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THE FIFTEEN YEARS' DIGEST 1951–1965

(Civil, Criminal & Revenue)

[Including the cases of 1950]

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ABBREVIATIONS

(i) Relating to Journals and Reports.

A. I. R. 1914 All., Bom., etc. ... All India Reporter, Allahabad, Bombay, etc., sections of the respective years.
A. M. L. J. ... Ajmer-Merwara Law Journal.
All. or I.L.R. All. ... Indian Law Reports, Allahabad Series.
All. L. Jour. ... Allahabad Law Journal.
All. W. R. ...Allahabad Weekly Reporter.
I. L. R. Andhra (Andh. Pra.) ... Indian Law Reports, Andhra (Andhra Pradesh) Series.
Andh. L. T. ... Andhra Law Times.
Andhra (or Andh.) W. R. ... Andhra Weekly Reporter.
I. L. R. Assam ... Indian Law Reports, Assam Series.
B. L. J. or Bihar L. J. R. ... Bihar Law Journal Reports.
Bom. or I. L. R. Bom. ... Indian Law Reports, Bombay Series.
Bom. L. R. ... Bombay Law Reporter.
Cal. or I. L. R. Cal. ... Indian Law Reports, Calcutta Series.
Cal. L. Jour. ... Calcutta Law Journal.
Cal. L. R. ... Calcutta Law Reports.
Cal. W. N. ... Calcutta Weekly Notes.
Com. Cas. ... Company Cases.
Com. L. J. ... Company Law Journal.
Cr. or Cri. L. Jour. ... Criminal Law Journal.
Cur. L. J. ... Current Law Journal.
I. L. R. Cut. ... Indian Law Reports, Cuttack Series.
Cut. L. T. ... Cuttack Law Times.
E. P. or East Punj. ... East Punjab.
I. L. R. E. P. or East Punj. ... Indian Law Reports, East Punjab Series.
F. C. R. ... Federal Court Reports.
F. L. J. ... Federal Law Journal.
F. J. R. ... Factories Journal Reports.
I. L. R. Guj. ... Indian Law Reports, Gujarat Series.
Guj. H. C. R. ... Gujarat High Court Reporter.
Guj. L. R. ... Gujarat Law Reports.
Him. Pra. ... Himachal Pradesh.
Hyd. ... Hyderabad.
I. L. R. Hyd. ... Indian Law Reports Hyderabad Series.
Ind. App. ...Law Reports, Indian Appeals.
Ind. Cas. ... Indian Cases.
I. T. J. ... Income-Tax Journal.
I. T. R. ... Income-Tax Reports.
Jab. L. J. ... Jabalpur Law Journal.
J. & K. ... Jammu & Kashmir.
J. & K. L. R. ... Jammu & Kashmir Law Reports.
J. L. R. or Jaipur L. R. ... Jaipur Law Reports.
Kar. L. J. ... Karnatak Law Journal.
I. L. R. Ker. (or Kerala) ... Indian Law Reports, Kerala Series.
Ker. L. J. ... Kerala Law Journal.
Ker. L. R. ... Kerala Law Reports.
K. L. T. or Ker. L. T. ... Kerala Law Times.
Lab. L. J. ... Labour Law Journal.
Law Rep. ... Law Reports (Mys).
Luck. or I. L. R. Luck. ... Indian Law Reports, Lucknow Series.
Madh. B. or M. B. ... Madhya Bharat.
I. L. R. Madh. B. ... Indian Law Reports, Madhya Bharat Series.
Madh. B. L. J. ... Madhya Bharat Law Journal.
Madh. B. L. R. ... Madhya Bharat Law Reporter.
I. L. R. Madh. Pra. or M. P. ... Indian Law Reports, Madhya Pradesh Series.
M. P. C. ... Madhya Pradesh Cases.
M. P. L. J. ... Madhya Pradesh Law Journal.
Mad. or I. L. R. Mad. ... Indian Law Reports, Madras Series.
Mad. L. Jour. ... Madras Law Journal.
Mad. L. Tim. ... Madras Law Times.
Mad. L. W. ... Madras Law Weekly.
Mad. W. N. ... Madras Weekly Notes.
Mah. L. J. ... Maharashtra Law Journal.
M. L. R. or Marwar L. R. ... Marwar Law Reporter.
Mys. ... Mysore.
I. L. R. Mys. ... Indian Law Reports, Mysore Series.

Mys. H. C. R. ... Mysore High Court Reports.
Mys. L. J. ... Mysore Law Journal.
I. L. R. Nag. ... Indian Law Reports, Nagpur Series.
Nag. L. Jour. ... Nagpur Law Journal.
Orissa J. D. ... Orissa Judicial Decisions.
I. L. R. Patiala ... Indian Law Reports, Patiala Series.
Pat. or I. L. R. Pat. ... Indian Law Reports, Patna Series.
Pepsu L. R. ... Pepsu Law Reports.
I. L. R. Punj. ... Indian Law Reports, Punjab Series.
Pun. L. R. ... Punjab Law Reporter.
Raj. ... Rajasthan.
I. L. R. Raj. ... Indian Law Reports Rajasthan Series.
R. L. W. or Raj. L. W. ... Rajasthan Law Weekly.
R. D. ... Revenue Decisions.
Sau. ... Saurashtra.
Sau. L. R. ... Saurashtra Law Reporter.
S. C. A. ... Supreme Court Appeals.
S. C. C. ... Supreme Court Cases.
S. C. D. ... Supreme Court Decisions.
S. C. J. ... Supreme Court Journal.
S. C. R. ... Supreme Court Reports.
S. C. W. R.... Supreme Court Weekly Reports.
Trav..Co. or T. C. ... Travancore.Cochin
I. L. R. Trav..Co. or T. C. ... Indian Law Reports, Travancore.Cochin Series.
T. C. L. R. or Trav.Co. L. R. ... Travancore.Cochin Law Reports.
T. L. J. or Trav. L. J. ... Travancore Law Journal.
Vind. Pra. or V. P. ... Vindhya Pradesh

(ii) Other Abbreviations.

App. ... Appeal.
Appln. ... Application.
Appr. ... Approved.
Art. or A. ... Article.
B. R. ... Board of Revenue.
Ch. ... Chapter.
Civ. ... Civil.
Cl. ... Clause.
C. N. ... Case Number.
Cons. ... Considered.
Cr. ... Criminal.
Diss. ... Dissented.
Dist. ... Distinguished.
D. B. ... Division Bench.
Expl. ... Explained.
Expln. ... Explanation.
F. A. ... First Appeal.
F. B. ... Full Bench.
F. C. ... Federal Court.
Foll. ... Followed.
Illus. ... Illustrations.
Jour. ... Journal.
L. P. A. ... Letters Patent Appeal.
O. ... Order.
Over. ... Overruled.
P. ... Page.
Pr. or P ... Para.
Pt. ... Point.
P. C. ... Privy Council.
Pre. ... Preamble.
R. ... Rule.
Ref. ... Referred or Reference.
Regn. ... Regulation.
Rel. on. ... Relied on.
Rev. ... Revenue.
Revn. ... Revision.
S. ... Section.
S. A. ... Second Appeal.
S. B. ... Special Bench.
S. C. ... Supreme Court.
Sch. ... Schedule.

■ Black dot at the beginning of a point indicates that the decision is of the Supreme Court, the Federal Court, the Privy Council, a Full Bench or a Special Bench of a High Court.

* In the Contents indicates that the Heading has a cross-reference only and has no case law.

G. N. D... Advocate High C... Jammu & Kash... Srinagar.

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THE
FIFTEEN YEARS' DIGEST
1951-1965

(CIVIL, CRIMINAL & REVENUE)

VOLUME 12

PENAL CODE (1860) — *contd.*

SECTION 53

SYNOPSIS

(Penal Code (45 of 1860), S. 53.)

1. Scope.
2. Minimum and maximum punishment.
3. Fine.
4. Fine in addition to imprisonment.
5. Imprisonment for life.
6. Punishment —Principles.

1. Scope.

● —S. 53 — Forfeiture provided in (Criminal Law Amendment Ordinance 38 of 1944) — Not penalty within meaning of Art. 20 (1). See Constitution of India, Art. 20 (1). 1963 (1) Cri L J 252 : A I R 1963 S C 255.

—S. 53—Scope—Section 408, Criminal P. C. confers on a person convicted, a right of appeal to the Court of Session. Section 414 contains an exception to the general rule. The exception contained in the latter section will not apply to the case of a person convicted in a summary trial of an offence where he is awarded both a sentence of fine and sentence of forfeiture of the cloth seized because the punishment awarded is of two different kinds and not a sentence of fine only within S. 414. In such a case an appeal could be brought by an application under S. 415 also because the sentence of fine has been combined with the sentence of forfeiture of property. 1954 Cri L J 1348 : AIR 1954 All 642 (642. 643) (Prs 3, 4, 5).

— S. 53—Youthful offender convicted of murder need not be sent to Reformatory School. See Reformatory Schools Act (1897), S. 4 (a). 1965 (1) Cri L J 704 : AIR 1965 Madh Pra 122 (DB).

—S. 53 — Constitution of India, Art. 14 — Equality — Meaning — Graded punishment offends rule of equality — Equality intended under Art. 14 is not to be judged by equality of sentence. Punishments, graded according to age, gravity of the offence in the context of fact and attending circumstances that lend colour to the perversity involved in the crime and other circumstances, do not offend the rule of quality that law assumes as to the members of society See Constitution of India. Art. 14. 52 Cri L J 700 : AIR 1951 Orissa 259 (DB).

2. Minimum and maximum punishment.

—S. 53—Conviction if must follow punishment — Criminal P. C. (1898), S. 32.

It is imperative that every conviction of an offence shall be followed by the prescribed punishment while in case no minimum is prescribed to reduce it to something nominal is completely within the discretion of the Court. A I R 1951 Orissa 284 (290) (Pt H) (Pr 28) (DB).

—S. 53—Punishment — Second offence under the Act;— Delay in disposal ot case — Good ground for awarding minimum sentence. See Prevention of Food Adulteration Act (1954), S. 16 (1) (g) (ii). 1963 (1) Cri L J 475 : AIR 1963 Punj 175 (DB).

3. Fine.

—S. 53 — Conviction without hearing evidence — Imposition of fine jointly and severally — Legality— The Magistrate cannot pass a sentence of fine payable jointly and severally. See Criminal P. C. (1898), S. 537. 1957 Cri L J 1426 : AIR 1957 Manipur 34.

4. Fine in addition to imprisonment.

—S, 53—Sentence of fine in addition to sentence of imprisonment—Propriety—(Criminal P. C. (1898), S. 32).

Where long terms of imprisonment are given to convicts it is not desirable that in addition to imprisonment a sentence of fine should be passed upon them for the sentence of fine will be a burden upon the family of the convicts and not upon the convicts themselves. ILR (1952) 4 Assam 436 : 1953 Cri L J 1568 : AIR 1953 Assam 201 (202) (Pr 6) (DB).

—S. 53—Causing death by negligence — Sentence —Sentence is a matter of discretion and the limits cannot be fixed. The discretion is that of the trial Court—Ordinarily the High Court will not interfere with the exercise thereof, yet having regard to the

circumstances of the case and the fact that the sentence must be such as to serve as a deterrent to others the High Court may if necessary impose a substantive sentence of imprisonment in addition to the sentence of fine imposed by the trial Court. See Penal Code (1860), S. 304-A. 1966 Cri L J 400 : 67 Bom L R 472 : 1965 Mah L J 668 : AIR 1966 Bom 122.

——S. 53—Fine when improper.

It is quite unnecessary to impose fines on persons who have been sentenced to death or to substantial terms of imprisonment. 1958 Andhra L T 200 : (1958) 1 Andh W R 441 : 1958 M L J (Cr) 388 : 1958 Cr L J 733 : A I R 1958 Andh Pra 380 (383) (Pt B) (Pr 29) (DB).

5. Imprisonment for life.

——Ss. 53 and 53-A — Transportation for life and imprisonment for life.

Whatever justification there might have been for the contention that a person sentenced to transportation could not be legally made to undergo rigorous imprisonment in a jail in India except temporarily till he was so transported (S. 58), subsequent to the insertion of S 53-A in the Penal Code there is none. Under S. 53-A a person transported for life or any other term before the enactment of the said section would be treated as a person sentenced to rigorous imprisonment for life or for the said term. Gopal Vinayak Godse v. State of Maharashtra, 1961 S C D 255 : 1961 Mad W N 361 : (1962) 1 S C J 423 : 1962 Mad L J (Cri) 269 : (1961) 3 S C R 440 : 39 Mys L J 388 : 69 Bom L R 517 : (1961) 2 S C A 361 : 1961 (1) Cr L J 736 : AIR 1961 S C 600 (601, 602) (Pt A) (Pr 4).

● **——Ss. 53 and 57 — Duration of imprisonment for life—No definite period is fixed.**

There is no provision of law whereunder a sentence for life imprisonment without any formal remission by appropriate Government, can be automatically treated as one for a definite period. Section 57 does not say that transportation for life shall be deemed to be transportation for twenty years for all purposes ; nor does the amended section which substitutes the words 'imprisonment for life' for 'transportation for life' enable the drawing of any such all-embracing fiction. A sentence of transportation for life or imprisonment for life must prima facie be treated as transportation or imprisonment for the whole of the remaining period of the convicted person's natural life. Gopal Vinayak Godse v. State of Maharashtra, 1961 S C D 255 : 1961 Mad W N 361 : (1962) 1 S C J 423 : 1962 Mad L J (Cri) 269 : (1961) 3 S C R 440 : 39 Mys L J 388 : 63 Bom L R 517 : (1961) 2 S C A 361; 1961 (1) Cr L J 736: AIR 1961 S C 600 (602) (Pt B) (Pr 5).

● **——S. 53 and S. 55—Criminal P. C. (1898). Ss. 401 and 402 — Sentence of imprisonment for life is for indefinite period — Government alone can remit sentence—Remissions earned by convict are of little help.**

Before the Code of Criminal Procedure (Amendment) Act, 1955, a sentence of transportation for life could be undergone by a prisoner by way of rigorous imprisonment for life in a designated prison in India. After the said Act, such a convict shall be dealt with in the same manner as one sentenced to rigorous imprisonment for the same term (S. 53-A). Unless the sentence is remitted or commuted by appropriate authority under S. 55 or the Code of Criminal Procedure (S. 402), a prisoner sentenced to life imprisonment is bound in law to serve the life term in prison. The rules framed under the Prisons Act (e. g Bombay Rules 1419 (c) and 1447 (2)) enable such a prisoner to earn remissions — ordinary, special and State — and the said remissions will be given credit towards his term of imprisonment. As the sentence of transportation for life or its present equivalent, the life imprisonment, is one of indefinite duration, the remissions so earned do not in practice help such a convict as it is not possible to predicate the time of his death. That is why the rules provide for a procedure to enable the appropriate Government to remit the sentence under S. 401 of the Code of Criminal Procedure on a consideration of the relevant factors, including the period of remissions earned. Gopal Vinayak Godse v. State of Maharashtra, 1961 S C D 255 : 1961 Mad W N 361 : (1962) 1 S C J 423 : 1962 Mad L J (Cri) 269 : (1961) 3 S C R 440 : 39 Mys L J 388 : 63 Bom L R 517 : (1961) 2 S C A 361 : 1961 (1) Cr L J 736 : A I R 1961 S C 600 (603, 604) (Pt C) (Pr 8).

——S. 53—Imprisonment for life.

The Penal Code knows of no imprisonment for life. It provides for transportation for life. 52 Cri L J 257: AIR 1951 Kutch 27 (30) (Pt E) (Pr 15).

——Ss. 53 and 60 — Imprisonment for life — Court need not specify its nature — Means always rigorous imprisonment only.

'Imprisonment for life' in the I. P. Code means 'rigorous imprisonment for life' and it can never mean 'simple imprisonment for life'. There is therefore no necessity for the Court, when imposing the sentence of 'imprisonment for life' to specify that it should be rigorous : AIR 1957 Ker 102, Diss. from; AIR 1962 S C 605; AIR 1961 S C 998 and AIR 1959 S C 572, Rel. on. Under S. 53, 'Imprisonment for life' is a class of punishment different from imprisonment which is of two descriptions namely rigorous and simple. S. 60 refers only to the latter kind of imprisonment and therefore in terms it cannot be invoked in support of the argument that the Court when imposing 'imprisonment for life' should specify whether it is to be 'rigorous' or 'simple'. 'Imprisonment for life' in S. 53 was substituted for the word 'transportation' by S. 117 and schedule of Central Act, 26 of 1955. Prior to amendment, 'transportation for life' was construed to mean 'rigorous imprisonment for life' in AIR 1945 P C 64 and S. 60 was not applied in construing the meaning of 'transportation'. That section cannot be used in construing the meaning of 'imprisonment for life' even after the amendment.

The definition of 'imprisonment' given in S. 3 (27) and the provisions of S. 4 of the General Clauses Act cannot be applied to the Penal Code which is an enactment of an earlier date because the General Clauses Act itself has provided that the definition therein would apply only to Central Acts and Regulations made after the coming into force of that Act. 1964 (1) Cri L J 685 : AIR 1964 Orissa 149 (151) (Pt B) (Pr 6) (DB).

6. Punishment—Principles.

● **——S. 53—Measure of punishment — Principles as to, stated—Offence of blackmarketing—Fine imposed held excessive and reduced.** See Essential Supplies (Temporary Powers) Act (1946), S. 7. **1953 Cri L J 542 : AIR 1952 S C 14.**

——S. 53—Object of awarding sentence is to provide a deterrent and is not to be vindictive. See Criminal P. C. (1898), S. 32 **ILR (1962) 1 All 451.**

——S. 53—Object of awarding punishment—(Criminal P. C. (1898), S. 32).

Punishment is awarded in order to achieve any or as many as possible of the four objectives namely, to serve as deterrent to be preventive to be reformative and to be retributive. Of these four the first is the all important one others being merely accessory. Punishment has to be before all things deterrent, for the chief end of the law of crime is to make the evil doer an example and a warning to all that are like-minded

with him. Punishment is intended to prevent offences being committed by destroying the interests to which they owe their origin by making all deeds which are injurious also to the doers of them. Punishment must make the evil-doer feel that his act was an 'ill bargain' for him. 1959 All L J 540 : 1959 All W R (HC) 405 : 1959 All Cr R 321 : 1960 Cr L J 431 : I L R (1959) 2 All 591 : A I R 1960 All 190 (193) (Pt B) (Pr 20) (DB).

——S. 53 — Appropriate sentence — Subsequent notoriety of accused — Relevancy.

In order to judge the appropriateness of the sentence a Court cannot take into account the subsequent notoriety which the accused acquired. 1957 All L J 857 : 1958 Cri L J 324 : AIR 1958 All 214 (233) (Pt L) (Pr 83) (DB).

——S. 53—Punishment—Principles — Duty of Courts —Offence under U. P. Prevention of Cow-Slaughter Act—Sentence — Considerations—The law leaves the measure of punishment to the discretion of the Court. Nevertheless it insists that, the discretion be used judicially and not arbitrarily. This implies that it is bounden duty of the Court to apply its mind to the question and decide it after due consideration of all relevant circumstances. See Criminal P. C. (1898), S. 32. 1958 Cri L J 316 : AIR 1958 All 198.

——Ss. 53, 420 and 511 —Railway Officer convicted under S. 420/511—Sentence of one year, if too severe —Object of punishment — Criminal P. C. (1898), S. 32.

The fact that the accused will lose his service is a relevant consideration in determining the sentence to be imposed but it is not the only one. Punishments are inflicted not to satisfy the desire for revenge in the human mind ; the State has no desire for revenge. One of the principal reasons for inflicting punishments is to deter others from repeating the crime. If corrupt railway officials could get off merely with a dismissal from service after making money by unlawful means, that would be no punishment at all and there would be no deterrent effect in the punishment. Hence, the sentence of one year's rigorous imprisonment awarded to an Assistant Engineer of a railway for offence of cheating under S. 420/511, Penal Code, cannot be said to be too severe. AIR 1950 All 639 (643) (Pt G) (Pr 39).

——S. 53 — Sentence of imprisonment till the rising of Court—Legality—Proper procedure—The sentence of imprisonment till the rising of the Court is unknown to law. Such sentence is incapable of execution and does not therefore, amount to the suffering of imprisonment. If the Courts intend to give one day's imprisonment, it is their plain duty to issue a warrant to the jail to confine the accused. If the Court does not wish to send the person to jail it must all the same commit the person to be kept in confinement in some other place provided for the purpose. See Criminal P. C. (1898), S. 367. 1959 Cri L J 1141: AIR 1959 Andh Pra 530.

[Reversed on another point in AIR 1962 S C 586.]

——S. 53— Punishment — Duty of Courts — Serious offence.

It is the infliction of lenient punishment that brings the administration of justice into contempt and sets a wrong standard before the public that they could commit serious offences and yet get away with them lightly. It is one thing if the Court does not believe the evidence let in for the prosecution in support of the charges and acquits the accused. But if the prosecution evidence is believed and an accused person is convicted of a serious crime, it is imperative to award an adequate and proper sentence commensurate with the gravity of the crime committed. 1958 Andh L T 856.

——S. 53 — Mitigating circumstances—Accused not previouly convicted—Trial dragging on for long time Amount involved trivial—Sentence of imprisonment reduced to imprisonment already suffered. AIR 1955 NUC (Him Pra) 1295.

——S. 53 — Sentence — Accused accosted by the deceased, when he had robbed a boy at point of knife—Inflicting of fatal injuries to the deceased—Offence committed without any premeditation — Apparent lack of motive—Extreme penalty altered to punishment of life imprisonment in view of the above circumstances. See Criminal Trial. ILR (1956) Hyd 914.

——S. 53 — Apportionment of sentence—Principles—Duty of Court — The apportionment of sentence in a case is left to the discretion of the trial Judge. Unless it is grossly inadequate or perverse, superior Courts are not to interfere. If a mitigating circumstance exists the sentence may be reduced accordingly but the reasons for the leniency should be stated so that the appellate or revisional Court can, by a perusal of the records adjudge the correctness or propriety of the order. See Criminal P. C. (1898), S. 32. (1961) 1 Ker L R 184 : 1961 Ker L T 328.

——Ss. 53, 497 — Sentence — Law when offence is committed should be considered.

The sentence prescribed for the offence by the law in force when it was committed cannot be ignored, and must be taken into account in determining the sentence. Thus where an offence of adultery was committed at a time when the old Kutch Penal Code was in force and one year was the maximum punishment prescribed for the offence, a Court should not pass a sentence of nine months rigorous imprisonment which is almost the maximum punishment and is very severe, only because Indian Penal Code which has replaced the old Code, prescribed a higher punishment. A I R 1951 Kutch 17 (18) (Pt B) (Pr 9).

——S. 53—Punishment — Criminal Trial—Sentence—Murder charge—Death caused by gun shot — Motive for firing—Accused suspecting deceased having illicit connection with his wife—Circumstance held enough to award lesser penalty — Death sentence commuted to transporation for life. 1956 M B L J (H C R) 343.

——S. 53 — Criminal Trial — Sentence — Offence under S. 304, IInd part—Sentence of 10 years rigorous imprisonment — Accused aged 18 to 20 years — Offence committed in the heat of temper arising during a family quarrel — Sentence reduced to 3 years rigorous imprisonment. 1956 MBLR (Cri) 301.

——S. 53—Punishment—Criminal trial—Murder case —Sentence — Sudden and unpremeditated fight between two groups, resulting in death of two persons —One of the deceased keeping the wife of one of the accused—Provocation to accused side—Trial Court awarding lesser of the two punishments prescribed in S. 302, Penal Code—No interference with the discretion exercised by trial Court in awarding the lesser punishment in the circumstances of the case. 1956 M B L R (Cri) 204.

——S. 53—Conviction—Punishment must be awarded — Detention as under-trial — Not a punishment—Refusal to punish on account of long detention as under-trial is illegal. See Criminal P. C. (1898), S. 367 (2). 1962 (1) Cri L J 156 : AIR 1962 Madh Pra 36.

——S. 53 — Enhancement of sentence — Deterrent punishment when called for—A dastardly attack was made on the Assistant Manager of a colliery by a labourer who happened to be an active member of the labour union for the reason that he did not get the post he wanted. The labourer was sentenced to 6

months' rigorous imprisonment. Held, that a deterrent punishment was called for in the case as unless such acts were put down no colliery could work, particularly as such attacks might too often be made in the pits when absolutely no evidence would be available the sentence was enhanced to one and a half years' rigorous imprisonment. See Criminal P.C. (1898), S. 439. 1954 Cri L J 306 : AIR 1954 Orissa 49 (DB).

——S. 53 - Proper sentence — Discretion of Court — Punjab Excise Act (1 of 1914), S. 61 — (Criminal P. C. (1898), S. 32).

What should be an adequate punishment within the maximum provided for an offence is primarily for the convicting Court to decide, but that discretion should exhibit that a reasonable proportion has been maintained between the seriousness of the crime and the punishment imposed. No hard and fast rule can be laid down. But Courts are expected to observe a desirable proportion between the gravity of the offence and the punishment for it.

(Held, that the facts that the accused was a refugee and that he had confessed his guilt were not, by themselves, extenuating circumstances and his sentence was enhanced). 1953 Cri L J 1261 : I L R (1953) Patiala 129 : AIR 1953 Pepsu 118 (119) (Pt A) (Prs 3, 5).

● —— S. 53 — Contempt of Courts Act (1926), S. 3 — Punishment — Measure of — The measure of punishment depends upon the facts and circumstances of each individual case. See Contempt of Courts Act (1926), S. 3. 51 Cri L J 1219: AIR 1950 Pepsu 9 (SB).

——S. 53 — Rajasthan Public Gambling Ordinance (1949), S. 4 — Sentence — Adequacy of — In case of first offence a sentence of fine is more suitable. See Rajasthan Public Gambling Ordinance (1949), S. 4. 1962 Raj L W 355.

——S. 53 — Legality of sentence — Power of High Court to examine after it is served — High Court has power to examine after it has become final when it is excessive on the face of it. AIR 1955 N U C (Raj) 264 (DB).

——S. 53 — Offences on highways — Sentence.

The quantum of the sentence must depend upon facts of each particular case. It is necessary that the highways are kept safe for passers-by and for that purpose, offences which are committed with a view to striking terror in the minds of people residing in the country-side must be punished with a heavy hand. 52 Cri L J 704 : AIR 1951 Sau 40 (41) (Pt C) (Pr 4) (DB).

SECTION 53-A

● ——Ss. 53-A, 55 and 57 — Transportation for life and imprisonment for life.

Whatever justification there might have been for the contention that a person sentenced to transportation could not be legally made to undergo rigorous imprisonment in a jail in India except temporarily till he was so transferred (S. 58), subsequent to insertion of S. 53A there is none. Under S. 53A a person transported for life or any other term before the enactment of the said section would be treated as a person sentenced to rigorous imprisonment for life or for the said term. Gopal Vinayak Godse v. State of Maharashtra, 39 Mys L J 388 : 63 Bom L R 517 : (1961) 2 S C A 361 : 1961 (1) Cri L J 736 : AIR 1961 S C 600.

——S. 53-A — Andhra Pradesh (Andh. Area) Children Act (4 of 1920), Ss. 3, 22, 24, 27 — Youthful offender — Effect of amendment in Penal Code — Young person cannot be sentenced to imprisonment for life — S. 24, applicability of — Section 27 held not desirable to be applied — Conviction under S. 302 maintained but sentence awarded under S. 24 of the Andhra Pradesh Children Act. See Andhra Pradesh (Andh Area) Children Act (4 of 1920), S. 3. 1964 (2) Cri L J 126 : AIR 1964 Andh Pra 350 (DB).

SECTION 55

● ——Ss. 55, 53 — Criminal P. C. (1898), Ss. 401 and 402 — Sentence of imprisonment for life is for indefinite period — Government alone can remit sentence — Remissions earned by convict are of little help. See Penal Code (1860), S. 53. 1961 (1) Cri L J 736 : AIR 1961 S C 600.

——S. 55 — Commutation of sentence of transportation can only be made by the Government and not by the Court. AIR 1955 NUC (All) 2753.

SECTION 57

● ——Ss. 57, 53 — Duration of imprisonment for life — — No definite period is fixed. See Penal Code (1860), S. 53. 1961 (1) Cri L J 736 : AIR 1961 SC 600.

——S. 57 — Scope — Imprisonment for life.

Section 57 does not merely state that imprisonment for life shall be reckoned as imprisonment for 20 years. What it says is that it is for the purpose of calculating fractions of terms of punishment that such reckoning will have to be made. Instances of cases where fractions of terms of punishment have to be calculated are to be found in S. 116 and S. 511 of the Indian Penal Code. 37 Mys L J 202 : 1959 Mad L J (Cri) 397 : ILR 1959 Mys 115.

——S. 57 — Imprisonment for life in Rajasthan — Duration of — (Rajasthan Jail Manual, Chap. III).

Where the accused sentenced to R. I. for life, was placed in class I in accordance with the classification directed in Chapter III of the Rajasthan Jail Manual, the sentence of imprisonment for life is to be calculated as equivalent to 25 years. 1959 Raj L W 417 : I L R (1959) 9 Raj 689 : 1959 Cri L J 1365 : AIR 1959 Raj 273 (274) (Pr 4) (DB).

——S. 57 — Life imprisonment — Interpretation of — Power of High Court to release accused — The High Court with the jurisdiction under S 491 Criminal Penal Code, to examine a case already decided by the Highest Court of the Covenanting State to see if the sentence is illegal, can order release of an accused who has undergone a sentence of more than 20 years by taking into consideration the remissions granted to him along with the actual sentence served by him. See Criminal P. C. (1898), S. 491. AIR 1955 NUC (Raj) 5039 (DB).

——S. 57 — Jaipur Penal Code (1924), S. 49 — Life sentence — It means 20 years under Jaipur Penal Code — No analogy of S. 57, I. P. C. can be applied — Sentence for 25 years is illegal — Excess should be ignored. AIR 1955 NUC (Raj) 264 (DB).

SECTION 60

——S. 60 (as amended by Act 26 of 1955) — Murder — Sentence — Alternative punishment — Rigorous or simple can be awarded. See Penal Code (1860), (as amended by Act 26 of 1955), S. 302. 1957 Cri L J 852 : AIR 1957 Ker 102 (DB).

——Ss. 60, 63, 64 — Imprisonment — Fine — Imprisonment in default — Criminal P. C. (1898), Ss. 32 and 33.

If an offence is serious one short term imprisonment, i. e., anything less than three months, would be inadequate. If it is not serious, fine alone would be sufficient. The amount of fine should be within the means of the accused to pay though he must be made to feel the pinch of it. Imprisonment in default of fine should also be long enough to induce the accused

to pay the fine rather than suffer the imprisonment. AIR 1950 Kutch 73 (74) (Pr 3).

—Ss. 60, 53 — Imprisonment for life—Court need not specify its nature—Means always rigorous impri sonment only. See Penal Code (1860), S. 53. 1964 (1) Cri L J 695 : AIR 1964 Orissa 149 (DB).

SECTION 63

——Ss. 63, 60, 64 — Imprisonment—Fine—Imprisonment in default—Criminal P. C. (1898), Ss. 32 and 33.

If an offence is serious one short-term imprisonment would be inadequate. If it is not serious, fine alone would be sufficient. The amount of fine should be within the means of the accused to pay though he must be made to feel the pinch of it. Imprisonment in default of fine should also be long enough to induce the accused to pay the fine rather than suffer the imprisonment. AIR 1950 Kutch 73 (74) (Pr 3).

SECTION 64

——S. 64 — Scope — Sentence of imprisonment in default of payment of fine cannot be made concurrent with substantive sentence of imprisonment. AIR 1955 NUC (All) 3523.

——Ss. 64 and 69 — Sentence of imprisonment in default of fines—If can run concurrently—Criminal P. C. (1898), Ss. 35 and 398 (2).

It is not competent for the Court to direct that sentences of imprisonment imposed for default in payment of fines should run concurrently. Such order, if passed is illegal; such direction can only be given in respect of substantive sentences of imprisonment or transportation and not to imprisonments in default of payment of fines. 1950 All L J 447 : 1950 All W R (HC) 479 : 1950 All Cri Cas 156 : AIR 1950 All 625 (625) (Pt A) (Pr 5)

——S. 64—Madras General Sales Tax Act (9 of 1939), S. 15 (b)—Order for payment of fine and in default, imprisonment — Legality — By virtue of S. 25 of the General Clauses Act, S. 64 of the Penal Code, would apply to the fines imposed under the Madras General Sales Tax Act — (General Clauses Act (1897), S. 25). See Sales Tax — Madras General Sales Tax Act (9 of 1939), S. 15 (b). 1958 Cri L J 1377 : AIR 1958 Andh Pra 707.

——Ss. 64, 65, 66 and 67, 40 to 42 — Offence under Calcutta Municipal Act punishable with fine only — Magistrate's jurisdiction to impose sentence of simple imprisonment in default of payment of fine—(Bengal General Clauses Act (1 of 1899), S. 26). (Obiter). See Penal Code (1860), S. 40. AIR 1953 Cal 41.

——S. 64—Applicability—The amount specified as due from a defaulter by way of fine, licence fees etc., in an order passed against him under S. 19, Travancore Cochin Act is outside the scope of S. 64. 1960 Cri L J 349 : AIR 1960 Ker 86.

—S. 64—Scope — Conviction and sentence of fine under Sales Tax Act — Accused further directed to pay arrears of tax or to suffer imprisonment — Legality.

Section 64 only enables the Court to direct that the offender sentenced to pay fine shall suffer imprisonment for a certain term in default of payment of the same. It is by virtue of this section that the Court awards a sentence of imprisonment if the fine is not paid, even though the penalty provided by S. 19 of the Travancore Cochin Act is only a fine and not imprisonment. The provision in S. 19 that the Court should specify the amount of arrears of tax does not mean that such amount automatically becomes transferred into a fine so as to attract the provisions of S. 64, Penal Code. 1959 Mad L J (Cr) 268 : 1959 Ker L T 403.

——Ss. 64, 60, 63—Imprisonment—Fine—Imprisonment in default — Criminal P. C. (1898), Ss. 32 and 33.

If an offence is serious one short term imprisonment would be inadequate. If it is not serious fine alone would be sufficient. The amount of fine should be within the means of the accused to pay though he must be made to feel the pinch of it. Imprisonment in default of fine should also be long enough to induce the accused to pay it rather than suffer the imprisonment. AIR 1950 Kutch 73 (74) (Pr 3).

——S. 64 — Sentence of imprisonment in default of payment of fine — Sentence would be in excess of other sentence of imprisonment — Two cannot run concurrently. 1964 M P L J (Notes) 215.

——S. 64—Power of Court—Person ordered to make payment in respect of two items — Appropriation of money tendered — Option — (Sales Tax — Madras General Sales-tax Act (9 of 1939), S. 15(b).)

If a person on conviction is ordered by a Court to make payments in respect of two items or matters, whatever the items or matters may be, then in the absence of any express provision in that regard the person, who is required to pay, has the option of saying that the money tendered by him should be appropriated to a particular item or matter most beneficial or at any rate least injurious to him and a Court has no jurisdiction to prevent him from making such an appropriation. A I R 1931 Sind 73, Rel. on.

Where, therefore, the accused who was convicted under S. 15(b), Madras General Sales-tax Act, was sentenced to pay fine and the amount of tax due from him was also specified with a direction for its recovery as if it were a fine and the accused paid a sum of money making it clear that the payment was in respect of the fine;

Held, that the accused was entitled to make the appropriation. 1955 Mad W N 344 : (1955) 6 S T C 712 : (1955) 2 Mad L J 425 : 1955 Cri L J 1362 : AIR 1955 Mad 599 (599) (Pr 2).

——S. 64 — Procedure and Powers — Sentence in default of payment of fine — Order to run concurrently with substantive sentence — Revision to High Court dismissed in limine — Reference to High Court —Power to correct illegality—High Court has power to correct illegality. See Criminal P. C. (1898), S. 438. 1958 Cri L J 80 : AIR 1958 Pat 35 (DB).

——S. 64—Rajasthan Municipalities Act (38 of 1959), Ss. 265(2), 170(11) — Conviction under S. 170(11) — Sentence to pay fine and in lieu of it, to serve simple imprisonment — Jurisdiction with respect to imposition of sentence of imprisonment—Rajasthan Municipalities Act prescribing special mode under S. 265(2) for realisation of fine—General law under Penal Code and Criminal P. C. held could not apply — Criminal P. C. (1898), S. 33. See Municipalities — Rajasthan Municipalities Act (38 of 1959), S. 265(2). AIR 1966 Raj 238.

——Ss. 64 and 70 — Imprisonment in default of payment of fine—Accused is not liberated from payment of fine—(Criminal P. C. (1898), S. 35).

Imposition of sentence of imprisonment in default of payment of fine—Jurisdiction of trial Court is permissive—Imprisonment in default of payment of fine does not liberate accused from his liability to pay fine — Such imprisonment is imposed as punishment for non-payment — It does not serve as discharge of fine—Accused not having means to pay fine — It can be recovered from property acquired by him subsequently within period specified—It can be recovered even after his death. 1953 Ker L T 28 : 1953 Cri L J 1265 : I L R (1952) Trav-Co 1006 : A I R 1953 Trav-Co 233 (234) (Pt A) (Pr 3) (DB).

——Ss. 64 and 70—Imprisonment in default of payment of fine — Heavy fine where accused is unable to pay should not be imposed. 1953 Ker L T 28: 1953 Cri L J 1265 : I L R (1952) Trav Co 1006 : AIR 1953 Trav-Co 233 (234) (Pt B) (Pr 3) (DB).

——S. 64 — Sentence of imprisonment in default of payment of fine — Substantive sentence of imprisonment for other offence — Both sentences to run concurrently — Order is illegal—S. 64, Penal Code, must be read with S. 35, Criminal P. C. — (Criminal P. C. (1898), S. 35). 1953 Ker L T 28 : ILR (1952) Trav-Co 1006 : 1953 Cri L J 1265 : A I R 1953 Trav-Co 233 (234) (Pt C) (Pr 4) (DB).

SECTION 65

——S. 65—Sentence of fine with alternative term of imprisonment — Alternative sentence exceeding the maximum limit prescribed — Mistake can be rectified under S. 561-A. Criminal P. C. 1960 Ker L T 356 : 1960 Ker L J 443 : 1960 Mad L J (Cri) 269 : (1960) 1 Ker L R 794 : 1960 Cri L J 1212 (1) : A I R 1960 Ker 285 (285) (Pr 1) (DB)

——S. 65 — Suggestion that the accused may have been possibly drunk, without any evidence in its support, cannot affect the nature of the crime. 1962 Raj L W 434 : I L R (1962) 12 Raj 481.

SECTION 67

● ——S. 67—Sentence of fine or in default imprisonment – Validity.

Even though S. 65 of the Bihar Waqfs Act does not provide for any imprisonment in default of payment of fine the sentence of imprisonment in default is valid under S. 33 of the Criminal P. C. read with Ss. 40 and 67 of the Penal Code. 1957 Cri L J 1023 : AIR 1957 S C 645.

——S. 67—It is true that there is no specific provision in the Bengal Municipal Act by which a sentence of imprisonment in default of fine may be imposed— But the Bengal Act is a local Act and S. 26 of the Bengal General Clauses Act attracts the provisions of S. 67 of the Penal Code and S. 26 read along with Ss. 67 and 42 of the Penal Code make the position plain that a Court is entitled to pass a defaulting sentence of simple imprisonment in a case under the Bengal Municipal Act. See Municipalities — Bengal Municipal Act (15 of 1932), S. 500. (1958) 62 Cal W N 812.

——S 67—Conviction under S. 46, Hazaribagh District Board Bye-Laws — Sentence of fine — Rigorous imprisonment in lieu of is illegal. See Penal Code (1860), S. 40. AIR 1955 N U C (Pat) 108.

——S. 67 — Bihar Prevention of Food Adulteration Act (5 of 1948), Ss. 9 (2) (e) and 27 — Contravention of S. 9 (2) (e)—Sentence in default of fine.

Under the Bihar Act first offences of contravention of s. 9 (2) (e) of that Act can be punished with a sentence of fine only. Hence in view of S. 67 of Penal Code only simple imprisonment can be ordered for the default of payment of fine imposed in cases of first offences under S. 9 (2) (e) of the Bihar Act. 51 Cri L J 1136 : AIR 1950 Pat 301 (Pt D).

SECTION 69

——Ss. 69 and 64 — Sentences of imprisonment in default of fines—If can run concurrently— Criminal P. C. (1898), Ss. 35 and 398 (2).

It is not competent for the Court to direct that sentences of imprisonment imposed for default in payment of fines should run concurrently such order is illegal ; such direction can only be given in respect of substantive sentence of imprisonment or transportation and not to imprisonments in default of fines. 1950 All L J 447 : 1950 All W R (HC) 479 : 1950 All Cri Cas 156 : A I R 1950 All 625 (625) (Pt A) (Pr 5).

SECTION 70

● ——S 70—Applicability—S. 70 applies to recovery of fine imposed by Panchayati Adalat under U. P. Panchayat Raj Act, 1947.

In the U. P. Panchayat Raj Act, 1947 there is no provision prescribing a period of limitation or providing for the non-applicability of S. 70 of the Penal Code to sentences of fine passed by the Panchayat Adalats. As a matter of fact S. 94 of the Act provides that if there is difficulty in the recovery of a fine the Sub-divisional Magistrate shall recover it as if it was a fine imposed by himself which supports the contention of the accused that the period of limitation as provided in S 70 of the Penal Code is not made inapplicable to convictions by Panchayati Adalats. Hence, it cannot be held that the period of limitation provided by S. 70 of the Penal Code for recovery of fine is inapplicable to the recovery of fines imposed by Panchayati Adalats. Palakdhari Singh v. State of U. P., 1962 All L J 551 : 1962 All W R (HC) 470 : 1962 All Cr R 279 : (1962) 2 Ker L R 548 : 1962 (2) Cr L J 256 : (1965) 2 S C J 201 : 1965 Mad L J (Cri) 522: 1962 S C D 673: 1962 Supp (2) S C R 650 : ILR (1962) 2 All 651 : AIR 1962 S C 1145 (1146) (Pt A) (Pr 5).

● ——S. 70—Limitation for recovery of fine — Starting point of limitation.

The language of S. 70 prescribes the terminus a quo to be the date of 'passing of the sentence' by Court which passes such order. The filing of appeal or revision does not, unless specifically ordered arrest the operation of the order of passing of the sentence of conviction. Hence the limitation starts from the date of conviction by the trial Court and not from the date of dismissal of Revision by the High Court. Palakdhari Singh v. State of Uttar Pradesh, (1965) 2 S C J 201 : 1965 Mad L J (Cri) 522 : 1962 S C D 673 : 1962 Supp (2) S C R 650 : I L R (1962) 2 All 651 : 1962 All L J 551 : 1962 All W R (HC) 470 : 1962 All Cri R 279 : (1962) Ker L R 548 : 1962 (2) Cr L J 256 : A I R 1962 S C 1145 (1146) (Pt B) (Pr 6).

——S. 70—Applicability — Conviction and sentence by Court Martial—Order of sentence sent to Judicial Magistrate for recovery of fine — Recovery of fine will be governed by period of limitation prescribed in S. 70 — Scope and object of Ss. 69 and 174. Army Act.

There is nothing in S. 69 of the Army Act which relates to the recovery of the fine awarded by a Court Martial. All that S. 69 provides is to empower the Court Martial to take cognizance of and try civil offences as if they were offences under the Act.

Section which speaks about realisation of fine awarded by a Court Martial is S. 174 of the Army Act. That section creates a fiction that when a copy of the sentence of fine awarded by Court Martial is sent to any Magistrate in India, he gets jurisdiction to recover the amount of fine as if the sentence of fine awarded by the Court Martial is a sentence imposed by the Magistrate himself Thus the powers of the Magistrate to recover the fine awarded by the Court Martial are co-extensive with the powers of the Magistrate to realise the fine imposed by him. Therefore the powers of the Magistrate to realise the fine are subject to the limitations imposed by S. 70 of Penal Code. 64 Bom L R 440 : 1962 Nag LJ 515 : I L R (1962) Bom 523 : 1963 (1) Cri L J 152 : A I R 1963 Bom 21 (23) (Pt A) (Pr 5) (DB).

——S. 70 — Criminal P. C. (1898), S. 386 — Levy of fine — Procedure to be followed is as provided in

S. 386, Criminal P. C.—Word "levy"- Interpretation of — It means "to enforce execution" and not "to realise."

Section 70 or any other provision of the Penal Code does not prescribe the procedure by which the fine imposed has to be levied. The section only speaks of the period of limitation within which the fine imposed has to be levied. The procedure relating to the realisation of fine is provided in S. 386, Criminal P.C. and the rules framed thereunder.

The Legislature in using the expression "levy" in S. 70 did not prescribe an outside limit within which the entire process, commencing from attachment of the property and ending with conversion thereof in cash by sale has to be completed. To hold so may result in tempting convicts to resort to questionable methods for preventing sale of their attached properties by protracting the proceedings.

It is true that the expression 'levy' in Ss.68 and 69 has been used in the sense 'realise'. But then the subject-matter of those sections is totally different than the subject-matter of S. 70. The meaning of the expression 'levy' in S. 70 is to seize for the purposes of collecting the fine or to enforce an execution for a certain sum. A I R 1943 Pesh 56 and A I R 1941 Bom 158, Disting. **64 Bom L R 440 : 1962 Nag L J 515 : I L R (1962) Bom 523 : 1963 (1) Cri L J 152 : A I R 1963 Bom 21 (23 to 25) (Pt B) (Prs 6, 8, 9) (DB).**

——S. 70 — Process for recovery of fine against property of deceased — Person in possession resisting process on ground that property did not belong to deceased — Claim rejected — His remedy is not by way of revision but by a civil suit against Government.

Where a process for recovery of a fine is issued under S. 70, against property belonging to the deceased, the person in possession of the property may show that the property did not belong to the deceased person but if his claim is rejected by the Court issuing the process, his remedy is not by way of revision but by a civil suit against the Government for declaration that no right belonging to the deceased person exists in the property. **51 Cri L J 643 : AIR 1950 Kutch 20 (20) (Pr 4).**

——S. 70—Applicability—Offender having undergone imprisonment in default of payment of fine—Warrant for recovery of fine issued while offender undergoing sentence — Execution—Warrant cannot be executed unless special reasons are shown. See Criminal P. C. (1898), S. 386 (1) (b). **1964 (1) Cri L J 418 : A I R 1964 Mys 64.**

——S. 70 — Ancestral land left by deceased convict governed by customary law — If liable in hands of reversioners for fine imposed on him.

The ancestral landed property left by a deceased convict governed by customary law is not liable in the hands of his reversioners in respect of the amount of fine imposed upon the deceased convict.

It follows that if on realisation of the fine the ancestral property of the convict is put to sale what is transferred to the Government or rather to the purchaser through the Government, are the personal rights of the convict in the property and nothing which he could not have assigned away. 4 Punj Re 1913 (FB) and 18 Punj Re 1908 (FB), Rel. on. **I L R (1955) Pepsu 688 : 1955 Cr L J 1625 : A I R 1955 Pepsu 170 (171) (Pt A) (Pr 6) (DB).**

——S. 70, 64 — Imprisonment in default of payment of fine—Accused is not liberated from payment of fine —(Criminal P. C. (1898), S. 35) See Penal Code (1860), S. 64. **1953 Cri L J 1265 : A I R 1953 Trav-Co 233 (DB).**

——Ss. 70, 64—Imprisonment in default of payment of fine —Heavy fine where accused is unable to pay should not be imposed. See Penal Code (1860). S. 64. **1953 Cri L J 1265 : AIR 1953 Trav-Co 233 (DB).**

SECTION 71

SYNOPSIS

(Penal Code (45 of 1860), S. 71.)

1. Scope.
2. Offence made up of parts— Para. (1).
3. Offence falling under two or more separate definitions—Para. (2).
4. Several acts when combined constituting different offence—Para. (3).
5. Cases where separate sentences can be passed.

1. Scope.

——S. 71—Disappearance of evidence in respect of two offences committed by same act—There are two offences under S. 201 by same act — S. 71 does not apply. See Penal Code (1860), S. 201. **1965 (2) Cr L J 426 : AIR 1965 S C 1413.**

——S. 71—Accused charged under Ss. 457 and 380 —Offences under Ss. 457 and 380 do not fall under S. 71—Conviction under both sections not illegal. Udai Bhan v. State of Uttar Pradesh, **1962 S C D 527 : 1963 Mad L J (Cri) 209 : 1962 Supp (2) S C R 830 : 1962 Mad W N 419 : (1963) 1 S C J 454 : 1962 (2) Cr L J 251 : 1962 All Cri R 291 : 1962 All W R (HC) 512 ; I L R (1962) 2 All 522 : (1952) 2 Andh L T 502 : AIR 1962 S C 1116 (1118) (Pt B) (Pr 12).**

——S. 71—Applicability and scope.

Section 71, I. P. Code is not applicable to a case where the charge is only under one offence. It also does not restrict the extent of punishment to the lower limit provided for either of the two offences. It merely protects an accused against the multiplicity of punishment and if his act falls within two or more separate definitions of any law in force, it limits the punishment to the maximum term which could be awarded to him for any single offence. S. 71, I. P. Code is not a bar to punishing a public servant under S. 409, I. P. Code, to more than seven years, on the ground that for such conduct which could lead to a charge both under S. 409, I. P. Code, and under S. 5 (1) (c) of Act (2 of 1947). the offender will be punished within the lower limit provided for either of the two offences. 1953 All L J 534; AIR 1954 All 80; 1954 Cr L J 96, **Overruled.** Om Prakash v. State; **1955 All L J 224 : 1955 Cri L J 754 : A I R 1955 All 275 (283) (Pt D) (Pr 35) (FB).**

——S. 71—Scope—S. 71 provides that where anything which is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences. For such conduct which could lead to a charge both under S. 409, I. P. Code and under S. 5 (1) (c) of Act 2 of 1947 the offender will be punished within the lower limit provided for either of the two offences. 1954 Cri L J 96 : AIR 1954 All 80 (80, 81) (Pr 8) (DB).

[Overruled in AIR 1955 All 275 (FB).]

——S. 71—Scope.

Section 71 prohibits punishment for and not conviction under two offences—Sentences made to run concurrently—There is no double punishment. **1953 All W R (H C) 389 : 1953 Cr L J 1729 . AIR 1953 All 749 (750) (Pt D) (Pr 14).**

——S. 71 — Scope —Separate sentences—No mention whether sentences were concurrent or consecutive— Sentences are consecutive — (Criminal P. C. (1898), S. 35). **1953 Cr L J 1222 : AIR 1953 All 510 (511) (Pt A) (Pr 3).**

——S. 71 — Conviction for more offences than one—Punishment—Criminal P. C. (1898), S. 35.

If a Court convicts a person under two offences, it cannot refuse to pass a sentence under either of them It may be obliged to pass one sentence, but that sentence must cover both the offences of which he has been convicted: AIR 1950 All 436, Dissent 1950 All L J 444 : 1950 All W R (HC) 466 : 1950 All Cri Cas 148 : AIR 1950 All 610 (610) (Pt B) (Pr 1).

——S. 71—Scope of—Section does not apply where act constituting offence falls under two or more enactments—Such case is governed by S. 26 of General Clauses Act (1897). (1965) 6 Guj L R 226 : I L R (1965) Guj 201.

——S. 71 — Trivendrum City Municipal Act (4 of 1116 M. E.), S. 295 (1)—Filing of separate cases for omission to take license for each of articles—S. 71, Penal Code is not contravened—There is no ground for consolidation of several cases See Municipalities —Trivendrum City Municipal Act (4 of 1116 M. E.), S. 295 (1). AIR 1955 NUC (Trav Co) 1913.

2. Offence made up of parts—Para (1).

■ ——S. 71—Distinct offence—Meaning of—Offences to be distinct must not be inter-related—Contract to supply wood to Government—Money obtained from Government on various bills at different times in pursuance of conspiracy entered into between various accused — Held single charge under S. 420, Penal Code, did not contravene S. 233 as object of conspiracy was not to obtain diverse amount but to obtain entire contract money from Government. See Criminal P. C. (1898), S. 233. 1963 (2) Cri L J 529 : AIR 1963 S C 1620.

——Ss. 71, 34, 304, 460 — Charges and conviction under Ss. 460 and 304 — Charge and conviction of accused under S. 460, I. P. Code for lurking house-breaking by night along with others and voluntarily causing death —Separate conviction of accused under S. 304, Part II read with S. 34 cannot stand — Criminal P. C (1898), S. 235. 52 Cri L J 390 (1) : AIR 1951 Assam 60 (DB).

——S. 71—Opium Act (1 of 1878), S. 9 (a) and (c)—Accused importing opium by carrying it himself — Conviction for two separate offences, one under S. 9 (a) for possession and other under S. 9 (c) for importing, and imposing two separate sentences are not justified—(Evidence in fact not establishing offence under S. 9 (c) but only under S. 9 (a)—Conviction under S. 9 (a) upheld and that under S. 9 (c) set aside) —Criminal P. C. (1898), S. 235. See Opium Act (1 of 1878), S 9 (a) and (c). 51 Cri L J 240 : AIR 1950 Assam 5 (DB).

——S. 71 — Bombay Prohibition Act (25 of 1949), S. 85 (1). Cls. (1) and (2) — Offence under—Proof of drinking of prohibited liquor not necessary—Separate sentences.

Where two offences arise out of the same incident it would be proper to impose only one sentence. Separate sentences are not required — (Criminal P. C. (1898). S 35). 1956 Cri L J 584 : AIR 1956 Bom 279 (279, 280) (Prs 2, 4) (DB).

——S. 71, Illus. (a)—Several blows struck — One or more proving fatal— Charge under S. 304 and under S. 323 is not legal—Separate charge under S. 323 is uncalled for. See Criminal P. C. 1898), S. 235. 1959 Cri L J 1331 : AIR 1959 Ker 372 (DB).

——S. 71—Scope — Offences under S. 9 (a) and (b), Opium Act—Single sentence— Offences under S. 9 (a) and (b), Opium Act are such that the offence of transporting opium would involve the offence of possessing the same —S. 71, Part I applies and single sentence cannot be objected to. 1955 Cri L J 815 : AIR 1955 Madh Bha 80.

——S. 71 — Scope — Punishment for offence—Additional punishment for the acts constituting the offence—Legality.

When an unlawful act is committed and certain consequences follow from it in the usual course and the person concerned is punished in respect of such consequences he cannot be punished over again, that is to say, additionally for the act which produced those consequences. 67 Mad L W 893 : (1954) 2 M L J 765 : 1954 Mad W N 747 : 1955 Cri L J 1267: A I R 1955 Mad 548 (549) (Pr 3).

—— S. 71 — Scope — Act punishable under S. 121, Motor Vehicles Act — As a result of the Act, accused convicted under S. 304-A, I. P. Code, for rash and negligent act—He cannot be punished again under S. 121, Motor Vehicles Act. See Criminal P. C (1898), S. 35. 1955 Cri L J 1267 : AIR 1955 Mad 548.

——Ss. 71, 143 and 447 — Unlawful assembly — Common object to commit trespass — Criminal trespass committed — Conviction under Ss. 143 and 447 both—Not illegal.

There is nothing wrong in convicting and sentencing a person separately under Ss. 143 and 447, Penal Code. Paragraph 1 of S. 71 deals with a case where there are several parts to an offence, of which any of the parts may itself amount to an offence. But the offences under Ss. 143 and 447, Penal Code are not of that category.

Criminal trespass committed by the members of the unlawful assembly cannot be said to be a part of the offence of being a member of the unlawful assembly. Criminal trespass need not have been committed actually to constitute an offence under S. 143, even though the common object of the assembly may have been to commit criminal trespass. Hence S. 71 would not enter into the picture at all. 8 Cal W N 305, Disting ; A I R 1925 Cal 1015 and 54 Cal W N (2 D R) 311 and A I R 1939 Sind 76, Relied on. 1961 (1) Cri L J 618 : A I R 1962 Manipur 23 (23, 24) (Pt A) (Prs 4, 6).

——S. 71 — Accused convicted under S. 332, Penal Code read with S. 149 — A further conviction under S. 323 read with S. 140 becomes unnecessary. 1962 (2) Cri L J 147 (Manipur).

——S. 71—Conviction for robbery and theft on same facts—Legality.

Robbery is an aggravated form of theft. When the accused are convicted of an offence of robbery in respect of the articles removed from the house of a person they cannot also be convicted of an offence punishable under S. 380 of the Penal Code for having committed theft of them. 36 Mys L J 278 : 1958 Mad L J (Cri) 341 : I L R (1957) Mys 177 : 1958 Cri L J 1489 : A I R 1958 Mys 150 (183) (Pt O) (Pr 41) (DB).

——Ss. 71, 279 and 338 — Conviction for offences under Ss. 279 and 338—Proper sentence — Separate sentence for each offence not invalid.

When two distinct offences are committed sentences passed under both offences cannot be said to be illegal. But the measure of punishment would be as is laid down under S. 71. Thus where an accused is convicted under S. 279 and S. 338, Penal Code and is sentenced to rigorous imprisonment for one month on each count and a fine of Rs. 500 on both counts, the sentences passed cannot be said to be contrary to the provisions of S. 71. However, looking to the circumstances of the case that both the offences were committed in the same transaction, it would be proper that both the sentences are allowed to run concurrently and the fine is reduced to Rs. 125 under each count. 1961 Raj L W 404.

——Ss. 71, 201 and 302 — Conviction and punishment under S. 201 and S. 302 — (Criminal P. C. (1898), Ss. 35, 236).

There is no legal bar to a person being convicted both of murder and of the offence under S. 201 and the proper course for the trial Court in a case where the evidence warrants it will be to enter a conviction for both the offences but not to award any sentence for the accessory offence. 29 Coch L R 120, Affirmed; A I R 1953 S C 131, Rel. on. 1953 Ker L T 403 : 1953 Cri L J 1613 : I L R (1953) Trav Co 514 : A I R 1953 Trav-Co 402 (407) (Pt D) (Pr 28) (DB).

——S. 71—Sentence—Accused sentenced under S. 302 for causing death of a pregnant woman — Even if a separate conviction under S 316 is not objectionable, separate punishment therefor offends S 71. See Penal Code (1860), S. 316. 1953 Cri L J 1551 : A I R 1953 Trav-Co 374.

3. Offence falling under two or more separate definitions—Para. (2).

——S. 71 — Scope of — Offences punishable under Ss. 147 and 323/149, Penal Code.

If the case is governed by the first paragraph of the section, sentence can be awarded in respect of one offence only. But if the case falls under paragraph 2 or 3 of the section, sentences may be awarded in respect of both offences, but the aggregate of such sentences should not be more than what could be awarded under any one of the two offences. Where what is proved against the accused persons is that they were members of an unlawful assembly of which the common object was to give a beating to another person and it is not proved that they themselves caused hurt to any one, their act constitutes two separate offences, viz. those punishable under Ss. 147 and 323/149. Therefore, their case falls under paragraph 2 of S. 71. Consequently sentences can be awarded to them under both sections provided the aggregate sentence does not exceed the limit which is prescribed in respect of one of them. 14 A L J R 738, Rel. on ; 16 Cal 442. Dissent. 1951 R D (H C) 267 : 1951 All W R (H C) 597 : A I R 1952 All 92 (93) (Pt B) (Prs 10, 11).

●——Ss. 71, 279, 337, 338—Offence under S. 279 and Ss. 337 and 338 are distinct — Conviction and sentences — Madh B L R 1952 (Cri) 302 : Madh B L J 1952 H C R 459, Overruled—(Criminal P. C. (1898), S. 233).

Offences under Ss. 279 and 337 committed in same transaction — Offences are distinct and so conviction for both offences is legal but assessment of punishment will be governed by S. 71. 1956 Cri L J 624 : A I R 1956 Madh Bha 141 (FB).

——S. 71 — Crossing of trains at railway station—Omission to discharge personal responsibility cast on Assistant Station Master by rules — Act directly contributing to train collision — Conviction under S. 101 and S. 304-A, Penal Code held proper — Single sentence passed for both offences — Particular offence for which sentence was passed not indicated—Lower Courts' order modified. See Railways Act (1890), S. 101. I L R (1962) Cut 60.

——S. 71, Paras. (2) and (3) — Accused found guilty under Ss. 201 and 435 — Offences arising out of one set of facts—Removal of evidence of murder primary object—Mischief by fire only incidental — Limit of punishment—Sentence of 7 years under each section, ordered to run consecutively, held illegal.

The accused were prosecuted under S. 201 and S. 435. They were sentenced to 7 years (maximum substantive sentence provided) under each of those sections and the sentences were ordered to run consecutively. From the circumstantial evidence it was clear that the same set of facts gave rise to two distinct offences. The primary object of the appellants was to remove the evidence of murder. Mischief by fire was only incidental.

Held, that the offences committed in the case fell within the second or the third paragraph of S. 71. That being so, the accused could not be inflicted with a more severe punishment than could be awarded for any one of such offences Hence the substantive sentences imposed under Ss. 201 and 435 must be modified to run concurrently. A I R 1958 S C 935, Rel. on. 1962 Mad L J (Cri) 41 : 1962 (2) Cri L J 81 : 40 Mys L J 504 : I L R (1961) Mys 524 : A I R 1962 Mys 138 (139) (Pt C) (Pr 19) (DB).

4. Several acts when combined constituting different offence — Para. (3).

——S. 71 — Scope and effect — Bombay Prohibition Act, Ss. 65 (b), 65 (f) and 66 (b)—Convictions under—Sentence—Separate sentences—Legality of.

Although separate sentences can legally be passed at the same trial, so long as aggregated punishment awarded does not exceed the maximum which can be inflicted for any of one of those offences, ordinarily one sentence alone should be passed. Paras. 1 and 3 of S. 71 will apply. A I R 1951 Bom 244 (DB).

5. Cases where separate sentences can be passed.

●——S. 71 — Opium Act (1878), Ss. 9 (a), 9 (b) — Conviction under both — Separate sentence for each offence—Maximum limit—Criminal P.C. (1898), S. 35.

The maximum sentence which could have been imposed for any of those offences is one year, the sentence of 3 months imprisonment imposed under each count does not contravene S. 71. 1958 Cri L J 1432 : A I R 1958 S C 935.

●——S. 71 — Separate convictions under S. 147 and S. 323, read with S. 149 — Separate sentences — Legality—Scope of S. 71, Indian Penal Code.

Per Malik C. J. and Mukerji J.: (Desai J. Dissenting) where an unlawful assembly has used force or violence, it becomes guilty of rioting under S. 146 and can be convicted and punished under S. 147, I. P. C. If however as a result of the use of that force or violence simple hurt is caused every member of the unlawful assembly can also be convicted and sentenced under S. 323 read with S. 149, I. P. C. Where, therefore, the accused are charged with an offence under S. 147 and an offence under S. 323 read with S. 149, provided the offences are proved, the accused can be convicted under both the sections 147 and 323/149 and also can be separately sentenced under the two sections. 1955 Cri L J 671 : A I R 1955 All 232 (FB).

——Ss. 71, 147, 149 and 325—Scope—Separate sentence—(Criminal P. C. (1898), S. 35).

An accused can be punished separately for the offences of Ss. 147 and 323, or 324 or 325 or 326, Penal Code, read with S. 149, Penal Code.

Applicability and scope of S. 71 fully discussed. 1953 Cri L J 1222 : A I R 1953 All 510 (515, 520) (Pt B) (Prs 11, 23).

——Ss 71, 147, 149—Sentence—Separate sentences—Legality.

The imposition of two separate sentences, one for rioting and the other for substantive offence read with S. 149, Penal Code, is illegal as it offends the provisions of S. 71 of the Penal Code. 1958 Andh L T 109.

——S. 71—Separate sentences.

When facts in a given case constitute an offence falling either under one section or another and charges are framed against the accused for both the offences, separate sentences are not permissible as it falls under S. 71. AIR 1955 N U C (Andh Pra) 6009.

——Ss. 71, 147, 143, 149, 325 — Separate convictions and sentences — (Criminal P. C. (1898), Ss. 35, 235).

Where several acts committed by an unlawful assembly of five persons, when combined, constituted two different offences, one under S. 147 and another under S. 325/149, Penal Code and they were convicted therefore, the offenders were not under S. 71, Penal Code, liable to be punished with the punishment for more than one of such offences, for, the accused cannot be punished twice for the same acts 8 All 121; 16 Cal 442 (FB), Foll; 7 All 29; 9 All 645; 17 Bom 260 (FB), Disting. **1955 Cri L J 1033 : A I R 1955 Bhopal 9 (14) (Pt E) (Prs 19, 20, 22).**

——S. 71 — Companies Act (1913), Ss. 76 and 133 — Ss. 76 and 133 create two distinct offences — The former offence may give rise to the latter offence or even independently of it — Hence there is no case of the accused being prosecuted twice for the same offence and put in double jeopardy. **1953 Cri L J 1062 : AIR 1953 Mad 558.**

——Ss. 71, 395, 342 — Offence of wrongful confinement in course of dacoity — Offences are distinct — S. 71 not applicable — Separate sentences must be imposed — Criminal P. C. (1898), Ss. 258 (2), 309 (2). **1962 (1) Cri L J 168 : A I R 1962 Manipur 7 (10) (Pt C) (Pr 19).**

——S. 71—Member of unlawful assembly—Constructive liability—Separate sentence.

Where a member of an unlawful assembly or of an assembly guilty of rioting incurs constructive liability for a distinct offence committed by one of the members of the assembly, it will not be proper to pass separate sentences for rioting and for the offence for which constructive liability was incurred by the accused. If, on the other hand, it is not a case of constructive liability but is a case where a person has been convicted of rioting and also of a distinct offence committed by him there can be separate convictions under S. 149, Penal Code, and the distinct offence committed by the accused concerned and separate sentence also can be passed. Case Law discussed. **1952 Cri L J 1592 : 1952 Ker L T 704 : ILR (1952) Trav Co 133 : A I R 1952 Trav-Co 459 (463) (Pt F) (Pr 15) (DB).**

SECTION 75

——S. 75—Applicability:— Previous convict — Minimum imprisonment.

There is no minimum imprisonment prescribed for a previous convict. A previous convict can be given imprisonment for a term of one year or even less. Section 75 applies only when a person is sought to be punished with imprisonment exceeding the maximum imprisonment provided for the offence. **1956 All L J 611 : 1956 All W R (HC) 735 : 1957 Cri L J 275.**

——S. 75—Previous conviction—Particulars of, when to be stated.

Facts about the previous conviction have to be mentioned in the charge only when it is intended to punish the accused with imprisonment exceeding the maximum punishment provided for the offence by invoking the provisions of S. 75. If a Magistrate does not wish to use the powers under S. 75 the particulars of the previous conviction need not be given in the charge. See Criminal P. C. (1898), S. 221 (7). **1957 Cri L J 275 (All).**

——S. 75 — Burden of proof—Previous conviction — Onus.

It is for the accused to prove that he was not a previous convict and deserved to be treated as first offender. See Criminal P. C. (1898), S. 221 (7). **1957 Cri L J 275 (All).**

——S. 75—Scope — Enhanced punishment for every subsequent offence—Imposition of—Punishment for prior offence need not be for three years or upwards.

The accused was charge-sheeted under S. 379, Penal Code, for theft and also under S. 75, Penal Code (for enhanced punishment) by reason of a previous conviction and sentence of 9 months' imprisonment suffered by him under Ss. 457 and 380, Penal Code. The Magistrate without framing a charge under S. 75, convicted the accused only under S. 379, on the ground that the previous conviction had resulted only in a sentence of 9 months' imprisonment but not three years 'the minimum that is required for enhancement of punishment . . . . . under S. 75, Penal Code, relying on the decision in (1950) A L T 851 :

Held, what S. 75, Penal Code, contemplates is that; where a person who has been previously convicted of an offence punishable under Chap. XII or Chap. XVII with imprisonment of either description for a term of three years or upwards, is once again found guilty of a similar offence, he shall be liable to enhanced punishment which may extend to imprisonment for life or to imprisonment of either description for a term which may extend to ten years. Section 75 is concerned with a previous conviction for a similar offence but it does not postulate that in respect of the previous conviction, the punishment imposed should have been one of not less than three years. All that it posits is that, the previous conviction should have been in respect of an offence punishable with a term of imprisonment not that the offender should have been actually punished with such a term of imprisonment. AIR 1960 Andh Pra 490, Disapproved. **1963 Mad L J (Cri) 566 : (1963) 2 Andh L T 449 : 1965 (1) Cri L J 508 : (1963) 2 Andh W R 361: ILR (1964) Andh Pra 1292.**

——S. 75—Applicability—Sentence awarded under previous conviction for two months only—Effect.

When it is required that the accused should be severely dealt with because of previous conviction, there must be a specific charge under S. 75, Penal Code. However where the previous sentence awarded is only two months, the previous conviction cannot be proved against him or any evidence allowed to be adduced thereof, even where he is charged under S. 75, unless the Court comes to the conclusion that the offence with which he has been charged has been proved. See Criminal P. C. (1898), S. 221 (7). **1960 Cri L J 1302 : A I R 1960 Andh Pra 490.**

——S. 75 — Duty of Court — Committal — It is not obligatory to commit accused to Sessions in all cases under S. 75, Penal Code. See Criminal P. C. (1898), S. 348. **1955 Cri L J 1235 : AIR 1955 Andhra 190.**

——S. 75—Enhanced sentence—Previous conviction —If enhanced sentence must be awarded.

The principle of S. 75 is that if the previous sentence borne by the accused had no effect on him, a more severe sentence should be awarded. But it does not follow as a rigid and inflexible rule that in all cases of previous convictions, an enhanced sentence should be awarded. It is good as a rule of thumb but the circumstances of each case should be taken into account in inflicting punishment. It is certainly open to a Magistrate to award a sentence less than that given on a previous occasion if the circumstances of the case warrant it. AIR 1935 Mad 231, Rel. on. **1955 Andh W R 265 : 1955 Andh L T (Cri) 107 : 1955 Cri L J 1235 : AIR 1955 Andhra 190 (192) (Pt B) (Pr 10).**

——S. 75—Judgment—Previous convictions—List to be appended — (Criminal P. C. (1898), S. 348).

Clearly the number of previous convictions is a circumstance to be taken into consideration in determining the sentence. Moreover, the Criminal Rules of Practice require that Magistrates and Judges should

append to their judgments a list of previous convictions. It is therefore essential that Magistrates and Judges set out in a tabular form all the previous convictions at the end of the judgment. AIR 1943 Mad 418, Approved. 1955 Andh L T (Cri) 107 : 1955 Andh W R 265 : 1955 Cri L J 1235 : AIR 1955 Andhra 190 (192) (Pt C) (Pr 12).

——S. 75 — Procedure — Charge under, when to be framed — Incorrect proceeding not prejudicing accused—(Criminal P. C. (1898), Ss. 221 (7) and 255-A).

It is not correct to say that additional charge under S. 75, Penal Code, should be framed after recording conviction of the accused — The additional charge under S. 75, I. P. Code, has to be framed with the main charge — This is clear from the provisions of Ss. 221 (7) read with S. 255-A, Cr. P. Code — What is required is that evidence in proof of previous conviction be led only after a judgmant recording conviction is pronounced — Where the trial Court heard evidence after he concluded that the accused was guilty it is an incorrect procedure.

Defect in procedure held did not, however, prejudice the accused. AIR 1944 Lah 25 (FB), Ref. 1953 Cri L J 96 : AIR 1953 Kutch 1 (2) (Pt C) (Pr 5).

——S. 75—Charge—Necessity—Charge under S. 447—Previous conviction not under Chaps. 12 and 17 of Penal Code but under Sections of Kutch Penal Code corresponding to Ss. 323 and 186, I. P. Code — Additional charge under S. 75, held improper when it was not intended to exceed limits of punishment. 1953 Cri L J 95 : AIR 1955 Kutch 1 (2) (Pt D) (Pr 6).

——S. 75 — Object and scope — Previous conviction can be taken into account in determining sentence, even though additional charge under S. 75 could not be framed — Considerations when such conviction should be taken into account stated. AIR 1929 Mad 306; AIR 1928 Rang 200, Rel. on. 1953 Cri L J 96 : AIR 1953 Kutch 1 (2) (Pt E) (Pr 7).

——S. 75—Proof of previous conviction—Questioning accused under S. 342. Cr, P. C.—Propriety—(Cr. P. C. (1898), Ss. 342 and 511).

A Magistrate is not justified in questioning the accused under S. 342, Cr. P. C., about the previous conviction when there was no evidence against him on that point. S 511, Cr. P. C., is quite explicit and clear on the point and says that for the purpose of S. 75, I. P. Code, a previous conviction must be proved in accordance with law. 1956 Madh B L J 434 : 1957 Cri L J 448 (Madh B).

——S. 75—Criminal P. C. (1898), S. 348—Scope.

S. 348, Cr. P. C. has been enacted in order to aid the requirements of S. 75, I. P. C. The object really is that an old offender should be tried by a person who could inflict such adequate punishment as the circumstances of the case may demand. 1957 Cri L J 1403 (1) : AIR 1957 Madh Pra 213 (Pt E).

——S. 75 — Previous convictions are not relevant except in cases where the application of S. 75, I. P. C. is sought by the prosecution. See Criminal P. C. (1898). S. 221 (7). AIR 1955 NUC (Mad) 932.

——S. 75—It is improper for the Magistrate to question the accused about his previous conviction when examining him under S. 342, Cr. P. Code. Proper procedure stated. See Criminal P. C. (1898), S. 342. AIR 1955 NUC (Pepsu) 1114.

——S. 75 — Evidence of previous conviction — (Evidence Act (1872), S. 1).

Search slip cannot be said to be judicial evidence of the previous convictions. 1953 Cri L J 1431 : AIR 1953 Punj 217 (218) (Pt A) (Pr 4).

——S. 75 — Proof of previous conviction—(Criminal P. C. (1898), S. 342).

Proof of previous convictions must be given in the proper manner required by the Evidence Act before the provisions of S. 75 of I. P. Code can be invoked. When the accused has not been proved to have been a habitual offender, S. 75 cannot be applied merely on an admission made under S. 342, Cr. P. C. by the accused when there is no proof of his previous conviction. 1953 Cri L J 1431 : AIR 1953 Punj 217 (218) (Pt B) (Pr 4).

SECTION 76

——Ss. 76 to 106, Chap. 4 (General) and S. 304-A—Mens rea.

The concept of 'mens rea', and the descriptions given of the state of mind in section 304-A, Penal Code, are far more helpful than the notion of degrees of negligence in defining and explaining that degree of negligence or rashness which distinguishes a criminally culpable wrong from a tort, involving a civil liability only; one is almost compelled to say that criminal negligence or rashnees is one which requires a particular "mens rea". Difficulty in reading words such as "grossly" or "highly", before words "rash" or "negligent" in S. 304-A is that such qualifying words could easily have been used by the legislature but are not there. Applying a well-recognised principle of interpretation the absence of such qualifying words must be deemed to be intentional. But, applying an equally well-recognized principle, the requirements of mens rea can be read into a provision creating a criminal offence and proceed to specify what this means with reference to a particular provision. It is, therefore, preferred to conceive of criminal rashnees or negligence in terms of the required mens rea. It is now an essential part of the doctrine of mense rea that even offences created or defined by statute must rest on the assumption that a mens rea is contemplated by them, unless the offence is one of those "statutory offences", which either by the force of express words of the statute or by a necessary implication, exclude the assumption. The test of guilt is that of knowledge and consciousness on the part of the malefactor that hurt or damage is likely to result from what he does; his criminality consists in the wilfully incurring the risk of causing loss or suffering to others. The principle of exemption from criminal liability in respect of a hurtful consequence is that of bona fide ignorance of the connection existing between the mere mechanical act and its consequence. In applying this fundamental doctrine of our criminal jurisprudence to an offence defined in a statute, when it is applicable as it is to all offences under the Penal Code, one has to assume that there is a mens rea for the offence and then to proceed, by scanning the words of the statute, to discover it. One cannot, by resorting to it, alter the statutory definition. It enables the Court to discover the meaning of the statutory provision and not to travel outside it. AIR 1947 P C 135, Rel. on; ILR (1946) 2 Cal 127, Dissent. from. 1964 All W R (HC) 134 : 1964 All Cri R 118 : 1965 (1) Cri L J 524 : AIR 1965 All 196 (200, 201) (Pt B) (Prs 17, 18, 19).

——Ss. 76 and 79 — Applicability—Police officer in attempting to re-arrest escaped thief firing at him but hitting and killing another person.

Where a suspected thief who has been arrested escapes and the Police officer finding that he is not in position to apprehend him fires at him but in so doing hits another person and kills him, he cannot plead justification either under S. 76 or S. 79. 1955 Cri L J 905 : AIR 1955 All 379 (381) (Pt C) (Pr 9) (DB).

——S. 76—Murder by soldier — Plea of obedience to order of superior—When not available.

Obedience of an unlawful order of his superior does not exonerate the soldier who commits a murder as a consequence of such order See Penal Code (45 of 1860), S. 300. AIR 1950 East Punj 321 (DB).

——(Ss 76 to 95), Chap. 4 (General) — Evidence Act (1872), S. 105—Burden of proof on accused to prove that case falls under exception—Burden sufficiently discharged if accused satisfies court of probability of what he is to establish — Proof beyond reasonable doubt not necessary—Defamation—Exceptions—Mere creation of doubt regarding truth of statement not sufficient to prove exception. See Evidence Act (1872), S. 105. 1964 (2) Cri L J 549 : AIR 1964 Ker 277.

——(Ss. 76 to 106), Chap. 4 (General)—Mens rea — Criminal liability of persen for criminal acts of servant, agent or independent contractor.

Comparison with position of servant or agent—M. P. Land Revenue Code (1954), S. 228 (7) — Penalty under — Mens rea not ingredient — Mining lease — Illegal extraction by independent contractor employed by lessee—Lessee not criminally liable under S. 228 (7). 1965 (1) Cri L J 301 : AIR 1965 Madh Pra 66 (DB).

SECTION 79

——S. 79—Benefit of S. 132, Criminal P. C.—What accused is required to prove — To show this is not to prove requirements of S. 79, Penal Code. See Criminal P. C. (1898), S. 132. 1964 (1) Cri L J 161 : AIR 1964 S C 269.

——S. 79 — Bar of limitation under S. 53, Madras District Police Act — Protection of when available—Act done or intended to be done under provisions of Police Act or any other law — What amounts to—Torture by police during investigation of persons suspected of crime—Protection of bar of limitation under S 53 not available. See Madras District Police Act, (1859), S. 53. 1964 (1) Cri L J 16 : AIR 1964 S C 33.

——S. 79—Prosecution under a valid penal statute—Defence that accused was engaged in asserting a fundamental right — Not valid — (Constitution of India, Part III (Gen)—Criminal Trial—Defence.

The fact that a person is engaged in asserting a fundamental right affords no defence to a charge of having contravened a valid penal statute while so engaged, Dalbir Singh v. State of Punjab, 1962 (2) Cri L J 247 : AIR 1962 S C 1106 (1110) (Pr 14).

——S. 79—Applicability — Arrest of person without warrant or order of Magistrate—Arrested person filing complaint under S. 342, Penal Code, for unlawful arrest and detention — Policemen pleading that they were justified by law in arresting the complainant—No mistake of fact or good faith pleaded or made out—S. 79, held had no application. 1963 All W R (HC) 760 : 1963 All Cri R 460 : 1965 (1) Cri L J 413 : AIR 1965 All 161 (166) (Pt F) (Pr 16).

——Ss. 79, 30, 44, 52 and 477—Good faith—'Valuable security' — What constitutes—Offence of destruction of valuable security—Essentials — Suit for malicious prosecution—Application filed by defendant admitting that complaint filed by him was false and agreeing to pay damages to plaintiff — Court not accepting it as part of record but returning it to defendant for reconsideration in consultation with his counsel—Defendant tearing off application outside Court in good faith—Defendant held not guilty of any offence — Application held not a valuable security. See Penal Code (1860), S. 30. 1963 (1) Cri L J 279 : AIR 1963 All 131.

—S. 79 — Mistake of law — Act done on basis of Full Bench decision — Decision not accepted as laying down correct law—Offence—Nature of.

The I. P. Code, does not exempt an act done under a mistake of law from the operation of the penal law but, it is obvious that if a person accepts the decision of a Full Bench of the High Court in the State (from which no appeal has been preferred to the Supreme Court) as a guide to his conduct, he commits nothing more than a technical offence if that view is later not accepted as laying down the correct law. 1955 Cri L J 1025 : AIR 1955 All 397 (399) (Pt C) (Pr 15) (DB).

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——S. 79—Applicability—Police officer in attempting to rearrest escaped thief firing at him but hitting and killing another person. He cannot plead justification either under S. 76 or S. 79. 1955 Cri L J 905 : AIR 1955 All 379 (DB).

——S. 79—Though under the Essential Supplies Act the burden of proving that the business was being carried on under a lawful permit or licence is on the person who carries on the business, where there are ample grounds for the accused under the misapprehension of the fact with regard to the validity of the licence and the undertaking to renew the licence was given at a time when the department was well aware that the accused was carrying on the business for some time even without a valid licence, it was held that the accused was entitled to the benefit of S. 79. AIR 1955 N U C (All) 5505.

——Ss 79, 300 and 76 — Murder by soldier—Plea of obedience to order of superior, when not available.

Obedience of an unlawful order of his superior does not exonerate the soldier who commits a murder as a consequence of such order 52 Pun L R 331 : ILR (1950) Punj 354 : AIR 1950 East Punj 321 (Pt A) (DB).

——Ss. 79 and 427—Scope of — Cutting off of overhanging branches of tree in neighbour's land — Offence.

A person is entitled to cut off those portions of the tree in neighbour's land which overhang his land. It does not, by virtue of S. 79 of the Penal Code, amount to an offence of mischief punishable under S. 427. 1956 Ker L T 369 : 1957 Cri L J 166.

——S. 79—Ignorance of law—If can be pleaded.

Ignorance of the law will not excuse from the consequence of guilt any person who has capacity to understand the law. Mistake of law, however, normally relates to mistake as to accused's rights under the law to do a particular act or pursue a particular course of conduct. The Courts are not at all concerned with the legality or otherwise of the rights under which the accused purported to act. The only question that the Courts have to decide in such cases is, whether the claim of right was honestly and bona fide held by the accused. This question will essentially be one of fact. In such cases, it is the good faith of the accused and not the right itself which requires adjudication. In this sense, a mistake of law can, to a certain extent, be a defence to a criminal charge. 1956 Madh B L J 674 : (1956) Madh B L R (Cr) 182: ILR (1956) Madh B 374 : 1956 Cri L J 1327 : AIR 1956 Madh B 241 (243) (Pt B) (Pr 10) (DB).

——S. 79—Mistake of fact—Accused held entitled to benefit of S. 79. AIR 1955 N U C (Madh B) 5360.

——S. 79—Accused in delusion killed his own son believing him to be tiger—Held there was mistake of fact—Accused was protected by S. 79.

Where an accused, in a moment of delusion, considered that his own son to whom he was attached, was a tiger and he accordingly assailed him with an axe, thinking by reason of a mistake of fact that he was justified in destroying the deceased whom he did not regard to be a human being but a dangerous animal

Held, that the accused was protected by S. 79, Penal Code. AIR 1926 Lah 554 and AIR 1943 Pat 64, Rel. on. 1952 Nag L J 350 : 1952 Cri L J 1212 : ILR (1952) Nag 348 : AIR 1952 Nag 282 (283) (Prs 7, 9) (DB).

—Ss. 79, 52—'Good faith'—Standard of care and attention—Human being believed to be ghost and attacked—Accused held protected.

Good faith requires due care and attention but there can be no general standard of care and attention applicable to all persons and under all circumstances. The question of good faith must be considered with reference to the position of the accused and the circumstances under which he acts. The law does not expect the same standard of care and attention from all persons regardless of the position they occupy.

Where from the circumstances under which the apparition appeared before the accused it would be reasonably inferred that he believed, in good faith, that he was attacking a ghost and not a human being, he was protected by S. 79, Penal Code, and the mere fact that had he exercised extra care and attention the incident might have been averted was no ground for denying him that protection : 31 Bom 293 and 12 Bom 377 and AIR 1940 Rang 129, Relied on. (1959) I O J D 680 : I L R (1960) Cut 22 : 26 Cut L T 238 : 1960 Cri L J 1349 : A I R 1960 Orissa 161 (163) (Prs 7, 9) (DB).

—S. 79—"Mistake of fact"—Meaning of — Burden of proof—Mistake of law — Error of mixed question of law and fact—Effect of.

"Mistake of law" ordinarily means mistake as to the existence or otherwise of any law on a relevant subject as well as mistake as to what the law is. But an error of a mixed question of law and fact is treated as a mistake of fact. Where an act is prima facie innocent and proper, unless certain circumstances co-exist, then ignorance of such circumstances is an answer to the charge. The state of mind of the accused must amount to absolute ignorance of the existence of the circumstances which alters the character of the act or to a belief in its non-existence. The burden is on the accused to satisfy that the conditions that could exonerate them existed at the time when the offence was committed. When there is absolutely no reason to believe that the mental state of absolute ignorance of the existence of circumstances altering the character of the act or the belief in its non-existence existed at the material time, the accused cannot be held to be "not guilty". 15 Cut L T 12 : ILR (1950) Cut 75 : 52 Cri L J 837 : AIR 1951 Orissa 284 (289, 290) (Pt E) (Prs 20, 23) (DB).

—S. 79 — Burden of proof — Evidence Act (1872), S. 105.

The accused has to satisfy that the conditions that could exonerate him existed at the time when the offence was committed. A I R 1951 Orissa 284 (290) (Pt G) (Pr 26) (DB).

SECTION 80

—S. 80 — Misdirection — Omission to refer to statutory presumption under S. 105, Evidence Act and to explain ingredients of S. 80, Penal Code—Verdict of jury vitiated. See Criminal P. C. (1898), S. 297. 1962 (1) Cri L J 521 : AIR 1962 S C 605.

—Ss. 80, 87 and 304A — Accused and deceased friends—Former inviting latter for wrestling bout—Whilst wrestling deceased receiving accidental injury on his skull resulting in death — No foul play by accused—Case falls under Ss. 80 and 87—Accused held committed no offence.

The accused and the deceased were friends and were fond of wrestling. The accused invited the deceased for wrestling bout. They went to akhara and wrestled there. Whilst wrestling the deceased was thrown and his head came in contact accidentally with the hard edge of the adjoining Chabutra which resulted in the fracture of the skull and death. The accused was tried under S, 304, Penal Code, but was convicted under S. 304A :

Held that when the accused and the deceased agreed to wrestle with each other there was an implied consent on the part of each to suffer accidental injuries. As the injury was caused accidentally and without any criminal intention and as there was no proof of any foul play on the part of the accused his act did not amount to any offence by reason of Ss. 80 and 87, Penal Code : AIR 1927 Lah 880 (2); AIR 1931 Lah 54 and 3 Bom L R 678, Ref. 1949 All W R (HC) 476: 1949 All Cri Cas 1171 : 51 Cri L J 402: AIR 1950 All 95 (96) (Pr 7).

—Ss. 80, 321 and 322—Offence of hurt—Intention or knowledge essential—Accident.

The accused swept the instruments kept on the shelf with his hand in order to cause a rattle and frighten the boy and send him away and in a sleepy state dislodged a hammer which hit the boy standing below the shelf and caused the fracture leading to his immediate death. In the circumstances,

Held : This is clearly a case of an accident within the scope of S. 80 of the Indian Penal Code and no offence is involved. Even if there was some slight negligence on the part of the accused a claim in damages only may be sustained. S. 321 and the specific Explanation to S. 322, Indian Penal Code, make it clear that either the ingredient of intention or that of knowledge must be essentially present in order to constitute the offence of hurt. (1962) I M L J 161 : 1962 All Cr R 341 : 1962 All W R (Sup) 12, 1962 Mad L J Cri 174 : 75 Mad L W 162.

—Ss. 80, 304-A—Death caused by shooting under a mistaken but bona fide belief that object aimed at was wild animal—No offence is committed. See Penal Code (45 of 1860), S. 304A, 1952 Cri L J 1191 : AIR 1952 Nag 268 (DB).

—S. 80—Defence that there was no real intention to kill and it was by chance that injury inflicted happened to be on vulnerable part—Defence does not take case out of offence of murder. See Penal Code (1860), S. 302. 1965 (2) Cri L J 127 : AIR 1965 Punj 291 (DB).

SECTION 81

—S. 81—Criminal trial—Elements of mens rea in offence—Penal Code (1860), S. 40.

It is a general principle of criminal law that guilty intention is necessary ingredient of a crime. The Legislature may by using express language or by implication, exclude an element of mens rea in any particular crime but unless such exclusion is deducible from the express language of the statute or by implication, mens rea forms a necessary ingredient. 1956 Cri L J 1156 : AIR 1956 All 610 (DB).

—Ss. 81, 87 and 88—Complainant tried by panchayat with his consent for alleged offence— Complainant's face blackened and paraded and given shoe-beating in pursuance of panchayayat's decision — Offence.

Ordinarily a self-constituted Panchayat has no right to try an offence alleged to have been committed by a person and order his face to be blackened and the person paraded through the village and given shoe-beating. In ordinary circumstances, such a conduct would not be tolerated and the persons responsible for it would be dealt with according to law. But when the accused persons acted bona fide, in calling a Panchayat without any

criminal intent, in order to save the complainant from more serious consequences, resulting from his own indecent behaviour towards a girl with his consent to abide by the decision of the Panchayat obtained in writing and for his benefit, the position is entirely different. In such a case the action of the accused in enforcing the decision of the panchayat cannot be held to be an offence. ('51) 52 Cri L J 179 : A I R 1951 All 500 (501) (Pt B) (Pr 5).

——S. 81—Applicability—Conditions.

Section 81 comes into play when the person confining another has a genuine and reasonable apprehension that to allow the other to remain at large will endanger the person and property of others. So, in order to attract S. 81 it should be shown that the act complained of was done in good faith in order to prevent or avoid harm to the person or property of others. 46 Mad 605, Rel. on. (1957) Mad L J (Cr) 474 : (1957) 2 Andhra W R 201 : 1959 Cri L J 167 : AIR 1959 Andh Pra 102 (103) (Pt B) (Pr 6).

SECTION 82

——Ss. 82, 83—Applicability—Minor over 12 years—Can be guilty under S. 408. 1959 All W R (H C) 116 : 1959 All Cr R 127 : 1959 Cr L J 1264 : AIR 1959 All 693 (699) (Pr 2).

SECTION 83

——S. 83—Applicability.

What S. 83, Penal Code, contemplates is that the child should not know the natural and physical consequences of his conduct.

When, however, the accused picked up his knife and advanced towards the deceased with a threatening gesture, saying that he would cut him to bits, and did actually cut him, his entire action can only lead to one inference, namely, that he did what he intended to do and that he knew all the time that a blow inflicted with a kathi would effectuate his intention, and, therefore, the accused would be guilty under S. 302, Penal Code. 16 Cut L T 102 : ILR (1950) Kutch 293 : AIR 1950 Orissa 261 (262) (Pt B) (Pr 8) (DB).

——S. 83—Offence under S. 457 — Conviction and sentence of boy of ten years.

In such a case the Magistrate should take into consideration whether the boy is of sufficient maturity of understanding to be able to realise the nature of his act within S. 83 and while sentencing him consider the provisions of S. 31 of the Reformatory Schools Act and the rules thereunder under which the youthful offender who is below the age of 13 has to be sentenced to five years' detention in the Reformatory School. See Reformatory Schools Act (1897), S. 8. AIR 1955 N U C (Punj) 1330.

SECTION 84

SYNOPSIS

(Penal Code (45 of 1860), S. 84.)

1. Plea of insanity — Absence of motive.
   - (A) Condition of mind before and after commission of crime.
   - (B) How far constitutes good defence.
2. "Incapable of knowing the nature of the Act".
3. "What is either wrong or contrary to law."
4. Proof of insanity—Legal and medical.
   - (A) Burden of proof.
     See also Evidence Act (1872), S. 105.
   - (B) Burden of proof—Crucial point of time.
   - (C) Unsoundness of mind.
5. Drunkenness.
6. Occasional or recurring insanity.
7. Somnambulism.
8. Unsoundness of mind not covered by S. 84—How far relevant for ascertaining intention.
9. Unsoundness of mind not covered by S. 84—Punishment.
10. Criminal responsibility of deaf and dumb.

1. Plea of insanity—Absence of motive.
   - (A) Condition of mind before and after commission of crime.
   - (B) How far constitutes good defence.

1. Plea of insanity — Absence of motive.

——Ss. 84, 300, 302—Inability to prove — The mere fact that the prosecution is unable to prove motive beyond any reasonable doubt is no reason for holding that there was no motive for it. Nor is the absence of motive any reason for holding that the plea of insanity has been established — See Penal Code (1860), S. 300. AIR 1951 Assam 79 (DB).

——Ss. 84 and 302—Murder—Absence of motive.

Absence of a motive can be no ground to throw out the prosecution story of murder of a child by its father, but in the peculiar circumstances of a case the absence of the motive can be used as one of the circumstances proving the insanity of the accused as contemplated by S. 84, Penal Code. 1956 Madh B L J (Bh) 134 : 1956 Cr L J 1291 : A I R 1956 Bhopal 57 (59) (Pt C) (Pr 7).

——S. 84 — Criminal P. C. (1898), Ss. 297, 303, 470, 471—Trial by jury—Plea of insanity—Procedure to be followed in obtaining jury's verdict stated—Action under S. 471 when can be taken—See Criminal P. C. (1898), S. 297. 1961 (2) Cri L J 202 : AIR 1961 Cal 436 (DB).

——S. 84—Criminal P. C. (1898), S. 297 — Charge to jury — Misdirection — Plea of insanity—What Judge should tell the jury while dealing with S. 84, Penal Code, explained — Omissions such as omission to explain S. 84 or tell the jury that burden of proof required of the accused to establish plea is less than that required at the hands of prosecution in proving case beyond reasonable doubt, held amounted to grave misdirections which vitiated jury's verdict and brought about a failure of justice—See Criminal P. C. (1898), S. 297. 1961 (2) Cri L J 202 : AIR 1961 Cal 436 (DB).

——S. 84 — Insanity — Legal and medical—Distinction in — Nature and extent of unsoundenss of mind required for legal insanity.

The test of legal insanity as distinct from medical insanity is that the nature and extent of unsoundness of mind must reach such a stage where the cognitive faculty of the mind would be so materially affected as would make the offender incapable of knowing the nature of the act or that he is doing what is wrong or contrary to law. Further, one must look outside the act itself for the evidence as to how much the accused knew about it. Apart from the act, there must be some clear and distinct proof of mental delusion or intellectual aberration existing previously or at the time of the perpetration of the crime. The Court is only concerned with the state of mind of the accused at the time of the act and the antecedent and subsequent conduct of the man is relevant only to show what the state of the mind was at the time when the act was committed. 23 Cal 604; AIR 1949 Cal 182; AIR 1960 Guj 1; 10 Bom 512, Rel. on. (1964) 5 Guj L R 474 : ILR (1964) Guj 324.

—S. 84 — Scope — Inference of insanity — Relevant facts.

Held, that the accused was labouring under the influence of an insane delusion that his wife had done him injury and was responsible for depriving him of his liberty. The previous insanity of the accused and this persistent delusion of his wife having done him some wrong established conclusively that the accused who was in other respects completely and utterly insane and who had 'glimmering knowledge' of the nature and consequence of his act in striking his wife with an axe was absolutely incapable of realising that it was wrong or contrary to law. 1956 Madh B L J 1275 : 1957 Cri L J 370 : AIR 1957 Madh B 104 (107) (Pt C) (Pr 8).

—S. 84 — Insanity — Nature of insanity required to escape punishment — Absence of motive — Not enough to get exemption of insanity.

To attract the provisions of S. 84 it must appear from the evidence that at the time when the said offence was committed, the accused was not mentally in a position to understand the nature and the consequences of the act and that what he was doing was either wrong or contrary to law. Mere absence of motive coupled with atrocious nature of the crime is not enough. 1956 Madh B L R (Cri) 295: 1956 Madh B L J 1152.

—S. 84 — Insanity — Uncontrollable anger—Effect — Sentence — Extenuating fact — Multiple murders within short time on uncontrollable impulse.

It would be a most dangerous doctrine to lay down that because a man has committed multiple murders within a very short time on uncontrollable impulse, he, though not insane enough to exempt him from criminal liability, was at the time of murders suffering from mental derangement of some sort so as to entitle him to indulgent consideration in the matter of sentence. Clearly the atrocity of crime, the multiplicity of murders or the mode of perpetrating the crime cannot constitute an extenuating fact for passing the lesser sentence. See Penal Code (1860), S. 302. AIR 1955 NUC (Madh B) 4528 (DB).

—S. 84 — Insanity — What amounts to — Nature of evidence — Absence of motive is not enough — Mere eccentricity is no insanity — (Evidence Act (1872), Ss. 105 and 35). AIR 1955 NUC (Madh B) 2993 (DB).

—S. 84 — Determination of criminal responsibility — More progressive attitude has to be adopted. 1959 M P L J 344 : 1959 M P C 289 : 1959 Cri L J 844 : 1959 Jab L J 386 : AIR 1959 Madh Pra 259 (260) (Pt A) (Pr 2) (DB).

—Ss. 84, 302 and 309 — Applicability — 'Insanity' — Murder by woman of children and attempt to commit suicide by drowning — Accused in strained circumstances and suffering from fits of mental depression — Offence — Sentence — Remission — Criminal Procedure Code (5 of 1898), S. 401 — Applicability. (1960) 1 M L J 332 : 1960 M L J (Cr) 242 : 1960 All W R (Sup) 7 : 1960 All Cr R 78.

—S. 84 — Uncontrollable impulse is no defence. 1951 Mad W N Cr 263: 1951 Mad W N 843 : 1951-2 Mad L J 593 : 1952 Cri L J 625 : AIR 1952 Mad 289 (290) (Pt B) (Pr 7) (DB).

—S. 84 — Plea of insanity — Questions to be considered.

When a plea of insanity is raised under S. 84, the Court has to consider two issues : (1) whether the accused has established that at the time of committing the act he was of unsound mind; (2) if he were of unsound mind, whether he has established that the unsoundness of mind was of a degree and nature to satisfy the tests laid down by the section. AIR 1955 NUC (Pat) 451.

—S. 84 — Unsoundness of mind — Facts to be proved.

Accused has first to show that he was at the time the act was committed of unsound mind. This is a matter of inference from his acts at or before the time of the incident, and from such other evidence relating to his mental history or to the mental history of his relations as might be available. Secondly that the unsoundness of mind is of the kind that is required under S. 84, Penal Code.

A person may be unsound in mind in some respect and may still know very well the nature of his act like murder and also that doing of such an act was wrong AIR 1947 Pat 222, Foll. 1952 Raj L W 138 : ILR (1951) 1 Raj 800.

—S. 84 — Duty of Court — No plea of insanity — Court, if can investigate question of insanity.

Where from the behaviour of the accused the Sessions Judge suspected the insanity of the accused, though there is no suggestion of the insanity by the counsel for the accused the Judge would be justified in eliciting the information by questioning the witnesses and whether the plea was taken by the accused or not, if the evidence discloses the insanity of the accused at the material time then it has to be considered in weighing the criminality of the accused and in adjudging whether he was responsible for the crime or not. 1955 Cri L J 1628 : 8 Sau L R 269 : AIR 1955 Sau 105 (106) (Pt A) (Pr 4) (DB).

—S. 84 — Insanity — What is.

While considering whether the accused was insane when he committed the act, a fit of insanity which the accused had ten years before the act is irrelevant. 1955 Cri L J 1628 : 8 Sau L R 269 : AIR 1955 Sau 105 (106) (Pt B) (Pr 5) (DB).

—S. 84 — Insanity — Requirements stated — Evidence Act (1872), S. 105). AIR 1955 N U C (Trav-Co) 1456 (DB).

—S. 84 — Insanity — What is — Benefit.

When all the witnesses belonging to the village have stated that the accused is known as a "Pagla" (Lunatic) though actually he may not be so, a conclusion may be drawn that the accused has certainly some derangement in his brain—although not to the extent that he can be called of unsound mind and therefore deserving of the benefit of S. 84. 1954 Cri L J 154 : AIR 1953 Tripura 9 (9) (Pt A) (Pr 6).

1 (A). Condition of mind before and after commission of crime.

—S. 84 — Plea of insanity — Condition of accused antecedent and subsequent to commission of crime — Evidence Act (1872), S. 14.

The condition of the accused antecedent and subsequent to the commission of the crime is relevant only in so far as it might assist the Court in coming to a conclusion as to the mental capacity at the time when the accused struck the fatal blow. It is not per se enough to establish that the case is covered by S. 84. ('50) ILR (1950) 2 Assam 423 : AIR 1951 Assam 79 (81) (Pt B) (Pr 9) (DB).

—S. 84 — Scope — Test of insanity — Relevancy of antecedent or subsequent conduct.

Section 84 lays down the legal test of responsibility in cases of alleged unsoundness of mind, and it is by that test, as distinguished from the medical test, that the criminality of an act is to be determined.

The antecedent and subsequent conduct of the man is relevant only to show the state of his mind at the time when the act was committed. In other words, so far as S. 84 is concerned, the Court is only concerned with the state of mind of the accused at the time of the Act. The nature and the extent of the unsound-

ness of mind required must reach that stage as would make the offender incapable of knowing the nature of his act or that he is doing what is either wrong or contrary to law. 1960 Cri L J 1200 : (1960) 1 Guj H C R 32 : (1960) 1 Guj L R 27 : AIR 1960 Guj 1 (2, 4) (Prs 3, 7) (DB).

——S. 84 — Previous insanity — Effect of — Presumption.

In all cases where previous insanity is proved or admitted, a presumption of sanity at the time of the commission of the act would be greatly weakened and considerations whether there was deliberation and preparation for the act, whether it was done in a manner which showed a desire to concealment, whether after the crime, the offender showed consciousness of guilt, and made efforts to avoid detection, whether after his arrest, he offered false excuses and made false statements, become very relevant. 1956 Madh B L J 1275 : 1957 Cri L J 370 : AIR 1957 Madh B 104 (106) (Pt B) (Pr 6) (DB).

——S. 84 — Tests to ascertain state of accused's mind.

Speaking generally, the pattern of the crime, the circumstances under which it has been committed, the manner and method of its execution, the behaviour of the murderer before and after the commission of the crime furnish some of the important clues to ascertain whether by reason of unsoundness of mind the accused was incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law. 1959 M P L J 344 : 1959 M P C 289 : 1959 Cri L J 844 : 1959 Jab L J 386 : AIR 1959 Madh Pra 259 (261) (Pt C) (Pr 5) (DB).

——Ss. 84 and 300 — Deliberate and premeditated murder — Preparation for burying dead body in house — Plea of insanity failed. 1959 M P L J 344 : 1959 M P C 289 : 1959 Cri L J 844 : 1959 Jab L J 385 : AIR 1959 Madh Pra 259 (263) (Pt D) (Pr 13) (DB).

——S. 84—Benefit under — Crucial point of time.

The crucial point of time for deciding whether the benefit of S. 84 should be given or not is the material time when the offence takes place. In coming to that conclusion, no doubt, the Court has to take into consideration the relevant circumstances like the behaviour of the accused before the commission of the offence and after the commission of the offence. The non-exhibition of feelings and the absence of secrecy on the part of the accused are only some of the relevant circumstances which have to be considered along with the other circumstances of the case and by themselves they do not make out sanity or insantty. ('51) 64 Mad L W 820 : 1951 Mad W N 755 (2) : 1951 Mad W N Cr 223 (2) : 1951-2 Mad L J 356 : 1952 Cri L J 351 : ILR (1952) Mad 479 : AIR 1952 Mad 174 (174) (Prs 4, 5) (DB).

1 (B). How far constitutes good defence.

——S. 84 — Plea of insanity — When can be availed of by accused.

What S. 84 lays down is not that the accused claiming protection under it should not know an act to be right or wrong, but that the accused should be incapable of knowing whether the act done by him is right or wrong. What is protected is an inherent or organic incapacity, and not a wrong or erroneous belief which might be the result of a perverted potentiality. 'Legal insanity is not the same thing as medical insanity and a case that falls within the latter category need not necessarily fall within the former. Further, the case where a murderer is struck with an insane delusion is different from the case of a man suffering from organic insanity. AIR 1949 Cal 182, Dissented from; AIR 1923 All 327 (2), Disting. ILR (1959)2 All 216 : 1959 All L J 287 : 1959 All W R (HC) 268 : 1959 All Cr R 238 : 1959 Cri L J 1033 : AIR 1959 All 534 (536) (Prs 11 to 13) (DB).

——S. 84 — Insanity as defence.

Unsoundness excusable under section must be such as to render accused incapable of knowing either the nature of the act or that what is being done is either wrong or contrary to law. State of mind of the accused at the time of committing the act and not anterior or posterior to it is relevant. In case of periodic insanity condition of mind of the accused has to be judged by circumstances surrounding the act, previous history of the accused and medical opinion.

Consciousness of the act does not necessarily imply that the accused was capable of knowing the nature of the act or that he was doing what was either wrong or contrary to law. AIR 1955 N U C (Madh-B) 5636 (DB).

——S. 84 — Plea of insanity—When good defence.

Tek Chand, J. — It is not every impairment of mental processes or any deviation from the recognised standards, that will earn for the accused the verdict of not guilty, in the sense that mens rea is absent. The test that law insists upon is the 'right and wrong test' of Macnaughten Rules as recognised in S. 84 of the Penal Code. This test has been accepted in India as a correct guide for determining the guilt or innocence of the person who pleads insanity as a defence. 1958 Cri L J 555 : 59 Punj L R 597 : ILR (1957) Punj 1914 : AIR 1958 Punj 104 (110) (Pt B) (Pr 24) (DB).

——S. 84 — Insanity how far constitutes good defence stated. AIR 1955 N U C (Sau) 533 (DB).

——S. 84 — Defence of insanity — Accused appearing in full possession of his senses — Defence under S. 84 not put forward by mouth — This held did not debar him from availing himself of defence put forward in defence evidence and in arguments. AIR 1955 N U C (Trav-Co) 1456 (DB).

2. "Incapable of knowing the nature of the act".

● ——S. 84 — Case of homicide — Plea of insanity — Burden of proof. See Evidence Act (1872), S. 101. 1964 (2) Cri L J 472 : AIR 1964 S C 1563.

■ ——S. 84—Plea of insanity—Proof — Circumstances which preceded, attended and followed the crime to be considered.

When a plea of legal insanity is set up, the Court has to consider whether at the time of commission of the offence the accused, by reason of unsoundness of the mind, was incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law. The crucial point of time for ascertaining the state of mind of the accused is the time when the offence was committed. Whether the accused was in such a state of mind as to be entitled to the benefit of S. 84 of the Penal Code can only be established from the circumstances which preceeded, attended and followed the crime.

(Held, entire conduct of the accused from the time he killed his wife upto the time the sessions proceedings commenced was inconsistent with the fact that he had a fit of insanity when he killed his wife). Dahyabhai Chhaganbhai Thakkar v. State of Gujarat, (1964) 1 S C W R 831 : (1964) 7 SCR 361 : 1965 Mad L J (Cri) 773 : 1964 Mad W N 538 : (1965) 2 S C J 531 : 1965 All W R (H C) 740 : 1965 All Cri R 501 : (1964) 5 Guj L R 911 : 1965 S C D 44 : 1964 (2) Crs L J 472 : AIR 1964 S C 1563 (1569 to 1571) (Pt C) (Prs 9, 14).

——Ss. 84 and 302 — Insanity—Every abnormality of mind does not come under exception—Murder case—Defence that accused was victim of hallucination — His conduct showing that he knew nature of his act—Held that he was not insane.

It is not every abnormality of mind or reason that brings a case within the exception in S. 84. Mental disorder is not to be inferred from the mere fact that a pereon has committed an abnormal crime or has acted from a motive which has no basis in reason or fact. Nor can it be presumed that because the accused committed what most people would regard as a senseless act that he has all along been insane.

The accused, a mendicant was very much attached to a temple elephant. The elephant fell ill and the accused took it very much to his heart. He used to weep and sometimes even refuse food out of sorrow. The deceased was his fellow mendicant. Both used to sleep in the verandah of a shop. At the dead of night the accused killed his fellow mendicant under the obsession that a human sacrifice would save the life of the elephant. There was no evidence whatsoever of any mental disorder either before or after the commission of the act.

Held (i) that there was no reason whatsoever to doubt the accused's sanity at the time of his trial and therefore there was no need for the Sessions Court to proceed under S. 465, Cr. P. C.

(ii) that whatever be the obsession or hallucination under which the accused laboured, it certainly did not so deprive him of his reason as to make him incapable of knowing the nature of his act or that he was doing what was wrong or contrary to law. His very conduct in seeking a convenient opportunity at dead of night when the deceased was asleep for killing him, then secreting the body while preserving the head (presumably for some sacrificial ceremony). next removing the blood-stains on the verandah and pledging P. W. 1 to secrecy, and then, washing his clothes and the chopper used by him before putting it in its usual place, proclaimed that he knew very well what he was about and that what he was doing was wrong and contrary to law. Even his own statement that he killed the deceased in order to save the life of the elephant, showed that he knew very well the nature of his act. Hence he was not insane. AIR 1941 Cal 129; AIR 1954 Trav Co. 435, Disting. 1957 Ker L J 845.

——Ss. 84 and 302 — "Incapable of knowing the nature of act"—Proof of insanity—(Evidence Act (1872), S. 105).

If an accused is found to be insane prior to an occurrence as well as subsequent to the occurrence, that is not enough for giving him the benefit of S. 84, unless it is also established that he was insane at the time of committing the offence itself.

The quantum of proof required under S. 105 of Evidence Act relating to the burden of proving the case within the exception, is not proof beyond reasonable doubt and all that the accused may do is to make out a prima facie case. The burden of proof in the matter rests upon the accused; it is not so onerous as the burden which rests upon the prosecution. The burden is discharged if the accused establishes facts and circumstances which may lead to a reasonable inference that at the time of the commission of the offence the accused was of unsound mind, the unsoundness of his mind being of the nature or extent mentioned in S. 84. AIR 1961 Pat 355; AIR 1964 S C 1963, Rel. on. (1965) ILR 44 Pat 899 (DB).

3. "What is either wrong or contrary to law."

■ **——S. 84 — Criminal P. C. (1898), Ss. 417, 423 — Appeal against acquittal—Nothing on the record of trial Court to show that at the moment of the act the accused was incapable of knowing that what he was doing was wrong or contrary to law—Held that refusal to interfere with acquittal by the High Court could not be justified under any rule as to impelling** reasons for interference even assuming the existence of such a rule — See Criminal P. C. (1898), S. 417. 1961 (2) Cri L J 43 : AIR 1961 S C 998.

——Ss. 84 and 300—Madness is a question of fact—Held, on facts and circumstances of the case that the accused was really of unsound mind at the time of occurrence.

The question as to whether the accused was mad at the time of occurrence so as to attract the application of S. 84, Penal Code, is a question of fact to be decided on merits of each case and on the facts of that case. AIR 1961 S C 998; AIR 1959 Mad 239; AIR 1937 Lah 486, Foll.

The mere fact that the accused was in sound state of mind when the Medical Officer examined him about a month after the occurrence and when trial was held or some months after occurrence does not mean that the accused must have been of sound mind at the time of occurrence.

Held, on facts and circumstances of the case that the accused was really of unsound mind at the time of attacking the deceased, his wife and was by reason of unsoundness of mind incapable of knowing that he was doing what was wrong or contrary to law and was therefore entitled to the benefit of S. 84, Penal Code. 1965 (1) Cri L J 138 : AIR 1965 Andh Pra 28 (31, 32) (Prs 18, 23, 28).

——S. 84 —Applicability—Legal insanity—Only unsoundness of mind materially impairing its cognitive faculties is ground of exemption under S 84.

It is not every sort of mental instability or abnormality that can be termed legal insanity. It is only unsoundness of mind which materially impairs its cognitive faculties that could form a ground of exemption from criminal responsibility.

Held that the evidence did not reveal that the accused suffered from any mental defect, if it could be so termed, other than being subject to moods and being possessed of a highly suspicious nature. When the accused killed the person he suspected after having made public his intention to kill him, it was clear that the accused knew what he was doing. His declaration on former occassions that he would do away with the deceased was a strong circumstance which would indicate that he committed the crime consciously. The ferocity of the attack might signify nothing more than the depth of hatred and anger he bore against his victim. His conduct in immediately surrendering himself to the police was indicative of his realisation that what he had done was contrary to law. The case was not covered by S. 84. 1959 Ker L R 1345 : 1959 Ker L J 138.

——S. 84 — Insanity — Nature of — Law as to.

The principle underlying the section is substantially based on the well-known Macnaughten Rules. For the purposes of the criminal law, the emphasis is on unsoundness of mind which incapacitates the person from knowing the nature of the act or that he is doing what is either wrong or contrary to law.

The Penal Code contemplates as grounds of exemption from criminal responsibility, two completely different mental conditions arising from unsoundness of mind, viz., an incapacity : (1) To know the nature of the act and (2) To know that he is doing what is either wrong or contrary to law. Of these, the first seems to refer to the offender's consciousness of the bearing of his act on those who are affected by it; the second, on his consciousness of its relation to himself. Each species of consciousness is ordinarily present to the mind of a normally sane person. Either, or both, or neither may be absent from the mind of one who is mentally diseased. The absence of both, or either, relieves the offender from liability to punishment. Every criminal when he commits a

crime has an instinctive dread of the consequences. To a normal man the sanction provided by the Criminal law acts as a deterrent, 'influencing, guiding and controlling his conduct'. 1959 Jab L J 505 : 1959 M P C 240 : 1959 M P L J 336 : 1959 Cri L J 718 : AIR 1959 Madh Pra 203 (205, 208) (Pt B) (Prs 11, 14, 19, 20, 22, 23) (DB).

——S. 84 — Accused murdering girl of seven years in broad day-light — Plea of unsoundness of mind— Unsoundness of mind at the time of actual act of offence, necessary — Fact, that accused did not run away from scene, not indicative of insanity — Nor does it indicate incapability of knowing nature of act or that what he was doing was wrong or contrary to law : AIR 1961 S C 998, Rel. on. (1964) 1 Mad L J 156 : 1964 M L J (Cri.) 153 : 1964 (2) Cri L J 683 : AIR 1964 Mad 526 (527) (Prs 7, 8) (DB).

——S. 84 — Construction — 'What is either wrong or contrary to law'.

The statement of the prisoner may suggest that he was capable of knowing the nature of his act but that does not suggest that he was capable of knowing that he was doing what was either wrong or contrary to law. 1955 Cri L J 825 : AIR 1955 Pat 209 (214) (Pt B) (Pr 14) (DB).

——S. 84 — Insanity — What amounts to.

The legal conception of insanity is different from the medical conception. In the former case it has further to be proved that the insanity is of such a degree that, because of it, the man is incapable of knowing the nature of the act or that what he is doing is wrong or contrary to law. 1953 Cri L J 1859 : ILR (1953) Patiala 254 : AIR 1954 Pepsu 4 (6) (Pt A) (Pr 8) (DB).

——S. 84 — Burden of proof.

To get the benefit of S. 84, Indian Penal Code, it is for the accused to prove that at the time of committing the act his cognitive faculties were impaired to such an extent that he was incapable of knowing the nature of his act or that he was doing what was either wrong or contrary to law. But to find out the state of the mind of the accused, a Court need not look for such a plea having been raised by him or the evidence examined by him in defence. It may equally rely on what is elicited from the prosecution witnesses as well as on the circumstantial evidence consisting of his condition antecedent and subsequent to the commission of the crime and also on surrounding circumstances including an absence of any motive.

Thus, where the prosecution case itself is that the accused was not only insane but was violent too, and for that reason he was constantly kept in chains for more than two weeks preceding the incident, that once having been released he assailed his own mother without rhyme or reason, that he did not take food for full one week, but threw it away to dogs and crows and had no sleep during the period, that he not only lost affection for his near and dear ones but got into the delusion that they were all after his life, that on the fateful day he somehow got himself released and all of a sudden speared his own uncle who was quite affectionate to him, without any motive at all and did not try to run away or escape thereafter.

Held, that the accused committed the offence without realising the nature of the act or knowing that what he was doing was contrary to law and hence was entitled to the protection of S. 84, Indian Penal Code. 1953 Cri L J 1859 : ILR (1953) Patiala 254: AIR 1954 Pepsu 4 (6) (Pt B) (Prs 8 to 10) (DB).

——S. 84 — Defence under — What accused has to establish stated.

Accused must establish that at the time of committing the act he was of unsound mind. Secondly, the unsoundness of mind was of a degree and nature to satisfy one of the knowledgeable tests laid down by the section. Whether or not an accused at the time he committed the act, was of unsound mind is a matter of inference from his previous and contemporaneous acts, statements and demeanour and from any other relevant evidence as to insanity in his ancestors or relations, as to particular illness affecting the mind and from any medical evidence that may be tendered. Mere eccentricity is not enough, there must be evidence to show that at the material time the accused was suffering from some definite or recognisable form of mental disease. There is a clear distinction between "medical insanity" and "legal insanity" and the Courts are only concerned with the legal and not with the medical view of the question. The Court may rely not only on the defence evidence but also on what is elicited from the prosecution witnesses, as well as on circumstantial evidence. The best evidence would be of his behaviour before or after the incident or of what he did and said when he was captured. The fact that immediately after the incident when people tried to capture him he resisted and grappled with them, is enough to draw an inference that he knew that he had done something which was wrong or unlawful and consequently he did not like to be captured. Mere absence of motive does not justify the conclusion that the accused was of unsound mind. Case law referred. 1953 Cri L J 382 : ILR (1952) Pepsu 451 : AIR 1953 Pepsu 17 (18, 19) (Pt B) (Pr 67) (DB).

4. Proof of insanity — Legal and medical.

(A) Burden of proof.

See also Evidence Act (1872), S. 105.

(B) Burden of proof — Crucial point of time.

(C) Unsoundness of mind.

4. Proof of insanity — Legal and medical.

● ——S. 84 — Plea of insanity — Proof — Accused giving many stabs to kill unarmed and undefended woman.

Many sane men give more than the necessary stabs to their victims. The number of blows given might perhaps reflect his vengeful mood or his determination to see that the victim had no escape. One does not count his strokes when he commits murder. This does not necessarily prove that the accused was doing the act under some hallucination. Dahyabhai Chhaganbhai Thakkar v. State of Gujarat, (1964) 1 S C W R 831 : (1964) 7 S C R 361 : 1965 Mad L J (Cri) 773 : 1964 Mad W N 538 : (1965) 2 S C J 531 : 1965 All W R (H C) 740 : 1965 All Cri R 501 : (1964) 5 Guj L R 911 : 1965 S C D 44 : 1964 (2) Cri L J 472 : AIR 1964 S C 1563 (1572) (Pt E) (Pr 15).

● ——S. 84 — Case of homicide — Plea of insanity — Burden of proof.

It is fundamental principle of criminal jurisprudence that an accused is presumed to be innocent and, therefore, the burden lies on the prosecution to prove the guilt of the accused beyond reasonable doubt. The prosecution, therefore, in a case of homicide shall prove beyond reasonable doubt that the accused caused death with the requisite intention described in S. 299 of the Penal Code. This general burden never shifts and it always rests on the prosecution. But, under S. 105 of the Evidence Act, the burden of proving the existence of circumstances bringing the case within the exception lies on the accused ; and the Court shall presume the absence of such circumstances. Under S. 105 of the Evidence Act, read with the definition of 'shall presume' in S. 4 thereof, the Court shall regard the absence of such circumstances as proved unless, after considering the matters before it, it believes that the said circumstances existed or their existence was so probable

that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that they did exist. To put it in other words, the accused will have to rebut the presumption that such circumstances did not exist, by placing material before the Court sufficient to make it consider the existence of the said circumstances so probable that a prudent man would act upon them. The accused has to satisfy the standard of a 'prudent man'. If the material placed before the Court, such as, oral and documentary evidence, presumptions, admissions or even the prosecution evidence, satisfies the test of 'prudent man', the accused will have discharged his burden. The doctrine of burden of proof in the context of the plea of insanity may be stated in the following propositions : (1) The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea : and the burden of proving that always rests on the prosecution from the beginning to the end of the trial. (2) There is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by S. 84 of the Penal Code : the accused may rebut it by placing before the Court all the relevant evidence — oral, documentary or circumstantial, but the burden of proof upon him is no higher than that rests upon a party to civil proceedings ; (3) Even if the accused was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the Court by the accused or by the prosecution may raise a reasonable doubt in the mind of the Court as regards one or more of the ingredients of the offence, including mens rea of the accused and in that case the Court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged : AIR 1962 S C 605 ; AIR 1955 Pat 209 and (1878) 4 Couper 70, Rel. on ; A I R 1956 Nag 187, Overruled. Dahyabhai Chhaganbhai Thakkar v. State of Gujarat, 1964 (2) Cri L J 472 : (1964) 1 S C W R 831 : (1964) 5 Guj L R 911 : 1965 S C D 44 : AIR 1964 S C 1563.

——S. 84—Proof of insanity.

The person who is accused of murder can get the benefit of S. 84, I. P. Code, only if there is satisfactory evidence on the record in proof of the fact that he was of unsound mind at the time of the commission of the offence and was therefore incapable of knowing the nature of the act or that he was doing what was wrong or contrary to law. The evidence of the prosecution witnesses that the accused in the past had acted in such a manner which indicated that he was not behaving like a sane man, itself will not be of any help to the accused in availing himself of the benefit of that section. 1958 All L J 253 : 1958 All W R (HC) 277 : 1958 All Cr R 225 : I L R (1958) 2 All 867.

——S. 84—Criminal P. C. (1898), S. 367 — Appreciation of evidence — Prosecution witnesses supporting defence when most of the prosecution witnesses make a statement favourable to the accused, it is wrong to discard their statement on a mere supposition that they may be helping the accused. See Criminal P. C. (1898), S. 367. AIR 1956 Bhopal 57.

——S. 84—Evidence Act (1 of 1872), S. 3 — Evidence —Appreciation of—Insanity—Proof. I L R (1963) 1 Ker 76.

——S. 84—Legal and medical insanity — Distinction —S. 84 when applies.

There is clear distinction between medical and legal insanity. The Courts are concerned with the legal and not with the medical view of the question. A man may be suffering from some form of insanity in the sense in which the term is used by medical man but may not be suffering from unsoundness of mind as is described in S. 84. If the facts of a particular case show that the accused knew that he had done something wrong, it did not matter how, though he might be insane from the medical point of view he could not be exonerated under S. 84, I. P. Code.

Further, if the evidence shows that the accused was conscious of the nature of the act he must be presumed to have been conscious of its criminality. 10 Bom 512, Rel. on. 1960 Ker L T 1116 : 1960 Ker L J 1375 : 1961 Mad L J (Cr) 356 : 1962 (2) Cri L J 135 (140, 141) (Pt F) (Prs 39, 45) (DB) (Ker).

——S. 84—Proof of insanity.

It would be dangerous to hold that, because a monstrous crime like murder is committed for no apparent reason and for no proved motive, the offender must have been insane at the time, and that without any proof whatsoever of prior insanity. No inference of insanity can be drawn from the circumstance that, after having stabbed his wife and child, the accused made no attempt to escape or shield himself from justice, but proceeded to inflict injuries on himself and submit to fate. That is often the conduct of a perfectly sane man, who acting under some impulse, commits so monstrous a crime. 1957 Ker L J 765 : 1958 Cri L J 513 : 1957 Ker L T 761 : AIR 1958 Ker 80 (81) (Pt B) (Prs 10, 11) (DB).

——S. 84—Proof of insanity—There must be substantial evidence that accused at the time of committing act did not know its nature and that what he was doing was either wrong or contrary to law—Absence of motive coupled with atrocious nature of crime is not enough — Killing of wife by husband who loved her without apparent motive -Act atrocious in nature — Eccentric conduct extending over period of one month — Plea of insanity held not made out — Case recommended for action under S. 401, Criminal P. C. AIR 1955 N U C (Madh B) 2092 (DB).

——S. 84—Essentials—Proof of insanity—Onus.

It is necessary for the application of S. 84, I. P. C. to show that (a) the accused was insane (b) that he was insane at the time when he did the act and not merely before or after the act; and (c) that as a result of the unsoundness of the mind he was incapable of knowing the nature of the act or that he was doing what was really wrong or contrary to law. There is no rule that once insane always insane or that now sane, he must have been sane before. The burden of proof under S. 84, I. P. Code, is on the accused. Queer behaviour will not amount to insanity contemplated under S. 84, I. P. Code. Similarly, inadequacy of motive standing by itself is no proof of insanity. 1960 Mad W N 238 : 1960 Cri L J 930 : 1960 All W R (Supp) 18 : 1960 All Cr R 208 : 1960 Mad L J (Cr) 550 : A I R 1960 Mad 316 (317) (Pr 9) (DB).

——S. 84—Burden of proof—Test of insanity.

A person is presumed to be sane, possessed of understanding as to what is right or wrong, to have sense enough to anticipate what will or may happen in certain cases. That is the rule, and the burden of proving the exception is on those who rely on it. Exemption from liability is provided for in the Code when the persons concerned are of the exceptional class.

From the mere fact of the accused being subject to periodic fits, the interval and the intensity of which are left uncertain, it is difficult to assume or infer anything more than that the mind is enteebled and that his intellectual power is impaired.

The test is whether cognitive faculties of the mind are so impaired as to make the offender incapable of knowing that what he is doing is wrong. The atrocity of the crime and absence of motive are not the criterion to constitute unsoundness of mind and are only some of the features ordinarily associated

with it. (1843) 10 Cl and F 200, Rel. on. **ILR (1956) Mys 414 : 35 Mys L J 76 : 1957 Cri L J 985 : A I R 1957 Mys 68 (69) (Pt B) (Prs 3, 4) (DB).**

——S. 84 — Proof of insanity — Legal and medical test.

Test which distinguishes legal from medical insanity is, whether the unsoundness of mind was of a degree and nature to satisfy the Court that by reason thereof the accused was incapable of knowing the nature of his act or that he was doing what was either wrong or contrary to law.

(Held : that there was no legal insanity when the accused committed the crime). AIR 1948 Nag 20 (2). Foll. **1953 Nag L J 231 : 1953 Cri L J 1357 : A I R 1953 Nag 255 (256) (Prs 8, 10) (DB).**

——S. 84 — Plea of insanity — Absence of motive— Consideration of —If there was no motive and the crime was completely motiveless then that circumstance can be taken into account along with the evidence of prior insanity. See Penal Code (1860), S. 40. 1957 Cri L J 875 : A I R 1957 Orissa 168 (DB).

——S. 84—Proof of insanity—Medical evidence.

It is the duty of the medical expert who is called to prove insanity of the prisoner at the time of the commission of the offence, but who is sane at the time of the trial, to offer to keep the prisoner under his observation. He cannot base his opinion on the summary of evidence at the trial, supplied to him. A medical man, conversant with the disease of insanity, who has never seen the prisoner before the trial but who is present at the whole trial, cannot in strictness be asked his opinion as to the state of the prisoner's mind at the time of the commission of the crime or his opinion whether the prisoner was conscious, at the time of doing the act that he was acting contrary to law or whether he was labouring under a delusion at the time or whether by reason of any disease affecting the mind the accused was incapable or prevented from controlling his conduct.

These are questions for the jury to decide, and the questions are not mere questions upon a matter of science. There is distinction between appreciation of facts and an expression of opinion on questions of science. The opinion of a medical man on the state of the mind of the accused at the time of the commission of the murder is merely relevant as being helpful. It is for the Judge or the Judge and the jury, as the case may be, to give a decision of these matters, and the function of the medical witness is to assist, not to supersede the Judge. AIR 1949 Nag 66, Rel. on. **1955 Cri L J 1628 : 8 Sau L R 269 : A I R 1955 Sau 105 (109) (Pt E) (Pr 12) (DB).**

——S. 84 — Proof of insanity — Accused suffering from epileptic fits murdering his father — Burden of proof.

Where in a trial of accused for murdering his father the accused pleads unsoundness of mind by reason of epileptic fits, he must establish that at the time and moment when the act was being committed he was in such a state of mind that his cognitive faculties had been so impaired that he did not know what he was doing nor did he know any distinction, between right and wrong. Where the evidence adduced fails to establish that the accused when he committed the offence was of unsound mind, he cannot take the advantage of S. 84 and would be guilty under S. 302. **('51) 53 P L R 15 : A I R 1951 Simla 302 (303) (Pr 5) (DB).**

——S. 84—Proof of insanity—Doctors who had treated accused should be examined. A I R 1955 N U C (Trav-Co) 1456 (DB).

4 (A). Burden of proof.

See also Evidence Act (1872), S. 105.

——S. 84 — Insanity — Burden of proof — Criminal P. C. (1898), S. 465—Evidence Act (1872), S. 105.

There is a distinction, between incapacity at the time of doing the act charged and incapacity at the time of trial. While both are induced by unsoundness of mind, the former is substantive which excuses the offence under S. 84, Penal Code; the latter affects procedure and merely postpones the trial under S. 465 of the Criminal P. C.

Incapacity continuing from the time of doing the act, as much as incapacity supervening thereafter and persisting at the time of trial, will only result in postponement of the proceedings. But if there is no present incapacity, the trial takes place at which the plea of incapacity at the time of doing the act charged becomes a relevant plea, the proof of which lies on the defence under S. 105 of the Evidence Act. As soon as it appeared to the Judge that the accused is incapable by reason of unsoundness of mind to make his defence, it becomes his duty to act at once under S. 405, Criminal P. C. **1961 All Cr R 315 : 1961 All W R (Supp) 62 : 65 Cal W N 290 : 1961 (1) Cri L J 811 (Cal).**

——S. 84 — Proof of insanity — Burden of proof lies on accused — Discharge of burden — Evidence Act (1872), S. 105.

Where a plea of insanity is taken by the accused charged with an offence under S. 302, Penal Code, the burden is on the accused to establish affirmatively such defence and the same cannot be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable. It must further be shown that the explanation is a true one, i. e., so probable that a prudent man ought in the circumstances to have accepted it. AIR 1962 S C 605 ; (1935) A C 462 , 65 Bom L R 332, Rel. on. **(1964) 5 Guj L R 474 : ILR (1964) Guj 324.**

——Ss. 84 and 300 — Plea of insanity — Nature and burden of proof —Evidence Act (1 of 1872), S. 105.

It is true that the prosecution in a case of homicide shall prove beyond reasonable doubt that the accused caused the death with the requisite intention described in the section. This general burden never shifts and it always rests on prosecution. But S. 84 being an exception under S. 105 of the Evidence Act the burden of proving the existence of circumstances bringing the case within the said exception lies on the accused and the Court shall presume the absence of such circumstances. It is no doubt not so onerous as the burden of proof resting upon the prosecution to prove the fact that the accused committed the act with which he is charged. The burden in cases in which the accused has to prove insanity may fairly be stated as not being higher than the burden which rests on a plaintiff or defendant in civil proceedings. In civil cases the preponderance of probability may constitute sufficient ground for a verdict. If on a consideration of the prosecution evidence and the evidence led by the accused the Court comes to the conclusion that there was probability of the accused being legally insane at the time of the Commission of the crime he would be entitled to be acquitted on the ground of insanity. **1965 Ker L T 263 : (1965) M L J (Cri) 387.**

—— S. 84—Plea of insanity—Burden of proof—Nature and extent of proof—Evidence Act (1872), S. 105.

If unsoundness of mind is urged as a ground of exemption from liability, it is for the person who seeks the exemption to prove it. The accused cannot get the benefit of S. 84 by merely creating a reasonable doubt in the mind of the Court about the

existence of circumstances bringing his case within the exception.

The burden of proof resting on the accused to prove the insanity is no doubt not so onerous as the burden of proof resting upon the prosecution to prove the fact that the accused committed the act with which he is charged. Therefore if on a consideration of the prosecution evidence and the evidence led by the accused the Court comes to the conclusion that there was a probability of the accused being legally insane at the time of the commission of the crime he would be entitled to be acquitted on the ground of insanity. AIR 1941 All 402 (FB), Disting. 1960 Ker L T 1116 : 1960 Ker L J 1375 : 1961 Mad L J (Cr) 356 : 1962 (2) Cri L J 135 (140) (Pt E) (Prs 36, 37) (DB) (Ker).

——S. 84—Insanity — Proof'— (Evidence Act (1872), S. 105).

Per Khan, J.: — It is not every person who is mentally diseased, ipso facto is exempted from criminal responsibility. Any person who seeks the benefit of S. 84, Penal Code, must prove that at the time of committing the act he was labouring under such defect of reason as not to know the nature and quality of the act he was doing.

Per Shiv Dayal, J.: — A person is presumed to be responsible for his acts and the natural consequence thereof unless he affirmatively proves that he is entitled to exemption from criminal liability. One of the exceptions is provided in S. 84 of the Penal Code.

In order that benefit may be given to an accused under this section, it is not sufficient to show that he was of unsound mind before the commission of the crime or that he became so afterwards. It must be established by the defence that, firstly, he was incapable of knowing the nature of his act or that he was doing that was either wrong or contrary to law and, secondly that such unsoundness of mind existed at the time of doing the act. If either of these two elements is not positively proved, no benefit can be given under S. 84.

It is settled law that a distinction must be drawn between legal insanity and medical insanity. Whatever may be the controversy about the McNaughten Rules, S. 84 of the Penal Code is very clear and it requires that degree of infirmity of the mind which renders a person incapable of knowing the nature of his act. 1960 Cri L J 480 : 1960 Jab L J 391 : 1960 M P L J 691 : AIR 1960 Madh Pra 102 (103, 104) (Pt A) (Prs 11, 14, 15) (DB).

——S. 84 — Plea of insanity — Burden of proof — Standard of proof required — (Evidence Act (1872), S. 105).

Section 105, Evidence Act, together with illustration (a) to that section makes it clear that the burden of proving that the accused is entitled to the benefit of S. 84, Penal Code, is on the accused. The standard of proof required from the accused is that there should be preponderance of probability showing that at the time when the offence was committed the accused by reason of his unsoundness of mind was incapable of knowing the nature of the act or that he was doing what is either wrong or contrary to law. Where the evidence showed that accused was subject to getting epileptic fits but there was nothing abnormal in his behaviour it was held that he could not claim the benefit of S. 84.

Per K. S. Hegde, J. — The burden placed on an accused taking the plea of insanity is in the nature of the burden placed on a party in a civil litigation. AIR 1959 Madh Pra 203 and AIR 1956 Nag 187, Rel. on; AIR 1955 Pat 209, Criticised. 1959 Mad L J (Cr) 986 : 37 Mys L J 786 : ILR (1959) Mys 644 : 1960 Cri L J 373 : AIR 1960 Mys 48 (51) (Pt C) (Pr 6) (DB).

——S. 84 — Evidence Act (1872), S. 105 — Plea of insanity — Burden of proof — Burden on accused is not discharged by merely creating doubt about his sanity — A I R 1955 Pat 209, Dissented from. See Evidence Act (1872), S. 105. 1956 Cri L J 756 : AIR 1956 Nag 187 (DB).

[Overruled in AIR 1964 S C 1563]

——S. 84 — Plea of insanity — Standard of proof — Evidence Act (1872), S. 105.

The accused is not called upon to prove the ingredients of the provisions of S. 84, Penal Code, beyond all reasonable doubt in order to get an order of acquittal. If on a review of the entire evidence the Court entertains a reasonable doubt about the guilt of the accused, he is entitled to an acquittal in the case, on the cardinal principle of criminal justice which has not been affected by the special provisions of S. 105, Evidence Act. AIR 1937 Pat 263 and AIR 1928 Pat 363, Disting.; AIR 1937 Rang 83 (FB) and AIR 1948 Pat 294, Foll. 23 Cut L T 203 : 1957 Cri L J 875 : ILR (1957) Cut 408 : AIR 1957 Orissa 163 (171) (Pt B) (Pr 6) (DB).

——Ss. 84, 302 — Plea of unsoundness — Burden of proof — Evidence Act (1872), S. 105.

In order to succeed in a plea of insanity, the accused has to establish, firstly, that at the time of committing the offence he was of unsound mind, and, secondly, that the unsoundness of mind was of such a degree that he was incapable of knowing the nature of the act or that what he was doing was either wrong or contrary to law. The burden of proof in this matter rests upon the defence. It is not enough for the defence to rely upon a mere possibility that the accused may have been of unsound mind at the time when he committed the offence. The absence of motive is not sufficient indication of legal insanity, but this is an important factor which must be taken into consideration, along with the other facts and circumstances which have been established, for the purpose of determining the true state of the accused's mental condition at the time when the crime was committed. 1961 All W R (Sup) 49 : 1961 All Cr R 302 : 1961 Pat L R 9 : 1961 BLJR 185 : 1961 (2) Cri L J 357 : AIR 1961 Pat 355 (357 to 359) (Prs 9, 13, 17, 22) (DB).

——S. 84—Burden of proof—Evidence Act, S. 105.

It lies on the prosecution to prove the charge against the prisoner beyond reasonable doubt. 1935 A C 462, Rel. on.

The law in S. 105 of the Evidence Act provides the prosecution with an additional support to establish its case beyond reasonable doubt but with an option to the defence to deprive the prosecution of this additional support and then to make it stand exclusively on the strength of its own evidence leaving the presumption provided under S. 105 out of consideration.

Section 105 in substance lays down three propositions; firstly that the prosecution case shall be judged on the presumption that no exception existed, secondly, that presumption is rebuttable and thirdly, that the fact, if any, sufficient to rebut that presumption has to be proved by the defence. That being so, the moment that presumption is rebutted by the defence, the onus under S. 105 has to be taken as discharged. The defence has not to prove affirmatively beyond reasonable doubt that the prisoner was of unsound mind and that by reason of unsoundness of mind was incapable of knowing the nature of the act. The defence has only to demolish the aforesaid presumption laid down against the prisoner under S. 105 and not to prove beyond reasonable doubt the opposite of that presumption. (1936) 2 All E R 1138 and AIR 1941 All 402 (FB). Rel. on. 1955 Cri L J 825 : AIR 1955 Pat 209 (212, 213) (Pt A) (Prs 11, 12) (DB).

——S. 84—Burden of proof — Evidence — Evidence Act (1872), S. 105.

The burden of proving the plea of insanity rests on the accused and that onus can be discharged by producing evidence as to his conduct shortly prior to the offence and his conduct at the time or immediately afterwards, and by evidence of his mental condition and other relevant facts.

There is a difference between medical insanity and legal insanity and it is only insanity which exonerates the accused from the crime. There can be no legal insanity unless the cognitive faculties of the accused are, as a result of unsoundness of mind, so completely impaired as to render him incapable of knowing the nature of the act, or that what he is doing is wrong or contrary to law.

There can be no general rule and the only proper course to adopt is to decide each case on its own peculiar facts. 1955 Cri L J 1628 : 8 Sau L R 269 : AIR 1955 Sau 105 (107, 109) (Pt D) (Prs 7, 11) (DB).

——S. 84—Plea of insanity—Onus — Nature of proof required—Burden held not discharged — Evidence Act (1872), Ss. 105 and 8.

Where in a murder charge, the accused pleads insanity at the time the murder was committed, the onus is on him to establish it, within the meaning of S. 84, Penal Code. To judge the state of his mind at the time the act is committed, his behaviour after the act is committed would be very relevant. The mere fact that there is apparent absence of motive is not by itself sufficient to establish legal insanity. The law requires proof of incapacity to realise the nature of the act. Where a man's mind or his faculties of retiocination are sufficiently clear to apprehend what he is doing he must always be presumed to intend the consequences of the action he takes. It is not mere eccentricity or singularity of manner that will suffice to establish plea of insanity. In the absence of proof in the affirmative of his insanity the mere probability of his being insane at the time of the murder perpetrated by him, would not be enough to absolve him of the criminal liability for it.

After dealing fatal injuries to his wife the accused was rebuked by his father, whereupon being conscious of his crime and the serious consequences it would involve him into, he put on his coat having a valet in its pocket containing money, and a gold ring and then absconded. He was found after some days at Junagadh loitering about near a Picture house at night by a Police Officer. The accused successfully managed to reach Junagadh far away from his town. It was in evidence of the father, that the accused had been to Junagadh once before for "Satsang." He therefore seemed to have consciously directed his footsteps towards that place. On being questioned by the Police Officer he gave his name and address. His conduct was certainly not that of a demented person aimlessly wandering. It was in evidence that the accused was attending 3 or 4 days previous to crime to sowing operations in the field all alone. The accused was no doubt eccentric in his behaviour and was in the habit of beating his wife. The evidence of near relatives on the question of insanity was found exaggerated :

Held, that there was no proof that the accused was at the time of the crime by reason of unsoundness of mind incapable of knowing the nature of the act or that it was either wrong or contrary to law. (1951) 4 Sau L R 82 : 52 Cri L J 369 : AIR 1951 Sau 19 (19 to 22) (Pt A) (Prs 5, 6, 8, 9, 10, 11, 16) (DB).

4 (B). Burden of proof—Crucial point of time.

● ——S. 84—Burden of proof—Burden of proving offence lies on prosecution—Where necessary, it has to prove intention—But where plea of insanity is invoked by accused it is for him to establish that fact. See Penal Code (1860), S. 302. (1965) 3 SCR 194 : 1965 SCD 953 : (1965) 4 Law Rep 97 : (1965) 2 SCWR 777 : 1966 Cri L J 63 : AIR 1966 SC 1.

● ——S. 84—Unsoundness of mind—Burden of proof.

The burden of proof that the mental condition of the accused was, at the crucial point of time, such as is described by S. 84 lies on the accused who claims the benefit of this exemption. State of Madhya Pradesh v. Ahmadulla, 1961 (2) Cri L J 43 : 1961 Mad W N 278 : 1961 SCD 293 : (1961) 3 SCR 583 : 1961 All Cr R 251 : (1961) 2 SCJ 197 : 1961 Jab L J 1060 : 1961 Mad L J (Cr) 480 : (1961) All W R (HC) 463 : (1961) 1 Ker L R 389: AIR 1961 SC 998 (999) (Pt A) (Pr 3).

● ——Ss. 84, 300, 302 — Unsoundness of mind — Epileptic insanity.

The crucial point of time at which the unsoundness of mind as defined in S. 84 has to be established is when the act was committed.

The accused bore illwill to the deceased and the act was committed at dead of night the accused taking a torch with him, access to the house of the deceased being obtained by scaling over a wall.

Held, that it was a crime committed not in a sudden mood of insanity but one that was preceded by careful planning and exhibiting cool calculation in execution and directed against a person who was considered to be the enemy. 14 Cr App. Rep 48, Rel. on. State of Madhya Pradesh v. Ahmadulla, (1961) 1 Ker L R 389 : 1961 Mad W N 278 : 1961 SCD 293 : (1961) 3 S C R 583 : 1961 (2) Cri L J 43 : 1961 All Cr R 251 : (1961) 2 SCJ 197 : 1961 Jab L J 1060 : 1961 Mad L J (Cr) 480: 1961 All W R (HC) 463 : AIR 1961 SC 998 (998, 999, 1001) (Pt B) (Prs 2, 8).

——S. 84—Burden of proof — Every form of insanity is not recognised by law — Burden to prove insanity is on defence — It has to be shown that at time of committing offence, accused was by reason of unsoundness of mind incapable of knowing nature of act or that he was doing what was wrong or contrary to law—Nothing short of this will bring case within legal insanity — Minor aberrations of mind are not recognised — Insanity during trial does not indicate that he was insane when he committed offence — It may raise suspicion but is no proof. AIR 1955 NUC (All) 856 (DB).

——S. 84 — Burden of proof — Evidence of insanity before occurrence — Not sufficient — Nor is inadequacy of motive conclusive evidence of insanity.

The burden of proof that the mental condition of the accused was, at the crucial point of time such as is described by S. 84 lies on the accused who claims the benefit of the exemption. The evidence of the defence witnesses showing that the accused was exhibiting signs of insanity before the occurrence would not be sufficient to bring the case within the exception contained in S. 84.

Inadequacy of motive is not a matter which is conclusive evidence of insanity. The circumstances of an act being apparently motiveless is not a ground from which the existence of a powerful and irresistible influence of homicidal tendency can be safely inferred. The law recognises nothing but incapacity to realise the nature of the act presumes that where a man's mind or faculties of ratiocination are sufficiently clear to apprehend what he is doing, he must always be presumed to intend the consequences of the action he takes.

In considering the plea of insanity the antecedent and the subsequent conduct of the man are no doubt, relevant to show what was the state of the mind of the accused at the time the act was committed, but

the state of the mind at the time of doing the act is the chief thing to be taken into consideration.

In a murder case, the evidence was that the accused after fatally stabbing the deceased constable, stabbed another constable who had come to apprehend him and chased him for some distance but then retraced and ran away from the scene. He travelled in bus and when he was about to get into the railway station, the driver of Police Jeep who was following him arrested him. The accused attempted to stab him which was warded off. There was also evidence that blood stains found on his shirt, were removed by him with lime :

Held, that all these actions indicate that the accused had known that what he had done was wrong or contrary to law and that he had taken steps to conceal the crime. In the circumstances the plea of insanity was rightly rejected : 14 Cr App Rep 48; AIR 1961 SC 998, Foll. **(1963) 1 Ker L R 47.**

——S. 84 –Plea of insanity –Burden of proof.

When a plea of insanity is raised under S. 84, I. P. Code, the Court has to consider two questions. Firstly whether the accused has shown that at the time of committing the act he was of unsound mind. Secondly, if he was of unsound mind, whether he has established that the unsoundness of mind was of a degree and nature to satisfy one of the knowledge tests laid down by S. 84. The crucial point of time in deciding whether the benefit of S. 84 should be given or not is the time when the offence took place. The burden of proving the existence of circumstances for bringing his case within the exception under S. 84 is on the accused. This must be proved affirmatively. The accused cannot get the benefit of S. 84 by merely creating a reasonable doubt in the mind of the Court about the existence of circumstances which bring his case within the exception. AIR 1941 All 402, Diss. **1956 Madh B L J 1274 : 1957 Cri L J 370 : AIR 1957 Madh B 104 (105) (Pt A) (Pr 5) (DB).**

——S. 84—Insanity—Plea of - Onus.

The law presumes every one to be of sound mind until the contrary is proved, and the burden of proving that he was not criminally responsible for the crime by reason of his 'unsoundness of mind' is on the accused. Even in cases where a person subject to attack of insanity has lucid intervals, the law presumes the offence to have been committed in a lucid interval. The accused would therefore, be better advised when setting up the plea of 'unsoundness of mind' to specify the type of disorder because mental disorders have now been fairly well classified and their essential characteristics described in some detail in medical text books, which makes it easier to appearance the evidence bearing on the point in record. **1959 M P L J 344 : 1959 M P C 289 : 1959 Cri L J 844 : 1959 Jab L J 386 : AIR 1959 Madh Pra 259 (261) (Pt B) (Pr 4) (DB).**

——S. 84—Insanity—Plea of—Onus.

All persons who have reached the age of discretion are presumed to be sane, and criminally responsible, and in cases where person subject to attacks of insanity has lucid intervals, the law presumes the offence of such person to have been committed in a lucid interval, unless it appears to have been committed in the time of his distemper. It lies on the accused to prove that he was insane at the time of the commission of an offence, so as not to be liable to punishment as a sane person. AIR 1955 Pat 209, Dissented from. AIR 1956 Nag 187, Relied on. **1959 Jab L J 505 : 1959 M P C 240 : 1959 M P L J 336 : 1959 Cr L J 718 : AIR 1958 Madh Pra 203 (205) (Pt A) (Pr 8) (DB).**

——S. 84—Plea of insanity—Burden of proof.

A plea under S. 84 of the Indian Penal Code implies an admission on the part of the accused that the acts for which he was prosecuted were done by him.

Where in a trial for murder of his wife and two children, the accused totally denies his guilt but at the same time sets up a plea of insanity, the accused has got to establish that while he killed his wife and children, by reason of unsoundness of mind, he was incapable of knowing the nature of his acts. The burden of establishing this plea is fairly and squarely on the accused. AIR 1960 Mys 48, Rel. on. **1961 (2) Cr L J 250 : 39 Mys L J 288 : 1962 Mad L J (Cri) 313 : ILR (1961) Mys 286.**

——S. 84—Murder—Accused charged with — Plea of unsoundness of mind set up—Burden lies heavily on him to prove unsoundness — He must prove that he was totally deprived of his understanding and memory —Held, accused failed to discharge burden of proof. See Penal Code (1860) S. 302. **1963 (1) Cri L J 213 : AIR 1963 Orissa 33 (DB).**

4 (C). Unsoundness of mind.

——S. 84—Insanity — Burden of proof—Conduct of accused—Moody or pensive state of mind or eccentricity or character of crime — Sufficiency. It would certainly be dangerous to a defence of insanity upon arguments merely derived from the character of the crime. **1960 All L J 74 : 1960 Cr L J 768 : AIR 1960 All 333 (335) (Prs 13, 14) (DB).**

——S. 84 –Absence of proof of motive does not necessarily lead to inference of insanity of accused— Cognitive faculties of accused not shown to have been affected—Defence of insanity not available.

The accused who was prosecuted for murder of his wife and two of his three daughters aged 6 years and 6 months pleaded insanity as defence. Although the evidence of witnesses showed that he had given to the witnesses two motives that he had suspicion about character of his wife and that he felt that he was possessed or some deity and that impelled him to commit the murder, it was argued for the defence that motive was not proved.

Held, that even assuming that no motive was proved, it was not correct to say that failure of the proof of motive must lead to an inference that the person was insane. The remarks of Bramwell B. in 175 E. R. 898, quoted in ILR 1948 Nag 711 at page 733 were Rel. on.

It could not be accepted that because the accused committed the murders of his wife and two of his three daughters that fact itself should result in an inference of insanity. This would only mean that the perpetration of crimes was to be excused by their very atrocity. ILR 1948 Nag 711 (729), Rel. on.

To establish the defence of insanity it must prove that at the time of committing the act, the accused was labouring under such a defect of reason or from disease of mind as not to know the nature or quality of the act he was doing, or if he did know it that he did not know that he was doing what was wrong. The facts did not show that the cognitive faculties of the accused were affected. A mere irresistible impulse or hallucination would not attract S. 84, I. P. C. **1963 Mah L J (Notes) 24.**

——S. 84—Applicability.

In order that S. 84 may come into play it has to be established that an accused is of unsound mind and his faculties are so impaired that he did not know the nature of the act done by him or that what he is doing is either wrong or contrary to law.

Every person who is mentally diseased is not ipso facto exempted from criminal responsibility. **1961 (2) Cri L J 475 (Him Pra).**

——S. 84 — Principle — Essential conditions for applicability of section.

S. 84 embodies the fundamental maxim of criminal law — 'Actus non facit reum nisi mens sit rea' (An act does not constitute guilt unless done with a guilty intention). In order to constitute crime, the intent and act must concur, but in the case of insane persons, no culpability is fastened on them as they have no free will (furiosi nullo voluntas est).

It is necessary for the application of S. 84, I. P. C., to show (1) that the accused was of unsound mind; (2) that he was of unsound mind at the time he did the act and not merely before or after the act; and (3) as a result of unsoundness of mind he was incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law. **1960 Ker L T 1116 : 1960 Ker L J 1375 : 1961 Mad L J (Cr) 356 : 1962 (2) Cri L J 135 (140) (Pt D) (Pr 34) (DB) (Ker).**

S. 84 — Applicability — Unsoundness of mind— Effect on guilt.

Where an accused had stabbed his wife and child for no apparent reason and then tried to commit suicide by causing injuries on his neck and abdomen.

Held, that in absence of evidence of the state of mind of the accused at the actual time of the commission of the offence, the mere alleged physical weakness, which made the accused moody and silent and at times affected his mind is not sufficient to bring his case within the provisions of S. 84. The presumption of sanity remains unweakened by any evidence of earlier insanity. **1957 Ker L J 765 : 1958 Cri L J 513 : 1957 Ker L T 761 : AIR 1958 Ker 80 (81)(Pt A) (Pr 10) (DB).**

——Ss. 84 and 302 — Offence under S. 302 — Plea of insanity — Mere establishing that some time prior to occurrence accused suffered from derangement of mind, will not be sufficient to bring case under exemption — Burden lies on accused to prove mental condition, at crucial point of time, such as described under S 84—Evidence Act (1872), S. 105.

It was established beyond reasonable doubt by the evidence on record that the accused who had been denied, by his father on the day of occurrence, an immediate partition and also denied funds for starting some business and who had a grouse against his stepmother in whose favour his father had transferred valuable lands, had committed murder of his father by cutting the deceased with an aruval. A plea of exemption under S. 84 was raised on behalf of the accused. The Sessions Judge remarked that the accused looked a little saturnine but was certainly sane. It was found on evidence that about several months back of the occurrence the accused was in a demented condition. The evidence was not clear as to what was the mental condition of the accused during the period of dementia. The evidence did not show that at any time immediately preceding the occurrence, the accused was of unsound mind, and there was also nothing on record to show that the subsequent mental history of the accused was anything not normal. The evidence made it clear that the accused perfectly understood what he was about.

Held that the accused had deliberately committed the murder knowing what he was about and that he was doing wrong. Hence he was not entitled to the benefit of the exemption provided in S. 84.

Merely establishing that sometime prior to the occurrence the accused had suffered from the derangement of mind and that even subsequently he had behaved in a strange manner or had been taciturn, moody or saturnine would not be sufficient to bring his case under exemption. To attract the provisions of S. 84, it must be established that the person, at the time of doing the act, was by reason of unsoundness of mind, incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law, and that he was labouring under such a defect of reason as not to know the nature and quality of the act he was doing or if he did know it, that he did not know he was doing what was wrong. The burden of proof that the mental condition of the accused at the crucial point of time was such as is described by S. 84, lay on the accused who claimed the benefit of this exemption. AIR 1961 S C 998 and ILR 23 Cal 604, Followed. **1964 Mad W N 442 : 1965 (2) Cri L J 44 : (1965) 2 Mad L J 489 : 1965 Mad L J (Cri) 878 : ILR (1965) 1 Mad 76 : AIR 1965 Mad 283 (285, 286) (Prs 10, 11) (DB).**

——S. 84 — What amounts to.

A moody and pensive temperament and at the highest some eccentricity and abnormality of behaviour, does not in the least indicate an unsoundness of mind. **1955 Cri L J 1628 : 8 Sau L R 269 : AIR 1955 Sau 105 (106) (Pt C) (Pr 5) (DB).**

5. Drunkenness.

——Ss. 84, 85 and 86 — Applicability — Drunkenness how far an excuse for commission of offence.

Voluntary drunkenness is no excuse for the commission of a crime. If a man knew what the natural consequences of his acts were, he must be presumed to have intended to cause them. Section 85 deals with the question of the knowledge possessed by an accused person of the time he commits the offence and leaves quite open the question of intention. On the question as to how far drunkenness is an excuse for a crime, the proper test is that laid down in the case 1920 A C 479.

There is a distinction between the defence of insanity in the true sense caused by excessive drunkenness and the defence of drunkenness which produces a condition such that the drunken man's mind becomes incapable of forming a specific intention. If actual insanity in fact supervenes as the result of alcoholic excess, it furnishes as complete an answer to a criminal charge as insanity induced by any other cause. But in cases falling short of insanity, evidence of drunkenness which merely establishes that the mind of the accused was so affected by drink that he more readily gave way to some violent passion does not rebut the presumption that man intends the natural consequences of his acts. Russell on Crime p. 63, 10th Edn. and AIR 1956 S C 488, Rel. on. **1957 All L J 572 : 1957 All W R (H C) 494 : 1957 Cri L J 1056 : AIR 1957 All 667 (670) (Prs 6, 7) (DB).**

6. Occasional or recurring insanity.

——S. 84 — Plea of insanity — Temporary insanity — Presumption of law—Evidence Act (1872), S. 105.

The law presumes every person at the age of discretion to be sane unless the contrary is proved; and even if a lunatic has lucid intervals, the law presumes the offence of such person to have been committed in a lucid interval, until it has been proved that it was committed during a state of derangement. It would be most dangerous to admit a defence of insanity upon arguments merely derived from the character of the crime. The mere fact that it was attended with uncommon ferocity could alone not suffice for the inference that the accused had a deranged mind. **('50) ILR (1950) 2 Assam 423: AIR 1951 Assam 79 (81) (Pt C) (Pr 10) (DB).**

——Ss. 84 and 300 — Accused killing mother during period of epileptic insanity — Act is saved by S. 84.

The accused was subject to periodic epileptic fits from his childhood and symptoms of an impending epileptic seizure were seen on the day he killed his aged mother. The evidence showed that three wea-

pons, namely, a bill-book, a wooden reaper and a stick of firewood were used in the attack, that the assault continued for some time, that the accused's reply to the deceased plea not to kill his old mother was that she deserved something more than mere killing and that the accused made no attempt whatsoever either to conceal his crime or the scape from the scene. It was suggested that the accused's occasional quarrels with his mother over the quality of food which she served him constituted motive for the crime.

Held, that it would be puerile to hold that an occasional quarrel over the quality of meals would motivate a mature man to hack to death his old and defenceless mother. The complete absence of motive or provocation, the nature and multiplicity of the weapons used, the duration of attack the maniacal fury with which the attack was delivered and his subsequent conduct were all indications that the accused was acting under some insane impulse, and therefore his act was saved by S. 84 from constituting the offence. 1959 Ker L J 855 : 1959 Ker L R 864 : 1959 Ker L T 864: 1960 Cri L J 73 : 1959 Mad L J (Cri) 883 : AIR 1960 Ker 24 (26, 27) (Prs 9, 10) (DB).

—S. 84 — Scope — Sentence—Mental condition of accused — Mental delusion — Temporary insanity — Effect.

The accused laboured under a strong delusion of unfaithfulness of his wife. The brooding over the character of his wife took the form of a kind of temporary insanity. Disturbed by the thoughts about the unchastity of his wife, during the night of occurrence, the accused caused her death by throwing nitric acid upon her. The Medical evidence showed that he was capable of knowing what he was doing and had ordinary concept of right and wrong. **Held**, that the accused was guilty under S. 302. But this was not a fit case for the extreme penalty provided for the offence. (Death sentence reduced in appeal to transportation for life). See Penal Code (1860), S. 302. 1958 Cri L J 555 : AIR 1958 Punj 104 (DB).

7. Somnambulism.

——Ss. 84 and 302—Applicability — Mother killing child and attempting suicide—Unsoundness of mind —Somnambulism — If good plea in defence.

Where a mother killed her child by throwing it into a well and attempted to suicide by throwing herself into the same well and a plea of somnambulism was set up in defence.

Held, Somnambulism is the unconscious state known as sleep-walking and might constitute a good ground for exemption from criminal liability if it could be established that the act was done while in that state of mind. Somnambulism; if proved, will constitute that unsoundness of mind attracting the application of S. 84. (1959) 1 M L J 125 : 1959 M L J (Cr) 147 : 1959 Cr L J 724 : 1959 All W R (Sup) 57 : 1959 All Cr R 229 : 1959 Mad W N 49 : AIR 1959 Mad 239 (240, 241, 243, 244, 245) (Prs 8, 9, 10, 12, 14 to 17) (DB).

8. Unsoundness of mind not covered by S. 84 — How far relevant for ascertaining intention.

——S. 84 — Plea of insanity — Burden of proof — Evidence Act (1872), S. 105.

The burden of proving the plea of insanity is on the accused. He has to establish that by reason of the unsoundness of mind he was incapable of knowing the nature of the act and could not realise that what he was doing was wrong or contrary to law. A disease or derangement of the mind, which materially impairs or leads to a temporary suspension of the cognitive faculty at the time of the offence can alone form the basis of exemption if the nature and the extent of the unsoundness of mind reaches a stage when it is not possible for the person concerned to distinguish between right and wrong. ('50) I L R (1950) 2 Assam 423 : AIR 1951 Assam 79 (81) (Pt A) (Pr 8) (DB).

——S. 84 — Applicability — Unbalanced mind.

Where a person is not insane but is unbalanced and excited, and probably is in some kind of obsession or hallucination, S. 84 cannot be invoked in his favour as he cannot be said to be not knowing the nature of act or that he was doing a wrong act while cutting the neck of a person. 63 Mad L W 442 : 1950 Mad W N 335 : 51 Cri L J 1329 : (1950) 1 Mad L J 813 : 1950 Mad W N (Cri) 91 : AIR 1950 Mad 576 (576) (Pt A) (Pr 2) (DB).

9. Unsoundness of mind not covered by S. 84 — Punishment

——S. 84 — Insanity — What amounts to — Accused working himself up into state of great fury —Accused dominated by violent impulse, resulting in some kind of mental derangement — Abnormal conduct due to intensity of anger — Plea of insanity cannot be sustained. AIR 1955 N U C (Assam) 2852 (DB).

——Ss. 84 and 302 — Offence of murder — Accused making extra-judicial confessions — Weapon used in committing offence discovered at his instance — Held, his conviction was proper — Accused also could not take benefits of S. 84.

The accused immediately after killing his wife made a confession to his son and daughter. The confession consisted of a single line that the applicant had killed the mother of the chidren. He made similar confessions, to his brother-in-law and other persons. Another piece of evidence, which connected the accused with the crime, was the discovery from a bush, at his instance of a Takwa with which he killed, his wife. The takwa was stained with human blood. The motive for the crime was that the accused suspected his wife's loyalty and he believed even to the extent that she attempted to poison him, so that she could live with his own younger brother thereafter. The accused also claimed the benefit of S. 84 and denied his confessions.

Held, that the accused had failed to prove that he was of unsound mind at the time of committing the crime and was incapable of knowing the nature of his act. He was not therefore entitled to the benefit of S. 84 and was rightly convicted under S. 302 The extra-judicial confessions made by the accused were voluntarily made and could be used along with other evidence for convicting the accused. AIR 1959 S C 902, Rel. on.

Unless the contrary is proved, every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his acts. There was no evidence to show that the accused had ever suffered from any attack of insanity. From the evidence that the accused had asked his wife to accompany him to the jungle, he had taken a Takwa with him, and after committing the crime, he had concealed the Takwa in a bush, the inference was that the accused was conscious that he had committed an act which was wrong or contrary to law and that the blood-stained Takwa would furnish a clue to the commission of the unlawful act. AIR 1961 S C 998 and AIR 1959 Madh Pra 259 and AIR 1917 Pat 503 and AIR 1918 Pat 179 (S B), Rel. on. It could not be concluded, from the mere fact that the accused did not abscond after the commission of the crime and made open confession of his guilt to several persons, that he was of unsound mind and was incapable of knowing the nature of his act. 1965(2) Cri L J 765 :

AIR 1965 Him Pra 68 (70, 71) (Pt A) (Prs 14, 20, 23, 24).

——S. 84 — Presumption under S. 105, Evidence Act — Insanity — Burden of proof — Accused killed his wife and severed her head — Admission — Death sentence confirmed. See Evidence Act (1872), S. 105. 1957 Mad L J (Cri) 803 (Ker).

——S. 84 — Though insanity at the time of murder is not legally proved still, previous mental derangement has to be taken into consideration. In such cases, policy of High Courts has been to inflict the lesser punishment of transportation for life. 1956 M B L R (Cri) 258 : 1956 M B L J 1008.

——Ss. 84, 302 — Multiple murders — Accused not insane—No motive—Sentence—(Criminal P. C. (1898), Ss. 401 and 367) — In cases of multiple murders, where an accused is clearly not insane in the sense that he did not know what he was doing, and clearly knew what he was about, the courts cannot take upon themselves the responsibility of recommending for a comparatively short period of imprisonment, to a man who has once been a victim to homicidal frenzy and expose innocent persons to a similar attack after his release from prison. See Penal Code (45 of 1860), S. 302. 1953 Cri L J 625 : AIR 1952 Mad 289 (DB).

——Ss. 84, 302 — Death caused on account of anger due to hunger — Criminal P. C. (1898), S. 401.

Where the accused stated that he caused the death of four children on account of anger caused by hunger :

Held, that as the accused ran to the police station surrendered himself and produced the weapon with which the crime was committed, he fully knew that he was committing homicide and also knew that the act was both wrong and contrary to law. Hence S. 84 did not apply. (Under the circumstances, however, the death sentence was reduced to transportation for life and accused was recommended under S. 401, Criminal P. C.). 63 Mad L W 300 : (1950) 1 Mad L J 465 : 1950 Mad W N 339: 1950 Mad W N (Cri) 95 : 51 Cri L J 1491 : AIR 1950 Mad 592 (592, 593) (Prs 2, 3, 4) (DB).

——S. 84 — Sentence — Accused cutting neck of a person by aruval—Though not insane, accused proved to be unbalanced and excited — Accused held not in normal mind — Death sentence reduced to that of transportation for life. See Penal Code (45 of 1860), S. 302. 51 Cri L J 1329 : AIR 1950 Mad 576 (DB).

——S. 84—Proof of insanity.

To establish the plea of insanity under S. 84 the accused has to show that he was of unsound mind at the time of the commission of the act and that by reason of this unsoundness of the mind he was incapable of knowing the nature of the act or that what he was doing was either wrong or contrary to law. It is not enough to prove mere mental derangement or what is termed as medical insanity.

History of the accused before the offence and his conduct during and after the offence are sure criteria for judging his mental state.

Where all that was established was that the accused was suffering from insomnia which might have brought about nervousness of mind and the conduct of the accused after killing his wife in running away when a hue and cry was raised: and his discarding of blood-stained clothes and attempt to remove blood stains from his body by rubbing it out by earth;

Held, that this left no doubt that whether the accused was mentally weak or not at the time of committing the murder he fully understood the nature of his act and that therefore his plea of insanity could not stand. 1955 Cri L J 63 : 7 Sau L R 40 : AIR 1955 Sau 13 (14, 15) (Pt A) (Prs 4, 7).

10. Criminal responsibility of deaf and dumb.

——Ss. 84 and 302 — Criminal responsibility of deaf and dumb —Charge under S. 302—Accused cannot be exempted from punishment merely because he is deaf and dumb—Criminal P. C. (1898), S. 341. (1960) 2 Ker L R 206.

——S. 84 — Accused congenitally deaf and dumb, murdering his father—Incapability of understanding nature of act—Evidence of conduct before and after murder—Accused held not guilty. A I R 1953 Orissa 30 (31) (Pt B) (Pr 4) (DB).

SECTION 85

——S. 85—Scope—Drunkenness how far an excuse for commission of offence.

Drunkenness makes no difference to the knowledge with which a man is credited and if a man knew what the natural consequences of his acts were, he must be presumed to have intended to cause them—S. 85 deals with the question of the knowledge possessed by an accused person of the time he commits the offence and leaves quite open the question of intention. See Penal Code (1860), S. 84. 1957 Cri L J 1056 : AIR 1957 All 667 (DB).

——S. 85—Plea of intoxication — When available — Accused drinking liquor at persuasion of his father to alleviate pain —Effect.

In order to bring a case within S. 85, Penal Code, the thing which intoxicated the person should have been administered to him without his knowledge or against his will. The expression without his knowledge simply means in ignorance of the fact that what is being administered to him is or contains or is mixed with an intoxicant. An act which is against the 'will' must be an act which the performer performed not out of his own conscious volition but on compulsion by some outside agency by overpowering or paralysing his will by overt physical acts. Normal persuasion acting as an incentive has never been considered as an adequate excuse. Where the accused drank liquor at the persuasion of his father to alleviate his pain, it cannot be said that the administration of liquor to him was against his will and, therefore, he could not claim any benefit under S. 85, Penal Code. 1960 M P C 316 : 1960 Cri L J 1093 (2) : 1960 M P L J 615: 1960 Jab L J 652: AIR 1960 Madh Pra 242 (243, 244) (Prs 7, 9, 11) (DB).

——Ss. 85, 86, 300—Scope of—Drunkenness—When proper defence.

The state of intoxication envisaged in S. 86 is not in any way different from that contemplated in the preceding section. Both Ss. 85 and 86, Penal Code, lay down the law relating to drunkenness as bearing on the wrongful acts committed by persons; the difference between the two sections being with regard to consequences depending upon whether the drunkenness is involuntary or voluntary. The absence of qualifying words in S. 86 cannot lead to the inference that even if the insobriety is not such as to impair the reason of the offender the requisite intent cannot be presumed.

It is an ordinary rule that every man is presumed to intend the consequences of his acts but this presumption can be rebutted by showing that the person concerned could not have formed the intent by reason of his drunkenness. It is only in cases where it is proved that the prisoner was in such a condition of drunkenness that his reason was "dethroned" and was incapable of forming any intention, that the defence of drunkenness would be available. A I R 1926 Lah 232; A I R 1926 Lah 428; A I R 1934 Rang 361 and A I R 1953 Mad 827, Rel. on; 1920 A C 479, Expl.

Held, on facts that the offence committed by the appellant was one of murder and his voluntary drunkenness did not avail him to reduce the offence to one of culpable homicide not amounting to murder. 1954 Cri L J 672 : 1953 Mad W N 941 : A I R 1954 Mad 523 (526, 527) (Pt A) (Prs 15, 17, 20).

——Ss. 85, 86 and 300 — Intoxicated person killing another by repeated stab wounds — Requisite knowledge and intention can be presumed—Offence cannot be reduced to one under S. 304 — (Evidence Act (1872), S. 14).

A person, who gets into a state of intoxication voluntarily, is presumed to have the same knowledge he would have had if he had not been intoxicated. When the state of intoxication is such as to make him incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law, he can only be punished on the basis of knowledge and not of a particular intention. The words "state of intoxication" in S. 86 can only mean intoxication, which renders a person incapable of knowing the nature of the act in question or that he is doing what is either wrong or contrary to law when he commits it. It would be extremely dangerous to extend the protection under S. 86 to persons, who commit serious offences under the influence of liquor in varying stages and differentiate culpability in their favour as opposed to similar offences by perfectly sober persons.

Intention, of course, in many cases, is an inference from knowledge. As an intoxicated man is assumed to have the knowledge, he must, in the generality of cases, be assumed to have had the intention. But there may be cases in which a person by reason of intoxication may, under certain circumstances, be incapable of knowing the nature of a particular act he commits or that it is either wrong or contrary to law, although his stage of intoxication may not be such as to render him incapable of knowing the nature of all his acts. In such cases, in determining the quality of the offence, evidence may be necessary of a specific state of mind, which must be found as a fact and not assumed. It is only in such cases, which are rare, that S. 86 can be invoked by a person in some stage of intoxication to mitigate culpability, and to limit it to knowledge without inference of criminal intention, where the offence with which he is charged, such as murder, requires proof of a specific intention.

A man, who keeps on stabbing a person in vital parts, must clearly be presumed to know the consequences of his acts and it is not open to him to plead that he was so drunk at the time as not to know or intend what he was doing. Such a defence based on the distinction between knowledge and intention in S. 86, Penal Code cannot be put forward to reduce the offence to one under S. 304, Penal Code. (1909) 1 K B 895; 33 Mad 479, Rel. on. **('52) 1952 Mad W N (Cri) 88 : 1952 Mad W N 384 : 1952-1 Mad L J 772 : 1953 Cri L J 1587 : A I R 1953 Mad 827 (828, 829) (Prs 5, 7, 8) (DB).**

——S. 85—Voluntary drunkenness.

Voluntary drunkenness is no excuse for the commission of a crime. In such a case the Court will not attach any importance to the fact that the accused was drunk and will draw the natural inferences which follows from the acts of the accused. **1951 Raj L W 386 : I L R (1951) 1 Raj 526 (DB).**

SECTION 86

■——S. 86—Scope—Offence committed under intoxication—Knowledge and intention—Inference of.

While the first part of the section speaks of intent or knowledge, the latter part deals only with knowledge and a certain element of doubt in interpretation may possibly be felt by reason of this omission. So far as knowledge is concerned the Court must attribute to the intoxicated man the same knowledge as if he was quite sober. But so far as intent or intention is concerned, the Court must gather it from the attending general circumstances of the case paying due regard to the degree of intoxication. Was the man beside his mind altogether for the time being? If so it would not be possible to fix him with the requisite intention. But if he had not gone so deep in drinking, and from the facts it could be found that he knew what he was about the Court can apply the rule that a man is presumed to intend the natural consequences of his act or acts. **Basdev v. State of Pepsu, 1956 Mad W N 858 : 1956 S C J 554 : 1956 Cri L J 919 (2) : 1956 Andh L T 593 : 1956 S C A 695 : 1956 S C C 276 : 1956 Nag L J 711 : 1956 All L J 666 : 1956 All W R (Sup) 118 : 58 Punj L R 569: 1956 S C R 363 : 1956 M P L J 151 : AIR 1956 S C 488 (489, 490) (Pt A) (Prs 4, 5).**

●——Ss. 86, 300, 302 and 304 (Part II) — Applicability—Murder under influence of drink—No evidence to show accused's incapacity to form requisite intention—Offence.

The appellant, a retired military Jamadar, was charged with the murder of a young boy aged about 15 or 16. Both of them and others of the same village went to attend a wedding in another village. All of them went to the house of the bride to take the midday meal on the 12th March, 1954. Some had settled down in their seats and some had not. The appellant who was very drunk and intoxicated asked the young boy to step aside a little so that he may occupy a convenient seat. But he did not move. The appellant whipped out a pistol and shot the boy in the abdomen. The injury proved fatal. It was found that although the accused was under the influence of drink, he was not so much under its influence that his mind was so obscured by the drink that there was incapacity in him to form the required intention.

Held, that the offence was not reduced from murder to culpable homicide not amounting to murder under the second part of S. 304 of the Indian Penal Code by reason of the provisions of S. 86 of the Code. **Basdeo v. State of Pepsu, 1956 Mad W N 858 : 1956 S C R 363 : 1956 M P L J 151 : 1956 Cr L J 919 (2) : 1956 S C J 554 : 1956 Andh L T 593 : 1956 S C A 695 : 1956 S C C 276 : 1956 Nag L J 711 : 1956 All L J 666 : 1956 All W R (Supp) 118 : 58 Punj L R 569 : AIR 1956 S C 488 (492) (Pt C) (Pr 16).**

——S. 86—Scope—Drunkenness how far an excuse for commission of offence.

Voluntary drunkenness is no excuse for the commission of a crime. On the question as to how far drunkenness is an excuse for a crime, the proper test is that laid down in the case of Director of Public Prosecutions v. Beard, 1920 A C 479. See Penal Code (1860), S. 84. **1957 Cri L J 1056 : AIR 1957 All 667 (DB).**

——Ss. 86 and 300—Offence of murder—Defence of drunkenness, when available.

It is only in cases where it is proved that the prisoner was in such a condition of drunkenness that his reason was 'dethroned and was incapable of forming any intention, that the defence of drunkenness would be available.' The degree of intoxication is the criterion. If the man was beside his mind altogether for the time being it would not be possible to fix him with the requisite intention. AIR 1956 S C 488 and AIR 1954 Mad 528, Rel. on.

Held, on facts that as the accused though drunk had not gone so 'deep in drinking' as not to know what he was about. It was not possible to reduce the offence from murder to one of culpable homicide not amounting to murder because of the accused's volun-

tary drunkenness. 1959 Ker L R 614 : 1950 Ker L J 623 : 1959 Ker L T 634.

——S. 86—Scope of — Drunkenness — When proper defence. Every man is presumed to intend the consequencess of his acts but this presumption can be rebutted by showing that the person concerned could not have found the intent by reason of his drunkenness. It is only in cases where it is proved that the accused was in such a condition of drunkenness that his reason was dethroned and was incapable of forming any intention, that defence of drunkenness would be available. See Penal Code (1860), S. 85. 55 Cr L J 672 : AIR 1954 Mad 523 (DB).

——Ss. 86, 85 and 300 — Intoxicated person killing another by repeated stab wounds — Requisite knowledge and intention can be presumed - Offence cannot be reduced to one under S. 304—(Evidence Act (1872), S. 14). See Penal Code (45 of 1860), S. 85. 1952-1 Mad L J 772 : 1952 Mad W N (Cri) 88 : 1952 Mad W N 384 : 1953 Cri L J 1587 : AIR 1953 Mad 827 (DB).

——S. 86—Plea of drunkenness as defence when available to accused.

The act done by a person in a state of intoxication would become an offence unless it is shown that the thing which intoxicated him was administered to him without his knowledge or against his will. In other words, if a man drinks and commits an offence, then he would be guilty of the offence charged against him. The law imputes to a person who is drunk the same knowledge as he would have had if he had not been intoxicated, unless the state of intoxication has been brought about without his knowledge or against his will. (1960) 38 Mys L J 603.

——Ss. 86, 300, 304—Offence by drunken person—Presumption as to guilty intention—Law discussed.

The omission of any reference to 'intent'' in the second part of S. 86 though it is expressly referred to in the first part was deliberate. The result is that though by virtue of the said section at Court may presume guilty knowledge, the Court cannot presume guilty intention in judging the nature of the offence committed by a drunken person. But the guilty intention which is the ingredient of several offences in the Penal Code is obviously not capable of direct proof and is generally inferred from the proved facts and circumstances of each case. There is the general presumption that every man intended the natural consequences of his act. Intention may ordinarily be inferred from knowledge and if guilty knowledge can be presumed by virtue of S. 86, I. P. Code, it necessarily follows that guilty intention may also be reasonably inferred unless there are some other facts and circumstances to repel such an inference.

Where a drunken person commits an offence, there will be no presumption of guilty intention under S. 86, I. P. Code and such intention must be proved like any other fact in issue. But the Court may, after presuming the necessary guilty knowledge from that section on the assumption that he committed the act while in a sober condition, infer the guilty intention also if the other proved facts and circumstances justify the same. There may be different degrees of intoxication and if the evidence merely shows that the accused more readily gave way to violent passion because or his drunken condition it may be reasonably inferred that he intended the natural consequences of his acts. If, however, the evidence shows that he was in such a state of intoxication as to be incapable of forming the specific intent, drunkenness may be ground for altering the nature of the offence.

The accused who was drunk demanded food and drink, then quarrelled with his father, who called him a glutter, dragged him down and tried to throttle him. At that time he had no weapon in his hand. When his brother intervened and separated the two his father tried to assault him but his brother again intervened. Then the accused ran to a place about 32 cubits away, pulled out a heavy wooden post which had been fixed to a fence and gave a terrific blow on the head of his father and ran away ;

Held, that these acts indicated much deliberation on his part and they were incompatible with the alternative theory that due to his intoxicated condition he was incapable of forming the specific intent necessary for the commission of the crime. When he gave such a blow he intended to cause such an injury as was sufficient in the ordinary course of nature to cause death and his action would come within clause '3rdly' of S. 300, I. P. Code.

Held also that it could not be said that the accused was in such a state of intoxication as to be incapable of forming any intent at all. Therefore the accused was also guilty of murder under clause '2ndly' of S. 300, I. P. C. 52 Cri L J 1136 : AIR 1951 Orissa 354 (355 to 357) (Pt B) (Prs 10, 12, 13, 14, 19, 20) (DB).

——S. 86—Drunken man—Presumption of intention—Proof of incapacity to form intent.

Even a drunken man is presumed to intend the natural consequences of his act, unless he proves incapacity in himself to form the intent necessary to constitute the crime and the fact that his mind was merely affected by drink that he readily gave way to some violent passion provides him no defence. 17 Ind Cas 800 (L B) (F B) and 1920 A C 479, Foll. 1955 Cr L J 1621 : I L R (1955) Pepsu 646 : AIR 1955 Pepsu 165 (167) (Pt A) (Pr 21) (DB).

——S. 86—Drunkenness—Presumption of intention.

Evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink, so that he more readily gave way to some violent passion; does not rebut the presumption that a man intends the natural consequences of his acts. 1920 A C 479, Relied on. 56 Punj L R 339 : 1955 Cri L J 305 : AIR 1955 Punj 13 (15, 16) (Pt A) (Prs 27, 42) (DB).

——Ss. 86, 300 & 302—Death caused by gun shot by person intoxicated—Punishment.

It is not even necessary to aim the gun at any particular person in order to bring the case under the fourth clause to S. 300, provides the nature of the act is such that it is so imminently dangerous that any man should know that it will, in all probability cause death or such bodily injury as is likely to cause death. Unless it can be proved that the person shooting is such a crack-shot that his aiming at a particular part of the body would result in an injury there and nowhere else in an ordinary case shooting with a gun must be held to be such an imminently dangerous act that it must in all probability cause death or such bodily injury as is likely to cause death and the case would be covered by the fourth clause to S. 300.

Where the evidence is that the accused took aim and shots struck near about the umbilicus and that the accused was intoxicated it cannot be predicated that his intention was to hit the deceased so carefully that it might not cause death.

If there is no evidence of motive and the accused was certainly drunk at that time ends of justice would be met by awarding the lesser penalty of transportation for life. AIR 1935 Cal 580, Dissent., AIR 1917 Lah 226; AIR 1930 Pat 168, Rel. on. 1952 Raj L W 145 : 1953 Cri L J 434: I L R (1951) 1 Raj 727: AIR 1953 Raj 40 (41, 42) (Prs 8, 9) (DB).

——Ss. 86 and 302—Intoxication—Sentence.

Drunkenness will not certainly be a ground for palliation where there is premeditation or where the self intoxication is with the intention of priming himself for a quarrel, during which a murder is committed, by the accused. If the attack is a premeditated one the mere fact that the accused had taken some liquor should not be regarded as a sufficient reason for not imposing the penalty of death. Where however the accused did not get himself intoxicated in order to strengthen himself in any quarrel with deceased and the meeting with the deceased was purely accidental and the attack a sudden one and without a motive, the lesser sentence of transportation for life is the proper one. **I L R (1953) Trav-Co 659.**

SECTION 87

——Ss. 87, 81 and 88 — Complainant committing indecent assault on girl — Members of girl's community assembling with lathis in front of complainant's house and taking threatening attitude — Matter referred to Panchayat—Complainant giving consent in writing — Face of complainant blackened and complainant paraded and given shoe beating in pursuance of Panchayat's decision — Action of accused held bona fide and for benefit of complainant to avert greater harm —No offence held committed by person responsible for such acts. See Penal Code (1860), S. 81. 52 Cri L J 179 : AIR 1951 All 500.

——Ss. 87, 80 and 304A — Accused and deceased friends — Former inviting latter for wrestling bout— Whilst wrestling deceased receiving accidental injury on his skull resulting in death—No foul play by accused — Case falls under Ss. 80 and 87—Accused held committed no offence. 51 Cri L J 402 : AIR 1950 All 95 (96) (Pr 7).

SECTION 88

——Ss. 88, 81, 87 —Complainant committing indecent assault on girl — Members of girl's community assembling with lathis in front of complainant's house and taking threatening attitude — Matter referred to Panchayat—Complainant giving consent in writing— Face of complainant blackened and complainant paraded and given shoe beating in pursuance of Panchayat's decision — Action of accused held bona fide for benefit of complainant to avert greater harm—No offence held committed by person responsible for such acts. See Penal Code (1860), S. 81. 52 Cri L J 179 : AIR 1951 All 500.

——S. 88 — Teacher administering corporal punishment to student aged 13 years. exceeding limits prescribed by Board of Secondary Education — Teacher still held entitled to benefit of exception under S. 88—Educational Institutions—Teacher and Pupil.

A complainant who was a student aged 13 years was found to have stolen a book of another student in the school. The petitioner who was the Head Master of the school beat him with a cane and also gave him some fists and blows. While administering the corporal punishment, the petitioner exceeded the limits prescribed by the Board of Secondary Education. From the medical evidence it appeared that there were 5 ecchymosis but all of them were of minor nature. One tooth was found loose and that could have been caused by some blow.

Held, that the petitioner was entitled to the benefit of the exception contained in S. 88 of Penal Code and, therefore, had not committed any offence under S. 323 of Penal Code and therefore had not committed any offence under S. 323 of Penal Code. From the facts it could not be said that the beating was intended to cause death. Even from the medical report it could not be said that the action of the petitioner was mala fide, not in good faith. The motive for the beating was very relevant for determining if it was in good faith. There was no doubt that the petitioner's move was to correct the complainant for his future good and to maintain discipline in the school.

Corporal punishment, according to the circular of the Board of Secondary Education was to be administered because the petitioner exceeded the limits prescribed by to inflict pain only without any bodily injury. But by merely the administrative circular of the Board of Secondary Education, it could not be said that the petitioner had deprived himself of the protection given to him under S. 88 of Penal Code, because the circular of the Board of Secondary Education could not and did not override the provisions of Penal Code. The mere fact that he exceeded the limits prescribed by the circular of the Board of Secondary Education does not prove that the petitioner did not act in good faith.

When a boy was sent by his parent or guardian to a school, the parent or the guardian must be said to have an implied consent to his being under the discipline and control of the School authorities and to the infliction of such reasonable punishment as might be necessary for the purpose of school discipline or for correcting him. Then again when a boy over 12 years of age himself went to a school it should be presumed that he gave an implied consent to subject himself to the discipline and control of the school authorities and to receive such reasonable and moderate corporal punishment as might be necessary for his correction or for maintaining school discipline. Under S. 90 of Penal Code consent could be given by a child not under 12 years of age. The action of the petitioner in administering corporal punishment to the complainant was therefore, covered by S. 88 of Penal Code. (1860) 2 F and F 202 and (1893) 1 Q B 465 and AIR 1926 Rang 107 and AIR 1922 Mad 200 and AIR 1949 Bom 226, Rel. on. **68 Cal W N 1081 : 1965 (1) Cri L J 24 : AIR 1965 Cal 32 (33) (Prs 6, 7, 8).**

——S. 88 —Treatment by medical practitioner—Consent and good faith under S. 88—What amounts to— Applicabiilty of section.

No doubt, when a patient puts himself under the treatment of a medical practitioner qualified or otherwise he gives an implied consent to suffer the harm and to take the risk but where the medical practitioner so called, is not qualified or begins to apply a medicine which no man in his senses would dare to apply, the consent is not a consent obtained in good faith. Good faith always implies diligence and caution. If a person sets out to be a doctor without knowing anything of the job, and tries to do the best he could under the circumstances, still he would be acting in bad faith.

Similarly, when a person administers quantities of a poison or a drug known to everybody and to him particularly after his experience as a deadly poison, pretending to treat his patient, there is no good faith at all. The two elements of consent on the part of the patient and of good faith on the part of the medical practitioner are interdependent and nobody can claim the benefit of this exception under S. 88, Penal Code., without good faith. **1963 (1) Cri L J 296 : 1963 M P L J 839 : 1963 Jab L J 959 : A I R 1963 Madh Pra 102 (105) (Pt C) (Pr 32) (DB).**

——Ss. 88 and 89 — Punishment to a student for mischief by his teacher is not an offence punishable under Penal Code — Action is protected under S. 89, Penal Code.

Held, on facts that there was no proof of want of care and caution. In the case, the doctor's theory in fact did not fit in with the testimony of eye-witnesses. Notifications prohibiting corporal punishment

by the school teacher was not also placed on record and the Court could not take judicial notice of them till they were proved in the manner provided for or under S. 78 of the Evidence Act. 1954 N L J 434 and AIR 1956 M B 138, Foll. Being merely executive instructions they could not overrule the clear provisions of Ss. 88 and 89 of the Penal Code. There could not be any doubt that Ss. 88 and 89 directly applied to the case and the principle of S. 89 of the Penal Code would be available even to a case of a child above the age of 12 years as that of the student in the case. AIR 1922 Mad 200, AIR 1949 Bom 226 and AIR 1962 Mad 216, Foll. The principle which applied both in India and in England was that when a child was sent by his parent or guardian to a school, the parent or guardian must be held to have given an implied consent to its being under the discipline and control of the school authority and to the infliction of such reasonable punishment as might be necessary for purposes of a school discipline and for correcting the child. If the beating had been brutal or the punishment had been administered in a reckless manner without having due care and caution to the safety of the student the teacher could not claim the benefit of protection under S. 88 of the Penal Code, (1938) 3 All E R 517, Dist. **1963 M P L J (Notes) 172.**

——Ss. 88, 89—Applicability — School teacher administering corporal punishment to pupil — Teacher's right to benefit of exceptions under Ss. 88 and 89 will depend on nature and severity of punishment inflicted.

Where a teacher exceeds the authority and inflicts such harm to the pupil as may be considered to be unreasonable and immoderate, he would naturally lose the benefit of the exceptions in the form of Ss. 88 and 89. Whether he is entitled to the benefit of the exceptions or not in a given case will depend upon the particular nature, extent and severity of the punishment inflicted. The principle of S. 89 would be available even to a case of a child above the age of 12 years. AIR 1922 Mad 200 : 42 M L J 460 and AIR 1949 Bom 226, Rel. on. **1961 Mad W N 710 : 1962 All Cri R 72 : 1962 All W R (Sup) 27 : 1962 (1) Cri L J 727 : AIR 1962 Mad 216 (218) (Prs 5, 6).**

SECTION 89

——Ss. 89 and 88—Punishment to a student for mischief by his teacher is not an offence punishable under Penal Code — Action is protected under S. 89, Penal Code. See Penal Code (45 of 1860), S. 88. **1963 M P L J (Notes) 172.**

——Ss. 89, 88—Applicability — School teacher administering corporal punishment to pupil — Teacher's right to benefit of exceptions under Ss. 88 and 89 will depend on nature and severity of punishment inflicted. See Penal Code (1860), S. 88. **1962 (1) Cri L J 727 : AIR 1962 Mad 216.**

SECTION 90

——Ss. 90, 378, 410—Theft—Consent, meaning of — Delivery of goods mentioned in railway luggage ticket — Persons taking delivery not entitled to do so — Delivery by Railway clerk under misconception that persons taking delivery were entitled to take it —Ingredients of 'thett' established — Persons found in possession of such goods soon after delivery can be presumed to be in possession of stolen property — Evidence Act (1872), S. 114, Illus. (a).

A consent given on a misrepresentation of facts is one given under a misconception of facts within the meaning of S. 90, and would not be a valid consent as contemplated under the Penal Code. Where delivery of the goods mentioned in a luggage ticket issued on a passenger ticket by the railway is normally given by the luggage clerk to the bearer on the mere production of the luggage ticket and delivery of such goods was taken from the luggage clerk on production of the luggage ticket by some persons who had no right to those goods and were not entitled to take delivery of the same, it is clear that the luggage clerk, who was in possession of the goods on behalf of the real owner, agreed to deliver the goods against the luggage ticket under a misconception of facts, viz., the persons taking delivery were entitled to take it, and there could be no doubt that the persons taking delivery knew that the railway clerk consented to give delivery under such misconception of facts. Thus, all the ingredients required for a theft are established and the accused found in possession of such goods soon after the theft was committed, i.e., soon after the delivery of the goods in question was taken from the luggage clerk, must be presumed to be in possession of stolen property, under Illus. (a) of S. 114, Evidence Act. ILR 36 Mad 453 and AIR 1916 Lah 414 and AIR 1930 Rang 114 and ILR 1 Bom 610, Rel. on. **64 Bom L R 788 : 1963 Mah L J 157 : ILR (1962) Bom 735 : 1963 (1) Cri L J 573 : AIR 1963 Bom 74 (77, 78) (Pt A) (Prs 11, 12) (DB).**

——Ss. 90, 300, Exception 5, 302 and 304 (Part I) — Applicability — Wife agreeing to suffer death at the hand of husband—Husband killing wife—Offence — Sentence—Ss. 300, Excep. 5, 302 and 304.

The accused was a student of Class X. He had failed at the annual examination for three years in succession. His wife, aged 19, was a literate woman. The accused was very much upset at these failures and took his last failure so much to heart that he decided to end his life and informed the wife of his decision. His wife asked him to first kill her and then kill himself. In accordance with the fact the accused killed his wife and was arrested before he could kill himself.

Held, that the deceased did not give consent under fear of injury of under a misconception of fact and, therefore, the accused was guilty under S. 304, first part, and not under S. 302. Held, further that, in the circumstances of the case, a lenient view of the case should be taken and the accused should be sentenced to 5 years' rigorous imprisonment. **1958 B L J R 60 : 1958 All W R (Sup) 61 : 1958 All L J (Rev) 56: 1958 Cri L J 548 : 1958 All Cri R 207 : AIR 1958 Pat 190 (193) (Pt C) (Pr 14) (DB).**

SECTION 93

——Ss. 93, 97, 103, 104, 302, 304 Part 1 — Accused exercising right, attacked by prosecution party — Accused have right of private defence — Exceeding the right — Death caused — Offence. See Penal Code (1860), S. 97. **(1962) 2 Ker L R 466 : 1962 Ker L T 868.**

SECTION 94

——S. 94 — Applicability — Intention — Statement made in Court — Accused acting under compulsion —Liability for offence.

To base a conviction of the accused solely on his statement in court the statement has to be accepted as a whole. Where the only statements which can go against the accused in his statements before the Sessions Court were that he awakened the deceased of the asking of A. But he did not know A's purpose and that he accompanied the deceased and A to a grove and there being threatened by others who were there held the life of the deceased while one of these others killed him: Held that the statement was insufficient to hold that the accused committed the murder of the deceased. See Criminal P. C. (1898), S. 342. **1957 Cri L J 344 : AIR 1957 All 184 (DB).**

[Overruled on another point in AIR 1966 All 192.]

——S. 94—Applicability—Intention — Accused member of unlawful assembly under duress—If can be

convicted of rioting—He would be protected by S. 94. See Penal Code (1860), S. 146. 1957 Cri L J 344: AIR 1957 All 184 (DB).

[Overruled on another point in AIR 1966 All 192.]

——S. 94—Intention—Offence under S. 201—Circumstances indicating continuance of effect of original threat — Effect. Accused cannot be convicted of offence under S. 201, Penal Code although he did not state that threat was again at the time of carrying the dead body. 1957 Cri L J 344 : AIR 1957 All 184 (Pt F) (DB).

[Overruled on another point in AIR 1966 All 192.]

——S. 94—Cancellation of permit — Effect.

Where the owner of a Motor Vehicle is prosecuted under S. 123 of the Motor Vehicles Act, he is prosecuted for an offence whereas an action is taken against the permit holder under S. 60 of the Act if involves only the departmental control. The suspension or revocation of the conditions of permit does not amount to a punishment for an offence. There is no question of the petitioner being entitled to the benefits of the exceptions provided for under S. 94, Penal Code. See Motor Vehicles Act (4 of 1939), S. 60. (1957) 2 Andh W R 296 : (1957) Mad L J (Cr) 507.

——Ss. 94, 477A — Falsification of accounts by clerk under President's order—Fear whether defence.

The law allows fear as a reason for acquittal in cases of offences only if there is fear of instant death or instant grievous hurt. The plea is not available to a clerk who alleges to have committed the offence under S. 477A, Penal Code, under the orders of the President of the Society if there is no such fear. (1951) 1 Mad L J 691 : 52 Cri L J 1093 : 1951 Mad W N 384 : 1951 Mad W N (Cri) 112 : 64 Mad L W 445 : AIR 1951 Mad 894 (895) (Pt B) (Pr 3).

SECTION 95

——S. 95—Order under Epidemic Diseases Act (1897), S. 2 preventing entry of pilgrims from outside flocking in Mela area unless they had got inoculated against cholera—Order not making inoculation compulsory for inhabitants of area but authorising competent authority to ask inhabitants to get themselves inoculated or leave area only in exceptional cases—Health Officer preventing entry of accused, inhabitant of area, unless he got himself inoculated—Accussed pushing officer and entering in area—Prosecution not showing that accused was asked not to remain in area without getting inoculated as intended by order — No offence — Assuming it to be offence, accused is protected under S. 95. See Penal Code (1860), S. 353. 1965 All Cri R 85 : 1965 All W R (HC) 69.

——S. 95 — Technical breach of provisions of Drugs Rules—Court should quash criminal proceedings. See Drugs Rules (1957), R. 1. 1964 All W R (HC) 345.

——S. 95 — Applicability — Offence under S. 504 — Offence held did not attract application of S. 95. ILR (1954) 6 Assam 274 : 1955 Cri L J 1318 : A I R 1955 Assam 211 (213) (Pt C) (Pr 8) (DB).

——S. 95—Applicability—Principle of S. 95—Words causing no harm—S. 504.

One of the first principles of law is de minimis non cural lex. This has found expression in S. 95, Penal Code. Intercourse in civilised society will come to an end if for certain words uttered a person found himself exposed to all the trouble and worry of a criminal trial.

Held, that an acquittal of the accused in a complaint under S. 506, Penal Code, for the words ..... meaning "you are telling a lie" was fully justified by S. 95, Penal Code. 1954 Cri L J 800 : A I R 1954 Cal 288 (288) (Pr 3).

——S. 95—Interruption at public meeting — No allegation of common injury, danger or annoyance caused to public — Prosecution for offence under S. 290 quashed. See Penal Code (1860), S. 290. 1962 Mad L J (Cri) 185 : 1961 Ker L J 96 : 1961 Ker L T 100 : (1961) 1 Ker L R 205.

——S. 95 — Applicability — Theft of cheque of no value. See Penal Code (1860), S. 379. 1955 Cri L J 816 : A I R 1955 Mad 264.

——Ss. 95, 341 — Wrongful restraint—It is doubtful whether, without physical obstruction, by mere words, a person commits offence under S. 341 — Even if it is considered offence S. 95 applies. See Penal Code (1860), S. 341. 52 Cri L J 716 (1) : A I R 1951 Mad 759.

——S. 95—Advocate uttering insulting words against witness in cross-examination—Court stopping further cross-examination — Enmity between Advocate and witness — Held, case was not covered by S. 95 but Advocate could be validly convicted under S. 504. See Penal Code (1860), S. 504. 1964 (2) Cri L J 692 : A I R 1964 Mys 285 (DB).

——S. 95—Applicability.

Section has no application unless the act in question amounts to an offence under the Code. 1953 Nag L J 357 : 1953 Cri L J 801 : I L R (1953) Nag 639 : A I R 1953 Nag 141 (142) (Pt A) (Pr 6) (DB).

——S. 95—Push on neck if punishable as hurt—Held, assuming that push was no hurt, accused would still be punishable under S. 353. (1965) 31 Cut L T 851.

——Ss. 95 and 161—Railway servant demanding and accepting bakshis of 8 annas for service rendered — Provisions of Penal Code (1860), do not apply. See Railway Establishment Code, Vol. I, R. 1701, Para 2 (1). A I R 1964 Orissa 253 (DB).

SECTIONS 96 TO 106

SYNOPSIS

(Penal Code (45 of 1860), Ss. 96 to 106.)

1. Right of private defence — S. 96.
(A) Both parties determined to fight.
(B) Plea of.
See also Note 8 (G).
(C) Onus.
See also Note 8 (E) and Evidence Act (1872), S. 105.
2. Private defence of body — S. 97.
(A) "Body of any other person."
(B) Right, when not available.
3. Private defence of property.
(A) Right, when not available.
(B) Defence of other people's property.
(C) Trespasser in possession.
See Note 3.
4. Right of private defence against act of person of unsound mind or of person under misapprehension—S. 98.
5. Right of private defence against act of public servant—S. 99.
(A) Explanation 1 to S. 99.
(B) Act of public servant without jurisdiction.
6. Extent to which right may be exercised.
See also Note 8.
7. Time to have recourse to protection of public authorities.
See also Note 6.

8. Right of private defence of body when extends to causing death or any other harm—S. 100.
See also Note 6.
(A) No apprehension of death — Illustrative cases.
(B) Assault with intention of gratifying unnatural lust.
(C) Assault with intention of kidnapping or abduction.
(D) Plea of.
See also Note 1 (B).
(E) Onus.
See also Note 1 (C).
9. Right of defence of body, when extends to causing harm other than death or grievous hurt — S. 101.
10. Commencement and continuance of right of private defence of body—S. 102.
See also Notes 6 and 8.
11. Right of private defence of property when extends to causing death—S. 103.
See also Note 8.
12. Right of private defence of property, when extends to causing harm other than death or grievous hurt—S. 104.
See also Note 6.
13. Commencement and continuance of right of private defence of property — S. 105.

1. Right of private defence—S. 96.

(A) Both parties determined to fight.

(B) Plea of.
See also Note 8 (G).

(C) Onus.
See also Note 8 (E) and Evidence Act (1872), S. 105.

1. Right of private defence—S. 96.

——Ss. 96, 141, 146—Vindication of rights by use of force—If a party is forced to maintain or defend his rights, it cannot be said that he was determined to vindicate his right by show or use of force. See Penal Code (1860), S. 141. 51 Cri L J 1057 : AIR 1950 F C 80.

——S. 96—Arms Act (1959), S. 19 (f) — Person using gun of his father to ward off imminent and serious danger to his life—Plea of self-defence—Conviction under S. 19 (f) not proper.

Where a person who was faced with a real and serious danger to his life and property fired from the gun of his father and thereby successfully warded off that danger he is completely protected under S. 96, I. P. C., and his conviction under S. 19 (f) of the Arms Act cannot be sustained. **1964 All W R (HC) 385 : 1964 All Cr R 263.**

●——S. 96 — Criminal P. C. (1898), Ss. 59, 46 — Dacoits have no right to shoot private persons in self-defence who are chasing them in an attempt to arrest them. See Criminal P. C. (1898), Ss. 59, 46. AIR 1951 All 3 (FB).

——S. 96 — Criminal P. C. (1898), S. 297—Misdirection regarding right of private defence. See Criminal P. C. (1898), S. 297. 1957 Cri L J 51 : AIR 1957 Cal 18 (DB).

——Ss. 96-106, 302 and 97—Right of private defence—Object and effect of.

The right of private defence has been provided for self-protection. Therefore, if by exercise of this right a person escapes death or grievous hurt it cannot be said that he had no apprehension that such a consequence would follow even if he did not act in self-defence, other circumstances have also to be considered. See Penal Code (1860), S. 97. **1958 M P L J (Notes) 119.**

——Ss 97 and 99 — Applicability discussed. See Penal Code (1860), S. 332. 1961 (2) Cri L J 504 (Manipur).

——Ss. 97, 99—Premeditated attack—What constitutes—Merely taking precaution is different from premeditation. (1961) 3 O J D 26 : 27 Cut L T 337.

——Ss. 96 and 504—Scope—Abuses and right of private defence—There is no provision in the Penal Code where an accused person can be excused for insulting out burst of abuses in the exercise of the alleged right of private defence. See Penal Code (1860), S. 504. 1959 Cri L J 1096 : AIR 1959 Orissa 155 (157) (Pt B) (Pr 4).

——S. 99 — Right of private defence against mere threat.

Mere threat, not carried out, and later completely abandoned, followed by retracing of steps by the threatener would not justify an assault from the person threatened, as he must have been convinced that the person threatening did not mean to carry out the empty threat. Such a course is no longer necessary for his defence. **('51) 17 Cut L T 220 : AIR 1952 Orissa 37 (40) (Pt D) (Pr 7) (DB).**

——Ss. 96, 106, Pre. — Private defence of person and property—Interpretation—Use of English precedents not to be permitted : Observations of Ross J., in AIR 1926 Pat 433, Dissented from. See Penal Code (1860), Preamble. 1959 Cri L J 71 : AIR 1959 Pat 22 (DB).

——S. 96 — Deceased constructing Bhuskar on his own land — Accused asking to stop construction which deceased refused — Accused then demolishing nad belonging to deceased—Deceased protesting—Accused then striking a bhala blow on chest of deceased—Held, that accused being aggressor had no right of private defence. 51 Cri L J 331 : (LR 28 Pat 762 : AIR 1950 Pat 44 (45) (Pt B) (Pr 7) (DB).

——S. 96—Right of private defence — No apprehension to accused of any injury—No right of private defence. AIR 1955 N U C (Raj) 494.

1 (A). Both parties determined to fight.

●——S. 96—Applicability — Free fight—Unlawful assembly—S. 141.

A free fight is "when both sides mean to fight from the start, go out to fight and there is a pitched battle. The question of who attacks and who defends in such a fight is wholly immaterial and depends on the tactics adopted by the rival commanders."

Held, that there could be no question of a free fight when there was a clear finding of the High Court that Anjaninandan's party were the aggressors. Having regard to the finding reached by the High Court that the riot took place at the narrow path as a result of the dispute about the Nepali pilgrim and the further fact that Gajanand's party received more numerous injuries one of which was fatal; it was obvious that Gajanand's party could not be said to have constituted an unlawful assembly. Gajanand's party was engaged in the peaceful pursuit of worship at their own takhat and was busy attending to the Puja for the Nepali pilgrim. At that point of time they were not members of an unlawful assembly. There was no material to justify the conclusion that they became members of the unlawful assembly at any time thereafter.

It was the party of Anjaninandan who left their place and came to Gajanand's takhat; presumably raising a dispute over the offerings made by the Nepali pilgrim. They came armed with deadly wea-

pons and one of them inflicted a severe blow on one Sukkhu on Gajanand's side which resulted in his death and others received as many as 27 serious injuries. In these circumstances it was not possible to suggest that both parties were pre-determined for a trial of strength and had a free fight. Gajanand's party were the worst sufferers and though they also inflicted injuries on the other side; they did so in the exercise of their right of self defence. AIR 1931 Lah 513, Approved. Gajanand v. State of U. P., 1954 Cri L J 1746 : AIR 1954 S C 695 (698) (Pt A) (Pr 5) (DB).

——Ss. 97, 99—Question of aggression.

The number of injuries is not always a safe criterion for determining the question of aggression. 1959 Cri L J 1258 : AIR 1959 All 690 (692) (Pt B) (Pr 16) (DB).

——S. 96—Right of private defence—Free fight.

There could be no question of a free fight when there was a clear finding of the Sessions Judge, that it was complainant's party which had been the aggressor. The right to take water on the date of occurrence vested in the accused and he was in the enjoyment of that right. He went there armed with a rifle on having been apprehensive of the fact that the other party would reach there with arms and reinforcement; he was perfectly justified to wait there in readiness to defend his property or the right from the expected aggression from the other side. It was not a case where the enjoyment of a right was not to be protected or defended; nor was it a case where the accused and his party men could be said to have gone to the spot to measure their strength, and the protection of property or right was a mere pretext. A I R 1954 S C 695, Foll. 1958 Cri L J 129 : A I R 1958 All 90 (95) (Pt C) (Pr 14) (DB).

——Ss. 96, 149, 304 — Applicability — Both parties determine to fight —No right of private defence. AIR 1955 N U C (All) 2713.

——Ss. 96, 34, 147, 304, Part II and 325 — Evidence Act (1872), S. 105—Dispute over possession of land — Fight —One party receiving grievous injuries resulting in death of one person — Party of accused receiving minor injuries —Plea that accused party was attacked not established—Assembly held not unlawful—Right of private defence did not arise — Absence of premeditation — Conviction under S. 304 held not maintainable. See Penal Code (1860), S. 34. 52 Cri L J 209 : A I R 1951 Assam 48 (DB).

——S. 96—Free fight—Right of private defence.

In a free fight where both parties intend to attack each other there would be no right of private defence. (1960) 1 Guj H C R 134 : (1960) 1 Guj L R 157 : 1961 (1) Cri L J 54 (2) : A I R 1961 Guj 8 (10) (Pt B) (Pr 8) (DB).

——S. 96—Applicability—Aggressive party — Who is —Unpreparedness for attack is the best proof of non-aggressiveness. 1960 Ker L T 965.

——Ss. 97, 100—Scope — Right of private defence—Two parties involved in fight — Court must ascertain who started it and who gave the first blow — The party meeting the aggression must be deemed to have acted in self-defence. A I R 1955 N U C (Madh B) 3351.

——S. 96 — Party of deceased aggressors — Accused stabbing deceased merely to defend himself —No pre-planned scheme of fighting the other party made by party of accused — Doctrine of free fight will not apply. A I R 1954 S C 695, Rel. on. 1963 Mad W N 698 : (1964) 1 Mad L J 41 : 1964 Mad L J (Cri.) 47 : 1964 (2) Cri L J 425 : A I R 1964 Mad 418 (420) (Pt B) (Pr 9) (DB).

——S. 97 — Dispute as to land — Both sides going armed—Free fight — Injuries received by both parties —Accused having ample time to have recourse to public authorities — Cannot exercise right of private defence of property. A I R 1948 Pat 294, Foll. 1959 B L J R 92.

——S. 99 — Deliberate fight in assertion of rival claims — No right of private defence can be claimed. A I R 1935 N U C (Pat) 2498.

——S. 96 — Right of private defence — Two parties arming themselves for a fight to enforce their supposed right of possession to field — Fight started in presence of police and despite their attempts to prevent it and telling parties not to fight — No crop on land nor any urgency about ploughing the field—Both parties held were in the wrong in fighting and both were unlawful assemblies — There was no right of private defence on the part of either. A I R 1951 Pat 473 (477) (Pt E) (Pr 17) (DB).

——S. 96—Free fight—What is—Free fight between the parties—None of them can claim right of private defence—Exception.

If two enemies, each shown to be determined to injure the other, meet suddenly and go to fight, it will be hardly proper to dispute the existence of a free fight and to assume right of private defence for both the parties. It must be remembered that the right of private defence is one of defence and not one of punishment or retaliation. While the grant of the right is intended to discourage cowardice and meek submission to aggression it cannot be extended to encourage private warfare and to substitute for the decision of the Courts the decision by the use of weapons. 1963 Raj L W 436 and A I R 1931 Lah 513 and A I R 1954 S C 695, Ref. to; A I R 1957 S C 469 and A I R 1935 All 438 and A I R 1934 Lah 512 and A I R 1943 Mad 492, Rel. on. A more appropriate test to determine whether a fight is a free one or not, is that both the parties should voluntarily enter into a fight and there should be a mutual intent to harm each other. A desire to fight and a mutual intent to harm each other will easily be entertained at the spur of the moment and the resulting fight will certainly be a free fight. Cases may arise where in the case of a sudden fight between two persons one of them may decline from a further fight and retreat as far as he can with safety and then faced with a dangerous situation causing reasonable apprehension of death or grievous hurt, recourses to violence, he can certainly claim the right of private defence. But the contention that a sudden and unpremeditated fight can never be a free fight cannot be accepted. Held, on facts of the case, that the fight between the parties was free and none of them could claim right of private defence. 1965 Raj L W 60 : 1965 (1) Cri L J 476 : I L R (1965) 15 Raj 174 : A I R 1965 Raj 74 (76, 77, 78) (Pt A) (Prs 7, 8, 12, 19).

1 (B). Plea of.

See also Note 8 (G).

——S. 96—Right of self-defence—Right need not be specifically pleaded—Evidence Act (1872), S. 105.

Even though the plea of self-defence may not have been taken by the accused specifically, it is open to the Court, if on a proper appraisal of the evidence, it comes to the conclusion that the injury caused by the accused was inflicted at a time when he was having reasonable apprehension of a grievous injury being caused to him by the deceased to give him the benefit of doubt : A I R 1928 Cal 700 held not good law in view of later decisions. A I R 1930 Cal 442 and A I R 1941 All 402 (FB) and A I R 1960 Ker 258 and A I R 1960 All 223 and 1964 All W R (H C) 629 and Cri Appeal No. 843 of 1964 dated 22nd January 1965 (All L.B.), Rel. on. 1965 All L J 977 : 1965 All W R (H C) 711 : 1965 All Cr R 486 : 1966 Cri L J

503 : I L R (1965) 2 All 530 : A I R 1966 All 244 (246) (Pt B) (Pr 10) (DB).

—Ss. 98, 99 — Private defence — Plea of—Duty of Court—Onus.

The right of private defence must not be assumed. The party claiming the right of private defence has to establish that claim. Where it is a definite case of the accused persons that they were chased and beaten by the men of the opposite party and accused persons raise the plea of private defence the court is bound to decide the question of private defence. It is not necessary for the accused to produce witnesses in defence for making out a case of private defence. It is possible for the defence to make out a case of private defence from the circumstances of the case. AIR 1957 S C 469, Applied.

Held, on evidence that there was a reasonable apprehension of the accused receiving grievous hurts as a result of the attack by the men of the opposite party. The right of private defence of person, therefore, extended to the voluntary causing of death. The accused or any of them could not be convicted for any offence. 1960 All W R (HC) 173 : 1960 All Cri R 131 : 1960 All L J 234.

—S. 96 — Plea of exercise of right of private defence of person or property — (Evidence Act (1872), S. 105).

It is now well settled that in taking a plea of exercise of the right of private defence of person or property an accused person need not take it specifically or in so many terms nor need he adduce any evidence on his own behalf for substantiating such a plea He may elicit such facts and circumstances from the cross-examination of prosecution witnesses as may support this plea and utilise them in meeting the case of the prosecution. 1956 All W R (Sup) 10 : 60 Cal W N 114.

—S. 96—Criminal P. C. (1898), S. 297 — Misdirection — Murder trial — Failure to direct regarding accused's right of private defence of person under S. 100, Penal Code—Effect stated—See Criminal P. C. (1898), S. 297. 1952 Cri L J 1267 : AIR 1952 Assam 148 (DB).

—S. 96 — Criminal P. C. (1898), S. 297 — Misdirection — Plea of private defence—Raising of—Accused repudiating complicity in crime — Evidence and circumstances showing that such plea could properly be raised Duty of Sessions Judge - Omission to explain to jury Exception II to S 300, Penal Code and law of private defence is misdirection — See Criminal P C. (1898) S. 297. 1962 (1) Cri L J 137 : AIR 1962 Cal 85 (DB).

—S 96 — Applicability — Plea of right of private defence is not available to accused pleading alibi. 55 Cri L J 774 : AIR 1954 Cal 258 (268) (Pt C) (Pr 33) (DB).

—S. 96—Plea of private defence—Who can take — Onus Evidence Act (1872), S 105.

A plea of the right of private defence can be taken by a person who admits the act charged against him, but pleads an excuse. If a person, however, states that he had not done the act at all, it is difficult to see how at the same time the question of a right of private defence would arise. Whether or not an accused person, taking a plea of the right of private defence, is to prove it in the same manner as the prosecution is required to prove its case or whether a lower standard of proof would suffice the accused must, at least, make a case out of which a plea of the right of private defence might arise.

It is true that an accused person taking the plea of the right of private defence is not required to call evidence but can establish that plea by reference to circumstances transpiring from the prosecution evidence itself. But the question in such a case would be a question of assessing the true effect of the prosecution evidence and not a question of the accused discharging any burden 1952 Cri L J 1427 : AIR 1952 Cal 621 (624) (Pt A) Prs 8, 9) (DB).

—S. 96 - Criminal P. C. (1898), S 297 Defence that accused not responsible for killing — No question of right of private defence arises — Direction to jury to consider question of right of private defence in alternative - See Criminal P C. (1898), S. 297. 51 Cri L J 1581 : AIR 1951 Cal 212 (DB).

—S. 96—Plea of self-defence.

Although the accused has not raised a plea of self-defence at all it is open to him to plead self-defence, in case there is evidence on record brought out either in examination of witnesses or their cross-examination or in any other shape or form, to support such a plea. (1962) 3 Guj L R 152 : 1962 (1) Cri L J 717 : AIR 1962 Guj 203 (207) (Pt B) (Pr 21) (DB).

—S 96 —Plea not raised in statement under S. 342 Criminal P. C — (Criminal P. C. (1898), S. 342).

Even though the accused has not stated in his statement under S. 342 Criminal P. C., that his act was in exercise of his right of private defence, he would be entitled to this defence provided it can be established from the evidence on record. ILR (1956) Hyd 148.

—S. 96 — Plea of self-defence — Accused totally denying having hit deceased.

Even where the accused in their statements totally deny having hit and killed the deceased, if there is sufficient evidence to show that their actions come under self-defence, they cannot be denied the benefit of this privilege. 1952 Cri L J 572 : AIR 1952 Hyd 55 (57) (Pt C) (Pr 16) (DB).

—S. 97—Right of self-defence—Need not be specifically pleaded — Plea can be established from prosecution evidence. AIR 1960 Ker 258 (259) (Pt A) (Pr 5) (DB).

—S. 96 — Accused not pleading private defence — Evidence disclosing exercising of the right—Accused is entitled to its benefit — See Evidence Act (1872), S. 105. 1959 Ker L J 1313.

—S 99—Prosecution evidence insufficient — Right of accused to make out case of private defence — Express plea of private defence not taken — Accused is not precluded from making out such defence on basis of prosecution evidence itself — But this does not mean that prosecution can succeed even if the evidence is insufficient to prove the case. See Criminal P C. (1898), S. 367. 1958 Cri L J 509 : AIR 1958 Ker 74 (DB).

—S. 96 — Right of private defence — Accused not specifically pleading right of self-defence — Court should not conclude that the plea was not available to accused to any degree. See Penal Code (1860), S. 300. 1957 Cri L J 635 : AIR 1957 Ker 53 (DB).

—S. 96—Private defence - No specific plea—Facts proved making out defence—Effect.

Though the accused may deny having beaten the complainant he may not specifically plead any exception (i. e.) private defence. But if the proved circumstances make out an explanation he is entitled to an acquittal. AIR 1951 Kut 11 (11) (Pt B) (Pr 7).

—S. 96 — Surrounding circumstances rendering it likely that accused might have acted in exercise of his right of private defence—Omission on part of prosecution to explain the injuries on the person of the accused would normally be treated as a circumstance favourable to the defence. 1960 Jab L J 755 : 1960

M P L J 1235 : 1960 M P C 754 : I L R (1961) Madh Pra 573.

——S. 100—Plea of self-defence — Duty of Court.

If the plea of self-defence is taken, the duty of the Court is to show in its judgment the circumstance in which the right is said to have been exercised. Merely saying that the accused has exceeded the right of self defence without showing the circumstances in which he acted is not proper. 1958 Jab L J 257.

——S. 96 — Right of self-defence — Specific plea — Necessity.

Plea of right of self-defence need not be taken specifically, but there should be circumstances to raise such an inference or even reasonable doubt in favour of the accused that they might have in fact acted in exercise of their right of private defence. (1958) 2 Andh W R 627 : 1958 M L J (Cr) 942.

——S. 97—Plea of private defence — Accused pleading alibi—Plea if available.

A plea of self-defence is inconsistent with the express plea of alibi raised by the accused However if on the material placed on record, the plea of private defence could be made out consistent with the provisions of S. 105, Evidence Act, there is no justification for denying the benefit of it to the accused. 1961 (1) Cr L J 403 : 38 Mys L J 995 : ILR (1960) Mys 126 : A I R 1961 Mys 74 (80) (Pt C) (Pr 50) (DB).

——Ss. 97, 149 — Common plea of self-defence by five or more accused—Effect of.

The plea of self-defence means that the harm which the accused had inflicted on the alleged aggressors is not an offence because the circumstances entitled them to exercise the right of self-defence. If, therefore the plea of self-defence fails, the harm so caused would undoubtedly be a punishable offence. If, in addition, five or more accused have acted in concert in the purported exercise of the right of self-defence to which they were not entitled, there is no escape from the conclusion that they together constituted an unlawful assembly with the common object of committing the offence constituted by the harm inflicted by them Such an admission is implicit in the plea of self-defence. 1960 Cr L J 1472 : 38 Mys L J 701 : 1961 Mad L J (Cri) 374 ; I L R (1960) Mys 668 : AIR 1960 Mys 294 (295) (Pt A) (Pr 24) (DB).

——S. 96—Plea of private defence not taken in trial Court—This will not prevent High Court in appeal from giving benefit of such defence to the accused if evidence supports it. ILR (1951) Mys 445 : A I R 1952 Mys 10 (Pt A) (Pr 5) (DB).

——S. 96—Accused denying attack cannot claim right of private defence. A I R 1954 Nag 126 (127) (Pt A) (Pr 9).

——S. 96—Private defence—Absence of plea—Question can be gone into from proved facts.

The question of right of private defence can be examined from proved facts of a case even though the accused had failed to take any specific plea to that effect. (1963) 29 Cut L T 488.

——S. 96—Private defence— Reasonable doubt as to existence of—Accused cannot get benefit—Plea must fail.

If there is reasonable doubt of the existence of private defence the plea must fail.

The deceased who was running away with the split bamboo was being pursued by the accused with a wooden pole in hand. When the accused shouted that he would kill the deceased, the latter turned round and gave a stroke on the head of the accused with the split bamboo whereafter the accused gave a stroke on the head of the deceased with the pole as a result of which the deceased fell down, and while he was trying to get up the accused gave further 2 or 3 blows on the head which resulted in the death of the deceased. It was suggested that there was a quarrel in the house of the deceased and the accused pleaded right of private defence.

Held, that whatever might have happened inside the house the accused had no right to pursue the deceased who was running away. He sought an attack on himself by his own threatened attack on the deceased. The deceased had clearly therefore right of private defence to protect his own body subject to the restrictions contained in S. 99, I. P. C. The deceased caused only simple injuries and the right, which he had extended to causing any harm other than death. The assault by the deceased on the accused was therefore protected by right of private defence of his body and is not an offence. The deceased having committed no offence by assault on the accused, the accused had no right of private defence. (1963) 29 Cut L T 200.

——S. 96 — Right of private defence — It need not be pleaded specifically—Accused can take advantage of prosecution evidence.

The accused persons need not specifically plead right of private defence. The defence can build any case out of the prosecution. Thus if from the prosecution story such a right of private defence can be made out the accused are not precluded from doing so. AIR 1942 Mad 295, AIR 1960 T C 12, Foll.

Held that in the circumstances of this case there was no right of private defence of property or person and it did not arise even from the prosecution evidence. (1962) 4 Ori J D 323 : 1 East L R 231.

——S. 96—Right of private defence — On review of all evidence Court left in reasonable doubt whether the circumstances brought the case within any of the general exceptions—Accused is entitled to benefit of doubt Court having reasonable doubt as to whether accused were entitled to right of private defence of person — Accused is entitled to the benefit of such doubt See Criminal P C (1898), S. 367. A I R 1955 N U C (Punj) 4926 (DB).

——S. 97 — Reasonable doubt whether accused is entitled to benefit of right of private defence or not—Accused is entitled to get benefit of right. 1963 Raj L W 436 : ILR (1963) 13 Raj 789.

——S. 97 — Right of private defence not pleaded by accused —They can still rely on prosecution evidence to establish right. 1963 Raj L W 436 : ILR (1962) 13 Raj 789.

——S. 96— Plea of private defence —Accused should come out with defence squarely at earliest opportunity —If evidence of prosecution itself shows that accused had such right accused would be given benefit of doubt. AIR 1955 N U C (Raj) 295.

——S. 96—Private defence —Plea of.

An accused person can under certain circumstances be allowed the benefit of the plea of self-defence on the basis of prosecution evidence itself whether or not he has specifically taken that plea at the trial. 52 Cri L J 1034 : A I R 1951 Raj 129 (130) (Pt A) (Pr 6) (DB).

——S. 97—Benefit of doubt —Self-defence — Criminal P. C. (1898) S. 367.

Where the prosecution party were armed with sticks only while at least one of the accused persons was armed with an axe there was no necessity for the use of axe and no benefit of doubt can be given on the ground of want of evidence as to who commenced the fight. The accused using the axe cannot

be said to be acting in self-defence also. 3 Sau L R 59 : AIR 1950 Sau 11 (11, 12) (Pt B) (Pr 3) (DB).

——S. 96—Plea of right of private defence—It should be seen whether accused had been aggressor.

In a case where the accused pleads the right of private defence it is the duty of the Court to see whether the accused had been the aggressor. An act done in the exercise of the right of private defence is not an offence and does not, therefore, give rise to any right of private defence in return. A I R 1917 Low Bur 12 (1), Rel on. 1955 Ker L T 638 : 1956 Cr L J 276 : A I R 1956 T C 89 (89, 90) (Pt A) (Pr 2) (DB).

——Ss 96 and 300, Exception 2 — Defence of right of self-defence —Accused letting in no evidence can raise it.

Even if the accused lets in no evidence he is entitled to raise the plea of self-defence provided that can be compelled out from the prosecution evidence. 51 Cri L J 653 : AIR 1950 Trav-Co 12 (13) (Pt C) (Pr 4) (DB).

1 (C). Onus.

See also Note 8 (E) and Evidence Act (1872), S 105.

—— S. 96 — Pleas of self-defence — Onus on whom indicated. See Evidence Act (1872), S. 105. 1961 (1) Cri L J 15 : AIR 1961 All 38 (DB)

—— S. 96 — Evidence Act (1872), S. 105 — Plea of private defence — Onus—Evidence — Held no question of right of private defence arose on facts of the case. See Evidence Act (1872), S. 105. (1962) 2 Andh L T 291.

——S. 96 — Onus — Burden to prove exception — Accused need only create reasonable doubt — Burden is not the same as on prosecution. See Evidence Act (1872), S. 105. 55 Cri L J 774 : AIR 1954 Cal 258 (DB).

——S. 96 — Right of self-defence — Burden of proof.

Though the accused has not actually pleaded self-defence it is open to him to show from the prosecution evidence itself that the accused had caused the fatal wound under such circumstances as gave him the right of private defence. The burden of proving the right of private defence is on the accused. If he fails to establish it, he would be criminally responsible for the injury caused by him to the deceased. (1961) 2 Gui L R 168 : 1961 (1) Cri L J 57 : AIR 1961 Guj 11 (15) (Pt D) (Prs 22, 23) (DB).

—— S. 96 — Right of self-defence — Duration of.

In order that the right of private defence may be established, it is not sufficient for the accused merely to establish that the right had commenced. He must also further establish that the right had not ended. In other words, in order that the right of private defence may be held to have been established, it is necessary for the defence to prove that reasonable apprehension which had been created in the mind of the accused as a result of the act of the aggressor, had continued at the time when the impugned injury was caused. 1961 (1) Cri L J 57 : (1961) 2 Gui L R 168: AIR 1961 Guj 11 (15) (Pt E) (Pr 23) (DB).

——Ss. 99 and 100 — Right of private defence of person — Burden of proof.

When an accused relies on the Exceptions relating to the right of private defence of person, it is for him to show the circumstances under which he was entitled to exercise the right of private defence to the extent claimed by him and also to show that the circumstances were not such as to lead one to the inference that he had exceeded the right of private defence. (1960) 1 Guj L R 151 : (1961) 2 Guj H C R 10 : 1961 (1) Cri L J 813 (Guj).

——Ss. 96, 97 and 100 — Accused putting up plea of right of private defence — Accused having injuries on his body — Necessity in such cases to find out who is aggressor — Prosecution eye-witnesses found unreliable — Failure of prosecution to call and examine material witness - Doubt whether defence is not probable and true — Benefit of doubt to be given to accused. See Evidence Act (1872), S. 3. 1965 (1) Cri L J 173 : AIR 1965 Ker 44 (DB).

——S. 96 — Plea of justification — Such plea raised by accused in his statement under S 342, Criminal P C. — Burden of proof is on accused. See Evidence Act (1872), S. 105. 1964 (2) Cri L J 297 : AIR 1964 Ker 222.

——S. 96 — Private defence — Evidence Act (1872), S. 105 - Scope and extent of presumption under — Plea that case falls under general or special exceptions in Indian Penal Code Burden is on the accused — Standard of proof required. See Evidence Act (1872), S. 105. 1961 Ker L J 58.

——S. 96 — Burden of proof — Self defence, plea of — Onus is on accused—(Evidence Act (1872), S. 105) — (Penal Code (1860), S. 300). AIR 1955 NUC (Madh B) 1557 (DB).

——S. 96 — Burden of proof — Plea of self-defence—Onus is on accused and is heavy. AIR 1955 N U C (Madh B) 1265.

——Ss. 97 and 302 — Burden of proof — Reasonable doubt arising on evidence and statement under S 342, Criminal P. C. — Benefit of doubt. AIR 1949 Nag 163. Foll. 1959 M P L J (Notes) 101.

——S. 100 — Plea of self defence — Burden lies on accused to prove circumstances to establish his case — To discharge burden it is sufficient if he makes out a prima facie case — Prosecution evidence leaving accused's guilt in doubt Court must give benefit of doubt to accused and acquit him even though he does not prove beyond reasonable doubt the existence of such circumstances See Evidence Act (1872), S. 106. 1964 (2) Cri L J 425 : AIR 1964 Mad 418 (DB).

——S 97 — Self-defence — Burden of proof.

Though the plea of self defence need not be specifically pleaded but can be spelt out or supported on the strength of the material on record, under S. 105 of the Evidence Act, the burden of proving the existence of circumstances entitling the accused to the right of self-defence is upon the accused and the Court shall presume the absence of such circumstances. It is therefore, for the accused to place necessary material on record either by themselves adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution 1960 Cri L J 1472 38 Mys L J 701 : 1961 Mad L J (Cri) 374 : ILR (1960) Mys 668 : AIR 1960 Mys 294 (296) (Pt B) (Pr 26) (DB).

——S 96 — Plea of right of private defence.

Where a plea of right of private defence has been raised or pleaded by the accused it is for the accused to adduce evidence in support of such plea. (1960) 38 Mys L J 603.

—S. 97 — Right of private defence of property — Onus to prove is on accused — Nature of proof required — Making out prima facie case of exception— Meaning of - Evidence Act (1872), S. 105.

Though under S 105, Evidence Act, the onus is on the accused to prove the existence of circumstances bringing his case within any of the general exceptions, it is well settled that the burden on the accused is not of the same nature as one on the prosecution to establish existence of the offence beyond reasonable doubt The nature of the burden on the accused to bring his case within the general exceptions is analogous to that resting on the plaintiff in civil cases.

The juristic principle in civil matter is that the preponderance of probability is the basis of success It is also well accepted that the accused need not prove the general exception by adducing positive evidence. The same can be established through the prosecution evidence also. If from the entire evidence on record it is probable that the defence version may be true, they are entitled to a verdict in their favour even though the truth of the version might not have been proved beyond reasonable doubt. The dictum therefore, 'that the accused need merely make out a prima facie case' means nothing else other than that a preponderance of probability is to be established by the accused as in civil cases. 1964 (2) Cri L J 696 : AIR 1964 Orissa 262 (265) (Pt C) (Pr 10) (DB).

——Ss. 96, 97, 350, Exception 2 — Right of private defence — Standard of proof necessary to establish right

The determination of the question whether there exists the alleged right of private defence is always a question of fact. It is always the accepted principle that the standard of proof necessary on the part of the prosecution to establish the guilt of the accused beyond all reasonable doubt is not what is required of the accused persons to establish their plea under any of the general exceptions of the Penal Code. But if the Court, after review of the entire evidence on record, finds that the plea is a plausible theory and if the Court entertains a reasonable doubt in its mind as to the guilt of the accused, the accused is entitled to the benefit even though the accused person has not been able to fully establish his plea of self-defence or any other plea under the general exceptions in the Penal Code. There are two important facts in every criminal trial that weigh heavily in favour of an accused person, one is that the accused is entitled to the benefit of every reasonable doubt and the other, an off-shoot of the same principle, that when an accused person offers a reasonale explanation of his conduct, that, even though he cannot prove his assertions they should ordinarily be accepted unless the circumstances indicate that they are false. AIR 1956 S C 217, Foll. 29 Cut L T 15 : 1963 (1) Cri L J 700 (Orissa)

——S. 96—Plea of exception—Evidence adduced failing to establish plea—Plea taken along with prosecution evidence—Evidence as a whole creating reasonable doubt as to guilt of accused—Accused is entitled to acquittal. See Evidence Act (18 2), S. 105. 1964 (1) Cr L J 346 : AIR 1964 Pat 138 (DB).

——S. 96—Burden of proof — Plea of private defence —Accused must prove it — He can take advantage of such right if it can be estabilised from prosecution evidence itself — (Evidence Act (1872), S. 105). AIR 1955 N U C (Pepsu) 3280 (DB).

——S. 96—Onus — Prosecution case disclosing doubt —Accused is entitled to its benefit even though he has not raised specifically the defence under exception. See Evidence Act (1872), S. 105. AIR 1955 N U C (Raj) 267.

2. Private defence of body—S. 97.

(A) "Body of any other person."

(B) Right when not available.

2. Private defence of body—S. 97.

——S. 97 — Applicability—Accused threatening deceased.

The law does not confer a right of self-defence on a man who goes and seeks an attack on himself by his own threatened attack on another, an attack which was likely to end in the death of that other. The right of self defence conferred by the law or preserved by the law for an individual is a very narrow and circumscribed right and can be taken advantage of only when the circumstances fully justify the exercise of such a right 1958 All Cri R 5 : I L R (1957) 1 All 43 : 1958 All W R (H C) 5 : 1957 C L J 498 : A I R 1957 All 317 (318) (Pt A) (Pr 6) (DB).

——Ss 96, 97 and 141 Private defence of body and property — Unlawful assembly— Case on facts. AIR 1955 N U C (All) 3285 (DB).

——S. 97—Applicability — Trespasser—Right of private defence of body.

Even if a person is a trespasser and has wrongfully cultivated a certain portion of a field of which he was bound in law to deliver possession to another person, the latter person has no right to take law into his own hands and beat the former in order to dispossess him from the field If the latter person is an aggressor there is no doubt that the former person, though a trespasser, has a right of self-defence. 1953 All W R (HC) 424 : 1953 All L J 605 : 1954 Cri L J 54 : AIR 1954 All 35 (37) (Pt A) (Pr 7).

——Ss. 97, 99, 100 — Private defence of body—Persistent assault with stick on accused—Person assaulted striking knife blow to ward off danger — Held, right of private defence not exceeded. 52 Cri L J 1246 : AIR 1951 Bhopal 2 (4) (Pr 8).

——Ss. 100, 97 — Right of private defence—Two parties involved in fight — Court must ascertain who started it and who gave the first blow — The party meeting the aggression must be deemed to have acted in self-defence. AIR 1955 N U C (Madh-Bha) 3351

——Ss 97, 302 and 307 — Right of private defence—Object and effect of.

The right of private defence has been provided for self-protection. Therefore, if by exercise of this right a person escapes death or grievous hurt it cannot be said that he had no apprehension that such a consequence would follow even if he did not act in self-defence. Other circumstances have also to be considered. 1958 M P L J (Notes) 119.

——Ss. 97, 96, 106, Pre — Private defence of person and property — Interpretation—Use of English precedents not to be permitted; Observations of Ross J., in AIR 1928 Pat 433, Dissented from — See Penal Code 1860), Preamble. 1959 Cri L J 71 : AIR 1959 Pat 22 (DB).

2(A). "Body of any other person."

——Ss. 96, 97, 99 — Prosecution party being aggressors — Accused party has right of private defence — Extent of right depends upon attitude of prosecution party.

If the prosecution party has assembled with the object of chastising the accused it would not be unlawful for any person to go to the aid of the accused to rescue him. But the degree of force to be used would depend upon the temper, disposition and determination of the prosecution party. If the accused persons without any provocation or cause fired at the deceased and injured other persons certainly their acts cannot in any view be justified and they would be guilty of riot attempt to murder and hurt, whether grievous or otherwise. ILR (1959) Andh Pra 797.

——S. 97 — Right of private defence of body—Right may be exercised to defend body of other person also.

For the exercise of right of private defence by a person, it is not necessary that the person himself must have been the target of assault. Though he himself may not be the target of assault, he has a right of private defence of the body of another under the law. (1964) 6 O J D 177 : 30 Cut L T 468.

——Ss. 97, 304 Part I, 302, 324—Exceeding right of private defence — Attack by B followed by tussle with deceased — Deceased gripping his armed hand in order to save himself — Fatal stab attack by A while tussle still going on — Conviction of A under S. 304, Part I—If proper.

When the deceased was proceeding homewards, the two accused A and B approached him, the second accused B spoke some challenging words and then attempted to stab him. But the deceased gripped the hand that held the knife and a tussle ensued. While the tussle was going on and the deceased was still holding the armed hand of B the first accused A stabbed the deceased fatally. During the tussle some minor injuries were sustained by the deceased from the knife in the hand of B. A also sustained some minor injuries. The Sessions Judge found that A had a right of private defence but he exceeded it and convicted him under S. 304, Part I, while B was convicted under S. 324.

Held, that the offence disclosed against A was clearly one of murder punishable under S. 302, as he had no right of private defence at all. When B himself had no right of private defence as against the deceased, a third party like A had no right to go to his succour and in such an attempt inflict fatal injuries on the deceased

In order that S. 97 should be applicable, first of all there should be an attempt to commit an offence against the person who claims to have acted in self-defence or against third party for the alleged purpose of saving whom, he acted. Here the deceased was himself exercising his right of private defence and there was no attempt to commit any offence by him as against A or B. Thus the accused cannot invoke S. 97, I. P. C., in support of their action.

As regards B clearly an attempt to commit an offence under S. 324 has been made out. ILR (1956) T C 615.

2 (B). Right when not available.

——S. 96 — Illegal seizure of cattle purporting to be under S. 10, Cattle Trespass Act — Does not amount to theft — Owner of cattle has no right to use force to rescue them—Persons seizing cattle held committed no offence in resisting attack by owner's party with arms and lathis. See Cattle-Trespass Act (1871), S. 10. 1965 (2) Cri L J 18 : AIR 1965 S C 926.

——S. 96—Initial firing by accused—Police firing in self-defence—Each of accused again firing in self-defence—Each of accused again firing towards police —Initial firing held was with common intention to overpower police -Firing by police held did not give accused right to act in self defence — Accused held could be convicted under S. 307. See Penal Code (1860), S. 34 1963 All W R (HC) 743.

——S. 97 (1) — Applicability — Private defence of person — Wife dragged forcibly out of her father's place by her husband against her will — Accused going to her rescue and stabbing husband with knife resulting in death—Offence Plea of private defence of person held not available. See Penal Code (1860), S. 100(6). 1957 Cri L J 1195 : AIR 1957 All 714(DB).

[Reversed in AIR 1960 S C 67.]

——S. 97 — Right of self-defence—When not available.

Where the deceased, who had a lathi with him, on hearing the alarm raised by his cousins who were being beaten by the accused on a chabutra, ran towards the chabutra to help his cousin and when he came close to the chabutra, the accused who were on the chabutra attacked him with lathis and felled him down on the ground and the deceased died shortly afterwards.

Held, that the accused had no right of self-defence, because they themselves were the aggressors; and it could not be argued that because the accused had already finished the beating and the cousins were lying injured over the chabutra therefore the deceased had no right to go there with lathi. (1957) All W R (H C) 526.

——Ss. 98, 103—Right of private defence of property —No right of defence against lawful act of self-defence — Attempt to house trespass at night — Intruders not disclosing identity in spite of repeated challenges from inmates — House-owner hitting one of intruders with arrow — Accused (other intruder) not entitled to any right of self-defence. See Penal Code (1860 S. 103. 1962 (1) Cri L J 717 : AIR 1962 Guj 203 (DB).

——S. 97 — Private defence of body—Accused waylaying deceased and challenging him — Deceased striking accused with stick — Accused hitting deceased with lethal weapon and causing death — Accused held had no right of private defence.

Where the accused who was carrying a lethal weapon waylaid the deceased and challenged him saying why he had taken false oath, and on being thus accosted by the accused the deceased struck the accused with his stick and then the accused hit the deceased in return and thereby caused his death :

Held that the accused not being within his right in standing up to the deceased could not claim a right of private defence. 51 Cri L J 749 : AIR 1950 Kutch 30 (32) (Pt C) (Pr 16).

——S. 100 — Accused himself making aggressive assault and inviting trouble — He has no right of private defence.

When there is no evidence on record to suggest that before the assault on the opposite party was opened by the accused, any of them made an attempt to use either the bows and arrows or the knives, and, in fact it was the accused who invited the trouble and began an unwarranted and aggressive assault, that action cannot be said to have been done in exercise of right of private defence of person. (1965) 7 Orissa J D 198 : 31 Cut L T 804 : ILR (1965) Cut 369.

——S. 97 — Private defence of body — Parties exchanging blows—Aggressor party cannot claim right of self-defence. 1964 (2) Cri L J 567 : AIR 1964 Orissa 251 (253) (Pt A) (Pr 8).

——S. 97 — "Against any offence affecting human body".

The matter of hurling of abuses by a woman at her enemy on an exciting occasion as that on an adult sitting naked in front of her for the purpose of easing is not serious enough to justify a reasonable man to proceed to commit criminal trespass with the object of assaulting a young widow after breaking into her house. ('51) 17 Cut L T 220: AIR 1952 Orissa 37 (41) (Pt E) (Pr 9) (DB).

——S 97 — Private defence — Right of — Extent — Altercation between A and B — B calling C—C giving lathi blow to A who leaving B, grappling with C—D A's brother, giving lathi blows to C as a result of which C dies—Held, even assuming that D had right to defend his brother's person, there was no occasion for D to intervene and give the blows to C in defence. 51 Cri L J 844 : AIR 1950 Raj 10 (13) (Pt D) (Pr 8) (DB).

3. Private defence of property.

(A) Right when not available.

(B) Defence of other people's property.

(C) Trespasser in possession.

See Note 3.

3. Private defence of property.

——S. 97 — Applicability — Forcible possession by rank trespasser—Right of private defence against true owner.

Before an accused person can set up the plea of defence of property in answer to a charge of homicide, he must prove that he had a right of property which had to be defended. S. 97, will not come to the aid of a trespasser, after he has turned out the rightful occupier by force. A trespasser who is in peaceful and settled possession of the property in dispute is entitled to defend his right of possession against physical attack. But a trespasser does not acquire this right from his own act of trespass or taking forcible possession. A trespasser acquires the right to defend his possession against physical attack only if he has come to it by the acquiescence, express or implied, of the rightful owner and his possession has become peaceful and settled. The question of lapse of time becomes relevant only if the rightful owner or occupier sits quiet and does nothing to assert his rights even after knowing that the trespasser is in possession of his property. AIR 1949 All 274 and AIR 1949 Lah 128 and AIR 1928 Pat 124 and 1884) 51 L T 746, Relied on; AIR 1949 All 564, Distinguished.

A person does not lose his right to regain his property from a trespasser merely because, before taking any action, he informed the guardians of law and order of what was taking place under their regime. This cannot be interpreted as acquiescence on his part. The law permits citizens to defend their property but does not insist, as a condition of the exercise of this right, that it should be exercised behind the back of the authorities. 1960 All Cr R 399 : 1960 All L J 782 : 1960 All W R (H C) 607 : 1961 (1) Cri L J 15 : AIR 1961 All 38 (41 to 43) (Pt E) (Prs 21, 23, 25, 27) (DB).

——S. 97 — Private defence of property — Accused taking loaded bullock-carts through fields in which crops were standing — Right of field owners. 1959 Cri L J 1258 : AIR 1959 All 690 (691, 692) (Pt A) (Prs 13, 14) (DB).

——S. 97 - Deceased's father stating that his holding and that of accused were joint—Statement is slender basis to support right of private defence. AIR 1955 NUC (All) 4169 (DB).

——S. 97 — Criminal P. C. (1898), S. 297 — Explaining law of defence of property to the Jury — Duty of Judge pointed out. See Criminal P. C. (1898), S. 297. 1953 Cri L J 1377 : AIR 1953 Cal 602 (DB).

——S. 99 - Decree for possession of a plot, in favour of a member of accused's party — Accused's party going there to fence it out stopped by complainants —Free fight resulting and one of complainant's party killed by gun shot. Accused held did not exceed his right of self defence. See Penal Code (1860), S. 97. 1955 Cri L J 1179 : AIR 1955 J & K 9 (DB).

——S. 97—Private defence of property — Right does not extend to enforce or vindicate right to possession of property.

In the exercise of the right of private defence in respect of property it must be established that the accused was in physical possession of the property so that he was entitled to resist or repel aggression in order to maintain that right. No person is however entitled to vindicate his right to possession of any property by resorting to criminal force. 1963 (2) Cri L J 570 : 1963 Jab L J 889 : ILR (1964) Madh Pra 419.

——S. 97—Decree-holders trying to secure possession of a house not included in decree— Accused forcibly resisting decree-holders to take possession — Accused entitled to defend his right to property. 1963 M P L J (Notes) 219.

——S. 97 — Applicability — Private defence of property — Obstruction by servient owner — Rights of dominant owner indicated. See Easements Act (1882), S. 24. 1958 Cri L J 1316 : AIR 1958 Madh Pra 341.

——S. 97—Dispute concerning right to usufruct of trees—Right of private defence when available.

Where in a case arising out of a dispute concerning the right to the usufruct of certain mango trees, the accused claims the right of private defence, it is necessary to decide whether the right to the usufruct belongs exclusively to the accused. It has to be investigated and decided whether the other party committed any act which is an offence against body or property of the type described in S. 97, against which the section confers upon the accused a right of private defence. 1961 (1) Cri L J 403 : 38 Mys L J 995 : ILR (1960) Mys 1126 : AIR 1961 Mys 74 (81) (Pt E) (Pr 52) (DB).

——Ss. 97, 300, Exception 2 — Private defence of property — Right when not available.

Where a land dispute has led to a mutual assault between the rival parties, resulting in deaths of some of the members of the prosecution party and simple and grievous hurts to others and the defence party claims a right of private defence, location of the place of assault and sequence of events, are the two vital considerations for fixing culpability.

Where it is evident that the incident was a continuous one and in different stages, and the place of fatal assaults was 400' from the place of the origin of the trouble, the distance between the two places is a circumstance against the plea of private defence. 29 Cut L T 15 : 1963 (1) Cri L J 700 (Orissa).

——Ss. 96, 97 and 104 — Deceased in possession of disputed land sowing bangi variety of paddy 4 or 5 days prior to occurrence— Accused, claiming to have purchased land coming for first time on date of occurrence and starting ploughing land and not heeding to protests by deceased — Deceased giving blow with lathi on head of accused causing simple injury —Accused dealing fatal blow to deceased thereafter —Right of private defence of property held available to deceased — Accused held not to have right of private defence of person. See Penal Code (1860), S. 302. (1963) 29 Cut L T 245.

——Ss 97 and 96—There is nothing in Ss. 96 to 106 which lend support to the view that a person entitled to exercise the right of private defence of property cannot exercise it until he has failed after taking other reasonable steps to avoid causing harm to the assailant. AIR 1959 Pat 22, Rel. on. 25 Cut L T 500 : ILR (1959) Cut 453.

——S. 97 —Right of private defence of property and possession — Assault on persons in peaceful possession of property — If gives rise to exercise of right.

B party was established to be in possession of certain plot of land. M party trespassed on the land and ploughed it. A case of criminal trespass was started and an order under S. 144, Criminal P. C. prohibiting M party from entering upon the land was passed. On the date of occurrence B party went to the field for the purpose of removing the Mung crop and carrying it to their house. They went there with carts and Bahungis. When they were in the act of removing the crop, the M party went there armed with lathis and one person of the B party who was on the land at some place was injured. In the fight, six persons of the M party were injured and one of them died later on. On being charged with an offence under S. 147 and S. 323, B party pleaded right of private defence of property and person.

Held, that a claim of right on the part of the M party did not in any way militate against the actual possession of the B party. (2) that under these circumstances, the explanation offered by the accused that they acted in exercise of the right of private defence of property and person was a reasonable explanation and it was made out even on the basis of the prosecution evidence. AIR 1945 Pat 283, Rel. on. (1958) 24 Cut L T 332.

——S. 97 — Applicability — Right of private defence —Test of—Considerations.

In order to determine whether the accused acted in exercise of the right of private defence of property and person, it is absolutely necessary to find out who started the assault first.

Where in a murder trial the defence was that it was the police party who initiated the attack.

Held, that it was the position in which the lathis, the rifles and the revolvers were held at the time of the march by the police that had to be looked into in determining whether the accused had any right of private defence. 23 Cut L T 88 : 1957 Cri L J 769 : AIR 1957 Orissa 130 (137) (Pt C) (Pr 16) (DB).

——S. 97— Attack in desperation — Right of self-defence.

Where the aggressors were the police party and the accused who were 9 in number began the attack in desperation, finding 51 persons of the police party advancing against them with loaded rifles; revolvers and lathis;

Held, that the attack by the accused, in the circumstances, was in protection of their bodies and property. 23 Cut L T 88 : 1957 Cri L J 769 : AIR 1957 Orissa 130 (139) (Pt D) (Pr 18).

——Ss. 96, 97 - Person informed that party of accused were invading his property by cutting away bamboos —Person is entitled to go suitably armed to the spot and object and if he is attacked, to defend himself by use of weapons. (1964) ILR 43 Pat 156.

——S. 97 — Private defence of person and property — Interpretation — Use of English precedents not to be permitted : Observations of Ross J., in AIR 1926 Pat 433, Dissented from. See Penal Code (1860), Preamble. 1959 Cri L J 71 : AIR 1959 Pat 22 (DB).

——S. 97 — Applicability — Both parties armed — One party in actual possession — Effect.

If neither party can be held to be in actual possession of the property in dispute and if both parties go armed to have a trial of strength, then neither party can be held to have acted in exercise of the right of private defence irrespective of whether one or the other party was the aggressor or the first to attack. If, however, a party is held to be in actual possession, it cannot be deprived of its right of private defence of property simply because it goes armed to defend its property after seeing the other party committing, or on feeling a reasonable apprehension that the other party would commit any of the offences referred to in the second clause of S. 97 of the Penal Code. The right has undoubtedly to be exercised within the limits and subject to the restrictions prescribed in the Penal Code. For instance, it cannot be exercised if there is time to take recourse to the protection of public authorities. 1957 B L J R 756 : 1959 Cri L J 71 : AIR 1959 Pat 22 (26) (Pt B) (Pr 17) (DB).

——S. 97 — Private defence of body—Conditions.

There is nothing in Ss. 96 to 106 of the Penal Code which can lend support to the view that a person entitled to exercise right of private defence cannot exercise it until he has failed after taking other reasonable steps to avoid causing harm to his assailant. 1957 B L J R 756 : 1959 Cri L J 71 : AIR 1959 Pat 22 (28) (Pt F) (Pr 27) (DB).

——S. 97 — Private defence of property.

A person in actual and peaceful possession of property is entitled to maintain that possession even by use of force if necessary. The question whether he had or had not the right to possession is immaterial.

On the other hand, the possession which a trespasser is entitled to defend against a rightful owner, must be a settled possession extending over a sufficiently long period indicative of acquiescence on the part of the true owner. A casual act of possession or mere entry on a vacant part of the land cannot have the effect of interrupting the possession of the rightful owner. He cannot therefore claim right of defence of property. ILR (1955) Pepsu 665 : 1955 Cri L J 1617 : AIR 1955 Pepsu 162 (165) (Pt C) (Pr 11) (DB).

——Ss. 96 and 97 — Trespasser in possession of field for about two months — Right of private defence.

When once a person has taken possession of, cultivated and sown the field and remained in possession of it for a couple of months, another person even though he was the owner is not entitled to take the law into his own hands and use force in ousting the former person. He had ample time to have recourse to the protection of public authorities. Instead of having it, if he goes to the field and uproots the crop there he is himself liable for committing criminal trespass and mischief, and will not, therefore, be entitled to the right of private defence of property. In such a case the latter person having been an aggressor and the former person, whose crop was being uprooted having no time to have recourse to the protection of the public authorities the former person even if he was a trespasser had a right to defend the property and himself. AIR 1927 Lah 705 and AIR 1954 All 35, Relied on. 1959 All W R (Sup) 52 : 1959 All Cr R 196 : 1959 Cri L J 1358 : AIR 1959 Punj 570 (571) (Prs 6, 8, 9).

——Ss 97 and 378 — Seizure of cattle not trespassing on land with intention to impound without owner's consent, is theft as wrongful loss is caused to the owner — Owner has right of private defence of property.

The taking away of the cattle, which have not trespassed and have not caused damage to the crops, to the cattle pound, without the consent of the owner, would amount to theft even though the person taking them may not have the intention of having any wrongful gain to himself. Such taking away would be dishonest because it would mean deprivation of cattle to the owner and consequently wrongful loss to him. That being so, the owner has a right of private defence of property : AIR 1959 Raj 124 and AIR 1963 Orissa 52 and AIR 1946 Nag 221 and AIR 1947 Lah 380 and AIR 1963 S C 1094, Rel. on; AIR 1943 Oudh 280, Dissent from. 1964 Raj L W 627 : 1965 (1) Cri L J 476 : ILR (1964) 14 Raj 1149 : AIR 1965 Raj 72 (73) (Pr 7)

——Ss. 97, 100 149 — Private defence of person and property — Land dispute — Clash between rival parties — Member of one party exceeding right of private defence — Constructive liability of other members of that party under S. 149.

Where in criminal case arising out of a land dispute which has led to a clash between two rival parties, it is found that the accused party had the right of private defence of property and person, the fact that one of its members has exceeded the right of private defence does not turn it into an unlawful assembly and make the member exceeding the right of private defence a member of an unlawful assembly, and he can only be convicted and punished for the individual act which he himself has done in excess of the

right of private defence. The other members of the accused party, therefore, could not be constructively held liable under S. 149, Penal Code, if any of them exceeded the right of private defence. AIR 1924 Pat 388, Dissent from; 39 Cal 896. Foll. 1962 Raj L W 657 : ILR (1962) 12 Raj 553 : 1963 (1) Cri L J 712.

——S. 97 — Possession of land — Defence of against trespasser — Rightful owners of land do not lose their possession particularly on an open piece of land merely because of a single act of trespass. See Penal Code (1860), S. 441. 1958 Cri L J 222 : AIR 1958 Raj 52 (DB).

——Ss. 97 and 99 — Party claiming possession attacked by party in possession — Determination to fight — Self-defence, plea of whether available, discussed. See Penal Code 1860), S. 141. 1958 Raj L W 505.

——Ss. 96, 97 and 100 — Accused in lawful possession of his field — Deceased and his party a king accused not to plough his field — Upon accused's refusal to comply, deceased aiming a lathi blow at accused — Accused picking up a lathi lying on spot and giving only one blow to the deceased resulting in his death — Accused held was protected by right of private defence of person as well as property. Case law referred. 1953 Raj L W 116 : AIR 1955 N U C (Raj) 1372.

——Ss. 97 and 441 — Private defence of property — Attack by trespassers.

A mere trespasser cannot, by the very act of trespass; immediately and without acquiescence, give himself what the law understood by possession against the person whom he elects and drive him to produce his title.

Where the accused were attacked by the trespassers and they had no time to approach the public authorities the trespassers could not convert their criminal trespass into 'possession' so as to drive the accused to prove their title and they are entitled to use force to ward off the attack which was delivered on them by the trespassers. 7 Sau L R 142 : 1955 Cri L J 77 : AIR 1954 Sau 156 (158) (Pt B) (Prs 10, 11) (DB).

——Ss. 97, 425 and 429 — To constitute offence of mischief existence of requisite knowledge or intention to cause wrongful loss is essential — Buffalo trespassing on field of accused — Accused assisting his daughter in driving it away — Accused throwing stone at buffalo and hitting it while it was in his field — Death of buffalo — Held, no offence of mischief — Accused held within his right to protect property from trespass. 1953 Cri L J 1350 : AIR 1953 Sau 158 (159) (Pr 2).

——Ss. 97, 323, 326 — Accused party having dao and lathis and complainant's party having lathis with them — Fight taking place in the field of one of the accused — Held, that by inflicting injuries by means of dao and lathis the accused must be held to have known or to have reason to believe that they were likely to cause hurt to the other side — But the same took place in the course of fight between two parties in which some of the accused also got injured — Again as occurrence took place on the land of accused where party of complainant had entered accused had right of private defence of property and they could not be convicted under Ss. 323 and 326. 1964 (2) Cri L J 213 : AIR 1964 Tripura 45 (48) (Pt D) (Pr 11).

3(A). Right when not available.

——S. 97—Cultivatory possession—Person uprooting crop sown by person in cultivatory possession and sowing his own crop cannot claim right of private defence. 1960 All Cr R 399 : 1960 All L J 782 : 1960 All W R (HC) 607: 1961 (1) Cri L J 15: AIR 1961 All 38 (42) (Pt F) (Pr 24) (DB).

——S. 97—Trespasser in possession of land — Possession not acquiesced in by true owner — True owner regaining possession in absence of trespasser - Trespasser has no right of private defence. 1960 All Cr R 399 : 1960 All L J 782 1960 All W R H C) 607: 1961 (1) Cri L J 15 : AIR 1961 All 38 (44) (Pt G) (Prs 33, 34) (DB).

——Ss. 97, 326/149 and 304 (1)—Deceased ploughing field of accused — On show of force by accused deceased stepping out and retreating — Deceased caught hold of by neck and speared—No right of private defence of property—No question of excessive exercise of right—Accused stabbing with spear guilty under S. 304 (1)—All guilty under S. 326/149. A I R 1956 S C 654, Relied on. 1960 All Cr R 399 : 1960 All L J 782 : 1960 All W R (H C) 607 : 1961 (1) Cri L J 15 : AIR 1961 All 38 (45) (Pt H) (Prs 38, 39) (DB).

——S. 97 — Applicability — Accused aggressor—No right of defence. See Criminal P. C. (1898), S. 154. 1959 All L J 340 : ILR (1959) 1 All 499.

——S. 97—Applicability - Right of private defence to property—When available—(Criminal P. C. (1898), S. 145).

When in a proceeding under S. 145, Criminal P. C., an ex parte order of possession is made in favour of A then merely because the order of the Magistrate in favour of A is ex parte, it cannot be said it has no legal effect and that one of the parties to the proceedings can ignore it and beat A when she went to cultivate the disputed land in pursuance of this order. The party has no right of private defence of property. The proper course for such a party is to have that order set aside. 1958 All L J 193 : 1958 All W R (HC) 105 : 1958 Cri L J 710 : ILR (1958) 1 All 306 : 1958 All Cr R 190 : A I R 1958 All 432 (435) (Pt B) (Pr 13) (DB).

——S. 97—Private defence of property — Accused claiming title and dissuading deceased and his son from digging manure pit—Altercation and abuses—Accused leaving and immediately returning with spear and lathis and assaulting deceased and his son who were unarmed—Accused held had no right of private defence of property—If they had, they exceeded it. AIR 1955 NUC (All) 3537 (DB).

——S. 97—Applicability.

The right of private defence only arises against acts which constitute an offence except in certain specified circumstances. The right of private defence of person extends to acts which amount to an offence affecting the body of the person exercising the right of the body of any other person The right of private defence of property covers cases of acts which are offences falling, under the definition of 'theft' 'robery' 'mischief' or 'criminal trespass' or an attempt to commit any of these.

Where the judgment-debtor offered resistance to the decree-holder who was ploughing the land of which he had obtained delivery of possession in execution of a decree, even if the judgment-debtor had cultivated the fields for a short time after the delivery of possession he has no right of private defence against the decree-holder. 1953 All W R (H C) 381 : 1953 All L J 430 : 1954 Cri L J 26 : A I R 1954 All 39 (41, 42) (Pt B) (Prs 12, 14, 15) (DB).

——Ss. 96, 147, 425, 339—Accused claiming right of easement to pass over inner courtyards of complainant's house through gap in complainant's boundary wall—Right disputed by complainant — Complainant trying to close gap—Complainant's act does not amount to mischief or wrongful restrain — No right of private defence arises in favour of accused party Accused party using criminal force to prevent closing of gap are guilty of rioting. 1963 (1) Cri L J 46 : AIR 1963 Cal 3 (5) (Pt B) (Prs 10, 11) (DB).

——S. 97—Complainant entering into land of accused to effect repairs to fence serving as boundary between lands of parties without intention to annoy, intimidate or insult accused—Act does not amount to criminal trespass so as to give accused right to inflict injury on complainant. See Penal Code (1860), S. 441. ILR (1964) Cut 706.

——Ss. 97 and 96—Right of private defence — Complainant in possession of disputed land—Accused party assaulting and injuring complainant party on disputed land — Complainant's son dying due to injuries on head — Accused party being aggressors, right of private defence of person and of property held not available to them.

Where the complainant was in possession of the disputed land, and the accused persons, armed with lathis, after committing aggression upon the land, assaulted and injured complainant party and killed complainant's son.

Held, that accused persons being aggressors had no right of private defence of person or property. Even in a case of disputed possession where neither party can be held, to be in actual possession of the disputed property, if both parties go armed with lathis for a trial of strength, then neither party can be held to have acted in exercise of his right of private defence irrespective of whether one or the other was the aggressor. Similarly, if a party is found to be in actual possession, he cannot be deprived of his right of private defence of property merely because he goes armed to defend his property. No doubt, the exercise of such right is subject to the limitation prescribed by the Penal Code, such as, if there is time enough to take recourse to protection of public authorities, etc. (1964) 30 Cut L T 556.

——Ss 96, 97, 378—Illegal seizure of cattle—There is right of private defence of property.

If a person knowing that the cattle of another person have not damaged his crops seizes them and drives them towards the pound his intention is obviously to compel the owner of the animals to incur some expenditure in releasing them from the pound and also to deprive the owner temporarily, at any rate, of the use of the animals. Illegal seizure of cattle with a view to impound them is theft because though the person who has seized the animals had no intention to cause wrongful gain to himself nevertheless his intention was to cause wrongful loss to the owner of the animals In such a case the owner of the cattle has a right to exercise the right of private defence of property in rescuing them. The position may, however, differ if the seizure of the cattle, though not justified was due to bona fide mistake. In such an event, no offence of theft may be said to have been committed by their being driven to the pound because the necessary criminal intention and knowledge are wanting In such a case there is no right of private defence against such seizure. A I R 1946 Nag 221 and AIR 1959 Raj 124 and AIR 1949 All 180, Rel. on; AIR 1943 Oudh 280 and 24 Suth W R Cr 7 and 1881 All W N 158, Dissented from. 28 Cut L T 613: 1963 (1) Cri L J 308 : I L R (1962) Cut 781 : A I R 1963 Orissa 52 (53) (Prs 3, 4, 5).

——Ss 96 and 97—Applicability—Private defence of property — Doubt as to party's actual possession — Effect.

There is nothing in Ss. 96 to 106 of the Penal Code which can lend support to the view that a person entitled to exercise the right of private defence of property cannot exercise it until he has failed after taking other reasonable steps to avoid causing harm to the assailant. AIR 1959 Pat 22, Rel. on.

But where there is a real doubt whether the land over the possession of which there is a quarrel between two parties resulting in committal of offences, belonged to one party or the other, then if either party uses force, that will amount to enforcing a right (S. 141, fourth) and there will be no right of private defence of property AIR 1940 Lah 523, Rel. on; 25 Cut L T 358 : 16 Cut L T 59, Disting. **(1959) 25 Cut L T 500 : ILR (1959) Cut 453.**

——S. 97 — Where there is a real doubt whether the land over the possession of which there is a quarrel between two parties resulting in committal of offences, belonged to one party or the other, then if either party uses force, that will amount to enforcing a right (S. 141, fourth) and there will be no right of private defence of property. **(1959) 25 Cut L T 500.**

——S. 97 —Right of private defence of property.

Where the lands in dispute were in the possession of the opposite party who had grown the crops and the accused came to reap the paddy with the help of a large armed mob to enforce their supposed right and claim over the produce and a riot followed :

Held, that the accused could not claim any right of private defence 1957 Cri L J 644 : ILR (1957) Cut 275 : **A I R 1957 Orissa 117 (120) (Pt C) (Pr 9) (DB).**

——S. 99 — Right of private defence — Stray act of trespass Trespasser cannot plead right of private defence against rightful owner. **AIR 1955 NUC (Pat) 2498.**

——S. 97 (2)—'Possession'—Stray act of tying cattle on land in possession of another—Right of private defence.

A stray act of tying cattle cannot be said to have given legal possession to a person who ties his cattle upon the land in possession of another. When there is an open piece of land, the person in possession does not very much mind that his neighbour has tied his cattle upon the land in possession of another. In order to defend such stray possession of his, a person is not entitled to use force with the person in rightful possession. Even supposing that the stray acts of the tethering of cattle might be taken to be as those of possession, the right to defend one's property arises only in the circumstances given in S. 97 (2), I. P. Code. Such a right comes into being to defend the property against any act which is an offence falling under the definition of theft, robbery, mischief of criminal trespass. Where the deceased had simply gone to the land and had protested against the action of the accused tying the cattle this act of his comes neither within the definition of theft, nor of robbery nor of mischief, nor of criminal trespass. **1959 Raj L W 35.**

——S 96—Applicability—Person in aggressor party assaulting person in other party—Such person cannot claim right of private defence. AIR 1955 N U C (Sau) 5301 (DB).

——S. 97—Private defence of property—Right of private defence — Accused persons trespassing into complainant's land and picking up quarrel over canal unauthorisedly dug by them on the land— Accused held could not be deemed to be in possession of the land—Accused held were aggressors and had no right of private defence. **AIR 1955 N U C (Sau) 4102 (DB).**

3 (B). Defence of other people's property.

—S 97—Right of private defence—Extent of.

It is not the law that the right of private defence is open only to the person whose land or person is attacked by any aggressor The right of private defence is open to any one against an attack on the land or person of even some one else. Thus where the accused had joined another person in defending the latter's land and person, they were also protected by the law of private defence. 1960 B L J R 526

3 (C). Trespasser in possession.

See Note 3.

4. Right of private defence against act of person of unsound mind or of person under misapprehension - S. 98.

—Ss. 98 and 34 — Applicability—Private defence of property—Persons doing lawful act.

Held, that since identity of the cows had not been established the accused must get the benefit of doubt. S. 98 makes it clear that a person does not lose the right of defence of property merely because the opposite party is under misapprehension. The accused could not be blamed for the use of reasonable force for rescuing their cattle. Since the opposing party consisted of as many as four persons, a little violence was permissible The accused could not be blamed for causing simple and grievous hurts. It appeared that some one from the four accused exceeded the right of private defence All the four accused were at first lawfully exercising the right of private defence. They were not committing any illegal acts. In order to attract S. 34, I. P. C criminal act has to be done by number of persons. If a number of persons are doing a lawful act, S. 34, I. P. Code, has no application. So although one accused was responsible for causing Musafi's death unlawfully, other accused could not be held responsible on the principle of S. 34, I. P. Code. The result was none of the accused would be convicted of any offence: AIR 1949 All 180, Dist. 1959 All W R (H C) 10: 1959 All Cr R 60: 1959 All L J 207: 1959 Cr L J 1394: AIR 1959 All 790 (791, 792) (Prs 8, 11 to 15).

—Ss. 103, 98 — Right of private defence of property—No right of defence against lawful act of self-defence - Attempt to house trespass at night—Intruders not disclosing identity in spite of repeated challenges from inmates—House owner hitting one of intruders with arrow—Accused (other intruder) not entitled to any right of self-defence.

Held, on facts that the deceased was justified in acting in self-defence in attacking the intruders and was within the limits of the law in the exercise of the same. The right of self-defence is not dependent on the actual criminality of the person resisted; it depends solely on the wrongful, or apparently, character of the act attempted If the apprehension is real and reasonable, it makes no difference that it is mistaken. There cannot be any right of defence against an act which is itself an act of lawful self-defence. (1962) 3 Guj L R 152: 1962 (1) Cr L J 717: AIR 1962 Guj 203 (206, 207) (Pt A) (Prs 18, 20, 21) (DB).

—Ss. 97, 100—Accused in sleep caught in vicious grip by mad man — In confusion accused getting hold of a chopper and causing death of mad man—Accused held had right of self-defence.

The accused was frightened out of sleep by a well nourished mad man of 45, who pounced upon him and held him in a vicious grip, and he apprehended danger to life and used the weapon that he could pick up (i. e. a chopper) in his half awakened mood to repel the onslaught of a thief or a murderer. The standard of the easy-chair critic or the cool bystander was not to be used and the weighing of the right of self-defence in golden scales was not to be indulged in The dangerous situation in which the accused was placed at that untimely hour when a sturdy man had pounced on him and held him in a vicious grip should be the deciding factor and not the number of injuries the accused had inflicted The conviction under S. 304 was bad. 1959 Ker L R 339.

5. Right of private defence against act of public servant—S. 99.

(A) Explanation 1 to S. 99.

(B) Act of public servant without jurisdiction.

5. Right of private defence against act of public servant—S. 99.

—Ss 99 and 332—Arrest made in good faith under colour of office Resistance to arrest—Warrant of arrest illegal—Effect of—Criminal P. C. (1898), S. 108

Where there is an order of a competent Magistrate to arrest a person, a police officer cannot be said to have acted without jurisdiction in arresting that person. Assuming that the warrant of arrest was defective or irregular, then at the most it would be a case of his exceeding the jurisdiction and not of acting absolutely without jurisdiction. Hence in executing such a warrant of arrest if the police officer acts in good faith colore officii, there is no right of private defence against his act. The only effect of the illegality of the warrant would be that the police officer cannot be said to have been acting in the discharge of his duty within the meaning of S 332. Penal Code, and consequently if the person to be arrested resists it or being arrested escapes from custody, he and others who help him commit no offence But if in addition they do other acts which are cirminal, they are certainly responsible for them. Case law ref.

In this case it was held that the warrant of arrest of the woman who was alleged to have been wrongfully confined was issued under S. 100 and not under S. 552, Criminal P. C. and that all the accused who were proved to have taken part in assaulting the police officer snatching and tearing the warrant and rescuing the woman from his custody were rightly convicted under Ss. 147, 332, 225B and 379, Penal Code. 52 Cri L J 912 (2): 1951 All W R (H C) 458: 1951 All Cri R 109: 1952 All L J 39: AIR 1951 All 637 (638 to 640) (Pt B) (Prs 5, 7, 11).

—S. 99—Warrant issued — Endorsement at foot of warrant not filled in due to oversight—Resistance—No right of private defence - Omission of endorsement will not make the apprehension unlawful—Case would fall within S. 99—See Punjab Village Panchayat Act (as applied to Himachal Pradesh), S. 33. 1954 Cri L J 1472: AIR 1954 Him Pra 68.

—S. 99—Principle of section

Section 99 rests partly on the probability that the acts of a public servant will be lawful in which case resistance must necessarily be unlawful; partly on the theory that resistance is unnecessary since the law will set right what has been wrongly done in its name, and, lastly, on the ground that it is good for society that a public servant should be protected in the execution of his duty even where he is in error. 1953 Mad W N 558: 66 Mad L W 361 1953 Cri L J 1730: AIR 1953 Mad 936 (937) (Pt A) (Pr 4).

—Ss 99, 323— Applicability — Police officer asking accused to surrender as there was warrant of arrest against him — Accused refusing to come out of his house—Police officer acting in belief that it was his duty to arrest accused though warrant was not valid —Right of private defence does not extend to kicking

police officer or beating him with stick—Accused held guilty under S. 323, Penal Code 1953 Nag L J 351 : 1953 Cri L J 1569 : A I R 1953 Nag 292 (295) (Pt C) (Pr 14).

—S. 99—Forest guard, acting in good faith, causing seizure of forest-produce — Right of private defence cannot be claimed by assaultees. See Penal Code (1860), S. 332. (1965) 31 Cut L T 851.

—S. 99, Cl. 3 — Protection of public authorities — Extent of.

Protection of public authorities referred to in S. 99, Penal Code, must mean such protection as can preserve the status quo. 1964 (2) Cri L J 696 : AIR 1964 Orissa 262 (265) (Pt A) (Pr 10) (DB).

—Ss. 97, 99 and 100 —Applicability — Actual commission of offence if necessary to give rise to right of private defence.

It is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence. It is enough if the accused apprehends that such an offence is contemplated and that it is likely to be committed if the right of private defence is not exercised. Even assuming that the march by the police party was a lawful one and that the Police party never intended to cause grievous hurt or death, the accused are justified by law to exercise the right of private defence if they were under a bona fide impression, though mistaken, that the march amounted to an assault causing an apprehension that otherwise death or grievous hurt would be the result. A I R 1933 Pat 144 and A I R 1954 All 39 and I A I R 1920 U B 35 and I L R 21 Mad 249, Not followed. 23 Cut LT 88: 1957 Cr L J 769:AIR 1957 Orissa 130 (149, 150) (Pt P) (Prs 43, 44) (DB).

—Ss. 97, 98, 353, 332, 323—Obstructing public servant in discharge of his duties — Ingredients of offence — Proof — Accused alleged assaulting Police Officer who wanted to search his (accused's) house for stolen articles under powers conferred by S. 165 (1) (3) and (5) of Criminal P. C., 1898 — Search contravening S. 165, Criminal P. C., being illegal, conviction of accused under Ss. 353 and 332, Penal Code, not maintainable—In view of illegality of search and right of accused to private defence of person conviction of accused could not be even altered to one under S. 323, Penal Code. See Penal Code (1860), S. 353. (1964) (2) Cri L J 571: AIR 1964 Pat 493.

—S. 99 - Applicability — Assault on public servant acting in good faith and under colour of his office — No right of private defence. See Penal Code (1860), S. 353. AIR 1955 NUC (Pat) 1592.

—S 99—Bona fide acts of public servants — Police keeping accused in lock-up openly and without attempt at secrecy—Superior immediately informed—Case registered against accused - No apprehension that death or grievous hurt would be caused—Police held acted in good faith — No representation made against police to public authorities — Attack on police party resulting in death and injury to police is not bona fide exercise of private defence — (Trav. Penal Code (1 of 1074), S. 89). A I R 1955 N U C (Trav-Co) 538 (DB).

—S 99 — Offence under S. 33 (1) (a) is cognisable offence — Person arrested for offence under S. 33 (1) (a) can be released on his executing bond to appear before Magistrate — Offence is not non-bailable — Private person like Plantation watcher can arrest person committing offence under S. 33 (1) (a) — Plantation watcher is forest officer within meaning of S. 2 (2), Forest Act and has power to arrest without warrant person committing offence under S. 33 (1) (a) —Person arrested has no right of private defence. See Criminal P. C. (1898), S. 59. 1963 (1) Cri L J 558 (Tripura).

5 (A). Explanation 1 to S. 99.

—S. 99—"Not strictly justifiable in law."

The words "not strictly justifiable in law" are not intended to cure the want of jurisdiction but only an erroneous exercise of it. When the error affects the procedure rather than the principle, it would be covered by the clause. Explanation (1) goes with this paragraph and it is intended to protect persons who may have acted in ignorance of the fact that the person they were dealing with was a public servant. 1953 Mad W N 558 : 66 Mad L W 361 : 1953 Cri L J 1730: AIR 1953 Mad 936 (938) (Pt D) (Pr 7).

—Ss. 99, Explanation 1, 300 Exception 2, 302—Public servant not acting strictly in accordance with law in arresting accused — Public servant not known to accused — Accused held had initially right of private defence against such public servant—Accused causing death of public servant who was helpless by giving him several Choora blows — Exception 2 of S. 300 did not apply - Accused was guilty under S. 302 — As accused could not be expected to make balanced judgment sentence of imprisonment for the life would meet ends of justice. 1960 Cr L J 271 : A I R 1960 Pat 62 (64, 65) (Prs 21, 23, 25, 26, 28, 29) (DB).

5(B). Act of public servant without jurisdiction.

● —S. 99, Cl. (ii) — Protection under — Extends even to acts which will not be strictly justifiable by law (Obiter). Kanwar Singh v. Delhi Administration, 1965 Cur L J 366 : 1965 (2) Cri L J 1 : (1965) 1 S C W R 896.: (1965) 2 S C J 115 : 1965 S C D 630 : 1965 Mad L J (Cri) 435 (1964) 1 SCR 7 : AIR 1965 S C 871 (874) (Pt E) (Pt 11).

● —S. 99, Cl. (ii) — Seizure of stray animals by raiding party possessing authority under S. 418 (1), Delhi Municipal Corporation Act — Accused resisting cattle-catching and inflicting injuries on raiding party—Held since raiding party's act was fully justifiable by law, accused were not entitled to claim right of private defence of property — Judgment and order of Punjab High Court in Criminal Revn. No. 337-D of 1962 dated 19th November, 1962 (Punj.). Affirmed. Kanwar Singh v. Delhi Administration, 1965 (2) Cri L J 1 : (1965) 1 S C W R 896 : (1965 2 S C J 115 : 1965 S C D 630 : 1965 Mad L J (Cri) 435 : (1965) 1 S C R 7 : 1965 Cur L J 366 : AIR 1965 S C 871 (874) (Pt F) (Pr 11).

—Ss. 97, 99 — Seizure of account books by public officer illegally but in good faith — Aggrieved party has no right of private defence — Limitation laid down in S. 99 must be observed. 1964 All W R (HC) 128 : 1964 All Cr R 107 : 1965 (2) Cri L J 582 : AIR 1965 All 543 (545) (Pt B) (Pr 25).

—Ss. 97, 99, 147, 143, 323 — Illegal attachment of of property — Judgment-debtor is not entitled to take it from the enclosure, where the sapurdar had kept it — There is no right of self-defence. See Penal Code (1860) S. 147. 1960 Cri L J 1040 AIR 1960 All 453.

—Ss. 97 and 99—Scope—Person resisting unlawful arrest of another, is protected. AIR 1955 N U C (All) 2782.

—Ss. 99, 147 and 353—Seizure of account books—Seizure not authorised by Law — Accused retrieving books forcibly—Force used not more than necessary — No injury caused - Accused held had right of private defence—No offence committed.

The Assistant Commercial Tax Officer proceeded to the premises of a mill accompanied by some other officials and on seeing the accused hastily taking away account books unceremoniously seized the books from the accused. The accused with the help of some persons retrieved the books in an equally

unceremonious manner. It appeared that force was not used in excess of what was barely necessary for recovering, and no injury was caused to the Tax Officer.

Held that since the seizure was not proved to be authorised by law and was not done after due observance of any formalities it could not be said that the accused had no right of private defence in view of S. 99, Penal Code or that they committed any offence. **(1960) 11 S T C 850: A I R 1960 Andh Pra 110 (111) (Prs 2, 3).**

——Ss 97 and 99—Applicability — Police Constables taking accused who were behaving in disorderly manner to dispensary for medical examination — Constables having no legal authority to require accused to submit to medical examination—Arrest and detention did not deprive accused of their right which was unconnected with their confinement - On the way accused who were being dragged, in resisting the constables, giving blows to constable and making good their escape — Accused held acted within their right under S. 97 —Right of private defence See Penal Code (1860), S. 352 1959 Cri L J 825 : A I R 1959 Bom 284 (DB).

——Ss. 97, 99 and 353 — Conviction under S. 353 — Public servant must be acting in discharge of his duties —If he was acting under order which was bad and illegal, then even if he might have been himself unaware of the illegality, that does not make any difference — Held that accused had right under S. 97 to resist seizure of the goods under distress warrant which was bad as certain steps were not taken, issued by the Panchayat but executed by the secretary of the Panchayat — Inasmuch as the orders were ultra vires, there was no room for the operation of either the first or the second clause of S. 99 — Accused held did not exceed the right of private defence — (Panchayats — Bombay Village Panchayats Act (6 of 1933), Rules under, R. 13). A I R 1956 Bom 580 (581, 582) (Pt C) (Prs 6, 7).

——Ss. 99 and 332 — Police Sub-Inspector acting in discharge of his duty as public servant in executing order of his superior—Fact that Order of superior was without proper authorisation in that behalf by State Government does not affect good faith of sub-Inspector when order is prima facie proper — Resistance to execution of order by accused and causing hurt to sub-Inspector — Accused held not protected by right of private defence under S. 99 —Conviction of accused under S. 332 held was proper.

The accused, a head constable of police was dismissed from service but he continued to stay in the quarters provided for him. On 25-5-1954 the D. S. P. issued a notice to him to vacate the premises occupied by him within 7 days from the receipt of the notice and if he failed to do so action under S 31 Bombay Police Act, 1951 would be taken against him. In spite of the service of this notice the accused failed to comply with it. An application of the accused for permission to stay in the quarters till 10-8-1954 was rejected by the D. S. P.

By an order D/- 29 7.1954 the D S. P. directed a particular sub-Inspector to take legal action against the accused and to report the result within 7 days. Pursuant to this order when the Sub Inspector went to the premises of the accused to execute the order D/- 29 7.1954 the accused refused to vacate the premises and offered resistance to the executions of the order and caused injury to the Sub-Inspector. The accused was prosecuted and convicted on a charge under S. 332, I. P. C.

Held (1), that when the Sub-Inspector who was bound to execute the order of D S P. went to execute the order of D S. P. dated 29.7-1954 he was acting in the discharge of his duty as a public servant and the mere fact that the order was defective for want of authorisation of the D. S. P. by the State Government under S 5(2) could not assist the accused in his defence that he was justified in resisting the execution of the order 18 All 246 and 40 All 28, Dist.

That the Sub-Inspector was acting in good faith under colour of his office when he went to the premises of the accused to execute the order of the D S. P. dated 29.7 1954 which was prima facie proper. The Sub-Inspector was not expected to consult legal opinion as to the soundness or legality of that order. Hence the accused had no right of private defence under S. 99, I. P. C., which was not attracted to the circumstances of the case The accused was therefore rightly convicted under S 332, I. P. C. ILR (1956) Bom 661.

——Ss 99, 224 and 302 — Criminal P. C. (1898), Ss. 54 (1) and 56 (1) — Special powers under S 56 cannot override general powers of arrest without warrant—Police constable arresting suspected thief without warrant on his own initiative under S. 54 (1) — Arrest is lawful even if S. 56 is not complied with —Suspected thief escaping from custody by causing death of constable — Held guilty of offences under Ss. 224 and 302, I P C —Causing of death not justified in view of S. 99, I. P. Code.

Held on facts, (i) that in the circumstances of the case the deceased constable had purported to act under S 54 (1) on his own initiative and not under S. 56 (1) Cr. P Code. The special powers under S. 56, Cr. P. Code, cannot override the general powers of arrest without warrant in the cases provided for in S 54 of the Code. The fact that the deceased constable had been deputed under S. 56 to arrest the accused did not take away from him his powers of arrest in his discretion under S. 54 of the Code, if the exigencies of the situation so required The deceased constable had acted under S 54 (1), Cr. P. Code and the arrest was therefore perfectly legal. There was also submission to custody under S. 46 and hence the accused was guilty under S. 224 I P C. 1981 Ker L T 577 and AIR 1924 Mad 555, Dist; AIR 1926 Pat 424 and AIR 1937 Bom 56 and AIR 1960 Orissa 33. Rel. on; (ii) that even otherwise the legality of the arrest did not affect the legality of the conviction under S. 302, I. P. C. in view of S 99 I. P. Code. The words "colour of his officer" in S 99 refer to irregular as distinguished from illegal acts. The arrest having been made in good faith and under colour of his office by the deceased constable, there was no right of private defence even if, the arrest might not be strictly justifiable by law. 1963 Ker L J 78 Foll. 1964 (2) Cri L J 34 : AIR 1964 Ker 185 (Pt A) (Prs 6, 9, 10) (DB).

——Ss. 99, 302 and 353—Principle and applicability of S. 99 — Warrant of arrest endorsed to constable not by name but by designation — Constable in uniform while executing warrant Constable held acted in good faith under colour of office Accused sought to be arrested held had no right of private defence —Accused assaulting constable and stabbing other constable resulting in his death—Accused held guilty under Ss. 302 and 353.

Section 99 applies to cases where there is jurisdiction to do an act, but that jurisdiction has been in some respects exercised wrongly. The words 'under colour of office' refer to irregular as distinguished from illegal acts. They show that the act was within the jurisdiction but that the jurisdiction had been exercised irregularly or on insufficient grounds. The protection in favour of public servants rests partly on the probability that their acts will be lawful; in which case resistance must necessarily be unlawful; partly on the theory that resistance is unnecessary since the law will set right what has been wrongly done in its name; and lastly on the ground that it is good for society that public servants should be pro-

tected in the execution of their duty when they are in error.

The Sub-Inspector of Police to whom the warrant was issued endorsed it to a constable not by his name as required by S. 79, Cr. P. Code but only noting his number in the warrant. The constable was in uniform while executing the warrant. The surety for the accused had already told the accused that a warrant had been issued by the Court for his apprehension and that he should appear in Court and not create trouble for the surety. The constable appraised the accused of the contents of the warrant thereby satisfying the provisions of S. 80 of the Cr. P. Code and caught his hand thereby showing that he was under arrest. The accused assaulted the constable and where the other constable, deputed to assist the former, tried to prevent further harm being done, the accused stabbed him resulting in his death:

Held, that the constable executing the warrant was acting in good faith under colour of his office and therefore, although the warrant was not strictly legal the accused had no right of private defence and was guilty under Ss. 302 and 353. 8 All 293 and AIR 1922 Oudh 224 and AIR 1936 Rang 119 and ILR (1956) Bom 661 and AIR 1953 Mad 936, Rel. on; AIR 1960 Andh Pra 110 and AIR 1960 Pat 232 and AIR 1953 Nag 292 and AIR 1959 Bom 284, Distinguished. 1963 Ker L J 76: ILR (1963) 1 Ker 220: (1964) 1 Cri L J 592 (Ker).

——S. 99—Person detained — Detention not authorised by S. 59, Cr. P. C. — Person detained has right of private defence—(Criminal P. C. (1898), S. 59).

Under S. 59 of the Criminal P. C. the right of arrest given to a private person is confined to cases where a non-bailable and cognisable offence has been committed. An offence under S. 447, I. P. C., though cognizable is non-bailable.

Where the person alleged to have committed an offence under S. 447 is detained, the detention being not authorised by S. 59, the person detained has a right of private defence and is entitled to use force to escape from wrongful confinement. (Person held exceeded the right). 1959 Ker L J 818: 1959 Ker L R 641.

——S. 99—'Colour of office"

The words 'colour" of office refer to irregular distinguished from illegal acts. They show that the act was within the jurisdiction but that the jurisdiction had been exercised irregularly or on insufficient grounds 1953 Mad W N 558: 66 Mad L W 361: 1953 Cri L J 1730: AIR 1953 Mad 936 (938) (Pt C) (Pr 6).

——Ss. 99, 97—Decree against a member of undivided joint family — Process server illegally attaching entire cattle belonging to family and persisting to remove them — Held, family members had right of private defence and could use minimum force against the attaching party.

A decree for recovery of possession of certain land and for recovery of certain amount was passed against the sole judgment debtor. The judgment-debtor and his sons were all members of an undivided joint family. The warrant of attachment mentioned the attachment of the debtor's share of the cattle. In execution of the decree, the process server hurriedly attached the entire cattle belonging to the family in the absence of the members of the family. He did not make any inquiry whether the entire cattle belonged to the judgment-debtor or they also belonged to his sons. When the cattle were being taken away the members of the family came on the scene of occurrence, demanded the cattle and protested that they would not allow the cattle to be taken away. There was a fight between the attaching party and the family members and in that melee many persons were injured on both side. The members of the family were prosecuted for forming an unlawful assembly, committing the offence of rioting and for assaulting the decree-holder, who accompanied with the process server.

Held, in the circumstances of the case that the accused had the right of private defence because the illegal attachment and actual removal of the entire cattle caused reasonable apprehension of danger to the property in the mind of the accused. A I R 1947 Pat 232, Rel. on.

It was never intended that a man would submit to the deprivation of property in his possession without exercising any right of self defence and trust to recover it by the tedious operation of a case in the Civil Court with all the weight of possession, onus of proof etc. against him. A party is under no obligation to retire from his field on the appearance of an attacking party on the scene and intent upon using violence, and in such a case S. 99, Penal Code is no bar to the accused persons getting benefit of the right of private defence of property.

The process-server had no right to seize the share of the sons of the judgment-debtor in the cattle and in doing so he would not be acting in good faith under the colour of his office. The protection afforded by S. 99 disappeared; the accused would be within their rights to resist the attachment of the entire cattle.

Even if the warrant of attachment were otherwise valid, the property belonging to a joint family could not be seized in execution of the warrant against one of them; as the attaching party persisted in their illegal attachment and removal, the accused could use minimum force to prevent such attachment and removal and their conviction would be bad. The accused persons could get the protection by recourse to public authorities only if there was time enough for them to get police help at the time of occurrence. But the police station being 12 miles away it could not be said that after knowing that the attaching party had already attached and removed their entire cattle illegally, and that the attaching party were in fact driving the cattle, the accused persons could take the recourse to public authorities. ILR (1964) Cut 766.

——Ss. 99 and 52 — 'Acting contrary to law and without jurisdiction' and 'acting in a way not strictly justifiable by law' — Distinction — Good faith in criminal law and in civil law.

There is a distinction between 'acting contrary to law and without jurisdiction' and 'acting in a way not strictly justifiable by law'. Good faith in criminal law is different from 'good faith' as understood in civil law. If an act is not done with due care and and attention, it cannot be said to be done in good faith as far as criminal law is concerned.

Held, that not only the police were not with legal authority either to arrest or to effect a search but also did not act in good faith as was required by law and their action was wholly without jurisdiction. Therefore, the action of the police was such as to give rise to a right of private defence on the part of the inmates of the Math under S. 99. 23 Cut L T 88: 1957 Cri L J 769: A I R 1957 Orissa 130 (145 to 147) (Pt O) (Prs 40, 41).

——S. 97—Search illegal — Still accused can be held guilty under S. 47 (a), Bihar and Orissa Excise Act, 1915. See Bihar and Orissa Excise Act (2 of 1915), S. 47 (a). 1962 B L J R 344.

——Ss. 99, 97 — Criminal P. C. (1898), Ss. 499, 514, Sch. 5, Form 42—Bond in favour of King Emperor is not bond in favour of Government. Same cannot be forfeited—Distress warrant for enforcing forfeiture is illegal — Attachment of cattle under illegal distress warrant — Accused have right of private defence.

See Criminal P. C. (1898), S. 499. 1960 Cri L J 636 : A I R 1960 Pat 232.

——S. 99 — Bihar and Orrisa Public Demands Recovery Act (1914), S. 7 — Execution of certificate by arrest of certificate debtor — Notice under S. 7, is necessary — Without such notice certificate officer cannot execute the certificate S. 99 does not help the officer. See Bihar and Orissa Public Demands Recovery Act (4 of 1914), S. 7. 1953 Cri L J 1681 : A I R 1953 Pat 313.

——S. 99 — Bihar and Orissa Public Demands Recovery Act (1914), Ss 47, 4 and Sch. II, Rule 54 1)— Execution of certificate by arrest of certificate debtor cannot be bad if certificate holder has deposited subsistence allowance in Court — Provision is mandatory — No subsistence allowance deposited — Arrest is illegal — S. 99 does not help the officer carrying out the arrest. See Bihar and Orissa Public Demands Recovery Act (1914), S. 47. 1953 Cri L J 1681 : A I R 1953 Pat 313.

——S 99 — The words 'strictly justifiable by law' in S. 99 show that the section does not contemplate a case of initial want of jurisdiction — If there was no jurisdiction to issue the warrant of arrest or to make arrest, S. 99 cannot be of any help to the public servant. 1953 B L J R 364 : 1953 Cri L J 1681 : AIR 1953 Pat 313 (315) (Pt C) (Pr 9).

——S. 99—Scope — Prosecution under S. 332, Penal Code — Non-compliance with S 165 — Accused held justified in resisting search in exercise of right of private defence of property. See Criminal P. C. (1898), S. 165. 1964 Cur L J 160 : 66 Pun L R 569.

——S. 99 — Assistant Sub-Inspector of Police of Punjab State coming with staff to village in Rajasthan for investigation of case in Punjab — Searches and seizure of properties of accused by Assistant Sub-Inspector held to be without jurisdiction — Police party held not to have acted in good faith — Right of private defence held, however, not available to accused under circumstances of the case — Offence under S. 395 held not proved — Conviction under Ss. 332 and 333 upheld. See Penal Code (1860), S. 52. 1964 Raj L W 126.

——Ss. 97, 99 — Illegal warrant of attachment — Resistance—Civil P. C. (1908), O. 21, R. 24 (2).

While O. 21, R. 24, Civil P. C, lays down that the warrant is to be delivered to the proper officer for execution, it contemplates that the name of such officer, whether by his personal name or by designation, should be entered in the warrant. Where not only the name of the process-server is not mentioned but the name of the Nazir whether personally or by virtue of his office is also not mentioned such a warrant is illegal. The act of executing such a warrant clearly lacks due care and attention. The words "though that act may not be strictly justifiable by law" in S. 99, Penal Code, only protect defect in minor particulars but do not cover cases where the person executing the warrant was not authorized to act The resistance to the execution of the warrant in such a case is covered by the plea of right of private defence of property. 1951 Raj L W 131 : I I R (1951) 1 Raj 86 : A I R 1951 Raj 105 (106, 107) (Prs 4, 5).

6. Extent to which right may be exercised.

See also Note 8.

■ ——Ss. 99, 100, 302 — Right of private defence—Extent of.

Under S 100, if the person claiming the right of private defence has to face assailants who can be reasonably apprehended to cause grievious hurt to him, it would be open to him to defend himself by causing the death of the assailant.

Where an individual citizen or his property is faced with a danger and immediate aid from the State machinery is not readily available, the individual citizen is entitled to protect himself and his property. That being so, it is a necessary corollary to the doctrine of private defence that the violence which the citizen defending himself or his property is entitled to use must not be unduly disproportionate to the injury which is to be averted or which is reasonably apprehended and should not exceed its ligitimate purpose. The exercise of the right of private defence must never be vindictive or malicious.

In judging the conduct of a person who proves that he had a right of private defence, allowance has necessarily to be made for his feelings at the relevant time. It is no doubt true that in striking a decisive blow, he must not use more force than appears to be reasonably necessary. The law of private defence does not require that the person assaulted or facing an apprehension of an assault must run away for safety. As soon as the cause for the reasonable apprehension has disappeared and the threat has either been destroyed or has been put to rout, there can be no occasion to exercise the right of private defence. If the danger is continuing, the right is there ; if the danger of the apprehension about it has ceased to exist there is no longer the right of private defence.

The victims who belonged to the party of aggressors were at a fairly long distance from the appellants when they were shot dead by the appellants. The aggressors had already started running away and there was no danger either to the property or to the bodies of the appellants.

Held, that the appellants were guilty of murder and could not invoke the right of private defence.

It was for the party pleading self-defence to prove the circumstances giving rise to the exercise of the right of self-defence, and this right could not be said to be proved as soon as the conclusion is reached that at the relevant time there was no threat either to the persons of the appellants or the persons or property of their companions Jai Dev v State of Punjab, (1963) 3 S C R 489 : 1964 Mad L J (Cri) 478 : (1964) 2 S C J 272 1963 S C D 66 : 1963 (1) Cri L J 495 : 1964 All Cri R 170 : 1963 A I W R (H C) 338 : A I R 1963 S C 612 (617, 619, 620) (Pt A) (Prs 11 to 13, 19, 20).

——S. 104 — Harm should be such as should be helpful in defending property. A I R 1955 N U C (All) 4157.

——S 99—Extent of right of private defence.

Where the total number of injuries on the side of the complainant are somewhat more than those on the side of the accused persons, the injuries, by themselves, do not necessarily prove that the accused were the aggressors and had exceeded their right of self-defence When lathis, tabar and other sharpedged weapons are being used by both the parties in the fight, it is very difficult for any side to weigh the strokes that are inflicted by him and to inflict injuries only up to a certain limit and no more 1953 All W R (H C) 424 : 1953 All L J 605 : 1954 Cri L J 54 : A I R 1954 All 35 (37) (Pt B) (Pr 11).

——Ss. 99, 103, 300. Exception 2, 304—Applicability —Cattle of deceased grazing on preserved grass of accused—Accused rounding up cattle to take them to cattle pound — Deceased forcibly taking away cattle from possession of accused Deceased though armed with lathi not using it — Accused hitting deceased with lathi on head — Deceased dying as result of injury—Accused held exceeded right of self-defence —Act covered by Exception (2) of S. 300—Conviction should be under S. 304, Part I and not Part II. 1951 All

W R (H C) 477 : 1951 All L J 464 : 1951 All Cri Cas 116 : 1953 Cri L J 1275 : A I R 1953 All 555 (556) (Pt A) (Prs 5 to 10, 12).

——Ss 96 and 99 — Scope — Right of self-defence — When justified — Extent of the right — Question if force used was more than was necessary — Consideration.

A was raising a wall on his own land and there was no invasion of B's rights. B demolished part of the wall built and a free fight ensued in which A and his son received minor injuries while B received greater number of injuries and grievous injury too. B complained to a Magistrate and A was convicted under Ss 308 and 323, Penal Code, his son was also convicted but was given the benefit of being a first offender On appeal A's conviction under S. 308 was altered to one under S. 325 and sentences were also reduced. The matter was taken in revision.

Held i a man is attacked he would be justified if he holds his ground and delivers a counter attack provided the injury he inflicts is not out of all proportion to the injury he was threatened with.

When two parties begin to use lathis or blunt weapons one by way of attack the other by way of defence it is impossible to count the blows or to expect equal number of blows would be given in retaliation.

In the light of the facts the accused was not bound to go to the thana and seek police help. He was certainly entitled to exercise the right of private defence of his property and the argument based on the number of injuries inflicted by him and the number received by him or the weight of the blows dealt by him to be heavier than what was received, to hold him to have exceeded his right is not correct. The law is not based on theory of retaliation. The blows dealt on him but also the blows that might have been dealt by the attackers, the further injuries he might have received have also to be considered to see if the right of private defence is exceeded in any case. In the instant case the accused has not exceeded and he is entitled to be acquitted. 31 Cri L J 654, Ref. 1952 All L J 609 : 1953 Cri L J 725 : 1953 All W R (H C) 204 : A I R 1953 All 338 (339) (Prs 4 to 6).

——S. 99 read with Ss 34, 144, 146, 148, 324 — Rioting and unlawful assembly — Private defence — Dispute regarding possession — Use of force by accused as lawful owner of land to vacate trespass resulting in injuries — Conviction of accused for rioting and unlawful assembly — Validity. See Penal Code (1860), S. 144. I L R (1965) Andh Pra 193 (DB).

——Ss. 96, 97, 99 — Prosecution party being aggressors — Accused party has right of private defence — Extent of right depends upon attitude of prosecution party.

If the prosecution party has assembled with the object of chastising the accused it would not be unlawful for any person to go to the aid of the accused to rescue him But the degree of force to be used would depend upon the temper, disposition and determination of the prosecution party. If the accussed persons without any provocation or cause fired at the deceased and injured other persons certainly their acts cannot in any view be justified and they would be guilty of riot attempt to murder and hurt, whether grievous or otherwise I L R (1959) Andh Pra 797.

——Ss. 96, 97, 99, 100, 102, 300, Exception 2 and S 304 (Part II) Right of private defence of body — Nature and extent of — Exceeding right — Question of fact.

A man who is attacked is perfectly justified in the eye of law if he delivers a counter attack to his assailant, provided always that the injury which he inflicts in self defence is not out of proportion to the injury with which he is threatened. I L R 28 Mad 454; A I R 1930 Lah 93. Rel. on. The only consideration that should weigh in such cases is whether the person threatened with danger or injury has not exceeded the limits fixed by law. This of course depends upon reasonable apprehension of danger to the person under the particular circumstances of the case. The weapon used, the manner of using it the nature of assault and the other surrounding circumstances will be taken into account for this purpose. No doubt, a man acting under an apprehension of death or grievous injury is not bound to modulate his defence step by step according to the attack before there is reason to believe that the attack is over. But it is always necessary that the apprehension of such injury must be natural or probable. Certainly the law does not permit an injury which is out of all proportion to the danger.

Held, on facts of the case that the accused had exceeded the right of self-defence of his body and therefore he was entitled only to the benefit of Exception 2 to S. 300. He was therefore rightly convicted under S. 304, Part 2. (1957) 1 Andh W R 181.

——S. 100—Right of private defence — Defence of body — In the face of danger it is not reasonable to expect accused to measure force of his blows or to succeed in avoiding vital part of the body. AIR 1954 Assam 56 (DB).

——Ss 96, 100 and 300—Scope of — Right of private defence.

Section 96, Penal Code, lays down that nothing is an offence which is done in the exercise of the right of private defence. Section 96 gives a right to every person to defend his body and the body of another person against any offence affecting human body. Section 100, Penal Code, gives a right of private defence of body, to the voluntary causing of death or any other harm to the assailant if the assault reasonably causes the apprehension of death or grievous hurt. But if the accused exceeds his right and kills his assailant though he could have caused lesser injury, the general exception may not apply In that event, the case is likely to fall under Exception 2 to S. 300, Penal Code. 1952 Cri L J 1366 : A I R 1952 Bhopal 25 (28 to 31) (Pt J) (Prs 28, 42, 45).

——S. 100—Applicability—Right of private defence of person or body — Causing of death — When justified — Apprehension of danger — Test.

A person who is assaulted is not bound to modulate the defence step by step according to the attack before there is reason to believe that the attack is over. Where the attack assumes a dangerous form every allowance has to be made for one who with the instinct of self preservation strong upon him pursues his defence a bit further than to a cool bystander would seem absolutely necessary. The question in such cases is not whether there was an actually continuing danger, but if there was any reasonable apprehension of such danger. It is only against a danger present and imminent that the right of private defence avails. AIR 1925 Nag 270, Applied and Foll; A I R 1925 Lah 514; A I R 1933 Oudh 63 : 29 Cri L J 755, Rel. on. 52 Cri L J 1246 : A I R 1951 Bhopal 2 (4) (Pr 8).

——Ss. 99 and 326 — Held, on facts that the accused had a right to private defence of property but that in inflicting the injuries he exceeded the right and thus he committed an offence under S. 326. 58 Cal W N 279 : 1954 Cri L J 774 : AIR 1954 Cal 258 (270, 271) (Pt H) (Prs 52, 53) (DB).

——S. 99—Right of private defence — If exceeded—Accused threatened by crowd—Shot fired by accused entering back of complainant's leg.

Where the accused has clearly established his right of private defence, the fact that a shot fired by him entered the back of the leg of the complainant cannot by itself show that the right was exceeded. When firing at the crowd some of whom were advancing and some were retreating a shot may very well hit one of the retreating persons. That would not indicate that the person threatened by the crowd was exceeding his right of private defence. Again the complainant may have just turned away at the very moment that the shot was fired thus causing the bullet to enter the back of his leg. Prior to that he may have been advancing towards the accused. 1952 Cri L J 579 : AIR 1952 Cal 217 (217, 218) (Pr 2).

——Ss. 97, 99 and 304, Part I — Right of private defence of one's body — Principles applicable — Extent of right—Test as to when right is exceeded—Accused must have acted under instinct of self-preservation and not out of malice or anger.

The central point which must be borne in mind is that the right of private defence continues only so long as a reasonable apprehension of the danger persists. The important point which has got to be determined is as to whether in the circumstances in which the accused was placed, the apprehension had persisted in his mind, when he inflicted a particular injury or injuries, that his life was in danger and whether, under the circumstances in which he was placed, that apprehension was a reasonable one. One of the tests which may be safely and usefully applied would be to discover whether the accused was still acting under the instinct of self-preservation or whether other feelings such as those of anger, malice and reprisals had intervened. In the former case, the accused would be entitled to right of private defence, but not in the latter cases.

Held, on facts that though in case of one of the three fatal injuries, the accused might be held to have acted in self-defence, he was acting out of malice and anger and feeling of retribution and, therefore, had exceeded the right of private defence. Consequently, his conviction under S. 304, Part I, Penal Code, was justified. (1961) 2 Guj L R 70 : (1961) (1) Cri L J 653 (Guj).

——Ss. 97, 99 and 104—Trespass — Owner has right of private defence subject to limitation in S. 99 — Right not exceeded—Trespasser has no right to cause injury to owner. AIR 1954 All 35, Disting. (1961) 2 Guj H C R 42 : (1961) 2 Guj L R 274 : 1961 (1) Cri L J 649 (Guj).

——Ss. 99, 34, 96, 97, 323, 326, 304 — Deceased, old man, damaging field of accused and raising his kalsa to strike one of the accused persons — Accused held had right of private defence of person and property—Accused however lost this right by using excessive force and causing death of deceased — Though accused had common intention only to belabour deceased and not to cause his death they must have known that injuries caused were likely to cause death of the deceased — Accused were guilty under S. 304, Part II read with S. 34. See Penal Code (1860), S. 34. 1965 (2) Cri LJ 499 (2): AIR 1965 Him Pra 49.

——Ss. 97 and 99—Applicability—Decree for possession of a plot, in favour of a member of accused's party — Accused party going there to fence it but stopped by complainants—Free fight resulting and one of complainant's party killed by gun shot — Right of self-defence.

A decree for possession was passed in favour of a member of the accused's party and possession having been already given to him, the accused's party went to the plot to fence it. The complainant's party stopped them as a result of which free fight took place and several persons on both sides were injured. A member of the complainant's party was killed by a gun shot from the accused;

Held, (1) that the accused had a right of private defence and he had not exceeded it. It would not be fair to expect of an accused under such circumstances to weight in golden scales the amount of force to be used by him. AIR 1955 N U C (Punj) 1353, Rel. on.

(2) that it could not be argued that the accused should have approached the police before taking the law into their own hand. AIR 1934 All 829, Rel. on.

(3) that from the fact that death had taken place in the complainant's party it could not be said that the accused persons were the aggressors. AIR 1954 All 35, Rel. on. 1955 Cri L J 1179 : A I R 1955 J & K 9 (10, 11) (Prs 6, 7, 9) (DB).

——Ss. 96, 99, 100—Right of self-defence — Nature and extent of.

The right of self-defence is a high-prized gift granted to the citzens to protect themselves by effective self-resistance against unlawful aggression. No man is expected to fly away when he is attacked. He can fight back and when he apprehends death or grievous hurt he can see that his adversary is vanquished without modulating his defence step by step. Faced with a dangerous adversary, no man can possibly act with a detached reflection and under such circumstances if he travels a little beyond the limit, the law protects him and hence Courts should not place more restrictions on him than the law demands. 1964 (2) Cri L J 297 : I L R (1963) 1 Ker 458 : 1963 Ker LT 450 : (1963) 1 Ker L R 468 : AIR 1964 Ker 222 (225) (Pt E) (Pr 8).

——S. 97—Right of private defence of body—When arises.

It is not necessary nor does the law require that the accused should wait till he receives a grievous injury for the purpose of exercising his right of private defence In considering whether the accused is entitled to exercise the right of private defence, one has to place himself in the position of the accused in the midst of circumstances in which the accused stood and then form an opinion whether under the peculiar circumstances the accused had not the apprehension of such injuries to his body as would entitle him to exercise his right. 1960 Ker L T 387 : 1960 Mad L J (Cr) 281 : 1960 Ker L J 579 : 1960 Cri L J 1088 : AIR 1960 Ker 258 (259) (Pt B) (Pr 6) (DB).

——S. 99 – Applicability—Using motor vehicle against a man standing before it—If justified.

Held, that in the circumstances disclosed by the evidence in the case, it was atrocious for anybody to think of using a heavy and mechanically propelled vehicle like a jeep as a means or weapon to exercise the right of private defence even it any existed, and to uphold the plea would be set at naught the limitations imposed by S. 90. 1957 Ker L T 720 : 1957 Ker L J 673 : ILR (1957) Ker 781 : (1957) Mad L J (Cr) 662 : 1958 Cri L J 33 : AIR 1958 Ker 8 (12) (Pt C) (Pr 11) (DB).

——S. 96—Circumstances showing that accused had reason to apprehend some danger to his body at hands of deceased and his brother — Accused in drunken state — Fatal stab wound by accused inflicted — No intention to cause more harm than was necessary for purpose of defence—Offence held one of culpable homicide not amounting to murder. See Penal Code (1860), S. 300. AIR 1957 Ker 53 (DB).

——Ss. 99, 97—Right of private defence, if exceeded—Decision—Considerations involved.:

The question whether the accused has exceeded his right of private defence does not necessarily depend on the seriousness of the injuries sustained by the aggressor but must largely depend on the dangerous nature of the situation in which the accused had to save himself. Where, therefore, a stronger and stouter adversary, whose criminal antecedents are known to the accused, attacks him and during the grapple between the two which ensues, the aggressor has his hands at the throat of the accused, and being reasonably apprehended by fear of death or grievous hurt to himself the accused uses his knife twice against his dangerous adversary, it cannot be said that in thus using the knife the accused had exceeded his right of private defence even though one of the two injuries inflicted by the accused proved fatal. **1957 Ker L J 602.**

——S. 100—Right of private defence of body — Accused, deceased and some others playing cards — Verbal altercations leading to blows — Deceased aggressor and beating accused—Accused caught hold by friend of deceased — Accused severely beaten, getting exhausted and falling down—Deceased again attacking—Accused taking out knife and stabbing deceased fearing death at hands of deceased and attempting to run away — Friend of deceased following accused—Fearing renewal of attack accused using knife and wounding the friend—Accused held acted in self-defence in both cases and that in doing so he did not exceed his right. 1957 Ker L J 413.

——S. 99—Right of private defence of body—Extent of.

The right of private defence of the body extends under the restrictions mentioned in S. 99 to the voluntary causing of death or any other harm to the assailant if the offence which occasions the exercise of the right be an assault as may reasonably cause the apprehension that death or grievous hurt will otherwise be the consequence of such assault. Whether the apprehension was reasonable is always a question of fact to be determined by the surrounding circumstances. The test in such a case is not whether there was any actual danger but whether there was reasonable apprehension that such danger existed. At the same time it must be borne in mind that a man acting under apprehension of death or grievous hurt cannot be expected to judge too nicely the situation and modulate his defence step by step. And where the assault has assumed a dangerous form every allowance must be made for one, who with instincts of self-preservation strong upon him, pursues his defence a little further than to a perfectly cool by-stander would seem absolutely necessary. **Madh BLR 1954 Cr 112 : Madh BLJ 1954 HCR 908: 1955 Cri L J 471: AIR 1955 Madh B 34 (36) (Pr 10) (DB).**

——Ss. 97, 99 and 302, Excep. 2—Right of private defence of property—Extent of—Accused employed to guard cotton stocked in courtyard hiding himself in courtyard with gun and knife to detect thief—Thief entering courtyard to steal cotton—Accused firing gun and later inflicting several injuries with knife on the thief—Accused held acted in the right of private defence of property but exceeded it—Accused held guilty under S. 304. AIR 1955 NUC (Madh B) 3011 (DB).

——Ss. 96, 97—Girl removed forcibly by her husband and companions against her will—People interested in rescuing her, are entitled to use minimum force in rescuing her.

Where a girl was being carried away by her husband and his companions forcibly against her will those who attempted to rescue her were entitled to use sufficient force to achieve that purpose. If in doing so they inflicted some injuries they could well claim the benefit of the plea of the right of private defence, provided limitations imposed by S. 99 were not transgressed. Those interested in rescuing her could not be reasonably expected to wait till the matter had been reported to the Police and action taken by the public authorities. The fact that the woman was being carried away by force by her own husband, would not affect the right conferred by S. 97, Penal Code.

While using minimum force in rescuing the girl, if accidentally a stone hits some one of the captors on the head and unfortunately results in an injury to the base of the skull, it could be said that the person who threw the stone exceeded his right of private defence **1953 Cri L J 1185 : AIR 1953 Madh Bha 182 (183, 184) (Prs 10, 12, 13) (DB).**

——Ss. 97 and 100—Decree-holders trying to secure possession of a house not included in decree—Accused forcibly resisting decree holders to take possession—Accused entitled to defend his right to property.

Held, on facts, that there was no satisfactory evidence to show that the decree-holders and the process server were acting within the scope of the authority of the warrant for delivery of possession. It could not be denied on the facts of the case that there was an invasion of property either actual or threatened which justified the exercise of the right of private defence because otherwise the offence of criminal trespass or house trespass would have been committed. A person had a right subject to restriction in S. 99 to defend property against any act amounting to criminal trespass. (1912) 13 Cri L J 764, Foll. The decree-holders had failed to show that they went to obtain possession of the house in the lawful exercise of the right conferred on them by decree. **1963 MPLJ (Notes) 219.**

——Ss. 99, 104, 105, 333 and 326—Criminal trespass and mischief upon Government forest—Right of forest guard to prevent—Extent—Accused cutting timber from Government forest—Seizing of axe from accused held did not exceed necessity—Accused not entitled to claim private defence. 1962 Jab L J 857 : 1962 MPLJ (Notes) 318.

——Ss. 97 and 99—Deceased attacking accused with a dagger first—Accused snatching dagger and causing injuries—Deceased succumbing to injuries — Act of accused covered by right of private defence and right not exceeded. 1962 MPLJ (Notes) 227.

——Ss. 99, 100 and 304 — Right of private defence—Limits.

Merely because the stab given by the accused is a little deeper than the one caused by the deceased it cannot be said that the accused is guilty of exceeding his right of private defence. It is not correct to say that a person apprehending danger to life or grievous hurt should inflict an injury of the same nature to the assailant as was caused to him. Under S. 100, Penal Code, the killing of an assailant is justified when the victim of the assault apprehends either death or grievous hurt. The only restriction imposed is that the person exercising the right should not use more force than is reasonably necessary and should not inflict an injury out of all proportion to the injury with which he was threatened. Where the assailant is killed by the victim exercising his right of private defence a conviction of the victim under S. 304, Penal Code, is not justified and he is entitled to an acquittal. **(1953) 1 M L J 69 : 1953 Mad W N 12 : 1953 Mad W N (Cri) 4 : 55 Cri L J 387 : AIR 1954 Mad 319 (319, 320) (Prs 6, 7) (DB).**

——S. 99 — Applicability discussed. See Penal Code (1860), S. 332. 1961 (2) Cri L J 504 (Manipur).

——Ss. 97, 141, 148, 149 and 326 — Accused more than 4 armed with deadly weapons trying to enforce

their disputed right to usufruct of mango trees — Incident resulting in simple injuries and grievous hurt resulting in death of person — No physical resistance encountered by accused — Accused guilty of offence — No right of private defence. 1961 (1) Cri L J 403 : 38 Mys L J 995 : ILR (1960) Mys 1126 : AIR 1961 Mys 74 (83) (Pt F) (Pr 56) (DB).

——Ss. 99, 96 — Extent of the right of private defence.

The right of private defence under S. 96 is clearly qualified under S. 99 which lays down that right of private defence in no case extends to the inflicting of more harm than it is necessary for the purpose of defence. If merely during the course of a slight hand-to-hand scuffle with an unarmed person the accused pulled out his knife and stabbed the deceased it is very difficult to accept that he did so in the exercise of his right of private defence so as to afford him the benefit of S. 96. ILR (1951) Mys 445 : AIR 1952 Mys 10 (11, 12) (Pt B) (Prs 7, 8) (DB).

——Ss. 96 and 99 — Right of private defence — Extent of — Right is qualified by S. 99 — If merely during the course of a hand-to-hand scuffle between unarmed person (the accused and the deceased) the accused pulled out his "gupti" and stabbed the deceased, it is very difficult to accept that he did so in the exercise of his right of private defence. AIR 1954 Nag 126 (128) (Pt B) (Pr 10).

——Ss. 97 and 99 — Defence of property and person — Right is available only subject to exception provided under S. 99 — No material on record to show that S. 99 does not apply to the case — Claim to right of private defence is not sustainable. (1965) 31 Cut L T 576 : ILR (1965) Cut 229.

——Ss. 99, 141, 147, 148, 149 — Unlawful assembly —Dispute between complainant's party and accused's party over right to cut embankment of irrigation tank in village — Riot — Complainant's party unarmed, while accused's party fully armed with some deadly weapons — Assault by accused party resulting in deaths of members of complainant's party. held constituted unlawful assembly — Common object — Proof — Offence committed by members of accused party.

Held on facts, (i) that even if the complainant's party had no right to cut the embankment to release the accumulated water, being unarmed they did not enforce that right or supposed right by means of criminal force or show of criminal force. That party, therefore, did not constitute an unlawful assembly. (ii) The accused party clearly constituted an unlawful assembly since they by means of criminal force wanted to enforce a right or supposed right. Those members of the accused party, who were armed with deadly weapons, were punishable under S. 148. The other members of the accused party carrying only lathis, were punishable under S. 147. ILR (1952) Cut 219, Rel on. (iii) Where several persons assaulted the deceased, the common object can be collected from the nature of the assembly and of the arms used by them and from the behaviour of the assembly at or before the scene of occurrence. The common object is an inference of fact to be deduced from the circumstances of each case. The circumstances of the case established the existence of the common object as being one of murder. From the circumstances, it was also clear that the members of the unlawful assembly knew it to be likely that murder would be committed in prosecution of the common object. Each of the accused therefore was liable to be convicted under S. 302/149, Penal Code. 1964 (1) Cri L J 114 (Ori) and AIR 1959 S C 572, Rel. on. (iv) The commission of an overt act is no doubt evidence of the fact that the accused was the member of an unlawful assembly. Whether a person is a member of the unlawful assembly or not is a pure question of fact to be determined on the assessment of evidence. (1963) 5 O J D 155 : 29 Cut L T 383: 1964 (1) Cri L J 117 (Orissa).

——S. 96 — Complainant's bullock damaging straw of accused — Accused has a right to impound it and apply force, in exercise of right of private defence, to remove obstruction caused by complainant — Mere number of injuries caused to complainant will not lead to the conclusion that the right of private defence was exceeded when the other evidence shows that some of the injuries were caused by the accused and remaining ones do not support that conclusion. (1963) 5 Orissa J D 297.

——S. 99 — Exceeding right of private defence — Question of fact — Accused having reasonable apprehension of getting grievous hurt from deceased dealing two knife blows in quick succession each of which sufficient to cause death in ordinary course of nature — Right of private defence held not exceeded.

Whether the accused has exceeded his right of private defence, is a question which depend upon the facts of each case. It is difficult to lay down any general proposition except to keep in mind what has been laid down under S. 99 that no more harm should be inflicted than is necessary for self-defence.

Where the accused who had reasonable apprehension of getting a grievous hurt from the deceased gave two knife blows on the deceased in quick succession in self defence and each blow was sufficient in the ordinary course of nature to cause death.

Held that the accused had not, in the circumstances, exceeded the right of private defence and could not be held guilty of any offence. AIR 1952 S C 165, Ref. to. (1963) 29 Cut L T 488.

——Ss. 96 and 99 — Right of defence of person — Extent of — Right held not exceeded.

As a result of quarrel and altercation the accused gave a blow to the nephew of the deceased who thereafter ran home. After an appreciable time the deceased came with a lathi and gave a severe blow on the head of the accused. The accused in turn gave two or three blows on the head of the deceased causing a fracture of the skull and ultimately in his death.

Held that the deceased had no justification to continue a quarrel which had already terminated and to assault the accused; and so long as the deceased had a weapon with him the accused had a reasonable apprehension that further assault on him may take place. With such an injury on his head there was a reasonable apprehension of grievours hurt and the accused was entitled to give severe blows on the head of the deceased with a view to disable him, though unfortunately the man died subsequently. The doctor who held the post-mortem examination on the corpse of the deceased certified that the deceased could have survived and the injury though grievous was not always fatal. In these circumstances the accused cannot be said to have exceeded the right of private defence of person conferred on him by law. (1962) 4 O J D 369 : 29 Cut L T 33 : 1963 All Cri R 85 : 1963 All W R (Sup) 32 : 29 Cut L T 33.

——Ss. 99, 148 — Case of rioting — Right of private defence of property — When can be claimed.

The right of private defence under S. 99 of Penal Code is an answer to a charge of rioting; but there can be no right of private defence when the riot is premeditated on both sides, unless object of the assembly is shown to have been to repel forcible and criminal aggression. The right of private defence can be exercised only in special circumstances and with the restrictions imposed by that section. The important considerations which always arise in order to

determine whether the action of the accused is covered by the right of private defence are, firstly, what is the nature of the apprehended danger and secondly, whether there was time to have recourse to the police authorities, always remembering that where both parties are determined to fight and go up to the land fully armed in full expectation of an armed conflict to have a trial of strength, the right of private defence disappears. The right is available only against an offence and not against a lawful act. In a case of right of private defence of property it should be clear from the evidence that the party exercising the right he claims is in possession of that right and that he is entitled to resist or repel aggression in order to maintain that right. It is only when these facts are proved that he can be said to be maintaining his right. A gathering of persons assembled to maintain the status quo may equally be unlawful if the defence of the right can only be effected by enforcing it through the use of force. The right is strictly confined only to acts against an offence and not against what may be a civil trespass.

If a person prefers to use force in order to protect his property when he can, for the protection of such property, easily have recourse to the public authorities, his use of force is made punishable by the Indian Penal Code, no matter what the intention of the person may be. The law says that he must not use force in such cases but should invoke the aid of the tribunals charged with enforcement of the law. **(1962) 28 Cut L T 548.**

——Ss. 97, 99—Right of private defence — Extent of.

There can be no right of private defence where the riot is premediated on both sides. The right of private defence can be exercised only in special circumstances and with the restrictions imposed by S. 99. The important considerations which always arise in order to determine whether the action of the accused is covered by the right of private defence are, firstly, what is the nature of the apprehended danger, secondly, whether there was time to have recourse to the police authorities. It is lawful for a person, who has seen an invasion of his rights, to go to the spot and object; it is also lawful for such person if the opposite party is armed, to take suitable weapon for his defence. **(1961) 3 Orissa J D 26 : 27 Cut L T 367.**

——Ss. 99, 300, Excep. 2— Private defence of body— When exceeded.

Held, that though a case of self-defence was made out in the evidence still the blow which caused the death being on a vital part of the body when the deceased was armed only with a lathi was a case of exceeding the right of private defence, and that the appellant was guilty of culpable homicide not amounting to murder as the case fell under S. 300, Exception 2, Penal Code. **1958 Cri L J 785 : 24 Cut L T 350 : AIR 1958 Orissa 113 (161) (Pt B) (Pr 11) (DB).**

——Ss. 96 and 97—Right of private defence of body —Extent of — Causing death— Right when exceeded stated. See Penal Code, Ss. 146 and 147. **(1958) 24 Cut L T 215.**

——Ss. 99, 101, 304 — Exceeding right of private defence—Punishment.

The second blow of axe given by the accused on the frontal aspect of the arm at a time when the deceased had been completely disabled may be said to be one not protected by the right of private defence. This however, would not make her liable to be convicted under S. 304. **('51) 17 Cut L T 220 : AIR 1952 Orissa 37 (42) (Pt G) (Pr 11).**

——Ss. 99, 96—Person informed that party of accused were invading his property by cutting away bamboos —Person is entitled to go suitably armed to the spot and object and if he is attacked, to defend himself by use of weapons. AIR 1936 Pat 622, Relied on. **(1964) I L R 43 Pat 156.**

——Ss. 99, 97, 103 — Private defence of property — One party in actual possession — Both parties armed —Simultaneous attack — Member of party in actual possession causing fatal injury to member of opposite party—Right of private defence of person or property held not exceeded. See Penal Code (1860), S. 97. **1959 Cri L J 71 : AIR 1959 Pat 22 (DB).**

——S. 99—Private defence of person and property — Interpretation—Use of English precedents not to be permitted: Observations of Ross J., in AIR 1926 Pat 433, Dissented from. See Penal Code (1860), Preamble. **1959 Cri L J 71 : AIR 1959 Pat 22 (DB).**

——S. 99 — Unlawful seizure of cattle — Hurt could be caused in rescue of cattle in exercise of right of private defence. See Penal Code (1860), S. 147. **AIR 1955 N U C (Pat) 1869.**

——S. 100 — Right of private defence — When exceeded stated. **AIR 1955 N U C (Pat) 456 (DB).**

——Ss. 99 and 100—Right of private defence—When exceeded indicated—Case on facts. AIR 1955 N U C (Pepsu) 456 (DB).

——S. 103 — Right of private defence of property is restricted by general provisions which apply to every kind of right of private defence mentioned in S. 99 which lays down, inter alia, that the right in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence. **('51) 3 Pepsu L R 620 (DB).**

——Ss. 100 and 97—Private defence of property and body — Accused lawfully ploughing land—Deceased starting fight deliberately preventing accused from lawfully exercising his right — Accused held had right of private defence — Killing deceased held no offence. See Penal Code (1860), S. 97. **AIR 1955 N U C (Punj) 1353 (DB).**

——S. 99—Unlawful assembly — Accused gathering in force, defending his possession — Accused within their right in peacefully occupying the field in dispute where it is lying vacant and preparing it for cultivation — They are entitled to resist by force any attempt by rival claimants to prevent them from doing so — In doing so the accused cannot be said to constitute unlawful assembly—Accused are entitled to use force as a defence against criminal trespass and are entitled to cause any harm short of death — Right held was not exceeded, since although no grievous injury was caused to any of these accused, the voluntary causing of death was justified. **1954 Cri L J 1518 : AIR 1954 Punj 232 (234, 235) (Pt B) (Prs 8, 11) (DB).**

——Ss. 97, 99 — Right of private defence of person and property — Principles — Degree of force to be used in exercise of right — Feelings of person attacked at time of occurrence are to be considered — Recourse to public authorities not possible or useful— Right is not lost.

Where an individual citizen or his property is faced with a danger and immediate aid from the State machinery is not available, the individual citizen is entitled to protect himself and his property but the violence which the citizen defending himself is entitled to use must not be unduly disproportionate to the injury which is to be averted or which is reasonably appehended and should not exceed its legitimate purpose. AIR 1963 S C 612, Foll. The exercise of right of private defence must never be vindictive or malicious, In judging the conduct of a person who proves that he had a right of private defence, allowance has necessarily to be made for his feelings at the relevant time. Right of private defence is subject to

the provisions in S. 99. 1963 Raj L W 436 : I L R (1963) 13 Raj 789.

——S. 97—Applicabiiity—Right of private defence of property—When exceeded indicated. See Penal Code (1860), S. 34. 1959 Cri L J 770 : AIR 1959 Raj 124.

——S. 97 — Applicability — Fight for possession of land — One of complaints party dying — Right of private defence held was not exceeded by accused. See Penal Code (1860), S. 300. 1958 Cri L J 222 : AIR 1958 Raj 52 (DB).

——Ss. 96, 97 and 100 — Accused in lawful possession of his field — Deceased and his party asking accused not to plough his field — Upon accused's refusal to comply deceased aiming a lathi blow at accused — Accused picking up a lathi lying on spot and giving only one blow to the deceased resulting in his death — Accused held was protected by right of private defence of person as well as property. 1953 Raj L W 116 : AIR 1955 N U C (Raj) 1372.

——S. 99 — Extent to which right of private defence may be exercised — No opportunity to accused to have recourse to public authorities at dead of night when deceased was trying to get into the house of the accused and menacing the safety and honour of the women folk of the household—Accused's right of private defence extended even to causing of death. AIR 1955 N U C (Raj) 496.

——Ss. 99 and 104 — Right of private defence — Extent to which may be exercised—Plea of self defence, when available.

Four boys of tender ages had taken their cattle for grazing outside their village. The cattle strayed into the adjoining field of the accused and actually mounted the heap of fodder and were committing mischief. The accused attempted to drive out the cattle and to take them to the pound. The boys intervened and scuffle ensued. The accused were armed and the boys received injuries in the scuffle. The question was whether the accused acted in the exercise of their right of private defence.

Held, that the cattle were admittedly trespassing into the appellants' field and causing damage and they had an undoubted right of taking measures to protect their fodder and this right extended under S. 104, I. P. Code, to causing injuries to the boys short of death. But this right is subject to the restrictions contained in S. 99. The material para. of that section enacts that the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence. The harm which the appellants caused was the assault on the boys. If it was shown that an occasion for the assault had arisen, the Court would not be justified in nicely balancing the amount of force necessary to repeal the trespass and mischief. The appellants could not justly be expected to measure out the attack proportionate to the needs of the occasion and even if they used more force than was strictly necessary, they would be entitled to claim the benefit of the exception. At the same time if the circumstances of the case show that the occasion to use force had not arisen at all, the use of any force was unjustified, and the assault on the boys would lose its justification and the plea of the right of private defence could not avail the appellants.

As the evidence in the case showed that the accused were not attacked by the boys, they had no right to use force. Moreover the boys were of tender age, whereas the accused were stalwart young men 25 to 30 and were also armed. Under these circumstances the accused could not have any justification for beating the boys and the plea of self-defence was not open for them. 1956 Cri L J 1439 : AIR 1956 Sau 107 (108, 109) (Pt A) (Prs 5, 6) (DB).

——Ss. 97, 323, 324 — Right of private defence of property—Extent of.

A was in possession of certain property as mortgagee from B. In dispute between A and B as to possession, the Mamlatdar held A to be in possession and referred B to Civil Court. Subsequently while A was sowing the field. B, his wife C and relatione D and E,entered the field and tried to stop the sowing. C caught the reins of A's bullocks. A thereupon snatched a spade and caused an injury to C. E thereupon went near A who gave him three blows on his head by the blunt side of the spade. A was tried under S. 323 for causing hurt to C and under S. 324 for causing hurt to E but was acquitted in appeal in respect of offence against C. In revision against the order :

Held, that even though B and other male members of the party did not use actual force against A, A's right to eject them by force was in no way affected thereby and A could use force against every one of them to the same extent as against C, as they had committed a criminal trespass.

(2) That the distinction between tha cases of C and E on the ground that C had used force while E did not, was not well founded. The injuries to both of them had been caused in the course of the same trespass committed with the same common object, and considering the number of trespassers and the fact that only simple hurt was caused to C and E it could not be said that the accused had exceeded his right of private defence. A was therefore acquitted also in respect of E's injury. 1955 Cri L J 27 : 7 Sau L R 53 : AIR 1955 Sau 2 (3) (Prs 3, 4) (DB).

——Ss. 99 and 100 — Right of private defence after disarming of deceased.

The question whether the accused had the right of private defence is in every case essentially a question of fact to be decided according to the circumstances of each case and decided cases are not of much help except as indicating generally the principles which should be borne in mind in deciding the question. It cannot be said that in every case the accused cannot claim the right of private defence of person, the moment the deceased is disarmed. 8 Sau L R 1 : 1955 Cri L J 23 : AIR 1955 Sau 1 (2) (Pr 3) (DB).

——S. 97—Private defence of body is legal—Accused having justifiable reasons to apprehend that deceased would cause grievous hurt to him—Accused stating to witnesses immediately on spot that he had struck deceased in self-defence — Only one fatal injury on head — Accused held did not exceed right of private defence. ('52) 5 Sau L R 17 : 1954 Cri L J 552 : AIR 1954 Sau 34 (34) (Pr 2) (DB).

7. Time to have recourse to protection of public authorities.

See also Note 6.

——Ss. 99, 104—Applicability—Party having time to have recourse to public authorities—There is no right of private defence. AIR 1955 NUC (All) 4157.

——S. 99—Extent of right—Limitations—Principle of —Right of self-defence held should be restricted — Accused anticipating resistance going to spot prepared to meet force by force—They cannot claim right of private defence of property—Accused should have approached public authorities for protection of their property. AIR 1955 NUC (Madh B) 2100 (DB).

——Ss. 99, Cl. 3, 105 — Right of private defence of property—When commences — Sufficient time to approach public authority for protection — Right of private defence is lost.

On reading the third clause of S. 99 with the first clause of S. 105, it is clear that the right of private defence of property commences not when the actual

danger to the property commences but when there is reasonable apprehension of danger. This is based on sound principle as the apprehension of danger is to be followed by an approach to the public authorities for protection. If the apprehension of danger has actually commenced and if the person can have recourse to the public authorities before an actual injury is caused to the property or right, he must do so, or else he will lose his right of private defence. This contingency usually arises when one has got definite information about the other side proceeding towards the land in dispute and the public authorities are within such a reach that one could inform them before actual damage to the property is done: AIR 1949 All 274 Rel. on. **1964 (2) Cr L J 696 : A I R 1964 Orissa 262 (265) (Pt B) (Pr 10) (DB).**

——S. 99—Accused in peaceful possession of disputed field—Attempt at trespassing by rival claimants — Nearest police station 10 miles away—It cannot be said that accused are not entitled to gather a force in the field in order to protect their right rather than have recourse to the public authorities. **1954 Cri L J 1518 : AIR 1954 Punj 232 (234, 235) (Pt B) (Prs 8, 10) (DB).**

——S. 99—Private defence of property — Recourse to public authorities—Other party cutting off water supplied by Govt.—Recourse cannot be had to force to settle dispute, under right of private defence of property — Proper course is to have recourse to public authorities. **AIR 1955 NUC (Raj) 1250 (DB).**

8. Right of private defence of body when extends to causing death or any other harm—S. 100.

See also Note 6.

(A) No apprehension of death— Illustrative cases.

(B) Assault with intention of gratifying unnatural lust.

(C) Assault with intention of kidnapping or abduction.

(D) Plea of.

See also Note 1 (B).

(E) Onus.

See alse Note 1 (C).

8. Right of private defence of body when extends to causing death or any other harm—S. 100.

See also Note 6.

● ——Ss. 99, 100—Right of private defence—Accused being strangulated – Right extends to causing death of assailant—Plea of self-defence—Onus — Evidence Act (1872), Ss. 101-104, 105.

There can be no doubt that if a person reasonably apprehends that his assailant is attempting to strangulate him, exercise of the right of defence of person extends even to causing death of the assailant.

The plea of self-defence has to be considered as a composite plea. It is not open to the Court to investigate whether the accused could have reasonably apprehended such injury to himself as justified him in causing the death of the assailant. Where a person accused of committing an offence sets up at his trial a plea that he is protected by one of the exceptions, general or special, in the Penal Code, or any other law defining the offence, the burden of proving the exception undoubtedly lies upon him. But this burden is only undertaken by the accused if the prosecution case establishes that in the absence of such a plea he would be guilty of the offence charged. Where the prosecution case did not by reliable evidence establish affirmatively that the accused had done any act which rendered him liable for the offence of murder, but his responsibility if any, arose only out of the plea raised by him, if the plea amounted to a confession of guilt the Court could convict him relying upon that plea, but if it amounts to admission of facts and raised a plea of justification, the Court could not proceed to deal with the case as if the admission of facts which were not part of the prosecution case was true, and the evidence did not warrant the plea of justification. Narain Singh v. State of Punjab, **1963 All Cri R 107 : 1963 All W R (H C) 165; 1963 All L J 330 : (1963) 1 S C W R 29 : (1963) 2 S C J 324 : 1963 B L J R 294 : 1963 S C D 297; 65 Pun L J 561: 1963 M P L J (Cri) 447 : (1963) 1 S C W R 29: (1963) 3 S C R 678 : 1964 (1) Cri L J 730 (733) (Pt B) (Pr 5) (SC).**

● ——Ss. 97, 99 and 100 & 102 — Right of private defence of body—Extent.

A communal riot broke out between some Sindhi refugees resident in the town and the local Muslims. The shops of the accused and his brother ran into each other and formed two sides of a rectangle, the accused's house facing North and the brother's house facing East. Each shop opened out on to a road. The mob approached accused's locality and broke into the portion of the building facing East in which his brother's shop was situate and looted it. There was a hole in the wall between the two portion of the building in which these two shops were situate and his brother's family got into accused's portion of the building through this hole and took refuge there. The accused's mother then told the accused that the crowd had burst into his (appellant's) shop and was looting it. The crowd was beating the doors of the accused's shop with their lathis. A shot was then fired by the accused as also a second shot, and that caused the death of one Sindhi and injured three others, also Sindhis — **Held** that the accused had no time to have recourse to the authorities. The mob or crowd had already broken into one part of the building and was actually beating on the doors of the other part. It was also evident that the accused had reasonable grounds for apprehending that either death or grievous hurt would be caused either to himself or his family. The circumstances in which he was placed were amply sufficient to give him a right of private defence of the body even to the extent of causing death. These things cannot be weighed in too fine a set of scales or in golden scales. Actual looting of the accused's shop was not necessary before the right could arise. The accused did not use more force than was necessary. Amjad Khan v. State, **1952 S C J 227 : 1952 Mad W N 409 : 1952 Mad W N (Cri) 113 : 1952 All L J 317 : 54 Pun L R 252 : (1952) 2 Mad L J 97 : 1952 S C R 567 : (1952) S C A 412 : 1952 Cri L J 848 : 65 Mad L W 426 : AIR 1952 S C 165 (166, 167) (Prs 9 to 11).**

——S. 97—Right of private defence—When arises.

The question of the accrual of the right of private defence to a person does not depend upon an injury being caused to him. Where the facts and circumstances of the particular case indicate that, the accused could have had a reasonable apprehension in his mind of a grievous injury being caused to him. then the right of self-defence was available to him. **1965 All L J 977 : 1965 All W R (H C) 711 : 1965 All Cri R 486 : 1966 Cri L J 503 : ILR (1965) 2 All 850 : AIR 1966 All 244 (247) (Pt A) (Pr 17) (DB).**

——S. 100—Applicability—'Reasonable apprehension of death or grievous hurt'—Test.

Four persons armed with sticks and bichuvas came to the place where the two accused were sitting. They were drunk and one of them started the fight by hitting one of the accused. Another person of the party used a knife against the other accused. Thereupon the accused inflicted injuries to the four persons which resulted in death of three of them.

Held, that the circumstances fully justified the accused to entertain a reasonable apprehension that death or grievous hurt was likely to be caused to him unless he himself dealt with the persons in the exercise of his right of private defence. He was therefore entitled to acquittal. 1956 Mad W N 729 : (1957) All W R (Sup) 17 (Mad).

——Ss. 97, 100, 300, Exception (2) — Scuffle between accused and deceased and his supporters — Deceased aggressor — Deceased and his supporters unarmed—Right of private defence, extent of; available to accused—Accused stabbing deceased, held exceeded the right.

On evidence as it stood it could not be said with any degree of certainty that the injuries of the accused were due to the relations of the deceased having beaten him before the accused stabbed the deceased, but on consideration of the evidence and all the circumstances, there was no doubt that the deceased was the aggressor, who questioned the accused, caught his hair and exchanged blows with him and the relations of the deceased who happened to be nearer by at the time went against the accused with a view to support the deceased and that the accused had reason to apprehend that the deceased and his relatives would make common cause and might handle him. It was in evidence that none out of the deceased and his relatives was armed with any weapon.

Held, that though a right of private defence of the body accrued to the accused under the first clause of S. 97 during his scuffle with the deceased, he had no reason to apprehend an assault of any of the descriptions in S. 100 and the right ceased when his scuffle with the deceased terminated. Although the accused acted in the exercise of his right of private defence of the body, he exceeded that right and came under Exception (2) to S. 300. 8 Ind Cas 1088 (Mad). Rel. on; AIR 1952 Raj 158; 1960 Mad L J (Cr) 272 (Ker), Distinguished. Catching a person's tuft of hair by way of assault does not amount to grave and sudden provocation in all circumstances. There was mutual provocation and the provocation to the accused was not so grave as to bring his act of stabbing the deceased within exception 1 to S. 300. 1946 A C 588 and AIR 1928 Mad 136, Distinguished; AIR 1962 S C 605 (630), Applied. (1965) 2 Andh W R 145 : 1965 (2) Cri L J 440 (Andh Pra).

——Ss. 96, 100, 300 Exceptions 1, 2 and 4 and 304—Right of private defence — Defence of body — In the face of danger it is not reasonable to expect accused to measure force of his blows or to succeed in avoiding vital part of the body. AIR 1954 Assam 56 (56, 57) (Prs 4, 5) (DB).

——Ss. 99, 100 and 300—Right of private defence—Right held not exceeded.

If the accused exceeds his right of private defence and kills his assailant though he could have caused lesser injury, the general exception may not apply. In that event the case is likely to fall under exception 2 to Section 300, Penal Code. But even if the accused were to cause more harm than is absolutely necessary in repelling the attack it cannot be said that he exceeded the right given to him by law.

Held, case fell under S. 100 and not under S. 300, Exception 2. 1952 Cri L J 1366 : AIR 1952 Bhopal 25 (29 to 31) (Pt J) (Prs 28, 42, 45).

——Ss. 97, 99, 100 — Private defence of body — Persistent assault with stick on accused — Person assaulted striking knife blow to ward off danger.

The deceased, taking up the most unreasonable attitude, actually picked up a stick and started and persisted in assaulting the accused with it. The accused had done his best to save himself from the deceased but the latter pursued him and still persisted in beating him. The accused received about 10 or 15 blows and yet his assailant continued the beating in spite of the protests of the bystanders. The deceased also threatened him with death.

Held, that there was no doubt that the accused had a very reasonable apprehension of at least a grievous hurt being caused to him, if not his death and therefore, his act of giving a blow of knife to the accused to save himself resulting in the death of the deceased was justified. The accused had not exceeded his right of private defence of his person and therefore, he cannot be said to have committed any offence. AIR 1925 Nag 260, Applied. 52 Cri L J 1239 : AIR 1951 Bhopal 2 (4) (Pr 8).

——S. 100—Private defence—Apprehension of death due to witch-craft—Apprehension unreasonable.

The law does not recognise the possibility of encompassing death by witch-craft or causing any harm by witch-craft The apprehension in the mind of accused that the death may be caused due to witch-craft is unreasonable and therefore it cannot confer any right of private defence on the accused person, unless he apprehends physical violence from his opponent. (1962) 3 Guj L J 503 : 1963 (1) Cri L J 431 : AIR 1963 Guj 78 (78) (Pt B) (Pr 5) (DB).

——S. 97— Right of private defence—Accused when may counter-attack ending in death.

Where the facts show that his adversary was using such a weapon, the use of which would cause death, the accused is entitled to defend himself and in defending himself if he happens to kill the adversary he cannot be held guilty of murder. If the accused apprehending immediate danger to his life thinks that it is only if he made a counter-attack that he could save his life and make the attack he is entitled to do so. The question in such cases whether the act of the accused was commensurate with and proportionate to the attack of the opponent is to be determined having regard to the particular facts and circumstances of the case. 1953 Cri L J 1141 : ILR (1952) Hyd 52 : A I R 1953 Hyd 207 (207, 208) (Prs 2, 3) (DB).

——Ss. 97, 99, 300, Exception II, Ss. 302, 304, 328 — Applicability — Accused 2 related to accused 1 — Accused tree-climbers by caste and having choppers in their hands—Deceased not armed—Deceased purposely destroying maize crop of accused No. 1 and showing threatening gestures — Accused 2 giving fatal blow with his chopper on shoulder of deceased and accused 1 causing heavy injuries on other parts of body of deceased — Held, accused being tree-climbers no adverse inference could be drawn from existence of choppers in their hands — Deceased being in the aggressive, accused had right of private defence — Accused 2 exceeded that right in causing death of the deceased—Act of accused 2 came within Exception II to S. 300—Accused 2 guilty not under S. 302 but under first part of S. 304 in view of seriousness of injury—Accused 1 also exceeded his right of private defence in inflicting serious cuts to deceased and was guilty under S. 327. 1960 Ker L T 207.

——Ss. 100, 300—Infuriated persons trespassing into accused's house — Accused placed in dangerous situation — Apprehension of death or serious injury — Trespassers not armed with dangerous weapons — Accused held entitled to right of private defence.

Death or grievous hurt can be caused without the aid of dangerous weapons when more persons than one are bent upon causing it. The dangerous situation in which the accused persons were placed and not the use of dangerous weapons is the deciding factor. If a person is surrounded by 3 or 4 infuriated

persons who assault him, apprehension of death or grievous hurt can very well be there. The standard of the cool by-stander is not to be used, and the weighing of the right self-defence in "golden scales" is not to be resorted to. Those who trespass into other persons' houses and man-handle the occupants, should have a fear that courts will be hesitant to place undue restrictions on the very valuable right of self-resistance against unlawful aggression. (Accused held did not exceed right of private defence). **1959 Ker L J 1313 : 1959 Ker L T 796.**

- Ss. 99, 100 and 300 — Right of private defence of body—Accused, deceased and some others playing cards — Verbal altercations leading to blows — Deceased aggressor and beating accused — Accused caught hold of by friend of deceased — Accused severely beaten, getting exhausted and falling down — Deceased again attacking — Accused taking out knife and stabbing deceased fearing death at hands of deceased and attempting to run away — Friend of deceased following accused — Fearing renewal of attack accused using knife and wounding the friend — Accused held acted in self-defence in both cases and that in doing so he did not exceed his right. **1957 Ker L J 413 : 1957 Ker L T 500.**

——Ss. 99 and 100 — Right of private defence — Causing death — Test to be applied — Circumstances, sufficient for apprehension.

In determining whether the accused had acted in exercise of the right of private defence in causing death of the aggressor, the test to be applied is not what a perfectly cool by-stander would think absolutely necessary, but whether there was reasonable apprehension of danger to the life on the part of the accused having regard to all the circumstances. In the excitement of the moment an average man is not expected to weigh in golden scales the means that he should adopt in order to save himself when he finds himself attacked by the aggressor with a dangerous weapon.

In a murder case it was established that the deceased was known in the village as a dangerous man and that he was suspected of being a murderer. He had not only carried away the wife of the accused but had also inflicted damage to his property and had beaten him in the past, that the accused was always afraid of him, that at the material time the assault was commenced by the deceased and that he was the aggressor, that he first struck a blow to the accused with the palia and after that weapon was snatched from his hands continued to beat him with a stick.

Held, that there existed circumstances which gave rise to reasonable apprehension in the mind of the accused that death or at least grievous hurt would be caused to him at the hands of the aggressor unless he was overpowered and prevented from doing so. The case of the accused was thus covered by S. 100, I. P. Code and he was justified in inflicting injuries to the deceased which resulted in his death. Held, further, that considering that the deceased had commenced the assault with a palia first and had continued to beat the accused with a stick later on, and though injured he was still able to walk some distance; it could not be held that the accused had acted cruelly or had exceeded the right of private defence. **Madh B L R 1956 (Cr) 457.**

——Ss. 99, 100 — "Reasonable apprehension" — Interpretation of — Law does not require person to modulate his defence in golden scale — Tests of reasonable apprehension, indicated. **AIR 1955 N U C (Madh B) 2100 (DB).**

——S. 97 — Right of private defence of body—When exceeded.

Where in a murder charge, faced with a situation where the deceased was an aggressor and was armed with a ballam, which he could have used as such, even though his first stroke was with the handle part of it, the accused could have a reasonable apprehension of danger to his life and was therefore justified in exercising his right of private defence in completely disabling his adversary. If in that attempt he happened to inflict the injury with a little more force than absolutely necessary he could not be held liable. The law makes every allowance to a person who apprehends a reasonable danger to his life from his adversary, and with intent of self-preservation strong upon him pursues his defence a little further than what to a perfectly bystander may seem absolutely necessary : (1895) 158 U S 550 and AIR 1952 S C 165 Rel. on. **1961 M P L J 71 : 1961 M P C 31 : 1961 Jab L J 343 : 1961 (2) Cr L J 346 : I L R (1961) Madh Pra 149 : AIR 1961 Madh Pra 241 (244) (Pt B) (Pr 24) (DB).**

——S. 99 - Apprehension to cause death or grievious hurt based on reasonable grounds — Right of self-defence can be exercised. **1959 M P L J (Notes) 145.**

——S. 96 — Right of private defence by shooting — When arises.

If the deceased had lifted his lathi to deal a blow at the accused and if he had apprehended that the blow would cause grievous hurt or death, then the accused would be justified in shooting at the deceased. But where it is not possible to assume that the accused had any reasonable apprehension in his mind, that on the mere raising of the lathi, if at all raised, the lathi would fall on him, or for the matter of that on his sons, in the absence of a reasonable apprehension he cannot be said to have been justified in shooting **1957 Jab L J 321 : 1957 M P C 461 : 1957 Cr L J 1138 : AIR 1957 Madh Pra 153 (156) (Pt E) (Pr 17).**

——Ss. 100, 103, 325, 335 — Right of self-defence of property or person — When arises — Causing of grievous hurt on grave and sudden provocation. 1958 Jab L J 257.

——S. 100 (1) and (2) Firstly and secondly — Aggression by party of deceased—Accused beaten by sticks and in fear of grievous hurt stabbing deceased — Accused cannot be held to have exceeded right of private defence and be convicted for any offence.

Where the party of the deceased assumed the role of aggressors and beat the party of the accused and further threatened to cause grievous injury and the accused in such a situation prompted by instinct of self-preservation and acting purely in self-defence stabbed the deceased to death, he cannot be convicted for any offence as his case comes under either of the clause (1) or (2) of S. 100. From the fact that the party of the accused were beaten with sticks and were further threatened to be beaten by sticks alone, it cannot be said that the accused in stabbing the deceased had exceeded the right of private defence.

No hard and fast rule can be laid down to determine the amount of harm which is legally justifiable or permissible in law under the exercise of the right of private defence. Individual cases have to be considered on their own facts. Section 100 does not require as a condition precedent that grievous hurt must be actually caused by the assailant for the right of private defence to come into play. The Section only provides that the person claiming such right must be under a bona fide apprehension or fear that death or grievous hurt would otherwise be the consequence of the threatened assault, if he does not defend himself. If the party of the accused is attacked by a party of men armed with sticks and the accused having no alternative but to defend himself to the best of his ability, retaliates, he clearly acts in private defence, although in doing so he may inflict an injury which may prove fatal. **1963 Mad W N 698 : (1964)**

1 Mad L J 41 : 1964 Mad L J (Cri) 47 : 1964 (2) Cr L J 425 : A I R 1964 Mad 418 (420, 421) (Pt A) (Prs 8, 10, 15) (DB).

——S. 100 — Reasonable apprehension of death — Right of private defence to the extent of causing death.

A used to have frequent quarrels with his wife. B the son used to vindicate the cause of his mother. On the date of occurrence, A quarrelled with his wife and then chased B (his son) with knife saying all the time that he would first kill his son B and then the wife. Thus pursued B turned round and dealt a few blows to A with an axe which he was holding. This resulted in the instantaneous death of A :

Held, that the knife which A had in his hands while chasing B was a deadly weapon capable of causing death. When evidently there was reasonable apprehension in the mind of B that he was going to be killed by his chasing father A and when A had approached B while chasing with a knife all the while shouting that he would kill B, the latter had the right of private defence of the body even to the extent of causing A's death. (1963) 29 Cut L T 464.

——Ss. 96, 100 and 304 — Private defence as to person—Extent of—Criminal P. C. (1898), S. 59.

An attempt to commit burglary at the house of the accused having been made the accused armed with a lathi chased the burglar to a distance of about 100' to 150' kept from the house. The burglar who was armed with an axe tried to assault the accused whereupon the latter with a view to save his own life, gave a blow with his lathi as a result of which the Tangi fell down on the ground. Apprehending further assault, the accused inflicted some more blows with the tangi on the burglar which ultimately resulted in his death. The incident occurred on a very dark night and it was not possible for the accused to know whether his blow fell on any vital part of the deceased burglar. The evidence of the doctor showed that there were 11 injuries only one of which could have been caused by the axe, the rest being caused by a fall. The accused who was convicted under S. 304, I. P. C. pleaded right of private defence.

Held, (i) that as the burglary was attempted to be committed in the very presence of the accused and in his own house the accused had the right of arrest of the culprit. AIR 1948 All 103, Rel. on.

(ii) that the accused under the circumstances had reasonable apprehension that either death or grievous hurt would be the inevitable result unless he took a bold stand and retaliated the burglar with his own weapon. The circumstances in which he was placed were amply sufficient to give him the right of private defence of his person even to the extent of causing death. It could not be said that the accused had exceeded his right of private defence in any manner whatsoever in giving the blows on the burglar which had resulted in his death. (1962) 28 Cut L T 515 : ILR (1962) Cut 891.

——S. 100—Scope—Private defence of body—Causing death — Right, when exceeded indicated. See Penal Code, Ss. 146 and 147. (1958) 24 Cut L T 215.

——Ss. 100 and 302—Deceased giving lathi blow to accused—Accused snatching lathi from deceased and giving blows on head of deceased — Deceased dying — Accused held not guilty under S. 302. AIR 1955 N U C (Orissa) 6106 (DB).

——S. 100—Assault—Nature of.

The assault referred to does not mean the assault, if any already committed but it is the assault of which an apprehension can reasonably be caused and that assault must be one which would amount to an offence. The right is a defensive one. It is granted to a citizen to be exercised for the purpose of preventing an offence affecting his body being committed. It is not a right of retaliation against the completed offence of assault. ('51) 17 Cut L T 220 : AIR 1952 Orissa 37 (39) (Pt B) (Pr 4) (DB).

——Ss. 100, 101—Reasonable apprehension of danger to life.

If after commission of an assault of a simple or grievous nature there is in any case no further apprehension of assault occasion for exercise of the right private defence of the body should not arise. At the same time the possibility of infliction of further assault likely to cause grievous bodily injury cannot as a rule be ruled out on the mere ground that the injury or the injuries already inflicted are simple.

Where a person charged with murder asserts that she killed in self-defence her state of mind at the time of the killing becomes material, and an important element in determining her justification for her belief in impending attack by the deceased. The reputation of the deceased for a violent dangerous or turbulent disposition is thus a circumstance which would cause such a belief. The previous relationship between the deceased and the accused and the deceased's aggressive temperament and disposition shown in his conduct of trespassing into the accused's house in order to assault her while she was retracing her steps must go a great way to cause belief in the accused in an impending danger to life accompanied with little chance of escape. ('51) 17 Cut L T 220 : A I R 1952 Orissa 37 (39) (Pt C) (Prs 4, 5) (DB).

——Ss. 100, 304 — Murderous attack — Right of private defence.

An accused is perfectly justified in resisting an aggressive murderous attack on him by taking the weapon from out of the deceased and inflicting injuries on him to the extent that may be required according to his assessment of the circumstances at the time for the purpose of preventing any further assault on himself by the deceased. If in the course of it he kills the originally aggressive person, S. 100 completely protects it. ('50) 16 Cut L T 227 : 52 Cri L J 685 : AIR 1951 Orissa 245 (247) (Pt B) (Pr 6) (DB).

——S. 100 — Private defence of person and property —Interpretation — Use of English precedents not to be permitted : Observations of Ross J., in AIR 1928 Pat 433, Dissented from. See Penal Code (1860), Preamble. 1959 Cri L J 71 : AIR 1959 Pat 22 (DB).

——S. 100—Secondly.

Sudden altercation between accused and deceased —Deceased twice attempting to hit with a 'salang' on head of accused—Accused warding off blows with arrow in his hand — Accused hitting deceased with arrow when latter was in act of hitting third time — Accused is protected by right of private defence as there was reasonable apprehension that deceased would cause grievous hurt to him : A I R 1929 Lah 443 and AIR 1934 Lah 995, Rel. on. 3 Pepsu L R 90 : 1953 Cri L J 884 : A I R 1953 Pepsu 66 (68) (Pt A) (Pr 11) (DB).

——Ss. 99 and 100—Right of private defence—Question if right was exceeded — Question of fact — Reasonable apprehension of grievous hurt—Test of reasonableness.

Whether a person has exceeded his right of private defence or not is a question of fact and in determining this question all the surrounding circumstances have to be considered. When a person acts under an apprehension he cannot be expected to judge too nicely the force of his own blows. A person with an instinct of self-preservation strong upon him may

pursue his defence a little further than what may be absolutely necessary, judged from the point of view of cool by-stander. Reasonable apprehension however, has to be judged from the point of view of the person faced with danger. Where, therefore, the unarmed respondents, who had climbed the roof of, their house to protect their property, were suddenly attacked and injuries were inflicted on them on the forehead and temple.

Held, that the circumstances were likely to cause a reasonable apprehension in the mind of the respondents that at least grievous hurt would be the result of the assault on them and that they were held justified in inflicting fatal injuries on the attackers. (1965) 67 Pun L R: 948.

——Ss. 100 and 300, Excep. 2 — Applicability—Conditions.

Four cardinal conditions must have existed before the taking of the life of a person is justified on the plea of self-defence. Firstly, the accused must be free from fault in bringing about the encounter; secondly, there must be present an impending peril to life or of great bodily harm, either real or so apparent as to create honest belief of an existing necessity; thirdly, there must be no safe or reasonable mode of escape by retreat; and fourthly, there must have been a necessity for taking life. The law of right of private defence as contained in S. 100 of the Penal Code is not different.

Held, that the previous conduct of the accused, his amorous relations with the witness, his unconcealed jealousy and pronounced repugnance of the deceased whom he considered to be his rival and whom he strongly suspected to be pursuing his intrigue with her, his surprise visit at night after having armed himself with a Chhura, his suspicion of the witness's being with another, his persistent refusal to enter the house unless she had lighted a lamp to enable him to see if there was anybody with her in the house, and on seeing the deceased his having plunged the chhura 16 times into his body without having received a single scratch or any other injury on his person, were facts which left one under no doubt that the accused had come with a premeditated intention to commit aggression if necessary. The attack on the deceased was fierce, murderous and unrelenting, without there being a semblance of belief far less well grounded foundation, that the accused would be attacked by the deceased. The killing in the circumstances could neither be excused nor extenuated on the plea of self-defence. The case of the accused could not be brought under Exception 2 to S. 300 of the Penal Code. I L R (1959) Punj 1473 : 1959 Cr L J 901 : 61 Punj L R 632 : 1959 All Cr R 356 : 1959 All W R (Sup) 90 : AIR 1959 Punj 332 (337, 338) (Pt B) (Prs 22 to 25) (DB).

——Ss. 97, 99, 100 — Exceeding right of private defence—Causing death.

The pursuing party consisting of 60 to 70 persons were fully armed with 'Kulharis' and 'Kirpans', etc. They were all brandishing their weapons. One of them who was ahead of the party was armed with a 'kulhari'. On reaching the accused the pursuit party surrounded them. One of the accused's party was attacked and injured with sharpedged weapons and was killed on the spot. One of the accused was found to have received eight injuries when he was arrested.

Held, that under the circumstances it could not be said that the accused did not have reasonable apprehension that he was likely to be killed by the members of the pursuit party. He was therefore justified in defending himself. He gave only one blow with his spear which unfortunately proved fatal. In the circumstances it could not be said that the accused exceeded their right of private defence. ILR (1956) Punj 119 : 1956 Cri L J 654 : AIR 1956 Punj 122 (124) (Pt D) (Pr 7) (DB).

——Ss. 97 and 100—Scope — private defence of property and body—Accused lawfully ploughing land — Deceased starting fight deliberately preventing accused from lawfully exercising his right — Accused held had right of private defence—Killing deceased held no offence. AIR 1955 NUC (Punj) 1353 (DB).

——Ss. 100 and 300, Exception 2—Applicability—Plea of self-defence—When not available.

It is an accepted proposition of law that a person cannot avail himself of the plea of self-defence in a case of homicide when he was himself the aggressor and wilfully brought on himself, without legal excuse the necessity for killing. It would be strange indeed if a person who provokes an attack, brings on a combat and then slays his assailant were to take shelter behind the plea of self-defence in justification of the blow which he struck during the encounter. 52 Cri L J 1517 : I L R (1951) Punj 202 : 53 P L R 284 : AIR 1951 Punj 137 (140) (Pt B) (Pr 13) (DB).

——S. 100—Right of private defence of person—Use of lathi.

If a person is saving himself or another and uses a lathi for that purpose, he is bound to cause at least simple hurt to the assailant and if he is held to have exceeded his right of private defence merely because he caused simple hurt to the assailant, there would really be no right of private defence left. 1952 Raj L W 1 (DB).

——S. 100 — Right of private defence of person — Reasonable apprehension of death or grievous hurt.

Where the accused acting in defence of his master, who had already been hit with a pharsi on the head by the deceased who was going to strike a second blow to the master, dealt a severe blow with a lathi on the deceased's head, resulting in his death.

Held that the accused had the right of private defence of person and had the right to cause even death under S. 100, and should be acquitted.

It is not possible in a fight like this in the heat of the moment to measure the weight of the blows and the mere fact that a particular blow happened to be harder than another would not take away the right of private defence of person, provided that the person defending himself or another had not acted in such a way as would show that more blows were given than were necessary for the purpose. 1952 Raj L W 1 (DB).

——S. 100—Apprehension of death or grievous hurt —Quarrel between father of accused and deceased — Deceased pressing father's testicles and others beating him—Accused stabbing deceased to save father—Accused held acted in right of private defence. AIR 1955 NUC (Sau) 530 (DB).

——Ss. 99, 100 and 102 — Right of self-defence — Extent.

In order that a person may avail himself of the right of self-defence to the extent of causing death, it must be proved that the assault by the other side was such as may reasonably cause apprehension of death or grievous hurt and the right ceases when such apprehension ceases.

Held that in the circumstances of the case there was no such apprehension, in any case after the deceased had fallen down and that there was absolutely no justification for dealing so many blows with the deliberate intention of killing. ('51) 4 Sau L R 249 (DB).

——S. 100 — Held, that the deceased was the aggressor. He had fired his gun on the accused. It was a muzzle loader and would take time to fill it

with powder and cartridges. The accused persons in excitement could not be expected to weigh the pros and cons with balanced minds. They might have apprehended that the gun would be used against them or their adherents as it was used against their brother. So they belaboured the deceased in the exercise of their right of private defence of bodies. ('50) 3 Sau L R 31.

——S. 100 — Quarrel between D and A while playing cards — D hitting A on face with wood plank — About 20 days after incident D going out with lighted torch—A accosting him on way—D inflicting injury on A with torch — Burn more than skin deep, on right side of chest — A in consequence inflicting injury on abdomen by sharp instrument by giving a deep thrust—Injury fatal — Held that there was apprehension in mind of A that D would cause grievous hurt—A held was justified in causing death. AIR 1952 Trav-Co 449 (449) (Pt A) (Pr 4) (DB).

8 (A). No apprehension of death— Illustrative cases.

——S. 100 — Applicability—Victim felled on ground — Accused overpowering him by sitting on his chest — No apprehension to accused of grievous hurt or death — Accused striking victim with stone on vital part of body—Injury caused ultimately proving fatal — Accused held did not strike deceased in exercise of right of private defence of his person. 1953 Cri LJ 217 : A I R 1953 Bhopal 1 (3) (Pt C) (Prs 16, 17).

——S. 97—Private defence of body.

Defence that deceased was fired at when he was attacking or was about to attack assailant — Medical evidence that gun shot had hit at back of deceased's neck — Nature of wounds and extent of dispersion showing distance between the two as 8 to 10 yards — Right of defence of body, held could not be, accepted. 1955 Cri L J 1617 : I L R (1955) Pepsu 665 : A I R 1955 Pepsu 162 (164) (Pt B) (Pr 10) (DB).

——S. 100 — Accused pointing pistol on deceased with intention to fire — Deceased pouncing on accused with drawn sword — Deceased held had right of private defence to the extent of causing death of accused — Accused firing — Accused cannot claim right of private defence.

If a person has reasonable apprehension of grievous hurt or death at the hands of his opponent, by virtue of the right of private defence of the body, he can go to the length of causing his opponent's death. Where the accused took out his pistol and pointed towards the deceased evidently with the intention of firing upon him, deceased must be considered to have had a genuine apprehension that the accused was going to fire upon him and the result must naturally be his death. So he would have every right to protect himself by pouncing upon the accused with a sword even though in doing so he might kill him. His case would fall within the purview of S. 100, Penal Code and since whatever he did, he did in the exercise of the rights of private defence, he would be committing no offence. In such a case because it was the accused who had set the ball rolling he could not invoke the right of private defence of his body and shoot the deceased who had pounced upon him with a drawn sword for the simple reason that such right did not accrue to him. ('50) 2 Pepsu L R 489 (DB).

——Ss. 96, 100—Apprehension of grievous hurt.

Where the deceased was empty handed and all that he was doing at the time the accused fired upon him was that he was attempting to relieve another accused of his gun so that he might not use it against the party of deceased, it cannot be said that the accused had any reasonable apprehension of any serious harm to the other accused at the hands of deceased and consequently the accused can have no justification for shooting the deceased. ('50) 2 Pepsu L R 288 (DB).

8 (B). Assault with intention of gratifying unnatural lust.

——S. 100 (4) — Creditor not allowing debtor boy to go till he pays money — No evidence to show creditor's intention to commit unnatural offence — Clause (4) does not apply.

A, a creditor, made a demand on a boy B to repay his debt of Rs. 300 at 9 P. M. on coming out of a cinema house. There was some altercation in which C intervened and stabbed A who died soon after. C pleaded right of private defence under cl. (4) of S. 100, Penal Code. There was no evidence of any intention in the mind of A to commit unnatural offence on B. The general evidence showed that both A and C were men of bad character.

Held, that A's demand of money from B and telling that he would not allow B to go till his money was paid did not amount to an assault and that there being no evidence of A's intention to commit unnatural offence on that particular occasion, cl. (4) did not apply so as to give C any right of private defence. 1949 All W R (HC) 458 : 1949 All Cri R 114 : 51 Cri L J 385 : ILR (1950) All 960 : A I R 1950 All 91 (92) (Pt A) (Pr 6) (DB).

——Ss. 99 and 100 — Attempt to commit unnatural offence against offender — Injuries inflicted on and consequent death of victim—Right of private defence pleaded—More harm caused than necessary—No right of private defence. See Penal Code (1860), S. 300, Except 2. 1962 (1) Cri L J 324 : A I R 1962 Guj 39 (DB).

8 (C). Assault with intention of kidnapping or abduction.

——S. 100, Fifthly — Clause fifthly is available in case of abduction as defined in S. 362.

The view that the word 'abducting' used in the fifth clause of S. 100 of the Penal Code refers to such abducting as is as offence under that Code and not merely to the act of abduction as defined in S. 362 thereof is not correct. On a plain reading of clause fifthly of S. 100, there does not seem to be any reason for holding that the word 'abducting' used in the clause means anything more than what is defined as 'abduction' in S. 362. All that the clause requires is that there should be an assault which is in an offence against the human body and that assault should be with the intention of abducting, and whenever these elements are present the clause will be applicable. AIR 1948 All 205, Overruled.

Where the appellant's sister was being abducted from her father's house by her husband, and there was an assault on her and she was being compelled by force to go away from her father's place :

Held, that the appellant had the right of private defence of the body of his sister against an assault with the intention of abducting her by force and that right extended to the causing of death. A I R 1957 All 714, Reserved. 1961 S C D 63 : 62 Pun L R 530 : 1959 Mad W N (SC) 76 : 1959 All L J 884 : 1960 S C J 26 : 1960 Cri L J 154 : 1960 M P C 1 : 1960 B L J R 26 : (1960) 1 M L J (SC) 21 : (1960) 1 Andh W R (SC) 21 : 1960 Pat L R (SC) 13 : (1960) 1 S C R 646 : ILR (1959) 2 All 633 : A I R 1960 S C 67 (68, 69) (Prs 5, 6).

——S. 100 (5)—Fifthly—Applicability—'Abducting' —Meaning—Wife dragged forcibly by husband from her father's house against her will—Person trying to rescue and killing husband—Plea of private defence.

The word 'abducting' used in Cl. (5) of S. 100 refers to such abducting as is an offence under the

Penal Code and not merely to the act of abduction as defined in S. 362. A I R 1948 All 205, Foll; A I R 1953 Madh B 182, Dissent from. Where the husband (deceased) forcibly dragged out his wife against her will from the house of her father, the conduct of the husband amounts to abduction simpliciter but is not an offence. Consequently, any person coming to her rescue and causing the husband's death in that attempt cannot claim any right of private defence. **1958 All L J 175 : 1958 All Cri R 213 : 1958 All W R (HC) 255 : 1957 Cri L J 1195 : A I R 1957 All 714 (716) (Pt A) (Pr 8) (DB).**

[Reversed in AIR 1960 S C 67].

——S. 100 — Attackers raiding house during night to carry away daughter of owner — Right of private defence extends to voluntary causing death. **1959 Cri L J 42 : AIR 1959 J & K 5 (7) (Pt B) (Pr 6) (DB).**

——S. 100 — **Husband assaulting wife to abduct her from her father's house—Wife inflicting injuries with knife resulting in his death — If exceeds right of self-defence.**

According to the prosecution the accused was married to one G, lived with him for a few months, and then went to live with her father. One day G went with some of his friends to fetch her back. The accused's father refused to send her and even closed the door of the house. G forced open the door and put his arms around the waist of the accused with a view to carry her away, whereupon the accused inflicted two or three injuries with a knife on the neck of G as a result of which G died. The accused denied that she was married to G and pleaded that she inflicted the injuries on him in self-defence because G was trying to abduct her by force.

Held, that the question whether the accused was married to G or not was of little importance in considering whether the defence under S. 100, Penal Code, was available to her. That was because, she being a major was free to refuse to go with G, whether he was her husband or not, and G's attempt to take her away by force was an unlawful act. Section 100, Penal Code, would justify the use of force by a person who was assaulted with a view to abduction even if the force used by him were to result in death, provided of course it was necessary for that person to use that much force. The accused did not exceed her right of self-defence in the circumstances of the case. Bearing in mind the fact that the only other inmate of the house, her father, was already put under restraint by the companions of G, it was natural for the accused to think that the only way in which she could prevent her abduction was to incapacitate G from carrying out his purpose. It might be that she could have stopped after inflicting one injury, but placed as she was, it was certainly difficult for her to judge whether what she had done was enough to serve her object; i.e., prevent her abduction. That accounted for her inflicting more than one injury on G's neck. **ILR (1951) Nag 508 : 5 A I Cr D 374 : 1951 Nag L J 252 : A I R 1951 Nag 349 (349) (Pr 5).**

——Ss. 100, 97 and 102—Reasonable apprehension — Facts held sufficient to come to conclusion that deceased intended at least to cause grievous hurt to members of accused's family or to kidnap his daughter and at any rate there was a reasonable apprehension in the mind of the accused that the deceased might do so—This finding held enough to afford a right of private defence to the accused. **AIR 1955 N U C (Raj) 496.**

8. (D) Plea of.

See also Note 1 (B).

—— S. 100 — Reasonable apprehension of death or grievous hurt— Plea is available to person who is not actually injured, but who in defence of father and brother exercises right of defence. **A I R 1955 N U C (Mad) 1227.**

8 (E). Onus.

See also Note 1 (C).

——Ss. 96 and 100—**Plea of private defence—If can be established from prosecution evidence—(Evidence Act (1872), S. 5)—(Criminal P. C. (1898), S. 367).**

Where in a trial for murder the accused admits the incident but puts forward the plea of private defence it is vitally important to elucidate the exact circumstances under which the accused acted, in the particular manner he did. It is well accepted that where the defence has not brought forward any evidence of its own, the case of private defence can still be spelled out from the circumstances appearing in the prosecution evidence.

Where the prosecution witnesses in their examination in chief support the prosecution that the incident took place but in their cross-examination support the defence plea by admitting the existence of circumstances which according to accused caused him apprehension of death or grievous hurt without going back on their statements in examination in chief it would be difficult to determine which part of their evidence is true and which false and there would be no justification in accepting only those portions which support the prosecution while discarding anything that supports the defence. **1959 Ker L J 1083 : 1959 Ker L T 1101 : 1960 Cri L J 589 : A I R 1960 Ker 142 (143) (Pt A) (Pr 5) (DB).**

——Ss. 100 and 302—**Plea of self-defence — Duty of Court and the prosecution — Benefit of doubt to be given to accused—Evidence Act, S. 105.**

In a case where the accused does not deny the act but puts forward the definite plea of private defence there should be reliable and unimpeachable evidence of the circumstances under which the incident took place. It is the duty of the prosecution not to suppress any facts favourable to the accused and not to indulge in embellishments and additions with a view to depriving the accused of his right of private defence, and it is the paramount duty of the Court to sift and scan the evidence carefully with a view to finding out the circumstances under which the accused had to use the weapon. The fact that the deceased was not armed with dangerous weapon is no ground to find that the accused could not have apprehended death or grievous hurt. Even if the accused has not succeeded in conclusively establishing that his version of the incident is the true one, that cannot justify the rejection of his plea in a case, where the prosecution evidence itself is such as to raise a reasonable doubt in the mind of the court that the occurrence might have taken place in the manner pleaded by the accused. **1960 Ker L T 362 : 1960 Ker L J 597 : 1960 Mad L J Cri 272.**

——S. 99 — Causing of grievous hurt — Plea of self-defence — Onus of proof. See Penal Code (1860), S. 300. **1955 Cri L J 852 : A I R 1955 Trav Co 104 (DB).**

9. Right of defence of body when extends to causing harm other than death or grievous hurt—S. 101.

——Ss. 101 and 324 — **Aggressor in warding off stabbing attack from accused sustaining injuries on hand—Injuries trivial—Accused held could not be convicted under S. 324.**

Accused 1 and 2 caused injuries to the hand of P. W. 1. The injuries were caused when P. W. 1 tried to ward off stabbing by accused 2, P. W. 1 was found to be the aggressor :

Held, that under S. 101, Indian Penal Code, the 2nd accused's right of private defence extended to

the voluntary causing of any harm other than death. So the 2nd accused's conviction under S. 324, Indian Penal Code, could not be supported. 1959 K L T 606: 1959 Ker L R 588 : 1959 Ker L T 716 : 1959 Mad L J (Cri) 647 : ILR (1959) Ker 718.

——S. 101 — Exceeding right of private defence — Deceased completely disabled—Axe blow on frontal aspect of arm after disablement of accused cannot be protected by right of private defence. A I R 1952 Orissa 37 (DB).

——S. 101 — Use of sharp-edged weapon.

Even if the right available to the accused is one prescribed in S. 101, she would be justified in using an axe and assaulting the deceased with a view to cause grievous hurt. The mere circumstance that she used a sharp-edged weapon as an axe and selected head as the site of injury might not be enough to hold that she exceeded right of private defence. She must exercise the right to avert the peril to her life by completely disabling or disarming the assailant. So long as the assailant's hands with the stout lathi are free to inflict assault on her the apprehension of grievous hurt could not be averted. In all probability the head or upper part of the body would be the only portions open to attack which also could be interrupted by the deceased using the lathi in his hand. In unequal fight of the kind the weaker's instinct is to lose no opportunity and to leave no stone unturned to avert the peril to life. ('51) 17 Cut L T 220 : AIR 1952 Orissa 37 (41) (Pt F) (Pr 10) (DB).

——Ss. 101 and 300, Excep. II ; 302 and 304, Part 1 —Applicability—Accused molesting wife of deceased — On complaint by wife deceased and his father going to house of accused probably armed to remonstrate him—Accused killing deceased by causing him injuries with barcha blows — Circumstances showing that accused did have an apprehension of danger though not reasonable apprehension of death or grievous hurt — Although right of private defence to the extent of killing deceased may not be proved, case fell under S. 101 and therefore came within Exception 2 to S. 300 — Accused held guilty under S. 304, Part 1 and not under S. 302. AIR 1955 N U C (Punj) 4939 (DB).

10. Commencement and continuance of right of private defence of body — S. 102.

See also Notes 6 and 8.

——S. 102 — Right of private defence — The mere fact that the accused persons were following the deceased with dangerous weapons would justify him in attacking them. It is not necessary that he should wait until he himself is attacked. (1961) 1 Cri L J 54 (2) : AIR 1961 Guj 8 (10) (Pt D) (Pr 8) (DB).

——S. 99 —Accused with gun shot injuring deceased in thigh who was armed with big penknife—Deceased turning away—Accused firing second shot on back and killing deceased — Second shot held could not be said to have been fired in self-defence : AIR 1929 Mad 748, Distinguished. 1953 Cri L J 961; ILR (1952) Mys 94 : AIR 1953 Mys 45 (46) (Pt A) (Pr 6) (DB).

——S. 97—Right of private defence of body—When and how long available.

The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed and it continues as long as such apprehension of danger to the body continues. (1962) 4 Orissa J D 17.

——S. 102 — Accused assaulted by another person delivering blows to that person in self-defence — Other person falling down and becoming incapable of causing any harm as a result of the blows — As there can be no further apprehension on the part of accused of receiving injuries from the other he exceeds his right of private defence in continuing to inflict injuries to him after his falling down : AIR 1934 Lah 748 ; AIR 1941 Lah 45 and AIR 1957 Punj 306, Rel. on. (1964) 66 Punj L R 281.

——S. 102 — Applicability—Arms snatched away—Deceased starting running away but attacked — Private defence.

Where although the deceased started the attack he was soon disarmed and one out of the two accused picked up the gandasi which was in the hands of the deceased and thus both of the accused became armed with weapons one with the gandasi and the other with a kirpan, there could be no right of private defence in such a case particularly when the deceased had started running away from the place : AIR 1939 Lah 393, Disting. 59 Punj L R 61 : 1957 All W R (Sup) 30 : 1957 Cri L J 1453 : AIR 1957 Punj 306 (307) (Pr 6) (DB).

——Ss. 97, 99, 100 and 102 — Right of private defence — Extent of.

The cattle of deceased had trespassed into the field of the accused and thereupon there was an exchange of abuses between them. While the exchange of abuses was going on deceased gave a lathi blow on the person of the accused. The accused happened to have a sword with him and struck the deceased with the sword in return. The first blow was stopped by the deceased on his lathi and then the accused gave a second blow on the left leg of the deceased with the result that the deceased fell down injured. Thereafter the accused did not give any other blow to the deceased and went away. The latter died in the hospital on the next day.

Held, that obviously when the deceased hit at the accused with a lathi right of private defence of person arose in favour of the latter. The assault was of such a nature that the accused could have an apprehension that at least grievous hurt would be the consequence of such assault if he did not defend himself. He was, therefore, entitled to hit back in defence of his own person and even to cause the death of the assailant. It could not be said that there was time to have recourse to the protection of the public authorities or that the right of private defence was exceeded and more harm than was necessary was caused to the deceased. The place of attack clearly showed that the intention of the accused was to disable the deceased who was still armed with the lathi. The apprehension that had arisen in the mind of the accused must still have continued, for the deceased was still in possession of the lathi. So, long, therefore, as the deceased had a lathi in his hand, the accused could repeat the attack which he had already made on the accused under the circumstances the second blow given by the accused was also justified. 1952 Raj L W 136 : ILR (1951) 1 Raj 796 : 1952 Cri LJ 1252 : AIR 1952 Raj 158 (158) (Prs 5, 6) (DB).

——S. 100 — Held, that in the circumstances of the case there was no apprehension of death or grievous hurt, in any case after the deceased had fallen down and that there was absolutely no justification for dealing them so many blows with the deliberate intention of killing them. ('51) 4 Sau L R 249 (DB).

11. Right of private defence of property when extends to causing death — S. 103.

See also Note 8.

● ——Ss. 103 and 300, Exception 2—Deceased peacefully cutting crops — Accused claiming the crops attacking the deceased in furtherance of common intention and killing them — Exception 2 to S. 300 does not apply to the case of accused.

The deceased, none of whom was in possession of any dangerous weapon, were harvesting the crops on a plot of land with peaceful intention under the protection of police. The accused who claimed the crops did not approach the authorities for redress although they had time to do so but attacked the deceased with guns and other dangerous weapons and shot them down from close range with the common intention of killing them after sending away by a ruse the constables who had accompanied the deceased to the field.

Held, that Exception 2 to S. 300 would not apply to the case, as on the facts of the case it could not be said that the accused had shot at the deceased without premeditation and without the intention of doing more harm, than was necessary for the purpose of private defence. The conditions laid down in S. 103 were not satisfied in the case and hence the accused had no right of private defence of property extending to the causing of the death of the deceased. The acts of the deceased did not amount to robbery mentioned by that section as in the circumstances disclosed in the case it cannot be held that there was any reasonable apprehension on the part of the accused that they would be killed or hurt by the deceased.

Section 103 of the Penal Code is subject to S. 99 thereof. Under S. 99, there is no right of private defence in cases in which there is time to have recourse to the protection of public authorities, and the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence. The accused knew beforehand that the deceased had gone to the field to cut the crop. They could have gone to the police station to inform the proper authority of the intentions of the deceased and asked for police protection. They did not do so. Instead they deployed the constables who had accompanied the accused on a false pretext. Secondly it was not necessary for the accused, in the circumstances in which they were placed to use their guns immediately on coming to the field to shoot to kill. The deceased had no arms and they were cutting the crop under the protection of the police, indicating thereby their peaceful intentions. Shooting at close range without warning would certainly be causing more harm than was necessary, in the circumstances of the case, to inflict for the purpose of private defence. Gurdatta Mal v. State of U. P., 1964 S C D 792 : 1965 (1) Cri L J 242 : 1964 Mad W N 563 : (1965) 2 S C J 550 : 1965 Mad L J (Cri) 785 : ILR (1964) 2 All 632 : AIR 1965 S C 257 (263, 264) (Pt B) (Prs 13, 14, 15).

● **——Ss. 99, 97 and 103 — Section 97 is subject to S. 99.**

The right of private defence of property which is set out in S. 97 is subject to the provisions of S. 99, where the owner fixes live naked electric wire of high voltage across passage to his latrine to dissuade trespassers and no warning that the wire was live one was given and the trespasser gets a shock and some time later dies, the owner is guilty of offence under S. 304A. The type of injury caused by the trap laid by the owner cannot be brought within scope of S. 99 nor of course of S. 103, Charubin Gregory v. State of Bihar, (1963) 2 Ker L J 331: 1963 Cur L J S C 123 : 1963 -2 S C W R 419 : 1963 S C D 991 : 1964 M P L J 360 : 1964 Mah L J 503: (1964) 2 S C A 198: 1964 (1) Cri L J 138 : 1964 B L J R 193: 1964 Ker L T 656 : 1964 M L J (Cri) 236 : (1964) 1 S C J 415 : AIR 1964 S C 205 (206) (Pr 6).

——Ss. 99 and 103 — Private defence of property — Causing death — When justified.

Under S. 103 the right of private defence of property extends under the restrictions mentioned in S. 99 to the voluntary causing of death or any other harm to the wrong-doer if the offence; the committing of which or the attempting to commit which, occasions the exercise of the right, be an offence of robbery or of theft under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence if such right of private defence is not exercised. 1958 All W R (HC) 622 : 1958 All L J 511 : 1958 All Cr R 415 : 1959 Cri L J 413 : AIR 1959 All 233 (235) (Pt B) (Pr 10) (DB).

——S. 103, Fourthly — Applicability — Husband entering house of father-in-law and forcibly dragging out wife — Accused going to rescue — Right of private defence of property.

It is not every sort of house-trespass which under Cl. (4) of S. 103 gives the extended right. Such right is conferred in the case of house trespass only when the house trespass is committed under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence if such right of private defence is not exercised.

Where a person entered the house of his father-in-law and forcibly dragged out his wife against her will, S. 103, Cl. (4) will not be available to any person who went to her rescue and caused the death of the husband in that attempt. 1958 All L J 175 : 1958 All W R (HC) 255 : 1958 All Cr R 213 : 1957 Cri L J 1195 : AIR 1957 All 714 (716) (Pt B) (Pr 9) (DB).

[Reversed on another point in AIR 1960 S C 67].

——S. 103 — Extent of private defence.

Under S. 103 of the Penal Code, a person was entitled to prevent a robbery and if necessary even to cause injuries to the extent of causing death. But the extent of harm to be caused in defending one's property depends on the circumstances of each case. Unnecessary harm is not permitted to be caused in the exercise of the right of self-defence. 1951 A W R (HC) 477 : 1951 A L J 464 : 1951 All Cri Cas 116 : 1953 Cri L J 1275 : AIR 1953 All 555 (556) (Pt A) (Prs 8, 9, 10, 12).

——Ss. 103, 147, 148, 304, 323 and 325 — Applicability — Dispute as to land — Suits under S. 180 of U. P. Tenancy Act — Decrees in favour of P and his party man T — Dakhal-dehani also in their favour — Surgarcane crop on the land —Fight over cutting of crop—P and his party on one side and the defendants in the suit, K and his party on the other — Death of one of K's party — Grievous injuries on one of P's party — P's party protected by law of private defence. 1952 A L J 431 : 54 Cri L J 717 : AIR 1953 All 327 (328, 329) (Prs 9, 10).

——Ss. 97, 93, 103, 104, 302, 304, Part 1 — Accused exercising right, attacked by prosecution party — Accused have right of private defence — Exceeding the right — Death caused — Offence.

Where when the accused in the exercise of their right were trying to abate the nuisance caused by a dam set up by the prosecution party across a water channal, which they had no right to erect, the accused were attacked by the prosecution party :

Held, that the accused had a right of private defence.

The right, however, extended to voluntary causing death only if conditions mentioned in S. 103 existed. Where there were no such conditions, the right would be subject to limitations contained in S. 104 and it did not extend to causing death but only to the voluntary causing to the wrong doer of any harm other than death. In causing death the right of private defence would be exceeded and the act would fall under exception 2 to S. 300 (Conviction altered from 302, Penal Code to one under S. 304, Part 1). 1962 Ker L T 868 : (1962) 2 Ker L R 466.

——S. 103 — Right of self-defence of property or person — When arises — Causing of grievous hurt

on grave and sudden provocation. 1958 Jab L J 257.

——Ss. 97, 99, 103, 104—Private defence of property and person—Extent of.

The accused were in possession of the land and while they were ploughing the land, the deceased entered the land and started a quarrel about the right of the accused to plough the land. As the deceased did not pay heed to the protest of the accused, one of the accused gave the murderous strokes on both the deceased with the axe and the deceased were indiscriminately assaulted, even though they fell down by the first stroke on each of them till they were dead.

Held, that in the circumstances the assults were not necessary to be inflicted for the purpose of private defence of person and as the offences committed by the deceased were only criminal trespass and mischief the right of private defence of property under Ss. 103 and 104 did not extend to the voluntary causing of death. The exercise of right of private defence of property is itself subject to restrictions mentioned in S. 99 which prescribes that the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence. Under S. 104 the accused were entitled to cause any harm to the wrongdoer other than death. 1965 (1) Cri L J 744 : AIR 1965 Orissa 99 (101) (Pt C) (Pr 9) (DB).

——Ss. 103, 97, and 99—Private defence of body and property — Beginning and extent of right—It may extent to voluntarily causing of death of aggressor.

The right of private defence of property arises as soon as there is a reasonable apprehension of danger to the property. The person entitled to exercise that right can act before actual harm is done. The right of private defence of body or property extends to the voluntarily causing of death. In trying to defend these rights the defender and his people cannot see whether their assault will only result in simple hurt to or death of any of the aggressors. AIR 1945 Pat 283; AIR 1959 Pat 22; (1960) B L J R 75, Rel. on. 1961 B L J R 824.

——Ss. 99, 100 and 103—Right of private defence — When extends to voluntary causing of death.

Held, that in the circumstances the accused had a right of private defence of person and property and they had not exceeded that right in causing the death of a person belonging to the prosecution party. 1960 B L J R 75.

——Ss. 97, 99, 103 — Private defence of property — One party in actual possession — Both parties armed — Simultaneous attack — Member of party in actual possession causing fatal injury to member of opposite party — Right of private defence of person or property held not exceeded. 1957 B L J R 756 : 1959 Cri L J 71 : AIR 1959 Pat 22 (27, 28, 30) (Pt D) (Prs 23, 25, 26, 40) (DB).

——Ss. 99 and 103—Right of private defence of property — Extent of.

The exercise of the right of private defence of property is restricted by the general provisions which apply to every kind of right of private defence mentioned in S. 99 which lays down, inter alia, that the right in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence. ('51) 3 Pepsu L R 620 (DB).

——Ss. 103, 104 and 300, Exception 2—Scope of the right of private defence of property—Causing death.

The right of private defence, under S. 103, Penal Code, in the case of theft extends to voluntarily causing death provided there are such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence if such right of private defence is not exercised. Where there are no such circumstances the right of private defence of property, if any, would come under S. 104 which does not extend to the voluntary causing of death but extends subject to the restrictions mentioned under S. 99 to the voluntarily causing to the wrongdoer any harm other than death. Where in causing death the right of private defence is exceeded, unless the case is brought within the exception 2 to S. 300, Penal Code, the accused will be guilty of murder, provided of course that the usual conditions required by S. 300 are complied with. 3 Sau L R 184 : 5 A I Cr D 117 : AIR 1951 Sau 1 (3,15) (Pt A) (Prs 7, 12) (DB).

12. Right of private defence of property when extends to causing harm other than death or grievous hurt — S. 104.

See also Note 6.

——S. 104 — Deceased entering appellant's house at night in prosecution of his intrigue with appellants' daughter — Assault by appellant and his companions — Injuries caused leading to death — Appellant held acted in lawful exercise of his right of private defence and committed offence — Viewing the matter from another angle, the deceased committed house trespass which gave the appellant a right of defending his house property — Section 104 applied thereby giving the appellant as well as his companions right of causing some harm other than death — But since death was caused the case became one where the right of private defence was exceeded. I L R (1960) 2 All 235.

——Ss. 97 and 104 — Extent of right under — Minor injuries to aggressor—Inference.

Where the complainant's own examination showed that he was the aggressor and the accused therefore had the right of defence of property and the injuries caused were few and mere scratches and bruises :

Held, that it could not be said that the accused exceeded the right of private defence. 1957 Cri L J 1426 : AIR 1957 Manipur 34 (35) (Pt B) (Pr 4).

——S. 104—Extent of right — Causing minor injuries to aggressor. 1957 Cri L J 1426 : AIR 1957 Manipur 34.

——S. 104—Unlawful seizure of cattle — Hurt could be caused in rescue in exercise of right of private defence. See Penal Code (1860), S. 147. AIR 1955 NUC (Pat) 1869.

——Ss. 104, 141, Cl. 4, 97—'To enforce right' — Encroachment by complainant on common way—Right of common user of way recognised by Court — Accused party asserting right by criminal force—Use of criminal force — Use of criminal force is for enforcement and not for defending right — Accused party constitutes unlawful assembly and right of self-defence under S. 104 cannot be claimed. 36 Cal 865 and AIR 1961 Mys 74, Disting. 66 Punj L R 706 : 1965 (1) Cri L J 209 : AIR 1965 Punj 90 (92, 93) (Pt A) (Prs 9 to 11) (DB).

——Ss. 97, 100 and 104—Private defence of body—Case on facts—Held that an attack by lathis must in every case lead to reasonable apprehension that grievous hurt might be caused if no steps were taken to defend the person attacked — Helpers of the person attacked were also entitled to maintain the former's right of private defence of property — When to the right of private defence of property was added the further right of private defence of person, there could no question of exceeding that right—Right of private defence arose against all the members of the assembly attacking the accused. AIR 1955 N U C (Raj) 1044 (DB).

13. Commencement and continuance of right of private defence of property—S. 105.

● —S. 105 — Right of private defence of property against criminal trespass — Appellants forcibly taking loaded carts through the field belonging to H—Right of H to defend property continues till appellants leave the field.

Where the appellants forcibly took two carts loaded with sugarcane through the filed of H in which there were standing crops, in transporting the sugarcane to the public passage running by the side of H's field so long as they were inside the field, the trespass had not come to an end and H had the right to prevent the appellants from continuing to commit the criminal trespass for whatever short distance they had still to cover before reaching the public pathway. It is true that the appellants' party had to get out of the field and that this they could not have done without committing further criminal trespass. But it does not follow that this difficult position in which the party found itself gave them any right for insisting that they must continue the criminal trespass. They had to abide by the direction of H, whatever be the degree of patience required in case they were not allowed to move in any direction in order to leave the field. **1961 S C D 672 : 1961 Mad W N 530 : (1962) 1 S C R 601 : 1961 B L J R 707 : 1961 All L J 587 : 1961 All W R (HC) 506 : 1961 (2) Cri L J 711 : 1961 M P C 720 : 1961 All Cri R 293 : (1961) 2 S C J 586 : (1961) M L J (Cri) 667 : A I R 1961 S C 1541 (1542) (Pt A) (Pr 6).**

——S. 105—Recapture of stolen property—Right of defence of property.

Recapture of the stolen or plundered property while it is in the course of being carried away is authorised in view of S. 105, Penal Code, for the taking and retaking is one transaction. But when the offence has been committed and the property removed, a recapture after an interval of time by the owner or by other persons on his behalf however, justifiable cannot be deemed an exercise of the right of defence of property. The recovery which S. 105, Penal Code contemplates is a recovery either immediate or made before the offender has reached his final retreat. **1958 All W R (HC) 622 : 1958 All L J 511 : 1958 All Cr R 415 : 1959 Cri L J 413 : A I R 1959 All 233 (235) (Pt A) (Pr 9) (DB).**

——Ss. 105, 97 and 99 — Commencement of right—Exercise of right not on property threatened—Permissibility.

All that is required to give rise to the right of private defence is that a reasonable apprehension of danger to the property should commence. It has always to be found out in the particular circumstances of each case whether in those ciruumstances the person who claims the benefit of the right of private defence had a reasonable apprehension of danger to the property. If the question is answered in the affirmative the right exists; and it is not necessary that the offence or an attempt should actually have been committed.

Where a body of persons (the complainant's party) armed with lathis and accompanied with bullocks and a plough were going with the avowed object of upturning the crop which had previously been sown by the opposite party, there could be no doubt about their intention and their act, if completed, would have amounted to mischief and criminal trespass. When there was no time for having recourse to lawful authorities because the police station was far away, the restriction imposed by section 99 does not come into play and the opposite party has a right to protect their property. The mere circumstance that the property was situate at a distance of 6 or 7 furlongs from the place at which the parties met did not prevent the right of the opposite party from coming into existence. Even if a person who is claiming the right of defence of property happens to be placed at some distance from the property, he can exercise that right provided he finds that damage to property will accrue if the right is not exercised. Therefore, the right of private defence of property could, in the circumstances of the case, be exercised at the place where the two parties met. The right of private defence of property however did not extend to the causing of any one's death, and the opposite party could only commit any offence short of death in their attempt to save the property, by preventing the complainant from proceeding towards the property. **1954 Cr L J 1710 : A I R 1954 All 771 (772, 773) (Pt A) (Prs 6 to 8) (DB).**

——S. 105—Accused arrested and danger to property averted—No right of private defence of property can be claimed. AIR 1951 Kutch 11 (12) (Pt C) (Pr 9).

——Ss. 104, 105, 99, 333 and 326 — Criminal trespass and mischief upon Government forest — Right of forest guard to prevent — Extent — Accused cutting timber from Government forest—Seizing of axe from accused held did not exceed necessity— Accused not entitled to claim private defence.

A forest guard has a right of private defence available to him in preventing commission of criminal trespass or mischief on Government property. That right commences as soon as a reasonable apprehension of danger to the property commences and continues as long as the offender continues in the commission of criminal trespass or mischief.

A forest guard in trying to prevent the accused from cutting timber in the Government forest seized his axe and in the scuffle that ensued accused inflicted certain blows. Accused who was convicted under Ss. 333 and 326, I P. C., pleaded private defence contending inter alia that the right of forest guard extended only to seizing of timber.

Held, that the forest guard had by virtue of his office the right to protect the property of the Government and had the right of private defence in respect of Government property. Seizing the axe in the circumstances could not be said to be in excess of what was necessary and accused could not claim any private defence. **1962 Jab L J 857 : 1962 M P L J (Notes) 318 : 1963 (2) Cri L J 95.**

——Ss. 105, 302, 300, Exception 2 — Deceased committing theft at house of accused and running away with stolen goods — Accused chasing and assaulting deceased — Death of deceased—Right of private defence of property held continued upto time of assault but did not extend to causing death—Case held did not fall under Exception 2 to S. 300, since deceased was assaulted indiscriminately after he had fallen down—Onus to prove that case fell under Exception was on accused — Accused held guilty under S. 302—Evidence Act (1872), S 105.

Where the deceased who had committed theft at the house of the accused was chased by the accused and his men while he was carrying the stolen articles in a wrapper to a distance of about 546 feet into a jungle and there assaulted with sticks as a result of which the deceased died of shock and haemorrhage.

Held, that the right of private defence of property had commenced, when the deceased was carrying away the property of the accused and this right continued upto the time when the deceased was assaulted in the jungle, as the offender had not effected his retreat with the property or the property had not been recovered. The continuance of such right is integrally connected with the time factor. There was no lapse of time between the theft and the effort on the part of the accused to recover the property before the offender effected his retreat. But since at

the time of the assault the deceased was wholly defenceless and was carrying no arms and there was complete absence of circumstances as might reasonably cause apprehension that death or grievous hurt would be the consequence, the right of private defence of property, which the accused had, did not extend to causing death of the deceased—Held, further that assuming that the killing was without premeditation, the accused could not be said to have no intention of doing more harm than it was necessary for the purpose of such defence. The intention had to be gathered from the acts preceding and subsequent to the assault. The fact that after the first blow was given by accused on the head, the deceased fell down and all other injuries were caused on him indiscriminately thereafter, showed the intention of causing more harm than was necessary for the purpose of defence. This also showed the absence of good faith. Exception 2 to section 300, I. P. Code had therefore no application as the element of good faith and absence of intention of doing more harm than was necessary for the purpose had not been established. The onus of proving these elements was on the accused under s. 105, Evidence Act, and the Court would presume the absence of such circumstances. The accused therefore was guilty under section 302, I. P. Code. (1965) 31 Cut L T 265.

——Ss. 105, 99, Cl. 3 — Right of private defence of property—When commences stated — Sufficient time to approach public authority for protection— Right of private defence is lost. 1964 (2) Cri L J 696 : AIR 1964 Orissa 262 (DB).

——Ss. 104, 105 — Right of private defence of property—Nature of — Principles as to exercise of right before actual harm and as to extension of right stated.

The law as to the right of private defence is well settled. It is not the law that the rightful owner in peaceful possession of property must run away, if there is an actual invasion of his right and an attempt on his person. The person in possession of property is entitled to defend himself and his property by force and to collect such numbers and such arms as are necessary for that purpose, if he sees an actual invasion of his rights, which invasion amounts to an offence under the Penal Code, and when there is no time to get police help. It is lawful for a person, who has seen an invasion of his rights, to go to the spot and object. It is also lawful for such persons, if the opposite party is armed, to take suitable weapons for his defence. The right of private defence of property arises as soon as there is a reasonable apprehension of danger to the property. The person entitled to exercise that right can act before actual harm is done.

It is not a right of retaliation and hence he need not wait until the aggressor has started committing the offence which occasions the exercise of his right of private defence. In such a case the right of private defence of body or property extends to the voluntarily causing of death. It is obvious that in trying to defend these rights the appellant and his people could not be expected to weigh the blows inflicted by them on the aggressors in golden scales; and, therefore, they cannot, at the time of resisting the attack, see whether their assault will only result in simple hurt to or death of any of the aggressors. AIR 1945 Pat 283; AIR 1959 Pat 22; 1960 B L J R 75, Ref. 1961 B L J R 824.

——Ss. 97 and 105—Scope—Right of private defence of property and person—When arises—Actual damage to property—Necessity.

In order to give rise to the right of private defence of property it is not necessary that any of the offences mentioned in the second clause of S. 97 should have been actually committed. As laid down in S. 105, I. P. C., the right of private defence of property commences when a reasonable apprehension of danger to the property commences. It is the reasonable apprehension of danger to the property arising out of either commission or attempt to commit, the offences mentioned in S 97 that gives a person the right to defend his property. If a person is already in possession of his property, he alone has the right to go upon the land and carry with him such arms and such men, as he deems necessary to defend his property. There is no right of private defence in a case in which there is time to have recourse to the protection of public authorities. AIR 1959 Pat 22; 35 Cal 368; AIR 1945 Pat 283 and AIR 1938 Pat 518, Rel. on.

Held, that when the members of the prosecution party went armed and were bent upon stopping the harvesting and causing criminal trespass and mischief, the appellants, at that stage, could not have abandoned their property and left the place for seeking the help of public authorities. AIR 1959 Pat 22, Rel. on.

The appellants had no doubt a right of private defence of property. They also had a right of private defence of person. 1960 B L J R 75.

——S. 105 — Private defence of property — Commencement of.

The right of private defence of property arises as soon as there is a reasonable apprehension of danger to the property. The person entitled to exercise that right can act before actual harm is done. It is not a right of retaliation and hence he need not wait until the aggressor has started committing the offence which occasions the exercise of his right of private defence. AIR 1952 Orissa 37, Rel. on. 1957 B L J R 756 : 1959 Cri L J 71 : AIR 1959 Pat 22 (28) (Pt C) (Pr 24) (DB).

——S. 105—Scope—Right of private defence of property against criminal trespass—Duration.

The deceased entered the house of the accused with the intention of outraging the modesty of wife of the accused. The accused beat him with a stick as a result of which the deceased fell down but the accused continued to beat him even after the deceased fell down.

Held, that whatever intention the deceased entertained at the time of entering the house, it had disappeared and he continued on the premises not because he intended to commit an offence but because he was physically unable to get out. After the deceased fell down the accused's right of private defence came to an end. 1956 Cri L J 1234 : AIR 1956 Sau 77 (80) (Pt B) (Pr 9) (DB).

——Ss 103, 300, Exception 2 and S. 100 — Though the right of private defence against theft continues till the offender has effected his retreat with the property or till it has been recovered, where the thief has been felled down by a blow with an axe and his lying prostrate with the stolen property thrown on the ground, it cannot be said that the right of private defence extends to inflicting further blows on the thief of which he dies subsequently. In such a case the case of the accused neither falls under S. 103 nor under Exception 2 to S. 300, Penal Code, to reduce the offence to one of culpable homicide. See Penal Code (1860), S. 300, Exception 2. AIR 1951 Sau 1 (Pr 12) (DB).

——Ss. 97, 99, 104 and 105—Right of private defence of property—Extent of.

Trespass on property to steal crops—Right of private defence of property begins—Accused need not run to police or public authorities to seek redress—Accused cannot be expected to judge his act by the cool standard of a passer by — Death caused — No intention to cause death or to cause such bodily

injury as is likely to cause death could be attributed --Offence held amounted to culpable homicide not amounting to murder 1953 Ker L T 31 : 1953 Cri L J 1394 : AIR 1953 Trav-Co 340 (342, 343) (Pt A) (Prs 7, 8, 10) (DB).

SECTION 107

SYNOPSIS

(Penal Code (45 of 1860), S. 107).

1. Scope.
2. Instigation.
3. Conspiracy.
4. "Intentionally aids by act."
5. Illegal omission.

1. Scope.

——Ss. 107 and 120-A—Distinction between offence of abetment by conspiracy and offence of criminal conspiracy — Sanction under S. 196-A for offence of abetment by conspiracy is not necessary. See Criminal P. C. (1898). S. 196-A. 1962 (1) Cri L J 770 : AIR 1962 S C 876.

——S. 107 — Abetment of contravention of Order — Mens rea not required. See Imports & Exports (Control) Act (1947), S. 5. 1962 (2) Cri L J 472 : AIR 1962 Bom 243 (DB).

——S. 107—Abetment—What constitutes.

Section 107 defines abetment. It is well known that an act of abetment may take place in one of three ways: (1) Instigation, (2) Conspiracy, or (3) Intentional aid. 60 Bom L R 428 : ILR (1958) Bom 700 : 1960 Cri L J 1189 : AIR 1960 Bom 393 (393) (Pt A) (Pr 7).

——S. 107—Scope.

In order that there may be abetment, there must be either instigation or intentional aiding or engaging in a conspiracy as laid down in S. 107, I. P. C. General advice is far too vague an expression to prove abetment under the Indian Penal Code. 52 Cri L J 1480 : ILR (1953) 1 Cal 81 : AIR 1951 Cal 581 (584) (Pt D) (Pr 11) (DB).

——Ss. 107 and 109—Bribery, abetment of

When considering whether giver of a bribe is guilty of abetment the definition of abetment given in S. 107, Penal Code, must be construed along with Illus. (a) to S. 109. ILR (1952) Cut 364 : 1952 Cri L J 1393 : AIR 1952 Orissa 267 (270) (Pt B) (Pr 5) (DB).

2. Instigation.

——S. 107, 'Firstly'—Instigation — Proof of —Actual words need not be proved.

There is no doubt that there has to be a reasonable certainty in regard to the meaning of the words used by the inciter in order to judge whether or not there was an incitement, but it is not necessary in law to prove the actual words used for the incitement. 1957 All W R (H C) 169 : 1957 All L J 459 : 1957 Cr L J 337 : AIR 1957 All 177 (182) (Pt E) (Pr 26) (DB).

——S. 107—Abetment — Offer to pay bribe to public servant without actually producing money amounts to offence under S. 165-A—Offer, what amounts to.

Illustration (a) to S. 116 makes it clear that the offer of the bribe would amount to an abetment under S. 116, Penal Code and would necessarily constitute an offence under S. 165A. The definition of the word 'instigation' as defined in S. 107 leads to the same result. 56 Bom L R 1021 : 1955 Cri L J 181 : AIR 1955 Bom 61 (62) (Pr 6) (DB).

——S. 107—Abetment, what constitutes.

Under S. 107, Penal Code it is the instigation to the commission of the act itself which constitutes the offence that is regarded as abetment. To ask a person as a mere threat to fire a gun without intending that he should really fire it, is not to instigate him to fire the gun. The threat would become instigation only if it is found that in the event of the threat having no effect, the gun should in fact be fired. 1953 Cri L J 995: AIR 1953 Madh B 155 (156) (Pt B) (Pr 5) (DB).

——Ss. 107 and 108 — Wilful misrepresentation of a fact would amount to abetment of an act.

The appellant, a businessman, loaded only 54 bags instead of 251 in the railway wagon and arranged them in such a way that it would not be possible on a superficial check to detect short loading. He represented to the Railway staff that the wagon was ready for scaling which impliedly meant that the wagon had been loaded as per details in his declaration—the forwarding note—and having obtained the railway receipt showing the wagon containing 251 whereas to his knowledge it contained only 54 bags. He sold the contents of the wagon representing them to be 251 bags.

Held, that the above mentioned circumstances and conduct of the appellant would justify the conclusion that he wilfully misrepresented to the railway staff that the wagon was loaded according to declaration made by him in the forwarding note. The wilful misrepresentation in view of Explanation (i) of S. 107, Penal Code, would amount to instigation and as such would constitute abetment of the act of preparing incorrect records by a railway servant. 1962 M P L J (Notes) 246.

——S. 107 — 'Instigation' — Accused aiding widow to commit Sati—S. 306.

Where the accused were members of the crowd who had joined the funeral procession, from the house of the deceased to the cremation ground, while the widow of the deceased was walking in front of the procession with an intention to commit Sati and they were shouting 'Sati-Mata-ki-Jai' and as the procession proceeded, about 100 or 150 of the crowd surrounded the police in order to make it impossible for them to prevent her from committing Sati and ultimately the funeral pyre was set on fire with the widow sitting on it:

Held, that all those persons who joined that procession were aiding the widow in committing Sati. S 306, Penal Code, provides punishment for abetment of suicide. One of the ways of abetment in S. 107 is intentionally doing of any act or illegal omission; abetment also includes instigation. Those people who were in that procession, including the accused, were throughout intentionally aiding the widow in her decision to commit suicide by taking her with bier to the cremation ground. ILR (1958) 8 Raj 143 : 1958 Raj L W 19 : 1958 Cri L J 967 : AIR 1958 Raj 169 (171) (Pt A) (Pr 10) (DB).

3. Conspiracy.

——S. 107—Secondly—Conspiracy.

The term "abetment" as defined in S. 107 includes a case of conspiracy provided an act or illegal omission takes place in pursuance of that conspiracy. 1951 R D (H C) 48.

——S. 107, Secondly—Abetmet by conspiracy.

Abetment by conspiracy as set forth in Cl. (2) of S. 107, Penal Code is not established by proof of association together, nor by mere suspicion of guilt. Close association and friendship are relevant only if they tend to show any concert or preparation with regard to the particular crime designed. 1961 Mad

L J (Cr) 280 : 1961 All W R (Sup) 9 : 1961 All Cr R 146 : (1961) 1 M L J 379.

——Ss. 107 (2) and 405 — Abetment of breach of trust by conspiracy — Proof — Conviction — Interference in revision — Criminal Procedure Code (V of 1898), S. 439.

Where the abetment was a form of abetment by conspiracy as set forth in Cl. (2) of S. 107 of the Penal Code, any charge of conspiracy is not established merely by proof of association together nor by mere suspicion of guilt.

Where the record is itself not capable of sustaining a conviction and the conscience of the Court is roused to the extent of compelling the Court to find that the accused ought not to have been convicted upon the evidence, interference in revision would be warranted. 1961 All W R (Sup) 9 : 1961 All Cr R 146 : (1961) 1 M L J 379 : 1961 M L J (Cr) 280 (Mad).

——Ss. 107, 120B—Offence committed in pursuance of conspiracy — Charge of conspiracy is irrelevant - Conspiracy amounts to abetment — Criminal P. C. (1898), S. 235. See Penal Code (1860), S. 120B. 1960 Cri L J 1360 : AIR 1960 Pat 459 (DB).

——Ss. 107, 120-A— Abetment by conspiracy — Evidence.

It is very difficult to obtain direct evidence of conspiracy which is generally inferred from certain criminal acts of parties, accused, done in pursuance of an apparent criminal purpose in common between them. In order to constitute the offence of abetment by conspiracy there must be a combining together of two or more persons in the conspiracy and an act, or illegal omission must take place in pursuance of that conspicary, and in order to the doing of that thing when parties concert together, and have a common object, the act of one of the parties done in furtherance of the common object and in pursuance of the concerted plan, is the act of the whole. 52 Cri L J 646 : AIR 1951 Raj 89 (91) (Pt A) (Pr 9) (DB).

4. "Intentionally aids by act."

●——Ss. 107 and 165-A — Abetment — Forms of — Commission of offence unnecessary — Offence of bribery — Acquittal of accused charged with — Conviction of abettor.

According to S. 107, a person abets the doing of a thing when he instigates any person to do a thing or engages with one or more other person or persons in any conspiracy for the doing of that thing or intentionally aids, by any act or illegal omission the doing of that thing. In either of the first two cases it is immaterial for the conviction of the abettor whether the person instigated commits the offence or not or the persons conspiring together actually carry out the objects of the conspiracy.

In the case of abetment by aid a person can be said to abet by aiding only when by the commission of an act he intends to facilitate the commission of the offence and does not facilitate the commission thereof. Therefore, where a person is charged with abetment by aid of an offence under S. 161 and the person charged with the offence is acquitted on the ground that he had not committed the offence no question of intentionally aiding by any act or omission of the commission of that offence arises. Therefore whether the acquittal is right or wrong the conviction of the abettor also cannot be allowed to stand in the circumstances : 1953 S C J 532 : AIR 1953 S C 364, Distinguished. Faguna Kanta Nath v. State of Assam. 1959 Cri L J 917; 1961 Mad W N 188 : 1959 Mad L J (Cri) 365 : 1959 S C J 643 : 1959 All Cr R 261 : 1959 Pat L R (SC) 60 : 1959 All W R (HC) 310 : 61 Punj L R 655 : (1959) 2 M L J (SC) 18 : (1959) 2 Andh W R (SC) 18 : (1959) Supp 2 S C R 1 : AIR 1959 SC 673 (675, 676) (Prs 5, 6).

——Ss. 107, 116 and 108—Presence of accused either with Bhala or spear on the scene of occurrence of marpit and their participation in the marpit proved — Even if they have not actually applied their weapons, they are vicariously responsible for the injuries caused to the complainant party. See Penal Code (1860), S. 116. 1965 (1) Cri L J 267: AIR 1965 All 120.

——S. 107—Applicability — Statement made in Court by accused that he assisted murderers under compulsion—Offence—Held that the accused was not guilty of abetment. See Criminal P. C. (1898), S. 342. 1957 Cri L J 344 : AIR 1957 All 184 (DB).

[Overruled on another point in AIR 1966 All 192.]

——S. 107—Person joining another in commission of crime.

If a person joins another in the commission of a crime by which he is to benefit and which it would not be possible to commit but for his aid, he is guilty of the commission of the crime. AIR 1950 All 639 (643) (Pt F) (Prs 28, 38).

——S. 107—Abetment — Proof.

A woman was found guilty under S. 5 (a) of the Assam Opium Prohibition Act for illegal possession of opium recovered from her person and her husband was found guilty of abetment. All that was found against him was that he was the husband of the woman and was with her when the opium was recovered from her person. Held that it would not be correct to infer from the fact of relationship that there was instigation or conspiracy between the two or there was an intentional aid by any act or omission on the part of the husband and so there was no case of abetment. AIR 1955 N U C (Assam) 3305.

——S. 107—Intentional aid — Mere presence at commission of crime — Sufficiency.

Mere presence at the commission of a crime even with the awareness that a crime was being committed is not in itself an intentional aid. 60 Bom L R 428 : I L R (1958) Bom 700; 1960 Cri L J 1189 : AIR 1960 Bom 393 (394) (Pt B) (Pr 8).

——Ss. 107 and 494—Merely allowing one's premises to be used for the purpose of the marriage does not prove abetment of bigamous marriage. I L R 6 Bom 128, Foll. 60 Bom L R 428 : ILR (1958) Bom 700 : 1960 Cri L J 1189 : AIR 1960 Bom 393 (395) (Pt D) (Pr 13).

——Ss. 107, Explanation 2 and 494 — Holding of 'Antarpat' by accused — Offence.

Where the 'antarpat' was held by the accused and it was done with the full knowledge that the marriage was void marriage, the act of the accused falls within the purview of Explanation 2 to S. 107 even though the act of holding the 'antarpat' was done prior to the performance of the marriage as the Explanation 2 to S. 107 states that an act of abetment may take place prior to the commission of the offence. In order that Explanation 2 to S. 107 may apply, it is necessary to determine whether an aid was given and whether with that aid the act or the offence was committed. 60 Bom L R 428 : ILR (1958) Bom 700 : 1960 Cri L J 1189 : AIR 1960 Bom 393 (395) (Pt E) (Pr 13).

——S. 107 — Abetment — What is — Cheating by cheque — Offence complete on handing over of cheque — Subsequent endorsement on cheque not abetment.

An abetment is an instigation to a person to act in a certain way or aid some other in doing of an act, which is an offence. It is a preparatory act and connotes active complicity on the part of the abettor

at a point of time prior to the actual commission of the offence.

The act of cheating by issuing a cheque knowingly to a person impersonating the person whom it ought to have been given is complete when the cheque is handed over to the alleged person. A subsequent act of mere endorsement on that cheque does not and cannot amount to an abetment without any proof of conspiracy between the person issuing the cheque and the endorser. **1956 M B L R (Cri) 444.**

——Ss. 107, 109, Illustration (a) and 161 — Person giving bribe to a public servant — If accomplice — Evidence if requires corroboration.

Section 107, Penal Code, says that a person who intentionally aids the doing of a thing is an abettor. Illustration (a) to S. 109 shows that a person who has offered a bribe to a public servant which that public servant has accepted is an abettor in respect of the offence under S. 161. It has been accepted by all the Courts that the voluntary giver of a bribe to gain some advantage is an abettor and hence an accomplice. But an intentional act which is otherwise an offence ceases to be such under S. 94, Penal Code, only if it is done under compulsion or threats of such a nature which at the time of the commission causes reasonable apprehension of death. Compulsion or threat under other circumstances does not operate to absolve an offence.

Evidence Act, S. 114, Illustration (b) shows that a Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars and S. 133 shows that an accomplice shall be a competent witness against an accused person and a conviction based on the uncorroborated testimony of an accomplice is not illegal. It follows that while normally it would be unfare to act on the uncorroborated testimony of an accomplice whether in a particular case it is to be accepte1 without corroboration or not would depend on a comprehensive consideration of the accomplice's evidence. The rule requiring corroboration is a rule of practice and prudence and has come to be treated as almost a rule of law.

As regards the nature of corroboration that is required a review of the case-law on the question leads to the following conclusion. The giver of the bribe is in law an abettor of the offence and therefore an accomplice irrespective of whether the giving was voluntary or in response to a demand accompanied by threat or fear. But in the latter case, i e., of bribe-giving under threats whether the evidence of accomplice is safe to be acted upon depends on circumstances. In the first place one must be satisfied that the story of threats is itself reliable and not the outcome of a conspiracy to involve a strict officer in trouble or is motivated by some other personal malice. If on being so satisfied the Court considers the sole testimony of accomplice is safe to be acted upon a conviction can be based thereon. In such a case even if corroboration is considered desirable, a less strict standard of corroborative evidence may be accepted, as for instance reliable evidence, of previous statements and the like. (Case-law discussed.) **I L R (1952) Cut 109 : 1952 Cri L J 1533 : A I R 1952 Orissa 289 (298) (Pt E) (Pr 32) (DB).**

——Ss. 107, 116, 161—Abetment—Sentence.

If an offer of bribe is made on the invitation of a public servant such offer would still be 'intentional aid' which is one of the ingredients of abetment under S. 107. Though the actual amount of bribe is first mentioned by the public servant, a Sub-Inspector, that cannot in any way exonerate the other party from having first suggested monetary consideration for the Sub-Inspector dropping the case against a third person. His conduct in bringing the money and giving it to the Sub-Inspector would amount to 'intentional aid' and would, as such, constitute abetment. There seems to be no justification for treating the abettor leniently, especially when the abettor is not a simple-minded villager but a Marwari merchant of Cuttack town who wanted to take advantage of his previous acquaintance with the Sub-Inspector. For such an offender a sentence of fine is merely a flea-bite and a substantive sentence of imprisonment alone would serve as a real deterrent. AIR 1933 All 513 Rel. on. **17 Cut L T 160 : 1952 Cri L J 941 : AIR 1952 Orissa 180 (181) (Prs 4 to 6) (DB).**

——Ss. 107, 114, 338 and 279—Principal offender or abettor—Driver of lorry carrying passengers allowing minor to drive lorry with full knowledge that minor did not know driving — Rash and negligent driving by minor resulting in grievous hurt — Driver sitting by the side of minor — Driver is liable as principal offender under S. 114 as he was the person who was driving through the hand and instrumentality of minor. See Penal Code (1860), S. 114. 52 Cri L J 930 : AIR 1951 Punj 418 (DB).

——Ss. 107, 302—Abetment of murder—Two accused catching deceased—Third giving fatal blow—Former not guilty of abetment of murder. AIR 1955 N U C (Sau) 5754 (DB).

——Ss. 107, Expln. 2, 114—Applicability — A facilitating stabbing by B by holding victim's hands — A aids commission of offence. See Penal Code (1860), S. 114. 1955 Cri L J 1535 : A I R 1955 Trav-Co 266 (DB).

——S. 107, Explanation 2 — Accused A holding deceased within his grip — Accused B coming with open penknife and dealing fatal blow to deceased—Accused A not making statement that he did not notice accused B approaching deceased with open penknife and aiming blow at him — Accused A held guilty.

Where after accused A had held the deceased within his grip, accused B came towards the deceased with an open pen-knife and gave him a fatal blow and accused A did not state that he did not notice accused B's approach or the latter aiming the blow at the deceased:

Held, that no doubt the prosecution had to establish the positive fact of the complicity of accused A but it need not necessarily be by direct testimony. It could also be by circumstantial evidence. In evaluating such evidence the silence of accused A on the matter was a relevant factor to be taken into account. His act or conduct in keeping the deceased within his grip while the stab was dealt by accused B was irreconcilable with any other hypothesis than that of his guilt. **1949 Ker L T 66 : 51 Cri L J 988 : 1949 Trav-Co L R 74 : AIR 1950 Trav-Co 41 (45) (Pt E) (Pr 12) (DB).**

——S. 107—Presence at place of occurrence when amounts to abetment stated.

Mere presence cannot be taken as amounting to abetment unless it be the person whose presence is considered to aid the commission of the offence is a person in authority. **51 Cri L J 648 : AIR 1950 Trav-Co 9 (10) (Pt B) (Pr 5) (DB).**

5. Illegal omission.

——S. 107—Scope.

The relations between the deceased and his wife were not happy and the wife had an illegal connection with the accused. Although the wife knew that the accused was waiting for an opportunity to ambush and murder her husband, she told him that her husband intended to go to a particular Sadhu on a particular day.

Held, that in the circumstances the conduct of the wife in not warning her husband though certainly open to censure did not amount to abetment of murder committed by the accused. 1955 Cri L J 679 : AIR 1955 Him Pra 15 (19) (Pt D) (Pr 25).

——Ss. 107, 109, 409 and 406 — Abetment of misappropriation — When it is found that accused had collected amounts to knowledge of P and same had not been checked by P with reference to receipts and relative registers which P was bound to do under duties of his service, inference is irresistible that P omitted to do so to aid misappropriation committed by accused. Criminal P. C. (1898), S. 367 —Evidence Act (1872), S. 3. 1966 Mad L W (Cri) 217 : 1964 Mad W N 356.

——S. 107—Mere omission, does not amount to abetment — Servant put in charge of writing accounts — Non-making of accounts, is not abetment. See Essential Supplies (Temporary Powers) Act (1946), S. 8. AIR 1955 N U C (Pat) 5970 (DB).

SECTION 108

——Ss. 108, 116, 107 — Presence of accused either with Bhala or spear on the scene of occurrence of marpit and their participation in the marpit proved— Even if they have not actually applied their weapons, they are vicariously responsible for the injuries caused to the complainant party. See Penal Code (1860), S. 116. 1965 (1) Cri L J 267 : AIR 1965 All 120.

——S. 108 — License in Form B under U. P. Foodgrains Order issued to firm—Non-compliance with conditions of licence—Liability of servants—It cannot be said that every servant of the firm which holds a licence in Form B is required to comply with the conditions of the licence held by the firm. Therefore where the master who according to the conditions of the licence issued to him is liable to maintain accounts in a certain form has failed to comply with those conditions, his employees or servants cannot be held guilty for abetment of the offence or for the substantive offence. AIR 1955 N UC (All) 3521 (DB).

——S. 108 — Principal not chargeable—Abettor can be proceeded against.

In law the fact that the principal cannot be brought to trial does not prevent a charge of abetment against the abettor. **(1952) 22 Com Cas 175 : 56 Cal W N 594 : 1952 Cri L J 1480 : I L R (1954) 1 Cal 403 : AIR 1952 Cal 759 (760) (Pt B) (Pr 2).**

——S. 108, Expln. 3—Scope.

According to Expln. 3 of S. 108 it is necessary that the person abetted should have committed the offence and been punished. **1956 Cr L J 229 : Madh B L R 1955 Cr 500: AIR 1956 Madh B 65 (66) (Pt B) (Pr 10).**

——S. 108—Wilful misrepresentation of a fact would amount to abetment of an act. See Penal Code (1860), S. 107. 1962 M P L J (Notes) 246.

——S. 108. Explns. (2) and (4) — Abetment of abetment is offence, though the second abetment is ineffective—Accused approaching doctor for poison for murdering mistress — Doctor refusing—Accused is guilty of offence under S. 302 read with S. 116, Penal Code. (1950) 2 Mad L J 201 : 63 Mad L W 835 : 1950 Mad W N 723 : 1950 Mad W N (Cri) 247 : I L R (1951) Mad 626 : AIR 1950 Mad 827 (830) (Pr 16).

——S. 108, Explanations 4 and 165-A—Abetment of offence under S. 165-A.

In view of Explanation 4 to S. 108 there can be abetment of the offence punishable under S. 165-A. **56 Punj L R 298 : 1954 Cr L J 1503 : AIR 1954 Punj 228 (230) (Pt A) (Prs 17, 18).**

SECTION 109

SYNOPSIS

(Penal Code (45 of 1860), S. 109.)

1. Scope and applicability.
2. Sections 109 and 114.
3. Sections 109 and 120B.
4. Evidence
5. Illustrative cases.
6. Offences under special or local law.
7. Charge and conviction.

1. Scope and applicability.

——Ss. 109, 94—Necessity, how far excuse for criminal act—Persons in order to avoid molestation giving bribe to public servant are guilty under S. 109 — They cannot take plea of duress. See Penal Code (1860), S. 94. 1950 Nag L J 435 : I L R (1950) Nag 229 : 51 Cri L J 285 : AIR 1950 Nag 1.

——S. 109, Illus. (a) — Persons paying illegal gratification to public servant on demand can be convicted under S. 109.

Persons paying illegal gratification to a public servant are guilty under S. 109, of committing an offence of abetment of offence of taking bribe by public servant, even if the gratification is given upon a demand by such public servant: A I R 1933 All 513, Rel. on; Observations in "Law of Crimes" by Ratanlal, 17th Edn. on p. 385, Disapproved. **1950 Nag L J 435 : I L R (1950) Nag 229 : 51 Cri L J 235: AIR 1950 Nag 1 (5) (Pt C) (Prs 23, 24).**

——S. 109 — Applicability—Condition—Accused not participating in actual commission of crime but only in primary stages — Can be convicted under S. 109 but not under S. 34, See Penal Code (1860), S. 34. 1961 (2) Cr L J 266 (Pat).

——Ss. 109, 120-A and 120-B—Applicability—Nature of offence.

——Section 120-B applies where any other crime has not been actually committed. Where the matter has gone beyond the stage of mere conspiracy and offences are alleged to have been actually committed in pursuance thereof, Sections 120-A and 120-B are wholly irrelevant. Conspiracy is one form of abetment and where an offence is alleged to have been committed by more than two persons, such of them as actually took part in the commission should be charged with the substantive offence, while those who are alleged to have abetted it by conspiracy should be charged with the offence of abetment under S. 109, Indian Penal Code. AIR 1938 Mad 130, Rel. on., AIR 1938 Sind 108 and AIR 1936 Mad 317, Disting. 1956 Raj L W 234 : 1957 Cr L J 234 (235) (Pr 8) (Raj).

——Ss. 109, 146, 147 — Abetment of offence of rioting.

Considering the definition in S. 109, I. P. Code strictly, the instigation must have reference to the thing that was done and not to the thing that was likely to have been done by the person who is instigated. It is only if this condition is fulfilled that a person can be guilty of abetment by instigation.

Where the common object of an assembly was to march in a Jatha or procession from the office of a Union from the vicinity of which the procession started, and proceed without stopping up to a certain place, breaking the conditions imposed upon the residents of the locality in the proclamation promulgated by the District Magistrate, and the accused was found to have instigated the members of that assembly to use force or violence for over-coming any resistance offered by the Army or by the Police with

the object of making them break up and desist from taking the procession, the offence committed by the accused is abetment by instigation of rioting.

If there is no evidence to support a finding that the throwing of stones at the members of the Police party at the point at which the unlawful assembly launched a joint attack upon the Police was specifically instigated by the accused, he cannot be held liable for abetment of all the acts of violence or of the individual acts of violence done by the unlawful assembly 1952 Ker L T 737 : 1953 Cri U J 1273 : ILR 1952 Trav-Co 547 : AIR 1953 Trav Co 251 (252) (Pt A) (Pr 4) (DB).

——S. 109, Explanation—Instigation—What is.

A person is said to instigate another to an act when he actively suggests or stimulates him to the act by any means or language direct or indirect whether it takes the form of express solicitation or of hints, insinuation or encouragement. It is not necessary that express and direct words should be used to indicate what exactly should be done by the persons to whom directions are given, AIR 1923 Bom 44 Rel. on. 1952 Ker L T 737 : 1953 Cri L J 1273 : I L R (1952) Trav-Co 547 : A I R 1953 Trav Co 251 (252) (Pt B) (Pr 3) (DB).

2. Sections 109 and 114.

——Ss. 109 and 114 — Applicability and relative scope and distinction—Principles and test.

Section 114 of the Indian Penal Code is only brought into operation when circumstances amounting to abetment of a particular crime have first been proved, and then the presence of the accused at the commission of that crime is proved in addition. The real test to see whether or not the section is applicable lies in its words; 'who if absent would be liable to be punished as an abettor.' Abetment, to come under this section, must be one which is minor to the commission of the offence and complete by itself and not an abetment which is done immediately before or at the time of the commission of the offence, for, in the latter case, the abettor would not have committed the abetment if he had not been present and would not, therefore, have been liable to punishment as an abettor. When a person is present and abets another to commit an offence then S. 114 of the Indian Penal Code will not be applicable to the case. Active abetment at the time of the committing of the offence is covered by S. 109 of the Indian Penal Code and S. 114 of the Indian Penal Code is clearly intended for an abetment previous to the actual commission of the crime; any time, that is before the first steps have been taken to commit it. 1958 All W R (H C) 159 : 1958 All Cr R 153 : 1958 All L J 82.

3. Sections 109 and 120B.

——Ss. 109, 120-B and 121—Expression 'moral delinquency'—Scope of—Conviction under S. 120-B read with S. 109 or S. 121, Penal Code—Offences held involved — 'Moral delinquency' — See Panchayats—Madras Village Panchayats Act (10 of 1950), S. 16 (1). (1964) 2 Mad L J 426.

4. Evidence.

——S. 109—Evidence of abetment — Corroboration held not sufficient — (Evidence Act (1872), S. 133)—(Ajmer Land and Revenue Regulation (II of 1877), S. 3). AIR 1955 N U C (Ajmer) 324.

——Ss. 109 and 366-A—Corroboration to the version of prosecutrix is a rule of caution and not rule of law—Corroboration might be even by circumstantial evidence.

Held, that a girl who was victim of an outrageous act could not generally speaking be considered to be an accomplice though the rule of prudence might require that the evidence of a prosecutrix should be corroborated before a conviction could be based upon it. The corroboration need not be by direct evidence. It could as well be by circumstantial evidence. The rule of corroboration was really a rule of caution and not a rule of law, Corroboration in the case was to be found by the fact of seizure of a shwal belonging to the appellant from the possession of the prosecutrix after she reached Satna where her cousin rescued her. The other factors in support of her version were that she had entrusted some ornaments to the appellant, she was on visiting terms with the appellant and the other accused was introduced to her by the appellant. AIR 1952 S C 54 and AIR 1958 S C 143, Rel. on. 1962 M P L J (Notes) 230.

——S. 109—Accused forging thumb impression of payee on money order—Money not received by payee—Burden of proof.

It is for the accused to prove that he did pay the amount covered by the money order to the payee and that the impression on that voucher is that of the payee. If he fails to do that he will be liable under S. 467 read with S. 109 Indian Penal Code. 1957 Cri L J 73 (2): AIR 1957 Mad 47.

——S. 109 — Identification of accused by voice—Accused close relation of identifier— Identification can be relied on—See Penal Code (1860), S. 302. (1961) 3 Orissa J D 110.

——S. 109—Evidence Act (1872), S. 133 — Agent for prosecution — Evidence of —Value of— Necessity of corroboration—See Evidence Act (1872), S. 133. AIR 1952 Orissa 267 (DB).

5. Illustrative cases.

——S. 109—Abetting offence under S. 436—Person charged of committing offence acquitted—Conviction of accused charged of abetting the offence—Legality —Evidence of witnesses in one respect not believed—Evidence in other respects believed — Propriety—(Evidence Act (1872), S. 5)—Credibility of witness —(Falsus in uno falsus in omnibus).

The accused was a member of an unlawful assembly, the common object of which was to attack a certain hut and commit assault on remonstrance. The accused was found to have given orders to one B, a member of the unlawful assembly to set fire to the hut. The hut was set fire to and burnt. Accused was charged among other counts under S. 436 read with S. 109 of the Penal Code. B was charged under S. 436. B was acquitted of this charge because the evidence of the witnesses. that B had set fire to the hut was not believed. But their evidence that the accused had ordered to set fire to the hut and the hut was actually burnt by one of the members of the unlawful assembly was believed and on it the accused was convicted under S. 436 read with S. 109.

Held that there was no violation of any rule of law in not accepting the evidence of the witnesses in so far as they said that B set fire to the hut and accepting it in so far as they said that it was the accused who ordered to set fire to the hut; Held, further, that the hut was set on fire by one of the members of the unlawful assembly and it was in consequence of the orders given by the accused and therefore the conviction of the accused under S. 436 read with S. 109 was not illegal. Gullu Sah v. State of Bihar. 1958 All L J 716 : 1958 All W R (H C) 766 : 1958 M L J (Cr) 970 : 1958 All Cr R 523 : 1958 M P C 670 : 1958 B L J R 762 : 1958 S C J 1257 : 36 Mys L J 728 : 1958 Mad W N (S C) 129 : I L R 37 Pat 1122 : 1958 Cri L J 1352 : AIR 1958 S C 813, (815, 816) (Prs 5, 9).

——Ss. 109, 420 and 109—A falsely representing himself to be a big sugar merchant entering into bogus transaction with B and extracting money from

him — C, a close acquaintance of A, accompanying him (A) to settle the transaction and allowing himself to pass as munim of A – C held was guilty of abetment of offence of cheating — See Penal Code (1860), S. 420. AIR 1952 Ajmer 60.

——Ss. 109, 147, 299, 300, 302, 304 and 34—Four accused armed with lathis and one with spear—Common object of beating deceased—One member, being struck by deceased, becoming incapable of taking further part—Rest beating deceased causing several injuries resulting in death—Offences committed by accused stated.

Held that the member who was struck by deceased was guilty of the offence under S. 304, Part II read with S. 109 – See Penal Code (1860), S. 147. 51 Cri L J 1133 . AIR 1950 All 418 (DB).

——S. 109—Distribute — Meaning of—Sale of drugs by manufacturer at Calcutta intended for transportation to Nasik — Drugs found not according to standard specified in Act—Manufacturers at Calcutta held distributed drugs at Nasik and further abetted offence committed by dealer at Nasik — Ss. 179 and 180, Criminal P. C. held were applicable — Manufacturers held could be tried at Nasik. See Drugs Act (1940), S. 18 (a). 1962 (1) Cri L J 16 : A I R 1962 Bom 21.

——S. 109—Rescuing requires overt act—Mere instigation to escape would make it only an abetment of offence of escape. See Penal Code (1860), S. 225. 1961 (2) Cri L J 774 : AIR 1961 Ker 331 (DB).

——S. 109 — Abettor — Accomplice—Person paying bribe under compulsion and with a view to assist detection of crime — Not an abettor. See Evidence Act (1872), S. 133. 1957 Cri L J 1127 : AIR 1957 Ker 134 (DB).

——S. 109 — Accused holding deceased permitting principal offender to stab victim—Accused are guilty of abetment of culpable homicide. See Penal Code (1860), S. 304. 51 Cri L J 392 : AIR 1950 Kutch 5.

——S. 109—Criminal P. C. (1898), Ss. 198, 4 (1) (b) — Abetment of offence under S. 494, I. P. C. — S. 198 applies—Deposition is not a complaint—AIR 1916 All 307 and 20 Cal 483, Dissented from. See Criminal P. C. (1898), S. 198. 1955 Cri L J 1359 : A I R 1955 Madh Bha 176.

——Ss. 109, 165-A, 193, 214 — Criminal Procedure Code, S. 195-B — Municipal employees attesting Panchanama of seizure of 'Ganja'—Attesting is not as municipal employees but as witnesses — Defence trying to win over attesting witnesses and constable who seized 'ganja'—Offence punishable under Ss. 109 and 193, Indian Penal Code—S. 214, Indian Penal Code is inapplicable — Prosecution can be on complaint by Court where case pending — Trial is vitiated. 1965 M P L J (Notes) 11.

——Ss. 109, 406 — Main offence not established — Effect on abettor.

Where A is charged with an offence under S. 406 and B with an offence under S. 406 read with S. 109, I. P. C. and if the accused A is not found guilty of the offence under S. 406, B cannot be held to be guilty of having abetted the same. 1957 M P C 334 : 1957 Jab L J 706.

——S. 109 — Prevention of Corruption Act (1947), Ss. 5 (1) (c) and 5 (2) —Payment of Money order by village postmaster to wrong person — Acknowledgment purporting to be of addressee obtained and attested by witness — Addressee, the Postmaster and attesting witnesses each beloging to different villages —Post office situated in another village — Absence of evidence that addressee often came to Post Office—Plea of mistaken identity by Postmaster — Incriminating statements in departmental enquiry not sufficient to prove charge — Postmaster not guilty under S 471, I. P. Code or under S. 5 (1) (c) read with S. 5 (2) of Prevention of Corruption Act — Attestation of acknowledgment stated to be on representation of Postmaster — Attesting witness not guilty of charge under Ss. 467/109, I. P. Code. See Penal Code (1860), S. 471. (1962) 4 O J D 4.

——S. 109—Scope—Application praying for lodging of complaint under S. 209 or 193, I. P. C. or both read with S 109 — Lodging of a complaint under S. 209, I. P. C. read with S 109, I. P. C not prohibited. See Criminal P. C. (1898), S. 195. ILR (1962) 2 Punj 504.

——S. 109 — Abettor of offence under S. 388, Penal Code, can be tried with principal offender at place where principal offence was committed. See Criminal P. C. (1898), S. 239 (b). (1962) 64 Punj L R 193.

——S. 109 — A, along with others charged of rape under S. 376, Penal Code — Offence of rape established against other accused but not against A — A can be convicted under S. 109, when charge under substantive offence gave full notice to A of circumstances alleged against him, though abetment is not a minor offence — (Criminal P. C. (1898), Ss. 236, 237).

Where the case is covered by Ss. 236 and 237 of the Code of Criminal Procedure and the accused has notice of all the facts which go to make up the charge of abetment, he can be convicted of the charge of abetment, even though the charge framed against him was only of substantive offence. Where the evidence as to the charge of abetment of the offence of rape was all before the Court in the statement of the girl, on which evidence the accused could have been charged of an offence under S. 376 read with S. 109 for abetting the offence of rape by other accused, the accused can be convicted under S. 376 read with S 109. Case law reviewed. 1952 Raj L W 95 : I L R (1951) 1 Raj 871 : 1952 Cri L J 1136 : AIR 1952 Raj 123 (128) (Pt E) (Prs 31, 32) (DB).

——S. 109 — Mewar Hoarding and Profiteering Prevention Act (1 of 1944), Ss. 4, 2 and 6—Employee in a shop is not 'dealer' within meaning of term in S. 4 and as defined in S. 2 but he can be guilty of abetment of offence under S. 6 by virtue of S. 109, Penal Code. 1951 Raj L W 403 : I L R (1951) 1 Raj 546 (DB).

——Ss. 109, 441, 447, 425 & 426—Criminal trespass and mischief—Intention—Abetment.

The complainant and the accused owned adjoining houses. The complainant's roof was higher than the accused and projected its eaves over it. The accused raised her roof and she employed workmen to do the job under the supervision of her maternal Uncle. In the process of raising the roof the complainant's eaves were cut. The rain water from the complainant's roof could no longer be discharged because the accused had raised the height of her roof and therefore she got her workmen to construct a drain on the complainant's wall by plastering mobhias (broad Indian tiles) on the complainant's wall to carry away rain water.

Held that on instructing her maternal uncle to raise the roof which necessitated the cutting of the complainant's eaves and entering upon his property the accused must be deemed to have intended to cause annoyance and wrong loss to the complainant and therefore to have abetted the offences of criminal trespass and mischief. The accused could not be convicted as the principal offender but as an abettor only under Ss. 447 and 426 read with S. 109, I. P. C. 5 Sau L R 82 : 1953 Cri L J 881 : A I R 1953 Sau 81 (81) (Pt C) (Prs 4, 6) (DB).

6. Offences under special or local law.

——S. 109—Offence of transfer of high denomination Government currency notes—Abetment of—Whether punishable.

The abetment of an infraction of any provision of any special law would also amount to an offence as defined in S. 40, Penal Code and be punishable. See High Denomination Bank Notes (Denomination) Ordinance (1946), S. 7. **AIR 1955 N U C (Bom) 4493 (DB).**

——S. 109 — Opium Act (1898), S. 9 — Abetment of offence under S. 9 is offence under S. 109, Penal Code—See Opium Act (1898), S 9. **A I R 1952 Madh Bha 17.**

7. Charge and conviction.

● **——S. 109—Charges for two distinct offences based on same evidence—Acquittal of one of the offences—Conviction in respect of other offence on same evidence—Validity.**

An item of evidence may corroborate charges for more offences than one but acquittal of the accused for one of such offences will not render that item of evidence inadmissible in assessing the criminality of the accused for another offence corroborated thereby. See Criminal P. C. (1898), S. 403. **(1964) 1 S C J 7: 1964 Mad L J (Cri) 1 : 1964 (1) Cri L J 733 (SC).**

● **——S. 109—Accused acting under common intention and common conspiracy — Conviction and sentence—Concurrent finding—Effect.**

The concurrent finding that a particular accused is guilty of criminal conspiracy along with the other for the commission of the offences is not open to challenge in the appeal before the Supreme Court under Art. 136. See Penal Code (1860), S. 364. **1957 Cri L J 559 : AIR 1957 S C 381.**

■ **——S. 109** — Applicability — Conviction under S. 165 for offence committed in 1948—Conviction not valid — Appellate Court can alter finding—Accused may be convicted under S. 161 read with S. 109, Penal Code. See Criminal P. C. (1898), S. 423 (1) (b). **1957 Cri L J 695 : A I R 1957 All 388.**

[Reversed on another point in A I R 1960 S C 409.]

——S. 109—Charge—Alteration of—Accused charged with S. 165-A, Penal Code—Necessary facts mentioned in charge — Charge could be changed into, under S. 161 read with S. 109, Penal Code. See Criminal P. C. (1898), S. 537. **1957 Cri L J 695 : AIR 1957 All 388.**

[Reversed on another point in A I R 1960 S C 409.]

——S. 109'— Charge for abetment — Conviction for principal offence—Legality—Criminal P. C. (1898), S. 236.

Under the direction of a person who was also present at the spot several others forcibly removed a lady from a lorry and carried her away. The person who directed the abduction, was charged under S. 366 read with S. 109, Penal Code while the others were charged for the principal offence. The jury found all of them guilty for the minor offence of wrongful restraint under S. 341 for which they were convicted. Upon the accused charged with abetment alone, objecting to the conviction on the ground that he ought to have been convicted under S. 341 read with S. 109, Penal Code.

Held, that the objection was only technical and that the jury were not wrong in having taken the view that he also was a participator in the offence of wrongful restraint in view of the fact of his presence at the spot directing the forcible removal of the lady. **52 Cri L J 189 : A I R 1951 All 504 (507) (Pt D) (Pr 14).**

——S. 109—Offence of abetment not alleged in complaint — Still Court can frame charge at later stage if offence is disclosed—No prejudice is caused to accused. See Criminal P. C. (1898), S. 221. **1962 (1) Cri L J 16 : A I R 1962 Bom 21.**

● **——S. 109** — Criminal P. C. (1898), S. 196-A — Offence of abetment of forgery by conspiracy—Sanction under S. 196-A not required — Forgery committed — Charge of abetment of forgery is legal. See Criminal P. C. (1898), S. 196-A. **1961 (1) Cri L J 204 : A I R 1961 Cal 461 (FB).**

——S. 109 — Criminal P. C. (1898), S. 236 — Charge for substantive offences—Conviction for abetment — Hyderabad Penal Code, Ss. 66, 71, 330, 380.

Where the accused was charged with substantive offences of dacoity and house breaking under Ss. 395 and 445 read with S. 114 but the challan did not mention the nature of help given by the accused to the others or the part he himself played, no charge of abetment can be brought against him and so merely on account of his presence on the scene of occurence, he cannot be held guilty either of the abetment or of the commitment itself of any of the crimes. Even if it were proved that he abetted the commission of these offences, he cannot be convicted of abetment in the alternative as he was not charged as an abettor but substantially as the principal. See Criminal P. C. (1898), S. 236. **A I R 1952 Hyd 25 (DB).**

——Ss. 109 and 302 — Death penalty imposed on principal offender — Sentence to be passed against abettor — Powers of appellate Court — (Constitution of India, Art. 134 (1) (a)).

Where the death penalty has been imposed on the principal offender and there is no ground to show any differentiation between him and the accused who abetted the murder, the normal sentence for a conviction for murder has to be passed against the latter. Even if his acquittal by the trial Court and the difference of opinion as to his guilt between the Judges of the Division Bench might weigh the Executive Government to commute the death sentence, if passed, that cannot influence the Court to pass the lesser sentence prescribed by law. Besides, to impose the lesser penalty would be to deprive the accused of the benefit of an appeal which he would of right get under Art. 134 (1) (a) of the Constitution in case he is condemned to death. **1959 Ker L T 167 : 1959 Ker L J 221 : ILR (1959) Ker 319.**

——Ss. 109, 111, 114, 304, Part II and 323 — Applicability — Sudden quarrel — Abettor present on spot instigating another co-accused to beat deceased — Latter giving heavy blow on head of deceased with log of wood lying nearby resulting in his death — Injury sufficient in ordinary course of nature to cause death — Abettor held guilty under S. 323/109, Penal Code and not under S. 304, Part II/114, Penal Code—Principal accused held guilty under S. 304, Part II. 1962 Jab L J 427 : 1961 M P L J (Notes) 205 : 1962 (1) Cri L J 435 : A I R 1962 Madh Pra 91 (92) (Prs 5, 6).

——S. 109—Criminal P. C. (1898), S. 198—Abetment of offence under S. 494, Penal Code—Section applies.

No express provision having been made by the Penal Code for the punishment of the abetment of an offence punishable under S 494, such abetment is punishable with punishment provided for the offence falling under S. 494 by reason of Ss. 109 and 114. See Criminal P. C. (1898), S. 198. **AIR 1952 Mad 193 (DB).**

——S. 109 — Abetment — The date of the abetment was stated in the charge to be that of offence or about that time while evidence was let into make out that the investigation was 10 days before; **Held**, that there would be no room for the objection that divergence concerning the time is a vital defect sufficient to entitle the accused to an acquittal irrespective of

the evidence if it was stated in the charge that the accused abetted the commission of the offence between any two dates within which the one referred to by witness falls. See Criminal P. C. (1898), S. 222. 1954 Cri L J 905 : A I R 1954 Mys 81 (DB).

——S. 109 — Accused charged with main offence only — Conviction for abetment — (Criminal P. C. (1898), S. 237).

It cannot be laid down as an inflexible rule that a conviction for abetment cannot be made in a case where the accused is charged with the main offence only, and no separate charge has been framed under S. 109. If the accused had notice of the facts, which constituted abetment, although the charge was one for the main offence and if there has been no prejudice to the accused by the omission to frame a separate charge for abetment he can be convicted for abetment even though the charge for the main offence fails. 21 Cut L T 296 : 1955 Cri L J 1373 : A I R 1955 Orissa 156 (158) (Pt A) (Pr 6) (DB).

——S. 109 — Offence of abetment is not confined to offences under Code. 1951 Raj L W 403 : ILR (1951) 1 Raj 546 (DB).

——Ss. 109, 34, 149 and 302 — Section 109 if can be invoked when accused are charged under S. 149 and S. 302/34.

Where the acts of abetment alleged against accused 2 to 6 were that they prevented the deceased from escaping from the scene of occurrence while accused, was inflicting fatal injuries it is not necessary to call in aid S. 109 where the accused 2 to 6 are actually charged under S. 149 and S. 302 read with S. 34. The act of abetment that falls under S. 34 is committed at the time the offence itself is committed and in the case of a riot there is no need to base a conviction on the ground of abetment. See Penal Code (1860), S. 34. 1956 Cri L J 1358 : AIR 1956 Trav Co 230 (DB).

——Ss. 109, 34 and 149 — Charge and conviction — Duty of Court—(Criminal P. C. (1898), Ss 221, and 367).

A mere mention of the relevant sections in the charges to which accused persons are called upon to plead or when entering convictions against them will not satisfy the conscience of an appellate Court that the lower Court has applied its mind to the question whether the elements attracting the application of the rules relating to constructive liability for crimes are present in the case nor would such mere mention of the sections clothe accused persons with proper notice of the crimes for which they are sought to be made constructively liable. These remarks apply with equal force to a charge relating to the abetment of the offence. See Penal Code (1860), S. 34. 1956 Cri L J 1358 : A I R 1956 Trav Co 230 (DB).

——Ss 109, 148, 149, 341 and 302/34 — Charges under — Leaving out S. 149 in relation to charge of murder held was a serious omission as it would keep the door open for guilty man to escape. See Penal Code (1860), S. 148. 1956 Cri L J 1358 : A I R 1956 Trav Co 230 (DB).

SECTION 110

——Ss. 110, 463, 464 — A writing out petition for withdrawal of certain appeal on advice of B who had been employed as tadbirkar to look after the appeal by the appellant — Petition not signed by B but bearing endorsement in his handwriting and signed by him to the effect that he had authority to file this petition and that he was handing it over to the lawyer — Application signed by pleader and filed — B's authority to file petition not proved — Endorsement on petition consistent with B's belief that he had such authority — B held could not be convicted of abetment of forgery. See Penal Code (1860), S. 465. 52 Cri L J 1480 : AIR 1951 Cal 581 (DB).

SECTION 111

——Ss. 111, 112 and 113 — Person abetting another in commission of offence—Principal offender making offence aggravated — Abettor's liability.

Sections 111, 112 and 113 make it abundantly clear that if a person abets another in the commission of an offence and the principal goes further thereafter and does something more which has a different result from that intended by the abettor and makes the offence an aggravated one, the abettor is liable for the consequences of the acts of his principal. 1957 Cri L J 815: AIR 1957 Andh Pra 231 (234) (Pt C) (Pr 14) (DB).

——Ss. 111, 109, 114, 304, Part II and 323 — Applicability — Sudden quarrel — Abettor present on spot instigating another co-accused to beat deceased — Latter giving heavy blow on head of deceased with log of wood lying nearby resulting in his death — Injury sufficient in ordinary course of nature to cause death — Abettor held guilty under S. 323/109, Penal Code and not under S. 304, Part II/114, Penal Code—Principal accused held guilty under S. 304, Part II. See Penal Code (1860), S. 109. 1962 (1) Cri L J 435 : AIR 1962 Madh Pra 91.

SECTION 112

——Ss. 112, 111 and 113 — Person abetting another in commission of offence — Principal offender going further and making offence aggravated one—Abettor is liable for the consequences of acts of principal offender. See Penal Code (1860), S. 111. 1957 Cri L J 815 : AIR 1957 Andh Pra 231 (DB).

SECTION 113

——Ss. 113, 111, 112 — Person abetting another in commission of offence — Principal offender going further and making offence aggravated one—Abettor is liable for the consequences of acts of principal offender See Penal Code (1860), S. 111. 1957 Cri L J 815 : AIR 1957 Andh Pra 231 (DB).

SECTION 114

● ——S. 114 — Common intention — Instigation — Presumption under S. 114 — Actual presence plus prior abetment can mean nothing else but participation — That is the irrebuttable presumption raised by S. 114 and brings the case under S. 34. See Penal Code (1860), S. 34. 1956 Cri L J 341 : AIR 1956 S C 177.

● ——S. 114 — Scope — Absence of charge under—Effect.

Per Chandrashekhar Aiyer, Jagannadhadas and Imam JJ.—Sections 34, 114 and 149 provide for criminal liability viewed from different angles as regards actual participants, accessories and men attracted by a common object or common intention and the charge is a rolled up one involving the direct liability and the constructive liability. In such a situation the absence of charge under one or other of the various heads of criminal liability for the offence cannot be said to be fatal by itself. See Penal Code (1860), S. 34. 1956 Cri L J 291 : AIR 1956 S C 116.

● ——Ss. 114 and 201 — Procedure and Practice.

Section 201 is not restricted to the case of a person who screens the actual offender; it can be applied even to a person guilty of the main offence, though as a matter of practice a Court will not convict a person both of the main offence and under S. 201. Where the border line between abetment of the offence and giving false information to screen the offender is rather thin, it is prudent to err on the safe

side, and hold the accused guilty only of an offence under S. 201, Penal Code. The acquittal of the main offence is no legal impediment to the accused's conviction under S. 201 : AIR 1925 P C 130, Ref. Kalawati v. State of H. P., 1953 S C J 144: 1953 Mad W N 219 : 1953 S C R 660 : 1953 Cri L J 668 : 1953 All W R (Sup) 52 : 1953 S C R 546 : AIR 1953 S C 131 (135) (Pt D) (Prs 21, 22).

——Ss. 114, 376 — Abetment of rape.

One of the accused standing with open knife at the time of offence of rape was committed by the other accused — Former held guilty under S. 376/114. 1953 Cri L J 1196 : AIR 1953 Ajmer 12 (14) (Pt C) (Prs 14, 16).

——S. 114 — Applicability and relative scope and distinction — Principles and test stated. See Penal Code (1860), S. 109. 1958 All W R (HC) 159 : 1958 All Cr R 153 : 1958 All LJ 82.

——S. 114 — Accused charged with offence under Ss. 302 and 114 — Confession of co-accused stating that accused threw torch light and lifted mosquito net of deceased's bed to enable him to kill deceased— Evidence-apart from statements in confession of co-accused proving acts such as silencing eye witness when informed that deceased was lying on floor and other accused was seen running away — Accused subsequently spreading false story as to cause of deceased's death — Accused, held, was present at the time of commission of crime within intendment of S. 114, Penal Code. AIR 1952 Him Pra 81 (95) (Pt G) (Pr 43).

——S. 114 — Criminal P. C. (1898), S. 236—Charge for substantive offences — Conviction for abetment — Hyderabad Penal Code, Ss. 66, 71, 330, 380.

Where the accused was charged with substantive offences of dacoity and house breaking under Ss. 395 and 445 read with S. 114 but the challan did not mention the nature of help given by the accused to the others or the part he himself played, no charge of abetment can be brought against him and so merely on account of his presence on the scene of occurrence, he cannot be held guilty either of the abetment or of the commitment itself of any of the crimes. Even if it were proved that he abetted the commission of these offences, he cannot be convicted of abetment in the alternative as he was not charged as an abettor but substantially as the principal. See Criminal P. C. (1898), S. 236. AIR 1952 Hyd 25 (DB).

——S. 114 — Applicability.

In order to bring a case within S. 114, Penal Code, the abetment must be complete, apart from the presence of the abettor, in other words, the act of abetment must have taken place at a time prior to the actual commission of the offence and it is only when the abettor happens to be present at the time of the commission of the offence itself, that the operation of S. 114 would be attracted. AIR 1915 Cal 545 and AIR 1927 Mad 1115 and AIR 1932 Lah 483 and ILR 27 Cal 566, Rel. on. 1963 Ker L T 222 : 1963 Mad L J (Cri) 491 : 1964 (1) Cri L J 375 (377) (Pt B) (Pr 8) (Ker).

——S. 114 — Person charged with principal offence read with S. 114, Penal Code — Facts proved disclosing principal offence—Conviction for principal offence not bad even in absence of proof of previous abetment — Imperfection in charge curable under S. 537. See Criminal P. C. (1898), S. 237. 1962 Ker L J 384.

——S. 114 — Misdescription in warrant — Resistance to arrest is not offence — Burden lies on prosecution to establish identity of accused with person described in warrant — Aiding escape from illegal arrest is also not an offence. See Penal Code (1860), S. 225-B. 1961 Ker L T 612.

——S. 114—Criminal P. C. (1898), Ss. 198, 4 (1) (h)—Abetment of offence under S. 494, I. P. C. — S. 198 applies — Deposition is not a complaint — AIR 1916 All 307 and 20 Cal 483, Dissented from. See Criminal P. C (1898), S. 198. 1955 Cri L J 1359 : AIR 1955 Madh Bha 176.

——S. 114 — Accused charged with abetment — Conviction for principal offence — Accused charged with principal offence—Conviction for abetment.

It is not illegal to convict an accused of the principal offence although he is charged with abetment thereof. Similarly the accused charged with abetment of an offence can be convicted of having committed the principal offence by recourse to S. 34. AIR 1955 NUC (Madh B) 3335 (DB).

——Ss. 114, 109, 111, 304, Part II and 323. — Applicability — Sudden quarrel — Abettor present on spot instigating another co-accused to beat deceased — Latter giving heavy blow on head of deceased with log of wood lying nearby resulting in his death — Injury sufficient in ordinary course of nature to cause death — Abettor held guilty under S. 323/109, I. P. C. and not under S. 304, Part II/114, I. P. C. — Principal accused held guilty under S. 304, Part II. See Penal Code (1860), S. 109. 1962 (1) Cri L J 435 : AIR 1962 Madh Pra 91.

——Ss. 114 and 34 — Scope — Mere presence of a person at the time of commission of offence by confederates — Not sufficient to bring under S. 34. See Penal Code (1860), S. 34. 1963 Mad L J (Cri) 491.

——S. 114—Criminal P. C. (1898), S. 198 - Abetment of offence under S. 494, Penal Code - Section applies. See Criminal P. C. (1898), S. 198. AIR 1952 Mad 193 (DB).

——Ss. 114, 107, 338 and 279—Principal offender or abettor—Driver of lorry carrying passengers allowing minor to drive lorry with full knowledge that minor did not know driving — Rash and negligent driving by minor resulting in grievous hurt — Driver sitting by the side of minor — Driver is liable as principal offender. AIR 1951 Punj 418 (418, 419) (Prs 4, 6) (DB).

——Ss. 114, 107, Expln. II —Applicability —A facilitating stabbing by B by holding victim's hands — A aids commission of offence.

S. 114 applies to a case where a person abets the commission of an offence, some time before it takes place and happens to be present at the time when the offence is committed. It is not applicable to a case where the abetment is at the time when the offence takes place and the abettor helps in the commission. When a person who abets the commission of an offence is present and helps in the commission of the offence he is guilty of the offence and not merely of abetment except in a few cases like rape or bigamy.

Where A facilitates the stabbing of C by B holding C's hands while B stabbed C, A must be deemed to have aided the commission of the offence within the meaning of Expln. 2 to S. 107, I. P. Code. 1955 Ker L T 417 : ILR (1955) Trav-Co 510 : 1955 Cri L J 1535 : AIR 1955 T-C 266 (267) (Pt B) (Pr 7) (DB).

SECTION 116

——S. 116 —Scope —Offence under —S. 165-A — After the Criminal Law Amendment Act inserted S. 165-A into the Code abetment of an offence under S. 161 is no longer an offence under S. 161/116. See Public Safety — West Bengal Criminal Law (Amendment Special Courts) Act (21 of 1949) (as amended by W. B. Act 12 of 1952 and W. B. Act 15 of 1953), S. 4 and Schedule. 1959 Cri L J 98 : A I R 1959 S C 8.

——Ss. 116, 161 — Criminal Procedure Code (1898), Ss. 162, 172 — Prosecution for offence under S. 161

read with S. 116, Penal Code — Prosecution story altogether unnatural and illogical — Copies of statements of witnesses recorded by police during investigation not supplied even though requested by accused—Recovery of currency notes not mentioned in General Diary—Accused given benefit of doubt and acquitted. See Penal Code (1860), S. 161. 51 Cri L J 1301 : AIR 1950 Ajmer 44.

——Ss. 116, 107 and 108—Presence of accused either with Bhala or spear on the scene of occurrence of marpit and their participation in the marpit proved —Even if they have not actually applied their weapons, they are vicariously responsible for the injuries caused to the complainant party. 1963 All Cr R 370 : 1963 All W R (H C) 639 : 1963 All L J 966 : 1965 (1) Cri L J 267 : AIR 1965 All 120 (121) (Pt B) (Pr 2).

——S. 116 — Offence of offering bribe must be severely punished. See Penal Code (1860), S. 161. 1954 Cri L J 459 : AIR 1954 All 223.

——Ss. 116 and 161 — Receiving bribe on behalf of public servant — Criminal P. C. (1898), Ss. 238, 237, 423 and 439.

Where a police constable engages with another person that the latter should pay money as a bribe to the Sub-Inspector and that the constable should receive it on behalf of the Sub-Inspector as a reward for the Sub-Inspector's releasing the other person on bail and receives the money for paying it to the Sub-Inspector, the constable is not guilty under S. 161, Penal Code but is guilty under S. 161 read with S. 116, Penal Code. If in such a case the accused is charged and convicted under S. 161 by the trial Court the High Court in revision cannot alter the conviction to one for abetment but must send the case back for re-trial. 51 Cri L J 1073 : 1950 All L J 750 : AIR 1950 All 412 (412, 414) (Prs 4, 10).

——S. 116 — Offer to pay bribe to public servant without actually producing money amounts to offence under S. 165-A — Offer, what amounts to — It would amount to an abetment under S. 116 and would necessarily constitute an offence under S. 165-A. 1955 Cri L J 181 : A I R 1955 Bom 61 (DB).

——Ss. 116, 161 — Bribe offered to public servant — Public servant not in position to do act, or show favour or render service.

If the intention or object with which money is offered to a public servant is to induce him to perform an official act or show favour in the exercise of his official functions or render any service with any public servant, the offence punishable under S. 161 read with S. 116 would be complete and it is immaterial whether the public servant is or is not in a position to do the act or show favour for doing, showing or rendering which the bribe is offered to him. 1952 Cri L J 1572 : AIR 1952 Bom 435 (DB).

——Ss. 116, 161 — "As a motive or reward" — Abetment.

Even though the public servant may not have been in a position to do the official act in question, the accused is guilty of the offence punishable under S. 161, read with S. 116, as soon as he offered gratification to him as a motive or reward for doing it. Case law referred. 1952 Cri L J 107 : AIR 1952 Him Pra 1 (3) (Pt B) (Pr 9).

——Ss. 116, 161—Bribe giver—Punishment.

As between the taker and the giver of the bribe the latter is by far the worse of the two. And the suppression of the crime is called for with a stronger hand. AIR 1929 Mad 756, Rel. on. 1952 Cri L J 107 : AIR 1952 Him Pra 1 (3) (Pt C) (Pr 11).

——S. 116 — Offer of bribe — Offence committed in 1950 — Conviction under S. 165-A, Penal Cade — Legality of — Alteration of conviction to one under S. 161 read with S. 116, Penal Code.

Held, (1) that in view of the provisions of Art. 20 of the Constitution the accused could not be convicted under S. 165-A, I. P. C. which was incorporated in the Penal Code on 28-7-1952 for a bribe said to have been offered on 16-1-1950 (2) that as the accused could not be tried by the Special Judge for an offence under S. 161 read with S. 116, Penal Code, the High Court could not find him guilty of that offence in appeal. The conviction and sentence imposed must be quashed. 1954 Cri L J 872 : AIR 1954 Madh B 83 (84) (Prs 3, 7).

——Ss. 116, 108, Explns. (2) and (4) — Abetment of abetment is offence, though the second abetment is ineffective — Accused approaching doctor for poison for murdering mistress—Doctor refusing—Accused is guilty of offence under S. 302 read with S. 116, Penal Code. See Penal Code (1860), S. 108. A I R 1950 Mad 827.

——Ss. 116, 165 (A), 161—Person offering bribe can only be prosecuted under S. 165 (A) and not under S. 161 read with S. 116—(Interpretation of Statutes—Repeal of earlier by later). See Penal Code (1860), S. 165 (A). 1956 Cri L J 249 : A I R 1956 Manipur 9.

——Ss. 116, 107, 161—Abetment—Sentence.

If an offer of bribe is made on the invitation of a public servant such offer would be "intentional aid" which is one of the ingredients of abetment under S. 107. There seems to be no justification for treating the abettor leniently especially when that abettor is not a simple minded villager but a Marwari merchant of cuttack who wanted to take advantage of his previous acquaintance with the Sub-Inspector. 1952 Cri L J 941 : A I R 1952 Orissa 180 (DB).

——Ss. 116, 161—Offence under S. 161 — Essentials of.

The fact that the public servant is functus officio when money is offered to him as a bribe would not by itself and as a matter of law be sufficient to negative the offence. See Penal Code (1860), S. 161. A I R 1952 Orissa 73 (DB).

——Ss. 116 and 161—Abetment.

Where a person acted only as a agent of a public servant in accepting a bribe and the amount paid was also meant for the latter and the favour that was to be done to the complainant in lieu of the remuneration was to be done by the public servant himself in the exercise of his official functions:

Held that the person could only be charged for abetment under S. 116 and not under S. 161. ('51) 3 Pepsu L R 652.

——S. 116—Abetment of bribery—Sentence.

Offences of bribery on abetment of bribery rarely come to light and where such an offence is proved beyond all reasonable doubt, the perpetrators thereof must be visited with deterrent punishment. See Penal Code (1860), S. 161. 1957 Cri L J 96 : A I R 1957 Raj 1.

——Ss. 116, 161 — Criminal P. C. (1898), S. 4 (1) (f) and Sch. 2 — Under any law for the 'time being in force'—Offence under S. 161 read with S. 116, Penal Code is cognizable by reason of S. 3, Prevention of Corruption Act—(Prevention of Corruption Act (1947), S. 3). See Criminal P. C. (1898), S. 4 (1) (f). A I R 1955 NUC (Raj) 4672.

——Ss. 116, 161 — Applicability — Person to whom gratification is paid need not be in position of influencing superior authority—Person paying such gratification is guilty under S. 161 read with S. 116. A I R 1955 N U C (Sau) 4690.

SECTION 117

——Ss. 117, 143 and 188 — Applicability.

Where the order promulgated under S. 144, Criminal P. C. did not specifically prohibit the making of speeches but merely prohibited assembly of five or more persons, processions or shouting of slogans in public places.

Held, that the speeches made by the two accused which were merely exhortations that the struggle of satyagraha should be continued and jails should be filled did not constitute an exhortation to defy the order and therefore, did not constitute an offence under S. 188 and much less an offence under S. 117 read with S. 188, Penal Code. But the speech made by the third accused in which he used the words that S. 144, Criminal P. C., which was illegally applied should be violated, constituted an offence under S. 188, Penal Code.

Held further that as the persons assembled were more than five and the instigation was obviously to resist not only the order under S. 144 but to overawe Government or the public servants who were engaged in the task of maintaining law and order all the three accused were guilty of offences under S. 117 read with S. 143, Penal Code. 1957 Nag L J 63.

SECTION 119

——S. 119 — Scope — Charge under S. 409, Penal Code — Conviction under S. 119.

Where the facts constituting an offence under S. 119 were neither stated in the charge-sheet nor was the accused at any time put on notice of the same. **Held**, that the charge under S. 409 of Penal Code being disproved against him, he could not be taken by surprise for an offence under S. 119 and the conviction without charge was against law. See Criminal P. C. (1898), S. 233. (1957) Mad L J (Cri) 509 : (1957) 2 Andh W R 298.

SECTIONS 120-A AND 120-B

SYNOPSIS

(Penal Code (1860), Ss. 120A and 120B.)

1. Scope and applicability.
2. "Criminal conspiracy".
3. Abetment by conspiracy and criminal conspiracy —Distinction.
4. Charge.
5. Proof of conspiracy.
6. Sanction for prosecution.
7. Place of trial.
8. Conviction and sentence.
9. Conviction of single person.

1. Scope and applicability.

●——Ss. 120-A, 120-B — Scope — Accused charged with having conspired to do certain illegal acts— They can be held guilty under S. 120-B even if for individual offences all of them may not be liable.

It is not an ingredient of the offence under S. 120-A that all the parties should agree to do a single illegal act. It may comprise the commission of a number of acts. Where the accused are charged with having conspired to do three categories of illegal acts, the mere fact that all of them could not be convicted separately in respect of each of the offences has no relevancy in considering the question whether the offence of conspiracy has been committed. They can all be held guilty of the offence of conspiracy to do illegal acts, though for individual offences all of them may not be liable. Major E. G. Barsay v. State of Bombay, (1962) 1 S C A 106 : (1962) 1 S C J 231: 1962 Mad L J (Cri) 153 : (1962) 2 S C R 195 : 1961 (2) Cri L J 828 : A I R 1961 S C 1762 (1778) (Pt I) (Pr 31).

●——S. 120-B — Distinction between English and Indian Law —(Criminal P. C. (1898), S. 423).

The rule of English law as to the acquittal of an alleged conspirator following from the acquittal of the other when the conspiracy was said to be only between the two and in a joint trial of both is based upon a rule of practice and procedure, namely, that repugnancy or contradiction on the face of the record is a ground for annulling a conviction. But such a repugnancy is not by itself a sufficient ground for quashing a conviction in India where the matter is governed by statutory law both as to the offence and the procedure for bringing the offender to justice. In India there is no provision in the statutory law justifying an interference with a conviction on the ground of repugnancy in the record. That is not to say that the Court is to shut its eyes to the inconsistency in convicting one person of the offence of conspiracy on the same evidence on which the other alleged conspirator had been acquitted. Bimbadhar v. State of Orissa, 1956 Cri L J 831 : 1956 Mad W N 473 : 1956 S C J 441 : 1956 Pat L R (SC) 178 : 1956 S C R 206 : 1956 S C A 857 : 1956 All W R (Sup) 89 : 22 Cut L T 276 : ILR (1956) Cut 409 : (1956) 2 Mad L J (SC) 13 : A I R 1956 S C 469 (474) (Pt E) (Pr 11).

——S. 120-A — Scope:— Gift of offence consists in agreement between parties —Proof of conspiracy.

A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as a design rests in intention only, it is not indictable. When two agree to carry it into effect the very plot is an act in itself and the act of each of the parties, promise against promise, actus contra actum capable of being enforced, if lawful, is punishable if for a criminal object or for the use of criminal means.

The gist of the offence of conspiracy lies not in doing the act or effecting the purpose for which the conspiracy is formed, nor in attempting to do any of the acts nor in inducing others to do them but in the forming of the scheme or agreement between the parties. The factum of the criminal agreement should not be confounded with its proof. So far as proof goes conspiracy is a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose common between them. (1962) 1 Andh L T 57 : 1963 (2) Cri L J 546 (554) (Pt G) (Pr 58) (AP).

——S. 120-B — Conspiracy outside India — Jurisdiction to try offence of conspiracy by Indian Courts —Offences being objects of conspiracy committed in India — Conspiracy being continuous — Parties to conspiracy continue to be liable.

Before Ss. 120-A and 120-B were added to the Penal Code conspiracy to commit offences was not punishable. On the amendment of the Penal Code, by addition of Ss. 120-A and 120-B the legislature brought the law in India in line with the English law and made conspiracy itself punishable as a distinct offence apart from the object of conspiracy which, if carried out would itself amount to an offence. It is no doubt true that the offence of criminal conspiracy is complete as soon as an agreement is made between the conspirators but S. 120-B does not limit its operation to those who are parties to the agreement at the moment of its formation but is also applicable to those who continue to be parties during the entire period during which the conspiracy continues. By its very language, S. 120-B must apply to those who are members of the conspiracy during its

continuance and it is intended to be treated as a continuous offence.

It is not that merely because the objects with which the conspiracy was entered into were achieved and actual offences committed there could be no prosecution for conspiracy itself. From S. 120-B it is clear, that if the persons were parties to a conspiracy during its continuance when all of them were in India, they committed the offence in Indian territory the Courts in India have jurisdiction to try the offence under the section. 65 Bom L R 864 : I L R (1963) Bom 800 : (1964) Mah L J 95 : 1964 (1) Cri L J 648 : AIR 1964 Bom 133 (134 to 136) (Pt A) (Prs 5, 6, 8, 9) (DB).

——S. 120-B—After examination of several prosecution witnesses State filing second case separately against same accused persons under same sections for same offences committed in pursuance of same conspiracy — Accused cannot be tried twice over in two cases for same offence of conspiracy permissible under S. 120-B. See Constitution of India, Art. 20 (2). 1965 (2) Cri L J 351 : AIR 1965 Cal 457.

——S. 120-B—Prosecution under Ss. 120-B, 420, 467 and 471, I. P. C. — State filing Second Case against same accused under same sections — There may not be any bar to trial of more than three offences as the same trial by virtue of S. 235, Criminal P. C. but separate trials may also be continued if no prejudice is caused to accused by separate trials. See Criminal P. C. (1898), S. 235. 1965 (2) Cri L J 351 : AIR 1965 Cal 457.

——S. 120-B — After 1913 criminal conspiracy is a separate offence by itself whether or not any offence is committed in pursuance of it. 52 Cri L J 561 : AIR 1951 Vindh-Pra 17 (33) (Pt J) (Pr 107).

——Ss. 120-A and 489-C— Conspiracy to utter forged notes—Different accused joining at different stages—Conspiracy can still be one — Some persons joining conspiracy afterwards — They will be members of same conspiracy. AIR 1955 N U C (All) 3583.

——S. 120-B — Criminal conspiracy — Essentials — Proof.

The essence of a Criminal conspiracy is an agreement between two or more persons for one of the unlawful purposes specified in S. 120-A. The formulation of the agreement may be established either by direct evidence or by inference from other facts which are proved. It need not be formed at the same time as between all the parties to the conspiracy. But there should be a consensus or a meeting of the minds and each person alleged to be a party to the conspiracy must be proved to have shared the criminal intention. For substantiating the charge under S. 120-B, I. P. C. evidence is necessary, proving that accused joined the conspiracy and shared the criminal intention, which might have been possibly entertained by one of them alone. 1959 Andh L T 562.

——Ss. 120-A, 300—Conspiracy — Murder— Justification.

Persons suffering from social disabilities and living in difficult conditions should not commit crimes like murder. The fact that the survey measurement was unfavourable to the Mahars or Harijans and that some of them thought that the introduction of a Gram Panchayat was not beneficial to them is hardly a reason for forming a criminal conspiracy and to carry out the object of the conspiracy by committing a murder. ILR (1958) Bom 1092 : 59 Bom L R 244 : 1957 Cr L J 1107 : A I R 1957 Bom 226 (231) (Pt F) (Pr 16) (DB).

——S. 120-A —Proof—Characteristics of conspiracy.

Privacy and secrecy are more characteristic of a conspiracy than a loud discussion in an elevated place open to public view in the garden of a stranger. 1954 Cr L J 905 : I L R (1953) Mys 625 : A I R 1954 Mys 81 (83) (Pt C) (Pr 9) (DB).

● ——S. 120-A — Whether conspiracy is established is a question of fact which has to be determined on evidence—Per Bhandari J. Nathu Ram V. Godse v. Rex. ILR (1956) Punj 499 (FB).

2. "Criminal conspiracy".

● ——Ss. 120-A; 120-B—It is not necessary that each member of a conspiracy must know all the details of the conspiracy. R. K. Dalmia v. Delhi Administration (1963) 1 S C R 253 : (1962) 32 Com Cas 699 : 1962 (2) Cri L J 805 : A I R 1962 S C 1821 (1874) (Pt S) (Pr 317).

● ——S. 120-B — Substantive offences not committed—Effect.

The offence of criminal conspiracy consists in the very agreement between two or more persons to commit a criminal offence irrespective of the further consideration whether or not those offences have actually been committed. The very fact of the conspiracy constitutes the offence and it is immaterial whether anything has been done in pursuance of the unlawful agreement. Bimbadhar Pradhan v. State of Orissa, 1956 S C J 441 : 1956 Mad W N 473 : 1956 S C R 206 : 1956 All W R (Sup) 89 : 1956 S C A 857 : (1956) 2 M L J (S C) 13 : ILR (1956) Cut 409 : 1956 Cr L J 831 : 22 Cut L T 276 : A I R 1956 S C 469 (474) (Pt B) (Pr 13).

——Ss. 120-A, 120-B and 420 — Essence of criminal conspiracy—Conspiracy to cheat.

The essence of criminal conspiracy is an agreement to do an illegal act for instance commit cheating. Such an agreement can be proved either by direct evidence or by circumstantial evidence or by both. It is not necessary that there should be express proof of the agreement. The agreement can be inferred. Proved acts of cheating by various persons belonging to one group at various times at various places by the same devices would furnish strong evidence of the existence of a conspiracy to cheat as also of the membership of those persons of the conspiracy. 1960 All L J 33 : 1960 Cr L J 188 : 1960 All W R (HC) 67 : 1960 All Cr R 84 : AIR 1960 All 103 (109) (Pt B) (Pr 25) (DB).

3. Abetment by conspiracy and criminal conspiracy—Distinction.

●——S. 120-A—(Per S. K. Das, J.) — Distinction between offence of abetment by conspiracy and offence of criminal conspiracy — Sanction under S. 196-A, Criminal P. C. for offence of abetment by conspiracy is not necessary. See Criminal P. C. (1898), S. 196-A. 1962 (1) Cri L J 770 : AIR 1962 S C 876.

4. Charge.

●——S. 120-B — Criminal conspiracy — Charge — Framing of—Actual commission of offences in pursuance of conspiracy—Charge for conspiracy in addition to charges for other offences can also be framed —Cumbersome charge — Objection to, not taken at proper time—Effect—Criminal P. C. (1898), Ss. 225 and 239.

The view that it is not permissible to frame a charge of conspiracy when the matter has proceeded beyond the stage of conspiracy and that in pursuance of it offences have actually been committed, cannot be accepted as correct. AIR 1961 S C 1241, Foll. The offence of conspiracy is an entirely independent offence and though other offences are committed in pursuance of the conspiracy the liability of the conspirators for the conspiracy itself cannot disappear. Section 120-B which makes criminal conspiracy punishable was added by the Indian

Criminal Law Amendment Act, 1913 (8 of 1913) along with S. 120-A.

In framing a charge for conspiracy, the offences actually committed should not be mentioned in the charge. But the mere mention of such offences in the charge will not necessarily vitiate the charge. In the present case it was held that even assuming that the charge was cumbersome, in the absence of any objection by the accused at the proper time and in the absence of any material from which prejudice to accused could be inferred, the accused was precluded by S. 225, Criminal P. C., from complaining about it after their conviction by the trial Court. State of Andhra Pradesh v. Cheemalapati Ganeswara Rao, **(1964) S C A 38 : (1964) 3 S C R 297 : 1963 (2) Cri L J 671 : AIR 1963 S C 1850 (1864 to 1866) (Pt C) (Prs 34, 39, 40).**

●——S. 120-B — Distinct offence — Meaning of — Offences to be distinct must not be inter-related—Contract to supply wood to Government—Money obtained from Government on various bills at different times in pursuance of conspiracy entered into between various accused — **Held**, single charge under S. 420, Penal Code did not contravene S. 235 as object of conspiracy was not to obtain diverse amounts but to obtain entire contract money from Government. See Criminal P. C. (1898), S. 233. **1963 (2) Cri L J 529 : AIR 1963 SC 1620.**

●——S. 120-B—Charge of criminal conspiracy under S. 120-B read with Ss. 467, 468, 471 and 420-B, Penal Code. Reference to sections of Penal Code made merely to indicate objects of conspiracy—Charge held was not a jumbled one—Accused fully undertaking implication of charge and not raising any objection to it at any stage—Objection regarding charge not entertained by Supreme Court. See Criminal P. C. (1898), S. 225. **1963 (1) Cri L J 623 : A I R 1963 S C 666.**

● ——S. 120-B—Criminal P. C, (1898), Ss. 222 (2), 235, 537 — Charge contravening proviso to S. 222 (2) Defect held did not cause prejudice to accused—Trial not vitiated. See Criminal P. C. (1898), S. 222 (2). **1962 (2) Cri L J 259 : AIR 1962 S C 1153.**

●——Ss. 120-B, 420—Charge — Single conspiracy to cheat members of public — Several persons joining—Several transactions spread over several years — Single trial — Legality — (Criminal P. C. (1898), S. 235).

Where the charge, as framed, discloses one single conspiracy, although spread over several years, there is only one object of the conspiracy, and that is to cheat members of the public, the fact in the course of years others joined the conspiracy or that several incidents of cheating took place in pursuance of the conspiracy does not change the conspiracy and does not split up a single conspiracy into several conspiracies.

Held, on facts that as the instances of cheating were in pursuance of one conspiracy and were parts of the same transaction, there was no misjoinder of charges. AIR 1936 Bom 154 and (1910) 20 M L J 220. Disting. **1957 Cri L J 422 : A I R 1957 S C 340 (344) (Pt B) (Pr 7).**

——Ss. 120-B, 409 and 380—Applicability — Accused can be tried and punished under S. 120-B even when charge under Ss. 409 and 380 cannot be made out. **1958 All L J 690 : 1958 All W R (HC) 748 : 1958 All Cr R 504 : 1959 Cri L J 18 : AIR 1959 All 75 (77) (Pt A) (Prs 7, 8).**

——Ss. 120A, 120B and 489C—Charge under Ss. 120B and 489C—There is no illegality. **A I R 1955 N U C (All) 3583.**

——S. 120-B — Particulars of charge of conspiracy—Particulars sufficient to give the accused notice of matter with which he is charged are sufficient. See Criminal P. C. (1898), S. 222. **1964 (1) Cri L J 648 : AIR 1964 Bom 133 (DB).**

——S. 120-A—Ingredients of offence stated—Charge—Frame and contents of—Six Persons of whom three are public servants tried together by Special Judge for offence under S. 5 (1) (c) and (d), Prevention of Corruption Act—Criminal Conspiracy forming one of heads of charges — Charge held not illegal. See Criminal P. C. (1898), S. 255. **1958 Cri L J 1144 : AIR 1958 Bom 354 (DB).**

——S. 120-B—Criminal conspiracy to commit certain offences—Prosecution not bound to include all acts of conspirators in charge—Splitting of conspiracy into two cases commenced one after other—Validity of first trial not affected. See Criminal P. C. (1898), S. 239. **1953 Cri L J 806 : A I R 1953 Bom 177 (DB).**

——Ss. 120-B, 395—Charge of conspiracy to commit dacoity—There is nothing artificial in combination—Criminal Procedure Code (1898), S. 235.

Dacoity as defined in S. 391 undoubtedly implies conjoint action. It is only when such action takes place that an offence is committed, but there may well be a stage where there is only an agreement to commit the offence, that agreement is itself punishable under S. 120-B of the Penal Code. To say that a charge under S. 120-B/395 of the Code is artificial is to ignore the essential fact that a conspiracy to commit dacoity is different from dacoity. It may well be that, five men merely conspire to commit a dacoity. If there is proof of the agreement, the offence of conspiracy is complete. That being so, there is nothing artificial in the combination implied in the charge of conspiracy to commit dacoity. **1965 (2) Cri L J 718 : AIR 1965 Cal 598 (605) (Pt C) (Pr 25) (DB).**

——S. 120-B—Procedure—Framing of charge — Evidence adduced to be considered cumulatively — Criminal P. C. (1898), S. 254.

The testimony of certain prosecution witnesses without more, is sufficient to pass the prima facie standard to enable the charge of conspiracy being framed. When such evidence is supported by documentary evidence, the whole evidence, taken together; provides sufficient justification in its cumulative effect to frame charge for conspiracy, though the Magistrate may have committed an error in considering each item of evidence individually. **1965 (2) Cri L J 443 (445) (Pt B) (Pr 20) (Cal).**

——S. 120-B—General charge of conspiracy with charges for specific offences committed in pursuance of conspiracy—Acquittal in respect of general charge—Conviction in respect of specific charges still legal—Criminal P. C. (1898), Ss. 235 and 239.

When there is a general charge of conspiracy framed under S. 120-B/409 and the prosecution case is that the specific offences under S. 409/109, were committed by one or other accused in pursuance of the conspiracy, it is usual to mention in the subsidiary charges that the specific offence was committed in pursuance of the conspiracy, but when the main charge of general conspiracy fails the conviction of one or more of the accused in respect of one or more of the specific charges is still quite legal. A I R 1960 S C 661, Rel. on, **1963 (1) Cri L J 156: AIR 1963 Cal 64 (67) (Pt A) (Pr 9) (DB).**

● ——S. 120-A—Offence of abetment of forgery by conspiracy — Sanction under S. 196-A Criminal P. C. not required—Forgery committed — Charge of abetment of forgery is legal. See Criminal P. C. (1898), S. 196-A. **1961 (1) Cri L J 204 : A I R 1961 Cal 461 (FB).**

——S. 120-B — Charge of conspiracy—Two or three persons conspiring generally to commit offence of cheating in particular way and in pursuance of such conspiracy, cheating different peoples at different times in that particular way — There is only one offence of conspiracy to cheat—(Criminal P. C. (1898), S. 233). AIR 1955 N U C (Cal) 2944 (DB).

——S. 120-B — Criminal P. C. (1898), Ss. 233, 253 — Distinct offences — What are — Offences under Ss. 120B and 420, Penal Code are distinct offences committed in course of same transaction—If person accused of the offences is charged under S. 420, it can be said that he is impliedly discharged of offence of conspiracy under S. 120B. See Criminal P. C. (1898), S. 233. AIR 1954 Kutch 33.

——S. 120-B — Framing of charge — Whether in a particular case a charge for an offence be not framed on ground that it is unnecessary redundant or superfluous is a matter for Magistrate framing charge to consider — Question will depend in each case on nature of offence alleged and prima facie shown to have been committed — Held that there was nothing illegal in framing a charge under S. 120-B. See Criminal P. C. (1898), S. 254. 1954 Cri L J 1086: AIR 1954 Kutch 33.

——S. 120-B—Charge.

Criminal conspiracy, defined in S. 120-A and made punishable under S. 120.B, is a new substantive offence introduced by Chapter VI-A in the Criminal Law of India. It follows that where it was alleged and prima facie shown that an offence of criminal conspiracy was committed, a charge under that section could be framed. If in pursuance of the said criminal conspiracy, offences were committed, there is nothing in the Code of Criminal Procedure which prohibits framing of charges for those offences along with the charge for criminal conspiracy. Charge for other offences may be for commission of substantive offence by one or more of the conspirators and abetment by others. There is nothing illegal in framing a charge of criminal conspiracy against certain person and at the same time, framing charges of other offences; substantively or by abetment, alleged to have been committed in pursuance of the conspiracy. AIR 1938 Mad 130, Dissented from. 1953 Cri L J 17: AIR 1953 Kutch 54 (55, 56) (Prs 6, 8).

——Ss. 120A and 120B — Criminal P. C. (1898), S. 239 — Charge under S 120-A and S. 120-B, Penal Code — Joinder of charges — Effect of S. 239, Criminal P. C. and Ss. 120A and 120B, I. P. C. is to open out an unlimited avenue for masses of charges being framed against persons in a joint trial on a mere accusation of conspiracy. See Criminal P. C. (1898), S. 239. AIR 1952 Mad 727 (DB).

——S. 120-B — Criminal P. C. (1898), S. 439—Retrial — Several persons connected with Bank charged under S. 120-B read with Ss. 409 and 477-A, I. P. C. — Protracted trial for 2½ years — Joinder of charges in way impossible to try — Retrial ordered after splitting up charges. See Criminal P. C. (1898), S. 439. AIR 1952 Mad 727 (DB).

——Ss. 120-B. 489-B, 489-C—Trafficking in counterfeit currency notes in pursuance of conspiracy — Consideration parts played by different conspirators irrelevant in considering charge under S. 489.B read with S. 120.B—Conviction under S. 489-B—Conviction under S. 489-C redundant.

Where trafficking in counterfeit currency notes was done in pursuance of a conspiracy; the fact that several conspirators placed different rules is wholly irrelevant in considering charge under S. 489-B read with S. 120-B. Each one is responsible for the acts of the other conspirators as well. The Court should not have separated the several incidents and considered them in isolation. The conviction of any of the accused under S. 489-C is redundant in view of the fact that they had been convicted under S. 489-B. 1962 Mad L J (Cri) 695: 1962 (2) Cri L J 765: 40 Mys L J 494: ILR (1961) Mys 482: AIR 1962 Mys 275 (278) (Pt C) (Pr 33) (DB).

——Ss. 120-B and 107 — Offence committed in pursuance of conspiracy — Charge of conspiracy — Conspiracy — If abetment — Criminal P. C. (1898), S. 235.

Where an offence which is alleged to the object of the conspiracy is actually committed, the charges of criminal conspiracy under S. 120 B is irrelevant. In such a case the conspiracy amounts to abetment: AIR 1936 Pat 346, Foll. AIR 1938 Mad 130, Rel. on: AIR 1938 Bom 481, Not foll. 1660 B L J R 565: 1960 Cri L J 1360: AIR 1960 Pat 459 (468) (Pt D) (Pr 32) (DB).

——S. 120-B—Act not illegal—No charge for conspiracy — Question of conspiracy held not relevant. See Cotton Cloth and Yarn (Transmission By Post) Prohibition Order (1946), Cl. 3. 1959 Cri L J 636: AIR 1959 Pat 207 (DB).

● ——Ss. 120-A, 120.B — Criminal conspiracy to commit offence—Offence committed — Accused can be charged and convicted for both, offence of criminal conspiracy and the offence committed in pursuance of the conspiracy.

Per Achhru Ram J. :— Offence of criminal conspiracy to commit an offence and the offence committed in pursuance of that conspiracy are two quite distinct offences and the accused can be charged with both. The offence of criminal conspiracy is not wiped out when either some act or illegal omission has taken place in pursuance of that agreement so as to bring the case within purview of clause secondly of S. 107 or when the offence, the committal of which is the object of the conspiracy, is committed.

Though the accused can be legally charged for both the offences, the Court will exercise wide discretion in refraining from convicting the accused on the charge of conspiracy when they are found guilty of the offence itself. It will, in any case, refrain from passing a separate sentence for conspiracy. Nathu Ram V. Godse v. Rex, ILR (1956) Punj 499 (FB).

——S. 120-B — Accused merely present at meetings of accused persons—No overt act on his part shown—Framing of charge under S. 120-A, is not warranted. 1964 (2) Cri L J 209: AIR 1964 Tripura 41 (45) (Pt D) (Pr 17).

5. Proof of conspiracy.

● ——S. 120-A—Proof of criminal conspiracy—Scope and applicablity of S. 10, Evidence Act.

There is no difference between the mode of proof of the offence of conspiracy and that of any other offence: it can be established by direct evidence or by circumstantial evidence. But S. 10 of the Evidence Act introduces the doctrine of agency and if the conditions laid down therein are satisfied, the act done by one is admissible against the co-conspirators. But this section will come into play only when the Court is satisfied that there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, that is to say, there should be a prima facie evidence that a person was a party to the conspiracy before his acts can be used against his co-conspirators. Once such a reasonable ground exists, anything said, done or written by one of the conspirators in reference to the common intention, after the said intention was entertained, is relevant against the others, not only for the purpose of proving the existence of the conspiracy but also for proving that the

other person was a party to it. The evidentiary value of the said acts is limited by two circumstances, namely, that the acts shall be in reference to their common intention and in respect of a period after such intention was entertained by any one of them. The expression "in reference to their common intention" in S. 10, is very comprehensive and is designedly used to give it a wider scope than the words "in furtherance of" in the English law, with the result, anything said, done or written by a co conspirator, after the conspiracy was formed, will be evidence against the other before he entered the field of conspiracy or after he left it. Another important limitation implicit in the language is indicated by the expressed scope of its relevancy. Anything so said, done or written is a relevant fact only as against each of the persons believed to be so conspiring as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it. It can only be used for the purpose of proving the existence of the conspiracy or that the other person was a party to it. It cannot be used in favour of the other party or for the purpose of showing that such a person was not a party to the conspiracy. Bhagwan Swarup Lal Bishan Lal v. State of Maharashtra, (1964) 3 S C R 378 : (1964) 2 S C J 771 : 1965 (1) Cri L J 608 : AIR 1965 S C 682 (686) (Pt E) (Pr 8).

● ——Ss. 120-B 420, 193, 24, 25—Prosecution under Ss. 420, 193 and 120-B, Penal Code—Charge of conspiracy not proved — Absence of criminal intent — Reasonable explanation by accused — Accused held entitled to benefit of doubt — (Criminal P. C. (1898), S. 367). See Penal Code (1860), S. 420. **1957 Cri L J 583 : AIR 1957 SC 466.**

● ——S. 120-B—Proof—Approver's evidence — Corroboration—Necessity—Charge of conspiracy to cheat —If a specific instance of cheating was proved beyond doubt against any of the accused that would furnish best corroboration of offence of conspiracy. See Evidence Act (1872), S. 133. **1957 Cri L J 422 : AIR 1957 SC 340.**

■ ——S. 120-B—Proof—Offence under S. 120-B held not proved. Shiv Bahadur Singh v. State of V. P., 1954 S C J 362 : 1954 SCR 1098 : 1954 Cri L J 910 : 1954 S C A 1316 : A I R 1954 S C 322 (329) (Pt K) (Prs 14, 15) (DB).

● ——Ss. 120-B and 34 — Filing of conspiracy — Evidence as to conspiracy under S. 120-B, having been rejected, the same evidence cannot be used for finding a common intention under S. 34. See Penal Code (1860), S. 34. 1953 Cri L J 1772 : AIR 1953 SC 420.

——S. 120-B — Conspiracy — Proof of — Filling of certain form by bank clerk—It does not show that he was privy to conspiracy. AIR 1955 NUC (Ajmer) 771.

——S. 120-A, Proviso—Overt act is not necessary — Proviso applies to cases where agreement is not to commit offence—Mere agreement to commit offence can be punished. AIR 1955 NUC (All) 3583.

——Ss. 120-A and 489-C—Persons charged of criminal conspiracy—Proof of their meeting together and deciding to commit illegal act is not necessary—This can be decided with reference to acts done by each of them. AIR 1955 NUC (All) 3583.

——S. 120-B—Conspiracy—Evidence of—Legitimate inference from proved circumstances can be drawn. AIR 1955 NUC (All) 166 (DB).

——S. 120-B—Criminal conspiracy—Proof.

In a criminal conspiracy, what is to be proved is agreement and common design. It is true that this proof need not be by direct evidence and that existence of a conspiracy may even be a matter of inference deduced from criminal acts done in pursuance of a common criminal purpose. But, unless a detailed and specific proof against each of the accused that they participated in a particular design to do a particular thing has been established, there can be no conviction under S. 120 B. **(1957) 2 Andhra W R 156: (1957) Mad L J (Cr) 421 : 1957 Cri L J 1091 : AIR 1957 Andh Pra 758 (766) (Pt H) (Pr 20) (DB).**

——S. 120-A—Criminal conspiracy — Proof — (Evidence Act (1872), S. 3).

In considering the question of criminal conspiracy it is not always possible to give affirmative evidence about the date of the formation of the criminal conspiracy, about the persons who took part in the formation of the conspiracy, about the object which the conspirators set before themselves as the object of conspiracy and about the manner in which the object of conspiracy is to be carried out. All this is necessarily a matter of inference. 31 Bom L R 515 and AIR 1936 Cal 73, Rel. on. **ILR (1958) Bom 1092 : 59 Bom L R 244 : 1957 Cri L J 1107 : AIR 1957 Bom 226 (229) (Pt A) (Pr 12) (DB).**

——S. 120-B—Proof of conspiracy.

The gist of the offence of conspiracy is the agreement itself where the object of the agreement is to do an illegal act. Express proof of agreement is rarely available and may not even be necessary. Agreement can be inferred from overt acts and conduct. If it is proved that the persons charged pursued by their acts the same object, one performing one part and the other performing another part, with a view to attaining the object they were pursuing, the inference of conspiracy will be justified. Indeed where the agreement is to commit an offence no overt act need be proved. Overt acts raise a presumption of agreement, knowledge of the purpose of conspiracy, and properly looked at, they evidence the existence of a concerted intention. It is true, conspiracy in many cases is a matter of inference largely from the facts and circumstances established in the case. But where overt acts, are committed in pursuace of a conspiracy, those acts form part of the same transaction :which embraces the conspiracy and the acts under it. Thus the requirement of proof, where conspiracy has for its object commission of an offence, is merely proof of bare engagement or association. **1965 (2) Cri L J 713 : AIR 1965 Cal 598 (607) (Pt E) (Pr 30).**

——S. 120-A—Conspiracy—Agreement need not be proved by direct evidence—Overt acts in pursuance of agreement enough to infer participation — But overt act must by itself prove participation.

An agreement which is alleged to be a criminal conspiracy need not be proved by direct evidence and it often happens that participation in overt acts in pursuance of the alleged agreement provides good grounds for the inference of participation in the agreement itself. Where the only overt act was the issue of a cheque towards the payment of the price of shares, it was held that such an overt act by itself would not be sufficient material for inferring that there was participation in a criminal conspiracy. 69 Cal W N 292 : 1965 (1) Cri L J 26 : AIR 1965 Cal 38 (41) (Pt E) (Pr 10).

——Ss. 120-B, 420 — Evidence — Sale of drugs in bottles containing false statements as to the brand etc.—There must be evidence that the buyers were induced to buy drug by the misrepresentation in the label. See Penal Code (1860), S. 420. 1959 Cri L J 829 : AIR 1959 Cal 427 (DB).

——Ss. 120-A and 120-B—Proof of conspiracy.

To substantiate a charge of conspiracy the prosecution must prove the agreement between two or more persons to do an unlawful act or a lawful act by unlawful means. Such agreement may be proved by direct evidence or inferred from other proved facts. But the

inference of fact may be drawn only when the circumstances are such as to be incapable of any other reasonable interpretation. The law requires specific proof against each of the conspirators participating in a particulur design to do a particular criminal thing. The object of the conspiracy must be proved as laid down. 1954 Cri L J 979 : AIR 1954 Cal 373 (374) (Pt A) (Pr 7).

——Ss. 120-A and 34—Inference of common intention —When conspiracy is disproved common intention cannot be inferred on the same evidence. See Penal Code (1860), S. 34. 1956 Cri L J 887 : AIR 1953 Hyd 99 (DB).

——S. 120-A — Conspiracy can be inferred from circumstantial evidence — Accused pursuing by similar acts same object by same means — One performing one part of act, the other another part to complete it in attainment of object—Conspiracy can be inferred.

The essence of criminal conspiracy is an agreement to do an illegal act. Direct evidence in proof of conspiracy is seldom available and even when available, it will be tainted being that of an accomplice and would require corroboration. Generally, conspiracy is a matter of inference by circumstantial evidence. From the acts and conduct of the parties agreement could be inferred. For instance, if it can be proved that the accused pursued by similar acts the same object, often by the same means, one performing one part of the act and the other another part of the same act, so as to complete it with a view to the attainment of the object they were pursuing, the Court will be at perfect liberty to conclude that they had conspired together to effect that object. 1962 Ker L J 881 : ILR (1962) 2 Ker 362 : (1962) 2 Lab L J 301 : 1962 Ker L T 690 : 1963 (1) Cri L J 675 (683) (Pt N) (Pr 72) (Ker) (DB).

——S. 120-B — Criminal conspiracy — Evidence and proof — Cannot be proved by evidence raising mere suspicion of guilt.

A conspiracy cannot be established by mere proof of association of a person with guilty persons, nor by evidence raising a mere suspicion of guilt; for suspicion and conjecture, however strong or reasonable, cannot supersede or take the place of legal proof.

Thus where beyond the doubtful record of a dying declaration about a conversation which might never have occurred, there was no other evidence to connect the accused with the crime, such as his presence at the spot and hour, or shortly before the occurrence or of any letter or message, or of any material object acquired by him to further the conspiracy.

Held that there being no adequate legal evidence to connect the accused with the crime he was entitled to acquittal upon the benefit of doubt. 1960 All Cr R 396: 1960 All W R (Suppl) 58: 1960 M W N 535.

——S. 120-B—Proof of conspiracy.

Direct evidence is seldom available to prove a conspiracy. In such cases the guilt of the accused, has to be inferred from facts and circumstances proved before the Court. 1957 Mad W N 495.

——S. 121-A—Evidence Act (1872), S. 10 — Conspiracy—Proof of—It is always difficult to secure outside and independent evidence — It is to be proved by circumstances—Conspiracy can be proved by conduct of accused. See Evidence Act (1872), S. 10. A I R 1952 Manipur 4.

——S. 120-A—Conspiracy—Proof—Every conspirator need not be present at every stage of conspiracy.

It is not the law that every conspirator must be present at every stage of the conspiracy. If the conspirator concerned had agreed to the common design and had not resiled from that agreement, it can be presumed that he continued to be a party to the conspiracy. AIR 1957 SC 340, Rel. on. 1962 Mad L J (Cri) 695 : 1962 (2) Cri L J 765 : 40 Mys L J 494 : ILR (1961) Mys 482: AIR 1962 Mys 275 (278) (Pt B) (Pr 32) (DB).

——S. 120-B — Conspiracy — Common intention — Persons acting in concert by virtue of common intention and of criminal conspiracy —Their activities cannot normally be brought out in evidence by direct evidence because they are done in privacy—It is only from members of family or from persons intimately connected with those persons or from their associates that evidence of conspiracy can be gathered. 1958 Cri L J 1489: AIR 1958 Mys 150 (DB).

——S. 120-B—Conspiracy—Proof.

To sustain a charge under S. 120-B, one of the essential ingredients that the prosecution should establish is that there was an agreement between one or more persons to do an illegal act or a legal act by illegal means. There can be no conspiracy without an agreement in this behalf. Direct evidence in proof of conspiracy is seldom available and even when available it will be tainted, being that of an accomplice and requires corroboration.

Generally conspiracy is a matter of inference to be deduced from the criminal acts committed by the accused. Acts and declarations of conspirators in furtherance of the common design or anything said or done or written by any one of such persons in reference to their common intention and the evidence of conduct of the accused and the surrounding circumstances, both before and after the commission of the offence, may be given in evidence to support the offence of conspiracy. I L R (1955) Mys 644 : 1956 Cri L J 633 : A I R 1956 Mys 46 (47) (Pt C) (Pr 7).

——S. 120-B—Charge of conspiracy to commit series of crimes — Proof of agreement is sufficient for conviction — Proof of overt act not essential — Proof of overt act how for establishes agreement.

In order to establish the charge of conspiracy the prosecution has to prove an agreement between the persons charged to do an illegal act. Where the conspiracy alleged is one to commit a series of crimes, mere proof of such an agreement between the accused is sufficient to sustain a conviction and no overt act need be proved. Proof of overt acts is not necessary but if some of them were concerned in the overt acts that would go a long way to establish that the agreement was in fact made by them. 1961 B L J R 411 : 1961 (2) Cri L J 677: AIR 1961 Pat 451 (459) (Pt E) (Pr 24) (DB).

——S. 120-B — Conspiracy to commit crime — Evidence of accused being a member merely consisting of commission of offence by others — Not sufficient for conviction.

The offence of a conspiracy to commit a crime is a different offence from the crime because the conspiracy precedes the commission of the crime and is complete before the crime is attempted or completed. A crime attempted or completed does not require the element of conspiracy as one of its ingredients. A I R 1958 S C 119, Rel. on.

Where the evidence against the accused of his being a member of the conspiracy merely consists of the commission of the offences themselves by others, it cannot be said that the charge of conspiracy has been proved against him. 1961 B L J R 411: 1961 (2) Cri L J 677 : A I R 1961 Pat 451 (459) (Pt F) (Pr 25) (DB).

——S. 120-B — Evidence of conspiracy — Direct evidence of conspiracy is rarely available and existence of conspiracy has always to be deduced from circumstances of the case — But where the circumstances are such as may at the most create a suspicion, they

cannot amount to proof of conspiracy — Evidence Act (1872), S. 3. (1965) Punj L R (Supp) 437.

●——Ss. 120-A, 120-B—Conspiracy, proof of—It has to be inferred from circumstantial evidence.

Per Achhruram J.: Conspiracy can seldom, if even be proved by means of direct evidence and has almost invariably to be inferred from circumstantial evidence consisting generally of evidence as to the conduct of the parties on certain occasions and in relation to certain matters. (1702) W M B L 301; 7 R R 551; (1881) 5 Cox C C 505; (1868) L R 3 H L 306; I L R 37 Cal 467; A I R 1933 Lah 977; A I R 1945 Nag 163, Rel. on. Nature of circumstantial evidence indicated. Nathu Ram V. Godse v. Rex, **I L R (1956) Punj 499 (FB).**

●——S. 120-A—Criminal conspiracy—Proof—English Law—Statement by conspirator is admissible against other conspirators, if it has been made in reference to common intention — It is not necessary that it should have been made in furtherance of common intention. See Evidence Act (1872), S. 10. **ILR (1956) Punj 499 (FB).**

●——Ss. 120-A, 120-B — Agreement to commit offence need only be proved—Criminal P. C. (1898), S. 223 — Plan of design formed by the conspirators need not be alleged.

Per Achhru Ram J. : The offence of criminal conspiracy consists merely in the agreement to commit any illegal act and is complete as soon as the agreement is reached. In order to justify conviction for the offence of criminal conspiracy, it is not necessary for the prosecution to prove anything more than the agreement. If the agreement is proved, the accused are liable to be punished even though they may not yet have formed or even considered any plan or design for achievement of their common object. Therefore the indictment for criminal conspiracy need not allege or indicate plan or design formed by the alleged conspirators for carrying out the object of the conspiracy nor need it even allege that any plan or design has been formed. Nathu Ram V. Godse v. Rex, **I L R (1956) Punj 499 (FB).**

——S. 120-A—Abetment by conspiracy—Evidence.

There must be combining together of two or more persons in conspiracy and an act or illegal omission must take place in pursuance of that conspiracy. See Penal Code (1860), S. 107. **52 Cri L J 646 : AIR 1951 Raj 89 (DB).**

——S. 120-B—Proof of conspiracy.

It is not always possible to give direct evidence about conspiracy. It can be inferred from the circumstances proved. If, at dead of night a number of people entered a house armed with deadly weapons such as guns, lances, choppers and explosives, it cannot be with any legitimate object. The weapons themselves being of dangerous nature if there is any evidence to show that the accused persons had the use of one or the other of the weapons in inflicting injuries on the deceased and the members of his family, it is easy to infer that they proceeded to the scene with the common object that was to be achieved by the use of such dangerous weapons.

(General principles regarding proof of conspiracy laid down). **1954 Ker L T 683 : 1955 Cr L J 996 : AIR 1955 Trav Co 117 (118) (Pr 3) (DB).**

6. Sanction for prosecution.

●——S. 120-B—Prosecution of public servant on charges of conspiracy and bribery — Sanction under S. 197, Cri. P. C. not necessary, See Criminal Procedure Code (1898), S. 197. **1954 Cri L J 1161 : AIR 1954 S C 455.**

——Ss. 120-B, 420, 466 and 467 — Criminal P. C. (1898), S, 196-A — Charge of conspiracy to commit offences mentioned in Ss. 420, 466 and 467 under S. 120-B, Penal Code—Offences under Ss. 466 and 467 being non-cognizable the consent contemplated by S. 196-A (2) and not by S. 196-A (1), Criminal P.C. is prerequisite for taking cognizance—S. 196-A being not applicable to a case of criminal conspiracy to commit offence under S. 420, Courts are competent to take cognizance without any sanction or consent. See Criminal P. C. (1898), S. 196-A. **(1958) 2 Andh W R 523: (1958) M L J (Cri) 882 : ILR (1958) Andh Pra 791.**

[Reversed on another point in AIR 1961 S C 1241.],

——Ss. 120-B and 420 — Criminal P. C. (1898), S. 197 (1) — (Rajasthan States) Covenant. Art. 17 — Offence by public servants against Government under S. 420 or S. 120-B read with S. 420, Penal Code — Sanction held necessary, See Criminal P. C. (1898), S. 197 (1). **AIR 1950 Raj 51.**

——S. 120-B — Sanction to prosecute — Criminal conspiracy — Attack on police party — Police Sub-Inspector murdered —Incomplete charge-sheet without any sanction—Proper sanction obtained before final charge-sheet—Requirement of S. 196-A, Criminal P. C. held duly comolied with. See Criminal P. C. (1898), S. 196-A. **1955 Cri L J 414 : AIR 1955 Trav.Co 33 (DB).**

7. Place of trial.

●——Ss. 120-B and 420 — Prevention of Corruption Act (2 of 1947), S. 5 (1) (d) read with S. 5 (2) — Conviction under—Trial before one Special Judge but proceedings and conviction by another Special Judge—Competency of—Criminal P. C. (5 of 1898), S. 350 — Applicability — Criminal Law Amendment Acts (46 of 1952) and (2 of 1956).

Section 8 (3) of the Criminal Law Amendment Act (46 of 1952) did not contemplate that S. 350 of the Criminal P. C. (5 of 1898) becomes applicable to proceedings before a Special Judge. The amendment made in the Criminal Law Amendment Act by Act 2 of 1956 by which S. 3 (a) was added to it making the provisions of S. 350 of the Code applicable to a trial by Special Judge has no retrospective effect. Thus where a trial commenced before a Special Judge was continued before another Special Judge who convicted the accused the conviction cannot be upheld as the subsequent proceedings before another Judge are not competent. Krishanlal Dhawan v. Delhi Administration, **1962 S C D 565 : (1962) 2 Ker L R 313 : 1963 Mad L J (Cri) 460 : (1963) 2 S C J 350.**

●——S. 120-B—Overt acts committed in pursuance of conspiracy—Place of trial Court having jurisdiction to try offence of conspiracy has also jurisdiction to try offence constituted by overt acts which are committed in pursuance of conspiracy, beyond its jurisdiction. See Criminal P. C. (1898), S. 180. **1962 (2) Cri L J 805 : AIR 1962 S C 1821.**

●——S. 120-B—Scope—Prosecution—Maintainability of—Conviction of offence under S. 167 (8), Sea Customs Act — Subsequent trial for conspiracy, if barred — Collector of customs acts judicially under S. 167 (8). See Constitution of India, Art. 20 (2). **1958 Cri L J 260 : AIR 1958 S C 119.**

——S. 120-B — Offence of criminal conspiracy committed at different places—Place of trial—Accused can be tried at any place where object of conspiracy was carried out. See Criminal P. C. (1898), S. 182. **AIR 1955 NUC (All) 3583.**

——S. 120-B—Jurisdiction—Place of trial — Conspiracy outside Kerala—Consequences in Kerala—Deception begun in Kerala but completed outside— Charge of conspiracy to commmit offence under S. 5 (2),

Prevention of Corruption Act could be tried by Special Judge for Kerala within whose jurisdiction that latter offence was committed. See Criminal P. C. (1898), S. 177. 1959 Cri L J 1172: AIR 1959 Ker 311.

——S. 120-B—Applicability—Conspiracy in one State—Offence in pursuance thereof committed in another State—Place of trial — Charge against accused not merely one of S. 120-B, but of abetment of so many offences—Courts of the State where the offences abetted by the accused were alleged to have been committed had by virtue of illustration (a) to S. 180. Criminal P. C., jurisdiction to inquire into matter. See Penal Code (1860), S. 109. 1957 Cri L J 234 (Raj).

——S. 120-B — Criminal P. C. (1898), S. 182—Uncertainty as to local area in which offence of criminal conspiracy is committed — S. 182, Criminal P. C. would come into operation. See Criminal P. C. (1898), S. 182. AIR 1956 Vind Pra 30.

8. Conviction and sentence.

● ——Ss. 120-B, 409— Accused being chief person to carry out main work of conspiracy—Fact that he made no profit for himself out of impugned transactions, that he was 59 years old and had already been ten days in jail held not sufficient for reducing sentence to the period already undergone. R. K. Dalmia v. Delhi Administration, (1963) 1 S C R 253 : (1962) 32 Com Cas 699 : 1962 (2) Cri L J 805 : AIR 1962 S C 1821 (1878) (Pt Z) (Pr 340).

● ——S. 120-B — Accused acting under common intention and common conspiracy — Conviction and sentence—Concurrent finding not open to challenge in appeal before Supreme Court. See Penal Code (1860), S. 364. 1957 Cri L J 559 : AIR 1957 S C 381.

——Ss. 120-B, 366—Procedure.

Though an accused is acquitted of a charge under S. 366, Penal Code, there is no bar in law for her being convicted on a charge of conspiracy to commit an offence of kidnapping. A I R 1952 Cal 831 (834) (Pt C) (Pr 17) (DB).

——S. 120-B — Charge of conspiracy to commit offences under Ss. 471/467 and 420—Actual commission of offences under Ss. 471/467 and 420 in pursuance of conspiracy proved — Matter goes beyond stage of conspiracy — Conviction of accused under S. 120-B is unnecessary. 1961 B L J R 411 : 1961 (2) Cri L J 677 : A I R 1961 Pat 451 (460) (Pt G) (Pr 26) (DB).

——S. 120-B — Accused in pursuance of conspiracy, inciting police constables to desert their posts and withhold their services and rise in mutiny — Charge of conspiracy to commit offence under S. 3, Police (Incitement to Disaffection) Act, 1922—Accused held guilty and could be sentenced to 6 months R I. 52 Cri L J 462 : ILR 30 Pat 152 : AIR 1951 Pat 60 (67) (Pt D) (Pr 25) (DB).

——Ss. 120-B, 148, 149, 396, 302, 324, 332 and 427 — Assault on police party in pursuance of criminal conspiracy — Murder of Inspector and fatal injuries on others—Conviction upheld.

Where, in pursuance of the criminal conspiracy, the accused and their friends formed together into an unlawful assembly having the common object of assaulting and murdering a Police Inspector and the police constables who had come to their place and in prosecution of the common object of the unlawful assembly they all ambushed the police party springing upon them from both sides of a lane as they were proceeding through it and throwing stones at them and also cutting and stabbing and beating the Inspector and the police constables, with deadly weapons such as choppers, knives, daggers, stones, slings and sticks, as the result of which the Inspector and a constable died on the spot and other persons died in the hospital :

Held, (i) that all the accused were guilty of the offences punishable under S. 120-B, I. P. Code and all of them except the 13th accused were also guilty of the offences punishable under S. 148, I. P. Code.

(ii) that 1st accused was clearly liable under S. 302, I. P. Code for the murder of the Inspector and other persons.

(iii) that every one of the accused was constructively liable under S. 149, I. P. Code for the offences committed by the other members of the unlawful assembly, that is to say, all of them were liable under S. 149, I. P. Code read with Ss. 302, 307, 324, 326 and 332, I. P. Code. 1954 Ker L T 567 : 1955 Cri L J 414 : A I R 1955 Trav-Co 33 (41) (Pt C) (Pr 17) (DB).

9. Conviction of single person.

● ——S. 120-B—Conviction of single person—(Cr. P. Code (1898), Ss. 222, 225, 537).

Where the only persons alleged to have been guilty of the offence of conspiracy were the persons placed on trial and there was no allegation nor any evidence forthcoming that any other persons were, though not placed on trial, concerned with the crime, it was essential to bring the charge of conspiracy home to the accused person or persons to prove that there was agreement to commit an offence between two or more persons. As a person cannot be convicted of conspiring with himself to commit an offence his conviction could not be sustained. But where on the findings of the Courts below, apart from the persons placed on trial, there was the approver who implicated himself equally with the other accused persons and a number of other prosecution witnesses as having been privy to the conspiracy the conviction of one only is not illegal.

Section 222, Criminal P. C. which requires the particulars of the offence to be stated does not in terms further require that in an offence like conspiracy the names of the co-conspirators should also be mentioned. But it is always advisable to give those particulars also in order to give a reasonable notice to the accused that he has been charged with having conspired with so and so (persons named), as also persons unnamed to commit a certain offence. If the charge under S. 120-B has added the words "and other persons known or unknown", there would be no ground for a grievance on the part of the accused. But even if the charge does not specifically mention the name of the approver as having been one of the conspirators, S. 225, Criminal P. C will cure the defect if the accused is not misled or the charge has not occasioned a failure of justice. Further, S. 537, Criminal P. C. will apply and if though the other accused had been acquitted by the trial Court and though he was the only accused in the High Court he did not raise the points with reference to the alleged illegality or irregularity in the charge before the lower Court, under the Explanation to that section, it cannot be urged that the omission in the charge has occasioned a failure of justice. Bhim bahadur Pradhan v. State of Orissa, 1956 Mad W N 473 : 1956 S C R 206 : 1956 All W R (Sup) 89 : 1956 S C A 857 : (1956) 2 M L J (SC) 13 : ILR (1956) Cut 409 : 1956 S C J 441 : 1956 Cri L J 831 : 22 Cut L T 276 : A I R 1956 S C 469 (472, 473) (Pt A) (Prs 7 to 9).

● ——S. 120-B — Conviction of single accused — Evidence and proof (Cr. P. Code (1898), S. 367). —

It is not essential that more than one person should be convicted of the offence of criminal conspiracy. It is enough if the Court is in a position to find that two or more persons were actually concerned in the

criminal conspiracy. If the Courts below had come to the distinct finding that the evidence led on behalf of the prosecution was unreliable then certainly no conviction could have been based on such evidence and all the accused would have been equally entitled to acquittal. But it cannot be held that the accused having been acquitted by the trial Court, the particular accused should not have been convicted because the evidence against all of them was the same, when the Court is not satisfied that the acquittal of the other accused persons was entirely correct. Bhimbahadur Pradhan v. State of Orissa, 1956 Mad W N 473: 1956 S C R 206: 1956 All W R (Sup) 89: 1956 S C A 857: (1956) 2 M L J (SC) 13: I L R (1956) Cut 409: 1956 S C J 441: 1956 Cri L J 831: 22 Cut L T 276: A I R 1956 S C 469 (475) (Pt C) (Pr 14).

■ —Ss. 120-A, 120-B—Conviction of one person for conspiracy.

By the terms of the definition of criminal conspiracy itself, there ought to be two or more persons who must be parties to an agreement and it is trite to say that one person alone can never be held guilty of criminal conspiracy for the simple reason that one cannot conspire with one-self. If, therefore, 4 named individuals were charged with having committed the offence under S. 120-B, Penal Code and if three out of these 4 were acquitted of the charge, the remaining one accused could never be held guilty of the offence of criminal conspiracy. AIR 1916 All 141 and A I R 1924 Cal 809, Approved. Topandas v. State of Bombay, P L D 1956 S C (India) 215: 1956 Mad W N 208: 1956 Pat L R (SC) 46: 58 Bom L R 492: 1956 All W R (Sup) 24: (1955) 2 S C R 881: (1956) 1 M L J (SC) 60: 1956 All L J 161: 1956 S C J 86: 1956 Nag L J 204: 1956 S C A 74: 1956 Cri L J 138: 58 Pun L R 178: 1956 B L J R 139: A I R 1956 S C 33 (34, 35) (Prs 6, 14).

—S. 120-B — Accused 1 and 2 charged under S. 120-B read with S. 302 — Accused 1 given benefit of doubt and acquitted — Charge against accused 2 could not stand by itself in view of acquittal of sole remaining accused to connect accused 2 with such conspiracy — Accused 2 held must be acquitted though he was tool or instrument of some other designing persons. 1960 All Cr R 396: 1960 All W R (Sup) 58: 1960 M W N 535.

SECTION 121

—S. 121—"Waging war"—Meaning — Words and phrases.

The expression "waging war" in S. 121 can only mean "waging war in the manner usual in war." In other words in order to support a conviction on such a charge, it is not enough to show that the persons charged have contrived to obtain possession of an armoury and have when called upon to surrender, it used the rifles and ammunition so obtained against the King's troops. It must also be shown that the seizure of the armoury was part and parcel of a planned operation and that their intention in resisting the troops of the King was to overwhelm and defeat these troops and then to go on and crush any further opposition with which they might meet until either the leaders of the movement succeeded in obtaining possession of the machinery of Government or until those in possession of it yielded to the demands of their leaders. 52 Cri L J 462: ILR 30 Pat 152: AIR 1951 Pat 60 (63) (Pt A) (Pr 11) (DB).

—S. 121—Scope — Society against capitalism and private ownership and for establishment of socialist State—No use of force or violence—Offence.

It is the fundamental right of every citizen to have his own political theories and ideas and to propagate them and work for their establishment so long as he does not seek to do so by force and violence or contravene any provision of law.

Thus, where the pledge of a society amounts only to an undertaking to propagate the political faith that capitalism and private ownership are dangerous to the advancement of Society and work to bring about the end of capitalism and private ownership and the establishment of a socialist state for which others are already working under the lead of the working classes:

Held, (i) that it was open to the members of the society to achieve these objects by all peaceful means, ceaselessly fighting public opinion that might be against them and opposing those who desired the continuance of the existing order of Society and the present Government.

(ii) that it would also be legitimate to presume that they desired a change in the existing Government so that they could carry out their programme and policy. But from these it did not follow that the society desired to bring about the change by force and violence.

(iii) that the mere use of the words 'fight' and 'war' in their pledge did not necessarily mean that the society planned to achieve its object by force and violence. 1954 Ker L T 567: 1955 Cri L J 414: AIR 1955 Trav-Co 33 (37) (Pt A) (Pr 7) (DB).

—S. 121 — Applicability—Attack on police party and murder of Inspector—Offence.

Where all that is established by the prosecution is that some of the persons of a locality, who happened to belong to a society pledged against capitalism and private ownership, opposed certain person when he came to fish in certain tank in pursuance of his kuthakapattom lease and that, while the Inspector of Police was camping at the place with a party of policemen to enquire into his complaint about the matter, a large body of persons attacked the police party and murdered some of them.

Held, that it was not sufficient to show that Government's authority or prerogative was raised or called in question, and that it was impossible to hold that there had been a conspiracy to wage war against the Raj Pramukh or that there were the necessary elements in the case to constitute the offence of waging war against the Raj Pramukh. (The distinction between a riot by a mob and general rising or insurrection pointed out). AIR 1944 Pat 58, Rel. on. 1954 Ker L T 567: 1955 Cri L J 414: AIR 1955 Trav-Co 33 (37) (Pt B) (Pr 7) (DB).

SECTION 121-A

—S. 121-A—Evidence.

The mere fact, that a person had, at one time, been involved in a rebellion, would not necessarily warrant the inference, that he had organised conspiracy, to shield another from legal punishment. 1957 Cri L J 1254: AIR 1957 Him Pra 52 (58) (Pt I) (Pr 34).

—S. 121-A—Scope—Conspires to overawe—Meaning—(Words and Phrases).

The words "conspires to overawe by means of criminal force or the show of criminal force the Central Government or any Provincial Government" clearly embrace not merely a conspiracy to raise a general insurrection, but also a conspiracy to overawe the Central Government or any Provincial Government by the organisation of a serious riot or a large and tumultuous unlawful assembly.

The word "overawe" clearly imports more than the creation of apprehension or alarm or even perhaps fear. It appears to me to connote the creation of a situation in which the members of the Central or the Provincial Government feel themselves compelled to

choose between yielding to force or exposing themselves or members of the public to a very serious danger. It is not necessary that the danger should be a danger of assassination or of bodily injury to themselves. The danger might well be a danger to public property or to the safety of members of the general public.

As the section stands, in certain circumstances persons who organise a strike among policemen or certain other public or Municipal employees might render themselves liable to prosecution under it. Clearly. however, persons do not commit this crime unless it was part and parcel of their plans to overawe the Central or the Provincial Government by criminal force or show of criminal force.

Where a large number of police havildars and constables conspired to withhold their services with the object of compelling the Provincial Government to yield to their demands and the conspirators seized the armouries and took possession of the arms and ammunition but remained peacefully in the police lines and did nothing to intimidate the general body of citizens, but, took steps to ensure that the working of the treasury should not be interrupted.

Held, that it could not fairly be said that there was any such show of criminal force as was contemplated by S. 121-A. 52 Cri L J 462 : ILR 30 Pat 152 : AIR 1951 Pat 60 (64, 65, 67) (Pt B) (Prs 14, 15, 16, 22) (DB).

——S. 121-A—Conspiracy—Proof.

It is not usual for a prosecution for conspiracy to be instituted unless the Public Prosecutor is in a position to put into the witness box one or more persons who have, at one time or another, been parties to the conspiracy and also to produce documentary evidence in the shape of letters or communications which have passed between some of the conspirators, showing what exactly they intended to do and how they intended to do it. **52 Cri L J 462 : ILR 30 Pat 152 : AIR 1951 Pat 60 (66) (Pt C) (Pr 19) (DB).**

SECTION 124-A

■ **——Ss. 124-A and 505 — Constitutionality — Gist of the offences — Freedom of speech and expression — Restrictions on, imposed by impugned provisions come within permissible limits under Art. 19 (2) of the Constitution — Interpretation of Statutes — Constitution of India, Art. 19 (1) (a) and (2). AIR 1959 All 101 (FB), Reversed.**

The provisions of Ss. 124-A and 505, Penal Code, are not unconstitutional as being violative of the fundamental right of freedom of speech and expression under Art. 19 (1) (a) of the Constitution. The restrictions imposed by the impugned provisions cannot but be said to be in the interest of public order and within the ambit of permissible legislative interference with that fundamental right. AIR 1959 All 101 (FB), **Reversed.**

The explanations appended to the main body of S. 124-A make it clear that criticism of public measures or comment on Government action, however strongly worded would be within reasonable limits and would be consistent with the fundamental right of freedom of speech and expression. It is only when the words have the intention of creating public disorder or disturbance of law and order that the law steps in to prevent such activities in the interest of public order. So construed the section strikes the correct balance between individual fundamental rights and the interest of public order. The provisions of the sections should be so construed as to limit their application to acts involving intention or tendency to create disorder, or disturbance of law and order, or incitement to violence : AIR 1955 S C 661 and AIR 1957 S C 628, Foll. Each one of the constituent elements of the offence under S. 505 has reference to and a direct effect on, the security of the State or public order. Hence, these provisions would not exceed the bounds of reasonable restrictions on the right of freedom of speech and expression. Clause (2) of Art. 19 clearly saves the section from the vice of unconstitutionality. AIR 1959 All 101 (FB), Reversed; AIR 1947 P C 82 and 22 Bom 112, Overruled; AIR 1942 F C 22, Approved, Kedar Nath Sinha v. State of Bihar, **1962 (2) Cri L J 103 : (1962) 2 S C A 162 : 1962 Supp (2) S C R 769 : 1962 B L J R 636 : 1962 Mad W N 500 : (1963) 1 S C J 18 : (1963) 1 Mad L J (S C) 40 : (1963) 1 Andh W R (S C) 40 : 1963 Mad L J (Cri) 25 : ILR 41 Pat 984 : AIR 1962 S C 955 (968 to 970) (Prs 26, 28, 29).**

■ **——S. 124-A — Scope — Freedom of speech — Restriction on, imposed by S. 124 A — Restriction is not in interest of public order — It is also not reasonable — Section 124-A is void.** See Constitution of India, Art. 19 (1) (a). **1959 Cri L J 128 : AIR 1959 All 101 (FB).**

[Reversed in AIR 1962 S C 955.]

■ **——S. 124-A — 'State' includes Government — 'Government' — Meaning of, as contemplated by constitution, stated — Exciting a feeling of hatred, contempt, or disaffection towards a person holding the office of President or a Governor or a minister is not exciting such a feeling towards Government and is not punishable under S. 124-A.** See Constitution of India. Art. 19 (2). **1959 Cri L J 128 : AIR 1959 All 101 (FB).**

[Reversed on another point in AIR 1962 S C 955.]

——S. 124-A — Ingredient's — Government—Meaning.

In order to sustain a conviction under S. 124-A, it must be proved (a) that the accused spoke the words in question, (b) that he thereby brought or attempted to bring into hatred or contempt or excite or attempted to excite disaffection, and (c) that such disaffection was towards the Government established by law in India. **1963 M P L J (Notes) 247 : 1963 Jab L J 915 : ILR (1962) Madh Pra 449.**

——S. 124-A — Press and Registration of Books Act (1867), S. 4 — Declarant in jail long before and at the time of publication of objectionable article — No control over press — He cannot be convicted for publication of article. See Press and Registration of Books Act (25 of 1867), S. 4. **52 Cri L J 713 : AIR 1951 Mad 714.**

——S. 124-A — Charge of sedition — Case of minor importance — Magistrate conversant with language and competent to inflict punishment — Committal to sessions is not expedient. See Criminal P. C. (1898), S. 206. **51 Cri L J 765 : AIR 1950 Mad 364.**

——S. 124-A — Validity — Entire S. 124-A cannot be deemed to be ultra vires — Only the portion which seeks to impose restriction on exciting mere disaffection or attempts to cause disaffection is ultra vires. See Constitution of India, Art. 19 (2). **1955 Cri L J 184 : AIR 1955 Manipur 9.**

——S. 124-A — Practice and procedure — Prosecution under S. 124-A, Penal Code in Manipur State — No special provision made in Manipur State Courts Act regarding sanction — Provision of S. 196 should govern cases of prosecution under S. 124-A, Penal Code. See Criminal P. C. (1898), S. 196. **1955 Cri L J 184 : AIR 1955 Manipur 9.**

——S. 124-A — Scope — Creation of disorder not necessary.

Sedition embraces all those practices, whether by word, deed or writing, which are calculated to disturb the tranquility of State and lead ignorant persons to endeavour to subvert the Government and the law of

the country. Section 124-A of the Code thus clearly shows that sedition does not necessarily involve any creation of disorder. 1955 Cri L J 184 : AIR 1955 Manipur 9 (13) (Pt B) (Pr 9).

—— Ss. 124-A and 153-A — Hatred or contempt.

The accused were stated to have distributed at a meeting three leaflets which contained the statements that ranks of "Mayangs" had come into the State of Manipur and that outsiders were suppressing the people and that the Government had been placed in the hands of two refugees while every other State was enjoying self-Government.

A general criticism of certain officer or officers could not be deemed to be a criticism of Government established by law and order in British India and as it was not shown by the prosecution conclusively that the word 'Mayang' defined any particular class of people the accused could not be deemed to be guilty under Ss. 124-A and 153-A, Penal Code, simply because they used the word 'Mayang' in the leaflets. The pamphlets did not show that the accused ever brought or attempted to bring the Government established by law in India into hatred and contempt and that they did anything to disturb the security of the State or public order. Further even if any non-violent movement was to be started by other groups and it was to be started by some members of the public, the accused could not legally be deemed to be guilty either under S. 124-A or under S. 153-A, Penal Code. 1955 Cri L J 184 : AIR 1955 Manipur 9 (15, 16) (Pt E) (Prs 23, 25).

——Ss. 124-A and 153-A — Validity — Provisions are not rendered void on ground that they are inconsistent with fundamental right of freedom of speech and expression guaranteed to all citizens of India under Art. 19 (1) (a), Constitution of India. See Constitution of India, Art. 19 (1) (a). 1954 Cri L J 758 : AIR 1954 Pat 254 (DB).

—— Ss. 124-A and 153-A—Scope.

The speeches made must be considered as a whole and in a fair, free and liberal spirit, not dwelling too much upon isolated passages or upon a strong expression used here and there; in other words, an attempt should be made to gather the general effect of the speeches as a whole. The intention of the speaker in using the words complained of is relevant; but the intention must be gathered from the language used, as also from the whole of the circumstances in which the speeches were made including the audience to whom they were addressed. 1954 Cri L J 758 : I L R 32 Pat 1104 : 1954 B L J R 99 : AIR 1954 Pat 254 (260) (Pt D) (Pr 15) (DB).

——Ss. 124-A, 153-A—Applicability.

The general effect of the speeches was that the Adibasi Mahasabha wanted a separate State or region called Jharkhand with a separate administration for the Adibasis; and in giving reasons for such a claim or demand criticisms were made of certain administrative and legislative measures of the Government of Bihar.

Held, that our Constitution contained provisions for the formation of new States, alteration of the boundaries of existing States, etc., and an agitation for the formation of a new State did not necessarily come within the mischief of Ss. 124-A and 153-A. The agitation was not based on an incitement to violence or attempts to bring the existing Government into hatred or contempt, etc., though some of the criticisms were ill-informed and couched in crude and impolite language. 1954 Cri L J 758 : ILR 32 Pat 1104 : 1954 B L J R 99 : AIR 1954 Pat 254 (260) (Pt E) (Pr 16) (DB).

—— Ss. 124-A, 153-A—Criticism of Government.

In a democratic country criticisms of Governmental measures and administrative action are to some extent unavoidable; they are made for the purpose of enlisting popular support, and in considering the effect of such criticisms no serious notice ought to be taken of crude, blundering attempts or of rhetorical exaggerations by which nobody is likely to be impressed. With the change of times, the effect of criticisms also changes; what was damaging contempt or hatred of a bureaucratic Government is not so of a popular Government—a Government which can neither afford to be hyper-sensitive, nor impervious to criticism. 1954 Cri L J 758; ILR 32 Pat 1104: 1954 B L J R 99 : AIR 1954 Pat 254 (261) (Pt E) (Pr 18) (DB).

——Ss. 124-A and 153-A — Validity—Constitution of India, Arts. 19 and 372—Adaptation of Laws Order, 1950.

Both Ss. 124 A and 153-A, I. P. Code, have become void as providing unwarranted restriction on the freedom of speech and expression guaranteed by Art. 19 of the Constitution.

As the continuance of law is made expressly subject to provisions of the Constitution other than Art. 395, Art. 372 of the Constitution can be of no assistance to the continuing validity of S. 124-A or any other section of the Penal Code.

Paragraph 28 of the Adaptation of Laws Order, 1950 does not give to the Courts authority to remodel the law so as to make good what otherwise would become void under the Constitution. 52 Cr L J 449 : 5 A I Cr D 245 : 53 P L R 22 : I L R (1951) Punj 193 : AIR 1951 Punj 27 (29, 30) (Pt C) (Prs 13 & 15) (DB).

● ——S. 124-A — Press (Emergency Powers) Act (1931), S. 4 (1) (b), (d) and (h) — Provisions must be liberally interpreted in favour of subject—Incitement to violence or disorder is not essential for offence of sedition — Reasonable criticism of Government not leading to hatred, contempt or disaffection, is permissible. See Press (Emergency Powers) Act (1931), S. 4 (1) (b) (d) and (h). 51 Cri L J 725 : AIR 1950 East Punj 150 (SB).

● ——S. 124-A, Expls. II and III — Right to criticise Government—Limits, pointed out—Travancore News-Papers Act (5 of 1101), S. 5 (i) — Travancore Penal Code, S. 117, Expls. II and III. See Press (Emergency Powers) Act (1931), S. 4 (1), Expls. II and III. 51 Cri L J 1536 : AIR 1950 Trav-Co 83 (FB).

● ——S. 124-A — Distinction between section 4 (1), Press (Emergency Powers) Act (1931), and S. 124-A, Penal Code, pointed out—Travancore Newspapers Act (5 of 1101), S. 5 (i)—Travancore Penal Code, S. 117, See Press (Emergency Powers) Act (1931), S. 4 (1). 51 Cri L J 1536 : AIR 1950 Trav-Co 83 (FB).

● ——S. 124-A —Press (Emergency Powers) Act (1931), S. 4 (1) (d) — Incitement to people to rebellion, not necessary to bring publication within section — Travancore Newspapers Act (5 of 1101), S. 5 (i) — Travancore Penal Code, S. 117. See Press (Emergency Powers) Act (1931), S. 4 (1) (d). 51 Cri L J 1536 : AIR 1950 Trav-Co 83 (FB).

● ——S. 124-A—Article attempting to lower Minister in public estimation is libellous of Minister but not seditions of Government. See Press (Emergency Powers) Act (1931), S. 4 (1) (d). 51 Cri L J 1536 : AIR 1950 TC 83 (FB).

● ——S. 124-A — Attack on Ministry, is attack on Government, for purposes of sedition under Travancore Newspapers Act (5 of 1101), S. 5 (i) (a) and Travancore Penal Code, S. 117. See Press (Emergency Powers) Act (1931), S. 4 (1) (d). 51 Cri L J 1536 : AIR 1950 T C 83 (FB).

SECTION 129

—S. 129 — Expression while acting or purporting to act in the discharge of his official duty—Interpretation of — Question substantially one of fact — Act complained must be directly concerned with official duties—Duty of Magistrate in determining question of sanction pointed out. See Criminal P. C. (1898), S. 197. 1963 (2) Cri L J 573 (Pat).

SECTION 141

SYNOPSIS

(Penal Code (45 of 1860), S. 141.)

1. Scope and applicability.
2. "Unlawful assembly."
3. Common object.
4. Common object and same or similar object—Distinction.
5. Clauses fourth and fifth.
6. Charge.
7. Explanation.

1. Scope and applicability.

—S. 141 — Applicability — Members resisting attacks in self-defence—Offence.

If an assembly of persons resisted an attack upon them, the action of such members of the assembly in defending their persons and properties could take away its character as an unlawful assembly. 1961 All W R (Sup) 245 : 1961 All Cr R 161 : 65 Cal W N 645.

—Ss. 141, 147—Prosecutian of five or more named persons — Court entertaining doubt about presence of some reducing number of remaining persons below five — No conviction of latter under S. 147. ILR (1960) Bom 626 : 62 Bom L R 514 : 1960 Nag L J 362 : 1960 All W R (Sup) 45 : 1960 All Cr R 267 : 1960 Cri L J 1571 : ILR (1960) Bom 626 : AIR 1960 Bom 515 (515) (Pr 2).

● —Ss. 141, 299 and 34—Applicability — Question of applicability of S. 34 may also come up for consideration in proper cases and so also question of applicability of S. 141 when five or more persons form an unlawful assembly with common object and intention of committing murder. See Penal Code (1860), S. 299. 1954 Cri L J 454 : AIR 1954 Hyd 54 (FB).

—S. 141 — Hyderabad Penal Code — Ss. 119 and 123 and 124—Applicability — Conditions of conviction for rioting—Essentials to be proved.

Before a person could be held guilty of rioting under S. 123 or 124, Hyderabad Penal Code, it is essential that he should have been a member of an unlawful assembly as defined in S. 119 of that Code. It must further be proved that force or intimidation was employed in furtherance of a common object, which common object must be an unlawful object.

Where the common object charged in the charge-sheet is a conspiracy to take revenge, and the challan mentions the common object of the assembly to be bringing to book persons who dared assault and insult a peon of the Irrigation Department of the Government of the State and snatched Government property from him, the object mentioned must be held to be not only unobjectionable but laudable when the charge does not mention or specify how the object was unlawful and in what way the party could be said to be an unlawful assembly. AIR 1952 Hyd 25 (27) (Pt B) (Pr 8) (DB).

—S. 141 — Liability of leader — Accredited leader of party not exerting his power of influence to stop the unlawful acts—It may be said that as leader and a person of authority, the constructive liability is enlarged enough to embrace him, under doctrine of common objective in cases of unlawful assembly. See Penal Code (1860), S. 34. 52 Cri L J 1123 : AIR 1951 Hyd 97 (DB).

—Ss. 141, 149, 302—Unlawful assembly—Common object — Carrying of weapons — Conviction under S. 149 read with S. 302 held justified. AIR 1956 S C 513 has no application. 1964 (1) Cri L J 198 : AIR 1964 Madh Pra 30 (40) (Pt F) (Prs 41, 42, 43) (DB).

—Ss. 141, 146, 147 and 148 — Burden of proof — Duty of Court — Principles to be observed.

The fundamental principles which a Court of law will have to observe in convicting the accused in cases of mammoth rioting are :

Firstly, notwithstanding the large number of rioters or of the persons put up in Court for rioting and the consequent difficulty for the prosecution to name the specific act attributed to each of the accused, the Court must see to it that all the ingredients required for unlawful assembly and rioting are strictly proved by the prosecution before convicting that particular accused. The fact that there was a thousand rioters, and 122 accused before the Sessions Judge, will not take away from the prosecution even an iota of the responsibility of proving them. Just as the culprits in undetected crimes escape punishment, unproved persons also must be unhesitatingly acquitted.

Secondly, spectators, wayfarers, etc., attracted to the scene of the rioting by curiosity, as generally happens in the countryside when a riot or affray is going on should not be, by reason of their mere presence at the scene and with the rioters, held to be members of the unlawful assembly or rioters.

Thirdly it will be very unsafe, in the case of such large mobs of rioters to rely on the evidence of a single witness speaking to the presence of an accused in the mob for convicting him, especially when no overt act of violence or shouting of slogan, or organising the mob or giving orders to it or marching in procession with it, or other similar thing is proved against him.

The fourth principle to be observed in such cases is that where there are such acute factions one based agrarian disputes and troubles, another on political wrangling and rivalry and third on caste division, or the division of the haves and the have-nots, the greatest care must be exercised before believing the evidence of a particular witness belonging to one of these factions against an accused of the opposite views. This principle becomes of special importance when there are no overt acts, etc., proved.

The fifth principle to be observed is that mere followers in rioting deserve a much more lenient sentence than leaders.

Once the prosecution has proved against an accused his marching along with the rioters, it is the duty of that accused to show that though he was found marching with the rioters he was with the group not with any unlawful common object of committing rioting, but only out of curiosity. If he fails to prove that, he is liable to be convicted under S. 147 of the Penal Code. (1951) 2 M L J 446 : 1951 Mad W N 829 : 1951 Mad W N (Cri) 249 : ILR (1952) Mad 728 : 53 Cri L J 583 : ILR (1952) Mad 728 : AIR 1952 Mad 267 (269, 270) (Pt B) (Prs 6 to 10).

—S. 141—Scope and object of.

The object of S. 141 is to prevent resort to criminal force by five or more persons to do any of the acts set out in the section. Cl. (4) lays down that an assembly of five or more persons is an unlawful assembly if their common object is to take or obtain possession of any property or to deprive any person of the enjoyment of a right of way or of the use of

water or other incorporeal right of which he is in possession or enjoyment or to enforce any right or supposed right by means of criminal force.

No person is entitled to vindicate his right to possession of any property by resort to criminal force. That right is subject to the limitations in Ss. 96 to 106. When there is an actual invasion of one's property or person and there is no time to seek the aid of public authorities the right of private defence is available and that right extends also to S. 141, Penal Code. It would depend on the circumstances of each case in order to determine the question as to whether five or more persons having a common object joined together and committed a particular crime. In all these cases it should be clear from the evidence that the party exercising the right he claims is in possession of that right and that he is entitled to resist or repel aggression in order to maintain that right.

In the case of incorporeal rights such as for instance a right of way, a right to use water, etc., no one is in possession of it except during the actual moment when he is peacefully exercising it. The right to use the water arises only when the water is actually made available which again vests in Government who as the controlling authority regulates the flow and the use of the water from a tank. Any attempt to vindicate such a right by the use of force must necessarily be an attempt to "enforce a right or supposed right" within the meaning of Cl. (4) of S. 141, Penal Code, and not an act to maintain an existing right of peaceful possession. **ILR (1952) Cut 219.**

——S. 141 — Applicability — Processionists uttering provocative slogans and afterwards resorting to pelting of stones, removal of trellis and burning it —Effect.

The processionists were in an agitated mood, and they were uttering slogans which were provocative. But such denunciatory exhortations or similar singsong declarations by a tumultuous crowd ordinarily are not likely to inspire terror. Not being satisfied by a demonstration outside the Police Post for nearly two hours, they resorted to pelting of stones which actually injured a number of members of the police force and they also removed the trellis and burnt it.

Held, that this act of the crowd brought their conduct within the four corners of S. 141, first and third clauses. **62 Punj L R 37 : 1960 Cri L J 646 : AIR 1960 Punj 271 (274) (Pt A) (Pr 39).**

—— S, 141—Constructive liability.

Simply because certain persons are present in a crowd at the time of a riot by certain members of their community, it cannot be said that these also who used no violence, were guilty of the riot. **1957 Cri L J 1187 : AIR 1957 Raj 331 (336) (Pt G) (Pr 17).**

2. "Unlawful assembly".

●——Ss. 141, 149—Unlawful assembly — Whether person is member of unlawful assembly — Tests.

That the mere presence in an assembly does not make a person, who is present, a member of an unlawful assembly unless it is shown that he had done something or omitted to do something which would make him a member of an unlawful assembly, or unless the case falls under S. 142, I. P. C., cannot be read as laying down a general proposition of law that unless an overt act is proved against a person who is alleged to be a member of an unlawful assembly, it cannot be said that he is a member of such an unlawful assembly. What has to be proved against a person who is alleged to be a member of an unlawful assembly is that he was one of the persons constituting the assembly and he entertained along with the other members of the assembly the common object as defined by S. 141, I. P. C. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified by S. 141. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely passive witnesses. In fact, S. 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly; is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed by S. 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly. Masalti v. State of U.P., **1964 S C D 980: (1965) 1 Andh L T 19 : 1965 (1) Cri L J 226 : 1964 Mad W N 588 : (1965) 1 S C J 605 : 1965 Mad L J (Cri) 312 : (1964) 8 S C R 133 : I L R (1964) 2 All 694 : AIR 1965 S C 202 (210) (Pt G) (Pr 17).**

●——Ss. 141 and 149—Unlawful assembly—Constitution of—Conviction of less than five—Actual number of assailants' party consisting of five or more persons —Party is unlawful assembly though only three are convicted. Kartar Singh v. State of Punjab, **1963 1 S C J 298: (1963) Mad L J (Cri) 175 : 1962 All Cri R 23 : 1962 All W R (H C) 16 : 1962) 2 S C R 395 : 1961 (2) Cr L J 853 : AIR 1961 S C 1787 (1789) (Pt A) (Pr 11).**

●——Ss. 141, 142 and 146 — Mere presence of person does not make him member of unlawful assembly — Evidence required, nature of.

It is well settled that mere presence in an assembly does not make such a person a member of an unlawful assembly unless it is shown that he had done something or omitted to do something which would make him a member of an unlawful assembly, or unless the case falls under S. 142, Indian Penal Code. If members of the family of the appellants and other residents of the village assembled, all such persons could not be condemned ipso facto as being members of that unlawful assembly. It is necessary therefore for the prosecution to lead evidence pointing to the conclusion that all the appellants had done or been committing some overt act in prosecution of the common object of the unlawful assembly. The omnibus evidence in general terms to the effect that all these persons and many more were the miscreants and were armed with deadly weapons, like guns, spears, pharsas, axes, lathis, etc., naturally has to be very closely scrutinised in order to eliminate all chances of false or mistaken implication.

Their Lordships examined the case of each individual accused to satisfy themselves that mere spectators who had not joined the assembly and who were unaware of its motive had not been branded as members of the unlawful assembly which committed the dastardly crimes. Baladin v. State of Uttar Pradesh, **1956 Cri L J 345 : AIR 1956 S C 181 (189) (Pt E) (Pr 19).**

●——S. 141—Applicability—Free fight — Unlawful assembly.

Held, that, having regard to finding reached by High Court that riot took place at narrow path as a result of dispute about Nepali pilgrim and further fact that G's party received more numerous injuries one of which was fatal, it was obivious that G's party could be said to have constituted unlawful assembly. See Penal Code (1860), S. 96. **1954 Cri L J 1746 : AIR 1954 S C 695.**

——S. 141 — Applicability — Object of assembly to loot house of a person and cause damage to property — Assembly is unlawful assembly. 1953 All W R (H C) 389 : 1953 Cri L J 1729 : AIR 1953 All 749 (750) (Pt B) (Pr 7).

——S. 141 — Unlawful assembly of five persons with common object of beating victim — They splitting themselves in two parties for trapping victim — They still form unlawful assembly. 1950 All L J 246 : 51 Cri L J 1133 : 1950 All W R (H C) 376 : I L R (1951) 2 All 141 : AIR 1950 All 418 (419) (Pt C) (Pr 7) (DB).

——Ss. 141 and 147 —Applicability—Number being less than five.

To constitute the offence of rioting there should be at least five persons and force should be used in prosecution of the common object. If the number is less than five there could be no unlawful assembly and consequently no rioting. If it is proved that besides the persons found guilty, there were other persons unidentified the position is different. But when it is alleged that a particular number of persons took part in the rioting and the prosecution could not establish that five or more than five persons out of them took part in the crime, the charge under S. 147, Penal Code can not be sustained. Case Law discussed. AIR 1955 N U C (Andh Pra) 2042.

● —S. 141 — Unlawful assembly.

The formation of an unlawful assembly is not to be assumed merely because 5 or more persons meet at a particular place and shortly afterwords some offence or offences are committed. I L R (1951) 3 Assam 96 (DB).

——S. 141 — Evidence — Mere presence at the time of offence not sufficient — (Evidence Act (1872), S. 114).

The mere fact that a person resides in the same street or his mere presence at the time when the offence of rioting is committed, is not sufficient to show that he was a member of the unlawful assembly, which committed the offence, 1956 Cri L J 1066 : AIR 1956 Bom 609 (611) (Pt B) (Pr 8) (DB).

——S. 141 — Common object must be established. AIR 1955 N U C (Madh B) 3407 (DB).

——Ss. 141, 142 and 146—Applicability — Rioting — Conviction cannot be sustained unless it is proved that there was unlawful assembly, and force was used and an offence committed—Mere assembly of persons is not unlawful assembly. AIR 1955 N U C (Madh B) 1322.

——S. 141—Unlawful assembly—What constitutes — Proof—Nature of—Test regarding, laid down. 1961 (1) Cri L J 291 : 38 Mys L J 1039 : 1962 Mad L J (Cri) 55 : I L R (1960) Mys 1238 : A I R 1961 Mys 57 (61) (Pt B) (Prs 25, 32) (DB).

——Ss. 141, 149—Free fight between two groups — Whether accused constructively responsible for acts of others.

If there is a free fight between the party of the accused and the party of the deceased none of the accused can be held constructively responsible for the acts of others. Each one must be held responsible for his own act. 1962 Mad L J (Cri) 355 : 39 Mys L J 481 : ILR (1961) Mys 605.

——S. 141—Unlawful assembly — Test for determination.

If more than five persons group together with the determination to vindicate their right or supposed right by unlawful force, they could be designated an unlawful assembly. No conspiracy or preconcerted meditation need always be proved to constitute an unlawful assembly and the test is whether the common object could reasonably be inferred from direct as well as circumstantial evidence including the conduct of parties. It is not the nature of the right but the criminality involved in the determination of using force and the actions otherwise than in due course of law that determine the nature of an assembly. Even though the Muslims may have a right to prohibit the playing of music before a mosque they cannot enforce such prohibition by using criminal force and attacking the processionists which beyond doubt constitute an offence of rioting. No question of self-defence arises. The common object is not to protect a right, but to enforce the same. They therefore constitute an unlawful assembly to enforce their right or supposed right. 3 Mys L J 237 : 2 Mys C Cr 194 : 18 Mys C C R 146, Rel. on. ('51) 55 Mys H C R 317.

——S. 141—Unlawful assembly — Quarrel between two persons—Others taking sides later—It would not form unlawful assembly unless they had a preconcerted plan for prosecution of common object—In absence of proof conviction under S. 147 set aside. 1957 M P C 138 : 1957 M P L J 111 : I L R (1956) Nag 899.

——S. 141—'Unlawful assembly'—Magistrate declaring assembly unlawful and asking it to disperse — Failure to disperse — Offence.

After an assembly is declared unlawful and asked to disperse, failure to do so is a sufficient indication of a behaviour from which it can justifiably be concluded that the persons assembled were members of unlawful assembly. When an authorised person like a Magistrate commands an assembly to disperse after declaring it to be unlawful, persons who are voluntarily and deliberately remaining there in disobedience to the proclamation, cannot be held to be neutrals or curiosity smitten spectator. 62 Punj L R 37 : 1960 Cri L J 646 : AIR 1960 Punj 271 (274) (Pt C) (Pr 41).

——Ss. 141 and 99 — Unlawful assembly — Applicability — Accused gathering in force, defending his possession.

If the party of the accused are within their rights in peaceably occupying the field in dispute when it is lying vacant and preparing it for cultivation they are entitled to resist by force any attempt by the rival claimants to the land to prevent them from doing so and in doing so the accused cannot be said to constitute unlawful assembly. It is no offence for a person who is acting within his rights to make preparations for resisting an invasion of those rights.

And where the nearest police station is more than 10 miles from the field, it cannot be said that the accused are not entitled to gather a force in the field in order to protect their rights rather than have recourse to the public authorities.

The accused are entitled to use force as a defence against criminal trespass by the opposite party in the field, and even if the offence against which they are protecting themselves are only criminal trespass they are entitled under the law to cause any harm short of death. 56 Punj L R 252 : 1954 Cri L J 1518 : I L R (1955) Punj 80 : AIR 1954 Punj 232 (234, 235) (Pt B) (Prs 8 to 11) (DB).

——S. 141—Essence of offence—Active participation in actual violence — Necessity.

Active participation in actual violence is not necessary; persons who by words or by signs or otherwise encourage violence are equally members of the unlawful assembly. ILR (1960) 10 Raj 1200 : 1960 Raj L W 565 : 1961 (1) Cri L J 155 : AIR 1961 Raj 24 (27) (Pt D) (Pr 11).

——S. 141 — Applicability — Minimum number required — Use of criminal force — Inference.

For an unlawful assembly, the minimum number

required is five. Thus where the evidence showed that eight persons were armed with lathis which they wielded and belaboured the deceased and when others went to the rescue of the victim they were also beaten :

Held, that there was no doubt that force or violence was used at the time of the occurrence. The fact that no external or internal injuries were found on the person of the deceased at the time of the post mortem examination would not make the story about the belabouring of the deceased a mere myth. **1957 Cri L J 1187 : AIR 1957 Raj 331 (335) (Pt C) (Pr 13).**

——Ss. 141 and 146 — Applicability — There should be definite finding that number of persons was five or more than five. AIR 1955 N U C (Raj) 5017.

——Ss. 141 and 142 — Scope — Unlawful assembly— Spectators in the assembly are not guilty of rioting or of being members of unlawful assembly. AIR 1955 NUC (Raj) 1080 (DB).

3. Common object.

——S. 141—Common object — Unlawful assembly— Object.

Complainant and his party going armed with lathis pharsa and gandasa to field in dispute with intention of harvesting crop sown by accused G and meeting any resistance that might be offered to them in their wrongful act — Subsequently accused G and his party going to field which was in G's possession and protesting against wrongful act of complainant's party and stating that crop would not be allowed to be taken by them—Fighting arising between two parties resulting in death of one person and injuries to five persons on complainant's side and injuries to three persons on side of accused—Held it could not be said that accused formed an unlawful assembly when their object was to save their property. See Penal Code (1860), S. 96. **AIR 1955 NUC (All) 3285 (DB).**

——Ss. 141, 147 — Common object — Change over— Evidence.

Change over of the common object could only be established by evidence of the conduct of the details connected with the movement in the activity of the assembly. **1958 Andh L T 856.**

——S. 141 — Common object—Specific offences not proved — Common object if should be found to be non-existent.

Merely because the specific offences with which members of an unlawful assembly are charged are are not proved it does not mean that the common object of the unlawful assembly should be found to be non-existent. The acquittal based on the absence of proof regarding the overt acts attributed to an individual offender does not mean that the unlawful assembly was not animated by a common object to commit some offences. **AIR 1955 N U C (Andh-Pra) 6009.**

——S. 141 (4)—Common object.

Where a civil Court has declared the right of way with respect to a path in favour of the accused and against the complainant, the accused cannot be said to have the common object as described in S. 141 (4) if they debar the complainant any access to the pathway. **ILR (1953) 5 Assam 191 : 1954 Cri L J 358 : AIR 1954 Assam 57 (57) (Pr 4) (DB).**

——Ss. 141, 143, 441 and 447 — Common object— Unlawful assembly with intent to commit criminal trespass—Intention—Proof.

Where the gravamen of the two charges under Ss. 143 and 447, Penal Code of which the accused were convicted, was that the accused formed themselves into an unlawful assembly with the common object of committing criminal trespass and actually committed criminal trespass by entering upon the land of the complainant by constructing huts thereon it is essentially necessary to see whether the evidence establishes the ingredients of S. 441, Penal Code.

In order to constitute an offence of criminal trespass under the first part of S. 441 there must be entry upon property in possession of another with intent to commit an offence or to intimidate, insult or annoy the person in possession of the property.

It is necessary in a case of this kind to examine the evidence relative to the state of mind of the person who is alleged to have committed the offence, and it would be utterly wrong to rely on the result. The resultant annoyance or insult felt by the complainant is a wholly irrelevant consideration in a charge under S. 441.

If the evidence is insufficient to prove the substantive charge of criminal trespass it will be extremely difficult to hold that the accused were members of an unlawful assembly the only common object of which was to commit the offence of criminal trespass; as an abstract proposition of law it might not be inconceivable that some persons might form themselves into an unlawful assembly for the purpose of committing an offence of criminal trespass although no actual offence of trespass was committed; but then that would be a position very much divorced from the realities of the situation. **1955 Cri L J 1338 : I L R (1957) 1 Cal 518 : AIR 1955 Cal 515 (516) (Prs 9 to 11, 13).**

——S. 141 — Common object — Unlawful assembly beating deceased —Another batch joining it and beating deceased — Members of the second batch can be said to have joined unlawful assembly with the same common intention. A I R 1955 N U C (Cal) 2931 (DB).

——S. 141 — 'Common object' — How to be determined.

The common object has to be determined with reference to the evidence in each particular case. The nature of the weapons used or the injury inflicted may be a guide in deciding the common object, but it is not decisive. No hard and fast rule can be laid down. **1960 Ker L T 965.**

——S. 141—Common object—Proof.

It is not possible for the prosecution to prove what was in the minds of the persons assembled. That can only be inferred by the subsequent conduct of the assembly. It is not necessary to prove that there was a previous concert regarding the common object. The common object can be even after the original assembly was formed.

When the Magistrate asked the crowd to disperse they refused and continued to be there and began to pelt stones and create obstruction and cause mischief.

Held, that the assembly had the common object mentioned in section 141, first, third, fourth and fifth. **1962 (2) Cr L J 147 (154) (Pt D) (Pr 30) (Manipur).**

——S. 141—Proof of common object.

Existence of a common unlawful object is a requisite for an unlawful assembly under the Code and unless there is proof of an agreement amongst persons to do anything or a plan to carry out a design, and if this is not possible unless it is shown that an inference in support of it can reasonably be drawn from the relations, acts and conducts of the parties, persons cannot be constructively made liable for other's acts.

From the mere fact of all or some of the accused being found at the scene of the occurrence at the time when the deceased was injured, it cannot be inferred that they were members of an unlawful assembly. Nor is it reasonable to assume from the acts themselves that the persons present had a com-

mon object to commit them and that they were committed in pursuance of a common object. AIR 1923 Mad 369 (2), Rel. on.

Where it is stated in the judgment that the attack was not pre-concerted and there was no arrangement by accused to meet at the spot to murder the deceased, the accused cannot have been members of an unlawful assembly if no other object suggested. **32 Mys L J 83 : I L R (1953) Mys 69 : 1953 Cri L J 1001 : 1953 All W R (Sup) 78 : A I R 1953 Mys 41 (42) (Pt B) (Pr 4) (DB).**

——S. 141—Common object—Proof.

In order to prove common object it is necessary to establish a connection between those who take active part in a riot and those who merely utter some words intended to provide encouragement. This can only be done by showing that the former became aware of what the latter said. **1951 Nag L J 163 : 52 Cri L J 813 : ILR (1951) Nag 45 : AIR 1951 Nag 47 (1) (47) (Pt A) (Pr 4).**

——S. 141—Common object.

To constitute an unlawful assembly, the common object of the assembly must be an immediate one to be carried into effect forthwith. If a certain number of people meet merely to arrange a plan for some future action, on an uncertain event taking place, it cannot be said that they had assembled to carry out some plan forthwith. There should be some present and immediate purpose of carrying into effect the common object. If five or more persons meet for deliberations only or to arrange some plans for future action which may be brought into effect individually and not necessarily jointly, that would not constitute an unlawful assembly. A I R 1925 Rang 326, Rel. on. **AIR 1954 Pat 194 (195) (Pt A) (Pr 4) (DB).**

——S. 141 — 'Common object' — What constitutes—Inference—Factors to be considered.

If a few individuals were to take it into their head to damage the trellis or to throw brickbats on members of the police force, their individual action could not be confused with the common object of the persons composing the assembly. In order to determine common object of the assembly, circumstances of the case, the attitude and deportment of the persons assembled very often furnish key to their mental bent. A person who encourages, or promotes, or takes part in rioting, whether by words, signs or gestures, or even by wearing the badge or ensign of the rioters becomes a rioter, for in this case all are deemed principals. On the other hand, a mere presence without encouragement is not enough to establish criminality. **62 Punj L R 37 : 1960 Cr L J 646 : AIR 1960 Punj 271 (274) (Pt B) (Pr 40).**

——S. 141 — Common object — Time of forming unlawful intent—Relevancy.

It is not necessary that the intention or the purpose which is necessary to render an assembly an unlawful one, need not come into existence at the outset. The time of forming an unlawful intent is not material. An assembly which at its commencement or even for some time thereafter is lawful, may subsequently become unlawful, or even riotous. To constitute a riot, the original intention need not be riotous. The unlawfulness of an assembly depends on its behaviour, purpose for which it meets, the manner in which it expresses itself, and the means which are used by its members to consummate the common object, though the actual consummation of its purpose is not essential and it may remain unexecuted. **62 Punj L R 37 : 1960 Cri L J 646 : AIR 1960 Punj 271 (275) (Pt D) (Pr 42).**

——Ss. 141, 148, 149 and 302 — Rioting — Conditions — Common object — Beating with sharp weapons resulting in death—Liability of members.

After a quarrel at village J with A's wife and son the accused persons, six in number and armed with various weapons started together towards another village where A had gone. A, having been informed of the incident at J, also started towards J, with some of his relations. On the way the head of the accused party threw a challenge to A and began beating him. Other accused persons also followed suit and caused injuries to A and his men of whom one died immediately.

Held, (i) that the conduct of the accused proved that they had come with the common object of belabouring A and anybody who came to intervene on his behalf. (ii) that it was certainly an unlawful common object and the assembly was therefore an unlawful assembly. As violence was committed, the offence fell under S. 148, Penal Code. (iii) that at any rate this unlawful common object had developed when one of the accused threw out a challenge to A and soon indulged in beating him and the other accused persons also followed suit and gave beating to A and other members of his party. (iv) that numerous bodily injuries resulting in death of one were deliberately caused indiscriminately without caring for the consequences. As however it was doubtful as to which of the accused actually caused the fatal injury, any one of them could not be convicted under S. 302 pure and simple. But since four persons took part in beating the deceased they could be held guilty of offence under S. 302 by virtue of S. 149, Penal Code. (v) that S. 149 applies not only to offences actually committed in pursuance of the common object but also to offences that members of the assembly know are likely to be committed. AIR 1956 S C 513 and AIR 1956 S C 241, Relied on. **1958 Cr L J 1232 : ILR (1957) 7 Raj 997 : AIR 1958 Raj 226 (232 to 235) (Pt B) (Prs 20, 21, 24, 25, 27) DB).**

——S. 141 — 'Common object'.

Where the evidence on record showed that there was bad blood between the Ahirs of the village and the Chamars who claimed to break banjar, that the accused came armed with lathis and began belabouring the deceased and his son who wanted to rescue his father and that the Ahirs out-numbered the Chamars :

Held, that there was common object of teaching the Chamars a lesson for the audacity to claim to break the banjar and the accused were rightly convicted under S. 147, Penal Code. They might also having been convicted at least under S. 323, Penal Code read with S. 149, Penal Code but simply because they have not been so convicted, it does not mean that they should be acquitted of the offence of rioting also. **1957 Cri L J 1187 : AIR 1957 Raj 331 (336) (Pt F) (Pr 16).**

——Ss. 141 and 142—Unlawful assembly—Evidence.

Villagers numbering about 1200 men gathering to consider and deliberate ways and means to check menace from nearby settlement of criminal tribes — Police officers also invited to gathering — Villagers coming with sticks — Few members advocating use of violence while majority opposing it — These facts held did not make the assembly an unlawful one — So long as the meeting was at stage of deliberation it could not be said that they had any common object in their view — In order to find out the common object of an unlawful assembly at the beginning; it is not a legitimate method to take the actual offence committed by certain persons in the course of riot at the later stage and to infer therefrom that such activities were originally part of the common object of the whole assembly. **AIR 1955 NUC (Raj) 1080 (DB).**

——S. 141—Common object.

The only ingredient necessary is that the object should be common to the persons who composed the

assembly, that is to say, they should all be aware of it and concur in it. There must also be some present and immediate purpose of carrying into effect the common object.

The common object of the unlawful assembly has to be considered with reference to what transpired on the date of the occurrence. **1953 Cri L J 1301 : AIR 1953 Trav-Co 275 (277, 280) (Pt A) (Prs 8, 15) (DB).**

4. Common object and same or similar object — Distinction.

——S. 141 — Scope — Common object and similar object — Distinction pointed out. See Penal Code (1860), S. 34. 1960 Cri L J 1329 : AIR 1960 Guj 13 (DB).

——S. 141 — Common object — Same object.

The same object is not necessarily a common object, but it becomes so only when it is known to and shared by all having it. **1951 Nag L J 163 : I L R (1951) Nag 45 : AIR 1951 Nag 47 (1) (47) (Pt B) (Pr 5).**

5. Clauses fourth and fifth.

——Ss. 141, 146 and 96 — Vindication of rights by use of force.

If a party is forced to maintain or defend his rights it cannot be said that he was determined to vindicate his rights by show or use of force. Kapildas Singh v. The King, **1950 Mad W N (Cri) 83 : 1950 Raj L W 62 : 1950 Mad W N 327 : 63 Mad L W 501 : ILR 29 Pat 391 : 51 Cri L J 1057 : 1949 F C R 834 : 1950 S C J 143 : 52 Bom L R 512 : AIR 1950 F C 80 (81) (Pt D) (Pr 10).**

——Ss. 141, 97, 148, 149 and 326 — Accused more than 4 armed with deadly weapons trying to enforce their disputed right to usufruct of mango trees — Incident resulting in simple injuries and grievous hurt resulting in death of person — No physical resistance encountered by accused—Offence of which accused were guilty — Accused held not entitled to Right of private defence — Accused held constituted themselves into unlawful assembly and every one of them would be guilty not only under S. 148 but also under S. 326 read with S. 149. See Penal Code (1860), S. 97. 1961 (1) Cri L J 403 : AIR 1961 Mys 74 (DB).

——S. 141, Cl. 4 — 'Enforce any right or supposed right'—Meaning of—Act done in defending or maintaining right already in enjoyment of person — Not covered by Cl. (4).

The use of the terms 'any right' or 'supposed right, in S. 141, Cl. (4) does not indicate any difference or distinction in the application of the section depending upon the actual existence of a right and the supposed existence of that right. Whether that right exists or is merely supposed to exist, the essence of the fourth clause of S. 141 is the use or show of criminal force to enforce that right. The expression 'enforce a right' implies the existence of two persons —the person who enforces it and the person against whom it is enforced. Such a situation can arise when the property over which, or the subject in respect of which, the right is sought to be enforced, is not in the possession of the person trying to enforce that right. The import of the phrase used in the section, relates to an act done in furtherance of any right or claim of right and not to an act done in defending or maintaining the right already in the enjoyment of the person. **1961 (1) Cri L J 403 : 38 Mys L J 995 : ILR (1960) Mys 1126 : AIR 1961 Mys 74 (81) (Pt D) (Pr 52) (DB).**

——S. 141 (fifthly), 142, 143, 148 — 'Unlawful assembly'—Ingredients.

An agreement reached between the Hindus and Muslims of a place whereby the Muslims agreed not to object to processions being taken out with music in front of a mosque on a high-way on occasions of national festivals cannot have the effect of a decree of Court or an award of arbitrators defining and declaring the rights of the parties. 38 Mys L J 293 and A I R 1925 P C 36 and A I R 1944 P C 33, Rel. on.

Such an agreement will not give any right to the members of the Muslim Community to prevent the processionists to proceed along the mosque on the public highway with music. By such obstruction the persons would constitute themselves an unlawful assembly within the meaning of S. 141 (fifthly). **1961 (1) Cri L J 291 : 38 Mys L J 1039 : 1962 Mad L J (Cri) 55 : ILR (1960) Mys 1238 : A I R 1961 Mys 57 (61) (Pt A) (Prs 21, 22) (DB).**

——Ss. 141, 149, 341—Applicability — Accused preventing processionists from proceeding along mosque on public high-way with music—Accused held guilty under S. 341 read with S. 149 — But in view of the general nature of the incident itself and in view of the fact that the accused would be liable to punishment by virtue of S. 149 held it will be more proper and more logical not to record a separate conviction against these accused in respect of individual acts under S. 341. 1961 (1) Cri L J 291 : 38 Mys L J 1039: 1962 Mad L J (Cri) 55 : ILR (1960) Mys 1238 : AIR 1961 Mys 57 (62) (Pt C) (Pr 39) (DB).

——Ss. 141, Fourth and fifth — 'Enforcing right' — What amounts to.

Where the Civil Court decree had declared the right of the accused party to erect a bund on the junction of two plots, and there was nothing to prevent them from doing so, it cannot be said that the action of the accused in going to the spot to erect a bund was illegal. There could be no question of their enforcing any right within the meaning of Cl. (4) or (5) of S. 141, Penal Code. **1959 Pat L R 12 : 1959 B L J R 272.**

——S. 141, Fourth and fifth — 'To enforce any right or supposed right' in Cl. (4)—Assault with a view to defend one's right in property—Offence.

When people go to defend their rights, that cannot be described as enforcing any right or supposed right. In the Cl. (5) of S. 141, Penal Code, nothing has been mentioned about defending one's right. In other words, if a person defends his right it is not considered to be illegal for the purposes of unlawful assembly. Where a person is forced to maintain or defend his right, he cannot, when charged with an offence under S. 147, Penal Code, be said to have committed any illegal act. There is a difference between 'forced to maintain or defend' any right and 'to enforce any right or supposed right. What S. 141, Penal Code, prohibits is enforcing any right or supposed right and not maintaining or defending one's right. The common object of the assembly may be to assault. But every assault is not illegal. If the assault takes place in order to defend one's right or maintain one's right, then such an assault by itself cannot be said to be illegal. A I R 1950 F C 80, Rel. on. **1957 B L J R 442 : 1957 Pat L R 156 : 1958 Cri L J 1215 : A I R 1958 Pat 492 (493) (Pt A) (Pr 3).**

——S. 141 — Party claiming possession attacked by party in possession—Determination to fight—Offence —Plea of self-defence—Sustainability—Ss. 97, 98 and 99. 1958 Raj L W 505.

6. Charge.

——S. 141 — Charge against five persons — Three of them acquitted charge against remaining accused will not fail if the Court on evidence before it comes to conclusion that there were other members of unlawful assembly and the number was more than five. See Penal Code (1860), S. 143. 1965 (2) Cri L J 613 : A I R 1965 Assam 86.

—Ss. 141, 143, 153A and 228—Unlawful assembly — Common object — Charge not suifficient to give notice to accused of alleged common object — Conviction under S. 143, Penal Code cannot stand.

Under S. 141, the common object must be one of those mentioned in that section. Disturbance of Court's word or public tranquillity may be covered by third common object mentioned in S. 141 namely to commit any mischief or criminal trespass or other offence. Mere disturbance of court's work does not amount to an offence under S. 228 nor does mere disturbance of public tranquillity amount to an offence under S. 153A. Where it was merely the trial Court's inference that the common object of the accused persons was to commit offences under Ss. 153A and 228 but the charges were not framed in such a manner as to give sufficient notice to them that their common object was to commit those offences, nor was there any evidence that such was their common object the charges must be held defective and conviction under S. 143 cannot stand. 1956 B L J R 652.

7. Explanation.

● —S. 141, Explanation — Assembly lawful at inception—Common object—S. 34.

An assembly which was lawful when it assembled can become unlawful subsequently. That is the Explanation to S. 141. Previous concert is not necessary. The common object required by S. 141, differs from the common intention required by S. 34 in this respect.

An assembly which was lawful at its inception held became unlawful the moment one of them called on others to assault a member of the other party and they in response to his invitation, started to chase the member of the other party who was running away. Moti Das v. State of Bihar, 1954 Cri L J 1706 : A I R 1954 S C 657 (659) (Pt B) (Prs 6, 7).

—S. 141 — Applicability — Persons assembled in exercise of right of private defence of property — Assembly does not become unlawful. See Penal Code (1860), S. 146. 1954 Cri L J 1710 : AIR 1954 All 771 (DB).

—S. 141, Explanation—Common object—Evidence of premeditation or preparation is not necessary to impute a common object to the members of an unlawful assembly. 1955 Andh W R 813 : 1956 Cri L J 198 : 1955 Andh L T (Cri) 277 : A I R 1956 Andh 53 (53) (Pt A) (Pr 2) (DB).

—S. 141, Explanation—Assembly becoming unlawful—Determination of exact time when accused was observed in it is difficult—If specific acts are attributed and proved against accused, there is no difficulty. A I R 1955 N U C (Madh B) 3862 (DB).

—Ss. 141 and 147 — Assembly lawful in its inception—Other party found to be aggressor — Assembly does not become unlawful by repelling attacks by other party. A I R 1952 Madh Bha 205 (206) (Pt B) (Prs 3, 4).

—Ss. 141, 146—Expressions "common object" and "assembly"—Meaning—For "common object" there must be pre-concerted plan—"Assembly" in Explanation contemplates assembly of 5 or more persons.

It is true that common object, which denotes a privity of minds, may be formed instantaneously. But there must be some facts to denote a pre-concerted plan. Otherwise, each one of the participants in the quarrel would be deemed to be acting independently without any united mind. In such a case, even if they may individually have the same object, it would not be a case of a common object. The word "assembly" in the explanation to S. 141 appears to be an assembly as contemplated by the first part of the section, that is an assembly of five or more persons. If there are not 5 or more persons initially, and others join later, it would not form an unlawful assembly unless they had a pre-concerted plan for prosecution of a common object. A I R 1955 S C 216, Rel. on. 1957 M P C 138 : 1957 M P L J 111 : I L R (1956) Nag 899.

—S. 141, Explanation—An assembly lawful in the beginning if may become unlawful at a later stage—Conviction in such a case when proper.

An assembly lawful in the beginning may become unlawful at a later stage and the common object which may not have been present in the initial stage may be formed at a later stage. In all such cases the question whether the conviction is proper or not would turn upon whether the charge laid against the accused gave sufficient notice of the facts constituting the offence. I L R (1952) Cut 219.

SECTION 142

● —Ss. 142, 141, 143, 144, 145, 146, 147, 148 and 149—Unlawful assembly—Whether person is member of unlawful assembly — Tests indicated. See Penal Code (1860), S. 141. 1965 (1) Cri L J 226 : AIR 1965 S C 202.

● —Ss. 142, 141 and 146—Mere presence of person, does not make him member of unlawful assembly—Evidence required, nature of indicated. See Penal Code (1860), S. 141. 1956 Cri L J 345 : AIR 1956 S C 131.

—S. 142—"Continues"—Means physical presence as member of unlawful assembly. AIR 1955 N U C (All) 166 (DB).

—S. 142 — Withdrawal from unlawful assembly — Indications.

Withdrawal of a member from the unlawful assembly can be either actual and voluntary, which would be if he removes himself from the assembly and goes away, clearly indicating that he is adverse to taking any further part in the incident. If a member of an unlawful assembly is not able to walk away like this and has perforce to remain on the spot either because he is so injured that he cannot remove himself or because he is held up by others, he may still continue to be a member of the unlawful assembly if he shares the common object of the assembly subsequent to his being made helpless. He can, however, in such a position disavow his share in the common object by expressions, leaving no doubt that he did not share the object any more. If he is also unable to express himself in this respect, it would be fair to presume that he was incapable of both taking part and of sharing the objects of the unlawful assembly and that he had withdrawn himself from the unlawful assembly. 1950 All L J 246 : 51 Cri L J 1133 : 1950 All W R (HC) 376 : I L R (1951) 2 All 141 : AIR 1950 All 418 (420) (Pt B) (Pr 8) (DB).

—Ss. 142, 141, 146—Rioting—Conviction cannot be sustained unless it is proved that there was unlawful assembly, and force was used and an offence committed — Mere assembly of persons is not unlawful assembly. See Penal Code (1860), S. 141. A I R 1955 N U C (Madh B) 1322.

—Ss. 142, 141 (fifthly), 143, 148 — Unlawful assembly—What constitutes—Hindu Muslim factions—Agreement as to right to take procession with music in front of mosque on public highway — Such an agreement will not give any right to members of the Muslim Community to prevent processionists to proceed along the mosque on public highway with music —By such obstruction the persons would constitute themselves an unlawful assembly within meaning of S. 141 (fifthly). See Penal Code (1860), S. 141 (fifthly). 1961 (1) Cri L J 291 : AIR 1961 Mys 57 (DB).

——Ss. 142 and 149—Applicability — Mere presence of person in assembly does not make him member of unlawful assembly—Evidence required—Nature of.

Mere presence in an assembly does not make a person a member of an unlawful assembly unless it is shown that he had done something or omitted to do something which would make him a member of an unlawful assembly. It is therefore necessary for the prosecution to lead evidence pointing to the conclusion that all the accused had done or been committing some overt act in prosecution of the common object of the unlawful assembly. The omnibus evidence in general terms to the effect that all these persons and many more were the miscreants and were armed with deadly weapons, like guns, spears, axes, lathis, has to be very closely scrutinised in order to eliminate all chances of false or mistaken implication. 1956 Cri L J 345 : AIR 1956 S C 181, Rel. on. 28 Cut L T 435 : I L R (1962) Cut 661 : 1964 (1) Cri L J 114 (Orissa).

—— Ss. 142 and 147—Applicability—'Member of unlawful assembly'—Who is.

Where the entry of the police party into a Math for search of arms and arrest of some inmates of the Math was not authorised by law, the police party cannot be held to have acted in due discharge of their duties and under process of law and consequently resistance to their action to attempt to arrest or to seize the property cannot be an illegal act so as to make the members resisting members of an unlawful assembly. 23 Cut L T 88 : 1957 Cri L J 769 : AIR 1957 Orissa 130 (145) (Pt L) (Pr 39) (DB).

——S. 142—Member of unlawful assembly — Spectators in the assembly are not guilty of rioting or of being members of unlawful assembly. See Penal Code (1860), S. 141. AIR 1955 N U C (Raj) 1080 (DB).

——Ss. 142 and 141—Unlawful assembly—Evidence.

Villagers numbering about 1200 men gathering to consider and deliberate ways and means to check menace from nearby settlement of criminal tribes—Police officers also invited to gathering — Villagers coming with sticks—Few members advocating use of violence while majority opposing it—These facts held did not make the assembly an unlawful one—So long as the meeting was at stage of deliberation it could not be said that they had any common object in their view — In order to find out the common object of an unlawful assembly at the beginning, it is not a legitimate method to take the actual offence committed by certain persons in the course of riot at the later stage and to infer therefrom that such activities were originally part of the common object of the whole assembly. AIR 1955 N U C (Raj) 1080.

—— S. 142 — Offences committed by unlawful assembly — Mere presence of accused — Constructive liability.

The accused cannot be held liable on the ground of constructive responsibility for offence committed by members of unlawful assembly merely because he was found at the scenes where the offences were committed his mere presence may be as an onlooker and there is no jurisdiction for saddling him with constructive liability. 1951 Ker L T 451 : 1954 Cri L J 684 : AIR 1954 Trav-Co 253 (254) (Pr 1) (DB).

SECTION 143

——Ss. 143, 147, 323, 97, 99 — Illegal attachment of property — Judgment-debtor is not entitled to take it from the enclosure, where the sapurdar had kept it—There is no right of self-defence. See Penal Code (1860), S. 147. 1960 Cri L J 1040 : A I R 1960 All 453.

——S. 143 — Accused jointly tried by Magistrate for offences under Ss. 143, 447 and 506, Penal Code — Case cannot be said to be cognizable by a Panchayati Adalat unless all the offences were cognizable by it — Offence under S. 143, Penal Code, not being cognizable by it, S. 55 did not apply and therefore tried by Magistrate was not illegal. See Panchayats—U. P. Panchayat Raj Act (26 of 1947), S. 55. AIR 1952 All 431.

——S. 143—Conviction for being members of unlawful assembly—Common object must be set out in the charge and proved beyond reasonable doubt. 1958 Andh L T 856.

——Ss. 143, 141 and 149 — Charge against five persons—Three of them acquitted—Whether charge against remaining accused fails.

Where five persons are charged under S. 143/147, I. P. C. and two of them are convicted still the charge will not fail if the Court on the evidence before it comes to the conclusion that there were other members of the unlawful assembly and the number was more than five. AIR 1963 S C 174, Foll. ILR (1963) 15 Assam 461 : 1965 (2) Cri L J 613 : AIR 1965 Assam 86 (87) (Pr 4).

——S. 143—Separate conviction and sentences.

Held, that the act of using force or violence essential to convert the offence under S. 143 into an offence under S. 147 itself converted the offence under S. 143 into that under S. 325/149 — As two offences under S. 147 and S. 325/149 were held to have been committed by same acts, accused were not liable to be punished with punishment for more than one of such offences. See Penal Code (1860), S. 71. 1955 Cri L J 1033 : AIR 1955 Bhopal 9.

——S. 143 — Complaint in respect of offences under S. 117 read with Ss. 143 and 188, Penal Code — Compliance — Held, that the endorsement of District Magistrate at bottom of complaint contained all ingredients of S. 4 (1) (h), Criminal P. C.—Hence it was sufficient compliance of S. 195 (1) (a), Criminal P. C. See Criminal P. C. (1898), S. 195 (1) (a). 1957 Nag L J 63.

——S. 143—Applicability — Persons assembled more than five—Instigation to resist not only order under S. 144, Criminal P. C. but to overawe Government or public servants engaged in task of maintaining law and order — Held, that all the three accused were guilty of under S. 117 read with S. 143, I. P. C. See Penal Code (1860), S. 117. 1957 Nag L J 63.

——S. 143—Attack by persons not recognised—Trial and conviction—Considerations.

It is undoubtedly true that if an attack is made by persons who are not recognised there is often a chance of somebody who did not take part in the assault being falsely implicated. The decision whether an accused person has been falsely implicated or not has to be made by the Court on careful scrutiny of the evidence and on a consideration of all the circumstances. 63 Cal W N 454 : 1959 All W R (Sup) 72 : 1959 All Cri R 338 : 1959 Cri L J 318 : ILR (1960) 1 Cal 13 : AIR 1959 Cal 176 (177) (Pt A) (Pr 7) (DB).

——S. 143 — Ten persons charged — Six acquitted—Remaining four—If can be convicted.

Where the accused charged under S. 143 were 10 in number, and the charge which they were called upon to meet mentioned only 10 named persons as having been members of the unlawful assembly, and six of the accused were acquitted, the remaining four cannot be said to have been members of an unlawful assembly and their conviction under S. 143 cannot stand. The fact that the prosecution evidence showed that there were many more persons than the 10 mentioned in the charge who participated in the crime is immaterial. 1958 All W R (Sup) 98 : 1958 All Cr R 326 : 62 Cal W N 500.

——Ss. 143, 141, 441 and 447 — Offence under first part of S. 141 — Essentials to be proved — Intention must be proved — Charges under Ss. 143 and 447 — Evidence must establish ingredients of S. 441 — Evidence of state of mind has to be examined — Annoyance or insult felt by complainant is wholly irrelevant consideration in charge under S. 441. See Penal Code (1860), S. 141. 1955 Cri L J 1338 : AIR 1955 Cal 515.

——S. 143—Charge under—Basis of—Annoyance to policemen — (Criminal P. C. (1898), S. 210 and S. 254).

Causing of annoyance to policemen cannot be made the foundation of a charge of unlawful assembly under S. 143, Penal Code. When there is no allegation that the petitioners had formed themselves into a procession or assembly of five or more persons or that they were holding a meeting or doing anything which the terms of the order made under S. 144, Criminal P. C. forbade, the charge under S. 143, Penal Code cannot be maintained. 59 Cal W N 999 : ILR (1957) 2 Cal 351 : 1955 Cri L J 1336 : AIR 1955 Cal 513 (513) (Pt A) (Pr 10).

——Ss. 143, 426 — Persons more than five, moving about in demonstration and shouting slogans—English signboards—Some of them tarring the boards and writing new legends on them — Those who do not actually do this but only stood by and formed a part of demonstrating assembly held also guilty under S. 143 read with S. 426 — Boards suffer decrease in utility by substituting English legends — Utility for the purposes of S. 425 is utility as conceived by the owner and not utility as conceived by the accused. 1961 Jab L J 1243 : 1962 M P L J 822 : 1962 (2) Cri L J 692 (Madh Pra).

——Ss. 143, 71 and 447 — Unlawful assembly — Common object to commit criminal trespass - Criminal trespass committed — Conviction under Ss. 143 and 447 both — Not illegal. See Penal Code (1860), S. 71. 1962 (1) Cri L J 618 : AIR 1962 Manipur 23.

——Ss. 143 and 188 — Conviction — Validity order under S. 144, Criminal P. C. — Disobedience of — Shouting of slogans causing annoyance to Magistrate and police going to preserve law and order — Conviction under S. 188 valid.

Held, on evidence (i) that the conviction under S. 143 on the ground that the petitioners were members of the unlawful assembly of more than 5 was wrong, as they were arrested only for shouting slogans and the first petitioner in particular for delivering the speech; (ii) that there was a disobedience of order duly promulgated by the District Magistrate; (iii) that the Magistrate and the police were engaged in their legitimate duties and if in the midst of such duties annoyance was caused to them by such disobedience of lawful order on the part of the petitioners it would certainly come within the purview of S. 188, I. P. Code. The conviction of the petitioners under S. 188, I. P. Code was therefore quite correct. AIR 1960 Assam 20, Dist. 1962 (1) Cri L J 827 (Manipur).

——Ss. 143, 145, 188—Constitution of India, Art. 226 —Habeas corpus—Petitioners holding meeting peacefully in order to vindicate their public right under Manipur State Constitution Act — Order on analogy of S. 144, Criminal P. C., passed — Order held illegal —Detention for offences under Ss. 143. 145 and 188 —Detention held illegal — (Criminal P. C. (1898), S. 144). See Constitution of India, Art. 226. 1955 Cri L J 1603 : AIR 1955 Manipur 41.

——S. 143—Scope—Unlawful assembly — Ascertainment of members constituting it—Acquitted persons must be omitted—Less than five persons when can be convicted under S. 149 stated. See Penal Code (1860), S. 149. (1965) 1 Law Rep 714 : 1966 Cri L J 223 (Mys).

——Ss. 143, 141 (fifthly), 142, 148 — Unlawful assembly—What constitutes—Hindu Muslim factions — Agreement as to right to take procession with music in front of mosque on public highway — Such an agreement will not give any right to members of the Muslim Community to prevent processionists to proceed along the mosque on public highway with music—By such obstruction the persons would constitute themselves an unlawful assembly within the meaning of S. 141 (fifthly). See Penal Code (1860), S. 141 (fifthly). 1961 (1) Cri L J 291 : AIR 1961 Mys 57 (DB).

——S. 143—Unlawful assembly—Test for determination indicated. See Penal Code (1860), S. 141. (1950) 55 Mys H C R 317.

——S. 143 — Prosecution under S. 143 for preventing complainant from catching fish from tank taken by him on lease, permitted to be withdrawn as the tank the only source of drinking water to persons in locality — Held there was proper exercise of discretion on part of trial Court. See Criminal P. C. (1898), S. 494. 1961 (1) Cri L J 693 (Orissa).

——Ss. 143 and 379 — Removal of crops — Question for consideration.

In a prosecution under Ss. 143 and 379 for removing the paddy crops from the land possession of which was in dispute, the main question for consideration by a criminal Court is whether the prosecution has established beyond reasonable doubt that the complainant had raised the crops on the disputed land.

Where both the lower Courts believed, the prosecution evidence and disbelieved the defence evidence the High Court will not interfere with the concurrent findings on the question as to who grew the crops on the disputed land. ILR (1956) Cut 241 : 22 Cut L T 247 : 1956 Cri L J 1421 : AIR 1956 Orissa 212 (213) (Pt A) (Pr 4).

——Ss. 143 and 379 — Evidence — Dishonest intention not proved—Accused entitled to benefit of doubt — (Criminal P. C. (1898), Ss. 290, 367) — (Evidence Act (1872), Ss. 3, 5, 14 and 15).

Where in a trial of 34 persons under Ss. 143 and 379, Penal Code on allegations that they formed an unlawful assembly with a common object of committing theft and committed theft by cutting and removing paddy crops from the lands, it was found that the possession of lands was in dispute and that accused 15 to 34 being labourers merely obeyed the orders of accused 1 and that there was no evidence to show that they were aware of any previous quarrel and of the person who grew the crops, nor was there evidence to show that they had gone to the fields with dishonest intention.

Held, that accused 15 to 34 were entitled to the benefit of doubt. ILR (1956) Cut 241 : 22 Cut L T 247 : 1956 Cri L J 1421 : AIR 1956 Orissa 212 (214) (Pt D) (Pr 10).

——Ss. 143, 296 — Unlawful assembly with common object of disturbing a religious gathering — Case of each accused not considered individually — High Court remanding case for fresh disposal according to law. 1961 B L J R 347.

——Ss, 143, 141, 153-A and 228—Unlawful assembly — Common object — Charge not sufficient to give notice to accused of alleged common object — Conviction under S. 143, Penal Code cannot stand. See Penal Code (1860), S. 141. 1956 B L J R 652.

——S. 143 — Applicability — Conviction of accused set aside under S. 186, Penal Code for want of complaint under S. 195 (1) (a), Criminal P. C. — He can

be convicted under S. 143, Penal Code without such complaint. See Criminal P. C. (1898), S. 195 (1) (a). 1960 Cri L J 987 : AIR 1960 Punj 356.

——S. 143 — Sentence.

When the attitude of the accused, convicted under S. 143, Penal Code was that of truculence at the time of the commission of the offence and of recalcitrance during the trial, the sentence of two months' imprisonment and a fine of Rs. 50, on each accused cannot be deemed excessive. 62 Punj L R 73 : 1960 Cri L J 987 : AIR 1960 Punj 356 (357) (Pt B) (Pr 10).

——S. 143 — Charge under Ss. 143 and 447, Penal Code and S. 24, Cattle Trespass Act — Conviction under S. 426, Penal Code held bad — Case not covered by S. 238 (2). See Criminal P. C. (1898), S. 238 (1). 1963 (2) Cri L J 112 (Tripura).

SECTION 144

——Ss. 144, 146, 148, 324, 99 read with S. 34 — Rioting and Unlawful assembly — Private defence — Dispute regarding possession — Use of force by accused as lawful owner of land to vacate trespass resulting in injuries — Conviction of accused for rioting and unlawful assembly — Validity.

Where the victims committed trespass on the land in possession of accused, and the latter used force, to eject the trespasser which resulted in injuries to the victims, one of whom died later due to a different cause, and the accused were convicted for rioting and unlawful assembly on the grounds that there was no standing crop on the land which could have been disturbed by the trespassers and the accused could have approached the authorities for ejecting the trespassers.

Held, that the accused were as lawful owners of land, only maintaining their possession and not enforcing any right. They had the right to eject the trespassers from the land. Though no crop was standing on the land, the accused had to maintain their lawful possession and could use force to eject the trespassers since it was not possible to get the help of authorities in time. Further, the death of deceased was not due any injuries received during the fight but due to different cause, as proved by medical evidence. Hence, the accused had the right to use force to eject the trespassers to maintain their possession and the force used by them was not excessive and hence, they could not be convicted for the offences. 1931 Mad W N 646; 1934 Mad W N 43; 1935 Mad W N 1116; 1942 Mad W N 42; AIR 1917 Mad 662 (2); AIR 1934 All 826; AIR 1938 Lah 60; AIR 1930 Lah 314; AIR 1945 Pat 283; AIR 1938 Pat 518; AIR 1963 S C 612; 1935 A C 462; AIR 1937 Rang 83; AIR 1941 All 402; AIR 1962 S C 605, Rel. on. ILR (1965) Andh Pra 193 (DB).

——S. 144 — Charge under — Failure to mention common object in charge vitiates trial. See Criminal P. C. (1898), S. 223. 1957 Cri L J 146 (Orissa).

——Ss. 144 and 379 — Removal of crops by five accused from land belonging to complainant — No clear finding as to who had sown the crops — Accused held entitled to a benefit of doubt. AIR 1955 NUC (Pat) 3264.

SECTION 145

——Ss. 145, 143, 188—Constitution of India, Art. 226 —Habeas Corpus—Petitioners holding meeting peacefully in order to vindicate their public right under Manipur State Constitution Act — Order on analogy S. 144, Criminal P. C., passed — Order held illegal — Detention for offences under Ss. 143, 145 and 188 — Detention held illegal—(Criminal P. C. (1898), S. 144) — See Constitution of India, Art. 226. 1955 Cri L J 1603 : AIR 1955 Manipur 41.

——Ss. 145, 188 — Trial for offences under — Non-compliance with S. 195, Criminal P. C., in respect of offences under S. 188 — Conviction under S. 188 set aside — Conviction under S. 145 held did not stand — Criminal P. C. (1898), S. 195. ILR (1950) Cut 545 : 17 Cut L T 80 : AIR 1951 Orissa 84 (86) (Pt B) (Pr 10) (DB).

SECTION 146

SYNOPSIS

(Penal Code (45 of 1860), S. 146.)

1. Scope and applicability.
2. "Force or violence".
3. "Common object".
4. Private defence.
   See Penal Code (1860), S. 147.
5. Conviction of less than five persons.
   See Penal Code (1860), S. 147.
6. Evidence.
7. Finding as to number of persons necessary.
8. Cases and counter cases.

1. Scope and applicability.

——Ss. 146 and 147—Offence—Nature and gravity of—Test—Nature of injuries inflicted — If conclusive—Shouting of Mahatma Gandhi-ki-jai if justifies or provokes wanton and brutal attack.

In considering whether an incident is a fracas or a serious riot the seriousness of the occurrence is not to be judged by the nature of the injuries inflicted but by the way they were inflicted in utter disregard of the administration and the forces of law and order. Nor could a serious and unprovoked attack be minimised or justified on the ground that the shouting by people of Mahatma Gandhi-ki-jai was the cause of or provoked the assault or attack. Such shouting cannot be considered to be a provocation. 52 Cri L J 1123 : AIR 1951 Hyd 97.

——Ss. 146 and 148—Charge of rioting with deadly weapons against several persons — Necessity of considering case of each accused separately pointed out —Mere presence at scene of occurrence not sufficient — Mere carrying of weapons by some — Inference against those who were unarmed that they were all members of unlawful assembly, cannot be drawn — Some overt act indicating participation has to be proved. AIR 1955 N U C (Madh Bha) 3801.

——S. 146 — Insured motor car meeting accident causing death of a boy—Crowd of persons including deceased's relations and sympathisers surrounding car and burning it — Held, that loss was caused by riot and since that risk was expressly excepted by the policy of insurance, the Insurance Company was not liable—'Riot' and 'Civil commotion' what amounts to — See Insurance. AIR 1965 Madh Pra 32 (DB).

——Ss. 146, 109 and 147 — Abetment of offence of rioting — Instigation must have reference to the thing that was done and not to the thing that was likely to have been done by the person who is instigated — Common object of the assembly to march in procession breaking the conditions imposed by the Magistrate — Accused found to have instigated the members of that assembly to use force for over coming any resistance offered by army or by police with the object of making them break up — The offence committed by the accused is abetment by instigation of rioting—See Penal Code (1860), S. 109. 1953 Cri L J 1273 : AIR 1953 Trav-Co 251 (DB).

——S. 146 — Person in arrest of police—Rescuing—Conviction for rioting.

The unlawful assembly gathered and developed into a mob of rioters with the object of rescuing the

2nd accused from the custody of the Police officers who had effected his arrest. His cry for assistance led to the formation of the unlawful assembly which subsequently developed into a riot.

Held, that the 2nd accused was not a member of that assembly and consequently merely because their object was to rescue the 2nd accused from the custody of the Police Officer who had arrested him, he could not be made liable for rioting. 1952 Cri L J 1592 : 1952 Ker L T 704 : ILR (1952) Trav-Co 133 : AIR 1952 Trav-Co 459 (463) (Pt D) (Pr 13) (DB).

2. "Force or violence".

● ——S. 146—Vindication of rights by use of force—If a party is forced to maintain or defend his rights it cannot be said that he was determined to vindicate his rights by show or use of force — See Penal Code (1860), S. 141. 51 Cri L J 1057 : A I R 1950 F C 80.

● ——S. 146 — "Force or violence" — Meaning.

While the word 'force' has been defined in S. 349, the word 'violence' has not been defined in the Code. 'Violence' must therefore be understood in its ordinary sense. 'Violence' is a word of wider import than 'force' and includes force used against inanimate objects also. Sundar Singh v. State, 1955 Cri L J 671 : 1955 All L J 293 : 1955 All W R (H C) 316 : ILR (1955) 1 All 472 : AIR 1955 All 232 (233) (Pt C) (Pr 3) (FB).

——Ss. 146 and 349—Essentials of offence—Damage to property.

To constitute offence of rioting there should be either "force" or 'violence' — Force must be against human being and not against inanimate object — Motion caused to inanimate object without affecting human being—There is no force within meaning of S. 349 — 'Violence' however, is not confined to human being — Damage caused to property by unlawful assembly without any harm to any person — It is violence and rioting : AIR 1923 Mad 606 and 40 Cal 367, Rel. on. 1953 All W R (H C) 389 : 1953 Cri L J 1729 : AIR 1953 All 749 (750) (Pt C) (Prs 8, 10).

3. "Common object".

——Ss. 146, 147, 323, 149, 300, 302, 304 and 34 — Rescue of cattle lawfully taken to pound — Injury—Death—Offence—Common object—(Cattle Trespass Act (1871), S. 24).

Where the evidence was that the six accused formed an unlawful assembly and used force in executing their common object, namely, the release of the cattle and inflicted injuries to the persons lawfully taking the cattle to the pound, whatever was done by each one of the accused was in furtherance of the common intention of all. The accused were guilty of the offences under Ss. 147 and 323, Indian Penal Code, read with Ss. 149 and 34, Indian Penal Code.

Where one of the persons injuried seriously on the head died within a few hours :

Held, that in the circumstances of the case the third para. to S. 300 applied and also that none of the exceptions applied. Therefore the act of killing amounted to murder under S. 302 and not an offence under S. 304. Held, further that as the evidence showed that all the six accused arrived together at the scene of occurrence armed with lathis with the joint object namely to have the cattle released by force the fact that some of the cattle belonged to one group and the others to the other group among them made no difference. 1958 Cri L J 588 : AIR 1958 All 348 (350, 351) (Prs 5, 10, 11) (DB).

——Ss. 146, 147 and 94 — Applicability—Common object — Absence of — Effect.

Although it appears from the accused's statement in the Sessions Court that there were more than five persons the accused cannot be said to be a member of the unlawful assembly when he had no common object with them to commit an offence. Further when his presence in the assembly was due to duress he would be protected by S. 94. 1957 All L J 20 : 1957 All W R (H C) 86 : 1957 Cri L J 344 : AIR 1957 All 184 (188) (Pt E) (Pr 16) (DB).

[Overruled on another point in AIR 1966 All 192.]

——S. 146 — Essentials of offence — Finding as to common object is necessary. AIR 1955 N U C (Madh Bha) 3301 (DB).

——Ss. 140 and 141 — Expressions "common object" —and "assembly"—Meaning — For "common object" there must be pre-concerted plan — "Assembly" in Explanation contemplates assembly of 5 or more persons. See Penal Code (1860), S. 141. ILR (1956) Nag 899 : 1957 M P C 138 : 1957 M P L J 111.

——S. 146—Charge — Failure to frame—Prejudice—Strict adherence to S. 362 (4), Cr. P. C. and not framing a charge would result in prejudice to the accused —Magistrate stating that charges under Ss. 147, 337, 427 and 149 were framed did not state in the charge what exactly the common object was—Held in the circumstances, it could not be said that the accused were not prejudiced at all — As the conviction under S. 147 failed for the failure to mention the common object, the conviction under S. 149 did not arise as a conviction under S. 149 is dependent upon conviction under S. 147. See Criminal P. C. (1898), S. 362 (4). 1954 Cri L J 1254 : AIR 1954 Mad 785.

——S. 146 and 147—Common object—Proof — Mere presence not sufficient.

Mere presence of a person along with members of an unlawful assembly is not sufficient to support a finding that he had the common object of the unlawful assembly, even for the purpose of conviction under S. 147. There must be other evidence direct or circumstantial to justify a finding that he had the common object. 1954 Cri L J 632 : 34 Mys L J 13 : ILR (1953) Mys 690 : AIR 1954 Mys 75 (78) (Pt C) (Pr 8) (DB).

——Ss. 146 and 147—Ingredients of offence—Essentials to be proved.

In order to prove successfully a charge under S. 147, it is incumbent upon the prosecution to show that there was use of some force or violence by an unlawful assembly or by any member thereof, and secondly, such force or violence should have been used in prosecution of the common object of such assembly. Where the common object of the assemblage of the appellants was to take forcible possession of the house and lands in occupation of others by using criminal force, the essential ingredients of the section are complied with and the conviction of the appellants under S. 147, is proper. ILR (1957) Cut 642.

——Ss. 146, 149 — Common object — Some accused persons merely present at place of assault with lathis in hand—Not actually joining in assault — Common object of assault held not shared by them. 1965 (1) Cri L J 73 : AIR 1965 Pat 45 (47) (Pt A) (Pr 14).

—S. 146—Charge — Omission to mention common object in charge does not vitiate the trial or render the conviction bad and it is necessary to see in each case whether or not the accused had been misled by the omission — Prejudice to accused—Test to determine would be to see whether the accused had no notice during the trial of the case of the prosecutions as to the common object so as to enable them to meet it in their defence and in cross-examination. See Criminal P. C. (1898), S. 223. AIR 1955 N U C (Raj) 2194 (DB).

4. Private defence.

See Penal Code (1860), S. 147.

5. Conviction of less than five persons.

See Penal Code (1860), S. 147.

6. Evidence.

■ — Ss. 146, 141 and 142 — Mere presence of person, does not make him member of unlawful assembly —Evidence required, nature of. See Penal Code (1860), S. 141. 1956 Cri L J 345 : AIR 1956 S C 181.

——Ss. 146, 147 — Conviction of less than five persons.

Satisfactory evidence that more than five persons took part in abduction and criminal trespass—All persons are members of unlawful assembly—Conviction of only three of them under S. 147 is legal. AIR 1954 All 249 (251) (Pt C) (Pr 13).

——Ss. 146 and 147—Rioting—Evidence.

A number of accused involved—Charge of rioting—Main issue is of identification—Appellate Court should analyse the evidence against each accused and consider his case in the light of the points made by the defence—Otherwise grave injustice is likely to occur. See Criminal P. C. (1898), S. 367. 1958 Andh L T 740.

——S. 146—Conviction.

Failure of the prosecution to establish that there was an unlawful assembly, that force was used and an offence committed—Conviction for rioting cannot be sustained—A mere assembly gathering of persons is not unlawful though some of its members may apply force to commit an offence—From the mere fact that all or some of the accused being found at the scene of occurrence at the time when the complainant was injured, it cannot be inferred that they were members of an unlawful assembly—Nor is it reasonable to assume from the acts themselves that the persons present had a common object to commit them and these were committed in pursuance of a common object. See Penal Code (1860), S. 141. AIR 1955 NUC (Madh B) 1322.

——S. 146—Criminal P. C. (1898), S. 367—Appreciation of evidence—Riot cases — Discrepancies in evidence natural—Value to be given—Duty of Court — Broad possibilities have got to be considered — Court must also consider the defence put forward by the accused and its validity by testing the prosecution version. See Criminal P. C. (1898), S. 367. 1958 Cri L J 385 : AIR 1958 Mad 127.

——Ss. 146, 147 — Mammoth rioting involving large number of persons—Evidence and proof—Principles to be borne in mind by Court.

In a case of rioting involving a large number of accused the Court should bear in mind the following five fundamental principles.

(i) Notwithstanding the large number of the rioters or of the persons put up in Court for rioting and the consequent difficulty for the prosecution to name the specific acts attributed to such of the accused, the Court must see to it that all the ingredients required for unlawful assembly and rioting are strictly proved by the prosecution before convicting that particular accused.

(ii) Spectators, Wayfarers etc., attracted to the scene of the rioting by curiosity as generally happens in the country-side when a riot or affray is going on, should not be, by reason of their mere presence at the scene of rioting and with the rioters, held to be members of the unlawful assembly or rioters. But, of course, if they are proved to have marched with the rioters for a long distance, when the rioters were shouting tell-tale slogans and pelting stones, it will be for them to prove their innocence under S. 106 of the Indian Evidence Act

(iii) It will be very unsafe, in the case of such large mobs of rioters to rely on the evidence of a single witness speaking to the presence of an accused in that mob for convicting him, especially, when no overt act of violence or shouting of slogan, or organising the mob, or giving orders to it, or marching in procession with it, or other similar thing is proved against him. In a big riot, by hundreds of persons, it is very easy even to mistake one person for another, and implicate honestly really innocent persons, and even to mistake persons seen elsewhere as having been seen there. An ordinary rule of caution and prudence will require that an accused identified only by one witness, and not proved to have done overt act etc., as described above, should be acquitted, by giving him the benefit of the doubt.

(iv) Where there are such acute factions, one based on agrarian disputes and troubles, another on political wrangling and rivalry, and a third on caste division or the division of the haves and the havenots, the greatest care must be exercised before believing the evidence of a particular witness belonging to one of these factions against an accused of the opposite views. This principle becomes of special importance when there are no overt acts etc., proved, and when there are only one or two witnesses speaking to the presence of the accused among the rioters, and they belong to the classes or factions opposed to the accused.

(v) Mere followers in rioting deserve a much more lenient sentence than leaders who mislead them into such violent acts by emotional appeals, slogans and cries. 1951-2 Mad L J 446 : 1951 Mad W N 829 : 1951 Mad W N Cr 249 : 1952 Cri L J 583 : ILR (1952) Mad 728 : AIR 1952 Mad 267 (269, 270) (Pt B) (Prs 6 to 10).

——S. 146—Essentials of offence.

To sustain a charge of rioting, the prosecution has to establish that there was an unlawful assembly, that force or violence was employed and that an offence was committed.

When what operated as the proximate and substantial cause for the assault and the persons concerned in it are not free from doubt, the charge of rioting cannot be taken to be satisfactorily substantiated. 32 Mys L J 83 : I L R (1953) Mys 69 : 1953 Cri L J 1001 : 1953 All W R (Sup) 78 : A I R 1953 Mys 41 (42) (Pt A) (Prs 4, 6) (DB).

——S. 146—Applicability —Evidence.

For the offence of riot it is sufficient if it is proved against an individual that he remained in an unlawful assembly after he was aware that the assembly was unlawful. He would also be liable for an offence committed by any member of that unlawful assembly provided the said offence was committed in prosecution of the common object of that assembly, or was such, as the members of that assembly knew was likely to be committed.

Thus where the object of the unlawful assembly from the very beginning was to use criminal force against police officers, even if there is no direct evidence as to the person or persons responsible for the injuries found on a police officer who subsequently dies of those injuries, each one of the members of the assembly is liable for the offence committed by their comrades. 1953 Cri L J 1301 : AIR 1953 Trav-Co 275 (278) (Pt B) (Pr 9) (DB).

7. Finding as to number of persons necessary.

——S. 146 Conviction—Basis of — Definite finding as to number of persons.

Any Court which convicts the accused before it for an offence of riot should record a definite finding that the number was five or more than five and not that there were a number of persons who took part

in the riot. See Penal Code (1860), S. 141. AIR 1955 N U C (Raj) 5017.

S. Cases and counter-cases.

●—S. 146 — Determined fight.

Where one party complains that three persons received gun-shot injuries and the other complains that one or two persons received a few simple injuries the occurrence cannot be regarded as being in the nature of a determined battle between two armed mobs, in which the desire to fight and attack each other becomes a more important objective of the opposing mobs than the cause or subject-matter of the fight. Kapildeo Singh v. The King, 1950 Mad W N (Cri) 83 : 1950 Raj L W 62 : 1950 Mad W N 327 : 63 Mad L W 501 : ILR 29 Pat 391 : 51 Cri L J 1057 : 1949 F C R 834 : 1950 S C J 143 : 52 Bom L R 512 : AIR 1950 F C 30 (81) (Pt E) (Pr 10).

——S. 146—Case and counter-case—Duty of Court—It cannot coin out third version of its own. A I R 1955 N U C (Cal) 4845.

——S. 146 — Evidence — Case and counter-case — Injuries on body of accused is a relevant consideration in finding out who were aggressors — (Evidence Act (1872), S. 7). AIR 1955 N U C (Cal) 4845.

——S. 146—Conviction—Basis of — Complaint and counter-complaint—Tests to determine culpability of accused.

Where there is a riot committed by two factions in a locality and complaint and counter-complaint are made, the High Courts have laid down four tests to fix the culpability of the accused, viz., first whether they had a motive to share the common object and be present at the unlawful assembly and participate in the facts of violence therein; secondly whether they committed the acts proved by well corroborated evidence and which would establish affirmatively their common object, presence and participation; thirdly whether the names of these persons have been mentioned at the earliest instance; and finally the exonerating pleas of these persons and how far they can be acted upon. 55 Cri L J 610 : 1954 Mad W N 41 : (1953) 2 Mad L J 425 : AIR 1954 Mad 442 (453) (Pt D) (Pr 39).

——Ss. 146 and 147—Evidence — Free fight between two parties—Cross cases — No evidence as to what actually happened and how injuries were received — Accused in neither case can be convicted. AIR 1955 N U C (Sau) 4103.

SECTION 147

SYNOPSIS

(Penal Code (45 of 1860), S. 147.)

1. Scope and applicability.
2. Conviction and sentence.
3. Conviction under—Necessaary ingredients to be proved.
4. Charge.
5. Conviction also under another section and separate sentences.

   See also Penal Code (1860), S. 148.
6. Conviction of less than five persons.
7. Right of private defence.
8. Sections 147 and 148.

1. Scope and applicability.

——Ss. 147 and 148—Offence not actually committed—Object of the accused to be judged by—Appreciation of surrounding circumstances and conduct of accused —Benefit of doubt — Intention to commit dacoity could not be inferred from the circumstances but the purpose for which they assembled was certainly unlawful as the possession of arms and ammunition by the accused was not consistent with peaceful assembly and the accused could be convicted under S. 147 and S. 148. See Penal Code (1860), S. 402. 1962 (1) Cri L J 3 : AIR 1962 All 13.

——Ss. 147, 146, 323, 149, 300, 302, 304 and 34—Unlawful acts - Rescue of cattle being lawfully taken to pound — Injury caused in commission of common object by an assembly of six persons—Whatever was done by each of the accused was in furtherance of common intention of all—The accused were guilty of an offence under S. 24, Cattle Trespass Act and Sections 147 and 323, I. P. C. read with S. 149 and 349, I. P. C.—(Cattle Trespass Act (1871), S. 24). See Penal Code (1860), S. 146. 1958 Cri L J 558 : AIR 1958 All 348 (DB).

——S. 147—Applicability — Number being less than five. There could be no unlawful assembly and no rioting—Prosecution could not prove that five or more persons out of the alleged large number of persons took part in the crime the charge under S. 147, Penal Code cannot be sustained. See Penal Code (1860), S. 141. AIR 1955 N U C (Andhra) 2042.

——Ss. 147, 141 — Prosecution under S. 147 of five or more named persons - Court entertaining doubt about presence of some of the persons reducing the number of the remaining persons below five—Conviction of latter not maintainable. See Penal Code (1860), S. 141. 1960 Cri L J 1571 : AIR 1960 Bom 515.

——S. 147—Unlawful assembly — Purpose of crowd only to demonstrate with black flags—Offence.

The purpose of a crowd was only to demonstrate with black flags and this was not an unlawful purpose. There is complete lack of evidence to show that there was a common object to commit any offence or illegal act by the crowd and in the absence of such common object any act even if committed by one of the crowd, could not make the others liable. 1960 Ker L T 948 : (1961) Mad L J (Cr) 45 (Ker) : 1961 (1) Cri L J 661 (Ker).

——S. 147—Charge under S. 147 against 12 persons constituting only members of unlawful assembly—Acquittal of nine — Remaining three cannot be convicted under S. 147.

Where the definite case for the prosecution was that the members of the unlawful assembly were accused 1 to 12 only and nine of them were properly acquitted, the remaining three cannot be guilty of an offence under S. 147. Case law Ref. 1959 Ker L R 1124.

——S. 147 — Scope—Offence under—Case on facts—Accused were tried under S. 147, Penal Code on the allegation that in order to prevent the complainants from tilling their lands, they attacked them jointly—It was not established that the complainants were in prior peaceful possession of the field in dispute. It was doubtful whether the complainants or the accused were in prior peaceful possession — Held, that the accused were entitled to acquittal because the accused would have to be taken actually presumptively to have gone to maintain possession and would not be held to form an unlawful assembly. AIR 1955 N U C (Madh B) 2408.

——S. 147—Hindu religious procession with music passing mosque on highway—Attack by Mahomedan crowd in vindication of supposed right of stopping music — They are guilty of being members of an unlawful assembly and rioting, punishable under S. 143 and 147, I. P. Code. See Penal Code (1860), S. 141. (1950) 55 Mys H C R 317.

——S. 147 — Applicability—Riot—Seventy or eighty persons assembled out of which twelve tried and convicted—In appeal nine acquitted—S. 148, applies. ILR (1959) Cut 111.

——S. 147—Conviction under—Common object with regard to at least five persons must be established.

The common object of assaulting, established with regard to four persons cannot be used to justify a conviction for rioting under S. 147 and a common object must be established which is common to at least five persons. Where apart from finding four accused persons guilty of other offences, there is no specific finding with regard to any overt act having been committed by these four persons aiding with others the common object the unlawful assembly is not established against them and they will not be legally liable for an ofience under S. 147 of the Penal Code. 1963 B L J R 332.

——S. 147—Applicability — Seizure of land by force under claim of right is not justified—Right should be got established by a suit in civil Court. A I R 1955 NUC (Pat) 5699.

——Ss. 147, 141—Criminal force—Extent of.

It is not necessary for an offence under S. 147, I. P. Code, that force or violence should be used to such an extent that death or grievous injury might be caused. For an offence under S. 147, I. P. Code, force or violence to whatever extent used, would be sufficient if it is used by all or some of the members of an unlawful assembly. 1957 Cri L J 1187 : A I R 1957 Raj 331 (335) (Pt E) (Pr 14).

2. Conviction and sentence.

——Ss 147 and 148—Sentence—Considerations.

The assemblage of 30 or 40 lathials at a place where the peaceable reaping of paddy is supposed to be in progress indicates an intention to use force; and where the complainant, who felt himself aggrieved, did not take the law into his own hands but had recourse to the authorities and sought and obtained the assistance of those in local charge of the forces of law and order, to attack such an unarmed man peaceably registering a protest in the very manner contemplated by law, does not call for an exercise of leniency. Moti Das v. State of Bihar, 1954 Cri L J 1706 : AIR 1954 S C 657 (659) (Pt D) (Pr 10).

—— S. 147—Sentence—Reduction.

Where the accused who had lost their jobs, were trying to ventilate their grievances but not in a lawful way and they were sentenced of the offence of rioting and, in revision, their conviction was upheld two years after the occurrence ;

Held, that the interests of justice did not require that they should be sent back to jail to serve the unexpired portion of the sentence and, therefore, the sentence passed should be reduced to the period of imprisonment already undergone by them. 1958 Andh L T 740.

——S. 147 - Charge of rioting - Common object charged not proved - Conviction not maintainable on basis of ancillary common object.

Where the primary common object as mentioned in the charge of rioting fails, it would not be proper to maintain a conviction on that charge by observing that, in any case the common object of assaulting the complainant and his men was established. If the primary common object fails, there should be no conviction on basis of the ancillary common object. AIR 1936 Cal 428, Rel. on. 1963 (1) Cri L J 46 : AIR 1963 Cal 3 (4) (Pt A) (Prs 7, 8) (DB).

——Ss. 147, 427—Applicability—Dispute about land Actual physical possession not proved—Conviction—Legality.

In cases of disputes about land, the most material consideration is the question of actual physical possession. Documentary evidence of title of recent date cannot afford a safe basis for the purpose of finding persons guilty of charges under Ss. 147 and 427, I. P. Code relating to possession of such lands.

Where the only act of possession alleged by the complainant party was that the land was cultivated three or four days prior to the date of the occurrence such a single, casual act of possession cannot be safely relied upon as furnishing a firm foundation for a finding of possession and unless actual possession has been clearly established, it is impossible to hold that the charges of rioting or of mischief could be brought home to the other party, who also claim to be in continuous possession of the land, as in such cases, the possibility of their acting in bona fide belief that that they had a right of possession cannot be excluded. ILR (1957) 1 Cal 510 : 1955 Cri L J 1247 : AIR 1955 Cal 474 (475) (Prs 7, 8).

——S. 147—Scope—Trial under Ss. 448, 147 and 341—Acquittal under Ss. 147 and 341—It means that the elements necessary to constitute offence charged have not been proved by the evidence called—It would be speculations of the worst type to hold that although the evidence fell short of the proof of rioting or of wrongful restraint, the intent to commit some unnamed offence survived the acquittals. Such speculations could never be indulged in administering criminal law. See Penal Code (1860), S. 448. AIR 1955 NUC (Cal) 5921.

——S. 147—Applicability—Only two men mentioned in F. I. R. to have assaulted but F. I. R. mentioning that there were other persons along with accused—Charge of rioting based on what was found in police report—Conviction under S. 147—Decision held did not require interference in revision. AIR 1955 N U C (Cal) 2898.

——S. 147—Evidence—Child witness—Offence under S. 308 read with Ss. 143 and 147 - Accused charged for an offence under S. 302 read with Ss. 149 and 147, I. P. Code—A boy of 12 or 13 years of age the only eye-witness— Discrepncies in his statement recorded before the committing magistrate and before the Sessions Judge—Such witness could not be relied upon for convicting all the accused. See Evidence Act (1872), S. 118. AIR 1955 NUC (Madh B) 3097 (DB).

——Ss. 147, 149 and 325—Charge under Ss. 325, 147 and 149 against several accused — Conviction of all under S. 147—Sentence—Court would not be justified in imposing a most serious punishment on one of the accused if there is nothing in the evidence to show that he had assaulted anybody or had taken a prominent part in the occurrence — Criminal P. C. (1898). S. 32. AIR 1952 Madh B 205 (206) (Pt A) (Pr 2).

——Ss. 147 and 160—Two parties fighting on open space between houses of locality — Want of proof of common object—Facts disclosing minor offence on public place—Conviction under S. 147 set aside and altered into one under S. 160. See Penal Code (1860), S. 160. 1957 MPC 138.

——S. 147—Both sides indulging in stone throwing—Persons from both sides injured — Death of one — It is difficult to fasten guilt on particular accused for injury caused to deceased—Accused convicted of rioting and acquitted of other charges — Sentence reduced to one already undergone. 1952 Mad W N (Cr) 18 : 1952 Mad W N 69 : 65 Mad L W 146 : 1952-1 Mad L J 244 : 1953 Cri L J 1898 : ILR (1952) Mad 562 : AIR 1954 Mad 15 (17) (Pt A) (Pr 10) (DB).

——Ss. 147, 146 — Mammoth rioting involving large number of persons — Evidence and proof—Principles to be borne in mind by Court stated. See Penal Code (1860), S. 146, 1952 Cri L J 583 : AIR 1952 Mad 267.

——S. 147—Mammoth rioting—Merely because some rioters have received gun shot wounds at the hands of police they cannot be presumed to have been more aggressive than others. 1951-2 Mad L J 446 : 1951 Mad W N 829 : 1951 Mad W N (Cr) 249 : 1952 Cri L J 583 : ILR (1952) Mad 728 : AIR 1952 Mad 267 (271) (Pt C) (Pr 14).

——S. 147—Common object — Proof—Mere presence not sufficient. See Penal Code (1860), S. 146. 1954 Cri L J 632 : AIR 1954 Mys 75 (DB).

——Ss. 147 and 379—Appellants cutting and forcibly removing standing crops from disputed land — Finding that complainant was in possession of land and had grown crops on it at material time — Appellants' conviction under Ss. 147 and 379 maintained. (1964) 6 O J D 140: 30 Cut L T 446: 1965 (2) Cri L J 393 : AIR 1965 Orissa 166 (168) (Pt B) (Pr 9) (DB).

——S. 147 — Accused not mentioned in F. I. R. as one of assailants of deceased — Held it was good ground for not convicting him under S. 302/149— His presence and participation in riot well established —His conviction under S. 147 held well justified. See Penal Code (1860), S. 302/149. ILR (1952) Cut 219.

——Ss. 147, 148, 326/149, 302 — Rioting — Common object to assault deceased not established — One of accused guilty of murder and convicted under S. 302 —Others held could not be convicted under Ss. 147, 148 and 326/149. 51 Cri L J 331 : ILR 28 Pat 762 : AIR 1950 Pat 44 (48) (Pt C) (Pr 8) (DB).

——S. 147—Evidence — Conviction — Free fight between two parties with rifles and sharp instruments— Persons on both sides killed and injured — Both parties filing cross cases— Evidence did not establish what actually had happened when the two parties met and how men of each party came to receive the injuries — Accused in neither of the cases could be convicted. See Penal Code (1860), S. 146. AIR 1955 N U C (Sau) 4103.

——Ss. 147 and 447—Applicability — Accused numbering more than 50 going in company of Court's officer to take delivery of field under order of Court —Scuffle—Offence.

Where the accused (more than 50) accompanied by an officer of Court go to the field for effecting delivery of possession to the accused as per order of the Court and a scuffle ensue: between them and the complainant, the accused cannot be said to have formed an unlawful assembly as they went to the field for a lawful purpose. And as there is no criminal intent to commit any offence, etc, there is no criminal trespass in such a case. The accused are, therefore, entitled to be acquitted of the charges under Ss. 147 and 447, Penal Code. 1960 Cri L J 1665 : AIR 1960 Tripura 43 (43) (Pr 3).

3. Conviction under—Necessary ingredients to be proved.

——S. 147 — Applicability — Murder by several accused — Deceased sending buffaloes in B's field for grazing — Attitude of deceased leading to sudden quarrel—Several accused armed with 'luhangis' and 'lathis' arriving at the spot and assaulting deceased, causing injuries on the head of deceased who dies soon after — No enmity which might have prompted the murder established—Medical report stating that first injury was grievous which caused his death — Held, that in the circumstances it could not be held that all the accused were there assembled with the common object or with the common intention of murdering deceased. AIR 1955 N U C (Madh Bha) 8097 (DB).

——S. 147—Common object.

Although it appears from the accused's statement in the Sessions Court that there were more than five persons, the accused cannot be said to be a member of the unlawful assembly when he had no common object with them to commit an offence. Further where his presence in the assembly was due to duress he would be protected by S. 94. See Penal Code (1860), S. 146. 1957 Cri L J 344 : AIR 1957 All 184 (DB).

——S. 147 — Common object — Change over — Evidence.

Change over of common object could only be established by evidence of the conduct of details connected with the movement in the activity of the assembly. See Penal Code (1860), S. 141. 1958 Andh L T 856.

——S. 147 — Conviction — Failure to consider case against each of several accused— Legality of conviction. (Criminal P. C. (1898), S. 367) 1958 Andh L T 559.

——S 147—For offence of rioting at least five persons and use of force essential — If less than five persons, no offence of rioting — Allegation of a particular number of persons participating in the rioting — Prosecution unable to establish that five or more than five persons took part in the crime—Change under S. 197 cannot be sustained. See Penal Code (1860), S. 141. AIR 1955 N U C (Andhra) 2042.

——S. 147—Applicability — Common object— Proof —Necessity.

In order to sustain a conviction under S. 147, it is essential that the person forming the unlawful assembly should be animated by a common object and in the absence of a clear finding to that effect the conviction cannot be sustained.

The mere presence in an assembly does not make such a person a member of an unlawful assembly unless it is shown that he had done something or omitted to do something which would make him a member of an unlawful assembly, or unless the case falls under S. 142 of the Penal Code. It is necessary for the prosecution to lead evidence pointing to the conclusion that all the accused had done or been committing some overt act in prosecution of the common object of the unlawful assembly. The omnibus evidence in general terms to the effect that all these persons and many more were the miscreants and were armed with deadly weapons, like guns, spears, pharsas, axes, lathis, etc., naturally has to be very closely scrutinised in order to eliminate all chances of false or mistaken implication. AIR 1956 S C 181, Rel. on. (1959) 1 O J D 460 : 25 Cut L T 433.

——Ss. 147 and 146—Ingredients of offence.

Essentials to be proved (i) use of force or violence by an unlawful assembly or by any member thereof— (ii) use of violence in pursuance of common object of the assembly — Where essentials are complied with, conviction under S. 147 is proper. See Penal Code (1860), S. 146. ILR (1957) Cut 642

——S. 147 — Unlawful assembly — Necessary ingredients to be proved.

Where a party goes to a spot armed, that by itself is no offence. If a fight takes place and then assault, then only those will be liable who actually take part in the assault, and not those who happen to be present there, because mere presence in the circumstances cannot show that those who were present had shared the common object of the unlawful assembly. In such a case it has further to be shown that those present also did some overt act from which it can reasonably be inferred that they shared the common object of the assembly, namely, to assault. 1957 B L J R 442 : 1958

Cri L J 1215 : 1957 Pat L R 156 : AIR 1958 Pat 492 (494) (Pt B) (Pr 4).

——Ss. 147 and 149 — Common object and acts done in prosecution must be definitely found and not merely left to conjecture or inference from other facts found in the judgment. There should also be a finding as to whether the acts done were committed for the prosecution of the common object of the assembly or such as the members of that assembly knew to be likely to be committed in prosecution of that object, or even as to when the assembly came into being. See Penal Code (1860), S. 149. 1956 Cri L J 1358 : AIR 1956 Trav-Co 230 (DB).

4. Charge.

——Ss. 147, 148 — Essentials.

For a charge under Ss. 147 and 148, there need not be a prior meeting of minds, of the accused and it is enough that each accused had the same object in view and their number was five or more and that they acted as an assembly to achieve that object The commonness of purpose is an inference of fact which courts of fact are entitled to make. AIR 1956 S C 513, Foll. 1962 (1) Cri L J 394 : AIR 1962 Andh Pra 166 (170) (Pt C) (Pr 39) (DB).

——Ss. 147 and 328 — Applicability — Absence of charge under S. 147 — Effect — Conviction.

In the absence of a charge under S. 147, Penal Code, it is only the persons who caused the injuries that can be punished for their individual acts. It cannot be said in such a case that it is not necessary to establish that any particular accused person inflicted the injuries or caused hurt to the complainant and that it is sufficient to show that they were present there. (1957) Mad L J (Cr) 474 : (1957) 2 Andh W R 201 : 1959 Cri L J 167 : AIR 1959 Andh Pra 102 (103) (Pt A) (Pr 4).

——S. 147 — Accused charged with common object of terrorising local administration by taking recourse to violent methods—Local administration acts through its agents — Object to terrorise agents of law and order held to be aimed at local administration—Charge under S. 147, held not vague. 1965 (1) Cri L J 160 : AIR 1965 Cal 89 (94) (Pt F) (Pr 31) (DB).

——S. 147 — Charge under S. 326/34 against some of accused only, is legal even when there was no charge under S. 326/149 against all accused. See Criminal P. C. (1898), S. 239. 55 Cri L J 963 : AIR 1954 Cal 362 (DB).

——S. 147 — Charge — Failure to frame—In spite of S. 362 (4), Criminal P. C., the Magistrate must frame a charge because strict adherence to S. 362 (4), Criminal P. C. would result in prejudice to the accused — Held, on facts that it could not be said that the accused were not prejudiced at all by failure to mention the common object in the charge which is an essential element in the offence of rioting — Conviction under S. 147 failed for failure to mention charge — Question of conviction under S. 149 did not arise as that was dependent upon conviction under S. 147. See Criminal P. C. (1898), S. 362 (4). 1954 Cri L J 1254 : AIR 1954 Mad 785.

——Ss. 147, 323 — Charge under — Conviction under S. 323 — Legality.

Charge under S. 147 — No evidence that a particular accused's act was responsible for the hurt — No one can be convicted under S. 323. (1954) 1 Mad L J 497 : 1954 Mad W N 124 : 1954 Cri L J 1254 : AIR 1954 Mad 785 (788) (Pt B) (Pr 10).

——S. 147 — Charge under — Statement of common object — Necessity — Effect of omission — (Criminal P. C. (1898), S. 225).

It is incumbent upon the Magistrate to specify the common object of the unlawful assembly in the charge itself under S. 147, Penal Code. Mere statement of the common object to commit rioting would not be sufficient in law to indicate as to what really their common object was. The Magistrate should have mentioned one of the objects as the common object as enumerated in S. 141, Penal Code.23 Cut L T 88 : 1957 Cri L J 988 : AIR 1957 Orissa 190 (191) (Pt A) (Pr 5) (DB).

——S. 147 — Charge — Error or omission in—Effect — (Criminal P. C. (1898), Ss. 225, 537).

Where the only common object alleged in the charge under S. 147, Penal Code, was to assault the members of the opposite party and to enforce the supposed right and claim over the produce of the disputed fields, whereas in the judgment of the Additional Sessions Judge, it was found that the common object of the assembly was to commit the offence of criminal trespass and theft of the paddy of the opposite party and also for assaulting them if they offered resistance, that finding is not vitiated on the ground that in the charge the common object was not stated to be to commit theft and criminal trespass, AIR 1956 S C 116, Foll. 1957 Cri L J 644 : ILR (1957) Cut 275 : AIR 1957 Orissa 117 (120) (Pt B) (Pr 8) (DB).

——Ss 147, 323, 324/34 — Convictions under Ss. 324 and 324/34 altered by appellate Court into convictions under Ss. 324 and 323/34 in spite of acceptance by trial Court of compromise in respect of offences under S. 323 — Compromise can be given effect to even in revision against appellate order and charges under S. 323 and S. 323/34 must fail — Because of compromise charge under S. 147 also fails when the common object of unlawful assembly was to assault — Criminal P. C. (1898), S. 345. 1964 (2) Cri L J 111 (Pat).

——Ss. 147, 148, 149 and 304 — Charge — There can be conviction under S. 304 read with S. 149 without there being substantive charge either under S. 147 or S. 148. AIR 1955 N U C (Pat) 1308.

——Ss. 147 and 325 — Charge under S. 147, Penal Code fallen through — No reference in the charge to the furtherance of a common intention nor to the specific act of any of the accused — Conviction of some only under S. 325, Penal Code, cannot be sustained, particularly where the prosecution story is unsatisfactory and unreliable. See Criminal P. C. (1898), S. 225. 52 Cri L J 1024 : AIR 1951 Raj 135.

5. Conviction also under another section and separate sentences.

See also Penal Code (1860), S. 148.

● ——Ss. 147, 149, 323, 71 — Conviction — Separate convictions under S. 147 and S. 323 read with S. 149 — Separate sentences — Legality.

Per Malik, C. J. and Mukerji, J. (Desai, J.; dissenting) — Where an unlawful assemply has used force or violence, it becomes guilty of rioting under S. 146 and can be convicted and punished under S. 147, Penal Code. If, however, as a result of the use of that force or violence simple hurt is caused, every member of the unlawful assembly can also be convicted and sentenced under S. 323 read with S. 149, Penal Code. An offence under S. 147 need have no ingredient which is common to S. 323, nor for an offence under S. 323 there need be any ingredient which constitutes an offence under S. 147. Both are separate offences for which separate convictions and separate sentences can be awarded. No difference can be made between a case where one blow is given by a member of an unlawful assembly and a case where more than one blow is given by a member thereof, and the restrictions given in S. 71 will not apply to such a case. ——

Per Desai, J. — It cannot be held that the punishment that can be inflicted on a member of an unlawful assembly for the offence of Ss. 147 and 323, Penal Code, is in no circumstances subject to the restrictions imposed by the second or third part of S. 71 and that it is irrelevant to consider whether only one blow was given by a member of an unlawful assembly or more than one.

An offence of S. 147 can be committed even if an offence of S. 323 is not committed and vice versa. It does not, however, follow that the punishments for the two offences can never be governed by the third part of S. 71. If an offence of S. 147 is committed without an offence of S. 323 being committed at the same time and subsequently an offence of S. 323 is committed the punishments for the two will certainly not be governed by S. 71; for example where two blows are dealt. But if an offence of S. 147 is committed just because a member commits an offence of S. 323, the position is altered completely.

A single act with a definite beginning and a definite end and impelled by a single impulse cannot be split up into two acts like this. There is only one act done when one blow is given. AIR 1953 All 315 : 1953 Cri L J 711, Overruled. Sundar Singh v. The State, 1955 Cri L J 671 : 1955 All L J 293 : 1955 All W R (H C) 316 : ILR (1955) 1 All 472 : AIR 1955 All 232 (234, 235) (Pt A) (Prs 5 to 7, 12, 13) (FB).

——Ss. 147, 149 and 325—Conviction and sentence—Offence under S. 147 is complete when member of unlawful assembly uses force or violence — If other offences are committed each member becomes liable, if same is done in furtherance of common object — — S. 149 is not substantive offence—It only declares liability — Conviction under S. 147 and S. 325 read with S. 149 will not be unlawful. AIR 1955 N U C (All) 3523.

——Ss 147 and 353—Criminal P. C,. S. 233 — Different offences — Conviction for each offence is not illegal. See Criminal P. C. (1898), S. 233. AIR 1955 NUC (All) 2683.

——S. 147 — Simultaneous conviction under S. 147 and S. 323 read with S. 149, I. P. Code — Legality is valid as there is a vital distinction between a conviction under S. 147 and a conviction under S. 323 read with S. 149. See Criminal P. C. (1898), S. 233. 1954 Cri L J 1450 : AIR 1954 All 689.

——Ss. 147, 323 and 326—Conviction—Legality of.

There is nothing illegal in conviction both under Ss. 147 and 323 or 326. AIR 1926 All 225; 24 All L J 178; AIR 1933 All 819; 34 Cri L J 1099; AIR 1952 All 92; 7 All 757 (FB ; 41 Cal 836, Foll. 1953 All L J 408 : 1953 All W R (HC) 399 : 1953 Cri L J 1677 : AIR 1953 All 726 (728) (Pt B) (Pr 14).

——Ss. 147, 71, 149 and 325 — Scope and applicability of S. 71 — Separate sentence—An accused can be punished separately for the offences of Ss. 147 and 323 or 324 or 325 or 326 I. P. C. read with S. 149, I. P. C. (Criminal P. C (1898), S. 35). See Penal Code (1860), S. 71. 1953 Cri L J 1222 : AIR 1953 All 510.

——Ss. 147, 149 and 323 — Convictions under S. 147 and under S. 353 read with S. 323 — No individual act under S. 323—Legality of conviction.

Where the accused are convicted both under S. 147 and S. 323 read with S. 149, I. P. C. and none of them is convicted for himself causing any injury under S. 323, I. P. C. but only for the act of some members of an unlawful assembly of which they were members, their conviction under S. 323 read with S. 149, I. P. C. cannot stand as the conviction under S. 147, I. P. C. depends also on the same facts and they cannot be punished twice over in respect of facts which constitute one offence. AIR 1940 Nag 120, Rel. on. 1952 All L J 392 : 1953 Cri L J 711 : AIR 1953 All 315 (316) (Pt B) (Pr 4).

[Overruled in AIR 1955 All 232.]

——Ss. 147, 149 and 325—Conviction—Five persons tried on charge of offences under S. 147 and S. 325 read with S. 149 — Acquittal of two in appeal—Sentence under S. 147 maintained against remaining three—Legality.

Five accused were charged with offences under S. 147 and S. 325 read with S. 34, Penal Code and were tried and convicted for offences under S. 147 and S. 325 read with S. 34, Penal Code; on appeal the Sessions Judge acquitted two of them and maintained the conviction and sentence of the other three; they applied in revision to the High Court.

Held : Their conviction under S. 147, Penal Code cannot stand in the absence of evidence that there were other persons who participated in the assault along with them.

In view of the evidence in the case and the findings arrived at by the trial Court it was open to alteration of the conviction and sentence under S. 325 read with S. 34, Penal Code, where it did not cause any prejudice to the accused. AIR 1948 All 162, Rel. on. 1952 All Cri R 113 : 1952 All L J 436 : 1952 All W R (HC) 362 : 1952 Cri L J 1737 : AIR 1952 All 941 (942) (Prs 3, 4).

——Ss, 147, 149, 295 and 297—Criminal P. C. (1898), S. 535 (1) — Charge under S. 295/149, Penal Code — Conviction under S. 297/149, Penal Code—Circumstances of case such that accused could be convicted under S. 147, Penal Code even in absence of charge—Mere absence of conviction under S. 147, Penal Code is no ground for setting aside their conviction where there has been no failure of justice. See Criminal P. C. (1898), S. 535 (1). AIR 1952 All 878.

——Ss. 147 and 71 — Scope of—Offences punishable under Ss. 147 and 323/491, Penal Code. Fact that accused persons were members of an unlawful assembly of which the common object was to give a beating to another person and if is not proved that they had caused hurt to any one, their act constitutes two offences punishable under S. 147 and S. 323/149 — Case falls under S. 71 (2). Aggregate sentence should not exceed the limit which is prescribed in respect of one of them. See Penal Code (1860), S. 71. AIR 1952 All 92.

——Ss. 147, 323 — Conviction under another section.

A person who actually causes hurt and is also a member of an unlawful assembly can be convicted of committing riot under S. 147 and of causing hurt under S. 323. ILR 7 All 757, Rel. on. 1951 R D (HC) 267 : 1951 All W R (HC) 597 : AIR 1952 All 92 (92) (Pt A) (Pr 4).

——Ss. 147, 299, 300, 302, 304, 109 and 34 — Four accused armed with lathis and one with spear—Common object of beating deceased—One member, being struck by deceased, becoming incapable of taking further part—Rest beating deceased causing several injuries resulting in death — Offences committed by accused stated.

Due to old enmity, five accused, four armed with lathis and one with a spear, intended to give beating to the deceased. With this intention they attacked the deceased. One of the accused, A, aimed a first lathi blow at the deceased who avoided it and succeeded in striking a lathi at 'A'. A fell down and could not take any further part in the incident on account of the injuries he received. The rest of the accused then beat the deceased with lathis and spear as a result of which the deceased received as many as 29 injuries including seven incised and three contused wounds on the head and died instantane-

ously. As to what offences were made against the accused including A :

Held that (1) the accused formed an unlawful assembly with the common intention of giving beating to the deceased. They further did commit the offence of rioting the moment 'A' attacked the deceased;

(2) the accused, other than A, were guilty under S. 302 read with S. 34.

(3) A was guilty of the offence under S. 304, Part II read with S. 109. 1950 All L J 246 : 51 Cri L J 1133 : 1950 All W R (HC) 376 : ILR (1951) 2 All 141 : AIR 1950 All 418 (419 to 421) (Pt A) (Prs 7, 9, 12) (DB).

——Ss. 147, 148, 149 and 325 — Sentences—Accused sentenced for offences under Ss. 149 and 325—Separate sentences under Ss. 147 and 148, not legal. AIR 1934 Mad 388, Rel. on. ILR (1962) Andh Pra 313 : 1963 (2) Cri L J 70 (Andh Pra).

——S. 147—Sentence—Separate sentences—One for offence under S. 147 and other for substantive offence read with S. 149 — Not legal, as it offends the provisions of S. 71. See Penal Code (1860), S. 71. 1958 Andhra L T 109.

——Ss. 147, 379—Charge under both sections—Common object of offences under Ss. 147 and 379 same—There should be no separate sentences. AIR 1955 NUC (Assam) 2850.

——S. 147—Conviction — Offences under S. 147 and another offence under S. 325/149, I. P. C. held to be committed by the same act and the accused convicted therefor—The offenders were not liable to be punished for more than one such offences for the accused cannot be punished twice for the same act. See Penal Code (1860), S. 71. 1955 Cri L J 1033 : AIR 1955 Bhopal 9.

——Ss. 147, 302, 34 and 149 — Several accused charged under S. 302/149, charge under S. 147, I. P. C. not established — Conviction of the accused under S. 302 read with S. 34 permissible provided no prejudice results therefrom and the facts are such that the accused could have been charged alternatively under S. 149 or S. 34, I. P. C. Such a situation might arise only when the common intention is co-extensive with the common object and does not go beyond the common object. See Penal Code (1860), S. 302. 1965 (1) Cri L J 160 : A I R 1965 Cal 89 (DB).

——Ss. 147 and 149'— Offence under—Deceased persons not having injuries in such a manner or in such circumstances as would indicate anything like grim determinations on the part of assailants to endanger their lives—Held that all the accused persons could be held as members of unlawful assembly whose common object was at least to cause hurt—That they could be aware of possibility of grievous hurt but not of killing any person — That the case fell under S. 325 read with S. 149, besides under S. 325 read with Ss. 149 and 147 — Offence under S. 323 being minor form of offence to the offence under S. 325, conviction under S. 323 was superfluous. See Penal Code (1860), S. 302. 1964 (1) Cri L J 185 : A I R 1964 Madh Pra 182 (DB).

——S. 147 — Accused charged under Ss. 147 and 302/34 — Conviction under Ss. 147 and 325/34 legal. See Penal Code (1860), S. 34. A I R 1955 N U C (Mad) 3941.

——S. 147—Complaint under Ss. 147 and 380 against three accused but summoned under Ss. 380 and 323 — Participation of other accused in occurrence was not proved — Charge under S. 380 also not fully established — Prosecution evidence regarding assault was quite convincing as there were no material discrepancies in statements—Charges under Ss. 147 and 380 must fail but accused can be held guilty of the minor offence under S. 323 for their individual acts of assault. See Penal Code (1860), S. 323. 1965 B L J R 278.

6. Conviction of less than five persons.

——Ss. 147, 146 — Conviction of less than five persons.

The identity of the persons comprising the assembly is a matter relating to the determination of the guilt of the individual accused, and even when it is possible to convict less than five persons only, S. 147 still applies if upon the evidence in the case the Court is able to hold that the person or persons who have been found guilty were members of an assembly of five or more persons, known or unknown, identified or unidentified. 1950 Mad W N (Cri) 83 : 1950 Raj L W 62 : 1950 Mad W N 327 : 63 Mad L W 501 : ILR 29 Pat 391 : 51 Cri L J 1057 : 1949 F C R 834 : 1950 S C J 143 : 52 Bom L R 512 : A I R 1950 F C 80 (81) (Pt A) (Pr 7).

——S. 147 — Conviction of less than five persons — Satisfactory evidence that more than five persons took part in abduction and criminal trespass — All persons are members of unlawful assembly —Conviction of only three of them under S. 147 is legal. See Penal Code (1860), S. 146. AIR 1954 All 249.

——S. 146 and S. 147—Applicability—Riot—Seventy or eighty persons assembled — Out of which twelve tried and convicted — In appeal nine acquitted — S. 147 applies.

A number of unknown and unidentified persons were stated to have taken part in the rioting. The evidence showed that 70 or 80 persons had assembled at the place of occurrence. Out of these 70 or 80 only 12 were named and sent up for trial before the Magistrate who convicted them and sentenced each to rigorous imprisonment for three months under section 147—The Sessions Judge on appeal, however, acquitted them all except the three petitioners. The rest nine of the accused persons were acquitted.

Held on the evidence that there were about 70 or 80 persons who had participated in the alleged occurrence out of which 12 were sent up for trial and that S. 147 applied. A I R 1950 F C 80, Rel. on. A I R 1939 Mad 392; A I R 1939 Lah 416; A I R 1952 All 941; A I R 1945 All 31, Disting. I L R (1959) Cut 111.

——S. 147 — Evidence — Finding that more than five persons formed into unlawful assembly and committed riot — It is immaterial that only two persons happen to be convicted while others are acquitted. AIR 1955 N U C (Raj) 2194 (DB).

7. Right of private defence.

——Ss. 147, 143, 323, 97, 99 — Illegal attachment of property—Judgment-debtor is not entitled to form an unlawful assembly along with his men and go to the enclosure with the common object of taking away the attached property by force from the enclosure where the sapurdar had kept it — If they use force with this common object they commit an offence under S. 147 — No right of self-defence. 1959 All L J 781 : 1959 All W R (HC) 637 : 1960 All Cr R 1 : 1960 Cri L J 1040 : ILR (1960) 1 All 53 : A I R 1960 All 453 (455) (Pt C) (Pr 8).

——Ss. 147, 146, 141, 149, 34, 304, 323 and 325 — Applicability—Private defence.

Persons who are asserting their right of private defence of property are doing a perfectly legitimate act and the assembly is not an unlawful assembly. Consequently the provisions of section 149, I. P. Code cannot be invoked so as to make every one of those persons vicariously liable for the acts of their comrades. If any one of them exceeds that right

and gives a blow which causes death that is his individual act and he alone would be liable for the consequences thereof. If there is no evidence whatsoever to fix the identity of the individual who delivered that blow the result would be that no one of those persons could be convicted of an offence under S. 304.

Similarly as regards the grievous hurt and simple hurt caused, apart from the fact that the causing of them is legitimate in the exercise of the right of private defence, in the absence of evidence as to who caused the hurts, there can be no presumption that the lathi wielded by every one of the appellants must have necessarily struck one or the other of the injured persons on the complainant's side. As those who did not hit any one committed no offence, every one is entitled to the benefit of doubt.

Section 34 also will not apply because there was no pre-arranged plan. **1954 Cri L J 1710: AIR 1954 All 771 (773) (Pt B) (Prs 9 to 11) (DB).**

——**Ss. 147, 103, 148, 304, 323 and 325** — Right of private defence of property — Dispute regarding cutting of sugarcane crop — Rioting — Each party charging other as aggressor — Title legally with accused under decree — Accused had right of private defence—(Tenancy Laws — U. P. Tenancy Act (17 of 1939), Ss. 160 (3) and 180). See Penal Code (1860), S. 103. **AIR 1953 All 327.**

——**Ss. 147 and 148**—Rioting and unlawful assembly — Private defence — Dispute regarding possession — Use of force by accused as lawful owner of land to vacate trespass resulting in injuries — No time to get the help of authorities in time — Conviction of accused for rioting and unlawful assembly not justified — The accused as lawful owners were only maintaining their possession and not enforcing any right — They had the right to use force to eject the trespassers — Use of force was not excessive. See Penal Code (1860), S. 144. **I L R (1965) Andh Pra 193 (DB).**

——**Ss. 147 and 353** — Seizure of account books — Seizure not authorised by law — Accused retrieving books forcibly—Force used not more than necessary — No injury caused — Accused held had right of private defence — No offence committed. See Penal Code (1860), S. 99. **(1960) 11 S T C 850 (Andh Pra).**

——**Ss. 147, 34, 96, 304, Part II and 325** — Evidence Act (1872), S. 105 — Dispute over possession of land — Fight — One party receiving grievous injuries resulting in death of one person — Party of accused receiving minor injuries — Plea that accused party was attacked not established — Assembly held not unlawful — Right of private defence did not arise — Absence of premeditation—Conviction under S. 304 held not maintainable. See Penal Pode (1860), S. 34. **52 Cri L J 209 : AIR 1951 Assam 48 (DB).**

——**S. 147** — Right of easement — Use of criminal force, if offence—Accused claiming right of easement to pass over inner courtyard of complainants' house through gap in complainants' boundary wall — Right disputed by complainant—Complainant trying to close gap — Complainants' act does not amount to mischief or wrongful restraint — No right of private defence arises in favour of accused party — Accused party using criminal force to prevent closing of gap are guilty of rioting. See Penal Code (1860), S. 96. **1963 (1) Cri L J 46 : AIR 1963 Cal 3 (DB).**

——**Ss. 147 and 141** — Assembly lawful in its inception — Other party found to be aggressor—Assembly does not become unlawful by repelling attacks by other party. See Panal Code (1860), S. 141. **AIR 1952 Madh Bha 205.**

——**S. 147—Applicability — Private defence — Defence of possession of property — No offence.**

Once it is established that the accused were actually in possession over the land where the fighting took place and they were ploughing it, and the deceased and his sons went there to take possession forcibly on the basis of certain compromise decree and a judgement and on the basis of the mutation order, the accused would not be guilty of either committing a riot or for causing injuries or even for committing a murder if they merely tried to maintain their possession. Where the other party was found to be the aggressor, the accused cannot be deemed to be guilty under S. 147, I. P. C., if they merely repel attacks by the other party. **1955 Cri L J 705 : AIR 1955 Manipur 21 (27) (Pt B) (Pr 34).**

——**Ss. 147, 148 and 99**— Case of rioting — Right of private defence of property — When can be claimed — The right of private defence under S. 99, I. P. C. is an answer to a charge of rioting: but there can be no right of private defence when the riot is premeditated on both sides, unless the object of the assembly is shown to have been to repel forcible and criminal aggression. The right of private defence can be exercised only in special circumstances and with restrictions imposed by that section. See Penal Code Code (1860), S. 99. **(1962) 28 Cut L T 548.**

——**Ss. 147 and 146 — Applicability — Sections 96. 97 and 100.**

Where the evidence did not warrant the conclusion that the accused party had gone prepared for a fight, but that the fight ensued as a result of the prosecution party rushing at them armed with thengas and assault them, it cannot be held that the accused party had the common object of assaulting the prosecution party. The conduct of the accused party in beating some members of the prosecution party which resulted in the death of one of them amounted to an act of exercise of the right of private defence of their person. In the circumstances it cannot also be held that they exceeded that right by causing the death. At any rate when the evidence raises a doubt with regard to that, the accused are entitled to an acquittal. **(1958) 24 Cut L T 215.**

——**S. 147** — Member of unlawful assembly — Unauthorised entry of police party into a math for search of arms and arrest of some inmates — Police party cannot be held to have acted in due discharge of their duties and under process of law — Resistance to police — Not an illegal act to make the resisting members as members of unlawful assembly. See Penal Code (1860), S. 142. **1957 Cri L J 769 : AIR 1957 Orissa 130 (DB).**

——**Ss. 147, 323, 99 and 104** — Conviction — Legality — Unlawful seizure of cattle — Rescue — If the seizure of the cattle is not proved to be legal, their rescue by the accused also could not be said to have been caused by them as being members of an unlawful assembly in asmuch as the object of rescuing the cattle seized could not be said to be unlawful — No offence — Minor injuries caused to complainant by accused while rescuing cattle illegally seized — No conviction under S. 323, I. P. C., injuries being caused in exercise of right of private defence — (Cattle Trespass Act (1871), Ss. 24 and 10). **AIR 1955 N U C (Pat) 1869.**

——**S. 147** — Assistant Sub-Inspector from Punjab State coming with staff to village in Rajasthan for investigation of a case in Punjab — Searches and seizure of properties of accused by Assistant Sub-Inspector held to be without jurisdiction — Police party held not to have acted in good faith — Right of private defence held however not available to accused under circumstances of case — Offence under S. 395 held not proved — Conviction under Ss. 332,

383 upheld. See Penal Code (1860), S. 52. 1964 Raj L W 126.

8. Sections 147 and 148.

——Ss. 147 and 148 — Applicability of ratio of the decision in Boya Husainappa in 1958 Andh L T 109 applies as much to sentence under S. 148, Penal Code as to a sentence under S. 147, Penal Code because both deal with offence of rioting, one with rioting simpliciter and the other with rioting armed with deadly weapones. See Penal Code (1860), S. 148. 1963 (1) Cri L J 415 : AIR 1963 Andh Pra 146 (DB).

——Ss. 147 and 148 — Rioting—Only persons armed with deadly weapons are liable under S. 148—Others not so armed are liable under S. 147. ILR (1962) Andh Pra 313 : 1963 (2) Cri L J 70 (Andh Pra).

——Ss. 147, 148 — Weapons used not shown to be dangerous or deadly—Conviction.

——Muslim crowd originally unarmed attacking Hindu procession in the first instance with stones not shown to be either dangerous or deadly — Later on some bamboo sticks and clubs used—Prosecution not proving that weapons used were either dangerous or likely to cause death — Conviction should be under S. 147 and not under S. 148. AIR 1942 Mad 213, Rel. on. (1950) 55 Mys H C R 317 (DB).

——Ss. 147 and 148—Specific charge under S. 148 along with other offences — Omission to convict accused under that section — Conviction cannot be altered to one under S. 147 in appeal. See Penal Code (1860), S. 148. AIR 1961 Orissa 29.

——Ss. 147, 148 and 149—Scope and applicability.

Section 148 deals with direct responsibility and a rioter who does not carry a deadly weapon himself cannot be made liable under that section by virtue of S. 149. The appropriate section to apply to him is therefore S. 147. 1956 Ker L T 30 : ILR (1956) Trav-Co 1 : 1956 Cri L J 1358 : AIR 1956 Trav-Co 230 (233) (Pt G) (Pt 10) (DB).

SECTION 148

SYNOPSIS

(Penal Code (45 of 1860), S. 148.)

1. Applicability.
2. Conviction and sentence.
3. Deadly weapon.
4. Charge.
5. Conviction under different sections.
   See also Penal Code (1860), S. 147.
6. Proof.
7. Right of private defence.
   See Penal Code (1860), S. 147.
8. Sections 148 and 149.
9. Special Judge under M. B. Public Security Act (19 of 1953)—Jurisdiction to try offences under S. 148.
10. Leave to appeal to Supreme Court.

1. Applicability.

——S. 148 — Rioting — Only persons armed with deadly weapons are liable under S. 148 — Others not so armed are liable under S. 147. I L R (1962) Andh Pra 313 : 1963 (2) Cri L J 70 (Andh Pra).

——S. 148—Essentials.

For a charge under Ss. 147 and 148 there need not be a prior meeting of minds of the accused and it is enough that each accused had the same object in view and their number was five or more and that they had acted as an assembly to achieve that object. The commonness of purpose is an inference of fact which Courts are entitled to make. See Penal Code (1860), S. 147. 1962 (1) Cri L J 394: A I R 1962 Andh Pra 166 (DB).

——Ss. 148 and 149 — Unlawful assembly — Some accused acquitted—Others can still be convicted.

The argument that convictions under S. 148, and by applying under S. 149, Penal Code, cannot be sustained, in view of the acquittal of the other accused is not acceptable. Notwithstanding the acquittal of some of the accused, if the Court is able to find, that the convicted person and some others, though known or unknown, were members of an unlawful assembly, then the conviction of the known or identified person can stand. A I R 1953 S C 364; AIR 1950 FC 80, Foll. 1959 Ker L J 664: 1959 Ker L T 704.

——S. 148 — Applicability — Member of unlawful assembly not armed with deadly weapon—He cannot be convicted under section—A I R 1942 Mad 420, Not foll. AIR 1955 NUC (Madh B) 3862 (DB).

——Ss. 148 and 300—Applicability — A and his companions armed with lathies and dagger trying to take away A's wife from the house of A's father-in-law — A striking his dagger in his daughter's abdomen in scuffle — Death of daughter — Offence committed is under S. 304, Penal Code — There being no evidence to indicate the accused entered the house of his father-in-law with the intention necessary to constitute criminal trespass and that he entered the house after having made a preparation to assault his wife A's conviction under Ss. 452 and 148 must be set aside. See Penal Code (1860), S. 300. 1957 Cri L J 1405 (2): AIR 1957 Madh Pra 217 (DB).

——Ss. 148, 141 (Fifthly), 142, 143 — Unlawful assembly—What constitutes—Hindu Muslim factions — Agreement as to right to take procession with music in front of mosque on public highway — Such agreement does not give any right to the Muslim community to prevent the processionists to proceed along the mosque on the public highway with music —It cannot have the effect of a decree of Court or an award of arbitrators defining and declaring the rights of the parties—Right to use public highway is in the nature of a fundamental right and does not originate in agreement on custom — By obstructing procession the persons would constitute themselves an unlawful assembly within the meaning of S. 141. See Penal Code (1860), S. 141 (Fifthly). 1961 (1) Cri L J 291 : AIR 1961 Mys 57 (DB).

——S. 148—Applicability—Essentials of.

Section 148 of the Penal Code can only be employed when the rioters are armed with deadly weapons or with weapons of offence likely to cause death. A person cannot be found guilty unless he actually has a dangerous weapon in his hand. (1950) 55 Mys H C R 317.

——Ss. 148, 147, 326/149, 302 — Rioting — Common object to assault deceased not established—One of the accused guilty of murder and convicted under S. 302 — Others held could not be convicted under Ss 147, 148 and 326/149. See Penal Code (1860), S. 147. 51 Cri L J 331: AIR 1950 Pat 44 (DB).

——Ss. 148, 141, 149 and 302 — Rioting—Conditions to be satisfied — Unlawful common object — Beating with sharp weapons resulting in death — Liability of members—Six persons armed with various weapons—The head of the party challenging A and beating him — Other accused persons also followed suit causing injuries to A and his men one of whom died immediately — Held the persons had come with the common object of belabouring A whch was an unlawful object and the assembly was therefore an unlawful assembly — The offence committed was of riot and the persons being armed with deadly weapons, it fell

under S. 148. See Penal Code (1860), S. 141. 1958 Cri L J 1232 : A I R 1958 Raj 226 (DB).

——S. 148—Essentials.

For a conviction under S. 148, Penal Code, it is necessary that each person who is convicted for this offence should be proved to have been armed with deadly weapon at the time of the riot. If only some of them are so armed and others are not, all of them cannot be convicted under S. 148 Penal Code and only those who are proved beyond reasonable doubt to have been armed with deadly weapons can be convicted under S. 148, Penal Code. Where it is not proved as to which, if any of the accused was armed with deadly weapon at the time of the riot, none of them can be convicted under S. 148, Penal Code. 1958 Raj L W 505.

——Ss. 148 and 147—Scope and applicability—S. 148 deals with direct responsibility and a rioter who does not carry a deadly weapon himself cannot be made liable under that section by virtue of S. 149 — The appropriate section to apply is S. 147 See Penal Code (1860), S. 147. 1956 Cri L J 1358 : AIR 1956 Trav-Co 230 (DB).

——S. 148 — Assault on police party in pursuance of Criminal conspiracy — Murder of Inspector and fatal injuries on others — Held, all accused were guilty of offences punishable under S. 120-B and all of them except 13th accused were also guilty of offences punishable under S. 148, Penal Code. See Penal Code (1860), S. 120 B. (1955) Cri L J 414 : A I R 1955 Trav-Co 33 (DB).

2. Conviction and sentence.

——S. 148—Sentence — To attack an unarmed man peaceably registering a protest in the very manner contemplated by law does not call for an exercise of leniency. See Penal Code (1860), S. 147. 1954 Cri L J 1708: A I R 1954 SC 657.

——S. 148 — Charge under Ss. 148, 324, 325 and 326/149 against five accused — Common object not proved and hence accused acquitted under S. 148 and S. 149 — One accused acquitted — Rest convicted for individual acts in absence of specific charges against each of them — Convictions of the accused for the offences under Ss. 325, 324 and 323 could not be sustained as they were not called upon to meet those specific charges. See Penal Code (1860), S. 34. 1956 All L J 833.

——Ss. 148, 147—Applicability of ratio.

The ratio of the decision in Boya Husainappa, In re, 1958 Andh L T 109, applies as much to a sentence under S. 148, Penal Code, as to a sentence under S. 147, Penal Code, because both deal with the offence of rioting, one with rioting simpliciter and the other with rioting armed with deadly weapons. (1962) 2 Andh L T 303: 1963 (1) Cri L J 415: AIR 1963 Andh Pra 146 (147) (Pt A) (Pr 3) (DB).

——S. 148 — Rioting — Common object to assault deceased not established — One of accused guilty of murder and convicted under S. 302 — Others held could not be convicted under Ss. 147, 148 and 326/149. See Penal Code (1860), S. 147. 51 Cri L J 331: AIR 1950 Pat 44 (DB).

3. Deadly weapon.

——Ss. 148 and 302 - Stick whether deadly weapon, depends upon its size and weight—Stout male bamboos are deadly weapons—Hallow bamboos are not. ILR (1962) Andh Pra 313 : 1963 (2) Cri L J 70 (Andh Pra).

4. Charge.

——Ss. 148 and 149—Defective charges.

Since the offence of rioting itself requires a specified common object as described in S. 141, Penal Code, it will be a case of defective charges if a Court were to say that the common object was to commit rioting, while framing charges under other sections of the Penal Code read with S. 149 of the Code. 26 Cut L T 111 : (1959) I O J D 699 : (1961) Cri L J 132(2): AIR 1961 Orissa 29 (30) (Pt A) (Pr 5).

——Ss. 148, 341 and Ss 302/34 and 109 — Charges under—Leaving out S. 149 in relation to charge of murder held was a serious omission as it would keep the door open for guilty men to escape. 1956 Ker L T 30 : ILR (1956) Trav Co 1 : 1956 Cri L J 1358 : AIR 1956 Trav Co 230 (233) (Pt I) (Pr 9) (DB).

5. Conviction under different sections.
See also Penal Code (1860), S. 147.

——Ss 148, 147, 149, 325 — Sentences — Accused sentenced for offences under Ss. 149 and 325—Separate sentences under Ss. 147 and 148, not legal. See Penal Code (1860), S. 147. ILR (1962) Andh Pra 313 : 1963 (2) Cri L J 70 (Andh Pra).

——S. 148—Charges against several accused under Ss. 148, 323, 326, 324 and 451 read with S. 149, Penal Code—Acquittal of the accused on charges of unlawful assembly but conviction for specific individual acts under different sections—Absence of separate charges for specific offences in the alternative — Prejudice—Conviction for individual specific offences held proper in the circumstances of the case. See Criminal P. C. (1898), S. 233. 1962 Ker L J 793.

——Ss. 148 and 307—When the accused were convicted under Ss. 307 and 148, it was held unnecessary in the circumstances of the case to convict them for rioting and S. 148, Penal Code — Their conviction under S. 307/149 held sufficient. See Penal Code (1860), S. 307. 1952 Cri L J 1500 : AIR 1952 Manipur 2.

——Ss. 148, 149 and 324—Charge under—Accused acquitted of offence of rioting—Conviction of accused under S. 324 read with S. 149 cannot be sustained.

The accused five in number were prosecuted at the instance of P. W. 1 for offences under Ss. 148, 326, 324 read with S. 149, I. P. C., on the allegation that P. Ws. 1 and 2 were belaboured by the members of unlawful assembly constituted of the accused persons. The accused were acquitted of the offences under S. 148 and S. 326, Penal Code. All the accused were convicted under S 324 read with S. 149 in respect of hurt caused to P. W. 1 and accused 4 alone was convicted under S. 324, Penal Code, in respect of hurt caused to P. W. 2.

Held, that once the accused were acquitted of the offence of rioting under S. 148, Penal Code, the Magistrate could not convict them under S. 324 read with S. 149, Penal Code. The acquittal in respect of the offence of rioting necessarily implied that either there was no unlawful assembly or that the employment of force or violence on P. Ws. 1 and 2 was not in prosecution of the common object of the assembly. But a conviction under S. 149 could be sustained only if an offence was committed by any member of an unlawful assembly in prosecution of the common object of that assembly or such as the members of that assembly knew was likely to be committed in prosecution of that object. There was no finding to that effect. The conviction in respect of the offence under S. 149, Penal Code could not therefore be substained. (1965) 1 Law Rep 592 : 1966 Cri L J 150 : AIR 1966 Mys 53 (55) (Pt A) (Pr 7).

——Ss. 148, 97, 141, 149 and 326—Accused more than 4 armed with deadly weapons trying to enforce their disputed right to usufruct of mango trees—Incident resulting in simple injuries and grievous hurt resulting in death of person—No physical resistance encountered by accused—Offence of which accused

were guilty—Accused not entitled to right of private defence — Accused constituted themselves into unlawful assembly and every one of them would be guilty not only of offence punishable under S. 148 but also of offence punishable under S. 326 read with S. 149. See Penal Code (1860), S. 97. 1961 (1) Cri L J 403 : AIR 1961 Mys 74 (DB).

——Ss. 148, 149, 341—Sentence — Sentence of two year's rigorous imprisonment awarded in respect of offence under S. 148—Sentence of one month's simple imprisonment awarded in respect of offence under S. 341 read with S. 149—Sentence of fine in respect of latter offence held was uncalled for. 1961 (1) Cri L J 291 : 38 Mys L J 1039 i 1962 Mad L J (Cri) 55 : ILR (1960) Mys 1238 : A I R 1961 Mys 57 (62) (Pt D) (Pr 39) (DB).

——Ss. 148 and 147—Specific charge under S. 148 along with other offences—Omission to convict accused under that section—Alteration into conviction under S. 147 in appeal—Legality.

Once a specific charge under S. 148 is framed, (along with other offences), the Magistrate must expressly say whether he convicts or acquits the accused of that offence. The omission of the Magistrate to convict the accused under S. 148, Penal Code must be held to mean that he was acquitted of that charge irrespective of whether this omission was due to oversight or any other reason and the Sessions Judge has in appeal (from the conviction for other offences) no jurisdiction to alter the conviction under S. 148 to one under S. 147, Penal Code as there was no conviction by the trial Magistrate under S. 148 at all. (1959) 1 OJD 699 ; 26 Cut L T 111 : 1961 (1) Cri L J 132 (2) : AIR 1961 Orissa 29 (30) (Pt C) (Prs 6, 7).

——S. 148—Charge—There can be conviction under S. 304 read with S. 149, I P.C., without there being a substantive charge either under S. 147 or S. 148, Penal Code—See Penal Code (1860), S, 147. AIR 1955 NUC (Pat) 1308.

——S. 148—Assistant Sub-Inspector from Punjab State coming with staff to village in Rajasthan for investigation of a case in Punjab—Searches and seizure of properties of accused by Assistant Sub Inspector held to be without jurisdiction—Police party held not to have acted in good faith—Right of private defence, held, however not available to accused under circumstances of the case — Offence under S. 395 held not proved — Convictions under Ss. 332 and 333 upheld. See Penal Code (1860), S. 52. 1964 Raj L W 126.

6. Proof.

——S. 148—Applicability—Charge of rioting with deadly weapons against several persons—Necessity of considering case of each accused separately especially where the prosecution evidence against each of the accused is of a very general character, vague and indefinite—Mere presence at scene of occurrence not sufficient to make them members of that assembly — Overt act of each of the accused, that he was a member of the assembly and showed common object necessary—Mere carrying of weapons by some cannot lead to the conclusion that they and others who were unarmed were all members of the unlawful assembly. See Penal Code (1860), S. 146. AIR 1955 NUC (Madh B) 3801 (DB).

——S. 148—Travancore Penal Code, S. 140—Unlawful assembly committing riot—Evidence—Examination of—Participating by each one of the accused must be ascertained from evidence.

It is the clear duty of the Judge to examine on the evidence not only whether some particular accused were properly joined as accused but also whether each one of the accused did form a member of the unlawful assembly that committed the riot and the murders attributed to the assembly.

In a case where a motive can be attributed to the witnesses to falsely implicate persons to whom they bore a grudge, it will be unsafe to place any reliance on such witnesses in deciding whether any of the accused did participate in the offence. The Court. should be guided in the matter only by the evidence of such witnesses whose veracity is beyond question. 51 Cri L J 833 : AIR 1950 Trav Co 20 (25) (Pt B) (Pr 12) (DB).

——S. 148—Travancore Penal Code, S. 140—Unlawful assembly committing riot — Common object—Proof of—Participation in assembly—Doing of overt act in furtherance of common object must be established.

Where number of labourers in certain estate were accused of forming into an unlawful assembly armed with sticks for committing riot and murdering two watchmen of the estate and at the earliest point of time after the occurrence the prosecution appeared to be interested in including among the accused as many of the persons engaged in creating labour trouble in the estate and carrying mischievous propaganda against its management and where out of the 98 persons alleged to have participated in the attack only 28 persons were included in the first information report, out of whom even 10 were later on dropped by the Investigating Inspector and 4 others were included:

Held, that this was a clear indication that the information available to the police either by the statements taken at the inquest or collected otherwise was not definite as to who at all participated in the commission of the crime and that under the circumstances it was unsafe to assume that any of the accused was a member of the unlawful assembly unless it was proved by unimpeachble evidence that he did an overt act in furtherance of what might be called the common object of the unlawful assembly.

Held further, that the common object of the assembly is not to be fixed with reference to what actually happened. It has to be ascertained with reference to the evidence regarding the manner in which the fight started and the broad probabilities arising from all the circumstances relating to how the fight developed. 51 Cri L J 833 : AIR 1950 Trav-Co 20 (25) (Pt C) (Pr 13) (DB).

7. Right of private defence.

See Penal Code (1860), S. 147.

8. Sections 148 and 149.

——Ss. 148 and 149—Relative scope and distinction.

There is no scope for reading S. 148 along with S. 149. Section 149 contemplates only constructive liability whereas S. 148 deals with direct liability. Being armed with weapon cannot be made to be a constructive liability and one who does not carry weapon himself cannot be convicted under S. 148 by virtue of S. 149.

Held, that this difference ought to have been pointed out to the jury by the Judge and that not having been done. the jury failed to understand the implication of the sections and wrongly returned a verdict of guilty under both these sections read together. The conviction under S 148 read with S. 149 was bad in law and was liable to be set aside. 1955 Cri L J 780 : AIR 1955 Assam 105 (106) (Pt A) (Pr 5) (DB).

——Ss. 148 and 149 — Scope of — There can be no conviction under Ss. 148/149.

There can be no conviction under Ss. 148/149. The question of constructive liability under S. 149 does not arise for a conviction under S. 148 because the

very definition of the offence of rioting in S. 146, I. P. Code, involves constructive liability. Hence a Magistrate should convict those rioters who are armed with deadly weapons, under S. 148, I. P. Code and those of them who are not armed with deadly weapons, under S. 147, I. P. Code and should not convict any of the accused under S. 148 read with S. 149, Indian Penal Code. 26 Cut L T 111 : (1959) 1 O J D 699 : (1961) 1 Cri L J 132 (2) : AIR 1961 Orissa 29 (30) (Pt B) (Pr 5).

9. Special Judge under M. B. Public Security Act (19 of 1953) — Jurisdiction to try offences under S. 148.

——Ss. 148 and 149 — Jurisdiction — Special Judge under M. B. Act 19 of 1953 has no power to try offences under Ss. 148 and 149, Penal Code. See Public Safety — M. B. Public Security Act (19 of 1953), S. 12. 1957 M P C 74 : 1957 Jab L J 126.

10. Leave to appeal to Supreme Court.

——S. 148 — It is not necessary that in every case when a point of law is raised the matter should be certified as fit for appeal—Held, though the case involved a question of law relating to the legality of conviction under S. 149, I. P. C., where the culprits that could be identified were less than five, it was not a fit case for appeal to the Supreme Court. See Constitution of India, Art. 134 (1) (c). 52 Cri L J 1409 : AIR 1951 Pepsu 152 (DB).

SECTION 149

SYNOPSIS

(Penal Code (45 of 1860), S. 149.)

1. Scope and applicability.
2. "Offence"
3. "Any member."
4. "In prosecution of common object".
5. Sections 149 and 34.
See also Penal Code (1860), S. 34.
6. "Knew to be likely to be committed."
7. Evidence.
8. "Every person who . . . . . is a member of same assembly."
9. Conviction of less than five.
10. Private defence.
11. Sections 149 and 148.
12. Charge — General.
See also Penal Code (1860), S. 34.
13. Charge under S. 149 — Conviction under S. 34.
See also Penal Code (1860), S. 34.
14. Charge under S. 34—Conviction under S. 149.
See also Penal Code (1860), S. 34.
15. Sentence.
16. Procedure.
17. Leave to appeal to Supreme Court.
18. Sections 149 and 302.
19. Marpit cases.
See also Penal Code (1860), S. 34.
20. Alteration of conviction in appeal.

1. Scope and applicability.

——S. 149—Applicability—Conditions.

Section 149, I. P. Code cannot apply unless there is proximity of time and place both between members of an unlawful assembly and the criminal acts of individual members of that assembly, for there obviously cannot be an assembly unless the five or more persons constituting it are at the same place, while S. 149 itself speaks distinctly of 'at the time' of the committing of the offence. 1958 Cri L J 424 : AIR 1958 All 255 (290) (Pt J) (Pr 151) (DB).

——S. 149—Applicability—Commissioner appointed to execute decree for delivery of possession—Obstruction by applicants — Applicants can be convicted under S. 332 read with S. 149. See Penal Code (1860), S. 21. 1957 All L J 268 : I L R (1957) 1 All 187.

——S. 149—Scope—Does not create new offence.

Section 149 does not create a new offence but makes a member of an unlawful assembly vicariously liable for offences committed by others in furtherance of the common object. Sundar Singh v. State, 1955 Cri L J 671 : 1955 All L J 293 : 1955 All W R (H C) 316 : I L R (1955) 1 All 472 : A I R 1955 All 282 (283) (Pt B) (Pr 2) (FB).

——S. 149—Applicability—Essentials.

Section 149, I. P. Code, requires three things primarily—(1) that one should be a member of an unlawful assembly, (2) that in prosecution of the common object of that assembly, an offence should be committed by a member of that unlawful assembly, and (3) that the offence should be of such a nature that the members of that assembly knew the offence to be likely to be committed in prosecution of their common object. If these three elements are satisfied, then only a conviction under S. 149, I. P. Code, may be substantiated, and not otherwise. 1955 Cri L J 1470 : AIR 1955 Assam 226 (228) (Pt B) (Pr 8) (DB).

——S. 149—Applicability.

Use cannot be made of S. 149 for the purpose of establishing the guilt of the accused constructively except in cases falling under the Penal Code. 1953 Cri L J 692 : AIR 1953 Bhopal 8 (10) (Pt E) (Pr 18).

——S. 149—Applicability—Conditions.

It is not correct to say, when dealing with an offence under S. 149, that all the persons must combine together or help one another at the time of the assault. 62 Cal W N 873 : 1958 All W R (Sup) 139 : 1958 All Cri R 472 : 1959 Cri L J 835 : AIR 1959 Cal 457 (460) (Pt C) (Pr 17).

——Ss. 149, 34 — Applicability — Pre-requisites for applicability are (1) that act must be done in prosecution of common object (2) or that assembly knew that particular act was likely to be committed in gaining the common object—Each case to be judged on merits. AIR 1955 N U C (Madh B) 70 (DB).

——S. 149 — Applicability — Proof that particular named member of assembly committed offence not necessary.

In order that other members of the assembly can be convicted of an offence, it is not necessary for the prosecution to prove that a particular named member of the assembly committed the offence. I L R (1962) Cut 661 : 28 Cut L T 435 : 1964 (1) Cri L J 114 (Orissa).

——S. 149—Applicability—Essentials.

For applicability of S. 149 there need not be a prior meeting of minds. It is enough that each has the same object in view. The elements of S. 149 are : (i) Commission of an offence by any member of an unlawful assembly; (ii) Commission of the offence in prosecution of the common object of the unlawful assembly; and (iii) the offence must be such as the members of the unlawful assembly knew to be likely to be committed in prosecution of the common object. AIR 1956 S C 513; AIR 1956 S C 731 and 20 Suth W R (Cr) 5, Rel. on.

It was held that the common object of the assembly consisting of five or more persons was to commit offence falling under S. 326, Penal Code. 1957 Cri L J 532 : AIR 1957 Punj 81 (83) (Pt B) (Pr 18) (DB).

2. "Offence".

●——Ss. 149 and 326—Unlawful assembly—Common object to cause grievous hurt—One member only causing death—Liability of others.

Section 149 of the Indian Penal Code is declaratory of the vicarious liability of the members of an unlawfull assembly for acts done in prosecution of the common object of that assembly or for such offences as the members of the unlawful assembly knew to be likely to be committed in prosecution of that object. But members of an unlawful assembly may have a community of object upto a certain point, beyond which they may differ in their objects, and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object may vary not according to the information at his command, but also according to the extent to which he shares the community of object and as a consequence of this the effect of S. 149 of the Indian Penal Code may be different on different members of the same unlawful assembly. Where the common object of the assembly was to cause grievous hurt and death was caused by only one of the members of the assembly for which the other members were not responsible, the conviction of the other members under S. 326 read with S. 149 cannot be held illegal merely because no member of the assembly was proved to have caused grievous hurt to the victims. The offence under S. 326 is in its relation to the offence of murder a minor offence and the language used in S. 149 does not prevent the Court from convicting for that minor offence merely because an aggravated offence is committed. I L R 1 Pat 753 : AIR 1923 Pat 50 : 24 Cri L J 65 and I L R 24 Pat 760 : AIR 1946 Pat 242. Overruled. Sambhu Nath Singh v. State of Bihar, 1960 B L J R 236 : 1960 Cri L J 1144 : AIR 1960 S C 725 (727 to 729) (Pt B) (Prs 6, 7, 14, 15).

——Ss. 149, 307 — Some of accused assembled for committing dacoity firing at raiding police party—None, however, injured—All accused held guilty under S. 307 read with S. 149 — See Penal Code (1860), S. 307. AIR 1961 All 452.

——S. 149—Applicability—Liability limited to criminal act intended to be committed—Does not extend to offence likely te be committed — Common intention of accused to do a criminal act must be shown —See Penal Code (1860), S. 34. 1963 (2) Cri L J 570 (Madh Pra).

——Ss. 149, 323, 324, 326 — Unlawful assembly—Common object to cause grievous hurt—Grievous and simple injuries in prosecution of common object —Conviction for Ss. 323, 324 read with S. 149—Sustainability.

Where the common object of the unlawful assembly armed with deadly weapons was to cause grievous hurt and during the prosecution of that common object some accused caused grievous injuries, some others caused simple injuries with sharp-edged weapons and blunt weapons, and the lower Court had convicted all the accused under Ss. 326, 324 and 323 read along with S. 149:

Held, that their conviction under Ss. 324 and 323 both read with S. 149, cannot be sustained. I L R (1957) Punj 950 : 1957 Cr L J 1307 : AIR 1957 Punj 278 (284) (Pt C) (Pr 39) (DB).

——S. 149 — Common object to give beating—Hurt to several persons and grievous hurt to one—Held offences committed were under Ss. 323 and 325—See Penal Code (1860), S. 323. 1958 Raj L W 505.

—— Ss. 149, 34, 109 and 302—Not necessary to call in aid—Section 109 when accused are charged under S. 149 and S. 302/34—See Penal Code (1860), S. 34. 1956 Cri L J 1358 : AIR 1956 Trav-Co 230 (DB).

3. "Any member".

——S. 149—Burden of proof.

As S. 149 stands the ingredients of the offence have to be made out by the prosecution and not by the accused. It has to be proved by the prosecution that at the time of the committing of the offence the accused was a member of the assembly. If once the prosecution has led evidence that the accused was present at the time of the commission of the offence as a member of the mob, it would be for the accused, if he so wishes to give evidence to rebut the prosecution case.

But unless there is some evidence to show that the accused was a member of the unlawful assembly at the time of the commission of the offence, no burden lies upon the defence to prove his innocence. It is for the prosecution to prove every bit of the chain in the guilt of the accused beyond any reasonable doubt. AIR 1924 All 233, Approved; AIR 1934 All 776, Not foll. 1956 Pat L R 440 : 1958 Cri L J 72 : AIR 1958 Pat 12 (16) (Pt A) (Pr 15) (DB).

4. "In prosecution of the common object".

●——Ss. 149 and 302 — 'In prosecution of common object'—Interpretation.

In order that the case may fall under the first part, the offence committed must be connected immediately with the common object of the unlawful assembly of which the accused were members. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under S. 149 if it can be held that the offence was such as the members knew was likely to be committed. When people go armed with lethal weapons to take possession of land which is in possession of others, they must have the knowledge that there would be opposition and the extent to which they were prepared to go to accompiish their common object would depend on their conduct as a whole. AIR 1956 S C 731, Distinguished. Tej Singh v. State of U. P. 1959 All Cr R 256 : 1959 M P C 325 : 1959 All W R (HC) 305 : 1959 Pat L R (S C) 45 : 1959 Cri L J 777 : I L R (1959) 2 All 13 : (1959) Supp 1 S C R 952 : 1959 All L J 408 : 1959 B L J R 371 : 1959 S C J 554 : 1959 Mad L J (Cr) 359 : AIR 1959 S C 572 (576, 577) (Prs 6, 8, 10 to 12).

●——S. 149—Applicability—Common object.

Under section 149, the liability of the other members for the offence committed during the continuance of the occurrence rests upon the fact whether the other members knew beforehand that the offence actually committed was likely to be committed in prosecution of the common object. Such knowledge may reasonably be collected from the nature of the assembly, arms or behaviour, at or before the scene of action. If such knowledge may not reasonably be attributed to the other members of the assembly then their liability for the offence committed during the occurrence does not arise.

Held, that the accused appellants had only lathis which might possibly account for injuries on the deceased's left arm and left hand but they could not be held liable for murder by invoking the aid of S. 149. According to the evidence only two persons were armed with deadly weapons. Both of them were acquitted and a third, who was alleged to have had a spear, was absconding. No knowledge of the existence of deadly weapons could therefore be ascribed to the appellants, much less they would be used in order to cause death. Accordingly the appellants were not guilty of the offence under S. 302/149, I. P. Code. AIR 1946 Pat 242, Approved. Gajanand v. State of U. P., 1954 Cri L J 1746 : AIR 1954 S C 695 (699) (Pt B) (Pr 9).

——Ss. 149, 302 — 'In prosecution of the common object of the assembly' — Interpretation of — Not killing but only beating of deceased in contemplation of members of unlawful assembly — Murder of deceased by one member while unlawful assembly was acting in accomplishment of common object—Other members not liable for murder under S. 149.

Under the first part of S. 149 all the members of an unlawful assembly are not liable to punishment for any and every offence committed by one or more members of that assembly, even if that offence be in excess of the known, agreed or intended common object of the unlawful assembly because that offence was committed while the unlawful assembly was acting in the accomplishment of the intended common object.

Where in a murder charge against several persons forming an unlawful assembly the killing of the deceased was not in the contemplation of any other member except one, and their conduct gave a positive indication of their mind only to beat him, it cannot be said that the murder was committed in furtherance of the common object. The other members of the unlawful assembly are not liable to punishment under S. 302 under the first or second part of S. 149. **1962 (1) Cri L J 698 : 1962 All Cr R 229 : 1962 All W R (H C) 419 : AIR 1962 All 272 (276, 277) (Prs 20, 21, 23) (DB).**

——Ss. 149, 34 — Charge under — Common object—Proof.

Under S. 149 the liability of the other members for the offence committed during the continuance of the occurrence rests upon the fact whether the other members knew beforehand that the offence actually committed was likely to be committed in prosecution of the common object. Such knowledge may reasonably be collected from the nature of the assembly, arms or behaviour, at or before the scene of action. If such knowledge may not reasonably be attributed to the other members of the assembly then their liability for the offence committed during the occurrence does not arise. A I R 1954 S C 695 and A I R 1946 Pat 242, Foll.

Where in a charge against a member of the gang of bandits under S. 302 read with S. 149, Penal Code, the evidence showed that the plan of killing the deceased was formed by the gang leader suddenly and was put into execution immediately the other members of the gang cannot be held constructively liable for the murder. **1958 Cri L J 424 : AIR 1958 All 255 (285) (Pt E) (Pr 131) (DB).**

——S. 149—One member of unlawful assembly, all of a sudden, striking deceased on head—Blow proving fatal—Act not in furtherance of common object — Other accused cannot be held guilty under S. 304 read with S. 149. 1954 All W R (H C) 45 : 1954 Cri L J 507 : 1954 All L J 237 : A I R 1954 All 249 (251) (Pr A) Pr 10).

——Ss. 149 and 325 — Victim dying as result of assault by several persons with sticks and weapons—It can be presumed that common object was at least to cause grievous hurt—Even accused causing simple injuries are guilty under Ss. 149, 325.

In the case of an assault on a person by about 16 persons with sticks and kattuvas, spear and axe, resulting in his death, it cannot be said, merely because some of the assailants caused only simple injuries to the deceased, that their common object was not likely to have gone beyond causing simple hurts. It may well be that they preferred not to carry out their common object themselves and left it to be performed by another member of their party. They must have naturally known that an attack by about 16 persons with the weapons mentioned above was likely to cause at least hurt which endangered the deceased's life and thereby constituted grievous hurt. The common object of such accused can, therefore, be at least to cause grievious hurt and they are guilty under Ss. 149 and 325. **I L R (1962) Andh Pra 313 : 1963 (2) Cri L J 70 (Andh Pra).**

——S. 149 — Scope and applicability — Essentials—Preconcert as to common object not necessary — Offence must either be connected immediately with common object or assembly or the knowledge of members that it was likely to have been committed necessary. A I R 1959 S C 572, Applied. **1962 Mad L J (Cri) 86 : (1962) 1 Andh L T 181 : (1962) 1 Andh W R 84.**

——S. 149—Common object.

The common object of the assembly was to attack the police party when the accused responded to the order of one S that they should attack the police party and not spare any of them. Before his very eyes, three or four persons were put to death by some of the members of the attacking party and there was nothing to show or suggest that the accused acted in a way to show that his intention was to cease to be a member of that assembly. The accused gave a start to the beating and he himself beat one of the persons on his head with a stick.

Held, that under these circumstances, it could not be said that the jury would be wrong in holding that the accused share the same common object of killing the police which was actually done by the rioters. **54 Cal W N 2 (DR) 214 (Dacca).** Rel. on. **1955 Cri L J 780 : A I R 1955 Assam 105 (107) (Pt B) (Pr 7) (DB).**

——S. 149—Common object—Evidence of—No direct evidence normally available and like, common intention, has to be gathered from the act which the person commits and the result therefrom. See Penal Code (1860), S. 307. **1955 Cri L J 1033 : A I R 1955 Bhopal 9.**

——S. 149—Common object—Importance of.

In fastening constructive liability, the importance of the common object is very great and it is on this basis alone that an accused is punished for the act of his associates.

(Note : The judgment contains an analysis of S. 149 and an exposition of the underlying idea in the words 'common object'). **1953 Cri L J 692 : AIR 1953 Bhopal 8 (10) (Pt D) (Pr 11).**

——S. 149—Common object—Proof.

If there is a search for the common object or if the common object is changed now and then, according to the conveniences of the prosecution, the prosecution case falls to the ground as it will be difficult without causing some confusion, to switch on from one to the other common object. In any case, law will not permit it. **1953 Cri L J 692 : A I R 1953 Bhopal 8 (11) (Pt F) (Pr 23).**

——S. 149—Common object and similar object— Six accused (close relatives) having common motives, attacking deceased surrounding him and causing him numerous injuries—Held it could not be said that object of accused was not common but merely similar. See Penal Code (1860), S. 34. **1960 Cri L J 1329 : AIR 1960 Guj 13 (DB).**

——S. 149—Offence under S. 367 read with S. 149—Ingredients to be proved stated. See Penal Code (1860), S. 367. **AIR 1955 N U C (Madh B) 3779 (DB).**

——S. 149—Applicability—Murder by several accused —Deceased sending buffaloes in B's field for grazing —Attitude of deceased leading to sudden quarrel— Severel accused armed with 'luhangis' and 'lathis' arriving at the spot and assaulting deceased causing injuries on the head of deceased who dies soon after— No enmity which might have prompted the murder

established — Medical report stating that the first injury was grievous which caused his death — Held that in the circumstances it could not be held that all the accused were there assembled with the common object or with the common intention of murdering deceased. See Penal Code (1860), S. 34. **A I R 1955 N U C (Madh B) 3097 (DB).**

——Ss. 149, 302, 325, 323 and 147—More than five persons with only thin lathis in their hands coming together—Some of them beating complainants who were working at their fields - Death of some of the victims—Deceased persons not having injuries in such number or in such circumstances as would indicate anything like grim determination on the part of assailants to endanger their lives — Held, that all the persons could be held as members of unlawful assembly whose common object was at least to cause hurt—That they could be aware of the possibility of grievous hurt but not of killing any person—That the case fell under S. 325 read with S. 149, besides under S. 323 read with with Ss. 149 and 147—That offence under S. 323 being only a minor form of offence under S. 325, conviction under S. 323 was superfluous. See Penal Code (1860), S. 302. **1964 (2) Cri L J 185: AIR 1964 Madh Pra 182 (DB).**

——S. 149 — Scope — More than five accused belabouring deceased—Decision as to common object — Factors to be taken into account.

When there is no doubt that all the nine accused persons constituted themselves into an unlawful assembly and that every one of them has acted in some manner or other in furtherance of the common object but there is some difficulty in deciding whether common object was to commit murder or merely to inflict severe injuries the fact that they have chosen to belabour men who have fallen helpless on the ground and cause fractures of ribs and puncture of lungs, is a strong circumstance in favour of imputing to them an intention to kill. It is never possible to state with accuracy who, among the members of the unlawful assembly, inflicted what may be called the fatal blow, and the ultimate consequence, viz., the death of the victim may be the cumulative effect of sevaral blows given by different persons, each of whom might not have intended to kill. **38 Mys L J 701 : 1961 Mad L J (Cri) 374 : ILR (1960) Mys 668: 1960 Cri L J 1472 : AIR 1960 Mys 294 (296) (Pt D) (Pr 31) (DB).**

——S. 149—Scope and effect of—'Common object'—Test of.

Section 149, Penal Code, makes every member of an unlawful assembly guilty of an offence which is committed in prosecution of the common object of the assembly. The mere fact that one of the persons was assaulted by one or more members of the assembly at a little distance from the scene of occurrence or in the next street does not preclude the incident from being part of the same transaction committed in prosecution of the common object. **(1950) 55 Mys H C R 317.**

——Ss. 149 and 302—Common object of unlawful assembly—How to be determined — Held that common object was to commit murder.

The common object of an unlawful assembly can be collected from the nature of the assembly and of the arms used by the members of the assembly and from the behaviour of the assembly at or before the scene or ocurrence.

Held, on facts, that the conclusion was irresistible that the common object of the unlawful assembly was to commit murder. The murder was committed by the members of the unlawful assembly in prosecution of their common object and accordingly all the accused persons were guilty under S. 302/149, Penal Code. **I L R (1962) Cut 661 : 28 Cut L T 435 : 1964 (1) Cri L J 114 (Orissa).**

——Ss. 149 and 395—Members of unlawful assembly guilty of rioting—Dacoity committed by some at same transaction — Conviction of all for dacoity not legal unless common object of dacoity is made out. **18 Cut L T 188 : 54 Cri L J 123 : A I R 1953 Orissa 1 (3) (Pt B) (Pr 7) (DB).**

——Ss. 149, 146—Common object—Some accused persons merely present at place of assault with lathis in hand — Not actually joining in assault — Common object of assault held not shared by them, See Penal Code (1860), S. 146. **1965 (1) Cri L J 73 : A I R 1965 Pat 45.**

——S. 149—Scope of—Unlawful assembly—Common object to cause grievous hurt — One member causing death—Other member not vicariously guilty of death. **A I R 1960 S C 725, Foll. 66 Punj L R 706 : 1965 (1) Cri L J 209 : A I R 1965 Punj 90 (93) (Pt B) (Pr 12) (DB).**

——Ss. 149, 300, 302, 307 and 328—Applicability—Assault by several persons armed with dangerous weapons—Death caused by one unidentified member —Common object to murder not established.

Murder and assault are not mutually exclusive; in order to convict for an offence of murder there must either be necessary intention or knowledge. AIR 1947 Pat 27, Rel. on. The words 'in prosecution of the common object' in S. 149 do not mean 'during the prosecution of the common object of the assembly'. The expression means that the offence committed was immediately connected with the common object of the assembly or the act is one which upon the evidence appears to have been done with a view to accomplish the common object attributed to the members of the assembly. AIR 1935 Oudh 52, Rel. on. The words 'in prosecution of the common object' have to be strictly construed as equivalent to 'in order to attain the common object'.

Where a number of persons armed with dangerous weapons lay in wait and one of the members of the assembly caused death, but in the circumstances it could not be found as to who caused the death and the conduct of the accused was such that it could not be said that the common object of the accused persons was to cause murder, but it was only one which fell under S. 326, Penal Code :

Held, that everyone of the accused persons could not be convicted under S. 302 read with S. 149. The proper section under which they could be convicted was S. 326 read with S. 149, and, therefore S. 307, Penal Code did not apply. Held, further that with regard to individual accused persons who caused injuries to persons other than the deceased the conviction could only be for the injuries caused. It could not be said that they would be liable to conviction under S. 307. **ILR (1957) Punj 1950 : 1957 Cri L J 1307 : AIR 1957 Punj 278 (281, 283) (Pt A) (Prs 24, 32 to 34) (DB).**

——Ss. 149 and 147—Common object and acts done in prosecution—Finding as to—If essential.

It is a common place of the law relating to unlawful assembly and rioting that the common object of an unlawful assembly must be definitely found and not merely left for conjecture or inference from other facts found in the judgment. There should also be a finding as to whether the acts done were committed for the prosecution of the common object of the assembly or such as the members of that assembly knew to be likely to be committed in prosecution of that object, or even as to when the assembly came into being. 11 Cal 106 and 22 Cal 276 and 33 Cal 295 and AIR 1924 Lah 667 (2), Rel. on. **1956 Ker L T 30 : I L R (1956) Trav-Co 1 : 1956 Cri L J 1358 : AIR 1956 Trav-Co 230 (232) (Pt A) (Pr 3) (DB).**

5. Sections 149 and 34.

See also Penal Code (1860), S. 34.

■ —Ss. 149, 34 — Applicability — Common object and common intention — Distinction — Enmity between different castes in village—Attack by S and G of one caste on persons of another caste at night with gun and sword—Hearing cries of help and gun fire, 30 or 40 villagers armed with deadly weapons rushing to the scene thinking there were thieves—Some of them later joining S and G in beating victims and all those who came to their rescue — Riot resulting in death of certain persons—Offence.

Held, on fact that persons who had come there quite lawfully, in the first instance, thinking there were thieves could well have developed an intention to beat up the thieves instead of helping to apprehend them or defend their properties; and if five or more shared the object and joined in the beating, then the object of each would become, the common object. There is no differnce in principle between this and a case in which the original object was unlawful. The only difference is that a case like this is more difficult to establish and must be scrutinised with greater care. Held, further, that any person who carries a fire arm at that hour of the night and uses it and then continues a fight after an excited crowd has assembled and when at least nine of them rush in to join in the beating after his first shot must know either that somebody is likely to deal a fatal blow or at least that the cumulative effect of blows inflicted by a number of persons armed with lathis is likely to cause death from shock.

The requisite knowledge that somebody would be likely to be killed in a melee could be imputed to all others who joined S and G accused belonging to one caste in beating all those who came to the help of P and C belonging to another caste. Sukha v. State of Rajasthan, 1956 S C R 288 : 1956 Pat L R (SC) 168 : 1956 Cri L J 923 : 1956 S C J 503 : 1956 Andh L T 583 : 1956 S C A 781 : 1956 All W R (Sup) 83 : 1956 S C C 355 : A I R 1956 S C 513 (514, 516, 518, 519) (Pt A) (Prs 7, 11, 29, 30, 33, 35, 36).

●—Ss. 149 and 34—Relative scope and distinction —Criminal P. C. (1898), S. 233.

Under S. 149, a specific offence is created. Under this section a person, who is a member of an unlawful assembly is made guilty of the offence committed by another member of the same assembly in the circumstances mentioned in the section, although he had no intention to commit that offence and had done no overt act except his presence in the assembly and sharing the common object of that assembly. When the accused are acquitted of riot and the charge for being members of an unlawful assembly fails, there can be no conviction of any one of them for an offence which he had not himself committed.

Section 149 creates an offence but the punishment must depend on the offence of which the offender is by that section made guilty. The finding that all the members of an unlawful assembly are guilty of the offence committed by one of them in the prosecution of the common object at once subjects all the members to the punishment prescribed for that offence and the relative sentence.

Section 34 does not however create any specific offence. There is a clear distinction between the provisions of Ss. 34 and 149 and the two sections are not to be confused. The principal element in S. 34 is the common intention to commit a crime. In furtherance of the common intention several acts may be done by several persons resulting in the commission of that crime. In such a situation S. 34 provides that each one of them would be liable for that crime in the same manner as if all the acts resulting in that crime had been done by him alone.

Th ere is no question of common intention in S 149. An offence may be committed by a member of an unlawful assembly and the other members will be liable for that offence although there was no common intention between that person and other members of the unlawful assembly to commit that offence provided the conditions laid down in the section are fulfilled. 34 Cal 698 : A I R 1915 Cal 292. Approved. Observations of Lord Sumner in A I R 1925 P C 1, Rel. on; AIR 1925 Mad 7 (FB); I L R 47 Mad 748: AIR 1925 Mad 1 : 25 Cri L J 1297 (FB); I L R 9 All 645 : 1887 All W N 149 and ILR 7 Pat 484 : A I R 1928 Pat 454 : 29 Cri L J 648. Overruled. Nanak Chand v State of Punjab, 1955 S C A 272: 1955 Mad W N 826: 1955 Cri L J 721 : (1955) 1 Mad L J (SC) 141 : 1955 Andh W R (SC) 141 : (1955) 1 S C R 1201 : 1955 All W R (Sup) 54: I L R (1955) Punj 154: 1955 S C J 241: AIR 1955 S C 274 (276 to 278) (Pt A) (Prs 5, 7, 9).

——Ss. 149, 34—Relative and distinction.

The distinction between Ss. 149 and 34 is that while S. 34 speaks of a common intention S. 149 speaks of a common object. AIR 1925 P C 1, Ref. 1954 All W R (HC) 330 : 1954 Cri L J 1424 : A I R 1954 All 680 (681) (Pt B) (Pr 6) (DB).

——Ss. 149 and 34 — 'Common object' and 'Common intention' — Distinction — Elimination of difference would amount to misdirection tending to mis-application of law—Criminal P. C. (1898), S. 297.

Section 34 limits itself to the furtherance of the 'common intention' while S. 149 goes further and is more strongly worded than S. 34. The words 'common object' and 'common intention' are not synonymous. They involve a substantial difference and if this difference is sought to be eliminated in charge to the jury, that would amount to a misdirection tending to misapplication of the law in this regard resulting in a wrong verdict. 1965 (1) Cri L J 160 : A I R 1965 Cal 89 (91) (Pt A) (Pr 11) (DB).

——Ss. 149, 34 — Correct section to be applied held was S. 149 and not S. 34.

A separate charge was framed under S. 302 read with S. 34 against accused 1 to 10 and 12 and an alternative charge under S. 302 read with S. 149 against all the accused. The common object of the accused was found to be not to kill the deceased but only to cause injuries to him. The accused were convicted under S. 148.

Held, that the correct section to be applied was S. 149 and not S. 34. 1951 Mad W N 861 : 1952 All W R (Sup) 11: 1951 Mad W N (Cri) 281: 1951-2 Mad L J 635 : AIR 1951 Mad 190 (190) (Pt A) (Pr 1) (DB).

——Ss. 149, 34—Distinction—Common object alleged to be assaulting—Conviction for murder—Validity.

It is more on the applicability of S. 149 than of S. 34 that the correctness of the conviction of persons who are not the assailants depends. S. 34 cannot be invoked as it has been held to refer to cases in which several persons intend to do an act some do that act and not to cases where several persons intend to do an act and some one or more of them do an entirely different act.

Section 149 may be applicable to cases to which S. 34 does not apply. The essential condition for the operation of either section is that the intention in one case and object in the other should be common and if the act is in excess of or beyond the intention or object of the members they cannot be constructively liable for it. AIR 1925 Cal 913, Ref.

Where the common object specified in the charges is "assaulting the Pariwars" the words cannot be understood as denoting murder though assault may sometimes prove fatal and if the latter part of S 149 imputing knowledge of the offence likely to be com-

mitted is not referred to in the charge, there is no jurisdiction for the conviction of all the members of the unlawful assembly for murder, when it is not alleged in the charges that murder was the common object and the evidence did not establish it. AIR 1942 Mad 446, Rel. on. 1954 Cri L J 632 : 34 Mys L J 13 : ILR (1953) Mys 690 : AIR 1954 Mys 75 (77) (Pt B) (Prs 6, 7) (DB).

——Ss. 149 and 34—Object and intention—Distinction.

There is a difference between object and intention, for, though their object is common the intentions of the several members of an unlawful assembly may differ and indeed may be similar only in respect that they are all unlawful, while the element of participation in action which is the leading feature of S. 34 is replaced in S. 149 by membership of the assembly at the time of the committing of the offence. Both sections deal with combination of persons, who become punishable as sharers in an offence. Thus, they have a certain resemblance and may to some extent overlap. The common object is an inference of fact to be deduced in the circumstances of each case. Intention is the volition of the mind immediately preceding the overt act while object is the end to which effect is directed, the thing aimed at and that which one endeavours to attain or carry on. 1955 Cri L J 721 : AIR 1955 S C 274 and 1956 Cri L J 1365 : AIR 1956 S C 731 and 1960 Cri L J 424 : AIR 1960 S C 289 and 1961 (2) Cri L J 711 : AIR 1961 S C 1541, Rel. on. ILR (1962) Cut 661 : 28 Cut L T 435 : 1964 (1) Cri L J 114 (Orissa).

6. "Knew to be likely to be committed."

——Ss. 149, 300—Common object to murder.

Section 149 applies not only to offences actually committed in pursuance of the common object but also to offences that members of the assembly know are likely to be committed.

Held, that even if it be assumed that the common object was only to rescue the two accused who were in the lock up, it was obvious that the use of violence was implicit in that object. People do not gather together at the dead of night, armed with crackers and choppers and sticks to rescue persons who are guarded by armed police without in ending to use violence in order to overcome the resistance of the guards; and a person would have to be very naive and simple minded if he did not realise that the sentries posted to guard prisoners at night are fully armed and are expected to use their arms should the need arise. It would be impossible on the facts of this case to hold that the members of the assembly did not know that murder was likely to be committed in pursuance of a common object of that kind by a large assembly. Accordingly, even if the common object be not placed as high as murder the conviction on the murder-cum-rioting charge was fully justified. K. C Mathew v. State of Travancore-Cochin, (1956) S C J 213 : 1956 Mad W N 217 : 1956 Cri L J 444 : 1956 S C A 175 : 1956 All W R (Sup) 34 : 1956-1 Mad L J (S C) 130 : 1956 Ker L T 355 : 1956 Andh L T 506 : (1955) 2 S C R 1057 : AIR 1956 S C 241 (245) (Pt D) (Pr 17).

——S. 149 – Second part—Scope.

The word 'knew' implies something much more than mere conjecture or speculation, and it is highly significant that the legislature refrained from incluc-ing in the section some such expression as 'or had reason to believe'; further, the likelihood of the result must be 'in the prosecution of the common object' and not through some other reason. 1959 All W R (HC) 609 : 1959 All Cr R 510 : 1959 Cri L J 419 : ILR (1958) 2 All 426 : AIR 1959 All 255 (258) (Pt B) (Pr 15) (DB).

——S. 149—Scope—Common intention.

The most important requirement necessary for the application of both the portions of the section is that the act for which each of the members of the assembly can be made liable should be an act which was either actually committed or was in any case likely to be committed in prosecution of the common object of the assembly. The purpose for which the members of the assembly set out or desired to achieve is the object. If the object desired by all the members is the same the knowledge that that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved, the object becomes the common object of the assembly. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Even if the act is an individual act of one member and it is not actually done in prosecution of the common object all the other members will be liable for it, provided they knew—and positive knowledge is necessary, it is not sufficient to show that they ought to have or might have known or that they had reason to believe that it might happen—that the act was likely to be committed in prosecution of the common object. The use of the word 'Likely' in the second part of S. 149, I. P. Code, implies something more than a possibility. 1959 All W R (H C) 609 : 1959 All Cr R 510 : 1959 Cri L J 419 : ILR (1958) 2 All 426 : AIR 1959 All 255 (261, 262) (Pt C) (Prs 40 to 42) (DB).

——Ss. 149, 360—Applicability — 'Knew to be likely to be committed' — Meaning—Expression imports at least expectation founded upon facts known to members of assembly that offence of particular kind committed would be committed — It means something more than speculation. AIR 1955 N.U C (Madh B) 70 (DB).

——S. 149—Applicability—Common liability—When arises.

Under S. 149, I. P. Code, the liability of the other members for the offence committed during the continuance of the occurrence rests upon the fact whether other members knew beforehand that the offence actually committed or likely to be committed in prosecution of the common object. Such knowledge may reasonably be collected from the nature of the assembly, arms, or behaviour at or before the scene of action. If such kdowledge cannot be reasonably attributed to the other members of the assembly then their liability for offence committed during the occurrence does not arise. AIR 1950 Pat 44, Ref. 1955 Cri L J 705 : AIR 1955 Manipur 21 (28) (Pt C) (Pr 35).

——Ss. 149 and 304 — Knowledge that death was likely to result from use of force—Common object of assembly to result or cause hurt — Indiscriminate blows over body of deceased — Death held to be caused in accomplishing common object—Conviction under Ss. 304/149 valid.

Held, that having regard to the fact that all the appellants took part in the assault and that indiscriminate blows were given on all parts of the body it could not be said the appellants had no knowledge that such merciless assault was likely to cause death. It was clear that the members of the assembly were determined to go to any length even to the length of causing death. The offence actually committed must, therefore, be deemed to have been included within the common object of the assembly. In this view of the case, the conviction of the appellants under S. 304, part two, of the Indian Penal Code was fully justified. AIR 1959 All 690, Rel on.; 20 W R 9; AIR 1936 Pat 481, Dist. 1961 B L J R 855.

7. Evidence.

—S. 149 — Evidence — Trial under S. 307/149 — Common object to fire on police party — Accused found running along with other accused persons — No evidence to show that he actually fired—Evidence held not sfficient to warrant conviction under S. 307/149. See Penal Code (1860), S. 307. **AIR 1955 N U C (Ajmer) 2622.**

—S. 149 — Applicability — Obstruction to arrest— Not sufficient to hold that persons so resisting were members of unlawful assembly. See Penal Code (1860), S. 332. **AIR 1955 NUC (All) 2782.**

—S. 149 — Evidence — Innocent individuals when become liable under S. 149 stated — Accused charged under S. 149 — It cannot be urged that only evidence of specific parts having been assigned to specific persons should be accepted and acted upon in assessing the guilt of any particular accused and the rest of the evidence should be rejected. **AIR 1955 NUC (All) 166 (DB).**

—Ss. 149, 302 — Evidence — Question of motive favouring more the defence version rather than prosecution version — Assault taking place in dark and under circumstances when assailants could not have been recognised — Whole prosecution evidence found interested and not reliable — Accused persons named because of enmity — Charges held not proved. See Penal Code (1860), S 302. **1954 All L J 165,**

—S. 149 — Number of persons participating in assault — Participation of accused A and B established — Proof that injury was inflicted by them — Other circumstances may be taken into consideration apart from prosecution evidence — Evidence Act (1872), S. 3 — 'Proved.' **1950 All L J 596: 1952 Cri L J 824: AIR 1952 All 453 (454) (Pr 7).**

—Ss. 149 and 301 — Section 301 applicable to facts — Section 149 does not apply. See Penal Code (1860), S. 301. **1963 (1) Cri L J 415: AIR 1963 Andh Pra 146 (DB).**

—Ss. 149, 302 and 304 — Attack by members of unlawful assembly resulting in death of victim — Medical officer deposing that only two out of 43 injuries had caused death — Prosecution failing to elicit whether the two injuries were sufficient in ordinary course of nature to cause death — Only offence under S. 304 is proved and not one under S. 300. See Penal Code (1860), Ss. 302. **ILR (1964) Andh Pra 313: 1963 (2) Cri L J 70 (Andh Pra).**

—S. 149 — Common object — Direct or res gestae evidence absent — Common object is to be inferred from circumstances such as weapons with which members were armed or their conduct during riot.

In order that an object should be common to the persons composing an unlawful assembly, they should be aware of the object and concur in it. The expression "common object" has reference to a state of mind and in the absence of direct or res gestae evidence, it has to be inferred from the circumstances, such as the weapons with which the members were armed or their conduct during the riot.

Where the two fatal injuries among the several injuries on the person of the deceased as the result of an attack by an unlawful assembly were, in external appearance, merely a contusion, 4 inches x 2 inches and an abrasion, 2 inches x 1 inch respectively and it was only on account of corresponding injury caused to the kidney by one injury and the lung, by the other injury that they proved fatal, it would be far-fetched to presume that the accused knew the internal damage caused by these injuries and therefore ran away after these injuries were caused being satisfied that their common object of causing death was achieved. It cannot therefore be said, under the circumstances mentioned above, that the common object was to cause death or to cause an injury likely to cause death. **ILR (1962) Andh Pra 313: 1963 (2) Cri L J 70 (74, 75) (Pt F) (Pr 19) (Andh Pra).**

—Ss. 149, 324, 302 — Common object — Proof of, by course of conduct — Individual acts need not be proved.

Where ten persons lay in wait in a field fully armed with axes, spears and sticks and rushed to the place where the deceased and his father were resting assaulted the father inflicting about nine injuries on him and killed his son, the deceased:

Held, that the course of conduct adopted by the accused clearly showed that they were actuated by the common object of inflicting injuries on the father and of causing the death of the deceased. (2) That in such cases it was not necessary for the prosecution to prove that a particular accused caused a particular injury either to the deceased or to his father and so was guilty under S. 324 or S. 302, Penal Code. Since the offence was under Ss. 302 and 324 read with S. 149 of the Penal Code, it would be enough for the prosecution to prove that as a result of the assault carried out in the field by the members of the unlawful assembly grievous hurt was caused to the father and his son's death was intentionally caused. **(1956) Cri L J 389: AIR 1956 Bom 183 (185) (Pt B) (Prs 5 10) (DB).**

—S. 149 — Evidence — Child eye-witness of 12 or 13 years — Offence under S. 302 read with Ss. 149 and 147 — Discrepanies in his statements — Witness held could not be relied upon for convicting all accused. See Evidence Act (1872), S. 118. **AIR 1955 NUC (Madh B) 3097 (DB).**

—Ss. 149, 300, 326—Absence of evidence of doctor or post-mortem certificate — Not possible for Court to infer whether injury in question to skull would have been sufficient in the ordinary course to cause the death — Conviction of accused only for offence of causing grievous injury with deadly weapon, considered safe. See Penal Code (1860), S. 300. **(1964) 1 Mys L J 393.**

—S. 149 — Conviction of person present in riot.

The mere presence of the riotous crowd of supporters of the leader is sufficient to support conviction of the person present. AIR 1943 All 49, Rel. on. ('50) 55 Mys HCR 317 (DB).

—S. 149 — Land dispute leading to mutual assault by rival parties resulting in deaths — Evidence — Appreciation of—Testimony of partisan eye-witnesses when may be accepted stated. See Penal Code (1860), S. 302. **1963 (1) Cri L J 700 (Orissa).**

—S. 149 — It is for prosecution to prove that, at the time of committing of offence, accused was member of assembly—Presence of accused as member of mob at the time of offence proved — It would be for accused to rebut prosecution case — (Evidence Act (1872), S. 114, Illustration (d). AIR 1924 All 233 and AIR 1934 All 766, Rel. on. **1956 Pat L R 440: 1958 Cri L J 72: AIR 1958 Pat 12 (17, 18) (Pt B) (Prs 15, 17) (DB).**

8. "Every person who ..... is a member of same assembly."

—S. 149 — Applicability — Accused persons leading their cattle into field of complainants — Complainants when taking cattle to pound intercepted and beaten by accused — One of complainants receiving smashing blow on head by one of accused and dying — All held guilty under S. 302/149. See Penal Code (1860), S. 300 (3). **AIR 1955 N U C (All) 1701 (DB).**

—Ss. 149 and 323 — Scope — Liability of member of unlawful assembly.

Where the accused were members of an unlawful assembly having a common object of beating the complainant, the mere fact that they did not take part in actual beating cannot exonerate them of their liability for offence under S. 323, Penal Code, committed by other members of the assembly. They would be guilty under S. 323, when it is proved that they were present in the assembly at the place of occurrence. 1953 All W R (HC) 405 : 1953 All L J 420 : 1953 Cri L J 1796 : AIR 1953 All 778 (779) (Pr 5).

——S. 149 — Person being members of unlawful assembly—Proof.

In order that a person may be a member of an unlawful assembly and be guilty of rioting, it is only necessary to prove affirmatively that there was an unlawful assembly in which, after knowing its unlawful object, the person intentionally continues to remain. If any member commit an act of violence he is guilty of rioting and if any offence is committed by any member in prosecution of the common object, he is constructively guilty of that offence under S. 149, Penal Code. It is not necessary to prove any overt act of violence or any incitement to others on his part. AIR 1950 Kutch 94 (95) (Pt C) (Pr 9).

——S. 149—Applicability — Assault on police party in pursuance of criminal conspiracy — Murder of Inspector and fatal injuries on others—Conviction upheld. Every one of accused constructively liable under S. 149 for offences committed by other members of unlawful assembly—All members liable under S. 149 read with Ss. 302, 307, 324, 326 and 332. See Penal Code (1860), S. 120-B. 1955 Cri L J 414 : AIR 1955 Trav Co 33 (DB).

9. Conviction of less than five.

● ——S. 149—Conviction of less than five persons — Circumstances under which Court can conclude that there was unlawful assembly in such cases.

Held, that the judgment of the High Court should be set aside as it had failed to determine questions which it was essential for it to do. It should have fully examined the entire evidence and come to a definite conclusion as to whether there was an unlawful assembly consisting of more than five persons including the appellants and some other persons who were unidentified or not and stated its reasons for coming to such a conclusion. It should then have ascertained the particular acts committed by any member or members of that assembly in furtherance of the common object as also the question whether any of the appellants had participated in the incident. In the light of its findings on these matters the High Court should then have proceeded to consider whether all or any of the appellants could be held liable vicariously for all or any of the acts found to have been committed by the unlawful assembly or any member or members thereof other than those alleged to have been committed by persons whose acquittal has become final. Ram Bilas Singh v. State of Bihar, 1963 B L J R 562 : 1963 All L J 609 : 1963 All W R (HC) 537 : 1963 Cur L J (SC) 48 : 1964 S C D 60 : (1964) 1 S C A 146 : (1963) 1 S C W R 743 : 1963 All Cr R 265 : ILR 42 Pat 396 : (1964) 1 S C R 775 : (1964) 1 Cr L J 573 (SC).

● ——Ss. 149 and 34—Applicability — Five persons charged with substantial offence read with S. 149 and S. 34 — Some acquitted — Conviction of rest under substantial offence read with S. 149 and S. 34 —Propriety of—Different situations considered.

One of the essential ingredients of S. 149 is that the offence must have been committed by any member of an unlawful assembly and S. 141 makes it clear that it is one of the essential conditions of an unlawful assembly that its membership must be five or more.

In dealing with the question as to the applicability of S. 149 in such cases, it is necessary to bear in mind the several categories of cases which come before the Criminal Courts for their decision. If five or more persons are named in the charge as composing an unlawful assembly, and evidence adduced by the prosecution proves those charges against all of them, that is a very clear case where S. 149 can be invoked. It is, however, not necessary that five or more persons must be convicted before a charge under S. 149 can be successfully brought home to any members of the unlawful assembly It may be that less than five persons may be charged and convicted under S. 302/149 if the charge is that the persons before the Court along with others named constituted an unlawful assembly, the other persons so named may not be available for trial along with their companions for the reason, for instance, that they have absconded. In such a case, the fact that less than five persons are before the Court does not make S. 149 inapplicable for the simple reason that both the charge and the evidence seek to prove that the persons before the court and others number more than five in all and as such, they together constitute an unlawful assembly. Similarly, less than five persons may be charged under S. 149 if the prosecution case is that the persons before the Court and others numbering in all more than five composed an unlawful assembly, these others being persons not identified and so not named. In such a case, if evidence shows that the persons before the Court along with unidentified and unnamed assailants or members composed an unlawful assembly, those before the court can be convicted under S. 149 though the un-named and un-identified persons are not traced and charged. Cases may also arise where in the charge, the prosecution names five or more persons and alleges that they constituted an unlawful assembly. In such cases, if both the charge and the evidence are confined to the persons named in the charge and out of the persons so named two or more are acquitted leaving before the court less than five person to be tried, then S. 149 cannot be invoked. Even in such cases it is possible that though the charge names five or more persons as composing an unlawful assembly, evidence may nevertheless show that the unlawful assembly consisted of some other persons as well who were not identified and so not named. In such cases, either the trial court or even the High Court in appeal may be able to come to the conclusion that the acquittal of some of the persons named in the charge and tried will not necessarily displace the charge under S. 149 because along with the two or three persons convicted were others who composed the unlawful assembly but who have not been identified and so have not been named. In such cases, the acuittal of one or more persons named in the charge does not affect the validity of the charge under S. 149 because on the evidence the court of facts is able to reach the conclusion that the persons composing the unlawful assembly nevertheless were five or more than five. It is true that in the last category of cases, the court will have to be very careful in reaching the said conclusion. But there is no legal bar which prevents the court from reaching such a conclusion. The failure to refer in the charge to other members of the unlawful assembly un-named and un-identified may conceivably raise the point as to whether prejudice would be caused to the persons before the court by reason of the fact that the charge did not indicate that un-named persons also were members of the unlawful assembly. But apart from the question of such prejudice which may have to be carefully considered, there is no legal bar preventing the court of facts from holding that though the charge specified only five or more persons, the unlawful assembly in fact consisted of other persons who were not named and identified.

Where five named persons were charged and tried for an offence read with S. 149 and two of them are acquitted, and the membership of the assembly is reduced from five to three, that makes S. 141 inapplicable which inevitably leads to the result that S. 149 cannot be invoked against the remaining members. As soon as two of the five named persons are acquitted, the assembly must be deemed to have been composed of only three persons and that clearly cannot be regarded as an unlawful assembly. AIR 1953 S C 364, AIR 1960 S C 289, Rel. on. AIR 1961 S C 1787, Explained and Approved.

Like S. 149, S. 34 also deals with cases of constructive criminal liability. It provides that where a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. The essential constituent of the vicarious criminal liability prescribed by S. 34 is the existence of common intention. If the common intention in question animates the accused persons and if the said common intention leads to the commission of the criminal offence charged each of the persons sharing the common intention is constructively liable for the criminal act done by one of them. Just as the combination of persons sharing the same common object is one of the features of an unlawful assembly, so the existence of a combination of persons sharing the same common intention is one of the features of S. 34. In some ways the two sections are similar and in some cases they may overlap. But nevertheless, the common intention which is the basis of S. 34 is different from the common object which is the basis of the composition of an unlawful assembly. Common intention denotes action in concert and necessarily postulates the existence of a pre-arranged plan and that must mean a prior meeting of minds. Cases to which S. 34 can be applied disclose an element of participation in action on the part of all the accused persons. The acts may be different; may vary in their character, but they are all actuated by the same common intention. The common intention required by S. 34 is different from the same intention or similar intention. AIR 1945 P C 118, Rel. on., Mohan Singh v. State of Punjab, 1962 All Cri R 448 : 1663 (1) Cri L J 100 : 1962 S C D 707 : 1962 Mad W N 572 : 1962 All W R (HC) 804 : AIR 1963 S C 174 (178, 180) (Prs 8, 9, 13).

■ ——Ss. 149 and 141—Unlawful assembly—Constitution of — Conviction of less than five — Actual number of assailants' party consisting of five or more persons — Party is unlawful assembly though only three are convicted. See Penal Code (1860), S. 141. 1961 (2) Cri L J 853 : AIR 1961 S C 1787.

■ ——S. 149—Applicability—More than five persons constituting unlawful assembly — Identity of four only established—Effect—Error, omission or irregularity in charge—(Criminal P. C. (1898), S. 537).

Where the finding is that the number of persons who constituted the unlawful assembly was more than five, though the identity of four only was established and the killing was done in prosecution of the common object of the entire unlawful assembly, there can be no serious difficulty in applying S. 149 to such a case. Whether such a finding can be given or not must depend on the facts of each case and on the evidence led. Any mere error, omission or irregularity in the charge will not invalidate the finding as a matter of law in the absence of prejudice to the convicted persons. Bharwad Mepa Dana v. State of Bombay, 1960 Cri L J 424 : 1960 Mad W N 457 : (1960) 1 Ker L R 277 : 62 Bom L R 269 : 1960 S C J 478 : (1960) 2 S C R 172 : (1960) All W R (H C) 258 : 1960 Mad L J (Cr) 398 : 1960 All Cr R 178 : AIR 1960 S C 289 (293 to 295) (Pt A) (Prs 13, 18).

■ ——S. 149—Scope—Seven accused charged under S. 302, read with S. 149—Five acquitted in appeal—Conviction of two under Ss. 302 and 149, held by the Supreme Court not affected as acquittal of five was wrong. See Penal Code (1860), S. 302. 1954 Cri L J 1668 : AIR 1954 S C 648.

■ ——S. 149—Applicability—Finding that more than five persons were involved — Identification of only two—Effect.

High Court giving clear finding that there were more than five persons in the band of attackers and believing eye-witnesses who identified two of them —The mere fact that only two of them were satisfactorily identified does not weaken the force of the finding that more than five were involved — Use of S. 149 was therefore justified. Nar Singh v. State of Uttar Pradesh, 1954 S C J 570 : 1954 Mad W N 741 : (1954) 2 Mad L J 122 : 1954 S C A 642 : 1954 Cri L J 1167 : 1954 All L J 438 : 1954 All W R 457 : (1955) 1 S C R 238 : AIR 1954 S C 457 (459) (Pt C) (Pr 8).

■ ——S. 149—Applicability.

Before S. 149 can be called in aid, the Court must find with certainty that there were at least five persons sharing the common object. A finding that out of seven men in question three "may or may not have been" at the site of offence betrays uncertainty on this vital point and consequently a conviction resting on that uncertain foundation cannot be sustained. Especially in a murder case where the sentence of transportation in no less than four cases has been enhanced to death it is essential that the Judge should give a finding on the point with unerring certainty. Dalip Singh v. State of Punjab, (1953) S C J 532 : 1953 Mad W N 642 : 1953 Cri L J 1465 : 1954 S C R 145 : AIR 1953 S C 364 (366) (Pt A) (Prs 19, 20).

■ ——S. 149—Conviction of less than five—Legality.

It is not essential that five persons must always be convicted before S. 149 can be applied. Where it is possible to conclude that though five persons were unquestionably at the place of offence the identity of one or more is in doubt a conviction of the rest with aid of the section would be good. Dalip Singh v. State of Punjab, 1953 S C J 532 : 1953 S C A 709 : 1953 Mad W N 642 : 1954 S C R 145 : 1953 Cri L J 1465 : A I R 1953 S C 364 (366) (Pt B) (Pr 20).

——S. 149 — Conviction of less than five when evidence showed that number of people attacking was more than five—Conviction held right under Section 302/149. AIR 1955 NUC (All) 2672 (DB).

——S. 149 — Applicability — Conviction of five or more persons not necessary.

In order to sustain a charge under S. 149, it is not necessary that five or more persons should be found guilty. All that has to be proved is that there were five or more persons who committed the offence. 1956 Cri L J 31 : 1955 Andh L T (Cri) 285 : ILR (1955) Andh 666 : 1955 Andh W R 920 : AIR 1956 Andh 26 (30) (Pt C) (Pr 17) (DB).

——S. 149 — Unlawful assembly — Some accused acquitted — Other can still be convicted. See Penal Code (1860), S. 148. 1959 Ker L J 664.

——Ss. 149, 148 and 302 — Unlawful assembly — Conviction of less than five — Five accused charged as being members of unlawful assembly — Three acquitted on ground that their presence at the time of occurrence was doubtful — No allegation that assembly consisted of unknown persons—Remaining two accused cannot be convicted of any offence calling in aid S. 149. 1961 All Cr R 271 : 1961 All W R (Sup) 39 : 1962 Mad L J Cri 36 : 1962 (1) Cri L J 51 (Mys).

——S. 149 — Criminal P. C. (1898), S. 423 — Appeal from conviction — Powers of appellate Court — Trial under S. 149, I. P. C. — All except one accused acquitted — Appeal by convicted accused — Conviction under S. 149 can be maintained. See Criminal P. C. (1898), S. 423. **1960 Cri L J 1472 : AIR 1960 Mys 294 (DB).**

——S. 149 — Unlawful assembly consisting of more than five members having common object of killing the deceased — Conviction of four persons of the assembly under S. 302 read with S. 149 and wrong acquittal of others — Conviction held justified. See Penal Code (1860), S. 302. **ILR (1963) 42 Pat 293.**

——S. 149 — Trial under Ss. 302/149, Penal Code — Conviction of one and acquittal of rest is legal.

In every case where the names of all the persons who are alleged to have formed an unlawful assembly and to have participated in a crime are specifically given, the acquittal of some of them reducing the number of the rest to less than five does not necessarily result in the acquittal of all. There may be a case in which some of the accused are falsely included in place of the real culprits who in fact had not been identified. The Court, while acquitting them who in its opinion appear to have been so implicated, may yet convict under S. 302/149, Penal Code, one more with respect to whose participation there could not possibly be any doubt if further it be of the definite opinion that the number of the participants could not be less than five and they formed an unlawful assembly. Case law discussed. [Editorial Note—For a similar case, See AIR 1951 All 660 (FB), where, however, it was held that the accused could be convicted under S. 34, I. P. C. in such cases.] **52 Cri L J 1409 : 3 Pepsu L R 132 : AIR 1951 Pepsu 152 (152, 153) (Pt A) (Prs 3, 4) (DB).**

——Ss. 149, 34, 302 — Out of 5 persons 3 convicted and 2 acquitted — In appeal against acquittal Court issuing notice only to one out of two — S. 149, held inapplicable—S. 34, held applied. AIR 1953 S C 364, AIR 1960 S C 289, AIR 1961 S C 1787, Rel. on. **(1963) 65 Pun L R 503.**

——S. 149—Applicability — Conviction of less than five.

In applying S. 149 the Court must find with certainty that there were at least persons sharing the common object. Where the finding is that four out of the six accused may have been named simply to add to the number of the assailants, the finding betrays uncertainty about the participation of at least five persons in the crime. When in no part of the judgment does the Court come to the conclusion that at least five persons participated in the crime though the identity of one or more was in doubt the case does not come within S. 149. AIR 1950 F C 80; AIR 1953 S C 364, Foll. **1954 Cri L J 752 : 56 Pun L R 43 : ILR (1954) Punj 813 : AIR 1954 Punj 126 (127, 128) (Pt A) (Prs 7, 14) (DB).**

——S. 149—Conviction of less than five—No finding that at least five persons participated in the crime—Case does not come under S. 149. **ILR (1954) Punj 813 : 56 Pun L R 43 : 1954 Cri L J 752 : AIR 1954 Punj 126 (DB).**

10. Private defence.

——S. 149 — Deceased entering appellant's house at night in prosecution of his intrigue with appellant's daughter—Assault by appellant and his companies—Injuries caused leading to death—Injuries held caused in lawful exercise of right of private defence—Appellant, therefore committed no offence—Neither S. 149 nor S. 34 had any application. Held not guilty. See Penal Code (1860), S. 34. **ILR (1960) 2 All 285.**

——S. 149 — Applicability — Both parties determined to fight—No right of private defence. See Penal Code (1860), S. 96. **AIR 1955 N U C (All) 2713.**

——S. 149 — Applicability — Persons assembled in exercise of right of private defence of property — Assembly is not unlawful — They are not liable to punishment under section for act of each other. See Penal Code (1860), S. 146. **1954 Cri L J 1710 : A I R 1954 All 771 (DB).**

——Ss. 149, 97, 141, 148 and 326 — Accused more than 4 armed with deadly weapons trying to enforce their disputed right to usufruct of mango trees—Incident resulting in simple injuries and grievous hurt resulting in death of person—No physical resistance encountered by accused — No right of private defence — Every one of accused held guilty under S. 148 and also under S. 326/149. See Penal Code (1860), S. 97. **1961 (1) Cri L J 403 : A I R 1961 Mys 74 (DB).**

——Ss. 149, 97—Common plea of self-defence by five or more accused—Implications of — Failure to establish the plea — Unlawful assembly with common object held constituted. See Penal Code (1860), S. 97. **1960 Cri L J 1472 : AIR 1960 Mys 294 (DB).**

——S. 149 — Unlawful assembly — Maintaining or enforcing a right by force would be unlawful unless justified on ground of private defence.

Per Narasimham J. — Any attempt to maintain or enforce one's right by criminal force would be unlawful unless it can be justified as the exercise of right of private defence under Ss. 97 to 99, Penal Code. It would be wholly academic to discuss whether for the purpose of constituting an unlawful assembly there is any material distinction between maintaining a right by criminal force and enforcing a right by criminal force.

Per Panigrahi J. — A reading of Cl. (4) of S. 141, Penal Code, would clearly indicate that no person is entitled to vindicate his right to possession of any property by resort to criminal force. That right is subject to the limitations in the Code itself, in Ss. 96 to 106. The law of private defence rests on the assumption that society undertakes to protect private persons against unlawful attacks against their person or property and that public authorities should, in the first instance, be appealed to for assistance. If the aid of public authorities is not available, the individual whose person or property is attacked can take steps to protect himself, provided he does not inflict more harm than is necessary to repel the attack. The right is available only against an offence and not against a lawful act. In view of this, the contention has sometimes been raised that the Penal Code while conceding the right of less than five persons to defend any attack on their property could not have denied it to five or more persons. But the right arises only when there is an actual invasion of one's property or person and when the assistance of public authorities cannot be obtained. That, of course, does not mean that a man whose property is threatened to be taken away must abandon it. When there is such an actual invasion of one's property or person, and there is no time to seek the aid of public authorities the right of private defence is available and that right extends also to a case covered by S. 141, Penal Code. An assembly of five or more persons gathered to protect a right, apprehending an invasion thereof, may not be an unlawful assembly. But until an invasion of the right actually takes place the right to use force in self defence does not arise. A different consideration will arise when force is used to repel an attack and when the person who uses force exceeds the right of private defence by using more force than is necessary. In such a case the person who uses force may be adjudged guilty and the assembly as such of which he was a member may not be held liable for his individual act if they did not have the common object of using force. In other words, it would

depend upon the circumstances of each case, in order to determine the question as to whether five or more persons having a common object joined together and committed a particular crime.

Where the right itself is doubtful and it becomes necessary to resort to force in order to defend it, the provisions of Cl. (4) of S. 141, Penal Code, would be attracted and the assembly gathered for that purpose would clearly be an 'unlawful assembly'. The distinction between 'enforcing a right' and 'maintaining a right' has been the subject-matter of some divergance of opinion among Judges but the distinction, though subtle, ceases to exist if force is required to defend that right. In the case of incorporeal rights, such as, for instance, a right of way, a right to use water, etc., no one is in possession of it except during the actual moment when he is peacefully exercising it. Any attempt to vindicate such a right by the use of force must necessarily be an attempt to 'enforce a right or supposed right' within the meaning of Cl. (4) of S. 141, Penal Code and not an act to maintain an existing right of peaceful possession. The phrase 'enforce a right' applies when the party claiming the right has not got possession over the subject matter of the right, while the phrase 'maintain a right' implies that the party is in possession and is entitled to resist and repel any aggression. In repelling the aggression the right of the party in possession to use force is strictly limited to the exercise of the right of private defence subject of course to the limitations imposed by the Penal Code. It is only a right of defence and not of punishment. **ILR (1952) Cut 219.**

——S. 149 — Searches and seizure of properties of villagers (accused) by police making investigation found without jurisdiction—Right of private defence however held not available to accused under circumstances of case. See Penal Code (1860), S. 52. **1964 Raj L W 126.**

——Ss. 149, 97, 100 — Private defence of person and property—Land dispute—Clash between rival parties —Member of one party exceeding right of private defence —No constructive liability of other members of that party under S. 149 for offence committed by that member. See Penal Code (1860), S. 97. **1962 Raj L W 657.**

11. Sections 149 and 148.

——Ss. 149, 147, 148, 325 — Sentencees — Accused sentenced for offences under Ss. 149 and 325 — Separate sentences under Ss. 147 and 148 not legal. See Penal Code (1860), S. 147. **ILR (1962) Andh Pra 313 : 1963 (2) Cri L J 70 (Andh Pra).**

——S. 149 —Conviction under Ss. 148 and 149 — Bad in law. See Penal Code (1860), S. 148. **1955 Cri L J 780 : AIR 1955 Assam 105 (DB).**

——Ss. 149, 148— Acquittal of one accused in a prior and separate trial — No bar to trial and conviction of another who committed same offences along with him and others — See Criminal P. C. (1898), S. 403. **1963 M P L J (Notes) 14.**

——S. 149 — Special Judge under M. B. Public Security Act (19 of 1953), S. 12 — Not empowered to try offences under Ss. 148 and 149, Penal Code. See Public Safety — Madhya Bharat Public Security Act (19 of 1953), S. 12. **1957 Jab L J 126 : 1957 M P C 74.**

——Ss. 149 and 148 —Unlawful assembly — Legality of conviction.

Cases where it is proved that an unlawful assembly consisted of more than 5 persons but some of them were not identified must be distinguished from those where the Court is doubtful about the presence of some of the persons mentioned as members of an unlawful assembly and if they are excluded from consideration the remaining members are not 5 or more. In the former case the existence of an unlawful assembly is established though some of its members are not identified. But in the latter case the existence of an unlawful assembly itself is doubtful. An offence under S. 302 read with S. 149, Penal Code, is not an independent offence and a person charged for that offence can in a proper case be convicted either under S. 302 or under S. 302 read with S 34 of the Penal Code. **1962 Mad L J Cri 36 : 1961 All Cri R 271 : 1961 All W R (Sup) 39 : 1962 (1) Cri L J 51 (Mys).**

——S. 149 — There can be no conviction under Ss 148/149. See Penal Code (1860), S. 148. **1961 (1) Cri L J 132 (2) : AIR 1961 Orissa 29.**

——Ss. 149, 147 and 148 — Scope and applicability —Rioter not carrying deadly weapon cannot be made liable under S. 148 by virtue of S 149 — Appropriate section to apply is S. 147. See Penal Code (1860), S. 147. **1956 Cri L J 1358 : AIR 1956 Trav-Co 230 (DB).**

12. Charge — General.

See also Penal Code (1860), S. 34.

■ ——S. 149 — Offender accused of offence under S. 302, read with S. 149 — It is not obligatory that a charge under S. 147 or S. 148, should have been framed. See Penal Code (1860), S. 302 **(1965) 2 S C W R 686 : 1965 B L J R 814 : 1965 S C D 1160 : ILR 45 Pat 896 : 1966 Cri L J 197 : AIR 1966 S C 302.**

■ **——Ss. 149 and 34 — Applicability — Five persons charged with substantive offence read with S. 149 and S. 34—Some acquitted—Conviction of rest under substantial offence read with S. 149 and S. 34 — Propriety of — Different situations considered.**

One of the essential ingredients of S. 149 is that the offence must have been committed by any member of an unlawful assembly and S. 141 makes it clear that it is one of the essential conditions of an unlawful assembly that its membership must be five or more. If five or more persons are named in the charge as composing an unlawful assembly, and evidence adduced by the prosecution proves those charges against all of them, that is very clear case where S. 149 can be invoked. It may be that less than five persons may be charged and convicted under S. 302/149 if the charge is that the persons before the Court along with others named constituted an unlawful assembly, the other persons so named may not be available for trial along with their companions for the reason, for instance, that they have absconded. In such a case, the fact that less than five persons are before the Court does not make S. 149 inapplicable. Cases may also arise where in the charge, the prosecution names five or more persons and alleges that they constituted an unlawful assembly, and out of the persons so named two or more are acquitted leaving before the Court less than five persons to be tried. Even in such cases, it is possible that the unlawful assembly consisted of some other persons as well who were not identified and so not named. In such cases, either the trial Court or even the High Court in appeal may be able to come to the conclusion that the acquittal of some of the persons named in the charge and tried will not necessarily displace the charge under S. 149 because along with the two or three persons convicted were others who composed the unlawful assembly but who have not been identified. In such cases, the acquittal of one or more persons named in the charge does not affect the validity of the charge under S. 149.

Where five named persons were charged and tried for an offence read with S. 149 and two of them are acquitted, and the membership of the assembly is reduced from five to three that makes S. 141 inapplic-

able which inevitably leads to the result that S. 149 cannot be invoked against the remaining members. As soon as two of the five named persons are acquitted, the assembly must be deemed to have been composed of only three persons and that clearly cannot be regarded as an unlawful assembly. AIR 1963 S C 384 and AIR 1960 S C 289, Rel on; AIR AIR 1961 S C 1787, Explained and Approved.

Like S. 149, S. 34 also deals with cases of constructive criminal liability. It provides that where a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. In some ways the two sections are similar and in some cases they may overlap. But nevertheless the common intention which is the basis of S. 34 is different from the common object which is the basis of the composition of an unlawful assembly. Cases to which S. 34 can be applied disclose an element of participation in action on the part of all the accused persons. The acts may be different, may vary in their character, but they are all actuated by the some common intention. The common intention required by S. 34 is different from the same intention or similar intention. AIR 1945 P C 118, Rel. on. Mohan Singh v. State of Punjab, **1962 Mad W N 572 : (1962) Supp 3 S C R 848 : 1962 S C D 707 : 1962 All W R (H C) 804 : 1962 All Cri R 448 : 1963 (1) Cri L J 100 : AIR 1963 S C 174 (178 to 180) (Prs 8, 9, 13).**

●——S. 149—Unlawful assembly — Persons charged with being members of such assembly—Other charges in respect of offences committed by such assembly. Acquittal of some— Effect on prosecution of remaining stated. See Penal Code (1860), S. 302. **1962 (2) Cri L J 290 : AIR 1962 S C 1211.**

●——S. 149—Criminal P. C. (1898), S. 537—Accused charged under S. 307 read with S. 149, Penal Code — No express statement made in charge with respect to S. 149 — Held defect in charge did not occasion failure of justice. See Criminal P. C. (1898), S. 537. **1961 (1) Cri L J 859 : AIR 1961 S C 803.**

●——S 149 — Charge—Accused not charged under S. 149—Supreme Court hearing appeal would require strong reasons to convict accused under S. 149. See Criminal P. C. (1898), S. 411-A. **1955 Cri L J 572 : AIR 1955 S C 216.**

——Ss. 149, 302—Charge under S. 302 — Conviction under S. 302/149—Legality—(Criminal P. C. (1898), Ss. 236, 237, 537 (b)—Distinct offences).

A man charged under S. 302, Penal Code, cannot be convicted under S. 302/149, Penal Code or vice versa. Whereas a charge under S. 302, Penal Code, fixes the direct individual liability of the cause for a particular murder, S. 149 Penal Code, creates a distinct head of criminal liability which has come to be known as 'constructive liability' and such cases are not covered by Ss. 236 and 237, Criminal P. C. The framing of a specific and distinct charge in respect of every distinct head of criminal liability constituting an offence is the foundation for a conviction and sentence thereof. AIR 1955 S C 419, Foll. Where at the trial the accused was called upon to defend himself against the charge of murder simpliciter and had no opportunity to defend himself against the charge of constructive liability for it, a liability which arises out of different factual considerations altogether, there is manifest danger of miscarriage of justice by applying S. 149, Penal Code in appeal without giving him a chance of being tried afresh on a new charge under that provision of the law. **1958 Cri L J 424 : AIR 1958 All 255 (290) (Pt I) (Pr 151) (DB).**

——Ss. 149, 302, 323—Charge against accused under Ss. 302 and 323 read with S. 149, Penal Code — Conviction under S. 302 or S. 323 cannot be maintained —See Criminal P. C. (1898), S. 233. 1956 Cri L J 1039 : AIR 1956 All 529 (DB).

——S. 149—Charge under S. 304/149, Penal Code — All except one accused acquitted—Remaining accused alone convicted and sentenced under S. 304 (1) — Conviction cannot be maintained. See Criminal P. C. (1898), S. 221. 1956 Cri L J 194 : AIR 1956 All 159.

——Ss. 149 and 295—Criminal P. C. (1898), S. 537 — Defective charge — Charge framed under S. 295/149, Penal Code — No mention that accused were members of unlawful assembly—Conviction for offence read with S. 149 not vitiated — Defect if any is mere irregularity. See Criminal P. C. (1898), S. 537. A I R 1952 All 878.

——Ss. 149, 147, 295 and 297—Criminal P. C. (1898), S. 535 (1) — Charge under S. 295/149, Penal Code — Conviction under S. 297/149, Penal Code — Circumstances of case such that accused could be convicted under S. 147, Penal Code even in absence of charge— Mere absence of conviction under S. 147, Penal Code is no ground for setting aside their conviction where there has been no failure of justice. See Criminal P. C. (1898), S. 535 (1). AIR 1952 All 878.

——Ss. 149, 143, 141— Charge against five persons — Three of them acquitted — Charge against remaining accused does not necessarily fail if there were other members of unlawful assembly. See Penal Code (1860), S. 143. 1965 (2) Cri L J 613 : AIR 1965 Assam 86.

——S. 149—Charge under S. 326/34 against some of accused only, when there was no charge under S. 326/149 against all accused valid. See Criminal P. C. (1898), S. 239. 1954 Cri L J 963 : A I R 1954 Cal 362 (DB).

——S. 149—Charge — Failure to frame—Prejudice— Essential element of what common object was not stated — Accused held prejudiced. See Criminal P. C. (1898), S. 362 (4). 1954 Cri L J 1254 : A I R 1954 Mad 785.

——Ss. 149, 148—Charge for rioting and under other sections read with S. 149 — Charge defective. See Penal Code (1860), S. 148. 1961 (1) Cri L J 132 (2) : AIR 1961 Orissa 29.

——Ss. 149, 304—Charge under — Omission to mention that accused had knowledge of likelihood of death being caused—Effect—(Criminal P. C. (1898), Ss. 225, 537).

Where the charge under S. 304/149 did not mention that the accused had knowledge that death was likely to be caused in prosecution of the common object of the assembly, the omission was not an illegality but an irregularity and was a curable defect. Where the accused were defended by counsel in the trial, it cannot be held that the accused were in any way prejudiced by the omission. AIR 1956 S C 116, Foll. **ILR (1957) Cut 275 : 1957 Cri L J 644 : AIR 1957 Orissa 117 (119) (Pt A) (Pr 7) (DB).**

——Ss. 149 and 326 — Criminal P. C. (1898), Ss. 225, 233, 537 (a)—Charge for substantive offence under S. 326, Penal Code — Conviction under S. 326/149, Penal Code—Legal - Omission to frame charge under S. 326/149 curable irregularity. See Criminal P. C. (1898) S. 225. 1956 Cri L J 1083 : AIR 1956 Orissa 171 (DB).

——S. 149—Charge—No charge under S. 147 or S. 148 —Conviction under S. 304 read with S. 149 — Valid. See Penal Code (1860), S. 147. **AIR 1955 NUC (Pat) 1308.**

—S. 149—Criminal P. C. (1898), Ss. 297, 417 and 423—Misdirection — Verdict of acquittal — Misdirection in charge under S. 149, Penal Code, held in favour of prosecution — Misdirection held did not lead to erroneous verdict. See Criminal P. C. (1898), S. 297. AIR 1955 NUC (Pat) 449 (DB).

—S. 149—Accused charged generally under Ss. 325, 326 read with S. 149—Charge on particular persons with offences under Ss. 323, 324, 325 and 326 not necessary. See Criminal P. C. (1898), S. 221. 1952 Raj L W 462.

—Ss. 149 and 302 — Accused charged under both sections—Previous charge under S. 147—If necessary.

Before the accused are charged under S. 302 read with S 149, Penal Code, there should be a charge under S. 147, Penal Code, against all of them. 1952 Raj L W 181.

—S. 149—Scope.

While S. 149 creates an offence the punishment for it must depend on the offence of which the offender is by that section made liable. There is, therefore, no meaning in charging a person merely with S. 149. The only purpose such a charge can serve is to create confusion in the minds of the accused persons as to whether they are directly charged with the other offences mentioned or only constructively read with the section. 1956 Ker L T 30 : ILR (1956) Trav-Co 1 : 1956 Cri L J 1358 : AIR 1956 Trav-Co 230 (233) (Pt H) (Pr 11) (DB).

—Ss. 149, 148, 341 and Ss. 302/34 and 109 — Charges under — Leaving out S. 149 in relation to charge of murder held was a serious omission as it would keep the door open for guilty man to escape. See Penal Code (1860), S. 148. 1956 Cri L J 1358 : AIR 1956 Trav-Co 230 (DB).

—S. 149—Conviction for offence read with S. 34 or 149 — No prejudice caused owing to non-mention of those provisions in the charge — Conviction not vitiated. See Penal Code (1860), S. 34. 1954 Cri L J 1303 : AIR 1954 Vin Pra 36.

13. Charge under S. 149 — Conviction under S. 34.

See also Penal Code (1860), S. 34.

—Ss. 149, 302 and 34—Charge under Ss. 302, read with S. 149—Conviction under S. 302 read with S. 34—Valid. See Penal Code (1860), S. 302. AIR 1955 NUC (All) 1697 (DB).

● —Ss. 149, 34 — Criminal P. C. (1898) S. 423 (1) (b) — Prosecution of more than five persons for riot and other offence — All except one given benefit of doubt — Remaining accused found guilty of committing offence with others — Conviction of accused under S. 34, I. P. C. — Validity—Power of appellate Court in appeal from conviction.

(i) Where an act is alleged to have been committed by a number of specified persons, five or more in number, in furtherance of the common intention of all of them and they are prosecuted for rioting and for the commission of the alleged act in view of the provisions of S. 149, I. P. C. but the Court acquits all except one accused, gives them the benefit of the doubt but at the same time definitely finding that the accused was associated with some at least of those acquitted persons in the commission of the alleged act and accordingly convicts him of the commission of the alleged act applying S. 34, such conviction is valid : Case law discussed.

(ii) In an appeal by the accused in such a case it is open to the appellate Court to find, there being no Govt. appeal against the acquittal of such acquitted persons, that, although it cannot interfere with such acquittal, such persons or some of them had been wrongly acquitted and had in fact taken part in the commission of the alleged act in association with appellant and on this ground hold that the appellant was rightly convicted. The mere omission of the State Govt. to appeal against an order of acquittal does not, in all cases, give finality to such finding and it can be altered by the High Court under S. 423 (1) (b), Criminal P. C. which does not impose any limitation upon the powers of the Court to alter any finding so long as it does not involve an enhancement of sentence. AIR 1944 All 137 (FB), Foll.

Editorial Note: — With respect, the questions as framed and answered by the Full Bench require a little elucidation. The first question contemplates a case where though there is a definite finding that the convicted person was associated with some at least of the acquitted persons in the commission of the Act it is not clear who exactly these persons were. The second question raises the point whether in upholding the conviction of the accused, the appellate Court can in the absence of an appeal by the Govt. against the acquittal, find that any or more specific person or persons out of the acquitted persons were associated in the crime and were wrongly acquitted. Thus there is a difference in the "finding" (as to the other accused) which is referred to in the two questions. Gulab v. State. 52 Cri L J 924 : 1951 All L J 406 : 1951 All W R (H C) 444 : 1951 All Cri R 94 : I L R (1952) 2 All 726 : AIR 1951 All 660 (660, 663) (Pt A) (Prs 1, 15, 16) (FB).

—Ss. 149 and 34 — Distinction—Accused charged under S. 307 read with S. 149 — Acquittal under S. 307 — Conviction under Ss. 149 and 326 — Convictions held sustainable — (Criminal P. C. (1898), S. 233).

When a person is charged with an offence read with S. 149 he is only put on notice of two facts that he was a member of unlawful assembly, and that an offence was committed in prosecution of the common object or he knew that an offence was likely to be committed. He is therefore called upon to meet only the points mentioned above, and is not called upon to show that he has not committed any individul act. Section 149 creates a distinct offence, at any rate, a distinct head of liability. So a person charged with constructive liability cannot be convicted for a substantive offence. It is not the case with S. 34 which does no purport to create an offence, but only lays down a rule of law. The reason of the rule is that the accused is very much prejudiced when he is convicted for substantive offence without a specific charge because his attention is not focussed on any individual act. But the position is different when a person is charged with an offence read with Penal Code. Overt acts are attributed to the accused and they have opportunities of meeting that case. Consequently, the conviction for the substantive offence does not occasion any prejudice to the accused.

Thus where in a trial under S. 307 read with S. 149 specific act committed by each of the accused persons, the weapon used by each and the injury caused by him were mentioned in the charge and the Sessions Judge while acquitting them under S. 307 convicted them under S. 326 :

Held, that there was no basis for the complaint that any of the accused had in any way been prejudiced by lack of a specific charge for a substantive offence. Hence, the convictions under S. 326 were sustainable. 1956 Andh W R 170 : 1956 Andh L T 438 : 1957 Cri L J 46 : AIR 1957 Andh Pra 14 (15, 16) (Prs 11 to 13).

—S. 149 — Original charge under S. 325 read with S. 149 — Conviction under S. 325 read with S. 34 — Not illegal. See Penal Code (1860), S. 325. 1961 (1) Cri L J 625 (Assam).

——Ss. 149, 302, 34 and 147 — Accused charged under S. 302/149 — Conviction of the accused under S. 302 read with S. 34 permissible if no prejudice results. See Penal Code (1860), S. 302. **1965 (1) Cri L J 160 : AIR 1965 Cal 89 (DB).**

——Ss. 149, 34 — Charge under S. 149 — Conviction for offence read with S. 34 no doubt not invalid — But notice of precise grant of liability proper. **1957 Ker L T 1230 : 1958 Cri L J 516 : 1958 Mad L J (Cri) 1 : I L R (1958) Ker 283 : 1958 Ker L J 115 : AIR 1958 Ker 94 (DB).**

——S. 149 — Charge under S. 149/302 — Conviction under S. 34/302. See Criminal P. C. (1898), S. 237. **1954 Cri L J 1458 : AIR 1954 Sau 115 (DB).**

14. Charge under S. 34—Conviction under S. 149.

See also Penal Code (1860), S. 34.

——Ss. 149, 34 and 302 — Rioting with deadly weapons resulting in murders—Charge framed under S. 302 read with S. 34 — No evidence to establish who had participated in attack on deceased—No legal bar to convict accused under S. 302 read with S. 149. See Penal Code (1860), S. 34. **1961 (1) Cri L J 42 : AIR 1961 Andh Pra 23 (DB).**

——S. 149 — Facts and circumstances warranting framing of charge under S. 34—Charge under S. 149 can be framed. See Penal Code (1860), S. 34. **1958 Cri L J 733 : AIR 1958 Andh Pra 380 (DB).**

15. Sentence.

——S. 149 — Scope of S. 303 — Person undergoing sentence of imprisonment — Conviction under S. 302/34 or S. 302/149 —Person should be sentenced to death only. See Penal Code (1860), S. 303. **1963 (1) Cri L J 86 : AIR 1963 S C 118.**

——S. 149 — Conviction under S. 302/149 — Sentence—Leniency in matter of sentence to some accused is no ground for reducing sentence of death passed against remaining accused. See Penal Code (1860), S. 302. **1957 Cri L J 591 : AIR 1957 S C 474.**

——S. 149—Separate convictions under S. 147 and S. 323 read with S. 149 — Separate sentences—Legal. See Penal Code (1860), S. 147. **1955 Cri L J 671 : AIR 1955 All 232 (FB).**

——S. 149 — Separate convictions under S. 147 and under any other section read with S. 149 — Legal — AIR 1953 All 315, Not foll. See Penal Code (1860), S. 147. **AIR 1955 NUC (All) 3523.**

——S. 149 — Simultaneous conviction under S. 147 and S. 323 read with S 149, Penal Code — Valid. See Criminal P. C. (1898), S. 233. **1954 Cri L J 1450 : AIR 1954 All 689.**

——Ss. 149, 71, 147 and 325 — Separate sentences — Accused can be punished separately for offences under Ss. 147 and 323, or S. 324 or 325 or 326 read with S. 149—(Criminal P C (1898), S. 35). See Penal Code (1860), S. 71. **1953 Cri L J 1222 : AIR 1953 All 510.**

——Ss. 149, 147 and 323 — Convictions under S. 147 and under S. 323 read with S. 149 — None convicted for himself causing injury under S. 323—Conviction under S. 323 with S. 149 cannot stand. See Penal Code (1860), S. 147. **1952 All L J 392 : 1953 Cri L J 711 : AIR 1953 All 315.**

[Overruled in AIR 1955 All 232 (FB).]

——S. 149 — Separate sentence for rioting and other for substantive offence read with S. 149—Illegal as it offends S. 71 — Legality. See Penal Code (1860), S. 71. **1958 Andh L T 109.**

——S. 149—Sentence—Group of persons, found guilty of murder—Who inflicted fatal blows not established —Lesser punishment when warranted in the case of any accused stated. — Discretion—Accused drunk — Extenuating circumstances. See Penal Code (1860), S. 302. **56 Cri L J 81 : AIR 1954 Andh 46 (DB).**

——S. 149—Two offences one under S. 147 and another under Ss. 325/149 committed by the same acts —Offenders not liable to be punished with the punishment for more than one of such offences. See Penal Code (1860), S. 71. **1955 Cri L J 1033 : AIR 1955 Bhopal 9.**

——Ss. 149, 147 and 325 — Charge under, against several accused—Conviction under S. 147—Sentence — More severe punishment on one of the accused held not justified—Criminal P. C. (1898), S. 32 — See Penal Code (1860), S. 147. **AIR 1952 Madh B 205.**

——Ss. 149, 141, 341 — Accused preventing processionists from proceeding along mosque on public highway with music — Accused held guilty under S. 341 read with S. 149—But in view of the general nature of the incident itself and in view of the fact that the accused would be liable to punishment by virtue of S. 149 held it will be more proper and more logical not to record a separate conviction against these accused in respect of individual acts under S. 341. See Penal Code (1860), S. 141. **1961 (1) Cri L J 291 : AIR 1961 Mys 57 (DB).**

——Ss. 149, 148, 341 — Sentence — Sentence of two years' rigorous imprisonment awarded in respect of offence under S. 148—Sentence of one month's simple imprisonment awarded in respect of offence under S. 341 read with S. 149 — Sentence of fine in respect of latter offence held was uncalled for. See Penal Code (1860), S. 148. **1961 (1) Cri L J 291 : AIR 1961 Mys 57 (DB).**

——Ss. 149, 304—Sentence.

Where several accused were tried for an offence under S. 304/149, Penal Code and the Court finding all of them guilty, sentences the appellants to 5 years rigorous imprisonment and others to 3 years' R. I., but states no reasons for imposing a higher sentence on the appellants, the sentence of 5 years' R. I., passed on the appellants was reduced to 3 years' R. I. **1957 Cri L J 644 : ILR (1957) Cut 275 : AIR 1957 Orissa 117 (121) (Pt D) (Prs 11, 12) (DB).**

——Ss. 149, 302—Conviction under—Lesser sentence than life imprisonment is illegal. See Penal Code (1860), S. 302. **1962 Raj L W 448.**

16. Procedure.

——Ss. 149, 323, 333 — Procedure for trial—Trial by jury—Legality—(Criminal P. C. (1898), S. 536).

It is no doubt true that S. 149, Penal Code embodies a rule of vicarious liability. Nevertheless, it is also true that it is by virtue of this section that members of the assembly who have not themselves committed any offence beyond the offence of being members of that assembly are made liable for an offence committed by others. S. 149 therefore creates a specic offence and impliedly provides for punishment of that offence.

Since under U. P. Govt. Notification 2038/VII-B-1583-50, dated 7-3-1951, offences under Chapter VIII, I. P. Code are not to be tried by a jury, an offence under S. 149 is not to be tried by a jury. It is not correct to say that S. 149 refers to some other offence; because when a person is a member of an unlawful assembly, and is convicted of a particular offence by virtue of section 149, he is being convicted under S. 149, though the punishment which will be awarded to him is to be awarded having regard to that other offence for which he is liable. The trial of the offences under S. 323 read with S. 149 and S. 333 read with 149, or to be more accurate of the offences under S. 149 read with S. 323 and of S. 149 read with S. 333 should

Question be with the aid of assessors and not by jury.

Where however offences under above sections were tried by a jury instead of with the aid of assessors it remained a trial with the aid of jury, and in view of S. 536 it would not be considered to be illegal. 1954 Cri L J 1494 : 1954 All W R (HC) 930 : AIR 1954 All 670 (682) (FB) (Prs 6, 7, 8) (DB).

—S. 149 — Charge to jury — Misdirection — Common object of unlawful assembly to cause hurt — Victim dying from such hurt — Judge directing jury that homicide is committed in prosecution of common object held amounted to misdirection. See Criminal P. C. (1898), S. 297. I L R (1957) 1 Cal 123.

—S. 149 — Large number of accused — Joint trial when proper stated — Different offences committed by groups of persons at different places — No continuity of purpose — No conspiracy — Acts done with similar objects—Not necessarily with common object — Joint trial whether justified stated — Absence of prejudice—Effect. See Criminal P. C. (1898), S. 236 (d). 1964 (2) Cri L J 125 : AIR 1964 Madh Pra 192 (DB).

—S. 149 — M. B. Public Security Act (13 of 1953), S. 14 — Notification under, not including S. 149 in those offences specified as triable by Special Judge — Special Judge not competent to try any of the specified substantive offences read with S. 149. 1957 Cri L J 941 : AIR 1957 Madh Pra 47 (49) (Pr 2).

—S. 149 — Conviction — Trial with assessors — Accused charged under S. 302 and also under S. 302/149 — Omission to ask assessors their opinion on latter charge — Whole trial vitiated. See Criminal P. C. (1898), S. 309 (as before the Amendment Act of 1955). 1953 Cri L J 54 : AIR 1953 Mys 1 (DB).

—Ss. 149, 300 and 325—Applicability and scope—Accused members of unlawful assembly—Accused found not guilty of murder — Conviction under S. 325/149—Permissibility.

It is a well-established principle of law that an accused who is a member of an unlawful assembly is not necessarily guilty of the graver offence committed by any member of an unlawful assembly but that he could be convicted of a lesser offence, provided it is found that he was a member of the unlawful assembly and that such lesser offence was likely to be committed in prosecution of the common object of the assembly.

Where the accused were members of an unlawful assembly which started beating the deceased and the assembly was armed with deadly weapons, but the accused were found not guilty of murder:

Held, that the accused must have known that a grievous injury was likely to be caused and they could be constructively held guilty of the offence of causing grievous hurt read with S. 149. 1953 Pat L R 640 : 1953 Cri L J 72 : AIR 1953 Pat 12 (16) (FB) (Pr 15) (DB).

17. Leave to appeal to Supreme Court.

—S. 149—Leave to appeal to Supreme Court—Case involving question of law — Legality of conviction under S. 149 when persons identified were less than five—Case held not fit for grant of leave to appeal to Supreme Court. 52 Cri L J 1409 : 6 Repts L R 132 : AIR 1951 Nagpur 152 (153, 154) (Pt B) (Prs 6, 7) (DB).

18. Section 149 and S. 302.

C—Ss. 149, 300, 302—Intention to use violence in prosecution of common object.

Where several persons are armed with lathis and one of them is armed with a hatchet and are agreed to use those weapons in case they are thwarted in the achievement of their object, it is by no means incorrect to conclude that they were prepared to use violence in prosecution of their common object and that they knew that in the prosecution of such common object it was likely that some one may be so injured as to die as a result of those injuries. Where violence is used in prosecution of their common object and one person dies as a result of the injuries inflicted, the offence made out on account of the death caused by the concerted acts of the several accused is the offence of murder. AIR 1959 All 680. Affirmed. Hukam Singh v. State of U. P., 1961 B L J R 707 : 1961 S C D 872 : 1961 Mad W N 530 : (1962) 1 S C R 456 : 1961 All L J 537 : 1961 All W R (H C) 503 : 1961 (2) Cri L J 711 : 1961 M P C 720 : 1961 All Cri R 293 : (1961) 2 S C J 858 : 1961 Mad L J (Cr) 867 : AIR 1961 S C 1541 (1543) (Pr B) (Pr 8).

D—Ss. 149, 34 and 302—Scope—Common object of unlawful assembly only to administer chastisement to deceased — Charge not mentioning that members of unlawful assembly knew that deceased was likely to be killed in prosecution of that common object—Deceased killed—Members not causing fatal injury held not guilty under S. 302 read with S. 149 or S. 34—See Penal Code (1860), S. 34. 1956 Cri L J 1885 : AIR 1956 S C 731.

E—S. 149—Accused charged under S. 302, read with S. 149, Penal Code—He cannot be convicted under S. 302 when he was acquitted of S. 302 read with S. 149—See Criminal P. C. (1898), S. 231. 1955 Cri L J 721 : AIR 1955 S C 274.

—S. 149 — Conviction under S. 302 read with S. 149 of Penal Code for vicarious liability in committing murder on provocation—Offence cannot be said to involve element of moral turpitude to disqualify candidate under S. 5-A (h), U. P. Panchayat Raj Act (26 of 1947)—See Panchayats—U. P. Panchayat Raj Act (26 of 1947), S. 5-A (a). 1964 All L J 1115 : 1965 All W R (H C) 25 : 1965 All Cri R 40 : 1 L R (1965) 1 All 230.

—Ss. 149, 302 — Absence of common object of murder—Death caused — Conviction of members of assembly under S. 302 read with S. 149 — Legality.

When the common object of the assembly is not murder but some other unlawful object, and death is caused in the course of the achievement of that object the question that arises is, whether the evidence discloses that in achieving the common object, the members of the assembly were determined to go to any length, even to the length of committing murder:

Held, on facts, that the conviction of the appellants under S. 302 read with S. 149 was correct. 29 Suth. W R Cr 5 and AIR 1959 All 255, Disting. 1959 Cri L J 1255 : AIR 1959 All 695 (698, 699) (Pr C) (Prs 18, 20, 21) (DB).

—Ss. 149 and 302—Murder committed in prosecution of common object of unlawful assembly—Only some members assaulting deceased—All members guilty. 1959 All W R (H C) 375 : 1959 All Cr R 473 : 1959 Cr L J 909 : AIR 1959 All 455 (455) (Pr 1 1) (DB).

—S. 149 — Applicability — Deceased with his men ploughing field—Accused armed with lathis claiming share in field—Deceased and his men refusing to get out—Attack by accused with lathis resulting in death—Accused held liable under S. 302 read with S. 149—See Penal Code (1860), S. 300. 1955 All W R (H C) 72.

—Ss. 149 and 302—Attack by persons armed with deadly weapon — Death caused — Offence—Persons attacking guilty under S. 302 read with S. 149—See Penal Code (1860), S. 302. AIR 1951 All 865 (DB).

——S. 149—Some members of rioting mob armed with guns—Others armed with lathis and other weapons aware of this fact—Member using gun and killing member of opposite party—Other members are liable for offence committed by member by killing deceased with firing from gun—AIR 1954 S C 695 and AIR 1946 Pat 242, Rel. on. 1962 (1) Cri L J 394 : AIR 1962 Andh Pra 166 (172) (Pt G) (Pr 46) (DB).

——Ss. 149 and 302—Conviction.

An accused cannot be convicted under S. 302, Indian Penal Code, for committing the offence directly, and under S. 302 read with S. 149, Indian Penal Code, at the same time, for committing the offence constructively. If a man does commit an offence directly, there is no question of his committing it constructively, and vice versa. 1955 Cri L J 1470 : AIR 1955 Assam 226 (228) (Pt C) (Pr 9) (DB).

——S. 149—Charge under S. 302/149 and S. 302—Conviction under S. 302 for murder held not legal as prejudice was caused to accused—See Criminal P. C. (1898), S. 221. 1958 Cri L J 516 : AIR 1958 Ker 94 (DB).

——Ss. 149 and 302—Several accused charged under S. 302 read with S. 149 of murdering deceased—No finding as to whether accused had constituted themselves into an unlawful assembly with the common object of murder and whether murder was committed in prosecution of that common object—Conviction of accused under S. 302 read with S. 149 cannot be sustained—See Penal Code (1860), S. 302. AIR 1955 N U C (Madh-B) 3408 (DB).

——Ss. 149 and 302 — Some members of unlawful assembly running away after inflicting one or two injuries on deceased — Responsibility of such members for death.

Where the persons participating in an assault upon the deceased are members of one unlawful assembly, the mere fact that some of the members of that assembly run away after inflicting one or two injuries each upon the deceased cannot absolve them of the responsibility for the death even though it was not the direct result of the injuries inflicted by any one of them but was the cumulative result of the injuries inflicted by them and other members of the same unlawful assembly. It is impossible to dissociate the act done by one member of an unlawful assembly from the acts of other members of the same assembly if all those acts form part of the same transaction. 1952 Cri L J 1261 : A I R 1952 Madh B 133 (135) (Pt B) (Pr 21) (DB).

——S. 149 — Unlawful assembly—Common object — Carrying of weapons — Conviction under S. 149 read with S. 302 held justified. See Penal Code (1860), S. 141. 1964 (1) Cri L J 198 : AIR 1964 Madh Pra 30 (DB).

——Ss. 149 and 302—Unlawful assembly—Murder—Circumstances attracting liability of all rioters — Conviction.

It was established from the evidence on record that the accused persons had a motive to do away with the deceased who was harassing some of them and were awaiting, some openly and some concealed for the deceased and others passing on the way. The accused persons were all armed with deadly weapons like aruvals, bichuvas, kutheetis and a gun. In pursuance of the premeditated plan of attack, on sighting these persons, the openly sitting accused and the concealed accused who were whistled for, emerged and set upon the deceased and caused multiple injuries. Accused 1 cut off the head of the deceased. They then marched in a body along with accused 1 and the head was soaked in Kerosene oil and burnt. Other incriminating articles were also got rid of. The accused persons then absconded as a body and were all caught together :

Held that an offence under S. 149 read with S. 302 Indian Penal Code had been brought home affirmatively and satisfactorily. 1959 Mad W N 708.

——Ss. 149, 302—Charge under S. 302/149—No room for doubt that prosecution held accused responsible for murder — Failure to frame specific charge under S. 302 held did not prejudice accused—Omission did not vitiate trial — See Penal Code (1860), S. 302. (1962) 64 Pun L R 338.

——Ss. 149, 141, 148 and 302—Rioting—Beating by four accused with sharp weapons resulting in death—Members could be held guilty under S. 302 by virtue of S. 149. See Penal Code (1860), S. 141. 1958 Cri L J 1232 : AIR 1958 Raj 226 (DB).

——S. 149—Common object—Proof of — Question is one of fact — Policemen guarding police station assaulted and killed—Common object of rescuing by force certain persons from lock-up — Knowledge that police party were likely to be killed—One alone sufficient for liability under S. 149 — All members can be convicted under S. 302 read with S. 149. A I R 1955 N U C (Trav-Co) 538 (DB).

——Ss. 149, 300—Murder—Constructive liability.

The other members of the mob were not aware of the fact that the 1st accused did have a sharp weapon like a knife or dagger in his possession and that he was going to use it to stab the victim.

Held that there was no constructive liability, in the circumstances, incurred by the other members of the mob for the act of stabbing done by the 1st accused. It was only the first accused that was liable for offence of murder committed by him. 1952 Cri L J 1592 : 1952 Ker L T 704 : ILR (1952) Trav-Co 133 : A I R 1952 Trav-Co 459 (462) (Pt C) (Pr 12) (DB).

——S. 149 — Seven accused standing at P's door armed with lathis and attacking deceased and his companions when they passed in front of the house and killing him on the spot—Previous enmity between P and deceased established —S. 149 held applicable and all accused held guilty under S. 302 read with S. 149. See Penal Code (1860), S. 302. 1954 Cri L J 1303 : AIR 1954 Vin Pra 36.

19. Marpit cases.

See also Penal Code (1860), S. 34.

——Ss. 149, 304, Part II — Constructive liability for causing death—Assault by several persons armed with axes — Axes used — Death caused by blow given by one—All other accused taking part are constructively liable under S. 304, Part II read with S. 149. See Penal Code (1860), S. 304, (Part II). 1956 Cri L J 1066 : AIR 1956 Bom 609 (DB).

——Ss. 149, 141 — Free fight between two groups—None of accused can be held constructively responsible for acts of others — Each one must be held responsible for his own act. See Penal Code (1860), S. 141. 1962 Mad L J (Cr) 355 : ILR (1961) Mys 605.

——S. 149—Land dispute — Prosecution party trying to take forcible possession—Protest by defence party in possession — Aggression by prosecution party — Attack with lathis by defence party, resulting in fatal injuries—No evidence to prove apprehension of death or grievous hurt to members of defence party—Members of defence party held exceeded right of private defence and were guilty under S. 304, Part 2. See Penal Code (1860), S. 300. 1963 (1) Cri L J 700 (Orissa).

——S. 149 — Maramari cases—Duty of Court.

In cases of mutal 'Maramari' in which both sides receive injuries, and each side alleges that the other

was the aggressor it is for the Court to find out which side acted on the aggressive, and if there is distinct evidence that one of the sides must have acted on the aggressive and came with a common intention to fight, the question as to which of the accused inflicted the injuries on the members of the other side and with what weapons does not become material. 52 Cri L J 390 (E) : AIR 1951 Sau 22 (22) (Pr 8) (DB).

20. Alteration of conviction in appeal.

C——Ss. 149, 302, 307 and 34 — Unlawful assembly —"In prosecution of the common object" — Intention to fight and cause injury—Inference in respect of — Constructive liability of all persons in assembly — Assembly of less than five—Attack by such assembly —Conviction under Ss. 302, 307 and 149 can be converted into one under Ss. 302, 307 and 34. Kartar Singh v. State of Punjab, 1962 All Cri R 22 : (1962) 1 S C J 293 : 1962 Mad L J (Cri) 175 : 1962 All W R (HC) 18 : (1962) 2 S C R 695 : 1961 (2) Cri L J 953 : AIR 1961 S C 1787 (1790) (Pr 5) (Pars 14, 15).

C——S. 148 — Conviction under S. 302 read with S. 34—Can be altered by High Court to one under S. 320 read with S. 148 — See Criminal P. C. (1898), S. 423. 1958 Cri L J 441 : AIR 1956 S C 239.

——Ss. 148, 34 and 302 — Conviction under S. 302 read with S. 149 — Can be altered in appeal to one under S. 302 read with S. 34—(Criminal P. C. (1898), S. 423 (1) (d). See Penal Code (1860), S. 34. 1951 Cri L J 638 : AIR 1952 S C 164.

C——Ss. 148, 302 and 34—Conviction under S. 302—Conversion into one under S. 302 read with S. 34 by appellate Court valid. See Penal Code (1860), S. 302. AIR 1955 N U C (All) 1097 (DB).

——S. 149—Accused tried for murder with six others who were acquitted—Conviction under S. 149, Penal Code can be converted under S. 34, Penal Code. See Criminal P. C. (1898), S. 237. 1963 M P L J (Notes) 14.

——S. 149—Charge under S. 149 read with S. 302 but no separate charge under S. 302—Conviction—Appeal —Charge under S. 149 not established—Accused not prejudiced in defence by absence of separate charge under S. 302 — Conviction of accused under S. 149 can be converted into conviction under S. 302. See Criminal P. C. (1898), S 535. (1965) 1 Law Rep 714 : 1966 Cri L J 928 (Mys).

——Ss. 149, 302, 34—Murder committed in course of same transaction—Accused persons charged and convicted both under Ss. 302, 149 and S. 302/34—Appeal —Conviction under S. 302/149 upheld and conviction under S. 302/34 found redundant—Conviction under S. 302/34 even if set aside, held would not affect conviction under S. 302/149 — Sentence to be deemed to have been imposed only under S 302/149. Criminal P. C. (1898), S. 423—See Penal Code (1860), S. 302. 1964 (1) Cri L J 426 : AIR 1964 Pat 158 (DB).

SECTION 151

——S. 151 — "Lawfully" commanded or disperse".

The word "lawfully" in S. 151 cannot be construed as having reference only to the authority or competency of the person issuing the command but is to be understood as signifying authority as well as likelihood of disturbance of public peace and if either of these is found lacking, the command cannot be said to be "lawful". The command under the section is not to be sought or issued for placing a party whose right to or possession of a land is seriously and "bona fide" disputed by others in a position of advantage. If the accused persons tried to cut the crops on land claimed as their own or the strength of registered sale deed, they were entitled to do so and their acts would not properly justify the command as it would be the other party interfering with them who had to be directed to leave the place. AIR 1954 Mys 58 (58) (Pr 8).

SECTION 153

——S. 153 — Ingredients of offence under —Trampling over National Flag held an offence under the section.

The ingredients necessary to establish the offence under S. 153 are: (1) That the accused did an act which was illegal; (2) That he thereby gave provocation to any person; (3) That he did this maliguantly or wantonly; (4) That he did this (a) intending that the provocation will cause the offence of rioting to be committed or (b) knowing it to be likely that such provocation will cause the offence of rioting to be committed.

Held, on facts that the act of the accused was a deliberate act for the purpose of insulting the flag, thereby intending to wound the feelings and sentiments of the other persons present. Equally the act done was a wrongful act done without a just cause or excuse and was malignant and wanton within the meaning of S. 153. Further, though the act was neither an offence as defined in S. 40, Penal Code nor was it prohibited by law, it was an illegal act within the meaning of Ss. 43 and 154, Penal Code, because the accused was civilly liable for trespass both to land as well as to goods. 1962 M P L J 44 : 1962 Lab L J 277 : 1962 (2) Cri L J 493 : ILR (1962) Madh Pra 762 : AIR 1962 Madh Pra 292 (293, 294) (Pars 6, 11) (DB).

——S. 153 — "Wantonly" — Person killing cow or only does the act wantonly.

"Wantonly" in S. 153 means recklessly, thoughtlessly without regard for right or consequence. Today, it must be recognised that to kill or to slaughter a cow in the open exposed to the view of the public would cause needless offence to a very large body of persons who inhabit this land. A person who so kills or slaughters a cow obviously does so recklessly, thoughtlessly and without regards for the sentiment of those who do not approve of such an act. Such conduct, therefore, amounts to a wanton act. 29 All 369, Rel. on. 1959 Cri L J 449 : AIR 1952 Pat 132 (139) (Pr A) (Pr 4).

——S. 153 — Killing of cow — Act must not only be wanton but it must also be illegal.

If the act is not illegal, however, wanton, however undesirable, however to be deplored the act may have been, there could be no offence committed under S. 153. Where there is no provision of law which would make the killing of a cow an offence, it is impossible to hold that the act of persons in killing a cow in the open is an illegal act, although it may have been wanton and one which was deplorable. 1959 Cri L J 449 : AIR 1952 Pat 132 (139) (Pr B) (Pr 4).

SECTION 153-A

——S. 153-A—Arrest without warrant—Requisite conditions — Person likely to commit breach of public peace and tranquility — His arrest is not justified. See Criminal P. C. (1898), S. 151. 1965 (1) Cri L J 448 : AIR 1965 All 161.

——S. 153-A (before 1961 amendment) — Classes of citizens — Political party can be one such class — Distorted heading of speech of a member of political party — Presumption as to want of honest intention —Heading can be held to have intended to promote enmity between members of the party as a class against non-members — Interpretation of Statutes — General words — Interpretation of Statutes — Meaning of words.

Section 153-A has been worded generally to apply to all classes of citizens of India and not classes dis-

tinguished on grounds of religion, caste or community. When the legislature used general words the Courts of law shall not be justified in restricting their scope. The general words must be given their ordinary meaning and must be made applicable to all classes provided it is possible to place the person in a distinct class or group. The class or group can be based not only on grounds of religion, race, language, caste or community but also on political or economic affiliations. It is, however, necessary that the classes must be distinct and not vague and ordinarily exclusive of each other. But to say that classes must be associated with their origin, race or religion is to narrow down the scope of the term, which has otherwise a general meaning. Before a set of persons can be placed in one class it is necessary that they must be in sufficient number. An individual cannot be placed in a distinct class within the meaning of S. 153 A but his party can.

Hindu Mahasabha is a well-known political party and it commands sufficient membership to justify its being placed in a class for purpose of S. 153-A. The aims and objects of a political party are generally assumed to be those uttered by its leaders in public. Consequently, a speech of a leader can give rise to enmity or hatred between the political body as a whole and non-members. Where the accused publishes a speech of a leader of the Hindu Mahasabha as a news item under distorted heading reading which Muslim will bear enmity with the speaker and his party, the Court would presume that the publication was with dishonest intention. In such a case the accused is not entitled to the protection of the Explanation to S. 153-A. It is an important duty of an editor to give a heading which gives a clear idea of what the article contains. If it is found that the heading is different from what is contained in the article (news item) inference can be drawn from the heading itself. But where the heading does not give a story different from what is contained in the news items, for drawing inferences the news items as a whole must be read. To put it differently, the heading is a part of the news item (articles) but in certain respects heading stands in a category of its own. **1964 All W R (H C) 694 : (1964) All Cr R 501 : 1964 All L J 545.**

——S. 153-A — Section is not unconstitutional — Reasonable restriction on exercise of right of speech and expression— Restrictions in relation to incitement of an offence — Promotion of enmity between classes is, in substance, incitement to offence — Restriction imposed on freedom of speech and expression by S. 153-A is reasonable restriction — Constitution of India, Art. 19 (1) (a), (2). 1964 All W R (HC) 694 : 1964 All Cr R 501 : 1964 All L J 545.

——S. 153-A — Constitutional validity — Not ultra vires Art. 19 (1) (a) of Constitution of India.

The language used in S. 153-A is not of an all-pervading nature and does not suffer from being all-embracing with the result that because of language no one who does not either promote or attempt to promote class hatred and enmity can be convicted. The section is neither too widely worded nor is indefinite.

The section is not ultra vires Art. 19 (1) (a) of the Constitution. The addition of the words "in the interest of public order" in Art. 19 (2) by the First Amendment Act of 1951 makes the ambit of the protection very wide and any provision which has been enacted in the interest of public order would be valid. Therefore if the State has, in the Penal Code, provided a provision which makes either the attempt or the actual commission of an act promoting feelings of enmity and hatred between different classes of the citizens of India punishable, it must be held that the provision is in the interest of public order. It is not necessary that [illegible] may have been designed directly to maintain public order. It would be valid even if it had been enacted in the interest of public order. AIR 1959 All 101 (FB) and AIR 1951 Punj 27 held no longer law in view of S C decisions in AIR 1962 S C 955. **1963 All L J 21 : 1963 All W R (HC) 87 : 1963 All Cr R 80 : 1963 (2) Cri L J 4 : AIR 1963 All 335 (336, 337) (Pt B) (Prs 3, 4) (DB).**

——Ss. 153-A and 295-A — Criminal P. C. (1898), Ss. 99-A, 99-D — Scope of S. 99-A —Powers of High Court.

The High Court, in view of the provisions of S. 99-D of the Criminal P. C., is precluded from considering any other point than the question whether in fact the document comes within the mischief of the offence charged. It is evident that the scope of S. 99-A, Criminal P. C. is wider than that of S. 153-A, Penal Code, because the words "or is intended to" have been added to S. 99-A which do not find a place in S. 153-A. "Intention" falls short of "attempt" and has been made in addition an alternative ground under S. 99-A — The legislature contemplates that the words spoken or written which do promote hatred etc., would create sufficient mischief so as to fall within the scope of S. 153-A and that it is not necessary for the State further to establish that the writer had intention to promote such hatred. See Criminal P. C. (1898), S. 99-A. **1957 Cri L J 912 : AIR 1957 All 538 (SB).**

——Ss. 153-A and 295-A — Criminal P. C. (1898), S. 99-A—Scope.

If the author has dealt with the subject from a purely scientific or historical point of view avoiding all offensive and abusive language then even if he was wrong in his conclusions the passages might not be open to objection — Again, even if in support of theory he was relying merely on certain customs, habits and practices which are prevailing among some of the Sikhs contrary to the practices laid down in their scriptures he may still be not guilty of an offence under Ss. 153-A and 295-A, Penal Code. But if the remarks are generalised the book ceases to be purely historical and is bound to promote hatred and enmity between the classes which are compared. In such cases the offence may fall within the scope of S. 153-A. See Criminal P. C. (1898), S. 99-A. **1957 Cri L J 912: AIR 1957 All 538 (SB).**

——S. 153-A — Press (Objectionable Matter) Act (1951), S. 3(v) and Expln. 1— Scope and applicability — Promoting feelings of enmity between different sections of people of India. AIR 1954 Ajmer 19, Not foll.

In order to determine whether the impugned article comes within the mischief of S. 3 (v) it is not enough to show that it is likely to promote feelings of enmity between different classes of people but the attending circumstances have to be established by the State Government so that the intention of creating enmity or hatred between the different sections can be inferred. AIR 1952 S C 329, Discussed. See Press (Objectionable Matter) Act, S. 3 (v) and Expln. 1. **1956 Cri L J 1199 : AIR 1956 Hyd 151 (DB).**

——S. 153-A — Editorials written in intemperate and slanderous language against a political party and its members—Does not amount to an offence under the section.

Political parties are susceptible of rapid changes in their composition and complexion and therefore they could not be called a 'class of citizen' as contemplated by S. 153-A, Penal Code.

A libellous or slanderous attack in most intemperate language against a political party or its individual members cannot be said to promote feelings of hatred or enmity between different classes of citizens within the meaning of the section. **I L R (1956) Hyd 889.**

——S. 153-A — Validity of — A reasonable restriction has been imposed in S. 153-A for whosoever promotes or attempts to promote the feelings of enmity or hatred between different classes of citizens of India to the extent of endangering public order cannot be protected by cl. (2) of Art. 19 and so the section can be deemed to be not wholly ultra vires in view of the amended cl. (2) of Art. 19 of the Constitution. See Constitution of India, Art. 19 (2). 1955 Cri L J 184 : AIR 1955 Manipur 9.

——S. 153-A—Hatred or contempt — A general criticism of certain officer or officers could not be deemed to be a criticism of Government established by law and order, and as it was not shown by the prosecution that the word "Mayang" used in the leaflets distributed in the meeting defined any particular class of people, the accused could not be deemed to be guilty under Ss. 124-A and 153-A, simply because they used the word 'Mayang" in the leaflets. See Penal Code (1860), S. 124-A. 1955 Cri L J 184 : A I R 1955 Manipur 9.

——S. 153-A—Proof of sanction — Order authorising Senior Superintendent of Police to make complaint under S. 153-A, Penal Code — Such order signed by Deputy Secretary to Government—Assistant who was acquainted with Deputy Secretary's signature could prove it. See Criminal P. C. (1898), S. 196. 1965 (2) Cri L J 401: AIR 1965 Pat 393.

——S. 153-A, Explanation (as it stood before Amendment of 1961)—Mens rea is main ingredient — Intention how to be ascertained. A I R 1943 Pat 382; A I R 1928 Cal 1133; A I R 1954 Pat 254 and A I R 1920 Cal 478 (SB) Rel. on. 1965 B L J R 613 : 1965 (2) Cri L J 401 : A I R 1965 Pat 393 (396 397) (Pt C) (Prs 8, 9, 13, 14).

——S. 153-A—Offence under—Preliminary investigation by police officer under order of District Magistrate—In appropriate case, Investigating officer may arrest accused in course of investigation under authority of warrant—Warrant of arrest issued by Sub-divisional Magistrate to facilitate Inspector's investigation — Sub-divisional Magistrate does not act beyond jurisdiction. See Criminal P. C. (1898), S. 196-B. 1962 (1) Cri L J 62: AIR 1962 Pat 2 (DB).

——Ss. 153-A, 141, 143 and 228—Unlawful assembly —Common object—Charge not sufficient to give notice to accused of alleged common object — Conviction under S. 143, Penal Code cannot stand. See Penal Code (1860), S. 141. 1956 B L J R 652.

——S. 153-A — Validity — The provisions of S. 124-A and 153-A are not rendered void on the ground that they are inconsistent with the fundamental right of freedom of speech and expression guaranteed to all citizens of India under Art. 19 (1) (a) of the Constitution. See Constitution of India. Art. 19 (1) (a). 1954 Cri LJ 758: AIR 1954 Pat 254 (DB).

——S. 153-A—Applicability — The Constitution contains provisions for the formation of new states, alteration of the boundaries of the existing states etc. Any agitation for the formation for a new State did not, therefore, necessarily come within the mischief of Ss. 124-A and 153-A. See Penal Code (1860), S. 124-A. 1954 Cri L J 758; AIR 1954 Pat 254 (DB).

——S. 153-A—Criticism of Government.—In a democratic country criticism of Governmental measures and administrative action are to some extent unavoidable — With the change of times, the effect of criticisms also changes; what was damaging contempt or hatred of a bureaucratic Government is not so of a popular Government, Government which can neither afford to be hyper-sensitive, nor impervious, to criticism. See Penal Code (1860), S. 124-A. 1954 Cri L J 758; AIR 1954 Pat 254 (DB).

——S. 153-A — Validity — Constitution of India, Arts. 19 and 372 — Adaptation of Laws Order, 1950, Para. 28 — The gist of the offence under S. 153-A is the promotion or attempt to promotion of feelings of enmity or hatred between different classes of citizens of India — Though many acts falling under S. 153-A will be acts undermining or tending to overthrow the State there can equally be many acts made punishable by S. 153-A which will not in any way undermine the security of or tend to overthrow the State — Section 153-A has become void as providing an unwarranted restriction on the freedom of speech and expression. See Constitution of India. Art. 19. 53 P L R 22 : I L R (1951) Punj 193; 52 Cri L J 449 : AIR 1951 Punj 27 (DB).

SECTION 159

——S. 159—Affray—Fight is essential.

To constitute an affray there must be a fight and it is not a fight when one side is aggressive and the other side is passive. A fight is a bilateral affair in which both parties should participate. AIR 1937 Oudh 425; AIR 1938 Mad 924, Rel. on. 1952 Cri L J 1282 : 1952 All L J 493 : 1952 All W R (H C) 547 : 1952 All Cri R 146 : AIR 1952 All 788 (794) (Pt D) (Pr 24).

——S. 159—Affray — What constitutes — Fighting necessary.

The word 'fight' connotes a bilateral act in which two parties participate and it will not amount to an affray when the party who is assaulted submits to the assault without resistance. Again, there must be a definite disturbance of the public peace due to the fight in the public place to make the offence 'affray.' AIR 1938 Mad 924 and AIR 1950 Mad 409, Rel. on. 1961 Ker L J 766 : ILR (1961) 2 Ker 363 : 1961 Ker L T 698 : (1961) 2 Ker L R 323 : 1962 (1) Cri L J 339 (Ker).

——S. 159 — Fight essential — Passive submission not enough.

To constitute affray, fight between two sides is essential. Mere passive submission to beating by the other side will not do. Where a person beats another in a public place and the latter submits to the beating without the least retaliation and simply howls in pain, no offence of affray is committed. (1950) 1 Mad L J 106 : 63 Mad L W 209 : 1950 Mad W N 219 : 51 Cri L J 979 : 1950 Mad W N (Cri) 43 : AIR 1950 Mad 408 (409) (Pr 1).

——Ss. 159, 160—Mere abuses not sufficient.

Mere exchange of abuses at a public place does not amount to an affray. Something more than a mere wordy quarrel is needed before a person can be convicted under S. 160. It would be enough if blows are aimed, whether these prove to be successful or otherwise. AIR 1928 Lah 813 (1); AIR 1937 Oudh 425; AIR 1955 Punj 191, Rel. on; AIR 1926 Lah 412; AIR 1937 Mad 286, Disting. (1963) 65 Punj L R 813.

SECTION 160

——Ss. 160 and 290 — Criminal P. C. (1898), S. 237 — Person charged under S. 160, Penal Code—Doubtful if he can be convicted under S. 290. See Criminal P. C. (1898), S. 237. 1959 Cri L J 1440 : AIR 1959 Mad 513.

——S. 160 — Conviction under — Subsequent trial under S. 323 — Legality — Constitution of India, Art. 20. The test for determining the legality of the trial of a person more than once is whether the offences for which he is tried are distinct from those for which he was previously tried. The facts necessary to make out an offence of hurt being altogether different from those for affray the previous trial and conviction under S. 160, Penal Code are therefore, not

impediment to a subsequent case under S. 323, Penal Code filed by one of the parties to that affray. AIR 1955 Mys 138 (139) (Prs 4, 5) (DB).

——Ss 160, 147—Two parties fighting on open space between houses of locality—Want of proof of common object — Facts disclosing minor offence on public place — Conviction under S. 147 set aside and altered into one under S. 160, Criminal P. C. (1898), S. 238. 1957 M P C 138 : 1957 M P L J 111 : I L R (1956) Nag 899.

——Ss. 160 and 159—Mere abuses not sufficient.

Mere exchange of abuses at public place does not amount to an affray. Something more than a mere wordy quarrel is needed before a person can be convicted under S. 160. It would be enough if blows are aimed, whether these prove to be successful or otherwise. (1963) 65 Pun L R 813.

——S. 160—Criminal P. C. (1898), S. 498 — Offence under — Bail bond — Amount of.

The nature and seriousness of the offence of which the accused is being tried ought always to be borne in mind by the Court while fixing the amount of bail. See Criminal P. C. (1898), S. 498. 1960 Cri L J 1498 : AIR 1960 Punj 572.

SECTION 161

SYNOPSIS

(Penal Code (45 of 1860), S. 161).

1. Applicability and scope.
2. Public servant.
3. Procedure.
4. Gratification.
5. Attempt to obtain bribe.
6. Burden of proof.
7. Motive or reward.
8. "Forbearing to do any official act."
9. Official act.
10. "In the exercise of his official functions."
11. Rendering or attempting to render service to person with public servant.
12. Punishment.
13. Abetment.
14. Evidence.
    - (A) Evidence of trap witness.
      - —Magistrate as trap witness.
      - —Evidence of Police Officer laying trap.
      - —Laying of trap — Desirability.
    - (B) Evidence of bribe giver.
    - (C) Recovery of currency notes and marked coins from accused.
    - (D) Presumption under S. 4, Prevention of Corruption Act.
    - (E) Accused as defence witness.
15. Sanction.
16. Charge under the section.

1. Applicability and scope.

●——S. 161 — Scope — If repealed by S. 5, Prevention of Corruption Act — Prosecution of accused under S. 409 — Sanction — Art. 14 of the Constitution. The section is not repealed by S. 5 (1) (c), Prevention of Corruption Act and its application is also not barred by Art. 14 of the Constitution. No sanction is necessary to prosecute the public servant as he does not normally act in his capacity as a public servant when committing criminal breach of trust. See Prevention of Corruption Act (1947), S. 5. 1957 Cri L J 575 : AIR 1957 S C 458.

——S. 161 — Offence under by Police Officer — Limitation for prosecution — Special rule of limitation does not apply.

The rule of limitation contained in S. 161 (1) of the Bombay Police Act can apply only if the act complained of was done under colour of duty or in excess of duty imposed or authority conferred on the officer concerned by any provision of the Act or by any other law or by any other rule, order or direction made or given under the Act or under any other law. See Bombay Police Act (22 of 1951), S. 161. 1965 (2) Cri L J 193 : AIR 1965 Bom 124 (DB).

——S. 161 — Scope — Section prohibits punishment for same set of facts under two sections—Trial however not prohibited. See General Clauses Act (1897), S. 26. — 1962 (2) Cri L J 598 : AIR 1962 Bom 263 (DB).

——Ss. 161 and 383 — Distinction.

It is quite conceivable that a public servant may commit extortion by compelling a person put in fear to part with property. But whether in a given case the evidence makes out a charge of extortion or one under S. 161 is a question to be decided upon the facts of each case. 1956 Cri L J 522 : AIR 1956 Cal 116 (117) (Pt A) (Pr 10).

——S. 161 — Panchnama in a corruption case — Admissibility of — When hit by S. 162, Criminal P. C.

In a case under S. 161, Penal Code or S. 5 (1) (d) of the Prevention of Corruption Act an offence thereunder is complete when an illegal gratification is accepted, by an accused person. The panchnama to fall under S. 162 of the Code the statement in question must have the element of communication to a police officer. See Criminal P. C. (1898), S. 162. 1963 (2) Cri L J 14 : AIR 1963 Guj 145 (DB).

——S. 161—Cognizance of offence under.

Even after the amendment of 1952 in the Prevention of Corruption Act the position regarding an offence under S. 161 and under sub-s. (2) of S. 5 of Prevention of Corruption Act is that it is cognizable so far as officers of the rank of a Deputy Superintendent of Police and above are concerned. But so far as the officers below the rank of D. S. P. are concerned, the said offences are non-cognizable in so far as they cannot investigate them without the permission of a Magistrate of the First Class. See Prevention of Corruption Act (1947), S. 5 (2). 1957 Cri L J 184 : AIR 1957 Madh B 43 (DB).

——S. 161 —Applicability—Connection between payment and performance of official duty should be established. AIR 1955 N U C (Madh B) 5362.

——S. 161—Applicability—Person taking gratification need not be in position to do service. A I R 1955 N U C (Madh B) 4861.

——S. 161—Scope — Withdrawal of prosecution before charge has been framed—Effect.

Where in a trial for offences under S. 161, I. P C., and S. 5 (1) (a) and S. 5 (1) (d) read with S. 5 (2), Prevention of Corruption Act, the application by the prosecution for withdrawal of charge in respect of the offence under S. 5 (1) (a) was allowed before the charge was framed, even though the order for discharge was not passed, the necessary consequence was that the accused would be deemed to have been discharged so far as that offence was concerned. See Criminal P. C. (1898), S. 494. A I R 1955 N U C (Madh B) 3883.

——S. 161 — Railway Establishment Code, Vol. I, R. 1701, para 2 (1) — Railway servant demanding and accepting bakshis of 8 annas for service rendered — Provisions of Penal Code (1860), do not apply since the Railway Establishment Code, itself prohibits the

acceptance of any "gift; gratuity or reward." See Railway Establishment Code, Vol. I, Rule 1701, Para 2 (1) AIR 1964 Orissa 253 (DB).

2. Public servant.

● —S. 161 — Public servant who is — Servant of Road Transport Corporation — Taking bribe — So far as receiving of a bribe is concerned, it cannot be brought within the scope of acting or purporting to act in pursuance of any of the provisions of the Transport Act, or any other law within the meaning of S. 43 of the Act. It cannot be the case of the prosecution that the accused while acting or purporting to act in pursuance of any of the provisions of the Transport Act or any other law would take the money. Therefore he would not be a public servant within the language of S. 43 of the Act. The difficulty has however now been obviated by the amendment of S. 21 of the Penal Code by the addition of the twelfth clause therein. See Penal Code (1860), S. 21 (before Amendment by Act 2 of 1958). 1964 (1) Cri L J 432 : AIR 1964 S C 492.

● —S. 161—Construction—'Public servant.'

There is nothing in the terms of S. 161, requiring that the public servant contemplated therein must be a specified public servant. Mahesh Prosad v. State of V. P. 1955 Cri L J 249 : 1955 Mad W N 240 : 1955 B L J R 98 : 1955 All W R 245 : 1955 All L J 87 : 1955 S C A 65 : 1955 S C J 153 : (1955) 1 M L J (S C) 83 : 1955 Andh W R (S C) 83 : 1955 Nag L J 375 : (1955) 1 S C R 965 : AIR 1955 S C 70 (72) (Pt B) (Pr 4).

—S. 161 — Police constable of particular outpost accepting bribe from man resident of another outpost—Offence under S. 161 is committed.

The mere fact that a constable is posted at a particular police outpost does not make him cease to be a public servant within the meaning of S. 161 when he is dealing with a man resident of another outpost. If the constable acting as a police officer accepts illegal gratification from such person he would be guilty under S. 161. 1949 All W R (HC) 485 : 1949 All Cri Cas 122 : 51 Cri L J 222 : ILR (1950) All 1113 : AIR 1950 All 5 (5) (Pt A) (Pr 3).

—Ss. 161 and 21 — Unpaid candidate in office of Deputy Commissioner assisting some clerk in work connected with duties of arms clerk — He is not public servant. 51 Cri L J 884 : A I R 1950 East Punj 167.

—S. 161 — Applicability — Railway servant, if can be convicted under S. 161 — (Railways Act (1890), S. 137 (1)) — (Prevention of Corruption Act (1947), S. 2).

Section 161 appears in Chapter IX of the Penal Code, and by virtue of sub-s. (1) of S. 137 of the Indian Railways Act as it stood before the amendment of the year 1955, every railway servant had to be deemed to be a public servant for the purpose of Chapter IX of the Penal Code. Thus the accused, a railway servant, could be tried and convicted of the offence under S. 161 of the Indian Penal Code. (1959) 1 Jab L J 28 : 1957 Ker L J 476 : ILR (1957) Ker 559 : 1957 Mad L J (Cr) 443 : 1957 Cri L J 1127 : 1957 Ker L T 784 : A I R 1957 Ker 134 (138) (Pt C) (Pr 9) (DB).

—Ss. 161, 21 — Prevention of Corruption Act (1947), S. 2 — Public servant — Sar Panch of Gram Panchayat holding an office under the provisions of the M. B. Village Panchayat Act is a public servant. See Prevention of Corruption Act (1947), S. 2. 1956 Cri L J 227 : AIR 1956 Madh B 51.

—S. 161 — "Public servant" — Member of Gram Panchayat is public servant — Member receiving reward for doing any act mentioned in S. 161—Receipt of payment would amount to receipt of gratification other than his legal remuneration. AIR 1955 N U C (Sau) 4104.

3. Procedure.

● —S. 161—Procedure—Offence exclusively triable by Special Judge—Criminal P. C. (1898), Ss. 526, 531—Applicability — Special Judge having no territorial jurisdiction—Conviction if illegal — The order of the Special Judge, was not to be set aside on the ground of his having no territorial jurisdiction to try the case, when no failure of justice had actually taken place. See Criminal Law Amendment Act (1952), S. 7. (1961) 2 Cri L J 811 : AIR 1961 S C 1629.

—S. 161 — Criminal Law (Amendment) Act (1952), Ss. 7, 8 — Offence of bribery triable exclusively by Special Judge — Final report under S. 173, Criminal P. C., can be accepted by District Magistrate — Departmental Inquiry under Para. 486 of Police Regulation is not barred — (Prevention of Corruption Act (1947), S. 5 (2))—(Criminal P. C. (1898), S. 173) — (Police Regulation, Regn. 486, Para. 1 (6)). See Criminal Law (Amendment) Act (1952), S. 7. 1960 Cri L J 1290 : AIR 1960 All 618 (DB).

—S. 161 — Procedure — Investigation by Sub-Inspector — Permission by First Class Magistrate — Jurisdiction of Magistrate to try case, if affected — Irregularity — Curability — Held, that this was not the proper approach in the matter — The permission having been granted mechanically and the case having been conducted partly before the so-called permission and partly after, there was an illegality. But the illegality committed in the course of investigation did not affect the competency and the jurisdiction of the Court — Such a defect being an irregularity is curable under S. 537 of Criminal P. C. — But the question of curability under S 537, Criminal P. C., arises where the trial has proceeded to conclusion — But where the trial has not been completed, different considerations would prevail — See Prevention of Corruption Act (1947), S. 5-A. 1958 Cri L J 764 : AIR 1958 Madh Pra 157 (DB).

4. Gratification.

—Ss. 161 and 165A — Expression of a desire to meet the doctor in connection with an autopsy he had performed on dead body of a person alleged to have been murdered—No illegal gratification offered to doctor — Offence under S. 165-A not committed —Essential ingredient is lacking : ILR 55 All 654 and 67 I C 818, Ref. 1964 All Cri R 194 : 1964 All W R (H C) 280.

—S. 161 — 'Gratification' — Meaning of — (Prevention of Corruption Act (1947), S. 4).

The expression 'gratification' is not defined in the Prevention of Corruption Act, and the third paragraph of S. 161 of the Penal Code, states that the word 'gratification' is not restricted to pecuniary gratification, or to gratification estimable in money. The expression 'gratification' must be held to have been used in S. 161, Indian Penal Code, in the sense of anything which gives satisfaction to the recipient. Prima facie, therefore, voluntary acceptance of an amount of money or a valuable thing by a public servant will amount to acceptance of gratification : AIR 1951 All 546, Rel. on. 61 Bom L R 837 : 1959 Cri L J 1421 : AIR 1959 Bom 543 (547) (Pt B) (Pr 14) (DB).

—S. 161 — Applicability — Offer to pay bribe to public servant without actually producing money amounts to offence under S. 165-A — Offer, what amounts to — See Penal Code (1860), S. 165-A. 58 Cri L J 181 : AIR 1955 Bom 61 (DB).

—S. 161 — Knowledge on the part of the victim.

The gratification must be impressed with the character of being illegal remuneration which is knowingly given as such and knowingly taken as such. If the victim has not the slightest notion that the money or other illegal gratification which passes from him is not taken as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show favour or disfavour to the victim, then it is indeed difficult to hold that such transaction will amount to an offence described in S. 161. **1956 Cri L J 522 : AIR 1956 Cal 116 (117) (Pt B) (Pr 10).**

——S. 161 — Gratification—Attitude of modern law towards bribery.

Modern law attaches little importance to terms like Mariada, mamool, etc., but will get into the core of the matter and see what the nature of the payment is and if it is "illegal gratification" or a bribe taken by an officer for doing a favour or abstaining from doing a disfavour it will come within the scope of S. 161, Penal Code. No doubt, some mamools like Pongal, Deepavali, Dasara and Christmas mamool, paid to peons as baksheesh may not come within the term "illegal gratification", or "bribe" as they are not paid for showing or forbearing to show favour or disfavour in the exercise of official functions : (1949) 2 M L J 443 and AIR 1950 Mad 93, Foll. **1952 Mad W N 220 : 1952 Mad W N (Cr) 45 : (1952) 2 Mad L J 11 : 1952 Cri L J 1245 : AIR 1952 Mad 561 (563) (Pt C) (Pr 9).**

——S. 161 — Rival contentions to be considered in finding out whether money was accepted as bribe.

The rival versions, one of the prosecution and the other of the accused, in regard to the exact circumstances under which the accused came to be in possession of the currency notes, had to be taken into consideration for the purpose of finding out whether the accused had accepted gratification other than legal remuneration : AIR 1954 S C 322, Foll. **1960 Cri L J 934 : 38 Mys L J 265 : 1962 Mad L J (Cri.) 222 : ILR (1960) Mys 26 : AIR 1960 Mys 111 (123) (Pt D) (Pr 7) (DB).**

5. Attempt to obtain bribe.

■—Ss. 161, 162 and 165 — Prevention of Corruption Act (1947), S. 5 (1) (d) — Offence under S. 5 (1) (d) and bribery — Distinction between — "Obtains" — Includes acceptance of voluntary offer — (Words and Phrases) — See Prevention of Corruption Act (1947), S. 5 (1) (d). 1956 Cri L J 837 : AIR 1956 S C 476.

——S. 161—Applicability—Public servant accepting gratification or holding out hopes that he would render service—It is offence. AIR 1955 N U C (Assam) 2795.

——S. 161 — Essentials of offence—Even agreement to accept or attempt to obtain illegal gratification is enough. AIR 1955 N U C (Madh Bha) 4861.

——S. 161 — Offence — What constitutes.

A mere demand or solicitation of gratification by a public servant amounts to an offence under S. 161. **1958 M P C 72 : 1958 All L J (Rev. Sup.) 32 : 1958 Jab L J 162 : 1958 All W R (Sup) 49 : 1958 M P L J 166 : 1958 Cri L J 764 : 1958 All Cri R 184 : AIR 1958 Madh Pra 157 (160) (Pt B) (Pr 11) (DB).**

——S. 161—Proof of service or the thing to be done for which bribe is given—Necessity—Not necessary.

When it is proved by the prosecution that the accused has accepted or obtained any gratification (other than legal remuneration), it is not necessary to prove the service (or the thing to be done) for which the gratification was given ; because, under sub-s. (1) of S. 4 of the Prevention of Corruption Act, it should be presumed unless the contrary is proved that the accused accepted or obtained that gratification as a motive or reward such as is mentioned in S. 161, Indian Penal Code. **1960 Cri L J 934 : 38 Mys L J 265 : 1962 Mad L J (Cri) 222 : ILR (1960) Mys 26 : AIR 1960 Mys 111 (123) (Pt C) (Pr 7) (DB).**

——S. 161 — Construction—"Obtaining or attempting to obtain"—Meaning—Includes threat by public servant — Prevention of Corruption Act (1947), S. 5 (1) (d).

The words 'obtaining' or 'attempting to obtain' in S. 161, Indian Penal Code, can certainly include threat. The illegal gratification may be obtained by threat, and if that is so done, even then it would come under S. 161 of the Penal Code. The mere fact that the complaint said that the accused by putting the complainant in fear of injury and of threat to implicate him in a criminal case obtained the illegal gratification does not take the offence outside the scope of S. 161, Indian Penal Code, or S. 5 (1) (d) of Act (2 of 1947). **1955 B L J R 183 : 1955 Cri L J 1382 : AIR 1955 Pat 453 (455) (Pt C) (Pr 6).**

6. Burden of proof.

——S. 161—Burden of proof — Bribe — Question of fact—Interference in revision—The question whether the bribe had been taken or not is a question of fact and it could not be gone into revision where both the lower Courts have found in favour of the prosecution on this question of fact. See Criminal P. C. (1898), S. 439. AIR 1955 N U C (All) 3570.

——S. 161 — Motive — Presumption — Extent of — Effect on burden of proof on accused — (Prevention of Corruption Act (1947). S. 4 (1)).

It is one of the essential ingredients of the offence under S. 161, Penal Code, to be established by the prosecution that gratification was accepted or agreed to be accepted or attempted to be obtained as a motive or reward for performing an official act. By S. 4 of the Prevention of Corruption Act, in a trial of a public servant for an offence under S. 161, when it is proved that the public servant has accepted or agreed to accept any gratification or any valuable thing, it is required that the Court shall raise a presumption that he has accepted or agreed to accept the same as a motive or reward for doing or forbearing to do an official act. By enacting S. 4 (1) the Legislature has not only dispensed with the proof of that ingredient by the prosecution, but has imposed upon the person accused, when it is proved that he has accepted or obtained or agreed to accept or attempted to obtain gratification other than legal remuneration the budren of proving that it was not as a motive or reward that the gratification was obtained.

As the expression 'gratification in' S. 161, Penal Code is used in the primary meaning, the prosecution is required to prove nothing besides the voluntary acceptance by a public servant of a valuable or other thing which satisfied his desires or appetite, before the presamption under S. 4 may arise.

The presumption however is not one which is required to be rebutted by evidence establishing the defence of the accused beyond reasonable doubt. If the person accused show a reasonable preponderance of probability enouh to support a verdict in a civil action, that the gratification was not as a motive or reward for doing or forbearing to do an official act, the burden may be deemed to be discharged. **61 Bom L R 837 : 1959 Cri L J 1421 : AIR 1959 Bom 543 (547, 548) (Prs 15, 16) (DB).**

——Ss. 161 and 165 — Prevention of Corruption Act (1947), S. 4 — Burden of proof on the prosecution — Standard of proof required — Evidence Act (1872), Ss. 3, 101 to 103.

Ordinarily, the prosecution would be liable to prove the motive or reward under S. 161, or absence or inadequacy of consideration under S. 165, because such notice or reward or such absence of inadequacy of consideration is part of the very offence under Ss. 161 and 165. But now by reason of S. 4 of Prevention of Corruption Act, 1947, that presumption will be made against the accused the moment the prosecution proves that the accused accepted or agreed to accept or obtained or attempted to obtain any gratification or valuable thing. This does not mean that the burden of proof on the prosecution to establish the acceptance or the agreement to accept or the obtaining or the agreement to obtain the gratification or the valuable thing is at all displaced by this section. The burden still remains on the prosecution. This proof must be in accordance with the standard of proof laid down by S. 3, Evidence Act. Any other standard of proof by percentage or plausibility cannot be accepted. **52 Cri L J 1116 : AIR 1951 Cal 524 (DB).**

——S. 161 — — Burden of proof — Mere fact that defence version is not proved beyond reasonable doubt is not sufficient to convict the accused. 1961 M P L J (Notes) 204.

——S. 161 — Burden of proof — S. 4. Prevention of Corruption Act— Presumption when arises —Shifting of onus to accused.

In order to bring home the charge of bribery against a public servant it is essential to prove that there is (1) acceptance of or attempt to obtain a gratification and (2) as a motive or reward for doing or forbearing to do any official act etc. The first essential is to be proved by the prosecution. Once that is proved the presumption under S. 4 of the Prevention of Corruption Act arises. It would then be for the accused to prove that he did not receive gratification as a motive or reward for exercising any official favour or disfavour. The accused can discharge the burden on him by evidence which shows the probability of his claim. **1957 Cri L J 541: AIR 1957 Raj 138 (DB).**

[Overruled on another point in AIR 1960 S C 548].

7. Motive or reward.

● **——S. 161** — Prevention of Corruption Act (1947), S. 4 (1) — Indication that public servant was to be approached by accused — No presumption under section can be made. See Prevention of Corruption Act (1947), S. 4 (1). **1959 Cri L J 1127 : AIR 1959 S C 847.**

[Overruled on another point in AIR 1962 S C 195.]

● **——Ss. 161, 165 and 409 — Proof of offence — Existence of property in excess of official remuneration—Presumption — (Prevention of Corruption Act (1947), S. 5).**

Where a person is charged with criminal misconduct and it is seen that he is in possession of property or income which could not have been amassed or earned by the official remuneration which he had obtained, the Court is entitled to come to the conclusion that the amassing of such wealth was due to bribery or corruption and the person is guilty of an offence of criminal misconduct. Such a presumption cannot be drawn in the case of a prosecution under Ss. 161, 165 and 409 of the Penal Code. Om Parkash Gupta v. State of U. P., **1957 Cri L J 575: 1957 S C A 337 : 1957 S C J 289 : 1957 Mad L J (Cr) 237 : 1957 M P C 433 : 1957 All W R (H C) 401 : 1957 B L J R 502 : 1957 All L J 585 : 1957 S C C 214 : 1957 S C R 423 : (1958) 2 Lab L J 645 : ILR (1957) 2 All 468 : AIR 1957 S C 458 (461) (Pt B) (Pr 12).**

● **——S. 161—With what motive or as reward for what act, bribe was paid, should be considered.**

The essence of an offence under S. 161 of the Penal Code is the obtaining or acceptance, by a public servant, of a gratification other than legal remuneration as a motive or reward for doing or forbearing to do an official act or for showing or forbearing to show any favour or disfavour to any person or for rendering any service or disservice to him. The first question that requires consideration is, with what motive or as reward for what act was the sum paid as illegal gratification by the complainant and accepted by the accused.

No doubt a public officer has no right to demand any bribe; but when he is hauled up before a criminal Court to answer a charge of having taken illegal gratification, the question whether any motive for payment or acceptance of bribe at all existed is certainly a relevant and a material fact, for consideration. Madan Mohan Singh v. State of U. P., **1954 Cri L J 1656 : AIR 1954 S C 637 (641, 642) (Pt D) (Prs 10, 13).**

——S. 161—Motive — Proof of — Necessity.

Under S. 161 of the Penal Code it is necessary to prove that the public servant accepted money as a motive or reward for doing or forbearing to do any of the things mentioned in the section. So where the mere acceptance of money alone by a patwari is proved and there is no proof of the motive or the reason for it, he cannot be convicted under S. 161, Penal Code. **1950 A L J 703 : 1952 Cri L J 615 : AIR 1952 All 312 (313) (Pt B) (Pr 3).**

——S. 161 — Prevention of Corruption Act (1947), S. 4—Presumption — Motive or reward —Court must presume that accused under circumstances accepted money as motive or reward. See Prevention of Corruption Act (1947), S. 4. **1955 Cri L J 1585 : AIR 1955 Him Pra 51.**

——Ss. 161, 116 — "As a motive or reward" — Abetment.

Even though the public servant may not have been in a position to do the official act in question, the accused is guilty of the offence punishable under S. 161, read with S. 116, as soon as he offered gratification to him as a motive or reward for doing it. Case law referred. **1952 Cri L J 107 : AIR 1952 Him Pra 1.**

——Ss. 161 and 511 — Scope—Accused charged and tried for bribery — Conviction for attempting to commit bribery — Legality—Criminal P. C. (1898), S. 238 (2-A).

Where a charge against the accused under S. 161, Penal Code, is in terms about the actual acceptance of the gratification as motive for forbearing from executing the warrant of arrest, and tearing it away he canot be convicted for the offence of attempting to obtain the gratification, where the Court is dealing with a long and rambling story and happenings in the course of a fortnight all over different localities, so that, when the accused called upon to answer a charge based on one incident he may not be aware of the legal implications of the other incidents—may not, at all events, be considering their importance. Charged with the actual receipt of the gratification, he is at pains to repudiate it and is not giving equal attention, or any attention, to what is supposed to have happened several days or a week earlier. **1961 M P C 778 : 1961 M P L J 721.**

8. "Forbearing to do any official act".

——S. 161—Essentials to bring a case under S. 161.

All that is necessary is that the bribe taker was acting in his official capacity and not in a purely private capacity unconnected with his official functions and that he made a representation that he was in a position to do or forbear from doing the alleged

official act or that it was within his power or within his official functions to show the alleged favour or disfavour. 53 Bom L R 699, Rel. on.; AIR 1948 P C 156; AIR 1948 P C 128, Expl. and Disting. (1965) 6 Guj L R 958.

9. Official act.

——S. 161 — Acceptance of money as motive or reward for act which is not official — No offence under S. 161. AIR 1952 All 667 (668) (Pt B) (Pr 3).

——S. 161—The Official act need not be an act which public servant is obliged to do—Accused a police patil receiving gratification for issuing solvency certificate is guilty of offence under S. 161. (1951) 53 Bom L R 699, Foll. (1956) 58 Bom L R 355.

——S. 161—Offence under—Essentials—Illegal gratification — Acceptance of money must be in exercise of official acts.

The gist of the offence under S. 161 is the nature of the act and if the act complained of is not part of the official duty or conduct of the person, then it does not become an official act and any payment made for such act will not amont to an offence. AIR 1952 Ori 73, Rel. on. (1956) 9 Sau L R 39.

10. "In the exercise of his official functions".

——S. 161—Applicability—Offer of bribe to public servant—Public servant fully performing his duty regarding the case before offer—Showing any favour or rendering any service to accused not possible—Whether offence is committed by offer of bribe. Mahadev Dhanappa v. State of Bombay. (1953) S C J 229 : 1953 S C A 685 : (1953) 1 M L J 615 : 1953 Cri L J 902 : 55 Bom L R 513 : 55 Punj L R 307 : AIR 1953 S C 179 (181) (Pt B) (Pr 5).

——S. 161 and 21 — 'Public servant' — ,Medical Officer—Private practice allowed — Acceptance of money from injured person—Offence.

Where the allegation against the accused was that he as a public servant and Medical Officer in charge of a Government Hospital accepted Rs. 100 from an injured person as illegal gratification for showing one of his injuries as grievous in the injury report and it was in evidence that the accused had the right of private practice.

Held, that the fact that the accused was the Medical Officer-in-charge of the hospital and thus a public servant within the meaning of the Penal Code, did not necessarily mean that when he accepted Rs. 100 from the complainant, he did as a motive or reward for doing or forebearing to do any official act or for showing or forbearing to show in the exercise of his official function favour or disfavour to any person. When the right of private practice was given to the accused he, when giving his report was not acting in the discharge of his official duty and consequently he could not be convicted under S. 161. 1956 All W R (H C) 330 : 1956 All L J 466 : 1956 Cri L J 1276 : AIR 1956 All 673 (675) (Pt A) (Pr 5) (DB).

——Ss. 161 and 116—Bribe offered to public servant —Public servant not in position to do act, or show favour or render service.

In the case of a person who offers a bribe the mens rea consists in his intention to give a bribe in order that it may induce the public servant to do or not to do something which he would otherwise not do or do. This state of mind of the person, who offers a gratification, has obviously nothing to do with the question whether the public servant, to whom the gratification is offered, is or is not in a position to do or not to do the act, for doing or for not doing which the amount is offered to him. If, therefore, the intention or object with which money is offered to a public servant is to induce him to perform an official act or show favour in the exercise of his official functions or render any service with any public servant, the offence punishable under S. 161 read with S. 116 would be complete, and it is immaterial whether the public servant is or is not actually in a position to do the act or show favour or render service, for doing showing or rendering which the bribe is offered to him. (1941) 23 Lah 402, Rel. on. (1904) 1 A L J 207; (1928) 51 All 467 : I L R 1947 Nag 611 and 52 Bom L R 699, Ref. to. (1952) 21 Bom Cr C 310 : 54 Bom L R 153 : 1952 Cr L J 1572 : ILR (1952) Bom 900: AIR 1952 Bom 435 (435) (Pt A) (Pr 1) (DB).

——S. 161—Applicability — Public servant receiving bribe for doing official act—Act not within his power to perform — Public servant, if still guilty.

The section does not require that the public servant must himself have the power or must himself be in a position to perform the act or show favour or disfavour, for doing or showing which the bribe has been paid to him. From the last explanation to the section it is clear that it is not necessary in order to constitute an offence under S. 161 that the act for doing which the bribe is given should actually be performed. It is sufficient if a representation is made that it has been or that it will be performed and a public servant, who obtains a bribe by making such representation, will be guilty of the offence punishable under this section, even if he had or has no intention to perform and has not performed or does not actually perform that act. A representation by a person that he has done or that he will do an act impliedly includes a representation that it was or is within his power to do that act. (1904) 1 A L J 207; 51 All 467; AIR 1947 All 444; 23 Lah 402 and AIR 1947 Nag 611, Foll. 53 Bom L R 699 : 21 Bom Cr C 199 : 1952 Cri L J 925 : I L R (1952) Bom 169 : AIR 1952 Bom 58 (61) (Pr 8) (DB).

——Ss. 161, 116—Offence under S. 161 — Essentials of — Fact whether public servant concerned is functus officio if negatives offence.

The fact that the public servant is functus officio when money is offered to him as a bribe would not itself and as a matter of law be sufficient to negative the offence under S. 161. However such fact may have in any particular case an important bearing on the question whether the gratification offered or accepted was intended to be or was believed or held out to be an official act. AIR 1921 Cal 344 and A I R 1929 Mad 756, Dissent. Case law Ref.

The gist of the offence clearly is not that there was at the time an official act to be procured capable of being performed by the taker of the bribe or by another public servant with whom he is intended to exercise his influence but that the extra legal gratification is obtained as a motive or reward for doing official acts, that is for doing what may be or is believed or held out to be official conduct. The stress in the section is not so much on the performance of the official act itself, or on its being capable of performance but on the nature of the act as being official. This is meant to exclude from its purview acts which were totally unconnected with any official conduct and which may be attributable purely to the private capacity of the bribe taker or of the other public servant. The emphasis on the gratification offered being a motive or reward for official conduct (inclusive of that which is believed or held out to be so.) Further the connection between the money and the act sought to be procured as being by way of motive or reward for procuring such act must be clearly established either by direct or circumstantial evidence. Illustration C to S. 161 clearly shows that the inducing of the belief by the taker of the bribe would be quite enough to bring the case within the purview of S. 161 so long as the achievement contemplated is an act of official character if the bribe is a motive or reward for the same. Similarly, the belief in the

giver of the bribe would be enough to bring the case under S. 161/116.

Held, on the evidence that the motive of the accused in offering bribe was not established beyond doubt and, therefore, he was not guilty under S. 161/116. Penal Code. 18 Cut L T 19 : 1952 Cri L J 367 : A I R 1952 Orissa 73 (74, 75) (Prs 5, 7, 9) (DB).

——Ss. 161 and 165-A—Applicability—Bribe offered to Head Constable—Head Constable unable to act—Conviction—[Punjab Weights and Measures Act (12 of 1941), Ss. 1 and 37].

Section 161 does not require that the public servant must in fact be in a position to do the official act, favour or service at the time. Therefore even if a Head Constable is not in a position to take action under Ss. 18 and 37 of the Punjab Weights and Measures Act that would not affect the guilt of the accused convicted under S. 165-A. 56 Punj L R 298 : 1954 Cri L J 1503 : A I R 1954 Punj 228 (230) (Pt B) (Prs 20, 21).

——S. 161—Scope— State of mind of person offering gratification—Relevancy.

In a case under S. 161 of the Code, the state of mind of the person who offers 'gratification' has nothing to do with the question whether the public servant to whom illegal gratification is offered is or is not in a position to do or not to do the act or doing or for not doing which the amount is offered to him. 56 Punj L R 298 : 1954 Cri L J 1503 : A I R 1954 Punj 228 (230) (Pt C) (Pr 25).

——Ss. 161, 165-A — Scope.— Offer of bribe after order is passed.

It is not correct to say that if a public servant accepts or is offered bribe after he has passed a particular order no offence of accepting illegal gratification or offering illegal gratification is established. It is however necessary that it should be proved that the offer was made to the public servant for the purpose of getting an official act done by him. AIR 1921 Cal 344 ; A I R 1929 Mad 756 ; A I R 1935 Pesh 26, Dissented from. 1955 Cr L J 992 : 1956 Raj LW 173: I L R (1955) 5 Raj 497 : A I R 1955 Raj 108 (111) (Pt A) (Pr 11).

——Ss. 161, 165-A — Applicabiltty — Public servant powerless to assist accused.

Even if the public servant had no power to assist the accused, the question is not what the public servant could have done but the question is what the accused wanted him to do. Where the accused wanted that the public servant in his official capacity should assist him and for that he made an offer to pay him some cash the accused was clearly guilty of an offence under S. 165-A. AIR 1941 Lah 276 ; AIR 1952 Bom 58, Rel. on. 1955 Cr L J 992 : 1956 Raj L W 173 : ILR (1955) 5 Raj 497 : AIR 1955 Raj 108 (112) (Pt C) (Pr 13).

——S. 161—Applicability—Public servant not on duty —If can be convicted.

An accused though not on duty at the time can be convicted under S. 161 when he is found to show favour that he could in the discharge of his official duties. 8 Sau L R 306 : 1955 Cr L J 1633 : A I R 1955 Sau 117 (119) (Pt C) (Pr 5) (DB).

——S. 161—Applicability.

Businessman paying illegal gratification to Municipal clerk in consideration of his influence with the Municipal Board to obtain favourable decision for the businessman — Businessman held guilty of offence under S. 161 read with S. 116 —It was not necessary that municipal servant should have been in a position to influence Municipal Board when illegal gratification was paid. See Penal Code (1860), S. 116. A I R 1955 N U C (Sau) 4690 (DB).

——S. 161—Applicability — Public servant need not have power to perform act of favour.

Section 161 does not require that the public servant himself must have the power or must himself be in a position to perform the act, to show favour or distavour or to render service or disservice for doing, showing or rendering which the bribe has been paid to him. AIR 1952 Bom 435, Rel. on. 6 Sau L R 216 : 1954 Cr L J 688 : AIR 1954 Sau 62 (63) (Pt B) (Pr 5) (DB).

11. Rendering or attempting to render service to person with public servant.

■ ——S. 161 — Applicability — Taking money in order to get job for another person somewhere — Offence.

The mere fact that a person takes money in order to get a job for another person somewhere would not by itself, necessarily be an offence under S. 161 unless all the ingredients of that section are made out. Thus where the charge under S. 161 states that the accused being a public servant,accepted a sum of money from a certain person 'as illegal gratification' as a motive for securing a job for him in the Railway Running Shed the third ingredient of the offence under S. 161 is not charged against the accused for it does not disclose who was the public servant whom the accused would have approached for rendering or attempting to render service to the other person in securing a job for him. State of Ajmer (now Rajasthan) v. Shivjilal. 1959 All Cr R 303 : 37 Mys L J 878 : 1959 Mad W N (SC) 72 : 1959 S C J 911 : 1959 Mad L J (Cr) 589 : 1959 Cr L J 1127 : 1959 All W R (HC) 376 : (1960) 1 Lab L J 239 : (1961)1 S C A 288 : (1959) Supp 2 S C R 739 : A I R 1959 S C 847 (850) (Pt C) (Pr 6).

[Overruled on another point in AIR 1962 S C 195.]

■ ——S. 161, Explanation—Motive.

To constitute an offence under S. 161 it is enough if the public servant who receives the money takes it by holding out that he will render assistance to the giver "with any other public servant" and the giver gives the money under that belief. Mahesh Prasad v. State of U. P., 1955 Cri L J 249 : 1955 B L J R 98 : 1955 All W R (HC) 245 : 1955 Mad W N 240 : 1955 All L J 87 : 1955 S C A 65 : 1955 S C J 153 : (1955) 1 M L J (SC) 83 : (1955) Andh W R (SC) 83 : 1955 Nag L J 375 : (1955) 1 S C R 965 : AIR 1955 S C 70 (71) (Pt A) (Pr 3) (SC).

——S. 161—Evidence and proof.

As far as offence under S. 161, I. P. C. is concerned it must be established that the appellant told the agent that he would render service by approaching, a particular public servant, which is one of the essential ingredients of the offence. It is to the effect that a connection between payment and the performance of the official duty must be established, for proof of guilt under S. 165, Penal Code. See Evidence Act (1872), S. 133. 1961 (2) Cri L J 778 : AIR 1961 Mad 482.

——S. 161—Charge silent as to rendering of any service — Effect — Acquittal — (Cr. P. Code (1898), Ss. 221, 223)).

Where one of the main ingredients of S. 161, namely, rendering or attempting to render any service with any public servant is not referred to in the charge under S. 161, is not spoken to by the witnesses and is not mentioned in the complaint, the accused is entitled to acquittal. AIR 1959 S C 847, Foll. 1959 Mad W N 597 : 72 Mad L W 764 : 1960 All W R (Sup) 1 : 1960 Cri L J 363 : (1960) 1 M L J 339 : 1960 All Cr R 41 : 1960 Mad L J (Cr) 248 : AIR 1960 Mad 141 (142) (Pr 5).

12. Punishment.

■ ——S. 161—Constitution of India, Art. 136—Appeal by special leave—Sentence for offence under S. 161, Penal Code—Practice of Supreme Court.

In a trial for offence under S. 161, Penal Code, the Supreme Court would ordinarily not interfere with the quantum of punishment given by the Courts below, particularly in the exercise of its jurisdiction under Art. 136 of Constitution of India. For a public servant to be guilty of corruption is a very serious matter and the Courts would not took upon it with undue leniency. See Constitution of India, Art. 136. 1960 Cri L J 1380 : AIR 1960 S C 961.

■ ——S. 161—Prevention of Corruption Act (1947), S. 5 (1) (d) — Trap laid for detection of offence—Effect on sentence.

There is no warrant for the view that the offences committed in the course of traps are less grave and call for lenient or nominal sentences. See Prevention of Corruption Act (1947), S. 5 (1) (d). 1956 Cri L J 837 : AIR 1956 S C 476.

——Ss. 161 and 116 — Sentence—Offence of offering bribe must be severely punished. 1954 Cri L J 459 : 1953 All W R (HC) 606 : 1953 All L J 660 . AIR 1954 All 223 (224) (Pt E) (Pr 1).

——S. 161—Sentence.

Held, that it could not be said that a severe punishment was not called for as the accused had been trapped into the commission of the offence. But considering that the accused had been dismissed and had forfeited his right to pension and bearing in mind his long record of service, the Court would reduce the fine to Rs. 50 and maintain the sentence of imprisonment till the rising of the Court. 1955 Cri L J 1585 ; AIR 1955 Him Pra 51 (54) (Pt C) (Pr 15).

——Ss. 161, 116—Bribe-giver—Punishment.

As between the taker and giver of the bribe the latter is by far the worse of the two. And suppression of the crime is called for with a stronger hand. See Penal Code (45 of 1860), S. 116. 1952 Cri L J 107 : AIR 1952 Him Pra 1.

——S. 161—Sentence—Accused very low and subordinate officer—Sentence reduced to 1 year R. I. AIR 1955 N U C (Madh B) 4861.

——S. 161—Offences mentioned in S. 5 (1) of Prevention of Corruption Act are same as that in S 161, Penal Code — Separate sentences under S. 5 (2), of Prevention of Corruption Act and S. 161, Penal Code are not legal See Prevention of Corruption Act, (1947), S. 5 (1). 1960 Cri L J 92 : AIR 1960 Mad 27.

——S. 161 — Mysore Prevention of Corruption Act (1948), S. 5 (1) (d) — Sentence — Facts constituting offence under both — Similar sentences of imprisonment and fine under each — Sentences to run concurrently—Propriety.

Where the sentences awarded against the accused are two years' rigorous imprisonment and fine of Rs. 1000 for the offence under S. 161, Penal Code, and a similar sentence for the offence under S 5 (1) (d) of Prevention of Corruption Act, the direction that these are to run concurrently cannot relieve the accused of the liability for payment of the fine in each case. But when the act constituting the offence and facts relating to it are the same for the purpose of conviction under both the sections, a double sentence of fine is not proper.

Held, on facts that as regards the sentence of imprisonment though in view of the consideration that corruption was a grave and growing evil to be nipped in the bud and when a case was made out against a person holding a responsible position in service, the sentence should be deterrent, the consequences of the conviction on his career at the late stage of his life could not be overlooked. (Period of rigorous imprisonment was limited for each offence to six months, sentences to run concurrently. Sentence of fine of Rs. 1000 with respect to offence under S. 161, Penal Code, alone was maintained,) 1952 Cri L J 919 : 32 Mys L J 1 : ILR (1952) Mys 151 : A I R 1952 Mys 42 (47) (Pt E) (Pr 11) (DB).

——Ss. 161, 107, 116—Abetment—Sentence.

If an offer of bribe is made on the invitation of a public servant such offer would still be "intentional aid" which is one of the ingredients of abetment under S. 107. There seems to be no justification for treating the abettor leniently; such an offender should be granted a substantive punishment. See Penal Code (45 of 1860), S. 107. 1952 Cri L J 941 : A I R 1952 Orissa 180 (DB).

——S. 161—Sentence — Clerk taking bribe of Rs. 5—Sentence of three months reduced to period already undergone. A I R 1955 N U C (Pat) 1030.

——S. 161—Sentence—Considerations.

A corrupt official is a menace to the society and, far from helping in the proper functioning of the Government and implementing of the laws, brings the Government and the society at large into disrepute. It is through the agency of the public servants that the policy of the Legislature as well as of the Government is implemented. It is through the public servants that crimes are detected and offenders are brought to book. It is through strictly honest and incorruptible public servants that the welfare of the society can be ensured. If such public servants are open to corruption and coerce the public into paying them illegal gratification the whole structure of the society would be upset and the policy of the Government and of the Legislature, howsoever beneficial it may be, would gravely suffer. A public servant therefore once he is found to be guilty of accepting or obtaining illegal gratification, deserves no soft corner or indulgence from the Courts of law. 1958 Raj L W 596.

——Ss. 161 and 116 — Sentence.

Offences of bribery or abetment of bribery rarely come to light and where such an offence is proved beyond all reasonable doubt, the perpetrators thereof must be visited with deterrent punishment. An assessee who offers bribe to an Income-tax Officer to induce him to tax him leniently is not entitled to any lenient consideration. 1958 Raj L W 561 : 1957 Cri L J 96 : ILR (1957) 7 Raj 111 : AIR 1957 Raj 1 (5) (Pt C) (Pr 17).

——S. 161 — Sentence—Naib Tahsildar taking bribe of Rs. 200 — Sentence of Rs 1000 held inadequate — Loss of service and other benefits held no consideration — Substantial sentence of imprisonment should be awarded. AIR 1955 N U C (Raj) 1192.

——S. 161 — Sentence — Same act constituting offence under S. 161, Indian Penal Code, and S. 5 (2), Prevention of Corruption Act, 1949 — Separate sentence under each section — Validity.

Under S. 26 of the Saurashtra Acts (Interpretation) Act, 1952, which is on the same lines as S. 26 of the General Clauses Act, the offender is not to be punished twice for the same offence. Separate sentences for the conviction under S 161 of the Code, and S 5 (2) of the Prevention of Corruption Act, are therefore, illegal since there is only one act, which constitutes an offence under two enactments — See General Clauses Act (1897), S. 26. 1954 Cri L J 1466 : AIR 1954 Sau 121 (DB).

——S. 161 — Sentence — Fine of Rs. 200 for taking illegal gratification of Rs. 300 is ridiculous—See Prevention of Corruption Act (1947), S. 5 (2). 1954 Cri L J 688 : AIR 1954 Sau 62 (DB).

—S. 161 — Bribery case — Delay in investigation and filing charge-sheet — Effect — Delay on part of Police deprecated — Sentence reduced — See Criminal P. C. (1898), S. 173. 1960 Cri L J 404 : AIR 1960 Tripura 8.

13. Abetment.

● —S. 161 — Accused serving in the very office where appointment is to be made and accepting money for such appointment — Charge against accused in such case need not refer to other public servant with whom service would be rendered.

Where the charge against the accused is under that part of S. 161, which refers to accepting of gratification for rendering any service or disservice to a person with any public servant, the charge should specify the other public servant who is to be approached for rendering service or disservice. At the same time even if the other public servant is not specified in the charge, the trial would not be bad. Where the other public servant is not specified in the charge that would only mean that there is defect in the charge and such a defect would be curable under S. 537 of the Criminal P. C., unless such error or omission or irregularity or misdirection has in fact occasioned a failure of justice. Where, besides the omission to indicate the other public servant in the charge there is nothing in the complaint, in the charge-sheet submitted by the police and in the evidence to show who was the other public servant with whom service or disservice would be rendered by the accused one of the main ingredient of S. 161 is not proved. Where, however, a person is a public servant in the very office where the appointment of the person giving bribe is to be made and takes money in order to get the appointment made there is no further question of the charge or evidence indicating who was the other public servant with whom the service would be rendered. It is not necessary to show whether there was any other public servant who was to be approached where the public servant taking the money is himself in the very office by which the appointment would be made. In such a case the person would be taking money for himself or for any other person in his office in order to do any official act or get it done. It is enough if it is shown that money was paid to a public servant in a particular department by which an order would be made and if it was taken for doing any official act in that department : AIR 1959 S C 847, Disting. 1964 Mad W N 12 : (1964) 4 S C R 299 : 1964 (1) Cri L J 432 : 1964 S C D 228 : 1964 Mad L J (Cri) 404 : (1964) 2 S C J 215 : 66 Bom L R 244 : (1963) 2 S C W R 464 : AIR 1964 S C 492 (494, 495) (Pt A) (Prs 5, 6).

—S. 161 — Applicability and scope — Wrong conviction under S. 165, Indian Penal Code, for offence committed in 1948—Appellate Court's power to alter finding—Conviction under S. 161 read with S. 169, Indian Penal Code — Legality.

Where the alleged offence of offering bribe has been committed in the year 1948, the accused cannot be convicted under S. 165-A. However the accused can be convicted on the same facts under S. 161 read with S. 109. If it is otherwise permissible, it would be open to the High Court in exercise of its appellate jurisdiction under S. 423, Criminal P. C., to alter the finding as to the accused's liability from one under S. 165-A to that under S. 161/109, Indian Penal Code — See Criminal P. C. (1898), S. 423 (1) (b). 1957 Cri L J 695 : AIR 1957 All 388.

[Reversed on another point in AIR 1960 S C 409.]

—Ss. 161 and 116 — Receiving bribe on behalf of public servant—Criminal P. C. (1898), Ss. 238, 237, 423 and 439.

If a police constable receives bribe on behalf of a Sub-Inspector the constable is not guilty under S. 161 but is guilty under S. 161 read with S. 116, Penal Code—See Penal Code (45 of 1860), S. 116. 51 Cri L J 1073 : AIR 1950 All 412.

—Ss. 161 165 (A) and 116—Person offering bribe can only be prosecuted under S. 165-A and not under S. 161 read with S. 116 — (Interpretation of Statutes — Repeal of earlier by later) — See Penal Code (1860), S. 165-A. 1956 Cri L J 249 : A I R 1956 Manipur 9.

—Ss. 161 and 116—Abetment — Person accepting bribe acting as agent of public servant — Offence.

Where a person acted only as an agent of a public servant in accepting a bribe and the amount paid was also meant for the latter and the favour that was to be done to the complainant in lieu of the remuneration was to be done by the public servant himself in the exercise of his official functions :

Held, that the person could only be charged for abetment under S. 116 and not under S. 161, Penal Code. ('51) 3 Pepsu L R 652.

—Ss. 161 and 165-A — Essentials of offences — Mere offer to pay money.

The mere fact of the accused asking the Magistrate to take something from him and make an order in his favour was sufficient to constitute an offence of attempt to pay bribe to the Magistrate. It was not necessary that the accused should have placed the cash which he wanted to pay to the Magistrate before the latter. It was enough that the accused had money in his pocket and after requesting the Magistrate to take something from him for making a favourable order, he put his hand in his pocket to take out his money bag which was not empty and contained a sum. AIR 1925 Pat 48 ; AIR 1927 Mad 1011 and 53 M L J 723, Rel. on. 1955 Cri L J 992 : 1956 Raj L W 173 : ILR (1955) 5 Raj 497 : AIR 1955 Raj 108 (111) (Pt B) (Pr 12).

—Ss. 161 and 165-A — Accused paying illegal gratification to Food Inspector for giving certificates in respect of ration cards — Accused charged under S. 165-A with having abeted Food Inspector in commission of offence under S. 161 even though the said offence under S. 161 was not committed—Held, that question whether ration cards were true or false had nothing to do with the case—See Penal Code (1860), S. 165-A. 1961 (1) Cri L J 437 : AIR 1961 Tripura 8.

14. Evidence.

(A) Evidence of trap witness.

—Magistrate as trap witness.

—Evidence of Police Officer laying trap.

—Laying of trap—Desirability.

(B) Evidence of bribe giver.

(C) Recovery of currency notes and marked coins from accused.

(D) Presumption under S. 4, Prevention of Corruption Act.

(E) Accused as defence witness.

14. Evidence.

● —S. 161 — Evidence — (Evidence Act (1872), S. 133)—When could not be impeached as that of partisan witnesses.

Where the witnesses came on the scene after the whole affair was practically over and a stage had been reached when it was necessary to compare the numbers of the notes which had been recovered from the bedroom of the accused with the numbers of the notes which had been handed over to the person who gave the bribe when the raid was being organised and it was as that stage that they figured in the transaction their evidence certainly could not be impeached as that

of partisan witnesses. Shiu Bahadur Singh v. State of Vindh Pradesh. 1954 S C J 362 : 1954 Cri L J 910 : 1954 S C A 1316 : 1954 S C R 1098 : A I R 1954 S C 322 (327) (Pt H) (Pr 12).

——Ss. 161, 116 — Criminal Procedure Code (1898), Ss. 162, 172 — Prosecution for offence under S. 161 read with S. 116, Penal Code—Prosecution story altogether unnatural and illogical—Copies of statements of witnesses recorded by police during investigation not supplied even though requested by accused —Recovery of currency notes not mentioned in general Diary—Accused given benefit of doubt and acquitted. 51 Cri L J 1301 : AIR 1950 Ajmer 44 (45) (Pr 3).

——S. 161—Trap arranged to detect bribery—Different kinds oi traps explained. 1958 Cri L J 586 : AIR 1958 All 334 (DB).

——Ss. 161, 34—Common intention to obtain bribe—Evidence.

Common intention within the meaning of S. 34 implies a pre-arranged plan, and to convict the accused of an offence applying this section, it should be proved that the criminal act was done in concert pursuant to the prearranged plan. It was difficult, if not impossible, to procure direct evidence to prove the intention of an individual and in most cases intention had to be inferred from his act or conduct or other relevant circumstances of the case. See Penal Code (1860), S. 34. 1956 Cri L J 585: AIR 1956 Bom 287 (DB).

——Ss. 161, 34 — Evidence — (Evidence Act (1872), Ss. 6, 14).

Where the two accused were being prosecuted under S. 161 read with S. 34, Penal Code, for receiving illegal gratification on 19-11-1954, if the prosecution contended that on 21st October both the accused together went to the society when accused 2 made a demand for money on behalf of both of them, if they further contended that on the 24th October both the accused went again to the Society premises for the same purpose and if, according to the prosecutian, on 13-11-1954 both the accused repeated their visit to the Society premises for the same purpose. it could not be said that the evidence which the prosecution led in respect of the incidents of 21st October 24th October and 13th November was inadmissible. It would be admissible on the point of common intention. 58 Bom L R 90 : 1956 Cri L J 585 : ILR (1956) Bom 343 : AIR 1956 Bom 287 (298) (Pt I) (Pr 21) (DB).

——S. 161—Prevention of Corruption Act (1947), S. 4 —It is unnatural to expect that the accused would demand a bribe in the presence of a person about whom he was not sure. See Prevention of Corruption Act (1947), S. 4. 1956 Cri L J 227 : A I R 1956 Madh Bha 51.

——S, 161—Evidence of previous acts af taking bribes—Relevancy.

It would not be correct to say that the evidence relating to the previous incidents either formed the foundation for the subsequent incident a question or would be relevant for showing that the taking of the bribe in question had developed through various stages. Nor would it be correct to take the view that the evidence in regard to the previous bribes is in the nature of introductory evidence forming a background to the later incident which alone is the subject-matter of the charge. Evidence in regard to previous incident not mentioned in the charge, has the danger of creating prejudice against the accused, while it is no proof of the particular offence which is the subject-matter of the charge. A I R 1957 S C 458, Foll. 38 Mys L J 265 : 1962 Mad L J (Cri) 222 : ILR (1960) Mys 26 : 1960 Cri L J 934 : A I R 1960 Mys 111 (116) (Pt A) (Pr 4) (DB).

——S. 161—Evidence — It is not necessary that there should be the evidence of independent eye-witnesses to the taking of the bribe. It is sufficient even though it is merely circumstantial evidence of connection of the person taking bribe with the crime. AIR 1958 S C 500, Rel. on. 38 Mys L J 265 : 1962 Mad L J (Cri) 222: ILR (1960) Mys 526: 1960 Cri L J 934 : AIR 1960 Mys 111 (130) (Pt J) (Pr 11) (DB).

——S. 161—Prosecution witnesses deposing to events prior to the arrest of accused for accepting bribe—Evidence cannot be rejected on the ground that it consisted of statements made in the course of investigation. See Criminal P. C. (1898), S. 162. 1965 (2) Cri L J 846 : (1964) 66 Pun L R 877.

——S. 161—Evidence — Suspicion against accused—Benefit of doubt should be given—(Evidence Act (1872), Ss. 101-103). AIR 1955 NUC (Raj) 1192.

——S. 161—Burden of proof—Prosecution alleging specific agreement to take bribe on a particular date —It must prove whole case — Falsity of defence cannot discharge its burden — (Evidence Act (1872), Ss. 101 to 103). AIR 1955 N U C (Sau) 4361 (DB).

14 (A). Evidence of trap witness.

——S. 161—Proof—Evidence of police witnesses—Corroboration—Necessity and extent of.

It does not seem to be the law that if the money given as bribe is provided by a particular police officer then the evidence of all the witnesses becomes evidence of accomplices and must be looked at with suspicion. As regards corroboration of accomplice witnesses it is not necessary that there should be independent corroboration of every material circumstance. There should be some additional evidence rendering it more probable. The corroboration need not be direct evidence, See Evidence Act (1872), S. 133. 1966 Cri L J 1380 : AIR 1960 S C 961.

——S. 161—Proof—Persons participating in trap—Evidence of—Weight of—Corroboration.

It is difficult to lay down what evidence should be or could be regarded as corroboration. Its nature and extent will always vary with the facts and circumstances of each case and no hard and fast rule can be laid down. See Evidence Act (1872), S. 133. 1957 All W R (H C) 167.

——S. 161—Motive for acceptance of money — Evidence of person participaling in trap—Value of motive —When inferred—(Evidence Act (1872), S. 133).

A person who lends himself to be a tool in the hands of the police in a trap may evidently be regarded as a partisan witness and to that extent his evidence requires corroboration. But if from the record it appears that the payment of the amount by such person could not on any other reasonable hypothesis be in satisfaction of some liability of his to the accused, an inference would inevitably arise that the amount was paid to the accused by way of bribe. 61 Bom L R 837 : 1959 Cri L J 1421 : AIR 1959 Bom 543 (546) (Pt A) (Pr 11) (DB).

——S. 161 — Evidence — Complainant's evidence — Corroboration—Necessity.

In a bribery case under S. 161, Penal Code, started against the accused as a result of trap set up against him at the instance of the complainant, the complainant himself is a partisan witness and it is not safe to rely upon his uncorroborated evidence. ILR (1959) Bom 243 : 60 Bom L R 811 : 1959 Cri L J 34 : AIR 1959 Bom 30 (31) (Pt B) (Pr 4) (DB).

[Overruled on another point in AIR 1960 S C 548.]

——S. 161 — Evidence Act (1872), S. 5—Credibility of witness—Partisan witness — Panch taking part in laying trap in bribery cases.

It cannot be said that the evidence of every panch witness who takes part in the laying of a trap in cases of bribery can be regarded as evidence of partisan witness. See Evidence Act (1872), S. 5. 1956 Cri L J 725 : AIR 1956 Bom 426 (DB).

——S. 161—Evidence—Decoy witness—Evidence of person giving information to police for trapping accused—Value of — Corroboration—Comparison with accomplice evidence—(Evidence Act (1872), S. 133).

Where the accused (public servants) compelled a society, though A, a member of the managing committee of the Society to pay a bribe to them on the threat of adverse report and the accused are trapped by the police with the help of A who gives information to the police, and who gives marked currency notes to the accused, A is not an accomplice. He was a partisan witness. His evidence would, therefore, not be tainted evidence, but it would be interested evidence which would require independent corroboration before acceptance.

It is not tainted evidence in the sense that it is not evidence of a person who had tarnished his hands by the commission of an offence. Not being tainted evidence, it would not suffer from a disability of being unworthy of acceptance without independent corroboration. But being interested evidence, caution requires that there should be corroboration from an independent source before its acceptance. To convict an accused on the tainted evidence of an accomplice is not illegal, but it is imprudent. To convict an accused upon the partisan evidence of a person at whose instance a trap is laid by the police is neither illegal nor imprudent, but inadvisable. The degree of corroboration, however, in the case of tainted evidence of an accomplice would be higher than that in the case of a partisan witness. There can be no rigid rule as to what degree of corroboration would be necessary for partisan evidence before it could be accepted. The degree of corroboration requisite in each case would depend on its own facts. 1964 S C J 362, Rel. on. 58 Bom L R 90 : 1956 Cr L J 585 : ILR (1956) Bom 343 : AIR 1956 Bom 287 (293) (Pt B) (Pr 8) (DB).

——S. 161—Evidence — Panch witness—Evidentiary value—Corroboration—(Evidence Act (1872), S. 133) —(Cr. P. C. (1898), Ss. 103, 165).

Merely because the police take the panchas with themselves before the raid the panchas do not become members of the raiding party and cannot be looked upon as partisan witnesses. They are independent witnesses and their evidence is good evidence and requires no corroboration before acceptance. The police take the panchas with themselves so that they should watch what happens. The law of the land requires that certain things should be done by the police in the presence of independent, respectable persons so that the presence of the said persons may put the particular transaction beyond the pale of suspicion. In these circumstances, to construe the conduct of independent and respectable people, who accompany the police at the asking of the police to serve as panches, as being the conduct of partisan persons would be grossly unfair to these people. 58 Bom L R 90 : 1956 Cr L J 585: ILR (1956) Bom 343 : AIR 1956 Bom 287 (294) (Pt C) (Prs 9, 10) (DB).

——S. 161—Proof—Trap witness — Whether accomplice or partisan witness — Corroboration — When necessary.

A person who is not a willing party to giving of bribe and who is only actuated by the motive of trapping another cannot be regarded as an accomplice, but the evidence of such a witness is that of a partisan witness who was out to entrap another.

If after scrutinizing the evidence of an interested witness, the Court finds it safe to accept such evidence, then independent corroboration is not necessary. The evidence of a partisan witness, which is unsatisfactory, cannot, however, be relied upon for implicating an accused person without independent corroboration. See Evidence Act (1872), S. 133. (1961) 1 Cr L J 50 : AIR 1961 Guj 1 (DB).

——S 161 — Applicability — Person paying bribe under compulsion and with a view to assist detection of crime—Liability of—If abettor or accomplice.

A person who pays bribe to the accused, not voluntarily but as a result of demand from the accused, and merely with a view to render necessary assistance in the detection of the crime cannot be said to be an accomplice in the commission of the offence under S. 161 because he has not the mens rea that he is paying the amount to secure a favour from the accused. It cannot be said that he aided or abeted the offence of illegal gratification by the accused. See Evidence Act (1872), S. 133. 1957 Cri L J 1127 : AIR 1957 Kerala 134 (DB).

——S. 161—Evidence—Decoy witness—There should be independent corroboration of his statement. See Prevention of Corruption Act (1947), S. 5 (2). AIR 1955 NUC (Madh B) 3044.

——S. 161—Trap case—Evidence—Corroboration — Distinction between legitimate and illegitimate trap —Evidence Act (1872), S. 133.

There are two kinds of traps a legitimate trap where the offence has already been born and is in its course, and an illegitimate trap, where the offence has not yet been born and a temptation is offered to see whether an offence would be committed, succumbing to it, or not. Thus, where the bribe has already been demanded from a man, and the man goes out offering to bring the money, but goes to the police and the Magistrate and brings them to witnesss the payment, it will be a legitimate trap, wholly laudable and admirable, and adopted in every civilized country without the least criticism by and honest man.

But where a man has not demanded a bribe and he is only suspected to be in the habit of taking bribes, and he is tempted with a bribe, just to see whether he would accept it or not and to trap him, if he accepts it, it will be an illegitimate trap and, unless authorised by an Act of Parliament it will be an offence on the part of the persons taking part in the trap who will all be "accomplices" whose evidence will have to be corroborated by untainted evidence to a smaller or larger extent as the case may be before a conviction can be had under a rule of Court which has ripened almost into a rule of law. But, in the case of a legitimate trap, the officers taking part in the trap, and the witnesses to the trap would in no sense be "accomplices", and their evidence will not require under the law to be corroborated as a condition precedent for conviction though the usual rule of prudence will require the evidence to be scrutinised carefully and accepted as true before a conviction can be had. 1917 M W N 831; AIR 1918 Mad 738 and 1947 All E R 572, Ref. 1952 Mad W N Cr 45 : 1952 Mad W N 220 : 1952-2 Mad L J 11 : 1952 Cri L J 1245 : AIR 1952 Mad 561 (Pt A) (Pr 6).

——S. 161 — Evidence Act (1872), S. 133 — Spy witnesses are not accomplices — Their evidence however requires corroboration. See Evidence Act (1872), S. 133. A I R 1952 Mys 42 (DB).

——S. 161—Evidence—Trap witness—Corroboration is necessary—(Evidence Act (1872), Ss. 144 and 133). AIR 1955 N U C (Orissa) 3978.

——S. 161 — Proof — Suspicion — Presumption of innocence—Explanation of accused.

A charge of bribery is one which can easily be made, and often lightly made, and however difficult it may be to establish by direct evidence the commis-

sion of the offence of bribery, it would not relieve the prosecution of the burden of establishing it beyond all reasonable doubt. If after everything that can legitimately be considered has been given its due weight, room still exists for taking the view that however strong the suspicion raised against the accused, every reasonable possibility of innocence has not been excluded, he is entitled to acquittal. ILR (1952) Cut 364 : 1952 Cri L J 1393 : A I R 1952 Orissa 267 (270) (Pt B) (Pr 5) (DB).

——S. 161—Proof—Intention—Trap witness—Use of marked currency notes.

Mere offer of money or illegal gratification to a public servant would not amount to an offence of abetment of bribery unless that offer is made 'as a reward for showing that person some favour in the exercise of the official functions of the public servant'. This is to say, there must be the necessary criminal intention on the part of the offerer. In the case of a trap witness engaged for the purpose of decoying a public official by offering him marked currency notes this essential criminal intention is wanting. ILR (1952) Cut 364 : 1952 Cri L J 1393 : AIR 1952 Orissa 267 (272, 275, 276, 277) (Pt C) (Prs 7, 19, 22, 23) (DB).

——S. 161 — Evidence — Tainted evidence of decoy witnesses—Necessity of independent corroboration—Evidence Act (1872), S. 114.

There should be some independent evidence, either direct or circumstantial to prove the guilt. AIR 1951 Orissa 281 (283) (Pt B) (Prs 7, 8) (DB).

——S. 161 — Evidence Act (1872), S. 133 — Accomplice and decoy witness — (Criminal P. C. (1898), S. 337).

A distinction has to be drawn between an accomplice and a decoy witness, the former being a person who joins another with the intention of aiding the commission of an offence and the latter who is instrumental in provoking the commission of the offence with the object of discovering the offence and detecting the offender. An accomplice is an associate in the crime. Mere aiding in the detection of the crime by becoming an instrument of detection without any intention to commit the crime and without any intention to make gain out of the perpetration of the crime cannot make the person so aiding an associate in crime. See Evidence Act (1872), S. 133. 1953 Cri L J 986 : AIR 1953 Pepsu 82 (DB).

——S. 161—Evidence — Uncorroborated evidence of decoy witness — (Evidence Act (1872), S. 133) — (Criminal P. C. (1898), S. 337).

In cases of illegal gratification the uncorroborated evidence of a decoy witness can form the basis of a valid conviction provided it can warrant the safe and unhesitating conclusion that what it divulges is true, convincing and credible. The rule of caution which has become a recognised rule of law that it is unsafe to convict a person on the uncorroborated evidence of an accomplice does not equally apply where the witness is simply a decoy witness. 38 Cal 96, Foll. 1953 Cri L J 986 : I L R (1952) Patiala 512 : A I R 1953 Pepsu 82 (84) (Pt C) (Pr 4) (DB).

——S. 161—Evidence—Decoy witness—Evidence of —Need for corroboration.

Every case of bribery in which decoys are used must be decided on its own peculiar facts, and it is not necessary that there should be independent corroboration of the decoy witness that the money was received by the accused person for an illegal purpose. Informers, that is, persons who have joined, or even provoked, the crime as police spies have not been regarded as accomplices and the rule requiring the corroboration of accomplices does not apply to this class of accomplices. 5 (A I) Cr D 485 : 1951 All W R (Supp) 87 : 52 Cri L J 944 : AIR 1951 Punj 424 (425) (Pt A) (Pr 7).

Magistrate as trap witness.

——S. 161—Evidence.

The Magistrates should not be employed by the police as witnesses of police traps. The independence of the judiciary is a priceless treasure to be cherished and safe-guarded at all costs against predatory activities of this character and it is of essence that public confidence in the independence of the judiciary should not be undermined by any such tactics adopted by the executive authorities. A I R 1936 P C 252 (2), Rel. on.; A I R 1951 Cal 524, Approved. Shiv Bahadur Singh v. State of V. P. (1954) S C R 1098 : (1954) S C J 362 : 1954 Cri L J 910 : 1954 S C A 1316 : A I R 1954 S C 322 (335) (Pt F) (Pr 28).

——S. 161—Evidence—Trap by S. D M. — S. D. M. signing notes to be offered as bribe—Money not supplied by S. D. M. or by police — S. D. M. present at time of payment — Evidence of S. D. M. held could not be discarded. A I R 1955 N U C (All) 3570.

——S. 161—Evidence — Use of Magistrate for police trap—Effect on their evidence.

There can be no doubt that it is highly improper to make use of magistrates as witnesses in laying police traps for the detection of the offences of taking illegal gratification.

But, however profound their disapprobation be with regard to this practice, it is difficult for the Courts to shut their eyes to the materials which might appear before them in particular cases. Courts cannot decide cases except on the basis of a careful weighing of such evidence as is placed before them. AIR 1954 Madh B 101, Rel. on. 1955 Cri L J 246 : A I R 1955 All 75 (77, 78) (Prs 9, 10, 11).

——S. 161—Evidence—Trap laid by Magistrate without reference to police — Statement of Magistrate, is admissible. (Evidence Act (1872), S. 133). A I R 1955 N U C (Him Pra) 3679.

——S. 161 — Practice — Magistrate accompanying raiding parties.

The advisability of Magistrate being deputed to accompany raiding parties conducted by the police is questioned and disapproved. A I R 1951 Cal 524, Approved. Madh B L J 1954 (H C R) 474 : 1954 Cri L J 966 : A I R 1954 Madh B 101 (110) (Pt G) (Pr 81).

——S. 161—Practice—Practice of sending Magistrates under disguise to witness traps laid by police regarding acceptance of bribe and the like disapproved. A I R 1955 N U C (Mad) 3258 (DB).

——S. 161 — Prevention of Corruption Act (1947), S. 5—Testimony of executive Magistrate participating in a trap in bribery case — It cannot be ignored since separation of judicial magistrates from executive magistrates—Observations in A I R 1954 S C 322 do not apply to executive magistrates. See Prevention of Corruption Act (1947), S. 5. 1955 Cri L J 1387 : AIR 1955 Pepsu 156.

Evidence of Police Officer laying trap.

——S. 161 — Evidence Act (1872), S. 133 — Police officer laying trap and receiving gratification — No intention of taking bribe but to bring to book person offering gratification—Police Officer is not accomplice — (Criminal P. C. (1898), S. 337). See Evidence Act (1872), S. 133. ('52) 54 Bom L R 153 : 1952 Cri L J 1572 : 21 Bom Cri Cas 310 : ILR (1952) Bom 900 : A I R 1952 Bom 435 (DB).

Laying of trap—Desirability.

——S. 191 —Acceptance of bribe—Offence—(Prevention of Corruption Act (1947), S. 5).

Whatever the criminal tendencies of a man may be, he has a right to expect that he will not be deliberately tempted beyond the powers of his frail endurance and provoked into breaking the law; and more particularly by those who are the guardians and keepers of the law. However regrettable the necessity of employing agents provocateurs may be it is one thing to tempt a suspected offender to over action when he is doing all he can to commit a crime and has every intention of carrying through his nefarious purpose from start to finish, and quite another to egg him on to do that which it has been finally and firmly decided shall not be done.

Held, that this was not a case of laying a trap in the usual way, for a man who was demanding a bribe but of deliberately tempting a man to his own undoing after his suggestion about breaking the law had been finally and conclusively rejected with considerable emphasis and decision: AIR 1954 S C 322, Rel. on. Ramjanam Singh v. State of Bihar, 1956 Cri L J 1254 : AIR 1956 S C 643 (651) (Pt C) (Pr 37).

● —S. 161—Evidence.

It may be that the detection corruption may sometimes call for the laying of traps, but there is no justification for the police authorities to bring about the taking of a bribe by supplying the bribe money to the bribe giver where he has neither got it nor has the capacity to find it for himself. It is the duty of the police authorities to prevent crimes being committed. It is no part of their business to provide the instruments of the offence. Shiv Bahadur Singh v. State of V. P., 1954 S C R 1098 : 1954 S C J 362 : 1954 Cr L J 910 : 1954 S C A 1316 : AIR 1954 S C 322 (334) (Pt E) (Pr 27).

—S. 161—Conviction —Delay in trapping accused Effect.

The fact that nothing is done for a long time (here, two months) between the alleged offer to brite and the actual trapping of the accused does not suggest that the story is false. The police authorities have perforce to wait until the accused make a further move in the matter. It is not reasonable to suggest that the police authorities should go out of their way and actively invite bribes in order to trap the accused. Mahadeo Dhanappa v. State of Bombay. (1953) S C J 229 : 1953 S C A 685 : (1953) 1 M L J 615 : 1953 Cri L J 902 : 55 Bom L R 513 : 55 Punj L R 307 : AIR 1953 S C 179 (181) (Pt A) (Pr 4).

—S. 161 — Evidence Act (1872), S. 133 — Decoy witness — Practice of supplying decoy witness with Government money for bringing about the completion of offence deprecated. See Evidence Act (1872), S. 133. 1956 Cri L J 227 : AIR 1956 Madh Bha 51.

—S. 161—Procedure — Laying of trap—Propriety.

An offence had already been born where demand had already been made by the accused for the payment of bribe to him for hushing up the matter of the alleged abduction of one Lakhi against one Nandlal.

Held, that the trap laid was a legitimate trap. AIR 1954 S C 321, Foll. 1958 Raj L W 596.

14 (B). Evidence of bribe giver.

● —S. 161—Evidence.

Witnesses not willing party to giving of bribe to accused but only actuated with the motive of trapping the accused—Their evidence cannot be treated as the evidence of accomplices — Their evidence is nevertheless the evidence of partisan witnesses who were out to entrap the accused—The evidence cannot be relied upon without independent corroboration. But the evidence of witnesses who came on the scene after the raid was practically over, cannot be impeached as that of partisan witnesses. Shiv Bahadur Singh v. State of V. P., 1954 S C J 362 : 1954 Cr L J 910 : 1954 S C A 1316 : 1954 S C R 1098 : AIR 1954 S C 322 (327) (Pt G) (Pr 11).

—S. 161 — Evidence Act (1872), Ss. 133, 114, Illus. (b) — Accomplice, who is — Bribery cases — Charge of conspiracy and bribery against railway servants in allotting wagons and booking goods — Forwarding agents and commission agents paying bribes to secure advantage over others who did not pay — Whether accomplices — Evidence of such witnesses—Value of—Necessity, nature and extent of corroboration—(Prevention of Corruption Act (1947), S. 5).

If the Forwarding Agents are treated as accomplices, their evidence must receive independent corroboration in respect of the each of the accused persons from evidence which is not tainted before prudence will allow it to be accepted — In such circumstances the evidence of one Forwarding Agent will not be sufficient to corroborate the evidence of others, nor will complaints made by them earlier to the authorities be corroboration of the nature required. See Evidence Act (1872), S. 133. 1956 Cri L J 687 : AIR 1956 All 353.

—S. 161—Evidence—Bribe — giver as trap witness —Independent corroboration, if necessary.

All that is insisted on as a matter of prudence is that before acting upon such evidence the Court must be satisfied that such evidence has been corroborated in material particulars by other items of independent evidence. See Evidence Act (1872), S. 133. 1957 Cri L J 1127 : AIR 1957 Kerala 134 (DB).

—Ss. 161 and 109 — Evidence Act (1872), S. 133—Agent for prosecution — Evidence of — Value of — Necessity of corroboration.

The evidence of a spy or a decoy witness though admissible in evidence and may be acted upon the value to be attached to that evidence will depend upon the character of the person employed; where the spy or the police officer goes beyond the limit of collecting evidence and instigates or solicits the commission of a crime, he would be guilty of abetment. The Courts should, therefore, as a matter of prudence, require corroboration of their evidence like that of an accomplice. See Evidence Act (1872) S. 133. AIR 1952 Orissa 267 (DB).

—S. 161—Bribe giver whether accomplice — Evidence Act (1872), Ss 114, 133.

In the case of a bribe giver, he is an accomplice only when he gives it with the intention of gaining some undue official favour, but not one who gives it in order to aid the detection of crime. He has not the necessary mens rea. AIR 1951 Orissa 297 (299) (Pt A) (Pr 12) (DB).

● —S. 161—Evidence of decoy witness—Corroboration.

In a bribery case under S. 161, Penal Code, the evidence of the bribe giver or decoy witness is no better than that of an accomplice and requires corroboration that the money was received by the accused person for an illegal purpose. In any case, the evidence of such a witness should be carefully examined before it can form the basis of a conviction. See Evidence Act (1872), S. 114, Illus. (b). AIR 1955 N U C (Raj) 1129.

—S. 101—Evidence—Accomplice's evidence—Rule of law and practice.

A person, who is compelled by force of circumstances to give a bribe to a public servant, stands on a higher footing as regards his credibility than a person giving bribe voluntarily, and slight corroboration would be sufficient to render his evidence credible. 3 Sau L R 196, Rel. on. See Evidence Act (1872), S. 113. AIR 1955 N U C (Sau) 955 (DB).

——S. 161 — Evidence Act (1872), Ss. 114, 133 — Accomplice — Amount of corroboration — Bribery cases.

A distinction must be drawn between a person who is threatened and becomes an accomplice and a person who volunturily takes part in the crime. In the former case the corroboration necessary to establish the credit of a person would be very much less than in the latter case. In bribery cases this factor becomes of great importance by the very nature of the crime itself. When a person gives a bribe to a public servant with a view to induce him to abstain him from doing his duty and to the detriment of a third party, the bribe giver is equilly guilty with the bribe taker. His evidence would certainly require greater amount of corrobaration than in the case of person who is compelled by the force of circumstances to give bribe to a public servant to induce him to do just his plain duty which he refuses to do otherwise. See Evidence Act (1872), S. 114. 52 Cri L J 471 : AIR 1951 Sau 25 (DB).

14 (C). Recovery of currency notes and marked coins from accused.

● —S. 161—Evidence.

Held, that the circumstance that on the numbers of the notes being tallied and his explanation in that behalf being asked for by the police authorities the accused was confused and could furnish no explanation in regard thereto also supported the conclusion that the accused was guilty of the offence under S. 161. Shiv Bahadur Singh v. State of V. P. (1954) S C R 1098 : 1954 S C J 362 : 1954 Cr L J 910 : 1954 S C A 1316 : AIR 1954 S C 322 (334) (Pt J) (Pr 26).

●——S. 161 — Offence — Proof — Recovery of money — Effect of — (Prevention of Corruption Act (1947), S. 5 (2)).

The recovery of the currency notes from the person of the accused is an important link in proving the case in the prosecution for offence under S. 161, Penal Code and S. 5 (2), Prevention of Corruption Act and if the recovery becomes doubtful no conviction can be maintained. 1957 All L J 934 : 1957 All W R (H C) 874 : 1958 Cri L J 586 : AIR 1958 All 334 (335) (Pt C) (Pr 7) (DB).

——S. 161 — In a criminal trial the responsibility to prove a particular offence (e.g. offence under S. 161 Penal Code) is always on the prosecution, and the mere recovery of money does not exclude the possibility that the accused was an innocent recipient of the same. See Evidence Act (1872), Ss. 101 to 103. AIR 1955 N U C (All) 2726.

——S. 161 — Burden of proof —Investigating agency using technique of anthracene powder for detection of bribery — What prosecution has to prove.

The prosecution must establish that the tests for detection of anthracene powder had been properly made and had yielded positive results. It is essential for the prosecution to prove that there was light blue emission of light under influence of ultra violet light It is not sufficient for the prosecution to prove that under the ultra violet light the witnesses saw stains of white powder or even that under the ultra violet light they saw some sparkling or some shimmering. (1961) 1 Cri L J 50 : AIR 1961 Guj 1 (DB).

——S. 161 — Bribery —Proof of acceptance of currency notes by accused — Use of Anthracene powder and ultra violet rays by police for detecting crime — Duty ot prosecution and nature of expert evidence required. (1960) 1 Guj H C R 42 : (1960) 1 Guj L R 138 : 1960 Cri L J 1207 : AIR 1960 Guj 7 (8) (Pr 1) (DB).

——S. 161 — Evidence — Trap laid — Evidence of recovery of initialled currency notes — Credibility not challenged — Non-production of currency notes held amounted to negligence but not fatal — Production held at most would have amounted to corroborative evidence. AIR 1955 N U C (Madh B) 4861.

——S. 161 — Trap cases — Caution to be taken — Simply saying that currency notes were found somewhere in house of public servant cannot attribute possession to him — Courts have to be satisfied that notes were put there by him or at his instance. See Prevention of Corruption Act (1947), S. 1 (d). 1962 M P L J (Notes) 211.

——S. 161 — Evidence — The mere handing over the notes will not adequately prove that they were paid as bribe — Prosecution either fails or succeeds according as it is proved that the notes were paid as bribe or not — Evidence Act (1872), S. 3 AIR 1951 Orissa 297 (298) (Pt C) (Pr 7) (DB).

14 (D). Presumption under S. 4, Prevention of Corruption Act.

● ——S. 161 — Accused shown to have accepted money which was not legal remuneration—Presumption can be raised — Rebuttal must be by explanation which must be true and not merely plausible — Presumption under S. 4 (1) and Evidence Act S. 114, distinction between — Whether presumption is rebutted is question of fact—Supreme Court will not interfere. See Prevention of Corruption Act (1947), S. 4 (1). AIR 1964 S C 575.

● ——S. 161 read with Prevention of Corruption Act (2 of 1947), Ss. 5 (1) (d) and 5 (2)—Conviction and sentence under — Whether the presumption raised against the appellant could be held to have been rebutted by the explanation given by him inasmuch as it was both reasonable and probable — Evidence Act (1 of 1872), S. 114 — Presumption — Nature of.

The plain meaning of S. 4 (1) of the Prevention of Corruption Act (2 of 1947) undoubtedly requires the presumption to be raised whenever it is shown that the valuable thing has been received by the accused without anything more. In such a case the presumption arises not under S. 114 of the Evidence Act (1 of 1872), but under S. 4 (1) of the Prevention of Corruption Act. Where as under S. 114 of the Evidence Act it is open to the Court to draw or not to draw presumption as to the existence of one fact from the proof of another fact and it is not obligatory upon the Court to draw such presumption, under S. 4 (1) however, if a certain fact is proved. that is, where any gratification (other than legal remuneration) or any valuable thing is proved to have been received by an accused person the Court is required to draw a presumption that the person received that thing as a motive or reward such as is mentioned in S. 161 of the Penal Code (XLV of 1860). Therefore the Court has no choice in the matter: once it is established that the accused person has received a sum of money which was not due to him as a legal remuneration. The burden resting on the accused person in such a case wonld not be as light as it is where a presumption is raised under S. 114 of the Evidence Act, and cannot be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable. The words 'unless the contrary is proved' occurring in S. 4 (1) of the Prevention of Corruption Act make it clear that the presumption has to be rebutted by proof and not by a bare explanation which is merely plausible. Dhanvantrai Balwantrai Desai v. State of Maharashtra. (1964) 1 S C J 133 : 1963 Mad W N 246 : (1963) 1 Mys L J 66 : 1964 M L J (Cri) 65 : (1963) 1 S C W R 178 : 1963 All W R (H C) 358 : 65 Bom L R 332 :

1963 All Cri R 185 : (1963) 2 Lab L J 415 : 1964 (1) Cri L J 437 : (1963) Supp 1 S C R 485 : AIR 1964 S C 575 (578 to 580) (Prs 10, 12, 13).

● —Ss. 161 and 165—Presumption under — When can be raised—Money paid need not be by way of bribe. See Prevention of Corruption Act (1947), S. 4 (1). 1960 Cr L J 729 : AIR 1960 S C 548.

—S. 161—Criminal P. C. (1898), S. 423 — Statutory presumption of motive of payment ignored — Appeal from acquittal — Acquittal cannot stand—(Prevention of Corruption Act (1947), S. 4 (1). See Criminal P. C. (1898), S. 425. 1959 Cri L J 1421 : AIR 1959 Bom 543 (DB).

—S. 161 — Prevention of Corruption Act (1947), S. 4—Presumption of motive — Rebuttal of — 'Proof to the contrary'—Extent of burden of proof on accused — Evidence Act (1872), Ss. 101-103, 3)—(Criminal P. C. (1898), S. 367).

It is clear from S. 4, Prevention of Corruption Act that the moment it is proved that the accused has received a sum of money from the complainant it shall be presumed unless contrary is proved that he accepted it as a motive or reward such as one mentioned in S. 161, I. P. Code. This presumption being there the burden lies heavily upon the accused to prove to the contrary. See Prevention of Corruption Act (1947), S. 4. 1956 Cri L J 233 (2) : AIR 1956 Madh Bha 86 (DB).

—S. 161—Evidence—Acceptance of illegal gratification proved — Presumption under S. 4 Prevention of Corruption Act arises—(Prevention of Corruption Act (1947), S. 4). AIR 1955 NUC (Madh B) 4861.

—S. 161 — Prevention of Corruption Act (1947), S. 4 (4) Presumption under — Effect on onus—Duty of prosecution to prove guilt of accused—Benefit of doubt — (Evidence Act (1872), S. 105).

Where it is proved that a gratification has been accepted the presumption at once arises under S. 4 of the Prevention of Corruption Act which shifts the onus upon the accused to prove that such acceptance was not for the purpose mentioned in S. 161, Penal Code. The presumption of law thus created by the section is, not unlike other presumptions of law, rebuttable. (e. g., the one contained in S. 105 of the Evidence Act).

In spite of the above the burden in criminal case, resting upon the prosecution to prove the guilt of the accused, in a way never shifts and there is no burden upon the accused to prove his innocence beyond reasonable doubt. Where, therefore, after everything that can legitimately be considered has been given due weight, reasonable doubt is created as to his guilt, he ought to be acquitted. AIR 1958 S C 61; 1935 A C 462; (1943) 1 K B D 607; AIR 1944 F C 66, Rel. on.

Held, after taking into account the presumption under S. 4 of the Prevention of Corruption Act and also after giving every piece of evidence both for and against the accused due weight, a reasonable doubt was still created as regards the guilt of the accused. The benefit of this doubt must go to him. 1959 Jab L J 757.

—S. 161 — Accused in his capacity as supervisor recommending to his superior for retention of services of certain persons discharged from service —Accused receiving from such persons sums of money as a reward for his services — Accused is guilty under S. 161 in view of presumption arising under S. 4, Prevention of Corruption Act—Prevention of Corruption Act (2 of 1947), S. 4.

Where a clerical supervisor who is believed to be able to influence his superior promises to recommend certain persons to his superior for retention of their jobs in spite of discharge notices served on them and actually recommends them in his capacity as supervisor and subsequently receives from such persons sums of money as a reward or 'mariyadas' there is an implied bargain for, and fulfilment of, an illegal gratification transaction and hence such a person is guilty under S. 161, Penal Code. The fact that the money was given to him willingly as a reward out of gratitude for recommending them would not make it any the less an illegal gratification in view of the presumption arising under S. 4, Prevention of Corruption Act. 1947. The fact that the accused had himself no power to retain them in services is immaterial : AIR 1924 Mad 851 and AIR 1929 Mad 756, Disting. (1949) 2 Mad L J 443 : 62 Mad L W 712 : 1949 Mad W N 649 : 1949 All W R (Sup) 81 : 1949 All Cri Cas 150: 51 Cri L J 386 : A I R 1950 Mad 93 (94) (Prs 3, 4).

—S. 161 — Prevention of Corruprion Act (1947), S. 4 — Scope—Presumption of innocence of accused is not displaced by S. 4. See Prevention of Corruption Act (1947), S. 4. AIR 1952 Orissa 267 (DB).

—S. 161 — Accused receiving money from complainant not by way of legal remuneration — Presumption arising under S. 4 —Rebuttal.

Where in a prosecution under S. 161, Penal Code and S. 5 (2) read with S. 5 (1) (d), Prevention of Corruption Act, it is proved that the accused had received a sum of money from the complainant and it was nobody's case that this is a part of accused's legal remuneration, a presumption under S. 4 of the Act arises against the accused. that unless he proves to the contrary, he must be treated as having received the said money as a motive or reward within the meaning of S. 161, Penal Code such a presumption would be rebutted even if the explanation given by the accused for receiving the money is a reasonably probable one. AIR 1960 S C 548, Applied. 1962 Raj L W. 421.

—S. 161—(Obiter) : Merely because money passes from the hand of the complainant to that of the accused, there does not arise in law a presumption that such money was given as a bribe. The onus is on the prosecution under S. 4 of the Prevention of Corruption Act as under S. 161 of Penal Code. The moment, however, the prosecution proves that the accused accepted or agreed to accept any gratification, the presumption will be raised against him that he received it as a motive or reward for exercising any official favour or disfavour and if the accused wants to suggest to the contrary it would be for him to establish that such was not the case. See Prevention of Corruption Act (1947) (as Amended in 1952, S. 4). AIR 1955 NUC (Raj) 1192.

14 (E). Accused as defence witness.

● —S. 161—An accused person is held competent to be a witness on his behalf. See Prevention of Corruption Act (1947), S. 7. 1957 Cri L J 575 : AIR 1957 S C 458.

—S. 161 — In view of S. 1 (2), Criminal P. C. the Criminal Law Amendment Act repeals, alters or amends none of the provisions of the Prevention of Corruption Act either expressly or by implication. Section 7, is still binding in regard to trials under S. 161, Penal Code and the violation of this mandatory provision is not a minor illegality but vitiates the trial. See Prevention of Corruption Act (1947), S. 7. A I R 1955 N U C (All) 3590.

—S. 161—Court is not bound to inform the accused who is being prosecuted under S. 161, that he has a right to examine himself in defence and his conviction cannot be quashed merely on account of the Court's refusal or failure to inform him of the right. (Prevention of Corruption Act (1947), S. 6). A I R 1954 All 223 (224) (Pt A) (Pr 1).

15. Sanction.

● ——Ss. 161 and 197—Prosecution of public servant under—Sanction is not necessary. See Criminal P. C. (1898), S. 197. 54 Cal W N 143 : 63 Mad L W 1 : (1950) 1 Mad L J 100 : (1950) 16 Cut L T 1 : 1950 All W R 308 : 1950 All L J 318 : 52 Bom L R 458 : 29 Pat 1 : A I R 1950 P C 26.

● ——S. 161—Prosecution requiring sanction — Trial without sanction is null and void being by Court not competent—Subsequent trial with proper sanction is not barred. See Criminal P. C. (1898), S. 403. 1957 Cri L J 597 : A I R 1957 S C 494.

● ——S. 161 — Sanction — Authority competent to remove.

Article 311 (1) of the Constitution and R. 1705 (c) of the Railway Establishment Code cannot be read as implying that the removal must be by the same authority who made the appointment or by his direct superior. It is enough that the removing authority is of the same rank or grade. See Prevention of Corruption Act (1947), S. 6 (c). 1955 Cri L J 249 : A I R 1955 S C 70.

● ——S. 161 — Sanction — Facts on which proposed prosecution is based must be proved to have been put before the sanctioning authority. See Prevention of Corruption Act (1947), S. 6 (1) (c). 1954 Cri L J 1656: A I R 1954 S C 637.

● ——S. 161 — Letter of sanction signed by Personal Assistant of Sanctioning authority—Personal Assistant examined as witness proving another document which purported to be draft of letter of which sanctioning letter was copy—Draft signed by sanctioning authority, below the word "approved" — Sanction held was in fact given, though the form was not proper. See Prevention of Corruption Act (1947), S. 6 (1) (c). 1954 Cri L J 1656 : A I R 1954 S C 637.

● ——S. 161 — Prosecution of public servant on charges of conspiracy and of bribery—Sanction.

Sanction under S. 197, Criminal P. C. (1898), is not necessary for instituting proceedings against a public servant on charges of conspiracy and bribery. See Criminal P. C. (1898), S. 197. 1954 Cri L J 1161 : A I R 1954 S C 455.

——S. 161—Scope—Accused tried for offences under S. 5 (2), Prevention of Corruption Act and under S. 161, Penal Code — Sanction to prosecute given under S. 161, Penal Code only — Trial under S. 5 (2), Prevention of Corruption Act is not vitiated—Criminal P. C., S. 230. See Prevention of Corruption Act (1947), S. 6. 1958 Cri L J 827 : A I R 1958 All 481 (DB).

——S. 161 — There is no particular form in which sanction should be requisitioned and should be given. See Prevention of Corruption Act (1947), S. 6 (1) (c). A I R 1955 N U C (All) 3570.

——S. 161 — Sanction — (Prevention of Corruption Act (1947), S. 6).

Valid sanction to prosecute by Superintendent, Watch and Ward—Magistrate wrongly thinking that sanction to investigate given by District Magistrate, to be sanction to prosecute — Mistake of Magistrate held did not matter as long as there was valid sanction. 1954 Cri L J 459 : 1953 All W R (H C) 606 : 1953 All L J 660 : A I R 1954 All 223 (224) (Pt B) (Pr 1).

——S. 161 — Sanction — Necessity — (Prevention of Corruption Act (1947), S. 6).

Whether the sanction had been given or not is to be seen before taking cognizance of the offence and not after it. If there is no sanction no cognizance of the offence can be taken at all. The sanction is required only for the purpose of taking cognizance of the offence ; once the cognizance is taken its utility is exhausted and it is no longer needed, either during the enquiry into the guilt of the accused or for the purpose of convicting him. Whether an accused is guilty or not does not depend upon whether his prosecution was sanctioned or not ; the existence of sanction is not an ingredient of any offence. Nor is it the law that an accused cannot be convicted unless the sanction by the appropriate authority of his prosecution has been proved. After the Court has taken cognizance of the offence, all that the prosecution has to prove, in order to secure conviction of the accused is that he committed the crime, and there is no provision obliging it to prove any other fact such as the sanctioning of his prosecution. Only the Court has to be satisfied of the existence of the sanction. The accused is not the person required to be satisfied by it; as a matter of fact the law does not contemplate his presence even when the prosecution satisfied the Court. 1954 Cri L J 459 : 1953 All W R (H C) 606 : 1953 All L J 660 : A I R 1954 All 223 (224) (Pt C) (Pr 2).

——S. 161 — Sanction — Presumption as to official acts — (Prevention of Corruption Act (1947), S. 6)—(Evidence Act (1872), S. 114).

Sanction of Superintendent to prosecute produced —Court can presume that police report was placed before him and that he considered it and that it was he who signed the sanction — Presumption can be rebutted. 1954 Cri L J 459 : 1953 All W R (H C) 606 : 1953 All L J 660 : A I R 1964 All 223 (224) (Pt D) (Pr 2).

——Ss. 161 and 218—Criminal P. C. (1898), S. 235—Joinder of charges — Joint trial of offences under Ss. 161 and 218, Penal Code—Previous sanction under S. 6, Prevention of Corruption Act, 1947, not obtained for former offence—Evidence of demand and acceptance of illegal gratification for making false entry relevant for both offences—Accused is not prejudiced by joint trial and conviction for latter offence is valid—Prevention of Corruption Act (1947), S. 6. See Criminal P. C. (1898), S. 235. 52 Cri L J 184 : A I R 1951 All 502.

——S. 161—Sanction—Prevention of Corruption Act (2 of 1947), S. 6 — Charge against police constable —Absence of sanction—Effect.

Under S. 6 of the Prevention of Corruption Act, 1947, before a Court can take cognizance of an offence under S. 161 of the Penal Code, against a police constable, the sanction of the authority competent to dismiss the constable is necessary. In the absence of such a sanction no Court is entitled to take cognizance of the case. ILR (1950) All 670.

——S. 161—Sanction for investigation — Validity — Demand and acceptance on different dates — Sanction obtained after demand—Investigation—Validity —Subsequent trial—Legality.

A sanction for investigation for an offence under S. 161, issued immediately after a demand has been made does not become an anticipatory sanction even if the payment is made on a different date. The words of S. 161, I. P. C. and 5-A of the Prevention of Corruption Act are wide enough to include investigation into an intended offence or offence imminently likely to take place. See Prevention of Corruption Act (1947), S. 5. 1962 (2) Cri L J 598 : AIR 1962 Bom 263 (DB).

——S. 161 — Essentials of sanction — Sanction held valid. See Criminal Procedure Code (1898), S. 197. AIR 1955 N U C (Madh B) 897.

——S. 161—What is essential for a valid sanction for prosecution under S. 161, Penal Code and S. 5 (2), Prevention of Corruption Act, is that the nexus between the sanction and the facts constituting the

offence charged must be clear from the terms of the sanction itself or must be established by extraneous evidence. See Prevention of Corruption Act (1947), S. 5. **AIR 1955 N U C (Madh B) 852.**

——S. 161 – Cognizance under S. 161, Penal Code or S. 5 (2) of Prevention of Corruption Act against cholera—The sanction itself or other evidence should clearly show that sanctioning authority applied its mind and gave sanction after consideration of all circumstances — Lack of proper sanction vitiates the trial. See Prevention of Corruption Act, S. 5 (2). **1963 M P L J (Notes) 255.**

——S. 161 — Sanction for prosecution under — Requirements.

The sanction for prosecution under the section to be a legal one there should be evidence either from the order granting the sanction or other documentary evidence placed before the Court or even oral evidence that the facts were placed before the officer from whom sanction was sought. **A I R 1951 Mad 255 (255) (Pr 3).**

——S. 161 — Criminal P. C. (1898), S. 197 (1) and (2) — Mysore Prevention of Corruption Act (1948), S. 12 — Sanction for prosecution under S. 161, Penal Code and Ss. 5 (2), 5 (1) (a), Prevention of Corruption Act — Sanction not required — Specification of Court of trial is unnecessary — Sanction does not take away ordinary jurisdiction of Court to commit accused to Sessions — Sanction is required under S. 12, Prevention of Corruption Act but no specification of Court is necessary — Prevention of Corruption Act (1947), S. 6. See Criminal P. C. (1898), S 197 (1) and (2). **1952 Cri L J 919 : AIR 1952 Mys 42 (DB).**

——Ss. 161 and 165—Sanction to prosecute under — Facts on which proposed prosecution is based must be put before sanctioning authority — Condition satisfied — Sanction held was valid — Prevention of Corruption Act (1947), S. 6 — Criminal P. C. (1898), S. 197.

In order that a sanction for prosecution to be valid it is incumbent upon the prosecution to prove by other evidence that the material facts constituting the offence were placed before the sanctioning authority.

In a trial under Ss. 161 and 165, against the public servants of the Police department, the prosecution produced a letter written by the D. S. P. to S. P. requesting that "sanction may be accorded for trial of the accused persons in the above case supervised by you" and the S. P. endorsed "prosecution sanctioned." The Superintendent of Police was the person who supervised the investigation and the D. S. P. specially referred to the case number in the letter. The D. S. P. also stated that the above case was supervised by the S. P.

Held that the Superintendent of Police, was, according to this letter, in possession of the facts of the case and the sanction given was valid. The contention that the sanction was only with reference to prosecution under S. 161 and not with reference to prosecution under S. 165 was not acceptable because in the sanction there was not specifically mentioned that sanction to prosecute under such and such section was given. Further the mention was made of sections 342, 376 etc. and 161. **(1957) 23 Cut L T 31.**

——S. 161—Prosecution of public servant for taking bribe — No sanction under S. 197, Cr. P. C. is required — Public servant not removable except by previous sanction of Provincial Government — Sanction for his prosecution is required under S. 6 of Prevention of Corruption Act (Criminal P. C., 1898, S. 197) — (Prevention of Corruption Act (2 of 1947), S. 6).

In respect of the prosecution of a public servant for an offence of bribe-taking under S. 161 of the Penal Code, no sanction under S. 197, Cr. P. C. is necessary. The reason is that in receiving a bribe, a public servant neither acts, nor purports to act in the discharge of his official duty. A I R 1945 P C 148, Rel. on.

But sanction under S. 6 of the Prevention of Corruption Act will be required for his prosecution, if he is not removable from office except with the previous permission of the Provincial Government.

The prosecution must place before the Court proof of the very order granting the sanction and not proof of the fact that the sanction had been granted. The sanction of the Provincial Government is an executive act of the said Government. The requirement being a statutory one, it must be given in the manner and expressed in the form authorised by the statutory provisions or regulations and no other.

By virtue of sub-section (1) of S. 59, Government of India Act 1935, the order of sanction though authenticated by the Secretary of the Government must be expressed in the name of Governor. It is only an order expressed in the form authorised by S. 59 (1) taken if need be with the definition of "Provincial Government" in the General Clauses Act, as meaning the Governor, and authenticated in the manner indicated in S. 59 (2) that constitutes, the legal proof of a valid sanction of the Provincial Government and no other. This is not a question of mere form, but one of substance, since it relates to the jurisdiction of the Court to take cognizance. It is well settled that where certain forms and formalities are prescribed as a condition precedent for jurisdiction, those requirements must be strictly complied with, before jurisdiction can be taken.

Moreover, the sanction must be under S. 6 of the Prevention of Corruption Act and not under S. 197, Cr. P. C. A sanction purporting to have been given under S. 197, Cr. P. C. is no sanction at all. The sanction under the Prevention of Corruption Act, must be given with full realisation of the responsibility that the sanction is a pre-requisite for the Court taking cognizance. **18 Cut L T 227 : I L R (1952) Cut 344 : A I R 1952 Orissa 220 (221, 222) (Prs 4, 6, 7) (DB).**

——S. 161 — Sanction, absence of — Trial is illegal—Sanction must be in respect of facts constituting offence—When in face of sanction it is not clear whether facts were put before sanctioning authority this can be proved by extraneous evidence—It must be shown that sanctioning authority applied his mind to facts — Report of magistrate, note of Sub-Divisional Magistrate and sanction of District Magistrate all on one page — Sanction held valid. **A I R 1955 N U C (Pat) 1030.**

—S. 161 — Prevention of Corruption Act (1947), Ss. 5, 6—Penal Code (1860), Ss. 161, 384—Complaint disclosing offence requiring sanction — Trial for offence not requiring sanction is not valid—See Prevention of Corruption Act (1947), S. 5. **1955 Cri L J 1382 : AIR 1955 Pat 453.**

——Ss. 161, 165 — Prevention of Corruption Act (1947), S. 3 — Permission under, to investigate — It need not be in any form or in writing — Presumption under S. 114, illus. (e), Evidence Act, may be drawn —No objection in trial court to the defective nature of permission — Objection in appeal cannot be sustained — (Evidence Act (1872), S. 114) - (Words and Phrases — Regularly performed) — See Prevention of Corruption Act (1947), S. 3. **1955 Cri L J 609 : AIR 1955 Punj 65 (DB).**

——S. 161 — The sanction given by the Collector to prosecute the Police Patel whose appointment was made by the Collector was a valid sanction under

S. 6 (1) (c). Prevention of Corruption Act. **AIR 1955 N U C (Sau) 955 (DB).**

——S. 161 — Sanction to prosecute for offence under S. 161.

The sanction to prosecute the accused under S. 161, did not state the facts which constituted the offence nor did the prosecution offer any extraneous evidence to show that the facts on which the opponent had been prosecuted were placed before the sanctioning authority.

Held, that there was no valid sanction for prosecuting the accused — See Prevention of Corruption Act (1947), S. 6. **1953 Cri L J 1268 : A I R 1953 Sau 139 (DB).**

——S. 161—It is the duty of the lawyers to take the point about the sanction at the earliest stage and invite the Judge or the Magistrate to decide it before proceeding to deal with the merits of the prosecution case. See Prevention of Corruption Act (1947), S. 6. **1954 Cri L J 1559 : AIR 1954 Sau 132 (DB).**

——S. 161 — Sanction — Sanction of Raj Pramukh — Delegation power — Power of Rajpramukh is not exhausted — See Prevention of Corruption Act (1947), S. 6 (3). **1954 Cri L J 688 : AIR 1954 Sau 62 (DB).**

16. Charge under the section.

■ **——Ss. 161 and 109** - Criminal P. C (1898), Ss. 225, 537—Alteration of charge under S. 165A, Penal Code to one under S. 161/109, Penal Code. in respect of abetment — No illegality—See Criminal P. C. (1898), S. 225. **1960 Cri L J 514 : AIR 1960 S C 409.**

■ **——Ss. 161, 116 and 165A**— West Bengal Cri. Law Amendment (Special Courts) Act (21 of 1949), S. 4 and Schedule (as amended by W. B. Act 12 of 1952 and W. B. Act 15 of 1953 — S. 165A, Penal Code, is not mere restatement of S. 116 of Code — Case under Ss. 161, 116, Penal Code distributed to Special Judge — S. 165-A not included in Schedule at time Judge took cognizance of case —Charge and conviction under S. 165A improper— Special Judge whether Court of competent jurisdiction — Defect of jurisdiction could not be cured by S. 529, Criminal P. C — (Criminal Law Amendment Act (1952), S. 3) — (Criminal P. C. (1898), S. 529 (e) —AIR 1956 Cal 385, **Reversed**. See West Bengal Criminal Law Amendment (Special Courts) Act (21 of 1949), S. 4. **1959 Cri L J 98 : AIR 1959 S C** 8.

——S. 161—Charge under — Name of authority to be influenced need not be mentioned. (Cr. P. C. (1898). S. 222). **56 Cri L J 608 : AIR 1955 Ajmer 18 (1) (18) (Pt B) (Pr 4).**

——S. 161 — Alteration of charge — Charge under S. 165-A, I. P. Code — Necessary facts mentioned— Charge could be changed into under S. 161 read with S. 109, I. P. Code—See Cr. P. C. (1898), S. 537. **1957 Cri L J 695 : AIR 1957 All 388.**

[**Reversed** on another point in AIR 1960 S C 409.]

——S. 161— Offence under Prevention of Corruption Act, S. 5-A is cognizable - S. 5-A, does not limit its nature—See Criminal P. C. (1898), S. 4 (1) (f). **1962 (2) Cri L J 598 : AIR 1962 Bom 263 (DB).**

——S. 161—Offence of accepting bribe completed— Charge for offence of attempting to obtain and obtaining illegal gratification—Whether necessary.

If a person attempts to obtain a bribe, say, of Rs. 1,000 and succeeds in obtaining it, technically he commits two offences under S. 161. But for meeting out justice to him, it is unnecessary to charge him with the offence of having made an attempt when the said offence merged into what one might call a bigger offence of the attempt having been successfully made viz., the offence of actual acceptance of the bribe. **58 Bom L R 90 : 1956 Cri L J 585 : ILR (1956) Bom 343 : A I R 1956 Bom 287 (292) (Pt A) (Pr 6) (DB).**

——S. 161—Charge.

Where it is evident that the accused themselves and their advocates had thoroughly understood the charge made under S. 161 the charge cannot be said to suffer from any vagueness. **58 Bom L R 90 : 1956 Cri L J 585 : I L R (1956) Bom 343 : AIR 1956 Bom 287 (296) (Pt E) (Pr 13) (DB).**

——S. 161—Applicability—Charge under S. 5 (1) (a), Prevention of Corruption Act, specifying nine instances of accepting illegal gratification — Proof of only one instance — Conviction under S. 161, Penal Code—Legality — Held, that as the particulars by themselves were sufficient to constitute the smaller offence punishable under S. 161, the conviction for that smaller offence was legal and was warranted by S. 238 of Criminal P. C. (1898). **1957 Cri L J 1127 : AIR 1957 Kerala 134 (DB).**

——S. 161 — Charge—Prevention of Corruption Act, S. 5 (1) (a)—Charge under—Whether implies charge under S. 161, Penal Code.

The charge framed against the accused that he has committed an offence under S. 5 (1) (a) of the Prevention of Corruption Act necessarily implies that he has committed an offence punishable under S. 161, Penal Code. **1957 Cri L J 1127 : AIR 1957 Kerala 134 (DB).**

——S. 161—Applicability—Offer of bribe—Offence committed in 1950 — Conviction under S. 165-A— Legality of — Alteration of conviction to one under S. 161 read with S. 116, Penal Code.

On 16-1-1950 while the Naib Tahasildar was proceeding to the Court the accused, who was a party in a case pending before the Tahasildar, offered bribe to him. The Tahasildar made a report to the police and in due course the accused was convicted of an offence punishable under S. 165-A, Penal Code by a Special Judge appointed under S. 6, Criminal Law Amendment Act (1952).

Held, (i) that in view of the provisions of Art. 20 of the Constitution, the accused could not be convicted under S. 165-A of I. P. C. which was incorporated in the Penal Code on 28th July 1952, for a bribe said to have been offered on 16-1-1950.

(ii) that the accused could not be tried by the Special Judge for an offence under S. 161 read with S. 116 of the Penal Code, the High Court could not find him guilty of that offence in the appeal. The conviction and sentence imposed on the appellant must therefore, be quashed. **1954 Cri L J 872 : AIR 1954 Madh Bha 83.**

——S. 161 — Criminal P. C., S. 238—Three complete minor offences of bribe-taking committed within space of 12 months included — Only one offence proved — Acquittal under S. 5 (2) — Accused can be convicted under S. 161, I. P. C. — (Prevention of Corruption Act (1947), S. 5) — (Penal Code (1860), S. 161). See Cr. P. C. (1898), S. 238. 1953 Cri L J 1429 : AIR 1953 Mad 785.

——S. 161 — Prevention of Corruption Act (1947), Ss. 5 (1) and 5 (2) — Accused granting bail to complainant without demanding tip — Tip demanded after finishing entire work of granting bail — No offence under S. 161 or S. 5 (2) read with S. 5 (1) held was committed.

The habit of demanding tips or inam after doing the work cannot possibly be encouraged but it is difficult to hold that that would constitute any offence under S. 161, Indian Penal Code or S. 5 (2), read with S. 5 (1) of the Prevention of Corruption Act. Thus, where the accused granted bail to the complainant without demanding any amount by way of

reward, or bribe or gratification, before the accused finished the entire work of granting the bail and it was only afterwards that he asked for some tip which was given to him.

Held, that the action of the accused in demanding the tip from the complainant did not constitute an offence under S. 161, Penal Code or S. 5 (2) read with S. 5 (1), Prevention of Corruption Act. AIR 1954 Punj 89. Foll. 67 Pun L R 939 : 1965 All Cri R 436 : 1965 All W R (Sup) 26 : 1966 Cri L J 1796 : AIR 1966 Punj 302 (303) (Pr 6).

——S. 161—Bribery case—Delay in filing complaint —Effect.

The delay of one day in filing the complaint in a case of bribery is certainly not very material and does not in any manner show that in the interval of that one day a false case has been concocted against the accused persons. 1960 Cri L J 404 : AIR 1960 Tripura 8 (10) (Pt A) (Pr 16).

SECTION 162

■ ——S. 162 — Scope — If repealed by S. 5, Prevention of Corruption Act — Prosecution under S. 409— Sanction — Prosecution if offends provisions of Art. 14 of the Constitution.

As S. 405, Penal Code, is not repealed by S. 5 (1)(c), Prevention of Corruption Act the application of S. 409 which is an aggravated form of offence to a public servant is not barred by Art. 14 of the Constitution.

No sanction is necessary to prosecute the public servant as he does not normally act in his capacity as a public servant when committing criminal breach of trust. 1957 Cri L J 575 : AIR 1957 S C 458.

——Ss. 162, 161 and 165 —Prevention of Corruption Act (1947), S. 5 (1) (d) — Offence under S. 5 (1) (d) and bribery — Distinction between — "Obtains" — Includes acceptance on voluntary offer—(Words and Phrases). See Prevention of Corruption Act (1947), S. 5 (1) (d). 1956 Cri L J 837 : AIR 1956 S C 476.

——Ss. 162 and 182 — Criminal P. C. (1898), S. 195 (1) (a) —Offence under —"Public servant concerned" in S. 195 (1) (a) — Meaning of — False information against police officers — Complaint by District Magistrate is competent. See Criminal P. C. (1898), S. 195 (1) (a). 1961 (2) Cri L J 47 : AIR 1961 All 352 (DB).

——Ss. 162 and 163 — Ss. 162 or 163, Penal Code do not form part of S. 6, Criminal Law Amendment Act —Therefore, no trial under the said Act is valid for an offence under those sections of the Code. See Criminal Law Amendment Act (1952), S. 6. A I R 1955 NUC (All) 3531.

SECTION 165

■ ——S. 165 — Subordination — Does not mean in respect of those very functions—Administrative subordination is sufficient—Order rejecting application for export permit — Appeal pending before Joint Chief Controller of Imports and Exports — Illegal gratification accepted by Assistant Controller of Imports—Offence covered by S. 165.

Section 165 has been so worded as to cover cases of corruption which do not come within S. 161 or S. 162 or S. 163. When with that intention the legislature has used the word 'subordinate' in S. 165 without any limitation there is no justification for reading into the word the limitation suggested by the words 'in respect of those very functions'. Such interpretation needs the addition of some words in the section, and that is clearly not permissible. By the use of the word 'subordinate' without any qualifying words, the legislature has expressed its legislative intention of making punishable such subordinates also who have no connection with the function with which the business or transaction is concerned. To limit the meaning of 'subordinate' in the section by adding the words, would be defeating that legislative intention and laying down a different legislative policy. This the Court has no power to do. The argument that 'subordinate' means something more than 'administratively subordinate' must therefore be rejected.

Thus when an appeal against the rejection of an application for exports licence is pending before the Joint Chief Controller of Imports and Exports and an illegal gratification in respect of that matter is accepted by an Assistant Controller of Imports who is under administrative subordination of that officer, an offence under S. 165, Penal Code is committed, even though the accused had no functions to discharge in connection with the appeal before the Joint Chief Controller of Imports and Exports. R. G. Jacob v. Republic of India, 1963 S C D 316 : (1963) 2 S C J 330 : (1963) 2 Andh W R (S C) 79 : (1963) 2 Mad L J (S C) 79 : 1963 Mad L J (Cri) 453 : 1963 (1) Cri L J 486 : (1963) 1 S C W R 62 : (1963) 3 S C R 800: 1963 Mad W N 225 : A I R 1963 S C 550 (553) (Pr 9).

■ ——S. 165 — Prevention of Corruption Act (1947), S. 4 (1)—Presumption under—When can be raised—Money paid need not be by way of bribe. AIR 1957 Raj 138 and AIR 1959 Bom 30, Overruled. See Prevention of Corruption Act (1947), S. 4 (1). 1960 Cri L J 729 : AIR 1960 S C 548.

■ ——S. 165 — Scope — Existence of property in excess of official remuneration—Presumption.

The Court is entitled to presume that the amassing of such wealth was due to briberty or corruption and the person is guilty of an offence of criminal misconduct. Such a presumption cannot be drawn in the case of a prosecution under Ss. 161, 165 and 409, Penal Code. See Penal Code (1860), S. 161 1957 Cri L J 575 : AIR 1957 S C 458.

■ ——Ss. 165 and 161, 162 — Prevention of Corruption Act (1947), S. 5 (1) (d)—Offence under S. 5 (1) (d) and bribery — Distinction between "Obtains" — Includes acceptance on voluntary offer—(Words and Phrases) See Prevention of Corruption Act (1947), S. 5 (1) (d). 1956 Cri L J 837 : AIR 1956 S C 476.

——S. 165 — Knowledge that amount was being offered as bribe.

Where in a prosecution under Ss. 165 and 165A, Penal Code, the accused, an Excise peon, contended that he neither willingly accepted the amount, paid to him by a person, against whom a case was pending in respect of illicit liquor, nor he had knowledge that the amount was being paid to him as bribe for payment to the Excise Inspector in connection with the said excise case.

Held that the circumstances of the case indicated that the accused had knowledge that the sum was being offered as bribe for payment to the Excise Inspector and he was rightly convicted. 1958 All Cri R 285 : 1958 All W R (HC) 399.

——Ss. 165 and 161—Burden of proof on the prosecution — Standard of proof required — Evidence Act (1872), Ss. 3, 101 to 103.

Ordinarily, the prosecution would be liable to prove the motive or reward under S. 161, Penal Code, or absence or inadquacy of consideration under S. 165, Penal Code, because such motive or reward or such absence or inadequacy of consideration is part of the very offence under S. 161 or 165, Penal Code, respectively But now by reason of S. 4, Prevention of Corruption Act, 1947, that presumption will be made against the accused the moment the prosecution proves that the accused accepted or agreed to accept or obtained or attempted to obtain any gratification or valuable thing. This does not mean that the burden of proof

on the prosecution to establish the acceptance or the agreement to accept or the obtaining or the agreement to obtain the gratification or the valuable thing is at all displaced by this section. That burden still remains on the prosecution. This proof must be in accordance with the standard of proof laid down by S. 3, Evidence Act. Any other standard of proof by percentage or plausibility cannot be accepted. **52 Cri L J 1116 : AIR 1951 Cal 524 (DB).**

——S. 165 — Prevention of Corruption Act (1947), S. 4—Presumption under Rebuttal — (Evidence Act (1872), Ss. 101 to 104).

The only element remaining to be proved to constitute an offence under S. 165 is that the acceptance was without consideration or for a consideration which the accused knew to be inadequate. It cannot be said that it must first be proved that the acceptance of the valuable thing was as a gratification other than legal remuneration before the presumption under S. 4 can be drawn so as to throw the burden on the accused. It is not enough for the accused to offer an explanation which has not been disproved or to create some doubt in the mind of the Court. The burden cast on the accused is however less stringent than that laid on the prosecutor in proving guilt and corresponds to that which rests upon the plaintiff or defendant who is required to prove an issue in civil proceedings. **1958 Cri L J 640 : AIR 1958 Ker 136 (DB).**

——S. 165 — One of the essential ingredients of the offence is that the person from whom the accused accepted or obtained, or agreed to accept or attempted to obtain, any valuable thing without consideration was known to the accused to have been or then was likely to be concerned in a proceeding or business transacted or about to be transacted by himself, or which had a connection with the official functions of himself or of a public servant to whom the accused was subordinate or from a person known to the accused to be interested in or related to the person so concerned.

The words "having any connection with the official functions of himself" qualify the words "proceeding or business and not the words from any person." **AIR 1955 N U C (Madh B) 4889 (DB).**

——S. 165 — Evidence and Proof — Bribery cases — Trap by Police to catch corrupt official — Legitimate and illegitimate traps — Trap set after suggestion of illegal gratification by official himself — Trap not illegitimate. See Evidence Act (1872), S. 133. **1961 (2) Cri L J 778 : AIR 1961 Mad 482.**

——S. 165 —Bribe accepted by subordinate officer in respect of official act directly concerning his superior officer — Promise to use influence to see that act was accomplished but no promise to use influence with superior officer or with any other designated person —Still section applies.

Held, that the facts proved were sufficient to establish the ingredients under S. 165 in the strict sense of the language employed.

It was not essential that the accused must be a subordinate in respect of the matter in question in the sense that the matter must belong to that sphere of duties which was common to both the subordinate and superior officers. **1961 Mad W N 201 : 1961 Mad L J (Cri) 776 : (1961) 2 Cr L J 778 : (1961) 2 Mad L J 547 : AIR 1961 Mad 482 (433) (Pt A) (Pr 7).**

——S. 165 — Prevention of Corruption Act (1947), S. 4 (1). The only presumption which can be drawn by virtue of S. 4 (1) is that the thing was obtained without consideration or for a consideration which the accused knew to be inadequate. Presumption that it was obtained from any person whom he knew to be interested in or related to the person so concerned is not covered by this provision. It is for the prosecution to prove by positive evidence that the accused obtained the thing from a person who is known to be related to the concerned person. (Evidence Act (1872), Ss. 101-104). See Prevention of Corruption Act (1947), S. 4 (1). **1956 Cri L J 1341 : A I R 1956 Orissa 201 (DB).**

——S. 165—Sanction to prosecute under — Facts on which proposed prosecution is based must be put before sanctioning authority — Condition satisfied — Sanction held was valid. See Penal Code (1860), S. 161. **(1957) 23 Cut L T 31.**

——S. 165—Prevention of Corruption Act (1947), S. 3 **—Permission under, to investigate —It need not be in any form or in writing — Presumption under S. 114,** illus. (e) Evidence Act, may be drawn—**No objection in trial Court to the defective nature of permission— Objection in appeal cannot be sustained — (Evidence** Act (1872), S. 114)—(Words and Phrases— **Regularly performed).** See Prevention of Corruption Act (1947), S. 3. **1955 Cri L J 609 : AIR 1955 Punj 65 (DB).**

SECTION 165-A

SYNOPSIS

(Penal Code (1860), S. 165-A.)

1. **Retrospective operation.**
2. **Offence under.**
3. **Cognizance and jurisdiction.**
4. **Sanction.**
5. **Evidence.**
6. **Conviction and sentence.**
7. **Alteration of charge.**

1. Retrospective operation.

——S. 165-A—Scope—If same as S. 116 — Distinction between the two.

Held, that S. 165-A, is not merely a restatement of the offence of abetment under S. 116 of the Penal Code, and therefore it cannot be said that merely because the abetment of an offence under S. 161 was specified in the schedule of the West Bengal Act of 1949, S. 165-A which did not then exist in the Penal Code must be deemed to have been specified therein. Therefore under the notification of the case distributed to the Special Court for the appellant's trial was for a non-existing offence because when the Special Judge took cognizance of the case there was no such offence as Ss. 161/116, Penal Code. AIR 1956 Cal 385, **Reversed.** See Public Safety—W. B. Criminal Law Amendment (Special Courts) (13 of 1952), S. 4. **1959 Cri L J 98 : AIR 1959 S C 8.**

——S. 165-A — Scope — Retrospective operation — [Criminal Law Amendment Act (1952)].

Section 165-A, Penal Code which imposes a higher penalty for abetment of offences under S. 161 and S. 165, Penal Code has no application to acts committed before its enactment that is before 28th July 1952. In respect of abetment of offence under S. 161 committed prior to 28th July 1952, S. 161 read with S, 116, Penal Code, would be available even after the enactment of the Criminal Law Amendment Act, 1952. **56 Bom LR 199: 1954 Cri L J 952: ILR (1954) Bom 763 : AIR 1954 Bom 327 (328) (Pt A) (Pr 3) (DB).**

——Ss. 165-A, 161 and 116—Scope —If retrospective —Offer of bribe — Offence committed in 1950— Conviction under S. 165-A—Legality of— (Constitution of India, Art. 20).

On 16th January, 1950, while the Naib Tahshildar was proceeding to the Court the accused, who was a party in a case pending before the Tahsildar, offered

bribe to him. The Tahsildar made a report to the police and in due course the accused was convicted of an offence punishable under S. 165-A, Penal Code, by a Special Judge appointed under S. 6, Criminal Law Amendment Act. 1952.

Held, (i) that in view of the provisions of Art. 20 of the Constitution of India, the accused could not be convicted under S. 165-A of the Penal Code, which was incorporated in the Penal Code on 28th July, 1952, for a bribe said to have been offered on 16th January, 1950.

(ii) that as the accused could not be tried by the Special Judge for an offence under S. 161 read with S. 116 of the Penal Code, the High Court could not find him guilty of that offence in the appeal. The conviction and sentence imposed on the appellant must therefore, be quashed. **1954 Cri L J 872, Madh B L I 1954 H C R 892 : ILR (1954) Madh Bha 411 : A I R 1954 Madh B 83 (84) (Prs 3, 7).**

——Ss. 165-A, 161 and 116 — Person offering bribe can only be prosecuted under S. 165-A and not under S. 161 read with S. 116—(Interpretation of Statutes—Repeal of earlier by later.)

By insertion of S. 165-A, Penal Code, the Legislature has clearly and expressly made provisions for punishment and abetment in bribery cases and such abetment has been made a substantial offence. Hence a person offering bribe can only be prosecuted under S. 165-A and not under the old provisions as laid down in S. 161 and S. 116, Penal Code, for even if two sets of provisions be deemed to be co-existing and the result of this co-existence would be destructive of the object for which the new law was passed, the earlier would be repealed by the later. **1956 Cri L J 249 : A I R 1956 Manipur 9 (10) (Pt A) (Pr 7).**

——S. 165-A—Criminal Law Amendment Act (1952), Ss. 6 and 7—Applicability to Manipur State.

Criminal Law Amendment Act (1952) is fully applicable to Manipur State so far as the offence under S. 165-A, Penal Code, is concerned and the provisions laid down in Ss. 6 and 7 of that Act must, therefore be followed strictly. **1956 Cri L J 249 : AIR 1956 Manipur 9.**

——S. 165-A —Abetting offence under S. 161—Person abetted incapable of committing offence under S. 161 —Abettor cannot be prosecuted under S. 165-A. 1962 (1) Cri L J 67 : AIR 1962 Pat 8 (10, 11) (Prs 12, 13) (DB).

2. Offence under.

——S. 165-A—Applicability—Commissioner appointed by Civil Court to seize account books—Offering bribe to him is not an offence under S. 165-A—Commissioner is not a public servant. AIR 1959 All 707, Reversed. See Civil P. C. (1908), S. 151. 1961 (1) Cr L J 322 : AIR 1961 S C 218.

——S. 165-A — Expression of a desire to meet the doctor in connection with an autopsy he had performed on dead body of a person alleged to have been murdered—No illegal gratiffcation offered to doctor—Offence under S. 165-A not committed — Essential ingredient is lacking. See Penal Code (1860), S. 161. 1964 All W R (HC) 280.

——S. 165-A—Abetment of—When complete,

So soon as there is an instigation to a person to commit an offence under S. 161 the offence of abetment of the offence under S. 161 is complete within the intendment of S. 165-A quite irrespective of the fact that the person did not accept, or even consent to accept the money. **:1959 All W R (HC) 27 : 1959 All Cr R 69 : 1959 Cri L J 1267 :AIR 1959 All 707 (708) (Pt A) (Pr 10).**

[Reversed on another point in AIR 1961 S C 218.]

——S. 165-A—Offence—When complete.

In a case under S. 165-A, since it is the mens rea of the bribe-giver that has to be considered it should be sufficient to render him liable if his object in bribing or attempting to bribe the public servant was to induce the public servant to do an official act or show or forbear to show, in the exercise of his official functions, favour or disfavour to him. it being quite immaterial whether the public servant was not in fact in a position to do or not to do the act or show or forbear to show the favour or disfavour in question. **1959 All W R (H C) 27 : 1959 All Cr R 69 : 1959 Cri L J 1267 : AIR 1959 All 707 (710) (Pt C) (Pr 15).**

[Reversed on another point in AIR 1961 S C 218.]

——S. 165-A — Where in a prosecution under Ss. 165 and 165-A the accused an Excise peon, contended that he neither willingly accepted the amount, paid to him by a person, against whom a case was pending in respect of illicit liquor, nor he had knowledge that the amount was being paid to him as bribe for payment to the Excise Inspector in connection with the said excise case.

Held, that the circumstances of the case indicated that the accused had knowledge that the sum was being offered as bribe for payment to the Excise Inspector and he was rightly convicted. **1958 All W R (HC) 399.**

——Ss. 165-A, 107. 116, 161—Gist of offence— Offer to public servant without actually producing money —Offence—Offer, what amounts to.

Section 165-A provides for the punishment of an abetment of an offence punishable under S. 161 or S. 165 whether or not that offence is committed in consequence of the abetment. The prosecution must, therefore, establish that the conduct of the accused amounts to an abetment of the offence under S. 161.

It is not necessary in order to bring home to the public servant the charge under S. 161 to prove that he has actually accepted or obtained illegal gratification. If a proposal is made to the public servant in respect of payment of illegal gratification and the proposal is accepted by the public servant, he would be guilty under S. 161 of the Indian Penal Code. If a person who offers to pay the amount makes his proposal, that constitutes an ofience under S. 165-A. If the proposal is accepted, that constitutes an offence under S. 161, Penal Code.

Illustration (a) to S. 116, Penal Code, makes it clear that the offer of the bribe would amount to an abetment under S 116 and would necessarily constitute an offence under S. 165-A. The definition of the word "instigation' contained in S. 107 leads, to the same result. Any act committed by a person which amounts to instigation as defined in S. 107 would attract the provisions of S. 165-A of the Indian Penal Code. **1955 Cr L J 181 : 56 Bom L R 1021 : AIR 1955 Bom 61 (62) (Pr 6) (DB).**

——S. 165-A—In view of Explanation 4 to S. 108 there can be abetment of the offence punishable under S. 165-A. See Penal Code (1860). S. 108, Explanation 4. 1954 Cri L J 1503 : AIR 1954 Punj 228.

——S. 165-A—Applicability— Bribe offered to Head Constable unable to act—Conviction.

Section 161 does not require that the public servant must in fact be in a position to do the official act, favour or service at the time. Therefore, even if Head Constable is not in a position to take action under Ss. 18 and 37 of the Punjab Weights and Measures Act that would not affect the guilt of the accused convicted under S. 165-A. **1954 Cri L J 1503 : AIR 1954 Punj 228.**

——S. 165-A—Essence of offence—Relevant question —State of mind of accused.

In a trial for the offence of offering a bribe to a public servant the relevant question is the state of mind of the accused, when he offers a bribe; it has nothing to do with the question whether the public servant is or is not in a position to do or not to do the act, for the doing or not doing whereof the amount is offered to him. AIR 1950 Mad 93 and AIR 1952 Bom 435 and AIR 1955 S C 70, Rel. on. **1956 Raj L W 464 : 1957 Cri L J 157 (Raj).**

——S. 165-A — Applicability—Offer of bribe after order is passed.

It is not correct to say that if a public servant accepts or is offered bribe after he has passed a particular order, no offence of accepting illegal gratification is established. It is, however necessary that it should be proved that the offer was made to the public servant for the purpose of getting an official act done by him. AIR 1921 Cal 344; AIR 1929 Mad 756; AIR 1935 Pesh 26, Diss. from. See Penal Code (1860), S. 161. **1955 Cri L J 992 : AIR 1955 Raj 108.**

——S. 165-A—Gist of offence — Mere offer to pay money was sufficient to constitute an offence of attempt to pay bribe. See Penal Code (1860), S. 161. **1955 Cri L J 992 : AIR 1955 Raj 108.**

——S. 165-A—Applicability—Public servant powerless to assist accused.

Even if the public servant had no power to assist the accused the question is not wnat the public servant could have done but the question is what the accused wanted him to do. Where the accused wanted that the public servant in his official capacity should assist him and for that he made an offer to pay him some cash the accused was clearly guilty of an offence under S. 165-A. See Penal Code (1860), S. 161. **1955 Cri L 992 : AIR 1955 Raj 108.**

——Ss. 165-A, 161—Scope — Paying illegal gratification to Food Inspector for giving certificate in respect of ration cards — Accused charged under S. 165-A with having abetted Food Inspector in commission of offence under S. 161 even though the said offence under S. 161 was not committed—**Held**, that question whether ration cards were true or false had nothing to do with the case. **1961 (1) Cri L J 437 : AIR 1961 Tripura 8 (11) (Pt B) (Pr 12).**

3. Cognizance and jurisdiction.

——S. 165-A—Offence under — If non-cognizable — First information and investigation — Admissibility of first information — S. 3, Prevention of Corruption Act, effect of—(Prevention of Corruption Act (1947), Ss. 3, 5-A—Criminal P. C. (1898), Ss. 154, 157).

The provisions of S. 5-A of the Prevention of Corruption Act are attracted only when the stage of investigation is reached and that too in the Presidency town of Bombay. They have no application at the stage of the first information which precedes the commencement of the investigation. It is the basis upon which the investigations under Chapter XIV of the Code of Criminal Procedure commences. The provisions of S. 5-A do not affect, and are not intended to override, the provisions about the giving of first information relating to the commission of cognizable offences. Section 5-A of the Prevention of Corruption Act cannot be pressed into service for contending that the statement of the complainant taken by Police Sub-Inspector is not admissible in evidence as first information. The stage of taking cognizance comes after the stage of investigation is over.

The provisions of S. 3, Prevention of Corruption Act, can only have one meaning and the meaning is that an offence under S. 165-A of the Penal Code has to be deemed to be a cognizable offence for the purposes of the Code of Criminal Procedure. There is nothing in the language of S. 5-A which would suggest that an offence under S. 165-A of the Penal Code is not to be treated as a cognizable offence. **59 Bom L R 875 : 1958 Cri L J 481 : I L R (1958) Bom 96 : AIR 1958 Bom 125 (131, 132) (Prs 11, 12) (DB).**

——S. 165-A—Constitution of India, Art. 134 (1) (c) — Certificate of fitness for appeal — (Criminal P. C. (1898), S. 529 (e)).

Where the Judge of the Special Court in West Bengal in good faith takes cognizance of an offence under S. 165-A, Penal Code, at a time when he had no jurisdiction to do so, the question whether the case is covered by S. 529(e), Criminal P. C., is of considerable importance and the case is a fit one for granting leave to appeal under Art. 134(1)(c), Constitution of India. See Constitution of India, Art. 134(1)(c). **1956 Cri L J 994 : AIR 1956 Cal 388 (DB).**

——S. 165-A—Constitution of India, Arts. 21 and 22 — Letter of Ministry of State, New Delhi to Chief Commissioner, inconsistent with Criminal Law Amendment Act (1952)—Validity — (Criminal Law Amendment Act (1952), Ss. 6 and 7).

Any law or provision of law which affects the personal liberty and is inconsistent with Arts. 21 and 22 of the Constitution of India, is void to that extent. Case law referred.

In view of the provisions of Arts. 21 and 22, the Delhi official letter from the Ministry of States, New-Delhi, to the Chief Commissioner, Manipur, which is inconsistent with the provisions of the Criminal Law Amendment Act (1952) cannot be legally operative and binding and it cannot confer jurisdiction on the E. A. C. to try the case under S. 165-A, Penal Code. **1956 Cri L J 249 : AIR 1956 Manipur 9.**

——S. 165-A—Where cognizance of an offence under S. 165-A, Penal Code, is taken and the trial has proceeded to termination the invalidity of the investigation, by reason of failure to obtain permission to investigate it necessary under S. 5-A, Prevention of Corruption Act, 1947, will not vitiate the result, unless miscarriage of justice has been caused thereby. AIR 1955 S C 196, Rel. on. **1958 Cri L J 1053 : AIR 1958 Manipur 17.**

4. Sanction.

——S. 165-A—Sanction to prosecute not necessary. See Prevention of Corruption Act (1947), S. 6. **AIR 1955 N U C (Him Pra) 1295.**

——S. 165-A — Kotwar in former Madhya Pradesh was a public servant within the meaning of cl. (8) to S. 21, Penal Code. Under S. 6 of the Prevention of Corruption Act, previous sanction is necessary for prosecution under S. 165-A, Penal Code as he was a public servant. **1957 M P L J (Notes) 173.**

5. Evidence.

——S. 165-A—Any person charged with an offence punishable under S. 161 or 165-A, Penal Code, or under sub-s. (2) of S. 5 of the Prevention of Corruption Act, is competent witness for the defence and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial; and there are also certain safeguards provided in the matter of giving such testimony. See Prevention of Corruption Act (1947), S. 7. **1957 Cri L J 575 : AIR 1957 S C 458.**

——S. 165-A—Evidence Act (1872), S. 133—Bribery cases—Evidence of person to whom bribe was offered —Corroboration—(Criminal P. C. (1898), S. 367).

In a case under S. 165-A, Penal Code, the complainant and the person to whom bribe had been tendered, must be regarded as a witness whose evidence should be corroborated before the same can be acted upon. See Evidence Act (1872), S. 133. **1956 Cri L J 991 : AIR 1956 Cal 385 (DB).**

[Reversed in AIR 1959 S C 8.]

6. Conviction and sentence.

●——S. 165-A—Attempt to corrupt responsibie public servant—Sentence of 6 months' imprisonment and a fine of Rs. 1,000 held was not severe. Mohammed Dastagir v. State of Madras. (1960) 1 Ker L R 592 : 1960 S C J 726 : 1960 Cri L J 1159 : (1960) 2 Mad L J (SC) 39 : 1960 M L J (Cr) 466 : (1960) 2 An W R (SC) 39 : 1960 All Cri R 240 : 1960 All W R (HC) 357 : (1960) 3 S C R 116 : AIR 1960 S C 756 (762) (Pt D) (Pr 11).

●——Ss. 165-A and 107—Abetment—Forms of—Case where commission of offence unnecessary—Offence of bribery—Acquittal of accused charged with—Conviction of abettor.

Whether the acquittal is right or wrong the conviction of the abettor also cannot be allowed to stand in the circumstances. AIR 1953 SC 364, Disting. See Penal Code (1860), S. 107. 1959 Cri L J 917 : AIR 1959 S C 673.

——S. 165-A—Scope — Conviction under S. 165, I. P. Code for offence committed in 1948 — Legality—Appellate Court's power to alter into one under S. 161 read with S. 109, I. P. Code. Conviction not valid — Appellate Court can alter findings — Accused may be convicted under S. 161 read with S. 109, I. P. C. See Criminal P. C (1898), S. 423 (1) (b). 1957 Cri L J 695 : AIR 1957 All 388.

[Reversed on another point in AIR 1960 SC 409.]

——Ss. 165-A, 109, 193, 214—Criminal P. C., S. 195-B—Municipal employees attesting Panchanama of seizure of "Ganja" — Attesting is not as municipal employees but as witnesses—Defence trying to win over attesting witnesses and constable who seized "Ganja"—Offence punishable under Ss. 109 and 193, I. P. C. — S. 214, I. P. C. is inapplicable—Prosecution can be on complaint by Court where case pending — Trial vitiated. See Penal Code (45 of 1860), S. 109. 1965 M P L J (Notes) 11.

——S. 165-A—Sentence.

The accused in his rustic simplicity did not know the full consequences and implications of his act. This was clear from the fact that he asked the Magistrate to accept something publicly in open Court.

Held, that it would not be proper to treat him in the matter of punishment in the same way as is necessary in the case of those bribe-givers who deliberately want to corrupt public officials in order to gain their ends. 1955 Cri L J 992 : 1956 Raj L W 173 : ILR (1955) 5 Raj 497 : AIR 1955 Raj 108 (112) (Pt D) (Pr 15).

——S. 165-A—Sentence.

It is the gravity of the offence committed and not the nature or size of the instrument employed for committing that offence that should be the criterion for determining the sentence to be awarded to the offender. Where the accused was making a daring attempt to corrupt a public officer by inducing him to go out of his way and to wink at the land-grabbing enterprise pursued by the accused and to render illegal help to him for achieving success in such unlawful pursuits such an offence has to be viewed as a grave offence calling for a deterrent sentence. 1954 Ker L T 455 : ILR (1954) Trav-Co 856 : 1954 Cr L J 1604 : AIR 1954 Trav-Co 492 (495) (Pt G) (Pr 7) (DB).

7. Alteration of charge.

●——S. 165-A—Criminal P. C. (1898), Ss. 225, 537—Alteration of charge under S. 165A, Penal Code to one under S. 161/109, Penal Code, in respect of abetment—No illegality. See Criminal P. C. (1898), S. 225. 1960 Cri L J 514 : AIR 1960 S C 409.

——S. 165-A—Charge — Alteration of—Charge under S. 165-A, I. P. Code — Necessary facts mentioned — Charge could be changed into one under S. 161 read with S. 109, I. P. Code. See Criminal P. C. (1898), S. 537. 1957 Cri L J 695 : AIR 1957 All 388.

[Reversed on another point in AIR 1960 SC 409.]

SECTION 166

——S. 166—'While acting or purporting to act in the discharge of his duty'—Act includes illegal omissions—Allegation that public servants disregarded their duties cast on them for safety of the populace—Sanction under S. 197 held necessary. See Cr. P. Code (1898), S. 197. 1962 (2) Cr L J 320 : AIR 1962 Bom 198 (DB).

——S. 166 — Contempt of Courts Act (1952), S. 3 — Bailiff using force in obtaining delivery of possession—(Constitution of India, Art. 215.)

The rules of the Court provide that the bailiff has to return to the Court for being armed with necessary powers and help. The mistake on the part of the bailiff in using force, however, without being properly armed by an order of the Court does not make his offence a culpable one for contempt of Court. See Contempt of Courts Act (1952), S. 3. 1956 Cri L J 734 : AIR 1956 Cal 249 (DB).

——S. 166 — Prisoners in police lock up — Circle Inspector not allowing them to take food—Offence.

Where it is admitted that when certain under trial prisoners in police lock up were about to take their food the officer in charge, whose primary responsibility it was to give them proper food, was not present and the circle inspector asked them not to take food but to wait till the arrival of the officer in charge, it cannot be said that he committed an offence under S. 166, Penal Code. By merely asking them not to touch any food until the person directly responsible for the feeding of the under trial prisoners, namely the officer in charge, arrived there, the circle Inspector was presumably taking the usual precaution so that there may not be any complaint about the quality of food, etc. and S. 166, Penal Code, has absolutely no application to this case. (1965) 31 Cut L T 695.

——S. 166—Case under—Delay in placing allegations before Magistrate.

In cases such as under Ss. 342 and 166, Penal Code the most important though by no means the only test is whether allegations against the police officer or any other public servant concerned are placed before proper authority at the very earlier opportunity. A delay in making this allegation before the magistrate or other competent authority is almost fatal to a prosecution of this nature. 1952 Cri L J 1390 : AIR 1952 Vindh Pra 57 (58) (Pt B) (Pr 5).

SECTION 167

——S. 167—Prosecution for giving false information—Protest petition pending enquiry—Opportunity to prove truth of that charge—Duty of Court to give.

Where a person who is accused of having committed an offence by reason of his having given false information demands a judicial investigation into the truth of the charge made by him, he is entitled to be given an opportunity to prove the truth of that charge. During the pendency of such judicial investigation into what should be regarded as a complaint made by accused in this case, a prosecution against him on the supposition that the charge made by him was false is unjustified. See Penal Code (45 of 1860), S. 201. 1959 All W R (Sup) 12 : 1959 All Cr R 111 : 1959 M L J (Cri) 204 (Mys).

——S. 167—Ranbir Penal Code (1989 B. K.), S. 167 — Intention to cause harm — Patwari — Making wrong entry in revenue records—Possibility of mistake being bona fide not ruled out—Wrong entry was innocuous as there was decree of civil Court determining rights

of complainants — Held, that Patwari could not be said to have intended to cause any harm. 1965 Kash L J 93 : AIR 1966 J & K 96.

——S. 167 — False document — Making of wrong entries initially not to constitute false document. See Penal Code (1860), S. 464. 1965 (1) Cri L J 213 : AIR 1965 Raj 9.

SECTION 168

——S. 168—Bombay Civil Services, Conduct, Discipline and Appeal Rules (framed under R. 48 (2))—Civil Services (Classification, Control and Appeal Rules), R. 21 — Trade — Meaning of — Words and Phrases.

The expression 'trade' used in S. 168 I. P. C. and R. 21, should not be construed in its technical sense and should not be confined only to mercantile operations or commercial transactions but should be given wider meaning bearing in mind the context in which it is used. So construed it would include any business carried on with a view to profit and, therefore, the business of making plans and estimates for profits as consulting sanitary engineers and contractors would be included within the expression "trade", AIR 1951 Bom 233 (239) (Pt A) (Prs 18, 19, 21, 22) (DB).

SECTION 170

——S. 170—"Particular office."

What is meant by "any particular office" is "any specified office" regardless of whether such an office exists or not. There can certainly be a particular office though it does not exist. 1953 All L J 260 : 1953 Cri L J 1279 : 1953 All W R (H C) 376 : AIR 1953 All 549 (549) (Pr 1).

● ——S. 170—Personating public servant—Four acts done while so personating — Gist of offence — One trial for all four acts — Same transaction — Criminal P. C. (1898), S. 235.

The act of pretending to hold a particular office as a public servant alone does not make a person punishable under S. 170 unless that person in such an assumed character does or attempts to do some act under colour of such office. The act or acts done by the person who personates a public servant merely gives a clear indication that the person has misused his position, i. e, he has done some overt act in exercise of the authority of the assumed public servant. It is thus wholly immaterial whether such a person indulges in one act only or in a series of acts. Assuming for the sake of argument that each of the four acts done by such a person technically constitutes a distinct offence, if it can be inferred from surrounding circumstances that all the activities at particular places were carried out in pursuance of one dominent idea then all the acts done by him would be acts done in the course of the same transaction. In such a case his trial for a number of distinct offences committed in the course of one and the same transaction would be permissible under S. 235, Criminal P. C. AIR 1951 All 481 (481) (Pr 3).

——S. 170—Personation.

Mere personation is insufficient to justify conviction under S. 170, Penal Code. The phrase "act under colour of such office", points to acts which could not have been done without assuming official authority or responsibility. Where the accused was not a Civil Surgeon but he issued a certificate on which he had made a rubber stamp which purported to show him a Civil Surgeon.

Held, that as under S. 288 of the old Civil Service Regulation, corresponding to S. 387 of the new Civil Service Regulations, the accused even in his capacity of a retired Assistant Civil Surgeon could issue a certificate, he could not be deemed to have done an act under colour of the office of a Civil Surgeon. ILR (1956) Hyd 436.

——S. 170 — Person travelling without ticket representing himself to be I. A. S. officer and managing to secure money for railway fare — Offence may be cheating but not covered by S. 170, Indian Penal Code. 'Act under colour of office' points to acts which could have not been done without assuming official capacity and would not connote acts of ministerial character which might be done without requiring the justification of offence in the person doing. 1963 M P L J (Notes) 224.

——Ss. 170 and 419 —Applicability —Personation of public servant—Ingredients.

Cheating by personation (S. 419) is an offence of a general character under which a person may pretend to be any one other than what he really is. But cheating by pretending to be a public servant (S. 170) is a specific offence where one pretends to be a public servant. It has all ingredients of cheating by personation under S. 419. But when the personation is that of a public servant and the pretender does some act, then the offence becomes one under S. 170. 1958 M P L J 287 : 1953 Cri L J 1039 : 1958 Jab L J 726 : AIR 1958 Madh Pra 230 (230) (Pr 4).

SECTION 171-A

——S. 171-A(b)—A person giving some land to a voter for refraining to vote at an election is guilty of an offence under S. 171-B. See Penal Code (1860), S. 171-B. 1957 Cri L J 1212 (1) : AIR 1957 Andh Pra 845 (DB).

SECTION 171-B

——S. 171-B — Trial for offence under — The unregistered deed of sale is admissible in evidence for the limited purpose. See Registration Act (1908), S. 49 (c). 1957 Cri L J 1212 (1) : AIR 1957 Andh Pra 845 (DB).

——S. 171-B, 171-A (b) — Applicability — Bribe for refraining from voting—Offence.

If the words "electoral right" in S. 171-B are substituted by the relevant part of the definition given in S. 171-A (b), it is obvious that to induce a person not to vote or to refrain from voting would be to induce him not to exercise his electoral right. A person, therefore who gives some land to a voter for refraining from voting at an election is guilty of an offence under S. 171-B, Penal Code. 1956 Andh W R 420 : 1956 Andh L T 376 : 1957 Cri L J 1212 (1) : AIR 1957 Andh Pra 845 (846) (Pt A) (Pr 4) (DB).

SECTION 171-C

——Ss. 171-C, 171-F — Representation by candidate and his agent that he was Chalanti Vishnu and as such representative of Lord Jagannath and persons not voting for him would be sinning against the God and also be committing sacrilege against dharma—Candidate also appealing to voters in the name of caste and using symbols of the God in his propaganda—Held, that the representations fell within the scope of sub-s. (2) and also constituted offences under S. 171-F/171-C and S. 508, Penal Code — The appeal and use of symbols came within sub-s. (3) of S. 123, Representation of People Act (1951) but were not offences under the Penal Code. See Representation of the People Act (1951), S. 123. 1964 (1) Cri L J 57 : AIR 1964 Orissa 1 (DB).

SECTION 171-D

● ——S. 171-D—Scope and applicability.

The essence of the offence of false personation is the offender pretending to be other than what he really is. The gist of the offence being false personation, the section does not come into play when

the candidate or his agent does not claim to be the voter himself whom he makes a cross against any name. 1955 Andh W R 903 : 1955 Andh L T 766 : AIR 1956 Andhra 65 (72) (Pt. G) (Pr 48) (F B).

——S. 171-D — Personation at election — Mens rea, proof of — Application for voting paper, when made.

When a person applies for a ballot-paper his name is checked and the fact that he has not already voted is checked by the first polling officer. When a person goes to get these facts checked, he is taken to have applied for ballot paper. Those who do not want to apply for ballot paper do not enter the polling station unless they are polling agents, Candidates, or Government Officer on duty. Every person who goes to the first polling officer does so because he applies for a ballot paper though actual issue of ballot paper is done by third polling officer. Merely because the work of checking the name, checking the fact that he has not already voted and the work of issuing a ballot paper is divided between different persons it cannot be said a person does not apply for ballot paper when he goes to any of the polling officers in charge of that work. AIR 1959 Orissa 97, Dissented from. It is not necessary that offence of personating at an election should require proof of mens rea. When a person goes to a polling station and applies for a ballot paper under a false name corrupt motive is implied in the very fact that he applies for a ballot paper under a false name. A I R 1960 Mad 243, Distinguished. 1965 (1) Cri L J 440 : (1965) 1 Cut L R 465 : AIR 1965 Cut 83 (88, 91) (Prs 1, 2).

——S. 171-D — Essentials of offence — Mens rea — Duty of prosecution to prove.

Chapter 9-A of the Penal Code provides for the punishment of malpractices in connection with election and attempts to safeguard the purity of the franchise. The very idea of personation connotes knowledge of or advertence to the act of pretending to be some other person. In fact it implies false pretence. The only injunction which is to be found in the section and which is the mental element requisite to a conviction is, the intention to personate at the election for one who is a voter.

It will thus be seen that the statute does not rule out mens rea as a constituent part of the crime and the accused cannot be found guilty of an offence under S. 171-D unless he is proved to have a guilty mind. If the intention of the accused was to do a thing forbidden by statute, he must be convicted. But this intention is to be judged from the circumstances of the case and in the light of common sense. The circumstances that it was the first election on the basis of adult franchise and that the percentage of illiteracy in the part of the country in which the election was held is low cannot altogether be ignored. 1958 Madh B L J 674: Madh B L R 1958 (Cr) 152 : 1958 Cri L J 1327 : I L R (1958) Madh B 374 : A I R 1958 Madh B 241 (244) (Pt A) (Pr 12) (DB).

——Ss. 171-D and 171-F — Personation at election — Elements of offence.

Where the accused is charged of personation at an election, the first element to be proved by the prosecution is that he had applied for a voting paper at the election in question. Another ingredient is that the accused in doing that act with which he is charged was actuated by corrupt motive. Until the voter does not approach the third polling Officer for purposes of getting the ballot paper, it cannot be said that he had applied for a voting paper within the meaning of S. 171-D, Penal Code. His approach to the second polling Officer may, at best, amount to some preparation on his part for the commission of the offence; but preparation is not an attempt within the meaning of S. 511, Penal Code.

Similarly, in order to sustain a conviction under S. 171-F, Penal Code, the prosecution must prove that there was an offence of undue influence or personation at the election committed by the accused; in other words, the prosecution must prove that the accused voluntarily interfered or attempted to interfere with the free exercise of the electoral right.

Where a person named 'Colai Barik' who was otherwise known in the village as 'Ghuma barik' went to the polling officer finding the name Ghuma in the election roll issued an identity slip to him of the name of Ghuma the son of Niranjan, neither of the ingredients of Ss. 171-D and 171-F could be said to have been present and the conviction could not be sustained. AIR 1926 All 425, Foll.; AIR 1937 Sind 21 and AIR 1941 Sind 109 and AIR 1939 Lah 52, Distng. I L R (1959) Cut 153 : 1958 Cri L J 752 : A I R 1959 Orissa 97 (97, 99) (Pt A) (Prs 2, 5).

SECTION 171-F

——S. 171-F—Scope—Section—Necessity — S. 136, Representation of the People Act, is not a mere direction—It actually amends S. 188, Cr. P. C. — Since the amendment therefore no order of Government is now required for instituting proceedings under S. 171-F, I. P. C. so far as it relates to false personation. 1958 Cri L J 384 : AIR 1958 Madh Pra 67 (DB).

——S. 171-F—Impersonation at election—Conviction and sentence.

Held on facts considering the fact that personation at election has become fairly rampant and considering the fact that it was during the part of accused to give out his name falsely as Pakir Choudhury even when asked a second time his name by the Senior Polling Officer, it was not a case in which a mere fine would be adequate punishment for the offence but the ends of justice would be met by passing upon him a sentence of simple imprisonment for a period of one month. AIR 1955 N U C (Mad) 2236 (DB).

——S. 171-F — Representation by candidate and his agent that he was Caalaaki Vishnu and as such representative of Lord Jagannath, and persons not voting for him would be sinning against the God and also be committing sacrilege against dharma—Candidate also appealing to voters in the name of caste and using symbols of the God in his propaganda — Held, that the representations fell within the scope of sub-s. (2), and also constituted offences under S. 171-C and S. 508, Penal Code—The appeal and use of symbols came within sub-s. (3) of S. 123 but were not offences under the Penal Code. See Representation of the People Act (1951), S. 123. 1964 (1) Cri L J 57 : AIR 1964 Orissa 1 (DB).

——S. 171-F — To sustain conviction under the section, the prosecution must prove that there was an offence of undue influence or personation at the election — That the accused voluntarily interfered or attempted to interfere with free exercise of the electoral right. See Penal Code (1860), S. 171-D. 1958 Cri L J 752 : A I R 1958 Orissa 97.

——S. 171-F—Personation at election — Sanction for prosecution — Not necessary — Although no corresponding amendment has been made in Criminal P. C., The Representation of the People Act (1951) has omitted the inclusion of S. 171-F, I. P. C. under S. 196 Criminal P. C. 1958 Cri L J 752 : A I R 1958 Orissa 97.

SECTION 171-G

——Ss. 171-G, 499 and 500 — Offence under—Sanction for prosecution — Necessity — (Criminal P. C. (1898), S. 196).

No prosecution can be instituted for an offence under S. 171-G without the sanction of Government as provided in S. 196, Criminal P. C. But it is only when the offence strictly falls within the purview of

S. 171-G that a sanction is necessary. An offence under S. 171-G is not a species of the more general offence of defamation and the section cannot be said to have been carved out of S. 499, I. P. Code. Where the statement is merely defamatory and does not fall under this section no sanction is necessary. **70 Mad L W 942 : 1957 Mad W N 612: 1958 Cri L J 647 (2): AIR 1958 Mad 240 (241) (Pt A) (Pr 8).**

[Overruled on another point in AIR 1967 S C 808].

——S. 171-G—Essentials to be proved.

Under S. 171-G, the points required to be proved are : (1) That an election was impending. (2) That the accused made or published a statement. (3) That it purported to be a statement of fact. (4) That it related to the personal conduct or character of a candidate. (5) That he published it with intent to prejudice his election. (6) That it was false or that the accused had no reasonable ground for believing it to be true. **1957 Mad W N 612 : 70 Mad L W 942 : 1958 Cri L J 647 (2) : AIR 1958 Mad 240 (241) (Pt B) (Pr 9).**

[Overruled on another point in AIR 1967 S C 808.]

——Ss. 171-G, 499 and 500—Speeches made during elections—Privilege—Statement of fact when offence—(Elections)—(Criminal P. C. (1898), S. 196).

There is no special privilege attached to speeches made during an election. The political address or the public career or speeches of rivals are fair subjects for bona fide discussion and unfavourable comments are privileged. One should not however allude to the private life or circumstances of any candidate. One should always bear in mind the distinction between criticism and allegation of fact. Where the bulk of the matter consists of mere general expressions, it will not fall under S. 171-G. Statements of fact are those statements, of the falsity of which prima facie proof is possible.

A printed notice contained a series of rhetorical questions whether it was true or not that the candidate used to receive money and withdraw from contest in elections. Beyond these rhetorical questions no particulars were mentioned which would enable the candidate to refute them.

Held, that the allegations could not be construed as a statement of facts and the complaint under S. 500, Penal Code having been property filed, no sanction was necessary. **1957 Mad W N 612 : 70 Mad L W 942 : 1958 Cri L J 647 (2) : AIR 1958 Mad 240 (241, 242) (Pt C) (Prs 8, 10, 11, 13).**

[Overruled in AIR 1967 S C 808.]

SECTION 172

——S. 172 — A served with notice but not appearing before adalat—Trial and conviction of A by Panchayati Adalat under S. 172, I. P. C. — As A was served with a notice he could not be convicted under S. 172, Penal Code — S. 172 makes absconding of a person to evade service of summons or notice an offence and not non-appearance of a person served with notice or a summons an offence — Conviction of A under S. 172 was bad in law—(Criminal P. C. (1898), S. 195 (1)). See U. P. Panchayat Raj Act (26 of 1947), S. 52. **1953 Cri L J 555 : AIR 1953 All 200.**

——S. 172 — Applicability:— Mukhiya of gram panchayat was informed that woman had died — No information given that she had unnatural death or her death occurred in suspicious circumstances — Offence — Criminal P. C. (1898), S. 45 (1) (d). **1961 B L J R 35.**

SECTION 174

——S. 174 — Section 485-A, Cr. P. C., whether deals with offence falling under S. 174, I. P. C. — Sections 485 and 487, Cr. P. C. whether repugnant—S. 485-A whether dead letter on account of omission to mention it in S. 487, Cr. P. C., S. 485-A, Cr. P. C. does not deal with an offence falling under S. 174, I. P. C. which falls within the purview of S. 195, Cr. P. C. — There is no difficulty in reconciling S. 487 with S. 485-A — They provide for different situations and there is no repugnancy at all between the two— Consequently question of S. 485-A being a dead letter does not arise — (Interpretation of Statutes) — (Civil P. C. (1908), Preamble). See Criminal P. C. (1898), S. 485-A. **1959 Cri L J 300 : AIR 1959 Andh Pra 144 (DB).**

——S. 174 — Cognizance of offence under, committed by a person figuring as accused before it — Power of Nyaya Panchayat — Exercise of — Amounts to violation of principles of natural justice. See Panchayats — Himachal Pradesh Panchayat Raj Act (6 of 1953), S. 57. **1964 (1) Cri L J 34 : AIR 1964 Him Pra 2.**

——S. 174 — "Intentionally omits to attend" — Prosecution's failure to prove satisfactorily service of summons on accused — Conviction for intentional omission to attend cannot stand. **A I R 1955 N U C (Him Pra) 4301.**

——S. 174 — Offence under — S. 487, Cr. P. C. prohibits the Magistrate from trying any person who has been guilty of an offence under the section in relation to a summons issued by him. See Criminal P. C. (1898), S. 487. **1961 (2) Cri L J 87 : A I R 1961 J and K 54.**

——S. 174—Procedure.

Non-attendance in obedience to a summons — If the Magistrate thinks that such an offence has been committed by the persons in question he ought to follow the procedure prescribed by the Criminal Procedure Code in trying them therefor. When this is not done but a simple notice to the persons is sent and they come forward and ask to be excused and the Magistrate "sentences" them to pay a fine of Rs. 5/-, the procedure is not contemplated by the Code. The Magistrate cannot formulate his own procedure, however convenient it be. **1961 (2) Cri L J 87 : AIR 1961 J and K 54 (54) (Pt A) (Pr 3).**

——S. 174 — Offence under—Complaint by Court—Necessity—Criminal P. C. (1898), S. 195 (1) (a).

In view of the provisions of S. 195 (1) (a) of Criminal P. C. an offence punishable under S. 174 of the Penal Code can be taken cognizance of by a Court only on the complaint in writing of the public servant concerned or of some other public servant to whom he is subordinate. **1961 (2) Cri L J 87 : A I R 1961 J and K 54 (54) (Pt B) (Pr 3).**

——S. 174—'Order in writing'—Nature of direction.

Order contemplated by S. 160, Cr. P. C. is an order addressed to a person whose presence is required — An order given to a subordinate officer to produce a person before the Sub-Inspector is not an order contemplated by S. 160, Cr. P. C., disobedience of which could be made punishable under S. 174, I. P. C. even though the order might be brought to the notice of person concerned. The words summons, notice, order or proclamation in S. 174, I. P. C. are different forms of directions as such if they are not addressed to the persons whose attendance is required. These directions are not warrants of arrest addressed to a police officer in respect of which there could be no intentional omission. **1954 Cri L J 1060 : AIR 1954 Kutch 25.**

——S. 174 — Omission to attend — Whether intentional—Question of fact.

Whether the omission to appear before the investigating officer was intentional is a question of fact and where the trial Court had found in favour of the prosecution and the order was proper and legal : held, that prima facie the omission was intentional and High Court will not interfere in revision. **1954 Cri L J 1060 : AIR 1954 Kutch 25 (26) (Pt C) (Pr 4).**

——S. 174 — If presence of a person cannot be compelled and he is not legally bound to appear, refusal to appear in response to notice and summons, etc., not an offence.

Held, that the offence contemplated by S. 174, Indian Penal Code, consists in an omission to appear at a particular place before a specified public functionary in obedience to a summons, notice, order or proclamation, which is otherwise valid. There cannot be a conviction under S. 174 unless a summons, notice or order or proclamation for attendance has been issued by a public servant to a person and unless that person is legally bound to attend at a certain time and place in obedience to the summons, notices, etc. The notices which were issued to the petitioner did not in any way require his attendance before the Gram Panchayat and the applicant could not be compelled to appear before the Panchayat for his non-compliance with the said notices. The conviction of the petitioner under S. 174 could not be sustained. 1962 M P L J (Notes) 331.

——S. 174 — Summons merely to produce account books — Company's non-compliance — Effect of — Officer not authorised to summon books for departmental enquiry—Company held not bound to comply with the summons—No offence committed. See Sales Tax—Madras General Sales Tax Act (1 of 1959), S. 41 (1). (1962) 2 Mad L J 264.

——S. 174—Intentional omission—Meaning — Accused attending but leaving, to answer on urgent call of nature—Explanation if satisfactory.

The expression 'intentional' in S. 174 occurring in that section conveys the idea that the disobedience must be wilful. Mere omission on the part of the accused to give previous intimation to the Court about his inability to attend at the time fixed may not by itself be decisive, because there may be some sudden disability which could not be anticipated, but such an omission is relevant on the question as to whether the explanation given by the accused person for his non-attendance can be believed or not. A I R 1922 All 82 and A I R 1923 Lah 163, Rel. on. (1960) 2 Ori J D 308 : 26 Cut L T 571.

——S. 174 — Applicability — Disobedience of order of Gram Panchayat to patrol village—Disobedience not intentional but due to factors over which accused had no control — Conviction by Gram Panchayat under S. 174, Penal Code, held not sustainable. See Bihar Panchayat Raj Act (1947), (7 of 1948), S. 73. AIR 1955 N U C (Pat) 3988 (DB).

——S. 174 — Construction—Defective proclamation —Effect—Applicability of S. 537 – Attachment under S. 88 is invalid—As terms of S. 87 are mandatory and imperative, petitioner against whom the proclamation is issued cannot be prosecuted for disobedience of a defective proclamation. See Cr. P. C. (1898), S. 87. 1955 Cri L J 318 : AIR 1955 Punj 18 (DB).

SECTION 175

——S. 175 — Summons merely to produce account books — Company's non-compliance — Effect of — Officer not authorised to summon books for departmental enquiry—Company held not bound to comply with the summons—No offence committed. See Sales Tax—Madras General Sales Tax Act (1 of 1959), S. 41 (1). (1962) 2 Mad L J 264.

——S. 175—"Legally bound to do' '— Karnam failing to hand over government records to his successor — Commits offence under S. 175. See Penal Code (1860), S. 43. 1956 Cri L J 754 : AIR 1956 Mad 335.

——S. 175—Contempt of subordinate Court — Jurisdiction of High Court—When barred.

If the act alleged are offences under Ss. 175, 178, 179, 180 or S. 228, I. P. C., then they constitute contempt and they can be taken cognizance of by the Court in whose view or presence they are committed and in respect of only such contempts, the High Court would not take cognizance and S. 3 (2) of the Contempt of Courts Act bars its jurisdiction. If the act complained of does not fall under the sections mentioned, then the jurisdiction of the High Court is not excluded. See Contempt of Courts Act (1952), S. 3 (2). 1961 :(1) Cri L J 134 : A I R 1961 Pat 1 (DB).

——S. 175 — Applicability— Failure to produce account books by plaintiff.

A party who fails to comply with an order for production or inspection of the documents can under the present law, be punished only in the manner prescribed by O. 11, R. 21, Civil P. C. and cannot be held punishable under Indian Penal Code. See Penal Code (1860), S. 43. AIR 1955 N U C (Raj) 4627.

SECTION 176

——Ss. 176, 21 — Applicability — Section 176, applies to public servant—Person appointed as investigator under S. 33 of the Insurance Act is not public servant—Statement made to such person is not barred under S. 24, Evidence Act.

For the application of S. 176, it is necessary that a person as Investigator under S. 33 (3) of the Insurance Act, be a public servant. A Chartered Accountant who had been directed by the order of the Central Government to investigate into the affairs of an Insurance Company and to report to the Government on the investigation made by him cannot be said to be a public servant. A person who is directed to investigate into the affairs of an Insurance Company under S. 33 (1) of the Insurance Act does not ipso facto become an officer. He is not employed in service and therefore definition in 9th clause of S. 21 would not apply to him. The making of a statement to the Investigator under S. 33 (3) of the Insurance Act does not amount to furnishing information on any subject to any public servant as contemplated by S. 176 an omission to furnish which would be an offence under that section. Section 176 would not compel an accused to make a statement to the Investigator to the effect that he misappropriated the money of the Insurance Company, and the statement cannot be considered to be involuntary under S. 24 of the Evidence Act. (1963) 1 S C R 253 : (1962) 32 Cam Cas 699 : 1962 (2) Cri L J 805 : A I R 1962 S C 1821 (1869, 1870) (Pt P) (Prs 285 to 287).

——S. 176—"In or near such village"—Suicide place in a village at a distance of one mile from the village of the land owner and there was another village and a nullah between the two—Village could not be said to be near the village where the landlord lived. See Criminal P. C. (1898), S. 45 (1) (d). A I R 1954 Him-Pra 67.

——S. 176—Essentials for conviction.

Before a person can be convicted under S. 176, Penal Code the prosecution is bound to prove (a) that the accused person was legally bound to furnish a certain information to a public servant and (b) that he intentionally omitted to give such information. 1954 Cri L J 1465 : AIR 1954 Him Pra 67 (67) (Pt C) (Pr 2).

——S. 176—Applicability—Holder of a license to sell mill made cloth—Statement of stock held—Omission of some stock—Offence.

Where under the terms of the license the holder thereof is bound under the Tripura State Cotton Cloth and Yarn Control Order (1358 T. E.) to supply information to the Civil Supplies Department of the stock of cloth held by him and on being so asked he gave a list with regard to mill made cloths in his

shop but omitted to include the mill made cloth stored in a rented godown elsewhere which were subsequently seized.

Held, that intention is to be presumed from circumstances and in the face of the requirements of the license and the non-disclosure of the godown and the accidental seizure of the cloth from the godown, the conclusion is clear that the accused intentionally omitted to furnish information and is liable under S. 176, Penal Code. **1952 Cri L J 1642 : A I R 1952 Tripura 18 (20) (Pt B) (Pr 17).**

SECTION 177

——S. 177—Legally bound—Knowledge of falsity is necessary to constitute offence — Registration Act (1908), S. 21.

Section 21, Registration Act, does not lay any obligation on the executants of documents to correctly describe the property sold, the object of that section in requiring sufficient description being only to secure easy identification of property. Even if such an obligation is assumed to exist, the Court is under a duty to see whether such information was given with the knowledge that it was false or whether there was reason to believe it false before it can hold an accused to have committed an offence punishable under S. 177, Penal Code. **51 Cri L J 883 : AIR 1950 Ajmer 19 (2) (20) (Pr 2).**

——S. 177—Subordinate Court—Complaint of offence under by Additional Deputy Commissioner—Application to withdrawal by the Board of Revenue—Not maintainable — Additional Deputy Commissioner is not subordinate to the Board of Revenue under S. 195 (5), Criminal P. C. — (C. P. and Berar Municipalities Act (2 of 1922), S. 83 (1) — (C. P. and Berar Board of Revenue Act (12 of 1949), S. 6). See Criminal P. C, (1898), S. 195 (5). **1953 Cri L J 741: (A I R 1953 Nag 121 (DB).**

SECTION 178

——S. 178—Contempt of Subordinate Court — Jurisdiction of High Court — When barred stated. See Contempt of Courts Act (1952), S. 3 (2). **1961 (1) Cri L J 134 : A I R 1961 Pat 1 (DB).**

SECTION 179

——S. 179 — Scope — Action under S. 480 to be preceded by action under S. 485. Section 480, Criminal P. C., is the general section for contempts committed in view or presence of Court whereas S. 485, Criminal P. C., is the particular provision regarding a witness refusing to answer questions as required by S. 179, Penal Code. See Criminal P. C (1898), S. 480. **1962 (1) Cri L J 409 : A I R 1962 Cal 195.**

——S. 179—Contempt of Subordinate Court —Jurisdictions of High Court — When barred stated. See Contempt of Courts Act (1952), S. 3 (2). **1961 (1) Cri L J 134 : A I R 1961 Pat 1 (DB).**

SECTION 180

——S. 180—Contempt of Subordinate Court — Jurisdiction of High Court — When barred indicated. See Contempt of Courts Act (1952), S. 3 (2). **1961 (1) Cri L J 134 : A I R 1961 Pat 1 (DB).**

SECTION 182

SYNOPSIS

(Penal Code (45 of 1860), S. 182.)

1. Nature and ingredients of offence under.
2. Information to any public servant.
3. Intention, whether necessary.
4. Sections 182 and 217 —Distinction.
5. Report of police officer not a complaint.
6. Evidence and proof.
7. Practice and procedure.

1. Nature and ingredients of offence under.

●——S. 182 — Report to Tahsildar with a view to take action — Report found false — Offence under S. 182, Penal Code, is complete even if no action is taken on report — S. 182 does not require that action must always be taken if the person who moves the public servant knows or believes that action would be taken—Prosecution under S. 182 must be on complaint in writing by Tahsildar. See Criminal P. C. (1898), S. 195. **1962 (2) Cri L J 286 : A I R 1962 S C 1206.**

——Ss. 182 and 191 — Applicability — Information given under S. 182 must be information which accused knows or believes to be false — To have reason to believe it to be false is not sufficient — S. 191 — Distinction.

To constitute the offence punishable under S. 182, it is necessary that the information given should be information which the accused person knows or believes to be false. It is not sufficient that he had reason to believe it to be false, or that he did not believe it to be true; there must have been positive knowledge or belief that it is false. **A I R 1930 Lah 54 : 29 Cri L J 753, Foll.**

Unlike S. 191, the scope of S. 182 is restricted in that whereas the former also makes it an offence on the part of the accused person to make a statement which he does not believe to be true, the latter does not make it so. **1961 All Cr R 312 : (1961) All W R (Sup) 59 : 63 Punj L R 566.**

——S. 182 — Offence under — Nature of —Involves moral turpitude.

"Moral turpitude" is not defined anywhere— But it means anything done contrary to justice, honesty modesty or good morals and implies depravity and wickedness of character —S. 182 (a) enjoins a duty on persons to abstain from giving false information to a public servant. Individual's conduct in giving false information to a public servant in the circumstances stated in S 182 (a) is contrary to justice, honesty, good morals and shows depravity of character. See Panchayats—U. P. Panchayat Raj Act (26 of 1947), S. 5-A. **AIR 1959 All 71.**

——S. 182 — Information known or believed to be false.

A necessary ingredient of an offence under S. 182 is that the information which the person sought to be prosecuted gave must have been known or believed to be false by him. In the absence of such an allegation in the complaint an offence under S. 182 is not disclosed. **I L R (1950) 2 Assam 249 : 52 Cri L J 394 : AIR 1951 Assam 54 (55) (Pt C) (Pr 7).**

——S. 182 (a)—Accused writing letter to chairman of municipality objecting to name of S in Electoral Roll—Assertion therein that S was not paying income tax and therefore he could not claim to be voter — Copy of letter sent to Sub-Divisional Officer — Such officer requested in accompanying memorandum to call for from Income-tax Officer necessary information—Enquiry made by Sub-Divisional Officer.

In order to establish an offence punishable under S. 182, Penal Code it must be established that a person gave information which he knew or believed to be false to a public servant and that he intended thereby to cause such public servant to do something which he ought not to do. The words "to do something" which such public servant ought to do must mean to do something which the public servant was enjoined to do in his official capacity as public servant. If a person gives false information to a public servant knowing it to be likely or intending

that he would do something which had no connection with his office as a public servant the conduct of the person giving such information would not come within purview of S. 182, Penal Code.

The accused wrote a letter to the Chairman of a municipality objecting to the inclusion of the name of S in the preliminary Electoral Roll, asserting that he had come to know after an informal enquiry that S did not pay income-tax, that therefore he could not claim to be a voter and that his name should be struck off if it was found after necessary enquiry that he did not pay the income-tax. A copy of the letter was sent to the Sub-divisional Officer and in the accompanying memorandum he was requested to look into the matter seriously and call for from the Income-tax Officer necessary information in this connection. Enquiries were made by the Sub-Divisional Officer and he found that S paid income-tax and that the allegation against him was false. Upon that the Sub-Divisional Officer filed a complaint against the accused alleging that he had committed an offence punishable under S. 182, Penal Code:

Held, that the Sub-Divisional Officer was being asked to do something which did not constitute an act to be done in the exercise of his duties as a public servant. That being so, so far as the sending of the letter to the Sub-Divisional Officer together with memorandum was concerned, no offence under S. 182, Penal Code had been committed and therefore the Sub-Divisional Officer had no right to file the complaint. **51 Cri L J 469 : A I R 1950 Cal 97 (98) (Pt B) (Prs 2, 6).**

——S. 182 — Applicability — Section requires that information given must be false to the knowledge of accused —Allegation found not proved is not necessarily false and false to the knowledge of the maker —Accused cannot be convicted under the section if fails to establish that the reported information was true. **AIR 1955 N U C (Madh-Bha) 35.**

——S. 182—Essential ingredient of.

Section 182 of the Penal Code inter alia requires as an essential ingredient thereof that the allegedly false information must have been given with the intention to cause, or knowing it to be likely that it will cause a public servant in the exercise of his duties as such (a) to do or omit anything which he ought not to do if the true facts were known to him or (b) to use his lawful power to the injury or annoyance of any person. **1966 Raj L W 33 : 1966 Cri L J 576 : I L R (1965) 15 Raj 1134 : A I R 1966 Raj 101 (103) (Pt C) (Pr 6) (DB).**

2. Information to any public servant.

——S. 182 — Offence under— "Public servant concerned'—Meaning.

So far as S. 182 is concerned words mean public servant to whom false information is given with the intention or knowledge that he will do something which he ought not to do. See Criminal P. C. (1898), S. 195 (1) (a). **51 Cri L J 469 : AIR 1950 Cal 97.**

——Ss. 182, 201 and 203—Scope.

Sections 201 and 203 contemplate information given to private persons as well as public servants— First information reports under S. 154, Criminal P. C. are covered by sections but statements made to police during investigation are not covered— It any person gives the first information statement to the police even though not voluntarily which is recorded under S. 154, Criminal P. C. and if ultimately it turns out to be false it would not amount to giving false information. It would amount to giving false information and the offender would be punishable under S. 201, I. P. C. provided the requisite intention is proved unlike S. 182, I. P. C. which deals with giving false information to any public servant, Ss. 201 and 203 do not refer to whom the information should be given. It would take in private persons as well as public servants including the police. **1962 (1) Cri L J 610 : AIR 1962 Ker 133 (DB).**

——S. 182 — Assistant Sub-Inspector in charge of police station in absence of Sub-Inspector who is officer-in-charge recording F. I. R. and investigating it — Complaint about offence under S. 182, I. P. C., filed by him is valid. See Criminal P. C. (1898), S. 4 (p). **ILR (1963) Cut 790.**

——S. 182 — Misrepresentation to Magistrate as to identity of person, whether cheating — Offence made out is one under S. 182 since it is a case of misrepresentation as to identity and not of cheating. See Penal Code (1860), S. 415. **AIR 1951 Sau 8 (DB).**

3. Intention, whether necessary.

——S. 182—Making false report of burglary—Offence —Motive of suppressing certain documents on the plea of their having been stolen—Effect.

For an offence under S. 182 the accused must intend to cause or know it to be likely that he will cause a public servant to use his lawful power to the annoyance of any person, that is of any other person. Where the ulterior motive of making a false report of burglary was to suppress certain documents by pleading that they were stolen making of the false report with this intention is not punishable under S. 182. **1958 All W R (HC) 606 : 1959 All Cri R 508 : 1959 Cri L J 1037 : A I R 1959 All 545 (545) (Prs 1, 2).**

——S. 182—Intention — Ascertainment.

In the case of an offence under S. 182, Penal Code the accused's intention has to be gathered from his acts. Where the whole object was clearly to invite the police to act in a manner which would make an election a farce it was held the offence under S. 182 was made out. **1952 Cr L J 365 : A I R 1952 All 178 (179) (Pr 4).**

4. Sections 182 and 211—Distinction.

——S. 182 — Mere filing of report under S. 307 amounts to institution of criminal proceedings — Person reporting can be convicted only under S. 211 and not under S. 182. See Penal Code (1860), S. 211. **(1965) All W R (H C) 282.**

——S. 182 — Applicant lodging complaint under S. 307, I. P. C.—It amounts to institution of criminal proceedings—Applicant can be convicted only under S. 211 and not under S. 182. See Penal Code (1860), S. 211. **(1965) All W R (H C) 282.**

——S. 182 — Proceedings under Ss. 182 and 211, Penal Code—Provisions of S. 195 (1), Criminal P. C., applicable—Effect of non-compliance — Cognizance cannot be taken. See Criminal P. C. (1898), S. 195 (1) (a). **1962 (1) Cr L J 627 (All).**

——Ss. 182 and 211 — Scope — They do not overlap each other.

An accused can commit both offences under S. 182 and S. 211 in the pursuit of the same purpose one after the other but their circles are clearly separated and they do not overlap each other. **1961 All L J 278: 1961 All Cr R 135 : 1961 All W R (H C) 286 : 1962 (1) Cr L J 627 (All).**

——Ss. 182, 211 — Prosecution under S. 182—Complaint repeated before Magistrate—Conviction under S. 182—Bar of S. 195, Cr. P. Code —(Cr. P. C. (1898), S. 195).

After the Police had filed a complaint under S. 182, Penal Code against the accused the latter lodged a complaint to the Magistrate alleging that his allega-

tion was correct. The Magistrate tried both the cases together and convicted the accused under S. 182 holding that his complaint was thus automatically dismissed:

Held, that the complaint under S. 182 could be proceeded with, even though a complaint was filed by the accused. The question whether the Magistrate should have also filed a complaint under S. 211 was a distinct question and if so persuaded he could have lodged a complaint himself under S. 195, Criminal P. C. If the Magistrate did not choose to do that his conviction was not incorrect. Sanction of the Magistrate is required for a complaint under S. 211 and not for one under S. 182, I. P. C. AIR 1943 Lah 31, Foll. **1956 Cri L J 215 : I L R (1955) Hyd 842 : AIR 1956 Hyd 25 (25) (Prs 2, 4).**

——S. 182 — Scope — Offence also one under S. 211, Penal Code committed in relation to proceeding in Court—Necessity for complaint by Court—Held also that assuming the case fell within S. 182, I. P. C., or even S. 47 of Madras District Police Act, provisions as to necessity for a complaint by a Magistrate could not be evaded by prosecuting the complainant under S. 47 of the M. D. Police Act or S. 182, I. P. C., because the facts also constituted an offence for which such a complaint was necessary. See Cr. P. Code (1898), S. 195. **1954 Cri L J 799 : AIR 1954 Mad 561.**

——Ss. 182 and 211—Complaint under S. 182—Facts disclosing offence under S. 211 as well as under S. 182—Accused not to be acquitted on ground that prosecution should have been under S. 211.

If a case comes both under Ss. 211 and 182 of the Indian Penal Code, it is open to the authority concerned to proceed either under one section or the other. But if in such a case the authority concerned has thought fit to file a complaint under S. 182, Penal Code the Magistrate is not justified in acquitting the accused on the sole ground that he should have been prosecuted under S. 211, Penal Code. 32 Cal 180 : 7 M H C R (App) 5 & 15 All 336, Foll., 14 Cr L J 491, Not foll. **1952 Raj L W 220 : I L R (1952) 2 Raj 44 : AIR 1952 Raj 142 (144) (Pt A) (Pr 6).**

5. Report of police officer not a complaint.

——S. 182—Report of police officer of offence under S. 182, Penal Code not complaint. See Criminal P. C. (1898), S. 4 (h). **1963 Raj L W 48.**

6. Evidence and proof.

——Ss. 182, 109 — Evidence — Writer of application proved to be false—Liability under S. 182 — Accused was only the writer of the application and he had no reason for supposing that the allegations in it were false and hence he could not be held guilty. **1956 Cri L J 503 (1) : AIR 1956 Bom 265 (265) (Prs 2, 3, 5).**

——S. 182—Burden of proof.

Under S. 182 it is not the law that the accused must prove that the information given by him is true or that he believed it to be true. On the other hand, it is for the prosecution to prove satisfactorily that the allegations made by the accused, were false and were false to his knowledge or, at any rate, he did not believe them to be true at the time when he made those allegations. The fact that belief of the accused turns out to be a wrong belief, is not sufficient to bring home a conviction under S. 182. AIR 1930 Lah 54 (1) and 29 Pun Re 1894 (Cr) and 26 Mad 640, Relied on. **37 Mys L J 201 : I L R (1960) Mys 484 : 1960 Mad L J (Cr) 301 : 1960 Cri L J 1113 : AIR 1960 Mys 208 (208 (Pr 3).**

7. Practice and procedure.

——S. 182 — Complaint regarding offence, by whom to be made — False information about bribery given to Chief Minister—Enquiry regarding it made by the Sub-Divisional Magistrate — False information repeated before him—The repeated information can be the basis on which the Sub-Divisional Magistrate can file a complaint against the informant under S. 182, I. P. C. — Said Magistrate will be the public servant concerned within, under S. 195, Criminal P. C. See Criminal P. C. (1898), S. 195. **1959 Cri L J 683 : AIR 1959 All 378 (DB).**

——S. 182 — Report by police officer to Magistrate after investigation following complaint that complaint was false — Order by Magistrate directing prosecution of complainant under S. 182, Penal Code is wholly without jurisdiction. See Criminal P. C. (1898), S. 476. **52 Cri L J 394 : AIR 1951 Assam 54.**

——S. 182—Procedure—Offence under—Necessity of preliminary enquiry—S. 182 is not one of the offences mentioned in cl. (b) or (c) of S. 195 (1), Criminal P. C., therefore preliminary enquiry, before a complaint is actually made by public servant is not necessary. See Criminal P. C. (1898), S. 476. **1957 Cri L J 716 : AIR 1957 Cal 382.**

——S. 182—Sentence.

Accused mere servant and then out of employment —In view of facts and circumstances, sentence reduced to fine of Rs. 100 from that of Rs. 200. **I L R (1958) 1 Cal 555 : 1957 Cr L J 716 : 61 Cal W N 967 : AIR 1957 Cal 382 (383) (Pt C) (Pr 7).**

——S. 182—Prosecution under—When misconceived.

As the law deals with the bribe-givers and bribe-takers on the same par and treats them as accomplices of each other when it is not shown whether the information given by the accused was false or true and secondly when the accused persons are not bound to incriminate themselves their prosecution under S. 182, Penal Code, is misconceived. **1954 Cri L J 263 : (1952) 1 Mad L J 803 : A I R 1954 Mad 245 (245) (Pr 1).**

——S. 182—Complaint under S. 195 (1) (a), Criminal P. C. — Complaint in cases of offences mentioned in Cl. (a)—Offence under S. 182, Penal Code. See Criminal P. C. (1898), S. 195 (1) (a). **1963 B L J R 471.**

——S. 182 — Prosecution under — Dismissal of, on ground that the complaint not presented by public servant concerned — Does not bar the second prosecution on valid complaint. See Criminal P. C. (1898), S. 403 (1). **1965 Raj L W 279 : I L R (1965) 15 Raj 1018 : 1966 Cri L J 166 : A I R 1966 Raj 40.**

——S. 182 — Section 247, Criminal P. C. does not apply to case registered on report of police officer as public servant — Dismissal on case of default in appearance by police officer making report of offence under S. 182, Penal Code not in accordance with law. See Criminal P. C. (1898), S. 247. **1963 Raj L W 48.**

——S. 182 — Complaint of theft found to be false—Complainant prosecuted under S. 182.

Complainant is not entitled to get the copies of statement of witness who had been examined by the police during the course of investigation in connection with the theft case—Proviso to S. 162 (1), Criminal P. C. relates to inquiry or trial of offence which was under investigation at the time when the statement was made and does not relate to a different offence which could not have been made the subject-matter of investigation by the police — To say that S. 182 does not amount to an offence in itself as an independent entity and it is indistinguishable from the offence investigation into which has led to a dropping at that case and to a subsequent complaint by the police under S. 182, Penal Code is to say something which is quite untenable. See Criminal P. C. (1898), S. 162 (as it stood before amendment of 1955). **A I R 1957 Raj 185.**

SECTION 183

——S. 183 — Order prohibiting act of directing or promoting procession without licence — Merely joining procession—Offence.

Where an order promulgated under S. 30, Police Act prohibited the convening or collecting any assembly or directing or promoting any procession in the regulated area without obtaining licence.

Held, that merely joining the procession did not amount to contravention of the order and no offence is committed. 1960 Nag L J (Notes) 114.

——Ss. 183 and 186—Civil P. C. (1908), O. 21, Rr. 46, 49—Decree passed against some partners of partnership business in their individual capacities—Attachment of partnership business in execution of decree against them is irregular — Officer executing decree obstructed in execution of decree — Question whether property attached belongs to partnership business is to be decided by executing Court and not left for decision in prosecution for offences under Ss. 183, 186.

A decree-holder cannot proceed against the interest of a partner except in the manner laid down in the different sub-rules, R. 49 of O. 21 and an attachment made under O. 21, R 46 of the partnership business in execution of a decree against the partners in their individual capacities is irregular and ineffective.

Where at the time of the execution of a decree passed against some of the partners of a partnership business in their individual capacities, the fact that the property sought to be attached belongs to a partnership business in which some other persons are also partners, is brought to the notice of the Officer executing the decree, it is his duty to stay his hands and report the matter to the Court for further orders. Then the Court would make necessary inquiries and come to a finding whether it was a partnership business or not and issue an appropriete writ of attachment. This important question cannot be left for decision of a Criminal Court in which the persons alleged to have obstructed the officer executing the decree are prosecuted for offences under Ss. 183 and 186, Penal Code. 1963 B L J R 375.

——Ss. 183 and 186—Civil P. C. (1908), O. 21, Rr. 46, 49—Decree passed against some partners in partnership business in their individual capacities — Nazir seeking to execute decree against partnership property in which some other persons were partners—Facts pointed out to Nazir — Nazir giving one hour's time for payment and, on non-payment, starting attachment — Judgment-debtors on advice of pleader asking Nazir to leave and snatching away article attached—Conduct of judgment-debtors and pleader held not to amount to obstruction or resistance. 1963 B L J R 375.

——S. 183 — Applicability — Removal of property lawfully attached — Obstruction during process of attachment not made out—Offence—Tripura Municipal Act, Ss. 256 and 297.

Section 256, Tripura Municipal Act deals with powers of entry and inspection as contained in S. 255 and prevents an obstruction to entry, inspection or search. Where the charge against the accused was that they forcibly removed from the custody of a tax collector certain property said to have been attached by lawful authority and it appeared that the tax collector and the municipal servant were not obstructed while entering the shop and preparing the attachment list but it was only after the movables were taken into custody that the accused were said to have removed the attached articles. Held, that there was no offence under S. 256 read with S. 297 of the Tripura Municipal Act but the offence came directly under S. 183, Penal Code. 1961 (2) Cri L J 564 (Tripura).

——S. 183—Attachment by lawful authority — Proof —Absence of—Offence.

In order to prove that an attachmeut made in pursuance of S. 109 of Tripura Municipal Act was effected by lawful authority the prosecution has to prove that on the date the attachment was effected the necessary 15 days had elapsed after the service of the notice and the bill. If the prosecution fails to prove this, the taking of the property is not by lawful authority and therefore the offence under S. 183, Penal Code has to be treated as not having been proved. 1961 (2) Cri L J 564 (Tripura).

SECTION 186

SYNOPSIS

(Penal Code (45 of 1860), S. 186.)

1. Ingredients of offence.
2. "Voluntarily obstructs."
3. Complaint—Necessity of and what is.
4. Practice and procedure.

1. Ingredients of offence.

——Ss. 186 and 189—Applicability — Ingredients of offence.

As the traffic constable was trying to clear the congestion from the road the accused became angry, showed him red eyes and asked him to give him his number. The accused persisted in asking for the number of the Police constable even when the constable was engaged in clearing the congestion on the road and he placed his hand on the uniform of the police constable and was pushing him, thus obstructing him in the discharge of his public functions.

Held, that the mere demand for the number of the constable was no threat of an injury nor did the pushing amount to a threat of injury although it might amount to an assault. Section 186 was the proper section to apply and not S. 189. (1958) 1 Cal L J 81.

——S. 186—Essentials of offence — Madras Ceneral Sales Tax Act, Ss. 14 aud 15.

To constitute an offence punishable under S. 186, Penal Code, the prosecution has to prove that the accused voluntarily obstructed a public servant in the discharge of his public functions. But the rigour of this section has been considerably diluted and even taken away by the corresponding provision in clause (c) of S. 15 of the Sales Tax Act. To attract this clause it is sufficient that an officer authorised under S. 14, has been prevented or obstructed from entering the shop and conducting the inspection contemplated by S. 14. It is not necessary that force or violence should have been used in preventing or obstructing such entry or inspection. All that is necessary is that entry or inspection should have been effectively prevented or obstructed. See Sales Tax—Madras General Sales Tax Act (9 of 1939), S. 14. 1958 Mad L J (Cri) 255 : 1958 Ker L J 63.

2. "Voluntarily obstructs".

——S. 186—Scope—Obstruction to order for seizure made by Provincial Government under the Essential Supplies (Temporary Powers) Act (24 of 1946), S. 3 (1)—Obstructing removal of goods seized constitutes an offence under S. 186, Penal Code—See Essential Supplies (Temporary Powers) Act (24 of 1946), Ss. 3 (1) and (2). 52 Cri L J 757 : AIR 1951 S C 201.

——S. 186—'Obstruction'—Meaning of.

The word 'obstruction' in S. 186 connotes some overt act in the nature of violence or show of vio-

lence. It cannot be said that a man obstructed another if that man runs away from arrest or if he does not actually submit to the arrest. 1955 Cr L J 278 : 1954 All L J 544 : A I R 1955 All 104 (105) (Pr 7).

——S. 186—Obstruction—What constitutes.

To constitute 'obstruction' within S. 186 it is not necessary that there should be actual criminal force. It is sufficient if there is either a show of force or threat or any act preventing the execution of the process of the civil Court. AIR 1935 Bom 24, Rel. on. 1956 Cr L J 48 : 58 Bom L R 1021 : ILR (1957) Bom 80 : AIR 1957 Bom 10 (11) (Pt 10) (Pr 10) (DB).

——S. 186—Obstruction to public servant in executing warrant of possession — Offences—(Contempt of Court.)

If an accused person obstructs a public servant in the discharge of his public function (viz., in execution of a warrant of possession) he commits two offences. One is the alleged obstruction which comes within S. 186 and the other offence is the offence of having been guilty of undermining the authority of the Court. If an accused person has committed an offence within S. 186, he would seem to have committed also an offence of contempt of Court. 1956 Cr L J 48 : 58 Bom L R 1021 : ILR (1957) Bom 80 : AIR 1957 Bom 10 (11) (Pt C) (Pr 10) (DB).

——S. 186 — Commissioner in partition proceedings —If public servant — Obstruction to, after protest, if offence.

A Commissioner appointed by a Court to divide properties by metes and bounds, as a result of a preliminary decree for partition, is a public servant within the meaning of the term under S. 21. Any obstruction to work done by him is an offence under S. 186 — See Penal Code (1860), S. 21. 52 Cri L J 847 : AIR 1951 Mad 773.

——S. 186 — Obstruction — Mere abusive words or threats not sufficient—Accompaniment of gestures or other signs causing reasonable apprehension of resistence in the mind of public servant necessary.

Mere threat or abusive words would not be sufficient to constitute 'obstruction' within the meaning of S. 186, I. P. Code, unless such words are accompanied by gestures or other signs from which the public servant could reasonably infer that any attempt by him to discharge his duty would be resisted and thereupon, out ot prudence, he decides to abstain from discharging his duty. A I R 1932 Cal 871, Followed; AIR 1935 All 118 and AIR 1938 Nag 529, Rel. on.

Where in the execution of a distress warrant against the petitioner, the petitioner used threatening words in a loud tone and taunting manner showing red eyes to the Ohakla Kanungo who was trying to execute the warrant, as a result of which the Kanungo got frightened and did not execute the warrant—Held, that the action of the petitioner amounted to an obstruction within the meaning of S. 186, I. P. Code. (1960) 2 O J D 401 : 26 Cut L T 596.

——S. 186—Criminal P. C. (1898), Chap. X, Ss. 133, 134—Application under S. 133, alleging encroachment on public road by opposite party — Magistrate not following procedure in Chapter X, but appointing pleader Commissioner to measure spot—Obstruction to pleader from entering house does not amount to offence under S. 186.

Before a person resisting a public servant can be held to be guilty of an offence under S. 186, I. P. Code, it must be established that the act of the public servant was legal and valid. When the act of the public servant was without jurisdiction, the person, who was being subjected to a position which is not valid or justifiable in the eye of law, cannot be said to be guilty of an offence under S. 186, even if in the course doing that he committed some other offence on which he may be legally liable. 14 Cr L J 251 : AIR 1927 Bom 483 : 22 Cal 286 : AIR 1920 Lah 295, Rel. on.

A Magistrate commencing proceedings under S. 133, Criminal P. C., is bound to proceed in strict conformity with the rules laid down in Chapter X. Where therefore, a Magistrate after receipt of an application under S. 133, alleging encroachment on a public road by the opposite party, instead of following the procedure laid down by Ss. 133, 134, Criminal P. C. of passing a conditional order and issuing notice to the opposite party, orders a pleader commissioner to measure the spot and submit his report, the procedure adopted by the Magistrate is misconceived and unwarranted in law and mere resistance on the part of the opposite party by stopping the pleader from entering his house to measure the land cannot be regarded as an obstruction to a public servant in the discharge of his duties within the meaning of S. 186, I. P. Code, although the opposite party may be liable for punishment for adopting threatening attitude and using indecent words towards the pleader. A I R 1928 Lah 95 : 29 Cr L J 530, Rel. on. 43 Pat 735 : 1963 B L J R 279.

——S. 186—Applicability—Minor certificate-debtor—Illegal arrest in execution of certificate—Father rescuing him from arrest:— Rescuing from such illegal arrest does not amount to any criminal offence—See Bihar and Orissa Public Demands Recovery Act (4 of 1914), S. 7. AIR 1955 N U C (Pat) 2490.

——S. 186 — Omission to prove writ under which public servant was acting—Propriety of conviction.

Conviction under S. 186 cannot be sustained where the prosecution entirely omits to prove the writ under which the public servant was acting and therefore, it is impossible to say what his functions were in the discharge of which he was obstructed. AIR 1952 Pat 85 (85) (Pr 1).

——S. 186 — Voluntary obstruction — What constitutes.

In order to constitute an obstruction physical force is not necessary. It may be in various ways. But where a tenant states to a peon who wants to effect delivery of possession of the house to a decree-holder, that he had rented the house from certain persons and would vacate it only if they asked him to do so, make such endorsement of the writ and the person returns without doing anything further, the action on the part of the tenant does not amount to obstruction as the peon has not persisted in the performance of his duties and is not obstructed as such. A I R 1950 Pat 544 (544) (Pr 6].

——S. 186—Obstruction—Nature of.

The word 'obsruction' does not mean 'physical obstruction' and differs according to the nature of duty that a public servant has to discharge. Thus, where a public servant has to search the stock of sugar and has to seize certain quantity of it, placing of obstacles on the way to sugar godown making any vehicular traffic to it impossible and the attitude of resistance on the part of the accused who is the general manager of the Company amounts to 'obstruction' within the meaning of S. 186, even though he has actually used no physical force and the stocks are in fact seized and removed with the help of the police : Case law referred. AIR 1950 Pat 436 (439) (Pt B) (Prs 15, 17) (DB).

——Ss. 186 and 353 — Taxation Officer has no right under provisions of E. P. General Sales Tax Act (1948), to insist on production of account books after refusal by dealer to produce — His act is illegal and presence at shop after refusal is as trespasser —

Hence even if he was pushed out of shop, dealer or persons assisting him cannot be said to have committed offences under sections. AIR 1928 Lah 328 and AIR 1960 A P 110. Foll. ILR (1965) 1 Punj 242: 1965 (2) Cr L J 116 : AIR 1965 Punj 264 (266) (Pr 9).

3. Complaint — Necessity of and what is.

——S. 186 — Offence under — Report by Deputy Superintendent of Opium to Police—Charge sheet submitted by Police to Magistrate on basis of that report — No complaint within S. 4 (1) (h) — Conviction was illegal. See Criminal P. C. (1898), S. 195 (1) (a). **AIR 1952 Him·Pra 32.**

——S. 186 — Cr. P. C. (5 of 1898), S. 195 (1) (a) (b) (c)—Complaint by Court—Competency,

No complaint for an offence under S. 186 of the Penal Code can be filed by Court, as S. 476, Cr. P. Code, applies only to cases falling within S. 195 (1) (b) and (c) of the Cr. P. Code and S. 186, Penal Code, does not fall under S. 195 (1) (b) or (c) but only under S. 195 (1) (a). **(1951) 1 M L J 290 : 1951 Mad W N (Cri) 59 (1) : 1951 Mad W N 231 (1) : 53 Cr L J 1210 : AIR 1952 Mad 607 (608) (Pr 1).**

——S. 186 — Report by forester to D. E. O. about obstruction to execution of search warrant—D. F. O. in his turn reporting the matter to the Police—Police after investigation chargesheeting accused under S. 186 — Absence of complaint in writing of officer concerned. Cognisance without complaint in writing by concerned officer was fatal to the prosecution. See Criminal P. C. (1898), S. 195. **1954 Cri L J 240 : AIR 1954 Orissa 175.**

4. Practice and procedure.

——S. 186 — Criminal Procedure Code, S. 195 (1) (a) — Application for framing additional charge under S. 186 along with copy of complaint by officer concerned—Provision of S. 195 (1) (a) not complied —No cognisance can be taken of the offence.

The accused was prosecuted under S. 353, Indian Penal Code. During the trial the Police Prosecutor filed an application for framing additional charge under S. 186, Indian Penal Code along with a copy of the complaint of the concerned Police Officer. Original charge-sheet was not however signed by this Police Officer.

Held, that the mandatory provisions of S. 195 (1) (a) were not complied with as a complaint in writing of the officer concerned was not filed and the Court could not take cognisance of such offence. AIR 1943 All 6; AIR 1950 Nag 12, Dist. (Conviction under S. 186, Indian Penal Code set aside; conviction under S. 353 maintained). **1965 Mah L J (Notes) 35.**

——S. 186 — Practice and procedure—Offence under —Magistrate cannot take cognisance of the offence unless there is a complaint by public servant concerned or by some other person to whom he is subordinante. See Criminal P. C (1898), S. 195 (1) (a). **1956 Cri L J 524 : AIR 1956 Cal 118.**

——S. 186—Requirements of—Accused acquitted for offence under S. 353, Penal Code—Accused can again be charged under S. 186, Penal Code for same act. See Criminal P. C. (1898), S. 403. **1962 Ker L T 493.**

——Ss. 186, 448 and 426 — Sentence. See Penal Code (1860), S. 448. **ILR (1963) Cut 42.**

——S. 186—Distinct offences—Offences under Ss. 186 and 332, Penal Code are distinct offences. See Criminal P. C. (1898), S. 233. **ILR (1962) Cut 610.**

——S. 186—Practice and procedure—Accused charged under Ss. 186 and 353 — Charge under S. 186 failed for non-compliance with S. 195, Cr. P. C. — Consequently prosecution under S. 353 also failed. See Criminal P. C. (1898), S. 195. **AIR 1954 Orissa 175.**

——S. 186 — Decree passed against same partners of partnership business in their individual capacities — Attachment of partnership business in execution of decree against them is irregular — Officer executing the decree obstructed in execution of decree — question whether property attached belongs to partnership business is to be decided by the executing Court and not left for decision in prosecution for offences under Ss. 183 and 186, I. P. C. See Penal Code (45 of 1860), S 183. **1963 B L J R 375.**

——S. 186 — Practice and procedure — Conviction of accused set aside under S. 186, Penal Code for want of complaint under S. 195 (1) (a) — Conviction under S. 143, Penal Code is not barred — Prosecution under S. 143 does not require the making of a written complaint by public servant. See Criminal P. C. (1898), S. 195 (1) (a). **1960 Cri L J 987 : AIR 1960 Punj 356l.**

SECTION 187

——S. 187 — Application under S. 476 (1), Criminal P. C. alleging commission of offence under S. 409, I. P. C. in proceedings before Court—Facts disclosing offence under S. 187, I. P. C. — Application not affected by mention of wrong section — S. 476 does not apply to the case.

It is well settled that the mere labelling of a petition under a particular section of the Penal Code is not very relevant if the contents of the petition are sufficient to disclose a particular offence. Thus even if an application is made under S. 476, Cr. P. C. alleging that an offence under S. 409, I. P. C. was committed in proceedings before Court, there is no bar for the Court to treat the application as one for trial of an offence under S. 187, I. P. C. if otherwise a case could be made out under that section from the facts disclosed in the application. See Criminal P. C. (1898), S. 476 (1). **1965 (2) Cri L J 525 : AIR 1965 Orissa 180.**

SECTION 188

SYNOPSIS

(Penal Code (45 of 1860), S. 188.)

1. Applicability and scope.
2. Essentials of offence under.
3. Conviction—Propriety of order.
4. 'Promulgated'—Meaning.
5. Necessity of complaint or sanction.
6. Disobedience of illegal or irregular order.
7. Practice and procedure.
8. Revision.

1. Applicability and scope.

——S. 188 — Order under S. 144, Criminal P. C. — Expiry of — Apprehension expected even thereafter —Fresh order promulgated by Magistrate would be continuation of the first — Such order is therefore beyond jurisdiction — Complaint under S. 188 for breach of such order is also beyond jurisdiction of the Magistrate. See Criminal P. C. (1898), S. 144 (6). **1960 Cri L J 865 (2) : AIR 1960 All 397.**

——S. 188 — Applicability — Disobedience of order under S. 145 (6), Cr. P. C.—Offence.

The section includes in its ambit both executive and judicial orders.

The word 'promulgation' in the section in essence means that the contents of the order which is promulgated should be known to the person against whom proceedings are taken under the section. The executive authorities cannot make their orders known to the public at large without adopting some form of promulgation. They do not pass any orders in a case in which they pronouce a judgment. On the other hand the pronouncement of the judgment in open

Court is a promulgation to the parties to that case. An order, whether it be judicial or executive, if it is for the purpose of maintaining public tranquillity, health, safety or convenience, its breach would be punishable under the section. Normally judicial orders, that is orders of civil, revenue or criminal Courts, affect only the right of parties and not the public and therefore it is right that such orders will not be governed by the section. But an order under S. 145, Cr. P. Code, is an exception inasmuch as it is passed for maintaining public peace and therefore its breach is punishable under the section. 1959 All W R (H C) 178 : 1959 All Cr R 204 : 1959 All L J 163.

—S. 188 — Scope and applicability — 'Disobedience causing or tending to cause etc.'

Per Mehrotra and Sahai JJ.—Orders passed in judicial proceedings by civil, revenue or criminal Courts are not governed by S. 188, Penal Code. The disobedience of an order promulgated by a public servant, which has been made punishable by S. 188, Penal Code must be a disobedience which causes or tends to cause obstruction, annoyance or injury or risk of obstruction, annoyance or injury to any person lawfully employed. This also suggests that orders contemplated under S. 188, Penal Code are orders made by public functionaries in the public interest. The disobedience of any order passed in favour of a party to the litigation by a Court may result in annoyance to the party in whose favour it has been passed, but it cannot be said that it necessarily causes or tends to cause obstruction or annoyance or injury to any person. Section 188, Penal Code, does not contemplate orders passed by civil or revenue Courts in judicial proceedings. Any breach of such orders can be adequately dealt with under the provisions of the Code of Civil Procedure but it cannot be said that they are orders promulgated within the meaning of S. 188, Penal Code, the disobedience of which would result into obstruction, annoyance or injury. **1956 Cri L J 1176 : 1956 All L J 607 : 1956 All W R (H C) 459 : A I R 1956 All 630 (631, 632) (Pt A) (Prs 3, 4) (DB).**

——S. 188 — Scope — Disobedience of order under S. 145, Criminal P. C.—Offence—Complaint by Magistrate passing order under S. 145 or his superior is necessary. See Criminal P. C. (1898), S. 195. 1958 Cri L J 1378 : AIR 1958 Andh Pra 718.

——S. 188—There must be violation of order duly promulgated — Mere order of attachment under S. 145, Criminal P. C., without prohibitory order, is not order duly promulgated.

Section 188 of Penal Code would not be attracted to a case where there is no prohibitory order served on a party. A bare order of attachment passed under S. 145, without any prohibitory order directing one of the parties not to do any acts in respect of the land, does not attract S. 188. Section 188 requires violation of an order duly promulgated. AIR 1961 Assam 94 and AIR 1960 Assam 109, Foll. **1965 (1) Cri L J 424: I L R (1964) 16 Assam 276: AIR 1965 Assam 29 (30) (Pt A) (Pr 4).**

——S. 188 —Applicability — Attachment order under S. 145, Criminal P. C.—Disobedience of—Offence.

An order of attachment passed under S. 145 and continued under S. 146 should not be construed to be an order forbidding the other interested parties or third parties from doing an act violation of which might come under S. 188 of the Penal Code, when there is no specific order passed on any of the parties either served or promulgated—that none of the parties will enter into possession of the property in dispute or do any act in reference thereto.

Violation of such an order can be punished by a proceeding under the Contempt of Courts Act or even by a process for criminal trespass. **1961 (2) Cri L J 64: I L R (1961) 13 Assam 414: AIR 1961 Assam 94 (95) (Prs 4, 5) (DB).**

——S. 188—Applicability—Attachment of land before starting proceedings under S. 145, Criminal P. C.—Disobedience of such order—No offence under S. 188 is committed. See Criminal P. C. (1898), S. 145. 1960 Cri L J 891 : AIR 1960 Assam 109.

——S. 188—Applicability — Essentials — Attachment order under S. 145, Criminal P. C., not containing direction on petitioner to 'abstain from certain acts, etc.' — No finding that act of petitioner was such as to cause obstruction, annoyance or injury— Petitioner not shown to have known of order — Disobedience is not offence under S. 188 — (Criminal P. C. (1898), S. 145). 1960 Cri L J 891: AIR 1960 Assam 109 (111) (Pt C) (Prs 8, 9).

——S. 188 —Attachment of land under S. 145, Criminal P. C.—Removal of crops in violation of Court's order amounts to theft — Accused would have been convicted even under S. 188, but omission, if any, in this respect did not affect legality of accused's conviction under S. 379 — Criminal P. C. (1898), S. 195. See Penal Code (1860), S. 379. 1952 Cri L J 994: AIR 1952 Assam 109.

—S. 188 — Applicability. See Penal Code (1860), S. 117. 1957 Nag L J 63.

——S. 188—Scope.

Mere disobedience under S. 188 of an order promulgated by a public servant is not in itself an offence unless it entails one or other of the consequences which the section itself mentions. 60 Cal W N 633 : 1956 Cri L J 515 : AIR 1956 Cal 102 (104) (Pt C) (Pr 8).

——S. 188 — Applicability — Injunction order under S. 144, Criminal P. C. — Opposite party obtaining Civil Court injunction — Violation of order under S. 144, Criminal P. C.—Effect—In spite of Civil Court injunction, S. 144, Criminal P. C., order remains in force and its violation is an offence under S. 188, Penal Code. See Criminal P. C. (1898), S. 144. 1955 Cri L J 1171 : AIR 1955 Cal 439.

——S. 188 — Applicability — District Magistrate not empowered to promulgate order — Contravention of order is no offence under S. 188. AIR 1955 N U C (Madh Bha) 3048 (DB).

——S. 188—Applicability — Violation of order under S. 144, Criminal P. C. — Person arrested can apply under S. 435, Criminal P. C., before waiting for his conviction under S. 188, Penal Code. See Criminal P. C. (1898), S. 144. 1961 (1) Cri L J 676 : AIR 1961 Manipur 12.

——S. 188—Applicability and scope — Promulgation of order — Proof — (Criminal P. C. (1898), S. 134) — Mere proof of general notification promulgating order does not satisfy requirement—Determination of question of knowledge of order — Place of residence of accused at place where order was promulgated will be taken into consideration — Due promulgation of order not admitted — Promulgation has to be proved according to law. AIR 1955 N U C (Manipur) 1836.

——S. 188 — Applicability — Mere disobedience of order—Sufficiency — Prohibitory order under S. 79, Orissa Tenancy Act — Disobedience of — Offence — (Tenancy Laws — Orissa Tenancy Act (2 of 1913), S. 79).

Where a Rent Suit Officer made a prohibitory order under S. 79 of the Orissa Tenancy Act for appraisement and division of the crop in respect of a plot and the accused having disobeyed the order was prosecuted under S. 188, Penal Code, but there was no evidence that his disobedience of the order caused or tended to cause any obstruction, annoyance or injury nor was there any risk thereof.

Held (1) that the case did not fall within the terms of S. 188 as there was mere disobedience of the order. AIR 1957 Orissa 214 and AIR 1950 Nag 12, Rel. on. (2) that the order passed by the Rent Suit Officer was of a civil nature and not for maintenance of public peace and security and, as such, S. 188 was inapplicable. A I R 1956 All 630, Rel. on. (1959) 25 Cut L T 264

——S. 188—Applicability — Wall under attachment under S. 146, Criminal P. C. — Repairs made on account of marriage in family—Offence — (Criminal P. C. (1898), S. 146).

It is not every disobedience of the Court's order that comes within the mischief of S. 188 of the Penal Code. The disobedience complained of must cause or tend to cause obstruction, annoyance or injury, etc., as stated in that section.

The wall which was under attachment under S. 146, Criminal P. C, was in a dilapidated condition. There was a marriage of a girl in the family of one of the parties and on account of this marriage ceremony the wall was repaired without the permission of the Court :

Held, that the offence under S. 188, Penal Code, was not made out and therefore, the prosecution under that section was incompetent. A I R 1939 Pat 611 and A I R 1944 Pat 213 and A I R 1955 All 423, Disting. 1960 Cri L J 387 : A I R 1960 Pat 125 (125, 126) (Prs 4, 5).

——S. 188 -Applicability and scope.

Under S. 188, Penal Code, mere disobedience of an order made by a public servant lawfully is not punishable. Thus where the only finding of the Court was that the act of the petitioner was done stealthily in the night it clearly indicated that the petitioners took some precaution to prevent it being known as to what they were doing or intended to do and their act, although disobedience of an order of the Court, was not done in circumstances which tended to cause a riot or affray 1953 B L J R 123 : 1953 Cri L J 1787 : AIR 1953 Pat 376 (376) (Prs 1, 2).

——S. 188 — Applicability — Eviction order against tenant — Tenant obtaining injunction against landlord restraining execution of order — Prosecution of tenant under S. 188, Penal Code for contravening order — Maintainability—Houses and Rents — Bihar Buildings (Lease, Rent and Eviction) Control Act (3 of 1947), Ss. 17 and 20.

A landlord who had obtained an eviction order against his tenant took out execution of the same under S. 17 of the Bihar Buildings (Lease, Rent and Eviction) Control Act. The tenant thereupon filed a civil suit for declaration that the eviction order was illegal and obtained an ad interim injunction restraining the landlord from executing the order of eviction. The landlord then moved the Controller and at his instance a complaint was filed against the tenant for contravening the eviction order. The tenant was however proceeded against under S. 188, Penal Code.

Held, that S. 188, Penal Code had no application to the case as it relates to violations of orders made under the Code. The tenant having obtained an injunction from the Civil Court was fully entitled to rely upon it and refuse to vacate the house so long as it subsisted. The course adopted savours unpleasantly of a manoeuvre to evade the injunction granted by the Civil Court. This kind of thing is against the public interest and cannot be approved. Hence the prosecution must be quashed. 1952 Cri L J 1410 : AIR 1952 Pat 356 (357) (Pr 3).

——S. 188—Scope—Refusal to comply with order of injunction.

The refusal to comply with an order of injunction issued by a Civil Court is not an offence that comes under the scope of the section. Obviously the section applies to orders promulgated by public servants in respect of matters relating to safety, health or convenience of the public or in other words, to orders promulgated by public functionaries for public purposes. It does not apply to an order passed by a civil Court in respect of matters affecting the parties to a suit. The proper remedy for the disobedience of such an order is committal for contempt. 1952 Ker L T 547 : 1953 Cri L J 1421 : A I R 1953 Trav-Co 350 (351) (Pt B) (Pr 2).

2. Essentials of offence under.

——S. 188 -- Order under S. 144, Criminal P. C. — Disobedience of — Punishment—Constitutionality of order is to be judged in conjunction with S. 188 through which it is enforced and not in isolation — A mere disobedience of the order is not enough for conviction under S. 188, disobedience must cause or tend to cause obstruction, annoyance, or injury, or risk of obstruction, annoyance or injury to any person lawfully employed or danger to human life, health or safety or a riot or affray — (Constitution of India, Part III). See Criminal P C. (1898), S. 144. 1956 Cri L J 1026 : AIR 1956 All 481 (DB).

——S. 188 — Order of attachment under S. 146 Criminal P. C. —Encroachment on attached land by one of the parties to dispute — No offence under S. 188 is committed. 1956 All W R (HC) 393

——S. 188 — Infringement of order under S. 145, Criminal P. C.

Under S. 188 it is not necessary that annoyance is actually caused; it is sufficient if the infringement has a tendency to cause annoyance. The act done by the accused, i.e., of taking forcible possession in spite of an order under S. 145 (6), Criminal P. C., passed against them has a tendency to annoy the complainant. 1951 All L J 710 : 1951 All W R (HC) 530 : 1951 All Cr C 140 : 1951 R D (HC) 297 : 52 Cri L J 1508 : AIR 1951 All 828 (829) (Pt A) (Pr 2).

——S. 188—Mere disobedience of order—Offence—Mental annoyance is not sufficient.

Mere disobedience is not an offence under S. 188, Penal Code. Unless the consequence of the act of disobedience is proved, a person cannot be convicted under that section. In order to establish that annoyance was the result of the disobedience of the order, there must be some proximity between the conduct of the accused and disobedience. The annoyance has to be proved as a fact: mere mental annoyance of the authorities concerned does not come within S. 188, Penal Code. 1960 Cri L J 215 : AIR 1960 Assam 20 (21, 22) (Pt A) (Prs 2a, 4).

——S. 188—Essentials of offence—Proof—(Criminal P. C. (1898), S. 195).

The ingredients of S. 188, Penal Code require: (1) That there must be an order promulgated by a public servant. (2) That the public servant must have been lawfully empowered to promulgate such order (3) That a person having knowledge of such order and directed by such order (a) to abstain from a certain act, or (b) to take certain order with certain property in his possession, or under his management, has disobeyed such direction. (4) That such disobedience causes or tends to cause (i) obstruction, annoyance, or injury, or risk of it, to any person lawfully employed, or (ii) danger to human life, health or safety, or (iii) a riot or affray.

A complaint in writing of the public servant concerned or of some other public servant to whom he is subordinate is required. A prosecution under this section should not be launched unless all the elements necessary for a conviction are present. A complaint for an alleged disobedience of the order under S. 144,

Criminal P. C., must show that the disobedience caused or tended to cause obstruction, annoyance or injury or a riot.

Out of all these requirements the most essential is that no prosecution can be instituted under this section without the personal complaint of the public servant concerned : S. 195, Criminal P. C. 1959 Cri L J 328 : (1959) 1 Mad L J 135 : 1959 Mad L J (Cr) 157 : AIR 1959 Mad 89 (93, 94) (Pt C) (Prs 9, 12. 13).

——S. 188 — Order under S. 144, Criminal P. C. — Order does not affect legitimate activities of citizen— Violation of any part of the order by itself does not amount to an offence—It is only when such an order is taken along with S. 188, Penal Code, that the violation becomes an offence. See Constitution of India, Art. 19. 1961 (1) Cri L J 676 : A I R 1961 Manipur 12.

——S. 188—Essentials under — No evidence of causing obstruction, annoyance or injury — Validity of conviction.

Section 188, Penal Code, requires four ingredients: (1) there must be an order promulgated by a public servant, (2) the public servant must have been lawfully empowered to promulgate such order, (3) a person must disobey such an order and (4) such disobedience must cause or tend to cause obstruction, annoyance, or injury, or risk of it, to any person lawfully employed, or danger to human life, health or safety, or a riot or affray. Where, therefore, there is no evidence to show that the disobedience tended to cause obstruction, annoyance or injury or risk of obstruction, annoyance or injury to any person lawfully employed there can be no conviction for an offence under S. 188, Penal Code. Case law referred. 52 Cri L J 1526 : A I R 1951 Mys 121 (122) (Pr 4).

——S. 188 — Order under S. 36 (4), Legal Practitioners Act (1879).

Proceedings under the Legal Practitioners Act are quasi-criminal proceedings and a person disobeying an order passed by the District Judge under S. 36 (4) of that Act is liable to be punished under S. 188, Penal Code provided he is aware of the order. 1950 Nag L J 215 : 51 Cri L J 1007 : 1950 All W R (Supp) 75 : ILR (1950) Nag 449 : A I R 1950 Nag 158 (159) (Pr 6).

——S. 188—Person refusing to get himself inoculated against Cholera on ground that he had taken preventive homeopathic medicine — Person contravenes provisions of paras 7 and 8 of Regulations made under Epidemic Diseases Act and hence is guilty under S. 188, Penal Code. (1963) 5 Orissa J D 238 : ILR (1963) Cut 640 : 1968 (2) Cri L J 659 : AIR 1963 Orissa 216 (217) (Prs 3, 6).

——S. 188—Complaint under—Mere disobedience of order under S. 144, Criminal P. C. not sufficient—Other ingredients must be present—Criminal P. C. (1898), S. 144.

In a complaint under S. 188, I. P. Code the mere allegation that the accused had disobeyed the order under S. 144, Criminal P. C., is not sufficient. It has further to be shown that the disobedience caused or tended to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury to any person lawfully employed, or that the disobedience caused or tended to cause danger to human life, health or safety, or caused or tended to cause a riot or affray. In the absence of consideration of these ingredients, the filing of a complaint for an offence under S. 188 is not legal. AIR 1922 Pat 84 and AIR 1960 Pat 125, Rel. on. 1964 B L J R 799.

——S. 188 — Disobedience to order under S. 145, Cr. P. Code—Order attaching land in dispute recorded on order sheet only — No specific direction prohibiting parties from going on land — No factual attachment made in pursuance of order — Order is not validly promulgated — Disobedience does not constitute an offence under S. 188. 1962 BLJR 405.

3. Conviction — Propriety of order.

——S. 188—Breach of an order promulgated by public servant — Conviction — There must be evidence of promulgation of order by a public servant lawfully empowered to promulgate such order. AIR 1955 NUC (Madh B) 3057.

——S. 188—Order by Ruler not to carry goods out of Kutch—Breach of—Recovering of penalty by customs authority—Punishment under S. 188.

The Notification No. 135 dated Ashad Sud 6th, Samvat 1988, reiterating an order by the Ruler prohibiting carrying of goods out of Kutch except by recognised routes is not superseded by the Land Customs Act, 1948, and the persons carrying bullocks through the little desert, by passing customs outposts, commit an offence under S. 188, Penal Code. The fact that the customs authority recovers penalty from such person for the evasion of customs out-posts does not dispense with punishment under the Penal Code for the same offence. 51 Cri L J 1330 : AIR 1950 Kutch 62 (63) (Prs 2, 3, 5).

——S. 188— Conviction — Validity — Order under S. 144, Cri. P. Code — Disobedience of— Shouting of slogans causing annoyance to Magistrate and police going to preserve law and order— Conviction under S. 188, valid. See Penal Code (1860), S. 143. 1962 (1) Cr L J 827 (Manipur).

——S. 188, First part—Burden of proof.

For a conviction under S. 188 first part it has to be proved not merely that the accused disobeyed the prohibitory order under S. 144, Criminal P. C knowing of the same but that the said disobedience caused or tendered to cause obstruction, annoyance or injury or risk of obstruction to person lawfully employed. It was for the prosecution to establish that. 1961 (2) Cr L J 583 (Manipur).

——S. 188—Likely consequences of breach of order not proved—Conviction under S. 188 improper—Gap not to be filled by resort to judicial notice.

There can be no conviction under S. 188 unless the likely consequences of the breach of the order are proved affirmatively. The gap cannot be filled up by resort to judicial notice. It is a fact to be proved : AIR 1931 Cal 122, Rel. on. 51 Cri L J 254 : 1950 Nag L J 211 : ILR (1949) Nag 976: AIR 1950 Nag 12 (13) (Pt B) (Pr 5).

——S. 188 — Order under S. 144, Criminal P. C, restraining both parties (A and B) from going over land with standing crops—A going there and cutting crops in presence of B — Though B does not resist, A commits offence under section as riot or affray is likely consequence of his disobedience—Criminal P. C. (1898), S. 144.

Where in a proceeding under S. 144, Criminal P. C., an order is promulgated restraining both the parties A and B from going over the land in dispute over which paddy crops are standing and A in disobedience of that order goes over there and in the presence of B cuts and takes away the crops, even though a riot does not take place by B's non-resistance, an inference that the disobedience of A tended to result in a riot or affray is not unjustified for his conviction under S. 188, Penal Code : AIR 1934 Oudh 162 and AIR 1940 Pat 446 and AIR 1951 All 828, Rel. on. 1953 BLJR 522 and AIR 1953 Pat 376 and AIR 1931 Cal 122 and AIR 1949 Cal 677 and 4 Cal W N 226 and AIR 1922 Pat 84 and 14 Cal W N 234 and AIR 1950 Nag 12 and AIR 1960 Assam 20, Distinguished. 1964 (2) Cri L J 704 : 1965 B L J R 180 : AIR 1964 Pat 526 (529) (Pr 9) (DB).

4. Promulgated — Meaning.

——S. 188—'Promulgate'—Meaning of—(Cr. P. Code (1898), S. 145 (b).)

Per Agarwala and Desai, JJ., Mehrotra, J., contra.—The word "promulgate" connotes two ideas: (i) making known of an order, and (ii) the means by which the order is made known must be by something done openly and in public. Private information will not be "promulgation." But the law does not prescribe any particular mode in which an order is made known openly, publicly. It may be by beat of drum; it may be by publication in Gazette; it may be by reading out an order openly in public. An order duly pronounced in open Court must be deemed to be duly promulgated so far as the parties to the case are concerned. Therefore an order of the criminal Court under S 145 (b) having been passed in the presence of the parties, must be deemed to have been duly promulgated within the meaning of S. 188 qua the parties to the litigation in the Court. **1955 Cri L J 1111 : ILR (1955) 2 All 547 : AIR 1955 All 423 (425, 429, 431) (Prs 6, 29, 45) (DB).**

——S. 188 — "Promulgated" — Meaning of — Final order under S. 145 (6), Criminal P. C.

The word "promulgation" is not used in any narrow or technical sense in S. 188. When a judgment or order is passed in open Court, it constitutes a formal declaration to the public of the decision of the Court in the case in which the order is given or the judgment is passed. The delivery of the final order in the case under S. 145 (6) of the Code of Criminal Procedure would constitute promulgation within the meaning of S 188 as the final order is pronounced in open Court. In order to constitute promulgation under S. 188 affixation of the order on the spot or on the property which is the subject-matter of dispute or the promulgation of the order by a beat of drum is not necessary. AIR 1935 Cal 63, 13 Cal 175; 16 Cal 9, Rel. on. **1951 All Cri C 143 : 1951 All W R (H C) 582 : 1953 Cri L J 623 : AIR 1953 All 257 (258) (Pr 5) (DB).**

——S. 188 — Order promulgated under S. 144, Cr. P. Code—Disobedience—Offence.

Mere disobedience of an order under S. 144, Cr. P. Code, does not render a person liable to punishment under S. 188, Penal Code. It must be further shown that such disobedience had either of the two tendencies described in the second and third paragraphs of that section. These tendencies have to be inferred from the proved facts and circumstances of each case and are not capable to direct proof. **ILR (1957) Cut 233 : 23 Cut L T 176 : 1957 Cri L J 1151 : A I R 1957 Orissa 214 (215) (Pr 5).**

5. Necessity of complaint or sanction.

——S. 188—Offence under the section made cognisable—S. 195 (1), Cr. P. Code not affected thereby—Magistrate cannot take cognisance of offence under S. 188 without complaint in writing of the public servant concerned—Magistrate has no jurisdiction to try offence under S. 188 merely on the report of public when there was no complaint by the Magistrate whose order was disobeyed. See Cri. P. Code (5 of 1898), Ss. 190 (1), 195 (1) (a). 1952 Cri L J 1034: AIR 1952 All 560.

——S. 188—Offence under—Cognizance of, without written complaint by public servant—Trial by Magistrate of such an offence on police report made to him is without jurisdiction. See Criminal P. C (1898), S. 195 (1) (a). 1952 Cri L J 641 : AIR 1952 Assam 68 (DB).

——S. 188—Criminal P. C. (1898), S. 195 — Notification by Home Minister prohibiting burial of dead body at a place other than one specified for the purpose—Trial for offence under S 188, Penal Code, for contravening the order — No written complaint by Home Secretary — Cognizance cannot be taken by Court on complaint by police. 51 Cri L J 1345 : AIR 1950 Madh-B 58 (58) (Pt B) (Pr 4).

——S. 188—Annoyance.

The Collector by a disobedience of his orders under S. 3 (2) of the Madras Buildings (Lease and Rent Control) Act and the Sub-Inspector of Police lawfully employed in operations under the Act must be said to be annoyed and can file a complaint under S. 188. **1950 Mad W N 142 : (1950) 1 Mad L J 201 : 1950 Mad W N (Cri) 26 : 51 Cri L J 1518 : AIR 1950 Mad 599 (601) (Pt D) (Pr 5).**

——S. 188—Offence under — Complaint of Court—Necessity. See Criminal P. C. (1898), S. 195. **ILR (1959) Cut 555.**

——S. 188—Trial for offences under Ss. 188 and 145—Non-compliance with S 195 Criminal P. C., in respects of offence under S. 188—Conviction under S. 188 set aside—Conviction under S. 145 held did not stand—Criminal P. C. (1898), S. 195. See Penal Code (1860), S. 145. **AIR 1951 Orissa 84 (DB).**

——S. 188—Offence under made cognisable by S. 10 of the Criminal Law Amendment Act 1932—Provisions of S. 195, Criminal P. C are not rendered nugatory thereby — Complaint by public authority concerned is essential — Non-compliance with S. 195, Criminal P. C., is fatal to prosecution—Criminal P. C. (1898), S 195—Criminal Law Amendment Act (1932), S. 10. AIR 1951 Orissa 84 (85) (Pt A) (Pr 4) (DB).

——Ss. 188 and 379 — Criminal P. C. (1898), S. 195 (1) (a) — Person committing offence under S. 188, committing additional offence of theft—Court can take cognizance of the offence even in absence of complaint by public servant—Criminal P. C. (1898), S. 195 (1) (a).

Although it is true that before a Court takes cognizance of an offence under S. 188 I. P. Code, there must be a complaint by the public servant concerned under S. 195 (1) (a), Criminal P. C., it cannot be said that if a person commits an offence under S. 188, he cannot be put upon his trial for any of the offences which he commits unless and until the public servant files a complaint.

Where an additional offence of theft has been committed by the party committing an offence under S. 188, the Court can take cognizance of the offence even in absence of a complaint by the public servant. **1963 B L J R 211.**

——S. 188 — Sanction for prosecution of an offence under not necessary—All that is necessary for cognisance of an offence under S. 188, I. P C. is that there must be a complaint in writing of public servant concerned or of some public servant to whom he is subordinate. See Cr. P. Code (1898), S. 195. **AIR 1955 N U C (Pat) 99.**

6. Disobedience of illegal or irregular orders.

——S. 188—Person arrested for disobedience of order under S. 144, Criminal P. C.—Fact that order is vague and widely worded is no ground for releasing person on habeas corpus—It may be ground for challenging it during his trial under S 188, I. P. C. See Constitution of India, Art. 226. **1956 Cri L J 1026 : AIR 1956 All 481 (DB).**

——S. 188—Petitioners holding meeting peacefully in order to vindicate their public right under Manipur State Constitution Act — Order on analogy of S. 144, Cr P. C., passed — Order held illegal— Detention for offences under Ss. 143, 145 and 188—Detention held illegal and the order of commitment under Ss. 143, 145 and 188, I. P C., must be quashed — Petitioners set at liberty—(Criminal P. C. (1898), S. 144)—(Penal Code (1860), Ss. 143, 145). See Constitution of India, Art. 226. **1955 Cri L J 1603 : AIR 1955 Manipur 41.**

——S. 188—Proceedings under S 144, Criminal P. C.—Attachment cannot be ordered — Consequence of

disobedience of an order under S. 144 is not a prosecution under S. 353 or S. 379, Penal Code, but one under S. 188, Penal Code. See Criminal P. C. (1898), S. 144. 1953 Cri L J 1198 : AIR 1953 Vindh Pra 25.

7. Practice and procedure.

——S. 188 — Procedure. See Criminal P. C. (1898), S. 195 (1) (a). 1957 Nag L J 63.

——S. 188 — **Disobedience of order promulgated — Prosecution for — Accused can plead worthlessness of order and question it on merits.**

It is open to a person charged with disobedience to an order promulgated by a public servant lawfully empowered to promulgate such order, to plead in defence that the order though made with the jurisdiction was utterly wrong or improper on the merits. The accused persons cannot be precluded from pleading the worthlessness of the order in question on the merits although a Court trying a charge will proceed on the footing that the order, if made with jurisdiction, is 'prima facie' a good and valid order but that position is liable to be challenged by the accused in his defence and cannot be held to be sacrosanct. 6 Cal 88, Rel. on.

(Note. — It was held that the petitioners had succeeded in showing that the ex parte order of injunction was a highly improper order which should never have been made in the circumstances of the case). 60 Cal W N 633 : 1956 Cri L J 515 : AIR 1956 Cal 102 (105) (Pt D) (Pr 11).

——S. 188 — Service of order by affixing copy on bamboo pole near place of dispute—No proof that personal service or service on adult member could not be effected—Service is no service—Breach of order is no offence — No proceedings under S. 188, I. P. C., can therefore be commenced for the breach of the order when there was nothing to show that the accused was aware of the order before he was charged. See Criminal P. C (1898), S. 164. 51 Cri L J 1575 : AIR 1951 Cal 207 (DB).

——S. 188—Procedure—Case under S. 188, I. P. Code to be tried as summons case. See Criminal P. C. (1898), S. 241. AIR 1955 N U C (Madh-B) 3057.

——S. 188 — Possession of successful party in civil suit confirmed in subsequent proceedings under S. 145—Unsuccessful party interfering with possession—Action under S. 107 against him is the proper course—Direction for prosecuting him under S. 188, I. P. Code for past incidents, not proper course. See Criminal P. C. (1898), S. 107. ILR (1963) Cut 771.

——S. 188 — Prosecution under for breach of order under S. 144, Criminal P. C. — Accused not party to proceedings under S. 144 — Prosecution not legal. 1964 B L J R 799.

——S 188 — Practice and procedure — Mere disobedience of order promulgated by public servant does not constitute offence under section — Independent of proof of disobedience, there must be some evidence to prove the consequence of alleged disobedience and a finding based on it. AIR 1955 N U C (Pat) 5703.

8. Revision.

——S. 188—Sanction to prosecute for offence under S. 188, Penal Code.

S. 476, Criminal P. C. does not apply to an offence under S. 188, Penal Code—Order according sanction to prosecute for that offence is not appealable — As the order is not open to appeal a revision petition is maintainable against it. See Criminal P. C. (1898), S. 195 (1) (a). 1953 Cri L J 1421 : AIR 1953 Trav-Co 350.

SECTION 189

——Ss. 189, 186 — Applicability — Ingredients to offence.

As the Traffic Constable was trying to clear the congestion from the road the accused became angry, showed him red eyes and asked him to give him his number. The accused persisted in asking for the number of the police constable even when the constable was engaged in clearing the congestion on the road and he placed his hand on the uniform of the police and was pushing him, thus obstructing him in the discharge of his public functions. Held, that the mere demand for the number of the constable was no threat of an injury nor did the pushing amount to a threat of injury although it might amount to an assault. S. 186 was the proper section to apply and not S. 189. (1958) 1 Cal L J 81.

SECTION 190

——Ss. 190, 193—Scope—Statement on oath - Statement continued on subsequent date — Oath also continues — Statement not read over to witness — Conviction not affected.

Before a person can be convicted for giving false evidence under S. 193, Penal Code, it has to be proved that he was legally bound by an oath, or by an express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false. Where a statement made by a witness on a certain date on solemn affirmation before the Court was continued on a subsequent date, it must be presumed that the oath which was administered to the witness on the first date continued to bind his statement and he continued to be on oath till the evidence was concluded. The fact that the statement was not read over to the witness as required by S. 360, Criminal P. C. is curable and not fatal to his conviction under S. 193. AIR 1927 P C. 44 and AIR 1950 All 501 and AIR 1952 Sau 7, Rel. on. AIR 1928 Lah 125, Not foll. 66 Pun L R 65 : 1964 (1) Cri L J 544 : AIR 1964 Punj 211 (212, 213) (Prs 2, 3, 6).

SECTION 191

——Ss. 191, Expln. 2 and 193 — 'Whoever being legally bound by an oath or by an express provision of law to state the truth' — Meaning of — (Oaths Act (1873), Ss. 4, 5 and 14).

The opening words of S. 191, I. P. Code 'whoever being legally bound by an oath or by an express provision of law to state the truth .....' do not support the submission that a man, who is not bound under the law to make an affidavit, can, if he does make one, deliberately refrain from stating truthfully the facts which are within his knowledge. Whenever a man makes a statement in Court on oath he is bound to state the truth and if he does not, he makes himself liable under the provisions of S. 193, I. P. Code. It is no defence to say that he was not bound to enter the witness box. A defendant or even a plaintiff is not bound to go into the witness-box but if either of them chooses to do so he cannot, after he has taken the oath to make a truthful statement, state anything which is false.

In an application for a writ of habeas corpus filed by S's brother it was alleged that S was illegally detained in police custody by the appellant, a police Sub-Inspector. In his return the appellant filed a false affidavit denying that S was ever arrested by police or was in his custody.

Held, (i) that the appellant was legally bound to place facts and circumstances before the Court to justify S's detention and this could be done by an affidavit, (ii) that Ss. 4 and 5 read with S. 14 of Oaths Act show that the High Court or its officers were authorised to administer the oath and as the appellant was stating facts as evidence before the High Court he had to make the oath or affirmation and was bound to state the truth. Since the statement

made by him in the affidavit was found to be false he had committed the offence under S. 193, I. P. Code. (iii) That the fact that the affidavit filed by the appellant was affirmed as being true to the best of knowledge and belief did not affect the question of his guilt inasmuch as even a false statement as to belief would fall under Expln. 2 to S. 191 AIR 1947 All 235, Overruled. Ranjit Singh v. State of Pepsu (now Punjab), 26 Cut LT 576: (1960) 2 Ker LR 541: (1959) Supp (2) S C R 727: 1959 Mad W N (SC) 86: 37 Mys L J 869: ILR (1959) Punj 1709: 1959 All W R (HC) 371: 1959 S C J 905: 1959 Cri L J 1124: 1959 All Cri R 298: 1959 Mad L J (Cri) 618: (1959) 2 M L J (S C) 121: (1959) 2 Andh W R (S C) 121: (1959) 2 S C A 552: AIR 1959 S C 843 (846, 847) (Pt B) (Prs 5, 6, 8).

——S. 191—Perjury—A witness perjures himself not only when he does not state the truth, but also when he states something which is not the whole truth. (1963) 7 Fac L R 30 (All).

——Ss. 191 and 193 — Criminal P. C. (5 of 1898), S. 162 – Statement before Sessions Court contradictory to earlier statement made to police — Witness, whether liable for perjury — Criminal P. C. (5 of 1898), S. 479-A.

The petitioner, a witness before the Sessions Court in a criminal trial, made a statement contradictory to the one he had earlier made to the police, which he explained was due to pressure of the police. The Sessions Judge filed a complaint under S 479-A, Criminal P. C. for an offence under S. 193, I. P. C. Petitioner preferred a revision to the High Court.

Held, the burden is on the prosecution to prove that the statement made by the petitioner in his deposition in the Sessions Court was false as defined in S. 191, Indian Penal Code. It cannot be presumed that, in the statements made before the police the petitioner spoke the truth and it is not possible to hold on the basis of that assumption that, in the deposition before the Sessions Court he gave false evidence and thereby committed offence under S. 193, I. P. Code. Assumption is not permissible under the law. If there is no basis to positively hold that the statements were false and if the possibility existed of their being either true or false, there can be no positive finding that the deposition in the Sessions Court is false and the accused would have to be given the benefit of doubt. (1965) 1 Andh W R 465: 1965 M L J (Cri) 358: 1965 (2) Cri L J 599: AIR 1965 Andh Pra 402 (404, 405) (Prs 6 to 9).

——S. 191 — Accused filing statement containing list of property according to direction of Deputy Commissioner in miscellaneous proceedings before him —To constitute offence under S. 193 it is necessary to show that the list supplied by accused amounted to declaration which he was bound by law to make. See Penal Code (1860), S. 193. 1954 Cri L J 1838: AIR 1954 Assam 259 (DB).

——S. 191 –Scope –Giving false evidence.

S. 191, Penal Code only defines what amounts to 'giving a false evidence'. The definition has been enacted for the purposes of the provisions of the Penal Code, and it cannot be said that it contains any general principle of law of universal application as such. That a person should always tell truth is a moral principle, but it cannot be said to be a legal principle as such. Whenever the Legislature requires a person to tell truth, it has so enacted in various enactments. It is only when it has been so enacted and a person fails to tell truth that he comes within the mischief of the provisions of the Penal Code. 67 Bom L R 317: ILR (1965) Bom 648: 1965 (2) Cri L J 616: 1965 Mah L J 705: AIR 1965 Bom 195 (207) (Pt E) (Pr 38) (DB).

——S. 191— False statement in application for transfer—Petitioner is bound to state truth by his solemn affirmation in affidavit — (Civil P. C. (1908), S. 24) — (Oaths Act (1873), Ss. 5-A and 14). AIR 1955 N U C (Cal) 2906 (DB).

——S. 191 — 'Evidence' in section is not confined to oral evidence only — A statement whether verbal or otherwise is within its meaning. A I R 1955 N U C (Cal) 2906 (DB).

——S. 191—"Being legally bound by an oath"—There must be valid and legal oath administered by person authorised by law to administer it — Person to whom oath is administered must be person competent in law to whom such oaths can be administered. A I R 1955 N U C (Cal) 2906 (DB).

——S. 191—"Being legaliy bound by oath" — Oath must have been taken before the statement in question was made. AIR 1955 N U C (Cal) 2906 (DB).

——S. 191—False affidavit — Affidavit filed by complainant against fact admitted in complaint itself must be considered to be false. A I R 1955 N U C (Madh B) 3073.

——Ss. 191 and 193 — Scope — 'Intentionally gives false evidence'—False statement need not be material to case. AIR 1955 N U C (Orissa) 3980 (DB).

——S. 191—Filing of false affidavit — Duty of Court stated. 1962 (1) Cri L J 478: AIR 1961 Punj 185.

——Ss. 191, 182—Applicability — Information given under S. 182 must be information which accused knows or believes to be false — To have reason to believe it to be false is not sufficient. See Penal Code (45 of 1860), S. 182. (1961) All W R (Sup) 59: 63 Punj L R 566.

——Ss. 191 and 193 — Complaint under — When can be filed —Persons swearing false affidavits in writ proceedings—High Court expressing opinion that it was satisfied about false swearing—No opinion about their having given false evidence intentionally and for prosecution under S. 193, Penal Code, however expressed — Complaint cannot be filed. See Criminal P. C. (1898), S. 479-A. 1961 (2) Cr L J 796: AIR 1961 Raj 268 (DB).

SECTION 192

●——Ss. 192 to 195 –Prosecution under—Procedure for — S. 479-A may be resorted to in case falling within first paragraph of S. 193 and Ss. 194 and 195. See Criminal P. C. (1898), S. 479-A. 1964 (1) Cri L J 555: AIR 1964 S C 725.

——S. 192—Scope — Requirements of offence under —Meaning of 'taken by law' and 'evidence'—Cochin Municipal Act (18 of 1113 T E), S. 195—Proceedings before Executive Authority of Municipality covered by section.

Section 192 does not insist that the proceedings in which false or fabricated evidence is produced should be either judicial or quasi judicial; nor does it say that it does not apply where proceedings are non-judicial. A proceeding before the Executive Authority of a municipality, therefore, satisfies the requirements of the section and a person producing false documentary evidence in a proceeding before the Executive Authority as such would be guilty of an offence under section as such a proceeding is before a public servant as such. The section thus contemplates even a proceeding which is non-judicial. Expression 'taken by law' in the section only means 'taken under the provisions of any law'; similarly the word 'evidence' as used in the section is used in its ordinary sense, namely, 'information (given personally or drawn from documents etc.) tending to establish a fact. 6 Cal 482; 7 Cal L R 356; AIR 1918 Cal 61, Rel. on. 1960 Ker L J 1307.

——S. 192—Offence under — Essential of — Cochin Municipal Act (17 of 1113 T E), S. 195 — Nature of proceedings under.

For an offence under S. 192 it is essential that there should be an intention on the part of the accused that the false statement in the document produced or relied on, assuming that it was false, may cause any person to entertain opinion touching a point material to the result of a proceeding. Such intention is an essential element of the offence. Since the Executive Officer of a municipality has no authority to investigate whether an applicant for permission to build has a right to build on the land in question, production of a false document by the applicant would not make him fall within the mischief of S. 192. **1960 Ker L J 1307.**

——**S. 192 — Police fabricating evidence— Impropriety of.**

The police are too often tempted to introduce padding in a case in their over-zealousness to establish a charge which they believe to be true in support of which the evidence in their possession is weak. But this practice has to be condemned in no uncertain terms. AIR 1936 Lah 380, Rel. on. **1957 M P C 541 : (1957) M P L J 837 : 1958 Cr L J 190 : A I R 1958 Madh Pra 55 (59) (Pt B) (Pr 9) (DB).**

——**S. 192—Fabrication of false evidence.**

In a proceeding under S. 144, Criminal P. C. between a raiyat A and B who claimed to be in possession as a bataidar A produced an antedated deed of exchange of title between him and another raiyat C under which A was authorised to be in possession of the disputed plot but there was no recital of past possession.

Held, that there being no recital of any kind as to past possession in the deed of exchange the deed was not relevant for the purpose of deciding a dispute of actual possession between A and his bataidar B. The deed of exchange even if antedated, therefore could not be held to be the fabrication of false evidence within the meaning of S. 192, Penal Code. **1955 B L J R 453 : 1956 Cr L J 647 : A I R 1956 Pat 154 (156) (Pt A) (Pr 10).**

SECTION 193

SYNOPSIS

(Penal Code (1860), S. 193.)

1. Scope.
2. "Intentionally gives false evidence."
3. "In any stage of a judicial proceeding."
4. Depositions.
5. False affidavit.
6. Contradictory statements.
7. Complaint.
8. Proof.
9. Practice and procedure.
10. Charge.
11. Conviction and sentence.

1. Scope.

— S. 193—Criminal P. C. (1898), Ss. 479-A, 476 — Scope — S. 479-A may be resorted to in case falling within first paragraph of S. 193, Penal Code and Ss. 194 and 195 — Offence under S. 471, Penal Code — S. 479-A (1) not applicable — Resort to S. 476 proper. See Criminal P. C. (1898), S. 479-A. **1964 (1) Cri L J 555 : AIR 1964 S C 725.**

— S. 193 — Criminal P. C. (1898), Ss. 195 (1) (b) and 195 (1) (c)—Expressions "in relation to" in S. 195 (1) (b) and "in respect of" in S. 195 (1) (c) — Meaning of — Sale deed got executed fictitiously by three parties —One of them starting mutation proceedings on basis of such sale deed—Dismissal of mutation application — Private complaint under Ss. 467 and 471, Penal Code — Bar of — Offence was in relation to mutation proceedings — S. 195 (1) (b) held applied — Even if allegations disclosed offences under Ss. 467 and 471 and not under S. 193, Penal Code, private complaint would be barred under S. 195 (1) (c). See Criminal P. C. (1898), S. 195 (1) (b). **AIR 1966 All 124.**

— Ss. 193, 195 — Scope — Section 195 is an aggravated form of offence contemplated under S. 193 See Penal Code (1860), S. 195. **A I R 1966 All 66 (DB).**

——Ss. 193 and 195 —Alleged substitution of original F. I. R. — Circumstances and evidence indicating allegation to be justified — Offences under S. 193 of the Code held clearly appeared to have been committed and further inquiry by Magistrate held needed. See Criminal P. C. (1898), S. 476. **1966 Cri L J 115 : 1965 All Cri R 229 : AIR 1966 All 66 (DB).**

——S. 193 — Criminal P. C. (1898), S. 195 (1) (b) — Falsification of public record (false entry in birth and death register) by public servant — Offences under Ss. 193 and 218, Penal Code are distinct — Prosecution of public servant for offence under S. 218 alone without sanction not barred. See Cr. P. C. (1898), S. 195 (1) (b). **1962 (1) Cri L J 240 : A I R 1962 All 150.**

——S. 193 — Case under S. 193, I. P. C. — Section 479-A, Cr. P. C. does not apply. See Criminal P. C. (1898), S. 479-A **1959 Cri L J 1279 : A I R 1959 Andh Pra 567 (DB).**

——S. 193 — Scope — Finding should be recorded at time of delivery of judgment or final order disposing of proceedings, although formal complaint can be made subsequently after giving witness an opportunity of being heard. See Cr. P Code (1898), S. 479-A. **1958 Cri L J 1289 : A I R 1958 Andh Pra 657.**

——S. 193—Criminal P. C. (1898), Ss. 476-B and 476 — Offence under S. 193, Penal Code — Order under S. 476-B — No enquiry and preliminary order under S. 476 — When the Judge records his finding that it is expedient in the interests of justice, that the persons concerned should be prosecuted and directs the institution of complaint under S. 193, it is an order in conformity with provisions of Ss 476-B and 476 even though he may inappropriately call it a "report". See Criminal P. C. (1898), S. 476-B. **AIR 1953 Madh Bha 12.**

——Ss. 193, 165-A, 109 and 214 — Criminal P. C. (1898), S. 195-B — Municipal employees attesting panchnama of seizure of 'ganja' — Attesting is not as municipal employees but as witnesses — Defence trying to win over attesting witnesses and constable who seized 'ganja' — Offence punishable under Ss. 109 and 193 — S. 214 is inapplicable — Prosecution can be on complaint by Court where case pending — Trial is vitiated. **1965 M P L J (Notes) 11.**

——S. 193—Applicability—Undertaking in guardianship proceedings by mother that she would not marry her daughter during pendency of proceedings — Breach — Held that undertaking given to Court would amount to a contempt and not to a false declaration as contemplated by S. 191 punishable under S. 193. See Cr. P. Code (1898), S. 476. **1958 M P L J (Notes) 138.**

——S. 193—Scope - 'Person appearing as witness' — Interpretation of—Section to be strictly construed — Person giving false evidence by affidavit but not physically appearing is not person appearing as witness — Complaint against him must be made under S. 476 and not under S. 479-A. See Criminal P. C. (1898), S. 479-A. **1965 (1) Cri L J 311 : A I R 1965 Mad 100 (DB).**

——S. 193 — Scope—Application praying for lodging of complaint under Ss 209 and 193, I. P. C or both read with S. 109 — Lodging of a complaint under S. 209, I. P. C. read with S. 109 I. P. C. not prohibited. **ILR (1962) 2 Punj 504.**

2. "Intentionally gives false evidence."

——S. 193 — Applicability — False confession — If 'false evidence'—Accused if witness—(Evidence Act (1872) Ss 3, 157).

Before S. 193 can be invoked it should be found that the person concerned has given false evidence. An accused who has made a false confession under S. 164, Cr. P. Code cannot be said to have given false evidence within the meaning of S. 193. Accused making a false confession is not a witness within the scope of the definition of 'evidence' in S. 3, Evidence Act. Section 157, Evidence Act has no bearing on this question. **1959 Andh L T 512 : (1959) 2 Andh W R 326 : 1959 Cri L J 1279 : 1959 M L J (Cr) 757 : ILR (1959) Andh Pra 681 : A I R 1959 Andh Pra 567 (568) (Pt B) (Prs 5, 6) (DB).**

——S. 193 — Scope — 'Intentionally gives false evidence' – False statement need not be material to case. See Penal Code (1860), S. 191. **A I R 1955 N U C (Orissa) 3980 (DB).**

3. "In any stage of a judicial proceeding."

——S. 193 - Applicability — Contradictory statements on oath under S 164, Criminal P. C. and at preliminary enquiry — Complaint under S. 476, Criminal P. C —Conviction—Legality — Proceedings under Chap. XIV, Criminal P. C. — 'If judicial proceeding.'

Where a person had given two contradictory statements on oath, one under S. 164, Criminal Procedure Code and the other at the preliminary enquiry and had admitted in the course of his deposition before the committing Court that the statement he made before the Sub-Magistrate under S. 164 was false, and a complaint was filed under S. 476, Criminal P.. C. for an offence under S. 193, Indian Penal Code and the accused was acquitted by the trial Magistrate on the grounds (i) that the statement recorded under S. 164, Criminal P. C was made only during investigation and not during a judicial proceeding, and (ii) that the case would stand only if it were proved that what the accused stated before the District Magistrate was false.

On appeal by the State against the said acquittal, held:— (1) An investigation under Chapter XIV of the Criminal P. C. is a stage of judicial proceeding and a person who makes on an oath statements which he knew to be false before a Magistrate conducting the investigation, gives false evidence and commits an offence under S. 193. Penal Code. (2) Once a complaint has been laid and it has not been challenged in appeal and the trial ensues, it is not open to the accused to try to put the clock back and contend that the laying of the complaint itself was not expedient in the interest of justice. Once the case comes up for trial, the question which of the two statements is false is really not germane to the question whether the accused has intentionally given false evidence on oath. That the accused might have given the first statement under police pressure and had stated the truth in his later statement have no relevancy in adjudicating the question whether or not an offence under S. 193, Penal Code, has been made out. Such considerations may have a bearing on the question of sentence but not on the question of guilt. Illustration (b) to S. 238, Criminal P. C., makes the position crystal clear. It matters not which of the two statements is false.

On the facts of the instant case, held that the accused had intentionally given false evidence in a judicial proceeding and the order of acquittal is wrong. **(1958) 2 Andh W R 189 : 1958 M L J (Cr) 649 : 1958 Andh L T 813 : 1959 Cri L J 564 : I L R (1958) Andh Pra 614 : AIR 1959 Andh Pra 250 (251) (Pt A) (Pr 5).**

——S. 193 — Applicability — False evidence outside judicial proceedings.

The argument that S. 193, Penal Code, applies only to false evidence given in judicial proceedings applies only to sub-paragraph (1) of that section and does not apply to sub-paragraph (2). **I L R (1958) Mad 87 : 70 Mad L W 666 : 1957 M L J (Cr) 528 : (1957) 2 M L J 348 : 1958 Cri L J 197 : AIR 1958 Mad 69 (70) (Pr 6).**

——S. 193 — 'In any stage of judicial proceedings' — Statement of witness recorded under S. 164 — Does not amount to evidence in any stage of judicial proceeding within S 193, I. P. C See Criminal P. C. (1898), S 479-A. 1963 (2) Cri L J 284 : AIR 1963 Manipur 21.

——S. 193—Applicability — Statement under S. 164, Criminal P. C. — Section not attracted — Criminal P. C. (1898), S. 164.

The statement made by a person under S. 164 of Criminal P. C., cannot be said to have been made in relation to judicial proceedings so as to attract the provisions of S. 193, Penal Code. A Magistrate recording the statement under S. 164 is not authorised by law to take evidence for the simple reason that he is not charged with the duty of deciding any case and there is no matter to be proved or disproved before him. The provisions of the Evidence Act make it clear that no person can claim the status of a witness except in relation to a proceeding before a Court. **31 Cut L T 925 : I L R (1965) Cut 510.**

4. Depositions.

● **——Ss 193 and 191, Expln. 2 — "Whoever being legally bound by an oath or by an express provision of law to state the truth"—Meaning of, stated—Person making a statement in Court on oath is bound to state truth—Statement made by him in affidavit found to be false — He had committed offence under S 193, — (Oaths Act (1873), Ss. 4, 5 and 14) AIR 1947 All 235. Overruled.** See Penal Code (1860), S. 191, Expln. 2. **1959 Cri L J 1124 : AIR 1959 S C 843.**

——S. 193—Deposition containing false statement — Prosecution for perjury — Non-compliance with S. 360, Criminal P. C. — Effect of — Criminal P. C. (1898), S. 360—Evidence Act (1872), Ss. 80 and 91.

Where a deposition by a witness contains a false statement, the deponent is guilty of perjury. The deposition is false notwithstanding its not being read over to the witness as required under S 360, Criminal P. C. The provisions of Penal Code relating to punishment for perjury do not pay any regard to the question whether the deposition was read over or not.

The deposition is to be produced in evidence against the deponent during his trial not for the purpose of proving its truth but for the purpose of proving that he made it. There is nothing in S 91, Evidence Act, to prevent this fact being proved without producing the deposition itself.

If a deposition is not read over to the witnesses, it is only an irregularity and the irregularity does not vitiate the conviction: AIR 1918 L B 129; 6 Cal 762; 23 Mad 308; 51 Cal 236; AIR 1924 Cal 705 and 12 C W N 845, Dissent. **1950 All L J 277 : 1950 All W R 323 : 1950 All Cri Cas 94 : 51 Cri L J 1346 : AIR 1950 All 501 (502, 503) (Pt A) (Prs 6, 10, 11).**

——S. 193—Applicability — Deposition — Failure to remember prior statement.

The mere failure to recollect a former statement made does not involve one in the offence of perjury. **AIR 1955 N U C (Andh-Pra) 5834.**

——S. 193—Deposition containing false statement— Prosecution for perjury — Non-compliance with

S. 360, Criminal P. C.—Effect—Criminal P. C. (1898), Ss. 360, 476.

Where a deposition made by a witness contains a false statement, the deponent is guilty of perjury. The deposition is false notwithstanding its not being read over to the witness as required under S. 360, Criminal P. C. The provisions of Penal Code relating to punishment for perjury do not pay any regard to the question whether the deposition was read over or not. If a deposition is not read over to the witness, it is only an irregularity and the irregularity does not vitiate the conviction AIR 1950 All 501, Foll. **1952 Cri L J 167 : AIR 1952 Sau 7 (7, 8) (Pr 1) (DB).**

5. False affidavit.

——S. 193—Applicability — False affidavit—Allegation on false information.

Where in an affidavit the deponent makes certain allegations based on information conveyed to him by other persons, even if the information which was given to him was wrong he cannot be held liable unless at the time he swore to the affidavit he knew that he was wrong and in spite of that knowledge he swore the affidavit. **1955 Cr L J 1439 : AIR 1955 All 608 (609) (Prs 11, 12).**

——S. 193—Applicability — Swearing a false affidavit and filing it in Court as evidence — Offence under S. 193 is committed—Fact that affidavit was not fully in conformity with O. 19, R. 8, held immaterial — (Evidence Act (1872), S. 3)—(Civil P. C. (1908), O. 19, R. 1, R. 8 (All)) —(Oaths Act (1873), S. 14). **AIR 1955 N U C (All) 2700.**

——S. 193 — False affidavit filed by Amin of Municipality on relevant questions of fact — Prosecution under S. 193, Penal Code, desirable. See Criminal P. C. (1898), S. 476. **1963 (2) Cr L J 526 : AIR 1968 Orissa 179.**

6. Contradictory statements.

——S. 193—Murder trial—Conflicting statements as to commission of murder by witness — Charge for perjury - Delay in filing application under S. 476, Criminal P. C. — Effect — Criminal P. C. (1898), S. 476.

Where a person as a witness for the prosecution in a murder trial makes conflicting statements regarding the commission of murder, it is expedient in the interest of justice that he should be tried under S. 193. The delay in filing the application under S. 476, Criminal P. C, after the decision of the murder case, is not material in the circumstances. **51 Cri L J 1187: 1950 All L J 34 : AIR 1950 Ajmer 37 (2) (38) (Pr 3).**

——S. 193—Scope—Contradictory statements not in course of same deposition—Conviction for perjury — Nature of proof — Proceedings under S. 476 distinguished.

If the prosecution succeeds in proving that an accused in the witness-box deliberately made two statements which are so contradictory to, and irreconcilable with, each other, that both cannot possibly be true, he can be convicted of perjury even without its being proved which one of them was not true. It is only when the prosecution charges him with making a particular statement falsely, that it has to prove that that statement is false and not the other. When all that is proved is that one of the two statements is false, it means that it is not proved that a particular statement is false. If the accused is charged with making that statement falsely, naturally the charges must fail.

Mens rea is an essenial ingredient of the offence of perjury. The mere fact that a statement made by a witness turns out to be wrong or inaccurate does not make him liable to punishment. He must make the statement deliberately and must know or believe it to be false or must not believe it to be true.

When a witness admits having made a previous statement incorrectly and corrects himself later, it is not expedient to prosecute him for perjury. Where the two statements made by the applicant were so contradictory to each other that they could not be reconciled with each other and could not both be true and one of them was bound to be false, the applicant deposing about matters which were within his knowledge and there being no scope for his making any mistake, it is clearly a case of making both the statements deliberately and when they are found to be irreconcilable he must be convicted.

It is quite immaterial that the two contradictory statements were made in the course of one deposition in one trial. If the requirements of S. 191 are fulfilled, he committed the offence of perjury as soon as he made it. The completion of the offence does not remain in abeyance for a short time in order to give him an opportunity of repenting and correcting himself. The offence is not purged or wiped off by subsequent repentence or retraction or correction. S. 191 does not take into consideration the fact that the false statement was subsequently in the same deposition or in the same trial, admitted to be incorrect and replaced by the correct statement or that the deposition was not finished before the accused corrected himself.

The questions that are in issue when a person is prosecuted for perjury are quite different from those that arise in proceedings under S. 476 of the Cr P. Code. In the latter the Court has to see whether it is expedient in the interest of justice to prosecute the witness for committing perjury whereas in the former the Court has only to see whether the ingredients of the offence of perjury are proved by the prosecution and is not at all concerned with the question of the expediency. No accused can be acquitted of the charge of perjury on the ground that it was not expedient to prosecute him. **1954 Cr L J 860 : 1954 All L J 246 : 1954 All W R (H C) 10 : AIR 1954 All 424 (425 to 427) (Prs 2 to 4, 6, 9).**

——Ss. 193, 191 — Charge of perjury — Burden of proof is on prosecution — Contrary statements made before police prior to deposition in Court—Burden is not shifted. A I R 1965 Andh Pra 402.

——S. 193 — Criminal P. C. (1898), S. 195 (1) (b)—Offence under S. 193, Penal Code—Cognizance of—When can be taken.

A made certain statement before B, a Magistrate 2nd Class in the course of an enquiry directed by C, a First Class Magistrate. Before the Magistrate C, A however made a contrary statement and stated that his prior statement was false. C, thereupon, filed a complaint against A for trial of A for an offence under S. 193, Penal Code. A was tried and convicted by another Magistrate. On revision against the order:

Held, that there being nothing else apart from the contradictory character of the statement, the Magistrate C was not in a position to decide which of these statements was false and hence could not file a complaint under S. 195 (1) (b), Criminal P. C. in respect of any offence committed before him.

Further, C could not file a complaint on behalf of Magistrate B as B's Court was not subordinate to C's Court. Hence, the cognizance taken on the complaint of C was bad and the whole trial illegal **1956 Cri L J 398 : A I R 1956 Cal 63 (63) (Pr 2) (DB).**

——S. 193—Applicability — Contradiction between pleading in plaint in former suit and deposition in later suit—Prosecution for perjury — (Criminal P. C. (1898), S. 476).

In many cases persons in verifying pleadings are often found to say something which is not strictly true; but by such action they do not render themselves liable for prosecution for perjury for making a false statement. This by itself does not constitute an offence under S. 193. A I R 1930 Cal 639, Foll.

Accused making allegation of oral partition in plaint in former suit — Accused stating on oath in later suit that there was no partition — Allegation of oral partition found not necessary for getting decree in former suit nor allegation spoken to by accused in evidence recorded in that suit — Facts showing that there could have been no intention to make false statement to get undue advantage over defendant or to mislead Court — Allegation of oral partition held could not be regarded as intentionally false so as to attract operation of S. 193, Penal Code. 1954 Cri L J 1201 : 20 Cut L T 188 : I L R (1954) Cut 87 : A I R 1954 Orissa 193 (194) (Pt A) (Pr 3).

——S. 193 — Scope — Contradictory statements—Desirability of prosecution.

If a person makes two contradictory statements and the Court finds that he has in fact reverted to truth in the later statement it is not always desirable that he should be prosecuted for perjury. 1953 Cri L J 1221 : I L R (1953) Patiala 137 : A I R 1953 Pepsu 110 (111) (Pt B) (Pr 2).

——S. 193—Scope—Contradictory statements—Conviction.

It is very unsafe to convict an accused of perjury simply because there is some oral evidence to show that the statement was false. The evidence to prove perjury should be as strong if not stronger, as in any other criminal case. The Court should have no reasonable doubt about the statement being perjured before it can convict an accused of perjury. Even if there are two contradictory statements, the accused should be convicted of perjury only when they are found to be altogether irreconcilable. A witness has a right to correct himself, and if he had stated something in a statement and further on he thinks that the statement was not correct, he is entitled to make the necessary correction. 1954 Cri L J 1000 (Raj) : 1953 Raj L W 215.

7. Complaint.

——S. 193—Proceedings before Income-tax Officer —Offence under S. 193, Penal Code, committed in respect of such proceedings — Complaint by private party not competent. See Income-tax Act (1922), S. 37 (4). 1964 (2) Cri L J 249 : A I R 1964 S C 1154.

——Ss. 193 and 194 — Offence committed during investigation — No complaint under S. 195 (1) (b) is necessary by Court See Criminal P. C. (1898), S. 195 (1) (b). 1959 Cri L J 2 : A I R 1959 All 14.

——Ss. 193 and 465 — Offence under S. 193, Penal Code—Absence of complaint by Court — It is not open to complainant that he would confine his case to an offence under S. 465 for which no complaint by Court is needed. See Criminal P. C. (1898), S. 195 (b). 51 Cri L J 1235 : A I R 1950 All 465.

——S. 193 – Criminal P. C (1898), Ss. 476 and 4 (h)— "Make a complaint thereof in writing" — Judgment containing complaint under S. 193, Penal Code at the end and setting out precise facts and evidence available—Requirements of complaint held satisfied— Separate formal complaint is not necessary. See Criminal P. C. (1898), S. 476. A I R 1955 N U C (Cal) 2906 (DB).

——S. 193—Requirements for prosecution of witnesses under S. 193, stated — Contradictory statements by witnesses in two different Courts — Court competent to file complaint. See Criminal P. C (1898), S. 479-A (1). 1961 (1) Cri L J 668 (Madh Pra).

——S. 193—Complaint without giving witness opportunity of being heard is invalid. 1962 Mad W N 290.

——Ss. 193, 467 and 471—Applicability.

Complaint containing allegations that the accused as guardian of his minor daughter had filed a suit against the complainant on the basis of a will forged by him intending that such will may cause the Judge before whom the suit is filed to form an opinion that the will is genuine one and therefore his minor daughter was entitled to the property.

Held, that the complaint disclosed offence under S. 193, Penal Cade as well as those under Ss. 467 and 471, Penal Code. 1954 Mad W N 231 : (1954) 1 Mad L J 650 : 56 Cri L J 716 : A I R 1955 Mad 237 (238) (Pt B) (Pr 2).

——S. 193—Offence of perjury – Court must consider whether it is expedient in interest of justice to make complaint. See Criminal P. C. (1898), S. 476 1954 Cri L J 374 : A I R 1954 Mad 303.

——S. 193 — Complaint when not proper for offence under Penal Code (1860), S. 193—In case of doubt in the mind of District Magistrate unless he specifically and clearly finds that the statements made in Court are false, he should not order prosecution for offence under S. 193. See Criminal P. C. (1898), S. 476. 1953 Cri L J 1382 : A I R 1953 Mad 745.

——S. 193—False statement – Duty of cross-examiner pointed out—Finding as to expediency of prosecution in the interest of justice is essential. See Criminal P. C. (1898), S. 476. A I R 1955 N U C (Orissa) 1471.

——S. 193—Criminal P. C. (1898), S. 479-A—Criminal trial—Sessions Judge holding prosecution case to be false and acquitting accused – No finding in acquittal order that complainant should be prosecuted for perjury — Judge is debarred from filing such complaint against complainant by subsequent order. See Criminal P. C (1898), S 479-A. 1961 (1) Cri L J 303 (2) : A I R 1961 Pat 71.

——S. 193—Criminal P. C. (1898), S. 479-A — Complaint under—When can be filed - Persons swearing false affidavits in writ proceedings — High Court expressing opinion that it was satisfied about false swearing—No opinion about their having given false evidence intentionally and for prosecution under S. 193, Penal Code, however, expressed — Complaint cannot be filed. See Criminal P. C. (1898), S. 479-A. 1961 (2) Cri L J 796 : A I R 1961 Raj 268 (DB).

8. Proof.

——S. 193 — Contradictory statements on oath by accused—Complaint under S. 476 for perjury—Proof —Question as to which one of two statements is false is irrelevant. See Criminal P. C (1898), S. 476. 1959 Cri L J 564 : AIR 1959 Andh-Pra 250.

——Ss. 193 and 191—Applicability—Proof.

Where in a miscellaneous proceedings before the Deputy Commissioner for direction to a person who was alleged to be in the possession of the movable property of the deceased that person filed a statement containing a list of such property according to the direction of the Deputy Commissioner and was charged under S. 193, Penal Code, for giving false evidence by the concealment of certain items from that list.

Held, that in order to attract the applicability of S. 193 to the case it was necessary to show that the list supplied by the accused amounted to a declaration which he was bound by law to make and so long as that condition was not satisfied the charge under S. 193 could not succeed 55 Cr L J 1838 : AIR 1954 Assam 259 (261) (Pt C) (Pr 5) (DB).

——S. 193 – Prejury—Complaint in respect of—Proof —Intention is an essential ingredient of the offence

of perjury—No man can be convicted of giving false evidence except on proof of facts which if accepted as true show not merely that it is incredible but that it is impossible that the statement of the party accused made on oath can be true. See Criminal P. C. (1898), S. 476. **1959 Cr L J 848 : AIR 1959 Madh Pra 264.**

——S. 193—If explanation given by the party accused is possible no action to prosecute him under S. 193, should be taken. See Criminal P. C., S. 476. **1952 Nag L J (Notes) 53.**

——S. 193—Essentials—Intention is essential ingredient — Prosecution must prove that accused knew when making statement that it was false—Rash and credulous act and failure to make reasonable inquiry is not enough.

Intention is the essential ingredient in the constitution of the offence of giving false evidence punishable under S. 193, Penal Code. The prosecution has to establish in a trial for an offence under that section that the accused knew at the time of making the statement that it was false or believed it to be false or did not believe it to be true. An accused cannot be convicted of giving false evidence for having acted rashly and credulously and having failed to make reasonable inquiry with regard to the facts alleged by him to be true. **1952 Nag L J (Notes) 53.**

——S. 193—Prosecution for perjury—Previous statement of accused — Necessity of confronting — Evidence Act (1872), S. 145.

Under S. 145, Evidence Act, it is necessary that witness should be confronted if his evidence is to be attacked by a previous statement, but such a thing is not necessary where a person is prosecuted under S. 193, Penal Code. The fact that in the judicial proceeding in which he is alleged to have given the false evidence he is not confronted with the previous statement will not vitiate his prosecution. **53 Pun L R 122 : 52 Cri L J 1497 : AIR 1951 Punj 131 (132) (Pr 6).**

9. Practice and procedure.

——S. 193—Perjury — Defendant, a pleader committing deliberate perjury — High Court taking serious view of offence — But out of respect for old age of defendant and in view of apology of his counsel in his presence, his Lordship forgave him. **AIR 1952 Cal 773 (774) (Pt A) (Pr 8).**

——S. 193 — Transfer application — Procedure. See Criminal P. C. (1898), S. 526. **1959 M P C 226.**

——Ss. 193 and 196 — Facts alleged making out offences under S. 193 as well as under Ss. 463, 467 and 471, Penal Code — Proper procedure for filing complaint for offence under Ss. 463, 467 and 471 — Procedure under S. 476 not illegal. See Cr. P. C. (1898), S. 476. **1962 (2) Cri L J 89 : AIR 1962 Pat 282.**

——S. 193—Prosecution under legislation or preventing food adulteration—Doubt in Magistrate's mind as to truthfulness of evidence by responsible Govt. Officer giving evidence for prosecution — Duty of Magistrate.

Where in prosecution for an offence under the Prevention of Food Adulteration Act, 1954, the Magistrate entertains a genuine doubt about the presence of an officer of the Prevention of Food Adulteration Department (who figures as a prosecution witness) at the time of the sale of an article of food for analysis, then it is the Magistrate's duty not to leave the matter at that. He should pursue the matter further because the officer has on this premise tried falsely to help the prosecution of an innocent citizen, which is intolerable in a democracy like ours, which is continually subject to moral judgments. In case the doubt was not justified, then it was highly unfair to the officer concerned Except, preservation of their liberties, no people can have any higher interest than integrity in the administration of their Government in all its forms. **1965 (2) Cri L J 571 (Punj).**

10. Charge.

——S. 193—Charge—Frame of—Application for transfer of case under S. 24, C. P. Code—False statements in affidavit — Charge against him stating that it was framed under S. 193, Penal Code in respect of those statements knowing or believing them to be false — Held that the fact that charge was made under S. 193 was tantamount to a statement that every legal condition including that of intention was fulfilled — (Cr. P. C. (1898) Ss. 221 and 539). **AIR 1955 N U C (Cal) 2906 (DB).**

——S. 193—Scope—Contradictory statements in same deposition — Alternative charge under held justified —Propriety. See Cr. P. C. (1898), S. 236. **1959 Cr L J 197 : AIR 1959 Madh Pra 35 (DB).**

——S. 193 — Contradictory statements charge under S. 193, may be framed alternatively. See Cr. P. C. (1898), S. 236, Illus. (b) and Sch X. xxviii, (110-No. 4). **AIR 1955 NUC (Orissa) 3980 (DB).**

——S. 193—Complaint under—Statement in criminal case — Charge including another statement from previous civil suit in alternative — Not legal. See Criminal P. C. (1898), S. 195. **1958 Cr L J 1241 : AIR 1958 Raj 240 (DB).**

——S. 193—Alternative charge—When proper, indicated — Held on facts that the two statements mentioned in the charge being wholly unconnected did not form a series of facts mentioned in S. 236 Cr. P. C. and a charge in the alternative in respect of the two statements could not be made. See Criminal P. C. (1898), S. 236, Ill. (b). **1958 Cr L J 1241 : AIR 1958 Raj 240 (DB).**

11. Conviction and sentence.

——S. 193—Offences of cheating and false evidence —No fraudulent representation—Reasonable explanation by accused — Accused held entitled to benefit of doubt. See Penal Code (1860), S. 420. **1957 Cri L J 583 : AIR 1957 S C 466.**

——S. 193—Swearing of false affidavit—Sentence.

The accused in support of his transfer application made before the District Judge, had filed an affidavit making certain allegations against his decree-holder, who was a retired District and Sessions Judge. On enquiry under S. 476, Criminal P. C., the affidavit was found to be false. The accused was prosecuted under S. 193, and was convicted and sentenced to six months R. I. :

Held, that the sentence was somewhat excessive. A substantive sentence of one month's rigorous imprisonment and a fine of Rs. 3,000 would meet the ends of justice. **1965 All W R (HC) 508 : 1965 All Cr R 321 : 1965 All L J 940 : 1966 Cri L J 825 (All).**

——S. 193 — Complaint under in respect of offence under S. 193, Penal Code—Accused can be convicted of offences under S. 466/471, Penal Code. See Criminal P C. (1898), S. 476. **1962 (1) Cri L J 229 : A I R 1962 All 132 (DB).**

—S. 193 — Accused as witness giving general answers in reply to specific question — General answers found to be false — Conviction under S. 193 if justified—Sentence.

Where as a witness in a criminal case, the accused was asked whether he had been arrested in a prohibition case, and he states in reply that he had not been arrested in any case by the police and had never been in custody before and to emphasise that he was not concerned in any police case he went on to add that he had never entered the Courts before, the answers given by the accused are very general and are not confined only to prohibition cases but apply to other cases also. Where his answers are found to be false for he was arrested by the police and was actually on bail at the time he gave false evidence though it was not a prohibition case, he can be convicted under S. 193, Penal Code.

Where it appeared in the circumstances of the case that the accused gave false answers to the questions put to him either under the influence of the police or because he was under the impression that if he gave such evidence he would be able to obtain a discharge in the case which was then pending against him.

Held, that a severe sentence was not called for. 1956 Cri L J 891 : A I R 1956 Bom 185 (186) (Pars 4, 6) (DB).

—Ss. 193 and 191 — Scope — Statement on oath — Statement continued on subsequent date — Oath also continues — Statement not read over to witness — Conviction not affected. See Penal Code (1860), S. 191. A I R 1954 Punj 211.

—Ss. 193, 467, 471 — Forged thumb impression — Acquittal on charges under S. 467 and 471 — Accused can be convicted under S. 193.

It cannot be said that where the accused and others are exonerated of charges under Ss. 467 and 471, Penal Code, the conviction of the accused under S. 193, Penal Code, cannot be maintained. There is no legal bar for arriving at a finding that the thumb impression on the document was forged in connection with the determination of the guilt of the accused under S. 193, Penal Code on the basis of the examination with respect to other charges, especially when the question arises during the course of one trial. Secondly, even without a definite finding regarding forgery, the accused can be treated as having fabricated false evidence if it is shown that he made a document, purporting to be one on behalf of a certain person, when in fact there was no justification or authority for making of that kind of document. 1960 (1960) 16 Raj 1191 : 1960 Raj L W 521.

SECTION 194

—S. 194—Criminal P. C. (1898), Ss. 479A, 476 — Scope — S. 479A may be resorted to in cases falling within first paragraph of S. 193, Penal Code and Ss. 194 and 195 — Offence under S. 471, Penal Code — S. 479A (1) not applicable — Resort to S. 476 proper. See Criminal P. C. (1898), S. 479-A. 1964 (1) Cri L J 555 : A I R 1964 S C 725.

—S. 194—Jurisdiction—Case falling under first part of section—Magistrate empowered under S. 30, Criminal P. C. is competent to try the case. See Criminal P. C. (1898), S. 28. 1964 Cri L J 1494 : A I R 1964 Him Pra 79.

SECTION 195

—S. 195:— Criminal P. C. (1898), Ss. 479A, 476 — Scope — S. 479A may be resorted to in case falling within first paragraph of S. 193, Penal Code and Ss. 194 and 195 — Offence under S. 471, Penal Code — S. 479A (1) not applicable—Resort to S. 476 proper. See Criminal P. C. (1898), S. 479-A. 1964 (1) Cri L J 555 : A I R 1964 S C 725.

—Ss. 195, 193 — Alleged substitution of original F. I. R.—Circumstances and evidence indicating allegation to be justified—Offences under Ss. 193 and 195 of the Code clearly appear to have been committed and further inquiry by Magistrate is needed. See Criminal P. C. (1898), S. 476. 1965 All W R (HC) 313 : 1965 All Cri R 229 : A I R 1966 All 66 (DB).

—Ss. 195, 193 — Scope — S. 195 is an aggravated form of offence contemplated under S. 193. 1965 All W R (HC) 316 : 1965 All Cr R 229 : 1966 Cri L J 115 : A I R 1966 All 66 (68) (Fn C) (Fn 10) (DB).

—S. 195 — Witness making voluntarily statements before Court — Prosecution under S. 500 on basis of private complaint is not barred merely because statements disclose offence under Ss. 193 and 195. See Criminal P. C. (1898), S. 195. 1965 (2) Cri L J 705 (1) : A I R 1965 All 537.

SECTION 196

—Ss. 196, 471—"Corruptly"—It means something different from 'dishonestly' or 'fraudulently'—Filing false receipts to claim tenancy—Accused is guilty of 'corruptly' using as true or genuine evidence, which he knows to be false—Offence is not under S. 471 but under S. 196—Cri. Rev. Appeal No. 23 of 1959 (Bom), Dss. from. A I R 1955 N U C (Cal) 562.

—Ss. 193, 196, 468, 467 and 471 — Criminal P. C. (1898), Ss. 479, 479A and 255—Facts alleged making out offences under S. 193 as well as under Ss. 468, 467 and 471, Penal Code—Proper procedure for filing complaint for offence under Ss. 468, 467 and 471—Procedure under S. 476 not illegal. See Criminal P. C. (1898), S. 479. 1962 (2) Cri L J 88 : A I R 1962 Pat 252.

SECTION 199

—S. 199—Applicability — Consent to marriage by bogus guardian before Special Marriage Registrar—Offence—Prosecution under S. 199 Penal Code read with S. 21, Special Marriage Act—Sustainability.

Where an ad hoc guardian got up temporarily for the purpose of a marriage to be performed under the Special Marriage Act subscribes to the declaration by the girl before the Special Marriage Registrar to the effect that he was her guardian and had given consent to her marriage, knowing that the father of the girl and her natural guardian was not prepared to consent to such a marriage, he becomes a bogus guardian of the girl and as such makes a false declaration and statement before the Registrar and thereby commits an offence under S. 199, Penal Code read with S. 21, Special Marriage Act. 1956 Cri L J 362 : A I R 1956 Bom 439 (442) (Pr B) (Pr 9) (DB).

SECTION 200

—S. 200, Exception 1 and S. 302 — Grave and sudden provocation—Long standing feeling of provocation becoming motive—Expl. 1 will not apply.

Where the accused had known that the deceased was misbehaving with his mother that would certainly afford provocation to him to retaliate. But when such feeling of provocation is a long standing one gaining intensity from day to day until finally the person harbouring such feeling yields to the provocation by attacking his enemy, it cannot be said that he is acting under grave and sudden provocation. Feeling of provocation which he was entertaining can only be termed the motive for the act committed by him and when the accused comes to the house knowing that the deceased is there to punish the deceased he cannot be said to have acted under exception (1) to S. 300. 1962 Ker L J 1004.

SECTION 201

SYNOPSIS

(Penal Code (1860), S. 201).

1. Essentials of the offence.
2. "Whoever causes evidence to disappear."
3. Intention necessary for the offence.
4. Evidence of the offence.
5. Charge.
6. Practice and procedure.
7. Conviction and sentence.

1. Essentials of the offence.

—S. 201—Ingredients — Mere knowledge of removal of dead bodies not sufficient.

Per Kapur and Hidayatullah, JJ. — It may be that the accused had knowledge of the removal of the dead bodies, but what S. 201 requires is causing any evidence of the commission of the offence to disappear or giving any information respecting the offence which a person knows or believes to be false. Ragha Prapanna Tripathi v. State of Uttar Pradesh, 1963 (1) Cri L J 70 : 1962 S C J 1024 : AIR 1963 S C 74 (89, 90) (Pt D) (Pr 63).

—S. 201—Applicability—Essentials.

Before an offence under S. 201 can be made out, it is necessary that the person charged should, among other facts, know that an offence had been committed and that he caused the evidence thereof to disappear. He should be instrumental in the disappearance of the evidence of the crime. 1958 Cri L J 821 : AIR 1958 All 467 (473) (Pt D) (Pr 30) (DB).

—S. 201 — Applicability — Offence in respect of which evidence is removed must have been committed.

Where the charge against the accused was that he caused disappearance of the evidence of the offence of forgery, and the first charge failed the ingredients essential to constitute an offence under S. 201, were lacking and the accused could be rightly discharged. 1955 Cri L J 769 : 1954 Mad W N 1013 : 1954 Andh L T (Cri) 49 : (1954) 2 M L J (Andhra) 103 : AIR 1955 Andhra 82 (83) (Pt B) (Pr 4).

—S. 201 — Ingredients of offence indicated. AIR 1955 N U C (Hyd) 908 (DB).

—Ss. 201, 203 and 182 — Scope—Ss. 201 and 203 contemplate information given to private persons as well as public servants — First information reports under S. 154, Cr. P. Code are covered by sections but statements made to police during investigation are not covered.

Sections 201 and 203, I. P. Code, contemplate giving information respecting an offence which the accused person knows or believes to be false. For the offence under S. 201, I. P. Code, the false information should also be furnished with the intention of screening the offender from legal punishment. S. 182 of the Penal Code deals with giving false information to any public servant.

If any person gives the first information statement to the police even though not voluntarily which is recorded under S. 154, Cr. P. Code and if it ultimately turns out to be false it would amount to giving false information and the offender would be punishable under S. 201, I. P. Code, provided the requisite intention is proved. AIR 1953 S C 131, Foll.

But statements given by a person in the course of an investigation by the police cannot amount to an offence under Ss. 201 and 203, I. P. Code, even if they ultimately turn out to be false. AIR 1933 Pat 555 (1) and AIR 1936 Sind 94, Diss from. 1961 Ker L T 1060 : 1961 Ker L J 1393 : ILR (1962) 1 Ker 224 : 1961 (1) Cri L J 610 : AIR 1962 Ker 133 (134, 135, 137) (Prs 4, 5, 24) (DB).

—S. 201—Applicability—Ingredients of offence.

Section 201 looks upon a person giving false information with intent to screen an offender as an accessory after the fact and makes him culpable as an offender committing an offence against public justice, as the policy of the law is that even at the early stage of the enquiry nothing should be done which would lay false trials or cause the enquiry to be burked or weaken the prosecution and injuriously interfere against public justice. S. 201 will apply only when the false information touching the offence with intent to screen the offender is given to those interested in bringing the offender to justice. If the accused gives information to a wayfarer, it will only be a case of gossiping and not with intent to screen the offender. This connotation vastly reduces the denotation of the persons thus informed, and in practice would reduce itself only to the authorities, persons in authority and the persons so interested that they would take action to bring the offender to justice, e. g., the father, guardian, caste head etc.

Some sections in Chapters 10 and 11 of the Penal Code use the words that the information should be given to a public servant and some sections lay down that such information should be given by persons legally bound to do so. In the case of S. 201 neither the term 'public servant' nor the term 'legally bound' is used. In other words, persons to whom information is given will take in non public servants. Persons not legally bound to give information would take in persons like the principal or the actual offender. This false information can be given at a very early stage and the object is to put off the enquiry and screen the offender by puting, for instance, an innocent complexion on an otherwise sordid crime. 72 Mad L W 522 : 1959 Mad W N 433 : ILR (1959) Mad 654 : 1960 Cri L J 85 : AIR 1960 Mad 9 (14, 15) (Prs 24 to 27) (DB).

—S. 201—Essentials of offence.

In order to establish the charge under S. 201 of the Indian Penal Code, it is essential to prove that an offence has been committed — mere suspicion that it has been committed is not sufficient—and that the accused knew or had reason to believe that such an offence had been committed. AIR 1952 S C 354 Foll.

Held, that the prosecution having failed to establish that the dead body exhumated was that of the person alleged to be murdered and that the fracture of jaw was the result of an ante-mortem injury there could be no justification for convicting the accused on the assumption that he had caused the disappearance of the evidence of an offence under S. 326 of the I. P. C., in this view of the case much importance could not be attached to the circumstance that it was on the information of the accused person, that the place where the corpse was buried was discovered. 1959 Cr L J 1349 : 37 Mys L J 511 : 1959 M L J (Cri) 919 ; A I R 1959 Mys 250 (252) (Pt B) (Pr 4) (DB).

—Ss 201, 211 and 167 — Prosecution or giving false information—Protest pending enquiry—Opportunity to prove truth of that charge — Duty of Court to give.

Where a person who is accused of having committed an offence by reason of his having given false information, demands a judicial investigation into the truth of the charge made by him, he is entitled to be given an opportunity to prove the truth of that charge. During the pendency of such judicial investigation into what should be regarded as a complaint made by accused in this case a prosecution against him on the supposition that the charge made by him

was false is unjustified. 1959 All W R (Sup) 12 : 1959 All Cr R 111 : 1959 M L J (Cri) 204 (Mys).

—S. 201 — Accused not attempting to screen anybody else excepting themselves — No offence under S. 201 arises for consideration of Court. 1956 Cri L J 638 : ILR (1955) Cut 625 : AIR 1956 Orissa 108 (111) (Pt C) (Pr 16) (DB).

—S. 201—Applicability—Murderer removing dead body—Offence.

A murderer by removing a dead body from a place of murder to another place cannot be held to screen himself as the person to be screened must be somebody else than the offender within the meaning of S. 201, Penal Code. 1958 Raj L W 353 : 1958 Cri L J 1540 : ILR (1957) 7 Raj 944 : AIR 1958 Raj 338 (342) (Pt E) (Pr 7) (DB).

2. "Whoever causes evidence to disappear."

—S. 201—'Any evidence of the commission of that offence'—Expression refers not to evidence in extensive sense but to evidence in its primary sense as meaning anything that is likely to make crime evident such as existence of wounded corpse or blood-stains etc. -Words causing disappearance imply some active exertion in that direction — Held, picking of blood-stained pestle and placing it in almyrah of house without anything more would not satisfy requirements of S. 201, Evidence Act (1872), S. 3. ILR (1963) Andh Pra 454.

—S. 201—"Whoever causes evidence to disappear" —Accused himself responsible for offence evidence of which has been made to disappear by him — He can be convicted under S. 201. A I R 1955 N U C (Assam) 2832 (DB).

—S. 201 - 'Whoever causes evidence to disappear' —Proof of mere knowledge of disappearance of evidence not enough for conviction under S. 201.

The fact of discovery, of course proves knowledge on the part of the person discovering the fact. But mere knowledge of the existence of such a fact is not sufficient to make him guilty under S. 201. To make a person guilty under S. 201, it must be proved that that person had caused the evidence of the commission of the offence to disappear and not merely that that person knew that some other person had caused the evidence of the commission of the offence to disappear. It must be positively proved that it was the accused who had caused the evidence of the commission of the offence to disappear. (1962) 3 Guj L R 571 : 1962 (2) Cr L J 66 : A I R 1962 Guj 225 (226) (Pt B) (Pr 7) (DB).

—S. 201—"Whoever causes evidence to disappear" — Mere pointing out place of burial does not lead to presumption that accused concealed dead body there. AIR 1955 N U C (Hyd) 908 (DB).

—S. 201 — Evidence of offence — Circumstantial evidence.

Held, on facts that, from all the circumstances of the case it was reasonable to infer that the accused knowing that the deceased was killed, had tried to dispose of his dead body with a view to destroy the evidence of murder. 1962 Mad L J (Cr) 41 : 1962 (2) Cr L J 81 : 40 Mys L J 504 : I-L R (1961) Mys 524 : AIR 1962 Mys 138 (139) (Pt B) (Pr 18) (DB).

—S. 201 — Removal of dead body from place of occurrence is not causing disappearance of evidence of offence.

Removal of the dead body of a murdered person from the place of murder to another place does not by itself necessarily amount to causing the disappearance of evidence of the commission of the offence with the intention of screening the offender from legal punishment, though in certain circumstances such removal of the body may amount to causing disappearance of evidence of the offence by the real culprit. It is a matter of evidence in each case.

The use of the word 'concealed' by itself does not furnish the essential ingredient of causing disappearance of evidence as contemplated by S. 208. 63 Punj L R 526 : 1961 (2) Cr L J 886 (Punj).

—S. 201—Causing evidence to disappear.

The expression 'any evidence of commission of that offence' refers to evidence in its primary sense as meaning anything that is likely to make the crime evident, such as the existence of a wounded corpse or blood-stained clothes and weapons, fabricated documents or similar material objects, indicating that an offence has been committed.

Held, that the removal of the corpse from the village to the Grand Trunk Road suggested that by removing the corpus delicti the intention was to avert the suspicion from the accused. The removal was presumably with a view to suggest that the man had been done to death by someone who was a passerby. This act was an attempt to screen the real offenders. The conclusion as to the commission of the offence under S. 201, Penal Code, by the accused was therefore inescapable. A I R 1921 Bom 115, Rel. on ; AIR 1952 S C 354 Disting. 1958 Cr L J 689 : I L R (1957) Punj 1985 : A I R 1958 Punj 183 (186) (Pt C) (Pr 13).

—S. 201—Causing evidence to disappear — Hiding blood-stained weapon—Effect of.

When a weapon is stained with human blood it affords a primary evidence of the offence and not any evidence in the extensive sense and if a person conceals that weapon, provided his intention in doing so is to screen the offender, he is guilty of causing that evidence to disappear. View of Sharif, J. in 48 Cr L J 786 (Lah); Not Foll. 1958 Cr L J 689 : I L R (1957) Punj 1985 : A I R 1958 Punj 183 (186) (Pt D) (Pr 14).

—S 201—Applicability — Removal of corpse from place of murder - Offence.

Removal of the corpse of a murdered man from the place of murder to another place is not causing disappearance of some evidence of commission of the murder and the offence would not fall under S. 201. A I R 1934 Cal 144 and A I R 1941 Cal 456, Rel. on. ILR (1957) Punj 950 : 1957 Cr L J 1307 : AIR 1957 Punj 278 (283) (Pt B) (Pr 36) (DB).

3. Intention necessary for the offence.

—Ss. 201 and 94—Intention — Offence committed under duress.

The accused in his statement in the Court stated that he held the legs of the deceased under threat of instant death and helped the murderers in removing the body and concealing it. He did not say in his statement that he protested against carrying the body and that he was again threatened with death. It was clear however from the statement of the accused that the murderers practically kept him in custody when he removed the body at their order and that the person who had threatened him and asked him on pain of death to hold the legs of the deceased was amongst them. The Court did not question him specifically about the removal and ask him to explain his conduct in doing that.

From the circumstances disclosed by him in his statement and also in view of the fact that in all probability if he had been questioned he might have answered that he removed the dead body on account of the fear of instant death at the hands of the murderers it was reasonable to hold that his conduct in removing the dead body was also on account of his fear of instant death at the hands of the murderers in

case he refused to do so. (1956) 1 W L R 965 (PC), Rel. on. 1957 All L J 20 : 1957 All W R (HC) 86 : 1957 Cri L J 344 : AIR 1957 All 184 (188, 189) (Pt F) (Prs 18, 19) (DB).

[Overruled on another point in AIR 1966 All 192].

——S. 201—Shoes of murdered person discovered at instance of accused — Intention to screen offender can be inferred.

The statement of the accused that he had hidden the shoes of the murdered person is admissible in evidence under S. 27 of Evidence Act and his intention to screen the offender from punishment must be inferred. AIR 1952 Bom 299 (FB), Rel. on. (1962) 3 Guj L R 1052 : 1963 (1) Cri L J 755 : AIR 1963 Guj 135 (139) (Pt C) (Pr 12) (DB).

——S. 201—Essentials of — Intention to screen accused must be sole object — Mere likelihood not sufficient.

What S. 201, I. P. Code requires is that the accused must have had the intention of screening the offender. To put it differently, the intention to screen the offender must be the primary and sole object of the accused. The fact that the concealment was likely to have that effect is not sufficient, section speaks of intention as distinct from a mere likelihood. 1962 M P L J 1064 : 1962 Jab L J 876 : 1963 (1) Cri L J 433 : ILR (1963) Madh Pra 730 : AIR 1963 Madh Pra 106 (114) (Pt H) (Pr 33) (DB).

——S. 201—Mere removal of dead body is not sufficient — Intention to escape punishment must be proved.

A mere act of removing the dead body of a murdered may not by itself be sufficient to justify a conviction under S. 201, I. P. C. It is necessary to prove in a case under S. 201, I. P. C., that such removal was made with the intention of screening the offender from legal punishment. AIR 1953 S C 131, Rel. on. ILR (1965) 1 Mad 346.

4. Evidence of the offence.

——S. 201 - Evidence—Circumstantial evidence—(Evidence Act (1872), S. 3).

In order to establish the charge under S. 201, I. P. Code, it is essential to prove that an offence has been committed that the accused knew or had reason to believe that such offence had been committed and with the requisite knowledge and with the intent to screen the offender from legal punishment causes the evidence thereof to disappear or gives false information respecting such offence knowing or having reason to believe the same to be false.

The Court should safeguard itself against the danger of basing its conclusion on suspicions however strong they may be and the necessity for adopting the caution becomes absolute in a case in which the situation of the parties, the belated investigation of the case and the sensation it had created demands the same; (1838) 2 Lewin 227 and AIR 1952 S C 343, Rel. on.

Where there is no direct evidence and the circumstantial evidence answers the questions, essential to the proof of the offence, only vaguely and indefinitely and is not incompatible with the theory of the innocence of the accused there is no evidence on which the accused can be found guilty. Palvinder Kaur v. State of Punjab, (1952) S C J 545 : 1953 Mad W N 418 : 1953 Cri L J 154 : 1953 All L J 18 : 1953 S C R 94 : 1953 All W R (Sup) 19 : 1953 B L J R 30 : ILR (1953) Punj 107 : AIR 1952 S C 354 (356, 358) (Pt A) (Prs 13, 14, 19) (DB).

——S. 201—Evidence of offence—Meaning—Murder case—Concealment of weapon with which offence was committed and blood-stained clothes of accused —No offence under S. 201.

When an offence is committed, there may be evidence of various types : (1) Evidence to show that the offence had been committed, (2) Evidence to show that the offence had been committed at a particular place; (3) Evidence to show that the offence had been committed by a particular person or persons. When S. 201 uses the expression 'whoever causes any evidence of the commission of that offence to disappear', it refers to a person who causes the evidence of actual commission of the offence to disappear and not to person who causes the disappearance of evidence as to by whom the offence was committed.

Held, on facts that the discovery of the scythe and the blood-stained clothes of the accused would not amount to an offence under S. 201, and even assuming that the accused had concealed them, he would not be guilty under S. 201. AIR 1921 Bom 115, Rel. on.; AIR 1958 Punj 183, Dissented. (1962) 3 Guj L R 571 : 1962 (2) Cri L J 66 : AIR 1962 Guj 225 (225) (Pt A) (Pr 4) (DB).

——S. 201 — Evidenee of offence under — Pointing out spot by accused where dead body was—Evidence held not sufficient.

The pointing out of a particular spot by the accused from where, later on, the dead body was recovered does not advance the case for the prosecution for proving the guilt for offence under S. 201. The conduct of the accused in pointing out the spot, where the dead body was would show, at the most, that he had knowledge that a dead body was lying there Without any further evidence that is not sufficient to hold that the dead body was thrown thereby by the accused. AIR 1955 S C 104, Relied on. 1961 Jab L J 1250 : 1961 M P L J 1291 : 1962 (2) Cri L J 690 (Madh Pra).

——Ss. 201 and 302—Appreciation—Murder and concealment of dead body — Evidence disbelieved on murder charge cannot be believed for charge under S. 201, Penal Code. (1960) 26 Cut L T 638.

5. Charge.

—— Ss. 201, 300, 379, 411—Murder for gain—Separate charge under each section is not necessary—(Criminal P. C. (1898), S. 236). See Penal Code (1860), S. 300. AIR 1953 Mad 1006 (DB).

6. Practice and procedure.

——Ss. 201 and 114—Procedure and practice.

Section 201 not restricted to the case of a person who screens actual offender—It can be applied even to a person guilty of main offence, though as a matter of practice a Court will not convict a person both of the main offence and S. 201 - Acquittal of main offence is no legal impediment to accused conviction under S. 201. See Penal Code (1860), S. 114. 1953 Cri L J 668 : AIR 1953 S C 131.

——S. 201—Person charged under Ss. 302 and 201—Acquittal under S. 201 on mere ground that she was convicted under S. 302—Procedure dangerous. See Penal Code (1860), S. 302. 1957 Cri L J 1152 : AIR 1957 Orissa 216 (DB).

7. Conviction and sentence.

——S. 201—Interpretation — "Knowing or having reason to believe" in Para. 1 and "knows and believes" in Para. 2, mean the same thing—Punishment depends on gravity of offence which was committed and which accused knew or had reason to believe to have been committed — Erroneous belief of accused as regards offence committed does not provide basis of punishment. Roshan Lal v. State of Punjab, 1965 (2) Cri L J 426 : (1965) 2 S C A 447 : 1965 S C D 1133 : (1965) 2 S C R 316 : A I R 1965 S C 1413 (1417, 1418) (Pt A) (Prs 12, 13).

●——Ss. 201, 71—General Clauses Act (1897), S. 26—Disappearance of evidence in respect of two offences committed by same act — There are two offences under S. 201, by same act—Punishment.

Where the accused has caused the evidence of the two offences under Ss. 330 and 348, Penal Code, committed by the same act to disappear, commits by the same act two separate offences under S. 201. The case is not covered either by S. 71 of the Penal Code or by S. 26 of the General Clauses Act, and the punishment for the two offences cannot be limited under those sections. But, normally no Court should award two separate punishments for the same act consisting two offences under S. 201. The appropriate sentence under S. 201, for causing the evidence of the offence under S. 330, to disappear should be passed, and no separate sentence need be passed under S. 201, for causing the evidence of the offence under S. 348 to disappear. The maximum sentence for the offence under S. 330, is imprisonment for seven years, and under the fourth paragraph to S. 201, the accused are liable to be sentenced to a maximum of one-fourth of seven years of imprisonment. Roshan Lal v. State of Punjab, 1965 (2) Cri L J 426 : (1965) 2 S C A 447 : 1965 S C D 1133 : (1965) 2 S C R 316 : A I R 1965 S C 1413 (1419) (Pt B) (Pr 15).

●——Ss. 201, 302—Criminal P. C. (1898), Ss. 236 and 237—Charge of murder—Acquittal — Conviction for offence under S. 201 without any further charge is not legal. See Criminal P. C. (1898), S. 236. 1952 Cri L J 839 : A I R 1952 S C 159.

——Ss. 201 and 34 — Person charged with others under S. 201, Penal Code read with S. 34 — Others acquitted — Person can be convicted under S. 201 only. See Criminal P. C. (1898), S. 233. 1958 Cri L J 18 : A I R 1958 Andh Pra 37 (DB).

——S. 201 — Applicability — Charge under S. 302, Penal Code—Facts justifying conviction under S. 201—Accused can be convicted under latter section though there is no specific charge — Legality of conviction. See Criminal P. C. (1898), S. 237. 1957 Cri L J 1071 : A I R 1957 Andh Pra 611 (DB).

——Ss. 201 and 302 — Conviction under S. 302 not maintainable — Accused found guilty under S. 201 — No legal bar to his being convicted under S. 201. See Penal Code (1860), S. 302. A I R 1955 N U C (Him Pra) 2347.

——Ss. 201, 300 and 302—Applicability—Recovery of head and clothes of deceased at instance of accused—Accused cannot be convicted under S. 302 — Accused is guilty of offence under S. 201—A I R 1937 P C 179 Applied. 1954 Cri L J 1124 : A I R 1954 J & K 42 (44) (Pt C) (Pr 13) (DB).

——S. 201—Punishment how to be awarded—Punishment under S. 201, cannot be awarded without ascertaining what original offence was committed. 51 Cri L J 1178 : A I R 1950 Kutch 54 (54) (Pt B) (Pr 4).

——S. 201 — Person found guilty of main offence—He should not, as a matter of practice, be convicted both of the main offence and under S. 201. See Criminal P. C. (1898), S. 236. 1956 Cri L J 1401 : A I R 1956 Madh B 262 (DB).

——Ss. 201 and 302—Applicability — Charge under S. 302 — Conviction under S. 201 — (Criminal P. C. (1898), S. 236).

Accused charged and convicted under S. 302 for murdering a boy — No evidence to convict accused with offence of murder — Accused admitting possession of ornaments belonging to murdered boy and also disposal of the same by himself — Falsity of explanation offered by accused not established—Disposal of ornaments resulting in screening whoever had been responsible for the murder—Accused must be presumed to intend the natural consequences of his act and it is only reasonable to presume an intention to screen the offender — Conviction altered to one under S. 201, even though no specific charge was framed under S. 201. (1954) 2 Mad L J 673 : 1954 Mad W N 586 : 1954 Cri L J 1768 : A I R 1954 Mad 1088 (1090) (Pt B) (Pr 6) (DB).

——Ss. 201, 302, 379, 411 — Murder for gain — Convictions under Ss. 302, 379 or 411 in alternative—Acquittal of charge under S. 201—Appeal — Conviction under S. 302 set aside and under S. 379 maintained. See Penal Code (1860), S. 302. A I R 1953 Mad 1006 (DB).

——Ss. 201 and 302—Accused five in number charged under S. 302 and alternatively under S. 201—Conviction under S. 302 without any express finding with regard to offence under S. 201—Appellate Court has power to convict some of them under S. 201 if evidence against them is not sufficient to connect them with murder — Conviction is not illegal — (Criminal P. C. (1898), S. 236). ('50) 55 Mys H C R 48 (DB).

——S. 201—Charge under, against two named persons only—No reference in charge or in evidence that any other person was involved—Acquittal of one, conviction of other under S. 302 or 201 read with S. 34 cannot be sustained. See Penal Code (1860), S. 34. I L R (1962) Cut 516 : 1963 (2) Cri L J 229 (Orissa) (DB).

——S. 201 — Uncorroborated testimony — Evidence connecting accused with crime not clear — Reasons for accepting evidence not given by judge — Conviction cannot be sustained. See Evidence Act (1872), S. 133. (1960) 26 Cut L T 638.

——S. 201 — Conviction—Disposal of dead body with intention of concealing or removing the evidence of murder — Absence of evidence regarding knowledge of accused that offence punishable with death has been committed — Accused cannot be convicted. (1960) 26 Cut L T 638.

——S. 201—Conviction under—Maintainability.

Where the charge of murder against the accused has been proved beyond all reasonable doubt his conviction under S. 201, Penal Code cannot be sustained for the simple reason that a murderer by throwing the body of the person murdered by him from one place to another cannot be held to screen himself, as the person to be screened must be obviously somebody else than the offender himself within the meaning of S. 201, Penal Code. I L R (1965) 15 Raj 989 : 1965 Raj L W 418 : A I R 1966 Raj 74 (83) (Pt F) (Pr 30) (DB).

——Ss. 201 and 302—Death of X by strangulation by K in room of S—Body removed by K and S and concealed — S held guilty under S. 201 and not under S. 302—A I R 1930 All 45, Disting. See Penal Code (1860), S. 302. 1963 Raj L W 214 : I L R (1963) 13 Raj 199.

——S. 201 — Applicability — Accused charged with murder—Ornaments of deceased recovered from him—Accused denying that he committed murder but admitting that the murder was committed by co-accused and that he was given the ornaments of the deceased by them — Accused hiding away the ornaments and not informing police — Charge of murder not established — Accused held guilty under S. 201—A I R 1941 Mad 359 : 42 Cri L J 664, Rel. on. A I R 1955 N U C (Raj) 511 (DB).

——Ss. 201, 71 and 302—Conviction and punishment under S. 201 and S. 302 — No legal bar to a person being convicted both of murder and of offence under S. 201 — Proper course for trial Court in case where evidence warrants it will be to enter a conviction for both offences but not to award any sentence for

accessory offence—Criminal P. C. (1898), Ss. 35, 236. See Penal Code (1860), S. 71. 1953 Cri L J 1613: AIR 1953 Trav-Co 402.

SECTION 202

——S 202—Criminal P. C. (1898), S. 44 — Offence of murder — Requirements — Failure of person having knowledge of offence to give information to police—Punishable. See Criminal P. C. (1898), S. 44. 1964 (1) Cri L J 214 : AIR 1964 Pat 62 (DB).

——S. 202 — Applicability — Absence of evidence or finding that any offence has been committed — No finding that accused intentionally omitted to give information respecting any offence — Conviction illegal. 1961 B L J R 35,

SECTION 203

——Ss. 203, 201 and 182 — Scope — Ss. 201 and 203 contemplate information given to private persons as well as public servants — First information reports under S. 154, Criminal P. C., are covered by sections but statements made to police during investigation are not covered. See Penal Code (1860), S. 201. 1962 (1) Cri L J 610 : AIR 1962 Ker 133 (DB).

SECTION 204

——S. 204—Criminal P. C. (1898), Ss. 439 and 253—Order of discharge under S. 253—Revision.

The accused on being asked to produce certain documents refused to produce on the ground that its production might prejudice him in other proceedings. Thereupon a search warrant was issued but since the document could not be found the accused was prosecuted under S. 204, Penal Code. The Presidency Magistrate discharged the accused under S. 253, Criminal P. C., on the ground that mere refusal did not amount to an offence under S. 204 remanding the case. Held, that the order of the Magistrate was wrong since the accused in showing cause against the production of the document had admitted its possession and the Court had evidence before it from which it could be inferred that the accused had secreted the document. 52 Cri LJ 946 : I L R 1951 Cal 101 (FB).

[Overruled on another point in AIR 1965 S C 1251.]

——S. 204—Place of trial — Offence under—Offence alleged to have been committed at Banglore by accused residing at Bangalore — Magistrate at Visakapatnam has no jurisdiction to try. See Criminal P. C. (1898), S. 177. (1957) Mad L J (Cr) 603 : (1957) 2 Andh W R 368.

SECTION 205

——S. 205—Applicability—False personation—Personation of fictitious or non-existing person—Offence.

A did two acts; one of getting a rent note executed in the name of B, a fictitious person and the other of posing to be B and producing the rent note before the Sub-Registrar.

Held, that there might have been no personation by A when he did the former act because he simply assumed another name. But when he did the other act he committed personation within the meaning of S. 82 (c) of the Registration Act by assuming the personality of B. (1961) 1 Cri L J 30 : AIR 1961 All 62.

SECTION 206

——Ss. 206 and 379 — Applicability — Execution of money-decree — Distraining sheep belonging to the judgment-debtor and entrusting them to decree-holder's representative on his executing a bond — Removal of sheep by force — If the removal 'fraudulent' under S. 195 (1) (b) of the Criminal P. C, or 'dishonest' — Whether a complaint by a civil Court is necessary for prosecution.

The judgment-debtor and four others removed two sheep distrained in execution of a decree and entrusted to the son of the decree-holder on his executing a security bond. The removal of sheep was open and without any element of secrecy or deception.

Held : In the circumstances, it might be 'dishonest removal and might even amount to 'robbery' and not theft'. But it was not 'fraudulent removal'. Hence S. 206 of the Penal Code cannot be held to be involved in this case, and the complaint was perfectly competent without the sanction or institution of complaint by the concerned Civil Court under S. 195 (1) (b), Criminal P. C. (1898).

The decisions in (1936) Mad W N (Cr) 36 and (1941) Mad W N (Cr) 79 are perfectly reconcialable. (1962) 2 Mad L J 283 : 1962 Mad L J (Cri) 473 : 1962 All Cr R 43 : 1962 All W R (Sup) 14 : 1962 (2) Cri L J 555 (Mad).

SECTION 209

——S. 209—Ingredients — Accused must know that claim was false.

One of the important facts which has to be proved by the prosecution to bring home the charge under S. 209, Penal Code is that the accused when making claim knew it to be false. 1952 Nag L J (Notes) 44.

——S. 209—Essentials for complaint under S. 476, Criminal P. C.—Application by private person — Proceeding under S. 476 should not be undertaken unless prosecution is in interest of State and reasonably certain to result in conviction. See Criminal P. C. (1898), S. 476. 1952 Nag L J (Notes) 44.

——S. 209—Scope—Application praying for lodging of complaint under Ss. 209 or 193, Penal Code or both read with S 109—Lodging of a complaint under S. 209, Penal Code read with S. 109, Penal Code not prohibited. See Criminal P. C. (1898), S. 195. I L R (1962) 2 Punj 504.

SECTION 211

SYNOPSIS

(Penal Code (1860), S. 211.)

1. Scope and applicability.
2. Sections 211 and 182.
3. Sections 211 and 47, Madras District Police Act.
4. Intent to cause injury.
5. "Institutes ... any criminal proceedings".
6. "Falsely charges any person."
7. Illustrative cases.
8. "If such criminal proceedings be instituted."
9. Accused to have opportunity to prove truth of his complaint.
10. Practice and procedure.

1. Scope and applicability.

——S. 211 — Mere filing of report under S. 307 amounts to institution of criminal proceedings within S. 211. (1965) All W R (HC) 282.

——S. 211—Scope—Proceedings under Ss. 192 and 211, Penal Code — Provisions applicable — Effect of non-compliance — Cognisance cannot be taken. See Criminal P. C. (1898), S. 195 (1) (a). 1962 (1) Cri L J 627 (All).

——S. 211—Criminal P. C. (1898), S. 195 — Facts constituting offences under Ss. 211 and 500, Penal Code — Complaint only under S. 500 — Maintainability.

It is open to the complainant to prosecute for an offence under S. 500 without at the same time asking for sanction under S. 195, Criminal P. C., to prosecute for an offence under S. 211, Penal Code. 52 Cri L J 1269 : AIR 1951 Bom 289 (DB).

—S. 211—Applicability — Demand for judicial investigation pending — Prosecution for giving false information — It is unjustified. See Criminal P C. (1898), S. 173 (2) (b). (1959) Mad L J (Cri) 204 (Mys).

—S. 211 — Criminal P. C. (1898), S. 195 (1) (b) — Information to police of cognizable offence — Final report by police that information is false — Report accepted by Magistrate — No protest petition by informant — S. 195 (1) (b) does not apply. See Criminal P C. (1898), S. 195 (1) (b). 1961 (2) Cri L J 878 (Orissa).

—S 211 — Criminal P. C. (1898), Ss. 195 (1) (b) and 173 —Applicability—Offence under S. 211, Penal Code in relation to proceedings in Court — Final report under S. 173 that complaint was false — Does not constitute proceedings before Magistrate — Order of Magistrate that report be filed is an administrative order — S. 195 (1) (b) does not apply. See Criminal P. C. (1898), S 195 (1) (b). 1962 Raj L W 272.

2. Sections 211 and 182.

—Ss. 211, 182 and 307 — Applicant lodging complaint under S. 307, Penal Code — It amounts to institution of criminal proceedings — Applicant can be convicted only under S. 211 and not under S. 182 —Proceedings under S. 211 can be started only on complaint of Magistrate concerned — Criminal P. C. (1898), Ss. 195 (1) (b) and 260.

Where the applicant has lodged a complaint against certain persons under S. 307, Penal Code, which is a cognizable offence, the mere filing of a report under that section amounts to institution of criminal proceedings within the meaning of S. 211, Penal Code and as such the applicant can be convicted only under S. 211 in a regular trial and not under S. 182, Penal Code in a summary trial. Moreover, proceedings under S. 211 can be started only on the complaint of the Magistrate concerned. AIR 1931 All 269; (1962) 2 Cri L J 719 and AIR 1952 Sau 67, Rel. on. 1965 All Cri R 208 : (1965) All W R (H C) 282.

—Ss. 211 and 182 — Prosecution under S. 182 — Complaint repeated before Magistrate — Conviction under S. 182—Bar of S. 195, Criminal P. C.

Where after a complaint had been filed under S. 182, by the Police, the accused lodged a complaint with the Magistrate alleging that his allegations were correct and the Magistrate tried both the cases together and convicted the accused under S. 182 holding that the complaint of the accused was automatically dismissed — Held that the complaint under S. 182 could be proceeded with, even though a complaint was filed by the accused— One Magistrate could have lodged a complaint under S. 195, Criminal P. C. before another Magistrate for proceeding against the accused under S. 211 and his action in convicting the accused under S. 182 was not bad. 1956 Cri L J 215 : AIR 1956 Hyd 25 (25) (Prs 2, 4).

—Ss. 211 and 182—Complaint under S. 182—Facts disclosing offence under S. 211 as well as under S. 182 — Accused not to be acquitted on ground that prosecution should have been under S. 211. See Penal Code (45 of 1860), S. 182. AIR 1952 Raj 142.

3. Section 211 and S. 47, Madras District Police Act.

—S. 211—Madras District Police Act (24 of 1859), S. 47 — Charge — Meaning — (Words and Phrases —Charge).

The word 'charge' is not defined in the Madras District Police Act and must therefore be taken to bear its ordinary meaning, 'to prefer an accusation against one'. The charge under S. 211 must be one against any person with having committed an offence. In this view therefore there is no identity between S. 47, Madras District Police Act and S. 211, Penal Code with regard to the meaning of the word "charge". 1953 Cri L J 959: AIR 1953 Mad 507.

4. Intent to cause injury.

—S. 211—Enquiry into allegation of offence under S. 211—Words 'with intent to cause injury' in the section indicate malice and words 'there is no just or lawful ground' indicate want of reasonable or probable cause — Standard and measure for judging 'malice' and 'want of reasonable or probable cause' stated. See Criminal P. C. (1898), S 476. 1965 All W R (H C) 316 : 1965 All Cri R 229 : 1966 Cri L J 115 : AIR 1966 All 66 (DB).

5. "Institutes any criminal proceeding."

—S. 211 — Applicability and scope — Complaint should have been instituted before Court.

Section 211 contemplates that a complaint should be instituted before a Court either by the accused himself or at his instigation. Where no complaint is filed before a Court against a person, even if the allegation made in a report earlier is completely false, S. 211 will not be applicable. AIR 1924 All 779, Not foll.; AIR 1928 All 765 and 35 All 522, Foll. 1961 All L J 278: 1961 All Cr R 135 : 1961 All W R (H C) 286 : 1961 (1) Cri L J 627 (All).

—S. 211 — "Instituting criminal proceeding" and "making false charge" — Expressions though not co-extensive are not mutually exclusive — Setting in motion criminal law by making false charge to police — Amounts to institution of criminal proceedings.

The expressions "instituting criminal proceedings" and "making a false charge" in S. 211, Penal Code, though not co-extensive are not mutually exclusive in meaning so that the instituting of criminal proceedings must be by something which is not a charge, and a charge must be something which is not the institution of criminal proceedings. The fact that the offence in the second part of the section has been made, as a graver offence is attributable only to the serious nature of the offence with regard to which on a false charge the criminal proceeding has been instituted, and not to the fact that the person making a charge owing to his greater skill has succeeded in getting the police to arrest his enemy and place him before the Court. Therefore, a person who sets the criminal law in motion by making a false charge to the police of a cognizable offence, institutes criminal proceedings within the meaning of S. 211 of the Penal Code even though the person charged may not be arrested or the matter may not go further than the police inquiry and if the offence falls within the description in the latter part of the section he is liable to the punishment there provided. 17 Cal 574 (FB) and 32 Mad 258 (FB). Foll.; AIR 1941 Bom 414 and AIR 1938 Rang 397 and 16 All 124 and AIR 1931 Nag 134 (FB), Not foll. (1962) 1 Andh W R 195 : 1962 Mad L J (Cri) 187 : 1962 (2) Cri L J 719 (Andh Pra).

—S. 211 —Applicability — Mere statement or communication of suspicion cannot amount to institution of proceeding within section. ILR (1952) 4 Assam 338 : 1953 Cri L J 1598 : AIR 1953 Assam 204 (204) (Pr 8) (DB).

—S. 211—Criminal proceedings—Not necessarily a judicial proceeding—Includes investigation under Chapter 14, Criminal P. C. Giving information to police that a person has committed a cognizable offence — Amounts to institution of criminal proceeding within S. 211—Criminal P. C. (1898), S. 4 (1) (i).

The word 'proceedings' is used in S. 211 in the ordinary sense of a prescribed mode of action for prosecuting a right or redressing a wrong. It is not used in the technical sense of a proceeding taken in a Court of law. If an investigation under Chapter 14 is a proceeding it necessarily follows that it is a criminal proceeding. The expression, 'criminal proceeding' in S. 211 of the Penal Code is wide enough to include a proceeding under Chap. 14 of the Criminal P. C. This is made clear by the fact that the expression 'criminal proceeding' in S. 211 ,Penal Code is not qualified by the word, 'judicial' or by anything else showing that it is confined to a proceeding before a Court of law or other tribunal ILR 5 All 215 and ILR 5 All 598 and ILR 16 All 124 and AIR 1931 Nag 134 (FB) and AIR 1938 Rang 397 and AIR 1941 Bom 414, Dissented from. Where, therefore, the criminal law is set in motion against a person by giving information to the police that that person has committed a cognizable offence, the person giving information institutes a criminal proceeding against that person within the meaning of S. 211 of the Penal Code, for the reason that the police are bound by law to investigate the accusation against that person whether they believe it or not and make a final report under S. 173 of the Criminal P. C. AIR 1931 All 269 and ILR 17 Cal 574 and ILR 20 Mad 79, Rel. on. The final report may be against some other person or against none at all; but this fact cannot alter the fact that a criminal proceeding was instituted against the person accused. Similarly the circumstance that a police investigation need not necessarily be directed against a definite person (though in the vast majority of cases it is) will not alter the fact that it is a proceeding against a person when it is so directed. Albert, Accused No. 1 v. State of Kerala, 1965 Ker L T 865 : ILR (1965) 2 Ker 329 : (1965) 2 Ker L R 117 : 1965 Ker L J 877 : 1966 Cri L J 26 : AIR 1966 Ker 11 (13) (Pr 5) (FB).

——S. 211—First information by accused not naming any particular person as culprit — Subsequent statement by him to police merely expressing suspicion on particular person—No criminal proceedings started against that person — Accused held not guilty under S. 211.

The accused made a report to the police that there had been house-breaking and theft in his house but did not name any person as the culprit. When questioned by the police during the investigation he merely expressed his suspicion on a particular woman. The investigation revealed that there had not been a real house-breaking. The accused was convicted under S. 211, Penal Code, upon the complaint of the woman.

Held, that the statement of the accused to the police of a suspicion that the woman was involved in the crime did not amount to a charge within the meaning of S. 211. No criminal proceedings were instituted against the woman and, therefore, the accused was not guilty under S. 211: AIR 1925 Lah 325: 14 I C 767 (Mad) and A I R 1924 All 779, Ref 1949 Nag L J 604 : 51 Cri L J 267 : 1950 All W R (Supp) 13 ; 1950 All Cri Cas 30 : ILR (1950) Nag 208 : AIR 1950 Nag 20 (21) (Pt A) (Pr 6).

6. "Falsely charges any person."

——S. 211—Institution of criminal proceedings — False charge—Charge of having committed contempt of Court—Held amounted to falsely charging (Per Sarkar and Mudholkar, JJ.) — Held amounted to institution of criminal proceedings (Per Hidayatullah, J.)

Per Sarkar, J.: Assuming that a proceeding for committal for contempt of Court is not a criminal proceeding within the meaning of that expression as used in S. 211 the section also says that falsely charging a person with the commission of an offence would be an offence under it. When S. 211 says that an offence under it may be committed by falsely charging a person with the commission of an offence, it does not intend that the offence must be one which gives rise to a criminal proceeding. Under the definition of offence in S. 40 the word 'offence' in S. 211 means an offence punishable under the Code or under any special or local law as defined in it. Section 41 defines a special law as a law applicable to a particular subject. Now the Contempt of Courts Act is an Act dealing with the subject of contempt of Courts and is therefore, a special law. It also provides for punishment for contempt of Court by simple imprisonment up to six months, subject to certain conditions mentioned. A charge of having committed a contempt of Court is, therefore, a charge of having committed an offence within the meaning of S. 211. ILR 6 Cal 620 and ILR 17 Cal 574 (FB) and ILR 19 Bom 51, Distinguished.

Per Mudholkar, J.—Since making of a false charge before any person, whosoever he may be, is covered by S. 499, Penal Code it would be appropriate to construe S. 211 as being applicable only to a case where a fale charge is made by the accused person against another before a person who is competent to enquire into it and take other proceedings himself or cause proceedings to be initiated. It is not limited to false charges made to a person who also has the power to try the accused or commit him for trial by another Court. The word 'offence' used in S.211 would also include a thing punishable under a special law. Special law is defined in S. 41 as a law applicable to a particular subject. The law of contempt is a particular subject and the High Court has inherent power to punish a person for the offence of contempt committed by him by disobeying an injunction issued against him. Disobedience of an injunction issued by the High Court is not something with respect to which action under S. 24 or S. 95 of the Civil P. C., could alone be taken but being contempt of the High Court's order is punishable by it in its discretion in exercise of its inherent powers. The only limitation which the statute has placed is with regard to the punishment that the High Court can meet out to the contemner.

Per Hidayatullah, J. : An application to take proceedings under the Contempt of Courts Act undoubtedly can be regarded causing criminal proceeding to be instituted. There may be some dispute as to whether a person charging another of having committed a contempt of Court charged the other with an offence, but. there can be no doubt that it amounted to the institution of a criminal proceeding because a contempt of Court can be punished by imprisonment and fine and that brings an accusation charging a man with contempt of Court within the wide words 'criminal proceeding.' Such proceedings were described as quasi-criminal proceedings by the Privy Council because such proceedings are not tried under the Criminal P. C. That does not render it any the less a criminal proceeding because the Criminal P. C., is not exhaustive. If there was no just or lawful ground for commencing the proceedings for contempt in the High Court then the requirements of S. 211 of the Penal Code must be taken to be prima face satisfied. 1964 Mad W N 574 : 1965 SCD 219 : (1965) 2 SCJ 329 : 1965 Mad L J (Cri) 588 : (1964) 7 S C R 237 : 1964 (2) Cri L J 737 : (1965) 1 SCWR 42 : AIR 1964 SC 1773 (1775) (Pt A) (Prs 5, 8).

——S. 211—'False charge'—Meaning of.

The meaning of the expression 'false charge' is simply 'falsely accuses,' and as the section stands, there is no necessity of this false accusation being made in connection with a criminal proceeding. If false allegations were made in connection with an

application for contempt, it is at once obvious that these allegations were made in order that the Court might be persuaded to take action against the petitioners in contempt, and it must be held that there was an intention on the part of the opposite parties to cause injury to the petitioners by falsely accusing them of having committed certain offences : ILR 19 Bom 51, Dissented. 1959 Cri L J 583 : 1960 All W R (Supp) 13 (2) : 64 Cal W N 237 : 1960 All Cri R 148: AIR 1959 Cal 293 (293) (Prs 4, 5) (DB).

—S. 211 — Ingredients of — Mere statements of facts or communications of suspicions not sufficient —Charge must be wilfully false to the knowledge of the maker — Accused must have intent to cause injury to persons against whom offence is alleged.

Mere statements of facts or communiciation of suspicions cannot amount to institution of criminal proceedings within the meaning of S. 211, I. P. C. Yet another ingredient of the offence the prosecution is bound to prove is that the charge was wilfully false to the knowledge of the maker of the charge. If that proof of knowledge is not insisted upon no person would feel it safe to convey information to the police about any suspicion of the commission of a cognizable case. But when the complaint is substantially true and what is false is a mere fringe to the complaint there is no offence made out under S. 211, I. P. C. Further, the accused in giving information must have acted with the intent to cause injury to the person against whom the offence is alleged. 1912 Mad W N 1125 and A I R 1924 All 779 ; A I R 1953 Assam 204 and A I R 1914 Cal 349 and AIR 1937 Pat 84, Rel. on. (1963) M L J (Cri) 396 : (1962) 2 Ker L R 103 : 1962 Ker L T 564 : ILR (1962) 2 Ker 355: 1963 (1) Cri L J 597 : A I R 1963 Ker 152 (153, 154) (Pt A) (Prs 4, 5, 6).

——S. 211 – False charge — Circumstances in which it can be made — Considerations which might go to prove that person concerned knew that there was no just or lawful ground for such charge.

A false charge can be made in two circumstances (i) the person making the charge may have himself seen the offence being committed and (ii) the charge may be made on the basis of information received by him. In the former case the prosecution can easily establish that there was no just or lawful cause. In the latter however the prosecution has to show by producing the informant who gave the information to the accused or by showing that the facts given in the report were such that no man of ordinary prudence would make such a charge. AIR 1953 Raj 115 (115, 116) (6).

7. Illustrative cases.

——S. 211 – Information about commission of offences by some persons lodged with police – Informant also filing private complaint for prosecution of accused persons—Final report by police in respect of information – Prosecution under S. 211 not justified unless and until complaint or information to police is found to be false.

Where a person lodges information with the police alleging commission of certain offences by some persons and later on, before any report is filed by the police in respect of his report files a complaint for prosecution of the accused persons at his instance, the fact that a final report in respect of the information lodged by him is submitted by the police does not justify an order for his prosecution under S. 211, I. P. C. He is liable to be proceeded against under S. 211. I. P. C. only if his complaint or the information lodged by him with the police is found to be false but not before that. ILR (1958) 10 Assam 242.

——S. 211—Evidence—Information of alleged offence given at police station — Entry in the General Diary —Subsequent statement recorded from victim of the alleged occurrence — If can be used against him for convicting him of an offence under S. 211, Penal Code. Held that it fell within the mischief of S. 162, Criminal P. C. and therefore could not be used against him. See Criminal P. C. (5 of 1898), Ss. 154 and 164. 52 Cr L J 857 : AIR 1951 Mad 812.

——S. 211—Fact that police wanted to initiate proceedings under S. 211 of Penal Code against complainant—Order is illegal. See Criminal P. C. (1898), S. 250. (1965) 31 Cut L T 324.

8. "If such criminal proceedings be instituted."

——S. 211, Second part—Scope of—False complaint of murder made to Village Mursif — Complaint proved false on police enquiry — Magistrate committing accused to Sessions — Validity — Criminal Procedure Code (5 of 1898), Ss. 207-A and 208.

If a false charge is made before the Village Munsif or police with regard to commission of an offence of the description in Part two of S. 211, with intent and knowledge as stated in the section even though the person charged may not be arrested or the matter may not go further than the police enquiry. S. 211, Part two will apply because setting the criminal machinery thus in motion is the institution of criminal proceedings on a false charge of an offence of the description in Part two of S 211. It was therefore a case exclusively triable by a Sessions Court and the Magistrate taking cognizance of such an offence on a report of the police could very well on seeing sufficient grounds, commit the case to Sessions.

Section 207, Criminal P. C., which relates to the enquiry into cases triable by a Court of Session or High Court, provides for two different procedures. Sub-s. (a) provides for procedure to be followed when the proceedings are instituted on a police report embodied in S. 207-A. Sub-s. (b) provides a different procedure for any proceeding which is not instituted on a police report. In the instant case, even though the police had investigated the matter and made report thereafter, since that investigation was not by the order of the Magistrate as contemplated by S. 155 (2), the report based thereon was not a 'police report' to which the provisions of S. 207-A would apply. Therefore it was obligatory on the part of the Magistrate to follow the procedure prescribed in S. 208, Criminal P. C. (1962) 1 Andh W R 195 : 1962 Mad L J (Cr) 187 : 1962 (2) Cr L J 719 (Andh Pra).

9. Accused to have opportunity to prove truth of his complaint.

——S. 211— Prosecution for giving false information —Protest petition pending enquiry— Opportunity to prove truth of that charge—Duty of Court to give.

Where a person who is accused of having committed an offence by reason of his having given false information demands a judicial investigation into the truth of the charge made by him he is entitled to be given an opportunity to prove the truth of the charge. During the pendency of such judicial investigation into what should be regarded as complaint made by accused in this case, a prosecution against him on the supposition that the charge made by him was false is unjustified. 1959 All W R (Sup) 12 : 1959 All Cr R 111 : 1959 M L J (Cri) 204 (Mys).

——S. 211—Evidence—Charge of making false allegations against police officer — Proof — Evidence necessary.

In a case where a person is charged with having made false allegations against a police officer, it is necessary that the falsity must be proved to its hilt by examining all the witnesses mentioned by him 1951 Mad W N 59 : 1951 Mad W N (Cri) 7 : 5 A I Cr

D 540 : 52 Cr L J 686 : (1951) 2 Mad L J 25 : A I R 1951 Mad 717 (717) (Pr 4).

——S. 211—Complaint against Armed police — Enquiry under S. 202, Criminal P. C. by Magistrate — Report that complaint is false—Enquiry unsatisfactory and held almost like a trial — Case under S. 211, should not be kept before the same Magistrate. 1952 Cri L J 303 : AIR 1952 Pat 125 (125) (Pt B) (Pr 3).

10. Practice and procedure.

——S. 211—"Proceeding"—"In relation to" — Meaning — False report to police against certain persons leading to their arrest and remand to custody—Remand and bail proceedings are "proceedings" — Cognizance of offence cannot be taken without complaint by Magistrate. See Criminal P. C. (1898), S. 195 (1) (b). 1963 (2) Cri L J 64 (All).

——S. 211—Ingredients of—Mere statements of facts or communications of suspicions not sufficient — Charge must be wilfully false to the knowledge of the maker—Accused must have intent to cause injury to persons against whom offence is alleged.

Mere statements of facts or communication of suspicions cannot amount to institution of criminal proceedings within the meaning of S. 211, I. P. C. Another ingredient of the offence the prosecution is bound to prove is that the charge was wilfully false to the knowledge of the maker of the charge. Mere proof of the falsity of the complaint or the failure to prove its truth is not enough. To adduce evidence of such knowledge may be very difficult but it is still the unavoidable duty of the prosecution to prove that, if the accused is to be convicted under S. 211. If that proof of knowledge is not insisted upon no person would feel it safe to convey information to the police about any suspicion of the commission of a cognizable case When the complaint is substantially true and what is false is a mere fringe to the complaint there is no offence made out under S. 211, I. P. C. Further, the accused in giving information must have acted with the intent to cause injury to the person against whom the offence is alleged 1912 Mad W N 1125; AIR 1924 All 779; AIR 1953 Assam 204; AIR 1914 Cal 349; AIR 1937 Pat 84, Rel on. 1962 Ker L T 564 : (1962) 2 Ker L R 103 : ILR (1962) 2 Ker 355.

— S. 211 — Report to Police — Complaint filed in Court later — Prosecution under S. 211, Penal Code — Complaint from Court — Necessity — (Criminal P. C. (1898), S 195 (1) (b)).

Non-applicant made a report to the Police that he was attacked by a number of persons and was stabbed with a knife. Since Police did not prosecute the accused persons, non-applicant filed a complaint before a Magistrate. About 4 months thereafter, the Police prosecuted the non-applicant under S. 211, Penal Code alleging that the report made by him to the Police was false.

Held, that clause (b) of sub-s. (1) of S. 195 of the Criminal Procedure Code being applicable, a prosecution under S. 211, Penal Code cannot be instituted without the complaint of the Court. The complaint filed by the Police was incompetent. 1959 M P L J (Notes) 175.

——S. 211—Offence under — Cognizance of —Sanction under S. 195 (1) (b) of the Criminal Procedure Code (5 of 1898)—When essential.

Where the Magistrate has already taken cognizance of a complaint under S. 211, Penal Code, and after that stage the accused moves the Court in a revision petition for inquiring into the truth of the complaint, there will be no question of the former complaint being hit by S. 195 (1) (b), Criminal Procedure Code and no sanction of the Court which has taken cognizance of the revision petition will be necessary to validate the further proceedings under the earlier complaint. (1964) 2 Mad L J 471 : 1964 Mad L J (Cr) 640.

——S 211 — False charge — Interpretation of. See Madras District Police Act (24 of 1859), S. 47. 1960 M W N 154.

——S. 211—Practice and procedure

Offence under S. 211, Penal Code, committed in relation to proceeding in Court—Once a complaint goes to the Court and the accused is discharged, thereafter for any complaint by the discharged person in respect of the complaint made against him to the Court, the complaint of the Court is necessary for an offence under S. 211, Penal Code See Cr. P. C. (1898), S. 195. 1954 Cri L J 799 : AIR 1954 Mad 561

——S. 211 — Offences under Ss. 182 and 211, Penal Code—Complaint by officer in charge of police station —Offence under S. 182, Penal Code held could be tried. See Criminal P. C. (1898), S. 195 (1) (a). 1957 B L J R 387.

——S. 211 — False information to Police—Case cancelled on final report from police — Magistrate in accepting such report does not act as Court—Prosecution of informant under S. 211, I. P. C., is not in relation to proceedings before Court — Complaint of Court is not necessary. See Cr. P. C. (1898), S. 173. 1961 (2) Cri L J 691 : AIR 1961 Raj 231.

——S. 211 — Information to police followed by criminal complaint — Prosecution of informant — Complaint by Court is necessary. See Criminal P. C. (1898), S. 195. 1960 Cr L J 995 : AIR 1960 Raj 168.

SECTION 212

——S. 212—Punishment.

Not only that the law makes harbouring of an offender punishable but that the punishment provided for against harbour is made to conform to the gravity of the offence committed by the person who is being harboured, the more serious the offence committed by the absconder, the greater is the disfavour shown by law to the accused being harboured or screened from legal punishment. 1958 Cri L J 324 : AIR 1958 All 214 (Pr 32) (DB).

——S. 212—Scope.

Until the 'offender' has been convicted of the offence he is alleged to have committed no prosecution can be launched under S. 212, Penal Code for harbouring him. 52 Cri L J 470 : I L R (1951) Trav-Co 61 : 1950 Ker L T 628 : AIR 1951 Trav-Co 90 (91) (Pr 3).

SECTION 214

——Ss 214, 109, 165-A and 193 — Criminal P. C. (1898), S. 195-B -Municipal employees attesting panchnama of seizure of 'ganja'—Attesting is not as municipal employees but as witnesses—Defence trying to win over attesting witnesses and constable who seized 'ganja' — Offence punishable under Ss. 109 and 193, Penal Code — S. 214, Penal Code is inapplicable — Prosecution can be on complaint by Court when case pending. 1965 M P L J (Notes) 11.

SECTION 215

——S 215 — 'Deprived of movable property by any offence punishable under the Code' — Meaning of — Straying of cattle — Person finding it, demanding money for its return to owner — Not guilty under S. 215. 1963 All Cri R 455 : 1963 All W R (HC) 755.

——S. 215—Deprivation of property—What amounts to,

The deprivation of the property is not confined to one resulting from an act of theft. A person who

commits criminal misappropriation of a property also deprives the owner of the possession of the property. 1953 Cri L J 1189 : AIR 1953 Madh B 191 (191) (Pt A) (Pr 4) (DB).

——S. 215—"By any offence"—Meaning of.

From the mere fact that the accused took the complainant during night time to the jungle and did not point out to him the actual place where his buffaloes were, but himself went alone and returned with buffaloes, it cannot be inferred that some person had committed criminal misappropriation in respect of them. AIR 1938 All 440, Distinguished. 1953 Cri L J 1189 : AIR 1953 Madh B 191 (191) (Pt B) (Pr 4) (DB).

——S. 215 — Burden of proof — "Unless he uses all means"—Onus.

The burden of proving that the accused used all means in his power to cause the offender to be apprehended and convicted of the offence is on the accused. AIR 1933 Cal 599, Rel. on. 1953 Cri L J 1189 : AIR 1953 Madh B 191 (192) (Pt C) (Pr 5).

——S. 215—Onus—Duty of prosecution and accused — (Evidence Act (1872), S. 105)—(Cr. P. C. (1898), S. 367).

Under S. 215, Penal Code, once it is established by the prosecution that the accused accepted the gratification, for restoring the stolen property he must be guilty under S. 215 unless and until he successfully proves that he did all that lay within his means for the apprehension and conviction of the real culorits. 1959 Cri L J 1438 : 1960 M P C 49 : 1960 M P L J 205 : 1960 Jab L J 153 : AIR 1959 Madh Pra 418 (420) (Pt B) (Pr 12).

——S. 215—Onus and proof—Section is not intended to punish persons, receiving consideration bona fide for helping owner to recover property lost by theft—Prosecution has initially to prove that accused received money without any intention of tracing offender and bringing him to book—Onus to prove exception lies on accused — Evidence Act (1872), S. 105.

Section 215 of the Code is not intended to punish person who receives consideration bona fide for helping the owner to recover property which he has lost by theft, criminal misappropriation etc. It is intended to deal with cases which are similar to collections in the nature of 'Thuppukooli' made by the persons who from the circumstances of their offer to help the owner, are expected to contact the thief, pay him a portion of the money on the understanding that he won't be exposed if he would release the concerned property to the owner. There is thus, besides the promise by the accused to recover the stolen property an implied association between him and the thief or the means on his part of discovering the thief and recovering the property but without at the same time any undertaking on his part, to do what the law expects every honest citizen to do in the situation, namely to help in the prosecution of the person who has committed a cognizable and non-bailable offence like theft or an offence in regard to moveable property.

For giving the section this significance the first part has to be read in conjunction with the last part containing the words 'unless he uses all means in his power to cause the offender to be apprehended.' Therefore, the first part of the section itself is really intended to deal with persons who impliedly have means of contacting the offender and recovering the property, and who then undertake to recover the property from the thief on payment of a sum which will serve to remunerate them and also 'square' up the thief. It is only when this state of affairs has been established by the prosecution, can the onus of proof be thrown on the accused person to prove the terms of the exception namely that he had 'used all means in his power to cause the offender to be apprehended and convicted of the offence.' These being facts within his knowledge, the statute has placed the onus on him to establish them. Therefore, though it is clear that the clause 'unless he uses all means in his power to cause the offender to be apprehended and convicted of the offence' is in the nature of a special exception or proviso, within the meaning of S. 105 of the Evidence Act, for which the onus of proof is on the accused, the juxtaposition of this clause with the other ingredients of the offence specified in the first portion of the section, shows that the prosecution has initially to establish that the circumstances of the taking of the money were such that the accused received it without any intention of tracing the offender and bringing him to book, assuming he had the means of getting at the offender.

Where, therefore, the accused received the money and made the representation that he would recover the property stolen, before night-fall,

Held, that the accused had the means of getting at the offender and that he had also no intention to bring the thief to book, while restoring the property. He could, therefore, be convicted under S. 215, Penal Code. 1965 Mad W N 154 : (1965) 2 Mad L J 321 : 1965 Mad L J (Cri) 719 : 78 Mad L W 110 : 1965 (2) Cri L J 826 (Mad).

——S. 215—Scope—Missing property must have been stolen—The accused must have consented to take gratification under pretence of recovering same — Exception where accused has used all means in his power to apprehend offender. AIR 1955 N U C (Raj) 125.

——S. 215 — Sentence—Accused old man of 60 and serving sentence of two months already — Complainant says to accused that he would report matter to police — Sentence of six months reduced to one already undergone. AIR 1955 N U C (Raj) 125.

SECTION 216-A

——S. 216-A—Essentials of offence—Burden of proof.

In a prosecution under S. 216-A, Indian Penal Code, the burden is on the prosecution to establish the following ingredients:—(i) that the persons in questions were about to commit or had recently committed robbery; (ii) that the accused knew this; (iii) that the accused harboured them or some of them; (iv) that the accused did so with the intention of— — (a) facilitating the commission of robbery or dacoity, or (b) screening them or some of them from punishment. 1958 M P L J (Notes) 94.

SECTION 218

● —S. 218 — Police Officer manipulating police diary to save another accused — Another accused acquitted of offence and also of abetting under S. 218—Conviction of public servant—Not affected—U. P. Police Act, Ss 36 and 42—Scope—For anything done or intended to be done under the Act—Prosecution under S. 218 of the Penal Code — Limitation of three months — Not applicable to an offence under the Penal Code.

It is manifest that whether G was guilty or not, at the time the false entries were made in the case diary by X (the accused) there was every likelihood of being prosecuted along with others for causing the death of R and another. Indeed as expected G and others were prosecuted though they were acquitted. On the said facts the mere acquittal of G cannot displace the finding that X the accused manipulated the record with an intent thereby to save or knowing it to be likely that he would thereby save G from legal punishment. If X had made the false entry in the diary and manipulated other records with a view to

save G from the legal punishment that might be inflicted upon him, the mere fact that he was subsequently acquitted of the offence could not make it any the less an offence under S. 218 of the I. P. Code. The acquittal of G for the abetment of the offence under S. 218 of the I. P. Code committed by X does not affect the conviction of X under S. 218 of the I. P. Code.

The period of three months prescribed for commencing a prosecution under S. 42 of the U. P. Police Act is only with respect to prosecution of a person for something done or intended to be done by him under the provisions of the U. P. Police Act or under general police powers given by the Act. S. 42 does not apply to prosecutions against any person for anything done under the provisions of any other Act or under police powers conferred under any other Act. Under S. 36 nothing contained in the Police Act shall be construed to prevent any person from being prosecuted under any Regulation or Act for any offence made punishable by this Act or for being liable under any other Regulation or Act or any other or higher penalty or punishment than is provided for such offence by this Act.

The prosecution in the present case was for an offence under S. 218 of the I. P. Code which is an offence under a different Act and for which a much higher punishment is prescribed. By reason of S. 36 of the Police Act, S. 42 thereof cannot apply to such a prosecution. Maulud Ahmad v. The State of Uttar Pradesh, (1964) 1 S C J 164 : 1964 M L J (Cri) 76 : (1963) 1 S C W R 268 : 1963 All L J 555 : 1963 All W R (H C) 482 : 1963 S C D 714 : I L R (1963) 2 All 528 : 1963 All Cr R 253 : (1963) Supp 2 S C R 38 : 1964 (2) Cr L J 71 (S C).

● ——S. 218—Prosecution under of Police Officer — Limitation prescribed by S. 42 has no application. See Police Act (1861), S. 42. (1954) 1 S C J 164 : 1964 Mad L J (Cri) 76 : 1964 (2) Cri L J 71 (S C).

● ——S. 218:— Police officer charged with manipulation of records to save accused—Accused acquitted—Held, police officer could be convicted under S. 218. Maulad Ahmad v. State of U. P., 1963 All L J 155 : (1964) 1 S C J 164 : (1963) All W R (H C) 482 : I L R (1963) 2 All 528 : 1964 M L J (Cri) 76 : 1963 All Cr R 253 : (1968) Supp 2 S C R 38 : (1963) 1 S C W R 268 : 1963 S C D 714 : 1964 (2) Cri L J 71 (S C).

● ——S. 218—Police Act (1861), S. 42—Sentence—If a police officer manipulates the record such as police diary etc. it will be the end of honest criminal investigation in the country. Such offences shall receive deterrant punishment. Maulud Ahmad v. State of U. P. 1963 All L J 555 : 1963 S C D 714 : 1963 All W R (H C) 482 : (1964) 1 S C J 164 : 1 L R (1963) 2 All 528 : 1963 All Cr R 253 : 1964 Mad L 7 (Cri) 76: (1963) Supp 2 S C R 38 : (1963) 1 S C W R 268 : 1964 (2) Cri L J 71 (SC).

● ——S. 218—Proof of intention — Duty of prosecution.

In order to sustain a conviction under S. 218, it is not sufficient that the entries are incorrect, but it is essential that the entry should have been made with the intention mentioned in that section. Where direct evidence proving the necessary criminal intention is lacking in the case and the circumstantial evidence too meagre to support any safe conclusion as to the intention with which the accused made the entry complained of, it must be held that the prosecution has failed to prove the necessary criminal intention. Raghubansh Lal v. The State of Uttar Pradesh, 1957 Mad W N (SC) 21 : ILR (1957) 1 All 368 : 1957 B L J R 362 : 1957 Mad L J (Cri) 388 : 1957 S C J 417 : 1957 Cri L J 595 : 1957 S C R 696 : 1957 M P C 361 : 1957 Ker L T 452 : 1957 S C A 607 : 1957 Andh L T 550 : 1957 S C C 207 : 1957 All W R (HC) 476 : 1957 All L J 472 : A I R 1957 S C 487 (488) (Pr 12).

—S. 218—Conviction under — Dishonest intention not proved—Accused given benefit of doubt — Criminal trial—Evidence—Benefit of doubt. 1964 All Cr R 244 (All).

——S. 218 — Criminal P. C. (1898), S. 195 (1) (b) — Falsification of public record (false entry in birth and death register) by public servant—Offences under Ss. 193 and 218, Penal Code are distinct—Prosecution of public servant for offence under S. 218 alone without sanction not barred. See Criminal P. C. (1898), S. 195 (1) (b). 1962 (1) Cri L J 240 : A I R 1962 All 150.

——S. 218 — Criminal P. C. (1898), S. 235—Joinder of charges — Joint trial of offences under Ss. 161 and 218, Penal Code — Previous sanction under S. 6, Prevention of Corruption Act. 1947, not obtained for former offence—Evidence of demand and acceptance of illegal gratification for making false entry relevant for both offences—Accused is not prejudiced by joint trial and conviction for latter offence is valid — Prevention of Corruption Act (1947), S. 6. See Criminal P. C. (1898), S. 235. 52 Cri L J 184 : A I R 1951 All 502.

——S. 218—Ranbir Penal Code (1989 B. K.), S. 167 — Intention to cause harm — Patwari making wrong entry in revenue records—Possibility of mistake being bona fide not ruled out—Wrong entry was innocuous as there was decree of civil Court determining rights of complainants — Held, that Patwari could not be said to have intended to cause any harm. 1965 Kash L J 93 : AIR 1966 J & K 96.

SECTION 220

——S. 220—Malicious confinement.

Where the unlawful commitment to confinement is wilful, without any excuse and with a view to put pressure on the person confined to come to terms with a certain person in whom the accused is interested, the accused can safely be said to have acted 'maliciously'. 1956 Cri L J 412 : ILR (1956) Pepsu 13 : A I R 1956 Pepsu 30 (30) (Pt B) (Pr 6).

SECTION 221

——S. 221 — Person apprehended with stolen property handed over to Datadar—Escape from custody of Dafadar — Duties of Dafadar under Bihar and Orissa Village Administration Act, Ss. 27 and 28—Dafadar held guilty under S. 221.

Held, on facts established that the petitioner as a dafadar had arrested the person and had thus taken him in custody, and was under duty to keep him under arrest and that inasmuch as he allowed him to escape he was guilty under S. 221 of the Penal Code. A I R 1940 Pat 696; 27 Cal 366; A I R 1914 Cal 272 and 46 Cal W N 163. Disting. 1962 B L J R 438 : 1963 (1) Cri L J 827 (Pat).

——S. 221 — Person apprehended with stolen property handed over to Dafadar—Escape from custody of Dafadar — Duties of Dafadar under Bihar and Orissa Village Administration Act Ss. 27 and 28—Dafadar held guilty under S. 221.

Under S. 27 (a) Bihar and Orissa Village Administration Act (3 of 1922), a dafadar is empowered to exercise all the powers conferred on a Choukidar under sub-s. (1) of this section. Under the definition given by S. 4 (4) of the Act, a dafadar merely means a head choukidar. Consequently, under S. 27 (1) (ii) (d), a dafadar is bound to arrest a person in whose possession anything is found which may reasonably be suspected to be stolen property, or who may reasonably be suspected of having committed an offence with reference to such thing. Where some persons

hand over the accused along with articles alleged to have been stolen by him, to the dafadar and tell him all about the occurrence and circumstances under which the accused was caught, the dafadar takes the custody of the person of the accused as well as the suspected property and when he takes away the accused and the suspected property to his house, it must be held that the dafadar as dafadar has actually arrested the accused by virtue of the power conferred on him It may be, that not being a police officer within the meaning of the Code of Criminal Procedure, the dafadar is not governed by S 59 (2), Criminal P. C, in the sense that he should re-arrest the accused, after the latter had been handed over to him, but it cannot be said that the dafadar had not arrested the accused.

If a dafadar receives information, which may lead to an inference that a person has been found in possession of property which may reasonably be suspected to be stolen property, or upon which a person may reasonably he suspected of having committed an offence with reference to such thing, the dafadar in exercise of his own rights under S. 27 of the Bihar Act 3 of 1922 can arrest the person concerned. Only because S. 27 of the Act does not mention any power of a chowkidar to re-arrest, it is difficult to hold that he cannot arrest by virtue of his powers, even if circumstances exist under which he can take action under S. 27 (1) (ii) (d) of the Act.

Under S. 28 whenever a dafadar or chowkidar arrests any person under S. 27, he is bound to take the arrested person forthwith to the police station within the limits of which the union was situated. Where, however, the arrest has been made at night, it is open to him to take the accused to the police station as soon as it was convenient to do so in the following morning.

Held on facts established that the petitioner as a dafadar had arrested the person and had thus taken him in custody, and was under duty to keep him under arrest and that inasmuch as he allowed him to escape he was guilty under S. 221 of the Penal Code. A I R 1940 Pat 698, I L R 27 Cal 366, A I R 1941 Cal 272, 46 Cal W N 163, Disting. 1962 B L J R 438.

——S. 221—Charge—Framing of—Details.

A person must be told as to what offences he is being directly charged with and what others, if any, he is being sought to be vicariously made liable. There is no reason or rhyme to seek to make a person who has committed a criminal act with his own hand liable constructively for that act under any of the sections of the Penal Code relating to vicarious responsibility. As the principal offender the charge and the conviction against him must be for the substantive offence he committed and not for that offence by virtue of any vicarious responsibility. A I R 1955 Assam 226, Ref. to. **1956 Ker L T 30 : I L R (1956) Trav-Co 1 : 1956 Cri L J 1358 : A I R 1956 Trav-Co 230 (232) (Pt E) (Pr 7) (DB).**

SECTION 223

——S. 223 — Accused was posted on duty to guard sub-jail at midnight — Escape of prisoners from jail during period of his watch — It is prima facie evidence of his negligence—Accused must satisfactorily establish that he took all reasonable care in performing his duty which required extra vigilance and which is expected of a person performing similar duties — Failure to establish — Moreover accused found to be actually negligent in his duty — He is guilty under S. 223 — Sentence of fine only is out of all proportion to gravity of offence — Deterrent sentence should be passed — Sentence of fine of Rs. 50 enhanced to one of six months' simple imprisonment. 1952 Cri L J 22 : A I R 1951 Kutch 89 (90) (Prs 6, 7, 8).

——S. 223 — Neglect of duty — Under-trial persons escaping—Offence.

Held, on facts of the case that the accused was guilty of neglect of duty on account of which the under-trial prisoners escaped from confinement and the conviction under S 225, Penal Code could therefore be altered to one under S. 223, Penal Code. See Penal Code (1860), S. 225. AIR 1955 N U C (Pepsu) 2508.

——Ss. 223 and 224 — Escape from custody—Person responsible for escape not prosecuted under S. 223 — Inference against prosecution cannot be drawn. AIR 1955 N U C (Raj) 490 (DB).

SECTION 224

SYNOPSIS

(Penal Code (45 of 1860), S. 224.)

1. Scope and applicability.
2. "Intentionally."
3. Resistance or obstruction to apprehension.
4. "For any offence with which he is charged."
5. Escape from lawful custody.
6. Sentence.

1. Scope and applicability.

——S. 224 — Applicability — Proceedings against prisoner—Imposition of fetters by Superintendent of Jail not shown to be by way of punishment for offence—Legality of proceedings—Prisons Act, S. 46 —Constitution of India, Art. 20.

Where proceedings were instituted against a prisoner under S. 224 or 224/114, Penal Code, on the allegation that he along with others attempted to escape from jail and there was nothing definite to show that the imposition of fetters and the restriction on him to take exercise in the cellyard inflicted by the Superintendent of Jail were by way of punishment for the offence under S. 46 of the Prisons Act, the proceedings are not liable to be quashed.

If, however, the prisoner was already punished for the alleged offence under S. 224 or 224/114, Penal Code, there is no doubt that the proceedings would be against the provisions of Art. 20 of the Constitution and would, therefore, be illegal.

The provisions of S. 403, Criminal P. C. cannot apply to the facts of the case **55 C W N 140 : A I R 1952 Cal 319 (320) (Pt A) (Pr 4) (DB).**

——S. 224 — Lawfully detained:— Warrant of arrest returned unexecuted — No issue of fresh warrant — Second attempt to arrest — Accused taken into custody—Arrest is without any order of arrest — It is not custody in which accused could be held to be lawfully detained — To escape or attempt to escape from such custody is no offence. 51 Cri L J 679 : I L R (1949) 1 Cut 623 : A I R 1950 Orissa 62 (64) (Pt B) (Pr 7) (DB).

——S. 224 — Offence under S. 33 (1) (a), Forest Act is cognizable offence—Person arrested for offence under S. 33(1)(a) can be released on his executing bond to appear before Magistrate—Offence is not non-bailable —Private person like Plantation Watcher can arrest person committing offence under S. 33 (1) (a) — Plantation Watcher is forest officer within meaning of S. 2 (2). Forest Act and has power to arrest without warrant person committing offence under S. 33 (1) (a) — Person arrested has no right of private defence. See Criminal P. C. (1898), S. 59. 1963 (1) Cri L J 558 (Tripura).

2. "Intentionally."

——S. 224—'Intentionally' escapes.

Accused 3 was arrested by the police on a public

road believing him to be indulging in unlawful gaming with other accused. While being taken to the police station accused 2 threw soda water bottles at the police constable who as a result, released his hold on the accused. Taking advantage of the situation accused 3 ran away.

Held, that the accused was guilty of intentional escape from lawful custody within the meaning of S. 224, I. P. Code (1963) 1 Mys L J 251 : 1964 Mad L J (Cri) 131 : I L R (1963) Mys 456 : 1963 (2) Cri L J 466 (Mys).

——S. 224—"Intentionally"—Accused forcibly taken away from custody by others — Accused cannot be said to have "intentionally" escaped from custody. 51 Cri L J 679 : I L R (1949) 1 Cut 623 : A I R 1950 Orissa 62 (64) (Pt C) (Pr 8) (DB).

3. Resistance or obstruction to apprehension.

——Ss. 224 and 225 — Endorsement on warrant not by name but by designation — Warrant is not legal—Resistance to execution of such warrant—Conviction under, not sustainable. See Criminal P. C. (1898), S. 79. 1964 (1) Cri L J 592 (Ker).

——Ss. 224, 225 and 225-B — Lawful apprehension —Apprehension made within power and authority of person making it — Accused acquitted of offence for which apprehension was made — Acquittal does not make apprehension unlawful. (1965 1 Mys L J 307 : (1965) 1 Law Rep 806 : 1965 Mad L J (Cr) 404 : 1966 Cri L J 36 : A I R 1966 Mys 20 (21) (Pt B) (Pr 7).

—— Ss. 224, 225 and 225-B — Lawful apprehension—Apprehension must be lawful—Whether it is in good faith is immaterial. (1965) 1 Mys L J 307 : (1965) 1 Law Rep 806 : 1965 Mad L J (Cr) 404 : 1966 Cri L J 36 : AIR 1966 Mys 20 (21) (Pt C) (Pr 8).

——Ss. 224, 226 and 225-B — Intentional obstruction or resistance—Proof—Intention should be that there should be no apprehension notwithstanding apprehension is known to be lawful — Very act of rescue involves intention to take away person rescued.

To constitute an offence under Ss. 224 and 225 the obstruction or resistance must be intentional. An obstruction or resistance to apprehension would be intentional when the persons offering it did so with the intention that there should be no apprehension notwithstanding that such apprehension is to their knowledge lawful. Rescuing a person from lawful custody is clearly an offence because the very act of rescue involves the intention to take away the person rescued from the custody in which he is lawfully detained. (1965) 1 Mys L J 307 : (1965) 1 Law Rep 806 : 1965 Mad L J (Cr) 404 : 1966 Cri L J 36 : AIR 1966 Mys 20 (21) (Pt D) (Pr 10).

——S. 224 — Apprehension must be lawful — Case under S. 447 — In first instance summons should issue — Issue of warrant is not lawful apprehension — Resistance is not offence — Criminal P. C. (1898), S. 204.

Where a person was put on trial for having committed an offence under S. 224, Penal Code, on the allegations that he offered resistance to his lawful apprehension, in order to bring the charge home to the accused, it has to be established that the accused intentionally offered resistance to his lawful apprehension for the offence with which he was charged or he escaped from the custody in which he was lawfully detained.

The case under S. 447, Penal Code is one in which, according to S. 204, Criminal P.C., summons has to be issued for the accused's attendance. The Court shall be entitled to issue a warrant not in the first instance but only later, after the summonses are not complied with.

Where the Magistrate issues warrant of arrest at the first instance for an offence under S. 447 after taking cognizance of the offence, instead of summons, apprehension of accused under such circumstances cannot be said to be lawful one within S. 224, Penal Code, and resistance to it will not be an offence. 51 Cri L J 679 : I L R (1949) 1 Cut 623 : A I R 1950 Orissa 62 (63) (Pt A) (Prs 2, 3) (DB).

4. "For any offence with which he is charged."

——S. 224—Escape from lawful custody—Proof that person escaping was charged with offence is essential—'Charged', meaning of.

In a prosecution under S. 224, I. P. Code, what should be proved is that the person who escaped from lawful custody had been charged with an offence not in the sense that a charge had been framed against him by a Court of law under the Code of Criminal Procedure but in the ordinary sense of that expression, namely, that he was accused of having been involved in an offence. The question whether a person was or was not charged with an offence should depend upon the facts and circumstances of each case and the inference to be drawn from such facts and circumstances. (1963) 1 Mys L J 251 : 1964 Mad L J (Cri) 131 : ILR (1963) Mys 456 : 1963 (2) Cri L J 466 (467) (Pt A) (Pr 6) (Mys).

——S. 224 — Charge —Offences committed not in the course of same transaction — Misjoinder of charges—Effect — The trial held was vitiated by misjoinder. See Criminal P. C. (1898), S. 239. A I R 1955 N U C (Mad) 2415.

——S. 224—Applicability—Person who escapes must be charged with offence—Evidence — Contradiction in—Ingredient held not established —(Criminal P. C. (1898), S. 367). AIR 1955 N U C (Sau) 5050.

5. Escape from lawful custody.

——S. 224 — Name and designation of person who was to execute warrant not mentioned in the warrant — Where legality of warrant is basis for prosecution and is challenged, error or omission in warrant cannot be considered to be mere irregularity within S. 537, See Criminal P. C. (1898), S. 537. 1965 All W R (H C) 143.

——S. 224 —Lawfully detained — Meaning of.

Section 61, Criminal P. C. (1898), provides that the police officer should not detain a person in custody for a period longer than 24 hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court. Where the accused is sent to be produced before the Magistrate within 24 hours of his arrest the fact that more than 24 hours have elapsed before he could reach the Magistrate's Court which was situate in another town, to which he had to be taken in view of the circumstance that the Magistrate was on leave cannot make the detention of the accused unlawful within the meaning of S. 224, Penal Code. 1954 Cri L J 651 : AIR 1954 Hyd 89 (DB).

——S. 224 — Escape from custody — What is.

Even when the escape is effected by the consent or with the knowledge of the person escorting the prisoner in custody, the accused is no less guilty, 1954 Cri L J 651 : I L R (1954) Hyd 68 : AIR 1954 Hyd 89 (90) (Pt B) (Pr 5) (DB).

——S. 224 — Police constable arresting suspected thief without warrant on his own initiative under S. 54 (1) — Arrest lawful even if S. 56 not complied with — Suspected thief escaping from custody by causing death of constable — Held guilty of offences under Ss. 224 and 302, I. P. C. See Penal Code (1860), S. 99. 1964 (2) Cri L J 34 : AIR 1964 Ker 185 (DB).

——Ss 224 and 225 — Lawful custody – Resistance to or escape from — Warrant of arrest—Endorsement on — No proper endorsement as required by S. 79, Cri. P. Code —Arrest not lawful—S. 54, Cri. P. Code cannot be availed.

Under the terms of S. 79, Cri. P. Code, the endorsement on the warrant of arrest should be regularly made by name to a certain person in order to authorise him to make an arrest. Where there is no such endorsement the arrest is not a legal arrest so as to make the accused liable for an offence under Ss. 224 and 225, Penal Code. 4 Cal W N 85, Foll. To hold that S. 54 applies in such cases without any intimation to the accused and without any allegation by the police officer in his deposition that he proceeded under the section could be to nullify several salutary provisions contained in the Code of Criminal Procedure regarding the execution of warrants of arrest. AIR 1924 Mad 555; AIR 1918 Pat 252, Rel. on. **1961 Ker L J 769 : 1961 Ker L T 577 : 1962 (2) Cri L J 437 (Ker).**

——S. 224 – Applicability—Conditions—'Escape.'

A person forcibly snatchad away from custody cannot be said to have intentionally escaped from custody and therefore cannot be convicted under this section. AIR 1950 Orissa 62, Followed. **1957 Mad W N 423 : (1957) Mad L J (Cr) 405 : 1957 Cri L J 1284 (1) : AIR 1957 Mad 714 (714) (Pr 2).**

——S. 224 — Applicability — Detention of accused by villagers on suspicion — Subsequent arrest by constable — Escape — Offence — (Cri. P. Code (1898), Ss. 46, 54 56 and 59).

The accused was detained by certain villagers on suspicion. On information sent by them to the Police station the Officer-in-charge deputed a constable who took charge of the accused. On their way to the Police station the accused escaped. In the case under S. 224, Penal Code the command certificate authorising the constable to effect arrest was not produced and on the question whether the arrest was legal.

Held, that in order to convict the accused under S. 224, I. P Code the prosecution must prove that there was a lawful arrest within the meaning of S. 54 or S. 56, Cri. P. Code. In order to enable a private person to effect an arrest of any person a cognizable offence must be committed in his presence. In the present case no cognizable offence had been committed in the presence of the villagers. Therefore, the villagers could not have effected a legal arrest. There was no evidence on record that he was re-arrested by the constable. The arrest, therefore was neither under S. 54 nor under S. 56, Cri. P. Code. Nor was there submission to custody by the accused himself under S. 46, Cri. P. Code. It could not be said. therefore, that the accused escaped from lawful custody. **25 Cut L T 244 : I L R (1959) Cut 504 : 1960 Cri L J 267 : AIR 1960 Orissa 23 (25) (Pr 7).**

——S. 224 — Jaipur Penal Code (1924), S. 224 — Escape from custody.

The fact that the public servant who had the custody of the accused and suffered him to escape has not been prosecuted under S. 223 does not necessarily lead to an inference against the prosecution case against the accused under this section. **AIR 1955 N U C (Raj) 490 (DB).**

——S. 224 — Accused apprehended for possession of opium—Search and seizure of opium from person — Accused suddenly managing to escape from armed police guard while seizure list was being prepared and on being chased escaping to Pakistan border — Conviction of accused under S. 224 is justified. **1965 (2) Cri L J 814 : AIR 1965 Tripura 45 (48) (Pt E) (Pr 18).**

6. Sentence.

—— Ss. 224. 225 and 225-B—Sentence.

The offences under Ss. 224 and 225 are serious ones. A person securing his freedom from lawful apprehension by offering resistance to such apprehension and those who, depending upon their greater number, over-power and manhandle a public servant discharging his duty and rescue such person, can plead no circumstance in extenuation. **(1965) 1 Mys L J 307 : (1965) 1 Law Rep 806 : 1965 Mad L J (Cr) 404 : 1966 Cri L J 36 : AIR 1966 Mys 20 (22) (Pt E) (Pr 13).**

——S. 224 — Sentence.

When the Constables told the petitioner that he must agree to be put under arrest and taken to the Police Station, the petitioner replied that he had obtained a bail order from the Magistrate and that he was ready to accompany the Constable to the Police Station, but refused to be arrested. The Constables were not however satisfied with the assurance given by him and caught hold of his hand with a view to arrest him. Thereupon the petitioner snatched away his hand and attempted to assault the Constable by raising his Kudi (spade) which was then snatched away by the other constable who received a light injury.

Held, that as the accused did not agree to be arrested there was no "submision" to custody within S. 46, Criminal P. C. Considering all the circumstances, status of the accused, and the fact that in that in respect of the main offence he has been given bail by the Magistrate, a substantive sentence of imprisonment under S. 224, Penal Code, was not necessary. A fine of Rs 200 and in default rigorous imprisonment for three months was sufficient. **(1959) 1 O J D 677 (1960) 26 Cut L T 92.**

SECTION 225

——S. 225 — Name and designation of person who was to execute warrant not mentioned in the warrant — Where legality of warrant is basis for prosecution and is challenged, error or omisssion in warrant cannot be considered to be mere irregularity within S. 537. See Criminal P. C. (1898), S. 537. 1965 All W R (H C) 143.

——Ss. 225 and 353 — Sentence.

Where accused are convicted under Ss. 225 and 353 for offences committed in the course of the same transaction and the Magistrate feels that a sentence of imprisonment is necessary, the proper course for him is to inflict a sentence of imprisonment for each offence and to direct that the two sentences run concurrently. **1954 Cri L J 1472 : AIR 1954 Him Pra 68 (70) (Pt C) (Pr 14).**

——Ss. 225, 224 and 225B — Lawful apprehension—Apprehension made within power and authority of person making it — Accused acquitted of offence for which apprehension was made — Acquittal does not make apprehension unlawful. See Penal Code (1860), S. 224. (1965) Mad L J (Cri) 404 : (1965) 1 Mys L J 307 : AIR 1966 Mys 20.

——Ss. 225, 224 and 225B — Lawful apprehension — Apprehension must be lawful — Whether it is in good faith is immaterial. See Penal Code (1860), S. 224. (1965) Mad L J (Cri) 404 : (1965) 1 Mys L J 307 : AIR 1966 Mys 20.

——Ss. 225, 225B and 224 — Gist of offence.

What is necessary to constitute an offence under S. 225 of the Penal Code is that the obstruction or resistance was intentional. An obstruction or resistance is intentional when those who offered the obstruction or those who resisted did so with the intention that there should be no apprehension not-

withstanding such apprehension is to their knowledge lawful. (1965) 1 Mys LJ 307: (1965) M L J (Cr) 404: (1965) 1 Law Rep 806: AIR 1966 Mys 20 (21) (Pt D) (Pr 10).

——S. 225 — Sentence.

The offences under Ss. 224 and 225 are serious ones. A person securing his freedom from lawful apprehension by offering resistance to such apprehension and those who depending upon their greater number, overpower and manhandle a public servant discharging his duty and rescue such person can plead no circumstance in extenuation. (1965) Mad L J 404: (1965) 1 Mys L J 307: AIR 1966 Mys 20.

— S. 225 — Offence under — Intention — Proof of — Necessary only in regard to resistance to apprehension and not for rescue from lawful custody.

In order to amount to an offence under the second part of S. 225, Penal Code a rescue from lawful custody need not be intentional. It is only resistance or illegal obstruction to apprehension that has to be proved to be intentional before it can amount to an offence under the first part of S. 225, Penal Code. When a person rescues another person who is in lawful custody so that he may be prosecuted for an offence committed by him it is obvious that the rescue cannot be anything but intentional. (1962) 40 Mys L J 380: 1962 All Cr R 203: 1964 Mad L J (Cri) 436: 1962 All W R (Suppl) 46 (Mys).

——Ss. 225 and 353 — Sarpanch forwarding warrant to Chief Officer for execution — No irregularity or illegality — Accused rescuing arrested person from custody of Chief Officer — Can be punished under S. 353, Penal Code. See Panchayats — Bihar Gram Cutcherry Rules (1949), R. 9. 1963 B L J R 641.

——S. 225 — Lawfully detained.

Under R. 28 (2) of Bihar Gram-Cutcherry Rules (1949) it is incumbent to send the accused to jail custody with the village chowkidar who is to be assisted by such person of the village volunteer force as the Mukhiya may direct. Instead of that where the convict was sent to Jail custody and on the way the convict was rescued by others:

Held that at the time the convict was rescued he was in lawful detention within the provisions of S. 225, Penal Code. AIR 1955 NUC (Pat) 1392.

——Ss. 225, 223 — 'Rescue' means forcibly liberating or recovering prisoner from custody — There must be intention and use of violence — In absence of proof of this, there cannot be conviction under S. 225 — Accused held guilty of negligence in allowing undertrials to escape — Conviction altered to one under S. 223. AIR 1955 NUC (Pepsu) 2508.

SECTION 225-B

——S. 225-B — Applicability — Absence of valid or legal warrant for apprehension of a person is fatal to conviction under this section. See Penal Code (1860), S. 332. AIR 1955 NUC (All) 2782.

——S. 225B — Illegal custody — Escape from — If offence.

The person from whose custody the rescue is effected or escape made must have authority to lawfully detain the person rescued. If the apprehension or detention is not lawful then his own escaping as well as the rescuing of such a person by others is no offence. ILR (1951) Hyd 237: AIR 1950 Hyd 20 (DB).

—— Ss. 225-B, 323 — Accused rescuing person from unlawful detention and simultaneously causing hurt — Acquittal under S. 225-B — Conviction under S. 323 not legal — Criminal P. C. (1898), S. 235. 1965 (2) Cri L J 89: AIR 1965 Cal 368 (368) (Prs 3, 6) (DB).

——S. 225-B — Warrant of arrest of judgment-debtor — It is to be issued to a person named — Necessity of such issue — Improper issue of warrant — Escape of judgment-debtor from custody — Offence under S. 225-B, Penal Code cannot be made out. See Civil P. C. (1908), O. 21, R. 24 (2). 1962 (2) Cri L J 372: AIR 1962 Ker 258 (DB).

——S. 225-B — Requirements to constitute the offence — Warrant issued in the name of Nazir — Arrest by process server without endorsement by Nazir — Escape whether amounts to an offence.

It cannot be contended that the warrant having been issued to the Nazir should be executed by himself and that he is not empowered to delegate its execution to another. If the Nazir has made an endorsement on the back of the warrant authorising any particular process server or Amin to effect the arrest there is no doubt that that particular person would have authority to go and effect the arrest. A warrant for arrest must be issued to some person for execution and where no name or description of that person is given in the warrant the person arrested can have no knowledge that the person who presents the warrant and demands the payment of the decree amount and arrests him in default is legally authorised to do so. It may be that the person who is arrested is unable to read the warrant or had no knowledge as to whether the warrant is or is not properly filled up but it is the duty of the Court to issue a warrant in proper form and when the warrant is incomplete, no offence under S. 225-B of the Penal Code is made out. There must be an order of the Munsif leaving the judgment-debtor in the custody of a particular officer of the Court and an order to produce the judgment-debtor at the expiration of the period specified. Order 21, R. 40 of Civil P. C., says nothing about the order having to be in writing. In order that an offence under S. 225-B of Penal Code is made out the apprehension and detention must be lawful, that is to say, the warrant on which the arrest was made and detention was ordered must satisfy all due formalities of law. The statutory rules which involve penal consequences for infringement must be strictly interpreted and it is the duty of the prosecution to prove all the essential ingredients that constitute the offence. As the custody of the accused with the peon is not proved to be legal custody, his escape will not amount to an offence (1964) M L J (Cr) 392: 1961 Ker L J 1095: 1962 Ker L T 169: 1962 (2) Cri L J 372: 1962 All W R (Sup) 99: 1962 All Cri R 458: AIR 1962 Ker 258 (261) (Pt E) (Pr 16) (DB).

——Ss. 225-B and 109 — 'Rescuing' requires overt act — Mere instigation to escape would make it only an abetment of offence of escape.

Where no overt act has been done by the first accused to forcibly rescue the second accused from the custody of the Amin, the oral incitement or instigation to escape, alone would not be sufficient to constitute the offence of rescuing from custody made punishable under S. 225-B; 'rescuing' indicates some positive overt act on the part of the accused by which the liberation of the person arrested is effected. Whether there is any such act done by the accused in a particular case would depend on the facts of each case. When the accused No. 1 only instigated the second accused to escape and in consequence of that he escaped from custody, the offence committed by the first accused, is really abetment of escape by the second accused, an offence punishable under S 225-B read with S. 109. ILR (1961) 1 Ker 279: 1961 Ker L T 353: 1961 Mad L J (Cr) 597: 1961 (2) Cri L J 774: AIR 1961 Ker 331 (334) (Pt C) (Prs 15, 16) (DB).

——Ss. 225-B, 353 and 114 — Misdescription in warrant — Resistance to arrest is not offence — Burden lies on prosecution to establish identity of

accused with person described in warrant — Aiding escape from illegal arrest is also not an offence.

If the description in the warrant of the person to be arrested is wrong it makes the warrant invalid and the arrest illegal. The attempt of the accused to resist an illegal arrest does not make him liable to punishment under S. 225-B. ILR 28 Cal 399, Rel. on,

It is but elementary that in a criminal case the burden of proving the necessary facts to constitute an offence is always on the prosecution and it never shifts.

Persons aiding accused to escape from custody also are not exposed to punishment even if they had knowledge that the persons having custody of the accused are officers of Court. 1961 Ker L J 696 : (1961) M L J (Cr) 795 : 1961 Ker L T 612.

—S. 225-B — Authority to sign warrants given to Head Clerk—Warrant signed by Deputy Nazir acting as Head Clerk—Legality—Warrant issued is legal as authority conferred on Head Clerk was general. See Civil P. C. (1908), O. 21, R. 24 (2). 1957 Cri L J 1264: AIR 1957 Ker 17.

—S. 225-B—Ingredients of offence.

In order that forcible escape from the custody of process-server may amount to an offence under S. 225-B two pre-requisites must be satisfied : (1) that the process-server had the legal authority to arrest the accused, and (2) that the warrant of arrest had been legally issued by a competent authority. 1957 Ker L J 419 : (1957) Mad L J (Cr) 335 : 1957 Ker L T 555 : I L R (1957) Ker 586 : 1957 Cri L J 1264 : AIR 1957 Ker 174 (174) (Pt A) (Pr 2)

—S. 225-B—Applicability—Person arrested refusing to accompany process server—Conviction—Legality.

In a trial under S. 225-B the prosecution case was that after the process server of a Civil Court effected the arrest of the accused, the latter refused to accompany the process server and thus escaped from the lawful custody. No evidence was led to show that the Head clerk who had signed the warrant of arrest was authorised under O. 21, R. 24 (2), C. P. Code to sign such warrants. Subsequent report of the District Munsiff however stated that the Head clerk was duly authorised under the High Court Circular.

Held (i) that technically speaking the evidence of authority to Head clerk to sign warrants of arrest ought to be given in Court but the failure to file the authorisation was not a lacuna in the prosecution case so as to warrant the case being sent back for letting in that evidence.

(ii) that the refusal of the accused to accompany the process server necessarily meant that he would not go with the process server and that the latter will have to leave the accused and go unless force was used. It was, therefore, an attempt to escape within the meaning of S. 225-B.

(iii) that though the charge was only for escape the alteration in conviction for attempt to escape did not in any way affect the conviction under S. 225-B. AIR 1933 Lah 128 (1), Dissented from. 1955 Cri L J 569 : 1955 Mad W N 24 : A I R 1955 Mad 157 (158) (Prs 3, 4).

—S. 225-B—"Lawful apprehension"—Meaning of.

The person from whose custody the rescue is effected or escape made must have authority to lawfully detain the person rescued; if the apprehension or detention is not lawful, then his own escaping as well as the rescuing of such a person by others is no offence. 1953 Mad W N 362 : (1953) 1 Mad L J 653 : 55 Cri L J 396 : AIR 1954 Mad 321 (323) (Pt C) (Pr 13).

—Ss. 225-B, 224, 225!— Lawful apprehension — Apprehension made within power and authority of person making it— Accused acquitted of offence for which apprehension was made — Acquittal does not make apprehension unlawful. See Penal Code (1860), S. 224. (1965) Mad L J (Cri) 404 : (1965) 1 Mys L J 307 : AIR 1966 Mys 20.

—Ss. 225-B, 224, 225—Lawful apprehension—Apprehension must be lawful — Whether it is in good faith is immaterial. See Penal Code (1860), S. 224. (1965) Mad L J (Cri) 404 : (1965) 1 Mys L J 307 : AIR 1966 Mys 20.

—Ss. 225B, 224, 225 — Intentional obstruction or resistance—Proof—Intention should be that there should be no apprehension nothwithstanding apprehension is known to be lawful—Very act of rescue involves intention to take away person rescued. See Penal Code (1860), S. 224. (1965) Mad L J (Cri) 404 : (1965) 1 Mys L J 307 : AIR 1966 Mys 20.

—S. 225-B—Sentence.

The offences under Ss. 224 and 225 are serious ones. A person securing his freedom from lawful apprehension by offering resistance to such apprehension and those who depending upon their greater number overpower and manhandle a public servant discharging his duty and rescue such person can plead no circumstance in extenuation. (1965) Mad L J (Cri) 404 : (1965) 1 Mys L J 307 : AIR 1966 Mys 20.

—S. 225-B—Applicability—Minor certificate-debtor —Illegal arrest in execution of certificate—Father rescuing him from arrest — Offence.—Held, that the arrest was illegal as it was in breach of the mandatory provisions of Ss. 7, 42 and Sch. 2, R. 54(1) of the Bihar and Orissa Act 4 of 1914. Held also that in the circumstances the act of the father of the minor in rescuing him did not amount to any criminal offence. See Bihar and Orissa Public Demands Recovery Act (4 of 1914), S. 7. AIR 1955 N U C (Pat) 2490.

—Ss. 225-B, 225, 147 and 353—Warrant of arrest without seal of Court — Obstruction to execution by more than five persons — Conviction under Ss. 225-B and 353 not maintainable—Conviction under S. 147 held legal. AIR 1918 Lah 332, Rel. on. 1960 Raj L W 637 : I L R (1960) 10 Raj 1689 : 1962 (1) Cri L J 91 (Raj).

—S. 225-B—Applicability — "Arrest," meaning of.

By showing the warrant to the judgment-debtor and by requesting him to accompany to the Court, an arrest cannot be deemed to have been effected so as to hold the judgment-debtor liable for an offence under S. 225-B, Penal Code on his trying to refuse to accompany the Amin An arrest under a civil process is not effected unless either the person to be arrested submits to the arrest or the officer making the arrest actually touches or confines the body of the person to be arrested. Request to the judgment-debtor by the Amin to accompany him to the Court is not an arrest as required by law where the judgment-debtor is not informed that he is being put under arrest. 5 Cal W N 843, Ref. ILR (1961) 11 Raj 243: 1961 Raj L W 227: 1961 (2) Cri L J 151: AIR 1961 Raj 156 (157) (Pr 3) (DB).

SECTION 228

SYNOPSIS

(Penal Code (1860), S. 228.)

1. Insult or interruption.
2. Insult or interruption should be intentional.
3. Insult or interruption by lawyer.
4. Judicial proceedings.
5. Contempt of Court.
6. Procedure.

1. Insult or interruption.

● —S. 228—Offence—Essential ingredients.

The essential ingredients of the offence under S. 228 are (1) intention, (2) insult or interruption to a public servant and (3) the public servant insulted or interrupted must be sitting in any stage of a judicial proceeding. State of Madhya Pradesh v Revashankar, 1959 All W R (Sup) 17 : 37 Mys L J 7 : 1959 Mad W N (S C) 5 : 1959 M P L J 251 : 1959 All Cr R 137: 61 Pun L R 343 : 1959 Nag L J 85 : 1959 M P C 25 : 1959 S C J 86: 1959 Mad L J (Cr) 14 : (1959) 1 Andh W R (S C) 84 : (1959) 1 Mad L J (S C) 84 : 1959 Cri L J 251: 1960 Andhra L T 712: 1959 S C R 1367 : AIR 1959 S C 102 (105) (Pt B) (Pr 5)

—S. 228—Case under S 228, Penal Code—Not applicable to case under S. 37-A, Himachal Pradesh Panchayat Raj Act (1953). See Panchayats — Himachal Pradesh Panchayat Raj Act (6 of 1953), S. 37-A. 1965 (1) Cri L J 550 : AIR 1964 Him Pra 95.

—S. 228—Scope—Interruption of Panchayat work as Court—Complaint to police—Proper procedure.

Member of Panchayat, while it was functioning as Court, insulted and interruption caused to Panchayat —Member making complaint to Sarpanch who forwarded it to police—Police forwarding it to Magistrate who convicted accused under S. 228—Held that not only under the mandatory provision of S. 476, Criminal P. C. but also according to the definition of complaint as given in S. 4 (1) (h) of the Code, the cognizance of the case by the Magistrate on report of the police was clearly barred by S. 195 (1) (b) of the Code. 1954 Cri L J 166 : AIR 1954 Him Pra 32.

—S. 228 — Applicability — Mere audible remarks interrupting Court's proceedings not enough See Criminal P. C (1898), S. 480. AIR 1955 N.U C (Madh B) 3034 (DB).

—S. 228 — Applicability—Insult to judicial officer — Offence—Personal feelings of officer—Relevancy.

To insult a public servant while he is sitting in any stage of a judicial proceeding or to cause an interruption to such public servant is a very serious matter and the Legislature has conferred a power on the Court itself in such a contingency to cause the offender to be detained in custody and, if thought fit, to take cognizance of the offence and sentence the offender. The gravity of the offence is clear from the fact that the Court in such cases has been given the extraordinary power of being the complainant, the prosecutor and the judge. The Legislature has thus manifested its anxiety to maintain and uphold the dignity and prestige of Courts of justice. It is therefore essential that a judicial officer while exercising the extraordinary powers of committing a person for contempt of Court must never allow his personal feeling to have any weight or importance because those powers have been conferred on him exclusively for the purpose of supporting the dignity of his important office and not for upholding his on vanity. 1960 Cri L J 511 : AIR 1960 Punj 211 (213) (Pt A) (Pr 3).

—S. 228—Criminal P. C. (1898). S. 480—Scope and applicability of S. 480 — Alleged contempt under S. 228, Penal Code—Action by Sessions Judge against clerk working in another department for alleged interruption of Court work—Accused denying offence and questioning jurisdiction of Court whether intentional insult — Order finding him guilty not recorded as required by S. 481—Order held vitiated—Proper procedure to be followed in such cases. See Criminal P. C. (1898), S. 480. 1963 (2) Cri L J 668: AIR 1963 Tripura 50.

2. Insult or interruption should be intentional.

■ —S. 228 — Intention to offer insult — Depends on facts and circumstances. State of Madhya Pradesh v Revashankar, 1959 All W R (Sup) 17 : 37 Mys L J 7 : 1959 Mad W N (SC) 5 : 1959 M P L J 251 : 1959 All Cri R 137 : 61 Punj L R 343 : 1959 Nag L J 85 : 1959 M P C 25 : 1959 S C J 86 : 1959 Mad L J (Cr) 14 : (1959) 1 Andh W R (SC) 84 : (1959) 1 Mad L J (SC) 84 : 1959 Cr L J 251 : 1960 An L T 712 : 1959 S C R 1367 : AIR 1959 S C 102 (107) (Pt C) (Pr 8).

—S. 228 — Question of intention to offer insult to trying Magistrate depends on facts and circumstances of each case.

The question of an intention to offer insult to the Magistrate trying the case is a question of drawing inferences from primary facts and depends on the facts and circumstances of each case. AIR 1959 S C 102 and AIR 1922 Bom 261 and AIR 1932 Lah 502, Rel. on; AIR 1930 All 483 and AIR 1936 PC 141, Dist. 1964 All Cr R 334 : 1964 All W R (HC) 484 : 1964 All L J 614.

—S. 228 — Insult or interruption — What record should show — (Criminal P. C. (1898), S. 481 (2)).

Where the record only shows that the accused was badly drunk and talked irrelevant in Court it does not necessarily follow from this fact that he was behaving so as to cause interruption or insult. The record should show how the accused had acted or what he had stated caused interruption or amounted to insult. 1952 R D (HC) 166 (2) : 1952 All Cr R 69 : 1952 All W R (HC) 198 : 1952 All L J 240 : 1953 Cri L J 320 : AIR 1953 All 59 (60) (Pt B) (Pr 11).

—S. 228 — Intentionally.

Where the accused could not be presumed to have deliberately taken liquor out of his free will before coming to the Court in which he appeared and talked irrelevant:

Held, that the accused could not be held to have intentionally offered any insult or caused any interruption. ('52) 1952 R D (HC) 166 (2) : 1952 All Cr 69 : 1952 All W R (HC) 198 : 1952 All L J 240 : 1953 Cri L J 320 : AIR 1953 All 59 (61) (Pt C) (Pr 12).

—S. 228 — Applicability — Accused on conviction abusing members of Panchayati Adalat—Offence.

As every member of a Panchayati Adalat is a Judge and therefore a public servant, where an accused on the pronouncing of the judgment convicting him by a Panchayati Adalat abuses the members of the Panchayati Adalat and threatens them, he is guilty of an offence under S. 228 as every ingredient of the offence is present. 1951 A L J 551 : 53 Cri L J 621 : AIR 1952 All 306 (306) (Pt A) (Pr 6).

—S. 228—"Insult" or "interruption"—Meaning of.

Every protest made, in fact, does interrupt the Court but it is its duty to listen to protests how much soever they may delay its proceedings. So long as they are made bona fide they do not constitute the interruption which the section punishes as contempt. But if they are made with that sole object in view, they cease to be bona fide and they may then supply necessary element to constitute the offence. I L R (1953) Hyd 389 : 1953 Cri L J 1856 : AIR 1953 Hyd 285 (285) (Pt B) (Pr 2).

—S. 228 — Insult or interruption must be intentional.

The petitioner's criminal complaint was dismissed by the Magistrate summarily under S. 203, Criminal P. C. No opportunity was given to the petitioner to explain the legal position. After pronouncing the order, the Magistrate directed the complainant to bring his lawyer so that he may go through the order passed by him.

But the complainant expressed surprise at this and enquired how his complaint could be dismissed without any examination of his witnesses. According to the Magistrate the complainant repeated this statement several times with the deliberate intention of insulting him He therefore drew up proceedings for contempt against the complainant, and convicted hi n under S 228, Penal Code.

Held, that after having pronounced the order of dismissal the Magistrate lost seisin of the matter and his direction to the complainant to bring his Vakil could not be regarded as an order of the Court trying the matter. It was not unnatural for the petitioner whose case had been summarily dismissed by the Magistrate without hearing his witnesses or his Vakil to have remarked that the presence of a Vakil at that stage was unnecessary, and there appeared to be no justification to import any intention to insult the Magistrate. After all Courts could not be overtouchy in such matters. **21 Cut L T 320 : 1956 Cri L J 85 : AIR 1956 Orissa 28 (29) (Prs 4, 5).**

——S 228 — Intentional disobedience of order of presiding officer to leave Court—Offence.

The mere fact that a judicial officer feels insulted is of no consequence. The intention of the alleged offender must be looked into. If the facts and circumstances show that he intended to cause insult or interruption, his act may amount to an offence under S. 228. If they show that he has no such intention, his act cannot be held to amount to that offence. Where the presiding officer of a Court asked the petitioner to quit the Court but the petitioner insisted upon staying in spite of the warning that action for contempt of Court might be taken against him, it was held that the petitioner intentionally and deliberately disobeyed and defied the Magistrate by not leaving the room and was guilty under S. 228 An intentional disobedience of the order of the presiding officer of a Court in his presence must lead to the conclusion that the person responsible intended, at least, to offer insult to that officer. **1960 Cri L J 976 : AIR 1960 Pat 309 (309, 310) (Prs 5, 9).**

● —S 228 — Applicability — Plaintiff in a civil suit on being asked by court if he has brought certain books denying he has those books—Subsequently going out and talking to his witness — No offence held committed under S. 228. **AIR 1955 N U C (Raj) 4627.**

3. Insult or interruption by lawyer.

——S. 228 — Contempt of Courts Act (1952), S. 3 — Offence punishable under Penal Code.

Merely appearing in a drunken state in Court is neither offering an insult nor causing any interruption to the Presiding Officer of the Court. A counsel appearing in Court under intoxication may be showing disrespect to the Court but showing disrespect is not synonymous with insulting. He may do an act under the influence of liquor which amounts to an insult but it would be an additional act to that of merely being under intoxication. As there is no other provisions of the Penal Code under which the counsel could be punished the High Court is not deprived by S. 3(2), Contempt of Courts Act from taking cognizance of the contempt, if his mere presence in the subordinate Court in a drunken state amounted to contempt of Court. **1956 Cri L J 679 : AIR 1956 All 258 (DB).**

[Overruled on other point in AIR 1962 All 315.]

——S. 228 — Insult or interruption by lawyer — (Civil P. C. (1908), O. 3, R. 4) — (Criminal P. C. (1898), S. 340).

While it is true that the Court has the power, and indeed it is its duty, to see that undue advantage is not taken of the ignorance of witnesses or parties, it is no less the duty of the Court to see that there is a faithful record of the proceedings in Court. If for any reason the Court does not see its way to accept the position contended for by a counsel, there is nothing unnatural or wrong in the counsel requesting the Court to place on record its ruling. While it cannot be said that the Court is bound to record all contentions, objections or representations, even if they are of a trivial or a frivolous character, it is undoubtedly the Court's duty to record its decision on any matter of substance that arises in a case. If some time was taken by the counsel in looking up authorities to satisfy the Court about the correctness of the position contended for by him and if the discussion took some time and if all this occupied about 20 minutes, it can hardly be said that the counsel interrupted the Court's proceedings. The mere circumstance that the counsel expressed his intention to retire from the case or to move for a transfer of the case did not constitute a threat or insult. It is scarcely necessary to emphasise that when under some exceptional provisions the Court itself is constituted both the prosecutor and the Judge, it is all the more incumbent upon the presiding officer not to lose a sense of perspective while there can be no doubt that it is the duty of all those appearing in Court and more particularly of counsel to conduct themselves with becoming decorum and restraint and to do nothing which is likely to bring down the prestige or dignity of the Court; it is equally essential that no occasion should be given for any party to feel that he has not been given the fullest opportunity to present his case or that there is not a fair, substantial and faithful record of the proceedings in Court Some latitude should be allowed to the member of the Bar insisting in the conduct of his case upon his question being taken down or his objections noted where the Court thinks the question inadmissible or the objections untenable. **8 Bom L R 541, Rel. on. 1956 Cri L J 1415 : ILR (1956) Mys 371 : AIR 1956 Mys 60 (2) (61, 62) (Prs 4, 8).**

4. Judicial proceedings.

——S. 228 — "Judicial proceeding" — Pronouncement of judgment — Accused threatening and abusing panches immediately after hearing sentence.

Pronouncement of judgment is a state of judicial proceeding. Where the panches had assembled on a particular day to pronounce judgment they should be deemed to be sitting in a stage of a judicial proceeding till their dispersal, unless, of course, the dispersal was delayed beyond a reasonable time. Where immediately on hearing the sentence, the accused abuses the panches and swears in open Court to kill them, it cannot be urged that the threat and abuses were hurled by the accused at a stage which was not a stage of a judicial proceeding. **1897 P R (Cri) 43, Rel. on. 1951 All L J 551 : 1952 Cri L J 621 : AIR 1952 All 306 (307) (Pt B) (Pr 7).**

——S. 228 — Judicial proceedings — What are — Demarcation of land by Nyaya Panchayat officials under Himachal Pradesh Panchayat Raj Act not a judicial proceeding — Interruption to proceedings and insult not an offence under S. 228. 12 Bom 38, Foll. 1965 (1) Cri L J 550 : AIR 1965 Him Pra 25 (27, 28) (Pt B) (Prs 12, 13, 15, 18).

——S. 228—"Judicial proceedings."

Where the order of the Magistrate showed that he was engaged in the trial of criminal cases and that he had finished recording the deposition of a witness and was presumably to proceed with the recording of other depositions when the interruption occurred :

Held, that this was sufficient to indicate the case in which he was engaged and stage at which he was interrupted. **ILR (1953) Hyd 369, 1953 Cri L J 1956, AIR 1953 Hyd 285 (285) (Pt A) (Pr 2).**

——S. 228 — Settlement Officer under E. P. Holdings (Consolidation and Prevention of Fragmentation Act, 1948, convicting person under S. 228 of Penal Code exercising powers under S. 480 of Criminal P. C. — Held, Settlement Officer not Civil, Criminal or Revenue Court—Conviction held without jurisdiction. See Criminal P. C. (1898), S. 480. 1965 (2) Cri L J 669 : AIR 1965 Punj 454.

——S. 228 — Judicial proceeding—Member of Gram Panchayat returning from spot inspection—Does not sit in any stage of judicial proceeding — S. 228 not attracted.

A Panch does not sit in any stage of a judicial proceeding when he is returning after the inspection of a spot.

Section 228, therefore, is not attracted, where a member of Gram Panchayat is abused while returning from inspection of a spot and abuse relates to another dispute between the accused and the Gram Panchayat not connected with the spot inspection. 1962 All W R (Sup) 96 : 1962 All Cr R 390: 1962 Cur L J 415: 64 Punj L R 868.

5. Contempt of Court.

● ——S. 228 — Application under S. 528, Criminal P. C. — Aspersions against Magistrate — Jurisdiction to take cognisance of contempt—S. 3 (2), contempt of Courts Act (1952), if bar.

Held that the aspersions amounted to something more than a mere intentional personal insult to the Magistrate; they scandalised the Court itself and impaired the administration of justice. S. 3 (2) of the Contempt of Courts Act, therefore did not stand in the way of the High Court taking cognizance of the contempt. Madh BLR 1955 Cri 111 : AIR 1955 NUC (Madh B) 3775, Reversed. 1959 Cri L J 251 : A I R 1959 S C 102 (104) (Pt A) (Pr 3).

——S. 228—Conditions required.

The contention that the High Court should not have treated the qualified apology as an unqualified one and should have convicted and sentenced the accused for contempt of Court, cannot be considered in an application for a certificate that the case is a fit one for appeal to the Supreme Court. 1953 Cri L J 1206 : AIR 1953 Ajmer 11.

——S. 228 — Matter of public importance.

There can be no doubt that the question of maintenance of integrity of the jurisdiction is a matter of great public importance. But the reputation of judiciary is so well established that it will not suffer even if one contempt of Court goes unpunished. The publication of an article in a newspaper against a Magistrate is not of great importance and the purpose would not be advanced by the grant of a certificate of leave to appeal to the Supreme Court. 1953 Cri L J 1206 : AIR 1953 Ajmer 11.

——S. 228—Person abusing Judge in Court, calling him dishonest and unfair — Not a mere insult of Judge but amounts to scandalization of tribunal — Offence not excluded by S. 3 (2), Contempt of Courts Act. See Contempt of Courts Act (1952), S. 3 (2). 1964 (1) Cri L J 652 : AIR 1964 Bom 147 (DB).

——S. 228 — Jurisdiction — Offence under S. 228 — Jurisdiction of High Court to punish.

Where an application for transfer submitted to the Magistrate is intended to offer insult to the Magistrate the act would fall within the purview of S. 228 and the High Court will be precluded from taking action for the contempt committed before the Court of the Magistrate. Madh BLR 1955 Cri 111 : AIR 1955 NUC (Madh B) 3775 (DB).

[Reversed in AIR 1959 S C 102.]

——S. 228 — Witness creating scene by shouting and imputing great irregularity to Nyaya Panchayat on their face — Offence—Act held amounts to contempt within S. 228. 1961 M P L J 108 : 1961 Jab L J 265 : 1961 M P C 295 : 1961 (2) Cri L J 494 (Madh Pra).

——S. 228 — Contempt of Court — What amounts to — Proof.

To wilfully impede, hinder, embarrass, interrupt or obstruct the judicial proceedings, or to insult the Court, in its presence in the course of adjudication of some cause, amounts to undue interference with the administration of justice and therefore to contempt, and as such it can never be tolerated or countenanced by the High Court. Contempt may be shown either by language or by manner and language which may otherwise be unobjectionable. 1960 Cri L J 511 : AIR 1960 Punj 211 (213) (Pt C) (Pr 3).

6. Procedure.

——S. 228 — In circumstances of case trying Magistrate committing no error of principle in not acting on so called apology — High Court will not interfere in revision with the exercise of discretion of trying Court under S. 484. See Criminal P. C. (1898), S. 439. 1964 All W R (HC) 484.

——S. 228—Criminal P. C. (1898), S. 260 (a)—Offence under S. 228, Penal Code, may be tried summarily. See Criminal P. C. (1898), S. 260 (a). 1952 Cri L J 621 : AIR 1952 All 306.

——S. 228 — Constitution of India, Article 134 (1) (c) — Act amounting to insult — Act if can be dealt with under summary jurisdiction of High Court — Question is not of great public importance particularly where the contemner can be adequately punished under S. 228. See Constitution of India, Art. 134 (1) (c). 1956 Cri L J 243 : AIR 1956 Madh-Bha 96 (DB).

——S. 228 — Contempt of subordinate Court — Jurisdiction of High Court — When barred.

If the acts alleged are offences under Ss. 175, 178, 179, 180 or S. 228 of the Penal Code then they constitute contempt and they can be taken cognizance of by the court in whose view or presence they are committed and in respect of such contempt, the High Court would not take cognizance and S. 3 (2) of the Contempt of Courts Act (1952), bars its jurisdiction. 1961 (1) Cri L J 134 : AIR 1961 Pat 1 (DB).

——S. 228 — Unlawful assembly — Common object — Charge not sufficient to give notice to accused of alleged common object — Conviction under S. 143, Penal Code cannot stand. See Penal Code (1860), S. 141. 1956 B L J R 652.

——S. 228 — Scope.

The opinion of the Magistrate that by his tone and temper and heat and anger the accused intentionally offered insult to the Court is not enough when the Magistrate has not placed any facts on the record from which it could be gathered that the conduct of the accused was clearly vexatious. 1952 Raj L W 200 : ILR (1952) 2 Raj 564.

SECTION 231

——S. 231 — Counterfeit coins — Proof.

One need not be an expert to find out a bad coin and experience shows that many have the knack and capacity to mark it out readily even though the same is mixed up with good ones. 1957 Cri L J 381 : ILR (1956) Mys 238 : AIR 1957 Mys 24 (25) (Pt A) (Pr 1).

SECTION 232

——Ss. 232, 235 and 243 — Accused alleged to have committed offences under sections — It is unsafe to enter conviction on uncorrobarated testimony of Sub-Inspector of Police — (Criminal P. C. (1898), S. 367) — (Evidence Act (1872), S. 5). 1959 Ker L R 731 : 1959 Ker L T 901.

——S. 232 — Joinder of charges under Ss. 232, 235, with that under S. 240, Penal Code — Propriety — Effect of. See Criminal P. C. (1898), S. 233. 1957 Ker L T 215.

——S. 232 — Fine. See Criminal P. C. (1898), S. 32. 1957 Ker L T 215.

SECTION 235

——S. 235 — Essentials — Ownership of house from which articles were recovered need not be proved.

All that is required to convict a person under S. 235, is that he should be in possession of the material for counterfeit coins. It is not necessary that he should be the owner of the building in which the material was found stored. 1950 All L J 516 : 1950 All W R 525 : 1950 All Cri Cas 193 : AIR 1950 All 732 (733) (Pt A) (Pr 5).

——S. 235 — Criminal P. C (1898), S. 297 — Misdirection — Offence under S. 235, Penal Code — Nature of occupation by accused — It must be conscious possession of incriminating articles — Mere recovery from room in mere occupation is not enough — Direction to jury held amounted to misdirection. See Criminal P. C. (1898), S. 297. AIR 1955 N U C (Cal) 1012 (DB).

——S. 235 — Applicability — Coins having irregular edges — If counterfeit — Offence.

Although the alleged counterfeit coins which have irregular edges cannot pass off as genuine coins and therefore are not counterfeit coins within the definition of S. 28 they are clearly materials which are in the process of being made into counterfeit coins, and a person in possession of such materials would come under the mischief of S. 235, provided other conditions of that section are fulfilled. 1961 (2) Cri L J 472 (Guj).

——S. 235 — Accused alleged to have committed offences under section — It is unsafe to enter conviction on uncorroborated testimony of Sub-Inspector of Police. See Penal Code (1860), S. 232. 1957 Ker L T 801.

——S. 235 — Joinder of charges under Ss. 232, 235, with that under S. 240, Penal Code — Propriety — Effect of. See Criminal P. C. (1898), S. 233. 1957 Ker L T 215.

——S. 235, Parts I and II — Applicability — Accused found in possession of instruments and materials for counterfeiting coins — No evidence of possession of same for counterfeiting Indian coins — Offence — Accused guilty under Part I and not under Part II. (1958) 24 Cut L T 445.

SECTION 240

——S. 240 — Delivery of counterfeit coin — Knowledge of possession — How to be proved — Several accused—Joint trial and conviction.

In a prosecution under S. 240, it is not always possible or necessary that the particular knowledge should be proved by positive evidence. The prosecution may bring out circumstances which might indicate or on which a reasonable presumption could be raised that the accused ought to have known at the time he or she became possessed of the coins that they were counterfeit.

Where three accused are indicted for uttering counterfeit coins, having other counterfeit coins in their possession, it is not necessary to prove with certainty which of the pieces was the ones uttered and which was found on them unuttered, if all the pieces of money are proved to be counterfeit; and if it appears that the three accused went to different shops and that one or the other uttered the bad money and all of them fraudulently prevailed upon the shopkeepers to accept the money as genuine, they can all be convicted under S. 240, Penal Code. 1957 All W R (H C) 160 : 1957 All L J 283.

——Ss. 240 and 243 — Separate convictions under — Legality.

A person having certain counterfeit coins in possession but uttering only one of them, cannot be separately convicted under S. 240 respecting the one coin and under S. 243 regarding the other coins because an offence under S. 240 implies prior guilty possession. 1957 All W R (H C) 160 : 1957 All L J 283.

——S. 240—Essentials of offence—Fraudulent possession with knowledge is essential — Prosecution to prove—Inference can be drawn from facts — Knowledge can be inferred from mere possession of small number of counterfeit coins. AIR 1955 N U C (All) 2662.

——Ss. 240 and 243 — Applicability — Accused delivering counterfeit coins to constable taking him as bona fide purchaser—Charge under S. 240 must fail. AIR 1955 NUC (Cal) 5566 (DB).

——S. 240 — Joinder of charges under Ss. 232, 235, with that under S. 240, I. P. C — Propriety — Effect of. See Criminal P. C. (1898), S. 233. 1957 Ker L T 215.

——S. 240 — Applicability — Knowledge of counterfeit coins - Inference of.

For a conviction under S. 240 the point of time to be considered in connection with the offence is the time when the accused becomes possessed of the false coins and it has to be shown that at that particular time the accused knew that the coins were not genuine.

In view of the fact that the accused was carrying as many as 890 similar coins and had passed on 350 out of them as genuine to three of the prosecution witnesses it could be safely presumed that the accused had the particular knowledge when he got possession of the coins. 1953 Cri L J 452 : AIR 1953 Pepsu 43 (43) (Pr 3).

SECTION 241

——S. 241—"Counterfeit coin which he knows to be counterfeit" — Knowledge that coin is counterfeit is always matter of inference from circumstances which appear against accused and which must be adequately explained by accused — Accused delivering genuine coins first and counterfeit coins afterwards — If accused had no knowledge that coins were counterfeit, it is difficult to understand why accused separated counterfeit coins from genuine coins and when there is no adequate explanation by accused, such knowledge follows as inescapable inference — Criminal P. C (1898), S. 367 — Appreciation of evidence — Evidence Act (1872), S. 114. 1966 All Cri R 15 : 1965 All W R (H C) 837.

——S. 241—'Ten times the value of the coin counterfeited' — Section is not happily worded as actual value of counterfeit coin would be less than face value—Intention of Legislature was to indicate that fine may extend to ten times the face value of the counterfeit coin. 1966 All Cri R 15 : 1965 All W R (H C) 837.

——S. 241 — Sentence — Accused not a confirmed dealer in counterfeit coins but only a first offender — Ends of justice would be served by imposing sentence of fine only. 1965 All Cri L 15 : 1965 All W R (H C) 837.

SECTION 243

——S. 243—Separate convictions under—Legality.

A person having certain counterfeit coins in possession but uttering only one of them, cannot be-

separately convicted under S. 240 respecting the one coin under S. 243 regarding the other coins because an offence under S. 240 implies prior guilty possession. **1957 All W R (H C) 160 : 1957 All L J 283.**

——S. 243 — Essentials — Innocent possession of counterfeit coins — Retention after knowing them to be counterfeit—Offence.

In order to find a person guilty under S. 243 it must be proved, inter alia that at the time of coming into possession of the counterfeit coins he knew that the coins were counterfeit. If a person who innocently comes into possession of counterfeit coins, discovers later on that the coins are counterfeit, he does not thereby become liable to punishment under S. 243, Penal Code, if he retains possession of those coins with him. AIR 1941 Pat 36, Rel. on; 1943 A W R 31 (C C), Disting. **1950 All L J 516 : 1950 All W R 525 : 1950 All Cri Cas 193 : AIR 1950 All 732 (733) (Pt B) (Pr 10).**

——Ss. 243, 28—Counterfeit coin—Ingredients of.

For conviction under S. 243 it is essential that the counterfeit coin must be of such a character that it would be possible to pass it off as a genuine coin. Where the evidence of the expert is that it is not possible to pass off the counterfeit coin as genuine the accused cannot be said to have committed an offence under this section. **1956 Cri L J 881 : AIR 1956 Bom 511 (DB).**

——Ss. 243 and 240—Applicability — Accused delivering counterfeit coins to constable taking him as bona fide purchaser — Charge under S. 240 must fail. See Penal Code (1860), S. 240. **AIR 1955 NUC (Cal) 5566 (DB).**

——S. 243 —Applicability—Coins in process of being made counterfeit—Deception not possible. See Penal Code (1860), S. 28. **1961 (2) Cri L J 472 (Guj)).**

——S. 243 — Accused alleged to have committed offence under section — It is unsafe to enter conviction on uncorroborated testimony of Sub-Inspector of Police. See Penal Code (1860), S. 232. **1959 Ker L T 801.**

——S 243—Essential ingredients of offence.

To sustain a conviction under S. 243, I. P. Code, the prosecution should establish : firstly, that the accused was in possession of coins; secondly, that the said coins were counterfeit coins; thirdly, that the accused was in possession with intent to defraud, and fourthly, that the accused, at the time he became possessed of them, knew that they were counterfeit. **1956 Cri L J 904 : ILR (1956) Mys 118 : AIR 1956 Mys 51 (52) (Pt A) (Pr 5).**

SECTION 253

——S. 253 — Proceedings under S. 144, Criminal P. C. (1898) — Attachment cannot be ordered — Disobedience of order under — Consequence is prosecution under S. 188 and not S. 253 or S. 379, Penal Code. 1953 Cri L J 1198 : AIR 1953 Vind Pra 25.

——S. 253 — Duty of Magistrate — Discharge of accused — When justified.

It is wrong for a Magistrate to discharge the accused under S. 253, Criminal P. C., simply because he finds that the prima facie evidence did not make out the offences defined in the very sections mentioned in the complaint. He can discharge the accused under S. 253 only when he finds that no case has been made out against the accused, which, if unrebutted, would warrant his conviction. The responsibility for the application of a particular section of the Penal Code or any special law, rests on the Magistrate and not on the party. **AIR 1951 Vind Pra 1 (2) (Pt A) (Pr 7).**

SECTION 265

——S. 265 — Ingredients of offence — False weight used in Ginning Factory — Accused working as Manager alone prosecuted — Neither owner nor weighman prosecuted — In the absence of evidence that weight was used by or under orders of Manager, or that he derived benefit from it, Manager is not liable. 1961 M P L J (Notes) 176.

SECTION 266

——S. 266 — Possession of false weights with intention to use — Proof of.

Where the evidence on record shows that the accused was sitting on the gunny bag beneath which true and false weights were recovered by the police Officer, that series of false weights were found at a distance of 4' from the series of true weights and that the box containing opium and the scales for weighing it were near the gunny bag beneath which false weights were found and the accused was the person who carried on the business of selling opium at the shop, the only inference that can be drawn from these circumstances is that the accused possessed false weights knowing them and intending that the same may be fraudulently used. **1959 Raj L W 138 : ILR (1959) 9 Raj 86 : 1959 Cri L J 1112 : AIR 1959 Raj 191 (192) (Pt A) (Pr 5).**

——S. 266 — Sentence.

The offence under S. 266, Indian Penal Code, is an offence against society and in such cases any leniency will be misplaced **1959 Raj L W 138 : ILR (1959) 9 Raj 86 : 1959 Cri L J 1112 : AIR 1959 Raj 191 (193) (Pt D) (Pr 12).**

SECTION 268

——Ss. 268 and 290—Non-payment of Panchayat taxes —Does not amount to public nuisance—Conviction of accused under S. 290 is illegal — See Penal Code (1860), S. 290. **1964 (1) Cri L J 24 (1) : AIR 1964 All 16.**

——S. 268 — Nuisance — Tenant placing furniture in passage used by other tenants — Notice under S. 381 (1) (ii) of Bombay Municipal Corporation Act, 1858, on landlord —No steps taken to abate nuisance— Such keeping in the passage meant for persons especially going to and coming down from upper floor constitutes nuisance — If the tenant and the landlord served with notice under S. 381 (1) (ii) of Bombay Municipal Corporation Act, do not take steps to remove it, both are liable to be convicted for not complying with the notice — (Tort — Nuisance — What is) — See Municipalities — Bombay Municipal Corporation Act (3 of 1858), S. 381 (1) (ii). **1956 Cri L J 380 : AIR 1956 Bom 163.**

——S. 268 — Community—Meaning of—Community means public at large or the residents of entire locality—Public nuisance — cecream making machinery causing nuisance to residents of buildings whose flats were adjacent to place where machinery was working—Not public nuisance—S. 133, Criminal P. C., not attracted See Criminal P. C. (1898), S. 133 (1), Para 3. **51 Cri L J 1315 : AIR 1950 Cal 349 (DB).**

——Ss. 268 and 290 — Public nuisance — Clandestine prostitution.

Before any finding can be arrived at that a public nuisance has been committed the elements contained in S. 268, Penal Code, must be established. Common injury, danger or annoyance mentioned in the section must be to the public at large dwelling in the vicinity and not to a particular individual. If prostitution is carried on in a clandestine or hidden manner, there can be no public nuisance although persons who come to know of the immoralities committed in the house may feel their moral sense outraged. **54 Cal W**

N 384 : 51 Cri L J 1241 : AIR 1950 Cal 330 (330) (Pt A) (Pr 4).

——S. 268 — 'Public nuisance' — What is.

The expression means an act or illegal omission which causes any common injury, danger, or annoyance to the public or the people in general who dwell or occupy property in the vicinity — See Criminal P. C. (1898), S. 133. 1958 Cri L J 1319 : AIR 1958 Madh Pra 350.

——S. 268 — Public nuisance — Gist of offence.

The offence of public nuisance may be analysed thus : (i) It may be caused either by an act or illegal omission, (ii) the effect thereof must be either injury, danger or annoyance, (iii) actually caused either to the public or to that portion of the public who dwell or occupy property in the vicinity ; or (iv) threatened of necessity to persons who may have to use any public right.

Thus where a person raises the rastha in front of his house and cross-bunds the rastha leading to stagnation of rain-water, breeding mosquitoes and giving rise to offensive smell a clear case of public nuisance is made out. 1952 Mad W N 846 : 1952 Mad W N (Cri) 234 : 54 Cri L J 500 : (1952) 2 Mad L J 554 : AIR 1953 Mad 242 (243) (Pr 4).

SECTION 273

——S. 273 — Charge only under S. 3, Bihar and Orissa Prevention of Adulteration Act — No particulars of offence under the section explained — Accused cannot be convicted under this section — Bihar and Orissa Prevention of Adulteration Act (2 of 1919), S. 3 — See Criminal P. C. (1898), S. 237. 1952 Cri L J 295 : AIR 1952 Pat 77.

SECTION 276

——Ss. 276, 365 and 366 — Criminal P. C. (1898), S. 238 — Major and Minor offences — See Criminal P. C. (1898), S. 238. AIR 1954 Madh-Bha 97.

SECTION 277

——S. 277—Applicability—Pollution of private well.

Section 277, I. P. Code does not apply to case of pollution of a well which the complainant claims to be her private well, particularly in the absence of any evidence to show that the public were using its water by right. The mere fact that the neighbours were using its water does not make it a public well, as they may be doing so by license. AIR 1916 Nag 15 (1) and (1885) 14 Q B D 63, Distinguished. 1954 Cri L J 998 : 1954 B L J R 31 : AIR 1954 Pat 309 (310) (Pt A) (Pr 5).

SECTION 278

——S. 278—Making atmosphere noxious.

Accused using open compounds as latrine for himself and his family—Offence under S. 278 is committed as obnoxious smell is bound to emanate from it—Facts that neighbours are not inconvenienced and that the other houses were constructed after the commencement of nuisance and with their full knowledge are immaterial. 1953 Cr L J 1192 : AIR 1953 Ajmer 4 (4) (Pr 3).

SECTION 279

SYNOPSIS

(Penal Code (1860), S. 279.)

1. Rash and negligent driving.
2. Procedure.
3. S. 279 and S. 338.
4. Gist of offence.
5. Enhancement of sentence.

1. Rash and negligent driving.

——Ss. 279 and 304-A—Death caused due to rash and negligent driving of a motor vehicle on public road — Criminal rashness and criminal negligence—What amounts to — Conviction — Sentence—Interference by appellate Court or by High Court in revision—Criminal P. C. (1898), Ss. 32, 423 & 439.

A person who is driving a motor vehicle should always keep it in a state of control sufficient to enable him to avoid dashing against any other vehicle or running into any passenger who may fail to step off the road and he is prima facie guilty of negligence if the vehicle leaves the road and cashes headlong and knocks against other users of the road. (Criminal rashness and criminal negligence explained 3 All 776 Rel. on.)

The accused, a driver of a stage carriage vehicle was found guilty under Ss. 279 and 304-A, I. P. Code and was sentenced to simple imprisonment for three months under S. 279, I. P. Code and to simple imprisonment for six months under S. 304-A, I. P. Code the sentences to run concurrently. In appeal the conviction was confirmed but the sentence was reduced to a fine of Rs. 150 only. The facts established at the trial showed utter callousness on the part of the driver in having gone on the wrong side of the road losing control of the vehicle and running over a person who was sitting on the extreme end of the road and dashing against the cyclist who was coming on his proper side.

Held, that on the facts found by the trial Magistrate the conviction and sentences passed under Ss. 279 and 304-A were quite correct and the appellate court was not justified in reducing the sentences. AIR 1937 Bom 96, AIR 1926 Cal 300, Ref. to.

The question of sentences is a matter of discretion of the trial Judge and where that discretion has been properly exercised along accepted judicial lines an appellate court should not interfere with the sentence except for strong reason.

It is true that the power of enhancing sentence should be exercised by the High Court very rarely, but when it appears to the Court that the sentence imposed on the accused is grossly inadequate having regard to the gravity of the offence resulting in miscarriage of justice, it should not hesitate to impose an adequate sentence on the accused even though the effect of the order will be to send the accused back to jail. 1961 Ker L T 769.

——S. 279—Section contemplates distinction between negligence and rashness—Rash and negligent driving—Distinction between negligence and rashness — In the case of rashness party does an act and breaks a positive duty — Held on facts that the collision was brought about by reckless and careless driving. See Motor Vehicles Act (1939), S. 116. 1960 Cr L J 239 : AIR 1960 Mad 50.

——S. 279—Driver of goods vehicle carrying passengers—Passengers allowed to sit on top of goods due to negligence of driver—Passengers falling down and run over by truck—Driver is liable for offences under section. See Penal Code (1860), S. 304-A. ILR (1964) Cut 603.

——S. 279—Criminal negligence in driving loaded truck with worn out front tyre on down gradient, at excessive speed—Bursting of tyre — Truck going out of control and meeting with accident—Contravention of Rule 85 (4) of Orissa Motor Vehicles Rules, 1940, held itself culpable negligence. See Penal Code (1860), S. 304-A. (1962) 4 Orissa J D 372 : ILR (1962) Cut 947.

——S. 279 — Rash or negligent driving — Petitioner driving heavily loaded bus up-hill along zig-zag road on wrong side at speed between 20 and 25 miles per

hour and colliding with car proceeding from opposite direction on right side — Offence — Petitioner held guilty of rash and negligent driving —Doctrine of contributory negligence does not apply to criminal liability. 26 Cut L T 86: 1961 (1) Cri L J 541 : AIR 1961 Orissa 71 (72) (Prs 6, 7, 8).

——S. 279—Motor driver backing car at night time —Duty to take care — Motor Vehicles Act (1939), S. 91—Rules under, R. 166 (Orissa Government).

The appellant, a motor driver, in the town of Cuttack at about 10 p. m. in the night while driving his car on the Buxi Bazar, parked it in front of a petrol shop the parking being done not on the road, but on the side-land to the South of the road. He then went to a shop and after purchasing some petrol there, while he was backing the car for the purpose of coming away, the rear wheel ran over the chest of an old beggar woman who was sleeping under the tree which stood there. When the beggar woman shrieked in pain he stopped the car, driving it forward, and came out. He and some other persons who gathered there gave some water to the woman who thereupon rose to a sitting posture. He took her in his car to the Hospital but the doctor on examination, found her to be dead, upon which he came with the dead body to the Police station and reported there the occurrence.

It was a dark night and on account of the darkness, the backside was not reflected in the mirror fixed to the front part of the car and the mirror did not show whether there was nobody under the neighbouring tree. The driver was looking back to his right side while backing the car and sounded the horn twice or thrice.

Held, that the driver had the peremptory duty of satisfying himself before backing that the ground to the rear was clear enough for backing so as not to cause any danger or undue inconvenience to any person. In the circumstances, it could not be held that the appellant took sufficient care in attempting the backing merely by sitting at the wheel, and looking from his rightside backwards and blowing the horn, even though he might have had no reason to anticipate the presence of a sleeping woman just behind the wheels of the car. It was negligence on the part of the appellant not to have gone to the rear of the car and satisfy himself before he started backing. The convictions under Ss. 304A and 279 must accordingly be maintained.

Taking the extenuating circumstances into consideration a sentence by way of a fine of Rs. 100 was held adequate ('51) 17 Cut L T 359 (DB).

——Ss. 279, 304-A and 338—Applicability—Culpable rashness and negligence—Meaning—Motor bus with defective brakes—Driving at high speed — Accident resulting in injury to passengers and death of one —Offence.

Culpable rashness consists in acting with consciousness that mischievous and illegal consequences may follow, but with the hope that they will not and often with the belief that the actor has taken sufficient precaution to prevent their happening. The imputability arises from acting despite the consciousness. Culpable negligence consists in acting without consciousness that illegal or mischievous effects will follow, but in circumstances which show that the actor has not exercised the caution incumbent on him and that if he had, he would have had the consciousness. The imputability arises from the neglect of the civic duty of circumspection. The driver of a motor bus with passengers in it drove the bus at a high speed, knowing that the hand-brake was ineffective and the foot-brake defective and the rod and drag-link were loose. The driver, when signalled to stop the bus, applied the brake, but he could not control the bus or stop it. It swerved to the right and then to the left and turned upside down and capsized. The road was clear and straight and there was no traffic on it. Two of the wheels had gone into a nala which was by the side of the road, before it capsized. Several of the passengers were injured, some seriously and one of them died as a result of the injuries. The driver was prosecuted and tried for offences under Ss. 279, 338 and 334-A.

Held, that he was guilty of the offences for which he was charged and liable to conviction therefor. 4 Cal 764; 7 M H C R 119, Foll. ILR 31 Pat 716 : 1953 Cri L J 518 : AIR 1953 Pat 56 (57, 58) (Prs 5, 6) (DB).

——Ss. 279, 114, 107 and 338—Principal offender or abettor—Driver of lorry carrying passengers allowing minor to drive lorry with full knowledge that minor did not know driving — Rash and negligent driving by minor resulting in grievous hurt—Driver sitting by the side of minor — Held the driver was liable as principal offender under S. 114—In fact he was the person driving through the instrumentality of the minor and therefore was liable to be punished for offences under Ss. 338 and 279. See Penal Code (1860), S. 114. 52 Cri L J 930 : AIR 1951 Punj 418 (DB).

——Ss. 279 and 304A — Travancore Penal Code, Ss. 277 and 304 — Rash or negligent driving—Culpable rashness and negligence explained—Car proceeding north and south at 20 to 22 miles per hour—Driver first seeing pedestrian S at distance of furlong —Horn sounded and S moving to eastern extremity of road — Car keeping to correct side close to eastern extremity leaving only 1 1/2 feet of road—When car 10 feet away, S cutting across to western side—S run over and dying—Open lawn on road level on eastern side—Held case of pure accident—Driver not guilty of rash or negligent driving — Motor Vehicles Act (1939), S. 116.

Culpable rashness is often explained as acting with the consciousness that dangerous consequences will follow, but with the hope that they will not follow and with the belief that the actor has taken sufficient precautions to prevent the happening of such consequences. Similarly, culpable negligence is acting without the consciousness that dangerous consequences will follow, but in circumstances which show that the actor has not exercised the caution that was incumbent on him. The imputability arises from the neglect of the duty of circumspection.

The negligence in such cases must be what is designated 'gross'. There must be such an amount of recklessness or negligence as to be something more than normal or ordinary. It must at once bring into view the possibility of danger, the happening of some catastrophe. It must be something more than a mere omission or neglect of duty : 1943 Tr L R 710, Rel. on.

The car was proceeding at a speed of 20 to 22 miles per hour north to south on a straight road and S a pedestrian was coming in the opposite direction. There was not on the road at that time any other vehicle or pedestrian. The driver saw S first at a distance of about one furlong and at the sound of the horn he moved to his right on the extreme eastern edge of the road. The car was keeping to the correct side close to the eastern extremity of the road leaving only a space of about one and a half feet of the road on the eastern side. The space on the eastern side was an open lawn on the same level as the road. When the car approached the man at a distance of about ten feet, he cut across to the western side of the road and dashed against the head light and the

bumper on the left side of the car and was run over by the car. He sustained injuries resulting in his death :

Held, that the driver could not have by any degree of circumspection foreseen the contingency that S would expose himself to danger by trying to cross the road in the sudden and unexpected manner. It was a case of pure accident and the driver could not be said to have been rash or negligent in driving the car. 51 Cri L J 658 : 1950 T C L R 416 : AIR 1950 Trav-Co 14 (16) (Pr 6) (DB).

——Ss. 279, 304-A, 337 and 338 — Applicability — Rash or negligent driving causing death—Travancore Penal Code, Ss. 277, 304, 339 and 338.

Accused driving a lorry along the centre of a straight road at a high speed in order to keep pace with a railway train running parallel to the road—Lorry loaded with several bags of paddy upon top of which were seated two persons — Three bullock-cars coming in opposite direction along the correct side of the road — First two carts passed without any danger — Third cart loaded with iron bars which protruded in front of cart suddenly turning to its right — Accused suddenly swerved towards the right to allow cart to pass with result that the lorry overturned causing death of one person and grievous hurt to other sitting on top of the bags — Accused held was liable for the death and grievous hurt caused by his rash and negligent driving, at the time of accident. 1954 Cri L J 7 : AIR 1954 TravCo 25 (26) (Pr 5) (DB).

——S. 279—Applicability—Hurt caused to animal—Offence.

One of the ingredients of S. 279 is that it must endanger human life or be likely to cause hurt or injury to another person. The section will not apply if the accused hurts any animal like a mule. 1957 All L J 123.

2. Procedure.

——Ss. 279 and 280 — Accused once convicted under S. 304-A cannot be convicted under S. 279 for minor offences—Offences defined by Ss. 279, 280, 336, 337 and 338 can be viewed as minor offences included within S. 304A. See Penal Code (1860), S. 304-A. 1965 (1) Cri L J 524 : AIR 1965 All 196.

——Ss. 279 and 304-A—Collision of motor-vehicles—Trial of drivers for offences under Ss. 279 and 304-A, Penal Code, in one trial is bad—For it cannot be said that there is one transaction in which different offences have been committed. See Criminal P. C. (1898), S. 239, Cl. (d). 1963 (2) Cri L J 519 (1) : AIR 1963 Guj 275.

——S. 279—Scope — Charge under read with S. 112, Motor Vehicles Act — Legality and propriety of — (Motor Vehicles Act (1939), S. 112).

Section 112 of the Motor Vehicles Act would apply to offences not only under the Motor Vehicles Act but also for breach of provisions the punishment for which is not provided for under those provisions. S. 279 of the Penal Code on the other hand is a self-contained provision like any other section in that Code prescribing the extent of punishment. There is no meaning in connecting it or reading it with S. 112 of the Motor Vehicles Act. S. 112 of the Motor Vehicles Act cannot be read with S. 279 of the Penal Code. 1958 Mad W N 223 : 1958 Mad L J (Cri) 260 : (1958) 1 Mad L J 243 : 1958 All W R (Sup) 69 : 71 Mad L W 415 : 1958 All Cr R 240 : 1958 Cri L J 775 : AIR 1958 Mad 286 (286) (Pt A) (Pr 1).

——S. 279—Procedure for trial of offence.

An offence under S. 279 cannot be said to be an offence under the M. V. Act — If in such a case summons is issued under S. 130 (1) of the Motor Vehicles Act and accused is convicted on the plea of guilty, the summons being contrary to the provisions of S. 130 (1) is illegal and consequently the plea also becomes illegal. Therefore the conviction of the accused is to be set aside. See Motor Vehicles Act (1939), S. 130 (1). (1958) 1 M L J 243 : 1958 Mad L J (Cri) 260 : 1958 Cri L J 775: AIR 1958 Mad 286.

——Ss. 279 and 337 — Expressions 'same transaction' and 'in the course of the same transaction'—Meaning of — Various independent acts if connected either subjectively or objectively and producing particular result from one transaction — Collision of two motor vehicles — Joint trial for offences under Ss. 279, 337 and 426, Penal Code not illegal—Even if illegal, there being no prejudice caused to prosecution, retrial could not be ordered. See Criminal P. C. (1898), S. 239 (d). 1962 (1) Cri L J 763 : AIR 1962 Raj 155 (DB).

3. Sections 279 and S. 338.

——S. 279—Conviction for offences under Ss. 279 and 338 — Proper sentence — Separate sentence for each offence not invalid.

When two distinct offences are committed sentences passed under both cannot be said to be illegal. But the measure of punishment would be as laid down under S. 71. See Penal Code (45 of 1860), S. 71. 1961 Raj L W 404.

——Ss. 279 and 338—Offences under — Not of same nature and character — Being distinct offences, separate convictions are valid.

It may be that one of the ingredients constituting the offence under S. 338, i. e., the act of driving rashly and negligently constitutes an offence falling under S. 279 but it does not mean that both the offences under these sections are of the same nature and character or that S. 338 is an aggravated form of S. 279. The offences under Ss. 279 and 338 are distinct offences and a person can be separately convicted under these offences. AIR 1956 M B 141; 1950 P L R 193 and (1933) 1 K B D 704, Rel. on. 1961 Raj L W 404.

4. Gist of offence.

——Ss. 279, 336 and 337 — Nature of offences — Composition of offence under S. 337 — If involves acquittal under S. 279 — (Criminal P. C. (1898), S. 345).

By S. 336, Penal Code, an act, endangering life or personal safety of others, which is done rashly or negligently is penalised, and evidently the offence punishable under S. 337, Penal Code is an aggravated form of the offence defined by S. 336, Penal Code. The offences under Ss. 279 and 337, Penal Code, are however, offences of different nature and the conduct referred to therein is penalised with different objects. An act, which is rash or negligent or is likely to endanger human life, may be the result of driving any vehicle or riding on a public way. The offence under S. 279, Penal Code is non-compoundable; and the compounding of the offence under

S. 337, Penal Code, will not prevent the prosecution from being continued under S. 279, Penal Code. The composition of the offence under S. 337, Penal Code, sanctioned by the Magistrate therefore does not result in the acquittal of the accused of the offence under S. 279, Penal Code. Where the offence which is the result of rash and negligent driving, may constitute independently an offence punishable under S. 279, Penal Code, that will not justify the view that the offence under S. 337, Penal Code, is an aggravated form of offence penalized by S. 279, Penal Code. **61 Bom L R 1674 : ILR (1960) Bom 75 : 1960 Cri L J 814 : AIR 1960 Bom 269 (270) (Prs 2, 4) (DB).**

——S. 279— Gist of offence — Nature of rashness or negligence — Appeal from acquittal — High Court's power to review entire evidence — Criminal P. C. (1898), S. 417.

A person could be found guilty of an offence under S. 279, Penal Code, only if it is proved that the vehicle was driven rashly and negligently. Rashness or negligence must be what must be described as criminal rashness or criminal negligence. There must be something more than mere carelessness or an error of judgment.

The High Court, no doubt, has the power to review the entire evidence on which the order of acquittal is founded and to reach its own conclusions, but in reaching its conclusions upon pure questions of fact, the High Court will always give proper weight and consideration to the presumption of innocence in favour of the accused and the right of the accused to the benefit of every reasonable doubt. **(1961) M L J (Cr) 325 (Ker).**

——Ss. 279 and 337—'Negligence'—What amounts to.

Applicant was convicted under Ss. 279 and 337, Penal Code for rash and negligent driving when a bus was washed away on a 'rapta.' Driver and two other passengers had ascertained the depth of water over the 'rapta' and were of opinion that the bus could pass. It was washed away due to sudden gush of water.

Held, that negligence has been defined to be the breach of a duty caused by the omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do or doing something which a prudent and reasonable man would not do. Negligence in order to render a person criminally liable must be of such a degree as to endanger human life or to be likely to cause hurt or injury to any other person. The accident in the case was the result of circumstances which could not possibly have been anticipated by exercise of any amount of prudence or caution. **(1960) M P L J (Notes) 79.**

——S. 279 —Gist of offence — Rash and negligent act need not result in injury to life or limb — Bare negligence involving risk of injury is enough for a conviction under the section. 1953 Cri L J 913: AIR 1953 Trav-Co 173 (173) (Pr 5) (DB).

5. Enhancement of sentence.

——S. 279—Driving a vehicle in a manner which is dangerous to public — Conviction for — Enhancement of punishment — Punishment enhanced — Accused to be disqualified from holding a driving licence for a period of six months. See Motor Vehicles Act (1939), S. 116. 1965 (2) Cri L J 84 : AIR 1965 Cal 363.

——Ss. 279 and 304-A—Death caused due to rash and negligent driving of a motor vehicle on public road—Criminal rashness and criminal negligence—What amounts to — Conviction—Sentence—Interference by appellate court or by High Court in revision—Criminal P. C. (1898), Ss. 32, 423 and 439.

A person who is driving a motor vehicle should always keep it in a state of control sufficient to enable him to avoid dashing against any other vehicle or running into any passenger who may fail to step off the road and he is prima facie guilty of negligence if the vehicle leaves the road and dashes headlong and knocks against other users of the road (Criminal rashness and criminal negligence explained. 3 All 778 Rel. on.).

The accused, a driver of a stage carriage vehicle was found guilty under Ss. 279 and 304-A, I. P. C. and was sentenced to simple imprisonment for three months under S. 279, I. P. C. and to simple imprisonment for six months under S. 304 A I. P. C. the sentence to run concurrently. In appeal the conviction was confirmed but the sentence was reduced to a fine of Rs. 150 only. The facts established at the trial showed utter callousness on the part of the driver in having gone on the wrong side of the road losing control of the vehicle and running over a person who was sitting on the extreme end of the road and dashing against the cyclist who was coming on his proper side.

Held that on the facts found by the trial Magistrate the conviction and sentences passed under Ss. 279 and 304-A were quite correct and the appellate court was not justified in reducing the sentences. AIR 1937 Bom 98 and AIR 1928 Cal 300 Ref. to.

The question of sentences is a mater of discretion of the trial Judge and where the discretion has been properly exercised along accepted judicial lines an appellate court should not interfere with except for strong reason.

It is true that the power of enhancing sentence should be exercised by the High Court very rarely, but when it appears to the Court that the sentence imposed on the accused is grossly inadequate having regard to the gravity of the offence resulting in miscarriage of justice, it should not hesitate to impose as adequate sentence on the accused even though the effect of the order will be to send the accused back to jail. **1961 K L T 769.**

——Ss. 279, 337, 338 and 71—Offences under S. 279 and Ss. 337 and 338 are distinct—Conviction and sentences—A person therefore convicted of offences under S. 337 or S. 338 can also be convicted under S. 279—If however the two offences are committed in the same transaction S. 71 will govern the assessment of punishment—Madh. B.L.R. 1952 Cr. 302; Madh. B. L. J. 1952 H. C. R. 459, Overruled—(Criminal P. C. (1898), S. 233). Madh B L R 1956 Cr 36 : 1956 Madh B L J 70 : 1956 Cr L J 624 : I L R (1956) Madh B 208 : AIR 1956 Madh B 141 (144) (Pr 16) (FB).

SECTION 282

——S. 282—Murder trial—Out of eight eye-witnesses named in F. I. R. only three were examined in committing Magistrate's Court — Mere fact that these witnesses did not give evidence helpful to prosecution is no ground for not examining the rest—Prosecution examining different set of eye-witnesses at trial whose evidence was not trustworthy—Motive for crime not established—Held on a consideration of entire evidence that evidence adduced was not of such a character as could be relied upon for conviction—In any case accused was entitled to benefit of doubt — See Criminal P. C. (1898), S. 286. AIR 1955 N U C (All) 1326 (DB).

——S. 282 — Negligent conveying in over loaded vessel—Liability of owner—Owner living nearby and daily taking proceeds from over loading—Owner held guilty.

Where the owner of the boats, which carried terrific overloads, thus endangering the safety of the passengers, lived near the starting place of the boats

and leaving everything to his tindals, only took the daily proceeds from such overloading :

Held that even though there was no proof that he actually knew about the overloading, he was guilty of the offence under S. 282, Penal Code, as his negligence was directly responsible for the overloading of his boats. If he had exercised due care and caution, as he lived nearby, the overloading would have never happened; the fact that the tindal, a man of straw, had not been prosecuted for the offences was irrelevant as the owner was a man of substance and was also liable. (The sentence, however, was reduced as there was no direct knowledge and it was his first offence). AIR 1949 All 11, Disting. **(1949) 2 Mad L J 773 : 1950 Mad W N 37 : 1950 All W R (Sup) 11 : 1950 All Cri Cas 28 : 51 Cri L J 729 : 1950 Mad W N (Cri) 17 : AIR 1950 Mad 300 (300, 301) (Prs 3, 4, 5).**

SECTION 283

——S. 283 — Applicability — Mere standing on road whether offence — (Interpretation of Statutes—Punctuations—Act—Meaning of).

So far as the Acts of the Indian Legislature and the Constitution of India are concerned, it has been held that in India, the punctuation in the statutes should not be ignored. The Court cannot therefore ignore the comma after the words 'by doing any act' in S. 283. The words 'or by omitting to take order with any property in his possession or under his charge' are disjunctive and not conjunctive to 'by doing any act'.

As it was the intention of the Legislature to restrict the omission only to any property in the possession or under the charge of the accused, the expression 'or by omitting to take order with any property in his possession or under his charge' had to be added. The word 'act' under S. 283 cannot be read in such a wide sense that mere standing on the road without anything more is such an act as is punishable under S. 283. **I L R (1956) 6 Raj 539 : 1956 Raj L W 492 : 1957 Cr L J 391 : AIR 1957 Raj 64 (65) (Prs 10, 11) DB).**

SECTION 285

——S. 285—Negligent omission to take proper order with fire and combustible matter—Factory-manager, in breach of licence condition; keeping naked fire in proximity of stores of turpentine and varnish—Act always matter of 'probable danger' to human life, viz., factory workers, and not simply a 'possible danger on ground that no fire broke out earlier—Fire causing death of seven workers—Held, maximum punishment of six months' rigorous imprisonment given to manager was not harsh. Criminal Appeal No. 433 of 1963, dated 8-4-1963 (Bom.) Affirmed Kurban Hussein v. State of Maharashtra. (1965) 2 S C R 622 : 1965 S C D 1056 : 1965 All Cri R 331 : (1965) 1 S C W R 718 : 1965 M P L J 561 : 67 Bom L R 447 : 1965 Mah L J 497 : 1965 (2) Cri L J 550 : 1965 All W R (H C) 527 : AIR 1965 S C 1616 (1618) (Pt B) (Pr 5).

SECTION 289

——S. 289—Applicability—Failure to guard dangerous animal.

If the owner was clearly aware of the vicious disposition of the animal vis-a-vis human beings and if he negligently or knowingly omitted to take sufficient care to guard it against probable danger to human life or probable danger of grievous hurt, he is liable under S. 289 if the animal attacks a person and causes injuries to him. **AIR 1955 N U C (Nag) 5679.**

SECTION 290

——S. 290 and S. 268—Non-payment of Panchayat taxes—Does not amount to 'public nuisance' under S. 268—Conviction of accused under S. 290 is illegal. 1964 (1) Cr L J 24 (1) : AIR 1964 16 (17) (Prs 2, 3).

——S. 290 — Applicability — Notice under S. 100, U. P. Panchayat Raj Act, 1947—Prosecution under.

Where the notice is given by the Gaon Sabha under S. 100 of the Panchayat Raj Act the Sabha can take action for the prosecution of the accused before a Magistrate—The Panchayat Adalat cannot try the accused under S. 290 Penal Code — See U. P. Panchayat Raj Act (1947), S. 52. **AIR 1955 N U C (All) 1725.**

——S. 290—Allegation that public servants disregarded their duties cast on them for the safety of the populace — Prosecution — Sanction under S. 197 Cr. P. C., held necessary inasmuch as the illegal omissions of the public servants must necessarily arise out of the official duty they were performing—See Criminal P. C. (1898), S. 197. 1962 (2) Cr L J 320 : AIR 1962 Bom 198 (DB).

——Ss. 290, 268—Public nuisance—Clandestine prostitution.

If prostitution is carried on in clandestine or hidden manner, there can be no public nuisance although persons who came to know of the immoralities committed in the house may feel their moral sense estranged. Before any finding can be arrived at that a public nuisance has been committed the elements contained in S. 268 must be established. **51 Cri L J 1241 : AIR 1950 Cal 330.**

——Ss. 290 and 95—Scope—Merely interrupting at a public meeting will not amount to an offence—Complaint or charge sheet by police disclosing no offence—Interference by High Court is called for—Criminal P. C. (1898), S. 561-A

Merely interrupting at a public meeting without anything more would not amount to an offence under S. 290 of the Penal Code. Section 95 of the Penal Code would be a complete answer to such a charge. In cases where the allegations in a complaint would at the most amount to some technical offence the matter would be covered by S. 95 barring cognizance by Courts in view of its triviality. AIR 1932 Bom 193 and AIR 1954 Cal 299, Rel. on.

Ordinarily the High Court does not interfere at the interlocutory stage of criminal proceedings in a Subordinate Court. But if in a particular case the complaint or the police charge sheet discloses no offence and where even on the admitted facts there is no case against the accused and there is no chance of the case ending in a conviction and the High Court is clearly of opinion that a further prolongation of the prosecution would amount to harassment of the process of the Court, it is the duty of the High Court to interfere under S. 561-A of the Criminal P. C., and put an end to this abuse by directing the quashing of the prosecution. AIR 1960 Ker 263, Foll. **(1962) Mad L J (Cri) 185 : 1961 Ker L J 96 : 1961 Ker L T 110 : (1961) 1 Ker L R 205.**

——S. 290—Person charged under S. 160—Doubtful if he can be convicted under S. 290. See Criminal P. C. (1898), S. 237. **1959 Cri L J 1440 : A I R 1959 Mad 513.**

——S. 290 — Applicability — Quarrelling in public street in village—Offence.

Quarrelling in public street in village is not likely to cause annoyance to villagers and as such would not constitute offence under S. 290, Penal Code. AIR 1937 Mad 130, Rel. on. **1959 Mad L J (Cri) 346 : 72 Mad L W 444 : 1959 Mad W N 366 : 1959 Cri L J 1440 : AIR 1959 Mad 513 (513) (Pt A) (Pr 1).**

——S. 290—Applicability—Encroachment must constitute public nuisance for there may be encroachment which may fall short of public nuisance—Bona fide dispute between accused and the Board about alleged encroachment — Proper forum is Civil Court and the criminal prosecution of the accused was misconceived. AIR 1955 N U C (Orissa) 583.

—— S. 290 — Trade or business — Factory operating for long time—If can become public nuisance.

Although a person is at liberty to carry on any trade or business on the property belonging to him, he has no right to do so if such trade or business deprives another of the reasonable and comfortable use of his property. Even a lawful trade would become a nuisance if it interferes with the comfort and enjoyment of the neighbours, gives offence to their senses or obstructs the reasonable use of property.

The question whether a particular trade or business is or is not a nuisance can be determined only after taking into consideration a number of circumstances such as the place where it is located or carried on, the number of people whose rights are prejudicially affected thereby and the extent of the injury, discomfort and annoyance caused to normal human beings.

The mere fact that the factory was allowed to operate for several years without any objection having been raised by the neighbours would not render the accused immune from punishment if it is found that its existence constitutes a nuisance to the people of the neighbourhood. No prescriptive right can be acquired to maintain and no length of time can legalise a public nuisance. **I L R (1956) Punj 1072 : 1958 Cri L J 91 : AIR 1958 Punj 11 (12) (Prs 4, 5).**

——S. 290—Accused using vulgar language against some one in public place thereby causing annoyance to public — Such conduct amounts to public nuisance. **1953 Cri L J 288; 1952 Ker L T 487 : AIR 1953 Trav-Co 43 (44) (Pt A) (Pr 2).**

SECTION 292

SYNOPSIS

(Penal Code (1860), S. 292.)

1. Scope.
2. Validity.
3. Whether repealed.
4. Test of obscenity.
5. Mens rea—Necessity and proof.
6. Obscene in part—Obscene as a whole.
7. Publication.
8. Obscene matter—Defence.
9. Sentence.
10. Interference in revision.

1. Scope.

● **——S. 292—Whether a book is obscene depends on interpretation of S. 292 and not on expert evidence—Evidence Act (1872), S. 45.**

In a prosecution under S. 292, the question whether the book is obscene or not does not altogether depend on oral evidence of a writer and art critic because the offending novel and the portions which are the subject of the charge must be judged of by the Court, in the light of S. 292, and the provisions of the Constitution. This raises two broad and independent issues of law—the validity of S. 292 and the proper interpretation of the section and its application to the offending novel. Ranjit D. Udeshi v. State of Maharashtra, **1965 (2) Cri L J 8; (1965) 1 S C W R 778 : 67 Bom L R 500 : (1965) 1 S C R 65 : AIR 1965 S C 881 (884) (Pt A) (Pr 3).**

——S. 292, Exception—Scope of Exception — Effect of amendment of 1925—Scope is not widened.

Section 292 of the Penal Code, as it originally stood in 1861, made it an offence to sell, distribute, import or print for sale or hire, or wilfully to exhibit any obscene book, pamphlet, paper, etc. A representation in a temple or on a car used for conveying of an idol was however, exempted from the operation of the section. In 1925, in implementation of the International Convention for Suppression of Traffic in obscene literature, the scope of the section was widened and the exception was also slightly enlarged The exception now applies to any such matter connected with religion. However, the scope ot the exception has not been widened so as to make it applicable to object of art and literature. **64 Bom L R 356 : 1962 Nag L J 406 : 1962 (2) Cri L J 741 : I L R (1962) Bom 538 : A I R 1962 Bom 268 (269) (Pt C) (Pr 3) (DB).**

——S. 292—Trial under — Change in society to be considered.

In deciding whether a publication absorbed with sex relationship of men and women and purporting to describe the contemporary life, is an obscene libel, it is necessary to take into account the change brought out in the society. **I L R (1959) 1 Cal 678.**

——S. 292 — Scope — (Press (Objectionable Matter) Act (1951), S. 11)—Effect of.

Prosecution under section does not amount to evasion of S. 11, Press Objectionable Matter Act of 1951 —That Act does not repeal any provision of Penal Code and is not a bar to prosecution under the section. **(1953) 1 Mad L J 144 : 1953 Mad W N (Cri) 9 : 1953 Mad W N 17 : 1953 Cri L J 763 : 66 Mad L W 51 : AIR 1953 Mad 418 (418) (Pt B) (Pr 6).**

2. Validity.

● **——S. 292 — Section is not invalid in view of Art. 19 (2) of Constitution.**

Article 19 guarantees complete freedom of speech and expression but it also makes an exception in favour of existing laws which impose retrictions on the exercise of the right in the interests of public decency or morality. The cherished rights of freedom of speech or expression is meant for the expression of free opinions to change political or social conditions or for the advancement of human knowledge. This freedom is subject to reasonable restrictions which may be thought necessary in the interest of the general public and one such is the interest of public decency and morality. Section 292. Penal Code manifestly embodies such a restriction because the law against obscenity of course, correctly understood and applied, seeks no more than to promote public decency and morality. Section 292 does not go beyond obscenity which falls directly within the words 'public decency and morality' of the second clause of the Article.

Condemnation of obscenity depends as much upon the modes of the people as upon the individual. It is always question of degree or as the lawyers are accustomed to say of where the line is to be drawn. It is however clear that obscenity by itself has extremely poor value in the propagation of ideas, opinions and informations of public interest or profit. When there is propagation of ideas opinions and information of public interest or profit the approach to the problem may become different because then the interest of society may tilt the scales in favour of free speech and expression. It is thus that books on medical science with intimate illustrations and photograp though in a sense immodest are not considered to be obscene but the same illustrations and photographs collected in book form without the medical text would certainly be considered to be

obscene. Section 292, Penal Code deals with obscenity in this sense and cannot thus be said to be invalid in view of the second clause of Art. 19. Ranjit D. Udeshi v. State of Maharashtra, 1965 (2) Cri L J 8 : (1965) 1 S C W R 778 : 67 Bom L R 506 : (1965) 1 S C R 65 : A I R 1965 S C 881 (885) (Pt B) (Prs 7 to 9).

3. Whether repealed.

——S. 292—S. 292 is not impliedly repealed by Press (Objectionable Matter) Act. 1951—(General Clauses Act (1897). S. 26) — (Press (Objectionable Matter) Act (1951)) — (Constitution of India, Art. 254) — Interpretation of Statutes—Repeal—Implied repeal—Repugnancy.

The Press (Objectionable Matter) Act (1951) does not provide for punishment for printing and publishing obscene matter but provides only against the repetition of such publications. It is preventive in nature regarding objectionable matters and not penal. On the other hand under S. 292, Penal Code, once a a person is found to have been concerned with the publication of obscene matter, the Court must convict and punish him. A person found guilty under S. 292, Penal Code, is considered as an offender and is guilty of having committed an offence. Moreover it cannot be said that the ingredients of the offence laid down in S. 292, Penal Code, have been repeated in the 1951 Act or that that 1951 Act qua this provision of Indian Penal Code covers the same ground. Taking the two Acts together it cannot be said that S. 292, Penal Code, cannot be read together with the 1951 Act, The provisions of S. 292, Penal Code, are not inconsistent with the provisions of the 1951 Act and therefore it cannot be said that S. 292, Penal Code, is repealed by implication by the Press (Objectionable Matter) Act (1951) so far as it is applicable to the keepers of the press and publishers of offending articles. ILR (1986) Punj 104 : 1956 Cr L J 415 : 58 Punj L R 795: AIR 1956 Punj 85 (87) (Pt B) (Prs 7 to 10, 12) (DB).

4. Test of obscenity.

■ ——S. 292 — Test of obscenity — It must square with freedom of speech and expression guaranteed by Constitution — Test laid down — Constitution of India, Art. 19 (1) (a) and (5).

The Penal Code does not define the word 'obscene' and this delicate task of how to distinguish between that which is artistic and that which is obscene has to be performed by Courts and in the last resort by the Supreme Court. The test must obviously be of a general character but it must admit of a just application from case to case by indicating a line of demarcation not necessarily sharp but sufficiently distinct to distinguish between that which is obscene and that which is not. None has so far attempted a definition of obscenity because the meaning can be laid bare without attempting a definition by describing what must be looked for. It may, however, be said at once that treating with sex and nudity in art and literature cannot be regarded as evidence of obscenity without something more. The test of obscenity must square with the freedom of speech and expression guaranteed under our Constitution. This invites the Court to reach a decision on a constitutional issue of a most far-reaching character and it must beware that it may not lean too far away from the guaranteed freedom.

The test of obscenity, as laid down in Hicklin's case, (1868) 3 Q B 360 ; and formerly applied in India is this : Whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall. It is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character.

The Court must apply itself to consider each work at a time. An overall view of the obscene matter in the setting of the whole work would, of course, be necessary but the obscene matter must be considered by itself and separately to find out whether it is so gross and its obscenity so decided that it is likely to deprave and corrupt those whose minds are open to influences of this sort and into whose hands the book is likely to fall. In this connection the interests of our contemporary society and particularly the influence of the book etc., on it must not be overlooked. A number of considerations may here enter. Emulation by our writers of an obscene book under the aegis of the Court's determination is likely to pervert our entire literature because obscenity pays and true art finds little popular support. Where obscenity and art are mixed, art must be so preponderating as to throw the obscenity into a shadow or the obscenity so trivial and insignificant that it can have no effect and may be overlooked. In other words, treating with sex in a manner offensive to public decency and morality (and these are the words of our fundamental law) judged of by our national standards and considered likely to pander to lascivious, prurient or sexually precocious minds must determine the result. A balance should be maintained between freedom of speech and expression and public decency and morality but when the latter is substantially transgressed the former must give way. The test to adopt in our country is that obscenity without a preponderating social purpose or profit cannot have the constitutional protection of free speech and expression and obscenity is treating with sex in a manner appealing to the carnal side of human nature. or having that tendency. Such a treating with sex is offensive to modesty and decency but the extent of such appeal in a particular book, etc., are matters for consideration in each individual case.

Applying this test, to the book in question (Lady Chatterley's Lover) their Lordships held that in treating with sex the impugned portions viewed separately and also in the setting of the whole book passed the permissible limits judged of from our community standards and as there was no social gain to the public which could be said to preponderate the book must be held to satisfy the test of obscenity indicated above. AIR 1962 Bom 268 Affirmed. Ranjit D. Udeshi v. State of Maharashtra, 1965 (2) Cri L J 8 : (1965) 1 S C W R 778 : 67 Bom L R 506: (1965) 1 S C R 65 : AIR 1965 S C 881 (887, 888, 889, 891) (Pt E) (Prs 14, 16, 19 to 22, 29).

——S. 292—Obscene matter—What is.

The word 'obscene' is not defined in the Penal Code ; but it may be taken as meaning offensive to chastity or modesty, expressing or personating to the mind or view something that delicacy, purity and decency forbid to be expressed. The test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall ; and in determining whether or not such a book is obscene regard must be had to that book alone ; other books not the subject of charges may not be referred to. A picture of a woman in the nude is not per se obscene. For the purpose of deciding whether a picture is obscene or not one has to consider to a great extent the surrounding circumstances, the pose, the posture, the suggestive element in the picture, and the person or persons in whose hands it is likely to fall.

The publication concerned was not a medical one. Neither was it sold to registered subscribers nor had

its circulation or sale been restricted to members of the medical and legal professions and to students of Psychology and Sociology. The book was written, printed and published and brought into circulation for prurient tastes. The probable effect of the publication was to prejudice public morals and decency. It was intended for those who had ardent sex appeal in them and it was for the delectation of the married and the unmarried for the gratification of their normal and abnormal sex appetites and it described varieties of sexual intercourse in a manner which to say the least was obscene.

Held, that if the probable effect of the publication was to prejudice public morals and decency, the accused must be taken to have intended the natural consequences of his acts. It was no justification that the matter published was by an eminent writer or was composed in a style not easily understood by all. The matter constituted obscene matter contemplated under S. 292. **1958 All L J 578 : 1958 All W R (H C) 680 : 1958 All Cri R 458 (2) : 1959 Cri L J 9 : A I R 1959 All 49 (52, 53) (Prs 17, 21) (DB).**

——S. 292—Obscene literature—Test — That there is gulf between legalism and literature on decency, is no ground for judging publication in question on different standard than strictly legal one. **A I R 1955 N U C (All) 3567.**

——S. 292 (a) - Obscene book — Test of obscenity— Book to be judged by present day standards of morality — Effect of book on mind of average person and adolescents — Court has to see whether book tends to deprave public morality.

Section 292 of the Penal Code does not define the word "obscene". On a review of the cases decided, the test of obscenity will be as to whether or not looking to the present day standards of morals and thoughts, the tendency of the book alleged to be obscene would be to deprave public morality. (1868) 3 Q B 360 and (1954) 2 Q B 16 and 3 All 837 and 20 Bom 193 and 15 Bom L R 307 and A I R 1956 Bom 32, Rel. on.

While judging the character of a publication, the Court must consider the effect that it would produce on the mind of an average person in whose hand the book is likely to fall. While so judging, neither a man of wide culture or superb character nor a person of depraved mentality only should be taken as a reader of such publication. The standard of readers is neither one of exceptional susceptibility nor one without any susceptibility whatsoever. A I R 1952 Cal 214, Rel. on.

The Court must also consider the effect on the mind of young and unwary persons or those of impressionable age. (1872) 7 C P 261 (266) and (1954) 2 All E R 683 and 39 Cal 377 and A I R 1952 Cal 214 and A I R 1961 Cal 177, Rel. on.

Held, that taking into consideration several passages occurring in the novel "Lady Chatterley's Lover" by D. H. Lawrence and taking also an overall view of the case the novel should be held to be obscene within the meaning of S. 292, Penal Code. **1962 (2) Cri L J 741 : I L R (1962) Bom 538 : 64 Bom L R 356 : 1962 Nag L J 406 : A I R 1962 Bom 268 (270, 271, 273, 274) (Pt A) (Prs 5, 9, 10, 15, 20) (DB).**

——S. 292—Obscene matter—Test for determination —Effect produced on ordinary member of society is to be considered.

The true test of obscenity is whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to immoral influences and into whose hands a publication of such sort might fall. The effect produced by the publication on the ordinary member of the society has to be ascertained. (1868) 3 Q B 360 and (1954) 2 All E R 683 and A I R 1952 Cal 214 and (1872) 7 C P 261 and A I R 1940 Cal 290, Rel. on. **1961 (1) Cri L J 371 : I L R (1960) 1 Cal 867 : A I R 1961 Cal 177 (178, 179) (Pt B) (Prs 7, 8) (DB).**

——S. 292—Obscene book — Test — A book may be obscene although it contains but a single obscene passage. 3 All 837, Rel. on. **1961 (1) Cri L J 371 : I L R (1960) 1 Cal 867 : A I R 1961 Cal 177 (179) (Pt C) (Pr 11) (DB).**

——S. 292 — Obscene matter — What constitutes— **Held, that the three books, 'The Dark Urge', 'The Shame of Mary Quinn' and 'Find Me in Fire' were meant to pander to the prurient taste of the public and appeal to their baser instincts. They were 'obscene' within the meaning of S. 292. 1961 (1) Cri L J 371 : I L R (1960) 1 Cal 867 : A I R 1961 Cal 177 (180) (Pt E) (Pr 13) (DB).**

——S. 292 — Prosecution under for publication of collection of stories alleged to be obscene — Such stories taken from past periodicals — Stories not objected to when appeared in periodicals—Collection held still objectionable because a stray passage or a stray story occasionally thrown into a magazine might escape the attention of persons who read them, but to collect such stories together and publish them in book form is certainly bound to excite a particular feeling in the minds of the readers. ILR 39 Cal 377, Rel. on. **I L R (1959) 1 Cal 678.**

——S. 292 — 'Obscene' — Test of — Sexual urge not necessary.

It may be quite true that to a person past his seventies there would be no sexual urge on reading the passages of the book in question, but that will not be the correct test to determine the question of obscenity which has been accepted to be one that is detrimental to public morals and calculated to produce a pernicious effect in depraving and debanching the minds of persons into whose hands it may come. If the story would suggest to the minds of the young of either sex thoughts of most impure and libidinous character it is obscene though the ulterior object of the writer might have been innocent or even laudable. **I L R (1959) 1 Cal 678.**

——S. 292—Obscene literature—Test of obscenity — Sex magazine containing articles dealing with ancient Indian architecture as exhibited on walls of old Hindu temples — Indecent items selected.

The word "obscene" has not been defined in the Penal Code. The tests to be applied for determining whether a particular object is obscene or not would depend on various circumstances. The idea as to what is to be deemed to be obscene has varied from age to age, from region to region, dependent upon particular social conditions. There cannot be an immutable standard of moral values.

The Courts have, more often, restricted the use of the term obscenity to sexual immorality only. Such matters as would tend to stir in persons, into whose hands such matter is ordinarily expected to reach, sex impulse which leads to sexually impure and lustful thoughts, are declared as obscene, attracting the jurisdicsion of the Court to ban out such publications. The true test is not to find out what depraves the morals in any way whatsoever, but what leads to deprave only in one way, viz., by exciting sensual desires and lascivious thoughts. The effect produced on an ordinary member of the society or a particular class or readers for which a particular publication may be meant has to be ascertained. It is neither men of wide culture or rare character nor persons of depraved mentality who should be thought of as being the readers of such literature. The standard of readers is neither one of exceptional sensibility nor one without any sensibility whatsoever. (1868) 3 Q B 360, Rel. on.

Scientific treatises and journals are not to be tested in the same way as books and papers which are published for being read by the common and ordinary man and woman.

The form and method of expression together with the occasion and surrounding circumstances play an important part for determining whether a particular matter is obscene or not.

A sex magazine, meant to educate the ordinary members of the public in science of sexology, contained articles dealing with ancient Indian architecture as exhibited on the walls of old Hindu Temples. With the exception of a few sentences the entire article was devoted to descriptions of and made reference to statutory representations of co-habiting couples found on the walls of certain specified temples. The particular items selected for the article were not really the best from the artistic point of view but those which were indecent and more aphrodisiac. Both the text and the pictures selected were with that aim alone and the articles could not in any view be considered to be one in which art was explained for the sake of art. Detailed descriptions of the scenes of the story which even the writer would not express in language were made explicit by the pictorial representation.

Part of the magazine was also devoted to correspondence from readers and the reply by the Editorial Board of the paper. Questions published in some cases had nothing of a scientific bearing. Those could only be characterised to be a clear article for advertising the capacity of the paper to rouse the immoral sex urge or in some cases even unnatural offences.

Held, that the manner in which the pictures had been selected and the various descriptions were given had only one effect. Its sole object was to exploit the base instinct in human nature, and the passages and the pictures came within the purview of S. 292. **1952 Cri L J 575 : A I R 1952 Cal 214 (215, 216) (Prs 3, 4, 7, 10, 13, 14, 17, 18) (DB).**

——S. 292—'Obscene' book—Tests.

It is a question of fact in each case, whether a particular book falls within the meaning of 'obscene' coming within the mischief of S. 292. The test of obscenity is this: whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall. (1868) 3 Q B D 360, Foll.; (1954) 1 All E R 741, (1955) 1 Mad L J 106; (1953) 1 Mad L J 144; A I R 1953 S C 418; (1957) 1 Mad L J (Cri) 731, Rel. on.; AIR 1940 Cal 290; AIR 1947 Lah 387, Distinguished. Whether the book is obscene is a matter in which the Court is entitled to rely on its own judgment apart from the other circumstances. **1961 Ker L J 771 : 1961 Ker L T 701.**

——S. 292 — Obscene matter — What constitutes — Mere defamatory article—Offence.

What is 'obscenity' is not defined by the Penal Code. But Courts have laid down that the word 'obscene' should be given its ordinary and literal meaning, viz., repulsive, filthy, loathsome, indecent and lewd. But every indecent or filthy article will not come within the scope of obscenity punishable under S. 292 of the Penal Code.

In order that an article should be obscene it must have the tendency to corrupt the morals of those in whose hands it may fall. The mere fact that an article is highly defamatory of certain person referred to therein or is so highly indecent that no decent person will indulge in such writings, will not by itself make them necessarily 'obscene' also. Though all obscene articles will be either filthy, indecent or repulsive, every filthy or indecent article may not necessarily come within the mischief of 'obscenity.' **1958 Mad W N 52 : (1958) 1 Mad L J 8 : 1958 All Cri R 71 : 1958 Mad L J (Cri) 27 : 71 Mad L W 111 : 1958 All W R (Supp) 27 (1) : 1958 Cri L J 647 (1) : AIR 1958 Mad 210 (210) (Pr 1).**

——S. 292—Obscene publication—Test.

The test of obscenity is, whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to immoral influences and in whose hands a publication of this sort may fall. The publication must be regarded as obscene if it is calculated to produce a pernicious effect in depraving and debauching the minds of the persons into whose hands it might come. (1868) 3 Q B 360, Rel. on.

Works of art are never considered as obscene.

It is the effect of the publication on the mind of an ordinary young person that has to be considered in deciding whether it is obscene or not. A I R 1952 Cal 214, Rel. on.

Whether the book is obscene is a matter in which the Court is entitled to rely on its own judgment as well as the evidence of witnesses in support of this finding of fact. A I R 1932 Cal 651, Rel. on.

Where a man publishes a work manifestly obscene he must be taken to have intended the inevitable consequences. The object which the writer has view is immaterial. If the publication is an obscene publication it would be no defence to say that the law was broken for some wholesome and salutary purpose.

Held, on a consideration of the publication 'Kama Kala' as a whole that it was obscene within the meaning of S. 292, Penal Code. **1954 Cri L J 1622 : 34 Mys L J 100 : ILR (1954) Mys 229 : A I R 1954 Mys 164 (165, 166) (Pt A) (Prs 4, 6, 8, 9) (DB).**

——S. 292—"Obscene,' meaning of — Determination of obscenity — Non-prosecution of publishers of similar books—Effect.

The word "obscene" in the section should be interpreted to have its dictionary meaning.

Whether a particular book is obscene is a question of fact.

Non-prosecution of publishers of similar books cannot mean that the book which is an obscene one does not fall within the scope of S. 292, Penal Code. **(1953) 1 Mad L J 144 : 1953 Mad W N (Cri) 9 : 1953 Mad W N 17 : 1953 Cri L J 763 : 66 Mad L W 51 : A I R 1953 Mad 418 (418) (Pt A) (Prs 4, 7, 8).**

——S. 292—'Obscene' — Test— (Press (Objectionable Matter) Act (1951), S. 3 (vi)).

The word 'obscene' has not been defined in the Indian Penal Code and the determination of this question depends on various circumstances. The idea as to what is to be deemed to be obscene varies from age to age, from region to region and even from person to person. As a matter of fact all that can be done in such a case is to apply a set of tests which depends on every individual's notion of obscenity and there is no doubt that there cannot be an immutable standard of moral values.

The test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall. **ILR (1956) Punj 104 : 1956 Cri L J 415 : 58 Punj L R 79 : A I R 1956 Punj 85 (88) (Pt D) (Pr 14) (DB).**

5. Mens rea—Necessity of and proof.

——S. 292—Prosecution need not prove knowledge of obscenity on part of accused.

In prosecution under S. 292 the prosecution need not prove that the person who sells or keeps for sale

any obscene object knows that it is obscene before he can be adjudged guilty. The first sub-section of S. 292 does not make knowledge of obscenity an ingredient of the offence. The prosecution need not prove something which the law does not burden it with. Something much less than actual knowledge must therefore suffice. Courts can only interpret the law as they find it and if any exception is to be made it is for Parliament to enact a law. The difficulty of obtaining legal evidence of the offender's knowledge of the obscenity of the book etc. has made the liability strict. Under our law absence of such knowledge, may be taken in mitigation but it does not take the case out of the sub-section. Ranjit D. Udeshi v. State of Maharashtra. **1965 (2) Cri L J 8 : (1965) 1 S C W R 778 : 67 Bom L R 506 : (1965) 1 S C R 65 : AIR 1965 S C 881 (886) (Pt C) (Pr 10).**

——S. 292 — Sale of obscene book — Mens rea — Proof—Need not be proved by positive evidence.

In S. 292, in the matter of the second part of the guilty act (Actus reus), namely, the selling or keeping for sale of an object which is found to be obscene, the ordinary guilty intention (mens rea) will be required before the offence can be said to be complete. The offender must have actually sold or kept for sale, the offending article The circumstances of the case will then determine the criminal intent and it will be a matter of a proper inference from them. The prosecution need not give positive evidence to establish a guilty intention. In criminal prosecution mens rea must necessarily be proved by circumstantial evidence alone unless the accused confesses. The sub-section makes sale and possession for sale one of the elements of the offence. Where sale has taken place and the accused is a book seller the necessary inference is readily drawn at least in this case. Difficulties may, however, arise in cases close to the border. To escape liability the accused can prove his lack of knowledge unless the circumstances are such that he must be held guilty for the acts of another. The Court will presume that he is guilty if the book is sold on his behalf and is later found to be obscene unless he can establish that the sale was without his knowledge or consent. The law against obscenity has always imposed a strict responsibility. Ranjit D. Udeshi v. State of Maharashtra, **1965 (2) Cri L J 8 : (1965) 1 S C W R 778 : 67 Bom L R 506 : (1965) 1 S C R 65 : AIR 1965 S C 881 (886) (Pt D) (Pr 11).**

——S. 292 (a) — Scope — Mens rea is not dispensed with under the section.

Unless a statute either clearly or by necessary implication rules out mens rea as a constituent part of the crime, no one should be found guilty of an offence under the criminal law unless he has got a guilty mind. The offence under S. 292 is not of a minor character, for the liberty of the subject is at stake. A sentence of three months' rigorous imprisonment prescribed under S. 292 is not insignificant. 'Possession' referred to in S. 292 (a) connotes conscious possession and in that sense mens rea or guilty mind has not been dispensed with under the provision. All the surrounding circumstances may have to be taken into consideration in determining whether the accused had the guilty mind. What is most important is that a man is deemed to have intended the natural consequences of his act. Hence mens rea cannot be said to have been absent, once it is found that the books concerned are obscene. 3 All 837 and (1868) 3 Q B 360, Rel. on. **1961 (1) Cri L J 371 : I L R (1960) 1 Cal 867 : A I R 1961 Cal 177 (178) (Pt A) (Pr 6) (DB).**

——S. 292 — Prosecution under, for publication of obscene book—Specification of particular passages—Not necessary.

In a case where a publication is alleged to be obscene it is not necessary to specify any particular passage or passages, taking the same out of the context. If a charge was framed on such isolated passages, the accused in the case would at once take objection, and very legitimately, that the entire book or article from which these particular passages had been abstracted, should be considered as a whole. A passage out of the context may have one meaning while in relation to the context, it may not have the same meaning. I L R 1 Cal 356, Disting. **ILR (1959) 1 Cal 678.**

——S. 292—Proof of offence.

Conviction of keeper of press and printer and publisher — (Cr. P. Code (1898), S. 342) — (Press and Registration of Books Act (1867), S. 7).

Prosecution not proving that book was printed at particular press—Keeper of that press cannot be convicted on the mere evidence of the printed statement on the book as to where it was printed for it raises no presumption under S. 7, Press and Registration of Books Act and is no evidence against him. Nor can he be convicted on admission in his statement under S. 342, Cr. P. Code.

The presumption under S. 7, Press and Registration of Books Act, however arises against the person who is shown as the printer and publisher. **1953 Mad W N (Cri) 9 : 1953 Mad W N 17 : (1953) 1 Mad L J 144 : 1953 Cri L J 763 : 66 M L W 51 : AIR 1953 Mad 418 (419) (Pt C) (Prs 9, 10).**

6. Obscene in part—Obscene as a whole.

——S. 292 — Portion of book only obscene — Entire book must be condemned as being obscene. **A I R 1955 N U C (All) 3567.**

——S. 292 (a)—Obscene book — Even single passage in book may render it obscene.

A publication is an obscene publication even if only a part of it is obscene. And even a single passage in a book may render the book obscene. There lurks a danger in the doctrine of taking into consideration "the book as a whole." The application of this doctrine would mean that if in a book some portion, say, a few pages are clearly obscene and the rest inocuous, the book can pass muster, good overshadowing the bad. The fact, will, however remain that despite the large portion of the book being inocuous, the obscene portion would have the effect to deprave the mind of the reader. The result would be that obscenity could then parade under the protective cloak of a quantity of innocuous pages. (1952) 1 All E R 1256 and 3 All 837 and A I R 1961 Cal 177, Rel. on. **64 Bom L R 356 : 1962 Nag L J 406 : 1962 (2) Cri L J 741 : ILR (1962) Bom 538 : A I R 1962 Bom 268 (270, 271) (Pt B) (Prs 6, 7, 8) (DB).**

7. Publication.

——S. 292 — Private circulation not protected under the section — Putting obscene literature into circulation whether privately or otherwise is an offence. See Criminal P. C. (1898), S. 439. **A I R 1955 N U C (All) 3567.**

——S. 292—Publication of obscene matter.

Where a Tamil Quarterly Journal was intended to be sold to pruriently minded adolescents, all and sundry, in order to stir the sex impulses and lead to sexual and impure thoughts, and the publication was obscene on every page and unrelieved by a single ennobling thought, and the general character and dominant effect of the publication was obscene, impure, indecent, and manifestly tending to the corruption of youth and further it had no literary or artistic or medical, legal, political, religious or scientific character or importance :

Held, that the publication constituted obscene matter under S. 292, I. P. Code. It was plainly intended to be for the lewd, lascivious, and filthy minded who might secure it at street corners for a few annas. It did not become less smutty or more sanctified because the information had been copied from similar foreign works. (1957) Mad L J (Cr) 731 : (1957) 2 Mad L J 552.

8. Obscene matter—Defence.

——S. 292 — Defence — The fact that other publications which could have been subject of prosecution but were not made, is no defence. AIR 1965 N U C (All) 3537.

——S. 292—Obscene matter—Defence.

It will be no defence to say that one object of the books alleged to be obscene was to hold up to the reader contemporary life in the West. So also it is no defence to show that other books freely circulating now are not subject to any com. (1868) 3 Q B 360 and (1872) 7 C P 231 and H.R. & All 987 and and (1954) 2 Q B 18, Rel. on. 1961 (1) Cri L J 871 : 2 LR (1960) 1 Cal 967 : AIR 1931 Cal 177 (150) (Pt B) (Pr 78) (DB).

——S. 292 — Trial under for obscene publication — Plea that book is not in circulation is not acceptable. (LR (1959) 1 Cal 678.

9. Sentence.

——S. 292 — Sentence — While reducing sentence of Rs. 200 fine to Rs. 250, the following facts were considered : (i) that similar publications had gone unchallenged (ii) that accused would lose great deal of amount expended on publication by destruction of copies and (iii) that book contained undoubtedly some matter which was useful on sexual matters. AIR 1965 N U C (All) 3587.

——S. 292—Sentence—Accused a petty bookseller—Entire stock of obscene book seized — No likelihood of repetition of offence—Accused giving undertaking —Held, that though a fine of Rs. 200 was not severe and unwilled for, considering the circumstances of the case, the sentence of fine should be reduced to Rs. 50. 1966 Ker L J 771 : 1967 Ker L T 701.

10. Interference in revision.

——S. 292 — Charge under, need not indicate the alleged obscene passages when whole book is maintained to be obscene—Criminal P. C. (1898), Ss. 221, 298.

Where a person is prosecuted under S. 292 no doubt it is better to indicate in the charge in what respect exactly the book is obscene. But if the accused is not prejudiced in his defence and the prosecution maintains that the whole book is obscene mere failure to mention particular passages is not a sufficient reason to interfere in revision. AIR 1962 Cal 651. Rel. on. : 1966 Ker L J 771 : 1967 Ker L T 701.

SECTION 292

——S. 292-A (Madras)—Publication of grossly indecent and scurrilous pictures in newspaper—Liability under section is absolute and prosecution need not prove that publication was intentional—Burden is on accused, the declared printer, to prove that he had no knowledge of or hand in such publication. 3 Mad 337 and 32 Mad. 335, Rel. on. (1930) 2 M L J 778 : AIR 1957 Mad 714, Distng. 1964 Mad L J (Cr) 604 : (1964) 2 Mad L J 440.

SECTION 294

——S. 294 — Obscene act — What amounts to — Annoyance to others — Proof of — Address to respectable young girls in public place suggestive of illicit sex relation with them — Amounts to obscene act within S. 294 — Production of girls as witnesses not necessary. (1963) All W R (H C) 216 : 1963 All Cri R 135 : 1963 (1) Cri L J 278 : AIR 1963 All 105 (106, 107) (Pt A) (Prs 8 to 10).

——S. 294—Offence under—Offender a youngster—Proper sentence.

An offence under S. 294 when proved, must be looked upon with utmost severity and should be punished. The maximum sentence of three months' rigorous imprisonment is called for in such cases and a lighter sentence would not meet the ends of justice even if the accused is a youngster of 16 or 17 years of age. 1963 All W R (H C) 216 : 1963 All Cri R 135 : (1963) 1 Cri L J 278 : AIR 1963 All 105 (107) (Pt B) (Prs 12, 13).

——S. 294—Ingredients of offence.

One of the essential ingredients of the offence under S. 294, I. P. Code is that the act was done in or near any public place. Where the accused went to the complainant's house and abused him, this does not amount to an offence under S. 294. 1960 Nag L J (Notes) 111.

——S. 294—Evidence and proof.

Accused charged under the section for using obscene words towards school girl and teasing her on road—No eye-witness or informant (girl) produced by prosecution — Prosecution solely relying on the sole testimony of witness who had reached the spot after the incident and was told about the words used by the girl — Evidence purely hearsay and inadmissible—Offence under the section not proved. See Evidence Act (1872), S. 3. 1965 (1) Cri L J 564 : AIR 1965 J & K 37.

——S 294 — Obscene act or obscene words uttered in public places — Act or utterance will constitute offence only if annoyance is caused to others — Test to see if offence committed — Regard to be had to circumstances of case and to the class of society to which parties belong.

The offence punishable under S. 294, Indian Penal Code is essentially in doing an obscene act or in uttering obscene words in or near any public place to the annoyance of others. The word 'obscene' has been wisely not defined in the Penal Code inasmuch as notions about obscenity are found to change from time to time and depend considerably upon the class of persons whose susceptibility into the matter is involved. Filthy phrases are not per se obscene within the meaning of S. 294, Indian Penal Code. 1957 M P L J Note 62, Foll. and L R (1868) 3 Q B 371, Rel. on. 1956 M P L J (Notes) 95.

SECTION 294-A

——S. 294-A — Sanction for trial of offence under second part of S. 294-A—Trial and conviction under first part in the circumstances is without jurisdiction. See Criminal P. C. (1898), S. 230. 1957 Cri L J 1459 : AIR 1957 Andh Pra 987.

——S. 294-A — Essentials — Offence under second clause — When complete — Actual carrying out of scheme—If necessary.

The offence under S. 294-A, I. P. C. consists in the publication of proposals and does not depend on whether the proposals were to be actually carried out or not. The intention of the Legislature appears to have been that the public should not be informed of such proposals. If the proposals are such as come within the mischief of the second clause of S. 294-A, Indian Penal Code, the offence is contemplated by publishing them and it does not matter whether the scheme is to actually conduct the lottery or to merely defraud the public. 1958 Andh W R 503 : 1957

Cri L J 1389 : AIR 1957 Andh Pra 987 (989) (Pt B) (Pr 8).

——S. 294-A—All chit transactions are not lotteries—What is lottery indicated — Where the agreement is unattended with the risk, speculation and uncertainty which make lotteries void, such a transaction can be held to be a good contract unaffected by the provisions of S. 294-A, I. P. C. — Chit fund held not lottery—Suit relating to recovery of deposit, winning or losses held maintainable — (Words and phrases—Lottery). See Contract Act (1872), S. 30. AIR 1955 NUC (Mad) 425.

——S. 294-A—Applicability.

Accused keeping a particular place as office for running a lottery — Lottery winning tickets were to be drawn out of urn, box or other receptacle at that place—Offence falls under the first part of S. 294-A. AIR 1955 NUC (Mad) 78.

SECTION 295

●——S. 295—'Object held sacred"—Matter of evidence.

Whether any object is held sacred by any class of persons, must depend upon the evidence in the case, so also the effect of the words in S. 295 "with the intention of thereby insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion". S. Veerabadran Chettiar v. E. V. Ramaswami Naicker, 1959 Ker L T 45 : 1959 All W R (Sup) 21 : 1959 All Cr R 142 : (1959) 1 Mad L J (SC) 1 : (1959) 1 An W R (SC) 1 : 1958 Mad L J (Cri) 989 : 1959 Mad W N 14 : 1958 S C A 1116 : (1959) S C J 1 : 1959 S C R 1211 : 1958 Cri L J 1565 : AIR 1958 SC 1032 (1035) (Pt A) (Pr 6).

●——S. 295—"Object held sacred"—Duty of Court.

Section 295 has been intended to respect the religious susceptibilities of persons of different religious persuasions or creeds. Courts have got to be very circumspect in such matters, and to pay due regard to the feelings and religious emotions of different classess of persons with different beliefs, irrespcetive of the consideration whether or not they share those beliefs, or whether they are rational or otherwise, in the opinion of the Court. S. Veerabadran Chettiar v. E. V. Ramaswami Naicker, 1959 Ker L J 45 : 1959 All W R (Sup) 21 : 1959 All Cri R 142 : (1959) 1 Mad L J (S C) 1 : (1952) 1 An W R (SC) 1 : 1958 Mad L J (Cri) 989 : 1959 Mad W N 14 : 1958 S C A 1116 : (1959) S C J 1 : 1959 S C R 1211 : 1958 Cri L J 1565 : AIR 1958 SC 1032 (1035) (Pt B) (Pr 7).

●——S. 295—"Object held sacred"—What is sacred stated—Actual worship or consecreation of idol is not necessary.

Any object however trivial or destitute of real value in itself, if regarded as sacred by any class of persons would come within the meaning of the penal section namely, S. 295. It is not absolutely necessary that the object, in order to be held sacred should have been actually worshipped. An object may be held sacred by a class of persons without being worshipped by them. Apart from the question of evidence it is a well known fact that the image of Lord Ganesa or any objective representation of a similar kind, is held sacred by certain classes of Hindus even though the image may not have been consecrated. S. Veerabadran Chettiar v. E. V. Ramaswami Naicker. 1959 Ker L J 45 : 1959 All W R (Sup) 21 : 1959 All Cri R 142 : (1959) 1 Mad L J (SC) 1 : (1959) 1 An W R (SC) 1 : 1958 Mad L J (Cri) 989 : 1959 Mad W N 14 : 1958 S C A 1116 : (1959) S C J 1 : 1959 S C R 1211 : 1958 Cri L J 1565 : AIR 1958 SC 1032 (1035) (Pt C) (Pr 6).

——Ss. 295, 297, 149 — Charge under S. 295/149, Penal Code — Conviction under S. 297/149, Penal Code — Circumstances of case such that accused could be convicted under S. 147, Penal Code even in absence of charge—Mere absence of conviction under S. 147, Penal Code is no ground for setting aside their conviction where there has been no failure of justice. See Criminal P. C. (1898), S. 535 (1). 1952 Cri L J 1551 : AIR 1952 All 878.

——Ss. 295, 149 — Defective charge — Charge under S. 295/149, Penal Code — No mention that accused were members of unlawful assembly will not vitiate the conviction thereon. See Criminal P. C. (1898), S. 537. 1952 Cri L J 1551 : AIR 1952 All 878.

— Ss. 295, 295A, 403, 427—Bull dedicated to Lord Shiva — If public property—Bull sold at auction by cattle pound keeper—Auction purchaser using it for his own purpose if commits any offence.

A dedicated bull is neither nullius propritas or res nullius nor property of a particular deity. Case law Ref.

A bull dedicated to Lord Shiva is public property unless the deity contemplated is in existence in the shape of a consecrated idol. A public bull has no licence to trespass upon private property. If if does so trespass it can be rightly sent to the cattle pound. When it has been sent to the cattle pound and no one appears to claim it on payment of charges cattle pound authorities can sell it by auction. If the bull is so sold under the Cattle Trespass Act the purchaser acquires proprietary title to it and the public lose their title to it. If the auction purchaser uses the bull for the purpose of ploughing his fields after puncturing its nose he does not commit offence under S. 427 or any other section of the P. C. 1951 All L J 656 : 1952 Cri L J 168 : 1952 All W R (HC) 104 : 1952 R D (HC) 26 : 1952 All Cr R 39 : AIR 1952 All 26 (26, 27) (Prs 2, 3).

——S. 295/511 — Applicability — Burning cigarette thrown on 'Viman' — Cigarette striking Viman but falling on the ground — Accused held guilty under S. 295/511.

Before a criminal act is complete there is first of all an intention followed by preparation and actual attempt and when the attempt is successful the substantive offence is committed. But where for certain unforeseen reasons beyond the control of the accused the offence is not actually committed he can be punished of the offence of attempt to commit such an offence.

Where the accused, a Mahomedan, threw a burning cigarette on the 'Viman' (an object held sacred by the Hindus) in a procession taken out by the Hindus but the cigaratte did not actually fall on the 'Viman' but struck the side and thereafter fell on the ground :

Held, that the accused was guilty under S. 295/511, Penal Code. 1955 Cri L J 1563 : AIR 1955 Bhopal 23 (24) (Prs 5, 7).

——S. 295—'Defile'—Meaning — Damaging idol by breaking them—Offence.

The word 'defile' in S. 295, Indian Penal Code, is not to be restricted in meaning to acts that would make an object of worship unclean as a material object but extends to acts done in relation to the object of worship would render such object, ritually impure. By contrast the words 'destroy' and 'damage' have obviously a physical or material significance but the expression 'defile' is to be construed ejusdem generis with the words 'destory' or 'damage'. Therefore, even damaging the idols by breaking them up would amount to defilement. 1959 Nag L J (Notes) 120.

——S. 295—'Class'—Meaning of.

A class of persons would certainly be a body of persons. But in order that a body of persons might form a class, there must be a principle of classification, and even two persons would be sufficient to form a class, if those two persons according to the principle of classification adopted, form a group distinct from any other group. (1956) 98 Cal L J 139.

——S. 295—'Place of worship'—What constitutes—Absence of dedication—Effect.

Where the lessor has not dedicated the site or the shed on it to the Hindu public of the locality to be used as a temaple or a place of worship, the mere fact that the lessee used the same as a place of worship and permitted such user by other Hindus of locality cannot in any way prejudice the proprietary right of the lessor over the property. The privilege enjoyed by the lessee and others in making use of this shed as a prayer hall could continue only as long as the arrangements continued. In such a case no valid dedication could have come into existence as a result of the unlawful act of the lessee. Such a user cannot make the place a place of worship within the meaning of S. 295. AIR 1941 Pat 492, Rel. on. **1961 Mad L J (Cri) 108 : 1960 Ker L J 673 : (1960) 1 Ker L R 728 : 1960 Ker L T 623 : I L R (1960) Ker 1045 : (1961) 1 Cr L J 82 : AIR 1961 Ker 28 (31) (Pt B) (Pr 6) (DB).**

——S. 295—'Object held sacred'—Articles which were abandoned by a person cannot be said to be aricles held sacred by him. 1961 Mad L J (Cr) 108 : 1960 Ker L J 673 : (1960) 1 Ker L R 728 : 1960 Ker L T 623 : ILR (1960) Ker 1045 : (1961) 1 Cri L J 82: AIR 1961 Ker 28 (31) (Pt C) (Pr 7) (DB).

——Ss. 295 and 380 — Applicability — Essentials — Ingredients of offences.

Where in a property with buildings given on lease, a shed in the compound was used as a place of worship by members of the family of lessee and other Hindus of the locality and a decree for recovery of property and buildings was passed in favour of landlord, the assignee of decree took delivery through Court and destroyed the shed and carried away the pictures of Hindu Gods kept in that shed.

Held : The owner had not dedicated this particular site or the shed to the Hindu public of the locality to be used as a temple or a place of worship. The lessees who had no proprietary right over the property could not also make any such dedication. A lessee by his unilateral act cannot prejudice the lessor's proprietary right in the leasehold property. Even if it is assumed that the prayer hall was used by lessee and others as a place of worship and the articles therein had been held sacred by them the act of the accused in pulling down the shed and in moving the articles can amount to an offence under S. 295 of the Penal Code only if these acts were done by the accused with the intention of insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to the religion. After having got delivery of the property through Court, the accused must have honestly believed that he had the undoubted right to use the property as he liked. In pulling down the shed, he cannot be said to have intended or known that such an act will be an insult to the religion of others who had no manner of right over the property or the shed. Similarly he cannot be said to have committed an act of theft in removing the articles which were found in the shed even after the same had been delivered over to him through Court. Hence it follows that the essential elements of the offences punishable under Ss. 295 and 380 of the Penal Code, have not been brought home to the accused. **1960 Ker L J 673 : (1960) 1 Ker L R 728 : 1960 Ker L T 623 : ILR (1960) Ker 1045 : (1961) 1 Cr L J 82 : (1961) M L J (Cr) 108 : AIR 1961 Ker 28 (31) (Pt D) (Pr 8) (DB).**

——S. 295 — Essentials of offence — 'Object held sacred' meaning of— Breaking of mud image of God Ganesh in public—No offence.

The ingredients of S. 295, I. P. Code are, first that a person must destroy, damage or defile any place of worship or any object held sacred by any class of persons and secondly he must have the intention of thereby insulting the religion of any class of persons or the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion. If one of the ingredients is not present, the offence is not made out.

The word 'object' has to be interpreted ejusdem generis with a place of worship. The section would apply only to cases where an idol in a temple is sought to be destroyed, damaged or defiled. The words 'any object held sacred by any class of persons' even otherwise will apply only to idols in a temple or when they are carried out in procession on festival occasions.

Hence, the breaking in public of a doll or mud image of a deity (God Ganesh) does not amount to an offence under S. 295 I. P. Code, as it cannot by any means be called an object held sacred. **1955 Cr L J 1268 : 1955 Mad W N 245 : (1955) 1 M L J 368 : 68 Mad L W 250 : AIR 1955 Mad 550 (551) (Pr 4).**

——S. 295 and 420—Scope.

Section 295 was intended to prevent wanton insult to the religious notions of a class of persons. S. 420.

Held on facts that the accused before they could be held guilty of the offences must be shown to have known (a) that the pollution of the kind alleged could be removed only by the performance of the purificatory ceremony known as the Mahasnan and (b) that the bhog offered by any class of sebaks other than puja pandas was polluted bhog and not mahaprasad. As it was in evidence that on previous occasions the pushpalak sebaks had been allowed to offer the seba puja and as the nitis had been inordinately delayed by the refusal of puja pandas on the day in question the accused when they thought that the pushpalaks may be asked to perform the remaining nitis could not be said to have either intended or knew it to be likely that the bhog offered by the pushpalak sebaks would be defiled and that the Hindu religion would thereby be insulted. In the above circumstances it could not also be held that the accused had any intention to deceive inasmuch as they might believe that the bhog had been offered to the deity by authorised persons and therefore was properly mahaprasad. Hence it could not be said that in offering it to the public for sale as such they committed the offence of cheating. **24 Cut L T 183 : 1958 Cr L J 1207 : I L R (1958) Cut 485 : AIR 1958 Orissa 220 (222 to 224) (Prs 6, 9, 10, 12, 13).**

——S. 295—Essentials—Intention or knowledge.

Accused must act with intention mentioned in section—Carrying away of idol by shebait cannot constitute offence under section. **A I R 1955 N U C (Raj) 4036.**

SECTION 295-A

● **——S. 295-A—Scope—Validity—Section falls within protection of Cl. (2) of Art. 19 of the Constitution.** See Constitution of India, Art. 19 (1) (a). **1957 Cri L J 1006 : AIR 1957 S C 620.**

● **——S. 295-A— Criminal P. C. (1898), S. 99-A, 99-B and 99-D—Sections are not ultra vires.** See Criminal P. C. (1898), S. 99-A. **1960 Cri L J 256 : AIR 1960 All 715 (SB).**

● ——S. 295-A—Intention—Books written by way of reply to pamphlets issued from opposite camp — If affords immunity.

It may be that the applicant wrote the books, alleged to come within the scope of S. 295-A as outraging the religious feelings of a class of Indian citizens, by way of a reply to the pamphlets issued from the opposite camp. But that circumstance will not by itself take out the books from the scope of S. 295-A.

The intention of the writer of a book must be judged primarily by the language of the book itself though it is permissible to receive and consider external evidence either to prove or to rebut the meaning ascribed to it. Ii the language is of a nature calculated to produce or to promote feelings of enmity or hatred, the writer must be presumed to intend that which his act was likely to produce. AIR 1927 All 649 (FB), Rel. on. Baba Khalil Ahamad v. State, ILR (1960) 2 All 113 : 1960 All L J 481 : 1960 All W R (H C) 389 : 1960 All Cr R 256 : 1960 Cr L J 1528 : AIR 1960 All 715 (718) (Pt C) (Pr 24) (SB).

[Overruled on another point in AIR 1961 S C 1662.]

● ——S. 295-A—Intention of writer—Ascertainment of—Truth of language—Relevancy.

In the case of books alleged to fall within the scope of S. 295-A, the truth of the language can neither be pleaded nor proved. The enquiry under S. 295-A has to be confined to the question whether there was malicious intention of outraging the religious feelings of a class of citizens of India. Even a true statement may outrage religious feelings. AIR 1927 All 649 (FB), Rel. on. Baba Khalil Ahmad v. State, ILR (1960) 2 All 113 : 1960 All L J 481 : 1960 All W R (H C) 389 : 1960 All Cr R 256 : 1960 Cri L J 1528 : A I R 1960 All 715 (718) (Pt D) (Pr 27) (SB).

[Overruled on another point in AIR 1961 S C 1662.]

● ——S. 295-A—'Malicious'—Meaning.

In order to establish malice as contemplated by S. 295-A, it is not necessary for the prosecution to prove that the applicant bore illwill or enmity against specific persons. If the injurious act was done voluntarily without a lawful excuse, malice may be presumed.

Provocation received from supporters of the opposite view cannot be treated as a lawful excuse for writing the offensive books. AIR 1917 All 317 (1). Ref. Baba Khalil Ahmad v. State, ILR (1960) 2 All 113 : 1960 All L J 481 : 1960 All W R (H C) 389 : 1960 All Cr R 256 : 1960 Cr L J 1528: AIR 1960 All 715 (719) (Pt E) (Pr 32) (SB).

[Overruled on another point in AIR 1961 S C 1662.]

● ——S. 295-A—Scope—Books attacking character of Muawiya, religious leader and historical figure held in great regard by class of Sunni Muslims— Muawiya described as man of despicable character — Book written by way of reply to pamphlets issued from opposite camp—Language likely to outrage religious feelings of admirers of Muawiya — Publications held punishable under S. 295-A, Penal Code — Order for forfeiture of books under S. 99-A, Cri. P. Code, held justified. Baba Khalil Ahmad v. State, ILR (1960) 2 All 113 : 1960 All L J 481: 1960 All W R (H C) 389: 1960 All Cr R 256 : 1960 Cr L J 1528: A1R 1960 All 715 (719) (Pt F) (Pr 33) (SB).

[Overruled on another point in AIR 1961 S C 1662.]

● ——Ss. 295-A and 153 — Criminal P. C. (1898), Ss. 99-A, 99-D — Scope—In order to bring matter under S. 295-A it is not the mere matter of discourse or written expression but also the manner of it which has to be looked to. See Criminal P. C. (1898), S. 99-A. 1957 Cri L J 912 : AIR 1957 All 538 (SB).

● ——Ss. 295-A, 153-A—Criminal P. C. (1898), S. 99-A —Scope, indicated—If the author uses language which shows malice and is bound to annoy members of the community so as to degrade them in eyes of other classes, he would be promoting feelings of enmity and hatred. See Criminal P. C. (1898), S. 99-A. 1957 Cri L J 912 : A IR 1957 All 538 (SB).

——Ss. 295-A, 295, 403, 427—Bull dedicated to Lord Shiva— If public property — Bull sold at auction by cattle pound keeper—Auction purchaser using it for his own purpose does not commit any offence. See Penal Code (1860), S. 295. 1952 Cri L J 168 : A I R 1952 All 26.

● ——S. 295 A — Defence—It is no defence to a charge under S. 99-A, Criminal P. C. or S. 295-A, Penal Code, that author had incidentally attacked other religious beliefs also—(Per Majority, Bhimsankaram, J ; Contra) — See Criminal P. C. (1898), S. 99-A. 1959 Cri L J 1280 : AIR 1959 Andh Pra 572 (SB).

[Overruled on another point in AIR 1961 S C 1662.]

——S. 295-A—Constitution of India, Arts. 19 (1) (a), (2), 25 — S. 295-A is valid — Applicability and scope of S. 295 A — Intention of writer found clearly to outrage religious feelings of Muslims deliberately and maliciously — Offence under S. 295-A held made out. AIR 1957 S C 620 and A I R 1958 S C 1032, Rel. on. 1963 Mad W N 667 : (1964) 1 Mad L J 147: 1964 All Cr R 61 : 1964 Mad L J (Cri) 123 : 1964 (1) Cri L J 672 : AIR 1964 Mad 258 (259, 260) (Prs 6 to 10, 13).

——S. 295-A—Malice—What constitutes — Negation of bona fides — Persons with knowledge that his words are bound to offend religious faith of others iudulging in them—Malice implicit in such action.

Malice is one of the important ingredients of the offence under S. 295-A, Penal Code and it is necessary for the prosecution to establish that element by proper evidence. But it being a state of mind is often not capable of direct and tangible proof and in almost all cases has to be inferred from the surrounding circumstances. If a person knowing that his words, either uttered or written, are likely to offend or injure the religious faiths of others, indulges in them it would be difficult to hold that his act was done bona fide and without malice.

Where the accused who was charged under S. 295-A. Penal Code, admitted that the published articles were such as would offend the respective religious and religious beliefs of sections of Hindus and Christians, but contended that their publication was not proved to have actuated with malice.

Held, that the malice was naturally and necessarily implicit and apparent from the fact of the publication. 1962 Mad L J (Cri) 465 : (1962) 2 Mad L J 210 : 1962 (2) Cri L J 146 (147) (Pt A) (Prs 3, 5) (Mad).

——S. 295-A—Criticism of Roman church by accused —Accused using vile and abusive language likely to insult and offend followers of the church—Malicious intention of accused must be inferred from the language—Truth of criticism or sincerity of accused is no valid defence.

The accused who has criticized in a series of articles certain beliefs and practices of the Roman church in vile and abusive language likely to insult and offend the followers of that church is guilty of an offence under the section even if there is truth in his criticism and the criticisms arose out of his sincere conviction that those beliefs and practices were opposed to the teachings of Christ.

It is true that in countries where there is religious freedom a certain latitude must of necessity be conceded in respect of the free expression of religious opinions together with a certain measure of liberty to criticise the religious beliefs of others. But the liberty

to criticise does not include a license to resort to vile and abusive language.

If the language used by the accused in the several articles transgresses the limits of decency and is designed to vex, annoy and outrage the religious feelings of others then, the malicious intention of the writer necessary for the offence under the section can be inferred from the language so consistently employed by him. AIR 1957 SC 620, Distinguished. The malicious intention has to be gathered primarily from the language used by the accused. AIR 1959 Andh Pra 572 (SB), Rel. on.

The truth of the allegations cannot be an effective defence to a charge under the section. Having regard to the purpose for which S. 295-A of the Penal Code has been enacted, a statement which would otherwise fall within the mischief of the section, cannot be taken out of it merely because it happens to be a true statement. AIR 1960 All 715 (SB), Relied on. Nor can the fact that the accused was sincerely opposed to the practices and beliefs criticised by him can constitute a just or lawful excuse for using foul and abusive language and take his case out of the mischief of the section. **40 Mys L J 271 : 1963 Mad L J (Cri) 259 : I L R (1961) Mys 1099 : 1962 (2) Cri L J 564 (566 to 568) (Pt A) (Prs 5, 7) (Mys) (DB).**

——S. 295-A — Constitution of India, Art. 25 (1) — S. 295-A, Penal Code is a law creating an offence relating to religion in the interests of public order and is therefore not inconsistent with the right guaranteed by Art. 25 (1) of the Constitution to propagate religion AIR 1957 SC 620, Rel. on. **40 Mys L J 271 : 1963 Mad L J (Cri) 259 : I L R (1961) Mys 1099 : 1962 (2) Cri L J 564 (568) (Pt B) (Pr 6) (DB) (Mys).**

——S. 295-A—Custom — Prohibition of sacrifice of cows by Moslems on festive occasions—Custom as to —Onus—Custom arising out of common consent and voluntary forbearance—If unreasonable or invalid.

None can dispute the legal right of Mahomedans to kill their own cows in privacy. It is a well-known rule of jurisprudence that every man is entitled to use his own property as not to injure the rights of another. Where the Mahomedans found their right to kill cows on festive occasions not on any custom but on their ecclesiastical law which enjoins the sacrifice of a camel, a buffalo, a cow, a sheep or any other quadruped, and the Hindus object to the exercise of such right by the Mahomedans on the ground of a local village custom, the onus, is on the Hindus to prove that the Mahomedans have lost their legal or ecclesiastical right under a valid custom, i.e., a custom which owes its origin to common consent and voluntary forbearance on the part of the Mahomedans of the village and was never disputed at law. Such agreement when it becomes a valid custom can no longer be regarded as a matter of choice, but acquires an obligatory element and a binding force. If the Hindu and Mahomedan inhabitants of a village who are close neighbours and whose houses are intermingled, enter into some agreement in order to maintain good social relations and neighbourly feelings between the two communities, under which out of deference to the religious susceptibilities of the Hindus and in order to respect their feelings, the Mahomedans knowingly and willingly desist from exercising their right to slaughter kine on Bakrid days or other festive occasions, a custom thus arising cannot be said to be unreasonable. **ILR 30 Pat 606 : AIR 1951 Pat 583 (587) (Pt C) (Pr 9) (DB).**

● **——S. 295-A—Charge under — It is no defence for accused to plead that he was writing a book in reply to one written by one professing another religion who has attacked his own religion. See Criminal P. C. (1898), S. 99-A. 1955 Cri L J 337 : AIR 1955 Punj 28 (SB).**

● **——S. 295-A—Applicability.**

In order to bring a case within S. 295-A it is not so much the matter of discourse as the manner of it. In other words, the words used should be such as are bound to be regarded by any reasonable man as grossly offensive and provocative and maliciously and deliberately intended to outrage the feelings of any class of citizens of India. **Shiv Ram v. Punjab State, 1955 Cri L J 337; ILR (1954) Punj 1020; 56 Punj L R 354 : AIR 1955 Punj 25 (30) (Pt B) (Pr 34) (SB).**

SECTION 296

——Ss. 296, 143—Unlawful assembly with common object of disturbing a religious gathering — Case of each accused not considered individually — High Court remanding case for fresh disposal according to law. See Penal Code (1860), S. 143. 1961 B L J R 347.

SECTION 297

——Ss. 297, 295, 147, 149 — Charge under S. 295/149, Penal Code — Conviction under S. 297/149, Penal Code — Circumstances of case such that accused could be convicted under S. 147, Penal Code even in absence of charge — Mere absence of conviction under S. 147, Penal Code is no ground for setting aside their conviction where there has been no failure of justice. See Criminal P. C. (1898), S. 535 (1). 1952 Cri L J 1551 : AIR 1952 All 878.

——S. 297—Trespass inludes criminal as well as civil trespass. AIR 1952 All 878 (879) (Pt C) (Pr 7).

SECTION 298

——S. 298 — Intention :wounding religious feelings has to be gathered from circumstances — Muslim garlanding cow and parading it before sacrificing it at place open to public view — Carcass with horns and legs protruding carried on cot — Intention was to wound religious feeling of other community. AIR 1955 N U C (All) 9.

——S. 298 — Wounding religious feelings of section of public — Requisite intention — Proof — Performance of Bali puja of village deity by unauthorised person on inauspicious day to prevent spread of cattle epidemic — Mere invasion of Civil rights of others not sufficient — Abence of requisite intention — Accused held not guilty. 28 Cut L T 294 : 1962 All Cri R 204 : 1962 All W R (Sup) 47 : 1963 (1) Cri L J 212 : AIR 1963 Orissa 23 (23, 24) (Prs 4, 5).

——S. 298 — Intention to wound religious feeling must be deliberate and dominant.

The essence of the offence under S. 298 consists in the "deliberate intention" of wounding the religious feelings of other persons. A mere knowledge of the likelihood that the religious feelings of other persons may be wounded would not suffice nor a mere intention to wound such feelings would suffice unless that intention was deliberate. Where the intention to wound was not conceived suddenly in the course of discussion, but premeditated, deliberate intention may be inferred. Similarly, if the offending words were spoken without good faith by a person who entered into a discussion with the primary purpose of insulting the religious feelings of his listeners deliberate intention may he inferred. The deliberate intention has undoubtedly to be inferred from the words spoken, the place where they were spoken and the persons to whom they were addressed and other surrounding circumstances. A man is not free in a public place where passers-by who might not willingly go to listen to him knowing what he was going to say might accidentlly hear his words, or where young people might be present. A man is not free in such places to use coarse ridicule on subjects which are sacred to most people in the country. Intention which is a state of mind, can

never be proved as a fact; it can only be inferred from facts which are proved. In doing particular act a person may have more intentions than one and to hold him guilty of the intention required for a particular offence it must be further shown that the intention specified in that offence was the real or dominant intention. Case law Ref.

The accused No. 1 had honestly believed that he was a god incarnate. On a Rath Jatra day, he and his consort were being taken out, seated on a Rath, in a procession on the village road. His disciples and the accused were dissuading people from going to Ratha Jatra of Lord Jagannath which they said "was only a piece of wood while he himself was a living god." Accused No. 2, a fanatical disciple of the accused No. 1, who was accompanying the procession of the Accused No. 1, saying the same thing, reinforced the argument by saying that "the village goddess and the deity were stone idols and that he could pass urine on them."

Held that the primary or dominant intention of accused No. 1 was to emphasise his own divinity and not to deliberately wound the religious feelings of others by insulting Lord Jagannath. The fact that some of the villagers who had implicit faith in the divinity of Lord Jagannath were likely to be offended by his remarks might show knowledge on his part but was not sufficient to show that he had that intention, much less deliberate intention. He was not therefore guilty of offence under S. 298.

Held further that the accused No. 2 was a man of the village and he knew very well that the village deity and the goddess were held in great reverence by some of his co-villagers. His dominant intention in saying that he could pass urine on them could not be anything else except to outrage their feelings and to administer such rude shock that they would fall in line with him and join in the worship of the accused No. 1. In his case the deliberate intention required for the purpose of S. 298, could be reasonable inferred and he was guilty of offence under that section. **1952 Cri L J 772 : 19 Cut L T 127 : ILR (1952) Cut 199 : AIR 1952 Orissa 149 (150 to 152) (Pt B) (Prs 6 to 9 and 11, 12).**

——S. 298—Essence of offence.

The essence of the offence under S. 298, consists in the deliberate intention of wounding the religious feelings of other persons and a mere knowledge of the likelihood that the religious feelings of other persons may be wounded would not suffice nor a mere intention to wound such feelings would suffice unless the intention was delibrate. Where prosecution has not proved that the petitioners flourished their knives or exhibited some gesture while dividing the flesh with the deliberate intention of wounding the religious feelings of Hindus who were passing at a distance of at least 200 feet from the spot, it could not be inferred that the petitioners deliberately intended to wound the religious feelings of the persons who were passing by. **AIR 1955 N U C (Pat) 442.**

——S. 298—Complaint by Hindus under S. 298 on ground of bullock-slaughter in their right — Eye-witness—Minor discrepancies which would not affect merits of testimony — Concurrent findings of facts of lower Courts — Court of Revision should not interfere with appreciation of oral evidence. 1965 (2) Cri L J 134 : AIR 1965 Tripura 22.

——S. 298—'Religious feeling'—Meaning of—Feeling of Hindus against cow-slaughter is 'religious feeling' and not feeling of superstition. AIR 1954 S C 282, Rel. on. 1965 (2) Cri L J 134: AIR 1965 Tripura 22 (24) (Pt B) (Pr 7).

——S. 298—Slaughter of bullock by Muslims in open public place in broad day-light on Bakr-id-Day — Sacrifice of cow on Bakr-id-Day is not obligatory act for Muslim and protection of fundamental right under Art 25 (1) cannot be availed of — Slaughter in open public place and in day-light and despite protests establishes 'deliberate intention' to offend religious feelings—AIR 1958 S C 731, Rel. on.

Held, on fact that the accused persons were not protected by Art. 25 (1) of the Constitution and the slaughter of the bullock in the open public place in broad day-light and despite protest by Hindus established that the accused persons had 'deliberate intention' to offend the religious feelings of the complainant and were guilty under S. 298 of Penal Code: AIR 1937 All 13, Rel. on; AIR 1942 Pat 471, Disting. **1965 (2) Cri L J 134 : AIR 1965 Tripura 22 (24, 25) (Pt C) (Prs 8, 9).**

SECTION 299

SYNOPSIS

(Penal Code (1860), S. 299).

1. Scope.
2. Intention and knowledge.
3. "With the intention of causing death".
4. "With the intention of causing such bodily injury as is likely to cause death".
5. "With the knowledge that he is likely by such act to cause death".
6. Absence of knowledge or intention.
7. Explanation 2.

1. Scope.

——Ss 299 and 300 — Scope of.

Section 299 defines culpable homicide. Culpable homicide is of two kinds, culpable homicide amounting to murder and culpable homicide not amounting to murder. Section 299 cannot be taken to be the definition of culpable homicide not amounting to murder, as the section clearly speaks of culpable homicide simpliciter. The scheme of the Penal Code is that first the genus 'culpable homicide' is defined and then murder, which is a species of culpable homicide is defined. What is left out of culpable homicide after the special characteristics of murder have been taken away from it, is culpable homicide not amounting to murder. For this reason the Code does not contain any definition of culpable homicide not amounting to murder. **1952 All L J 546 : 1953 All W R (HC) 63 : 1953 Cri L J 565 : ILR (1953) 2 All 885 : AIR 1953 All 203 (205) (Pt D) (Pr 10) (DB).**

——Ss 299 and 300 — Distinction between, pointed out. 1952 Cri L J 1366 : AIR 1952 Bhopal 25 (29) (Pt H) (Pr 31).

——S. 299 — Injury to spinal cord by penknife stab — Death after seven months — Offence.

Any act is said to cause death, within the meaning of S. 299, when the death results either from the act itself, or from some consequences necessarily or naturally flowing from, that act and reasonable contemplated as its result. Where therefore without the intervention of any considerable change of circumstances the death is connected with the act of violence by a chain of causes and effects, the death must be regarded as a proximate and not too remote a consequence of the act of violence. No doubt when death is caused, by what the medical books often call remote or indirect causes, it might be difficult to establish the mens rea necessary for the offence of murder.

Where the accused stabbed his wife in her back by a penknife which injured her spinal cord and resulted in paralysis of the lower limbs and of the bladder, followed by cystitis and bedsore and, in turn, by death after seven months in hospital :

Held, that the death was caused by the injury and the accused was guilty of nothing short of murder. 1958 Ker L T 273 : 1958 Ker L J 424 : (1958) Mad L J (Cri) 481 : 1958 Cri L J 1021 : ILR (1958) Ker 545 : AIR 1958 Ker 207 (210) (Pt C) (Prs 16, 17, 19, 20) (DB).

——Ss. 299 and 300 — Injury — Nature of — Duty of prosecution — Nature of medical evidence.

In a trial for murder it is essential that the medical witness should be asked about the character of the injury on the deceased and whether it was an injury merely likely to cause death, or sufficient in the ordinary course of nature to cause death, it is of the greatest importance that, in murder cases, such facts should be carefully elicited by the prosecution from the medical officer who has held the autopsy. 1962 Mad W N 24 : 1963 (2) Cri L J 651 : AIR 1963 Mad 476 (477) (Pt A) (Pr 7) (DB).

——S. 299 — Culpable homicide — Essentials of.

The mental element in culpable homicide, i. e., the mental attitude of the agent towards the consequences of his conduct, is one of intention or knowledge. Motive is immaterial so far as the offence is concerned, and need not be established. There are three species of mens rea in culpable homicide : (1) An intention to cause death, (2) an intention to cause a dangerous injury, (3) knowledge that death is likely to happen.

If a person in performing some act either (1) expects death to be the consequence thereof; or (2) expects a dangerous injury (i. e. a bodily injury likely to cause death) to be the consequence thereof; or (3) knows that death is a likely consequence thereof, and in each case death ensues, his intention in the first two cases, and his knowledge in the third render the homicide culpable. A guilty intention or knowledge is thus essential to this offence, and if this does not exist the killing cannot amount to culpable homicide. The intention or knowledge necessary in order to render killing culpable homicide must be clearly proved by the prosecution which can usually be done by proof of the circumstances which prove the act or omission in question for the presumption is that a man knows the probable result of his conduct. The fact that such knowledge is accompanied by indifference whether death or serious injury is caused or not, or even by a wish that it may not be caused. makes no difference. 1959 Cri L J 993 : 1959 Mad W N 215 : AIR 1959 Mad 323 (325) (Pt A) (Prs 14 to 17) (DB).

——Ss. 299 and 300 — Law of homicide — Exceptions — Onus — Evidence Act (1872), S. 105.

The law of homicide is contained in Ss. 299 and 300, Penal Code. If the case falls under S. 300 then it is murder unless one of the exceptions to the section becomes applicable. The other defences to a charge of murder are contained in earlier sections which might make it excusable or justifiable homicide but in any case unless one of the various sections of the Penal Code applies the onus under S. 105 of the Evidence Act is not discharged. 1957 Cri L J 532 : AIR 1957 Punj 81 (83) (Pt C) (Pr 22) (DB).

2. Intention and knowledge.

——Ss. 299 and 300—Essentials of offence — Knowledge and intention—Distinction explained.

Knowledge and intention must not be confused. A man's intention has to be inferred from what he does. But there are cases in which death is caused and the intention which can safely be imputed to the offender is less grave. The degree of guilt depends upon intention and the intention to be inferred must be gathered from the facts proved. Sometimes an act is committed which would not in an ordinary case inflict injury sufficient in the ordinary course of nature to cause death, but which the offender knows is likely to cause the death. Proof of such knowledge throws light upon his intention. Every person is presumed to intend the natural and probable consequences of his act until the contrary is proved. It is therefore necessary in order to arrive at a decision as to an offender's intention to inquire what the natural and probable consequences of his acts would be. Once there is evidence that a deceased person sustained injuries which were sufficient in the ordinary course of nature to cause death, the person, who inflicted them can be presumed to have intended those natural and probable consequences. His offence would fall under the third head of S. 300, Penal Code.

Under S. 299 there need be no proof of knowledge that the bodily injury intended was likely to cause death. Before deciding that a case of culpable homicide amounts to murder, there must be proof of intention sufficient to bring it under S. 300. Where the injury deliberately inflicted is more than merely 'likely to cause death' but sufficient in the ordinary course of nature to cause death, the higher degree of guilt is presumed. (1960) 1 Andh W R 313: 1960 Mad L J (Cri) 265 : 1960 Cri L J 303 : AIR 1960 Andh Pra 141 (143) (Pt B) (Pr 12) (DB).

——Ss. 299 and 300—Intention.

In deciding the question of intention in cases of murder, the nature of the weapon used, the part of the body on which the blow is given, the force of the blow and its number are some of the factors which assume importance. Death from a blow or blows on the head with a heavy sharp edged weapon is probably as a rule associated by the villagers with the breaking of the skull but the ignorance of the actual cause which will bring about the victim's death as a result of the blow or blows cannot affect the question of striker's intention. 1952 Cri L J 1366: AIR 1952 Bhopal 25 (29) (Pt I) (Pr 33).

—S. 299, Cls. 2 and 3, S. 300 Thirdly—Distinction between knowledge and intention.

Though there is difference between the Cls. 2 and 3 of S. 299 it is only one of degree. The former requires a particular intent. The latter is satisfied with knowledge only .'Intention' is the state of mind of a person with reference to certain consequences which result from his willed movements or omissions. An act is said to be intentional when it is done with a desire that certain consequences shall follow from a person's physical acts or omissions.

Where the accused stabbed the deceased in a very vulnerable part, e. g., the region of the chest, with sufficient force and with a dangerous weapon namely, a knife of sufficient dimensions, he can safely be credited with the knowledge that such an injury was substantially certain or inevitable and consequently he shall be deemed to have intended it. This is not a case therefore where it can be said that the foresight of consequences as to the injury on the chest was in the realm of "likelihood" only and not substantially certain.

The case of the accused falls under the third clause of S. 300. Examining the aforesaid clause, in the light of the third illustration, it is clear that if the accused intentionally gave the deceased a forceful stab wound at his back in the region of his chest with a knife causing an injury of the dimensions and magnitude which was sufficient in the ordinary course of nature to cause death, and death resulted in consequence, he would be guilty of murder because both the ingredients of the third clause are fully satisfied. The accused would be guilty of an offence punishable under S. 302. AIR 1958 S C 465, Rel. on. 1962 M P C 206 : 1962 Jab L J 629 : 1963 (1) Cri L J 363 (367 to 369) (Prs 20 to 24, 27, 30) (Madh Pra).

——Ss. 299, 304, 326 and 324 — Intention or knowledge — Single stab in chest — Death not definitely

traceable to injury — Offence held one under S. 324. AIR 1955 N U C (Trav-Co) 5429 (DB).

3. "With the intention of causing death."

——S. 299—Intention of causing death.

Intention of causing death is not the intention of causing the death of any particular person. The first illustration to S. 299 shows that a person can be guilty of culpable homicide of a person whose death he did not intend. The same may be gathered from illustration (d) to cl. (4) of S. 300. 1955 Cri L J 1448 : AIR 1955 All 626 (629) (Pt B) (Pr 9) (DB).

——Ss. 299 and 300—Scope — Killing when constitutes murder.

Killing may be murder although it is not premeditated. Generally speaking the "murder" is killing with the intention of killing or inflicting a fatal injury and will cover Cls. (1), (2) and (3) of S. 300, Penal Code. Cases under Cl. (4) of S. 300, Penal Code, are very rare as will be evident from a perusal of illus. (d) to S. 300, Penal Code. 1952 Cri L J 1366 : A I R 1952 Bhopal 25 (29) (Pt H) (Pr 31) (Bhopal).

●——Ss. 299, 34 and 141—Applicability.

Under S. 299, Penal Code, the intention of causing death is necessary and unless that is proved the offence under that section and the subsequent sections cannot be said to have been committed. No doubt, often times it may be very difficult to procure direct evidence and the Court in proper cases may infer such an intention from the acts of the accused. The question of the application of S. 34, Penal Code may also come up for consideration in proper cases, as also the question of the application of S. 141, Penal Code, when five or more persons form an unlawful assembly with the common object and intention of committing murder. 29 Dec L R 105, Explained.

In order that S. 34, Penal Code, may be applicable there must be a common intention to commit some crime, that is something punishable under the Penal Code or any other law; if that is so, every one would be liable for the result of their joint act in committing the crime if the result was such as was likely to follow from their joint act in committing the crime intended and was not foreign to their common intention; and it is not necessary in order that S. 34, Penal Code should apply that the common intention should have been to cause, the particular result which came about in committing the crime. To convict the accused of an offence applying S. 34 it should be proved that the criminal act was done in pursuance of the pre-arranged plan. A I R 1951 All 21 and A I R 1945 P C 118, Rel. on. Hulliah v. State, 1954 Cri L J 454 : I L R (1953) Hyd 613 : AIR 1954 Hyd 54 (55) (Prs 5, 6, 7) (FB).

4. "With the intention of causing such bodily injury as is likely to cause death".

——Ss. 299, 147, 300, 302, 304, 109 and 34 — Four accused armed with lathis and one with spear — Common object of beating deceased — One member, being struck by deceased, becoming incapable of taking further part — Rest beating deceased causing several injuries resulting in death — Offences committed by accused was of rioting, the moment they attacked the member who had become incapable of taking further part, as the result of the attack — Accused formed an unlawful assembly with the common intention of giving beating to the deceased. 1950 All L J 246 : 51 Cri L J 1133 : 1950 All W R (HC) 376 : I L R (1951) 2 All 141 : AIR 1950 All 418 (419) (Pt A) (Pr 7) (DB).

——S. 299 — Intention — Giving blow with hatchet — Death caused — Intention is to cause death or such injury as was sufficient, in ordinary course of nature, to cause death. AIR 1955 N U C (Him Pra) 2346.

——S. 299 — Applicability — Death not imminent result — Offence.

Obiter per Shiv Dayal, J. :— Ordinarily if a child of two years is thrown across a wall five feet high, death will not be the imminent result. If therefore, the child dies, the offence is not under S. 302 but under S. 304. 1960 Cri L J 480 : 1960 Jab L J 391 : 1960 M P L J 691 : AIR 1960 Madh Pra 102 (104) (Pt D) (Pr 16) (DB).

——Ss. 299 and 300 — Intention of causing bodily injury as likely to cause death may be inferred from firing with fire arm at persons indiscriminately.

The act of indiscriminate firing with fire arm at persons is in itself so imminently dangerous that unless there is some other defence available, the offender must be held to have the intention of causing such bodily injury as he knew was likely to cause death or in the ordinary course of nature was likely to cause death. AIR 1935 Cal 530. Dissent from. 1961 Raj L W 82 : ILR (1961) 11 Raj 134.

5. "With the knowledge that he is likely by such act to cause death."

●——Ss. 299, 300, 302, 304, Part 1—Applicability—Lathi blow—Knowledge of bodily injury likely to cause death—Sentence.

The accused administered six blows of the lathi on the person of the deceased and the injury No. 1 was the fatal injury. The injury No. 1 was kept under observation. The deceased however developed slight symptoms of compression of brain and these symptoms gradually increased and he became absolutely unconscious on the 28th March, 1952. Extra dural haemorrhage set in and proved fatal.

Held, that it was the accused who was responsible for inflicting the injuries which ultimately resulted in the death of the deceased. But the accused could not under the circumstances be held to have been actuated with the intention of causing the death of the deceased. But the accused no doubt knew that he would be causing such bodily injury as was likely to cause death and the offence committed by him would fall under S. 304, Part 1 and not under S. 302.

(The conviction under S. 302 of the Penal Code was converted to that under S. 304, Part 1 of the Indian Penal Code and the sentence of transportation for life meted out to the accused, was converted into a sentence of 10 years' rigorous imprisonment).

Inder Singh v. State of Pepsu, 1955 Cri L J 1014 : I L R (1954) Patiala 380 : A I R 1955 S C 439 (441) (Pt A) (Prs 9, 10).

——Ss. 299, 300 fourthly and 304, Para. 2 — Applicability — Illustration (d) to S. 300 fourthly—Accused firing gun on members of opposite party—No intention of killing any particular person—One member hit and killed — Offence.

Where in the altercation that arose between the two parties, the accused fired his gun in the air to scare away the opposite party and in that act one stray pellet caused gunshot wound to a member of the opposite side which proved fatal, the accused must be deemed to have caused the death of the deceased with the knowledge that he was likely by such act to cause death but without knowing that the act was so imminently dangerous that it must, in all probability; cause death or such bodily injury as was likely to cause death, and commits an offence under Part 2 of S. 304. 56 Punj L R 339 : 56 Cri L J 305 : AIR 1955 Punj 13 (15, 17) (Pt B) (Prs 29, 30, 43) (DB).

——Ss. 299, 300, 302 and 304 — "Knowledge that he is likely by such act to cause death."

Bitter enmity between accused and deceased — Accused inflicting as many as seventeen injuries on deceased, out of which eight were on head — Death due to shock and intracranial haemorrhage—Accused throwing body in a well—Accused using blunt sides of weapons—Held that in the circumstances the offence was one under S. 304, Part 2 and not one under S. 302. 1958 Cri L J 2815 : AIR 1958 Punj 262 (264) (Pt A) (Pt I.I) (DB).

——Ss. 299, 300, 304 and 304-A — Applicability — "With the knowledge that he is likely by such act to cause death"—Accused wrongfully confining deceased in a room — Accused by burying deceased in a lime quarry believing him to be dead, though in fact he was alive — Accused held guilty under S. 304-A although he had no guilty intention or knowledge within the meaning of S. 299 but the act of the accused was a rash act. 1960 Raj L W 4 : AIR (1960) 2 Raj 702.

——Ss. 299 and 300 —Circumstantial evidence—Evidence Act (1872), S. 3.

It will not be wrong or opposed to any rule of law to find the accused guilty of the offence charged against him merely on the strength of the circumstantial evidence provided that such evidence is so conclusive as to lead only to one conclusion, viz., that it establishes beyond doubt the guilt of the accused; when the circumstantial evidence is so thorough and convincing it can be accepted and acted upon as good as direct evidence.

The accused and the deceased were together in a toddy shop at Kalimuthan on the evening of 2-5-1124 till about 9 p. m. They left the shop together and both of them proceeded towards the south along the Arappamuttam lane. They were fully drunk and while they were proceeding along the lane they were engaged in a wordy quarrel by using foul and abusive language against each other. They were seen in that condition about at 9-30 p.m. by P. W. 5.A little later accused alone was seen going towards his house by P. W. 15. On the next morning the dead body of deceased was found in the Arappamuttam lane and at a point to the south of the spot where the accused and deceased were together seen by P. W. 5 and some distance to the north of the place where the accused alone was seen by P. W. 15. The clothes worn by the accused on the night were washed by him and spread for drying. In spite of such washing human blood was detected on these clothes when they were subjected to chemical examination after they had been recovered from the accused's house. A knife which belonged to the accused and which was in his possession on the night of 2-5-1124 and which was recovered from him at the time of his arrest, was also subjected to chemical examination and human blood was detected on that knife also. The accused was seen to have sustained certain minor injuries as described in the wound certificate on the night of 2-5-1124. These injuries were admitted by him to have been sustained at 10 p.m. on the crucial night and in the course of a struggle.

Held, that the cumulative effect of all these circumstances was to lead to the irresistible conclusion that the deceased sustained the minor injuries already mentioned, in the course of a tussle between himself and the deceased and that the fatal wound on the deceased was inflicted by the accused himself at that time. That several links in the chain of the circumstantial evidence were complete in themselves and it was impossible to explain them away in favour of the innocence of the accused. Thus the circumstantial evidence already adverted to conclusively proved and established the fact that it was the deceased who caused the death of the deceased. The offence committed was culpable homicide not amounting to murder, punishable under S. 304, Part I. 1952 Ker L T 723 : 1952 Cri L J 1804 : AIR 1952 Trav Co 305 (306) (Pt A) (Pt 4) (DB).

6. Absence of knowledge or intention.

C——S. 298 — Homoeopath administering poisonous medicines to patient without studying its effect — Death of patient — Petitioner held guilty under S. 304-A but not under S. 302. See Penal Code (1860), S. 304-A. 1955 (1) Cri L J 783 : AIR 1955 S C 331.

——Ss. 299, 300, 304, Part I and 34—Scope of first three clauses of S. 300 — Intention or knowledge a necessary ingredient of these clauses — Applicability of fourth clause—Wounds made on hands and feet with blunt—Death of deceased in hospital—Offence committed held was one under S. 299 and not under S. 300—Accused was punishable under S. 304, Part I and his assistants under that section read with S. 34. See Penal Code (1860), S. 300. 1954 (2) Cri L J 171 : AIR 1954 Pat 334 (DB).

——Ss. 299 and 300 — Exchange of abusive language between accused and deceased on money matters — Being excited by abusive language and in moment of frustration accused striking deceased on head with halmudi lying nearby — No evidence of previous enmity — Offence held was culpable homicide not amounting to murder.

The accused asked the deceased to let him have the money that he owed to him. The deceased wanted more time and upon this the accused started cursing him. The deceased returned the abuse and this resulted into an altercation. The accused got excited by the exchange of abusive language which he had with the deceased and when he saw that the deceased was about to go away, in a moment of frustration he took up the halmudi lying nearby and struck it on the head of the deceased. The man fell down unconscious and succumbed to his injury in a few hours. There was no previous enmity between the two :

Held, that there being no previous enmity between the accused and the deceased, it could not even be held that the accused could have intended to cause a serious hurt. The accused picked up the weapon that he used from the spot and the peculiar shape of the weapon was such that even if used with both hands, it could not ordinarily result in causing a fatal injury. Accordingly it could not be held that the accused intended to cause an injury that he knew was likely to cause death or an injury that would be sufficient to cause death in all probability. All that could be held was that he knew that he was likely to cause death and since death was caused by him, the offence committed by him was culpable homicide not amounting to murder. AIR 1935 All 4; 16 Cri L J 129 ; 5 I P R 1932, Full. ; A I R 1949 Nag 15 and A I R 1934 Lah 741, Disting. ; A I R 1934 Lah 895, Dissent. (51) 3 Pep L R 144 : 1953 Cri L J 1189 : A I R 1952 Rajas 112 (118) (Pt 5) (DB).

7. Explanation 2.

——Ss. 299, 302 — Applicability — Accused causing deep injury on abdomen—Offence.

Where an accused causes several knife injuries on the person of the deceased, one on the abdomen being abdominal cavity deep, the injury is sufficient to cause death in the ordinary course of nature and the accused is guilty of an offence punishable under S. 302.

The fact that better medical treatment could not be available at the local dispensary does not affect the nature of the offence. 1958 All L J 465 : 1958 All W R (HC) 503 : 1958 All Cr R 368 : 1958 Cri L J 1967 : AIR 1958 All 781 (782) (Pt 4) (Pt 10) (DB).

——S. 299, Expl. II — Applicability — In view of Expl. II to S. 299 and Cls. (2) and (4) of S. 300, it would be no defence at all to a charge of murder to plead that there was no proper medical treatment, if the injury which caused the death was inflicted with the intention of causing such bodily injury as the accused knew to be likely to cause the victim's death or that his act was so imminently dangerous that it must in all probability cause the victim's death or such bodily injury as was likely to cause death. See Penal Code (1860), S. 300 (2). **1959 Cri L J 931 : AIR 1959 Ker 230 (DB).**

——S. 299, Expl. (2) — Death of victim due to fatal injury intentionally caused by accused — Offence is murder under S. 300 'thirdly'—Absence of immediate medical attention does not affect nature ot offence. See Penal Code (1860), S. 300 thirdly. **1965 (2) Cri L J 42 : AIR 1965 Mad 261 (DB).**

——Ss. 299, :Expl. 2, 302, 307, 34, 511 — Attempt to commit crime—Elements—Distinction between preparation and attempt — Attempt to murder—Accident intervening and resulting in death—Effect—Husband and wife determined to commit suicide, jumping into well with infant child—Child slipping from hands of mother as accused jumped, falling in and drowned — Accused held guilty only of attempt to murder child and not of murder — See Penal Code (1860), S. 302. **1961 (2) Cri L J 781 : AIR 1961 Mad 498 (DB).**

——S. 299, Expl. 2—Death caused by bodily injury.

Where somebody strikes a man causing a wound and that wound in the ordinary course gives rise to certain disease which is the immediate cause of the death, the person causing the wound cannot be exonerated and he will be guilty either for murder or culpable homicide not amounting to murder according to the circumstances of each case, even if death could have been prevented by the deceased by resorting to proper remedies and skilful treatment. He would also be responsible for the death of the deceased if the latter was negligent in a way that he carried on as usual without taking the necessary precautions which a man in his position would have done. But, if something also intervened between the injury and the death due to distinct set of circumstances, such as gross neglect, or resorting to improper remedies, that disease not being the natural and probable result of the injury itself, the person causing the injury cannot be held responsible for culpable homicide amounting or not amounting to murder. 16 W R (Eng) 319, Rel. on. **1956 Pat L R 317.**

——Ss. 299, Expl. II, 300—Applicability — Injury to side of head of old man of 75 with chopper such as to cause exposure of tissue of brain—Death resulting — Offence — Plea of death being due to negligence and carelessness of doctors — If open — Conviction under S. 301.

To break open the side of the head of a peron with a chopper in such manner as to expose the tissue of the brain in that region cannot be held to be a minor injury inflicted without any intention to cause death and without the knowledge that death was likely to be caused as a consequence of that injury, especially when the victim is an old man of about 75 years of age. When the medical evidence is to the effect that the injury was serious and that death was due to coma from inflammation of the brain membrane and substance consequent on the injury to the head the case must be held to be a typical one of murder falling under S. 301, Travancore Penal Code, (S. 302, I. P. C.) and it cannot be said that there was no intention to cause death or no knowledge that it was likely to cause death. To hold in such a case that death was caused not by the injury but as a result of the negligence and carelessness of the doctors who attended upon the victim is directly opposed to the provisions of Explanation II to S. 298, Penal Code, and such a defence is not open to the accused. The case falls easily within the purview of S. 301, and the accused is liable to conviction for murder under S. 301, Travancore Penal Code, and not merely under S. 326 of that Code. **1950 Ker L T 257 (Trav-Co).**

SECTION 300

SYNOPSIS

(Penal Code (1860), S. 300.)

1. **Scope.**
2. **"Act by which death is caused."**
3. **Knowledge and intention.**
   See also Penal Code (1860), S. 299.

3A. Common intention.
   See Note 20 and Penal Code (1860), S. 34.

4. Intention of causing death.
5. "Secondly."
6. "Thirdly."
7. "Fourthly."
8. Exceptions — General.
   See also Note 24 and Evidence Act (1872), S. 105.
9. **Exception 1 — Grave and sudden provocation.**
   - (A) Sudden provocation.
   - (B) "Whilst deprived of his power of self-control."
   - (C) Adultery causing provocation.
   - (D) Words and abusive language causing provocation.
   - (E) Provocation not grave and sudden.
   - (F) Proviso 1.
   - (G) Provocation — Burden of proof.
10. **Exception 2 — General.**
    See also Penal Code (1860), Ss. 96-106.
    - (A) "In the exercise of the right of private defence."
    - (B) No right of private defence.
    - (C) "Exceeds the power given to him by law."
    - (D) "Without any intention to do more harm than necessary."
11. **Exception 3.**
12. **Exception 4 — Scope and applicability.**
    - (A) "Without premeditation."
    - (B) "In a sudden fight."
    - (C) "In the heat of passion upon a sudden quarrel."
    - (D) "Without offender's . . . .unusual manner."
13. **Exception 5.**
14. **Murder and culpable homicide not amounting to murder — Distinction.**
    See also Penal Code (1860), Ss. 299 and 304.
15. **Murder and culpable homicide not amounting to murder — Illustrative cases.**
    See also Penal Code (1860), S. 304.
16. **Murder or hurt.**
17. **Motive.**
    See also (1) Evidence Act (1872), S. 5.
    (2) Penal Code (1860), S. 302.
18. **Framing of charge under S. 302, Penal Code.**
19. Charge to jury.
    See also Criminal P. C. (1898), S. 297.
20. **Sections 34 and 300, Penal Code.**
    See also Penal Code (1860), S. 34.
21. **Sections 149 and 300, Penal Code,**
    See also Penal Code (1860), S. 149.

22. Evidence — General.

23. Onus of proof.

See also (1) Notes 8 and 9 (G).
(2) Evidence Act (1872), S. 105.

24. Benefit of doubt.

See also Evidence Act (1872), S. 3.

25. Circumstantial evidence.

See also (1) Criminal P. C. (1898), S. 367.
(2) Evidence Act (1872), S. 3.

26. Proof of death.

See also Penal Code (1860), S. 302 — Corpus delicti.

27. Dying declaration.

See also Evidence Act (1872), S. 32.

28. Evidence of poisoning.

29. Evidence as to possession of property.

See also Evidence Act (1872), S. 114.

30. Confession.

31. Evidence, value of — Illustrative cases.

1. Scope.

——S. 300 — Intention — Proof — Conviction on statement made in Court — Accused's act done under duress and threat of instant death — Absence of common intention between accused and others who killed — Offence fell under S. 201. See Criminal P. C. (1898), S. 342. **1957 Cri L J 344 : AIR 1957 All 184 (DB).**

[Overruled in AIR 1966 All 192 (FB)].

——**Ss. 300 and 299 — Scope of—Section 299 defines culpable homicide. Culpable homicide is of two kinds, culpable homicide amounting to murder and culpable homicide not amounting to murder. Section 299 cannot be taken to be definition of culpable homicide not amounting to murder, as the section clearly speaks of culpable homicide simpliciter. The scheme of the Code is that first the genus "culpable homicide" is defined and then murder, which is species of culpable homicide, is defined. What is left out of culpable homicide after the special characteristic of murder is taken away from it, is culpable homicide not amounting to murder. For this reason the Code does not contain any definition of culpable homicide not amounting to murder. See Penal Code (1860), S. 299. 1953 Cri L J 565 : ILR (1953) 2 All 885 : AIR 1953 All 203 (DB).**

——**S. 300 — Scope and effect — Whether offender should intend injury to be sufficient to cause death — Offender to face natural consequences of injuries inflicted.**

While discussing the nature of the offence committed by the accused in the instant case, the Court proceeded to discuss the ambit of S. 300, Penal Code, and held that the test laid down in (1960) 1 An W R 313, is opposed to the observations in AIR 1958 S C 465. The Court, in the instant case, held that the observations in (1960) 1 An W R 313 being opposed to the Supreme Court decision, were rightly dissented from in an earlier Division Bench judgment in Cr. A. Nos. 654, 689, 694 of 1959 and 12 of 1960, (1960) 1 An W R 313 : (1960) M L J (Cr) 265, Diss. from; AIR AIR 1958 S C 465, Foll. (1962) 1 Andh L T 181 : 1962 Mad L J (Cri) 86 : (1962) 1 Andh W R 84.

——**Ss. 300, 304 — Applicability — Right approach to cases.**

The right approach in cases of culpable homicide is to first find out if the offence falls under any of the four clauses of S. 300, Penal Code. If it is so found the trial Judge is then to see if the case is covered by one of the exceptions to the section. The offence if proved to fall under one of the exceptions would be punishable under S. 304, Part I, otherwise, it would be murder punishable by S. 302, Penal Code. If, on the other hand, the requirements of S. 300 are not fulfilled and the offence does not fall under any one of its four clauses, the Court should proceed to see whether it was committed with one of the intentions mentioned in Part I or only with the knowledge described in Part II to S. 304. **(1951) 3 Pepsu L R 558.**

——S. 300 — Person convicted for murder and sentenced to transportation of life—Sentence afterwards remitted conditionally under S. 401 (3), Criminal P. C. and accused released — Accused committing murder of two women after release — Accused is liable to be convicted under S. 303. See Penal Code (1860), S. 303. **1965 (1) Cri L J 473 : AIR 1965 Punj 156 (DB).**

2. "Act by which death is caused".

——S. 300—Applicability — Illegal omission — Husband not providing his wife necessaries for existence —Death of wife — Liability of husband, discussed. See Penal Code (1860), S. 32. **1959 Cri L J 368 : A I R 1959 Punj 134.**

——**Ss. 300, 299 — "With the knowledge that he is likely by such act to cause death"—Accused wrongfully confining deceased in a room — Accused by bringing deceased in lime quarry believing him to be dead though in fact he was alive — Accused held guilty under S. 304-A although he had no guilty intention or knowledge within meaning of S. 299 but the act was a rash act. 1960 Raj L W 4 : I L R (1959) 9 Raj 762.**

3. Knowledge and intention.

See also Penal Code (1860), S. 299.

● ——**Ss. 300 and 40 — Motive, intention and knowledge — Distinction pointed out.** See Penal Code (1860), S. 40. **1956 Cri L J 919 (2) : A I R 1956 S C 488.**

——S. 300—Intention and knowledge—Distinction.

The words used in S. 300 connote intention and not knowledge. Knowledge as contrasted with intention would more properly signify a state of mental realisation in which the mind is a passive recipient of certain ideas and impressions arising in it or passing before it. It would refer to a bare state of conscious awareness of certain facts in which human mind might itself remain supine or inactive.

On the other hand, intention connotes a conscious state in which mental faculties are roused into activity and summoned into action for the deliberate purpose of being directed towards a particular and specified end which the human mind conceives and perceives before itself. Mental faculties which might be dispersed in the case of knowledge are in the case of intention concentrated and converged on a particular point and projected in a set direction. The difference between the shades of the meaning of the two words is fine but clear, and the use of the one in place of the other by the Legislature cannot be without purpose. The words used by the Legislature must, therefore, be given their full effect. **I L R (1956) 1 All 84 : 1955 Cri L J 884 : A I R 1955 All 321 (325) (Pt B) (Pr 20) (DB).**

——**Ss. 300 and 299 — Ingredients of—Knowledge and intention — Distinction explained.** See Penal Code (1860), S. 299. **1960 Cri L J 303 : A I R 1960 Andh Pra 141 (DB).**

——**Ss. 300, 307, 323 and 325 — Lathi not a lethal weapon—Knowledge imports certainty, not probability under S. 300 (2), Penal Code—In the absence of**

such knowledge conviction under S. 307, Penal Code is improper.

Held, that in view of the injuries the offence could not be one under S. 323, Penal Code. Having regard to the fact that the assailants had used lathis as weapons of offence, it could not be said definitely that their intention was to cause death. Ordinarily, lathis are not held to be lethal weapons even if used over the head of the victim The word 'knowledge' in clause (2) of S. 300, Penal Code, imports a certainty and not merely a probability. In the absence of any material on record to attribute to the accused any such 'knowledge' as was required to bring their act within the mischief of S. 307, Penal Code, they could only be attributed with the knowledge of natural consequences that follow the assault by a lathi. They could be convicted under S. 325 read with S. 34, Penal Code. **1961 M P L J (Notes) 290.**

——Ss. 300, 302 — Applicability — Death of suspect caused by torture of police officer — Applicability of S. 302 is not excluded. **1955 Cri L J 1385 : A I R 1955 Pepsu 153 (155) (Pt C) (Pr 9).**

——S. 300—Intention or knowledge of causing death —Evidence Act (1872), Ss. 101-103.

Under S. 300 the prosecution has to prove that the act by which death is caused was done with a certain intention or knowledge and as long as the prosecution does not prove such intention or knowledge, the accused is entitled to acquittal and there is no onus on him to take or prove any special plea of accident or necessity. Where, as in the offence of murder, intent or knowledge is an ingredient of a crime, there is no onus on the accused to prove that the act was accidental. 29 T L R 350, Rel. on.

Where death is caused by injuries from a fire-arm, the prosecution has to show not only that the firing was intentional or voluntary but also that the firing was prompted by any such intention or knowledge as is mentioned in S. 300. If either of these ingredients is not proved, the offence committed is not murder whatever else it may be. A I R 1949 Lah 85, Rel. on; 1935 A C 465, Ref. **I L R (1950) Punj 155 : 1954 Cri L J 22 : A I R 1953 Punj 295 (296) (Pt B) (Pr 12) (DB).**

3-A. Common intention.

See Note 20 and Penal Code (1860), S. 34.

4. Intention of causing death.

●——Ss. 300, 84, 302 — Unsoundness of mind—Epileptic insanity—Must exist at the time of commission of the act — Held on facts that the murder was committed not in a sudden mood of insanity. Criminal A. No. 3 of 1957 decided by Madhya Pradesh High Court (Gwalior Bench), Reversed. See Penal Code (1860), S. 84. **1961 (2) Cri L J 43 : A I R 1961 S C 998.**

●——S. 300 — Applicability — Attempt to commit robbery by five or more persons — Accused running away without committing robbery on hue and cry—Villagers chasing accused—One accused, killing one of chasers when they had gone at considerable distance — Offence is one of dacoity punishable under S. 395—Murder not being committed in the course of dacoity within the meaning of S. 396, the murder was a separate transaction — Accused could be convicted under S. 302 though not under S. 396. See Penal Code (1860), S. 395. **1957 Cri L J 416 : A I R 1957 S C 320.**

●——**S. 300—Intention of causing death.**

Where the accused set fire to the cottage in which the deceased was sleeping and before doing so took care to lock the door from outside so that the servants of the deceased who were sleeping outside would be of no help to the deceased and further took active steps to prevent the villagers also from bringing any succour to the person who was being burnt alive.

Held, that the intention of the accused to kill the deceased was clear from these facts. Rawalpenta Venkalu v. State of Hyderabad, **1956 Cri L J 338 : A I R 1956 S C 171 (174) (Pt A) (Pr 9).**

——Ss. 300 (1) and 302—Accused who was asked by his brother to quit his house, following him with axe in hand—Accused hitting deceased on his head, neck and back resulting in instantaneous death—Accused must be presumed to have intended to cause his death—Case falls under S. 300, Cl. (1)—Exception (1) to S. 300 held did not apply as provocation was not grave—Offence is murder. **A I R 1950 Ajmer 75 (76) (Pt B) (Prs 7, 8).**

——S. 300—Serious injury on vital part with dangerous weapon.

Causing of a serious injury on a vital part of the body of the deceased with a dangerous weapon, like an axe, must necessarily lead to the inference that the accused intended to kill the deceased. He is therefore, clearly guilty of murder. **1952 All L J 400 : 1952 All W R (HC) 544 : 1952 All Cri R 143 : 1953 Cri L J 804 : ILR (1954) 2 All 65 : AIR 1953 All 373 (374) (Pt B) (Pr 13) (DB).**

——S. 300, Firstly and Thirdly.

Where injuries are inflicted by a number of persons with the intention of killing a person and death ensues as a result of the injuries, it is a case of murder falling under the first clause of S. 300—Even if the common object of the assembly is not to kill that person still the case will fall under Cl. (3) of S. 300, if the injuries actually inflicted show that they are sufficient in the ordinary course of nature to cause death—The persons who cause such injuries must be held to have inflicted them intentionally. **1952 All Cri R 162 : 1952 All L J 682: 1952 All W R (H C) 615 : 1952 R D (HC) 352 : 1953 Cri L J 450 : AIR 1953 All 189 (191) (Pt A) (Pr 12) (DB).**

——S. 300—Stabbing old unarmed person with knife on vital part of body.

When a person stabs another person, more especially an old unarmed person, with a knife or any other sharp-edged cutting weapon on a vital part of the body, like the abdomen, he obviously intends to cause death or to cause such bodily injury as is sufficient in the ordinary course of nature to cause death; and he would be guilty of murder as defined in S. 300. **51 Cri L J 1040 : (LR (1951) 1 All 673 : AIR 1950 All 380 (382) (Pt A) (Pr 19) (DB).**

——S. 300—Madness is a question of fact—Held on facts and circumstances of the case that the accused was really of unsound mind at the time of occurrence. See Penal Code (1860), S. 84. **1965 (1) Cri L J 138 : AIR 1965 Andh Pra 28 (DB).**

——S. 300—Accused without excuse firing a gun at crowd and killing one of the crowd — No premediation or design to kill any particular person—Offence is murder. (In this case it was found that the accused had taken deliberate aim at the deceased). **1962 (1) Cri L J 394 : AIR 1962 Andh Pra 166 (171) (Pt D) (Pr 41) (DB).**

——S. 300—Intention—Man is presumed to intend consequences of his own act—Accused piercing spear through vital part (right side of head) of deceased which alone was sufficient to cause death in ordinary course—Accused held intended to cause death. **AIR 1955 NUC (Andhra) 3840 (DB).**

——S. 300—Intention to cause death—Sword blows aimed at head.

The offence committed would be of murder not only when the act is done with the intention of causing

death, but also if it was done with the other intentions or knowledge enumerated in S. 300.

Where blows with a sword were aimed at the head no other inference can be drawn except that the intention of the accused was to cause the death of the person or to cause such bodily injuries as were in his knowledge likely to cause death. 1956 Madh B N. J (Bhopal) 159.

——S. 300—Intention to cause death—Administering aconite.

A person who administers to another aconite producing fatal results within 3 hours cannot but have the intention of killing him. In any case, he must be taken to know that his act is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and if death ensues, he is guilty of murder, notwithstanding that his intention may not have been to cause death. AIR 1943 Mad. 396, Distinguished. 1953 Cri L J 1900 : AIR 1954 Him Pra 11 (16) (Pr 6) (Pr 13).

——Ss. 299 and 302—Intention to cause death, when to be inferred—Death sentence when to be passed.

The nature of the weapon used by the first accused, the vital parts of the body which were attacked, and the number and nature of the injuries all indicate that the intention of the first accused when he stabbed the deceased was to cause his death. Therefore he has to be convicted for murder.

Per Ange Chandy, J.—Choice as to which of the two punishments prescribed by S. 302 of the Penal Code for murder is the proper one to be awarded, will depend upon the particular circumstances of each case, but broadly speaking, murder for gain and other sordid motives, murder committed in connection with sexual offences or with deceit, premeditated, cold blooded murder committed with unusual brutality and such murders that appear to be particularly heinous as to arouse judicial indignation, may be considered as some of the cases deserving the extreme penalty. Of course these cases are not exhaustive, but merely illustrative.

Per Govinda Menon, J.—It is not possible to lay down any hard and fast rule of universal application. Each case must be decided on its own merits and punishment should be awarded suitable to each case. There can be no general rule defining the classes of cases in which lesser sentences can be imposed, though from time to time certain circumstances have been recognised by the Judges as valid grounds for imposing such sentences. In the absence of any extenuating circumstances, whatever, the sentence of death would be the appropriate sentence. The Court whose duty it is to award punishment must exercise its own discretion, but the discretion must be exercised judicially and not arbitrarily. (1963) M L J (Cr) 193 : 1962 Ker L T 1171 : M L R (1962) 1 Ker 548 : 1963 (1) Cri L J 396 (538, 539) (Prs 10, 11, 17) (Ker) (DB).

——S. 300—Intention to cause death—Proof.

Where the serious nature of the injury inflicted on the vital part of the body of the deceased, the weapon used and the words proved to have been spoken to by the accused at the time of stabbing the deceased made it clear that the accused had inflicted the stab injuries with the intention of causing death the accused must be held guilty of murder. (1963) 1 Ker L R 47.

——Ss. 302, 304—Murder—Intoxicated condition of accused—Effect.

Where the degree of the accused's intoxication falls short of a proved incapacity in the accused to form the necessary intent to constitute murder, the offence is murder. AIR 1957 SC 482, Relied on. 1958 Ker L R 356: 1959 Ker L J 940 : (1959) Ker L T 814 : 1960 Cri L J 247 : AIR 1960 Ker 120 (122) (Pr. B) (Pr. 7) (DB).

——S. 300—Applicability—Accused killing mother during period of epileptic insanity — Act is saved by S. 84. See Penal Code (1860), S. 84. 1959 Cri L J 78 : AIR 1960 Ker 24 (DB).

——S. 300—Intention of causing death—Evidence of.

Where the accused goes at dead of night to the house of his wife who has left him and then after locating her with the aid of his torch-light, deliberately stabs her in the middle of the back with such force as to penetrate the spinal cavity and cause damage to the cord, the intention could only have been to kill her. 1951 Ker L T 978: 1953 Ker L J 424: 1953 Mad. L J (Cri) 481 : 1953 Cri L J 1321 : M L R (1953) Ker 545: AIR 1953 Ker 207 (209) (Pr B) (Pr 12) (DB).

——Ss. 300, Exception 1, 302—Intention of causing death — Heavy stones thrown on vital parts of deceased—Accused must be deemed to have intended the consequences—Exception 1 does not apply. AIR 1955 NUC (Mad) 4315 (DB).

——S. 300—Applicability—Accused believing deceased to be witch striking her with axe—Accused is guilty of murder. AIR 1955 NUC (Mad) 2880 (DB).

——S. 300—Applicability—Deliberate and premeditated murder—Preparation of burying dead body in house—Plea of insanity raised—Plea held not established. See Penal Code (1860), S. 84. 1959 Cri L J 944 : AIR 1959 Madh Pra 258 (DB).

——Ss. 300, 307, 34, 299, Exception 2, S. 511 — Attempt to commit crime—Elements — Distinction between preparation and attempt—Attempt to murder—Accident intervening and resulting in death—Effect—Husband and wife, determined to commit suicide, jumping into well with infant child—Child slipping from hands of mother as accused jumped, falling in and drowned — Accused held guilty only of attempt to murder child and not of murder. 1961 Mad. L J (Cri) 487 : 1961 Mad W N 423 : (1962) 2 Mad L J 293 : 74 Mad L W (Cr) 1 (1961) (SC) (Cri L J 481 : AIR 1961 Mad 493 (500, 501) (Prs 10, 12, 15) (DB).

——Ss. 300, 34—Applicability—Repeated stabbing on the back of deceased causing death—Offence was murder. Penal Code (1860), S. 34. 1960 Cri L J 358 : AIR 1960 Mad 125 (128) (Pr A) (Prs 13, 14) (DB).

——Ss. 300 and 302 — Applicability — Intention of causing death—Offence falls under S. 302, however the injury was caused. AIR 1955 N U C (Mad) 5867 (DB).

——S. 300—Scope of — Drunkenness—When proper defence.

State of intoxication envisaged in S. 86 is not in any way different from that contemplated in the preceding section — Difference between two sections is regarding consequences depending on whether drunkenness is involuntary or voluntary—Absence of qualifying words in S. 86 cannot lead to the inference that even if the intoxicity is not such as to impair the reason of the offender the requisite intent cannot be presumed—Presumption that every man is presumed to intend the consequences of his acts can be rebutted by showing that the person could not have formed the intent by reason of his drunkenness—It is only in cases where it is proved that the prisoner was in such a condition of drunkenness that his reason was "dethroned" and was incapable of forming any intention, that the defence of drunkenness would be available—Held, that offence was one of murder and that his voluntary drunkenness did not avail him to reduce the offence to one of culpable homicide not amounting to murder. See Penal Code (1860), S. 85. 1954 Cri L J 972 : AIR 1954 Mad 532 (DB).

——Ss. 300, 85, 88 — Intoxicated person killing another by repeated stab wounds—Requisite knowledge and intention can be presumed — Offence cannot be reduced to one under S. 304 — Evidence Act (1872),

S. 14). See Penal Code (1860), S. 85. 1953 Cri L J 1587 : AIR 1953 Mad 827 (DB).

——S. 300 — Intention to cause death — Four sons armed with deadly weapons attacking deceased on the roof of a house—Deceased being unarmed jumping from the roof to save himself and dying — Held, attack by the accused persons must be held to be the direct cause of death of the deceased. 1960 Cri L J 1222 (2) : 38 Mys L J 365 : 1960 Mad L J (Cr) 575 : AIR 1960 Mys 228 (229) (Pt C) (Pr 9) (DB).

——S. 300—Intention to cause death — Separate acts of accused following closely upon and connected with one another—Death caused — All accused may be convicted of murder—Separate charges not necessary.

If the intention is to kill and a killing results and if the acts of the accused follow closely upon one another and are intimately connected with one another, the action being continuous it is impossible to resolve the incidents into two or three wholly separate actions. It cannot be said that these separate actions were inspired by different motives or committed for different reasons. The accused must be treated as having done one act with the intention of causing death; they are therefore guilty of murder. In such a case it is inappropriate to frame separate charges for separate incidents. AIR 1931 Lah 27, Rel. on. 38 Mys L J 365 : 1960 Cri L J 1222 (2) : 1960 Mad L J (Cr) 575 : : AIR 1960 Mys 228 (229) (Pt D) (Pr 9) (DB).

——S. 300—Intention to cause death—Acts, resulting in death done with reckless indifference or ignorance whether deceased was alive or dead—Accused is guilty of murder. 38 Mys L J 365 : 1960 Cri L J 1222 (2) : 1960 Mad L J (Cr) 575 : AIR 1960 Mys 228 (229) (Pt E) (Pr 9) (DB).

——Ss. 300 and 302—Murder—Intention of accused is to be gathered from injury inflicted by him.

The intention of an accused person can be gathered only from the act which has been actually committed by him. When a deadly weapon (such as a Jambia) is used with so much of violence as to result in an injury whereby the chest cavity is punctured, the left lung is injured and the heart is cut, it cannot be said that the offence committed by the accused can be any offence other than that of murder. Therefore, it has to be taken that by dealing the blow with the weapon the accused intended to cause this injury. AIR 1933 Pat 508; AIR 1934 Lah 741; AIR 1956 S C 488; AIR 1958 S C 465, Rel. on. 39 Mys L J 665 : 1961 Mad L J (Cri) 705 : ILR (1960) Mys 446.

——Ss. 300, 302—Accused illiterate, aboriginal boy of 16—Woman killed at night under impression that she was witch—No proof of his awareness that he was killing human being — Accused held not guilty of murder under S. 302. 30 Cut L T 163 : 1964 (2) Cri L J 105 (106) (Pt B) (Pr 5) (Orissa) (DB).

——S. 300—Liability under Ss. 34 and 149—Distinction—Joint liability—Essentials — Inference of intention to form a plan for an offence—Carrying of weapons of every day use — Sufficiency. See Penal Code (1860), S. 34. (1961) 3 O J D 315.

——Ss. 300, 86, 304 — Offence by drunken person—Presumption as to guilty intention—Law discussed—Accused held capable of forming necessary intention to constitute murder. See Penal Code (1860), S. 86. 52 Cri L J 1136 : AIR 1951 Orissa 354 (DB).

——S. 300—Murder—Terrific blow on head fracturing skull like coconut shell—Inference stated.

Where the accused gave the deceased a terrific blow on the head in consequence of which the skull got fractured like a cocoanut shell and the unfortunate man died, it was held that the only inference that could be made was that the person who gave such a blow either intended to cause the victim's death or else intended to cause such bodily injury as would be sufficient in the ordinary course of nature to cause death. 52 Cri L J 1136 : AIR 1951 Orissa 354 (354) (Pt A) (Pr 4) (DB).

——Ss. 300, 302—Intention to cause death — Brutal injuries even after falling of deceased after first blow.

Where the evidence discloses that the deceased had fallen after the very first blow inflicted by the accused by the blunt side of a tabla and that even after the fall, the accused inflicted further assault on his person with the sharp edge of the tabla, that can be only consistent with the intention of finishing him to death; and hence the accused is clearly guilty under S. 302, I. P. Code. ILR 33 Pat 397 : 1955 Cri L J 577 : AIR 1955 Pat 161 (166) (Pt C) (Pr 9) (DB).

——S. 300—Intention—Presumption as to intention.

A gandasa is deadly weapon and a person who strikes a blow with it on the head of another from the sharp side with such violence as to cut through the skull and brain and thereby causes his death can be presumed to have done so with the intention of causing death or an injury sufficient in the ordinary course of nature to cause death. ILR (1953) Patiala 123 : 55 Cri L J 362 : AIR 1954 Pepsu 51 (52) (Pr 5) (DB).

——S. 300—Intention.

Where injury on the neck given by a formidable weapon cut through the trachea and large vessels and resulted in instantaneous death, the intention of the assailant could have been no other than to take the life of the victim and the assailant could be convicted under S. 302. 1953 Cri L J 1835 : A I R 1953 Pepsu 193 (194) (Pt B) (Pr 9) (DB).

——S. 300—Intention of causing death—Presumption from nature of injuries.

The repetition of Barchha blows with violent force on vulnerable and vital parts of the body can easily give rise to the presumption that the intention of the assailant was to take away the life of his victim, 1953 Cri L J 1748 : ILR (1952) Patiala 59 : A I R 1953 Pepsu 186 (186) (Pt A) (Pr 2) (DB).

——S. 300—Intention of causing death.

Every sane person must be presumed to intend the result that his action normally produces and if a person hits another on a vulnerable part of the body and death occurs as a result of the blow or blows inflicted by him, the intention of the accused was no other than to take the life of his victim and the offence committed by him amounted to murder. (1951) 3 Pessu L R 635.

——S. 300 — Intention of causing death — Presumption of.

Every person is presumed to intend the natural and probable consequences of his act. A man who repeatedly stabs a defenceless person with a dangerous weapon in the abdomen and chest and pierces almost all the vital internal organs like pleura, peritoneum, liver, lung and spleen, can hardly be heard to say that he did not act with the intention of causing bodily injury which was sufficient in the ordinary course of nature to cause death. The fact that accused acted without premeditation or under some sort of provocation would not be of much importance when his intention was so clearly evidenced from the result of his actions. ('51) 3 Pepsu L R 558.

——S. 300 — Person committing house-breaking by night — Murder committed during occurrence — Punishment under S. 302 cannot be escaped. See Penal Code (1860), S. 460. 1964 (1) Cri L J 353 : AIR 1964 Punj 130 (DB).

——S. 300 — Murder by running a man over by tractor.

Where the accused stood to gain by the death of the deceased and the litigation between the parties showed that they were on terms of enmity with each other and the deceased was run over deliberately by a tractor driven by the accused:

Held, that this was not a case of accident and that the accused had committed an offence under S. 302. 1956 All W R (Sup) 71 : 58 Pun L R 318.

——S. 300 (1) and (2) — Small intestine of deceased torn in track of bullet—His left kidney found smashed in course of bullet injuries suffered by deceased in abdomen—Act of accused falls within S. 108 (1) and (2) of S. 300. 1955 All W R (Sup) 91 : (1955) 57 Pun L R 379.

[Reversed on another point in A I R 1956 S C 528, with the result that the conviction was set aside and the appeal by the accused was allowed.]

——S. 300 — Death of X by strangulation by K in room of S—Body removed by K and S and concealed —S held guilty under S. 201 and not S. 302. See Penal Code (1860), S. 211. 1963 Raj L W 214 : ILR (1963) 13 Raj 199.

——S. 300 — Civil P. C. (1898), S. 367 — Offence of murder—Judgment should contain finding on intention. See Criminal P. C. (1898), S. 367. A I R 1955 N U C (Sau) 1646 (DB).

——S. 300—Applicability—Assault on police party in pursuance of criminal conspiracy—Murder of Inspector and fatal injuries on others — Conviction upheld. See Penal Code (1860), S. 120-B. 56 Cri L J 414 : A I R 1955 Trav Co 33 (DB).

——S. 300 — Intention—Premeditation — Absence of, cannot be presumed — (Evidence Act (1872), S. 114). A I R 1955 N U C (Trav-Co) 4115 (DB).

case, the proper section under which the appellant should have been convicted was S. 304 (1) and not S. 302. Kapur Singh v. State of Pepsu, ILR (1955) Patiala 113 : 1956 Cri L J 1265 : AIR 1956 S C 654 (655) (Prs 3, 4).

● ——S. 300—Applicability — Direction to comrade to fire indiscriminately at hostile group — Death of member of group.

If the direction given by the accused to his comrade is a direction to fire indiscriminately as against the members of the hostile group, he would clearly be guilty if his direction brings about a shooting and death of any one or more out of the members of that group. Mathurala Adi Reddy v. Hyderabad State, 1956 Cri L J 341 : A I R 1956 S C 177 (179) (Pt A) (Pr 3).

● ——S. 300 — Lathi blow — Knowledge of bodily injury likely to cause death — Sentence. See Penal Code (1860), S. 299. 1955 Cri L J 1014 : A I R 1955 S C 439.

——S. 300—Secondly—Applicability.

Clause (2) of S. 300 refers to the case of a person with a peculiar physical condition and to the accused having knowledge of that peculiarity. A I R 1949 All 342, 1950 A L J 75, A I R 1932 Oudh 186, Not foll. 1952 All L J 546 : 1953 All W R (HC) 63 : 1953 Cri L J 565 : ILR (1953) 2 All 885 : A I R 1953 All 203 (206) (Pt C) (Pr 15) (DB).

——Ss. 300, 302 — Accused without excuse firing a gun at crowd and killing one of the crowd—No premeditation or design to kill any particular person—Offence is murder. A I R 1956 S C 177, Foll. AIR 1959 S C 465, Applied. 1962 (1) Cri L J 394 : A I R 1962 Andh Pra 166 (171) (Pt D) (Pr 41) (DB).

——S. 300—Death caused by bodily injury — Intention—Proof.

What a man intends can be judged from what he does or says. It is a general rule that a man is presumed to do what is the natural consequence of his act. Law presumes in such a case that he intended the natural and probable consequences of his act or in other words that he intended to inflict bodily injury to the deceased and the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death. Even if there was no intention to cause death, the act would still amount to murder if the act is done with the intention of causing such bodily injury as the offender knows to be likely to cause death of the person to whom the harm is caused. 1960 Ker L J 609.

——Ss. 300 (2), 300 (4), 299, Expl. II, 304 Part I — Intention.

Where, a grown up person in the full possession of his senses stabs another person on the stomach in the region of the umbilicus inflicting a wound 3" long and causing the intestines to protrude through it that injury is found by medical officers to be a 'very serious injury' with 'very little chance of survival', and when death also has occurred as a result of that injury, it would amount almost to judicial misconduct to hold that there was no intention to cause such bodily injury as the assailant knew to be likely to cause the death of the victim or that he had no knowledge that his act was so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death. Further, in view of Explanation II to S. 299 and clauses (2) and (4) of S. 300, Penal Code, it would be no defence at all to a charge of murder to plead that there was no proper medical treatment if the injury which caused the death was inflicted with the intention of causing such bodily injury as the accused knew to be likely to cause the victim's death or that his act was so imminently dangerous that it must in all probability

5. "Secondly."

● ——S. 300, Secondly — Intention to cause bodily injury likely to cause death—Inference.

Where there were 24 injuries on the person of the deceased and of them 21 were incised and they were either on his head or the neck or the shoulders and on the forearms:

Held, that all the parts of the body on which the injuries were caused, except perhaps the last, were vital parts of the body and the accused who caused those injuries with deadly weapons must be fixed with the intention of causing such bodily injury or injuries as would fall within S. 300 of the Penal Code. B. N. Srikantiah v. State of Mysore. 36 Mys L J 505 : 1959 Mad W N (SC) 24 : 1958 Cri L J 1251 : 1958 S C J 918 : 1958 Mad L J (Cri) 721 : 1958 All W R (Sup) 118 : 1958 All Cr R 426 : 1959 S C R 498 : A I R 1958 S C 672 (674) (Pt A) (Pr 7).

● ——S. 300 and S. 304, Part I—Applicability.

The appellant inflicted as many as 18 injuries on the arms and legs of the deceased with a gandasa while his companion held the head of the deceased. None was caused on the vital part of the body. The motive for the crime was to wreak vengeance on the deceased for what his son had done to the appellant's son. The Sessions Judge convicted him under S. 302 and passed a death sentence.

Held, that the fact that no injury was inflicted on any vital part of the body of the deceased goes to show in the circumstances of the case that the intention of the appellant was not to kill the deceased outright. He inflicted the injuries not with the intention of murdering the deceased, but caused such bodily injuries as he must have known would likely to cause death having regard to the number and nature of the injuries. Under the circumstances of the

cause the victim's death or such bodily injury as was likely to cause death. 1958 Ker L J 236 : ILR (1958) Ker 448 : 1958 Ker L T 1179 : 1959 Cr L J 981 : AIR 1959 Ker 230 (232) (Pr 7) (DB).

——Ss. 300, 302 and 304 (2)—Applicability — Accused killing deceased by gun shot — No evidence of sudden quarrel—Accused held guilty of murder—Sentence in circumstances held should be lesser. AIR 1955 NUC (Madh B) 3742 (DB).

——S. 300 — Secondly — "Intention of causing such bodily injury as the offender knows to be likely to cause death"—Injury by arrow discharged at deceased in stomach—Intention can be assumed. AIR 1955 NUC (Madh B) 1552 (DB).

——S. 300—Applicability — Accused beating deceased with lathi and then cutting body in pieces — Offence.

The deceased was beaten by the accused with a lathi giving her two blows upon receiving which she fell down. These blows had fallen on the upper portion of the left pinna, which was not a vital part of the body. There was no reason for the accused to believe that she was dead. He then cut the body in three pieces and buried them.

Held, that as the accused did not exercise any due care and caution and since he acted under a sudden impulse, he must be deemed to have knowledge of the consequence arising from his act and that the accused was guilty of the offence of murder. 1959 M P C 704 : 1959 M P L J 1211 : 1960 Jab L J 77 : 1960 Cr L J 605 : I L R (1959) Madh Pra 300 : AIR 1960 Madh Pra 132 (134) (Pt B) (Pr 11) (DB).

——S. 300 — 'Secondly', S. 302 — Applicability—A stabbing his wife in lungs and intestines — Injuries resulting in death — A complaining about her illicit intimacy with his cousin — Offence — Sentence — Commutation—(Cr. P. C. (1898), S. 402.)

Where it was proved that it was A who stabbed his wife as a result of which she died soon after; that there were four incised wounds some of which punctured the lungs and the small intestines; that A was complaining that his wife was on terms of illicit intimacy with his cousin and he had, therefore, on that account a strong motive to do away with her;

Held, that it was a clear case of murder; (ii) that the fact that she was on terms of illicit intimacy with A's cousin and that A killed her in a fit of passion, would only be a motive for committing the offence but could not be a ground for awarding the lesser of the penalties prescribed by law; (iii) that it was for the Government to consider whether it was a fit case for commuting the sentence to one of transportation for life. (1956) 1 Mad L J 206 : 1955 Madh W N 1042 (2) : (1956) Cri L J 1004 : AIR 1956 Mad 425 (426, 427) (Pt A) (Prs 3, 4) (DB).

——S. 300, Cl. 4 — Injuries on deceased showing that weapon used for commission of offence must be dangerous weapon — Accused must be presumed to know that if such weapon is used, he would cause death of victim—Act of accused amounts to murder even though there was no intention to cause death of deceased. (1960) 38 Mys L J 603.

——Ss. 300, 302, 328—Accused administering poisonous substance to another resulting in his death — Normally accused must be expected to know the effect of the poisonous substance — If death resulted, accused must be held to have intended to cause death or at least knew that death was the imminent result of the poison administered — Accused guilty under S. 302 and not S. 328. See Penal Code (1860), S. 302. 1957 Cri L J 553 : AIR 1957 Pat 462 (DB).

——Ss. 300 and 302 — Applicability — Death of suspect caused by torture of police officer.

The application of S. 302, cannot be excluded in a case where the police officer, in the zeal of his duty to trace out an offience, commits torture on the suspect and thereby causes his death. 1955 Cri L J 1385 : AIR 1955 Pepsu 153 (155) (Pt C) (Pr 9).

——S. 300—Intention of accused in causing injury—Fatal injury in chest by knife blade of 9 inches — Intention—Offence held murder.

Dealing a blow with a lathi even though on a vital part like the head does not necessarily establish that the accused intended to cause death but where a knife with blade of 9 inches is thrust in the chest of the deceased causing a great damage inside the chest, it must be concluded, in the absence of any reasonable explanation, that the accused intended to inflict the injury which he did and in such a case the offence would be murder under S. 302. AIR 1958 SC 465; Cr. A. No. 194 of 1963, dated 5-11-1964 (SC), Foll.

Once the intention to cause bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question would be whether as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. (1965) 67 Punj L R 1175.

——S. 300 — Intention of causing bodily injury as likely to cause death may be inferred from firing with fire arm at persons indiscriminately. See Penal Code Code (1860), S. 299. 1961 Raj L W 82 : ILR (1961) 11 Raj 134.

——S. 300 — "Secondly" — Case on facts. AIR 1955 NUC (Raj) 497 (DB).

6. "Thirdly".

——Ss. 300 thirdly, 34 — Scope and applicability of the sections—Test of offence under clause thirdly — Intentional causing of bodily injuries sufficient in ordinary course to cause death — Several persons intentionally causing such injuries resulting in death of the victim — All persons are guilty of murder under clause thirdly of S. 300 read with S. 34, Penal Code, Anda v. State of Rajasthan, (1965) 2 S C W R 948 : AIR 1966 SC 148 (151, 152) (Prs 7, 12, 13).

——S, 300, Thirdly — Applicability — Essentials to be proved — Inference of intention from nature of injury — AIR 1916 Bom 191 : I L R 41 Bom 27, Overruled.

The prosecution must prove the following facts before it can bring a case under S. 300 "thirdly"; First, it must establish, quite objectively, that a bodily injury is present; secondly, the nature of the injury must be proved. These are purely objective investigations. Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further and, fourthly, it must be proved that the injury of the type, just described, made up of the three elements set out above, is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender. Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout), the offence is murder under S. 300 "thirdly". It does not matter that there was no intention to cause death, or that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (there is no real distinction between the two), or even that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be

present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death.

The question whether the intention is there or not is one of fact and not one of law. It is true that in a given case the enquiry may be linked up with the seriousness of the injury. AIR 1916 Bom 191 ; I L R 41 Bom 27, Overruled. Virsa Singh v. State of Punjab, 1958 Cri L J 818 : 1959 Mad W N (S C) 34 : 36 Mvs L J 723 : I L R (1958) Punj 1528 : 1958 S C J 772 : 1958 Mad L J (Cr) 579 : 1958 All W R (H C) 572 : 1958 All Cr R R 373 : AIR 1958 S C 465 (467, 468) (Prs 12, 13, 15 to 17).

● —S. 300, 'Thirdly' — "Injury sufficient in the ordinary course of nature to cause death"—Meaning of.

Although the medical evidence does not say that any one of the injuries on the body of the deceased was sufficient to cause death in the ordinary course of nature, it is open to the Court to look into the nature of the injuries found on the body of the deceased and infer from them that the assailants intended to cause death of the deceased. Even if none of the injuries by themselves was sufficient in the ordinary course of nature to cause the death of the deceased, cumulatively they may be sufficient in the ordinary course of nature to cause his death. Brij Bhukhan v. The State of Uttar Pradesh. 1957 Cri L J 591 : AIR 1957 S C 474 (477) (Pt B) (Pr 6).

● —S. 300 — Injury sufficient in the ordinary course of nature to cause death.

Whether a particular injury is of the fatal or non-fatal type is a question of fact in each case.

Where as a result of the blow with a penknife on the chest of the deceased, the stomach and the omentum had herniated together and the omentum protruded through the hole which the injury had made and the pleura and the diaphragm were both cut and the injury had extended right up to the abdominal cavity :

Held, that the injury was sufficient to cause death in the ordinary course of nature. Narayana Nair v. the State of Trav-Co. 1956 Cri L J 278; 1956 Ker L T 92; 1956 All W R (Supp) 28 : AIR 1956 S C 99 (101) (Pt A) (Pr 10).

—S. 300, thirdly — Conviction under — Intention to cause injury actually inflicted and sufficient to cause death is sufficient — Such intention can be presumed from circumstances — Conviction under S. 302 held proper.

For the conviction under the third clause of S. 300, I. P. C., it is not necessary for the prosecution to establish that he had an intention of causing such bodily injury as was sufficient in the ordinary course of nature to cause death. All that is necessaey for the prosecution is to establish that the accused had the intention of causing the injury which was actually caused to the deceased, and that that injury was sufficient in the ordinary course of nature to cause death.

Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether as a matter of purely objective inference, the injury is sufficienl in the ordinary course of nature to cause death. Once the existence of an injury is proved, the intention to cause that injury will be presumed unless the evidence of the circumstances warrant an opposite conclusion. If the accused prove or if the totality of the circumstances justify an inference that the accused intended to cause only some superficial injury and that it was purely accidentally or unintentionally that the injury was caused; then of course the offence would not be of murder.

Held, on facts that the accused must be presumed to have intended to cause the injury that was actually inflicted and which resulted in death of the victim and that the accused was guilty of an offence under S. 300, I. P. C. AIR 1958 S C 465, Rel. on. 1962 All L J 347 : 1962 All W R (H C) 277 : 1962 All Cri R 172 : 1962 (2) Cri L J 641 (644) (Pr 28) (All) (DB).

—S. 300 — Injury sufficient to cause death.

Where the spear thrust was given such force that it went deep into the abdominal cavity, penetrated bladder:

Held, that in view of the forceful nature of the spearthrust, the Court would be on safe ground in assuming that the accused knew that the injury inflicted would be likely to cause death or that it would be sufficient in the ordinary course of nature to cause death or that it must in all probability cause death. AIR 1956 S C 116, Foll. I L R (1958) 2 All 426 : 1959 All W R (H C) 609 : 1959 All Cr R 510 : 1959 Cri L J 419 : AIR 1959 All 255 (257) (Pt A) (Pr 14) (DB).

—Ss. 300 and 299 — Accused causing deep injury on abdomen — Injury sufficient to cause death in ordinary course of nature — Accused is guilty of murder — Fact that better treatment could not be available at the local dispensary does not affect the nature of offence. See Penal Code (1860). S. 299. 1958 Cri L J 1367 : AIR 1958 All 791 (DB).

—Ss. 300, Exceptions 2 and 4, 302, 149 —Deceased and his men ploughing field — Accused armed with lathis claiming share in field — Deceased and his men denying claim and refusing to get out — Attack by accused with lathis causing death — Offence.

While the deceased and the other members of his family were ploughing their field, the accused appeared there armed with lathis. One of the accused called upon the deceased and his men to unyoke the bullocks, claiming a share in the field. The deceased and his men replied that he had no such share and refused to go out. Thereupon all the accused assaulted the deceased and his men, some of the accused striking the deceased over the head with great vigour resulting in death. The medical evidence showed that the death was due to the injuries on the head which caused concussion of the brain. It was found that the field belonged to the complainant's party.

Held, that (1) Exception 2 to S. 300 could not help the accused because the complainant's party was absolutely unarmed and no attack had been made by the complainant's party over the accused. The right of private defence of property also did not exist as the property belonged to the complainants who were in lawful possession. (2) Nor could the accused take advantage of Exception, because there was neither a sudden quarrel nor a sudden fight between them and the deceased, and, the accused took undue advantage and acted in a cruel or unusual manner. The presumption that in the absence of accident or negligence, every person must be presumed to intend the natural consequences of his acts, left no room for doubt that the deceased intended to cause bodily injuries sufficient in the ordinary course of nature to cause death, and the accused must, by virtue of the third clause of S. 300, be held liable for culpable homicide amounting to murder punishable under S. 302 read with S. 149, I. P. C. AIR 1953 All 203 and AIR 1956 All 668, Rel. on. 1958 All W R (H C) 79 : 1958 All Cr R 60.

—S. 300, Thirdly and Exceptions 1 and 4 — Accused giving lathi blows to a woman—Death caused on the spot by laceration of liver and rupture of spleen—No sudden provocation—Offence.

In view of the circumstances in which the attack was made by the accused the use of a dangerous weapon like a lathi for it, the ferocity with which the blows were struck, the fact that the victim was a woman, the delicate parts of her body which were hit, and the presumption that in the absence of accident or negligence every person must be presumed to intend the natural consequences of his acts left no room for doubt that the deceased intended to cause bodily injuries sufficient in the ordinary course of nature to cause her death. Since her death was due to the laceration of her liver and the rupture of her spleen, which were the direct result of his lathi blows, he must by virtue of the 3rd Clause of S. 300, I. P. C., be held liable for culpable homicide amounting to murder. AIR 1953 All 203, Rel. on, AIR 1931 Cal 261 (SB) and AIR 1954 S C 706, Distinguished. **1956 All W R (HC) 532 : 1956 All L J 643 : 1956 Cri L J 1272 : A I R 1956 All 668 (669) (Prs 9, 10) (DB).**

——Ss. 300, Cl. 3 and 304, Pt. II — Applicability — Presumption of intention to cause injury— When rebutted.

Section 304, I. P. C., applies to cases where the injury caused is not of the higher degree of likelihood which is covered by the expression 'sufficient in the ordinary course of nature to cause death' but is of a lower degree of likelihood which is generally spoken of as an injury 'likely to cause death' and such a case does not fall under Cl. (3) of S. 300, I. P. C. A I R 1953 All 203, Rel. on.

To bring an act within the four corners of Cl. (3), it is not enough that the injury actually inflicted is sufficient in the ordinary course of nature to cause death. It is further necessary that the offender should intend to cause an injury of this nature. The one does not conclusively prove the other.

The doctrine that a man intends the natural consequences of his act cannot be carried too far. The true rule is that where the injury caused is not the result of accident or of negligence a strong presumption arises that the injury caused was intended to be caused though this presumption may be rebutted by other circumstances, e.g.. the motive of the accused, the nature of the instrument of attack, the time and place of attack, the position and condition of the deceased, the number of injuries, the force used etc. AIR 1953 All 203, Foll. **1955 Cr L J 884 : ILR (1956) 1 All 84 : AIR 1955 All 321 (323 to 325) (Pt A) (Prs 9, 10. 12, 20) (DB).**

——Ss. 300 and 304 — Applicability — Death, result of injuries inflicted — Injuries sufficient, in the ordinary course of nature to cause death —Murder— Enhancement of sentence for offence under S. 304, Part II.

Held : The bodily injuries inflicted resulted in death and when there was an intention to kill (as found) the offence was clearly one of murder. Even if there was no such intention to kill, the nature of the serious injuries inflicted sufficient in the ordinary course of nature to cause death raised a presumption that they caused them intentionally and the offence then would fall under Cl. 3 of S. 300. The case in any view fell under S. 300 ; it did not fall under S. 304, second part. If the Judge was of opinion that the injuries were not sufficient in the ordinary course of nature to cause death but were merely likely to cause death then the offence fell under S. 304, Part I.

But without an appeal against acquittal in exercise of the powers of revision, the High Court could not by itself convict the accused under S. 302 or S. 304, Part I; notice of enhancement of punishment having been already issued the maximum punishment of S. 304, Part II, was awarded. **1952 A L J 682 : 1952 All Cri R 162 : 1953 Cri L J 450 : 1952 A W R (HC) 615 : A I R 1953 All 189 (191) (Pts A, B) (Pr 12) (DB).**

——Ss. 300 , 147, 299, 302, 304, 109 and 34 —Four accused armed with lathis and one with spear — Common object of beating deceased — One member, being struck by deceased, becoming incapable of taking further part — Rest beating deceased with lathis and spear causing several injuries resulting in instantaneous death — Held that accused formed an unlawful assembly with common intention of giving beating to the deceased — They further committed offence of rioting — The accused other than the one who had become incapable of taking part being disabled by the deceased were guilty under S. 302 read with S. 34 — The accused who was disabled was guilty under S. 304 read with S. 109. See Penal Code (1860), S. 147. **51 Cri L J 1133 : A I R 1950 All 418 (DB).**

——S. 300, thirdly—Scope.

A person inflicting injuries sufficient to cause death in the ordinary course of nature will be guilty under S. 300, I. P. C. unless it can be shown, or reasonably deduced that the injury was accidental or otherwise unintentional. A I R 1958 S C 465, Foll.; A I R 1960 Andh-Pra 141. Not approved. Cr. A. 654, 689, 694 of 1959 and 12 of 1960 (A. P.) Rel. on. **1962 Mad L J (Cri) 86 : (1962) 1 Andh W R 84 : (1962) 1 Andh L T 181.**

——S. 300, Thirdly — Accused hurling a big stone at the head of his wife from close quarters causing fracture of skull bone, concussion of brain and resulting in her death immediately—Accused must be held to have intended to cause injury on the head a vital part of the body—Injuries caused in all probability resulting in her death — Offence falls within third clause of S. 300. 1963 (1) Cri L J 120 (122) (Pt B) (Pr 7) (Him-Pra).

——Ss. 300, Thirdly, 302 — Injury sufficient in the ordinary course of nature to cause death.

The accused went to the veranda where the deceased was standing and attacked him with darat causing a very serious injury on the left side of the head. As a result of the impact the deceased fell from the veranda to the courtyard below. He succumbed to his injuries within an hour or so. The darat was a very formidable heavy weapon. According to the Civil Surgeon the incised injury was sufficient in itself to cause death in the ordinary course of nature.

Held, that the accused must be held responsible for causing death. There were no mitigating circumstances; there was no ground for provocation. It may be that the deceased abused the accused in filthy language but that would not amount to grave and sudden provocation. The accused was clearly guilty of an offence under S. 302. **1955 Cr L J 688 : A I R 1955 Him Pra 20 (22) (Pt A) (Pr 6).**

——S. 300, Thirdly—Injury with heavy sharp cutting weapon—Artery and veins severed —Victim dying of haemorrhage within 30 minutes — Accused held intended to cause injury as was sufficient in the ordinary course of nature to cause death. A I R 1955 N U C (Him Pra) 3682.

——Ss. 300, 302, 304—Bodily injury sufficient in the course of nature to cause death — Deep abdominal injury with knife—Peritonitis cauing death is natural result —Conviction under S. 302 proper.

Courts have to distinguish between two types of cases ; first, where the intervening cause of death like peritonitis is only a remote and a rather improbable consequence of the injury ; then it can be said that the injury is done which may in particular circumstances result in death but which may not in ordinary course of nature be likely to lead to it.

Secondly, there is the type where the so-called complication which is the intervening cause of death is itself a practically inevitable sequence to the injury. In that event the probability is very high indeed amounting to practical certainty; that is, death is a result in due course of natural events. A deep abdominal thrust with a knife followed by injury to the internal organs is clearly a case of murder under S. 302 and not merely of culpable homicide. A I R 1956 S C 116, Dist.; A I R 1949 Nag 19 Rel. on. 1961 Jab L J 1414 : 1962 M P L J (Notes) 12 : 1962 (2) Cri L J 195 : A I R 1962 Madh Pra 244 (245) (Prs 5, 7, 8) (DB).

——Ss. 300, Clause 'thirdly' and 299 Explanation (2)—Injury need not necessarily be caused on vital part of the deceased—Victim died due to fatal injury caused by accused—Offence is murder under S. 300 'thirdly'—Absence of immediate medical attention does not affect nature of offence.

Where it was established beyond doubt that the stab wound in question was inflicted by the accused, that the injury was necessarily fatal and death of the victim was due to shock and haemorrhage following the injury :

Held that all the essential ingredients of the offence of murder under S. 300 thirdly, had been made out and hence the offence was punishable under S. 302. The fact that the stab was not given at a vital part of the body did not mean that the offence was not murder. It is not a requirement of S. 300 that injury must be to a vital part of the body. The third part of S. 300 coming thirdly of the section brings within the definition of murder all acts done with the intention of causing bodily injury to any person, when the bodily injury actually found on the person of the deceased was the one that was intended to be inflicted and was sufficient in the ordinary course of nature to cause death, It is also not the requirement of the section that the injury should be intended to be serious but the prosecution has to establish that the accused had intention to inflict the injury that was present on the victim. A I R 1958 S C 465, Followed. AIR 1939 Mad 269, Doubted. Held, further that the contention that the deceased would have survived if medical attention had been given to him immediately had no relevancy for, if death resulted from an injury intentionally caused. the person who caused that injury should be deemed to have caused death even though the life of the victim might have been saved if proper medical attention had been given. Explanation 2 to S 299 is explicit and gives no room for discussion. The reason for the provision is obvious that it is not always that proper remedies and skilful treatment are within the reach of a wounded man and the danger of allowing any exception in the matter could be easily imagined. 1964 Mad W N 446 : 1965 (2) Cri L J. 42: AIR 1965 Mad 261 (262, 263) (Prs 7 to 9) (DB).

——S. 300, Thirdly—Accused stabbing his wife—One of injuries very grave—Injury held fatal — Accused held guilty of murder.

Where the acused,, who had practically run amok, stabbed his wife and one of the several injuries caused to her was very grave, cutting through the pleura, the inferior margin of the lower lobe of the left lung, and the spleen and the left lobe of the lever and the wife died as the result of the injuries;

Held, that the injury was fatal and the inference must be that the accused was guilty of murder under the third Clause of S. 300. ILR (1964) 2 Mad 881: 1966 Cri LJ 222 (223) (Pt A) (Pr 5) (Mad) (DB).

——S. 300. Clause Thirdly and Exceptions 1, 2 and 4—Accused inflicting thirty-nine injuries by sickle some of them being individually fatal—Death of, victim on spot—Plea of justification—Intention of accused can be gathered from acts actually committed by him—Right of private defence held did not extend to inflicting such injuries—Offence held was under Cl. 'thirdly' and not within Exceptions (1) (2) and (4) of the section.

The accused was charged under S. 302 for an offence of murder. The prosecution clearly established the fact that the accused assaulted the deceased with the sickle and inflicted as many as 39 injuries on his person, that most of the injuries were on vital parts of the body and three of them were individually fatal. The accused also admitted that he belaboured the deceased and he succumbed to those injuries on the spot. The accused failed to establish his plea of justification that he was provoked by the challenge given to him by the deceased and that the deceased hit him with the handle of spade which caused him pain and his mind was very much disturbed on account of the infliction of that injury. On the other hand unchallenged evidence of the eye-witnesses clearly indicated that the accused proceeded a few paces from the place after inflicting some injuries and having observed deceased getting up he came back to the place and once again inflicted a good number of injuries with sickle and caused his death on the spot. The trial Court, though accepted the entire evidence of the prosecution, acquitted the accused of the charge under S. 302 but convicted him under S. 304 for the offence of culpable homicide not amounting to murder.

Held, that the offence committed by the accused was clearly murder falling under Cl. 'thirdly' of S. 300 punishable under S. 302, and that the trial Court was not justified in aquitting the accused of the charge under S. 302 and convicting him under S. 304. When a person has inflicted as many as thirty-nine injuries three of them being of fatal character with a sharp weapon like sickle to a person who was unarmed it should be presumed that he intended to cause such bodily injury as was likely to endanger his life.

The intention of the accused, who has inflicted injury to another which in the ordinary course of nature brought about the death of the other person, could be gathered only from the act which had been actually committed. The real question was not whether the accused intended to kill or inflict an injury to a particular degree of seriousness; it was whether the accused intended to inflict the injuries as found on the body of the deceased and once those injuries established the intention to cause those injuries, it must be presumed unless the evidence on record or the circumstances placed on record warranted an opposite conclusion. Therefore where even the fatal injuries were admittedly inflicted by the accused and there was no evidence on record to indicate that the accused did not know the seriousness of the injuries that he had inflicted with the sickle to the accused the accused must be held guilty of an offence of murder under Cl. 'thirdly' of S. 300 punishable under S. 302 : AIR 1958 S C 465 and (1961) 31 Mys L J 665 and AIR 1961 Mys 21, Rel. on.

Further, the offence committed by the accused did not fall within the Exceptions (1), (2) and (4) of S. 300 as the version of the accused that he committed the act in the heat of passion on grave and sudden provocation or the act of the deceased gave him a feeling that his life was in peril or that the deceased was likely to cause any bodily harm was not true in the light of unchallenged evidence of the eye-witnesses; the evidence on record did not also establish that he committed the act in a sudden fight and without any premeditation or that he did not take any undue advantage over the deceased in inflicting the injuries. Moreover. even if there was some truth in the version of the accused that the deceased gave a blow with the hind portion of the

spade, the right of private defence of the accused could not be said to be extended to the extent of inflicting as many as thirty-nine injuries, three of them being individully fatal to the deceased. **1965 (1) Cri L J 737 : (1964) 1 Mys LJ 529: AIR 1965 Mys 150 (153 to 156) (Pt A) (Prs 5, 6, 9)**

——S. 300—Presumption as to causing injury culminating in death.

Where it is proved that a particular injury was deliberately caused and that injury is sufficient in the ordinary course of nature to cause death, then the accused must be presumed to have intended to cause such injury as is sufficient to cause death. Thus, the accused must be presumed to have intended to cause injuries which in fact, he had caused on the left of the deceased with a sharp cutting instrument such as a scythe which injuries were sufficient in the ordinary course of nature to cause death : A I R 1958 S C 465, Foll, 1961 Mad L J (Cr) 454 : 1961 (2) Cri L J 253 (255) (Pt B) (Pr 6) (Mys) (DB).

——S. 300 'thirdly', 307 and 308 — Applicability — Attempt to murder or to commit culpable homicide.

In order to bring a case within the third clause of S. 300, Penal Code, it is not only necessary that the injury is sufficient in the ordinary course of nature to cause death but also that the accused intended to cause such injury.

Where the accused after inflicting dagger wounds on the deceased uttered certain words which clearly indicated that he did not intend to cause death or any injury which he knew to be likely to cause death or even to cause such injury as was sufficient in the ordinary course of nature to cause death, the case would not, apart from the exceptions to S. 300, fall under S. 302 if death were caused and, therefore, the accused can be convicted under S. 308 and not S. 307. **1956 Cri L J 908 : 1956 Nag L J 388 : ILR (1956) Nag 566 : AIR 1956 Nag 208 (208) (Pt A) (Pr 4) (DB).**

——S. 300, 'thirdly' — Accused intentionally dealing blow on head of deceased — Injury caused not accidental — Injury sufficient in course of nature to cause death — Offence under S. 300 'thirdly' is established.

Where the accused gave a blow with a lathi on the head of the deceased with the intention of inflicting an injury on the head and the injury so caused on the head was not accidental or that some other kind of injury was intended and the medical evidence is to the effect that the injury was sufficient in the ordinary course of nature to cause death, an offence under S. 300 'thirdly' is fully established even though the accused had no intention to cause death. AIR 1958 S C 465, Rel. on. **(1963) 29 Cut LT 245.**

——S. 300, thirdly.

A man must be deemed to know the nature and consequences of his act. Inflicting a knife injury to the deceased in the region of the heart, the accused must have intended to cause a bodily injury which was sufficient in the ordinary course of nature to cause death. AIR 1956 S C 116, Foll. **1958 B L J R 454 : 1959 Cri L J 226 : AIR 1959 Pat 66 (68) (Pt C) (Pr 17) (DB).**

——S. 300, thirdly — Intention of causing bodily injury.

Where a person, not under the influence of drink takes out a pistol and shoots at the deceased without motive, the irresistible conclusion is that he does the act with the intention of causing bodily injury to the victim and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death within the scope of the third clause of S. 300. **1955 Cri L J 1621 : ILR (1955) Pepsu 646 : A I R 1955 Pepsu 165 (169) (Pt B) (Pr 22) (DB).**

——Ss. 300 and 304 — Trespass with primary object of abduction—Person to be abducted attacked with dangerous weapons—Victim dying of fatal injuries—Intention of accused must be held to have been to cause injuries sufficient to cause death in ordinary course of nature — Offence committed is murder and not culpable homicide. 2 Pepsu L R 660: AIR 1951 Pepsu 66 (67) (Pt B) (Pr 6) (DB).

[Overruled on another point in AIR 1962 S C 424].

——S. 300, thirdly—Scope — Facts to be proved by prosecution.

The prosecution has to prove the following facts before it can bring a case under S. 300, "thirdly": first, it must establish, quite objectively, that a bodily injury is present; secondly, the nature of the injury must be proved. These are purely objective investigations. Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say that it was not accidental or unintentional, or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further and, fourthly, it must be proved that the injury of the type, just described, made up of the three elements set out above, is sufficient to cause death in the ordinary course of nature. **(1963) 65 Pun L R 503.**

——S. 300, 'thirdly' — Presumption of knowledge and intention.

A person dealing seven blows to the deceased four of which were on the head by means of a heavy instrument, out of which two were individually sufficient to cause death in the ordinary course of nature is presumed to know that their natural consequences would be death and he would clearly fall within Cl. 3 of S. 300. AIR 1930 Bom 483; Expl., AIR 1916 Bom 191, Disting. **8 Sau L R 33 : 56 Cri L J 69 : AIR 1954 Sau 150 (151) (Pt A) (Pr 4) (DB).**

7. "Fourthly".

——Ss. 300, 304 and 325—Clauses 3 and 4.

Where the medical evidence showed that the deceased was given lathi blows with the intention of causing bodily injury to him, and the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death or at any rate the persons committing the act knew that it was so imminently dangerous that it must in all probability cause death or such bodily injury as was likely to cause death, and they committed the act without any excuse whatsoever.

Held, that the case fell within clauses 3 and 4 of S. 300 and not either under S. 304 or 325. **1958 All Cri R 12:1958 All W R (HC) 12.**

——Ss. 300, Cl. 4 and 304 — Applicability—Attack by fists or wooden end of scythe — Degree of knowledge.

The emphasis in the preceding part of cl. 4 is on the imminently dangerous nature of the act itself. It cannot be said that the attack by fists or even by the wooden end of a scythe is by itself of such a nature as must in all probability, cause death. Death in an attack of this nature is an exception rather than the rule.

The degree of knowledge required in cl. (4) is so strong as to make it impossible to believe that the peril of the act ensuing in fatal consequences had not irresistibly forced itself on the mind of the offender and yet he had deliberately chosen to disregard this danger signal.

Where, this degree of knowlede cannot be fastened on the accused and it is a case where all that can be

said is that death might have been known to be the probable result of the act but not a case where death must have been known to be the most probable result of the act, the conclusion brings the case out of cl. (4) of S. 300 and would reduce the offence to one of culpable homicide not amounting to murder, that is, one under S. 304, I. P. Code. ILR (1956) 1 All 84 : 1955 Cri L J 884 : AIR 1955 All 321 (327) (Pt C) (Pr 25) (DB).

——Ss. 300, 4thly Illus. (d), 302 and 326 — Accused firing with revolver near the ground where there was a group of persons—No premeditation or intention or knowledge of likelihood of causing death proved —Accused held guilty under S. 326 and not under S. 302. ILR (1959) Andh Pra 797.

——Ss. 300 and 302 — Intention to cause death or such bodily injury as would be sufficient in the ordinary course of nature to cause death.

A person's intention can only be inferred from the acts committed by him; and where a person gives a blow with a dangerous weapon like an axe to another person on his head and causes a fatal injury, the only reasonable inference, which can be drawn, is that he intended to cause that person's death or to cause such bodily injury as would be sufficient in the ordinary course of nature to cause death. He may at least reasonably be presumed to have known that his act was so imminently dangerous that it would in all probability cause death. Under such circumstances it is proper to convict the accused under S. 302, Penal Code. 1956 Cri L J 1066 : AIR 1956 Bom 609 (612) (Pt C) (Pr 11) (DB).

——Ss. 300 and 302 — Applicability — Accused administering poison—Death—offence—Sentence.

Where a person administers poisonous substance to another which has resulted in his death, he is normally expected to know the effect of the poisonous substance and if death has resulted, it must be held that the accused intended death or at least knew that death was the imminent result, and the accused is guilty of murder (where the accused acted as a foil of her paramour, the ends of justice held did not require the infliction of the extreme penalty of law). 1959 Cri L J 448 : AIR 1959 Him Pra 3 (12) (Pt K) (Prs 33, 34).

——Ss. 300, 304, Part 2 — Arrow shot in thigh of victim—Femoral artery cut causing death—Fourthly of S. 300 not applicable—Offence covered by S. 304, Part 2.

Where the accused shot an arrow in the thigh of the victim, which cut the femoral artery in his thigh and the victim died on account of profuse bleeding.

Held, that as there was nothing established on record apart from the act and its consequence to indicate that the accused intended to cause death or to cause bodily injury which is sufficient in the ordinary course of nature to cause death, application of Clause 4 of S. 300 to the circumstances of the case is inapt. Shooting an arrow on the lower part of the body cannot constitute an act so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death. The cutting of femoral artery was an accident and it is difficult to attribute intention of the accused to bring about the result.

Held; further, that the accused intended to cause bodily injury and that he should be assumed to have knowledge that it is likely to cause death. The arrow struck thigh and not any vital part of body such as chest, stomach, back or head. There was a single arrow shot. The accused therefore ought to be convicted under section 304, Penal Code, Part second. Madh B L R 1956 Cr 142 : 1956 Madh B L J 723 : 1956 Cr L J 1078 : AIR 1956 Madh B 207 (208) (Prs 14, 15) (DB).

——S. 300, "Fourthly — Woman jumping in well with her children—Death of children—Offence.

The words "without any excuse .... aforesaid" indicate that the imminently dangerous act is not murder if it is done to prevent a greater evil. If the evil can be avoided without doing the act, then there can be no valid justification for doing the act which is so imminently dangerous that it must, in all probability, cause death or such injury as is likely to cause death.

Where the act of the accused in jumping into the well with her children was clearly one done by her knowing that it must in all probability cause the death of her children, she had no excuse for incurring the risk of causing the death of her children, the fact that there were quarrels between her and sister-in-law and that her life had become unbearable on account of this family discord, could not be regarded as a valid justification. The act of the accused was, therefore, clearly murder, under S. 300 (4). AIR 1940 All 486 and AIR 1925 Bom 310, Disting. 1953 Cri L J 588 : I L R (1953) Madh B 43 : AIR 1953 Madh B 61 (62) (Pr 5) (DB).

——S. 300, Fourthly and S. 304-A — Treatment by medical practitioner — Death of patient — Criminal liability of the doctor—Extent of.

Where the doctor is a qualified person, and administers a drug which after due research and experiment is accepted on all hands as the appropriate remedy, he also administers it in the prescribed quantity and manner, that is to say, orally or by injection as the case may be, and with due precautions indicated in the science and still the patient dies on account of a surprising and unexpected personal idiosyncrasy in such a case, unfortunate as the event may be, the doctor would not be liable for any criminal offence.

Secondly, there is the case where the medicine is certainly the proper one, but a mistake has been committed in regard either to the quantity or the manner of administration, or in regard to the precautions. It is this class of cases that would present a certain amount of difficulty whether the mistake committed by the doctor is so serious or he has gone so, far out of his way that he should be deemed to have knowledge of the certainty of death following his mistake. So such a case would become either murder under S. 302, or a rash or negligent act causing death under S. 304-A of the Penal Code; the decision would depend on all the circumstances of each case.

Thus where the medicine is one not at all indicated as a proper remedy for the ailment in question, in the system practised by the doctor or as for that matter in any system based on science and scientific experiment, even if the quantity is no more than the safe dosage, and the manner is the same as indicated for the disease for which the drug is a proper remedy, still the fact that the doctor is using the drug for a disease for which it has not been prescribed would make him liable for murder if death follows.

The case is undoubtedly one of murder coming under definition "fourthly" in S. 300, I. P. C. AIR 1960 Madh Pra 50, Dist. 1963 (1) Cri L J 296 : 1963 M P L J 839 : 1963 Jab L J 959: AIR 1963 Madh Pra 102 (105) (Pt B) (Prs 28 to 30) (DB).

——S. 300, Fourthly — Knowledge—Presumption of.

A person who plunges his knife into the neck of another and causes an injury which results in death within an hour must be deemed to know that the injury is likely to cause death. 1953 Madh W N 941: 1954 Cr L J 672 : AIR 1954 Mad 523 (526) (Pt B) (Pr 19) (DB).

——Ss. 300, 328 — Applicability—Accused administering poisonous substance to another resulting in death—Offence.

Where a person administers a poisonous substance to another which has resulted in his death, he is normally expected to know the effect of the poisonous substance and, if death has resulted, it must be held that the accused persons intended death or at least knew that death was the imminent result of the poison administered. AIR 1918 All 283 and AIR 1923 All 608 and AIR 1926 Bom 518, Rel. on. **I L R 34 Pat 821 : 1957 Cr L J 990 : AIR 1957 Pat 462 (464, 465) (Pt A) (Prs 10 to 12) (DB).**

——S. 300, fourthly—Applicability.

The fourth clause of S. 300 can only apply when the case is not covered by any of the first three clauses of that section. **I L R (1955) Pepsu 646 : 1955 Cr L J 1621 : AIR 1955 Pepsu 165 (169) (Pt C) (Pr 24) (DB).**

——Ss. 300, 299 'Thirdly' — Medical opinion not definite and consistent that the injury caused by accused which resulted in death was necessarily sufficient to cause death in ordinary course of nature —It was more consistent with the circumstances of the case and medical opinion that the injury was likely to cause death—**Held,** that the injury causing death was not within scope of thirdly of S. 300 but was one under second part of S. 299. See Penal Code (1860), S. 304, Part 1. **1965 Cri L J 730 : 67 Pun L R 1204.**

——S. 300, fourthly — Accused firing gun on members of opposite party without intention of killing any particular person—One member hit and killed — Accused held guilty under S. 304, Para. 2. See Penal Code (1860), S. 299. **56 Cr L J 305 : AIR 1955 Punj 13 (DB).**

——S. 300, Fourthly and S. 304—Evidence disclosing exchange of abusive language, grappling with each other and enmity — Case held did not fall under S. 300, fourthly. **AIR 1955 N U C (Punj) 5395 (DB).**

——Ss. 300, 302, 304, Part II—Murder case—Medical witness stating that death was caused on account of shock and haemorrage due to certain injuries—Statement of medical witness cannot be equated to statement that 'injuries by themselves were in ordinary course of nature likely to cause death' — Duties of Public Prosecutors and Judges while dealing with medical evidence in murder trials stated — Evidence Act (1872), S. 45—Cr. P. Code, S. 286. **1964 Raj L W 554 : 1965 (1) Cri L J 219 : 1 L R (1965) 15 Raj 129: AIR 1965 Raj 32 (34) (Pt A) (Pr 6).**

——Ss. 300, 302, 304, Part 2 — Murder charge—Circumstantial evidence— Death by throttling—Simulation of ligature mark to give false appearance to crime—Knowledge that in all probability death would be caused by throttling not likely —Offence—Murder or culpable homicide not amounting to murder. **1964 Raj R W 279 : I L R (1964) 14 Raj 572 : 1965 (2) Cri L J 574 (Raj).**

——Ss. 300, 302 and 86 — Applicability — Shooting with gun.

Where a person takes the risk of shooting at another with a gun, the act would ordinarily be an imminently dangerous act which must in all probability cause death or such bodily injury as is likely to cause death and the case would be covered by the fourth clause to S. 300, I. P. Code. **1952 R L W 145: 1953 Cri L J 434 : I L R (1951) 1 Raj 727: AIR 1953 Raj 40 (41, 42) (Prs 8, 9) (DB).**

——S. 300, Secondly and Fourthly—Accused attacking boy of eight years with a dantra—Deep cuts in the abdomen causing protrusion of spleen and guts —Case falls under cls. (2) and (4) — Accused deemed to have knowledge that it would cause death in all probability—Absence of motive immaterial—Punishment for offence under, extreme penalty. **1952 R L W 318 : I L R (1952) 2 Raj 222.**

8. Exceptions — General.

See also Note 24 and Evidence Act (1872), S. 105.

——S. 300—Evidence Act (1872), S. 105 — Accused pleading exception — Onus is on accused—Onus how to be discharged — Prosecution case indicating that exception is applicable — Accused not pleading same —Accused cannot be denied benefit thereof. See Evidence Act (1872), S. 105. **1960 Cri L J 437 : AIR 1960 All 223 (DB).**

——S. 300—Exception not specifically pleaded—Duty of Court pointed out. See Evidence Act (1872), S. 105. **1958 Cri L J 883 : AIR 1958 J and K 23 (DB).**

——S. 300, Exceptions—Onus of proof — (Evidence Act (1872), S. 105).

If an accused person wants to take benefit of one of the Exceptions to S. 300 he has not only to state his case with clarity but also to establish it. **(1958) Cri L J 883 : AIR 1958 J & K 23 (24) (Pt A) (Pr 6) (DB).**

——S. 300, Exception 1 —Applicability—Conditions.

On a plain reading of Exception 1, it is clear that the accused persons will be entitled to come within the exception only if the deceased was responsible for provoking the accused to such an extent that a reasonable man in the circumstances would lose his power of self-control and further that the provocation must be grave and sudden.

If indeed the circumstances in which the offence was committed indicate that there was sufficient time for the passion of the accused to cool down and that reason had in fact resumed its functions before the fatal below was given or the last act was committed which led to the death of the man, it cannot come under Exception 1. Moreover it is settled law now that the mode of resentment bears some proper and reasonable relationship to the sort of provocation that has been given. **ILR (1955) Cut 625 : 1956 Cri L J 638 : AIR 1956 Orissa 108 (110) (Pt A) (Pr 11) (DB).**

——S. 300 — Law of homicide— Exceptions — Onus indicated. See Penal Code (1860), S. 299. **1957 Cri L J 532 : AIR 1957 Punj 81 (DB).**

——S. 300, Excep. 4—Accused to prove exception.

It is the duty of any accused who is claiming the benefit of one of the Exceptions to S. 300 to make an attempt to establish the facts which will support his case. **57 Punj L R 437 : 1955 All W R (Supp) 107 : 1955 Cri L J 1283 : ILR (1955) Punj 1252 : AIR 1955 Punj 191 (192) (Pt A) (Pr 9) (DB).**

9. Exception 1—Grave and sudden provocation.

(A) Sudden provocation.

(B) "Whilst deprived of his power of self-control".

(C) Adultery causing provocation.

(D) Words and abusive language, causing provocation.

(E) Provocation not grave and sudden.

(F) Proviso 1.

(G) Provocation—Burden of proof.

9. Grave and sudden provocation.

——S. 300. Exception 1.—Conviction under S. 302 read with S. 149 of Penal Code for vicarious liability in committing murder on provocation — Offence cannot be said to involve element of moral turpitude to disqualify candidate under S. 5-A (h), U. P. Panchayat Act. See Panchayats — U. P. Panchayat Raj Act (26 of 1947), S. 5-A (h) **1964 All L J 1118 : 1965 All W R (H C) 8 1965 All Cri R 40 : ILR (1965) 1 All 260.**

——S 300, Exception 1—Grave and sudden provocation—Tests—Difference between English and Indian law—Test of reasonableness of conduct after loss of self-control not required to be imposed by Exception 1—Fact that death was caused by concealed knife not sufficient to overthrow plea of grave and sudden provocation — Use of insulting or abusive language may amount to grave and sudden provocation—Matters which Court must consider in determining whether accused was entitled to benefit of Exception 1.

Held, on the facts and circumstances of the case, that there was a grave and sudden provocation for the appellant and the appellant stabbed S, while he was deprived of the power of self-control, and he was entitled to the benefit of Exception 1 to S. 300, I. P. Code and could not be convicted under S. 302. In cases where power of self-control has been lost, the power to form the intention required for an offence punishable under S 304 Part I, must necessarily be lacking. In the circumstances the appellant could only be convicted under S. 304, Part II, A I R 1961 All 538. Foll. 1965 All W R (HC) 531 : 1965 All Cri R 337 : ILR (1964) 1 All 809 : 1964 (1) Cri L J 617 : AIR 1964 All 262 (265 to 270) (Prs 9, 11, 12, 20, 21, 23 to 25) (DB).

——S. 300, Exception 1 — Grave and sudden provocation—Test.

Under Exception 1 of S. 300 the provocation must be grave and sudden and must have by its gravity and suddenness deprived the accused of the power of self-control. It ought to be distinctly shown not only that the act was done under the influence of some feeling which took away from the person doing it all control of his action but that the feeling had an adequate cause. The test is that of the effect of the provocation on a reasonable man and not on an unusually excitable or pugnacious individual. In applying the test it is of particular importance to consider whether sufficient interval has elapsed since the provocation to allow a reasonable man time to cool, and to take into account the instrument with which the homicide was effected. 1957 All L J 302 : 1957 Cr L J 617 : 1957 All W R (HC) 351 : AIR 1957 All 377 (380) (Pt A) (Pr 13) (DB).

——S. 300, Exception 1—Provocation—Nature of.

What may amount to grave and sudden provocation as has been provided for in the Explanation to Exception 1 of S. 300, is a question of fact. The provocation has to be, not only sudden but grave and the gravity of the provocation is to be judged by the fact whether or not the offender is deprived of the power of self-control. The provocation must be such as will upset not merely a hasty, hot-tempered and hypersensitive person but would upset also a person of ordinary sense and calmness. A Court has to consider whether a reasonable person placed in the same position as the accused was would have reached under that provocation in the manner in which the accused did. 1958 All W R (H C) 5 : 1958 All Cr R 5 : 1957 Cr L J 498 : ILR (1957) 1 All 43 : A I R 1957 All 317 (318) (Pt B) (Pr 10) (DB).

——S. 300, Except. 1—Sudden provocation—Gravity and suddenness has reference to nature of provocation and magnitudes of action of accused—It has reference to normal person and not to hyper-sensitive person — Action of accused out of all proportion to gravity of provocation—Case is not covered by exception—Merely abusing accused in ordinary conversation as "Hai to poora chamar" held did not justify killing the abuser. AIR 1955 NUC (All) 859 (DB).

——Ss. 300, Exceptions 1 and 4, 302—Applicability.

Quarrel between wife of accused and wife of deceased - Accused intervening and scolding wife of deceased — Deceased reprimanding accused and and saying that he should not interfere between quarrel of ladies—Accused threatening to kill some one and running into the room and bringing a knife and rushing towards deceased and inflicting several blows, on back, chest and neck— Serious injury in left bring and cutting of blood vessels of neck and arms—Deceased collapsing and dying — Exceptions 1 and 4 cannot be pleaded in defence If the injuries were caused on vital organs of the body by a sharp-edged weapon, the inference is irresistable that the accused intended to kill the deceased—Exceptions 1 and 4 were held not applicable. 1953 All W R (HC) 138 : 1953 All L J 235 : 1953 Cri L J 1150 : AIR 1953 All 497 (497, 498) (Pt A) (Prs 3, 4, 5) (DB).

——S. 300, Exception 1—Provocation—Consideration of castes of accused and deceased.

The fact that the accused was a Brahmin and the deceased a barbar cannot be taken into consideration in deciding whether the insult by the deceased had reasonably enhanced the degree of provocation. 1952 Cri L J 946; AIR 1952 Bhopal 21 (24) (Pt C) (Pr 16).

—S. 300, Except. 1 and S. 302 — Deprivation of power of self-control as result of grave and sudden provocation—Degree of loss of power is that envisaged by reasonable man — Reasonable relation of violence to degree of loss of power—Attempt to commit unnatural offence against offender—Infliction of injuries by offender — Injuries resulting in death of victim — Held, Except. 1 to S. 300 did not apply — Offender was guilty of murder. 1962 (1) Cri L J 324 : AIR 1962 Guj 39 (43) (Pt A) (Prs 14, 16) (DB).

——Ss. 300, Exception 1 and 304—Benefit of Exception 1 given — Conviction would be under S 304, Part 1 and not part 2—Exception 1 to S. 300 can arise in cases of murder and where the accused person has been given the benefit of that exception, the conviction would be under S. 304, Part 1. It can never be under Part II, because that part can apply only to those cases where there was no intention to cause death. AIR 1955 NUC (Him Pra) 2346.

——Ss. 300, 302, 304 — Applicability — "Grave and sudden provocation" — What amounts to.

For sometime past the accused was entertaining a firm belief that his uncle with whom he was residing and his wife were in terms of illicit intimacy. The accused used to accuse his wife of this and to assault her for that reason. The accused had complained to a neighbour about the misconduct of his wife and requested him to persuade his uncle to arrange for a separate residence for the accused and his wife. Nothing came out of this and the ill-feeling of the accused towards his uncle became highly embittered. One early morning the accused woke up his uncle and accused him of the intimacy with his wife and shot him dead with a gun :

Held, that this could not be said to be an act done under grave and sudden provocation so as to bring it under Exception 1 of S. 300 of the Penal Code. On the other hand, it was a deliberate and preconceived act of retaliation and the weapon used was unquestionably a dangerous weapon and the shot was fired at a vital part of the body of the deceased obviously with the intention of killing him. The offence was murder. 1957 Ker L J 439 : 1957 All W R (Sup) 69 : 1957 Ker L T 637 : 1957 Cri L J 1261 : 1957 Mad L J (Cr) 658 : AIR 1957 Ker 166 (169) (Pr 5) (DB).

——Ss. 300, Exception 1, 302 and 304, Part I—Applicability — Grave and sudden provocation—Plea at late stage—If to be considered.

Held on facts that on a consideration of the entire circumstances in the case, that the statement given by the accused before the Sessions Judge was one that could be accepted as revealing the real circumstances

in which the accused was placed, when he lost his balance of mind and resorted to the stabbing of his wife and that those circumstances should be viewed in a liberal manner in the psychological setting, which arose, as constituting sudden and grave provocation. This would consequently reduce the offence of murder into one of culpable homicide not amounting to murder by reason of the operation of Exception 1 to S. 300, I. P. Code. Therefore his case came within S. 304, Part I, I. P. Code and the ends of justice would be amply met if he is convicted under this section and sentenced to rigorous imprisonment for five years. AIR 1925 All 676, Rel. on; 1931 M W N (Cr) 105; AIR 1932 Mad 25 (1); AIR 1954 Mad 538 and AIR 1934 Mad 176, Distinguished. English case law discussed. **(1957) Mad L J (Cr) 271 : 1957 Mad W N 337 : 70 Mad L W 531 : (1957) 2 M L J 9 : 1957 Cr L J 970 : ILR (1957) Mad 805 : 1957 All W R (Sup) 61 : AIR 1957 Mad 541 (545-546) (Pt B) (Prs 11, 12).**

——Ss. 300, 304—Beating with shoe—Grave and sudden provocation — Offence—Culpable homicide not amounting to murder.

In this country if a person were to beat another with a shoe that is considered to be the height of shame and particularly in the midst of number of villagers right in the middle of the street. Where on account of the mothers of the accused and deceased quarrelling with each other the sons joined the affray and when the deceased beat or attempted to beat the accused with a shoe, he retaliated by stabbing the deceased with a pen-knife which he was carrying in his short's pocket, and where there was no evidence that accused came on the scene with the object of causing injury to anybody:

Held, the offence is one of culpable homicide not amounting to murder as the accused had grave and sudden provocation. **1952 Mad W N 978 : 1952 Mad W N (Cri) 290 : (1953) 1 M L J 180 : 1953 Cri L J 1109 : AIR 1953 Mad 579 (579) (Pr 3) (DB).**

——S. 300—Provocation—Whether sudden and grave enough to reduce offence from murder is a question of fact. See Penal Code (1860), S. 304. **1964 (1) Cri L J 685 : AIR 1964 Orissa 149 (DB).**

——S. 300, Except. 1 — Grave and sudden provocation — Test of—Held there was no grave and sudden provocation.

One of the tests of 'grave and sudden' provocation is whether a reasonable man, belonging to the same class of society, as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control. AIR 1962 SC 605, Foll.

Held, on facts that the manner in which the deceased was assaulted by the accused and the nature of the injuries indicated that it was not under grave and sudden provocation. **ILR (1964) Cut 841.**

9 (A). Sudden provocation.

——Ss. 300, Exception 1 and 304 — Applicability — 'Sudden provocation'.

Whether in the absence of actually seeing one's wife in a compromising position, the sudden appearance of a lover would amount to a sudden provocation or not would depend upon the background and the circumstances of the case.

Where the husband thinks that the illicit intimacy which might have existed earlier between his wife and the deacesed had ceased to exist because of the changed place of residence and this belief is shattered when he finds the deceased at his hut when he was absent, this would certainly give him a mental jolt and as this knowledge will come all of a sudden it should be deemed to have given a grave and sudden provocation. The fact he had suspected this illicit intimacy on an earlier occasion also will not alter the nature of the provocation and make it any the less sudden. **1960 Cri L J 437 : 1960 All L J 136 : I L R (1959) 2 All 255 : AIR 1960 All 223 (226) (Pt C) (Prs 14, 15) (DB).**

——S. 300, Exception 1 — Applicability—Interval of time between provocation and act will make exception inapplicable—Interval of time is material.

Before an accused can draw any benefit from Exception I to S. 300, there should be some circumstance to indicate that the act of the accused was done in the same transaction in which he received the grave and sudden provocation (in this of 2 hours) between provocation and act. **1960 All L J 721 : 1960 All W R (HC) 556 : 1960 All Cr R 355.**

——S. 300. Excep. 1—Sudden provocation—It is question of fact. **AIR 1955 NUC (All) 859 (DB).**

——S. 300, Exception 1 — Grave and sudden provocation — Altercation between A and B in public place — C intervening — A striking C with shoe on face — C stabbing A who died — Provocation held grave and sudden — C's conviction under S. 302 altered into one under S. 304, Penal Code.

There was an altercation between A, a creditor, and B, a boy, his debtor, on a main thoroughfare at a market place. C intervened but A struck him with shoe on his face. Thereupon C stabbed A who died soon after. C was convicted under S. 302, Penal Code and sentenced to death. On appeal:

Held, that there existed a grave and sudden provocation. It was sudden because C did not expect that he would be so treated simply because of his intervention on behalf of B. It was grave because the blow was inflicted with a shoe in a public place and upon the face. Exception 1 of S. 300 applied to the case and conviction under S. 302 was not sustainable. (Section 304, Penal Code, was applied and the appellant was convicted under it). **1949 All W R (H C) 458 : 1949 All Cri Cas 114 : 51 Cri L J 385 : ILR (1950) All 960 : A I R 1950 All 91 (92) (Pt B) (Pr 7) (DB).**

——S. 300, Exception 1 — Sudden provocation — Proof.

Chopra J.—To bring a case under the Exception it has to be proved that the provocation was both grave and sudden and that the provocation, by its gravity and suddenness, deprived the accused of the power of self-control. The provocation should be such as would deprive a normal and reasonable man of the control of himself. In the absence of any such proof, the atrocity of the offence cannot be mitigated and the offender must suffer the legal consequences of his act. **ILR (1953) Patiala 655 : 1954 Cri L J 1505 : AIR 1954 Pepsu 160 (172) (Pt C) (Pr 58) (DB).**

——S. 300, Exception 1 and S. 302—Murder—Grave but not sudden provocation—Punishment.

Where the provocation on which the accused commits an offence is grave but not sudden, though it cannot bring the case within the purview of exception 1 to S. 300, it can all the same be used as an extenuating circumstance for awarding lesser penalty. **(1951) 3 Pepsu L R 635 (DB).**

——S. 300—Applicability—Provocation—Effect.

Illicit connection with another person does not provide any justification for murder when nothing is brought on record to show that on the day of the incident the deceased was seen by the accused with that another person. **1955 Cri L J 327 : AIR 1955 Punj 25 (26) (Pt B) (Pr 18) (DB).**

9 (B). "Whilst deprived of his power of self-control".

—S. 300, Exception 1 — Benefit of Exception — When can be invoked—Sudden and impulsive attack due to loss of self-control—Tests.

In order to attract Exception 1 to S. 300, Penal Code, the provocation must have been given by the victim and it must have been both grave and sudden. Furthermore, the provocation must have by its gravity and suddenness, deprived the offender of the power of self-control.

Where the scuffle which ensued between the accused and the deceased, was occasioned by the accused himself, and even assuming he had received some provocation because of the scuffle, it cannot possibly be said that it was grave and sudden so as to warrant his whipping out a dagger which he had aapparently kept concealed in the waist, and launching a savage and determined attack on a defenceless woman. The brutal attack by the accused had no reasonable relationship to the provocation and the offence committed by the accused is nothing short of murder. The Sessions Judge fell into a grave error in bringing the case within Exception 1 to S. 300, Penal Code. **1961 Andh L T 699 : 1961 M L J (Cri) 580 : (1961) 2 Andh W R 182**

—S. 300, Exception 1—Applicability—There must be act of provocation, grave and sudden loss of self-control and retaliation proportional to provocation — There must not be time for passion to cool down — Deceased abusing accused filthily and then charging accused with having committed unnatural offence with a pigeon — Accused held entitled to protection under S. 300, Exception 1.

Provocation in law consists mainly of three elements, the act of provocation, the loss of self-control, both actual and reasonable and the retaliation proportionate to the provocation. The defence of grave and sudden provocation thus connotes something more than a provocative incident, which could constitute only one of the elements aforesaid. And further the circumstances must also be related to each other—Particularly in point of time, so that there was no time for passion to cool and the inference of deliberation or design was excluded. (1963) 1 All E R 73 and 1946 A C 588 and AIR 1962 S C 605 and AIR 1932 Lah 438 and 7 Suth W R (Cri) 27 and (1949) 1 All E R 932 and (1942) A C 1, Rel. on.

Proof of loss of self-control cannot be dispensed with by the Courts; but loss of self-control can also be shown by inference instead of by direct evidence; and if the facts proved to suggest a reasonable inference of loss of self-control, the Court would be entitled even to discard the denial of the accused and hold that there was loss of self-control. The interval of time between the throwing of the insinuation and the accused's going into his house and coming out with a spear was so short that it could not be said that there was time enough for passion to cool and for reason to regain dominion over the mind. Therefore, under the circumstances established in the case, the accused struck the deceased with a spear whilst he was deprived of the power of self-control by the grave and sudden provocation given by the deceased.

It is true that retaliation must bear a reasonable relationship to the provocation but in the instant case the giving of one blow with a spear, which the accused found handy at the moment in his house, could not be said to be so grossly disproportionate to the provocation as would show that the provocation was not the primary cause of the retaliation but only a pretext for it. Therefore the accused was entitled to protection under Exception 1 to S. 300 of the Penal Code. His case would thus fall under part one of S. 304. **1963 MPLJ 592 : 1963 Jab L J 659 : 1963 (2) Cri L J 631 : ILR (1964) Madh Pra 609 : AIR 1963 M P 364 (366 to 368) (Prs 13, 18, 21 to 25) (DB).**

——S. 300, Exception 1 — Exception 1 applies only when accused deprived of self-control by grave and sudden provocation caused by deceased - Test of provocation is that the act should be sufficient to upset a man of ordinary sense and calmness belonging to same class of society as the accused.

Exception 1 to S. 300, Indian Penal Code, applies only when the accused is shown to have been deprived of the power of self-control by grave and sudden provocation which is caused by the person whose death is caused or when the death of some other person is caused by mistake or accident. The test of grave and sudden provocation is whether a reasonable man belonging to the same class of society as the accused was placed in the situation in which the accused was placed, would be so provoked as to lose self-control. The provocation must be such as would upset not merely a hot-tempered or hyper-sensitive person but one of ordinary sense and calmness. AIR 1962 S C 605, Foll. **1962 M P L J (Notes) 317 : 1963 Jab L J 137.**

——Ss. 300 and 304-II — Grave and sudden provocation — Accused caught by throat by deceased — Subsequent altercation resulting in accused shooting an arrow at deceased — Accused held had grave and sudden provocation.

Held, on facts that the circumstances indicated that the accused got some provocation from the deceased in consequence of the catching hold of his throat by the latter and further that he acted without premeditation in a moment of excitement and in a fit of rage at a time when quarrel was going on in the evening between the deceased and the accused's brother. The act of accused, in shooting the deceased was an act done with the knowledge that it was likely to cause death, but without any intention to cause death or to cause such bodily injury as is likely to cause death and accordingly it came under Part II of S. 304, Indian Penal Code. **(1962) 4 Ori J D 247 : 28 Cut L T 359.**

9 (C). Adultery causing provocation.

——Ss. 300, Exception 1 and 304, Part 1 — Applicability.

Accused seeing his wife committing act of adultery with deceased — It is a case of grave and sudden provocation within S. 300, Exception 1 — Husband killing wife — Offence is one under S. 304, Part 1. **1953 All L J 158 : 1953 All W R (H C) 129 : 1953 Cri L J 1034 : AIR 1953 All 464 (466) (Pt A) (Pr 7).**

——S. 300, Exception 1 —"Grave and sudden provocation"—What amounts to—Wife strangulated on confession of adultery and pregnancy by another—Offence.

To come under Exception 1 to S. 300, I. P. Code, the act of causing death should have been done by the offender under the influence of some feeling depriving him of all self-control engendered by a provocation, which is both grave and sudden. Thus where the accused, who was a young man and who had lurking suspicions of the conduct of his wife who newly joined him was confronted with the confession of illicit intimacy with and consequent pregnancy by another, the provocation was both sudden and grave and if the accused, deprived of his power of self-control, strangled his wife to death, his case is covered by Exception 1 to S. 300, I. P. Code. **1958 Mad L J (Cr) 163 : 1958 Cri L J 476 : (1958) 1**

Andh W R 149 : A I R 1958 Andh Pra 235 (238) (Pt B) (Pr 11) (DB).

——Ss. 300, Excep. 1, 302 and 304—Grave and sudden provocation—Accused cutting his wife with dao when he saw her having illicit intercourse with another person — Offence committed is under grave and sudden provocation — Case falls under Exception 1 to S. 300 — Accused held guilty under S. 304 and not under S. 302. 1965 (2) Cri L J 614 : AIR 1965 Assam 89 (92) (Pt C) (Pr 7) (DB).

——S. 300, Exception 1 — 'Grave and sudden provocation'—Murder of wife — Adultery by wife — Effect.

Held on facts that what occurred in the field in the morning could not ordinarily be regarded as grave and sudden provocation to justify the killing of a person. Bearing in mind the fact that adultery though frowned upon in our country is not uncommon in the village community and bearing also in mind the fact that even before the law made a provision for obtaining a divorce, a customary form of divorce has prevailed in the village communities, it would not be right to hold that the reaction of an Indian spouse from such a community would be different from that of one in the Western countries. The incident which the accused alleged occurred in the field on the morning of August 20, was not sufficient in law to constitute grave and sudden provocation within the meaning of that expression used in the First Exception to S 300 I L R (1959) Bom 1580 : 61 Bom L R 35 : 1959 All W R (Sup) 78 : 1959 Nag L J 341 : 1959 All Cr R 343 (2) : 1959 Cri L J 1299 : AIR 1959 Bom 463 (465) (Pt A) (Pr 7) (DB).

——S. 300, Excep. 1 — Deceased committing adultery with sister of accused — After sufficient interval accused attacking deceased — Murder — Exception 1 does not apply.

It is well settled that if a man were to see a stranger in the actual act of committing adultery with his sister and if he commits murder of either, the offence is culpable homicide not amounting to murder. But if that opportunity is gone and sufficient interval has elapsed since the provocation to allow a reasonable man time to cool, and if the man commits murder of that another man the provisions of Exception 1 to S. 300 will not be attracted. A. I. R. 1929 Lah. 861, Disting. Madh B L R 1956 Cr 19 : 1956 Cri L J 408 : 1956 Madh B L J 262 : A I R 1956 Madh B 107 (109) (Pt C) (Pr 8) (DB).

——S. 300, Excep. 1 — Accused murdering his wife whom he saw in compromising position and she refused to disclose stranger's name — Accused entitled to benefit of Exception 1 to S. 300, Indian Penal Code. 1962 M P L J (Notes) 315.

——S. 300, Exception 1 and S. 304 — Grave and sudden provocation—Adultery causing provocation —Husband discovering deceased with his wife behind chained doors in his house at dead of night—Sentence.

When the appellant at dead of night, found the deceased with his wife alone in the house with the doors chained from inside and losing control of his mind chased the deceased and ultimately killed him.

Held that a person who finds his wife and her paramour in flagrante delicto, undoubtedly receives the highest provocation and the indulgence which the law shows in such cases is condescension to the frailty of human nature. The circumstances provoked the appellant gravely and suddenly. 1959 Jab L J 403 : 1959 Cr L J 850 : 1959 M P L J 487 : 1959 M P C 646 : AIR 1959 Madh Pra 267 (269) (Pt C) (Pr 17).

——Ss. 300, 302 and 304 — Adultery causing provocation.

When a wife or mother or married sister, living under the protection of the husband or son or brother, is caught in the act of having sexual intercourse with a stranger, the killing of that stranger by the husband, son or brother before there is time to get over the sudden anger would be only an offence under S. 304, I. P. Code. But a person who is not the guardian or custodian of a woman would have no similar right to kill her and claim to be convicted only under S. 304, I. P. Code. AIR 1955 N U C (Mad) 1834 (DB).

9 (D). Words and abusive language causing provocation.

——S. 300, Exception 1—Provocation whether grave and sudden is question of fact — Abusive language used by deceased—Held provocation was neither grave nor sudden. 1953 Cri L J 1361 : AIR 1953 Bilaspur 27 (30) (Pt D) (Pr 7).

——S. 300 Excep. 1—Grave and sudden provocation —Accused provoking deceased by asking provocative question — Deceased retorting by provocative answer—Accused killing the deceased by firing from gun which he carried — No grave and sudden provocation—Mere verbal abuse does not amount to grave and sudden provocation.

Accused asked the deceased, a Hindu, whether he had unnatural connection with a cow. The deceased got enraged and said "Yes, I have done and I will do so even with your mother". Upon this, the accused fired the rifle which he carried and killed the deceased. The accused pleaded grave and sudden provocation.

Held that it was the accused who first provoked the deceased by asking the deceased whether he had unnatural intercourse with a cow. Putting such a question itself was, to a Hindu who worships a cow, an insinuation of a foul abuse. It was the accused himself who provoked the deceased into the retort which was given by the deceased to the accused. In this view, therefore the provocation was neither sudden nor grave, It was not sudden because the accused himself provoked it. It was not grave for it was the accused who himself first used a very foul abuse.

Held also that mere verbal abuse would not amount to grave and sudden provocation: under Exception 1 to S. 300. (1946) 2 All E R 124, 61 Bom L R 35, Rel. on; A I R 1936 Rang 40, Dissented from; AIR 1934 Mad 722, 3 Mad 33, 1953 Cri L J 1109, Distinguished. (1962) 3 Guj L R 739.

——S. 300, Exception 1 — Grave and sudden provocation — What is—Question is one of fact.

The question as to whether the provocation given to the offender is grave and sudden or not is one of fact and has to be decided on the circumstances of each case.

The circumstances in which the accused murdered his wife were that the wife had successively refused to cook the evening meals and to spread the beds; that she threatened to leave the house on the following morning, that when he fondled her and asked her as to why would she be leaving the house she kicked him at the chest and asked him to get away from her bed and to have sexual intercourse with his mother and sister. This infuriated the accused and he hit her on the head by hurling a stone lying nearby.

Held, that the circumstances were sufficient to provoke a reasonable person to the extent of depriving him of the power of self-control and therefore the provocation was grave and sudden within the meaning of Exception 1 to S. 300, Penal Code. 1963 (1) Cri L J 120 (122) (Pt D) (Pr 10) (Him-Pra).

—S. 300—Grave and sudden provocation.

Accused asking wife to cook food for him — Wife declining to cook saying that she would rather die in sweeper's house than cook meals for him :

Held, that the answer given could not by any stretch of imagination be treated as a provocation which would have led an ordinary and reasonable man to act in the manner that that accused did. Madh-B L J 1955 H C R 1955 : Madh B L R 1955 Cr 441 : I L R (1956) Madh B 46 : 1956 Cri L J 241 : AIR 1956 Madh-B 94 (96) (Pt B) (Pr 7) (DB).

—S. 300, Exception 1—Provocation—Use of vulgar or abusive language—Provocation cannot be so grave as to deprive person of self-control to cause fatal injuries on vital part of body—Provocation and gravity have to be determined from point of view of ordinary reasonable man and not irritable or hot headed human being. AIR 1955 NUC (Madh-B) 3795 (DB).

—S. 300, Except. 1—Evidence only indicating that deceased might have abused accused — This is no evidence of grave and sudden provocation to entitle accused to attack unarmed accused with axe, particularly when he had fallen down. M B L J 1955 H C R 1427 : M B L R 1955 (Cri) 244.

—Ss. 300, Exception 1, 304, Part 1 — Husband doubting morality of wife - Effect of wife's words —When amounts to provocation — Offence held one under S. 304, Part 1.

As regards the effect of wife's words on the mind of a jealous husband who doubts the morality of his wife a set of general patterns is traceable, in which there is general judicial opinion that grave and sudden provocation has been caused. Two elements are always found in such cases. The first is speech or conduct on the part of the wife that has altogether been unexpected. The second is a moral revulsion which prompts him to acts of violence which he would not have thought of in a normal state of mind.

When the wife continued by the threatening thereafter to do the very act with which he was charging her and in addition when she insulted him by saying that she wanted him no more, there would be grave provocation and the offence would be one under S. 304 Part I, I. P. C. and not one under S. 302, I. P. C. 1961 Jab L J 1310 : 1962 M P L J 333 : 1962 (2) Cr L J 670 (671) (Prs 6, 7, 8) (Madh-Pra) (DB).

—S. 300, Exception 1—Death as a result of sudden and grave provocation — Quarrel between husband and wife - Relevant factors for applicability of the exception.

The quarrel started between the accused and his wife when the accused returned home late at night (2 a. m). The wife was greatly provoked and stated that she would be better advised to leave him and live with some one else if the husband persisted in his conduct. The accused caught hold of his wife by the hair when she went in and brought a broom-stick and used indecent language of abuse which further aggravated the provocation, culminating in the accused beating her with the broom stick, kicking her and beating her with an iron rod which happened to be there as a result of which she died. In the circumstances:

Held that a husband is likely to be gravely provoked by the threat of his wife to leave him and to live with some one else; if the wife brought a broom-stick and used indecent language of abuse during the course of the quarrel, this is likely to have deprived the husband of all powers of self-control. This is an appropriate case for the award of the benefit of Exception 1 to S. 300 of the Penal Code. The applicability of this Exception has to be judged in relation to the class of persons to whom it is applied, their general habits of living, speech and domestic relations. 1964 M L J (Cr) 121 : (1964) 1 M L J 145.

—S. 300, Exception 1 and S. 302 — Provocation — Deceased nephew, aged 30 years abusing and assaulting uncle (accused) aged 60 years — It is a grave and sudden provocation — Accused allowing his anger to cool down —Deceased found sleeping under tree — Accused dealing blow by yoke on head of deceased— Skull fractured in 15 pieces — Offence held murder. 1954 Cri L J 463 (2) : 1954 Cr L J 1545 : AIR 1954 Mad 1006 (1007) (Pt B) (Pr 3) (DB).

—Ss. 300 and 304—Deceased found always teasing accused (a male) that latter is his wife — Provocation leading accused to fatally attack deceased with dao— Offence falls under S. 304 and not S. 302. See Penal Code (1860), S. 304. 1953 Cri L J 89 : A I R 1952 Manipur 11 (2).

—S. 300, Exception 1—Provocation— Test—Verbal provocation caused by physical attack.

Whether or not there is provocation in a particular case is essentially a question of fact. There can be no universal rule as to what may amount to provocation. Words alone can never in law amount to sufficient provocation so as to reduce the offence of murder into one of culpable homicide when the act is done with intent to kill. The test, in all such cases is firstly whether the accused was subjected to such provocation as to cause reasonable man to do what he did, and secondly whether the provocation was such that it influenced him so to act. But mere verbal provocation even if it be by threat or gestures or by the use of abusive and insulting language cannot induce a reasonable person to commit an act of violence. The case of provocation caused by physical attack is, on the other hand, different as the instinct of self-defence will be both grave and sudden. In such a case the question is one of degree rather than of kind. But hard words never break bones and the law expects a reasonable person to endure abuse without resorting to fatal violence. There may be circumstances which may merely pre-dispose to a violent act but these are not enough to bring the offender within the exception. The provocation must be an act or series of acts which by their very nature, would induce sudden and temporary loss of self-control in a reasonable man so that it can be said that he is no longer master of his mind. But mere threat which may induce a desire for revenge cannot constitute provocation. 16 Cut L T 102 : ILR (1950) Cut 293 : A I R 1950 Orissa 261 (263) (Pt C) (Pr 9) (DB).

—Ss. 300, 299—Exchange of abusive language — Being excited by abusive language and in moment of frustration accused striking deceased on head with halsundi lying nearby — No evidence of previous enmity — Offence held was culpable homicide not amounting to murder. See Penal Code (1860), S. 299. 1952 Cri L J 1189 : AIR 1952 Pepsu 112 (DB).

9 (E). Provocation not grave and sudden.

—S. 300, Exception 1, S. 302—"Grave and sudden provocation" explained — False accusation of theft— Accused stabbing accuser to death—No grave provocation within the meaning of Exception 1 to S. 300— Case one of murder — But death sentence commuted. 1961 All L J 209 : 1961 All W R (HC) 207 : 1961 All Cri R 90 : 1961 (2) Cri L J 591 : A I R 1961 All 538 (539, 542) (Prs 3, 30, 31) (DB).

—S. 300, Exception 1 — Grave and sudden provocation — What is — Test to be applied — Husband insisting on wife to part with ornaments on her body —Wife reluctantly throwing the same at him — No provocation. 1961 All W R (H C) 135 : 1961 All Cr R 54 : (1961) All L J 100.

——S. 300, Exception 1—Grave and sudden provocation – Wife of accused discovered to be thief not grave provocation.

That the wife of the accused was discovered to be a thief might have been a shock to the accused but it is not possible to treat it as a grave provocation. One has to judge these things in the light of reactions of normal human beings and not in the light of hypersensitive and unbalanced individuals. 1960 All W R (HC) 558 : 1960 All Cr R 355 : 1964 All L J 721.

——S. 300—Mutual provocation — Accused stabbing deceased with pen-knife apprehending danger from unarmed relations of deceased — Held although accused acted in exercise of his right of private defence of body, he exceeded the right — Case fell under S. 300, Exception 2—Provocation was not so great as to bring the case within Exception 1 to S. 300. (1965) 2 Andh W R 145 : 1965 (2) Cri L J 440 (Andh Pra).

——S. 300, Exception 1—Grave and sudden provocation — Deceased challenging members of accused's party and calling for a fight— Accused's party itself responsible for starting whole trouble and for offering earlier provocation—Provocation offered by deceased held was not grave and sudden as contemplated by Exception 1 to S. 300. 1962 (1) Cri L J 394 : A I R 1962 Andh Pra 166 (171) (Pt E) (Pr 43) (DB).

——S. 300—Provocation—Existence of dispute.

The mere existence of a dispute does not invite the commission of an offence of murder. 59 Bom L R 244 : 1957 Cri L J 1107 : I L R (1958) Bom 1092 : AIR 1957 Bom 226 (231) (Pt E) (Pr 15) (DB).

——S. 300, Exception 1 and S. 302 — Deprivation of power of self-control as result of grave and sudden provocation—Degree of loss of power is that envisaged by reasonable man — Reasonable relation of violence to degree of loss of power - Attempt to commit unnatural offence against offender—Infliction of injuries by offender — Injuries resulting in death of victim - Held Except. 1 to S. 300 did not apply — Offender was guily of murder.

Held, (1) that the statement suggested that the accused lost his temper after the stick blow and not before. A stick blow was not grave provocation. This was therefore not a case of the loss of the power of self-control by grave and sudden provocation; (2) that the injuries inflicted on the deceased were not commensurate with the degree of loss of self-control that could be expected in an average person having regard to the nature of provocation consequent on the attempt to commit an unnatural offence; (3) that the accused was not entitled to the benefit of Exception 1 to S. 300, Penal Code, and that it must be inferred that the accused had caused injuries with the intention to cause bodily injuries to the deceased sufficient in the ordinary course of nature to cause death; (4) that the offence committed by the accused amounted to murder punishable under S. 302, Penal Code. 1962 (1) Cri L J 324 : AIR 1962 Guj 39 (43) (Pt A) (Prs 14, 16) (DB)

——S. 300, Except. 1 — Provocation not grave — Attempt to commit unnatural offence.

Assuming that there was, on the part of the deceased, an attempt to commit an unnatural offence evinced by the act of removal of 'langoti' of the accused, mere attempt will not amount to grave provocation as contemplated by Except. 1 to S. 300 although the commission of an unnatural offience may amount to grave provocation. (1837) 8 C and P. 182, Rel. on. 1962 (1) Cri L J 324 : AIR 1962 Guj 39 (41) (Pt B) (Pr 10) (DB).

——S. 300, Exception 1—Grave and sudden provocation — Wife of accused developing illicit connection with deceased and living with her father — At latter's house deceased insulting accused and saying his wife would not accompany him — Held no grave and sudden provocation. AIR 1955 NUC (Him Pra) 2346.

——Ss. 300, Exception 1 and 302—Grave and sudden provocation — Long standing feeling of provocation becoming motive — Exception 1 will not apply.

Where the accused had known that the deceased was misbehaving with his mother, that would certainly afford provocation to him to retaliate. But when such feeling of provocation is a long standing one gaining intensity from day to day until finally the person harbouring such feeling yields to the provocation by attacking his enemy, it cannot be said that he is acting under grave and sudden provocation. Feeling of provocation which he was entertaining can only be termed the motive for the act committed by him and when the accused comes to the house, knowing that the deceased is there, to punish the deceased, he cannot be said to have acted under Exception 1 to S. 300. 1962 Ker L J 1094.

——S. 300, Exception 1 — No grave provocation.

To bring the offence under Exception 1 to S. 300, it should be shown that the accused acted while deprived of self-control, due to grave and sudden provocation.

Held, that though the act of the deceased was highly provocative it was not so grave as to provoke a matured man like the accused to stab the deceased (his father) to death. 1959 Ker L R 1457.

——S. 300, Excep. 1 — Applicability — Statement by wife, that she liked to live with her husband's brother during a wordy quarrel between her and her husband — No admission by her of adultery or of a determination to persist in such conduct — Husband killing his wife with axe—Held that though there was some degree of provocation it was not grave and sudden so as to bring the case within exception 1 to S. 300 — Accused held was rightly convicted under S. 302, Penal Code and lesser sentence under S 302 was justified and proper in view of the provocation — 1957-1 M L J (Cr) 271, Dist. 1959 Ker L J 1230 : 1959 K L T 1264 : 1959 Ker L R 1266.

——S. 300, Exception 1 — Provocation — What amounts to.

Where the accused who was charged with killing his wife, mother-in-law and brother in law, well knew before that his wife was unwilling to go with him tried to take her away forcibly from his mother-in-law's house and he was resisted by her relations as they did in the past as well, in these circumstances it could not be said that he did not anticipate the resistence from the relations on the day of occurrence of the offence and consequently when he pleaded that his case fell within Exception 1 to S. 300, it was held that the provocation, if any, could not under the circumstances, be grave and in no event could it be called sudden. 1956 Madh B L R (Cri) 420.

——Ss 300, Exception 1 and 302—Grave and sudden provocation—Wife leaving husband's house — Husband following her with view to bring her back — Wife refusing to return but promising to come back next day—No fowl language used—Husband causing serious injury by dow — Held no grave and sudden provocation — Death of wife — Husband held guily under S. 302. AIR 1955 NUC (Madh B) 1339 (DB).

——S. 300, Except. 1 — Wife within two months of her marriage discovering her husband to be impotent and often running away to her father's place — Husband's impotency given out as reason for her conduct —Wife alleging impotency before Panchas—Accused alleging that he was cured—Wife acceding to the request of Panchas, going to live with husband but again leaving him, finding that there was no change in condition of accused — Accused along with wife's

father going to fetch her, to a third person's house where she had gone to stay — Refusal of wife to accompany husband—Accused giving blows with bamboo — Death of wife—Skull found fractured — Held circumstances did not make out a case of sudden and grave provocation. M B L J 1955 H C R 1981 : M B L R 1955 (Cri) 399.

——S. 300, Excep. 1 and S 304, Part 1—Grave and sudden provocation — Accused admitting to have killed deceased with axe — Story set up by him that when his wife had gone to field of deceased which adjoined his field to bring back his bullock which had strayed in there, the deceased abused her—Story not corroborated by near relations who were there—Case of sudden and grave provocation held not proved. **M B L J 1955 H C R 1179 : M B L R 1955 (Cri) 184.**

——S. 300, Exception 1—Grave and sudden provocation — Test of — Murder of wife – F. I. R. stating only abuse by her and no other provocating circumstance — No evidence of provocation —Held case not within Exception 1 to S. 300. **1963 Lab L J 137 : 1962 M P L J (Notes) 317 : 1964 (1) Cri L J 596 (Madh Pra).**

——S. 300, Exception 1 — Sudden and grave provocation—Murder of wife—Course of living constituting continuing course of provocation cannot be considered.

In a case of murder of the wife by her husband, a Court would not be justified in taking into account a certain course of living, which is said to have constituted a continuing course of provocation to one or other spouse, as adequate to attract the Exception 1 to S. 300, when the actual provocation was sudden, but not grave. At any rate, that would indeed be an unsafe doctrine. **ILR 2 Mad 122, Disting. I L R (1964) 2 Mad 881 : 1966 Cri L J 222 (223) (Pt B) (Pr 6) (Mad) (DB).**

——Ss. 300, Exception 1 and 302 — Provocation not grave and sudden—Murder or culpable homicide.

The accused suspected that his wife was in criminal intimacy with one N who was living nearby. On the day of occurrence while the accused was busy in some work in front of his house, his wife passed that way in the direction of N's house. On being questioned by the accused whether she was going to N's house, she replied in a defiant tone that that was her destination. Thereupon the accused tried to prevent her from going there and threatened her with dire consequences if she did not listen. When in spite of this she proceeded in that direction the accused caught her by the tuft of her hair and brutally cut her several times with an aruval resulting in her death :

Held, that in the circumstances of the case the provocation was not sufficiently grave and sudden so as to bring the case within exception 1 to S. 300 and, therefore, the offence was one of murder and not culpable homicide not amounting to murder. **(1946) 2 All E R 124, Foll. ; A I R 1925 All 676, Dist. 1954 Cri L J 733 : 1953 Mad W N 945 : A I R 1954 Mad 538 (540) (Pr 11) (DB).**

——Ss. 300, Exception 1, 302 — Accused, himself a married person, in illicit love with brother's widow — Knowledge of widow's illicit intimacy with third person held not grave enough to provoke widow's murder — Illicit intimacy allowed both to accused and another person for time long enough for passions arising out of any provocation to cool down — Provocation held not so sudden. A I R 1962 S C 605, Foll. 30 Cut L T 1 : ILR (1964) Cut 137.

——Ss. 300, Exception 1, 302—Concubine's refusal to marry accused — Accused himself a married man in illicit intimacy with brother's widow — Offer of carriage made to and refused by widow long before her murder — Provocation arising out of refusal to marry held neither grave nor sudden. AIR 1962 S C 605, Foll. 30 Cut L T 1 : ILR (1964) Cut 137.

——S. 300, Exception 1—Sudden provocation — Provocation not sudden when there is some deliberation and desire to have revenge.

Where there is some deliberation and desire to have revenge, it cannot be said that the provocation was so sudden as to deprive the accused of all self-control.

When a person, anticipating entry into the house of another person whom he reasonably suspects to be carrying on illicit intrigue with his wife, is determined to punish him and for that purpose keeps himself ready with a katari by his side and as soon as he notices that person attacks him with that weapon and kills him, it cannot be said that the crime was committed under such sudden provocation as to deprive him of all self-control. There is clear deliberation and attempt to take revenge. **29 Cr L J 454 and A I R 1938 All 532, Distinguished. 25 Cut L T 413 : (1959) 1 Orissa J D 356.**

——S. 300, Exception 1—Grave and sudden provocation — Husband murdering wife on unfounded suspicions about her chastity.

In order to bring a murder under Exception 1 to S. 300, the provocation must be grave and sudden upon an adequate cause and that should be strong enough to make a normal man lose his self-control. The peculiar notions of a man about his wife's subjection to him cannot be allowed to give latitude to murder. The weaker sex is not to be regarded as chattel and a husband cannot be given the right to take the life of his wife on the unfounded suspicions that his wife was carrying on an intrigue with some one else. A I R 1939 Lah 436; A I R 1929 Lah 861; A I R 1933 Lah 126 and A I R 1933 Lah 869, Disting.

(Note. — In this case it was held that there was neither grave nor sudden provocation to the accused, nor had he lost his self-control on any such account and that the case was not covered by Exception 1 to S. 300). **1953 Cri L J 445 : A I R 1953 Pepsu 32 (33) (Pr 3) (DB).**

——Ss. 300, Exception 1 and 302—Grave and sudden provocation.

Where the accused had already purchased a knife and had threatened the wife with murder if she did not mend her ways and after what the wife had said he was not so enraged that there and then he picked up something and struck his wife, but asked her to help him in picking up the chhabri, went upstairs; brought down the dagger, caught hold of his wife, took her inside, chained the door from inside and then gave her dagger blows:

Held : that there was no grave and sudden provocation within S. 300, Exception 1 of the Indian Penal Code, and the accused was rightly convicted under S. 302. **1953 Cri L J 1629 : A I R 1953 Punj 255 (255, 256) (Prs 4, 5) (DB).**

——Ss. 300, 302 and 304 — Applicability—Grave and sudden provocation.

The accused heard rumours a week before the occurrence that his wife had illicit intimacy with the deceased. He investigated into these rumours and was confirmed in his mind that the rumour was true. He went to his wife and confronted her with the information. She made a confession which enraged the accused. He bit off her nose then and there and then proceeded to take revenge upon the deceased. He took a dagger from the shop K and went to the shop of the deceased. He attacked him with the dagger and killed him and, after severing his head

from his body he went to the police outpost with the head and the dagger and made a report :

Held, that the accused had undoubtedly received some provocation. But this provocation could not be regarded as grave and sudden enough to extenuate the offence under S. 302 to one under S. 304, I. P. C. 1960 Cri L J 520 : A I R 1960 Raj 101 (105) (Pt E) (Pr 12) (DB).

——S. 300, Exception 1 — Grave and sudden provocation.

The accused, who was charged with the murder of his wife, pleaded grave and sudden provocation. The defence was that there were rumours regarding the bad character of the wife and when he returned home on the night of the occurrence, he saw a person in the osri of his house and going away. On account of this provocation he dealt numerous dharia blows to the deceased and killed her.

Held that the mere presence of a stranger in the osri would not constitute either grave or sudden provocation, nor would it be such provocation as to deprive him of his self-control. Nor did the fact that the accused had dealt numerous blows to the deceased in a brutal manner suggest that he must have lost self-control and that must have been because of some grave and sudden provocation. 1952 Cri L J 137 : AIR 1952 Sau 3 (6) (Ft B) (Pr 6) (DB).

——S. 300, Exception 1—Grave and sudden provocation—Test to be applied stated — Debtor's conduct in denying liability and asking creditor to resort to his legal remedies is not grave and sudden provocation. A I R 1955 N U C (Trav. Co) 4114 (DB).

9 (F). Proviso 1.

——S. 300, Exception 1 and First Proviso—Provocation not sudden and sought by accused himself.

The provocation, if any, must be not merely sudden nor only grave but must be both grave as well as sudden which alone gives the benefit to the culprit The effect of such grave and sudden provocation, if any, must be the loss of self-control. If there was time enough to cool down and the accused afterwards avenges himself for the insult or offence given, he can hardly plead the extenuating circumstance as enacted.

Held on facts that provocation was not sudden and further was sought by accused himself. Case law discussed. 1952 Cri L J 946 : AIR 1952 Bhopal 21 (23, 24) (Pt B) (Prs 11, 14).

——Ss. 300, Exception 1 and Proviso 1 and 302 — Grave and sudden provocation — Grave provocation must also be sudden — Provocation must come to offender—He should not go to it — Case held did not fall under Exception I to S. 300. A I R 1955 N U C (Raj) 3452 (DB).

9 (G). Provocation—Burden of proof.

—— S. 300, Exception 1 — Provocation — Burden of proof is on accused to show that he acted under grave and sudden provocation — (Evidence Act (1872), S. 105). AIR 1955 N U C (Madh Bha) 4525 (DB).

——S. 300, Exception 1—Grave and sudden provocation — Burden of proof lies on accused — Facts on record must establish provocation not only grave but also sudden- Provocation must be sufficient to deprive ordinarily reasonable man of self-control. A I R 1955 N U C (Madh Bha) 4315 (DB).

——S. 300, Exception 1 Burden of proof—Burden to show that case falls within exception is on accused—To apply Exception 1 to S. 300, he must establish that act has been committed by reason of grave and sudden provocation and it was committed when he was deprived of self control. (Evidence Act (1872), S. 105). AIR 1955 N U C (Madh Bha) 3795 (DB).

10. Exception 2—General.

See also Penal Code (1860), Ss. 96-106.

(A) "In the exercise of the right of private defence."

(B) No right of private defence.

(C) "Exceeds the power given to him by law".

(D) "Without any intention to do more harm than necessary."

10. Exception 2—General.

See also Penal Code (1860), Ss. 96-100.

——Ss. 300, 302, 96 — Evidence Act (1872), S. 105—Pleas of self-defence — Accused found to have killed another—Onus is on him to establish that killing was justified—It is however open to an accused person at any stage of the trial to request the Court to examine the evidence and ascertain for itself whether it is consistent with a plea of self-defence. See Evidence Act (1872) S. 105. 1961 (1) Cri L J 15 : A I R 1961 All 38 (DB).

——Ss. 300, 100, 302—Plea of self-defence—Duty of Court and the prosecution — Benefit of doubt to be given to accused. See Penal Code (1860), S. 100. 1960 Ker L J 597.

——S. 300—Accused not pleading private defence — Evidence disclosing exercising of the right—Accused is entitled to its benefit. See Evidence Act (1872), S. 105. 1959 Ker L T 796 : 1959 Ker L J 1313.

——S. 300 - Omission to plead right of self-defence—This will not influence the Court in concluding that the plea of self-defence was not available to the accused to any degree. 1957 Cri L J 635 : A I R 1957 Ker 53 (54) (Pr 4) (DB).

——Ss. 300, 99 — Burden of proof — Plea of self-defence—Onus of proof.

Where the evidence in the case clearly shows that accused was responsible for causing two injuries on P and one injury on M, if accused is to be exonerated from blame, it is clearly on him to show that he had justification for inflicting those injuries, or rather that he acted in self-defence. 1955 Cri LJ 852: I L R (1954) Trav-Co 1308 : 1954 Ker L T 920 : AIR 1955 Trav Co 104 (106) (Pt A) (Pr 6) (DB).

10 (A). "In the exercise of the right of private defence."

——S. 300—Right of private defence—Right held not exceeded. See Penal Code (1860), S. 99. 1952 Cri L J 1366 : AIR 1952 Bhopal 25.

——S. 300—Infuriated persons trespassing into accused's house — Accused placed in dangerous situation—Apprehension of death or serious injury -Trespassers not armed with dangerous weapons—Accused held entitled to right of private defence. See Penal Code (1860), S. 100. 1959 Ker L J 1313 : 1959 Ker L T 796.

——S. 300—Right of private defence of body — Accused, deceased and some others playing cards — Verbal altercations leading to blows — Deceased aggressor and beating accused — Accused caught hold of by friend of deceased — Accused severely beaten, getting exhausted and falling down—Deceased again attacking — Accused taking out knife and stabbing deceased fearing death at hands of deceased and attempting to run away — Friend of deceased following accused—Fearing renewal of attack accused using knife and wounding the friend—Accused held acted in self-defence in both cases and that in doing so he did not exceed his right. See Penal Code (1860), S. 99. 1957 Ker L J 413.

——Ss. 300, 304 (Part I), 96 and 102—Applicability—Deceased striking his mother and accused intending

to kill with handle of spade — Accused snatching handle—Deceased trying to snatch back — Accused giving blows on head of deceased — Fracture and death—Offence.

On a quarrel between mother and son the latter slapped the mother. The accused intervened but the son took up a handle of a spade and rushed at them. Evidence showed that the accused had declared that the son would kill the mother as well as the accused. The accused snatched the handle resisting the attempt of the deceased son to snatch it back, gave two blows on the head of the son resulting in multiple fracture and death. In his trial for murder the accused pleaded right of self defence, but the Sessions Judge convicted him under S. 304, Part I and sentenced him to 5 years' R. I.

Held, in appeal, that in the circumstances of the case, the intention of the deceased to kill his mother and the accused being proved, the accused could not be convicted of murder or of culpable homicide not amounting to murder as he hit the deceased in self-defence. The extent to which the exercise of the right of self-defence will be justified will depend not on the actual danger but on whether there was reasonable apprehension of such danger. If the accused, already provoked as he was consequent upon the assault on the mother first and on him later on by the deceased, after snatching the handle and gave two blows by the same in the heat of moment, evidently with the sole intention of disabling the assailant he could not be said to have exceeded his right of self-defence. AIR 1959 S C 165, Rel on. As the intention to cause death was not established, the fight being sudden and unpremeditated, there could be no conviction under S. 304, Part I, Penal Code. **1960 M P L J (Notes) 34.**

—S. 300 — Applicability — Deceased giving lathi blow to accused — Accused snatching lathi from deceased and giving blows on head of deceased — Deceased dying — Accused held not guilty under S. 302. See Penal Code (1860), S. 100. **A I R 1955 N U C (Orissa) 6106 (DB).**

10(B). No right of private defence.

—S. 300, Exception 2—Deceased peacefully cutting crops—Accused claiming the crops attacking the deceased in furtherance of common intention and killing them — Exception 2 to S. 300 does not apply to the case of accused. See Penal Code (1860), S. 103. **1965 (1) Cri L J 242 : AIR 1965 S C 257.**

— S. 300—Accused robbing a boy at point of knife —Deceased accosting the accused tried to apprehend him in discharge of his duty under S. 59, Criminal P. C.—Accused stabbing the deceased on vital spot—Defence of grave and sudden provocation, held not tenable in the circumstances. **I L R (1956) Hyd 914.**

—S. 300 — Free fight between the parties—Accused beating the adversary even though he had fallen and was completely overpowered — Adversary dying — Accused had no right of private defence and was guilty of murder.

Held, on facts that the deceased died of homicidal violence. There was no evidence to establish that the appellant could have any bona fide claim of right to the land which the deceased was ploughing and consequently in entering that field which at that moment was in possession of the deceased and which he was then ploughing, the appellant was guilty of criminal trespass and unauthorised aggression. He, therefore, under the circumstances established in the case, could not validly claim any right of defence of his property or person. In any case, as both the appellant and the deceased had no right or title to the land then being ploughed by the deceased, they would be guilty of a free fight where both would be guilty of their individual acts and as the appellant had beaten his adversary to death, he would be guilty of murder and his plea of right of private defence was rightly rejected. **1963 M P L J (Notes) 83.**

—S. 300, Exception 1 — "Grave and sudden provocation".

The deceased was on the top of a cocoanut tree for tapping it. The accused questioned him as to who was on the top of the tree and the deceased announced his identity. When the accused interrogated him as to with whose permission he was climbing the trees, the deceased replied that he need not ask for anybody's permission as he (deceased) was Pattomdar. The accused then stated that if he wanted to exercise his rights as Pattombar, he must pay the pattom to him (accused). The deceased stated that he had paid portion of the pattom due for that year and has also paid the advance and therefore he would pay the Pattom only from next year onwards. The accused persisted that unless he was paid, the deceased could not climb the trees in that garden. In the course of this altercation the accused stabbed the deceased which caused the death of the deceased.

Held, that the plea of grave and sudden provocation would not apply, because it was the accused who picked up quarrel with the deceased. **(1961) 1 Mad L J 307 : 1961 M L J (Cr) 241 : ILR (1960) Mad 1082.**

—Ss. 300, 96, 97, 104 — Deceased in possession of disputed land sowing bangi variety of paddy 4 or 5 days prior to occurrence — Accused claiming to have purchased land coming for first time on date of occurrence and starting ploughing land and not heeding to protests by deceased — Deceased giving blow with lathi on head of accused causing simple injury — Accused dealing fatal blow to deceased thereafter —Right of private defence of property held available to deceased — Accused held not to have right of private defence of person.

The crucial test for deciding whether a right of private defence of property is available or not, is whether the harm to the property committed by the offender is immediate or not. The concept will vary according to facts and circumstances of each case and no hard and fast rule can be laid down to determine the character of the harm.

The deceased (exercising the right of private defence of property) was in possession of the disputed land as bhag tenant and had showed bangi variety of paddy which was likely to germinate soon, 4 or 5 days prior to the date of occurrence. The accused claiming to have purchased the land came to enforce this right for the first time on the date of occurrence and started ploughing the land and continued to do so in spite of the fact that the deceased arrived on the spot and tried to dissuade him from doing the unlawful act of criminal trespass and mischief. The police station was about 7 miles from the place of occurrence. On refusal by the accused to listen, the deceased gave a blow on the head of the accused causing a simple injury on his head. The accused thereafter gave the fatal blow with a lathi on the head of the deceased.

Held, that the harm that was being caused to the property of the deceased by the accused was immediate and as there was no time to take recourse to the protection of the public authorities to prevent the loss, that would have been caused to him, the right of private defence of property was available to the deceased. That inasmuch as the infliction of the injuries on the accused by the deceased in exercise of his right of private defence was not an offence under S. 96, the accused had no right of private defence of person. AIR 1948 Pat 294, Disting. **(1963) 29 Cut L T 245.**

——S. 300, Excep. 2—Accused himself being aggressor — Plea of self-defence, if available.

A person cannot avail himself of the plea of self-defence in a case of homicide when he was himself the aggressor and wilfully brought on himself without legal excuse the necessity for the killing. It would be strange indeed if a person who provokes an attack, brings on a combat and then slays his assailant, were to take shelter behind the plea of self-defence in justification of the blow which he struck during the encounter. 53 Punj L R 284 : 52 Cri L J 1517 : ILR (1951) Punj 202 : AIR 1951 Punj 137 (140) (Pt B) (Pr 13) (DB).

——Ss. 300, Exception 2 and 100—Plea of self-defence —When not available stated—See Penal Code, Ss. 100 and 300, Exception 2. AIR 1950 East Punj 325.

——Ss. 300 and 97 — Fight for possession of land — Right of private defence—One of complainant's party dying — Right of private defence not exceeded — Neither party can claim right of private defence. ILR (1958) 8 Raj 15 : 1958 Raj L W 24 : 1958 Cri L J 222 : AIR 1958 Raj 52 (55, 56) (Pt B) (Prs 10, 12, 13) (DB).

——Ss. 300, 103, 104, 99, 100 — Right of private defence of property, when extends to causjng death indicated. See Penal Code (1860), S. 103. AIR 1951 Sau 1 (DB).

——S. 300, Exception 2 — Held, no right of self-defence — Right if existed, had been exceeded.

From the mere fact that the deceased, who was unarmed started the abuse or he went near to the accused, it cannot be taken that he had any aggressive intention, justifying the use of a pen-knife on the part of the accused, even granting that the accused apprehended that the deceased might cause him injury and that he had right of private defence. 51 Cri L J 653 : AIR 1950 Tra-Co 12 (12) (Pt A) (Pr 3) (DB).

10 (C). "Exceeds the power given to him by law".

——S. 300 — Deceased entering appellant's house at night in prosecution of his intrigue with appellant's daughter — Assault by appellant and his companions — Injuries caused leading to death — Appellant held had right of private defence — Held, also that he did not exceed the right — Conviction under S. 302 set aside. See Penal Code (1860), S. 34. ILR (1960) 2 All 235.

——S. 300 — Applicability — Cattle of deceased grazing on presumed grass of accused — Accused rounding up cattle to take them to cattle pound — Deceased forcibly taking away cattle from possession of accused — Deceased though armed with lathi not using it — Accused hitting deceased with lathi on head — Death of deceased as result of injury — Accused held exceeded right of private defence — Act covered by Exception 2 to S. 300 — Conviction should be under S. 304, Part I and not Part II. See Penal Code (1860), S. 99. 1953 Cri L J 1275 : AIR 1953 All 555.

——Ss. 300, 302 and 304 — Mutual provocation — Accused stabbing deceased with a pen-knife apprehending danger from unarmed relations of deceased —Act of stabbing, if comes within Exception 1 or 2.

The deceased, on seeing the accused coming along a road on his way home, went up and asked him why he had beaten his son (P. W. 1) in the morning. The accused did not regret his act but gave a challenging reply provoking the deceased to catch hold of his tuft and they began to exchange blows. When P. Ws. 1 to 4 approached them with the intention of helping the deceased, the accused stabbed the deceased and P. W. 1 and escaped. The Sessions Judge convicted the accused under S. 302, Penal Code, and an appeal was preferred to the High Court. Held, that the accused had reason to apprehend that he could not escape, except by using against the deceased before P. Ws. 1 to 4 pounced upon him, the pen-knife which happened to be in his possession. Although the accused acted in the exercise of his right of private defence of the body he exceeded that right and came under Exception 2 to S. 300, Penal Code. There was mutual provocation in the case and it cannot be said that the provocation to the accused was so grave as to bring his act of stabbing the deceased within Exception 1 to S. 300, Penal Code. (1965) 2 An W R 145 : 1965 (2) Cri L J 440 (442, 443) (Pt B) (Prs. 10, 12, 14) (Andh Pra) (DB).

——S. 300, Except. 2, S. 99 and S. 100 — Attempt to commit unnatural offence against offender — Injuries inflicted on and consequent death of victim — Right of private defence pleaded — More harm caused than necessary—No right of private defence. 1962 (1) Cri L J 324 : AIR 1962 Guj 39 (41) (Pt C) (Pr 9) (DB).

——S. 300, Exception II — Applicability — Right of private defence exceeded—Effect.

Even when the right of private defence is exceeded and even when more harm was done than was necessary for the purpose of private defence, Exception II would apply provided (1) the accused caused the death of a person without premeditation and (2) provided that when the accused caused the death of a person he had no intention of doing more harm than was nceessary for the purpose of defence. It is important to note that these two provisos have reference to the act of causing death which amouts to culpable homicide. (1960) 1 Guj L R 151 : (1961) 2 Guj H C R 10 : 1961 (1) Cri L J 813 (814) (Pt B) (Pr 3) (Guj) (DB).

——S. 300, Excep. 2 and S. 304, Part 1 — Accused snatching away axe from deceased and hitting him back—Act in excess of right of private defence — Offence held fell under Excep. 2 of S. 300. Madh B L J 1955 H C R 1744 : Madh B L R 1955 Cr 350 : 1956 Cri L J 70 : A I R 1956 Madh B 23 (25) (Pt B) (Prs 20, 22) (DB).

——Ss. 300, Exception 2, 430 and 103 — Exceeding right of private defence in preventing mischief and causing death—Offence.

The accused used a heavy instrument like a spade on the head of the deceased so forcibly as to fracture the skull extensively and injure the brain causing his death. Where the deceased was committing the specific offence of mischief enumerated in S. 430, Penal Code, i.e., by wrongfully diverting water, the accused was justified in preventing him forcibly from consummating that mischief in defence of the property of his master. The accused was held however to have clearly exceeded the right of private defence and therefore his act fell within the Exception 2 to S. 300, Penal Code and the conviction under S. 304 (Part II) of the Penal Code had to be confirmed. 1959 Mad W N 585 : (1960) 1 M L J 341 : 1960 M L J (Cr) 251 : 1960 Cri L L J 834 : 1960 All W R (Sup) 23 : 1960 All Cr R 219 : A I R 1960 Mad 240 (244) (Pt D) (Pr 20) (DB).

——S. 300, Exception 2 — Exceeding right of private defence — Indiscriminate beating of deceased—Case held not covered by Exception 2. See Penal Code (1860), S. 105. (1965) 31 Cut L T 265.

——Ss. 300, 149, 304, Part 2—Land dispute — Prosecution party trying to take forcible possession—Protest by defence party in possession — Aggression by prosecution party — Attack with lathis by defence party, resulting in fatal injuries — No evidence to prove apprehension of death or grievous hurt to members of defence party—Members of defence party held exceeded right of private defence and were guilty under S. 304, Part 2.

Held, on facts, that although the defence (accused) party might have had a right of private defence, they exceeded that right by inflicting fatal blows on the members of the prosecution party. The weapons used were lathis and the accused must have known that injuries inflicted with such weapons were likely to cause death, even though they had no intention either to cause death or grievous bodily injury. In those circumstances, the accused were not guilty of murder but were guilty under second part of S 304. 29 Cut L T 15 : 1963 (1) Cri L J 700 (704) (Pt D) (Pr 17) (Orissa) (DB).

——Ss. 300, Excep. II and S. 304, Part 1—Exceeding right of private defence of property—Death caused — —Case falls within purview of S. 300 Excep. II and accused can be convicted under S. 300, Part 1—No enmity of any kind alleged between accused and deceased — Incident not the outcome of deliberate desire on the part of accused to take life—Accused of good character—Sentence of 7 years' R. I. reduced to five years. (1951) 3 Pepsu L R 620 (DB).

——S. 300, Exception 2 — Applicability — Accused molesting wife of deceased—On complaint by wife of deceased, the deceased and his father going to the house of the accused, probably armed, to remonstrate him — Accused killing deceased by causing him injuries with barcha blows—Circumstances showing that the accused did have apprehension of danger though not reasonable apprehension of death or grievous hurt —Although right of private defence to the extent of killing deceased may not be proved, case held fell under S. 101, Penal Code and therefore came within exception 2 to S. 300 — Accused held guilty under S. 304, Part. 1 and not under S. 302. See Penal Code (1860), S. 101. AIR 1955 N U C (Punj) 4939 (DB).

——S. 300, Exception 2 and Ss. 100, 103—Deceased seen stealing sugarcane from field of accused —Accused fetching axe and dealing blow on deceased—Death — Offence — Right of private defence of property.

The right of private defence against theft continues till the offender has effected his retreat with the property or till the property has been recovered. But where the deceased who was in the habit of stealing sugarcane from the field of the accused, was seen by the accused, taking away a bundle of sugarcane, and the accused went home and fetched an axe and gave a blow on the head of the deceased, who immediately fell down unconscious and was completely at the mercy of the accused, it could not be said that after the deceased had fallen down completely prostrated and the stolen property thrown on the ground the right of private defence still continued and extended to inflicting two more fatal blows to the deceased, so severe and brutal as to lead to the inference that the accused had the intention to cause the death of the deceased. In such circumstances the case of the accused neither fell under S. 103 giving absolute immunity nor under exception 2 to S. 300 to reduce the offence to culpable homicide not amounting to murder but fell under S. 302. AIR 1951 Sau 1 (3, 5) (Pt B) (Prs 7, 12) (DB).

10 (D). "Without any intention to do more harm than is necessary."

——S. 300, Exception 2—Applicability.

Accused 1 had invited accused 2 to go over to his residence during the night of murder and there he joined hands with accused 1 in bringing about the death of a woman by tightening the copper wire around her neck. Accused 2 admitted having held one end of the wire and helped accused I to strangulate the victim. He however stated that when he went there he found a quarrel between accused 1 and the deceased wowan and he entered the hut only after hearing the cries of the woman and that then he found that accused 1 had already put the copper wire around her neck and was tightening it while the woman was holding accused 1 by his private parts.

Held, that assuming there was occasion to defend or protect the person of accused 1, accused 2 not only far exceeded that right but even on his own showing also engaged himself in tightening the wire even after the woman fell down. The woman died soon after. Even if his version were fully accepted, Exception 2, S. 300 Penal Code would have no application to such deliberate act of strangulating a woman to death. Not only could there have been any good faith for the action but it was also clear that more harm than was necessary for the purpose of defending accused 1 was caused. 1958 Ker L T 761 : 1958 Ker L J 985 : 1959 Cri L J 137 : 1959 Mad L J (Cr) 369 : AIR 1959 Ker 46 (50) (Pt B) (Pr 17) (DB).

11. Exception 3.

——Ss. 300, Exception 3, 302 and 304 — Police constable while attempting to re-arrest escaped thief firing at him but hitting another person—Offence.

A suspected thief who had been arrested by the Police Constables escaped from the running train. One of the Constables pursued him with a view to effect his re-arrest and when he was not in a position to apprehend him, he fired at him but in that process he hit the fireman of the engine and killed him.

Held, that the case was covered by Exception 3 to S. 300, Penal Code. The constable no doubt exceeded the powers given to him by law and caused the death of the fireman by doing an act which he, in good faith, believed to be lawful and necessary for the due discharge of his duty. In such circumstances the offence that was committed was culpable homicide not amounting to murder punishable under S. 304, Part 2, Penal Code, and not under S. 302. 1955 Cri L J 905: AIR 1955 All 379 (382) (Pt A) (Pr 14) (DB).

——Ss. 300, 76 and 79—Murder by soldier — Plea of obedience to order of superior, when not available.

Obedience of an unlawful order of his superior, does not exonerate or excuse the soldier who commits a murder as a consequence of such an order. To plead that he acted in obedience to the order of his superior will not excuse him where the order is unlawful.

Information was received that some persons were gambling in a tent. A party consisting of A, as superior officer and B, a soldier, was sent to make an enquiry into this matter. The party arrived outside the tent and surrounded it. Soon after this the report of a gun was heard and the deceased who was inside the tent was found to have been shot dead. At the trial B admitted that he had fired the shot but pleaded that he had done so in obedience to the orders of his superior :

Held, (1) that the order issued by A was wholly unjustified and unlawful and therefore B was not bound to obey it;

(2) that B was guilty of the offence of murder; and

(3) that neither Ss. 76, 79 nor Exception 3 to S. 300 applied. 52 Pun L R 331 : I L R (1950) Punj 354 : AIR 1950 East Punj 321 (322) (Pt A) (Pr 4) (DB).

12. Exception 4—Scope and applicability.

(A) "Without premeditation."

(B) "In a sudden fight".

(C) "In the heat of passion upon a sudden quarrel."

(D) "Without offender's ..... unusual manner."

12. Exception 4 — Scope and applicability.

——Ss. 300, Excep. 4, 302 and 304, Part II—Applicability.

Sudden altercation between accused and deceased ensuing in free fight between two parties in which each party assaulted the other with sticks in their hand—Accused dealing only one blow on deceased resulting in his death—Injuries suffered by both sides evenly distributed—Accused receiving several injuries including injury on head and fracture of bone—Accused held entitled to benefit of exception to S. 300 and was guilty under S. 304, Part 2 and not under S. 302. Prandas v. State, 1954 Cri L J 331: AIR 1954 SC 36 (39) (Pt B) (Pr 10).

——S. 300, Exception 4—Applicability—Accused held not entitled to benefit of Exception 4. AIR 1955 N U C (Ajmer) 4732.

——Ss. 300, 302 and 304—Scope—Conditions for applicability of Exception 4 to S. 300—Accused dealing only one lathi blow in sudden quarrel on head of deceased who was unarmed — Death—Murder or culpable homicide.

The relations between the accused and the deceased were strained because the accused wanted to build a ghar on the disputed land and the deceased was not allowing him to do it. There was a sudden altercation with exchange of abuses between the two over this dispute and the accused gave only one lathi blow on the head of the deceased who was unarmed, resulting in his death on the spot. The accused was tried for murder but was convicted under S. 304, Penal Code, and sentenced to 9 years' R. I.

Held, (i) To bring the case within Exception 4 to S. 300, it was necessary that all the ingredients of that exception should have been present. Since the accused was armed with lathi and the deceased was not, it must be held that the accused took undue advantage of the situation of his opponent. Further though there was sudden quarrel there was no fight since there was but one blow dealt by the accused only. Hence the accused was not entitled to the benefit of Exception 4 to S. 300. (ii) That the act of the accused was one of murder as the case fell within clause thirdly under S. 300, Penal Code. The only intention qua the act which caused the death that need be proved is the intention to cause the bodily injury actually found, and that the other requirement as to the nature of the injury inflicted being such as to be sufficient in the ordinary course of nature to cause death should be established objectively independently of the intention of the accused: 1936 All L J 335 and AIR 1916 Bom 191, held no longer good law in view of AIR 1958 S C 465. (iii) Since the injury caused depressed fracture of the skull and laceration of the brain, and death was instantaneous on receipt of it, the injury was undoubtedly such as to be sufficient in the ordinary course of nature to cause death. In this view the offence committed was one of murder under S. 302, Penal Code 1959 All W R (HC) 505: 1959 Cri L J 158: 1959 All Cr R 424: A I R 1959 All 131 (132, 133) (Prs 6 to 9).

——S. 300, Excep. 4—Scope and applicability.

Exception 4 will not come into play every time that a quarrel takes place suddenly; for its applicability a number of facts are required in addition to the suddenness of fight; there must be heat of passion, sudden fight and absence of undue advantage or of acting in a cruel or unusual manner. 1953 Cri L J 1505: ILR (1954) 1 All 214: AIR 1953 All 668 (670) (Pt A) (Pr 6) (DB).

——Ss. 300, 96, Exception 4—Applicability—Sudden fight—One person deliberately attacking another—Offence.

If some persons deliberately go to another with the intention of attacking him, that can never be a case of free fight or sudden fight. That would be a case where the latter would be entitled to the right of private defence in order to ward off the attack on him by the former. (1960) 1 Gui H C R 134: (1960) 1 Gui L R 157: 1961 (1) Cri L J 54 (2): A I R 1961 Guj 8 (10) (At C) (Pr 8) (DB).

——S. 300, Exception 4—Applicability.

Where from words the parties come to blows and if after exchange of blows on equal terms, one of the parties without any such intention at the commencement of the affray snatches a deadly weapon and kills the other party with it, such a killing will be only manslaughter. But if a party under colour of fighting upon equal terms, uses from the beginning of the contest a deadly weapon without the knowledge of the other party and kills the other party with such a weapon, or if, at the beginning of the contest he prepares a deadly weapon so as to have the power of using it at some part of the contest and uses it accordingly in the course of the combat, and kills the other party with the weapon, the killing in both these cases will be murder. As long as the fight is unpremeditated and sudden, the accused irrespective of his conduct before the fight, earns the mitigation provided for in the Exception 4 to S. 300 subject to the condition that he did not in the course of the fight take undue advantage or act in a cruel or unusual manner. 1959 Cr L J 993: 1959 Mad W N 215: AIR 1959 Mad 323 (327) (Pt D) (Pr 27) (DB).

——Ss. 300, Excep. 4, 302 and 304—Applicability.

Where the accused dragged the deceased, his father (who remonstrated with him about his waywardness) and made him lie down and when he was in that posture and trying to extricate himself the accused threw stones on his head with force, resulting in fracture of the skill with instantaneous death:

Held, that the offence committed was one of murder and exception 4 to S. 300 could not be invoked in such a case. (1954) 2 M L J 398: 1954 Mad W N 332: 1954 Cr L J 1443: AIR 1954 Mad 948 (949) (Pt A) (Pr 3) (DB).

——S. 300, Excep. 4—Mutual fight—Neither party having right of self-defence—Consequences.

In the case of a mutual fight, where neither party had the right of private defence the question as to which party was the aggressor in such a circumstance would be immaterial. When neither party had a cause to fight and if they do fight, both the parties would become members of an unlawful assembly as soon as the fight develops, if the number of either side is more than 5, and they would be guilty of the consequences that follow. I L R (1964) 43 Pat 156.

——S. 300, Excep. 4 — Applicability indicated See Penal Code (1860), S. 34. AIR 1955 N U C (Pepsu) 3280 (DB).

——S. 300 Exception 4 — Fight—What is.

Before a case can come within the ambit of the exception 4 to S. 300, it must be shown that there was fight, which implies mutual attack by both the parties, or at least an actual attack by one party and preparation to attack by the other. Where it was all one-sided after and only the accused and their companions caused injuries to their opponents and the latter did not even attempt to retaliate, the exception can have no application. (1950) 2 Pepsu L R 288 (DB).

——S. 300, Excep. 4—Applicability.

The help of the Exception 4 to S. 300 can be invoked if and only if death is caused (a) without premeditation (b) in a sudden fight (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner. To bring a case within this Exception all the ingredients mentioned in it must be found. 53 Punj L R 284: 52 Cri L J 1517: I L R (1951) Punj 202: AIR 1951 Punj 137 (138) (Pt C) (Pr 4) (DB).

12 (A). "Without premeditation".

——S. 300. Excep. 4, Ss 302 and 304—Applicability—Deceased just finishing bath in public street—M & D asking him to refrain from taking bath in public street which was frequented by women—Deceased protesting and claiming his right as member of public to have bath at public tap—M & D remonstrating and pushing him from tap into street—Exchange of abuse and tempers running high—One of accused passing on knife to M who plunging it into chest of accused—Accused succumbing during night—Exception 4 to S. 300 applied—M was guilty under S. 304 and not under S. 302. **AIR 1955 N U C (Punj) 3432 (DB).**

——S. 300, Excep. 4 — Without pre-meditation—Meaning.

Exception 4 comes into play only if death is caused without pre-meditation. To constitute a pre-meditated killing, it is necessary that the accused should have reflected with a view to determine whether he would kill or not; and that he should have determined to kill as the result of that reflection; that is to say, the killing should be a pre-determined killing upon consideration and not a sudden killing under the momentary excitement and impluse of passion upon provocation given at the time or so recently before as not to allow time for reflection. **53 Punj LR 284 : 52 Cr L J 1517 : I L R (1951) Punj 202 : AIR 1951 Punj 137 (140) (Pt D) (Pr 14) (DB).**

——S. 300, Excep. 4 — Without pre-meditation — Proof of.

Prermeditation may be established by direct or positive evidence or by circumstantial evidence. Evidence of pre-meditation can be furnished by former grudges or previous threats and expressions of ill-feeling; by acts of preparation to kill, such as procuring a deadly weapon or selecting a dangerous weapon in preference to one less dangerous and by the manner in which the killing was committed. For example, repeated shots, blows or other acts of violence, are sufficienl evidence of pre-meditation. Pre-meditation is not proved from the mere fact of killing by the use of a deadly weapon but must be shown by the manner of the killing and circumstances, under which it was done or from other facts in evidence. **53 Punj L R 284 : 52 Cri L J 1517 : I L R (1951) Punj 202 : A I R 1951 Punj 137 (140) (Pt E) (Pr 14) (DB).**

12 (B). "In a sudden fight".

■——S 300, Excep. 4 — Applicability—Contending factions meeting accidentaily and attacking each other—Offence.

Where a mutual conflict develops and there is no reliable and acceptable evidence as to how it started and as to who was the aggressor, it will not be correct to assume private defence for both sides. Such a case will be a case of sudden fight and conflict and has to be dealt with under S. 300, I. P. Code. Exception 4. Jumman v. The State of Punjab, 1957 Cr L J 586: AIR 1957 S C 469 (474) (Pt C) (Pr 24).

■——Ss. 300, Exception 4, 302 and 304, Part 1 — Applicability — Sudden and free fight between two contending parties armed with deadly weapons —Death—Offence.

Proceedings under S. 145, Cr. P. Code were pending with regard to a dispute regarding shamilat land between the party of the accused and the party of the deceased. On the day of occurrence there was a sudden and free fight in the course of which the deceased M died by reason of the injury inflicted by the appellant, one of the accused, by a sharp-edged instrument without any premeditation. The evidence established that the deceased's party was also armed with dangerous weapons and though the appellant had received only minor injuries, the other accused had received incised wounds. Both, the lower Courts found the appellant guilty under S. 302 and sentenced him to transportation for life. On appeal by special leave:

Held, (1) When two such contending parties, each armed with sharp edged weapon clashed and in the course of a free fight some injuries were inflicted on one party or the other, it cannot be said that either of them acted in a cruel or unusual manner. (2) On the findings arrived by the High Court the case against the appellant clearly falls within Exception 4 of section 300 of the Indian Penal Code. (3) That at the time the appellant caused the injury he did it with the intention of causing death or such bodily injury as was likely to cause death and therefore, the offence is one under Part I of section 304 and not under S. 302 of the Indian Penal Code. Dharman v. State of Punjab, 1957 S C R. 1 : 1957 Cri L J 420 : AIR 1957 S C 324 (326) (Pt B) Prs 7, 10).

——S 300, Exception 4 — Applicability — Sudden fight — Prosecution evidence unreliable — Duty of Court — Conviction—Legality.

The occasion to use Exception 4 to S. 300 arises only when it is found that the accused has committed culpable homicide and the Court is to determine whether it amounts to murder or not. A person who causes the death of another in the exercise of the right of private defence of person does not commit the offence of culpable homicide as defined in S. 299, I. P. Code and therefore no question can ever arise for determining whether he has committed the offience of murder. Consequently, no occasion will arise to determine whether his case comes under Exception 4 to S. 300 I. P. Code or not. An occasion to consider the applicability of this Exception will thus arise where the accused, who had no right of private defence of person, had caused the death of another in circumstances which according to him would bring his case within Exception 4

Where a fight between two parties leading to death was a sudden one and without premeditation and the prosecution has led no reliable evidence to determine which party was the aggressor, the aid of Exception 4 to S. 300 cannot be invoked for the purpose of recording a conviction. The Court has still to decide who started the fight and who was the aggressor. It cannot follow the path of least resistance and convict both parties by holding that the fight was a free one. If the prosecution evidence is unworthy of credence, the onus still lies on the Court to arrive at a finding on the basis of probabilities : Criminal Appeals Nos. 804, 805 and 1044 of 1955, dated 3rd December, 1957 (All), Foll. **1960 Cri L J 1179 : AIR 1960 All 567 (569) (Pr 9).**

——S. 300, Exception 4 — 'Fight' — Essentials.

In order to constittue fight it is necessary that blows should be exchanged and it is not necessary that weapons should be used. **1959 Cri L J 993 : 1959 Mad W N 215 : AIR 1959 Mad 323 (327) (Pt C) (Pr 27) (DB).**

——S. 300, Excep. 4 — "Fight" meaning of.

The term 'fight' occurring in Excep. 4 to S. 300 is not defined in the Code. It takes two to make a fight. It is not necessary that weapons should be used in a fight. An affray can be a fight even if only one party in the fight is successful in lending a blow on his opponent. In order to consitute fight, it is necessary that blows should be exchanged even if they do not all find their target. **57 Punj L R 437: 1955 All W R (Supp) 107 : 1955 Cri L J 1283 : I L R (1955) Punj 1252 : AIR 1955 Punj 191 (192)(Pt B) (Pr 10) (DB).**

——Ss. 300, Exception 4 and 304, Part I — Sudden fight—Sentence.

On quarrel arising between A and B, both grappling with each other and catching hold of each other's long hair — On B shouting his relatives, including C, coming to the spot. Some helpers of A also coming — Grappling itself turning into free fight in which C giving fatal blow with his spear to A B and C also receiving injuries at the hands of relations of deceased A — Held, that case was one of sudden fight and fell within exception 4 to S. 300. Offence of C, therefore, fell under S. 304, Part I and sentence of seven years' rigorous imprisonment would meet the ends of justice. **1954 Cri L J 746 : 56 Punj L R 106 : AIR 1954 Punj 121 (121) (Pt A) (Pr 5) (DB).**

12 (C). "In the heat of passion upon a sudden quarrel".

——Ss. 300, 302 and 304, Part 2—Applicability.

The circumstances as found by the Court were that there was a severe exchange of abuses between the parties preceding the incident, that during the abuse the temper rose and both the parties came out of their respective houses in anger and that in the course of quarrel the accused dealt the fatal blow on the head of the deceased with his lathi.

Held, that even though the circumstances were such as not to bring the case within Exception 1 to S. 300 the crime was committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the accused having taken undue advantage or acted in a cruel or unusual manner thus bringing the case within Exception 4 thereto with the result that the offence committed was culpable homicide not amounting to murder. The accused therefore could not be convicted of having committed an offence under S. 302 of the Indian Penal Cede.

Held, further, that when the fatal injury was inflicted by the accused on the head of the deceased by only one blow it could as well be that the act by which death was caused was not done with the intention of causing death or of causing such bodily injury as was likely to cause death. The act appeared to have been done with the knowledge that it was likely to cause death, but without any intention to cause death or to cause such bodily injury as was likely to cause death within the meaning of Part II S. 304 of the Penal Code. Chamru v. The State of M. P., **1954 Cri L J 1676 : AIR 1954 S C 652 (653) (Prs 4, 5).**

——Ss. 300, 302, 325 — **Accused persons attacking deceased with sticks indiscriminately and one of them hitting him on head — Accused guilty under S. 325 and not under S. 302.**

Where the accused persons attacked the deceased indiscriminately with sticks and one of them hit him on the head, the accused cannot be convicted under S. 302 as it is not a murderous attack, death being neither known to be likely nor intended. They should, however, be held to have known that they were likely to cause grievous hurt and are guilty under S. 325. **51 Cri L J 363 : AIR 1950 Kutch 2 (3) (Pt C) (Pr 9).**

—— S. 300, Thirdly and Exception 4 — **Applicability — Family quarrel suddenly taking serious turn — Accused giving one stab of knife in abdomen — Victim dying within one hour — Offence.**

Held, that in the family quarrel which had taken a serious turn, though there was neither premeditation nor any deliberate intention to kill on the part of the accused the injury was sufficient in the ordinary course of nature to cause death and as the accused did intend to cause the injury of such nature the case clearly fell under clause 'thirdly' of S. 300 and the offence was punishable under S. 302.

Further that the case did not fall under the fourth exception as the accused had failed to establish that he stabbed the victim in the heat of passion without taking any undue advantage and without acting in a cruel or unusual manner. **38 Mys L J 352 : I L R (1960) Mys 571 : 1960 Mad L J (Cr) 808 : 1961 (1) Cri L J 120 : AIR 1961 Mys 21 (24, 25) (Pt B) (Prs 16, 22) (DB).**

——S. 300, Exception 4, S. 304—Applicability — Free fight taking place between accused and deceased and their associates — Accused beating deceased in heat of passion without premeditation — Accused held punishable under S. 304, second part. **AIR 1955 N U C (Nag) 3957 (DB).**

——S. 300, Exception 4 — Applicability — **Stabbing without pre-meditation and in heat of passion but no sudden fight.**

The mere exchange of hot words does not constitute a fight, even though it may be regarded as a quarrel.

Where there was no sudden fight between the accused and the deceased and the accused caused the death of the deceased by plunging spear into his abdomen :

Held, that the accused was guilty of murder. Exception 4 did not apply even though the accused acted without pre-meditation and in the heat of passion. AIR 1933 Pat 508; AIR 1943 Pat 397 and AIR 1940 Mad 293, Rel. on. **(1950) 2 Pepsu L R 639 (DB).**

——Ss. 300, 302, 304 Pt 1 — Sudden and unpremeditated fight — Both parties inflicting injuries by weapons — Death of one person — Case held covered by Exception 4 of S. 300 — Conviction under S. 302 altered to that under S. 304 Pt. I — Sentence of transportation reduced to 5 years' R. I. **52 Cri L J 1034 : AIR 1951 Raj 129 (131) (Pt B) (Pr 8) (DB).**

12 (D). "Without offender's . . . . . unusual manner."

——S. 300, Exception 4—Applicability.

The fight was between V and the accused. The deceased had no hand in it. He did not even try to separate the assailants. All that he did was to ask V to stop fighting and said that he would settle the dispute. The accused thereupon stabbed the deceased causing injury resulting in death.

Held, that the exception requires that no undue advantage be taken of the other side. It was impossible to say that there was no undue advantage when the accused stabbed the unarmed person who made no threatening gesture and merely asked the accused's opponent to stop fighting. Then also, the fight must be with the person who is killed. Here the fight was between V and the accused. The exception, therefore, did not apply. Narayanan Nair v. State of Travancore Cochin, **1956 Cri L J 278 : 1956 All W R (Sup) 28 : 1956 Ker L T 92: AIR 1956 S C 99 (101) (Pt B) (Pr 11).**

——S. 300 — Question as to what is "undue advantage" in each particular case is a question of fact and no question of law is involved. The case involving interpretation of those words does not fall under Art. 134 (1), Cls. (a) and (b). **AIR 1954 Ajmer 7 (1) (7) (Pr 2).**

——S. 300—No enmity between accused and deceased — On trivial quarrel accused momentarily losing temper and giving stick blow on head of deceased — Held though accused could be imputed with knowledge that the hit was likely to cause death he could not be imputed with intention of causing such bodily

injury as was likely to cause death — Conviction under S. 302 changed to S. 304, Para. 2 and accused fined Rs. 300/- only. See Penal Code (1860), S. 304. 1960 Andh L T 510.

—S. 300, Exception 4 — No premeditation but accused taking undue advantage and acting in cruel manner.

To claim the benefit under Excep. 4 to S. 300, it must be shown that the accused committed the offence without premeditation in a sudden fight and without taking undue advantage or acting in a cruel manner. Where though there was no premeditation, but the quarrel was sudden, the accused took undue advantage of the deceased who was unarmed and had acted in a cruel manner in stabbing him thrice, the accused is not entitled to the benefit of Excep. 4. 1959 Ker L R 1457.

—S. 300, Exception 4 — Offender taking undue advantage and acting in unusual manner.

The expression 'undue advantage' as used in Exception 4 to S. 300 means 'unfair advantage' and cannot be limited to a case where the victim is made physically incapable to defend himself. An assailant cannot but be said to have taken undue advantage of his victim if the latter is taken completely unawares and is struck when he does not even suspect that he is about to be struck. Furthermore, no reasonable person can expect that a man would whip out knife and strike another on a vital part of the body with it on account of a petty quarrel. If the weapon or manner of attack by the assailant is out of all proportion to the offence given, that circumstance must be taken into consideration for deciding whether undue advantage has been taken. In such a case, the assailant must also be held to have acted in an unusual manner. AIR 1954 S C 652, Dist. AIR 1947 Pat 168, Rel. on. 1958 B L J R 454 : 1959 Cri L J 226 : AIR 1959 Pat 66 (69) (Pt D) (Pr 19) (DB).

——S. 300, Exception 4— Applicability — Essentials.

In order to bring a case within Exception 4 to S. 300, it must be shown that not only was the culpable homicide committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel but also the other condition that the offender did not take undue advantage or act in a cruel manner. Where the accused is found to have acted without premeditation in a sudden fight in the heat of passion upon a sudden quarrel but though the deceased was unarmed and the accused did not stop short of giving as many as five slabs, three of which were fatal:

Held, that accused was guilty of the offence of murder. (1951) 3 Pepsu L R 558.

—S. 300, Excep. 4, Part 2— Applicability—Quarrel between cow-heards—B catching hold of C and A stabbing C in chest—Case not covered by Exception 4. AIR 1955 N U C (Trav-Co) 5428 (DB).

— S. 300, Excep. 4 — Fight not premeditated and occurring out of sheer accident — Accused giving stab wound by penknife — Manner of attack not cruel and unusual — Stab on vulnerable part of body and victim dying — Case held not one of murder but fell under Exception 4. 51 Cri L J 653 : AIR 1950 Trav-Co 12 (13) (Pt B) (Pr 5) (DB).

13. Exception 5.

——S. 300, Excep. 5—Consent must be unconditional and without any reservation.

In order to bring the offence of murder under Excep. 5 to S. 300, Penal Code, the consent by the deceased must be given unconditionally and without any reservation. It must further be unequivocal consent which does not involve the choice of alternatives to which the person taking the life more or less has driven the person.

Thus where although the wife flatly refused to go back to her mother and said that if her husband insisted on her doing so she would rather be killed, the consent was not the type of consent which is contemplated by Exception 5 to S. 300, Penal Code and the husband was guilty of murder. (1955) 2 M L J 383 : 1955 Mad W N 605 (2) : 1955 All W R (Sup) 102 : 1956 Cri L J 244: AIR 1956 Mad 97 (97) (Prs 6, 7) (DB).

——S. 300, Excep. 5 – Applicability — Accused, a 10th class student failing at annual examination for third time—His wife aged 19 years, a literate woman — Accused upset at his failures, and taking the last failure at heart, deciding to end his life — Wife informed of the resolve — Wife asking him to kill her first and then kill himself — Accused accordingly killing her but was arrested before he killed himself— Held that wife did not give her consent to be killed under fear of injury or under a misconception of fact and thus the case was covered by Exception 5 — Accused was held guilty under S. 304, Part I, and not S. 302. 1958 Cri L J 548 : AIR 1958 Pat 190 (192, 193) (Pt C) (Prs 13, 14) (DB).

14. Murder and culpable homicide not amounting to murder—Distinction.

See also Penal Code (1860), Ss. 299 and 304.

——Ss. 300, 302 and 304, Part II— Scope and applicability.

Where the accused causing the death of another had no intention to kill, then the offence would be murder only if (1) the accused knew that the injury inflicted would be likely to cause death or (2) that it would be sufficient in the ordinary course of nature to cause death or (3) that the accused knew that the act must in all probability cause death. If the case cannot be placed as high as that and the act is only likely to cause death and there is no special knowledge, the offence comes under S. 304, Part II of the Penal Code. Willie (William) Slaney v. State of M P., 1956 Cri L J 291 : 1956 Mad W N 391 : (1956) 1 Mad L J (S C) 100 : 1956 S C J 182: 1956 S C A 183: 1956 All W R (Sup) 38 : (1955) 2 S C R 1140 : AIR 1956 S C 116 (133, 138, 140) (Pt B) (Prs 70, 71, 72, 90, 91, 101).

——Ss, 300 and 299—Scope of.

Section 299 defines culpable homicide. Culpable homicide is of two kinds: culpable homicide amounting to murder and culpable homicide not amounting to murder. Section 299 cannot be taken to be definition of culpable homicide not amounting to murder, as the section clearly speaks of culpable homicide simpliciter. The scheme of the Code is that first the genus "culpable homicide" is defined and then murder, which is species of culpable homicide is defined ; what is left out of culpable homicide after the special characteristic of murder is taken away from it, is culpabale homicide not amounting to murder. For this reason the Code does not contain any definition of culpable homicide not amounting to murder. 1952 All L J 546 : 1953 All W R (H C) 63 : 1953 Cri L J 565 : ILR (1953) 2 All 885 : AIR 1953 All 203 (205) (Pt D) (Pr 10) (DB).

——Ss. 300, 304, Second Part, 299 — Case not falling within any exception to S. 300 — Still second part of S. 304 may apply — Classes of cases where S. 304 applies narrated. See Penal Code (1860), S. 304, Second Part. 1960 Cri L J 303 : AIR 1960 Andh Pra 141 (DB).

——Ss. 300 and 299 — Scope — Culpable homicide and murder — Distinction.

The difference between the two offences of culpable homicide and murder is fine but real. Culpable homicide is a generic term. The offence will amount to murder if the conditions laid down in S. 300 are satisfied. If the offence comes under S. 299 or under one or other of the exceptions to S. 300, it will be culpable homicide not amounting to murder.

The offence is culpable homicide if the bodily injury intended to be inflicted is likely to cause death, it is murder, if such injury is sufficient in the ordinary course of nature to cause death. The distinction is fine, but appreciable.

The third clause of S. 300 can be invoked only if the intended bodily injury is sufficient in the ordinary course of nature to cause death.

Where the accused used a stick 3½ feet in length and 3 inches in diameter to beat the deceased on his head causing serious injuries both external and internal including fracture of the skull resulting in compression of the brain and also used a knife to chop off the victim's nose when he fell on the ground :

Held, that the accused intended to cause bodily injury sufficient in the ordinary course of nature to cause death. The serious wounds caused in the vital part of the body of the deceased were also sufficient in the ordinary course of nature to cause death. The accused was therefore guilty of murder. **1955 Andh W R 130: 1955 Cri L J 329: AIR 1955 Andhra 24 (25, 26) (Pt A) (Prs 4, 6) (DB).**

——S. 300 — Judge not explaining circumstances when an act, if it does not amount to murder, whether it amounts to culpable homicide not amounting to murder — Charge held amounted to misdirection— Plea of right of private defence — Burden lies on accused — See Criminal P. C. (1898), S. 297. **ILR (1955) 7 Assam 392.**

——Ss. 300 and 299 — Distinction between pointed out. See Penal Code (1860), S. 299. **1952 Cri L J 1366 : AIR 1952 Bhopal 25.**

——Ss. 300 and 299—Culpable homicide and murder — Distinction.

To cause death by an act intended to cause death is culpable homicide amounting to murder. To cause death by an act intended to cause a bodily injury which is known to the doer to be likely to cause the death of the person in question, or to cause death by an act intended to cause a bodily injury sufficient in the ordinary course of nature to cause death is culpable homicide amounting to murder. To cause death by an act known to be likely to cause death is culpable homicide; but it is not murder, unless the conduct is so imminently dangerous, that death, or a bodily injury likely to cause death, must in all probability occur. Wherever, however, culpable homicide, amounts to murder, it is reduced to culpable homicide if it falls within one or other of the Exceptions to S. 300. **1959 Mad W N 215 : 1959 Cri L J 993 : AIR 1959 Mad 323 (326, 327) (Pt B) (Prs 21, 23 to 25) (DB).**

——S. 300 — Applicability — Distinction between murder and culpable homicide not amounting to murder in border line cases pointed out. See Penal Code (1860), S. 34. **AIR 1955 NUC (Pat) 452 (DB).**

——Ss. 300, 304 — Applicability — Offence when amounts to one under S. 304.

The Penal Code recognises no exception to a case of murder than the five exceptions enacted in S. 300 and no Court will be justified in reducing a crime of murder into one of culpable homicide not amounting to murder without advertence to those exceptions. **1954 Ker L T 206 : 1954 Cri L J 1181 : AIR 1954 Trav-Co 396 (398) (Pt B) (Pr 9) (DB).**

15. Murder and culpable homicide not amounting to murder — Illustrative cases.

See also Penal Code (1860), S. 304.

——Ss. 300, 86, 302 and 304, Part II — Offence of murder under influence of drink — No evidence to show accused's incapacity to form requisite intention — Offence is one under S. 302 and not S. 304, Part II. See Penal Code (1860), S. 86. 1956 Cri L J 919 (2) : AIR 1956 S C 488.

——Ss. 300, 302 and 304, Part 2 —Offence held fell under S. 304 and Part 2. Chamra Budhwa v. State of Madh. Pra., 1954 Cri L J 1676 : AIR 1954 S C 652 (653) (Prs 4, 5).

——S. 300 — Rash and negligent act resulting in death of a person — Sentence — A, a mahant going to house of B who was having drinking party — B, over-anxious to show hospitability to A — B anxious that A should not go away without taking meals and spending night with him — A seen going away — B letting go his gun without aiming but only to terrify him to deter him from leaving — A hit in chest — A later on dying of the wound — That B had any intention of firing at A held not proved — B's act held was rash and negligent or at worst amounted to manslaughter—No offence of murder held constituted — Offence held one under S. 304-A — Sentence to imprisonment already undergone awarded. See Penal Code (1860), S. 304 A. 1954 Cri L J 727 : AIR 1954 S C 271.

——S. 300 — Applicability — Injuries caused in fight — Absence of intention to cause death No intention to cause such bodily injury as was likely to cause death — Offence indicated. See Penal Code (1860), S. 304. 1959 All L J 340.

——Ss, 300. 302 and 304 — Applicability — Accused dealing only one lathi blow in sudden quarrel on head of deceased who was unarmed — Death — Murder or culpable homicide. 1959Cri L J 158 : AIR 1959 All 131 (132, 133) (Prs 6 to 9).

——S. 300 — Sections 300 and 146, applicability — Rescue of cattle lawfully taken to pound — Injury caused in commission of common object — Death — Accused held guilty of offence under S. 24, Cattle Trespass Act and Ss. 147 and 323, Penal Code read with Ss. 149 and 34, Penal Code — One of persons injured seriously on head and dying within few hours — Held, 3rd para. of S. 300 applied and that none of the exceptions applied — Act of killing amounted to murder under S. 302 and not an offence under S. 304. See Penal Code (1860), S. 146. 1958 Cri L J 588 : AIR 1958 All 348 (DB).

——Ss. 300, 304 — Violent lathi blows on vital part of body — Death ensued — Attacker to be charged under S. 302 and not under S. 304. AIR 1955 NUC (All) 1496.

——Ss. 300, 304, 149—Attack by members of unlawful assembly resulting in death of victim — Medical officer deposing that only two out of 43 injuries had caused death — Prosecution failing to elicit whether the two injuries were sufficient in ordinary course of nature to cause death — Only offence under S. 304 is proved and not one under S. 300.

Where, in a trial for offences under S. 302 read with S. 149, the accused are charged with having caused the death of a person by attacking him with sticks and other weapons, the Medical Officer, while deposing about the 43 injuries found on the person of the deceased, at first deposes that all the injuries were responsible for the death but subsequently admits, during his cross-examination, that only two of the injuries had caused the death and that the other injuries had nothing to do with the result and the prosecution fails to elicit specifically from him during re-examination the fact that the two injuries

were sufficient in the ordinary course of nature to cause death and leaves that fact only to be inferred from the fact that the deceased died within four hours after he received the injuries and there is no knowing as to whether there was any other contributory cause, it cannot be held that the higher decree of probability required by S. 300 is established The injuries are proved to be only likely to cause death and the offence committed by the unlawful assembly against the deceased would be punishable under S. 304 only. **ILR (1962) Andh Pra 313 : 1963 (2) Cri L J 70 (74) (Pt E) (Pr 16) (Andh Pra) (DB).**

——Ss 300 and 304, Part 2 — Sudden quarrel — Unarmed person stabbed in chest — Victim dying in a few hours — Offence held murder and not culpable homicide not amounting to murder — Accused drunk at the time — Does not affect nature of the offence. **1958 Andh L T 920.**

——Ss. 300, 304, 302 — Sudden fight between young boys—Accused stabbing deceased without premeditation—Offence is one under Part I of S. 304. In view of the fact that accused was a young boy of about 17 years, having no criminal tendencies, sentence of 4 years R I. would meet ends of justice. See Penal Code (1860) S 304. **1956 Cri L J 503 (2) : AIR 1956 Bom 267 (DB).**

——Ss. 300, 304 — P causing injuries to Q likely to cause death—Q operated on and dying after operation —Injuries not immediate cause of death in medical sense—P still must be deemed to have caused death of Q. **(1961) 2 Guj L R 716 : 1962 (1) Cr L J 609 : AIR 1962 Guj 77 (77) (Pr 1) (DB).**

——S. 300, Exception 2—Applicability—First attack on deceased followed by another after some time—Accused found to have acted in private defence in course of first incident and acquitted of charge under S. 302—Evidence indicating that injuries inflicted in the first incident were sufficient to cause death—Charge under S. 304, Second part — Validity if considered. See Penal Code (1860), S. 302. **1960 Ker L J 546.**

——S. 300, S. 304 and S. 96—Applicability — Omission to plead right of private defence — Murder or culpable homicide.

The fact that the accused does not specifically plead the right of self-defence should not influence the Court in concluding that the plea of self-defence was not available to the accused to any degree.

Where the circumstances which led up to the infliction of the fatal stab on the deceased showed that the accused had reason to apprehend some danger to his body at the hands of the deceased and his brother:

Held, that there was no gainsaying that the accused exceeded the right the law gave him, but it was without premeditation and in the lawfully drunken state the accused was it could not be predicated that he intended to cause more harm than was necessary for the purpose of defence. At the same time it could not be said that he did not intend to cause such bodily injury as was likely to cause death. The offence committed against the deceased would in the circumstances amount only to an offence of culpable homicide not amounting to murder falling within the first part of S 304. I P. Code and not of murder under S. 302. **1957 Ker L T 278 : 1957 Cr L J 615 : 1957 Ker L J 369 : AIR 1957 Ker 53 (54) (Pr 4) (DB).**

——Ss. 300 and 304, Part I—Offence at night time — Arrow striking deceased on ribs — Spleen penetrated causing death — Accused drunk — No evidence of accused having selected place of injury — Intention to cause bodily injury which was likely to cause death — Offence falls under S. 304, Part I and not S. 302. **1956 Madh B L J 715 : Madh B L R 1956 Cr 136 : 1956 Cr L J 1410 : AIR 1956 Madh B 271 (272) (Prs 13, 14) (DB).**

——Ss 300 and 304 (2) — Applicability — Boy of 15 years shooting arrow at deceased without any intention to kill — Boy extremely careless and drunk—Deceased dying — Offence held did not fall under S. 300 but under S. 304, Part 2. **AIR 1955 N U C (Madh B) 3855 (DB).**

——Ss 300 and 304—Applicability—Accused bearing ill-will against deceased discharging arrow towards deceased while the deceased was running—Arrow piercing throat of deceased and causing his death—Accused held guilty under S 302 and not under S. 304 **AIR 1955 N U C (Madh B) 3730.**

——S. 300 — Accused beating wife — Death of wife—Meningial artery in brain ruptured and death due to haemorrhage in brain — No intention to cause death—Accused should be taken to know that injuries were likely to cause death — Accused held guilty under S. 304. See Penal Code (1860), S. 304. **Madh B L J 1955 H C R 1532.**

——Ss 300, 304—Applicability.

Where the handkerchief was stuffed into the mouth of the deceased in order to silence her and the female died due to suffocation before the offender could commence sexual intercourse, it cannot be said that the natural consequences of behaving in this way is definitely death. Though the conduct of the offender was most reprehensible and constituted a criminal offence, yet he cannot be saddled with the intention or knowledge, necessary to constitute an offence under S 302 The most that can be said then is that the offender must be presumed to have known that he was likely in so doing to cause her death He is, therefore, guilty of culpable homicide not amounting to murder. The conviction under S 302, Penal Code and the death sentence should be set aside and a conviction should be recorded under S. 304. AIR 1918 Mad 651. Rel. on. **1952 Cri L J 1261 : AIR 1952 Madh B 25 (27, 28) (Pt A) (Prs 10, 18) (DB).**

——Ss. 300 and 304—Death caused as result of peritonitis caused in consequence of deep abdominal injury inflicted by means of deadly weapon brought by accused with him with intention of attacking victim - Offence falls under S. 302—S. 304 has no application.

In deciding whether the offence committed falls under section 302 or section 304, I. P. Code an intervening cause or complication is, by itself, not of such significance, what is significant is whether that is only a remote possibility or which itself occurs in due course. In a case, therefore, where a deep abdominal injury caused by means of a deadly weapon which comes to the hands of the accused, not by accidentally picking it up at the moment nearabout the incident, but brought by him with the intention of attacking the victim, and the victim succumbs as a result of acute peritonitis which itself is the natural consequence of the stab injury, the intervening cause which results in death can be said to be a practical certainty of the injury; and in such a case the offence committed falls under the second category and is covered by S 302, and not one under S. 304, I. P. C. AIR 1956 S C 116, Dist. **1962 M P L J (Notes) 12 : 1962 Jab L J 1414 : (1962) 2 Cri L J 195 : AIR 1962 Madh Pra 244 (245) (Prs 5, 7, 8) (DB).**

——Ss 300 and 304 (1)—Grave and sudden provocation—Mere abuses — Blow not premeditated — Blow severe—Person dying in single blow of lathi—Offence under S. 304 (1), made out.

The appellant struck one blow on the head of the deceased resulting in his death. The deceased had abused the appellant who was inside his house. The

appellant came out and objected to the abuses and challenged the deceased. The deceased wanted to meet the challenge. There were injuries on the knuckles of the appellant. The appellant was convicted under S. 302, I. P. Code.

Held, that mere abuses did not constitute any grave and sudden provocation as contemplated by Exception 1 to S. 300, I. P. Code. The injuries to the appellant showed that it was not improbable that the deceased also had used violence towards the appellant. It was thus a case of sudden fight without premediation and the appellant acted in the heat of passion on a sudden quarrel. He did not take undue advantage and did not act in a cruel and unusual manner, since only one blow was struck on the head of the deceased. Exception 4 to S. 300, I. P. Code would be attracted. There could also be no doubt, looking to the force with which the blow was struck and that too on the vital part of the body, that the appellant intended to cause injuries sufficient in the ordinary course of nature to result in death. Because Exception 4 was attracted, the offence would be one under S. 304 (1), I. P. Code. **1962 M P L J (Notes) 69.**

——Ss. 300 and 304 — Applicability — Absence of intention to kill — Sudden attack—Offence.

The accused on reaching his home did not find his wife there. He, therefore, went to his brother's house where he found his wife On his wife's refusal to accompany him he stabbed her as a result of which she subsequently died There was nothing to indicate that the accused had gone prepared to kill his wife and had armed himself with a knife for that purpose. The attack was sudden and consequent to the refusal of the wife to accompany the accused to his house. No motive adequate to lead to the conclusion that the accused had an intention to kill his wife had been proved. The evidence of the doctor who had conducted the post mortem examination was silent on the question whether the accused intended to cause such bodily injury as he knew to be likely to cause death or such as was sufficient in the ordinary course of nature to cause death.

Held, that the accused was not guilty under S. 302, Penal Code. He was guilty of the offence of culpable homicide not amounting to murder punishable under S. 304, Penal Code. **1959 M P L J (Notes) 228.**

——Ss. 300, 301, 304, Paras 1, 452 and 148 — Applicability — A and his companions armed with lathis and dagger trying to take away A's wife — A striking dagger in his daughter's abdomen in scuffle—Death — Offence—S. 148.

Held, that to establish the offence of murder it is not sufficient that the injury inflicted was in the ordinary course of nature sufficient to cause death; it must further be proved that the assailant intended to cause an injury of this kind. There being no evidence of this intention, A the accused must be held guilty of the offence of culpable homicide not amounting to murder under para 1 of S. 304, I. P. C. and not of murder under S. 302, I. P. C. (2) That even if the blow was not aimed at C the daughter of A but at B, A's wife, the accused A would still be guilty of the offence of culpable homicide not amounting to murder by virtue of S. 301, I. P. C. (3) That there being no evidence to indicate that the accused entered the house with the intention necessary to constitute a criminal trespass and that he entered the house after having made a preparation to assault his wife B, A's conviction under Ss. 452 and 148, I. P. C. must be set aside. **1957 M P C 370 : 1957 Jab L J 773:1957 Cri L J 1405 (2) : AIR 1957 Madh Pra 217 (218, 219) (Prs 3 to 5) (DB).**

——S. 300 — Sudden fight — No premeditation — Rude behaviour of accused — Quarrel ensued — Accused inflicting fatal injury and also receiving injuries — Conviction, held should be altered from one under S. 302 to one under S. 304.

Held, on facts that the act of the accused came under Exception 4 of S. 300 and that he could only be held guilty of culpable homicide not amounting to murder punishable under S. 304 and not of murder punishable under S. 302: AIR 1957 S C 324 and AIR 1957 S C 469, Foll. **(1964) 1 Mys L J 543 : 1965 (2) Cri L J 288 (292) (Pt B) (Prs 11, 12) (Mys) (DB).**

——Ss. 300, Exception 1 and 304—Large number of injuries on both parties to quarrel — Deceased suffering fatal injury in course of quarrel—Failure on part of prosecution to explain injuries suffered by accused —Held on evidence of eye-witnesses read with evidence of doctor that grave and sudden provocation on part of accused was proved. (1965) 7 OJD 179 : 31 Cut L T 67.

——Ss. 300, 304 — Applicability — No premeditated plan for the murder, but it was the result of a sudden quarrel on the spur of the moment and in a fit of temper the accused persons assaulted the deceased to death — The case clearly came within the purview of S. 304, Part II and not under S. 302. ILR (1962) Cut 366 : (1962) 4 O J D 156: 1964 (2) Cri L J 487 (492) (Pt I) (Pr 15) (Orissa) (DB).

——Ss. 300, 302, 304 — Applicability — Blow with ordinary force with a faggot on forehead causing fracture of the frontal bone — Accused held guilty under S. 304, Part II and not under S. 302.

The accused as soon as he picked up the half-burnt faggot took care to extinguish it by rubbing it on the ground and he dealt the blow on the forehead of the deceased with ordinary force causing a fracture of the frontal bone to an extent of 4" vertically upwards.

Held that this indicated that he did not intend to fracture the skull of the victim, though it might be reasonably inferred that the accused knew that by giving such a blow on the forehead of a person with such a weapon he was likely to cause such an injury as might result in the death of the victim. The case would therefore more appropriately come within the scope of Part II of S. 304 than under S. 302. **(1963) 5 Ori J D 42 : (1964) 30 Cut L T 59 (Ori).**

——Ss. 300, 299, 304, Part I and S. 34 — Scope of three clauses of S. 300—Intention or knowledge a necessary ingredient of these clauses — Applicability of fourth clause—Wounds made on hands and feet and bhujali — Death of deceased in hospital — Offence committed held was one under S. 299 and not under S. 300 — Accused was punishable under S. 304, Part I, and his assistants under that section read with S. 34.

In the first three clauses of S. 300, Penal Code, intention or knowledge is the essential ingredient, in absence of which the act will not be murder. The 4th clause contemplates the doing of an imminently dangerous act in general, and not the doing of any bodily harm to any particular individual. In case of intentionally causing bodily injury to a particular person, the question whether such an act is murder has to be decided with reference to the first three clauses of S. 300. The fourth clause is designed to provide for rare class of cases, like putting, by act done, in jeopardy lives of many persons as envisaged in illustration (d) of the section and the like.

Held on facts. (1) that owing to the inconclusive nature of the medical evidence it was not possible to hold with any precision that the injuries in question were inflicted on the deceased either with the intention of causing his death or of causing such bodily injuries as were sufficient in the ordinary course of nature to cause death, or with the knowledge that they were likely to cause his death: (2) that the first three

clauses of S. 300 were not attracted, but the act of the third accused was covered by the second part of S. 299, namely, the doing of an act with the intention of causing such bodily injury as is likely to cause death; (3) the trial Court was in the wrong to have taken the aid of the fourth clause of S. 300 when the other three clauses did not suit the circumstances of the the case; (4) that the offence found to have been committed in this case by the third accused was not the offence of murder falling under any of the four clauses of S. 300, but it was an offence of culpable homicide not amounting to murder falling under the second part of S. 299 and punishable under S. 304, Part I of the Penal Code; (5) that the first and second accused were guilty under S. 304, Part I, read with S. 34 of the Code. 1964 (2) Cri L J 171: 1963 B L J R 384 : AIR 1964 Pat 334 (337, 338) (Prs 22, 23, 25) (DB).

——S. 300 — Accused, a person belonging to backward tribe of Chotanagpur inflicting a tangi blow on his nephew believing him to be a wizard — No intention to cause death — Nephew surviving for several hours after assault but ultimately succumbing — Offence comes under S. 304, Part II and not under S. 302 — Sentence altered from rigorous imprisonment for life to that for five years. See Penal Code (1860), S. 304, Part II. 1961 B L J R 513.

——S. 303 — Applicability — Offence held murder. AIR 1955 N U C (Pepsu) 3281 (DB).

——Ss. 300 and 304, Part II—Intention.

It is no doubt true that a person must normally be presumed to intend the result that his action produces; but this intention is to be judged by his acts in relation to the surrounding circumstances.

It appeared that the accused, a young lad in his teens, was provoked by the deceased, his mother, and the lad reacted suddenly to that provocation. The kulhari which is commonly found with the villagers happened to lie close by. He picked it up and struck a blow which landed on her head. There was no motive for the accused to kill his mother. The whole affair was sudden and unpremeditated. The blow proved fatal and the mother died of the injury caused by the blow :

Held, on the circumstances of the case that the accused was not possessed of an intention either to kill or to cause a fatal injury to his mother but he knew that a blow on the head with a weapon like kulhari was likely to cause death and that the offence committed by the accused fell not under S. 302 but under S. 304, Part II. Case-law Ref. 1953 Cri L J 1878 : ILR (1953) Patiala 151 : AIR 1954 Pepsu 10 (13) (Prs 12, 13) (DB).

——S. 300—Applicability — Bitter enmity between accused and deceased — Accused inflicting as many as seventeen injuries on deceased out of which eight were on head — Death due to shock and internal haemorrhage — Accused throwing body in a well — Accused using blunt sides of weapons. Held, that in the circumstances the offence was one under S. 304, Part 2 and not one under S. 302. See Penal Code (1860), S. 299. 1953 Cri L J 1815 : AIR 1953 Punj 262 (DB).

——Ss. 300, 304—Intention to cause death.

After a quarrel at a well between A and B and C, B and C arrived at the spot armed with dangs. There was an exchange of abuse and blows were given by B and C. C's blows fell on A's head which resulted in A's death. B was tried separately and acquitted. C was tried, convicted under S. 302, Penal Code and was sentenced to transportation for life. In the appeal by C,

Held, that in the circumstances of this case the intention was one to give a beating and not necessarily to kill. The offence would therefore fall under S. 304, Part II. The sentence was therefore reduced to five years' rigorous imprisonment. 1953 Cri L J 1805 : AIR 1953 Punj 261 (261) (Pr 3) (DB).

——Ss. 300 and 304—Applicability.

Where there was a great deal of ill-will between the parties and the deceased had intervened when other fighters were grappling with each other.

Held, that the circumstances took the case out of offence of murder and came only under S. 304, Part II. 1953 Cri L J 1642 : AIR 1953 Punj 241 (242) (Pr 3) (DB).

——S. 300—Circumstantial evidence—Death by throttling—Simulation of ligature mark to give false appearance of crime — Knowledge that in all probability death would be caused by throttling not likely — Offence — Murder or culpable homicide not amounting to murder. 1964 Raj L W 279.

——Ss. 300, 302 and 304 second part — Quarrel between two brothers over food—Accused acting impulsively and inflicting blow with sharp weapon on vital part of body causing death—Offence falls under S. 302—Trial Court convicting accused under S. 304, Second Part—No rule for enhancement issued—Conviction not altered to S. 302.

Intention is what intention does. If with a four pronged instrument a blow was inflicted on a vital part of the body and according to the doctor each one of those injuries was sufficient in the ordinary course of nature to cause the death, then surely the intention of causing such bodily injury as the offender knew was likely to cause death or was sufficient in the ordinary course of nature to cause death would be attributed to the accused.

Where the quarrel ensued between two brothers regarding some food and the accused who was a young man lost his temper and inflicted a chowkani blow on the chest of his brother resulting in death.

Held, that though it was a case of murder, and as the trial Court assumed that the offence fell under the second part of S. 304 and there was no rule for enhancement of that finding, it was not necessary to alter the conviction to S. 302. 1962 Raj L W 55 : ILR (1961) 11 Raj 1091.

——Ss. 300 and 304, Part 2 — Scope — Offence held fell under S. 304, Para 2. AIR 1955 NUC (Raj) 267.

——Ss. 300, 302 and 304 — Murder — Evidence of quarrels between accused and deceased about woman —No evidence of threat uttered by accused to murder deceased — Lathi used as weapon and only three blows inflicted — Held that accused should properly be convicted under S. 304 and not under S. 302. 1952 Raj L W 20 : ILR (1951) 1 Raj 718 (DB).

——Ss. 300, 304 — Applicability — Deliberate and cold-blooded cutting of throat — Offence.

Where the accused in order to rob a person of his ornaments throws him on the ground and cuts his throat from ear to ear with a razor, of which wound the person dies subsequently and the ornaments and the razor are recovered from the accused and further the evidence shows that the offence committed is deliberate and is not a result of an action on the spur of the moment.

Held, that judging from the nature of the injury there was no doubt that the offence committed is one of murder and not of culpable homicide. 1956 Cri L J 1240 : AIR 1956 Sau 83 (87) (Pt C) (Pr 11) (DB).

——S. 300 — Exceeding right of private defence — Attack by B followed by tussle with deceased — Deceased gripping his armed hand in order to save himself — Fatal stab attack by A while tussle still going on—Conviction of A under S. 304, Part I — If proper. See Penal Code (1860), S. 97. I L R (1956) Trav-Co 615.

16. Murder or hurt.

—Ss. 300 and 326—Illegal seizure of cattle purporting to be under S 10, Cattle Trespass Act—Does not amount to theft—Owner of cattle has no right to use force to rescue them—Persons seizing cattle held committed no offence in resisting attack by owner's party with arms and lathis. See Cattle Trespass Act (1871), S. 10. 1965 (2) Cri L J 18 : AIR 1965 SC 926.

—Ss. 300 and 34—Conviction for murder—Common intention.

Even where it is true that the appellant convicted under S. 302 read with S 34, Penal Code did not inflict any blow on the deceased yet if it is found that he shared the common intention to kill him and actually participated in the criminal Act by being present on the spot armed with his lathi, then in the eye of the law, he is as much guilty of the whole criminal act as is his co-accused who actually dealt the fatal blow on the sleeping man. Rishideo Pande v. State of Uttar Pradesh, 1955 Cri L J 873 : A I R 1955 SC 331 (333) (Pt C) (Pr 4).

—S. 300 - Applicability—Held on facts that common intention to kill the deceased could not be attributed to the three accused — Only common intention that could be attributed was only to beat the deceased with weapons in their hands which were likely to produce grievous hurt — All the three accused were guilty in respect of assault on the deceased for an offence under S. 326, while B one of the accused alone has guilty of offence under S. 302. See Penal Code (1860), S. 34. 1954 Cri L J 178 : AIR 1954 SC 706.

—S. 300 — Accused knowingly and intentionally throwing corrosive acid on deceased — Inference is that it was done to cause such bodily injury as is likely to cause death — Acid thrown when deceased was sleeping — Accused having motive of revenge against deceased — Previous attempts to put deceased out of her way — Act of throwing acid not sudden or at spur of movement or heat of passion — Offence held fell under S. 302 and not S 326 Nature of offence under S. 326, indicated. See Penal Code (1860), S. 302. ILR (1958) 2 All 698.

—Ss. 300, 304 and 323—Applicability—Beating with stick with object of chastisement—No intention or apprehension of death - Offence.

Accused A 1 and A-2, the father-in-law and husband respectively of the deceased, finding her with a man in their house, beat her with a stick on her buttocks and thighs which are not the fatal parts of the body. Their idea was only to chastise her and there was no intention to kill her and she had also taken her meals 2 or 3 hours before her death.

Held, that having regard to the injuries found on the person of the deceased and the circumstances justifying the chastisement, S 302, Penal Code or 304, Penal Code would not be applicable, and that they would be liable only under S 323 Penal Code for a simple hurt. (1960) 1 Andh W R 305 : 1960 M L J (Cri) 256 : 1960 An L T 304 : 1961 (1) Cri L J 219 : ILR (1960) 1 Andh Pra 411 : AIR 1961 Andh Pra 79 (85) (Pt C) (Pr 21) (DB).

—Ss. 300, 4thly Illus. (d) 302 and 326 — Accused firing with revolver near the ground where there was a group of persons — No premeditation or intention or knowledge of likelihood of causing death proved—Accused held guilty under S. 326 and not under S. 302. ILR (1959) Andh Pra 797.

—Ss. 300, 34, 324, 326 - Applicability — Attack by three persons with sticks and one with spear—Death due to all injuries taken together—Offence.

Two persons were attacked by four persons, three, armed with heavy sticks and one with spear. All of them inflicted several injuries resulting in the death of the two There was no evidence to disclose which injury was caused by which of the accused. The medical evidence was that the deaths of the deceased were due to all the injuries sustained by each of them, taken together It was impossible from the evidence to gather whether anything less than all the injuries together would have caused death nor to ascribe any particular injury to any particular accused except that all the incised wounds must have been caused by the 4th accused.

Held, that in this state of the evidence, it was impossible to convict any one of the accused of murder simpliciter under S. 302, Penal Code. AIR 1953 SC 364, Rel. on. (2) That as S 34, Penal Code was not invoked in the charges under S. 302, framed against the accused the Court was not justified in making each of the accused liable for the effect of their co-joint action. (3). That the fourth accused alone being responsible for an incised wound resulting a grievous hurt was punishable under S. 326, Penal Code (4) That accused 1 to 3 should be given the benefit of the doubt as to which of them caused grievous hurt to the 1st deceased. But the sticks with which they were armed being undoubtedly deadly weapons they were guilty of an offence punishable under S. 324, Penal Code. 1956 Andhra W R 369.

—Ss. 300 and 326 —Applicability—Absence of post mortem examination—Injury on deceased severe one and one in nature of endangering life—Post mortem not possible due to custom not allowing anybody to touch dead body some days - Possibility that death might have been caused by blow inflicted by accused but not certainty—Conviction altered to one under S. 326. AIR 1955 NUC (Assam) 2852 (DB).

—Ss. 300, 321 Accused beating wife with bamboo stick and causing two abrasion injuries on her chest—Death of wife due to rupture of spleen—Accused not aware of enlarged spleen - Offence under S. 323 and not S 304 held committed.

Where the injuries caused to a person are not such as are likely to cause death, it is not a case of culpable homicide Where the accused beat his wife with a bamboo stick and inflicted two abrasion injuries on her chest and the wife died short time afterwards of the rupture of enlarged spleen, and there was no evidence that the accused was aware of the existence of enlarged spleen and nor was there any medical evidence to show that the death was the result of abrasions, the accused must be held to have beat his wife without intending to cause her death or without intending to cause such bodily injury as was likely to cause her death.

(Conviction under S. 304 altered to one under S. 323 and sentence of 7 years rigourous imprisonment reduced to 6 months.) 1952 Cri L J 997 : AIR 1952 Assam 110 (111) (Pr 5) (DB).

—Ss 300 and 326—Applicability.

Where the accused fired a gun at the deceased causing wound in the abdomen but there is no medical evidence that injury was the cause of death, conviction under S. 326 and not under S. 302 is proper. 10 J & K L R 1 : 1954 Cri L J 505 : AIR 1954 J & K 19 (21) (Pt D) (Pr 10) (DB).

—S. 300—Applicability.— Accused aged 16 years and deceased studying in 6th standard — Boyish quarrel — Accused hitting deceased with granite stone on temple — Death of deceased—Injury sufficient in ordinary course of nature to cause death — Only intention which accused could have had was to give a good blow to deceased as he entertained a grudge against him — Offence was of committing grievous hurt falling under 7th category of S. 320 and considering the weapon, offence held fell under under S. 326 — Accused not entitled to benefit of

S. 399, Criminal P. C.—Sentence of five years R I. would meet ends of justice. See Penal Code (1860), S. 323. 1960 Cri L J 1213 : AIR 1960 Ker 301 (DB).

——Ss. 300 and 302 — Accused persons attacking deceased with sticks indiscriminately and one of them hitting him on head Accused guilty under S 325 and not under S 302. 51 Cri L J 363 : AIR 1950 Kutch 2 (3, 4) (Pt C) (Pr 9).

——Ss. 300, 326—Accused held, on evidence, not guilty under S 302 but under 326.

Held, that evidence clearly indicated that immediately after the injuries inflicted upon deceased, another person who appeared on the scene and applied tincture iodine to these deep bleeding wounds. Within a short time thereafter Chena died The medical witness had stated that tincture iodine if applied to such wound it is sure to result in death due to irritation caused Whatever may be the reason for this sort of uncertainty about the evidence the benefit of that must go to the accused.

In taking stock of the entire evidence, oral and circumstantial, there was enough material to hold that the accused Dhulji caused injuries with a sharp pointed and edged weapon upon back and neck of the deceased but it was not enough to hold him guilty under S. 302, Penal Code. The injury on the neck was grievous. Therefore, he was liable to be convicted for an offence under S. 326, Penal Code instead of S. 302, Penal Code. 1956 MBLJ 534 : Madh BLR 1956 (Cri) 94.

——Ss. 300 and 325—Applicability—Sudden quarrel under influence of liquor No intention to kill — Nature of offence committed — Offence is under S. 325. AIR 1955 NUC (Madh B) 5627 (DB).

——S. 300—Applicability—Accused beating deceased with sticks without pre-meditation—Deceased falling down and later on dying—Injuries sustained simple and caused on scapula back and buttocks—Accused held were guilty under S. 323 and not under S. 304/34 or under S. 302 See Penal Code (1860), S. 323. AIR 1955 NUC (Madh B) 2113.

——S. 300—According to evidence of eye witnesses, the deceased was surrounded by four persons and beaten by them with lathis - Death of deceased — According to evidence, deceased sustaining injuries on head, temple, neck and back—Injuries bleeding — Body of deceased in advance stage of decomposition, at time of post mortem examination — Evidence of injuries not corroborated by medical evidence—Whether skull or any other bone was fractured not detectable — Codition of vital organs not known —Accused held could not be found guilty under S. 302—Accused convicted under S. 323—See Penal Code (1860), S. 323. MBLJ 1955 HCR 1329.

——Ss. 300 and 325—Accused hanging his wife rendered unconscious by blows believing she was dead and to make it appear to be a case of suicide Injuries caused by blows not serious enough to cause death — Death due to asphyxiation caused by the hanging—Offence.

A husband in a quarrel with his wife dealt her two blows on the head as a result of which she became unconscious. Imagining her to be dead, he wanted to erase the fact of his having given her blows and therefore he tied a rope round her neck and hung her to a beam to create the impression on others that she had committed suicide. The medical evidence proved that the injuries on her were not serious enough to have killed her and that she should have only died of asphyxiation by the tying of the rope round her neck. In the circumstances.

Held, that the charge and conviction for transportation for murder under S. 302, Indian Penal Code, was not sustainable and that the accused should be only convicted under S. 325, Indian Penal Code and as such, punishable with rigorous imprisonment for seven years. (1952) 2 M L J 550 : 1952 Mad W N 779 : 1952 Mad W N (Cri) 227 : 54 Cri L J 449 : AIR 1953 Mad 239 (239) (Pr 6) (DB).

——Ss. 300 and 328 — Accused pouring out of bottle arsenic poison into food - Person dying — Accused having no knowledge of real contents of bottle - Accused mere tool in hands of others — Accused held could not be convicted of murder — Accused held could properly be convicted under S 328. (1952) 2 Mad L J 62 : 1952 Mad W N 974 : 1952 Mad W N (Cri) 286 : 1952 Cri L J 1150 : AIR 1952 Mad 535 (538) (Pt C) (Prs 10, 12a) (DB).

——Ss. 300, 326—Accused dealing blow on forehead of deceased with dao (sharp cutting instrument) — Deceased fully conscious for 4 days and then collapsing—Disagreement between doctors whether injury was fatal—Offence fallas under S. 328 and not under S. 302 — Sentence of 4 years R. I. held sufficient to meet ends of justice. 1963 (2) Cr L J 592 (595) (Prs 12, 15) (Manipur).

——Ss. 300, 326, 149—Absence of evidence of doctor or post-mortem certificate—Not possible for Court to infer whether injury in question to skull would have been sufficient in the ordinary course to cause the death — Conviction of accused only for offence of causing grievous injury with deadly weapon, considered safe. (1964) 1 Mys L J 393 (DB).

——Ss. 300 and 323 — Applicability — Accused only beating deceased — Injuries not caused by accused — Accused could not be convicted only under S. 323. AIR 1955 NUC (Nag) 3956 (DB).

——Ss. 300, 320—Murder or grievous hurt—Injuries developing into gangrene — Death, natural consequence of gangrene — Offender must be deemed to be responsible for death — Plea of grievous hurt cannot be raised.

Where the medical evidence was clear to the effect that gangrene was itself the result of two injuries suffered by the deceased, the offender must be deemed to be responsible not only for causing gangrene but also for death which is its natural consequence. The offender cannot contend that it was no more than a case of grievous hurt, inasmuch as the death of the deceased was postponed and, in the meantime, gangrene supervened. 1964 (1) Cri L J 426 : AIR 1964 Pat 158 (158) (Pt A) (Pr 10) (DB).

——Ss. 300 and 326 & 34—Miscellaneous

When the evidence fell short of showing that the two accused had entered into a plan to bring about the murder and it was impossible for accused A to appreciate or realise the weight and magnitude of the strokes which were being inflicted by the other accused B, it could not be held that A had the intention of committing the murder or he knew that B had the intention of murdering the deceased. He could not therefore be convicted under S. 302/34. But since there were other injuries also which by themselves could prove fatal, the offence could not be less than an offence under S. 326/34, Penal Code. AIR 1948 P C 45, Distinguished; AIR 1945 P C 118, Applied. ILR 31 Pat 1037 : 1953 Cri L J 1809 : AIR 1953 Pat 394 (398) (Pt D) (Pr 14) (DB).

——Ss. 300, 304 and 325—Applicability—Altercation between parties — Violence resulting in death — Offence.

Where there was some altercation between the parties and in all probability hot words, possibly even abuses were exchanged, some kind of resort to violence between the parties was also imminent.

Held, that the blow to the deceased given by the accused in the circumstances, did not constitute an

offence under S. 302 or even under S. 304, Penal Code. Intention to cause grievous injury under S. 325 alone could be imputed to him. 1960 Cri L J 513 : I L R (1960) Punj 74 : AIR 1960 Punj 214 (216) (Pt B) (Pr 6) (DB).

——S. 300—Applicability—Assault by several persons armed with dangerous weapons — Death caused by one—Common object to cause murder, not established —Offence—Conviction of every one under S. 302 read with S. 149 is not proper — Proper section under which they could be convicted is S. 326 read with S. 149 and S. 307 did not apply. See Penal Code (1860), S. 149. 1957 Cri L J 1307 : AIR 1957 Punj 278 (DB).

——Ss. 300, 325—Sudden altercation between accused and deceased who had plucked sugarcane from accused's field — Accused inflicting on deceased two blows one of which causing rupture of spleen resulting in his death — Fact that deceased had an abnormally enlarged spleen not known to accused—Accused held guilty under S. 325 and not under S. 302 — Sentence reduced from four years R. I. to two years R. I. ('52) 54 Punj L R 153 : 1953 Cri L J 1190 : AIR 1953 Punj 173 (173, 174) (Prs 3, 4).

——S. 300 - Several accused beating deceased—No evidence who inflicted fatal blow—S. 34 not applicable—Accused held could only be convicted of offence under S. 324 and not S. 302. See Penal Code (1860), S. 324. 1952 Raj L W 387 : 1954 All W R (Supp) 1 : ILR (1952) 2 Raj 258.

——S. 300 — S. 316 does not apply to a case where act attributed to accused has resulted in death of pregnant woman — Obiter. See Penal Code (1860), S. 316. 1953 Cri L J 1551 : AIR 1953 Trav Co 374.

——Ss. 300, 325, 326—Accused inflicting injuries on body of victim in fit of anger — Injuries caused by piece of blunt stick to vital part — Consequent haemorrhage and collapse — Accused imagining victim to be dead hanging body to tree to suggest suicide — Death resulting from asphyxiation — Evidence not disclosing intention to kill when beating started — Accused is not guilty of murder under S. 301, Travancore Penal Code — Offence committed is one under S. 325, Penal Code and not under S. 326, Penal Code as stick used is not weapon falling within scope of latter section. 1950 Ker L T 657 : 52 Cri L J 871 : 1950 T C L R 570 : AIR 1951 Tra-Co 159 (160, 161) (Pt B) (Prs 5, 6) (DB).

17. Motive.

See also (1) Evidence Act (1872), S. 5.
(2) Penal Code (1860), S. 302.

●——S. 300—Motive for crime.

The motive behind a crime (in this case one punishable under S. 302, Penal Code) is a relevant fact of which evidence can be given. The absence of a motive is also a circustance which is relevant for assessing the evidence. The circumstances which prove the guilt of the accused are, however, not weakened at all by this fact that the motive has not been established. It often happens that only the culprit himself knows what moved him to a certain course of action. Rajinder Kumar v. State of Punjab, (1963) 2 S C J 418 : 1963 S C D 43 : 1963 Mad L J (Cri) 506 : 1963 S C R 281 : AIR 1966 SC 1322 (1324) (Pr 11).

●——S. 300 — Evidence — Motive — Murder of several boys — Overwhelming evidence to prove that accused committed murder — Speculation about motive which induced accused to murder innocent boys unnecessary. Nand Kumar v. State of Rajasthan, 1963 S C D 137 : (1963) 2 S C R 890 : (1963) 2 S C J 422 : 1963 M L J (Cri) 509 : 1963 (2) Cri L J 702 (706) (Pt D) (Pr 21) (S C).

●——S. 300—Motive—Accused charged with murder of his wife — Infatuation with another woman — Accused found to be oversexed — Obstacle of wife held to be sufficient motive.

Accused was charged under S. 302, Indian Penal Code, for the murder of his wife. He had illicit intimacy with another woman which fact was known to the wife who was opposing the accused. It appeared from the letters written by the accused to the woman that he was infatuated with her and was some what oversexed. He used to write in gross language expressing his sentiments about love, marriage and sex. On the question of motive for the murder,

Held, that to such a person the obstacle of a wife in the successful prosecution of an amour would be a motive sufficient for almost any purpose. Mathew v. State of Kerala, 1960 Ker L J 563 : 1960 Ker L T (S C) 1.

●——S. 300 — Motive — Evidence of previous bad conduct of accused — Relevancy discussed — See Evidence Act (1872), S. 54. 1957 Cri L J 325 : AIR 1957 S C 199.

●——S. 300 — Evidence — Motive.

Where it appeared that the accused had an eye on the handsome wife of the deceased and that he had already developed a liaison with her, it cannot be said that those circumstances were not sufficient motive for murdering the deceased. Sunder Singh v. State of Uttar Pradesh, 1956 Cri L J 801 : AIR 1956 S C 411 (415) (Pt E) (Pr 10).

——S. 300 — Motive — Weak motive cannot by itself lead to an inference adverse to prosecution — Evidence Act (1872), S. 5 — Motive — Evidence Act (1872), Ss. 5 and 114 — Absence of motive for committing murder — Inference — Evidence — Appreciation of Criminal P. C. (1898), S. 117. 1963 All L J 977.

——S. 300 — Motive not proved — Effect stated — See Evidence Act (1872), S. 5. 1957 Cri L J 337 : AIR 1957 All 177 (DB).

——S. 300 — Motive — Relevancy.

The question of motive may no doubt be irrelevant if there is direct evidence establishing the murder. But in weighing the evidece of the prosecution witnesses the motive has an important role to play. 1959 Andh L T 139 : 1959 Cri L J 689 : AIR 1959 Andh Pra 313 (314) (Pt A) (Pr 4).

——Ss. 300 and 40—Scope—Inadequacy of evidence of motive can only be regarded as a lamentable defect in the investigation by the Police and not as one militating against the prosecution story. 1956 Andh W R 369.

——S. 300 — Motive — Evidence of eye-witnesses coupled with admission of accused — Absence of evidence of motive is immaterial. AIR 1955 N U C (Assam) 2852 (DB).

——Ss. 300 and 120-A — Conspiracy — Murder — Persons suffering from social disabilities (Mahars or harijans) forming criminal conspiracy against establishment of Gram Panchayat which they thought was not beneficial to them — This is hardly a reason for forming criminal conspiracy and to carry out the object of the conspiracy by committing murder—See Penal Code (1860), S. 120-A. AIR 1957 Bom 226 (DB).

——S. 300 — Conviction — Motive — Evidentiary value.

Per Anna Chandy J.— Motive may not be very material in cases where there is enough of direct evidence, but in cases where there is not even an iota of legal evidence or a single telling circumstance, motive has vital part to play.

Per Govinda Menon J.— Motive by itself would not advance the prosecution case. 1963 Ker L T 292: 1963 Ker L J 369 : 1964 Mad L J (Cri) 347 : 1964 (1) Cri L J 493 (498) (Pt E) (Pr 15) (Ker) (DB).

——S. 300 — Conviction — Motive — Proof — Not essential when circumstances consistent with only guilt of accused.

Motive being a mental attitude is often difficult of proof. Absence of proof of motive or adequate motive is not fatal to the prosecution even in a case depending solely on circumstantial evidence. If the circumstances otherwise establish guilt, inability to prove motive or an adequate motive is not an impediment to a conviction.

Where the accused was convicted for murder of his children on the basis of the circumstantial evidence which fully established the charge and the circumstances were consistent only with the hypothesis of the guilt of the accused and did not leave any reasonable ground for concluding that they could also be consistent with the innocence of the accused, and the chain of circumstantial evidence was so complete as to leave no reasonable ground for escape to the accused, the accused was held to have been rightly convicted : AIR 1952 S C 343 ; AIR 1960 S C 800 ; (1854) 2 C and K 309 and (1911) 1 K B 988, Rel. on. 1963 Ker L J 228 : 1963 Ker L T 229 : 1964 Mad L J (Cri) 102.

——S. 300—Evidence—Case of murder purely based on circumstantial evidence — Motive for crime is of importance — Motive alleged by prosecution may mislead and vitiate appreciation of evidence if that is relied on before other evidence is discussed and appreciated — Criminal P. C. (1898), S. 367—Evidence Act (1872), S. 8. 1961 Ker L T 201.

——S. 300 — Motive — Importance of.

Inadequacy or absence of motive might not be very important in a case where the crime itself has been proved beyond doubt. But in case where the prosecution evidence does not bring out some suspicious circumstances against him, the existence of adequate motive is of the greatest importance. 1960 Ker L J 438 : 1960 Ker L T 510.

——S. 300 — Bitter feeling entertained by accused towards wife — Adequacy of motive for murder discussed — See Evidence Act (1872), S. 8. 1959 Ker L T 167 : 1959 Ker L J 221 : ILR (1959) Ker 319.

——S. 300 — Evidence of — Motive — Relevancy.

In a case of cruel and revolting murder, depending on circumstantial evidence and the testimony of an accomplice, motive assumes some importance. 1958 Ker L J 282 : 1958 Mad L J (Cri) 412 : 1958 Ker L T 181 : ILR (1958) Ker 420.

——S. 300 — Motive — Proof of motive for murder is not necessary where there is sufficient evidence of the commission of the offence. 52 Cri L J 278 : AIR 1951 Madh Bha 72 (74) (Pt C) (Pr 14) (DB).

——S. 300 — Murder — Evidence—Appreciation of — Motive.

Per Sharma J.— Persons who are about to commit a heinous offence like murder do not always act in a strictly rational manner. Only those motives could be brought to light which appeal in the conscious portion of the individual's psychic apparatus. The unconscious motives which not infrequently exert a greater dynamic influence on our actions remain unknown. That is why it is even impossible for the offender to give a really valid, casual explanation of his facts. 1964 Jab L J 10 : 1962 (2) Cri L J 672 (679) (Pt F) (Prs 49, 50) (Madh Pra) (DB).

——Ss. 300 and 302 — Reliable and direct evidence of murder available—Question of motive—Relevancy.

In a trial for murder under S. 302, Penal Code, where there is direct evidence of the commission of offence of a reliable character no question of motive can arise. This is subject to the consideration that the absence of motive may throw doubt on the truth of the direct evidence; but, if making all allowances for it the direct evidence can be trusted, the question of motive presents little difficulty. 1960 Mad W N 524 : 1960 All W R (Sup) 49 : 1960 All Cri R 279 : 1960 Cri L J 1622 : AIR 1960 Mad 533 (535) (Pr 17) (DB).

——Ss. 300, 40 — Murder — Proof — Circumstantial evidence - Importance of motive.

It is perfectly true that the law does not require that the elements of motive should be proved by the prosecution; criminals have been punished for apparently motiveless murders, upon proof of crime. But, in a case resting entirely upon the probabilities of circumstantial evidence it may be significant where the alleged motive also fails to fit the few circumstances actually established. 1960 Cri L J 1102 : 1960 Mad W N 512 : AIR 1960 Mad 370 (372) (Pt A) (Pr 9) (DB).

——S. 300 — Motive — Mere proof of motive not sufficient.

The evidence of motive which is frequently given in the cases of murder is of subsidiary importance. The mere fact that the accused had a motive to cause the death of the deceased is not a fact which will dispense with the proof of the other points namely that the accused had got a suitable immediate occasion for committing the crime and that he actually committed it. AIR 1933 All 394, Rel. on. 1955 Cri L J 139 : AIR 1955 Manipur 1 (5) (Pt A) (Pr 16).

——S. 300—Motive becomes important when cogent evidence to establish murder has not been given. AIR 1955 NUC (Manipur) 4549.

——S. 300 —Motive —Necessity of proof of, pointed out. (1965) 2 Law Rep 699 (Mys).

——S. 300—Motive—Relevancy of.

Motive is not a necessary ingredient of an offence. If evidence of motive is produced, it may support the prosecution in showing that the other substantial evidence on which an offence can be established is more probable. Hence the evidence of motive is one which helps the appreciation of evidence by showing whether the evidence could be more or less probable. There may be cases where the evidence is strong enough to sustain a conviction but where there may be little or no evidence in respect of motive or where the motive suggested may itself be very weak. 35 Mys L J 353 : 1957 All W R (Sup) 117 : (1957) Mad L J (Cri) 832 : 1958 Cri L J 529 : ILR (1957) Mys 159 : AIR 1958 Mys 48 (53) (Pt C) (Pr 16) (DB).

——S. 300—Motive—Enmity incurred by dispossessing accused of their lands — Accused aboriginal khonds—Motive for murder held was adequate.

The fact that there were a large number of cases, both civil and criminal, between the accused who were aboriginal khonds and the deceased coupled with the fact that ultimately the deceased succeeded in depriving the accused of his lands would be sufficient to incur bitter enmity of the khonds and would be a strong motive even for a non-aboriginal khond to assault the adversary. For an aboriginal khond, who should not be judged by standards applicable to men of the plains, the motive was certainly stronger. Similarly, where on the day, previous to the occurrence the other accused entreated the deceased to give him some land saying that he would otherwise starve, but the deceased gave evasive replies, the motive was sufficient for him to join in the murderous attack on the deceased. (1963) 5 Orissa J D

145 : 1964 (1) Cri L J 464 (465, 466) (Pt A) (Pr 7) (Orissa) (DB).

——S. 300 – Evidence of motive.

There is no burden of proof on the prosecution to establish the existence of any motive, ILR (1962) Cut 806 : 29 Cut L T 290 : 1963 (1) Cri L J 213 : AIR 1963 Orissa 33 (DB).

——S. 300—Motive.

In a criminal trial failure to prove a motive does not necessarily mean that there was no motive for the crime. The circumstances of an Act being apparently motiveless is not a ground from which the existence of a powerful or irresistible influence or homicidal tendency can be inferred. Motives exist unknown and innumerable which might prompt the act. 29 Cut L T 290 : ILR (1962) Cut 806 : 1963 (1) Cri L J 213 : AIR 1963 Orissa 33 (37) (Pt C) (Pr 15) (DB).

——S. 300 — Criminal Trial — Motive — Proof of — Penal Code (1860), S. 302. (1962) 28 Cut L T 460 : 1963 (2) Cri L J 470 (Orissa).

——S. 300—Evidence appreciation of—Mere absence of motive is not enough to hold that murder charge is not established if the case is otherwise made out—Criminal trial — Evidence appreciation of - Murder charge — Motive absence of — Evidence Act (1872), S. 3 "Proved". 30 Cut L T 194 : ILR (1963) Cut 511.

——S. 300 — Motive — Consideration — Existence of positive evidence of offence against accused – Motive is not important : AIR 1956 S C 460, Rel. on. (1963) 29 Cut L T 200.

——S. 300—The motive, however adequate, is wholly insufficient to sustain a criminal charge of murder. 18 Cut L T 345 : ILR (1952) Cut 620 : 1953 Cri L J 1008 : AIR 1953 Orissa 149 (150) (Pt C) (Pr 8) (DB).

—— S. 300 — Motive — Mere existence of motive is by itself not an incriminating circumstance. AIR 1951 Orissa 53 (59) (Pt J) (Pr 11) (DB).

——S. 300—Motive—Evidence as to participation of accused clear and convincing—Question of motive is of no importance. 1964 B L J R 263,

——S. 300—Motive—Relevancy and effect indicated. See Evidence Act (1872), S. 5. 1957 Pat L R 434.

——S. 300—Motive—Proof.

It is not necessary for the prosecution to prove by any affirmative evidence the motive which impelled the offender to commit murder. 1956 Pat L R 434.

——S. 300—Motive—Existence of adequate motive is not necessary to be proved,— (Criminal P. C. (1898), S. 367). AIR 1955 NUC (Pat) 243 (DB).

——S. 300—Motive—Proof of.

Motive is a thing which is primarily known to the accused themselves and it may not be possible for the prosecution in every case to explain what actually prompted or excited the accused to commit the particular crime or crimes. The alleged motive in a case may be very meagre and ostensibly in some others there may not be any motive, but for that reason alone the prosecution story cannot be thrown out as false, or regarded improbable or suspicious. If the evidence is sufficiently clear and convincing, the fact that there is no apparent motive or the one alleged is inadequate shall not be of much consequence or stand in the way of recording conviction.

The manner in which the culprits act to attain a particular object depends on the way in which their minds work at the moment; or the way in which they set out their plans. Direct and reliable evidence that the act was so committed cannot be brushed aside on the seeming improbability of it. ILR (1954) Patiala 352 : 1955 Cri L J 983 : AIR 1955 Pepsu 81 (83) (Pt A) (Pr 7) (DB).

——S 300 –Evidence—That accused was the assassin proved — Absence of motive or evidence of immediate cause of attack—Effect.

The absence or inadequacy of motive or the absence of the evidence relating to the immediate cause of the attack cannot adversely affect the prosecution case, if clear evidence of the accused being the assassin is available on record. ILR (1952) Patiala 59 : 1953 Cri L J 1748 : AIR 1953 Pepsu 186 (187) (Pt B) (Pr 3) (DB).

——S. 300 and S. 302—Trial for murder—Prosecution resting case on circumstantial evidence. There must be reliable evidence of motive for murder. (1962) 64 Punj L R 98.

——S. 300—Motive—No reason to disbelieve story of eye-witness – Fact that there was no adequate motive for murder held was, immaterial. ILR (1952) 2 Raj 977 : AIR 1953 Raj 105 (110) (Pt D) (Pr 29) (DB).

[Reversed on another point in AIR 1953 S C 174.]

——S. 300 –Absence of motive.

The absence of any motive being proved is not material where there is direct evidence of the offence. (1951) 4 Sau L R 223 (DB).

——Ss. 300 and 304—Motive.

When question in issue is whether accused had committed offence of murder or not it might be material to examine whether he had any motive—But when it has been found he had committed the offence, fact that he was actuated by lofty ideals is not a ground for holding the offence committed as one falling under S. 304 — In deciding nature of offence committed motive is irrelevant. 1953 Ker L T 340 : 1953 Cri L J 1551 : AIR 1953 Trav-Co 374 (375) (Pt A) (Pr 4) (DB).

18. Framing of charge under S. 302, Penal Code.

● ——Ss. 300 and 149 – Offender accused of offence under S 302 read with S. 149 — It is not obligatory that a charge under S. 147 or S. 148 should have been framed.

It is not obligatory to charge a person under S. 143 or S. 147 when charging him for an offence with the aid of S. 149. Sections 143 and 147 are implied. When the charge is laid for an offence like murder with the aid of S. 149, offences under Ss. 143 and 147 must always be present but the other two charges need not be framed separately unless it is sought to secure a conviction under them. It is thus that S. 143 is not used when the charge is under S. 147 or S. 148 and S. 147 is not used when the charge is under S. 148 When the charge is under S. 149 read with an offence under the Penal Code, S. 147 may be dispensed with. For the validity of the conviction under S. 302/149, Penal Code, it is not obligatory that a charge under S. 147 or S. 148 should have been framed and a conviction under those sections recorded. Mahadev Sharma v. State of Bihar, (1965) S C W R 686 : 1965 B L J R 914 : 1965 S C D 1160 : 1966 Cri L J 197 : I L R 45 Pat 896 : AIR 1966 S C 302 (304) (Prs 8, 9).

● ——S. 300 — Error in charge — Held that omision to mention S. 34 in the charge had only academic significance and had in no way mislead the accused and further the charge of murder had been brought home against both the accused. See Criminal P. C. (1898), S. 537. 1956 Cri L J 338 : AIR 1956 S C 171.

● ——S. 300—Criminal P. C. (1898), Ss. 233, 535 and 537 — Charge against two accused nnder S. 302 read with S. 34 Penal Code — Acquittal of one accused and conviction of the other under S. 302, Penal Code — Absence of separate alternative charge

under S. 302, Penal Code — Effect of on validity of conviction, indicated — Prejudice question of — Relevancy. See Criminal P. C (1893), S. 233. 1956 Cri L J 291 : AIR 1956 S C 116.

●——S. 300 — Applicability — Accused charged under S. 302, read with S. 149, I. P. Code — He cannot be convicted under S. 302 when he was acquitted of S. 302 read with S. 149. See Criminal P. C. (1898), S. 233. 1955 Cri L J 721 : AIR 1955 S C 274.

●——Ss. 300, 201 — Criminal P. C. (1898), Ss. 236 and 237 — Charge of murder—Conviction for offence under S. 201, Penal Code — Legality — See Criminal P. C. (1898), S. 236. 1952 Cri L J 559 : AIR 1952 S C 159.

——S. 300—Charge under—Conviction under S 302/149—Legality. See Penal Code (1860), S. 149. 1958 Cri L J 424 : AIR 1958 All 255 (DB).

——S. 300—Criminal P. C (1898), Ss. 233, 236, 237 — Penal Code (1860), Ss. 149, 302, 323 — Charge against accused under Ss. 302 and 323 read with S. 149, Penal Code — Conviction under Ss. 302 and 323 — Legality. See Criminal P. C (1898), S. 233. 1956 Cri L J 1039 : AIR 1956 All 529 (DB).

——Ss. 300, 149 and 34 — Charge — Charge under S. 302 read with S. 149 — Conviction under S. 302 read with S. 34 held valid — Object and intention — Distinction pointed out — (Criminal P. C. (1898), Ss. 236, 237). AIR 1955 N U C (All) 1697.

——S. 300 — Charge under — Facts justifying conviction under S. 201 — Accused can be convicted under S. 201, though there is no specific charge—Legality. See Criminal P. C. (1898), S. 237. 1957 Cri L J 1071 : AIR 1957 Andh Pra 611 (DB).

——S. 300 — Criminal P. C., S. 173 — Framing of charge — Duty of Prosecution pointed out—Prosecution case that act of accused in inflicting injuries on deceased caused death of deceased — Charge should be under S. 302 and not under S. 304, unless special circumstances are present which clearly and beyond any doubt indicate that offence could only be under S. 304 — Prosecution should leave the matter of determining under what section offence falls, to the Sessions Court — They should not pre-judge the case by deciding to frame a charge under S. 304 — If a charge is framed under S. 302 and the Court ultimately comes to the conclusion that the offence is one under S. 304, it would be open to the Court to acquit the accused under S. 302 and convict him on the charge under S. 304. 1964 (1) Cri L J 393 : AIR 1964 Assam 53 (54) (Pt B) (Pr 6).

——Ss. 300 and 34 — Applicability — Two accused charged under — One acquitted — Other can be convicted under S. 302.

Where two co-accused are charged under S. 302 read with S. 34 and one of them is acquitted or found not guilty of the offence charged, the other co-accused can be convicted of murder under S. 302, provided of course the evidence justified it. That there was no alternative charge under S. 302 against the convicted person is not of much consequence : AIR 1956 S C 116, Rel on. 1957 Cri L J 360 : AIR 1957 Assam 45 (47) (Pt B) (Pr 6) (DB).

——S. 300 — Criminal P. C., S. 210 (1) — Case under S. 302, Penal Code, put in Magistrate's Court for enquiry — It is advisable to commit, accused on charge under S. 302 instead of framing charge under S. 304 — Whether offence falls under S. 302 or S. 304 should be left to Sessions Court. See Criminal P. C. (1898), S. 210 (1). 1953 Cri L J 217 : AIR 1953 Bhopal 1.

——Ss, 300, 34 and 149 and 147 — Accused charged under S. 302/149 — Conviction of the accused under S. 302 read with S. 34 when permissible.

When several persons are charged for an offence committed in pursuance of a common object under S. 149, I. P. C. and the charge under S. 147, I. P. C. is not established, a conviction for an offence committed in furtherance of a common intention under S. 34, I. P. C. is permissible provided no prejudice results therefrom and the facts are such that the accused could have been charged alternatively under S. 149 or under S. 34, I. P. C. Such a situation might arise only when the common intention is co extensive with the common object and does not go beyond the common object. AIR 1956 S C 731 and AIR 1952 S C 167 and AIR 1954 S C 204 and AIR 1961 S C 1787 and AIR 1955 S C 274, Rel. on. 1965 (1) Cri L J 160 : AIR 1965 Cal 89 (93) (Pt E) (Pr 28) (DB).

——S. 300 — Charge under, against two named persons only — No reference in charge or in evidence that any other person was involved — Acquittal of one, conviction of other under S. 302 or 201 read with S. 34 cannot be sustained. See Penal Code (1860), S. 34. 1963 (1) Cri L J 579 : AIR 1963 Cal 261.

——Ss. 300, 34 — Murder — Applicability — Several accused—Absence of charge under S. 302 read with S. 34—No evidence to show who actually committed murder — Conviction for murder—(Cri P. C. (1898), S. 367).

Per Guha Ray, J. — Where there are two accused and both of them are charged under S. 302 read with S. 34 and it is proved that both of them committed murder in furtherance of their common intention then both would be guilty of murder irrespective of the part each played therein But where there is no such charge, and the evidence does not indicate which of the accused actually murdered the deceased, the charge of murder against any of the accused cannot be sustained. 1960 Cri L J 338 : AIR 1960 Cal 183 (185) (Pt C) (Pr 5) (DB).

——Ss. 300, 302 — Defect in charge — Omission of words "intentionally or knowingly" — No failure of justice. See Criminal P. C. (1898), S. 225. 1953 Cri L J 1665 : AIR 1953 Him Pra 105.

——Ss 300 and 364—Abductor charged with murder of abducted person — Further charge under S. 364—Maintainability.

When the case of the prosecution is that the person abducted has been murdered by the abductor, there is no scope for further charge under S. 364 I. P. C. for kidnapping or abducting in order to murder. AIR 1953 Hyd 249, Foll. 1960 Ker L J 220.

——S. 300—Charge under Ss 302/149 and 302—Contents—Mere mention of S. 302, if sufficient indicated. See Criminal P. C. (1898), S. 221. 1958 Cri L J 516 : AIR 1958 Ker 94 (DB).

——Ss. 300 and 34 - Scope—Murder by two accused by beating deceased — No evidence as to whose act caused death—No charge for constructive liability—One accused cannot be held responsible for death of deceased and convicted under S. 302. AIR 1955 N U C (Madh B) 3786 (DB).

——Ss. 300 and 34—Omission to frame charge under S. 34—Murder by several accused—Fatal and non-fatal injuries inflicted on deceased with sharp weapons Evidence not sufficient to fix responsibility for fatal injuries on individual accused—Evidence indicating pre-concerted plan - Fit case for applying principle of S. 34 — Charge under S. 34 not framed by lower Court—Lower Court convicting accused under S. 302 alone—Appellate Court can convict them under S. 302 read with S. 34—Omission to frame charge not material where no prejudice has been occasioned. See Penal Code (1860), S. 34. 1960 Cri L J 1100 : AIR 1960 Mad 362 (DB).

——S. 300—Ss. 337, 342 and 494, Criminal P. C. — A and B charged together before committal Court, former

under Ss. 302 and 379 I. P. C. and latter under Ss. 201 and 411, I. P. C.—When case was before Sessions Court and before commencement of trial, case against B separated—B offered as witness against A in the trial - Pardon need not have been granted to B—This would, however, affect value of B's evidence —Movement cases were separated, B was not an accused within the meaning of S. 342 Criminal P. C. at the trial of A and oath could be administered to B. See Criminal P. C. (1898), S. 337. **1957 Cri L J 1287 : AIR 1957 Mad 727 (DB).**

—S. 300—Charge—Charge under Ss. 147 and 302/34—Conviction under Ss. 147 and 325/34 — Legality considered. See Penal Code (1860), S. 34. **AIR 1955 N U C (Mad) 3941.**

——S. 300—Charge under —Conviction under S 201. See Penal Code (1860), S. 201. **1954 Cri L J 1768 : AIR 1954 Mad 1088 (DB).**

——Ss. 300, 302, 379, 411 or 201 — Separate charges if essential—Conviction for murder—Power of appellate bench to modify into one under S. 201.

It is quite unnecessary in a case of murder for gain to frame separate charges under S. 302 or 411 or S. 379 or 201, I. P. Code. Normally if an accused person is convicted under S. 302, I. P. Code, of murder it would be quite open to the Appellate Bench, if the evidence warrants it to modify the conviction to one under S. 201, I. P. Code, if the facts show that the accused had no hand in the murder itself but only assisted in the disposal of the body after the murder.

Where, however, the Sessions Judge convicted the accused under S. 302, I. P. Code, and in addition found him guilty under S. 379 or 411, I. P. Code, in the alternative but acquitted him of the charge under S. 201, I. P. Code, it would not be strictly correct for the appellate Court to modify the conviction to one under S. 201, I. P. Code, without the State filing an appeal against the acquittal. **1952 Mad W N 613 : 1952 Mad W N (Cri) 185 : (1952) 2 M L J 288 : 54 Cri L J 1889 : AIR 1953 Mad 1006 (1006) (Pt B) (Pr 5) (DB).**

——S. 300 — Cri. P. C., S. 240 — Accused committed under Ss. 302, 307, 392, Penal Code — Sessions Judge should not spilit up case of murder from robbery to be dealt with separately—(Madras High Court Rules of Practice, R. 156). See Criminal P. C. (1898), S. 240. **1952 Cri L J 853 : AIR 1952 Mad 411 (DB).**

——S. 300—Charge under S. 149 read with S. 302 but no separate charge under S. 302—Conviction—Appeal — Charge under S. 149 not established—Accused not prejudiced in defence by absence of separate charge under S. 302 — Conviction of accused under S. 149 can be converted into conviction under S. 302. See Criminal P. C. (1898), S. 535. **(1965) 1 Law Rep 714 : 1966 Cri L J 223 (Mys).**

——S. 300—Charge—Proof—Necessity.

It is no doubt true that even in the absence of the discovery or production of the body of the murdered person a conviction can be sustained if the evidence clearly establishes that a particular person was intentionally killed. But if the charge is that a particular person was murdered that fact has to be established. **1959 All W R (Sup) 15 : 1959 All Cr R 1114 : 1959 Cri L J 617 : 37 Mys L J 53 : ILR (1958) Mys 411 : AIR 1959 Mys 116 (116) (Pt B) (Pr 5) (DB).**

——S. 300—Knowledge and intention — Absence of words in charge — Effect — (Criminal P. C. (1898), S. 223).

The view of the Sessions Judge that the accused, in stabbing his father and thereby causing his death, acted without motive, ill-will or sinister purpose and that he must be presumed to have known the result of it is tantamount to saying that the act was intentional, as intention has to be inferred from the manner in which a person acts. The accused cannot, therefore, be said to have been prejudiced by absence in the charge, which imputes intention to commit the act, of words alleging that he stabbed the father with knowledge that it is likely to cause death. **35 Mys L J 76 : ILR (1956) Mys 414 : 1957 Cri L J 985 : A I R 1957 Mys 68 (69) (Pt A) (Pr 2) (DB).**

——Ss. 300, 201—Charge under Ss. 302 and 201—Acquittal under S. 201 on mere ground of conviction order S. 302—Propriety.

Where the accused was charged under Ss. 302 and 201, the Court ought not to record a finding of acquittal on the charge under S. 201 without going into that question and taking the evidence into consideration, on the mere ground that as she was convicted under S. 302 she is to be acquitted of the charge under S 201. Such a procedure is dangerous. **23 Cut L T 180: 1957 Cri L J 1152: AIR 1957 Orissa 216 (219) (Pt D) (Pr 11) (DB).**

——S. 300—Charge reciting facts constituting offence of murder and common object to commit murder—Accused proved to have shared common object at particular time—They cannot complain that they had no notice of charge. See Criminal P. C. (1898), S. 221. **ILR (1952) Cut 219.**

——Ss. 300, 302/84, 302/149 — Common object and common intention may overlap—Charge under S. 302 would also include charge under S. 302/34.

Held, that there is undoubtedly a real distinction between common intention on the one hand and common object on the other though they sometimes overlap. If five or more persons jointly attack an officer with the object of killing him their common object and their common intention are just the same. A discussion of this aspect of the case is merely academic where the accused persons have been charged under S. 302, Penal Code, also which would include a charge under Section 302/34, Penal Code, and in the alternative under S. 302/149. for having brought about the murder of the deceased with the common object of murdering him. **ILR (1952) Cut 219.**

——Ss. 300 and 34—Common intention — Charge under S. 34, whether necessary.

To constitute common intention, the acts of the accused should be done in pursuance of a pre-arranged plan or a pre-arranged concert, which may even develop on the spot during the course of commission of an offence.

Held, on facts, that there was a pre-arranged plan to bring about the death of the deceased; both the accused shared the common intention to cause death and therefore both were guilty of the offence of double murder under S. 302 read with S. 34, I. P. Code, since the absence of any charge has not caused any prejudice to the accused, omission of the charge was of no consequence in the circumstances of the case **1964 (1) Cri L J 121 (124) (Pt A) (Prs 18, 19) (Pat) (DB).**

——S 300—Charge under S. 364 — Maintainability—Intention of abductor to murder the person abducted must be proved—Specific case that abductors had murdered the person abducted — Charge under S. 364 cannot be maintained. See Penal Code (1860), S. 364. **(1961) ILR 40 Pat 809.**

——S. 300 — Charge under S. 149/302 — Conviction under S 34/302. When legal considered. See Penal Code (1860), S. 34. **1957 Cri L J 216 : AIR 1957 Pat 52 (DB).**

——Ss. 300 and 34—Charge — Facts showing that attack on deceased was in furtherance of common intention of accused with another person — Accused

can be convicted under S. 302 read with S. 34, even though there was no separate charge under S. 34. See Penal Code (1860), S. 34. AIR 1955 N U C (Pat) 452 (DB).

——Ss. 300, 149 — Charge under S. 302/149 framed against accused — Charge and questions during his examination leaving no room for doubt that prosecution held him responsible for murder — Failure to frame specific charge under S. 302 does not prejudice accused - Omission does not vitiate trial — Cr. P. Code (1898), Ss. 225, 537.

Where the charge under S. 302/149 framed against the accused and the questions put to him during the course of his examination by the committing Magistrate and the Sessions Court should not have left him in doubt that the prosecution intended to prove that he was responsible for the murder of the deceased, it cannot be said that his case has been even remotely prejudiced simply because a charge under S. 302 was not specifically framed against him. The omission is curable and cannot vitiate his trial in the Sessions Court. AIR 1958 S C 116, Foll.; AIR 1955 S C 274; AIR 1955 S C 419, Dist. (1962) 64 Pun L R 338.

——Ss. 300 and 34 — Scope—Charge under S. 302, Penal Code simpliciter mentioning that each of the accused along with the other intentionally killed the deceased — Conviction under S. 302 read with S. 34 — Validity — Criminal P. C. (1898), S. 233.

Section 34, Penal Code, does not create any distinct offence but is merely explanatory. Therefore if S. 34 is not mentioned in the charge sheet the conviction for the substantive offence is not bad. (Accused charged under S. 302, Penal Code, charge mentioning that each of the accused along with the other intentionally killed the deceased—Conviction under S. 302 read with S. 34 held not illegal.) ILR 14 Pat 225, AIR 1942 Lah 214; AIR 1931 Cal 625 and AIR 1948 All 162 Rel. on; AIR 1955 S C 274, Expl. 1956 Raj L W 435.

——S. 300 — Charge under S. 149/302 — Conviction under S. 34/302 is legal even if no charge has been framed under S. 34 — (In this case though no charge under S. 34 was framed, the words 'common intention" were used and the principle ingredients of "common intention" had been brought home to the accused. See Criminal P. C (1898), S. 237. 1954 Cri L J 1458 : AIR 1954 Sau 115 (DB).

——Ss. 300, 34, 109, 149 — Section 109 need not be invoked when accused are charged under S. 149 and S. 302/34. See Penal Code (1860), S. 34. 1956 Cri L J 1358 : AIR 1956 Tra-Co 230 (DB).

——Ss. 300, 148, 149, 341 and 109 — Charges under — Leaving out S. 149 in relation to charge of murder held was a serious omission as it would keep the door open for guilty man to escape. See Penal Code (1860), S. 148. 1956 Cri L J 1358 : AIR 1956 Trav-Co 230 (DB).

19. Charge to jury.

See also Criminal P. C. (1898), S. 297.

● ——S. 300 — Misdirection — Whether a reasonable person in the circumstances of a particular case committed the offence under provocation which was grave and sudden is a question of fact for the jury to decide. See Criminal P. C. (1898), S. 297. 1962 (1) Cri L J 521 : AIR 1962 S C 605.

——S. 300 — Criminal P. C. (1898), S. 367 — Charge of murder by poison - Giving of lethal dose not proved — Benefit of doubt has to be given to the accused. See Criminal P. C. (1898), S. 367. 1957 Cri L J 930 : AIR 1957 Andh Pra 456 (DB).

——Ss. 300, 302 and 804 — Criminal P. C. (1898), S. 297 — Charge to jury — Misdirection — Judge not explaining circumstances when an act, if it does not amount to murder, whether it amounts to culpable homicide not amounting to murder—Charge held amounted to misdirection — Plea of right of private defence — Burden lies on accused. See Criminal P. C. (1898), S. 297. ILR (1955) 7 Assam 392.

——S. 300 — Criminal P. C., S. 297 — Summing up — Trial for murder—Motive—See Criminal P. C (1898), S. 297. 1958 Cri L J 1380 : AIR 1958 Bom 439 (DB).

——S. 300—Criminal P. C. (1898), S 297 — Misdirection — Plea of private defence—Raising of—Accused repudiating complicity in crime — Evidence and circumstances showing that such plea could properly be raised — Duty of Sessions Judge — Omission to explain to jury exception II to S. 300, Penal Code and law of private defence is misdirection. See Criminal P. C. (1898), S. 297. 1962 (1) Cri L J 137 : AIR 1962 Cal 85 (DB).

20. Sections 34 and 300, Penal Code.

See also Penal Code (1860), S. 34.

● ——Ss. 300, 34, 301 and 302 — 'Criminal act' and 'in furtherence of common intention' — Meaning of — Four accused with common intention to kill M shooting at R bona fide taking him to be M — Shooting resulting in R's death — Accused are guilty under S. 302 read with S. 34 — Section 301 has no application. See Penal Code (1860), S. 34. 1965 (2) Cri L J 266 : AIR 1965 S C 1260.

● ——S. 300—Common intention—Conviction under S. 302 read with S. 34—Pre-requisite — Four persons charged under S. 302 read with S. 34—Three acquitted — Fourth cannot be convicted for having committed the offence along with one or more of the acquitted persons. See Penal Code (1860), S. 34. 1963 (2) Cri L J 351 : AIR 1963 S C 1413.

● ——Ss. 300, 34, 302—Accused charged under S. 302 read with S. 34 along with four others, gravamen of charge being that he shared common intention with four other accused — Four other accused acquitted—Conviction of accused with aid of S. 34 cannot be bad. See Penal Code (1860), S. 34. 1956 Cri L J 147 : AIR 1956 S C 51.

——S. 300 — Common intention how gathered stated. See Penal Code (1860), S. 34. 1957 Cri L J 28 : AIR 1957 All 50 (DB).

——Ss. 300 and 34 — Common intention — Want of sufficient evidence—Applicability of S. 34.

In a trial for offence under S. 302 read with S. 34 unless there is sufficient evidence to establish common intention, S 34 cannot be pressed into use and all the accused cannot be convicted under S. 302 of the Code. 1957 Cri L J 28 : I L R (1956) 2 All 188 : AIR 1957 All 50 (52, 53) (Pt A) (Pr 20) (DB).

——Ss. 300, 34 — Common intention — One accused instigating others to kill deceased and his father — Accused held had common intention. See Penal Code (1860), S. 34. AIR 1955 NUC (All) 4169 (DB).

——Ss. 300 and 34, Thirdly, 302 and 304—Death by single lathi blow by one of three persons — Head injury sufficient to cause death in ordinary course of nature—Case falls under thirdly — Who caused injury not known — Same intention (to cause injury sufficient in ordinary course of nature to cause death) must be attributed to other accused — All are liable for murder. See Penal Code (1860), S. 34. 1953 Cri L J 565 : AIR 1953 All 203 (DB).

——Ss. 300, 34 and 323 — Assault by several persons armed with spears and lathis — Constructive liability —Death caused mainly due to incised wounds—Conviction of accused under S. 302/34 armed only with lathis for murder, when those who were armed with spears acquitted, held not legal—They could only be

convicted under S. 323. See Penal Code (1860), S. 34. 51 Cri L J 993 : AIR 1950 All 355.

——Ss. 300 (3), 302 read with S. 34 — Conviction under—Existence of a common intention to beat—Sufficiency.

For a conviction under S. 302 read with S. 34, Penal Code, the existence of a common intention to beat is not insufficient and a common intention to kill is not always necessary. Even if the common intention is merely of beating, if the bodily injury intended to be inflicted by the beating is found to be sufficient to cause death in the ordinary course of nature, the mens rea required for liability under S. 302, read with S. 34, Penal Code, would be satisfied. The question would depend upon the extent to which the beating was carried out in furtherance of the common intention. But if the acts exceed the common intention, S. 34 would, of course, not be applicable. (1965) 2 Andh W R 151 : 1965 Mad L J (Cri) 607 : 1965 (2) Cri L J 458 : A I R 1965 Andh-Pra 361 (366, 367) (Pt A) (Prs 20, 24, 27, 28, 29) (DB).

——Ss. 300, 34 and 326 — Rioting with guns and other deadly weapons resulting in deaths—Deceased sustaining gunshot and other fatal injuries—Accused charged under S. 302 read with S. 34 — Conviction should be under s. 302 read with S. 34 even if there was no evidence to prove who caused fatal injury—Conviction under S 326 read with S. 34 not proper. See Penal Code (1860), S 34. 1961 (1) Cri L J 42 : AIR 1961 Andh-Pra 23 (DB).

——Ss, 300, 34, 302, 304 and 323—K cleaning nala—T, his uncle, objecting — K not heeding objection — T's sons J and N coming out armed with daos — T holding K from behind and sons dealing blows with daos—K dying of injuries—J and N held participated in assault with common intention—T held was guilty under S. 323. See Penal Code (1860), S. 34. AIR 1955 NUC (Assam) 4206 (DB).

——S. 300—Common intention— Attack by number of person, one of whom was armed with axe — Common intention to cause bodily injuries sufficient in ordinary course to cause death may be inferred. See Penal Code (1860), S. 34. 1962 (2) Cri L J 55 : AIR 1962 Guj 214 (DB).

——Ss. 300 and 34 — In speaking to the accused-appellant of the errand which he was asked to join, the other accused only saying that they would take revenge with their own hands—Diverse acts of appellant's companions not such as to have necessarily led the appellant to the conclusion that those acts were a preliminary to murder—Appellant held not guilty under S. 302 read with S. 34. See Penal Code (1860), S. 34. 1952 Cri L J 133 : AIR 1952 Him-Pra 3.

——S. 300 -Applicability - Murder by several accused —Deceased sending buffaloes in B's field for grazing —Attitude of deceased leading to sudden quarrel—Several accused armed with 'luhangis' and 'lathis' arriving at the spot and assaulting deceased, causing injuries on the head of deceased who dies soon after —No enmity which might have prompted the murder established—Medical report stating that first injury was grievous which caused his death — Held that in the circumstances it could not be held that all the accused were there assembled with the common object and with the common intention of murdering deceased. See Penal Code (1860), S. 34. A I R 1955 N U C (Madh-B) 3097 (DB).

——Ss. 300, 34—Bandits armed with revolvers waylaying passer-by — One firing shot and killing the passer-by—All of the bandits carrying revolvers are guilty under S. 302 read with S. 34. See Penal Code (1860), S. 34. 1952 Cri L J 853 : AIR 1952 Mad 411 (DB).

——S. 300—Conviction and sentence—Charge under S. 302 read with S. 34 — Accused is as much guilty of criminal act as is his co-accused who actually committed the murder. AIR 1955 S C 331, Rel. on. ILR (1962) Cut 726 : 1963 (2) Cri L J 294: AIR 1963 Orissa 144 (150, 151) (Pt F) (Pr 24) (DB).

——Ss, 300, 299—Two persons attacking deceased—One having murderous intention causing injury sufficient to cause death — Other not having that intention causing simple injury—Offence.

Cases frequently arise that the death could not have occurred but for an act on the part of the accused, but in which he had been excused on the ground that some other person intervened and appeared to have been the more immediate and direct cause of the death on the ground that the death was not the consequence of what the accused did, but was the consequence of what the intervener did. But if one person is engaged in murderously beating another to death and causes injury which is sufficient to cause death and a stranger, without sharing the common intention, was to rush in and add some more blows so that the victim's death was more speedily brought about, then, it is a case where both would be guilty of murder and the first man cannot be allowed a defence that it was the second assailant's stroke that finally ended the victim's life. 1958 Cri L J 785 : 24 Cut L T 350 : AIR 1958 Orissa 113 (115) (Pt A) (Pr 10) (DB).

——Ss. 300 and 304, Part I — Accused charged for murder—Free fight between two parties resulting in death of deceased -Accused also sustaining some injuries—Evidence of doctor indicating that if injuries of the deceased were attended to he would have survived — Conviction altered from S. 302 to S. 304, Part I. 1964 (2) Cri L J 107 (111) (Pt B) (Pr 13) (Pat.) (DB).

——S. 300—Applicability — Several accused, armed with axes, attacking M with intention of using them not only against M but against one who interceded on his behalf—Stranger unexpectedly arriving on the scene injured while trying to intervene on behalf of M and died as result of injuries—Accused held liable for murder — Question whether deceased's arrival was unexpected and accused could not have intended to cause his death in particular had no relevance in considering their liability for murder. See Penal Code (1860), S. 34. AIR 1955 NUC (Sau) 4083 (DB).

——Ss. 300 and 34—Common intention to murder.

Unless it is shown that there was from the outset a common intention to murder the deceased, the accused (in this case two in number) cannot be convicted under Section 302 read with Section 34, and in the absence of any evidence to show which of the accused killed the deceased neither can be convicted of murder, for the mere fact that one of the accused had an axe will not mean conclusively that they had a common intention and that common intention was to kill the deceased. 6 Sau L R 183 : 1954 Cri L J 378 : AIR 1954 Sau 24 (25) (Pr 5) (DB).

——Ss. 300, 34 and 149—Common intention.

Common intention does not necessarily mean that the pre-arranged plan must have contemplated the actual offence that would be made out from the conduct of some of the accused or that the pre-arranged plan must have decided all the minute details of the transaction. Every confederate becomes guilty of the actual offence which is made out from the acts comprising the criminal acts. The intention so imputed to such confederates who did not actually commit that particular act leading to the serious consequences need not be the same common intention which existed between all the confederates at the start of the course of conduct which amounted to the criminal

act and which resulted in the commission of the offence.

Where there was previous enmity between P (one of the accused) and the deceased, all the seven accused were standing at P's door armed with lathis from before and they attacked the deceased and his companions when they passed in front of his house killing him on the spot.

Held that the accused intended to give a good beating to the deceased and his companions without any clear conception of the precise nature of injuries which would be caused and they were all liable for the offence under S. 302 Penal Code, in view of the provisions of S. 34, Penal Code.

Held, further that S. 149, Penal Code, was also applicable. The common object of the unlawful assembly was to beat the deceased and his companions. All the appellants must have known that they were likely to commit murder. Therefore, all the appellants were constructively guilty of it in view of the provisions of S. 149, Penal Code. AIR 1948 All 229, Foll. **1954 Cri L J 1303 : AIR 1954 Vin Pra 36 (39, 40) (Pt C) (Prs 18, 19, 20).**

21. Sections 149 and 300, Penal Code.

See also Penal Code (1860), S. 149.

● **——Ss. 300, 34 and 149 — Scope — Common object of unlawful assembly only to administer chastisement to deceased — Charge not mentioning that members of unlawful assembly knew that deceased was likely to be killed in prosecution of that common object — Deceased killed — Members not causing fatal injury held not guilty under S. 302 read with S 149 or S. 34. See Penal Code (1860), S. 34. 1956 Cri L J 1365 : AIR 1956 S C 731.**

——S. 300 — In prosecution of the common object of the assembly — Interpretation of — Not killing but only beating of deceased in contemplation of members of unlawful assembly — Murder of deceased by one member while unlawful assembly was acting in accomplishment of common object — Other members not liable for murder under S. 149. See Penal Code (1860), S. 149. 1962 (1) Cri L J 698 : AIR 1962 All 272.

——S. 300 — Applicability — Reserve of cattle lawfully taken to pound — Injury caused in commission of common object — Death of injured — Offence stated. See Penal Code (1860), S. 148. 1958 Cri L J 588 : AIR 1958 All 348 (DB).

——Ss. 300 (3), 302, 304 and 149 — Applicability — Accused persons leading their cattle into field of complainant's — Complaints when taking cattle to pound intercepted and beaten by accused — One of complainants receiving smashing blow on head by one of accused and dying — All held guilty under S. 302/149. AIR 1955 N U C (All) 1701 (DB).

——Ss. 300, 34 and 149 — Rioting with deadly weapons resulting in murders—Charge framed under S. 302 read with S. 34 — No evidence to establish who had participated in attack on deceased — No legal bar to convict accused under S. 302 read with S 149 See Penal Code (1860), S. 34. 1961 (1) Cri L J 42 : AIR 1961 Andh-Pra 23 (DB).

——Ss. 300, 149, 324 — Common object — Proof of, by course of conduct — Individual act need not be proved See Penal Code (1860), S. 149. 1956 Cri L J 389 : AIR 1956 Bom 183 (DB).

——S. 300 — Common intention and same intention — Distinction — Person when can be vicariously convicted for murder committed by another — What prosecution has to prove — Prior meeting of minds essential for common intention. See Penal Code (1860), S. 3. 1959 Ker L J 785.

——Ss. 300 and 149 — Conviction — Several accused charged under S. 302 read with S. 149 of murdering deceased — No finding as to whether accused had constituted themselves into an unlawful assembly with the common object of murder and whether murder was committed in prosecution of that common object — Conviction of accused under S. 302 read with S. 149 cannot be sustained. AIR 1955 N U C (Madh-B) 3498 (DB).

——Ss. 300, 325, 323, 149 and 147 — More than five persons with only thin lathis in their hands coming together — Some of them beating complainants who were working at their fields — Death of some of the victims — Deceased persons not having injuries in such number or or in such circumstances as would indicate anything like grim determination on the part of assailants to endanger their lives — Held, that all the persons could be held as members of unlawful assembly whose common object was at least to cause hurt — That they could be aware of the possibility of grievous hurt but not of killing any persons — That the case fell under S. 325, read with S. 149, besides under S. 323 read with Ss. 149 and 147 — That offence under S 323 being only a minor form of offence to the offence under S 325 conviction under S. 323 was superfluous. 1963 Jab L J 932 : 1964 (2) Cri L J 185 : AIR 1964 Madh-Pra 182 (192, 193) (Pt C) (Prs 44 to 47) (DB).

——S. 300 — Unlawful assembly — Common object — Carrying of weapons - Conviction under S. 149 read with S. 302 held justified. See Penal Code (1860), S. 141. 1964 (1) Cri L J 198 : AIR 1964 Madh-Pra 30 (DB).

——Ss. 300, 34, 149 — Murder by several accused — Common intention — Cannot be inferred unless it is a necessary inference from circumstances of case — Held on facts of case that there was no common intention.

Where the accused party consisting of eight persons went to the house of B armed with weapons and sticks to chastise him for his rude and insolent behaviour towards one of them, and on B raising an alarm, his brother K and others arrived on the spot and pleaded with the accused party not to harm B, but still one of the accused opened the attack by giving the fatal blow with a kirpan on the head of K,

Held, that it could not be said that all the accused had the common intention to punish K, much less to kill him, and the accused other than the accused giving the fatal blow with kirpan could not be held responsible for the stray individual act of the accused giving the fatal blow to K. **(1962) 64 Pun L R 338.**

——Ss. 300, 149 — Murder — Constructive liability — Other members of the mob were not aware of the fact that the first accused did have a sharp weapon like knife or dagger in his possession and that he was going to use it to stab the victim — Held, that there was no constructive liability in the circumstances, incurred by the other members of the mob for the act of stabbing done by the 1st accused. It was only the 1st accused that was liable for the offence of murder committed by him — See Penal Code (1860), S. 149. 1952 Cri L J 1592 : AIR 1952 Tra-Co 459 (DB).

22. Evidence — General.

● **——S. 300 — Unlawful assembly assaulting with weapons, including guns—Death of some victims—Duty of Court in appreciating evidence. Masalti v. State of U. P. 1965 (1) Cr L J 226 : 1964 S C D 980: 1965 Mad L J (Cri) 312 : I L R (1964) 2 All 694 : (1964) 1 An L T 19 : (1964) 1 S C W R 721 : A I R 1965 S C 202 (210) (Pt E) (Pr 15).**

● **——S. 300 — Corroboration of evidence admitted under the Section—Extent of indicated. See Criminal**

P. C. (1898), S. 288. 1964 (2) Cr L J 359 : AIR 1964 S C 1357.

● —S. 300—Evidence — Appreciation of — Murder trial — Duty of Court pointed out. Moti Singh v. State of U. P. 1963 MLJ (Cri) 625 : 1963 All W R (H C) 469: ILR (1963) 2 All 708 : 1963 All L J 647 : (1964) 1 SCR 688 : 1963 All Cr R 250 : 1963 Cur L J (S C) 87 : 1963-2 S C J 714 : 1963 S C D 1007 : 1964 (1) Cri L J 727 : AIR 1964 S C 900 (902) (Pt B) (Pr 14).

● —S. 300—Conviction—Evidence—Conviction on evidence of single witness—Propriety of, discussed. See Evidence Act (1872), S. 134. 1957 Cri L J 1000 : AIR 1957 S C 614.

● —Ss. 300 and 302—Murder charge — Cruel and revolting murder — Evidence —Necessity to examine evidence with more than ordinary care.

Where the murder committed is a particularly cruel and revolting one, it is necessary to examine the evidence with more than ordinary care lest the shocking nature of the crime might induce an instinctive reaction against a dispassionate judicial scrutiny of the facts and law. Kashmira Singh v. State of M. P., 1952 Cri L J 839: 1952 All W R (Supp) 64 : (1952) S C A 474 : 1952 S C J 201 : 1952 Mad W N 402 : 1952 Mad W N 106 : 1952 1 Mad L J 754 : 1952 S C R 526 : AIR 1952 S C 159 (160) (Pt E) (Pr 2).

—S. 300. Exception 4 — Circumstances showing probability that complainants were aggressors and accused acted in self-defence—Prosecution witnesses disbelieved — Case of free fight could not be made out—Conviction of accused—Illegal.

Held, on facts, that the probability that the members of the complainant's party were the aggressors and the accused persons had acted in exercise of the right of private defence could not be ruled out. It was not safe to convict the accused persons on the ground that as they were injured at the time and place of the occurrence, they must have taken part in the fight which must be a free fight. The prosecution evidence was totally unreliable, and hence a new case could not be made out for the prosecution and the accused persons could not be convicted on the assumption that it must be a case of free fight between the members of the two rival parties. AIR 1957 S C 469, Distinguished, 1959 All L J 423, Applied. 1965 (1) Cr L J 373 (377) (Pr 30) (All) (DB).

—S. 300—Murder by firing gun-shot from close range. Absence of blood at the place of occurrence cannot establish that the murder has not taken place at the alleged place of occurrence. Once internal bleeding starts, very little blood comes out of the wound outside the body particularly if the wound is caused by gun-fire and from a close range. Where the accused was prosecuted for committing murder by firing a gun-shot from a very close range, the absence of blood at and near the place of occurrence cannot establish that the murder has not taken place at the alleged place of occurrence. 1963 All L J 977.

—S. 300—Appreciation of evidence—Conviction for murder — Private defence pleaded by accused—No explanation of evidence against him by the accused in his statement — Court cannot invent possible explanation in his favour. Power of Court' See Criminal P. C. (1898), S. 367. ILR (1961) 1 All 609.

—S. 300—Proof of intention—Conviction on statement made in Court—Accused's act stated to be under duress—Absence of common intention between accused and those who killed - Accused held not responsible for acts of others which were not committed in furtherance of any common intention —His act above amounted to assistance given to other murderers— If this assistance was intentional he would be guilty of abetting the offence of murder — If it was not intentional, he would not be guilty even of such offences— If he committed abetment of murder under threats or of being put to death, he committed no offence in view of S 94. See Criminal P. C (1898), S. 342. 1957 Cri L J 344 : AIR 1957 All 184 (DB).

[Overruled on another point in AIR 1966 All 192.]

—S. 300—Intention—Presumption of.

The accused is ordinarily responsible for his own acts and is not responsible for the acts of others unless law specifically makes him responsible for the acts of others. Where, in a case of murder, it was sought to infer the necessary intention on the part of the accused from the fact that he held the legs of the deceased while the others killed him and there was nothing to show that those others committed the acts in furtherance of any common intention between them and the accused but on the other hand the accused's act was committed under duress :

Held, that this was a case where intention of the accused could not be presumed from the natural consequences of his conduct and the conduct of the others who were acting simultaneously with him at the time. His own act also was not so imminently dangerous that it must in all probability have caused death. His conduct would not amount to the offence of murder even under Cl. (4) of S. 300, I. P. Code. (1947) 1 All E R 813, Rel. on. 1957 All L J 20 : 1957 All W R (HC) 86 : 1957 Cr L J 344 : AIR 1957 All 184 (187, 188) (Pt D) (Prs 14, 15) (DB).

[Overruled on another point in AIR 1966 All 192.]

—S. 300 - Criminal P. C., Ss. 288, 367 —Murder trial —Out of eight eye-witnesses named in FIR, only three were examined in committing Magistrate's Court— Mere fact that these witnesses did not give evidence helpful to prosecution is no ground for not examining the rest — Prosecution examining different set of eye-witnesses at trial whose evidence was not trustworthy —Motive for crime not established— Held on a consideration of entire evidence that evidence adduced was not of such a character as could be relied upon for conviction — In any case accused was entitled to benefit of doubt. See Criminal P. C. (1898), S. 286. AIR 1955 NUC (All) 1326 (DB).

—S. 300—Charge against accused substantiated by overwhelming evidence such as dying declaration and testimony of four persons out of whom two were independent witnesses—Sessions Court rejecting large body of evidence on fanciful grounds and acquitting accused — Finding of acquittal held was based on wrong approach and was perverse and therefore set aside. (Criminal P. C. (1898), S. 417). ILR (1964) Andh Pra 286 (DB).

—S. 300—Evidence Act (1872), S. 3 — Cogent evidence of conclusive nature cannot be jettisoned on 'a priori' considerations.

Cogent evidence of a conclusive nature cannot be jettisoned on 'a priori' considerations. There is no talismanic test to determine the course of human conduct in a given situation, and as human behaviour may manifest itself in infinite varieties of circumstances, it is perilous to generalise as to what a man may or may not do, after committing a ghastly murder. There is, however, nothing inherently improbable in a murderer trying to cover up his tracks as best as he could. (1963) All L R (Cri J) 25 : (1962) 2 Andh L T 393 (DB).

—S. 300—Evidence and proof—Evidence — Criminal trial — Murder — Proof—In the trial for murder, if there is total absence of substantive direct evidence the absence of cogent medical evidence on the point of suicide and insanity of the deceased will not prove the guilt of the accused. (1965) 69 Cal W N 764.

—S. 300 — Autrefois acquit — Principle of - Scope and applicability—Trial of seven accused under S. 302 read with S. 34, Penal Code -Conviction of two and acquittal of rest — Appeal by convicted persons—No appeal filed against acquittal order:— High Court can reappreciate evidence on record in so far as it affects case for and against convicted accused for determining whether they had common intention with those who were acquitted. See Criminal P. C. (1898), S. 403. **ILR (1964) Guj 414.**

—S. 300—Murder case—Overwhelming direct and circumstantial evidence for prosecution — Knife and clothes recovered from accused not got examined by Chemical Examiner—Lacuna held of no consequence. See Criminal P. C. (1898), S. 367. **1965 (2) Cri L J 771 : A I R 1965 J & K 126 (DB).**

—S. 300—Evidence—Recovery of head and clothes of deceased at instance of accused—Accused cannot be convicted under S. 302 — Accused is guilty of offence under S. 201. See Penal Code (1860), S. 201. **1954 Cri L J 1124 : A I R 1954 J & K 42 (DB).**

—S. 300—Murder case—Prior deposition of witness —Admissibility—Record of reasons essential -Reasons not sufficient—Other evidence ample to prove guilt of accused — Conviction affirmed. See Evidence Act (1872), S. 33. **1962 Ker L T 374.**

—S. 300—Murder by hanging—Proof—Distinction between death by strangulation and hanging — Appreciation of medical evidence.

In case of strangulation a continuous transverse ligature mark will be found on the neck but in the case of hanging it would be oblique and non-continuous. In the case of hanging marks would be high up in the neck and the neck would be stretched and elongated. In the case of strangulation no such symptoms would be seen. Bleeding from the nose, mouth and and ears would be very rare in the case of hanging and will be found in the case of strangulation. Again in the case of hanging, saliva would be flowing out of the mouth down on the chin and chest and in the case of strangulation no saliva would be seen. Emphysematous patches on the surface of the lungs would not be present in the case of hanging but would be present in a case of strangulation. **1960 Ker L J 618.**

—S. 300 — Evidence Act (1872), Ss. 101 to 104 — Criminal Trial — Explanation by accused — Appreciation of evidence — Duty of Court pointed out. See Evidence Act (1872), Ss. 101 to 104. **(1960) 2 Ker L R 329.**

—S. 300 - Scope — Statement of witnesses recorded not in their language but in English — Effect stated. See Criminal P. C. (1898), S. 161 (3). **(1960) 2 Ker L R 329.**

—S. 300—Offence of murder—Defence of drunkenness—When available stated. See Penal Code (1860), S. 86. **1959 Ker L T 634.**

—S. 300—Silence of accused—Admissibility as conduct—Silence observed by accused when the accusation was made and what he did on hearing, that would be relevant material to be taken into account along with other circumstances. See Evidence Act (1872), S. 8. **1959 Ker L T 167 : 1959 Ker L J 221 : ILR (1959) Ker 319.**

—Ss. 300 and 34 — Common intention — Proof — Circumstances.

That no one cut inflicted on the deceased was in itself fatal is no reason to hold that the offence committed is not murder or that all the accused who participated in the occurrence cannot be convicted of that offence. Where the fact that there was enmity between accused on the one hand and the deceased on the other was not only proved in the case but was also admitted by accused. The injuries sustained by the deceased external and internal-were of a serious nature even though no vital part as the head or the chest or the abdomen was involved, no important artery, however escaped being injured, the medical evidence was positive that a man sustaining these injuries could never survive, all the three accused came to the scene together, well-prepared and well-armed, and after the incident all the three ran away together and escaped in the dead of the night, they remained in hiding for some period and then, all the three together surrendered themselves before the Sub-Magistrate.

Held that these would appear tell-tale circumstances that the accused was acting in pursuance of a common intention. The nature of the weapons used and the extent and the enormity of the injuries inflicted would clearly show that the common intention was to bring about the death of their victim. The offence committed was nothing short of murder and all the three accused were equally guilty. **1957 Ker L J 1224 : ILR (1957) Ker 524.**

—S. 300 - Criminal trial—Evidence—Murder charge —Material contradictions and discrepancies in evidence—Cannot be relied upon conviction. **1956 M B L J (H C R) 1412.**

—S 300—Evidence.

Held, having regard to the evidence of two witnesses before whom the accused had admitted to have killed his wife with an axe, and having regard to the admission made by him before the committing Court which was subsequently retracted before the Sessions Court on the ground that it was extracted from him by police under undue pressure which was an excuse put forward as an after-thought and having regard to the place namely the house of the accused, where the body of the wife was found, the conclusion arrived at by the Sessions Judge that the accused had killed his wife was not erroneous. **1956 M B L J 472 : Madh B L R 1956 (Cri) 56.**

—S. 300—Evidence.

Held, that the medical evidence indicated that only a portion of the liver of the deceased was smashed. The direct evidence was unmistakably decisive on the point that the deceased was on his senses after firing and he while lying with face downwards declared that the accused had fired at him. The declaration was recorded in the first information report lodged before the death of the deceased and even thereafter the Police Sub Inspector on reaching found him in a position to make a dying declaration which he took down. Having regard to all these facts it could not be said that the finding of the Court below that it was the accused who had fired at the deceased was erroneous. **1956 M B L J 343 : Madh B L R 1956 (Cri) 1.**

—S. 300—Evidence—Sufficiency of, for conviction.

Criminal Trial — Evidence — Circumstantial evidence — Murder charge — Existence of bad blood between accused and deceased — Shirt of accused stained with human blood -Extra judicial confession made by accused before witnesses who were examined in the case — Conviction held proper. **1956 M B L J (H C R) 288.**

—S. 300—Murder charge—Evidence.

Murder charge—Evidence — Discrepancy between oral testimony and medical evidence — Sufficiency of evidence for conviction — Circumstantial evidence —Conduct of accused suspicious — Report of incident made immediately—Evidence held adequate for conviction. See Criminal Trial. **1956 M B L J (H C R) 85.**

—S. 300 —Acquittal upheld in appeal.

Held, in view of the previous acquittal of the rest of the accused by the former Sessions Judge, and

its confirmation by the High Court the opinion of the Sessions Judge received considerrable weight. Even on materials as they stood the Sessions Judge was justified in disbelieving the witnesses in view of the absence of motive, absence of reasonable and consistent nature of the version given by them and intrinsic inconsistency in their statements. 1956 M B L J 62 : Madh B L R 1956 (Cri) 17.

——S. 300—Evidence — Opinion of medical expert — Appreciation of. See Evidence Act (1872), S. 45. AIR 1955 N U C (Madh B) 3407 (DB).

——S. 300—Evidence — In post-mortem examination report of doctor stating cause of death to be haemorrhage in abdominal cavity but not deposing so in witness box — Omission held did not help accused. **AIR 1955 N U C (Madh B) 1815.**

——S. 300—Murder — Conviction can be based on evidence of witnesses related to deceased although uncorroborated—Criminal Trial—Evidence—Murder.

It is not a universal proposition that a conviction cannot be based on the statements of the witnesses who are related to the deceased in the absence of corroboration Such statements will have to be judged on their own merits and, if the Court finds that there is nothing to warrant a disbelief in the statements of such witnesses, conviction can legally rest on such testimony. **Madh B L R 1954 (Cri) 198 : Madh B L J 1954 (H C R) 663.**

——S. 300 - Proof — Evidence contradictory and discrepant for co-accused — Co-accused acquitted — In absence of strong corroborative evidence of witnesses whose evidence was found discrepant and contradictory regarding other accused could not be made basis for conviction even though consistent regarding him. See Evidence Act (1872), S. 5. 1958 M P L J (Notes) 60.

——S. 300—Proof of guilt—Murder—Guilt-conscious conduct of accused.

When summons are afloat connecting a man with a grave and brutal murder, a quite innocent man may behave very foolishly quite like a guilty one. He may attempt to fabricate some evidence in order to see that he may not be required to undergo the fortune and suspense of a trial for murder. Such apparently guilty conscience conduct should not be heavily weighed against the accused, particularly where the identification itself is a matter of doubt. 1960 Cri L J 1102 : AIR 1960 Mad 370 (373) (Pt D) (Pr 12) (DB).

——Ss. 300 and 302—Evidence—Value of.

Where, on the question whether the injuries which caused death were caused by the first accused only, or by the second accused only, or by both, the version untill the case came up before the Sessions Court was that the stones which caused the fatal injuries were used by the second accused, but the evidence at the sessions trial was that the injuries were caused by the first accused and not the second' then neither of the accused can be held responsible for the injuries caused to the deceased and both of them must necessarily be acquitted. 1957 Mad W N 153 : (1957) Mad L J (Cr) 366 : 1957 Cri L J 863 : (1957) 2 M L J 126 : AIR 1957 Mad 505 (507) (Pt A) (Prs 6, 10) (DB).

——S. 300 — Evidence — Appreciation of — Medical evidence — Murder — Rigor mortis - Inference about time of death on basis of. See Criminal Trial. 1962 (1) Cri L J 733 : AIR 1962 Mys 124 (DB).

——S. 300—Proof of accused holding deceased by neck — Deceased missing thereafter — Accused in police custody stating that he had thrown dead body into cave— Discovery of dead body from cave—Held that deceased died as result of homicide of which accused was author. See Evidence Act (1872), S. 27. (1965) 7 O J D 170: 1965 All Cri R 258: 1965 All W R (Supp) 11 : (1965) 31 Cur L T 229.

——S. 300— Trial for murder — Evidence — Appreciation of — Opinion of doctor not conclusive — Evidence Act (1872), Ss 3 and 45—Criminal P. C. (1898), S. 367 — Criminal Trial —Evidence, circumstantial.

Two persons (cousin and the second wife of the deceased) who were living with the deceased were charged for offence of murder for having caused the death of the deceased by strangulation. The prosecution was based on circumstantial evidence and the circumstances relied upon were the illicit intimacy between the accused persons and the knowledge of the deceased about it; presence of ligature marks on the neck of the deceased and an alleged attempt of accused to hide the mark by application of Sandalwood paste to it and the opinion of the doctor that it was an homicidal strangulation by application of chord or rope. Some ropes were found with blood-like stains but were not shown to the doctor nor was it clear from the evidence whether these ropes were sent to chemical examiner. The evidence as to wherefrom these ropes were found was also at variance. The illicit intimacy between the accused was sought to be proved by the fact that accused 1 was found to be carrying accused 2 on cycle to another village and both of them staying there for some time. The investigating officer was not examined nor was the report of chemical examiner produced even though demanded by accused.

Held, on appreciation of evidence that there was not a single circumstance which directly connected any of the accused persons with the alleged murder of the deceased. Though there was enough room for suspicion against the accused persons, suspicion however strong could not take the place of legal evidence. By their close relationship the accused were supposed to be intimately connected and no inference of illicit intimacy could be inferred merely because they were found going on one cycle. The only circumstance that was considered as incriminating against the accused was that they had not explained the existence of the ligature marks which was the result of a homicidal strangulation, as opined by the doctor. The doctor's opinion could be given its due weight but it could not be the sole basis for a conviction. Assuming, however, that the deceased died as a result of homicidal strangulation, there was no evidence to show that either one or both the accused effected such strangulation. AIR 1960 S C 500, Rel on. (1963) 29 Cut L T 557.

——S. 300 — Practice and procedure — Evidence — Examination of investigating officer essential — Non-examination likely to cause prejudice to accused. (1963) 29 Cut L T 557.

——S. 300—Appreciation — Murder and concealment of dead body — Evidence disbelieved on murder charge if can be accepted for charge uner S. 201, Penal Code. (1960) 26 Cut L T 638.

——S. 300 — Evidence — Duty of prosecution to put all material evidence—Criminal P. C. (1898), S. 286.

Per Panigrahi, J. — In a case involving capital punishment it is essential that all material evidence should be placed before the Court, particularly if that evidence would go in favour of the accused. But it is not obligatory on the prosecutor to examine any number of witnesses on the same point, regardless of time or propriety. ILR (1952) Cut 219.

——Ss. 300 and 302 — Criminal Trial — Evidence — Medico-legal — Murder — Stomach contents of deceased —Inference as to time of death. 1964 (1) Cri L J 426 : AIR 1964 Pat 158 (159) (Pt B) (Pr 22) (DB).

——S. 300—Evidence — Presence of bloodstains on shirt and body of accused—If conclusive — Criminal trial—Murder—Evidence Act (1872), S. 114.

The murder took place in a village at night. In the morning the accused, elder brother of the deceased, contacted some of the villagers including the village chaukidar and took them near the dead body of his brother. Later the accused proceeded to the police station along with the chaukidar and there he lodged the first information report. Some bloodstains were discovered on his shirt and person at the time of F. I. R. The accused denied those established facts in his statement under S. 342, Criminal P. C.

Held, that the movements of the accused in the morning in question were not those of an assailant of the deceased. In this view of the matter it was not safe to draw an inference as to the guilt of the accused merely from the circumstance that there were blood stains on his shirt and person at the time when he appeared at the police station for lodging the F. I. R., particularly when the explanation offered by the accused for the presence of the blood on the person in the F. I. R. also appeared reasonable. The complicity of the accused in the crime had not been proved beyond reasonable doubt and he was entitled to the benefit of doubt. **1961 B L J R 249.**

——S. 300—Evidence Act, S. 3—Intention—Evidence as to — It can be gathered from facts and circumstances — It is matter of inference to be drawn from evidence on record. See Evidence Act (1872), S. 3. **1955 Cri L J 1385 : AIR 1955 Pepsu 153.**

——S. 300—Evidence.

The fact that the murder was committed at accused's house raises a strong suspicion of guilt against him but any amount of suspicion cannot take the place of proof. Without reliable and convincing evidence that he actually took part in the assault or was in any way responsible for it he cannot be held liable for the murder. **ILR (1953) Patiala 435 : 1954 Cri L J 592 : AIR 1954 Pepsu 69 (72) (Pt C) (Pr 9) (DB).**

——S. 300—Identity of spot of murder should be established.

In cases of murder it is not only desirable but necessary that the identity of the spot of murder should be fixed by collecting the blood-stained earth, if and when available, and forwarding it to the Chemical Examiner and the Imperial Seriologist for analysis of the blood. **(1950) 2 Pepsu L R 489 (DB).**

——S. 300—Murder Charge—Evidence—Medical evidence—Accused striking with iron picket (weighing more than two kilograms used for pegging tents) twice on uncovered head of A (deceased) with great force—A dying next day after unsuccessful operation — Post-mortem report saying that death was due to "extensive subarachnoid haemorrhage complicated by laceration of brain as a result of fracture of skull"—Defence that haemorrhage was result of violence or lesion caused by operation and death was not directly attributable to injury inflicted by accused. Extensive haemorrhage (assigned to be the reason of death) held was probably the result of violent physical blows inflicted on deceased and death was caused by those injuries—Evidence Act (1872), S. 45—Taylor's Principles and Practice of Medical Jurisprudence (11th Edition, Vol. 1, p. 309) and Medical Jurisprudence by Modi (14th Edition, p. 274) Quoted with approval. 1964 Cur L J 435 (Punj) : 1965 (2) Cri L J 832 (2) (834) (Prs 7, 8) (Punj) (DB).

——S. 300—Appreciation of evidence—Eye-witnesses —Determination of credibility of their testimony—Test. (Evidence Act (1872), S. 5) and (Criminal P. C. (1898), S. 367).

Where persons offer themselves as eye witnesses, there are a number of ways to find out and to check if they have actually seen the occurrence as alleged by them. One of the tests is whether the evidence of such witnesses is corroborated by legal evidence. The other is whether there are any contradictions or discrepancies in the statements of those witnesses. It has also got to be seen whether during the trial the witnesses have tried to improve upon their earlier statements. If the answer to the above questions is in the affirmative, this leaves an impression in the mind of the Court that such witnesses have not seen the occurrence and the Court can on this basis either accept or reject the testimony of such witnesses. **('65) 67 Pun L R 960 (DB).**

——S. 300 — Evidence — Recoveries of Kirpan and clothes from accused—Evidentiary value of.

In a murder case when the prosecution evidence is held to be untrustworthy or unsafe of credence and the dying declaration to have been recorded in circumstances which do not inspire confidence, the Court would be most reluctant to base the conviction of the accused only on the recovery of the kirpan and the clothes particularly when the investigating agency also does not appear to have conducted themselves in a straightforward manner. Such recovery of articles should not be held to be a strong corroborative piece of evidence. **64 Punj L R 1064 : ILR (1962) 2 Punj 855 : 1963 (1) Cri L J 469 : AIR 1963 Punj 170 (174) (Pt B) (Pr 14) (DB).**

——S. 300—Medical evidence—Murder—Question of time when food was taken by deceased—Medical evidence based on contents of stomach not reliable. (1961) 63 Punj L R 742.

——S. 300—Murder—Delay in post-mortem examination of dead bodies is not material factor which should seriously tell against authenticity of prosecution story. (1961) 63 Punj L R 742.

——S. 300—Accused last seen with deceased—Accused hiding in a field and when found making confessional statement which is supported by tracker's evidence that accused was near the dead body of deceased — Traces of seminal fluid found on turban of accused and on langota of deceased—Anal margin of deceased found torn—Confessional statement retracted—Circumstances and evidence held sufficient to uphold conviction under Ss. 302 and 377, I. P. C. AIR 1955 N U C (Punj) 4997 (DB).

——S. 300 — Evidence — Accused held could not be convicted on evidence tendered—(Evidence Act (1872), S. 3). AIR 1955 N U C (Punj) 1359.

——Ss. 300, 302, 304, Part II—Murder case—Medical witness stating that death was caused on account of shock and haemorrhage due to certain injuries—Statement of medical witness cannot be equated to statement that "injuries by themselves were in ordinary course of nature likely to cause death"—Duties of Public Prosecutors and Judges while dealing with medical evidence in murder trials stated—Evidence Act (1872), S. 45 — Criminal P. C., S. 286. 1965 (1) Cri L J 219 : AIR 1965 Raj 32 (34) (Pt A) (Pr 6).

—S. 300 — Appreciation of evidence—Principle of falsus in uno falsus in omnibus does not apply in India — Prosecution witnesses omitting to explain injuries on the accused — Accused not entitled to acquittal on that ground alone. See Criminal P. C. (1898), S. 367. **ILR (1952) 12 Raj 481.**

—S. 300 — Omission to send alleged weapon of offence to chemical examiner for examination — —Effect.

In cases where the accused seriously challenges that the alleged weapon of offence had nothing to do with him or the crime in question, the omission to

send the suspected blood-stained article for examination by a chemical examiner and by a serologist may lead to acquittal of a guilty person simply on account of such omission. Where, however, there was evidence of a witness to show that the axe in question was the axe with which the accused had committed the offence in question and the accused far from challenging the statement of this witness, admitted in his examination before the Committing Magistrate that that was the axe with which he had committed the offence, the omission to send the axe or scrapings from it for chemical examination or examination by a Serologist has no effect upon the prosecution. **ILR (1955) 5 Raj 1012 : 1956 Cri L J 266 : 1956 Raj L W 229 : AIR 1956 Raj 34 (36, 37) (Pt B) (Prs 8, 12) (DB).**

——S. 300—Murder — Accused, uneducated villager —His running away from scene of occurrence and remaining absconding does not necessarily suggest guilty mind.

The conduct of an accused charged with murder, in running away from the scene of occurrence and in absconding for a period of four months, although it may raise some suspicion against him, does not necessarily suggest a guilty mind when he happens to be an uneducated person living in a village. **1955 Raj L W 307.**

——S. 300—Murder—Person dying of injury—Medical witness—Duty of prosecutor and Sessions Judge.

In all cases especially in the case of a murder, where a person dies of injuries, it is the duty of the prosecutor to put a question to the Doctor, when he is examined in Court, as to the nature of the injuries, i. e., whether they were sufficient in the ordinary course of nature to cause death, or likely to cause death, because the intention or the knowledge of the person is to be inferred only from the nature of the injuries. And if this duty is neglected by the Prosecutor, then the Sessions Judge, when the case comes up before him, ought to examine the Doctor when he sees that no such question has been put by the prosecutor in the committing Magistrate's Court. **(1951) 52 Cri L J 207 : A I R 1951 Sau 17 (17) (Pt A) (Pr 3) (DB).**

——S. 300—Proof—Suspicion—Sufficiency.

Where there is neither direct evidence nor any circumstantial evidence worth the name to connect the accused with the cause of the death, he cannot be held responsible for the killing of the deceased. It is really unfortunate that a grave crime should go unpunished but the question before the Court is whether the accused is proved to have been the murderer. There is no doubt that there is the strongest suspicion against him, but suspicion however strong ; is no substitute for proof. **1954 Ker L T 206 : 1954 Cri L J 1181 : A I R 1954 Trav-Co 396 (398) (Pt A) (Pr 8) (DB).**

23. Onus of proof.

See also (1) Notes 8 and 9 (G).

(2) Evidence Act (1872), S. 105.

——S. 300 and S. 84—Evidence Act (1872), S. 105 —Burden of proof — Burden of proving offence lies on prosecution — Where necessary it has to prove intention — But where plea of insanity is invoked by accused it is for him to establish that fact. Bhikari v. State of Uttar Pradesh, 1965 S C D 953 : (1965) 3 S C R 194 : (1965) 4 Law Rep 97 : (1965) 2 S C W R 777 : 1966 Cri L J 63 : A I R 1966 S C 1 (2) (Pr 5).

——Ss. 300, 299 and 302/34 — Death caused by administering poison—Intention or guilty knowledge —Burden of proof lies on prosecution and not on accused — (Evidence Act (1872), S. 106)—Scope and applicability. See Penal Code (1860), S. 299. 1960 Cri L J 309 : A I R 1960 Andh Pra 153.

——S. 300—Burden of proof—Duty of prosecution.

The burden of establishing guilt of the accused is throughout on the prosecution and the prosecution must prove every link in the chain of evidence against the accused from the beginning to the end. When two persons are seen together and shortly afterwards one of them is found to have been murdered it cannot be inferred positively that his companion is responsible for the murder of the deceased unless there are other circumstances to support that inference. No doubt the circumstances that the deceased was last seen in the company of the accused raises a strong suspicion against the accused but mere circumstances of suspicion without more conclusive evidence are not sufficient to justify conviction of the accused. **1953 Cri L J 242 : 11 J & K L R 111 : A I R 1953 J & K 1 (3) (Pt B) (Pr 15) (DB).**

——S. 300 — Plea of insanity and burden of proof, indicated. See Penal Code (1860), S. 84. 1965 Ker L T 263 : I L R (1965) 1 Ker 454.

——S. 300—Essentials of—Offence under—Burden of proof indicated. A I R 1955 N U C (Madh B) 5627 (DB).

——S. 300 — Evidence Act (1872), S. 105 — Scope— Presumption of innocence of accused — Burden to prove guilt of accused—Benefit of doubt—Burden of introducing evidence to bring case within exceptions —When can be said to be discharged—Duty of Courts to determine guilt of accused on consideration of whole of evidence—Murder charge—Facts established by prosecution raising plea of self-defence, not explained by prosecution — Conviction for murder cannot be sustained. See Evidence Act (1872), S. 105. 1961 (2) Cri L J 346 : A I R 1961 Madh Pra 241 (DB).

——S. 300—Injury—Nature of—Duty of prosecution —Nature of medical evidence. See Penal Code (1860), S. 299. 1963 (2) Cri L J 651 : A I R 1963 Mad 476 (DB).

——S. 300—Offence under S. 302, Penal Code—Prosecution prima facie establishing guilt of accused— Plea of alibi by accused, but accused not supporting it by calling defence witnesses on ground that he cannot be called on to prove his innocence — Held, it was for accused to rebut prosecution evidence by pointing out inherent weaknesses in prima facie case established by prosecution, See Evidence Act (1872) S. 3. 1963 Mad W N 638.

——Ss. 300 and 84—Murder—Accused charged with —Plea of unsoundness of mind set up — Burden lies heavily on him to prove unsoundness—He must prove that he was totally deprived of his understanding and memory — Held accused failed to discharge burden of proof.

Section 84 of the Penal Code and S. 105 read with S. 4 of the Evidence Act place a heavy burden on the defence before the offence can be excused. The effect of S. 4 of the Evidence Act interpreting the words "shall presume" is that the Court shall regard the absence of unsoundness of mind proved, unless and until it is disproved. The mere fact that the accused's mind was partially deranged or that he was subject to some uucontrollable impulse due to insanity will not do. So long as the accused was not insane as to make it impossible for him to know the nature of the act or to realise that his act was wrong or contrary to law, he would be guilty of the offence committed by him. The evidence ought to be sufficient for a categorical finding that at the time when the accused committed the act he was of unsound mind to such an extent that he was incapable of knowing what he was doing was wrong or contrary to law.

Eccentricity or unsoundness of mind of a very minor type is not sufficient. It is not every kind of idle and frantic humour of a man, or something unaccountable in his actions, which will show him to be such a mad man as is to be exempted from punishment; but where a man is totally deprived of his understanding and memory, and does not know what he is doing, any more than a wild beast, he will properly be exempted from the punishment of the law.

Where the accused, a barber, gave with a razor three deep cuts on the throat of the deceased, who had been to the barber's shop to have a shave, sat on the dead body of the deceased and drew out some cords of the throat by his fingers and when charged with the offence of committing murder set up the plea of unsoundness of mind.

Held, that the circumstances on which the defence relied were innocuous, that the defence did not establish insanity or even probability of insanity, that the circumstances were consistent with the behaviour of a sane person and that, therefore, defence failed to discharge the burden of proof. **I L R (1962) Cut 806.**

——S. 300 — Burden of proof — Onus to prove that case falls under exception — Accused not pleading exception — Prosecution case and examination witnesses making out case of grave and sudden provocation — Accused is entitled to benefit of doubt. See Evidence Act (1872), S. 105. **55 Cri L J 1505 : A I R 1954 Pepsu 160 (DB).**

——Ss. 300, 80 — Defence that there was no real intention to kill and it was by chance that injury inflicted happened to be on vulnerable part—Defence does not take case out of offence of murder. **66 Punj L R 1230 : 1965 (2) Cri L J 127 : AIR 1965 Punj 291 (295) (Pt E) (Pr 12) (DB).**

——S. 300—Evidence—Onus of proof.

In a murder case where the penalty provided by law is that of death, it is the duty of the prosecution to leave no room for any doubt or suspicion in establishing the facts on which conviction is sought against the accused. **1952 Raj L W 140 : I L R (1951) 1 Raj 808 (DB).**

——S. 300 — Accused producing weapon with blood on it and saying that he killed deceased with it — Prosecution failing to prove that blood on weapon was human blood — It must be presumed that blood was not human blood and consequently weapon had no connection with crime. **51 Cri L J 739 : A I R 1950 Raj 5 (7) (Pt E) (Pr 5) (DB).**

24. Benefit of doubt.

See also Evidence Act (1872), S. 3.

● ——S. 300, Exception I — Grave and sudden provocation—What amounts to — Accused momentarily losing self-control but regaining it — S. 300, Exception I when applicable.

The test of "grave and sudden" provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control. Where between the time when the accused left his house, and the time when the murder took place, three hours had elapsed, there was sufficient time for the accused to regain his self-control, even if he had not regained it earlier. On the other hand, his conduct in the instant case clearly showed that the murder was a deliberate and calculated one. The mere fact that before the shooting, the accused abused the deceased and the abuse provoked an equally abusive reply could not conceivably be a provocation for the murder. Therefore, the facts did not attract the provisions of Exception 1 to S. 300. Nanavati K. M. v. State of Maharashtra, **64 Bom L R 488 : 1962 Mad W N 363 : 1962 Supp (1) SC R 567 : (1962) 2 S C A 434 : 1962 Mad L J (Cri) 531 : (1962) 2 S C J 347 : 1962 (1) Cri L J 521 : AIR 1962 S C 605 (630) (Pt I) (Prs 85, 86).**

——S. 300 — Circumstantial evidence — Death by throttling—Medical evidence.

As a result of post-mortem examination, the doctor found in a suspected case of death by throttling a contusion mark on the whole front area of the neck but he did not find any bruising of the subcutaneous tissues under the contused area of the neck. There were no external signs found on the body to indicate that death was due to strangulation and even the blueness of the finger nails and the typical post-mortem appearance of asphyxial death were absent. The internal symptoms showed that the suggestion of the defence that the deceased might have contracted pneumonia on the previous day of the death could not be lightly brushed aside. The medical testimony given in the case was the most valuable piece of evidence on which the prosecution could rely to make out a case of death by throttling. The medical witness was also not certain as to the cause of the death.

Held, it was not possible to say for certain that the mark found on the neck was as a result of external pressure brought about by throttling. The law entitled the accused to have the benefit of this dubiousness in regard to the cause of the death of deceased. **1956 All W R (HC) 295 : 1956 All L J 399 : 1956 Cri L J 1385 : AIR 1956 All 731 (734) (Pt A) (Pr 14) (DB).**

——Ss. 300 read with 34, 324 read with 34 and 397 —Accused A, B, C and D attacking N, J, R and S who were carting paddy to their house — Continued beating with spears and sticks even after victims fell down with injuries — A and B taking away paddy — Death of N and J the same day as result of injuries — Inference as to intention from nature of injuries — Existence of common intention — Divergence in prosecution evidence raising doubt as to extent of liability of A and C — Benefit of doubt must go to accused — Conviction of A and B under S 397, propriety of—Evidence Act (1872), S. 3. **(1965) 2 Andh W R 151 : 1965 Mad L J (Cri) 607 : 1965 (2) Cri L J 458 : A I R 1965 Andh Pra 361 (366, 367) (Pt A) (Prs 20, 24, 27, 28, 29).**

——S. 300—Charge of murder by poisoning—Giving of lethal dose not proved — Accused should be given benefit of doubt (Accused convicted under S. 328. **1957 Cri L J 930 : A I R 1957 Andh Pra 456 (462) (Pt D) (Prs 23, 24) (DB).**

——S. 300—Benefit of doubt.

No convincing motive for murder brought home to accused — Testimony of eye-witness regarding discovery of dead body shattered by evidence of investigating officer — Mystery surrounding two reports made to police, in that, one drawn up by Lumberdar and Chowkidar, did not mention names of eye-witnesses and the other drawn up by husband of deceased, from which conclusion was irresistible that report was outcome of conspiracy against accused who was regarded as a village-bully — Also it was impossible to record definite finding on question of scene of murder — Held there was room for grave doubt in truth of prosecution story — Accused held was entitled to benefit of doubt. (Board of Judicial Advisor.) **1953 Cri L J 1706 : A I R 1953 J & K 44 (46, 47) (Prs 20, 21) (DB).**

——S. 300 — Conviction — Circumstantial evidence must be wholly inconsistent with innocence of accused — Accused has to be given benefit of any doubt arising in such evidence.

Accused was convicted under S. 302, I. P. Code, for murder of his wife. The prosecution case was

that on the date of occurrence, the accused came home drunk in the night and started quarrelling with his wife and severely belaboured her causing her death. Accused denied the charge. His case was that on that night when he returned home he found his wife lying dead in the court-yard; carried her inside and took the children to his sister's house. After coming back he called his neighbours and told them. There were no eye-witnesses. The prosecution relied on the evidence of two of the neighbours of the accused who were residing near the house of the accused and deposed to having heard the noise of the accused belabouring his wife. These witnesses were living at a distance of 100/125 yards and the open space between their houses and that of the accused was planted with trees and there was also a brook. The evidence was discarded by Sessions judge. The F. I. R. of the incident was unusually delayed. The nature of injuries revealed in the post-mortem which was conducted after putrefaction had started, did not rule out the probability of death being caused as a result of fall from a height. Enmity between the accused and his wife wss alleged but was not sufficiently proved.

Held, Per Anna Chandy J. — That accused could not be convicted. It began as a case of suspicious death and remained as such when all was said and done. There were no eye-witnesses to the occurrences and there was not a single telling circumstance to connect the accused with the crime. There was no motive much less an adequate one. The medical evidence was unconvincing. The identification by voice was too fragile a foundation and could not be relied. The conduct of the accused to carry the dead body of his wife from the courtyard to the house, his attempt to call his immediate neighbours to his help and when that failed, taking his children to his sister's house and returning to the house to keep watch over the body were not in the least incompatible with his innocence. It was conduct more compatible with innocence than guilt.

Per Govinda Menon J.—Circumstantial evidence in order to furnish a basis for conviction in a criminal case required a high degree of probability and ought to be consistent and consistent only with the guilt of the accused. If any rational explanation was possible then there was an element of doubt of which the accused must be given the benefit.

Though there was some evidence of strained relationship between the accused and his wife the motive by itself was not sufficient to advance the prosecution case. The conduct of the accused was far from establishing his innocence was indicative of his guilt but the rule of circumstantial evidence had inevitably to satisfy the inexorable test that the evidence ought to be wholly inconsistent with the innocence of the accused and unmistakably point to the guilt of the accused. The circumstantial evidence afforded in the case against the accused did not satisfy the test laid down for cases of circumstantial evidence and the accused had therefore to be given the benefit of doubt and ought to be acquitted, **1963 Ker L T 292 : 1963 Ker L J 369 : 1964 Mad L J (Cri) 347 : 1964 (1) Cri L J 493 (499 to 501) (Pt A) (Prs 16 to 18, 23, 29, 30) (Ker) (DB).**

——S. 300 — Circumstantial evidence — Plausible explanation for circumstance appearing against accused—No motive — Held accused entitled to benefit of doubt.

In cases depending on circumstantial evidence, motive one way or the other is highly relevant. In cases depending on circumstantial evidence, no one case can be exactly parallel to another.

The only and a very strong link of circumstantial evidence against the accused was that the weapon, which was most likely used in the murder of the deceased (the father of the accused) was found out from the possession of the accused. There was no evidence on the prosecution side whatsoever that the said weapon belonged to the accused. There was no motive for the murder, on the contrary it was established that the accused and the deceased were on very good terms. The explanation given by the accused for the discovery of the weapon, was a plausible one.

Held, that the explanation offered by the accused regarding the possession of the axe, which was the most likely weapon of the murder, was a plausible one and even if it was not so that link alone and with no other incriminating circumstance could not be definitely taken to be a conclusive link to establish the case against him. A I R 1943 Mad 408, Disting. **(1960) 26 Cut L T 491.**

——Ss. 300, 84 — Plea of unsoundness of mind — Burden of proof — Nature of proof required stated— Evidence Act (1872), S. 105. See Penal Code (1860), S. 84. **1961 (2) Cri L J 357 : A I R 1961 Pat 355 (DB).**

——Ss. 300, 302, 324 — Applicability.

Held, that though the injuries were individually fatal, it was impossible to ascribe any particular injury to one or the other of the accused and hence neither the conviction of one nor of the other under S. 302 could be sustained. (Conviction was altered to one under S. 324). **1954 Cr L J 752 : 56 Punj L R 43 : ILR (1954) Punj 813 : AIR 1954 Punj 126 (128) (Pt D) (Pr 22) (DB).**

——Ss. 300, 299 — Murder — Evidence and proof— Discovery of blood stained weapon through accused —Possibility of weapon having kept at the spot by other person—Benefit of doubt.

It was alleged that A and B had conspired to murder the deceased C and for that purpose got a pharsa fixed to a stick at the shop of S. The only evidence was the recovery of blood-stained pharsa from the house of A at his instance. The evidence of S was that B got the blade of Pharsa fixed to the handle at his shop one week before the occurrence. The evidence of motive was both against A and B;

Held, that the possibility that B might have committed the murder and put the pharsa at the spot where it was found could not be ruled out and the recovery of pharsa by itself could not therefore prove the case of murder against A and as such he was entitled to the benefit of doubt. **1960 Raj L W 314.**

——S. 300—Evidence and proof — Death caused by gun shots — Evidence of ballistic expert and wife of deceased creating strong suspicion against two accused who were proved to be on inimical terms with deceased — Evidence however not sufficient to prove beyond reasonable doubt that accused persons fired shots at deceased person causing his death — Benefit of doubt allowed to accused. 1960 Raj L W 32.

25. Circumstantial evidence.

See also (1) Criminal P. C. (1898), S. 367.
(2) Evidence Act (1872), S. 3.

——S. 300 - Evidence - Circumstantial evidence— Discovery of dead body and silver buttons stained with human blood at instance of accused — Value of —Evidence Act (1872), Ss. 3 'proved', 114 Illus. (a).

The mere fact that the dead body was pointed out by the prisoner or was discovered as a result of a statement made by him would not necessarily lead to the conclusion of the offence of murder. But the discovery of the silver buttons belonging to the deceased with human bloodstains at the instance of the prisoner is a circumstance which may raise the presumption of the participation of the prisoner in

the murder. AIR 1956 S C 400. Ref. Kanbi Karsan Jadav v. The State of Gujarat. 1962 S C D 618 : (1962) 1 Ker L R 511 (SC) : (1963) 2 S C J 364 : (1963) Mad L J (Cr) 465 : (1962) Supp 2 S C R 726 : 1966 Cri L J 605 : AIR 1966 S C 821 (823) (Pr 9).

● —S. 300 — Incriminating statement made by accused to police officer—Statement not leading to discovery of fact—It is not admissible in evidence—Fact when can be treated as discovered—Held that if statement of accused was excluded from evidence, the circumstantial evidence was not complete to lead to conviction of accused for murder. See Evidence Act (1872), S. 25. 1963 (2) Cri L J 182 : AIR 1963 S C 1113.

● —S. 300—Circumstantial evidence —Appreciation of — Charge against husband of murdering his first wife and her son by gun-shots — Ill-feeling between accused and his family and first wife after second marriage—Accused present in his village house with first wife and son on day of occurrence — Gun-shots heard from house:—Accused leaving village same night in his jeep and reaching Lucknow next day where he had second wife—First wife and son disappearing and not seen alive thereafter — Absence of any enquiry by accused or other members of his family as to whereabouts of wife and son—Blood-stained earth recovered from house in village—Accused absconding after matter was reported to police—Blood-stained clothes belonging to accused recovered from laundry in Lucknow—Police unable to trace out jeep — Circumstances held insufficient to draw sole conclusion that husband committed murders. 1963 (1) Cri L J 70 : AIR 1963 S C 74.

● —S. 300 — Circumstantial evidence — Proof — Murder by shooting—Evidence of fire-arms expert—(Evidence Act (1872), Ss. 3 and 45)— Criminal P. C. (1898) S. 367.

Held, on facts that the fire-arms expert made the necessary tests and was careful in what he did. There was no good reason for distrusting his opinion. There could therefore, be no room for thinking, in the circumstances established in this case that any one else other than the accused might have shot the deceased. He was, therefore, rightly convicted for the offence of murder. Kalua v. The State of U. P. 1957 S C R 187 : 1958 Cri L J 300 : I L R (1957) 1 All 15 : A I R 1958 S C 180 (181) (Pr 8).

● —S. 300—Circumstantial evidence — (Evidence Act (1872), Ss. 3 and 5) — (Criminal P. C. (1898), S. 367).

It is a fundamental principle of criminal jurisprudence that circumstantial evidence should point inevitably to the conclusion that it was the accused and the accused only who were the perpetrators of the offence and such evidence should be incompatible with the innocence of the accused.

Where the accused enticed away the deceased on the evening of the day of murder and the deceased was found hanging in the backyard of his house these circumstances by themselves are not enough without anything more to connect the accused with the crime. Eradu v. State of Hyderabad, 1956 Cri L J 559 : AIR 1956 S C 316 (318) (Pr 10).

● —S. 300 — Evidence — Circumstantial evidence.

Where there is no eye-witness to the murder and the case against the accused depends entirely on circumstantial evidence, the standard of proof required to convict the accused on such evidence is that the circumstances relied upon must be fully established and the chain of evidence furnished by these circumstances should be so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused. AIR 1952 S C 343, Rel. on.

It is true that in a case of circumstantial evidence not only should the various links in the chain of evidence be clearly established, but the completed chain must be such as to rule out a reasonable likelihood of the innocence of the accused. But in a case where the various links have been satisfactorily made out and the circumstanses point to the accused as the probable assailant, with reasonable definiteness and in proximity to the deceased as regards time and situation, and he offers no explanation, which if accepted though not proved, would afford a reasonable basis for a conclusion on the entire case consistent with his innocence, such absence of explanation or false explanation would itself be an additional link which completes the chain. Deonandan Mishra v. State of Bihar, 1955 S C J 41 : 58 Pun L R 171 : 1956 B L J R 77 : 1656 Mad W N 385 : 1956 Pat L R (SC) 21 : 1956 All L J 97 : 1956 All W R (Supp) 17 : (1956) 1 M L J (SC) 31 : 1956 An W R (SC) 31 : 1955 Cri L J 1647 : (1955) 2 S C R 570 : AIR 1955 S C 801 (806) (Pr 9).

● —S. 300 — Evidence.

The accused was tried for the murder of the deceased. The only evidence against him was as follows. Some 5 or 6 days before the murder the accused and the deceased had both attended the Court in connection with some litigation The accused knew that the deceased had attended the Court and that he had seen him there but when questioned about it he told a lie.

Thirteen days after the murder he knew that the deceased had been murdered. He also knew where the murder had been committed and where the body and certain articles belonging to the deceased were hidden. There was also ill-will between them, but an ill will, that other members of the accused's family might be expected to share. He had full opportunity to commit the crime but the same kind of opportunity that the other members of his family also had. His brother was also challaned for murder but as he absconded he could not be tried.

Held, that the mere knowledge thirteen days later, coupled with a motive which three others shared and a lie about the deceased's movements told four or five days after the murder were not enough to warrant a conclusion of murder by the accused, as the same circumstances could be said to point with equal suspicion at other members of the accused's family. Machander v. State, ILR (1955) Hyd 807: 1956 S C A 12 : 1956 All W R (Supp) 14 : 1956 All L J 76 : 1956 Mad W N 190 : 58 Pun L R 163 : 1956 B L J R 93 : 1956 Pat L R (SC) 17 : 1956 S C J 34 : (1956) 1 M L J (SC) 25 : (1955) 2 S C R 524 : 1956 An W R (SC) 25: 1955 Cri L J 1644: AIR 1955 S C 792 (794) (Pt B) (Pr 17) (DB).

● —Ss. 300, 302, 378, 379 — Circumstantial evidence.

The circumstances fully established against the accused were that on the date of the occurrence about an hour before sunset she was seen by two ladies proceeding with the deceased in the direction of the scene of the occurrence; that the accused came home without the deceased in her company in the evening of the same day in hurried steps and with her clothes lifted up; the cloth was, on examination, found to be stained with human blood and that the two Naulis of the deceased which were seen on her person up to her going towards the scene of the murder had been discovered at her instance from the thatch of her hut.

Held, that the circumstantial evidence in the case was only consistent with the guilt of the accused. The murder undoubtedly was cold blooded and committed out of pure greed, and the accused was properly convicted under Ss. 302, 379 of the Penal

Code. Nisa Stree v. State of Orissa, 20 Cut L T 247 : 1954 Cri L J 743 : AIR 1954 S C 279 (280) (Pr 5).

●——S. 300 — Circumstantial evidence.

Both the accused and the deceased were seen together at about 2 P.M. on the 25th July, 1951, by the prosecution witnesses. Immediately after the alleged murder the accused went to one Bishandas Tularam with the gold half mohur and the silver churas and offered to sell them to Bishandas Tularam, who did not purchase the half gold mohur but accepted the pledge of the silver churas. The accused went the next morning to Bhagwandas the goldsmith and sold to him the half gold mohur which was melted by Bhagwandas into a gold bar. The accused himself took the police to Bishandas Tularam and to Bhagwandas the goldsmith from whom the silver churas and the gold bar were recovered along with the relative documents showing the pledge and the sale by the accused to these respective parties. These silver churas were identified by the prosecution witnesses as those which were habitually worn by the deceased.

Held, that as the ornaments were established to be the ornaments worn by the deceased and the accused was not in a position to give any satisfactory explanation as to how he came to be in possession of the same on the very same day on which the alleged murder was committed the circumstantial evidence was sufficient to hold the accused responsible for the murder of the deceased. Sunderlal v. State of M. P., 1954 Cri L J 357 : AIR 1954 S C 28 (30) (Pr 6).

——S. 300 — Murder — Absconding of accused — Effect of, stated. See Evidence Act (1872), S. 5. 1963 All L J 977.

——Ss. 300 and 392 — Murder and robbery — Circumstantial evidence — On evidence accused held guilty under Ss. 302 and 392.

Held on facts that circumstances 5 and 6 had also been satisfactorily established and the result was a completed chain of circumstanses which unmistakeably and inexorably fastened the guilt to the accused. Hence the accused should be convicted under Ss. 302 and 392, Penal Code and sentenced to life imprisonment.

(As the accused was over sixteen years by the time the judgment was pronounced, the High Court recommended under S. 10-A, Andhra Pradesh Borstal Schools Act, read with R. 172-A of the Criminal Rules of Practice to the State Government that the accused might be detained in a Borstal School for a period of 5 years). 1965 (2) Cri L J 63 : AIR 1965 Andh Pra 251 (260) (Pr 40) (DB).

——Ss. 300, 302 — Evidence Act (1872), Ss. 3 and 5 — Criminal P. C. (1898), S. 367 — Conviction on circumstantial evidence — Consideration of evidence. See Evidence Act (1872), S. 3. ILR (1962) Andh Pra 1230.

——S. 300—Murder charge—Circumstantial evidence — Nature of evidence required stated. See Evidence Act (1872), S. 3. 1958 Andh L T 633.

——S. 300 — Recovery of blood-stained knife — Evidential value.

Ordinarily, in a case of circumstantial evidence where there has been a discovery as a result of confession made under S. 27, Evidence Act, one expects to find the discovery of something which can be associated with the deceased and not with the accused. Hence, in a case of murder the mere fact that a weapon, which could have been used for the commission of the crime, was discovered with blood stains on it on information given by the accused would not by itself be sufficient to show that he was the murderer. AIR 1950 Mad 714, Rel. on.

Held, that the prosecution evidence at the most created a strong suspicion which, however strong, could not be a ground for conviction. 1958 Andh L T 633.

——S. 300 — Evidence — Circumstantial evidence—Sufficiency.

The accused and the deceased were living as husband and wife. The accused was charged with having committed murder of the deceased. He and the deceased were seen moving together on the day of the occurrence. He had reasons to suspect the faithfulness of the deceased to him. And after the occurrence of murder he made himself scarce in the neighbourhood until he surrendered to the police after five days of the occurrence ;

Held, that these circumstances were insufficient to sustain a conviction of the accused for the offence of murder. 1955 Andh W R 863 : 1957 Cri L J 814 : AIR 1957 Andh Pra 213 (214) (Pt A) (Pr 3) (DB).

——S. 300—Accused and deceased living together as husband and wife — They were seen together on the date of occurrence after which the accused made himself scarce until he surrendered to the police after 5 days—Held circumstantial evidence was not enough to convict the accused for murder. AIR 1955 N U C (Andhra) 6013 (DB).

——S. 300—Criminal P. C., S. 297 — Summing up the evidence to jury — Non-direction — Failure to place before jury two versions of evidence which were at variance, that if one version were believed, there would be no direct evidence but only circumstantial evidence against accused and that for conviction circumstantial evidence should point to only one conclusion that of guilt — Charge held defective. See Criminal P. C (1898), S. 297. 1955 Cri L J 450 : AIR 1955 Assam 59 (DB).

——S. 300 — Evidence — Circumstantial evidence—Conviction on.

Circumstantial evidence must be a combination of facts creating a network through which there is no escape for the accused because the facts taken as a whole do not admit of any inference but of his guilt. AIR 1960 S C 500 Foll. 1962 (2) Cr L J 354 : AIR 1962 Cal 504 (507) (Pt C) (Pr 20) (DB).

——S. 300—Circumstantial evidence.

In a trial on the charge of murder, the chain of circumstantial evidence against the accused was that the deceased child was last seen in his company. She was wearing some ornaments. She was missing for over 24 hours during which period the accused was also absent from his house. The body of the child and the ornaments she was wearing were discovered at the instance of the accused, the body from the well and the ornaments from S, who deposed that the accused sold them to him on the very day of occurrence. The accused did not explain how he came by the ornaments and how he came to know that the body was in the well nor did he explain why was he absent from his house. The death of the child was from drowning. The well was more than a mile away from the residence of the child. The way to it passed through graveyards which excludes the possibility of the child going there and falling in it by inadvertence. There was no explanation on the record as to why the accused did not sleep in his own house in the night of occurrence:

Held, that taking into consideration all these factors the only inference was that of the guilt of the accused. I L R (1954) Hyd 256 : 1955 Cr L J 1262 : AIR 1955 Hyd 200 (202) (Pt B) (Pr 10) (DB).

——S. 300 — Circumstantial evidence—Accused last seen with deceased and disappearing after occurrence —Not sufficient for conviction. 1959 Cri L J 839 : AIR 1959 J & K 66 (66) (Pr 3) (DB).

——S. 300 —Circumstantial evidence against accused —Conduct of accused incompatible with innocence —Absence of explanation and false explanation regarding facts proved — Offence can reasonably be held to be proved.

Where the conduct of the accused charged with murder is entirely different from what it would have been had he not committed the offence and the accused has no explanation to offer with regard to some proved facts which go against him and gives false explanations with regard to others these circumstances, taken along with the other circumstantial evidence against him advance the case against the accused very much beyond suspicion and reasonably and definitely point to the conclusion that he was responsible for the murder. AIR 1955 S C 801, Rel. on. I L R (1963) 2 Ker 26 : 1963 (2) Cri L J 458 (462, 463) (Pt D) (Pr 22) (Ker) (DB).

——S. 300 — Attempt at suicide by accused, though strange coincidence does not amount to proof of offence of murder.

The attempt to commit suicide by the accused charged with murder on the night of murder is, no doubt, a strange coincidence which would give room for strong suspicion but law does not permit of neither the strongest of coincidences nor the gravest of suspicious being substituted for proof. 1962 Ker L J 755 : (1962) 2 Ker L R 244 : 1962 Ker L T 476.

——S. 300 — Circumstantial evidence — Nature of proof required — Some links missing in prosecution evidence — Circumstances held not sufficient to warrant conviction—Evidence Act (1872), S. 3.

In a case of circumstantial evidence not only should the various links in the chain of evidence be clearly established but the completed chain must be such as to rule out a reasonable likelihood of the innocence of the accused. AIR 1955 S C 801, Followed. 1961 Ker L T 546.

——S. 300 — Circumstantial evidence —Sufficiency for conviction.

The deceased was murdered between 2 and 4 P.M. At the time when the murder must have been committed, the accused and the deceased were together at the place of the murder and they were alone there. The gate had been fastened from within by the accused and, soon after the murder, the accused came out with a false story that the deceased had gone out at about 3 P. M.

Held, that the circumstances were sufficient to bring home guilt to the accused for they were consistent only with his guilt and were inconsistent with any reasonable hypothesis of innocence. 1959 Ker L T 167 : 1959 Ker L J 227 : I L R (1959) Ker 319.

——S. 300 — Murder — Evidence — Circumstantial evidence—Adequacy of, for conviction.:

Criminal trial—Evidence—Circumstantial evidence —Murder charge — Accused admitting presence of eye-witness near deceased immediately after he was shot at—Explanation of accused not plausible one—Recovery of a gun from the accused immediately or short while after the incident—Deceased in his dying declaration to witnesses naming accused as the culprit—Evidence held adequate to base conviction. See Criminal Trial. 1956 M B L J (H C R) 343.

——S. 300—Direct and circumstantial evidence held proved the guilt of accused.

Held, on facts that taking stock of the entire evidence, the existence of bad blood between the accused and the deceased, statements of eye-witnesses who saw the accused with an axe near the place of the incident immediately on coming out after their doors, which were chained from outside, were later unchained, and soon after they heard the sound of strokes which killed the deceased, existence of blood stains said to be of human origin, on the shirt of the accused and the fact that the wife of deceased, who was one of the eye-witnesses had named the accused as the culprit from the very start, all go to indicate that the view taken by the lower Court that the accused killed the deceased, was well founded. 1956 M B L J 288 : Madh B L R 1956 (Cri) 49.

——S. 300—Evidence—Criminal Trial—Circumstantial—Murder trial —Some conflict between evidence of eye-witnesses and medical evidence — Incident happening on dark night whereas witness stating it to be moonlit night and also stating that there was fire burning nearby — Conduct of accused suspicious —Report of incident promptly made — Accused held guilty of murder. See Evidence—Appreciation. 1956 M B L J 85.

——S. 300 — Direct evidence and circumstantial evidence held amply made out a case against the accused. M B L J 1955 H C R 2187 : Madh Bha L R 1955 (Civil) 432.

——S. 300 — Murder — Circumstantial evidence — Accused and his wife, the deceased, only inmates in house — No explanation of killing of wife—Accused himself reporting to police — Discovery of weapon and dead body on such information — Sufficient to conclude that accused had killed her.

The very fact that at the time of occurrence the accused and the deceased, his wife, were the only inmates of the house who were in and the accused has given absolutely no explanation as to how his wife was killed, constitutes very strong circumstantial evidence against him and in the absence of anything pointing to the contrary, the only possible conclusion to draw is that it was accused who killed his wife. Further, the conduct of the accused in going to the police station shortly after the crime was committed and the recovery of the basula and also of the dead body in consequence of the information given by him are again strong pieces of evidence against him.

The test of grave and sudden provocation is whether a reasonable man belonging to the same class of the society as the accused placed in the situation in which the accused was placed would be so provoked as to lose his self-control. The provocation must be such as will upset not merely a hot tempered or hyper-sensitive person but one of ordinary sense and calmness : AIR 1962 S C 605, Rel. on. Thus where in a trial for murder, of his wife by the accused, the first information report, given by the accused himself, stated only that the deceased wife had abused the accused, and the circumstances in which provocation was caused had not at all been brought on record ; the statement of the accused, under S. 342, Criminal P. C., was absolutely silent on the question of any provocation, much less of its being sudden and grave; there was no eye-witness to the occurrence and so it was futile to expect any evidence with regard to provocation which might have been caused to the accused at that time.

Held, that, in these circumstances, it was not possible to hold that the case fell within the first exception to S. 300. 1963 Jab L J 137 : 1962 M P L J (Notes) 317 : 1964 (1) Cri L J 596 (597, 598) (Pt A) (Prs 5, 9) (Madh Pra) (DB).

——S. 300 — Circumstantial evidence — Accused found in possession of jewels worn by deceased, shortly after murder — No explanation of possession — Circumstances held not sufficient to convict accused of murder — Evidence Act (1872), Ss. 114, 106 and 3.

The inference of presumption of guilt, upon the charge of murder can be safely drawn, where the

accused is in unexplained possession of jewels or articles of the victim after the crime, and where in addition, there is some evidence at least connecting the movements of the accused with those of the victim, either before or after the crime, and in some manner or another, establishing a nexus between the accused and the offence. The mere unexplained possession or production of the jewels of the victim by the accused may not constitute a safe basis for a conviction upon a charge of murder, when that is the only bare circumstance proved in evidence.

Section 106, Evidence Act, cannot apply to shift the onus of proof in a criminal prosecution, at any stage of the prosecution. It is only where the circumstantial evidence fully establishes the guilt of the accused, and where, nevertheless some explanation by the accused compatible with his innocence could possibly be put forward by him relating to facts within his exclusive knowledge, that his failure to put forward any such explanation could be considered by the Court as an additional circumstance against him. Clearly, an accused might fail to put forward a particular explanation such as theft or dishonest retention of the jewels of the victim, which may be true, owing to fear or ignorance. Where such a probability exists, the mere fact that he does not put forward the explanation, cannot justify the inference of guilt, when the chain of circumstantial evidence is otherwise incomplete. **1962 Mad W N 24 : 1963 (2) Cri L J 651 : AIR 1963 Mad 476 (478, 479) (Pt B) (Prs 13, 14) (DB).**

——S. 300 — Appreciation of evidence — Offence of murder proved by clear and credible testimony of eye-witness—Circumstantial evidence is not of great importance—See Criminal P. C. (1898), S. 367. 1960 Cri L J 1100 : AIR 1960 Mad 362 (DB).

——S. 300—Circumstantial evidence—Evidence Act (1872), S. 3.

The deceased and the accused were on inimical terms some time prior to the date on which the murder took place. The accused had threatened the deceased that he would cut him even as the deceased had cut and killed his goat. On the date of murder both the deceased and the accused were seen either in each other's company or in close proximity to each other some hours before the murder took place. Sometime after the alleged murder, the accused was seen with a blood-stained chopper going in a direction opposite to the place of murder but coming from the place of murder ; and on information given by the accused, a blood-stained chopper was recovered from a bush about 2 furlongs to the east of the scene of murder :

Held, that the offence of murder could not be held to have been brought home beyond reasonable doubt to the accused. **(1950) 1 Mad L J 663 : 1950 Mad W N 333 : 1950 Mad W N (Cri.) 89 : AIR 1950 Mad 714 (714, 715) (Pt A) (Prs 1, 3) (DB).**

——S. 300 — Evidence — Circumstantial evidence.

In order to justify an inference of guilt, the circumstances from which such an inference is sought to be drawn must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt. **1955 Cri L J 139 : AIR 1955 Manipur 1 (9) (Pt F) (Prs 26, 27).**

——S. 300 — Murder — Evidence — Circumstantial evidence — Deceased and accused seen together on day of occurrence — Injuries on person of deceased caused by sharp cutting instrument like sickle — Sickle recovered on information supplied by accused —Clothes of accused found blood-stained at the time of arrest — Blood-stains not satisfactorily explained by accused — Ring which deceased was wearing produced by accused — Evidence held sufficient to prove that accused was guilty of murder. 1963 Mad L J (Cri.) 5 : 1962 (1) Cri L J 733 : 39 Mys L J 993 : ILR (1961) Mys 586 : AIR 1962 Mys 124 (126) (Pt B) (Pr 19) (DB).

——S. 300 — Appreciation of evidence — Circumstantial evidence — Incriminating facts must be incompatible with innocence of accused and incapable of explanation on any hypothesis other than that of his guilt. 1955 Cri L J 1274 : AIR 1955 Mys 119 (120) (Pr 7) (DB).

——S. 300 — Evidence Act (1872), S. 8 — Accused charged with murder running away after suspicion falls on him and joining service elsewhere under another name — Conduct does not by itself, lead to inference of guilt. (1963) 5 Orissa J D 372 : 1964 (1) Cri L J 680 : 31 Cut L T 17 : AIR 1964 Orissa 144 (149) (Pt E) (Pr 22) (DB).

——S. 300 — Evidence — Circumstantial evidence consistent with guilt of accused — Conviction held proper—Criminal Trial—Evidence. 29 Cut L T 531 : ILR (1963) Cut 567.

——S. 300 — Circumstantial evidence—Sufficiency for conviction—Evidence Act (1872), S. 3—Criminal P. C. (1898), S. 367.

In dealing with circumstantial evidence, there is always the danger that conjecture or suspicion may take place of legal proof. In cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. There must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused: AIR 1952 S C 343 and AIR 1960 S C 29, Foll. **ILR (1959) Cut 659.**

——S. 300—Circumstantial evidence — Sufficiency.

Where there is no eye-witness to the murder and the case against the accused depends entirely on circumstantial evidence, the standard of proof required to convict the accused on such evidence is that the circumstances relied upon must be fully established and chain of evidence furnished by these circumstances should be so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused. Not only should the various links in the chain of evidence be clearly established, but the completed chain must be such as to rule out a reasonable likelihood of the innocence of the accused. But in the case where the various links have been satisfactorily made out and the circumstances point to the accused as the probable assailant, with reasonable definiteness and in proximity to the deceased as regards time and situation and he offers no explanation which, if accepted, though not proved would afford a reasonable basis for a conclusion on the entire case consistent with his innocence, such absence of explanation or false explanation would itself be an additional link which completes the chain. AIR 1955 S C 801 and AIR 1958 S C 343 Foll. **(1959) 1 O J D 265 : (1959) 25 Cut L T 216.**

——S. 300 — Evidence — Circumstantial evidence — Must be consistent with guilt of accused — (Criminal P. Code (1898), S. 367). AIR 1955 N U C (Orissa) 6082 (DB).

——S. 300 — Evidence — Appreciation of — Circumstantial evidence — Accused and deceased seen together for the last time — Explanation given by accused not checked by prosecution — Circumstance

cannot go against accused—(Criminal P. Code (1898), S. 367). AIR 1955 N U C (Orissa) 6082 (DB).

— S. 300 — Murder trial — Seizure of blood-stained articles—Seizure made a week after alleged murder—Blood-stains disintegrated and their origin not detectable — No value can be attached to this evidence. AIR 1951 Orissa 53 (56) (Pt A) (Pr 7) (DB).

—S. 300 — Murder — Circumstantial evidence.

Mere fact that person has been last seen with murderer is not by itself enough, unless it appears that the latter was in the company of the deceased at or about the time when and at the place where the murder appears to have been actually committed. AIR 1951 Orissa 53 (59) (Pt I) (Pr 11) (DB).

—Ss. 300 and 394, 34, 302 — Charge of robbery accompanied with murder — Murderous assault at night with dagger on first class passenger in running train — Circumstantial evidence — Appreciation of. See Penal Code (1860), S. 34. 1964 (1) Cri L J 473 (Pat).

—S. 300 — Circumstantial evidence.

Where the circumstances are not inconsistent with the innocence of the accused, the medical evidence supports the theory of death by misadventure; there is no positive motive for the alleged murder; the witnesses make inconsistent and untrue statements from stage to stage, and the only eye-witness, who is a child of tender years cannot be believed or trusted implicitly the accused cannot be convicted of an offence of murder. 1953 B L J R 280 : 1953 Cri L J 1344 : I L R 32 Pat 217 : AIR 1953 Pat 246 (249) (Pt B) (Pr 12).

—S. 300—Circumstantial evidence—Sufficiency — (Evidence Act (1872), S. 3).

The fact of the recovery of dead bodies at the instance of the accused together with the possession of property belonging to the deceased immediately after murder and giving rise to presumption under illustration (a) of S. 114, Evidence Act is sufficient to hold the accused guilty of murder. 1958 Raj L W 353 : 1958 Cri L J 1540 : I L R (1959) 7 Raj 944 : AIR 1958 Raj 338 (341) (Pt C) (Pr 6) (DB).

—Ss. 300 and 364 — Murder — Proof of death — Abduction with intent to murder — Proof of intention — Circumstantial evidence — Charge under Ss. 302/34 and 364 — Failure to prove that accused was murderer — Accused can be held guilty under S. 364 — (Evidence Act (1872), S. 3).

The accused was committed to Sessions under Ss. 364, 397 and 302/34 I. P. C. but was convicted only under S. 342 and was acquitted under S. 302/34 I. P. C. It was proved that the accused along with two other dacoits had come to the house of deceased Swamiji, tied his hands with a rope and took him away on a camel towards a jungle. Prior to this they searched his house but nothing valuable was discovered. Finding that they could not get sufficient loot from the house of Swamiji, they managed to stop a bus on their way. In that bus there was one circle inspector. One of the dacoits did not hesitate to shoot him and straightway killed him. All the passengers of the bus were thereafter, robbed at the point of the gun. Then they took away Swamiji. The search party had discovered a skull and certain bones and Arts. 1 to 5 in a jungle in the village Basoda. It was also proved that since the date of his abduction the Swami was not heard of by any person who might have heard of him, had he been alive. It was not proved that the skull was that of Swami but there was the significant fact that the saffa and other articles were found at the place where the skull and the bones were found and the earth of that place was also blood-stained.

Held, (i) that the circumstances proved led to the irresistible inference that the death of Swami had taken place and he was no longer alive.

(ii) that it cannot be laid down as a matter of law that in no circumstances a charge under S. 364, I.P.C. can be made out if the prosecution alleges that the deceased met death at the hands of the abductors or other persons. The circumstances proved clearly showed that the abductors of Swamiji had the intention at the time of abduction to murder him or to put him in such state that he might be in danger of being murdered. Since the accused was one of the persons who abducted the Swamiji he was liable under S. 364 I. P. C. The prosecution evidence fell short of proving that the accused caused the death of Swamiji or abetted his murder. It may have been caused by some one else also. He, therefore, could not be convicted under S. 302 or 302/34 I. P. C. AIR 1945 Cal 42, AIR 1947 Cal 35, AIR 1937 Cal 578, AIR 1953 Hyd 249, AIR 1940 Cal 561, Disting. 1958 Raj L W 584 : I L R (1958) 8 Raj 181.

—S. 300 — Evidence — Conviction on circumstantial evidence.

In a case depending upon circumstantial evidence, all possibility of the innocence of the accused should be excluded. The mere possession of articles belonging to the murdered person, even supposing that they were bloodstained, would not be sufficient to prove a case of murder against the accused beyond all reasonable doubt, particularly when it is not proved that the articles were in possession of the deceased or that they were not missing before the date of the offence. Case-law referred.

Similarly the presence of the blood stains on the coat and turban of the accused after a period of seven days does not necessarily indicate that they must have been received in the murder. 4 Raj L W 640 : I L R (1953) 3 Raj 655 : 1955 Cri L J 835 : AIR 1955 Raj 82 (84) (Pt B) (Prs 10, 12) (DB).

—Ss. 300 and 322 — Evidence — Charges based on circumstantial evidence — Inference of guilt when can be drawn—(Evidence Act (1872), S. 3). AIR 1955 N U C (Raj) 478 (DB).

—S. 300 — Circumstantial evidence.

Where the deceased wore the jewellery, went in the direction of the well in the company of the accused and his dead body was found in the well without the jewellery and there was the additional fact that the two accused were last seen in the company of the deceased:

Held, that the accused could be held guilty of murder in default of any reasonable explanation. AIR 1943 Mad 69 Rel. on. 6 Sau L R 473 : 1954 Cri L J 1553 : AIR 1954 Sau 129 (130, 131) (Pt G) (Pr 6) (DB).

—S. 300 — Cricumstantial evidence — Conviction on — One tongawalla taking certain constable with complainant to wadi belonging to accused — Constable and complainant not heard of afterwards — Blood-stained knife and service belt bearing number of constable recovered from wadi — Traces of recent burning in a pit in wadi — Held, conviction of accused for murder of two persons on this evidence was proper, though burnt bones were not found. (1950) 3 Sau L R 114 : AIR 1950 Sau 2 (4) (Pt A) (Pr 5) (DB).

—Ss. 300 and 299 — Circumstantial evidence — (Evidence Act (1872), S. 3) - Circumstantial evidence when can be accepted and acted upon as direct evidence indicated. 1952 Cri L J 1304 : A I R 1952 Trav-Co 305 (306) (Pt A) (Pr 4) (DB).

26. Proof of death.

See also Penal Code (1860), S. 302—Absence of corpus delicti.

● ——Ss. 300 and 302 — Conviction—Basis of—Corpus delicti not traceable — Proof of murder solely dependant on retracted confession — Improbability of manner of murder—Benefit of doubt — (Evidence Act (1872), Ss. 24, 3 and 5) — (Cr. P. Code (1898), Ss. 164 and 367.)

In law a conviction for an offence does not necessarily depend upon the corpus delicti being found. There may be reliable evidence, direct or circumstantial of the commission of the murder though the corpus delicti is not traceable.

Normally speaking it would not be quite safe, as a matter of prudence if not of law, to base a conviction for murder on the confession of the alleged murderer, by itself and without more.

Held, on facts that having given careful and anxious thought to all the features of the case and to the findings of the Courts below, in that behalf, the confession in this case was not safe to be acted upon, at least in so far as the commission of murder was concerned; that the Court was not satisfied that the murder, if any, had been committed at the time and the place and in the manner indicated in the confession and hence the accused were entitled to benefit of doubt in respect of the offence of murder. Ram Chandra v. State of Uttar Pradesh. **1957 Cri L J 559 : AIR 1957 S C 381 (387) (Pt A) (Pr 6).**

——S. 300 — Failure to recover body of deceased — Effect — Conviction on circumstantial evidence — Validity—(Criminal P. C. (1898), S. 367)—Evidence Act (1872), Ss. 3, 5.

To sustain a charge of murder, the failure on the part of the prosecution to recover the dead body will not indicate that there was no murder if the other evidence is convincing enough to establish the crime of murder. On a criminal charge the fact that the murdered man was killed like any other fact, can be proved by circumstantial evidence, being evidence which leads only to that one conclusion of fact, although no body is found.

Held, on facts that the incriminating circumstances appearing against the accused were fully established and that those circumstances were consistent only with the hypothesis of the guilt of the accused and that they did not leave any reasonable ground for concluding that they may also be consistent with the innocence of the accused. The conviction of the accused under S. 302 read with S. 34 was therefore upheld. **1958 Cri L J 842 : AIR 1958 All 514 (520, 521) (Pt E) (Prs 31 to 34) (DB).**

——S. 300 — Proof — Non-recovery of dead body — Effect does not render conviction of accused impossible — Corpus delicti — Meaning is that offence has been committed and not that dead body has been recovered — Death can be proved by circumstantial evidence as any other fact can be. **AIR 1955 NUC (All) 4425 (DB).**

——S. 300—Conviction on circumstantial evidence—Absence of corpus delicti—Legality — Evidence Act (1872), S. 3—Circumstantial evidence.

Even though the dead body is not traced and the cause of death is not known, murder can be proved by circumstantial evidence. Whether there is sufficient proof to arrive at such a finding would depend on the facts of each case. A conviction for the offence does not depend upon the corpus delicti being found. There may be reliable evidence, direct or circumstantial, of the commission of the murder though the corpus delicti are not traceable. Failure on the part of the prosecution to recover the dead body will not indicate that there was no murder if the other evidence is convincing enough to establish the crime of murder. AIR 1960 S C 500; 1955-1 Q B 388; 1952 N Z L R 111; 1911 Cr App R 225, Rel. on.

Where only the skulls of the two small children were found but the other circumstances clearly indicated that they belonged to the deceased children murdered by accused, the accused was convicted on the basis of such evidence. **1963 Ker L J 228 : 1964 Mad L J (Cri) 102 : 1963 Ker L T 229.**

——S. 300 — Proof of death — Absence of corpus delicti.

It is not obligatory for proving the death of an individual that his dead body should be recovered. **(1950) 1 Mad L J 428 : 63 Mad L W 315 : 1950 Mad W N 260 : 1950 All W R (Supp) 70 : 51 Cri L J 1068 : 1950 Mad W N (Cri) 64 : AIR 1950 Mad 452 (452) (Pr 5)** (DB).

——S. 300 — Proof—Evidence of death—Either dead body should be available or somebody's statement who knew deceased that he had seen deceased dead or had seen the dead body — In absence of this from the fact that certain person has not been seen for certain period, it cannot be said that he is dead. **AIR 1955 NUC (Raj) 1637 (DB).**

27. Dying declaration.

See also Evidence Act (1872), S. 32.

——S. 300 — Evidence Act (1872), S. 32 — Dying declaration — Containing complete statement and making clear accusation against accused — Declarant suddenly dying and his thumb impression taken after his death — Admissibility and probative value of — Corroboration — Necessity. See Evidence Act (1872), S. 32. **1962 (2) Cri L J 404 : AIR 1962 SC 1252.**

● ——S. 300—Accused pouring oil on clothes of wife and setting fire — Wife dying of burns — Conviction under S. 302, Penal Code, based solely on her dying declaration—Held correct. (Majority view). AIR 1958 S C 22, Rel. on. Tarachand Damu Sutar v. State of Maharashtra. **1963 Mad L J (Cri) 307 : 1962 All W R (HC) 135 : 1962 All Cri R 103 : (1962) 2 S C R 775 : 1962 (1) Cri L J 196 : 64 Bom L R 74 : AIR 1962 S C 130 (132, 133, 134) (Pt B) (Prs 8, 12, 21).**

——S. 300 — Evidence Act (1872), S. 32 (1) — Dying declaration — Proof of — Actual words need not be proved—(Criminal P. C. (1898), S. 512). See Evidence Act (1872), S. 32 (1). **1957 Cri L J 337 : AIR 1957 All 177 (DB).**

——S. 300 — Evidence Act (1872), S. 32 (1) — Dying declaration — Proof of — Needs corroboration. See Evidence Act (1872), S. 32 (1). **1957 Cri L J 337: AIR 1957 All 177 (DB).**

——S. 300 — Evidence Act S. 32 (1) — Dying declaration — Probative value of — Tests to be applied — Duty of Court indicated. See Evidence Act (1872), S. 32 (1). **1963 (1) Cri L J 469 : AIR 1963 Punj 170 (DB).**

28. Evidence of poisoning.

● ——S. 300 — Murder by poisoning — Facts to be established — Possession of poison — Evidence of.

In the case of a murder by administering poison, the prosecution has, along with the motive, also to establish that the deceased died of a particular poison said to have been administered, that the accused was in possession of that poison and that he had the opportunity to administer the same to the deceased. Criminal App. No. 98 of 1958, (S C), Rel. on. Where the evidence in the case shows that the accused gave the deceased three 'peras' and within half an hour, he became ill and died within two hours, that the food which the deceased had taken did not contain any poison, that the deceased did not take any other food apart from the peras and lastly it was clear from the result of the chemical examination that he had died of arsenic poisoning.

Held, that arsenic was contained in the peras given by the accused and it also inevitably followed that the accused was in possession of arsenic before he gave the paras to the deceased. Mohan v. State of U. P. 1960 Cri L J 1011 : (1960) 2 Ker L R 14 : AIR 1960 S C 659 (660) (Prs 8, 9).

——S. 300 — Poisoning — Burden of proof.

It is of the utmost importance in a case of arsenic poisoning that the prosecution should prove that a lethal dose of arsenic, that is, two grains or upwards, had been administered. In India, arsenic is used as a medicine in all manner of diseases. It is therefore impossible to take the mere evidence that arsenic was detected as sufficient to prove conclusively that death was from arsenic poisoning. Before a Court can find any individual guilty of murder by the administration of arsenic complete analysis should be made. AIR 1933 All 837, Rel. on. 1958 Cri L J 1 : AIR 1958 All 1 (4) (Pt B) (Pr 10) (DB).

——Ss. 300, 302 and 328—Charge of murder by poison — Giving of lethal dose not proved—Accused should be given benefit of doubt (Accused convicted under S. 328). 1957 Cri L J 930 : AIR 1957 Andh-Pra 456 (462) (Pt D) (Prs 23, 24) (DB).

——S. 300 — Death due to administration of lethal dose of dhatura—Question as to knowledge of accused that particular dose was so poisonous — Evidence of previous similar incident is admissible. See Evidence Act (1872), S. 14. 1963 (1) Cri L J 296 : AIR 1963 Madh-Pra 102 (DB).

——S. 300—Criminal P. C. (1898), S. 367 — Appreciation of evidence—Murder by poisoning — Facts to be established by prosecution — Facts are not invariable criteria of proof by direct evidence. See Criminal P. C. (1898), S. 367. 1965 (1) Cri L J 321 : AIR 1965 Orissa 38 (DB).

——S. 300 — Circumstantial evidence — Nature of—Murder by poisoning.

The quantum of circumstantial evidence must be such as to lead to the inference that the guilt of the accused is established beyond reasonable doubt and that the circumstances are wholly incompatible with the innocence of the accused.

Where, therefore, there is (1) unimpeachable evidence that the viscera and the chatni contained oleander poison, (2) the unchallenged testimony of the doctor that death was due to oleander poisoning and (3) full corroboration from the findings on Chemical tests and the medical opinion of the statements made by deceased at three different stages that the chatni, served to him by the accused, tested bitter.

Held, the chain of circumstantial evidence was complete and no link was missing to come to a conclusion beyond reasonable doubt that the deceased died of poisoning arising out of the service of the chatni by the accused. **1965 (1) Cri L J 321 : AIR 1965 Orissa 38 (41, 44) (Pt B) (Prs 4, 14) (DB).**

29. Evidence as to possession of property.

See also Evidence Act (1872), S. 114.

——S. 300 — Evidence — Possession of stolen property belonging to murdered person — Inference that the thief was the murderer when justifiable stated. See Evidence Act (1872), S. 114, Illus. (a). AIR 1955 N U C (S C) 5807 (DB).

——Ss. 300 and 411 — Applicability — Murder taking place at night — Early next morning accused disappearing from his house — After his arrest accused producing articles which were removed from body of deceased from his house — Inquests made shortly after dawn and not late in day — Accused held was not merely receiver of stolen property but murderer. Ram Bharosey v. State of U. P. 1954 Cri L J 1755 : AIR 1954 S C 704 (706) (Pt C) (Pr 6).

——S. 300 — Evidence Act, S. 114 — Inference — Circumstances showing that theft and murder were committed at same time — Person in possession of stolen property — Inference that he was murderer cannot be drawn. See Evidence Act (1872), S. 114. 1952 Cri L J 1585 : AIR 1952 All 776 (DB).

——S. 300 — Conviction — Evidence—Accused found in possession of property proved to have been in possession of deceased at time of murder—Absence of any other evidence — Conviction for murder is not justified on this circumstance alone. See Evidence Act (1872), S. 114 (a). AIR 1958 Andh-Pra 273 (DB).

——S. 300 — Evidence Act (1872), S. 114 — Presumption for graver offence can be drawn in proper cases — Ornaments on person of deceased recovered from accused, shortly after murder — Murder and theft held appeared to be part of same transaction — Presumption of graver offence under Ss. 302 and 380 could be drawn against the accused. See Evidence Act (1872), S. 114. 1958 Cri L J 596 : AIR 1958 Andh-Pra 255 (DB).

——Ss. 300 and 201 — Applicability — Recovery of head and clothes of deceased at instance of accused — Accused cannot be convicted under S. 302 — Accused is guilty of offence under S. 201. See Penal Code (1860), S. 201. 1954 Cri L J 1124 : AIR 1954 J & K 42.

——Ss. 300 and 390 — Robbery and murder as part of the same transaction — Recent and unexplained possession of stolen property — Presumption to be drawn — Section 302 — Murder by a child below 16 years — Nature of sentence to be awarded—Children Act (Travancore, 1120), Ss. 26 and 33.

In cases, where robbery and murder are connected as to form part of the same transaction, the recent and unexplained possession of the stolen property is not only presumptive evidence against the accused on the charge of robbery but also on the charge of murder.

The offence committed by the accused (who was below the age of 16 in the instant case) in this case is of a very serious nature and mere detention in a Certified School under S. 26 of the Children Act will be no adequate punishment for the offence. The more appropriate section for dealing with the accused under the Children Act is S. 33. **(1965) M L J (Cri) 454 : 1965 Ker L T 279.**

——Ss. 300, 392 — Evidence — Unexplained possession of stolen articles soon after the crime — Inference — Evidence Act (1872), S. 114.

In cases where robbery and murder are so connected as to form parts of the same transaction the unexplained possession of the stolen property soon after the event will not only be presumptive evidence against the accused on the charge of robbery but also on the Charge of Murder. AIR 1953 Trav-Co 402; AIR 1954 S C 28; AIR 1956 S C 400, Rel. on. **1960 Ker L J 896 : (1960) 2 Ker L R 222 : 1960 Ker L T 829.**

——S. 300 — Evidence—Statement as regards possession — Inference of murder cannot be drawn. See Evidence Act (1872), S. 27. AIR 1955 N U C (Madh-B) 3861 (DB).

——S. 300 — Evidence — Murder — Articles recovered from possession of accused—Nature and extent of presumption. See Evidence Act (1872), S. 114. AIR 1955 N U C (Madh-B) 1556 (DB).

——S. 300—Evidence Act S. 114, Illus. (a)—Applicability to cases other than theft discussed. See Evidence Act (1872), S. 114, Illus. (a). AIR 1950 Madh-Bha 104 (DB).

● ——Ss. 300 and 390—Stolen property of deceased found in possession of accused — No common intention to commit murder —Inference — Evidence Act (1872), S. 114.

Merely on the recovery of stolen property of the deceased, found in possession of the accused soon after murder and in the absence of any evidence that the common intention of both the accused was to commit murder in furtherance of common intention to commit robbery, the Court is not justified in drawing the inference that the accused are guilty of murder. The possession by the accused of all the property which was the result of robbery, justify an inference that they took part in the robbery. Fakirchand Nandram v. The State, 51 Cri L J 1345 : AIR 1950 Madh-B 76 (79) (Pt D) (Pr 18) (FB).

● ——S. 300 — Accused refusing to give explanation about possession of property stolen from deceased——Inference as to commission of murder — Evidence Act (1872), S. 114.

Merely because the accused refused to give explanation about the possession of property stolen from a murdered person or gives unsatisfactory explanation, no inference can be drawn that the accused committed murder in the act of theft or robbery. The accused is not bound to give explanation. A reasonable explanation of the evidence should not be rejected because it is not offered by the accused. 51 Cri L J 1265 : AIR 1950 Madh-B 76 (80) (Pt E) (Pr 22) (FB).

——Ss. 300 and 411 — Applicability — Unexplained possession of stolen property in case of murder — Absence of other evidence—Offence.

It is now well established that where unexplained possession of stolen property is the only circumstance the presumption for a graver offence cannot be drawn unless there are other circumstances justifying the drawing of presumption for a graver offence. Where the prosecution in a case of murder had not established any further circumstance other than the unexplained possession of stolen property the presumption for the lesser offence under S. 411, I. P. C. was drawn and not S. 302. 1957 M P L J (Notes) 164.

——Ss. 300, 379 and 411—Evidence Act S. 114, Illustration (a)—Possession of stolen property — Application of principles to murder case—Held on facts that presumption of murder against accused should have been drawn. See Evidence Act (1872), S. 114, Ill. (a). AIR 1955 NUC (Mad) 1217.

——S. 300—Evidence — Recent possession of articles belonging to deceased—Presumption—Circumstantial evidence. See Evidence Act (1872), S. 114. 1954 Cri L J 115 : AIR 1954 Mad 152 (DB).

——Ss. 300, 302, 379, 411 and 201— Murder for gain —Accused found in possession of jewels worn by deceased — Actual participation in murder not established—Conviction and sentence for offence under Ss. 379 and 411 affirmed but conviction under S. 302 set aside. 1952 Mad W N 613 : 1952-2 Mad L J 288 : 1952 Mad W N (Cr) 185 : 1953 Cri L J 1889 : AIR 1953 Mad 1006 (1006) (Pt A) (Pr 4) (DB).

——S. 300—Applicability — Mere knowledge of facts as to an offence—Person in possession of incriminating articles—Adverse inference can be drawn — But mere knowledge of facts such as the place where blood-stained articles are found or the place where the dead body is found does not conclusively establish that the person to whom such knowledge is attributed is guilty of murder. A I R 1955 N U C (Mys) 435 (DB).

——S. 300—Evidence — Absence of ridge between land is no evidence of oneness in title or possession—(Limitation Act (1908), Art. 144) — (Criminal P. C. (1898), S. 145). 1955 Cri L J 597 : A I R 1955 Pat 161 (165) (Pt B) (Pr 7) (DB).

——S. 300—Offence of murder — Presumption from circumstances. See Evidence Act (1872), S. 114, Ill. (a). AIR 1954 Punj 201 (DB).

——Ss. 300, 411 — Charge of murder and receiving stolen property—Forming part of same transaction—Accused in unexplained possession of stolen property —Presumption of murder, therefrom—Propriety of.

It is well settled that in cases where murder and robbery or a like offence form part of one transaction, recent and unexplained possession of stolen property, while it would be presumptive evidence on a charge of theft or robbery or receiving stolen property, would similarly be evidence on a charge of murder. There is, therefore no doubt that where murder and robbery (or theft or receipt of stolen property) are proved to have been integral parts of a certain transaction, the presumption that can be drawn from the possession of the property may, consistent with all the facts proved in the case, be not only that the person to whom such possession was traced committed the theft or received the stolen property but also that he committed the murder which forms part of the same transaction as theft or robbery. AIR 1954 S C 1 : AIR 1954 S C 28, Foll. 1965 Raj L W 418 : I L R (1965) 15 Raj 989 : A I R 1966 Raj 74 (82, 83) (Pt C) (Prs 26, 27) (DB).

——Ss. 300 and 302—Proof of death—Non-discovery of body of deceased is not fatal to the proof of the offence, when there is clear proof that the person alleged to have been murdered was in fact dead. 1952 Raj L W 376: 1953 Cri L J 1038 : 1LR (1952) 2 Raj 669 : A I R 1953 Raj 131 (133) (Pt D) (Pr 7) (DB).

—— Ss. 300, 397 — Evidence Act (1872), S. 114 — Murder and robbery—Circumstantial evidence — Inference from possession of ornaments worn by deceased - Inference that person found in possession committed murder or robbery, when should be drawn, indicated—(Criminal P. C. (1898), S. 367). See Evidence Act (1872), S. 114. 1955 Cri L J 1522 : A I R 1955 Sau 93 (DB).

30. Confession.

● ——S. 300—Evidence—Extra-judicial confession—Value—Proof by person who had no reason to state falsely—Corroboration by circumstances proved by independent evidence — Accused held was rightly convicted under S. 302—Evidence Act (1872), S. 24.

Extra judicial confessions are not uasully considered with favour but that does not mean that such a confession coming from a person who has no reason to state falsely and to whom it is made in circumstances which tend to support his statement, should not be believed. The appellant was convicted under S. 302, I. P. C. and sentenced to death for the murder of one, S. with sword. The prosecution evidence established that the accused had made an extra judicial confession just after the murder when he was having a bath in the canal, that he purchased a cycle from the deceased that there was quarrel between the appellant and the deceased at a play of cards, that he had purchased the sword and that he had deposited the sword stained with human blood at the police station after making a confession to the police by way of first information.

Held that apart from the confession to the police, the extra judicial confession, supported by independent evidence of the appellants having enmity with the deceased, the appellant's conduct in purchasing a sword and delivering it stained with human blood, fully establish that the appellant did commit the murder and that he was rightly convicted and sen-

tenced to death under S. 302. Ram Singh v. State of Uttar Pradesh, 1962 All L J 302 : 1962 (Sup) 2 S C R 203 : 1962 All W R (H C) 230 : 1962 All Cri R 147 : (1962) 2 S C J 136 : 1962 Mad L J (Cri) 429 : 1962 S C D 733 : AIR 1967 S C 152 (154) (Prs 18, 19).

●——Ss. 300, 364, 386 — Accused charged under Ss. 302, 364 and 386, Penal Code — Confession not relied in respect of offence under S. 302 — Value in regard to other offences indicated. See Evidence Act (1872), S. 24. 1957 Cri L J 559 : AIR 1957 S C 381.

——S. 300 — Offence of murder — Accused making confession to his son and daughter that he killed their mother — Weapon used in committing offence discovered at his instance—Held conviction was proper under S. 302, Penal Code. See Penal Code (1860), S. 84. 1965 (2) Cri L J 765 : AIR 1965 Him-Pra 68.

——S. 300—Criminal P. C. (1898), S. 287—Statement of accused — Allegation of police pressure— Mere allegation not sufficient to exclude such admission. See Criminal P. C. (1898), S. 287. 1963 Ker L T 229.

——S. 300, 302—Evidence Act (1872), S. 27—Confession — Corroboration — Circumstances connecting accused with murder absent—Subsequent attempt by accused to commit suicide, plausibly explained, not sufficient corroboration. See Evidence Act (1872), S. 27. 1962 Ker L T 476.

——S. 300 — Ornaments worn by deceased recovered as result of statement made by accused under S. 27, Evidence Act — Production of ornaments would not by itself be sufficient to charge accused with crime of murder. (1953) 1 M L J 467 : 1953 Mad W N 150: 1953 Cri L J 1069 : ILR (1953) Mad 1170 : AIR 1953 Mad 564 (565) (Pt C) (Pr 4) (DB).

——S. 300—Evidence Act, S. 27—Weapon discovered with blood-stains thereon — Evidentiary value— See Evidence Act (1872), S. 27. AIR 1950 Mad 714 (DB)

——S. 300 — Evidence — Recoveries of Kirpan and clothes from accused — Evidentiary value of — Evidence Act (1872), S. 27.

In a murder case when the prosecution evidence is held to be untrustworthy or unsafe of credence and the dying declarations to have been recorded in circumstances which do not inspire confidence, the Court would be most reluctant to base the conviction of the accused only on the recovery of the kirpan and the clothes, particularly when the investigating agency also does not appear to have conducted themselves in a straightforward manner. Such recovery of articles should not be held to be a strong corroborative piece of evidence. (1962) 64 Pun L R 1064.

——S. 300—Murder — Evidence of approver — Corroboration — Necessity of, pointed out. See Evidence Act (1872), S. 114. (1957) 59 Pun L R 70.

——S. 300—Murder—Proof of— Accused in his statement before police describing the place where and the manner in which dead body was placed—Accused leading the police to the place indicated by him in his statement — Recovery of the body tied exactly as stated by the accused — Accused, though denying the charge of murder, unable to explain how he knew the dead body was in that place — Accused further giving discovery of ornaments belonging to the deceased — Discovery of the dead body in the place at the instance of accused is reasonably consistent with the only hypothesis that the accused was the murderer and no other. 1965 Raj L W 418 : ILR (1965) 15 Raj 989 : AIR 1966 Raj 74 (83) (Pt D) (Pr 28) (DB).

——S. 300—Evidence — Extra Judicial confession — Duty of Court pointed out. See Evidence Act (1872), S. 24. AIR 1955 N U C (Raj) 2172 (DB).

31. Evidence, value of — Illustrative cases.

●——S. 300 — Trial for murder — Eye-witnesses closely related to victim — Evidence given by such witnesses to be closely scrutinised — Plea that their evidence cannot be accepted unless it is corroborated is not acceptable. Darya Singh v. State of Punjab, 1965 (1) Cri L J 350 : (1964) 2 S C J 319 : 1964 S C D 87 : 1964 Mad W N 1 : 1964 M L J (Cri) 503 : 1964 All W R (H C) 532 : 1964 All Cri R 394 : (1964) 3 S C R 397 : (1964) 7 S C R 410 : AIR 1965 S C 328 (331) (Pt A) (Pr 6).

●——S. 300 — Approver's evidence — Corroboration necessity—There should be corroboration in material particulars and qua each accused. See Evidence Act (1872), S. 133. 1963(1) Cri L J 489 : AIR 1963 S C 599.

——S. 300—Evidence Act (1872), S. 5 — Credibility of witness — Independent witness — Who is — Testimony — Evidentiary value, See Evidence Act (1872), S. 5. ILR (1961) 1 All 609.

——S. 300—Evidence and proof— Discovery of dead body and confession—Accused's statement supported by medical evidence — Probative value — (Evidence Act (1872), S. 327).

In a murder case recovery of a dead body at the instance of an accused and his judicial confession are no doubt important pieces of evidence, but where it was contended that neither the confession was voluntary nor the discovery genuine, and this contention was supported by the circumstance that the jail doctor who had examined the accused at the time of his admission in jail before the confession, had found a number of contusions on the person of the accused, and it was also found that not only did the prosecution make no attempt to explain the injuries but the investigating officer tried to whittle them down that the accused was beaten by the police twice, once before the recovery of the dead body and again before his consignment to jail.

Held, that the medical evidence fully corroborated the accused's statement and it was therefore, worthy of reliance and particularly so in view of the suppressio veri indulged in by the prosecution. 1957 Cri L J 431 : 1957 All L J 330 : 1957 All W R (H C) 114 : AIR 1957 All 197 (201, 202) (Pt A) (Prs 20, 21) (DB).

——S. 300—Evidence — Appreciation of— (Criminal P. C. (1898), S. 367).

If the assailant recognised by the victim were only a single person, the mere ability to recognise can be a guarantee that the person accused of the crime must be the culprit as naturally the victim must have no soft corner for him. But when persons more than one are accused of the crime, it is possible that the persons so accused might comprise both the real culprits and the culprits against whom there might be some reason to bring accusation. 1956 All L J 751 : 1956 All W R (H C) 716 : ILR (1956) 2 All 736.

——S. 300—Witnesses asserting that accused charged with murder suspected that deceaced had murdered his father — Ground of knowledge as to state of mind of accused, not mentioned — Requirement of S. 60, Evidence Act are not satisfied. See Evidence Act (1872), S. 60. ILR (1962) Andh Pra 313.

——S. 300 — Proof — Evidence, unsatisfactory — Infirmity — Effect of.

Where the eye-witnesses for the prosecution, though unsophisticated, were found clever enough to make improvements on the points which they thought material, it is a very serious infirmity particularly in a murder case and if such direct evidence is not wholly satisfactory, the subsidiary facts on which the prosecution relies, viz., the

discovery of the axe, however suspicious, cannot cure the infirmity. 1956 Cri L J 869 : AIR 1956 Bom 471 (472, 473) (Prs 7, 9, 10) (DB).

——S. 300 — Murder case — Statements of eye-witnesses in committing Court and under S. 164 connecting the accused with crime — In Sessions Court witnesses resiling from their statements on the ground that statements were obtained under Coercion —Statements cannot be relied upon under S. 288. See Criminal P. C. (1898), S. 288. 1963 (2) Cri L J 148: AIR 1963 J & K 34 (DB).

——S. 300 — Approver's testimony and its corroboration — Conviction based thereon — Corroboration of every minor detail not necessary — Recovey of dead body from a particular spot and articles of deceased from different accused held sufficient corroboration. See Evidence Act (1872), S. 133. 1963 (2) Cri L J 148 : AIR 1963 J & K 34 (DB).

——S. 300—Criminal trial — Prosecution witnesses — Relations of each other — Credibility of evidence considered. See Evidence Act (1872), S. 5. 1958 Cri L J 883 : AIR 1958 J & K 23 (DB).

——S. 300 — Evidence — Identification by voice — Reliability. See Evidence Act (1872), S. 9. (1964) Mad L J (Cri) 347 : 1964 (1) Cri L J 493 (Ker).

——S. 300 — Murder — Evidence— Blood-stains on clothes of accused—Sufficiency for conviction—Evidence Act (1872), S. 3—'Proved'—Evidence—Appreciation of.

Unless the blood-stains are of considerable size, it is not possible to draw any damning conclusion against the man from the mere existence of slight blood-stains on his wearing apparel. Moreover, in the absence of other evidence, the fact that some blood-stains were found on his clothes would not by itself provide sufficient basis for a conviction. 1960 Ker L J 438 : 1960 Ker L T 510.

——S. 300 — Evidence — Proof of death — Doctor's opinion expressed on noticing in X-ray photo metallic bodies that death was due to shock caused by homicidal gunshot injuries—Doctor not removing metallic bodies giving convincing reasons for his action—His opinion cannot be rejected as not conclusive— (Cr. P. Code (1898), S. 367). AIR 1955 N U C (Madh B) 4525 (DB).

——S. 300—Evidence—Deceased found lying on top of staircase — Statement in F I R that deceased was found in middle of staircase and death might be due to fall—Statement is mere opinion. AIR 1955 N U C (Madh B) 3861 (DB).

——Ss. 300, 302 — Evidence— Panchnama—Panchnama cannot be used in place of statements of eye-witnesses as substantive piece of evidence. AIR 1955 NUC (Madh B) 3786 (DB).

——S. 300—Evidence—Witnesses related—Slight prevarication in the statement of one witness before Court of Session and before committing Magistrate regarding implication of one accused — Entire evidence of witnesses held could not be thrown out. See Criminal P. C. (1898), S. 367. A I R 1955 NUC (Madh B) 3747 (DB).

——S. 300—Evidence—Child witness—Offence under S. 302, read with Ss. 149 and 147—Only eye-witness, a child of 12 or 13 years—Discrepancies in his statements recorded before committing magistrate and Sessions Judge — Such witness held could not be relied upon for convicting all the accused. See Evidence Act (1872), S. 118. AIR 1955 NUC (Madh B) 3097 (DB).

● ——S. 300 — Evidence Act, S. 45—Murder case — Opinion of expert as to footprints—Value of, stated. See Evidence Act (1872), S. 45. 51 Cri L J 1265 : AIR 1950 Madh Bha 76 (FB).

——S. 300—Appreciation of evidence —Discrepancy between first report and testimony of eye-witness in Court—Brutal murder committed at stop in few minutes by several accused while deceased was proceeding along footpath accompanied by witness —Discrepancies between first report and witnessess's testimony in Court relating to minor particulars (such as the exact manner in which accused came to assault the deceased, who surrounded him first, etc.) — Eye-witness cannot be held to be unreliable on account of the discrepancies. See Criminal P. C. (1898), S. 367. 1960 Cri L J 1100 : A I R 1960 Mad 362 (DB).

——S. 300 — Statements before committing Court — Evidentiary value — Statements are admissible if the Court is satisfied about their truth. See Criminal P. C. (1898), S. 288. (1964) 6 O J D 248 (Orissa).

——Ss. 300, 149—Land dispute leading to mutual assault by rival parties resulting in deaths—Evidence —Appreciation of — Testimony of partisan eye-witnesses.

Once it is established that eye-witnesses belong to a hostile faction and it is also clear that they are suppressing material portion of the occurrence, it is not possible to accept their evidence as to how exactly the fight took place; doubtless, if a consistent story has been put forward, it may be possible for a Court even to accept the testimony of partisan witnesses especially when the village is divided into two factions and disinterested persons may not be available; but when the F I R version and the case as put forward in their Court do not tally, it will be hazardous for a Court to conjecture as to how the fight must have taken place. The Court, however, should not reject eye-witnesses, who speak with slight and inconsequential variations, on unsubstantial grounds and on the basis of insignificant discrepancies. 29 Cut L T 15; 1963 (1) Cri L J 700 (704) (Pt C) (Prs 13, 16) (Orissa) (DB).

——Ss. 300, 109 — Identification of accused by voice —Accused close relation of identifier—Identification can be relied on — Evidence Act (1872), S. 9.

Identification of a person by his voice can be relied upon, if the person who is to be identified is intimately known to the person who identifies him.

Thus where the accused persons were close relations of a blind woman and who were also living in close proximity of the woman it was held that the identification of the accused by his voice by the woman could be relied on. (1961) 3 Orissa J D 110.

——S. 300 — Evidence — Appreciation of—Murder—Nature of weapon—(Cr. P. Code (1898), S. 367). AIR 1955 NUC (Orissa) 6082 (DB).

——S. 300—Evidence — Katari alleged to be used for murder not having blood marks is no evidence of incriminating circumstances against accused—(Cr. P. Code (1898), S. 367). AIR 1955 N U C (Orissa) 6082 (DB).

——S. 300—Murder — Evidence of approver—Corroboration, necessity of, pointed out. See Evidence Act (1872), S. 114. (1957) 59 Pun L R 70.

——S. 300—Evidence—Prosecution witnesses related to deceased—Credibility.

The mere fact that the prosecution witnesses are closely related to the deceased, (here, mother and the son of the deceased) does not by itself render the evidence given by them open to doubt and suspicion. 52 Cri L J 1517 : 53 Punj L R 284 : ILR (1951) Punj 202 : AIR 1951 Punj 137 (139) (Pt A) (Pr 10) (DB).

——S. 300—Evidence—Mere suspicion.

There may be a suspicion that the accused took part in a murder; but suspicion cannot take the place of proof, particularly when the entire case depends

upon circumstantial evidence, 4 Raj L W 640 : I L R (1953) 3 Raj 655 : 1955 Cr L J 835 : AIR 1955 Raj 82 (85) (Pt C) (Pr 16) (DB).

—S. 300—Evidence — Conviction on evidence of one witness who has no scruples, is unsafe—(Evidence Act (1872), Ss. 1 and 134). AIR 1955 N U C (Raj) 511 (DB).

—S. 300 — Evidence — Time of death — Degree of digestion—Value of. The time of death can be ascertained with some possibility from the degree of digestion of the stomach contents and from the condition of the bladder and intestines as regards their contents. The degree of digestion of the contents, however, cannot always be relied upon in determining the time of death, inasmuch as the power of digestibility may remain in abeyance for a long time in states of privation, shock and coma. 1950 Raj L W 351 : ('51) 52 Cr L J 201 (Raj) : A I R 1951 Raj 37 (41) (Pt D) (Pr 9) (DB).

—S. 300—Eye-witnesses, natural witnesses of occurrence of murder—Their testimony cannot be doubted only because they happened to be relatives of deceased. 1964 (2) Cri L J 585 : AIR 1964 Tripura 54 (56) (Pt B) (Pr 10).

SECTION 301

● —Ss. 301 and 302 — Four accused with common intention to kill M shooting at R bona fide taking him to be M — Shooting resulting in R's death—Accused are guilty under S. 302 read with S. 34 — S. 301 has no application. See Penal Code (1860), S. 34. 1965 (2) Cri L J 266 : AIR 1965 S C 1260.

●—Ss. 301, 302, 326 and 34 — Scope—Sentence — Two accused firing shots at X with common intention to kill him but actually causing death of S through mistake — No evidence to show which of them caused fatal injuries—Conviction of both under S. 302 read with Ss. 34 and 301 — No distinction should be made in matter of sentence. Wazir Singh v. State of Punjab. AIR 1956 S C 754 (757) (Pr 9).

—Ss. 301, 304-A, 323 and 304, Part II — Accused attacked N who was sitting on chabutra with baby in his lap — Lathi after hitting N fell on baby — N while falling from Chabutra dropped baby into lane —Baby sustained injuries on eyelid and head — Baby expired as a result of head injury — Held accused was not guilty for an offence under S. 304, Part II by virtue of S. 301 but he was punishable under Ss. 304-A and 323. A I R 1920 Bom 224, Disting. Rash or negligent act causing death by. See Penal Code (1860), S. 304-A. 1965 All W R (HC) 132 : 1965 All Cri R 136 : 1965 All L J 52.

—S. 301—Scope of.

Section 301 declares a rule deducible from Ss. 299 and 300. It states that the quality of the homicide, that is, whether it amounts to murder or not, will depend on the intention or knowledge which the offender had in regard to the person intended or known to be likely to be killed or injured and not with reference to his intention or knowledge with reference to the person actually killed.

Thus S. 301 clearly makes the culpable homicide murder notwithstanding the fact that there was no intention actually to commit the murder of the deceased particularly. In such a case the accused can be rightly convicted under S. 302. 13 Cri L J 145 (Mad) and AIR 1917 All 455, Foll. 1955 Cri L J 1448 : AIR 1955 All 626 (629) (Pt C) (Pr 9) (DB).

—Ss. 301 and 149 — S. 301 applicable to facts — S. 149 does not apply.

Section 301 applies to a situation where a person causes the death of another whose death that person neither intends nor knows himself likely to cause. That being so, it is rather difficult, as a process of logical reasoning, to apply S. 149 to a situation, like that, S. 149 contemplates inter alia the commission of an offence which the members of the assembly knew likely to be committed in prosecution of the common object of the unlawful assembly. If by the terms of S. 301 the offender could not have known it likely that he would cause the death of the person whom he has actually killed, equally, by the terms of S. 149, the other member of the unlawful assembly, that is to say, the members other than the member who has actually caused the death of the person, could not have known it to be likely that the death of that particular person would be caused. (1962) 2 Andh L T 303 : 1963 (1) Cri L J 415 : A I R 1963 Andh Pra 146 (147) (Pt B) (Pr 21) (DB).

—Ss. 301, 304 (Part II) and 323 — Doctrine of transfer of malice or transmigration of motive — Applicability.

Where the accused gave a blow with a small stick to a woman who had a small child in her lap and the blow fell on the head of the infant who died on the next day.

Held that the doctrine of "transfer of malice" or "transmigration of motive" namely, that where a blow aimed at one person alights upon another the offence committed by the assailant is the same as it would have been if the blow had struck the intended victim, was applicable. In the instant case, the intention of the accused was only to cause simple injury to the woman, and therefore, he could be convicted only for an offence under S. 323 and not under S. 304 (Part II) of the Penal Code. A I R 1920 Bom 224, Foll. 1959 M P L J 21 : 1959 Jab L J 57 : 1958 M P C 722.

—Ss. 301, 300, 304, Part. I, 452 and 148 — A and his companions armed with lathies and dagger trying to take away A's wife — A taking out dagger to cut his wife's nose — A striking his dagger in his daughter's abdomen in scuffle:— Death of daughter— No evidence to show intention to cause injury sufficient in ordinary course of nature to cause death — Even if blow was aimed at the wife and not at the daughter, A would still be guilty of culpable homicide not amounting to murder. See Penal Code (1860), S. 300. 1957 Cri L J 1405 (2) : A I R 1957 Madh Pra 217 (DB).

SECTION 302

SYNOPSIS

(Penal Code (1860), S. 302.)

1. Sentence.
2. Premeditation.
   See also Penal Code (1860), S. 300.
3. Provocation.
   See also Penal Code (1860), S. 300.
4. Enmity.
5. Conviction on circumstantial evidence.
   See also Penal Code (1860), S. 300.
6. Mental condition of accused.
7. Age.
8. Superstition.
9. Intention.
10. Drunkenness.
11. Starvation.
12. Confession by accused.
    See also Penal Code (1860), S. 300.
13. Sex.
14. Insanity.
    See also Penal Code (1860), S. 84.
15. Deaf and mute accused.

16. Nature of injury.
17. Class to which accused belongs.
18. Motive.
    See also Penal Code (1860), S. 300.
19. Injuries to accused.
20. Attempt to suicide.
21. Family considerations.
22. Lapse of time.
23. Weapon used.
24. Absence of corpus delicti.
    See also Penal Code (1860), S. 300.
25. Verdict of jury.
26. Murder under instigation or threat.
27. Murder by several accused.
    See also Penal Code (1860), Ss. 34, 149 and 300.
28. Acquittal of some accused.
29. Leniency to some accused.
30. Abetment.
31. Charge.
    See Penal Code (1860), S. 300.
32. Evidence.
    See Penal Code (1860), S. 300.
33. Onus.
    See Penal Code (1860), S. 300 and Evidence Act (1872), S. 105.
34. Sentence of fine.
35. Remission of sentence.
36. Interference by High Court.
37. Procedure.

1. Sentence.

● ——S. 302 — Sentence—Death sentence when can be substituted by life imprisonment by Supreme Court—Constitution of India, Art. 134.

Each case must be decided on its own facts and a sentence of imprisonment for life can only be substituted if the facts justify that the extreme penalty of law should not be imposed. Where the offence is one of brutal murder normally the death penalty should follow. Where the Judges of the High Court differed as to the guilt of the accused but there was no difference on the question of death sentence when the opinion of the third Judge was given under S. 429, Cr. P. C. the Supreme Court refused to reduce the sentence to one of life imprisonment. The observation of Bose J. in AIR 1955 S C 216, that when appellate Judges, who agree on the question of guilt differ on that of sentence, it is usual not to impose the death penalty unless there are compelling reasons, cannot be raised to the pedestal of a rule for that would leave the sentence to the determination of one Judge to the exclusion of the other. Babu v. State of U.P. (1965) 1 S C W R 936 : 1965 (2) Cri L J 539 : (1965) 2 S C A 296 : (1965) 2 S C R 771 : (1965) 2 Law Rep 221 : ILR (1965) 1 All 951 : AIR 1965 S C 1467 (1472, 1473) (Pt C) (Prs 16, 17).

● ——S. 302—Sentence—Account of background of incident must be considered.

On the question of sentence it would be relevant to take into account the background of the incident, the nature and extent of the threat held out by the crowd of villagers, the excitement which must have been caused at the time of the incident. Jai Dev v. State of Punjab, 1963 S C D 66 : (1963) 3 S C R 489 : 1964 Mad L J (Cri) 478 : (1964) 2 S C J 272 : 1963 (1) Cri L J 495 : 1963 All Cri R 170 : 1963 All W R (HC) 338 : A I R 1963 S C 612 (621) (Pt E) (Pr 24).

● ——Ss. 302, 303, 34, 149—Applicability and scope of S. 303—Person undergoing sentence of imprisonment for life — Conviction under S. 302 read with S. 34 — Sentence of death can be imposed upon him — Fact that he himself did not commit murder will not save him from effect of S. 34 —Scope and effect of Ss. 34 and 149, Explained. See Penal Code (1860), S. 303. 1963 (1) Cri L J 86 : AIR 1963 S C 118.

● —S. 302—Sentence—Considerations — Nature of proof—Relevancy—(Criminal P. C. (1898), S. 32).

In a case of murder the first question which the Court has to consider is whether the accused has been proved, to the satisfaction of the Court, to have committed the crime. If the Court is convinced about the truth of the prosecution story, conviction has to follow. The question of sentence has to be determined, not with reference to the volume or character of the evidence adduced by the prosecution in support of the prosecution case, but with reference to the fact whether there are any extenuating circumstances which can be said to mitigate the enormity of the crime. If the Court is satisfied that there are such mitigating circumstances, only then, it would be justified in imposing the lesser of the two sentences provided by law. In other words, the nature of the proof has nothing to do with the character of the punishment. Vadivel Thevar v. The State of Madras, 35 Mys L J 164: 1957 S C J 527: (1957) 2 Andh W R (S C) 69 : (1957) 2 M L J (S C) 69 : 1957 Cri L J 1000 : 1957 M P C 711 : 1957 All L J 898 : 1957 S C A 798 : 59 Bom L R 910 : 1957 All W R (H C) 640 : AIR 1957 S C 614 (619) (Pt B) (Pr 13).

● ——S. 302—Sentence—Two accused firing shots at X with common intention to kill him but resulting in death of S — No evidence to show which of them caused fatal injuries—Conviction of both under S. 302 read with Ss. 34 and 301 — No distinction should be made in matter of sentence. See Penal Code (1860), S. 301. AIR 1956 S C 754.

● ——S. 302—Sentence — Miscellaneous — Judges agreeing as to guilt but differing on question of sentence—Sentence should be that of transportation.

The sentence should be reduced to transportation where there is difference of opinion in the High Court, not only on the question of guilt, but also on that of sentence. But the discretion of judges in this matter, should not be fettered for a question of sentence is and must always remain, a matter of discretion, unless the law directs otherwise. But when appellate Judges, who agree on the question of guilt, differ on that of sentence, it is usual not to impose the death penalty unless there are compelling reasons Pandurang v. State of Hyderabad. 1955 Cri L J 572 : 1955 Mad W N 228 : (1955) 1 SCR 1083: 1955 S C A 228 : 1955 All W R (Sup) 34 : 1955 S C J 106 : AIR 1955 S C 216 (223) (Pt G) (Pr 37).

——S. 302—Sentence—Held, no extenuating circumstance justifying lesser penalty. AIR 1955 N U C (Ajmer) 4732.

——S. 302—Criminal P. C. (1898), S. 367 (5) — Effect of amendment of section in 1955 —Murder—Reasons for not imposing death sentence not required after amendment — Court cannot however depart from judicial considerations in imposing lesser sentence. See Criminal P. C (1898), S. 367 (5). 1963 (2) Cri L J 481 : AIR 1963 All 501 (DB).

——S. 302 — Murder—Sentence — Judges of High Court differing on question of sentence—Sentence should be that of imprisonment for life. AIR 1955 SC 216 and AIR 1953 All 220, Foll. 1963 (2) Cri LJ 481: AIR 1963 All 501 (505) (Pt C) (Pr 25) (DB).

——S. 302 — Criminal P. C. (1898), S. 367—Effect of amendment of section in 1955 — Reasons for not

imposing death sentence for offence of murder not essential now—Court cannot however depart from judicial considerations in imposing lesser punishment. See Criminal P. C. (1898), S. 367. 1960 Cri L J 1536 : AIR 1960 All 748 (DB).

——S. 302—Sentence—Discretion of trial Court—Interferenee by High Court—Extenuating circumstances — (Criminal P. C. (1898), Ss. 32, 367 (1) and (5), 423).

The determination of the right measure of punishment, not being subject to any rule, is necessarily a matter of discretion. It is, therefore, a matter within the province of the trial Court. That being so, appellate Court's interference in that regard would only be justified on exceptional grounds. One such ground may be, that the trial Court proceeded on wrong principle and that, as a consequence thereof, it committed an error in imposing the sentence it did. The assumption that the sentence of death was the normal penalty for murder and imprisonment for life, the exception which had to be justified by some reason, was based on the law as embodied in sub-s. (5) of S. 367, Criminal P. C. before its repeal by the Criminal P. C. (Amendment) Act 26 of 1955 with effect from 1st January, 1956. Since the omission of that sub-section, the question of proper sentence where the accused is convicted of an offence punishable with death is to be decided, not on any assumption of that nature, but like any other point for determination with the decision thereon and the reasons for the decision, as provided by sub-s. (1) of that section. The absence of cause of enmity between the accused and the deceased is an extenuating circumstance justifying the award of lesser punishment of imprisonment for life. 1958 Cri L J 1266 : AIR 1958 All 746 (757) (Pt I) (Pr 32) (DB).

——S. 302—Sentence—Lesser punishment—Accused himself not striking deceased—Sentence of transportation for life awarded. A I R 1955 N U C (All) 4169 (DB).

——S. 302—Sentence—Lesser sentence held would meet ends of justice — (Criminal P. C. (1898), S. 367 (5)). AIR 1955 N U C (All) 1722.

——S. 302—Sentence—Award of lesser sentence when warranted, stated. See Criminal P. C. (1898), S. 367. AIR 1955 NUC (All) 166 (DB).

——S. 302 — Punishment — Criminal P. C. (1898) S. 367 (5).

Per Agarwala, J. : Under S. 302 a discretion is vested in Courts either to impose a sentence of death or of transportation for life. The true principle of exercising the discretion of imposing either the penalty of death or of transportation for life should be that the sentence of death is awarded in cases in which the act is very brutal and highly repugnant to morals and the sentence of transportation for life is imposed in all other cases. Though under S. 367 (5), Criminal P. C., the Court is required to give reasons why the sentence of death is not passed for an offence punishable with death, the law does not lay down in what cases the two sentences shall be imposed and the law has deliberately conferred a discretion on the Court to award one sentence or the other according to the circumstances of each case. This discretion is intended to be exercised to secure the end which the law has in view, namely, social justice.

While one accused inflicted the gandasa injuries, the other merely held the legs of the deceased and the latter was aged 20 years only :

Held, that in the circumstances, a sentence of transportation for life would meet the ends of justice in the latter case.

Per Raghubar Dayal J.: Under the provisions of the Penal Code and the Code of Criminal Procedure the Court is to pass the sentence of death unless there be extenuating circumstances and the Court is not to withhold the passing of the death sentence on the ground that there were no aggravating circumstances to justify the death penalty. The facts that one of the accused is about 20 years old and that he is not alleged to have actually used the gandasa do not justify awarding him the lesser penalty of law provided for the offence, when the murder was planned and brutal : Case-law discussed. 1952 All Cri R 173 : 1952 All W R (H C) 653 : 1953 All L J 35 : 1952 All Cr R 173 : 1953 Cri L J 580 : ILR (1953) 1 All 608 : A I R 1953 All 220 (222 to 224, 226) (Prs 14, 18, 19, 31, 41) (DB).

——S. 302—Sentence—Criminal P. C. (1898), S. 367 (5) (as amended in 1955)— Absence of extenuating or mitigating circumstances — Court not bound to award sentence of death—Full discretion to award lesser sentence — Correct approach to the question of sentence.

The theory that where there are no extenuating or mitigating circumstances it is incumbent upon the Court to impose the sentence of death stems from the assumption that the sentence of death is the normal punishment for the offence of murder and the lesser sentence of imprisonment for life is the exception. This view was based on sub-s. (5) of S. 367, Criminal P. C. as it stood before the Code of Criminal Procedure (Amendment) Act, 1955. That sub-section has, however, been substituted by a new sub-section by Act 26 of 1955. The result of the amendment is that by virtue of the provisions of S. 302 of the Penal Code, the Court is now allowed full discretion to award the sentence of death or the lesser sentence of imprisonment for life for the offence of murder. That being the legal position now the view that the extreme penalty is the normal sentence and the mitigated sentence is the exception, does not hold water. It can no longer be said that death is the normal punishment for murder, and the view formerly held by Courts in India that it is not for the Judge to ask himself whether there are reasons for imposing the penalty of death but he should ask himself whether there are reasons for abstaining from doing so has lost its validity.

Correct approach to this question now is that upon a conviction for murder the Judge should ask himself the question, 'Are there any aggravating circumstances in this case which imperatively call for the exaction of the extreme penalty? If, in a given case, there are such circumstances, it is his bounden duty to award the capital sentence in the larger interest of society. If, on the ot herhand, circumstances of an aggravating nature are absent in a given case, the Judge would be justified in imposing the lesser of the two punishments prescribed by law, viz., imprisonment for life. The mere fact that a human life has been taken, cannot in itself be an aggravating factor calling for the extreme penalty for the simple reason that if death is not caused with the requisite intention or knowledge the offence would not amount to murder. (1963) 1 Andh W R 18 : 1963 Mad L J (Cr) 2 : 1963 (1) Andh L T 60 : 1963 (1) Cri L J 733 : ILR (1964) Andh Pra 87 : A I R 1963 Andh Pra 249 (249, 250) (Prs 19, 20) (DB).

——S. 302—Sentence—Mitigating circumstances.

Accused a young man of 25 years beating the deceased with a stick and also cutting his nose with a knife with the intention of disfiguring him but without any intention to kill him — Quarrels existing between family of accused and that of deceased — Accused suspecting that deceased had thrown acid on his brother and in order to teach him a lesson committing the above acts resulting in death of deceased — Held, that in the circumstances the

extreme penalty of death should be reduced to one of transportation for life. **1955 Andh W R 130 : 1955 Cri L J 329 : AIR 1955 Andhra 24 (26) (Pt B) (Prs 8, 9) (DB).**

——S. 302 — Though under S. 302, the minimum sentence is transportation for life the sentence of seven years is not illegal as Rules 10 and 16 of Administration of Justice and Police in Mikir Hills Rules do not fix any minimum sentence for murder. See Administration of Justice and Police in Mikir Hills Rules — R. 10. **ILR (1951) 3 Assam 413.**

——S. 302 — Evidence Act (1872), S. 5 — Shocking crime — Appreciation of evidence by Court must be dispassionate — It would not be right to inflict death penalty because the crime was shocking inasmuch as 6 members of a family including a six month child were killed mercilessly — In proper case the Court has to discriminate on ground that some accused took major part and some minor — (Criminal P. C. (1898), Ss. 32, 367). See Evidence Act (1872), S. 5. **1957 Cri L J 1107 : AIR 1957 Bom 226 (DB).**

——S. 302—Sentence—Lesser sentence—Reasons for stated, See Criminal Procedure Code (1898), S. 367 (5). **AIR 1955 N U C (Bom) 5329 (DB).**

——S. 302—Sentence—Deceased persons defenceless —Attack of severe character resulting in four murders and severe injuries to six other persons — Number of assailants taking part in attack—Difficulty in attributing any of fatal injuries on deceased persons to any of accused in particular—Court is justified in refraining from imposing extreme penalty of death. **A I R 1955 N U C (Bom) 4251 (DB).**

——S. 302 — Murder case — Sentence. **1965 (2) Cri L J 771 : 1965 Kash L J 301 : A I R 1965 J & K 126 (128) (Pt C) (Pr 15).**

——S. 302 — Sentence — Discretion — How to use stated—(Criminal P. C. (1898), S. 367 (5)). **A I R 1952 J & K 36 (37) (Pt A) (Pr 3) (DB).**

——Ss. 302, 60 (as amended by Act 26 of 1955) — Murder — Sentence — Alternative punishment — Rigorous or simple can be awarded.

Section 302 as amended by the schedule to the Criminal P. C. (Amendment) Act, 1955 (Central Act 26 of 1955) only states that the alternative punishment for murder shall be imprisonment for life and not rigorous imprisonment for life or simple imprisonment for life. The Court passing the sentence has, however, to keep in view the provisions of S. 60 of the Penal Code and choose one or the other form in view of all the circumstances. **1957 Ker L J 404 : 1957 Ker L T 418 : 1957 Cri L J 852 : 1957 Mad L J (Cr) 321 : A I R 1957 Ker 102 (102) (Pt A) (Pr 3) (DB).**

——S. 302 — Sentence of hanging—Court sentencing accused to be hanged (फाँसी की सजा दी जाती है) —Sentence held not in proper legal form — Manner and method by which death is to be carried out is not mentioned in S. 302. See Criminal P. C. (1898), S. 368. **AIR 1955 Madh B 119 (FB).**

——S. 302 —Applicability—Accused killing deceased by gun shot—No evidence of sudden quarrel—Accused held guilty of murder:— Sentence — Lessor punishment held would meet the ends of justice. See Penal Code (1860), S. 300. **AIR 1955 N U C (Madh B) 3742 (DB).**

——S. 302 (after amendment of S. 367 (5), Criminal P. C. in 1956)—Sentence—Lesser sentence—Reasons.

Though after the amendment of S. 367 (5), Criminal P. C. in 1956 there is no statutory direction that a Court should in such cases record its reasons why the lesser penalty is being awarded, still the Courts are not absolved of their duty of exercising their judicial conscience as to whether the extreme penalty should be awarded or only the life sentence. **1960 Jab L J 799 : 1960 M P L J 1226 : 1961 (1) Cr L J 89 : 1960 M P C 768 : I L R (1960) Madh Pra 692 : AIR 1961 Madh Pra 10 (12) (Pt C) (Pr 26) (DB).**

——S. 302—Sentence.

Per Mack J. — The ordinary penalty for murder is the death sentence unless some extenuating circumstance can be found to mitigate the extreme penalty and to justify the Court passing the lesser sentence. The fact of the youth of the accused that he is 16 or 17 years old cannot be taken into consideration as an extenuating circumstance ; nor can the mere fear or apprehension of a complaint being made against the accused (by the deceased) of theft (which made him commit the murder) be so taken into consideration.

It is a wrong impression that the law of murder has undergone a radical alteration in the matter of sentence and that the death sentence should not ordinarily be awarded unless the circumstances attaching to the murder are of a particularly revolting nature in addition to its being premeditated and cold-blooded. The law still remains the same. **54 Cri L J 651 : 1952 Mad W N 958 : 1952 Mad W N (Cri) 270 : (1952) 2 Mad L J 751 : A I R 1953 Mad 372 (373) (Pt A) (Pr 4) (DB).**

——S. 302—Murder—Sentence—It is not necessary to give reasons for awarding lesser sentence. See Criminal P. C. (1898), S. 367. **(1965) 2 L R 699 (Mys) (DB).**

——S. 302—Sentence—Duty of—Court.

The question whether, for an offence of murder the sentence to be imposed should be a sentence of death or should be a sentence of imprisonment for life, is one about which there can be no inflexible rule of universal application. It is for the Court which is vested with plenary discretion in the matter to select the one sentence or the other having regard to all the circumstances of the case. While in a proper case, if the court is of opinion that a sentence of death would be the appropriate sentence, it should not hesitate to award that sentence, it should not consider itself fettered by the absence of what is described as an extenuating circumstance, in the choice of the smaller sentence.

Held, on facts that the circumstsnces of the case were such that it would not be proper to award a death sentence for the offence committed by the accused. **(1965) 2 L R 699 (Mys) (DB).**

——S. 302—Sentence—Award of—Considerations.

The question of sentence has to be determined not with reference to the volume or character of the evidence adduced by the prosecution in support of the prosecution case but with reference to the fact whether there are any extenuating circumstances which can be said to mitigate the enormity of the crime. AIR 1957 S C 614, Foll. **36 Mys L J 278 : 1958 Mad L J (Cri) 341 : I L R (1957) Mys 177 : 1958 Cri L J 1489 : AIR 1958 Mys 150 (183) (Pt P) (Pr 41) (DB).**

——S. 302—Sentence—Section provides two categories of punishment for murder without specifying what sentence should be imposed and under what circumstances — Question of punishment left entirely to judicial discretion of Court—Law regulating punishments under Penal Code not affected by 1955 Amendment of S. 367, Criminal P. C.—Criminal P. C. (1898), S. 367 (5) (as amended in 1955). 30 Cut L T 1 : ILR (1964) Cut 137.

——S. 302 — Regulation of punishment—Law is not affected in respect of. See Criminal P. C. (1898),

S. 367 (as amended by Act (26 of 1955)). 1963 (2) Cri L J 234 (Orissa).

——S. 302—Sentence—Differerce of opinion between Judges of Court—Death penalty not to be imposed.

When there is a difference of opinion in the High Court on the question of sentence the accused is entitled to benefit of doubt and the death penalty should not be imposed. A I R 1957 S C 216, Foll. 1963 (2) Cri L J 229 : ILR (1962) Cut 516.

——S. 302 — Accused along with others attacking deceased public servant who had gone in village to distribute water from Govt. tank — Deceased entreating accused persons with folded hands not to murder another member of the party whom they were murderously attacking—No provocation given by deceased—Deceased attacked and killed—These aggravating circumstances held justified imposition of capital sentences on accused. ILR (1952) Cut 219.

——S. 302—Sentence—Reduction of death sentence—Court reducing sentence of death must give judicial reasons for it—Reduction under prerogative of mercy by State—Reasons need not be given. See Penal Code (1860), S. 396. 1954 Cri L J 171 : AIR 1954 Pat 109 (DB).

——S. 302—Murder — Sentence—Normal sentence is death and lesser punishment can be awarded only in exceptional cases, when there are extenuating circumstances. A I R 1951 Pepsu 73 (77) (Pt C) (Pr 11) (DB).

——S. 302—Sentence of death.

Where the accused caused the death of two women A and B by making a merciless attack on them; A was killed because she refused to accede to the monetary demands of the accused and B was attacked merely because she intervened to save A; Held, that the only proper and suitable punishment to the accused was the sentence of death. 1964 Cur L J 506 : ILR (1965) 1 Punj 201 : 1965 (1) Cri L J 473 : AIR 1965 Punj 156 (159) (Pt B) (Pr 12) (DB).

——S. 302 — Sentence—Lesser penalty—When to be awarded—Interference by High Court. See Criminal P. C. (1898), S. 367 (5). AIR 1955 N U C (Trav-Co) 5094 (DB).

——S. 302 — Sentence — Part B States — Laws Act (1951)—Effect—Murder after 1-4-1951—Sentence.

Under the Travancore Penal Code as it stood amended by a Proclamation dated 11-11-1944, rigorous imprisonment for life was the only sentence that could have been passed against a person convicted of murder. But where a Magistrate convicts an accused for the offence of a murder after the extension of the Part B States (Laws) Act to the State of Travancore-Cochin, he ought to impose a sentence of death or of transportation for life under S. 302, I. P. C., and he is in error if he passes a sentence of rigorous imprisonment for life. 1954 Cri L J 1418 : 1954 Ker L T 54 : ILR (1953) Trav-Co 1062 : A I R 1954 Trav-Co 435 (436) (Pt A) (Pr 3) (DB).

——S. 302—Sentence.

Under S. 302 of the Indian Penal Code transportation for life is the lesser punishment prescribed for murder and not imprisonment for life as was the case under the Cochin and Travancore Penal Codes. Hence, once the lower court decides only to impose the lesser penalty prescribed the proper sentence to be passed is one of transportation for life and not rigorous imprisonment for life. 1953 Cri L J 1803 : AIR 1953 Trav-Co 561 (563) (Pt C) (Pr 11) (DB).

——S. 302 — Sentence — (Part B States (Laws) Act (1951), S. 6)—(Code of Criminal Procedure (Amendment) Act (1951), S. 25).

Courts in Travancore and Cochin are now competent to impose death sentence for the offence of murder. After the extension of Indian Penal Code and the Indian Criminal Procedure Code to that State, the Cochin Proclamation dated 26-11-1944 and the Travancore Proclamation dated 11-11-1944 which had abolished death sentence for murder no longer remain as good law. Section 6 of the Part B States (Laws) Act, 1951, replaced the Cochin and Travancore Penal Codes with their various amendments by the Indian Penal Code and under that Code the death penalty is the normal punishment for murder. The saving clause in S. 25 of the Code of Criminal Procedure (Amendment) Act, 1951, does not retain the two proclamations in force. 1953 Ker L T 403 : 1953 Cri L J 1613 : I L R (1953) Trav-Co 514 : A I R 1953 Trav-Co 402 (408) (Pt F) (Pr 31) (DB).

——S. 302 — Sentence — Accused sentenced under S. 302 for causing death of pregnant woman—Even if separate conviction under S. 316 is not objectionable separate punishment therefor offends S. 71—See Penal Code (1860), S. 316. 1953 Cri L J 1551 : AIR 1953 Trav-Co 374 (DB).

——S. 302 — Convictions under Ss. 396 and 302, Indian Penal Code—Difference in matter of awarding death sentence — See Criminal P. C. (1898), S. 423 (1-A). 1964 (2) Cri L J 585 : AIR 1964 Tripura 54.

——S. 302—Sentence.

Where an accused was convicted of murdering an old man of 75 years if the Sessions Judge does not impose the normal sentence provided by law but gives a lighter sentence he should expressly state the circumstances, that weighed with him in awarding the lesser sentence. 1952 Cri L J 1490 : AIR 1952 Tripura 16 (18) (Pt B) (Prs 21 to 23).

2. Premeditation.

See also Penal Code (1860), S. 300.

——S. 302 — Sentence — Murder deliberate and premeditated — Sleeping man attacked and killed in his house — Sentence to be inflicted is that of death. 52 Cri L J 1523 : AIR 1951 Ajmer 95.

——S. 302 — Sentence — (Criminal P. C. (1898), S. 367 (5)).

Death caused by single injury caused by lathi blow on head — Attack premeditated, cold-blooded and well-calculated — Appropriate sentence is death — Mere fact that State Government may commute sentence of death into one for transportation for life is no ground for awarding lesser penalty. 1953 All L J 14 : 1953 All W R (HC) 104 : 1953 Cri L J 768 : AIR 1953 All 356 (358) (Pt B) (Pr 12) (DB).

——S 302 — Sentence — Deceased intervening in quarrel between his son and one of accused —Attack by various accused persons — One of them causing injury with spear which proved fatal — Attack held not pre-planned—Extreme penalty held not necessary. AIR 1955 NUC (Andhra) 3840 (DB).

——S. 302 — Sentence — Mitigation — Murder by hired assassins.

That the accused who committed murder were hired assassins, is no reason to award lesser sentences of life imprisonment. ILR (1953) Hyd 32 : 1953 Cri L J 935 : AIR 1953 Hyd 161 (166) (Pt F) (Pr 21) (DB).

——S. 302 — Sentence — Murder case—Incident not the result of premeditation — Sentence of death reduced to one for rigorous imprisonment for life. 1962 Ker L T 374 : 1963 (1) Cri L J 540 (Ker).

——S. 302 — Sentence — Patricide — No premeditation — Suddenness of quarrel — Adequate grounds for lesser penalty.

Though the circumstances do not justify bringing the offence either under Exception I or Exception IV

to S. 300, they may be taken into consideration in awarding the punishment, under S. 302. Patricide is a particularly heinous type of murder, but the lack of premeditation, the existence of provocation and the suddenness of the quarrel provide adequate grounds to reduce the sentence from one of death to rigorous imprisonment for life. 1959 Ker L R 1457.

——S. 302 — Sentence — There was no premeditation on the accused's part to attack the deceased. It looked as if he was upset by the sudden appearance of the forest officers who came there to question him about his unauthorised clearance of the forest land and in a sudden fit of despair or anger he launched an attack on the deceased.

Held, that the extreme penalty of law was not called for. Accused was sentenced to rigorous imprisonment for life. 1959 Ker L T 1340.

——S. 302 — Simply because a man has been warned against the possibility of robbery and still takes risk in a trial for his murder, this rashness or foolhardiness is not an extenuating circumstance for the accused. Similarly even assuming that the accused was deliberately poor, certainly that does not reduce the gravity of a murder of a brutal nature. 1961 (1) Cri L J 89 : 1960 Jab L J 799 : 1960 M P C 768 : 1960 M P L J 1226 : AIR 1961 Madh Pra 10 (12) (Pt C) (Pr 26) (DB).

——S. 302 — Sentence—No premeditation to commit murder — Deceased shot on spur of moment — Death sentence reduced to transportation for life. 1949 All Cr R 143 : 52 Cri L J 595 : 62 Mad L W 614 : 1949-2 Mad L J 428 : 1949 Mad W N 642 : 1949 All W R (Sup) 74 : AIR 1951 Mad 746 (752) (Pt C) (Pr 18) (DB).

——S. 302 — Sentence — Accused going to his wife at her parents' house armed with 8" knife — Wife ill and confined to bed — Accused bolting door of room and stabbing her on her refusal to follow him — Wife immediately dying of wound — Intention to cause injury presumed — Death sentence held justified. (1950) 1 Mad L J 337 : 1950 Mad W N 231 : 1950 Mad W N (Cri) 55 : 51 Cri L J 1137 : AIR 1950 Mad 484 (486) (Pt B) (Pr 4) (DB).

——S. 302 — Sentence—Accused committing brutal, cold-blooded and calculated murder of husband and wife while they were fast asleep along with their children — No extenuating circumstance to justify any lenient view being taken of the diabolical murder — Death sentence up held. 1965 (2) Cri L J 661 : 32 Cut L T 456 : ILR (1965) Cut 857 : AIR 1965 Orissa 205 (208) (Pt C) (Prs 18, 19) (DB).

——S. 302 — Husband refusing to accept deceased as his wife — Accused promising deceased to supply certain herb to attract her husband — Deceased credulously believing in accused — Accused committing murder of deceased by taking her to jungle under pretext of supplying herb — Accused belying confidence and taking advantage of credulousness of deceased — Imprisonment for life awarded by lower Court not sufficient — Penalty of death held only reasonable punishment. 1965 (1) Cri L J 317 : I L R (1964) Cut 752 : AIR 1965 Orissa 33 (37) (Pt D) (Pr 12) (DB).

——S. 302 — Accused killing deceased by assaulting him when interfered with in their attempt to commit burglary — No premeditation to kill — Case is not one fit for passing the extreme penalty of law. (1963) 5 O J D 128 (DB).

——S. 302 — Sentence — Accused not coming to attack deceased, but appearing on scene unexpectedly and getting involved in the occurrence — Sentence of imprisonment for life was not enhanced to that of death. ILR (1963) 2 Punj 328 : 1964 (1) Cri L J 350 : AIR 1964 Punj 120 (122) (Pt D) (Pr 12) (DB).

——S. 302 — Sentence — Deliberate crime — Proper sentence.

Where the crime was cold-blooded, deliberate and for sordid material gain, the only appropriate punishment is death. 1958 All W R (Supp) 147 : 1958 All Cr R 480 : 60 Pun L R 557.

——S. 302 — Sentence.

Deliberate murder committed for theft of goats belonging to deceased — No mitigating circumstance — Sentence of death held justified. 56 Punj L R 183 : 1954 Cri L J 1404 : ILR (1954) Punj 907 : AIR 1954 Punj 201 (203) (Pt B) (Pr 23) (DB).

3. Provocation.

See also Penal Code (1860), S. 300.

——S. 302—Sentence.

A slap by V on the face of the accused resulted in a minor scuffle between the two. The deceased, an innocent by-stander, intervened with a mild admonition to the accused's adversary to stop fighting. The accused thereupon took a penknife from his waist and hit on the chest of the deceased and caused the injury which eventually killed the man.

Held, that the lesser sentence was called for because the slap on the face evidently made the accused, who appeared to be hot blooded man, lose control of himself. That would not afford justification for killing an innocent by-stander. But this was not the type of case in which the death sentence was called for. There was no premeditation and the knife was not ready in the hand but was drawn from the waist after the accused had been slapped and the quarrel between V and him had started. Narayan Nair v. State of Travancore-Cochin. 1956 Cri L J 278 : 1956 Ker L T 92 : 1956 All W R (Supp) 28 : A I R 1956 S C 99 (102) (Pt C) (Pr 13).

——S. 302—Sentence—Provocation — Details at the time of murder not proved — Accused held entitled to benefit of doubt in the matter of sentence.

On the previous night of the occurrence, the accused, who was a young man, had been threatened by the deceased, after a quarrel over the amount which the deceased owed to the accused. The next morning the deceased was murdered in his field by the accused with a lathi. The prosecution had not given any details of the incident at the time of murder. The accused had made a frank confession.

Held, that there was a possibility that there was a verbal quarrel at the time of the incident resulting in murder and there was some kind of provocation given to the accused on account of which he got annoyed and struck the deceased. In the absence of any details of the incident the accused was entitled to the benefit of doubt in the matter of sentence. 1959 All L J 866 : 1959 All W R (HC) 665 : 1960 All Cri R 12.

——Ss. 302 and 304—Applicability—Stabbing fatally in return to a sudden shoe beating on the face in a public place.

Where the accused is suddenly given by another shoe beating on the face in a public place and he in return takes out a knife and stabs the other who dies, the accused cannot be said to be guilty of an offence under S. 302, Penal Code. He is only guilty of the offence of culpable homicide not amounting to murder as there was grave and sudden provocation within the meaning of Exception 1 to S. 300. 1949 All W R (HC) 458 : 1949 All Cri Cas 114 : ILR (1950) All 960 : 51 Cri L J 385 : A I R 1950 All 91 (92) (Pt B) (Pr 7) (DB).

——S. 302—Sentence—Extenuating circumstance.

Where an accused, a youngman of 19 years, and a college student, seeing that his mother and father were abused and insulted, by the deceased, shot at

the deceased in an excited and emotional manner without any premeditation and the deceased died :

Held, that the ends of justice would be served if lesser penalty of transportation for life was inflicted. 1955 Cri L J 917 : 1955 Andh W R 53 : A I R 1955 Andhra 118 (122) (Pt B) (Pr 20) (DB).

——S. 302—Sentence.

Held, that although no sudden and grave provocation, such as would reduce the crime from murder to a lesser offence could be made out, yet there was such provocation as bore pertinently upon the question of sentence, even if the provocation might have been caused by the conduct of the accused himself and therefore might not be a lawful excuse for the act done by him.

Sentence of death reduced to transportation for life. 58 Cal W N 1055 : 1955 Cri L J 485 : ILR (1956) 2 Cal 380 : A I R 1955 Cal 146 (153) (Pt F) (Pr 29) (DB).

——S. 302—Sentence—Deceased first to start quarrel by abusing accused and slapping him — Lesser sentence held justified—Criminal P. C. (1898), S. 367 (5).

Regarding the question of sentence to be passed in cases of murder it is not possible to lay down any hard and fast rule of universal application. Each case must be decided on its own merits and punishment should be awarded suitable to each case. There can be no general rule defining the classes of cases in which lesser sentence can be imposed though from time to time certain circumstances have been recognised by the Judges as valid grounds for imposing such sentence. In the absence of any extenuating circumstances whatsoever, the sentence of death would be the appropriate sentence. The Court whose duty it is to award punishment must exercise its own discretion, but the discretion must be exercised judicially and not arbitrarily.

Where it was a casual meeting when the act of the 'noisy spitting' by the accused was taken by the deceased rightly or wrongly as an insult and he was the first to start the quarrel by abusing the accused in vulgar language and by slapping him on his cheek.

Held, that the circumstances justified only the passing of the lesser sentence provided for by law. A I R 1956 S C 99 and A I R 1961 Madh Pra 10 and A I R 1953 All 220, Rel. on. ILR (1962) 1 Ker 348 : 1962 Ker L T 111 : 1963 (1) Cri L J 536 (538, 539) (Prs 10, 11, 17) (Kerala) (DB).

——S. 302—Sentence.

Husband obtaining by coercion and threat confession of unchastity from his wife — It cannot be a ground of sudden and grave provocation for inflicting severe injuries on wife and for killing the alleged paramour — No extenuating circumstance to award lesser punishment. 1964 Mad W N 294 : 1965 (1) Cri L J 184 : (1965) 2 Mad L J 28 : 1965 Mad L J (Cri) 428 : ILR (1964) 2 Mad 885 : A I R 1965 Mad 48 (49) (Pr 7) (DB).

——S. 302—Applicability — Adultery causing provocation — Offence held murder—In the circumstances sentence was reduced to transportation for life. See Penal Code (1860), S. 300. A I R 1955 N U C (Mad) 1834.

——S. 302 — Provocation grave but not sudden — Though case is not covered by Exception 1 to S. 300, it is an extenuating circumstance to award lesser penalty. (1951) 3 Pepsu L R 635 (DB).

——S. 302—Sentence.

Wife suspected of unfaithfulness—Whether it was a quarrel between husband and wife in which the husband accused his wife of adultery and the wife repudiated the charge in violent terms or some other quarrel between the two spouses that was the immediate provocation for her murder not known—Held, that it was not a case in which the extreme penalty of death should be exacted. 1954 Cri L J 1258 : 56 Punj L R 123 : A I R 1954 Punj 182 (186) (Pt B) (Pr 18) (DB).

——S. 302—Sentence—Sentence of death—Extenuating circumstance — Accused having illicit intimacy with deceased — Refusal by deceased to go with accused—Accused annoyed by refusal as he had spent much money on deceased — Held this was no extenuating circumstance. See Criminal P. C. (1898), S. 367 (5). A I R 1955 N U C (Raj) 491 (DB).

4. Enmity.

——S. 302—Extenuating circumstance — Absence of enmity is an extenuating circumstance justifying lesser penalty. 1958 Cri L J 1266 : AIR 1958 All 748 (757) (Pt I) (Pr 32) (DB).

——S. 302 — Murder by running a man over by tractor.

Where the accused stood to gain by the death of the deceased and the litigation between the parties showed that they were on terms of enmity with each other and the deceased was run over deliberately by a tractor driven by the accused:

Held, that this was not a case of accident and that the accused had committed an offence under S. 302. 1956 All W R (Sup) 71 : 58 Pun L R 318.

5. Conviction on circumstantial evidence.

See also Penal Code (1860), S. 300.

——S. 302 — Sentence — Conviction on circumstantial evidence—If ground for lesser sentence.

Dictum—Even if the conviction for murder under S. 302 is based on circumstantial evidence, the view that because of the evidence being circumstantial, the sentence to be awarded is the lesser one of life imprisonment is a startling proposition and is not warranted by any provision of law. 1959 Andh L T 851 : 1960 Cri L J 1302 : AIR 1960 Andh Pra 490 (492) (Pt F) (Pr 6) (DB).

——S. 302—Sentence—Murder by two—Conviction on circumstantial evidence—Death caused by strangulation—Evidence showing good deal of struggle between deceased and accused—Evidence not making it clear who gave fatal blow or did last act of strangulation—Award of lesser penalty of life imprisonment held proper. AIR 1953 S C 364, Foll. 1962 (2) Cri L J 354 : AIR 1962 Cal 504 (509) (Pt F) (Pr 42) (DB).

——S. 302 — Evidence — Burden of proof—Circumstantial evidence — Defence theory false — Effect—Benefit of doubt—Criminal P. C. (1898), S. 367.

In a murder trial the fact that a foolish or false theory has been advanced on behalf of the accused, viz., of death having been caused by accidental fall, will not relieve the prosecution from the responsibility of proving conclusively that it was the accused and accused alone who did it.

When the evidence against the accused is entirely circumstantial, it must, in order to sustain a conviction, be such as to be wholly incompatible with the innocence of the accused and if there are circumstances to raise a doubt that the injury might have been caused by some one else, then the benefit of that doubt must be given to the accused. Even if the circumstances of the case create a strong suspicion that the accused might have been the assailant of the deceased it cannot take the place of proof and no conviction can be based on such suspicion. 4 Sau LR 159 (161, 164) (DB).

——S. 302—Sentence—conviction for murder based on circumstantial evidence — Death sentence can be imposed — (Criminal P. C. (1898), S. 367 (5)). AIR 1955 NUC (Trav-Co) 4115 (DB).

6. Mental condition of accused.

——S. 302—Sentence—Matricide—Act, the result of sudden impulse resulting from sense of frustration and accumulated sense of grievance for unmotherly attitude of deceased towards accused, her son — Extreme penalty held not called for. See Criminal P. C. (1898), S. 367 (5). AIR 1955 N U C (Madh B) 899 (DB).

——S. 302 — Sentence — Incident, a result of minor incident regarding cutting thorny bushes—Sentiment running high and accused loosing self-control — No premeditation — Accused awarded lesser sentence of transporation for life. Madh B L J 1955 H C R 1427 : Madh BLR 1955 Cri 244.

——S. 302 — Accused killing his wife who had eloped with a stranger in sense of frustration — Sentence of imprisonment for life, and not death would meet ends of justice—Murder—Punishment.

The wife of accused eloped with a stranger and returned after some days. There were disputes between them after her return. The panchayatidars also effected a dissolution approving as it were, the conduct of the wife to refuse to live with her husband and elope with a stranger. After the deed of dissolution of their marriage, when she was proceeding with her father, the accused who was returning home saw her and stabbed her to death.

Held, that the murder was not a premeditated one, but was committed by the accused in a sense of frustration, all of a sudden, when he was very much chagrined in mind that his wife eloped with a stranger and hence ends of justice would be amply met if the accused was sentenced to imprisonment for life, and not to death. ILR (1964) 2 Mad 339 : 1965 (2) Cri L J 366 : AIR 1965 Mad 385 (389) (Pt B) (Pr 14) (DB).

——S. 302—Sentence—Mental condition of accused.

Where the murder was committed when the accused, who did not possess the mentality of an ordinary person, was in some frenzied mood or something in the nature of an abnormal state of mind, held that the ends of justice would be met if the sentence of death was reduced to one of transportation for life. 1951-1 Mad L J 291 : 1951 Mad W N 367 : 1951 Mad W N (Cri) 95 : 64 Mad L W 731 : 1952 Cri L J 366 : AIR 1952 Mad 175 (175) (Pr 4) (DB).

——Ss. 302, 84 — Sentence — Accused cutting neck of a person by aruval — Though not insane, accused proved to be unbalanced and excited—Accused held not in normal mind — Death sentence reduced to that of transportation for life. 63 Mad L W 442 : 1950 Mad W N 335 : 51 Cri L J 1329 : (1950) 1 Mad L J 813 : 1950 Mad W N (Cri) 91 : AIR 1950 Mad 576 (576) (Pt B) (Pr 2) (DB).

——S. 302 — Sentence.

Killing a man with kassi blows on his head, of such severity that he died within a few minutes can hardly possess any mitigating qualities. (1961) 63 Punj L R 674.

——Ss. 302, 84 — Sentence — Mental condition of accused — Mental delusion — Temporary insanity—Effect.

The accused laboured under a strong delusion of unfaithfulness of his wife. The brooding over the character of his wife took the form of a kind of temporary insanity. Disturbed by the thoughts about the unchastity of his wife, during the night of occurrence, the accused caused her death by throwing nitric acid upon her. The medical evidence showed that he was capable of knowing what he was doing and had ordinary concept of right and wrong.

Held, that the accused was guilty under S. 302. But this was not a fit case for the extreme penalty provided for the offence. 59 Pun L L 597 : 1958 Cri L J 555 : ILR (1957) Punj 1914 : AIR 1958 Punj 104 (106) (Pt A) (Pr 10) (DB).

——S. 302 —Murder —Sentence —Apparent want of motive for murder—Depressed state of mind—Lesser sentence upheld. 1952 Raj L W 138 : ILR (1951) 1 Raj 800 (DB).

——S. 302 — Sentence — Accused in state of mental excitement when he committed offence — Transportation for life awarded. AIR 1955 N U C (Trav-Co) 4114 (DB).

7. Age.

——S. 302 — Age or sex alone is not sufficient reason for imposing lesser penalty unless there are extenuating circumstances. 1960 Cri L J 1536 : 1960 All Cri R 249 : 1960 All W R (H C) 369 : 1960 All L J 499 : AIR 1960 All 748 (751, 753) (Pt B) (Prs 12, 15, 24) (DB).

——S. 302 — Age alone is not a consideration on which lesser punishment could be imposed. 1959 All W R (HC) 665 : 1960 All Cri R 12 : 1959 All L J 866.

——S. 302—Sentence—Age of accused.

The accused dealt four kanta blows out of which 3 were dealt on a vital part like the skull. Held, that in the circumstances, the mere fact that he was 70 or 75 years of age should not be taken to be a circumstance warranting commutation of his sentence. He was old enough to have known better, and he had lived long enough to lay the soothing function to his soul that his life was not being nipped in the bud. 1958 All Cr R 165 : 1958 All L J 19 : 1958 All W R (H C) 175 : 1957 Cri L J 1378 : A I R 1957 All 809 (816) (Pt I) (Pr 23) (DB).

——S. 302—Sentence—Youth of accused.

Accused sentenced to death—Held, on facts that in view of youth of accused, ends of justice would be met by commuting it to imprisonment for life. 1957 All L J 459 : 1957 All W R (H C) 169 : 1957 Cri L J 337 : A I R 1957 All 177 (184) (Pr 28) (DB).

——S. 302—Sentence—Age—Accused 22 years old is no reason to award lesser punishment. A I R 1955 N U C (All) 2279.

——S. 302—Youthful offender—Sentence. See Andhra Pradesh (Andhra Area) Children Act (4 of 1920), S. 3. 1964 (2) Cri L J 126 : A I R 1964 Andh Pra 350 (DB).

——S. 302 — Sentence — Accused recommended to Borstal School—Madras Borstal Schools Act, 1925 (5 of 1926), S. 10-A.

The accused was not a hardened criminal. He was a student of a College and was below 21 years at the time he was convicted of the offence of murder. He shot the deceased when he abused him and his father presumably when then they questioned him about his conduct in insulting his mother. The act was done by a young man of good antecedents in an emotional state

Held, that S. 10-A of the Borstal Schools Act was really intended to govern the case of such accused. (While sentencing the accused to transportation for life the High Court recommended his case to the Government to take action under S. 10-A and to commit him to the Borstal School for such period as they thought fit.) 1955 Cri L J 917 : 1955 Andh W R 53 : A I R 1955 Andhra 118 (122) (Pt C) (Pr 20) (DB).

——S. 302—Tender age—Lesser punishment.

Mere tender age is not a sufficient reason for awarding lesser penalty in a case where the murder is extremely brutal and ruthless. ILR (1950) 2 Assam 423 : A I R 1951 Assam 79 (82) (Pt E) (Pr 14) (DB).

——S. 302—Sentence — Age — Youth by itself is not sufficient reason for imposing lesser penalty. A I R 1955 N U C (Bom) 2977.

——S. 302—Sentence—Deliberate and brutal murder—Youth—If extenuating circumstance.

In a murder case death sentence should ordinarily be imposed but the trial Judge has discretion to impose lesser punishment of life imprisonment for reasons which should be recorded by him. The reasons for passing the lesser sentence must be adequate. Where the accused is a young lad incapable of fully appreciating the serious consequences of a criminal act youth may be pleaded as an extenuating circumstance, but where the Court is dealing with a man of 28 years of age serving in Police Force who had deliberately brutally murdered a young man who was sleeping and was defenceless and had further tried to kill a mother of two children who was in a helpless state, there are no extenuating circumstances for awarding the lesser penalty. 1960 Cri L J 1208 : A I R 1960 J & K 116 (119) (Pt B) (Pr 8) (DB).

——S. 302—Sentence—Age of accused between 17 or 18 — Lesser sentence would meet ends of justice. A I R 1955 N U C (Madh B) 3405 (DB).

——S. 302 — Youthful offender convicted of murder need not be sent to Reformatory School. See Reformatory Schools Act (1897), S. 4 (a). 1965 (1) Cri L J 704 : A I R 1965 Madh Pra 122.

——S. 302—Sentence—Murder—Youth of accused—Effect.

While the age of the accused is always given due weight on the question of sentence when there is no extenuating circumstance, the murder was in cold blood, the accused had taken precaution, the victim was an innocent and defenceless young man of 25, the murder was committed in a running train when the passenger was all alone in the compartment—a matter causing general alarm to the travelling public eleven incised wounds were caused indicating that the passenger was butchered to an instantaneous death, so that there may not remain the last trace of life before the train reached the next station, such a heinous crime, which was committed with inhuman brutality, calls for no other than the extreme penalty provided in law. 1962 M P L J 1064 : 1962 Jab L J 876 : 1963 (1) Cri L J 433 : I L R (1963) Madh Pra 730 : A I R 1963 Madh Pra 106 (112) (Pt E) (Pr 25) (DB).

——S. 302—Sentence—Extenuating circumstances—Youth (22 years in the instant case) not a ground in law for extenuation of sentence—But it may be justly taken note of by Government in exercise of their prerogative powers of mercy. 1960 Cri L J 1344 : A I R 1960 Mad 462 (467) (Pt F) (Pr 17) (DB).

——S. 302—Sentence—Extenuating circumstances—Youth.

The fact that the accused immediately stabbed himself after the murderous assault cannot serve as an extenuating circumstance. Similarly, youth is not a circumstance that the Court can take into account in awarding the penalty for the offence of murder; that must be considered by the authorities of the State, in exercising their prerogative of mercy. 1960 Mad W N 538 : 1960 Cri L J 1340 : A I R 1960 Mad 443 (445) (Pt B) (Pr 12) (DB).

——S. 302 — Bombay Borstal Schools Act (18 of 1929), S. 6 — Applicability — Act is not applicable to accused convicted of offence under S. 302, Penal Code. See Bombay Borstal Schools Act (18 of 1929), S. 6. (1961) 39 Mys L J 665.

——S. 302—Sentence—Mitigation.

So long as law enjoins sentence of death to be the primary sentence, it is the business of the Court to impose it unless their appear mitigating circumstances or grounds for the exercise of judicial discretion in the matter. In some cases youth has been considered as a ground for mitigation—Offence under S. 396 — Accused who was 22 and 23 years of age, held was not so young as to be a ground for reduction of sentence of death. I L R 32 Pat 243 : 1954 Cri L J 171 : A I R 1954 Pat 109 (114) (Pt H) (Pr 24) (DB).

——S. 302 — Sentence — Accused committing cold blooded murder of his step-mother and step-brother ruthlessly with considerable amount of determination — Appropriate sentence is one of death only—Fact that the accused is only 20 years of age or that the family would be ruined is no extenuating circumstance for awarding lesser punishment. 52 Cri L J 883 : 3 Pepsu L R 303 : A I R 1951 Pepsu 111 (115) (Pt D) (Pr 12) (DB).

——S. 302 — Age of the accused may be taken into consideration as regards sentence but not in respect of the nature of the crime when that of the accused in inflicting the fatal injuries is unusual and cruel in the circumstances. 1962 Raj L W 434 : I L R (1962) 12 Raj 481.

——S. 302—Sentence—Youth of accused.

Youth by itself is not a justification for awarding the lesser penalty. 1956 Cri L J 1240 : A I R 1956 Sau 83 (87) (Pt D) (Pr 11) (DB).

——S. 302 — Punishment — Accused committing murder in cold blood in order to qualify himself to be allowed to join a gang of dacoits with the object of helping them in spreading terror in the country—Held, neither youth nor political reasons could be placed in extenuation of the offence—Proper sentence is death. AIR 1954 Sau 39 (42) (Pt D) (Pr 15) (DB).

——S. 302—Sentence—(Criminal P. C. (1898), Ss. 32 and 367 (5)).

Youth is not in itself a reason why Court should not impose extreme penalty of death — Accused who was only 18 years of age, committing deliberate, cruel and coldblooded murder of his companion — No mitigating circumstances present — Sentence of death confirmed. AIR 1943 Mad 69, Rel. on. 1953 Ker L T 403 : 1953 Cri L J 1613 : I L R (1953) Trav-Co 514 : A I R 1953 Trav-Co 402 (407) (Pt E) (Pr 29) (DB).

——S. 302—Sentence—Considerations.

Age alone is not a factor to be considered in passing a lessor sentence than what is prescribed by law in the case of deliberate and premeditated murder of an aged man, manifestly for having rendered assistance in the investigation of crimes.

The possible distress in the family of the offender resultant on the execution of a legal sentence passed on him is not a matter which a Court of Law is expected to consider in passing the sentence prescribed by law. 1952 Cri L J 1424 : A I R 1952 Tripura 10 (10, 11) (Prs 5, 10, 11).

8. Superstition.

——S. 302—Accused an exorcist subjecting woman believed to be possessed by evil spirits, to prolonged suffocation by smoke during the course of ritual and in addition causing burns by heat brought too near her body — Woman dying on account of measures taken by accused — Accused has to be credited with the knowledge that the measures taken by him were likely to cause death—Accused can be convicted only under S. 304, Part II and not under S. 302. See Penal Code (1860), S. 304, Part II. 1964 (2) Cri L J 557 : AIR 1964 Mad 480 (DB).

9. Intention.

——S. 302—Intention—Absence of.

Where it does not appear that the accused either intended to cause death or bodily injuries which were sufficient in the ordinary course to cause death the conviction of the accused under S. 302 cannot be supported. Madh B L R 1955 (Cr) 130 : Madh B L J 1955 H C R 1008 : 1955 Cri L J 284 : A I R 1955 Madh B 26 (28) (Pt B) (Pr 10) (DB).

——S. 302—Murder—Intention of accused is to be gathered from injury inflicted by him. (1961) 39 Mys L J 665.

10. Drunkenness.

——S. 302—Sentence—Intoxication—No extenuating circumstance. AIR 1955 N U C (Ajmer) 4793.

——S. 302—Sentence.

The accused was rushing out of the house with a bitchuva in his hand when a person caught hold of him to prevent him from doing any harm. Accused freed himself from the hold of the person by stabbing him and deliberately pursued a defenceless old man who was running away and stabbed him on the neck, which brought about his death within an hour. Lesser sentence was prayed for on the ground that the accused was acting under the influence of liquor.

Held, that there were no palliative circumstances in the case which could induce the Court of impose the lesser sentence. A I R 1952 Mad 175, Dist. 1954 Cri L J 672 : 1953 Mad W N 941 : A I R 1954 Mad 523 (527) (Pt C) (Pr 21) (DB).

——S. 302, 86, 300 — Death caused by gun shot by person intoxicated—Punishment should be lesser one. AIR 1935 Cal 580 : 36 Cri L J 1322 (FB), Dissent. See Penal Code (1860), S. 86. 1953 Cri L J 434: AIR 1953 Raj 40 (DB).

——Ss. 302 and 86—Sentence — Murder by drunken person.

Where there is no clear motive for the murder, drunkenness of the accused at the time of the murder affords a sufficient excuse for not exacting the extreme penalty of the law. 1953 Cri L J 434 : I L R (1951) 1 Raj 727 : 1952 Raj L W 145 : AIR 1953 Raj 40 (41, 42) (Prs 8, 9) (DB).

11. Starvation.

——Ss. 302, 84—Death caused of four children, on account of anger due to hunger—Accused himself surrendering with the weapon — Accused held knew the nature of act and also knew what he was doing was both wrong and contrary to law — S. 84, held did not apply — Sentence was reduced to transportation for life — Criminal P. C. (1898), S. 401. See Penal Code (1860), S. 84. 51 Cri L J 1491 : A I R 1950 Mad 592 (DB).

12. Confession by accused.

See also Penal Code (1860), S. 300.

——S. 302—Confession made to Magistrate in accordance with S. 164, Criminal P. C., found to be voluntary and true — Accused also admitting in her statement before committing Magistrate that she had administered poison to her husband at instance and pursuasion of her co-accused — Confession retracted before Court of Session — Incriminating article recovered by Police on being pointed out by accused—Conviction of accused woman under S. 302, Penal Code on basis of such evidence held justified—Conviction of other co-accused could not be based on retracted confession of accused in absence of direct evidence. See Evidence Act (1872), S. 24. (1951-52) 10 J & K L R 162.

——S. 302—Conviction — Retracted confession — No corroboration - Effect.

Where the accused charged for offence under S. 302, Penal Code, had made a confession which he retracted even in the committal proceedings was convicted by the Sessions Court holding the confession to be true and where it was contended in the appeal by the accused that the conviction could be sustained if the Court believed the uncorroborated confession, even though retracted to be true:

Held, that the rule of prudence is that when a confession is retracted at the earliest opportunity the Court should require some corroboration of it in material particulars to convict the accused on that confession. (AIR 1950 Rajasthan 5 and 16, Ref.) Even though corroboration was possible by independent evidence nothing was adduced under the circumstances it is difficult to hold the confession is true. Hence the conviction has to be set aside. A I R 1946 All 15 and AIR 1925 All 627 (FB), Disting. 1952 Raj L W 312 : I L R (1952) 2 Raj 602 : 1953 Cri L J 1853 : AIR 1953 Raj 214 (214, 215) (Prs 4, 12) (DB).

13. Sex.

——S. 302—Sentence—Discretion of Court—Relevant considerations — Youth or sex alone not sufficient reason for imposing lesser penalty unless there are extenuating circumstances. 1960 All L J 499 : 1960 All W R (HC) 369: 1960 All Cri R 249: 1960 Cri L J 1536 : A I R 1960 All 748 (751, 753) (Pt B) (Prs 12, 15, 24) (DB).

14. Insanity.

See also Penal Code (1860), S. 84.

——Ss. 302, 84, 300—Unsoundness of mind—Epileptic insanity — Must exist at time of commission of the act—Held on facts that the murder was committed not in a sudden mood of insanity. See Penal Code (1860), S. 84. 1961 (2) Cri L J 43 : AIR 1961 S C 998.

——Ss. 302 and 84—Inability to prove motive — Plea of insanity.

The mere fact that the prosecution is unable to prove motive beyond any reasonable doubt is no reason for holding that there was no motive for it. Nor is the absence of motive any reason for holding that the plea of insanity has been established. ILR (1950) 2 Assam 423 : AIR 1951 Assam 79 (82) (Pt D) (Pr 12) (DB).

——Ss. 302 and 84 — Offence under S. 302—Plea of insanity — Mere establishing that some time prior to occurrence accused suffered from derangement of mind, will not be sufficient to bring case under ex-

emption—Burden lies on accused to prove mental condition, at crucial point of time, such as described under S. 84—Evidence Act (1872), S. 105. See Penal Code (1860), S. 84. AIR 1965 Mad 283 (DB).

——S. 302—Sentence—Insanity, if ground for mitigation. Accused recently giving birth to a child jumping in a well with the child in the night—After hue and cry accused taken out of well but child dying by drowning — Accused charged with murder and attempt to commit sucide — Plea of somnambulism not substantiated — No expert examination or collection of evidence in light of medical knowledge of puerperal disorders—Specific defence not set up by accused —Held that court could not guess that it was a case of puerperal insanity constituting valid defence under S. 84—Conviction and sentence of imprisonment for life confirmed — Case recommended for reduction of imprisonment to six months. See Penal Code (1860), S. 84. **1959 Cri L J 724 : AIR 1959 Mad 239 (DB).**

——Ss. 302 and 84—Murder—Accused charged with —Plea of unsoundness of mind set up — Burden lies heavily on him to prove unsoundness — He must prove that he was totally deprived of his understanding and memory — Held accused failed to discharge burden of proof.

Section 84 of the Penal Code and S. 105 read with S. 4 of the Evidence Act place a heavy burden on the defence before the offence can be excused. The effect of S. 4 of the Evidence Act interpreting the words "shall presume" is that the Court shall regard the absence of unsoundness of mind as proved, unless and until it is disproved. So long as the accused was not insane as to make it impossible for him to know the nature of the act or to realise that his act was wrong or contrary to law, he would be guilty of the offence committed by him. The evidence ought to be sufficient for a categorical finding that at the time when the accused committed the act he was of unsound mind to such an extent that he was incapable of knowing what he was doing was wrong or contrary to law.

Where a man is totally deprived of his understanding and memory, and does not know what he is doing, any more than a wild beast, he will properly be exempted from the punishment of the law.

Where the accused, a barber, gave with a razor three deep cuts on the throat of the deceased, who had been to the barber's shop to have a shave, sat on the dead body of the deceased and drew out some cords of the throat by his fingers and when charged with the offence of committing murder set up the plea of unsoundness of mind:

Held, that the circumstances on which the defence relied were innocuous, that the defence did not establish insanity or even probability of insanity, that the circumstances were consistent with the behaviour of a sane person and that, therefore, defence failed to discharge the burden of proof. **ILR (1962) Cut 806 : 1963 (1) Cri L J 213 : 29 Cut L T 290 : AIR 1963 Orissa 33 (35, 36) (Pt A) (Prs 6, 10).**

15. Deaf and mute accused.

——Ss. 302, 84 — Criminal responsibility of deaf and dumb—Charge under S. 302, I. P. C.—Accused cannot be exempted from punishment merely because he is deaf and dumb. See Penal Code (1860), S. 84. **(1960) 2 Ker L R 206.**

——S. 302—Sentence—Deaf-mute. Where a deaf and mute but sane person is found guilty of murder, the High Court can pass the minimum sentence of life imprisonment by exercise of its powers under S. 341, Cr. P. C. But there is no provision in the Code for exempting such a person from punishment. **1959 Cri L J 596 : AIR 1959 Ker 165 (DB).**

16. Nature of injury.

——S. 302—Sentence—Mitigation.

Held, that there were no extenuating circumstances which might justify the awarding of the lesser sentence provided under S. 302 in a case where the deceased was given deliberately a number of incised wounds with a sharp-edged weapon like a knife which entered the ribs causing rupture of the peritoneum and the abdominal cavity, entering into the stomach and the liver and the spleen making clear-cut injuries in them. Under circumstances such as these a sentence of death was the proper sentence under S. 302. **1957 All L J 302 : 1957 Cri L J 617 : 1957 All W R (HC) 351 : AIR 1957 All 377 (380) (Pt B) (Pr 13) (DB).**

——S. 302—Weapon used—If injuries were caused on vital part of body by sharp-edged weapon, inference is irresistible that accused intended to kill deceased—Exceptions 1 and 4 were held not applicable. See Penal Code (1860), S. 300, Exceptions 1 & 4. **1953 Cri L J 1150 : AIR 1953 All 497 (DB).**

——Ss. 302, 304 and 325—Applicability.

Quarrel between accused and deceased for latter's refusal to allow accused to take water from his channel—Next day accused following deceased with lathi and after some distance suddenly giving him lathi blow on leg—Deceased falling down — Accused giving another severe and smashing lathi blow on head of deceased resulting in fracture of skull, compression of brain with profuse bleeding and ullimately resulting in his death—Intention to cause death, held must be presumed in the circumstances as the attack was deliberate, planned and cold-blooded—Offence falls under S. 302 and not under S. 304 or S. 325. ILR 19 Mad 483 and AIR 1953 All 203, Rel. on. 1936 All L J 333, Disting. **1953 All L J 14 : 1953 All W R (HC) 104 : 1953 Cri L J 768 : AIR 1953 All 356 (357, 358) (Pt A) (Prs 8, 11) (DB).**

——Ss. 302, 304 — All injuries inflicted on deceased not on vital part of body but on legs — Injuries sufficient in ordinary course of nature to result in death—That a skilful surgeon may possibly have prevented death is really not relevant as this is not a reasonable possibility—Offence falls under S. 302 and not under S. 304. **(1949) 8 J & K L R 69.**

——Ss. 302, 84—Sentence—Extenuating fact—Multiple murders within short time on uncontrollable impulse and the atrocious nature of the crime do not constitute extenuating facts. **AIR 1955 N U C (Madh B) 4528 (DB).**

——S. 302 — Sentence — Brutal murder of innocent girl aged 3 years — Crime actuated by greed—Death penalty should be imposed. **ILR (1952) Madh B 75 : 1952 Cri L J 1631 : AIR 1952 Madh B 155 (156) (Pt B) (Pr 9) (DB).**

——Ss. 302, 304—Lathi blows—Death—Punishment.

A single lathi blow even on a vital part of the body has sometimes been held to be punishable only under S. 304, I. P. C. The reason is that a person giving a single blow may not be aware of the possibility of its resulting in death. But no such doubt can arise where two assailants simultanously attack an unresisting victim, and both belabour him with dozens of lathi blows some of which caused fracture of bones, the sheer quantity indicates that the assailants must have had the common intention of inflicting such injuries as were certain to result in death in normal course of events. Therefore the convictions of the accused under S. 302, I. P. C. and the sentences for life imprisonment are proper. **1962 Jab L J 901 : 1962 M P L J 352 : 1962 (2) Cri L J 682.**

——S. 302—Sentence—Considerations — Seriousness of injuries.

Where the accused dealt blows after blows causing no less than 28 stab-wounds on a defenceless woman, it called forth for a deterrent sentence. **1957 Jab L J 920.**

——S. 302 — Sentence — Murder by administering oleander in high dose.

Where the appellant was proved to have caused the death of the deceased by administering him oleander in liquor in high dose and he had undertaken the act for his friend (son-in-law of the deceased) for a petty matter, like a domestic matter between husband and wife :

Held, that the murder was an extremely wicked one on the part of the appellant. There were no redeeming features in the case, and the sentence of death passed upon him could not be commuted to transportation for life. **1957 Cri L J 990 : ILR 34 Pat 821 : AIR 1957 Pat 462 (465) (Pt B) (Pr 13) (DB).**

——S. 302 — Sentence.

Where other side was not armed with any weapon and there is no evidence that they did any aggressive act against the accused persons or that they assaulted any of them, on the other hand, they were all along in the course of discussion quite reasonable but in spite of their reasonable attitude, the accused, without any justification, committed the brutal assault on the deceased with the sharp weapon which resulted in his death :

Held, that the accused was, in the circumstances, rightly sentenced to death under S. 302, Penal Code. **ILR 33 Pat 397 : 1955 Cri L J 597 : AIR 1955 Pat 161 (166) (Pt D) (Pr 9) (DB).**

——S. 302 — Sentence — Accused committing cold-blooded murder of his step mother and step brother ruthlessly with considerable amount of determination — Appropriate sentence is one of death only — Fact that the accused is only 20 years of age or that the family would be ruined is no extenuating circumstance for awarding lesser punishment. 1952 Cri L J 1056 : AIR 1951 Pepsu 111 (115) (Pt D) (Pr 12) (DB).

——S. 302 — Murder caused by injury — Absence of medical evidence — Presumption of lesser injury.

Absence of medical testimony as to the nature of the injuries in a case of murder need not necessarily lead the Court to presume the lesser kind of injury; for if the injury is such that the Court might itself think it to be sufficient in the ordinary course of nature to cause death, even without medical testimony, then the accused can be convicted under S. 302. **52 Cri L J 207 : AIR 1951 Sau 17 (18) (Pt B) (Pr 4) (DB).**

——Ss. 302, 304 — Applicability — Death caused by single blow.

No general rule can be laid down that in all cases where one blow is given and deceased dies, the offence must be presumed to be under S. 304, Penal Code. Each case depends upon its own circumstances.

Where the accused caused the death by a single blow by a stick on the temple of the deceased while he was sleeping it was held that the offence fell under S. 302 and not under S. 304, Penal Code. **(1950) 3 Sau L R 280 (DB).**

——S. 302 — Sentence — Accused killing four years old child by mercilessly cutting her with heavy and sharp weapon — Accused also killing his wife — Sentence of death is only possible sentence — (Criminal P. C. (1898), Ss. 439 and 367). AIR 1955 N U C (Trav-Co) 4115 (DB).

17. Class to which accused belongs.

——S. 302 — Sentence — Mitigation — Grounds.

Where an accused, convicted on a charge of murder, pleads that he belonging to a higher caste was insulted by the deceased belonging to a lower caste, and that it provoked him to do the act which ended in the death of deceased, it cannot be said that such an insult coming from a member of a lower caste would reasonably enhance the degree of provocation so as to justify the infliction of the lesser sentence of transportation. The question of the respective caste, of the deceased and the accused cannot be a relevant factor in such a case. **1952 Cri L J 946 : AIR 1952 Bhopal 21 (24) (Pt C) (Pr 16).**

——S. 302 — Sentence — Accused an aboriginal who is by nature highly excitable and inclined to commit most serious crimes on even mild provocation — He having been dispossessed of lands by the deceased in shrewd litigation not allowed to cultivate lands in spite of entreaties that he would otherwise starve — Accused becoming desperate and joining in murderous attack on the adversary—Death of co-accused during trial - Accused already in Jail for more than 18 months undergoing agony of capital sentence hanging over his head—Lesser penalty permitted by law held would meet ends of justice, (1963) 5 Orissa J D 145 : 1964 (1) Cri L J 464 (Orissa).

——S. 302 — Conviction for murder — Sentence of death — Accused an aborigin Adibasi — That itself is no reason for not passing death sentence. 1963 (2) Cri L J 234 (Orissa).

——S. 302 — Sentence — Double murder — Sentence primarily depends upon the gravity of the offence — Extenuating circumstance—Accused being aborigines of backward tribe by itself is not an extenuating circumstance for passing lesser sentence. 1964 (1) Cri L J 121 (Patna).

——S. 302 — Sentence.

Where the accused aged about 20 to 22 years and belonging to a backward class killed the deceased acting under the stress of great emotion caused by the belief that the deceased practised witchcraft and was responsible for the death of his bullock :

Held, that the lesser sentence (transportation for life) would meet the ends of justice. **1955 B L J R 422 : 1956 Cri L J 89 : AIR 1956 Pat 10 (15) (Pt B) (Pr 29) (DB).**

18. Motive.

See also Penal Code (1860), S. 300.

——Ss. 302 and 40 — Motive—Proof of, when essential — Murder case depending on circumstantial evidence — Motive may be necessary to prove intention — Existence of other evidence to prove offence — Proof of motive is not necessary. AIR 1955 N U C (Ajmer) 5485.

——S. 302 — Sentence — Mitigating circumstance — Absence of motive of the fact that accused did not run away after committing murder — Not mitigating circumstance.

Per Srivastava. J.— It is not always possible for the prosecution to suggest a motive for each crime that is committed. The absence of a motive may be a circumstance to be used in favour of the accused so far as the conviction is concerned. But if the commission of the offence is proved by satisfactory evidence no importance can be attached to the inability of the prosecution to suggest a motive for the crime. Absence of a motive cannot be used as a mitigating circumstance in connection with the measure of sentence to be imposed. AIR 1957 S C 614, Rel. on.

The circumstances that after attacking the deceased the accused did not run away but was sitting near the place of occurrence and did not resist his being taken to the thana do not also provide any grounds for extenuation for the purposes of sentence. **1963 (2)**

Cri L J 481 : AIR 1963 All 501 (504-505) (Pt B) (Prs 19, 22) (DB).

——S. 302 — Absence of motive — Effect of, indicated. See Penal Code (1860), S. 40. 1958 Cri L J 1266 : AIR 1958 All 746 (DB).

——S. 302 — Sentence.

Where it was as much the stubbornness of the deceased as the intransigence of the accused that led to a murder following a dispute between the brothers with regard to the division of their properties, lesser sentence of imprisonment for life would meet the ends of justice. ILR (1964) Andh-Pra 185 (DB).

——S. 302—Sentence—Murder of unsuspecting and defenceless woman by head constable for gain — Death sentence passed by trial Court confirmed.

Where one head constable, a member of police force who is expected to protect life; himself took to murder and robbery and it was preplanned and diabolical murder for gain and the victim was an unsuspecting and defenceless woman:

Held that there was no hesitation in confirming the sentence of death passed by trial Court. (1962) 2 Andh L T 393.

——S. 302—Sentence—Base motive—Aggravating circumstances — Tendency to award lesser sentence deprecated.

If an offender is actuated by a base motive in the commission of a murder, that does not go in mitigation of the crime. On the other hand, that is an aggravating circumstance. In such a case the proper sentence is death.

Tendency of some of the Sessions Judges to award lesser sentences to culprits who commit gruesome murders on the ground that the commission of murder was necessitated by their desire to commit theft or robbery and it was not a pre-planned murder, deprecated. (1955) Andh W R 703: 1955 Andh L T (Cri) 231 : 1957 Cri L J 1222 : AIR : 1957 Andh Pra 899 (902) (Pr 10) (DB).

——Ss. 302 and 40 — Proof of motive—Necessity.

Motive is not an essential element to prove the guilt in a criminal case. It may strengthen the evidence on record. But adequacy or otherwise of the motive is of no consequence, for most of the grievous crimes are committed out of very flimsy and frivolous consideration. If there is positive evidence, want of motive or inadequacy thereof can have no bearing on the case. (1957) 2 Andh W R 156 : (1957) Mad L J (Cri) 421 : 1957 Cri L J 1091 : AIR 1957 Andh Pra 758 (762) (Pt C) (Pr 11) (DB).

——S. 302 — Sentence — Base motive — Aggravating circumstance — Tendency to award lesser sentence deprecated. AIR 1955 NUC (Andhra) 6092 (DB).

——S. 302 — Motive — Absence of, how far relevant indicated. See Criminal P. C. (1898), S. 367. 56 Cri L J 1152 : AIR 1955 Andhra 161 (DB).

——S. 302 — Trial under Ss. 304/326, Penal Code. — Evidence of prosecution witnesses that there was ill-feeling between accused and his victims over question of promotion—Motive for assaulting and causing injuries held was apparent and the existence of motive lend additional support to the finding of guilt. ILR (1963) 15 Assam 552.

——S. 302 — Murder — Absence of motive — Effect of, stated. See Penal Code (1860), S. 84. AIR 1956 Bhopal 57.

——S. 302—Appreciation of circumstantial evidence — Murder — Motive — Importance of — Absence of motive if necessarily vitiates conviction. 1962 (2) Cri L J 354 : AIR 1962 Cal 504 (509) (Pt C) (Pr 44) (DB).

——S. 302—Motive—Proof of, necessity.

Ordinarily when there is sufficient direct and circumstantial evidence connecting the accused with the commission of the offence the proof of motive becomes unimportant (There was held not sufficient motive for murder). ILR (1953) Hyd 32 : 1953 Cri L J 935 : AIR 1953 Hyd 161 (165) (Pt D) (Pr 19) (DB).

——S. 302—Motive.

Motive however strong is nothing more than a link in a chain of circumstances establishing the guilt of a person. At the same time mere non-establishment of motive would not be sufficient ground to order the acquittal of an accused 1954 Cri L J 1124 : AIR 1954 J & K 42 (43) (Pt B) (Pr 7) (DB).

●——S. 302 — Evidence of murder—Motive, how far relevant.

Where in a trial for murder there is direct evidence of a reliable character, no question of motive can arise. This is, of course, subject to the consideration that the absence of motive may throw doubt on the truth of the direct evidence but if making all allowances for it, the direct evidence can be trusted the question of motive presents little difficulty.

Hence, the mere fact that the motive alleged by the prosecution is inadequate is not in itself a ground for not convicting the accused. Satar Mir v. State, 10 J & K L R 155 : 1952 Cri L J 949 : AIR 1952 J & K 22 (23) (Pr 8) (FB).

——S. 302—Motive for murder — It is not necessary for prosecution to establish existence of motive when evidence is otherwise cogent and clear. (1949) 8 J & K L R 69.

——Ss. 302, 34 and 300—Applicability—A stabbing C with knife given by B—Both tried together—Acquittal of B—Effect on A's conviction—Applicability of maxim 'falsus in uno falsus in omnibus'—Sentence.

While B and C were sitting before a beedi shop, accused A came to the shop and asked C to get him a chew. On C's expressing inability, A's brother purchased for him the chew and B gave his knife to A for splitting arecanuts for the chew. A kept the knife after its use and after speaking something with B took C with him and stabbed C in abdomen within 10 feet of the shop. A and B were tried under S. 302 and S. 302 read with S. 34, I. P. Code respectively. B was acquitted but A was convicted and sentenced to death. It was contended in appeal that in view of B's acquittal, the maxim 'falsus in uno falsus in omnibus' applied and A should have been acquitted.

Held, that the maxim was not a rule of law of universal acceptance. It was only a rule of caution and not a mandatory rule of evidence. AIR 1957 SC 366, Rel. on. (2) that on a careful and anxious consideration of the prosecution evidence there was no doubt that A had stabbed C to death. (3) that in view of the absence of premeditation, lack of motive to murder, and the probability of some provocation before the actual stabbing the sentence of death was not the proper punishment. 1959 Ker L T 792 : 1959 Mad L J (Cri) 880 : 1959 Ker L J 1305 : ILR (1960) Ker 66 : 1960 Cri L J 594 : AIR 1960 Ker 149 (150, 151) (Prs 9 to 11) (DB).

——Ss. 302, 325—Absence of motive.

Absence of motive cannot be sufficient to quash the conviction when there is the direct testimony of the witnesses who had seen the accused committing the crime. Absence of motive is useful when the guilt of the accused is to be determined on circumstantial evidence, for, in such a case the evidence of motive is helpful in determining the probabilities of the case. But this is not so when there is overwhelming direct evidence corroborated by the subsequent conduct of the accused. 1956 Madh B L J 905 : Madh B L R 1956

Cr 209 : 1956 Cri L J 1408 : AIR 1956 Madh B 269 (271) (Pt B) (Pr 28) (DB).

——S. 302—Sentence—Motive for murder that deceased was on visiting terms with wife of accused, who resented it—Lesser penalty awarded. 1956 M B L J 343 : Madh B L R 1956 Cri 1.

——Ss. 302 and 300—Reliable and direct evidence of murder available—Question of motive does not arise. See Penal Code (1860), S. 300. 1960 Cri L J 1622 : AIR 1960 Mad 533 (DB).

——Ss. 302, 300, secondly — A stabbing his wife in lungs and intestine — Injuries resulting in death — A complaining about her illicit intimacy with his cousin—Offence is murder — That the deceased was on terms of illicit intimacy with A's cousin was only motive for murder and was no ground for awarding lesser punishment — It was for Government to consider whether it was a fit case for commuting death sentence to transportation for life. See Penal Code (1860), S. 300. 1956 Cri L J 1004: AIR 1956 Mad 425 (DB).

——S. 302 — Lesser penalty — Extenuating circumstances — Ordinarily for offence of murder death penalty is appropriate sentence. Only where adequete reasons exist that this rule should be departed from and lesser penalty awarded. For every murder there would be a motive but the Court cannot treat motive as an extenuating circumstance — Accused catching hold of deceased and pushing him to go along with him to village munsif's house — Deceased trying to escape from him—Accused taking out his knife and stabbing him in fit of passion—There is no extenuating circumstance. See Criminal P. C. (1898), S. 367 (5). AIR 1955 N U C (Mad) 5676 (DB).

——Ss. 302, 84 — Multiple murders — Accused not insane — No motive — Sentence — (Criminal P. C. (1898), Ss. 401, 367).

In cases of multiple murders where an accused is clearly not insane in the sense that he did not know what he was doing, and clearly knew what he was about, the mere absence of motive, the apparent senselessness of the murders and the fact that he murdered persons in his own family in cold blood can furnish no extenuating circumstances which the Courts can take into consideration in mitigation of the sentence. In such cases, Courts cannot take upon themselves the responsibility of recommending for a comparatively short period of imprisonment a man who has once been a victim to homicidal frenzy of this description and expose other innocent persons to a similar attack after his release from prison. In cases of this kind the law must take its course, and the only sentence that a criminal Court can pass is the extreme penalty. Case law reviewed. (Court refused to reduce sentence to transportation for life or recommend the case under S. 401, Criminal P. C., to Government). 1951 Mad W N Cr 262 : 1951 Mad W N 343 : 1951-2 Mad L J 593 : 1952 Cri L J 625 : AIR 1952 Mad 289 (291) (Pt A) (Pr 8) (DB).

——S. 302—Motive.

Absence of evidence of motive will not be material when there is other convincing evidence of the guilt of the accused. 1955 Nag L J 278 : 1955 Cri L J 728; ILR (1955) Nag 23 : AIR 1955 Nag 97 (98) (Pt C) (Prs 13, 10) (DB).

——Ss. 302 and 323 — Evidence — Chain of circumstantial evidence is complete which leads to irresistible conclusion that accused was responsible for murder —Death of deceased by fatal injury—Proof of accused assaulting victim with first blows and kicks though infliction of the fatal injury not seen by eye-witness —Proof of facts and circumstances— Held, that facts and circumstances were only consistent with guilt of accused that he was author of the fatal injury and those were not consistent with any other rational explanation—Since motive for murder was shrouded with mystery, lesser sentence of imprisonment for life would meet ends of justice. (1964) 6 Orissa J D 257.

——S. 302—Evidence of motive.

There is no burden of proof on the prosecution to establish the existence of any motive. ILR (1962) Cut 806 : 29 Cut L J 290: 1963 (1) Cri L J 213 : AIR 1963 Orissa 33 (36) (Pt B) (Pr 13) (DB).

——S. 302—Motive—Absence of.

In a murder case it is not obligatory on the prosecution to prove adequate motive for the crime. At the same time the absence of an apparent motive on the part of the accused in committing a murder is material when the question of sentence is concerned. The failure of the prosecution to establish motive is not sufficient to disbelive eye-witnesses. AIR 1941 Mad 326, Ref. to. 1952 Cri L J 1213 : AIR 1952 Tripura 7 (8) (Pt B) (Pr 12).

19. Injuries to accused.

——S. 302 — Sentence — Court excluding portion relating to confession of offence and admitting in evidence only the complaint portion relating to assault on the accused — Accused not prejudiced by such admission of portion, which was wholly separable — Such portion held would enure for the benefit of the accused as an extenuating circumstance regarding sentence. See Criminal P. C. (1898), S. 367. AIR 1955 N U C (Mad) 5367 (DB).

——S. 302 — Lesser sentence — Accused beaten by men of deceased before accused committed terrible deed — Lesser sentence awarded — (Criminal P. C. (1898), S. 367). AIR 1955 N U C (Mad) 5367 (DB).

20. Attempt to suicide.

——S. 302—Sentence—Mitigation—Considerations.

The accused wanted to take his wife to his place, and when he did not succeed in his attempts he stabbed his wife having had a feeling of frustration. Immediately after he stabbed his wife he wanted to put an end to his own life:

Held, that this was not a case in which the extreme penalty of law should be imposed upon the accused. The ends of justice would be met by reducing it to life imprisonment. (1957) Mad L J (Cri) 460 : (1957) 2 Andh W R 187 : 1958 Cri L J 473 : AIR 1958 Andh Pra 203 (205) (Pt B) (Pr 9) (DB).

21. Family considerations.

——Ss. 302 and 326—Intention to kill — Inference—Throwing of acid on deceased—Offence — Sentence.

In law there is no difference between death being the result of a direct intention to kill and the result of a person wilfully doing an act of which death is a probable consequence. It is a well-established judicial rule that every one is presumed to contemplate the probable consequence of his own act. Throwing acid is likely to cause death and if the accused knowingly and intentionally throws corrosive acid on the deceased, then he obviously intends to cause such bodily injury as is likely to cause death.

Accused was charged under S. 302, Penal Code, for causing the death of two females by throwing acid upon them in the dead of night when they were sleeping. The evidence clearly indicated that the accused had motive to take serious revenge against the deceased and had contemplated, prior to the date of the incident, using another deceased as a cats' paw to put the deceased out of her way and it was not a sudden act committed at the spur of the moment or in the heat of passion, was a pre-planned and care-

fully executed act. It was contended that the accused could not be said to have intended to cause the death of the deceased. It was further contended that throwing of acid could not be said to be an act which was likely to cause death since the punishment for throwing acid was provided under S. 326 of the Penal Code.

Held (1) that under the circumstances the intention of the accused was not to cause such injuries as would cause some pain or disfiguration. Although S. 320 provided for injury by corrosive substances, the nature of the corrosive substance and the quantity of it and the result following from it have always to be the determining factors in finding out whether or not it could be said that the act complained of in a particular case was likely to cause death. The accused having knowingly and intentionally thrown corrosive acid on the deceased, obviously intended to cause such bodily injury as was likely to cause death and was rightly convicted under S. 302.

(In view of the fact that the accused belonged to a respectable family and also had given birth to an infant six months back, the High Court altered the sentence from death to one of for life). ILR (1858) 2 All 888.

——S. 302 — Sentence — Accused having 8 children suspecting his wife's illicit connection with his own brother and killing her — Accused if sentenced to death at least his 7 children would be rendered orphans—Held extreme penalty of law was not called for and the ends of justice would be met if he was sentenced to imprisonment for life. (1965) (2) Cri L J 765 : AIR 1965 Him Pra 62 (71) (Pt C) (Pr 25).

——S. 302—Sentence—Liability arising under Ss. 302 and 114 — Accused mother of three children out of which one is an infant—She herself not committing murder — Lesser punishment can be awarded. 1958 Cri L J 1740 : AIR 1958 Him Pra 81 (86) (Pt 5) (Pr 45).

——S. 302 — Sentence — Perverse sense of family honour—If mitigating circumstance.

The perverted sense of family honour which actuated the accused to commit murder regarded as a mitigating circumstance. I L R (1960) Mad 157 ; 1959 Mad W N 580 : L 1960 Mad L J (Cri) 133 : (1960) 1 Mad L J 118 : 73 Mad L W 210 : 1960 Cri L J 620 : AIR 1960 Mad 218 (223) (Pt B) (Pr 29) (DB).

——S. 302—Sentence — Reduction of death sentence to one of imprisonment for life — Mitigating circumstances—Cause of murder not known — Accused an illicit lover of brother's widow—Widow also allowing illicit intimacy to an outsider — Possibility of accused committing widow's murder for preserving family honour held justified the reduction of sentence. I L R (1964) Cut 137 : 30 Cut L T 7.

——S. 302—Sentence—Accused having small child—No consideration for awarding lesser sentence.

The existence of an extremely young baby born to the accused since the murder is not a ground for passing the lesser sentence when there are no extenuating circumstances. AIR 1941 Mad 27, Rel. on. 1943 (2) Cri L J 296 : I L R (1942) Cut 796 : AIR 1943 Orissa 144 (150) (Pt C) (Pr 24) (DB).

——S. 302, 307 — Sentence—Accused throwing her two daughters into well — One (three years of age) getting drowned — Other rescued — Accused guilty of offence of murder and attempt to murder — Sentence reduced to transportation, since accused has child of one year old. AIR 1955 N U C (Punj) 1043 (DB).

24. Lapse of time.

——S. 302—Sentence.

The sentence of death substituted by the sentence of transportation for life, having regard to the time that has elapsed since the occurrence and the probable motive of provocation of cruelty to a helpless woman. Kalawati v. State of H. P. 1953 S C J 144 ; 1953 Mad W N 219 ; 1953 Cri L J 185 ; 1953 All W R (Sup) 52 ; 1953 S C R 546 ; AIR 1953 S C 131 (135) (Pt E) (Pr 23).

——S. 302—Sentence—Extenuating circumstances—Inordinate delay in trial — Murderer absconding for number of years — Not a valid ground for reducing sentence—Brutal murder—Accused being of advance age having his wife and children living — Lesser penalty imposed.

The Court has power and no doubt must consider, where there has been inordinate delay, to allow the appeal so far as the death sentence is concerned, and substitute a sentence for imprisonment for life on account of the time factor alone. But in a case of murder in which the extreme penalty of law is called for, the circumstances that the murderer absconded for a number of years before he was brought to trial is not by itself a ground for reducing the sentence of death to one for life imprisonment.

The fact that the prosecution failed to prove any motive for the murderous assault and that the accused is of advanced age having his wife and children living, constitute an extenuation of an offence.

Held, that in the circumstances of the case the death sentence should be commuted to a sentence of imprisonment for life. 1962 (2) Cri L J 178 : AIR 1962 Cal 433 (438, 437) (Pt B) (Prs 33 to 37, 39) (DB).

——S. 302—Sentence — Extenuating circumstance—Lapse of time—Sentence of death set aside in appeal and retrial ordered — Some time spent in retrial — Court will not be justified in reducing sentence to transportation for life. AIR 1955 N U C (Madh B) 4525 (DB).

——S. 302 — Sentence — No premeditation — Crime committed in a fit of anger on account of altercation immediately preceding occurrence — More than 18 months elapsing since then — Death sentence not passed but sentence of imprisonment for life held sufficient. (1963) 5 O J D 182.

——S. 302—Sentence.

Accused in custody for about 27 months due to protracted trial—Sentence of death reduced to transportation. I L R (1954) Punj 649 : 56 P L R 952 ; 1954 Cri L J 902: 1955 All W R (Sup) 115: AIR 1954 Punj 87 (411) (Pt C) (Pr 28) (DB).

——S. 302—Death reference and appeal before High Court—High Court referring question of law to Full Bench — Delay of three months caused due to reference — This is a circumstance to be taken into consideration while confirming death sentence but case should be placed before executive Government with a recommendation for commutation of death sentence to one for transportation. Criminal P. C. (1898), Ss. 374 and 401. 21 Ind Cas 852; I L R (1944) 2 Cal 267 ; AIR 1944 P C 1, Rel. Dena Singh v. State, 5 C Punj L R 38 ; 1952 Cri L J 983 ; 1952 All W R (Supp) 78 ; I L R (1954) Punj 512 ; AIR 1952 Punj 2114 (2129) (Pt B) (Pr 26) (DB).

——S. 302 — Sentence — Lapse of considerable time between murder and conviction — Lesser penalty justified. 1953 Raj L W 339 ; 1953 Cri L J 1540 ; I L R (1957) 7 Raj 844 ; AIR 1953 Raj 336 (341) (Pt D) (Pr 8) (DB).

28. Weapon used.

——Ss. 302, 326—Weapon not proved to be deadly — Act done in a melee.

Where a person hit is a young man of 26 years, the stick with which the blow is dealt is not proved to be deadly and it is neither seized nor produced, there is no evidence about the nature of the blow except that to be gathered from the inquiry and contributory causes, if any, for the immediate death are not elicited, it is rather unsafe to impute the consequences of the intention to the person that dealt the blow. Further, if the act has been done suddenly in a melee where the accused could not have intended the death of the person dealt with the conviction should be under S. 326 and not under S. 302. **(1951) 55 Mys H C R 317 (DB).**

— Ss. 302, 326—Lethal weapons.

A dang is a lethal weapon and in State of Punjab it is used effectively to kill. A lathi is a lethal weapon. AIR 1928 Lah 93, Rel. on. **I L R (1951) Punj 227 (DB).**

24. Absence of corpus delicti.

See also Penal Code (1860), S. 300.

● **——S. 302 — Conviction—Basis of—Corpus delicti not traceable — Proof of murder solely dependent on retracted confession — Improbability of manner of murder — Accused entitled to benefit of doubt.** See Penal Code (1860), S. 300. **1957 Cri L J 559 : AIR 1957 S C 381.**

——S. 302—Sentence—Extenuating circumstances—Body not found—Youth of accused.

The murderers having been found, the mere circumstance that the body of the unfortunate victim had been effectively made away with by the convicts should not influence the Court in the passing the sentence of death.

Held, that inexperience and youth of the accused taken with other circumstances of the case justified the passing of the lesser sentence. **1958 Cri L J 842 : AIR 1958 All 514 (521) (Pt F) (Fr 41) (DB).**

——S. 302—Evidence and proof— Discovery or identification of dead body if absolutely essential.

Though proof of death of the deceased is the initial condition to be satisfied for rendering the accused guilty of murder it is not imperatively essential, in order to justify a conviction for murder, that the 'corpus delicti' should be forthcoming. To recognize any such condition precedent, as being absolutely necessary to conviction in all cases, would be to afford complete immunity and certain escape to those murderers who are cunning or clever to make away with or destroy the bodies of their victims. Hence the mere circumstance that the body of the deceased has not been or could not be identified due to mutilation is a most inadequate reason upon which to refuse to convict accused of murder. ILR 3 All 383, Ref. **(1950) 55 Mys H C R 48 (DB).**

——S. 302—Conviction—Dead body not found—Fact of killing proved—Confession of accused retracted—Evidence of accessory after the fact — Corroboration —(S. 24, Evidence Act).

B was charged for murder. He had confessed to a Magistrate admitting the killing. The clothes of the deceased worn at the time of his death were recovered at his instance. Circumstantial evidence also was in favour of his guilt. M the wife of the deceased who was with her husband at that time, was living with B, shortly after, her evidence of killing was also on record. She was found to have had illicit relations with B before and after. B's statement before the trial Court was that it was M who killed the deceased and she came to him after the event and lived with him. On appeal against conviction.

Held. Where there is the confession of the accused, and his statement before Court that the man was killed and there was also other evidence to show the deceased was killed the fact that the body was not recovered is not a material ground for not convicting him under S. 302 and the contention that he could only be convicted under S. 307, cannot be accepted. The mere fact that the accused was not taken into judicial custody but handed back to the police does not affect the value of the confession of the accused. The confession though retracted at the trial can be relied on if there is corroboration. Retracted confession may be used as corroboration of the evidence of an accomplice so far as the maker of the confession is concerned. **1952 Raj L W 376 : 1953 Cri L J 1038 : I L R (1952) 2 Raj 669 : AIR 1953 Raj 131 (133) (Pt D) (Pr 7) (DB).**

25. Verdict of jury.

● **——S. 362—Charges under—Trial with aid of jury —Acquittal under S. 364 but conviction under S. 302 —Appeal to Supreme Court under Art. 134 (1) (c)—Supreme Court not concerned with acquittal under S. 364—No misdirection to jury — Held no scope for argument that verdict should be interfered with or conviction under S, 302 based on it altered on by hypothetical consideration not founded on any facts on record.** See Penal Code (1860), S. 364. **1963 (2) Cri L J 170 : AIR 1963 S C 1074.**

26. Murder under instigation or threat.

——S. 302—Sentence — Accused drawn into murder of deceased as hireling—It is not extenuating circumstance — (Criminal P. C. (1898), S. 367). **A I R 1955 NUC (All) 2289.**

——S. 302—Sentence—One of accused taking part in murder simply to oblige his friend, the other accused —Normal sentence of death and not of transportation for life to be imposed.

The fact that one of the accused was not related to the deceased in any way and he did not stand to gain by the murder of the deceased but took part in the murder simply to oblige the other accused who was his very thick friend is wholly an inadequate reason for imposing sentence of transportation for life. The normal sentence of death should be given in such a case. **52 Pun L R 73 : 51 Cri L J 747 : AIR 1950 East-Punj 159 (160) (Pt A) (Pr 5) (DB).**

——Ss. 302, 300 — Accused administering poison — Death—Offence - Sentence.

Where a person administers a poisonous substance to another which has resulted in his death, he is normally expected to know the effect of the poisonous substance and, if death has resulted, it must be held that the accused persons intended death or at least knew that death was the imminent result of the poison administered, and the accused is guilty of murder. AIR 1957 Pat 462, Rel. on.

Held that considering that the accused acted as a foil of her paramour, the ends of justice did not require the infliction of the extreme penalty of law and that the only alternative was to sentence her to life imprisonment. **1959 Cri L J 448 : AIR 1959 Him Pra 3 (12) (Pt K) (Prs 33, 34).**

27. Murder by several accused.

See also Penal Code (1860), Ss. 34, 149 and 300.

● **——Ss. 302, 34, 96 and 103 — Murder committed in furtherance of common intention—Accused establishing right of private defence under S. 103 cannot be held liable for murder— Otherwise they would be liable for that offence.**

Where several accused commit the murder of a person by doing an act or acts in furtherance of common intention they would not be liable for the

said act or acts done in furtherance of the common intention only if they are able to establish that they had the right of private defence to voluntarily cause the death of the person. Under S. 103, the right of private defence of property extends, under the restrictions mentioned in S. 99 thereof, to the voluntarily causing of death, if the offence, the committing of which or attempting to commit which occasions the exercise of the right, falls in one of the categories mentioned therein. Hence all the accused would be liable for murder if they are not able to establish that the offence which made them voluntarily cause death fell in one of the categories enumerated in the section as all of them participated in the offence pursuant to the common intention to murder.

It is well settled that S. 34 does not create a distinct offence; it only lays down the principle of joint criminal liability. The necessary conditions for the application of S. 34 of the Code are common intention to commit an offence and participation by all the accused to doing an act or acts in furtherance of that common intention. If these two ingredients are established, all the accused would be liable for the said offence; that is to say, if two or more persons had common intention to commit murder and they had participated in the acts done by them in furtherance of that common intention, all of them would be guilty of murder. In that situation S. 96 of the Code says that nothing is an offence which is done in the exercise of the right of private defence. Common intention, therefore, has relevance to the offence and not to the right of private defence. What would be an offence by reason of constructive liability would cease to be one if the act constituting the offence was done in exercise of the right of private defence. Once it is established that the common intention was to commit murder, the question of separate individual liability in the context of private defence would be out of place.

It is true that in ascertaining whether a group of persons had common intention to murder, the evidence adduced by the defence that they had common intention only to cause hurt is relevant. But in most of the cases, the discussion of the evidence in compartments —one relating to the offence and the other to the right of private defence— may not be possible, for almost the evidence relating to one part will have impact on the other part, and the Court in considering whether the accused are liable constructively for murder will have to consider also the evidence of the defence that their common intention was not to commit murder but only to protect their right and to cause hurt, if necessary. Gurdatta Mal v. State of U. P., 1964 S C D 792 : 1965 (1) Cr L J 242 : 1964 Mad W N 563 : (1965) 2 S C J 550 : 1965 Mad L J (Cri) 785 : ILR (1964) 2 All 632 : AIR 1965 S C 257 (260) (Pt A) (Pr 9).

■——Ss. 302 and 149 — Sentence — Murder committed by some members of unlawful assembly — Death sentence on every member — Propriety of.

As a mere proposition of law, it would be difficult to accept the argument that the sentence of death can be legitimately imposed only where an accused person is found to have committed the murder himself. Whether or not sentences of death should be imposed on persons who are found to be guilty not because they themselves committed the murder, but because they were members of an unlawful assembly and the offence of murder was committed by one or more of the members of such an assembly, in pursuance of the common object of that assembly, is a matter which has to be decided on the facts and circumstances of each case. Masalti v. State of U. P. 1964 S C D 980 : (1965) 1 Andh L T 19 : 1965 (1) Cri L J 226 : 1964 Mad W N 588 : (1965) 1 S C J 605 : 1965 Mad L J (Cri) 312 : (1964) 8 S C R 133 : ILR (1964) 2 All 694 : A I R 1965 S C 202 (211) (Pt H) (Pr 20).

■——Ss. 302, 149 and 34—Prosecution of more persons than one — Acquittal of some — Effect on prosecution of remaining.

If out of six persons charged under S. 149 of the Penal Code, along with other offences, two persons are acquitted, the remaining four may not be convicted because the essential requirement of an unlawful assembly might be lacking. Where however four persons are prosecuted under S. 302 read with S. 34, Penal Code, failure of the prosecution to prove that one of them took part in the commission of the offence does not introduce any infirmity in its case against the remaining accused at all. Even if he is held not to be present at the scene of the offence, that in law, cannot prevent the prosecution from presenting its case against the remaining accused if the evidence adduced by it is otherwise satisfactory and cogent : (1902) 2 K B 339, Disting. Sunder Singh v. State of Punjab. 1962 (2) Cri L J 290 : 1962 S C D 416 : (1963) 1 S C J 97 : 1963 Mad L J (Cri) 59 : 1962 Supp (2) S C R 654 : 1962 All W R (H C) 600 : 1962 All Cri R 343 : AIR 1962 S C 1211 (1215) (Pt A) (Pr 8).

■——Ss. 302 and 149 — Seven accused charged under S. 302 read with S. 149 — Five acquitted in appeal — Conviction of two under Ss. 302 and 149.

The two appellants were charged and convicted along with five others of having constituted an unlawful assembly and committed murder (S. 302 read with S. 149). But in the appeal before the High Court the five accused were given benefit of doubt and acquitted. In an appeal before the Supreme Court it was contended that the said five accused having been acquitted, and in the absence of a charge that five other unknown persons constituted an unlawful assembly, the two appellants could not be held members of the unlawful assembly which had the common object.

Held, after reviewing the evidence and weighing the opinion embodied in the judgment of the High Court that there was no scope left for introducing into the case the theory of the benefit of doubt, that the five accused were wrongfully acquitted and that though their acquittal stood that circumstance could not affect the conviction of the two appellants under S. 302 read with S. 149. Marachalil Pakku v. State of Madras. 1954 Mad W N 670 : 1954 Cri L J 1668 : AIR 1954 S C 648 (651) (Pt B) (Pr 8).

■——Ss. 302, 34 and 149—Conviction under S. 302 read with S. 149 — Alteration in appeal to one under S 302 read with S. 34, propriety of—(Criminal P. C. (1898), S. 423 (1) (b))—See Penal Code (1860), S. 34. 1952 Cri L J 863 : AIR 1952 S C 167.

——Ss. 302 and 149—Sentence—Murder committed by several accused — Who inflicted fatal injury not known — Ground if sufficient for awarding lesser sentence to all accused.

Where a number of accused persons are found guilty of the offence under Ss. 302 and 149, the trial Judge can award sentence of death to all the accused persons or to only a few depending upon the facts and circumstances of the case. He should not, in each and every case, be unduly moved by the factor that it was not known who had inflicted the fatal injury or caused injuries which by themselves would have been sufficient to cause death as penalty when the accused persons have acted brutally in committing a pre-planned murder. What is necessary is that there should be no discrimination and all the accused persons equally placed be awarded the same sentence: AIR 1956 S C 754, Foll. ; AIR 1953 S C 364, Rel. on. 1964 (2) Cri L J 75 (All.).

——S. 302—Applicability—Accused persons leading their cattle into field of complainants—Complainants when taking cattle to pound intercepted and beaten by accused — One of complainants receiving smashing blow on head by one of accused and dying — All held guilty under S. 302/149—See Penal Code (1860), S. 300 (3). AIR 1955 N U C (All.) 1701.

——Ss. 302 and 149—Evidence—Question of motive favouring more the defence version rather than prosecution version — Assault taking place in dark and under circumstances when assailants could not have been recognised—Whole prosecution evidence found interested and not reliable — Accused persons named because of enmity — Charges held not proved — Evidence Act (1872), S. 3. 1954 All W R (H C) 113 : 1954 All L J 165.

——Ss. 302 and 149—Attack by persons armed with deadly weapons — Death caused — Offence.

Where a number of persons go armed with deadly weapons to attack a person or a party, it may be assumed as a matter of commonsense that their common intention is at least to cause grievous hurt. If in the course of the commission of that offence, death is caused, the persons so attacking will be guilty of an offence under S. 302 read with S. 149. Conviction under S. 304 or S. 323 read with S. 149, is erroneous. 1950 All L J 871 : 1952 Cri L J 738 : ILR (1953) 1 All 1 : AIR 1951 All 365 (366, 368) (Pt A) (Prs 4, 15) (DB).

——Ss. 302, 147, 299, 300, 304, 109 and 34 — Four accused armed with lathis and one with spear — Common object of beating deceased — One member, being struck by deceased, becoming incapable of taking further part — Rest beating deceased causing several injuries resulting in death — Offences committed by accused stated — See Penal Code (1860), S. 147. 51 Cri L J 1133 : AIR 1950 All 418 (DB).

——Ss. 302 and 149—Group of persons, found guilty of murder—Who inflicted what blows not established — Lesser punishment, if warranted — Discretion — Accused drunk — Extenuating circumstances.

A combined reading of the provisions of S. 302, Indian Penal Code and S. 367 (5), Criminal P. C. makes it clear that the normal punishment in the case of murder is death, but a mitigated punishment can be given for stated extenuating circumstances. When the statutes laid down in express terms that reasons shall be given for a lesser sentence, it presupposed that the normal sentence for murder is death. The section, therefore, does not confer an absolute discretion in the Court to give one or the other of the alternative sentences. The normal sentence is indicated and the lesser can only be given for definite extenuating circumstances : AIR 1953 All 220, Not followed.

It cannot be laid down as a rule of law that in every case where it is not possible to allocate the wounds inflicted to a particular accused, a lesser penalty should be given. Where a group of persons brutally murdered the deceased, they all deserve the same punishment. But there may be cases where part taken by each of the accused may vary, one of the accused taking a part and other taking a subsidiary part, though their common object is to commit murder. In such a case, perhaps, there may be a good ground for differentiating the accused for inflicting punishment.

Where it was found that all the accused who were guilty of murder, were in the habit of manufacturing illicit toddy and were drunk as usual when they committed the murder, but had not primed themselves with drink for the purpose of committing the murder, it was held that this was sufficient extenuating circumstance for awarding the lesser punishment of transportation for life. 1954 Andh L J (H C) 88 : 1955 Cri L J 81 : 1955 Andh W R 183 : AIR 1954 Andhra 46 (49, 50) (Pt B) (Prs 16, 18) (DB).

——S. 302—Sentence—Murder by several accused—Doubt as to who dealt fatal blow — If ground for lesser penalty.

Where several accused are charged with murder but it is not clear from whose blow the death was caused, the Court may commute their death sentences to transportation for life. ILR (1956) Hyd 205 : 1956 Cri L J 887 : AIR 1956 Hyd 99 (106) (Pt J) (Pr 22) (DB).

——S. 302, read with Ss. 148, 149 and 201—Criminal trial—Practice—Murder — Conspiracy — Several accused — One absconding—Trial of the remaining accused resulting in acquittal for lack of reliable evidence—Subsequent arrest of absconding accused and his trial for same offences — Accused acquitted — Acquittal held proper in the circumstances. 1956 M B L J (H C R) 362.

——S. 302—Murder charge against several persons—Death as a result of sudden fight — Flimsy evidence about part played by particular accused — Unsafe to found a conviction on such evidence.

Where in an unpremeditated sudden fight between two groups two persons were alleged to have darted arrows at one of the deceased persons and killed him and only one incised wound was found on the dead body, the court acquitted one accused but convicted the other. In conviction appeal by the other accused:

Held, that though in a sudden fight between two groups it is easy for witnesses to observe as to who was discharging the arrows, but it is extremely difficult to observe as to what portion of the dead body particular person's arrows struck and therefore it is unsafe to found a conviction on such flimsy evidence against a particular accused, especially when one of the two persons who were alleged to have darted the arrows is acquitted on the same evidence. 1956 M B L R (Cri) 204 : 1956 Madh B L J 900.

——Ss. 302 and 149 — Some members of unlawful assembly running away after inflicting one or two injuries on deceased—Responsibility of such members for death. See Penal Code (1860), S. 149. 1952 Cri L J 1261 : AIR 1952 Madh B 133 (DB).

——Ss. 302 and 34 — Sentence — Murder by several accused — Common intention to kill—Conviction of all under S. 302 read with S. 34 — No distinction to be made in matter of sentence.

Several accused were charged under S. 302 read with S. 34 for having committed murder of two persons. The Sessions Judge while finding the accused guilty under S. 302 read with S. 34 awarded the sentence of death to three of them as they were armed with deadly weapons. The other two were sentenced to imprisonment for life.

Held, that no distinction in sentence could be made on the ground that some of them were armed with deadly weapons. If two of them were awarded the lesser punishment of imprisonment for life, there was equally good reason that the other should have been awarded the same penalty. A I R 1956 S C 754, Foll. 1963 Jab L J 117 : 1963 (1) Cri L J 55 : A I R 1963 Madh Pra 29 (30) (Pr 19) (DB).

——S. 302—Accused tried for murder with six others who were acquitted — Conviction under S. 149. Penal Code can be converted under S. 34, Penal Code. See Criminal P. C. (1898), S. 237. 1963 M P L J (Notes) 14.

——Ss. 302 and 34 — Sentence — Murder by several accused originating in local struggle for power—Evidence not sufficient to fix responsibility for fatal in-

juries on individual accused—Subsequent restoration of amity—Lesser sentence expedient. See Penal Code (1860), S. 34. 1960 Cri L J 1100 : AIR 1960 Mad 362 (DB).

——S. 302—Sentence — Pre-planned murder—Offenders animated with common intention — Penalty of death could be justified—Case against three accused—Only one convicted — Out of injuries only one found necessarily fatal — Evidence not sufficient to show whether convicted accused was responsible for that particular injury — Award of lesser sentence of imprisonment for life not interfered with. 1960 Mad W N 510.

——S. 302—Unlawful assembly — Murder—Circumstances attracting liability of all rioters—Conviction. See Penal Code (1860), S. 149. 1959 Mad W N 708.

——S. 302—Evidence Act (1872), S. 26—Two accused charged with murder — One of them admitting to be joint participant facilitating murder by the other—Explanation that he was threatened with death by other accused held did not exonerate him. (1963) 5 Orissa J D 372 : 1964 (1) Cri L J 680 : 31 Cut L T 17 : A I R 1964 Orissa 144 (Pt D) (Pr 21) (DB).

——S. 302—Conviction and sentence—Charge under S. 302 read with S 34—Accused is as much guilty of criminal act as is his co-accused who actually committed the murder. A I R 1955 S C 331. Rel. on. ILR (1962) Cut 726 : 1963 (2) Cri L J 294 : A I R 1963 Orissa 144 (150) (Pt F) (Pr 24) (DB).

——Ss. 302/149 and 147 — Accused not mentioned in F. I. R. as one of assailants of deceased — Held, it was good ground for not convicting him under S. 302/149 — His presence and participation in riot well established — His conviction under S. 147 held well justified. ILR (1952) Cut 219.

——Ss. 302, 149, 34—Murder committed in course of same transaction—Accused persons charged and convicted both under S. 302/149 and under S. 302/34—Appeal — Conviction under S. 302/149 upheld and conviction under S. 302/34 found redundant — Conviction under S. 302/34 even if set aside, held would not affect conviction under S. 302/149 — Sentence to be deemed to have been imposed only under S. 302/149 — Criminal P. C. (1898), S. 423. 1964 (1) Cri L J 426 : AIR 1964 Pat 158 (159) (Pt C) (Prs 36, 38) (DB).

——Ss 302/149 — Unlawful assembly consisting of more than five members having common object of killing the deceased — Conviction of four persons of the assembly under S. 302 read with S. 149 and wrong acquittal of others—Conviction held justified. (1963) ILR 42 Pat 293.

——Ss. 302, 147, 148, 326/149 — Rioting — Common object to assault deceased not established — One of accused guilty of murder and convicted under S. 302—Others held could not be convicted under Ss. 147, 148 and 326/149. See Penal Code (1860), S. 147. 51 Cri L J 331 : A I R 1950 Pat 44 (DB).

——Ss. 302 and 149 — Conviction under — Lesser sentence than life imprisonment is illegal.

Conviction under S. 302 read with S. 149 does not stand on a different footing from that under S. 302 simpliciter, and it is not legally permissible to impose lesser sentences of punishment on persons convicted by force of that section than the minimum sentence of life imprisonment provided for the substantive offence under S. 302. Once the conditions of S. 149 are fulfilled, and a person is held guilty of the offence of murder under S. 302 read with S. 149 then the only lawful punishment which can be imposed on such an offender would be the one provided under S. 302, itself and the minimum punishment provided thereunder is imprisonment for life and no less. 1962 Raj L W 448 : ILR (1962) 12 Raj 383.

——Ss. 302,141, 148, 149—Rioting—Conditions to be satisfied — Unlawful common object — Beating with sharp weapons resulting in death—Liability of members — Scope and extent of. See Penal Code (1860), S. 141. 1958 Cri L J 1232 : AIR 1958 Raj 226 (DB).

28. Acquittal of some accused.

——S. 302 — Lesser punishment — (Criminal P. C. (1898), Ss. 367, 402).

The fact that the principal instigator has been acquitted, is not a proper case to act under S. 402, Criminal P. C. This would not be an extenuating circumstance. But in view of the fact that these accused who were young men had come under the influence of the older man, viz., Bhima Pillai, and would have committed this offence but for that baneful influence upon them, the ends of justice do not require that the High Court must confirm the extreme penalty of law awarded to them. The sentences were reduced to imprisonment for life. 1956 Cri L J 1202: 1956 Mad W N 327 : 69 Mad L W 788 : 1956 All W R (Supp) 114 : (1956) 2 Mad L J 43 : AIR 1956 Mad 536 (540) (Pt G) (Pr 24) (DB).

29. Leniency to some accused.

■ ——Ss. 302, 149 — Sentence — Leniency to some accused if ground for reducing sentence of death as regards others.

Where the High Court, while upholding the conviction of the appellants under S. 302/149, Penal Code, reduced the sentence of death of some of the accused to transportation for life, but did not reduce the sentence of death passed on the appellant B :

Held (by the Supreme Court in appeal) that merely because leniency had been shown to some of the appellants in the matter of sentence was no ground for reducing the sentence, passed on B, who was shown to be responsible for the killing. Brij Bhukhan v. State of U. P., 1957 Cri L J 591 : AIR 1957 S C 474 (478) (Pt C) (Pr 8).

30. Abetment.

——Ss. 302 and 109 — Death penalty on principal offender — No ground for any differentiation between him and his abettor — Normal sentence of death has to be passed against him also — Even if his acquittal by the trial Court and difference of opinion as to his guilt between the Judges of the Division Bench might weigh the Executive Government to commute death sentence, if passed, that cannot influence the Court to pass the lesser sentence. Besides to impose the lesser penalty would be to deprive accused of the benefit of an appeal which he would of right get under Art. 134 (1) (a) of the Constitution in case he is condemned to death. See Penal Code (1860), S. 109. 1959 Ker L T 167: 1959 Ker L J 221 : ILR (1959) Ker 319.

——Ss. 302, 108, Explns. (2) and (4) — Abetment of abetment is offence, though the second abetment is ineffective — Accused approaching doctor for poison for murdering mistress — Doctor refusing — Accused is guilty of offence under S. 302 read with S. 116, Penal Code. See Penal Code (1860), S. 108. AIR 1950 Mad 827.

——Ss. 302, 107 — Abetment of murder — Two accused catching deceased — Third giving fatal blow—Former not guilty of abetment of murder. See Penal Code (1860), S. 107. AIR 1955 NUC (Sau) 5754 (DB).

31. Charge.

See Penal Code (1860), S. 300.

32. Evidence.

See Penal Code (1860), S. 300.

33. Onus.

See Penal Code (1860), S. 300 and Evidence Act (1872), S. 105.

34. Sentence of fine.

—S. 302 — Longest term of imprisonment awarded — Desirability of sentence of fine — (Criminal P. C. (1898), S. 32).

It is highly undesirable that where the longest term of imprisonment is awarded to an accused person, this punishment should be supplemented by an additional sentence of fine. 1960 Cri L J 437 : 1960 All L J 136 : ILR (1959) 2 All 255 : AIR 1960 All 223 (227) (Pt D) (Pr 18) (DB).

—S. 302 — Sentence — Substantive sentence and fine — (Criminal P. C. (1898), S. 32).

The Penal Code sanctions either a term of imprisonment or a fine or both and it is left to the discretion of the Court whether to inflict a sentence of imprisonment or fine or both. It is only in very exceptional cases that it is suitable and appropriate to inflict a fine as well as substantive term of imprisonment. It is only suitable in cases where the Court thinks that the justice of the case will be met by inflicting a substantial fine but at the same time thinks that a short term of imprisonment in addition will serve as a salutary lesson to the accused or in cases where it is desired to compensate the complainant, or in cases where the accused had profited financially by his misdeeds. The Court should exercise a careful discretion in the matter of superimposing fines upon long substantive terms of imprisonment. It would not be proper to add to a very long term of substantive imprisonment a fine which there is no reasonable prospect of the accused person being able to pay, and for default in payment of which he will have to undergo a still further term of imprisonment. 1957 Cri L J 1205 : AIR 1957 All 764 (764) (Pr 5) (DB).

—S. 302 — Sentence of fine with transportation for life — When to be awarded — Reasons to be given.

The Penal Code confers a discretion on the Court to sentence an accused as it thinks proper. When a Court imposes a sentence of fine also under S. 302, Penal Code, then obviously the Court has got to give reasons why a sentence of fine also was being imposed, for the simple reason that a sentence of fine over and above the substantive sentence is deemed to be in excess thereof. A sentence of fine in a murder case looks appropriate only where the murder has been motivated by monetary gain. Murder held was not motivated by monetary gain and the sentence of fine was set aside. AIR 1956 Bom 711, Rel. on. 1958 All W R (HC) 5 : 1957 Cri L J 498 : 1958 All Cr R 5 : ILR (1957) 1 All 43 : AIR 1957 All 317 (319) (Pt C) (Pr 11) (DB).

—S. 302 — Sentence — (Criminal P. C. (1898), Ss. 31, 32 and 367).

Where the Sessions Judge has sentenced the accused to transportation for life for an offence of murder, he cannot impose a sentence of fine. The sentence of fine for an offence of murder is wholly inappropriate. 1956 Cri L J 1306 : AIR 1956 Bom 711 (714 (Pt A) (Pr 8) (DB).

35 Remission of sentence.

—S 302 — Constitution of India. Arts. 226, 161, 162, 246 — Order of Governor commuting death sentence confirmed by High Court—Validity - Mandamus directing State to execute death sentence — Cannot be issued. See Constitution of India, Art. 226. 1962 (1) Cri L J 241 : AIR 1962 All 151.

—Ss 302, 300, Exception 1 — "Grave and sudden provocation" explained — False accusation of theft — Accused stabbing accuser to death — No grave provocation within meaning of Exception 1 to S. 300 — Case one of murder — But death sentence commuted. 1961 All L J 209 : 1961 All W R (HC) 207 : 1961 All Cr R 90 : 1961 (2) Cri L J 591 : A I R 1961 All 538 (539, 542) (Prs 3, 30, 31)(DB).

— S. 302 — Sentence — Accused suspecting illicit connection between his father and wife—Murdering both — No question of grave and sudden provocation — Death sentence commuted to imprisonment for life.

Where a husband had knowledge of his wife's infidelity but kept brooding over it, and finally killed both her and the paramour on a day when they had done nothing improper, no question of any grave and sudden provocation arose, and the crime was not taken out of S. 302 though it might be a fit case for awarding the lesser sentence of imprisonment for life.

Where, therefore, in prosecution of accused for murder of his father and wife the disinterested witnesses testified that the accused was oppressed by the feeling that his own father had sullied the honour of his wife, that was a case not without extenuating circumstance. The death sentence was commuted to imprisonment for life. 1961 All W R (HC) 63 : 1961 All Cr R 27 : 1961 All L J 13.

—S. 302 — Sentence — Murder case — Incident not the result of premeditation — Sentence of death reduced to one for rigorous imprisonment for life. 1962 Ker L T 374.

—S. 302 — Sentence—Remission of—Recommendation by Court—Effect indicated. See Criminal P. C. (1898), S. 401. 1957 Cri L J 852 : AIR 1957 Ker 102 (DB).

—S. 302—Accused who had recently given birth to a child, jumping with child in well — Accused rescued but child dying — No specific plea of insanity raised — No expert examination or collection of evidence on question of puerperal disorder—Court held could not guess that it was a case of puerperal insanity — Sentence of transportation for life confirmed — Case recommended for reduction of imprisonment for six months. (1959) 1 Mad L J 125 : 1959 Mad L J (Cri) 147 : 1959 Cri L J 724 : 1959 All W R (Sup) 57 : 1959 All Cr R 229 : A I R 1959 Mad 239 (240, 244, 245) (Prs 8, 14 to 17) (DB).

—S. 302—Sentence—Accused aged 60 found guilty of murdering nephew aged 30 years — Accused previously assaulted and abused by deceased—Case held invoked mercy but Court held could not do anything — It was for Government to consider the question of commutation. See Criminal P. C. (1898), S. 401. 55 Cri L J 154 : AIR 1954 Mad 1006 (DB).

36. Interference by High Court.

■ —Ss. 302, 149 — Confirmation of death sentence and appeal—Duty of High Court. See Criminal P. C. (1898), S. 374. 1965 (1) Cri L J 226 : A I R 1965 S C 202.

■ —S. 302—Sentence.

In a murder case death sentence should ordinarily be imposed. But the trial Judge has the discretion to impose the lesser punishment of transportation for reasons recorded by him and when those reasons are such that a judicial mind could properly find on them the appellate Court could not interfere with that discretion. There must be strong reasons to entitle the appellate Court to enhance the sentence of death and it is not enough if the appellate Court feels that

left to itself it would have awarded the greater penalty of death.

Conviction for murder in which no one of the accused is convicted for his own but is being held vicariously liable for the act of another or others — When facts are fully known as to amongst the accused who inflicted the fatal blows it is a sound exercise of judicial discretion to discriminate in punishment —When otherwise and the Judge decides to award the lesser punishment to all the accused that is also exercise of sound judicial discretion. Dalip Singh v. State of Punjab, 1953 S C A 709 : 1953 Mad W N 642 : 1954 S C R 145 : (1953) S C J 532 : 1953 Cri L J 1465 : A I R 1953 S C 364 (367, 368) (Pt G) (Prs 39, 40).

——S. 302 — Criminal P. C. (1898), Ss. 439 (1), 367 (5) (a) (amended in 1955) — Effect of amendment— Enhancement of sentence—Trial Judge in awarding lesser sentence proceeding on wrong assumption of law — High Court will not enhance sentence even though it is of opinion that sentence of death could be awarded.

Prior to the repeal of the old S. 367 (5), Criminal P. C., in 1955 the sentence of death was a normal penalty for murder and imprisonment for life an exception for the award of which reasons had to be given; but since after the amendment of the Criminal P. C., the Sessions Judge is at liberty to award either of the two sentences, as he may consider appropriate. The sentences provided for the offences of murder, dacoity with murder, etc., now stand in the same category as sentences provided for other criminal offences and the trial Judge can award any of the punishments so provided and whatever punisbment is awarded shall be deemed to be in the exercise of his judicial discretion. The enhancement of the sentence from imprisonment for life to death shall, therefore, be governed by the same principles as are applicable to enhancement of sentence for other offences.

The award of sentence is discretionary and the discretion exercised by the trial Judge can be interfered with in appeal only if it was improperly exercised, i.e., not in accordance with the well-established principles. Further, the appellate Court shall not be justified to interfere with the sentence awarded simply because, as a trial Court, it would have awarded a higher sentence. Enhancement of sentence is thus possible only if the trial Judge had acted arbitrarily and did not follow the rules applicable to the award of sentence. Where the trial Judge has proceeded on a wrong assumption of law that in case a murder is committed by several accused persons and it is not known who inflicted the fatal injury, all the accused should be awarded the lesser sentence, the High Court will not be justified in enhancing the sentences of some of them, even though, it is of the opinion that those accused persons could be awarded the sentence of death. 1964 (2) Cri L J 75 (All).

——S. 302—Sentence.

Sentence of transportation for life when can be enhanced to one of death, stated. See Criminal P. C. (1898), S. 439. 1957 All W R (HC) 57.

——Ss. 302, 149 and 34—Scope — Conviction under S. 302 — Conversion into one under S. 302 read with S. 34 by appellate Court is not illegal — (Criminal P. C. (1898), S. 423). AIR 1955 N U C (All) 1697.

■ ——S. 302:— Criminal P. C. (1898), Ss. 423 and 439 —Charge under S. 302, Penal Code — Conviction under S. 323, Penal Code — Power of High Court to sentence under S. 302 indicated. 16 All L J 918; A I R 1918 All 65; 20 Cri L J 22; 9 Luck 607; A I R 1934 Oudh 200; 35 Cri L J 973, Overruled. See Criminal P. C. (1898), S. 423. 1952 Cri L J 751 : AIR 1952 All 369 (FB).

——S. 302 — Criminal P. C. (1898), Ss. 367 (5) and 439 — Cold-blooded and premeditated murder — Sessions Judge sentencing accused to transportation for life — Even though normally, High Court would not interfere with the discretion of the Sessions Judge, here the discretion was not judicially exercised — Proper sentence would be the death sentence — Sentence enhanced upon application by the State. See Criminal P. C. (1898), S. 367 (5). 1956 Cri L J 1306 : AIR 1956 Bom 711 (DB).

——S. 302 — Sessions Judge imposing lesser penalty — No perverse exercise of discretion — Interference by High Court. See Criminal P. C. (1898), S. 439 (6). 1956 Cri L J 496 (2) : AIR 1956 Bom 231 (DB).

——S 302 — Sentence for murder—Enhancement by appellate Court. See Criminal P. C (1898), S. 423. 1954 Cri L J 767 : AIR 1954 Hyd 110 (DB).

——S. 302 — Sentence — Discretion of trial Judge— Improper exercise — Interference with — Brutal and gruesome murder — Emaciated legs of accused no ground for lesser sentence. AIR 1953 S C 364, Distfng.; A I R 1961 Madh Pra 10 & 1 Low Bur Rul 216 (FB) and AIR 1935 Oudh 265 and AIR 1933 Nag 307 and AIR 1948 Lah 58, Rel. on. 1965 Kash L J 301 : 1965 (2) Cri L J 771 : A I R 1965 J & K 126 (128) (Pt B) (Pr 17) (DB).

——S. 302 — Sentence — Murder case—Alteration of sentence to life imprisonment — Mitigating circumstances. See Criminal P. C. (1898), S. 423. 1963 (2) Cri L J 148 : AIR 1963 J & K 34 (DB).

——S. 302 — Sentence — No deliberate but sudden fight — No premeditated plan to kill anybody—Held under the circumstances High Court should not interfere with discretion exercised by trial Court in awarding the lesser of the two punishments prescribed under S. 302. Madh B L R 1956 (Cri) 204 : 1956 M B L J (H C R) 900.

——S. 302 — Appeal from acquittal — Powers of appellate Court for interference—Dying declaration not revealing identity of assailant in unmistakable terms — Oral evidence of witnesses disbelieved by Sessions Judge — Case held not fit for interference. See Criminal P. C. (1898), S. 423. (1963) 2 Mad L J 392.

——Ss. 302, 34 — Sentence—A armed with revolver and B with knife committing robbery—A shooting at C who dies — B causing simple injury to D, C's companion carrying some money — Both A and B held guilty of murder — B's sentence of death reduced to transportation for life. (1952) 2 Mad L J 745 : 1952 Mad W N 962 : 1952 Mad W N (Cri) 274 : 1954 Cri L J 212 : A I R 1954 Mad 196 (197) (Pt B) (Pr 5) (DB).

——Ss. 302 and 304, Part I — Acquittal on charge of murder under S. 302/34 but conviction under S. 304, Part I, Penal Code — Appeal by accused—No appeal by State Government — Revision by complainant for enhancement of punishment — High Court cannot alter finding of acquittal to conviction under S. 302. See Criminal P. C. (1898), S 423 (1) (b). 1962 (2) Cri L J 210 : AIR 1962 Punj 348 (DB).

——S. 302 – Offence falling under S. 302—Trial Court convicting accused under S. 304, Second part — No rule for enhancement issued — Conviction cannot be altered to S. 302. 1962 Raj L W 55 : ILR (1961) 11 Raj 1091.

37. Procedure.

■ ——S. 302—Offences of same kind—Offences under S. 302 and S. 307, Penal Code are of same kind— Two offenders committing offences under Ss. 302 and 307, Penal Code — Their joint trial is justified.

See Criminal P. C. (1898), S. 234. **1962 (2) Cri L J 278 : AIR 1962 S C 1198.**

——S. 302—Conviction—Separate convictions under Ss. 392 and 302. See Penal Code (1860), S. 390. **AIR 1955 NUC (All) 3573 (DB).**

——Ss. 302, 201 — Scope — Conviction under S. 302 not maintainable — Accused can beconvicted under S. 201 if he is found guilty thereunder. **A I R 1955 N U C (Him Pra) 2347.**

——Ss. 302 and 307 — Acquittal of one accused in prior and separate trial—No bar to trial and conviction of another person who committed same offences along with him and others. See Criminal P. C., S. 403. **1963 M P L J (Notes) 14.**

——S. 302—Submission of proceedings under S. 341, Criminal P. C.—Conditions for—Conditions made out —Proper course of action by High Court in the two cases. See Criminal P. C. (1898), S. 341. **1964 (2) Cri L J 316 : AIR 1964 Mys 182 (DB).**

——S. 302 — Procedure — Trial with assessors — Opinion of assessors in respect of some charges not recorded—Effect on conviction, indicated. See Criminal P. C. (1898), S. 309 (as before the Amendment Act of 1955). **1958 Cri L J 54 : AIR 1958 Mys 1 (DB).**

——S. 302 — Out of 5 persons 3 convicted and 2 acquitted — In appeal against acquittal, Court issuing notice only to one out of two — S. 149, held inapplicable — S. 34, held applied. See Penal Code (1860), S. 149. **(1963) 65 Pun L R 503.**

——S. 302—Conviction—Irregularities in procedure —Ss. 211, 289 and 342 not properly complied with —Confession before committal retracted at the trial —Corroboration in material particulars by evidence and statements in F. I. R.—Conviction legal.

F.I.R. was by the accused; it was a confessional statement reciting how he committed crime and why. His bloodstained dhoti was seized by the Sub-Inspector, he was taken to his house where the wife was lying dead in a room upstairs. An inquest was held and the report was prepared there and then. Several stab-wounds were found on her body and fresh blood on the floor. The sheath of a dagger was found near the head of the dead body. P. W. 1 produced a dagger, blood-stained. The articles were seized and the clothes of the deceased were also taken and sent along with the dhoti for examination by the chemical examiner.

The accused was in custody for 3 days and on the morning of the fourth day at 7 a. m. was produced before the Magistrate who took him in Court custody. He was brought before the Magistrate at 11 a. m. and his confession was recorded.

No eye-witnesses spoke to the committing of the crime and the accused was convicted on the confession made by him retracted at the trial and the circumstantial evidence in the case.

Held, 1. In view of the fact that the accused was throughout represented by a pleader and no list attempted to be filed and no application presented under S. 292 of the Code as also the fact that the evidence in the case was merely circumstantial the non-compliance with the provisions of S. 211 and S. 289 (1) of the Criminal P. C. was a mere irregularity in the proceedings covered by S. 537 of the Code, and the trial was not vitiated when it had not occasioned a failure of justice. There was no grievance made of it even in the grounds of appeal.

2. The entire first information report (F.I.R.) made by an accused to the police could not be held to be inadmissible in evidence under S. 25 of the Evidence Act when it contained a confession also. (AIR 1917 P C 25, Rel.; A I R 1921 C 111, Foll.; A I R 1939 P C 47, Ref.; AIR 1918 L 89; AIR 1935 Bom 26; AIR 1940 Pat 163, Not foll.) Portions of the report giving the motive, the state of the deceased at the time of the report and the dagger stated to be lying by her were admissible.

3. Where the Magistrate before recording the confession gave the required warning and told the accused that there was no police pressure and inducement on him to make the confession and also asked if he was making the confession voluntarily the confession so recorded is admissible and cannot be ruled out for the breach of S. 164 (3) of the Code. (AIR 1940 Pat 163, Dist.). The giving of the warning that the accused was free to depose what he liked instead of in the negative form did not matter. In view of S. 29 of the Evidence Act it is relevant and admissible. AIR 1932 Mad 431; AIR 1938 All 625 and AIR 1941 All 145, Foll.

4. Although it is necessary that the Chemical Examiner should furnish the grounds of his opinion in his report when it has been admitted at the trial without any objections or a request made for his examination in Court it cannot be ruled out on objection in the appeal. AIR 1934 All 873 and AIR 1933 All 837, Rel. on.

5. It is the duty of the Sessions Judge to examine the accused under S. 342 of the Code in detail and to put to him all the circumstances appearing against him. Merely reading over his statement before the Magistrate's Court, committing him, and asking him if he made it and also if he had anything more to say is most unsatisfactory; but it is curable under S. 537, Criminal P. C. **1952 Raj L W 269 : I L R (1962) 2 Raj 93.**

SECTION 303

●——Ss. 303, 34, 149 and 302 — Applicability and scope of S. 303 — Person undergoing sentence of imprisonment for life—Conviction under S. 302 read with S. 34—Sentence of death can be imposed upon him — Fact that he himself did not commit murder will not save him from effect of S. 34 — Scope and effect of Ss. 34 and 149 explained.

Section 303 cannot be confined only to cases where a person undergoing sentence of imprisonment for life actually and in fact himself commits an act which results in the death of the victim. The said section would apply even in cases where such a person is convicted either under S. 302 read with S. 34 or under S. 302 read with S. 149. Section 34 embodies the ordinary commonsense principle that if two or more persons intentionally commit an offence jointly in substance, it is just the same as if each one of them had committed that offence. Common intention which is the basis of the principle laid down by S. 34 implies action in concert and that in its turn postulates the existence of a pre-arranged plan. Therefore, if two or more persons acting in concert in pursuance of a pre-arranged plan proceed to commit an offence, S. 34 steps in and provides that for the act committed by one the other is liable in the same manner as if it had been done by him alone.

The position would not be any different even if the accused had been convicted under S. 332/149. It is true that the basis of constructive liability imposed by S. 149 is mere membership of the unlawful assembly, whereas the basis of the constructive liability contemplated by S. 34 is participation in the same action with the common intention of committing a crime. That, however, does not make any difference in the legal position. Mahabir Gope v. State of Bihar, **1963 Mad L J (Cri) 503 : 1963 B L J R 49 : 1962 S C D 1024 : 1963 All Cri R 86 : 1963 All W R (H C) 116 : (1963) 2 S C J 416 : (1962) 2 Ker L R 328 : (1963) 3 S C R 331 : ILR 42 Pat 853 : 1963 (1) Cri L J 86 : AIR 1963 S C 118 (120) (Pr 10).**

——Ss. 303, 302 — Person convicted for murder and sentenced to transportation for life — Sentence afterwards remitted conditionally under S. 401 (3), Criminal P. C. and accused released—Accused committing murder of two women after release — Accused is liable to be convicted under S. 303 — Criminal P. C. (1898), S. 401 — AIR 1939 Rang 124, Rel. on. AIR 1943 Sind 114, Disting. 1964 Cur L J 506 : I L R (1965) 1 Punj 201 : 1965 (1) Cri L J 473 : AIR 1965 Punj 156 (159) (Pt 8) (Pr 11) (DB).

SECTION 304

SYNOPSIS

(Penal Code (1860), S. 304)

1. Scope and applicability.
2. Conviction under S. 304 read with S. 34.
   See also Penal Code (1860), Ss. 34 and 300.
3. Conviction under S. 304 read with S. 149.
   See also Penal Code (1860), Ss. 149 and 300.
4. Sentence.
5. Provocation—Offence and sentence.
   See also Penal Code (1860), S. 300.
6. Sudden quarrel—Offence and sentence.
   See also Penal Code (1860), S. 300.
7. Exceeding right of private defence—Offence and sentence.
   See also Penal Code (1860), Ss. 96-106.
8. Section 304, Part I—Illustrative cases.
   See also Penal Code (1860), S. 300.
9. Section 304, Part II—Illustrative cases.
   See also Penal Code (1860), S. 300.
10. Section 304 not applicable—Illustrative cases.

1. Scope and applicability.

——Ss. 304, 300 and 302—Conditions for applicability of exception 4 to section 300—Accused dealing only one lathi blow in sudden quarrel on head of deceased who was unarmed—Death—Act of accused amounted to murder as it fell under S. 300, thirdly—Murder or culpable homicide — 1936 All L J 333 and A I R 1916 Bom 191 held no longer good law in view of AIR 1958 S C 465 — See Penal Code (1860), S. 300. 1959 Cri L J 158 : AIR 1959 All 131.

——Ss. 304, 146, 147, 149, 302, 323, 300 and 34—Applicability — Rescue of cattle lawfully taken to pound—Injury and death—Offence—Held, in circumstances that third Para of S. 300 applied and also that none of exceptions applied — Therefore the act of killing amounted to murder under S. 302 and not an offence under S. 304—See Penal Code (1860), S. 146. 1958 Cr L J 588 : AIR 1958 All 348 (DB).

——S. 304—Applicability—Section applies to cases where injury caused is not of higher degree of likelihood which is covered by the expression "sufficient in the ordinary course of nature to cause death" but is of a lower degree of likelihood which is generally spoken of as an injury "likely to cause death" and such a case does not fall under Cl. 3 of S. 300. 1955 Cri L J 884 : AIR 1955 All 321 (327) (Pt C) (Pr 25) (DB).

——S. 304, Part II—Applicability.

Section 304, Part II can never come into operation when there is an intention to cause such bodily injury as is likely to cause death. 1951 All W R (HC) 477 : 1951 All Cr C 116 : 1952 R D (HC) 95 (2) : 1951 All L J 464 : 1953 Cri L J 1275 : AIR 1953 All 555 (556) (Pt B) (Pr 11).

——S. 304—Applicability—Section 304 will apply to the following classes of cases:—

(i) When the case falls under one or the other of the clauses of section 300 but it is covered by the exceptions to that section, (ii) when the injury caused is not of the higher degree of likelihood which is covered by the expression "sufficient in the ordinary course of nature to cause death" but is of a lower degree of likelihood which is generally spoken of as an injury "likely to cause death" and the case does not fall under clause (2) of section 300.

(iii) When the act is done with the knowledge that death is likely to ensue but there is no intention to cause death or an injury likely to cause death. In such cases there may be either no intention to cause any injury at all, or there may be an intention to cause simple or grievous hurt but not an injury likely to cause death. 1952 All L J 546 : 1953 All W R (HC) 63 : 1953 Cri L J 565 : ILR (1953) 2 All 885 : AIR 1953 All 203 (207) (Pt B) (Pr 23) (DB).

——S. 304—Attack by members of unlawful assembly resulting in death of victim—Medical officer deposing that only two out of 43 injuries had caused death—Prosecution failing to elicit whether the two injuries were sufficient in ordinary course of nature to cause death — Only offence under S. 304 is proved and not one under S. 300 — See Penal Code (1860), S. 302. ILR (1962) Andh Pra 313.

——Ss. 304, Part 2, 299 — Applicability—Case not falling within any exception to S. 300 — Second part of S. 304—Application of.

Section 304, Penal Code divides the offence of culpable homicide into two degrees of guilt, the graver of which depends on the intention proved or to be inferred from all the circumstances and the less serious of which does not depend on intention at all. But though the absence or presence of intention is not criterion to be adopted in deciding on which side of the line an offence under S. 304 falls, there are cases in which there is an intention which makes the offence the graver offence of culpable homicide but which would yet fall short of the intention requisite to satisfy S. 300. Cases coming under the last part of S. 299 are either cases under Part II, or else they fall prima facie under S. 300. In that class of cases recourse cannot be had directly to the first part of S. 304 unless it is a prima facie case of murder to which some exception applies. The Code nowhere says that an act done with the intention to inflict bodily injury likely to cause death is prima facie murder. On the contrary, S. 299 expressly describes it as culpable homicide and S. 300 does not deal with it at all.

Where the evidence did not disclose that there was any intention to cause death of the deceased but it was clear that the accused had the knowledge that their acts were likely to cause death the accused can be held guilty under the second part of S. 304, I. P. Code. 1960 Cr L J 303 : (1960) 1 Andh W R 313 : 1960 Mad L J (Cri) 265 : AIR 1960 Andh Pra 141 (144) (Pt C) (Prs 14, 15) (DB).

——S. 304 - Essence of offence—Essence of offence is intention to cause death or knowledge of likelihood of death — Absence of both — Offence cannot be brought either under S. 302 or S. 304. A I R 1955 N U C (Andhra) 5949.

——S. 304 — Evidence. See Cr. P. C. (1898), S. 367. AIR 1955 N U C (Assam) 4247 (DB).

——S. 304—Charge to jury—Misdirection—Judge not explaining circumstances when an act, if it does not amount to murder, whether it amounts to culpable homicide not amounting to murder — Charge held amounted to misdirection—Plea of right of private defence—Burden lies on deceased — See Criminal P. C. (1898), S. 297. I L R (1955) 7 Assam 392.

——S. 304 — Criminal P. C., S. 210 (1) — Case under S. 302, Penal Code, put in Magistrate's Court for en-

quiry—It is advisable to commit accused on charge under S. 302 instead of framing charge under S. 304 —Whether offence falls under S. 302 or S. 304 should be left to Sessions Court. See Criminal P. C. (1898), S. 210 (1). **1953 Cri L J 217 : AIR 1953 Bhopal 1.**

——S. 304, Parts 1 and 2 and S. 323 — Distinction between Part I and Part II of S 304—Injury to solar plexus by hitting at it — Death caused by injury—Offence committed is one not under S. 304 but one under S. 323.

When a bodily injury as is likely to cause death is intentionally caused and results in the death of the victim, the case will fall under Part I and not under Part II of S. 304, Penal Code. Part II comes into play when death is caused by doing an act with knowledge that it is likely to cause death and, when such act is the infliction of bodily injury the infliction must not be intentional. A person who intentionally causes bodily injury with knowledge that such act is likely to cause death must necessarily be a person who does as act with intent to cause bodily injury likely to result in death. AIR 1953 All 189 and 203, Rel. on.

The finding of the trial Court that the act by which death was caused was known by the accused to be likely to cause death involves the following findings : (1) that the accused had intentionally inflicted first blows and kicks inter alia in the abdominal region, (2) that the cause of death was injury to solar plexus and (3) that the accused knew that injury to solar plexus was likely to cause death. The aforesaid findings bring the case under the first part of S. 304, Penal Code.

It is a little difficult to hold that the accused knew that a first blow or a kick at that delicate part was likely to result in death. It cannot, therefore, be held that the act by which the death of the deceased was caused was known to the accused to be such as was likely to cause death or that it was committed with intent to cause bodily injury likely to cause death. The case, therefore, is not covered by either the first or the second part of S. 304, Penal Code.

Held, that the accused had voluntarily caused hurt and was guilty of an offence under S. 323, Penal Code. **1963 (1) Cri L J 762 : A I R 1963 Him-Pra 18 (20, 21) (Pt A) (Prs 7, 10, 15, 21).**

——Ss. 304, 302—Murder — Intoxicated condition of accused falling short of proved incapacity to form necessary intent to constitute murder — Offence is murder. **1960 Cri L J 477 : A I R 1960 Ker 120 (DB).**

——Ss. 304 Part 2, 302, 300 Exception 2 — Applicability—First attack on deceased followed by another after some time — Accused found to have acted in private defence in course of first incident and acquitted of charge under S. 302—Evidence indicating that injuries inflicted in the first incident were sufficient to cause death — No proof that deceased was alive at the time of second attack — Probability that deceased was already dead by injuries caused at first attack — Conviction under S. 304, second part for second attack set aside. See Penal Code (1860), S. 302. **1960 Ker L J 546.**

——Ss. 304, Part I, 300 (2), 300 (4), 299-Expl. II — Conviction for murder — Intention to cause death — Not always necessary — Infliction of serious bodily injury causing death—Conviction under S. 304 Part I held improper—Absence of proper medical treatment not material. See Penal Code (1860), S. 300 (2). **1959 Cri L J 981 : AIR 1959 Ker 230 (DB).**

——Ss. 304 and 109 — Accused holding deceased permitting principal offender to stab victim — Accused are guilty of abetment of culpable homicide.

Where the accused with the object of punishing the deceased for abusing one of the dignitaries in the village, ran, caught and held the deceased permitting the principal offender to stab the victim twice with a dagger, the accused are guilty of abetment of culpable homicide under S. 304/109 **51 Cri L J 392 : A I R 1950 Kutch 5 (6) (Prs 11, 12).**

——Ss. 304 and 326—Intention — Two parties determined to fight to enforce their right — Intention of accused party should be ascertained. **AIR 1955 NUC (Madh-B) 2100 (DB).**

——S. 304, Part 2 — Accused intending to beat a woman with small stick — Blow falling on an infant —Death of infant due to shock and haemorrhage as result of fracture of skull — Conviction under S. 304, Part II—Held that by the doctrine of transfer of malice, the offence is the same as it would have been if the blow had struck the intended victim — Accused held guilty under S. 323 and not S. 304, Part II. **1959 M P L J 21.**

S. 304, Part 2—Conviction under— When justified stated. See Madras Borstal Schools Act (5 of 1926), S 8. **1952 Cri L J 333 : AIR 1952 Mad 172.**

——S. 304—Charge indicated. See Penal Code (1860), S. 147. **AIR 1955 NUC (Pat) 1308.**

——Ss. 304, Part 1, 300 'thirdly' and S. 299 — Medical opinion not definite and consistent that the injury caused by accused which resulted in death was necessarily sufficient to cause death in ordinary course of nature — It was more consistent with the circumstances of the case and medical opinion that the injury was likely to cause death—Held, that the injury causing death was not within scope of thirdly of S. 300 but was one under second part of S. 299 and hence offence committed was one under Part I of S. 304.

The circumstances of the case established that the deceased appeared unexpectedly during the incident and it was when he caught the kirpan of J that the accused S gave him a spear thrust which resulted in his death. It was more of a sudden act probably in defence of J whose weapon had been caught hold of by the deceased and S might have anticipated that on the weapon being taken away J might be attacked and this apprehension led him to give the blow. Medical opinion was not definite and consistent that the injury was necessarily sufficient to cause death in the ordinary course of nature. It was more consistent with the circumstances of the case, and medical opinion, that it was likely to cause death.

Held, that the injury which resulted in the death of the deceased was not within the scope of 'thirdly' of S. 300 but as one under second part of S. 299 and hence the offence committed by S was one under Part 1 of S. 304, I. P. C.

It is settled law that second part of S. 299 corresponds to 'secondly' and 'thirdly' of S. 300. If the injury caused is no more than an injury likely to cause death, then it is an injury under second part of S. 299 but if, in addition, it is either proved that the offender had the knowledge that the injury was likely to cause death, the case becomes more serious and comes under 'secondly' of S. 300, or the injury is proved to be sufficient in the ordinary course of nature to cause death, even then the offence is more serious and falls under 'thirdly' of S 300. If the offence does not come under 'secondly' or 'thirdly' of S. 300, but falls under second part of S. 299, then the offence is culpable homicide not amounting to murder coming under Part I of S. 304. No doubt the accused intended to cause the injury on the body of the deceased and the doctor also found the injury to have proved fatal but he was not consistent in his opinion that it was

necessarily sufficient in the ordinary course of nature to cause death because another part of his opinion shows that it was a type of injury that was likely to cause death. Therefore, on the facts of the case and on the medical opinion, the conclusion cannot be arrived at that the injury was sufficient to cause death in the ordinary course of nature and even in this matter the accused is entitled to the benefit of doubt and the only safe conclusion would be that it was likely to cause death. In a matter of doubt between these two conclusions, the lesser and the one favourable to the accused should prevail. **1965 Cur L J 730 : 67 Punj L R 1204.**

—Ss. 304, 300 — Deliberate and cold-blooded cutting of throat by razor from ear to ear, in order to rob deceased – Offence is one of murder and not culpable homicide. **AIR 1956 Sau 83 (DB).**

—S. 304—Applicability — Knowledge that injuries were likely to cause death — Conviction for culpable homicide not amounting to murder. **AIR 1955 N U C (Sau) 5049 (DB).**

—S. 304—Applicability—Offence when amounts to one under S. 304 indicated. See Penal Code (1860), S. 300. **1954 Cri L J 1181 : AIR 1954 Trav-Co 396 (DB).**

—S. 304—Motive—When question in issue is whether accused had committed an offence of murder or not, it might be material to examine whether he had motive — When it has been found that he had committed the offence, the fact that he was actuated by lofty ideals, is not a ground for holding the offence committed is one falling under S. 304—In deciding the nature of the offence committed motive is irrelevant. See Penal Code (1860), S. 300. **1953 Cri L J 1551 : AIR 1953 Trav-Co 374 (DB).**

2. Conviction under S. 304 read with S. 34.

See also Penal Code (1860), Ss. 34 and 300.

● —Ss. 304, Part 2, 299, 34, 35, 37, 38—Conviction under S. 304, Part 2, read with S. 34—Legality — Several offenders by diverse acts and with prior concert chasing the deceased, throwing him to the ground and beating him to death—Conviction of all offenders under S. 304, Part 2, read with S. 34 is legal notwithstanding that S. 304, Part 2 speaks only of knowledge, while S. 34 deals with common intention—Knowledge of death being likely consequence of criminal act of beating, attributable fo each offender, attracts S. 34—S. 304, Part 2 cannot be divorced from common intention.

A conviction under S. 304, Part 2, read with S. 34 is legal and valid. Part 2 of S. 304 can be read together with S. 34, notwithstanding that Part 2 of S. 304 speaks only of knowledge while S. 34 deals with common intention. Minority decision of Das, J. in AIR 1944 Cal 339 (FB), Disapproved; AIR 1950 Peshawar 24, Diss. from. AIR 1951 All 21 (FB), Overruling AIR 1943 All 271), Approved.

Where the deceased went to a particular place for a peaceful purpose and immediately after his arrival there, he was chased by two of the accused and caught and felled to the ground and after this the remaining four accused appeared, and beat the deceased with diverse weapons, while those who were not armed held him pinned to the ground, the conviction of all the six accused for culpable homicide not amounting to murder in furtherance of a common intention under S. 304, Part 2, read with S. 34 was legal.

The causing of the death of a person by doing an act accompanied by intention in the two ways described in S. 299 or with the knowledge that the act is likely to cause death also described there, is distinguished from cases of deaths resulting from accident or rash and negligent act and those cases where death may result but the offence is of causing hurt either simple or grievous. Once it was established, that the act was a deliberate act and was not the result of accident or rashness or negligence, it is obvious that the offence which was committed was one under S. 304.

The requirement of S. 34, i.e., the existence of the common intention before the criminal act is perpetrated was completely satisfied because the six accused could not but by a prior concert have appeared simultaneously at the scene, and chased and overthrown the victim, held him down and beaten him. Provided there is common intention, the whole of the result perpetrated by several offenders, is attributable to each offender, notwithstanding that individually they may have done separate acts, diverse or similar. AIR 1925 P C 1, Rel. on.

The second part of S. 304 speaks of knowledge and does not refer to intention which has been segregated in the first part. But knowledge is the knowledge of the likelihood of death. If it could be said that knowledge of this type was possible in the case of each one of the accused, there is no reason why S. 304, Part 2 cannot be read with S. 34. The common intention is with regard to the criminal act, i.e., the act of beating. If the result of the beating is the death of the victim, and if each of the assailants possesses the knowledge that death is the likely consequence of the criminal act of beating there is no reason why S. 34 or S. 35 should not be read with the second part of S. 304 to make each liable individually.

It is an error to view the second part of S. 304 divorced from common intention whatever. A person does not do an act except with a certain intention; and the common intention which is requisite for the application of S. 34 is the common intention of perpetrating a particular act. Previous concert which is insisted upon is the meeting of the minds regarding the achievement of a criminal act. That circumstance is completely fulfilled in a case where a large number of persons attack an individual, chase him, throw him on the ground and beat him till he dies. Even if the offence does not come to the grade of murder, and is only culpable homicide not amounting to murder, there is no doubt whatever that the offence is shared by all of them and S. 34 then makes the responsibility several if there was a knowledge possessed by each of them that death was likely to be caused as a result of that beating. Abrahim Sheikh v. State of W. B., **(1964) 1 S C W R 344 : (1964) 6 S C R 172 : 1964 Mad W N 552 : (1964) 2 S C A 656 : 1964 (2) Cri L J 350 : (1964) Cur L J (SC) 152 : 1964 All Cri 187 : 1964 All L J 437 : 1964 All W R (HC) 275 : 1964 B L J R 361 : AIR 1964 S C 1263 (1265 to 1268) (Prs 4, 5, 8 to 11).**

—Ss. 304, Part 2, 325 and 34—Applicability — Essential ingredients — Knowledge that act was likely to cause death.

A particular knowledge is an essential ingredient of the offence under S. 304, Part 2. Unless a Court can record finding that each person, taking part in committing the crime in furtherance of the common intention of all, had the knowledge that their act was likely to cause death, the accused cannot be rightly held guilty under S. 304, latter part. AIR 1951 All 21, Rel. on.

Where, therefore, out of six injuries inflicted by four persons upon the deceased, five injuries were simple and only one was grievous which resulted in death:

Held, that obviously that injury could have been inflicted only by one person. It must be taken that the person who inflicted that injury had the knowledge that it was likely to cause death but knowledge of one person was not necessarily the knowledge of others and

as it was not ascertained as to who inflicted the fatal injury, none of the accused could be rightly convicted under S. 304, Penal Code, though they were all guilty under S. 325 read with S. 34, Penal Code. 1953 All W R (HC) 147 : 1953 Cri L J 1111 : 1953 All L J 346 : AIR 1953 All 491 (492) (Pt A) (Pr 10).

● ——Ss. 304, 34 — Common intention — What is — Applicability of S. 34 to S. 304, Part 2—It is possible to commit an accused of an offence under S. 304, Part 2 read with S. 34, provided the court is of opinion that each person taking part in committing the crime in furtherance of common intention of all had knowledge that their act was likely to cause death. AIR 1943 All 271; AIR 1936 All 437 ; 29 All 282; 5 Cri L J 130 ; AIR 1918 All 209 ; 1887 A W N 236 and 9 A L J 180; 13 Cri L J 265, **Overruled**. See Penal Code (1860), S. 34. **52 Cri L J 131 : AIR 1951 All 21 (FB).**

—— Ss. 304, 34, 71, 460 — Charges under Ss. 460 and 304 that the accused committed house-breaking by night along with four others and he along with these four others at the time of committing the offence voluntarily caused death of the deceased—A separate conviction of the accused under S. 304 read with S. 34 is not justifiable as this is repetition of one of the ingredients of the charge under S. 460. **52 Cri L J 390 (1) : AIR 1951 Assam 60 (61, 62) (Prs 4, 5) (DB).**

——Ss, 304 and 34—If it is proved that the common intention of two or more persons was to cause death of a person and in furtherance of common intention an act was done by one which caused the death of a person, S. 34 would apply to such a case whether the conviction is recorded under S. 304, Part 1 or S. 304, Part 2. **51 Cri L J 945 : A I R 1950 Assam 98 (DB).**

——S. 304—Scope—Common intention of several accused to cause injury so as to cause victim's death—Injury caused by one of them resulting in death of victim—Others can be convicted under S. 304, Part 2 read with S. 34. See Penal Code (1860), S. 34. **A I R 1955 N U C (Bom) 5870 (DB).**

——Ss. 304/34 — Accused sought to be liable for individual parts played by them — Prosecution must prove specific part played by each individual and injury caused by him—Unless a witness particularises when there are number of accused, it is ordinarily unsafe to accept omnibus statement that all the accused attacked the person concerned. AIR 1955 S C 216, Rel. on. **M B L J 1955 H C R 1235 : M B L R 1955 (Cri) 217.**

——Ss. 304, Part 2 and 34—Conviction under—Legality.

It is possible to convict an accused person of an offence under S. 304, Part 2, read with S. 34 of the Penal Code provided it is established that each person taking part in committing the crime in furtherance of the common intention of all had knowledge that their act was likely to cause death. AIR 1951 All 21 (FB), Foll. **1960 Cri L J 851 : A I R 1960 Punj 310 (311) (Pt B) (Pr 11).**

——S. 304, Part 2—Vicarious liability.

It is logically wrong to hold that S. 34 can never be applied to a case under the second part of S. 304. A person commits an offence under S. 304 when he intends to cause an injury which is not necessarily fatal but which he knows is likely to prove fatal. The intention to do something is present although not the intention to commit murder. The intention in so far as it relates to the causing of injuries may be shared by other persons. The knowledge that an injury is likely to prove fatal may also be shared and if that be so then a person can be held vicariously liable under the second part of S. 304. AIR 1927 Cal 324, Foll. **1953 Cri L J 1815 : AIR 1953 Punj 262 (263) (Pt B) (Prs 12, 14) (DB).**

——S. 304 (2) — Scope — No common intention to cause death — Where the accused does not share the common intention to cause death of the deceased he can be convicted of the offence of culpable homicide if it is shown that he was responsible for any blow which caused the death. See Penal Code (1860), S. 34. **1955 Cri L J 77 : AIR 1954 Sau 156 (DB).**

3. Conviction under S. 304 read with S. 149.

See also Penal Code (1860), Ss. 149 and 300.

——S. 304 — Scope — Death caused by some one amongst those assembled in exercise of right of private defence of property — Liability cannot be fixed on all assembled. See Penal Code (1860), S. 146. **1954 Cri L J 1710 : AIR 1954 All 771 (DB).**

——S. 304—Four accused armed with lathis and one with spear — Common object of beating deceased—One member being struck by deceased, becoming incapable to taking further part — Rest beating deceased causing several injuries resulting in death — Offences committed by accused — Held, that accused formed unlawful assembly with common object of giving beating to deceased—They further committed offence of rioting. See Penal Code (1860), S. 147. **51 Cri L J 1133 : AIR 1950 All 418 (DB).**

——Ss. 304, Part 2 and 149 — Constructive liability for causing death.

Where a number of persons go armed with axes in order to assault their opponents or enemies and use axes in prosecution of the common object, everyone of them may reasonably be expected to know that the offence of culpable homicide is likely to be committed in prosecution of that object. Hence although the death of the injured may have been caused by the blow given by one of the accused, all the other accused who took part in the offence along with him can be held constructively liable for causing the death of the victim and should be convicted under S. 304, Part 2 read with S. 149, Penal Code. **1956 Cri L J 1066 : A I R 1956 Bom 609 (612) (Pt D) (Pr 11a) (DB).**

——S. 304—Knowledge that death was likely to result from use of force — Common object of assembly to assault or cause hurt—Indiscriminate blows over body of deceased—Death held to be caused in accomplishing common object — Conviction under Ss. 304, 149, valid. See Penal Code (1860), S. 149. **1961 B L J R 855.**

4. Sentence.

● ——S. 304—Criminal P. C. (1898), Ss. 439 and 423—High Court's power to enhance sentence — Limits of, indicated—Discretion how to be exercised, stated—Sentence. See Criminal P. C (1898), S. 439. **1955 Cri L J 1642 : AIR 1955 S C 778.**

● ——S. 304—Scope—Rash and negligent act resulting in death of a person—Offence fell under S. 304-A — Even if it fell under S. 304, a severer punishment than imprisonment already undergone held was not necessary. See Penal Code (1860), S. 304-A. **1954 Cri L J 727 : AIR 1954 S C 271.**

——Ss. 304 and 302—Applicability — Injuries caused in fight — Absence of intention to cause death — No intention to cause such bodily injury as was likely to cause death—Offence — Death of two persons—Sentence — Maximum sentence of imprisonment under Part. 2 of S. 304 in spite of accused's old age. **1959 All W R (HC) 321 : 1959 All Cri R 267 : 1959 All L J 340.**

——S. 304—Sentence—No premeditation—In excitement accused striking lathi blow to accused — Sen-

tence of three years reduced to two years' rigorous imprisonment. AIR 1955 N U C (All) 1278.

— S. 304—Sentence—Single lathi blow not effecting fracture of skull resulting in death — Sentence of ten years reduced to five years. A I R 1954 All 249 (251) (Pt D) (Pr 15).

——S. 304, Part 1—Sentence—Criminal P. C. (1898), S. 32.

Sentence in such cases should be so low as is commensurate with nature of offence as the facts would justify it. But at the same time it should not be so low as to encourage commission of homicide. Sentence of four years reduced to half. 1953 All W R (HC) 129 : 1953 All L J 158 : 54 Cri L J 1034 : AIR 1953 All 464 (466) (Pt B) (Pr 7).

——S. 304, Part 2—Conviction under—Enhancement of sentence — Powers of High Court in the matter, indicated. See Criminal P. C. (1898), S. 435. 1958 Andh L T 920.

——S. 304, Part 2 – Sentence—Sentence of two years held grossly inadequate under circumstances of case. AIR 1955 N U C (Bom) 5870 (DB).

— S. 304, Part I — Causing death by giving blows with axe — Sentence should be severe. A I R 1955 N U C (Bom) 3660 (DB).

——S. 304, latter part —Sentence—Deceased with one more person going to accused to pick up a quarrel and to teach him a lesson — Accused when attacked by deceased and the other person losing his power of calm reasoning and hitting out deceased with knife in his belt—Accused having neither intention to cause death nor such bodily injury as was likely to cause death — Attack by accused neither cruel nor brutal, much less premeditated — Sentence of five years' rigorous imprisonment held severe and reduced to two years. I L R (1951) Mys 445 : AIR 1952 Mys 10 (12) (Pt C) (Pr 9) (DB).

——S. 304, Part 1 – Sentence—Accused having illicit intimacy with sister of deceased, visiting her on her invitation — Deceased arriving there by chance—Scuffle between accused and deceased — Accused stabbing deceased — Conviction of accused under S. 304 Part 1 as he exceeded right of private defence —Sentence of ten years reduced to 5 years. AIR 1954 Nag 126 (128) (Pt C) (Pr 11).

——S. 304—Sentence — Several accused tried for an offence under S. 304 read with S. 149 – Court finding all of them guilty — Some sentenced to 5 years' R. I. and others to 3 years' R. I.—No reasons given — Sentence of 5 years reduced to three years. 1957 Cri L J 644 : AIR 1957 Orissa 117 (DB).

——S. 304, Part 2—Sentence — Accused, young man of 25 years hitting his father with stone resulting in his death—Incident arising out of quarrel between father and son as the former wanted to have immoral connection with his daughter-in-law which naturally infuriated accused—Sentence of 4 years was held excessive for an offence under S. 304 Part 2—Sentence of one year's R. I. would meet the ends of justice. (1960) 62 Punj L R 61.

5. Provocation — Offence and sentence.

See also Penal Code (1860), S. 300.

——S. 304 Part I —Applicability—Accused seeing his wife committing act of adultery with deceased — It amounts to grave and sudden provocation — Offence is one under S. 304, Part 1—Sentence under S. 304, reduced to 2 years and sentence under S. 326 to one year's R. I., sentences to run concurrently. 1953 Cri L J 1034 : AIR 1953 All 464 (464) (Pt A) (Prs 4, 7).

——Ss. 304, 300, Excep. 1 and 302—Grave and sudden provocation — Accused cutting his wife with dao when he saw her having illicit intercourse with another person — Offence committed is under grave and sudden provocation—Case falls under Exception I to S. 300 — Accused held guilty under S. 304 and not under S. 302. 1965 (2) Cri L J 614 : A I R 1965 Assam 89 (DB).

——S. 304 (Part 1) — Sentence — Accused causing death of his wife of average built and 18 or 19 years old by hurling a stone at her head under grave and sudden provocation—Sentence of 10 years' R. I. held not severe. (1963) 1 Cri L J 120 (Him Pra).

——S. 304—Applicability— Accused harbouring suspicion of illicit intimacy of his uncle with his wife for long time, and requesting friend to ask his uncle to arrange separate residence for accused and his wife —Nothing coming out of request —Accused shooting uncle—Act held committed under deliberation—Provocation not sudden – Offence held murder. 1957 Cri L J 1261 : AIR 1957 Ker 166 (169) (Pr 5) (DB).

——S. 304—Applicability— Grave and sudden provocation—Husband discovering deceased with his wife behind chained doors in his house at dead of night – Held circumstances provoked the accused gravely and suddenly — Sentence reduced from 5 to 3 years. 1959 Cri L J 850 : A I R 1959 Madh Pra 267 (269) (Pt C) (Pr 17).

——Ss. 304, 300 — Attempt to beat man with shoe in street.

In this country if a person were to beat another with a shoe, that is considered to be the height of shame and particularly in the midst of a number of villagers right in the street. An attempt to beat a man with a shoe would therefore give sufficient provocation to the man intended to be beaten.

Held, that, as there was grave and sudden provocation the offence was not one of murder under S. 300 I. P. C. but only under S. 304, Part I. (Sentence of death was therefore altered into one of 7 years' R. I.). (1953) 1 Mad L J 180 : 1952 Mad W N 978 : 1952 Mad W N (Cri) 290 : 1953 Cri L J 1109 : A I R 1953 Mad 579 (579) (Pr 3) (DB).

——Ss. 304 and 302—Applicability — Accused teased by the deceased — Deceased claiming accused to behave like a wife towards him—Provocation leading to a single stab with a dao near at hand—No premeditation — Offence of culpable homicide — Lesser penalty proper. 1953 Cri L J 89 : A I R 1952 Mani 11 (2) (13) (Pt B) (Pr 24).

——S. 304—Large number of injuries on both parties to quarrel — Deceased suffering fatal injury in course of quarrel – Failure on part of prosecution to explain injuries suffered by accused — Held on evidence of eye witnesses read with evidence of doctor that grave and sudden provocation on part of accused was proved. See Penal Code (1860), S. 300. (1965) 7 O J D 179 : 31 Cut L T 67.

——Ss. 304 and 302 — Provocation held not grave and sudden enough to extenuate offence under S. 302 to one under S. 304. See Penal Code (1860), S. 302. 1960 Cri L J 520: A I R 1960 Raj 101 (DB).

6. Sudden quarrel — Offence and sentence.

See also Penal Code (1860), S. 300.

——Ss. 304, Part 1 and 34—Sentence—Sudden quarrel in heat of passion — Sentence of 7 years reduced to 4 years' R. I. 1965 (2) Cri L J 331 : A I R 1965 All 417 (420) (Pt B) (Pr 19).

——S. 304, Part 2 — Applicability—Sudden quarrel—Unarmed person stabbed in chest — Victim dying in few hours — Accused drunk — Conviction by trial Court under S. 304 Part 2 held stood. 1958 Andh L T 920.

——S. 304 — Scope — Absence of previous enmity — Death caused in sudden quarrel — Intention to cause death or injury likely to cause death cannot be attributed to accused — Case falls under second part of section. AIR 1955 N U C (Assam) 4232 (DB).

——Ss. 304, 300, 302 — Sudden fight between young boys—Accused stabbing deceased without premeditation—Offence is one under Part I of S. 304 — Proper sentence.

Held, that the injury had been caused by the accused without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and on receiving sudden provocation and that the offence committed by him was that punishable under S. 304, Part I and not under Part 2 thereof.

(2) That in view of the fact that the accused was a young boy of about 17 years of age having no criminal tendencies or bad associations, a sentence of 4 years' R. I would meet the ends of justice. 1956 Cr L J 503 (2) : AIR 1956 Bom 267 (267, 268) (Prs 2, 3) (DB).

——S. 304—Sentence—Sudden fight—Lack of intention to cause death — Accused in the heat of the moment without any forethought catching hold of axe not taken by himself but by somebody else and dealing one blow on deceased with the back of axe —Accused about 23 years old — Sentence of 2 years' R. I. held not grossly inadequate. 40 Mys L J 278 : (1963) Mad L J (Cri) 178 : 1962 (2) Cri L J 710 (Mys).

——S. 304 (Part 2) — Sudden quarrel on disputed land between two parties resulting in fight—Accused giving fatal blow wtth lathi on head of member of opoosite party — Nature of weapon used and injury inflicted establishing requisite knowledge on part of accused that his act would result in death—Held, accused could be rightly convicted under S. 304 (Part 2). (1964) 30 Cut L T 556.

——Ss. 304, 302 — Applicability — No premeditated plan for the murder, but it was the result of a sudden quarrel on the spur of the moment and in a fit of temper the accused persons assaulted the deceased to death—The case clearly came within the purview of S. 304 Part 2 and not under S. 302. See Penal Code (1860), S. 302. ILR (1962) Cut 366.

——Ss. 304, 300, Exception 4 — Applicability — Essentials stated — Accused found to have acted without premeditation in a sudden fight in the heat of passion upon a sudden quarrel—Though deceased unarmed, accused not stopping short of giving as many as five stabs, three of which were fatal — Accused held guilty of murder. ('51) 3 Pepsu L R 558.

——S. 304—Applicability—Deceased and M originally meeting on fair terms—Hot words exchanged and M inflicting deadly injury on person of deceased in course of sudden fight and without premeditation — Exception 4 to S. 300 held applied — M held guilty under S. 304 and not under S. 302. A I R 1955 N U C (Punj) 3432.

——S. 304, Part 1—Sudden fight — Quarrel between A and B — Both grappling with each other and catching each other's hair—B shouting - His relatives including C coming to the spot — Some helpers of A also coming — Grappling turning into free fight—C giving fatal blow with spear to A—B and C receiving injuries at the hands of relatives of deceased A—Held, case fell within Exception 4 of S. 300—Offence of C fell under S. 304, Part 1 — Sentence of 7 years' R. I. held proper. See Penal Code (1860), S. 300, Exception 4. 1954 Cri L J 746 : A I R 1954 Punj 121 (DB).

——S. 304, Second Part — Quarrel between two brothers over food — Accused acting impulsively and inflicting blow with sharp weapon on vital part of body causing death — Offence falls under S. 302—Trial Court convicting accused under S. 304, Second Part—No rule for enhancement issued — Conviction cannot be altered to S. 302. See Penal Code (1860), S. 300. 1962 Raj L W 55 : I L R (1961) 11 Raj 1091.

7. Exceeding right of private defence—Offence and sentence.

See also Penal Code (1860), Ss. 96-106.

——Ss. 304, 103, 147, 148, 323 and 325 — Right of private defence of property — Rioting — Each party charging other as aggressor — Title legally with accused under decree and he had right of private defence. 1953 Cri L J 717 : A I R 1953 All 327 (328, 329) (Prs 9, 10).

——S. 304, (Part 2)—Deceased thrusting burning log of wood in the mouth of accused—Accused snatching it and giving a blow resulting in his death — Accused acting in exercise of right of private defence — Conviction set aside. 1963 M P L J (Notes) 102.

——S. 304, Part 1—Applicability — Deceased striking his mother and accused, intending to kill with handle of spade—Accused snatching handle and giving blows on head of deceased — Fracture of skull and death of deceased—Plea of self-defence accepted—Conviction under S. 304, Part 1 held not justified. 1960 M P L J (Notes) 34.

——S. 304, (Part 2) — Land dispute — Prosecution party trying to take forcible possession—Protest by defence party in possession—Aggression by prosecution party — Attack wlth lathis by defence party, resulting in fatal injuries—No evidence to prove apprehension of death or grievous hurt to members of defence party—Members of defence party held exceeded right of private defence and were guilty under S. 304 (Part 2). 1963 (1) Cri L J 700 (Orissa).

——Ss. 304, 99, 101 — Exceeding right of private defence — Punishment. See Penal Code (1860), S. 99. A I R 1952 Orissa 37.

——Ss. 304, 100—Murderous attack—Right of private defence—While no doubt it is true that the exercise of right of private defence subsists only so long as an apprehension of aggressive attack continues, it is also well settled that an accused who has had to face an aggressive murderous attack by the deceased and who had to struggle with him in order to get possession of the weapon which was used against him cannot be expected to exercise any cool judgment in the situation. His responsibility is not judged by any meticulous standards (conviction set aside. 52 Cri L J 685 : A I R 1951 Orissa 245 (DB).

——Ss. 304, Part 1, 300 Exception 2 — Exceeding right of private defence of property — Death caused — Case falls under S. 300, Exception 2 — Accused can be convicted under S. 304, Part 1—No enmity of any kind alleged between accused and deceased — Incident not the outcome of deliberate desire on part of accused to take life—Accused of good character—Sentence of 7 years' R. I. reduced to 5 years. ('51) 3 Pepsu L R 620 (DB).

8. Section 304, Part 1—Illustrative cases.

See also Penal Code (1860), S. 300.

——S. 304, Part 1—Applicability—Accused inflicting as many as 18 injuries on arms and legs of deceased with gandasa while his companion held the hand of deceased — No injury on vital part of body—Motive to wreak vengeance for what the son of deceased had done to the son of accused—Held that intention of accused was not to kill deceased outright —Injuries were inflicted not with intention of murdering deceased but were such as the accused must have known would likely cause death— Proper sec-

tion under which accused could be convicted was S. 304 (1) and not S. 302 –Sentence of transportation for life amended. 1956 Cri L J 1265 : AIR 1956 S C 654.

● —S. 304. Part 1 — Lathi blow — Knowledge of bodily injury likely to cause death — Accused administering six blows of lathi on person of deceased a young man and strongly built—Lathi not iron- shod —Death of deceased 15 days after incident — Offence held fell under S. 304, Part 1 and not under S. 302. See Penal Code (1860), S. 299. 1959 Cri L J 1014 : A I R 1955 S C 439.

——Ss. 304, Part 1 and 34 — A obtaining decree and permanent injunction against B in respect of possession of land. Sudden fight between party A and party B—Party B found to be aggressors—Large number of injuries on party B cannot wipe out criminal liability of that party—Minor discrepancies in statements of prosecution witnesses — Benefit of doubt—Benefit of doubt cannot be given where totality of evidence is in favour of conviction. 1965 (2) Cri L J 331 : A I R 1965 All 417.

——Ss. 304 (1), 97, 326/149 — Deceased ploughing field of accused — On show of force by accused deceased stepping out and retreating—Deceased caught hold of by neck and speared—No right of private defence of property—No question of excessive exercise of right—Accused stabbing with spear guilty under S. 304 (1)—All guilty under S. 326/149. 1961 (1) Cri L J 15 : A I R 1961 All 38 (DB).

——Ss. 304, 99, 103, 300, Exception 2—Applicability Cattle of deceased grazing on preserved grass of accused—Accused rounding up cattle to take them to cattle pound — Deceased forcibly taking away cattle from possession of accused—Deceased though armed with lathi not using it — Accused hitting deceased with lathi on head — Deceased dying as result of injury—Accused held exceeded right of self-defence —Act covered by Exception 2 of S. 300—Conviction should be under S. 304, Part 1 and not Part 2. ('51) 1951 All L J 464 : 1951 All W R (H C) 477 : 1951 All Cri Cas 116 : 1953 Cri L J 1275 : A I R 1953 All 555.

——S. 304, Part 1 — Where the injuries inflicted on a person are not such as are sufficient in the ordinary course of nature to cause death, but are merely injuries which are likely to cause death, then the accused are guilty under S. 304, Part 1 and not under Part 2. 1952 All LJ 682: 1952 All Cri R 162: 1952 All W R (H C) 615 : 1952 R D (H C) 352 : 1953 Cri LJ 450 : AIR 1953 All 189 (191) (Pt B) (Pr 12) (DB).

——Ss. 304 and 300, Exception 1 — Benefit of Exception 1 given — Conviction would be under S. 304, Part (1) and not Part 2. See Penal Code (1860), S. 300. A I R 1955 N U C (Him Pra) 2346.

——Ss. 304, Part 1 and 302 — Offence at night time— Arrow striking deceased on ribs — Spleen penetrated causing death—Accused drunk — No evidence of accused having selected place of injury — Intention to cause bodily injury which was likely to cause death—Offence falls under S. 304, Part I and not S. 302. 1956 Cri L J 1410 : AIR 1956 Madh Bha 271 (272) (Prs 13, 14) (DB).

—S. 304, Part I—Case held fell under S. 304, Part 1. See Penal Code (1860), S. 300, Excep. 4. A I R 1955 N U C (Madh B) 1557 (DB).

——S. 304, Part 1—Applicability — A and his companions armed with lathis and dagger trying to take away A's wife—Refusal of wife — A intending to cut wife's nose—A's daughter intervening—A striking his dagger in his daughter's abdomen in scuffle—Death—Offence held fell under S. 304, Part 1 and not S. 302. See Penal Code (1860), S. 300. 1957 Cri L J 1405 (2): AIR 1957 Madh Pra 217 (DB).

——S. 304, Part 1—Applicability—Grave and sudden provocation—Wife of accused resorting to adultery and on accused's asking her to cease to do so abusing him and swearing that she would continue to do so—Case held fell under S. 304, Part 1. (1957) 2 M L J 9 : 1957 Cri L J 970 : 1957 M L J (Cr) 271 : A I R 1957 Mad 541 (545, 546) (Pt B) (Prs 11, 12) (DB).

——Ss. 304, Part 1, 300, 299 and 34 — Scope of first three clauses of S. 300 — Intention or knowledge a necessary ingredient of these clauses — Applicability of fourth clause — Wounds made on hands and feet with bhujali—Death of deceased in hospital—Offence committed held was one under S. 299 and not under S. 300—Accused was punishable under S. 304, Part I and his assistants under that section read with S. 34. 1964 (2) Cri L J 171 : A I R 1964 Pat 334 (337, 338) (Prs 22, 23, 25) (DB).

——S. 304, Part 1 — Applicability — On account of failure at examination accused deciding to end his life — Wife asking him to kill her — Held first that the deceased (wife) did not give her consent under fear of injury or under misconception of fact—Offence fell under S. 304, Part 1 and not S. 302. 1958 Cr L J 548 : AIR 1958 Pat 190 (192, 193) (Pt C) (Prs 13 14) (DB).

——S. 304 — Applicability — Evidence disclosing exchange of abusive language, grappling with each other and enmity — Case did not fall under S. 300, Fourthly but under S. 304, Part 1. AIR 1955 N U C (Punj) 5395 (DB).

——S. 304, Part I— Applicability — Accused molesting wife of deceased- Complaint by wife to deceased who along with his father going to accused, probably armed to remonstrate with him —Accused killing deceased by injuries by barcha blows — Circumstances showing accused did have reasonable apprehension of death or grievous hurt— Held, that although right of private defence to the extent of killing might not be proved, case fell under S. 101 and came within exception 2 of S. 300 — Accused held guilty under S. 304 Part 1 and not S. 302. AIR 1955 N U C (Punj) 4939 (DB).

——Ss. 304, Part 1, 302 –Sudden and unpremeditated fight — Both parties inflicting injuries by weapons — Death of one person — Case held covered by exception 4 to S. 300 — Conviction under S. 302 altered to that under S. 304, Part 1—Sentence of transportation reduced to 5 years Rigorous Imprisonment. See Penal Code (1860), S. 300. 52 Cri L J 1034 : AIR 1951 Raj 129 (DB).

9. Section 304, Part II—Illustrative cases.

See also Penal Code (1860), S. 300.

● ——Ss. 304, Part 2 and 200, 302 — Scope and applicability—Offence when murder and when culpable homicide not amounting to murder stated — Accused 22 years old in love with sister of deceased who did not like the intimacy — On day of occurrence quarrel between accused and deceased —:Accused asked to get away from house of sister — Accused returning shortly afterwards with his younger brother and called the sister to come out—Deceased coming out— Heated exchange of words — Accused slapping deceased on face—Accused lifting fist and snatching hockey stick from his brother and giving a blow with it on head of deceased fracturing the skull — Death of deceased 10 days afterwards in hospital — Injury such as was likely to cause death — Case held fell under S. 304, Part II — Accused held could not be attributed with special knowledge required by S. 300 —Sentence of 5 years' R. I. awarded. W. Slaney v. State of M. P., 1956 All W R (Sup) 38 : 1956-1 Mad L J (S C) 100 : 1956 S C J 182 : 1956 S C A 183 : 1955-2 S C R 1140 : 1956 Cri L J 291 : A I R 1956

S C 116 (133, 138, 140) (Pt B) (Prs 70, 71, 72, 90, 91, 101).

——S. 304, Part 2—Severe exchange of abuses between parties preceding the incident — Tempers rising high —Both parties coming out of their respective houses in anger—In course of quarrel accused dealing fatal blow with lathi on head of deceased — Accused held could not be convicted under S. 302, but under S. 304, Part 2. See Penal Code (1860), S. 300. **1954 Cri L J 1676 : AIR 1954 S C 652.**

——**Ss. 304, 328 — Applicability — Administration of datura with gur—No intent to cause hurt.**

Accused, a pujari of a temple sending gur mixed with datura seed as prasad—A boy eating it dying and his mother rendered unconscious — Seeds recovered from possession of accused — No intent to cause hurt or to commit or facilitate commission of offence — Intention to establish reputation as 'bhopa' by curing the boy — Conviction under S. 328, I. P. C., held unsustainable — Conviction under S. 304 read with S. 109 I. P. C., upheld as accused had knowledge that administering datura seed was likely to cause death. **1955 Cri L J 1022 : A I R 1955 Ajmer 48 (49) (Pr 8).**

——Ss. 304, 323 — Person throwing child of '5 years on ground with force—Fracture of skull—Knowledge that the act was likely to cause death must be presumed — Conviction under S. 304 justified. **1964 All W R (H C) 392 : 1964 All Cri R 271.**

——S. 304, Part 2 — Applicability — Wife dragged forcibly out of her father's place by husband against her will - Accused going to her rescue and stabbing husband with knife resulting in his death—Plea of private defence of person — Conduct of deceased husband held amounted to abduction simpliciter but was not an offence — Any person coming to her rescue and causing husband's death could not claim right of private defence. AIR 1953 M B 182, Dissented. **1957 Cri L J 1195 : A I R 1957 All 714 (715, 717) (Pt C) (Prs 5, 13) (DB).**

[**Reversed** in AIR 1960 S C 67.]

——S. 304—Applicability — Police constable while attempting to re-arrest escaped thief firing at him but hitting another person—Case held covered by Exception 3 to S. 300 and offence punishable under S. 304 part II. **1955 Cri L J 905 : A I R 1955 All 379 (382) (Pt A) (Pr 14) (DB).**

● ——S. 304, Part 2 —Applicability—Presumption of intention to cause injury — When rebutted, indicated —Offence held to be one under S. 304, Part 2 and not under S. 302, I. P. C. See Penal Code (1860), S. 300 (3). **56 Cri L J 884 : AIR 1955 All 321 (FB).**

——S. 304— Mutual provocation — Accused stabbing deceased with a pen-knife apprehending danger from unarmed relation of deceased — Accused held although acting in exercise of right of private defence exceeded that right—Case held fell under Exception 2 of S. 300 — Provocation held was not so great as to bring the case within exception 1 to S. 300—Accused convicted under S. 304, Part 1. **(1965) 2 Andh W R 145 : 1965 (2) Cri L J 440 (442, 443) (Pt B) (Prs 10, 12, 14).**

——Ss. 304, 302 — No enmity between accused and deceased — On trivial quarrel accused momentarily losing temper and giving stick blow on head of deceased—Held though accused could be imputed with knowledge that the hit was likely to cause death he could not be imputed with intention of causing such bodily injury as was likely to cause death—Conviction under S. 302 changed to S. 304, Part 2 and accused fined Rs. 300/- only. **1960 Andh L T 310.**

——S. 304 — Deceased old man, damaging field of accused and raising his kalsa to strike one of the accused persons — Accused held had right of private defence of person and property—Accused however, lost his right by using excessive force and causing death of deceased — Though appellants had common intention to belabour deceased and not to cause his death they must have known that injuries caused were likely to cause death of the deceased—Accused were guilty under S. 304, Part 2 read with S. 34. See Penal Code (1860), S. 34. **1965 (2) Cri L J 499 (2) : AIR 1965 Him Pra 49.**

——Ss. 304, Part 2, 300 — Arrow shot in thigh of victim—Femoral artery cut causing death — Clause 4 of S 300 not applicable—Offence covered by S. 304, Part 2. **1956 Cri L J 1078 : AIR 1956 Madh Bha 207 (208) (Prs 14, 15) (DB).**

——S. 304 (2) —Culpable homicide not amounting to murder—Husband in anger hitting wife on head with blunt end of an axe—Blow resulting in death due to fracture of skull — Accused immediately after incident admitting to witnesses to have killed his wife — Medical evidence also disclosing that injury to skull could have been caused by a fall from a height of 15-20 ft. — In appeal against his conviction accused pleading, in contravention of his statement before committing Magisrate, that his wife received the injury by a fall from a tree—Body of deceased found in the house—Having regard to circumstances of the case it is difficult to say that the conviction of the accused was erroneous—Plea about wife having a fall and dying in consequences seems to be an afterthought. **1956 M B L J 472 : Madh B L R 1956 Cri 56.**

——**S. 304, Part. 2—Blows with stick on head—Presumption.**

Though it is not proved that any one of the injuries caused are sufficient in the ordinary course to cause death, yet it the blows are given with stick on the head of the deceased, the accused must be presumed to have known that he will thereby cause injuries which are likely to cause death. **Madh B L R 1955 (Cr) 130 : Madh B L J 1955 H C R 1008 : 1955 Cr L J 284 : AIR 1955 Madh B 26 (28) (Pt C) (Pr 11) (DB).**

——S. 304 (2) — Boy of 15 years shooting arrow at deceased without any intention to kill—Boy extremely careless and drunk—Deceased dying—Offence held did not fall under S. 300 but under S. 304. See Penal Code (1860), S. 300. **AIR 1955 NUC (Madh B) 3855 (DB).**

——**Ss. 304, 302 — Accused beating wife —:Death of wife—Meningeal artery in brain ruptured and death due to haemorrhage in brain—No intention to cause death—Accused should be taken to know that injuries were likely to cause death—Accused held guilty under S. 304.**

The deceased had forsaken her husband the accused and her child by him and had gone to live with another person. Some ten days later, the accused went to the village of that person to bring the deceased back. The person was not at home. The accused caught hold of the deceased and started back for his house. On the way the deceased refused to go with the accused and wanted to go back to the person. The accused thereupon gave her some stick blows and as the result of this she died. The accused himself gave F. I. R. giving all these facts. He admitted these facts before the Sessions Court as well. The medical evidence showed that there were as many as eight injuries on the body of the deceased. Material injury for purposes of S. 302 was contused lacereted wound on the head extending over an area of 4" x 1/2" and was scalp deep. Internal examination showed no fracture but meningeal artery was ruptured and there was internal haemorrhage in the brain :

Held that having regard to the nature of the weapon used and the force with which the blows were given which could not have been considerable in view of the fact that there were no fracture of the skull, it could not be said that the accused intended to cause death. But, there was no doubt that the accused caused injuries to his wife and that he should be taken to know that these injuries were likely to cause death and the accused should be convicted under S. 304. AIR 1925 Lah 549. Ref. **M B L J 1955 H C R 1532 : M B L R 1955 Cri 313.**

——Ss. 304, 302 — Applicability — Handkerchief stuffed into mouth of deceased in order to silence her — Death due to suffocation before offender could commence sexual intercourse — Held it could not be said that natural consequence of behaving in this way was definitely death — Conduct of offender, though most reprehensible and constituted a criminal offence, he could not be saddled with the intention or knowledge necessary to constitute an offence under S. 302—The most that could be said was that the offender must be presumed to have known that he was likely in so doing to cause her death—Offence held amounted to culpable homicide not amounting to murder—Conviction recorded under S. 304, Part 2. 1952 Cri L J 261 : AIR 1952 Madh B 25 (Prs 10, 18) (DB).

——Ss. 304, Part 2 and S. 323—Applicability—Sudden quarrel — Abettor present on spot instigating another co-accused to beat deceased—Latter giving heavy blow on head of deceased with log of wood lying nearby resulting in his death—Injury sufficient in ordinary course of nature to cause death—Abetter held guilty under S. 323/109, I. P. C. and not under S. 304, Part II/114 I. P. C. — Principal accused held guilty under S. 304, Part 2. See Penal Code (1860), S. 109. 1962 (1) Cri L J 435 : AIR 1962 Madh Pra 91.

——S. 304 (I) — Grave and sudden provocation — Mere abuses—Blow by lathi not premeditated—Blow severe—Person dying in single blow of lathi—Offence under S. 304, Part I held made out—Mere abuses held did not constitute provocation contemplated by S. 300 Exception 1. See Penal Code (1860), S. 302. 1962 M P L J (Notes) 69.

——S. 304 (II) — Assault with lathi causing death — Assault single and not premeditated — Case covered by S. 304 (II) and not by S. 302.

Accused was convicted under S. 302, I. P. Code for having caused the death of C by giving him one blow with a lathi over his head. Both the deceased and the accused had a hot exchange of abuses and had grappled with each other. The accused when he followed the deceased was unarmed and picked up the lathi lying near about and inflicted the single blow with it. He was sentenced to life imprisonment by the Sessions Judge.

Held, that the assault was with the lathi used as a weapon which was the only piece lying there and naturally came handy to the enraged accused. The assault was not at all a premeditated one. At the spur of the moment while picking it up at random the accused could never be said to have had realised that it was a dangerous weapon and only one blow was given. In the circumstances it could not be safely held that the accused intended to cause such injuries as would render him guilty of murder. He could be safely ascribed the knowledge, especially in view of the medical evidence, that the blow was given with considerable force and that he knew the likely consequence of the assault. **AIR 1954 S C 652, Rel. 1962 M P L J (Notes) 51.**

——S. 304, Part 2 and 302 — Exorcism for curing woman of evil spirits — Death by suffocation by smoke—Act with knowledge that it is likely to cause death—Offence.

The accused, in order to cure the deceased woman of the hysteria which showed itself in spells of fainting, and fits of convulsions taken to be symptoms of possession by an evil spirit, tied up the deceased and raised considerable quantity of smoke before her. Finding that the deceased was not cured of it on the first occasion, the accused repeated the process with double the quantities of the things to raise smoke. A fire was raised, and the deceased was made to sit before it after which the accused tied her hands and feet and further secured her to a granite mortar by a rope, and she was left alone with the accused. When the door was opened in the early morning next day life was found to be extinct. The medical evidence showed marked congestion of lungs with carbon particles in the respiratory passages, and congestion of all internal organs and lacerated external injuries. The prosecution did not claim that the accused intended to cause the death of the woman. However deluded he might have been, the accused was under the genuine impression that the woman was possessed by an evil spirit and that he could exorcise her effectively by means of such prolonged ritual. The lacerated injuries also showed that the accused inflicted some external violence on the deceased. The accused has to be credited with the knowledge that such measures were likely to cause the death of the victim and if he indulged in those measures notwithstanding such knowledge he did so under the peril of being convicted under the criminal law. The accused has to be convicted under S. 304, Part 2 of the Penal Code. **(1964) 1 M L J 188 : (1964) Mad L J (Cri) 157 : 1964 (2) Cri L J 557 : AIR 1964 Mad 480 (481) (Prs 7, 8) (DB).**

——S. 304, Part 2—Applicability—Deceased committing offence under S. 430 — Accused exceeding right of private defence and killing deceased—Act of accused falls within Excep. 2 to S. 300 — Conviction under S. 304, Part 2 is correct. 1960 Cr L J 834 : AIR 1960 Mad 240 (244) (Pt B) (Pr 20) (DB).

——S. 304, Part 2—Fatal injury on vital portion with deadly weapon.

Every man must be presumed to intend the natural consequences of his act. An offence under S. 304, Part 2 would be clearly proved against a person where a fatal injury is inflicted by him on a vital portion of the deceased's body, the abdomen, with a deadly weapon, a spear. **('51) 64 Mad L W 460 : (1951) 1 Mad L J 679 : 1951 Mad W N 462 : 1951 Mad W N (Cri) 142 : 1952 Cri L J 333 : A I R 1952 Mad 172 (173) (Pt A) (Pr 5).**

——S. 304—Applicability—J returning to village with the produce of his field—Deceased, a cousin of J seeing J being assaulted — J requesting accused to stop beating J—He even asked accused to take the produce but stop the beating—M, one of the accused annoyed by this, giving a lathi blow on the head of the deceased—This was followed by another blow on the back by B, another accused — Servant of M joining and giving a blow on head of deceased—Deceased falling down unconscious — Deceased removed to police station and expiring during evening — Held, accused had no intention of assaulting deceased — It was a free fight inasmuch as accused also received injuries — That the fight was started by accused was immaterial for determining whether act fell under exception 4 to S. 300—Act against deceased was not premeditated—Act did not amount to murder but was punishable under S 304, Part II — R. I for three years held sufficient punishment, considering that the accused were in jail as under-trials for a considerable period. A I R 1955 N U C (Nag) 3957 (DB).

——Ss. 304, 300, 302 — Applicability — Blow with ordinary force with a faggot on fore-head causing

fracture of the frontal bone — Accused held guilty under S. 304, Part II and not under S. 302. 30 Cut L T 59 (Ori).

—— Ss. 304, Part 2, 302—Accused a person belonging to a backward tribe of Chota Nagpur, inflicting a tangi blow on his nephew believing him to be a wizard —No intention to cause death—Nephew surviving for several hours after assault but ultimately succumbing — Offence comes under Part 2 of S. 304 and not under S. 302—Sentence altered from rigorous imprisonment for life to that for five years. 1961 B L J R 543.

—— Ss. 304 Part 2, 334 and 323 — Young person kicked in abdomen — Intestines perforated resulting in his death — Offence held fell under S. 304, Part 2 and not under either S. 334 or S. 323. A I R 1955 N U C (Pepsu) 1876.

——S. 304, Part 2—No intention to kill—No murder. See Penal Code (1860), S. 302. 1953 Cri L J 1878 : A I R 1954 Pepsu 10 (DB).

——S. 304 Part 2 — Scope — Criminal P. C. (1898), S. 423.

Where several persons attacked the victim who died out of a fatal injury and one of them was sentenced under S. 304 (11) while the others for minor offences the responsibility for the fatal injury was not clearly assignable to the former, and the prosecution witnesses were also inimical, interested and unsatisfactory.

Held, that the conviction of the accused under S. 304 (11) was bad (The conviction of other accused also were set aside suo motu). A I R 1951 Pepsu 62 (65, 66) (Prs 21 to 23).

——S. 304, Part 2—Offence under — Accused attacking the deceased and his brother and giving them blows on the head with lathis — Injuries on the head resulting in death of one of them — Attack on the deceased and his party not a premeditated one but was a result of sudden heat of passion — Nature of offence committed — Though accused could be fixed with the knowledge that the blows were such as were likely to cause death yet it could not be inferred that the accused were animated with the intention to cause death — Offence, therefore, fell under second part of the section and not the first one. 1964 Cur L J 74 : 1964 (2) Cri L J 197 : A I R 1964 Punj 321 (328) (Pt B) (Pr 11).

——S. 304, Part 2 — Accused firing gun on members of opposite party without intention of killing any particular person—One member hit and killed — Accused held guilty under S. 304, Part. 2. See Penal Code (1860), S. 299. 56 Cri L J 305 : AIR 1955 Punj 13 (DB).

——Ss. 304, 299, 300 and 302—Bitter enmity between accused and deceased—Accused inflicting as many as seventeen injuries on deceased out of which eight were on head—Death due to shocks and intracranial haemorrhage — Accused throwing body in a well — Accused using blunt sides of weapons — Offence held one under S. 304, Part 2 and not one under S. 302. A I R 1953 Punjab 262 (263) (Pr 11) (DB).

——S. 304—Intention to cause death — After quarrel at a well between A and B and C, B and C arrived at the spot armed with dangs — There was exchange of abuse and blows were given by B and C—C's blows fell on A's head which resulted in A's death — B was tried separately and acquitted—C was tried, convicted under S. 302 and was sentenced to transportation for life—In appeal:

Held that the intention was to give a beating and not necessarily to kill — Offence fell under S. 304, Part II (Sentence reduced to 5 years' R. I). See Penal Code (1860), S. 300. 1953 Cri L J 1805 : A I R 1953 Punj 261 (DB).

——S. 304 — Offence under — Great deal of ill-will between parties — Deceased intervening when other fighters were grappling with each other — Held, that circumstances took the case out of offence of murder and came only under S. 304, Part 2. See Penal Code (1860), S. 300. 1953 Cri L J 1642 : A I R 1953 Punj 241 (DB).

——Ss. 304, Part 2, 300, 302—Murder case—Medical witness stating that death was caused on account of shock and haemorrhage due to certain injuries — Statement of medical witness cannot be equated to statement that "injuries by themselves were in ordinary course of nature likely to cause death" — Duties of public prosecutors and Judges while dealing with medical evidence in murder trials stated — Evidence Act (1872), S. 45 — Criminal P. C, S. 286. 1965 (1) Cri L J 219 : A I R 1965 Raj 32.

——Ss. 304, Part 2, 300, 302—Murder charge—Death by throttling — Simulation of ligature mark to give false appearance to crime — Knowledge that in all probability death would be caused by throttling not likely — Offence held one under S. 304, Part 2. See Penal Code (1860), S. 300. 1964 Raj L W 279.

——S. 304, Part 2—Accused appearing to have acted in heat of passion — Circumstances showing that accused must have known that by stabbing he was likely to cause death of deceased — Accused's guilt held did not amount to murder but only to culpable homicide not amounting to murder under S. 304, Part 2. A I R 1955 N U C (Raj) 267.

——Ss. 304, 302 and 300 — Murder — Evidence of quarrel between accused and deceased about woman — No evidence of threat by accused to murder deceased — Lathi used as weapon and only three blows inflicted — Held, that accused should properly be convicted under S. 304 and not under S. 302. 1952 Raj L W 20 : ILR (1951) 1 Raj 718 (DB).

——S. 304, Part 2—Accused giving one stab by penknife—Injury not big and not one by heavy penknife —Accused not intending death of victim — Case held fell under Part II. 51 Cri L J 653 : A I R 1950 Trav Co 12 (13) (Pt D) (Pr 6) (DB).

——S. 304, Part 2 and 325—Scope — Blow not likely to cause death.

Second part of S. 304 applies where there is no guilty intention but there is guilty knowledge. Though the result of an ordinary lathi blow was unexpectedly unfortunate in that the person struck died, it cannot be said that the accused known in the village as "pagla" (lunatic) could have any knowledge of the likelihood of causing death by such a blow. An act which is not likely to cause death amounts to grievous hurt even though death is caused. A I R 1946 Bom 38 (FB), Rel. on. 1954 Cri L J 154 : A I R 1953 Tripura 9 (9) (Pt B) (Prs 7, 8).

——S. 304, Part 2—Applicability.

Abdomen is a delicate part of the body and vulnerable too and if violence is used on it resulting in fracture of ribs and rupture of the spleen, it can be safely presumed that the accused should have known that such a violence on his part was likely to cause death of the person to whom it was used and more specially when the man was old, sickly and infirm. The accused in such a case is guilty under S. 304, Part II, Penal Code. 1953 Cri L J 1516 : A I R 1953 Tripura 7 (1) (7) (Pr 7).

10. Section 304 not applicable — Illustrative cases.

● ——Ss. 304, Part II, 86, 300 and 302 — Offence of murder under influence of drink — No evidence to show accused's incapacity to form requisite intention —Offence is one under S. 302 and not S. 304, Part II. Basdeo v. State of Pepsu, 1956 An L T 593 : 58 Pun

L R 569 : 1956 S C A 695 : 1956 S C R 363 : 1956 S C J 554 : 1956 M P L J 151 : 1956 S C C 276: 1956 Nag L J 711 : 1956 All L J 666 : 1956 All W R (Sup) 118 : 1956 Cri L J 919 (2) : AIR 1956 S C 488 (492) (Pt C) (Pr 16) (DB).

——Ss. 304 (2) and 325—No previous enmity between parties—'Marpit' starting over exchange of abuse—Accused inflicting two blows with a light and short stick—Probable cause of death found to be haemorhage due to rupture of spleen and lung—Evidence that spleen of deceased was enlarged — Offence held to be one under S. 325 of I. P. C. and not under S 304 (2), I. P. C. 1952 Cri L J 1165 : AIR 1952 Ajmer 29 (1) (29) (Prs 4, 5).

——Ss. 304 and 304-A—Applicability — Boy playing in the middle of road — Truck passing over—Death — Offence.

The accused was driving his truck at a very great speed. He did not blow horn. Nor did he stop the truck on seeing children playing on the road. A boy of six years was in the middle of the road. The accused kept on driving at a high speed. The truck passed over the boy, and he was killed. There was no suggestion of enmity between the accused and the deceased. There was no definite evidence to prove that the accused deliberately took his truck over the boy.

Held, that the death was due to rash and negligent act of the driver and the offence was one under S. 304-A and not under S. 304. 1959 All W R (H C) 410 : 1959 All Cr R 326 : 1959 (2) All L J 548.

——S. 304—Applicability — Rescue of cattle lawfully taken to pound — Injury caused in commission of common object—Whatever was done by each one of accused was in furtherance of common intention of all—Accused held guilty of offences under S. 24 Cattle Trespass Act and Ss. 147 and 323, Penal Code read with Ss. 149 and 34 of the Code — One person injured seriously on head, dying within few hours — 3rd para of S. 300 applied—Act of killing amounted to murder under S. 302 and not an offence under S. 304—Responsibility for crime attached to all the accused. See Penal Code (1860), S. 146. 1958 Cr L J 588 : AIR 1958 All 348 (DB).

——Ss. 304 and 325 — Applicability — Nature of offence—Determination of—Intention.

The accused intended to strike a lathi blow at the father, C, when unexpectedly the mother intervened with a child in her lap and the blow fell on the child causing its death.

It appeared from evidence that the weapon used by the accused was a lathi, and that C, the person aimed at, was 50 years of age, and that the lathi was wielded with such force that the child was thrown down to the ground from the lap of its mother. Held, that regard being had to these data cumulatively, the only reasonable inference should be that had the blow struck C, the person at whom it was aimed, it would in all probability have caused grievous hurt. The accused should therefore be convicted under S. 325, and not under S. 304, I. P. C. AIR 1920 Bom 224, Distinguished. 1957 Cr L J 336 : 1956 All L J 532 : 1956 All W R (H C) 636 : AIR 1957 All 132 (133) (Prs 5, 7).

——S. 304—Applicability— Accused persons leading their cattle into field of complainants— Complainants when taking cattle to pound intercepted and beaten by accused—One of complainants receiving smashing blow on head by one of accused and dying—All held guilty under S. 302/149. See Penal Code (1860), S. 300 (3). AIR 1955 NUC (All) 1701 (DB).

——S. 304—Applicability—Violent lathi blow on vital part of body—Death ensued—Attacker to be charged under S. 302 and not under S. 304. See Penal Code (1860), S. 302. AIR 1955 NUC (All) 1496.

——S. 304 —Applicability—Quarrel between accused and deceased for the latter's refusal to allow accused to take water from his channel — Next day accused following deceased with lathi and after some distance suddenlly giving him lathi blow on leg — Deceased falling down—Accused giving another severe and smashing blow by lathi on head of deceased resulting in fracture of skull, compression of brain with profuse bleeding and ultimately resulting in his death—Intention to cause death must be presumed in the circumstances as the attack was deliberate, planned and cold-blooded—Offence held fell under S. 302 and not S. 304 or S. 325. 1953 Cri L J 768 : AIR 1953 All 356 (Pt A) (DB).

——S. 304—Applicability — Beating with stick with-object of chastisement—No intention or apprehension of death—Offence held fell under S. 323. See Penal Code (1860), S. 302 1960 Andh L T 305 : 1961 (1) Cri L J 219 : ILR (1960) 1 Andh Pra 411 : (1960) 1 An W R 305 : 1960 M L J (Cr) 256 : AIR 1961 Andh Pra 79 (DB).

——Ss. 304, Part 2 and 326—Scope—Charge under S. 304. read with S. 149—Acquittal — Conviction under S. 326—Propriety.

One morning the deceased went to his field with some ploughmen. The accused also went there armed with dangerous weapons and attacked him. D was said to have given the first blow with a jatha on the eye. B struck him with a dao on the head several times. H gave the deceased a dao blow on the eye when he fell down and then all the accused except one were said to have given the deceased indiscriminate beating. The charge against the appellants was under S. 304 read with S. 149 of the Penal Code but the jury returned a verdict of not guilty in respect of that charge. They however returned a unanimous verdict of guilty under S. 304. Part 2 against D, B, and H. No charge was framed under this section. The Assistant Sessions Judge was of the opinion that they could be convicted only under S. 326. On a reference under S. 307, Criminal P. C.

Held, that in the circumstances of the case, the accused D, B and H could not be convicted under S. 304, Part 2, the evidence not being enough to fix liablility for culpable homicide on any or each as the result of his own acts, but that they could be held guilty under S. 326 and no prejudice would be caused to the accused thereby. ILR (1956) 8 Assam 191 : 1958 Cri L J 742 : AIR 1958 Assam 44 (48) (Pt F) (Pr 21) (DB).

——S. 304, Part I and S. 326—A and B charged with offence under S. 304, Part I, Penal Code, read with S. 34 — Prosecution clearly establishing that A had struck at deceased with dao — Evidence at same time showing that injury which was sufficient in the ordinary course of nature to cause death was not caused by A but by B — Proper verdict against A would be one of guilty under S. 326. AIR 1953 Assam 28 (30) (Pt C) (Pr 10) (DB).

——Ss. 304 (2), 323 and 325—Injuries caused by accused not shown to have caused death—Case would not be covered by S. 304 (2) or by S. 325 — Accused admitting beating—He can be convicted under S. 323. 1952 Cri L J 1272: AIR 1952 Assam 157 (157) (Pt A) (Pr 7) (DB).

——S. 304—Applicability—Injuries not likely to cause death — Death due to rupture of spleen existence of which was not known to accused—Conviction not sustainable. 1952 Cr L J 997 : AIR 1952 Assam 110 (111) (Pr 5) (DB).

——S. 304, Part II—Dispute over possession of land—Fight—One party receiving grievous injuries resulting

in death of one person — Party of accused receiving minor injuries—Plea that accused party was attacked not established—Assembly held not unlawful— Right of private defence did not arise — Absence of premeditation—Conviction under S. 304 held not maintainable. See Penal Code (1860), S. 34. 52 Cri L J 209 : AIR 1951 Assam 48 (DB).

——Ss. 304 and 304A—Charge of culpable homicide —Condition precedent — Ingredients of S. 304A— Held offence alleged was one under S. 304A and not under S. 304.

One boy was riding cycle and proceeded along left side of road when bus driven by A came up and dashed against it from behind with result that boy was drawn off cycle and fell between front and rear wheels of bus and was smashed to death. A failed to stop the bus until he went ahead about 6 cubits with the result that the boy was completely run over. Before the bus struck the cycle A did not sound the horn. A was arrested and charge sheet under S. 304A was submitted. On request by prosecution the Magistrate treated the case under S. 304 and followed procedure under Ch. XVIII. In application to quash order of commitment:

Held, that unless and until the intention to cause death or the intention of causing such bodily injury as is likely to cause death is established or circumstances are proved which will make it appear that the person doing the act did it with the knowledge that he was likely to cause death, no charge can possibly be laid for culpable homicide. A did not drive the bus with the knowledge that he was likely by such act of driving to cause the death of the unfortunate boy. The Magistrate completely misdirected himself in thinking that the allegations made out a charge under S. 304.

Held further that the ingredients of S. 304A merely require proof of death and the doing of any rash or negligent act which does not amount to culpable homicide. If these elements are satisfied, an offence under S. 304A is proved. It cannot be said that the mere act of rash or negligent driving of a bus with its mechanism tolerably in order, on a road in condition, by a person licensed to drive such vehicles, will make the act an act of culpable homicide. The offence alleged was one under S. 304A and not under S. 304.

Hence order of committal was set aside and the Magistrate was directed to proceed under Ch. XXI. **I L R (1957) 2 Cal 269.**

——Ss. 304, 34, 326 — Common intention—Accused having sticks, some of them being iron-ringed—21 blows given, some of them being on vital parts but only two injuries fatal — Offence committed held was one under S. 326. **1961 (1) Cri L J 251 : AIR 1961 Guj 16 (DB).**

——Ss. 304 and 379—Held on evidence that conviction of the accused under S. 304 could not stand and must be set aside, but their conviction under S. 379 upheld. **AIR 1955 N U C (J and K) 582 (DB).**

——Ss. 304, Part 2 and S. 323—Applicability — Hurt or culpable homicide not amounting to murder— Accused dealing only one blow with open hand on neck of deceased resulting in his death—No other act of violence proved — Offence is one under S. 323 and not under S. 304, Part 2. See Penal Code (1860), S. 323. 1960 Cri L J 1351 : AIR 1960 Ker 197.

——Ss. 304 and 323 — Applicability — Absence or intention to cause death or grievous hurt—Effect.

When the injury is not serious and there was no intention to cause death or grievous hurt, nor did the accused have knowledge that it was likely to cause grievous hurt or death, he is guilty of causing hurt and not death even though death is caused. Therefore where from the circumstances of the case it is impossible to draw an inference that the accused would have intended to give the deceased anything more than a beating or thrashing to teach him a lesson for using foul language to him, a police officer, it would not be possible to attribute to him the requisite intention or knowledge merely because of the diseased condition of the spleen of the deceased which got ruptured. In such circumstances his conviction under S. 304 cannot stand. **1959 Ker L R 128: 1959 Ker L J 150 : 1959 Ker L T 258 : 1959 Mad L J (Cr) 641 : 1959 Cr L J 1331 : AIR 1959 Ker 372 (376) (Pt C) (Prs 9, 10) (DB).**

——Ss. 304, Part 2, 325—Accused on coming to know that his son had sold part of his goods in his house behind his back, losing his temper and setting out to chastise son—Son tied to a post and beaten with stick —Beating continuing throughout night after intervals —Beating causing number of injuries all over son's body—Son dying five days later as a result of beating —Injuries not serious — Held that having regard to nature of weapon used and surrounding circumstances, neither an intention to cause death nor any knowledge regarding likelihood of causing death could legitimately be attributed to the accused — Accused held should be convicted under S. 325 instead of S. 304, Part 2. **AIR 1955 N U C (Madh B) 3879 (DB).**

——S. 304 (2)—Accused killing deceased by gun-shot —No evidence of sudden quarrel — Accused held guilty of murder. See Penal Code (1860), S. 300. **AIR 1955 N U C (Madh B) 3742 (DB).**

——S. 304—Applicability — Accused bearing ill-will against deceased discharging arrow towards deceased while the deceased was running — Arrow piercing throat of deceased and causing his death — Accused held guilty under S. 302 and not under S. 304. See Penal Code (1860), S. 302. **AIR 1955 N U C (Madh B) 3730 (DB).**

——S. 304—Applicability —Death due to two injuries on head—Witness speaking of one blow only—Nature of offence indicated. See Penal Code (1860), S. 325. **AIR 1955 N U C (Madh B) 3725.**

——S. 304/34 — Applicability — Accused beating deceased with sticks without premeditation—Deceased falling down and later on dying — Injuries sustained simple and caused on scapula, back and buttocks — Accused held were guilty under S. 323 and not under S. 304/34 or under S. 302. See Penal Code (1860), S. 323. **AIR 1955 N U C (Madh B) 2113 (DB).**

——S. 304, Part I — Grave and sudden provocation— Accused admitting to have killed deceased with axe —Story set up by him that when his wife had gone to field of deceased which adjoined his field to bring back his bullock which had strayed in there, the deceased abused her—Story not corroborated by near relations who were there—Case of sudden and grave provocation held not proved. See Penal Code (1860), S. 300 Excep. 4.: **Madh B L J 1955 H C R 1179.**

——Ss. 304, 319 and 323 — Applicability — Deceased receiving only two injuries which were not grievous —Injuries only remoter cause of death—Accused can be convicted under S. 323 and not under S. 304. **1954 Cri L J 6 : AIR 1953 Madh B 262 (264) (Pt C) (Pr 5).**

——Ss. 304, 300, 302 — Bodily injury sufficient in the couse of nature to cause death — Deep abdominal injury with knife - Peritonitis causing death is natural result—Conviction under S. 302 proper. See Penal Code (1860), S. 300. **1962 (2) Cri L J 195 : AIR 1962 Madh Pra 244 (DB).**

——S. 304—Applicability — Accused after drinking arrack for one rupee returning home in night at meal time — Father questioning him as to where he had

been and as to how long he would be having free feeding without doing any work—Accused not giving any reply, eating his food and coming out — Father following him armed with stick, saying "you are going out without giving any reply."—Accused catching hold of suit of father and with another hand, fisting him while he lay prone on abdomen—P. Ws. 1 and 2 intervening — Accused picking up two stones throwing them with force on head of father who was lying on ground, resulting in fracture of skull and instantaneous death—Offence held murder—Exception 4 to S. 300 held could not be invoked. See Penal Code (1860), S. 302, Excep. 4. 1954 Cri L J 1443 : AIR 1954 Mad. 943 (DB).

——Ss. 304, Part 2, and 323, 35, 25 — Applicability—Two accused beating thief stealing crop at dead of night - Thief dying — No evidence to show that accused were armed or about the manner in which they participated in attack—Accused not guilty under Second Part of S. 304 read with S. 34, not under S. 304 (Part 2) read with S. 35 — At best the accused may be guilty under S. 323—AIR 1961 Kab 749, Rel. on AIR 1954 S C 705, Disting. 1961 (2) Cri L J 515 (Mys) : 58 Mys L J 296 : I L R (1961) Mys 392.

——Ss. 304 and 324—Applicability—Intention.

There was nothing to establish that the accused intended to kill his father or that he intended to cause such bodily injury as was likely to cause his death. He hit his father in a fit of rage, possibly on account of the father's denial to pay him money.

Held, that the accused could not be charged under S. 304 but that the offence fell under S. 324.

[Considering the youth of the accused a lenient view was taken and the accused was sentenced to six months R. I.] 85 Mys L J 353 : 1957 All W R (Sup) 117 : 1957 Mad L J (Cri) 382 : 1958 Cr L J 553 : I L R (1957) Mys 159 : AIR 1958 Mys 48 (53) (Pt D) (Pr 29) (DB).

——Ss. 304 and 325—Provocation—Whether sudden and grave enough to reduce offence from murder is a question of fact—Accused harvesting crop belonging to deceased — Deceased merely remonstrating with accused from inside his hut — Where exchange of words taking place — Accused using heavy weapon and inflicting injuries on the vital parts of deceased — Assault cannot be held to have been made under sudden and grave provocation : 1942 A C 1 and AIR 1956 Orissa 108, Rel. on; 28 Cut L T 359, Distinguished. 1964 (1) Cri L J 355 : AIR 1964 Orissa 148 (151) (Pt A) (Pr 5) (DB).

——Ss. 304, 36, 300 — Offence by drunken person—Presumption as to guilty intention — Law discussed—Accused held capable of forming necessary intention to constitute murder. See Penal Code (1860), S. 86. 52 Cri L J 1146 : AIR 1951 Orissa 354 (DB).

——Ss. 304 and 300—Trespass with primary object of abduction — Person to be abducted attacked with dangerous weapons—Victim dying of fatal injuries—Intention of accused must be held to have been to cause injuries sufficient to cause death in ordinary course—Offence committed is murder and not culpable homicide. See Penal Code (1860), S. 300. AIR 1951 Pepsu 66 (DB).

[Overruled on another point in AIR 1952 S C 424.]

——Ss. 304, 302 and 325 — Altercation between parties—Violence resulting in death — The act held did not amount to offence under S. 302 or even under S. 304 — Intention to cause grievous hurt only could be imputed to the accused. 1960 Cri L J 518 : AIR 1960 Pat 214 (DB).

——S. 304—Accused wrongly confining deceased in a room—Secured by burying deceased in kiln quarry [Val. (12)] Pat. D. 29.

believing him to be dead though in fact he was alive —Accused held guilty under S. 304-A although he had no guilty intention or knowledge within meaning of S. 299 but the act was rash act. See Penal Code (1860), S. 299. 1960 Raj L W 4 : ILR (1959) 9 Raj 762.

——S. 304—Applicability — Accused giving kick to mother-in-law near abdomen without knowing she was suffering from fatty heart and enlarged liver—Victim dying—Offence held fell under S. 323 and not under S. 304, Part 2. See Penal Code (1-30), S. 323. AIR 1955 N U C (Raj) 4674.

——Ss. 304, 317—Child dying on account of exposure—Accused cannot be convicted for offences both under Ss. 317 and 304 (Obiter per Datt J.) See Penal Code (1860), S. 317. 1952 Cri L J 2196 : AIR 1951 Raj 158 (DB).

——S. 304—Intention or knowledge—Single stab in chest—Death not definitely traceable to injury — Accused held not guilty under S. 304 but of lesser offence under S. 324. See Penal Code (1860), S. 295. AIR 1955 N U C (Trav-Co) 5429 (DB).

—— S. 304, Part 2—Applicability — Quarrel between co-lords — B catching hold of C and A stabbing C in chest—Case not covered by Exception (4)—Acquittal on charge of murder was set aside and A sentenced to transportation for life. See Penal Code (1860), S. 300, Excp. (4). AIR 1955 N U C (Trav-Co) 5428 (DB).

SECTION 304-A

SYNOPSIS

(Penal Code (1860), S. 304-A.)

1. "Rash or negligent act"—Meaning.
2. Death must be direct result of rash or negligent act.
3. Rash or negligent act—Illustrations.
   — Act held not rash or negligent.
4. Rash or negligent driving.
5. Contributory negligence.
6. Sentence.

1. "Rash or negligent act"—Meaning.

——S. 304-A—Mens rea — Concept of mens rea and description given of the state of mind in S. 304-A was far more helpful than the notice of degrees of negligence in defining and explaining that degree of negligence and rashness which distinguishes a criminally culpable wrong from a tort involving a civil liability only, one is almost impelled to say that criminal negligence or rashness is one which requires a particular mens rea. Difficulty in reading words such as "grossly" or "highly" before words "rash" or "negligent" in S. 304-A is that such qualifying words could easily have been used by the legislature but are not there. Applying a well-recognized principle of interpretation the absence of such qualifying words must be deemed to be intentional. But applying equally well-recognised principle the requirements of mens rea can be read into a provision creating a criminal offence and proceed to specify what this means with reference to a particular provisions. It is therefore preferred to conceive of criminal rashness or negligence in terms of the required mens rea. 1964 All W R (HC) 154 : 1964 All Cri R 128 : 1965 (1) Cri L J 324 : AIR 1965 All 195 (200) (Pt B) (Pr 17) (DB).

——S. 304-A — Distinction between civil and criminal liability.

Before a conviction can be had under S. 304-A, Penal Code, a very high degree of negligence must be found, negligence which must amount to recklessness or utter indifference to consequences and not

merely negligence of tort. Rashness and negligence are not the same things. Mere negligence cannot be construed to mean rashness. There are degrees of negligence and rashness, and, in order to amount to criminal rashness or criminal negligence, one must find that the rashness has been of such a degree as to amount to taking hazard knowingly that the hazard was of such a degree that injury was most iikely to be occasioned thereby. The criminality lies in running the risk or doing such an act with recklessness and indifference to the consequences. Criminal negligence is a gross and culpable neglect, that is to say, a failure to exercise that care and failure to take that precaution which, having regard to the circumstances, it was the imperative duty of the individual to take. Culpable rashness is acting with consciousness that mischievous consequences are likely to follow although the individual hopes, even though he hopes sincerely, that such consequences may not follow. The criminality lies in not taking the precautions to prevent the happening of the consequences in the hope that they may not happen. The law does not permit a man to be uncautious on a hope however earnest or honest that hope may be : AIR 1954 All 186, Foll.; AIR 1950 All 300, Rel. on. **1964 All W R (HC) 134 : 1964 All Cri R 118 : 1965 (1) Cri L J 524 : AIR 1965 All 198 (198, 199) (Pt C) (Prs 9, 13).**

——Ss. 304-A, 279, 280, 336, 337 and 338 — Offences defined by Ss. 279, 280, 336, 337 and 338 can be viewed as minor offences included within S. 304-A— Accused once convicted under S. 304-A cannot be convicted under S. 279 for minor offence. **1964 All W R (HC) 134 : 1964 All Cri R 118 : 1965 (1) Cri L J 524 : AIR 1965 All 196 (201) (Pt D) (Prs 20, 24).**

——S. 304-A — 'Rash or negligent act'—Negligence consists in not taking care such as a man of ordinary prudence is expected to take and to do an act regardless of consequences is rashness—Held on facts that accused was guilty of both rash and negligent driving : AIR 1939 Peshwar 33 and AIR 1954 M P 41, Disting. **1964 All W R (HC) 349.**

——S. 304-A—Applicability.

Section 304-A does not apply to a case in which there has been the voluntary commission of an offence against the person. If a man intentionally commits such an offence, and consequences beyond his purpose result, it is for the Court to determine how far he can be held to have the knowledge that he was likely by such an act to cause the actual result. If such knowledge can be imputed, the result is not to be attributed to mere rashness; if it cannot be imputed still, the wilful offence does not take the character of rashness, because its consequences have been unfortunate.

Acts which are offences in themselves must be judged with regard to the knowledge, or means of knowledge of the offender, and placed in their appropriate place in the class of offences of the same character. Where the act is in its nature criminal, S. 304-A has no application. **1955 Cri L J 1448 : AIR 1955 All 626 (629) (Pr 8) (DB).**

——S. 304-A—Rash or negligent act.

Before a conviction can be had under S. 304-A, Penal Code, a very high degree of negligence must be found, negligence which must amount to recklessness or utter indifference to consequences and not merely negligence of tort.

Rashness and negligence are not the same thing. Mere negligence cannot be construed to mean rashness. There are degrees of negligence and rashness. Criminal negligence is gross and culpable neglect, that is to say, a failu[illegible] to exercise that care and failure to take that precaution which having regard to the circumstances, it was the imperative duty of the individual to take; culpable rashness is acting with consciousness that mischievous consequences are likely to follow although the individual hopes, even though he hopes sincerely, that consequences may not follow. The criminality lies in not taking the precautions to prevent the happening of the consequences in the hope that they may not happen. The law does not permit a man to be uncautious on a hope however earnest or honest that hope may be. AIR 1953 All 72 and (1937) 2 All E R 552, Rel. on. **1954 Cri L J 405 : 1953 All L J 689 : 1953 All W R (H C) 637 : AIR 1954 All 186 (187, 188) (Pt A) (Prs 6, 8).**

——S. 304-A —Criminal rashness—Tests — To judge criminality of accused one should put himself in situation in which accused found himself and see what would be his reaction—Driver of goods train not seeing raised signal which was meant for him due to visual obstruction caused by tree and other railway construction but wrongly thinking that the lowered signal was meant for him — Train carried to a line ending dead end—Accident causing death of persons—Accused held not guilty under S. 304-A.

Where a driver of goods train was misled by railway signals due to visual obstructions caused by railway constructions and a tree and could not see the raised signal meant for him and thinking that the line was clear (being misled by the lowered signal not meant for him) drove on the train on a particular line, and dashed the train against the dead end with the result that some persons who were beyond the dead end unauthorisedly were killed, in order to judge of the criminality of the accused it is necessary, to put one-self in his position and to see what in the circumstances which were before him would be the normal reaction to these signals of a man situated as he was. It is easy after the event to analyse the happenings and to find out possible methods or devices which if adopted may have averted the accident. But this would be a wrong approach. Criminal rashness means hazarding a dangerous or wanton act with the knowledge that it is dangerous or wanton and the further knowledge that it may cause injury but done without any intention to cause injury or knowledge that it would probably be caused. The criminality in such a case lies in running the risk of doing such an act with recklessness or indifference as to the consequence. Criminal negligence under S. 304-A is gross and culpable neglect or failure to exercise that reasonable and proper care and to take precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances attending the charge, it was the imperative duty of the accused person to have adopted. Where the accused exercised the ordinary caution which was demanded of him inasmuch as he slowed down his train on entering the yard, it is difficult to saddle him with the knowledge that his train was to be received on the platform with a dead end line or failure to notice that a further signal which was intended for that particular line but which was obstructed from view, was not lowered. It is impossible, to insist in such a case that the driver should have discerned that the signals which misled him were not intended for him. His action might be unfortunate but could by no means be called grossly negligent. 3 All 776; 53 Cal 333, Applied. **1952 All L J 553 : 1952 All W R (HC) 604 : 1952 All Cri R 159 : 1953 Cri L J 324 : AIR 1953 All 72 (73) (Pr 4) (DB).**

——S. 304-A—Rash or negligent act—Meaning—Liability for—Civil and criminal—Distinction—Mere error of judgment is not sufficient for criminal liability.

Section 304-A does not apply to cases where there is an intention to cause death or knowledge that the act done will in all probability cause death. It only applies to cases in which without any such intention or knowledge death is caused by what is described as a 'rash' or 'negligent' act. A negligent act is an act done without doing something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or an act which a prudent or reasonable man would not do in the circumstances attending it. A rash act is a negligent act done precipitately. Negligence is the genus, of which rashness is the species. It has sometimes been observed that in rashness the action is done precipitately with the consciousness that the mischievous or illegal consequences may follow, but with a hope that they will not. But it is not necessary that there should always be this consciousness in a rash act. It has also been observed that in negligence there is no such consciousness of the consequences. This is also untrue : (1937) 2 All E R 552, Rel. on.

What may be called a negligent act in civil proceedings is not necessarily so in criminal cases. The principles of liability governing civil actions based on negligence differ from those governing criminal liability in two important particulars, firstly, that negligence in a criminal case must be culpable and gross and not the negligence which is merely based upon an error of judgment, or arises because of defect of intelligence; and secondly, that the principle of the avoidance of liability when there is contributory negligence by the injured person is no defence in criminal law: (1807) 172 E R 579, 16 Cox's Cr C 710, Ref.

But at the same time in order to find whether there was negligence at all, or whether the negligence was so gross as to make the accused criminally liable, one has to take into consideration all the attending circumstances and the attending circumstances must include the situation created by the negligent act of injured person.

The accused was driving at 15 or 20 miles per hour. When he saw the deceased in front of his lorry he blew the horn. When the deceased did not listen to the horn the accused swerved to his left in order to avoid the deceased. When the accused had already swerved to the left the deceased turned to his right, that is, in the same direction in which the lorry had been turned by the accused. The accused thereupon still further turned his lorry to the left so as to reach the footpath on the left. At this point the deceased was caught underneath the lorry and crushed ;

Held, that even if it be assumed that a more careful driver would have stopped the lorry at once, the act of the accused in swerving to his left, in order to avoid the deceased, was not so grossly negligent or reckless that the accused must be held criminally liable. 1950 All W R (HC) 23 : 1950 All Cri Cas 5 : 1950 All L J 93 : 51 Cri L J 865 : AIR 1950 All 300 (300, 301) (Prs 6, 7, 11, 12).

——S. 304-A—Rashness and negligence—Distinction between.

There is a distinction between rashness and negligence. If a person does an act with utter indifference to the consequences of which he may be conscious but which he hopes may not take place, he is said to be rash; and neglect to take that precaution which a reasonable and prudent person is expected to take under the circumstances obtaining in a given case is criminal negligence. In order to infer whether or not there is criminal rashness or negligence on the part of the accused, all relevant facts have to be considered. 67 Bom L R 472 : 1965 Mah L J 668 : 1966 Cri L J 400 : AIR 1966 Bom 122 (124) (Pt B) (Pr 13).

——S. 304-A—Ingredients of S. 304-A—Held, offence alleged was one under S. 304A and not under S. 304. See Penal Code (1860), S. 304. ILR (1957) 2 Cal 239.

——S. 304-A—Applicability.

Intentionally or knowingly inflicted violence directly or wilfully caused is excluded under S. 304A, Penal Code. In other words, the said section does not apply to a case in which there has been voluntary commission of an offence against a person. Thus where bodily injury is intentionally inflicted and the victim dies, the offence will be one of simple or grievous hurt if the intention or knowledge which is an ingredient of culpable homicide is wanting. 8 All 776 and 7 Mad H C R 119, Rel. on. 1963 (1) Cri L J 762 : AIR 1963 Him Pra 15 (21) (Pt B) (Pr 17).

——S. 304-A—Rash and negligent act—Tests.

The question whether the accused's conduct amounted to culpable rashness or negligence depends directly on the question as to what is the amount of care and circumspection which a prudent and reasonable man would consider it to be sufficient considering all the circumstances of the case. In such cases it is necessary to avoid being influenced by the prejudice arising out of the loss of a life which is so dominant a factor in accident cases : AIR 1944 Sind 124 ; A I R 1950 All 300 and AIR 1926 Cal 300, Rel. on. 1953 Cri L J 643 : AIR 1953 Hyd 123 (124) (Pr 2).

——S. 304-A—Negligence—Culpable rashness—Negligence is the omission to do something which a reasonable man, guided upon these circumstances which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. In order to establish the criminal liability the fact must be such that the negligence of the accused shows such disregard or lack to the safety of the other. While culpable rashness is acting with consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not and often with the belief that the actor has taken sufficient precautions to prevent their happening. A I R 1954 Madh Bha 41 (41) (Pr 12).

——S. 304-A—Rashness and negligence—Distinction—Person might be rash as well as negligent—Punishment—Principles to inflict—Circumstances for consideration.

Held, that negligence was not doing an act which one was bound to do because he adverted not to do it. Rashness was running a risk of which one was conscious. Culpable negligence was acting without the consciousness that dangerous consequences would follow. It was culpable rashness when a person thought of the probable mischief but in consequence of a mis-supposition begotten of insufficient advertence, he assumed that mischief would not ensue. All the same it was possible that a person might sometimes be both rash and negligent. Further, it should be remembered that the twin objects of punishment, merely are to prevent the convict from repeating it; to prevent others from doing similar things. Sentence must, therefore, be passed so that both the objects might be achieved. 1964 M P L J (Notes) 69.

——S. 304-A—Charge under—Alternative charge, for rashness or negligence—Rashness and negligence—Distinction.

A charge is defective if it uses the words 'rashness and negligence'. The accused can be charged alternatively for rashness or negligence. Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting, despite the consciousness. Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances incumbent upon him and that if he had, he would have had the consciousness. The imputability arises from the negligence of civic duty of circumspection. Criminal rashness and criminal negligence are two different things. 1959 M P L J 856 : 1959 Jab L J 495 : 1959 M P C 614 : 1960 Cri L J 482 : AIR 1960 Mah Pra 105 (106) (Pt C) (Pr 11).

——S. 304-A—Culpable rashness — Negligence—Distinction.

Acting with the consciousness that mischievous and illegal consequences may follow but with the hope that they will not follow is culpable rashness. Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow : 1953 N L J 320, Foll. 1959 M P L J (Notes) 138.

——S. 304-A — "Rash and negligent act"—Death of cyclist.

Rashness means doing an act with the consciousness of a risk that the evil consequences will follow but with the hope that they will not. Negligence is a breach of duty imposed by law. In criminal cases, the amount and degree of negligence are the determining factors. There must be mens rea in criminal negligence also. In order to establish criminal liability the facts must be such that the negligence of the accused went beyond a mere matter of comprehension and showed such disregard for the life and safety of others as to amount to a crime. Russel on Crime (1950) Edition, Page 641, Rel. on. 1957 Jab L J 208 : 1957 M P C 176 : 1957 M P L J 315 : 1956 Cri L J 1416 : AIR 1957 Madh Pra 236 (237) (Prs 5 to 8).

——S. 304-A — Scope — Mines Act, Ss. 72 and 74 — Offences under Mines Act and S. 304A of Penal Code are not same—Rashness and negligence are not necessary ingredients of offence under Ss. 72 and 74 of Mines Act — What is rashness indicated. See Mines Act (1952), S. 72. 1957 M P L J (Notes) 196.

——S. 304-A — Applicability — Criminal and Civil negligence—Distinction.

In sections of the Penal Code where the mens rea required is negligence, the word "negligence" is not used in any different manner from the word "negligence" in civil law. But there is bound to be difference between the proof of negligence required to sustain a conviction for criminal negligence and proof of negligence required in a civil suit to obtain compensation for damages. In a civil suit, it is sufficient to prove neglect of duty by consideration of the probabilities of the case But in criminal law it is necessary to prove beyond reasonable doubt the negligent act of the accused which resulted in particular harm to a person, such as hurt, grievous hurt, or death. (1962) 2 Mad L J 508 : 1962 Mad L J (Cri) 668 : 1963 (1) Cri L J 690 (690) (Pr 4) (Mad).

——S. 304-A— Criminal rashness and criminal negligence defined.

Criminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so and that it may cause injury, but without intention to cause injury or knowledge that it will probably be caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences. Culpable negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury to public generally or to an individual in particular which having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused to have adopted. 3 All 776 and 53 Cal 333, Foll. ('52) 1952 Nag L J (Notes) 30.

——S. 304-A — Case under Motor Vehicles Act—No issue raised as to whether accused was driving truck or not — Case under S. 304-A, Penal Code—Prosecution not debarred from adducing evidence as regards rash and negligent driving. See Cr. P. Code (1898), S. 403 (1). 1965 (2) Cri L J 683 : A I R 1965 Raj 221.

——S. 304-A — Offence under S. 304-A, is distinct from offences under Ss. 3/112, 89 and 126, Motor Vehicles Act. See Cr. P. Code (1898), S. 403 (1). 1965 (2) Cri L J 683 : AIR 1965 Raj 221.

——S. 304-A—Degree of rashness and negligence on the part of the accused required to be proved in criminal cases should be of such a nature that an inference about the commission of a crime may be safely made against him. Simple lack of care which may give rise to evil liability will not be enough for the purpose of establishing guilt of the accused under S. 304-A. 1961 (2) Cri L J 561 (562) (Pr 4) (Raj).

——S. 304-A—Mens rea, is essential.

Under S. 304A carelessness is not sufficient. Section 304A like other sections of the Penal Code, requires a mens rea or guilty mind. The rashness or negligence must be such as fairly to be described criminal. The question whether the accused's conduct in a particular case amounted to culpable rashness or negligence would have to be judged from the circumstances of each case and on the question as to what is the amount of care and circumspection which a prudent and reasonable man would consider to be sufficient upon all the circumstances of the case. 1953 Cri L J 94 : AIR 1953 Sau 10 (11, 12) (Prs 5, 6) (DB).

2. Death must be direct result of rash or negligent act.

——S. 304-A — Death must be direct result of the rash or negligent act of accused and the act must be efficient cause without intervention of another's negligence—It must be the causa causans; it is not enough that it may have been the causa sine qua non. 4 Bom L R 679, Approved. (1965) 1 S C W R 718 : (1965) 2 S C R 622 : 1965 All Cri R 331 : 1965 S C D 1056 : 1965 M P L J 562 : 67 Bom L R 447 : 1965 Mah L J 497 : 1965 (2) Cri L J 550 : 1965 All W R (HC) 527 : AIR 1965 S C 1616 (1617, 1618) (Pt A) (Prs 3, 4).

——S. 304-A—Conviction — Essentials—Death must be direct result of rash or negligent act.

In order to impose criminal liability under S. 304 A of the Code, it is essential to prove that death must have been the direct result of the rash, negligent act of the accused. The act of the accused must be the approximate and the efficient cause without the intervention of any other circumstance. It must be cause causans and not merely the cause sine qua non.

Where, therefore, the deceased persons in their endeavour to save themselves from an imminent danger caused by the collision of the truck with the Railway engine received the fatal injuries; while the persons who remained in the truck had not received such severe injuries on their persons.

Held, that it was a fit case for giving benefit of doubt to the driver accused under S. 304. ILR (1953)

5 Assam 412 ; 55 Cri L J 1297 : AIR 1954 Assam 169 (169) (Pr 2).

—S. 304-A and S. 337 — Causing death by negligence — Accident must be direct result of rash or negligent act.

In order to establish a charge of negligence under S. 304-A of the Penal Code, it must be established that the accident was the direct result of the negligence or rashness of the accused. A far higher standard of proof of negligence or rashness in a criminal prosecution is required by the Court in England, because the offence there is that of manslaughter if death is caused. But in respect of the offence under Ss. 304-A and 337 of the Penal Code, the same standard cannot obtain though no doubt the guilt must be proved beyond reasonable doubt. AIR 1943 P C 193, Rel. on. 67 Bom L R 472 : 1965 Mah L J 668 : 1963 Cri L J 490 : AIR 1936 Bom 122 (124) (Pt A) (Pr 22).

—S. 304-A—Applicability—Death must be result of rash or negligent act—Expression 'act' includes illegal omission.

In order to impose criminal liability on a person under S. 304-A, I. P. C. the rash or negligent act which causes the death of the victim must be the immediate or proximate cause of death and not any act or omission which can be said to be a remote cause of death. The expression "act" includes, unless the context otherwise warrants, an illegal omission (vide S. 32 of the Indian Penal Code). But not only must the act or illegal omission result in death, but the death must have been the direct result of the act or illegal omission of the accused. (1902) 4 Bom L R 679, Foll.

The accused were respectively the occupier, manager, manager in charge at the relevant time and the engineer of a factory. A valve pit in the purification plant of the factory stopped functioning and, on instructions from a person attending the plant, a labourer entered into the valve pit and was overpowered by poisonous fumes and became unconscious.

The same fate befell four others who entered the pit and all of them died. The accused were charged under S. 304-A, I. P. C. for having neglected to take all practicable measures to remove the fumes of dangerous gases from the pit of the purification plant in the mill premises and for having also neglected to provide the workers with suitable breathing apparatus and belts, and with failing to take the necessary precautions and thereby causing the death of the victims. None of the four accused was present when the workmen entered the pit nor was it the prosecution case that any of the accused directed the workmen to enter the pit. There was also no evidence on the record to show that it was even to the knowledge of any of the four accused that these workmen had entered the pit.

Held, that the death of the workmen of the factory was not the same causes of any act or illegal omission on the part of the four accused or any of them, and they could not be convicted under S. 304-A. 61 Bom L R 1909 : ILR (1959) Bom 1758.

—S. 304-A—Applicability—Conditions.

A person can be held guilty under S. 304-A, Penal Code, only when it is held that he 'caused' the death. A conviction can be sustained under S. 304-A of the Penal Code if death is the direct result of rash or negligent act of the accused. That act must have been the immediate, proximate and efficient cause, the causa causans and not merely the causa sine qua non of death without the intervention of any other negligence. 61 Bom L R 679 and AIR 1939 All 232, Rel. on. (1960) Mad Pri 165 : 1960 Jab L J 803 : 1958 Cri L J 933 : ILR (1959) Madh Pra 411 : AIR 1959 Madh Pra 234 (237) (Pt B) (Pr 54) (DB).

—Ss. 304-A and 337—Accused (snake-charmer) administering pills to his disciples along with boiled liver of goat—Some disciples dying and rest becoming sick — Burden of proof — No proof that death and sickness were direct result of taking pills — Accused held not guilty—Evidence Act (1872), Ss. 101-104 — Criminal trial. 30 Cut L T 18 : 1964 (2) Cri L J 42 : (1964) 6 O J D 275 : AIR 1964 Orissa 273 (274) (Prs 5, 6).

3. Rash or negligent act—Illustrations.

—Act held not rash or negligent.

(a) —Ss. 304-A, 302, 299 — Homeopath administering poisonous medicines to patient without studying its effect — Death of patient — Practitioner, held guilty under S. 304-A but not under S. 302.

Where the accused, who was registered as a Homoeopath, administered to the patient suffering from guinea worm, 24 drops of stramonium and a leaf of datura without studying its effect and the patient died of poisoning, the accused was guilty under S. 304-A and not under S. 302, Penal Code. The prisoner's contents of the leaf having not been satisfactorily established, the prosecution failed to prove that the dose given to the deceased was necessarily fatal. Therefore S. 299 did not apply and it cannot be held that the accused administered the stramonium drops and datura with the knowledge that he was likely by such an act to cause the death of the deceased. AIR 1943 P C 72, Distinguished. It is a rash and negligent act to prescribe poisonous medicines without studying their probable effect. Jayprakash v. State of Madhya Pradesh, (1965) 1 S C R 14 : (1965) 1 S C W R 797 : 1965 S C D 535 : (1965) 2 S C J 119 : 1965 Mah L J 483 : 1965 M P L J 357 : 1965 Mad L J (Cri) 422 : 1965 (1) Cri L J 763 : 1965 Jab L J 409 : AIR 1965 SC 881 (882) (Prs 10 to 12).

(b) —S. 304-A—Owner hanging live naked electric wire of high voltage across passage to his latrine to dissuade trespassers — No warning that wire was live one — Trespasser getting shock and some time after dying—Occupier is guilty of offence under S. 304-A —To become crime act need not be actionable wrong. Cherubin Gregory v. State of Bihar, (1964) 1 S C J 417 : 1964 M L J (Cr) 230 : 1964 Ker L T 366 : 1964 B L J R 193 : (1964) 2 S C A 128 : (1964) 2 S C W R 419 : 1964 Mah L J 503 : 1964 M P L J 350 : (1964) 5 Ker L R 691 : 1963 S C D 991 : 1963 Cri L J (SC) 128 : 1964 (1) Cri L J 188 : (1964) 4 S C R 199 : ILR 43 Pat 77 : AIR 1964 S C 205 (206) (Pr 7).

(c) —Ss. 304-A, 304 and 302 — Rash and negligent act.

A, a madman went to the house of B who was having a drink party. B was respectful to A and was over anxious to show all hospitality to him. B was anxious that the lunatic should not go away leaving his horse without taking meals and spending the night with him, and seeing that he was going away, in all probability let go his gun without aiming it at the lunatic in order to prevent him from leaving his place by terrifying him to some extent. The shot hit A in chest and he died of the wound later on. The evidence of the eye-witnesses and the first information report showed that the incident happened in a very short time and suddenly but the story that B took aim before firing at the lunatic or that he said that he had never allowed in the past anybody to go like that from his house was subsequently introduced in the case to add gravity to the offence committed by the accused.

Held, that on the materials placed on the record it could not be held proved that B had any intention of

firing at the Mahant. He seems to have pulled the trigger without aiming at the Mahant in a state of intoxication in order to see that by the gun fire the Mahant was prevented from leaving his place. It was a wholly rash and negligent act on B's part or at the worst was an act which would amount to manslaughter. It could not be held to constitute an offence of murder. B was, therefore, held guilty of an offence under S. 304-A; Penal Code, and sentenced to imprisonment already undergone by him;

(ii) that even if the offence were to be regarded as falling under S. 304, Penal Code, a severer punishment than the imprisonment that he has already undergone, was not neccssary. Sadhu Singh v. State of Pepsu, 1954 Cri L J 727 : I L R (1954) Patiala 66 : AIR 1954 S C 271 (276) (Pt B) (Pr 13).

——S. 304-A — Rash and negligent act — Ferrying passengers in river in floods—Boat capsizing — Loss of life — Ferry contractor is guilty under S. 304-A — Servants ferrying boat not guilty.

Where a ferry contractor, who had not taken a licence for the ferry service across the river after the expiry of his previous licence took the risk of putting the boat in water and ferrying passengers and transporting them, as floods in the river were receding, and there was a heavy wave which dashed against the boat and capsized it resulting in the loss of lives, the accused is guilty of rash and negligent act under S. 304-A.

But servants of the ferry contractor, who had ferried the boat cannot be held to be guilty under S. 304-A. Negligence and rashness consisted in taking the decision to ferry passengers in spite of the river being in floods. The responsibility for that decision and carrying it out was solely of the ferry contractor. 1962 Nag L J 329 : 1962 All Cri R 257 : 1962 All W R (Supp) 65 : 1963 (1) Cri L J 44 : I L R (1962) Bom 404 : AIR 1963 Bom 1 (2) (Pr 6).

——S. 304-A—'Rash or negligent act'—Hakim giving Procain Penicillin injection to deceased—Offence.

The fact that a person totally ignorant of the science of medicine or practice of surgery undertakes a treatment or performs an operation is very material in showing his gross ignorance from which an inference about his gross rashness and negligence in undertaking the treatment can be inferred.

Where the accused a Hakim, had no knowledge whatsoever of Penicillin injection treatment, his act of giving Procain Penicillin injection to the deceased would be clearly rash and negligent within the meaning of S. 304-A. 1959 Jab L J 602 : 1959 M P C 672 : 1959 M P LJ 966 : 1960 Cri L J 234 : AIR 1960 Madh Pra 50 (50) (Pr 4).

——S. 304-A—Crossing of trains at railway station—Omission to discharge personal responsibility cast on Assistant Station Master by rules — Act directly contributing to train collision—Conviction under S. 101, Railways Act, 1890 and S. 304-A, Penal Code held proper. I L R (1962) Cut 60.

—— S. 304-A — Accused wrongfully confining deceased in a room—Accused burying deceased in lime quarry believing him to be dead though in fact he was alive — Accused held guilty under S. 304-A although he had no guilty intention or knowledge — His act was rash. See Penal Code (1860), S. 299. 1960 Raj L W 4 : I L R (1959) 9 Raj 762.

Act held not rash or negligent.

——S. 304-A—Rash and negligent act.

The driver of an express goods train which was not expected to stop at a station slowed down on reaching the outer signal and on nearing the station yard saw only the inner starter signal of another line down —The starter signals of the line he was coming in obstructed from his view by a banyan tree and a water tank—and so he was running through at a speed of only ten miles an hour, and on coming to realise that the starter signals in the down position seen by him earlier was for another train which had just left the station—they had not been raised up again — he applied the brakes only invain and it, being a heavy goods train, ran through the dead end, a sand hump and into 2 huts unauthorisedly occupied and as a result 4 people were killed.

Held, to judge the criminality of the act of the driver charged under S. 304-A, it is necessary to put oneself in his place and see what would be the normal reaction under the said circumstance. It is possible after the event to devise modes of averting the accident. On the facts appearing as stated he had exercised the reasonable care expected of him slowed down before entering the station and was running the train at a slow speed being misled by the down position of the starter signals, which he had no reason to suspect to be not for him but for another train. His action was unfortunate; but he cannot be held to be grossly negligent and guilty of the offence under S. 304-A. 1952 All Cri R 159 : 1952 All L J 553 : 1952 All W R (HC) 604 : 54 Cri L J 324 : AIR 1953 All 72 (73) (Pr 4) (DB).

——Ss. 304-A, 80, 87—Accused and deceased friends —Former inviting latter for wrestling bout — Whilst wrestling deceased receiving accidental injury on his skull resuling in death — No foul play by accused — Case falls under Ss. 80 and 87 — Accused held committed no offence. See Penal Code (1860), Ss. 80, 87. 1949 All W R (HC) 476 : 1949 All Cri C 117 : 51 Cri L J Cas 402 : AIR 1950 All 95.

——Ss. 304-A and 323 — Applicability — Accused intending injury to one person throwing piece of wood —Piece of wood missing its mark and hitting a boy of seven on his head—Boy dying as a resuit of injury —Offence held was under S. 323 and not under S. 304-A. AIR 1955 N U C (Madh.B) 3884 (DB).

——Ss. 304-A and 338 — Accused directing labourers to stand across the road to stop a truck — Truck not stopping and crushing a person—Accused not guilty under S. 304-A or 338. 1962 M P L J (Notes) 236.

——Ss. 304-A, 321, 322 and 325—Hurt—Intention or knowledge is essential ingredient — Lawful act of accused resulting in death of boy due to accidental fall of hammer on head — Absence of intention to cause hurt or knowledge that hurt would be caused —Accused held not liable in view of S. 80. See Penal Code (1860), S. 80. 1962 Mad L J (Cri) 174 : (1962) 1 Mad L J 161.

——Ss. 304-A and 80 — Death caused by shooting under a mistaken but bona fide belief that object aimed at was wild animal—No offence is committed.

The accused, an employee in an Ammunition Depot, during the fore-noon on a particular day, went along with his co-employees towards the place of occurrence with the intention of shooting a hyena which was seen in the locality on the previous day and which they honestly believed had reappeared. Visibility on that day was poor due to drizzling of rain. All the persons were under the bona fide belief that the moving object seen by them was a wild animal and not a human being; nor was the area in question one in which the accused might reasonably have anticipated the presence of human being. The accused fired a gun shot at the moving object and to their surprise the object aimed at was found to be a human being who died on the spot. The accused was acquitted of the offence under S. 304-A, Penal Code but was convicted of the offence under S. 19 (e), Arms Act and sentenced to pay a fine of Rs. 20.

Held, that the accused was rightly found not guilty under S. 304-A, Penal Code. The facts unmistakably

showed that the amount of care and circumspection taken by the accused was that which a prudent and reasonable man would consider to be adequate upon all the circumstances of the case. The whole affair was a pure accident and accused was protected by the provisions of S. 80, Penal Code. The fact that he used an unlicensed gun would not deprive him of the benefit of that immunity. 8 All 778; 7 M H C R 115; 58 Cal 938, Applied; A I R 1926 Lah 556; 43 Cri L J 797 and 8 L L R 358, Rel.

Held further, that the offence committed under S. 19 (e), Arms Act being only technical, the sentence imposed was adequate and should not be enhanced. 1952 Cri L J 1181; 1952 Nag L J 320; I L R (1952) Nag 83; A I R 1952 Nag 268 (270); (Pr 14) (DB).

——S. 304-A — Death of patient bona fide treated in normal course with due care by X qualified Ayurvedic and Unani Surgeon and Physician having good practice and using allopathic drugs — Chemical examiner's report that poison detected in viscera of patient was morphine — Defence of X that he injected quinine and not morphia—Evidence that shortly after treatment by X, Y, who was Assistant Surgeon, also administered injections to the patient — Held that in the circumstances it was doubtful whether the action of X would be culpable — Nor was it possible to hold that treatment given by X was even proximately the cause of death—Accused was, therefore, entitled to benefit of doubt. 1951 All W R (Sup) 1; 1951 All Cr R 1; 52 Pun L R 203.

4. Rash or negligent driving.

——S. 304-A — Rashly and negligently—Meaning — Held on facts that there was rash and negligent driving.

The words 'rashly' or 'negligently' mean doing an act without due diligence and caution. The words are comparative words. A speed of 30 to 35 miles an hour may not be rash or negligent at one place, while at another place at a curve with billocks on one side and a 'khud' on the other side it may be rash or negligent.

Thus where a lorry of its own action left the proper road near a sharp bend, though the road was clear, crossed the kachha 'pert' went down the 'khud' and came to a stop after somersaulting several times.

Held, that there was no due diligence and caution in driving it. 1952 Cri L J 1956; 1951 A M L J 97; AIR 1952 Ajmer 34 (34) (1 Jus 2, 8).

——S. 304-A—Rash or negligent driving.

The accused was driving a motor lorry when a girl of 10 was run over, the injuries caused resulting in her death. It was found that the speed was moderate and the accused was driving on the correct side of the road. It was possible that the accident took place because the girl unexpectedly crossed the road.

Held, that in the circumstances the accused could not be said to be guilty of rashness or negligence. The accused was acquitted, to the benefit of doubt. 1950 A M L J 88; 51 Cri L J 1289; AIR 1950 Ajmer 45 (46) (Pr 5).

——S. 304-A — 'Rash' or 'negligent act'—Meaning of —Accused, after driving truck, with defective brakes, from evening to midnight, hurrying back at high speed with load, without taking rest and sleep — On the way accused dozing off and losing control, colliding with cart, resulting in death of one occupant and injuries to another — Accused held guilty under section 304-A. The case was fully covered by the state of mind which constitutes mens rea for the purpose of S. 304-A. 1960 All W R (HC) 184; 1964 All Cri R 116; 1965 (1) Cri L J 524; A I R 1965 All 149 (DB, 200) (Pr 4) (Pars 5, 15a).

——S. 304-A — Accused driving truck at very high speed — Horn not blown when he saw children playing on road — Truck not stopped — Boy of six years who was in the middle of road run over and killed — No suggestion of enmity between accused and deceased—No definite evidence to prove that accused deliberately took his truck over the boy—Death held due to rash and negligent act of driver and offence is under S. 304-A and not S. 304. See Penal Code (1860), S. 304. 1958 All Cr R 328. 1958 (2) All L J 548.

——S. 304-A—Evidence.

In a prosecution under S. 304-A, Penal Code, for rash and negligent driving the Court should not take into account the speed which the accused developed after the accident to judge the speed at which he was driving the truck prior to the accident. It is well known that it is a common human failing, however reprehensible it may be, for a man to attempt to run away if he has committed an accident. 1954 Cri L J 405; 1953 All L J 682; 1953 All W R (HC) 697; AIR 1954 All 186 (190) (Pr B) (Pr 10).

——S. 304-A — Rash and negligent driving, motor vehicle — Person found not to have driven vehicle, cannot be convicted. A I R 1955 M B C (Assam) 283.

——Ss. 304-A and 337 — Act endangering life of others—Motor driver's duty to members of public.

A person who is driving a motor car owes a duty to the members of the public to keep a look-out on the road. This is more so when approaching a pedestrian crossing where he would normally expect a pedestrian to cross the road. Regard must be paid to the habits of the public. 1949 A C 155, Considered. 57 Bom L R 472; 1955 Mah L J 686; 1955 Cri L J 490; A I R 1956 Bom 122 (125) (Pr C) (Pr 15).

——S. 304-A — Rash or negligent driving — Driver knocking down pedestrian who had avoided the road — Driver held guilty of rash and negligent driving. AIR 1955 N U C (Cal) 2938 (D B).

——Ss. 304-A, 279 — Criminal P. C., S. 239, Cl. (d) — Collision of motor vehicles — Trial of drivers for offences under Ss. 279 and 304-A, Penal Code, in one trial is bad. 1965 (2) Cri L J 518 (L); A I R 1965 Gau 275 (275) (Pr 1).

——S. 304-A — Cyclist trying to overtake rickshaw dashing against mudguard of bus coming from opposite direction—Cyclist receiving injuries resulting in death—Bus-driver—If guilty.

A deceased cyclist in trying to overtake a rickshaw dashed against the right side of a mud-guard of a bus coming from opposite direction, fell down and received injuries resulting in death. It was established that the bus-driver had to bring his bus to a stand-still 150 yards before the accident took place because there was a cart obstructing his way. After the obstruction had cleared he again set his bus in motion, and after proceeding 100 yards or so this accident took place.

Held, that having regard to all these facts it was not possible to hold that the bus-driver was driving his bus in such a rash or negligent way as would bring him within the ambit of S. 304-A. On the other hand it was clear that there had been negligence on the part of the cyclist who in attempting to overtake a rickshaw dashed against the mud-guard of the bus. I L R (1958) Kyd 93; 1958 Cri L J 843; AIR 1958 Kyd 185 (191) (Pars 2, 5).

——S. 304-A — Death caused due to rash and negligent driving of a motor vehicle on public road — Criminal rashness and criminal negligence — What amounts to stated. See Penal Code (1860), S. 279 1961 Ker L T 709.

——S. 304-A—Driver of truck not stopping his goods truck then and there after a girl has crossed it but proceeding further — Girl struck by the back-side of the truck, resulting in extensive fracture of skull — Accident taking place on bazar day — Road narrow— Truck proceeding at comparatively moderate speed— No inference of gross negligence and recklessness can be drawn against the driver, because he did not stop the truck immediately after the girl had crossed the road—Accused acquitted. **A I R 1954 Madh B 41 (42) (Pr 16).**

——S. 304-A — Accused driving a truck dashing against a cyclist from opposite direction—Also hitting a tree and stopping later beyond 180 feet—Driving indicated to be at excessive speed and rash — Burden was on accused how unfortunate accident occurred— Principle of res ipsa loquitur applied — Conviction maintained. A I R 1945 Nag 242, Foll. **1965 M P L J (Notes) 114.**

——S. 304-A — To avoid accident motor driver impelled to take vehicle to wrong side — Situation perilous—Driver's decision proving to be wrong—He was neither rash nor negligent.

The accused was convicted for driving a bus rashly, negligently and at an excessive speed and thereby causing death of a person. In his defence the accused stated that in order to avoid collision with a car travelling from the opposite direction he had to swerve the bus to the right. that in that process the foot brakes got jammed. that in the meantime the person who was coming from the opposite direction, emerged from behind a tonga and the bus was turned further to the right to save him and that he dashed against the rear portion of the bus, fell with his bicycle and the rear wheel of the bus passed over him.

Held, that sudden mechanical failure of foot brakes was not uncommon. That being so, it appeared that the unfortunate accident was attributable to the endeavour of the accused to avoid collision with a car travelling in the opposite direction from the wrong side of the road and the mechanical failure of the foot brakes in the process of suddenly swerving it to right to do that. The motor driver was neither rash nor negligent when, in order to avoid an accident, he was suddenly impelled to take his vehicle to the wrong side of the road. It was hardly necessary to say that a driver, who was suddenly faced with a perilous situation, had to decide in split second how best to act in order to avoid it and even if he decided upon a course which might subsequently be shown to be wrong, he was not criminally liable. The circumstances appearing in the case did not fully bring home the offence to the accused. **1964 M P L J (Notes) 63.**

——S. 304-A—Accused was driving a bus without the left headlight and without sounding the horn when it was going through a village and taking a bend to enter the main trunk road. A boy who was sitting on the left crossed the road at a distance of 15 feet in front of the bus. He was hit by bus and killed. It was in evidence that the person who was sitting with the accused was able to see the boy.

Held, that the accused was guilty of negligence under S. 304-A. **(1962) 2 Mad L J 508 : 1962 Mad L J (Cri) 668 : 1963 (1) Cri L J 690 (691) (Pr 5) (Mad).**

——S. 304-A—Ingredients of offence — Duty of motorist to pedestrains—Negligent driving—What is.

In an offence under S. 304-A, I. P. Code, where a death is caused by the negligent and rash driving of a motor car, negligence consists of two factors (a) speed and (b) failure to apply the brakes in time.

Both as regards the civil and criminal liability the rate of speed which will be considered dangerous varies with the nature, condition and use of the particular highway and the amount of traffic which actually is or may be expected to be on it. The driver of a vehicle must drive at a speed that will permit of his stopping or deflecting his course within the limits of his vision. It is the duty of the driver to drive his vehicle at a speed which will not imperil the safety of others using the road. The driver is under a duty of using whatever means are at hand to avoid a threatened collision. The most obvious means of avoiding the collision is the brakes with which the car must be equipped. It will constitute culpable negligence if a driver drives a vehicle with patently defective brakes or fails to apply the brakes in time.

Applying the above principles to the facts of the case, held that by reason of the criminal negligence in driving his car at a speed which the circumstances existing at the time of the collision did not warrant and secondly, by not keeping a lookout to avoid collision and thirdly, by failing to apply the efficient brakes which he had in time, and which braking would have averted the collision, the accused was plainly guilty of an offence under S. 304-A. **72 Mad L W 341 : 1959 Mad W N 67 : 1959 Mad L J (Cr) 31: (1959) 1 Mad L J 46 : 1959 Cri.L J 1344 : AIR 1959 Mad 497 (500, 501) (Pt A) (Prs 14, 17 to 19).**

——S. 304-A—Rash or negligent driving.

Where the driver of a bus drove the vehicle at an excessive speed over a wet and zigzag road, deviating from the right side of the road to the wrong side and keeping a proper look out and putting himself in a position as not to be able to apply the brake in time with the result that it over-ran the people standing near a bridge resulting in the death of one.

Held, that there was gross negligence and the driver was clearly guilty of the offence under S. 304A. **(1959) 72 Mad L W 367.**

——S. 304-A—Rash and negligent driving.

At the time of the day when the road is likely to be used frequently by others the driving of a bullock cart at terrific speed by letting loose the reins of the bulls amounts not only to rashness but also to negligence on the part of the driver of the cart. **(1951) 2 Mad L J 54 : 1953 Cri L J 1393 : AIR 1953 Mad 774 (775) (Pr 4).**

——S. 304-A—Cyclists driving abreast and conversing —Accident with motor bus—Driver held not negligent —(Tort—Negligence—Motor accident).

Held, that it is a very common feature in Manipur that when more cyclists than one go along the road, they always drive their cycles in parallel fashion, abreast of each other and that in spite of the sounding of the horn by motor vehicles they refuse to give side and expect the motor vehicles to avoid the cycles by swerving the vehicles towards the right. In this case the driver of a bus had to swerve towards the right in order to avoid A and B who were driving their cycles in parallel fashion along the road and if at time C and D were coming in the opposite direction also in parallel fashion conversing with one another and the bus was not able to avoid one of them even though it was not coming at a high speed and it sounded its horn it could not be positively stated that the bus driver was negligent in driving the bus. It is better that the cyclists understand that driving abreast along the road on cycles is against the rules. If the accident happened when the cyclist was driving along the road against the rules the driver of the motor vehicle cannot be found fault with. **1963 (1) Cri L J 692 (692) (Pr 5) (Manipur).**

——S. 304-A—Burden of proof ordinarily is on prosecution—When accident is by vehicle dashing against tree, presumption is that accused was driving vehicle rashly and negligently — Presumption. **AIR 1955 N U C (Mys) 699.**

——S. 304-A—Accused driving a defective vehicle loaded with bags on a ghat allowing three persons including deceased to sit on bags—Vehicle while ascending slipping back—Vehicle overturned — Death of deceased—Accused held guilty under S. 304A. ('52) 1952 Nag L J (Notes) 30.

——Ss. 304-A and 279 — Driver of goods vehicle carrying passengers—Passengers allowed to sit on top of goods due to negligence of driver—Passenger falling down and run over by truck—Driver is liable for offences under sections — Orissa Motor Vehicles Rules.

Held, on facts, that the driver contravened the provisions of clauses (a), (c) and (e) of R. 95 of the Orissa Motor Vehicles Rules and as in consequence of that contravention the deceased fell down and died, the liability of the driver of the vehicle for rashness and negligence necessarily followed. 31 Cut L T 279 : ILR (1964) Cut 603.

——Ss. 304-A, 279—Criminal negligence in driving loaded truck with worn out front tyre on down gradient, at excessive speed—Bursting of tyre—Truck going out of control and meeting with accident — Contravention of Rule 85 (4) of Orissa Motor Vehicles Rules, 1940, held itself, culpable negligence.

A fully loaded truck while being driven down a slope in a Ghat met with an accident by the burst of a front wheel tyre. As a result of the burst, the truck swerved to one side and the driver could not control the same. The truck turned turtle and fell in ditch. Some of the passengers were severely injured and one old lady passenger died. It was found that the truck was being driven at excessive speed of 30 to 35 miles per hour. The burst tyre was too much worn out, with its canvas exposed.

Held, that driver in undertaking the responsibility of driving a vehicle with such a worn out tyre on the front wheel which he could have noticed had he exercised ordinary care and diligence, was clearly guilty of criminal rashness and negligence.

That there was contravention of R. 85 (4) of the Orissa Motor Vehicles Rules, 1940, which required the driver of a public service vehicle to exercise reasonable care and diligence in maintaining the vehicle in a fit and proper condition, which amounted, in the circumstances of the case to criminal negligence. Merely because there was an alternative remedy by way of a prosecution for contravention of a rule under the Motor Vehicles Rules, it could not be laid down as a general proposition that the contravention of a specific rule under the aforesaid rules clearly casting a duty on the driver to be vigilant, could not be taken as a circumstance to show negligence or rashness on his part in driving the vehicle though this circumstance must be judged along with other facts and circumstances proved in the case to decide whether he was guilty or not. 16 CLT 181 held impliedly overruled by 17 C L T 39; AIR 1944 Nag 285, AIR 1953 Pat 56, 17 C L T 39, Relied on.

The driver was thus guilty of both culpable rashness and culpable negligence. He was rash in undertaking to drive the truck with such a worn out tyre thereby running a great risk, in the faint hope that nothing serious may happen. He was negligent in not driving the vehicle with due care at slow speed and in not controlling the steering with a view to prevent the vehicle from falling into the ditch even after the tyre had burst. (1962) 4 Orissa J D 372 : 29 Cut L T 59 : I L R (1962) Cut 947.

——S. 304-A — Burden of proof — Duty of prosecution.

The prosecution must prove that the accused was guilty of rashness or negligence in utter indifference to consequences.

After having fitted up the spare spindle to the motor vehicle, the accused wanted to put the vehicle in motion. He was pressed by the coolies in the vehicle to go by the vehicle since they were waiting for two days in the jungle without food and get into the truck. The truck was coming with a slow speed. At the place where the accident took place there being a slope, no driver could keep control over the vehicle. There was proof that the spindle fitted by him was not quite in order.

Held, that the prosecution had failed to prove that the accused was either rash or negligent when the occurrence took place. (1959) 1 O J D 703 ; ILR (1959) Cut 709.

——S. 304-A—Rash or negligent driving.

There is a fundamental difference between criminal rashness and negligence necessary to establish criminal liability and mere negligence or rashness which may involve only a civil liability. In judging whether the driver of motor vehicle was guilty of rashness or negligence sufficient to render him liable to punishment under the section no abstract standard can be laid down. The Court has to judge what is the amount of care and circumspection which a prudent man would consider it to be sufficient having regard to all the circumstances of the case.

A prudent driver should not take his bus along a route which is not his authorised route. When he has taken that route he should proceed at a slow speed, blow the horn when he notices somebody on the route in front and keep the vehicle under such control so as to be able to stop it within a very short distance. When he takes none of the precautions the fact that the pedestrian in front suddenly crossed the path of his bus would not exonerate him from guilt for an offence under S. 304-A. (1959) 25 Cut L T 175.

——S. 304-A—Rash or negligent driving—Test—Difference between criminal rashness or negligence and rashness or negligence giving rise to civil liability pointed out.

In judging whether a driver of a motor vehicle is guilty of rashness or negligence, no abstract standard can be laid down, and the Court has to judge what is the amount of care and circumspection which a prudent and reasonable man would consider it to be sufficient having regard to all the circumstances of the case. (Difference between criminal rashness or negligence and rashness or negligence giving rise to civil liability pointed out.) AIR 1953 Hyd 123 and AIR 1926 Cal 300, Rel. on.

Accused was driving a motor bus. He left the starting station nearly three hours after the scheduled time of departure. During the journey he tried to overtake another bus several times in spite of the fact that a passenger who was sitting by his side in the vehicle cautioned him not to compete with that bus. After reaching the bus stand he drove through a lane towards the police station though it was not the authorised route, mainly for the purpose of reaching earlier than the other bus which had taken the main route. The surface of the road in the lane was rough and uneven and the road was also slipping downwards in the direction in which the bus was proceeding. The accused ran over a woman who was walking on the lane ahead of the bus and killed her outright. He pleaded that the accident took place because the woman who was proceeding all along on the left side of the lane suddenly got confused and ran towards the right side when the bus was almost upon her; and that notwithstanding his desperate efforts to avert the accident by turning to the extreme right the collision could not be avoided. There was evidence indicating that he did not blow the horn though the woman was first noticed at a distance of thirty yards from the bus.

Held that under the circumstances there was criminal rashness and negligence on the part of accused and he was rightly convicted. (1959) 25 Cut L T 175.

——S. 304-A—Applicability — Motor driver backing car at night when dark without going to the rear to see that rear is clear — Car running over sleeping person and causing death — Liable under S. 304-A. (1951) 17 Cut L T 359.

—— S. 304-A—Applicability —Driving at high speed of motor bus with defective brakes—Accident resulting in injury to passengers and death of one due to the bus capsizing on the road — Body of bus going into pieces — Road clear—Accused driver held guilty under S. 304-A. 1953 Cri L J 518 : AIR 1953 Pat 56 (DB).

——Ss. 304-A and 338 — Prosecution must prove accused guilty of culpable negligence to bring case under sections—Defect in pull and push rod of bus — Meticulous examination necessary to detect defect—Driver is not bound to undertake such examination before driving the vehicle — Absence of evidence to show that defect could have been within knowledge of the driver—Criminal liability cannot be fastened to him. 1962 R L W 281 : ILR (1962) 12 Raj 103.

—S. 304-A—Rash or negligent driving — Inability to avoid collision due to defective brakes—Death of pedestrian—Culpable negligence of driver—Conviction under S. 304-A.

Where the driver of a motor vehicle cannot stop the vehicle in time to avoid collision with a pedestrian on a crowded street, due to inefficiency in the strength of the brakes, the resultant death of the pedestrian must be attributed to the culpable negligence of the driver in driving the vehicle with defective brakes making him liable for a conviction under S. 304-A. (Duty of motor drivers to the pedestrians fully explained.) Case law discussed. 1961 Raj L W 466.

——S. 304-A—Scope—Rash and negligent driving—Collision in centre of road between buses approaching from opposite directions—Brakes out of order—Offence.

The degree of rashness and negligence on the part of the accused required to be proved in criminal cases should be of such a nature that an inference about the commission of a crime may be safely made against him. Simple lack of care which may give rise to civil liability will not be enough for the purpose of establising guilt of the accused under S. 304-A.

When two buses are approaching each other from opposite directions, it is the duty of the driver to observe the rule of the road and to keep to his side of the road leaving sufficient space for the other to pass by safely. Driving a bus when both its brakes are out of order is itself a negligent act. It is the duty of the drivers to drive the vehicles at such a speed that they may be able to pull up at the time of emergency.

Held, on facts that the accident took place due to the rash and negligent driving by the drivers of both the buses. There was a failure on the part of the drivers to observe the rule of the road and that was prima facie evidence of negligence. 1961 (2) Cri L J 561 (562 to 564) (Prs 4, 5, 6) (Raj).

——S. 304-A—Rash or negligent driving — Inference of—Herd of cows coming on road from opposite direction — Accused driving truck on wrong side to the extent of leaving road, and causing death of a boy who was on right side of the road—Accused admitting in examination that he wanted to stop the truck but could not do so — Held, that the fact that he could not stop the truck indicated that the speed was such that he could not pull up at the crucial moment. He should have taken reasonable and proper care when there was a herd of cows and the road was not clear —In the circumstances, it would be correct to hold that the boy was killed on account of rash and negligent driving of the truck by the accused. AIR 1950 Ajmer 45; AIR 1929 Mad 256, Disting. 1960 Raj L W 680 : ILR (1960) 10 Raj 1415.

——S. 304-A—Rash and negligent act — Mens rea is essential—Novice having no license, driving car having no horn and workable brakes, in busy thoroughfare, knocking down a girl passerby and killing her and causing grievous hurt to others, is guilty under S. 304-A and S. 338.

Where the driver of a motor car who is novice and has no license, ventures to drive in a crowded thoroughfare a defective car having no horn and the brakes of which were entirely defective, knowing himself to be still a novice, his act amounts to rashness. Where he in such circumstances tries to overtake the pedestrians and other vehicles which are on the road, being fully conscious of his incompetence as a driver, his act amounts to negligence. In such a case, if a girl passerby is overrun and dies, and others sustain grievous hurt, the driver is guilty of criminal rashness and criminal negligence under S. 304A and commits offences under Ss. 304A and 338, Penal Code. Case law ref.

The question of sentence depends on facts of each case. Case law ref.

The sentence of 4 months simple imprisonment was enhanced to 4 months rigorous imprisonment and the fine of Rs. 500 was retained. 1953 Cri L J 94 : AIR 1953 Sau 10 (11, 12) (Prs 5, 6) (DB).

——S. 304-A—Rash or negligent driving causing death — Accused driving a lorry along the centre of a straight road at a high speed in order to keep pace with railway train running parallel to the road—Lorry loaded with several bags of paddy upon top of which were seated two persons. Three bullock carts coming in opposite directions along the correct side of the road'— First two carts passing without danger —Third cart loaded with iron bars protruding in front of the cart suddenly turning to its right — Accused suddenly swerving towards right to allow cart to pass with the result that the lorry overturned causing death of one person — Accused held was liable for the death caused by his rash and negligent driving at the time of the accident. 1954 Cri L J 7 : AIR 1954 Trav Co 25 (26) (Pr 5) (DB).

——Ss. 304-A and 337 — Rash and negligent act—Sentence—(Travancore Penal Code (I of 1074), Ss. 337 and 304).

Motor lorry passing by 18 feet road at midmight — Right side wheels passing over 20 feet of metal stacked on right side of road. Left wheel tyre bursting causing lorry to overturn on left side — One passenger and cleaner injured—Latter dying as result of injury—No explanation for running on right side of road given—Belated reason as to overtaking bullock carts not believed — Driver held guilty of offences under Ss. 337 and 304-A—Sentence of fine of Rs. 150 held sfficient. 1953 Cr L J 1850 : A I R 1953 Trav-Co 617 (617) (Pr 3) (DB).

——S. 304-A—Rash and negligent driving—Culpable rashness and negligence explained —Motor car passing along correct side of road at speed of 20 M. P. H.—Road clear — Man coming from opposite direction on right side of road, suddenly crossing across road when approaching him within 10 feet—Case held was pure accident and driver not guilty of any rash or negligent act of driving. See Penal Code (1860), S. 279. AIR 1950 Trav-Co 14 (DB).

5. Contributory negligence.

——S. 304-A — Contributory negligence — Rash or negligent driving — Duty to slow down in face of

apparent danger — Collision of trucks proceeding at 15 to 20 miles an hour on bridge 22 feet wide with small car coming from opposite direction at 30 to 35 miles an hour — Contributory negligence of car driver—Liability of truck drivers could not be exonerated. (1952) 148 L T 391, Rel. on. 1962 All Cr R 376 : 1962 All W R (Sup) 93 : 1962 (1) Cri L J 189 (190) (Pr 6) (Punj).

——Ss. 304-A and 338 — Applicability — Rash and negligent act—Motor accident — Contributory negligence—In driving a mechanically propelled vehicle which has now become an indispensable part of our civilization the driver has most often to take decision in a split second. In criminal law contributory negligence is no defence therefore all that the court has to see is whether the accused acted rashly irrespective of the fact whether the cartman coming from opposite direction also contributed to the accident and judge his conduct by the standard of an ordinary reasonable and careful driver. 1958 M P C 213 : 1958 Jab L J 331 : 1958 M P L J 318 : 1958 Cr L J 1032 : I L R (1957) Madh Pra 357 : A I R 1958 Madh Pra 205 (207 to 209) (Pt B) (Prs 15, 16, 18 to 21) (DB).

——S. 304-A—Rashness and negligence of accused proved to have caused accident — Contributory negligence of victim does not excuse liability — Award of sentence—Contributory negligence, proper consideration.

Contributory negligence in the strict sense of the term has no place in criminal law. Therefore in assessing the liability of a person charged under the section the fact that the victim also contributed a little by his negligence to his own death is absolutely immaterial where there is ample proof that the accused had brought about the accident by his own negligence and rashness. But the little contributory negligence on the part of the victim and the accused's good military record are relevant for the purpose of sentence. (1949) 2 Mad L J 819 : 1950 Mad W N 39 : 1950 All W R (Supp) 9 : 1950 All Cri Cas 26 : 1950 Mad W N (Cri) 19 : 51 Cri L J 733 : AIR 1950 Mad 308 (308) (Prs 3, 4).

——S. 304-A — Plea of contributory negligence — Doctrine of contributory negligence is no defence in a criminal case. (1959) 1 O J D 312 : I L R (1959) Cut 335 : A I R 1960 Orissa 7 (13) (Pt C) (Pr 24) (DB).

6. Sentence.

——Ss. 304-A and 53 —Causing death by negligence —Sentence.

Sentence is a matter of discretion and the limits cannot be fixed by judicial precedents for all time in the future. The discretion is that of the trial Court. Ordinarily, the High Court will not interfere with the exercise thereof. Yet having regard to the circumstances of the case and the fact that the sentence must be such as to serve as a deterent to others the High Court may, if necessary impose a substantive sentence of imprisonment in addition to the sentence of fine imposed by the trial Court. 67 Bom L R 472 : 1965 Mah L J 669; 1966 Cri L J 400 : AIR 1966 Bom 122 (126) (Pt D) (Pr 19).

——S. 304-A—Severity of sentence depends to great extent on degree of callousness which is present in the character of accused — Utter callousness on the part of driver of motor vehicle in having gone on wrong side of the road, losing control and running over a person who was sitting on extreme end of road and dashing against a cyclist — Accused purely found guilty—Question of sentence is a matter of his discretion — Appellate Court not to interfere when sentence awarded was proportionate to gravity of offence, except upon strong grounds—Sessions Judge reducing sentence for reasons which are not quite satisfactory — High Court, however, should exercise powers of enhancement very rarely — But when sentence is grossly inadequate, it would not hesitate to impose adequate sentence even though effect of enhancement is to send the accused back to jail. 1961 Ker L T 769.

——S. 304-A — Rash or negligent driving — Plea of guilty—Sentence—(Criminal P. C. (1898), S. 32).

If a man is riding a bicycle and is crushed under a motor vehicle in circumstances which cause instantaneous death, there are only two possibilities, either the victim himself is negligent or rash, while the driver is not at fault, or the driver is rash or negligent to a high degree. In the first case the accused is entitled to an acquittal. In the second, the accused is liable to an appropriate punishment. A sentence of a fine of Rs. 25 even though the accused pleads guilty is palpably inadequate and does not meet the ends of justice. 1959 M P L J 856 : 1959 Jab L J 495 : 1959 M P C 614 : 1960 Cr L J 482 : A I R 1960 Madh Pra 105 (105) (Pt A) (Pr 5) (DB).

——S. 304-A—Sentence—Duty of Court.

In regard to the sentence the Court must keep out false prejudices in cases of accidents. The difficulty is to keep out of mind the prejudice that inevitably creeps in by reason of the fact that lives have been lost and the responsibility for the same ultimately rests with none else but the accused. This prejudice is bound more or less to reflect on the question of the culpability of the accused and give rise to false issues which tend to cloud judicial vision. The task no doubt of keeping out the prejudice is a difficult one but it has got to be performed. The Court must, therefore without any prejudice award a punishment which is proportionate to the gravity of the offences and to ensure that road-hogs of the description of the accused are taught a deterrent lesson. 1959 Mad W N 67 : 1959 Mad L J (Cr) 31 : (1959) 1 Mad L J 46 : 72 Mad L W 341 : 1959 Cr L J 1344 : AIR 1959 Mad 497 (501) (Pt B) (Pr 20) (DB).

——S. 304-A—Scope of — Motor Vehicles Act (4 of 1939), S. 121—Separate sentence.

The imposition of one punishment on a driver of a motor vehicle under S. 304-A, Indian Penal Code for causing death by negligence and a further punishment for the same offence under S. 121 of the Motor Vehicle Act for using a vehicle in unsafe condition is opposed to law. (1954) 2 M L J 765 : 67 Mad L W 893 : 1954 Mad W N 747 : 1955 Cri L J 1267 : AIR 1955 Mad 548 (549) (Pr 3).

——S. 304-A — Sentence of fine — Adequacy and legality.

A fine of Rs. 10 and in default R. I. for one week imposed on accused on his plea of guilty to charge under S. 304-A, I. P. C. is wholly inadequate. 1960 Mad LJ (Cr) 318 : 1960 Cr L J 965 : ILR (1959) Mys 477 : AIR 1960 Mys 177 (177) (Pt B) (Pr 2).

——S. 304-A—Conviction under S. 101, Railways Act and S. 304-A, Penal Code—Single sentence passed for both offences—Particular offence for which sentenced was passed not indicated — Order modified. I L R (1962) Cut 60.

——S. 304-A—Sentence—Rash and negligent driving resulting in death of nine persons.

The petitioner was the driver of a truck heavily loaded with timber and carrying 16 passengers. The driver was driving the truck down a ghat road and knocked down 6 curve stones fixed on the left, rolled down into a ditch below and turned turtle killing down six perons on the spot. The petitioner was convicted under S. 304-A, I. P. Code and was sentenced to fine only on ground of protraction of the trial.

Held, (i) that in the circumstances of the case the incident was direct result of recklessness and negligent driving by the petitioner in utter disregard of the safety of the passengers and there was no question of error of judgment.

(ii) that the conduct of the petitioner was callous throughout and his inability to control the vehicle was due to his recklessness and therefore a mere sentence of fine was inappropriate. The undue prolongation of the trial may be a ground for not imposing a long term sentence of imprisonment, but it will not be a ground for letting off the petitioner with a sentence of fine only. 27 Cut L T 146 : 1961 All W R (Sup) 28 : 1961 All Cr R 207 : 1961 (1) Cr L J 300 : AIR 1961 Orissa 45 (47) (Prs 10, 11).

SECTION 306

——Ss. 306, 107—Instigation—Accused aiding widow to commit sati — Accused held guilty under S. 306. See Penal Code (1860), S. 107. 1958 Cri L J 967 : AIR 1958 Raj 169 (DB).

—— S. 306— Sentence.

A sentence of six months' rigorous imprisonment for barbarous act or abetment of sati is ludicrous. It is essential that people should respect the law and as the custom of Sati is forbidden by law, a deterrent punishment is called for in such case. 1958 Raj L W 19 : 1958 Cri L J 967 : ILR (1958) 8 Raj 143 : A I R 1958 Raj 169 (172) (Pt B) (Pr 11) (DB).

SECTION 307

SYNOPSIS

(Penal Code (1860), S. 307.)

1. Scope.
2. "Whoever does any act . . . . guilty of murder."
3. Intention or knowledge.
4. "Under such circumstances".
5. Evidence and proof.
6. Charge.
7. Conviction and sentence.
8. Procedure.

1. Scope.

——Ss. 307 and 351 — Attempt to slaughter and preparing for slaughter—Distinction pointed out—Mere preparation for slaughter of cow is no offence. See U. P. Prevention of Cow Slaughter Act (1 of 1956), S. 8. 1962 (1) Cri L J 7 : A I R 1962 All 22.

——S. 307—Scope.

In an attempt to murder all the elements of murder exist except the fact of death. The cause of the want of success is immaterial. It may be due to timely escape, or the rescue of the person assaulted, the missing fire of the gun or recovery from a wound. Whatever the intervening obstacle to succe ss may be, the accused cannot plead it in his aid if it was not known to him. To sum up, an attempt to commit murder is an act done with intent to commit the crime and forming part of the series of acts which would constitute such actual commission and would be the last proximate act done in the execution of the crime, the completion of the offence being prevented only by some cause independent of the offender's volition.

The nature of the injuries actually caused may often give considerable assistance in determining the intention of the accused, but the intention may be deduced from other circumstances and may in some cases be ascertainted with reference to the actual wounds. 1960 Mad W N 528.

2. "Whoever does any act . . . . guilty of murder."

——Ss. 307, 511, 33—Attempt to commit murder—What constitutes — The act towards commission of murder need not be the penultimate act — Course of conduct adopted by accused in regularly starving person in order to accelerate his end constitutes attempt to commit murder.

A person commits an offence under S. 307 when he has an intention to commit murder and, in pursuance of that intention, does not act towards its commission irrespective of the fact whether that act is the penultimate act or not. The expression 'whoever, attempts to commit an offence' in S. 511, can only mean 'whoever intends to do a certain act with the intent or knowledge necessary for the commission of that offence.' The same is meant by the expression 'whoever does an act with such intention or knowledge and under such circumstances that if he, by that act, caused death, he would be guilty of murder' in S. 307. The expression 'by that act' does not mean that the immediate effect of the act committed must be death. The word 'act' denotes, according to section 33 as well, a series of acts.

Held, on facts, of the case that the course of conduct adopted by the accused in regularly starving the wife in order to accelerate her end came within the purview of S. 307 though it was not the last act which if effective would cause death A I R 1961 S C 1698 and (1910) 2 K B 124, Rel. on; 10 Cri L J 363 (Low Bur) Dist.; 14 All 38, Overruled. Om Parkash v. State of Punjab, 1961 S C D 859; 1961 All W R (HC) 660 ; 1961 All Cri R 375 : (1962) 1 S C J 189 : 1962 Mad L J (Cri) 115 : (1962) 2 S C R 254 : 1961 All L J 822 : 1961 (2) Cri L J 848 : A I R 1961 S C 1782 (1786) (Pt A) (Prs 9, 10).

——S. 307—Attempt to commit murder by fire arm —Act amounting to attempt to commit murder is bound to be the last act.

In cases of attempt to commit murder by fire arm the act amounting to an attempt to commit murder is bound to be the only and the last act to be done by the culprit. Till he fires, he does not do any act towards the commission of the offence and once he fires, and something happens to prevent the shot taking effect, the offence under S. 307 is made out. Om Prakash v. State of Punjab, 1961 S C D 859 : 1961 All W R (HC) 660 : 1961 All Cri R 375 : (1962) 1 S C J 189 : 1962 Mad L J (Cri) 115 : (1962) 2 S C R 254 : 1961 All L J 822 : 1961 (2) Cri L J 848 : AIR 1961 S C 1782 (1787) (Pt B) (Pr 16).

——S. 307 — Accused using country-made pistol on non-vital part of body from close range — Offence does not fall with within S. 307. 1965 All Cri R 31 : 1965 All L J 282 : (1964) All W R (HC) 786.

——Ss. 307, 149 — Some of accused assembled for committing dacoity firing at raiding police party — None however, injured — All accused held guilty under S. 307, read with S. 149. A I R 1951 All 452 (453) (Pt C) (Pr 4).

——S. 307—Attempt to murder — 'Attempt' — What constitutes—Principles — Intervening circumstance preventing the attempt from being successful but yet bringing about the same result by accident.

The accused in order to put an end to their lives and that of their infant daughter had tied themselves together with a rope before jumping into a well. The child slipped and fell in and was drowned when the two accused jumped into the well. Held, the accused are guilty only of attempt to murder. 1961 Mad W N 423 : (1962) 2 Mad L J 286 : 1962 Mad L J (Cri) 487 : 74 Mad L W 687 : 1961 (2) Cri L J 781 : A I R 1961 Mad 498 (500, 501) (Prs 10, 11, 12, 15) (DB).

——S. 307 — A with intention to murder deceased causing serious injuries with dangerous weapon — B having no common intention with A causing injury resulting in death of deceased — A convicted under S 307 and B, under S. 324. See Penal Code (1860), S. 34. 51 Cri L J 218 : A I R 1950 Mad 10 (DB).

——Ss. 307, 300 thirdly and 308 — Applicability — Attempt to murder or to commit culpable homicide— Accused after inflicting dagger wounds on victim uttered certain words which clearly indicated that he did not intend to cause death or any injury which he knew to be likely to cause death or even to cause such injury as was sufficient in ordinary course of nature to cause death—Case would not apart from exceptions to S. 300 fall under S. 302 if death were caused and, therefore, accused can be convicted under S 308 and not S. 307. See Penal Code (1860), S. 300. 1956 Cri L J 908 : A I R 1956 Nag 208 (DB).

——Ss. 307 and 326 — Applicability — Attempt to murder—Intention.

Causing injuries, though with the intention of causing death but which do not result in death, does not come under S 307. Section 307 contemplates a case of an attempt to murder. Where the appellant caused with a sharp cutting instrument several injuries on the body of a woman, one of which was grievious in nature, caused on the vital portion of the body which would ordinarily cause the death of a man.

Held, that the appellant was punishable under S. 326 not under S 307. 25 Cut L T 212: ILR (1958) Cut 700 : 1959 Cri L J 313 : A I R 1959 Orissa 21 (22) (Pr 5).

—Ss. 307 and 324—Accused entering the house of A and B to intimidate B to withdraw a case filed by him—Scuffle taking place resulting in injuries to both accused and A and B—No evidence to show that the accused committed house trespass after making preparations for causing hurt or assault — No indication also that the accused really intended or attempted to cause any deadly injury to B — The offences committed by the accused fall under Ss. 324 and 448, Penal Code and not under Ss. 307 and 452, Penal Code and are therefore compoundable. See Criminal P. C. (1898), S. 345. 1964 B L J R 660.

——S. 307 — Applicability— Accused with his pistol firing at random — Attempt to murder —Held that there was no intention to murder.

Where an examination of facts indicates that the accused was shooting at random for the purpose of frightening his pursuers and would be captors, it is not possible to hold that he had the 'mens rea,' that is, he had intended to cause death, or knew that, in the circumstances, his act of firing was going to cause death, to any of his pursuers. AIR 1933 Cal 354, Expl., A I R 1933 Lah 852, Disting. 1955 Crl L J 1092 : AIR 1955 Pat 330 (332, 333) (Pt C) (Prs 6, 7).

——S. 307 — Act when punishable as attempt to murder.

If a man commits an act with such intention and knowledge and under such circumstances that if death had been caused the offence would have amounted to murder and the act itself is of such a nature as would have caused death in the usual course of events but for something beyond his control which prevented that result his act would be punishable as an attempt to murder. Case Law discussed.

Thus, where the accused fired at his opponents with his gun and firing went on for some time and the distance between the parties was about 35 Karars and no one was injured.

Held, that the reason why the shots missed might have been that the ammunition used was defective or the accused was unable to take the correct aim and since both these matters were beyond his control the offence committed by him amounted to attempt to commit murder. Case Law discussed. 1952 Cri L J 1467 : ILR (1952) Pepsu 258 : A I R 1952 Pepsu 138 (141, 142) (Pt B) (Prs 16, 17).

——S. 307 — Applicability — Assault by several persons armed with dangerous weapons—Death caused by one — Common object to cause murder not established — Held, everyone of the accused persons could not be convicted — Under S. 302 read with S. 149 — Proper section under which they could be convicted was S. 326 read with S. 149 and therefore S. 307 did not apply — Held further that with regard to individual accused who caused injuries to persons other than deceased the conviction could only be for injuries caused — It could not be said that they would be liable to conviction under S. 307. See Penal Code (1860), S. 149. 1957 Cri L J 1307 : AIR 1957 Punj 278 (DB).

3. Intention or knowledge.

——S. 307—Ingredients of offence under—Intention to cause death — Inference of intention — When could be made.

Whoever does any act with such intention or knowledge and under such circumstances that, if he by that act caused death he would be guilty of murder and is liable to punishment under S. 307, I. P. C. It is not necessary for the application of the section that the injury capable of causing death should have been actually inflicted. The intention which brings the case within S. 307, I. P. Code has to be inferred from the totality of all the facts and circumstances of the case which must be carefully examined.

In the present case, the fact of hostility between the two women resulting in a criminal complaint against the appellant, is indicative of premeditation, deliberation, and preparation before the attack. It certainly was not a case of a sudden quarrel or impulse. The knife used for the attack was such as would cause a fatal injury if it had been used to cut a vital organ. The fact that it could not be so used was due to the resistance and struggle put up by the complainant. If extraneous factors, outside the control of and unforeseen by the appellant, had not intervened, death could and was likely to have been caused. In these circumstances, the intention or at least the knowledge of the appellant must be held to have been established sufficiently to bring the case within the purview of S. 307, I. P. Code. 1965 All L J 1121 : 1965 All W R (HC) 829 : 1966 All Cr R 5.

——Ss. 307 and 328 — Scope and applicability—Accused administering small dose of poison (Opium) not capable of causing death — Offence is one under S. 328 and not under S. 307.

Section 307 rather postulates the intrinsic capacity of the act to cause death. Any amount of the intention of the accused to cause death by the act or his knowledge that the act was likely to cause death will not matter unless the act was itself intrinsically or inherently capable of causing death; and the words "Under such circumstances" in S. 307 point this requirement; for instance, poisoned food is given to a person and that person is saved by immediate vomitting the accused cannot escape criminal responsibility; but the poisoning must, at any rate, be of sufficient strength to bring about death in the usual course of events. It would be nullifying the effect of the words "under such circumstances" to hold that even if the quantity of the poison is negligible and not capable of causing death in the natural course of events the offence under S. 307 would be complete if the accused had the requisite intention or knowledge.

Where the accused administered to the complainant a small dose of opium which was far less than the normal lethal dose.

Held, that the offence committed was not one of attempt, to murder under S. 307, but that it fell under S. 328, I. P. Code viz. causing hurt by means of poison. Case law discussed. **(1956) 9 Sau L R 307 : 1957 All W R (Supp) 1.**

——S. 307—Intention of knowledge.

There should be an intention to murder or the knowledge that the injuries caused would result in the death of the person attacked before a man can be held guilty under S. 307 if the injured persons luckily escape death. The injuries inflicted should therefore be taken into consideration in arriving at the conclusion about the intention of the persons who had made the attack. Two incised wounds on the head and nose which were both bone deep and were caused by spear coupled with severe fractures of bones of other parts of the body do lead to the inference that it was the intention of the assailants to cause the death of the deceased. **1953 All W R (H C) 491 : 1954 Cr L J 68 : A I R 1954 All 59 (62) (Pt C) (Pr 14).**

——S. 307—Gist of offence—Intension or knowledge —Proof of.

Section 307 would apply only where the accused had the intention of causing murder and did all that was possible to do so but for some intervening factor death could not be caused although it would have been the normal result of the act of the accused. The gist of the offence under section 307 is the question of intention. It is manifest that the liability of the accused must be limited to the act which he has in fact caused and should not be extended so as to embrace the consequence of some act which he might have done but did not in fact intend to do. In order, therefore, to determine the intention of an accused the Court has to look to various factors, like the nature of the injury caused, severity of the blow or its persistence, circumstances in which it is caused and the immediate motive for the fact, etc., etc. The fact that the accused lowered down the muzzle and aimed only at the thigh and the injury caused was very simple are important circumstances to indicate that he had no intention to murder. **1959 Cri L J 1316 : AIR 1959 J & K 119 (120) (Pt B) (Pr 9).**

——S. 307—Intention to cause death—Firing several shots with rifle.

A rifle is a dangerous weapon. If a person fires several shots with a rifle at a person it would ordinarily mean that he wants to kill that person. The fact that the persons aimed at were not killed though the accused was a good shot does not necessarily mean that he had no intention to kill them. A person may be excited and that is why he may not be able to hit properly; or the aim may be missed because the person aimed at may move aside. **1956 Cri L J 217 : AIR 1956 Kutch 1 (7) (Pt E) (Pr 45).**

——S. 307—Scope—Intention or knowledge.

Section 307 provides for a punishment for an act done with such intention or knowledge and under such circumstances that if by that act death was caused, the person would be guilty of the offence of murder. Hence, it cannot be urged that the accused could not be convicted of the offence u/s. 307, I. P. C. unless it was proved that he had the intention to cause the death. **1956 Madh B L J (Bhopal) 159.**

——Ss. 307 and 326 — Intention or knowledge of causing death—Determination of—Nature of injuries is of considerable assistance — Held on facts that it was impossible to take any other view than that applicant's act amounted to an attempt within meaning of S. 307. AIR 1955 N U C (Madh B) 3736.

——S. 307 — Intention or knowledge — For offence under S. 307, act must be done with intention or knowledge and under circumstances mentioned therein, irrespective of the result — No evidence of circumstances showing such intention or knowledge —Accused cannot be convicted of attempt to murder. AIR 1955 N U C (Madh B) 3383.

——S. 307 — Intention or knowledge is material to constitute offence.

For the purpose of S. 307, what is material is the intention or knowledge and not the consequence of the actual act done for the purpose of carrying out the intention. **51 Cri L J 745 : A I R 1956 Madh B 21 (22) (Pr 8) (DB).**

——S. 307—Intention to cause death—Injury caused with sharp-edged instrument resulting in fracture of skull and making victim unconscious for number of days — Inference as to intention of accused not to cause death not to be drawn without examining doctors under whose treatment victim was kept — Evidence Act (1872), S. 3 'proved'. 1961 Jab L J 1282 : 1962 (2) Cri L J 190 : 1964 M P L J 521 : ILR (1964) Madh Pra 321 : AIR 1962 Madh Pra 239 (240) (Pt A) (Pr 3).

——Ss. 307, 302, 323 and 325 — Lathi not a lethal weapon — Knowledge imports certainty, not probability under S. 300 (2) — In the absence of such knowledge conviction under S. 307 is improper. See Penal Code (1860), S. 302. 1961 M P L J (Notes) 290.

——S. 307—Intention to kill person injured—Can be inferred from nature of act done.

To make S. 307 applicable, it is not necessary that the hurt must be caused to person against whom the shot was aimed at. Mere attempt is sufficient and the causing of hurt is only an aggravating circumstance. It cannot therefore be reasonably argued that unless the injury caused is sufficient in the ordinary course of nature to cause the death of the person injured, the inference of intention to kill contemplated under S. 307 cannot be presumed. All that is necessary to establish the intention is the nature of the act done, irrespective of the fact that whether that act is a penultimate act or not. **ILR (1964) Cut 730 : 1965 (2) Cri L J 168 (Orissa).**

——S. 307—Intention or knowledge.

A man cannot be convicted for an attempt to murder or to commit any other offence, if the evidence discloses that he was rash, negligent or reckless. The word 'rash' and 'rashness' are sometime used to indicate same mental attitude as 'recklessness', although; there is some subtle distinction between them. Intention cannot exist without foresight but foresight can exist without intention; for a man may foresee the possible or even probable consequences of his conduct and yet not desire them to occur; nonetheless, if he persists on his course, he knowingly runs the risk of bringing about the unwished result. A man who is reckless may prefer that the contemplated event shall not happen, or he may not care whether it happens or not; but in either case he does not desire it to happen and, therefore, does not act with the purpose that it shall happen.

Different state of mind from that of inadvertence is needed for criminal liability. A state of mind which amounts to 'mens rea' is that of man who conceives the future event, and believes that there is a chance of its following his volition or act. Text books by Kenny, Austin and Russel referred. **1955 Cri L J 1092 : AIR 1955 Pat 330 (332) (Pt B) (Pr 6).**

——S. 307—Applicability—Intention—Proof.

In order to bring a case within the purview of S. 307, it is not necessary that the injury inflicted

should in itself be sufficient in the ordinary course of nature to cause death. This section may apply even if no hurt is caused. Under this section intention precedes the act and not merely gathered from the consequences that ensure. A I R 1932 Bom 279 and A I R 1937 Lah 619 and A I R 1941 Pat 51 and A I R 1952 Pepsu 138, Rel. on. **1960 Cri L J 651 : A I R 1960 Punj 282 (283) (Pr 9).**

——S. 307 — Essentials — Mens rea — Principles — Burden of proof —(Evidence Act (1872), Ss. 101-104).

The offence is constituted by the concurrence of mens rea followed by an actus reus. An intent per se is not an attempt. It implies purpose and attempt is an actual effort made in execution of the purpose. The attempt for purposes of S. 307, Penal Code should stem from a specific intention to commit murder, and this blameworthy condition of mind may be gathered from direct or circumstantial evidence, including the conduct of the accused. Apart from the necessary mens rea, the actus reus must be more than a preliminary preparation.

Held, that from the mere fact that on being challenged one of the accused had fired two or three shots it was unsafe to leap to the conclusion that the shots were fired with murderous intent. In the circumstances there were equal probabilities in favour of the conclusion, that the shots were fired at random, in order to scare the persons challenging, and in that case no mens rea could be said to have been present. The character and circumstances of this case did not give rise to the inference that the accused necessarily had the intention which the prosecution wanted to make out. The initial burden which is always on the prosecution had not been discharged in this case. Once the first essential as to the existence of mens rea is left unproved, no other element need be looked into. In the absence of unlawful intent, existence of an overt act is immaterial. **1960 Cri L J 393 : A I R 1960 Punj 135 (137, 138, 140) (Ft A) (Prs 14 to 17, 19, 20, 36, 37).**

——S. 307—Intention to commit murder can be inferred even if only simple hurt is caused.

First part of S. 307 does not even contemplate that it must be necessary that the victim should receive even a simple hurt. All that is necessary is, that the accused should have the intention to commit murder of the victim or he should have knowledge that he is likely to cause his death. If he commits a certain act with that intention or knowledge and there are circumstances to show that, if he by that act caused the death of the victim, he would be guilty of murder, he may be punished under this section even though the victim may not be hurt at all. The illustration (a) to S. 307 further makes it clear that it is not necessary that the person whose murder is attempted must be hurt by the offender.

It cannot therefore be said that an intention to commit murder on the part of the accused should not be inferred simply because the injuries received by victim were of a simple nature. AIR 1932 Bom 279; AIR 1941 Pat 51; A I R 1944 Sind 83; A I R 1941 Nag 302 and A I R 1958 All 677, Relied on; A I R 1950 Madh-B 21, Distinguished; A I R 1959 Orissa 21, Dissented from.

But if there is no other evidence direct or circumstantial against the accused to show his intention and if his intention is to be inferred only from the injuries, then he should ordinarily be deemed to have intended to cause only that kind of injury which has been actually caused by him. Even a grievous hurt of each and every type caused by the accused cannot give rise to an inference that he had made an attempt to cause murder of the injured. **1962 Raj L W 70 : ILR (1962) 12 Raj 144 : 1963 (1) Cri L J 387 (389) (Pt B) (Pr 17) (Raj).**

——Ss. 307, 449, 324 — Intention of accused — Test indicated—Firing of gun after house trespass—Effect —Held, offence under S. 449 not committed. See Penal Code (1860), S. 449. **52 Cri L J 276 : AIR 1951 Raj 42 (DB).**

——S. 307—Absence of mens rea — Use of agricultural implements — No intention to cause death — Offence.

Where the mens rea which is essential to the offence of murder was absent and where the weapons used by the accused were ordinary agricultural implements and did not necessarily indicate a deliberate intention to cause death or fatal injuries, conviction under S. 307 was held not sustainable. **1956 Cri L J 1439 : AIR 1956 Sau 107 (109) (Pt C) (Pr 8) (DB).**

——S. 307—Intention or knowledge—Inference.

The intention of the assailant is to be gathered from the nature of the weapon used and the parts of the body where the injuries are inflicted. Thus where the accused has inflicted six injuries by stabbing the complainant on vital parts of his body, it can safely be inferred that the accused had intended to cause his death by inflicting those injuries. **1955 Ker L T 417 : 1955 Cri L J 1535 : A I R 1955 T-C 266 (267) (Pt A) (Pr 6) (DB).**

4. "Under such circumstances."

——Ss. 307 and 308—"Under such circumstances"—Meaning of.

The words "under such circumstances" have nothing to do with the question whether the act committed by the accused could or could not cause death, but relate to the nature of the offence which the accused would have committed, if his act did cause death. Both in S. 307 and S. 308 the phrase "under such circumstances" does not stand by itself and it has to be read in conjunction with "such intention or knowledge." Before a Court can hold that the act committed by the accused amounts to attempt to murder or attempt to commit culpable homicide, it should be satisfied that the act was committed with such intention or knowledge and under such circumstances that if it had caused death, it would have amounted, in one case, to murder and in the other case, to culpable homicide not amounting to murder. This means that "intention or knowledge" and the "circumstances under which the act is committed" have to be considered for the same purpose and the only purpose, i.e, to find out what the nature of the offence would have been if death had been caused. Case Law discussed. **1952 Cri L J 1467 : I L R (1952) Pepsu 258 : A I R 1952 Pepsu 138 (139) (Pt A) (Prs 6, 7).**

5. Evidence and proof.

——Ss. 307, 149—Evidence – Trial under S. 307/149, I. P. Code—Suggestion that five persons had collected to commit some offence and so accused-petitioner was member of unlawful assembly — No suggestion that Police party was fired upon in furtherance of original common intention—Only evidence to prove that accused-petitioner had common intention of firing on Police party was that he was running along with other accused persons — No evidence to indicate that he actually fired — No gun found on his person—Evidence held was not sufficient to warrant conviction under S. 307/149, I. P. Code. AIR 1955 NUC (Ajmer) 2622.

——S. 307 — Burden of proof — Prosecution has to prove—Accused firing pistol at close range resulting in superficial injures due to defective ammunition—Knowledge—Onus—(Evidence Act (1872), S. 106).

For liability under S. 307 the prosecution has to prove the following facts : — (1) that the accused did an act, and (2) that the act was done with such inten-

tion or knowledge and under such circumstances that if he by that act caused death he would be guilty of murder. If hurt is caused by such act, the offender becomes liable to transportation for life, otherwise the maximum term of imprisonment prescribed is 10 years. Thus the section itself does not take into consideration the effect of the act of the accused except as a measure of sentence to be imposed upon him. AIR 1932 Bom 279, Rel. on. **1958 Cri L J 1112 : AIR 1958 All 677 (678) (Pr 6).**

——Ss. 307 and 149—Constructive liability — Common object—Evidence of.

An object is entertained in the human mind and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commits and the result therefrom.

Mere words or utterances in excitement are not enough to indicate the real mental attitude and it is the act committed and result therefrom that are the main features, though in every case the result alone does not necessarily indicate the attitude of the mind of the doer of the Act.

Thus, where the simple nature of the injuries indicated that they were not caused with very great force or violence, the motive as found for the assault also did not on probability of human conduct, support the presence of an object of causing death and although there was medical opinion that had the complainant been a man of normal built and strength it was possible that his death might have been caused, it was mere hypothesis and not tangible facts proved on record.

Held, that the common object of the unlawful assembly was to give severe thrashing to the complainant, that is, only to voluntarily cause grievous hurt to him. The conviction under S. 307/149, I. P. Code, was therefore not warranted by law. **1955 Cri L J 1033 : AIR 1955 Bhopal 9 (11 to 13) (Pt C) (Prs 11, 15, 16).**

——Ss. 307 and 324 — Scuffle between complainant and accused having pistol in his hand—Shots fired, one hitting complainant — Injury not grievous — Offence held fell under S, 324 and not under S. 307.

In order to bring home the offence under S. 307 the prosecution must show that the accused had done an act with such a guilty intention and knowledge, that but for some intervening fact the act would have amounted to murder in the normal course of events.

Where there was a quarrel between the accused and the complainant but its cause was not known, and while they were grappling with each other the accused who had a pistol in his hand fired shots one of which hit the complainant but the injury was not a grievous one, and there was no evidence to show that the accused had any intention of causing death by firing at the complainant, the offence did not fall under S. 307 but under S. 324. **1960 Cri L J 1080 : AIR 1960 J & K 104 (105) (Pt A) (Pr 14).**

——S. 307 — Criminal Trial—Standard of proof required - Court must be satisfied that prosecution story must be true. See Evidence Act (1872), S. 3. **1960 Cr L J 78 : AIR 1960 Madh Pra 11.**

——S. 307 — Conviction — Circumstantial evidence raising strong motive and suspicion—Sufficiency.

Complainant in F.I.R. and dying declaration alleged that the appellant stabbed but failed to implicate him in committal and Sessions Court. The Session Judge taking support of circumstantial evidence convicted him under S. 307, I. P. Code.

Held, that the whole evidence only established a powerful motive on the part of appellant and gave ground for suspicion against him. But the circumstantial evidence was not of a decisive character. It did not bring the charge of crime home to the accused with reasonable certainty. The accused was entitled to the benefit of doubt. **1958 M P L J (Notes) 44.**

——S. 307—Burden of proof.

To constitute an attempt to murder contemplated by S. 307 there must be some overt act combined with evidence of 'mens rea'. The burden is always on the prosecution to prove, first, the 'actus reus', that is, the accused had done something which in point of law marked the commission of the offence, and, second, the 'mens rea', that is in taking this step he was inspired by the intention to go on to reach a definite objective which would constitute a specific offence. **1955 Cr L J 1092 : AIR 1955 Pat 330 (332) (Pt A) (Pr 6).**

——S. 307—Applicability — Prosecution must prove that act was done with intention or knowledge and under circumstances that if offender by that act caused death—Held on facts that charge under S. 307 could not be said to have been brought home to accused beyond reasonable doubt. AIR 1955 N U C (Punj) 3431.

6. Charge

——Ss. 307 and 34—Charge under S. 307 read with S. 34 is sustainable.

The act committed by a number of persons shall in the circumstances mentioned in S. 34 of the Penal Code be held to be the act of each one individual of those persons. Once it is decided that the act is so done by a number of persons in furtherance of the common intention of all, the legal position that results is that each person shall be held to have committed the entire criminal act. Hence a charge under S. 307, read with S. 34 is sustainable in law. Matiullah Sheikh v. State of West Bengal, **(1964) 6 S C R 978 : 1965 All W R (H C) 93 : 1965 Mad L J (Cri) 102 : (1965) 1 S C J 216 : 1965 All Cri R 106 : 1965 Mad W N 3 : (1964) 1 S C W R 501 : 1964 S C D 766 : 1965 (1) Cr L J 126 : AIR 1965 S C 132 (134) (Pt B) (Prs 9, 10),**

——S. 307 — Accused charged under S. 307 read with S. 149, Penal Code—No express statement made in charge with respect to S. 149—Held defect in charge did not occasion failure of justice. See Criminal P. C. (1898), S. 537. **1961 (1) Cri L J 859 : A I R 1961 S C 803.**

——Ss. 307, 511—Attempt — Meaning of—Charge—Error—Effect—(Cr. P. C. (1898), Ss. 223, 225, 537).

An attempt is an act or a series of acts which necessarily lead to the commission of an offence and stops short of the commission by frustration neither foreseen nor intended. Therefore, when the accused persons were charged of entertaining the object of making only an attempt on human life it cannot be said that the object of the assembly was that they should be frustrated in the commission by some unforeseen event just before the completion of the offence. The charge of entertaining an object of attempt under the law is, therefore, incorrect. But where no prejudice was caused to the accused or there had been no failure of justice the irregularity is curable in view of S. 225 and S. 537. Cr. P. Code. **1955 Cr L J 1033 : AIR 1955 Bhopal 9 (13) (Pt D) (Pr 17).**

——S. 307—Charge should contain precise accusation —Charge under one section — Conviction under another—Conviction held was bad. See Cr P. Code (1898), S. 221. **1960 Cr L J 78 : AIR 1960 Madh Pra 11.**

——S. 307—Charge — Distinct offences under S. 307 and S. 19 (f), Arms Act—Committed on different occassions cannot be tried jointly at same trial. See Cr. P. Code (1898), S. 233. **AIR 1955 NUC (Pepsu) 2158.**

7. Conviction and sentence.

●——Ss. 307 and 324 — Accused causing injury to A in a vital region with a knife—Fact that no vital organ of A has been cut would not by itself be sufficient to take the act of accused out of the purview of S. 307—But in order to bring the offence home to accused the prosecution must establish that his intention was one of the three kinds mentioned in S. 300—State of mind of accused has to be deduced from surrounding circumstances and motive would be a relevant circumstance — Evidence not sufficient to establish with certainty existence of requisite intention or knowledge of accused — Accused can be convicted only under S. 324 and not under S. 307. AIR 1961 S C 1782 and AIR 1932 Bom 279 and 15 Bom L R 991, Rel. on; 4 Bom H C (Cr) 17, Not followed. Sarju Prasad v. State of Bihar, (1965) 1 SCWR 284 : (1965) 1 Andh L T 373 : (1965) 2 S C J 126 : 1965 Mad L J (Cri) 446 : 1965 Cur L J 390 : 1965 B L J R 316 : 1965 S C D 281 : 1965 (1) Cr L J 766 : AIR 1965 S C 843 (844, 845) (Prs 6, 7, 10).

●——S. 307—Unlawful assembly —In prosecution of the common object — Intention to fight and cause injury—Inference in respect of—Constructive liability of all persons in assembly—Assembly of less than five —Attack by such assembly—Conviction under Ss. 302, 307 and 149 can be converted into one under Ss. 302, 307 and 34. See Penal Code (1860), S. 149. 1961 (2) Cr L J 853 : AIR 1961 S C 1787.

——Ss. 307, 324 and 326—A throwing acid on B—B's death some days later — Medical evidence contradictory on death being directly due to burns — Held A was rightly convicted under S. 324. See Penal Code (1860), S. 324. 51 Cri L J 905 : AIR 1950 Ajmer 21.

——S. 307—Initial firing by accused—Police firing in self-defence — Each of accused again firing in self-defence—Each of accused again firing towards police —Initial firing held was with common intention to overpower police—Firing by police held did not give accused right to act in self-defence—Accused held could be convicted under S. 307. See Penal Code (1860), S. 34. 1963 All W R (HC) 746.

——Ss. 307, 34 and 96—Initial firing by accused—Police firing in self-defence—Each of accused again firing towards police—Initial firing held was with common intention to overpower police — Firing by police held did not give accused right to act in self-defence — Accused held could be convicted under S. 307. See Penal Code (1860), S. 34. 1963 All Cri R 442.

——Ss. 307 and 326—Scope—Conviction under S. 307 and S. 326 for same offence—Legality.

Where an accused person shoots one with a pistol and thereby causes hurt to him he is liable to conviction under the latter part of S. 307 and his conviction under S. 326 for the same offence is not warranted. 1953 All L J 408 : 1953 All W R (HC) 399 : 1953 Cr L J 1677 : AIR 1953 All 726 (728) (Pt C) (Pr 15).

——S. 307 — Applicability — Gun shot aimed at vital part but missed — Conviction under S. 307 held proper—Sentence of 4 years held proper. AIR 1955 NUC (Madh B) 3347.

——S. 307—Accused hitting with stone and causing fracture — Intention to kill not proved—Conviction under S. 307 cannot be maintained — Conviction altered from S. 307 to 325. 1962 M P L J (Notes) 2.

——Ss. 307, 148 — Conviction under Ss. 307 and 148 Held not proper but one under S. 307/149 held sufficient.

Where the accused have been punished for specific act which constitutes the object of the riot, i.e., S. 307, it was held unnecessary in the circumstances of the case to convict them for rioting and S. 148, I. P. C. both though it might not be illegal. Their conviction under S. 307/149, I. P. C. was held sufficient. 1952 Cri L J 1500 : AIR 1952 Manipur 2 (3) (Pt C) (Pr 9).

——Ss. 307, Part II, 301 — Accused in drunken state abusing people—A advising him to go home—Resenting A's advice accused bringing his gun and firing at A—Shot hitting B causing B injury in chest — Accused held guilty of offence under section 307, Part II —Sentence of seven years reduced to five years. AIR 1935 Pesh 74, Rel. on. ILR (1964) Cut 730 : 1965 (2) Cri L J 168 (169, 170) (Pt B) (Prs 8, 10) (Orissa).

——Ss. 307, 308, 34, 35, 38 and 300, Exception 4—Applicability—Deceased and accused persons A and B abusing each other while drunk—Deceased proceeding towards A with a stick in hand in order to silence him and giving a blow on A's head—A in turn suddenly retaliating without pre-meditation and in heat of passion by firing one shot at deceased injuring him—B who was standing by also firing a single shot at deceased injuring him—Injuries resulting in death but who caused fatal injury not known —A's case falls under exception 4 to S. 300 and he is guilty under S. 308—B's case falls under S. 307 and he is guilty of attempted murder—A and B can be convicted under S. 308 and S. 307 respectively by application of S. 38 — Ss. 34 and 35 had no application. AIR 1955 NUC (Pepsu) 3280 (DB).

——Ss. 307 and 337—Conviction under S. 307—Alteration under S. 337 — Validity — Injury caused by shooting — Absence of proof about intention to kill — Inference of criminal responsibility under S. 337—Permissibility — Conviction legal—Criminal P. C. (1898), S. 238 (2).

When the accused is convicted under S. 307, I. P. C. for having injured the complainant by firing at him with his shot gun and if there is no evidence that shooting was done with intention to kill or even hurting the victim, the Court is not precluded from coming to the conclusion that the shooting was done in such circumstances as to give rise to criminal responsibility on the part of the accused on the ground of criminal rashness or negligence as contemplated in S. 337, Indian Penal Code. Conviction of the accused can therefore be altered from S. 307 to 337 though no charge under the latter section had been framed. AIR 1938 Rang 220, Rel. on. ILR (1962) 1 Punj 6.

——Ss. 307, 511 — Attempt — What is — Husband deliberately starving and maltreating his wife—Wife on point of death but saved through escape and timely hospital treatment — Husband held guilty under S. 307—Sentence.

An attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof. For purposes of criminal liability, it is sufficient, if the attempt had gone so far, that the crime would have been completed, but for extraneous intervention which frustrated its consummation.

A and his mother D deliberately starved and ill-treated A's wife B because B had not brought any cash in her dowry. As a result of the starvation, her health deteriorated. She was not given any medical treatment and not allowed to contact anybody outside the house. One day finding that D was away, B escaped from the house and managed to reach the civil hospital of the place. She narrated her story to the doctor and was admitted as indoor patient. A and D attempted to take B back to their home but were not allowed to do so. The condition of B was serious and it took ten months of hospital treatment

to recoup her. A was tried under S. 307, I. P. C. for attempt to murder B by deliberate starving and ill-treatment.

Held that the law cast on A inter alia the duty to provide his wife with food, and medical treatment but he wilfully and deliberately failed to discharge the obligation he owed to her in the matter of food and medical attention though he possessed the capacity, means and ability to perform the legal duty.

(2) That the food was wilfully and intentionally withheld so as to shorten the remaining span of her life.

(3) That it was not a mere preparation, but steps adapted to the purpose intended had been taken. But for the intervention of the fortuitous circumstances of the girl having managed to reach the hospital, the accomplishment of the object was according to the medical opinion, within sight; and under those conditions B was not expected to survive for long. There was therefore no doubt that A had attempted to murder his wife B within the meaning S. 307 I. P. C.

(4) That the sentence of three year's rigorous imprisonment was not excessive having regard to the studied and systematic nature of the attempt steadily pursued for a considerable length of time. **ILR (1958) Punj 2319 : 60 Pun L R 563 : 1959 Cri L J 368 : AIR 1959 Punj 134 (145) (Pt C) (Prs 45 to 48).**

——Ss. 307 and 302 — Sentence — Accused throwing her two step-daughters into well—One got drowned and other taken out by persons who reached the place in good time—Accused held committed offences under Ss. 302 and 307—But since the accused had a child who was one year of age at the time of offence the sentence was reduced from death to one of transportation of life. See Penal Code (1860), S. 302. **AIR 1955 NUC (Punj) 1048 (DB).**

——S. 307—Sentence — Very dangerous spear injury — Three years' sentence held not excessive. **AIR 1955 NUC (Punj) 735.**

8. Procedure.

——S. 307—Offences of same kind—Offences under S. 302 and S. 307, Penal Code are of same kind—Two offenders committing offences under Ss. 302 and 307, Penal Code—Their joint trial is justified. See Cr. P. Code (1898), S. 234. **1962 (2) Cr L J 278 : AIR 1962 SC 1198.**

——Ss. 307 and 324 — Trial on several charges under Ss. 307 and 324, Penal Code—Verdict of not guilty by jury in respect of some of them and of guilty in respect of others — Sessions Court disagreeing with Jury's verdict of guilty and referring case to High Court—Reference in part — Validity—Conditions requisite for valid reference, stated — Scope of sub-sections (1) and (2) of S. 307 stated — Final order in respect of some of charges—Duty of High Court. See Criminal P. C. (1898), S. 307. **ILR (1956) 2 Cal 308.**

——S. 307—Accused committed under Ss. 302, 307, 392, Penal Code—Sessions Judge should not split up case of murder from robbery to be dealt with separately—(Madras High Court Rules of Practice, R. 156). See Criminal P. C. (1898), S. 240. **1952 Cri L J 853 : AIR 1952 Mad 411 (DB).**

SECTION 308

——Ss. 308, 34 and 325—Number of accused charged under S. 308 read with S. 34 — Who inflicted fatal injury not known — No one can be convicted under S. 308 or even under S. 325.

A number of accused were charged under S. 308 read with S. 34, Penal Code. Common intention was however not proved and who inflicted the fatal injury was not known.

Held, that in these circumstances no one could be convicted under S. 308 or even under S. 325. (Point conceded). **1957 All W R (HC) 149 : 1957 All L J 308.**

——Ss. 308, 300 thirdly, and 307—Applicability—Attempt to murder or to commit culpable homicide—Accused after inflicting dagger wounds on victim uttered certain words which clearly indicated that he did not intend to cause death or any injury which he knew to be likely to cause death or even to cause such injury as was sufficient in ordinary course of nature to cause death — Case would not apart from exceptions to S. 300, fall under S. 302 if death were caused and, therefore, accused can be convicted under S. 308 and not S. 307. See Penal Code (1860), S. 300. **1956 Cri L J 908 : AIR 1956 Nag 208 (DB).**

——Ss. 308, 307, 34, 35, 38 and 300, Exception 4 — Applicability—Deceased and accused persons A and B abusing each other while drunk — Deceased proceeding towards A with a stick in hand in order to silence him and giving a blow on A's head—A in turn suddenly retaliating without premeditation and in heat of passion by firing one shot at deceased injuring him—B who was standing by also firing a single shot at deceased injuring him — Injuries resulting in death but who caused fatal injury not known—A's case falls under exception 4 to S. 300 and he is guilty under S. 308 — B's case falls under S. 307 and he is guilty of attempt of murder — A and B can be convicted under S. 308 and S. 307 respectively by application of S. 38 — Ss. 34 and 35 had no application. **AIR 1955 N U C (Pepsu) 3280 (DB).**

——Ss. 308 and 307—"Under such circumstances"—Meaning of — Both in S. 307 and 308 the phrase does not stand by itself and it has to be read in conjunction with "such intention or knowledge."—See Penal Code (1860), S. 307. **1952 Cri L J 1467 : AIR 1952 Pepsu 138.**

——S. 308—Conviction—Grounds.

The infliction of only one of the two serious head injuries could be positively imputed to the two accused but one could not be certain which one should be held positively liable for any one serious head injury and which one:

Held, that while holding the accused responsible for their individual acts it was not open to the Sessions Judge to have considered the cumulative effect of the head injuries and to have held these accused responsible for offence under S. 308. **ILR (1960) 10 Raj 1200 : 1960 Raj L W 565 : 1961 (1) Cri L J 155 : AIR 1961 Raj 24 (27) (Pt C) (Pr 10).**

——S. 308 — Applicability — Serious head injuries with underlying fractures of skull bone.

Where there are a number of injuries including three serious head injuries with underlying fractures of the skull bone, it could be considered sufficient to bring the case of the accused under S. 308, I. P. Code, because had the injured died, they could have been easily convicted under S. 304, I. P. Code. **ILR (1960) 10 Raj 1200 : 1960 Raj L W 565 : 1961 (1) Cri L J 155 : AIR 1961 Raj 24 (29) (Pt H) (Pr 20).**

SECTION 309

——S. 309 — Attempt to commit suicide by starting hunger strike—Difficulty in determining intention to fast to death—Evidence necessary to substantiate charge **1961 All L J 550 : 1961 All W R (HC) 428 : 1961 All Cri R 344 : 1962 (1) Cri L J 697 : AIR 1962 All 262 (262, 263) (Prs 4, 8).**

——S. 309—Applicability—Accused going on hunger strike — Intention to commit suicide—Accused ac-

cepting nourishment readily in hospital — Effect. 1960 M P L J (Notes) 194.

SECTION 312

——S. 312—Scope and applicability.

A distinction is made in S. 312 between miscarriage to a woman "with child" and 'quick with child' as a larger punishment is provided for the former.

Where the pregnancy has advanced beyond seven months from gestation, acts of doctors and nurses which facilitate or accelerate delivery cannot be treated as offences under the section only because the delivery otherwise would have been delayed and particularly when the child is born alive and no injury is caused to the mother or the child. Modi's Medical Jurisprudence. 1955 Cri L J 372 : AIR 1955 Mys 27 (29) (Pt C) (Pr 6) (DB).

SECTION 316

——Ss. 316 and 302—Applicability.

Obiter—S. 316 has no application to a case where act attributed to accused has resulted in death of a pregnant woman. 1953 Ker L T 340 : 1953 Cri L J 1551 : AIR 1953 Trav Co 374 (375) (Pt B) (Pr 6) (DB).

——Ss. 316, 302 and 71—Sentence.

Accused sentenced under S. 302 for causing death of pregnant woman — Even if a separate conviction under S. 316 is not objectionable separate punishment therefor offends S. 71. 1953 Ker L T 340 : 1953 Cri L J 1551 : AIR 1953 Trav Co 374 (375) (Pt C) (Pr 6) (DB).

SECTION 317

——S. 317—Applicability.

The exposure, as contemplated by S. 317, must be one, by which some danger to the life of the child may ensue. The section applies only where the child is exposed alive. If the child is dead before being exposed, or if the person exposing remains with the child till it is dead, or if the person exposing murders the child and then leaves its body somewhere, a case under S. 317, is not made out. 52 Cri L J 981 : 1952 Raj L W 95 : ILR (1951) 1 Raj 871 : A I R 1951 Raj 123 (124) (Pt A) (Pr 7) (DB).

——Ss. 317, 304 — Child dying on account of exposure—Accused cannot be convicted for offences both under Ss. 317 and 304 (Obiter Per Datt, J.)

Obiter (Per Datt, J.) — Even in a genuine case of exposure, if a child dies on account of the exposure, the accused cannot be convicted for both the offences under Ss. 317 and 304. It is only before the death of the child that the person exposing the child can be convicted for the offence under S 317. If the death of the child occurs on account of the exposure, the accused can be convicted for an offence under S. 304, but not for an offence under S. 317, because the offence under S. 317, becomes merged into a bigger offence under S. 304, Penal Code. 52 Cri L J 981 : 1952 Raj L W 95 : ILR (1951) 1 Raj 871 : A I R 1951 Raj 123 (125) (Pt B) (Pr 8) (DB).

SECTION 318

——S. 318 — Ingredients of offence — Evidence of commission of deed or participation in it lacking — Mere existence of intention whether sufficient to constitute offence. 1958 A L J 703 : 1958 All Cri R 518 : 1958 All W R (HC) 761.

——S. 318—Girl consenting to child being delivered to third person or otherwise disposed of — Child living at that time—Offence under section not made out.

Section 318 requires that the child should be dead at the time when participation in its secret burial or disposal should have taken place. If the child was living at the time, and the girl merely consented at the instance of the father to the said child being delivered to a third person or otherwise disposed of, the offence under S. 318, Penal Code, would not be made out. 1958 All L J 703 : 1958 All Cri R 518 : 1958 All W R (HC) 761.

——S. 318 — Girl trying to conceal birth of child — Conduct capable of explanation.

Where the conduct of the girl in wrongly trying to conceal the birth of the child is capable of a number of explanations which might be the offsprings of an innocent intention, the mere fact that she subsequently tried to conceal the birth of the child would not be enough to bring the charge home to her. 1958 All L J 703 : 1958 All Cri R 518: 1958 All W R (HC) 761.

——S. 318 — Case under — Benefit of doubt — (Evidence Act (1872), S. 3) — Criminal P. C. (1898), S. 367.

There was direct evidence to indicate that the father of the girl had taken the matter of the birth of an illegitimate child to the girl to heart. He was smarting under a sense of disgrace and was extremely anxious to have the child removed in order to prevent any reflection being cast on the honour of the family. There was evidence also to the effect that the father was actually seen carrying the jhola which contained the dead body of the child. There was further prosecution evidence to the effect that the father had absconded and was still absconding. There was also a clear finding of the trial Court to the effect that the girl had no hand in the murder of the child and was not a party to any such design. Held, that the prosecution failed to bring the charge home to the accused (girl) who was, therefore, entitled to the benefit of doubt. 1958 All L J 703 : 1958 All Cri R 518 : 1958 All W R (HC) 761.

——S. 318 — Applicability — Absence of evidence about concealment of corpus delicti—Effect.

The offence of secret disposition under S. 318, Penal Code, consists in the situation in which the body is placed. Where the evidence does not show that there was any concealment of the corpus delicti i. e., the dead body of the child or there was an endeavour in that direction, one of the ingredients of an offence under S. 318 is not established. (1959) Nag L J (Notes) 40.

——S. 318—Offence under—Ingredients of.

Section 318 is designed to punish a person for intentionally concealing the birth of the child from the public. It punishes a person for secretly burying or otherwise disposing of the dead body of a child and so intentionally concealing or endeavouring to conceal the birth of such a child. Where, therefore, the birth of a child is not concealed from the world at large, no offence under S. 318 is made out. A I R 1935 Cal 489 and A I R 1952 Madh Bha 124, Rel. on. 1960 Ker L J 1497 : 1951-1 Ker L R 49.

——S. 318 — Evidence and proof — Criminal P. C. (1898), S. 367.

The same evidence which has not been believed for an offence of murder should not be believed for an offence under S. 318 when there is no eye-witness who can depose that the accused herself came to the Charwada and secretly buried the body of the child there. The fact that she absconded soon after the incident is not sufficient to base a conviction under S. 318 thereon. Even grave suspicion against an accused cannot be taken to be substitute for proof. AIR 1953 Madh Bha 224 (Pr 2).

——S. 318—Intention of concealing birth of child.

When the birth of the child was known to most of the villagers in the village, no inference can be drawn that the disposing of the dead body of the child was with the intention of concealing the birth of a child within the meaning of the expression in section 318. **M L R 1952 (Cri) 65 : 1952 Cri L J 1187 : 1952 All W R (Supp) 41 : ILR (1953) Madh Bha 219 : A I R 1952 Madh Bha 124 (124) (Pr 6) (DB).**

——S. 318—Essentials of offence—Secret disposal of dead body necessary.

Appellant's pregnancy was known to all. Having given birth to an illegitimate child, she took it in her sari but witnesses saw one of its legs and she was prosecuted for having murdered it and disposed it of with a view to conceal its birth. She was acquitted of the charge of murder but was convicted under S. 318, Penal Code.

Held, that in order to constitute an offence under S. 318, Penal Code, there must be secret disposal of the dead body of the child with a view to conceal its birth. The appellant might have contemplated a secret disposal of the body but inasmuch as her intention was not given effect to, it could not be held that the offence was completed. 13 C P L R 188, Foll. **1960 M P L J (Notes) 227.**

SECTION 319

——Ss. 319, 320, 337 and 338—Applicability.

Where though the complainant had to be kept treated in the hospital as an in-patient for 45 days as a result of motor injuries, the medical witnesses stated that after 14 days, the complainant could have been discharged and that after the said period, he was in a position to attend to his ordinary avocation in life, the criminal act of the accused would fall under S. 337 and not under S. 338 as it naturally would have been as the result of 45 days' stay in the hospital. **1957 Ker L T 720 : 1957 Ker L J 673 : I L R (1957) Ker 781 : (1957) Mad L J (Cri) 662 : 1958 Cri L J 33 : AIR 1958 Ker 8 (11) (Pt B) (Pr 9) (DB).**

——Ss. 319, 323 and 304—Applicability and scope—Deceased receiving only two injuries which were not grievous — Injuries only remoter cause of death — Accused can be convicted under S. 323 and not under S. 304. See Penal Code (1860), S. 304. **55 Cri L J 6 : AIR 1953 Madh B 262.**

—— Ss. 319, 328—Applicability—Bodily pain, disease or infirmity — Administration of poison — Person having reeling sensation and bitter taste—'Hurt'.

The evidence was that there was reeling sensation after one D had eaten the curry served by the accused and he had also bitter taste of the curry :

Held, that this was sufficient to constitute an offence under S. 328 as there was hurt caused to D within the meaning of S. 319. **25 Cut L T 391 : I L R (1959) Cut 662.**

SECTION 320

——Ss. 320, 326 - Cut on bridge of nose with sharp weapon like razor held amounted to permanent disfiguration.

Where a person causes a cut 1" × 1/2" × 1/2" on the bridge of the nose of another with a sharp weapon like a razor or knife, this amounts to permanent disfiguration even though the internal wall separating the two nostrils is intact. A chance remark by the doctor who examined the person injured that the injury may heal in future if the person puts on flesh or that the disfiguration was not very noticeable cannot take the offence out of the mischief of S. 326. **1949 A M L J 64 : 51 Cri L J 799 : A I R 1950 Ajmer 13 (1) (13) (Pt A) (Pr 2).**

——Ss. 320, 324 and 326—Fracture—Injuries on head going deep to skull bone and also cutting to some extent skull bone but not extending to inner surface of it — There is no fracture and as such no grievous hurt within S. 320 — Offence falls under S. 324 and not S. 326. **('51) 1951 All Cri Cas 20 : 1951 All W R (HC) 107.**

——Ss. 320, 324 and 326 — Applicability — Injury without a cut in the bone or a fracture in it—Nature of hurt.

Where there was no doubt a deep injury, deep to the bone, but there was neither a cut in the bone nor was there any fracture, it cannot be said that there was any grievous hurt within the meaning of S. 320, Penal Code and in such a case the persons causing the injury can only be convicted of an offence under S. 324 and not under S. 326. **1951 All W R (HC) 107.**

——Ss. 320 and 326—Charge under Ss. 325 and 326—No bar to charge under S. 367. See Criminal P. C. (1898), S. 561-A. **1962 (2) Cri L J 28: AIR 1962 Andh Pra 267.**

——S. 320—Applicability—Boyish quarrel — Accused hitting deceased with granite stone on temple—Death —Injury sufficient in ordinary course of nature to cause death — Offence committed was grievous hurt falling under seventh category of S. 320. See Penal Code (1860), S. 323. **1960 Cri L J 1213 : A I R 1960 Ker 301 (DB).**

——S. 320—Applicability.

Where though the complainant had to be kept treated in the hospital as an inpatient for 45 days as a result of motor injuries, the medical witnesses stated that after 14 days the complainant could have been discharged and that after the said period, he was in a position to attend to his ordinary avocation in life, the criminal act of the accused would fall under S. 337 and not under S. 338 as it naturally would have been as the result of 45 days' stay in the hospital. **1958 Cri L J 33 : AIR 1958 Ker 8 (11) (Pt B) (Pr 9) (DB).**

——S. 320 (8)—Proof of being in hospital for more than 20 days is not equivalent as proof of grievous hurt. 19 Bom 24; A I R 1931 Lah 280, Rel. on. **1953 Cri L J 104 : AIR 1953 Kutch 7 (8) (Pt C) (Pr 7).**

——Ss. 320 and 326—Fracture—Mere scratch caused to the bone by a cut cannot be deemed a fracture—But a cut in the bone to a depth of 1/2" amounts to a fracture and grievous injury even though the crack does not extend to the inner side of the bone. AIR 1937 Rang 253; AIR 1942 Pat 376, Not followed; AIR 1955 Raj 36 and AIR 1956 Raj 39, Rel. on. **1964 Mad W N 259 : 77 Mad L W 347 : 1964 All W R (Sup) 20 : 1964 All Cri R 376 : 1964 Mad L J (Cri) 601 : (1964) 2 Mad L J 437: AIR 1965 Mad 10 (11) (Pr 4).**

——S. 320, Eighthly—Proof.

Under S. 320, eighthly any hurt which causes the sufferer to be, during the space of 20 days unable to follow his ordinary pursuits will be grievous. The fact that a person was in hospital only for 15 days is not enough. It does not follow that he was so ill in hospital to be unable to do his normal duties. **1962 (2) Cri L J 147 (155) (Pt F) (Pr 34) (Manipur).**

——S. 320, Seventhly — Fracture or dislocation of tooth — What constitutes — Looseness of tooth not sufficient. **1962 (2) Cri L J 147 (154) (Pt E) (Pr 33) (Manipur).**

——S. 320, Eighthly — Grievous hurt — Unable to follow his pursuits during space of twenty days.

The mere fact that the sufferer did not attend to his duty for the statutory period or that he remained

in the hospital for that period is no indication of his inability to do so. An injured man may be quite capable of following his ordinary pursuits long before 20 days or over and yet for the sake of permanent recovery or greater ease or comfort may be willing to remain as a convalescent in a hospital, especially if he is fed at the public expense. When the patient is treated in a hospital, the opinion of the Medical Officer attending on him on the point of his disability is very important. It is only if there is such proof that it would be safe to conclude that the injury would come in under the description of grievous injury. 19 Bom. 247, Rel. on. 1951 Ker L T 762 ; 1951 Mad L J (Cri) 634 ; 1952 (1) Cri L J 652 (656, 654) (Pt A) (Prs 8, 9) (Kerala).

——S. 320—Fracture of Bone—Medical Officer stating that there was "fracture of the metacarpal bone of right hand confirmed by X-Ray examination"—Though extent of fracture not indicated, it may be reasonably inferred that it was not a superficial cut on bone, but the breaking of bone itself. See Penal Code (1860), S. 325. (1957) 23 Cut L T 146.

——S. 320—Murder or grievous hurt—Injuries developing into gangrene—Death, natural consequence of gangrene — Offender must be deemed to be responsible for death — Plea of grievous hurt cannot be raised. See Penal Code (1860), S. 300. 1964 (1) Cri. L J 420 ; AIR 1964 Pat 158 (FB).

——S. 320, Fifthly—Injury must actually endanger life to be grievous one.

An injury may be called grievous only if it "endangers life." This means that the injury which is actually found should itself be such that it may put the life of the injured in danger. A simple injury cannot be called grievous simply because it happens to be caused on a vital part of the body, down to the carotid artery, unless the nature and dimensions of the injury or its effect are such that in the opinion of the doctor it actually endangers the life of the victim. 1962 Ker L W 70 ; ILR (1962) 12 Raj 144 ; 1963 (1) Cri L J 357 (359) (Pr 4) (Pr 10).

——S. 320—Grievous hurt.

A cut given by the sword on the vital part of a shoulder cutting the acromion process of the right scapula, the bone being cut through 1/8" x 1/8" is a grievous hurt within the meaning of section 320, I. P. Code. A I R 1937 Rang 253, Criticised; A I R 1942 Pat 376, Dist. I L R (1956) 6 Raj 80 ; 1956 Raj L W 105 ; 1956 Cri L J 270 ; A I R 1956 Raj 89 (DB). (Pt. A) (Pr. 7).

——S. 320 — "Fracture"—Fissured fracture of outer table of skull bone.

Ordinarily, fracture means 'breaking' of a bone. Fissured fracture is one in which there is no displacement of the fragments, and this condition may be caused by direct or indirect violence, usually resulting from a fall or a blow from a blunt object. These fissures may extend far and wide from the point struck, may implicate one or both tables, and not infrequently run down into the base. A scratch on the skin which does not go across the bone cannot be said to be a fracture of a bone within the meaning of S. 320. Both outer and the inner tables of the skull bone may be considered to be bones by themselves and fracture of outer or the inner table by itself can be taken to be a fracture of a bone within the meaning of S. 320. A crack which does not involve both the tables of the skull bone may amount to a fracture of a bone. A fissured fracture of the outer table of the skull bone would therefore, bring the case within the definition of a grievous hurt. A I R 1937 Rang 253 and A I R 1942 Pat 376, Not Followed. 1956 Cri L J 579 ; I L R (1955) 5 Raj 1 ; 1955 Raj L W 486 ; A I R 1955 Raj 38 (37, 38) (Prs 7 to 9).

SECTION 321.

——Ss. 321, 300—Accused beating wife with bamboo stick and causing two abrasion injuries on her chest—Death of wife due to rupture of spleen — Accused not aware of enlarged spleen — Offence under S. 323 and not S. 304. See Penal Code (1860), S. 300. 1952 Cri L J 397 ; A I R 1952 Assam 170 (DB).

——Ss. 321, 324, 379 — Beating resulting in injuries followed immediately by theft—Accused guilty under S. 324. See Penal Code (1860), S. 324. 1955 Cri L J 1846 ; A I R 1955 Cal 527 (DB).

——Ss. 321, 323 and 337 — Applicability considered. A I R 1955 N U C (Mad. B) 48.

——Ss. 321, 323, 325, 304-A and 80 — Hurt—Intention or knowledge is essential ingredient — Lawful act of accused resulting in death of boy due to accidental fall of hammer on head — Absence of intention to cause hurt or knowledge that hurt would be caused — Accused held not liable in view of S. 80. (1962) 1 Mad L J 161 ; 75 Mad L W 16.

——S. 321—Offence of hurt—Intention or knowledge essential — Accident — No offence. See Penal Code (1860), S. 80. 1962 Mad. L. J Cri 174 ; 75 Mad L W 16.

SECTION 322

——Ss. 322, 324, 325, 304-A and 80—Hurt—Intention or knowledge is essential ingredient — Lawful act of accused resulting in death of boy due to accidental fall of hammer on head — Absence of intention to cause hurt or knowledge that hurt would be caused. —Accused held not liable in view of S. 80. (1962) 1 Mad L J 161 ; 75 Mad L W 16.

——S. 322—Offence of hurt—Intention or knowledge essential — Accident — No offence. See Penal Code (1860), S. 80. 1962 Mad L J Cri 174 ; 75 Mad L W 16.

——S. 322 — Applicability—"Grievous hurt"—Essentials — Intention — Inference from circumstances—When drawn, stated—Offence committed held under S. 325. See Penal Code (1860), S. 325. 1958 Cri L J 1077 ; AIR 1958 Pat 452.

——S. 322—Applicability—Essentials.

In order to determine whether the hurt caused is grievous, the extent of the hurt and the intention of the offence have to be taken into account. The requirement of explanation to S. 322, Penal Code, will be satisfied if the offender had the knowledge that by his act he was likely to cause grievous hurt. Such a knowledge can be inferred from the part of the body chosen for inflicting violence and the severity of that violence as shown by the injuries on the body of the victim. 1958 Ker L T 656 ; 1958 Cri L J 706 ; AIR 1958 Trav-Co 129 (139) (Pr 8) (DB).

SECTION 323

SYNOPSIS

(Penal Code (1860), S. 323.)

1. Offence under. Illustrative cases.
2. Charge.

3. Constructive liability.
See also Penal Code (1860), Ss. 34 and 149.
4. Evidence and proof.
5. Composition of offence.
6. Private defence.
See also Penal Code (1860), Ss. 96, 106.
7. Conviction and sentenee.
8. Procedure.

1. Offence under, illustrative cases.

——Ss. 323, 302 and 149 — Charge against accused under Ss. 302 and 323 read with S. 149, Penal Code —Conviction under Ss. 302 and 323 — Legality. See Criminal P. C. (1898), S. 233. **1956 Cri L J 1039 : AIR 1956 All 529.**

——S. 323—Applicability — Beating with stick with object of chastisement—No intention or apprehension of death — Offence held to be one under S. 323. See Penal Code (1860), S. 302. **1961 (1) Cri L J 219 : AIR 1961 Andh Pra 79 (DB).**

——Ss. 323, 304 (II) and 325 — Injuries caused not shown to have caused death — Case would not be covered by S. 304 (II), or by S. 325 — Accused admitting beating — He can be convicted under S. 323. See Penal Code (1860), S. 304 (II). **1952 Cri L J 1272 : AIR 1952 Assam 157 (DB).**

——Ss. 323 and 324 — Applicability—Lathi whether lethal weapon.

The question whether a lathi used by the accused is or is not an instrument likely to cause death is one of fact in each case. Hence when the lathi used by the accused for causing a simple injury is not before the Court and the Court is not in a position to say whether it was likely to cause death the accused should be convicted under S. 323 and not under S. 324. **51 Cri L J 1005 : A I R 1950 East Punj 209 (210) (Pt B) (Pr 6) (DB).**

——Ss. 323, 304, Parts I and II—Distinction between Part I and Part II of S. 304 — Injury to solar plexus by hitting at it — Death caused by injury — Offence committed is one not under S. 304 but one under S. 323. See Penal Code (1860), S. 304, Part I. **1963 (1) Cri L J 762 : AIR 1963 Him-Pra 18.**

——S. 323—Applicability — Illegal custody by police constable—Assault and escape—Offence under S. 323 and not under S. 332 held committed. See Penal Code (1860), S. 332. **AIR 1955 NUC (Hyd) 2355.**

——S. 323—Applicability—Accused intending injury to one person throwing piece of wood — Piece of wood missing its mark and hitting a boy of seven on his head — Boy dying as a result of injury — Offence held was under S. 323 and not under S. 304-A. See Penal Code (1860), S. 304-A. **A I R 1955 N U C (Madh-B) 3884 (DB).**

——Ss. 323, 304/34 and 302—Applicability—Accused beating deceased with sticks without pre-meditation —Deceased falling down and later on dying — Injuries sustained simple and caused on scapula back and buttocks —Accused held were guilty under S. 323 and not under S. 304/34 or under S. 302. **AIR 1955 NUC (Madh-B) 2113 (DB).**

——Ss. 323, 337 and 321 — Applicability — Personal injury if intentionally caused is neither a rash nor negligent act and constitutes an offence under S. 323 —S. 337 applies where hurt is caused involuntarily yet negligently or rashly. See Penal Code (1860), S. 321. **AIR 1955 NUC (Madh-B) 48.**

——Ss. 323, 304 and 319—Applicability and scope — Deceased receiving only two injuries which were not grievous — Injuries only remoter cause of death — Accused can be convicted under S. 323 and not under S. 304. See Penal Code (1860), S. 304. **1954 Cri L J 6 : AIR 1953 Madh-B 262.**

——Ss. 323, 109, 111, 114, 304, Part 2—Applicability Sudden quarrel — Abettor present on spot instigating another co-accused to beat deceased — Latter giving heavy blow on :head of deceased with log of wood lying nearby resulting in his death — Injury sufficient in ordinary course of nature to cause death—Abettor held guilty under S. 323/109, I. P. C. and not under S. 304 Part 2/114, I. P. C. — Principal accused held guilty under S. 304 Part 2. See Penal Code (1860), S. 109. **1962 (1) Cri L J 435 : AIR 1962 Madh-Pra 91.**

——Ss. 323, 304 (Part 2) and 301—Doctrine of transfer of malice or transmigration of motive — Applicability—Accused gave a blow with a small stick to a woman who had a small child in her lap and blow fell upon head of infant who died on spot—Intention of accused being only to cause simple injury to woman, he could be convicted only under S. 323 and not under S. 304 Part 2. See Penal Code (1860), S. 301. **1959 M P L J 21 : 1958 M P C 722 : 1959 Jab L J 57.**

——Ss. 323, 334 and 304 Part 2 — Applicability — Young person kicked in abdomen by A, a man of same age—Intestines perforated resulting in death—Nature of offence—A must be presumed to have knowledge that his act was likely to cause death—Offence committed by him was one under S. 304 Part 2 and not one under either S. 334 or S. 323. See Penal Code (1860), S. 304, Part 2. **A I R 1955 N U C (Pepsu) 1876.**

——Ss. 323, 392—Prosecution under—Warrant under Raj. Revenue Act (15 of 1956), S. 230—Endorsement —Attachment of Cows of B by Revenue Inspector, void—Assault on Revenue Inspector by sons of B — Accused persons having offered resistance to execution of a not duly endorsed warrant could not be treated as having assaulted public servants in discharge of their public duties. See Penal Code (1860), S. 392. **1964 Raj L W 617 : ILR (1965) 15 Raj 166.**

——Ss. 323 and 304—Applicability—Accused giving kick to mother-in-law on rear abdomen without knowing she was suffering from fatty heart and enlarged liver —Victim dying — Offence of which accused can be held guilty is S. 323 and not S. 304. **AIR 1955 NUC (Raj) 4674.**

——Ss. 323 and 325—Applicability—Minor beating— Rupture of spleen and death—Accused not aware of enlarged spleen — Offence held one under S. 323. **AIR 1955 NUC (Raj) 2181.**

2. Charge.

——S. 323—Applicability—Prosecution under Ss. 147 and 323—Absence of charge under S. 147—Effect — Only the persons who caused injuries can be punished for their individual acts. See Penal Code (1860), S. 147. **1959 Cri L J 167 : AIR 1959 Andh-Pra 102.**

——Ss. 323, 324 and 34—Applicability—Conviction— A tried under S. 324 and A and B under S. 324 read with S. 34 and convicted accordingly — No separate charge under S. 323—Appellate Court holding A and B not constructively liable — They cannot be convicted under S. 323. See Cr. P. C. (1898), S. 236. **1959 Nag L J (Notes) 38.**

——S. 323 — Charges against several accused under Ss. 148, 323, 326, 324 and 451 read with S. 149, I. P. C.—Acquittal of the accused on charges of unlawful assembly but conviction for specific individual acts under different sections — Absence of separate charges for specific offences in the alternative — Prejudice—Conviction for individual specific offences held proper in the circumstances of the case. See

Criminal Procedure Code (1898), S. 233. 1962 Ker L J 792.

——Ss. 323, 325 and 34 —Charge—Several accused—Common intention — No reference to S. 34 in the charge—No questions bearing on this aspect of matter put to any of accused in their examination under S. 342, Cr. P. C. — Each of the accused can only be held responsible for his individual act — There cannot be a case of constructive liability. See Penal Code (1860), S. 34. AIR 1955 NUC (Mad.) 3821.

——Ss. 323, 332, 224 and 147 — Charge — Offence committed not in the course of same transaction — Misjoinder of charges — Effect — S. 233 (1) Cr. P. C. could not apply to facts and trial was vitiated by misjoinder—Prejudice has to be presumed when there is a misjoinder of charges or persons. See Cr. P. C. (1898), S. 233. AIR 1955 NUC (Mad) 2415.

3. Constructive liability.

See also Penal Code (1860), Ss. 34 and 149.

—Ss. 323, 325 and 34 — Constructive liability — Common intention—Proof of—Complaint against two accused for causing grievous hurt — No evidence as to who was responsible for causing hurt—Magistrate has to find out that there was common intention to cause grievous hurt—If he does not find such intention established he would not be justified in convicting either of them under S. 325 read with S. 34—Only offence that can be made out would be one under S. 323. See Penal Code (1860), S. 34. 56 Cri L J 682 : AIR 1955 All 280.

—S. 323 — Constructive liability — Hurt caused by some one of persons assembled in exercise of private defence of property—Evidence as to individual who caused hurt absent — Everybody of the assembly cannot be made liable. See Penal Code (1860), S. 149. 35 Cri L J 1713 : AIR 1954 All 771 (DB).

—Ss. 323, 325 and 34 — Constructive liability — Common intention to cause grievous hurt—Presumption of.

When several persons combine with the object of judiciously blows upon others with lathis and grievous hurt is caused as a result of the blows thus inflicted, it may safely be presumed that the common intention of all was at least to inflict grievous injury. 1954 Cri L J 739 : AIR 1954 All 358 (356) (Pt A) (Pr S).

——Ss. 323, 149—Constructive liability—Liability of member of unlawful assembly — Mere fact that they did not take part in actual beating cannot exonerate them of their liability for offence under S. 323, committed by other members of assembly. See Penal Code (1860), S. 149. 1958 Cri L J 1798 : A I R 1958 All 778.

——Ss. 323, 147, 149 — Conviction under S. 147 and under S. 323 read with S. 149 — None convicted for himself causing injury under S. 323 — Conviction under S. 323 with S. 149 cannot stand. See Penal Code (1860), S. 147. 1958 Cri L J 711 : AIR 1958 All 315.

[Overruled in AIR 1955 All 282.]

——Ss. 323, 34, 302—Assault by several persons armed with spears and lathis — Constructive liability — Deaths caused mainly due to incised wounds—Accused armed only with lathis could only be convicted under S. 323. See Penal Code (1860), S. 34. 51 Cri L J 993 : AIR 1950 All 835.

——S. 323—Applicability—Absence of evidence justifying a finding of existence of common intention. See Penal Code (1860), S. 34 — Circumstances which can justify a conviction under S. 323 only and not under S. 304/34. AIR 1955 NUC (Assam) 1206 (DB).

——Ss. 323, 34, 325—Sudden fight between three accused and three complainants — Complainants found to be aggressors — Accused inflicting several simple and grievous injuries with lathis on complainants—One of accused causing death of one of complainants by a sharp-edged weapon—Who inflicted fatal blow or who inflicted grievous hurts not known —Accused accepting their right of private defence but who exceeded it not known — S. 34 held inapplicable in such a case—Accused held guilty under S. 323 and not under S. 325 or S. 302. See Penal Code (1860), S. 34. AIR 1950 East Punj 218 (DB).

——Ss. 323, 34, 325, 326—Applicability.

If a person receives more than one injury inflicted by two persons, but there is only one injury which amounts to grievous hurt and it is not possible to say which of the two accused committed the injury which amounts to grievous hurt, none of the accused can be convicted for any offence other than simple hurt, unless there is material to show that the grievous hurt was caused in furtherance of a common intention to inflict an injury of that kind. AIR 1954 Mys 53 (54) (Pr 5) (DB).

——Ss. 323, 324 and 326 — Applicability — Common object to cause grievous hurt—Grievous and simple injuries caused in prosecution of common object—Conviction under Ss. 325, 324 read with S. 149—Not proper. See Penal Code (1860), S. 149. 1957 Cri L J 1307 : AIR 1957 Punj 278 (DB).

——Ss. 323 and 325—Applicability—Common object to give beating—Hurt to several persons and grievous hurt to one—Offence—S. 149.

The common object of the assembly had been fully established by the prosecution evidence and the circumstances of the case to be that of giving beating to C's party. In prosecution of this common object all the five appellants caused hurt to various persons and grievous hurt to one.

Held, that the offences committed were under Ss. 323 and 325. When an unlawful assembly makes an attack with lathis its members must know that grievous hurt was likely to be committed in the prosecution of the common object of beating. All the appellants therefore by virtue of S. 149 were guilty of the offence of grievous hurt as a grievous hurt was caused by some member of that unlawful assembly. But if it was not possible to hold on the state of evidence in the case as to whether the lathi with which the grievous hurt was caused was such an instrument which, used as a weapon of an offence, was likely to cause death, it would not be safe to convict the appellants under S. 325 read with S. 149, I. P. Code. That proper conviction could be under S. 325 read with S. 149, I. P. Code. 1958 Raj L W 505.

4. Evidence and proof.

——Ss. 323, 302—Evidence — Benefit of doubt—Case on facts—(Criminal P. C. (1898), Ss. 220, 537)—(Evidence Act (1872), S. 1) — See Penal Code (1860), S. 302. AIR 1955 N U C (Ajmer) 4758.

——Ss. 323, 325 and 34—Fight between two parties — Both parties receiving injuries — Question of aggression—Evidence and proof.

In a case where the happening of the incident is admitted and both parties have received injuries, the only question which falls for consideration is as to which of the two parties was the aggressor. The nature and number of injuries received by the parties is one of the factors which has to be taken into account in deciding the question of aggression. Where the prosecution version of the incident is not an unvarnished truth, a serious effort should be made to find

out the truth and unless the court is unable to disengage truth from falsehood, there is no reason why that part of the prosecution version which is found plausible and reliable in the light of the natural course of events and human conduct, should not be accepted. **1965 All Cri R 474 : 1964 All W R (HC) 684.**

——S 323—Evidence — Benefit of doubt—Witnesses not credible—Whether assault was seen, not convincing—Testimony not corroborated—Accused held entitled to benefit of doubt — (Evidence Act (1872), S. 37) — (Criminal P. C. (1898), S. 367). **AIR 1955 N U C (Assam) 2799.**

——Ss. 323, 325—Intention.

To sustain a conviction for causing grievous hurt, it must be shown that not only grievous hurt had been caused but that the accused intended or knew himself to be likely to cause grievous hurt. **:1962 Ker L T 868 : (1962) 2 Ker L R 466.**

——S. 323 — Criminal Trial — Appreciation of evidence — Part of evidence of witness untrue — Entire testimony need not be discarded — Charge under Ss. 448, 354, and 323, I. P. C. **1960 Ker L J 649.**

——S. 323 — Causing momentary physical pain is sufficient to constitute offence — Proof by medical evidence is not necessary. **51 Cri L J 1062 : AIR 1950 Kutch 41 (42) (Pt E) (Pr 4).**

——Ss. 323, 302 — According to evidence of eye-witnesses, the deceased was surrounded by four persons and beaten by them with lathis — Death of deceased—According to evidence, deceased sustaining injuries: on head, temple. neck and back—Injuries bleeding—Body of deceased in advance stage of decomposition, at the time of post mortem examination — Evidence of injuries not corroborated by medical evidence — Whether skull or any other bone was fractured not detectable — Condition of vital organs not known—Accused held could not be found guilty under S. 302—Accused convicted under S. 323. **M B L J 1955 H C R 1829 : MBLR 1955 Cri 370.**

——S. 323—Overwhelming evidence showing assault by three accused on a person amounting to offence under S. 323 — Omission to mention name of the accused in F. I. R. and mentioning spot of incident approximately held immaterial—Criminal Trial—Evidence.

Where there is overwhelming evidence in support of an assault with sticks by three accused on a person, amounting to an offence under S. 323 *I*, P. C., much importance cannot be attached, either to the fact that the name of one of the accused was not mentioned in the first information report or to the fact that the place of incident was mentioned approximately, when the name of the accused which was not mentioned was not known to the person making the report and when the place of incident was not far away from the place mentioned in the report. **Madh B L J 1955 (H C R) 1829 : Madh B L R 1955 (Cri) 370.**

——S. 323—Evidence — Chain of circumstantial evidence is complete which leads to irresistible conclusion that accused was responsible for murder—Death of deceased by fatal injury—Proof of accused assaulting victim with first blows and kicks though infliction of the fatal injury not seen by eye-witness — Proof of facts and circumstances—Held, that facts and circumstances were only consistent with guilt of accused that he was author of the fatal injury and those were not consistent with any other rational explanation — Since motive for murder was shrouded with mystery, lesser sentence of imprisonment for life would meet ends of justice. See Penal Code (1860), S. 302. **(1964) 6 Orissa J D 257.**

——Ss. 323, 380 and 147 — Complaint under Ss. 147 and 380 against three accused but summoned under Ss. 380 and 323—Participation of other accused in occurrence was not proved—Charge under S. 380 also not fully established—Prosecution evidence regarding assault was quite convincing as there were no material discrepancies in statements — Charges under Ss. 147 and 380 must fail but accused can be held guilty of the minor offence under S. 323 for their individual acts of assault. **1965 B L J R 278 : ILR 45 Pat 146 : 1966 Cri L J 339 (2).**

——Ss. 323, 324 and 302—Criminal P. C. (1898), S. 367—Evidence Act (1872), Ss. 5 and 105 — Appreciation of evidence—Principle of falsus in uno falsus in omnibus does not apply in India—Prosecution witnesses omitting to explain injuries on the accused —Accused not entitled to acquittal on that ground alone. See Evidence Act (1872), S. 3, Note 5 (E). **1962 Raj L W 434 : I L R (1962) 12 Raj 481 (DB).**

——S. 323—Applicability — Attack by several persons—Evidence not showing which accused caused injury.

Where injury could be attributed only to one of the accused and from the evidence it cannot be found as to which of the accused caused that injury, the conviction of the accused under S. 323, I. P. Code, cannot be maintained. **1959 Raj L W 35.**

5. Composition of offence.

——S. 323—Composition of offence under S. 323, Penal Code—Effect—Subsequent withdrawal of complainant from compromise—Not permissible. See Criminal P. C. (1898), S. 345 (6). **1962 (2) Cri L J 206 : AIR 1962 Pat 316.**

6. Private defence.

See also Penal Code (1860), Ss. 96-106.

——Ss. 323, 147, 143. 97, 99 — Illegal attachment of property—Judgment-debtor is not entitled to take it from the enclosure, where the sapurdar had kept it —There is no right of self-defence. See Penal Code (1860), S. 147. **1960 Cri L J 1040 : AIR 1960 All 453.**

——Ss. 323, 103, 147, 148, 304 and 325—Right of private defence of property—Dispute regarding cutting of sugarcane crop—Rioting — Each party charging other as aggressor — Title legally with accused under decree who had right of private defence—(Tenancy Laws—U. P. Tenancy Act (17 of 1939), Ss. 160 (3) and 180), See Penal Code (1860), S. 103. **1953 Cri L J 717 : AIR 1953 All 327.**

—— Ss. 323 and 326 — Deceased old man, damaging fieldof accused and raising his kalsa to strike one of the accused person—Accused held had right of private defence of person and property — Accused however lost this right by using excessive force and causing death of deceased — Though appellants had common intention to belabour deceased and not to cause his death they must have known that injuries caused were likely to cause death of the deceased—Accused were guilty under S. 304 Part 2 read with S. 34. See Penal Code (1860), S. 34. **1965 (2) Cri L J 499 (2) : AIR 1965 Him Pra 49.**

——Ss. 323, 99 — Right of private defence does not extend to kicking police officer or beating him with stick See Penal Code (1860), S. 99. **1953 Cri L J 1569 : AIR 1953 Nag 292.**

——S. 323 — Complainant entering into lands of accused to effect repairs to fence serving as boundary between land of both parties without intention to annoy, intimidate or insult accused — Act does not amount to criminal trespass so as to give accused right to inflict injury on complainant. See Penal Code (1860), S. 441. ILR (1964) Cut 706.

7. Conviction and sentence.

——Ss. 323 and 304—Person throwing child of 5 years on ground with force.—Fracture of skull - Knowledge that the act was likely to cause death must be presumed—Conviction under S. 304 justified. See Penal Code (1860), S. 304. 1964 All W R (H C) 392.

——Ss. 323, 425, 427 — Loss or damage to property under S. 425—Nature of indicated—Accused was alleged to have cut and taken away sugar cane crops of complainant—When she protested accused beat her and her nephew — Held, mere cutting of sugar-cane crop which was ripe did not amount to any mischief and hence conviction under S. 427 could not be maintained — Conviction under S. 323 held maintainable. See Penal Code (1860), S. 425. 1957 Cri L J 702: A I R 1957 All 405.

——S. 323—Separate convictions under S. 147 and S. 323 read with S. 149—Separate sentences held legal —Scope of S. 71, Indian Penal Code stated. See Penal Code (1860), S. 147. 56 Cri L J 671: AIR 1955 All 232 (FB).

——S. 323—Sentence—Accused responsible only for minor injuries while all major injuries were inflicted by co-accused — Held, that 3 months R. I was sufficient to meet ends of justice and that 6 months R. I, was excessive. AIR 1955 N U C (All) 1329.

——Ss. 323, 147, and 326—Nothing illegal in conviction both under Ss. 147 and 323 or 326. See Penal Code (1860), S. 147. 1953 Cri L J 1677 : AIR 1953 All 726.

——Ss. 323 and 34—Sentence—Complainant attacked and injured while taking the cattle of the accused to the Cattle Pound—Sentence to be severe. 1951 All L J 713 : 1953 Cri L J 817 : 1951 A W R (HC) 533 : AIR 1953 All 358 (359) (Pr 4).

——Ss. 323 and 302—Criminal P. C. (1898), Ss. 423 and 439—Charge under S. 302, Penal Code—Conviction under S. 323, Penal Code—Appeal — High Court cannot alter conviction to one under S. 302. 16 All L J 918 : AIR 1918 All 65 : 20 Cri L J 22; 9 Luck 607 : AIR 1934 Oudh 200 : 35 Cri L J 973, Overruled. See Criminal P. C. (1898), S. 423. 1952 Cri L J 751 : AIR 1952 All 369 (FB).

——Ss. 323, 147—Conviction under another section—A person who actually causes hurt and is also a member of an unlawful assembly can be convicted of committing riot under S. 147 and of causing hurt under S. 323. AIR 1952 All 92.

——Ss. 323/149, 71—Scope of—Offences punishable under Ss. 147 and 323/149, Penal Code—Prosecution proving that accused were members of unlawful assembly of which the common object was to give beating to another person — No proof that they themselves caused hurt to any one — Their act constitute two separate offences viz., those punishable under Ss. 147 and 323/149 — Sentence can be awarded to them under both sections provided aggregate sentence does not exceed limit prescribed in respect of one of them. See Penal Code (1860), S. 71. A I R 1952 All 92.

——S. 323—Sentence — Assault resulting in death—Sentence of one year not excessive. AIR 1955 N U C (Assam) 5540 (DB).

——S. 323—Contravention of S. 83 of Bombay Village Panchayats Act (3 of 1959), vitiates trial and conviction. See Panchayats — Bombay Village Panchayats Act (3 of 1959), S. 83. 1963 Mah L J (Notes) 7.

——S. 323 — Prosecution under S. 506, Part 2, Penal Code—Charge framed—Facts not disclosing offence—Conviction under S. 323, Penal Code not legal. See Criminal P. C. (1898), S. 238 (1). 1958 Nag L J (Notes) 61 (Bom).

——Ss. 323 and 334—Conviction under section.

The accused was prosecuted under S. 394 on the allegation that he gave two blows with a stick to G who was moving along the road and snatched away his purse. The accused denied the taking of the purse but admitted of having delivered the blows in retaliation for the blow which G gave him in the first instance. The Magistrate after perusing the statements of the prosecution witnesses recorded in the police diary found them unworthy of credence and framed a charge and convicted the accused under S. 323, Penal Code.

Held, that apparently his plea that he was beaten in the first instance was not correct, otherwise he would have said that he wanted to adduce evidence to prove that fact. Apart from that even if he was beaten in the first instance, it would not justify his beating G and completely absolve him from legal liability unless he did so in self-defence. If he merely took revenge upon G for what G did to him, his act would all the same amount to an offence. Similarly if he acted under grave and sudden provocation he would be liable under S. 334, Indian Penal Code. As there was no plea of grave and sudden provocation; in the circumstances, the conviction of the accused under S. 323 was correct. 1957 Nag L J 184.

——S. 323—Accused rescuing person from unlawful detention — Acquitted under S. 225-B but convicted under S. 323 — Rescuing and causing hurt proved to form part of same transaction — Conviction quashed. See Penal Code (1860), S. 225-B. 1965 (2) Cri L J 89 : AIR 1965 Cal 368 (DB).

——S. 323—Sentence - Maximum punishment is one year—Sentence of two years is illegal—Importance of consulting enactment however simple, pointed out. AIR 1955 N U C (Him Pra) 1302.

——S. 323—Sentence—Accused remaining in judicial lock up for nine months — Sentence reduced to 6 months' R. I. AIR 1955 N U C (Him Pra) 1302.

——Ss. 323, 302, 320 and 326—Applicability—Boyish quarrel—Accused hitting deceased with granite stone on temple — Death — Injury sufficient in ordinary course of nature to cause death — Offence — Ss. 320 and 326—Sentence—Cr. P. Code, S. 399.

The accused a boy of sixteen years of age and the deceased were students in VI standard. As a result of a boyish quarrel between them, the accused hit the deceased from behind with a granite stone on his right temple near the ear, as a result of which the deceased died some time afterwards in the hospital. First the injury was supposed to be simple, but on post mortem, it was found that there was a depressed fracture and that the injury was sufficient in the ordinary course of nature to cause death.

Held, that the offence did not fall either under S. 323 or S. 302, I. P. Code. It would be going too far to hold, that, under the circumstances the accused knew that the blow was so imminently dangerous that it must in all probability cause death or that the injury which he intended to cause was sufficient in the ordinary course of nature to cause death. The only intention that the accused could have had would have been to give a good blow to the deceased as he entertained a grudge against him because of his

former quarrels with him. It was clear that the offence committed was grievous hurt falling under the seventh category of S. 320, I. P. Code and considering that the granite stone in question was an instrument which used as a weapon of offence was likely to cause death, the offence fell under S. 326 : AIR 1922 Lah 26 (2) and AIR 1925 Lah 559, Not foll. Held, also that considering the age of the accused (16 years) he was not entitled to the benefit of S. 399, Cr. P. Code. Held, further, that under the circumstances rigorous imprisonment for five years would meet the ends of justice. 1960 K L T 430 : 1960 Cri L J 1213 : AIR 1960 Ker 301 (303, 304) (Pt B) (Prs 9 to 11) (DB).

——Ss. 323 and 304, Part 2—Applicability—Accused dealing only one blow with open hand on neck of deceased resulting in death—Offence.

Where the accused gave only one blow with his open hand on the neck of the deceased, while they were facing each other, causing fracture of vertebrae, unconsciousness resulting in death and the blow was not followed by other acts of violence nor was any weapon used :

Held, that so long as the intention or knowledge to cause grievous hurt has not been proved, the offence was only one under S. 323, even though death ensued. (Conviction altered from S. 304, Part 2 to one under S. 323, I. P. Code). 1959 Ker L R 805 : 1959 Ker L J 1004 : 1959 Ker L T 1351 : 1960 Cri L J 827 : AIR 1960 Ker 197 (198) (Pr 4).

——Ss. 323 and 304—Conviction under—Absence of intention — Conviction under S. 304 cannot stand. See Penal Code (1860), S. 304. 1959 Cri L J 1331 : AIR 1959 Ker 372 (DB).

——S. 323—Sessions Judge awarding one year's rigorous imprisonment—Appeal by accused—Held having regard to the multiple injuries received by the deceased and having regard to the injuries received on hands causing fracture of metacarpal bone, the sentence could not be regarded as unduly heavy. 1956 MBLJ 494 : Madh B L R 1956 Cri 61.

——Ss. 323 & 325—Applicability—Spleen of deceased abnormally enlarged—Accused not aware—Contusion on lower part of back caused by wooden piece of "dhamania"—Conviction under S. 323 held proper. AIR 1955 NUC (Madh B) 3735 (DB).

——Ss. 323 and 325, 302, 149 and 147—Offence under—Held on facts that the case fell under S. 325 read with S. 149, besides under S. 323 read with Ss. 149 and 147—Offence under S. 323 being only a minor form of offence to the offence under S. 325 conviction under S. 323 was superfluous. See Penal Code (1860), S. 302. 1964 (2) Cr L J 185 : AIR 1964 Mad Pra 182 (DB).

——Ss. 323, 325, 302 and 307—Lathi not a lethal weapon—Knowledge imports certainty, not probability under S. 300 (2)—In the absence of such knowledge conviction under S. 307 is improper. See Penal Code (1860), S. 302. 1961 MPLJ (Notes) 290.

——Ss. 323, 147—Charge under S. 147, Penal Code—No evidence that a particular accused's act was responsible for hurt—No one can be convicted under S. 323. 1954 Cri L J 1254 : AIR 1954 Mad 785.

——Ss. 323 & 300—Applicability—Evidence showing that accused had only beaten the deceased — No evidence to show the injuries or fatal injury was caused by accused—Nature of injuries such as would be caused by lathi—Held conviction of accused under S. 302 could not be sustained— Conviction altered into one under S. 323. AIR 1955 N U C (Nag) 3956 (DB).

——S. 323—Assault by master on servant — Master is guilty—Master and Servant.

The law does not give any sanction to a master to commit assault on his servant even by way of reprimanding him; and if a case is made out, there is no difficulty in convicting the assailant even though he happens to be the employer of the victim. (1963) 5 O J D 65.

——Ss. 323 and 332— Obstructing public servant in discharge of his duties—Ingredients of offence—Proof—Held, search contravening S. 165, Cr. P. Code being illegal, conviction of accused under Ss. 353 and 332, I. P. Code not maintainable— In view of illegality of search and right of private defence of person, conviction of accused could not be even altered to one under S. 323, I. P. C. See Penal Code (1860), S. 353. 1964 (2) Cr L J 571 : AIR 1964 Pat 493 (DB).

——S. 323—Conviction—Legality — Seizure of cattle unlawful—Hurt caused in rescuing cattle — No conviction. See Penal Code (1860), S. 147. AIR 1955 NUC (Pat) 1869.

——Ss. 323 and 326—Conviction under—Complainant party entering on accused land—Fight taking place in field of one of the accused—Accused had right of private defence of property and they could not be convicted under Ss. 323 and 326. See Penal Code (1860), S. 97. 1964 (2) Cr L J 213 : AIR 1964 Tripura 45.

8. Procedure.

——Ss. 323 and 325—Procedure — Magistrate finding accused guilty under S. 323, Penal Code and sentencing to fine—Sessions Judge altering conviction to one under S 325 but maintaining sentence—Sentence held illegal under S. 325 as offence under that section must be punished with imprisonment whether with or without fine—Proper course for magistrate held was to refer the matter to High Court for making sentence legal under S. 439. See Criminal P. C. (1898), S. 423. AIR 1955 NUC (All) 2675 (DB).

——Ss. 323, 333 and 149—Procedure—Trial by jury—Trial of offences under S. 323 read with S 149 and S. 333 read with S. 149 should be with aid of assessors and not by jury — If however these offences were tried by a jury instead of with aid of assessors it remained a trial with aid of jury—In view of S. 536, Cr. P. C. it would not be considered to be illegal. See Penal Code (1860), S. 149. 1954 Cri L J 1424 : AIR 1954 All 680 (DB).

——S. 323—Illegal commitment to High Court under S. 207-A (10)—High Court can quash under S. 561-A—Commitment for offences under Ss. 323/34, I. P. C. See Criminal P. C. (1898), S. 561-A. 1964 (1) Cr L J 588 (Cal).

——Ss. 324, 304, 300, 96 and 97— Criminal P. C. (1898), S. 297—Misdirection— Plea of private defence—Raising of — Accused repudiating complicity in crime—Evidence and circumstances showing that such plea could properly be raised—Duty of Sessions Judge — Omission to explain to jury exception II to S. 300, I. P. C. and law of private defence is misdirection. See Criminal P. C. (1898), S. 297. 1962 (1) Cri L J 137 : AIR 1962 Cal 85 (DB).

——S. 323—Facts of case pointing to two alternative offences — No direction in charge of possible offence—Jury left with alternative of convicting or altogether acquitting — It is misdirection vitiating trial. Criminal P. C. (1898), S. 297. 1952 Cri L J 1013 : AIR 1952 Cal 481 (DB).

——S. 323 — Criminal P. C. (1898), Ss. 262, 241, 251 and 537 — Adoption of wrong procedure— Effect — Joint trial under Ss. 323, 504 and 506 (2), Penal Code—Procedure prescribed for summons cases followed—Accused acquitted under Ss. 504 and 506 (2)—Convicted under Ss. 323 — No failure of justice — Trial not vitiated. See Criminal P. C. (1898), S. 262. 1962 (2) Cri L J 68 : AIR 1962 Guj 231.

——Ss. 323, 180 — More than one trial — Legality — Test is whether offence for which accused is tried is distinct from one for which he was previously tried.—(Criminal P. C. (1898), s. 403). See Constitution of India, Art. 20. 1955 Cri L J 1011 : AIR 1955 Mys 126 (DB).

——Ss. 323 and 347—Expression "... while acting or purporting to act in the discharge of his official duty" ... Interpretation of — Question substantially one of fact — Act complained must be directly concerned with official duties—Duty of Magistrate in determining question of sanction stated. See Cr. P. Code (1898), S. 197. 1963 (2) Cr L J 678 (Pat).

——S. 323 — Criminal P. C. (1898), S. 423 (1) (b) and 439—Appeal against conviction—Powers of appellate Court to order retrial—Appellate Court upholding conviction—Remand for writing fresh judgment and for passing proper sentence, is illegal. See Criminal P. C. (1898), S. 423 (1) (b). 1961 (1) Cri L J 897 : AIR 1961 Pat 258 (DB).

——S. 323—Complaint under Ss. 323 and 504 Penal Code filed before Magistrate First Class—Magistrate recording evidence and on explicit finding that prima facie offence under S. 323 alone was made out and that offence under S. 504 was not disclosed, transferring the case to Panchayat for trial — Held that there was no illegality or irregularity in the course followed by the Magistrate. See Panchayats Punjab Gram Panchayat Act (4 of 1953), S. 41. (1962) 64 Pun L R 1053.

——S. 323—Complaint for offence under Ss. 452, 323, 504, 147, Penal Code—Police Challan also put up before same Magistrate against same accused for offence under Ss. 452 and 149, Penal Code, in respect of same occurrence—Case on complaint dropped from register but tagged with challan case — Challan case proceeded with under S. 251-A, Cr. P. C, and accused convicted under Ss. 452 and 457, Penal Code—Held, there was no consolidation of complaint's case with challan case and trial under S. 251-A was not illegal. See Cr. P. Code (1898), S. 252. 1961 Raj L W 191.

SECTION 324

SYNOPSIS
(Penal Code (1860), S. 324.)

1. Instrument likely to cause death.
2. Evidence and proof.
3. Charge.
4. Private defence.
   See also Penal Code (1860), Ss. 96-106.
5. Constructive liability.
   See also Penal Code (1860), Ss. 34 and 149.
6. Illustrative cases.
   (A) Sections 324 and 307.
   (B) Sections 324 and 326.
7. Conviction and sentence.

1. Instrument likely to cause death.

——S. 324—Instrument likely to cause death—Lathi —When instrument likely to cause death.

The accused was prosecuted for having committed murder of M by causing him hurt with a lathi. However the accused was convicted under S. 324, Indian Penal Code and the lathi used was held to be an instrument likely to cause death. The lathi as per seizure memo was said to have a hole at both ends. Its thickness was approximately one inch.

Held, that the instrument by virtue of its very nature should be such that one could reasonably presume that by its use as a weapon of offence death would be probable. It was something inherent in the instrument which rendered death probable. That being the true import of the word "likely" used in the section, the lathi said to have been used for assault could not be said to be by its very nature an instrument likely to cause death within the purview of that section. The learned Additional Sessions Judge failed to consider the real import of the expression in S. 324 "any instrument which used as a weapon of offence is likely to cause death." 1961 Pat P L J (Notes) 77.

——S. 324—Applicability—Causing hurt with a short sharp-edged instrument is an offence punishable under S. 324 and it is a cognizable offence—Assault on constable while trying to arrest — Offence under S. 353. See Penal Code (1860), S. 353. 1958 Cr L J 541 : AIR 1958 Orissa 69 (DB).

2. Evidence and proof.

——Ss. 324 and 302—Criminal Trial — Explanation by accused—Appreciation of evidence—Duty of Court — Accused is not bound to offer any explanation — Onus of proving guilty is on prosecution. See Evidence Act (1872), Ss. 101 to 104. (1960) 2 Ker L R 329.

——Ss. 324, 302—Applicability.

Held that though the injuries were individually fatal, it was impossible to ascribe any particular injury to one or the other of the accused and hence neither the conviction of one nor of the other under S. 302 could be sustained. (Conviction was altered to one under S. 324). 56 Pun L R 43 : ILR (1954) Punj 318 : 1954 Cri L J 752 : A I R 1954 Punj 126 (1st) (Pt D) (Pr 29) (DB).

——S. 324—Appreciation of evidence — Principle of falsus in uno in omnibus does not apply in India — Prosecution witnesses omitting to explain injuries on the accused —Accused not entitled to acquittal on that ground alone. See Criminal P. C. (1898), S. 537. I L R (1962) 12 Raj 481.

3. Charge.

——Ss. 324, 325 and 323—Charge under Ss. 148, 342, 325 and 325/149 against five accused — Common object not proved. — One accused acquitted — Rest convicted for individual acts — Absence of specific charges—Legality of conviction. Held conviction of the accused for offences under Ss. 325, 324 and 323 could not be sustained as they were not called upon to meet those specific charges. See Penal Code (1860), S. 34. 1958 All L J 688.

——S. 324 — Charges against several accused under Ss. 148, 323, 326, 324 and 451 read with S. 149, I. P. C. — Acquittal of the accused on charges of unlawful assembly but conviction for specific individual acts under different sections — Absence of separate charges for specific offences by the alternative — Prejudice —Conviction for individual specific offences held proper in the circumstances of the case. See Criminal P. C. (1898), S. 233. 1962 Ker L J 793.

4. Private defence.
See also Penal Code (1860), Ss. 96-106.

——Ss. 324, 144, 148, 99 read with S. 34—Rioting and unlawful assembly — Private defence — Dispute regarding possession—Use of force by accused as lawful owner of land to resist trespass resulting in injuries — Conviction of accused for rioting and unlawful assembly —Validity. See Penal Code (1860), S. 144. ILR (1965) Andh Pra 198 (DB).

——Ss. 324, 97, 304 Part I, 302 — Exceeding right of private defence—Attack by B followed by tussle with deceased — Deceased slapping his accused hand in

order to save himself — Fatal stab attack by A while tussle still going on — Conviction of A under S. 304, Part I if proper. See Penal Code (1860), S. 97. I L R (1956) Trav-Co 615.

——S. 324— Offence under S. 33 (1) (a), Forest Act is cognizable offence—Person arrested for offence under S. 33 (1) (a) can be released on his executing bond to appear before Magistrate—Offence is not non-bailable —Private person like Plantation Watcher can arrest person committing offence under S. 33(1) (a)—Plantation watcher is forest officer within meaning of S. 2 (2). Forest Act and has power to arrest without warrant person committing offence under S. 33 (1) (a) — Person arrested has no right of private defence. See Criminal P. C. (1898), S. 59. 1963 (1) Cri L J 558 (Tripura).

5. Constructive liability.

See also Penal Code (1860), Ss. 34 and 149.

——S. 324 read with S. 34 — Accused A, B, C and D, attacking N. J. R and S, who were carting paddy to to their house — Continued beating with spears and sticks even after victims fell down with injuries— Death of N and J the same day as result of injuries— Inference as to intention from nature of injuries — Existence of common intention—Divergence in prosecution evidence arising doubt as to extent of liability of A and C—Benefit of doubt must go to accused. 1965 (2) Cri L J 458 : AIR 1965 Andh Pra 361 (DB).

——Ss. 324, 149, 302 — Common object—Proof of by course of conduct — Individual acts need not be proved. See Penal Code (1860), S. 149. 1956 Cri L J 389 : AIR 1956 Bom 183 (DB).

——S. 324 — A with intention to murder deceasad causing serious injuries with dangerous weapon — B having no common intention with A causing injury resulting in death of deceased—A convicted under S. 307 and B under S. 324. See Penal Code (1860), S. 34. 51 Cri L J 218 : AIR 1950 Mad 10 (DB).

—— Ss. 324, 148, 149 — Charge under — Accused acquitted of offence of rioting — Conviction of accused under S. 324 read with S. 149 cannot be sustained when it is found that all accused had used force. See Penal Code (1860), S. 148. 1966 Cr L J 150 : (1965) 1 Law Rep 592 : AIR 1966 Mys 53.

——S. 324 read with S. 34—Accused J causing injuries with a kirpan to K and G—Accused S though coming out from his house armed with a spear along with his brother, J., not using his weapon till sudden appearance of deceased M who caught kirpan of J — Occurrence not premeditated but sudden — Held J was rightly convicted under S. 324 but so fas as hurt caused to K and G was concerned S. 34 was not attracted to case of S and he was entitled to the benefit of doubt as to the applicability of S. 34 and therefore acquitted— Evidence Act (1872), S. 3. 1965 Cur L J 730 : 67 Pun L R 1204.

——Ss. 324, 149, 323, 326 — Unlawful assembly — Common object to cause grievous hurt — Grievous and simple injuries caused in prosecution of common object — Conviction for Ss. 323. 324 read with S. 149 —Not proper. See Penal Code (1860), S. 149. 1957 Cri L J 1307 : AIR 1957 Punj 278 (DB).

——S. 324 — Several accused beating deceased — No evidence who inflicted fatal blow — S. 34 not applicable — Accused held could only be convicted of offence under S. 324. (Penal Code (1860), S. 300). 1952 Raj L W 387 : 1954 All W R (Supp) 1 : ILR (1952) 2 Raj 258 (DB).

6. Illustrative cases.

(A) Sections 324 and 307.

(B) Sections 324 and 326.

6. Illustrative cases.

——Ss. 324, 307 and 326—A throwing acid on B—B's death some days later—Medical evidence contradictory on death being directly due to burns — Held A was rightly convicted under S. 324.

A suspected B of illicit intimacy with his wife and threw acid on him. B remained an in-patient for 9 days and died. The burns were simple and the medical evidence was contradictory on death being directly due to the burns. The remnant of the acid in a bottle produced for chemical analysis as being the same as that thrown by A was reported to be of considerable strength whereas the burns showed that the acid thrown must have been very weak. Identity of the acid produced for chemical analysis was not established beyond doubt with that used by the accused. The accused was convicted under S. 324, but the prosecution contended that he ought to have been convicted under Ss. 302 or 307 and 326, Penal Code

Held, that it was not possible to hold that A knew that his throwing acid on B was likely to cause B's death and therefore was rightly convicted under S. 324. 51 Cri L J 890 : AIR 1950 Ajmer 21 (22, 23) (Prs 7, 9).

——S. 324 — Applicability—Attack by three persons with sticks and one with spear — Death due to all injuries taken together — Offence — Held, accused could not be convicted under S. 302 simpliciter and as S. 34 was not invoked in charges under S. 302 Court was not justified in making each of the accused liable for effect of their co-joint action — But sticks being deadly weapon they were guilty under S. 324. See Penal Code (1860), S. 300. 1956 Andh W R 369.

——S. 324—Applicability — Injury simple — Offence can only fall under S. 324. (1950) 2 Pepsu L R 346 and 354 : AIR 1950 Pepsu 52 (52) (Pt D) (Pr 8) (DB).

——Ss. 324, 449 307 — Intention of accused—Test— Firing of gun after house trespass — Effect — Held, offence under S. 449 not committed. See Penal Code (1860), S. 449. 52 Cri L J 276 : A I R 1951 Raj 42 (DB).

——S. 324—Intention or knowledge — Single stab in chest — Death not definitely traceable to injury — Nature of offence — Held, accused could not be convicted either under S. 304 or under S. 326 — Proper section under which he could be convicted was S. 324. See Penal Code (1860), S. 299. A I R 1955 N U C (Trav-Co) 5429 (DB).

6 (A). Sections 324 and 307.

●——S. 324 — In order to bring the offence under S. 307 home to accused the prosecution must establish that his intention was one of the three kinds mentioned in S. 300 — Evidence not sufficient to establish with certainty existence of requisite intention or knowledge of accused — Accused held could be convicted only under S. 324 and not under S. 307. See Penal Code (1860), S. 307. 1965 (1) Cri L J 766 : A I R 1965 S C 843.

——Ss. 324, 307 — Scuffle between complainant and accused having pistol in his hand — Shots fired, one hitting complainant — Injury not grievous — Offence held fell under S. 324 and not under S. 307. See Penal Code (1860), S. 307. 1960 Cri L J 1080 : A I R 1960 J and K 104.

6 (B). Sections 324 and 326.

——Ss. 324, 326 and 320—Fracture—Injuries on head going deep to skull bone and also cutting to some extent skull bone but not extending to inner surface of it — No fracture and as such no grievous hurt

within S. 320 — Offence falls under S. 324 and not S. 326. See Penal Code (1860), S. 320. 1951 All W R (HC) 107.

——Ss 324, 326—Applicability—Spear thrust in chest causing punctured wound extending only up to pleural cavity — No injury caused to pleura or lungs or any other vital organ—Proper section applicable is S. 324 and not S. 326. 1963 (2) Cri L J 255 : ILR (1963) 15 Assam 189 : A I R 1963 Assam 151 (153) (Pt C) (Pr 12) (DB).

——Ss 324, 326—Evidence—Conviction under S. 326 on ground, that person injured, was discharged from hospital only 30 days after his admission — Materials wanting from which it may be held, that injured person was unable to follow his ordinary pursuits for more than twenty days — Held, that opinion of the Surgeon though relevant and valuable, was not conclusive. Benefit of doubt on this point must enure to the accused and his conviction under S. 326 may be altered to a conviction under S. 324. 1959 Ker L J 1288 : 1960 Ker L T 303.

7. Conviction and sentence.

——Ss. 324, 304, 302 and 34 — Charge under S. 302 read with S. 34 — Conviction of one accused under Ss. 304 and 324 and acquittal of others held legal. See Penal Code (1860), S. 34. 1957 Cri L J 270 (All).

——S. 324—Sentence — Student stabbing another on account of previous enmity—His case cannot be considered more leniently — As a student, he ought to have known, more than an ignorant or the illiterate offenders, that he cannot take such liberties with the person of another. 1959 Ker L J 1288 : 1960 Ker L T 303.

——S. 324—Aggressor in warding off stabbing attack from accused, sustaining injuries on hand — Injuries trivial—Accused held could not be convicted under S. 324. See Penal Code (1860), S. 101. 1959 Ker L R 588 : 1959 Ker L T 606 : 1959 Ker L J 716 : 1959 Mad L J (Cri) 647 : ILR (1959) Ker 718.

——S. 324 — Conviction — Alteration of conviction under S. 324 to S. 325, Penal Code — Case on facts. See Criminal P. C. (1898), S. 423. A I R 1955 N U C (Madh B) 1205.

——S. 324 — Simple injury—Sentence of three years is not excessive. 38 Mys L J 365 : 1960 Cri L J 1222 (2) : 1960 Mad L J (Cri) 575 : A I R 1960 Mys 228 (229) (Pt A) (Pr 8) (DB).

——Ss. 324, 304 - Applicability—Nothing to establish that accused intended to kill his father or that he intended to cause such bodily injury as was likely to cause death—He hit his father in a fit of rage, possibly on account of father's denial to pay him money—Held, accused could not be charged under S. 304 but that the offence fell under S. 324—Considering youth of accused a lenient view was taken and accused was sentenced to six months' R. I. 1957 Mad L J (Cri) 832 : 1958 Cri L J 529 : AIR 1959 Mys 48 (53) (Pt D) (Pr 18) (DB).

——S. 324—Sentence.

Accused a lad of 18—No evidence that he began the assault or that his assault was very vindictive — Sentence under S. 324, Penal Code reduced to one year. 1955 Cri L J 597 : 33 Pat 397 : A I R 1955 Pat 161 (166) (Pt E) (Pr 10) (DB).

——S. 324—Applicability—Assault on police party in pursuance of criminal conspiracy—Murder of Inspector and fatal injuries on others — Conviction upheld. See Penal Code (1860), S. 120-B. 56 Cri L J 414 : A I R 1955 Trav-Co 33 (DB).

SECTION 325

SYNOPSIS

(Penal Code (1860), S. 325.)

1. Measure of crime.
2. Intention and knowledge.
3. Constructive liability.
   See also Penal Code (1860), Ss. 34 and 149.
4. Right of private defence.
   See also Penal Code (1860), Ss. 96-106.
5. Evidence and proof.
6. Practice and procedure.
7. Conviction and sentence.

1. Measure of crime.

——Ss. 325, 304 (2) — No previous enmity between parties — 'Marpit' starting over exchange of abuse — Accused inflicting two blows with a light and short stick—Probable cause of death found to be haemorrhage due to rupture of spleen and lung—Evidence that spleen of deceased was enlarged—Offence held to be one under S. 325 and not under S. 304 (2). See Penal Code (1860), S. 304(2). 1952 Cri L J 1165 : A I R 1952 Ajmer 29 (1).

——Ss. 325, 304 and 300, Cls. (3) and (4) — Medical evidence showing that deceased was given smashing blow over head and blows were given with intention of causing bodily injury to him — Bodily injury intended to be inflicted was sufficient in ordinary course of nature to cause death — Held that the case fell under Cls. (3) and (4) of S. 300 and not either under S. 304 or S. 325. See Penal Code (1860), S. 300. 1958 All W R (HC) 12.

——Ss. 325 and 304—Applicability — Test, stated — Accused intended to strike lathi blow at father, C, of about 50 years — Unexpectedly the mother intervened with a child in her lap and blow fell on child causing its death — Held the only reasonable inference should be that had the blow struck C, it would in all probability have caused grievous hurt — Hence accused should have be been convicted under S. 325 and not under S. 304 See Penal Code (1860), S. 304. 1957 Cri L J 336 : AIR 1957 All 132.

——S. 325 — Applicability — Accused following deceased and giving lathi blow on leg — Deceased falling down — Accused giving another severe and smashing lathi blow on head — Fracture of skull resulting in death—Intention to cause death, held must be presumed in circumstances as the attack was deliberate, planned and cold-blooded — Offence falls under S. 302 and not under S. 304 or S. 325. See Penal Code (1860), S. 302. 1953 Cri L J 768 : A I R 1953 All 356 (DB).

——Ss. 325, 304 (II), 323—Injuries caused not shown to have caused death—Case would not be covered by S. 304 (II), or by S. 325—Accused admitting beating —He can be convicted under S. 323. See Penal Code (1860), S. 304 (II). 1952 Cri L J 1272 : A I R 1952 Assam 157 (DB).

——S. 325 — Assault — Victim sustaining injury by fall — Offence under S. 325 when said to be committed.

Though grievous hurt may be caused in an assault, it does not at all follow that the person who assaulted is guilty of causing grievous hurt under S. 325. A person is only liable under S. 325, if he voluntarily causes grievous hurt and voluntarily causing hurt according to S. 322 means if he intends to cause grievous hurt or knew himself to be likely to cause such hurt. Now a man striking another with a rod might have no intention of causing grievous hurt and it might be said that he would have no knowledge

that he was likely to cause grievous hurt. In such a case if grievous hurt was caused owing to a fall after the blow, the person guilty of assault might well not be liable for causing grievous hurt. On the other hand, if the nature of the blow was such that the jury could attribute to the person committing the assault knowledge that he was likely as a result of the blow to cause grievous hurt, then the conviction under S. 325 might be sustained. **1952 Cri L J 1013 : ILR (1953) 1 Cal 302 : A I R 1952 Cal 481 (485) (Pt C) (Prs 26, 27) (DB).**

——Ss. 325, 34, 302 and 323 — Sudden fight—Complainants found to be aggressors — Accused inflicting several simple and grievous injuries with lathis on complainants — One of the accused causing death of one of complainants by sharp-edged weapon— Who inflicted fatal blow and grievous hurts not known — Who exceeded right of private defence not known — S. 34 held inapplicable — Accused held guilty under S. 323 and not under S. 325 or S. 302. 51 Cri L J 1005 : AIR 1950 East Punj 209 (DB).

——S, 325—Essential ingredient of offence.

It is an essential ingredient of the offence under S. 325, Penal Code, that either grievous hurt should be intended to be caused or the offender should have knowledge that the hurt caused was likely to be grievous. **1963 (1) Cri L J 762 : A I R 1963 Him Pra 18 (21) (Pt C) (Pr 19).**

——S. 325—Applicability — Blows on neck resulting in death—Offence.

The accused asked the deceased, his wife to bring hay. She not only refused to carry out the behest but foully abused him involving his mother. This enraged the accused and he gave her two blows with a tehanta, causing her simple injuries. The woman repeated the foul abuse, and thereupon he gave a blow on her back with a danda causing simple injury and catching her by the locks and holding her close to the ground with her face downwards gave two blows on her neck which proved fatal. The deceased was a well-built young girl of 22 years and did not suffer from any extreme and perilous sensibility.

Held, that the blows in question were inflicted on a vital part of the body, i.e., the neck. That being so, the blows inflicted by him on the said vital part of the body must not only have been so hard as to have intended to cause or at least to have known that he was likely to cause hurt which endangered the life of the victim of his assault. There could therefore be no doubt whatsoever that the accused voluntarily caused grievous hurt to the deceased and was therefore guilty under S. 325, Penal Code. A I R 1941 Mad 560, Dissented from. **1953 Cri L J 84 : AIR 1953 Him Pra 1 (2) (Pr 6).**

——S. 325 — Accused persons attacking deceased with sticks indiscriminately and one of them hitting him on head — Accused guilty under S. 325 and not under S. 302. See Penal Code (1860), S. 300. 51 Cri L J 363 : AIR 1950 Kutch 2.

——Ss. 325 and 302 — Absence of motive—Cannot be sufficient to quash conviction when there is direct testimony of witnesses who had seen the accused committing crime. See Penal Code (1860), S. 302. 1956 Cri L J 1408 : AIR 1956 Madh B 269 (DB).

——Ss. 325, 304, Part 2 — Accused on coming to know that his son had sold part of his goods in his house behind his back, losing his temper and setting out to chastice son — Son tied to a post and beaten with stick — Beating continuing throughout night after intervals — Beating causing number of injuries all over son's body — Son dying five days later as a result of beating — Injuries not serious — Held that having regard to nature of weapon used and surrounding circumstances, neither an intention to cause death nor any knowledge regarding likelihood of causing death could legitimately be attributed to the accused — Accused held should be convicted under S. 325 instead of S. 304, Part 2. See Penal Code (1860), S. 304, Part 2. AIR 1955 N U C (Madh B) 3879 (DB).

——S. 325—Lawful act of accused resulting in death of boy due to accidental fall of hammer on head — Absence of intention to cause hurt or knowledge that hurt would be caused — Accused held not liable in view of S. 80. See Penal Code (1860), S. 80. (1962) 1 Mad L J 161 : 75 Mad L W 16.

——Ss. 325, 300 — B rendered unconscious by blow from A—Taking B to be dead A hanging B by rope — Death caused by hanging—Offence not murder. See Penal Code (1860), S. 300. 1953 Cri L J 449 : A I R 1953 Mad 239 (DB).

——S. 325 — Causing grievous hurt — Essentials — Intention — Inference from circumstances — When drawn—Sentence—S. 322.

It will appear from S. 325 read with S. 322, I. P. Code that the essential ingredients of offence of voluntarily causing grievous hurt are three in number (1) grievous hurt as described in S. 320 must first be caused. If the hurt actually caused is simple, a person cannot be held guilty of voluntarily causing grievous hurt, even if it was in his contemplation; (2) the offender intended or knew himself to be likely to cause grievous hurt; there must be complete correspondence between the result and the intention or the knowledge of the accused; (3) the hurt was caused voluntarily. In other words, the causation of grievous hurt was either in contemplation or was the likely result of the act done.

When the act that the offender did in the process of causing hurt is such as any person of ordinary prudence knows is likely to cause grievous hurt, he may safely be taken to have intended grievous hurt, or at least to have contemplated grievous hurt as likely to occur. The means by which the injury was caused is not the true criterion. The answer really depends upon the nature of the injury caused and the manner in which the blows were administered, whether by fists and slaps or by a weapon.

Thus where in a sudden quarrel between two full brothers one was dashed to the ground and the other, sitting on his stomach dealt him severe blows with his fists with the result that some of his ribs were fractured, his spleen was ruptured, he was rendered senseless and died in some hours.

Held, that though there could have been no intention on the part of the accused to cause grievous hurt to his brother, there was no doubt that from the way in which he assaulted his brother, he should have known that he was likely thereby to cause grievous hurt to him. The offence committed by the accused was therefore causing grievous hurt as contemplated by section 325. Held further that having regard to the relationship between the parties and also the fact that unfortunate incident occurred on the spur of the moment due to provocation given by the deceased himself and also considering the fact that there was absolutely no intention on the part of the appellant either to kill him or to cause him such bodily injury as was likely to cause his death, the ends of justice will be sufficiently met if he is awarded one year's rigorous imprisonment. **1958 B L J R 88 : 1958 Cri L J 1077 : AIR 1958 Pat 452 (455, 456) (Prs 7, 8).**

——Ss. 325, 302, 304 — Altercation between parties — Violence — Resulting to death — Held blow to deceased given by accused, in circumstances, did not constitute offence under S. 302 or even under S. 304 — Intention to cause grievous injury under S. 325, alone could be imputed to him. See Penal Code

(1860), S. 302. 1960 Cri L J 513 : A I R 1960 Punj 214 (DB).

——S. 325—Applicability — Minor beating—Rupture of spleen and death — Accused not aware of enlarged spleen — Offence held one under S 323. See Penal Code (1860), S. 323. AIR 1955 N U C (Raj) 2181.

——Ss. 325, 329 — Causing hurt to compel person to write off debt or withdraw suit — No offence under S. 329. See Penal Code (1860), S. 329. 52 Cri L J 704: AIR 1951 Sau 40 (DB).

——Ss. 325, 300, 326—Accused inflicting injuries on body of victim in fit of anger — Injuries caused by piece of blunt stick to vital part—Consequent haemorrhage and collapse—Accused imagining victim to be dead hanging body to tree to suggest suicide—Death resulting from asphyxiation—Evidence not disclosing intention to kill when beating started—Accused is not guilty of murder under S. 301, Travancore Penal Code —Offence committed is one under S. 325 and not under S. 326 as strick used is not weapon falling within scope of latter section. See Penal Code (1860), S. 300. AIR 1951 Trav-Co 159 (DB).

——Ss. 325, 304, Part 2—Scope — Blow not likely to cause death — Amounts to grievous hurt even though death is caused. See Penal Code (1860), S. 304, Part 2. 1954 Cri L J 154 : AIR 1953 Tripura 9.

2. Intention and knowledge.

——Ss. 325 and 323—Intention.

To sustain a conviction for causing grievous hurt, it must be shown that not only grievous hurt had been caused but that the accused intended or knew himself to be likely to cause grievous hurt. 1962 Ker L T 868.

——Ss. 325, 323, 302 and 307 — Lathi not a lethal weapon—Knowledge imports certainty, not probability under S. 300 (2) — In the absence of such knowledge conviction under S. 307 is improper. See Penal Code (1860), S. 302. 1961 M P L J (Notes) 290.

3. Constructive liability.

See also Penal Code (1860), Ss. 34 and 149.

——S. 325—Repeated fist blows inflicted on neck of complainant by two accused causing grievous injuries while third accused continuing to press down legs of complainant—Held, third accused was equally responsible for acts of first two accused and all were guilty of offence under S. 325 read with S. 34. See Penal Code (1860), S. 34. 1964 All W R (HC) 602.

——S. 325 — Constructive liability — Grievous hurt caused by some one of persons assembled in exercise of right of private defence — Absence of evidence of identity of person causing hurt—All of them forming assembly cannot be punished. See Penal Code (1860), S. 146. 55 Cri L J 1710 : AIR 1954 All 771 (DB).

——Ss. 325 and 34—Common intention — Attack by several persons—Grievous hurt caused by one—Each can be convicted under S. 325. See Penal Code (1860), S. 34. 1952 Cri L J 797 : AIR 1952 All 435.

——Ss. 325 and 34—Constructive liability — Grievous hurt—Attack by less than five persons—Person who caused the hurt known — Others, if can be convicted with the aid of S. 34.

If a person is attacked by several persons numbering less than five and grievous hurt is caused, and it is known which of them had caused the grievous hurt, the others can be convicted of causing hurt with the aid of S. 34, Penal Code, provided the criminal act was done in furtherance of the common intention of all. State v. Saidu Khan, 52 Cri L J 131 : 1950 All L J 884 : I L R (1952) 1 All 635 : AIR 1951 All 21 (44) (Pt B) (Pr 139) (FB).

——Ss. 325, 149—Victim dying as result of assault by several persons with sticks and weapons — It can be presumed that common object was at least to cause grievous hurt — Even accused causing simple injuries are guilty under Ss. 149, 325. See Penal Code (1860), S. 149. I L R (1962) Andh Pra 313.

——S. 325—Constructive liability — Common intention to cause grievous hurt and death — Inference of common intention within meaning of S. 34 should never be reached unless it is a necessary inference deducible from circumstances of case. See Penal Code (1860), S. 34. 1958 Cri L J 733 : AIR 1958 Andh Pra 380 (DB).

——S. 325—Charge—Several accused — Common intention — No reference to S. 34 in the charge—Each of the accused can only be held responsible for his individual act — There cannot be a case of constructive liability. See Penal Code (1860), S. 34. AIR 1955 N U C (Madh B) 3821.

——Ss. 325, 304, 34 — Applicability — Death due to two injuries on head — Witnesses speaking of one blow only—Held, S. 34 did not apply—Each accused was responsible for individual act—There being uncertainty as to who inflicted head injury, accused held guilty under S. 325. AIR 1955 N U C (Madh B) 3725.

——S. 325—Four accused armed with clubs making joint attack on deceased inflicting several injuries—Evidence showing common intention to cause grievous hurt—Death due to shock from multiple injuries —Conviction under S. 304, Part 2 read with S. 34 altered to one under S. 325 read with S. 34. See Penal Code (1860), S. 34. ('50) 28 Mys L J 322 (DB).

——Ss. 325, 34—Concerted and premeditated attack—Who struck blow is immaterial. See Penal Code (1860), S. 34. (1957) 23 Cut L T 146.

——S. 325—Common intention — Some accused persons simultaneously assaulting deceased — Held, they shared common intention of assaulting with consequential result. See Penal Code (1860), S. 34. 1965 (1) Cri L J 73 : AIR 1965 Pat 45.

——S. 325—Applicability — Accused members of unlawful assembly which started beating the deceased and the assembly was armed with deadly weapons—Accused found not guilty of murder — Accused must have known that a grievous injury was likely to be caused and they could be constructively held guilty under S. 325 read with S. 149. See Penal Code (1860), S. 149. 1958 Cri L J 72 : AIR 1958 Pat 12 (DB).

——Ss. 325 and 34 — Attack by several persons — Liability of individual accused—Common intention —Proof of.

Where there is common intention it does not matter whether one or other accused caused a grievous injury and the other only a simple injury — Both of them could be convicted under S. 325 read with S. 34 of causing grievous injury to deceased. 1959 Raj L W 35.

——Ss. 325, 323 and 149:— Applicability — Common object to give beating — Hurt to several persons and grievous hurt to one—Offence — Offences committed were under Ss. 323 and 325 — Held, proper conviction could be under S. 325 read with S. 149. See Penal Code (1860), S. 323. 1958 Raj L W 505.

4. Right of private defence.

See also Penal Code (1860), Ss. 96-106.

——Ss. 325, 146, 141, 149, 34, 304, 323 — Private defence—Right, when comes into existence—Persons asserting their right of private defence of property are doing a perfectly legitimate act and assembly is not an unlawful assembly — Consequently provisions of S. 149 cannot be invoked so as to make every one of those persons vicariously liable for acts of their

comrades — In absence of evidence as to who caused hurts, there can be no presumption that lathi yielded by every one of accused must have necessarily struck one or other of injured persons on complainants side. See Penal Code (1860), S. 146. AIR 1954 All 771 (DB).

——Ss. 325, 103, 147, 148, 304, 323—Right of private defence of property — Dispute regarding cutting of sugar-cane crop—Rioting—Each party charging other as aggressor—Title legally with accused under decree had right of private defence—(Tenancy Laws—U. P. Tenancy Act (17 of 1939), Ss 160 (3) and 180). See Penal Code (1860), S. 103. 1953 Cri L J 717 : AIR 1953 All 327.

——S. 325—Dispute over possession of land — Fight — One party receiving grievous injuries resulting in death of one person — Party of accused receiving minor injuries — Plea that accused party was attacked not established—Assembly held not unlawful—Right of private defence did not arise—Absence of premeditation — Conviction under S. 304 held not maintainable. See Penal Code (1860), S. 34. 52 Cri L J 209 : AIR 1951 Assam 48 (DB).

——S. 325 — Right of self defence of property or person — When arises — Causing of grevious hurt on grave and sudden provocation. See Penal Code (1860), S. 100. 1958 Jab L J 257.

5. Evidence and proof.

——S. 325—Fight between two parties—Both parties receiving injuries—Question of aggression—Evidence and proof, required, pointed out. See Penal Code (1860), S. 323. 1964 All W R (HC) 664.

——S. 325—Injured attacked by several persons — Witnesses deposing that one accused dealt axe blow —Inability to specify site of impact of blow does not justify rejection of their evidence.

Where a person is assaulted with sticks and other weapons by about 16 persons, the fact that the prosecution witnesses, otherwise completely reliable, are unable to specify the site of the impact of an accused's blow with an axe, in the confusion of the attack perpetrated by so many persons, is not a valid reason at all to reject their evidence that the accused did give the blow. ILR (1962) Andh Pra 313 : 1963 (2) Cr L J 70 (73) (Pt B) (Pr 11) (Andh Pra) (DB)

——Ss. 325, 320 — Fracture of bone — Medical evidence, if must indicate extent of fracture.

Where the medical officer in his evidence has clearly stated that there was "fracture of the matacarpal bone of the right hand confirmed by X Ray examination" he may be presumed to know what amounts to "fracture" and though the extent of the fracture is not indicated in his evidence, yet it may be reasonably inferred that it was not a superficial cut on the bone, but the breaking of the bone itself. (1957) 23 Cut L T 146.

6. Practice and procedure.

——S. 325 — Criminal P. C. (1898), Ss. 561-A, 235, Illustration (c) and Schedule II, column 8 — Case involving offences under Ss. 367, 325 and 326, I. P. C. —Charge under Ss. 325 and 326 no bar to charge for auxiliary offence under S. 367—Committal by Magistrate to Court of Sessions—Validity—Interference by High Court under S. 561-A. See Criminal P. C. (1898), S. 561-A. (1962) (2) Cri L J 28 : AIR 1962 Andh Pra 267.

——Ss. 325, 326 and 367 — Accused charged with offences under Ss. 325 and 326 — If can be charged with auxiliary offence under S. 367.

There is clear indication, in the Criminal Procedure Code that a person can be charged with an auxiliary offence when he stands charged with the main offence it self. For example, in. Illustration (c) to S. 235 of the Criminal Procedure Code, the offence of enticing under S. 498, Penal Code, is an auxiliary offence in relation to the offence of adultery under S. 487, which is the main offence. Therefore, a person can be charged with an auxiliary offence under S. 367, Penal Code, when he stands charged with the main offence itself, under S. 325 and 326, Penal Code. (1962) 1 Andh W R 125 : 1962 Mad L J (Cr) 148 : (1962) 1 Andh L T 203 : 1962 (2) Cri L J 28 : ILR (1963) Andh Pra 832 : AIR 1962 Andh Pra 267 (270) (Pr 8).

——Ss. 325, 149 and 34 — Original charge under S. 325 read with S. 149 — Conviction under S. 325 read with S. 34 — Legality — Test — Conviction held valid.

Although there is a difference between 'common object' (S. 149) and 'common intention', (S. 34) both sections deal with a combination of persons who become punishable as sharers in an offence. A charge under S. 149, I. P. Code is no impediment to a conviction by the application of S. 34. The omission to mention S. 34 in the charge does not affect the case unless prejudice is shown to have resulted in consequence thereof. AIR 1958 S C 672, Rel. on.

Held, that though the accused persons were originally charged under S. 325 and at a latter stage a charge under S. 149, I. P. Code was added, having regard to the circumstances and evidence in the case there was no illegality in the matter of conviction of the accused under S. 325 with S. 34, I. P. Code. 1961 (1) Cri L J 625 (626) (Pr 5) (Assam).

——S. 325—Facts of case pointing to two alternative offences — No direction in charge of possible offence — Jury left with alternative of convicting or altogether acquiting—It is misdirection vitiating trial. See Criminal P. C. (1898), S. 297. 1952 Cri L J 1013 : AIR 1952 Cal 481 (DB).

——Ss. 325, 149 and 34 — Charge — Person charged under Ss. 325 and 149 — Can be convicted under Ss. 325 and 34. AIR 1952 Kutch 4 (5) (Pt C) (Pr 5).

——Ss. 325, 323 — Appreciation of evidence—Benefit of doubt should be given to accused. See Criminal P. C. (1898), S. 367. AIR 1955 NUC (Raj) 5738.

——Ss. 325 and 147 — Charge under S. 147, Penal Code — Not proved — No reference in charge to furtherence of common intention nor to specific act of any of the accused — Conviction of some only of the accused under S. 325 cannot be sustained—(Bikaner) Penal Code, Ss. 147, 325. See Criminal P. C. (1898), S. 225. 52 Cri L J 1024 : AIR 1951 Raj 135.

7. Conviction and sentence.

——S. 325—Number of accused charged under S. 308 read with S. 34—Who inflicted fatal injury not known — No one can be convicted under S. 308 or even under S. 325. See Penal Code (1860), S. 308. 1957 All W R (HC) 149.

——S. 325 — Sentence — Age of accused — Accused young lad of about nineteen years and under influence of elder members of family when he committed offence—Considering nature of assault and injuries, accused should not be let off with sentence of one year — Proper sentence held three years. (Criminal P. C. (1898), Ss. 32 and 439 (1). AIR 1955 NUC (All) 3537.

——S. 325—Sentence—Fracture of humerus bones — 6 months' imprisonment will not be excessive in normal circumstances — Accused already in jail for over three months—Held he should not be sent back to jail. AIR 1955 NUC (All) 3523.

——S. 325 — Conviction and sentence — Conviction under S. 147 and S. 325 read with S. 149 would not be unlawful. See Penal Code (1860), S. 147. AIR 1955 NUC (All) 3523.

——S. 325 — Sentence — Magistrate finding accused guilty under S. 323, Penal Code and sentencing him to fine—Sessions Judge altering conviction to one under S. 325 but maintaining sentence — Legality of sentence — Sentence held illegal under S. 325 as offence under that section must be punished with imprisonment whether with or without fine. See Criminal P. C. (1898), S. 423. AIR 1955 N U C (All) 2675 (DB).

——Ss. 325, 71, 147, 149—Scope and applicability of S. 71—Separate sentence — (Cr. P. C. (1898), S. 35)—An accused can be punished separately for the offence of Ss. 147 and 323, or 325 or 326, I. P. C. read with S. 149, I. P. C. See Penal Code (1860), S. 71. 1953 Cri L J 1222 : AIR 1953 All 510.

——S. 325—Sentence—Fight not premeditated—Only few hot words responsible for unfortunate result—Loss of life no reason for severe sentence. 1953 All W R (HC) 147 : 1953 Cri L J 1111 : 1953 All L J 346 : AIR 1953 All 491 (492) (Pt A) (Pr 10).

——Ss. 325/149, 147 — Trial of five persons only for offences under Ss. 147 and 325/149—No allegation that any other person took part in crime—Conviction—Conviction of two persons set aside in appeal — Conviction of remaining three under S. 147 cannot be sustained—Conviction under S. 325 can be maintained—(Criminal P. C. (1898), S. 535). See Penal Code (1860), S. 147. 1952 Cri L J 1737 : AIR 1952 All 941.

——Ss. 325, 147, 148, 149—Sentences—Accused sentenced for Offences under Ss. 149 and 325—Separate sentences under Ss. 147 and 148, not legal. See Penal Code (1860), S. 147. ILR (1962) Andh Pra 313.

——S. 325—Conviction—Sudden fight—Participation by large number of persons.

If a large number of persons participated in a sudden fight arising from a land dispute, it would be really difficult for any one to state that any particular injury was caused by a particular person. Where the accused was mentioned as one of the assailants of the deceased in the F. I. R. but the grievous hurt found on the person of the latter was not attributed to him, his conviction under S. 325, I. P. Code, cannot be maintained. 52 Cri L J 209 : AIR 1951 Assam 48 (53) (Pt B) (Pr 28) (DB).

——Ss. 325, 71, 143, 147, 149 — Separate conviction and sentence—Held, as the two offences under S. 147 and S. 325/149 were held to have been committed by same acts and the accused convicted therefor the offenders were not under S. 71 liable to be punished with imprisonment for more than one of such offences, for the accused cannot be punished twice for the same acts. See Penal Code (1860), S. 71. 1955 Cri L J 1033 : AIR 1955 Bhopal 9.

——S. 325—Sentence of imprisonment—If mandatory.

Provisions of S. 325 are mandatory and the Court is bound to award a sentence of imprisonment to the accused convicted under the section. It may in addition award a sentence of fine also. The discretion of the Court is limited to a decision on the question of quantum of the sentence. 1959 Ker L R 799 : 1959 Ker L J 850 : 1959 Ker L T 902 : ILR (1959) Ker 1253 : 1960 Cri L J 592 : AIR 1960 Ker 147 (147) (Pt A) (Pr 2) (DB).

——S. 325 — Matters to be considered in awarding sentence—(Criminal P. C. (1898), S. 367 and S. 32).

In awarding sentence, the Court should take into account the weapon used, the manner in which the offence was committed and the consequences that had ensued. 1956 Madh B L J 905 : 1956 Madh B L R (Cr) 209 : 1956 Cri L J 1408 : AIR 1956 Madh B 269 (271) (Pt C) (Pr 30) (DB).

——Ss. 325, 300 — Applicability — Sudden quarrel under influence of liquor — No intention to kill — Nature of offence committed — Offence of murder held not committed—Accused were rightly convicted under S. 325. See Penal Code (1860), S. 300. AIR 1955 N U C (Madh B) 5627 (DB).

——Ss. 325, 323—Conviction under — Held on facts, that it was difficult to hold from use of dhamania alone that accused caused an injury which endangered life of deceased — Conviction under S. 323 was proper. See Penal Code (1860), S. 323. AIR 1955 N U C (Madh B) 3735.

——Ss. 325 and 324—Conviction—Alteration of conviction under S. 324 to one under S. 325, Penal Code — Weapon used by accused not proved to be an instrument of cutting or stabbing or an instrument which used as a weapon of offence is likely to cause death — Conviction under S. 324 is untenable—Accused can be convicted under S. 325 at appellate stage. See Criminal P. C. (1898), S. 423. AIR 1955 N U C (Madh B) 1205.

——Ss. 325, 147, 149 — Charge under, against several accused—Conviction under S. 147—Sentence—Court would not be justified in imposing more severe punishment on one of the accused if there is nothing in evidence to show that he had assaulted anybody or had taken a prominent part in occurrence — Criminal P. C. (1898), S 32. See Penal Code (1860), S. 147. 1953 Cri L J 6 : AIR 1952 Madh Bha 205.

——S. 325 — Charge under Ss. 147 and 302/34—Accused could be convicted under Ss. 147 and 325/34—Without altering the charge. See Penal Code (1860), S. 34. AIR 1955 N U C (Mad) 3941.

——S. 325—Sentence—Mitigation.

Where trial Court convicts an accused of causing hurt and sentences him the High Court in revision can reduce the sentence when it believes that there was some provocation for the accused to retaliate. 1964 (2) Cri L J 567 : AIR 1964 Orissa 251.

——S. 325—Sentence of fine only.

Accused convicted of offence under S. 325, I. P. Code—Magistrate taking into consideration beating received by accused and sentencing him only to pay fine—Reference to High Court for imposition of substantive sentence of imprisonment—In view of these facts and great delay, Court was not inclined to impose sentence of imprisonment—Interference in revision in cases of irregular sentence is intended for redress of genuine grievances and not of mere formal defects. 55 Punj L R 172 : 1953 Cri L J 1288 : ILR (1953) Punj 635 : AIR 1953 Punj 201 (201) (Pr 3).

——Ss. 325 and 302 — Sudden altercation between accused and deceased who had plucked sugarcane from accused's field — Accused inflicting on deceased two blows one of which causing rupture of spleen resulting in his death—Fact that deceased had an abnormally enlarged spleen not known to accused—Accused held guilty under S. 325 and not under S. 302—Sentence reduced from four years rigorous imprisonment to two years rigorous imprisonment. ('52) 54 Pun L R 153 : 1953 Cri L J 1190 : AIR 1953 Punj 173 (173) (Prs 3, 4).

——Ss. 325, 304—Applicability—A assaulting B with lathi—C and D intervening—B getting aside and the blow hitting C accidentally on head with force sufficient to break bone of C's head—C dying as result of the injury — Offence is one of causing grievous hurt under S. 325 and not one under S. 304, I. P. Code—Conviction altered and sentence reduced from seven years R. I. to four years with fine. 1952 Raj L W 394 : ILR (1951) 1 Raj 849.

——S. 325 — Travancore Penal Code (1 of 1074), S. 325—Applicability — Causing serious injuries by blunt weapon in delicate part of body, resulting in haemorrhage and collapse of victim — Absence of intention to kill — Hanging body to tree by neck to avert suspicion of murder and believing victim to be dead — Offence — Accused not guilty of murder—Offence committed is one under S. 325 and not under S. 326 as stick used is not weapon falling within scope of latter section. 52 Cri L J 871 : AIR 1951 T C 159 (DB).

——S. 325—Punishment and sentence—Accused adopting atrocious method of torture resulting in collapse of victim — Maximum punishment provided in section was given. 1950 T C L R 570 : 52 Cri L J 871 : AIR 1952 Tra-Co 159 (162) (Pt C) (Pr 9) (DB).

SECTION 326

SYNOPSIS

(Penal Code (1860), S. 326.)

1. Effect of amendment of 1955.
2. Scope and applicability.
3. Intention or knowledge.
4. Fracture.
5. Constructive liability.
   See also Penal Code (1860), Ss. 34 and 149.
6. Evidence and proof.
7. Private defence.
   See also Penal Code (1860), Ss. 96-106.
8. Conviction and sentence.
9. Practice and procedure.

1. Effect of amendment of 1955.

——S. 326 — (Criminal P. C. (1898), Ss. 28, 29, 30 — Amendment of S. 30 by Act 26 of 1955 — Effect on powers of magistrate under S. 28—Not precluded from trying offences under S. 326, I. P. C. — See Criminal P. C. (1898), S. 28. 1959 Cri L J 361 : AIR 1959 Punj 98 (DB).

——S. 326 — Jurisdiction — Power of First Class Magistrate to try — Offence under—Effect of amendment by Act 26 of 1955, stated — See Criminal P. C. (1898) (as amended by Act 26 of 1955), S. 28. 1958 Cri L J 800 : AIR 1958 Punj 214.

2. Scope and applicability.

——S. 326—Applicability—Hurt by axe on head.

A blow on the head with an axe which penetrates half an inch into the head is likely to endanger life. 1955 Cr L J 572 : 1955 Mad W N 161 : (1955) 1 S C R 1083 : 1955 S C A 228 : 1955 All W R (Sup) 34 : 1955 S C J 106 : A I R 1955 S C 216 (223) (Pt F) (Pr 36).

——Ss. 326, 324, 307 — A throwing acid on B—B's death some days later — Medical evidence contradictory on death being directly due to burns—Held A was rightly convicted under S. 324—See Penal Code (1860), Ss. 324, 307. 51 Cri L J 905 : A I R 1950 Ajmer 21.

——Ss. 326 and 320 — Cut on bridge of nose with sharp weapon like razor held amounted to permanent disfiguration—Offence under S. 326—See Penal Code (1860), S. 320. 51 Cri L J 799 : AIR 1950 Ajmer 13 (1).

——Ss. 326, 300, 4thly Illus. (d), 302 — Accused firing with revolver near the ground where there was a group of persons—No premeditation or intention or knowledge of likelihood of causing death proved—Accused held guilty under S. 326 and not under S. 302 — See Penal Code (1860), S. 300. ILR (1959) Andh Pra 797.

——Ss. 326, 324 — Applicability — Spear thrust in chest causing punctured wound extending only up to pleural cavity — No injury caused to pleura or lungs or any other vital organ—Proper section applicable is S. 324 and not S. 326—See Penal Code (1860), S. 324. 1963 (2) Cri L J 255 : A I R 1963 Assam 151 (DB).

——S. 326 — Applicability — Cutting of fingers and fracture caused in rioting—Injuries constitute grievous hurt. AIR 1955 N U C (Bom) 5867 (DB).

——S. 326 — Applicability — Accused having sticks, one of them being ironringed — 21 blows given, some of them being on vital parts but only two injuries fatal—Offence committed held was one under S. 326. See Penal Code (1860), S. 34. 1961 (1) Cri L J 251 : AIR 1961 Guj 16 (DB).

——S. 326 — Accused attacking persons with sharp chopper on heads and necks and causing major—injuries — Victims treated in hospital for not longer than four or five days — Offence is attempt to commit murder.

Where it was estabiliseed that P. W. 8 was hit with a chopper by the accused on the head and shoulder, P. W. 13 was hit on the shoulder, the head and left hand and left knee. P. W. 14 was hit on the head and neck, P. W. 15 was hit on the head and P. W. 16 was given three blows, one on the head, one on the neck and one on the right hand and the injuries were not minor injuries. The offence committed was one under S. 326 Penal Code, notwithstanding the fact that the persons attacked were in the hospital for not longer than four or five days. Chopper is an extremely dangerous weapon. When a person uses a sharp chopper upon the neck or head of another and delivers blows with it, it is only reasonable to say that his intention was to kill him, and the accused could rightly be found guilty of the offence of attempt to commit murder of those five persons. (1965) 2 Mys L R 699 (DB).

——Ss. 326 and 307 — Applicability—Causing grievous injuries not resulting in death — Offence held under S. 326 and not under S. 307 — See Penal Code (1860), S. 307. 1959 Cri L J 213 : A I R 1959 Orissa 21.

——Ss. 326, 300, 325—Accused inflicting injuries on body of victim in fit of anger — Injuries caused by piece of blunt stick to vital part—Consequent haemorrhage and collapse — Accused imagining victim to be dead hanging body to tree to suggest suicide—Death resulting from asphyxiation—Evidence not disclosing intention to kill when beating started — Accused is not guilty of murder under S. 301, Travancore Penal Code — Offence committed is one under S. 325 and not under S. 326 as stick used is not weapon falling within scope of latter section—See Penal Code (1860), S. 300. 52 Cri L J 871 : AIR 1951 Trav-Co 159.

3. Intention or knowledge.

——Ss. 326 and 302 — Intention to kill—Inference—Throwing of acid on deceased—Offence—Sentence.

Although S. 326 provided for injury by corrosive substance, the nature of corrosive substance and quantity of it and result following from it have always to be the determining factors in finding out whether or not the act complained of was likely to cause death — See Penal Code (1860), S. 302. ILR (1958) 2 All 698.

——S. 326—Intention or knowledge of causing death—Determination of indicated—See Penal Code (1860), S. 307. AIR 1955 N U C (Madh B) 3736.

——S. 326 — Intention — Two parties determined to fight to enforce their right — Intention of accused party should be ascertained — See Penal Code (1860), S. 304. AIR 1955 N U C (Madh B) 2100 (DB).

——S. 326 — Intention or knowledge—Single stab in chest — Death not definitely traceable to injury — Nature of offence — Held, accused could not be convicted either under S. 304 or under S. 326—Proper section under which he could be convicted was S. 324 — See Penal Code (1860), S. 299. AIR 1955 N U C (Trav.Co) 5429 (DB).

4. Fracture.

——Ss. 326, 324 and 320 — Fracture — Injuries on head going deep to skull bone and also cutting to some extent skull bone but not extending to inner surface of it — No fracture and as such no grievous hurt within S. 320 — Offence falls under S. 324 and not S. 326. See Penal Code (1860), S. 320. 1951 All W R (H C) 107.

——Ss. 326, 320—Fracture — Mere scratch caused to the bone by a cut cannot be deemed a fracture— But a cut in the bone to a depth of ½" amounts to a fracture and grievous injury even though the crack does not extend to the inner side of the bone. See Penal Code (1860), S. 320. 1965 (1) Cri L J 48 : AIR 1965 Mad 10.

5. Constructive liability.

See also Penal Code (1860), Ss. 34 and 149.

——Ss. 326, 149 — Unlawful assembly — Common object to cause grievous hurt — One member only causing death — Others can be convicted under S. 326/149 even though no one member has caused grievous hurt. AIR 1923 Pat 50 and AIR 1946 Pat 242, Overruled. See Penal Code (1860), S. 149. 1960 Cri L J 1144 : AIR 1960 S C 725.

——Ss. 326, 34, 302 — Rioting with guns and other deadly weapons resulting in deaths — Deceased sustaining gunshot and other fatal injuries — Accused charged under S. 302 read with S. 34 — Conviction should be under S. 302 read with S. 34 even if there was no evidence to prove who caused fatal injury— Conviction under S. 326 read with S. 34 not proper. See Penal Code (1860), S. 34. 1961 (1) Cri L J 42 : AIR 1961 Andh-Pra 23 (DB).

——S. 326—Applicability — Attack by three persons with sticks and one with spear — Death due to all injuries taken together — Held on facts that it was impossible to convict any one of the accused of murder simpliciter under S. 302 — Fourth accused alone being responsible for an incised wound resulting in a grievous hurt was punishable under S. 326. See Penal Code (1860), S. 300. 1956 Andh W R 369.

——Ss. 326/34 and 302/34—Offence under.

When the evidence fell short of showing that the two accused had entered into a plan to bring about the murder and it was impossible for accused A to appreciate or realise the weight and magnitude of the strokes which were being inflicted by the other accused B, it could not be held that A had the intention of committing the murder or he knew that B had the intention of murdering the deceased. He could not therefore be convicted under S. 302/34. But since there were other injuries also which by themselves could prove fatal, the offence could not be less than an offence under S. 326/34. 1953 Cri L J 1809 : AIR 1953 Pat 394 (399) (Pt D) (Pr 14) (DB).

——Ss. 326/149, 147, 148, 302 — Rioting — Common object to assault deceased not established — One of accused guilty of murder and convicted under S. 302 —Others held could not be convicted under Ss. 147, 148 and 326/149. See Penal Code (1860), S. 147. 51 Cri L J 331 : AIR 1950 Pat 44.

——S. 326— Applicability — Assault by several persons armed with dangerous weapons — Death caused by one — Common object to cause murder not established—Offence — Held, every one of the accused could not be convicted under S. 302 read with S. 149 —Proper section under which they could be convicted was S. 326 read with S. 149. See Penal Code (1860), S. 149. 1957 Cri L J 1307 : AIR 1957 Punj 278.

——Ss. 326, 323 and 324—Unlawful assembly—Common object—Grievous and simple injuries caused in prosecution of common object—Conviction for Ss. 323, 324 read with S. 149—Not proper. See Penal Code (1860), S. 149. 1957 Cri L J 1307 : A I R 1957 Punj 278.

6. Evidence and proof.

——S. 326—Trial under Ss. 304/326, Penal Code — Evidence of prosecution witnesses that there was ill feeling between accused and his victims—Motive for assaulting and causing injuries held was apparent and the existence of motive lend additional support to the finding of guilt. ILR (1963) 15 Assam 552.

——S. 326 — Accused held, on evidence, not guilty under S. 302 but under S. 326. See Penal Code (1860), S. 302. M B L J 1956 H C R 534.

——Ss. 326, 300, 149—Absence of Evidence of doctor or post-mortem certificate—Not possible for Court to infer whether injury in question to skull would have been sufficient in the ordinary course to cause the death — Conviction of accused only for offence of causing grievous injury with deadly weapon, considered safe. See Penal Code (1860), S. 300. (1964) 1 Mys L J 393.

——S. 326—Applicability—Causing burns by acid—Absence of expert medical evidence — Nature of burns and acid not known — Offence — (Criminal P. C. (1898), Ss. 367, 509 — (Evidence Act (1872), S. 45).

The accused was charged under S. 326, I. P. Code for causing grievous hurt on the deceased by throwing some acid on him, when he was asleep. The deceased was taken to the hospital and discharged after about four months and was again admitted to the hospital where he remained for about seven months till death. The death was reported to the Police after about a month. The Medical Report showed "heart failure" as the cause of death. The bed ticket did not indicate the nature of burns or the acid used, though the scrappings of clothes and some liquid from bottle which was alleged to have been used for pouring acid, were available for chemical examination. The investigating officer did not care to examine finger-prints on the bottle. There was no expert evidence, on the cause of death, nature of acid used, symptoms of the burn and finger-prints on the bottle. There was no post-mortem examination.

Held, that considering the lamentable omissions in and the irresponsible nature of investigation it was not proved beyond all possibility of reasonable doubt that the accused caused grievous hurt to the deceased by any corrosive substance. (1958) 24 Cut L T 241.

——S. 326—Proof—Unjustified attack—Evidence.

In order to believe a story of an apparently unjustified attack it must be supported by unambiguous and unimpeachable evidence. 1954 Cri L J 1546: 1954 B L J R 23 : AIR 1954 Pat 483 (484) (Pt B) (Pr 5).

——Ss. 326, 34 and 149—Evidence Act (1872), S. 3—Dispute between adjoining landholders regarding channel — Attack by one party with spades and shovels - One person injured seriously — No eye witness as to who inflicted injuries — Conviction based on circumstantial evidence — Test of sufficiency — Accused held guilty under S. 326 read with S. 34.

To convict an accused on the basis of circumstantial evidence, the circumstances must be inconsistent with any other conclusion except the guilt of the accused.

Thus where the circumstances proved were (1) presence of accused persons with spades and shovels on the land of the complainant, (2) dispute between the parties about the channel, (3) various injuries on the person of one person on the side of the complainant to which he ultimately succumbed and (4) bloodstains on clothes of accused No. 1 and his spade.

Held that accused No. 1 was guilty of an offence under S. 326 read with S. 34, I. P. C. but as it could not be said whether he was attacked by all the five accused, his conviction under S. 326 read with S. 149 could not stand. 8 Sau L R 217.

7. Private defence.

See also Penal Code (1860), Ss. 96-106.

——Ss. 326, 378, 96 and 302 — Cattle Trespass Act (1871), Ss. 10, 20 —Illegal seizure of cattle purporting to be under S. 10—Does not amount to theft—Owner of cattle has no right to use force to rescue them—Persons seizing cattle held committed no offence in resisting attack by owner's party with arms and lathis —Order in Government App. No. 24-of 1960 dated 13-12-1962 (Pat), Reversed. See Cattle Trespass Act (1871), S. 10. **1965 (2) Cri L J 18 : A I R 1965 S C 926.**

——Ss. 326/149, 97 and 304 (1)—Deceased ploughing field of accused — On show of force by accused deceased stepping out and retreating—Deceased caught hold of by neck and speared — No right of private defence of property—No question of excessive exercise of right — Accused stabbing with spear guilty under S. 304 (1)—All guilty under S. 326/149. See Penal Code (1860), S. 97. **1961 (1) Cri L J 15 : A I R 1961 All 38 (DB).**

——Ss. 326, 34, 96, 97, 99, 323, 304 — Deceased, old man, damaging field of accused and raising his kalsa to strike one of the accused persons — Accused held had right of private defence of person and property —Accused however lost this right by using excessive force and causing death of deceased—Though accused had common intention only to belabour deceased and not to cause his death they must have known that injuries caused were likely to cause death of the deceased—Accused were guilty under S. 304, Part II read with S. 34. See Penal Code (1860), S. 34. **1965 (2) Cri L J 499 (2) : A I R 1965 Him Pra 49.**

——S. 326 — Criminal trespass and mischief upon Government forest—Right of forest guard to prevent —Extent—Accused cutting timber from Government forest — Seizing of axe from accused held did not exceed necessity — Accused not entitled to claim private defence. See Penal Code (1860), S. 104. **1962 Jab L J 857.**

——Ss. 326, 97, 323 — Accused party having dao and lathis and complainant's party having lathis with them — Fight taking place in the field of one of the accused — Held, that by inflicting injuries by means of dao and lathis the accused must be held to have known or to have reason to believe that they were likely to cause hurt to the other side — But the same took place in the course of fight between two parties in which some of the accused also got injured—Again as occurrence took place on the land of accused where party of complainant had entered accused had right of private defence of property and they could not be convicted under Ss. 323 and 326. See Penal Code (1860), S. 97. **1964 (2) Cri L J 213 : A I R 1964 Tripura 45.**

8. Conviction and sentence.

——S. 326—Sentence—Two accused firing shots at X with common intention to kill him but resulting in death of S:— No evidence to show which of them caused fatal injuries — Conviction of both under S. 302 read with Ss. 34 and 301 — No distinction should be made in matter of sentence. See Penal Code (1860), S. 301. **A I R 1956 S C 754.**

——S. 326 — Nose-cutting — Sentence of 6 months R. I. not excessive.

Nose-cutting is a very serious offence and such cases should, ordinarily, be committed to the Sessions. The sentence of 6 months rigorous imprisonment under S. 326, in such a case, cannot be said to be excessive. **1949 All L J 64 : 51 Cri L J 799 : A I R 1950 Ajmer 13 (1) (13) (Pt B) (Pr 3).**

——Ss. 326 and 307 — Conviction under S. 307 and S. 326 for same offence held not warranted. See Penal Code (1860), S. 307. **1953 Cri L J 1677 : A I R 1953 All 726.**

——Ss. 326, 147, 323 — Legality of conviction—Nothing illegal in conviction both under Ss. 147 and 323 or 326. See Penal Code (1860), S. 147. **1953 Cri L J 1677 : A I R 1953 All 726.**

——Ss. 326 and 506—Conviction — Charge of offence under — Benefit of the exception in Ss. 81 and87 — When available indicated. See Penal Code, (1860), Ss. 81 and 87. **52 Cri L J 179 : A I R 1951 All 500.**

——Ss. 326, 304, Part I — A and B charged with offence under S. 304, Part I, Penal Code, read with S. 34—Prosecution clearly establishing A had struck at deceased with dao — Evidence at same time showing that injury which was sufficient in the ordinary course of nature to cause death was not caused by A but by B — Proper verdict against A would be one of guilty under S. 326. See Penal Code (1860), S. 304, Part I. **1953 Cri L J 326 : A I R 1953 Assam 28.**

——S. 326—Punishment — Public servant injured by accused with axe while performing his duty—Accused unusually excitable and poor villager — Whether mitigating circumstances.

Where the accused causes injury with an axe to a public servant resulting in his death while he was performing his duty in order presumably to prevent him from prosecuting an enquiry against the brother of the accused.

Held that the sentence of 3 years' R. I. for the accused was grossly inadequate. The fact that the accused was an unusually excitable and pugnacious individual could not be a ground for imposing such an inadequate sentence looking to the gravity of the offence.

That he took offence against the conduct of the public servant who was performing his duty could evidently not be regarded as constituting any provocation to the accused which justified him in causing the injury which resulted in the public servant's death. That the accused was a poor villager and belonged to a backward class also could not be a justification for this grossly inadequate sentence. **1956 Cri L J 479 : A I R 1956 Bom 193 (195) (Pt C) (Pr 6) (DB).**

——S. 326 — Sentence — Grievous hurt caused by deadly weapon — Proper sentence is imprisonment — When offence is technical or trivial, fine is proper sentence. **A I R 1955 N U C (Bom) 5883 (DB).**

——S. 326 — Sentence — Enhancement of sentence, wound inflicted with a sharp weapon was serious and complainant would have died but for timely medical treatment given—No substantial motive for offence or any sudden or grave provocation — No extenuating circumstances — Sentence of 1½ year imposed on accused under S. 326 was inadequate and deserved to be enhanced to 5 years rigorous imprisonment. See Criminal P. C. (1898), S. 439. **AIR 1955 N U C (Bom) 3663 (DB).**

——S. 326 — Sentence — Violent blow with heavy 'darat' on forearm — Ulnar artery and accompaying veins severed and deceased dying after 15 to 30 minutes—Accused of 19 years — Sentence of 5 years enhanced to 8 years. A I R 1955 N U C (Him Pra) 3682.

——Ss. 326 and 302—Applicability.

Where the accused fired a gun at the deceased causing wound in the abdomen but there is no medical evidence that the injury was the cause of death, conviction under S. 326 and not under S. 302 is proper. AIR 1954 J and K 19.

——Ss. 326, 323, 320 and 302 — Boyish quarrel—Accused hitting deceased with granite stone on temple —Death — Injury sufficient in ordinary course of nature to cause death—Held that offence did not fall either under S. 323 or S. 302—Offence fell under S. 326 — Held, further that under circumstances rigorous imprisonment for five years would meet ends of justice. See Penal Code (1860), S. 323. 1960 Cri L J 1213 : AIR 1960 Ker 301 (DB).

——S. 326 — Accused dealing blow on forehead of deceased with dao—Deceased fully conscious for 4 days and then collapsing — Disagreement between doctors whether injury was fatal—Offence falls under S. 326 and not under S. 302 — Sentence of 4 years R. I. held sufficient to meet ends of justice. 1963 (2) Cr L J 592 (595) (Prs 12, 15) (Manipur).

——Ss. 326 and 302 — Weapon not proved to be deadly — Act done in a melee—Conviction should be under S. 326 and not under S. 302. See Penal Code (1860), S. 302. ('50) 55 Mys H C R 317 (DB).

——S. 326 — Sentence — Dastardly attack on Asst. Manager of a colliery by an active member of Labour Union — Deterrent sentence necessary. See Cr. P. Code (1898), S. 439. 55 Cr L J 306 : AIR 1954 Orissa 49.

——S. 326—Punishment— Considering the intention of the assailants and the manner in which they behaved nothing but the maximum sentence under S. 326, held would be appropriate. ILR (1951) Punj 227 (DB).

——S. 326—Accused below 18 years of age—Accused cannot be dealt with under the provisions of the Probation of Offenders Act — Held however that the accused deserves to be treated leniently considering the fact that he was a junior member of the family and was acting under the influence of the senior member of the family. See Probation of Offenders Act (1958), S. 4. 1965 (1) Cri L J 478 : AIR 1965 Raj 74.

9. Practice and procedure.

——S. 326—Applicability—Charges under S. 304 read with S. 149 — Acquittal—Conviction under S. 326 held justified. See Penal Code (1860), S. 304. 1958 Cr L J 742 : AIR 1958 Assam 44 (DB).

——S. 326 — Charges against several accused under Ss. 148, 323, 325, 324 and 451 read with S. 149, I. P. Code—Acquittal of the accused on charges of unlawful assembly but conviction for specific individual acts under different sections — Absence of separate charges for specific offences in the alternative — Prejudice — Conviction for individual specific offences held proper in the circumstances of the case. See Criminal Procedure Code (1898), S. 233. 1962 Ker L J 793.

——S. 326—Criminal P. C. (1898), S. 439—Finding on facts — No interference See Criminal P. C. (1898), S. 439. 1960 Ker L T 303.

——Ss. 326 and 149 — Criminal P. C. (1898), Ss. 225, 283, 537 (a)—Charge for substantive offence under S. 326, I. P. C.—Conviction under S. 326/149, I. P. C. —Legality — Omission to frame charge under S. 326/149 is curable irregularity under Ss. 225 and 537 (a), Cr. P. C. See Criminal P. C. (1898), S. 225. 1956 Cri L J 1083 : AIR 1956 Orissa 171.

SECTION 327

——Ss. 327, 383—"Property" — Meaning of — Hyderabad Penal Code. Ss. 267, 319.

The word 'property' occurring in Ss. 327 and 383 must be taken to mean both movable and immovable property and not movable property only, 27 Deccan Law Reports 5, Overruled. 52 Cri L J 912 (1) : ILR (1951) Hyd 607 : AIR 1951 Hyd 91 (92) (Pt A) (Pr 4) (FB).

SECTION 328

——S. 328—Administration of Dhatura, with Gur—No Intent to cause hurt. See Penal Code (1860), S. 304. 1955 Cri L J 1022 : AIR 1955 Ajmer 48.

——Ss. 328, 302, 300—Charge of murder by poison—Giving of lethal dose not proved—Benefit of doubt. See Criminal P. C. (1898), S. 367. 1957 Cri L J 930 : AIR 1957 Andh Pra 456.

——S. 328—Dhatura administrated by accused causing pain in stomach — Accused to be credited with knowledge to cause hurt—Offence is punishable under S. 328, Indian Penal Code.

Held, on facts that according to Modi's Medical Jurisprudence and Texicology (XIII Edn.) page 625, the seeds of dhatura were reputed to have an aphrodiasiac property. It was also sometimes given as a Love Philter. It might, therefore, be that the dhatura in the instant case might have been administered by the appellant to her husband not with intent to cause hurt to him but as a Love Philter or as an aphrodiasiac. It could not, however, be controverted that knowing dhatura to be poison, one, who administered it to another in quantities which caused burning pain in the stomach, should be credited with knowledge that such administration was likely to cause hurt. The conviction of the appellant under S. 328 of the Penal Code was maintained. 1963 MPLJ (Notes) 88.

——S. 328—Conviction — Circumstantial evidence—Sufficiency—Offence under S. 328 — Essentials to be proved, indicated—Suspicion not sufficient. See Evidence Act (1872), S. 3. 1957 Jab L J 841.

——Ss. 328, 300 — Accused mere tool in hands of others — Accused held could not be convicted of murder —Accused held could properly be convicted under S. 328. See Penal Code (1860), S. 300. 1952 Cri L J 1150 : AIR 1952 Mad 535 (DB).

——S. 328 — Applicability — Bodily pain disease of infirmity—Administration of poison — Person having reeling sensation and bitter taste—Held, it was sufficient to constitute offence under S. 328 as that hurt was caused within meaning of S. 319. See Penal Code (1860), S. 319. 25 Cut L T 391 : I L R (1959) Cut 662.

——Ss. 328, 302, 300—Accused administering poisonous substance to another resulting in his death — Accused held guilty under S. 302 and not under S 328. See Penal Code (1860), S. 302. 1957 Cri L J 990 : AIR 1957 Pat 462.

——S. 328—Appreciation of evidence — Suspicion — Case under S. 328—Doctor suspecting case to be of dhatura poisoning—Mere suspicion cannot take place of evidence. See Evidence Act (1872), S. 5. 1957 Raj L W 132 : I L R (1956) 6 Raj 1027.

——S. 328 — Accused administering small dose of poison (Opium) not capable of causing death—Offence is one under S. 328 and not under S. 307. (1956) 9 Sau L R 307 : 1957 All W R (Sup) 1.

SECTION 329

——Ss. 329, 325—Causing hurt to compel person to write off debt or withdraw suit — No offence under S. 329.

It is constraining the person to do an illegal act which is made punishable under S. 329 and even if the person was constrained to write off the debt or to withdraw the suit by improper means, the action itself, viz., the writing off or the withdrawal of the claim not being an illegal thing, the bringing about of that action by causing grievous hurt will not contravene the provisions of S. 329. The offence in such case falls under S 325. 52 Cri L J 704: AIR 1951 Sau 40 (41) (Pt A) (Pr 3) (DB).

SECTION 330

——S. 330—Police Officers subjecting suspect to torture with a view to extract confession – Death of suspect in course of torture due to fracture of odoutoid process of second cervical vortabrae and medullary compression — No intention or knowledge of causing death or grievous hurt — Conviction under S. 330 held justified. (1964) 2 Andh W R 43 : 1964 Mad L J (Cri) 415 : 1964 (2) Cri L J 636 : AIR 1964 Andh Pra 548 (555) (Pt D) (Pr 108) (DB).

——S. 330/511—Sentence.

The accused in order to extort confession from a boy who was suspected of having committed theft, brought together his hands, wrapped pieces of cloth round the hands, poured kerosene oil over the wrapping and set fire to it. As a result the boy's hands were burnt and he had to remain an in-patient in the hospital for 12 days. The accused was convicted under S. 330, read with S 511, Penal Code and sentenced to imprisonment till rising of the Court.

Held, that the sentence imposed upon the accused was grossly disproportionate to the gravity of the case. (The sentence was enhanced to one year's rigorous imprisonment). 1955 Mad W N 252 (2) : 68 Mad L W 236 : 1955 Cri L J 1080 : (1955) 2 Mad L J 651 : AIR 1955 Mad 424 (424) (Pr 3).

SECTION 331

——S. 331—Conviction on uncorroborated testimony of complaint is not safe. A I R 1955 N U C (Punj) 2528.

——S. 331—Scope and applicability.

The section applies to cases when the grevious hurt is caused by a person for the purpose of having a claim or demand, which the other person owes to him, satisfied and not to cases where the claim or demand is owed by the culprit to the victim of the assault. 52 Cri L J 704 : AIR 1951 Sau 40 (41) (Pt B) (Pr 3) (DB).

SECTION 332

——Ss. 332 and 323—Evidence — Benefit of doubt—Case on facts—(Criminal P. C. (1898), Ss. 290, 367)—(Evidence Act (1872), S. 1). AIR 1955 N U C (Ajmer) 4753.

——Ss. 332, 342 — Police Officer entering house in joint possession to prevent breach of peace beaten and confined—Offence.

Where the Police Sub-Inspector enters a house in the joint possession of complainant and the accused with their consent, apprehending a breach of peace from one of the parties, his entry in the house is not unauthorised and illegal and the accused beating the Sub Inspector and confining him in a room are guilty under Ss. 332 and 342. 1951 A M L J 13 : 52 Cri L J 220 : AIR 1951 Ajmer 37 (38) (Pr 4).

——S. 332 —'Public servant'—Commissioner appointed to execute decree for delivery of possession—Persons obstructing such commissioner can be convicted under S. 332 read with S. 149. See Penal Code (1860), S. 21. 1957 All L J 268.

——Ss. 332 and 225-B — Applicability — Absence of valid or legal warrant is fatal to conviction. AIR 1955 N U C (All) 2782.

——Ss. 332 and 149—Scope — Obstruction to arrest effected without legal authority—Persons resisting do not form unlawful assembly. A I R 1955 N U C (All) 2782.

——S. 332—"In consequence of anything done".

The offence under S. 332 can be committed not only when a person is assaulted while he is discharging public duty but also when he is assaulted in consequence of the discharge of his duty.

Thus, where the Naib Tahsildar had made a report against the patwari in the lawful discharge of his duty, and as a consequence thereof he was beaten by the accused.

Held, that the facts of the case clearly brought the accused within the purview of S. 332. ('52) 1952 All W R (HC) 343 : 1952 All Cr R 99 : 1952 All L J 434: 1952 Cri L J 1709 : AIR 1952 All 933 (933) (Pr 2).

——S. 332—Applicability — Commissioner appointed to execute decree for delivery of possession—Obstruction — Accused can be convicted under S. 332 read with S. 149—"Public servant". See Penal Code (1860), S. 21. 1951 All WR (HC) 379: I L R (1951) 1 All 187.

——S. 332—Bombay Police Act (22 of 1951), S. 31(1) and (2) — Authorisations under sub-ss. (1) and (2) — Distinction explained — Eviction of dismissed head constable from his room — D. S. P.'s order without jurisdiction — Sub-Inspector acting in good faith — Accused resisting and assaulting Sub-Inspector — Held, accused had no right of private defence and convicted under S. 332, Penal Code. See Bombay Police Act (22 of 1951), S. 31(1). ILR (1956) Bom 661.

——S. 332—Conviction—Police Sub-Inspector acting in discharge of his duty as public servant in executing order of his superior—Fact that order of superior was without proper authorisation in that behalf by State Government does not effect good faith of Sub-Inspector when order is prima facie proper—Resistance to execution of order by accused and causing hurt to sub-Inspector—Accused held not protected by right of private defence under S. 99—Conviction of accused under S. 332 held was proper. See Penal Code (1860), S. 99. ILR (1956) Bom 661.

——S. 332—Applicability—Application for permission for search endorsed as 'approved'—Search without warrant any seizure of someone's property would be illegal—Obstruction to such search cannot constitute offence under S. 332. See Criminal P. C. (1898), S. 98. AIR 1955 N U C (Cal) 4276 (DB).

——Ss. 332 & 323—Applicability—Illegal custody by police constable—Assault and escape—Offence under S. 323 and not under S. 332 held committed. A I R 1955 NUC (Hyd) 2355.

——S. 332 — Sentence — Constable going to house of accused for service of warrant against brother of accused—Accused catching hold of constable's hand and bitting it—Conviction under S. 332—Sentence of two months regorous imprisonment held severe and not justified — Accused sentenced to imprisonment already undergone (one month's). M B L J 1955 H C R 1460 : M B L R 1955 (Cri) 232 (1).

——S. 332 — Illegal entry of Excise Inspector—Resistence to—No offence—(Criminal P. C. (1898), S. 165). 1959 MP L J (Notes) 113.

——Ss. 332, 323, 147, 224 — Same transaction— Misjoinder of charges—Effect—Case on facts –S. 239 (f), Criminal P. C could not apply to facts and trial was vitiated by misjoinder—Prejudice has to be presumed when there is a misjoinder of charges or of persons—(Madras Prohibition Act (10 of 1937), S. 4A).

See Ciminal P. C. (1898), S. 239. A I R 1955 N U C (Mad) 2415.

——S. 332 — Applicability — Public Gambling Act (1867), S. 13—Police Officer illegally but bona fide trying to arrest accused S. 13, P. G. Act—Simple hurt caused to police officer—Ss. 97, 99 and 323—Offence under S. 332—Accused cannot claim right of private defence—Case is covered by S. 99. 1961 (2) Cri L J 504 (505) (Pt B) (Prs 7, 8, 9) (Manipur).

——S. 332—Applicability — C. P. and Berar Prohibition Act (7 of 1938), Ss. 13 (a) and 40—Search without complying with provisions of S. 40 — Police carrying out search assaulted—Person assaulting him is not guilty under—S. 13 (a), C. P. and Berar Prohibition Act or under S. 332, Penal Code. See C. P. and Berar Prohibition Act (7 of 1938), S. 13 (a). 1957 Cri L J 1298 (2) : AIR 1957 Nag 93.

——S. 332 — In discharge of his duty as public servant—Meaning of.

The words "in the discharge of his duty as such public servant' in S. 332 mean in the discharge of a duty imposed by law on such public servant in the peculiar case and do not cover an act done by him in good faith under colour of his office. ILR (1946) Nag 395, Rel. on.

Held, a public servant arresting a person under an invalid warrant is not so acting. 1953 Nag L J 351 : 1953 Cri L J 1569 : A I R 1953 Nag 292 (294) (Pt B) (Pr 12).

——Ss. 332 and 333—'In the discharge of his duty as such public servant'—Removal of timber which under Orissa Timber and other Forest Produce Rules, 1958 requires transit permits within such a permit—Forest Guard who is under R. 16 (c), Orissa Forest Manual responsible for the protection of the Forests under his beat is under duty to prevent damage being done and to apprehend the offender—Hence in apprehending the person who is removing timber without a valid permit and seizing the timer he is discharging his duties as a forest guard. (1965) 31 Cut L T 516 : 1967 Cri LJ 97: AIR 1967 Orissa 1 (2, 3) (Pt A) (Prs 4, 5).

——Ss. 332, 99—Forest guard, acting in good faith, causing seizure of forest-produce — Assaulters cannot claim right of private defence — Absence of report of seizure under S. 52 (2), Forest Act, 1927, held, was irrelevant for the case. AIR 1954 Orissa 16 and AIR 1960 Pat 323, Disting.—Forest Act (1927) S. 52. (1965) 31 Cut L T 851.

——Ss. 332, 319, 95 and 353—Push on neck given to public servant—Push if 'hurt' — Held, assuming that push was no hurt, accused would still be punishable under S. 353. (1965) 31 Cut L T 851.

——S. 332—Distinct offences—Offences under Ss. 186 and 332, Penal Code are distinct offences. See Criminal P. C. (1898), S. 233. ILR (1962) Cut 610.

——Ss. 332, 353, 323, 96 and 97 — Obstructing public servant in discharge of his duties—Ingredients of offence — Proof — Accused alleged assaulting Police Officer who wanted to search his (accused's) house for stolen articles, under powers conferred by S. 165 (1) (3) and (5) of Criminal Procedure Code, 1898—Search contravening S. 165, Criminal P. C. being illegal, conviction of accused under Ss. 353 and 332, I. P. C. not maintainable—In view of illegality of search and right of accused to private defence of person conviction of accused could not be even altered to one under S. 323, I. P. C. See Penal Code (1860), S. 353. 1964 (2) Cri L J 571 : A I R 1964 Pat 493.

——Ss. 332 and 353—Accused snatching papers from hands of Officer and pushing him and causing injuries—Offence under Ss. 353 and 332, Penal Code and not under S. 26 (1) (h), Bihar Sales Tax Act committed — Sanction under S. 26 (2) not necessary. See Sales Tax — Bihar Sales Tax Act (19 of 1947), S. 26. 1960 B L J R 715.

——S. 332—Applicability—Minor certificate-debtor—Illegal arrest in execution of certificate — Father rescuing him from arrest—Act of father did not amount to any offence. See Bihar and Orissa Public Demands Recovery Act (4 of 1914), S. 7. A I R 1955 N U C (Pat) 2490.

——S. 332—Scope—Prosecution under S. 332, I. P. C. —Non-compliance with S. 165—Accused held justified in resisting search in exercise of right of private defence of property. See Criminal P. C. (1898), S. 165. 1964 Cur L J 160 (Punj.)

——S. 332—Assistant Sub-Inspector of Punjab State coming with staff to village in Rajasthan for investigation of case in Punjab — Search and seizure of properties of accused by assistant sub-Inspector held to be without jurisdiction—Police party held not to have acted in good faith — Right of Private defence held, however, not available to accused under circumstances of case—Offence under S 395, held not proved—Convictions under Ss. 332, 333 upheld. See Penal Code (1860), S. 52. 1964 Raj L W 126.

——Ss. 332, 353 — Expression, 'in consequence' — Scope of — Beating given to public servant in consequence of anything done by him in discharge of duty —S. 332 is attracted — Causing of hurt is not necessary.

While framing a charge under S. 332 it is not essential that the hurt should be caused to the public servant while he is actually discharging his official duty. If a beating is given in consequence of anything done by him in the discharge of his duties as a public servant, then it is sufficient to attract the application of S. 332. The expression 'in consequence' used in S. 332 and S. 353 includes the motive which actuates the accused to cause voluntary hurt or assault to a public servant. 1963 Raj L W 468 : ILR (1963) 13 Raj 999 : 1964 (1) Cri L J 254 (255) (Pt B) (Pr 5) (Raj).

——S. 332—Applicability—Assault on police party in pursuance of criminal conspiracy—Murder of Inspector and fatal injuries on others — Conviction upheld. See Penal Code (1860), S. 120-B. 56 Cri L J 414 : AIR 1955 Trav-Co 33.

SECTION 333

——Ss. 333, 323 and 149—Trial by jury—Legality—Trial of offences under S. 323 read with S. 149 and S. 333 read with S. 149 should be with aid of assessors and not by jury—If however these offences were tried by a jury it remained a trial with aid of jury—In view of S. 536, Cr. P. C, it would not be considered to be illegal. See Penal Code (1860), S. 149. 1954 Cri L J 1424 : AIR 1954 All 680.

——Ss. 333, 104 — Forest Act (1927), S. 52 — Forest guard attempting to snatch away axe from trespasser who was chopping wood from Government forest—Trespasser inflicting injuries on Forest guard is guilty under S. 333.

A forest guard who was attempting to snatch the axe with which the accused was chopping wood in Government forest was injured by him with the axe. In his trial under S. 333 the accused pleaded that it was not established that the forest was notified as reserved forest and the forest guard had no authority to seize the axe, but only to seize chopped wood under S. 52 of the Forest Act.

Held, that the forest guard had the right to prevent wood being chopped in the forest which became Government forest under the M. P. Abolition of Proprietary Rights Act and the accused was guilty under S. 333, Indian Penal Code. 1962 Jab L J 857 : 1962 M P L J (Notes) 318 : 1963 (2) Cri L J 95.

——Ss. 333, 326, 104, 105 and 99—Criminal trespass and mischief upon Government forest—Right of forest guard to prevent — Extent—Accused cutting timber from Government forest—Seizing of axe from accused held did not exceed necessity — Accused not entitled to claim private defence. See Penal Code (1860), S. 104. 1962 Jab L J 857.

——Ss. 333, 332, 395 — Assistant Sub-Inspector of Punjab State coming with staff to village in Rajasthan for investigation of case in Punjab — Search and seizure of properties of accused by assistant sub-Inspector held to be without jurisdiction — Police party held not to have acted in good faith — Right of private defence held, however, not available to accused under circumstances of case—Offence under S. 395, held not proved—Convictions under Ss. 332, 333 upheld. See Penal Code (1860), S. 52. 1964 Raj L W 126.

——Ss. 333, 34, 97, 99, 325—Applicability—Right of private defence of property—Exceeding the right—Held that as the complainant had no lawful right to chase cattle into field of accused, the accused had a right of private defence of their property, but they had exceeded that right when they continued to beat him when cattle had been rescued. See Penal Code (1860), S. 34. 1959 Cri L J 770 : AIR 1959 Raj 124.

SECTION 334

——S. 334—Applicability.

Held, that the Magistrate had approached the matter absolutely wrongly. Instead of considering the prosecution evidence he merely considered objection by accused that the prosecuting witnesses not being of the same locality should not be believed. The Magistrate gave his reasons for not relying on the defence evidence and proceeded to say that since it was the complainant who had gone to prevent the accused from construction of building, the offence committed was one under S. 334. All this exhibited a lack of adequate knowledge as regards circumstances under which S. 334 could be used and the way in which a criminal case ought to be approached. M B L J 1955 H C R 1536 : M B L R 1955 Cri 316.

——Ss. 334 and 323 — Scope — Prosecution under S. 394 — If accused acted under grave and sudden provocation he would be liable under S. 334—As there was no plea of grave and sudden provocation, in the circumstances, the conviction under S. 323 was correct. See Penal Code (1860), S. 323. 1957 Nag L J 184.

——S. 334—Applicability — Young person kicked in abdomen by A, a man of same age — Intestines perforated resulting in death—Nature of offence—A must be presumed to have knowledge that his act was likely to cause death—Offence committed by him was one under S. 304, Part 2 and not one under either S. 334 or S. 323. See Penal Code (1860), S. 304, Part 2. AIR 1955 N U C (Pepsu) 1876.

SECTION 335

——S. 335—"Grave and sudden provocation" — Indecent assault by deceased on accused's minor sister-in-law — Provocation is sudden and grave—Punishment under S. 335 awarded. AIR 1955 N U C (Madh B) 51.

——S. 335—"Grave and sudden provocation."

Deceased suspected to be carrying on love intrigue with wife of A — A and his neighbour B concealing themselves in cowshed near A's house for whole day —Deceased approaching A's wife at night and having intercourse with her — A and B rushing at deceased and giving him first blows—A also inflicting injuries with burning firewood—Held there was no grave and sudden provocation as A and B were as if waiting for opportunity to teach deceased a fitting lesson. 19 Cut L T 310 : ILR (1953) Cut 453 : 1953 Cri L J 1713 : AIR 1953 Orissa 308 (311) (Pt C) (Pr 10) (DB).

——S. 335—Applicability — Grievous hurt—Injuries inflicted with burning firewood.

Injuries inflicted with the help of burning firewood cannot be considered as a grievous hurt as they do not come within the specific items of the injuries mentioned in the definition of grievous hurt nor do they endanger life. 19 Cut L T 310 : ILR (1953) Cut 453 : 1953 Cri L J 1713 : AIR 1953 Orissa 308 (311) (Pt D) (Pr 10) (DB).

SECTION 336

——Ss. 336, 304-A, 279, 280, 337 and 338 — Offences defined by Ss. 279, 280, 336, 337 and 338 can be viewed as minor offences included within S. 304-A—Accused once convicted under S. 304-A cannot be convicted under S. 279 for minor offence. See Penal Code (1860), S. 304-A. 1965 (1) Cri L J 524 : AIR 1965 All 196.

——S. 336—Rash and negligent act — What is—Act done intentionally and deliberately is not such act.

Where a person commits a wanton or dangerous act with the knowledge that it is so and he commits it without knowing that it may probably cause injury or without the intention of causing it, it will be a rash act. The person committing the act in such a case does not know that the result of his recklessness or negligence may probably cause injury to somebody he never intends that such an injury would be caused. It may be negligent act, when a person is negligent as to the consequences of his act and there is a failure on his part to take reasonable and proper care and precaution to guard against injury to somebody else. Where however, a person commits an act with the intention of causing an injury to somebody else it is an intentional act done with consideration and will and therefore, amount to a rash and negligent act. Both in the case of intentional as well as rash and negligent acts, the fact that the act may endanger human life or the safety of others may be a common factor. But that by no means is the decisive factor. Where the accused intentionally pelted a stone at the complainant after abusing him but the stone missing its target hit the front wheel of the complainant's van, the act does not amount to a rash and negligent act within the meaning of S. 336, I.P.C. and the charge and conviction of the accused under that section cannot be sustained. 33 Pat 1006 and AIR 1928 All 745 and AIR 1925 All 396 and AIR 1937 Rang 273 and A I R 1926 Cal 300 and 3 All 776, Relon. 67 Bom L R 223 : 1965 Mah L J 411 : I L R (1965) Bom 519 : 1966 Cr L J 7 : A I R 1966 Bom 13 (15) (Pt A) (Pr 7).

——Ss. 336, 279 — Nature of offence — Distinction pointed out. See Penal Code (1860), S. 279. 1960 Cr L J 814 : AIR 1960 Bom 269 (DB).

——S. 336 — Essentials of offence — Throwing of stones of size of pice—Offence.

For an act to be an offence under S. 336 of the Penal Code, it must be such as will endanger the life of a person or the personal safety of others. Throwing of stones not bigger than the size of a pice does not bring the act of the person under S. 336, I. P. C. 1958 Nag L J (Notes) 11.

——Ss. 336 and 352 — Conviction under S. 336—Alteration into one under S. 352—Legality—Absence of charge—Effect.

It is one thing to say that no act was rash and negligent and it is another thing to say that it was such as to create apprehension in the mind of another. Therefore, in the absence of a charge in the alterna-

tive under section 352, the conviction under S. 336 cannot be altered to one under section 352, Indian Penal Code. 1958 N L J (Notes) 11.

——S. 336—Applicability— No allegation of rashness or negligence in first information report—Offence.

Where in the first information report the complainant stated that he was given a beating with the butt end of a khanda after being carried into the Math of the accused and that he came away running and it was further stated that the cycle of his companion was also broken with the Khanda :

Held, that there was absolutely no allegation in the first information report to make out a case under S. 336, neither rashness not negligence being stated anywhere in the report. 23 Cut L T 88 : 1957 Cr L J 769 : A I R 1957 Orissa 130 (143) (Pt I) (Pr 33) (DB).

——Ss. 336, 337 and 352— Accused convicted under Ss. 336 and 337 for causing hurt to complainant — Evidence showing act to be deliberate—Accused held could be convicted under S. 352 rather than under S. 336 or S. 337 notwithstanding absence of charge— Offence under S. 352 triable exclusively by Bench of Gram Kutchery—Magistrate having initially jurisdiction can try offence under S. 352. See Criminal P. C. (1898), S. 238. 1964 B L J R 277.

——S. 336 — Rash act—Deliberate stone throwing is not a rash act. AIR 1955 N U C (Pat) 1438.

——S. 336—'Rashly'—Meaning of—Drunken person firing in air on seeing complainants during night — Act is both rash and negligent—Guilty under S. 336.

The phrase 'rashly' means something more than mere inadvertence or inattentiveness or want of ordinary care. A person who acts rashly shows indifference to obvious consequences and to the rights of others, and does not mind whether a danger would result or not, A rash act is indicative of disregard of consequences.

Whether the accused who were drunk started firing in the air on seeing the complainants coming in a jeep at about 8-30 p. m. in the night and the complainants had to take shelter behind the jeep.

Held, that as the accused were drunk their act of firing in the dark was both rash and negligent and was covered by the ingredients of the offence under S. 336. ILR (1963) 2 Punj 611 : 1963 (2) Cr L J 718 (Punj).

SECTION 337

——Ss. 337, 304-A, 279, 280, 336 and 338 — Offences defined by Ss. 279, 280, 336, 337 and 338 can be viewed as minor offences included within S. 304-A— Accused once convicted under S. 304-A cannot be convicted under S. 279 for minor offence. See Penal Code (1860), S. 304-A. 1965 (1) Cri L J 524 : A I R 1965 All 196.

——S. 337 —Act endangering life of others — Motor driver's duty to members of public pointed out. See Penal Code (1860), S. 304-A. 1965 Mah L J 668 : 67 Bom L R 472 : 1966 Cri L J 400 : A I R 1966 Bom 122.

——S. 337—Accident must be direct reuslt of negligent act. Causing death by negligence. See Penal Code (1860), S, 304-A. 1966 Cri L J 400 : 67 Bom L R 472 : 1965 Mah L J 668 : AIR 1966 Bom 122.

——Ss. 337, 336 and 279 — Scope — Composition of offence under S. 337 does not involve acquittal of accused under S. 279. See Penal Code (1860), S. 279. 1960 Cr L J 814 : AIR 1960 Bom 269 (DB).

——Ss. 337, 427—Rash and negligent driving leading to collision causing hurt to person on road—Conviction of driver under S. 337 proper—Conviction under S. 427, illegal.

Where the applicant's rash and negligent driving of his lorry has led to a collision as a result of which hurt is caused to a person sitting in a jeep the applicant can be properly convicted under S. 337 although the hurt was not caused knowingly. The word 'voluntarily' is not used in S. 337. But his conviction under S. 427 is not proper as the requisite mens rea of intention is absent. 1962 (2) Cr L J 760 (1) : AIR 1962 Guj 318 (318) (Prs 2, 3).

——Ss. 337 and 338—Applicability—Complainant had to be kept treated in hospital as an in-patient for 45 days as result of motor injuries—Medical witness stated that after 14 days he could have been discharged and after the said period he was in a position to attend his ordinary avocation in life — Criminal act of accused would fall under S. 337 and not under S. 338. See Penal Code (1860), S. 319. 1958 Cr L J 33 : AIR 1958 Ker 8.

——Ss. 337, 279, 333 and 71—Offence under S. 279 and Ss. 337 and 338 are distinct — Conviction and sentences—Person convicted of offence under S. 337 or S. 338 can also be convicted for an offence under S. 279 — If however two offences are committed in same transaction S. 71 will govern assessment of punishment—Madh. B L R 1952 Cr 302; Madh B L J 1952 H C R 459, Overruled — (Criminal P. C. (1898), S. 233). 1956 Cri L J 624 : AIR 1956 Madh Bha 141 (FB).

——S. 337—Applicability — Personal injury if intentionally caused is neither a rash nor negligent act and constitutes an offence under S. 323 — S. 337 applies where hurt is caused involuntarily yet negligently or rashly. See Penal Code (1860), S. 321. A I R 1955 N U C (Madh B) 48.

——S. 337—'Negligence'—What amounts to, indicated—See Penal Code (1860), S. 279. (1960) M P L J (Notes) 79.

——Ss. 337, 338 — Essence of liability under—Negligence or rashness - Degree of culpability required— Learner practising motor driving in street—Accident through mistake and inexperience — Held not guilty of criminal offence.

Mere negligence or rashness is not enough to bring a case within the ambit of S. 337 or S. 338, I. P. Code. Negligence or rashness proved by evidence must be such as should necessarily carry with it a criminal liability. Whether such liability is present may depend on the degree of culpability having regard in each case to the particular time, place and circumstances. If it is merely a case of compensation or reparation for injury or damage caused to a person or property, it is clearly not punishable under either of the sections. The culpability to be criminal should be such as concern not merely the person injured or property damaged but the safety of the public on the road. But the nature and extent of the injury or damage will be irrelevant in fixing criminal liability for negligence under the sections.

Where there was no traffic or crowd at the place and time of the accident and the accused who was a learner tried to stop the motor but failed to do so as by sheer inexperience he could not be held to be guilty of the criminal offence. 7 Mad H C R 119 and (1807) 3 C and P 635 and 1937 A C 576, Relied on. (1962) 2 Mad L J 146 : 1962 (2) Cr L J 386 : 75 Mad L W 760 : 1962 Mad L J (Cri) 444 : AIR 1962 Mad 362 (365) (Pt A) (Prs 10, 11).

——S. 337 — Accused (snake-charmer) administering pills to his disciples along with heated liver of goat— Some disciples dying and rest becoming sick—Burden of proof — No proof that death and sickness were direct result of taking pills—Accused held not guilty See Penal Code (1860), S. 304-A. 1964 (2) Cr L J 42 : AIR 1964 Orissa 173.

——Ss. 337 and 307 — Injury caused by shooting—Absence of proof about intention to kill—Inference of criminal responsibility under S. 337—Conviction of accused can be altered from S. 307 to S. 337 though no charge under the latter section had been framed—See Penal Code (1860), S. 307. ILR (1962) 1 Punj 6.

——S. 337—Prosecution of medical practitioner registered under S. 36 (2), Rajasthan Indian Medicines Act (1953) for performing surgery with gross negligence —Controversy whether certificate entitled accused to practise surgery or medicine only — Court held under a duty to summon Registrar, Board of Indian Medicines, Rajasthan, as a witness—See Cr. P. Code (1898), S. 252 (2). **1964 (2) Cr L J 583 : A I R 1964 Raj 242.**

——S. 337—Criminal P. C. (1898), Ss. 239 (d), 235 (1), 537 — Expressions "same transaction" and "in the course of the same transaction" — Meaning of—Various independent acts if connected either subjectively or objectively and producing particular result from one transaction — Collision of two motor vehicles — Joint trial for offences under Ss. 279, 337 and 426, Penal Code not illegal — Even if illegal, there being no prejudice caused to prosecution retrial could not be ordered — See Criminal P. C. (1898), S. 239 (d). **1962 (1) Cri L J 763 : AIR 1962 Raj 155 (DB).**

——S. 337—Rash or negligent driving causing grievous hurt to one person and death of other—Accused held was liable for death and grievous hurt — See Penal Code (1860), S. 279. **1954 Cri L J 7 : A I R 1954 Trav-Co 25.**

——S. 337 — Rash and negligent act of lorry driver resulting in death — No explanation for running on right side of road given—Belated reason as to overtaking bullock carts not believed—Driver held guilty under Ss. 337 and 304-A—Sentence of fine of Rs. 150 held sufficient — See Penal Code (1860), S. 304-A. **1953 Cri L J 1850 : AIR 1953 Trav-Co 617.**

SECTION 338

——Ss. 338, 304-A, 279, 280, 336, 337—Offences defined by Ss. 279, 280, 336, 337 and 338 can be viewed as minor offences included within S. 304-A—Accused once convicted under S. 304-A cannot be convicted under S. 279 for minor offence — See Penal Code (1860), S. 304-A. **1965 (1) Cri L J 524 : A I R 1965 All 196.**

——Ss. 338, 279, 337 and 71—Offence under S. 279 and sections 337 and 338 are distinct—Conviction and sentences — Person convicted of offence under S. 337 or S. 338 can also be convicted for an offence under S. 279—If however two offences are committed in same transaction, S. 71 will govern assessment of punishment—Madh B L R 1952 Cr 302; Madh-B L J 1952 H C R 459, Overruled — (Criminal P. C. (1898), S. 233. **1956 Cri L J 624 : AIR 1956 Madh-Bha 141 (FB).**

——Ss. 338 and 304-A — Accused directing labourers to stand across the road to stop a truck—Truck not stopping and crushing a person—Accused not guilty under S. 304-A or 338. **(1962) M P L J (Notes) 236.**

——S. 338 — "Rash and negligent act"—Motor accident—Driver not possessing licence—Effect—Contributory negligence — Plea in defence — Held, that placed in the situation he was, the accused did not act unreasonably in overtaking the cart from the left and that 'rashness' or 'negligence sufficient to warrant a conviction either under S. 304-A or under S. 338 had not been established. See Penal Code (1860), S. 304-A. **1958 Cr L J 1032 : A I R 1958 Madh Pra 205.**

——Ss. 338, 337 — Essence of liability under—Negligence or rashness — Degree of culpability required—Learner practising motor driving in street—Accident through mistake and inexperience — Held, not guilty of criminal offence — See Penal Code (1860), S. 337. **1962 (2) Cri L J 386 : AIR 1962 Mad 362.**

——S. 338 — Driver driving motor vehicles found guilty of error of judgment only is not liable to be punished—See Motor Vehicles Act (1939), S. 116. **51 Cri L J 374 : AIR 1950 Mad 71.**

——S. 338 — Ingredients of offence—Culpable rashness and culpable negligence — What amounts to—Accused held on facts to be guilty under Ss. 279, 338 and 304-A — Conviction under S. 121, Motor Vehicles Act held no bar to conviction—See Penal Code (1860), S. 279. **54 Cr L J 518 : A I R 1953 Pat 56.**

——Ss. 338, 114, 107 and 279 — Principal offender or abettor—Driver of lorry carrying passengers allowing minor to drive lorry with full knowledge that minor did not know driving—Rash and negligent driving by minor resulting in grievous hurt — Driver sitting by the side of minor — Driver was liable as principal offender under provisions of S. 114. See Penal Code (1860), S. 114. **52 Cri L J 930 : A I R 1951 Punj 418.**

——Ss. 338, 304-A—Prosecution must prove accused guilty of culpable negligence to bring case under sections—Defect in pull and push rod of bus — Meticulous examination necessary to detect defect—Driver is not bound to undertake such examination before driving the vehicle — Absence of evidence to show that defect could have been within knowledge of the driver—Criminal liability cannot be fastened to him. See Penal Code (1860), S. 304-A. **1962 Raj L W 281 : ILR (1962) 12 Raj 103.**

——S. 338—Offences under—Not of same nature and character—Being distinct offences separate convictions are valid. See Penal Code (1860), S. 279. **1961 Raj L W 404.**

——S. 338—Conviction for offences under Ss. 279 and 338 — Proper sentence — Separate sentence for each offence not invalid. See Penal Code (1860), S. 71. **1961 Raj L W 404.**

——S. 338 — Rash or negligent driving causing grievous hurt to one person and death of other—Accused held was liable for death and grievous hurt. See Penal Code (1860), S. 279. **1954 Cri L J 7 : A I R 1954 Trav Co 25.**

SECTION 339

——S. 339—Gist of offence — Indirect obstruction.

The fact that an act of an accused indirectly results in the complainant not proceeding in the direction in which he wanted to proceed originally would not make the accused guilty of causing obstruction to the person so as to prevent him from going in that direction. The gist of the offence defined in S. 339 is causing obstruction directly to a human being. **A I R 1954 Mad 247, Disting. A I R 1955 N U C (Andhra) 3628.**

——S. 339 — Applicability — Unyoking of buffaloes tied to plough does not amount to wrongful restraint of persons. **A I R 1955 N U C (Andhra) 3628.**

——Ss. 339 and 341 — Accused obstructing private right of way alleged by complainant over land of accused—Accused denying existence of right of way —Trial and conviction under S. 341 — Revision — Accused can plead that evidence adduced did not exclude existence of bona fide belief in mind of accused that he had right to obstruct — Act is not offence in view of exception to S. 339 — Proper remedy of complainant lies in civil Court. . . .

The accused was tried under S. 341, Penal Code for obstructing a private right of way which the complainant claimed over the land of the accused.

The accused denied any such right in the complainant. The trial Court found in favour of the complainant and therefore convicted the accused under S. 341:

Held, that the failure on the part of the accused to plead at the trial that his act fell within the exception to S. 339 could not deprive him of the right to show that the evidence in the case did not exclude the existence of a bona fide belief in his mind that he had a right to close the pathway. The act of the accused did not amount to any offence. Moreover as the dispute could be more appropriately tried in a civil Court instead of in a summary trial on criminal side, the conviction could not be maintained. 51 Cri L J 809 : A I R 1950 Assam 82 (83) (Pr 5).

——S. 339—Criminal P. C. (1898), S. 522 (1) — Order under for restoration of possession — Essential conditions—Conviction under S. 341, Penal Code—Offence of wrongful restraint is attended by show of force — Dispossession taking place when offence committed —Order for restoration can be passed See Criminal P. C. (1898), S. 522 (1). 1960 Cri L J 459 : A I R 1960 Bom 139.

——Ss. 339, 340, 341—Word 'proceed' in Ss. 339, 340 —Meaning of — Obstruction of bus from proceeding towards its destination—If amounts to wrongful restraint of passanger and crew of bus.

The word 'proceed' in Ss. 339 and 340 is confined to the case of a person who can walk on his own legs or can move by physical means within his own power. Surely the word 'proceeding' in S. 340 includes the case of proceeding by outside agency. To contemplate that when a person driving in a motor vehicle along a highway is stopped and prevented from moving forward would not be said to have been wrongfully restrained if he is asked to get down from the vehicle and left free to move on his foot would take away a very large part of the content and meaning of the word 'proceed' occuring in the definition in S. 339. That word cannot be given the limited meaning of proceed on foot only.

Held, on facts, that the acts of the accused persons in obstructing a motor bus from proceeding towards its destination did amount to wrongful restraint of the passengers as also the crew of the bus within S. 339. 67 Cal W N 1029 : 1964 (2) Cri L J 20 : AIR 1964 Cal 286 (289) (Pt A) (Prs 10, 11).

——S. 339 — Right of easement — Use of Criminal force if offence—Accused claiming right of easement to pass over inner Court yard of complainant's house through gap in complainant's wall — Right disputed by complainant — Complainant trying to close the gap — Complainant's act does not amount to mischief or wrongful restraint — No right of private defence arises in favour of accused party — Accused party using criminal force to prevent closing of gap are guilty of rioting. See Penal Code (1860), S. 96. 1963 (1) Cri L J 46 : A I R 1963 Cal 3 (DB).

——Ss. 339, 341 — 'Obstruction'—Meaning — It means physical obstruction, may be by force or menaces and threats—Offence under S. 339 or S. 341 is determined more by nature of effect caused and not by nature of act. A I R 1955 N U C (Cal) 1420.

——S. 339 —Landlord preventing tenant from using bath-room and privy by locking it — Offence under S. 339 is committed—Dispute of this kind can however be tried more suitably in civil Court — On facts landlord held not guilty of any offence as bath-room and privy were not part of tenancy.

Where a landlord by locking the door prevents a tenant from entering and making use of a bathroom and a privy which he is entitled to use as a tenant, the landlord is technically guilty of the offence of wrongful restraint under S. 339, Penal Code. However, a dispute of this kind can be tried far more suitably in a civil Court than in a criminal Court:

(Held on the evidence in the case that as it was not established beyond reasonable doubt that the bath room and the privy were part of the tenancy the landlord was not guilty of any offence.) 51 Cri L J 668 : A I R 1958 Cal 157 (158) (Prs 11, 12).

——Ss. 339 and 341—Ranbir Penal Code (12 of 1989), Ss. 339 and 341 — Joint owner of a house having larger share preventing co-owner having smaller share from using a door opening into Sehan—Right of such other owner to use the door not established — Action does not constitute offence of wrongful restraint— Dispute can best be settled by Civil Court. A I R 1950 Assam 82; A I R 1950 Cal 157; A I R 1949 Cal 112; A I R 1918 Bom 256 and A I R 1925 Cal 1214, Rel. on. 1963 Kash L J 117 : 1964 (1) Cri L J 40 : A I R 1964 J and K 4 (5, 6) (Pt A) (Prs 6, 8).

——S. 339 — Applicability — Obstruction of van in which person is travelling —Offence.

The voluntary obstruction of a van in which persons are travelling would amount to the offence of wrongful restraint of the person in the vehicle. The fact that the person or persons may get down and then be left at liberty to proceed on their way unmolested is immaterial. If the person is prevented from proceeding at the moment of restraint, the terms of S. 339, Indian Penal Code, are satisfied. 1960 Ker L J 856 : 1960 Ker L T 789 : (1961) M L J (Cr) 67 (Ker) : 1961 (1) Cri L J 656 (657) (Pr 11) (Kerala).

——Ss. 339, 341—Passengers travelling by motor van — Van not allowed to proceed further — There is wrongful restraint of passengers.

Where the persons by standing in front of a motor van, prevent the van from proceeding further, they wrongfully restrain the persons travelling by the van, from proceeding further, and are punishable under S. 341. 1960 Ker L J 856 : 1960 Ker L T 789 : 1961 Mad L J (Cr) 67 : 1961 (1) Cr L J 656 (657) (Pr 11) (Kerala).

——Ss. 339, 341—Scope—Wrongful restraint — User of public way to carry a corpse to funeral ground — Obstructions — Offence — Good faith and belief of having a lawful right —Not a good defence. See Penal Code (1860), S. 241. (1963) 2 MLJ 80 : 1963 Mad L J (Cr) 337.

——Ss. 339, 341—Exception—Obstruction by members of Hindu Community to Harijan in taking a corpse along public road — Constitutes an offence under S. 341—Exception to S. 339 does not apply. See Penal Code (1860), S. 341. (1963) 2 Mad L J 80 : 1963 Mad L J (Cr) 337.

——Ss. 339 and 341—Wrongful restraint—Meaning — Public path passing through accused's field — Neighbour passing with ploughs—accused armed with sticks obstructing him and striking bulls, making them run away — Accused held guilty of wrongful restraint.

The offence of wrongful restraint is linear in its scope; while wrongful confinement is circular in its character. Wrongful restraint is keeping a man out of a place where he wishes to be and has a right to be. A person may obstruct another by causing it to appear to the other that it is impossible, difficult or dangerous to proceed as well as by causing it actually to be impossible, difficult or dangerous for that other to proceed. The obstruction must be physical. A verbal prohibition or remonstrance does not amount to such obstruction. The offence is the abridgment of the liberty of a person against his will.

In a wrongful restraint there need not be any stoppage of the movement; it may be directed into a channel different from the direction, in which the

victim intends to move. Physical presence of the obstructor is not necessary; nor is any actual assault necessary and fear of immediate harm restraining a man out of a place where he wishes to be and has a right to be is sufficient. Case law Ref.

The accused, who were the owners of a certain land through which a pathway passed, came there armed with sticks and obstructed a neighbour when he was passing with his ploughs and struck the bulls and made them run away. The neighbour came home fearing that if he proceeded further he would also be beaten. The accused's pleas of private way over the land and resistance under a bona fide claim of right were negatived.

Held, that the accused were guilty of wrongful restraint. ('52) 1952 Mad W N 163 : 1952 Mad W N (Cr) 39 : 65 Mad L W 446 : 1952-1 Mad L J 164 : 1954 Cri L J 283 : A I R 1954 Mad 247 (248) (Prs 8, 10).

——S. 339—Essentials of offence. The definition of robbery requires that either death or hurt or wrongful confinement is caused or the victims put in fear of such result. There must be evidence and it must be actually found that there was the fear of death or hurt or wrongful confinement. 1959 Cri L J 1203 : AIR 1959 Orissa 171.

——S. 339 - Exception—Accused charged for putting lock on a house from outside and convicted — Accused recorded to be in possession of the house in the raiyati parcha in the survey operations—Magistrate also acquitting accused on a similar charge two months previous to the occurrence holding that the accused was in possession of the house — Held, as there was sufficient ground to induce the accused to believe that he could go and put a lock on the house, his case was covered by the exception and hence his conviction was unsustainable. 1964 B L J R 321.

——S. 339—Applicability — Obstruction in bona fide belief of right — No offence under S. 339, held committed — Matter could be settled by Civil Court and resort to criminal Court was unjustified. AIR 1955 N U C (Raj) 1073.

——Ss. 339, 341—Applicability.

Where the passage through the plot on which the complainant's son was proceeding with the complainant's cart full of manure had been used for long time as a passage for carts to the complainant's fields, and the accused prevented the son of the complainant along with the cart to proceed towards the complainant's field by erecting a wall across the passage the offence under S. 341 was clearly made out. 1953 Raj L W 199 : 1954 Cri L J 1005.

SECTION 340

——Ss. 340, 339, 341 — Word "proceed" in Ss. 339, 340—Meaning of—Obstruction of bus from proceeding towards its destination—It amounts to wrongful restraint of passenger and crew of bus. The word 'proceed' in Ss. 339 and 340 is confined to the case of a person who can walk on his own legs or can move by physical means within his own power. Surely the word 'proceeding' includes the case of proceeding by outside agency. See Penal Code (1860), S. 339. 1964 (2) Cri L J 20 : AIR 1964 Cal 286.

——Ss. 340, 347 & 383 — Wrongful confinement for purpose of extorting money—'Injury' in S. 383 need not be physical.

The accused who were chaukidar and daffadar charged the complainant with theft of an article belonging to a certain person. The complainant denied the charge. Thereupon the accused said that they would take him to the police station. They accordingly tied him with a turban and took him towards the police station. On their way they detained him in an orchard where they made a proposal of payment of Rs. 50 for his release. The complainant then got himself released by making the payment.

Held that (i) the action of the accused in keeping the complainant tied in the orchard was certainly an act which amounted to wrongful restraint in such a manner as to prevent that person from proceeding beyond certain circumscribing limits.

(ii) the word 'injury' in S. 383, Penal Code, was not confined to physical injury. Even a terror of a criminal charge, whether true or false amounts to a fear of injury 7 W R (Cr) 28, (1824) S C & P 479, Rel. on.

(iii) the accused by threatening to take the complainant to the thana on a charge of theft had put him in fear of injury and therefore their act amounted to wrongful confinement for the purpose of extorting the complainant. 1952 Cri L J 1391 : AIR 1952 Pat 379 (380) (Pt A) (Pr 2).

SECTION 341

SYNOPSIS

(Penal Code (1860), S. 341.)

1. Wrongful restraint.
2. Sentence.
3. Practice and procedure.

1. Wrongful restraint.

——Ss. 341, 339, 340 — Word "proceed" in Ss. 339, 340—Meaning of—Obstruction of bus from proceeding towards its destination — It amounts to wrongful restraint of passenger and crew of bus. The word "proceed" in Ss. 339 and 340 is confined to the case of a person who can walk on his own legs or can move by physical means within his own power. Surley the word "proceeding" includes the case of proceeding by outside agency. See Penal Code (1860), S. 339. 1964 (2) Cri L J 20 : A I R 1964 Cal 286.

——Ss. 341, 339 — Obstruction—Meaning—It means physical obstruction, may be by force or menaces and threats—Offence under S. 339 or S. 341 is determined more by nature of effect caused and not by nature of act. See Penal Code (1860), S. 339. AIR 1955 N U C (Cal) 1420.

——Ss. 341 and 427 — Wrongful restraint and mischief.

A fisher woman who occupies on payment of rent daily a particular stall in a fish market has a right to be at that stall and cannot be thrown out of it without due process of law. Hence preventing her from exercising her right to go to the stall is an offence under S. 341. And if in order to diminish the utility of the property to her rubbish etc. are dumped such prevention will amount to mischief punishable under S. 427. 1954 Cri L J 551 : A I R 1954 Cal 192 (192) (Pr 3).

——Ss. 341 and 339 — Ranbir Penal Code (12 of 1989 Svt.) — Joint owner of a house having larger share preventing co-owner having smaller share from using a door opening into Sehan — Right of such other owner to use the door not established — Action does not constitute offence of wrongful restraint — Dispute can best the settled by civil Court. See Penal Code (1860), S. 339. 1964 (1) Cri L J 40 : AIR 1964 J and K 4.

——S. 341 — Applicability — Complainant carrying wheat without licence— Bailable offence — Arrest by private persons — Offence—The accused were held guilty of an offence under Ss. 341 and 147, I. P. C. See Madhya Bharat Essential Supplies (Temporary

Powers) Act (3 of 1948), S. 15. A I R 1955 N U C (Madh B) 1222 (DB).

——S. 341 — Applicability — Vacant house locked by accused — Offence of wrongful restraint — If committed.

The applicants asserted that the house in dispute belonged to the village community and locked it accordingly. They were convicted under S. 448, Indian Penal Code. While the Additional Sessions Judge in appeal altered the conviction to one under S. 341 of the Penal Code.

Held, that there was a bona fide dispute about title to the house and the intention requisite under S. 441, Indian Penal Code was wanting. In any event, there could be no offence under S. 341, Penal Code. That section contemplates an offence against person and not against property. A person cannot be convicted of wrongful restraint if he locks up a house under a bona fide claim of the same. 1960 M P L J (Notes) 106.

——Ss. 341 and 339, Exception — Obstruction by members of Hindu Community to Harijan in taking a corpse along public road — Constitutes an offence under S. 341—Exception to S. 339 does not not apply —Constitution of India, Art. 19 (1) (d).

Obstruction by certain members of Hindu Community to Harijan Christians in taking a corpse along a public road is an offence punishable under S. 341, I. P. Code. The fact that the obstruction was only to the corpse being taken along the road and not to the Harijans is no defence. In such a case exception to S. 339, I. P. Code cannot also be resorted to as it applies only to 'private way' and not to public roads. Besides, the Harijan residents have a right under Art. 19 (1) (d) of the Constitution to move freely on the public roads in India and to use every public road. 50 Mad 673; (1938) 2 M L J 160; I L R (1947) Mad 555 and 1949 M W N (Cr) 216, Rel. on; A I R 1958 S C 1032, Dist. (1963) 2 Mad L J 80 : 1963 Mad L J (Cr) 337.

——Ss. 341 and 339 — Scope—Wrongful restraint — User of public way to carry a corpse to burial ground—Obstructions — Offence — Good faith and belief of having a lawful right—If good defence.

Every citizen has a right to use a public road in a lawful manner and will have a right to take a corpse along the public road. It would not be a valid defence to plead that the obstruction caused was only to the carrying of the corpse and not to the persons who carry it. This right of movement is also guaranteed under the Constitution. The Exception to S. 339 of the Penal Code, i.e., the obstruction caused in good faith and believing to have a lawful right to do so is not an offence, applies only to private way. (1963) 2 M L J 80 : 1963 Mad L J (Cr) 337.

——Ss. 341 and 95—Wrongful restraint—It is doubtful whether, without physical obstruction, by mere words, a person commits offence under S. 341—Even if it is considered offence S. 95 applies. 1951 M W N (Cr) 19 (1) : 1951-1 M L J 13 : 1951 Mad W N 71 (1) : 52 Cri L J 716 (1) : A I R 1951 Mad 759 (759) (Pr 1).

——Ss. 341, 339 — Wrongful restraint — Where the complainant was going to his lands with his bulls through a pathway, the accused came there with sticks and obstructed him and his bulls and beat and drove away the bulls and the complainant came away fearing that if he proceeded further he would also be beaten the offence of wrongful restraint is made out. See Penal Code (1860), S. 339. 1954 Cri L J 283 : AIR 1954 Mad 247.

——S. 341 — Wrongful restraint—Prevention to proceed in desired direction amounts to offence — Liberty to proceed in any other or reverse direction is of no avail.

Any person travelling in a vehicle is entitled to travel in that vehicle, and should not be compelled to get down from that vehicle and walk or proceed in any other manner the obstructor wants. That is elementary commonsense. Where, therefore, a driver of a bus makes his bus stand across a road in such a manner as to prevent another bus coming from behind to proceed further, he is guilty of an offence under S. 341, Penal Code, of wrongfully restraining the driver and the passengers of the other bus. It is absurd to say that because the driver and the passengers of the other bus could have got down from that bus and walked away in different directions, or even gone in that bus to a different destination, in the reverse direction, there was, therefore, no wrongful restraint. Such a contention will make "wrongful restraint" under the Penal Code infructuous and meaningless. Proceeding in any direction must only mean proceeding in that direction and not in any other direction, much less in the reverse direction. A I R 1947 Mad 124, Rel. on; A I R 1942 Mad 539, Disting. (1949) 2 Mad L J 703 : 62 Mad L W 864 : 51 Cri L J 568 : 1949 Mad W N 838 : 1950 All W R (Supp) 10 : 1950 All Cri Cas 27 : I L R (1950) Mad 858 : AIR 1950 Mad 233 (233, 234) (Prs 4, 5).

——Ss. 341 and 342 — Obstruction or restraint—Gist of offence.

In every case of assault or hurt, certainly there will be a momentary restriction of the person injured but the gist of the offence either under S. 341 or S. 342 is that there must be a restraint when there is a desire to proceed in a particular direction. 23 Cut L T 88 : 1957 Cri L J 769 : AIR 1957 Orissa 130 (143) (Pt J) (Pr 33) (DB).

——Ss. 341, 342—Wrongful confinement or restraint —Test of — Coercion of mind may be sufficient. See Penal Code (1860), S. 342. 1959 Cri L J 368 : A I R 1959 Punj 134.

——S. 341—Applicability.

Where the passage through the plot on which the complainant's son was proceeding with the complainant's cart full of manure had been used for longtime as a passage for carts to the complainant's fields and the accused prevented the son of the complainant along with the cart to proceed towards complainant's field by erecting a wall across the passage the offence under S. 341 was clearly made out. 1953 Raj L W 199.

——Ss. 341, 376, 453 and 509 (ii) read with S. 28—Six accused charged under—Conviction for lesser offence under S. 354 when offence under S. 376 not proved beyond doubt— One of the accused found guilty under Ss. 341 and 509 (ii) — Others under S. 453—Conviction for offences committed by the co-accused.

A-6 was found to have threatened P. W. 2 (the husband) with a grievous hurt with a 'bichua' and to have wrongfully confined him for a sufficiently long time to enable the other accused 1 and 2 to gain their object of taking away forcibly P. W. 1 (the wife) from the house at 9 p. m. with the common object of committing some mischief on her. The evidence of P. W. 1, was to the effect that A-1 entered the house and took P. W. 1. away by force against her will with the aid of A-2 to a shed some distance away. A-1 disrobed her and A-2 gagging, they ravished her and A-3 to 5 who came there also joined in committing rape. P. W. 3 traced P. W. 1 and A-1 and A-2 to the shed and brought her back run-down and exhausted to the house where A-6 was still holding P. W. 2 in restraint and it was stated that he threatened further danger if P. Ws. 1 and 2 continued to live there.

Hence they left the place the same night to settle elsewhere and no disclosure of the offence was made out of shame.

The medical examination of P. W. 1, some days later could not disclose any injury and any evidence whatever there might have been of the commission of the offence under S. 376 had been obliterated by time. The trial Court acquitted accused 3 to 5 and convicted A-1 and A-2 under Ss. 376, 453, 509 (ii) and 341 and convicted A-6 under Ss. 509 (ii) and 341 as also under S. 453. The accused 1 and 2, preferred an appeal and A-6 another and they were heard together.

Held: The statement of P. W. 1 if it had been made immediately after the occurrence, there could have been first-hand information as to the offence of rape under S. 376 and any signs noted on her person or her clothes may be taken as circumstantial evidence corroborating her evidence on the matter as held in (1945) T L R 109. The convintion of A-1 and A-2 on the uncorroborated testimony of the person alleged to be ravished cannot be maintained when the medical examination long after does not help in any way and especially when her evidence was not relied as against A-3 to A-5 by the trial Court.

But A-1 and A-2 could not escape for what they did to P. W. 1. No explanation is offered by them. All the elements required for proving the offence under S. 354, I. P. Code, were mentioned in the charge against them and so the conviction under S. 376 was changed to one under the lesser offence under S. 354. Their conviction under S. 453 was maintained.

A-1 and A-2 were rightly convicted under Ss. 509 (ii) and 341 on the principle of constructive liability under S. 28 as the offences thereunder had been committed by their co-accused A-6. Similarly A-6 was rightly convicted under S. 453 also for offence committed by A-1 and A-2. **52 Cr L J 874 : I L R (1951) Tra-Co 164 : AIR 1951 T C 167 (DB).**

2. Sentence.

——S. 341—Sentence—Several persons convicted for offence under—Commission of offence not likely but for presence and support of one of them—Higher punishment in his case is justified. **52 Cr L J 189 : AIR 1951 All 504 (507) (Pt E) (Pr 15).**

——Ss. 341, 141, 149 — Accused preventing processionists from proceeding along mosque on public highway with music — Accused held guilty under S. 341 read with S. 149—But in view of the general nature of the incident itself and in view of the fact that the accused would be liable to punishment by virtue of S. 149 held it will be more proper and more logical not to record a separate conviction against these accused in respect of individual acts under S. 341. See Penal Code (1860). S. 141. **AIR 1961 Mys 57 (DB).**

——Ss. 341, 148 and 149—Sentence — Sentence of two years' rigorous imprisonment awarded in respect of offence undey S. 148—Sentence of one month's simple imprisonment awarded in respect of offence under S. 341 read with S. 149—Sentence of fine in respect of latter offence was uncalled for. **1961 (1) Cr L J 291 : AIR 1961 Mys 57 (DB).**

—— S. 341—Sentence.

Held, that the Magistrate had no right to order the maintenance of the passage and the demolition of the wall which caused the obstruction. **1953 Raj L W 199 : 1954 Cri L J 1005 (1005) (Pt B) (Pr 2) (Raj).**

3. Practice and procedure.

——S. 341— Criminal P. C. (1898), Ss. 238 and 297—Charge under S. 366, Penal Code —Conviction under S. 341, Penal Code—Legality of—There is no misdirection when the jury are told that they could convict the accused under S. 341 even of the intent necessary for conviction under S. 366 is not proved. See Criminal P. C. (1898), S. 238. **52 Cr L J 189 : AIR 1951 All 504.**

——S. 341 — Criminal P. C. (1898), S. 4 — Complaint can be of offence committed — There cannot be complaint under Ss. 341, 447, 504 and 506 Penal Code, read with S. 106, Criminal P. C. See Criminal P. C. (1898), S. 4. **AIR 1951 All 494.**

——Ss, 341, 339 — Accused obstructing private right of way alleged by complainant over land of accused — Accused denying existence of right of way —Trial and conviction under S. 341 — Revision— Accused can plead that evidence adduced did not exclude existence of bona fide belief in mind of accused that he had right to obstruct—Act is not offence in view of exception to S. 339—Proper remedy of complainant lies in civil Court. See Penal Code (1860), S. 339. **51 Cri L J 809 : AIR 1950 Assam 82.**

——Ss. 341, 448, 147—Acquittal on charge means that elements necessary to constitute offence have not been proved — Trial under Ss. 448, 147 and 341— Conviction only under S. 448 — Element of S. 448 relating to intent held not established. Acquittal under Ss. 147 and 341 — Effect. See Penal Code (1860), S. 448. **AIR 1955 NUC (Cal) 5921.**

——S. 341—Scope—Slightest unlawful obstruction to liberty of subject is punishable. **AIR 1955 NUC (Cal) 1420.**

——Ss. 341, 148, 149 and Ss. 302/34 and 109—Charges under—Leaving out S. 149 in relation to charge of murder held was a serious omission as it would keep the door open for guilty man to escape. See Penal Code (1860), S. 148. **1956 Cri L J 1358 : AIR 1956 Trav-Co 230.**

SECTION 342

——S. 342 — Corroboration of evidence admitted under the section—Extent of — Witness resiling from statement in committing Court — Such statement admitted under S. 288, Cr. P. C.—Conviction for murder based on such sole evidence — Satisfaction about its truth and reliability essential before convicting the accused. See Criminal P. C. (1898), S. 288. **1964 (2) Cri L J 359 : AIR 1964 S C 1357.**

——Ss. 342, 332—Police officer entering house to prevent breach of peace beaten and confined by accused. The accused are guilty under Ss. 332 and 342. See Penal Code (1860), S. 332. **52 Cri L J 220 : AIR 1951 Ajmer 37.**

——S. 342—Person likely to commit breach of public peace and tranquillity—His arrest without warrant is not justified. See Criminal P. C. (1898), S. 151. **1965 (1) Cri L J 413 : AIR 1965 All 161.**

——S. 342—Criminal P. C. (1898), S. 423 — Alter the finding—The conviction of the accused can be altered from Ss. 342 to 365. See Criminal P. C. (1898), S. 423. **AIR 1954 All 51.**

——S. 342 — Owner of house where person is wrongfully confined when not guilty.

Mere ownership of a house where a person was wrongfully confined does not render the owner of the house liable to be punished under S. 342 unless there is evidence to the effect that he took part in the wrongful confinement or abetted it in furtherance of the common object of the unlawful assembly. **52 Cri L J 912 (2) : 1951 All W R (HC) 458 : 1951 All Cri R 109 : 1952 All L J 39 : AIR 1951 All 637 (640) (Pt C) (Pr 10).**

——S. 342—Applicability—Application for permission for search endorsed as 'approved' — Search without

warrant — Legality — Obstruction to such search—Effect—Held no offence under S. 342 committed. See Cr. P. C. (1898), S. 96. AIR 1955 N U C (Cal) 4276 (DB).

——Ss. 342, 354—Essentials under S. 354.

The act of an accused in confining a girl of 9 years in a room, in making her lie on a bed and then sitting on her and becoming naked is clearly one amounting to use of criminal force with the intention or knowledge that the girl's modesty will be outraged and the accused can be convicted under S. 354 and S. 342. 1953 Cri L J 964 : AIR 1953 Madh B 147.

[Overruled on another point in AIR 1967 S C 63.]

——S. 342 — Offence of wrongful confinement in course of dacoity — Offences are distinct—S. 71 not applicable—Separate sentences must be imposed. See Penal Code (1860), S. 71. 1962 (1) Cri L J 168 : AIR 1962 Manipur 7.

——S. 342—Obstruction or restraint—Gist of offence. Wrongful confinement is a species of wrongful restraint. The gist of the offence either under S. 341 or 342 is that there must be a restraint when there is a desire to proceed in a particular direction. 1957 Cri L J 769 : AIR 1957 Orissa 130.

——S. 342—Applicability—Wrongful confinement—Person confined incapable of departing without immediate seizure by confiner and unable to escape—Offence.

While, no doubt, the absence of any desire on the part of the person confined to move would detract from it being an offence under S. 342, I. P. Code, the mere omission of an attempt to run away when there is a watch, does not mean the absence of a desire to move. Where it cannot be said that an escape is open to the person confined, even if he wished to effect an escape, and the circumstances are such that the person confined could not depart without being seized immediately by the confiner, the offence of wrongful confinement must be held to be committed. ILR (1950) Cut 185 : 20 C L T 153 : AIR 1951 Orissa 142 (145) (Pt B) (Pr 7) (DB).

——S. 342 — Accused tried and acquitted of the charge under S. 342, Penal Code — Can be tried subsequently for offence under S. 436, Penal Code. See Cr. P. C. (1898), S. 403. 1962 (1) Cri L J 73 : AIR 1962 Pat 13.

——Ss. 342 and 341 — Wrongful confinement or restraint—Test of—Coercion of mind—Sufficient—Actual physical restraint not essential. ILR (1958) Punj 2319 : 60 Punj L R 563 : 1959 Cri L J 368 : AIR 1959 Punj 134 (142) (Pt A) (Prs 29, 30).

——Ss. 342, 166—Proof—Charge against police officers Test—Delay in making complaint—Effect on prosecution is almost fatal. See Penal Code (1860), S. 166 1952 Cri L J 1390 : AIR 1952 Vindh Pra 57.

SECTION 347

——S. 347—Accused prosecuted on complaint for charge under S. 347, Indian Penal Code—Complainant absent on date of hearing—Accused cannot be discharged — Order discharging accused is void, See Criminal P. C. (1898), S. 247. 1964 M P L J (Notes) 183.

——Ss. 347, 340 and 383—Wrongful confinement for purpose of extorting money—'Injury' in S. 383 need not be physical. See Penal Code (1860), S. 340. 1952 Cri L J 1391 : AIR 1952 Pat 379.

SECTION 349

——Ss. 349, 350 and 353—Criminal force to deter public servant from discharging his duty—Sales Tax Officer—Surprise visit to shop of dealer and perusing account books of dealer — Act of snatching away the books from the hands of Officer—Offence committed—Act also an offence under S. 26 (1) (h) of Bihar Sales Tax Act (19 of 1947)—Prosecution launched for graver offence under the Penal Code and not under S. 26 (1)(h) of the Sales Tax Act—Not an unwarranted procedure. (1964) 1 S C J 116 : (1963) 1 S C W R 324 : 1963 B L J R 450 : 1964 Mad L J (Cr) 42 : (1963) 14 S T C 398 : (1963) Supp 1 S C R 419 : AIR 1667 S C 170 (171 to 173) (Prs 4 to 6, 8 to 10).

——S. 349 — Force must be against human being and not against inanimate object. See Penal Code (1860), S. 146. 1953 Cri L J 1729 : AIR 1953 All 749.

SECTION 350

——Ss. 350, 351—Intimidation—Assault—English and Indian Law—Collection of arrears of Land Revenue by village munsif — Threat by village munsif to distrain earrings worn by agriculturist — Village goldsmith called for — On arrival of goldsmith, one amongst those present paying amount of arrears, conduct of village munsif held did not amount to insult, intimidation or assault. See Tort — Insult. (1964) 2 Cri L J 636 : AIR 1964 Andh Pra 332 (DB).

——S. 350—Criminal P. C. (1898), S. 522 (1)—Use of criminal force or intimidation under S. 522 (1), Cr. P. Code the offence of which a person is convicted must be attended by criminal force or show of force or by criminal intimidation. By the words 'criminal force' it is intended to mean 'criminal force' as applied to a person and not as applied to an inanimate object. 1956 Cri L J 214 : AIR 1956 Cal 32 (32) (Pr 4) (DB).

SECTION 351

——S. 351—U. P. Prevention of Cow Slaughter Act (1 of 1956), S. 8—Attempt to slaughter and preparing for slaughter — Distinction — Mere preparation for slaughter of cow is no offence. See U. P. Prevention of Cow Slaughter Act (1 of 1956), S. 8. 1962 (1) Cri L J 7 : AIR 1962 All 22.

——S. 351—Assault—Aiming lathi blow.

Where a number of persons aim lathi blow at another, it is an act which irrespective of whether the blow hit the mark, renders the wielder guilty of assault as defined under S. 351. 1957 All W R (HC) 149 : 1957 All L J 308.

——Ss. 351 and 353—Police going to arrest offender—Offender running away with a gun in hand without attempt to aim at police — No offence under S. 353 is committed as there is no assault.

Where a police party goes to arrest an offender in connection with a cognizable offence and the offender merely runs away with a gun in hand without attempt on his part to aim it at the police in order to deter them from arresting him, he cannot be said to have committed assault on the police and therefore cannot be convicted under S. 353. 51 Cri L J 657 : AIR 1950 Kutch 23 (23) (Pr 5).

——S. 351 — Lifting one's lota to hit head constable constitutes assault. A I R 1951 Madh Bha 42 (43) (Pt B) (Pr 7).

——Ss. 351, 353 and 503 — Assault or criminal intimidation—Test.

Where the accused for the purpose of inducing the revenue inspector to desist from distraining his properties, threatened to kill the revenue inspector, he is guilty of criminal intimidation under S. 503 and not under S. 352, Penal Code, when there is no evidence to show that the words were accompanied by any gesture, which is essential for constituting assault.

1960 Mad W N 186 : 1959 Mad L J (Cr) 266 : 1959 Cri L J 1084 : AIR 1959 Mad 342 (342) (Pr 1).

SECTION 352

——S. 352—Applicability—Charge under S. 354 — Essentials not proved—Offence held one under S. 352. See Penal Code (1860), S. 354. 1954 Cri L J 1793 : AIR 1954 S C 711.

——S. 352—Sentence.

Where the accused was a railway officer of some status, and as such it was his duty to behave fairly and courteously to passengers, his conduct in forcibly trying to occupy the seat occupied by a woman passenger and her babe and assaulting her when she resisted, calls for censure, and where he had added insult to injury in casting aspersions on the character of that passenger the Court must award the maximum sentence permissible under S. 352. Ram Das v. State of West Bengal. 1954 Cri L J 1793 : A I R 1954 S C 711 (714) (Pt B) (Pr 8).

——S. 352, 21, 353 — Duties of Administrator similar to those of Manager of Court of Wards—Conflict between High Courts whether latter are public servant within S. 21, Penal Code - Benefit of doubt to be given to accused. See Penal Code (1860), S. 21. 1952 Cri L J 217 : AIR 1952 Ajmer 13 (1).

——Ss. 352, 392—Illegal and unauthorised seizure of account books from factory by Excise Department Officer—Owner does not commit offence under S. 392 in recovering them — If force is used in recovering books case falls under S. 352—Agent's possession is principal's possession. 1954 All W R (HC) 128 : 1964 All Cr R 107 : 1965 (2) Cri L J 582 : AIR 1965 All 543 (545, 546) (Pt A) (Prs 20 to 22, 24, 26).

——S. 352 — Sentence — Offences under Ss. 379 and 352 of the Code —Cumulative sentence. As each of the Ss. 379 and 352 creates a substantive offence, the sentence on each should be separate and independent and hence where the accused is convicted under S. 379 read with S. 352 the imposition of cumulative sentence of fine in respect of both is unwarranted. See Criminal P. C. (1898), S. 35. A I R 1955 N U C (All) 3501.

——Ss. 352, 447 and 426—Possession—Nature of—For the purpose of conviction under Ss. 447, 352 and 426, Penal Code, if the complainant alleges dispossession and if he succeeds he would succeed in establishing the commission of the offence under S. 447, Penal Code — See Penal Code (1860), S. 447. A I R 1954 All 650.

——Ss. 352 and 353—Applicability. Offence contemplated by S. 34, Police Act not committed within the view of Police officer—S. 34 is not attracted—Resistance to arrest police officer—No offence under S. 352 or 353. See Police Act (1861), S. 34. 1960 Cri L J 1420 : AIR 1960 Assam 206.

——Ss. 352, 353, 97, 99 — Constables taking accused to dispensary—Assault on constable—Right of private defence—Criminal P. C. (1898), S. 157.

Information was received at the police station that the accused was behaving in a disorderly manner in a public street under the influence of drink. Thereupon some police constables went to the spot and brought the accused to the police station. Then Head constable asked five or six constables to take the accused to the local dispensary for his examination by the medical officer. On the way, the accused refused to go any further, and resisted the attempts of the constables to drag him to the dispensary. While so resisting, he gave a blow to a constable and another to the other constable and made good his escape.

Held, that the police constable had no legal authority to require the accused to submit to medical examination, and the accused had the right of defending himself against the force sought to be illegally exercised against his person in pursuance of that order. The result was that the accused was not guilty either under S. 353 or under S. 352 of the Penal Code. 61 Bom L R 30 : 1959 Cri L J 825 : I L R (1959) Bom 852 : AIR 1959 Bom 284 (286, 287) (Prs 10, 12 to 15) (DB).

——S. 352—Criminal P. C. (1898), S. 403—Acquittal under S. 352, Penal Code—Trial on same facts under S. 323, Penal Code. A person acquitted under S. 247 on a charge of using criminal force under S. 352, Penal Code cannot be tried in respect of the same criminal matter on a charge under S. 323, Penal Code. 1953 Cri L J 496 : AIR 1953 Cal 197.

——Ss. 352, 353—Assault on public servant in execution of his duty as such public servant — Travelling held not part of duty—Offence held one under—The offence committed would be one under S. 352. It is too much to say that the officer was travelling by virtue of the office he held. 1960 Cri L J 824 : A I R 1960 Ker 200 (201) (Pr 3).

——S. 352—'Assaults or uses criminal force.'

Putting hand on the shoulder of the Vaccinator and asking him a question that may legitimately be asked is not such a gesture or preparation to use criminal force which would bring the act of the accused within the meaning of the expression "assaults or uses criminal force" in S. 352. Madh B L R 1954 (Cri) 64 : 1954 Cri L J 531 : 1954 All W R (Sup) 33 : Madh B L J 1954 H C R 780 : A I R 1954 Madh Bha 33 (33) (Pt B) (Pr 3).

——S. 352—Prisoners in police lock up—Allegations of ill treatment—Necessity of corroboration.

Though an under-trial prisoner in police custody is necessarily annoyed with the police on account of his detention and is likely to make any wild accusation against the police officers as soon as he is brought before a Magistrate and hence on his uncorroborated testimony, it would not be proper to put the officers on trial, it is well known that there are several methods of causing pain to an under-trial prisoner either for the purpose of extorting a confession or compelling him to give a bribe, or for any other reason, without leaving any visible mark of injury. The Court therefore cannot lay down an invariable rule of prudenee to the effect that no allegation by any under trial prisoner about ill treatment during police custody should be believed unless it is corroborated by independent evidence. (1965) 31 Cut L T 695.

——S. 352 — Criminal P. C. (1898), S. 241 — Order after local inquiry that no case under S. 379, Penal Code, was made out — Case proceeding as summons case for offence under S. 352, Penal Code—Evidence disclosing offence under S. 379—Magistrate can subsequently charge accused under S. 379 also and proceed as warrant case—See Criminal P. C. (1898), S. 241. 1952 Cri L J 691 : AIR 1952 Orissa 142.

——S. 352 — Deceased attempting to remove a gun from the hands of another accused — Young age of accused — Facts held sufficient for not inflicting extreme penalty of death. ('50) 2 Pepsu L R 288 (DB).

——S. 352 — Prisons Act (1894), S 45 (2) — Offence under S. 45 (2) — Prisons Act corresponds to offence under S. 352, Penal Code and not under S. 353, Penal Code—Offence by prisoner falling within S. 353, Penal Code is cognizable — Police taking cognizance and submitting challan to sub-divisional Magistrate — Latter does not act without jurisdiction in taking cognizance of case — See Prisons Act (1894), S. 45 (2). 1960 Cri L J 1661 : AIR 1960 Raj 288 (DB).

SECTION 353

SYNOPSIS

(Penal Code (1860), S. 353).

1. Scope and applicabiiity.
2. Assault on public servant in the execution of his duty.
3. "With intent to prevent or deter public servant from discharging his duty."
4. 'In consequence of'.
5. Assault on public servant acting in good faith and under colour of office.
6. Procedure.
7. Conviction and sentence.

1. Scope and applicability.

——S. 353 — Applicability — Section 14 (3) of Madras General Sales-tax Act does not empower officer with the powers of Police officers to enter domestic premises on mere suspicion — Entry amounting to trespass — Occupants have right to drive him out — Charge under S. 353 not sustainable. **(1962) 13 STC 69: (1962) 2 Mad LJ 87: 1962 Mad LJ (Cr) 407: 75 Mad LW 766 (Ker): 1962 (1) Cri LJ 45 (46, 47) (Prs 4, 6).**

——S. 353 — Applicability — Accused trying to secure his own release from immediate jeopardy — Public servant pursuing accused not acting in discharge of duty — Assault — Offence — Section 353 not applicable. **1952 Cr LJ 420: AIR 1952 Orissa 83 (85) (Pr 8) (DB).**

——S. 353 — Cattle Trespass Act (1871), S. 24 — Ingredients of two offences are not same — Latter does not repeal former — Does not repeal by implication, S. 353, I P. C.

Section 24, Cattle Trespass Act, 1871, does not repeal by implication S. 353, Penal Code. The ingredients of the offences under the two provisions are not the same. A person would be guilty under S. 24 if he rescues cattle after seizure. Assault or use of criminal force is not essential before a person can be convicted under S. 24 of the Cattle Trespass Act. Section 24 was never intended to be a substitute for S. 353, I. P. C. **1965 Pun LR (Supp) 366.**

——S. 353 — Ingredients of — Main ingredient is assault or use of criminal force — Mere obstruction to public servant would not amount to offence under S. 353 much less when it cannot be said that public servant was acting in lawful discharge of his official duties. **1963 (1) Cr LJ 559 (560, 562) (Pt A) (Prs 8, 14) (Tripura).**

——S. 353 — Conveyance carrying contraband articles — Powers of customs officer, preventive branch, to stop and search conveyance — Direction by customs officer to take conveyance to customs office for checking without detaining goods under S. 5, Land Customs Act or without seizure or arrest under S. 178 or S. 173, Sea Customs Act — Not in lawful discharge of official duties — Disregard of — Offence. See Sea Customs Act (1878), S. 171. **1963 (1) Cr LJ 559 (Tripura).**

2. Assault on public servant in the execution of his duty.

——Ss. 353, 95 — Order under Epidemic Diseases Act (1897), S. 2—Preventing entry of pilgrims from outside flocking in Mela area unless they had got inoculated against cholera — Order not making inoculation compulsory for inhabitants of area but authorising competent authority to ask inhabitants to get themselves inoculaed or leave area only in exceptional cases — Health Officer preventing entry of accused, inhabitant of area unless he got himself inoculated — Accused pushing officer and entering area— Prosecution under Section 353, I. P. C. — Prosecution not showing that accused was asked not to remain in area without getting inoculated as intended by order — No offence — Assuming it to be offence, accused is protected under S. 95. **1965 All Cri R 85: 1965 All LJ 449: 1965 All WR (HC) 69.**

——Ss. 353 and 442 — Applicability — Police in uniform doing surveillance entering accused's house and beaten — Accused held guilty under S. 353, I. P. Code — (Police Act (1861), Ss. 23 and 46 (2)) — (Police Rules (U. P.) under Section 46 (2) Police Act. R. 236). **AIR 1955 NUC (All) 2781 (DB).**

——S. 353 — Cattle grazing in reserved land which was not prohibited — Forest Guard wrongly trying to impound them — Accused catching hold of guard and rescuing cattle — Did not exceed his right of private defence of property and therefore, not guilty of offence under S. 353. **1958 Andh LT 843.**

——Ss. 353, 352, 97, 99 — Police Constables taking accused to dispensary — Right of private defence — Held that the police constables were not discharging their duty when they were taking the accused to the dispensary against his will — Hence no offence under S. 353 was committed — (Criminal P. C. (1898), S. 157). See Penal Code (1860), S. 352. **1959 Cri LJ 825: AIR 1959 Bom 284.**

——Ss. 353, 97, 99 — Conviction under S. 353 — Necessary condition — Right of private defence of property — Where a Gram Panchayat issued a distress warrant under the provisions of Bombay Village Panchayats Act and authorised its secretary to recover the dues from the accused but the order was bad as certain steps were not taken it was held that the accused had a right under S. 97 to resist the seizure of goods—(Panchayats — Bombay Village Panchayats Act (6 of 1933), Rules under — Rule 13). See Penal Code (1860), S. 97. **1956 Cri LJ 987: AIR 1956 Bom 580.**

——Ss. 353 and 352 — Applicability — Public servant — Travelling — If part of duty — Assault — Offence.

Where a Co-operative Extension Officer while proceeding to his headquarters after attending a meeting of a co-operative society was assaulted by the accused at a bus stop, the offence committed would be one under S. 352 and not under S. 353, I. P. C., S. 353 can apply only, when the public servant is discharging the duty imposed on him by virtue of his office; in other words, he must be performing an act, which is so integrally connected with the duty attached to his office as to form part of it. It is too much to say that he was travelling by virtue of the office which he held. The superior protection afforded to a public servant was not available to him under such circumstances; he must rank with any other citizen of the country, when he is not engaged in the performance of his official duty. **1959 Ker LT 1269: 1959 Ker LJ 1310: ILR (1960) Ker 146: 1960 Cr LJ 828: AIR 1960 Ker 200 (201) (Pr 3).**

——Ss. 353, 351 — Police going to arrest offender — Offender running away with a gun in hand without attempt to aim at police — No offence under S. 353 is committed as there is no assault. See Penal Code (1860), S. 351. **51 Cri LJ 657: AIR 1950 Kutch 23.**

——S. 353—Identity of public servant assaulted.

In an offence charged under S. 353, the plea that the head constable was not in uniform when he was assaulted and hence the accused did not know that he was a public servant cannot be

taken if in fact there was no mistake on the part of the accused as to the identity of the head constable. **AIR 1951 Madh Bha 42 (43) (Pt A) (Pr 6).**

——S. 353 — Public servant when is not acting in execution of his duty.

An officer exercising his official duties grossly, illegally and in an outrageous manner, cannot be deemed to be a public servant in the execution of his duty so as to bring an assault against such an officer within the purview of S. 353. Thus, a head constable cannot be said to be acting in discharge of his duty if he acts as an arbitrator between two parties when they disagree and behaves in an impolite manner towards one of them. **AIR 1951 Madh Bha 42 (43) (Pt C) (Pr 8).**

——S. 353 — Applicability — Prosecution for assaulting process-server — Warrant not bearing seal of executing Court nor signed by Judge — Effect — Conviction — Legality.

The accused was prosecuted under S. 353 of the Indian Penal Code for assaulting a process-server who had gone to execute a warrant. The warrant did not bear the seal of the Court which issued it and the signature of the Judge on it could not be deciphered. No evidence was led to prove that the presiding Judge of the executing Court had signed the warrant.

Held, that as the warrant was not prepared in accordance with the provisions of O. 21, R. 24 (2), C. P. Code, it was not a valid warrant and the accused could not be convicted under S. 353 of the Indian Penal Code. AIR 1919 Pat 404; 5 Pat 216; AIR 1934 All 1016, Foll.; 42 Cal 708, Rel. on; AIR 1948 All 167, Not foll.

(The conviction was changed to one under Section 352, Penal Code, relying on ILR (1946) Nag 395). **1958 MPLJ (Notes) 13.**

——Ss. 353 and 99 — Applicability — "Public servant" — Inspector of labour.

An Inspector of Labour is, under the Madras Shops and Establishments Act, within his rights in making the surprise visit to a shop and noting the result of his visit in the book kept for that purpose in the shop. Even though the act done or attempted to be done by him may not be strictly justifiable by law, he would be protected under S. 99.

Hence the fact that there is some irregularity in the inspection of the shop by the Inspector does not absolve the person using force against the officer from being convicted under S. 353. Case-law referred.

[Note.— There are observations made as to how a public servant should behave considerately, tactfully and courteously which is the minimum standard of conduct that is required of public servants in general and subordinate officials engaged in enforcing Acts, like the Madras Shops and Establishments Act in particular]. **66 Mad LW 361: 1953 Mad WN 558: 1953 Cri LJ 1730: AIR 1953 Mad 936 (938, 939) (Pt F) (Prs 8, 11, 12).**

——S. 353 — Illegal arrest by public servant — Arrested persons can use force to escape — Constable arresting persons committing affray — Offence being non-cognisable forcible escape is justified — Use of criminal force against constable after escape — Offence under S. 353 is committed.

Under S. 21, Madras District Police Act, police constables are always on duty when interfering in breaches of the public peace like affray within their station limits and jurisdiction. Therefore, a constable, interfering in an affray in order to prevent it, discharges his duty as a public servant though he is not entitled to arrest the persons committing an affray, the offence being non-cognisable. And the persons engaged in affray, if arrested unlawfully, are entitled to inflict the necessary minimum injuries on the constable in order to release themselves from such unlawful custody. However, if the constable is subjected to criminal force by pelting stones, after the persons have escaped from his custody and where there is no need to inflict any criminal force on him for the purposes of such escape, an offence under S. 353, Penal Code, will be made out. **(1950) 1 Mad LJ 27: 1956 Mad WN 34: 63 Mad LW 18: 1950 All WR (Supp) 25: 51 Cri LJ 604: 1950 Mad WN (Cri) 14: ILR (1950) Mad 1035: AIR 1950 Mad 365 (366) (Pr 3).**

——Ss. 353 and 324 — Applicability — Assault on constable while trying to arrest for cognizable offence — Offence.

Causing hurt with a short sharp-edged instrument is an offence punishable under S. 324, I. P. Code and it is a cognisable offence. A constable even if not on duty is entitled to arrest the offender for having inflicted injuries with a knife and if the constable is assaulted while he attempts to effect the arrest, it is clearly an offence under S. 353, I. P. Code. **23 Cut LT 428: 1958 Cr LJ 541: AIR 1958 Orissa 69 (71) (Pt A) (Pr 12) (DB).**

——Ss. 353, 332, 323, 96 and 97 — Obstructing public servant in discharge of his duties — Ingredients of offence — Proof — Accused alleged assaulting Police Officer who wanted to search his (accused's) house for stolen articles, under powers conferred by S. 165 (1), (3) and (5) of Criminal Procedure Code (1898) — Search contravening S. 165, Cr. P. Code being illegal conviction of accused under Ss. 353 and 332, I. P. C. not maintainable — In view of illegality of search and right of accused to private defence of person, conviction of accused could not be even altered to one under S. 323, I. P. Code.

To prove a charge of causing obstruction to a public servant in order to prevent him from discharging his duties, it must be shown by the prosecution that the public servant was discharging his duties lawfully and in accordance with law. When a police officer wants to make a search in exercise of his powers under S. 165, Cr. P. Code he must satisfy by legal and reliable evidence that he had gone there to exercise his power after fulfilment of all the requirements of the section. If the procedure adopted by the officer for the search of the house is not strictly legal as when he fails to comply with the requirements of Section 165, Cr. P. Code in the matter of making a record and sending a copy of it to the Magistrate as required by sub-section (5) the accused cannot be held to be guilty of an offence under Section 353 of the Penal Code. AIR 1960 SC 210; AIR 1944 Pat 228; AIR 1937 Pat 501; AIR 1932 Pat 66, Rel. on.

Where the search, in carrying out which the accused was alleged to have obstructed the public servant, was itself illegal, the accused got a right of private defence of his person and if while doing so he caused simple hurt to the public servant with his teeth or nail or stone chips in order to extricate himself from the clutches of the public servant holding him it cannot be said that the accused exceeded his right of private defence and hence he cannot be said to have committed any offence and consequently his conviction under Ss. 353 and 332, I. P. Code having been held illegal, the same could not be altered to one under S. 323, I. P. Code in the appeal. **1964 (2) Cr LJ 571: AIR 1964 Pat 493 (495, 496, 498) (Prs 10 to 14, 25).**

——S. 353 — Applicability — Attempt to seize stolen wood from custody of Forest Guard — Of-

fence under Forest Act not proved — Charge under S. 253 — Sustainability — (Forest Act (1927), Section 33).

Where the accused was alleged to have attempted to seize logs of sal wood from the Forest Guard at the time when an offence under S. 33 of the Forest Act was alleged to have been in process of being committed by others, but it was found that it was not proved that the offence under S. 33, Forest Act, had at all been committed:

Held, that in the circumstances, the Forest Guard could not be said to have been acting in execution of his duty as a public servant and the conviction under S. 353, Penal Code could not stand. **1960 BLJR 12: 1960 Cr LJ 634: AIR 1960 Pat 213 (214, 215) (Pt C) (Prs 5, 10).**

——**S. 353**—Accused snatching papers from hands of officer and pushing him and causing injuries—Offences under Ss. 353 and 332, Penal Code and not under S. 26 (1) (h) of Bihar Act committed — Sanction under S. 26 (2) of the Bihar Act not necessary. See Sales-tax — Bihar Sales Tax Act (1947), S. 26. **1960 BLJR 715.**

——**S. 353** — Taxation officer has no right under provisions of E. P General Sales Tax Act (1948) to insist on production of account books after refusal by dealer to produce — His act is illegal and his presence on shop after refusal is as a trespasser — Hence even if he was pushed out of shop, dealer or persons assisting him cannot be said to have committed offence under section. See Penal Code (1860) S. 186. **1965 (2) Cri LJ 116: AIR 1965 Punj 264.**

3. "With intent to prevent or deter public servant from discharging his duty".

●——**S. 353 — Bihar Sales Tax Act (19 of 1947), Ss. 17, 26 (1) (b) — Rules under Bihar Sales Tax Act, R. 50 — Assistant Superintendent of Commercial taxes inspecting shop of appellants and finding two sets of account books — Appellant snatching books from his hands — Surprise inspection by Asst. Supdt. under delegated powers is authorised — Offence held committed under S. 353, Penal Code and S. 26 (1) (b) of Bihar Sales Tax Act — Offence under S. 353, Penal Code is grave offence — Prosecution under Bihar Sales Tax Act requiring sanction of Commissioner — Prosecution under S. 353, Penal Code alone is not colourable — Cri. Rev. 1554 of 1953, D/-28-8 1954 (Pat.), Overruled.**

The Assistant Superintendent of Commercial Taxes paid a surprise visit to the shop of Hazari Lall and Co., in Barch town in order to inspect the books of accounts maintained by the shop. At that time the appellant was in the shop. The Assit. Suptd. of Commercial Taxes found that two sets of account books were kept in the shop. He took them up and started looking into them. The appellant snatched away both the books from him, passed them on to one of his servants who made them over to another servant who was on the upper floor. The Asst. Supdt. directed his orderly peon to recover the books. The peon was, however, prevented by the appellant from going to the place where the account books had been taken and in the scuffle which ensued between the two, the orderly's shirt was torn.

Held, that the act of the appellant might be said to have caused motion to the Asst. Supdt.'s hands. Further, the natural effect of snatching the books from the hand or hands of the Asstt. Supdt. would be to affect the sense of feeling of the hand or hands of the Asstt. Supdt. There was, therefore, no doubt that the action of the appellant amounted to use of force as contemplated by S. 349, I. P C.

Mere use of force, however, was not enough to bring the act within the terms of S. 353, I. P. C. It had further to be shown that force was used intentionally to any person without that person's consent in order to commit an offence or with the intention or with the knowledge that the use of force would cause injury, fear or annoyance to the person against whom the force was used.

Under delegated powers from the Commissioner the Asssit. Supdt. was authorised under S. 17 (2) of the Bihar Sales Tax Act, 1947, to inspect at all reasonable times all accounts, registers and documents relating to stocks of goods or purchases, sales and deliveries of goods by any dealer and all goods kept in any place of business of any dealer and under S. 17 (4) could enter and search any place of business of any dealer. Though the Asstt. Supdt. had not given any notice of his intention to make any inspection of the shop of the appellant, he could under R. 50 of the Rules under the Act, pay surprise visit of inspection. No permission from the appellant express or tacit, for that purpose was necessary. The Asstt Supdt. was, therefore, lawfully in possession of the account books when he took them up in the shop and started perusing them. The appellant had no justification in law to snatch the books of accounts from him. To feel annoyed at this action of the appellant would be the natural reaction of the Asstt. Supdt. and therefore, the appellant's act must be held to amount to use of criminal force within meaning of S. 350, I. P. Code. Further the appellant's act in snatching away the books amounted to obstruction of an officer making an inspection, which act was made punishable by S. 26 (1) (h) of the Bihar Sales Tax Act.

Merely holding books found lying in the premises for perusing them could not properly be regarded as seizure within meaning of S. 17 of the Bihar Sales Tax Act which required reasons for seizure to be recorded because seizure implied doing something over and above holding an article in one's hand. The Asstt. Supdt. merely picked up the books which were lying in the shop and did not snatch them away from any one, nor did he take them by force. On the contrary they were taken away by force by the appellant. If, indeed, he had retrieved them by force it might have been possible to urge that that latter act of his amounted to seizure. Cr. Rev. No. 82 of 1960 decided on October 6, 1950 (Pat), Distinguished.

The appellant had committed an offence under S. 26 (1) (h) of the Act as also under S. 353, I. P. C. because he had used criminal force. He could be prosecuted for either or both these offences at the discretion of the prosecution. It may be that he was not prosecuted for both the offences and the prosecution was restricted to the offence under S. 353, I. P. C. only to obviate the necessity of obtaining the Commissioner's sanction which was required for prosecution under S. 26 (1) (h) of the Act. Even so, the prosecution could not be said to have done something which was unwarranted by law. An offence under S. 353, I. P. C. was a graver offence than the one under S. 26 (1) (h) of the Act. In choosing to prosecute the appellant for a graver offence under the general law the prosecution could not be regarded as having acted colourably. If the prosecution were to be so restricted graver offences would go unpunished. Crl. Rev. 1554 of 1953 decided on 22-8-1954 (Pat), **Overruled.** Chandrika Seo v. State of Bihar, **1963 Mad WN 228: (1963) 1 SCWR 324: (1964) SCJ 116: 1963 BLJR 450: 1964 Mad LJ (Cri) 42: (1963) 14 STC**

398: (1963) Supp 1 SCR 419: 43 Pat 1: AIR 1967 SC 170.

——**Ss. 353, 96, 99** — Acts of public servant wholly without jurisdiction — Right of private defence — Forcible removal of account books by Commercial Tax Inspector in Andhra and attempt to inspect them — Obstruction by accused and use of force — Offence — Andhra G. O. No. MS 377 Finance (ST) as amended and published at p. 1259 in Andhra Gaz., dated 7-6-1956 — Scope — **Held.** that any obstruction offered would not amount to an offence under Section 353 — (Andh G. O. No. MS 377 (Finance) dated 7-6-1956 P. 1259). See Penal Code (1860), S. 96. **1960 Cri LJ 214: AIR 1960 Andh Pra 110.**

——**Ss. 353 and 147** — Seizure of account books — Seizure not authorised by law — Accused retrieving books forcibly — Force used not more than necessary — No injury caused — Accused held had right of private defence — No offence committed. See Penal Code (1860), S. 99. **(1960) 11 STC 850 (AP).**

——**S. 353— Applicability— Resistance to search by Land Customs Officer by pushing him — Offence — (Land Customs Act (1924), S. 5 (3)).**

Where the petitioner resists the search by the Land Customs Officer duly empowered to search the petitioner, by pushing him, he commits an offence under Section 353, Penal Code. AIR 1953 Cal 663, Rel. on. **1955 Cr LJ 1243: ILR (1957) 2 Cal 106: AIR 1955 Cal 470 (472) (Pt C) (Pr 5) (DB).**

——**S. 353** — 'While discharging his duty as a public servant' — Preventing a vaccinator from vaccinating a child against the wishes of its parents in a place where vaccination has not yet been made compulsory is no offence — (Vaccination Act (1880), Ss. 16 to 22). **AIR 1954 Madh Bha 33.**

——**S. 353 — "Prevent or deter" — Meaning of.**

The terms "prevention" and "deterrence" are not synonymous. In the first place, prevention does not mean only deterrence by physical force but by other means as well. Secondly, the distinction seems to be with reference to the stage of interference by the accused. **66 Mad LW 361: 1953 Mad WN 558: 1953 Cri LJ 1730: AIR 1953 Mad 936 (938) (Pt E) (Pr 10).**

——**S. 353** — Snatching of books of accounts and loose sheets of papers by accused, a dealer, from the hands of an Inspector of Commercial Taxes who had lawfully seized them under Bihar Sales Tax Rules — It amounts to an offence under section. **1964 BLJR 200: 1965 (1) Cr LJ 60: AIR 1965 Pat 8 (10) (Pt B) (Pr 15).**

——**Ss. 353 and 225** — Sarpanch forwarding warrant to chief officer for execution — No irregularity or illegality — Accused rescuing arrested person from custody of chief officer — Can be punished under S. 353. See Panchayats — Bihar Gram Cutcherry Rules (1949), R. 9. **1963 BLJR 641.**

——**S. 353** — Applicability — Search by Excise Officer — Obstruction — Offence — Reasons for search not recorded — Effect — If the search is made without complying with Section 165, Cr. P. Code, the search is not in accordance with law any resistance offered to such a search cannot amount to the commission of offence under Section 353. See Cr. P. C. (1898), S. 165. **1958 Cr LJ 1350: AIR 1958 Raj 296.**

4. 'In consequence of'.

——**S. 353** — Expression in consequence of — Scope of — Beating given to public servant in consequence of anything done by him in discharge of duty — S. 332 is attracted — Causing of hurt is not necessary. See Penal Code (1860), S. 332. **1964 (1) Cr LJ 254 (Raj).**

5. Assault on public servant acting in good faith and under colour of office.

——**S. 353 — Assault on public servant in execution of his duty — Police officer — Duty of — Police constable receiving information that theft is being committed — Police constable is in duty bound to intervene — Assault during such intervention would be an offence under S. 353.**

It is the duty of every Police Officer to prevent the commission of a cognizable offence. Section 149, Cr. P. Code says that he shall, to the best of his ability, interpose and prevent the commission of such an offence. Similarly Section 23 of the Police Act, 1861, requires him to prevent the commission of 'offences'.

Hence, when a constable of police is informed by a person that his crops are being cut away by the accused, the constable is in duty bound to go there to prevent the commission of theft. It is not his duty to examine witnesses and come to a decision whether the informant had established that he is in possession of the land and whether the accused are guilty of theft. In such a circumstance the police constable will be deemed to be discharging his duty though he was not entrusted specifically with the duty of guarding the crops in question, and if he is assaulted by the accused while preventing them from committing the offence the accused will be guilty of an offence under Section 353, I. P. Code, provided the prosecution proves that the accused knew that the person assaulted was a constable. **29 Cut LT 100: 1963 All Cr R 138: 1963 All WR (Sup) 34: 1963 (1) Cr LJ 826 (Orissa).**

——**Ss. 353, 99 and 21** — Applicability — Assault on public servant acting in good faith and under colour of his office — "Public servants" meaning of — Chief Officer of Panchayat is public servant — (Bihar Panchayat Raj Act (1947) (7 of 1948), Ss. 2, 83). **AIR 1955 NUC (Pat) 1592.**

6. Procedure.

——**S. 353** — Applicability — Recording of reasons under Section 90, Cr. P. Code — Failure in — Arrested person rescued forcibly — Conviction under Section 353, Penal Code — Maintainability — The omission to record reasons does not vitiate the legality of the conviction of persons who had forcibly rescued the arrested person from the custody of the constables. See Cr. P. C. (1898), S. 90. **AIR 1955 NUC (All) 2683.**

——**S. 353** — Criminal P. C. (1898), S. 233 — Different offences — Conviction for each offence is not illegal. See Criminal P. C. (1898), S. 233. **AIR 1955 NUC (All) 2683.**

——**S. 353** — Criminal P. C. (1898), S. 227 — Alteration of charge — Charge framed under S. 353 Penal Code on Police Report — On material on record found that offence under S. 336/34 was also made out — Magistrate permitting prosecution to add those charges without giving opportunity to accused to be heard — Accused held not prejudiced by order — Magistrate could add charges. See Cr. P. C. (1898), S. 227. **ILR (1959) 11 Assam 470.**

——**S. 353** — Accused committing assault while obstructing Sales-tax Officers from carrying out search — Trial only for offence under S. 353, I. P. C. — No sanction of Collector held necessary as accused not tried for offence under Sec-

tion 36 (h) — Assignment order under S. 44 (2) by Collector not necessary to empower officers to conduct search under Section 23. See Sales-Tax — Bombay Sales-Tax Act (3 of 1953), S. 36 (h). **(1961) 63 Bom LR 294.**

——**Ss. 353, 186** — Requirements of — Accused acquitted for offence under S. 353, I. P. C. — Accused can again be charged under S. 186, I. P. C. for same act. See Criminal P. C. (1898), S. 403. **1962 Ker LT 493.**

——**S. 353** — Misdescription in warrant —Resistance to arrest is not offence — Burden lies on prosecution to establish identity of accused with person described in warrant — Aiding escape from illegal arrest is also not an offence. See Penal Code (1860), S. 225 B. **1961 Ker LT 612: (1961) MLJ (Cri) 795.**

——**S. 353** — Criminal P. C. (1898), S. 195 — Non-compliance — Effect of — Prosecution under Sections 186 and 353 — Absence of complaint as required by Section 195, Cr. P. C. in respect of offence under Section 186 — Offence under Section 353 so connected with primary offence under Section 186 that it could not have constituted separate and individual offence — Prosecution will also fail in respect of offence under Section 353. See Criminal P. C. (1898), S. 195. **AIR 1954 Orissa 175.**

——**S. 353** — Prisons Act (1894), S. 45 (2) — Offence under Section 45 (2), Prisons Act corresponds to offence under Section 352, Penal Code and not under Section 353, Penal Code — Offence by prisoner falling within Section 353, Penal Code is cognizable — Police taking cognizance and submitting challan to Sub-Divisional Magistrate — Latter does not act without jurisdiction in taking cognizance of case. See Prisons Act (1894), S. 45 (2). **1960 Cri LJ 1661: AIR 1960 Raj 288 (DB).**

7. Conviction and sentence.

——**S. 353** — Criminal P. C. (1898), S. 562 — Concurrent finding that accused assaulted public servant while he was executing his duty — Conviction under Section 353 upheld — Accused being small boy with no previous conviction released on probation on execution of bond under Section 562, Criminal P. C. **1952 Cri LJ 1384: AIR 1952 Ajmer 42 (2) (42) (Pr 2).**

——**S. 353 — Sentence.**

Where the real intention of the accused, an aggrieved ex-employee of the Municipal Committee, was not to use criminal force but to lay his grievances before the Board when according to him the facts were being misrepresented before the Board:

Held, that it would meet the ends of justice if the sentence of imprisonment was set aside and the accused asked to furnish a bond under S. 562, Criminal P. C. AIR 1931 Pat 342, Rel. on. **1952 Cri LJ 1242: AIR 1952 Ajmer 38 (1) (38) (Pr 3).**

——**Ss. 353, 21, 352** — Duties of Administrator similar to those of Manager of Court of Wards — Conflict between High Courts whether latter are public servants within S. 21, I. P. C. — Benefit of doubt to be given to accused. See Penal Code (1860), S. 21. **1952 Cr LJ 217: AIR 1952 Ajmer 13 (1).**

——**S. 353** — Sentence — Guls placed under orders of Gaon Sabha — Canal mate trying to remove them and replace them at proper place — Accused obstructing him in zeal to uphold Gaon Sabha's order — Light view of the case taken — Sentence of 3 months' R. I. reduced to one already undergone **1953 All LJ 160: 1953 All WR (HC) 137: 1953 Cri LJ 1137: AIR 1953 All 494 (495) (Pt B) (Pr 5).**

——**S. 353** — Sentence — Offences under Sections 225 and 353 committed in the course of same transaction — Conviction for both offences — If Magistrate feels that a sentence of imprisonment is necessary proper course for him is to inflict a sentence of imprisonment for each offence and to direct the two sentences to run concurrently — Imposition of fine under Section 225 held not proper. **1954 Cri LJ 1472: AIR 1954 HP 68 (Pt C).**

——**Ss. 353, 351 and 505** — Assault or Criminal intimidation — Where the accused for the purpose of inducing the Revenue Inspector to desist from distraining his properties threatened to kill him and there is no evidence to show that the words were accompanied by any gesture, the offence comes under Section 503 and not Section 353. See Penal Code (1860), S. 351. **1959 Cri LJ 1084: AIR 1959 Mad 342.**

——**S. 353** — Sentence — Requires severe punishment — Mere sentence of fine, not sufficient. **29 Cut LT 100: 1963 All Cr R 138: 1963 All WR (Sup) 34: 1963 (1) Cr LJ 826 (826, 827) (Pt A) (Prs 5, 6, 7) (Orissa).**

——**Ss. 353 and 384 — Sentence — Award of six months' rigorous imprisonment held, not harsh.**

Where the act of the accused, a dealer, of snatching of books of accounts and loose sheets of papers from the hands of the Inspector of Commercial Taxes who had lawfully seized them, was a serious one as it showed complete disregard of law and order and it also showed an intention that the Sales-tax Authorities should not find out the true position about his financial transactions, the award of consolidated sentence of six months' rigorous imprisonment, for his conviction under Sections 353 and 384, was not harsh. **1964 BLJR 390: 1965 (1) Cr LJ 60: AIR 1965 Pat 8 (10) (Pt D) (Pr 19).**

SECTION 354

SYNOPSIS

(Penal Code (1860), S. 354.)

1. Validity.
2. Outraging the modesty of woman.
3. Evidence and proof.
4. Practice and procedure.
5. Sentence.

1. Validity.

——**S. 354** — Constitution of India, Art. 14 — Classification under — Should be reasonable and permissible — **Held,** provisions contained in Section 354, Penal Code cannot be condemned as repugnant to Article 14. See Constitution of India, Art. 14. **1953 Cri LJ 964: AIR 1953 Madh Bha 147.**

——**S. 354 — Scope — If offends against Art. 14 of the Constitution — (Constitution of India, Art. 14) — "He" meaning of.**

The propoun "he" used in the expression "that he will thereby outrage her modesty" must be taken under Section 8, Penal Code, as importing a male or a female. It is thus clear that under Section 354, Penal Code, man as well as a woman can be held guilty of the offence and be punished for it. The section, therefore, operates equally upon all persons whether males or females and as women are not exempt from any punishment under the section, it does not offend against the provisions of Art. 14 of the Constitution.

That the Penal Code gives no protection to man against "assault or criminal force with intent to outrage his modesty" is really an objection as to the policy of law in not creating a particular offence. It is not an objection as to the infringement of Art. 14 of the Constitution **1953 Cri LJ 964: ILR (1953) MB 361: AIR 1953 Madh B 147 (148) (Pt B) (Prs 2, 3).**

——S. 354 — Validity — If violates Art. 15 of the Constitution — (Constitution of India, Article 15 (1)).

The word 'only in Art 15 (1) emphasises the fact that the discrimination that is prohibited under the Article is a discrimination based on the ground of sex, or race, etc., alone. If the discrimination is based not merely on any of the grounds stated in Art. 15 (1) but also on considerations of propriety, public morals, decency, decorum and rectitude, the legislation containing such discrimination would not be hit by the provisions of the Article. **ILR (1953) MB 361: 1953 Cri LJ 964: AIR 1953 Madh B 147 (148) (Pt D) (Pr 5).**

2. Outraging the modesty of woman.

——Ss. 354, 376 and 511 — Attempt to commit rape — Conviction — Essentials — Intention of accused to gratify passions at all events necessary — Absence of — Accused held guilty under Section 354 for intending to outrage the modesty of the prosecutrix. **1962 All Cr R 39: 1962 All WR (Sup) 10: 64 Punj LR 62: 1962 (2) Cri LJ 715 (716) (Pr 8) (Punj).**

——Ss. 354, 342 — Essentials of offence.

It is not act of outraging the modesty that is made an offence under Section 354, Penal Code. In order to constitute an offence under S. 354, Penal Code, there must be an assault or use of criminal force to any woman with the intention or knowledge that the woman's modesty will be outraged. The offence under Section 354, Penal Code can therefore be committed by any man or a woman with the necessary intent or knowledge.

The act of an accused in confining a girl of 9 years in a room, in making her lie on a bed and then sitting on her and becoming naked is clearly one amounting to use of criminal force with the intention or knowledge that the girl's modesty will be outraged and the accused, is rightly convicted under Sections 354 and 342, Penal Code. **ILR (1953) MB 361: 1953 Cri LJ 964: AIR 1953 Madh B 147 (148) (Pt A) (Pr 2).**

——S. 354 — Applicability — Sense of modesty — A girl of 9 years asked to remove her clothes — Her refusal to do so and shouting for help shows her sense of modesty to be developed — Jack J.'s opinion in AIR 1933 Cal 142, Dissent. **ILR (1953) MB 361: 1953 Cri LJ 964: AIR 1953 Madh B 147 (149) (Pt E) (Pr 6).**

——Ss. 354 and 376 — Accused taking liberty with consent — Offence — Medical evidence not corroborating prosecutrix — Conviction under S. 376 — If justified.

If the accused took liberty with the girl with her consent, then he cannot be held guilty under Section 354, Penal Code, as it would not amount to an assault or use of criminal force with an intention to outrage her modesty. For, under Section 90, Penal Code, her consent would be a good consent in the absence of anything contrary to show that the consent was obtained in any manner contemplated under that section.

Where the medical evidence does not corroborate the evidence of prosecutrix in the matter of commission of rape, it would not be proper to convict the accused under Section 376, Indian Penal Code. 1949 NLJ 520, Foll. **1961 MPLJ (Notes) 73.**

——Ss. 354 and 375 — Applicability — Indecent assault and attempt to commit rape — Distinction — Accused making girl naked and running away on seeing her uncle — Offence.

The distinction between an attempt to commit rape and to commit indecent assault is sometimes very meagre. For the former, there should be some action on the part of the accused which would show that he is just going to have sexual connection with the prosecutrix. For an offence of an attempt to commit rape the prosecution must establish that it has gone beyond the stage of preparation. The difference between mere preparation and actual attempt to commit an offence consists chiefly in the greater degree of determination.

The accused went to the bada of the prosecutrix and tried to seduce her for intercourse. She repelled his advances, which made him furious. He felled her down on the ground forcibly, snatched her lugda and thereby made her naked. Her cries attracted her uncle who came to the spot. On seeing him, the accused fled away.

Held, that the case did not show that the accused was determined to have sexual intercourse at all events because as soon as he saw the uncle of the prosecutrix he ran away. Further he only made the girl naked. He did not expose nor attempted to expose his private part. Therefore, it was not a case of an attempt to commit rape but one under Section 354, Penal Code. **1960 Jab LJ 129: 1960 MPLJ 161: 1960 Cr LJ 612: ILR (1959) Madh Pra 612: AIR 1960 Madh Pra 155 (155, 156) (Prs 5, 6).**

——S. 354 — No outrage of woman's modesty where she is willing party. **1955 Nag LJ 563: 1955 All WR (Sup) 109: 1956 Cri LJ 83: ILR (1955) Nag 731: AIR 1956 Nag 8 (10) (Pt D) (Pr 19) (DB).**

——S. 354 — Victim of assault — A girl of 7½ months — Outraging her modesty — Offence under S. 354, if committed.

Held, (Per Mehar Singh and Capoor, JJ., Gurdev Singh, J., Contra)

Held, that the appellant having fingered the private parts of the victim, a girl of 7½ months causing injury to those parts, did not commit an offence under Section 354 of the Penal Code.

So far as the girl of the age of 7½ months is concerned, she is physically incapable of having any sense of modesty or propriety of behaviour, and all that can be said is that if she was sufficiently grown-up to have developed such a sense, the act of the accused would have outraged her modesty. The scope of Section 354 cannot be extended in this sense and it is a misnomer to talk of sense of modesty in connection with an infant girl of the age of 7½ months. AIR 1933 Cal 142, Disst. from.

Per Gurdev Singh, J.:—If assault is committed or criminal force used with the intention or knowledge specified in Section 354, the offender would be guilty, irrespective of the age of the female victim. Once the requisite intention or knowledge relating to the commission of assault or use of criminal force is proved, the offence will be complete.

The language of Section 354 does not indicate that the legislature wanted to limit its applicability only to females above a certain age or those who had attained sufficient maturity of thought or understanding. **1963 (2) Cr LJ 390:**

within the protection or care of the said guardian or depends upon him for his or her maintenance, support or sustenance whenever necessity arises. The tie cannot, therefore, be dissolved suddenly on the guardian having been struck with some infirmity or disease. **1954 All LJ 737: 1955 Cr LJ 252: 1955 All WR (HC) 20: AIR 1955 All 78 (80) (Pt B) (Pr 11) (DB).**

——Ss. 361 and 362 — Applicability.

Where a married girl under the age of 18 left her parents' house of her own free will and went to the accused's house and asked him to take her away to some other place as she wanted to avoid going to her father-in-law's house and the accused accordingly took her to another town it was held that the offence committed was not of abduction but one of kidnapping from lawful guardianship as it could not be said that the girl had abandoned her guardian with the intention of not returning to him but simply with a particular purpose. AIR 1949 All 710. Not foll. **1953 All WR (HC) 96: 1953 All LJ 78: 1953 Cri LJ 924: AIR 1953 All 412 (413) (Pr 3).**

——S. 361 — "Keeping" of lawful guardian.

The word "keeping" cannot be interpreted in a narrow sense. It is not the physical presence in the precincts of the father's house that matters, but whether she was in fact under his guardianship. Whether she left the house as the result of a pre-arranged plan between her and the accused, or, whether she went to answer calls of nature, it cannot make any difference, for in the former case, the accused by being a party to the arrangement takes her from her father's custody, and, in the latter case, her leaving her father's house for answering calls of nature cannot obviously make her any the less under the keeping of her father. AIR 1949 All 710. Distinguished. **(1954) 2 MLJ (Andhra) 234 : 1955 Cr LJ 581: ILR (1955) Andh Pra 200: AIR 1955 Andhra 59 (60) (Pt B) (Pr 6).**

——S. 361 — "Out of the keeping of the lawful guardian" — Removal in same house is not. AIR 1955 NUC (Assam) 5534 (DB).

——S. 361 — Applicability — Girl below 17 leaving parents' house of her own accord — Accused taking her to distant places — Offence.

A minor Hindu girl below the age of 17 was living under the care and protection of her parents. She was in criminal intimacy with the accused who was running a shop near the girl's house. The girl left her parents' house of her own accord and went to the shop of the accused and entreated him to take her away. The accused then took her to several distant places: ultimately he was arrested by the police.

Held, that the accused had taken the girl out of the keeping of her lawful guardians within the meaning of S. 361, I. P. Code and he was rightly convicted under S. 363, I. P. Code. He knew full well that the girl was living with her parents practically next door and even if he was under no legal obligation to take her back home he was certainly under a legal obligation not to run away with her. AIR 1928 Mad 585 and AIR 1954 Mad 62. Applied: AIR 1949 All 710, Dist. **(1957) Mad LJ (Cr) 784: 1957 Ker LT 831: 1958 Cr LJ 31: AIR 1958 Ker 4 (5) (Pr 8) (DB).**

——Ss. 361, 363 and 367 — Minor employed without permission of guardian or his employer — Taking of boy amounts to taking him out of lawful guardianship — Accused convicted under Section 363 and not under S. 367.

One who wants to employ a minor without the permission of his guardian must do so at his peril and it is no defence that a boy who was allowed to work in a particular place can be taken out from his job by another person without the permission of his guardian or his employer. The offence, therefore, of kidnapping is complete. Thus taking of the boy amounts to taking him out of the lawful guardianship as contemplated in S. 361, I. P. C.

Held on considering circumstances that the accused was convicted under S. 363 and not under S. 367. **1961 Jab LJ 405: 1961 MPLJ 1204.**

——S. 361 — Kidnapping from lawful guardianship — Enticing away female minor from husband — Same facts constituting an offence under S. 498 of Penal Code also — Offence under Section 498 of Penal Code cognizable only on the complaint of husband — No bar to conviction for an offence under S. 361 of Penal Code — General Clauses Act (10 of 1897), S. 26 — Offences punishable under two or more enactments — Applicability of provision.

The accused enticed away a minor married girl under the age of 18 from the keeping of the lawful guardianship of her husband, without the consent of the guardian. The action in the case was commenced on a complaint made to the police by the husband. This would be an offence under Section 363, Penal Code. The same facts would also constitute an offence under S. 498 of the Penal Code and by virtue of S. 199 of the Code of Criminal Procedure, no Court can take cognizance of it except on a complaint made by the husband of the woman. If the evidence justified a conviction of the offence under S. 363 as charged it would not be open to the trial Magistrate to avoid the conviction of the offence as charged because the offence as made out before him fell under another section of the Penal Code which required a complaint before a Court. Section 26 of the General Clauses Act would justify such conviction. **(1964) MLJ (Cr) 594: (1964) 2 MLJ 430: 1964 All WR (Sup) 48: 1964 All Cr R 521 (Mad).**

——Ss. 361, 363, 366 — 'Out of the keeping of the lawful guardian' — Meaning of.

Kidnapping is an offence against guardianship and the moment the minor is taken or enticed away out of the keeping of her lawful guardian, the offence is complete and is per se punishable unlike abduction where a particular purpose is necessary irrespective of the fact whether there is evidence that the kidnapping was with the intention of compelling her to marry against her will. The word 'keeping' is compatible with the independence of action and movement in the object kept. **ILR (1956) Cut 546: 22 Cut LT 438: 1957 Cr LJ 213: AIR 1957 Orissa 29 (31, 32) (Prs 9, 10) (DB).**

——Ss. 361, 362 — 'Out of the keeping of the lawful guardian', interpretation of — Girl in care of A—A out of town—B's son requesting girl to come along with him— Refusal— B's son pulling her out and taking her to B's house — C approaching her and proposing marriage — Refusal by girl — C taking her away in rickshaw from B's house — A's guardianship held continued till girl was taken away by C from B's house — Offence under S. 363, held established. AIR 1955 NUC (Orissa) 2471 (DB).

——Ss. 361 Explanation, 366 and 368 — 'Lawful guardian' — A committed his minor daughter to custody of B for a few days as there was no female member in his house — B is only temporary guardian for special purpose — A's higher legal guardianship not excluded — B removing her in house of C with intention to marry her to someone with help of other accused — C and other accused resisting A who had come to take her possession — All held guilty under S. 368 —

B held guilty under S. 366 also as his act amounted to offence. under S. 361. 24 Mad 284 and AIR 1925 All 295 and AIR 1929 Pat 316, Foll. **1964 BLJR 914.**

——**S. 361** — A removing a girl of 10 years from lawful guardianship of her father — B joining A on the way, after the girl had been kidnapped by A — Kidnapping not being a continuing offence, B is not guilty of kidnapping. **1952 Raj LW 476: 1953 Cri LJ 1028: ILR (1952) 2 Raj 423: AIR 1953 Raj 127 (128) (Pt A) (Pr 7) (DB).**

——**S. 361** — Legal guardianship — Daughter of A going for play to B's house in another village — A retains lawful guardianship over his daughter even at B's house — B removing girl from that place — Girl is taken away from lawful guardianship of her father. **1952 Raj LW 476: 1953 Cri LJ 1028: ILR (1952) 2 Raj 423: AIR 1953 Raj 127 (128) (Pt C) (Prs 9 10) (DB).**

4. Age of girl.

——**Ss. 361 and 366** — Age of minor — Offence under S. 361 committed before amendment of Section on 15-7-1949 — Prosecution to prove that age of girl was below 16 years and not 18 years — Doubt as to whether girl was below 16 years — Accused cannot be convicted, though girl was definitely under 18 years — No charge under S. 366 — No evidence on record in respect of this charge — Accused not questioned in respect of offence under S. 366 — Accused cannot be convicted under S. 366 — (Criminal P. C. (1898), S. 342). See Penal Code (1860), S. 366. **1955 Cri LJ 1296: AIR 1955 SC 574**

——Ss. 361, 366 — Applicability — Minority of person taken away — Relevancy.

A minor may not be competent to give her consent to her taking but a minor is certainly competent to leave the protection of the guardian of his or her own accord. Therefore, it is immaterial whether the girl alleged to be kidnapped was a minor or not in, so far as her leaving the house of her own accord is concerned. **1957 Cr LJ 1114: AIR 1957 Cal 589 (590) (Pt B) (Pr 6) (DB).**

——Ss. 361, 366 — Age of girl not established — No conviction.

In a criminal trial the accused must get the benefit of doubt and there can be no conviction under S. 366, Penal Code unless it can be clearly and unequivocally stated that the age of girl was below 16. **54 Cal WN 329: AIR 1950 Cal 406 (410) (Pt C) (Pr 20) (DB).**

5. Consent of person kidnapped.

——**Ss. 361, 365** — Minor girl enticed and married — Is offence under S. 361 — Consent of the girl or her overstating the age deceiving the accused would be no defence. **1959 Ker LT 833: 1958 Ker LJ 1189: 1959 Mad LJ (Cr) 217: 1959 Cr LJ 716: AIR 1959 Ker 197 (198, 199) (Prs 7, 8) (DB).**

——**Ss. 361, 363** — Scope — Consent of person enticed is no answer to charge under S. 363. **AIR 1955 NUC (Mad) 94.**

——**Ss. 361 and 363** — Kidnapping — Accused enticing girl of 14 years from guardianship of father — Fact that girl was consenting party is no defence. **(1957) 7 Orissa JD 183.**

——Ss. 361 and 366 — 'Out of the keeping of lawful guardian' — Seduced to illicit intercourse.

Where the accused induced a minor girl of 13 or 14 years by presentations of gold and silver ornaments, clothes, and words of persuasion to abandon a condition of purity and indulge in unlawful sexual intercourse and she was persuaded to leave the lawful guardiaship of her parents.

Held, that the accused had committed the offence under S. 366, I. P. Code. The mere fact that the girl was driven out of the house by her mother did not mean that she had permanently gone out of the protection of her guardian specially when there was no evidence that she had abandoned her parents with the intention of not returning to her house. Even if she had consented that would not help the accused since she was below 18 years. AIR 1926 Cal 467 and AIR 1933 Cal 718, Rel. on. **24 Cut LT 261: 1958 Cri LJ 1211: AIR 1958 Orissa 224 (226) (Pt B) (Pr 6).**

——**S. 361** — 'Takes or entices' — Minor girl, leaving father's house for specific purpose — Meeting accused on way and going with him — Returning home after two days, spent with accused — Girl's consent immaterial — Accused is guilty under S. 361. **1964 Raj LW 606: 1965 (1) Cri LJ 483: ILR (1965) 15 Raj 6: AIR 1965 Raj 90 (95) (Pt F) (Pr 29) (DB).**

6. Intention.

——S. 361 — Intention.

It is difficult to adduce direct evidence of intention in most cases under S. 361. Intention can only be inferred from circumstances. **1954 All LJ 737: 1955 Cr LJ 252: 1955 All WR (HC) 80: AIR 1955 All 78 (80) (Pt C) (Pr 12) (DB).**

——Ss. 361, 363 and 366 — Applicability — Charge under S. 366 — Accused suspected of intention to seduce the girl to illicit intercourse — Absence of evidence of indecent attempt on her person — Offence.

Per Shiv Dayal, J. :— For the purposes of Section 363, I. P. C. the intention of the offender, his motive, the means employed by him and the consent of the girl are all irrelevant. Where, from the circumstances of a case there is a strong suspicion that the intention of the accused was to seduce the girl to illicit intercourse but no evidence is adduced to show that he made any indecent attempt on her person then even if for that reason the accused is not convicted under S. 366, I. P. C. he can be convicted for an offence under S. 363 read with S. 361. **1961 Jab LJ 870: 1961 MPC 649.**

——**Ss. 361 and 362** — Girl under 16 years of age willing by going out with accused for sexual intercourse — No force or iducement — There is no abduction — Since there was no intention of taking away the girl from guardianship of father, there is no kidnapping. See Penal Code (1860), S. 362. **1952 Cri LJ 1136: AIR 1952 Raj 123 (DB).**

7. Lawful guardian — Explanation.

——Ss. 361, 363 — Lawful guardian.

The lawful guardian would include a de facto guardian.

Where a minor girl an orphan, whose maternal grand-mother lived by begging, was, therefore, living with her cousin since the death of her mother:

Held, that it must be held that the cousin had the custody of the minor with the consent of the maternal grand-mother which was necessarily implied and he was thus the de facto guardian of the minor. 22 Pat 263, Rel. on. **52 Cri LJ 1222: ILR (1951) 3 Assam 128: AIR 1951 Assam 122 (1) (122) (Pr 4) (DB).**

——Ss. 361, 363 — Applicability — 'Lawful guardian — Meaning — Mother given custody of minor daughter under decree for divorce — Father forcibly removing girl from custody of mother — Offence.

The words 'lawful guardian' as is apparent from the language of S. 361, are of wider connotation than the word 'legal guardian'. The word 'lawful' in that section has been deliberately used in its wider connotation, and means that whenever the relationship of a guardian and a ward is established by means which are lawful and legitimate, that relationship is intended to be included within the meaning of the words 'lawful guardian' as used in this section. AIR 1954 Bom 339, Rel on.

Where in a suit for divorce by the Hindu wife, the Court after decreeing the same, directs that their minor girl was to remain in the custody of the mother till the father (husband) gets himself appointed as the guardian of the minor under the Guardians and Wards Act, the order is made by virtue of S. 15 of the Bombay Hindu Divorce Act, 1947 and the mother was the lawful guardian of the minor by virtue of that order. If the father who was living separately forcibly takes the minor girl from out of the keeping of the lawful guardian without the consent of such lawful guardian the action of the father amounts to kidnapping. AIR 1919 All 36; AIR 1943 Pat 109 and AIR 1938 Mad 656; (1938) 1 MLJ 670, Disting. **60 Bom LR 329: ILR (1958) Bom 505: 1958 Cri LJ 1296: AIR 1958 Bom 381 (384, 385) (Pt A) (Prs 12, 15) (DB).**

——S. 361, Expl. — Object of — "Lawful guardian" — Who is.

The provisions of S. 361 and the other cognate sections of the I. P. Code, are intended more for the protection of the minors and persons of unsound mind themselves than for the right of the guardians of such persons. It may be that the mischief intended to be punished partly consists in the violation or the infringement of the guardian's right to keep their wards under the care and custody; but the more important object of these provisions undoubtedly is to afford security and protection to the wards themselves.

"Lawful guardian" includes any person who is lawfully entrusted with the care or custody of the ward concerned. The expression 'lawful guardian' therefore, must be held to include the legal guardian as well as a person who has become the guardian of the minor or the lunatic in a lawful manner.

A person can be said to be lawfully entrusted with care or custody of the minor or the lunatic if it is shown that the care or custody of such ward was given to him by a person who was the legal guardian of the ward or was his lawful guardian. Reading the section as a whole, it is clear that this liberal construction of the words 'lawful guardian' and 'lawfully entrusted' is not inconsistent with their plain and grammatical meaning, and there is no doubt that this liberal construction is consistent with the policy underlying the section and would help to prevent or punish the mischief at which it aims. 8 Cal 971 (FB) and AIR 1941 Nag 66, Rel. on; AIR 1923 Cal 672 and AIR 1930 Cal 665 (2), Dissented from. **56 Bom LR 258: ILR (1954) Bom 784: 1954 Cr LJ 1032: AIR 1954 Bom 339 (340, 341) (Prs 6, 8) (DB).**

——S. 363 — 'Out of the keeping of lawful guardian' — (Muhammadan Law — Guardianship — In absence of mother, mother's mother and not father is lawful guardian of minor girl). 1959 Jab LJ 218: 1959 MPLJ 169: 1959 MPC 41: 1959 Cr LJ 327: AIR 1959 Madh Pra 99 (Pt 4) (DB).

——S. 361, Explanation — Lawful guardian — Hindu minor girl — Right of maternal uncle — Entrustment may be proved by surrounding circumstances and conduct of parties.

The only persons having an absolute right to the custody of a Hindu minor are the father and the mother of the minor. No such right exists in the uncle on the mother's side of the minor. Such a relationship would not in law be a defence to a charge of kidnapping a minor from the custody of a de facto guardian.

Entrustment which S. 361 requires may be inferred from a well-defined and consistent course of conduct governing the relations of the lawful guardian alleged in the indictment and of the minor. AIR 1919 Pat 27 (FB), Foll. **1962 BLJR 41: 1962 (1) Cri LJ 440. AIR 1962 Pat 121 (122) (Prs 5, 6).**

——Ss. 361 and 363 — Applicability — Muslim minor married girl — Abode at the husband's house after marriage — Removal by accused from custody of husband — Offence.

The mother of the Muslim minor married girl continues to be the guardian of the girl even after the marriage. But on her being allowed to live in the husband's house the husband gets the guardianship of the girl and the natural guardianship is in abeyance. The husband while taking her to his house from short visit to her mother's house or an uncle's house he is the rightful and lawful custodian of the minor wife within the meaning of S. 361, Penal Code.

If the accused removed the girl from such custody and it was not proved that the removal was at the instance of the mother, who could terminate the guardianship of the husband no offence could be said to be committed. But where the mother did not do so and she only ratified the same after the complaint, having been won over as found by the Courts below, the accused cannot escape punishment for the offence; for in such a case the offence is not taken out of the purview of S. 363, Penal Code. **1953 Cri LJ 73: AIR 1952 Trl 27 (28) (Pt A) (Pr 7).**

8. Evidence.

——S. 361 — Proof of age — In a prosecution under S. 363 age of the girl is a material point because unless it is shown that she was below 18 years of age at the relevant time there could be no case of kidnapping within the meaning of Section 363, I. P. C. The doctor's estimate about age does not amount to proof, but is merely an opinion. See Penal Code (1860), S. 363. **1957 Cri LJ 847: AIR 1957 Him Pra 42.**

——S. 361 — Proof of age — Conflict between expert witness and other witnesses — Radiologist's opinion is not to be preferred to the positive evidence furnished by the Municipal birth register, the school admission register and the evidence of the girl's father particularly when medico-legal opinion is that owing to the variations in climatic conditons and other factors affecting the people of the different States of India, it cannot reasonably be expected to formulate a uniform standard for the determinaton of age by the extent of ossification and the union of epiphysis in bones. See Evidence Act (1872), S. 45. **1958 Cr LJ 637: AIR 1958 Ker 121.**

[Overruled on another point in AIR 1965 SC 942.]

——S. 361 — Proof of age — Medical Evidence — Use of.

Medical evidence as to the age of a person cannot be utilised to override the effect of other, cogent evidence on the point; AIR 1916 PC 242 & AIR 1946 Sind 132 and AIR 1939 All 708, Rel. on. **(1957) Mad LJ (Cr) 662: 1957 Ker LT 720: 1957 Ker LJ 673: ILR (1957) Ker 781: 1958 Cr LJ 33: AIR 1958 Ker 8 (12) (Pt E) (Pr 12) (DB).**

——Ss. 361, 375 and 376 — Age of prosecutrix — Positive proof — Necessity of — No X-ray examination in spite of doctor's suggestion — No explanation for omission coming from investigating officer — Accused given benefit of doubt. See Penal Code (1860), S. 375. **1962 MPLJ (Notes) 330: 1962 Jab LJ 840.**

——Ss. 361, 366 — "Below eighteen years" — Proof — Medical evidence.

Medical opinion is based on average and cannot be correct to the day. When the opinion of the doctor is that the girl is between 16 to 18 years one cannot say with certainty that she is below 18. **1961 Jab LJ 76: 1961 MPLJ 267: 1961 MPC 566.**

——S. 361 — Age of person kidnapped can be proved by other evidence than horoscope.

Where there is evidence in the case, consisting of the extract from the school register, the testimony of parents and relatives and of medical opinion, to show that the kidnapped girl was below eighteen years on the date of the offence, it cannot be held that she has not been proved to be a minor on that date merely because her horoscope was not put in evidence: AIR 1958 Kerala 19; AIR 1958 Orissa 224; AIR 1957 Him Pra 42 and AIR 1957 Punj 78, Rel. on. **1960 Mad WN 674.**

——S. 361 — Age of minor — Medical evidence — Certificate given on examination of height, weight, breast, teeth etc. — Evidence is worthless — Evidence Act (1872), S. 45.

When a Doctor gives evidence in Court, particularly, with regard to the age, which is most material it is the duty of the prosecution to elicit from the Doctor, the reasons which made her come to the conclusion stated in her certificate.

Section 361, in its application to Manipur Territory, makes it necessary that in a case of alleged kidnapping of minor girl in that territory, the fact to be proved conclusively by the prosecution is that the girl was below the age of 15 years. To prove that the girl was minor, the Doctor has not to give valid reasons why she concluded that the girl was below 15 years. The conclusive test in such matters of age is the ossification of bones and for this X-ray examination of the bones is absolutely necessary, when alone the Court will attach weight to the opinion of the expert under S. 45 of the Evidence Act. AIR 1916 PC 242 and AIR 1939 All 708, Rel. on. **1962 (1) Cr LJ 49: AIR 1962 Manipur 5 (6) (Prs 6, 8, 9).**

——S. 361 — Proof of — Age of girl — Matters to be taken into account.

In fixing the age of a girl the growth of teeth, growth of pubic and axillary hair, growth of the breasts, the height and weight of the girl are relevant considerations. The ossification test is no doubt a surer test for determining age. But Courts have acted on the opinion of the doctors arrived at without conducting any ossification tests and based on other factors as indicated above. AIR 1954 Orissa 33, Rel. on. **24 Cut LT 261: 1958 Cri LJ 1211: AIR 1958 Orissa 224 (225) (Pt A) (Pr 5).**

——Ss. 361 and 363 — Proof of age — Ossification test — Value of — Conviction based on mere opinion of expert — Sustainability — (Evidence Act (1872), S. 45).

An X-ray ossification test may provide a surer basis for determining the age of an individual than the opinion of a medical expert, but it can by no means be so infallible and accurate. The opinion of a medical expert based on such test cannot be regarded to be conclusive. Too much reliance should not be placed on the Table given at P. 30 of Modi's Medical Jurisprudence and Toxicology showing the age in years of the appearance and fusion of some of epiphysis as it merely indicates an average and is likely to vary in individual cases.

When there is no direct evidence to prove that the kidnapped girl was below 18 years, a conviction of the accused based on the mere opinion of a medical expert that the girl had not crossed her 18th year cannot be sustained. **1957 Cr LJ 475: AIR 1957 Punj 78 (78, 79) (Prs 3 to 5).**

SECTION 362

——S. 362 — Applicability — Married girl below 18 — Leaving parent's house of her own free will and going to the house of accused and requesting him to take her away to some other place as she wanted to avoid going to father-in-law's house — Accused taking her to another town — **Held,** offence committed was not of abduction but of kidnapping from lawful guardianship as it could not be said that the girl had abandoned her guardian with the intention of not returning to him but simply with a particular purpose. See Penal Code (1860), S. 361. **1953 Cri LJ 924: AIR 1953 All 412.**

——S. 362 — Section does not define offence — Abduction becomes offence when accompanied by certain intentions.

Section 362 merely defines what "abduction" is. It does not define an offence. Abduction becomes an offence only when it is accompanied by one of three intentions described in Ss. 364, 365 and 366, Penal Code. **51 Cri LJ 408: AIR 1950 Assam 37 (39) (Pt B) (Pr 14) (DB).**

——Ss. 362 and 366 — Offer to find bridegroom for major girl — Girl accompanying accused — No offence under S. 366, as there was no compulsion. **1959 MPLJ (Notes) 7.**

——Ss. 362 and 363 — Abduction per se of adult person — Offence.

Apart from the elements of force or fraud that may be involved in abduction and which elements may attract punishment under other sections of the Code, abduction per se of an adult person is not punishable under the Code. **1959 Mad WN 57: 72 Mad LW 74: 1959 All WR (Supp) 42: ILR (1959) Mad 320: 1959 All Cr R 187: 1959 Mad LJ (Cr) 503: 1959 Cr LJ 852: (1959) 2 Mad LJ 61: AIR 1959 Mad 274 (277) (Pt B) (Pr 21) (DB).**

——Ss. 362, 100 — Assaulting woman with view to abduct — Right of self-defence.

A woman, who is grown-up and a major, is free to refuse to go with a person who claims to be her husband. And if such person attempts to take her away by force from her father's house with a view to abduct her then she is justified under S. 100 in using force in resisting his assault even if such force were to result in his death. **1951 Nag LJ 252: ILR (1959) Nag 508: AIR 1951 Nag 349 (349) (Pr 5).**

——S. 362 — Abduction and kidnapping — Distinction. See Penal Code (1860), S. 366. **1953 Cri LJ 1790: AIR 1953 Punj 258.**

——Ss. 362, 366 — Absence of force or deceit — No offence.

Abduction as defined by S. 362, I. P. Code requires two essentials:— (1) forcible compulsion or inducement by deceitful means; and (2) the object of such compulsion or inducement must be the going of a person from any place. Where the evidence shows that the accused did not compel the girl to go from her place to other places but she accompanied the accused of her own free will and that there was no inducement by deceitful means to go out of her village, the

accused cannot be convicted of offence of abduction under S. 366, I. P. Code. 55 Punj LR 339: **1953 Cri LJ 1790: AIR 1953 Punj 258 (259) (Pt A) (Prs 11, 17).**

——S. 362 — Abduction — What prosecution has to prove.

An offence of abduction can be said to have been committed only if the prosecution is able to prove against the alleged offender that he has by force compelled or by deceitful means induced another person to go from any place. Where the finding is that the girl had eloped with the accused who was a young man and that she was neither compelled nor induced by him by any deceiful means to run away from the place of her mother the accused cannot be held guilty of abduction. **1959 Raj LW 269.**

——Ss. 362 and 361 — Girl under 16 years of age willingly going out with accused for sexual intercourse — No force or inducement — There is no abduction —Since there was no intention of taking away the girl from guardiantship of father. there is no kidnapping. **1952 Cri LJ 1136: 1952 Raj LW 95: ILR (1951) 1 Raj 871: AIR 1952 Raj 123 (126) (Pt C) (Pr 16) (DB).**

——S. 362 — Deceit — Meaning — Words and Phrases.

The expression "deceitful means" in S. 362 is wide enough to include the inducing of a girl to leave her guardian's house on a pretext. It is. really speaking. a matter of intention and even if the promisé held out by the accused is fulfilled by him the question is whether he is acting in a bona fide manner when he is extending certain promises to a woman and thereby inducing her to accompany him. **('51) 52 Cr LJ 217: 1950 Raj LW 340: AIR 1951 Raj 33 (35) (Pt C) (Pr 6) (DB).**

——S. 362 — Unlike kidnapping, abduction is continuing offence. **('51) 52 Cr LJ 217: 1950 Raj LW 340: AIR 1951 Raj 33 (36) (Pt D) (Pr 7) (DB).**

——Ss. 362 and 366 — Essentials — Woman leaving husband's place willingly but subsequently discovering intention on part of accused of selling her for concubinage — Deceit is proved. **AIR 1955 NUC (Sau) 1457 (DB).**

——Ss. 362 and 366 — Consent — Necessity of — Force — Use of — Intention of accused — (Cochin Penal Code (I of 1059), Ss. 342 and 346).

In the case of an offence under Section 362, no question arises as to whether there was consent or absence of consent. It is not necessary, according to the definition of abduction that any force should be used. It is enough if by deceitful means a woman is induced to go from any place. If the intention of the accused is that she may be seduced to illicit intercourse by which is meant intercourse between a man and woman who are not husband and wife. that would make the accused liable for this offence under S. 366. Where it is clear from the evidence that the person who is charged had abducted the woman in order that she may be seduced to illicit intercourse, he can be brought under S. 366 and punished. **1952 Cri LJ 1387: AIR 1952 Trav-Co 379 (381) (Pt A) (Pr 4) (DB).**

SECTION 363

SYNOPSIS

(Penal Code (1860), S. 363.)

1. Scope and applicability.
2. Kidnapping — Proof of.
3. Age of person kidnapped — Proof of.
4. Charge under S. 363 — Plea permissible in defence.
5. Corroboration of kidnapped person — If necessary.
6. Charge under S. 363 and S. 366 — Conviction under S. 363 if permissible.
7. Charge under S. 363 and S. 376 — Conviction under S. 363.
8. Charges under Ss. 363, 366, 366-A and 368 — Conviction under all sections whether legal.
9. Charge under another section — Conviction under S. 363 if proper.
10. Facts falling under S. 363 and S. 498 — Conviction under S. 363 not barred.
11. Sentence.

1. Scope and applicablity.

——Ss. 363 and 361 — "'Takes' minor out of keeping of lawful guardian" — Abandonment of guardian by minor — Even without 'animus revertendi' minor continues to be in lawful guardianship — AIR 1953 All 412. Dissent. from — Guardian trying to thrust unwanted husband on minor daughter — Daughter abandoning guardian of her own accord and seeking protection of strangers — Strangers do not commit 'taking' — Dividing line does exist between 'taking' and 'helping' runaway and abandoned minor. See Penal Code (1860), S. 361. **1965 All LJ 633: 1965 All WR (HC) 478: 1965 All Cri R 305: 1967 Cri LJ 311: AIR 1967 All 158.**

——Ss. 363, 361 — "Lawful guardian" — Meaning — Mother given custody of minor daughter under decree for divorce — Mother is lawful guardian — Father forcibly removing girl from custody of mother without her consent — Father is guilty of kidnapping — (Words and Phrases). See Penal Code (1860), S. 361. **1958 Cri LJ 1296: AIR 1958 Bom 381.**

——S. 363 — Kidnapping — Minor girl leaving home without persuasion or inducement by accused — Accused not restoring minor to her home — Accused not guilty under S. 363 — Essentials of S. 363 to be proved by prosecution.

If a girl leaves her home without any persuasion or inducement held out by the accused so that she has got fairly away from home and then goes to him. his not restoring her to her home is no infringement of the law. To sustain a conviction the prosecution has to prove that the accused had some active part in the minor leaving her guardian's house. The offence under S. 363 is not a continuing one. and it really consists in the initial act of takng her from the keeping of her lawful guardian. AIR 1958 Kerala 121. Rel. on. **1959 Ker LJ 755: 1959 Ker LR 656: 1959 Ker LT 684.**

——S. 363 — Taking — Proof — To sustain a conviction under S. 363, I. P. C. There must be proof of taking. A man is not bound to return to her father's custody a girl who, without any inducement on his part, has left her home and come to him: it must be shown that prisoner took some active step by persuasion or otherwise, to cause the girl to leave her home. See Penal Code (1860), S. 361. **1958 Cri LJ 637: AIR 1958 Ker 121.**

[Overruled in AIR 1965 SC 942.]

——Ss. 363, 361 — "Kidnapping from lawful guardianship" — What constitutes.

Held, that the circumstances unmistakably pointed to one inference that Kumari Ivy could not have left her father's house unless there was a definite plan arrived at between her and the accused, which might have been even during the short halt of the accused at her place. The intimacy that had developed between the two did play a considerable part in the whole affair of

elopment and Kumari Ivy could not have left the house but for the instigation or co-operation or accompaniment of the accused. The accused was therefore guilty of the offence under Section 363. **1961 (1) Cr LJ 513: 1960 MPC 718: 1960 Jab LJ 1071: 1960 MPLJ 1300. ILR (1960) Madh Pra 885: AIR 1961 Madh Pra 104 (104, 106) (Prs 2, 9).**

——**Ss. 363, 361, 367** — Minor employed without permission of guardian or his employer — Taking of boy amounts to taking him out of lawful guardianship — Accused convicted under Section 363 and not under Section 367. See Penal Code (1860), S. 361. **1961 MPLJ 1204.**

——**S. 363** — Offence under — Taking from lawful guardianship — Father of girl keeping her at his relative's house — Girl on verge of majority, studying in college, telephoning accused and meeting him and going with him to Sub-Registrar's Office for registering marriage agreement — No threat or inducement on part of the accused — Girl's insistence of marrying him — Accused held guilty of having taken girl out of guardianship of her father without his consent **('63) 1963 Mad WN 636.**

[**Reversed** in AIR 1965 SC 942.]

——S. 363 — Consent or disposition of minor does not exonerate accused.

In considering the liability of the accused for an offence under Section 363 the only point which has to be decided is whether he took or induced the minor to come away from her lawful guardian for the time being. Any disposition of the girl such as her being over-sexed or animated by a desire to have a good time or any consent or forwardness on her part are immaterial to the question of the prisoner's liability under the section.

Where the accused took the minor girl from her house under the pretence of taking her to the Cinema and there was nothing in the conduct of the girl, upto the moment of her departure later on in the company of the accused, to suggest that she had renounced the protection of her guardian but on the other hand there was evidence to show that she would not have left the guardian but for the promise of the accused to marry her:

Held, that there was sufficient 'taking' by the accused to render him liable for the offence under S. 363. **1960 Mad WN 674.**

——**Ss. 363, 366** — Applicability — Section 366 is aggravated form of offence under Section 363 — Marriage should be against girl's will for offence under S. 366. **AIR 1955 NUC (Mad) 1219.**

——S. 363 — Ingredients of offence.

An offence under Section 363 of the Penal Code is made out if (i) the person kidnapped was a minor; (ii) the minor was in the keeping of a lawful guardian; (iii) the accused took or induced such person to leave out of such lawful keeping and such taking was done without the consent of the lawful guardian. Where the evidence established that the victim was a girl under 18 years of age in the keeping a lawful guardian, her father, and that there was a preconcerted arrangement between the accused and her to leave the house, elope and have a good time the accused thereby instigating the victim to leave her guardian with all her belongings:

Held, the offence of kidnapping a minor girl from lawful guardianship was made out. **(1952) 1 MLJ 536: 1952 Mad WN 231: 1952 Mad WN (Crl) 55: 54 Cr LJ 1013: AIR 1954 Mad 62 (63. 64) (Pt B) (Prs 10, 12).**

——**Ss. 363 and 361** — Married girl — Minor Muslim girl living in husband's house after marriage — After marriage husband becomes the guardian after she begins to live with him — Removal from custody of husband while returning from short visit to mother — Removal not shown to have been at the instance of mother — Offence under Section 363, I. P. C. is complete and subsequent ratification by mother cannot take the case out of the purview of Section 363, I. P. C. — Effect. See Penal Code (1860), S. 361 **1953 Cri LJ 73: AIR 1952 Tripura 27.**

2. Kidnapping — Proof of.

——S. 363 — Minor girl not likely to have left guardianship of father but for promise by accused to marry her — There is sufficient 'taking' for purpose of S. 363.

Where, but for something which the accused consented to do and did ultimately, a minor girl would not have left her father's house, there is sufficient "taking" in law for the purpose of Section 363. Where, therefore, the evidence shows that the minor would not have left the guardianship of her father and gone with the accused but for the promise of the accused that he would marry her, the accused is guilty of having taken her out of the guardianship of her father without his consent. 54 MLJ 456. Rel. on; 1865-2 MHLR 331; 1968-4 MHCR 20, Ref. **1964 All Cri R 114: 1964 All WR (Sup) 5.**

——Ss. 363, 366, 360, 361, 498 — Prosecution under Ss. 363 and 366 — Proof.

To constitute an offence under Sections 363 and 366 it is not incumbent upon the prosecution to prove that the person kidnapped or abducted was married. The question of marriage would have been material in case the accused had been prosecuted under Section 497 or S. 498, I. P. C **1957 Cr LJ 847: AIR 1957 Him Pra 42 (44) (Pt A) (Pr 11).**

——Ss. 363, 366 — Kidnapping — Proof of "taking" is essential — Consent of minor is immaterial — Intention to marry against will of minor is essential for offence under S. 366.

To sustain the conviction under S. 363, I. P. C., there must be proof of "taking". The consent of the minor is no excuse, for, even then, it would amount to "taking". The prosecution has to prove that the accused had some active part in the girl leaving her father's house and taking shelter in his house.

A minor girl left her parents' house of her own free will and went to reside with the accused They got married subsequently. There was no evidence to show that the accused intended to marry her against her will but on the contrary the girl was quite willing to marry the accused and in fact pressed the accused to marry her.

Held, that the offence under the first part of Section 366, I. P. C. had not been made out against the accused. **1960 Ker LJ 205: 1960 Ker LT 273: 1960-1 Ker LR 301: ILR (1960) Ker 481.**

——**S. 363** — Appreciation of evidence — Delay in lodging complaint of offence under S. 363, Penal Code —Acceptable explanation for delay forthcoming in the case — Delay will not discredit the evidence of the kidnapped girl which is otherwise convincing and entitled to full credit. **1960 Mad WN 674.**

——S. 363 — Age of the girl.

Even if there is evidence that the accused had induced the girl to accompany him, the offence punishable under Section 363 is not brought home to him. The prosecution must further prove

that on the date of the incident, the girl was under eighteen years of age. **1956 Cr LJ 263: 1956 All WR (Sup) 1: ILR (1956) Nag 282: 1955 Nag LJ 799: AIR 1956 Nag 74 (76) (Pt B) (Pr 20) (DB).**

——**S. 363** — In order to prove an offence under Section 363 the prosecution must show that the accused took some active part in the girl leaving her lawful guardian's custody and taking shelter with him — **Held,** on facts that the accused took part in taking the girl out of her lawful guardian's custody and the age of the girl was below 18 years and the offence of kidnapping was complete — The offence of kidnapping being against the guardianship and the girl below 18 years her consent was quite immaterial. See Penal Code (1860), S. 361. **(1963) 29 Cut LT 602.**

——**S. 363** — Out of the keeping of the lawful guardian — Interpretation of — Minor girl of B under the guardianship of A — A out of town — B's son in the absence of A taking her forcibly to B's house where C proposed her marriage — Refusal by the girl — C taking her away forcibly from B's house — Contention that when C took her away she was not under the guardianship of A or anybody else — **Held,** till she was taken away by C the guardianship of A continued — The offence under Section 363 was sufficiently established. See Penal Code (1860), S. 361. **AIR 1955 NUC (Orissa) 2471 (DB).**

3. Age of person kidnapped — Proof of.

——**Ss. 363, 361 — Proof of age.**

In a prosecution under Section 363, age of the girl is a material point because unless it is shown that she was below 18 years of age at the relevant time, there could be no case of kidnapping within the meaning of Section 363, I. P. C. The doctor's estimate about age does not amount to proof, but is merely an opinion. AIR 1931 Lah 401 and AIR 1939 All 708, Rel. on. **1957 Cr LJ 847: AIR 1957 Him Pra 42 (44) (Pt B) (Pra 12, 13).**

——**S. 363** — Accused charged with kidnapping — Age of prosecutrix is primary question — Age estimated at 16 by lady doctor on physical development and ossification test — Skiagram not produced in Court — Radiologist allowing margin of only one month in his estimate of age of prosecutrix — Assertion ridiculous — Evidence could not be said to prove prosecutrix below 18 years of age — Conviction cannot be sustained. **1965 MPLJ (Notes) 3.**

——**S. 363** — Age of prosecutrix disputed — Kotwari book reciting name of prosecutrix as well — Entry of name not in official duty — Entry to be proved by independent evidence — No medical evidence or other evidence on record — Age held to be not proved. **1962 MPLJ (Notes) 137.**

——**Ss. 363 and 366 — Proof of age — Doctor's opinion and ossification test — If conclusive — Adverse inference for failure to produce Birth Register.**

Accused was convicted on Jury verdict under Section 363 for taking away a girl below 18 years. Jury verdict was based on doctor's evidence which was based on appearance and development of the girl's body stating her to be about 16 years old. Ossification test located her age to be about 17 years.

Held, that the burden of proving that the age was below 18 years had not been discharged by prosecution beyond reasonable doubt. The charge on the point of age was vitiated on account of failure of Judge to warn Jury that the doctor's evidence was insufficient to prove the age. The Judge should have also told that the Jury was free to draw adverse inference against the prosecution for its failure to produce the birth register in the Court. **1958 MPLJ (Notes) 38.**

——**Ss. 363 and 361** — Age of minor girl — Ossification test — Value of — Conviction based on mere opinion of expert that kidnapped girl had not completed her 18 years — No direct evidence to prove that the kidnapped girl was below 18 years — Conviction cannot be sustained — (Evidence Act (1872), S. 45). See Penal Code (1860), S. 361. **1957 Cri LJ 475: AIR 1957 Punj 78.**

4. Charge under S. 363 — Plea permissible in defence.

——**S. 363** —Minor girl disappeared from father's house and found with accused — Girl found to have written love letters to accused — Prosecution under Section 363 — Accused pleading love and girl's insistence on going with him — Love is no defence — Intention or motive of accused irrelevant. **1963 MPLJ (Notes) 240: 1961 Jab LJ 870: 1961 MPC 649.**

——**S. 363** — Plea in defence — Failure to detect previous offences is no answer to charge under S. 363. See Penal Code (1860), S. 361. **AIR 1955 NUC (Mad) 94.**

——**S. 363** — Plea in defence — Failure to detect offences previously committed is not defence to same offence committed subsequently. **AIR 1955 NUC (Mad) 94.**

——**Ss. 363 and 361** — Taking out of the keeping of the lawful guardian — What constitutes stated — Consent of minor girl immaterial. See Penal Code (1860), S. 361. **1953 Cri LJ 1913: AIR 1954 Mad 62.**

——**S. 363** — Kidnapping — Accused enticing girl of 14 years from guardianship of father — Fact that the girl was consenting party is no defence. See Penal Code (1860), Section 361. **(1965) 7 Orissa JD 183.**

5. Corroboration of statement of kidnapped person — If necessary.

——**S. 363 — Evidence.**

In law no corroboration to the story deposed to by the girl is required to base a charge against the accused of an offence punishable under Section 363, Penal Code. But where her story is of an unnatural character and contains contradictions it is not safe to place reliance on the testimony unless it is corroborated by independent evidence. **1956 Cr LJ 263: 1956 All WR (Supp) 1: ILR (1956) Nag 282: 1955 Nag LJ 799: AIR 1956 Nag 74 (75) (Pt A) (Pr 14).**

6. Charge under S. 363 and S. 366 — Conviction under S. 363 if permissible.

——**Ss. 363, 366 — Accused charged under Ss. 363 and 366 — Accused acquitted under S. 366 — Conviction under S. 363 — Legality.**

Where two separate charges have been framed against an accused person, one under Section 363, and another under Section 366, and he is acquitted of the charge under Section 366, he can still be convicted under S. 363. 45 CWN 27, Disting. **52 Cri LJ 1484: AIR 1951 Assam 168 (168) (Pr 4) (DB).**

——**S. 363** — 'Seduced to illicit intercourse' — Girl already pregnant as a result of illicit sexual intercourse — Failure to direct jury — Direction that if accused not found guilty under S. 366, he may be found guilty under S. 363 — **Held,**

misdirection. See Penal Code (1860), S. 366. **1955 Cri LJ 347: AIR 1955 Cal 100.**

[**Overruled** on another point in AIR 1962 SC 1908.]

——**S. 363** — Conviction — High Court has got power to alter conviction under into one under Section 363, if the prosecution had not been able to prove that charge in a major section but had been able to prove facts which come under minor section. See Criminal P. C. (1898), S. 238. **AIR 1955 NUC (Orissa) 2471 (DB).**

7. Charge under S. 363 and S. 376 — Conviction under S. 363.

——**Ss. 363 and 376 — Applicability.**

Charges under Sections 363 and 376 — Sessions Judge finding that girl was not an unwilling agent in going away with accused — Also that sexual intercourse was not against her will —Age of girl found more than 14 years but less than 16 years when rape was committed — Offence held did not come under Section 376 — Offence under S. 363 however held proved. **12 J and K LR 63: 1953 Cr LJ 1356: AIR 1953 J and K 21 (22) (Prs 11, 12) (DB).**

8. Charges under Ss. 363, 366, 366-A and 368 — Conviction under all sections whether legal.

——**Ss. 363, 366, 366-A and 368** — Scope — Conviction of same person under all sections is illgeal. **AIR 1955 NUC (All) 14.**

9. Charge under another section — Conviction under S. 363 if proper.

——**Ss. 363 and 366-A** — Charge under S. 366-A — Conviction under Section 363 in absence of charge not proper. See Penal Code (1860), Section 366-A. **1959 Ker LJ 755.**

—**S. 363** — Conviction — High Court has power to alter conviction for Section 366 into one for Section 363. See Cr. P. C (1898), S. 238. **AIR 1955 NUC (Orissa) 2471 (DB).**

10. Facts falling under S. 363 and S. 498 — Conviction under S. 363 not barred.

——**Ss. 363 and 498** — Facts disclosing an offence under two sections of Penal Code — Conviction under one of the sections is not untenable — Accused inducing married minor girl and taking her away out of the legal guardianship of her husband — Complaint made to the police by husband — Magistrate taking cognizance of offence, under S. 363, Penal Code on charge-sheet presented by police and accused convicted under Section 363, Penal Code — Conviction is not bad in law even though the same facts constitute also an offence under Section 498, Penal Code and cognizance of that offence can be taken only on a complaint made to the Court — Law does not bar trial of an accused for a distinct offence disclosed by the same facts — Provisions of Section 26, General Clauses Act justify such a conviction. See Cr. P. Code (1898), S. 199. **(1964) 2 Mad LJ 430.**

11. Sentence.

——**S. 363** — Offence being against guardianship is very grave — Fact that friendship between minor girl and accused was induced by minor cannot help accused — Sentence of one year R. I. held not excessive. **1964 All Cri R 114: 1964 All WR (Sup) 5.**

——**Ss. 363, 376** — Sentence — Sentence is a matter of discretion with the trial Court — Unless the sentence awarded is so grossly inadequate, the High Court normally will not interfere and particularly so where the State has not chosen to apply for enhancement of the sentence **1966 Cr LJ 210 (2) (214) (Pt B) (Pr 9) (Ker).**

——**S. 363** — Probation of Offenders Act, S. 4. — Accused taking a girl aged 17 years from the custody of her father and marrying her — Court finding the offence being of technical nature — Accused found to have fallen a prey to the entreaties of the girl in taking her and marrying her — Accused given benefit of Section 4 of the Probation of Offenders Act — ILR 1924 Mad 284, Foll. **1965 MPLJ (Notes) 40.**

——**S. 363** — Sentence — Offence by man of 27 on girl of 16 or 17 — Girl about to attain majority — Accused and girl in love with each other — Accused offering marriage — With all these punishment held should not be less than one year. **AIR 1955 NUC (Mad) 94.**

——**S. 363** — Accused B approaching K, a minor married girl and suggesting her to meet him at particular place if she wants to go to her parents — Same day K received information from G that B was waiting for her, K left her parents-in-law's house to meet B at appointed place from where she was taken from place to place — **Held,** it could not be said that K was not under lawful guardianship of her parents-in-law on the day of occurrence — There being no evidence that G ever met K or B thereafter or he took away K or enticed her, he was entitled to benefit of doubt. (1904) 6 Bom LR 785; 6 Cr LJ 30 and AIR 1916 All 272, Rel. on. — Evidence Act (1872), S. 3. **(1965) 67 Punj LR 628.**

——**S. 363 — Lower Court passing lenient sentence on consideration of facts not on record — Offence should be dealt with sternness — Sentence enhanced from two months' simple imprisonment to one year's rigorous imprisonment.**

Where the lower Court had passed a lenient sentence of two months' simple imprisonment for offence under Section 361, on consideration of facts not found on record.

Held, that the offence should be viewed with sternness and the sentence should be enhanced from two months' simple imprisonment to one year's rigorous imprisonment. **1964 Raj LW 606: 1965 (1) Cri LJ 483: ILR (1965) 15 Raj 186: AIR 1965 Raj 90 (96) (Pt G) (Prs 30, 31) (DB).**

——**S. 363** — The offence under Section 363, I. P. C. is punishable with imprisonment which may extend to seven years and fine and the Magistrate commits a grave error in letting off the accused on an admonition contrary to the provisions of law. See Criminal P. C. (1898), S. 562 (1-A). **1951 Raj LW 183: ILR (1951) 1 Raj 184.**

SECTION 364

●——**364, 302** — Charges under — Trial with aid of jury — Acquittal under Section 364 but conviction under Section 302 — Appeal to Supreme Court under Art. 134 (1) (c) — Supreme Court not concerned with acquittal under S. 364 — No misdirection to jury — There was held no scope for argument that verdict should be interfered with or conviction under S. 302 based on it altered on hypothetical considerations not founded on any facts on record. **(1963) SCD 638: (1963) 1 SCWR 511: (1964) 1 SCJ 82: 1964 Mad LJ (Cri) 19: (1963) 1 Mys LJ (SC) 96: (1963) Supp 2 SCR 852: 1963 (2) Cr LJ 170: AIR 1963 SC 1074 (1077) (Pt C) (Pr 12).**

●——**S. 364** — Proof — Accused charged under Sections 302, 364 and 386, I. P. C. — Confession not relied in respect of offence under Section 302 — It can be taken into consideration against the accused to lend assurance to conclusion against them in so far as other offences are concerned based on circumstantial evidence. See Evidence Act (1872), S. 24. **1957 Cr LJ 559: AIR 1957 SC 381.**

●——Ss. 364, 386 — Applicability — Recovery of ransom under threat of murder of son — Offence.

Where the modus operandi as disclosed in the letters from the accused demanding ransom from the father of the boy whom they have kidnapped is by putting him in fright of the boy being murdered and there is throughout the likelihood of the boy being murdered in case the ransom money was not paid for one reason or other, the accused are guilty of the aggravated forms of kidnapping and extortion under Ss. 364 and 386, I. P. C. **1957 Cr LJ 559. AIR 1957 SC 381 (387) (Pt E) (Pr 7).**

●——Ss. 364, 386, 34, 109, 120-B — Accused acting with common intention and conspiracy — Conviction and sentence — Concurrent finding — Interference — (Constitution of India, Article 136).

The concurrent finding, that a particular accused is guilty of criminal conspiracy along with the other for the commission of the offences is not open to challenge in the appeal before the Supreme Court under Article 136. Where on the same circumstantial evidence it is found that the offences under Sections 364 and 386, I. P. C. were actually committed in pursuance of the conspiracy or in pursuance of the common intention, one would be equally guilty with the other of the two substantive offences and would be liable to the same sentence. Such daring offences would necessarily have called for active planning and co-operation of both the accused together and probably of others. It is not, therefore possible to make any distinction between them even as regards the sentence. **1957 Cr LJ 559: AIR 1957 SC 381 (388, 389) (Pt G) (Prs 10, 11).**

——S. 364 — Essentials of offence — Non-direction to Jury amounting to misdirection — Effect.

In order to bring home a charge under Section 364, Penal Code in a trial by Jury the Jury must be satisfied that at the time when the accused took away the deceased they had the intention to cause death. The omission on the part of the Judge to point out to the Jury the possibility that there was no such plan at the time when the deceased was called by the accused to partake of a feast but that there was a drunken brawl subsequently must be regarded as a non-direction, amounting to misdirection. **1956 Cr LJ 1313: AIR 1956 Cal 600 (602) (Pr 9) (DB).**

——S. 364 — Applicability — Accused charged under Ss. 302 and 364 but acquitted under S. 302 can be convicted under S. 364.

Where an accused is charged under Ss. 302 and 364, Penal Code and has been acquitted on a charge of murder, he can be convicted under Section 364. For this purpose the motive, the previous relations of the parties and the circumstances showing clearly that the deceased was abducted with the object of being murdered or of being so disposed of as would put him in danger of being murdered should be taken into consideration. AIR 1933 Lah 1035 (2), Rel. on. AIR 1953 Hyd 249, Expl. **1954 Cri LJ 641: ILR (1953) Hyd 750: AIR 1954 Hyd 88 (89) (Prs 5, 7) (DB).**

——S. 364 — Applicability.

Where the case of the prosecution is that the person abducted has been murdered by the abductor, there is no scope for the charge under Section 364. AIR 1947 Cal 35; AIR 1945 Cal 42; AIR 1940 Cal 561, Foll. **ILR (1953) Hyd 322: 1953 Cri LJ 1517: AIR 1953 Hyd 249 (249) (Prs 3, 4) (DB).**

——Ss. 364 and 302 — Abductor charged with murder of abducted person — Further charge under S. 364 — Maintainability.

When the case of the prosecution is that the person abducted has been murdered by the abductor there is no scope for further charge under Section 364, I. P. C. for kidnapping or abducting in order to murder. **1960 Ker LJ 220.**

——Ss. 364 and 302 — Charge under S. 364 — Maintainability — Intention of abductor to murder the person abducted must be proved — Specific case that abductors had murdered the person abducted — Charge under S. 364 cannot be maintained.

Mere abduction is not an offence. In order to sustain a charge under Section 364, I. P. Code, it is incumbent upon the prosecution to prove that the abductors had the intention at the time of abduction that person abducted should be murdered or would be so disposed of as to be put in danger of being murdered. Where the case for the prosecution is that the person abducted has been murdered by the abductor there can be no scope for a charge under Section 364. **(1961) ILR 40 Pat 809.**

——S. 364 — Applicability.

Where the accused was one of the persons who were responsible for kidnapping or abducting the deceased, so that he may be murdered or may be so disposed of as to be put in danger of being murdered and the deceased was found lying murdered on the next day, the conviction of the accused was altered from one under Section 302, Penal Code, to Section 364, Penal Code, and he was sentenced to imprisonment for life. **(1962) 64 Pun LR 1017.**

——S. 364 — Murder — Proof of death— Abduction with intent to murder — Proof of intention — Circumstantial evidence — Charge under Sections 302/34 and 364 — Failure to prove that accused was murderer — Accused can be held guilty under Section 364. See Penal Code (1860), S. 302. **1958 Raj LW 584: ILR (1958) 8 Raj 181.**

SECTION 365

——S. 365 — Abduction — Accused known to witnesses before — Failure of witnesses to indentify accused as abductor — Eye-witness failed to identify accused at the identification parade — Evidence of eye-witness not relied on — Abducted person also failed to identify accused — Accused given benefit of doubt and acquitted. **1965 All WR (HC) 570: 1965 All Cri R 375.**

——Ss. 365, 342 — Cri P. C., S. 423 — Alter the finding — Accused charged under S. 365, I. P. C., acquitted of that offence but convicted under Section 342, I. P. C — Appellate court has power to alter the finding and convict him under Section 365, I. P. C. without altering the sentence imposed by the trial Court. See Criminal P. C. (1898), S. 423. **AIR 1954 All 51.**

——S. 365 — Scope.

An offence under the section is clearly made out when there is a finding that the woman in question had been forcibly dragged out of her house and was kept locked up in a room in the house belonging to the accused. It is not correct to say, on the ground that as the house was in the abadi the fact of her having been locked in that house cannot be a secret and that therefore was no offence under the section. **1953 All WR (HC) 360: 1953 All LJ 421: 1954 Cri LJ 46: AIR 1954 All 51 (52) (Pt A) (Pr 8).**

——S. 365 — Charge — Joinder — Major and minor offences — An offence under Section 365 is a minor offence within the meaning of Section 238, Cr. P. C. as compared with offences under Section 366 and S. 376 and High Court

can convict an accused of the former offence without a formal charge having been framed. See Criminal P. C. (1898), S. 238. **AIR 1954 Madh B 97.**

——Ss. 365 and 363 — Scope.

Essence of offence under Section 365 also is kidnapping. Therefore where the accused cannot be convicted under Section 363 he cannot be convicted under Section 365 also. **1957 Raj LW 345: 1957 Cr LJ 688 (694) (Pt E) (Pr 20).**

——Ss. 365 and 366 — Applicability — No circumstances to warrant inference that accused had one of objects mentioned in Section 366; in view — Inference that accused abducted woman for purpose of confining her wrongfully and secretly can be drawn — Offence held fell under S. 365 and not S. 366. **AIR 1955 NUC (Raj) 467 (DB).**

——Ss. 365 and 366 — Applicability.

Accused abducting woman by force — No evidence about intention to compel her to marry against her will or to force or seduce her to illicit intercourse — Woman not returning home — Case falls under Section 365 and not under Section 366. **AIR 1955 NUC (Raj) 467 (DB).**

——Ss. 365, 366 — Criminal P. C., S. 238 — "Minor offence" — S. 365, I. P. C., is minor offence as compared to one under Section 366, I. P. C. See Criminal P. C. (1898), S. 238. **AIR 1955 NUC (Raj) 467.**

SECTION 366

SYNOPSIS

(Penal Code (1860), S. 366.)

1. Scope and applicability.
2. "Kidnaps or abducts any woman".
3. "With intent . . . marry any person".
4. Against her will.
5. Intention of accused — How gathered.
6. "Forced or seduced to illicit intercourse".
7. Kidnapping and abduction — Distinction.
8. Evidence as to age.
9. Consent of minor abdueted girl — Whether material.
10. Evidence and proof.
11. Evidence of prosecutrix — Value of.
12. Place of trial.
13. Direction to Jury.
14. Charge under S. 363 and S. 366 — Conviction under S. 363 if legal.
    See Penal Code, S. 363.
15. Charges under Ss. 363, 366, 366-A and 368 — Conviction under all sections if legal.
    See Penal Code, S. 363.
16. Charge of kidnapping under S. 366 — Conviction for abduction if permissible.
17. Charge under S. 366 and S. 376 — Conviction under S. 376 when permissible.
18. Section 366 and S. 365, Penal Code.
19. Sentence.

1. Scope and applicability.

——S. 366 — Guardianship — Minor Hindu widow — Her father-in-law is her legal guardian and not her mother — Father-in-law can legally marry her in Karao form to another — Father-in-law commits no offence under Penal Code, S. 366. See Hindu Law — Guardianship. **AIR 1960 All 479.**

——S. 366 — Knowledge — Accused taking part in marriage of abducted minor girl — Accused not related to girl, giving out she was sister of girl's mother and had right to give her in marriage — Accused held guilty under Section 366. **AIR 1955 NUC (All) 175.**

——S. 366 — Knowledge — A abducting minor girl and taking her to another place for purposes of giving her in marriage — B, A's friend accompanying party on invitation of A not knowing that girl was abducted — B held not guilty under S. 366. **AIR 1955 NUC (All) 175.**

——S. 366 — Essentials — Ingredients of offence — Absence of intention or knowledge specified in section — No offence. **AIR 1955 NUC (Assam) 4211 (DB).**

——Ss. 366 and 361 — Minor girl taken away by accused for illicit intercourse from unlawful custody of original kidnapper— Does not amount to kidnapping and hence no offence under Section 366. See Penal Code (1860), S. 361. **1961 (2) Cri LJ 578: AIR 1961 Bom 282 (DB).**

——S. 366 — Criminal P. C. (1898), S. 549 — Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules (1952), Rr. 3, 4 — Navy (Discipline) Act (1934), Ss. 43, 45, 46 — Accused a naval rating on shore leave, charged under Section 366, Indian Penal Code — Magistrate committing the accused to Sessions — Committal Order, proper— Intimation to competent military authority necessary only in cases of offences expressly falling within terms of Sections 2 to 42 of Navy (Discipline) Act 1934 — Offence under Section 366, I. P. C. not one of offences mentioned in First Para of Section 45 of Navy (Discipline) Act 1934 — Jurisdiction of ordinary criminal Courts not taken away. **(1956) 58 Bom LR 157.**

——S. 366 — Essential ingredient of offence is intention. **AIR 1955 NUC (Bom) 6074 (DB).**

——S. 366 — Applicability — Taking away of a girl — Minority of person taken away is immaterial in so far as her leaving the house of her own accord is concerned. Because a minor may not be competent to give her consent to her taking but a minor is certainly competent to leave the protection of her guardian of his or her own accord. See Penal Code (1860), S. 361. **1957 Cr LJ 1114: AIR 1957 Cal 589.**

——S. 366 — Taking of minor girl — Absence of evidence — Effect.

Although there may be evidence in the case under Section 366, I. P. C., regarding the minority of the girl, if there is complete absence of evidence regarding another essential ingredient of the offence, namely, the taking of the girl by the accused, or of the active participation of the accused in the girl's leaving her guardian's house, there is no offence under S. 366. **1957 Cr LJ 1114: AIR 1957 Cal 589 (591) (Pt C) (Pr 7) (DB).**

——S. 366 — Husband forcibly carrying his wife from her parent's house — He cannot be convicted under Section 366.

Where there is no evidence to prove the dissolution of marriage of the wife with her husband and she continues to be his wife, in spite of her Natra marriage with another, the husband cannot be convicted under S. 366 for forcibly taking her with him from her parent's house. The fact that the wife was given away in Natra marriage to another does not itself lead to the conclusion that her marriage with the husband had been validly and legally dissolved. It is obvious from the language of Sections 362 and 366, Penal Code, that if a husband by force compels his wife to come to him and to live with him as his wife, he does not commit any offence under Sections 366. **1959 Jab LJ 570: 1959 MPC 738: 1960 Cr LJ 83: 1959 MPLJ 1193; AIR 1960 MP 24 (25) (Pt A) (Pr 5).**

——S. 366 — No persuasion by accused to prosecutrix an unmarried girl to leave her parent's house — From mere fact of being found in com-

pany of accused after removing herself from father's house offence under Section 366 not made out. **1960 MPLJ (Notes) 14.**

——**Ss. 366 and 362** — Apart from the element of force or fraud that may be involved in abduction and which elements may attract punishment under other sections of the Code, abduction per se of adult person is not punishable. See Penal Code (1860), S. 362. **1959 Cri LJ 852: AIR 1959 Mad 274 (DB).**

——**S. 366 — "Against her will" — Consent by minor kidnapped female — Value of.**

(Obiter) — The principle of Section 366 is to uphold the lawful authority of the parents or guardians over their minor wards and to throw a ring of protection over the girls themselves, and to penalise sexual commerce on the part of persons who corrupt or attempt to corrupt the morals of the minor girls by taking improper advantage of their youth and inexperience Hence, the consent given by a minor female is no consent at all for the purposes of Section 366. An offence under Section 366 will lie in such a circumstance. AIR 1929 All 709; AIR 1930 All 19; AIR 1944 Bom 159. Foll.; AIR 1932 Cal 442; 48 Cr LJ 542 (Oudh). Not foll. **1951-1 MLJ 570: 1951 MWN 387: 64 MLW 465: 1951 MWN Cr 115: 52 Cri LJ 1115: ILR (1952) Mad 257: AIR 1951 Mad 900 (901) (Pt C) (Pr 4).**

——**Ss. 366 and 361** — Out of the keeping of lawful guardian — Seduced to illicit intercourse — Girl of 13 or 14 — Induced to leave the lawful guardianship of parents by presentation of gold and silver ornaments and by persuasion indulge in unlawful sexual intercourse — **Held,** that the accused had committed an offence under Section 366, I. P. C. The mere fact that the mother had driven out the girl from her house did not mean that she had permanently gone out of the protection of her guardian especially when there was no evidence that she had abandoned her parents with intention of not returning to her house. Even if she had consented that would not help the accused as she was below 18 years. See Penal Code (1860), S. 361. **1958 Cri LJ 1211: AIR 1958 Orissa 224.**

——**S. 366** — Essential ingredient — Intention and knowledge as specified in section — Girl abducted by accused A and left by him in company of accused B with direction that she may be sold and sale proceeds shared — Possibility and likelihood that she may be married against her will and become victim of rape — A could be held guilty of offence under Section 366. **66 Punj LR 237: 1964 (2) Cr LJ 207: AIR 1964 Punj 357 (359) (Pt A) (Pr 9).**

——**S. 366 — Offence — Single error of female — If bar to charge.**

It is mistake to imagine that a single error on the part of the female will place her beyond the protection of the law punishing seduction. **59 Punj LR 564: 1958 Cr LJ 1097: ILR (1957) Punj 2003: AIR 1958 Punj 323 (324) (Pt A) (Pr 4).**

——**S. 366** — Absence of force or deceit — No offence. See Penal Code (1860), S. 362. **1953 Cri LJ 1790: AIR 1953 Punj 258.**

——**Ss. 366, 380** — Private complaint and Police report regarding cognizable offence — Magistrate can direct police to submit charge-sheet. See Criminal P. C. (1898) S 190. **1959 Raj LW 597: ILR (1959) 9 Raj 671.**

——**S. 366** — Applicability — Accused dragging and carrying away a woman by force —Woman not returning to house — No circumstance on the record to warrant an inference that the accused had in their view one of the objects mentioned in Section 366 — There was under the circumstances held good reason to infer that the accused had abducted the woman for purpose of confining her wrongfully and secretly — Offence therefore held fell under Section 365 and not Section 366. See Penal Code (1860), S. 365. **AIR 1955 NUC (Raj) 467 (DB).**

——**S. 366 — Person joining accused at subsequent stage of offence, whether guilty of abduction.**

Even though the offence of abduction is a continuing one, any person joining the accused at a subsequent stage cannot be held to be equally guilty of the offence under Section 366 if he was not associated with him from the very beginning, unless a charge of conspiracy is established against him. **('51) 52 Cr LJ 217: 1950 Raj LW 340: AIR 1951 Raj 33 (36) (Pt E) (Pr 9) (DB).**

——**S. 366 — Applicability — Accused having had previous intercourse with the girl concerned — Offence.**

A person can be convicted of seducing a girl under Section 366, Penal Code in spite of the fact that he had previous illicit connection with the girl. Seduction does not mean the first act of illicit intercourse. **4 Sau LR 151: AIR 1952 Sau 10 (11) (Pt B) (Pr 6) (DB).**

——**Ss. 366 and 362** — For abduction under Section 362 no question of consent or absence of consent arises — Use of force is also not necessary — Use of deceitful means is sufficient — Where it is clear from the evidence that the person who is charged had abducted the woman in order that she may be seduced to illicit intercourse, he can be brought under Section 366 and punished — (Cochin Penal Code (1 of 1059), Ss. 342 and 346). See Penal Code (1860), S. 362. **1952 Cri LJ 1387: AIR 1952 Trav-Co 379 (DB).**

——**S. 366 — Intercourse by all accused — Necessity of for conviction.**

It is not necessary to bring the guilt home to the accused under Section 366 that there must be definite evidence that all the accused taking part in abduction had intercourse with the woman abducted. **1952 Cri LJ 1387: AIR 1952 Trav-Co 379 (381) (Pt B) (Pr 4) (DB).**

2. "Kidnaps or abducts any woman".

——**S. 366** — Applicability — Willing departure from house is no abduction. **AIR 1955 NUC (Bom) 6074 (DB).**

——**S. 366 — 'Lawful guardian' — De facto guardian — Ingredients of offence.**

After marriage, the guardian of a minor girl would be her husband. Even so while she resides with her father, he would be the de facto guardian. The expression 'lawful guardian' in the definition of the offence of kidnapping from lawful guardianship would include a de facto guardian i.e. a person who takes care of a minor and who is not a lawful natural guardian of the minor.

It is true that the custody of the guardian does not come to an end by the minor merely going out temporarily from the roof of guardian, but if a minor of her own accord without any inducement or persuasion from any source, leaves the protection of the guardianship with the intention of never returning and accordingly goes away, then it cannot be said that the minor continued under the lawful guardianship or that she was kidnapped from the lawful guardianship. Kidnapping or abduction is an ingredient of the offence under S. 366, Indian Penal Code. The act of seduction is done when the girl is drawn away from virtuous course and then made to yield her chastity. AIR 1958 Punj 3, Foll. **1961 MPLJ (Notes) 65.**

——S. 366 — Essentials — Ingredients of offence — Woman leaving husband's place willingly but subsequently discovering intention on part of accused of selling her for concubinage — Deceit. See Penal Code (1860), S. 362. **AIR 1955 NUC (Sau) 1457 (DB).**

3. "With intent . . . marry any person".

——S. 366 — Essentials — Intention — Compulsion to marry against will — Repeated requests to girl confined in place without food and drink to give consent — If "force" — Inference of intention to compel her to marry against her will.

Where it is clear from the evidence that the accused's intention in forcibly carrying a girl of 17 was not only to persuade the unwilling girl to change her mind and to accept him as her groom, but also to marry her, her refusal notwithstanding, and that he kept her confined from 10-30 a.m. to 5 p.m., while the girl was standing and crying and refused to stay and marry him, there can be no other conclusion than that his intention was to compel her to marry him or, if opportunity permitted, to marry her forcibly Even repeated requests to one who knew her limitations, namely that she was completely within the grip of the requester (accused), when she was imprisoned and was given no food and drink, would certainly amount to forcing her to consent; and even if consent were to be given in such circumstances, that would never amount to consent in law. That is nothing less than "force" in law and it must therefore be held that the requisite intention was present and that an offence under S. 366, I. P. Code, has been committed rendering the accused liable to conviction under the section. **ILR (1950) Cut 185: 20 CLT 153: AIR 1951 Orissa 142 (145) (Pt A) (Pr 6) (DB).**

——Ss. 366, 361 and 363—Minor girl taken away from keeping of father — Marriage or seduction, the object of accused — Accused is guilty under S. 366 though girl accompanied him of her own accord: 1962 (1) Cri LJ 841 (Punj), **Overruled. 1964 (1) Crl LJ 220: AIR 1964 Punj 83 (DB).**

4. Against her will.

——S. 366 — Scope — Woman willingly yielding to proposal of accused to marry him — Offence under S. 366 not made out.

Unless the intent of the accused is to compel the woman, whatever her age may be to marry against her will, that is in spite of her opposition to the marriage, an offence under S. 366, I. P. Code will not be made out. Where the evidence shows that the woman was not unwilling to marry the accused and willingly yielded to his proposal to marry and got the marriage udampady registered the offence under S. 366 is not made out. **1966 Cr LJ 210 (2) (213) (Pt A) (Pr 7) (Kerala).**

——S. 366 — Applicability — Marriage should be against girl's will. See Penal Code (1860), Section 363. **AIR 1955 NUC (Mad) 1219.**

——S. 366 — Offence under — Essentials — Element of compulsion necessary.

The gist of the offence under S. 366 is that the accused person should kidnap or abduct a woman for the purposes mentioned in S. 366 by compulsion. Where the accused had taken out from the parent's custody the minor girl who was of mature understanding with a suggestion that they would get her married in a good family and there was no evidence on record to show that the complainant girl was in any way compelled either to accompany the accused or to subject herself to illicit intercourse with the accused, it was held that the mere suggestion that the accused would get her married in a good family did not constitute any pressure on the complainant girl to do something against her will and hence no offence could be attributed to the accused. AIR 1957 Cal 589, Rel. on. **63 Punj LR 625: 1961 All Cr R 317: 1961 All WR (Sup) 64: 1962 (1) Cr LJ 841 (Punj).**

[Overruled in AIR 1964 Punj 83.]

——S. 366 — Will and consent are different — kidnapped and then raped — Conviction for kidmarry girl against her will — Case depends on facts.

Of course, there is difference between consent and will, and if it is shown that there was no evidence to show that the girl was being kidnapped with intent to compel her to marry against her will, the offence under S. 366 of the Penal Code might not be made out. But it is not necessary that the prosecution witnesses should say in so many words that the girl was kidnapped with intent to compel her to marry against her will. Every case depends upon its own facts, and the circumstances proved in a particular case might show that the girl was kidnapped with intent to compel her to marry against her will.

(Circumstances proved that the girl of 10 years was taken away with intent to compel her to marry against her will). **1952 Raj LW 476: 1953 Crl LJ 1028: ILR (1952) 2 Raj 423: AIR 1953 Raj 127 (128) (Pt D) (Prs 9, 10) (DB).**

5. Intention of accused — How gathered.

——Ss. 366 and 376 — Applicability — Minor girls kidnapped and then raped — Conviction for kidnapping.

Where a minor girl is kidnapped and later on it is found that the accused had illicit intercourse with her, the accused is liable to be punished under S. 366. **1957 Cr LJ 353: AIR 1957 Assam 39 (42) (Pt B) (Pr 13) (DB).**

——S. 366 — Intention — Proof of.

The existence of an intention, like any other fact, has to be inferred by evidence of conduct and circumstances, as intention is after all a matter of inference from the circumstances of the case and the subsequent conduct of the accused after the abduction has taken place.

When young girls of marriageable age are abducted, the initial presumption is that the abduction was with the intention of having sexual inercourse with them either forcibly or with their consent after seduction. **Madh BLR 1954 (Cr) 28: Madh BLJ 1954 HCR 538: AIR 1954 Madh B 97 (100) (Pt C) (Pr 8) (DB).**

——S. 366 — Minor girl of marriageable age being abducted — Intention of sexual intercourse with her can be presumed.

Held, on facts that in view of the fact that the girl was a minor, any evidence indicating any little consent on her part in accompanying the accused would be of no avail to him to claim discharge from the offence. When young girls of marriageable age are abducted, the initial presumption is that the abduction was with the intention of having sexual intercourse with them, either forcibly or with their consent after seduction. AIR 1954 MB 97, Foll. The accused had no other intention but that coming within the mischief of S. 366, I. P. Code. **1962 MPLJ (Notes) 45.**

——S. 366 — Offence under — Intention — Proof.

Accused was charged under S. 366, I. P. C. He pursued a girl for a number of months, in order to arouse in her feelings of 'love' for him. When they had become sufficiently intimate with each

other he impresed on her mind that he could not live without her. He even went to the length of suggesting that even if they could escape for 24 hours they could accomplish their object. After the girl left her father's place as a result of pursuasion the accused took her from place to place for six days during which they were found to have been sharing the same bed.

Held, that the intention of the accused in removing the girl out of the keeping of her lawful guardian was to seduce her to illicit intercourse. **1961 Jab LJ 870: 1961 MPC 649.**

——S. 366 — Intention has to be established — It may be gathered from circumstances.

According to S. 366, it is the intention with which the accused kidnapped the girl to marry her against her will which has got to be established, and it can be gathered from the circumstances of the case and the conduct of the accused. AIR 1933 Rang. 98 (FB). Ref. **1952 Raj LW 476: 1953 Cri LJ 1028: ILR (1952) 2 Raj 423: AIR 1953 Raj 127 (128) (Pt E) (Prs 9, 10) (DB).**

6. "Forced or seduced to illicit intercourse".

——S. 366 — Seduced to illicit intercourse — Girl, though married, had never visited her husband and yet found to be used to sexual intercourse — Question of any further seduction for illicit intercourse would not arise. **1964 All Cri R 204: 1964 All WR (HC) 303.**

——S. 366 — 'Seduced to illicit intercourse'.

The word 'seduce' can be used in two senses, one wider and the other narrower. In the narrower sense, it may connote the first lapse from the path of virtue. In the wider sense, it includes every device or persuasion, every word or act, which induced a girl to submit to illicit intercourse. Indeed, every illict intercourse must be preceded by some overture on the part of the male. Though the words "seduction' 'and 'illicit intercourse" are distinct, more emphasis should be laid on the words "illicit intercourse" rather than on the word "seduction". Therefore, the word "seduced' should be understood in a wider sense of inducing a girl to carnal connection at any time or any occasion. AIR 1932 All 409, Diss. from. **(1954) 2 MLJ (Andhra) 234: 1955 Cr LJ 581: ILR (1955) Andhra 290: AIR 1955 Andhra 59 (61, 62) (Pt D) (Prs 10, 14).**

——S. 366 — 'Seduced to illicit intercourse'.

Any act on the part of a person to lead a woman astray from the path of rectitude is seduction and if it is followed by intercourse, it will be seduction for illicit intercourse **1955 Cr LJ 581: (1954) 2 MLJ (Andhra) 234: ILR (1955) Andhra 290: AIR 1955 Andhra 59 (61) (Pt E) (Pr 11).**

——S. 366 — Intention of abductors — Inference from subsequent conduct — Permissibility.

Ordinarily speaking, when a body of persons are alleged to have abducted a girl with the intention of compelling her to marry one of the abductors or a stranger, it is reasonable to suppose that the abductors, apart from the abductor with whom the girl was going to be compelled to marry, would not have the intention of seducing her to illicit sexual intercourse. The subsequent conduct of an abductor in making improper overtures to the girl, does not necessarily lead to the inference that he had the intention of seducing the girl at the time of abduction. **52 Cri LJ 698: ILR (1951) Assam 92: AIR 1951 Assam 95 (95) (Prs 6, 7) (DB).**

——S. 366 — Stages in seduction — Subsequent seduction.

The word 'seduced' in S. 366 is not used in the narrow sense of inducing a girl to part with her virtue for the first, time, but includes subsequent seduction for further acts of illicit intercourse. The words 'seduced to illicit intercourse' do not refer to the first act of seduction only when she is lured into surrendering her chastity. **59 Punj LR 564: 1958 Cr LJ 1097: ILR (1957) Punj 2003: AIR 1958 Punj 323 (324) (Pt B) (Pr 6).**

——S. 366 — Seduction — When complete.

It is 'seduction' when a woman is induced to consent to unlawful sexual intercourse by enticements and persuasion overcoming her reluctance and scruples. It occurs where a man abuses the simplicity and the confidence of a woman to obtain by false promise what she ought not to give. It is a criminal offence where a female under 18 years has been induced to surrender her chastity to an unlawful sexual intercourse. Where this has been accomplished by her seducer by the use of seductive arts such as flattery, solicitation, importunity or by importing some other species of artifice, beguilement, or deception, the offence is completed. It does not matter whether the accused person achieved his object by means of brute force or she may have capitulated to the gentle promptings of confiding love by deceitful promises; his guilt in either case is established. **59 Punj LR 564: 1958 Cr LJ 1097: ILR (1957) Punj 2003: AIR 1958 Punj 323 (324) (Pt C) (Pr 9).**

——S. 366 — 'Seduction' — Ingredients.

Etymologically the word 'seduction' is derived from two Latin words 'se' which means, away, and 'duco' which means to lead, and together they mean to lead away or to draw away. The term 'seduction' therefore, implies that the woman is led away or is induced to stray away from the path of rectitude. The act of seduction is done when the girl is drawn away from the virtuous course and then made to yield her chastity. But where the deviation on the part of the girl is the result of the promptings of her own inclinations, and she herself permits or encourages improper sexual reasons as opportunity comes her way, without the aid of any artifice or wile on the part of the man, it is no seduction. **59 Pun LR 564: 1958 Cr LJ 1097: ILR (1957) Punj 2003: AIR 1958 Punj 323 (324) (Pt D) (Pr 10).**

——S. 366 — "Seduce" — Interpretation.

The word "seduce" in S. 366 is used in the general sense of enticing or tempting and not in the limited sense of committing the first act of illicit itercourse, so that a person can be convicted of an offence under S. 366 in spite of the fact that he had previous illicit connection with the girl. Case law discussed. **('51) 4 Sau LR 151: AIR 1952 Sau 10 (10) (Pt A) (Pr 3) (DB).**

7. Kidnapping and abduction — Distinction.

——S. 366 — Scope — Difference — Kidnapping is an offence against guardianship and the moment the minor is taken or enticed away out of the keeping of her lawful guardian the offence is complete and is per se punishable unlike abduction where a particular purpose is necessary irrespective of the fact whether there is evidence that the kidnapping was with the intention of compelling her to marry against her will. The conviction under S. 363 is valid, once it is held that she was taken away or enticed away from the keeping of her lawful guardian — On facts held that the offence was punishable under S. 363. See Penal Code (1860), S. 361. **1957 Cri LJ 213: AIR 1957 Orissa 29.**

——Ss. 366, 363, 362 — Scope — Abduction and kidnapping — Distinction.

In 'kidnapping' consent of the person enticed is immaterial. In 'abduction' consent of the person removed, if freely and voluntarily given, condones it. In 'kidnapping' the intent of the offender is irrelevant, but in abduction it is the all important factor. 'Kidnapping' from lawful guardianship is not a continuing offence for as soon as the minor is removed out of his or her guardianship the offence is completed, but the person is being abducted not only when he is first taken from any place but also when he is removed from one place to another. **55 Punj LR 339: 1953 Cr LJ 1790: AIR 1953 Punj 258 (259) (Pt B) (Pr 21).**

8. Evidence as to age.

● **——Ss. 366 and 361 — Scope — Age of minor — Proof.**

If the allegation is that the accused had committed the offence of kidnapping a minor for the purpose of illicit intercourse on a date prior to 15-7-49, when the amendment of S. 361 fixing the outside age limit for girls at 18 came into force, the prosecution has to prove as the law then was, that the girl was under 16 years of age on the date of the alleged offence. If the Court, on the evidence, hesitates to hold that the girl was below 16 on that date the accused cannot be convicted under S. 366, although the Court holds there is affirmative evidence that the girl was below 18 years.

The accused cannot also be convicted under S. 366 on the count of abducting the girl for illicit intercourse when that charge was not sought to be proved against her and there was neither evidence on record to warrant the conclusion that the girl was compelled or induced by any deceitful means, by the accused, to go from her father's place nor was any question put to the accused in her examination under S. 342, Criminal P. C. **1955 All WR 536: 1955 Cr LJ 1296: AIR 1955 SC 574 (576) (Prs 4, 5).**

——S. 366 — Proof of age — Test of ossification — Sufficiency.

In the present state of the development of the medical science and the presnt state of knowledge, the Courts must proceed on evidence of age as furnished by the ossification test. Finding as regards age can be based on evidence regarding the state of ossification. **1957 Cr LJ 1114: AIR 1957 Cal 589 (590) (Pt A) (Pr 4) (DB).**

——Ss. 366, 361 — Age of girl not established — No conviction. See Penal Code (1860), S. 361. **54 Cal WN 329: 51 Cri LJ 1486: AIR 1956 Cal 406.**

——S. 366 — "Below eighteen years" — Proof — Medical evidence — Medical opinion is based on average and cannot be correct to the day — When the opinion of the doctor is that the girl is between 16 to 18 years one cannot say with certainty that she is below 18. See Penal Code (1860), S. 361. **1961 MPLJ 267: 1961 MPC 566.**

——Ss. 366, 498 — Ossification test — Mother of girl not examined to prove her age — Effect — Cognizance of offence — Complaint by husband — Cr. P. C. (1898), S. 199 — Necessity.

The accused was prosecuted for having kidnapped minor wife of C from his house. The guest witness (mother of the prosecutrix) was not examined to state her age. The lady doctor estimated the age after ossification test to be 15 to 16 years. The accused pleaded ignorance as to her age.

Held, that when best evidence that of the mother and that of birth register was not produced, her estimate could not be safely accepted as conclusive on the question. The prosecution thus failed to establish that the girl was minor on the date of offence. Also that when the accused pleaded ignorance as to her age it meant that he did not accept the age given out by the witnesses and amounted to denial. It might be that the act of the accused in taking her from place to place would amount to an offence punishable under S. 498, I P Code. But no cognisance of that offence could be taken without complaint of the husband as required by S. 199, Cr. P. Code and the accused could not be convicted under S. 498, I. P. Code. 1958 MPLJ Note No. 38, Foll. **1961 MPLJ (Notes) 82.**

——S. 366 — Age of the girl — Proof — Entry in birth Register — Evidentiary value — Conflicting evidence by parents regarding age — Ossification test can be relied upon — Evidence Act (1872), S. 45 — Medical evidence— Proof of age — Ossification test.

Positive evidence furnished by the Birth Register or the members of the family with regard to age, will have preference over the opinion evidence of the Doctor. But where the evidence adduced by the parents relating to the age of the girl is wholly unsatisfactory and so cannot form any basis for the determination of the correct age and if the ossification test is complete, such test can be accepted as a surer ground for determination of age in such cases. Further when there are two versions available regarding the age of the girl the accused is entitled to the benefit of the version that supports him. AIR 1957 Cal 589 and AIR 1954 Orissa 33, Foll. **(1964) 6 Orissa JD 1: ILR (1963) Cut 917: 1964 (2) Cr LJ 102 (104) (Pt B) (Pr 7) (Orissa).**

——S. 366 — Evidence as to age — Doctor in whose guardianship the girl was for five years is by far competent to speak about her age — His evidence is entitled to much weight — (Criminal P. C. (1898). S. 367) — (Evidence Act (1872), Section 1). **AIR 1955 NUC (Orissa) 2471 (DB).**

——S. 366 — To convict accused of offence under section there should be conclusive proof that the kidnapped woman is below 18 years — When prosecutrix and accused were arrested on suspicion and produced before Magistrate prosecutrix stating that her age was 20/21 years — She also expressing before witnesses her unwillingness to return to her parents — Oral and documentary evidence as to her minority not reliable — Opinion of medical expert giving her age as 17 years also not reliable as his opinion was formed on a physical examination of the woman and not after radiological examination — **Held,** the age of the woman was not shown beyond doubt to be below 18 years and hence accused should be acquitted — Evidence Act (1872), S. 45. **1964 Cur LJ 204 (Punj).**

——S. 366 — Kidnapping and abduction — Girl consenting party — Evidence as to her age — Duty of Court.

In a case under S 366, I. P. C. where the girl is a consenting party the Court should scrutinize the evidence about her age very closely. This is necessary because there is usual tendency on the part of women to understate their age in order to show their innocence and chastity and throw the entire blame on the other party. **1959 Raj LW 269.**

9. Consent of minor abducted girl — Whether material.

——S. 366 — Consent of minor girl who was abducted is immaterial. **AIR 1955 NUC (All) 175.**

——Ss. 366, 361 — Minor removed from legal guardian — Marriage — Offence under Ss. 361 and 366 complete — Consent of the girl or girl overstating her age is no defence. See Penal

Code (1860). S. 361. **1959 Cri LJ 716: AIR 1959 Ker 197.**

——Ss. 366, 363 and 361 — Minor girl taken away from keeping of father — Marriage or seduction the object of accused — Accused is guilty under S. 366 though girl accompanied him of her own accord.

Where a girl of less than 18 years is taken away from the keeping of her father by the accused with the object of marriage or seduction, he is guilty of an offence of kidnapping punishable under S. 366, Penal Code, notwithstanding the fact that the girl accompanied him of her own accord and not as a result of force or misrepresentation. 1962 (1) Cr LJ 841 (Punj). **Overruled.** Section 366 applies, whether the offence is kidnapping or abduction and the only additional ingredient required is that such kidnapping or abduction is with the object of marriage or seduction. No intention need be established. In S. 361 which defines the offence of kidnapping from lawful guardianship all that is required is that a minor under 16 in the case of male and 18 in the case of female must be 'taken or enticed' from the keeping of the lawful guardian. 'Taking' implies neither force nor misrepresentation and if a girl of less than 18 is taken away from the keeping of her lawful guardian even at her own wish the offence of kidnapping is established. Hence the fact that the girl is a consenting party does not affect the commission of the offence. **65 Punj LR 702: ILR (1963) 2 Punj 678: 1963 Cur LJ 454: 1964 (1) Cr LJ 220: AIR 1964 Punj 83 (85) (Prs 11 to 13) (DB).**

——S. 366 — Minor girl of border-line age — Consent.

It is incumbent upon persons, who deal with or choose to entice young girls or who try to seduce them, to be sure of their age, and in case of doubt they must keep their hands off such girls if they want to escape punishment prescribed by penal laws. A person dealing with a girl of border-line age, always does so at his own peril, and if the girl ultimately turns out to be below the prescribed age limit, be must suffer the consequences, his bona fide belief to the contrary notwithstanding. In cases of this kind consent of the minor is wholly immaterial. **(1960) 62 Pun LR 123.**

10. Evidence and proof.

——S. 366 — Prosecution under — Proof — To constitute an offence under Ss. 363 and 366 it is not incumbent upon the prosecution to prove that the person kidnapped or abducted was married. The question of marriage would have been material in case the accused had been prosecuted under S. 497 or 498 by a person in his capacity as a husband of the girl. See Penal Code (1860), Section 363. **1957 Cr LJ 847: AIR 1957 Him Pra 42.**

——S. 366 — Evidence and proof.

In a case against A for abduction of B the presecution witnesses had deposed that A was seen living with a girl for some time in the house of one K. There was however no evidence on the point whether that girl was B.

Held, that inference could not be drawn that B had been abducted by A. **1958 BLJR 78: 1958 All LJ (Rev) 47: 1958 All WR (Sup) 52: 1958 Cr LJ 929: 1958 All Cr R 187: 1957 Pat LR 478: AIR 1958 Pat 412 (413) (Pt A) (Pr 5).**

——S. 366 — Victim girl recovered from house of accused — Evidence that the accused was negotiating for sale of the victim girl for about two months — The accused on getting scent of the police in the village slipping away from there — Absence of the accused from the house when the recovery of the girl took place held was of no consequence — Joint possession of the accused and his brothers of the house also would not help the accused. **66 Pun LR 237: 1964 (2) Cr LJ 207: AIR 1964 Punj 357 (359) (Pt B) (Pr 10).**

——Ss. 366, 367 — Charge under S. 366 —Raped girl and her mother not traceable—Evidence Act, S. 33 — Application under, on ground that witnesses were not traceable — Necessity of proof of untraceability — Counsel of accused consenting to the admission of statements made before the committing magistrates in evidence before the Sessions Court does not do away with the necessity of the Court being satisfied by proof—Effect — Expense and delay when justifiable. See Evidence Act (1872), S. 33. **1959 Cri LJ 84: AIR 1959 Raj 21.**

11. Evidence of prosecutrix — Value of.

——S. 366 — Evidence — Abducted woman's evidence is not similar to evidence of accomplice. See Evidence Act (1872). S. 133. **AIR 1955 NUC (Bom) 6074 (DB).**

——S. 366 — Evidence Act (1872), Ss. 133, 114 Illus. (b) — Sexual offence committed in respect of girl — Uncorroborated testimony of girl — Conviction cannot be based upon it. See Evidence Act (1872), S. 133. **1952 Cri LJ 1667: AIR 1952 Cal 831.**

——Ss. 366, 362 — Evidence of girl abducted.

In case of offences under S. 366, the evidence of the girl alleged to have been abducted must be taken with a great amount of caution. AIR 1938 Lah 474, Rel. on. **1957 Cr LJ 847: AIR 1957 Him Pra 42 (45) (Pt D) (Pr 17).**

——S. 366 — Evidence — Corroboration of prosecutrix is not necessary — (Evidence Act (1872), S. 133) — (Criminal P. C. (1898), S. 297). AIR 1938 Lah 474; AIR 1939 Pat 536, Dissented from.

No doubt, in cases of rape it has almost become an accepted proposition that a person shall not be convicted of the offence of rape solely on the evidence of the prosecutrix, yet Courts have held again and again that even in such cases it is open to them to base the conviction solely on the evidence of the procecutrix if they are satisfied that the evidence is worthy of credence. Further, the rule requiring corroboration of the evidence of the prosecutrix is generally accepted only in cases of rape and not in other cases involving a sexual offence.

So the failure of the Sessions Judge to caution the jury with regard to the evidence of the prosecutrix in so far as the offence of abduction (Section 366) is concerned does not vitiate the charge. AIR 1938 Lah 474; AIR 1939 Pat 536, Dissented from; AIR 1943 Bom 150 (FB), Rel. on. **1955 Nag LJ 61: ILR (1954) Nag 922: 1955 Cr LJ 819: 1955 All WR (Supp) 12: AIR 1955 Nag 121 (124) (Pt B) (Pr 11).**

——S. 366 — Evidence of girl abducted — Conviction on — Sustainability.

In a case under S. 366, Penal Code the girl alleged to have been abducted being a co-conspirator in the crime, her evidence alone cannot safely be regarded as a basis for conviction in the absence of independent evidence. **1958 BLJR 78: 1958 All WR (Sup) 52: 1958 All LJ (Rev) 47: 1958 Cri LJ 929: 1958 All Cr R 187: 1957 Pat LR 478: AIR 1958 Pat 4'2 (414) (Pt D) (Pr 7).**

12. Place of trial.

——S. 366 — Abettor of offence under S. 366, Penal Code can be tried with principal offender at place where principal offence was committed.

See Criminal P. C (1898) S. 239 (b). **(1962) 64 Punj LR 193.**

13. Direction to Jury.

——**S. 366** — Cr. P. C., Ss. 238 and 297 — Charge under S. 366, Penal Code involving wrongful restraint — Jury told that they could convict the accused under S. 341 even if the intent necessary for conviction under S. 366 is not proved — There is no misdirection — Conviction under S. 341, Penal Code — Legal. See Criminal P. C. (1898), S. 238. **52 Cri LJ 189: AIR 1951 All 504.**

——**Ss. 366, 363 — 'Seduced to illicit intercourse — Girl already pregnant as a result of illicit sexual intercourse — Failure to direct Jury — Direction that if accused not found guilty under S. 366, he may be found guilty under S. 363 — Held misdirection — (Cr. P. C. (1898), S. 297).**

The words "seduced to illicit intercourse" mean 'induced to surrender or abandon a condition of purity from unlawful sexual intercourse' though it is not restricted to inducing a girl to surrender her chastity for the first time but covers the case in which the girl having surrendered her virtue in the past, had returned to a life of purity at the time of the kidnapping; but if the girl was already leading a life of indulgence in unlawful sexual intercourse at the time of the kidnapping and was pregnant due to such unlawful sexual intercourse, the accused cannot be said to have kidnapped her in order that she might be seduced to illicit intercourse. Where there was an omission of the Judge to place this aspect of the case before the Jury, but there was a bare direction at the end that if the jury found the accused not guilty under S. 366 they might find him guilty under S. 363, it must be held that there was a misdirection. (Retrial ordered). AIR 1933 Cal 718, Rel. on. **1955 Cr LJ 347: AIR 1955 Cal 100 (101) (Pt B) (Prs 6, 7) (DB).**

[**Overruled** in AIR 1962 SC 1908.]

——**Ss. 366, 376** — Scope — It is the duty of Judge to bring out distinction between Ss. 366 and 376 to the notice of the jury when the accused is charged under Section 366 and Section 376. Seduction may take the act out of Section 366 where the girl is above the age of consent but seduction would not necessarily take it out of S. 366 when the seduction is, for instance, the result of abuse of authority or of force or other form of compulsion. See Penal Code (1860), S. 376. **1955 Cri LJ 819: AIR 1955 Nag 121.**

——**S. 366 — Abduction for purposes of rape — Evidence — Corroboration — (Criminal P. C. (1898), S. 297) — (Evidence Act (1872), Sections 5 and 133).**

The case put forward by the prosecutrix was that while she was waiting on the railway platform for being taken home by her husband the accused accosted her and telling her that he knew her husband and their house asked her to accompany him. She did so and the accused taking her to lonely spot, raped her and brought her back to the station on her insisting upon it. The evidence relied upon by the prosecution and stated by the judge as evidence of corroboration was to the effect that she was absent from the platform for some time and that she was found weeping when she came back to the platform, following the accused.

Held, that those two factors stated by the judge to the jury as corroborative evidence with regard to abduction for rape did not by themselves connect the accused with the offence and therefore, the direction amounted to misdirection. **(1957) 23 Cut LT 57.**

14. Charge under S. 363 and S. 366 — Conviction under S. 363 if legal.

See Penal Code, S. 363.

15. Charges under Ss. 363, 366, 366-A and 368 — Conviction under all sections if legal.

See Penal Code, S. 363.

16. Charge of kidnapping under S. 366 — Conviction for abduction if permissible.

——**S. 366** — Charge for offence of kidnapping under S. 366, Penal Code—Accused cannot be convicted for offence of abduction under same section. See Criminal P. C. (1898), S. 223. **1961 Jab LJ 76.**

17. Charge under S. 366 and S. 376 — Conviction under S. 376 when permissible.

——**Ss. 366 and 376 — Abduction with intent to force her to illicit intercourse — Conviction under S. 376 when permissible.**

Where a person is convicted of abducting a girl with intent that she may be compelled to marry any person against her will or in order that she might be forced or seduced to illicit intercourse, ordinarily that person should only be convicted under S. 366, Penal Code and not under S. 376, Penal Code, unless very clear evidence in respect of that offence is forthcoming. **1950 All WR (Sup) 105 (Ajmer).**

18. Section 364 and S. 365, Penal Code.

——**S. 366** — Criminal P. C., S. 238 — Major and minor offences — An offence under S. 365, I. P. Code is within the meaning of Cr. P. C., S. 238 a minor offence as compared with offences under S. 366 and S. 376, I. P. C. and High Court can convict an accused of the former offence without a formal charge having been framed. See Criminal P. C. (1898), S. 238. **AIR 1954 Madh Pra 97.**

——**S. 366** — Criminal P. C., S. 494 — Public prosecutor if can give up offence — Where the charge sheet and complaint disclose an offence under S. 366 the public prosecutor cannot say that he is giving up the offence under that section at his will and pleasure. It is the Court to hear the witnesses and determine what offence was committed. See Criminal P. C. (1898), Section 494. **52 Cr LJ 1115: AIR 1951 Mad 900.**

——**S. 366** — Cr. P. C., S. 238 — "Minor offence — Section 365, I. P. C., is minor offence as compared to one under S. 366, I. P. C. See Criminal P. C. (1898), S. 238. **AIR 1955 NUC (Raj) 467.**

19. Sentence.

——**S. 366** — Cr. P. C., Ss. 301, 423 — When two inferences possible one leading to offence and other creating doubt about culpability the jury must give the accused benefit of doubt. See Cri. P. C. (1898), S. 301 **52 Cri LJ 698: AIR 1951 Assam 95.**

——**S. 366** — Procedure — Though an accused is acquitted of a charge under S. 366, I. P. C. there is no bar in law of her being convicted on a charge of conspiracy to commit an offence of kidnapping. See Penal Code (1860), Section 120-B. **1952 Cri LJ 1667: AIR 1952 Cal 831.**

——**S. 366** — Sentence —Certain amount paid by the accused to the father of the girl for getting his consent to the marriage—Girl dying before marriage —Panchayat held—Panches asking the father of the girl to return only half the amount — Accused dissatisfied — Accused taking away the cousin sister of the previous girl and performing marriage — Nothing besides formal ceremony done — Some of the accused being of tender years — Sentence of 5 years reduced to 2 years. **AIR 1954 Pat 218 (219) (Pt C) (Pr 4) (DB).**

——**S. 366** — Scope — Accused charged for offence of abduction and sentence to five years rigorous imprisonment — No evidence of compulsion or inducement — Conviction set aside — Age of girl below 18 years — No charge of kidnapping — Accused undergoing imprisonment for 5 months — **Held,** retrial for kidnapping need not be ordered. AIR 1926 Lah 677, Rel. on — (Criminal P. C. (1898), S. 423). **55 Punj LR 339: 1953 Cr LJ 1790: AIR 1953 Punj 258 (260) (Pt C) (Pr 23).**

——**S. 366** — Sentence — Seduced girl, although a consenting party and grown up and having previous intimacy with accused, a married woman to the knowledge of accused — Offence of seduction held most reprehensible and sentence of two years held not excessive. **('51) 4 Sau LR 151: AIR 1952 Sau 10 (11) (Pt B) (Pr 6) (DB).**

SECTION 366-A

● ——**Ss. 366-A, 366 — Ingredients of offence contemplated by S. 366-A — 'Seduction', meaning of — Person merely accompanying prostitute, below 18, going out to ply her profession — No offence under S. 366-A.**

There are three principal ingredients of the offence contemplated by S. 366-A: (a) that a minor girl below the age of 18 years is induced by the accused; (b) that she is induced to go from any place or to do any act, and (c) that she is so induced with intent that she may be or knowing that it is likely that she will be forced or seduced to illicit intercourse with another person. A person who merely accompanies a woman going out to ply her profession of a prostitute, even if she has not attained the age of eighteen years, does not thereby commit an offence under S. 366-A.

The verb 'seduce' is used in two senses. It is used in its ordinary and narrow sense as inducing a woman to stray from the path of virtue for the first time: it is also used in the wider sense of inducing a woman to submit to illicit intercourse at any time or on any occasion. It is in the latter sense that the expression has been used in Ss. 366 and 366-A, which sections partially overlap: AIR 1930 Cal 209 and AIR 1935 Bom 189 and AIR 1929 Pat 651 and AIR 1955 Andhra 59 and AIR 1930 Mad 980 and AIR 1927 Sind 97 and 10 Burma LR 199 and AIR 1958 Punj 323, Approved; AIR 1932 All 409 and AIR 1933 Cal 718 and AIR 1955 Cal 100 and AIR 1934 Lah 227, **Overruled.**

A case in which a girl had strayed from the path of virtue when she was in the custody of her guardian and had with a view to carry on her affair accompanied her seducer or another person may fall within the terms of S. 366 or S. 366-A whichever applies. But where a woman follows the profession of a prostitute that is, she is accustomed to offer herself promiscuously for money to 'customers' and in following that profession she is encouraged or assisted by someone no offence under S. 366-A is committed by such person. Ramesh v. State of Maharashtra, **64 Pun LR 780: (1963) 1 SCWR 504: (1963) 3 SCR 396: (1964) 2 SCJ 244: 1964 Mad LJ (Cri) 462: 1963 MPLJ 52: 1963 Mah LJ 321: (1963) 1 Ker LR 384: 1963 All WR (HC) 441: 1963 All Cr R 236: 1963 (1) Cr LJ 16: AIR 1962 SC 1908 (1911) (Prs 7, 8).**

——**S. 366-A** — Intention — Proof — It has to be inferred from surrounding circumstances. **AIR 1955 NUC (All) 14.**

——**Ss. 366-A, 363, 366 and 368** — Conviction of same person under all sections is illegal. See Penal Code (1860), S 363. **AIR 1955 NUC (All) 14.**

——**Ss. 366-A and 372** — Conviction under at the same time is illegal. See Penal Code (1860), Section 372. **AIR 1955 NUC (All) 14.**

——**S. 366-A** — Minor girl must be induced to go — Where there was no direct talk between accused and the girl, which could be regarded as inducement, accused held could not be convicted under S. 366-A. **1961 Nag LJ 394: 1962 All WR (Supp) 98: 1962 All Cri R 14: 63 Bom LR 408: 1961 (2) Cri LJ 578: AIR 1961 Bom 282 (283) (Pt B) (Pr 7) (DB).**

——**S. 366-A** — Abetment — Accused asking A having unlawful custody of minor girl, to bring the girl to a certain place for illicit intercourse — Accused had instigated A and is guilty of offence of abetment under S. 366-A by A. **1961 Nag LJ 394: 1962 All WR (Supp) 98: 1962 All Cri R 14: 63 Bom LR 408: 1961 (2) Cri LJ 578: AIR 1961 Bom 282 (283) (Pt C) (Pr 8) (DB).**

——**S. 366-A — "Seduced" — Girl's previous submission to illicit intercourse is immaterial.**

The word 'seduced' in S 366-A, is used in the ordinary sense of enticing or tempting irrespective of whether the girl has been previously compelled or has submitted to illicit intercourse. AIR 1933 Cal 718 and AIR 1955 Cal 100 and AIR 1958 Punj 323, Dissented from; AIR 1935 Bom 189, Rel. on. **1962 All WR (Supp) 98: 1962 All Cri R 14: 1961 Nag LJ 394: 63 Bom LR 408: 1961 (2) Cri LJ 578: AIR 1961 Bom 282 (284) (Pt D) (Pr 10) (DB).**

——**Ss. 366-A and 363 — Charge under S. 366-A — Conviction under S. 363 in absence of charge not proper — Criminal P. C. (1898), S. 238.**

Where the accused is tried for an offence under S. 366-A Penal Code and there is no charge under S. 363, I. P. C. the accused cannot be convicted under S. 363, I. P. C. Taking or enticing a minor out of the keeping of a guardian is not one of the elements of the offence under S. 366-A. **1959 Ker LJ 755: 1959 Ker LR 656: 1959 Ker LT 684.**

——**S. 366-A** — Corroboration to the version of prosecutrix is a rule of caution and not rule of law — Corroboration might be even by circumstantial evidence. See Penal Code (1860), S. 109. **1962 MPLJ (Notes) 230.**

SECTION 366-B

——**S. 366-B — Applicability — No case set up of importation for the purpose mentioned in section — Conviction — Legality.**

Where it is never the case of the prosecution that the girls concerned had been imported into the States with intent that they may be or knowing it to be likely that they will be forced or seduced to illicit intercourse with another person, a conviction under S 366-B, Penal Code would be wholly unjustified. **1950 RLW 340: 52 Cri LJ 217: AIR 1951 Raj 33 (35) (Pt A) (Pr 3) (DB).**

SECTION 367

——**S. 367** — Charge under Ss. 325 and 326 — No bar to charge under S. 367. See Criminal P. C. (1898), S. 561-A. **1962 (2) Cri LJ 28: AIR 1962 Andh Pra 267.**

——**Ss. 367 and 149** — Offence under — Ingredients — Abduction by itself is not offence — It must be accompanied with particular intention mentioned in sections — For conviction under S. 367 read with S. 149, there must be abduction in order that person abducted may be subjected to grievous hurt and this must have been done in prosecution of common object. **AIR 1955 NUC (Madh Bha) 3770 (DB).**

——**Ss. 367, 361, 363** — Minor employed without permission of guardian by his employer — **Taking**

of boy amounts to taking him out of lawful guardianship — Accused convicted under S. 363 and not under S. 367. See Penal Code (1860), S. 361. **1961 MPLJ 1204.**

——**Ss. 367, 366** — Charge under S. 367 — Raped girl and her mother not traceable—Evidence Act (1872), S. 33 — Application under, on ground that witnesses were not traceable — Necessity of proof of untraceability — Counsel of accused consenting to the admission of statements made before the committing magistrate in evidence before the Sessions Court does not do away with the necessity of the Court being satisfied by proof — Effect — Expense and delay when justifiable. See Evidence Act (1872), S. 33. **1959 Cri LJ 84: AIR 1959 Raj 21.**

SECTION 368

——**S. 368** — Scope and applicability — Kidnapping not proved — Fact that girl was found inside house of accused, does not lead to conclusion that she was a kidnapped girl. **AIR 1955 NUC (All) 14.**

——**Ss. 368, 363, 366 and 366-A** — Conviction of same person under all sections is illegal. See Penal Code (1860), S. 363. **AIR 1955 NUC (All) 14.**

SECTION 372

——**S. 372** — Intention — Object in selling minor girl — Accused selling minor girl as Brahman girl for marriage to a Brahmin — Accused knowing that girl was Chamarin — Object held was that she might be forced to illicit intercourse by person to whom she could not be married. **AIR 1955 NUC (All) 14.**

——**Ss. 372 and 366-A** — Conviction under, at the same time is illegal. **AIR 1955 NUC (All) 14.**

——**S. 372, Explanation II — Sale for marriage — Offence.**

The act of sale of a minor girl is criminal not per se but only on proof of one of the intentions mentioned in the section. Further the point of time which is crucial for determining the culpability of the accused is the one when sale of the girl takes place. It is at that point of time that the intention of the accused who sells the minor has to be taken into account. If marriage is the intention with which the sale is effected, it cannot be for the purpose of illicit intercourse, nor can performance of marriage be treated as a purpose unlawful or immoral. It is immaterial if the marriage which subsequently takes place turns out to be a marriage not strictly in conformity with the tenets of the Hindu Law. AIR 1934 All 324, Distinguished. **1954 Cr LJ 859: AIR 1954 Him Pra 43 (43, 44) (Prs 3, 4).**

SECTION 373

——**S. 373, Expl. I — Presumption wider when can be raised.**

In order that a presumption under Explanation I to S. 373, I. P. C., could be raised against the accused, it should first be proved either that she is a prostitute or that she is keeping or managing a brothel. Where the evidence was that the accused had not only given up her immoral trade many years ago but also that she had been carrying on for a number of years before the occurrence a propaganda for the uplift of the Bedia community by appealing to it not to indulge in prostitution, no adverse presumption under Section 373 can stand. **1959 Jab LJ 614: 1960 MPC 52: 1960 MPLJ 177.**

——**S. 373 — 'Otherwise obtains possession' — Includes even valid adoption.**

The express words used in S. 373 are "whoever buys, hires, or otherwise obtains possession'. Even a valid adoption would be covered by the expression 'otherwise obtains possession'. Therefore, it is of no consequence whether the accused could or could not adopt the girl and whether the alleged adoption was valid and effective. **1959 Jab LJ 614: 1960 MPC 52: 1960 MPLJ 177.**

SECTION 375

——**S. 375 — Consent — Interence.**

The mere fact that the woman did not bear the best of character may at best only render it likely that she might be a consenting party. It would not necessarily follow that she was a consenting party. **1953 Cr LJ 1196: AIR 1953 Ajmer 12 (13) (Pt A) (Pr 6).**

——**S. 375 — Consent — Inference.**

Woman in advanced stage of pregnancy—Fact that there was no resistance from her would not make her consenting party. **1953 Cr LJ 1196: AIR 1953 Ajmer 12 (13) (Pt B) (Pr 7).**

——**Ss. 375 and 376 — Applicability — Age of girl when material.**

If there be no consent, or if it be against the will of the girl, the age of the girl is immaterial for the offence of rape. **1957 Cri LJ 353: AIR 1957 Assam 39 (43) (Pt C) (Pr 15) (DB).**

——**S. 375** — Consent of raped girl is relevant only when she is above 16 years of age — Consent of girl below this age is no consent in law. **AIR 1955 NUC (Him Pra) 1805.**

——**Ss. 375 and 376 — Offence under — Defence — Consent — Inference — Absence of sufficient external marks on victim — Sufficiency.**

Consent on the part of a woman as a defence to an allegation of rape requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act, but after having freely exercised a choice between resistance and assent. Submission of her body under the influence of fear or terror is no consent. Absence of sufficient external marks on the victim showing resistance was held not to be sufficient for inferring consent on her part so as to negative the commission of offence. AIR 1958 Punj 123, Rel. on. **1962 All WR (Sup) 103: 1962 All Cr R 462: 1961 Ker LT 933: 1962 (2) Cri LJ 668 (669, 670) (Pt A) (Pr 14) (Kerala).**

——**S. 375** — Conduct of prosecutrix showing her to be willing party — Secret working of mind for repulsion will not render the act to be against her will. **1962 MPLJ (Notes) 13.**

——**Ss. 375 and 354** — Indecent assault and attempt to commit rape — Distinction — Accused making girl naked and running away on seeing her uncle — Offence fell under Section 354. See Penal Code (1860), S. 354. **1960 Cri LJ 612: AIR 1960 Madh Pra 155.**

——**Ss. 375 and 376** — Accused having sexual intercourse with girl below 16 years — Fact that girl was willing party is no defence. **(1965) 7 Orissa JD 183.**

——**S. 375 — Victim must be under age of 16.**

Under S. 375, I. P. Code, the law requires that the victim must be under 16 years of age or that sexual intercourse was made against her will and consent. **(1960) 2 OJD 437: 1961 (1) Cr LJ 689 (691) (Pt B) (Pr 8) (Orissa).**

——**S. 375 — Rape — Essentials.**

To constitute the offence of rape, partial penetration of the penis within the labia majora of the vulva or pudendum with or without emmission of semen or even an attempt at penetration is

quite sufficient for the purpose of the law. Thus, to constitute the offence the evidence of the lady doctor, that there was rupture of the hymen and that there was injury inside the vagina, is sufficient. **(1960) 2 OJD 437: 1961 (1) Cri LJ 689 (Orissa).**

——**S. 375** — Consent — What amounts to — Accused cohabiting with a girl of 13 or 14 years with her consent — Offence of rape is committed as consent is immaterial. **24 Cut LT 261: 1958 Cr LJ 1211: AIR 1958 Orissa 224 (227) (Pt C) (Pr 7).**

——**S. 375 — Consent — What amounts to.**

Consent on the part of a woman, as a defence to an allegation of rape, requires voluntary participation not only after the exercise of intelligence, based on the knowledge of the significance and moral quality of the act, but after having freely exercised a choice between resistance and assent. Submission of her body under the influence of fear or terror is no consent. There is a difference between consent and submission. Consent of the girl in order to relieve an act of a criminal character, like rape, must be an act of reason, accompanied with deliberation, after the mind has weighed as in a balance, the good and evil on each side, with the existing capacity and power to withdraw the assent according to one's will or pleasure. Consent implies the exercise of a free and untrammelled right to forbid or withhold what is being consented to; it always is a voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former. **59 Pun LR 519: 1958 Cr LJ 563: 1957 All WR (Sup) 85: AIR 1958 Punj 123 (126) (Pt A) (Pr 7).**

——**Ss. 375 and 376** — Consent — Sexual intercourse under influence of drink — Intercourse is not with consent. **AIR 1955 NUC (Raj) 473 (DB).**

——**S. 375** — Girl not under 14 years of age — Her consent to sexual intercourse would protect the accused. **1952 Cri LJ 1136: 1952 Raj LW 95: ILR (1951) 1 Raj 871: AIR 1952 Raj 123 (126) (Pt D) (Pr 17) (DB).**

SECTION 376

SYNOPSIS

(Penal Code (1860), S. 376.)

1. Scope and applicability.
2. Consent.
3. Penetration.
4. Evidence and proof.
5. Evidence of prosecutrix — Corroboration if and when necessary.
6. Corroboration — Nature and extent of.
7. Age of girl — Proof of.
8. Direction to Jury.
9. Charge under S. 376 disclosing facts under S. 354 — Conviction under S. 354 legal.
10. Attempt to commit rape.
11. Sentence.

1. Scope and applicability.

——**Ss. 376, 114** — Abetment of rape by one of the accused — Standing by with open knife at the time of offence — The accused is guilty under S. 376. See Penal Code (1860), S. 114. **1953 Cri LJ 1196: AIR 1953 Ajmer 12.**

——**Ss. 376 and 366** — Abduction with intent to force her to illicit intercourse — Conviction under S. 366 is proper instead of under S. 376, I. P. C. unless very clear evidence in respect of that offence is forthcoming. See Penal Code (1860), S. 366. **1950 All WR (Sup) 105 (Ajmer).**

——**Ss. 376, 509, 511** — Intruding upon privacy of lady and making indecent gestures and removing her clothes — Attempt to commit rape not established — Accused is guilty under S. 509 and not under S. 376 read with S. 511. **1961 (1) Cr LJ 330: AIR 1961 All 131 (132) (Pt A) (Pr 8).**

——**Ss. 376 and 366** — Minor girl kidnapped and then raped — The accused is liable to be punished under S. 366. See Penal Code (1860), S. 375. **1957 Cri LJ 353: AIR 1957 Assam 39.**

——**Ss. 376 and 375**—Age of girl is immaterial for the offence of rape if there be no consent or if it be against the will of the girl. See Penal Code (1860), S. 375. **1957 Cri LJ 353: AIR 1957 Assam 39.**

——**S. 376** — Offence under — Charges under Section 363 and Section 376 — Sessions Judge finding that girl was not an unwilling agent in going away with the accused — Also that sexual intercourse was not against her will — Age of girl found more than 14 years but less than 16 years when rape was committed — Offence held did not come under Section 376 — Offence under Section 366 however held proved. See Penal Code (1860), S. 363. **1953 Cri LJ 1356: AIR 1953 J and K 21.**

——**S. 376** — Circumstances showing consent of prosecutrix in act of accused — Burden to prove absence of consent lies on prosecution — Conviction set aside. **1964 MPLJ (Notes) 194.**

——**Ss. 376 and 360** — Rape — Consent — Inference — Woman raising alarm while being kidnapped, and narrating story of rape committed upon her to a witness immediately after being released by kidnappers — Allegation that she demanded money after sexual intercourse — Consent cannot be inferred. **1963 (2) Cr LJ 562 (566) (Pt B) (Pr 19) (Manipur).**

——**S. 376** — Scope — No injury found on private parts or any other part of the body of the woman — Accused, however, found lying over her — Accused held guilty under Section 354 and not under Section 376. See Penal Code (1860), S. 354. **AIR 1955 NUC (Raj) 470 (DB).**

2. Consent.

——**Ss. 376, 375 — Offence under — Prosecution must prove that sexual intercourse was without consent of the woman or against her will — Evidence Act (1872), Ss. 101 and 104.**

When an accused person is charged with the commission of rape on a grown up woman it is for the prosecution to prove that sexual intercourse was without the consent or against the will of the woman. It is not necessary for the defence to prove that sexual intercourse was with the consent of the woman.

The complainant alleged that the accused was armed with a knife and threatened to kill her but in spite of this she shouted. There was, however, no evidence that her shouts had been heard by anybody; so also there was no reference to the knife in the complaint by her, in the same way the medical evidence did not show any injury on the private parts or on her person, there was also no injury on the person of the accused except the head injury which was caused at the time when the accused was trying to run away from the room after the husband of the complainant entered the room.

Held, that these circumstances went to show that the intercourse was with the consent of the complainant. **(1961) 2 Gul LR 256.**

——**Ss. 376 and 375 — Charge of rape — Defence — Consent — Inference — Absence of sufficient external marks on victim — Sufficiency.**

Consent on the part of a woman as a defence to an allegation of rape requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having freely exercised a choice between resistance and assent Submission of her body under the influence of fear or terror is no consent. Absence of sufficient external marks on the victim showing resistance was held not to be sufficient for inferring consent on her part so as to negative the commission of offence. **1961 Ker LT 933: 1962 (2) Cri LJ 668 (669, 670) (Pt A) (Pr 14) (Ker).**

——Ss. 376, 375 — Consent — What amounts to.

Where, from the evidence of the prosecutrix herself, it clearly emerged that she was a girl of easy virtue and though she was raped one after another by as many as five persons within less than 24 hours she did not complain to anybody on any occasion it would lead to the conclusion that those who had carnal knowledge of her had it with her consent. **1962 Jab LJ 825: 1963 (1) Cr LJ 686: 1962 MPLJ (Notes) 325.**

——S. 376 — Scope — Consent— Inference from circumstances.

Prosecution contended that the accused committed rape on the prosecutrix on a stony ground when she resisted and scratched his legs and thighs and then went away crying. No marks of injuries on both of them were found.

Held, that absence of marks of injury on the person of the prosecutrix or on the accused, failure on the part of the prosecutrix to disclose the cause of her crying to persons at the first opportunity and absence of evidence to show that the accused could completely overpower the prosecutrix cast a strong suspicion that the sexual intercourse may well have been with the consent of the prosecutrix (Conviction set aside) **1959 MPLJ (Notes) 196.**

——S. 376 — Consent — Presumption of — Accused misbehaving with prosecutrix for long time — Absence of sufficient injuries on her person — Willingness presumed.

Prosecutrix over 18 years of age stated that accused was misbehaving with her for a long time (one hour). She had raised an alarm.

Held, that this would indicate her willingness which was confirmed by the absence of sufficient injuries on her person which would have indicated determined struggle on her part. She appeared to have raised alarm only when she suspected some persons approaching her in the vicinity and made out a case of forcible criminal assault in order to hide her shame. **1958 MPLJ (Notes) 120.**

——S. 376 — Evidence — Consent on part of victim — What amounts to.

Consent on the part of a woman as a defence to an allegation of rape, requires voluntary participation, not only after the exercise of intelligence, based on the knowledge of the significance and moral quality of the act, but after having freely exercised a choice between resistance and assent. Submission of her body under the influence of fear or terror is no consent. **1960 Cr LJ 927: 1960 Mad WN 261: (1961) 2 Mad LJ 459: 1961 Mad LJ (Cri) 681: AIR 1960 Mad 308 (311) (Pt D) (Pr 21) (DB).**

——S. 376 — Consent of woman obtained on fear of being arrested — Offence.

The consent of a woman of over 18 years of age to a sexual intercourse obtained by putting her in fear of death or of hurt is no defence to an accused person but where the fear to which the woman is subjected is neither of death nor of hurt, but of being arrested, when as a matter of fact there is no warrant of arrest, against her, the consent though obtained by fraud, is nonetheless consent, for she is willing to allow sexual intercourse for a price, which is fictitious one because there is no warrant of arrest against her.

In such a case the accused cannot be convicted under Section 376. (1888) 22 QBD 23, Rel. on. **1955 Nag LJ 61: 1955 Cr LJ 819: ILR (1954) Nag 922: 1955 All WR (Supp) 12: AIR 1955 Nag 121 (123) (Pt A) (Prs 5, 6).**

——S. 376 — 'Consent' — Surrender due to threat — Absence of resistance — Effect of.

From the circumstances that there were no injuries found on the person of the woman or on the person of the accused and that the woman had been undergoing forms of marriage with a number of persons some of whom were still alive it cannot be concluded that it was a case of voluntary consent by the woman and that she yielded her body to the accused out of her free will and volition. Absence of resistance does not necessarily imply consent.

Where a young woman of 30 years while passing from one village to another had been pestered by three police constables in uniform armed with dandas who were following her and accusing her of being a vagrant against which she was all the time protesting.

Held, that the conduct of the policeman was a sufficient threat and a surrender to them under the circumstances could not amount to a free consent. AIR 1958 Punj 123, Foll. **1960 Cr LJ 849: AIR 1960 Punj 303 (304) (Prs 5, 7).**

——Ss. 376, 497 — Offence under.

Held, that even if the accused had sexual intercourse with the girl, in view of her consent and the failure on the part of the prosecution that she was below 16 years of age, it could only be said that the accused had committed adultery and not rape. **1958 Raj LW 60: ILR (1957) 7 Raj 440.**

——S. 376 — Proof of age of girl — (Evidence Act (1872), Ss. 101 to 104).

In a case where it is found that the girl was a consenting party to the sexual intercourse and where the conviction of the accused for rape is sought on the mere ground of the age of the girl, it becomes all the more necessary for the prosecution to prove beyond doubt that the girl was below 16 years of age. Outward appearances are deceptive and a Judge cannot proceed to determine the age of the girl simply on his own estimate, without any convincing evidence. The burden of proving the age of the girl lay heavily on the prosecution in view of the fact that the girl was already used to sexual intercourse. **1958 Raj LW 60: ILR (1957) 7 Raj 440.**

——S. 376 — Consent — Absence of injury on body of prosecutrix — Presumption is that woman, unless she was not adult, was a willing party — Story of rape becomes doubtful. **AIR 1955 NUC (Raj) 5037.**

——S. 376 — Consent — Sexual intercourse under influence of drink cannot be said to be intercourse with consent. See Penal Code (1860), Section 375. **AIR 1955 NUC (Raj) 473 (DB).**

——S. 376 — Consent — Intercourse without consent — Evidence showing that some people had intercourse with woman and that not in normal way — No conclusion that intercourse was without her consent can be drawn. **AIR 1955 NUC (Trva-Co) 3464 (DB).**

3. Penetration.

——Ss. 376 and 375 — Offence under — Penetration — Proof — Only uniform layer of smegma round glans penis can negative possibility of penetration — Presence of negligible amount not sufficient to negative such possibility.

It is only when the glans penis is covered by a uniform layer of smegma that the possibility of recent complete penetration is negatived. The presence of a small quantity of smegma is not sufficient to negative such possibility since a negligible amount of smegma may be present even if a person has intercourse. **1961 Ker LT 933: (1962) 2 Cri LJ 668 (669) (Pt C) (Pr 12) (Ker).**

——S. 376 — Applicability — Slight penetration sufficient for offence.

For an offence of rape, while there must be penetration in the technical sense, the slightest penetration would be sufficient, and a completed act of sexual intercourse is not at all necessary. **1960 Mad WN 261: (1961) 2 Mad LJ 459: 1961 Mad LJ (Cri) 681: 1960 Cr LJ 927: AIR 1960 Mad 308 (311) (Pt B) (Pr 14) (DB).**

——S. 376 — Evidence and proof of penetration.

The depth of the penetration is immaterial so far as the offence under Section 376, Penal Code is concerned. From the mere fact that there was no dilation of the vaginal canal it could not be assumed that the offence was not committed when the injury to the hymen showed clearly that there was penetration by the male organ. **1957 Cr LJ 469: AIR 1957 Orissa 78 (80) (Pt B) (Pr 12) (DB).**

——S. 376 — Evidence and proof.

The simple fact that the doctor found some spots of semen by the medical examination on the dhoti of the accused or they were found on the petty coat of the girl or there were three slight bruises over the private parts of the girl is not only to prove that it was the accused who committed rape upon the girl. Of course the offence with which the accused was charged was very serious and some suspicion may be attached to him but suspiction cannot take place of legal evidence and the cirminal Court is open to do its duty of giving the benefit of doubt to the accused howsoever it may suspect that it might have been the accused who committed the guilt. Whatever may be the medical evidence, it cannot be acted upon in the face of the girl's clear admission in the committing Magistrate's Court that penetration did not at all take place. **1952 Cri LJ 1200: 1952 Raj LW 128: ILR (1951) 1 Raj 844: AIR 1952 Raj 153 (154) (Pt B) (Pr 5).**

4. Evidence and proof.

——S. 376 — Evidence — Evidence of witness before Committing Magistrate retracted at the trial (S. 288, Cr. P. C.) — Witness watching the perpetrating of the offence — Evidence of victim.

H was committed to the Sessions Court for trial of the offence of committing rape on S and he was convicted of the offence; H appealed against his conviction and sentence.

Held: No doubt the trial Court correctly brought on record the statement and depositions of a witness before the committing Court under Section 288, Cr. P. Code, when he went back upon it during the trial; but his evidence could not be accepted unless there is sufficient corroborative evidence otherwise. His evidence that he was watching the offence being committed from the beginning to the end without bestirring himself in the least to prevent it or cry out for help just shows that he was nothing less than an accomplice and no reliance can be placed on it unless corroborated.

The evidence of the victim hardly carries any weight in the case and has to be corroborated by other evidence.

Held, further the case should have been reported to the J. C.'s Court for action under Section 215, Cr. P. C. and should not have tried by the Sessions Judge. It was for a Magistrate empowered under Section 30, Cr. P. C. to have disposed of the case. **1952 Cr LJ 1563: AIR 1952 Ajmer 49 (50) (Pt C) (Pr 5).**

——S. 376 — Criminal P. C., S. 367—Appreciation of evidence — Sexual offences — Rape — Evidence of girl should carry more weight than the evidence of an ordinary witness — (Evidence Act (1872), S. 133). See Criminal P. C. (1898), S. 367. **1956 Cri LJ 4: AIR 1956 All 22.**

——S. 376 — Scope and applicability — Raped girl aged four years crying and disclosing the name of accused — Evidence of commission of offence on her private parts — Also evidence of stains of blood and semen on clothes of accused — **Held,** it would lead to only conclusion that the accused was offender. See Evidence Act (1872), S. 8. **1965 (2) Cri LJ 349: AIR 1965 Bom 154 (DB).**

——S. 376 — Evidence — Medical evidence — Non rupture of hymen is not conclusive of the fact that there was no sexual intercourse. **1962 (2) Cr LJ 651: 1963 All Cr R 11: 1963 All WR (Sup) 7: AIR 1962 Cal 641 (647) (Pt G) (Pr 30) (DB).**

——S. 376 — Evidence and proof — Accused not saying that he was suffering from venereal disease and that he could not have committed rape without communicating the disease— Failure to medically examine accused for venereal disease, is of no consequence. **AIR 1955 NUC (Him Pra) 1805.**

——S. 376 — Evidence and proof — Absence of spermatozoa in semen stains over salwar of the victim is not conclusive as there may be cases where semen without spermatozoa can be seen. **AIR 1955 NUC Him Pra 1805.**

——S. 376 — Offence under Section 376 —Direct evidence only of prosecutrix — Circumstances corroborating considered. AIR 1952 SC 54, Rel. on. **1964 MPLJ (Notes) 151.**

——Ss. 376, 375, 361 — Age of prosecutrix — Positive proof — Necessity of — No X-ray examination in spite of doctor's suggestion — No explanation for omission coming from investigating officer — Accused given benefit of doubt. **1962 MPLJ (Notes) 330: 1962 Jab LJ 840: 1963 (2) Cr LJ 354 (355) (Pt B) (Pr 4) (Madh Pra).**

——S. 376 — Identification parade — Evidentiary value — Identification after long interval — Prosecution under Section 376, Penal Code — Delay of one and half months — First identification parade proving abortive — On second occasion girl seated in the court-yard while accused persons seated in verandah in front of her — Identification parade loses all evidentiary value. See Evidence Act (1872), S. 9. **1962 Jab LJ 825.**

——S. 376 — Proof — Unsworn testimony of prosecutrix — Admissibility — Where in a case under Section 376, I. P. C the trial Court received the testimony of the minor prosecutrix after satisfying itself that she possessed sufficient understanding — **Held,** that her unsworn testimony was admissible. See Oaths Act (1873), S. 13. **1960 Cr LJ 237: AIR 1960 Madh Pra 59.**

——Ss. 376, 511 — Evidence — Eye witnesses giving out that accused persisted in sexual act

in their presence — Story held unbelievable — Conviction could not stand — Criminal P. C. (1898), S. 367.

It is not conceivable that a young lad of about 20 years would persist in the sexual act with a small girl of about 10 years at a place hardly a few paces from the track and would even persist in committing that act in the presence of two persons, himself remaining in that position. AIR 1954 SC 711, Rel. on. **1959 MPLJ 538: 1959 MPC 478: 1960 Jab LJ 178.**

——**S. 376** — Proof — Evidence of prosecutrix — Corroboration — Identification of hair — Evidence of expert — Science of identification of hair has not reached the stage of certainty — It is not at all a positive science — Corroboration of the statement of prosecutrix is necessary apart from such evidence in a trial on a charge of rape. See Evidence Act (1872), S. 45. **1959 MPLJ (Notes) 23.**

——**S. 376** — Evidence — Circumstances rendering investigation and successful prosecution stated — Court held must remember difficulties in deciding guilt or innocence — Principles to guide Court in assessing evidence and determining necessity for corroboration also stated — (Evidence Act (1872), S. 133) — (Criminal P. C. (1898), S. 423). **AIR 1955 NUC (Mad) 4329.**

——**Ss. 376, 375** — Evidence and proof — Penetration — Evidence of — Statement by victim in Committing Court as well to police that she was ravished forcibly by accused — Statement corroborated — Non-user of word 'penetration' immaterial — Marks of violence on body and back of victim, sufficient to infer determination on part of accused to gratify passions even with violence — Non-detection of injury or semen in private parts or clothes, immaterial. **1963 (2) Cr LJ 715 (716, 717) (Prs 6, 9) (Manipur).**

——**Ss. 376 and 375** — Statement of complainant immediately after occurrence — Is admissible as evidence of conduct and as corroboration. See Evidence Act (1872), S. 8. **1963 (1) Cr LJ 316: AIR 1963 Orissa 58 (DB).**

——**S. 376 — Examination of accused — Necessity of.**

If the accused is not circumcised, the existence of smegma round the corona gland is proof against penetration, since it is rubbed off during the act of sexual intercourse. The smegma accumulates if no bath is taken for twenty four hours. In rape cases therefore, the prosecution must get the male organ of accused examined. It is the duty of the prosecution if, according to the medical jurisprudence medical examination is capable of yielding conclusive results, to ensure that examination within a period of time when conclusive results could be achieved. **(1960) 2 OJD 437: 1961 (1) Cr LJ 689 (692) (Pt D) (Pr 11) (Orissa).**

——**S. 376** — Rape case — Corroborative evidence — Circumstances lending support to testimony of prosecutrix, narrated — Possibility of injury by fall — Doctor's statement cannot be given much importance in view of the positive evidence that the injury was caused by an act of rape on the victim, particularly when the doctor also does not rule out such a theory. See Evidence Act (1872), S. 157. **(1960) 28 Cut LT 385.**

——**S. 376** — Proof — Evidence — Corroboration by circumstances — Case of rape — Medical evidence disclosing the presence of abrasion in the prepuce of the accused — No satisfactory explanation from the accused about the injury — Court must hold it to be a corroborative piece of evidence relating to his participation in the commission of the offence. See Evidence Act (1872), S. 156. **1957 Cri LJ 469: AIR 1957 Orissa 78.**

——**S. 376** — Proof of — Evidence of girl — Trial under Section 376 with the aid of three assessors two of them holding the accused guilty under Section 376 and one holding them guilty under Section 377 — It is clear that all of them believed the story of the girl — It is an important circumstance to be taken into consideration in deciding whether the testimony of the girl should be accepted. See Evidence Act (1872), Section 156. **1957 Cr LJ 469: AIR 1957 Orissa 78.**

——**S. 376 — Evidence and proof.**

Per Narasimham, J. — In cases of rape the alleged victim and the accused persons should be specially examined with a view to ascertain if they are infected with venereal disease. **19 Cut LT 14: 1954 Cr LJ 132: AIR 1954 Orissa 33 (37) (Pt E) (Pr 18) (DB).**

——**S. 376** — Evidence and proof — Forcible intercourse — Evidence — Girl incapacitated from putting up resistance due to drink — Serious injuries on vagina cannot be expected. See Penal Code (1860), S. 375. **AIR 1955 NUC (Raj) 473 (DB).**

——**Ss. 376 and 375 — Evidence and proof.**

Forcible intercourse — Evidence — Girl incapacitated from putting up resistance due to drink — Serious injuries on vagina cannot be expected. **AIR 1955 NUC (Raj) 473 (DB).**

——**Ss. 376 and 375 — Evidence and proof.**

It is seldom that in rape cases direct evidence is available beyond the evidence of the raped woman. **AIR 1955 NUC (Raj) 473 (DB).**

——**S. 376** — Consent — Accused found to have sexual intercourse — Woman's statement one of rape — One witness speaking to her struggle — Another contradicting it — Conviction if sustainable. **1952 RLW 289.**

5. Evidence of prosecutrix — Corroboration if and when necessary.

——**Ss. 376 and 375 — Evidence — Rape on girl of 10 — No question of consent — Evidence of victim — Evidence of the mother — Value of — Necessity for corroboration — Sentence — Practice of recording of confession by person specially authorised, commented upon.**

The evidence, in a case of rape, adduced on the side of prosecution was the victim a girl of 10 and her mother. The Magistrate believed the girl and relied on the evidence of the mother and Doctor's evidence and convicted the accused. The accused applied in revision.

Held, on the authority of the recent decision in AIR 1952 SC 54, the law is not that corroboration is essential before conviction, but that the necessity of corroboration as a rule of prudence must be ever present in the mind of the Judge except when the circumstances make it safe to dispense with it and in jury cases it must find a place in the charge before a conviction without corroboration might be sustained.

The tender years of the child victim of the offence, its demeanour, unlikelihood of tutoring and so forth may render corroboration unnecessary; but it is a question of fact in every case.

There is no legal bar to exclude the mother's evidence as not in the nature of independent corroborative evidence merely on the ground of the relationship. Independent means merely independence of sources which are likely to be tainted.

On the evidence in the case and in the light of the authority of the decision in AIR 1952 SC 54, the accused had been rightly convicted.

Considering the brutality attendant upon the rape or a girl of 10 additional sentence of whipping could have been awarded along with 4 years' R. I.

The practice of investing persons with magisterial powers specially for recording confessions and identification especially of persons having nothing whatever to do with law at any time of their life is to be reviewed by the authorities concerned:

It is better if persons who are conversant with law as enunciated from time to time by Courts and those persons alone are invested with such powers of a Magistrate. **1952 Cr LJ 1575: AIR 1952 Ajmer 54 (55) (Pt B) (Pr 8).**

——S. 376 — The deposition of prosecutrix in a rape case by itself hardly carries any weight whatsoever unless it is corroborated otherwise. See Crimnal P. C. (1898), S. 367. **1952 Cr LJ 1563: AIR 1952 Ajmer 49.**

——S. 376 — Conviction on uncorroborated testimony of victim — Legality — (Evidence Act (1872), S. 133).

A conviction could be based on the uncorroborated testimony of the victim in a rape case and law does not require corroboration in cases of rape though as a rule of prudence some corroboration might become necessary.

The position of a victim in a rape case cannot be equated to that of an accomplice. Even if it were so, there is no obstacle in law in the way of acting upon the sole testimony of the complainant. But the Judge dealing with the matter should indicate that in any given case corroboration would be dispensed with. In every case of this type the rule about the admissibility of corroboration should be present to the mind of the Judge. Though corroboration is not essential, the necessity of corroboration, except in cases where the Judge thinks safe to dispense with it, must be present to the mind of the Judge. AIR 1952 SC 54, Foll. **1956 Andh WR 572.**

——S. 376 — Conviction can be based upon the sole evidence of prosecutrix when the evidence discloses nothing against her, either as respects her past character or as respects the truth of the accusation made by her in the case or as respects her being a consenting party to the act charged and this is particularly so when the prosecutrix is a mere child. See Evidence Act (1872), S. 114, Illus. (b). **AIR 1955 NUC (Cal) 2077 (DB).**

——S. 376 — Evidence Act (1872), S. 133— Case of rape on girl of 7 years depending of her evidence — Her evidence changing from time to time — Her evidence must be corroborated. See Evidence Act (1872), S. 133. **1953 Cri LJ 511: AIR 1953 Cal 206.**

——S. 376 — Evidence — Conviction for rape — If can be based on evidence of raped girl alone without any corroboration — Extent of corroboration required.

In practice a conviction for rape almost entirely depends on the credibility of the woman, so far as the essential ingredients are concerned, the other evidence being merely corroborative. The necessity of corroboration as a matter of prudence must be present to the mind of the Judge, and in jury cases must find place in the charge, before a conviction without corroboration can be sustained. The tender years of the child which is the victim of a sexual offence, coupled with its unlikelihood of tutoring may render corroboration unnecessary but that is a question of fact in every case. AIR 1952 SC 54, Rel. on.

Again, it is not necessary that there should be independent corroboration. All that is required is that there must be some additional evidence rendering it probable that the story of the complainant is true. The evidence, no doubt, should tend to connect the accused with the crime. **1961 Ker LT 630: 1961 MLJ (Cr) 785: 1962 (1) Cr LJ 650 (651) (Pt A) (Pr 6) (Ker).**

——S. 376 — Uncorroborated testimony of prosecutrix may be relied on.

Ordinarily, corroboration of the woman raped must be looked for but that is not an absolute rule and if the Court is completely satisfied with her evidence it is open to it to convict the accused even on her uncorroborated testimony. **1962 Jab LJ 840: 1962 MPLJ (Notes) 330: 1963 (2) Cr LJ 354 (355) (Pt A) (Pr 2) (Madh Pra).**

——S. 376 — Solitary evidence of prosecutrix — Necessity of corroboration not an absolute rule — Satisfaction of Court sufficient for conviction.

In a case under Section 376, ordinarily, corroboration of the woman raped must be looked for; but that is not an absolute rule and if the Court is completely satisfied with her evidence, it is open to it to convict the accused even on her uncorroborated testimony. AIR 1958 SC 143, Rel. on. **1962 Jab LJ 840: 1962 MPLJ (Notes) 330: 1963 (2) Cr LJ 354 (355) (Pt A) (Pr 2) (Madh Pra).**

——S. 376 — Corroboration of evidence of victim not required as matter of law. **1960 Cr LJ 927: 1960 Mad WN 261: (1961) 2 Mad LJ 459: 1961 Mad LJ (Cri) 681: AIR 1960 Mad 308 (311) (Pt C) (Pr 19) (DB).**

——S. 376 — Evidence of prosecution — Corroboration — Necessity.

It cannot be said that the evidence of the prosecutrix in a rape case is on the same footing as that of an accomplice. An accomplice is a person who voluntarily participates in the commission of the crime along with others. In the case of a prosecutrix for rape, she is the victim of the offence and not the offender. The case of an accomplice therefore materially differs from that of a prosecutrix for rape and the evidence of both cannot be placed on the same footing. In law the evidence of the prosecutrix does not require corroboration like that of an accomplice. There is no doubt that in sexual offences utmost caution and scrutiny of the evidence of the prosecutrix are necessary before it is acted upon. But in assessing the value of her evidence her conduct immediately after the offence is committed is of great value and would be relevant under Section 8 of the Evidence Act. **64 Mad LW 266: 1951 Mad WN 60: 1951 Mad WN (Cri) 8: ILR (1951) Mad 973: 52 Cr LJ 718 (2): (1951) 1 MLJ 110: AIR 1951 Mad 760 (763, 764) (Prs 11 to 14).**

——S. 376 — Evidence — Testimony of prosecutrix — Corroboration of — (Evidence Act (1872), S. 133).

The rule on the subject of corroboration in cases of rape which according to the cases has hardened into one of law is not that corroboration of the testimony of the prosecutrix is essen-

tial before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the Judge, and in jury cases, must find place in the charge, before a conviction without corroboration can be sustained. AIR 1952 SC 54, Foll. **1955 Nag LJ 563: 1955 All WR (Sup) 109: ILR (1955) Nag 731: 1956 Cr LJ 83: AIR 1956 Nag 8 (9) (Pt A) (Pr 5) (DB).**

——S. 376 — Evidence — Testimony of prosecutrix — Test whether corroboration is necessary — (Evidence Act (1872), S. 133).

The test as to whether corroboration is necessary lies in the naturalness of the story deposed to by the prosecutrix. If there be any doubt as regards its genuineness, there is the need of caution, and therefore, of corroboration. For this purpose it is not necessary that the entire story should appear doubtful. It is sufficient if any part of the narration has the semblance of exaggeration or artificiality. **1955 Nag LJ 563: 1955 All WR (Supp) 109: ILR (1955) Nag 731: 1956 Cr LJ 83: AIR 1956 Nag 8 (10) (Pt B) (Pr 6) (DB).**

——Ss. 376, 366 — Corroboration of prosecutrix is not necessary and it is open to the courts to base their conviction solely on the evidence of the prosecutrix if they are satisfied that the evidence is worthy of credence — (Evidence Act (1872), S. 133) — (Criminal P. C. (1898), Section 297). AIR 1938 Lah 474; AIR 1939 Pat 536, Dissented from. See Penal Code (1860), S. 366. **1955 Cri LJ 819: AIR 1955 Nag 121.**

——S. 376 — Corroboration in sexual offence — Offence of rape — Prosecutrix when is not to be treated as accomplice— Stand of the accused of complete denial — Stand of the prosecutrix that rape was committed on her against her will — Prosecutrix cannot be treated as accomplice — Corroboration not necessary if her statement can otherwise be accepted. See Evidence Act (1872), S. 133. **(1965) 31 Cut LT 1044 (Orissa).**

——S. 376—In the case of rape there is nothing in law to prevent a conviction on the sole testimony of the prosecutrix. Corroboration of her evidence is not absolutely essential since she does not stand in the position of accomplice. But the rule of prudence requires that there must be some corroboration of the evidence of prosecutrix. The nature of the corroboration must necessarily depend upon the facts of each particular case. See Evidence Act (1872), S. 114. **1961 (1) Cr LJ 689 (Orissa).**

——S. 376 — In a case of rape corroboration in case of grown-up woman is not only necessary but it must come from independent sources. The statement made by the prosecutrix to the witnesses after period of three hours cannot be said to be at all independent nor sufficiently connected with the crime itself. See Evidence Act (1872), S. 8, Illustration (j). **AIR 1955 NUC (Pat) 3245.**

——S. 376 — Evidence — Prosecutrix of tender age — Necessity of corroboration — Rule —Conviction on uncorroborated testimony — Legality — (Evidence Act (1872), S. 133).

The necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the Judge, and in jury cases must find place in the charge, before a conviction without corroboration can be sustained.

The tender years of the child which is the victim of a sexual offence, coupled with other circumstances appearing in the case, such, for example, as its demeanour, unlikelihood of tutoring and so forth, may render corroboration unnecessary but that is a question of fact in every case. 1952 SCJ 46; (1952) 1 MLJ 440; AIR 1952 SC 54, Foll.

Held, on facts that this rule was present to the mind of the learned Sessions Judge and the facts, which have been established on the record more than amply prove the guilt of the accused beyond the possibility of any reasonable doubt. **1961 All WR (Sup) 26: 1961 All Cr R 163: 63 Punj LR 513.**

——S. 376 — Rape — Conviction — Uncorroborated testimony of prosecutrix — Validity.

Conviction for the offence of rape can be legally based on the uncorroborated testimony of the prosecutrix alone. The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction, but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the Judge, and in jury cases, must find place in the charge, before a conviction without corroboration can be sustained. Where the evidence of the prosecutrix is so natural and convincing and there is sufficient corroboration in the form of evidence of other prosecution witnesses the conviction can be legally sustained on the testimony of the prosecutrix. AIR 1952 SC 54, Ref. **1961 All WR (Sup) 16: 1961 All Cri R 153: 63 Pun LR 431.**

——S. 376 — Evidence of prosecutrix — Corroboration — (Evidence Act (1872), S. 133).

In a case of rape there is no rule or practice that in every case, there must be corroboration of the statement of prosecutrix before a conviction can be based thereon, but as a matter of prudence, the necessity of corroboration must be present to the mind of the Judge. In the case of a girl of tender years, other circumstances may render corroboration unnecessary, but in a case where it is found that the girl was used to sexual intercourse and where it is further found that she is not giving true facts, a corroboration of her statement is very necessary.

Held, in the circumstances of the case the fact that the girl was found in the house of the accused and that it was also found that she had sexual intercourse that evening was not sufficient corroboration of her statement. **1958 Raj LW 60: ILR (1957) 7 Raj 440.**

——S. 376 — Evidence of prosecutrix — Corroboration is necessary as a matter of prudence— (Evidence Act (1872), S. 133). **AIR 1955 NUC (Raj) 5037.**

——S. 376—Corroboration of complainant's story — There is no rule of practice that there must be in every case of rape, corroboration of evidence of the woman alleged to have been raped. The only rule of law is that this rule of prudence must be present to the mind of the Judge or the Jury as the case may be and appreciated by him or them. See Penal Code (1860), S. 375. **AIR 1955 NUC (Raj) 473 (DB).**

——Ss. 376 and 375 — Evidence — Corroboration of complainant's story — Rape case—Corro-

boration of girl's evidence is not essential — Only thing is that the Court must be aware of the rule of prudence that girl's evidence should be corroborated — (Evidence Act (1872), Ss. 114 (b) and 133). **AIR 1955 NUC (Raj) 473 (DB).**

——S. 376 — Evidence of prosecutrix — Necessity of corroboration.

In a rape case ordinarily it may not be safe to rely upon the uncorroborated evidence of the prosecutrix. There should be other evidence to corroborate her. But that cannot be a hard and fast rule in all cases. On the facts of a particular case an accused person can be convicted on the testimony of the prosecutrix alone provided the circumstances of the case show that the woman's story is true. AIR 1952 SC 54, Rel. on. **1955 Cr LJ 1525: AIR 1955 Sau 96 (97) (Pt A) (Pr 2).**

——S. 376 — Evidence of prosecutrix — Corroboration.

Ordinarily it is not safe to rely upon the uncorroborated evidence of the prosecutrix, and there should be evidence in support of her accusations. But it could not be a hard and fast rule in all cases and cases could be conceived where direct oral evidence may not be available but the circumstances of the case indicate that the woman's story is true in which event it would not be illegal to convict the accused. In valuing the evidence of prosecutrix in cases of rape extra care and caution should no doubt be exercised in order to see whether she has not got up a false story and is not involving an innocent person. **('51) 4 Sau LR 179 (DB).**

——S. 376 — Evidence — Uncorroborated testimony of prosecutrix — Accused cannot be convicted on such evidence. **AIR 1955 NUC (Trav-Co) 4123 (DB).**

——S. 376 — Evidence — Rape by several accused — Evidence of ravished woman unreliable with reference to some accused — It is unsafe to act on her evidence with respect to other accused unless it is corroborated by independent testimony either direct or circumstantial — Evidence Act (1872), S. 133. **52 Cri LJ 874: ILR (1951) Trav-Co 164: AIR 1951 Trav-Co 167 (169) (Pt B) (Prs 7, 8) (DB).**

6. Corroboration — Nature and extent of.

——S. 376 — Conviction — Proof of— Offence — Victim of outrageous attack — Not an accomplice — Corroboration of evidence necessary as a rule of prudence — The nature and extent of corroboration necessary vary with the circumstances of each case — Jury appraised of the rule of corroboration — It is for the jury to decide whether or not to convict without corroboration — Necessity. See Evidence Act (1872), S. 114. **1958 Cr LJ 273: AIR 1958 SC 143.**

——S. 376 — Evidence of prosecutrix a girl of 10 years — Necessity of corroboration must be in mind of judge before acting on her evidence — Conviction can be based upon her evidence — Evidence of mother relied on — (Evidence Act (1872), S. 133). **AIR 1952 Ajmer 54.**

——S. 376 — Evidence of complainant — Corroboration — Evidence Act (1872), S. 133.

In the case of rape of a girl of seven years old, one would not insist on the same amount of corroboration of the statement of the girl as in a case in which a grown up woman is alleged to have been raped. The circumstantial evidence consisting of the girl telling her parents just after the crime about the accused causing her injuries, admission of the accused having committed a wrongful act, injuries on the knees and elbows of the accused and blood stains on his dhoti are sufficient to corroborate the direct evidence of the girl. **1950 AMLJ 77: 52 Cri LJ 584: AIR 1951 Ajmer 60 (60) (Pr 3).**

——S. 376 — Evidence of victim of rape — Corroboration necessity and nature of — The rule of prudence requires that her evidence should be corroborated — The nature and the extent of corroboration that is required when it is not considered safe to dispense with it must necessarily vary with the circumstances of each case and also according to the particular circumstances of the offence charged. See Evidence Act (1872), S. 133. **1962 (2) Cr LJ 751: AIR 1962 Cal 641 (DB).**

——S. 376 — Rape case — Evidence of prosecutrix — Corroboration of — Presence of spermatozoa found in vaginal swab — It is corroborative evidence of the prosecutrix that the accused had committed rape on her even though it was not established that the spermatozoa was that of the accused. See Evidence Act (1872), S. 157. **1962 (2) Cr LJ 751: AIR 1962 Cal 641 (DB).**

——Ss. 376 and 375 — Conviction—Evidence and proof — Corroboration of victim's story — Not always essential — Nature and extent of corroboration required.

In a case of rape there is no rule of law that corroboration of the evidence of the raped girl is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the Judge, before a conviction without corroboration can be sustained. Even if corroboration were necessary it is not necessary that there should be independent confirmation of every material circumstance by independent evidence. All that is required is that there must be some additional evidence rendering it probable that the story of the victim is true and that it is reasonably safe to be acted upon. **1962 All WR (Sup) 103: 1962 All Cr R 462: 1961 Ker LT 933: 1962 (2) Cri LJ 668 (669) (Pt B) (Pr 9) (Kerala).**

——S. 376 — Applicability — Accused taking liberty with the girl with her consent — No offence under S. 354 — Medical evidence not corroborating prosecutix in the matter of commission of rape — Conviction of accused under Section 376 not proper. See Penal Code (1860), Section 354. **1961 MPLJ (Notes) 73.**

——S. 376 — Evidence of prosecutrix corroborated by direct evidence — Medical evidence also partly supporting it though not fully — Evidence should be taken as conclusive — Evidence Act (1872), S. 45 — Criminal P. C. (1898), S. 367.

Held on facts, that the evidence of the victim was fully supported by the evidence of direct witnesses. The medical evidence also partly supported her case. Her evidence could, therefore, be taken as conclusive. AIR 1936 PC 154; AIR 1960 SC 500, Rel. on; 21 CLT 527; 23 CLT 57, Disting. **Held** further, that it was unlikely that a married woman at the cost of her reputation would falsely invoke the accused persons in a rape case. **(1965) 31 Cut LT 909.**

——S. 376 — Offence under — Nature and extent of corroborative evidence — It must support statement of prosecutrix — Evidence Act (1872), Section 5.

It is well settled that while establishing an offence under S. 376, the nature and extent of corroborative evidence would necessarily vary according to the circumstances of each case. The nature of corroborative evidence should be such as to lend assurance to the fact that what is stated by the prosecutrix is reliable and may be

acted upon. **(1962) 4 Orissa JD 305: (1962) 28 Cut LT 385: (1962) 1 East LR (Orissa) 213.**

——**S. 376** — Evidence of the girl in case of rape — Corroboration by circumstantial evidence as running away of the accused soon after the occurrence of the offence, injuries on his person, presence of spermatozoa on his dhoti and sari of the girl, statement of the girl soon after the incident to several persons who came there — **Held,** that the sexual intercourse with the girl had taken place and it was the accused who committed it. See Evidence Act (1872), S. 157. **AIR 1955 NUC (Pat) 447.**

——**S. 376** — Nature and extent of corroboration — Four tests as to extent and nature of corroboraition applicable to evidence of accomplice laid down in AIR 1952 SC 54: 1952 Cr LJ 547, applied to complainant's evidence in case of rape. See Penal Code (1860), S. 375. **AIR 1955 NUC (Raj) 473 (DB).**

——**S. 376 — Rape — Evidence — Child victim — Statement of — Corroboration — Statement shortly after occurrence — If corroboation—Evidence Act (1872), S. 157.**

Even if the victim of the rape is a child of tender age, her statement should not be received and accepted as true without any corroboration. What is the nature of this corroboration cannot possibly be stated as it will always depend upon the facts of each case. The statement of the mother of the child victim consisting of what had been narrated to her by her daughter shortly after the incident, amounts to corroboation. What weight should be attached to the evidence is entirely a different matter. It may be valuable corroboration and, on the other hand, the evidence may be worth very little: AIR 1949 Cal 613, Approved. **1950 Raj LW 329: 1952 Cri LJ 502: AIR 1951 Raj 30 (32, 33) (Prs 7, 8) (DB).**

7. Age of girl — Proof of.

●——**S. 376 — Girl's age — Proof — Evidence.**
The only conclusive piece of evidence of the girl's age may be the birth certificate, but, unfortunately, in this country such a document is not ordinarily available. The Court or the jury has to base its conclusions upon all the facts and circumstances disclosed on examining all the physical features of the person whose age is in question, in conjunction with such oral testimony as may be available. Sidheswar Ganguly v. State of Bengal, **1958 SCJ 349: 1958 SCA 147: 1958 All WR (HC) 391: 1958 Pat LR (SC) 1: 1958 All Cr R 277: 1958 Mad LJ (Cr) 311: 1958 Cr LJ 273: 1958 SCR 749: AIR 1958 SC 143 (148) (Pt F) (Pr 10).**

——**Ss. 376 and 375 — Scope — Determination of age of girl raped — Ossification test — (Majority Act (1875), S. 3) — (Criminal P. C. (1898), Section 367).**

It cannot be laid down as a rule of law that in all cases of rape in order to determine the age of the girl raped the ossification test must be performed, though it is desirable, where possible. It cannot be said that the medical evidence should be rejected simply because there was no ossification test. AIR 1950 Cal 40f, Rel. on. **1957 Cr LJ 353: AIR 1957 Assam 39 (45) (Pt E) (Pr 21) (DB).**

——**S. 376** — In cases of rape age of prosecutrix must be postively established. **1962 MPLJ (Notes) 330: 1962 Jab LJ 840: 1963 (2) Cr LJ 354 (355) (Pt A) (Pr 2) (Madh Pra).**

——**Ss. 376 and 375, Fifthly — Ascertainment of age — Entry in Kotwari book is strong evidence.**
In the ascertainment of age, the entry in Kotwari book which is genuine can certainly be taken into consideration as a strong piece of evidence. **1962 Jab LJ 825: 1962 MPLJ (Notes) 325: 1963 (1) Cr LJ 686 (687) (Pt B) (Pr 6) (Madh Pra).**

——**S. 376 — Evidence as to age of girl — Opinion of medical expert — Ossification test — Value of.**
In fixing the age of a girl the growth of the teeth, pubic and axillary hairs, the growth of the breast, height and weight of the girl are all relevant considerations. Ossification test might be a better or surer test for determining the age, but Courts have acted on the opinion of the doctors arrived at without conducting any ossification tests and based on other factors indicated above. **1961 Ker LT 630: 1961 MLJ (Cr) 785: 1962 (1) Cr LJ 650 (652) (Pt B) (Pr 9) (Kerala).**

——**S. 376** — Age of girl — Burden of proof — Consent of girl alleged — Prosecution should establish that girl was below 16 years — Evidence showing age between 13 to 18 — Prosecution held failed to prove that girl was below 16 years. **AIR 1955 NUC (Pat) 447.**

8. Direction to jury.

——**Ss. 376 and 375 — Proof of age of girl — Charge to jury — Duty of Court — (Criminal P. C. (1898), S. 297).**

In a trial under S. 376, with the aid of the jury, on the question as to the age of the girl raped, the opinion of the doctor was placed before the jury, as also the evidence, as to the age of the girl. The Sessions Judge further told the jury that the doctor's opinion was not final. But he opined that a doctor was always in a better position to form an opinion about the age of a person than a lay-man.

Held, that it could not be said that there was no due warning as to the opinion of an expert. **1957 Cr LJ 353: AIR 1957 Assam 39 (43) (Pt D) (Pr 16) (DB).**

——**Ss. 376 and 366 — Scope — Distinction.**
Where the accused were charged under Ss. 376 and 366, it was the duty of the Judge to bring to the notice of the jury the fundamental difference between the ingredients of the offence under Section 366 and one under S. 376, I. P. C. Seduction may take the act out of S. 366, I. P. Code where the girl is above the age of consent but seduction would not necessarily take it out of S. 366, I. P. Code, where the seduction is, for instance, the result of the abuse of authority, or of force or other form of compulsion. **1955 Nag LJ 61: 1955 Cr LJ 819: ILR (1954) Nag 922: 1955 All WR (Supp) 142: AIR 1955 Nag 121 (124) (Pt C) (Pr 15).**

9. Charge under S. 376 disclosing facts under S. 354 — Conviction under S. 354 legal.

——**S. 376** — Criminal P. C. (1898), Ss. 207-A (6), 346 — Discharge under S. 207-A (6) — Effect — Accused charged under S. 354, I. P. Code — Magistrate finding that an offence under S. 376, I. P. C., disclosed sending it to another Magistrate — Latter discharging accused under Section 207-A (6), Cr P. C. — Charge under S. 354, I. P. C. does not survive. See Criminal P. C. (1898), S. 207-A (6). **1962 (1) Cri LJ 343 (Madh Pra)**

——**Ss. 376 and 354** — Several accused charged under S. 376 — Evidence of woman ravished not relied as regards some — No corroboration by independent evidence direct or circumstantial — Conviction of others—Not good — Charge giving particulars of ingredients of lesser offence under S. 354 — Conviction under S. 354 permitted.. (Cr. P. Code, S. 238). **52 Cr LJ 874: AIR 1951 TC 167 (DB).**

10. Attempt to commit rape.

——**Ss. 376 and 354** — Offence under — Distinction — If there is evidence to show that the accused is determined to gratify his passion at all events and in spite of resistance and with that desire he undresses the girl and attempts to have sexual intercourse with her, then it is difficult to hold that such an assault would fall short of attempted rape and would merely amount to an offence within the contemplation of S. 354, Indian Penal Code. **63 Pun LR 431: 1961 All WR (Sup) 16: 1961 All Cri R 153.**

11. Sentence.

——**S. 376** — Rape on girl of 10 years attended with brutality — Sentence of 4 years' R. I. — Additional sentence of whipping held uncalled for. **AIR 1952 Ajmer 54 (Pt C) (Pr 10).**

——**S. 376** — U. P. First Offenders Probation Act (6 of 1938), Section 4 — Applicability — Tests of —Accused 13 years of age committing offence under S. 376, I. P. C. — Order — Benefit of S. 4, held proper—Accused ordered to execute personal bond of Rs. 500 with two sureties—Section 4 U. P. First Offenders Probation Act applies where the offence is punishable not with death or inprisonment for life — Hence it applied in the instant case and it was not proper to send the boy of tender years to jail and thus come in contact with hardened criminals. See U. P. First Offenders Probation Act (6 of 1938), S. 4. **1962 All LJ 720: 1962 All Cri R 316: 1962 All WR (HC) 561.**

——**S. 376 — Sentence.**

What has to be considered by the Court in determining the question of sentence is the age when the person committed the offence, and not when he is being dealt with by the Court. The offence of rape under S. 376 is punishable with transportation for life.

Held, that taking everything into consideration a sentence of eight months' rigorous imprisonment was wholly inadequate and that a sentence of two years' rigorous imprisonment should have been awarded. **1954 All LJ 256: 1954 Cr LJ 1288: 1954 All WR (HC) 454: AIR 1954 All 580 (582) (Pt D) (Pr 13) (DB).**

——**S. 376** — Sentence — Accused young man of 20 years committing rape on a girl of 14 — Deterrent sentence though called for, sentence of five years reduced to one of three years — (Criminal P. C. (1898), S. 32). **1953 All LJ 171 (2): 1953 Cr LJ 1164: 1953 All WR (HC) 340: AIR 1953 All 502 (503) (Pt C) (Pr 10).**

——**S. 376** — Sentence — Sentence is a matter of discretion with the trial Court — Unless the sentence awarded is so grossly inadequate, the High Court normally will not interfere. See Penal Code (1860), S. 365. **1966 Cr LJ 210 (2) (Ker).**

——**S. 376** — Sentence — Accused of 21 years committing rape on girl of 11 years — Accused in jail as undertrial for 8 months — R. I. for 5 years — Period of 8 months to be taken into account — Direction held futile — Magistrate should have reduced sentence accordingly — Jail authorities cannot act on directions — Sentence reduced to 4 years' R. I. **AIR 1955 NUC (Him Pra) 1805.**

——**S. 376 — Sentence.**

Where in a rape case the victim was a young girl of ten years, and the culprit an adult of 39 years he was her school teacher and he took advantage of his position by inducing her to come inside the school room and commited rape, the consequence of which might as well be the complete ruin of the future life of the girl.

Held, that there was no extenuating circumstance in his favour and the sentence of 3 years' R. I. was a lenient one. **1957 Cr LJ 469: AIR 1957 Orissa 78 (80) (Pt D) (Pr 16) (DB).**

——**S. 376** — Sentence — Offence committed by school teacher on relation of his who was married — Conduct cannot be too severely condemned — Sentence of 2 years' R. I. if anything held clearly inadequate. **63 Punj LR 546: 1961 All Cr R 211: 1961 All WR (Sup) 32: 1962 (1) Cr LJ 843 (847) (Pt D) (Pr 10) (Punj).**

——**S. 376 — Sentence — Girl of immature age — Accused given in addition sentence of whipping.**

In cases of rape of girl of immature age, it is desirable, that a sentence of whipping should also be inflicted. **1952 Cri LJ 1136: 1952 Raj LW 95: ILR (1951) 1 Raj 871: AIR 1952 Raj 123 (128) (Pt F) (Pr 35) (DB).**

——**S. 376** — Sentence — Railway constable on duty committing rape on innocent girl by taking advantage of her helpless position — Sentence should be deterrent. **('51) 4 Sau LR 179 (DB).**

SECTION 377

——**S. 377** — Evidence — Reports of Chemical Examiner and Serologist after microscopical, microchemical and physical methods of analysis — Detection of blood-stains and spermatozoa on langot and underwear of the accused — Medical evidence about injuries found on bodies of the victim and the accused as well as statements of eye-witnesses supporting prosecution case — No inherent improbability in statements of prosecution witnesses — No reason for discarding their testimony — Offence held was fully established. **ILR (1965) 2 All 1 (DB).**

——**S. 377** — Evidence — Conviction on certain remarks in post-mortem report without evidence is not justified. **AIR 1955 NUC (Madh Bha) 4885 (DB).**

——**S. 377** — Evidence that of boy only — Medical evidence showing abrasion on anus due to unnatural intercourse — F. I. R. corroborating this testimony — Conviction of accused under S. 377 held proper. **1961 MPLJ 1204: 1961 Jab LJ 405.**

——**S. 377** — Evidence of girl — Where in a trial under S. 376, I. P. C. with the aid of three assessors two of them held the accused guilty under S. 376 and one of them held him guilty under S. 377, I. P. C. it is clear that all of them believed the story as put forward by the girl. It is an important circumstance to be considered in deciding whether the testimony of the girl should be accepted. **1957 Cr LJ 469: AIR 1957 Orissa 78.**

——**Ss. 377, 302** — Conviction under, upheld — Where the confessional statement of the accused though retracted, is in accord with the evidence produced to show that the accused was seen together last with the deceased, that there were traces of seminal fluid on the turban of the accused and that the anal margin of the deceased was torn: held that the circumstances and the evidence were sufficient to uphold the conviction. **AIR 1955 NUC (Punj) 4997 (DB).**

SECTIONS 378 AND 379

SYNOPSIS

(Penal Code (1860), Ss. 378 and 379.)

1. Scope.
2. Dishonest intention.
3. "Out of possession of any person".
4. "Moves that thing in order to such taking".
5. Consent.
6. Theft of aircraft.
7. Fish in water.
8. Removal of cattle turned loose.
9. Bona fide claim of right.
10. Cutting and removal of trees.
11. Removal of crops.
12. Removal of property under attachment.
13. Creditor removing property of debtor.
14. Temporary removal.
15. Master and servant.
16. Theft and other offences.
17. Evidence and proof.
18. Presumption under Sec. 114, Illus. (a), Evidence Act.
See also Evidence Act (1872), Section 114.
19. Procedure.
20. Conviction and sentence.

1. Scope.

●——**S. 378 — Essential ingredients of offence.**

Commission of theft consists in (1) moving a movable property of a person out of his possession without his consent, (2) the moving being in order to the taking of the property with a dishonest intention. The absence of the person's consent at the time of moving, and the presence of dishonest intention in so taking and at the time, are the essential ingredients of the offence of theft. K. N. Mehra v. State of Rajasthan, **1957 Cr LJ 552: 1957 MPC 566: 1957 SCA 364: 1957 All LJ 669: 1957 SCC 192: (1957) Mad LJ (Cr) 308: 1957 SCJ 386: 1957 All WR (HC) 480: 1957 SCR 623: AIR 1957 SC 369 (372) (Pt A) (Pr 7).**

——**S. 378 — Theft — Ingredients of.**

Before the offence of theft is made out it has to be established that (1) the accused was not legally entitled to the property alleged to be stolen and that the complainant was wrongfully deprived of the property, (2) the means employed to take possession were unlawful and (3) the taking was without consent.

In case of a hire purchase agreement, the law leaves the parties to their own agreement in respect of various incidents of the hire purchase agreement. If the parties specifically provide in their agreement for certain situations and prescribe a particular procedure which they are to adopt and specify the means which they may use to resolve those situations, they are bound by those provisions in the agreement. Such provisions in the agreement, if they do not contravene any provisions of the Contract Act, are lawful. None of the parties can later on complain if the agreed means are used. Where a hire purchase agreement relating to a truck does not postulate the hirer being the owner of the vehicle at any time prior to the payment in full of the amount due under the agreement and some instalments are admittedly due, it is not correct for the hirer-complainant to allege that he was the owner of the truck. In truth and in the eye of law the company which let out on hire the truck to the complainant is the owner of the truck. Therefore, on termination of the contract the owner is legally entitled and the complainant is not so entitled to the vehicle. The first ingredient of the offence of theft is, therefore, lacking. Further it cannot be said that means employed to take possession of the vehicle were unlawful because force was used or because violence resulted through the resistance of the complainant. Similarly where a condition of the hire-purchase agreement grants leave and licence to the owner to take possession of the vehicles, it amounts to the hirer giving his consent to the removal of the truck. A licence given by a hirer to seize the vehicle is irrevocable. Such licence is tantamount to hirer's consent to the owner taking the vehicle. Such taking cannot, in law, amount to taking without consent. 10 CB NS 713, Rel. on. **1964 All Cr R 483: 1964 All WR (HC) 674: 1965 All LJ 214.**

——**S. 378** — Theft — Bona fide claim — It is enough if claim is prima facie sustainable. **AIR 1955 NUC (All) 2694 (DB).**

——**S. 378** — Essentials of offence — Moving of the object from the person, who complains, without that person's consent, is the necessary ingredient to the offence of theft. **1961 (2) Cr LJ 453 (455) (Pt A) (Pr 7) (Andh Pra).**

——**S. 378** — Theft of goods entrusted with mercantile agent with full authority of disposal — Illus. (d) to Section 378 held did not apply See Sale of Goods Act (1930), Section 27. **AIR 1965 Cal 355.**

——**S. 378 — Even temporary loss to owner comes under Section 378.**

The loss contemplated by Section 378 I. P. C. need not be a total deprivation but it is enough if it is a temporary keeping out of the property from the person legally entitled AIR 1957 SC 369, Rel. on.

Where the accused by their act of removal of the lorry temporarily deprived the owner of the use of the lorry with a view to gain a temporary advantage for themselves in view of the strike at the workshop of the owner of the lorry:

Held, that the accused were guilty under Section 378, Penal Code. **1959 Ker LT 878: 1959 Ker LJ 1053: 1959 Ker LR 957.**

——**S. 379 — French Penal Code, Articles 379, 401 and 463 — Conviction and sentence under — Tenability.**

In correspondence with the concept of theft in the Indian Penal Code (Section 379, Indian Penal Code), the French Law (Article 379 of the French Penal Code) appears to contemplate that the abstraction or taking away should be without the knowledge and consent of the owner, in order to render it fraudulent. Where, on the contrary, the abstraction or taking away is with the knowledge and consent of the owner, the act of removal per se does not constitute theft, though the offence of criminal misappropriation might be involved in the subsequent dishonest conversion of the object removed to the use of the person removing the object, or its subsequent destruction detrimental to the true owner. Hence on the established facts on record, since the inference is irresistible that the present document was removed or taken away with the knowledge, consent and willingness of the complainant (respondent), this will not be theft, though it might be some other offence. There can be no doubt at all that by virtue of powers as the Court of Cassation, the Madras High Court can set aside a conviction which is based upon any erroneous application of the law to the facts and send back the concerned appeal for rehearing and fresh judicial disposal. **ILR (1964) 1 Mad 915: (1964) 2 MLJ 271: (1964) 2 Mad LJ (Cr) 562.**

——Ss. 379, 414 — Scope — Guilt depends not on mere ownership of property in any one but on its removal from possession of owner and appropriation. **AIR 1955 NUC (Mys) 945 (DB).**

——Ss. 378, 24, 380 and 395 — Applicability — Demolition of building and removal of material — No violence — Offence — Intention to cause wrongful loss — Presumption of.

Held, on facts that the offence fell not under Section 395 but under Section 380, namely theft. **Held,** further that since wrongful loss was caused to the owner, it must be presumed that the act was done with the intention of causing wrongful loss. Every man is presumed to intend the natural consequences of his act and it is from the consequence that the Court has often to presume the intention of the accused in doing a particular act. Consequently there was dishonest taking of the property within the meaning of Sec. 378 read with Section 24. **1961 BLJR 126: 1961 (2) Cr LJ 364: AIR 1961 Pat 362 (363, 364) (Pt A) (Prs 6, 8) (DB).**

——S. 378 — Ingredients of offence — Removal with consent of complainant obtained by deceit and coercion — Offence.

Theft is defined as the removing of any movable property out of the possession of any person without that person's consent and with dishonest intention. Thus, where the accused, a Municipal commissioner, gets some letters written by him to the Chairman on which some orders have been passed, from the custody of the municipal clerk for perusal and does not return them to the clerk, but on his insistence, passes a receipt to the clerk that he has taken away the letters, and the clerk is satisfied with the receipt, it is evident that the removal was not without the consent of the clerk. It may be that the clerk, who was the complainant, was coerced by the circumstances created by the accused in parting with the possession of the letters. Even if the consent was obtained by deceit, in which case the accused may be liable for any other offence, but surely he could not be liable for an offence of theft. **1960 BLJR 326: 1960 Cri LJ 1646: AIR 1960 Pat 546 (547) (Pr 5).**

——Ss. 378 and 379 — Scope — Temporary removal — Distinction in English law and Indian law stated. **AIR 1955 NUC (Raj) 4646 (DB).**

——Ss. 378 and 441 — Applicability — Bona fide claim of right — Dispute as to right to the crops — Proper procedure.

Where there is a bona fide dispute as to the rights of parties with reference to the land and the share of produce to which the parties are entitled, even if their actions are high-handed they could not be convicted of criminal trespass and theft. Such a dispute may best be decided in a civil Court and it will be improper to convict the parties of criminal trespass and theft if acting under such a "bona fide" belief they removed the crops in question. **1952 Cr LJ 1098: 5 Sau LR 97: AIR 1952 Sau 22 (23) (Pt B) (Pr 4) (DB).**

2. Dishonest intention.

——Ss. 378, 23 and 24 — Dishonest intention — 'Theft' and 'larceny' — Distinction.

A person can be said to have dishonest intention if in taking the property it is his intention to cause gain, by unlawful means of the property to which the person so gaining is not legally entitled or to cause loss, by wrongful means, of property to which the person so losing is legally entitled. The gain or loss contemplated need not be a total acquisition or a total deprivation but it is enough if it is a temporary retention or a temporary "keeping out". In this respect 'theft' under the Penal Code differs from 'larceny' in English law which contemplates permanent gain or loss. K. N. Mehra v. State of Rajasthan, **1957 Cr LJ 552: 1957 MPC 566: 1957 SCA 364: 1957 All LJ 669: 1957 SCC 192: (1957) Mad LJ (Cr) 308: 1957 SCJ 386: 1957 All WR (HC) 480: 1957 SCR 623: AIR 1957 SC 369 (372) (Pt C) (Pr 8).**

——S. 378 — 'Dishonestly'.

Accused harvesting crops, bona fide believing that they had title to it. It cannot be said that they acted "dishonestly" and they cannot be convicted under Section 378. **62 Cal WN 500: 1958 All WR (Sup) 98: 1958 All Cr R 326 (Cal).**

——S. 379 — Dishonest intention — Property removed in assertion of bona fide claim of right.

Dishonest intention cannot be said to be present when the property is removed in assertion of a bona fide claim or right though unfounded in law and fact. Again, if the claim is asserted in the presence of the complaint and the property is removed in his presence, it cannot be said that the property is not removed in the assertion of a bona fide claim of a right. It is, no doubt, true that a mere colourable pretence to obtain and keep possession of the property does not negative the dishonest intention but the question whether the removal of property was in assertion of a bona fide claim of right must be determined upon all the circumstances of the case, and a Court cannot convict unless it holds that the claim is a mere pretence. **1953 Cr LJ 600: ILR (1952) Madh Bha 36: AIR 1953 Madh Bha 79 (80) (Pr 3).**

——S. 379 — Dishonest intention — Intent to cause wrongful gain or loss — Absence of — Effect — Theft — Gist of offence.

Section 379 of the Indian Penal Code requires that the removal of the property from the possession of another should be with intent to cause wrongful gain to himself or wrongful loss to the other person. Dishonest intention is the gist of of the offence. It is the intention of the taker which must determine whether the taking or removing of a thing is theft. When a person is prosecuted for the offence of theft it is for the prosecution to show that he was acting dishonestly. If the circumstances show that he was acting in the assertion of a bona fide claim of right, a dishonest intention cannot be attributed to him and the offence of theft would not be made out. Even where the bona fides of the claim are doubtful, the benefit of the doubt must be given to the accused and the criminal case thrown out. Such a doubt however must be reasonable one. (Tests of reasonableness of doubt and bona fides discussed).

Taking by a person in assertion of a partnership and his right as a partner and claiming to be in joint possession when supported by reliable evidence as to claim of partnership is something more than a colourable pretence and justifies a doubt. **1953 Cr LJ 1035: 1953 Mad WN 293: (1953) 1 MLJ 290: AIR 1953 Mad 516 (517 to 519) (Pt B) (Prs 8, 10, 11, 13).**

——Ss. 378, 379 — Dishonest intention — Mere claim by accused is not enough — Claim must be honest one and not mere excuse to escape conviction. **AIR 1955 NUC (Pat) 444.**

——S. 378 — "Dishonestly".

Illegal seizure of bullock under distress warrant — Owner of bullock taking away bullock does not commit theft. **1953 BLJR 382 (1): AIR 1955 NUC (Pat) 441.**

——**Ss. 378, 379 — Dishonest intention — Removal by one party of crops raised by other party in possession — Offence.**

Where there is a bona fide dispute as to the ownership and possession of a certain piece of land between two parties and one of the parties removes the crops raised on the land by the borgadar of the other party, the first cannot be charged under Section 379 unless the title of the second party to the land and her right to raise the crops on the land was established. It is not a case where the dishonest intention, which was the most important thing to establish in a case of theft, could be presumed from the fact that the land was in the possession of the second party through the borgadar and that the said borgadar had raised the crops thereon. 1961 (1) Cr LJ 685 (Manipur), Ref. **1961 (2) Cr LJ 435 (Tripura).**

3. "Out of possession of any person".

——**S. 378 — Applicability — Out of possession of any person — Meaning of.**

When a person is not in possession of a field, he has no right to take the cattle of the accused to the cattle pound, and his act in taking them to the cattle pound amounts to theft. AIR 1946 Nag 221, Rel. on. **1953 All WR (Sup) 27: 1953 Cr LJ 1081: 1954 NLJ 429: AIR 1953 Nag 211 (212) (Pt B) (Pr 5).**

——**Ss. 379 and 23** — Applicability — Paddy land of accused surrounding pond belonging to Government — Pond used by villagers for wetting jute — Dispute between accused and villagers regarding use of pond—Accused openly removing jute belonging to complainant in latter's presence from pond and keeping it outside and telling complainant to take jute away — Complainant refusing to do so — Complainant held not kept out of possession of his property or deprived of his property — Hence, no wrongful loss caused to him within meaning of Section 23 — No question of theft, therefore, arose in the case. **1960 Cr LJ 1662: AIR 1960 Tripura 40 (42) (Pt C) (Prs 12, 14).**

4. "Moves that thing in order to such taking".

● ——**S. 378 — Moving of property — Offence — Intention.**

Since the definition of theft in Sec. 378 requires that the moving of the property is to be in order to such taking, 'such' meaning 'intending to take dishonestly' the very moving out must be with dishonest intention. K. N. Mehra v. State of Rajasthan. **1957 Cr LJ 552: 1957 MPC 566: 1957 SCA 364: 1957 All LJ 669: 1957 SCC 192: (1957) Mad LJ (Cr) 308: 1957 SCJ 386: 1957 All WR (HC) 480: 1957 SCR 623: AIR 1957 SC 369 (372) (Pt B) (Pr 8).**

——**S. 378 — Ingredients of offence — 'Moves that thing in order to such taking'.**

The offence of theft is completed when there is a dishonest moving of the property even though the property is detached from that to which it is secured. But for moving the property the offence of theft is not completed, though it may still be an attempt. The section does not require that the thing stolen should be moved to any place or to any extent, or indeed that it should have been permanently displaced. If the thief moves the goods even an inch from the place where they lay, the offence would be complete even though he may then leave them alone. But even then a single motion towards changing the place or position of in any manner or towards the carrying, conveying, drawing, pushing or the like from one place to another or impelling, shifting of the subject-matter of the theft is brought home to the accused, the offence of asportation (moving) is complete. The moving must necessarily be with intent to take it dishonestly or must be connected with that intention or otherwise there may be moving but no theft. **1958 Mad WN 359: 1958 All WR (Sup) 102: 1958 Cr LJ 1198: 1958 All Cr R 330: AIR 1958 Mad 476 (479) (Pt B) (Pr 15).**

5. Consent.

——**S. 378, Expln. 5, Illus. (m)** — Applicability — Implied consent — Students of Air Force Academy taking away plane without authority — Plea of implied consent on the analogy of Illus. (m) of Expln. 5 to Section 378 held of no avail. **AIR 1955 NUC (Raj) 4646 (DB).**

6. Theft of aircraft.

● ——**Ss. 378 and 23 — Unauthorised use of aircraft — Offence — Wrongful gain and loss — Intention.**

The taking out of aircraft by the accused for an unauthorised flight gives him the temporary use of the aircraft, for his own purpose and temporarily deprives the owner of aircraft, viz., the Government of its legitimate use for its purposes. Such use being unauthorised is a gain or loss by unlawful means. K. N. Mehra v. State of Rajasthan. **1957 Cr LJ 552: 1957 MPC 566: 1957 SCA 364: 1957 All LJ 669: 1957 SCC 192: (1957) Mad LJ (Cr) 308: 1957 SCJ 386: 1957 All WR (HC) 480: 1957 SCR 623: AIR 1957 SC 369 (372, 373) (Pt D) (Prs 8, 9).**

——**S. 378, Expln. 5, Illus. (m)** — Applicability — Implied consent — Students of Air Force Academy taking away plane without authority — Plea of implied consent on the analogy of Illus. (m) of Expln. 5 to S. 378 held of no avail. **AIR 1955 NUC (Raj) 4646 (DB).**

7. Fish in water.

● ——**S. 379 — Theft of fish from a tank — What constitutes — Dishonest intention — Taking away movable property under a bona fide claim of right — Whether good defence — Bona fide claim of right — Meaning of.**

The offence of theft consists in the dishonest taking of any movable property out of the possession of another without his consent. Dishonest intention exists when the person so taking the property intends to cause wrongful gain to himself or wrongful loss to the other. There can be theft of fish from a tank which belongs to another and, if the offender catches them without the consent of the owner and without any bona fide claim of right. The ordinary rule that mens rea may exist even with an honest ignorance of law is sometimes not sufficient for theft. A claim of right in good faith, if reasonable, saves the act of taking from being theft and where such a plea is raised by the accused it is mainly a question of fact whether such belief exists or not. An act does not amount to theft, unless there be not only no legal right but no appearance or colour of a legal right. By the expression 'colour of a legal right' is meant not a false pretence but a fair pretence, not a complete absence of claim but a bona fide claim, however weak. If there be in the prisoner any fair pretence of property or right, or if it be brought into doubt at all, the Court will direct an acquittal. AIR 1962 SC 586 and 2 East PC 659

and 1 Hale PC 509. Foll.: AIR 1926 Cal 149. Approved.

The accused who were recorded tenants of a tank caught fish only once for a ceremony in their house when there was a real dispute about possession of the tank between the complainant and the accused.

Held, on facts that in the present case there was an absence of the animus furandi (dishonest intention) and the circumstances bring this case within the rule that where the taking of movable property is in the assertion of a bona fide claim of right, the act, though it may amount to a civil injury, does not fall within the offence of theft. Chandi Kumar Das Karmarkar v. Abanidhar Roy. **1964 All LJ 66: (1964) 1 SCWR 92: (1964) 1 Ker LR 123: 1964 Mad LJ (Cri) 238: (1964) 1 SCJ 419: 1964 SCD 287: 1964 All Cri R 129: 1964 All WR (HC) 197: 1965 (1) Cri LJ 496: AIR 1965 SC 585 (587, 588) (Prs 4, 5, 10).**

——**S. 379** — Applicability — Fish in tank — Dishonest removal of — Offence under Section 379 is committed. **AIR 1955 NUC (Orissa) 2466.**

——**S. 379 — Fish in tidal and navigable river are not in possession of anybody — Third person catching fish without permission does not commit theft.**

In a tidal and navigable river the fish can always come from and go into the sea though for a time they live in the river. The fish are, therefore, in a state of nature and cannot be held to be the property of anybody until they are caught. The licensee of the fishery from Government obtains nothing more than a right to fish in a particular area. If anybody other than the licensee catches fish, his act may amount to an invasion of the right of the licensee to fish. But the intention of the third person cannot be characterized as dishonest because he does not intend to cause any wrongful loss to the licensee, the fish not being in his possession. The elements of the offence of theft are not made out in such a case: **51 Cri LJ 885: ILR (1949) 1 Cut 740: AIR 1950 Orissa 106 (106) (Pr 3) (DB).**

——**S. 378** — Applicability — Theft of fish in water — Fish in flowing streams not preserved or reared cannot be subject-matter of theft — Fish removed from space within Jalkar right of person to whom space belonged — It is theft **AIR 1955 NUC (Pat) 3243.**

8. Removal of cattle turned loose.

——**S. 378 — Out of the possession of any person — Removal of cattle turned loose.**

Per Gurtu and Sankar Saran, JJ. — Where the accused took a calf into his possession while it was let loose in the open for grazing and while it was not in the custody of any particular person, the act does not amount to an offence of theft. **1952 Cri LJ 904: AIR 1952 All 481 (484) (Pt C) (Pr 15).**

——**Ss. 378 and 403 — Applicability — Removal of cattle turned loose.**

Cattle turned out to graze in the pasture or jungle are still in the possession of the owner unless the contrary is shown and the taking of such cattle is theft and not criminal misappropriation. Where the taker sells it subsequently his dishonest intention while taking away the cattle can be inferred from that fact. ILR 8 All 51, ILR 9 All 348; ILR 17 Cal 852; AIR 1917 Pat 459, Distinguished. 4 BLR 626; AIR 1938 Rang 138; (1938) Rang LR 63, Rel. on. **1953 Nag LJ 600: 1954 Cr LJ 280: AIR 1954 Nag 55 (56) (Prs 9, 10).**

——**Ss. 378, 96, 97** — Illegal seizure of cattle — There is right of private defence of property. See Penal Code (1860), Section 96. **1963 (1) Cri LJ 308: AIR 1963 Orissa 52.**

——**S. 378** — Seizure of cattle not trespassing on land with intention to impound, without owner's consent is theft as wrongful loss is caused to the owner — Owner has right of private defence of property. See Penal Code (1860), Section 97. **1965 (1) Cri LJ 476: AIR 1965 Raj 72.**

9. Bona fide claim of right.

●——**Ss. 379 and 380 — Charge of theft — Bona fide claim of right is good defence.**

Where a bona fide claim of right exists it can be a good defence to a prosecution for theft. An act does not amount to theft, unless there be not only no legal right but no appearance or colour of a legal right. 2 East PC 659 and 1 Hale PC 509, Rel. on; AIR 1959 Andh Pra 530. **Reversed.** Suwari Sanyasi Apparao v. Boddepalli Lakshminarayana. **1962 Supp (1) SCR 8: 1962 SCD 146: 1962 (1) Cri LJ 518: 1962 All WR (HC) 284: 1962 All Cri R 177: (1962) 2 SCJ 469: (1962) 2 Mad LJ (SC) 109: (1962) 2 Andh WR (HC) 109: 1962 Mad LJ (Cri) 629: AIR 1962 SC 586 (588) (Pt A) (Pr 8).**

——**S. 379** — Inherent powers of High Court — Abuse of process of Court — Criminal proceedings started against applicants — Theft of truck alleged — Question of title in truck doubtful — Bona fide claim of title in truck — Proceedings quashed. See Criminal P. C. (1898), Sec. 561-A. **1964 (2) Cri LJ 369: AIR 1964 All 433.**

——**Ss. 378, 380 and 24 — Removal of press from complainant's possession dishonestly — Offence.**

The act of the accused in removing press from the possession of the complainant—Whether such removal takes place during the day or during the night and whether such removal is effected under a claim of right or not — is, in law, done dishonestly within the meaning of the Penal Code and hence all the ingredients that are necessary to be proved for establishing an offence under Section 380 are present. **1959 Cr LJ 1141: AIR 1959 Andh Pra 530 (532) (Pt B) (Prs 10, 11)**

[Reversed in AIR 1962 SC 586.]

——**Ss. 378 and 380 — Removal of press — Plea of bona fide removal.**

The removal of a press cannot be bona fide if, having regard to the provisions of the Press and Registration of Books Act the accused could not lawfully keep the press in their possession at the time of its removal. **1959 Cr LJ 1141: AIR 1959 Andh Pra 530 (532) (Pt C) (Pr 11).**

[Reversed on another point in AIR 1962 SC 586.]

——**S. 379 — Offence under — Essentials of — Criminal intention is the gist of the offence — Removal of movable property in assertion of bona fide claim or right does not amount to theft.**

Criminal intention is the gist of the offence of theft and it is the intention of the taker which must determine whether taking away of the property was a theft or not.

If a person takes another man's property, believing, under a mistake of fact that he has a right to take it, he cannot be guilty of theft. Where the removal of a movable property is in assertion of a bona fide claim of right, the act does not constitute a theft although it may amount to civil injury. **ILR (1964) 16 Assam 271 (DB).**

——**S. 379 — Hyderabad Penal Code, Section 315 — Claim of right — When ground of exemption**

from liability — Removal of property after claim has been negatived by High Court — Offence.

A bona fide claim of right is no doubt indicative of the absence of mens rea, but the claim must be bona fide. Where there is dishonest intention, removal under the pretext of a claim of right will not take the case out of Section 315, Hyderabad Penal Code. Where the claim of the accused has been negatived by the highest Court (the High Court) in the land, the act of the accused in removing the property is not justified as being in exercise of a bona fide claim of right, and hence the accused cannot escape liability to conviction for theft. **52 Cr LJ 495: ILR (1951) Hyd 454: AIR 1951 Hyd 78 (78) (Prs 3, 7) (DB).**

——**Ss. 379, 447** — Bona fide belief of title — Servant's liability — A vada owned by one M — Landlord of village thinking that original tenant had left and vada had reverted to him, entered vada and removed things of another person lying there — **Held,** it was a dishonest act and a belief in his title to vada could not justify the act — Landlord would be guilty under Sections 447 and 379 — For servant's liability, it must be shown that he intended to assist his master to cause wrongful loss to owner of vada. **52 Cri LJ 672: AIR 1951 Kutch 49 (49) (Prs 2, 3).**

——**S. 379** — Bona fide claim of right is good defence to prosecution for theft — But accused has to prove that his claim is bona fide. **1965 MPLJ (Notes) 123.**

——**S. 378 — 'Claim of right' — Mere assertion — Sufficiency.**

It is not the Indian Law that where property is removed in the assertion of a contested claim of right, however ill-founded that claim may be, the removal does not constitute theft. Such a claim might be asserted by anybody, even a thief, but it will confer on him no immunity. The assertion of a claim of right must be sufficient to create reasonable doubt that the property which is the subject of theft may not be long to or be in the possession of the complainant. **1958 Mad WN 359: 1958 All WR (Sup) 102: 1958 Cr LJ 1198: 1958 All Cr R 330: AIR 1958 Mad 476 (477) (Pt A) (Pr 9).**

——**S. 378 — Vendor removing goods sold, from possession of vendee to coerce latter to pay up balance of price.**

Where a person (vendor) acts in the bona fide belief that he has a right to take away a thing from the possession of another (vendee) and asserts such a right immediately after he is charged with theft, no offence is committed. If, on the other hand, he takes away a thing, not because he bona fide believes that he has a right to take away the thing, but with the intention of coercing the person in possession to do something, as, for example, pay the balance of the price of the thing even though he does not intend to deprive that person of thing permanently, he must be deemed to have committed an offence of theft. 22 Cal 4017 (FB), Rel. on. **52 Cri LJ 71: 1951 All WR (Supp) 9: 1951 Nag LJ 91: ILR (1951) Nag 59: AIR 1951 Nag 162 (164) (Pr 13).**

——**S. 379 — Removal under a bona fide claim of right — No offence.**

In a trial under Section 379, I. P. Code, a bona fide claim of right is always a good defence. In such cases, the Courts have to examine whether the removal by the accused was under a colour of right or in other words under a bona fide claim of right or the claim was merely a pretence. Where a bona fide claim of right exists it can be a good defence in prosecution for theft. An act does not amount to theft unless there be not only no legal right but no appearance or colour of a right. 1962 (1) Cr LJ 518: AIR 1962 SC 586, Foll. **(1963) 29 Cut LT 425.**

——**S. 378 — Theft — Removing bags of paddy forcibly from carts.**

The accused diverted the carts on their way to the destination and unloaded the paddy bags, one of which was found to be missing. In spite of protests made by the driver the accused persons obstructed the carts, forcibly dragged them away and unloaded the bags. It was contended for the accused that they had held back the paddy bags under a bona fide belief that they had a right to do so.

Held, that the activities on the part of the accused did not show that there was any intention on their part to restore the paddy bags to the owner nor was there any evidence to show that this was merely with a view to teach or harass the owner of the goods by way of a joke. On the facts disclosed in the case the accused were guilty of the offence of theft within the meaning of Section 378. AIR 1957 SC 369, Rel. on; AIR 1941 Pat 383; 25 Cal 416, Disting. **ILR (1959) Cut 111.**

——**S. 378 — Theft — Bona fide claim.**

Where a claim of title to property is honestly made and it is not merely colourable, the jurisdiction of the Criminal Courts is ousted; and a man who honestly believes that he is taking away property from his own land cannot and ought not to be convicted of theft. Whether the claim is honest must be decided by the Court from all the circumstances of the case and it should not convict unless it is in a position to say that the claim is a mere pretence. AIR 1917 Cal 648; AIR 1917 Pat 40; AIR 1929 Pat 86, Foll. **(1959) 25 Cut LT 249.**

——**S. 379 — Bona fide claim of right — Question of fact — Onus of proof — (Evidence Act (1872), Ss. 101 to 104).**

If a person taking any movable property does it under a bona fide claim of right he cannot be found guilty of the offence of theft. It, however, depends on the facts and circumstances of the case whether there was such bona fide claim of right as claimed. Onus is always on the prosecution to make out its case and the accused is not bound to prove that no crime has been committed. Once the Court is satisfied as to the prima facie possession of the complainant then, it remains for the accused persons claiming bona fide claim of right to satisfy that there was satisfactory evidence on which such bona fide right could be claimed.

The whole test is whether the removal of the property was in assertion of a bona fide claim of right, though unfounded in law or mere colourable pretence to obtain or keep possession of property. The circumstance that the accused persons were adjacent owners of plots of land contiguous to the plot in dispute by itself is not conclusive.

Where, in a case under Section 379, Penal Code for plucking and removing mangoes from a tree prima facie belonging to the complainant, the only circumstance on which the accused persons mainly relied was the fact of the complainant having said in evidence that the accused persons had entered their names with regard to the piece of land on which the mango tree stood at the time of kistwari operation:

Held, that the complainant's admission by itself was not sufficient to show that the accused persons had any bona fide claim of right. **(1959) 1 Orissa JD 414.**

——Ss. 379 and 427 — Bona fide claim of right.

The complainant's house encroached upon a tiny bit of land belonging to the accused. The parties had been in dispute regarding their boundary wall between their adjoining plots. The accused in the bona fide belief that the encroached portion belonged to them demolished it and took away the materials:

Held, that in the absence of proof of criminal intent, however reprehensible or high-handed their action might have been, the accused could not be convicted under Sections 379 and 427. **16 Cut LT 78: 51 Cri LJ 1333: AIR 1950 Orissa 196 (197) (Pr 5).**

——Ss. 378, 441 — Bona fide claim of right.

Where there is a bona fide dispute as to the rights of the parties, however, high-handed their action might be, the accused cannot be convicted of theft or criminal trespass. The dispute may be decided in a Civil Court and it will be improper to convict the accused of criminal trespass and theft, if acting under such a bona fide belief, they removed the crops on the land. AIR 1940 Pat 588 and AIR 1950 Orissa 196. Rel. on. **5 Sau LR 9: 52 Cri LJ 1008: AIR 1952 Sau 22 (23) (Pt B) (Pr 4) (DB).**

10. Cutting and removal of trees.

——S. 378 — Applicability — Lessee of residential premises cutting bamboos growing in compound — Offence held under Section 379. See T. P. Act (1882), Section 108 (o). **1957 All LJ 917.**

——S. 379 — Trees on Government lands cut and removed — Charge of theft — Proof.

Where in a case under Section 379 on charge of cutting and removing mango trees from a plot in a village, the defence was that the trees were in possession of a village deity and that they were cut and removed by the accused and some other persons for the purposes of the deity, the criminal Court has to address itself solely to the question of possession. Unless the prosecution can affirmatively establish that the disputed mango trees were in the possession of Government the question of commission of an offence under Section 379, I. P. Code, does not arise. Finding of a mere title of the Government is not enough. Their acts of possession must be established. **25 Cut LT 160: 1959 Cr LJ 1460 (1): AIR 1959 Orissa 207 (208) (Pr 5).**

——S. 379 —Tree cut by plot holder — (Trees — Ownership — Presumption) — (Evidence Act (1872), Section 114 — Ownership — Trees).

In the absence of positive evidence one way or the other, a presumption may well arise that the tree in a holding belongs to the person to whom the holding belongs and if the plot holder cuts the tree it cannot be said that he was actuated by any dishonest intention of causing wrongful loss to Government or wrongful gain to himself. **(1955) 21 Cut LT 575.**

——Ss. 378 and 379 — Accused belonging to Electricity Department cutting branches of tree causing obstruction to overhead electricity supply line without permission of Magistrate as required by Section 18 (3), Electricity Act — Such act done in good faith under orders of superior officers — Accused not guilty of theft — Electricity Act (1910), Section 18 (3). **1963 (1) Cr LJ 702: ILR 43 Pat 231: AIR 1963 Pat 207 (209) (Pt B) (Pr 4) (DB).**

11. Removal of crops.

——S. 379 — Scope — Removal of crops—Offence — Case on facts. **AIR 1955 NUC (Cal) 1198.**

——Ss. 378 and 22 — Standing crops if can be the subject of theft — Standing crop attached by Civil Court and entrusted with a person on Kychit — Property whether taken from his possession — Complaint may be filed by any person aware of the offence — Criminal Procedure Code (5 of 1898), Section 190.

Standing crop, so long as it is attached to the earth, is not 'movable property' as defined in the Code, but the moment it is severed from the earth its character is changed and it can become the subject of theft. In fact the very act of severance may constitute the offence of theft. O. 21, Rule 44 of C. P. Code provides that after the completion of the prescribed formalities 'the produce shall thereupon be deemed to have passed into the possession of the Court'. It is therefore clear that when the accused cut and removed the crop they were taking the property out of the possession of the Court. A complaint need not necessarily be made by the person injured, but may be filed by any person aware of the offence and the only exceptions to this rule are to be found in Sections 195 to 199 of the Code of Criminal Procedure where certain offences are stated to be complainable only by special persons. An offence under Secion 378 is definitely not one to which Sections 195 to 199 apply. Besides the person to whose custody the crop was entrusted and who had undertaken to indemnify the Court against its loss is the person who stands to lose by the accused's action. (1962) KLT 639, Foll. **(1965) MLJ (Cr) 119: 1965 Ker LJ 51: 1965 Ker LT 66: ILR (1965) 1 Ker 218.**

——Ss. 379, 447 — Applicability — Removal of crop — Accused claiming bona fide right in land — Burden of proof.

When it is asserted by a person accused of theft and trespass that the land in dispute was in his possession; that he had raised the crop in dispute and had a right to cut and remove the same and his assertion is supported by some evidence, he cannot be convicted for offences of trespass and theft unless it is proved beyond doubt that his claim is a mere pretence.

Where the alleged theft consists in the removal of the crop grown on the land, the most vital point to be investigated is as to which of the parties had raised the crop in question and the decision on the point will, in the majority of cases, enable the Court to come to a definite conclusion as to whether the claim of the accused person is made in good faith or is a mere pretence. 28 Mad 304, Rel. on. **1956 Cri LJ 902: AIR 1956 Mys 49 (50) (Pt A) (Prs 4, 5).**

——S. 379 — Cutting and forcibly removing standing crops from disputed land — Complainant in possession of land and growing crops on it at material time. Conviction of accused under Sections 147 and 379 maintained. See Penal Code (1860), Section 147. **1965 (2) Cri LJ 381: AIR 1965 Orissa 166 (DB).**

——Ss. 378 and 379 — Removal of crop under bona fide claim of right — Complainant getting possession of disputed land through Court and doing agricultural operations including transplantation on the entire land — Accused removing crop while further litigation was pending in higher Court — Claim of right not bona fide.

Where a bona fide claim of right exists, it can be a good defence to a prosecution for theft. An act does not amount to theft unless there would be not only no legal right but no appearance or colour of a legal right. By the expression "colour of legal right" is meant not a false pretence but a fair pretence, not a complete absence

of a claim but a bona fide claim, however weak : 1964 (1) SCJ 419 and AIR 1962 SC 587, Foll.

In cases where the alleged theft consists in the removal of crop grown on the land, the most vital question to be investigated is as to which of the parties had grown the crop. A decision on this point would enable the Court to come to a definite conclusion in majority of cases as to whether the claim of the accused was bona fide or mere pretence. The aforesaid dictum cannot, however, be treated as laying down a universal rule : AIR 1929 Pat 86, Foll.

Where the complainant on obtaining delivery of possession of the disputed land through Court did the agricultural operations including transplantation on the entire land and while litigation with respect to the land was pending in the higher Court, the accused removed the crop, the claim of the accused to the crop could not be said to be a bona fide one but amounted to a false pretence. **ILR (1965) Cut 188: 31 Cut LT 601.**

——S. 379 — Theft by removal of crop — Bona fide claim of right — Principle to determine.

If property is taken away under a bona fide claim of right it will not amount to an offence under Section 379, I. P. C. even though the claim may be ill-founded in fact or in law. In cases where the alleged theft consists in the removal of crops grown on land, the most vital question to be investigated is as to which of the parties had grown the crops and a decision of this point will, in the majority of cases, enable the Court to come to a definite conclusion as to whether the claim of the accused is made in good faith or is a mere pretence. This rule can at best be treated only as a general principle, and circumstances may vary wherein other factors may also be found necessary to be taken into consideration.

In the present case there being a clear finding by the last Court of facts that after the delivery of possession to the complainant of the land, the complainant had throughout remained in possession and had grown paddy crop which was the subject of theft, the accused are liable to be convicted under S. 379, I. P. C. AIR 1929 Pat 86, Applied. **31 Cut LT 679: (1965) 7 OJD 165: ILR (1965) Cut 234.**

——S. 378 — Removal of crop — Claim of accused not proved — Offence — Duty of criminal Court.

When the Criminal Courts had before it clear evidence of the witnesses, examined in the case, who proved the fact that the disputed land was cultivated by the complainant's men who also reaped the paddy sheaves and kept them in the khala of certain person, from where it was removed by the accused, and furthermore, when it was clearly established that the plea of the accused regarding their previous bhag cultivation of the land for a long span of years was not borne out by any acceptable material before the Magistrate and the accused had themselves admitted the fact of removal of paddy sheaves by them:

Held, that there was no reason why the Criminal Court should shirk its duty to decide the case on the materials before it, and leave the matter to be decided by civil Court. **1959 Cr LJ 212: AIR 1959 Orissa 19 (21) (Pt B) (Pr 7).**

——S. 379 — Removal of crop — Disputes as regards possession of land—Question for consideration before Criminal Court is whether prosecution had established beyond reasonable doubt that complainant had raised crops on disputed land. See Penal Code (1860), Section 143. **1956 Cr LJ 1421: AIR 1956 Orissa 212.**

——S. 378 — Applicability — Person harvesting green crops grown by another person on his land commits mischief and not only theft. See Penal Code (1860), Section 425. **1961 (2) Cr LJ 265 (2) (Pat).**

——S. 379 — Theft of crops — Defence — Bona fide claim of title to land alleged — Sufficiency.

In the case of a theft of crops from the land if the accused claims title to that land, that will not be a sufficient defence for him. He can only have a good defence if he can show that he has a bona fide claim to the crops which he had harvested and taken away. 4 Cal WN 190; AIR 1929 Pat 86, Rel. on. **1961 BLJR 541.**

——S. 379 — Applicability — Removal of crops by five accused from land belonging to complainant — No clear finding as to who had sown the crops — Accused held entitled to a benefit of doubt. See Penal Code (1860), Section 144. **AIR 1955 NUC (Pat) 3264.**

12. Removal of property under attachment.

——S. 378 — Dishonest intention — 'Out of possession of any person' — Attachment by Court and custodians appointed over crop — Accused cutting and removing crop — Offence.

Per Oak, J :— Where a Revenue Court had attached certain plots and certain persons were appointed as custodians of the crop standing on the plots and accused cut and removed the crop in spite of knowledge of the promulgation of the order of attachment:

Held, that since the possession of the crop had passed to the custodians, the removal of the crop by the accused knowing about the order of the attachment was dishonest and that the conviction of the accused under Section 379 was proper. 22 Mad 151: 8 MLJ 259, Distinguished. 8 All LJ 656, Rel. on. **1956 All LJ 607: 1956 Cr LJ 1176: 1956 All WR (HC) 459: AIR 1956 All 630 (632) (Pt B) (Pr 9) (DB).**

——Ss. 379 and 188 — Attachment of land under Section 145, Criminal P. C. — Removal of crops in violation of Court's order — Criminal P. C. (1898), Section 195.

Where the accused were parties to the proceeding under Section 145, Cr. P. C. and they removed the paddy in violation of the order of the Court attaching the land with the crop on it, the removal of the paddy standing on land attached and taken possession of by the Court under Section 145, Cr. P. C. amounts to theft. The effect of the attachment was that the property passed into custodia legis. As there was a dispute about the land and the crops thereon and attachment had been effected with knowledge of the accused, dishonest intention is a very legitimate inference from facts proved. It might have been possible to convict the accused even under S. 188, Penal Code, but the omission if any, in this respect did not affect the legality of the accused's conviction under Section 379, Penal Code and the trial of the accused for this offence was not barred by reason of the absence of a complaint from the Court which attached the land as it was not one of the offences to which Section 195, Cr. P. C. applies. 2 Cal 419; AIR 1943 Pat 124, Rel. on. 41 CWN 1325, Disting. **1952 Cri LJ 994: AIR 1952 Assam 109 (110) (Pr 8).**

——S. 378 — Actual seizure of a bus under conditional offer of attachment — Bus taken possession of from accused — Order of attachment not made against the accused — Accused removing

the bus after such seizure — Commits no offence either under Section 392 or Section 378 as removal cannot be said to be dishonest. See Penal Code (1860), Section 392. **(1965) 2 Ker LR 418.**

——S. 379 — Criminal P. C. (1898), Sections 144, 145 — Dishonest removal of crops from land which is subject-matter of orders under Ss. 144 and 145, Criminal P. C. amounts to theft.

When there is an order under S. 144, Criminal P. C. prohibiting the parties from going upon the disputed lands and a person dishonestly cuts and removes crops from that land, he dishonestly takes the crops out of the possession of the party who may be held to have been in possession and to have grown the crops before the order under Section 144 was passed and his act amounts to theft. AIR 1949 Cal 632, Dissented from. So also, when an order under Section 145, Cr. P. Code is in force, the person who dishonestly removes crops from the land in question takes it out of the possession of the Court and apart from other offences which may, in different circumstances, be held to have been committed, the party removing the crops may certainly be convicted of theft. **1963 BLJR 211.**

——S. 379 — Scope — Removal of property wrongfully attached by owner — No offence.

Where in execution of decree against certain person's property belonging to another person is being wrongfully taken away by the bailiff and the owner and his associates take back that property, that is not an offence under Section 379: AIR 1941 Lah 217 and AIR 1915 Sind 25 (1), Foll. It is no doubt true that the proper course for the accused would have been to file objection under Order 21, Rule 58, Civil P. C., in the execution Court but simply because they did not do it and rescued their own property, it cannot be said that they acted dishonestly. **ILR (1958) 8 Raj 1109: 1959 Raj LW 279: 1959 Cr LJ 1475: AIR 1959 Raj 289 (289, 290) (Prs 5, 8).**

——S. 379 — Movable property under attachment — Removal by owner.

It can never be lawful for a person, even if he is the owner of an animal, to take it away after attachment from the person to whom it is entrusted without recourse to the Court under whose order the attachment has been made. Where the animals (buffalo and calf) were attached by the amin and were being taken away by the Supperddar when the accused (owner) arrived on the scene and drove away the animals by hitting at them with a lathi and thus removing them from the possession of the Supperddar, and it was proved that the accused knew that the property had been attached, the act amounts to a theft under Section 379. The removal amounts to removing attached property dishonestly. **1956 Cr LJ 1430 (2): 1956 Raj LW 490: ILR (1956) 6 Raj 772: AIR 1956 Raj 190 (191, 192) (Pt A) (Prs 10, 17) (DB).**

13. Creditor removing property of debtor.

——Ss. 378, 370 — Removal by creditor of movable security for debt from debtor without debtor's consent amounts to theft.

A creditor who takes from the possession of his debtor without his consent movable property which is at best a security for the debt commits theft. The creditor cannot dispossess the debtor without his consent, in order that he may be coerced into payment of the amount of the debt. There is no question of bona fide exercise of right in such cases. The creditor's remedy is to sue in a Court of law; he cannot take law in his own hands. A plea by the creditor that he was not causing a wrongful gain to himself on the assumption that he was the owner of the property, is not enough. The creditor is certainly causing a wrongful loss to the debtor. AIR 1930 Bom 159; AIR 1951 Nag 162, Rel. on. **1963 Mah LJ 674: ILR (1963) Bom 524.**

——Ss. 379 and 426 — Offence under — What amounts to — Compelling a person to pay his lawful dues by withholding his property — If an offence.

In order to constitute an offence of theft or mischief the necessary criminal intention has to be established. In the absence of such an intention the mere fact that a person removed another's property with a view to compelling the other to pay up his lawful dues, such as rent, etc., will not make him an offender. Forcible removal of property of another may amount to a tort but not a penal offence unless it is accompanied by the intention to cause wrongful loss or obtain wrongful gain. **(1960) 1 MLJ 84: 1960 Mad WN 33: 1960 MLJ (Cr) 62: 1960 All WR (Supp) 9: 1960 All Cr R 81: 1960 Cr LJ 492: AIR 1960 Mad 186 (187) (Pr 4).**

——S. 378 — Seizure of camel of debtor to enforce repayment of debt amounts to theft. **1959 Raj LW 446: 1959 Cri LJ 908 (1): ILR (1959) 9 Raj 497: AIR 1959 Raj 148 (148) (Pr 3) (DB).**

14. Temporary removal.

●**——S. 378** — A, a Superintendent in Government Office taking a certain file from office to his house and making the same available to B and then returning the same after replacing certain papers by other papers, to office — A held was not in legal possession of the file — To commit theft one need not take movable property permanently out of the possession of another with the intention not to return it to him. A unlawfully took the file from the department and for a short time he deprived the head of the Department of the possession of the said file A temporary period of deprivation or dispossession of the property of another causes loss to the other — A person acts dishonestly if he temporarily dispossesses another of his property — A's case therefore fell within four corners of Section 378. Pyare Lal Bhargava v. State of Rajasthan, **(1963) 1 SCWR 138: 1963 Mad WN 202: (1963) Supp (1) SCR 689: 1963 All LJ 459: 1963 BLJR 407: 1963 SCD 341: 1963 All WR (HC) 374: 1963 All Cr R 192: 1963 (2) Cr LJ 178: AIR 1963 SC 1094 (1097) (Pt D) (Pr 8).**

——S. 378 — Even temporary loss to owner comes under S. 378.

The loss contemplated by Section 378, I. P. C. need not be a total deprivation but it is enough if it is a temporary keeping out of the property from the person legally entitled: AIR 1957 SC 369, Rel. on.

Where the accused by their act of removal of the lorry temporarily deprived the owner of the use of the lorry with a view to gain a temporary advantage for themselves in view of the strike at the workshop of the owner of the lorry:

Held, that the accused were guilty under Section 378, Penal Code. **1959 Ker LJ 1053: 1959 Ker LT 878: 1959 Ker LR 957.**

15. Master and servant.

——S. 379 — Accused dishonestly removing 'gitti' from quarry owned by Ordnance Factory — Offence of theft committed even though accused be acting as servant of some one else. **1963 MPLJ (Notes) 61.**

——**S. 379 — Servants of forest contractor felling and removing trees of reserve forest — Liability of contractor — Madhya Bharat Forest Act (73 of 1950), S. 26 (1) (f).**

Unless the statute either expressly or by necessary implication rules out mens rea as a constituent part of a crime, a defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind. Dishonest intention is an essential ingredient of the offence under Section 379, Penal Code. The offence under Section 26 (1) (f) of the Madhya Bharat Forest Act also requires intent or a particular state of mind. There is nothing in the object of the Act or in the provisions thereunder ruling out mens rea, either expressly or by necessary implication, as an essential element of the offence. Hence where the servants of a forest contractor felled and removed some trees of the reserve forest area, the contractor is not criminally liable under Section 379, Penal Code and Section 26 (1) (f) of the Madhya Bharat Forest Act for the acts of his servants. AIR 1951 SC 204 and AIR 1947 PC 135, Rel. on. **(1960) MPLJ (Notes) 98.**

——**Ss. 379 and 380** — Creditor through his servant seizing radio of debtor openly, claiming it as security for debt — Charge of theft — Defence of bona fide claim of right — Claim of right though invalid in law not altogether false pretence — **Held,** seizure might be a tort justifying claim in damages but not act of theft — **Held,** further, servant having acted under directions of master his conviction also, could not be sustained. **(1965) All WR (Supp) 3: 78 Mad LW 165: 1965 All Cr R 176: 1965 (2) Cr LJ 652 (2): AIR 1965 Mad 483 (484) (Prs 6, 6a).**

——**Ss. 378 and 379** — Master and servant — Servant removing crop at his master's bidding — Servant would not be liable for offence only if it is shown that he did not participate in his master's knowledge of dishonest nature of the act. AIR 1929 Pat 86, Ref. **ILR 1965 Cut 188: 31 Cut LT 601.**

16. Theft and other offences.

●——**S. 378** — Illegal seizure of cattle purporting to be under Section 10, Cattle Trespass Act — Does not amount to theft — Owner of cattle has no right to use force to rescue them — Persons seizing cattle held committed no offence in resisting attack by owner's party with arms and lathis. See Cattle Trespass Act (1871), Sec. 10. **1965 (2) Cri LJ 18: AIR 1965 SC 926.**

●——**S. 378** — Dishonest abstraction of electricity is an offence against the Act under Section 39, and not under Penal Code — Section 50 of the Indian Electricity Act (1910) applies to the offence. See Electricity Act (1910), Section 39. **1965 (1) Cri LJ 605: AIR 1965 SC 666.**

——**S. 378** — Applicability — A receiving B's insured cover as his own — Allegation that it contained more amount — A ready to return cover with amount specified thereon — Nature of offence — **Held,** A could not be convicted under Section 403, I. P. C. or Section 68 of Post Offices Act. **AIR 1955 NUC (All) 1743.**

——**S. 379** — Electricity Act (1910), Sections 39 and 50 — Offence specified in Section 39 is punishable under Section 379, I. P. C. — Section 50 does not apply — AIR 1936 All 742, Dissent. from. See Electricity Act (1910), Section 39. **1956 Cri LJ 701: AIR 1956 Bom 354 (DB).**

——**Ss. 379, 394, 321** — Beating resulting in injuries followed immediately by theft — Accused guilty under Section 394. See Penal Code (1860), Section 394. **1955 Cri LJ 1346: AIR 1955 Cal 527 (DB).**

——**S. 379** — Offence under Section 39, Electricity Act — Section 379, I. P. C. need not be tacked on. See Electricity Act (1910), Section 39. **(1965) 2 Ker LR 367.**

——**Ss. 379 and 411** — Kutch Penal Code, Sections 126 and 145 — Offence of theft is distinct from offence of receiving stolen property — Person proved to have committed theft cannot be convicted for receiving stolen property. **AIR 1950 Kutch 88 (88) (Pt A) (Pr 5).**

●——**Ss. 378 and 379** — Offences of theft under Section 39, Electricity Act is one under Penal Code — Section 50, Electricity Act is not attracted. See Electricity Act (1910), Section 39. **1964 (2) Cr LJ 303: AIR 1964 Mad 367 (FB).**

[**Overruled** in AIR 1965 SC 666.]

——**S. 379** — Abstraction of electric energy punishable under Section 379, I. P. C. read with Section 39 of Electricity Act is offence against Electricity Act — Provisions of Section 50 of the Act should be complied with for prosecution to be launched. **1962 (2) Cr LJ 764: AIR 1962 Mad 497.**

[**Overruled** in AIR 1964 Mad 367 which itself was **overruled** in AIR 1965 SC 666 (668, 669) (Pt A) (Prs 6, 8, 9).]

——**S. 379 — Applicability — Ferae naturae — Theft of deer in reserve forest — Offence.**

A deer in the reserve forest is ferae naturae and therefore it cannot be said to be one in the possession of any person so as to make the removal of it theft within the meaning of the section. Till they are tamed and domesticated and brought to the custody of a person, whether it be Government or any other individual, such animals cannot be said to be in the possession of the Government and if they are not in the possession of the Government the offence of theft cannot be committed. The proper course in a case of this nature is not to proceed against the offenders for the offence of theft but to prosecute them for offences under the Forest Act which makes ample provision for such trespass and shooting of wild animals inside a forest. **(1954) 1 MLJ 286: 1954 Mad WN 122: 1955 Cri LJ 817 (1): ILR (1955) Mad 795: 67 Mad LW 412: AIR 1955 Mad 299 (300) (Pr 5).**

——**S. 379** — Scope — If controlled by Mysore Land Revenue Code, Section 43 — Offence falling under both sections — Trial and conviction under Penal Code is not illegal. See General Clauses Act (1897), S. 26. **52 Cr LJ 188: AIR 1951 Mys 25.**

——**S. 379** — Theft of copper wire belonging to Telegraph Department — Accused should also be convicted under Section 5, Telegraph Wires (Unlawful Possession) Act (1950). **(1962) 28 Cut LT 185.**

——**S. 379** — Existence of artificial means of abstraction of electrical energy — Amounts to prima facie evidence of theft within Section 378, I. P. C. — Prosecution proving existence of such means — Burden shifts to accused to prove his innocence — Loosening of top nut of meter and exposing stud hole — Amounts to such means of abstraction — Consumer responsible for such act — **Held,** guilty under Section 39, Electricity Act read with Section 379, I. P. Code. See Electricity Act (1910), Section 39. **1965 (1) Cr LJ 194: AIR 1965 Pat 76.**

——**Ss. 379 and 378** — Electricity found to have been dishonestly consumed in house by artificial

means — Person registered as consumer is liable for offence of theft of electric energy — Section 50, Electricity Act does not apply. See Electricity Act (1910), Ss. 39 and 50. **1964 (1) Cr LJ 472 (Pat).**

[**Overruled** on another point in AIR 1965 SC 666.]

——**Ss. 379, 23 and 24** — 'Dishonestly' — Accused taking away cow from possession of complainant without his consent for compelling him to repay loan — Theft is committed. See Penal Code (1860), S. 23. **1960 Cri LJ 1650: AIR 1960 Pat 518.**

——**S. 379** — Applicability — Force used in carrying goods — Offence is robbery and not theft. See Penal Code (1860), Section 390. **1958 BLJR 238.**

——**Ss. 379 and 390** — Scope — Theft when becomes roberry. It is not in every case where theft has been committed as well as assault, that the transaction becomes robbery. The assault must be found to have been committed for the purpose of committing the theft, or carrying away or attempting to carry away property obtained by theft. **1953 BLJR 330: 1954 Cr LJ 215: AIR 1954 Pat 157 (159) (Pt C) (Pr 5) (DB).**

——**Ss. 378, 403, 405** — Theft and criminal misappropriation of criminal breach of trust — Distinction, pointed out. See Penal Code (1860), Section 403. **1953 Cri LJ 842: AIR 1953 Pat 100.**

——**S. 379** — Applicability — Theft or robbery — If after committing theft offenders made good their escape along with property stolen and if at that stage fear of death is proved, case will not be one of robbery but still be one of theft. **AIR 1955 NUC (Punj) 3440.**

——**S. 379** — Tenancy Laws — Rajasthan Abolition of Zamindari and Beswedari Act (8 of 1959), Sections 7 (2) and 9 — Grant of lease after 1st January, 1953, of forest in Zamindari estate for a period not exceeding 3 years — Vesting of estate in the State on Abolition of Zamindari — Dispute regarding forest not settled — Lessee cannot be prosecuted under Section 379, I. P. Code. See Tenancy Laws — Rajasthan Abolition of Zamindari and Beswedari Act (8 of 1959), S. 7 (2). **1962 Raj LW 605: AIR 1963 Raj 35.**

——**Ss. 378, 392** — Theft for robbery — Accused originally intending to cause the complainant hurt only without intention of depriving him of property — While departing accused taking away Murkis and Bhakla by snatching them from person of complainant — Accused voluntarily causing hurt — Offence held robbery and not simple theft. See Penal Code (1860), Sec. 392. **1955 Cri LJ 1285: AIR 1955 Raj 147.**

——**Ss. 379, 390, 394, 397** — Theft when amounts to robbery pointed out. See Penal Code (1860), Section 390. **AIR 1953 Sau 85 (DB).**

17. Evidence and proof.

——**S. 378** — Evidence — Circumstantial evidence — **Held,** that the circumstantial evidence was only consistent with the guilt of the accused — Murder undoubtedly was cold blooded and committed out of pure greed —Accused was properly convicted under Sections 302 and 379. **1954 Cri LJ 743: AIR 1954 SC 279 (280) (Pr 5).**

——**Ss. 378, 379, 34 and 411 — Applicability — Evidence — (Evidence Act (1872), S. 114).**

To bring home a charge under Section 379, it is not necessary for the prosecution to prove that the physical act of lifting the stolen property was committed by an offender himself. It is sufficient if it is established by evidence or circumstances that he shared the intention of committing theft with the actual thief. If a stolen article almost at the very moment when it is stolen is handed over by the thief to a companion who was with him at the time of the commission of the offence, the proper inference to be drawn from this circumstance is that the second person was in concert with him and not that he merely received the stolen property. **1957 Cr LJ 1060: ILR (1957) 1 All 494: AIR 1957 All 678 (680), (Pt B) (Pr 5).**

——**S. 379 — Mens rea — Proof — Necessity.**

Taking away a thing without the consent of the owner and depriving him of the use of it, by itself, is not sufficient to convict a person of an offence of theft. There must be intention to take the thing dishonestly. Where a section specifically makes intention one of the ingredients of the offence, (such as under Sec. 379, Penal Code), that ingredient would not be satisfied by the application of the maxim that everyone must be taken to intend, the natural consequences of his act. 33 MLJ 729: AIR 1918 Mad 136 (2) and 37 Cr LJ 456 (Oudh), Rel. on. The question of fraudulent and dishonest intention is a question of fact. **1960 Andh LT 436: 1960 Cr LJ 1414: AIR 1960 Andh Pra 569 (570, 571) (Pt B) (Prs 6, 7).**

——**S. 379 — Evidence and proof — Evidence of eye witnesses — Recovery of stolen goods — Evidentiary value.**

In a case of theft depending on the evidence of eye witnesses, recovery of the stolen goods is of little importance and, in the case of unidentifiable goods is altogether immaterial. **(1960) 2 Ker LR 431**

——**S. 378 — "Dishonest intention" — Burden of proof.**

Removal by accused must be with intent to cause wrongful gain to accused or wrongful loss to another — Burden is on prosecution to show that accused was acting dishonestly — Accused shown to be acting in assertion of a bona fide claim of right — No dishonest intention can be attributed — Mere assertion of bona fide claim is not enough — There must be facts or evidence in order to make out the claim of bona fide right — Proof must be adequate and fair, though not necessarily acceptable or adequate in Civil Court — Where there is clear plea and evidence of bona fide title the prosecution should be dismissed and complainant left to civil remedy—Criminal case should also be thrown out when there is doubt regarding the bona fide claim, since the benefit of doubt should go to the accused — But the doubt must be a reasonable one — Test of adequacy of bona fides of claim indicated — Bona fide claim of partnership set up, supported by witnesses — Complainant not making out case that joint possession was converted into exclusive possesion by accused — No case of theft held made out. **(1953) 1 MLJ 290: 1953 Mad WN 293: 1953 Cr LJ 1035: AIR 1953 Mad 516 (517 to 519) (Pt B) (Prs 9, 10, 11, 13).**

——**S. 379** — Evidence of dishonest intention of accused — Previous judgment convicting accused for same offence is relevant and admissible to prove such intention. See Evidence Act (1872), Section 14. **(1961) 2 Cr LJ 787: AIR 1961 Manipur 43.**

——Ss. 378, 23 and 24 — Theft — Ingredients — Dishonest intention — Proof — Prosecution has to prove either wrongful loss to owner or wrongful gain to accused — Accused can set up bona fide claim of right to property. **1961 (1) Cr LJ 685 (686, 687) (Prs 4, 6 to 9) (Manipur).**

——S. 379 — Evidence — Possession of stolen property — Presumption — Nothing in statements of accused to show or suggest that stolen articles could be deemed ever to be in possession of accused — No burden is cast on him to show how he came to know where stolen articles were found. **AIR 1955 NUC (Mys) 924.**

——S. 379 — Complaint of theft — Essentials which prosecution must prove — Theft of crops — Material factor to be considered is as to who had grown the crop.

In cases of offence under Section 379, the prosecution must prove beyond all reasonable doubt that the complainant was in possession of the property which is the subject of theft. In cases of theft of crops, as to who had grown the crops, is a material factor to be considered. **(1965) 31 Cut LT 749.**

——S. 379 — Removal of property based on assertion of bona fide claim of right — Does not constitute theft — Essence of offence.

To sustain a conviction under Section 379, it is necessary to prove the dishonest intention to take property out of the possession of another. Taking of property under the assertion of a bona fide claim of right does not constitute theft. If the claim is a mere colourable pretence to obtain or to keep possession of such property and is not made in good faith, it will not be available as a defence. This will, however, depend upon the facts of each case. It is the essence of the offence that the removal must be with a dishonest intention to make a wrongful gain for himself and to cause a wrongful loss to the other. The existence of a bona fide claim of right can be a good defence in a prosecution for theft, whether the claim is a bona fide one or not, has to be examined in the background of the facts of each case. AIR 1962 SC 586; AIR 1957 SC 369, Foll. **(1965) 31 Cut LT 749.**

——S. 379 — Offence under — Proof of possession, an essential ingredient — Criminal Procedure Code (1898), Section 417.

In a case under Section 379, I. P. Code, where the charge is that the accused removed paddy crop from the field in possession of the complainant proof of possession is an essential ingredient. Where though it was alleged that the field in question was taken possession of by the complainant through the civil Court after obtaining a declaration of title in his favour, no one was examined to prove the fact of his possession from the date of the decree to the date of alleged offence, even though one of the witnesses to delivery of possession through the Court was still living and the accused produced one of the cosharers of the disputed land to show that he was in actual possession, the finding of possession against the complainant cannot in any sense be called unreasonable. **(1963) 29 Cut LT 425.**

——S. 379 — Evidence — Dishonest intention not proved — Accused entitled to benefits of doubt. See Penal Code (1860), Section 143. **1956 Cr LJ 1421: AIR 1956 Orissa 212.**

——S. 378 — Dishonest intention — Proof.

It is not a correct statement to say that when the accused does not plead any bona fide claim to property he should be held guilty of dishonest intention. It is for the Court to see whether, irrespective of the plea of the accused, the prosecution has made out dishonest intention necessary to constitute the offence of theft. **AIR 1955 NUC (Orissa) 3230.**

——S. 379 — Evidence and proof — Evidence of witnesses not named in complaint — Testimony of — Possession of complainant not proved — Benefit of doubt held could be given — Evidence Act (1872), Section 3 — Criminal P. C. (1898), Section 367. **1963 BLJR 251.**

——Ss. 378, 379 — Evidence and proof — Accused undefended — Prosecution amply establishing guilt — Accused cannot be acquitted merely on ground that prosecution witnesses were not cross-examined. Evidence Act (1872), Secs. 137, 138 — Criminal P. C. (1898), Section 256. **(1964) 66 Pun LR 1105.**

——Ss. 378 and 379 — Dishonest intention — Ingredients of theft having been proved it lies on accused to show that there had been no dishonest intention — (Evidence Act (1872), Section 114). **AIR 1955 NUC (Raj) 4646 (DB).**

——Ss. 378, 441 — Questions of title and past possession — Relevancy.

In a case of theft of crop and criminal trespass question of title and of past possession will incidentally arise and cannot be ignored altogether. They become relevant for the purpose of appreciating the evidence of the present possession of the land: AIR 1944 Pat 274, Rel. on. **5 Sau LR 9: 1952 Cri LJ 1098: AIR 1952 Sau 22 (22) (Pt A) (Pr 2) (DB).**

——S. 379 — Proof of theft — Burden of proof — Accused removing jack-fruits, etc., from ail of complainant — Plea of bona fide claim would be good defence — Theft can be established only by proof of dishonest intention of accused and not by proof of illegality — (Evidence Act (1872), Sections 101 to 104). **1965 (2) Cr LJ 810: AIR 1965 Tripura 42 (43) (Pr 9).**

——Ss. 378, 379 — Claim of right — Mere removal from possession of complainant not sufficient — Dishonest intention on part of accused must be proved — In order to prove dishonest intention question of title is relevant.

To prove an offence of theft, dishonest intention of the accused in removing the property has to be established. In order to prove dishonest intention the question of title to the property certainly will enter into the picture. A bona fide claim of right would be a good defence in a charge of theft. Theft can be established only by proof of the dishonest intention and not by proof of illegality. The accused may be liable for such illegality in tort or under civil law or may be guilty under some other section of the Penal Code.

Held, on facts that the case of the fish in the tank could not be taken separately from the ownership of the tank. The accused caught and removed the fish on their claim of right to the tank and to the fish therein which had been upheld by the Civil Court. It could not, therefore, be said that the dishonest intention had been proved against the accused. AIR 1929 Pat 86, Dist.; 14 Cal WN 408 and 1961 (1) Cr LJ 685 (Manipur), Rel. on. **1962 (1) Cr LJ 766: AIR 1962 Tripura 25 (27, 28, 30) (Prs 11, 16 to 18, 20).**

18. Presumption under Section 114, Illus. (a), Evidence Act.

See also Evidence Act (1872), S. 114.

●——Ss. 379, 302 and 411 — Evidence Act (1872), Section 114, Illus. (a) — Possession of stolen pro-

perty belonging to murdered person — Thief held was also murderer. See Evidence Act (1872), Section 114, Illus. (a). **AIR 1955 NUC (SC) 5807.**

——**S. 378** — Evidence Act (1872), Section 114, Illus. (a) — Presumption as to possession of stolen property — Only evidence against accused consisting of recovery of stolen goods on information given by him. from a hollow of tree situated in a jungle not belonging to him — Mere recovery cannot show that he was in possession of stolen properties, or that after committing theft he had kept the articles inside the tree. **AIR 1956 Bhopal 40 (40) (Pr 2).**

——**Ss. 378, 90, 410** — Theft — Consent, meaning of — Delivery of goods mentioned in railway luggage ticket — Persons taking delivery not entitled to do so — Delivery by Railway clerk under misconception that persons taking delivery were entitled to take it — Ingredients of 'theft' established — Persons found in possession of such goods soon after delivery can be presumed to be in possession of stolen property — Evidence Act (1872), Section 114, Illus. (a). See Penal Code (1860), Section 90. **1963 (1) Cri LJ 573: AIR 1963 Bom 74 (DB).**

——**S. 379 — Who can complain — Person even though not interested in property stolen can complain — Cr. P. Code (1898), Sections 195 to 199.**

The general rule is that a complaint need not necessarily be made by the person injured, but may be filed by any person aware of the offence and the only exceptions to this rule are to be found in Sections 195 to 199 of the Code of Criminal Procedure where certain offences are stated to be complainable only by specified persons. The Courts have no power to add to the list. An offence under Section 379, I. P. Code, not being one to which Sections 195 to 199 apply the prosecution for theft can be launched by a person who is not directly interested in the property stolen or adversely affected by its loss. AIR 1921 Cal 627; AIR 1929 Cal 639; ILR 21 Bom 536 and 14 Trav LJ 587, Rel. on. **1962 Ker LT 639: 1962 Ker LJ 1099: ILR (1962) 2 Ker 606: 1963 (1) Cr LJ 358 (359) (Pr 6) (Ker).**

——**S. 379** — Evidence Act (1872), Section 114, Illus. (a) — Recovery of stolen articles soon after theft — Presumption of theft would arise. See Evidence Act (1872), Section 114, Illus. (a). **AIR 1955 NUC (Madh Bha) 2397.**

——**Ss. 379, 411 and 300** — Evidence Act (1872), Section 114, Illustration (a) — Possession of stolen property — Application of principles to murder case — **Held**, on facts that presumption of murder against accused should have been drawn. See Evidence Act (1872), Section 114, Illus. (a). **AIR 1955 NUC (Mad) 1217.**

——**Ss. 379, 410 and 411** — Telegraph wires found in possession of accused — Accused denying recovery but giving no satisfactory explanation of their possession — Accused can be presumed to be receiver of stolen property. See Evidence Act (1872), Section 114, Illustration (a). **1965 (1) Cri LJ 746: AIR 1965 Orissa 123.**

——**Ss. 379 and 411** — Evidence Act (1872), Section 114, Illustration (a) — Presumption when arises — It must be proved that goods found in possession of accused were stolen. See Evidence Act (1872), Section 114, Illustration (a). **AIR 1955 NUC (Pepsu) 5707.**

19. Procedure.

——**Ss. 379, 498** — Criminal P. C. (1898), Section 199 —Effect of non-compliance — Case registered under Sections 498/379, I. P. C. — Magistrate having no jurisdiction to entertain complaint under Section 498 — Charge under Section 379 held could be proceeded with. See Criminal P. C. (1898), Section 199. **AIR 1955 NUC (Ajmer) 3828.**

——**S. 379** — U. P. Panchayat Raj Act (26 of 1947), Sections 5-A, 59, 12-C and 52 — Offence under Section 379 — Joint trial of several accused — Some of them public servants and therefore acquitted — Conviction of others — Nomination papers filed by convicted persons for election of office of Pradhan rejected — Tribunal has no jurisdiction to alter decision of Nyaya Panchayat. See Panchayats — U. P. Panchayat Raj Act (26 of 1947), Section 5-A. **1964 All LJ 692.**

——**S. 379** — U. P. Panchayat Raj Act (26 of 1947), Sections 52, 59, 5-A, 12-C — Jurisdiction of Nyaya Panchayat — Case under Section 379, Penal Code — Joint trial of several accused — Some of accused public servants and therefore acquitted — Conviction of others — Nomination papers filed by them for election to office of Pradhan rejected — Election petition — Jurisdiction of Election Tribunal to alter decision of Nyaya Panchayat. See Panchayats — U. P. Panchayat Raj Act (26 of 1947), Sec. 59. **1964 All WR (HC) 489.**

——**Ss. 378, 379 — Criminal P. C. (1898), Section 260 —Summary procedure — When not appropriate.**

Accused, watchmen in goods shed of Railway tried summarily and convicted under Section 379 for committing theft in goods shed — **Held,** though summary trial was legal, yet it was not desirable as conviction was likely to result in their dismissal from service. **1956 Cri LJ 368: AIR 1956 All 212 (213) (Pr 6).**

——**S. 379** — Criminal P. C. (1898), Section 260 — "May if he thinks fit" — Trial under Section 379, I. P. C. — Accused put in 23 years of service — Accused likely to lose job as result of trial — Trial lasting for one year — Summary trial held unsuitable — Case held should be tried afresh in ordinary way. See Criminal P. C. (1898), Section 260. **AIR 1955 NUC (All) 1998.**

——**Ss. 378, 411, 414 — Applicability — Suit for partition by minor against his father and uncle — Secretion of joint family property by defendant — Offence — Person with whom those properties are secreted — If guilty.**

Secretion of the family properties with a view to avoid distribution of the same, or the liability to account therefor, cannot be said to constitute an offence — Moreover such an accusation cannot be made by person who is neither a party to suit, nor was in possession of the goods nor has authority to file complaint on behalf of party. **1961 (2) Cr LJ 453 (454, 455) (Pt B) (Prs 5, 7, 8) (Andh Pra).**

——**S. 378** — Criminal Court is not competent to adjudicate upon civil rights or title to property. **1959 Cr LJ 1141: AIR 1959 Andh Pra 530 (531) (Pt A) (Pr 5).**

[Reversed on another point in AIR 1962 SC 586.]

——**Ss. 379, 395** — Criminal P. C. (1898), Sections 403 and 436 — Further enquiry in case of acquittal — Sessions Judge has no power to direct when further enquiry is in respect of offence of which he was acquitted — Acquittal of offence under Section 379 — Further inquiry into offence under Section 395 is without jurisdiction. See Criminal P. C. (1898), Section 403. **1955 Cri LJ 1255: AIR 1955 Cal 496.**

——**S. 379 — Applicability — Lessees under different lessors claiming property — Prosecution — Propriety — Abuse of process of Court.**

Where the right to a 'char' in the Rupnarain river was in dispute between the Burdwan Raj and the Collector of Howrah, P was the lessee of the former and N the lessee of the latter entitled under the lease to take sand from the char. P was prosecuted under Section 379, Penal Code for having removed sand therefrom. On revision :

Held : Instituting a case of theft under Section 379, Penal Code, under the circumstances, practically amounts to an abuse of process of Courts. The Criminal Courts are hardly fitted to decide the nice questions of the right to 'char'. The matter has to be fought out in a Civil Court by the lessors or the lessees. **51 Cr LJ 1575: AIR 1951 Cal 207 (209) (Pt E) (Pr 17) (DB).**

——**S. 379** — Scope — Charge under — Conviction under Section 403, I. P. Code can be legal if facts alleged and proved constitute that offence. See Criminal P. C. (1898), Section 237. **1958 Cr LJ 40: AIR 1958 Madh Pra 1.**

——**Ss. 379 and 395** — Jurisdiction — Magistrate taking cognizance — Evidence disclosing offence beyond competence — Complaint cannot be returned — Procedure indicated. See Criminal P. C. (1898), Section 201. **1957 MPLJ (Notes) 177.**

——**Ss. 379, 300, 411 and 201** — Murder for gain — Separate charge under each section is not necessary — Criminal P. C. (1898), Sec. 236. See Penal Code (1860), Section 300. **AIR 1953 Mad 1006 (DB).**

——**S. 379** — Criminal P. C. (1898), Section 236 — Accused charged under Section 379, Penal Code — No opportunity given to meet case under Section 411 — Conviction under Section 411, Penal Code not proper. See Criminal P. C. (1898), Section 236. **1961 (1) Cri LJ 827: AIR 1961 Mys 158.**

——**S. 379** — Criminal P. C. (1898), Section 241 — Order after local inquiry that no case under Section 379, I. P. C. was made out — Case proceeding as summons case for offence under Section 352, I. P. C. — Evidence disclosing offence under Section 379 — Magistrate can subsequently charge accused under Section 379 also and proceed as warrant case. See Criminal P. C. (1898), Section 241. **AIR 1952 Orissa 142.**

——**S. 379** — Person committing offence under Section 188 committing additional offence of theft — Court can take cognizance of the offence even in absence of complaint by public servant. See Penal Code (1860), Section 188. **1963 BLJR 211.**

——**S. 379** — Criminal P. C. (1898), Sections 236, 237, 403 — Applicability — **Held,** that on allegations made in complaint the accused could have been tried for offence under Section 426 or 379 — Having been acquitted on trial for offence under Section 426, he could not be tried again for offence under Section 379 on same facts. **AIR 1955 NUC (Pat) 720.**

——**Ss. 379 and 403** — Accused charged under, for criminal misappropriation and not under Section 379, I. P. Code — Magistrate cannot apply Section 237 to find him guilty under Section 379. See Criminal P. C. (1898), Sec. 237. **1964 (1) Cr LJ 616 (Tripura).**

——**S. 379** — Proceeding under Section 144, Cr. P. C. — Attachment cannot be ordered — Disobedience of order under — Consequence is prosecution under Section 188 and not under Section 253 or Section 379, I. P. C. **1953 Cri LJ 1198: AIR 1953 Vindh Pra 25 (27) (Pt C) (Pr 9).**

20. Conviction and sentence.

——**Ss. 378 and 379 — Picking of pocket — Sentence.**

It is not easy to detect cases of picking of pockets and it has become extremely rampant. A sentence of six months' rigorous imprisonment held was not excessive. **1957 Cr LJ 1060: ILR (1957) 1 All 494: AIR 1957 All 678 (680) (Pt C) (Pr 6).**

——**S. 379** — Sentence — Offences under Sections 379 and 352 of the Code — Cumulative sentence of fine in respect of both is unwarranted and cannot be countenanced. See Criminal P. C. (1898), Section 35. **AIR 1955 NUC (All) 5501.**

——**S. 379** — Whipping Act (1909), Section 3 — Accused, a history sheeter under police surveillance found picking pockets at cinema booking house — Accused convicted under Section 379, I. P. C. and sentenced to 1 year's rigorous imprisonment — **Held,** punishment with only whipping was not sufficient though one year's rigorous imprisonment was excessive and was reduced to 6 months. **1952 All WR (HC) 254: 1952 All LJ 264: 1953 Cri LJ 745: AIR 1953 All 345 (346) (Pt B) (Pr 5).**

——**S. 379** — Sentence — Charge under Sections 147 and 379 — Separate sentence in respect of each of the conviction should not be passed —Sentence under Section 147 should alone be maintained. See Penal Code (1860), Section 147. **AIR 1955 NUC (Assam) 2850.**

——**S. 379** — Applicability — **Held,** on evidence that conviction of the accused under Section 304, Penal Code, could not stand and must be set aside, but their conviction under Section 379 upheld. **AIR 1955 NUC (J and K) 582 (DB).**

——**S. 379** — Alteration of conviction—Appellate Court's power — Charge and conviction by trial Court under Section 379, I. P. C. — Alteration of conviction to one under Section 424, I. P. C. by appellate Court held improper. See Criminal P. C. (1898), Section 423. **1963 Ker LJ 342.**

——**Ss. 379, 447** — Sentence — Offence by unenlightened landlord cherishing old feudal rights — He is not liable to a more drastic punishment than any other villager committing the same offence under similar circumstances, only because he is a landlord. See Penal Code (1860), Section 447. **52 Cri LJ 461: AIR 1951 Kutch 58.**

——**S. 379** — Sentence — Accused stealing three sugarcane sticks and chewing them — Accused given benefit of Section 562 (1-A), Cr. P. Code. See Cr. P. Code (1898), Section 562 (1-A). **AIR 1955 NUC (Madh B) 4327.**

——**S. 379 — Applicability — Property — Theft of cheque of no value — Offence — Section 95 — Applicability.**

Every valueless paper that comes into the hands of an accused may be still property in respect of which either criminal breach of trust or theft may be committed. Thus, a cheque of no value will be property in respect of which an offence can be committed. But in view of the fact that this property has absolutely no value, Section 95 may be applied and the accused acquitted of theft. (1850) 169 ER 398; 27 All 28, Rel. on. **1954 Mad WN 754: 1955 Cr LJ 816: AIR 1955 Mad 264 (264) (Pr 6).**

——**Ss. 379, 302, 411 and 201** — Murder for gain — Conviction under Sections 302, 379 or 411 in alternative — Acquittal of charge under Section 201 — Appeal — Conviction under Section 302 set aside and under Section 379 maintained. See Penal Code (1860), Section 302. **AIR 1953 Mad 1006 (DB).**

——**Ss. 379 and 447** — Dishonest intention — No proof — Labourers hired by leader of accused party alleged to have cut and carried away crops from lands in possession of complainant — Finding of lower Court as to their dishonest intention based on inference that generally people in villages have knowledge about persons and lands in their possession in those villages, and on the fact that they cut away unripe crops — Reasons held insufficient to justify inference of dishonest intention of labourers; for, it is quite probable that being ordered by their master they cut and removed crops thinking that it was none of their business to further enquire whether crops were unripe or not — Under the circumstances, benefit of doubt could reasonably be given to them. **(1960) 26 Cut LT 566.**

SECTION 380

SYNOPSIS

(Penal Code (1860), Section 380.)

1. Scope and applicability.
2. Evidence and proof.
3. Defence.
4. Conviction and sentence.
5. Procedure.

1. Scope and applicability.

——**Ss. 380, 378 — Removal of press — Whether bona fide — (Press and Registration of Books Act (1867), Sections 3, 4 and 5).**

The removal of a press cannot be bona fide if, having regard to the provisions of the Press and Registration of Books Act, the accused could not lawfully keep the press in their possession at the time of its removal. **1959 Cri LJ 1141: AIR 1959 Andh Pra 530 (532) (Pt C) (Pr 11).**

[**Reversed** on another point in AIR 1962 SC 586.]

——**Ss. 380 and 302** — Evidence Act (1872), Section 114 — Presumption for graver offence — No article of accused found at scene of occurrence — Some of the ornaments recovered from accused shortly after murder were on person of deceased — **Held,** that murder and theft indeed appeared to be parts of the same transaction, and presumption of graver offence under Sections 302 and 380 could be drawn against accused. See Evidence Act (1872), Section 114. **1958 Cri LJ 596: AIR 1958 Andh Pra 255 (DB).**

——**Ss. 380 and 392 — Scope — Robbery or theft in dwelling house.**

Being enraged by slight provocation accused, a domestic servant, committing murder of deceased at 9 a. m. — Thereafter accused started thinking and weeping up to 4 a. m. — After that he started breaking boxes and packing stolen articles in trunk — Murder held could not be said to have any connection with theft and the offence fell under Section 380 and not Section 392. **1953 Cr LJ 1665: AIR 1953 Him Pra 105 (110) (Pt I) (Pr 14).**

——**S. 380** — Applicability — Accused charged under Sections 457, 380 — Evidence only of recovery of property — **Held,** on evidence and with aid of Section 114, Evidence Act that accused were guilty under Section 411 only. See Penal Code (1860), Section 411. **AIR 1955 NUC (Madh B) 3375.**

——**Ss. 380, 411 — Applicability — Conditions.**

Before convicting anybody of an offence either under Section 380 or Section 411, it is essential that the goods should be proved to have been stolen or misappropriated. Once a person is found in possession of stolen property certain presumptions follow and he is on explanation at the risk of being otherwise convicted either for the theft or under Section 411. But then it should already be stolen property (for the purpose of Section 411) that is, the Court should be able to come to the conclusion that the offence of theft or criminal misappropriation has been committed in respect of it.

The mere fact that certain medical ampules marked with the Government Hospital identity marks were found in a chemist's shop, is not sufficient to convict the owner of the shop under Section 380 or Section 411, unless it is established that the ampules of this particular batch were found missing or stolen from the Hospital stores. **1960 MPLJ 854: 1960 MPC 469: 1960 Jab LJ 832: 1960 Cr LJ 1620: AIR 1960 Madh Pra 395 (396, 397) (Prs 2, 4) (DB).**

——**Ss. 380, 378, 24, 395** — Demolition of building and removal of material — No violence used — Offence is theft and not dacoity — Wrongful loss to owner — Intention to cause wrongful loss can be presumed — There is therefore dishonest taking. See Penal Code (1860), Sec. 378. **1961 (2) Cri LJ 364: AIR 1961 Pat 362 (DB).**

——**S. 380** — Essential ingredients of offence of theft viz., (1) dishonesty and (2) removing of movable property from possession of another being missing, accused held could not be held liable under Section 380. See Cr. P. Code (1898), Section 561-A. **AIR 1955 NUC (Raj) 4036.**

2. Evidence and proof.

——**S. 380** — Evidence and proof — Recovery of stolen articles at instance of accused from open field accessible to all and sundry — Exclusive possession of articles by accused held not conclusively proved to sustain conviction under Section 380 — Evidence Act (1872), Section 114. AIR 1954 SC 39, Foll. **1965 All Cri R 30: 1965 All LJ 264: 1964 All WR (HC) 783.**

——**Ss. 380, 378 and 24** — Ingredients of offence under Section 380 — Removal of press from complainant's possession — Whether such removal takes place during day or during night and whether such removal is effected under a claim of right or not, is in law, done dishonestly — Hence all ingredients necessary to be proved for establishing offence under Section 80 are present. **1959 Cri LJ 1141: AIR 1959 Andh Pra 530 (532) (Pt B) (Prs 10, 11).**

[**Reversed** in AIR 1962 SC 586.]

——**Ss. 380 and 457** — Applicability — Evidence — Fact that the accused leading police to spot of concealment not only proving that he knew where incriminating articles were but materially supporting story given by approver who alleged that accused took part in theft — It cannot be said that accused could be convicted only under Section 411 and not under Section 380 or 457. See Penal Code (1860), Section 457. **1957 Cr LJ 1231: AIR 1957 Assam 168 (DB).**

——**S. 380 — Identity of material objects — Discrepancy as to content or carat of gold or shape or name of watch whether fatal — Evidence Act (1 of 1872), Section 114 (a) — Possession of stolen property seized after thirty days — Presumption from nature of property recovered.**

The fact that both the wrist-watch and the bracelet were seized together is a point of some significance in establishing the identity of both. The discrepancies as to the content or carat of the gold in Exhibit P-3 report made by P. W. 5 and in the evidence of P. W. 4 are of no moment because as testified by P. W. 5 his reading of the same was only an approximation.

Other discrepancies, if they were really so, as to the shape of the watch or the name are inconsequential.

In order to put the accused on his defence, his possession of the stolen property must be recent; although what shall be deemed recent possession must be determined by the nature of the articles stolen, i.e., whether they are of a nature likely to pass rapidly from hand to hand; or of which the accused would be likely, from his situation in life, or vocation to become possessed innocently. **1962 Ker LT 759: 1962 Ker LJ 840: (1963) MLJ (Cr) 401.**

——**S. 380** — Intention or knowledge — Proof — Property used as place of worship subsequently obtained by accused through Court — Accused in pulling it down can have no intention to insult religion of others — There could also be no theft of articles found therein. See Penal Code (1860), Section 295. **1961 (1) Cr LJ 82: AIR 1961 Ker 28 (DB).**

——**S. 380** — Evidence and proof — Complainant's house burgled — House belonging to accused searched — Accused's wife seen leaving house in hurry with bundle — Stolen property recovered from wife — Accused dumb and deaf and verging on lunacy — Accused absent at time of search — Accused, found subsequently, bringing from somewhere another bundle of stolen property — **Held,** it was accused who committed offence. **AIR 1955 NUC (Madh Bha) 3881.**

——**S. 380** — Articles (toda) which were alleged to have been stolen recovered on information supplied by accused — Accused claiming it as his own — Articles of common use amongst people of community of accused — Alleged owner of articles identifying them as his own — No special identification mark indicated — Weight of article not known — It is not sufficient evidence of identification. **MBLJ 1955 HCR 1194.**

3. Defence.

——**S. 380** — Charge of theft — Bona fide claim of right is good defence. See Penal Code (1860), Section 379. **1962 (1) Cr LJ 518: AIR 1962 SC 586.**

——**Ss. 380, 379** — Creditor through his servant seizing radio of debtor openly, claiming it as security for debt — Charge of theft — Defence of bona fide claim of right — Claim of right though invalid in law, not altogether false pretence — **Held,** seizure might be a tort justifying claim in damages but not act of theft — **Held,** further, servant having acted under directions of master his conviction also, could not be sustained. See Penal Code (1860), Section 379. **1965 (2) Cri LJ 652 (2): AIR 1965 Mad 483.**

4. Conviction and sentence.

——**S. 380 — Theft of cattle — Sentence.**

India being an agricultural country, theft of cattle must be regarded as a serious offence. (The sentence of two years' rigorous imprisonment with fine was held proper). **1951 RD (HC) 273 (1): 1951 All WR (HC) 616: 1951 All Cr C 158: 1951 All LJ 630.**

——**Ss. 380 and 457 — Sentence.**

Accused found guilty of offence under Sections 380 and 457, I. P. Code — Property involved being rice worth Rs. 10 — Three months' rigorous imprisonment held sufficient. **(1954) 2 MLJ (Andhra) 226: AIR 1955 NUC (Andh Pra) 3614.**

——**S. 380 read with Section 75** — Power of Police Officers to arrest without warrant — Arrest and seizure legal — Articles properly identified — Conviction held proper. See Criminal P. C. (1898), Section 51. **1962 Ker LJ 840.**

——**Ss. 380, 454 — Theft — Bona fide claim of right — A breaking open lock and removing ornaments of B, his sister-in-law, in belief that ornaments were joint family property — A's claim proved colourable pretence — Conviction held proper — Sentence, however, held should be reduced.**

A claim of right asserted in defence against prosecution for theft must be an honest one, albeit unfounded in law or in fact and if it is not in good faith but merely a colourable pretence to obtain or keep possession of the property, it will not avail as a defence. AIR 1917 Cal 648, Rel. on.

Where A broke open the lock of a room and removed a box of ornaments belonging to B, his sister-in-law, alleging that he considered the ornaments to be joint family property in which he had a share and not the stridhan property of B, and it was found, in fact, that they were the stridhan property of B, and not ancestral property liable to partition:

Held, that in view of these findings for which there was adequate material on record, A's asserted claim of right could not be said to be bona fide and was a mere colourable pretence to retain possession of property to which he was not entitled. A's conviction under Sections 380 and 454 was, therefore, proper: Case law discussed.

Held, further, that the case was not, however, one for severe punishment. Although A acted with highhandedness and by taking the law into his own hands caused wrongful loss to B and wrongful gain to himself, he was not an ordinary thief or housebreaker. He was related to B by marriage and was suffering from the obsession that the other members of the family were depriving him of a share in the family property. The sentence of imprisonment should, in the circumstances, be set aside and replaced by concurrent imprisonment until the rising of the Court under each of the aforesaid sections. The fine awarded, viz., Rs. 100, however, to be increased to Rs. 200. **51 Cri LJ 510: 1950 Nag LJ 346: ILR (1950) Nag 526: AIR 1950 Nag 92 (94) (Prs 8, 12, 14).**

——**Ss. 380 and 411** — Evidence — Only evidence against accused was their alleged confession to police leading to discovery of alleged stolen money — No evidence to connect money recovered from their houses with the money alleged to be stolen — Acquittal of accused by appellate Court is justified. **1965 BLJR 555.**

——**Ss. 380 and 457** — Sentences — Offences under Sections 380 and 457 committed at night in industrial area — Property worth Rs. 15,000 stolen — Deterrent sentence should be passed — Sentence of one month on each count is ludicrous. **1965 BLJR 555.**

——**S. 380** — Evidence — Conviction based on evidence of recovery of property — Information from accused which was relied upon for conviction not leading to any discovery — Conviction in the absence of any other evidence. See Evidence Act (1872), Section 27. **AIR 1955 NUC (Raj) 2546.**

——**Ss. 380, 405 and 406** — Applicability — "Entrusted with property or with any dominion over property" — Charge under Section 406 not made out -- Conviction under Section 380 can be made — (Criminal P. C. (1898), Section 237). **AIR 1955 NUC (Sau) 5053 (DB).**

5. Procedure.

●——**Ss. 380 and 451**—Offences under, committed in 1948 in Jhabua State which subsequently became part of Madhya Bharat — Law in force in that State was Indian Penal Code which was subsequently continued in force by Regulation of Government Act (M. B. Act 1 of 1948), and Part B States (Laws) Act (3 of 1951), after it became part of Madhya Bharat — Accused can be tried and punished in respect of those offences in 1955. Narwar Singh v. State of Madhya Pradesh. **1962 SCD 593: (1962) 2 Ker LR 225: (1963) 2 SCJ 372: 1962 Supp (2) SCR 973: (1963) 2 SCWR 375: 1964 (2) Cr LJ 64 (SC).**

——**Ss. 380, 120-B and 409** — Charge under — Conviction under Section 120-B — Accused can be tried and punished under Section 120-B even when charge under Sections 409 and 380 cannot be made out. See Penal Code (1860), Section 120-B. **1959 Cr LJ 18: AIR 1959 All 75.**

——**S. 380** — Criminal P. C. (1898), Sections 423 (1) (a) and 32 — Appeal against acquittal — Accused found guilty — Power of High Court to pass sentence — Limitation on power — Trial Court, a Court of Second Class Magistrate—Maximum sentence that the High Court can award in a case under Section 380 would be six months imprisonment of either description and a fine of Rs. 500. See Criminal P. C. (1898), Section 423 (1) (a). **1959 Cri LJ 1141: AIR 1959 Andh Pra 530.**

[Reversed on another point in AIR 1962 SC 586]

——**Ss. 380 and 411** — Scope — Procedure — Theft in Assam — Stolen articles recovered in Punjab — Case under Section 380, registered and investigation started in Assam — Subsequently case under Section 411 in Punjab — Trial under Section 380 — Should have priority. See Criminal P. C. (1898), Section 185 (2). **1959 Cr LJ 169: AIR 1959 Assam 20.**

——**Ss. 380, 323 and 147** — Complaint under Sections 147 and 380 against three accused but summoned under Sections 380 and 323 — Participation of other accused not proved — Charge under Section 380 not fully established — Charges under Sections 147 and 380 must fail but accused can be held guilty of minor offence under Section 323 for their individual acts of assault. See Penal Code (1860), Section 323. **1966 Cri LJ 339 (2): 1965 BLJR 278.**

——**S. 380** — Document produced by defendant in civil suit for being filed — Plaintiff removing document from record before it is actually exhibited and inserting another document forged by him in its place — Document is 'property' — Complaint by Court concerned necessary for prosecution of plaintiff for offences under Sections 467 and 471 but not for offence under Section 380. See Criminal P. C. (1898), Section 195 (1) (c). **1963 (2) Cr LJ 558 (Guj).**

——**S. 380** — Applicability — Deaf and dumb accused — Rule as to trial stated — It is unsafe to act on mere gestures and convict a deaf and dumb person for offence under Sections 454 and 380, I. P. Code. See Criminal P. C. (1898), Section 341. **(1955) 1 MLJ 113: AIR 1955 NUC (Mad) 2448.**

——**Ss. 380 and 411** — Evidence Act (1872), Section 114, Illus. (a) — Accused found to be in possession of stolen articles two days after theft — No evidence to show that accused committed the theft — No explanation by accused about possession of stolen articles — Accused must be presumed to be receiver of stolen properties and as such is liable for punishment under Sec. 411, I. P. Code — There is no legal bar to conviction of accused under Section 411, even though he was charged only under Section 380, I. P. Code in view of Section 237, Cr. P. Code. See Evidence Act (1872), Section 114, Illus. (a). **(1964) 6 Orissa JD 12.**

——**Ss. 380, 75** — Trial under Section 380, Penal Code — Accused questioned about previous conviction when examined under Section 342 — It is improper — Proper procedure pointed out. See Criminal P. C. (1898), Section 342. **AIR 1955 NUC (Pepsu) 1114.**

——**S. 380** — Private complaint and police report regarding cognizable offence — Magistrate can direct police to submit charge sheet. See Criminal P. C. (1898), Section 190. **1959 Raj LW 597: ILR (1959) 9 Raj 671.**

SECTION 381

——**Ss. 381 and 461** — Domestic servant decamping with master's ornaments worth Rs. 10,000 — Inadequate sentence — High Court will interfere. **1959 Jab LJ 738: 1959 MPC 441: 1959 MPLJ 800.**

——**S. 381 — 'Shall also be liable to fine' — Interpretation — Direction.**

The word 'liable' means a future possibility or probability happening which may or may not actually occur. The Magistrate has the power to impose fine under Section 381 but is discretionary. **1957 Cr LJ 389: ILR (1957) Punj 426: AIR 1957 Punj 55 (56) (Pr 9).**

SECTION 382

——**Ss. 382, 34** — Common intention to commit theft — Presumption of offence under Sec. 382. **51 Cri LJ 744: AIR 1950 Kutch 29 (29) (Pt B) (Pr 6).**

——**S. 382 — Sentence — Theft committed by armed persons — Two years' rigorous imprisonment held proper.**

Where an offence of theft was committed by persons armed with weapons who threatened the owner of property with hurt or death and the accused were sentenced to two years' rigorous imprisonment, it was held that the offence being very serious, practically one of highway robbery, the sentence was not excessive even taking into account their custody for six months. (Sentence of one young person of 16 years who was in custody for 8 months was reduced to period already undergone). **51 Cri LJ 744: AIR 1950 Kutch 29 (29) (Pt C) (Pr 7).**

SECTION 383

●——**Ss. 383, 384, 503, 506 — Charge against appellant of having committed criminal intimidation by threatening X and his daughter with injury to their reputation by having indecent photographs published with intent to cause alarm to them — Real intention of appellant not so much to cause alarm only as to make X pay 'hush money' — Conviction under Section 506, Penal Code, held not illegal — (Cr. P. Code (1898), Section 537).**

Held, (i) that it was not unoften that a particular act in some of its aspects came within the definition of a particular offence in the Penal Code, while in other aspects, or taken as a whole, came within another definition. There were obvious differences between the offence of extortion as defined in Section 383 and the offence of criminal intimidation as defined in Sec-

tion 503. On the finding of the Magistrate, which finding was affirmed by the High Court, the appellant was clearly guilty of the offence of criminal intimidation. (ii) It was true that the charge as framed against the appellant was not as clear as it might have been. But in the absence of any prejudice caused to the appellant by reason of the defect, if any, in the charge as to the intent of the appellant, the conviction could not be attacked as illegal. Romesh Chandra Arora v. State. **1960 Mad WN 9: 1960 SCJ 195: 1960 MLJ (Cr) 112: 26 Cut LT 225: 1960 All Cr R 104: 1960 Cr LJ 177: ILR (1960) Punj 272: (1960) 1 SCR 924: (1960) 1 Ker LR 49: (1960) All WR (HC) 119: AIR 1960 SC 154 (157) (Pt A) (Pr 6).**

——Ss. 383, 384 — Applicability — Threat to report an offence to authorities — No injury threatened.

The applicants in revision, public servants were convicted of the offence under Section 384, Penal Code on the finding that they held out the threat under colour of their office that they would report if the complainant fed more than 25 guests at his niece's wedding and obtained money from him for refraining from doing so.

Held, in revision, that the threat aforesaid was no injury within the meaning of Section 44 read with Section 43 of the Penal Code and therefore, even if they obtained money thereby, they could not be held guilty of the offence under Section 384 of the Penal Code. AIR 1929 All 935; 53 All 203, Dist.; AIR 1919 Mad 954; 42 Mad 615 (FB), Foll. **52 Cr LJ 873: AIR 1951 Ajmer 64 (2) (65) (Pr 3).**

——S. 383 — Criminal P. Code (1898), Sec. 197 — Covenant of merger by which United State of Rajasthan was created, Article 17 — Warrant for extradition issued by Regional Commissioner of Rajasthan — Enquiry into offences under Sections 383 and 420, Penal Code — Sanction of Rajpramukh, is not necessary. See Criminal P. C. (1898), Section 197. **51 Crl LJ 947: AIR 1950 All 342.**

——Ss. 383 and 384 — Essentials to be proved — Forcibly taking away — Offence.

To attract the operation of Sections 383 and 384, I. P. Code, there must be a delivery of the property by the victim and the will to do so must be engendered by the fear which should have proceeded from the extortioner antecedent to the delivery. Hence, where an accused is proved to have snatched away certain papers and accounts from the complainant in spite of the latter's resistance, a conviction for extortion would not at all be justified. The accused may be guilty of robbery but certainly not of extortion. **1950 ALJ 711.**

——S. 383— Charge of extortion or one under Section 161 — It is quite conceivable that a public servant may commit extortion by compelling a person put in fear to part with property — But whether in a given case, the evidence makes out a charge of extortion or one under Section 161, Penal Code is a question to be decided upon the facts of each case. **1956 Crl LJ 522: AIR 1956 Cal 116 (117) (Pt A) (Pr 10).**

●**——Ss. 383, 327** — "Property" — Meaning of — The word 'property' occurring in this section must be taken to mean both movable and immovable property — Hyderabad Penal Code, Sections 267, 319. See Penal Code (1860), Sec. 327. **52 Crl LJ 912 (1): ILR (1951) Hyd 607: AIR 1951 Hyd 91 (FB).**

——Ss. 383, 390, 392 — Dishonest intention.

Where the accused extracted his annual remuneration as a village barber from the complainant malguzar before it became due at the end of the year by putting him in fear of instant hurt, the accused is liable under Section 392 as the accused intended to cause wrongful loss to the complainant. **1950 Nag LJ 318: ILR (1950) Nag 715: AIR 1950 Nag 214 (215) (Pr 7).**

——Ss. 383, 384 — Cattle illegally seized — Person seizing refusing to release them unless money was paid — Offence under Section 384 held committed — (Cattle Trespass Act (1871), Sec. 22) — (General Clauses Act (1897), Section 26).

If a person's cattle are illegally seized and the person who seizes the same refuses to release them and threatens to impound them unless he was paid some money, such action on his part would amount to threat of injury to the property of the person whose cattle are thus illegally seized and would amount to extortion. **AIR** 1924 All 197, Rel. on.

It is true that for the same act prosecution under Section 22 of the Cattle Trespass Act may lie against the offenders. But the mere fact that there is an alternative remedy for such illegal seizure of cattle would not justify the Magistrate taking the view that prosecution under Section 384 of Penal Code would not lie. **(1956) 22 Cut LT 417.**

——S. 383 — Ingredients of offence — Terror or threat of criminal charge — Offence — "Injury" — If confined to physical injury.

Section 383, I. P. Code, requires the person to be put in fear of injury; the injury, however, need not necessarily be physical. A terror (or threat) of a criminal charge, whether true or false, amounts, to fear of injury, and the act of putting a person in terror of a criminal charge amounts to an offence of extortion under Section 383, I. P. Code. 7 WR (Cr) 28, Ref. **1952 Cr LJ 1391: AIR 1952 Pat 379 (380) (Pt A) (Pr 2).**

——S. 383 — Offence of extortion when complete — Anticipatory permission to investigate — Validity—The essence of the offence of extortion is in the actual delivery of possession of the property by the person put in fear and the offence is not complete before such delivery — An anticipatory order to investigate is not valid order. **1955 Crl LJ 839: 8 Sau LR 221: AIR 1955 Sau 42 (44) (Pt A) (Pr 4) (DB).**

SECTION 384

●**——Ss. 384, 383, 503, 506** — Charge against appellant of having committed criminal intimidation by threatening X and his daughter with injury to their reputation by having indecent photographs published with intent to cause alarm to them — Real intention of appellant not so much to cause alarm only as to make X pay 'hush money' — Conviction under Section 506, Penal Code, held not illegal. See Penal Code (1860), Section 383. **1960 Crl LJ 177: AIR 1960 SC 154.**

——Ss. 384, 383 — Threat of injury — Threat to report offence to authorities — **Held,** that the threat was no injury within the meaning of Section 44 read with Section 43, Penal Code. See Penal Code (1860), Section 383. **52 Crl LJ 873: AIR 1951 Ajmer 64.**

——Ss. 384 and 383 — Essentials to be proved.

To attract the operation of Sections 383 and 384 there must be a delivery of property by the victim and the will to do so must be engendered by the fear which should have proceeded from the extortioner antecedent to the delivery. Hence where an accused is proved to have snatched

away certain papers and accounts from the complainant in spite of the latter's resistance a conviction for extortion would not at all be justified. The accused may be guilty of robbery but certainly not of extortion. **1950 All LJ 711.**

——**S. 384** — Cattle illegally seized — Person seizing refusing to release them unless money was paid — Offence under Section 384, Penal Code held committed — Remedy under Sec. 22, Cattle Trespass Act, no bar. See Penal Code (1860), Section 383. **(1956) 22 Cut LT 417.**

——**Ss. 384, 353** — Sentence — Award of six months rigorous imprisonment held, not harsh. See Penal Code (1860), Section 353. **1965 (1) Cri LJ 60: AIR 1965 Pat 8.**

——**S. 384** — Prevention of Corruption Act (1947), Sections 5, 6 — Complaint disclosing offence requiring sanction — Trial for offence not requiring sanction is not vaid. See Prevention of Corruption Act (1947), Section 5. **1955 Cri LJ 1382: AIR 1955 Pat 453.**

——**S. 384** — Criminal P. Code (1898), Sections 155 (2), 190 — Unauthorised investigation into non-cognizable offence — Trial on basis of police report based on such unauthorised investigation, is vitiated as without jurisdiction. See Criminal P. C. (1898), Section 155 (2). **1955 Cri LJ 839: AIR 1955 Sau 42 (DB).**

SECTION 385

——**S. 385** — Constitution of India, Article 134 (1) (c) — Certificate of fitness — Terror of criminal complaint — Terror of criminal complaint whether true or false amounts to fear of injury and guilt or innocence of the party threatened is immaterial — The point involved in the case was held to be not of such a public or private importance that a certificate of fitness can be issued. **1952 Cri LJ 1037: AIR 1952 Kutch 54 (55) (Pt B) (Prs 6, 9).**

SECTION 386

●——**S. 386** — Accused having common intention and common conspiracy — Conviction and sentence — Concurrent finding — Effect — It is not open to challenge in the appeal before the Supreme Court under Article 136. See Penal Code (1860), Section 364. **1957 Cr LJ 559: AIR 1957 SC 381.**

●——**S. 386** — Proof — Accused charged under Sections 302, 364 and 386, I. P. Code — Confession not relied in respect of offence under Section 302 — Value in regard to other offences — Their confessions in regard to other offences can be relied upon in so far as these offences are based on circumstantial evidence. See Evidence Act (1872), S. 24. **1957 Cr LJ 559: AIR 1957 SC 381.**

●——**S. 386** — Applicability — Recovery of ransom under threat of murder of son — Offence — The accused are guilty of aggravated form of kidnapping and extortion. See Penal Code (1860), Section 364. **1957 Cr LJ 559: AIR 1957 SC 381.**

SECTION 387

——**S. 387** — Charge should contain precise accusation — Charge under one section — Conviction under another — Conviction was held bad. See Cr. P. Code (1898), Section 121. **1960 Cr LJ 78: AIR 1960 Madh Pra 11.**

——**S. 387** — Criminal trial — Standard of proof required — Court must be satisfied that prosecution story must be true. See Evidence Act (1872), Section 3. **1960 Cri LJ 78: AIR 1960 Madh Pra 11.**

SECTION 390

——**S. 390 — Applicability—Theft when robbery.** Theft will become robbery only if in the committing of theft or in order to the committing of theft or carrying away or attempting to carry away property obtained by theft, force is used. Where, therefore, no force or show of force is found to have been used in the committing of theft, etc., the accused cannot be found guilty of the offence of robbery. AIR 1952 All 785, Disting. **1954 All WR (HC) 510: 1954 All LJ 670: 1955 Cr LJ 336: AIR 1955 All 128 (130) (Pt B) (Pr 4).**

——**S. 390** — Applicability — When theft becomes robbery — Accused leaving subject-matter of theft and running — When challenged by one of pursuers returning and attacking him — Robbery is not committed because violence was used to destroy evidence of identification and that will not convert theft into robbery. **AIR 1955 NUC (All) 4439.**

——**Ss. 390, 392 and 302** — Conviction — Separate convictions — Accused carrying away stolen property apprehended by owner — Accused striking him with knife and killing him — Accused can be convicted both under Section 392 and Section 302. **AIR 1955 NUC (All) 3573 (DB).**

——**S. 390 — Ingredients of 'robbery' — 'For the end' — Implications of — Hurt or violence caused at the time of theft — Inference — If can be said to be caused for purpose of theft.**

Before theft can amount to 'robbery' the offender must have voluntarily caused or attempted to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt or of instant wrongful restraint. The second necessary ingredient is that this must be in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft. The third necessary ingredient is that the offender must voluntarily cause or attempt to cause to any person hurt, etc., for that end.

Where two views can be taken as to the object for which violence had been used by the accused, it would be safer to take the view which is more favourable to the accused. **(1961) 2 Guj LR 678: 1962 (2) Cr LJ 415 (416, 417) (Pr 20) (DB).**

——**Ss. 390, 392** — Applicability — Theft accompanied by force — Offence under Section 392 made out. **AIR 1955 NUC (Him Pra) 4302.**

——**S. 390** — Robbery and murder as part of the same transaction — Recent and unexplained possession of stolen property is not only presumptive evidence against accused on charge of robbery but also on charge of murder — Murder by child below 16 years — Sentence — More appropriate section for dealing with accused under the Children Act (Travancore, 1120), is Section 33. See Penal Code (1860), Sec. 300. **1956 Ker LT 279: 1965 Ker LJ 385.**

●——**Ss. 390 and 300** — Stolen property of deceased found in possession of accused — Justifies an inference that they took part in robbery. See Penal Code (1860), Section 300. **51 Cri LJ 1265: AIR 1950 Madh Bha 76 (FB).**

——**Ss. 390, 383, 392** — Dishonest intention — Accused extracted his remuneration as a village barber before it became due from malguzar by putting him in instant fear of hurt — Accused held guilty of extortion. See Penal Code (1860), Section 383. **AIR 1950 Nag 214.**

——**S 390. — Essential ingredients — Section 399.** The definition of robbery requires that either death or hurt, wrongful confinement is caused or

the victims put in fear of such result. Merely because the accused were armed with lathis when they removed the articles from the person of the victims it cannot be held that the accused had committed the offence of robbery. It cannot be said that the very presence of the accused armed with lathis in front of the victims amounts to wrongful confinement in law. There must be some evidence of any injury caused to the victims or use of force towards them. AIR 1933 All 114, Dissented from. **24 Cut LT 70: ILR (1958) Cut 169: 1959 Cri LJ 1203: AIR 1959 Orissa 171 (173) (Pr 6).**

——S. 390 — Applicability — Force used in carrying goods — Offence — Section 379.

When force is used when the person who had obtained or taken the goods was in the process of carrying or attempting to carry them, the offence is robbery and not theft. **1958 BLJR 238.**

——Ss. 390 and 391 — "For that end" — Violence used in attempt to escape and not to commit theft — This is no dacoity.

One important portion of the definition of "robbery" is the words "for that end". In other words, the violence must be used for the purpose of achieving the end of theft. If violence is used for any other purpose then it cannot be said to be a robbery. Thus where theft has already been committed and the thieves cause injuries in their attempt to escape and because one of their companions was being assaulted and not to commit theft, the element of robbery is wanting and it cannot therefore be said that there is a dacoity committed. **1956 BLJR 473: 1956 Pat LR 108.**

——S. 390 — Ingredients — Accused setting out to remove paddy bundles — One of them caught hold of by complainant and assaulted — Accused returning the assault — Case held did not fall under Section 390. **AIR 1955 NUC (Pat) 443.**

——Ss. 390, 379 — Theft when becomes robbery — Assault must be found to have been committed for purpose of committing theft, or carrying away or attempting to carry away property obtained by theft. See Penal Code (1860), Section 379. **1954 Cri LJ 215: AIR 1954 Pat 157 (DB).**

——Ss. 390, 392 and 379 — Applicability — Theft or robbery — "Carrying away", means if fear of death, hurt or wrongful restraint is caused after committing theft, in order to carry away property obtained by theft, offence would be robbery — Fear of death after offenders make good their escape with property — Case will not be robbery. **AIR 1955 NUC (Punj) 3440.**

——S. 390 — No mention in F. I. R. that accused had murdered a boy and removed ornaments from his body and had sold them — From prosecution evidence also it cannot be concluded that he caused the death of the boy and stole the ornaments from his person — Conviction for murder and robbery cannot be sustained. See Criminal P. C. (1898), Section 367. **1952 Raj LW 140: ILR (1951) 1 Raj 806.**

——Ss. 390, 394, 397 and 379 — Theft when amounts to robbery.

Theft is robbery if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person hurt etc. The words 'for that end' in Section 390 clearly mean that the hurt caused must be with the object of facilitating the committing of the theft or must be caused while the offender is committing theft or is carrying away or is attempting to carry away property obtained by the theft. It does not merely mean that the assault or the hurt must be caused in the same transaction or in the same circumstances. AIR 1941 Oudh 476; AIR 1918 Mad 821 and AIR 1933 Lah 407, Ref.

Where hurt was caused first and theft was the last act of the accused:

Held, that offence, if any, was mere theft and not robbery. **5 Sau LR 21: 1953 Cri LJ 909: AIR 1953 Sau 85 (86) (Pt B) (Pr 4) (DB).**

SECTION 391

——S. 391 — Dacoits unsuccessful in removing any booty — Dacoity if committed.

The word 'dacoity' has been defined not only where a robbery is committed by five or more persons but where five or more persons had attempted to commit a robbery. In view of the definition of a dacoity the argument that, as the dacoits were unsuccessful in removing any booty, no dacoity was committed, is misconceived. **1951 All LJ 567: 52 Cri LJ 1514: 1951 All WR (HC) 588: 1951 All Cr C 146: AIR 1951 All 834 (835) (Pt B) (Pr 8) (DB).**

——Ss. 391 and 395 — Offence of dacoity — Accused, more than 5, breaking open house and removing material after dismantling it — Accused chasing and threatening to beat servant of owner in charge of house, when he stopped them from breaking open the house — Ingredients of offence of dacoity held made out. **51 Cri LJ 1244: ILR (1951) 2 All 660: AIR 1950 All 471 (474) (Pt D) (Pr 26) (DB).**

——S. 391 — Five accused charged — One acquitted — Rest cannot be convicted — (Criminal P. C. (1898), Section 439).

Where five persons were charged under Section 395, and it was not the prosecution case that there were any more persons who took part in the dacoity, and one of the accused was acquitted, the remaining four accused cannot be convicted under Section 395. AIR 1957 Andh Pra 954, Rel. on.

(On the facts of the case, instead of remanding the case to see if the accused could be convicted for lesser offence, his Lordship acquitted the accused — AIR 1954 SC 51, Rel. on.) **1958 Cr LJ 1001: AIR 1958 Andh Pra 510 (511, 512) (Prs 7, 9).**

——S. 391 — Essence of offence — Common object.

The essence of the offence of dacoity is the conjoint act of five or more persons to commit or attempt to commit robbery. Only for acts committed by one of the members of the unlawful assembly in pursuance of the common object, could all of them be found guilty.

Thus where the accused were actuated by the common object of rescuing certain persons from the custody of the Prohibition Guards and in attempting to rescue them, one of the members of the unlawful assembly suddenly seized an object in the hands of one of the officers, it could not be said that it was the conjoint act of all the members of the mob and hence the essential ingredient to constitute an offence of dacoity is absent. **(1954) 2 MLJ (Andhra) 248.**

——S. 391 — Conjointly.

The word 'conjointly' is the most important word bearing on the liability of persons accused of an offence of dacoity. While it may be true to say that common intention is no part of the offence of dacoity, the word 'conjointly' used in S. 391 manifestly refers to united and concerted action of the persons participating in the transaction. If individual acts of persons cannot reasonably be referred to a united or concerted action

of such persons, there cannot be any question of any conviction for dacoity of the group of persons concerned.

The prosecution case was that the accused persons in a body surrounded the complainant's cart to see if it carried any paddy. The complainant who was following the cart on a bicycle resented this interference and had an altercation with the accused. Some of the accused got infuriated and began to assault the complainant and his companion and ultimately dispersed after taking away their bicycles. There was no grain in the cart and nothing was removed from it.

Held, that the original concerted action which the accused persons might have had in view came to an end with the assault on the complainant and his companion and if thereafter some of the accused acted individually and removed bicycles, it could not be said that the other persons were acting conjointly with those who removed the bicycles, so as to make each of them liable for theft or dacoity. **52 Cri LJ 1380: ILR (1951) 3 Assam 365: AIR 1951 Assam 143 (2) (143) (Pt B) (Pr 2) (DB).**

——S. 391 — Dacoity — Sufficiency of evidence. Where the evidence was that some persons on the top of the house of another person got into the house through the skylight and carried away some bags.

Held, that that could not obviously be construed as evidence sufficient for sustaining a specific charge of dacoity. **65 Mad LW 238: 1952 Mad WN 369: 1952 Mad WN Cr 81: (1952) 2 Mad LJ 7: 1953 Cri LJ 29: AIR 1952 Mad 821 (824) (Pt E) (Pr 19).**

——S. 391 — Essentials — Mere presence with others not sufficient — Evidence of committing or aiding commission of robbery necessary. 1962 (1) Cri LJ 168: AIR 1962 Manipur 7 (9) (Pt A) (Pr 12).

——S. 391 — Out of five accused challaned, two acquitted on ground that only three had taken part in committing offence — These three held could not be convicted under Section 395 for offence of dacoity cannot be committed by persons less than five (obiter). 1952 Raj LW 223: 1953 Cri LJ 447: ILR (1952) 2 Raj 177: AIR 1953 Raj 49 (51) (Pt C) (Pr 5).

——S. 391 —Scope — "Common intention" — If should be shared by all accused.

Under Section 391, Penal Code, it is necessary that all the persons should share the common intention of committing robbery. **1956 Cri LJ 1021: AIR 1956 Vin Pra 18 (18) (Pt B) (Pr 1).**

SECTION 392

——Ss. 392, 34, 302 — Circumstantial evidence — Recent possession of stolen property belonging to murdered man — Charge of murder and robbery against three persons — No mention of Section 34 in charge — Two of them acquitted — Conviction of remaining accused under Sections 302 and 392 held justified. See Penal Code (1860), Section 34. 1956 Cri LJ 790: AIR 1956 SC 400.

——S. 392 — Illegal and unauthorised seizure of account books from factory of Excise Department Officer — Owner does not commit offence under Section 392 in recovering them — If force is used in recovering books, case falls under Section 354 — Agent's possession is principal's possession. See Penal Code (1860), Section 352. 1965 (2) Cri LJ 582: AIR 1965 All 543.

——S. 392 — Evidence of identification — Appreciation of — One of most important factors for consideration is whether there was sufficient light for features of an unknown person being well seen by witnesses. See Evidence Act (1872), Section 9. **AIR 1955 NUC (All) 5287 (DB).**

——S. 392 — Scope — Separate convictions under Sections 392 and 302 — Accused in carrying away stolen property apprehended by owner of property — Accused striking him with a knife and killing him — He can be convicted both under Sections 392 and 302 as he has committed two separate offences. See Penal Code (1860), Section 390. AIR 1955 NUC (All) 3573 (DB).

——Ss. 392, 302 — Murder and robbery — Circumstantial evidence — On evidence accused held guilty under Sections 302 and 392. See Penal Code (1860), Section 302. 1965 (2) Cri LJ 63: AIR 1965 Andh Pra 251 (DB).

——Ss. 392 and 411 — Theft and retention of stolen goods form one and same offence and not to be punished separately — Conviction under Section 392 — Conviction and sentence under Section 411 improper.

Considering the language of Section 411, dishonest retention is contradistinguished in that section from dishonest reception. In the former offence dishonesty supervenes after the act of acquisition of possession, while in the latter dishonesty is contemporaneous with the act of acquisition. The act of dishonest removal within the meaning of Section 379 constitutes dishonest reception within Section 411 and that being so the thief does not commit the offence of retaining stolen property merely by continuing to keep possession of the property he stole. The theft and taking and retention of stolen goods form one and the same offence and cannot be punished separately.

Hence where the accused is convicted and sentenced under Section 392, his conviction and sentence under Section 411 cannot be sustained. Case law relied on. **51 Cri LJ 581: 1950 All WR (Supp) 15: 1950 All Cri Cas 32: AIR 1950 East Punj 66 (68, 69) (Prs 24, 27).**

——S. 392 — Applicability — Theft accompanied by force — Offence under Section 392 held made out. See Penal Code (1860), Section 390. AIR 1955 NUC (Him Pra) 4302.

——S. 392 — Scope — Robbery or theft in dwelling house — Held, in circumstances, murder could not be said to have any connection with theft and hence offence committed by accused fell under Section 380 and not Section 392. See Penal Code (1860), Section 380. **1953 Cri LJ 1665: AIR 1953 Him Pra 105.**

——Ss. 392, 378 and 24 — Actual seizure of a bus under a conditional order of attachment by the Court — Bus taken possession of by Court Amin from the accused — Order of attachment not made against the accused — Accused removing the bus after such seizure — Commits no offence either under Section 392 or Section 378 as removal cannot be said to be dishonest — AIR 1961 SC 803, Rel. on; AIR 1934 All 711; AIR 1933 All 46; AIR 1928 Rang 285, Applied. (1965) 2 Ker LR 418: 1966 Ker LJ 17.

——Ss. 392 and 302 — Evidence — Unexplained possession of stolen articles soon after crime — Not only presumptive evidence against accused on charge of robbery but also on charge of murder. See Penal Code (1860), Section 302. 1960 Ker LT 829: (1960) 2 Ker LR 222: 1960 Ker LJ 896.

——S. 392 — Conviction — Circumstantial evidence — Sufficiency — Possession of stolen property — Evidentiary value indicated. See Evidence Act

(1872), Section 3. **1957 Cr LJ 751: AIR 1957 Ker 65 (DB).**

——Ss. 392, 404 — Murder and robbery committed in same transaction — Offence falls under Section 392 — 'Person' does not exclude dead body in such a case.

Where murder and robbery are committed in the course of the same transaction by the same person, the offence would fall under Section 392 and not under Section 404. In that contest, the word 'person' cannot be so narrowly construed as to exclude the dead body of a human being who was killed in the course of the same transaction in which theft was committed. The matter would be different if a thing is stolen from a dead body apart from the transaction in which death occurred. **1962 MPLJ 1064: 1962 Jab LJ 876: 1963 (1) Cr LJ 433: ILR (1963) Madh Pra 730: AIR 1963 Madh Pra 106 (114) (Pt I) (Pr 34) (DB).**

——S. 392 — Accused committed under Sections 302, 307, 392, Penal Code — Sessions Judge should not split up case of murder from robbery to be dealt with separately. See Criminal P. C. (1898), Section 240. **AIR 1952 Mad 411 (DB).**

——S. 392 — Sentence — Accused 23 years old — No injury to complainant — Sentence of six months held sufficient. **63 Mad LW 195: (1950) 1 Mad LJ 235: 1950 Mad WN 263: 1950 All WR (Supp) 68: 1950 Mad WN (Cri) 67: AIR 1950 Mad 639 (640) (Pt B) (Pr 5) (DB).**

——S. 392 — Dishonest intention — Accused extracted his annual remuneration as village barber from complainant before it became due by putting him in fear of instant hurt — Accused held liable under Section 392. See Penal Code (1860), Section 383. **AIR 1950 Nag 214.**

——S. 392 — Five persons charged for dacoity — Acquittal of one — Remaining four cannot be convicted under Section 395 — Their conviction under Section 392. See Penal Code (1860), Section 395. **('58) 24 Cut LT 487.**

——S. 392 — Offence of robbery—Not triable by Gram Cutchery. See Panchayats — Bihar Panchayat Raj Act (1948), Section 73. **1958 BLJR 238.**

——Ss. 392, 390, 379 — Theft or robbery — "Carrying away", means if fear of death, hurt or wrongful restraint is caused after committing theft, in order to carry away property obtained by theft, offence would be robbery — Fear of death after offenders make good their escape with property — Case will not be robbery. **AIR 1955 NUC (Punj) 3440.**

——Ss. 392, 323 — Prosecution under — Rajasthan Land Revenue Act (15 of 1956), Section 230 — Warrant under endorsement — Extension — Procedure — Attachment of cows of B by Revenue Inspector, void — Assault on Revenue Inspector by sons of B — Latter, if committed any offence.

Held, on facts, (1) that there was no bar against the endorsement of a warrant in favour of more than one person; (2) that the Tahsildar having failed to mention the extended date in the warrant and having also failed to issue a new warrant the Revenue Inspector was not competent to execute the warrant on 30-8-1962 and they were not in the lawful discharge of the public functions. The accused persons having offered resistance to the execution of such a warrant could not be treated as having assaulted public servants in the discharge of their public duties or to have committed an offence under Section 392, I. P. C. in removing their own cattle from the possession of the Revenue Inspector. The attachment having been void ab initio the accused persons in taking their father's property committed no offence of theft and consequently, no offence of robbery. **1964 Raj LW 617: ILR (1965) 15 Raj 166.**

——Ss. 392, 378 — Applicability — Theft or robbery.

Where, the accused persons in the beginning only intended to cause hurt to the complainant but when they left him they took away his murkis and bhakla which were on the complainant's person and while doing it one of the accused caught hold of the complainant's hands and the other snatched the murkis from his ears, so that in committing the theft they voluntarily caused hurt to the complainant:

Held, that it was not a simple case of theft but of robbery. AIR 1953 Sau 85, Disting. **1955 Cr LJ 1285: 1956 Raj LW 67: ILR (1955) 5 Raj 510: AIR 1955 Raj 147 (151) (Pt B) (Pr 16).**

——S. 392 — Sentence.

Where the accused persons simply wanted to beat the complainant but when they saw that the complainant had fallen down one of them snatched the murkis from the complainant's ears to give him additional punishment and make a dishonest gain for himself.

Held, that it was not a planned robbery. It was committed at the spur of the moment and because temptation could not be resisted. Under the circumstances, three years' rigorous imprisonment would be quite sufficient to meet the ends of justice. **1955 Cr LJ 1285: 1956 Raj LW 67: ILR (1955) 5 Raj 510: AIR 1955 Raj 147 (151) (Pt C) (Pr 17).**

——S. 392 — Circumstantial evidence — Inference of guilt when can be drawn. See Penal Code (1860), Section 302. **AIR 1955 NUC (Raj) 478 (DB).**

SECTION 394

——S. 394 — Evidence of prosecution witnesses — Appreciation and credibility of — Testimony of ballistic expert to prove that injury was caused by the firearm — When essential, stated. See Penal Code (1860), Section 34. **1962 SCD 865: 1963 Mad LJ (Cri) 166.**

——Ss. 394 and 397 — Applicability — Accused snatching ornament from woman's neck and while doing so causing injury to her. Case falls under Section 394 — Accused also firing revolver shots to frighten his pursuers — Offence will fall under Section 394 read with Section 397. **AIR 1955 NUC (Ajmer) 4757.**

——S. 394 — Highway robbery — Voluntarily causing hurt during robbery — Conviction under Section 394 proper — Sentence.

Where there is sufficient evidence on record that the accused waylaid the victims and deprived them of their cycles and also beat one of the victims, their conviction under Section 394 is proper.

Highway robbery is a serious offence and is a great menace to the travelling public. In order to put a stop to it and ensure the safety of the persons travelling by the road a deterrent sentence is necessary. **1956 All WR (HC) 89.**

——S. 394 — Proof of offence — Recovery of articles taken at robbery — Sufficiency — Mere circumstance of a trunk proved to have been taken away in robbery having been recovered as a result of what the accused had said to the police cannot connect him with any crime under Section 394. See Evidence Act (1872), Section 114. **1959 Cri LJ 581: AIR 1959 Cal 280 (DB).**

——**Ss. 394, 321, 379 — Applicability — Beating resulting in injuries followed immediately by theft — Accused guilty under Section 394.**

Where after beating the complainant and his concubine which resulted in causing injuries to them, the accused entered the complainant's house and removed boxes containing cash, ornaments and utensils:

Held, that the beating was primarily for the purpose of the theft which took place immediately after the assault. There was but one transaction, namely, a robbery. The language of Section 394 was wide enough to include a case such as this. The facts concerned did not involve two transactions, the first of which constituted offence of hurt and the second an offence under Section 379. **1955 Cr LJ 1346: AIR 1955 Cal 527 (528) (Pr 5) (DB).**

——**S. 394** — Scope — Offence under Section 397, Penal Code taken cognizance of — Accused can, at the same trial be tried for offence under Section 394, Penal Code. See W. B. Tribunals of Criminal Jurisdiction Act (14 of 1952), Section 4. **56 Cr LJ 657: AIR 1955 Cal 177 (DB).**

——**S. 394** — Recovery of ornaments from fields accessible to all — No basis for conviction under Section 395. **1959 MPLJ (Notes) 11.**

——**Ss. 394, 397 and 404 — Murder — Removal of ornaments from dead body — Offence.**

Removal of ornaments from body of one after causing his death, cannot amount to robbery because robbery is theft by force and theft is taking movable property out of possession of a person. If the act of theft had taken place while the person murdered was alive, it would have been robbery (Section 394 read with Section 397) but removing ornaments from a dead body is not taking ornaments out of the possession of a person. A dead body is not a person. In the circumstances, the act of the accused amounts to dishonest misappropriation of property possessed by the deceased and is an offence under Section 404, Penal Code. **1958 All LJ (Rev) 76: 1958 MPC 247: 1958 All WR (Sup) 84: 1958 Cr LJ 902: 1958 All Cr R 282: 1958 MPLJ 398: AIR 1958 Madh Pra 192 (193) (Pr 9) (DB).**

——**S. 394** — Provision for — Imprisonment for life or imprisonment for ten years and fine — Lesser punishment in Section 394 is not alternative sentence — Accused cannot have benefit of provisions of Section 4, or 6 of Probation of Offenders Act. See Probation of Offenders Act (1958), Section 4. **1965 (2) Cri LJ 51: AIR 1965 Orissa 106.**

——**S. 394** — Five persons charged for decoity — Acquittal of one — Remaining four cannot be convicted under Section 395 — Their conviction under Section 392 — Applicability of Section 394, pointed out. See Penal Code (1860), Section 395. **('58): 24 Cut LT 487.**

——**S. 394** — Applicability — Test is whether hurt has been caused in committing or attempting to commit robbery. **AIR 1955 NUC (Pat) 443.**

——**S. 394** — Theft when amounts to robbery — Hurt was caused first and the theft was the last act of accused — **Held,** that the offence, if any, was mere theft and not robbery. See Penal Code (1860), Section 390. **AIR 1953 Sau 85 (DB).**

SECTION 395

SYNOPSIS

(Penal Code (1860), S. 395.)

1. Scope.
2. Conviction and sentence.
3. Evidence and proof.
(A) Identification.
(B) Presumption.
4. Procedure.

1. Scope.

——**S. 395** — Accused shooting and murdering persons pursuing them in hot haste after dacoity — Section 396 applies. See Penal Code (1860), S. 396. **1959 All WR (HC) 491.**

——**S. 395** — Scope — Section should not be used as security section — Evidence and proof required under S. 395, indicated — (Evidence Act (1872), S. 9). **AIR 1955 NUC (All) 2284.**

——**Ss. 395, 391** — Offence of dacoity — Accused, more than 5, breaking open house and removing material after dismantling it — Accused chasing and threatening to beat servant of owner, in charge of house, when he stopped them from breaking open the house — Ingredients of offence of dacoity held made out. See Penal Code (1860), S. 391. **51 Cri LJ 1244: AIR 1950 All 471 (DB).**

——**Ss. 395, 396, 397, 398, 399 and 402** — Ingredients of the offence — Presence of at least five persons taking part in robbery is essential ingredient of dacoity. See Penal Code (1860), S. 399. **1958 Cri LJ 25: AIR 1958 Cal 25 (DB).**

——**S. 395** — Liability of leader — **Held, on** facts that so far as the act of dacoity was concerned, the liability of leader could not be within the sphere of intention and yet it arises with regard to object of unlawful assembly. See Penal Code (1860), Section 34. **52 Cri LJ 1123: AIR 1951 Hyd 97 (DB).**

——**Ss. 395, 378, 380, 24** — Demolition of building and removal of material — No violence used — Offence is theft and not dacoity — Wrongful loss to owner — Intention to cause wrongful loss can be presumed — There is, therefore, dishonest taking. See Penal Code (1860), S. 378. **1961 (2) Cri LJ 364: AIR 1961 Pat 362 (DB).**

——**S. 395 — Offence of dacoity — Stages of — Punishable at four stages.**

Dacoity is perhaps the only offence which the legislature has made punishable at four stages. When five or more persons assemble for the purpose of committing a dacoity, each of them is punishable under S. 402 of the Penal Code merely on the ground of joining the assembly. Another stage is that of preparation, and if any one makes preparation to commit a dacoity, he is punishable under S. 399. The definition of 'dacoity' in S. 391 shows that the other two stages namely, the stage of attempting to commit, and the stage of actual commission of, robbery, have been treated alike and come within the definition. **1960 BLJR 511: 1960 Cri LJ 1650: AIR 1960 Pat 582 (586) (Pt F) (Pr 24).**

——**S. 395** — Evidence Act (1872), Ss. 9 and 134 — Dacoity case — Identification by only one witness — Value. See Evidence Act (1872), S. 9. **1956 Cri LJ 95: AIR 1956 Pat 39 (DB).**

——**S. 395** — Evidence Act (1872), S. 9 — Identification — Enmity of witness towards accused — Relevancy. See Evidence Act (1872), S. 9. **1956 Cri LJ 95: AIR 1956 Pat 39 (DB).**

——**S. 395 — Applicability.**

Where there had been a dacoity and the dacoits were more than five in number, then whosoever was concerned in the crime would be guilty of an offence under the section. **1958 Raj LW 527.**

2. Conviction and sentence.

——**Ss. 395, 396 and 302 — Applicability — Attempt to commit robbery by five or more persons — Accused running away without committing robbery on hue and cry being raised — Villagers chasing — One accused, killing one of chasers when they had gone considerable distance — Offence — Conviction for S. 395 and S. 302 — (Criminal P. C. (1898), S. 423).**

Where the accused and his companions who numbered five or more than five attempted to commit robbery at the house of A, but on a hue and cry being raised took to their heels without any booty, there was attempt to commit robbery and the accused would be punishable under Section 395.

There was clear attempt at robbery but it did not comprise the carrying away or attempting to carry away property obtained by theft. Since no theft was committed nor were the dacoits engaged in carrying away or attempting to carry away the property, the transaction of dacoity stopped short at the mere attempt to commit robbery. 3 Cr LJ 294 (All), Disting.

Held, even if the accused could not be convicted under S. 396, he could be convicted under Section 302. The accused could be convicted of the offence under S. 302, since such a charge could be made out against him. Shyam Behari v. State of U. P., **1957 Cr LJ 416: AIR 1957 SC 320 (322, 323) (Prs 5, 7, 14, 15).**

——Ss. 395 and 412 — Scope — Conviction of same accused under both — Legality.

Where a person is not guilty under S. 395, Penal Code for committing a dacoity but where the looted property is found in his possession and he has knowledge that it is looted property, he can be held guilty under S. 412, Penal Code: but where he is convicted under S. 395 for committing a dacoity and it is in the course of that dacoity that the property which is found in his possession came to him he cannot be held guilty both under Ss. 395 and 412. (1950) AC 32, Rel. on. **1956 All WR (HC) 40: 1956 Cr LJ 662: AIR 1956 All 336 (336) (Pr 1).**

——S. 395 — Sentence — Mitigating circumstance.

A dacoity is actuated by the contemptible motive of appropriating property lawfully belonging to another. The crime itself is difficult to trace, and only a small proportion of the criminals taking part are arrested; even then it is often difficult to secure the conviction of more than a fraction of them. For these reasons it is a grievous mistake to treat dacoits lightly in the matter of punishment. Accordingly, unless there is satisfactory proof of the existence of mitigating circumstances, the sentence on dacoits should invariably be heavy and deterrent.

A reasonable circumstance in mitigation can be the extreme youth of an offender, for in his case it is arguable that he acted under the domination of the will of his seniors. There can also be what for the sake of convenience might be termed a 'technical dacoity' for example, where two parties in a village have a dispute over some agricultural land and one of them numbering five or more forcibly harvests the crop and removes it. But where the dacoity is a real one, the normal sentence under S. 395 should be seven years' rigorous imprisonment together with fine.

Where fire-arms have been used or the village people injured or cruelly treated or their womenfolk dishonoured ten years would be more appropriate. Gang-leaders and previous convicts deserve to be punished even more severely. Leniency to those who are old enough to understand the nature and consequences of their acts is indefensible, and in the interest of society it is imperative for criminals to be made to learn that dacoity will not pay. **1956 All WR (HC) 1: 1956 Cr LJ 358 (2): 1956 All LJ 206: AIR 1956 All 163 (166, 167) (Pt B) (Prs 15, 19) (DB).**

——S. 395 — Dacoity on highway — Punishment.

Dacoity committed on a public road is not less heinous than that committed in a house. The commission of a dacoity on the highway between sunset and sunrise must be treated as an aggravation of the offence justifying a graver punishment. AIR 1942 Pat 156, Rel. on. **1956 All WR (HC) 1: 1956 Cr LJ 358 (2): 1956 All LJ 206: AIR 1956 All 163 (166) (Pt C) (Pr 18) (DB).**

——S. 395 — Sentence — Measure of punishment — Dacoity — Firearms used — Valuable property looted — Gang operating for some time and committing several dacoities previously — Deterrent sentences should be awarded. **AIR 1955 NUC (All) 4158.**

——S. 395 — Sentence of five years held lenient — Sentence held should be 10 years — But since there was no appeal by State, sentence was not enhanced. **AIR 1955 NUC (All) 1504.**

——S. 395 — Sentence — Dacoity on increase in State — Deterrent punishment is called for — 7 years' sentence held not excessive. **1952 All Cri Cas 7: 1952 RD (HC) 57: 1952 All WR (HC) 10: 1953 Cri LJ 367: AIR 1953 All 131 (133) (Pt B) (Pr 11).**

——S. 395 — Sentence — Fine — Adequacy of.

A sentence of fine is not appropriate in dacoity cases. The dacoits are generally persons of little or no means. Where there are also sentences of long term imprisonment, it simply means that the sentence of fine will cause hardship and suffering to the unfortunate members of their family, who have been deprived of their breadwinner. Such sentences generally result in what small property there may be being sold up during the absence of the convict in jail, and his womenfolk being severely harassed through no fault of their own. 47 Cr LJ 78, Rel. on. **(1958) 1 An WR 9: 1957 An LT 709: ILR (1957) Andh Pra 742: 1958 MLJ (Cri) 31: 1958 Cr LJ 343: AIR 1958 Andh Pra 165 (170) (Pt E) (Pr 22) (DB).**

——S. 395 — Conviction of less than five.

Where seven persons only were charged for the offence of a dacoity but the Court acquitted four of them for want of proof, the conviction of the remaining three accused under S. 395, I. P. Code cannot be sustained when there was nothing to indicate that other persons also took part in the crime. **1956 Andh WR 179: (1957) Cr LJ 1227: ILR (1956) Andh Pra 1019: AIR 1957 Andh Pra 954 (954) (Pt A) (Pr 7).**

——Ss. 395 and 412 — Simultaneous convictions under — Legality — (Criminal P. C. (1898), Section 236).

There is no statutory prohibition against conviction under both S. 395 and S. 412, Penal Code. On principle, if the criminal act is only a single act coming within the definition of two distinct offences, there should not be a conviction for both the offences. Where the act of dacoity in respect of which there has been a conviction under Section 395 does not necessarily involve a transfer of possession of the property which is punishable under S. 412 and the evidence relating to the participation in the robbery is distinct from that relating to the subsequent possession and it is quite likely that there was a separate act of division of the spoils by which the possession of the stolen property was transferred, simultaneous convictions under S. 395 and S. 412 are not illegal. **1956 Andh LT 915.**

——S. 395 — Sentence — Imprisonment and fine both obligatory — Fine imposed must be adequate and not merely a token fine. **1965 (2) Cr LJ 507: AIR 1965 Madh Pra 225 (228) (Pt A) (Pr 15) (DB).**

——S. 395 — Offence of wrongful confinement in course of dacoity — Offences are distinct — Section 71 not applicable — Separate sentences must be imposed. See Penal Code (1860), S. 71. **1962 (1) Cri LJ 168: AIR 1962 Manipur 7.**

——Ss. 395, 392, 394 — Five persons charged for dacoity — Acquittal of one — Remaining four cannot be convicted under S. 395 — Their conviction under S. 392.

When a charge says that the five accused persons committed dacoity and one of them is acquitted, then the conviction of the remaining four persons for dacoity under S. 395 is contrary to law and should be set aside.

Held, that it was unfortunate that the charge was framed only against five persons without mentioning the words "and others". It was better in the administration of criminal justice that the Sessions Judges should frame a charge after reading the committal order and bring their mind to bear upon the charge framed against the accused for which he was called upon to defend himself.

In view of the illegality of the conviction for dacoity, the conviction for dacoity also of the other two persons who had not appealed should be set aside in exercise of revisional powers.

It is necessary to convict the four persons for robbery that they must have caused the theft as also the injury. If these ingredients are not present, a judgment of conviction against the four persons under S. 392, I. P. C. cannot be passed.

The case would be governed under S. 394, I. P. Code, because though the person who caused the injuries is different from the person from whose house the stolen properties are recovered and who can be presumed to be the thief, yet by virtue of Section 394, I. P. C. they can be said to be persons jointly concerned in committing or attempting to commit robbery. **('58) 24 Cut LT 487.**

——Ss. 395 and 400 — Sentence.

Offences like dacoity have to be put down sternly by passing deterrent sentences on those found guilty. A sentence of two, three or four years' rigorous imprisonment is grossly inadequate, especially in a gang case under S. 400, I. P. C., which is far more heinous than a case of simple dacoity under S. 395. **ILR (1956) Cut 195: 1956 Cr LJ 1208: 22 Cut LT 317: AIR 1958 Orissa 177 (186) (Pt K) (Pr 49) (DB).**

——Ss. 395, 149 — Members of unlawful assembly guilty of rioting — Dacoity committed by some at same transaction — Legality of conviction of all for dacoity — Fact that unlawful assembly, rioting and dacoity formed one transaction would not be enough to make persons who were not actual participants in dacoity liable unless common object of dacoity is made out and case falls within purview of S. 149. See Penal Code (1860), S. 149. **AIR 1953 Orissa 1 (DB).**

——S. 395 — Scope — Charge against five or more persons — Conviction of only four persons — Legality of.

The fact that only four persons have been convicted of the persons charged does not make the conviction illegal or unsustainable. Merely because the fifth man is not identified and therefore, acquitted, it does not follow that the convicion of the other four who have been correctly identified must be held to be illegal. AIR 1917 All 173; AIR 1927 Lah 519; AIR 1928 Mad 144, Dist. and Expl.: AIR 1950 FC 80: 12 Cr LJ 193: AIR 1927 Lah 519; AIR 1930 Lah 263, Ref. **AIR 1951 Orissa 71 (77) (Pt G) (Prs 11, 14) (DB).**

——S. 395 — Sentence — Sentence of five years is inadequate — On facts held that proper sentence ought to be 8 years. **1965 (2) Cr LJ 839 (839) (Pr 4) (Pat).**

——S. 395 — Measure of punishment.

When the Court is satisfied about the guilt of an accused man of the charge of dacoity, the sentence to be imposed must be adequate and normally speaking a sentence of ten years' rigorous imprisonment is adequate unless of course, there are special circumstances of the case to justify a lesser sentence. **(1964) ILR 43 Pat 211 (DB).**

——S. 395 — Sentence of fine only is illegal. **1961 BLJR 126: 1961 (2) Cr LJ 364: AIR 1961 Pat 362 (364) (Pt B) (Pr 9) (DB).**

——Ss. 395, 397 — Sentence — Offence indicative of the law of the jungle—Dacoity committed at 6 p.m. by persons armed with guns and lathis by terrorising the whole village by firing shots from guns and threatening any one who dared to come near the house with dire consequences. Three of the villagers receiving wounds because of the random shots fired by the accused — Considering the daring nature, gravity of offence and the manner in which practically the whole village was terrorised, sentence of ten years' rigorous imprisonment could not be said to be too severe. **(1964) 66 Pun LR 173.**

——Ss. 395, 333 and 332 — Assistant Sub-Inspector of Punjab State coming with staff to village in Rajasthan for investigation of case in Punjab — Searches and seizure of properties of accused by Assistant Sub-Inspector held to be without jurisdiction — Police party held not to have acted in good faith — Right of private defence held, however, not available to accused under circumstances of case — Offence under S. 395, held not proved — Convictions under Ss. 332 and 333 upheld. **1964 Raj LW 126.**

——Ss. 395 and 397 — Applicability — Conviction.

As S. 397 does not create a substantive offence a conviction under that section is not correct, it ought to be under S. 395 read with S. 397. **1957 Cr LJ 1457: AIR 1957 Tripura 48 (49) (Pt A) (Pr 1).**

——Ss. 395 and 397 — Dacoity — Accused giving blow with lathi — Lathi not shown to be dendly weapon — Conviction — Sustainability.

Where it was proved that the accused was one of the dacoits and gave a blow with a lathi on the head of a person while committing dacoity, but there was no evidence to show that the lathi used by him was a deadly weapon, nor was there any evidence to support the view that grievous hurt was caused or attempted to be caused by him:

Held, that the conviction of the accused under S. 397, could not be maintained and must be altered into one under S. 395. **1957 Cr LJ 1457: AIR 1957 Tripura 48 (49) (Pt C) (Pr 6).**

——S. 395 — Great prevalence of dacoity — Punishment.

In view of the great prevalence of dacoity in certain parts, a sentence even under S. 395 has to be severe except where that section applies for purely technical or formal reasons, an adequate sentence is purely more than 7 years' R. I. Thus whether or not S. 397 also applies in such a case is of little practical consequence as it only prescribes that when there are particular aggravating circumstances the sentence shall not be less than 7 years. The actual sentence has to depend on the sections applicable and the circumstances of each case. **1952 Cri LJ 986: AIR 1952 Vind Pra 42 (49) (Pt N) (Pr 35).**

3. Evidence and proof.
(A) Identification.
(B) Presumption.

3. Evidence and proof.

——Ss. 395, 399 — Offence under S. 399 — Overt act by accused not necessary. See Penal Code (1860), S. 399. **1959 Cri LJ 1274: AIR 1959 All 727 (DB).**

——S. 395 — Evidence — List of stolen property — It is difficult, in case of dacoity, for person to remember everything that was lost — Certain items added to list later on — Second list is not necessarily incorrect. **AIR 1955 NUC (All) 3518.**

——S. 395 — Evidence — Credibility of witnesses.

It is not safe to rely on the testimony of one good witness for convicting a person of the offence of dacoity especially when there is no other circumstantial evidence to connect him with the crime. **1954 All WR (HC) 69: 1954 Cri LJ 1439: AIR 1954 All 684 (686) (Pt C) (Prs 9, 10).**

——Ss. 395 and 396 — Applicability — Commission of murder by one of the dacoits while retreating after unsuccessful attempt — Effect.

Where murder is committed by one of the dacoits while retreating after an unsuccessful attempt to commit dacoity, the question whether murder was committed while committing dacoity is a pure question of fact and of degree, not to be determined by any general rule, but by the special circumstances of each case. **1951 AWR (HC) 589: 52 Cr LJ 1514: 1951 ALJ 567: AIR 1951 All 834 (835) (Pt A) (Pr 7) (DB).**

——Ss. 395, 436, 412 — Proof of offence under — A, B, C and D charged under Ss. 395 and 436 — A and B mentioned in FIR — Recovery of looted property from C and D not denied — No proof of misdirection — Conviction of A and B under Ss. 395 and 436 and C and D under S. 412 correct. **AIR 1955 NUC (Assam) 4237 (DB).**

——Ss. 395 and 412 — Applicability — Case of dacoity — One accused found in possession of stolen articles — Accused not on scene of dacoity — Conviction under S. 395 altered to one under S. 412. **AIR 1955 NUC (Assam) 4191 (DB).**

——S. 395 — Evidence — Recovery of articles — Proof of — Absence of recovery memo — Oral testimony of recovery is unreliable. **AIR 1955 NUC (Madh Bha) 3388.**

——S. 395 — Evidence — Article recovered in absence of accused from his house — Evidence is not sufficient for conviction when there is no evidence to show that they were placed there by him and were in his exclusive possession. **AIR 1955 NUC (Madh Bha) 3388.**

——S. 395 — Applicability — Conditions.

In order to sustain a conviction under S. 395 of the Penal Code, it must be proved that the violence had been used for the act of committing theft. The hurt caused must have been for the express purpose of theft. Where the prosecution evidence is that the assault and the loot took place simultaneously and it is not the prosecution evidence that the assault took place in order to loot the property, the assault is not for the express purpose of committing the robbery and it cannot be said that the prosecution has substantiated the charge under Section 395. AIR 1933 Lah 407; AIR 1918 Mad 821, Rel. on. **(1959) 1 OJD 460: 25 Cut LT 433.**

——S. 395 — Evidence — Looting and removal of property — Looters more than five — Articles removed not ultimately recovered from accused — Details of stolen articles furnished to police only some time after occurrence — If negatives offence.

The circumstances that the actual articles removed by looting have not been ultimately recovered from any of the accused persons or that the details of the property removed or stolen were furnished to the police until some time after the occurrence, is of no consequence and cannot justify the rejecting of the prosecution evidence as regards looting or robbery as false. Where there is no doubt about the occurrence on the evidence and it is clearly made out that in each instance of looting and removal of articles, the group that entered each house and looted consisted of more than five persons, it must he held that the offence of dacoity is committed. **18 Cut LT 188: 54 Cr LJ 123: AIR 1953 Orissa 1 (3) (Pt B) (Pr 7) (DB).**

——S. 395 — Mere recovery of opium from deserted house without proof of possession — Charge of dacoity cannot be sustained.

The circumstance of mere recovery of an unusual quantity of opium from a deserted house without any proof of possession of any of the accused cannot lend any support to a charge of dacoity. **1964 Raj LW 171: ILR (1964) 14 Raj 715.**

3 (A). Identification.

——Ss. 395 and 396 — Proof — Investigating Officer getting accused photographed after arrest and before they were sent to jail — Evidence of identification — Value of — It should be entirely above board and should be such as can command confidence. See Evidence Act (1872), S. 9. **1960 All LJ 414: 1960 All Cr R 193.**

——S. 395 — Facts establishing identity of persons — Value of identification evidence in dacoity case stated. See Evidence Act (1872), S. 9. **1956 All WR (HC) 757: 1956 All LJ 718.**

——Ss. 395 and 392 — Evidence of identification — Appreciation of one of most important factors for consideration is whether there was sufficient light for the features of an unknown person being well seen by witnesses — Second point to be remembered is that the persons who identify an accused have had no opportunity of seeing him after commission of the crime. See Evidence Act (1872), S. 9. **AIR 1955 NUC (All) 5287 (DB).**

——S. 395 — Evidence — Single witness identifying accused — Conviction based on such identification can be legal if Court feels satisfied that it was perfect. **AIR 1955 NUC (All) 3835.**

——S. 395 — Evidence — Identifying parades — Procedure stated — Identification in dacoity cases. See Evidence Act (1872), S. 9. **AIR 1955 NUC (All) 2747.**

——S. 395 — Evidence and proof — Some of persons proceeding to commit dacoity during night arrested — Identification evidence unsatisfactory and absence of other evidence — Conviction cannot be sustained — (Evidence Act (1872), S. 9). **AIR 1955 NUC (All) 1332.**

——S. 395 — Evidence Act (1872), S. 9 — Identification of accused involved in dacoity — Evidence of identification for first time in Court is inherently weak — Corroboration by earlier identification proceeding, necessity of — Direct witness consistently identifying accused both at test parade and at trial — Identification can be safely accepted.

The evidence of identification of an accused for the first time in the dock is inherently weak, more specially so, when the identification in Court is about three to four years after the witnesses had seen the miscreants involved in a dacoity, on the night of the dacoity.

No doubt, the substantive evidence is the statement in Court; but the purpose of test identification is to test that evidence and the safe rule is that the sworn testimony of witnesses in Court as to the identity of the accused, who are strangers to the witnesses, generally speaking, requires corroboration, which should be in the form of an earlier identification proceeding. There may be an exception to this rule as where the Court is satisfied that the evidence of a particular witness is such that it can safely rely on it without the precaution of an earlier identification proceeding. **AIR 1960 SC 1340,** Rel. on.

Where a direct witness has consistently identified the accused both at the test parade and at the trial, his identification may safely be accepted, unless there are other circumstances indicating that the witness has probably made a mistake. But when the identification in Court is not supported by an earlier test, it is unsafe to act on that evidence in the absence of exceptional circumstances, such as adequate descriptive particulars of the accused given early by the witnesses which corroborate the identification. **ILR (1962) Andh Pra 96: 1963 (2) Cr LJ 121: AIR 1963 Andh Pra 314 (319, 320) (Pt B) (Prs 12, 13, 14) (DB).**

——**S. 395** — Evidence — Identifying facts — Delay in identification and inability of complainant to give any valid reason for remembering faces of dacoits makes the evidence as to identity of dacoits altogether unreliable — Evidence Act (1872), S. 9. **AIR 1955 NUC (Madh B) 3388.**

——**S. 395** — Identification evidence in case of dacoity during night time is an evidence of extremely weak character and should be accepted with great care. See Evidence Act (1872), S. 9. **AIR 1955 NUC (Madh Bha) 3334.**

——**Ss. 395 and 411** — Offence of dacoity — Identification parade — Value of — Unreasonable delay in holding parade — Description of accused persons not given prior to identification by witnesses — Effect — Evidence of approver — Identification parade of stolen property — Two such parades held — Reliability is not reduced — Conviction under Section 395, altered to one under Section 411, I. P. Code. **1960 Jab LJ 1037: 1960 MPC 578: 1960 MPLJ 1193.**

——**S. 395 — Evidence of identification.**

Where in criminal trial for dacoity, the accused was put up for identification 8 days after his arrest: **Held,** that his identification in the parade becomes rather suspicious and if two of the witnesses who were supposed to have identified him in the parade could no longer do so in Court he was entitled to the benefit of doubt. **ILR (1956) Punj 140: (1957) Cr LJ 678 (681) (Pt C) (Pr 11).**

——**S. 395 — Evidence — Identification at night — Evidentiary value of.**

Identification made at night at the time of a dacoity when blows are struck and the people are terrorized, is generally of very little value. Further, where identification is held a considerable time after the dacoity, it is difficult to place any confidence in the identification by witnesses who had only momentary opportunity to look at the dacoits. **1952 Raj LW 130: ILR (1951) 1 Raj 838.**

3 (B). Presumption.

——**S. 395** — Conduct of party — Case on facts — **Held,** accused could not be convicted because he was a man of bad character — He could be convicted only if the crime charged against him was proved beyond doubt — No inference of guilt could be drawn merely from the fact that he had absconded. See Evidence Act (1872), S. 8. **AIR 1955 NUC (All) 2284.**

——**Ss. 395, 411 and 412 — Recovery of goods stolen in dacoity from house of accused at their instance — Accused not identified as those involved in dacoity — Conviction under Ss. 395 and 412 — Legality — Applicability of presumption under S. 114, Illus. (a), Evidence Act.**

Where certain property stolen in a dacoity is recovered from the houses of the accused at their instance 8 days after dacoity but the Court disbelieved the evidence relating to the identification of the accused as those involved in the commission of the dacoity, it would be meaningless to convict the accused both under Ss. 395 and 412.

For a conviction under Section 412 the mere proof of knowledge or belief that the articles were stolen articles is not sufficient. It must further be proved that the accused had knowledge or belief that the possession of the articles had been transferred by the commission of a dacoity.

Where sufficient time had elapsed since the commission of the offence and the recovery was not made from a place very near to the place of commission:

Held, that it would be proper to convict the accused under S. 411. **1958 Andh LT 476.**

——**S. 395** — Evidence — Person in possession of stolen property soon after commission of dacoity — Participation in dacoity is to be presumed. **AIR 1955 NUC (Assam) 4191 (DB).**

——**Ss. 395 and 412** — Accused found in possession of articles taken in dacoity soon after its commission — Presumption is that accused was one of the dacoits and not receiver. See Evidence Act (1872), S. 114, Illus. (a). **ILR 39 Pat 361: 1960 BLJR 268.**

——**Ss. 395, 397, 412** — Applicability — Evidence Act (1872), S. 114 — Possession of stolen goods — Presumption — **Held,** that the facts led to irresistible conclusion that accused was not the receiver of C. C. notes having initial on them, knowing them to be stolen but was one who was a party in dacoity and had removed those notes from the bank in course of dacoity. **AIR 1955 NUC (Pat) 3235 (DB).**

——**Ss. 395, 412 and 411** — Evidence and proof — Dacoity, fact of, established — Recovery of property many days after from individual — No other evidence of person's participation — He cannot be convicted of dacoity — Presumption under Section 114, when can be drawn, stated — (Evidence Act (1872), S. 114). **AIR 1955 NUC (Raj) 262 (DB).**

——**S. 395** — Proof — Article taken away in dacoity found in accused's possession after two months — Presumption — It would not be either fair or safe to draw presumption that he took part in dacoity — In circumstances of case conviction under Section 395 altered into one under Section 412. See Evidence Act (1872), S. 114. **1957 Cri LJ 1457: AIR 1957 Tripura 48.**

4. Procedure.

●——**S. 395 — Six accused placed on trial under charge of dacoity — Three belonging to complainant's village and remaining three belonging to adjoining village — All six well known to complainant's party and actively opposed to him — High Court acquitting three accused of complainant's village on ground that evidence against them was tainted but convicting remaining three under S. 395 — Propriety — Retrial — Necessity.**

Held, that the High Court erred in making a distinction between the three accused belonging to the complainant's village and the remaining three belonging to the adjoining village. The High Court having come to the conclusion that three out of the six accused were not guilty, should have gone into the question whether there was satisfactory evidence to show that the three remaining accused could be convicted under Section 395, Penal Code on the charges as framed. In any event the three remaining accused could be convicted of the lesser offence of robbery under Section 392, Penal Code, if there was evidence to show that they had committed acts of theft and used violence while committing the

theft. In such a situation their individual acts in connection with the alleged occurrence had to be considered. That also had not been done. The evidence led on behalf of the prosecution had not sought to bring home to each individual accused the part played by him. This would also necessitate a retrial. But as the accused had already been in jail for a little less than three years, which period of imprisonment might have been enough as a sentence under Section 392, retrial should not be ordered in the interests of justice. The evidence against the accused not being above serious criticism, they should be acquitted. Ram Shankar Singh v. State of Uttar Pradesh, **1956 Cr LJ 822: AIR 1956 SC 441 (445) (Pt A) (Pr 10).**

——**Ss. 395, 427** — Criminal P. C. (1898), S. 238 — Major and minor offence — Meaning — Charge for dacoity — Conviction for mischief — held illegal. See Criminal P. C. (1898), S. 238. **51 Cri LJ 1244: AIR 1950 All 471 (DB).**

——**Ss. 395 and 396** — Conspiracy to commit dacoity with murder and conspiracy to commit dacoity — Latter is minor offence in relation to former. See Criminal P. C. (1898), S. 238. **1965 (2) Cr LJ 713: AIR 1965 Cal 598 (DB).**

——**S. 395** — Charge of conspiracy to commit dacoity — There is nothing artificial in combination. See Penal Code (1860), S. 120-B. **1965 (2) Cr LJ 713: AIR 1965 Cal 598 (DB).**

——**Ss. 395, 379** — Further enquiry in case of acquittal — Sessions Judge has no power direct when further enquiry is in respect of offence of which he was acquitted — Acquittal of offence under S. 379 — Further inquiry into offence under Section 395 is without jurisdiction. See Criminal P. C. (1898), S. 403. **1955 Cri LJ 1255: AIR 1955 Cal 496.**

——**S. 395 — Evidence — Non-compliance with section — Criminal P. C. (1898), S. 233.**

A rolled up charge against several accused regarding two dacoities committed in one night is defective and prejudicial to the accused. **AIR 1955 NUC (Cal) 1066 (DB).**

——**Ss. 395, 445, 109 and 114** — Criminal P. C. (1898), S. 236 — Charge for substantive offences of dacoity and house-breaking — Challan not mentioning the nature of help given by accused to others or the part he himself played — No charge of abetment could be brought against accused — Merely on account of his presence on the scene of occurrence he cannot be held guilty either of abetment or of commitment itself of any of the crimes. See Criminal P. C. (1898), S. 236. **AIR 1952 Hyd 25 (DB).**

——**S. 395** — Evidence — No prima facie evidence to show that articles were recovered from house of accused — Magistrate is not justified in questioning accused with regard to these articles. See Criminal P. C. (1898), S. 342. **AIR 1955 NUC (Madh B) 3388.**

——**Ss. 395, 398** — Special Courts empowered to try offences under Section 395, Penal Code — No illegality in trying offence under S. 398, Penal Code — Section 398 does not create a new substantive offence but only provides a principle for the sentence for offence created by any of the Ss. 392 to 395. See Public Safety — M. B. Public Security Act (19 of 1953), Section 14. **1959 Cri LJ 47: AIR 1959 Madh Pra 6.**

——**S. 395** — Charge under Sections 395 and 398 — Conviction under Section 458 held, saved by S. 535, Cr. P. C. and there is no prejudice. See Cr. P. Code (1898), S. 237. **1959 Cri LJ 47: AIR 1959 Madh Pra 6.**

——**S. 395** — Bail in dacoity case — Practice — Dacoity is a serious offence and is punishable with imprisonment for life, in which bail is not to be lightly granted. Fact that petitioners' names were not stated in F. I. R. is no ground for granting bail when no names were given in F. I. R. because none of the dacoits was identified. Cr. P. Code (1898), S. 498. **1959 Cr LJ 741: AIR 1959 Manipur 28.**

——**S. 395** — Benefit of doubt — Prosecution for offences under Sections 395 and 412, Penal Code — Suspicious circumstances — Delay in filing F. I. R. not explained — No mention of accused persons in F. I. R. — Confession made by accused, not true — Identification by prosecution witnesses of accused persons doubtful — Benefit of doubt held rightly given. **(1963) 29 Cut LT 455.**

——**S. 395** — Criminal P. C. (1898), S. 154 — First information report in case of dacoity — Not necessary to specify every little detail and describe the specific part played by each one of the dacoits when many of them enter into the house and commit dacoity. **AIR 1951 Orissa 71 (DB).**

——**S. 395** — Procedure — Imperfection in charge — Dacoity — Charge for — Omission of word 'others' — Accused fully aware of prosecution case — No prejudice — Conviction of accused under Section 395 could not be reversed on that account. See Criminal P. C. (1898) (as amended by Act 26 of 1955), S. 537, Cl. (b). **ILR 39 Pat 361: 1960 BLJR 268.**

——**S. 395** — Accused convicted under S. 395 — He cannot be convicted under Section 412 in respect of production of articles taken in dacoity. See Penal Code (1860), S. 412. **ILR 39 Pat 361: 1960 BLJR 268.**

SECTION 396

●——**S. 396** — Attempt to commit robbery by five or more persons — Accused running away on hue and cry being raised — Villagers chasing — One accused killing one of chasers when they had gone a considerable distance — Offence — Conviction for Section 395 and S. 302. See Penal Code (1860), S. 395. **1957 Cr LJ 420: AIR 1957 SC 320.**

●——**S. 396** — Evidence and proof — Prosecution adducing identification evidence in Sessions Court — Non-examination of such eye-witnesses in committing Magistrate's Court, no ground for disbelieving them. Jwala Mohan v. The State, **1962 All LJ 1119: 1962 All Cri R 471: 1962 All WR (HC) 880: 1963 (1) Cri LJ 404: ILR (1963) 1 All 585: AIR 1963 All 161 (171, 172) (Pt A) (Prs 17, 22, 23) (FB).**

——**S. 396** — Sentence in a case of dacoity should be heavy and deterrent. AIR 1956 All 163 and AIR 1960 All 190, Rel. on. **ILR (1960) 2 All 488: 1960 All LJ 595: 1960 All WR (HC) 440: 1960 All Cr R 271: 1961 (1) Cr LJ 340: AIR 1961 All 153 (168) (Pt P) (Pr 55) (DB).**

[**Overruled** on another point in AIR 1964 All 290.]

——**S. 396 — Murder while committing dacoity — Sentence of death — Rule as to — Reasons for imposing lesser punishment to be recorded — (Criminal P. C. (1898), S. 367 (5) (before its amendment in 1955)).**

So far as imposing of sentence of death is concerned there is no substantial distinction between Section 302 (murder) and Section 396 (murder while committing dacoity). The obligation in the matter of imposing the sentence is in the same

sequence in the two sections, only that in Section 396 the scope of the discretion is larger in so far as there is the possibility of imposing a sentence lesser than death or imprisonment for life for an offence punishable under this section. The duty imposed on Court by former sub-s. (5) of Section 367 to record its reasons for not inflicting a death penalty on a conviction for an offence which was punishable with death is not confined to the awarding of a sentence under Section 502 only, for death is a punishment prescribed and awardable for a conviction under Section 396 also. Whenever a dacoit is proved to have used a gun in the course of the dacoity, whether he actually killed or injured some one or not, he should be awarded a sentence of death. AIR 1938 All 625, Dissent. from. **1959 All LJ 548: 1959 All WR (HC) 405: 1959 All Cr R 321: ILR (1959) 2 All 591: 1960 Cr LJ 431: AIR 1960 All 190 (192, 193) (Pt A) (Prs 19, 20, 21) (DB).**

——**Ss. 396, 412** — Accused not arrested on spot — No satisfactory evidence about identification — Evidence of — Recovery of stolen property only — Conviction under Section 396 changed to one under Section 412. **1960 All Cr R 193: 1960 All LJ 414: 1960 All WR (HC) 275.**

——**Ss. 396, 395 — Accused shooting and murdering persons pursuing them in hot haste after dacoity — S. 396 applies.**

If certain persons after committing dacoity are pursued in hot haste after the act of dacoity and being brought to bay, one of the dacoits shoots and murders a man pursuing him, the act of murder will not be a separate transaction but an offence committed in committing the dacoity within the meaning of Section 396. AIR 1932 Cal 818, Foll.

When the murder is committed by dacoits while carrying away the stolen property, the murder must be held to have been committed in the commission of the dacoity. AIR 1951 All 834; AIR 1955 All 420; 2 Bom LR 325 and AIR 1957 SC 320, Ref. **1959 All WR (HC) 491: 1956 All Cr R 409: 1959 All LJ 700.**

——**S. 396 — Dacoits armed — One of persons killed — Offence.**

Where the dacoits used firearms and lathis in course of the dacoity and one of the resisters was shot dead the persons who are found to have taken part in the dacoity must be convicted under Section 396, I. P. C. **1959 All WR (HC) 366: 1959 All LJ 441: 1959 All Cr R 293.**

——**S. 396 — Sentence.**

Section 396 does not envisage rigorous imprisonment for a term exceeding ten years, and indeed as the law laid down by the section stands there is no middle course between ten years' rigorous imprisonment and transportation for life. Hence the accused could not be awarded rigorous imprisonment for fourteen years. **1956 All WR (HC) 1: 1956 Cr LJ 358 (2): 1956 All LJ 206: AIR 1956 All 163 (167) (Pt D) (Pr 20) (DB).**

——**S. 396 — Applicability — Armed dacoity — Murder committed by dacoits to facilitate escape — Conviction — Sentence — (Arms Act (1878), S. 19 (f)).**

While the dacoits were escaping with the booty the villagers hotly pursued them. The dacoits suddenly turned round and attacked the villagers and then there was a pitched fight between the two sides. Two of the dacoits fired their guns resulting in death of one villager and gun shot injuries to another.

Held, that as the murder had been committed to facilitate their escape with the booty the murder must be held to have been committed in committing the dacoity within the meaning of Section 396, Penal Code.

Though the decision in 3 Cr LJ 294 (All) was correct on facts the law laid down therein held to be too wide. Case-law Ref.

The fact that murder is committed because the criminal is being brought to bay and in the desire to escape is not an extenuating circumstance in awarding the sentence. **1954 All LJ 654: 1955 Cr LJ 1144: AIR 1955 All 420 (421) (Pr 5) (DB).**

——**S. 396** — Sentence of 14 years' rigorous imprisonment is illegal — (Criminal P. C. (1898), S. 32). **AIR 1955 NUC (All) 2753.**

——**S. 396 — Murder in commission of dacoity.**

The question whether murder was committed while committing dacoity is a pure question of fact and of degree, not to be determined by any general rule, but by the special circumstances of each case. 2 Bom LR 325, Foll. **1951 All LJ 567: 52 Cri LJ 1514: 1951 All WR (HC) 588: 1951 All Cr C 146: AIR 1951 All 834 (835) (Pt A) (Pr 7) (DB).**

——**S. 396 — Sentence — Death sentence — Judgment in capital cases — Criminal P. C. (1898), S. 367 (5).**

As in awarding any other sentence, a Judge who passes a sentence of death has to apply his judicial mind. He has to consider the question whether the case is one where a sentence of death should be passed or a lesser sentence. No Judge would pass a sentence of death where it is proper to pass a sentence of transportation for life merely because he has to give reasons for imposing the lesser sentence. As S. 367 (5) makes it necessary for the Judge to give reasons for imposing the lesser sentence, where no such reason is available, a sentence of death has to be passed. It is only to this limited extent that it can be said if at all, that the death sentence is the normal sentence in case of murder, but in that respect an offence of murder does not appear to be materially different from an offence of dacoity with murder. If while committing a dacoity a murder is committed it cannot be said that the gravity of the offence is less than an ordinary murder. **1951 All LJ 567: 52 Cri. LJ 1514: 1951 All WR (HC) 588: 1951 All Cr C 146: AIR 1951 All 834 (836) (Pt C) (Pr 12) (DB).**

——**S. 396 — Applicability.**

Under Section 396, Penal Code, it is not required that the murder should be committed by a certain individual or by one amongst the dacoits to the knowledge of the rest of persons involved in the dacoity. Mere commission of murder in the course of dacoity is enough to involve the provisions of Section 396, Penal Code, against all the persons who were conjointly committing the dacoity.

Where during the commission of a dacoity one of the dacoits started shooting at the owner of the house who was defending himself and thereby caused an injury to him which was likely to cause death or sufficient in the ordinary course of nature to cause death and the house owner died subsequently.

Held, that all the persons who had conjointly committed the offence of dacoity were liable under Section 396, Penal Code, and the fact that the death of the injured, might have been averted by skilful medical treatment did not affect the character of the injury and when it was followed by death the causing thereof amounted to murder. **1952 Cr LJ 413: AIR 1953 Assam 45 (46, 47) (Pt B) (Prs 5, 6) (DB).**

——S. 396 — Scope and applicability.

Section 396 merely declares the liability of others as co-extensive with that of the actual murder. Dacoity is the joint act of the persons concerned, and the essence of an offence under Section 396 is murder committed in commission of the dacoity. It does not matter whether murder is committed in the immediate presence of a particular person or persons. It is not even necessary, that murder should have been within the previous contemplation of the perpetrators of the crime. AIR 1932 Cal 818 (FB), Foll. **1965 (2) Cr LJ 713: AIR 1965 Cal 598 (612) (Pt H) (Pr 58) (DB).**

——S. 396 — Applicability — Essentials to be proved.

Section 396 is enacted to declare the liability of other persons as co-extensive with that of the actual murderer and, for this purpose, all that is required to be proved is that they should have been 'conjointly committing' the dacoity and any death caused by a dacoit in the course of the dacoity would be murder, and attributed to all of them. The death need not be proved against anyone of the dacoits in particular, so long as death is the result of cumulative effect of the violence used by the gang.

The accused are not allowed to plead that they do not know that the death will be the result of the violence used. Individual acts of violence do not require consideration for holding all the accused liable. They would fall for consideration only for fixing the appropriate sentence in respect of each of the accused.

As far as the joint liability of the accused is concerned, the only things to prove are (1) that there was a dacoity; (2) which was the joint act of the persons concerned, and (3) that the murder was committed in the course of the dacoity in question. **ILR (1954) Hyd 758: 1955 Cr LJ 953: AIR 1955 Hyd 147 (149) (Pt B) (Pr 8) (DB).**

——S. 396 — Construction — 'Murder in so committing dacoity' — Meaning of.

The words used in the section are 'in so committing a dacoity', i.e., the murder should take place during the commission of the dacoity and then alone the accused will be conjointly liable.

Certain police outpost was fired at by accused for four hours during which four police constables were injured and one killed. The attack on the police was not with the object of taking away the guns and rifles but to show how powerful the Communists were. They left unmolested three survivors just for that purpose so that they may relate to all and sundry how they were worsted in the encounter. They even exhorted these survivors to leave their jobs which brought them a salary of Rs. 50 and to join the Communists who were all powerful. Ultimately the accused removed the rifles and tommy guns in the police outpost. They were charged with offence under S. 396.

Held, that the death was committed before the dacoity and not in the commission of a dacoity. The conviction of all the accused under S. 396 was not, therefore, correct. **ILR (1954) Hyd 758: 1955 Cr LJ 953: AIR 1955 Hyd 147 (149) (Pt C) (Prs 9, 10) (DB).**

——S. 396 — Sentence — Dacoity with murder — Deterrent sentence should be given.

Section 396 provides even death penalty, and it is necessary that the Courts should not hesitate in giving the maximum penalty of death wherein murder or murders are committed in the act of committing dacoity. **(1963) ILR 42 Pat 454.**

——S. 396 — Applicability — Murder committed by one of dacoits — Whether individual act or part of same transaction — Test for determination.

In determining the question whether the act of murder was an individual act of one of the dacoits and it did not form part of the same transaction of the dacoity, the test is whether the act of murder by one of the dacoits was altogether a separate transaction removed by time and space or it was a part of one and the same transaction of the dacoity itself. If the act of murder is disjointed and bears no connection in point of time and space to the act of dacoity, then alone the act of murder by an individual among the several dacoits will be a separate transaction when the provision of Section 396 will not be attracted; but, if the murder is in continuation of the act of dacoity, surely the section will be attracted:

Where it was clear from the material on record that the deceased had been shot at quite near the scene of the dacoity and that was when the dacoits were leaving the place of dacoity with their booty.

Held, in the circumstances of the case, that the murder was a part of the transaction of dacoity, and, therefore, all the convicts were guilty under Section 396. AIR 1957 SC 320, Disting.; AIR 1932 Cal 878, Rel. on. **(1963) ILR 42 Pat 454.**

——S. 396 — Applicability.

If a dacoit in the progress of, and in pursuance of, the commission of dacoity, commits a murder, all of his companions, who are participating in the commission of the dacoity, may be convicted under Section 396, although they may have no participation in the murder beyond the fact of participation in dacoity. It is not necessary that murder should have been within the contemplation of all or some of them when the dacoity was planned, nor is it necessary that they should have actually taken part in or abetted its commission. AIR 1933 Lah 977, Rel. on. **32 Pat 243: 1954 Cr LJ 171: AIR 1954 Pat 109 (114) (Pt G) (Pr 18) (DB).**

——S. 396 — Sentence — Mitigation.

Imam, J.:— So long as the law enjoins the sentence of death to be the primary sentence it is the business of the Court to impose it unless there appear mitigating circumstances or grounds for the exercise of a judicial discretion in the matter. In some cases, youth has been considered as a ground for mitigation.

(In an offence under Section 396, the accused who was about 22 and 23 years of age, held was not so young, as to be a ground for reduction of the sentence of death). **ILR 32 Pat 243: 1954 Cri LJ 171: AIR 1954 Pat 109 (118) (Pt H) (Pr 24) (DB).**

——S. 396 — Sentence — Reduction of death sentence.

Per Imam, J.:— Court reducing sentence of death must give judicial reasons for it — Reduction under prerogative of mercy by State — Reasons need not be given. **ILR 32 Pat 243: 1954 Cri LJ 171: AIR 1954 Pat 109 (118) (Pt I) (Pr 24) (DB).**

——S. 396 — Applicability — Assault on police party in pursuance of criminal conspiracy — Murder of Inspector and fatal injuries on others — Conviction upheld. See Penal Code (1860), Section 120-B. **1955 Cri LJ 414: AIR 1955 Trav-Co 33 (DB).**

——S. 396 — Prompt recovery of stolen articles from house of accused charged with dacoity — Strong presumption of complicity of accused arises. See Evidence Act (1872), S. 114. **1964 (2) Cr LJ 585: AIR 1964 Tripura 54.**

——S. 396 — Convictions under Ss. 396 and 302, I. P. C.— Difference in matter of awarding death sentences stated. See Criminal P. C. (1898), S. 423 (1-A). **1964 (2) Cr LJ 585: AIR 1964 Tripura 54.**

SECTION 397

——S. 397 — Scope — Accused snatching ornament from woman's neck and while doing so causing injury to her — Case falls under Section 394 — Accused also firing revolver shots to frighten his pursuers — Offence will fall under S. 394, with S. 397. See Penal Code (1860), Section 394. **AIR 1955 NUC (Ajmer) 4757.**

——Ss. 397 and 149 — Applicability — Some members of dacoit party firing at police — Absence of injury — Offence.

Where some members of a party assembled for committing dacoity fire at a police party who had come to arrest them, even though none is injured, a conviction under Section 397, read with Section 147, I. P. Code, would be justified, because there is an attempt to cause the death of the members of the police party. **AIR 1951 All 452 (454) (Pt C) (Pr 5).**

——S. 397 — Accused A, B, C and D attacking N, J, R and S, who were carting paddy to their house —Continued beating with spears and sticks even after victims fell down with injuries — A and B taking away paddy — Death of N and J the same day as result of injuries — Conviction of A and B under S. 397, propriety of. See Penal Code (1860), S. 302, read with S. 34. **1965 (2) Cr LJ 458: AIR 1965 Andh Pra 361 (DB).**

——S. 397 — "Uses any deadly weapon" — Meaning of.

The word "uses" in Section 397 is not intended to mean that the knife must be actually used for stabbing any person. If it is used for the purpose of producing such an impression upon the mind of a person that he will be compelled to part with his property, that will amount to using the weapon within the meaning of Section 397. **1956 Cr LJ 700: AIR 1956 Bom 353 (353) (Pr 5) (DB).**

——S. 397 — Evidence and proof — Accused arrested on 20th February, 1955 — Prosecution proving that gold ring was produced by him after digging his cattle shed on 27th February, 1955 — No special identification marks on ring — Accused stating that it belonged to him and denying that he produced it from cattle shed —**Held**, that it was not proved beyond reasonable doubt that the ring belonged to complainant and was lost in dacoity — (Evidence Act (1872), S. 114, Illus. (a)). **1956 Cr LJ 392: AIR 1956 Bom 186 (188) (Pt A) (Pr 4) (DB).**

——S. 397 — Evidence and proof — (Evidence Act (1872), S. 60).

The evidence that after the occurrence of dacoity the police patil went round the village and ascertained whether the accused was in his house can at best be regarded as hearsay and has little evidentiary value. **1956 Cr LJ 392: AIR 1956 Bom 186 (188) (Pt B) (Pr 4) (DB).**

——S. 397 — Evidence and proof — Accused pointing out sword from field — Inference of participation in dacoity cannot be drawn — (Evidence Act (1872), S. 114, Illus. (a)).

The fact that the accused pointed out a sword from the field of A after digging up in a heap of thorns in absence of any suggestion that the sword belonged to any of the prosecution witnesses or that it was lost in the commission of the dacoity, at best would indicate that the accused knew that in the field of A there was a sword lying underneath a heap of thorns, but that evidence cannot lead to an inference that the accused had participated in the commission of the dacoity. **1956 Cr LJ 392: AIR 1956 Bom 186 (188) (Pt D) (Pr 5) (DB).**

——S. 397 — Armed dacoity — Accused with gun shot wounds on their persons — Arrest more than a week after incident — Inference — (Evidence Act (1872), S. 114).

When the accused were arrested more than a week after the date of a dacoity with injuries upon their persons which were testified by medical evidence to be gun-shot wounds, the fact at best may lead to an inference that they were concerned in some transaction in which they received gun-shot injuries but that does not lead to the inference that they were present in the village where dacoity took place on the particular night and that they received injuries on that night while they were committing the dacoity. **1956 Cr LJ 392: AIR 1956 Bom 186 (188) (Pt E) (Pr 6) (DB).**

——S. 397 —Applicability — Conditions essential for attracting penalty under section stated. **AIR 1955 NUC (Bom) 4489 (DB).**

——S. 397 — Scope — W. B. Tribunals of Criminal Jurisdiction Act (14 of 1952), S. 4 and schedule — "Scheduled offences" — Offence punishable under S. 397, Penal Code — There is no substance in contention that words used in Section 397 do not indicate an offence and that therefore, when schedule mentions an "offence punishable under S. 397, I. P. C." it means nothing at all and there is no scheduled offence. **59 Cal WN 312: 1955 Cri LJ 657: AIR 1955 Cal 177 (180) (Pt C) (Pr 18) (DB).**

——S. 397 — Applicability — Deadly weapon must have been used at the time of committing robbery or dacoity and not before commission of robbery or dacoity — No evidence led by prosecution whether deceased was alive at time of removal of ornaments from her body — Conviction under S. 397 not proper. **(1960) 1 Guj LR 103: (1960) 1 Guj HCR 110: 1961 (2) Cr LJ 255: AIR 1961 Guj 20 (22) (Pt E) (Prs 24, 26) (DB).**

——S. 397 — Scope — Applicability of S. 34 — Section 34 could not be invoked in the case of the accused who was not armed with deadly weapon so as to convict him under S. 397. See Penal Code (1860), S. 34. **AIR 1955 NUC (J and K) 2372 (DB).**

——S. 397 — 'Uses any deadly weapon', meaning of expression — Actual use of weapon not indicated — Use of, merely for intimidation, putting victim in instant fear of death, enough for constituting offence under section.

For constituting an offence under the section it is not necessary that the weapon should be actually used for the special purpose for which it is designed. It is enough if the deadly weapon is employed in some way or other, as for example, to intimidate. **1961 Ker LJ 548.**

——Ss. 397, 394 and 404 — Person murdered — Removal of ornaments from dead body — No robbery — It is misappropriation. See Penal Code (1860), S. 394. **1958 Cri LJ 902: AIR 1958 Madh Pra 192 (DB).**

——S. 397 — Applicability — Possession of stolen goods — Presumption — **Held** that the facts led to irresistible conclusion that accused was not the receiver of G. C. notes, having initial on them, knowing them to be stolen but was one who was a party in dacoity and had removed those notes from the bank in course of dacoity. See Penal Code (1860), S. 395. **AIR 1955 NUC (Pat) 3235 (DB).**

——**S. 397** — Seven persons originally charged with dacoity, four of whom were acquitted being given benefit of doubt — Sustainability of the charge against the three remaining accused — Where there is evidence about the part played by individual accused, acquittal of some of them does not render the conviction of the remaining accused illegal, even if the number of accused so convicted is below 5 as required by S. 395 to constitute, the offence of dacoity. AIR 1956 SC 441, Dist. **(1964) 66 Pun LR 173.**

——**S. 397** — Dacoity committed at 6 p.m. by persons armed with guns and lathis by terrorising whole village by firing shots from guns and threatening any one who dared to come near the house with dire consequences—Three villagers receiving wounds — Sentence of ten years rigorous imprisonment could not be said to be too severe. See Penal Code (1860), S. 395. **(1964) 66 Punj LR 173.**

——**Ss. 397, 300** — Murder and robbery — Circumstantial evidence — Inference from possession of ornaments worn by deceased — Inference that person found in possession committed murder or robbery, when should be drawn, indicated — (Criminal P. C. (1898), S. 367). See Evidence Act (1872), S. 114. **1955 Cri LJ 1522: AIR 1955 Sau 93 (DB).**

——**S. 397**—Theft when amounts to robbery, indicated — Where hurt was caused first and theft was the last act of the accused, the offence, if any, held, was mere of theft and not robbery. See Penal Code (1860), S. 390. **AIR 1953 Sau 85 (DB).**

——**Ss. 397, 395** — Dacoity — Accused giving blow with lathi — Lathi not shown to be deadly weapon — Conviction under S. 397 could not be maintained and must be altered into one under S. 395. See Penal Code (1860), S. 395. **1957 Cri LJ 1457: AIR 1957 Tripura 48.**

——**Ss. 397, 395 — Conviction under S. 397.**

As S. 397 does not create a substantive offence a conviction under that section is not correct, it ought to be under S. 395 read with S. 397. **1957 Cri LJ 1457: AIR 1957 Tripura 48 (49) (Pt A) (Pr 1).**

——**S. 397 — Applicability — Dacoity carrying fire-arm or other deadly weapon.**

Great prevalence of dacoity in certain parts — Sentence even under S. 395 has to be severe—Whether or not S. 397 also applies in such a case is little practical consequence as it only prescribes that when there are particular aggravating circumstances, the sentence shall not be less than seven years. **1952 Cri LJ 986: AIR 1952 Vin Pra 42 (49) (Pt N) (Pr 35).**

——**Ss. 397 and 398 — Distinction.**

The mere fact of carrying a fire-arm or other deadly weapon will not attract S. 397. That section does not say 'carries or is armed with" but says "uses any deadly weapon or causes grievous hurt or attempts to cause death or grievous hurt to any person". The distinction between "using" and "to be armed" is a material distinction and has been observed in the wording of the Ss. 397 and 398. The latter section covers attempts only to commit dacoity or robbery when "being armed' is by itself sufficient. But if it is a case of committing robbery or dacoity the weapon has to be used or it should be an overt act, which amounts to attempting to cause death, or grievous hurt, or of actually causing grievous hurt. **1952 Cri LJ 986: AIR 1952 Vind Pra 42 (49) (Pt O) (Pr 35).**

SECTION 398

——**Ss. 398, 395 and 458** — Charge under Sections 395 and 398, Penal Code — Conviction under S. 458, Penal Code held, saved by S. 535, Criminal P. C. and there is no prejudice—Legality. See Criminal P. C. (1898), S. 237. **1959 Cr LJ 47: AIR 1959 Madh Pra 6.**

——**Ss. 398, 395** — Special Courts empowered to try offences under S. 395, Penal Code — No illegality in trying offence under S. 398, Penal Code — Section 398 does not create a new substantive offence but only provides a principle for the sentence for offence created by any of the Ss. 392 to 395. See Public Safety — M. B. Public Security Act (19 of 1953), S. 14. **1959 Cri LJ 47: AIR 1959 Madh Pra 6.**

——**S. 398** — 'Uses a deadly weapon', meaning of — Expression includes the carrying of a weapon for the purpose of overawing the person robbed as contemplated by expression 'armed with any deadly weapon' in S. 398, I. P. C. **(1964) 66 Pun LR 173.**

——**Ss. 398 and 397** — Distinction, pointed out. See Penal Code (1860), S. 397. **1952 Cri LJ 986: AIR 1952 Vind Pra 42.**

SECTION 399

——**Ss. 399, 402** — Appreciation of evidence — Dacoity case — Prosecution's case that accused were caught when whispering to each other that they were going to commit dacoity at certain place — **Held,** accused would not be so foolish to whisper to each other within hearing of others, their plan of dacoity, and when there was no other evidence, direct or circumstantial, mere suspicion would not be sufficient to warrant their conviction under Ss. 399 and 402. See Evidence Act (1872), S. 3, "Proved". **1965 All WR (HC) 844.**

——**Ss. 399 and 402** — Sentence — No previous conviction shown against accused — Accused not shown to have undertaken any heinous duty in contemplated dacoity or to have put any resistance while being arrested — Sentence of accused reduced to $2\frac{1}{2}$ years of R. I. **1965 All WR (HC) 697: 1965 All Cri R 474.**

——**Ss. 399, 402** — Determination of — Offence not actually committed — Test — Appreciation of surrounding circumstances and conduct of accused — Benefit of doubt — Intention to commit dacoity — Accused held, could not be convicted under Ss. 399 and 402 but could be convicted under Ss. 147 and 148. See Penal Code (1860), S. 402. **1962 (1) Cri LJ 3: AIR 1962 All 13.**

——**Ss. 399 and 402** — Sentence — Attempt to commit dacoity — Property not looted by any member of gang — Accused of young age — Sentence of seven years' R. I. under S. 399 and five years R. I. under S. 402, held was severe. **1960 All LJ 567: 1960 All WR (HC) 431: 1960 All Cr R 297: 1961 (1) Cr LJ 591.**

——**Ss. 399, 402 — Intention to commit dacoity — Proof.**

That the purpose of the assembly or of the preparation was the commission of dacoity, is an essential ingredient of an offence under S. 399 or S. 402 to be proved by the prosecution. In rare cases it may be possible to adduce direct evidence of this purpose. Those are cases in which the evidence of an approver or of some reliable person who can depose about what has been said or done by the accused persons is available to show the purpose of their activities.

The Respondents belonged to different places, were not connected with each other but were found together in a room of the Dharmshala and they had with them everything which was ordinarily needed for the purpose of committing dacoity. They had pistols, revolver and gun. They had the requisite number of cartridges. They had a torch and one of them was actually carrying implements which could be used for breaking open locks, doors and safes.

Held, that in the absence of any adequate explanation of the incriminating nature of the circumstances, it could be concluded that the respondents after making necessary preparations had assembled for the purpose of committing dacoity.

No overt act, in addition to preparation, need be proved for showing the purpose. **1960 All WR (HC) 219: 1960 All Cr R 153: 1960 All LJ 277.**

——Ss. 399, 395 — Applicability — Overt act by accused — Effect of.

There is no distinction between a dacoity and an attempt to commit one: See S. 391, I. P. Code. Any overt act by the accused for preparation of dacoity would immediately amount to an attempt to commit dacoity, and would immediately make them liable under S. 395, I. P. Code. It would plainly be idle to seek for an overt act for recording a conviction under S. 399, I. P. Code. Section 395 would be the section applicable. **1959 All LJ 519: 1959 All WR (HC) 394: 1959 All Cr R 312: 1959 Cr LJ 1274: AIR 1959 All 727 (730) (Pt B) (Pr 13) (DB).**

——S. 399 — Recovery of house-breaking implements — Not necessary.

Mere fact that the accused charged with the dacoity under S. 399 did not carry any instruments of house-breaking can in no way weaken the prosecution case. **1959 All LJ 519: 1959 All WR (HC) 394: 1959 All Cr R 312: 1959 Cr LJ 1274: AIR 1959 All 727 (730) (Pt C) (Pr 14) (DB).**

——S. 399 — Accused not arrested near place of contemplated dacoity — Not material. **1959 All LJ 519: 1959 All WR (HC) 394: 1959 All Cr R 312: 1959 Cr LJ 1274: AIR 1959 All 727 (730) (Pt D) (Pr 15) (DB).**

——Ss. 399 and 402 — Circumstantial evidence.

Held on facts (i) that the object or intention with which the accused were proceeding together towards village P was a fact especially within the knowledge of the accused. Consequently under S. 10€, Evidence Act, the statutory burden was placed on the accused to satisfy the Court as to their object or intention. In the absence of any explanation by them, the Court was entitled to draw appropriate inference from that omission. (ii) The absence of any explanation by the accused or a false explanation by them would itself be an additional piece of circumstantial evidence against them completing the chain establishing the charge: (iii) A defence suggested by the Counsel but not by the accused cannot be accepted by the Court. (iv) The circumstantial evidence was not in any manner consistent with the innocence of the accused and it unambiguously showed that within all human probability they had embarked on an enterprise of dacoity, most likely in village, P. They had prepared themselves for this crime and had assembled for committing it. They were therefore, guilty under both Ss. 399 & 402, I. P. C. **1959 All LJ 519: 1959 All WR (HC) 394: 1959 All Cr R. 312: 1959 Cr LJ 1274: AIR 1959 All 727 (731) (Pt F) (Pr 20) (DB).**

——Ss. 399, 402 — Sentences — Youth — Sentence reduced.

Considering that the accused were quite young aged 20 and 22 years, and that there were no previous convictions against them, the sentences under Ss. 399, 402 were reduced. **(1960) 1 Fac LR 562: 1959 All LJ 94: 1959 All WR (HC) 160: 1959 All Cr R 199: 1959 Cr LJ 1040: AIR 1959 All 559 (562) (Pt C) (Pr 10).**

——S. 399 — Preparation for committing dacoity.

Under S. 399 one of the essential things that the prosecution must show is that there were persons who had conceived the design of committing dacoity. Once the existence of a such a conspiracy has been established then any step taken with the intention and for the purpose of forwarding that design may justify the Court in holding that there has been preparation within the meaning of that section. The making of preparation should be shown to the satisfaction of the Court by some act such as the collection of men, arms, provisions, etc. which coupled with other circumstances plainly manifest the intention to commit dacoity. **1957 All WR (HC) 529: 1957 All LJ 678.**

——Ss. 399 and 402 — Proof — Possession of unlicensed weapons — Sufficiency.

In a trial under Ss. 399 and 402 the only evidence against the accused persons was that they were arrested together by the police and some of them were in possession of unlicenced weapons. The fact that they were proceeding to commit dacoity was proved by the testimony of one P whose story had been rejected by the Sessions Judge. Further, the accused persons were not found in possession of and material required for committing house breaking:

Held, that if P's statement was eliminated there was no evidence to prove that all these persons were going on together with the object of committing dacoity and consequently the mere arrest of these persons together, did not necessarily lead to the inference that they had collected for the purpose of committing dacoity or that they had made preparations to commit dacoity. AIR 1951 All 452, Foll. **1956 All WR (HC) 212: 1956 Crl LJ 956: 1956 All LJ 853: AIR 1956 All 464 (465, 466) (Prs 6, 8, 9) (DB).**

——Ss. 399, 402 — Relative Scope and Distinction — Simultaneous conviction under both sections cannot be maintained. **AIR 1955 NUC (All) 1989.**

——Ss. 399, 402 — Applicability — Some of accused not armed with deadly weapons or doing any overt act amounting to preparation — They were guilty only under S. 402 and not also under S. 399. See Penal Code (18€0), S. 402. **AIR 1951 All 452.**

——Ss. 399, 402— Accused assembling in a grove at night with unlicensed fire-arms, swords and spears — On information received that they assembled for committing dacoity, police party arriving and surrounding grove — Some of accused opening fire on police — Accused held had assembled for the purpose of committing dacoity and were guilty under S. 402 — In arming themselves with the above weapons they had made preparation for commission of dacoity and were also guilty under S. 399. **AIR 1951 All 452 (453) (Pt A) (Pr 4).**

——Ss. 399 and 402 — Scope — Presumption of assembly for purposes of committing dacoity.

The natural inference from the fact that the accused were all found assembled in the dark in the night, inside a grove, some furlongs away from the village abadi, and far from their own homes, with two guns and a pistol and a lot of cartridges would be that they had assembled there for the purpose of the commission of a dacoity.

Such a presumption is no doubt a rebuttable one and it is open to such persons to show that they had assembled there for a lawful purpose and thus rebut the presumption. **1951 ALJ 466.**

——**Ss. 399 and 402** — Relative scope, stated. See Penal Code (1860), S. 402. **1958 Cri LJ 25: AIR 1958 Cal 25 (DB).**

——**Ss. 399, 395, 396, 397, 398 and 402 — Ingredients of offence — Intention of four others or their taking part, whether necessary.**

The presence of at least five persons taking part in robbery is an essential ingredient of dacoity, and indeed, is the one ingredient which distinguishes it from simple robbery. It is clear that in Ss. 395 and 396, I. P. C., and in offences under Ss. 397 and 398, where the charge is that the accused has actually taken part in a dacoity, this ingredient of at least four other persons having the common intention must be present before there can be a conviction. In S. 402, which makes punishable the act of assembling for the purpose of a dacoity, the section itself makes it clear that the above ingredient must be present. What is punishable under S. 399 is the making of any preparation for the committing of any dacoity.

Chakravartti, C. J.:— In order to establish a charge under S. 399, some act amounting to preparation must be proved and what must be proved further is that the act, for which the preparation was being made, was a dacoity, that is to say, robbery to be committed with five or more persons. For the latter, the test is the intention of the accused himself and his intention alone and if his intention to commit dacoity along with four or more other persons is proved, it is not necessary to prove that at least four other persons, sharing his intention and associated with him in the project, actually existed. Still less is necessary to prove, where four or more other persons were externally at least associated with the accused in the preparation, that they did in fact shared his intention. His belief in their intention and his own intention to commit a dacoity along with them is sufficient. **61 Cal WN 856: 1958 Cr LJ 25: ILR (1958) 1 Cal 447: AIR 1958 Cal 25 (28, 31) (Pt A) (Prs 5, 6, 36) (DB).**

——**Ss. 399 and 402 — Applicability — Assemblage and preparation to commit dacoity — Distinction.**

The persons assembled may make preparation for committing a dacoity. After making preparation a dacoity may be attempted and finally a dacoity be committed. The law has assigned different gravities to these different acts and had made such acts differently punishable. After assembling for the purpose of committing a dacoity and proceeding to a certain distance on their way to the destination, it is possible that the idea be abandoned or the process be intercepted. When once the destination is reached or almost reached preparation becomes complete and till then, there would be a mere assemblage:

Held, on facts of the case, that the conviction under S. 399 was wrong and the accused were liable to be convicted for the offence punishable under S. 402, Penal Code. AIR 1918 All 361; AIR 1943 Pat 82; AIR 1943 Sind 212, Distinguished. **1954 Cr LJ 366: AIR 1954 Kutch 1 (2) (Pr 6).**

——**S. 399** — Case of dacoity — Intention to commit dacoity—Proof. See Evidence Act (1872), S. 106, Illus. (a). **1960 Cri LJ 1650: AIR 1960 Pat 582.**

——**S. 399 — Proof of intention.**

In a case under S. 399 it is not necessary for the prosecution to prove that the intention of the accused was to commit dacoity in the house of a particular person of a particular village. The legal requirements would be satisfied if it is proved that the assemblage or preparation was made for the purpose of committing dacoity, irrespective of the place where it was to be committed. **1960 BLJR 511: 1960 Cri LJ 1650: AIR 1960 Pat 582 (585) (Pt E) (Pr 23).**

——**Ss. 399 and 402 — Preparation for dacoity and assembling for dacoity — Distinction.**

There is manifestly a distinction between the offences under S. 399 and S. 402. The offence under S. 402 is complete as soon as five or more persons assemble together for the purpose of committing a dacoity. Preparation for committing a dacoity may take place before or after the dacoits assemble together. There is a distinction between preparation for a dacoity and assembling for purpose of committing dacoity. Preparation consists in devising or arranging means necessary for the commission of an offence, an attempt is the direct movement towards the commission after preparations are made. AIR 1943 Pat 82, Rel. on.

Where the persons assemble at a particular spot for committing dacoity, they are guilty under Section 402. Facts that they had come from several miles away from their homes, armed with weapons of defence and attack and had assembled at an hour usual for committing dacoity, are enough to establish that they had made preparations to commit a dacoity. If they had actually arrived at the house where they intended to commit the dacoity, they would have been liable for actually committing dacoity even if their act did not go beyond an attempt to commit that offence. AIR 1916 Lah 334, Rel. on. **1960 BLJR 511: 1960 Cri LJ 1650: AIR 1960 Pat 582 (586) (Pt G) (Pr 25).**

——**Ss. 399 and 402** — Scope and applicability considered — Evidence and proof — Case on facts. **AIR 1955 NUC (Pat) 4903.**

——**S. 399 — Applicability — Actual injury not necessary.**

Section 399 makes any preparation for committing dacoity an offence and it is not necessary for actual injury to be caused in order to attract the provisions of that section. **62 Punj LR 156: 1960 Cr LJ 1234: AIR 1960 Punj 482 (483) (Pt A) (Pr 4).**

——**Ss. 399 and 402 — Scope and distinction.**

Though the offence under S. 402 and the one under S. 399 would probably involve similar ingredients, the difference between the two is that while under S. 402 mere assembly without other preparation is enough, S. 399 is attracted when some additional step is taken in the course of preparation. **1960 Cr LJ 1234: 62 Punj LR 156: AIR 1960 Punj 482 (483) (Pt B) (Pr 5).**

——**S. 399 — Requirements of.**

To bring the case within S. 399 it is not necessary that persons shown to be making the preparations should be five or more in number. It is, however, necessary for the prosecution to prove that the raid for which the persons prosecuted were making preparation was to be committed by five or more persons, for otherwise it would not be dacoity but merely robbery, and mere preparation for committing robbery, unless it ends in an actual attempt is not punishable by law. Section 399 contemplates that there is a general design to commit dacoity, or to engage in an expedition for that purpose, though the plans of the dacoits are not matured. Thus the Court has to satisfy itself that the accused had decided upon committing dacoity and it was for

committing dacoity that they were making preparation. **1952 Cri LJ 1119: AIR 1952 Punj 249 (250) (Pt A) (Prs 13, 14).**

SECTION 400

——S. 400 — Single charge under S. 400, I. P. Code framed against accused involved in several dacoities — Prosecution case about conspiracy between accused failing — Legality of joint trial for different dacoities not affected — Section 237 Cr. P. C. is applicable in absence of prejudice. See Criminal P. C. (1898), S. 237. 1963 (2) Cri LJ 121: AIR 1963 Andh Pra 314 (DB).

——S. 400 — Object of — 'Belongs' — Meaning of — Intimate connection with body of persons extending for sufficient period to warrant inference of identification with band committing dacoities is required — Previous conviction for similar offences are relevant, under Explanation 2 to Section 14, Evidence Act, to prove sharing in common purpose of gang.

The offence under S. 400 is entirely a creation of a statute and is intended to break up gangs mentioned therein, by punishing also their associates, who share their purpose. Section 400 appears to postulate the existence of a definite gang operating for a definite period and the object of the section would seem to be to provide for the punishment of those proved to be members of such a gang and against whom evidence is not forthcoming to convict them of specific offences of dacoity. ILR 32 Mad 179. Rel. on.

But the word 'belong' in S. 400, implies something more than the idea of casual association; it involves the notion of continuity and indicates a more or less intimate connection with a body of persons extending over a period sufficiently long to warrant the inference that the person affected has identified himself with a band, the common purpose of which is the habitual commission of decoity. AIR 1930 Oudh 455, Rel. on.

In order to prove that the person charged shared the purpose of the gang, previous convictions for and previous commissions of similar offences are relevant under Explanation 2 to S. 140, Evidence Act. 1 Cal WN 146. Rel. on. The previous offences must, however, be of a cognate character so as to reasonably permit an inference as to the state of mind of the person charged. It is doubtful whether evidence to show that the accused had committed crimes other than dacoities would be relevant to the charge. Such evidence is really evidence of bad character and is excluded by S. 54 of Evidence Act, as bad character of the accused is not a fact in issue. ILR 32 Mad 179, Rel. on. **ILR (1962) Andh Pra 96: 1963 (2) Cr LJ 121: AIR 1963 Andh Pra 314 (322) (Pt E) (Pr 41) (DB).**

——S. 400 — Identity of gang concerned in dacoities must be established.

Although the commission of a number of dacoities, within short space of 15 months, in which one or more of the accused charged under Section 400 are proved to have been concerned, may indicate that they were perpetuated by their gang, that does not mean that the identity of the gang concerned in the dacoities in question need not be established.

When admittedly there had been other gangs which operated in Hyderabad, a short period earlier than the dacoities with which the accused are charged and the possibility of several persons who were charged with having been members of those gangs, having relapsed into crime as the result of their acquittal cannot be ruled out, it cannot be said that only the gang, constituted by the accused under trial could have committed the dacoities with which they are charged.

So also, the modus operandi of the accused in using sten-guns and khaki dress at the time of the commission of the dacoities, does not stamp all the dacoities as the work of the same gang, when admittedly, illicit sten-guns and other firearms were easily available in the city of Hyderabad on account of events which took place shortly before the Police action and there had been several other parties of dacoits who had also used such weapons and khaki dress. **ILR (1962) Andh Pra 96: 1963 (2) Cr LJ 121: AIR 1963 Andh Pra 314 (323) (Pt F) (Pr 44) (DB).**

——S. 400 — Charge under — Judgment convicting accused under S. 411, I. P. C., only material evidence — Witnesses to material facts not called again and examined — Judgment is inadmissible to prove connection of accused with crime. AIR 1963 Andh Pra 314 (321) (Pt I) (Pr 22) (DB).

——S. 400 — Victims of different dacoities making rival claims to particular article — Their identification of article not reliable — Presumption under S. 114, Evidence Act, cannot be raised.

Proof that an article which is traced to the possession of an accused was stolen is a condition precedent for any presumption under S. 114. When the victims of different dacoities make rival claims to a particular article, no reliance can be placed on their identification and there is also no scope for raising the presumption under S. 114. **ILR (1962) Andh Pra 96: 1963 (2) Cr LJ 121: AIR 1963 Andh Pra 314 (321) (Pt J) (Pr 29) (DB).**

——S. 400 — "Gang" — Meaning — Two or more persons can constitute gang — Proof of participation in more than two dacoities, within comparatively short space of time is necessary to prove existence of gang.

The word 'gang' means any band or company of persons who go about together or act in concert.

The essence of the word 'gang' in S. 400 is that the persons should act in concert and therefore, two or more persons can constitute a gang. Their purpose of habitually committing dacoity may be proved by their declaration or by their conduct. Where the relevant evidence consists in the conduct of the accused in having participated in different dacoities and there is no other evidence to prove the criminal purpose, participation in more than two dacoities within comparatively a short space of time is necessary to prove the existence of a gang.

Even if it is assumed that more than two persons are necessary to constitute a gang, when the accused proved to have participated in three dacoities within a space of one year, happen to be residents of Hyderabad and have committed the crimes in distant villages along with a number of unidentifiable persons, it can be reasonably inferred that there were more members of the gang who happen to have been not identified. **ILR (1962) Andh Pra 96: AIR 1963 Andh Pra 314 (322) (Pt D) (Prs 40, 42) (DB).**

——S. 400 — Essentials of offence.

One of the chief points to be established in a case of gang dacoity is association in the crime and if it can be proved that the accused and other persons had joined together to commit dacoities, the former fact would be strong evidence of criminal association and would be relevant to show that they are members of the gang. If a gang of persons can be shown to have been associated for the habitual commission of dacoities, evidence as to other crime committed by the gang may very well be relevant against the accused. A conviction under S. 400 cannot be con-

sidered bad in law merely because the evidence on record would also justify conviction of a special offence under S. 395, I. P. C. **1959 Cr LJ 947: AIR 1959 Andh Pra 387 (388) (Pt A) (Pr 6) (DB).**

——**S. 400** — Evidence and proof indicated. **AIR 1955 NUC (Mad) 432.**

——**S. 400** — Evidence of bad character is admissible to prove relevant fact which cannot be proved aliunde — Evidence to prove criminality is admissible — (Evidence Act (1872), S. 54). **AIR 1955 NUC (Mad) 432.**

——**S. 400** — Sentence — Considerations for indicated — (Criminal P. C. (1898), S. 397). **AIR 1955 NUC (Mad) 432.**

——**S. 400** — Sentence — Dacoity — Sentence of two, three or four years' rigorous imprison. ment is grossly inadequate, especially in a gang case under S. 400, which is far more heinous than a case of simple dacoity under S. 395. See Penal Code (1860), S. 395. **1956 Cri LJ 1208: AIR 1956 Orissa 177 (DB).**

——**S. 400 — "Belong to a gang" — Meaning.**

The expression "belong" in S. 400, I. P. C., implies something more than casual association for the purpose of committing one or two dacoities by a person who was ordinarily living by honest means. It refers to those persons who habitually associate with a gang of dacoits and actively assist them in their operations. But evidence showing the actual participation by an accused in any given theft or robbery is evidence both of his association with the gang and of his object in such association. Doubtless it is only a piece of evidence and may not by itself suffice to show that he belongs to the gang. But if a person with a bad past record participates in the commission of dacoity even on one occasion in association with a well-known gang of habitual dacoits knowing them to be such a gang it may be reasonably inferred that he belongs to that gang unless there is some other material on record to justify an inference that the association was of a casual nature.

Again a person may belong to a gang of dacoits without having actually participated in the commission of even one dacoity. A clever member of the gang may always remain in the background while organising the operations of the gang, giving them active assistance for the purpose of meeting together, furnishing them with weapons and also screening them after the commission of the offence and helping them in the disposal of the looted property. It is true that a mere receiver of stolen property or mere harbourer of a gang of dacoits cannot be said to belong to such a gang. But a habitual harbourer of a gang of dacoits knowing them to be habitually committing dacoity may in some circumstances be held to belong to that gang. The question ultimately depends on whether from all the proved facts and circumstances it may be reasonably held that he identified himself so much the object of the gang and facilitated them in the commission of the offences as to become a member of the gang. For this purpose his intimate association with the gang before the commission of dacoities, his subsequent association with them after the commission of the offence, the facilities given by him in disposing of the looted property and in screening the dacoits would all be relevant pieces of evidence along with other evidence of his past activites. **ILR (1956) Cut 195: 22 Cut LT 317: 1956 Cr LJ 1208: AIR 1956 Orissa 177 (180, 181) (Pt B) (Prs 7, 8) (DB).**

——**S. 400 — 'Habit' — Evidence of previous conviction — (Evidence Act (1872), S. 54).**

In a trial for an offence under S. 400, I. P. C., evidence of previous conviction may be admissible for the purpose of proving habit and association. It is indeed difficult to dissociate habit from character. For proving a charge under Section 400, I. P. C., it must be established (1) that there was a gang associated for the purpose of habitually committing dacoity and (2) that the accused "belonged' to the gang, that is to say, the association of the accused with the gang was not casual but was intended to be habitual. Hence, 'habit' is a fact in issue to be proved for the purpose of establishing both the aforesaid ingredients of the offence. As habit is equivalent to character, it may be reasonably said that character of an accused is itself a fact in issue for proving a charge under S. 400, I. P. C. Thus Explanations 1 & 2 to S. 54 of the Evidence Act, are attracted and previous convictions not only in respect of dacoities but also in respect of other offences such as theft, burglary and orders under S. 109 or S. 110, Criminal P. C., may be admissible. Apart from the evidence of habit and character, these previous convictions may also be admissible for the purpose of proving association of a group of individuals. **ILR (1956) Cut 195: 1956 Cr LJ 1208: 22 Cut LT 317: AIR 1956 Orissa 177 (182) (Pt C) (Pr 10) (DB).**

——**S. 400 — Gang engaged in habitually committing dacoity.**

When people of bad antecedents are proved to have been kept in jail for several months and when subsequent to their release they are proved to have participated jointly in several dacoities it will be reasonable to infer that they operated as a gang engaged in habitually committing dacoity. **22 Cut LT 317: ILR (1956) Cut 195: 1956 Cr LJ 1208: AIR 1956 Orissa 177 (183) (Pt G) (Pr 13) (DB).**

——**S. 400 — "Belong to a gang" — Meaning of.**

A person who was actively helping a gang in its nefarious activities by keeping one of its leaders, as a guest in his house for several days and thereby facilitating the planning of several dacoities with the help of other leading members of the gang and also helping them financially and otherwise whenever they were involved in cases, cannot be held to be a mere harbourer or receiver of stolen property. **ILR (1956) Cut 195: 1956 Cr LJ 1208: 22 Cut LT 317: AIR 1956 Orissa 177 (185) (Pt I) (Prs 25, 46) (DB).**

——**S. 400** — Criminal P. C. (1898), Ss. 179, 181, 182, 531 — Scope and applicability — Accused charged under S. 400, Penal Code, with offence of belonging to gang of dacoits — Headquarters of gang in one district — Dacoities committed in several districts— Commitment enquiry and trial in district where headquarters were not situated — No irregularity. See Criminal P. C. (1898), Section 179. **1961 (1) Cri LJ 841: AIR 1961 Pat 260 (DB).**

——**S. 400 — Association for habitually committing dacoities — Proof.**

In a trial for an offence under S. 400, the correct principles to be followed is to look to the evidence of association and that must be held to be independent of whether an accused has been previously convicted or has been acquitted. It is the evidence of association that is really material and not participation in any particular dacoity, and for the purpose of proving association the evidence which has been found to be insufficient for a specific charge of dacoity may yet be relevant for establishing association of the members of the gang for the purpose of committing dacoities.

Not only evidence of previous convictions on the charge of dacoities but also in respect of other offences such as theft, burglary and orders under S. 109 or 110, Cr. P. Code, may be admissible. To establish the charge of belonging to a gang for habitually committing dacoities, the evidence of association based on other offences would be relevant to show that the gang also operated for the purpose of committing dacoities frequently and habitually. AIR 1930 Oudh 455 and AIR 1925 Oudh 374 (2) and AIR 1956 Orissa 177 and Cr App No. 218 of 1951, dated 4-4-1954 (Cal), Rel. on; ILR 38 Cal 559 (SB) and AIR 1929 Oudh 321 (2) and AIR 1928 Oudh 430, Disting. It is not essential that participation of each one of individual members must be established in at least three, or five dacoities. Nor is the applicability of S. 400 excluded because some outsiders as informers or helpers also have joined the gang in a particular enterprise. AIR 1925 Oudh 374 (2) and AIR 1956 Orissa 177, Rel on. Membership of the gang, in regard to an individual accused person will depend upon the facts and circumstances of a case and not upon any arithmetical calculation with regard to the number of dacoities in which an accused may be found to have taken part along with the other members of the gang. **ILR 38 Pat 1251: 1961 (1) Cr LJ 841: AIR 1961 Pat 260 (265, 266, 267) (Pt C) (Prs 16, 17, 61) (DB).**

——**S. 400** — Sentence — Considerations — Accused found guilty of habitually committing dacoities as members of gang, in villages — Offence under S. 400, being in its very nature more serious than charge of committing dacoity, deserved to be awarded more severe sentence than for dacoity, so as to operate as deterrent to commission of such offence — Sentence of 10 years R. I. which was normal sentence for committing dacoity enhanced to R. I. for life which was maximum penalty prescribed under S. 400. **ILR 38 Pat 1251: 1961 (1) Cr LJ 841: AIR 1961 Pat 260 (268) (Pt D) (Pr 76) (DB).**

SECTION 401

——**S. 401** — Evidence Act (1872), S. 54 — Offence under S. 401, Penal Code — Evidence of general bad repute — Evidence of previous convictions — When admissible. See Evidence Act (1872), S. 54. **1960 Cri LJ 1204: AIR 1960 Guj 5 (DB).**

——**S. 401 — Applicability — Evidence and proof.** Before S. 401 can apply the prosecution has to prove that the accused person charged under S. 401 belongs to a gang of persons and that the gang of persons is associated for the purpose of habitually committing theft or robbery. The word 'belong' implies something more than casual association; it involves the notion of continuity and the proof of a more or less intimate connection with a body of persons extending over a period of time sufficiently long to warrant the inference that the person affected had identified himself with the gang the common purpose of which was the habitual commission of either theft or robbery. It would not be sufficient for the prosecution merely to rely upon the fact that an accused person had associated himself with the gang in the commission of only one offence. The purpose for which the members of the gang were associated is usually not a matter of direct proof by direct evidence and is generally a matter of inference from the facts and circumstances proved and acts done by the accused. It is also not necessary that the members of the gang should be members right from the beginning. The evidence of the prosecution that a person was associated with the gang for the purpose of committing other offences would not be sufficient under S. 401. **1960 Cr LJ 1204: (1960) 1 Guj HCR 28: (1960) 1 Guj LR 34: AIR 1960 Guj 5 (6) (Pt A) (Pr 1) (DB).**

SECTION 402

——**S. 402** — Appreciation of evidence — Dacoity case — Prosecution's case that accused were caught when whispering to each other that they were going to commit dacoity at certain place — **Held,** accused would not be so foolish to whisper to each other within hearing of others, their plan of dacoity, and when there was no other evidence, direct or circumstantial, mere suspicion would not be sufficient to warrant their conviction under Ss. 399 and 402. See Evidence Act (1872), S. 3 "Proved". **1965 All WR (HC) 844.**

——**S. 402** — Sentence — No previous conviction shown against accused— Accused not shown to have undertaken any heinous duty in contemplated dacoity or to have put any resistance while being arrested — Sentence of accused reduced to $2^1/_2$ years of R. I. See Penal Code (1860), S. 399. **1965 All WR (HC) 697.**

——**Ss. 402 and 399 — Intention to commit offence — Determination of — Offence not actually committed — Test — Appreciation of surrounding circumstances and conduct of accused — Benefit of doubt — Intention to commit dacoity.**

Held, on facts that it could not be said that the purpose with which the accused had assembled in the sugar-cane field was necessarily for committing dacoity, though it could not be doubted that the purpose of the assembly was certainly unlawful. The presence of large number of arms and ammunition in the possession of the accused could not be consistent with the theory of peaceful assembly. The accused therefore, could not be convicted under Ss. 399 and 402, Penal Code, but could be convicted under Ss. 147 and 148. **1962 All Cri R 90: 1962 All WR (HC) 116: 1962 (1) Cr LJ 3: AIR 1962 All 13 (17, 18) (Pt A) (Prs 18, 19, 22).**

——**Ss. 402 and 399** — Attempt to commit dacoity — Property not looted by any member of gang — Accused of young age — Sentence of seven years' R. I. under Section 399 and five years' R. I. under Section 402, held was severe. **1961 (1) Cri LJ 591 (592) (Pt C) (Pr 24) (All).**

——**S. 402** — Intention to commit dacoity — Proof — That the purpose of assembly or of the preparation was the commission of dacoity, is an essential ingredient of an act under S. 399 or Section 402 to be proved by prosecution. See Penal Code (1860), S. 399. **1960 All Cr 153: 1960 All LJ 277.**

——**Ss. 402, 399** — Evidence and proof — Circumstantial evidence — Circumstantial evidence held inconsistent with innocence of accused and showed in all probability they were going on enterprise of dacoity — They were guilty under Sections 399 and 402 — (Evidence Act (1872), S. 106). See Penal Code (1860), S. 399. **1959 Cri LJ 1274: AIR 1959 All 727 (DB).**

——**S. 402** — Sentences under — Youth — Sentence reduced. See Penal Code (1860), S. 399. **1959 Cri LJ 1040: AIR 1959 All 550.**

——**Ss. 402, 399** — Evidence and proof — Possession of unlicensed weapons — Sufficiency. See Penal Code (1860), S. 399. **1956 Cri LJ 956: AIR 1956 All 464 (DB).**

——**S. 402** — Applicability — Assembling for committing dacoity — Proof of — Case on facts **AIR 1955 NUC (All) 1989.**

——**S. 402** — Scope — Distinction between Sections 399 and 402 — Simultaneous conviction under both sections. See Penal Code (1860), Section 399. **AIR 1955 NUC (All) 1989.**

——**Ss. 402, 399** —Accused assembling in a grove at night with unlicensed fire-arms, swords and spears — On information received that they had assembled for committing dacoity, police party arriving and surrounding grove — Some of accused opening fire on police — Accused held had assembled for the purpose of committing dacoity and were guilty under Section 402 — In arming themselves with above weapons they had made preparation for commission of dacoity and were also guilty under Section 399. **AIR 1951 All 452 (453) (Pt A) (Pr 4).**

——Ss. 402, 399 — Applicability — Some of accused not armed with deadly weapons or doing any overt act amounting to preparation, if guilty under S. 399.

Mere assemblage for the purpose of commission of dacoity being distinct offence punishable under Section 402, the mere act of assembling is not to be deemed to be a preparation for commission of dacoity punishable under S. 399.

Where some of the accused assembled for the purpose of committing dacoity had made preparation to commit it by arming themselves with unlicensed firearms, swords, etc., while the others were not so armed and had come to the assembly on the direction of others and not in pursuance of any previous agreement among themselves and there was no evidence to show that they had done any other overt act amounting to preparation:

Held, that the latter were guilty only under Section 402 and not also under S. 399 as the former. **AIR 1951 All 452 (453) (Pt B) (Pr 4).**

——**S. 402** — Scope — Presumption of assembly for purpose of committing dacoity — Presumption is rebuttable one and it is open to such persons to show that they had assembled there for a lawful purpose and thus rebut the presumption. See Penal Code (1860), S. 399. **1951 All LJ 466.**

——S. 402 — Purpose of assembly — Proof of — Purpose can be gathered only from circumstances — Police on information going to a grove — Number of persons assembling after dark — Four of them arrested — Articles usually found with dacoits recovered from them — Held, purpose was to commit dacoity.

On receiving information that certain persons were going to assemble for purpose of committing a dacoity, a police party went to a grove. When darkness set in number of persons came to the grove armed with a gun. Four of them were caught and articles recovered from them were a gun, some gun shots and gun-powder, a dagger, a chisel, electric torch and sticks. They were tried and convicted under Section 402, Penal Code. In appeal it was contended that there was no proof that they had assembled for purpose of committing a dacoity.

Held, that the purpose of the assembly can be gathered only from the circumstances. It is difficult to give any direct evidence of such purpose. Having regard to the circumstances which led the police party to come to the grove and in view of the articles recovered from the possession of the appellants there was hardly any room for doubt that the purpose of the assembly was to commit dacoity, as the articles usually recovered from dacoits were found in the possession of the appellants. **1949 All WR (HC) 471: 1949 All Cri Cas 116: 51 Cri LJ 399: AIR 1950 All 93 (93) (Pr 6).**

——S. 402 — Intention — Proof.

The intention or agreement to commit dacoity must be proved before the members of the assembly can be punished under Section 402. It is difficult to prove the agreement by direct evidence. But the circumstances established in a case may lead to the inference that such an agreement existed. **1953 Cr LJ 990: AIR 1953 Bhopal 21 (22) (Pt A) (Pr 7).**

——**S. 402** — Ingredients of the offence— Intention of four others or their taking part, is necessary. See Penal Code (1860), S. 399. **1958 Cri LJ 25: AIR 1958 Cal 25 (DB).**

——Ss. 402 and 399 — Relative scope.

Chakravartti, C. J. — Section 402 contemplates a stage when the whole project still lies in the realm of design and intention without any attempt having yet been made to give it a concrete shape. But the project advances a step further when someone of them does some act amounting to preparation even if it be by himself. In certain circumstances, assembly itself may amount to preparation, for example, when five or more persons, after having planned a dacoity and after having collected the necessary arms and implements, agree to assemble at a forsaken temple in a jungle in order to proceed therefrom to place of the raid and in pursuance of that agreement do in fact assemble there. The assembly in such a case would not be an assembly as contemplated by Section 402, but would be an act of preparation. If so, if the persons assembled were to be prosecuted, the prosecution would not require Section 402 at all, but might charge them and charge successfully under Section 399, if not under any other section. **61 Cal WN 856: 1958 Cr LJ 25: ILR (1958) 1 Cal 447: AIR 1958 Cal 25 (31) (Pt D) (Pr 37) (DB).**

——**S. 402** — Applicability — Assemblage and preparation — What is stated. See Penal Code (1860), S. 399. **1954 Cri LJ 386: AIR 1954 Kutch 1.**

——S. 402 — Ingredients of offence under — Distinction between preparation for dacoity and assembling for committing dacoity.

The offence under Section 402 is complete as soon as five or more persons assembled together for the purpose of committing a dacoity. Preparation for committing a dacoity may take place before or after the dacoits assembled together. There is distinction between preparation for a dacoity and assembling for the purpose of committing dacoity. Preparation consists in devising or arranging means necessary for the commission of an offence, an attempt is the direct movement towards the commission after preparations are made. Where the persons assemble at a particular spot for committing dacoity they are guilty under Section 402. The fact, that they had come armed with weapons of defence and attack and had assembled at an usual hour (night) for committing dacoity is enough to establish that they had made preparation to commit a dacoity. If they arrive at the house where they intended to commit dacoity, they would be liable for actually committing dacoity even if their act did not go beyond an attempt to commit that offence. **28 Cut LT 571.**

——**S. 402** — Ten to fifteen persons assembling for committing dacoity — Only five persons identified, traced and arrested, rest escaping — Acquittal of some of the accused does not take case of remaining accused, out of Section 402 — All that Section 402 requires is (i) assembly of five or more persons, and (ii) their purpose of committing dacoity. **28 Cut LT 571.**

——**Ss. 402, 399** — Preparation for dacoity and assembling for dacoity — Distinction. See Penal

Code (1860), S. 399. **1960 Cri LJ 1650: AIR 1960 Pat 582.**

——S. 402 — Applicability — Evidence and proof — Scope and applicability considered — Case on facts. See Penal Code (1860), S. 399. **AIR 1955 NUC (Pat) 4903.**

——Ss. 402 and 399 — Distinction pointed out. See Penal Code (1860), S. 399. **1960 Cri LJ 1234: AIR 1960 Punj 482.**

SECTION 403

SYNOPSIS

(Penal Code (1860), S. 403.)

1. Scope and applicability.
2. Criminal misappropriation, breach of trust and theft — Distinction.
3. "Misappropriates or converts to his own use".
4. Explanation 1.
5. Explanation 2.
6. Partner.
7. Evidence and proof.
8. Practice and procedure.
9. Conviction and sentence.

1. Scope and applicability.

——S. 403 — Accused having dishonest intention at time of taking possession — Offence.

It cannot be said that criminal misappropriation cannot be committed if the accused had a dishonest intention at the time of taking possession of the article. If the prosecution proves a case of Section 403, I. P. C., the accused by proving that he had a dishonest intention at the time of taking delivery of the article cannot change the nature of the offence to that of cheating. **1960 Cr LJ 857: AIR 1960 All 387 (394) (Pt J) (Pr 21).**

——S. 403 — Postal stamps supplied to stamp vendor — Transaction held amounted to entrustment and not loan — Post Offices Act (1898), S. 2 (e), 2 (k), 16 (1), 16 (2) — Rules under S. 16 (2) — Post and Telegraph Manual, Vol. VI, Chap. I, R. 45 (4) and (5).

Held, after considering the terms of the appointment, the security bond and the relevant provisions of the Post Offices Act including the Rules made thereunder, that the accused who was employed as an Extra Assistant Stamp Vendor at the Post Office, was supplied with the postal stamps for sale to the public and that the transaction was not a loan but an entrustment, pure and simple. **1960 All Cr R 261: 1960 All WR (HC) 415: 1960 All LJ 534.**

——S. 403 — Applicability —Innocent possession — Retaining becoming wrongful — It is criminal misappropriation — Accused mortgaging house as belonging to him — Discovery of will — House found belonging to another — Mortgagee demanding back money — Accused denying receipt — Offence under Section 403 held established. **AIR 1955 NUC (All) 2270.**

——Ss. 403, 420 and 378 — Applicability —Post Offices Act (1898), Section 68 — A receiving B's insured cover as his own — Allegation that it contained more amount — A ready to return cover with amount specified thereon — A could not be said to have fraudulently retained any postal article within meaning of Section 68, Post Offices Act — A held could not also be convicted under Section 403, I. P. Code. **AIR 1955 NUC (All) 1743.**

——Ss. 403, 427, 295 and 295-A — Bull dedicated to Lord Shiva — It is public property unless deity contemplated is in existence in shape of a consecrated idol —Bull sold at auction by cattle pound keeper — Auction purchaser using it for his own purpose commits no offence. See Penal Code (1860), S. 295. **1952 Cri LJ 168: AIR 1952 All 26.**

——Ss. 403 and 406 — Applicability — Dishonest retention of jewel lent — Offence.

Where it is alleged that the complainant lent a jewel to the accused who dishonestly retained it and converted it to his own use prima facie an offence under Section 403 or Section 406, Penal Code, is made out and it must be gone into and tried. **1951 ALJ 631: 1951 AWR (HC) 521.**

——Ss. 403, 411 — Essentials of offence — Property in custody of railway found in godown of accused — Applicability.

There are two things necessary before an offence under Section 403, Indian Penal Code can be established. Firstly, that the property must be misappropriated or converted to the use of the accused, and, secondly, that he must misappropriate or convert it dishonestly.

Certain bales of cloth which were in the custody of railway were found to be unloaded near the godown of the accused and were later on recovered from that godown. The accused was tried for an offence under Section 411, I. P. Code, on the specific allegation that the bales were stolen from the railway but the theft of property could not be established and hence the Court convicted the accused under Section 403, I. P. Code, instead of Section 411, I. P. Code.

Held, that the mere fact that the property was once in the custody of the Railway and was subsequently found in the godown of the accused did not make out a case under S. 403 against the accused. There being no proof of misappropriation or conversion of property or any evidence of dishonest intention, there could be no conviction under Section 403, I. P. Code. **1961 All WR (Sup) 91: (1960) 1 Assam LR 224: 1961 (2) Cr LJ 457: 1961 All Cri R 405: AIR 1961 Assam 132 (132) (Pr 4) (DB).**

——S. 403 — Bare intention to misappropriate is not enough.

The conviction of an accused under S. 403, without a finding that he had misappropriated or converted the properties in question to his own use, on the ground that he had the intention of doing so is bad in law. Where certain missing properties were traced to the accused but there was no proof of their having been stolen and so the accused was acquitted of a charge under Section 411, I. P. Code, he cannot be convicted under Section 403 on the ground of his intention to misappropriate them where there was no actual misappropriation by him. **1961 (1) Cr LJ 624 (Assam).**

——S. 403 — Accused found carrying property belonging to another with latter's mark on it — Defence that accused purchased it from third person — Accused cannot be convicted for criminal breach of trust — Misappropriation has to precede seizure of property and must be proved by independent evidence — Section 403 requires dishonest misappropriation or conversion —Mere intention to misappropriate is not enough. 52 All 200, Distinguished. **1953 Cri LJ 1405: ILR (1952) Assam 387: AIR 1953 Assam 154 (154) (Pt B) (Pr 4).**

——S. 403 — Person obtaining possession of property by cheating later on converting same to his own use — Is guilty of criminal misappropriation. **61 Bom LR 345: 1959 Cri LJ 1057: ILR (1959) Bom 865: AIR 1959 Bom 408 (410) (Pt D) (Pr 5) (DB).**

——S. 403 — Applicability.

A who had mortgaged certain lands to B had entered into an agreement with B under which the compensation money which A was to get in respect of mortgaged lands acquired under the Land Acquisition Act was to be first applied towards satisfaction of the mortgage loan. On receipt of the money A refused to pay it to B and kept the money for himself. On a complaint by B the magistrate issued summons to A under S. 403, Penal Code:

Held, that the compensation money could not in law become the money of B. The case was one of breach of contract. The refusal to pay every civil debt does not justify the finding of dishonesty. It could not be said that A had committed an offence under Section 403, Penal Code. The proceedings must therefore be quashed as no offence was disclosed. **58 Cal WN 552: 1954 Cr LJ 1566: AIR 1954 Cal 547 (Prs 2, 3, 4) (DB).**

——S. 403 — Cheque wrongly dishonoured —No misappropriation — Remedy lies in civil and not criminal Court.

If a cheque is dishonoured, that does not connote misappropriation. The remedy for a cheque being wrongfully dishonoured lies in the civil Court. This is not a matter which is to be tried by a criminal Court. **51 Cri LJ 388: (1950) 20 Comp Cas 220: AIR 1950 Cal 57 (59) (Pt D) (Pr 6).**

——S. 403 — Scope — Removal of cattle turned loose — Cattle turned out to graze in pasture or jungle are still in possession of owner unless contrary is shown — Taking of such cattle is theft and not criminal misappropriation. See Penal Code (1860), S. 378. **1954 Cri LJ 280: AIR 1954 Nag 55.**

——S. 403 — Applicability — Mere intention to misappropriate.

Section 403 punishes the dishonest misappropriation or conversion to his own use of moveable property by an accused. Mere intention to misappropriation or conversion. **1953 Cri LJ 842: AIR 1953 Pat 100 (102) (Pt C) (Pr 8).**

——Ss. 403, 378 — Possession — Person leaving cycle outside market temporarily with intention to come back and take it — Cycle cannot be said to have been out of his possession. See Penal Code (1860), S. 378. **AIR 1954 Sau 33 (DB).**

——Ss. 403, 409 and 477-A — Applicability — Dishonest misappropriation and falsification of accounts.

Complainant entrusting amount to accused, an employee of post office, for sending money order — Accused not despatching money order and also omitting to enter amount in account books and registers — In the counterfoil of the receipt issued for the amount accused entering particulars of earlier money order — Accused held had hishonestly misappropriated the amount entrusted to him and falsified the accounts. **1953 Ker LT 364: ILR (1953) Trav-Co 600: 1953 Cr LJ 1777: AIR 1953 Trav-Co 537 (538) (Pt A) (Pr 3) (DB).**

2. Criminal misappropriation, breach of trust and theft — Distinction.

——Ss. 403 and 405 — Breach of trust —Essential element — 'Entrustment' — Meaning of — Distinction between breach of trust and criminal misappropriation.

Entrustment is an essential element of the offence defined in Section 405. The word 'entrust' is not a term of art. In common parlance it embraces all cases in which a thing is handed over by one person to another for specific purpose. Entrustment need not be express, it may be implied. The essence of the offence of criminal misappropriation is that the property of another person comes into the possession of the accused in some neutral manner and is misappropriated or converted to his own use by the accused. No entrustment is required for this offence to be constituted. **1964 MPLJ 750: 1964 Jab LJ 724.**

——Ss. 403, 405, 378 — Criminal misappropriation and theft — Distinction.

In case of theft mere removal from the possession of a person with dishonest intention is enough, while in the case of criminal misappropriation there must further be misappropriation or conversion. **1953 Cri LJ 842: AIR 1953 Pat 100 (103) (Pt E) (Pr 11).**

3. "Misappropriates or converts to his own use".

——Ss. 403, 405 and 40 — Dishonest misappropriation — Mens rea and not actual amount misappropriated is important.

In a criminal trial what is important is the mens rea. It is not that the actual amount alleged to have been misappropriated may be more or less but if there is dishonest misappropriation of any amount the person so misappropriating would nevertheless be guilty of criminal breach of trust. **1965 All LJ 538: ILR (1965) 2 All 82.**

——S. 403 — Burden of proof— Misappropriates or converts to his own use — Accused found carrying cattle to cattle pound — It is not conversion or misappropriation — Prosecution must establish act leading to conclusion of conversion or misappropriation. **AIR 1955 NUC (All) 3530.**

——S. 403 — Entrustment — Joint family property in sole possession of father — Each member of joint family has interest in it — Suit by minor son for partition against father —Property in sole possession of father sold — There is no dishonest misappropriation of property. **1961 (2) Cr LJ 453 (Andh Pra).**

——S. 403 — Criminal misappropriation — Bhagdar misappropriating landlord's share of paddy is an offence under Penal Code —Tenancy Laws — West Bengal Bargadars Act (2 of 1950) does not bar prosecution for offences under Penal Code.

The relations between the owners and the Bhagdars envisaged in the West Bengal Bargadars Act are normal relations where no element of dishonesty enters. There may be differences and disputes as between owners and bargadars requiring adjudication; and it is such disputes and differences of a civil nature for which the legislature has provided a forum mentioned in the Act for solution. But where criminal acts involving dishonesty are charged and evidence is led in support of them the mere fact that the person charged fills a particular character will not oust the jurisdiction of the criminal courts to punish the offender. The Bargadars Act can never be put forward as a plea in bar or a shield against prosecution for offences under the Penal Code. Where, therefore, the evidence is clear that there has been dishonest appropriation of property, the status of the person charged cannot be availed of to prevent application of the ordinary law of the land creating offences and regulating punishment of crimes. **ILR (1957) 1 Cal 506.**

——S. 403 — Dihonest misappropriation — Accused in his capacity as booking-clerk at Mandi, received the sums in question from drivers of various transport vehicles for deposit with adda cashier — He, however, failed to deposit the

sums — It was only several days after his suspension that the missing sums were handed over by him to adda cashier — Accused, held guilty of dishonest misappropriation, although it was only temporary, punishable under Section 5 (2) of the Prevention of Corruption Act. See Prevention of Corruption Act (1947), S. 5 (2). **1959 Cr LJ 973: AIR 1959 Him Pra 14.**

——Ss. 403, 409 — Applicability — Mere retention of money — Offence — (Words and Phrases).

To establish an offence under Section 409, I. P. Code, the prosecution must prove that the accused misappropriated or converted the amount in question to his own use and that too dishonestly. To 'misappropriate' means 'improperly setting apart for one's use to the exclusion of the owner'. 'Converts' means appropriation and dealing with property of another without right as it is his own property.

Dishonesty may be proved by evidence or may be presumed from the circumstances but under no circumstances can it be assumed as a matter of course. Where it is not clear from the evidence what the accused did with the money during the period he was in possession of it, the Court cannot assume, in absence of any evidence to show or circumstances to infer, that he misappropriated the amount dishonestly.

Mere retention of money is not itself sufficient to conclude that the accused was guilty of criminal breach of trust. **1956 Cr LJ 630: ILR (1956) Mys 10: AIR 1956 Mys 40 (41) (Pt B) (Prs 4, 5).**

4. Explanation 1.

——S. 403, Expl. 1 — Misappropriation for time only — Proof of.

Section 403, Expln. 1 clearly states that a dishonest misappropriation for time only is misappropriation within the meaning of this section. The essential thing to be proved in such cases is whether the accused was actuated by dishonest intention or not and which dishonesty has to be inferred from false accounting, absence of bona fides or reasonable explanation for non-accounting. **1956 Cr LJ 1079: 1953 Mad WN 929: AIR 1956 Mad 452 (453) (Pt B) (Pr 9).**

——S. 403, Expl. 1 — Misappropriation for time only is misappropriation within meaning of section — Essential thing to be proved is dishonest intention — This can be inferred from false accounting. **AIR 1955 NUC (Mad) 433.**

5. Explanation 2.

——S. 403 — Finder of article or animal when can be held guilty under S. 403.

Per Gurtu and Sankar Saran JJ. — When a stray animal is found and is taken into possession by the finder thereof, he may, in the first instance, do it with no criminal intent. Thereafter, if he changes his intention with regard to the animal and converts the animal to his own use, he then commits an offence under S. 403, I. P. C. A finder of an article should take some steps in order to ascertain who the true owner is. If, after he has taken such steps, the true owner is not discovered, then, under certain circumstances, the finder may retain the article and in such a case he would not be held guilty of criminal misappropriation, but if he acts with reference to the article found in such a way that the true owner may never discover that it had been picked up by him, then undoubtedly he is attempting to create a situation where conversion of the goods to his own use would be easy. In such a case naturally the conduct of the finder is criminal conduct and he would come within the ambit of Section 403 of the Indian Penal Code. **1952 Cri LJ 904: AIR 1952 All 481 (484) (Pt D) (Pr 16).**

——S. 403, Expln. 2 — Tort — Conversion — Detinue — Action for — Plaintiff's timber lying on lands leased to defendant by railway —Notice by defendant to remove it within 15 days — Plaintiff's failure to remove it— Defendant clearing it himself — Suit for damages for conversion or detinue — Liability of defendant — **Held,** that apart from legal position that principles of criminal law are not applicable for purpose of determining civil liability, the notice given by defendant was sufficient within meaning of explanation 2 of Section 403 and after expiry of notice period defendant had no liability to plaintiff in respect of timber lying on lands leased to it — (Contract Act (1872), S. 71). See Tort — Conversion — Detinue — Action for. **AIR 1959 Orissa 103 (DB).**

6. Partner.

——S. 403 — Dishonest misappropriation of property — Partner using partnership asset for his own use — Not liable under S. 403, I. P. C.

An owner of property, in whichever way he uses his property and with whatever intention, will not be liable for misappropriation and that would be so even if he is not the exclusive owner thereof. A partner has undefined ownership along with the other partners over all the assets of the partnership. If he chooses to use any of them for his own purposes he may be accountable civilly to the other partners. But he does not thereby commit any misappropriation. Velji Raghavji Patel v. State of Maharashtra, **(1965) 1 SCWR 586: (1965) 2 SCR 429: 1965 All Cri R 392: 1965 All WR (HC) 598: (1965) 2 Andh LT 201: 1965 SCD 824: 1965 Mah LJ 487: 67 Bom LR 443: 1965 (2) Cri LJ 431: 1965 MPLJ 660: (1965) 2 SCJ 186: 1965 Mad LJ (Cri) 519: AIR 1965 SC 1433 (1436) (Pt B) (Pr 8).**

——Ss. 403, 405, 406 — Criminal breach of trust by partner — Accused held guilty under Section 406 — If accused had not been found guilty under Section 406, he would have been convicted for criminal misappropriation under S. 403 — Misappropriation which a partner may commit is necessarily specified property inasmuch as partnership property is specific and ascertainable — Fact that partnership account is a general account has relevancy only to existence of dishonest intention and not to whether property is specific and is jointly owned. AIR 1951 Cal 69 (FB) and AIR 1950 Nag 99. Dissented from — (Trusts Act (1882), Ss. 80, 94 and 88). **1959 Cri LJ 1302: AIR 1959 Bom 486 (488, 489) (Pt A) (Prs 7, 9, 13, 14) (DB).**

——Ss. 403, 408, 23, 24 — Government keeping grain stock with A, with a view to distribute same in deficit areas — Grain kept in Government godown — Grain belonging to Government — Partner of A removing stock to his own house knowing fully that grain was Government property —Partner held guilty under Section 403 — His motive to force A to settle accounts held immaterial — No extenuating circumstance held existed. **(1965) 7 OJD 287: ILR (1963) Cut 869: 30 Cut LT 184: 1964 (1) Cr LJ 525: AIR 1964 Orissa 119 (120, 121) (Prs 5a, 6 to 8).**

——Ss. 403, 405 — Whether a partner could be said to misappropriate or convert to his own use a property to which he himself is as much entitled as any other partner. (Quaere). **1953 Cri LJ 842: AIR 1953 Pat 100 (103) (Pt D) (Pr 10).**

7. Evidence and proof.

●——**S. 403 — Burden of proof— Criminal misappropriation — What prosecution has to prove.** In order to prove an offence under Section 403, Indian Penal Code, the prosecution has to prove that the property, in this case, the net amount of ninety-six thousand odd rupees collected by the accused by way of entry fees in the competition was the property of the complainants and (2) that the accused misappropriated that sum or converted it to his own use, and (3) that he did so dishonestly.

Held, on the facts and circumstances of the case that no offence under Section 403, I. P. Code, had been made out either on evidence or as a matter of law. Ramaswamy Nadar v. The State of Madras, **36 Mys LJ 113: 1958 Cr LJ 228: 1958 SCJ 343: (1958) 1 An WR (SC) 143: (1959) 2 SCA 221: 1958 SCR 739: (1958) 1 Mad LJ (SC) 143: 1958 All WR (HC) 386: 1958 Mad LJ (Cr) 306: 1958 All Cr R 273: AIR 1958 SC 56 (59) (Pt C) (Pr 7).**

——**S. 403 and S. 409** — Scope — Criminal misconduct by public servant by misappropriating money — Misappropriation need not be in discharge of his duty as public servant — Public servant collecting audit fees due to Government from co-operative societies — Failure to remit into treasury for a period — Proof of misappropriation. See Prevention of Corruption Act (1947), S. 5 (1) (c). **1963 (1) Cr LJ 360 (Ker).**

——**S. 403 — Misappropriation proof — Servant bound to account for goods entrusted to him, failing to do so — He is prima facie guilty — Burden of proving circumstances exonerating him is on him — Giving of false explanation, and making himself scarce relevant.**

Ordinarily, if a person receives money which he is bound to account for and does not do so, he is prima facie guilty of the offence of misappropriation. Where money is entrusted for a particular purpose, the owner cannot know that it has been misappropriated until the person to whom it has been entrusted fails to account for it. In the case of a servant charged with misappropriating the goods of his master, the elements of criminal offence of misappropriation will be established if the prosecution proves that the servant received the goods, that he was under a duty to account to his master and had not done so. It is not necessary for the prosecution to eliminate all possible defences or circumstances which may exonerate the accused. If these facts are within the knowledge of the accused then he has to prove them. The giving of a false explanation is an element which the court can take into consideration. AIR 1959 SC 1390; AIR 1960 SC 889, Rel. on.

Subsequent conduct of the accused and the fact of his making himself scarce are circumstances which are relevant and which can be taken into consideration in finding whether the accused had a guilty mind. (1836) 7 C and P 338; (1854) 6 Cox CC 445, Ref. **1962 Ker LT 679: (1962) 2 Ker LR 256.**

8. Practice and procedure.

——**Ss. 403, 405, 406 and 420** — Accused charged and convicted under S. 406, Penal Code — Facts proved not disclosing offence under S. 406, but one under S. 420 — Alteration of conviction in revision — Alteration of conviction for minor offence under S. 403. See Criminal P. C. (1898), S. 225. **1960 Cri LJ 857: AIR 1960 All 387.**

——**Ss. 403, 409** — U. P. Police Regulations, Para 486 — Non-compliance with — Effect — Allegations in complaint made to Superintendent of Police that the Sub-Inspector of Police concerned wanted to search potli containing currency notes and therefore, the complainant made over the potli to the officer and that the officer counting notes returned them to him but that he found that total amount returned to him was short by certain amount — Allegation amounts not to complaint of offence under S. 403 but of an offence under S. 409 which is cognizable offence. (Criminal P. C. (1898), Ss. 157 and 173). See U. P. Police Regulations, Para. 486. **1958 Cri LJ 994: AIR 1958 All 584 (DB).**

——**Ss. 403 and 414** — Scope of — Conviction under S. 414 altered into one under S. 403 — Practice and Procedure. See Criminal P. C. (1898), S. 236. **AIR 1955 NUC (All) 1995.**

——**S. 403** — Complainant alleging payment of money to accused for purchase of sewing machine from M — Accused neither purchasing machine nor returning money — Accused denying that he got money — Payment of money proved — Case held one of criminal misappropriation — Had accused admitted receipt of money, and alleged that he had bona fide paid it to M accused would have been entitled to acquittal — But Court held could not make out such defence for accused when it was not pleaded. **1949 All WR 570: 1949 All Cri Cas 164: 51 Cri LJ 505: AIR 1950 All 266 (266) (Pt B) (Pr 1).**

——**S. 403** — Criminal P. C. (1898), S. 238 (1) — Minor offence — Offence under S. 403 is a minor one, compared with the one under S. 409 — Accused can be validly convicted under S. 403. See Criminal P. C. (1898), S. 238 (1). **1956 Cri LJ 372: AIR 1956 Andhra 31 (DB).**

——**Ss. 403 and 406** — Offences by corporations — Offences involving mens rea committed by servant of company — Company can be prosecuted. See Penal Code (1860), S. 2. **1964 (2) Cr LJ 276: AIR 1964 Bom 195.**

——**S. 403** — Applicability — Complaint under Code — Dismissal— Subsequent complaint under S. 14, W. B. Bargadars Act held not barred. See West Bengal Bargadars Act (2 of 1950), S. 14. **(1957) 61 Cal WN 522.**

——**S. 403** — W. B. Bargadars Act (2 of 1950), S. 14 — Award made by Board — Complaint — Non-compliance — Proper procedure — Complaint under Section 403, Penal Code — Discharge of — Proceedings under S. 14, W. B. Act 2 of 1950 would have been appropriate — Proceedings under S. 403, Penal Code were misconceived— Order under S. 283, Cr. P. C. held justified. See Tenancy Laws — West Bengal Bargadars Act (2 of 1950), S. 14. **(1957) 61 Cal WN 522: 1957 Cri LJ 671.**

——**Ss. 403, 420** — Applicability — No proper charge — Magistrate should draw proper charge even when case was fixed for arguments — (Criminal P. C. (1898), Ss. 221, 227). **AIR 1955 NUC (Cal) 1538 (DB).**

——**Ss. 403 and 405** — Trial under Ss. 405 and 403, Penal Code — Accused acquitted by lower appellate Court — On appeal to High Court accused can be convicted under S. 403, even though there was no specific charge under Section 403 — Irregularity, if any, could be cured under Section 535. See Criminal P. C. (1898), S. 230. **1964 MPLJ 750.**

——**S. 403** — Procedure — Charge under Section 379, I. P. Code, only — Accused can be convicted under S. 403 if the facts alleged and proved constitute that offence. See Criminal P. C. (1898), S. 237. **1958 Cr LJ 40: AIR 1958 Madh Pra 1.**

——S. 403 — Scope — Detention of money.

It is true that if the detention of money is satisfactorily explained there can be no question of misappropriation. But where the explanation is not accepted by the Revenue Divisional Officer it is not open to the High Court to canvass his decision. **69 Mad LW 886. (1956) 2 Lab LJ 486: 1956 Mad WN 883: (1957) 1 Mad LJ 55: AIR 1957 Mad 46 (47) (Pt B) (Pr 4) (DB).**

9. Conviction and sentence.

——S. 403 — Sentence— Accused who was of 25 years age misappropriating cattle — Offence is not minor one — Sentence of one year's R. I. is justified. **1952 Cri LJ 904: AIR 1952 All 481 (486) (Pt G) (Pr 27).**

——S. 403 — Applicability — Person retaining in custody animals which have strayed and using them — Offence.

Certain buffaloes belonging to the complainant strayed. They were found in the possession of the accused. He kept them for some weeks. When the owner appeared on the scene twice, he did not deliver the buffaloes to him but put him off on the pretext that he would make inquiries from the vendor from whom he purchased them. He made no attempt to prove that he received these buffaloes from any one else. He merely disowned them. He was using them for the period that he kept them

Held, that the facts disclosed an offence of criminal misappropriation under S. 403 and the accused had incurred liability to punishment. AIR 1929 All 917, Rel. on. **1957 Cr LJ 349: AIR 1957 Assam 35 (38) (Pt D) (Pr 17) (DB).**

——S. 403 — Applicability — "Entrusted" — Money obtained by cheating on four occasions — Charge of criminal breach of trust — Accused held liable for conviction under S. 403 and not under S. 408. See Penal Code (1860), S. 408. **1957 Cr LJ 1284 (2): AIR 1957 Mad 722.**

——S. 403 — Sentence — Consideration indicated. See Cr. P. C. (1898), S. 32. **1957 Cr LJ 1284 (2): AIR 1957 Mad 722.**

SECTION 404

——Ss. 404 and 424 — Charge under — Heads of charge not specifically mentioning any property coming to the possession of the accused which he may have misappropriated or disposed of dishonestly — **Held** the heads of charge were extremely vague and indefinite and could not conceivably be answered. See Criminal P. C. (1898), S. 221. **1954 Cri LJ 1838: AIR 1954 Assam 259 (DB).**

——S. 404 — "Property" — Meaning — Does not mean immovable property.

The object behind S. 404 is to afford protection of property which by reason if its being peculiarly placed needs protection where the person who could look after it is dead and the person who is expected and entitled to look after it after the death of the aforesaid person has not appeared on the scene. There is a change available to strangers to dishonestly misappropriate and convert the same. Under these circumstances if such strangers are allowed to do so, the subsequent owner may lose that property entirely. In majority of cases there is no evidence as to what the property was and there is hardly any possibility of following the property which has passed into several hands or changed its form. All these possible risks ought to be checked. It is for this reason that a provision is made by which dishonest misappropriation or conversion under these circumstances is made specially punishable with a higher sentence.

In view of this position of immovable property it is difficult to say that properly where the subsequent owner has not stepped in, is open to any risk or needs any protection. The Legislature could not have intended to protect that property which is otherwise safe and evidence pertaining to which cannot be lost. The provision for prescribing punishment with respect to such property will be unnecessary and uncalled for. 23 Cal 372; 6 Bom HCR (Cr) 33, Rel. on; AIR 1925 All 673, Dissent from. **1956 Cr LJ 224: Madh BLJ 1955 HCR 1693: Madh BLR 1955 (Cr) 328: AIR 1956 Madh Bha 49 (50) (Pt A) (Prs 9, 10).**

——S. 404 — Applicability.

Where the accused, who took possession of property can only be said to have done so in bona fide exercise of his right, a criminal prosecution in such a case is misconceived. AIR 1915 Mad 506 (1), Rel. on. **1956 Cr LJ 224: Madh BLJ 1955 HCR 1693: Madh BLR 1955 Cri 328: AIR 1956 Madh Bha 49 (50) (Pt B) (Pr 16).**

——S. 404 — Scope.

Where the accused took possession of the property from a person who was entitled to be in possession and was in possession at the time of the death of the deceased, under these circumstances, the ingredients of S. 404 cannot be said to have been satisfied. **1956 Cr LJ 224: Madh BLJ 1955 HCR 1693: Madh BLR 1955 (Cr) 328: AIR 1956 Madh Bha 49 (50) (Pt C) (Pr 17).**

——S. 404 — Murder and robbery committed in same transaction — Offence falls under S. 492 — 'Person' does not exclude dead body in such a case. See Penal Code (1860), S. 392. **1963 (1) Cri LJ 433: AIR 1963 Madh Pra 106 (DB).**

——S. 404 — Ornaments shown to witness before test identification — No weight can be attached to the identification — Accused keeping ornaments buried — Burial alone insufficient to draw any inference against him. **1963 MPLJ (Notes) 258.**

——S. 404 — Murder and robbery committed in same transaction — Offence falls under S. 392 — Person does not exclude dead body in such a case. See Penal Code (1860), S. 392. **1962 MPLJ 1064.**

——S. 404 — Essential ingredients — Mens rea.

Held, that the essential ingredient of offence under S. 404, was the knowledge on the part of the accused that the property in question was in possession of the deceased person at the time of that person's decease and had not since been in the possession of any person legally entitled to such possession. So the prosecution had further to establish that knowledge on the part of the accused. Indirect evidence of circumstantial nature enabling interference of that knowledge could possibly be given without establishing that the prosecution would not be entitled to claim conviction of the accused person under S. 404, on mere recovery from him of the ornaments belonging to the deceased person and last worn by him. There being no evidence on record pointing out to such a knowledge on the part of the accused, conviction of the accused could not be sustained under S. 404. **1961 MPLJ (Notes) 130.**

——S. 404 — Applicability — Person murdered — Removal of ornaments from dead body — Act of accused held dishonest misappropriation of property possessed by deceased and was an offence under S. 404. See Penal Code (1860), S. 394. **1958 Cr LJ 902: AIR 1958 Madh Pra 192 (DB).**

——S. 404 — Recent unexplained possession of jewels worn by murdered person — Inference that accused was murderer if can be drawn —

Circumstantial evidence when sufficient to prove guilt indicated. See Evidence Act (1872), S. 3. **1956 Mad WN 805.**

SECTION 405

SYNOPSIS

(Penal Code (1860), S. 405.)

1. **Scope and applicability.**
2. **Criminal breach of trust distinguished from theft, cheating and criminal misappropriation.**
   See also Penal Code (1860), Sections 378, 379, 403 and 415.
3. **"In any manner entrusted".**
4. **"Property".**
5. **"Misappropriates or converts to his own use".**
6. **Disposal in violation of any legal contract.**
7. **"Dishonestly".**
   See also Penal Code (1860), S. 24.
8. **Failure to account or false account — Presumption of dishonest intention.**
9. **Breach of duty under civil law — Inference of dishonest intention.**
10. **Clerk or servant.**
    See also Penal Code (1860), Section 408.
11. **Public servant.**
    See also Penal Code (1860), S. 409.
12. **Broker.**
    See also Penal Code (1860), S. 409.
13. **Agent.**
    See also Penal Code (1860), S. 409.
14. **Depositary or custodian of property.**
15. **Pledge.**
16. **Vendor and purchaser.**
17. **Partner.**
18. **Debtor and creditor.**
19. **Banker.**
    See also Penal Code (1860), S. 409.
20. **Hirer.**
21. **Onus of proof.**
22. **Abetment.**

1. Scope and applicability.

●——**S. 405** — Criminal P. C. (1898), Sections 182 and 181 (2) — Criminal breach of trust — Uncertainty as to place where offence committed —Applicability of Section 182, Criminal P. C. — Venue of trial has to be primarily to be determined by averments in complaint or charge-sheet — Ordinarily the Court where the charge-sheet or complaint is filed has to proceed with it, except where action has to be taken under Section 202, Criminal P. C.— When it was uncertain whether the offence of embezzlement was committed at Nagpur or Bombay, Section 182, Criminal P. C. applied — Nagpur Court had jurisdiction to enquire into the offence. State of Madhya Pradesh v. K. P. Ghiara, **1957 MPLJ 230: 1957 Nag LJ 158: 1957 Cri LJ 322: AIR 1957 SC 196 (197 to 199) (Prs 2, 7, 9).**

●——**S. 405 — Applicability — Essentials to be proved.**

To constitute an offence of criminal breach of trust it is essential that the prosecution must prove first of all that the accused was entrusted with some property or with any dominion or power over it. It has to be established further that in respect of the property so entrusted, there was dishonest misappropriation or dishonest conversion or dishonest use or disposal in violation of a direction of law or legal contract, by the accused himself or by someone else which he willingly suffered to do. It follows almost axiomatically from the definition that the ownership or beneficial interest in the property in respect of which criminal breach of trust is alleged to have been committed, must be in some person other than the accused and the latter must hold it on account of some person or in some way for his benefit.

The accused, a receiver of a Cotton Mill appointed by the High Court, in the exercise of discretion conferred on him by the High Court, demanded and received payment over and above the market price in respect of bales allotted to a shopkeeper. The accused, however, failed to account for this extra payment. He was charged for and held guilty of criminal breach of trust in appropriating the extra money without bringing it into the mill's accounts. The question was whether the extra money was given by the shopkeeper to the accused for and on behalf of the Mill or was given to him personally as a motive or reward for showing some favour.

Held, (1) (on appreciation of evidence) that the money was intended to be paid to the accused as his own personal profit and it was not an item of additional or extra price for the goods purchased which was demanded by or paid to the accused on behalf of the mills. AIR 1952 Trav-Co 128, **Reversed.**

(2) As the sum was paid by way of illegal gratification, there could be no question of entrustment in such payment. The criminality of the act consisted in illegal receipt of the money and the question of subsequent misappropriation or conversion of the same did not arise at all. Ithiravi Nambudiri v. State of Trav-Co., **1953 Ker LT 173: ILR (1953) Trav-Co 181: 1954 Cri LJ 102: AIR 1953 SC 478 (484) (Pt C) (Pr 21).**

——**S. 405** — Criminal P. C. (1898), Sections 181 (2) and 179 — Criminal breach of trust — Venue of trial — Principles determining. See Criminal P. C. (1898), Section 181 (2). **1956 Cri LJ 1165: AIR 1956 All 619.**

——**S. 405 — Construction and scope — Ingredients of offence.**

The proposition that Section 405, I. P. Code, consists of two parts, one a positive part, which deals with what is known as criminal misappropriation or conversion of the property and the other a negative part which consists of dishonestly using or disposing of the property in violation of any contract touching the discharge of trust cannot be accepted as correct. Both the parts positive in their nature. In the first case the positive part consists of criminal misappropriation and the conversion of the property and in the second case the positive act consists in dishonestly using or disposing of the property in violation of any direction of law or prescribed mode of trust or legal contract. The using or disposing of, are definitely acts and not omissions. Even in the second instance unless the property is disposed of or used the offence would not be committed. **1956 Cri LJ 1165: AIR 1956 All 619 (626) (Pt D) (Pr 33).**

——**S. 405** — Essentials of offence stated. See Criminal P. C. (1898), Section 561-A. **AIR 1955 NUC (All) 3599.**

——**S. 405** — Jurisdiction of Courts — In cases falling under first part of S. 405, offence is complete as soon as there is misappropriation or conversion with dishonest intention loss or likely loss to owner is not material — The Court within whose jurisdiction the conversion or misappropriation takes place will have jurisdiction to try the offence — If this happens in more than one jurisdiction then under Section 182 of the Criminal P. C., more than one Court would have jurisdiction — In cases which fall in the latter portion of Section 405 the offence is complete as soon

as person, entrusted dishonestly uses or disposes of the property in violation of any direction of the law relating to the discharge of the trust or of the contract — In such cases it is a pure question of fact where and at what time the offence was committed — This may present difficulty — How the question has to be determined, indicated. See Criminal P. C. (1898), Section 179. **AIR 1955 NUC (All) 2768.**

——**S. 405** — Criminal breach of trust — Trust owning temples in Rajasthan registered and having head office at Bombay — Trustee sending money from Bombay to accused managing temples, for repairs and renovations — Complaint against accused for criminal breach of trust for unspent amount — Bombay Court has no jurisdiction. See Criminal P. C. (1898), Section 181 (2). **1962 (1) Cri LJ 401: AIR 1962 Bom 78.**

——**Ss. 405, 408 — Criminal breach of trust — Ingredients.**

The offence under Section 408 requires the following ingredients to be established (a) entrustment, (b) breach thereof by conversion to his own use and (c) dishonest intention. **1957 Mad WN 495.**

——**S. 405** — Applicability — Ingredients of offence. See Orissa Treasury Code, Vol. 1, Chapter IX, Rules under, Rules 544 and 549. **1958 Cri LJ 1071: AIR 1958 Orissa 194.**

——**S. 405** — Criminal P. C. (1898), Section 181 (2) — Criminal breach of trust — Trial for offence of — Venue is Court within whose jurisdiction part of property was received or, retained by accused — Complainant not able to show where misappropriation occurred — Jurisdiction lies at place where property had to be delivered — Scope of Section 405, Penal Code indicated. AIR 1925 Cal 613; 26 Cri LJ 725 and AIR 1942 Cal 575; 44 Cri LJ 132, Dissented from. See Criminal P. C. (1898), Section 181 (2). **AIR 1955 NUC (Pat) 250 (DB).**

——**Ss. 405 and 406** — Essentials — Proof of — Prosecution must prove that accused was entrusted with property and that he dishonestly misappropriated it. **AIR 1955 NUC (Raj) 4036.**

2. Criminal breach of trust distinguished from theft, cheating and criminal misappropriation.

See also Penal Code (1860), Sections 378, 379, 403 and 415.

●——**Ss. 405, 409 — Dominion over property — Two persons having authority to operate jointly on the accounts of a company with a bank — One of them delivering blank signed cheques to the other.**

One R and the accused operated jointly on the accounts of an Insurance Company with a bank under the powers given by the Board of Directors:

Held, that the effect of R's delivering the blank cheques signed by him to the accused might amount to putting the accused in sole control over the funds of the Insurance Company in the Bank and the accused could alone commit criminal breach of trust in respect of the funds.

The accused did not get dominion over the funds on account of R's signing blank cheques. He got control and dominion over the funds under the powers conferred on him by the Board of Directors, by its resolution authorising him and R, to operate on the accounts of the insurance Company with the Bank. It could not therefore, be held that the accused had obtained control over the funds of the Insurance Company by cheating R and that therefore, he could not commit the offence of criminal breach of trust. R. K. Dalmia v. Delhi Administration, **(1963) 1 SCR 253: (1962) 32 Com Cas 699: 1962 (2) Cri LJ 805: AIR 1962 SC 1821 (1837) (Pt G) (Prs 83, 84).**

——**S. 405** — Applicants who were two brothers went to H, a goldsmith, and made a false representation to him that their mother wanted a necklace of a certain design for getting the design copied for S, the wife of one of the applicants — H gave the necklace to the applicants who promised to return it in the evening but subsequently they refused to return it — It was found that the mother of the applicant had died long ago and S was not married—**Held,** that there was no contract of entrustment between H and the applicants — Transaction was nothing but loan — Refusal to return necklace was not punishable under Section 406 — Offence held fell under Sections 403 and 420. **1960 Cri LJ 857: AIR 1960 All 387 (389).**

——**S. 405** — The essence of the offence of criminal misappropriation is that the property of another person comes into the possession of the accused in some neutral manner and is misappropriated or converted to his own use by the accused — No entrustment is required for this offence to be constituted. **1964 Jab LJ 724.**

——**Ss. 405, 420 — Construction and scope — Criminal breach of trust distinguished from cheating.**

The word 'entrustment' or 'entrusted' though used in Section 405 is not defined in the Penal Code. The word itself conveys and includes that the person handing over the property must have confidence in the person taking the property so as to create a fiduciary relationship as between them. That confidence cannot arise when the property was acquired by the offender by some trick. Such a trick prevents any true consent arising. If the property is obtained by trick, or by any other unlawful means, then there cannot be an entrustment. 'Entrustment' means the handing over of the property by lawful means. The phrase 'any other manner' connotes any other legal manner but not otherwise. Once a property is acquired by trick or 'in any other means' by false representation to the owner thereof there is an offence under Section 420, Indian Penal Code and if the offender appropriates that amount to his use, he cannot be said to have committed an offence of criminal breach of trust, because in that case there was practically no trust created by the owner of the property. But there can be an alternative charge under Section 236, Criminal P. C., but if once an offender is punished under Section 420, Indian Penal Code, the other charge cannot be sustained. Majority view in AIR 1936 Mad 353 (FB), Foll. **20 Cut LT 80: 1954 Cri LJ 1429: AIR 1954 Orissa 213 (216) (Pt A) (Pr 11) (DB).**

——**Ss. 405, 403, 378** — Theft and criminal misappropriation and criminal breach of trust — Distinction pointed out. **1953 Cri LJ 842: AIR 1953 Pat 100 (103) (Pt E) (Pr 11).**

——**S. 405 — Ingredients — Criminal breach of trust distinguished from cheating, theft and criminal misappropriation.**

The offence of "criminal breach of trust" may be broadly defined as the fraudulent appropriation of another's property by a person to whom it has been entrusted or into whose hands it has lawfully come. It is akin to cheating, theft and criminal misappropriation but differs from them in important respects. In criminal breach of trust the property is lawfully acquired or acquired with

the consent of the owner, but dishonestly misappropriated by the person to whom it is entrusted. In cheating, the property is wrongfully acquired in the first instance by means of a false representation. In theft the property is taken without the consent of the owner and the dishonest intention to take property exists at the time of such taking. In criminal misappropriation, the property is innocently acquired often casually and by chance, but by a subsequent change of intention the retaining becomes wrongful and fraudulent. The character of the crime depends on the secret intention of the parties which is often difficult to ascertain. To make out a case of criminal breach of trust it is generally necessary to show that the property belonged to some one other than the accused, that the accused acquired it lawfully or with the consent of the owner, that it was in the physical or constructive possession of the accused at the time of the conversion, that the accused occupied a fiduciary relationship, that his dealing with the property constituted a conversion or appropriation of the same to his own use or the use of any person other than the owner and that there was a fraudulent intent to deprive the owner of his property. **54 Punj LR 18: ILR (1951) Punj 286: AIR 1951 Punj 103 (104) (Pt A) (Pr 4) (DB).**

——**S. 405** — Construction — "Entrusted with property or with any dominion over property" — Charge under Section 406 — Conviction under Section 380 held legal. See Penal Code (1860), Section 380. **AIR 1955 NUC (Sau) 5053 (DB).**

3. "In any manner entrusted".

——**Ss. 405 and 409 — Entrusting of property to public servant — Misappropriation by latter what amounts to.**

One T made an application to the Superintendent of Police that one L and one B a Police Sub-Inspector met him on the way and L said to B the Sub-Inspector that though T appeared to be clad in rags he had considerable money; after this the person of T was searched and the Sub-Inspector having opened the bundle of currency notes with T, handed them over to L one by one for being returned to T, but out of the same the amount of Rs. 250 was not returned.

Held, that the information given by T related to commission of an offence by the Sub-Inspector B. The Sub-Inspector being a police officer was legally entitled to search a person found under suspicious circumstances and T in handing over the bundle of notes to the police officer must have done so in the confidence that he would get back the notes from him when the suspicion was cleared. As the currency notes were taken by the Sub-Inspector in discharge of his duty for inspection and return he was certainly entrusted with the notes within the meaning of Section 405. Thus the information given by T disclosed an offence under Section 409, a cognizable offence within the meaning of Rule 1 of para. 486 of the U. P. Police Regulations. State of Uttar Pradesh v Babu Ram Upadhya, **1961 (1) Cri LJ 773: (1961) 1 SCA 593: (1961) 2 SCR 679: ILR (1961) 1 All 509: AIR 1961 SC 751 (754, 755, 766) (Pt A) (Prs 5, 6, 37).**

——**Ss. 405, 409** — Criminal breach of trust — Entrustment of property and trust explained. Jaswantrai Manilal v. State of Bombay, **1956 All WR (Sup) 126: 1956 SCA 941: 1956-2 Mad LJ (SC) 49: 1956-26 Com Cas 340: 58 Bom LR 1026: 1956 SCJ 613: 1956 SCR 483: 1956 Cri LJ 1116: AIR 1956 SC 575 (582) (Pt C) (Prs 11, 13).**

——**S. 405 and 420** — Applicability — Draft given to accused for encashment, in his personal capacity — There is no entrustment. **AIR 1955 NUC (Ajmer) 4731.**

——**S. 405 — Entrustment is essential — Cashier at treasury is entrusted with cash though ultimate responsibility is of Treasurer.**

In a prosecution under Section 409, Penal Code, the prosecution has to prove that, the accused was entrusted with property. Where the cash at treasury is actually handled from day to day by the Cashier it cannot be said that he was not entrusted with the cash even though the ultimate responsibility for the cash was that of the Treasurer. **AIR 1951 Ajmer 15 (16) (Pt A) (Pr 2).**

——**S. 405 — "In any manner entrusted" — Implied entrustment.**

For the purposes of Section 405 it is not necessary that entrustment should be express. An implied entrustment will suffice.

The accused persons sold the property on the footing that the land belonged to a certain Shamlat. In the sale-deed the accused persons described themselves as members of the Shamlat Committee. There was never any claim that they were owners of the land or the sale proceeds. They acted as representatives of the Shamlat Committee, held the sale proceeds in trust for the Shamlat Committee and dishonestly misappropriated this money:

Held, that the act of the accused amounted to criminal breach of trust as defined in Section 405. **AIR 1950 Ajmer 76 (77) (Pr 6).**

——**Ss. 405 and 406** — 'In any manner entrusted' — In order to establish offence under S. 406 prosecution has to prove that there was entrustment of moveable property belonging to another person to accused — Offence cannot be committed in respect of one's own property — In absence of any agreement to the contrary all partners hold, use and have interest in the whole of partnership property and a partner cannot be prosecuted for criminal breach of trust in respect of partnership property: AIR 1951 Punj 103 and AIR 1951 Cal 69 and AIR 1958 Andh Pra 555, Rel. on. **1964 All WR (HC) 263: 1964 All Cri R 174.**

——**S. 405 — Ingredients of offence — 'Entrustment' — Meaning.**

There is no entrustment within the meaning of Section 405 when property is obtained by cheating: AIR 1936 Mad 353 (FB), Relied on. Even if it be assumed for the sake of argument that the accused were entrusted with the money of the depositors, they cannot be held guilty under Section 409 unless it can be shown that they dishonestly converted the money to their own use in violation of any legal contract with the depositors. **1960 All LJ 33: 1960 Cri LJ 188: 1960 All WR (HC) 67: 1960 All Cr R 84: AIR 1960 All 103 (112) (Pt I) (Pr 40) (DB).**

——**S. 405 — Essentials of offence.**

A necessary element of the offence of the criminal breach of trust is that there should be entrustment of property to the accused. The entrustment may be in any manner. Another alternative is that the accused may get dominion of the property in any manner. In both cases the law contemplates that the accused person should receive the money and hold it on behalf of the other, so that he should be the trustee of the property. **1957 All WR (HC) 43: 1957 Cri LJ 170: 1957 All LJ 147: AIR 1957 All 122 (123) (Pt A) (Pr 3) (DB).**

——**Ss. 405, 409 — Applicability — Public servant collecting tax and fine as public servant and misappropriating it — Offence — Government**

not lawfully entitled to enforce landholder's alleged liability — Effect.

Under Section 405, Penal Code, provided there is entrustment of property, it matters little whether the complainant on whose behalf the property is entrusted is the owner thereof or not.

Where the accused as a Talati employed in the revenue department was invested with authority to collect land revenue and fines, ordered to be recovered under the Land Revenue Code from landholders, any amount collected as a tax or fine by him as a Talati from a landholder, becomes public fund and the accused becomes entrusted with that fund, even though it is found that no money was due from the landholder to the Government and that the Government could not have lawfully enforced the alleged liability of the landholder. Where therefore the accused makes default in paying the money collected into the Government treasury as required by the rules made in that behalf under the Land Revenue Code and misappropriates the same, he is guilty of criminal breach of trust in respect of that amount. AIR 1957 All 122, Dissented from: 2 Cal LR 515, Relied on. **61 Bom LR 885: ILR (1959) Bom 1160: 1960 Cri LJ 217: AIR 1960 Bom 53 (55, 56) (Prs 10, 14) (DB).**

——Ss. 405, 406 — Absence of entrustment — No criminal breach of trust — No offence under Section 406.

B instructed A, a jeweller, to make a gold chain and handed him Rs. 300 towards the cost of gold and the cost of making it. A did not deliver the chain on the stipulated day nor did he return the money. A was therefore prosecuted for an offence under Section 406, I. P. C.

Held, though A is guilty of dishonest and dishonourable conduct in not making the chain, he could not be said to have misappropriated the money because when it was paid to him it became his. His obligation thereafter was to produce the gold chain. That he failed to do and B would recover the money from A as money paid on a consideration which had wholly failed. That however would not make act of A a criminal act, and as there was no entrustment in the case, there could be no question of an offence under Section 406. **52 Cri LJ 28: 1951 All WR (Supp) 11: AIR 1951 Cal 206 (207) (Pr 5) (DB).**

——Ss. 405, 409 — "Entrusted" when used with respect to money means that the money has been transferred to the accused in circumstances which show that notwithstanding its delivery to the accused, the property in it continues to vest in the prosecutor and the money remains in the possession and conrol of the accused as a bailee to be restored to the bailor or applied in accordance with his instructions. **Madh BLR 1956 Cri 405: 1956 Madh BLJ 1447: 1957 Cri LJ 179: AIR 1957 Madh B 33 (35) (Pt A) (Pr 5).**

——S. 405 — Entrustment is an essential element of the offence defined in Section 405. The word "entrust" is not a term of art. In common parlance it embraces all cases in which a thing is handed over by one person to another for specific purpose. Entrustment need not be express. It may be implied. The essence of offence of criminal misappropriation is that the property of another person comes into the possession of the accused in some neutral manner and is misappropriated or converted to his own use by the accused. No entrustment is required for this offence to be constituted. **1964 Jab LJ 724.**

——S. 406 — Applicability — Deduction from employees' wages on account of their contribution to provident fund — Employer's failure to credit amount in fund — Offence is of criminal breach of trust. **(1960) 2 Lab LJ 664: 1960 MPLJ 898: 1960 MPC 537: 1960 Jab LJ 813: 1961 (1) Cr LJ 266: (1960-61) 19 FJR 171: (1960) 1 Fac LR 421: ILR (1960) Madh Pra 341: AIR 1961 Madh Pra 37 (38) (Pt A) (Pr 8).**

——S. 405 — Essentials of offence — Property must belong to person other than accused — Timber seized from accused on suspicion that it was illicitly felled — Same entrusted to accused on supratnama pending revenue enquiry — Failure on part of accused to produce part of it when called upon to do so — Prosecution for breach of trust before completing revenue enquiry — Prosecution held was misconceived as accused must be presumed to be owner of the timber. **1961 Jab LJ 731: 1961 MPLJ 765: 1961 (2) Cri LJ 496 (Madh Pra).**

——S. 405 — Entrustment — Father an office bearer of society — Receipt of money by son on his behalf.

A was the president of certain association of cloth dealers who deposited various amounts with the association. At the instance of A, his son B who was neither a member nor a servant of the association received the amount paid in A's shop by the dealers and passed receipts on behalf of A. In a trial of B under Section 406, I. P. C. it was contended that there was no entrustment to B.

Held, that B was entrusted with money and the fact that the entrustment was on behalf of his father did not alter the character of the handing over of money to B. **1957 MPC 334: 1957 Jab LJ 706.**

——S. 405 — "Entrusted".

In every offence of criminal breach of trust what must be established initially is the fact of entrustment of money or property. The word "entrusted" in Section 405 is not necessarily a term of law and may have different implications in different contexts: AIR 1936 Mad 1, Rel. on; AIR 1928 Sind 106, Not foll. **1949 Nag LJ 382: ILR (1949) Nag 620: AIR 1952 Nag 255 (256) (Pt B) (Pr 7).**

——S. 405 — "Entrusted".

Where a cheque drawn in the name of a firm was handed over by the complainant to the accused who was an agent of the firm for being credited to his account with the firm:

'Held', that the property in the cheque passed from the complainant to the firm as soon as the cheque was handed over to the account and, therefore, there was no entrustment of any money by the complainant to the accused: AIR 1926 Oudh 398, Dist. **1949 Nag LJ 382: ILR (1949) Nag 620: AIR 1952 Nag 255 (256) (Pt C) (Pr 9).**

——S. 405 — Entrustment.

Entrustment of goods to a firm is not same thing as entrustment of goods to its manager apart from his capacity as manager. So a person who is the manager of a firm cannot be held criminally liable for breach of trust where there is no personal entrustment of goods to him but to the firm in respect of which the offence was committed. AIR 1930 Rang 332, Rel. on. **1949 Nag LJ 382: ILR (1949) Nag 620: AIR 1952 Nag 255 (257) (Pt E) (Pr 12).**

——Ss. 405, 409 — "Entrustment" — Money handed over for despatch to Money Order Issue Clerk in post office — Effect.

Held, on facts, that the money handed over to Money Order Issue Clerk, in a post office by the remitters, for being despatched, which was proved by the receipts given to the remitters and corroborated by the evidence of the remitters, was money "entrusted" with the Money Order Issue

Clerk. **23 Cut LT 410: 1957 Cri LJ 1431: AIR 1957 Orissa 268 (270) (Pt A) (Pr 7) (DB).**

——**S. 405 — Entrustment — Breach of trust — Supply of wheat by Government to holder of fair-price shop on payment of price — Condition to sell in particular manner — Violation of condition does not amount to breach of trust.**

Where an accused holding a fair-price shop was supplied by the State Government with certain quantity of wheat on payment of its price on condition that it was to be sold to residents of particular villages and the accused sold the wheat to whomsoever he liked, he cannot be convicted of the offence of criminal breach of trust as there was no question of entrustment, the property in wheat having passed to the accused on payment of price. ILR (1947) 1 Cal 97, Rel. on. **1963 (1) Cri LJ 217: 1963 BLJR 32: AIR 1963 Pat 52 (53) (Pr 5).**

——**S. 405** — Conviction — Contravention of Bihar Milled Rice Procurement (Levy) Order (1958) and Milled Rice (Bihar) Price Control Order, 1958 subsequent to their cancellation alleged — Prosecution is misconceived — No entrustment within Section 405, I. P. C. See Essential Commodities Act (10 of 1955), Section 3 (2). **1961 Pat LR 77.**

——**Ss. 405 and 406 — Essentials — Property vesting in accused — No entrustment — No criminal breach of trust.**

One of the ingredients of the offence of criminal breach of trust is that the person accused must have been entrusted with the property in question. If the property belongs to and is owned by the accused person in his own right, it cannot be said that he was a trustee of that property for somebody else, and that by converting it to his own use he committed the offence of criminal breach of trust.

Even if the accused is a trustee with respect to the property its conversion, use or disposal by the accused person must have been in violation of any contract, express or implied, which he had made touching the discharge of such trust. AIR 1953 Pat 225; AIR 1951 Cal 206; AIR 1931 Mad 235, Rel. on. **1955 Cri LJ 1096: AIR 1955 Pat 338 (339 to 342) (Prs 2 to 5, 7).**

——**S. 405 — "Entrusted" — Meaning of.**

The distillers, who worked under licenses granted to them, required molasses as raw material; for movement of molasses they obtained permits from the Excise Commissioner; they paid for the molasses as also for the transport of the molasses to the distilleries; they manufactured spirit out of the molasses and sold the spirit to the warehouses or licensed vendors under the terms of the licenses granted to them.

Held, that the property in molasses or any dominion over them was not entrusted to the distillers. **1953 Cri LJ 1289: AIR 1953 Pat 225 (229) (Pt C) (Pr 12).**

——**S. 405 — Essentials.**

One of the essential conditions of the offence of criminal breach of trust is that the property which is the subject-matter of the offence must have been entrusted to a person; a trust of some kind is necessary, and the property in respect of which criminal breach of trust can be committed must be either the property of some person other than the person accused, or the beneficial interest in or ownership of it must be in some other person and the offender must hold such property on trust for such other person or in someway for his benefit. **1953 Cri LJ 1289: AIR 1953 Pat 225 (229) (Pt D) (Pr 13).**

——**S. 405** — Entrustment — Railway receipts made over by complainant to accused for taking delivery — Delivery of goods to accused by railway authorities — Whether accused was entrusted with goods by complainant (Quaere). **1953 Cri LJ 842: AIR 1953 Pat 100 (102) (Pt B) (Pr 8).**

——**S. 405** — B agreeing to supply opium to A — A paying Rs. 100 to B as advance of price — Balance deposited with C to be paid to B on his supplying opium — **Held,** that there was entrustment of money to C. AIR 1951 Cal 206, Distinguished but Commented. **1952 Raj LW 194: 1953 Cri LJ 835: ILR (1952) 2 Raj 341: AIR 1953 Raj 117 (118) (Pt B) (Pr 6).**

4. "Property".

——**Ss. 405, 409, 22 — 'Property' — Meaning of — Not restricted to movable property only — Dominion over property — Non-exercise of power will not make dominion nugatory.**

There is no good reason to restrict the meaning of the word 'property' to movable property only when it is used without any qualification in Section 405 or in other sections of the Penal Code. Whether the offence defined in a particular section of the Penal Code can be committed in respect of any particular kind of property will depend on the fact whether that particular kind of property can be subject to the acts covered by that section.

The word 'fund' may mean actual cash resources of a particular kind (e.g., money in a drawer or a bank) or it may be a mere accountancy expression used to describe a particular category which a person uses in making up his accounts. The words "payment out of" when used in connection with the word 'fund' in its first meaning connote actual payment, e.g., by taking the money out of the drawer or drawing a cheque on the bank. When used in connection with the word 'fund' in its second meaning they connote that, for the purposes of the account in which the fund finds a place, the payment is debited to that fund.

Where the charge against the accused referred to misappropriation by him, as Chairman and Principal Officer, of funds of the Bharat Insurance Company in current account of the Company with a Bank.

Held, that the expression 'funds' in the charge was used in the first sense meaning thereby that the accused had dominion over the amount credited to the Bharat Insurance Company in the accounts of the Bank. The funds referred to in the charge did amount to 'property' within the meaning of that term in Section 405, I. P. Code. 6 Bom HCR Cr 33 and ILR 23 Cal 372, **Overruled;** AIR 1915 All 93 (2) and AIR 1926 Lah 385 and AIR 1936 Bom 167 and AIR 1925 All 673 and AIR 1955 SC 590 and (1942) 2 KB 228, Rel. on. **Held** further that the omission to inform the Bank that the accused was entitled to operate on the account might disable him to actually issue the cheques on the company's accounts, but that position did not mean that he did not have any dominion over those accounts. As Chairman and Principal Officer of the Bharat Insurance Company, he had the power, on behalf of the company, to operate on those accounts. Non-exercise of the power will not make the dominion entrusted to him nugatory. R. K. Dalmia v. Delhi Administration, **(1963) 1 SCR 253: (1962) 32 Com Cas 699: 1962 (2) Cri LJ 805: AIR 1962 SC 1821 (1834) (Pt C) (Pr 61).**

——**Ss. 405 and 409** — Applicability — Criminal breach of trust of immovable property — Person cannot be convicted for — Exception may be in case of trustee. **AIR 1955 NUC (Punj) 118.**

——S. 405 — 'Property' — Meaning — Includes sale proceeds of property entrusted to bailee to be dealt with in accordance with bailor's directions.

The word 'property' appearing in Section 406, I. P. C. is comprehensive enough to include the sale proceeds of the property entrusted to a bailee and remaining with him on account of the bailor to be dealt with in accordance with bailor's directions. AIR 1928 Bom 521, Rel. on; AIR 1937 Mad 968; AIR 1915 Cal 266; AIR 1953 Nag 301. Discussed. **1961 Raj LW 346: ILR (1960) 10 Raj 1527.**

——Ss. 405, 409, 467 and 477-A — "Property" — Meaning of — Includes things purchased with money entrusted.

A, a special accountant of certain Pakuthy, was entrusted with certain amount for procuring paddy. He purchased 60 paras of paddy from B but credited only 14 paras in the Government account and misappropriated the rest. In the receipt given to B the quantity of paddy purchased and amount paid therefor was shown correctly, but in the counterfoil A entered only 14 paras and its price.

In the place of the voucher given by B as per rules, A fabricated a false voucher for the lesser amount and forged on it B's signature. A was tried for offences under Sections 467, 477-A and 409, I. P. Code. The contention was that A could not be convicted under Section 409 in respect of paddy with which he was not entrusted.

Held, that word "property" occurring in Section 405, Penal Code should be interpreted to include the paddy purchased with the money he was entrusted with, particularly in view of the words "in any manner" occurring in the section. AIR 1928 Bom 521; AIR 1915 Cal 266 and 7 Cri LJ 372 (Cal), Rel. on.

(2) That A could therefore, be rightly convicted of criminal breach of trust in respect of 46 paras of paddy out of 60 paras received from B. In any case A could be convicted for criminal misappropriation in respect of that paddy.

(3) Further that A was guilty of offences under Sections 467 and 477-A in respect of the voucher and the counterfoil respectively. **1955 Ker LT 509: 1955 Cri LJ 1539: AIR 1955 Trav-Co 271 (274, 275) (Prs 10, 11, 14) (DB).**

5. "Misappropriates or converts to his own use".

——S. 405 — The accused cannot be convicted under Section 409 simply on account of overwritings and similar irregularities in accounts. **AIR 1951 Ajmer 15 (16) (Pt D) (Pr 5).**

——Ss. 405 and 409 — Criminal breach of trust — Finding that accused actually misappropriated, or connived at it is not necessary to bring home offence to accused — Extent of error of judgment in good faith and negligence.

It cannot be contended that the accused may have been negligent in his duties and may have incurred civil liability, but that he could not be held guilty of criminal breach of trust in the absence of a finding that he actually misappropriated goods or connived at such misappropriation. Wilful suffering makes a man liable. **"Wilful" means deliberate or intentional and not accidental or by inadvertence.** Negligence is a term of art but has distinct meanings in different jurisdictions. In Torts, damage is an essential ingredient, but that element is not necessary in the law of master and servant. In law of crimes there are a series of offences based on negligence in which loss or injury is not material. It is enough if the act is likely to cause injury or endanger life. Sections 279, 280, 285 and 287 of the Code are illustrative examples. For criminal breach of trust under Section 405, dishonesty, i. e., wrongful loss or gain, has to be established.

Apart from the question of loss, another ingredient which runs through every branch of the law of negligence is that there must be a duty to take care. The nature of the duty and the standard of care will vary according to the nature of the office or the contract and the circumstances. Generally speaking, the standard that the law enjoins is governed by the knowledge and skill that the office or occupation requires, by the magnitude of the task and by the gravity of the consequences that are likely to ensue if the requisite degree or care is not exercised. Good faith imports the exercise of due care and attention. A person can be excused for having committed an error of judgment only if he exercised due care and attention and his conduct makes it clear that there was not negligence according to reasonable standards. The standard of care required is that of a reasonably prudent man who acts with the care and caution required of a person in his position dealing with a matter of similar importance. If such a person could have acted in a similar way, then only could the accused be excused for a mere error of judgment or innocent dereliction of duty.

Held, on facts that the appellant's conduct was deliberate, that it was not a mere error of judgment and his negligence was culpable. **Held,** also that, even if someone else committed the misappropriation, the appellant wilfully suffered him to do so: AIR 1961 SC 751 (756), Rel. on. **1965 (1) Cri LJ 539: AIR 1965 All 233 (236) (Pt B) (Prs 12, 13, 15 to 18).**

——S. 405 — Company directors — Position of — Directors are trustees of funds under their control and not of debts due to company — Wrongful remission of debt — No wrongful dealing with funds — Directors cannot be found guilty of criminal breach of trust.

The director of a company is a trustee in respect of those funds of the company which are under his control. Where the control over the funds of a company is vested in the Board of Directors, but in fact it is the Chairman of the Board of Directors who exercises effective control over the funds, in such a case, it is the Chairman and not the Board of Directors who will be in the position of a trustee, and if he deals with the funds in a manner which is beyond his power, he will be guilty of the offence of criminal breach of trust. (1894) 1 Ch D 616, Rel. on; AIR 1931 Cal 184 (FB), Distinguished.

However, in respect of the debts owed to a company, the Directors cannot be deemed to be in the position of trustees, and if they deal with such debts in writing off some debts wrongfully and thus cause loss to the company, they may be guilty of some other offence (example, under Section 422, Penal Code) but not of criminal breach of trust. There can be criminal breach of trust in respect of property entrusted with a person or the property, the dominion over which is entrusted to a person. The property must be tangible property in the hands of the directors or under their control and, therefore, the debts due to a company cannot be the subject-matter of criminal breach of trust. (1878) 10 Ch D 450 and (1894) 1 Ch D 616, Rel. on; AIR 1926 Lah 385 and AIR 1930 Lah 57, Distinguished.

Where there is only a remission of the debt due to a company, this dealing with the debt, even if improper and unlawful, cannot amount to criminal breach of trust. **1963 (1) Cri LJ 156: AIR 1963 Cal 64 (69, 70) (Pt B) (Prs 11, 13, 16, 20) (DB).**

——Ss. 405, 408 — Misappropriation.

Where it is the duty of the accused to pay over money received by him, his non-payment is prima facie evidence that he has wrongfully appropriated it to himself. Non-payment coupled with a false account either as to the receipt of the money or its disposal is conclusive evidence. **1957 Mad WN 495.**

——Ss. 405 and 406 — Petitioner taking jewel from gold-smith promising to return it — Jewel retained and claimed as petitioner's own — Petitioner is guilty under Section 406 — Fact that jewel is intact is irrelevant.

Wherever a thing is utilised for a purpose not intended against an express agreement or implied understanding there will be an offence under Section 406. Where a petitioner took a jewel from a goldsmith promising to return it and broke his promise and retained it towards some debts due to him and claimed to be his own, he has caused wrongful loss to the goldsmith by his dishonestly retaining it and misappropriating it and the petitioner is guilty under Section 406. The mere fact that the jewel is intact with the petitioner is irrelevant: AIR 1940 Mad 329, Rel. on; 6 Cri LJ 330 (Mad), Disting. **(1949) 2 Mad LJ 296: 62 Mad LW 613: 1949 Mad WN 631: 1949 All WR (Supp) 69: 51 Cri LJ 330: AIR 1950 Mad 49 (50) (Pr 3).**

——Ss. 405, 409 — Dishonest conversion to one's use — What amounts to.

In a prosecution for criminal breach of trust direct evidence of dishonest conversion to the accused's own use, of the money entrusted with him, can seldom be found, and such dishonest intention and conversion have to be inferred from the proved facts and circumstances of each case.

Thus where it is established that the accused, a Chairman of certain local board, retained Rs. 33,000 and odd belonging to the local Board, he handed over charge to his successor and did not refund any portion of the same at any time, that considering his assets he was living beyond his means, installed a Press and was publishing a weekly and incurred considerable expenditure on the same during the period when he was the Chairman of the Board and that when he vacated his office as Chairman of that Board he made desperate efforts to raise money but his efforts did not prove successful;

Held, that considering the means of the accused, the expenses that he was incurring when he was Chairman and his inability to raise even a portion of the money admitted by him to have been retained with him, the reasonable inference must be that the money was appropriated by him for his own use. **25 Cut LT 269: 1959 Cri LJ 1197: AIR 1959 Orissa 159 (165) (Pt C) (Pr 21).**

——S. 405 — Applicability — Entrustment of property proved but misappropriation or conversion not proved — Offence is not established.

For an offence of criminal breach of trust besides showing that the property was entrusted to the accused it is further necessary to show that he had dishonestly misappropriated or converted it to his own use. Therefore, in the absence of any allegation of misappropriation or conversion of the truck by the petitioner, offence under Section 405, I. P. Code will not be constituted. **1964 (2) Cri LJ 730: ILR (1964) 14 Raj 862: AIR 1964 Raj 267 (270) (Pt D) (Pr 7).**

——S. 405 — Person taking ornaments on approval and retaining them commits offence under Section 406 — Principle of Section 24 (g), Sale of Goods Act has no application. 1964 Raj LW 193: 1964 (2) Cri LJ 117.

6. Disposal in violation of any legal contract.

——Ss. 405, 408 — Accused appointed shop-manager by Co-operative Federation under a written agreement embodying arbitration clause — Entrustment of goods for public sale — Embezzlement — Agreement cannot stiffle criminal prosecution — Contract Act (1872), Section 23 — Words and Phrases — "Embezzlement" — Co-operative Societies Act (1912).

The accused was appointed a manager of a shop of a District Co-operative Federation. His rights and liabilities were governed by a written agreement with the Federation. He was entrusted with the grains and other material for sale to the public. It was his duty to maintain correct account and to deposit the sale proceeds of every day with the Federation. There was an embezzlement for which he was tried and convicted under Section 408. On appeal it was submitted on his behalf that in view of the agreement, it was not open to the Federation to launch a criminal complaint, since all the disputes between the parties were to be settled by means of an arbitration award under the Co-operative Societies Act and that the disputes between the parties were to be settled by means of an arbitration award under the Co-operative Societies Act and that it was only a civil liability.

Held, (i) That when the grain and the money of the Federation was entrusted with the accused with a clear contract that he will deposit the sale proceeds it was not open to him not to have deposited the sale proceeds and to have appropriated it to his own use. He not having complied with the terms of the agreement and having appropriated the amount to his own use clearly committed a criminal breach of trust.

(ii) that although every breach of trust does not give rise to a criminal prosecution but as soon as it is found that there has been embezzlement the person who has embezzled makes himself liable to criminal prosecution. The dictionary meaning of the word "embezzle" is "to appropriate oneself by a breach of trust" and 'embezzlement' means 'a fraudulent appropriation of other's property'. Therefore, as soon as embezzlement is found to be proved, the person embezzling commits a criminal breach of trust and as defined by Section 405 he makes himself liable to criminal prosecution. There cannot be an agreement to the effect that even if there is an embezzlement the person who has embezzled will not be prosecuted and the matter will be referred to an arbitration. Permitting such an agreement would be contrary to Section 23 of the Contract Act which prohibits an agreement which would defeat the provisions of any law. Agreements to stiffle criminal prosecutions, could not be allowed. They are bad for, it is not open to parties to make a trade of felony or to take the administration of justice out of the hands of authorities and themselves determine what should be done. **1965 All LJ 538: ILR (1965) 2 All 82.**

——Ss. 405 and 406 — Disposal in violation of any legal contract — Contract must be legal. AIR 1955 NUC (Cal) 5602.

——Ss. 405, Illus. (c), 406 — 'In any manner entrusted' interpretation — Giving money to gold-

smith for preparing ornaments when amounts to criminal breach of trust.

Entrustment arises whenever something, whether it be money or any other thing, is given to some person with some direction as to how it should be dealt with. Thus where gold is given to a goldsmith whose business is merely to prepare ornaments, there is clearly entrustment of that gold to the goldsmith for the purpose of preparing the ornaments desired by the person who gives the gold.

But it is a question in each case depending upon the facts of the case whether payment of money would amount to entrustment or merely to payment of price in advance. Where a person to whom the payment is made is a jeweller and has stock of gold, ornaments and precious stones with him, the payment would generally be an advance of price. But where the money is paid to a goldsmith viz., a person who makes ornaments and charges for his labour the payment amounts to an entrustment of the money to the goldsmith with a direction that he should use it for purchasing gold from the market and preparing the ornaments desired by the person making the payment. Such a case would be similar to the case in illustration (c) to Section 405, and if such goldsmith dishonestly converted it to his own use in violation of the implied contract that he should use it to purchase gold and prepare ornaments, he will be guilty of criminal breach of trust, and an offence under Section 406, I. P. Code, will be made out. AIR 1951 Cal 206, Disting. **1955 Raj LW 545: ILR (1955) 5 Raj 907: 1956 Cri LJ 107: AIR 1956 Raj 20 (20) (Prs 5, 6) (DB).**

7. "Dishonestly".

See also Penal Code (1860), Section 24.

●——**S. 405** — Prevention of Corruption Act (1947), Section 5 (1) (c) — Criminal misconduct by public servant — 'Dishonestly or fraudulently misappropriates' — What prosecution and defence have to prove indicated. See Prevention of Corruption Act (1947), Section 5 (1) (c). **1959 Cri LJ 1508: AIR 1959 SC 1390.**

●——**S. 405 — Criminal breach of trust — Mens rea.**

A deprivation even for a short period is within the meaning of the expression. If the Managing Director of a bank entrusted with securities owned by the pledgor disposes of those securities, against the stipulated terms of the contract entered into by the parties, with the intention of causing wrongful loss to the pledgor and wrongful gain to the bank, there can be no question but that the Managing Director has necessary mens rea required by Section 405. Jaswantrai Manilal Akhaney v. State of Bombay, **1956 Cri LJ 1116: (1956) 2 Mad LJ (SC) 49: (1956) 26 Com Cas 340: 1956 SCA 941: 1956 SCJ 613: 58 Bom LR 1026: 1956 All WR (Sup) 126: 1956 SCR 483: AIR 1956 SC 575 (583) (Pt D) (Pr 14).**

——**S. 405** — Dishonest misappropriation — Mens rea is important. See Penal Code (1860), Section 403. **1965 All LJ 538: ILR (1965) 2 All 82.**

——**S. 405** — Postmaster charged for misappropriation of postal cash — Explanation by accused that he could not make earlier deposits of cash due to his sudden illness — Evidence showing that he was not ill on the dates claimed — Explanation offered by accused when not reasonably true, dishonest misappropriation must be inferred. See Penal Code (1860), Section 409. **1964 All WR (HC) 315.**

——**Ss. 405 and 409** — Evidence Act (1872), Section 106 — Guilt of accused — Honesty, intention, etc. — Charge of criminal misappropriation of money-order against postman — Accused professing to have made payment through house-boy who obtained payee's signature — Duty of accused to produce evidence as to whom payment was actually made. See Evidence Act (1872), Section 106. **1957 Cri LJ 620: AIR 1957 All 381.**

——**S. 405 — Elements of — Mere retention of amount entrusted is not criminal breach of trust — Dishonest misappropriation must be proved.**

The temporary retention of money does not by itself amount to criminal breach of trust. It amounts to that offence only if the ingredient of dishonest misappropriation or conversion etc., can be correctly inferred. Hence, even if a person is required under rules to deposit the amount entrusted in the Treasury within a few days, the failure to do so will not by itself amount to the offence of criminal breach of trust unless it is proved that there was dishonest misappropriation. **(1961) 2 Guj HCR 117: (1961) 2 Guj LR 262: 1961 (1) Cri LJ 654 (Guj).**

——**Ss. 405, 409** — Dishonesty — Accused who was a Talati stating that amount of repayment of a Taqavi loan was paid to him by X in April, 1958 — According to prosecution and the finding of both lower Courts the amount was paid in December, 1957 — False explanation by accused held was sufficient to prove element of dishonesty, for conviction of the offence of criminal breach of trust. **(1961) 2 Guj HCR 117: (1961) 2 Guj LR 262: 1961 (1) Cri LJ 654 (Guj).**

——**Ss. 405, 409 — Money entrusted to public servant — Retention and remittance into treasury after six months — Offence — Proof of dishonest intention — Inference of.**

In a case of criminal misappropriation it is not necessary that the prosecution should always prove that the money entrusted to the accused was applied in any particular manner or for any particular purpose. It is sufficient if dishonest intention can be gathered from the circumstances.

The accused was a public servant whose duty was to collect land revenue and other Government dues which he was required, under the rules to remit into the treasury before the close of each treasury month. He collected certain amounts and remitted them into Government treasury several months after their collection and that also, after an enquiry was started against him in which the accused appeared, before Tahsildar and asked for a day's time. He remitted the amount in treasury with interest.

Held, that the fact that he could not produce the amount immediately was a circumstance to show that the amount must have been misappropriated by him. In remitting the amounts into the treasury he paid not merely the amounts actually collected but also the interest thereon. The relevant records relating to the collection show that such interest was not paid by the persons concerned. The intention to wrongfully deprive the Government of the use of the money for a time and to secure the use of the same for his benefit during that time is, therefore, clearly established and the circumstances thus conclusively prove that there was dishonest use or disposition of the money in violation of the direction prescribing the mode in which the trust was to be discharged. The conviction under Section 409 was, therefore, upheld. **1959 Ker LT 549: 1959 Mad LJ (Cr) 638: 1959 Ker LJ 729.**

——**Ss. 405 and 406** — Offence under — Essentials — Dishonest intention — Liability under civil law — Debtor and creditor — Money received from complainant for purchase of gold used by recipient for his own purpose — Promise to return the amount accepted by complainant — There is no dishonest intention — Dispute is between creditor and debtor — Accused cannot be charged under Section 406. **29 Cut LT 415: ILR (1963) Cut 399.**

——**Ss. 405, 409** — Intention — Dishonest intention — Absence of — Conviction not valid **AIR 1955 NUC (Punj) 2523.**

——**Ss. 405, 406 — "In any manner entrusted" — Meaning — Bicycle given to accused for specific purpose and specified period — Nature of relationship — Conversion of machine by accused — Offence.**

The word 'trust' which appears in Section 405 is a comprehensive expression which has been used not only to cover the relationship of trustee and beneficiary but also those of bailor and bailee, master and servant, pledgor and pledgee, guardian and ward, and all other relations which postulate the existence of a fiduciary relationship between the complainant and the accused. The expression 'entrusted' has a corresponding meaning and embraces all cases in which goods are 'entrusted' (that is voluntarily handed over for a specific purpose) and are dishonestly disposed of in violation of any direction of law or in violation of the contract.

Where the complainant delivers his bicycle to the accused for use for a specific purpose and a specified period upon contract that after the expiry of the said period the machine would be returned to him and the relationship between the complainant and the accused is that of a bailor and bailee, and where the accused dishonestly disposes of the machine and appropriates the money to his own use he is guilty of an offence punishabel under Section 406. **54 Punj LR 18: ILR (1951) Punj 286: AIR 1951 Punj 103 (105) (Pt B) (Prs 8, 11) (DB).**

——**S. 405 — Dishonest intention — Proof — (Evidence Act (1872), Sections 101 to 104).**

In an offence of the criminal breach of trust dishonest intention is the gist of the offence. Under Section 405 of the Penal Code dishonest misappropriation or conversion to his own use by the accused is an essential ingredient. It is the duty of the prosecution to prove that the accused acted with dishonest intention. As a general rule every man is taken to intend the natural and probable consequences of his act. In some cases the intention may be inferred as a necessary conclusion from the nature of the act done. But in other cases it is to be proved just as much as any other fact necessary to constitute the offence. In an offence of criminal breach of trust the intention is to be inferred from all other facts and circumstances of the case. Breach of trust by itself may not be with dishonest intention. If on the totality of the evidence there is room for more than one view as to the prisoner's intent and the Court is left in doubt as to the intention of the accused, the accused is entitled to an acquittal. In cases of criminal breach of trust and other allied offences, the accused sometimes claims to himself the right to take or retain the property, which is the subject-matter of the offence. In doing this he is taking the plea that he did not act with dishonest intention. In such cases it is the duty of the Court to consider all the facts and circumstances appearing in the case as to how far the accused can be said to have acted with dishonest intention bearing in mind that it is for the prosecution to prove the dishonest intention. A person who is pleading a claim of right may be acting without dishonest intention if he is asserting bona fide what he believes to be a lawful claim, even though it may be unfounded in law or in fact. Mere assertion of claim of right at the trial is not sufficient. It is the state of mind of the accused at the time of the commission of the offence which is material. The fact that the claim may turn out to be altogether unsupportable in law or that in fact that accused should not have relied on such a claim are not considerations which may ultimately decide the criminal responsibility of the accused. **ILR (1956) 6 Raj 942.**

——**S. 405 — Dishonest intention.**

A servant who is retaining part of the amount with him in a claim of right to which he was not entitled may not be acting dishonestly. **ILR (1956) 6 Raj 942.**

——**S. 405** — Mens rea is the essence of the offence of criminal breach of trust — Master (Government licensee) is not vicariously liable for offence committed by his employee, in the course of his employment. **1953 Ker LT 307: ILR (1951) Trav-Co 605: 1952 Cr LJ 791: AIR 1951 Trav-Co 158 (158, 159) (Pt A) (Prs 3, 4).**

——**Ss. 405, 409 — "Dishonestly" — Travancore Penal Code, Section 410.**

Where by an order the Assistant Information Officer was directed to take charge of all articles belonging to the Government in the possession of the Director of Publicity and no reference whatever was made in the order that the former should take charge from the latter also of the articles which the latter got from the palace:

Held, that the retention by the latter of the articles belonging to the palace was not with dishonest intention. **1951 Ker LT 344: ILR (1951) Trav-Co 793 (DB).**

8. Failure to account or false account — Presumption of dishonest intention.

——**S. 405** — Jurisdiction — Case falling under second part of Section 405, I. P. Code — Jurisdiction — Accused to render accounts by terms of contract at Allahabad — Jurisdiction of Allahabad Court. See Criminal P. C. (1898), Section 179. **AIR 1955 NUC (All) 3599.**

——**S. 405** — Evidence — Failure to account is generally a strong circumstance of dishonest intention. **AIR 1955 NUC (Madh Bha) 4869.**

——**S. 405** — Intention — Failure to render account — Presumption of dishonest intention arises — Burden of proof is on accused to show that their purpose was lawful and act legitimate. **AIR 1955 NUC (Madh Bha) 4869.**

——**Ss. 405 and 408** — Evidence — Failure to account or giving false accounts — It is regarded as strong circumstance against accused. **AIR 1955 NUC (Madh Bha) 3023.**

——**Ss. 405 and 408** — 'Dishonestly' — Failure to account or false accounts — Presumption of dishonest intention is very strong — But this has to be considered along with other facts of the case. **1954 Cri LJ 448: Madh BLJ 1954 HCR 410: Madh BLR 1955 Cri 260: ILR (1954) Madh Bha 181: AIR 1954 Madh Bha 21 (22) (Pt C) (Pr 5).**

——**S. 405** — Evidence — Duty of accused to pay over money at once — Non-payment is prima facie evidence of wrongful appropriation — Presumption can be negatived by evidence that delay was caused by forgetfulness and was acquiesced

in by person to whom money was due. **AIR 1955 NUC (Mad) 433.**

——Ss. 405 and 30 — Milk delivered on presentation of milk coupons — Milk-coupons are valuable security — Coupons entrusted with accused for sale — Coupons not accounted for — Accused is guilty of criminal breach of trust — Evidence Act (1872), S. 106.

Milk coupons which are purchased by customers are as good as cash when on their production by the customers they are entitled to the supply of the quantity of milk mentioned in the coupons. They are, therefore, valuable security as defined in Section 18 of the Indian Penal Code, and in any case would amount to movable property.

Where such coupons were entrusted by the Government for sale, with the accused and his acknowledgment for the receipt of the same obtained, the accused has to account for them and he must, by reason of Section 106, Evidence Act to explain what happened to the goods entrusted to him. AIR 1959 SC 1390, Rel. on.

If he fails to account for them, he is guilty of criminal breach of trust. **(1962) 4 Orissa JD 379.**

——Ss. 405, 400 — Applicability — Delivery of paddy at mill by Government for converting same into rice and delivery back to Government — Failure to deliver — Offence.

Certain paddy was delivered at a mill to the petitioner by the Government for turning it into rice and then handing back to the Government.

There was an agreement between the parties that for every 100 mds. of paddy delivered, the petitioner would deliver 63 mds. of rice. The petitioner never delivered the rice in spite of repeated demands. It was clear from the circumstances that the petitioner never intended to take any steps for supplying the rice as he was expected to do. **Held,** that the petitioner was guilty under Section 409, Penal Code. The delivery of the paddy at the mill could not lead one to the conclusion that the paddy had ceased to be the property of the Government and it had become the property of the petitioner. AIR 1954 All 583; AIR 1951 Cal 206 and AIR 1936 All 691, Disting. It did not matter in the least whether the contract was legal or not so long as it was shown that, in some manner whatever, there was an entrustment of the property in question. It is only from the circumstances that intentions can be inferred in case of criminal breach of trust; failure to render a satisfactory account on the part of the accused is a circumstance pointing to the guilt of the accused. AIR 1949 Pat 69, Rel. on. **1957 BLJR 772: 1958 Cri LJ 665: AIR 1958 Pat 272 (273 to 275) (Pt B) (Prs 7, 9, 11).**

——S. 405 — "Dishonestly uses or disposes of that property" — Accused receiver of mill — Payment over and above market price received — Failure to account — Offence, if committed.

The accused, a receiver of a cotton mill appointed by the High Court, in the exercise of discretion conferred on him by the High Court, demanded and received payment over and above the market price in respect of bales allotted to a shopkeeper. The accused was given absolute powers by orders of the High Court and therefore he was well within his rights in demanding the extra payments. The accused failed to account for this extra payment. It was contended that the extra payment was made with the object of propitiating the accused, that it was paid as a bribe, that when it was paid the offence became complete and that therefore, there could not be any subsequent misappropriation of the money nor could there be criminal breach of trust in respect of that money which was intended by both parties to go into the pocket of the accused.

Held, that the accused was clearly liable for criminal breach of trust as defined in Section 405 as it could be said within the meaning of that section that the accused who was entrusted with the property of the mill and its products dishonestly used or disposed of that property in violation of the direction of law which prescribed the mode in which such trust was to be discharged by him. **1951 Ker LT 503: 1952 Cri LJ 766: ILR (1951) Trav Co 765: AIR 1952 Trav Co 128 (131) (Pt A) (Pr 12) (DB).**

[Reversed in AIR 1963 SC 478.]

——S. 405 — Accused receiver of mill — Accused directing officers of mill to affix seals to bales manufactured in May to indicate that they were manufactured in April — Prices in April lower than in May — Accused held committed breach of trust. **1954 Ker LT 503: 1952 Cri LJ 766: ILR (1951) Trav-Co 765: AIR 1952 Trav Co 128 (131) (Pt B) (Pr 12) (DB).**

[Reversed in AIR 1953 SC 478.]

9. Breach of duty under civil law — Inference of dishonest intention.

——S. 405 — Criminal breach of trust — Distinction between civil and criminal action — Allegation of dishonesty.

Where on the allegations contained in the compaint, it is manifest that the complainant's case was that the accused acted dishonestly, it is a circumstance which distinguishes a civil from a criminal liability. The contention that the matter is purely of a civil nature does not hold good, in such a case. **1957 All WR (HC) 255.**

——Ss. 405, 409 — Dispute of civil nature.

Where the dispute between the complainant and the accused is one in the nature of accounting, the proper remedy of the complainant is to file a civil suit for recovery of the amount from the accused and not to lodge a prosecution under Section 409: AIR 1925 Lah 289 (2) and AIR 1920 Pat 168, Rel. on. **ILR (1951) 3 Assam 63 (DB).**

——S. 405 — Civil and criminal liability.

Where the contract provided that the party would be liable civilly for acts of misfeasance or malfeasance of his agents and servants including misappropriation of the goods received by the party by other partners of the firm of which the party was one of the partners.

Held, that the contract merely laid down the ordinary rule that the party would be liable for the acts of his agents and partners who may not have signed the agreement. It could not exonerate the party from criminal liability if he happened to incur it. **52 Cri LJ 814: AIR 1951 Kutch 66 (67) (Pt C) (Pr 9).**

——S. 406 — Amount deposited with a firm on interest — Firm refusing to pay on demand — Mere refusal to pay by Bank or Bankers would not amount to an offence — Liability is civil. **1964 MPLJ (Notes) 218.**

——S. 405 — Provident fund — Employer investing money in his own business — Liability.

There is no rule which requires an employer to invest the employee's provident fund in any particular manner. He has a discretion to invest it in any manner he considers businesslike. If he decides to invest it in his own business such investment will not amount to criminal breach of trust. The obligation would be only a civil liability. **1955 Mad WN 946: 1956 Cri LJ 71: AIR 1956 Mad 6 (6) (Pr 1).**

——S. 405 — Public Debts (Central Government) Act (1944), S. 19 — Criminal breach of trust

by holder of Government security — Negotiable Instruments Act (1881), Section 13) (Securities Act (1920), Section 5).

Reserve Bank of India vesting and recognising securities in petitioner — It operates to confer on him title to securities subject to personal liability, to rightful owner — Petitioner negotiating securities as negotiable instruments — The rightful owner (a trust in this case) has only a civil claim enforceable against the petitioner as for money had and received on account of rightful owner by holder of security. **1953 Mad WN 285: (1953) 2 Mad LJ 42: 1953 Cri LJ 1441: AIR 1953 Mad 787 (790) (Pt B) (Pr 13) (DB).**

——**S. 405** — Gold entrusted with goldsmith for preparation of ornaments — Receipt obtained - Goldsmith neither making ornaments nor returning gold — Dishonest intention not proved — No criminal breach of trust but a case of civil liability. **ILR (1963) Cut 589: 29 Cut LT 319: (1963) 5 OJD 201: 1963 (2) Cri LJ 474 (474) (Pr 3) (Orissa).**

——**S. 405 — Scope — Breach of contract.**

A mere breach of contract or a breach of the conditions of a permit is not necessarily synonymous with criminal breach of trust. **1953 Cri LJ 1289: AIR 1953 Pat 225 (229) (Pt E) (Pr 13).**

——**S. 405 — Essentials — State appointing accused as dealer to sell skimmed milk powder in particular area on certain conditions and allotting certain quota to him — Payment of price by the accused — Sale of powder to persons outside area on breach of conditions — No offence of criminal breach of trust held committed.**

To establish an offence of criminal breach of trust it must be proved that the ownership or beneficial interest in the property in respect of which criminal breach of trust is alleged to have been committed, must be in some person other than the accused and the latter must hold it on account of some person or in some way for his (beneficiary's) benefit.

The State Trading Corporation of India, Ltd., New Delhi, allotted some quota of skimmed milk powder for sale in Rajasthan State and Rajasthan Government while appointing different dealers for different areas, appointed the accused as a dealer for Ajmer area and allotted a certain quota of skimmed milk powder to him. The allotment was made subject to two conditions. However, in breach of these conditions he sold to a Calcutta party for exporting the same outside the Ajmer area. On these facts the accused was challenged under Section 406, I. P. Code. On the question whether in the circumstances of the case a charge under Section 406 could be framed.

Held, that the fact that the seller had agreed with the State to sell the skimmed milk powder to bona fide consumers in the Ajmer district at certain fixed price was not sufficient to create any beneficial interest in the skimmed milk powder in them. The skimmed milk powder therefore could not be said to have been entrusted to the accused within the meaning of Section 405. There was therefore no legal basis to frame a charge under Section 406, I. P. Code, against the accused. ILR (1947) 1 Cal 97; AIR 1963 Pat 223, Rel. on. **1963 Raj LW 638: ILR (1963) 13 Raj 1124: 1964 (1) Cri LJ 614 (615, 616) (Prs 5, 9) (Raj).**

——**S. 405** — Scope — Breach of contract. See Criminal P. C. (1898), Section 561-A. **AIR 1955 NUC (Raj) 4036.**

——**S. 405** — Essentials — Civil and criminal **breach of trust — Distinction.**

Every breach of trust is not criminal. It may be intentional without being dishonest or it may appear to be dishonest without being really so. In such cases the Court should be slow to move and this caution is all the more necessary because there is a tendency to secure speedy results by having recourses to criminal law.

It is only when there is evidence of a mental act of fraudulent misappropriation that the commission of embezzlement becomes an offence punishable as criminal breach of trust. It is this mental act of fraudulent misappropriation that distinguishes an embezzlement amounting to a civil wrong or tort from the offence of criminal breach of trust punishable under Section 406, Penal Code. Every offence of criminal breach of trust involves a civil wrong in respect of which the complainant may seek redress in a civil Court : but every breach of trust, in the absence of 'mens rea', is not criminal. 52 Cri LJ 1178 (Lah), Foll.

Thus, where paddy is supplied to the proprietor of a mill and he agrees to supply rice in lieu thereof, the mere shortage in the delivery of rice cannot establish dishonesty in any manner unless the mental act of fraudulent misappropriation is established by the prosecution by cogent evidence. **1955 Cri LJ 1636: AIR 1955 Tripura 35 (38) (Pt A) (Prs 12, 17).**

——**S. 405** — Point at issue fit for being agitated in Civil Court — Parties should not be encouraged to resort to criminal Court — (Criminal P. C. (1898), Section 203). **1955 Cri LJ 1636: AIR 1955 Tripura 35 (39) (Pt D) (Pr 24).**

10. Clerk or servant.

See also Penal Code (1860), S. 408.

——**Ss. 405 and 409 — Construction — 'Entrusted' — Money in possession of cashier of Railway.**

The word 'entrusted' when used with respect to money means that the money has been transferred to the accused in circumstances which show that notwithstanding its delivery to the accused, the property in it continues to vest in the prosecutor and the money remains in the possession or control of the accused as a bailee to be restored to the bailor or applied in accordance with his instructions.

Where money is received by a cashier from the Stores department of a Railway to be appropriated by him in accordance with the standing accounts instructions and the cashier alone is in charge of the keys of his safe and the cash box where according to him the amounts in question had been kept, then it cannot be maintained that he was not entrusted with any moneys . The fact that someone else also possessed keys of the cash room cannot alter the fact of entrustment of the moneys with the cashier. **1956 Madh BLJ 1447: 1956 Madh BLR (Cr) 405: 1957 Cr LJ 179: AIR 1957 Madh B 33 (35) (Pt A) (Pr 5).**

——**Ss. 405, 408 and 415** — Applicability — Clerk or servant — Case on facts — (Criminal P. C. (1898), Section 237). **AIR 1955 NUC (Pat) 4900.**

11. Public servant.

See also Penal Code (1860), S. 409.

●——**S. 405** — Scope — Not repealed by Section 5, Prevention of Corruption Act — Prosecution of accused under Section 409 — Sanction does not offend Article 14 of the Constitution. See Prevention of Corruption Act (1947), Section 5. **1957 Cri LJ 575: AIR 1957 SC 458.**

——**S. 405 — Misappropriation of money by public servant under instructions of superiors — Offence.**

Where a public servant wilfully suffered others to misappropriate the money entrusted to him that amounts to criminal breach of trust as defined by Section 405 as much as if he himself had misappropriated it. His plea that he did so under the instructions of his superiors can afford him no protection. **1952 Cri LJ 46: AIR 1951 Kutch 81 (81) (Pt A) (Pr 4).**

12. Broker.

See also Penal Code (1860), Section 409.

——Ss. 405 and 409 — Applicability — Money paid to share broker specifically for purchase of shares — Share-broker neither delivering shares nor returning money — Offence.

There can be no doubt that if money is paid as advance or as part price for the purchase of certain property, then it becomes the property of the person to whom it is paid and it is open to him to utilize it in any manner he likes and he cannot be convicted of criminal misappropriation or criminal breach of trust for not returning it. But where money is paid to a share-broker specifically for the purchase of certain shares and the share-broker neither delivers the shares nor returns the money but misappropriates it, he is guilty under Section 409. **1956 All WR (HC) 588: 1957 Cri LJ 265 (All).**

13. Agent.

See also Penal Code (1860), Section 409.

——Ss. 405, 409 — Entrustment of property — Directors are not only agents but in some sense and to some extent are in the position of trustees. AIR 1936 Lah 408 and (1872) 8 Ch A 149 and (1878) 10 Ch D 450, Rel. on. R. K. Dalmia v. Delhi Administration. **(1963) 1 SCR 253: (1962) 32 Com Cas 699: 1962 (2) Cri LJ 805: AIR 1962 SC 1821 (1837) (Pt E) (Prs 75, 78).**

——Ss. 405 and 409 — Entrustment of and dominion over property — Commission agent — Accountable under terms of agreement — Cheques issued by agent for payments due dishonoured — **Held,** on facts that there was neither entrustment nor dominion — Agent was not guilty of offence under Section 409. See Penal Code (1860), Section 409. **1962 (1) Cri LJ 411: AIR 1962 Cal 197 (DB).**

——Ss. 405, 409 — Applicability — Complainant handing over cheque to accused in latter's capacity as agent of firm — Whole amount of cheque and credited to complainant's account — Section 409 does not apply — Offence, if any, falls under Section 405. **AIR 1952 Nag 255 (256) (Pt A) (Pr 6).**

——Ss. 405 and 409 — Applicability — Agent — Liability of.

The accused was a purchasing agent of a Co-operative Society for procurement of foodgrains during a particular kharif year. The terms of his agreement were that for the work done he should receive his travelling and daily allowances and also a commission of eight per cent on the net profits of the society. The accused was given a certain sum of money for the purchase of foodgrains without any stipulation as to the time before which the purchase was to be completed. There was some delay and therefore the society terminated the agency even before the expiry of the kharif year and demanded the refund of the amount paid to the accused for the purchase. The accused in turn claimed that money was due to him on account of commission and asked the society to set off the amount so due. There was no direct evidence of the accused having dishonestly misappropriated or converted to his own use the money.

Held, that the conviction under Sec. 409 was wrong. Admittedly the society owed money to the accused but failed to clarify how much it was. In the circumstances it was a case where there was dispute for settlement of accounts and therefore a civil dispute which was entirely outside the purview of the criminal Court. AIR 1958 Andh Pra 765, Rel. on. Further, as an agent entrusted with money by the principal for a specific purpose to be completed before a specified period his criminal liability could not arise before the expiry of that period. Therefore no question of attaching any criminal liability to the accused could arise. AIR 1920 Pat 168, Rel. on. **24 Cut LT 455: ILR (1958) Cut 580.**

14. Depositary or custodian of property.

——S. 405 — Applicability — Standing crop attached in proceedings under Section 145, Criminal P. C. and given in custody of Sapurdar — Notice to Sapurdar after six years to submit accounts — Failure to produce — Offence — Conviction under Section 406 is bad — (Criminal P. C. (1898), S. 145).

Where in proceedings under Section 145, Criminal P. C. standing crops are attached and kept in the custody of sapurdar, it is the bounden duty of the Magistrate under the provisions of Clause (8), Section 145 to make an order to the effect that the property should be sold and the sale proceeds of such property should be kept in the custody of the sapurdar which is on the completion of the inquiry, could be made over to the person entitled to it. Where the Magistrate gives the standing crop in the custody of sapurdar, who undertakes to produce the crop when ordered by the Court, and after the lapse of six years sends notice to the sapurdar to file accounts of the crop from the date on which the custody was given to him, the notice given to him is not in strict terms of that contract, which was that he would produce these crops when required. The notice is therefore not touching the discharge of the trust which he had undertaken upon himself. When no evidence was given in the case to prove that he misappropriated the property entrusted to him or converted it to his own use, and that he did so in violation of the conditions of the trust, his conviction under Section 406, I. P. C. is bad in law. **1960 All LJ 120: 1960 All WR (HC) 104: 1960 All Cr R 98: 1960 Cri LJ 780: AIR 1960 All 380 (382) (Prs 7, 8) (DB).**

——S. 405 — Entrustment of title deeds to accused — Deeds given by accused to another — Harmful use of deeds by such other person — Offence is complete when deeds are harmfully used — Receipt of money by accused is not necessary to constitute offence.

Certain title deeds were entrusted to the accused for a definite purpose. The accused who neither completed the task nor returned them to the owner gave them to another. That person used them to harm the transferee of one of those lands covered by the deeds. The accused was prosecuted for criminal breach of trust in respect of those deeds. There was no evidence that any money was paid to him by the person who took the deeds from him :

Held, that the offence was complete when the documents were used to harm the transferee and that the taking of money was not necessary to constitute the offence. **51 Cri LJ 1139: AIR 1950 Kutch 52 (53) (Pt A) (Pr 6).**

——Ss. 405, 406 — Applicability — Custodian of property failing to produce property.

Where a Superdgidar, who was given custody of some buffaloes, pleaded, when asked to produce them for the purpose of the auction, that they were dead, the order of the Magistrate in ordering the Police to charge-sheet the Superdgidar under Section 406, without making any enquiry as to whether the buffaloes were really dead or not, cannot be upheld. **1957 MPC 621: 1957 MPLJ 748: 1958 Cri LJ 1040: AIR 1958 Madh Pra 234 (234) (Pt B) (Pr 3).**

——S. 406 — Entrustment — Materials issued to contractor for executing work — Contractor stopping work and not returning materials — Charge under Section 406 — Charge held was not warranted as there was no entrustment — Central Public Works Account Code, Rr. 238 to 244. **1965 (2) Cri LJ 418: AIR 1965 Tripura 36 (38) (Pr 7).**

15. Pledge.

——Ss. 405 and 409 — Offence under Sec. 409 — Criminal breach of trust — Entrustment of property and trust — Property pledged — — Dominion of pledgee over property pledged — (Contract Act (1872), S. 172).

For an offence under Section 409, Penal Code, the first essential ingredient to be proved is that the property was entrusted. When Sec. 405 which defines "criminal breach of trust" speaks of a person being in any manner entrusted with property, it does not contemplate the creation of a trust with all the technicalities of the law of trust. It contemplates the creation of a relationship whereby the owner of property makes it over to another person to be retained by him until a certain contingency arises or to be disposed of by him on the happening of a certain event. The person who transfers possession of the property to the second party still remains the legal owner of the property and the person in whose favour possession is so transferred has only the custody of the property to be kept or disposed of by him for the benefit of the other party, the person so put in possession only obtaining a special interest by way of a claim for money advanced or spent upon the safe keeping of the thing or such other incidental expenses as may have been incurred by him.

Whether securities have been delivered with a view to cover the repayment of any overdraft by the pledgor Bank to the pledgee Bank and it is agreed that they are to be disposed of on the arising of a stipulated contingency only, then by the very fact of the delivery of the securities to the bailee the latter becomes a trustee in terms of the contract, not for all purposes, but only for the limited purpose indicated by the agreement between the parties. The pledgor in such a case only transfers his possession of the property to the pledgee who has a special interest in the property of enforcing his charge for payment of an overdraft, if any, whereas the property continues to be owned by the pledgor. If in such a case there is no overdraft the pledgor Bank can ask for a return of the securities at any time. And the securities having continued to be the property of the pledgor Bank the pledgee Bank, or its Managing Director, has no right to deal with them.

In such case the Managing Director, holding a power-of-attorney on behalf of the pledgee Bank, can be said either to have been entrusted with the property in a derivative sense or to have dominion over the securities as a banker; and thus in either case, the first essential condition for the application of Section 409 Penal Code, is fulfilled. Jaswantrai Manilal v. State of Bombay, **1956 SCR 483: 1956 All WR (Sup) 126: 1956 SCJ 613: 58 Bom LR 1026: 1956-26 Com Cas 340: 1956-2 Mad LJ (SC) 49: 1956 SCA 941: 1956 Cri LJ 1116: AIR 1956 SC 575 (582) (Pt C) (Prs 11, 13).**

——S. 405 — Dishonest intention — Absence of — Complainant who had pledged ornaments with accused redeeming them — Accused placing them in hands of complainant — Complainant finding them to have been used expressing unwillingness to pay interest — Accused alleged to have snatched them from complainant and to have refused to return money — Accused repudiating transaction in his trial — Dishonest intention, held absent — Liability was of civil nature — Conviction not maintainable — Repudiation of transaction in trial, held had no bearing on dishonest intention. **29 Cut LT 579: 1964 (1) Cri LJ 421: AIR 1964 Orissa 93 (94) (Pr 3).**

——Ss. 405 and 406 — Construction—"Misappropriates or converts to his own use" — Meaning of.

Where the contract between the complainant and the accused is that the pledged ornament would be returned to the complainant on payment of the entire dues, and the accused in spite of the payment retains it and uses the ornament as a pledge in respect of a completely independent transaction, he definitely uses the ornament in violation of the legal contract between the parties creating the trust.

The act is clearly dishonest as the accused intends to make wrongful gain of the ornament by making an additional use of it as a pledge against another independent debt, and further causes wrongful loss to the complainant in keeping her out of the ornament in spite of her payment of the entire dues. AIR 1946 Pat 125, Distinguished. **21 Cut LT 24: 1955 Cri LJ 1371: AIR 1955 Orissa 145 (145, 149) (Pr 7) (DB).**

16. Vendor and purchaser.

——S. 405 — Tailor refusing to deliver clothes unless payment of tailoring is made — It is not case of criminal breach of trust unless it is shown that clothes were not made out of material supplied and that he had disposed of material — It would be criminal breach of trust if upon payment being tendered, delivery of clothes is refused.

Where a tailor to whom cloth was given by the complainant for preparing shirts out of it, refuses to deliver either the shirts or the cloth to the complainant and claims a lien upon it for the price, he cannot be convicted for criminal breach of trust, unless the complainant establishes that the accused had never worked on the material and had disposed of it in some other way. The defence here might well be true and the shirts withheld for the payment and the accused may have had lien on the shirts. The lien arises even before the tender of delivery of goods.

Obiter :— If the shirts are not delivered even after the tender is made of the amount due for making them, then the case of criminal breach of trust might arise. **51 Cri LJ 336: 1950 All WR (Supp) 5: 1950 All Cri Cas 21: AIR 1950 Cal 35 (36) (Prs 5, 6, 8) (DB).**

——Ss. 405 and 420 — Applicability — Vendor and purchaser — Breach of contract — Offence.

Mere retention of property without misappropriation does not constitute criminal breach of trust nor does a mere breach of contract give

rise to a criminal prosecution. Thus, where a person takes away ornaments on approval and promises to return them in the evening the same day, her failure to do so is not enough to sustain a charge under either Section 406 or 420. Such a case is essentially of a civil nature coming under Section 24 of the Sale of Goods Act. **1953 Nag LJ 347: 1953 Cri LJ 1586: ILR (1953) Nag 813: AIR 1953 Nag 301 (302) (Pt A) (Pr 7).**

17. Partner.

● **——Ss. 405, 409 — Criminal breach of trust — Entrustment of dominion over property is essential — Dominion of partner over partnership asset — No entrustment unless there is special agreement — Agreement authorising working partner to recover money and to utilise recoveries for partnership business — Failure to deposit money in bank — Not an offence under Section 409, I. P. C.**

Before a person can be said to have committed criminal breach of trust within the meaning of Section 405, I. P. C. it must be established that he was either entrusted with or entrusted with dominion over property which he is said to have converted to his own use. In order to establish "entrustment of dominion" over property to an accused person the mere existence of that person's dominion over property is not enough. It must be further shown that his dominion was the result of entrustment. In the case of a partnership, every partner has dominion over the partnership property by reason of the fact that he is a partner. This is a kind of dominion which every owner of property has over his property. But it is not dominion of this kind which satisfies the requirements of Section 405. The prosecution must further establish that dominion over the assets or a particular asset of the partnership was, by a special agreement between the parties, entrusted to the accused person. If in the absence of such a special agreement a partner receives money belonging to the partnership he cannot be said to have received it in a fiduciary capacity or, in other words, cannot be held to have been "entrusted" with dominion over partnership properties. Where, therefore, under an agreement between the partners the working partner is authorised to recover the dues of the partnership and to spend the money for the business of the partnership, he cannot be said to have been guilty of criminal breach of trust even with respect to the dues realised by him from certain person by not depositing them in the bank as alleged by the prosecution. AIR 1951 Cal 69 (FB), Approved. Velji Raghavji Patel v. State of Maharashtra, **(1965) 1 SCWR 586: (1965) 2 SCR 429: 1965 All Cri R 392: 1965 All WR (HC) 598: (1965) 2 Andh LT 201: 1965 SCD 824: 1965 Mah LJ 487: 67 Bom LR 443:, 1965 (2) Cri LJ 431: 1965 MPLJ 660: (1965) 2 SCJ 186: 1965 Mad LJ (Cri) 519: AIR 1965 SC 1433 (1435, 1436) (Pt A) (Prs 6, 7).**

● **——Ss. 405, 409 — Misappropriation by partner.** Where one partner is given authority by the other partners to collect moneys or property of the firm, he is entrusted with dominion over that property, and if he dishonestly misappropriates it, then he comes within Section 405. 21 Suth WR Cr 59 and AIR 1932 Bom 57, Rel. on; AIR 1949 Pat 69, Distinguished. R. K. Dalmia v. Delhi Administration, **(1963) 1 SCR 253: (1962) 32 Com Cas 699: 1962 (2) Cri LJ 805: AIR 1962 SC 1821 (1837) (Pt F) (Pr 82).**

——S. 406 — 'In any manner entrusted' — In order to establish offence under Section 406 prosecution has to prove that there was entrustment of moveable property belonging to another person to accused — Offence cannot be committed in respect of one's own property — In absence of any agreement to the contrary all partners hold, use and have interest in the whole of partnership property and a partner cannot be prosecuted for criminal breach of trust in respect of partnership property. 1964 All WR (HC) 263.

——S. 405 — Applicability — Partner when can be guilty of criminal breach of trust — It depends on agreement, whether partner was entrusted with property, e.g., whether money was given for specific purpose — If agreement is proved, case will be taken outside rule that Section 405 is not intended to apply to partners. AIR 1933 Cal 582; trust — (Partnrship Act (1932), Sections 13 and 15).

——Ss. 405, 406 and 409 — Applicability — Partner — If can be guilty of criminal breach of trust — (Partnership Act (1932), Sections 13 and 15).

The law of partnership is but a branch of the law of agency and Section 18 of the Partnership Act provides that subject to the other provisions of the Act a partner is an agent of the firm. But this capacity does not derogate from his capacity as a partner; nor by virtue of his management is he divested of his capacity as a partner. As a matter of fact according to the provisions of Section 9 all partners are bound to carry on business and to render true accounts and full information of all things affecting the firm to any partner. The management of the business is the right and duty of every partner. Ordinarily no partner is entitled to receive remuneration for managing the business but Section 13 of the Partnership Act permits fixation of some remuneration by agreement; and the fixation of such remuneration does not alter his status as a partner.

In the absence of any agreement to the contrary, all the partners hold, use and have interest in the whole of the partnership property. Hence in respect of ordinary partnership no entrustment of property within the meaning of Section 405, I. P. Code, is possible. Entrustment contemplated by this section is of the property which is not his and which he does not hold in his right. The entrustment or dominion of the property must be one as against the other. The partnership property cannot therefore, attract the operation of an offence of Section 406, I. P. Code. The sections relating to criminal breach of trust do not admit of an interpretation that there can be entrustment of property belonging to one's own self.

Of course, the case would be different if there be a contract as contemplated by Section 15, Partnership Act between the partners that a particular property would be the separate property of the partner. Unless there is a special agreement which admits of operation of Section 405, I. P. Code, a partner cannot be prosecuted for criminal breach of trust in respect of partnership property. AIR 1951 Cal 69 (FB), Rel. on. **ILR (1957) Andh Pra 853: 1957 Andh LT 876: (1957) 2 Andh WR 495: (1958) Cri LJ 1114: AIR 1958 Andh Pra 555 (556, 557) (Pt B) (Prs 4, 5).**

——Ss. 405, 406 and 403 — Criminal breach of trust by partner.

Where one partner is given authority by the other partners to collect moneys or property he is entrusted with dominion over that property and if he dishonestly misappropriates it, he comes within Section 405 of the Code.

Usually, where a partner is prosecuted for criminal breach of trust, it is very difficult to prove a dishonest intent which is an essential ingredient of the offence. But where the intent is clearly established there is no reason why a partner could not be convicted of criminal breach of trust in respect of a partnership asset. **60 Bom LR 1413: 1959 Nag LJ 41: ILR (1959) Bom 670: 1959 Cri LJ 1032: AIR 1959 Bom 488 (488, 489) (Pt A) (Prs 7, 13) (DB).**

—S. 405 — Applicability — Criminal breach of trust by partner — Partner entrusted with partnership money for specific purpose — Partner converting it to his own use — He would be guilty for criminal breach of trust. **AIR 1955 NUC (Cal) 2936 (DB).**

● **——Ss. 405, 496 — Partner it can be charged under S. 406 in respect of partnership property by another partner.**

Per Full Bench — A charge under S. 406, Indian Penal Code cannot be framed against a person who, according to the complainant, is a partner with him and is accused of the offence in respect of property belonging to both of them as partners.

The cases in 13 Beng. LR 307 (FB) & AIR 1940 Cal. 371 cannot be regarded as correctly decided if they lay down any general rules applicable to prosecution of partners for offences under S. 406, Penal Code, in respect of property received or held by such partners on behalf of the partnership in the ordinary course of partnership dealings. However the cases may be regarded as rightly decided if they are confined to cases where under special agreements made between the parties entrustment of the property or dominion over it was given to any particular partner.

Per P. B. Mukharji J. — The reason for holding that a partner cannot be prosecuted by another partner for criminal breach of trust in respect of partnership property u/s 406, I. P. C. is two-fold. The nature, character and incidents of partnership property are such that during the subsistence of the partnership there cannot be, except by special agreement, any entrustment or dominion and secondly partnership property is not a specific and ascertainable property and is of so equivocal and problematic a nature until dissolution and accounts, that it is not susceptible to be used in a manner which can bring into operation Sec. 405, Penal Code. It is only when such ordinary character and nature of the partnership property are varied by special contract of partnership so as to create entrustment of any specific property in favour of one partner as against the others or so as to give exclusive dominion of such property to one partner as against the other that there can be any scope of application of S. 405, I. P. C. Bhaban Mohan Das v. Surendra Mohan Das, **AIR 1951 Cal 69 (70, 74, 77, 78) (Prs 5, 34, 35, 54, 62) (FB).**

——S. 405 — Applicability to Mahomedan co-owners.

The proposition of law that S. 405 does not apply to partners as they are joint owners or co-owners of the partnership property, that is to say, of the common stock, does not apply to the case of Mahomedan co-owner of whom it cannot be said that he is co-owner of the whole of the stock. The position of a Mahomedan co-owner is that he has a specific share in the property.

(It was, however, found that the accused was not a partner but an employee and was guilty under Section 406). **1950 All WR (Supp) 96: AIR 1950 Cal 523 (523) (Pr 5) (DB).**

——Ss. 405, 406 — Charge of criminal breach of trust against partner.

In order to establish a charge of criminal breach of trust, it is essential to prove that the accused was entrusted with property or with the dominion over the property. The word "entrustment" connotes this that the accused holds the property in a fiduciary capacity. It is difficult to conceive of circumstances under which it could be held that there was an entrustment of partnership property by one partner to another. Hence, a partner can never be found guilty of criminal breach of trust with respect to partnership property. **ILR (1949) 1 Cal 454.**

——Ss. 405, 409 — Applicability — Partner if can be prosecuted.

Where a partner who was authorised to withdraw from a bank money belonging to the partnership firm only to the extent of Rs. 100 at a time, withdrew a sum of Rs. 3,000 from the bank without consulting his other partners and misappropriated the amount.

Held, that Section 405, Penal Code, was applicable to the case and a complaint under Section 409 could be entertained against the partner. **1954 Cri LJ 1202: AIR 1954 Him Pra 46 (47, 48) (Pt A) (Pr 5).**

——Ss. 405, 409 — 'Entrustment' — Partnership property — Nature of interest of partners — No entrustment in absence of special agreement — No criminal liability. **1959 Cri LJ 322: AIR 1959 J & K 19 (20, 21) (Prs 8, 14).**

——S. 405 — "Entrusted with property" — Partners and firm.

Where there was nothing in the contract except the words "managers of the firms of Doshi Amarchand Maimukchand" to suggest that it was the firm and not the individuals who were the contracting parties. **Held,** that these words were merely descriptive of the individuals and did not connote that the firm was making the contract; and when accused received the goods they received them personally and on behalf of any firm: AIR 1930 Rang 332, Disting. **52 Cri LJ 814: AIR 1951 Kutch 66 (67) (Pt A) (Pr 7).**

——S. 405 — "Entrusted with property" — Partners and firm.

The partners who are collectively called the firm are agents of the whole firm. When, therefore, property is received by a partner it is received by him on his own behalf and as agent of the firm. The property is received by the partner personally and it does not matter that he received it as agent of the firm also. **52 Cri LJ 814: AIR 1951 Kutch 66 (67) (Pt B) (Pr 8).**

——S. 405 — Partner cannot be convicted under Section 406.

A partner cannot be guilty of criminal breach of trust or misappropriation. A partner who receives money belonging to the partnership on account of himself and his co-partners does not do so in a fiduciary capacity: 13 Beng LR 307, Commented upon. **1950 Nag LJ 56: 51 Cri LJ 607 ILR (1950) Nag 379: AIR 1950 Nag 99 (101) (Pr 15).**

——S. 405 — Whether a partner could be said to misappropriate or convert to his own use a property to which he himself is as much entitled as any other partner (Quaere). **1953 Cri LJ 842: AIR 1953 Pat 100 (103) (Pt D) (Pr 10).**

——S. 405 — Misappropriation by partner — Dishonest misappropriation by partner entrusted with dominion over property — Charge can be framed under Section 405: AIR 1962 SC 1821 and AIR 1932 Bom 57, Rel. on. **1964 (2) Cri LJ 730: ILR (1964) 14 Raj 862: AIR 1964 Raj 267 (269) (Pt B) (Pr 4).**

——S. 405 — Partner not rendering accounts and withholding share of profits of other partner — Charge cannot be framed under Section 406, proper remedy lies in Civil Court.

A partner cannot be held liable for a charge under Section 406 of the Indian Penal Code for not rendering accounts to any other partner and for withholding the share of profits of the other partner when the accounts have not been gone into and it has not been ascertained whether there have been any profits in the partnership business at all and what sum is due to the complainant in those profits. It is not the function of a criminal Court to go into the accounts of partnership and determine the specific amount due to one partner from the other, for his share of profits. This can only be done by a civil Court in a suit for accounts. The proper remedy for the complainant is to file a suit for dissolution of the partnership and rendition of accounts. AIR 1948 Cal 292, Rel. on. **1964 (2) Cri LJ 730: ILR (1964) 14 Raj 862: AIR 1964 Raj 267 (269, 270) (Pt C) (Prs 5, 6).**

——Ss. 405, 406 — Partner entrusted specifically with money for being deposited as tender security — Misappropriation by partner — Charge under Section 406 can be framed against partner: AIR 1950 Nag 99, Dissent from. **1956 Cri LJ 919 (1): AIR 1956 Vindh Pra 7 (8) (Pr 2).**

18. Debtor and creditor.

——S. 405 — Trust and loan — Distinction.

One difference between a trust and a loan is that in the case of a trust the article cannot be returned before the object of the trust is carried out whereas in the case of a loan the article can be returned even before the object of the loan is carried out. **1960 Cri LJ 857: AIR 1960 All 387 (389) (Pt B) (Pr 8).**

——Ss. 405, 406, 409 — Applicability — Debtor and creditor — Relationship.

The one underlying idea in Section 405 is undoubtedly this that the property which is the subject-matter of entrustment or in respect of which dominion is passed over to the accused, does not even for the time being, become the property of the accused which he could use for his own purposes. Thus the section does not cover the case of a loan or of an advance of money when the borrower or the depositee intends to use or utilise that money, for the time being, till he is in possession of it, although he may have to return an equivalent amount later on to the person making the advance with or without interest, or compensation for the use thereof.

The amount of Rs. 10,000 was handed over by the complainant to the accused to be sent to his firm in the first instance, and to be held by the firm for the purchase of goods; no interest was payable and the receipt of the amount was denied when it was demanded.

Held, that upon the facts a relation of debtor and creditor was created between the parties. The beneficial ownership in the money so advanced to the accused was intended to be transferred to him and his partners in the firm, and it could not be said that it was intended that he was to keep the money intact in his possession and make no use of it at all whether or not interest was paid on it. The amount was not to be returned in specie, and the depositee was entitled to use the amount in his own business, but was bound to return the equivalent amount according to the directions of the complainant. This was not a case of entrustment of money in respect of which the accused was supposed to have committed any breach of trust within the meaning of Section 409. **1954 All WR (HC) 191: 1954 All LJ 97: 1954 Cri LJ 1293: AIR 1954 AM 583 (583, 587) (Pt B) (Prs 10, 11, 13) (DB).**

——Ss. 405 and 406 — "Entrustment" — Connotation of — Debtor and creditor — Non-compliance by creditor with request of debtor to make endorsement of payment on promissory note — Offence.

There is no entrustment within the definition of Section 405, when a payee or the mortgagee receives payment from his debtor or the mortgagor. The word 'entrustment' is not a term of law or of art. It is an ordinary word connoting that property was handed over to another in whom confidence was reposed for a specific purpose.

The question of trust would not arise at all when money is paid by debtor in discharge of a debt if the creditor does not give a receipt thereof or make the necessary endorsements or even give effect to his promise in that behalf. It does not make any difference even if there is an agreement governing it.

The essential ingredients of an offence under Section 406 would be lacking even in such a case. The very essence of criminal breach of trust is misappropriation or conversion to his own use in violation of any direction of law prescribing the mode in which such trust is to be discharged. The notion of a trust cannot be imported into a case like this. AIR 1940 Mad 329, Disting.; AIR 1946 Pat 125; AIR 1919 Cal 155, Rel. on. **AIR 1955 NUC (Andh Pra) 4814.**

——S. 405 — Dishonest intention — Loan — Intention to repay — 1902 Pun LR 157, Not foll.

The accused was cognisant of the fact that he could not take the loan without the sanction of his Highness the Maharaja of Dholpur. **Held,** that he could not entertain any belief while withdrawing the amount that he could take the loan to himself without the order from his superiors. The mere fact that he had the intention of repaying the same would not make any difference in his criminal liability. 1902 Pun LR 157, Not foll. **ILR (1956) 6 Raj 942.**

19. Banker.

See also Penal Code (1860), Section 409.

——S. 405 — Entrusted — Meaning of — Dealing between bank and customer — When amounts to entrustment — (Words and Phrases).

Entrustment within the meaning of Section 405 implies transference of possession of property for some purpose in accordance with the directions of the transferor, proprietary rights in the property continuing to vest in the transferor.

When there are money dealings between a bank and its customer the question generally arises whether the transaction amounts to a deposit or to a bailment for a specific purpose. In the former case there arises a relationship of debtor and creditor between the bank and the customer and the money becomes the bank's money, only to be repaid when demanded. In the latter case, proprietary rights in the money remain with the customer and there comes into being a trust in the hands of the bank with regard to the disposal of the money in accordance with the terms of the contract between the parties. No question however of the commission of the offence of criminal breach of trust arises in the former case inasmuch as the money in question becomes the

bank's money and no trust in regard to it arises: 1950 All LJ 808; AIR 1954 All 583; (1848) 2 HLC 28 and AIR 1949 EP 373, Ref.

Whether in a particular case the transaction falls within one category or the other depends on the facts and circumstances of that case. **1957 All WR (HC) 255.**

——Ss. 405, 409 — Banker and customer.

The money deposited by a customer with a banker is not held by the latter on trust for him. It becomes part of the banker's funds. The banker cannot be charged under Section 409 for making use of the money. **1950 All LJ 808: 1951 All Cri C 12: 1951 All WR (HC) 85.**

——Ss. 405 and 408 — Entrustment — What is — (Banker and Customer) — (Words and Phrases — Banker).

The fact that large sums of Co-operative Society were allowed to remain with a person because he possessed extensive properties and consequently there was no danger to the sums and that after the appointment of that person as a Secretary of the society he kept the surplus funds with himself, would not make such a person a banker of the society. The amounts deposited with him or kept by him must be held to have been entrusted to him and if he has utilised any amount of these funds for his own purposes it would amount to misappropriation. **1956 Cri LJ 979: AIR 1956 Bom 524 (526) (Prs 6, 7) (DB).**

——Ss. 405 and 409 — Customer depositing money in current account — Bank using money for other business — There can be no criminal proceeding against managing agents of bank for using money for purposes of other business — Relationship between customer and bank is simple relationship of creditor and debtor — When customer deposits money, it cannot be said that there is entrustment for particular purpose — Bank is only liable to refund the money when the depositor calls for it. **AIR 1952 Cal 193 (194) (Pt B) (Pr 4).**

——Ss. 405 and 409 — Entrustment — Deposit in bank — There is no entrustment — Relationship between bank and customer is that of creditor and debtor. **(1950) 20 Com Cas 220: 51 Cri LJ 388: AIR 1950 Cal 57 (58) (Pt C) (Pr 5).**

20. Hirer.

● **——S. 405** — Hire of motor — Hirer writing letter to owner claiming agreement as of 'sale or return' nature — Owner claiming agreement was of hire-purchase and filing complaint . that by letter hirer committed criminal breach of trust — Scope of both parts of section — **Held,** letter raised dispute of civil nature and no breach was committed : Criminal Appeal No. 429 of 1960, Dated 30-1-1962 (Cal), **Reversed.** Mohommad Sulaiman v. Md. Ayub, **(1965) 1 SCWR 484: 1965 All Cri R 388: 1965 All WR (HC) 593: (1965) 2 SCR 398: 1965 (2) Cri LJ 421: (1965) 2 SCJ 183: 1965 Mad LJ (Cri) 516: AIR 1965 SC 1319 (1320, 1321) (Prs 3, 4).**

——S. 405 — Hire-purchase agreement — Failure to pay instalments — Offence.

In a case of criminal breach of trust, the property remains with the person entrusting and the person entrusted does not have any right of his own in the property. Where under a hire-purchase contract executed by the acccused he has certain rights and he is entitled to keep and possess the articles which are the subject-matter of hire, provided he fulfils other conditions of the contract, mere failure to pay instalments of hire will not make out a case of criminal breach of trust. **1957 All WR (Sup) 27: 61 Cal WN 210.**

——S. 405 — Applicability — Hire-purchase agreement or sale — Distinction and tests pointed out — Sale of article by hirer to third person — Offence of criminal breach of trust held not committed — Agreement held not of hire-purchase — Remedy of vendor held was to sue for unpaid amount of purchase price — (Sale of Goods Act, (1930), Section 4). **AIR 1955 NUC (Pat) 3259.**

21. Onus of proof.

——S. 405 — Honesty, intention, etc. — Charge of criminal misappropriation of money order against postman — Accused professing to have made payment through boy who obtained payee's signature — Duty of accused to produce evidence as to whom payment was actually made. See Evidence Act (1872), Section 106. **1957 Cri LJ 620: AIR 1957 All 381.**

——S. 405 — Burden of proof — 'Entrusted' — Proof — (Criminal P. C. (1898), Sections 523 and 550).

The accused was alleged to have unlawfully cut and carried away the paddy and straw from the complainant's field and refused to honour the Zimmanama executed by them. He was therefore charged under Section 406, Penal Code.

Held, that where the entrustment depended upon the existence and genuineness of the Zimmanama it was the duty of the prosecution to prove the execution of that document by cogent evidence. There could not be entrustment unless, it could be said that the Zimmanama, when brought into existence became an active document which operated retrospectively; in other words, it was only when the Zimmanama considered as a document evidencing the prior right of the police to seize the stock and their act of seizing it that the further right to take a document by way of receipt or bond from the persons entrusted can be said to arise. One very important item of evidence would have been proof of the seizure itself. The seizure list might have shown what exactly was the immediate disposition of the paddy itself before the purported seizure. But in the absence of the seizure list which was really the parent document it was impossible to hold that there was entrustment by virtue of the operation of the Zimmanama. Unless the Zimmanama is considered to be a valid document, validly entrusting the accused with the custody of the paddy and straw, the accused could not be convicted of a breach of that undertaking of that trust sought to be created by the Zimmanama itself. **1957 Cri LJ 367: AIR 1957 Cal 148 (149) (Pr 7).**

——S. 405 — Burden of proof — "Misappropriates or converts to his own use".

It is for the prosecution to prove that the amount in question had been misappropriated by the acccused. It is not incumbent upon the accused to prove the opposite. Of course, onus of proof is a shifting entity, so that if the prosecution had led some evidence in support of non-payment of the amounts in question by the accused to the proper authority, the burden would shift on to the accused to rebut that evidence and to prove that he had in fact paid the amount to that authority. The circumstance of the accused having denied receipt of the amount in question does not absolve the prosecution from proving the aforesaid ingredient. AIR 1934 Sind 22, Rel. on. **1954 Cri LJ 833: AIR 1954 Him Pra 33 (35) (Pt B) (Pr 10).**

——**Ss. 405, 406** — Burden of proof — Proof, nature of — Prosecution must prove the essentials — It cannot rely on statement of accused under Section 342, Criminal P. C. — (Evidence Act (1872), Sections 101 to 103) — (Criminal P. C. (1898), Section 342). **AIR 1955 NUC (Hyd) 2359.**

——**S. 405 — Burden of proof.**

In a case of criminal misappropriation the prosecution must prove dishonest misappropriation. **1954 Chl LJ 448: Madh BLJ 1954 HCR 410: ILR (1954) Madh B 181: Madh BLR 1955 Cri 260: AIR 1954 Madh B 21 (22) (Pt B) (Pr 4).**

——**S. 405 — Evidence and presumption as to breach.**

The usual evidence of breach of trust in regard to moneys received for the purpose of payment over is either non-payment, or non-accounting or false accounting. Breach of trust is a definite act, like theft or misappropriation, and the above circumstance does not constitute, it but merely evidences it. Where it is the duty of the accused to pay over money at once or any different periods his non-payment is prima facie evidence that he has wrongfully appropriated it to himself. But this presumption may be negatived by evidence that the delay was caused by forgetfulness or that it was acquiesced in by the person to whom the money was due. **1953 Mad WN 929: 1956 Cr LJ 1079: AIR 1956 Mad 452 (453) (Pt A) (Pr 8).**

——**Ss. 405, 409 — Criminal breach of trust by public servant — Burden of proof—Burden rests on prosecution — Section 106, Evidence Act (1872) does not affect prosecution's initial onus of proving guilt of accused.**

The essential thing to be proved in case of criminal breach of trust is whether the accused was actuated by dishonest intention or not. The failure to account for the amount proved to have been received by the accused or giving a false account of its use is generally considered to be a strong circumstance against the accused. It is not necessary or possible in every case to prove in what precise manner the accused person has dealt with or appropriated the property of his master. In the case of a public servant charged with misappropriation of monies, the element of offence of criminal breach of trust will be established if the prosecution proves entrustment of the monies which he was under a duty to account and had not done so. If the failure to account was due to circumstances as pleaded by the accused in defence, then those facts being within the accused's knowledge, it is for the accused to explain them. Section 106 of the Evidence Act does not affect the prosecution's initial onus of proving the guilt of the accused. The onus rests on the prosecution and is not shifted on to the accused by reason of Section 106. Section 106 would not absolve the prosecution from the duty of proving that a crime was committed even though it is established that the accused had special knowledge on the point. If any explanation that the accused chooses to give is not proved beyond doubt, he cannot claim to be innocent; but even so, if his explanation shows any reasonable doubt on the prosecution story he would be entitled to an acquittal not because he proves the facts and circumstances referred to, but because the prosecution has failed to establish his guilt beyond reasonable doubt. AIR 1936 PC 289 and (1915) 84 LJKB 396, Rel. on. **(1963) 5 Orissa JD 1: ILR (1963) Cut 107: 29 Cut LT 499: 1964 (1) Cri LJ 339: AIR 1964 Orissa 46 (47, 48) (Prs 4, 5) (DB).**

——**S. 405** — Burden of proof — Duty of prosecution — Postal peon charged with criminal breach of trust in respect of money order entrusted to him for delivery to addressee — Accused alleging delivery to person whom he considered to be addressee on identification — Accused new to place — Prosecution must establish not only entrustment but also how the money was used — Section 106, Evidence Act, places burden on accused to prove the plea which absolves him but prosecution is not relieved of its duty to prove guilt of accused — It is enough for accused to show that his defence is not improbable — (Evidence Act (1872), Section 106) — (Criminal P. C. (1898), Section 367). **AIR 1955 NUC (Raj) 4686.**

——**Ss. 405 and 406** — Burden of proof — Admission by accused having received money but defence that he handed it over to proper person — Onus is not on accused to prove payment but on prosecution to prove non-payment — (Evidence Act (1872), Sections 101-103). **AIR 1955 NUC (Raj) 127.**

——**S. 405 — Misappropriation and conversion — Onus.**

It is well settled that once it has been proved that the money was entrusted to a person, the burden shifts on him to show what he did with the money, and if he completely denies having received the money, the presumption is that he misappropriated it or converted it to his own use. AIR 1940 Mad 329, Distinguished. AIR 1936 Pat 350, Rel. on. **1952 Raj LW 194: 1953 Cri LJ 835: ILR (1952) 2 Raj 341: AIR 1953 Raj 117 (118) (Pt C) (Pr 6).**

——**S. 405 — Burden of proof.**

Although the burden of proving entrustment of money rests on the prosecution, if it is proved that the accused was not in possession of the amount entrusted to him, it is for the accused to prove satisfactorily that he had not embezzled or misappropriated the amount but that the amount had been stolen, or that he had been robbed of it. It is not for the prosecution to prove how he disposed of the amount. **3 Sar LR 74: 1950 All WR (Supp) 113: AIR 1950 Sau 13 (15) (Pr 6) (DB).**

——**S. 405 — Burden of proof — No 'mens rea' — Effect.**

In criminal cases, the onus of proving the general issue never shifts and it lies upon the prosecution to prove beyond reasonable doubt the guilt of the accused. Where the accused gives some explanation which may reasonably be true, even though it may not be believed by the Judge or the jury, he or they must acquit him, because the onus lying on the prosecution of establishing the guilt of the accused beyond reasonable doubt has not been discharged.

Thus, where the accused is able to establish that due to incessant rain the paddy supplied to him by the Government for milling it into rice was damaged resulting in short delivery of rice, then there is no 'mens rea' on the part of the accused and hence an inference regarding dishonesty of the accused will not be justified. AIR 1933 Cal 800, Foll. **1955 Cri LJ 1636: AIR 1955 Tripura 35 (38) (Pt B) (Pr 18).**

22. Abetment.

——**S. 405** — Where abetment was a form of abetment by conspiracy as set forth in Clause (2) of Section 107, any charge of conspiracy is not established merely by proof of association together nor by mere suspicion of guilt. Where the record is itself not capable of sustaining a convic-

tion and the conscience of the Court is roused to the extent of compelling the Court to find that the accused ought not to have been convicted upon the evidence, interference in revision would be warranted. **1961 Mad LJ (Cri) 280: (1961) 1 Mad LJ 379.**

SECTION 406

——**S. 406** — Criminal P. C. (1898), Ss. 222 (2), 235, 537 — Charge contravening proviso to S. 222 (2)—Defect held did not cause prejudice to accused — Trial not vitiated. See Criminal P. C. (1898), Section 222 (2). **1962 (2) Cri LJ 259: AIR 1962 SC 1153.**

——**S. 406** — Criminal P. C. (1898), S. 203—Complaint under Section 406, Penal Code — Facts indicating dishonest intention of accused — Summary dismissal under Section 203, Criminal P. C. is wrong. See Criminal P. C. (1898), Section 203. **1953 Cri LJ 149: AIR 1952 Ajmer 58.**

——**S. 406** — Accused charged and convicted under Section 406, Penal Code — Facts proved not disclosing offence under Section 406, but one under Section 420 — Alteration of conviction in revision — Alteration of conviction for minor offence under Section 403. See Criminal P. C. (1898), Section 225. **1960 Cri LJ 857: AIR 1960 All 387.**

——S. 406 — Dishonestly retaining borrowed ornament.

Where A borrows from B certain ornament and instead of returning it on demand by B denies its loan, A commits an offence under Sec. 403 or Section 406, Penal Code by dishonestly retaining the ornament converting it to his own use. 6 Bom LR 1093, Expl. See Penal Code (1860), S. 403. **1951 RD (HC) 274: 1951 All WR (HC) 521: 1951 All Cri Cas 136: 1951 All LJ 631.**

——S. 406 — Scope — Offence under — Complainant having civil remedy — If bar to prosecution.

Where both the Courts below have come to the conclusion that the amount was paid to accused, that he admitted its receipt; but later on, having misappropriated or converted to it his own use, he kept on making promises for repayment and finally refused to pay, the act of accused does come within the definition of the offence under Section 406, I. P. Code and the criminal offence is thus made out. Merely because the complainant has a remedy to recover the amount through the civil Court, the criminal complaint cannot be thrown out. **1957 Andh LT 303: 1957 Mad LJ (Cri) 235: 1957-1 Andh WR 242.**

——**Ss. 406, 2, 11, 420, 403** — Definitions in Code are to be read subject to clause "unless there is anything repugnant in the subject or context" — "Person" in offences where imprisonment is mandatory does not include corporate body—Offences involving mens rea committed by servant of company — Company can be prosecuted — General Clauses Act (1897), Section 3 (42). See Penal Code (1860), Section 2. **1964 (2) Cri LJ 276: AIR 1964 Bom 195.**

——**S. 406** — Charge — Absence of — Charge under Section 420 — Conviction under Sec. 406, Penal Code, when not actually charged would not be illegal if accused had ample opportunity to meet such a case. See Criminal P. C. (1898), Section 236. **AIR 1955 NUC (Cal) 5602.**

——**S. 406** — Criminal P. C. (1898), S. 195—"Party to proceedings" — Proceedings under Section 406, I. P. C. — Objector laying claim to subject-matter of proceedings is also a party to proceeding — Court has to adjudicate upon his claim. See Criminal P. C. (1898), Section 195. **1952 Cri LJ 215: AIR 1952 Hyd 7 (DB).**

——S. 406 — A entrusting money to B for payment to C — B along with D reporting C loss of money by disappearance of coolie carrying money bags — Money recovered from D's house and B's person — Held, B committed offence under Section 406 and D abetted B.

A gave to B certain sum of money to pay C who resided at another town. On arrival in that town with the money, B put up with D. After some time both B and D went to C's shop and told C that, when they were going to C, the coolie carrying the bag disappeared with the bag. Some money was recovered in two bags from an unoccupied house belonging to D and some money on B's person. It was found that B and D were old acquaintances, that no row was made by B and D on alleged disappearance of the coolie and that the amount found on B's person made up the shortage in the amount found in the bags:

Held, that B was rightly convicted of an offence under Section 406, Penal Code;

Held, further that these facts clearly led to an inference as to D's knowledge about the disposal of money and when he had kept quiet both at C's shop and at police station, he had assisted B and thus abetted the offence under Section 406, Penal Code. **51 Cri LJ 783: AIR 1950 Kutch 37 (38, 40) (Pt A) (Prs 5, 9).**

——**Ss. 406, 379** — Case under French Penal Code, Articles 379, 401 and 403 — Accused taking property with consent of owner under promise to return it — Failure to return the property — Accused convicted under Arts. 379, 401 (theft) — Conviction held is not maintainable — Article 408 (breach of trust) may apply to the case. See Penal Code (1860), Section 379. **(1964) 2 Mad LJ 271.**

——**Ss. 406 and 409** — Offences under — Investigation—Section 630, Companies Act, does not bar jurisdiction vested in police officers by Sections 154, 156 (1) and 157 (1), Criminal P. C. See Companies Act (1956), Section 630. **1957 Cri LJ 205: AIR 1957 Mad 65.**

——**S. 406** — Petitioner taking jewel from goldsmith promising to return it — Jewel retained and claimed as petitioner's own — Petitioner is guilty under Section 406 — Fact that jewel is intact is irrelevant. **51 Cri LJ 330: AIR 1950 Mad 49 (50) (Pr 3).**

——Ss. 406 and 409 — Scope — Inference of misappropriation from mere retention.

It is true that normally mere retention is not such a circumstance from which there can be an inference that there has been misappropriation. But there may be cases where it is possible to draw such an inference. It is not possible to lay down a hard and fast rule to the effect that in no case retention would lead to an inference of misappropriation. In other words whether or not an inference of misappropriation from the fact of retention would be drawn would depend on the particular facts of each case. **35 Mys LJ 218: 1957 Knt LJ 34: (1957) Mad LJ (Cr) 71: ILR (1957) Mys 68: 1958 Cri LJ 784: AIR 1958 Mys 82 (83) (Pt A) (Pr 5).**

——**S. 406** — Principles relating to exercise of inherent powers of High Court to quash proceedings — Complaint under Section 406, Penal Code filed by newly married bride against her husband, husband's mother and other relations — Complaint not disclosing offence against accused other than husband and his mother —

Proceedings against such accused were liable to be quashed. See Criminal P. C. (1898), Section 561-A. **(1963) 65 Pun LR 667.**

——**S. 406** — Criminal P. C. (1898), S. 204 — Process fees — Process of Criminal Court relating to cognizable offence — No fee is chargeable — Offences under Sections 406 and 420 are cognizable and complainant need not pay process fees for serving and executing processes issued for compelling attendance of accused—Order discharging accused for non-payment of process fees by complainant is not sustainable — (Court-fees Act (1870), Section 20). See Criminal P. C. (1898), Section 204. **AIR 1955 NUC (Punj) 4985.**

——**S. 406** — Criminal P. C. (1898), Sections 190 (1) (c) and 550 — Bags of skimmed milk powder entrusted to distributor for distribution in district — Bags found being taken away in night out of district — Offence under Section 406, Penal Code, suspected of having been committed in respect of these bags — Magistrate can take cognizance of the offence — Bags in transit suspected of being stolen property — Magistrate and Police Officer have got authority to seize bags under Section 550, Criminal P. C. See Criminal P. C. (1898), Sec. 190 (1) (c). **(1963) Raj LW 30.**

——S. 406 — Evidence — Money given to accused in trust — Denial of its receipt by him.

Where the accused completely denies having received the money given to him in trust and it is proved that the money was received by him, that is the strongest possible circumstance to show that the accused has misappropriated the money or converted it to his own use. **1952 Raj LW 194: ILR (1952) 2 Raj 341: 1953 Cri LJ 835: AIR 1953 Raj 117 (118) (Pt C) (Pr 6).**

——**Ss. 406, 380 and 405** — "Entrusted with property or with any dominion over property" — Charge under Section 406 not made out — Conviction under Section 380 can be made — (Criminal P. C. (1898), Section 237). See Penal Code (1860), Section 380. **AIR 1955 NUC (Sau) 5053 (DB).**

SECTION 407

——Ss. 407 and 409 — Applicability — Criminal breach of trust by company appointed as carrier for whole year by Government Department — Jurisdiction to try — Special Court — (West Bengal Criminal Law Amendment (Special Courts) Act (21 of 1949), S. 2).

Where a transport company with which the accused persons were associated was appointed the carriers of building materials for the Construction Division for the whole year 1953-54 and thereafter they were entrusted with a delivery order in respect of 100 tons of cement in their capacity as such carrying contractors, and criminal breach of trust was alleged to have been committed by them in respect of a part of these 100 tons of cement after they were entrusted with dominion over the same in the way of their business as an agent of a department of the State Government:

Held, that it was a prima facie case under Section 409, Penal Code and not under Sec. 407, Penal Code and so the case would be triable by the Special Court set up under Section 2 of the West Bengal Criminal Law Amendment (Special Courts) Act, (1949). **1957 Cri LJ 124 (Cal).**

——**S. 407** — Sentence — Accused a carrier entrusted with corrugated sheets for booking — Sheets not booked and found missing — Sentence of imprisonment reduced as accused was also civilly liable for goods. **(1951) 2 Mad LJ 53: 1952 Cri LJ 704: AIR 1952 Mad 322 (323) (Pt B) (Pr 2).**

SECTION 408

——**S. 408** — Minor over 12 years of age — Can be guilty under. See Penal Code (1860), Sections 82, 83. **1959 Cri LJ 1264: AIR 1959 All 698.**

——**S. 408** — Ingredient of offence — Failure of prosecution to discharge initial onus — Conviction on presumption — Legality. See Evidence Act (1872), Section 114. **1958 Cri LJ 1460: AIR 1958 Andh Pra 765.**

——**Ss. 408, 403, 23, 24** — Government keeping grain stock with A, with a view to distribute same in deficit areas — Grain kept in Government godown — Grain belonging to Government — Partner of A removing stock to his own house knowing fully that grain was Government property — Partner held guilty under Section 403 — His motive to force A to settle accounts held immaterial — No extenuating circumstance held existed. See Penal Code (1860), Section 403. **1964 (1) Cri LJ 525: AIR 1964 Orissa 119.**

Clerk or servant.

■ **——Ss. 408 and 409 — Applicability — Agent and servant — Distinction — (Contract Act (1872), Section 182 — Partnership Act (1932), Section 18).**

The substance of the charge against the appellant was that as the promoter of a Society he lawfully received the amounts paid by three persons but that after its incorporation, when he failed on 22-4-1949 to hand over those amounts to the Treasurer and to include their names as share-holders of the minutes book, he committed offences under Sections 409 and 477-A. It was contended that the true status of the appellant was that of a servant and not of an agent, and that he should have been charged not under Section 409, but under Section 408.

Held, that having regard to the nature of the duties of the appellant as the Secretary of the Society his status was that of an agent and not servant. Moreover, whether the appellant should be charged under Section 408, or Section 409 was of no importance in the present case, as the sentence imposed on him under Section 409, viz., four years rigorous imprisonment could be maintained even under Section 408, Chandi Prasad Singh v. State of U. P., **1956 Mad WN 199: 1956 Pat LR (SC) 77: (1955) 2 SCR 1035: ILR (1956) All 76: 1956 SCJ 146: 1956 BLJR 130: (1956) 1 Mad LJ (SC) 88: 1956 Cri LJ 322: 1956 All WR 154: 1956 All LJ 153: 1956 SCA 136: AIR 1956 SC 149 (152) (Pt B) (Pr 8).**

——**S. 408** — Applicability — Accused not proved to be clerk or servant of complainant — He cannot be convicted under this section. **1953 Cri LJ 842: AIR 1953 Pat 100.**

Entrustment of property.

——Ss. 408, 403 and 417 — Applicability — "Entrusted" — Money obtained by cheating on four occasions — Charge of criminal breach of trust — Conviction for cheating or misappropriation — (Criminal P. C. (1898), Sections 234, 236 and 237).

The accused was a cashier in a mill. He had to prepare the debit vouchers on the authority of which the managing agent drew money from the bank. It was his duty to disburse the wages of labourers. He, taking advantage of the sys-

tem of payment of fornightly wages to badli workers drew money as payable to them twice over four months and after paying one set of wages, retained other to himself.

Held, that by placing debit vouchers and other papers before the managing agent for purpose of drawing cheques including wages already paid he had impliedly made a false representation and in inducing the managing agent to draw the cheques had cheated him. The amount so obtained by him could not therefore be said to have been "entrusted" to him. Hence he could not be convicted for the offence under Section 408, Penal Code. AIR 1936 Mad 353 (FB), Rel. on. Although under Sections 236 and 237, Cr. P. Code he could be convicted of the offence of cheating, it was not possible in this case to do that because the cheating was on four different occasions and under Section 234 of that Code more than three offences of the same kind could not be tried together. Still as the money drawn was not intended for the personal use of the accused but in not returning the second set of wages drawn in excess he had misappropriated the amount and was therefore liable for conviction under Section 403, Penal Code. **70 Mad LW 857: 1957 Mad WN 424: (1957) Mad LJ (Cr) 408: 1957 Cr LJ 1284 (2): AIR 1957 Mad 722 (723) (Pt A) (Prs 5, 7).**

——S. 408 — Essentials — Failure to account for moneys entrusted — Offence.

The mere failure of accounting for the moneys entrusted to him may not be sufficient to hold the accused guilty of criminal breach of trust. That is only an indication of a piece of evidence evidencing the dishonest intention and must be considered along with the other facts of the case.

Held, on a consideration of the evidence, that prosecution had failed to prove guilt of accused. **1957 Cri LJ 899: 23 Cut LT 352: ILR (1957) Cut 368: AIR 1957 Orissa 165 (168) (Pt B) (Pr 11) (DB).**

Dishonest intention.

——S. 408 — Dishonest intention — Essential ingredient of Section 408 is dishonest misappropriation — No evidence of dishonesty — Accused cannot be convicted merely on basis of assumption. **AIR 1955 NUC (Assam) 2825 (DB).**

——S. 408 — Dishonest intention — Proof.

Where it is proved that the Secretary of a Co-operative Society has converted the money of the Society in his hands to his own use or expended it for purposes other than the purposes of the society, he would be guilty of criminal breach of trust, for such conversion or expenditure must necessarily be dishonest. **1957 Ker LT 834: (1957) Mad LJ (Cr) 782: 1958 Cri LJ 518: AIR 1958 Ker 103 (104) (Pr 6) (DB).**

——S. 408 — Retention of money realised by accused — Inference of dishonest misappropriation — Benefit of doubt to accused.

Although under certain circumstances retention of money realised by the accused while he was in a fiduciary position may give rise to an inference of dishonest misappropriation this cannot be rigidly applied in every case irrespective of the special circumstances obtaining in that particular case. After all, it is a rule of evidence and not a rigid rule of law and case has to be taken in its application. AIR 1954 Madh B 21 and AIR 1930 Pat 209, Rel. on.

Even if there existed some room for doubt, in the absence of any attempt on the part of the complainant to call for an explanation from the accused for such retention and on account of failure on the part of the Magistrate to mention facts in the charge importing dishonest misappropriation, the accused is entitled to its benefit. **Madh BLR 1956 (Cri) 349: 1956 MBLJ (HCR) 1497.**

Sentence.

——S. 408 — Sentence — Considerations, indicated. See Criminal P. C. (1898), Section 32. **1957 Cri LJ 1284 (2): AIR 1957 Mad 722.**

——S. 408 — Punishment.

The offence of criminal breach of trust should not be lightly dealt with. **ILR (1956) 6 Raj 942.**

——S. 408 — Punishment — Fine — Direction for payment to other party — (Criminal P. C. (1898), Section 545).

Held, that the direction to pay a portion of the fine to the other party must be set aside. This was not a civil case in which a decree may be granted. **ILR (1956) 6 Raj 942.**

Procedure.

● **——Ss. 408 and 405** — Criminal P. C., Sections 182 and 181 (2) — Criminal breach of trust — Uncertainty as to place where offence committed — Provisions of S. 182, Criminal P. C. applies. See Criminal P. C. (1898), Section 182. **1957 Cri LJ 322: AIR 1957 SC 196.**

——S. 408 — Prevention of Corruption Act (1947), Sections 5 (1) (c) and 6 — Offence falling under Section 5 (1) (c) and requiring previous sanction for prosecution — Prosecution cannot, by ignoring that accused is public servant, evade requirement of previous sanction by filing complaint under Section 408, Penal Code — (Criminal P. C. (1898), Section 195). See Prevention of Corruption Act (1947), Section 5 (1) (c). **1957 Cri LJ 1078: AIR 1957 Andh Pra 663 (DB).**

——S. 408 — Two persons acting in concert can jointly be charged with misappropriation of same sum. See Criminal P. C. (1898), Section 222 (2). **1959 MPLJ (Notes) 85.**

——S. 408 — Offences under Sections 408, 477-A Penal Code — Sanction of Registrar of Co-operative Societies. See Co-operative Societies — Madras Co-operative Societies Act (6 of 1932), Section 56 (3). **ILR (1958) Cut 140.**

——S. 408 — Procedure — Offence committed by officer of Co-operative Society — Under B and O Co-operative Societies Act, Section 47, sanction for prosecution, is necessary — Criminal misappropriation is not one of offences indicated in Sections 45 and 46 of the Act, which require sanction — Such an offence falls under general law and prosecution under Sec. 408 is maintainable. See Co-operative Societies — Bihar and Orissa Co-operative Societies Act (6 of 1935), Section 47. **1957 Cri LJ 899: AIR 1957 Orissa 165 (DB).**

——Ss. 408, 405 and 21 — Criminal P. C. (1898), Section 197 — Railway servant charged under Section 408 for criminal breach of trust — No sanction is necessary for prosecution — (Railways Act (1890), Section 137). See Criminal P. C. (1898), Section 197. **1958 Cri LJ 1083: AIR 1958 Pat 441.**

SECTION 409

SYNOPSIS

(Penal Code (1860), Section 409.)

See also Penal Code (1860), S. 405.

1. Scope and applicability.

2. This section and Section 5 (1) (c) of Prevention of Corruption Act, 1947.

3. Public servant.
4. Banker.
5. Agent.
6. Partner.
7. Broker.
8. Sentence.
9. Evidence and proof.
10. Procedure.
See also Note 2.
11. Some illustrative cases.

1. Scope and applicability.

●——**S. 409** — Offence under, and that under Section 105, Insurance Act are not same — Two trials are not barred under Article 22 (3) of the Constitution. **1961 (1) Cri LJ 725: AIR 1961 SC 578.**

●——**S. 409**—Constitution of India, Art. 134 (1) (c) — High Court's power to grant certificate under Article — Trial of offence under Sec. 409, Penal Code, along with Section 5, Prevention of Corruption Act. See Constitution of India, Article 134 (1) (c). **1960 Cri LJ 539: AIR 1960 SC 397.**

●——**Ss. 409 and 405 — Offence under Sec. 409 — Criminal breach of trust — Entrustment of property and trust — Property pledged — Dominion of pledgee over property pledged — (Contract Act (1872), Section 172).**

For an offence under Section 409, Penal Code, the first essential ingredient to be proved is that the property was entrusted. When Section 405 which defines "criminal breach of trust" speaks of a person being in any manner entrusted with property, it does not contemplate the creation of a trust with all the technicalities of the law of trust. It contemplates the creation of a relationship whereby the owner of property makes it over to another person to be retained by him until a certain contingency arises or to be disposed of by him on the happening of a certain event. The person who transfers possession of the property to the second party still remains the legal owner of the property and the person in whose favour possession is so transferred has only the custody of the property to be kept or disposed of by him for the benefit of the other party, the person so put in possession only obtaining a special interest by way of a claim for money advanced or spent upon the safe keeping of the thing or such other incidental expenses as may have been incurred by him.

Where securities have been delivered with a view to cover the repayment of any overdraft by the pledgor Bank to the pledgee Bank and it is agreed that they are to be disposed on the arising of a stipulated contingency only, then by the very fact of the delivery of the securities to the bailee the latter becomes a trustee in terms of the contract, not for all purposes, but only for the limited purpose indicated by the agreement between the parties. The pledgor in such a case only transfers his possession of the property to the pledgee who has a special interest in the property of enforcing his charge for payment of an overdraft, if any, whereas the property continues to be owned by the pledgor. If in such a case there is no overdraft, the pledgor Bank can ask for a return of the securities at any time. And the securities having continued to be the property of the pledgor Bank the pledgee Bank, or its Managing Director, has no right to deal with them. In such a case the Managing Director, holding a power of attorney on behalf of the pledgee Bank, can be said either to have been entrusted with the property in a derivative sense or to have dominion over the securities as a banker; and thus in either case, the first essential condition for the application of Section 409, Penal Code, is fulfilled. Jaswantrai Manilal Akhney v. State of Bombay. **1956 SCR 483: 1956 Cri LJ 1116: 1956 All WR (Sup) 126: 1956 SCA 941: 1956 SCJ 613: (1956) 2 Mad LJ (SC) 49: (1956) 26 Bom Cas 340: 58 Bom LR 1026: AIR 1956 SC 575 (582) (Pt C) (Prs 11, 13).**

——**S. 409** — Scope — Ingredients of offence are that the accused in his capacity of a public servant had been entrusted with property and that he had committed criminal breach of trust in respect of that property. **1964 All WR (HC) 315: 1964 All Cri R 217.**

——**Ss. 409 and 420 — Applicability — Criminal breach of trust and cheating — Distinction.**

The accused realised a sum of Rs. 596-14-0 from certain cultivators on account of canal dues in his capacity as canal amin and deposited only a sum of Rs. 398-4-6 out of it in the Government treasury. The excess sum of Rs. 198-9-6 was not deposited in the treasury, though it was realised from the cultivators. The sum of Rs. 596-14-0 realised by the accused was not really due from those cultivators as canal dues. The sum due was Rs. 398-4-6 and that was the sum which, after realisation was deposited by the applicant in the Government treasury. The amount of Rs. 198-9-6 which was misappropriated by the applicant, had been realised by him from the cultivators representing that it was due from them as canal dues, though this was not correct.

Held, that so far as the balance of Rs. 198-9-6 was concerned, that amount was never due to the Government. At the same time, he could not become the trustee of this money on behalf of the cultivators from whom he realised this money. Hence, the only offence, which, on these facts, the applicant could be held liable for, was the offence of cheating and obtaining delivery of property by commission of that offence which would be punishable under Section 420, Penal Code. The appropriate provision of law is only Section 420, Penal Code and Section 409, could not apply at all. AIR 1936 Mad 353 (FB) and 1927 AC 487, Followed. **1957 All WR (HC) 43: 1957 Cri LJ 170: 1957 All LJ 147: AIR 1957 All 122 (123) (Pt B) (Pr 3) (DB).**

——**S. 409 — Validity of — (Constitution of India, Articles 13 (1), 14) — (Prevention of Corruption Act (1947), Section 5 (1) (c)).**

There is no discrimination against an accused who is proceeded against for an offence under Section 409, I. P. C. and not for an offence under Section 5 (1) (c) of the Prevention of Corruption Act. The provisions of Section 409, I. P. Code, therefore, do not go against Article 14 of the Constitution and are not void in view of Article 13 (1) of the Constitution. **1953 All LJ 534: 1954 Cri LJ 96: AIR 1954 All 80 (81) (Pr 9) (DB).**
[**Overruled** on another point in AIR 1955 All 275.]

——**S. 409 — "Entrustment" — What amounts to.**

Where under an agreement entered into by the accused with the Government the accused are under a duty to sell to persons the grain stored in the Unit established by Government and to keep the sale proceeds or pay over the sale proceeds to the Government and the accused sell the grain and misappropriate the sale proceeds thereof, there is an entrustment of property within the meaning of Section 409 and the charge must be deemed to be a charge for misappropriation of the sale proceeds. **ILR (1956) Hyd 191: 1956 Cr LJ 1320: AIR 1956 Hyd 180 (184) (Pt B) (Pr 13).**

——S. 409 — Ingredients of offence — Prosecution must prove that accused was one of categories of persons mentioned in section, that he was entrusted with property and that he committed breach of trust in respect of property. **AIR 1955 NUC (Mad) 3922.**

——Ss. 409, 403 — Misappropriation and converting to own use — What amounts to — Mere retention of money, effect stated — (Words and Phrases). See Penal Code (1860), Section 403. **1956 Cri LJ 630: AIR 1956 Mys 40.**

——S. 409 — Property — Intention to destroy and to abandon — Actual abandonment and destruction — Distinction.

If an article is abandoned, it becomes res nullius, and there can be no theft or breach of trust. But a very clear distinction must be drawn between an intention to destroy and to abandon and an actual destruction and abandonment. The very fact that the owner of the property intends to destroy or abandon that property and hands it over to some person to effect those purposes is a clear indication that he still maintains his rights as the owner of that property and that those rights subsist until the abandonment or destruction is completed. As long as the destruction or abandonment is not fulfilled and as long as it is still in the hands of the owner to countermand such destruction or abandonment the property is still the property of the owner and the taking it out of his possession is theft, and improper use of it is breach of trust. **52 Cri LJ 36: 1951 Nag LJ 102: ILR (1950) Nag 957: AIR 1951 Nag 150 (153) (Pt A) (Prs 28, 29) (DB).**

——S. 409 — Railway disposing of goods consigned — Disposal by destruction — Possession, how long continues.

A railway in disposing of the goods consigned can part not only with possession but also with ownership. But in the case of disposal by destruction there can be no fresh act of pretension till the reproduction of the animus possidendi is rendered impossible or there exists a contrary animus not to possess the thing. Possession thus continues so long as it is not negatived by a new act of will opposed to that under which possession of the thing originally continued (ita nulla amittatur, nisi in qua, utrumque in contrarium actum est). Once, of course, possession and ownership are destroyed and the goods go into the possession and ownership of another, there is no possibility of an animus revertendi. Till possession and ownership are so definitely destroyed, there would be theft, conversion, trover, trespass and misappropriation of the goods, as the case may be. **52 Cri LJ 36: 1951 Nag LJ 102: ILR (1950) Nag 957: AIR 1951 Nag 150 (154) (Pt B) (Pr 33) (DB).**

——S. 409 — Property — Movable does not cease to be "property" even if its value is reduced to almost nothing. **52 Cri LJ 36: 1951 Nag LJ 102: ILR (1950) Nag 957: AIR 1951 Nag 150 (155) (Pt D) (Pr 42) (DB).**

——S. 409 — Property — Abandonment and condemnation of movable property — Distinction.

Per Mudholkar J.:— A distinction must be made between abandonment of moveable by the owner thereof and condemnation of that movable by a person or authority under a statutory power. As a result of being abandoned, a moveable usually becomes res nullius. But it cannot become res nullius because someone, entitled to condemn it, condemns it. **52 Cri LJ 36: 1951 Nag LJ 102: ILR (1950) Nag 957: AIR 1951 Nag 150 (155) (Pt E) (Pr 43) (DB).**

——Ss. 409, 34 — Accused, a clerk in Tahsil office — Misappropriation of Government money by falsification of accounts and forgery in furtherance of common intention of accused and his superior officer — Defence that accused acted according to directions of his superior cannot protect him — Fact that superior officer died before trial is no legal bar to conviction of accused under Section 409/34. AIR 1956 SC 177, Rel. on. **ILR (1963) Cut 877.**

——S. 409 — Scope — Person cannot be convicted of criminal breach of trust of immovable property — Exception may arise when offender is trustee — But in such a case it may be argued that he committed the offence in respect of sale proceeds and not the property. See Penal Code (1860), Section 405. **AIR 1955 NUC (Punj) 118.**

——S. 409 — Criminal breach of trust — Gist of offence — Public servant should be required or authorised to receive property.

The gist of the offence under Section 409 is that the accused, though he might be a public servant, must be shown to have been either required or authorised to receive the property in respect of which the criminal breach of trust is alleged. If he is not so required or authorised, then even though he may have received it, he would be acting as a mere volunteer and will not be taken as having been entrusted with the property in his capacity of a public servant. The offence in such circumstances would fall under Section 406 and not under Section 409, I. P. C. **(1956) 9 Sau LR 323.**

——Ss. 409, 405, 467 and 477-A — Property — Meaning — Includes things purchased with money entrusted. See Penal Code (1860), Section 405. **1955 Cri LJ 1539: AIR 1955 Trav-Co 271 (DB).**

——S. 409 — Scope — Entrustment of goods for sale and not for safe custody — Sale with knowledge of complainant — Complainant only wanting price—Remedy of complainant is civil action for damages for breach of contract. **AIR 1955 NUC (Trav-Co) 5078.**

——S. 409 — Cochin Penal Code, Section 389 — Applicability — Receiver of estate appointed by Court — Duty of — Failure to bring into account all money received by him — Omission to show price actually charged for goods or produce of estate — Offence.

A receiver appointed by a Court in respect of a property stands in a fiduciary relationship to the Court which appointed him and to the estate of which he is the receiver; and it is therefore, incumbent on him to enter any income which he receives in respect of the property in his charge, in his account, by whatever name it is called, such as premium, though it may be an amount over and above what is received as legitimately can be demanded under the law. If he fails to do so, he is clearly liable for criminal breach of trust as defined in Section 385 of the Cochin Penal Code (Section 405, I. P. Code). There being a legal obligation on the receiver to conform to certain rules and regulations, if he violates them and fails to bring into account the amount actually received by him from persons to whom he sells the produce or goods of the estate, it must be that he dishonestly used or disposed of the property in violation of the direction of law prescribing the mode in which the trust has to be executed by him and it must be held that he is guilty of the offence under Section 385 and liable to conviction under Section 389, Cochin Penal Code. **1951 KLT 503: 1952 Cr LJ 766: ILR (1951) Trav-Co 765: AIR 1952 Trav-Co 128 (131) (Pt A) (Pr 12) (DB).**

[Reversed in AIR 1953 SC 478.]

2. This section and S. 5 (1) (c) of Prevention of Corruption Act, 1947.

○——S. 409 — Scope — Section 5 (2) of Prevention of Corruption Act — Offence under, is not identical. See Criminal P. C. (1898), Section 403. 1957 Cri LJ 582: AIR 1957 SC 592.

○——S. 409 — Scope — Is not repealed by Section 5, Prevention of Corruption Act — Prosecutions — Sanction — Does not offend Article 14 of the Constitution. See Prevention of Corruption Act (1947), Section 5. 1957 Cri LJ 575: AIR 1957 SC 458.

○——S. 409 — Criminal P. C. (1898), Sections 197 and 537 — Sanction for prosecution under Section 409, I. P. C., of one accused only, on charge of conspiracy to commit criminal breach of trust, with other accused — Sanction to prosecute both accused under Section 5 (2), Prevention of Corruption Act — Sanction will not cover prosecution of other accused under Section 409, I. P. C. — (Prevention of Corruption Act (1947), Section 5 (2)). See Criminal P. C. (1898), Section 197. 1955 Cri LJ 857: AIR 1955 SC 287.

——S. 409 — Prevention of Corruption Act (1947), Section 5 (1) (c) — Criminal breach of trust by public servant — Power of State to prosecute under Section 409, Penal Code — Applicability of Sections 3 and 7, Criminal Law Amendment Act (1952) — (Criminal Law Amendment Act (1952), Sections 6, 7). See Prevention of Corruption Act (1947), Section 5 (1) (c). AIR 1958 All 187.

○——S. 409 — Scope — Effect of Section 5 (2) of the Prevention of Corruption Act indicated. See Prevention of Corruption Act (1947), Section 5 (2). 1955 Cri LJ 775: AIR 1955 All. 475 (FB).

——S. 409 — Scope — Section 5 (1) (c) of Prevention of Corruption Act prior to amendment in 1952 — Does not pro tanto repeal Section 409, I. P. Code. See Prevention of Corruption Act (1947), Section 5 (1) (c). 1953 Cri LJ 15: AIR 1953 Nagpur Pra 29 (DB).

○——S. 409 — Scope — Is repealed by Prevention of Corruption Act — (Prevention of Corruption Act (1947), Section 5 (4) (as amended by Act 40 of 1952)) — (General Clauses Act (1897), Section 6).

The Court never looks with favour upon the suggestion that there is an implied repeal and the intention of the Court will always be against the repeal of an earlier statute when the Legislature has not expressly done so. The language used by the legislature in Section 5 (4), Prevention of Corruption Act, clearly negatives any suggestion that the legislature intended to repeal the provisions of Section 409, Penal Code. It cannot also be held that Section 409 is impliedly repealed. State v. Pandurang, ILR (1955) Bom 924: 57 Bom LR 893: AIR 1955 Bom 461 (451 to 455) (FB). Rel. on: (1954) 8, 9, 57) (FB).

——S. 409 — Prevention of Corruption Act (1947), Section 5 (1) (c) and (4) — Prosecution can elect to charge public servant either under Section 5 (1) (c) or under Penal Code (1860). Section 409. See Prevention of Corruption Act (1947), Section 5 (1) (c). 1955 Cri LJ 1298: AIR 1955 Cal 681 (DB).

——S. 409 — Scope — Is repealed by Section 5, Prevention of Corruption Act (1947). The provisions of Section 409, I. P. Code, so far as they relate to public servants have not been repealed by Section 5 of Prevention of Corruption Act (1947) and therefore, irrespective of whether the offences alleged to have been committed by the petitioner, pertain to a period before or after the Prevention of Corruption Act came into force, it must be held that the trial Magistrate has jurisdiction to proceed with the trials under Section 409, Penal Code, notwithstanding the provisions of Section 5 (2), Prevention of Corruption Act. AIR 1942 Cal 607; AIR 1952 Punj 89; AIR 1953 Punj 249, Not foll.; AIR 1952 All 35; AIR 1953 Mad 137; AIR 1953 Madh Bha 139; AIR 1953 Cal 681; AIR 1954 All 80; AIR 1954 Hyd 56; AIR 1954 Mad 401. Foll. 1954 Cri LJ 1431; AIR 1954 Him Pra 78 (78) (Pt A) (Pr 6).

——S. 409 — Section 5, Prevention of Corruption Act as amended does not repeal Section 409, Penal Code. See Prevention of Corruption Act (1947) (as amended by Act 40 of 1952) Section 5 (4). AIR 1955 NUC (Hyd) 5079 (DB).

——S. 409 — Scope — Section 5 (1) (c), Prevention of Corruption Act — Distinction pointed out. See Prevention of Corruption Act (1947), Section 5 (1) (c). 1954 Cri LJ 764: AIR 1954 Hyd 56 (DB).

——S. 409 — Scope — Is repealed by Prevention of Corruption Act (1947), Section 5 (4) (c).

Section 5 (1) (c) of the Prevention of Corruption Act, as it stood prior to the Prevention of Corruption (Second Amendment) Act of 1952, did not pro tanto repeal Section 409, Penal Code, so far as it relates to offences by public servants. A public servant can, therefore, be prosecuted under Section 409, Penal Code, notwithstanding Section 5 (2) of that Act. AIR 1954 Madh Bha 139; AIR 1953 Mad 137, Foll.; AIR 1952 Punj 89, Dissent from. 1954 Cri LJ 1404: ILR (1955) Hyd 573: AIR 1954 Hyd 56 (DB) (Pt C) (Pr 23) (DB).

——S. 409 — Prevention of Corruption Act (1947), Section 5 (1) (c) — Section does not repeal Section 409, Penal Code. AIR 1952 Punj 89, Dissented from. 1953 Cri LJ 989: AIR 1953 Madh Bha 139.

——S. 409 — Section 26 of the General Clauses Act (1897), shows that Section 409, Penal Code, cannot be considered to have been repealed by Section 5 (1) (c), Prevention of Corruption Act — AIR 1953 Mad 137, Foll.; AIR 1952 Punj 89, Dissented from. 1953 Mad WN 303: 1954-1 Mad LJ 456: 1954 Cri LJ 430: AIR 1954 Mad 401 (402) (Pt A) (Pr 4).

——S. 409 — Scope — Section is not repealed by Section 5 (1) (c) of the Prevention of Corruption Act (2 of 1947). 85 Mad LW 1120: 1953 Cri LJ 300: 1952 Mad WN (Cri) 208: 1952 Mad WN 957: (1952) 2 MLJ 777: AIR 1953 Mad 137 (137) (Pars 3, 4).

——S. 409 — Prevention of Corruption Act, Section 5 (1) (c) — Section does not repeal Section 409, Penal Code — (General Clauses Act (1897), Section 26) — AIR 1952 Punj 89, Dissented from. See Prevention of Corruption Act (1947), Section 5 (1) (c). 1953 Cri LJ 100: AIR 1953 Pepsu 1 (DB).

——S. 409 — Provisions of Section 409, Penal Code, concerning public servants are repealed by Section 5 (1) (c), Prevention of Corruption Act (1947). 53 Pun LR 198: 1952 Cri LJ 310: ILR (1954) Punj 85: AIR 1952 Punj 89 (DB).

[Overruled in AIR 1957 SC 456.]

——S. 409 — Scope — Is repealed by Section 5 (1) (c), Prevention of Corruption Act.

Section 5 (4), Prevention of Corruption Act makes it abundantly clear that Section 409, Penal Code, as applicable to public servants is not repealed by Section 5 (1) (c) at any rate, since the amendment came into force. Even for the period between 1947 when the Prevention of

Corruption Act was passed, and August, 1952, when the amendment was made, Section 409, as it related to public servants, cannot be deemed to have been repealed by implication. A special law does not repeal the general criminal law unless the intention is made clear in that law. AIR 1952 Punj 89 and AIR 1953 Punj 249, Not foll.; AIR 1953 Cal 681, Rel. on. **1954 Cri LJ 1446: ILR (1954) Raj 910: 5 Raj LW 4: AIR 1954 Raj 211 (213) (Pt A) (Prs 12, 13, 15) (DB).**

——S. 409 — Applicability — Offence covered by Section 409 and Section 5 (1) (c), Prevention of Corruption Act — Prosecution under Section 409 — Maintainability.

Where the act is an offence under two different enactments, Section 26, General Clauses Act, gives option to the prosecutor to prosecute either under one or the other, and it is not open for the Court to say that the prosecution must be under that enactment which requires sanction. What is implicit in view of Section 26 is made clear by Section 5 (4) of the Prevention of Corruption Act. It is, therefore, open to the prosecutor to prosecute a public servant under Section 409 without sanction from the State, and the Court cannot insist that the prosecution must be under Section 5 (1) (c), Prevention of Corruption Act with the sanction of the State. AIR 1925 All 230, Distinguished. **1954 Cri LJ 1446: 5 Raj LW 4: ILR (1954) Raj 910: AIR 1954 Raj 211 (213, 214) (Pt B) (Prs 17, 18) (DB).**

——S. 409 — Applicability — Offence falling under Section 409, Penal Code and Section 5 (1) (c), Prevention of Corruption Act — Accused can be prosecuted under either provision — General Clauses Act (1897), Section 26. **AIR 1955 NUC (Sau) 5768 (DB).**

3. Public servant.

——S. 409 — 'Public servant' — Qurq Amin of Co-operative Department is a public servant. **1960 All LJ 357.**

——S. 409 — Public servant — Mauzadar in Assam — Use of Government revenue for paying his arrears for earlier years — Liability under Section 409 — Assam Land and Revenue Regulation, Rule 167-A (6).

Where the accused, a Mauzadar in Assam (a public servant) had failed to deposit the entire amount collected by him as Government revenue for certain years within the period specified in the Kabuliat executed by the accused in favour of the State Government, the defence that he withheld part of the collection for paying up the arrears which are due from him in respect of earlier years would not exempt the accused from the liability under Section 409 in respect of the defalcations from the collections he had made. The money was Government money and unless authorised, he could make no other use of it but pay the same to the Treasury.

The liability incurred by the accused who was a public servant was not merely a civil liability. ILR (1937) 1 Cal 272, Rel. on.

The retention of the money by the accused or conversion thereof was illegal and against the provision of law and therefore, that was done 'dishonestly' as contemplated under Section 24, Penal Code. AIR 1953 SC 478; AIR 1956 SC 217; AIR 1936 Cal 520, Disting. **ILR (1960) 12 Assam 403.**

——Ss. 409, 405 — Accused, a public servant collecting tax and fine as public servant from landholder and misappropriating it — Government not lawfully entitled to enforce landholder's alleged liability — Accused still is guilty of criminal breach of trust — AIR 1957 All 122, Dissented from. See Penal Code (1860), Section 405. **1960 Cri LJ 217: AIR 1960 Bom 53 (DB).**

——Ss. 409, 21, Cl. 9, Expl. 2 — Public Officer — Nominee of permanent incumbent carrying on duties of branch Post-master — Nominee is not a public officer — As there is no letter of appointment by Government, no question of any legal defect in his right to hold situation arises — Expl. 2 of Section 29, Clause 9 has no application — Nominee, however, would become "public servant" if there is temporary letter of appointment by Government. See Penal Code (1860), Section 21, Clause 9, Expl. 2. **1955 Cri LJ 1253: AIR 1955 Cal 482 (DB).**

——S. 409 — Goods sent by railway found to be rotten — Order for destruction — Goods clerks selling goods privately — Offence under section, if committed.

Where the owner orders the destruction of the goods, abandoning at the same time his original animus to possess, possession and ownership come to an end by express abandonment. But a bailee is not in the same position as the owner. Thus, where goods sent by railway are found to be rotten the railway can order destruction of the goods, but possession of railway continues till destruction is carried out as there is no general abandonment. Different consequences arise on whether the goods are sold or destroyed; and the railway must, therefore, be deemed to continue in possession till one or the other action was carried out. They cannot, therefore, abandon the goods without the particular end being achieved.

A wagon of potatoes was unloaded at certain railway station. The potatoes were examined by doctor and were declared by him to be offensive and unfit for human consumption. The station master thereupon ordered the potatoes to be destroyed. The accused, who were two goods clerks and who had charge and custody of the potatoes sold them privately instead of destroying them:

Held, that the ownership of the owner of the goods was not destroyed and that the goods were still in the possession of the railway. Thus, both possession and ownership were outstanding in the consignor and the railway taken together. The goods clerks, therefore, were clearly guilty of breach of trust, and being public servants they ought to be convicted under Section 409. **52 Cri LJ 36: 1951 Nag LJ 102: ILR (1950) Nag 957: AIR 1951 Nag 150 (154) (Pt B) (Prs 34, 35) (DB).**

——Ss. 409 and 21, Cl. 4 — Criminal breach of trust by public servant — Receiver in insolvency — Receipt of sale proceeds of insolvent's property — Onus of proof — Failure to give amount while handing over charge to his successor — Accused held guilty.

In view of the definition of 'public servant' in Clause 4 of Section 21 of the Indian Penal Code, a Receiver in insolvency is a public servant.

In the case of a servant charged with misappropriating the property of his master, the elements of criminal offence will be established if the prosecution proves that the servant received the property, that he was under a duty to account to his master and had not done so. If these facts are within the knowledge of the accused, then he has to prove them; of course the prosecution has to establish a prima facie case in the first instance; it is enough to establish facts which give rise to a suspicion and then by reason of Sec. 106 of the Evidence Act to throw the onus on him to prove his innocence. AIR 1959 SC 1390, Rel. on.

The accused, a receiver in insolvency had received a sum of Rs. 1500 out of the sale of the insolvent's property but had not entered the the same in the General Cash Book as required by Rule 21, Part X, Chap. 1 of General Rules and Circular Orders of the Orissa High Court (Civil) Vol. 1. While giving over the charge of his office, the accused did not hand over the amount to his successor in office.

Held, that the accused was guilty of criminal breach of trust. **27 Cut LT 406: 1961 All WR (Supp) 88: 1961 All Cr R 402: 1962 (1) Cri LJ 658 (Orissa).**

4. Banker.

——S. 409 — 'Banker' — If includes firm.

The word 'banker' has not been used in Section 409 in the technical sense of the Indian Banking Companies Act, but signifies any person who discharges any of the functions of the customary business of banking and would, therefore, include a firm. **1960 All LJ 33: 1960 Cri LJ 188: 1960 All WR (HC) 67: 1960 All Cr R 84: AIR 1960 All 103 (112) (Pt G) (Pr 38) (DB).**

——S. 409 — Applicability — Deposit made with accused in their capacity as bankers — Dishonest misappropriation or conversion — Offence.

Where the deposits which the depositors make with the accused in the capacity of the latter as bankers, the accused cannot be deemed to have been entrusted with the money of the depositors; instead they remain merely their debtors. Since entrustment is the essence of an offence under Section 409 they cannot be said to have committed criminal breach of trust by dishonestly misappropriating or converting to their own use the deposited amounts. **1960 All LJ 33: 1960 Cri LJ 188: 1960 All WR (HC) 67: 1960 All Cr R 84: AIR 1960 All 103 (112) (Pt H) (Pr 38) (DB).**

——S. 409 — Construction — "Entrustment" — Applicability to deposit with a banker.

An offence under Section 409, I. P. Code, "presupposes an entrustment". But in the case of a deposit with a banker, it becomes the money of the bank and he is only under a contractual obligation to pay the sum deposited when demanded. **1951 All WR (HC) 85: 1950 All LJ 808.**

——S. 409 — Customer depositing money in current account — Bank using money for other business — No offence is committed — There is no question of entrustment. **1952 Cri LJ 552: AIR 1952 Cal 193.**

——S. 409 — Banker — Persons working in bank are not bankers.

Persons working in a bank are not bankers. Therefore, Section 409 has no application in respect of an alleged criminal breach of trust by such persons. **(1950) 20 Comp Cas 220: 51 Cri LJ 388: AIR 1950 Cal 57 (58) (Pt A) (Pr 3).**

——Ss. 409 and 405 — Entrustment — Deposit in bank — There is no entrustment — Relationship between bank and customer is that of creditor and debtor.

Section 409 presupposes entrustment. When a person opens a current account in a bank, there is no question of entrustment. The relationship between the bank and the customer is one of creditor and debtor. Hence, there can be no case against a bank or its officers for committing an offence under Section 409 in respect of the money deposited by a customer: AIR 1941 Cal 713 and AIR 1947 PC 44, Rel. on. **(1950) 20 Comp Cas 220: 51 Cri LJ 388: AIR 1950 Cal 57 (58) (Pt C) (Pr 5).**

5. Agent.

●——**Ss. 409, 405** — Entrustment of property — Directors are not only agents but in some sense and to some extent are in the position of trustees. R. K. Dalmia v. Delhi Administration, **(1962) 32 Com Cas 699: (1963) 1 SCR 253: 1962 (2) Cri LJ 805: AIR 1962 SC 1821 (1837) (Pt E) (Prs 75, 78).**

●——**S. 409 — 'In the way of his business as agent' — Meaning of — Expression not restricted to persons who carry on profession of agency — Requirements of section satisfied if person is entrusted with property in course of his duties as agent.**

What Section 409 requires is that the person alleged to have committed criminal breach of trust with respect to any property be entrusted with that property or with dominion over that property in the way of his business as an agent. The expression 'in the way of his business' means that the property is entrusted to him in the ordinary course of his duty. The requirements of this section would be satisfied if the person be an agent of another and that other person entrusts him with property or with any dominion over that property in the course of his duties as an agent. A person may be an agent of another for some purpose and if he is entrusted with property not in connection with that purpose but for another purpose, that entrustment will not be entrustment for the purposes of Section 409 if any breach of trust is committed by the person. The criminal breach of trust by an agent would be a graver offence only when he is entrusted with property not only in his capacity as an agent but also in connection with his duties as an agent. It is not correct to say that the word 'agent' in Section 409 refers to a 'professional agent, i.e., a person who carried on the profession of agency. 1953 AC 407 and (1885) 16 QBD 487 and 1935 Mad WN 649, Distinguished. R. K. Dalmia v. Delhi Administration, **(1963) 1 SCR 253: (1962) 32 Com Cas 699: 1962 (2) Cri LJ 805: AIR 1962 SC 1821 (1839, 1840) (Pt H) (Prs 91, 96).**

●——**S. 409** — Agent — Director of company is its agent. AIR 1942 Lah 47 and AIR 1951 Punj 99, Rel. on. R. K. Dalmia v. Delhi Administration, **(1963) 1 SCR 253: (1962) 32 Com Cas 699: 1962 (2) Cri LJ 805: AIR 1962 SC 1821 (1841) (Pt I) (Pr 98).**

●——**Ss. 409 and 408** — Applicability — Agent and servant — Distinction pointed out — (Contract Act (1872), Section 182) — (Partnership Act (1932), Section 18). See Penal Code (1860), Section 408. **1956 Cri LJ 322: AIR 1956 SC 149.**

——Ss. 409 and 405 — Entrustment of and dominion over property — Commission agent — Accountable under terms of agreement — Cheques issued by agent for payments due dishonoured — **Held,** on facts that there was neither entrustment nor dominion — Agent was not guilty for offence under Section 409. AIR 1938 Nag 254 and AIR 1956 Cal 188, Rel. on. **1962 (1) Cri LJ 411: AIR 1962 Cal 197 (199 to 201) (Prs 12, 14, 17, 21, 22) (DB).**

——S. 409 — Applicability — Criminal breach of trust by company appointed as carrier for whole year by Government Department.

Where a transport company with which the accused persons were associated was appointed the carriers of building materials for the construction division for the whole year 1953-54 and thereafter they were entrusted with a delivery order in respect of 100 tons of cement in that capacity as such carrying contractors, and criminal breach of trust was alleged to have been

committed by them in respect of a part of these 100 tons of cement after they were entrusted with dominion over the same in the way of their business as an agent of department of the State Government.

Held, that it was a prima facie case under Section 409 and not under Section 407. **1957 Cri LJ 124 (Cal).**

——**Ss. 409, 405** — Applicability — Complainant handing over cheque to accused in latter's capacity as agent of firm — Whole amount of cheque not credited to complainant's account — Section does not apply — Offence, if any, falls under Section 405. **1949 Nag LJ 382: ILR (1949) Nag 620: AIR 1952 Nag 255 (256) (Pt A) (Pr 6).**

6. Partner.

●——**Ss. 409, 405** — Criminal breach of trust — Entrustment of dominion over property is essential — Dominion of partner over partnership asset — No entrustment unless there is special agreement — Agreement authorising working partner to recover money and to utilise the recoveries for partnership business — Failure to deposit money in bank — Not an offence under Section 409, I. P. C. Velji Raghavji v. State of Maharashtra, **67 Bom LR 443: 1965 Mad LJ (Cri) 519: (1965) 1 SCWR 586: 1965 Mah LJ 487: 1965 SCD 824: 1965-2 Andh LT 201: 1965 All Cr R 392: 1965 MPLJ 660: 1965 All WR (HC) 598: (1965) 2 SCJ 186: 1965 (2) Cri LJ 431: AIR 1965 SC 1433 (1435, 1436) (Pt A) (Prs 6, 7).**

——**S. 409 — Applicability — Partner withholding money.**

It is essential in order to constitute an offence under Sec. 409 that the person with whom amounts or property is entrusted must act in fiduciary capacity. If it was a partnership and one partner had withheld monies of the other partners, the remedy would be by the other partner to file a suit for the recovery of the amounts and such a partner cannot be held as one acting in a fiduciary capacity. 52 Cal WN 441, Rel. on. **ILR (1952) Hyd 753.**

——**S. 409 — 'Agent' — Partner — If agent or servant.**

When accused had not only a share in the profits but he had a share in the losses, the accused cannot be regarded as a servant or an agent within the meaning of Section 409. AIR 1934 Sind 22, Disting. **ILR (1952) Hyd 753 (DB).**

——**Ss. 409, 405**—Partnership property — Nature of interest of partners — No entrustment in absence of special agreement — No criminal liability under Section 409. I. P. C. — (Partnership Act (1932), Section 14) — 21 Suth WR (Cr) 59 (FB) and AIR 1932 Bom 57 and AIR 1940 Mad 265, Dissented from. **1959 Cri LJ 322: AIR 1959 J and K 19 (20, 21) (Prs 8, 14).**

7. Broker.

——**S. 409** — Applicability — Money paid to share-broker specifically for purchase of shares — Share-broker neither delivering shares nor returning money — He is guilty under Section 409. See Penal Code (1860), Section 405. **1957 Cri LJ 265 (All).**

8. Sentence.

●——**S. 409** — Trial for offence of criminal breach of trust regarding various items — Separate trials — Sentences to run consecutively totalling 11 years — Accused holding responsible post of trust — Sentence cannot be attacked as severe on ground that this would not have been so if offences were tried at one trial — Criminal P. C. (1898), Section 222. Ranchhod Lal v. State of Madhya Pradesh. **1965 SCD 652: (1965) 2 SCR 283: (1965) 1 SCWR 765: 1965 (2) Cri LJ 253: AIR 1965 SC 1248 (1251) (Pt B) (Pr 20).**

●——**S. 409** — Accused being chief person to carry out main work of conspiracy — Fact that he made no profit for himself out of impugned transactions, that he was 59 years old and had already been ten days in jail held not sufficient for reducing sentence to the period already undergone. See Penal Code (1860), Sec. 120-B. **1962 (2) Cri LJ 805: AIR 1962 SC 1821.**

●——**Ss. 409 and 467—Sentence — Prevention of Corruption Act (1947), S. 5.**

Where the accused, a public servant was prosecuted and convicted for offences under Sections 409 and 467, Penal Code and sentenced to 7 years' and 4 years' rigorous imprisonment for respective offences, taking into consideration the fact that if he had been prosecuted under the Prevention of Corruption Act, the maximum sentence which would have been awarded to him would have been seven years' rigorous imprisonment though the special Court trying him would have imposed upon him a substantial fine even to the extent of the amount embezzled by him and having regard to the circumstances of the case, the sentences were reduced to three years' rigorous imprisonment in each case. Mangleshwari Prasad v. State of Bihar. **1954 Cri LJ 1797: AIR 1954 SC 715 (719) (Pt B) (Pr 11).**

——**S. 409 — Sentence — Considerations for Court.**

The breach of trust by a clerk or a public servant is of an aggravated nature calling for substantial punishment. But having regard to the large number of cases against the same accused with respect to acts committed at different places and at different times, the sentences of 5 years R. I. awarded in each case were allowed to run concurrently and not consecutively as the cumulative effect would be too severe. **(1957) 2 Andh WR 352: (1957) Mad LJ (Cr) 599: 1958 Cri LJ 15: AIR 1958 Andh Pra 29 (31) (Pt C) (Pr 9) (DB).**

——**S. 409** — Conviction and sentence under Section 409, Penal Code by Court Martial — Order of sentence sent to Judicial Magistrate for recovery of fine — Section 70 will apply and recovery will be governed by period of limitation prescribed therein — Scope and object of Sections 69 and 174, Army Act. See Penal Code (1860), Section 70. **1963 (1) Cri LJ 152: AIR 1963 Bom 21 (DB).**

——**S. 409** — Offences of breach of trust and criminal misconduct proved — Sentence — Discretion of Court — Interference by High Court. Prevention of Corruption Act (1947), Section 5 (2). **1962 Ker LT 690.**

——**Ss. 409, 465, 477-A** — Sentence — Amount involved being only Rs. 100 — Crime committed more than six years ago — Accused being under suspense of protracted trial — Sentence of 5 years' rigorous imprisonment held unduly severe and reduced to one year. **1959 Ker LJ 847.**

——**S. 409 — Criminal breach of trust by public servant — Sentence.**

Criminal breach of trust by public servants always calls for a deterrent sentence. That the accused's superior officers have been culpably negligent in supervising his work, can hardly be accepted as an extenuation of the offence. **52 Cri LJ 46: AIR 1951 Kutch 81 (82) (Pt B) (Pr 6).**

——Ss. 409 and 467 — Offence of forgery and embezzlement by postman — Deterrent sentence deserved — Circumstances to weigh sentence. **1964 MPLJ (Notes) 158.**

——S. 409 — Criminal P. C. (1898), Sec. 35 — Criminal breach of trust by accused — Accused convicted in 6 cases — Consecutive sentences totalling to 11 years and fine totalling to Rs. 10,500 held excessive. **(1963) 5 Orissa JD 294.**

——S. 409 — Misappropriation by public workers — Sentence must be severe. **25 Cut LT 269: 1959 Cri LJ 1197: AIR 1959 Orissa 159 (165) (Pt E) (Pr 20).**

——S. 409 — Previous trial in respect of some sum dishonestly misappropriated during a year — Fresh trial for 'misappropriation' of other sums during that year — Desirability of — Jurisdiction to prevent fresh trials is of High Court under Section 561-A — Conviction on second trial — Sentence — Lenient view should be taken. See Criminal P. C. (1898), Section 222 (2). **1961 Raj LW 119.**

9. Evidence and proof.

■ **——S. 409 — Applicability — Failure to account for property entrusted — Dishonest misappropriation or conversion — Inference.**

To establish a charge of criminal breach of trust, the prosecution is not obliged to prove the precise mode of conversion, misappropriation or misapplication by the accused of the property entrusted to him or over which he has dominion. The principle ingredient of the offence being dishonest misappropriation or conversion which may not ordinarily be a matter of direct proof, entrustment of property and failure, in breach of an obligation, to account for the property entrusted, if proved, may in the light of other circumstances, justifiably lead to an inference of dishonest misappropriation or conversion. Conviction of a person for the offence of criminal breach of trust may not, in all cases, be founded merely on his failure to account for the property entrusted to him, or over which he has dominion, even when a duty to account is imposed upon him, but where he is unable to account or renders an explanation for his failure to account which is untrue, an inference of misappropriation with dishonest intent may readily be made. Jaikrishnadas Manohardas Desai v. State of Bombay, **1961 SCD 136: 1961 Pat LR (SC) 38: 1960 Cr LJ 1250: 62 Bom LR 893: (1960) 2 Ker LR 297: (1960) Nag LJ 750: 1961 Mad LJ (Cr) 28: (1961) 1 SCJ 42: 1961 All WR (HC) 54: 1961 All Cr R 17: (1960) 3 SCR 319: AIR 1960 SC 889 (891) (Pt A) (Pr 4).**

——Ss. 409, 161, 165 — Existence of property in excess of official remuneration — Presumption — (Prevention of Corruption Act (1947), Sec 5.) See Penal Code (1860), Section 161. **1957 Cri LJ 575: AIR 1957 SC 458.**

——S. 409 — Police Act (1861), Section 29 — Policeman absconding with his kit — No evidence that he absconded with object of utilizing his kit when not in service — Offence is one under Section 29, Police Act, and not under Section 409, Penal Code. **1952 Cri LJ 433: AIR 1952 Ajmer 23 (2) (23, 24) (Pr 2).**

——S. 409 — Evidence — "Entrustment".

R. K. a cashier employed at a Government sub-treasury, confessed to the sub-treasury officer who was checking the cash that he had misappropriated Government money; he was taken to the Treasurer to whom he admitted having embezzled a sum of Rs. 84,000 during the previous six years in the presence of the Extra Additional Commissioner. He made a confession two days later (2-4-1948) before a Magistrate voluntarily to the same effect. But the confession states that there was no misappropriation or embezzlement between 1945 and May, 1947. It was found the total deficit of cash was Rs. 84,215 on 1-4-48. R. K. was then charged for an offence under Section 409, selecting the period August, 1946 to March, 1947 as the basis far removed from the detection of the offence and also not covered by the confession of the accused. He was convicted of the offence and he appealed.

Held: Though the Tahsildar and the Treasurer were ultimately responsible for the cash and the cashier had only the cash-book, yet it cannot be denied that he was entrusted with cash when he handled the cash day to day and was responsible for cash in the sub-treasury.

The overwriting and other similar irregularities in entries of the cash book, against the rules made by the Government, may be highly suspicious; but particular entries so suspected may not relate to any embezzlement. Mere suspicion cannot take the place of proof of the offence. The confessions of the accused having committed misappropriation during a period of six years but not including the period covered by the charge in the case cannot be used as the basis for conviction though they may furnish evidence as admissions of the fact, that he knew there was a shortage of cash. They do not admit in terms the offence charged and cannot be relied upon. (AIR 1939 PC 47; AIR 1945 Bom 152, Rel. on). **AIR 1961 Ajmer 15 (16) (Pt A) (Pr 2).**

——Ss. 409 and 405 — Criminal breach of trust — Evidence — Absence of evidence indicating modus operandi in committing embezzlement or showing when, how and by whom goods were removed — Criminal breach of trust can still be established: AIR 1960 SC 889 (891), Rel. on. **1965 (1) Cri LJ 539: AIR 1965 All 233 (236) (Pt A) (Pr 11).**

——Ss. 409, 405 — Criminal breach of trust — Finding that accused actually misappropriated, or connived at it, is not necessary to bring home offence to accused — Extent of error of judgment in good faith and negligence indicated. **1965 (1) Cri LJ 539: AIR 1965 All 233 (236) (Pt B) (Prs 12, 13, 15 to 18).**

——Ss. 409 and 405 — Postmaster charged for misappropriation of postal cash —— Explanation by accused that he could not make earlier deposits of cash due to his sudden illness — Evidence showing that he was not ill on the dates claimed — Explanation offered by accused when not reasonably true, dishonest misappropriation must be inferred: AIR 1949 All 412, Disting. **1964 All WR (HC) 315: 1964 All Cri R 217.**

——S. 409 — Public servant depositing security — Defalcation by him in course of service — Loss to Government, reimbursable for deposit — Fact is not conclusive of his dishonest intention. **1960 All Cr R 261: 1960 All WR (HC) 415: 1960 All LJ 534.**

——S. 409 — Burden of proof — Honesty, intention, etc, — Charge of criminal misappropriation of money order against postman — Accused professing to have made payment through boy who obtained payee's signature — Duty of accused to produce evidence as to whom payment was actually made. See Evidence Act (1872), Section 106. **1957 Cri LJ 620: AIR 1957 All 381.**

——S. 409 — Police constable entrusted with uniform not returning same on dismissal from service — Allegation that uniform was lost not proved by accused — Accused must be presumed to have converted it to his own use and is guilty under Section 409. **1950 All WR (Sup) 98 (Bhopal).**

——S. 409 — Dishonest object — Evidence and conviction — Money order clerk in post office receiving Rs. 40/- from remitter — Figures and words tampered with and altered into Rs. 14/- on both top and bottom portion of Money order form and also in carbon copy of receipt and journal — Dishonest object in this act held was obvious — Charge under Section 409 held was established. **ILR (1959) 1 Cal 607.**

——S. 409 — Evidence Act (1872), Section 8 — Mens rea — Charge under Section 409, Penal Code against Registration Clerk in post office in respect of stamp advance money — Shortage in stamp advance money discovered — Evidence as to accused having been found affixing used stamp is admissible to prove mens rea. See Evidence Act (1872), Section 8. **1955 Cri LJ 1578: AIR 1955 Cal 608 (DB).**

——S. 409 — Evidence and proof.

Amount actually handed over to accused and kept by him in the safe — Accused being in charge of the keys of the safe and as such he alone having acccess to the safe so that if from the safe this amount disappeared it was he and he alone who could have been responsible for its disappearance — **Held,** that as the man in charge of the keys the accused had opportunity of taking out the money which he himself had kept in the safe — The conclusion was inescapable that it was the accused who was responsible for the disappearance of the cash and was rightly convicted under Section 409. **1955 Cri LJ 784: ILR (1956) 2 Cal 625: AIR 1955 Cal 236 (239) (Pt A) (Pr 6) (DB).**

——Ss. 409, 405 — Entrustment of amount — Evidence and proof — Person making payment examined but not others who were said to be present at the time — Accused admitting to have received lesser amount — Evidence of person examined held sufficient — It is open to the Court to believe that evidence it is a matter of appreciation of evidence. **(1961) 2 Guj HCR 117: (1961) 2 Guj LR 262: 1961 (1) Cr LJ 654 (Guj).**

——S. 409 — Criminal breach of trust — Evidence and proof — Entrustment as well as dishonest misappropriation proved — Offence is complete.

For conviction under Section 409 what the prosecution has to prove is not only entrustment but also dishonest misappropriation. It is not necessary for prosecution to prove in what manner the accused has dealt with or appropriated the goods. The question is one of intention and not direct proof.

The articles belonging to the master were entrusted for sale to the accused, who was his servant, and some of the articles were found missing while the bills showed that they had been sold by the accused. There was no accounting of the missing articles nor was proof adduced as to how the accused paid off the amount admittedly collected by him under the sales evidenced by the bills.

Held, that irresistible conclusion was that the accused had utilised those moneys for his own use, making him liable for the offence of criminal breach of trust. AIR 1959 SC 1390 and AIR 1960 SC 889, Rel. on. **1963 Ker LJ 33: 1963 (2) Cri LJ 216 (218, 219) (Pt A) (Prs 7, 9, 11) (Kerala).**

——S. 409 — Evidence — Circumstantial evidence.

An assistant parcel clerk was charged under Section 409, I. P. Code. It was alleged that he was in charge of V. P. Parcels His duty was to deliver the parcels to the addressees, take money, and send the money by money order to the senders of the parcels. If the parcels were not delivered to the addressees he had to enter them in the registers as 're-entered on'. The undelivered parcels were supposed to be checked daily by supervisor. It was alleged that the accused delivered some V. P. Parcels to the addressees, took money and gave receipts, but the delivery was not entered in the registers. On the contrary they were entered as 're-entered on', meaning that they were not delivered. After some days, the accused went on sick leave. Accused was employed only two months back. The misappropriation of parcels was discovered when the accused was on leave. His uncle made good the amount by paying it off. The accused was charged under Section 409. None of the addressees could tell it was the accused who delivered the parcels to them. It was found that some times the parcel clerk also used to make the delivery of the V. P. Parcels, though it was the duty of the assistant parcel clerk to do it. The defence of the accused was that, he was a new man, that he had to do the work of a sorting clerk also, that he did not deliver the parcels, that he entered them as undelivered, because he was told to do this and that as he was a new man he had to follow the instructions.

Held, that in the absence of any direct evidence that it was the accused who delivered the parcels and in the face of evidence that the official practice was not always followed, the guilt of the accused was not brought home to him, beyond reasonable doubt. **1954 Madh BLR (Cr) 47: 1954 Cri LJ 1178: Madh BLJ (1954) HCR 558: AIR 1954 Madh Bha 135 (137, 138) (Prs 24, 25).**

——S. 409 — Prosecution under Section 409, I. P. C. — Prosecution to establish beyond doubt extent of property entrusted — Accused acting as agent of agricultural society — Shortage of 142 bags of fertiliser found — Accounts of society, suspicious — Accused not admitting correctness of account — Offence not brought home against accused. **1965 MPLJ (Notes) 67.**

——S. 409 — Postal clerk not counting, postal orders every day — Shortage detected after some days — Act held amounted to conversion.

Where a postal clerk who was keeping a journal in which the sales of postal orders and money realised was maintained did not report the shortage to his superior as he was supposed to do, his explanation that there was an inadvertent loss during the rush of the business cannot be accepted. If for days on end, he does not count and still gives an incorrect return, that itself is an indication of conversion. **1963 Jab LJ 142.**

——S. 409 — Proof — Deposit of amount alleged to have been defalcated does not amount to admission of guilt — Acquittal maintained. **1958 MPLJ (Notes) 161.**

——Ss. 409 and 477-A — Misappropriation by servant of the goods of his master — Nature and burden of proof.

It is not necessary or possible in every case to prove in what precise manner the accused person has dealt with or misappropriated the goods of his master. The question is one of intention and not a matter of direct proof but giving a false account of what he has done with the goods received by him may be treated as a strong circumstance against him. In the case of a servant charged with misappropriating the goods of his

master the elements of criminal offence of misappropriation will be established if the prosecution proves that the servant received the goods, that he was under a duty to account to his master and had not done so. If the failure to account was due to an accidental loss then the facts being within the servant's knowledge it is for him to explain the loss. It is not the law of this country that the prosecution has to eliminate all possible defences or circumstances which may exonerate him. If these facts are within the knowledge of the accused then he has to prove them. Of course the prosecution has to establish a prima facie case in the first instance. It is not enough to establish facts which give rise to a suspicion and then by reason of Section 106 of the Evidence Act to throw the onus on him to prove his innocence. **(1964) Mad LJ (Cr) 719: 1965 Mad WN 154: 78 Mad LW 110: 1965 (2) Cri LJ 826 (828, 829) (Prs 6, 7) (Mad).**

——**S. 409** — Scope — Retention — Inference of misappropriation whether should be drawn, depends on facts of particular case. **1958 Cri LJ 784: 35 Mys LJ 218: ILR (1957) Mys 68: (1957) Mad LJ (Cr) 712: AIR 1958 Mys 82 (83) (Pt A) (Pr 5).**

——**S. 409** — Accused, Sarpanch of Gram Panchayat, receiving money — Money subsequently refunded, accused having redeposited it in bank after three months — This amounts to misappropriation of money though temporarily. **(1965) 31 Cut LT 523.**

——**S. 409** — Public servant — Accused failing to produce money found short — Plea that money was spent on panchayat works — Block Development Officer of Panchayat deposing fact — Doubt whether accused's conduct was dishonest or negligent — Benefit of doubt must be given to accused. **(1965) 31 Cut LT 237.**

——**Ss. 409 and 405** — Charge of criminal breach of trust — Evidence and proof — Precise mode of conversion or misapplication of entrusted property need not be proved — Accused, rendering untrue explanation for his failure to account — Misappropriation with dishonest intention has to be inferred. AIR 1960 SC 889, Rel. on. **(1965) 7 OJD 281: 32 Cut LT 31 (Orissa).**

——**S. 409 — Offence under — Misappropriation of M. O. amount by son of Extra Departmental Agent of Post Office.**

Held, on facts, that as the accused was only liable to the father who was the real agent of the payers in relation to the payees and as a position could be visualised in which the money was handed over by him to his father who might have misappropriated the same, the accused was entitled to the benefit of doubt and could not be convicted for criminal breach of trust. **30 Cut LT 176: (1964) 6 OJD 119: 1964 (2) Cri LJ 325: AIR 1964 Orissa 202 (204) (Pt B) (Pr 6) (DB).**

——**S. 409** — Criminal breach of trust by public servant — Burden of proof — Burden rests on prosecution — Section 106, Evidence Act (1872), does not affect prosecution's initial onus of proving guilt of accused. See Penal Code (1860), Section 405. **1964 (1) Cri LJ 339: AIR 1964 Orissa 46 (DB).**

——**S. 409 — Criminal breach of trust by Public servant — Misappropriation of money — What prosecution has to prove — Proof of manner in which money was misappropriated is not necessary — Burden of proof — Evidence Act (1872), Section 106.**

The well-settled position in law on criminal breach of trust is that it is not necessary or possible in every case to prove in what precise manner the accused person has dealt with or misappropriated the property entrusted to him. The question is one of intention and not a matter of direct proof but giving a false account of what he has done with the property received by him may be treated as strong circumstance against the accused person. In the case of a servant charged with misappropriation of monies of his master, the elements of criminal offence of misappropriation will be established if the prosecution proves that the servant received the monies, that he was under a duty to account to his master and had not done so. If the failure to account was due to an accidental loss, then the facts being within the servant's knowledge, it is for him to explain the loss. It is not the law of the country that the prosecution has to eliminate all possible defences or circumstances which may exonerate the accused; if these facts are within the knowledge of the accused then he has to prove them; of course the prosecution has to establish prima facie case in the first instance; it is enough to establish facts which give rise to a suspicion and then by reason of Section 106 of the Evidence Act to throw the onus on the accused to prove his innocence. If under the law it is not necessary or possible for the prosecution to prove the manner in which the monies had been misappropriated, then the failure of the prosecution to prove facts as set out to prove the manner of misappropriation or the identity of the goods would be of little relevance. AIR 1959 SC 1390, Foll. **ILR (1963) Cut 877.**

——**Ss. 409, 468** — Accused writing accounts under direction of complainant — Intention to defraud not established — Accused held not guilty. See Penal Code (1860), Section 468. **(1963) 29 Cut LT 651.**

——**S. 409 — Intention — Burden of proof.**

Dishonest intention cannot be proved directly and must be inferred from the circumstances. Though the failure to comply with the Rules regarding custody and disbursement of public funds may not suffice to prove such dishonest intention, yet a fairly educated Sarpanch who has been maintaining the Cash Book and other Registers properly, cannot reasonably be expected to have advanced a large sum of money to various persons without obtaining proper receipts as required by the Gram Panchayat Rules. This has a direct bearing on the question of belief or disbelief of the defence story. If the accused failed to account for the sum at the appropriate time and put forward, at a belated stage, a plea which was a mere pretence, the Courts are justified in holding that he dishonestly misappropriated the money, even though there was no direct evidence of conversion of the same to his own use. **26 Cut LT 210: ILR (1960) Cut 143.**

——**Ss. 409, 405 and 477-A — Applicability — 'Misappropriation' — Evidence — Alteration of document.**

For a conviction under Section 409, not only entrustment but also dishonest misappropriation has to be made out.

Where the accused, a money order issue clerk at post office was prosecuted for misappropriation of moneys handed over to him for remittance, and as a proof of misappropriation, money order issue journal was tendered, showing alteration made in the books, and it was in evidence that the journal was not in the custody of the accused till they were seized, but it was not proved that the alterations were made in the handwriting of the accused, for want of originals or the certified copies thereof.

Held, that it could not be said that the accused was proved to have misappropriated the sum and that therefore, the prosecution though it succeeded in proving entrustment, failed to bring home the guilt under Section 409 to the accused. **Held,** further, that the accused could not also be convicted under Section 477-A, for want of proof that the alterations were in his handwriting. **23 Cut LT 410: 1957 Cri LJ 1431: AIR 1957 Orissa 268 (270, 271) (Pt B) (Prs 7, 8) (DB).**

——**S. 409** — Applicability — Dishonest intention — Absence of — Conviction not valid. See Penal Code (1860), Section 405. **AIR 1955 NUC (Punj) 2523.**

——**S. 409** — Evidence and proof — Embezzlement ascribed to two persons — One subordinate of other — Plea of subordinate that he had paid money to superior — Offence is not established against subordinate beyond reasonable doubt — (Evidence Act (1872), Sections 101 to 103). **AIR 1955 NUC (Sau) 5757 (DB).**

——S. 409 — Evidence and proof — Retention of money when amounts to dishonest misappropriation.

After the prosecution discharges the burden of proving entrustment, it is not necessary for it to prove in what manner the money alleged to have been misappropriated was spent by the accused. If it is shown that money entrusted to the accused for a particular purpose was not returned by him in accordance with his duty, it lies on him to prove his defence. It may well be that the retention may be for a short period and this would be consistent with his innocence.

But it cannot be said that the retention can under no circumstances amount to dishonest misappropriation unless the prosecution proves active dishonest conversion. The question is one of fact in each case and unexplained retention of money for a long time might well be sufficient to raise the inference of guilt. **9 Sau LR 15: 1955 Cri LJ 1528: AIR 1955 Sau 100 (102) (Pt C) (Pr 7) (DB).**

——**S. 409** — Applicability — Dishonest misappropriation and falsification of accounts by public servant — Complainant entrusting amount to accused, an employee of post office for sending money order — Accused not despatching money order and also omitting to enter amount in account books and registers — In the counter foil of the receipt issued for the amount, accused entering particulars of earlier money order — Accused held had dishonestly misappropriated the amount entrusted to him and falsified the accounts. See Penal Code (1860), Section 403. **1953 Cri LJ 1777: AIR 1953 Trav-Co 537 (DB).**

10. Procedure.

See also Note 2.

●——**S. 409** — Overt acts committed in pursuance of conspiracy — Place of trial indicated. See Criminal P. C. (1898), Section 180. **1962 (2) Cr LJ 805: AIR 1962 SC 1821.**

●——**S. 409** — Charge under with respect of one offence but mode of committing it not stated precisely — No prejudice — Trial not vitiated. See Criminal P. C. (1898), Section 233. **1962 (2) Cri LJ 805: AIR 1962 SC 1821.**

●——**S. 409** — Offence under Section 409 and offence under Section 105 Insurance Act are distinct offences — Trial and conviction for offence under Section 409, I. P. C.—Accused can be subsequently tried and punished under Section 105 Insurance Act — There is no double jeopardy State of Bombay v. S. L. Apte, **(1961) 1 SCJ 685: (1961) 1 Mad LJ (SC) 210: 1361 Mad LJ (Cr) 331: (1961) 1 Andh WR (SC) 210: 1961 (1) Cri LJ 725: AIR 1961 SC 578 (583) (Prs 15 to 17).**

●——**S. 409** — Criminal P. C. (1898), Section 197 — Construction should not be narrow — "Discharge of official duty" involves dereliction of official duty — Accused charged with abetment of offence under Section 409 I. P. C., in that he permitted disposal of goods by doing official act — Section 197 applies and sanction is necessary. See Criminal P. C. (1898), Section 197. **1955 Cri LJ 857: AIR 1955 SC 287.**

●——**S. 409** — Applicability — Charge under — Evidence indicating abetment only — But in view of fact that conviction for abetment would imply a definite finding that another (the officer of the accused) was guilty of offence under Section 409, conviction was not altered — (Criminal P. C. (1898), Section 439). Bhagat Ram v. State of Punjab, **1954 Cri LJ 1645: AIR 1954 SC 621 (630) (Pt E) (Pr 16).**

——**S. 409** — Accused can be tried and punished under Section 120-B even when charge under Sections 409 and 380 cannot be made out. See Penal Code (1860), Section 120-B. **1959 Cri LJ 18: AIR 1959 All 75.**

——**S. 409** — U. P. Police Regulations, Para 486 — Non-compliance with — Effect stated — (Criminal P. C. (1898), Sections 157 and 173). See U. P. Police Regulations, Para 486. **1958 Cri LJ 994: AIR 1958 All 584 (DB).**

●——**Ss. 409, 477-A** — Scope of — Joint trial of three embezzlements with three falsifications of corresponding entries in accounts not valid—See Criminal P. C. (1898), Section 233. **1956 Cri LJ 959: AIR 1956 All 466 (FB).**

——**Ss. 409, 465 and 477** — Criminal P. C. (1898), Section 197 — Offence committed not as public duty nor while acting in discharge of official duty — Sanction not necessary. See Criminal P. C. (1898), Section 197. **AIR 1955 NUC (All) 2727.**

●——**S. 409** — Prevention of Corruption Act (1947), Section 6 — Prosecution under Section 409, Penal Code — Previous sanction is not necessary, Rule about sanction laid down in Section 6, Prevention of Corruption Act has no application — Statute should not be given wider meaning than what the words actually denote — Per majority, Mulla J. Contra — (Interpretation of Statutes — Plain meaning) — (Civil P. C. (1908), Pre.). See Prevention of Corruption Act (1947), Section 6. **1955 Cri LJ 754: AIR 1955 All 275 (FB).**

——**Ss. 409 and 477-A** — Sanction for prosecution of managing agent for offences under Sections 409 and 477-A, Penal Code, is not necessary. See Companies Act (1913), Section 179. **1961 (2) Cri LJ 615: AIR 1961 Andh Pra 493.**

——**S. 409** — Criminal P. C., Section 197 — Form of sanction — Sanction signed by Secretary to Government. See Criminal P. C. (1898), Section 197. **1958 Cri LJ 1290: AIR 1958 Andh Pra 643.**

——**S. 409** — Scope — Charge under Section 409 disclosing offence under Section 119 — Offence under Section 409 not proved — Conviction under Section 119 cannot be had, without there being a charge under the section — Accused cannot be taken by surprise. See Criminal P. C. (1898), Section 233. **(1957) Mad LJ (Cr) 509: (1957) 2 Andh WR 298.**

●——**S. 409 — Scope — Sanction for prosecution under Section 5 (2), Prevention of Corruption Act, before amendment.**

It was open to the prosecution to launch a prosecution either under S. 409, Penal Code or under S. 5 (2), Prevention of Corruption Act, even before the amendment of the latter Act by Act (59 of 1952), and if the prosecution was launched under Section 409 and if the status of the accused was such that no sanction was required under the provisions of the Criminal P. C. then the prosecution is good and the conviction is proper notwithstanding the fact that if the prosecution had been launched under Section 5 (2) a sanction would have been necessary. 15 Bom LR 574 and AIR 1953 SC 293, Distinguished. State v. Pandurang. **ILR (1955) Bom 984: 57 Bom LR 868: AIR 1955 Bom 451 (456) (Pt C) (Pr 9) (FB).**

●——**S. 409** — Prevention of Corruption Act (1947), Section 5 (4) — Offence by public servant under Section 409, Penal Code — Jurisdiction of ordinary Courts under Criminal P. C. — (Criminal Law Amendment Act (1952), Section 10) — (Criminal P. C. (1898), Section 190). See Prevention of Corruption Act (1947), Section 5 (4). **AIR 1954 Bom 549 (FB).**

——**Ss. 409 and 477-A** — Several defalcations made at different times within course of one year can be joined together as one offence — Such charge can be joined with another charge under Section 477-A, Penal Code regarding false entries made for covering defalcations — Special Judge under Criminal Law Amendment Act (1952), can try accused under Section 477-A, Penal Code by reason of Section 7 (3) of the Act as case falls under Section 235 (1), Criminal P. C. See Criminal P. C. (1898), Section 233. **1963 (1) Cri LJ 162: AIR 1963 Guj 15 (DB).**

——**S. 409** — Offence committed while acting or purporting to act in the discharge of official duty — President of Municipality directing payment of expenses in connection with legal proceedings against him — Prosecution under Section 409, Penal Code — Sanction under Section 197 necessary. See Criminal P. C. (1898), Section 197 (1). **1961 (1) Cri LJ 499: AIR 1961 Guj 57.**

——**S. 409 — Burden of proof.**

In cases of criminal misappropriation the prosecution must always prove misappropriation. It is not enough if it merely establishes that the accused had received money. **ILR (1956) Hyd 191: 1956 Cri LJ 1320: AIR 1956 Hyd 180 (184) (Pt E) (Pr 18).**

——**S. 409** — Criminal P. C., Sections 204 and 207 — Offence under Section 342 (criminal breach of trust), Hyderabad Penal Code, committed by public servant — Accused challaned after extension to Hyderabad State of Prevention of Corruption Act (1947) — Procedure to be followed indicated. See Criminal P. C. (1898), Section 204. **AIR 1954 Hyd 56 (DB).**

——**S. 409** — Section whether has been offended — Test to determine — Whether section is offended against depends on whether there is connection between the act complained of and the discharge of the concerned person's official duty — Public servant committing criminal breach of trust does not normally act in his capacity as public servant — Sanction under Section 197 is not a pre-requisite for initiation of proceeding. See Criminal P. C. (1898), Section 197. **1959 Ker LJ 207: 1959 Mad LJ (Cri) 207: 1959 Ker LT 347.**

——**Ss. 409 and 477-A** — Criminal P. C., Sections 222 (2), 235 — Joinder of charges — Misappropriation with falsification of accounts. See Criminal P. C. (1898), Section 222 (2). **52 Cri LJ 823: AIR 1951 Kutch 64.**

——**S. 409** — Evidence — Accused giving false account as to use of money received — It is a very strong circumstance of dishonest intention against accused. AIR 1954 Madh Bha 21, Rel. on. **AIR 1955 NUC (Madh Bha) 3879 (DB).**

——**S. 409** — Prosecution under — Accused setting up defence that he was allowed time to pay money retained — Magistrate relying on statement in police diary, discharging accused without examining prosecution witnesses — Propriety. **1959 MPLJ (Notes) 91.**

——**S. 409** — Charge — Nature and contents of, indicated. See Criminal P. C. (1898), Section 222 (2). **1957 Cri LJ 1411: AIR 1957 Madh Pra 225.**

——**S. 409** — Offence under — Investigation by Inspector of Police, C. I. D. — Section 242 (1), Companies Act does not affect jurisdiction. See Companies Act (1956), Section 242 (1). **1957 Cri LJ 206: AIR 1957 Mad 65.**

——**S. 409** — Offence under — Investigation — Section 630, Companies Act, does not bar jurisdiction vested in police officers by Sections 154, 156 (1) and 157 (1), Criminal P. C. See Companies Act (1956), Section 630. **1957 Cri LJ 206: AIR 1957 Mad 65.**

——**S. 409** — Criminal P. C., Sections 222 (2) and 225 — Omission to specify amount in charge under Section 409, I. P. C. — Effect indicated. See Criminal P. C. (1898), Section 222 (2). **1956 Cri LJ 536: AIR 1956 Mad 209.**

——**S. 409** — Criminal P. C., Section 439 — Retrial — Several persons connected with Bank charged under Section 120-B read with Sections 409 and 477-A, I. P. C. — Protracted trial for 2½ years — Joinder of charges in way impossible to try — Retrial ordered after splitting up charges. **1952 Cri LJ 1564: AIR 1952 Mad 727 (DB).**

——**Ss. 409 and 477** — Criminal P. C., Section 530 (p) — Magistrate trying offences under Sections 477 and 409 I. P. C. — Former offence triable by Sessions Judge — Proceedings relating to offence under Section 477 are void. See Criminal P. C. (1898), Section 530 (p). **1959 Cri LJ 887: AIR 1960 Mys 86 (DB).**

——**S. 409** — Criminal P. C. (1898), Section 197 — Prosecution under Section 409, Penal Code sanction is not necessary. See Criminal P. C. (1898), Section 197. **AIR 1955 NUC (Nag) 5680 (DB).**

——**S. 409** — Application under Section 476 (1), Criminal P. C., alleging commission of offence under Section 409, I. P. C., in proceedings before Court — Facts disclosing offence under Section 187, I. P. C. — Application not affected by mention of wrong section — S. 476 Criminal P. C. does not apply to the case. See Criminal P. C. (1898), Section 476 (1). **1965 (2) Cri LJ 525: AIR 1965 Orissa 180.**

——**S. 409** — Criminal P. C., Sections 234, 222 (2), 537 — Charge under Section 409, Penal Code in respect of 3 entrustments in kind — Failure to show date and quantity of each delivery separately — Trial is not vitiated unless it is shown that the defect occasioned failure of justice. See Criminal P. C. (1898), Section 234. **1958 Cri LJ 665: AIR 1958 Pat 272.**

——**S. 409** — Misappropriation of panchayat money by Sarpanch — Sanction of State Government is not essential to prosecute him under Section 409, Penal Code. See Criminal P. C. (1898), Section 197 (1). **(1961) 63 Pun LR 872.**

——**S. 409** — Offence punishable under Section 409 is also offence defined in Section 5 (1)

(c) of Prevention of Corruption Act — Procedure prescribed under these provisions is in some respect different — Difference pointed out — Person tried under Prevention of Corruption Act cannot be said to have been denied equal protection of law — AIR 1955 Cal 236, Dissented from. See Prevention of Corruption Act (1947), Section 5 (1) (c). **1957 Cri LJ 659: AIR 1957 Punj 110 (DB).**

——**S. 409** — Criminal P. C. (1898), Sections 403, 235, 236, 237 — Previous conviction under Section 409, Penal Code — Subsequent trial under Section 477-A, Penal Code on same facts not barred. See Criminal P. C. (1898), Section 403. **1963 (1) Cri LJ 218: AIR 1963 Raj 14 (DB).**

——**S. 409** — Criminal P. C. (1898), Section 197 (1) — (Rajasthan States) Covenant Article 17 — Offence by public servant under Section 409, Penal Code — Sanction for prosecution. See Criminal P. C. (1898), Section 197 (1). **AIR 1950 Raj 51.**

——**Ss. 409 and 477-A** — Criminal P. C., Sections 222 (2), 235 (1) — Misappropriation and falsification of accounts — Joint trial is proper since evidence in both cases will generally be same. See Criminal P. C. (1898), Section 222 (2). **1955 Cri LJ 1520: AIR 1955 Sau 91 (DB).**

11. Some illustrative cases.

——**S. 409 — Applicability — Ingredients of offence.**

The accused who was a Khirdi Naviz and Sarbharathis Peskhar had the duties of receiving moneys, depositing the same in the bank and maintaining accounts relating thereto. It was also the duty of the accused to put up these papers and accounts for the signature of the Tahsildar. It was established that the entries were made by the accused in his own hand, that the entries were false, that the amounts were embezzled by not depositing them in the bank or by making entries relating to false expenditure and that the receipts given by him were fictitious.

Held, that the accused had committed criminal breach of trust within meaning of Section 409, I. P. Code. **(1957) 2 Andh WR 352: (1957) Mad LJ (Cr) 599: 1958 Cri LJ 15: AIR 1958 Andh Pra 29 (30) (Pt B) (Pr 7) (DB).**

——**S. 409** — Applicability — Amount withdrawn from bank by contingent clerk of police department for specific purpose — Amount retained by him 4 ½ months and then paid in part — Offence under Prevention of Corruption Act (1947), Section 5 (2), held committed. See Prevention of Corruption Act (1947), Section 5 (2). **1957 Cri LJ 131 (Him Pra).**

——**Ss. 409, 467 and 471** — Postman himself taking delivery of V. P. Parcels, by signing receipts himself, instead of delivering them to addressees Postman acts dishonestly — He is guilty under Sections 409, 467 and 471 — He held the position of trust — Three years R. I. on each count held not severe. See Penal Code (1860), Section 23. **1959 Cri LJ 881: AIR 1959 Mys 185 (DB).**

——**S. 409** — Scope — Delivery of paddy at mill by Government for converting same into rice and delivery back to Government — Failure to deliver — Offence under Section 409, held committed. 1958 Cri LJ 665: AIR 1958 Pat 272.

kit — If misappropriation.

——S. 409 — Person serving in Armed Constabulary leaving post without leave — Absence of intention never to return — Retaining articles of

Where a person serving in the Armed Constabulary left the post without leave and it is held that it was not a case of desertion and the accused had not left with the intention never to return, it can hardly be said that merely because he retained some articles forming his kit for a short time he was away, he misappropriated them or converted them to his own use. In the alternative, the prosecution would have to show that he dishonestly used the property in violation of any direction of law prescribing the mode in which the trust was to be discharged or of any legal contract express or implied. **ILR (1956) 6 Raj 996: 1957 Cri LJ 103: 1957 Raj LW 139: AIR 1957 Raj 26 (27) (Pt D) (Pr 6) (DB).**

SECTION 410

●——**Ss. 410, 414** — Despatch of woollen goods and bed-sheets by railway — Goods found missing from railway wagon — Large quantity of goods similar to those proved to have been despatched recovered at the instance of accused — Absence of adequate explanation for presence of such large quantity of articles similar to those found missing — Recovery of goods within few days of their disappearance and presence of silk and paper labels of the consignor on most of the woollen goods recovered and of certain manuscript writings on the bed-sheets written by someone connected with the consignor — Above circumstances held sufficient to justify the finding that property recovered was proved to be stolen property. Ajendranath v. State of Madhya Pradesh, **1963 Mad WN 674: (1963) 2 SCWR 145: 1964 All Cr R 57: 1964 Jab LJ 175: 1964 Mad LJ (Cr) 226: (1964) SCJ 407: (1963) 2 Ker LR 159: 1963 SCD 1018: 1964 (1) Cri LJ 129: 1964 All WR (HC) 15: AIR 1964 SC 170 (172) (Pt A) (Pr 8).**

●——**Ss. 410, 411 — Knowing or having reason to believe — (Evidence Act (1872), S. 114).**

From the bare fact that accused was residing in the complainant's village his knowledge that the ornaments were stolen property cannot legitimately be concluded. Trimbak v. State of Madhya Pradesh, **1954 Cri LJ 335: AIR 1954 SC 39 (40) (Pt C) (Pr 8).**

——**Ss. 410, 90, 378** — Theft — Consent, meaning of — Delivery of goods mentioned in railway luggage ticket — Persons taking delivery not entitled to do so — Delivery by Railway clerk under misconception that persons taking delivery were entitled to take it — Ingredients of 'theft' established — Persons found in possession of such goods soon after delivery can be presumed to be in possession of stolen property — Evidence Act (1872), Section 114, Illus. (a). See Penal Code (1860), Section 90. **1963 (1) Cri LJ 573: AIR 1963 Bom 74 (DB).**

——**S. 410** — Disposal of property under — Inquiry into title not necessary — Property produced before Court from possession of third party — Delivery to complainant without notice to third party not valid — Property should be restored to third party. See Criminal P. C. (1898), Section 517 (1). **ILR (1963) Guj 1002-A.**

——**Ss. 410, 378, 377 and 411** — Evidence Act (1872), Section 114, Illus. (a) — Presumption whether person is thief or receiver of stolen property depends on facts and circumstances of each case — Telegraph wires found in possession of accused — Accused denying recovery but giving no satisfactory explanation of their possession —

Accused can be presumed to be receiver of stolen property — Telegraph Wires (Unlawful Possession) Act (1950), Section 5. See Evidence Act (1872), Section 114, Illus. (a). **1965 (1) Cri LJ 746: AIR 1965 Orissa 123.**

——Ss. 410 and 414 — Possession of a particular person or in a locality need not be proved.

In order to prove that property is stolen property, it is not necessary that the stolen property should have been proved to have been in possession of a particular person and in a particular locality before it was stolen. It is enough that possession of property has been transferred by theft, or by extortion or by robbery or by criminal misappropriation. **1965 BLJR 209: 1965 (2) Cri LJ 570 (571) (Pt B) (Pr 6) (Patna) (DB).**

——S. 410 — "Stolen property" — Money received as result of selling stolen property is not stolen property. 39 Punj Re (Cri) 1881; (1840) 9 Car and P 355; (1829) 4 Car and P 133, Rel. on. **1952 Cri LJ 744: ILR (1952) Punj 326: AIR 1952 Punj 178 (180) (Pt B) (Pr 8).**

SECTION 411

SYNOPSIS

(Penal Code (1860), S. 411.)

1. Scope and applicability.
2. Section 411 and other sections.
3. Dishonestly receives or retains.
4. Stolen property.
5. Knowing or having reason to believe.
6. Presumption under S. 14, Evidence Act.
7. Possession after lapse of time.
8. Possession must be exclusive.
9. Identification of stolen property.
10. Pointing out or production of property.
11. Evidence and proof.
12. Conviction and sentence.
13. Practice and procedure.

1. Scope and applicability.

——S. 411 — Essentials to be proved.

It is the duty of the prosecution in order to bring home the guilt of a person under S. 411, I. P. Code, to prove, (1) that the stolen property was in the possession of the accused, (2) that some person other than the accused had possession of the property before the accused got possession of it, and (3) that the accused had knowledge that the property was stolen property. Trimbak v. State of Madhya Pradesh. **1954 Cri LJ 335: AIR 1954 SC 39 (40) (Pt B) (Pr 5).**

——S. 411 — Essential ingredients — Presumption under S. 114, Illus. (a), Evidence Act — Applicability and scope of.

It is not necessary in every cases for the prosecution in order to secure a conviction under S. 411, I. P. Code to prove by positive evidence in addition to the factum of theft and the recent recovery of property from the possession of the accused, that the property was in possession of someone else before it came into the possession of the accused.

In every case under S. 411, I. P. Code two facts, viz., (1) that a theft was committed and certain articles were stolen, and (2) that the stolen articles were recovered from the possession of the accused, have to be established by the direct evidence. They cannot be presumed. If these two facts are established and the recovery from the possession of the accused is a recent one, it will be open to the Court to presume under Illustration (a) to S. 114, Evidence Act that the accused is either the theft or a receiver of stolen property. The presumption, is however, a discretionary one and may not be available at all in certain case, e.g., where in the circumstances of the case the recovery cannot be held to have been made soon after the theft, in a case in which the presumption is available all the essential ingredients of the offences including possession of someone else at an earlier stage will be presumed and it will be for accused to rebut the presumption, and to offer a reasonable explanation of the possession of the articles. The accused cannot get any advantage of the omission of the prosecution to lead direct evidence in respect of it. **1959 All LJ 403: 1959 All WR (HC) 361: 1959 All Cr R 288: 1959 Cri LJ 1271: ILR (1959) 1 All 213: AIR 1959 All 718 (720) (Pt A) (Prs 5, 11) (DB).**

——S. 411 — Scope.

Accused can be said to have committed offence, under section in respect of only the property recovered from him. In a case under the section Court is not concerned with rest of property stolen and which has not been recovered from the accused. **1953 All LJ 368: 1953 All WR (HC) 351: 1953 Cri LJ 1699: AIR 1953 All 752 (752) (Pt B) (Pr 2).**

——Ss. 411, 414, 403 — Applicability — Person finding stray animal — Possession — Offence — Subsequent sale of same — Nature of offence.

Where the person who took possession of a stray animal sold the same at a public fair and he was charged under Ss. 379 and 414 of the Penal Code and convicted in respect of the charge under the latter section alone and on the case coming up before a Judge of the High Court doubting the correctness of the conviction the latter referred it to a Bench in the following terms. "If it is found that a person sells a property knowing it to be stolen property, can he be convicted for an offence punishable under S. 414, I. P. Code in the absence of any finding about the receipt of that property by such a person".

Held, on such reference,

On the fact, no offence of theft had been committed by the accused in taking possession of the stray animal. Nor had the accused received any stolen property. But if he converts it to his own use he is guilty of criminal misappropriation under S. 403, Penal Code.

When the owner of a property is deprived of his property without his consent it may be by criminal misappropriation. In such a case the property in the hands of the person who so deprived him is not stolen property. It is only when he passes on the same to another that other becomes the receiver of stolen property by vitrue of S. 410 of the Penal Code.

Section 414 aims at those persons who are not in possession of stolen property themselves and help others in possession to dispose of the same. Neither the thief nor the receiver of stolen property can come under S. 414. The accused disposed of the misappropriated property himself. He is not guilty of the offence under S. 414. The reference was answered in the negative. **1952 Cri LJ 904: AIR 1952 All 481 (484, 485) (Pt E) (Prs 19, 20).**

——S. 411 — Inquiry if article received was obtained by theft or honestly — Necessity of.

Section 411 does not require that the person receiving the article which is found later on to be a stolen article must make inquiries at the time of receiving it whether it was obtained by theft or honestly. **1950 All LJ 344: 51 Cr LJ 1331:**

1950 All WR (HC) 453: 1950 All Cri Cas 142: AIR 1950 All 497 (498) (Pt A) (Pr 4).

——S. 411 — Ingredients — Duty of prosecution.

A conviction under Section 411 is possible only if the accused received stolen property with the requisite intention. It is therefore, the duty of the prosecution in order to bring home the guilt of a person under S. 411, I. P. Code, to prove (1) that the stolen property was in the possession of the accused; (2) that some person other than the accused got possession of it; and (3) that the accused had knowledge that the property was stolen property. AIR 1954 SC 39; 1954 Cri LJ 335, Rel. on. **1957 Cri LJ 349: AIR 1957 Assam 35 (38) (Pt B) (Pr 15) (DB).**

——S. 411 — Constitution of India, Art. 14 — Section 124, Bombay Police Act (22 of 1951) — Validity — Section 124 does not make discrimination between accused and accused and is valid.

An offence under S. 124 Bombay Police Act is an offence of a minor character while an offence under S. 411, Penal Code is of a serious nature. The facts which are required to be proved under S. 124 are not the self-same facts which are required to be proved under S. 411 there is a section giving the police a discretion either to charge under S. 124 or S. 411. See Constitution of India, Art. 14. **60 Bom LR 403: ILR (1958) Bom 883: 1960 Cri LJ 1186: AIR 1960 Bom 377 (DB).**

——S. 411 — Essentials — What prosecution has to prove.

It is the duty of the prosecution in order to establish the charge under S. 411, to prove (1) that the stolen property was in possession of the accused, (2) that some person other than the accused had possession of the property before the accused got possession of it, and (3) that the accused has knowledge that the property was stolen property. **1954 Cri LJ 1713: AIR 1954 Manipur 13 (17) (Pt F) (Pr 12).**

——S. 411 — Evidence Act (1872), S. 114, Illus. (a) — Mere recovery of stolen property not enough to attract S. 411.

Mere recovery of stolen property is not enough to make out a case under S. 411 of the Penal Code. The prosecution has to establish that it was stolen property and the accused persons dishonestly retained the same knowing or having reason to believe the same to be stolen property. Unless it is proved to be stolen property no question of drawing a presumption under S. 114. Illus. (a) of the Evidence Act would arise. **1965 (2) Cri LJ 54: 31 Cut LT 941: (1965) 7 OJD 311: ILR (1964) Cut 795: AIR 1965 Orissa 114 (118) (Pt C) (Pr 7).**

——S. 411 — Essence of offence.

It is not inconceivable that although thefts may have been committed on different occasions the thief may pass on the stolen property to the receiver at one time. The fact of receiving in such a case would be one act, although the stolen property relates to a number of thefts and a number of stolen articles. Therefore, it is not correct to say that the offence under S. 411 is the offence of receiving a particular article of stolen property or property stolen in a particular theft. **ILR (1958) Punj 1141: 61 Pun LR 195: 1959 Cri LJ 762: AIR 1959 Punj 275 (277) (Pt B) (Pr 5).**

——S. 411 — Applicability — Evidence Act, Section 114, Illustration (a) — Illustrations are not exhaustive of all the presumptions— Evidence of accused's possession of stolen property soon after theft — Property recovered more than four years after theft — Accused held knew that the property was stolen property — Conviction under S. 411 held proper. See Evidence Act (1872), S. 114. **1961 (1) Cri LJ 310: AIR 1961 Raj 35.**

——S. 411 — Scope — **Held** on the facts of this case that in the nature of the evidence in this case it could not be said that any of the elements of S. 411, Penal Code had been clearly and conclusively brought home to the second accused. The best that could be ever said in favour of the prosecution evidence was that it created a suspicion that the first accused who had come into possession of the money stolen might have rendered financial help to the second accused. Such a suspicion however strong would not be sufficient to warrant a conviction of the second accused under S. 411. In these circumstances it would be unjustified and unwarranted to invoke an aid of S. 237, Cr. P. Code and to enter a conviction against the second accused under S. 411, Penal Code. See Criminal P. C (1898), S. 233. **AIR 1955 NUC (Trav-Co) 1494 (DB).**

2. Section 411 and other sections.

● ——**Ss. 411, 302 and 379** — Evidence Act (1822), S. 114, Illus. (a) — Possession of stolen property belonging to murdered person — Thief held was also murderer. See Evidence Act (1872), S. 114, Illus. (a). **AIR 1955 NUC (SC) 5807.**

● ——**Ss. 411, 300** — Murder taking place at night — Early next morning accused disappearing from his house — After his arrest accused producing articles which were removed from body of deceased from his house — Inquest made shortly after dawn and not late in day—Accused held was not merely receiver of stolen property but murderer. See Penal Code (1860), S. 300. **AIR 1954 SC 704.**

——**Ss. 411, 378, 379, 34** — Evidence where the prosecution proved that the purse of A was removed by X, that both X and Y were near A when the theft was committed and both ran away together, that X handed over the purse to Y immediately after the theft and that the purse was recovered from the possession of Y: **Held,** that Y committed an offence under S. 379/34 Penal Code and not under S. 411, Evidence Act (1872), S. 114. See Penal Code (1860), S. 378. **1957 Cri LJ 1060: AIR 1951 All 678.**

——**S. 411** — Applicability — Accused not liable to be convicted of offence of murder — It is legitimate to convict accused of offence under S. 411. See Penal Code (1860), S. 300. **AIR 1955 NUC (Bom) 3649 (DB).**

——**Ss. 411 and 300** — Evidence Act (1872), Sections 27, 114 — Possession of property taken from murdered person — No inference of murder can be drawn. See Evidence Act (1872), S. 27. **AIR 1955 NUC (Madh B) 3861 (DB).**

——**Ss. 411 and 395** — Offence of dacoity — Identification parade — Value of — Unreasonable delay in holding parade — Description of accused persons not given prior to identification by witnesses — Effect — Evidence of approver — Identification parade of stolen property — Two such parades held — Reliability is not reduced — Conviction under Section 395 altered to one under Section 411. **1960 MPC 578: 1960 MPLJ 1193.**

——**Ss. 411 and 412** — Applicability — Accused found to be in possession of property stolen in dacoity — Offence — Where the only evidence against the accused was that ornaments stolen in dacoity were recovered from the house of the accused and there was no evidence that the accused was seen near the place of dacoity or of joining the gang; **Held,** that it was safe to convict the accused neither under Section 395 nor

under S. 412 but only under Section 411. See Evidence Act (1872), S. 114, Illus (a). **1959 Cri LJ 496: AIR 1959 Madh Pra 125.**

——S. 411 — Applicability — Property looted in dacoity — Essentials to be proved — Recovery of articles of common use — Effect — S. 412.

Where all the articles that are recovered from the accused are ordinary ornaments, the recovery of such common things is not enough to sustain a charge under Section 411, I. P. C. For a conviction under Section 411, I. P. Code the prosecution has not only to prove that the stolen property was found in the possession of the accused, but it has further to prove that the accused knew and has reason to believe that the property was stolen. Where the property is obtained in the commission of a dacoity, it cannot be called stolen property and as such the conviction should be under Section 412, I. P. C. Even under Section 412, I. P. C. the ingredients of the offence are the same as those under Section 411, namely, that the accused should have known or should have reason to believe that the property which he acquired, belonged to the gang of the dacoits. In the absence of any proof of such knowledge it is difficult to convict the accused either under Section 411 or 412. **1958 Jab LJ 264.**

——S. 411 — Accused charged under Section 379, Penal Code — No opportunity given to meet case under Section 411 — Conviction under Section 411, Penal Code — Whether proper — See Criminal P. C. (1898), S. 236. **1961 (1) Cri LJ 827: AIR 1961 Mys 158.**

——Ss. 411 and 380 — Evidence — Only evidence against accused was their alleged confession to police leading to discovery of alleged stolen money —No evidence to connect money recovered from their house with the money alleged to be stolen—Acquittal of accused by appellate Court is justified. See Penal Code (1860), S. 380. **1965 BLJR 555.**

——Ss. 411 and 302 — Charge of murder and receiving stolen property — Forming part of same transaction — Accused in unexplained possession of stolen property — Presumption of murder, therefrom can be drawn. See Penal Code (1860), S. 302. **1965 Raj LW 418: ILR (1965) 15 Raj 989: AIR 1966 Raj 74 (DB).**

3. Dishonestly receives or retains.

——Ss. 411, 414 — Scope — Assists, meaning of — Person selling property knowing it to be stolen — Absence of finding as to receipt of such property — Person is not guilty either under Section 414 or S. 411. See Penal Code (1860), S. 414. **1952 Cri LJ 433: AIR 1952 All 481.**

——S. 411 — Evidence — "Dishonestly receives and retains" — Inference.

People do not secrete properties far away from the village in unknown places unless they are not in a position to claim them as their own and unless they have been dishonestly got they will not hide the traces of the same. **1953 Mad WN 918: 55 Cri LJ 583: AIR 1954 Mad 433 (435) (Pt C) (Pr 18).**

——Ss. 411, 412— "Receives or retains any stolen property" — Interpretation.

Doubtless there is a real distinction between receipt and retention. In some instances receipt of property may be honest, but subsequently when the offender comes to know that the property is stolen property and yet continues in possession of the same, he may be said to retain the same. But in Section 411 and 412, the words "receives" and "retains" occur side by side and the collocation of receipt and retention of stolen property is obviously intended to do away with the necessity of proving the presence of dishonesty at the time of its possession. As both receiving and retaining constitute one offence, the accused is not entitled to claim the nature of his possession specified, and it is sufficient if he is charged for receiving or retaining and evidence is adduced to prove guilty knowledge at some period antecedent to its recovery by the police. **ILR (1958) Cut 131: 1958 Cr LJ 657: AIR 1958 Orissa 106 (107) (Pt A) (Pr 7).**

——S. 411 — 'Dishonestly receives or retains' — What prosecution must prove.

To be liable under Section 411, it must be proved that the accused either dishonestly received the property or having received it honestly, dishonestly retained it. In both the cases the accused must receive it from another. Consequently, in order to bring a person in possession of any movable property within the mischief of Section 411, the prosecution must in the first instance prove that there was some other person who was in possession of that property and from whom the accused received it. AIR 1954 SC 39, Rel. on. **22 Cut LT 456: ILR (1957) Cut 112.**

4. Stolen property.

——Ss. 411, 410 — Evidence — Guilty knowledge — Inference of.

From the bare fact that the accused was residing in the complainant's village his knowledge that the ornaments were stolen property cannot legitimately be concluded. Trimbak v. State of Madhya Pradesh, **1954 Cri LJ 335: AIR 1954 SC 39 (40) (Pt C) (Pr 8).**

——Ss. 411, 380 — Property found in possession of accused must be shown to have been property stolen. See Penal Code (1860), S. 380. **1960 Cri LJ 1620: AIR 1960 Madh Pra 395 (DB).**

——S. 411 — Applicability — Stolen property — Proceeds of sale of property stolen.

Property into or for which the stolen property has been converted or exchanged is not stolen property. But an ingot of gold or silver obtained by melting gold or silver articles which were stolen does not cease to be stolen property. **1953 Mad WN 918: 55 Cri LJ 583: AIR 1954 Mad 433 (436) (Pt F) (Pr 19).**

——Ss. 411, 414 — Property not proved to be stolen for charge under Section 411 — Accused cannot be convicted under Section 414 also — Property must be proved to have been stolen, for Section 414 also. **1965 BLJR 209: 1965 (2) Cri LJ 570 (571) (Pt A) (Pr 6) (Patna) (DB).**

5. Knowing or having reason to believe.

——S. 411 — Applicability — Possession of stolen articles — Evidence of, is question of fact — Stolen articles dug out by accused and given to investigating officer by accused — Accused must be presumed to have knowledge that articles which if stolen, were in home — Even if house were in joint possession, other may not be held liable. **AIR 1955 NUC (All) 2735.**

——S. 411 — Knowing or having reason to believe — Evidence Act (1872), S. 114.

Per Bhargava J. — Where a calf belonging to another person is sold by the accused for an inadequate price only after a day it was stolen from the owner and the accused is unable to give any account as to how he came to be in possession of it, an inference that the accused knew it

to be stolen property can be reasonably drawn. **1952 Cri LJ 904: AIR 1952 All 481 (483) (Pt B) (Pr 5).**

——S. 411 — Conduct of accused in concealing property at time of its recovery — Evidence Act (1872), S. 8.

The conduct of the person, accused of having purchased a stolen property, in unsucessfully concealing it at the time of recovery is indicative that at that moment he either suspected or believed that the article purchased by him must have been the subject-matter of some offence. But it cannot be regarded as any conclusive evidence of the state of the mind of the accused at the time when he purchased it. This piece of circumstantial evidence does not exclude the possibility that the purchase was innocent and without any guilty knowledge or belief. **ILR (1951) 3 Assam 46: AIR 1950 Assam 193 (194) (Pt A) (Pr 7) (DB).**

——S. 411 — Word "believe" if equivalent to "suspect" — Purchase of stolen property in presence of other persons.

The word "believe" occurring in S. 411 is much stronger word than "suspect". It involves the necessity of showing that the circumstances were such that a reasonable man must have felt convinced in his mind that the property with which he was dealing must be stolen property. A person who has purchased stolen property openly in the presence of others cannot be said to have purchased it, knowing it to be stolen or having reason to believe that it is stolen. In a case like this it is not sufficient to show that the accused was careless or had reason to suspect that the property was stolen or that he did not make sufficient enquiry to ascertain whether the property had been honestly acquired. **ILR (1951) 3 Assam 46: AIR 1950 Assam 193 (194) (Pt B) (Pr 7) (DB).**

——S. 411 — Conviction under — It must be shown that accused knew or had reason to believe that property had been stolen.

Where the accused purchases a mare from another then he can be convicted under S. 411 only if it can be found that he knew or had reason to believe that the mare had been stolen. When there is no such allegation against the accused nor is there any finding to that effect, conviction is wholly unsustainable. **51 Cri LJ 509: ILR (1950) 2 Assam 208: AIR 1950 Assam 87 (88) (Prs 4, 5).**

——S. 411 — Essentials — Knowledge on part of accused not proved — Effect.

To succeed in a prosecution under Sec. 411, I. P. C. the prosecution must not only prove that the property had been stolen, but they must also establish facts from which the court can properly infer that the person charged with being in possession of stolen property either knew the property to be stolen or had reasonable grounds for believing the same to have been stolen. Unless there is some prima facie evidence as to the knowledge of the accused the latter is entitled to be acquitted, because, merely proving that he was in possession of the stolen property establishes no offence of any kind.

In cases of this kind the accused is called upon to offer an explanation only when there is a prima facie case against him. Whether there is no evidence at all as to his knowledge the accused must be acquitted upon the evidence for the prosecution, without calling upon him to enter upon his defence. **87 Cal LJ 387: 1952 Cri LJ 1298: AIR 1952 Cal 616 (617, 618) (Pt B) (Prs 9, 12).**

——Ss. 411 and 379 — Kutch Penal Code Ss. 126 and 145 — Theft and receiving stolen property — Conviction for former, precludes conviction for latter.

When an accused is found to be a participator in the theft there can be on question of his receiving the stolen property. The two offences are distinct, and a person proved to have committed theft cannot be convicted for receiving stolen property. **AIR 1950 Kutch 88 (88) (Pt A) (Pr 5).**

——S. 411 — Conviction — Basis of — Reasonable belief that property was stolen — Proof of.

Section 411, I. P. Code, does not apply to a case where the accused suspects the property to be stolen property He must have reasons to believe when he received the property that it was stolen property. The word "believe" is a very much stronger word than "suspect" and it involves the necessity of showing that the circumstances were such that a reasonable man must have felt convinced in his mind that the property with which he was dealing must be stolen property. It is not sufficient to show that the accused was careless, or that he had reason to suspect that the property was stolen, or that he did not make sufficient enquiry to ascertain whether it had been honestly acquired. **52 Cri LJ 646: AIR 1951 Raj 89 (92) (Pt B) (Pr 12) (DB).**

6. Presumption under S. 114, Evidence Act.

——S. 411 — Recent possession of stolen goods.

Where the stolen goods were recovered from the possession of the accused seven days after the theft and the accused's explanation that the goods were kept with him by another was not believed; presumption under Section 114, Evidence Act, was drawn and the accused was convicted under Section 411, Penal Code. Sentence however was reduced to a fine of Rs. 250. **1951 AMLJ 21.**

——S. 411 — Possession of stolen property — Essentials — Wife and younger brothers of accused — Liability of — Presumption under Section 114 — When arises — (Evidence Act (1872), S. 114).

The only fact that the wife and younger brothers of the accused reside in the same house from which the stolen property was recovered by itself is not sufficient to prove that they were in joint possession of the stolen iron safe wher there is no indication that the safe was recovered from any room which was locked and the key to that room was provided by any of these persons. For the purpose of holding joint possession some conduct or act which shows dominion over stolen property should also be proved against the accused and the presence of stolen property alone in the house cannot be considered sufficient.

The words used in Section 114 of the Evidence Act are that a Court 'may presume' and the word 'may' in the section is not equivalent to "shall'. A discretion is vested in the Court whether in the proved circumstances of the case a presumption should be raised or not.

Held, that in the circumstances of the case the other residents of the house at best passively acquiesced and they were not in any way exercising any dominion over the stolen property from which a justifiable presumption may be drawn that they were in joint possession of it. ILR (1955) All 464, Rel. on. **1959 All WR (HC) 180: 1959 All Cr R 295: 1959 All LJ 161.**

——S. 411 — Evidence — Possession of stolen property — Presumption—Once stolen property is recovered from the possession of a person under

circumstances mentioned in illustration (a) of Section 114 of the Evidence Act, the presumption of knowledge cannot ordinarily be limited in its scope or dissociated from the nature of the possession or the manner in which property was originally acquired. See Evidence Act (1872), Section 114, Illustration (a). **1954 Cri LJ 1439: AIR 1954 All 684.**

——S. 411 — Stolen article dug out by A from his field — Presumption against A — Evidence Act (1872), S. 114.

In the course of the investigation of theft by house-breaking, A took the Station Officer to his field and there he dug out a silver article which was one of the articles stolen from the house of the complainant. On the basis of this evidence the Magistrate convicted A and sentenced him to four months' rigorous imprisonment. In appeal the Sessions Judge held that the recovery of the article did not fasten the guilt upon A and so he acquitted A of the charge under Section 411 holding that no presumption of the offence under Section 411, I. P. C. arises against A under illustration (a) of Section 114, Evidence Act.

Held, that the view taken by the Sessions Judge was erroneous. ILR 17 All 576; AIR 1943 Oudh 298, Rel. on. AIR 1931 Lah 4, Not foll. **1951 All WR 555: 1952 RD (HC) 64: 1952 All LJ 61: 1953 Cri LJ 1297: AIR 1953 All 572 (572) (Pr 3).**

——S. 411 — Knowledge — Proof of — Evidence Act (1872), S. 114, Ill. (b).

The existence of knowledge of an accused person can be seldom proved affirmatively by positive evidence. The prosecution in cases under section 411, Penal Code, has, therefore, to depend generally either on a presumption under section 114, Ill. (b), Evidence Act, arising from possession of recently stolen properties or from inferences derived from proof of circumstances which render it difficult to exclude the fact of knowledge.

It is difficult to lay down any rule of law that an accused person should not be called upon to explain his possession of properties unless the theft was a recent one. A good deal depends on the circumstances of each case.

Where the nature of property or the circumstances indicate that possession is not in the natural course of things but is incriminatory, the fact that a false explanation is given by the accused renders the prosecution case stronger. **AIR 1950 All 631 (631, 632) (Prs 4, 5).**

——S. 411 — Presumption arising under S. 114, Illus. (a), Evidence Act — Rebuttal — In circumstances of case accused held not guilty under S. 411 — Evidence Act (1872), S. 114, Illustration (a).

A woollen coat, a muffler and a sweater belonging to a student were stolen and were found in the possession of the accused. He was wearing the sweater and muffler and he produced the coat on being asked about it. He stated at the time of recovery that he had purchased the clothes from a person who had told him that he had got them from students as a reward. The person selling the clothes was a short statured boy while the clothes were such as to fit a man of tall stature and the coat was not an old one:

Held, that the presumption arising against the accused under Section 114, Illus. (a), Evidence Act, was sufficiently rebutted by his giving an explanation as to how he got possession of the clothes;

Held, further, that the circumstances were not such as must have convinced the accused as a reasonable person that the clothes were stolen property and, therefore, it could not be held that the accused received the clothes knowing or having reason to believe that they were stolen property. **1950 All LJ 344: 51 Cri LJ 1331: 1950 All WR (HC) 453: 1950 All Cri Cas 142: AIR 1950 All 497 (498, 499) (Pt B) (Prs 4, 7, 8).**

——S. 411 — Evidence — Accused found in possession of articles recently stolen — Inability to account — Conviction.

If in a case where the accused is charged under Section 411, I. P. Code, it is proved that the articles were stolen property concerned in a recent theft and that the accused were found in possession thereof and were not able to account for such possession, the prosecution is entitled to rely on the presumption which arises under Section 114, Illus. (a) of the Evidence Act and the accused can be convicted under Section 411, I. P. Code. **1950 All LJ 738.**

——S. 411 — Evidence Act (1872), S. 114 (a) — Presumption under — Nature of — Explanation for possession of goods by accused—Consideration of — In a trial under Section 411, Penal Code the defence story was that two persons came to grocery shop of the accused and asked him to give change for a ten rupee note. The accused replied that he had no change, where upon they borrowed Rs. 2 from him and went away leaving two gunny bags behind saying that they would come back. They did not come for 2 or 3 days and the accused did not know the contents of the bag. **Held,** on evidence of the case that the explanation for possession could not be said to be inherently or palpably false and benefit of doubt could be given to the accused See Evidence Act (1872), S. 114 (a). **1957 Cri LJ 1393: AIR 1957 Andh Pra 1006.**

——S. 411 — Evidence Act (1872), S. 114, Illus. (a) — Goods stolen in dacoity recovered from accused's house — Unless the connection between the articles said to have been stolen and those recovered from the house of the accused has been established no presumption could be drawn under Section 114 (a), Evidence Act, either that a person is a thief or receiver of stolen property. See Evidence Act (1872), S. 114, Illus. (a). **1957 Cri LJ 939: AIR 1957 Andh Pra 482.**

——S. 411 — Presumption under Section 114, Illus. (a), Evidence Act when arises — Possession must be exclusive. See Evidence Act (1872), Section 114, Illus. (a). **1959 MPLJ 862.**

——S. 411 — Knowledge of incriminating articles buried in neighbour's house — Presumption of possession — If arises.

The conviction of applicant under Section 411, Indian Penal Code, was based on the fact that while in custody he made a statement in pursuance of which the discovery of incriminating articles was made from the courtyard of his neighbour's house. However, the seizure memo. did not say that discovery was made at the instance of the accused or that the articles were seized from his possession.

Held, that knowledge to the accused of the incriminating articles being buried in the house of his neighbour by itself would not be enough to infer that he was in the possession so as to raise a presumption of his guilt under Sec. 114, Illustration (a) of the Indian Evidence Act. **1960 MPLJ (Notes) 176.**

——S. 411 — Evidence Act (1872), Section 114, Illustration (a) — Possession of stolen property — Application of principles to murder case —

Held, on facts that presumption of murder against accused should have been drawn. See Evidence Act (1872), S. 114, Illus. (a). **AIR 1955 NUC (Mad) 1217.**

——**S. 411** — Evidence Act (1872), Section 114, Illus. (a) — Presumption whether person is thief or receiver of stolen property depends on facts and circumstances of each case — Telegraph wires found in possession of accused — Accused denying recovery but giving no satisfactory explanation of their possession — Accused can be presumed to be receiver of stolen property — Telegraph Wires (Unlawful Possession) Act (1950), S. 5. See Evidence Act (1872), S. 114, Illus. (a). **1965 (1) Cri LJ 746: AIR 1965 Orissa 123.**

——**S. 411** — Stolen property recovered from shop of A — No satisfactory explanation —Ordinarily A will be held guilty of receiving stolen property — Evidence Act (1872), S. 214. **(1960) 2 Ori JD 317: 27 Cut LT 159: ILR (1962) Cut 542.**

——**S. 411** — Evidence Act (1872), Section 114, Illus. (a) — Presumption about dishonest retention of stolen property — The words 'receives' or 'retains' are generally used together and though Illustration (a) to Section 114, Evidence Act, expressly refers to dishonest receipt of stolen property a presumption about dishonest retention of the stolen property may equally be made by virtue of that Illustration. See Evidence Act (1872), S. 114, Illus. (a). **1958 Cri LJ 657: AIR 1958 Orissa 106.**

——**S. 411** — Evidence Act (1872), Section 114, Illus. (a) — Applicability of presumption to offence under Section 412, Penal Code — It applies not only to cases of ordinary theft but also to cognate offences like dacoity. AIR 1950 All 398, Doubted. See Evidence Act (1872), Section 114, Illus. (a). **1958 Cri LJ 657: AIR 1958 Orissa 106.**

——**Ss. 411, 412 — Proof — Presumption under S. 114, Evidence Act — Effect — Proof of receipt from another not necessary — (Evidence Act (1872), S. 114, Illus. (a)).**

Per P. V. B. Rao, J. — Sections 411 and 412, I. P. Code lay down the conditions required to be proved in order to convict a person as a receiver or retainer of stolen property. But if in the process of proof the Court draws a presumption under Section 114, Evidence Act, that a person who is in possession of the stolen goods soon after the theft, has received the goods knowing them to be stolen, then the requirements of Sections 411 and 412, I. P. C. are complied with and the conviction of the accused under Section 411 or 412 on the basis of such presumption cannot be held to be bad on the ground that there is no evidence that the accused received the properties recovered from them from somebody else.

Per Narasimham, C. J.:— The impression that when an accused is charged with an offence under Section 411, I. P. C. the prosecution must invariably establish affirmatively that the stolen property was first in the possession of some other person and then was transferred to the possession of the accused is erroneous and is not supported by the decisions in AIR 1954 SC 39 and 22 Cut LT 456. Where the facts found justify the drawing of the presumption under Illustration (a) to Section 114 of the Evidence Act and a Court draws such a presumption it is obvious that the accused who was found in possession of stolen property soon after theft and who is unable to give a satisfactory explanation for his possession is either a thief or a guilty receiver, and it is not necessary for the prosecution to further show that possession was transferred to him from some other person. **ILR (1957) Cut 680: 24 Cut LT 1: 1958 Cri LJ 534: AIR 1958 Orissa 51 (55 to 57) (Pt B) (Prs 15, 29, 30) (DB).**

——**S. 411** — Evidence Act (1872), Section 114, Illus. (a) — Presumption when arises — It must be proved that goods found in possession of accused were stolen. See Evidence Act (1872), Section 114, Illus. (a). **AIR 1955 NUC (Pepsu) 5707.**

7. Possession after lapse of time.

——**S. 411** — Accused found in possession of property taken in robbery soon after commission of robbery — Accused presumed to be guilty under Section 411, unless he could explain possession — Evidence Act (1872), S. 114, (1950) 2 All ER 330 and (1963) 1 All ER 21, Rel. **1964 MPLJ (Notes) 78.**

——**S. 411 — Question of recent possession of stolen article — Effect of.**

In a case under Section 411, Indian Penal Code, no fixed time-limit could be laid down to determine whether possession was recent or otherwise. Every case had to be judged on its own facts. **1961 MPLJ (Notes) 88.**

——**S. 411** — Evidence Act (1872), Section 114, Illus. (a) — Stolen bullock recovered from accused little less than a year of theft — Presumption under Illus. (a) cannot be drawn against him. See Evidence Act (1872), S. 114, Illus. (a). **1964 (2) Cri LJ 338: AIR 1964 Punj 400.**

8. Possession must be exclusive.

——**S. 411 — Applicability — Possession must be exclusive — Recovery from women accused living with husbands — Effect.**

Where a house is occupied jointly by the husband and wife, it cannot in the absence of positive evidence be held that one is in exclusive possession. Hence, where stolen articles are produced from the house of women accused, who were living with their husbands, then the possession cannot be said to be exclusively theirs, for the purpose of Section 411. **1955 Cri LJ 595: 1954 AMLJ 129: AIR 1955 Ajmer 10 (11) (Pt C) (Pr 8).**

——**S. 411 — Applicability — Possession must be exclusive — Recovery from jungle.**

A person may know where a stolen property is concealed without being actually in possession of it. Where the stolen articles were produced by the accused from the jungle, it cannot be held that the accused were in possession unless there was evidence to show that the place was not accessible to anybody else. **1955 Cri LJ 595: 1954 AMLJ 129: AIR 1955 Ajmer 10 (11) (Pt D) (Pr 8).**

——**Ss. 411, 412 — Exclusive possession of stolen property — Property recovered from house in which accused lives jointly with his brothers — Exclusive possession of accused is not established.**

Where stolen ornaments are recovered from a house in which the accused and his brothers lived jointly, it is impossible to hold that the ornaments were in exclusive possession of the accused and so even if the property has been proved to be the proceeds of dacoity, it is not possible to convict the accused under S. 412. **51 Cri LJ 586: AIR 1950 All 180 (181) (Pt B) (Pr 8).**

——S. 411 — Applicability—Property in custody of railway found in godown of accused—Offence — Accused charged under Section 411 — Property not established to be stolen property — Conviction under Sec. 403 not legal. See Penal Code (1860). S. 403. **1962 (2) Cr LJ 457: AIR 1961 Assam 132 (DB).**

——S. 411 — Essentials — Possession and control — Accused not knowing that property was subject-matter of theft — No conviction under Section 411 — Mere retaining or receiving is not exercising act of control or possession. **AIR 1955 NUC (Assam) 2812.**

——S. 411 — Possession of stolen property — Evidence and proof of — Property found buried in field of accused—It is no proof that accused was in possession of it — It may have been buried by someone else — Conviction under Section 411, cannot stand. **ILR (1960) Bom 664: 1960 Nag LJ 390: 1960 All WR (Sup) 41: 1960 All Cr R 264: 1960 Cri LJ 1429: AIR 1960 Bom 488 (490) (Pt B) (Pr 7).**

[**Impliedly overruled** on another point in AIR 1961 SC 1808. See AIR 1963 Gui 159.]

——S. 411 — Evidence — Ownership and previous possession of property by complainant proved — Accused found in exclusive possession — Inference — Presumption under Section 412, Penal Code, may be drawn—In other cases one under Section 411, Penal Code may be drawn when there is no such proximity as regards time and place and nothing more. General rule is to draw presumption under S. 411, Penal Code. See Evidence Act (1872), S. 114, Illus. (a). **AIR 1955 NUC (Madh B) 3862 (DB).**

——S. 411 — Possession must be exclusive — Stolen articles found in accused's unfenced compond which was accessible to all — Mere fact of knowledge of accused of existence of stolen articles in such place is not conclusive proof of possession of those articles by accused — Evidence Act (1872), S. 114 — Evidence — Appreciation of — Criminal trial. **(1965) 7 OJD 10: 31 Cut LT 396: 1965 (2) Cri LJ 569 (569, 570) (Pt A) (Pr 3) (Orissa) (DB).**

——S. 411 — Applicability — House in joint possession of accused and his father — Accused showing places of concealment of stolen articles in house — Presumption as to possession — In the absence of evidence that accused was in exclusive control of the house the possession of stolen property cannot be attributed to him. See Evidence Act (1872), S. 114, Illus. (a). **1957 Cri LJ 1441: AIR 1957 Orissa 287.**

——S. 411 — Applicability — Possession must be exclusive. **AIR 1955 NUC (Orissa) 1589 (DB).**

——S. 411 — Stolen ornaments produced by accused — No conclusive proof of possession of accused — Accused if guilty under S. 411.

Where the accused produced certain stolen ornaments from a place which was easily accessible to every one and which did not belong to them it cannot reasonably be held that the accused were actually in possession of the stolen property. Mere proof of knowledge of the place of concealment would not suffice to prove conclusively that they were in exclusive possession of the accused. Where no conclusive inference can be drawn one way or the other, accused cannot be held guilty under S. 411. **(1951) 17 Cut LT 93 (DB).**

——S. 411 — Stolen property recovered from house in occupation of father and son — Conviction of father, propriety of.

Where the house from which the incriminating article was recovered was occupied jointly by father and son, the father cannot be convicted for the offence under Section 411, I. P. Code merely on the ground that he was the karta of the joint family, unless it was established that the portion of the house from which the recovery was made was in his exclusive and conscious possession. AIR 1947 Pat 236 and AIR 1941 Pat 223 and AIR 1946 Pat 169, Rel. on.; AIR 1951 Pat 296, Distinguished. **1960 BLJR 474: 1960 Cri LJ 1647: AIR 1960 Pat 551 (552) (Pr 4).**

——S. 411 — Stolen property taken out of public stream by accused — Exclusive possession on part of accused — Presumption — Utensils can be held to be in possession of the accused from the fact of his going alone to the stream and taking out the utensils when others failed to do so from the place of concealment in the stream. **ILR 38 Pat 151: 1958 Pat LR 387: 1959 Cri LJ 219: 1959 BLJR 198: AIR 1959 Pat 54 (60) (Pt D) (Pr 21) (DB).**

——S. 411 — Stolen property recovered from verandah in joint possession of two accused — Conviction of one — Sustainability.

Where stolen property (gold tabiz) is recovered from an open verandah which is in joint possession of both the accused, then the conviction of one of them under Section 411, Penal Code, cannot be maintained for being in possession of the stolen property, unless there is something more to show the conscious possession of and absolute control over it by the said accused. **ILR 38 Pat 151: 1958 Pat LR 387: 1959 BLJR 198: 1959 Cri LJ 219: AIR 1959 Pat 54 (60) (Pt E) (Pr 22) (DB).**

——S. 411 — Possession — If to be exclusive — Stolen property found in well.

Mere knowledge of the accused who is prosecuted for an offence under Section 411, Penal Code, about the stolen property (ornaments) being in the well will not be sufficient to lead to the inference that he was in possession of those ornaments in the absence of any evidence as to who had kept the ornaments in the well. **ILR 38 Pat 151: 1958 Pat LR 387: 1959 BLJR 198: 1959 Cri LJ 219: AIR 1959 Pat 54 (60) (Pt F) (Pr 23) (DB).**

——Ss. 411, 27 — Applicability — Recovery of stolen goods from box in petitioner's house on production of key by wife — Conviction — If justified.

Where, in the absence of the petitioner in his house, his wife produced the key of a box in the house, which box was found to contain stolen articles, the petitioner cannot, in the absence of any evidence to show that the incriminating articles were held by the wife on account of the petitioner, be convicted under Section 411. AIR 1941 Mad 694 and AIR 1944 Lah 339 (FB) and AIR 1955 Ajmer 10, Rel. on. **62 Pun LR 737: 1961 (1) Cri LJ 152: 1960 All Cr R 8: 1960 All WR (Sup) 65: AIR 1961 Punj 30 (30) (Pr 5).**

——S. 411 — Recovery of stolen gun at instance of accused from place accessible to others — Conviction under Section 411 and S. 19 (f), Arms Act — If justified— (Arms Act (1878), S. 19 (f)).

Where the place from where certain stolen gun was recovered at the instance of the accused, is a place accessible to all and sundry, from the fact of the recovery from such a place it is not possible to conclude beyond reasonable doubt that the accused had concealed the gun there and therefore he was receiver of stolen property in terms of Section 411. AIR 1954 SC 39, Rel. on. Nor is it safe to hold that the gun, which was concealed there, was in the possession of the accused. Hence his conviction under Section 19 (f), Arms Act would also not be justified. **ILR (1958)**

Punj 1747: 1958 Cr LJ 1084: AIR 1958 Punj 294 (302) (Pt D) (Pr 62).

——S. 411 — Recovery of articles from open place — No evidence that accused had concealed them there — Conviction under Section 411 not maintainable.

When the field from which the ornaments were recovered was an open one, and accessible to all and sundry, it is difficult to hold positively that the accused was in possession of those articles The fact of recovery by the accused is compatible with the circumstances of somebody else having placed the articles there and of the accused somehow acquiring knowledge about their whereabouts and that being so, the fact of discovery cannot be regarded as conclusive proof that the accused was in possession of these articles to have concealed them at that place and if there is no other circumstance to connect the accused with the crime, his conviction under Section 411, I. P. C., cannot be sustained. AIR 1954 SC 39, Rel. on; AIR 1937 Raj 234, Distinguished. **1960 Raj LW 537: ILR (1960) 10 Raj 1411.**

——S. 411 — Applicability — Property found in a house not in exclusive possession of accused — Responsibility cannot be affixed on accused. **AIR 1955 NUC (Raj) 2547.**

9. Identification of stolen property.

——S. 411 — For conviction under S. 411, prosecution must prove that property recovered from accused was stolen property — No identification proceedings held before Magistrate in respect of stolen property — Prosecution evidence merely showing that property recovered was similar in size to stolen property — Accused held should be given benefit of doubt. **AIR 1951 Ajmer 50 (2) (50) (Pr 3).**

——S. 411 — Proof of offence — Identification of jewels by women — Evidentiary value — Women may identify their necklaces even without marks of identification if they are whole and unbroken but they can never identify a piece of a necklace of ordinary type if it is made into several pieces See Evidence Act (1872), S. 9. **1958 Cri LJ 534: AIR 1958 Orissa 51 (DB).**

——S. 411 — Burden of proof — Duty of prosecution — Currency Notes recovered from houses of accused — Inference of guilty knowledge.

The mere fact that properties such as currency notes, alleged to be stolen, are recovered from some places in the houses of the accused persons cannot lead to an irresistible inference that they are guilty of dishonest retention of stolen property under S. 411, I. P. Code, when the currency notes recovered thus are unidentifiable and in fact were not identified by the complainant as part of his stolen property. The mere fact that the places from which the property was recovered at the instance of the accused are rather unusual and may indicate that the property did not belong to the accused would not relieve the prosecution from proving that the property did belong to the complainant and not to the accused and that the accused were in dishonest possession of stolen property. **17 Cut LT 93: 53 Cri LJ 916: AIR 1952 Orissa 162 (162) (Pt A) (Pr 4) (DB).**

10. Pointing out or production of property.

——S. 411 — Pointing out property buried in open space — Possession — (Evidence Act (1872), Section 27.

Where the ornaments were lying buried underneath a palm tree in an open space which was accessible to anyone, the fact that they were recovered from that place at the instance of the accused is not sufficient to hold that the accused was in possession of the same. AIR 1954 SC 39, Rel. on. **1956 All LJ 764: 1956 All WR (HC) 596.**

——S. 411 — Recovery of goods stolen in dacoity from house of accused at their instance — Accused not identified as those involed in dacoity — Conviction under Ss. 395 and 412 — Legality — Applicability of presumption under Section 114, Illus (a), Evidence Act.

For a conviction under S. 412, the mere proof of knowledge or belief that the articles were stolen articles is not sufficient. It must further be proved that the accused had knowledge or belief that possession of articles had been transferred by the commission of a dacoity. When sufficient time had elapsed since the commission of offence and the recovery was not made from a place very near to the place of commission. **Held** that it would be proper to convict the accused under S. 411. **1958 Andh LT 476.**

——S. 411 — Evidence — Production of currency notes — No marks of identification — Conviction on basis of production — Legality — (Evidence Act (1872), Ss. 9, 114, Illus. (a)).

Currency notes are unidentifiable properties and if there is no evidence that they had any mark of identification the conviction on the mere production of currency notes cannot be sustained. **ILR (1957) Cut 680: 24 Cut LT 1: 1958 Cri LJ 534: AIR 1958 Orissa 51 (57) (Pt F) (Pr 16) (DB).**

——S. 411 — Evidence — Possession of stolen property — Accused proved to have knowledge of place of concealment — Sufficiency.

Where stolen property is recovered on information given by the accused from places which do not belong to the accused and which are easily accessible to everyone, it cannot be reasonably inferred that the accused were actually in possession of stolen property. Mere proof of knowledge of the place of concealment would not suffice to discharge the burden cast on the prosecution. **17 Cut LT 93: 53 Cri LJ 916: AIR 1952 Orissa 162 (163) (Pt B) (Pr 5) (DB).**

——S. 411 — Applicability — Article produced but from pawnee — Sufficiency for conviction.

It is not necessary for conviction under S. 411, I. P. C., that the stolen property should have been physically produced from the actual possession of the accused. All that is necessary for the prosecution to show is that the accused person after the property was stolen came into control of the stolen property and that he did so dishonestly or having reason to believe that it was stolen. Where the accused had pawned the stolen property it was held that it satisfied the condition that the accused had come into possession of or had received the stolen property although at the time it was actually produced, it was produced not from the physical possession of the accused but from that of the pawnee. (1854) 4 I CLR 144: (1855) 24 LJMC 135, Rel. on. **1957 Raj LW 167: ILR (1956) 6 Raj 1007.**

——S. 411 — Pointing out or production of articles — Conviction.

Where the only thing which was proved was that the accused recovered the ornaments in question from a thatch meant for tethering cattle of the family of the accused which consisted of several members and which thatch could not therefore, be said to be in exclusive possession of the accused.

Held, that it was possible for the accused to have knowledge of the place without himself being guilty for any offence and the recoveries alone

were not sufficient to justify the conviction under S. 411. **1951 RLW 74: AIR 1952 Raj 20 (22) (Pt C) (Pr 14) (DB).**

11. Evidence and proof.

——**S. 411** — Bag of charcoal removed from truck — Accused picked up casually as coolie to accompany truck — It was not his regular duty to accompany truck — Accused not in know of what was to take place subsequently — Benefit of doubt given to accused and his conviction under S. 411 was set aside. **(1951) 25 AMLJ 73.**

——**S. 411 — Possession of stolen property — Burden of proof.**

In order to sustain a charge under S. 411, I. P. Code, it is necessary for the prosecution not only to prove that the accused was in possession of property belonging to another person but also to prove that the property was stolen property and he retained possession with that knowledge. Merely because a person is found in possession of the property of some other person no presumption can be raised by the Court that property was stolen property. The prosecution has to prove by satisfactory evidence that there was theft and the property in question was stolen. In absence of any definite proof on the point, no presumption can be drawn in favour of the prosecution about the theft or about the property being stolen. **1956 All WR (HC) 596: 1956 All LJ 764.**

——**S. 411 — Burden of proof.**

It is not upon the accused to prove how he came to possess the property which is said to be stolen property. Burden of proof lies upon the prosecution to bring the guilt home to the accused. **1953 All LJ 173: 1953 All WR (HC) 156: 1953 Cri LJ 1125: AIR 1953 All 493 (493) (Pt A) (Pr 6).**

——**S. 411** — Confession by accused charged under S. 411, I. P. Code, that they had taken part in a theft with a promise to deliver the loot — Subsequent handing over of part of the stolen articles and sale proceeds of some others—Admissiblity of confession—**Held** that confession would not be admissible in evidence. **1950 All LJ 738.**

——**S. 411** — Evidence — Circumstantial evidence — Sufficiency — The rule as to circumstantial evidence is that it should be consistent and consistent only with the guilt of the accused and if the evidence is consistent with any other rational explanation then there is an element of doubt of which the accused must be given the benefit. See Evidence Act (1872), S. 3. **ILR (1956) Andhra 538.**

——**S. 411 — Burden of proof — Duty of prosecution — (Evidence Act (1872), Ss. 101-104).**

From the fact that the accused who is found in possession of complainant's buffaloes does not disclose the circumstances under which he received them, it cannot be presumed that the buffaloes had become stolen property before he got them and that he had the requisite guilty knowledge. The burden is on the prosecution to prove the guilt of the accused by establishing the necessary ingredients of the offence. **1957 Cri LJ 349: AIR 1957 Assam 35 (38) (Pt C) (Pr 16) (DB).**

——**S. 411** — Dishonestly receiving stolen property — Statement of one accused before Police and Panchas resulting in discovery of shop of accused persons who had sold certain gold after the theft — Allegation that the stolen ornaments were converted into gold — No evidence to connect gold sold by accused with stolen ornaments — Statement of accused could not be used as evidence against co-accused — Accused held not guilty — Evidence Act (1872), S. 27. **(1960) 1 Guj LR 100.**

——**S. 411** — Evidence and proof — Disclosure statement by accused — Discovery of articles in consequence of that statement — Possession of stolen articles with accused held could be presumed — Evidence Act (1872), S. 114, Illus. (a). **1964 (2) Cri LJ 293: AIR 1964 Him Pra 27 (28) (Pt B) (Pr 12).**

——**S. 411** — Evidence — Person found in possession of property taken in dacoity — Inference. It may be presumed that he knew the property to have been stolen, but not that he knew or had reason to believe that it was stolen in a dacoity rather than, in a theft. See Evidence Act (1872), S. 114, Illustration (a)). **AIR 1955 NUC (Madh Bha) 3781.**

——**S. 411** — Essentials — Condition for conviction — The property recovered was stolen property, has to be proved. **AIR 1955 NUC (Madh Bha) 3732.**

——**Ss. 411, 457, 380** — Applicability — Evidence Act (1872), S. 114 — Accused charged under Sections 457 and 380 — Evidence only of recovery of property — Accused held guilty under S. 411 only. **AIR 1955 NUC (Madh Bha) 3375.**

——**S. 411 — Evidence — Possession of accused incriminatory — False explanation — Effect.**

Where the nature of the property and the circumstances indicate that the possession of the accused was not in the natural course of things, but was incriminatory, the fact that a false explanation was given by the accused regarding receipt of the property makes the prosecution case stronger and more acceptable. **1954 Cri LJ 1713: AIR 1954 Manipur 13 (16) (Pt C) (Pr 6).**

——**S. 411** — Evidence — Possession of stolen property — Sufficiency for conviction — Where a perusal of the statements made by the accused makes it clear that he did not make any statement to the effect that he kept the stolen articles in the place wherefrom they were found and there is nothing in those statements to show or suggest that the stolen articles could be deemed to have ever been in the possession of the accused no burden is cast on him to show how he came to know the shop where the stolen articles were found. See Evidence Act (1872), S. 114. **AIR 1955 NUC (Mys) 924.**

——**S. 411** — Information received from accused — Admissibility in evidence — Accused charged of dishonestly receiving stolen property — Evidence regarding discovery of stolen articles at instance of accused admissible in evidence. See Evidence Act (1872), S. 27. **(1964) 6 OJD 284.**

——**S. 411 — Evidence and proof.**

Conviction under S. 411 of the Penal Code cannot be maintained in the absence of any proof that the accused persons were found near about the place of occurrence, i.e., where alleged theft was committed, or that they had received the articles from anybody else. The mere recovery of stolen properties certainly is not enough for a conviction under S. 114. AIR 1958 Orissa 51, Rel. on. **(1959) 1 OJD 430: (1959) 25 Cut LT 454.**

——**S. 411** — Evidence Act (1872), S. 114, Illus. (a) — Possession of stolen goods — Burden of proof — While accounting for the possession of stolen goods, the burden is not cast upon the accused to establish beyond reasonable doubt that his explanation is true. Even if it might possibly be true, he is entitled to an acquittal, because the primary burden of proving the entire case beyond reasonable doubt rests on the prosecution. See Evidence Act (1872), S. 114, Illus. (a). **1958 Cri LJ 657: AIR 1958 Orissa 106.**

——**S. 411 — Charge of dishonest retention of stolen currency notes — Burden of proof.**

Where the accused is charged with dishonest retention of stolen currency notes, it is the duty of the prosecution to prove conclusively that the notes belonged to the complainant. If the prosecution fails to identify the notes as part of the stolen property the accused is entitled to an acquittal. The mere fact that the notes were produced by the accused from some unusual concealed place may indicate that they did not belong to the accused but that by itself cannot lead to the inference that they belonged to the complain ant. **(1951) 17 Cut LT 93 (DB).**

——**S. 411** — Applicability — Explanation by accused for possession accepted as true — He must be acquitted — Evidence Act (1872), S. 114. **AIR 1955 NUC (Punj) 458 (DB).**

——**S. 411** — Evidence and proof — Where it is established that a dacoity had been committed and also that property was recovered from an individual many days after the offence and there is no other evidence of that person's participation in the offence, it would be unsafe to convict him of the offence of dacoity on the evidence of the recovery alone. Where it can be assumed that he received the property from others and from the circumstances it can also be presumed under Section 114, Evidence Act that he had reason to believe when he received the property that it was stolen he is clearly guilty under S. 411. See Penal Code (1860), S. 395. **AIR 1955 NUC (Raj) 262 (DB).**

12. Conviction and sentence.

——**S. 411** — Sentence — Conviction under — Release on admonition — Legality — Section 3 of the U. P. Act is applicable only to those offences which were punishable up to two years' imprisonment. Section 411 Penal Code is punishable with imprisonment up to 3 years. **Held** that S. 3 of the U. P. Act was not applicable. If the Magistrate wanted to give the accused the benefit of the Act he should have acted under S. 4 of the U. P. Act. See U. P. First Offenders Act (VI of 1938), S. 3. **AIR 1955 NUC (All) 3547 (DB).**

——**S. 411** — Sentence — Charge under S. 302 and S. 411 — Charge under S. 302 not proved — Conviction under S. 411 —Circumstances that accused was charged for murder and property belonged to murdered person should not be taken in considering awarding sentence. **AIR 1955 NUC (All) 2735.**

——**S. 411** — Criminal P. C. (1898), S. 32 — Property stolen from train — Deterrent punishment is called for. See Criminal P. C. (1898), S. 32. **1953 Cri LJ 1125: AIR 1953 All 493.**

——S. 411 — Sentence.

Cases under the section especially when property found is property stolen from a railway train, call for deterrent punishment — Sentence of nine months rigorous imprisonment cannot be said to err on side of severity. **1953 All LJ 173: 1953 All WR (HC) 156: 1953 Cri LJ 1125: AIR 1953 All 493 (493) (Pt A) (Pr 6).**

——**S. 411** — Accused found with property — Property not proved to have been stolen property —No other offence with respect to it shown—Acsed cannot be convicted under S. 411. AIR 1929 All 917, Rel. on. **1953 Cri LJ 1405: ILR (1952) 4 Assam 387: AIR 1953 Assam 154 (154) (Pt A) (Pr 4).**

——S. 411 — Sentence — Offence should not be dealt with leniently.

Life in villages in Bengal and elsewhere would become quite impossible if theft of cattle and the crime of receiving stolen cattle were dealt with leniently. Stealing a villager's cow is a very serious offence and so is being in possession of such a cow knowing it to be stolen. The offence, therefore, should not be dealt with leniently.

Held, fine of Rs. 200 was inadequate. **87 Cal LJ 387: 1952 Cri LJ 1298: AIR 1952 Cal 616 (617) (Pt A) (Pr 3).**

——**Ss. 411, 302, 379 and 201** — Murden for gain — Convictions under Ss. 302, 379 or 411 in alternative — Acquittal of charge under S. 201 — Appeal — Conviction under S. 302 set aside and under S. 379 maintained. See Penal Code (1860), S. 302. **1953 Cri LJ 1889: AIR 1953 Mad 1006.**

——**S. 411** — Conviction under S. 411, Penal Code — Accused of immature age — Circumstances showing that they had fallen into temptation — Sentences set aside and release ordered on their entering into bonds to appear and receive sentence when called upon and to keep peace and be of good behaviour for one year. See Probation of Offenders Act (1958), S. 4. **(1964) 30 Cut LT 544.**

——**S. 411** — Sentence — Accused sentenced to rigorous imprisonment for six months — Appeal dismissed — In revision High Court releasing accused on bail — Conviction upheld — As regards sentence considering the value of the property involved, the remaining portion of sentence was converted into fine of Rs. 250. **1965 Cur LJ 284: 67 Pun LR 497: ILR (1965) 2 Punj 224: 1965 (2) Cri LJ 699 (700, 701) (Pt B) (Pr 6) (Punj).**

13. Practice and procedure.

——**S. 411** — Charge under S. 400 — Judgment convicting accused under S. 411, I. P. C. the only material evidence — Witnesses to material facts not called again and examined — Judgment is inadmissible to prove connection of accused with crime. See Penal Code (1860), S. 400. **1963 (2) Cri LJ 121: AIR 1963 Andh Pra 314 (DB).**

——S. 411 — Practice and procedure — Accused found in possession of stolen articles forming subject-matter of distinct thefts — Trial of accused under S. 411 more than once — Legality.

The accused cannot be tried and convicted under S. 411 more than once unless there is evidence to show that he had received the articles on different occasions. **(1957) 2 Andh WR 131: (1957) Mad LJ (Cri) 402: 1957 Andh LT 773: 1959 Cri LJ 298: ILR (1957) Andh Pra 462: AIR 1959 Andh Pra 137.**

——**S. 411** — Criminal P. C. (1898), S. 185 (2) — Theft in Assam — Stolen articles recovered from accused in Punjab — Case under S. 380, Penal Code registered and investigation started against accused in Assam — Subsequently case under Section 411, Penal Code started against accused in Punjab — Trial under S. 380, Penal Code, should get priority. See Criminal P. C. (1898), S. 185 (2). **1959 Cri LJ 169: AIR 1959 Assam 20.**

——S. 411 — Essentials for conviction — Duty of Court to examine accused — (Criminal P. C. (1898), S. 342) — (Evidence Act (1872), S. 114, Illus. (a)).

In order to convict a person under S. 411, I. P. Code, it is first necessary to prove that the property found in his possession was stolen property and next that the person concerned knew or had reason to believe that the same was stolen property. Under illustration (a) of S. 114, Evidence Act before a presumption could be drawn against the accused person he has to be asked to account for his possession. The answer may

be furnished by the accused of his own accord and if he does not do so, the Trying Magistrate has to ask under the provisions of S. 342, Cr. P. Code to explain the circumstances appearing in evidence against him. In a case where the Court is to convict a person for his failure to offer an explanation for the possession of the goods, it is incumbent upon the Court to ask the accused for an explanation and only when the accused fails to offer a reasonable explanation the Court is permitted to draw any presumption. 1958 Cri LJ 1012: AIR 1958 Cal 414 (416) (Pr 3) (DB).

——Ss. 411, 392 — Theft and retention of stolen goods form one and same offence and not to be punished separately — Conviction under S. 392 — Conviction and sentence under S. 411 improper. See Penal Code (1860), Ss. 392 and 414. 51 Cal LJ 381: AIR 1950 East Punj 68.

——S. 411 — Offence of theft is distinct from offence of receiving stolen property — Person proved to have committed theft cannot be convicted for receiving stolen property. See Penal Code (1860), S. 379. AIR 1950 Kutch 22.

——S. 411 — Criminal P. C. (1898), S. 439 — Revision against acquittal under S. 411, Penal Code — No appreciation by lower appellate Court of material evidence in proper perspective — No definite finding as to whether property in possession of accused was stolen property — Acquittal set aside and appeal remanded for rehearing. See Criminal P. C. (1898), S. 439. AIR 1950 Kutch 53.

——Ss. 411, 300, 379 and 201 — Murder for gain — Separate charge under each section is not necessary — (Criminal P. C. (1898), S. 233). See Penal Code (1860), S. 300. 1953 Cri LJ 1669: AIR 1953 Mad 1006.

——S. 411 — Dishonestly receives or retains — Proof of receipt of stolen property from another necessary.

An accused person cannot be held liable under S. 411 if there is no evidence as to who was in possession of the stolen property before he came to retain it. In order to bring a person in possession of any movable property within the mischief of S. 411, the prosecution must in the first instance prove that there was some other person who was in possession of that property and from whom the accused received it. ILR (1957) Cut 112: 22 Cut LT 438.

——S. 411 — Criminal P. C. (1898), S. 342 — Statement of co-accused — Use of, to elicit information from accused against whom there is no evidence is improper — (Evidence Act (1872), Ss. 18, 30). See Criminal P. C. (1898), S. 342. AIR 1956 NUC (Orissa) 4578.

——S. 411 — Several articles stolen from different persons — All recovered on two different days — Single charge in respect of — Legality — Held no error committed in law in framing the charge. ILR (1956) Punj 1141: 1956 Cri LJ 782: AIR 1956 Punj 275.

SECTION 412

SYNOPSIS

(Penal Code (1860), S. 412.)

1. Scope and applicability.
2. Evidence and proof.
3. Joint possession.
4. Section 412 and 396.
5. Practice and procedure.

1. Scope and applicability.

——S. 412 — Stolen property — Receiving or retaining of — Husband storing looted property in house — His wife busily scrubbing in keeping such property in house — Such passive partnership is not enough to sustain charge under Section 412 against wife.

In Indian rural society, particularly among the illiterate, husband is a dominant partner. If such a husband brings decoited or looted property into the house, his wife can neither prevent the husband from keeping the property in the house nor can know it even. She, being a passive partner in life has merely to acquiesce in the property being kept in the house even if she knows that the property was obtained in the course of a dacoity. Mere acquiescence in the receipt of stolen property is not the adoption of receipt so as to constitute receiving or retaining within the meaning of S. 412, Penal Code. The charge under S. 412 cannot, therefore, be sustained against the wife. 1955 (1) Cri LJ 344 (346) (Pr 5) (All).

——S. 412 — Evidence Act (1872), S. 27 — Section is not ultra vires — AIR 1939 All 1 (FB): held no more good law in view of AIR 1960 SC 1125 — Recovery of stolen property from persons charged under S. 412, Penal Code cannot be ignored. See Evidence Act (1872), S. 27. 1961 (2) Cri LJ 248: AIR 1961 All 614 (DB).

(Overruled on another point in AIR 1962 All 161 (FB).)

2. Evidence and proof.

——Ss. 412 and 392 — Accused not arrested on spot — No satisfactory evidence but only of identification and recovery of stolen property — Conviction under S. 392 changed to one under S. 412. See Penal Code (1860), S. 392. 1960 All Cr R 198: 1961 All WR (HC) 275: 1960 All LJ 915.

——S. 412 — Evidence — It is dangerous to rely purely on police evidence, which is contradictory, when recovery witnesses have been produced. AIR 1955 NUC (All) 3518.

——S. 412 — Evidence — Possession of stolen property — Presumption — Once stolen property is recovered from possession, presumption of knowledge cannot ordinarily be limited in its scope or dissevered from nature of possession or manner in which property was originally acquired. 1954 Cri LJ 1498: 1954 All WR (HC) 60: AIR 1954 All 634.

——S. 412 — Presumption — Illustration (a) to S. 114, Evidence Act does not limit the scope of the section and it is possible to raise a presumption in certain circumstances that a person found in possession of property stolen in a dacoity was either a dacoit or had received the property knowing it to have been stolen in a dacoity. Such a presumption however cannot be raised merely on account of a person being found in possession of property stolen in a dacoity. 51 Cri LJ 1000: AIR 1950 All 393.

——Ss. 412, 411 — Exclusive possession of stolen property — Property recovered from house in which accused lives jointly with his brothers — Exclusive possession of accused is not established. See Penal Code (1860), S. 411. 51 Cri LJ 538: AIR 1950 All 130.

——S. 412 — Evidence — Proof of offence under — Looted property recovered from house of accused and from jungle near his house — Evidence of possession not challenged by accused — Conviction under S. 412 held correct. See Penal Code (1860), S. 396. AIR 1955 NUC (Assam) 4257 (DB).

——S. 412 — Evidence — Ownership and previous possession of property by complainant proved — Accused found in exclusive possession — Pro-

sumption. Evidence Act (1872), S. 114, Illustration (a). **AIR 1955 NUC (Madh Bha) 3862 (DB).**

——**S. 412** — Evidence — Person found in possession of property taken in dacoity — Presumption — It may be presumed that he knew the property to have been stolen, but not, that he knew or had reason to believe that it was stolen in dacoity rather than in a theft. See Evidence Act (1872), S. 114, Illustration (a). **AIR 1955 NUC (Madh Bha) 3781.**

——**S. 412** — Benefit of doubt — Prosecution for offences under S. 395 and 412 — Penal Code — Suspicious circumstances—Delay in filing F.I.R. not explained — No mention of accused persons in F.I.R. — Confession made by accused, not true — Identification by prosecution witnesses of accused persons doubtful — Benefit of doubt held rightly given. See Criminal Trial — Evidence **(1963) 29 Cut LT 455.**

——**Ss. 412, 411** — "Receives or retains any stolen property" — In S. 412 the words "receives" and "retains" occur side by side and the collocation of receipt and retention of stolen property is obviously intended to do away with the necessity of proving the presence of dishonesty at the time of possession. **1958 Cri LJ 657: AIR 1958 Orissa 106.**

——**S. 412** — Evidence Act (1872), S. 114, Illustration (a) — Presumption about honest retention of stolen property — The words 'receives' or 'retains' are generally used together and though Illustration (a) to S. 114, Evidence Act, expressly refers to dishonest receipt of stolen property a presumption about dishonest retention may equally be made by virtue of that Illustration. See Evidence Act (1872), S. 114, Illus. (a). **1958 Cri LJ 657: AIR 1958 Orissa 106.**

——**S. 412** — Evidence Act (1872), S. 114, Illustration (a) — Possession of stolen goods — Burden of proof — While accounting for the possession of stolen goods, the burden is not cast on the accused to establish beyond reasonable doubt that his explanation is true. Even if it might be true though the jury are not convinced that it is true, he is entitled to an acquittal because the primary burden of proving the entire case beyond reasonable doubt rests on the prosecution. See Evidence Act (1872), S. 114, Illus. (a). **1958 Cri LJ 657: AIR 1958 Orissa 106.**

——**S. 412** — Evidence Act (1872), S. 114, Illustration (a) — Applicability of presumption to offence under S. 412, Penal Code — The principle of illustration (a) to S. 114, Evidence Act applies not only to cases of ordinary theft but also to cognate offences like dacoity and when other necessary facts have been established, the presumption under S. 114, can be taken recourse to. AIR 1950 All 398, Doubted. See Evidence Act (1872), S. 114, Illus. (a). **1958 Cri LJ 657: AIR 1958 Orissa 106.**

——**S. 412** — Proof — Presumption under Section 114, Evidence Act — Effect — Proof of receipt from another not necessary. See Penal Code (1860), S. 411. **1958 Cri LJ 534: AIR 1958 Orissa 51 (DB).**

——**Ss. 412 and 396** — Accused found in possession of articles taken in dacoity soon after its commission — Presumption is that accused was one of the dacoits and not receiver. See Evidence Act (1872), S. 114, Illus. (a). **1960 BLJR 268: ILR 39 Pat 361.**

——**S. 412** — Applicability — Person found in possession of property taken in dacoity soon after commission of dacoity — Proper inference to be drawn is that he was one of the dacoits. See Penal Code (1860), S. 395. **AIR 1955 NUC (Pat) 3235 (DB).**

——**S. 412 — Evidence.**

Held, that recovery from the possession of the accused of certain ornaments identified to be forming part of proceeds of the dacoity, within 3 weeks, was sufficient to establish a case against him under S. 412. **ILR (1956) Punj 140: 1957 Cri LJ 678 (681) (Pt B) (Pr 10) (Punjab).**

——**S. 412** — Applicability — Accused found in possession of camel shortly after commission of dacoity — No proof that he was one of the dacoits — Accused unable to justify possession and dishonestly denying possession could be convicted under S. 412. **1958 Raj LW 527.**

——**S. 412** — Evidence and proof — Where it is established that a dacoity had taken place and also that property was recovered from an individual many days after the offence and there is no other evidence of that person's participation in the offence it would be unsafe to convict him of the offence of dacoity on the evidence of recovery alone. Mere possession of the property by the accused is not enough to convict him under Section 412. See Penal Code (1860), S. 395. **AIR 1955 NUC (Raj) 262 (DB).**

3. Joint possession.

——**S. 412** — Conviction — Property looted in dacoity found in house jointly occupied by two brothers — It is difficult to convict one of them, when there is no evidence from whose possession property was recovered. **AIR 1955 NUC (All) 3518.**

——**S. 412 — Applicability — Possession of stolen property — Co-owner of premises from which property is recovered — Liability of.**

The mere circumstance that certain persons were co-owners of premises from which stolen property is recovered is not by itself wholly sufficient to establish any criminal liability to sustain a conviction under S. 412 I. P. Code, unless there are other circumstances showing that they (or any of them) were well aware of the existence of such property and were in control thereof. **52 Cri LJ 154: AIR 1951 Pat 296 (298) (Pt C) (Pr 2) (DB).**

4. Sections 412 and 395.

——**S. 412 — Ingredients of offence — Recovery of goods stolen in dacoity from house of accused at their instance—Evidence relating to identification of accused not believed — Effect — Conviction under Ss. 395 and 412 — Legality.**

Held it would be meaningless to convict the accused both under Ss. 395 and 412. **1958 Andh LT 476.**

——**S. 412** — Applicability — Case of dacoity — One of accused found in possession of articles stolen in dacoity soon after commission of dacoity —Evidence establishing that he was not on scene of dacoity at the time of its commission but waiting at some distance in a lorry — He can be convicted under S. 412 and not S. 395. See Penal Code (1860), S. 395. **AIR 1955 NUC (Assam) 4191 (DB).**

——**S. 412 — Article taken away in dacoity found in accused's possession after two months — Presumption. — Conviction.**

Held, that it would not be fair or safe to draw the presumption that the accused took part in the dacoity, but that the circumstances of the case and his association with the other accused justified the presumption that he received the article with the knowledge that if had been removed in a dacoity and therefore, his conviction

should be altered into one under S. 412. **1957 Cri LJ 1457: AIR 1957 Tripura 48.**

5. Practice and procedure.

——**Ss. 412, 395** — Practice and procedure — Conviction of same accused under Ss. 395 and 412 is not proper. See Penal Code (1860), S. 395. **1956 Cri LJ 662: AIR 1956 All 336.**

——**S. 412** — Simultaneous convictions under Section 412 and 395 — Legality of — **Held** are not illegal. See Penal Code (1860), S. 395. **1956 Andh LT 915.**

——**S. 412** — Criminal P. C. (1898), S. 297 — Non-direction — Charge under S. 412, Penal Code — Charge to jury is defective and conviction is vitiated. See Criminal P. C. (1898), S. 297. **1952 Cri LJ 1027: AIR 1952 Cal 491 (DB).**

——**Ss. 412, 395** — Accused convicted under Section 395 — He cannot be convicted under S. 412 in respect of production of articles taken in dacoity. AIR 1944 Cal 39 and AIR 1956 All 336, Foll. **1960 BLJR 268: ILR 39 Pat 361.**

SECTION 414

——**Ss. 414, 410** — Despatch of woollen goods and bed-sheets by railway — Goods found missing from railway wagon — Large quantity of goods similar to those proved to have been despatched recovered at the instance of accused — Absence of adequate explanation for presence of such large quantity of articles similar to those found missing — Recovery of goods within few days of their disappearance and presence of silk and paper labels of the consignor on most of the woollen goods recovered and of certain manuscript writings on the bed-sheets written by someone connected with the consignor — Above circumstances held sufficient to justify the finding that the property recovered was proved to be stolen property. See Penal Code (1860), S. 410. **1964 (1) Cri LJ 129: AIR 1964 SC 170.**

——**S. 414** — Several accused under the section — All acquitted on ground that property recovered was not proved to be stolen property — Appeal against acquittal of some of the accused alone — Power of appellate Court to record a finding about the recovered property being stolen property. See Criminal P. C. (1898), S. 423. **1964 (1) Cri LJ 129: AIR 1964 SC 170.**

——**S. 414 — Conviction under — Requirements.**

It is not necessary for a person to be convicted under S. 414 that another person must be traced out and convicted of an offence of committing theft. The prosecution has simply to establish that the property recovered is stolen property and that the accused provided help in its concealment and disposal. **(1963) 2 SCWR 145: 1963 Mad WN 674: 1964 All Cr R 57: 1964 Jab LJ 175: 1964 Mad LJ (Cr) 226: (1964) SCJ 407: (1963) 2 Ker LR 159: 1963 SCD 1018: 1964 (1) Cri LJ 129: 1964 All WR (HC) 15: AIR 1964 SC 170 (173) (Pt C) (Pr 14).**

——**S. 414** — Scope — Conviction under — Altered into one under S. 403. See Criminal P. C. (1898), S. 236. **AIR 1955 NUC (All) 1995.**

——**Ss. 414 and 411 — Scope — Assists, meaning of — Person selling property knowing it to be stolen — Absence of finding as to receipt of such property — Person is not guilty either under Section 414 or S. 411.**

Per Gurtu and Sankar Saran JJ.;— Section 414 clearly applies, as its language shows, to persons who voluntarily assist in the selling or disposing of or making away with property. Assistance means that there must be a person assisted. Except in the coloquial sense, a man cannot be said to assist himself. There must be another person whom he assists.

Neither the thief nor the receiver of the stolen properties can come under S. 414. Section 414 aims at bringing within its scope persons who have not been proved to be in possession of the property. The thief naturally is in possession of the property. So is the receiver of the stolen property. But there may be a third category of persons who never get actual custody or possession of the stolen property and yet assist in its disposal. It is to that category of persons that section 114, I. P. C. would be applicable.

Hence where a person sells a property knowing it to be stolen property, he cannot be convicted for an offence punishable under S. 414 or S. 411 of the Indian Penal Code in the absence of any finding about the receipt of that property by such person. AIR 1926 Bom 71, Rel. on. **1952 Cri LJ 904: AIR 1952 All 481 (484, 485) (Pt E) (Prs 19, 20).**

——**S. 414** — Applicability — Dacoity — Accused not taking part nor receiving any articles but throwing away a bundle into well — Offence committed by him is one under S. 414. **1957 Cri LJ 939: AIR 1957 Andhra Pra 482 (485) (Pt F) (Pr 20).**

——**S. 414 — 'Property' — Meaning of.**

Where dedication of a bull was for a public purpose and in the name of the idol of the village temple and the Mahanta of the temple was looking after the bull with the help of the villagers there is no justification for holding that the bull was fere bestia and therefore, res nullius. The property in the bull remained, after the dedication, in the temple for the benefit of the villagers. It was, therefore, property which could form the subject matter of an offence under Section 414. ILR 11 Mad 145, Rel. on; ILR 17 Cal 852, Disting. **1952 Cri LJ 1141: ILR (1951) 3 Assam 317: AIR 1952 Assam 123 (124) (Pr 8) (DB).**

——**Ss. 414, 379 — Scope.**

The guilt of the accused depends not on the mere ownership of the property in any one but on its removal from the possession of the owner and appropriation. **AIR 1955 NUC (Mys) 945 (DB).**

——**S. 414 — Offence under — Ingredients — Proof.**

The word 'believe' in S. 414 is much stronger word than the word 'suspect' and therefore, to establish an offence under it, it will not suffice merely to show that the accused was careless or that he had reasons to suspect that the property was stolen. For establishing an offence under the section the prosecution must adduce evidence of circumstances from which it can be reasonably inferred that the accused had reasons to believe that the property was stolen property. ILR 6 Bom 402, Followed. **(1963) 5 OJD 370.**

SECTION 415

SYNOPSIS

(Penal Code (1860), S. 415.)

1. Scope.
2. Intention.
3. Fraudulent or dishonest inducement.
4. Property.
5. Damage necessary.
6. Contracts opposed to public policy.
7. Attempt.
8. "Dishonest concealment of facts".
9. Evidence and proof.

1. Scope.

● ——**Ss. 415 and 419 — Offence of cheating — When constituted — Cheating by personation — Accused applying for post in Medical service in pursuance of notification of Public Service Commission — False representation as to name and qualification made in application — Accused appointed by Government to the post and drawing his salary for several years — Accused held guilty under S. 419.**

Cheating can be committed in either of the two ways described in S. 415, I. P. C. Deceiving a person is common in both the ways of cheating. A person deceived may be fraudulently or dishonestly induced to deliver any property or to consent to the retention of any property by any person. The person deceived may also be intentionally induced to do or to omit to do anything which he would not have done if not deceived and which act of his caused or was likely to cause damage or harm in body, mind, reputation or property.

Held on facts, (i) that as the accused had served efficiently and obtained good reports from his departmental superiors there was no likelihood of causing any damage to the reputation of the Public Service Commission by such appointment. In the circumstances the accused had not committed the offence of cheating as defined in the latter part of S. 415, I.P.C. even though he had deceived the Service Commission by representing himself to be a duly qualified candidate and thus induced it to select him for the post; (ii) that the conviction of the accused for the offence of cheaing by personation punishable under S. 419, I. P. Code was correct. The representation made by the accused to the Service Commission continued and persisted till the final stage of the Govt. passing an order of appointment and that therefore, the Government itself was deceived by the misrepresentation he had made in his application presented to the Service Commission. Though the Public Service Commisson was independent statutory body doing advisory function deception of such advisor was deception of the Government which is expected to pay heed to its advice and act accordingly. In consequence of the appointment, Government had to pay him the salaries which fell due. Therefore, the accused by deceiving the Government dishonestly induced it to deliver property to him and thus committed the offence of cheating under the first part of S. 415, I. P. C. Kanumukkala Krishnamurthy v. State of Andhra Pradesh, **1964 Mad WN 547 : 1965 SCD 618: (1965) 2 Andh LT 111: (1965) 1 Mad LJ (SC) 23: 1965 Mad LJ (Cri) 144: (1965) 1 SCJ 268: (1965) 1 Andh WR (SC) 23: (1965) 1 SCWR 16: 1965 (1) Cri LJ 355: AIR 1965 SC 333 (335, 337, 338) (Prs 9, 16 to 18, 25, 26).**

● ——**Ss. 415, 511 — Applicability — Interpolation in document made in January, 1944 — Contract with Government made on 2-3-1944 but to come into effect retrospectively on 11-11-1943 — Offence.**

Held, that latter date could not be utilised to impute criminal liability to accused for act done by them before the contract was executed.

The interpolation of an inflated figure in the document was made by the accused in January, 1944, whereas the contract entered into with the Government of India was dated March 2, 1944. That contract was to come into effect retrospectively, i.e., from November 11, 1943.

Held, that whatever legal effect it might have on the civil rights of the parties under the document, it was impossible to invoke the said date to impute a criminal liabilty to the accused for an act done by them before the contract was executed. Though the document might have been forged in anticipation of the execution of the contract with the Government, there was nothing on record to prove that fact. The interpolation might have been made for many reasons. The Court was not justified to base a finding on a pure surmise that it might have been done only in anticipation of the accused entering into a contract with the Government. State of Bombay v. Rusy Mistry, **1960 Cri LJ 532: AIR 1960 SC 391 (397) (Pt D) (Pr 14).**

● ——**Ss. 415 and 420** — Place of trial — Offence under S. 420 committed in Bombay — Accused a Pakistani national at time of commission of offence — If liable—He must be held guilty and punished under Penal Code notwithstanding his not being corporally present in India at the time. Mobarak Ali Ahmed v. State of Bombay, **1958 SCJ 111: 1957 Cri LJ 1346: 1958 MLJ (Cri) 42: AIR 1957 SC 857.**

——**S. 415 — 'False pretence' — Meaning of — English Law.**

Halsbury's statement of law that 'the false pretence must be of a fact that exists or has existed', does not apply to India. For false pretence in English Law is narrower in its application than what is contemplated by 'cheating' in S. 415, I. P. Code. A promise as to future conduct not intended to be kept is not by itself cheating under English law, but under the Penal Code this will amount to cheating, as is clear from a reading of Illustrations (f) and (g) to S. 415. **1960 All LJ 33: 1960 Cri LJ 188: 1960 All WR (HC) 67: 1960 All Cr R 84: AIR 1960 All 103 (111) (Pt D) (Pr 32) (DB).**

——**S. 415** — Essentials— Ingredients of "cheating" stated— Intention of causing wrongful gain. **AIR 1955 NUC (All) 1734.**

——**Ss. 415, 417 — Banker not paying customer.**

A banker cannot be charged under S. 417 for not paying the customer the money deposited by him. He only incurs a civil liability. **1951 All Cri C 12: 1951 AWR (HC) 85: 1950 All LJ 808.**

——**Ss. 415, 420 — Requirements.**

In order to bring a case within the ambit of Section 420, I. P. Code, it is necessary that there should be a direct connection between the false representation and the delivery of the property for the doing of something by the persop deceived. It is also necessary that the act or the omission complained of should cause or is likely to cause damage or harm to the person in body, mind, reputation or property. **1956 Andh LT 678: 1956 Andh WR 805.**

——**Ss. 415, 417 and 420** — Scope — Cheating — Wilful misrepresentation of fact with intent to defraud — Money obtained by accused on hypothecation bond by false representation that property belonged to him — Offence falls under Section 420, Penal Code. **1961 Ker LT 318: 1962 (1) Cri LJ 649.**

——**S. 415** — Sale of cotton by sample — Cotton supplied not shown to be of kind cheaper than cotton of sample — Charge of cheating cannot be levelled against sellers, as elements of deception and of dishonest inducement were wanting. **1960 Ker LJ 654: 1962 Mad LJ (Cri) 213: 1960 Ker LT 539: (1960) 1 Ker LR 711: 1960 Cri LJ 1600: AIR 1960 Ker 389 (390) (Pt C) (Pr 5).**

——**S. 415 — Dishonest intention — Receiving and retaining property without dishonest intention — Conduct, though unethical in refusing to return property, cannot attract the section.**

It is only where a fraudulent representation leads to delivery of property, which is dishonest-

ly retained, that the ingredients of section 415 of the Code are established. Otherwise every debtor who repudiates his civil liability, on some false pretext or other, would be guilty of cheating, and that is not the law. The criminal process can only be used against a person, when the ingredients of the offence are proved by the complainant, beyond any element of reasonable doubt. Because the conduct of a debtor has been highly unethical, the criminal process cannot be used against him, in order to compel him to discharge a civil liability. **1965 All Cri R 429: 1965 All WR (Supp) 19: 78 Mad LW 164: 1965 (2) Cri LJ 514: AIR 1965 Mad 452 (453) (Pr 2).**

——S. 415 — Essentials— Ingredients of offence.

The definition of cheating in Section 415, I. P. Code, consists of two parts to both of which the words "by deceiving any person" apply. The first part is applicable if there is deception and the accused has attempted fraudulently or dishonestly to induce the complainant to deliver property to him. But the second part does not require the inducement to be fraudulent or dishonest. **ILR (1950) Nag 908: 1951 All WR (Supp) 45: AIR 1951 Nag 315 (317) (Pt C) (Pr 15).**

——Ss. 415 and 420 — Scope — Words 'which act or omission is likely to cause' in second part have no application to first part of section — Deception resulting in obtaining property dishonestly from person deceived — Sufficient to constitute offence.

Section 415 consists of two parts. The first refers to the offence of cheating committed by fraudulently or dishonestly obtaining delivery of any property from the person deceived. That part also makes the act by which the deceived person is made to consent to the retention of such property, an offence of cheating. The words 'which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property', occurring in the second part of Section 415, have no application to the first part of that Section. They have reference only to the offence of cheating committed by inducing the deceived person to do or to omit to do something which he would not do or omit to do if he were not so deceived.

The petitioner was a police constable who was charged with having committed an offence of theft. He approached the son of the Police Prosecutor in charge of his prosecution, and induced him to allow the petitioner to take the papers away from his house.

Held, that the son of the Police Prosecutor having been deceived and having been fraudulently and dishonestly induced to deliver the police papers to the petitioner, the offence of cheating was thereby undoubtedly committed by the petitioner. **39 Mys LJ 1070: 1963 Mad LJ (Cri) 146: 1962 (2) Cri LJ 559 (560) (Prs 8 to 10,11) (Mys).**

——S. 415 — Allegation of all-correct solution to cross-word puzzle but failure to offer prize — Case of cheating or breach of contract held not made out — (Contract Act (1872), S. 73). **AIR 1955 NUC (Pat) 105.**

——S. 415 — Essentials — Deception — What is.

Deception is an essential ingredient of the offence of cheating. Where the persons who granted the permits as well as the persons who obtained the permits are alleged to be in the conspiracy there is no question of one deceiving the other. **1953 Cri LJ 1289: AIR 1953 Pat 225 (228) (Pt B) (Pr 11).**

——S. 415 — Case concerning only first portion of Section 415 — Question of inducing person deceived to do or omit to do does not enter. See Penal Code (1860), S. 420. **1963 (1) Cri LJ 716 (Tripura).**

2. Intention.

——Ss. 415 and 420 — Intention to cheat can only be gathered from surrounding circumstances **1960 All LJ 33: 1960 Cri LJ 188: 1960 All WR (HC) 67: 1960 All Cr R 84: AIR 1960 All 103 (111) (Pt F) (Pr 35) (DB).**

——Ss. 415 and 420 — Intention to defraud.

A negotiated an accommodation draft with his friend B and told the latter that the draft would be honoured if it was presented 14 days after date. Subsequently the Bank decided not to honour the draft when it was presented. The circumstances tended to show that A honestly believed at the time of negotiation that when the draft would be presented subsequently, it would be honoured:

Held, that A was not guilty of cheating. **AIR 1951 Assam 82 (85) (Pr 13) (DB).**

——S. 415 — Borrowing money on representation — Intention to defraud — Absence of.

A borrowed money from B on promissory notes on the representation that he wanted the money urgently for depositing it with the forest department. B lent the money not because of A's representation but because he knew that A was solvent. A however did not make the deposit on account of certain dispute between him and the forest department.

Held, that A was not guilty of the offence of cheating as he could not be said to have the intention at the time of borrowing to defraud B. **1951 Mad WN (Cri) 113: 1951 Mad WN 385: 1951-1 Mad LJ 554: 1952 Cri LJ 396: AIR 1952 Mad 183 (183) (Prs 4, 5).**

——S. 415, Illus. (i) — Applicability — Constructive notice of previous registered mortgage, validity of plea in defence to charge of cheating — Selling property on misrepresentation that it was unencumbered — (T. P. Act (1882), S. 3, Explanation I and S. 55 (1) (a)).

The object of Explanation (1) to Section 3, T. P. Act, is to safeguard the interests of a third party who has acquired a good title under a previous registered instrument but it does not in any way alter or modify the criminal liability of a person who deliberately suppresses certain facts or misstates certain facts. If 'A' has encumbered some property to 'B' by a registered deed and he then sells it again to 'C', representing that the property was unencumbered, 'C' cannot acquire a good title in the property because he must be deemed to have had notice of the previous registered sale deed in favour of 'B' but nevertheless he was made to part with money on a misrepresentation made by 'A' and therefore 'A' is guilty of the offence of cheating. The doctrine of constructive notice cannot be imported into criminal law for the purpose of determining whether a person is guilty of the offence of cheating or not. It is the intention which is important and not whether a man is under a legal duty to disclose or suppress facts within his knowledge. The non-disclosure of the previous registered encumbrances will not affect the right of the previous mortgagees and will not pass a complete title to the purchaser; the purchaser may nevertheless have been cheated. The extent of the purchaser's rights in the property which he acquired has nothing whatever to do with the fact that he was cheated. AIR 1951 Sind 21, doubted but distinguished: AIR 1937 Sind 56, Rel. on. **1954 Cr LJ 299: 55 Punj LR 431: ILR (1954) Punj 691: AIR 1954 Punj 31 (32) (Pr 4) (DB).**

3. Fraudulent or dishonest inducement.

——Ss. 415 and 420 — Applicability — Bogus schemes — Persons induced to deposit money — False representations and suppression of material facts — Offence.

Held, that the promotors of Bharat Helpers and their associates cheated a large number of persons and thereby induced them to deliver money in the form of deposits and, therefore, the offence under Section 420, was clearly established. **1960 All LJ 33: 1960 Cri LJ 188: 1960 All WR (HC) 67: 1960 All Cr R 84: AIR 1960 All 103 (109) (Pt A) (Prs 24, 25) (DB).**

——S. 415 — Sale of land — Dishonest inducement by accused as to his title to land sold.

If a person dishonestly induces another to believe that he is the sole owner of a certain land while in fact he is not, and deceives that person into purchasing the land his act amounts to cheating as defined in Section 415 of the Code. If there is an indemnity clause in the sale deed, the purchaser can also maintain a civil suit, but that fact does not preclude him from launching a criminal case, for cheating. **1959 MPC 40: 1959 MPLJ 181: 1959 Jab LJ 212.**

——Ss. 415, 417 and 511 — "Fraudulently" — Fraud, meaning of — On facts held accused could be convicted under Section 417 read with Section 511. **ILR (1950) Nag 908: 1951 All WR (Sup) 45: AIR 1951 Nag 315 (316) (Pt A) (Prs 6, 10).**

——S. 415 — Accused honestly believing himself to be god incarnate and inducing others to believe it — No evidence of deception — No offence under Section 417 held committed. **1952 Cri LJ 772: 19 Cut LT 127: ILR (1952) Cut 199: AIR 1952 Orissa 149 (150) (Pt A) (Pr 4).**

——Ss. 415 and 405 — Scope — Misrepresentation. Where the accused an employee of a firm who was not authorised to receive or encash cheques on behalf of the firm, had by getting an employee of the treasury to identify him as a partner of that firm induced the treasury officer to deliver money to himself on certain cheques issued to the firm by Government and used the same; **Held,** that what the accused did might amount to cheating but not criminal breach of trust. **AIR 1955 NUC (Pat) 4900.**

——Ss. 415 and 420 — Applicability — Woman fraudulently induced to believe that she was executing conveyance deed for Rs. 13,000 — Conveyance in fact for Rs. 7,500 — Signing of conveyance and handing it over to purchaser would come within latter parts of Ss. 415 and 420. 2 Sau LR 122, Explained. **AIR 1955 NUC (Sau) 957 (DB).**

4. Property.

——Ss. 415 and 420 — Property — Meaning of — "To deliver any property" — "Property" means movable property **AIR 1955 NUC (Sau) 957 (DB).**

5. Damage necessary.

——Ss. 415 and 419 — Cheating — Ingredients — Damage or harm must have been caused to person deceived and not to any one else — Damage in mind includes mental pain or anguish and not merely injury to mental faculties.

Where the accused pretending to be a certain well known eye-specialist induced the complainant to allow him to perform an operation on the eye of his 12 year old son and thereby deceived the complainant causing him a good deal of mental anguish.

Held, that the accused was guilty under Section 419, I. P. Code. **1962 All Cr R 25: 1962 All WR (HC) 1: 1961 (2) Cri LJ 759: AIR 1961 All 639 (640) (Pr 5).**

——S. 415 — Loss or damage arising from act of cheating must be proximate and not vague or remote.

The loss or damage spoken of in the latter part of Section 415 which defines "cheating" must be loss or damage which is the proximate result of the act. It must be a natural consequence of the act complained of. If it is a mere possibility and not a necessary consequence of the act, such loss or damage, even if it actually occurs, would not satisfy the element of damage which is one of the essentials of the offence of cheating as defined under Section 415, I. P. C. The question whether loss or damage is likely to occur to the person deceived, in a particular case, has to be determined with reference to the facts and circumstances of that particular case. It is not a question which can be determined with reference to any particular view of the facts taken in a particular case. **1952 RD (HC) 175: 1952 All LJ 232: 1953 Cri LJ 815: AIR 1953 All 381 (381) (Pt A) (Pr 6).**

——S. 415 — 'Damage' — Meaning of.

It cannot be said that the Public Service Commission has a physical body, though a mind for it may not be strictly wanting. Nevertheless, it would be indisputable that it has a reputation as an entity and that it would consist in its ability to make the right selection of candidates after due consideration of the applications before it. In such a case, if it is led or beguiled to make an unworthy selection or to select a person who is incompetent or disqualified, such an act cannot but be held to affect the reputation of the Public Service Commission and as a consequence thereof damage or harm would follow. No special proof of damage or loss need be insisted upon, as the Body deceived in any case had been harmed. Where there is fraudulent inducement by the accused to select him by mentioning false details in his application to the Public Service Commission, the ingredients of Section 415, I. P. Code as contained in the latter part of that section, must also be held to exist. 19 Mad LJ 271, Expl. and Distinguished; AIR 1941 Lah 460 and AIR 1924 Cal 495, Distinguished. **1960 Cri LJ 1181: AIR 1960 Andh Pra 441 (444) (Pt C) (Pr 8).**

——Ss. 415 and 419 — Essentials of offence — Proof of actual damage or harm — Necessity — Likelihood of harm or damage to professional reputation — Presumption of.

It is not necessary that the act or omission to constitute cheating should actually have caused damage or harm of the kind mentioned in Section 415. It is sufficient if it is likely to cause such damage or harm.

Where a doctor as a result of conspiracy between the accused to cheat the officers of a life insurance company, certifies a dying man as a first class life, that act is likely to cause harm to his morale as well as to his professional reputation. It is something which the Court will presume having regard to the common course of natural events and human conduct. **1961 (2) Cri LJ 98 (101) (Pt B) (Prs 28, 29) (Ker).**

——S. 415 — Applicability — Accused inducing petitioner to enter into shipping contract — No intention to cause wrongful gain or wrongful loss alleged — Offence.

Held, that this was one of those cases, in which a civil dispute was sought to be litigated in a criminal Court under the guise of a charge of cheating. It was not the case of the complainant that in inducing him to enter into a contract, there was any intention to cause wrongful gain to the accused or to cause wrongful loss to the complainant. There being in this case no

direct relation of cause and effect between the representation alleged to be made and the harm or damage to the complainant as a result of the breach of contract, offence under Section 415 had not been committed in consequence of the accused persuading the complainant to enter into a shipping contract. AIR 1925 Cal 100, Rel. on. **61 Bom LR 1648: 1960 Nag LJ 81: ILR (1960) Bom 64: 1960 Cri LJ 812: AIR 1960 Bom 268 (268, 269) (Prs 2 to 4, 6) (DB).**

——S. 415 — Applicability — Deception of A but loss caused to B — No offence.

The act or omission under Section 415, I. P. Code, must be such as to cause or is likely to cause damage or harm to the person deceived. No offence of cheating can be said to have been committed if one person is induced by deception to do or omit to do something and the act or omission causes or is likely to cause damage or harm to another person. AIR 1941 Lah 460; AIR 1924 Cal 495 and AIR 1934 Lah 833, Rel. on. **ILR (1953) Mys 382: 1954 Cri LJ 136: 33 Mys LJ 28: AIR 1954 Mys 9 (10) (Pt B) (Pr 5).**

——S. 415 — Essentials — Damage is necessary to constitute offence. **AIR 1955 NUC (Pat) 3251.**

——Ss. 415, 419, 182 — Misrepresentation to Magistrate as to identity of person, whether cheating — Offence under S. 182, if committed.

Where in a proceeding for issue of a certificate of marriageable age of a certain girl, the applicant by producing another girl misrepresents to the Magistrate that the girl produced is the girl whose age is required to be certified, the offence committed is not cheating, since the Magistrate would not suffer any harm in mind, body or reputation. The offence made out is one under Section 182, since it is a case of a misrepresentation as to identity of the girl where other ingredients of the offence are also present. **3 Sau LR 248: 1952 Cri LJ 850: AIR 1951 Sau 8 (9) (Pt A) (Prs 3, 4) (DB).**

——Ss. 415, 419, 468 — Applicability — Damage necessary — Travancore Penal Code, Ss. 416, 420, 469.

The 1st accused made the 2nd accused falsely personate the complainant and execute a document of sale in his favour of property which did not belong to the 2nd accused, but which was the property of the complainant. For registering that document the first accused took the 2nd accused to the Sub-Registrar's Office and the document was registered by the 2nd accused in these circumstances. The charge in the case specifically mentioned that the person deceived by the two accused was the Sub-Registrar.

Held, that condition as regards deception might be said to be fulfilled in the present case because but for the deception the Sub-Registrar would not have consented to register the document. But no harm or damage could be said to have been caused to the Sub-Registrar in body, mind, reputation or property. In the circumstances, the conviction and sentence so far as Section 419 was concerned could not be supported and must be set aside. But the case under Section 468 had been fully made out. **1953 Cri LJ 275: AIR 1953 Trav-Co 34 (35) (Prs 4, 4a) (DB).**

6. Contracts opposed to public policy.

——S. 415 — Contracts opposed to public policy.

A criminal prosecution for cheating can be based on a contract which cannot be enforced in a civil Court. If A induces B to part with a sum on the assurance that he would exert his influence over the Income-tax Officer so as to persuade him to assess B in a particular manner the Magistrate has only to see what offence has been committed by A, and it is immaterial whether the offence involved an illegal or void contract which could not be enforced in a civil Court. **1951 All WR (HC) 640: 1951 All Cri Cas 165: 1952 Cri LJ 747: AIR 1952 All 428 (428, 429) (Pt A) (Prs 5, 7).**

7. Attempt.

——Ss. 415, 417 — Fraud by post — Insured letter purporting to contain Rs. 400 — Amount actually sent less — Offence of cheating and not of attempt to cheat is committed.

Where a person purports to send Rs. 400 under an insured cover but the cover, when opened before postal authorities delivering it, is found to contain currency notes of only Rs. 130 and it is established that he had actually sent Rs. 130 instead of Rs. 400 as shown by the cover:

Held, that he was guilty of an offence of cheating and not of an attempt to cheat as the act of signing the acknowledgment and the consequent misuse of the acknowledgment by the person was likely to cause embarrassment and even actual danger or harm to the complainant in mind and property. AIR 1948 All 433, Rel. on; AIR 1924 All 205 and AIR 1927 Mad 199, Not foll. **1950 All LJ 679: AIR 1950 All 609 (609) (Pr 4).**

——Ss. 415, 420, 511 — Knowledge of falsehood of pretence — Attempt to cheat.

The accused told the complainant that he knew how to double currency notes. The complainant however did not believe this but he gave the currency notes to the accused with a view to entrap the accused.

Held, that as the complainant knew the falsehood of the pretence the accused could not be convicted of the offence of cheating. But making false pretence and asking for currency notes were in themselves sufficient for holding the accused guilty of the offence of attempt to cheat **52 Cri LJ 644: AIR 1951 Madh B 100 (101) (Prs 7, 8).**

8. "Dishonest concealment of facts".

——S. 415, Expl. — Dishonest concealment — It can occur even in absence of statutory duty to speak — A executing agreement to sell house to S — Subsequent agreement to sell it to R and receipt of earnest money — A charged for cheating — A's plea that he disclosed to R about previous negotiations with S — Evidence in support of that plea is inadmissible under S. 92, Evidence Act, 1872 — But earlier agreement of sale is not material defect in property or seller's title thereto — Omission to make its disclosure is not fraudulent — (T. P. Act (1882), S. 55 (1) (a)) — Evidence Act (1872), S. 92.

A, the accused, who had executed a deed of agreement to sell his house to S entered into a similar agreement with R and received earnest money from him. When he was charged for cheating he pleaded that he had disclosed to R about the previous negotiations with S. The Sessions Judge relied on a case of Sindh High Court AIR 1915 Sind 21 which was dissented from by a division bench of the Allahabad High Court in AIR 1956 All 341; he also accepted the version of the accused regarding subsequent disclosures to R and acquitted him. In revision against the acquittal it was held:

(i) that the Session Judge erred on the point of law. There could be dishonest concealment

even in the absence of statutory duty to speak AIR 1956 All 341 (DB), Ref.

(ii) that under Section 92 of the Evidence Act, no evidence of any oral agreement or statement could be admitted as between the parties to the agreement for purposes of contradicting, varying, adding or subtracting from the terms of the agreement which had been duly reduced to the form of a document, and hence it must be assumed that either the accused had not made disclosure to the complainant about the earlier contract of sale with S or the same, if disclosed, could not be taken note of in the eye of law.

(iii) that under Section 55 (1) (a) of the T. P Act (1882), the seller was bound to disclose to the buyer only such material defect in the property and in his title thereto, of which the seller was but the buyer was not aware, and which the buyer could not have, with ordinary care, discovered. The fact that the accused seller had entered into an earlier agreement of sale with S could neither be called a material defect in the property, nor in the seller's title thereto, inasmuch as he still remained full owner thereof. The last para of Section 55, T. P. Act, itself made it quite clear that only an omission to make such disclosures, as were mentioned in Section 55 (1) (a) could be fraudulent. An omission to disclose a fact that the seller had already entered into an agreement of sale with another person would not amount to any material defect in the property or in the seller's title thereto which the accused-seller could be said to be bound to disclose to the complainant-buyer. Thus the accused could not be held to be guilty of fraud by withholding that information from the complainant: AIR 1956 All 341, Disting. **1965 All WR (HC) 587: 1965 All LJ 786: 1968 All Cr R 380.**

——S. 415 — 'Dishonest concealment of fact', meaning of.

The explanation to Section 415 makes it clear that dishonest concealment of fact is a deception within the meaning of the section. The concealment of fact that is said to be a deception is dishonest concealment and not illegal and deliberate concealment. If a statute requires a person to mention a fact and he conceals it, it is illegal, but not necessarily dishonest concealment of the fact. This concealment may be deliberate or conscious or may be accidental or bona fide arising out of ignorance of law. Accidental or bona fide concealment, even though it is illegal, may not be said to be deception.

Concealment of a fact is not quite the same thing as mere refraining from stating it and something more than mere refraining from stating a fact is required to constitute concealment. But that something need not be a statutory provision compelling exposure of the fact; any other duty, such as arising out of the circumstances in which the parties are placed and the nature of the negotiation between them is enough. Also any act done, or precaution taken to prevent the fact from being brought to the notice of other party is concealment even in the absence of a duty to state it.

Every concealment does not, however, amount to deception; only dishonest concealment amounts to deception according to the explanation. Concealment can be dishonest even in the absence of a legal obligation to speak. Dishonesty has nothing to do with infringement of the law; it depends upon the state of mind at the time of the concealment or the intention behind it. If the intention is dishonest, the concealment is dishonest even in the absence of a duty to speak. 2 All LJ 268 and AIR 1915 Sind 21, Dissented from. **1956 Cri LJ 664: AIR 1956 All 341 (346, 347) (Pt C) (Prs 39, 40) (DB).**

——S. 415, Expl. — Inducement by act and conduct — Dishonest concealment of fact — Illegal concealment of facts not dealt with by the section — AIR 1956 All 341, Rel. on; AIR 1915 Sind 21, Not foll. — Contract for sale — Injunction against seller not to sell property — This fact not disclosed to buyer — It amounts to dishonest concealment of fact. **1963 (2) Cri LJ 369: (1963) 4 Guj LR 833: AIR 1963 Guj 239 (240, 241) (Pt A) (Prs 3, 4, 6).**

9. Evidence and proof.

●——**S. 415**—Proof—Charge of cheating — Previous acts of fraud committed by accused whereby he amassed larke fortune have no relevancy. State of Bombay v. Rusy Mistry, **1960 Cri LJ 532: AIR 1960 SC 391 (395) (Pt B) (Pr 9).**

——Ss. 415 and 420 — Cheating — Essentials of offence.

In order to constitute an offence of cheating, it must be established that the accused deceived the complainant dishonestly inducing him to part with any property in his favour which he would not have parted but for the deception played on him. This dishonest intention is an essential ingredient of the offence. In other words, mens rea on the part of the accused must be established before he can be convicted of an offence of cheating. **1965 All Cri R 71: 1965 All WR (HC) 53: 1965 All LJ 272.**

——S. 415 — Ingredients of offence — Merely parting with goods — Offence — Property how to be returned when accused acquitted — Criminal P. C., S. 517.

As far as the offence of cheating is concerned, the most essential ingredient that has to be proved by the prosecution is that one was cheated and thereby he was dishonestly induced to deliver the money to the accused.

Section 517, Criminal P. C., refers not only to property in respect of which offence has been committed but also to the property before the Court in its custody. Section 517 as amended by Act XVIII of 1923 empowers the Criminal Court to deliver the property or document to any person claiming to be entitled to its possession. The Court has therefore jurisdiction to decide the question of possession.

In normal circumstances, on acquittal or discharge the property would be returned to the person from whom it was seized. But when there are circumstances showing that the person concerned either has not claimed the property as his specifically or when there are no grounds to hold that the property could belong to the accused, the Magistrate has certainly got a discretion to return the property to the complainant and in such a case it may even be unreasonable to return the property to the accused persons. It depends on the facts of each case. It is not imperative that in all cases of acquittal that Magistrate shall return the property to the accused.

In proceedings under Section 517, Criminal P. C., which are more in the nature of proceedings analogous to civil proceedings in which the question of guilt of the accused is not to be determined the Court will be justified in acting on confessions. **(1960) 2 Ker LR 287: (1961) Mad LJ (Cr) 350 (Ker): 1960 Ker LT 1051.**

——S. 415 — Essentials — Intention — Evidence and proof — Promise of marriage — Co-habitation — Pregnancy — Accused refusing to marry.

Held, intention not to marry should be proved at the time when promise was given—Later conduct disowning the girl and refusing to marry

held not sole criterion to judge intention at time when marriage was proposed — Order for further inquiry held not justified — (Criminal P. C. (1898), S. 436). **AIR 1955 NUC (Pat) 3248.**

SECTION 416

——**Ss. 416, 419** — Applicability — "Pretending to be some other person" — Accused not pretending to be other person than himself — False representation that he is B. Sc. (Engineering) of Benares University— No evidence that any other person of name of accused had obtained B. Sc. degree in that year — Case under Section 419 held not made out. **AIR 1955 NUC (All) 2758.**

——**S. 416 — Personation — Prosecution —Duty of.**

As Section 416, itself mentions, it is not necessary for the prosecution to make out whom the accused has been personating, for the one personated may be imaginary or non-existing or unknown. Thus, where the prosecution has established that one K. V. Rama Rao who was an overseer had, by his representation that he was K. Rama Rao, an Engineering graduate of Mysore University and had, on that basis, induced the Public Service Commission to select him for a post in Government service, it must be held that the ingredients of the offence of cheating by personation have been made out, and it is not necessary to consider who was actually the holder of the degree. **1960 Cr LJ 1181: AIR 1960 Andh Pra 441 (443) (Pt B) (Pr 6).**

SECTION 417

●——**Ss. 417, 420** — Applicability — Cheating — Essentials — Dishonestly induces — Wrongful gain or wrongful loss — Proof of one of them is enough — Accused obtaining credits from banks for large sums on strength of hundis supported by forged railway receipts — Offence — Accused held guilty under Section 420. See Penal Code (1860), S. 420. **1963 (1) Cri LJ 623: AIR 1963 SC 666.**

——**S. 417** — Sending of cover insured for higher amount than the money inside it — Sender does not commit offence of cheating — Cannot be convicted under Section 417 — Absence of evidence to show that sender alone put the money in the cover and insured it — Cannot be convicted under Sec. 465, I. P. C. See Penal Code (1860), S. 465. **1956 All WR (HC) 117.**

——**S. 417 — Applicability — Refusal of banker to cash cheque as no funds had been received — Offence.**

In view of the relationship between a customer and a banker, when a banker refuses to cash a cheque on the ground that funds drawn against had not been received it is not possible in such circumstances to make out a case under Section 417, I. P. Code against the Banker. **1950 All LJ 808: 1951 All WR (HC) 85.**

——**Ss. 417, 415** — Banker cannot be charged under Section 417 for not paying the customer the money deposited by him — He only incurs a civil liability. **1950 All LJ 808: 1951 All WR (HC) 85.**

——**Ss. 417, 415** — Fraud by post — Insured letter purporting to contain Rs. 400 — Amount actually sent less — Offence of cheating and not of attempt to cheat is committed. See Penal Code (1860), S. 415. **AIR 1950 All 609.**

——**Ss. 417, 466, 511** — Criminal P. C. (1898), Ss. 197 (1), 207-A, 208 and 209—Madras Village Panchayats Act (10 of 1950), S. 106 — Complaint by President of Panchayat Board against P, a public servant under Ss. 411 and 511—Complaint alleging that P intentionally deceived him and thereby dishonestly and fraudulently induced him to sign on some blank paper — Magistrate taking complaint on file under Section 466 of Penal Code — P filing petition for dismissal of complaint for want of proper sanction under S. 197 (1) of Cr. P. C. and S. 106 of Madras Act (10 of 1950) — **Held,** Sections 197 (1) and 106 both contemplated same requirements — Substance of offence alleged in complaint was cheating under Section 417, because if signature of President in document had not been obtained by P. by cheating him, there would not have been offence of forgery regarding document — Offence of forgery could not be treated as one under Section 466 separated from element of cheating which is substance of complaint — Act of cheating had no reasonable connection with discharge of official duties of P and therefore no sanction for his prosecution was necessary for offence alleged whether under Section 197 (1) or Section 106 — This was unaffected by fact that case was taken on file under S. 466 — Procedure to be followed by Magistrate was not under Section 207-A but under S. 209. AIR 1960 SC 266, Foll. See Criminal P. Code (1898), S. 197 (1). **ILR (1963) Andh Pra 1040.**

——**Ss. 417 and 420 — Difference between.**

The difference between Sections 417 and 420, is that where, in pursuance of the deception, no property passes, the offence is one of cheating punishable under S. 417 but where, in pursuance of the deception, property is delivered, the offence is punishable under Section 420. **52 Cri LJ 1222: ILR (1951) 3 Assam 128: AIR 1951 Assam 122 (2) (123) (Pt B) (Pr 6) (DB).**

——**S. 417** — Dishonest intention — Prosecution under Section 417 on allegations that the taxi which was in complainant's possession was taken away by accused from J, the driver — J though made one of accused, examined as prosecution witness — Magistrate considering him as accomplice and refusing to rely on his uncorroborated testimony — Dishonest intention of accused persons not proved — Order of acquittal held was correct in law. **1964 (1) Cri LJ 186: AIR 1964 Cal 64 (67) (Pt C) (Pr 20).**

——**S. 417** — Applicability — Money obtained by cheating on four occasions — Charge of criminal breach of trust — Conviction for cheating or misappropriation — Accused held liable for conviction under Section 403 — Propriety. See Penal Code (1860), S. 408. **(1957) Cr LJ 1284 (2): AIR 1957 Mad 722.**

——**Ss. 417, 415 and 511** — "Fraudulently" — Fraud, meaning of — On facts held accused could be convicted under Section 417 read with Section 511. See Penal Code (1860), S. 415. **AIR 1951 Nag 315.**

——**Ss. 417, 511** — Criminal P. C. (1898), Section 238 (2-A) — Cheating and attempt to cheat — Accused sending packet containing newspaper cuttings insured for amount due from him to complainant — Probability of using postal acknowledgment receipt as evidencing discharge of debt — Offence is attempt to cheat — Charge framed under Section 417 alone — Conviction under Section 417 read with Section 511 is permissible — 34 IC 992. Foll. AIR 1948 All 433, Disting.; AIR 1924 Cal 215; AIR 1927 Mad 199; AIR 1933 Sind 193, Not foll. — Criminal P. C. (1898), S. 238 (2-A). **(1961) 3 OJD 354: 27 Cut LT 446.**

——**Ss. 417, 415** — Accused honestly believing himself to be God incarnate and inducing others

to believe it — No evidence of deception — No offence. See Penal Code (1860), S. 415. **1952 Cri LJ 772: AIR 1952 Orissa 149 (DB).**

●——**Ss. 417, 420 and 120-B — Offence under S. 420 — "Dishonestly" — Meaning of — Intention to cause wrongful loss or wrongful gain temporarily is enough.**

Per Majority: (Sahai and Singh ,JJ. Misra J Contra): — Even if the intention of the offender is only to cause temporary wrongful gain to himself or temporary wrongful loss to the other, the offence alleged to have been committed must be held to be the one under Section 420, I. P. C. The mere fact that the offenders intended to cause only temporary gain or temporary loss will not affect the situation. AIR 1957 SC 369, Foll.

Per S. C. Misra J. (Contra):—The very wording of the two sections would show that mere fraudulent conduct, which amounts to cheating under Section 417, would not make out a case under Section 420, because in order to sustain a charge under this section, it must be established further that the cheating was with dishonest intention which would be to the effect that at the time that the property alleged to have been received by the accused by fraudulent means from the complainant there is a dishonest intention not to return it or to pay for it to the complainant. If the intention be only to make temporary use of the property, it would not in every case amount to cheating accompanied with the dishonest intention, although in some cases it might be so. It is thus clear that the ingredient of dishonest intention is necessary. In the case of advance of money for obtaining goods the real criterion among other circumstances is to find out the intention of the accused person as to whether he intended to repay it at the time he succeeded in getting the amount or the goods on credit in question. It is the sum total of evidence available in a case and the circumstances surrounding it which will be decisive in the matter and not an abstract or general reference to the meaning of the words "dishonestly" or 'fraudulently' as incorporated in Sections 24 and 25 of the Code which may leave the position as vague and uncertain as the two words themselves. AIR 1938 Pat 165; AIR 1928 Pat 13; AIR 1933 Lah 215; AIR 1925 Mad 387; AIR 1957 SC 857; AIR 1923 Cal 594; AIR 1926 Cal 345; AIR 1916 All 141; AIR 1957 SC 466, Ref. **(1964) ILR 43 Pat 367 (FB).**

——**S. 417** — Criminal P. C. (1898), S. 179 — Offence of cheating — Venue of trial — Case on facts. See Criminal P. C. (1898), S. 179. **AIR 1955 NUC (Punj) 4955.**

——**S. 417** — Criminal P. C. (1898), S. 195 (1) (c) — Applicability — 'Party to the proceedings' — Meaning of — Agent of party not included — Protection of the section not available to an agent. See Criminal P. C. (1898), S. 195 (1) (c). **1963 Raj LW 416.**

——**S. 417 — Ingredients of.**

An offence under Section 417, I. P. Code can be said to be committed both where the accused deceived some one and induced him to deliver a certain property to him by fraudulent or dishonest representation, as also where the person deceived is proved to have done something which he was not bound to do on a fraudulent or dishonest inducement by the accused, and such an act caused or was likely to cause damage or harm in body, mind, reputation or property of the person on whom the deception was practised. The law does not require that the property fraudulently or dishonestly obtained by the accused must belong to the person on whom the deception is practised. The property may be 'any property' as is obvious from Section 415, I. P. C., which defines the offence of cheating.

Where it had been proved that the accused not only deceived the Tahsildar and thereby persuaded him to deliver the possession of the fields to him, but he had also intentionally induced him to pass an order for the delivery of the fields which he would not have passed but for the deception, and it has also been proved that because of the deception practised by the accused on the Tahsildar, the Tahsildar had actually been demoted, it could not be said that the conviction of the accused for the offence under Section 417, I. P. C. was unjustified. **1963 Raj LW 416: ILR (1963) 13 Raj 928.**

——**S. 417 — Applicability — Mere breach of contract — Offence — Intention — Proof.**

A mere breach of a contract cannot give rise to a criminal prosecution. The distinction between a case of mere breach of contract and one of cheating depends upon the intention of the accused at the time of the alleged inducement. Where there is no clear and conclusive evidence of the criminal intention of the accused at the time the offence is said to have been committed and where the party said to be aggrieved has an alternative remedy in a Civil Court, the matter should not be allowed to be fought in a Criminal Court. Subsequent conduct is no doubt a piece of evidence of criminal intention but that alone cannot be enough in every case, and it is the circumstances of each case, which have to be considered along with subsequent conduct. **1959 Cri LJ 1216: AIR 1959 Tripura 40 (41) (Pt C) (Pr 8).**

SECTION 419

●——**Ss. 419, 415** — Offence of cheating — When constituted — Cheating by personation — Accused applying for post in Medical service in pursuance of notification of Public Service Commission — False representation as to name and qualification made in application — Accused appointed by Government to the post and drawing his salary for several years — Accused held guilty under S. 419. See Penal Code (1860), Section 415. **1965 (1) Cri LJ 325: AIR 1965 SC 333.**

——**Ss. 419 and 415** — Cheating — Ingredients — Damage or harm must have been caused to person deceived and not to any one else — Damage in mind includes mental pain or anguish and not merely injury to mental faculties. See Penal Code (1860), S. 415. **1961 (2) Cri LJ 759: AIR 1961 All 639.**

——**Ss. 419 and 416** — Applicability — "Pretending to be some other person" — Accused not pretending to be other person than himself — False representation that he is B Sc. (Engineering) of Benaras University — No evidence that any other person of name of accused had obtained B. Sc. degree that year — Case under Section 419 held not made out. **AIR 1955 NUC (All) 2758.**

——**S. 419 — Applicability — Accused using Railway season ticket of another person pretending to be that another person — Offence — (Railways Act (1877), S. 70).**

Where an accused is found using a Railway season ticket issued in the name of a different person by pretending to be that person he can be charged under Section 419, Penal Code. Even if the Railways Act does not specifically provide for the abuse of a season ticket in this manner, the accused cannot escape his answerability under the general criminal law if his act brings him thereunder. **1956 Andh LT 316: 1956 Andh WR 342: 1957 Cri LJ 44: AIR 1957 Andh Pra 4 (6) (Pt C) (Pr 6).**

——S. 419 — Applicability — Meaning — P. W. D. Supervisor producing personators to receive payments due to others, obtaining their thumb marks in muster roll and falsely stating that thumb marks were of the persons to whom payment was due — Supervisor held guilty under Sections 477-A, 467 and 419. See Penal Code (1860), S. 477-A. **AIR 1955 NUC (Bom) 4472 (DB).**

——Ss. 419, 420 and 465 — Scope — Acquittal under Ss. 419 and 420 — Conviction under Section 465 — Legality.

The petitioner put himself forward as owner of a certain plot of land which in fact he was not. As a result of this false representation, the complainant was induced to part with a sum of money and a deed of sale was executed by the petitioner in favour of the complainant's son. The document was registered in due course. A considerable time afterwards it was discovered that the petitioner had nothing to do with the land in question and that he had perpetrated fraud upon the complainant. The accused was tried for offences under Sections 419, 420 and 465, Penal Code. The Magistrate acquitted the accused of offences under Sections 419 and 420, Penal Code, but convicted him under S. 465, Penal Code.

Held, that the effect of the order of acquittal of the accused in respect of charges under Sections 419 and 420 was that he could not be convicted of the offence under Section 465, Penal Code. When the Magistrate did not find it possible to believe the prosecution case on the two charges with all their implications, the charge under Section 465, I. P. Code could not possibly survive the consequence of such acquittal. **96 Cal LJ 177: 59 Cal WN 832: 1955 Crl LJ 1246: ILR (1957) 1 Cal 510: AIR 1955 Cal 473 (473, 474) (Prs 8, 10, 12) (DB).**

——S. 419 — Applicability —Personation of public servant — If pretender does some act it is offence under Section 170 — But cheating by pretending to be a public servant (S. 170) is a specific offence — It has all ingredients of cheating by personation under Section 419. **1958 Cri LJ 1039: AIR 1958 Madh Pra 230.**

——Ss. 419, 463 and 464 — Forgery — Conviction for — Fraud, essential elements for — Injury not an essential element.

Injury is not a necessary element of fraud in the Penal Code so that in order to sustain a conviction for forgery no injury need be established: AIR 1944 Lah 380, Foll; AIR 1916 Cal 341 (1), Rel. on; AIR 1951 Cal 581, Ref.; AIR 1930 Lah 314 and AIR 1935 Rang 203, Dissented from.

Accused had purchased a car in the name of her minor daughter. The car was insured with a company. The fact of the owner being a minor was not known to the company. On two occasions the car was involved in an accident and was damaged. The claims for which sums of money were paid by the insurance Company were genuine claims and the money paid represented the cost of the actual damage to the car and other expenses incidentally incurred in connection with the accidents. In all these transactions the accused represented to the employees of the Insurance Company as being the owner of the car and in this connection signed a large number of documents as such including letters, claim forms and receipts, two of which were attested by her husband. The accused was charged for a number of individual charges relating to offences of cheating and forgery. It was contended by the accused that since no injury was established, she could not be convicted for forgery.

Held, that the accused had committed the offence of cheating by personation under Section 419, Indian Penal Code and various offences of forgery with regard to all the documents, which she signed. (Since no charge under Section 419 had been framed, accused was convicted under Sections 467 and 468, I. P. C. **ILR (1966) 2 Punj 424.**

——Ss. 419, 467 and 471 — Evidence and proof — Presentation for encashment of National Saving Certificates by one not the real holder — Clerk in Post Office identifying such person — Fact that he knew that person encashing the certificates was personating for real holder must be proved.

One Dr. Miss S. Rao had purchased National Savings Certificates. These certificates purported to be in the name of "S. Rao" so that the holder could either be a male or a female. Upon an information received from her about the loss of these certificates investigation was started and on finding that some one had presented them for encashment at the Post Office, the clerk in the post office was charged to have endorsed the certificates to the effect that the holder was personally known to him and that the holder of the certificates had signed in his presence.

Held, that the prosecution should have established that the accused made this endorsement for the purpose of some wrongful gain. Further, the prosecution had not been able to trace out the person who got these certificates encashed. Mere proving that some one other than Dr. Miss. S. Rao personated for her and forged her signatures on the certificates to get them encashed by cheating the post office was not enough for the conviction of the accused. It was necessary for the prosecution to prove further that the accused while making the endorsement regarding the identity knew that the person presenting the certificates for encashment was not its holder and was personating for the actual holder of the certificates. The prosecution having failed to establish this fact, no fraudulent act on the part of the accused could be held to have been proved. **1962 Raj LW 263: ILR (1962) 12 Raj 270.**

——Ss. 419, 415 and 182 — Misrepresentation to Magistrate as to identity of person, whether cheating — Offence under Section 182, held committed. See Penal Code (1860), S. 415. **52 Cri LJ 471: AIR 1951 Sau 8.**

——Ss. 419, 415 and 468 — Applicability — Damage necessary — Charge specifically mentioning that the person deceived by the two accused was the Sub-Registrar — **Held,** no harm or damages could be said to have been caused to Sub-Registrar in body, mind, reputation or property — In circumstances, convictions and sentence so far as S. 419 was concerned could not be set aside — Case under Section 468 held fully made out — Travancore Penal Code, Sections 416, 420 and 469. See Penal Code, S. 415. **1953 Cri LJ 275: AIR 1953 Trav-Co 34 (DB).**

SECTION 420

SYNOPSIS

(Penal Code (1860), S. 420).

1. **Scope and applicability.**
2. **Essentials.**
3. **Intention.**
4. **False representation.**
5. **Concealment of facts**
6. **Property.**
7. **Valuable security.**
8. **Attempt.**
9. **Abetment.**
10. **Conspiracy.**

11. Procedure.
12. Sanction.
13. Evidence and proof.
14. Sentence.

1. Scope and applicability.

● ——**Ss. 420, 415 and 2** — Provisions relating to place of trial — Existence of substantial liability under Penal Code — Offence under S. 420 committed in Bombay — Accused Pakistani national at time of commission of offence — Liable to be punished under Penal Code. See Criminal P. C. (1898), S. 5 (1). **1957 Cri LJ 1346: AIR 1957 SC 857.**

● ——**S. 420 — Applicability — Sale of goods on conditions of payment of price one delivery — Non-payment, when amounts to cheating.**

Where the charge against the accused is under Section 420 in that he induced the complainant to part with his goods, on the understanding that the accused would pay for the same on delivery but did not pay, if the accused had at the time he promised to pay cash against delivery an intention to do so, the fact that he did not pay would not convert the transaction, into one of cheating. But if, on the other hand, he had no intention whatsoever to pay but merely said that he would do so in order to induce the complainant to part with the goods, then a case of cheating would be established. Mahadeo Prasad v. State of West Bengal, **1954 Cri LJ 1806: AIR 1954 SC 724 (725) (Prs 4, 5).**

——**S. 420** — Applicability — Draft given to accused for encashment, in his personal capacity — No entrustment — Accused cannot be convicted under Section 406 in respect of the drafts — Offence if amounted to mischief (Quaere) Offence. See Penal Code (1860), S. 406. **AIR 1955 NUC (Ajmer) 4731.**

——**S. 420** — Applicability — Using deception or false pretences to obtain money from depositors — Accused are punishable under Section 420. See Penal Code (1860), S. 23. **1960 Cri LJ 188: AIR 1960 All 103 (DB).**

——**S. 420** — Applicability — Financial schemes of accused of highly speculative nature — Fraudulent acts and omissions on accused's part — Accused are guilty of cheating. **1960 All LJ 33: 1960 Cri LJ 188: (1960) All WR (HC) 67: 1960 All Cr R 84: AIR 1960 All 103 (110) (Pt C) (Pr 31) (DB).**

——**Ss. 420 and 409** — Applicability — Criminal breach of trust — Distinction pointed out. See Penal Code (1860), S. 409. **1957 Cri LJ 170: AIR 1957 All 122 (DB).**

——**S. 420** — Applicability — Contract of marriage — Section 420 does not distinguish between property recoverable in a Court of law and not so recoverable — As soon as it appears that a person has been deceived and dishonestly induced to deliver any property to any person who has cheated him the person cheating him is guilty of an offence under S. 420. See Penal Code (1860), S. 34. **AIR 1955 NUC (All) 1999.**

——**S. 420 — Applicability — A receiving B's insured cover as his own — Allegation that it contained mere amount — A ready to return cover with amount specified thereon — Nature of offence.**

Held A could not be said to have fraudulently retained any postal article within the meaning of S. 68, Post Offices Act—He could not be convicted under S. 403 also — In cases where the person who is alleged to have received the property denies that he ever received possession thereof, he may be convicted for theft or cheating but not under S. 403. **AIR 1955 NUC (All) 1743.**

——**S. 420 — Applicability — Cheating based upon void and illegal agreement.**

It cannot be laid down as a proposition of law that in every case where cheating is based upon a void and illegal agreement there can be no criminal prosecution for cheating. Where essential ingredients of the offence of cheating are made out there can be a conviction for cheating irrespective of the fact whether cheating is based upon a void or illegal contract which could not be enforced in a Civil Court. **1951 All Cri Cas 165: 1951 All WR (HC) 640: 53 Cri LJ 747: AIR 1952 All 428 (428, 429) (Pt A) (Prs 5, 7).**

——**Ss. 420 and 417** — Difference between pointed out. See Penal Code (1860), S. 417. **52 Cri LJ 1222: AIR 1951 Assam 122 (2) (DB).**

——**S. 420** — Person, in offences where imprisonment is mandatory, does not include corporate body — Offences involving mens rea committed by servant of company — Company can be prosecuted. See Penal Code (1860), S. 2. **1964 (2) Cri LJ 276: AIR 1964 Bom 195.**

——**S. 420** — Applicability — Act giving rise to civil and criminal liability — Option of aggrieved party to follow any time of action — Vendor of land receiving price, having no right to part of land — Complaint under S. 420, by vendee, is maintainable, even though there is an indemnity clause in sale deed. See Criminal P. C. (1898), S. 4. **1957 Jab LJ 930.**

——**Ss. 420, 406** — Vendor and purchaser — Person taking away ornaments on approval and promising to return them in evening the same day — Her failure to do so is not enough to sustain a charge either under S. 406 or 420. See Penal Code (1860), S. 406. **1953 Cri LJ 1586: AIR 1953 Nag 301.**

——**Ss. 420, 468 — Charge under Ss. 420 and 468 — Accused acquitted under S. 468 on assumption that prosecution case was true and not on disbelief of prosecution evidence — Acquittal does not affect conviction under S. 420 — Criminal P. C. (1898), S. 403.**

Where the accused charged under both Ss. 420 and 468 of the Penal Code was acquitted under S. 468, but the acquittal was based on a correct view of the law based on the assumption that the prosecution case was true on facts and not on the disbelief of the prosecution evidence: the acquittal cannot affect his conviction under S. 420, sustained on the evidence produced. **(1960) 2 Ori JD 246.**

——**Ss. 420 and 295** — Scope stated—**Held** on facts and circumstances that it could not be said that accused in offering the bhog to public for sale committed the offence of cheating. See Penal Code (1860), S. 295. **1958 Cri LJ 1207: AIR 1958 Orissa 220.**

——**S. 420** — Scope — Criminal breach of trust — Distinction pointed out. See Penal Code (1860), S. 405. **1954 Cri LJ 1429: AIR 1954 Orissa 213 (DB).**

——**S. 420** — Forged document, what is — False bill made, signed and submitted by accused for work done as Assistant Public Prosecutor and encashed — Bill held forged document although signatures on it were not forged — Accused held guilty under Ss. 467, 471 and 420 — Case not fit to be dealt with under Probation of Offenders Act, 1958 — Applicability of Ss. 3 and 4 — Appending signature to official receipt for payment of money for Government work — Presumption — Evidence Act (1872), S. 114, Illus. (e). See Penal Code (1860), S. 464. **1963 (2) Cri LJ 36: AIR 1963 Pat 262 (DB).**

——**S. 420** — Applicability — Complaint purely of civil nature — There is no reason for com-

plainant to proceed against accused under S. 420. **AIR 1955 NUC (Pat) 4583.**

——**S. 420** — Post-dated cheque dishonoured — Accused purchasing buffaloes from complainant at Rohtak and including him to accept post-dated cheque on Bank at Poona assuring complainant that there would be no difficulty in encashment — Cheque dishonoured— **Held.** accused was guilty. **1965 All WR (Supp) 14: 1965 Cur LJ 470: 1965 All Cr R 261: 67 Pun LR 474.**

——**S. 420** — Applicability — Woman fraudulently induced to believe that she was executing conveyance deed for Rs. 13,000 — Conveyance in fact for Rs. 7,500 — Signing of conveyance and handing it over to purchaser would come within latter part of Ss. 415 and 420. See Penal Code (1860), S. 415. **AIR 1955 NUC (Sau) 957 (DB).**

——**Ss. 420, 415 — Case concerning only first portion of S. 415 — Question of inducing person deceived to do or omit to do not material.**

Where the case of cheating is concerned with the first portion of S. 415 in the definition of cheating, the question of inducing the person deceived to do or omit to do anything and the question whether the act or omission caused or was likely to cause damage or harm to that person in mind, body, reputation or property do not enter into the picture at all. **1963 (1) Cri LJ 716 (720) (Pt D) (Pr 20) (Tripura):**

——**S. 420 — Suitors' money in deposit with Government fraudulently withdrawn by practising deception — It is cheating.**

Where the suitor's money in deposit with the Government is fraudulently and negligently allowed to be withdrawn from Government deposit by the conduct of Government servants, the suitors cannot be made to suffer and the Government will have to make good the amount, though the Government may realise the money from their servants who are at fault in so allowing the money to be withdrawn. It cannot be denied that the Govt. suffered damage. Government is a corporate body and will certainly come within the definition of 'person' in S. 11. Government has to act through its servants. Thus if deception is practised on a servant of the Government and the servant is made to do anything, which he would not have done if he had not been deceived and which act caused damage in property to the Government, it will amount to cheating within the meaning of S. 415. **1963 (1) Cri LJ 716 (721) (Pt E) (Pr 24) (Tripura).**

——**S. 420 — Applicability — Breach of contract — Offence.**

Mere breach of a contract cannot give rise to a criminal prosecution. The distinction between a case of mere breach of contract and one of cheating depends upon the intention of the accused at the time of the alleged inducement which may be judged by his subsequent act, but of which the subsequent act is not the sole criterion. Where there is no clear and conclusive evidence of the criminal intention of the accused at the time the offence is said to have been committed and where the party said to be aggrieved has an alternative remedy in a Civil Court, the matter should not be allowed to be fought in a Criminal Court. **1959 Cri LJ 1027: AIR 1959 Tripura 38 (39) (Pr 9).**

——**S. 420** — Applicability — Accused representing themselves as belonging to a gang of certain persons and demanding things from villagers — No case that if accused really belonged to the gang, the villagers would voluntarily give things demanded — Offence is not one under S. 420 but the real intention of accused was to frighten and intimidate villagers by setting up to be members of a particular gang. **AIR 1955 NUC (Vind Pra) 1019.**

2. Essentials.

——**Ss. 420, 417 — Applicability — Cheating — Essentials — Dishonestly induces — Wrongful gain or wrongful loss — Proof of one of them is enough — Accused obtaining credits from banks for large sums on strength of hundis supported by forged railway receipts — Offence.**

For a person to be convicted under S. 420, I. P. Code, it has to be established not only that he has cheated someone but also that by doing so he has dishonestly induced the person who was cheated to deliver any property, etc. A person can be said to have done a thing dishonestly if he does so with the intention of causing wrongful gain to one person or wrongful loss to another person. Wrongful loss is the loss by unlawful means of property to which a person is entitled while wrongful gain to a person means a gain to him by unlawful means of property to which the person gaining is not legally entitled. These are the two facets of the definition of dishonesty and it is enough to establish the existence of one of them. The law does not require that both should be established. AIR 1932 Bom 545 and ILR 28 Mad 90 (FB), Dist.

Where a consignor of goods draws a hundi for the price of the consignment on some firm and supports that hundi with the railway receipt obtained by him in respect of the consignment, the party in fact pledges the consignment to the bank discounting the hundi and, therefore, in such a transaction the railway receipt cannot be regarded as anything else than a security for that transaction. If that security turns out to be worthless because the value of the consignment is only a fraction of what it was represented to be, the discounting of the hundi by the party drawing it must necessarily be regarded as unlawful.

The accused consigned small quantities of goods but subsequently tampered with the railway receipts by showing that the consignments were of large quantities. The accused then endorsed the railway receipts in favour of one of the firms belonging to them. Those firms drew large sums of money commensurate with the large quantities of goods specified in the forged receipts and on the security of those receipts drew demand drafts or hundis in favour of various banks.

Held, on the facts and circumstances of the case that the accused by obtaining credits for large amounts on the strength of hundis supported by forged railway receipts had made a wrongful gain and, therefore, was guilty under S. 420, I. P. C. Tulsi Ram v. State of Uttar Pradesh. **(1963) Supp 1 SCR 382: (1963) 2 SCJ 274: 1963 Mad LJ (Cr) 434 :ILR (1963) 1 All 840: 1963 (1) Cri LJ 623: AIR 1963 SC 666 (671 to 673) (Pt D) (Prs 14, 16, 17).**

——**S. 420** — Cheating — Essentials of offence stated. See Penal Code (1860), S. 415. **1965 All WR (HC) 53: 1965 All Cri R 71: 1965 All LJ 272.**

——**Ss. 420 and 415** — Requirements of S. 420 — There should be direct connection between false representation and delivery of property for doing of something by the person deceived — Act or the omission complained of should cause or is likely to cause damage or harm to the person in body, mind, reputation or property. **1956 Andh LT 678: 1956 Andh WR 805.**

——**S. 420** — Essentials — Representation may not be sole cause of damage or loss — It is enough that complainant was partly influenced by misrepresentation. **AIR 1955 NUC (Hyd) 415 (DB).**

——**420 — Ingredients of offence — False representation to accused's knowledge at time of making it must be proved.**

The main ingredients of an offence of cheating are that there should be deception of a person so as to fraudulently or dishonestly induce that person to deliver any property to any person or to consent that any person shall retain any property or intentionally induce that person to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind reputation or property. From this it follows that a wilful misrepresentation of a definite fact with intent to defraud would be cheating. Along with this, it has to be shown that the representation made was false to the accused's knowledge at the time when it was made. An act would not come within the definition of cheating if the representation has turned out to be untrue at a future date.

Where the accused made a representation to the complainant that he would supply labour and in pursuance thereof he got two sums of money at different times as an advance but ultimately failed to act according to the representation and the complainant did not allege anything more than this, the act would not come within the definition of cheating. **10 J and K L R 172: 1952 Cri LJ 1230: AIR 1952 J and K 26 (26, 27) (Pt A) (Prs 4, 5).**

——S. 420 — Requirements to constitute the offence — Accused collecting money by sale of lottery tickets — Lots were not drawn and prizes not distributed as stated in notice — Whether amounts to cheating.

In order to constitute an offence of cheating under S. 420, there should be dishonest or fraudulent intention. The offence of cheating should be distinguished from mere breach of contract. The distinction would depend upon the intention of the accused at the time of inducement which no doubt can be judged by subsequent acts but of which the subsequent act is not the sole criterion. The mere fact that lots were not actually drawn would not by itself lead to the conclusion that at the time they issued the notice and sold the lottery tickets they had no intention whatsoever to conduct the lottery. It may well be that the accused genuinely wanted to hold the lottery and collected the amount by sale of tickets and had no dishonest or fraudulent intention at that time but later after only a small amount was collected they could not keep up the promise of drawing the lots and distribute the prizes. Where there is no clear and convincing evidence of criminal intention of the accused at the time the offence is said to have been committed—and that must be at the time when they made the representation and induced payment of money—the offence cannot be said to have been proved beyond reasonable doubt. Where the necessary intention has to be inferred, the circumstances must be such as to exclude any reasonable hypothesis of good faith of the accused. **1964 Ker LJ 909: (1964) Mad LJ (Cr) 609: 1964 Ker LT 724.**

——S. 420 — Essential ingredient — Mere parting with money not sufficient.

As far as the offence of cheating is concerned, the most essential ingredient that had to be proved by the prosecution was that the complainant was cheated and thereby he was dishonestly induced to deliver the money to the accused. Merely parting with money will not amount to cheating: **(1960) 2 Ker LR 287: 1960 Ker LT 1051: 1961 Mad LJ (Cr) 350: 1962 (1) Cri LJ 654.**

——S. 420 — Essentials.

The offence of cheating is made up of 2 ingredients: Deception of any person and fraudulently or dishonestly inducing that person to deliver any property to any person or to consent that any person shall retain any property.

Where the facts are that the accused to the knowledge of the complainant was solvent, and the money was lent to him on promissory notes carrying interest, that the money was wanted badly by the accused as he had to deposit the sum with the Forest Department, but no such deposit was made on account of disputes between the accused and the Department, it cannot be said that the accused had an intention at the time of borrowing of defrauding the complainant nor that the money was lent because of his representation that he wanted the money for paying to the Forest Department. It was at best the occasion for borrowing. On the facts, no case of cheating can be held to be made out. **1951 Mad WN 385: 1951 Mad WN (Cri) 113: (1951) 1 Mad LJ 554: 53 Cri LJ 396: AIR 1952 Mad 183 (183) (Prs 4, 5).**

——S. 420 — Cheating — Essentials — Delivery of property may be through agent of the person deceived — Ownership of property delivered not necessary — Mere custody is sufficient.

To prove the offence of cheating it is not necessary that the person deceived must himself physically hand over the property to the person deceiving him. It is sufficient if he issues a payment order to his agent who in pursuance of that order, delivers the property to the person concerned. It is also not necessary that the property delivered by the victim of the deception must be his own property. It is sufficient if the property is in his custody or under his control. AIR 1937 Sind 293, Rel. on.

In order to practise deception, it is not necessary that the deceiver should make oral or written false representation. There may be deception by conduct or deception implied in the transaction itself. **(1960) 2 Ori JD 261.**

——Ss. 420, 471/467 — Ingredients of — Physical presentation of forged document — Not an important ingredient— Reference to presentation of chalans in charge held inconsequential.

Held, that the physical presentation of the chalans is not the important ingredient of the two offences. All that S. 471 requires is that there must be fraudulent or dishonest user of a document as genuine and knowledge or reasonable belief on the part of the person using the document that it is a forged one. Similarly, the ingredients of the offence under S. 420 are that the person deceived delivered to some one a valuable security or property, that the person so deceived was induced to do so, that such person acted on such inducement in consequence of his having been deceived by the accused and that the accused acted fraudulently or dishonestly when so inducing that person. **1961 BLJR 411: 1961 (2) Cri LJ 677: AIR 1961 Pat 451 (456) (Pt B) (Pr 16) (DB).**

——S. 420 — Essentials — Gist of offence — Guilty intention — Contract — Putting forward false excuse to defeat contract is not enough to show guilty mind — It may amount to breach of contract. **AIR 1955 NUC (Raj) 4041.**

——S. 420 — Charge under — Essentials — Charge held defective — Criminal P. C. (1898), Ss. 221, 223 and 225.

The most important ingredient in a charge under S. 420 is cheating. The second ingredient is that there must be dishonest inducement of the person deceived to deliver any property to any person or to make, alter or destroy the whole or any part of a valuable security or anything which is signed or sealed and which is capable of being converted into a valuable security.

Held, on facts that the Court ought to have made clear in the charges in the first place that

there was cheating and secondly, that the person deceived was dishonestly induced either to deliver property or to make a valuable security or anything signed or sealed which was capable of being converted into a valuable security. Held, further that the finding of the Sessions Judge completely proved the charges as framed by him namely, that the accused as Nazir fraudulently inflated the amounts in the Treasury copies after they were signed by the District Judge that by such inflation he dishonestly induced the Treasury Officer to pass the payment orders for the inflated amounts, that the said amounts were cashed through the State Bank of India and that the accused converted the excess amounts to his own use. In this case the Treasury Officer was clearly deceived and by such deceit the Treasury Officer was induced to deliver to the peons the property namely, the payment orders which were passed by him for the inflated amounts on account of the deceit practised on him. There could be no doubt that this was done dishonestly by the accused as his intention was to make wrongful gain for himself of the inflated amounts. Thus it was clear that the appellant had cheated the Treasury Officer. What the Courts had to see was whether the Treasury Officer would have passed the payment orders if he had been told that the amounts therein had been inflated. Thus, cheating of the Treasury Officer had been established. Consequently even though the charge was defective, there was no difficulty in holding that the accused was guilty of cheating under Section 420, I. P. Code.

Since the accused who understood the charge and knew the case he had to meet and was not misled and prejudiced, and since there was no failure of justice, the defect in the charge could not be considered as material. AIR 1941 Lah 460 and AIR 1954 Mys 9. Distinguished; AIR 1956 SC 513 and AIR 1953 SC 462, Rel. on. **1963 (1) Cri LJ 716 (717, 718, 720, 721) (Pt B) (Prs 4, 6, 18, 21, 25).**

3. Intention.

——S. 420 — "Dishonest intention" — Cheque not supported by credit in bank deposited by way of security — Cheque returned as not acceptable under Rules — On representation, cheque sent for encashment and dishonoured — Offence.

A, whose tender was accepted, was required to deposit Rs. 4.000 by way of security under the rules. Accordingly A delivered a cheque for Rs. 4,000 while in fact there was only Rs. 5 to his credit in the bank. As the prescribed procedure required the deposit to be made only in cash or postal securities, the cheque was returned. On next day A's brother saw the officer concerned and stated that A was not in station and that he could cash the cheque. On this representation the cheque was sent for encashment but was dishonoured. A was thereupon tried and convicted under S. 420, I. P. Code.

Held, that the conviction under S. 420 could not be sustained. As the cheque could not be accepted under the rules, there was no question of dishonest intention in delivering the cheque. In fact, there was no cheating till the cheque was returned as unacceptable. Further, in absence of any evidence to show that A had authorised his brother to act on his behalf, A could not be held responsible for the representation made by his brother. Laxmi Narain Kalra v. State of Uttar Pradesh, **1956 Cri LJ 948: AIR 1956 SC 544 (545, 546) (Prs 4, 6 to 8).**

——S. 420 — Intention — Intention can only be gathered from surrounding circumstances. See Penal Code (1860), S. 415. **1960 Cri LJ 188: AIR 1960 All 103 (DB).**

——S. 420 — Essentials — Dishonest intention — Proof — Crossword competition — Complainant alleging that accused suppressed all correct solution sent by complainant — Offence — Civil liability made out — Discharge of accused — Legality — Criminal P. C., S. 253 (2).

Where allegations made by a complaint, taken at their face value, and left unrebutted, would constitute at best a ground for a civil suit, no criminal Court would go on with the case, but would leave the matter to be agitated in a Civil Court.

In order to constitute an offence under S. 420, Penal Code, there should be a dishonest intention on the part of the accused which must precede or accompany the act of dishonesty. The mere breach of a contract cannot give rise to a criminal prosecution. Cheating amounts to inducing the victim to enter into a bargain which he would not enter into if he knew the real facts. Where the allegations themselves would not under the law constitute an offence under S. 420, it is open to a Magistrate to discharge the accused.

Held, on facts that (1) there must be an element of personal gain to any of the accused and, in order to gain that advantage, if they defrauded the complainant, then it could be said that the object was to gain the advantage at the cost of the complainant. The organizer of the competition gained no advantage in depriving any one winner of his share of the first prize as he could not retain any portion of the prize amount. In any event he had to pay out the total amount of the prizes and all the winners were entitled to share it. There could, therefore, be no intention at the inception on the part of any of the accused to defraud the complainant; (2) that the question of suppressing the coupons subsequently also would not arise, for, there must have been an object for doing so, viz., to benefit any one prize winner; (3) that it might be that in sending the coupon to accused 1, accused 2 and 3 committed a breach of contract, but that would amount to negligence or omission which would only entitle the complainant to an action for damages; (4) that the Magistrate had therefore, jurisdiction to discharge the accused under Section 253 (2), Criminal P. C. on the ground that the charge was groundless, after recording his reasons for doing so. **(1957) 2 Andh WR 368: (1957) Mad LJ (Cr) 603: 1957 Andh LT 777.**

——Ss. 420, 415 — Intention to defraud — A negotiated an accommodation draft with his friend B and told him that it would be honoured if presented 14 days after date — Subsequently Bank decided not to honour the draft when it was presented — Circumstances tended to show that A honestly believed at time of negotiation that the draft would be honoured—**Held** that A was not guilty of cheating. **AIR 1951 Assam 82.**

——S. 420 — Applicability — Mens rea — Payment by cheque — Cheque dishonoured for want of rubber stamp — Inference of guilty knowledge.

The accused purchased certain goods from the complainant on the representation that the price would be paid on delivery at his house. On delivery the accused offered to pay by cheque which was accepted by the complainant's servant after objection. The bank dishonoured the cheque on ground of absence of rubber stamp — 'Mahabir Agencies' below the signature on it, showing the name of the firm in which the account stood. The complainant tried to contact him for two days but could not do so and, therefore, he filed a complaint under S. 420, I. P. Code.

Held, that the accused could not be held guilty under S. 420, I. P. Code. In the absence of any evidence to show that the accused deliberately

omitted to put the rubber stamp on it, its absence was not inconsistent with the innocence of the accused. It was unreasonable to draw an inference of guilty knowledge on the part of the accused merely because he could not be contacted for two days. **1957 Cri LJ 1252: ILR (1958) 2 Cal 603: AIR 1957 Cal 663 (665) (Pt B) (Pr 11) (DB).**

——S. 420 — Payment in cheque of goods purchased — Implications of — Held on facts that accused had intention to obtain goods by fraud and misrepresentation and, therefore, committed offence under S. 420.

Even apart from any representation the fact of drawing up a cheque and tendering the same in payment of goods purchased implies three statements, namely, that the drawer has an account with the bank in question: that he had authority to draw on it for the amount shown on the cheque, and that the cheque, as drawn, is a valid order for the payment of that amount that in the ordinary course of events the cheque, on future presentation, will be honoured. It does not imply any representation that the drawer already has money in the bank to the amount shown in the cheque, for he may either have authority to overdraw, or have an honest intention of paying in the necessary money before the cheque can be presented. What it implies is representation that the drawer intends to have sufficient money in his account when the cheque is presented in the course of business. The giving of a cheque in payment of goods must be distinguished from the giving of a post dated cheque. If a person gives a current cheque in course of business in payment for goods and if it is dishonoured and from the circumstances it can be inferred that he must have been aware when the cheque was given that it would be dishonoured so that the failure to make payment is not accidental, it must be held that the goods are obtained by false misrepresentation and the accused is guilty under S. 420. AIR 1939 Lah 95 and AIR 1933 Oudh 86, Foll.

Held on facts that when the cheque was given and delivery of the goods taken in lieu thereof the accused had the intention to obtain the goods by fraud and misrepresentation and, therefore, committed the offence under S. 420. **ILR (1957) 2 Cal 443.**

——S. 420 — Intention — Proof of — Breach of contract.

Where a complaint of an offence of cheating is made on the ground that the accused has entered into a contract with the complainant to work for the latter and that he had not commenced work in spite of complainant making two payments as agreed, the complainant has to establish a preconceived intention on the part of the accused of not carrying out the terms of the agreement. Such an intention cannot be presumed from the mere receipt of money and not working subsequently according to the terms of the agreement. Mere receipt of money would not be cheating unless it is shown that it was received with the preconceived intention of denying it later on. If the intention is changed subsequently it would not be cheating. 159 Ind Cas 167 (1) (Pat) and AIR 1923 Lah 621, Rel. on.

The whole transaction may amount to a breach of contract, might involve a breach of faith, a betrayal of confidence, and might arouse moral indignation. But that would not convert it into a criminal offence. AIR 1938 Mad 129, Rel. on. **12 J and K LR 32: 1953 Cri LJ 1359: AIR 1953 J and K 22 (23, 24) (Prs 3, 6).**

——S. 420 — Applicability — Post-dated cheque given against delivery of goods dishonoured — Offence.

A distinction must be drawn between a case where a post-dated cheque is given to discharge an existing liability and a case where it is issued against delivery of goods, property or cash with an assurance that it will be met on being presented to the bank on the due date and in due course. In the first case, the failure to provide the balance is merely a breach of promise, whereas in the latter it may have different consequences. Intention of the drawer at the time the cheque is issued is a material test and if it appears from the circumstances of the drawer that he did not expect that the cheque would be cashed in normal course, it would be prima facie proof of the intion to cheat. AIR 1930 Bom 179, Rel. on. **Madh BLR 1954 Cr 305: Madh BLJ 1954 HCR 1641: 1956 Cri LJ 68: AIR 1956 Madh Bha 19 (19) (Pr 8).**

——S. 420 — Accused taking money from complainants to offer bribe for securing a job — Accused failing to secure the job — Intention of cheating when money was paid cannot be presumed — AIR 1948 Mad 258, Foll. **1963 MPLJ (Notes) 202.**

——S. 420 — Applicability — Wilful misrepresentation — Intention to defraud.

Wilful misrepresentation of a definite fact with intention to defraud would be cheating. Along with this, it has to be shown that the misrepresentation made was false to the accused's knowledge at the time when it was made. **1954 Cri LJ 1713: AIR 1954 Manipur 13 (17) (Pt E) (Pr 11).**

——Ss. 420, 40 — Applicability — Cross-word competition — Condition that editor's decision will be final — Silence over competitor's correspondence — No mens rea — No offence — (Cross-word competition).

A prosecution was started under S. 420, Penal Code, against an editor of a paper who ran a cross-word competition on allegations that a correct solution was sent by the complainant's son and that in spite of this his son was not awarded the first prize One of the conditions imposed upon the competitors was that the decision of the editor was final and legally binding and that the editor will not enter into any correspondence whatsoever with the competitors. There was a dispute as to whether the competitior had put a correct solution or not.

Held, that in the circumstances, it could not be said that because the editor did not enter into the correspondence with the competitor, there was any 'mala fide' or any deception on his part. Nor was there mens rea in the case. No offence was, therefore, made out and the order of the Magistrate taking cognizance of the case under S. 420, Penal Code was, therefore, set aside. **1956 BLJR 86: 1956 Cri LJ 916: AIR 1956 Pat 256 (256) (Prs 1, 2) (DB).**

——S. 420 — Intention to deceive — Essential ingredient — Such intention not proved — Merely taking money for paying as bribe to public servant — Cannot amount to cheating.

In order to bring the case within the offence of cheating it is necessary to prove that at the time the accused made the representation, he knew that it was false and it was made in order to deceive the persons paying the money. Merely taking money for the purpose of paying it as illegal gratification to a public servant without any intention to deceive, however, reprehensible it may be, cannot amount to the offence of cheating punishable under S. 420. AIR 1948 Mad 258,

Rel. on. **1962 Raj LW 229: ILR (1962) 12 Raj 536.**

4. False representation.

——S. 420 — Fraudulent representation through agent amounts to fraudulent representation by accused.

A fraudulent within the meaning of S. 420 may be made directly or indirectly. A fraudulent representation got made through a person acting as an agent for the accused amounts to fraudulent representation by and on behalf of the accused. **1962 (2) Cri LJ 722: 1962 All LJ 639: 1962 All WR (HC) 507: 1962 All Cr R 285: AIR 1962 All 582 (584) (Pt B) (Prs 15, 16) (DB).**

——Ss. 420, 464, 468 24 and 25 — Accused purporting to run two institutions, for holding examinations in Hindi and Sanskrit literature and Ayurveda and inviting applications—Pamphlet containing rules giving out that institutions were recognised by Government — Certificates conferring degrees issued on payment of money without holding any examinations — Institutions found to be bogus and not in existence—Certificates found to be ante-dated and containing roll-numbers and divisions — Accused held guilty of offence under S. 420, on ground of fraudulent representation that institutions were recognised by Government — Offence under S. 468 held not made out as certificates although false were not made dishonestly or fraudulently vis-a-vis recipients of certificates. **1962 (2) Cri LJ 722: 1962 All LJ 639: 1962 All WR (HC) 507: 1962 All Cr R 285: AIR 1962 All 582 (584, 585) (Pt D) (Prs 20, 25) (DB).**

——Ss. 420, 415 — Bogus schemes promoted by accused — Persons induced to deposit money with them on false representations and suppression of material facts — Accused held guilty under Section 420. See Penal Code (1860), S. 415. **1960 Cri LJ 188: AIR 1960 All 103 (DB).**

——S. 420 — Applicability — Breach of contract and cheating — Offence — Dispute when of civil nature — Nature of misrepresentation.

It is only in those cases where the representation on the basis of which the money is obtained by an accused person was correct at the time it was made or was not false to the knowledge of the accused and only subsequently the accused became dishonest or failed to carry out his part of the contract, that the dispute can be said to be of a civil nature. Where the accused knew from the very beginning that the representation which he was making to the complainant was a false one and it was on the basis of that representation that he obtained a certain sum from the complainant, the accused is guilty under S. 420 of the Penal Code. **1957 All WR (HC) 293: 1957 All LJ 141.**

——S. 420 — False representation — What constitutes — Statement by companion of accused that accused had power to cure all diseases — Statement does not amount to false representation.

A false representation must relate to some fact that is either past or present. A statement purely affecting the future will not suffice. But the state of mind of a person may be a present fact.

The companion of the accused told the complainant that the accused had power to cure all diseases. After the companion told the complainant about the accused, the latter himself asked the complainant to give him whatever money he had and the complainant parted willingly with the money believing the companion.

Held, the money was parted with willingly. What the companion of the accused told the complainant would not amount to a false representation. The representation did not relate to a past or present fact but related to the future powers of the accused. It was, therefore, not a false representation to come within the meaning of the definition of cheating. **1965 (2) Cri LJ 499 (1): AIR 1965 Guj 269 (270) (Pr 1).**

——S. 420 — Accused representing to be a graduate when that representation is false to his knowledge, and securing appointment — Offence of cheating committed. **1962 MPLJ (Notes) 223.**

5. Concealment of facts.

——S. 420 — Dishonest suppression — Sale by public auction — Non-mention of prior encumbrance on property — Offence — Transfer of Property Act (1882), S. 55 (1) (a).

Where the accused made no mention of a prior encumbrance on the property sold by him by public auction under the terms of which the successful bidder at the auction was made to pay only 1/4th of the amount when the hammer fell and another week's time was given for the balance to be paid, this interregnum afforded for the payment of the balance is not only to find time for the balance of purchase money but also must be taken to be the time afforded for ascertaining in regard to encumbrance, if any, pertaining to the property. If in spite of the opportunity so afforded the successful bidder does not choose to make enquiries of the auctioneer or obtain an encumbrance certificate for himself it cannot be said that the neglect of his own duties by the auctioneer is capable of imputing the existence of other factors as constituting dishonest conduct on the part of the vendor. It cannot be taken for granted that a property is always free from encumbrances and that a mere non-mention of the encumbrances by a vendor provides a sufficient guarantee that the property is free from encumbrances. The case of non-mention of encumbrances cannot be taken as dishonest non-disclosure of any material defect in the property which the buyer could not be made aware if he was only diligent as a vendee ought to be. It could not be said that there was any dishonest representation nor concealment of anything which the accused were bound in duty to disclose. **1960 Cri LJ 1067: 1960 Andh LT 672: AIR 1960 Andh Pra 405 (405, 406) (Prs 2, 3, 5).**

——S. 420 — Applicability —Sale of land already gifted without disclosing gift — Amounts to cheating. **1959 Cri LJ 740: AIR 1959 Manipur 26 (26) (Pt A) (Pr 3).**

6. Property.

——S. 420 — Property — Admission card to University examination.

An admission card to sit for the M. A. Examination of a University is property within the meaning of Section 420, Penal Code. Though the admission card as such has no pecuniary value it has immense value to the candidate for the examination. Without it he cannot secure admission to the examination hall and consequently cannot appear at the examination. ILR 12 Mad 151 and ILR 15 All 210. Rel. on. Abhayanand Mishra v. State of Bihar, **1961 Andh LT 946: (1962) 2 SCR 241: 1962 All Cr R 17: 1962 All WR (HC) 6: 1962 BLJR 1: (1962) 1 SCJ 183: 1962 Mad LJ (Cr) 110: 1961 (2) Cri LJ 822: 1961 SCD 885: ILR 41 Pat 767: AIR 1961 SC 1698 (1700) (Pt A) (Pr 7).**

——S. 420 — "Property" — Meaning of — Import licence in the hands of licensing authority.

The word 'property' occurring in Section 420 of the Indian Penal Code does not necessarily

mean that the thing of which a delivery is dishonestly desired by the person who cheats must have a money value or a market-value in the hand of the person cheated. Even if the thing has no money value in the hand of the person cheated, but becomes a thing of value in the hand of the person who may get possession of it as a result of the cheating practised by him, it would still fall within the connotation of the term 'property'. An import license, even when it is in the hand of the licensing authority is, therefore, 'property' within the meaning of Section 420, I. P. Code.

Further, although a particular thing may not have actual money-value or a market-value in the hand of a certain person, it may still have potential value and would be property within the meaning of Section 420 of the I. P. Code. It is, therefore, clear that even if the term 'property' be construed to mean a thing which has a value in the hand of the person cheated, even so, in the hands of licensing authority the import licence which certainly had a potential value would be property within the meaning of S. 420, I. P. Code.

Lastly, if the word 'property' is construed to mean that which acquires actual value only after it goes into the hand of the person who cheats, even then there is no doubt that the provisions of Section 420 must apply to this case. Case-law referred. **56 Bom LR 188: ILR (1954) Bom 554: 56 Cri LJ 289: AIR 1955 Bom 82 (87, 88) (Pt D) (Prs 14 to 16) (DB).**

——**S. 420** — Construction — "To deliver any property" — "Property" means movable property. See Penal Code (1860), S. 415. **AIR 1955 NUC (Sau) 957 (DB).**

7. Valuable security.

——**S. 420 — "Valuable security" — Import licence.**

As an import licence obtained from the Office of the Chief Controller of Imports is a valuable security because it is evidence of the title of the person possessing it to import foreign goods into India, quite irrespective of whether the import licence, was property or not within the meaning of Section 420, it is certainly a valuable security, and from that point of view also, the offence is covered by Section 420, I. P. Code. **56 Bom LR 188: ILR (1954) Bom 554: 56 Cri LJ 289: AIR 1955 Bom 82 (88) (Pt E) (Pr 18) (DB).**

8. Attempt.

● ——**Ss. 420, 511** — Applicability — Attempt to commit offence — What amounts to — Attempt and preparation — Distinction.

The question whether a certain act amounts to an attempt to commit a particular offence is a question of fact dependant on the nature of the offence and the steps necessary to take in order to commit it.

A person commits the offence of 'attempt to commit a particular offence' when (i) he intends to commit that particular offence; and (ii) he, having made preparations and with the intention to commit the offence does an act towards its commission, such an act need not be the penultimate act towards the commission of that offence but must be an act during the course of committing that offence. Abhayanand Mishra v. State of Bihar. **1961 Andh LT 946: (1962) 2 SCR 241: 1962 All Cr R 17: 1962 All WR (HC) 6: 1962 BLJR 1: (1962) 1 SCJ 183: 1962 Mad LJ (Cr) 110: 1961 (2) Cri LJ 822: 1961 SCD 885: ILR 41 Pat 767: AIR 1961 SC 1698 (1700, 1701, 1703) (Pt B) (Prs 11, 12, 26 to 28).**

● ——**Ss. 420, 511** — Applicability — Attempt to commit offence of cheating — Accused representing to complainant that he could duplicate currency notes — Complainant giving some currency notes to accused — It could not be said that accused had only made a preparation and not an attempt to commit offence of cheating — Two of the ingredients of the offence of cheating, false representation and delivery of property had taken place and they were acts done towards the commission of offence within the meaning of Section 511. Bashirbhai Mohamedbhai v. State of Bombay. **1960 Cri LJ 1383: 1961 Pat LR (SC) 15: 1960 Mad WN 639: 1960 Ker LT (SC) 23: (1960) 2 Ker LR 176: 62 Bom LR 908: 26 Cut LT 626: (1960) 3 SCR 554: 1961 All Cr R 11: 1961 Andh LT 82: 1961 All WR (HC) 48: (1961) Mad LJ (Cr) 20: (1961) 1 SCJ 76: AIR 1960 SC 979 (979, 980) (Pt A) (Pr 4).**

● ——**Ss. 420, 511**— Applicability— Complainant feigning belief in false representation and delivering property, in order to trap accused — The fact that complainant was not deceived is immaterial — ILR 16 Cal 310. Approved. Bashirbhai Mohamedbhai v. State of Bombay. **1961 Pat LR (SC) 15: 1960 Mad WN 639: 1960 Cri LJ 1383: 1960 Ker LT (SC) 23: (1960) 2 Ker LR 176: 62 Bom LR 908: 26 Cut LT 626: (1960) 3 SCR 554: 1961 All Cr R 11: 1961 An LT 82: 1961 All WR (HC) 48: 1961 Mad LJ (Cr) 20: (1961) 1 SCJ 76: AIR 1960 SC 979 (980) (Pt B) (Pr 5).**

——**S. 420** — Offence under Section 420 read with Section 511, I. P. Code — Attempt to cheat insurance company at Bombay by making false claim supported by false certificates — Policy and false certificates fraudulently secured and posted to company at Hyderabad — Court at Hyderabad has jurisdiction to try offence. See Criminal P. C. (1898), S. 179. **1962 (2) Cri LJ 21: AIR 1962 Andh Pra 257.**

——**Ss. 420, 511 — Attempt to cheat — Offence when committed.**

An offence under Section 420, read with Section 511 would be committed by a person who attempts to cheat another person and thereby attempts to induce him to do one or the other of the acts mentioned in Section 420, I. P. Code. **56 Bom LR 188: ILR (1954) Bom 554: 56 Cri LJ 289: AIR 1955 Bom 82 (86) (Pt B) (Pr 12) (DB).**

——**Ss. 420, 415, 511** — Knowledge of falsehood of pretence — Accused could not be convicted of cheating but the accused is guilty of attempt to cheat. See Penal Code (1860), S. 415. **52 Cri LJ 644: AIR 1951 Madh B 100.**

9. Abetment.

——**Ss. 420 and 109**— Applicability — R posing as a big sugar merchant entering into a bogus transaction with G and extracting money from him — N a close acquaintance of R allowing himself to be represented as his 'munim' — Presence at the place of transaction bogus to his knowledge, as such 'munim' — Guilty of abetment. **54 Cri LJ 159: AIR 1952 Ajmer 60 (60, 61) (Pt A) (Prs 5, 6).**

10. Conspiracy.

——**Ss. 420, 120-A, 120-B** — Essence of criminal conspiracy is agreement to do illegal act— Proof of agreement — Conspiracy to cheat. See Penal Code (1860), S. 120-A. **1960 Cri LJ 188: AIR 1960 All 103 (DB).**

11. Procedure.

●——**S. 420** — Information on disclosing cognizable as well as non-cognizable offence — Powers of Police officer to investigate — Offence under Section 420, I. P. C. and that under Section 7, Essential Supplies Act — Police Officer joining latter with former in charge sheet — Trial could proceed under Section 251-A, Criminal P. C. See Criminal P. C. (1898), S. 173. **1965 (2) Cri LJ 250: AIR 1965 SC 1185.**

●——**S. 420** — Distinct offence — Meaning of — Offences to be distinct must not be interrelated — Contract to supply wood to Government — Money obtained from Government on various bills at different times in pursuance of conspiracy entered into between various accused — **Held,** single charge under Section 420, Penal Code did not contravene Section 233 as object of conspiracy was not to obtain diverse amounts but to obtain entire contract money from Government. See Criminal P. C. (1898), S. 233. **1963 (2) Cri LJ 529: AIR 1963 SC 1620.**

●——**Ss. 420, 120-B** — Prevention of Corruption Act (2 of 1947), S. 5 (1) (d) read with S. 5 (2) — Conviction under — Trial before one special Judge but proceedings and convictions by another Special Judge — Conviction cannot be upheld as subsequent proceedings before another Judge are not competent — Criminal P. C. (1898), Section 350. See Penal Code (1860), S. 120-B. **(1962) 2 Ker LR 313: 1963 Mad LJ (Cri) 460 (SC).**

●——**S. 420** — Accused charged for cheating in 1942 — Misrepresentation made at Simla and accused paid money at Lahore at his request — Mere posting of cheque at Kolhapur (then a native State) held could not be considered as delivery of the cheque to the accused at Kolhapur— No part of offence of cheating was committed outside British India — Section 188, Criminal P. C. did not apply. See Criminal P. C. (1898), S. 188. **1960 Cri LJ 410: AIR 1960 SC 266.**

●——**S. 420** — Constitution of India, Art. 136 — Evidence whether discloses breach of civil liability or offence under Section 420, Penal Code — Facts found against accused by lower Courts — Facts are not open to challenge in Supreme Court. See Constitution of India, Art. 136. **1957 Cri LJ 1346: AIR 1957 SC 857.**

●——**Ss. 420 and 34 — Charge under S. 420/34 — Conviction under S. 420 — Legality — (Cr. P. Code (1898), Ss. 221 and 535).**

A conviction of an accused person under Section 420 would be valid though the charge is under Section 420 read with Section 34, unless prejudice is shown to have occurred. Mobarik Ali Ahmed v. State of Bombay, **1958 SCJ 111: 1958 SCA 665: 1958 All WR (HC) 112: 1958 All Cr R 94: 1958 SCR 328: 1957 Cri LJ 1346: 1958 Mad LJ (Cr) 42: 61 Bom LR 58: AIR 1957 SC 857 (865) (Pt E) (Pr 17).**

●——**S. 420** — Charge — Form and contents of — Single conspiracy to cheat members of public — Several persons joining — Several transactions spread over several years — **Held** there was no misjoinder of charges. See Penal Code (1860), S. 120-B. **1957 Cri LJ 422: AIR 1957 SC 340.**

●——**S. 420** — Offence of cheating — Charge not specifying the manner and mode in which cheating has been done — Charge is vague but vagueness is only an irregularity not vitiating the trial unless accused is materially prejudiced thereby. See Criminal P. C. (1898), S. 225. **1953 Cri LJ 1928: AIR 1953 SC 462.**

——**S. 420** — Offence (Penal Code, S. 420) compoundable with leave of Court — Leave not obtained — Complainant absent on date of hearing — Accused can be discharged under S. 259. See Criminal P. C. (1898), S. 259. **1962 (1) Cri LJ 801 (All).**

——**Ss. 420, 403, 405 and 406** — Accused charged and convicted under Section 406, Penal Code — Facts proved not disclosing offence under Section 406, but one under Section 420 — Alteration of conviction in revision — Alteration of conviction for minor offence under Section 403. See Criminal P. C. (1898), S. 225. **1960 Cri LJ 857: AIR 1960 All 387.**

——**S. 420** — Criminal P. C. (1898), S. 439 — Power to interfere in pending proceedings — Circumstances that the same set of facts alleged in complaint may also give rise to civil liability is no ground for quashing criminal proceedings. See Criminal P. C. (1898), S. 439. **1957 Cri LJ 1101: AIR 1957 Assam 148.**

——**S. 420** — Prosecution under Sections 120-B, 420, 467 and 471, I. P. C. — State filing second case against same accused under same sections — There may not be any bar to trial of more than three offences at the same trial by virtue of Section 235, Cr. P. C. but separate trials may also be continued if no prejudice is caused to accused by separate trials. Criminal P. C. (1898), Ss. 235 and 234. **1965 (2) Cri LJ 351: AIR 1965 Cal 457.**

——**S. 420** — Criminal P. C. (1898), S. 235 — 'In course of same transaction' — Offences under Sections 420 and 486, I. P. C. — Joint trial not barred. See Criminal P. C. (1898), S. 235. **1956 Cri LJ 738: AIR 1956 Cal 260.**

——**S. 420** — Scope - Charge under — Conviction under Section 406 Penal Code is legal if accused had opportunity to meet such a case. Criminal P. C. (1898), Ss. 236, 237. **AIR 1955 NUC (Cal) 5602.**

——**S. 420** — Applicability of Ss. 403, 420 of Penal Code — Complaint stating 'inter alia' that opposite party made a false representation and that but for the misrepresentation the complainant would not have parted with Rape-seed — Charge under Section 420 and not under Section 403 ought to have been framed. See Penal Code (1860), S. 403. **AIR 1955 NUC (Cal) 1538 (DB).**

——**Ss. 420, 419 and 465** — Charge under — Acquittal under Sections 419 and 420 — Conviction under Section 465, held not legal — S. 465 requires fraudulent intent — Magistrate having refused to believe only evidence of fraud and dishonestly implied in charges under Ss. 419 and 420, could not convict under S. 465 — Charges had to be considered as one wholly and not compartmentally. See Penal Code (1860), S. 419. **1955 Cri LJ 1246: AIR 1955 Cal 473 (DB).**

——**Ss. 420, 471, 467** — Conviction under — Misdirection to jury — Verdict that accused was not guilty of offence under S. 471/467, I. P. C was inconsistent with verdict of guilty under Section 420 — Misdirection held led to erroneous verdict — Conviction set aside — (Criminal P. C. (1898)., S. 297). See Penal Code (1860), S. 471. **1955 Cri LJ 513: AIR 1955 Cal 175 (DB).**

——**S. 420** — Scope — Offence committed by person as agent of Government — Allegation that accused by making a false representation that he had obtained the quantity of rice in question between the 3rd and 7th Oct. 1951, the accused induced Government to pay him certain amounts on account of bonus — **Held,** offence under Section 420 could not be said to have been committed by accused while purporting to act as agent of Government — It was not therefore triable by Special Court. See West Bengal Criminal Law Amendment (Special Courts) Act (21 of 1949) As Amended by Act (12 of 1952), Sch., Item 3. **55 Cri LJ 1435: AIR 1954 Cal 505 (DB).**

——**S. 420** — Private person conspiring with public servants to cheat — He is triable by Special Court in view of Item 8 of Schedule to W. B. Criminal Law Amendment (Special Courts) Act (21 of 1949). See Public Sefety — West Bengal Cri. Law Amendment (Special Courts) Act (21 of 1949), Sch., Item 3. **1953 Cri LJ 1540: AIR 1953 Cal 661 (DB).**

——**S. 420** — Special Court has jurisdiction to try offence of cheating if commited by a public servant — It is not necessary that he should be taking Government money by offence of cheating. See Public Safety — West Bengal Criminal Law Amendment (Special Courts) Act (21 of 1949), Sch., Item 8. **1953 Cri LJ 1540: AIR 1953 Cal 661 (DB).**

——**S. 420** — Agreement to sell contract — No intention to cheat at the time of agreement — Contract itself having spent its force no obligation to transfer contract — Failure to return consideration of agreement — Remedy by way of damages available — Complaint in criminal Court not proper. **1963 Kash LJ 190: 1964 (1) Cri LJ 374 (375) (Pt A) (Pr 4) (J and K).**

——**Ss. 420, 468 — Criminal P. C. (1898), S. 195 (1) (c) — Process server authorised to recover only process fee — Recovery of excess amounts under false representation — Official counterfoil of receipt book mentioning amounts of only process fee — Process server is guilty of offences under Ss. 420 and 468, I. P. C. — Formal complaint by Court not necessary.**

Held, on facts that the bar in Clause (c) of Section 195 (1), Criminal P. C. was in respect of offences mentioned therein. alleged to have been committed by a party to any proceeding in any Court and that as Section 420, I. P. C. was not mentioned in Section 195 (1) (c) and as the process server could not be said to be party to the proceedings, the bar under Section 195 (1) (c) read with Section 476, Cr. P. Code, did not apply. AIR 1946 Pat 362, Rel. on. (2) That it was well settled that the intention to cheat can only be gathered from the surrounding circumstances and no direct evidence is possible to ascertain the intention of the accused. The transactions in the case on the very face of it, showed that the accused intended to defraud the parties, as it was clear that he received those sums on dishonest inducement and gross misrepresentation, and thus he was clearly liable under Section 420, I. P. C. AIR 1925 Cal 106 and AIR 1949 Cal 586, Distinguished. (3) That as the counterfoils of the receipt books were false documents and as they were so made with the intention to cause damage or injury to the parties and to induce them to part with the excess amounts, those documents were forged and were used for the purpose of cheating. Accordingly the offence under S. 468, I. P. C. was also made out against the accused. **30 Cut LT 253: (1964) 6 Orissa JD 264: ILR (1964) Cut 248.**

——**S. 420** — Charge under — Search by Police Officer — Charge of selling fake railway tickets — Railway servants employed as witnesses — Search conducted in absence of accused — Evidence of recoveries made cannot be relied upon. See Criminal P. C. (1898), S. 96. **1962 All Cr R 351: 1962 All WR (Sup) 83: 64 Pun LR 874.**

——**Ss. 420, 406** — Criminal P. C. (1898), S. 204 — Process fees — Process of Criminal Court relating to cognizable offence — No fee is chargeable — (Court Fees Act (1870), S. 20). See Criminal P. C. (1898), S. 204. **AIR 1955 NUC (Punj) 4985.**

12. Sanction.

——**S. 420** — Conspiracy to obtain money by cheating — No property is actually delivered — No permission under Section 196-A (2), Criminal P. C. is necessary. See Criminal P. C. (1898), Section 196-A (2). **AIR 1950 All 639.**

——**Ss. 420 and 383** — Covenant of merger by which United State of Rajasthan was created, Art. 17 — Warrant for extradition issued by Regional Commissioner of Rajasthan — Enquiry into offences under Sections 383 and 420, Penal Code — No sanction under Section 197, Cr. P. C. or Article 17 of the covenant is necessary with respect to such offences. See Criminal P. C. (1898), S. 197. **51 Cri LJ 947: AIR 1950 All 342.**

——**S. 420** — Offence by public servants against Government under Section 420 or Section 120-B read with S. 420 — Sanction held necessary. See Criminal P. C. (1898), S. 197 (1). **AIR 1950 Raj 51.**

13. Evidence and proof.

● ——**Ss. 420 and 193 — Offences of cheating and false evidence — No fraudulent representation — Reasonable explanation given — Burden of proof — Benefit of doubt.**

In a prosecution under Section 420, Penal Code, it is the duty of the prosecution to prove affirmatively than the accused knew that the representations made by him are false. In the absence of circumstances from which it can be gathered that any such knowledge can be imputed to the accused, it is a case in which the benefit of reasonable doubt should be given to the accused. The burden of proof is never shifted to the accused. And if a reasonable explanation is given by the accused and the Court thinks that the explanation may reasonably be true, though it is not convinced about the truth, it should acquit the accused. 11 Cr AR 45; 11 Cal WN 159, Rel. on.

Held, (1) that there was not any fraudulent representation which had the effect of inducing the Petrol Rationing Authority to part with the coupons which it would not have otherwise done in this case; (2) that the explanation offered by the accused, though he had not been able to prove it conclusively, was a reasonable one and hence, he being entitled to the benefit of doubt, could not be convicted under Section 420; (3) that the conviction under Section 420 not being maintainable, his conviction under Section 193 also could not be maintained. Sukhdeo Jha Utpal v. State of Bihar, **1957 Cr LJ 583: 1957 BLJR 191: (1957) MPC 165: AIR 1957 SC 466 (468) (Pr 7).**

——**S. 420** — Proof — Approver's evidence — Corroboration — Necessity — Charge of conspiracy to cheat — If a specific instance of cheating was proved beyond doubt against any of the accused that would furnish best corroboration of the offence of conspiracy. See Evidence Act (1872), S. 133. **1957 Cri LJ 422: AIR 1957 SC 340.**

——**S. 420 — Intention — Inference — Negotiable instrument — Failure to honour — Intention to cheat when can be inferred — Proof — Evidence Act (1872), S. 106.**

The fact that the Hundi was not actually paid when it was presented for payment would not by itself make the accused guilty of cheating.

When a person draws a Hundi or a cheque he does thereby make a representation to the person in whose favour the Hundi or the cheque is drawn (1) that he has authority to draw that document and draw the document for that amount; (2) that the cheque or the hundi is

good or valid order of payment of its amount; and (3) that the cheque or the Hundi would be paid when presented for payment. The prosecution in a case of this nature can only establish facts which point prima facie to the conclusion that the failure to meet the negotiable instrument was not accidental but was a consequence expected and therefore intended by the accused. The prosecution cannot be expected to have knowledge which the accused has in respect of his financial position, particulary as to whether he was in a position to meet his obligation or not specifically; all that the prosecution can do is to place before the Court the circumstances on which it may legitimately be found that the accused had not the intention to meet the demand evidenced by the negotiable instrument. The non-payment is an important circumstance. **1957 Cri LJ 438: 1957 All WR (HC) 4: 1957 All LJ 158: AIR 1957 All 246 (247, 248) (Pt A) (Prs 6, 12) (DB).**

——**S. 420** — Proof — Facts forming part of same transaction — Cannot be said to be inadmissible or irrelevant. See Evidence Act (1872), S. 6. **1957 All WR (HC) 293: 1957 All LJ 141.**

——**S. 420 — Burden of proof — (Evidence Act (1872), Ss. 101-104).**

In a case for cheating it is for the prosecution to show that at the time the accused entered into the transaction with the complainant, the accused had no intention to pay the money and that he was actuated by a dishonest intention to cheat the complainant. **1960 Cri LJ 787: AIR 1960 Andh Pra 311 (312) (Pt B) (Pr 2).**

——**Ss. 420 and 120-B** — Cheating — Evidence — Sale of drugs in bottles containing false statements as to brand etc. — There must be evidence that the buyers were induced to buy drug by the misrepresentation in the label. **60 Cal WN 670: 1959 Cri LJ 829: ILR (1959) 2 Cal 706: AIR 1959 Cal 427 (428) (Pt A) (Prs 3, 7) (DB).**

——**S. 420 — Complainant induced to take accused as partners by their promise to invest capital — No fraudulent intention on the part of accused when they made the promise — Their subsequent failure to implement promise is no offence under the section.**

In order to constitute an offence of cheating it is obligatory for the prosecution or the complainant to show that when the first inducement was made it was fraudulent and the intention was to deceive or cheat the complainant.

Where the accused having induced the complainant to take them as partners in his business by making a promise that they would invest sufficient capital into the business, failed to implement their promise and also took complete control of the goods and other stock-in-trade of the partnership but there was nothing to indicate that they had any fraudulent intention at the time when they made the promise:

Held, that no process could be issued against the accused under Section 420, Penal Code as the facts of the case made out only a civil dispute and not a criminal case. The mere fact that the accused took complete control of the goods and stock-in-trade of the partnership would not constitute an offence under Section 420 of the Penal Code. **1964 Kash LJ 197.**

——**S. 420 — Prosecution under — Availability of means to complainant for detecting fraud — Not material.**

For prosecution for an offence under S. 420 of the Indian Penal Code it is immaterial whether the complainant had means of detecting the fraud if he had acted like a shrewd or prudent person. The relevant question is whether in fact the false statements or representations made by the accused did in fact impose upon the complainant or not. **1963 Mys LJ (Supp) 248 (DB).**

——**Ss. 420 and 511** — Evidence — Evidence of decoy witness supported by another trap witness about sale of spurious parts of cycle by accused — Not sufficient to sustain conviction of accused unless there is extraneous material wholly independent of police machination to show that sale in question was pushed by petitioner of spurious cycle parts representing them to be genuine of Hercules or Phillips make. **1960 Cri LJ 1656: AIR 1960 Punj 641 (642) (Pt A) (Pr 4).**

14. Sentence.

● ——**S. 420** — Sentence — Discretion — Unless discretion is improperly exercised, Supreme Court would not interfere — Sentence of rigorous imprisonment for six months held not severe in the circumstances. Dharamdas Hukamatrai Dorwani v. State of Bombay, **1960 Cri LJ 1148: (1960) 2 Ker LR 32: AIR 1960 SC 734 (738) (Pt B) (Pr 14).**

● ——**S. 420 — Sentence.**

Where there is strong indication, on the evidence on record, that there were other and perhaps bigger persons involved in the fraud for which the accused was tried and they are not brought to book, the circumstance, though it does not excuse or exonerate the accused from his guilt which has been established beyond reasonable doubt, has, nevertheless a bearing on the question of sentence. K. Damodaran v. State of Travancore-Cochin, **1953 Ker LT 295: 1953 Cri LJ 1928: AIR 1953 SC 462 (467) (Pt C) (Pr 12).**

——**S. 420 — Sentence — Cheating in business circles — Severe sentence — Propriety.**

In the case of a person who moves about in business community and does business, whether small or large, any conviction or any sentence however small is ruinous, for that forthwith destroys his credit in the market and it is the credit in the market that is the largest asset of an individual doing business. Severe sentence therefore is not called for in such cases. **1957 Cri LJ 438: 1957 All WR (HC) 4: 1957 All LJ 158: AIR 1957 All 246 (248) (Pt B) (Pr 13) (DB).**

——**S. 420 — Sentence.**

The accused, a member of a District Board professing to have authority from the Board sold certain leaves by public auction. The complainant who was the highest bidder paid the purchase price then and there and obtained a kutchcha receipt. The accused promised to give a proper receipt after the amount was deposited in the office of the Board. When the complainant failed to obtain the receipt he filed a complaint and the accused was convicted under Section 420 Penal Code and sentenced to a term of 6 months R. I. and a fine of Rs. 100. In the meanwhile the accused had deposited the amount in the office.

Held, that the accused was rightly convicted of the offence of cheating under Section 420, Penal Code.

Held, further that the sentence passed was excessive in the circumstances of the case. The accused was bound to lose his membership of the Board and to suffer in his reputation. Hence the sentence should be reduced to one month's R. I. with the same amount of fine. **1952 RD (HC) 175: 1952 All LJ 232: 1953 Cri LJ 815: AIR 1953 All 381 (381) (Pt B) (Pr 7).**

——**Ss. 420 and 511** — Railway officer convicted under Section 420/511 — Sentence of one year, cannot be said to be too severe — Object of punishment indicated. Criminal P. C. (1898), S. 32. See Penal Code (1860), S. 53. **AIR 1950 All 639.**

SECTION 423

——S. 423 — Applicability — 'Person' — Transfer of property by Hindu widow — Conveyance containing statement that transfer was for benefit of purchaser — 'Person' in S. 423 relates to purchaser — Widow receiving consideration — Offence.

Where it is not disputed that by the conveyances the properties concerned are to be transferred by a Hindu widow to the purchaser, then the use or benefit to accrue by such transfer will be that of the purchaser. According to S. 423, the false statement must relate to the person or persons for whose use or benefit the transfer is really intended to operate. The 'person or persons' must mean the purchaser or purchasers, as the case may be. True, the executant receives the consideration for the transfer and in that sense she receives a benefit, but then she is the vendor and the transfer cannot be said to be really intended to operate for her use or benefit. Hence, in such a case it cannot be said that an offence under S. 423 is made out. **61 Cal WN 723: 1957 All WR (Sup) 81: 1958 Cri LJ 370: AIR 1958 Cal 130 (130) (Pr 3) (DB).**

——S. 423 — False statement of consideration.

The petitioners obtained a loan from the Government by making a false statement as to the area of land in their possession. A charge for the consideration was created on the land.

Held, that the false statement made did not relate to the consideration for the charge which was created on the land and hence the petitioners were not punishable under Section 423. AIR 1915 Mad 233, Rel. on. AIR 1921 Cal 226, Disting. **1952 Cri LJ 1089: AIR 1952 Pat 285 (286) (Pr 1).**

SECTION 424

● **——Ss. 424 and 441— Applicability — Movable property attached in execution of decree — Removal by judgment-debtor by unlawful means — Offence.**

Where a property has been legally attached by a Court, the possession of the same passes from the owner to the Court or its agent. In that situation, the owner of the said property cannot take the law into his own hands, but can file a claim-petition to enforce his right. If he resorts to force to get back his property, he acts unlawfully and by taking the property from the legal possession of the Court or its agent, he is causing wrongful loss to the Court. The judgment-debtors in unlawfully taking away the cattle seized in attachment in execution of decree against them, are guilty of an offence under Section 424. AIR 1956 All 630 and AIR 1956 Raj 190 and AIR 1926 All 382, Rel. on; (1908) 25 TLR 87 and AIR 1934 All 711 and AIR 1933 All 46, Dist.; AIR 1930 All 329, held wrongly decided.

Held, that as the judgment-debtors entered the house of the decreee-holder with intent to remove the attached cattle constituting an offence under Section 424 of the Penal Code, they were guilty of the offence under Section 441 of the Penal Code. Teeka v. State of Uttar Pradesh, **1961 An LT 357: 1961 BLJR 545: 1961 All LJ 430: 1961 All Cr R 198: 1961 MPC 441: 1961 All WR (HC) 355: 1961 (1) Cr LJ 859: 1961 SCD 331: (1962) 1 SCR 75: (1962) 1 SCJ 439: 1962 Mad LJ (Cri) 303: (1962) 1 SCA 504: ILR (1961) 2 All 13: AIR 1961 SC 803 (807) (Pt B) (Prs 13, 14).**

——S. 424 — "Dishonestly or fraudulently" — Meaning of.

The tenants had harvested the crops and stored them over the open fields in Khalas for apportionment between them and the Zamindar. The tenants were prepared to pay the landlord a one-third share of the produce which was due to the landlord as rent but they were not prepared to pay any lag or neg over and above the one-third produce as demanded by the Zamindar. With the common consent of the landlord and the tenants, the crops were stored in the Khalas and they were estimated and appraised by the punches commonly nominated by them. Subsequently the tenants removed the crops as they thought that there was the risk of damage and deterioration on account of impending rains. But when they removed the crops they made an application to the Chief Commissioner that they had removed the crops and they were still ready to pay the Zamindar his one-third share of the rent.

Held, that under the circumstances it could not be said that the tenants concealed or removed the crops dishonestly or fraudulently with a view to deprive the Zamindar of his just dues. They were not therefore guilty under S. 424. **52 Cr LJ 193: AIR 1951 Ajmer 33 (33) (Pt B) (Pr 2).**

——S. 424 — Applicability — Buffaloes illegally attached — Removal by owner next day — Offence.

It is not a correct proposition of the law that a person who removes property belonging to him but unjustifiably attached, does not act dishonestly or fraudulently. The right of an owner of an article does not remain the same after the article has been attached by a person having authority to attach it. If the attachment is illegal, his remedy is to approach the Court, which ordered the attachment. During the attachment only the Court ordering the attachment can exercise authority over it. If the property is attached by a person having no authority to attach it, the matter would be different because then the attachment would be without jurisdiction and would amount to nothing but theft. If the true owner does not recapture the property immediately after it was attached, he can only proceed in accordance with the law, that is the common law.

When the owner and his men without getting the attachment set aside, take possession of the buffaloes by using unlawful means (committing trespass upon the property, forming an unlawful assembly and causing injuries to sapurdar, etc), they act dishonestly and commit the offence under Section 424. The law does not contemplate a person to take the law in his own hands except to a limited extent as provided in the provisions relating to the private right of defence in the Penal Code. AIR 1930 All 329, Dissented from. **1959 All LJ 781: 1959 All WR (HC) 637: 1960 All Cr R 1: 1960 Cr LJ 1040: ILR (1960) 1 All 53: AIR 1960 All 453 (455) (Pt D) (Pr 9).**

——S. 424 — Scope — Section does not intend to punish persons claiming under right, such as partners.

Section 424, Penal Code, is intended to punish fraudulent debtors and their accomplices and does not intend to punish persons who claim under a right such as partners of firm. Where one partner alleges fraudulent and dishonest removal of all stocks by the other partner, and when a civil suit is pending between the partners, one of them should not be encouraged to take resort to criminal Courts to get the other partner, who has a claim of right in the property, punished under Section 424, as the dispute can be more appropriately decided by a civil Court. 15 Cr LJ 602, Rel. on.; AIR 1948 Cal 292: AIR 1950 Nag 99 and

AIR 1939 All 710, Rel. on; 21 WR 10, Dissent. from. **(1964) 2 Andh LT 138: (1964) 2 Andh WR 151: 1964 MLJ (Cr) 518.**

——**S. 424** — Vague and indefinite charge — Where in a case under Ss. 404 and 424 the heads of charge did not specifically mention any property coming to the possession of the accused which he may have misappropriated or disposed of dishonestly it was held that they were extremely vague and indefinite and therefore could not conceivably be answered. See Criminal P. C. (1898), S. 221. **1954 Cri LJ 1838: AIR 1954 Assam 259 (DB).**

——**S. 424** — West Bengal Bargadar Act (2 of 1950), Ss. 2 and 7 (1) — Proceeding — Case under Section 424, Penal Code— A Criminal case under Section 424, Penal Code has no connection with any of the proceedings mentioned in Section 7 (1) of West Bengal Bargadar Act. See West Bengal Bargadar Act (2 of 1950), S. 2. **1952 Cri LJ 1218: AIR 1952 Cal 559.**

——**S. 424 — Object of section — Open removal of properties in exercise of bona fide claim to inherit those properties — No offence under S. 424.**

Cases of dishonest or fraudulent concealment or removal of property with a view to defeat creditors such as removal or concealment of property attached by the Court or about to be attached seem to be special class of cases for which Section 424 is designed. AIR 1961 SC 803, Ref.

No question of fraudulent removal or concealment of property arises in a case where the accused openly takes the properties in the exercise of an alleged bona fide claim to inherit the properties. AIR 1939 All 710, Rel. on. **(1963) 1 Ker LR 309: 1963 Ker LJ 342: 1963 Ker LT 373: 1965 Mad LJ (Cri) 139.**

——**S. 424** — "Dishonestly". See Penal Code (1860), S. 24. **1956 Pat LR 104.**

——**S. 424 — "Removal" — Meaning — (Interpretation of Statutes) — (Civil P. C. (1908), Pre.) — (Words and Phrases) — AIR 1939 All 710, Dissent. from.**

The ordinary rule of interpretation is that words used in any enactment should receive their plain, natural and full meaning. In certain circumstances, the ejusdem generis rule is applied to a general term when it follows terms which refer to particular and specific objects. In such a case, the meaning of the general term is limited to objects of the same genus as those referred to in the preceding terms. Under Section 424 there may be "concealment" with or without removal and there may be 'removal' with or without concealment. Neither word is any more general than the other. There is no reason why the use of one of these words should curtail the meaning of the other. Section 424 is meant not only to punish those who conceal but also those who remove property with or without concealment if the act is done dishonestly or fraudulently. AIR 1916 Pat 232 and AIR 1917 Pat 422, Rel. on; AIR 1939 All 710, Dissent. from. **1956 Pat LR 104.**

SECTION 425

SYNOPSIS

(Penal Code (1860), S. 425.)

1. Intention.
2. Knowledge.
3. Wrongful loss or damage.
4. Destruction or change.
5. Property.
6. Bona fide claim of right.
7. Destruction of one's own property.
8. Master's liability for servant's negligence.
9. Mischief and theft.
10. Evidence and proof.
11. Practice and procedure.

1. Intention.

——**Ss. 425, 427 — Intention to cause wrongful loss.**

Where the accused stored earth and other materials on the open space between his house and that of the complainant and owing to the accumulation of water due to abnormal heavy rains the wall of the complainant's house was damaged:

Held, that the accused could not be convicted under Section 427 as there was no direct act on the part of the accused and no intention to cause wrongful loss or damage to the complainant. **1950 All LJ 281: 1950 All WR (HC) 346: 1950 All Cri Cas 107: 51 Cri LJ 1242: AIR 1950 All 464 (464, 465) (Prs 2, 3).**

——**Ss. 425, 427 — Ingredients of offence — Invasion of civil right — Offence.**

Section 425, I. P. Code necessitates three things: (1) an intention or knowledge of likelihood to cause wrongful loss or damage to the public or to any person (2) causing the destruction of some property or any change in it or in its situation, and (3) such change must destroy or diminish its value or utility or affect it injuriously. No mischief can, therefore, be committed where the acts complained of amount to an invasion of civil right.

Held, that the allegations in the complaint amounted if anything, to an invasion of civil right and hence no offence under Section 427 was disclosed. **1958 Cr LJ 1396: AIR 1958 Cal 668 (669) (Pr 5).**

——**Ss. 425, 109, 441, 447 and 426** — Criminal trespass and mischief — Intention — Abetment — Where the accused instructed her maternal uncle to erect a roof which necessitated entering upon the property of the complainant and cutting his eaves. **Held** that the accused must be deemed to have intended to cause annoyance and wrongful loss to the complainant and must be held guilty of abetting the offence of mischief. See Penal Code (1860), S. 109. **1953 Cri LJ 881: AIR 1953 Sau 81 (DB).**

——**Ss. 425 and 429 and 97 — Ingredients of offence — Intention or knowledge.**

To constitute offence of mischief, existence of requisite knowledge or intention to cause wrongful loss is essential — Buffalo trespassing on field of accused — Accused assisting his daughter in driving it away — Accused throwing stone at buffalo and hitting it while it was in his field — Death of buffalo — Held, no offence of mischief — Accused held within his right to protect property from trespass. AIR 1916 Nag 14, Dist. **1953 Cr LJ 1350: 6 Sau LR 75: AIR 1953 Sau 158 (159) (Pr 2) (DB).**

——**Ss. 425, 427 and 40 — Mens rea** — Accused digging earth from his own land — Value of land not diminished — Loss of utility not proved — Intention to case wrongful loss or damage to complainant doubtful — No mischief held committed — Conviction set aside. **AIR 1955 NUC (Tripura) 5114.**

——**S. 425 — Ingredients of offence — Mere negligence is not enough.**

The gist of the offence under S. 425 lies in the intention or knowledge to cause wrongful loss or damage. Hence, mere neglect or carelessness on the part of the person in charge of the cattle to

keep them from straying into the field of others is not sufficient to bring home the offence of mischief against him. **1953 Cr LJ 1460: AIR 1953 Tripura 7 (2) (8) (Prs 3, 4).**

2. Knowledge.

——S. 425 — Intention and knowledge.

The accused must certainly be imputed the knowledge that when he was driving a heavy vehicle like a lorry with hopelessly poor lights, he is likely to cause wrongful loss or damage to any person, though there could be no intention to cause wrongful loss or damage to any person. **1956 Andhra WR 784: 1957 Cri LJ 627: AIR 1957 AP 100 (101) (Pt A) (Pr 4).**

——Ss. 425 and 428 — Applicability — Knowledge of likelihood of causing wrongful loss or damage is sufficient for offence of mischief — Accused giving blows to animal — He has such knowledge. **AIR 1955 NUC (Madh Bha) 5930.**

——S. 425 — Ingredients of offence — Knowledge and intention.

A person commits mischief if he causes destruction of property knowing that he is likely to cause wrongful loss or damage to the public or any person even if an intention to cause that damage is not made out. AIR 1934 Pat 221, Rel. on.

Where the accused persons allowed their three elephants to damage the complainant's sugar-cane crop on a number of dates and these elephants were allowed to cause extensive damage as no ropes (as is generally placed) were fastened round the legs of the elephants in spite of the fact that they were duly informed of the occurrence:

Held, that the accused knew that the elephants would cause wrongful loss to the complainant and even then they allowed their elephants to continue to cause damage to the complainant's sugar-cane crop on a number of dates and hence they committed mischief within the meaning of S. 425. **1955 Cr LJ 736: AIR 1955 Tripura 1 (2) (Prs 6, 7).**

3. Wrongful loss or damage.

——Ss. 425, 427, 323 — Applicability — Loss or damage to property — Meaning of.

In order to maintain a conviction under Section 425, I. P. Code, it is necessary that the loss or damage must be due to any act of the accused which causes destruction of the property itself by reducing its value or ulility.

Thus where the accused was alleged to have cut and taken away the sugar-cane crop of the complainant and when she protested about it, the accused beat her and her nephew and the accused was, on these facts, convicted under Section 427 and S. 323, I. P. Code.

Held, that though the accused caused wrongful loss or damage to the complainant when he removed the sugarcane crop which belonged to her, it could not be said that this loss or damage was caused to her due to the destruction or damage of the sugar-cane crop itself. The mere cutting of the sugar-cane crop, which was ripe, did not amount to any mischief to the crop in the sense contemplated in S. 425, I. P. Code and hence the conviction under S. 427 could not be maintained. **1958 All WR (HC) 280: 1958 All Cr R 228: 1957 Cr LJ 702: AIR 1957 All 405 (406) (Pr 4).**

——Ss. 425 and 429 — Applicability — Killing of rhinoceros in forest — Offence.

The various animals enumerated in S. 429 are all domestic animals. A rhinoceros cannot in any sense of the term be described as a domestic animal, though sometimes in rare cases it may get domesticated. The words 'or any other animal' in the section should refer to animals of the same kind or class, ejusdem generis, that is to say to domestic animals, and not to wild animals. 'Mischief' is an essential ingredient of the section. Where, therefore, no one has any property or right in an animal, the killing of that animal does not come within the meaning of S. 425, and thus the provisions of S. 429 will not be attracted, where the accused kills a rhinoceros in a forest. ILR 17 Cal 852, Rel. on. **ILR (1958) 10 Assam 124: 1961 (1) Cr LJ 226: AIR 1961 Assam 18 (18) (Pt A) (Pr 3).**

——S. 425 — Mischief — Essentials — Appeal against acquittal — Interference — Criminal P. C. Section 417.

The offence of mischief as defined in S. 425, Penal Code, relates not merely to intention but also to the knowledge of the likelihood of wrongful loss being caused. It is enough if the accused knew that by blocking the channel through which the complainant had a right to take water for his land, wrongful loss would be caused to the complainant. Once this is established the co-existence of a civil remedy really does not make any difference.

Interference with an acquittal would be justified only for substantial and compelling reasons evident from the record. **(1961) 1 MLJ 372: 1961 MLJ (Cr) 273: 1961 All WR (Supp) 14: 1961 All Cr R 151: 1961 (2) Cr LJ 501.**

——S. 425 — Mischief — What constitutes — Motive of accused to benefit himself — It is no answer to a charge of mischief to plead that the motive of the accused was to benefit himself and not to injure other, if he knew that he could only secure that benefit by causing wrongful loss to another. **AIR 1960 Mad 240 (243) (Pt C) (Prs 8, 10) (DB).**

——Ss. 425, 429 — Wrongful loss — Accused charged under S. 429 for having killed a Brahmain bull — Bull dedicated to Lord Mahadeb by its previous owner but even after dedication owner paying for its maintenance — Hence bull could not be held to be res nullius. **(1960) 2 OJD 110: 26 Cut LT 342.**

4. Destruction or change.

——S. 425 — Complainant having right to pass sullage water from his house through underground drain passing underneath the land of accused — Accused obstructing flow of water by blocking up the drain — Act amounts to mischief.

The sullage water from the complainant's house passed, from time immemorial, through an underground drain which ran underneath the land of the accused. The accused blocked the drain and obstructed the flow of water from complainant's house.

Held, that a drain was property and the act of the accused in blocking it amounted to causing a change in the drain or in its situation so as to destroy its utility to the complainant. The act of the accused, therefore, clearly amounted to mischief within S. 425, I. P. Code. **1967 Cri LJ 1227: (1965) 2 Andh LT 345.**

——S. 425 — Essentials of offence — Complainant in possession of fallow land covered with babla trees — Accused ploughing and sowing it — If commits mischief.

To constitute an offence of mischief within Section 425, I. P. Code, there must be the intent or knowledge on the part of the person concerned to cause wrongful loss or damage. There must be either destruction of the property or some

change in the property or in its situation which has the effect of destroying or diminishing its value or utility, or in any event, the property must be injuriously affected.

Where the accused ploughed and sowed the fallow land covered with babla trees in the possession of the complainant:

Held, that though the act of the accused might be unlawful, it did not constitute the offence of mischief. **61 Cal WN 404: 1957 Cr LJ 719: 1957 All WR (Sup) 50: AIR 1957 Cal 385 (386) (Pt B) (Prs 5, 6).**

——S. 425 — Mischief — Owner of land if has right to destroy property of the trespasser.

Even if the owner of the land has a right to eject the trespasser he has no right to destroy whatever property of the trespasser the owner may find on the land. Therefore, in this case the act of demolition of a basement constructed in the property would amount to an offence of mischief. **1964 Ker LT 757: 1964 Ker LJ 1036: (1964) 2 Ker LR 97: (1964) MLJ (Cr) 617.**

——Ss. 425 and 426 — Electricity cut off due to deliberate non-payment of electricity dues by landlord — Landlord not guilty of 'mischief' or abetment of 'mischief'.

If a landlord fails to pay electricity dues, even assuming that the failure is deliberate, and thereby causes a situation in which the Madras Electricity Supply Corporation is constrained to cut off electricity supply to the tenants, the landlord would certainly not be committing mischief as defined in S. 425, of the Penal Code. He may be committing a tort and may also be contravening S. 17 (1), of the Madras Buildings (Lease and Rent Control) Act, 1960, which is punishable under S. 33 (1), of that Act. But the act of the Electricity Corporation is not an act of destruction to property or causing illegal change in the property, as it has a right to cut off supply of electricity for non-payment of electricity dues. Thus the landlord cannot even be convicted of abetment of mischief committed by another. **ILR (1964) 2 Mad 357: 77 Mad LW 309: (1965) 1 MLJ 347: 1965 MLJ (Cr) 194.**

5. Property.

——S. 425 — Property — Does not include an incorporeal or intangible property such as easement. **1967 Cri LJ 1227: (1965) 2 Andh LT 345.**

——S. 425 — "Property" Meaning of.

— "Property" under S. 425 means tangible property capable of being forcibly destroyed and does not include an easement. **1951 Nag LJ 239: ILR (1951) Nag 855: AIR 1952 Nag 193 (1) (193) (Pr 3).**

6. Bona fide claim of right.

——S. 425 —Right of easement—Use of criminal force if offence — Accused claiming right of easement to pass over inner courtyard of complainant's house through gap in complainant's boundary wall — Right disputed by complainant — Complainant trying to close gap — His act does not amount to mischief or wrongful restraint — No right of private defence arises in favour of accused party — Accused party using criminal force to prevent closing of gap are guilty of rioting. **1963 (1) Cr LJ 46: AIR 1963 Cal 3 (5) (Pt B) (Prs 10, 11) (DB).**

7. Destruction of one's own property.

——S. 425, Explanation 2 — U. P. Coal Control Order (1959), Cl. 6 — Coal-stock allotted to one partner frozen by Authority and given in custody of other partner — When without written authority from State Coal Controller the other partner transfers coal, his act amounts to fraudulent or dishonest disposal of coal and mischief within S. 425 — Offence under S. 425 can very well be committed against one's own property — U. P. Coal Control Order (1959), Cl. 6. **1964 All WR (HC) 263: 1964 All Cri R 174.**

——S. 425, Expl. 2 — Destruction of one's own property.

The dispute between the accused and the complainant about the ownership of the Pardhan wall would not entitle the accused to demolish the wall, when it is found that the wall was the common property of both **1953 All WR (HC) 48: 1953 All Cri R 21: 1953 Cr LJ 905: AIR 1953 All 409 (410) (Pt A) (Pr 7).**

——S. 425 — Prima facie evidence of wilful damage to wall — Wall, joint property of both complainant and opposite party — Complainant not in possession — Still his complaint against mischief is competent. **AIR 1951 Vindh Pra 1 (2) (Pt A) (Pr 7).**

8. Master's liability for servant's negligence.

——S. 425 — Master's liability for servant's negligence — Owner of cattle not liable for mischief.

Where cattle sent for grazing under the supervision of a cowherd strayed into the complainants' field due to the negligence and carelessness of the cowherd the owner of cattle cannot be held to have any intention to cause damage and knowledge that his cattle were likely to cause damage. In the case of mischief, the master cannot be held vicariously liable for any damage caused by the conduct of his servant. **1963 (2) Cr LJ 112 (Tri).**

9. Mischief and theft.

——Ss. 425, 426 and 378 — Applicability — Person harvesting green crops grown by another person on his land — Offence.

Where A harvests green paddy crops grown by on his land, A commits the offence of mischief punishable under S. 426. Although theft may have been committed in respect of the crops which are actually harvested and taken away, a change is caused in the land itself whereby its produce is completely taken away and the value of the produce is lost. It is noteworthy that the offence of mischief is not committed in respect of immovable property only as the offence of theft is committed, but it may be committed in respect of immovable property also. AIR 1917 Pat 336 and 2 Pat LT 394, Dissented from. **1960 BLJR 713: 1961 (2) Cr LJ 265 (2).**

10. Evidence and proof.

——Ss. 425 and 429 — Intention — Proof.

Where the truck of the accused struck the buffalo of the complainant accidently which, as a result fell down and died of injury: **Held** that in the absence of evidence to show that the accused intended to cause wrongful loss or damage or he knew that he was likely to cause them to the complainant the accused could not be held guilty of the offence of the mischief. **AIR 1958 Raj 347.**

11. Practice and procedure.

——S. 425 — Constitution of India, Art. 20 (2)— Double jeopardy — (Houses and Rents — West Bengal Premises Tenancy Act (12 of 1956), Section 31 — Proceedings under, against landlord

for cutting electric connection — Subsequent conviction under S. 426, Penal Code for same act — Legality — Although there is proper and adequate remedy available to the tenant under S. 31 of the West Bengal Act it could not be said that the landlord's wife should not have been prosecuted under the general law. See Constitution of India, Art. 20 (2). **1959 Cri LJ 446: AIR 1959 Cal 260.**

SECTION 426

SYNOPSIS

(Penal Code (1860), S. 426.)

1. Scope and applicability.
2. Evidence and proof.
3. Practice and procedure.
4. Conviction and sentence.

1. Scope and applicability.

——**Ss. 426, 447, 352** — Possession — Nature of — For the purposes of conviction under Ss. 426, 447 and 352, I. P. C., if the complainant alleges his possession and if he succeeds in establishing it he would succeed in establishing the commission of the offence under S. 447, I. P. C. It is not necessary for the Court to hold that the land really belonged to the complainant. **1954 All LJ 232: 1954 All WR (HC) 284: 1954 Cr LJ 1408: AIR 1954 All 650 (650) (Pt A) (Pr 3).**

——**Ss. 426 and 23** — Act will amount to mischief only when loss or damage is wrongfully caused — Act of accused not unlawful — Offence of mischief not made out. **1964 MPLJ (Notes) 99.**

——**S. 426 — Easement — Interference and obstruction by servient owner — Offence — Rights of dominant owner.**

Where a dominant owner goes beyond the rights conferred by S. 24 read with S. 36, Easements Act, and removes direct obstruction to the easement of light and air wilfully and wrongfully placed by servient owner his action in removing the obstruction would amount to mischief under S. 426, I. P. C. **1958 Cri LJ 1316: AIR 1958 Madh Pra 341.**

——**Ss. 426 and 425** — Electricity cut off due to deliberate non-payment of electricity dues, by landlord — Landlord not guilty of mischief or abetment of mischief. See Penal Code (1860), S. 425. **ILR (1964) 2 Mad 357.**

——**S. 426** — Criminal trespass on land — Intention to commit an offence or to insult by entry on land — Proof — Bona fide claim or right — Entry does not become criminal. See Penal Code (1860), S. 447. **(1962) 28 Cut LT 375.**

——**Ss. 426, 441, 447, 425, 109 — Criminal trespass and mischief — Intention — Abetment.**

Where the accused instructed her maternal uncle to raise the roof which necessitated the complainant's eaves and entering upon his property, the accused must be deemed to have intended to cause annoyance and wrongful loss to the complainant within the meaning of S. 426 and, therefore, to have abetted the offences of criminal trespass and mischief. **1953 Cri LJ 881: AIR 1953 Sau 81 (DB).**

2. Evidence and proof.

——**Ss. 426 and 429 — Ingredients of offence.**

The three points which the prosecution has to prove in a case under S. 426 are: (1) the intention or knowledge of likelihood to cause wrongful loss or damage to the public or to any person, (2) causing the destruction of some property or any change in it or in its situation and (3) such change must destroy or diminish its value or utility or affect it injuriously. To constitute an offence under S. 426, it is not necessary that the animal should be destroyed or its value or utility diminished; it is sufficient if it is affected injuriously. If permanent injury had been caused to the animal the offence would be under S. 429. **1959 Ker LJ 722: 1959 Ker LT 765: 1959 Mad LJ (Cr) 636: ILR (1959) Ker 881: 1960 Cr LJ 228: AIR 1960 Ker 74 (74) (Pr 2).**

——**S. 426** — Persons, more than five, moving about in demonstration and shouting slogans against English signboards — Some of them tarring the boards and writing new legends on them — Those who did not actually do this but only stood by and formed a part of demonstrating assembly held also guilty under S. 143 read with S. 426 — Boards suffer decrease in utility by substituting English legends — Utility for the purposes of S. 425 is utility as conceived by the accused. See Penal Code (1860), S. 143. **1962 (2) Cri LJ 692 (Madh Pra).**

——**Ss. 426 and 427 — No evidence of intention or knowledge — Offence.**

Where from the evidence the intention or the necessary knowledge on the part of the accused as to the likelihood of any loss or damage does not appear to have been proved nor is there any evidence as to the exact value of the property which is alleged to have been damaged, the case cannot come either under S. 426 or under Section 427.

Where the prosecution failed to prove that the accused had any intention of causing loss to the complainant and what they did in cutting and removing the boundary ridge was under a mistaken impression that they had a claim to do so as of right and they were convicted and sentenced by the Magistrate under S. 427:

Held, that the conviction and sentence could not be maintained. **(1959) 1 OJD 19: (1959) 25 Cut LT 80.**

3. Practice and procedure.

——**S. 426** — Criminal P. C. (1898), S. 245 — Offence under S. 426, Penal Code — Value of loss not stated by complainant — Acquittal on this ground is not proper. See Criminal P. C. (1898), S. 245. **1955 Cri LJ 1357: AIR 1955 Cal 558.**

——**S. 426** — Prosecution — Complaint of aggrieved person, if essential — It is not essential since that offence is not covered by S. 198 or by S. 199 of Cr. P. Code. See Criminal P. C. (5 of 1898), Ss. 198 and 199. **53 Cri LJ 348: AIR 1952 Mad 170.**

——**Ss. 426 and 447** — Acquittal on plea not taken by accused — Validity — Charge under Ss. 426 and 447, I. P. Code — Land found not to be in possession of accused — Plea of bona fide claim of right by accused — Identity of land not disputed — Acquittal on the ground that complainant did not prove identity of land not valid. See Criminal P. C. (1898), S. 245. **(1962) 28 Cut LT 382.**

——**S. 426** — Criminal P. C. (1898), Ss. 190 and 251 — Question whether case was properly tried as summons case — Factors to be considered — Case taken on file under S. 426, Penal Code, and tried as summons case—Trial held not bad on ground that it should have been tried for major offence under S. 427 as warrant case. See Criminal P. C. (1898), S. 190. **1965 Raj LW 467: ILR (1965) 15 Raj 1176: AIR 1966 Raj 115.**

——**S. 426** — Expressions 'same transaction' and 'in the course of the same transaction' in S. 239, Criminal P. C. — Meaning of — Various independent acts if connected either subjectively or ob-

jectively and producing particular result from one transaction — Collision of two motor vehicles — Joint trial for offences under Ss. 279, 337 and 426, Penal Code not illegal — Even if illegal, there being no prejudice caused to prosecution, retrial could not be ordered. See Criminal P. C. (1898), S. 239 (d). **1962 (1) Cr LJ 763: AIR 1962 Raj 155 (DB).**

——**Ss. 426 and 447** — Charge under Ss. 143 and 147, I. P. Code and S. 24, Cattle Trespass Act — Conviction under S. 426, I. P. Code held bad — Case not covered by S. 238 (2). See Criminal P. C. (1898), S. 238 (1). **1963 (2) Cr LJ 112 (Tripura).**

——**S. 426 — Right to complain — Co-owner of joint property — Complaint against joint owner — Competency.**

A complaint of mischief under S. 426, I. P. Code, may be filed by a co-owner of joint property against another, if the accused has caused wilful damage, even though the latter be a joint owner and the complainant be not in actual possession of the property in dispute. It is for the opposite party to show that there was no damage and that there was no wrongful intention but that is only at a later stage. **AIR 1951 VP 1 (2) (Pt A) (Pr 7).**

4. Conviction and sentence.

——**Ss. 426, 379** — Removal of complainant's property in order to realise legal dues — No intention to cause wrongful loss or gain — Accused cannot be convicted. See Penal Code (1860), Section 379. **1960 Cr LJ 492: AIR 1960 Mad 186.**

——**Ss. 426, 448, 186** — Sentence — Where in the trial under Ss. 448, 426 and 186 the allegations were that during the elections the accused led a procession to the office of the Sub Divisional Officer and committed acts of mischief and the accused frankly admitted a guilt, a sentence of 15 days' simple imprisonment was adequate. **ILR (1963) Cut 42.**

——**Ss. 426, 448, 186** — Sentence. See Penal Code (1860), S. 448. **(1962) 4 Orissa JD 367.**

——**S. 426** — Criminal trespass on land — Intention to commit an offence or to insult by entry on land — Proof — Bona fide claim of right — Entry does not become criminal. See Penal Code (1860), S. 447. **(1962) 4 OJD 222.**

——**S. 426** — Civil dispute — Complainant's civil suit for damages to paddy seedings in his land, pending — Subsequent complaint in criminal Court alleging removal of crops from same land — Question as to who raised crops essential in both proceedings — Necessary criminal intention or knowledge absent — Dismissal of criminal complaint held was proper. See Criminal P. C. (1898), S. 203. **(1957) 23 Cut LT 12.**

——**S. 426** — Criminal P. C. (1898), S. 423 (1) (b)— 'Alter the finding' — (Cattle Trespass Act (1871), S. 24 — Conviction, legality of) — The expression 'alter the finding' occurring in S. 423 (1) (b) (2) Criminal P. C. is not subject to any limitation except that the sentence cannot be enhanced by the appellate Court. **Held,** on facts that the appellate Magistrate was dealing with an appeal against a conviction under S. 423 (1) (b), Cr. P. C. and could alter the conviction under S. 426, I. P. C. into one under S. 24, Cattle Trespass Act, on the same facts which had been held to have been proved against the accused. **ILR (1953) Cut 713: 20 Cut LT 308: 1954 Cri LJ 883: AIR 1954 Orissa 145 (148) (Pt C) (Prs 9, 13) (DB).**

——**Ss. 426 and 427 — Applicability — Duty of Court — Omission to determine amount of damage — Effect.**

A Magistrate cannot simply observe that the amount of loss mentioned in the first information report is inflated and proceed to convict the accused under S. 427, I. P. Code. It is imperative for him to determine the amount of damages or loss alleged to have been caused. The punishment under S. 427 cannot be justified in the absence of a clear finding of the extent of loss or damage. This omission, however, does not render the judgment invalid. The conviction under Section 427 can be altered to one under S. 426, I. P. Code. **1955 BLJR 608: 1957 Cr LJ 149 (Pat).**

——**Ss. 426 — Conviction — Sustainability — No definite finding — Effect.**

Where in a trial of an offence under S. 425, the judgment of trial Court does not show that the Court was satisfied as to under which of the various alternatives given in that section the case against the accused could come, where it had only quoted the section and held that they were guilty either under one alternative or the other, the finding is not sufficient to convict the accused. **1954 Cr LJ 998: 1954 BLJR 31: AIR 1954 Pat 309 (310) (Pt B) (Pr 7).**

——**Ss. 426, 427** — Question whether case was properly tried as summons case — Factors to be considered — Case taken on file under S. 426, Penal Code and tried as summons case — Trial held not bad on ground that it should have been tried for major offence under S. 427 as warrant case. See Criminal P. C. (1898), S. 242. **1966 Cri LJ 579: AIR 1966 Raj 115.**

SECTION 427

——**Ss. 427, 425, 323 — Loss or damage to property under S. 425 — Nature of.**

An accused causing wrongful loss or damage to the complainant by removal of her sugar-cane crop could not be convicted under S. 427, I. P. Code unless this damage or loss was caused to her due to the destruction or damage of the sugar-cane crop itself. The mere cutting of the sugar-cane crop which was ripe did not amount to any mischief to the crop within the meaning of the section. **1957 Cri LJ 702: AIR 1957 All 405.**

——**S. 427** — Bull dedicated to Lord Shiva — If public property—Bull sold at auction by cattle pound keeper — Auction purchaser using it for his own purpose if commits any offence — **Held** he does not commit any offence. A dedicated bull is neither nullius propriatas or res nullius, nor property of a particular deity and the auction purchaser acquires a proprietary title to the bull. **1952 Cri LJ 168: AIR 1952 All 26 (26, 27) (Prs 2, 3).**

——**S. 427** — Major and minor offence — Meaning — Charge for dacoity — Conviction for mischief — If legal — Accused cannot be convicted under S. 427. See Criminal P. C. (1898), S. 238 **51 Cri LJ 1244: AIR 1950 All 471 (DB).**

——**S. 427 — Intention to cause wrongful loss.**

Where the accused stored earth and other materials on the open space between his house and that of the complainant and owing to the accumulation of water due to abnormal heavy rains the wall of the complainant's house was damaged.

Held, that the accused could not be convicted under Section 427 as there was no direct act on the part of the accused and no intention to cause wrongful loss or damage to the complainant. **51 Cri LJ 1242: AIR 1950 All 464 (464, 465) (Prs 2, 3).**

——**S. 427** — Burden of proof — Mischief by uprooting paddy seedlings —Onus is on prosecu-

tion to show possession of plot and uprooting of seedling grown by complainant. **AIR 1955 NUC (Assam) 2823.**

——**S. 427** — Ingredients of offence under — Invasion of civil right — No offence. See Penal Code (1860), S. 425. **AIR 1958 Cal 668.**

——**S. 427** — Criminal P. C. (1898), S. 241 — Change of procedure — Accused summoned and placed on trial under Section 426, Penal Code summarily — At end of trial Magistrate convicting under Section 427, Penal Code — Procedure was wrong. See Criminal P. C. (1898), Section 241. **AIR 1955 NUC (Cal) 4268.**

——**S. 427 — Wrongful restraint and mischief.**

Dumping of rubbish etc. by the landlord's men with a view to diminish the utility of a particular stall in a fish market rented out to a woman, and thus preventing the use of the property constitutes mischief punishable under Section 427, I. P. Code. **1954 Cri LJ 551: AIR 1954 Cal 192 (192) (Pr 3).**

——**S. 427** — Rash and negligent driving leading to collision causing hurt to person on road — Conviction under S. 337 proper — Conviction under S. 427 illegal. See Penal Code (1860), Section 337. **1962 (2) Cr LJ 660 (1): AIR 1962 Guj 318.**

——**S. 427** — Mischief — Accused cutting down fruit trees grown by complainant under a mistaken belief that he had right to do so — Magistrate holding that the complainant had no right to raise the trees without the consent of the accused, acquitted the accused — **Held,** that that was not a matter for the Magistrate to decide in a case of mischief against the accused and the acquittal was therefore set aside. **1963 (1) Cr LJ 775: AIR 1963 Manipur 15 (17) (Pt E) (Pr 8).**

——**S. 427** —Bona fide claim of right — Decree recognising right of way over passage — Removal of compound wall and gate not directed — No evidence of obstruction — Demolition of wall and gate not justified — AIR 1938 Cal 669, Rel. on — (Easements Act (1882), S. 36). **(1960) 26 Cut LT 431.**

——**S. 427 — No evidence of intention or knowledge.**

Offence — Where from the evidence the intention or the necessary knowledge on the part of the accused as to the likelihood of any loss or damage does not appear to have been proved nor is there any evidence as to the exact value of the property which is alleged to have been damaged, the case cannot come either under S. 426 or S. 427. **(1959) 25 Cut LT 80.**

——**S. 427** — Intention to cause annoyance or to commit mischief is essential. See Penal Code (1860), S. 447. **(1958) 24 Cut LT 310.**

——**S. 427** — Bona fide claim of right — The complainant's house encroached upon a tiny bit of land belonging to the accused. The parties had been in dispute regarding their boundary wall between their adjoining plots. The accused in the bona fide belief that the encroched portion belonged to them demolished it and took away the material.

Held, that in the absence of proof of criminal intent, however, reprehensible or high-handed their action might have been, the accused could not be convicted under Sections 379 and 427. **16 Cut LT 78: 51 Cri LJ 1333: AIR 1950 Orissa 196 (197) (Pr 5).**

——**Ss. 427, 489 — Applicability — Copyright in books — Offence as to.**

An agreement was arrived at between the complainant on the one part and of Messrs. Better Books Co., Patna, on the other part, of which the accused was a partner and by that agreement the complainant assigned the copyright of his works to Messrs. Better Books Company. Under the agreement to copyright of the works would be the property of the publishers. The publishers were free to get those works revised, enlarged or improved by anyone they desired but at their own expense The complaint was that the accused fraudulently and dishonestly removed the author's name from the works. The grievance was that he entrusted the books and their copyrights to the accused on the understanding given by the latter that the accused would never tamper with the books or their copyrights and that their copyrights would return to the complainant after the period prescribed by law.

Held, that (1) there was no allegation that the works of the author published in the books, even if it was conceded for a moment that the works still remained his property, had anyway destroyed that property or that any change had been brought about in those works which had destroyed or diminished its value. Hence the charge under Section 427 of the Penal Code could not stand.

(2) Section 489 is applicable only to corporeal property. In this case the property, which was corporeal, was the book wherein the works of the complainant under the terms of the agreement had been published. The name of the author by itself even if present on the title page, could not be called the property mark of those books. The removal of the name of the author from the books could not therefore constitute an offence under Section 489. Thus the charge under Section 489 of the Penal Code as well could not stand in law. AIR 1936 Bom 167, Not foll. **1955 Cr LJ 832: 1954 BLJR 433: AIR 1955 Pat 228 (229, 230) (Prs 4 to 6).**

——**S. 427** — Criminal P. C. (1898), Ss. 190 and 251 — Question whether case was properly tried as summons case — Factors to be considered — Case taken on file under Section 426, Penal Code and tried as summons case — Trial held not bad on ground that it should have been tried for major offence under Section 427 as warrant case. See Criminal P. C. (1898), S. 190. **1965 Raj LW 467: ILR (1965) 15 Raj 1176: AIR 1966 Raj 115.**

——**S. 427** — Criminal P. C. (1898), S. 197 — In discharge of official duty — No sanction is necessary to prosecute a public servant for an offence punishable under Section 427, I. P. C. when the complainant does not allege that the accused committed mischief while acting or purporting to be acting in the discharge of his official duty as a public servant. See Criminal P. C. (1898), S. 197. **AIR 1954 Sau 132 (DB).**

——**S. 427** — Applicability — Cutting of overhanging branches of tree in neighbour's land — No offence. See Penal Code (1860), S. 79. **1957 Cr LJ 166 (Trav-Co).**

——**S. 427** — Mens rea is an essential ingredient of mischief. See Penal Code (1860), Section 425. **AIR 1955 NUC (Tripura) 5114.**

SECTION 428

——**S. 428** — Conviction — Essentials for — Knowledge of likelihood to cause wrongful loss or damage is sufficient for offence of mischief — Accused giving blows to animal — He has such knowledge. **AIR 1955 NUC (Madh B) 5930.**

SECTION 429

——**S. 429 — Applicability — Maiming mule, but not having intention to do so — Offence.**

Section 429 will only apply in those cases where there is a deliberate attempt on behalf of the accused to commit a mischief. Commission of a mischief involves an animus to do something. Where the accused had no intention of either killing, poisoning, maiming or rendering useless the mule, S. 429, will not apply. **1957 All LJ 123.**

——**S. 429** — General Clauses Act (1897), S. 26 — Act or omission constituting offence under two enactments — The offences under S. 429, I. P. C. and Section 116 of the Motor Vehicles Act are distinct and separate offences and a simultaneous conviction under both sections is perfectly valid. Under the former section, it is the result of any act or omission which is made punishable whereas under the latter section it is the act or omission constituting the manner of driving that makes the offence — (Motor Vehicles Act (1939), S. 116) — (Criminal P. C. (1898), S. 35). See General Clauses Act (1897), S. 26. **1957 Cri LJ 627: AIR 1957 Andh Pra 100.**

——**S. 429 — Term "maiming" — Meaning of — Held that cow was maimed within S. 429 — Words and phrases — Term "maiming".**

The term "maiming" refers to an injury which causes the privation of the use of a limb or a member of the body. It must, in any case, imply a permanent injury affecting the use of a limb or a member of the body

Where the accused speared a white milch cow resulting in 3″ long 1″ thick and 3″ deep injury to the cow:

Held, that the cow had been maimed within S. 429, I. P. C. **ILR (1957) 2 Cal 771.**

——**S. 429** — Ingredients of offences under Section 426 — To constitute offence under the section injury to animal is sufficient—If permanent injury is caused offence is under Section 429. See Penal Code (1860), S. 426. **1960 Cri LJ 228: AIR 1960 Ker 74.**

——**S. 429** — Offence under — Accused A and B charged with having killed a bull — Evidence against B showing B was merely standing near the place where the bull was killed — Evidence was not sufficient to show that he participated in killing of the bull — Hence he can claim benefit of doubt. **(1960) 2 OJD 110: 26 Cut LT 342.**

——**Ss. 429 and 425 — Intention — Proof of.**

In order to prove an offence of mischief it is necessary for the prosecution to establish that the accused had an intention or knowledge of likelihood to cause wrongful loss or damage to the public or to any person. Where it was only accidentally that the truck of the accused struck against the buffalo of the complainant which as a result fell down from a bridge and died of the injury later on and it was not the allegation even of the complainant that the accused had grouse against her and that he intended to cause wrongful loss or damage or that he knew that he was likely to cause them to her or any person and there was no such allegation either in the charge sheet nor was this ingredient brought out in the statements of the persons examined as eye-witnesses, the conviction of the accused for an offence under Section 429 cannot be sustained. **1957 Raj LW 642: 1959 Cr LJ 87: AIR 1958 Raj 347 (347) (Pt A) (Pr 5).**

——**S. 429** — To constitute offence of mischief existence of requisite knowledge or intention to cause wrongful loss is essential — Buffalo trespassing on field of accused — Accused assisting his daughter in driving it away — Accused throwing stone at buffalo and hitting it while it was in his field — Death of buffalo — **Held,** no offence of mischief — Accused held within his right to protect property. **1953 Cri LJ 1350: AIR 1953 Sau 158 (159) (Pr 2) (DB).**

SECTION 430

——**S. 430** — Charge under—Contents of—Where a charge under Section 430, I. P. C. mentioned that the action complained against had been committed in the month of July 1950 without specifying any date — **Held,** on facts that the charge was not defective and no prejudice could be caused to the accused by mentioning only the month and omitting the exact date of the offence. See Criminal P. C. (1898), S. 220. **AIR 1955 NUC (All) 5490.**

——**S. 430** — Applicability — Essentials — Accused closing channel leading to village tank and cutting new channel leading to his field — S. 430 applies. **AIR 1955 NUC (All) 5490.**

——**Ss. 430, 97, 99 — Deprivation of water supply by erecting bund across water channel — Right of person to defend against such deprivation — Recourse to authorities — Propriety of.**

The deprivation of water by putting up a bund across the water channel and thereby causing diminution of water supply to a person would be an offence under S. 430. Under S. 97 he has a right, subject of course to the restrictions contained in Section 99 to defend his property against any act which is an offence of mischief or an attempt to commit such an offence. If the person has a legal right to prevent the dam being constructed by the deceased, they need not abandon the enjoyment of that legal right and run away to seek protection of the authorities. **1962 Ker LT 868: (1962) 2 Ker LR 466.**

——**S. 430** — Offence under Section 430, Indian Penal Code — Diminution of water supply to be proved—Unless mischief by accused is proved his intention need not be considered — Additional District Judge arriving at erroneous conclusion with regard to crime — Error not said to be apparent on record nor is it error of jurisdiction—Power under Article 227 cannot be invoked. See Constitution of India, Art. 227. **1963 MPLJ (Notes) 216.**

——**S. 430** — Deceased committing offence under Section 430— Accused exceeding right of private defence and killing deceased — Accused's act falls within Exception 2 to Section 300 — Conviction under S. 304, Part 2 is correct. See Penal Code (1860), S. 300, Exception 2. **1960 Cri LJ 834: AIR 1960 Mad 240 (DB).**

SECTION 434

——**S. 434 — Applicability — Removal of land marks by accused — Possession of accused over land no defence — Marks put at cost of complainant — Removal entails loss to complainant.**

Possession by the accused of the land in which the land-marks were situated will not be a sufficient defence in a case where the ingredients of the offence under Section 434 are made out. Where the stones were fixed by the Revenue Supervisor after he measured the plot and the accused removed these stones from where they were placed by the supervisor, moving survey stones from their proper place will result in the diminution of their usefulness as land-marks duly fixed. Where it was the complainant who bore the expenses of having the land surveyed and its boundaries demarcated by survey stones, any removal of these stones will entail loss to him at least to the extent of repeating the whole process once again. The accused cannot escape liability under Section 434 by claiming that the

survey stones were wrongly placed in their own land. **(1961) 2 Ker LR 241: 1961 Ker LT 656: 1962 Mad LJ (Cri) 23.**

SECTION 435

——Ss. 435 and 436 — Applicability.

Arson does not cease to be arson if the chappar is first pulled down and then set fire to. It makes no difference whether the chappar is set fire to without being pulled down to the ground or is first pulled down and then set fire to. **1953 All WR (HC) 389: 1953 Cr LJ 1729: AIR 1953 All 749 (749) (Pt A) (Pr 4).**

——S. 435 — Applicability — Building, meaning of — An ordinary double thatched shed resting on bamboos or wooden or brick pillars having no doors etc. cannot be treated as building within the meaning of the term used in S. 436. **1952 Cri LJ 299: AIR 1952 All 146.**

——S. 435 — 'Damage to property' — Meaning of — Measure of damage.

The expression 'damage to property' in Section 435, Penal Code must be construed with reference to Section 425 and means destruction of property, diminution in its value or utility or being otherwise injuriously affected.

The expression is wide enough to include not only the actual loss but also the entire incidental loss suffered by the owner.

Consequently, where due to the mischief of the accused a thatched roof is destroyed by fire and a horse tied therein is badly burnt with the result that it was incapacitated and unfit for work for some days the correct measure of damage to property is the extent of loss suffered by the owner, viz. the cost of replacement of the thatched roof, the cost of treatment of the horse and also the loss of income during the period the horse was incapacitated. **1951 All LJ 558: 1951 All WR (HC) 651: 1951 All Cri R 170: 1952 Cri LJ 299: AIR 1952 All 146 (147) (Pt A) (Prs 6 to 8).**

SECTION 436

● **——S. 436 — Charge under — Acquittal — Conviction of accused charged of abetting offence — Sustainability.**

Where in consequence of the orders given by the accused, the hut is set on fire by one of the members of an unlawful assembly whose common object was to dismantle the hut and commit an assault on remonstrance, the accused can be convicted under S. 436 read with S. 109, I. P. C. **1958 Cr LJ 1352: AIR 1958 SC 813.**

——S. 436 — Arson — Arson does not cease to be arson if the chappar is first pulled down and then set fire to. It makes no difference whether the chappar is set fire to without being pulled down to the ground or is first pulled down and then set fire to. **1953 All WR (HC) 389: 1953 Cri LJ 1729: AIR 1953 All 749 (749) (Pt A) (Pr 4).**

——Ss. 436 and 435 — Applicability — Building, meaning of.

A structure made of straw and not of bricks and mortar may be considered a building if it has got the necessary furnishings needed for a building, such as doors, bars, etc. An ordinary double-thatched shed resting on bamboos or wooden or brick pillars having no doors etc., cannot be treated as a building within the meaning of that term used in Section 436, Penal Code. The building referred to in the section is a building which can be used as a place of worship or as a human dwelling or as a place for the custody of property. The word "custody" is undoubtedly different from the word "keeping" and it implies a sense of security which would be wanting in the case of a shed, which is only meant to provide shelter from sun and rain and which has no doors etc., consequently, where a thatched shed for tethering horses is destroyed by fire due to mischief, the offence falls under Section 435 and not under Section 436, Penal Code. **1951 All LJ 558: 1951 All WR (HC) 651: 1951 All Cri R 170: 1952 Cri LJ 299: AIR 1952 All 146 (147) (Pt B) (Pr 9).**

——S. 436 — Applicability — Persons witnessing arson being committed and not preventing same or interfering are not participants or abettors without overt act. **1958 Andh LT 856.**

——S. 436 — Proof of offence under. See Penal Code (1860), S. 395. **AIR 1955 NUC (Assam) 4237 (DB).**

——S. 436 — Sentence — (Criminal trial — Sentence).

Setting fire to a residential hut belonging to another is always a serious offence because it is potentially capable of endangering lives of persons and destroying property. **Held,** that taking, however, into consideration the extenuating circumstances that the accused was 78 years of age and was suffering from paralysis the ends of justice would be met by sentencing him to suffer 3 months' rigorous imprisonment. **1956 Cr LJ 386: AIR 1956 Bom 180 (183) (Pt B) (Pr 12) (DB).**

——S. 436 — Accused tried and acquitted of the charge under Section 342, Penal Code — Can be tried subsequently for offence under S. 436, Penal Code. See Criminal P. C. (1898), S. 403 **1962 (1) Cr LJ 73: AIR 1962 Pat 13.**

SECTION 441

SYNOPSIS

(Penal Code (1860), S. 441)

1. Scope and applicability.
2. Intention.
3. "To commit an offence".
4. To intimidate.
5. To annoy.
6. Bona fide claim of right.
7. Entry.
8. In the possession of another.
9. Joint possession and ownership.
10. "Unlawfully remains there".
11. Use of criminal force.
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13. Criminal trespass—Right of private defence.
14. Abetment.
15. Evidence and proof.
16. Practice and procedure.
17. Sentence.

1. Scope and applicability.

● **——Ss. 441, 424** — Movable property attached in execution of decree — Property removed by judgment-debtor by unlawful means — Wrongful loss to Court and wrongful gain to judgment-debtor — He is guilty under Sections 424 and 441. See Penal Code (1860), S. 424. **1961 (1) Cri LJ 859: AIR 1961 SC 803.**

——Ss. 441 and 456 — Applicability — 'House' trespass.

Where the accused entered the house of the complainant at night on the invitation of a married woman with intent to commit an offence under Section 497, it was held that he was guilty

under Section 456, Penal Code. AIR 1938 Lah 514 (FB), Rel. on. **1953 All WR (HC) 437: 1953 Cr LJ 1882: AIR 1954 All 17 (18) (Pr 3).**

——Ss. 441, 447 — Scope — (Municipalities — Madras District Municipalities Act (5 of 1920), S. 127) — Distinction.

An offence under Section 447 is a distinct offence from the offence contemplated by Section 127 of the Madras District Municipalities Act. Whereas mere entry in the premises connected with water-supply is an offence under Section 127, under S. 441, I. P. Code intention of such person to commit an offence or to intimidate, insult or annoy any person in possession of such property is the governing factor. **AIR 1955 NUC (Andhra) 3623.**

——Ss. 441 and 447 — Applicability — Continued possession of area cannot invoke provisions of sections. **AIR 1955 NUC (Assam) 4210.**

——Ss. 441, 447, 448 — Criminal trespass — Ingredients — What matters is intention to commit offence or to intimidate, insult or annoy any person in possession of property and what actually takes place or does not happen is not directly relevant.

To constitute an offence under S. 441, I. P. C. what matters is the intention to commit an offence or to intimidate, insult or annoy any person in possession of such property, as laid down in Section 441, I. P. C. What actually takes place or does not happen is not directly relevant. It cannot, therefore, be contended that because the complainant was not present, there could be no question of causing any annoyance to the complainant. Actual possession does not necessarily connote physical presence of the person in possession. If that were so, any criminal with impunity would break into a shop room during night when it has to be closed, without incurring the offence of trespass. Similarly, an owner, absent from his house or flat for a few minutes or a few hours, would find himself ousted. The concept of possession is not a fixed one. It varies according to circumstances, time, place, nature, of the thing, opportunity or circumstances of the owner and various other factors. AIR 1957 Cal 385 and 53 CWN 402, Ref.; 85 CLJ 200, Rel. on; 12 CWN 269 and 53 CWN 822, Disting. **ILR (1962) 1 Cal 82.**

——Ss. 441 and 447 — Ingredients of offence — Intention and knowledge.

In order that a conviction may properly be had upon a charge of offence of criminal trespass, there has to be a finding based upon evidence to the effect that the act of trespass was committed either with intent to commit an offence or with intent to intimidate, insult or annoy any person. It is further necessary that the intent to annoy or intimidate cannot be in respect of any and every person connected with the property, but with respect only to the person in actual possession of such property. If, therefore, the complainant was not present to be intimidated, insulted or annoyed, there could be no conviction unless it could be found upon evidence that there was intent to commit an offence.

Mere knowledge on the part of the accused that the result of their act is likely to cause annoyance or insult or intimidation to the complainant, is wholly insufficient to sustain a charge under S. 447. That section does not speak of knowledge. It would be utterly wrong to import the element of knowledge into S. 441 of the Indian Penal Code. **1957 Cr LJ 719: 1957 All WR (Sup) 50: 61 Cal WN 404: AIR 1957 Cal 385 (386) (Pt A) (Prs 4, 5, 8).**

——S. 441 — Scope — Unlawful entry with or without necessary intent followed by unlawful remaining — Such cases, if covered by section.

Whether there is unlawful entry without the necessary intent followed by unlawful remaining with one of the intentions prescribed or unlawful entry with the necessary intent followed by unlawful remaining also with the necessary intent, neither type of case is covered by plain words of Section 441 plainly interpreted. Whether such cases should be made punishable or not is a matter for the Legislature. AIR 1928 Pat 124 and AIR 1933 All 816, Dissent. from. **ILR (1952) 1 Cal 105: AIR 1951 Cal 297 (298) (Pr 11).**

——S. 441 — Hyderabad Penal Code, S. 371 — Essentials of offence — Re-entry upon land by person dispossessed by legal process in execution — Offence — Presumption of criminal intent.

To constitute the offence of criminal trespass under Section 371, Hyderabad Penal Code, there must be proof of an intention to commit an offence, or to intimidate, insult or annoy the person in possession or occupation of the property trespassed upon. The essence of the offence is the criminal intent to do one or other of the acts specified, and it is for the prosecution to prove that intent. The intent has to be gathered from the conduct of the accused or the circumstances of the case. It is sufficient to show that the accused must have known that his act would, as one of its inevitable incidents, cause annoyance. Re-entry into land from which the accused has been ejected by civil process (execution of decree) or of which possession has been given to another would raise a presumption that such entry was with intent to intimidate or annoy within the meaning of S. 371, Hyderabad Penal Code. When a person enters without any legal justification upon property in the established possession of another, it must be inferred that he has an intention to annoy the person in possession. 12 PR (Cr) 1906; 32 Dec LR 228; 35 Dec LR 173; 36 Dec LR 7, Foll. **1952 Cr LJ 505: ILR (1952) Hyd 326: AIR 1952 Hyd 50 (50, 51) (Prs 3, 5, 10) (DB).**

——Ss. 441, 447 — Ranbir Penal Code (12 of 1989 Smt.), Ss. 441 and 447 — Landlord going on his land and unyoking bullocks of his tenant — Intention to take forcible possession of land or to intimidate, insult or annoy cannot be inferred — Conviction under Section 447 cannot be sustained. AIR 1964 SC 986, Foll; AIR 1950 Bom 481, Rel. on. **1965 Kash LJ 42: 1965 (2) Cri LJ 504: AIR 1965 J and K 90 (90) (Pt B) (Pr 4).**

——S. 441 — Applicability — Land alleged to be given to father of accused by municipality — Accused asserting long possession — Accused erecting tinshed over disputed land — No criminal trespass. **AIR 1955 NUC (Madh B) 2406.**

——Ss. 441 and 447 — 'Possession' — Meaning of.

Possession contemplated under Section 441 must be actual physical possession, and persons, who merely have a right to graze cattle on another's land or to take fuel growing on it for their personal needs cannot be said to be in such possession or to own the property. Persons entitled to rights of easement or other incorporeal rights cannot be said to be persons in possession of the property within the definition of an offence of criminal trespass. ILR 33 All 773 and ILR 3 Mad 178, Distinguished. **1960 Cr LJ 631 (1): AIR 1960 Manipur 17 (17) (Pr 4).**

——Ss. 441, 447, 97 and 323 — Complainant entering into land of accused to effect repairs to fence serving as boundary between lands of both

parties without intention to annoy, intimidate or insult accused — Act does not amount to criminal trespass so as to give accused right to inflict injury on complainant. AIR 1964 SC 986, Foll. **ILR (1964) Cut 706.**

——S. 441 — Assertion of right to occupy house — Grounds for assertion not shown — Possession of accused held not bona fide — Intention to annoy, etc., can be presumed from circumstances.

Where the accused charged under Section 448, I. P. C., assert that the property of which they took possession was the dera of the community and that they bona fide entered into possession and had no intention to annoy the person in possession, but do not show on what grounds their assertion was founded, it cannot be said that the accused acted bona fide in occupying the property in the temporary absence of the owner.

Where it is found from the circumstances that the accused committed trespass with the intention to annoy, insult or intimidate the person in possession and not that they had merely the knowledge that their act would cause annoyance to him, the accused cannot have the benefit of the view that it is not enough for the prosecution to prove or for the Court to find that the accused knew that his entry would probably annoy the person in possession, but it is absolutely essential to affirmatively establish and find that the accused acted with an intention to annoy.

The intention has in most cases to be inferred from the circumstances and where the probable consequence of the act alleged to be criminal trespass was to cause annoyance to the person in possession it will be presumed that it was committed with that intention. Case Law Ref. **1953 Cri LJ 107: ILR (1952) Pepsu 302: AIR 1953 Pepsu 13 (13) (Pt A) (Pr 3).**

——S. 441— Possession of land — Trespass — Effect of S. 97.

Rightful owners of land do not lose their possession, particularly on an open piece of land merely because of a single act of trespass: AIR 1933 Nag 36 and 162 Ind Cas 813 (Nag), Rel. on. **ILR (1958) 8 Raj 15: 1958 Raj LW 24: 1958 Cr LJ 222: AIR 1958 Raj 52 (54) (Pt A) (Pr 7) (DB).**

2. Intention.

——Ss. 441, 448 — Actual possession of disputed premises delivered to complainant from accused tenant in execution of decree of ejectment — Re-entry by accused in absence of complainant by breaking lock — Complainant threatened by accused when former lodged protest with the latter — Held accused was guilty under S. 448.

The complainant's mother had obtained a decree for the ejectment of the accused who was her tenant. In execution of the decree the Court Amin delivered actual possession of the disputed premises to the complainant with aid of the police. The complainant put his lock on the house. On the same day when the complainant was away, the accused after breaking the lock unlawfully trespassed into the house. After the accused had broken up into the house, the complainant had gone there to lodge a protest with the accused. At that time the accused had threatened to give a beating to the complainant.

Held, that the accused had clearly committed an offence contemplated by S. 448 read with the second part of S. 441, I. P. C. The only object with which the accused could have re-entered the premises was to intimidate, insult or annoy the complainant and his mother though they were not actually present on the spot at the time of re-entry. AIR 1949 All 228, Rel. on; AIR 1925 All 540, Disting. **1965 All LJ 747.**

——S. 441 — Intention — Complainant in peaceful possession of shop — Accused beating complainant and forcibly ejecting him from shop — Accused tried for offences under Ss. 147, 323, 379, 448 and 504, Penal Code — Conviction only for offences under Ss. 147 and 448 — Though accused were acquitted under Ss. 323, 379 and 504, necessary intention held could be inferred from circumstances. 51 Cr LJ 469, Rel. on. **1952 All Cr R 93: 1952 All WR (HC) 337. 1953 Cri LJ 1664: AIR 1953 All 725 (725) (Pt A) (Pr 5).**

——Ss. 441 and 447 — Intention to constitute criminal trespass — Proof of — Presumption — Annoyance, probable consequence of act, alleged to be trespass — Intention may be presumed.

Unless the man committing criminal trespass gives expression to his intention, it would be impossible to produce direct evidence of the intention. The intention has in most cases to be inferred from the circumstances. Where the probable consequence of the act alleged to be criminal trespass was to cause annoyance to the persons in possession it will be presumed that it was committed with that intention. The presumption will hold good if it is not rebutted. **1949 All LJ 535: 1950 All WR (HC) 19: 1950 All Cri Cas 1: 51 Cri LJ 496: AIR 1950 All 157 (157) (Pr 1).**

[**Overruled** in AIR 1964 SC 986.]

——Ss. 441, 442 and 448 — Criminal trespass— Intention to insult — Accused, an office-bearer of School Committee going to school beating two boys in absence of Head Master and subsequently abusing Head Master on his return — Accused held guilty under S. 448.

The accused, a vice-chairman of a school Committee, came into the school while the Head Master was absent, beat two of the boys who had quarrelled with and beat his nephew learning in the same school. When the Head Master returned to the school and learnt about the incident he reprimanded the accused who was still there, that as a respectable person he should not have trespassed in the school and beaten the boys. The accused was incensed at this, and he started abusing the Head Master and tried to catch hold of his shirt and was about to use physical force. The Head Master pushed back the accused and the accused went away abusing. He also threatened the Head Master physical harm as soon as he came out of the school.

Held, that even though the accused may have the right to go into the school to make inquiries, his continuance there was certainly with the avowed object of chastising the Head Master which he demonstrated by starting abuses and preparation to use physical force. This was clear evidence of the accused having the criminal intention which makes the trespass a criminal trespass within the meaning of Ss. 441 and 442, I. P. Code. It would be impossible for the head of an educational institution to carry on effectively his duties if the parents or guardians or even any office-bearers connected with the management of the school were to be permitted to trespass in the premises of the school not only to humiliate the teachers in the presence of boys but also to indulge in abuses and use of physical force in supposed exercise of their right. There is no such right. The conviction of accused under S. 448, I. P. Code was, therefore, proper. **65 Bom LR 477: 1963 Mah LJ 690: ILR (1963) Bom 627: 1964 (1) Cr LJ 395: AIR 1964 Bom 82 (83) (Prs 4, 5).**

——S. 441 — Civil and criminal trespass — Distinction.

The difference between a civil and a criminal trespass is that in the latter one of the criminal intentions mentioned in S. 441 should be present. **1952 Cri LJ 542: AIR 1952 Him P and B 27 (27) (Pt B) (Pr 3).**

——S. 441 — Intention — Proof — Throwing complainant's servant out.

Entering the house of the complainant and throwing his servant out is not only intimidating the complainant or his servants, but is also causing annoyance to him. The criminal intent can be gathered from these very acts. **ILR (1952) Hyd 334: 1952 Cri LJ 343. AIR 1952 Hyd 38 (38) (Pt A) (Pr 3).**

——Ss. 441 and 453 — House trespass — Intention — Inference.

Where the accused broke open a locked house in possession of the complainant and occupied it and it was in evidence that previously the accused had been convicted on a complaint from the complainant for having gone to the complainant's house and threatening to cut him with chopper.

Held, that the intention necessary to complete the offence of criminal trespass was evident. AIR 1959 Ker 146; AIR 1950 All 157 and AIR 1918 Mad 136, Rel. on. **1961 Ker LJ 674: 1961 Ker LT 513: 1961-2 Ker LR 68.**

——Ss. 441 and 448 — Criminal trespass — Intention — Dominant intention must be to intimidate, insult or annoy — If dominant intention of wrongful entry is to take possession and intimidation, insult or annoyance is only casual result, offence of criminal trespass is not established. AIR 1964 SC 986 and ILR 25 Bom 202, Rel. on. **1965 BLJR 166: 1965 (2) Cr LJ 798: AIR 1965 Pat 507 (508) (Pt A) (Pr 9).**

——Ss. 441, 40 — Intention.

Intention which is a state of mind, can never be proved as a fact: it can only be inferred from facts which are proved. It may well be that in doing a particular act man may have more intentions than one. Therefore, to bring a case within S. 441 of the Penal Code, the intention specified in the section must be the dominant intention. (1951) AC 83, Rel. on. **1957 BLJR 546: ILR 36 Pat 786: AIR 1958 Pat 329 (347) (Pt K) (Prs 140, 141) (DB).**

——S. 441 — Intention — Proof.

In order to constitute criminal trespass, the prosecution must prove that the accused had the intention to intimidate, insult or annoy when he made the entry. A mere knowledge that the trespass is likely to cause insult or annoyance does not amount to an intent to insult or annoy within S. 441. Where certain persons re-occupy the lands acquired from them by the Government in the belief that the lands would be restored to them on return of the compensation money, they cannot be held guilty under S. 441 in the absence of any criminal intention as required by the section. **51 Cri LJ 821: AIR 1950 Pat 295 (296) (Pt A) (Pr 4) (DB).**

——Ss. 441 and 447 — Intention specified in section must be present — Absence of finding as to intention — Effect — Criminal P. C. (1898), Section 522.

Every trespass cannot be said to be a criminal trespass unless one of the intents given in Section 441 is proved.

The accused took possession of a field which was in the possession of the complainant as mortgagee, in his absence, with intent to obtain possession unlawfully and refused to make over possession of the field with a threatening attiude when the complainant demanded it back.

Held, that this did not necessarily mean that the accused intended to annoy, insult or intimidate the complainant or that in entering upon the field their intent was to commit any offence. In the absence of a clear finding to that effect the accused could not be convicted under S. 447. In such a case no question of restoration of possession of field under S. 522, Criminal P. C. can arise. AIR 1924 Lah 449; AIR 1933 Oudh 179, Rel. on. **1951 Raj LW 501.**

——Ss. 441, 447, 448 and 504 — Accused entering complaintiff's house for demanding their dues — On refusal to pay accused abusing complainant in filthy language and continuing to do so in spite of restraint shown by complainant — Intention to insult, intimidate or annoy or to provoke complainant to break peace — Inference of — Accused held guilty under Ss. 448 and 504. **1965 (1) Cri LJ 86: AIR 1964 Tripura 69 (71) (Pr 7).**

3. "To commit an offence".

——Ss. 441, 448, 451 — Accused entering complainant's house at midnight with intent to commit adultery with complainant's wife — Complainant absent at relevant time — **Held,** although intention to insult, intimidate or annoy may be absent, accused can be convicted either under S. 448 or 451 as he intended to commit offence. AIR 1938 Lah 534 (FB), Disting; AIR 1938 Lah 514 (FB), Rel. on. **1965 Raj LW 157: 1965 (2) Cri LJ 673: ILR (1965) 15 Raj 522: AIR 1965 Raj 191 (192) (Pt A) (Pr 5).**

4. To intimidate.

——Ss. 441, 447 — Intention to intimidate or annoy — Going on hunger strike in the compound of bungalow of another to secure compliance with certain demands, is criminal trespass.

The essence of the offence of criminal trespass lies in the intention with which the trespass is committed. Forming of an intention is a mental act and direct evidence cannot be expected to be produced about it. Intention has, therefore, to be inferred from admitted or proved facts and the question with what particular intention a person trespassed on the property in the possession of another must necessarily depend on the facts and circumstances of each case. Two things however, appear to be well settled in this connection. The first is that the intention contemplated by section 441, I. P. C. is the primary intention and not the secondary or subsidiary intention of the trespasser. The other is that knowledge is not identical with intention.

The accused felt aggrieved at the conduct of the police. They thought that the police, had without any justification, assaulted one H at first, and when on their intervention he had been admitted into the Hospital they had got him removed from there. The accused had two demands which they wanted the Superintendent of Police to fulfil. In the first place they wanted H to be readmitted into the Hospital immediately. They also wanted the police officials concerned to be adequately punished. On the 3rd February 1955 at 10 a.m. one of the accused entered the compound of the bungalow of the Superintendent of Police, and took his seat in the visitors' shed and started his hunger strike, the other accused accompanied him and they too took their seats in the same shed.

Held, that though professedly the hunger strike was undertaken for self-purification at the bidding of the inner voice its real purpose was to compel the Superintendent of police to fulfill the two demands which the accused was making. The trespass which was being committed by the accused was being committed with the intention of intimidating and annoying the Superintendent of

police on whose property the accused were trespassing. AIR 1938 Lah 574, Dist. **1958 All LJ 600: 1958 All WR 695: 1958 All Cr R 468.**

——S. 441 — Applicability — Essentials — Person in constructive possession — Annoyance or insult, etc. to — Offence.

The intent to annoy and intimidate must be not with respect to any and every person conected with the property but with respect to any person in actual possession of such property. A person in constructive possession is not contemplated by S. 441. Further, a mere knowledge on the part of the accused that the result of their act is likely to cause annoyance or insult or intimidation to the complainant is sufficent to sustain a charge of trespass. The section speaks not of knowledge but of intention. AIR 1949 Cal 107 and AIR 1957 Cal 385, Foll. **1960 Cr LJ 342: AIR 1960 Cal 189 (190) (Pr 8).**

——Ss. 441, 448 — Applicability — Criminal intention — Proof — Inference.

The accused entered the house of the complainant during the temporary absence of the complainant and when he went and remonstrated they chased him out with lathis.

Held, that when the accused chased out the complainant with lathis when he objected to their remaining in occupation of the house they clearly intimidated him and consequently when they continued to remain in the house with the criminal intention of intimidating him, the ingredients of S. 441, I. P. Code could be said to have been established. **(1957) 23 Cut LT 157.**

5. To annoy.

● **——S. 441 — Civil P. C. (1908), O. 21, Rr. 24, 25 — Scope — Execution of decree to be completed by date specified on process for this purpose — Warrants for delivery of possession cease to be executable after expiry of date fixed for execution — Persons going on land for taking delivery with such warrants held did not commit criminal trespass in the absence of intention to annoy.**

If O. 21, R. 25, Civil P. C., be read as a whole and in the light of the provisions in sub-rule (3) of R. 24 it is quite clear that the delay mentioned in R. 25 refers to the delay in returning the process whether after or without execution and not to any delay in execution. The words in sub-rule (3) of R. 24 clearly show the intention of the legislature that the execution must be completed by the date specified on the process for this purpose. Where the last date for execution of the warrants for delivery of possession was some time in April 1960, they were not executable in law on 7th June 1960. ILR 10 Cal 18 and AIR 1942 Pat 480 and AIR 1924 Nag 68 and AIR 1934 All 1016, Rel. on. The ultimate question for decision being whether an act was done with a particular intention all the circumstances including the natural consequence of the action have to be taken into consideration. It is legitimate to think also that when S. 441, Penal Code, speaks of entering on property with intent to commit an offence, or to intimidate, insult or annoy any person in possession of the property it speaks of the main intention in the action and not any subsidiary intention that may also be present. In order to establish that the entry on the property was with the intent to annoy, intimidate or insult it is necessary for the Court to be satisfied that causing such annoyance, intimidation or insult was the aim of the entry; that it is not sufficient for that purpose to show merely that the natural consequence of the entry was likely to be annoyance, intimidation or insult, and that this likely consequence was known to the persons entering; that in deciding whether the aim of the entry was the causing of such annoyance, intimidation or insult the Court has to consider all the relevant circumstances including the presence of knowledge that its natural consequences would be such annoyance, intimidation or insult and including also the probability of something else than the causing of such intimidation, insult or annoyance, being the dominant intention which prompted the entry. Thus where certain persons were armed with warrants of execution for delivery of possession though the date for execution of the warrants had expired, it might be that they knew that annoyance would result when they went on the land for taking possession; still it was reasonable to think that the intention which prompted and dominated their action was to execute the warrants. Further the persons could not be reasonably expected to know that the warrants had ceased to be executable in law. Taking the circumstances into consideration it was proper to hold that criminal trespass was not committed or apprehended from the acts of such persons. ILR 25 Bom 202 and AIR 1936 Bom 15 and AIR 1948 Cal 130 and AIR 1949 Cal 107 and AIR 1957 Cal 385 and AIR 1960 Cal 189 and ILR 19 Mad 240 and AIR 1918 Mad 136 (2) and AIR 1925 All 540, Rel. on; ILR 26 Bom 558 and ILR 35 Mad 186 and AIR 1950 All 157, **Overruled.** Smt. Mathri v. State of Punjab, **(1964) 5 SCR 916: 1964 SCD 557: 1964 (2) Cr LJ 57: AIR 1964 SC 986 (989, 991) (Pt A) (Prs 12, 13, 18, 19).**

● **——S. 441** — Wrongful entry by employee in employer's premises — Whether criminal trespass — Rejection of claim for reinstament — Mere knowledge that it might annoy or insult the officers would not necessarily lead to inference of intention requisite for constituting criminal trespass. See Industrial Disputes Act (1947), S. 2 (k). **AIR 1960 SC 160.**

——Ss. 441, 447 — Applicability — Accused entering upon parti land after it had vested in State — Offence held feli under S. 447 — Intention to annoy held could be presumed. **AIR 1955 NUC (All) 4807.**

——S. 441 — "To annoy".

The annoyance which is spoken of in S. 441, I. P. Code, is not intended to be instantaneous, that is, at the moment of entry. It may happen subsequently. When the accused knows that another person is lawfully in possession of property and illegally enters into possession of it, in the absence of that another person his intention cannot be anything else but that of annoyance to the person is possession. **1953 All LJ 514: 1953 All WR (HC) 519: 1954 Cr LJ 77: AIR 1954 All 67 (68) (Pr 4).**

——Ss. 441, 451 — Intention to annoy — Charge for criminal trespass with intention to have sexual intercourse with complainant — Proof.

Where the accused is charged under S. 451 for having committed criminal trespass by entering the room of the complainant with the intention of having sexual intercourse with her but the prosecution has not proved beyond reasonable doubt that the sexual intercourse was without the consent or against the will of the complainant the intention to annoy the complainant cannot be inferred. The accused could not be credited with the intention to annoy the husband of the complainant when he knew that the husband was not in the house and accused took advantage of the absence of the husband in order to do an act so as not to be discovered by him. **ILR 40 Cal**

221; AIR 1924 Bom 486; (1903) All WN 230; ILR 27 All 298, Rel. on. **(1961) 2 Guj LR 256.**

——**Ss. 441 and 442** — Educational institution — Misconduct by student — Disciplinary action — Powers of head of institution — Duty to maintain moral standard among students — Institution giving vocational training — Student writing love letter to innocent girl, stranger to him and entering her house to deliver it — Expulsion of student for misconduct, justified. **1963 (1) Cr LJ 200: 75 Mad LW 602: (1962) 2 Mad LJ 435: ILR (1963) Mad 63: AIR 1963 Mad 68 (70, 71) (Pt A) (Prs 8, 9, 12 to 15) (DB).**

——**Ss. 441 and 442 — House trespass — Entry into dwelling house — Intention to annoy — Presence of person in lawful possession of house not essential at time of entry.**

To constitute an offence of house trespass physical presence of the person in lawful possession of the house is not necessary at the time of the accused's entry into such house if the evidence and the circumstances justify the conclusion that such entry into the house, or remaining in possession of the house after an unlawful entry was with intent to intimidate, insult or annoy the person in possession. Neither S. 411 nor S. 442, I. P. Code requires that the persons in possession of the building must be present at the time of entry: AIR 1957 Cal 382 and AIR 1960 Cal 189. Diss.; AIR 1954 All 67 and AIR 1954 All 193 and AIR 1928 Bom 221 and AIR 1952 Hyd 50 and AIR 1931 Mad 560, Rel. on. **(1963) 1 Mys LJ 253: ILR (1963) Mys 435: 1964 Mad LJ (Cr) 115: 1964 (1) Cr LJ 52: AIR 1964 Mys 11 (12, 13) (Pt A) (Prs 3, 5).**

——**Ss. 441 and 456 — Applicability — Intent to annoy — Absence — Effect.**

Where the accused visited the complainant's house at night in response to an invitation from the latter's daughter and in view of the strained relations between the complainant and the accused the latter had not the slightest intention of annoying the former and was keenly desirous of not having his visit discovered by him:

Held, that the charge under S. 456, could not be sustained. AIR 1919 All 249; AIR 1938 Lah 534 and AIR 1941 Pesh 79, Rel. on. **1953 Nag LJ 475: 1954 Cr LJ 9: ILR (1954) Nag 137: AIR 1954 Nag 18 (19) (Prs 10, 11).**

——**Ss. 441 and 448 — Removal of meter under Electricity Act — Entry not unlawful — No intention to insult or annoy — No offence — (Electricity Act (1910), S. 20).**

Where the supply of electric energy in a certain premises was disconnected by the licensee and in the absence of any requisition from the new occupant of those premises for the supply of energy, the licensee or his employees went to remove the mater from the premises under Section 20 (1) of the Electricity Act:

Held, that neither the entry was unlawful within the meaning of S. 441 nor was there any intention to cause any insult or annoyance to the occupier so as to sustain conviction under S. 448. AIR 1918 Mad 136 (2) (FB), Foll. **24 Cut LT 408: ILR (1958) Cut 624.**

——**S. 441 — Dominant intention — Meeting held in S. D. O.'s office premises for canvassing for Election through propaganda — Case does not come within mischief of section.**

It has first to be established under S. 441, Penal Code, that the property was in fact in the possession of the aggrieved person. In order to establish that the entry on the property was with the intent to annoy, intimidate or insult, it is necessary for the Court to be satisfied that causing such annoyance, intimidation or insult was the main aim of the entry: that it was not sufficient for that purpose to show merely that the natural consequence of the entry was likely to be annoyance, intimidation or insult and that this likely consequence was known to the persons entering, that in deciding whether the aim of the entry was the causing of such annoyance, intimidation or insult, the Court has to consider all the relevant circumstances including the presence of knowledge that its natural consequence would be such annoyance, intimidation or insult including also the probability of something else than the causing of such intimidation, insult or annoyance, being the dominant intention which prompted the entry. AIR 1964 SC 986. Foll.

Thus where the object of the meeting, which was held inside the area set apart for the office compound of the Sub-Divisional Officer, was not to cause any annoyance to the S. D. O. or his staff but it was only to carry on canvassing for the election though propaganda, the case does not come within the mischief of S. 441, Penal Code, the object of the persons could not be said to cause annoyance to them, as their dominant intention was something else then causing annoyance. **ILR (1965) Cut 71: 1966 Cri LJ 849 (850) (Prs 6, 7) (Orissa).**

——**Ss. 441 and 447** — Intention, question of fact — Inevitable result of trespass to cause annoyance — Court can conclude that accused did intend to cause annoyance — Concurrent finding — No interference — (Criminal P. C. (1898), S. 439). **AIR 1955 NUC (Pat) 227.**

——**Ss. 441, 448, 40 — Intention to intimidate, insult or annoy — Intimidation, insult or annoyance contemplated need not be instanteneous with moment of entry but may be caused subsequently — Landlord breaking open house of tenant in his absence and taking possession — Intention to annoy tenant must be presumed — Distinction between intention and motive.**

There is nothing in S. 441 which requires that the intimidation, insult or annoyance, which is caused to the person in possession of a property as a result of the entry upon that property, should be instantaneous and confined only to the moment of entry and not caused subsequent to the entry. All that the section requires is that the accused should make the entry with the intention to insult, intimidate or annoy the person in possession and it is immaterial that the actual intimidation, insult or annoyance is caused not at the time of the entry but subsequently. To hold that criminal trespass implies an instantaneous intimidation, insult or annoyance upon the entry into possession of a property, would be going not only against the plain language of the section but would also lead to state of lawlessness and highhanded activities. Mere temporary absence of the person in possession would not make any difference if the other ingredients of the offence of criminal trespass are established.

Where a landlord broke open the lock of the house in the possession of his tenant in his absence, and took possession of the same it must have been obvious to the land-lord that his act in breaking open the lock of the property in possession of the tenant must cause annoyance to him, and as a man is presumed to intend the consequences of his act it follows that the petitioner must have intended to cause annoyance to the tenant. Although it may be correct that the object of the petitioner was to take possession of the house in question, his act shows that his intention was to cause annoyance to the tenant. The landlord would be guilty of an offence under S. 448. AIR 1954 All 67 and AIR 1945 All 26,

Rel. on; AIR 1960 Bom 481, Disting. **1963 Cur LJ 384: ILR (1963) 2 Punj 693: 1964 (1) Cr LJ 427: AIR 1964 Punj 145 (146, 147) (Prs 5, 7).**

6. Bona fide claim of right.

●——S. 441 — Ceylon Penal Code, S. 427 — Applicability — Criminal trespass — What constitutes — Entry under bona fide claim of right.

S. 427, Ceylon Penal Code does not make every trespass a criminal offence. It is confined to cases in which the trespass is committed with a particular intention and the intention specified indicates that the class of trespass be brought within criminal law is one calculated to cause a breach of the peace. The section deals with occupation, which is a matter of fact, and not with possession, which may be actual or constructive and may involve matters of law. The first paragraph of the section comes into operation when a trespasser enters land in the occupation of another with the intent specified, and the second paragraph applies when the entry is lawful but becomes unlawful, e.g., when the entry is made on the invitation of the occupier and there is a refusal to leave when the invitation is withdrawn. But in either case there must be an occupier whose occupation is interfered with, and whom it is intended to insult, intimidate or annoy (unless the intent is to commit an offence). The section has no application where the fact of occupation is consistent, the only change being in its character, as where a tenant holds over after the expiration of his tenancy.

Entry upon land, made under a bona fide claim of right however ill-founded in law the claim may be, does not become criminal merely because a foreseen consequence of the entry is annoyance to the occupant. To establish criminal trespass the prosecution must prove that the real or dominant intent of the entry was to commit an offence or to insult, intimidate or annoy the occupant and that any claim of right was a mere cloak to cover the real intent, or at any rate constituted no more than a subsidiary intent. Sinnasamy Selvanayagam v. The King, **52 Cri LJ 173: 55 CWN 1 (PC).**

——S. 441 — Person in peaceful possession of property for long time — Resort to force by claimant to eject such person.

Section 441 is designed to protect possession as distinguished from title in the sense that the question in whom title to the land or propery vests is foreign to the offence. The mere fact that the accused put forward a bona fide claim to the property would not save him from the consequence of the entry into the house in possession of the complainant if his intention was to take the property out of the complainant's possession without his consent and to cause wrongful gain to himself or wrongful loss to him. Therefore, when a person has been in peaceful possession of property for a fairly long time, it is not open to the claimant of the property to resort to force for the purpose of ejecting him. 51 Cr LJ 1167, Foll. **1952 All Cr R 93: 1952 All WR (HC) 337: 1953 Cri LJ 1664: AIR 1953 All 725 (726) (Pt B) (Pr 6).**

——Ss. 441, 451 — Bona fide claim by accused — Acquittal — Interference in revision — Criminal P. C. (1898), S. 439.

The sections which follow S. 441 in Ch. XVII are designed to protect possession as distinguished from title in the sense that the question in whom title to the land or property vests is foreign to the offence. The mere fact that the accused put forward a bona fide claim to the property would not save him from the consequences of the entry into the house in possession of the complainant if his intention was to take the property out of the complainant's possession without her consent and to cause wrongful gain to himself or wrongful loss to her. Where the lower Court acquits the accused in such a case the High Court in revision will set aside the acquittal. **51 Cri LJ 1167: AIR 1950 All 653 (654, 655) (Prs 5, 6).**

——Ss. 441, 447 — Applicability.

The accused claimed the field, in which the trespass was said to have been committed, as an occupant on the basis of a sale from the original occupant while the complainant was mere subtenant (Shikmi holder) of the latter for the previous year.

Held, that the question arose as to who was in possession and whether the accused claimed a bona fide right on his own behalf. That being so, the case was, therefore, of a civil nature and secondly the accused could not be held to have intention to commit an offence or to intimidate, insult or annoy the complainant and no offence under S. 447 could be held to have been committed by him. **1954 Cr LJ 394: AIR 1954 Bhopal 6 (7) (Pt B) (Pr 10).**

——S. 441 — Bona fide claim of right.

The mere assertion of a claim of right is not sufficient defence to a charge of criminal trespass; to be a good defence it must be a claim made in good faith; that is to say, it must be a claim in which the person must have himself believed that it cannot be legally untenable. **ILR (1952) Hyd 334: 1952 Cri LJ 343: AIR 1952 Hyd 38 (38) (Pt B) (Pr 3).**

——Ss. 441 and 447 — Bona fide claim of right — Law as to — Adjudication by Civil Court — Effect.

The law is that the lawful owner of land of which another is in possession without right, may enter on it provided he is entitled by law to enter and can do so peaceably. Even he cannot effect such entrance with a strong hand or a multitude of people. In order to sustain such entry, the person effecting it must have something more effective than a mere claim to the property. It is the duty of the criminal Court to determine what was the intention of the alleged offender and if it is found that he was not acting in the exercise of a bona fide claim of right, then it cannot refuse to convict the offender assuming of course that other facts are established which constitute the offence.

Where a dispute between the parties has been adjudicated upon by the Civil Court and possession has been given under a decree of Civil Court, it cannot be stated that the re-entry sought to be effected by the defeated judgment debtor subsequently would amount to a bona fide claim of right. It is well settled that the Magisrate should not refuse to recognise the effect of prior procedings in Civil Court. It is his duty to maintain the Civil Court's decree and support the possession given by it against force or show of force. **1959 Mad WN 222.**

——Ss. 441, 447 — Applicability — Bona fide boundary dispute between accused and complainant — Accused entering under bona fide belief of right — Dispute is civil and there is no criminal trespass. **1959 Cr LJ 1093: AIR 1959 Manipur 38 (39) (Pt A) (Pr 7).**

——Ss. 441 and 447 — Intention — Bona fide claim — Complainant in possession of land as tenant — Accused committing trespass by ploughing land — Primary intention of accused being to lay claim to land and not to commit any offence or annoy complainant — Accused cannot

be convicted under Section 447. **AIR 1955 NUC (Pat) 104.**

——**Ss. 441 and 447 — Criminal trespass — Assertion of claim or right.**

A person who enters upon land in the possession of another in the exercise of a bona fide claim of right cannot be convicted of criminal trespass because the entry was not made with any such intent as to constitute an offence. But mere assertion of claim of right cannot in itself be a sufficient answer to a charge of criminal trespass. **51 Cri LJ 1565: 1951 All WR (Supp) 7: AIR 1950 Pat 564 (565) (Pr 2).**

——**Ss. 441 and 448 — Intention — Entry under bona fide claim of right — Offence.**

In a case under the section where the accused claims that he had entered under a bona fide claim of right the first thing which the Court has to see is whether the claim is bona fide; for if the claim is not bona fide and is a mere cloak to cover the real intent, it would be of no avail. It could hold the accused guilty of an offence under Section 448 only if it finds that his dominant intention was to commit an offence or insult, intimidate or annoy the person in possession. If the intention is found to be merely to make an entry peacefully no offence could be held to have been made out. The mere fact that after making an entry or during its course the accused committed an offence would not result in the conviction of the accused for criminal trespass when it was not his intention from the very beginning to commit that offence. **1959 Raj LW 270: ILR (1958) 8 Raj 904: 1958 Cr LJ 1099: AIR 1958 Raj 214 (216, 217) (Prs 11, 15) (DB).**

——**Ss. 441 and 447** — Intention — Bona fide claim of right — Person considering himself legally entitled cannot take law into his own hands and take forcible possession. **AIR 1955 NUC (Raj) 759.**

——**Ss. 441, 447 — Applicability — Bona fide claim of right — Plea in defence.**

The question of the entry of the accused who is the landlord in the field being in bona fide exercise of his claim does not arise because no landlord can be permitted to re-enter the property on the alleged expiry of the lease otherwise than in due course of law and if he so enters, he cannot be permitted to plead that he did so in the bona fide exercise of his rights. **1954 Cr LJ 1164: 6 Sau LR 83: AIR 1954 Sau 110 (111) (Pt B) (Pr 4) (DB).**

——**Ss. 441, 378** — Questions of title and past possession — Relevancy — In a case of theft of crop and criminal trespass question of title and of past possession will incidentally arise and cannot be ignored altogether they become relevant for the purpose of appreciating the evidence of the present possession of land. **5 Sau LR 9: 1952 Cri LJ 1098: AIR 1952 Sau 22 (22, 23) (Pt A) (Pr 2) (DB).**

——**S. 441** — Where there is a bona fide dispute as to the rights of parties with reference to the land and the share of produce to which the parties are entitled even if their actions are high handed they could not be convicted of criminal trespass and theft. Such a dispute may best be decided in a Civil Court and it will be improper to convict the parties of criminal trespass and theft if acting under such a bona fide belief they removed the crop in question. **5 Sau LR 9: 1952 Cri LJ 1098: AIR 1952 Sau 22 (23, 24) (Pt B) (Pr 4) (DB).**

——**S. 441** — Evidence Act (1872), S. 114 — Official acts — Presumption — Delivery of possession in execution by delivery kychit shown bogus — Presumption that delivery was obtained, is not conclusive — No trespass if opposite party continues in possession. See Evidence Act (1872), S. 114. **52 Cri LJ 836: AIR 1951 Trav-Co 140 (DB).**

7. Entry.

——**S. 441** — Language of S. 441 has to be distinguished from that of S. 442. Going on the roof of a house does not amount to entry into a building. In a case covered by S. 442 entry must be into the building or remaining in the building. The person who is on the roof of a house cannot be said to be in the house. He is not guilty of house trespass but of committing criminal trespass under S. 447. **1951 All LJ 461.**

——**S. 441 — Intention — Re-entry of, after dispossession in execution.**

In order to the constitution of the offence of criminal trespass there must be proof of an intention to commit an offence or to intimidate, insult or annoy the person in possession of the property. When a person enters without any legal justification upon property in the established possession of another, he must be inferred to have had an intention to annoy the person in possession. Re-entry of ejected person after execution of decree would raise a presumption that re-entry was with the intent to intimidate or annoy. Case law referred. **ILR (1952) Hyd 326: 1952 Cri LJ 505: AIR 1952 Hyd 50 (50, 51) (Prs 3, 5, 10) (DB).**

8. In the possession of another.

——**S. 441 — 'In the possession of another'.**

The question whether the complainant was in possession of the premises in suit or not is a question of fact. Possession of a house delivered to the complainant in execution of a decree is sufficient to show that it was he who was in peaceful possession of it and that possession he has by keeping the house locked is sufficient to attract the provisions of S. 441. AIR 1925 All 540, Explained.

The essence of the offence is the intent in committing the offence and not the presence or absence of the person against whom that intent is held. That intention 'to annoy' may be there in spite of the fact that the person against whom that intention is held may not be actually present at the time of entry. 2 All 465, Rel. on.

When the dominion which the complainant had acquired over the property with the help of the Civil Court is invaded and usurped by the accused by breaking open the lock and clandestinely entering into the house the act of the accused could not but be a source of great annoyance to the complainant and one done to anoy the complainant who was in actual possession of the premises in suit. ILR (1950) All 163, Diss. **1954 Cr LJ 413: 1953 All WR (HC) 603: 1953 All LJ 673: AIR 1954 All 193 (194) (Prs 5, 7, 8) (DB).**

——**S. 441 — 'In the possession of another' — Possession contemplated by section.**

Section 441 clearly means and implies that a person has to be in possession of a place in the sense that he is entitled to exclude another if that other person enters the place. The attestation Officer carrying on his duties in a camp cannot conceivably be held to be in possession of it in the sense the word possession is understood in S. 441, I. P. C. The possession mentioned in S. 441 should be understood as meaning actual physical possession which includes the right to eject or exclude another person. **1956 Cri LJ 524: 97 Cal LJ 32: AIR 1956 Cal 118 (120) (Pt C) (Pr 7).**

——Ss. 441 and 447 — Criminal trespass — Ingredients — Entry upon property in possession of another — Possession may be physical or constructive — Presence of owner at time of entry not essential.

To constitute an offence of criminal trespass as defined in the first part of S. 441, I. P. Code, the following essential ingredients must be satisfied: (1) Entry into or upon property in the possession of another. (2) Such entry should be with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property. The word 'possession' as used in S. 441 is wide enough to include not only actual and physical possession but also constructive possession. Cri. Ref. No. 15 of 1960 (Him. Pra.), Rel. on; AIR 1925 All 540 and AIR 1960 Cal 189, and AIR 1942 Oudh 104, Not foll. **1962 (1) Cr LJ 31: AIR 1962 Him Pra 1 (2, 3) (Pt B) (Prs 10 to 13).**

——Ss. 441, 447— "In the possession of another" — Complainant obtaining delivery of possession in execution of decree — Accused admitting such possession — Court is bound to consider effect of these facts.

Criminal Courts ought to attach due weight to delivery records. Where, besides the record of delivery showing that the complainant was put in actual possession of the property concerned, there is also an admission by the accused made in a registered lease deed that the complainant had come into possession of the property in pursuance of the delivery kychit, they cannot brush aside the admission by a bald statement that the lease deed was brought into existence fraudulently. 34 Trav LJ 292, Disting.; AIR 1953 Trav-Co 340; 1959 Ker LT 444; 1959 Ker LT 501, Rel. on. **1963 Mad LJ (Cri) 87: 1961 Ker LJ 1091: (1961) 2 Ker LR 423: 1961 Ker LT 799.**

——S. 441 — Intention to commit offence — Accused purchasing land from a tenant whose occupancy right was extinguished — Accused entering into possession of land and ploughing it knowing fully that land was not in possession of tenant — Intention of accused held was to commit offence of mischief or possibly destroying evidence of possession — Accused held committed offence of criminal trespass. AIR 1955 NUC (Pat) 5698.

——Ss. 441, 442, 448 — "In the possession of another" — Petitioners in occupation for more than two years, of vacant house not in possession of opposite party — No offence under Section 448 read with Ss. 441 and 442 held committed — Criminal trespass is different from civil trespass which is within jurisdiction of Gram-Kutchery — (Constitution of India, Art. 227). AIR 1955 NUC (Pat) 4897 (DB).

——S. 441 — 'In the possession of another' ——Question relates to possession and not title. AIR 1955 NUC (Raj) 759.

9. Joint possession and ownership.

——Ss. 441 and 447 — Applicability — Criminal trespass by co-owner — Conditions — For prosecution, there must be some kind of ouster — Person having grazing rights but not right to construct — Building put up over common land against will of co-sharers — Construction is act of ouster of persons having grazing rights — Case held fell within mischief of Section 447 — Necessity — Person constructing is guilty of criminal trespass. **AIR 1955 NUC (Assam) 3632.**

——S. 441 — Criminal trespass — Entry into house locked by another.

In order that an entry should constitute the offence of criminal trespass the property should be in actual possession of some one whom it is intended to insult or annoy. If a person is in constructive possession through a tenant, that possession is held not sufficient to constitute the offence. But if a person is himself in possession of the property which he has kept locked, entry therein would constitute the offence provided its natural and probable consequence is the annoyance of that person. **52 Cr LJ 1477: AIR 1951 Kutch 76 (77) (Pt B) (Pr 9).**

10. "Unlawfully remains there".

——Ss. 441 and 442 — Unauthorised occupation of complainant's house by applicants — Applicants not vacating house in spite of notice — On facts applicants held did not commit offence of house trespass.

The complaint alleged that the applicant had wrongly occupied the house belonging to him during the time the house was under the management and control of the Custodian; that on 1-6-1962 the Rent Control Inspector came to the complainant to make an inquiry and then he (complainant) came to know that the applicants had made an application for allotment of the house; and that thereafter he served a notice, dated 22-9-1962 on the applicants, calling upon them to vacate the house by 4-10-1962. The applicants did not vacate the house.

Held, that on taking into consideration all the facts and circumstances of the case if could be said that while disregarding the notice served upon them or while continuing in occupation of the house the applicants had been guilty of the offence as laid down in Section 441, I. P. C. Their occupation did not amount to house trespass as defined in Section 442, I. P. C., and they all deserved to be discharged of the offence. In determining whether entry into a house or remaining in occupation of the house was with the guilty intention as contemplated by S. 442, I. P. C. one will have to look into not only the conduct of the accused persons but also of the complainant. **1964 All LJ 166.**

——Ss. 441 and 447 — "Unlawfully remains there" — Accused setting up stall within market boundary, asked to remove — Accused still remaining — Intention is to intimidate and annoy — Offence is not erection of stall but refusal to remove it. **AIR 1955 NUC (Cal) 836.**

——Ss. 441 and 448 — "Unlawfully remains there".

Where the accused took possession of the rooms belonging to the complainant when the latter had left for another place for a short while but refused to vacate them when, on his return, the complainant asked him to vacate, the latter part of Section 441 applies and the accused is guilty under Section 448. **85 Cal LJ 200: 51 Cri LJ 1496: AIR 1950 Cal 410 (410) (Pr 4).**

——S. 441 — Tenant temporarily vacating premises for purposes of repairs on request of landlord — Landlord refusing to give back possession — No evidence that landlord has any intention to intimidate, insult or annoy or to commit offence — Action of landlord though unlawful does not amount to offence under second part of S. 441.

A person charged with trespass under the second part of Section 441, Penal Code, not only must remain on the premises unlawfully but he must remain on the premises unlawfully with certain intentions, namely, the intent to intimidate, insult or annoy or to commit an offence.

Where a landlord induces his tenant to vacate the premises temporarily for the purpose of

repairs and the tenant vacates them but on return of the tenant the landlord refuses to hand over possession to the tenant, the action of the landlord in remaining in possession of the premises no doubt is unlawful but unless the prosecution establishes that the landlord had remained in possession with one of the intentions mentioned in the section, he cannot be held guilty under the second part of S. 441. **51 Cri LJ 407: AIR 1950 Cal 80 (81) (Pt A) (Pr 4).**

——**Ss. 441 and 448** — "To annoy" — Entry into tenant's house to demand rent is lawful — But if accused remains on house after refusal to pay rent, and throws out effects of tenant, the accused commits criminal trespass. **AIR 1955 NUC (Madh B) 3780.**

——**S. 441 — Public office — Public servant in charge, whether in possession of such premises — Entry by member of public — Member asked to quit by officer-in-charge — Non-compliance by member — If criminal trespass.**

A Government Officer who holds his office in a particular building allotted to him by the Government for the purpose, is in possession of it qua a member of the public who may have a right of access to it in connection with official business relating to the department with which the Government Officer concerned is connected. It is possible in law for public servant incharge of his official premises to make out a case under Section 441, Penal Code, provided the other ingredients of that section are fulfilled. Where a person, who has entered a public office, is asked to quit the same by the officer concerned, and he refuses to do so and he contumaciously remains therein with the requisite intent as prescribed in Section 441, that person cannot escape the impact of the second part of Section 441, his entry at its inception though lawful having become unlawful later. AIR 1956 Cal 118, Dissented from.

The word "possession" in Section 441 has been used in its most extensive sense meaning both 'mediate' and 'immediate' possession and no qualification whatever has been attached to it. To all intents and purposes a Government Officer who is in charge of his office building is in actual physical, immediate possession of his office premises and the possession is of a type that he may exclude poachers therefrom.

The mere right of access of a member of the public to a Government office in connection with such official business as he may have therein, does not divert the officer in charge of that office from having actual physical possession of his office building or deprive him of a right to exclude all interference with it if necessary. Entry into a public office is not entirely unregulated, and it is the officer in charge thereof who always has the right to regulate it. **1962 Raj LW 636: AIR 1963 Raj 19 (20 to 22) (Prs 7, 8) (DB).**

11. Use of criminal force.

——**Ss. 441 and 448** — 'Unlawfully' remains there — Intention to annoy, intimidate or insult complainant not made out — There can be conviction under Section 448. **AIR 1955 NUC (Assam) 4239.**

——**Ss. 441 and 447** — Scope — Use of criminal force — Criminal trespass — True owner immediately coming to scene of occurrence to regain possession — Trespasser preventing true owner from regaining possession by show of force and threatened assault — Case is covered by S. 522, Cr. P. Code. **AIR 1955 NUC (Assam) 3632.**

12. Criminal trespass whether continuing offence.

——**S. 441** — Scope — Continuing offence — Trespass is not a continuing offence — where a person is convicted of criminal trespass and he still continues to remain on the land and raises crops and refuses to vacate, he cannot again be convicted for committing criminal trespass. See Criminal P. C. (1898), S. 403. **AIR 1955 NUC (Assam) 3308.**

——**S. 441 — Trespasser cannot acquire possession by act of trespass — Acquiescence necessary — Unreasonable delay by the person ejected — Right of self-defence lost.**

A mere trespasser cannot immediately and without acquiescence, give himself possession against the person whom he ejects and drives him to produce his title deeds if he can, without delay, reinstate himself in his former possession. 12 A and E 624 and AIR 1928 Pat 124, Rel. on.

If the person ejected allows without any reasonable cause, a few days to elapse, such conduct may spell in the region of acquiescence and deprive him of his right of self defence which he had, if he had acted promptly. **1960 Ker LJ 24.**

——**S. 441 — Trespass and conviction — Accused continuing to remain in possession — No offence of trespass is committed.**

The offence of criminal trespass is complete as soon as there was unlawful entry, and the trespasser cannot be prosecuted again for remaining there after his conviction under S. 441. The plea of autre fois convict will be open to the accused in such a case. AIR 1932 Nag 112, Rel. on. **(1950) 63 MLW 1152: (1950) 2 MLJ 668: 1950 Mad WN 875 (2): 1950 Mad WN (Cri) 279 (2): 1951 All WR (Supp) 19: ILR (1951) Mad 893: AIR 1951 Mad 55 (56) (Pr 7).**

13. Criminal trespass — Right of private defence.

——**S. 441** — Applicability — Private defence of property — A mere trespasser cannot by the very act of trespass immediately and without acquiescence, give himself what the law understands by possession against the person whom he ejects and drives him to produce his title. The person ejected is entitled to use force to ward off the attack which is delivered on him by the trespasser. See Penal Code (1860), S. 97. **1955 Cri LJ 77: AIR 1954 Sau 156 (DB).**

14. Abetment.

——**Ss. 441 109, 447, 425 and 426 — Criminal trespass and mischief — Intention — Abetment.**

Where the accused instructed her maternal uncle to raise the root which necessitated the cutting of the complainant's eaves and entering upon his property, the accused abets the offence of criminal trespass. He cannot be convicted as the principal offender but as abettor only under Sections 447 and 426 read with S. 109. **5 Sau LR 82: 1953 Cri LJ 881: AIR 1953 Sau 81 (81, 82) (Pt C) (Prs 4, 6) (DB).**

15. Evidence and proof.

——**S. 441** — Offence under first part of S. 141 — Essentials to be proved — Intention must be proved — Charges under Sections 143 and 447 — Evidence must establish ingredients of S. 441 — Evidence of state of mind has to be examined — Annoyance or insult felt by complainant is wholly irrelevant consideration in charge under S. 441. See Penal Code (1860), S. 141. **1955 Cri LJ 1338: AIR 1955 Cal 515.**

——**Ss. 441 and 447** — Intention — Proof — Will be presumed from the circumstances of the case — Use of force not necessary. **AIR 1955 NUC (Him Pra) 4516.**

——**Ss. 441, 447 — Intention — Presumption.**

While the fact that trespass causes or is likely to cause annoyance to a person in possession may by itself be insufficient to justify a conviction for criminal trespass, the presumption of the necessary intention may be drawn where a person who has absolutely no interest in land in possession of others, forcibly takes possession in spite of the protest of the owner. **1959 Ker LJ 518: ILR (1958) Ker 1249: 1958 Ker LT 1048 (2): 1958 Mad LJ (Cr) 993: 1959 Cr LJ 588: AIR 1959 Ker 146 (148) (Pt C) (Pr 8) (DB).**

——**Ss. 441 and 448 — Intention — Proof — Presumption.**

Section 441, Penal Code, makes the trespass criminal, if the entry is with an intent to commit an offence, and for that it is not necessary that the offence must be against the person in possession. The entry is also criminal if the intention is to intimidate, insult or annoy the person in possession. Therefore, if N who was sitting at S's house was beaten or assaulted then the case would fall under the first part, and if not beaten or assaulted, then it would fall under the second part, as in such a case such an intention must be presumed from the very object with which the entry was made; for, if a person enters the house of another with such an object then the owner is bound to be annoyed unless the owner was a consenting party to it. AIR 1942 Mad 532 (2); (1942) 1 Mad LJ 585 and AIR 1927 Sind 261 and AIR 1928 Cal 263 (1), Dist. **1959 Cr LJ 1487: AIR 1959 Tripura 49 (50) (Pt A) (Pr 5).**

16. Practice and procedure.

——**S. 441** — Intention of accused — Case under Section 447 tried summarily — Court not considering as to what the intention of the accused was in committing trespass — Only number of section of offence noted but not the date of its commission — Record not showing whether accused was informed of the substance of the accusation — Statement of both the accused recorded jointly — Conviction was set aside — Considering the petty nature of offence retrial was not ordered. **AIR 1955 NUC (Bhopal) 5851.**

——**Ss. 441, 451 — Charge of criminal trespass — Intention to annoy not specified in charge — Defect will not vitiate conviction in the absence of prejudice — Criminal P. C. (1898), Ss. 221, 223, 537.**

When the charge relates to the offence of criminal trespass, it is always desirable that the charge should specify as far as possible the intent with which the accused is alleged to have committed the offence. But the defect in the charge will not vitiate the conviction unless prejudice had been caused to the accused by the defect. Intention to annoy is usually a matter of inference from the circumstances and if the accused had notice of the circumstances sought to be relied on by the prosecution the conviction for criminal trespass will not be bad because the charge did not state that the intention of the accused was to annoy. **(1961) 2 Guj LR 256.**

——**Ss. 441, 451, 497 — Charge for commission of adultery — Prosecution must prove marriage — Evidence Act (1872), S. 50, Proviso.**

When a person is charged with the commission of the offence of adultery with a woman or with doing an act with the intention of committing adultery with a woman, it must be strictly and definitely proved that the woman is the legally wedded wife of another. The mere evidence of the woman and her alleged husband is not sufficient. The same principle would apply to a prosecution under section 451 where the intention alleged is to commit the offence of adultery. It is however not necessary for the prosecution to prove that the accused had knowledge or had reason to believe that the complainant was the wife of another. ILR 20 All 166; 5 Cal 566, Rel. on. **(1961) 2 Guj LR 256.**

——**S. 441 — Criminal trespass — Record of delivery by Civil Court — Criminal Courts to attach due weight to them — Pendency of civil suit whether will oust jurisdiction of criminal Court.**

Where in a case the complainant was put in physical possession of the property by the civil Court and that Court actually authorised him to move the criminal Court for necessary action for further acts of trespass committed in the property, it was not open to the criminal Court to refuse to adjudicate on the criminal acts complained of for the mere reason that a civil suit in respect of the property is pending. The criminal Courts ought to attach due weight to the record of delivery in deciding whether actual possession passed under the record. The primary duty of a Court in a criminal trial is to determine whether the offence complained of is made out by the evidence produced before it. The question of civil rights is only ancillary or incidental. The criminal Court may not be competent to adjudicate on civil rights or title to the property but to say that the pendency of a civil suit will automatically oust the jurisdiction of the crimnal Court is too broad a proposition of law to meet with approval. **1964 Mad LJ Cr) 97: 1963 Ker LT 210: (1963) 2 Cri LJ 215 (216) (Prs 5, 6) (Ker).**

——**Ss. 441 and 447 — Offence under S. 447 — Magistrate is concerned only with question of possession, not of title.**

In the case of an offence under Section 447, Penal Code, it is no part of the duty of the Magistrate to take upon himself the task of deciding the title to the property as between the complainant and the accused; the Magistrate is concerned only with the question of possession of the land on the date of occurrence. **1960 Cr LJ 120: AIR 1960 Tripura 4 (5) (Pt A) (Prs 8, 9).**

17. Sentence.

——**Ss. 441, 448** — Criminal intention — Proof — Complainant chased out with lathis by accused who had entered complainant's house during complainant's temporary absence — There is clear intimidation — When the accused continued to remain in the house with criminal intention of intimidating the complainant, ingredients of Section 441, I. P. C. could be said to have been established. **(1957) 23 Cut LT 157.**

——**Ss. 441 and 447** — Sentence — Accused already put to great loss in unwisely contesting case in all Courts —Lenient view of matter could be taken. **AIR 1955 NUC (Pat) 227.**

SECTION 442

——**Ss. 442, 448 — Land given on rent by complainant to accused — Structures raised by accused over the land — Decree for arrears of rent and ejectment of accused — Households and structures removed in execution of decree and possession of land delivered to complainant — Re-entry by accused on the land whether**

makes him liable under S. 448 — Criminal P. C. (1898), Ss. 522, 423, 439.

The complainant appellant had given the land on rent to the accused respondent. The accused had raised structures on the land. Thereafter the complainant had obtained a decree against the accused for arrears of rent and for ejectment of the accused. The judgment debtor accused was absent when the commissioner went to the spot for effecting the execution of the decree. The wife of the judgment-debtor removed the household effects from the land at the instance of the commissioner and the possession was alleged to have been delivered to the complainant. When the complainant was out of station ,the accused persons were alleged to have re-entered on the land.

Held, in the circumstances that the conviction of the accused as recorded by the Magistrate was wholly misconceived because the complainant got only a formal possession of the site of hutments which continued to remain in actual possession of the respondents. Consequently the order of the Magistrate under Section 522 (1) Cr. P. C. directing the possession of the property to be restored to the complainant was also liable to be set aside. AIR 1958 All 159, Distinguished.

The delivery of possession in pursuance of the Civil Court decree could only be in respect of the open piece of land and not about the structures which were put on the same by the respondents. In view of the fact that the appellant had not obtained any decree against the respondents for their dispossession from the structures or for the demolition of the structures from the land, the Commissioner who was appointed to execute the decree had no authority in law to direct the judgment debtor or his wife to remove the structures from the premises in question and even if his wife had, under the directions of the Commissioner, removed her household effects from the premises in question that would not amount to dispossession of respondents in law from the premises and could not result in handing over the possession to the appellant. It was thus obvious that in view of the terms of the decree the appellant could not have been delivered actual physical possession over the structures or the land underneath which must be deemed to have remained in possession of the respondents. **1965 All LJ 736: 1965 All WR (HC) 590: 1965 All Cri R. 385.**

——**Ss. 442 and 441** — Unauthorised occupation of complainant's house by applicants — Applicants not vacating house in spite of notice — On facts applicants held did not commit offence of house trespass. See Penal Code (1860), s. 441. **1964 All LJ 166.**

——**S. 442** — Applicability — Police during surveillance entering accused's house and beaten — The constable does not commit an offence of trespass and if he is beaten and his uniform torn and he is locked up in a room by the accused, the accused is guilty under S. 353, I. P. C. **AIR 1955 NUC (All) 2781 (DB).**

——**Ss. 442, 441 — Distinction — Going on to roof of house if entry into building under S. 442.**

The language of S. 442 is clear and is to be distinguished from that of S. 441. In the latter section it is not only entry into but upon property which amounts to trespass. In a case covered by S. 442 the entry must be into the building or remaining in the building. The person who is on the roof of a building cannot be said to be in the building. 6 Cr LJ 444: 52 IC 59: 34 Cr LJ 1181, Rel. on. **1951 All LJ 461.**

——**S. 442** — Applicability — Entry into verandah — Verandah although not walled up, entry amounts to house trespass. **AIR 1955 NUC (Assam) 4230.**

——**Ss. 442, 441 and 448** — Criminal trespass — Intention to insult — Accused, an office bearer of School Committee, going to school, beating two boys in absence of Head Master and subsequently abusing head-master on his return — Accused held guilty under S. 448. See Penal Code (1860), S. 441. **1964 (1) Cri LJ 395: AIR 1964 Bom 82.**

——**S. 442 — Criminal trespass — Ingredients of — Question of title not germane to offence — Possession alone need be considered.**

In an offence under S. 442, it is not within the province of the Magistrate to decide whether the complainant has title to the land in question or not; he is only concerned with the question of possession of the complainant as far as the offence of criminal trespass is concerned. **1963 (1) Cr LJ 775: AIR 1963 Manipur 15 (17) (Pt D) (Pr 8).**

——**S. 442** — House trespass — Entry into dwelling house — Intention to annoy — Presence of person in lawful possession of house not essential at the time of entry. See Penal Code (1860), Section 441. **1964 (1) Cri LJ 52: AIR 1964 Mys 11.**

——**S. 442 — 'Building' — Meaning of — Gheran — Open space enclosed by walls and having exits leading to Zenani Kita — If building.**

If an open space is merely surrounded by walls but is not attached to any house for use as a part of that house, it cannot be called a part of a building. But where the Gheran was enclosed by brick walls, and it had two exits both of which led into the Zenani Kita of the house for use of the inhabitants of that kita, such an enclosure must be held to be a part of the Zenani Kita, i.e., a part of the building. AIR 1929 Sind 17 (2) and AIR 1945 All 81, Rel. on; 1 Weir 523 and AIR 1919 Lah 333, Disting. **1961 Pat LR 86: 1961 (2) Cr LJ 540: AIR 1961 Pat 409 (409, 410) (Pt A) (Prs 4, 5, 6).**

——**Ss. 442, 441, 448** — "In the possession of another" — Petitioners in occupation for more than two years of vacant house not in possession of opposite party — No offence under S. 448 read with Ss. 441 and 442 held committed — Criminal trespass is different from civil trespass which is not within jurisdiction of Gram-Kutchery. See Penal Code (1860), S. 441. **AIR 1955 NUC (Pat) 4897.**

——**Ss. 442, 452 — "Building" — Courtyard.**

Held, that the courtyard of the house where the complainant lived and tethered his cattle was a building within the meaning of the section. **ILR (1956) Punj 119: 1956 Cr LJ 654: AIR 1956 Punj 122 (123) (Pt A) (Pr 5) (DB).**

——**S. 442** —Building —What constitutes a building is question of fact — Tin shed held not to be building — AIR 1945 All 81; AIR 1927 Mad 343, Foll. **1964 Raj LW 524: ILR (1964) 14 Raj 1141: 1966 Cri LJ 236 (238, 239) (Pt B) (Prs 7, 14) (Raj).**

——**S. 442** — House trespass — Tin shed used as human dwelling — Outer open verandah whether a human dwelling — It is question of fact — Open tin shed adjoining shop held was not dwelling house. **1964 Raj LW 524: ILR (1964) 14 Raj 1141: 1966 Cri LJ 236 (238, 239) (Pt C) (Prs 7, 12, 13).**

SECTION 443

——**Ss. 443, 444 — Scope.**

The fact that a trespass was committed by night does not make the offence one of lurking house trespass unless offender takes some active

means to conceal his presence. AIR 1940 All 259, Rel. on. **AIR 1955 NUC (Raj) 470 (DB).**

SECTION 444

——**S. 444** — Scope — The fact that a trespass is committed by night does not make the offence one of lurking house trespass unless offender takes some active means to conceal his presence. **AIR 1955 NUC (Raj) 470 (DB).**

SECTION 445

——**S. 445** — Criminal P. C. (1898), S. 236 — Charge for substantive offences — Conviction for abetment — Hyderabad Penal Code, Ss. 66, 71, 330, 380 — The accused could not be convicted of abetment as he was charged with a substantive offence of house breaking. See Criminal P. C. (1898), S. 236. **AIR 1952 Hyd 25 (DB).**

——**Ss. 445 and 457** — Accused entering house by scaling or climbing over wall during night, and through passage and courtyard entering into one of rooms of the house — Offence under S. 457 held committed. **1951 Raj LW 386: ILR (1951) 1 Raj 526 (DB).**

SECTION 447

SYNOPSIS

(Penal Code (1860), S. 447.)

1. Scope and applicability.
2. Intention.
3. To intimidate.
4. To annoy.
5. Bona fide claim of right.
6. Master and servant.
7. "In the possession of another".
8. Joint possession and ownership.
9. Unlawfully remains there.
10. Use of criminal force.
11. Criminal trespass whether continuing offence.
12. Evidence and proof.
13. Practice and procedure.
14. Sentence.

1. Scope and applicability.

——**Ss. 447, 352 and 426 — Applicability — Possession — Nature of.**

For the purpose of convictions under Ss. 447, 352 and 426, Penal Code, if the complainant alleges his possession and if he succeeds in establishing it he would succeed in establishing the commission of the offence under S. 447, I. P. C. It is not necessary for the Court to hold that the land really belonged to the complainant. **1954 Cr LJ 1408: 1954 All WR (HC) 284: 1954 All LJ 232: AIR 1954 All 650(650) (Pt A) (Pr 3).**

——**Ss. 447 and 441** — Criminal trespass — Ingredients — Entry upon property in possession of another — Possession may be physical or constructive — Presence of owner at time of entry not essential. See Penal Code (1860), S. 441. **1962 (1) Cri LJ 31: AIR 1962 Him Pra 1.**

——**S. 447** — Plea in defence — Economic necessity of accused is no defence. **1959 Ker LJ 518: 1958 Ker LT 1048 (2): 1958 Mad LJ (Cr) 993: ILR (1958) Ker 1249: 1959 Cr LJ 588: AIR 1959 Ker 146 (149) (Pt D) (Pr 15) (DB).**

2. Intention.

——Ss. 447 and 441 — Intention to constitute criminal trespass — Proof of — Presumption — Annoyance, probable consequence of act, alleged to be trespass — Intention may be presumed. See Penal Code (1860), S. 441. **51 Cri LJ 496: AIR 1950 All 157.**

[**Overruled** in AIR 1964 SC 986.]

——**S. 447** — Applicability — An offence under S. 447 is a distinct offence from the offence contemplated by S. 127 of the Madras District Municipalities Act. Mere entry in the premises connected with water supply is an offence under Section 127. Under S. 441, I. P. Code intention of such person to commit an offence or to intimidate, insult or annoy any person in possession of such property is the governing factor. **AIR 1955 NUC (Andhra) 3623 (DB).**

——**Ss. 447 and 441** — Criminal trespass — Ingredients — Intention and knowledge — A mere knowledge on the part of the accused that the result of their act is likely to cause annoyance or insult or intimidation to the complainant is sufficient to sustain a charge of trespass. The Section speaks of intention and not of knowledge. See Penal Code (1860), S. 441. **1957 Cri LJ 719: AIR 1957 Cal 385.**

——**S. 447** — Intention — Proof — Use of force not necessary. See Penal Code (1860), S. 441. **AIR 1955 NUC (Him Pra) 4516.**

——**Ss. 447 and 441** — Landlord going on his land and unyoking bullocks of his tenant — Intention to take forcible possession of land or to intimidate, insult or annoy cannot be inferred — Conviction under S. 447 cannot be sustained. See Ranbir Penal Code (1989), S. 441. **1965 (2) Cri LJ 504: AIR 1965 J and K 90.**

——**S. 447** — Complainant entering upon land of accused to effect repairs to fence serving as boundary between lands of both parties without intention to annoy, intimidate or insult accused — Act does not amount to criminal trespass so as to give accused right to inflict injury on complainant. See Penal Code (1860), S. 441. **ILR (1964) Cut 706.**

——**Ss. 447 and 426 — Criminal trespass on land — Intention to commit an offence or to insult by entry on land — Proof of bona fide claim for right — Entry does not become criminal.**

To establish criminal trespass on land the prosecution must prove that the real or dominant intent of the entry was to commit an offence or insult, intimidate or annoy the occupant and that any claim of right was a mere cloak to cover the real intent or at any rate constituted no more than a subsidiary intent. An entry upon land made under a bona fide claim of right however ill founded in law the claim, may be, does not become criminal merely because a foreseen consequence of the entry is annoyance to the occupant. 52 Cr LJ 173 (PC), Rel. on; AIR 1928 Rang 113 and 1 Weir 522, Dist.

Where the complainant who had filed a complaint against the accused under Ss. 447 and 426, I. P. C. on the allegation that he had purchased certain land from the father of the accused and was in peaceful possession thereof and the accused trespassed upon the land and forcibly ploughed it did not mention the particulars of plot purchased by him and the evidence showed that the complainant had purchased some property other than the property claimed by him:

Held, that the accused did not commit any criminal trespass on the disputed land so as to make them liable under section 447 and Sec. 426, Indian Penal Code. **28 Cut LT 375: (1962) 4 Orissa JD 222.**

——**S. 447** — Intention, a question of fact. See Penal Code (1860), S. 441. **AIR 1955 NUC (Pat) 227.**

——S. 447 — Intention — Complainant in possession of land as tenant — Accused committing trespass by ploughing land — Primary mention of accused being to lay claim to land and not to commit any offence or annoy complainant — Accused cannot be convicted under S. 447. See Penal Code (1860), S. 441. **AIR 1955 NUC (Pat) 104.**

——S. 447 — S, a companion of accused, accompanying police unarmed to point out house of H and entering it — S shouting for help either on being attacked by H or apprehending attack — Accused, armed with weapons rushing to the rescue of S and entering house of H — Entry held not unlawful as to amount to offence under S. 447. **1963 Raj LW 436: ILR (1963) 13 Raj 789.**

——S. 447 — Intention specified in section must be present — Absence of finding as to intention — Effect — The accused could not be convicted under S. 447. See Penal Code (1860), S. 441. **1951 Raj LW 501.**

3. To intimidate.

——S. 447 — Essentials of offence — Accused having right of passage through verandah of building, squatting there — No allegation or proof of criminal force or show of force — No offence — Criminal Procedure Code (V of 1898), S. 522 — One month's time limit in sub-section (1) — Effect of.

Mere squatting on verandah of a building by accused who claimed an easementary right of passage will not constitute an offence under Section 447, Penal Code. To constitute the offence the accused must display a readiness to use force or criminal intimidation and thus scare away the victim of his offence.

A Court acting under sub-section (3) of S. 522 Criminal P. C. must make an order under that section within one month of the date on which it confirms the conviction in appeal, reference or revision: When sub-section (3) of S. 522 say that an order under that section may be made by any 'Court of appeal, confirmation, reference or revision' it obviously has in mind an order under sub-section (1), and such an order can be made by the Court only when convicting the person concerned or at any time within one month from the date of the conviction On an ordinary and natural construction of the section this limitation must apply also to a Court which, acting under sub-sec. (3), wants to pass an order under sub-section (1). And, in relation to such a Court, the words 'when convicting such persons or at any time within one month from the date of the conviction', obviously mean, 'when upholding the conviction of such person, or within one month from that date.' (1950) 1 MLJ 670; AIR 1927 Nag 131 and AIR 1949 Mad 191. Rel. on; AIR 1951 Orissa 30 and AIR 1953 Cal 308 and 393, Dissented from. **(1960) MLJ (Cr) 380: 1960 Ker LJ 460: (1960) Ker LT 556: (1960) 2 Ker LR 723: ILR (1960) Ker 1096: 1960 Cr LJ 1464: AIR 1960 Ker 348 (349) (Pt A) (Pr 6).**

——Ss. 447, 441 — Intention — Presumption — While the fact that a trespass causes or is likely to cause annoyance to a person in possesson may by itself be insufficient to justify a conviction for criminal trespass, the presumption of the necessary intention may be drawn where a person who has absolutely no interest in land in possession of others, forcibly takes possession in spite of the protests of the owner. **1959 Cri LJ 588: AIR 1959 Ker 146 (148) (Pt C) (Pr 8) (DB).**

4. To annoy.

——S. 447 — Applicability — Accused entering upon party land after it had vested in State — Offence — Accused having no claim to it after vesting — Offence held fell under S. 447. Intention to annoy held could be presumed. **AIR 1955 NUC (All) 4807.**

——S. 447 — Applicability — Essentials — Intention to cause annoyance or to commit mischief.

In a prosecution under Ss. 447 and 427, I. P. Code, it is not sufficient for the Court to say that the complainant has succeeded in proving his case and punish the accused. The trying Magistrate must on a consideration of the evidence come to a conclusion that the offence alleged against the accused was made out in evidence. Trespass by itself is not criminal. It is criminal only when it is done with the intention to commit an offence or with the intention of causing annoyance, etc. Unless there is a finding that the accused persons entered on the land with the intention of cutting the betel leaf creepers or with the intention of causing annoyance to the complainant or that mischief was done, there can be no conviction either under S. 447 or 427, I. P. Code. **('58) 24 Cut LT 310.**

——S. 447 — Applicability — Entry in public building — Accused, a stamp vendor going to the verandah of Sub-Registrar's building and selling stamps — His example followed by another stamp vendor with whom he had a quarrel — Noise created disturbing work of office— Sub Registrar ordering accused to leave verandah but accused refusing to do so saying that it was Government building — Accused held had a right to go to the building for public business but not to open private business of his own without permission— Registrar and clerks had every right to claim that they should not be disturbed — On refusal of accused he was certain to cause annoyance. **AIR 1955 NUC (Pat) 227.**

——S. 447 — Intention to insult or annoy — Landlord entering the premises of tenant with intent to ventilate grievance about non-payment of rent — No criminal trespass committed.

Held, on facts that the object of the accused being to seek the intervention of the Chief Minister who was entertained by the complainant in her troubles viz, non-payment of rent by the complainant for a long period, even if the accused knew that her entry was likely to annoy the complainant it could not be held that criminal trespass had been committed. The conviction could not be sustained. AIR 1960 SC 160, Rel. on. **(1963) 65 Pun LR 953.**

——Ss. 447, 109, 441, 425 and 426 — Criminal trespass and mischief — Intention — Abetment — Where the accused instructed her maternal uncle to raise the roof which necessitated the cutting of the complainant's eaves and entering upon his property, the accused must be deemed to have intended to cause annoyance and wrongful loss to the complainant and, therefore, to have abetted the offence of criminal trespass. **5 Sau LR 82: 1953 Cri LJ 881: AIR 1953 Sau 81 (81, 82) (Pt C) (Prs 4, 6) (DB).**

5. Bona fide claim of right.

——S. 447 — Intention to insult or annoy has to be proved — Proof — Intention cannot be inferred from effect produced on mind of person in possession — Bona fide claim to right under contract with zamindar — Whether Zamindar had power to let in accused, is immaterial — Assertion of title held could not be held to be not bona fide. **AIR 1955 NUC (All) 2857.**

——S. 447 — Applicability — The accused claimed the field in which the trespass was said to have been committed as an occupant on the basis of

sale from the original occupant while the complainant was mere sub-tenant (shekmi holder) of the latter for the previous year — **Held,** that the case was of a civil nature and secondly the accused could not be held to have intention to commit an offence and no offence under S. 447 could be held to have been committed by him. **1954 Cri LJ 394: AIR 1954 Bhopal 6 (7) (Pt B) (Pr 10).**

——**S. 447** — Trespass by landlord to take possession of his own land — Occupant claiming to be tenant — No criminal intention can be attributed — Trespass is civil. 52 Cr LJ 173 (PC), Rel. on. **62 Bom LR 499: 1960 Nag LJ 350: 1960 Cr LJ 1425: ILR (1961) Bom 131: AIR 1960 Bom 481 (482) (Pt B) (Pr 7).**

——**Ss. 447 and 441** — Bona fide boundary dispute between accused and complainant — Accused entering under bona fide belief of his right — Dispute is civil — No offence of criminal trespass. See Penal Code (1860), S. 441. **1959 Cri LJ 1093: AIR 1959 Manipur 38.**

——**Ss. 447, 379** — Removal of crop — Accused claiming bona fide right in land — Nature of offence — Assertion supported by some evidence — He cannot be convicted for offence of trespass. See Penal Code (1860), S. 379. **1956 Cri LJ 902: AIR 1956 Mys 49.**

——**S. 447** — Criminal trespass into land — Defence — Bona fide claim of right to possession — Mere assertion or a claim of right not sufficient. **(1962) 4 Orissa JD 210: 28 Cut LT 382.**

——**Ss. 447 and 441** — Criminal trespass — Assertion of claim of right — A person who enters upon land in the possession of another in the exercise of a bona fide claim of right cannot be convicted of criminal trespass under S. 447 as the entry is not made with any such intent as to constitute an offence, although the mere assertion of a claim of right in itself will not be sufficient defence to the charge of criminal trespass. **51 Cri LJ 1565: AIR 1950 Pat 564.**

——**S. 447 — Applicability — Bona fide dispute — No offence.**

Before a conviction under S. 447, is maintained, it must be held that the accused had not occupied the land under a bona fide claim of right and that the real and dominant intention of the accused was to insult or intimidate or annoy the complainant when the accused entered into the property. Where it is clear that there is a bona fide dispute regarding the title to the land in dispute it cannot be said that any offence under S. 447, has been committed. **ILR (1957) Punj 687: 1960 Cri LJ 400: AIR 1960 Punj 160 (163) (Pt D) (Pr 6).**

——**S. 447** — Scope — Bona fide claim of right. It is a dangerous doctrine to hold that a person who may consider himself legally entitled to possession may walk upon the property while another person is in peaceful possession of it, take the law into his own hands and when he is prosecuted, be permitted to say that all he intended was to claim possession to such property and not to intimidate, insult or annoy the person who was in peaceful possession thereof. **AIR 1955 NUC (Raj) 759.**

——**Ss. 447 and 441** — Bona fide claim of right. The question of the entry of the accused who is the landlord in the field being in bona fide exercise of his claim does not arise because no landlord can be permitted to re-enter the property on the alleged expiry of the lease otherwise than in due course of law and if he so enters, he cannot be permitted to plead that he did so in the bona fide exercise of his right. **AIR 1954 Sau 110.**

——**Ss. 447 and 147** — Rioting and criminal trespass — Accused numbering more than 50 going in company of Court's officer to take delivery of field under order of Court — Scuffle — No offence. See Penal Code (1860), S. 147. **1960 Cri LJ 1665: AIR 1960 Tripura 43.**

6. Master and servant.

——**Ss. 447 and 379 — Bona fide belief of title — Servant's liability.**

A vada was owned by one M. The Thakarai (landlord) of the village thinking that the original tenant had left, and the vada had reverted to him, entered the vada and removed the things of another person lying there.

Held, that the landlord was guilty under Sections 447 and 379:

Held further, that though one may presume that in a small village the servant of the accused knew that the accused was not in possession of the vada his (servant's) conviction could not be based on mere presumption. It must be shown that the servant intended to assist his master to cause wrongful loss to the owner of the vada. **52 Cri LJ 672: AIR 1951 Kutch 49 (49) (Prs 2, 3).**

7. "In the possession of another".

——**S. 447** — Applicability — Land requisitioned and allotted — Notice of requisition to stranger — Trespass by stranger — Offence is under Section 447, Penal Code. See Assam Land (Requisition and Acquisition) Act (25 of 1948), S. 10. **AIR 1955 NUC (Assam) 2811 (DB).**

——**S. 447** — In the possession of another — Complainant obtaining delivery of possession in execution of decree — Accused admitting such possession — Court is bound to consider effect of these facts. See Penal Code (1860), S. 441. **1961 Ker LT 799.**

——**Ss. 447 and 441** — Possession must be actual physical possession — Persons entitled to rights of easement are not persons in possession. See Penal Code (1860), S. 441. **1960 Cri LJ 631 (1): AIR 1960 Manipur 17.**

——**Ss. 447 and 441** — Offence under S. 447 — Magistrate is concerned only with question of possession, not of title. See Penal Code (1860), S. 441. **1960 Cri LJ 404: AIR 1960 Tripura 4.**

8. Joint possession and ownership.

——**S. 447** — Applicability — Criminal trespass by co-owner — Ouster — Proof — Necessity — Person having grazing rights but not right to construct — Building put up over common land against will of co-sharers — Construction is act of ouster of persons having grazing rights — Case held fell within mischief of S. 447 — Person constructing is guilty of criminal trespass. **AIR 1955 NUC (Assam) 3632.**

9. "Unlawfully remains there".

——**Ss. 447 and 441** — "Unlawfully remains there" — Accused setting up stall within market boundary, asked to remove — Accused still remaining — Intention is to intimidate and annoy — Offence is not erection of stall but refusal to remove it. See Penal Code (1860), S. 441. **AIR 1955 NUC (Cal) 836.**

——**Ss. 447, 441, 448 and 504** — Accused entering complainant's house for demanding their dues — On refusal to pay accused abusing complainant in filthy language and continuing to do so in

spite of restraint shown by complainant — Intention to insult, intimidate or annoy or to provoke complainant to break peace — Inference of — Accused held guilty under Ss. 448 and 504. See Penal Code (1860), S. 441. **1965 (1) Cri LJ 86: AIR 1964 Tripura 69.**

10. Use of criminal force.

——**S. 447** — Applicability — Common object of unlawful assembly to take forcible possession of land belonging to employer of prosecutor — Conviction under S. 447 cannot be sustained. **AIR 1955 NUC (Pat) 5699.**

11. Criminal trespass whether continuing offence.

——**Ss. 447 and 441** — Continued possession of area cannot invoke provisions of section. See Penal Code (1860), S. 441. **AIR 1955 NUC (Assam) 4210.**

——**S. 447** — Criminal P. C. (1898), S. 403 — Continuing offence — Conviction for trespass — Accused not vacating — Raising of crop by accused — Subsequent complaint for trespass into the identical plot — **Held,** there is no second act of trespass — Accused held could not be convicted once again on same act of trespass — The fact that accused refused to vacate does not constitute fresh act of trespass. See Criminal P. C. (1898), S. 403. **AIR 1955 NUC (Assam) 3308.**

12. Evidence and proof.

——**S. 447** — Offence under first part of S. 141 — Essentials to be proved — Intention must be proved — Charges under Ss. 143 and 447 — Evidence must establish ingredients of S. 441 — Evidence of state of mind has to be examined — Annoyance or insult felt by complainant is wholly irrelevant consideration in charge under S. 441. See Penal Code (1860), S. 141. **1955 Cri LJ 1338: AIR 1955 Cal 515.**

——**Ss. 447 and 426** — Acquittal on plea not taken by accused — Validity — Charge under Ss. 426 and 447, I. P. C. — Land found not to be in possession of accused — Plea of bona fide claim or right of accused — Identity of land not disputed—Acquittal on the ground that complainant did not prove identity of land not valid. See Criminal P. C. (1898), S. 245. **('62) 28 Cut LT 382.**

——**S. 447 — Criminal tresspass — Burden of proving possession of disputed property on the complainant — Presumption.**

In a prosecution for criminal trespass on his land, the burden is heavy on the complainant to establish beyond reasonable doubt that he was in possession of the property on which the criminal trespass was alleged to have been committed. In the absence of reliable evidence on the part of the complainant, no inference about trespass over that property could be made and the charge under S. 447, must, therefore, fail. **1961 All Cr R 314: 1961 All WR (Supp) 60: (1961) 27 Cut LT 111.**

——**S. 447 — Burden of proof as to possession is on complainant — Accused producing lease deeds in his favour — Presumption will be that he continued in possession — Evidence Act (1872), Ss. 101, 104 and 114.**

In a case under S. 447 it is not proper to shift the burden on the accused person to show that they failed to prove their possession on the date on which the incident was said to have taken place. The complainant has to establish beyond reasonable doubt that he was in possession of the disputed plots. The leases of the past years produced by the accused would raise a presumption that the lands, having been originally cultivated by him continued to remain in his possession unless there was clear evidence to show that he was dispossessed by the complainant. **(1957) 23 Cut LT 38.**

13. Practice and procedure.

——**S. 447** — U. P. Panchayat Raj Act (26 of 1947), S. 55 — Accused jointly tried by Magistrate for offences under Ss. 143, 447 and 506, Penal Code — Case cannot be said to be cognizable by a Panchayati Adalat unless all the offences were cognizable by it — Offence under S. 143, Penal Code, not being cognizable by it, S. 55 did not apply and therefore, trial by Magistrate was not illegal. See Panchayats — U. P. Panchayat Raj Act (26 of 1947), S. 55. **AIR 1952 All 431.**

——**S. 447** — Criminal P. C. (1898), S. 4 — Complaint can be of offence committed — There cannot be complaint under Ss. 341, 447, 504 and 506, Penal Code, read with S. 106, Criminal P. C. See Criminal P. C. (1898), S. 4. **AIR 1951 All 494.**

——**S. 447** — Criminal P. C. (1898), Ss. 195, 145 — Disobedience of order under S. 145 — Offences under Ss. 188, 447, 506, 323 and 379 committed — Offences under Ss. 188 and 447 cannot be tried, except upon complaint by magistrate passing order under S. 145 or his superior. See Criminal P. C. (1898), S. 195. **1958 Cri LJ 1378: AIR 1958 Andh Pra 718.**

——**S. 447** — Conviction under S. 447, I. P. C. — No evidence of use of criminal force to person — Order of restoration under S. 522, Criminal P. C. cannot be passed. **1961 (1) Cr LJ 627 (628) (Prs 3, 4) (Assam).**

——**S. 447** — Intention of accused — Case under S. 447 tried summarily — Court not considering as to what the intention of accused was in committing trespass — Only number of sections of offence noted but not the date of its commission — Record not showing whether accused was informed of the substance of the accusation—Statement of both the accused recorded jointly — Conviction was set aside — Considering the petty nature of offence retrial was not ordered. See Criminal P. C. (1898), S. 242. **AIR 1955 NUC (Bhopal) 5851.**

——**S. 447** — Criminal P. C. (1898), Ss. 438, 439, 561 — Charge-sheet disclosing no offence — Reference to High Court — Applicability of Section 439 — Right of Pankuvaramdar as to possession of land — Complaint by him under Section 447, I. P. C. — Not maintainable — Kerala Stay of Eviction Proceedings Act (1 of 1957) (as amended by Kerala Act 30 of 1958), Ss. 2 (5), 6, 7-A. See Criminal P. C. (1898), S. 438. **1960 Cri LJ 1091: AIR 1960 Ker 263.**

——**S. 447** — Criminal P. C. (1898), Ss. 221 and 223 — Criminal trespass — Charge — It is enough to state that accused committed criminal trespass on or about particular day at or about a particular time by entering into or upon or by illegally remaining on the particular land than in possession of certain person — Specification that the intention was to commit theft or to insult, annoy or intimidate without mentioning the way in which the criminal intimidation was made or annoyance caused does not make the charge defective. See Criminal P. C. (1898), S. 221. **AIR 1953 Kutch 1.**

——**S. 447** — Unlawful assembly — Common object to commit criminal trespass — Criminal trespass committed — Conviction under Ss. 143 and 447 both — Not illegal. See Penal Code (1860), S. 71. **1962 (1) Cr LJ 618 : AIR 1962 Manipur 23.**

14. Sentence.

——**S. 447** —Cognizance of offence under S. 447, I. P. C. by a Court — Transfer of case to Nyaya Panchayat for trial not necessary. See Panchayats — U. P. Panchayat Raj Act (26 of 1947), S. 55. **1956 All LJ 695.**

——Ss. 447, 379— Sentence.

When an act of the landlord of a village who was unenlightened and slow in receiving new ideas as ordinary villager, in taking forcible possession of a vada in his village from the possession of the occupant, in the belief that it had reverted to him showed that he was cherishing his ancestral feudal rights in spite of the introduction of the rule of law, he is not liable to a more drastic punishment than any other villager committing the same offence under similar circumstances, only because he is a landlord. The punishment should be governed by the circumstances attending the commission of the offence and the nature of the offence. **52 Cri LJ 461: AIR 1951 Kutch 58 (58, 59) (Prs 4, 7, 8).**

——Ss. 447 and 379 — Dishonest intention — No proof — Labourers hired by leader of accused party alleged to have cut and carried away crops from lands in possession of complainant — Finding of lower Court as to their dishonest intention based on inference that generally people in villages have knowledge about persons and lands in their possession in those villages, and on the fact that they cut away unripe crops — Reasons held insufficient to justify inference of dishonest intention of labourers, for, it is quite probable that being ordered by their master they cut and removed crops thinking that it was none of their business to further enquire whether crops were unripe or not — Under the circumstances benefit of doubt could reasonably be given to them. See Penal Code (1860), S. 379. **(1960) 26 Cut LT 566.**

——S. 447 — Sentence — Where the accused was already put to considerable loss in litigation and it was found that he did not want to see himself belittled in the presence of his rival in occupation and the public of the place and therefore persisted in remaining in the building in spite of knowing fully well that he was causing annoyance to the person in possession of the building, a lenient view of the matter could be taken. **AIR 1955 NUC (Pat) 227.**

SECTION 448

SYNOPSIS

(Penal Code (1860), S. 448.)

1. Scope.
2. Intention.
3. Illustrative cases.
4. Evidence and proof.
5. Practice and procedure.
6. Sentence.

1. Scope.

——S. 448 — Gist of offence — Presence of person in possession if necessary when accused enters.

To hold that the person in possession must be present when the accused enters into or upon the property is to introduce an element which is not to be found in S. 441 or Section 442 of the Indian Penal Code. **(1964) MLJ (Cr) 115: 1954 (1) Cr LJ 52: (1963) 1 Mys LJ 253: ILR (1963) Mys 435: AIR 1964 Mys 11 (12, 13) (Pt A) (Prs 3, 5).**

——Ss. 448, 441, 40 — Intention to intimidate, insult or annoy — Intimidation, insult or annoyance contemplated need not be instantaneous with moment of entry but may be caused subsequently — Landlord breaking open house of tenant in his absence and taking possession — Intention to annoy tenant must be presumed — Distinction between intention and motive stated. See Penal Code (1860), S. 441. **1964 (1) Cri LJ 427: AIR 1964 Punj 145.**

——S. 448 — Scope.

The section makes the trespass criminal if the entry is with an intent to commit an offence and for that it is necessary that the offence must be against the person in possession. The entry is also criminal if the intention is to intimidate, insult or annoy the person in possession. Therefore if an entry is made in a house with an intention to beat and assault a third person other than the owner of the house, such action is bound to annoy the owner of the house unless he is a consenting party. **1959 Cri LJ 1487: AIR 1959 Tripura 49 (50) (Pt A) (Pr 5).**

2. Intention.

——S. 448 — Criminal trespass — 'Intent to annoy' — Advocate entering surreptitiously house of Magistrate — Inspection by him of papers in pending file — Conduct highly improper but no intention to annoy — He cannot be convicted of criminal trespass.

Where an advocate enters the house of a Magistrate in his absence, taking along with him the books wanted by the Magistrate, and finding on the table the file of a case in which he has appeared, inspects it, it cannot be said that the Advocate in entering the house surreptitiously commits the offence of criminal trespass punishable under Section 448, Penal Code. But as the intention of the advocate was to inspect the file and leave the premises without allowing the Magistrate any opportunity of coming to know of his action it cannot be held that there was any deliberate intent to annoy. AIR 1947 All 61 and AIR 1916 All 152 and AIR 1938 Lah 534, Rel. on. **1962 All Cr R 27: 1962 All WR (HC) 13: 1961 (2) Cr LJ 756: AIR 1961 All 637 (638, 639) (Prs 6, 7).**

——S. 448 — Intention — Proof of — Inference from circumstances — Proper.

On a complaint from M the occupier of a shop that the accused trespassed at night beat him and took forcible possession of the shop, the accused were convicted of offences under Ss. 147 and 448 and acquitted of offences under Ss. 323, 379 and 504, Penal Code. The conviction and sentence based on the conclusions of the trial Court as to the intention of the accused were accepted and the conviction upheld in appeal.

Held, in revision, it is impossible in most cases to prove intention by direct evidence and it has to be inferred from circumstances proved.

The mere fact that the accused were acquitted of offences under Sections 323, 379 and 504 of the Penal Code cannot be held to rebut the presumption as to intention arising from the probable consequences of the acts complained of. **1952 AWR (HC) 337: 1952 All Cri R 93: 1953 Cri LJ 1664: AIR 1953 All 725 (725) (Pt A) (Pr 5).**

——Ss. 448, 441 — 'Unlawfully' remains there — Intention to annoy, intimidate or insult complainant not made out — There can be conviction under Section 448. See Penal Code (1860), S. 441. **AIR 1955 NUC (Assam) 4239.**

——Ss. 448, 441, 442 — Criminal trespass — Intention to insult — Accused, an office bearer of School Committee, going to school beating two boys in absence of Head Master and subsequently abusing head-master on his return — Accused held guilty under S. 448. See Penal Code (1860), S. 441. **1964 (1) Cri LJ 395: AIR 1964 Bom 82.**

——Ss. 448, 441 — Criminal trespass — Intention — Dominant intention must be to intimidate, insult or annoy — If dominant intention of wrongful entry is to take possession and intimidation, insult or annoyance is only casual result, offence of criminal trespass is not esta-

blished. See Penal Code (1860), S. 441. **AIR 1965 Pat 507.**

——**S. 448** — Intention to cause annoyance — Case on facts — Accused six in number, at dead of night taking advantage of the absence of complainant's father forcibly entered the land in possession of the complainant and took possession of the khand where the cattle were tethered. After driving away the cattle they closed the door of the khand by bricks giving an appearance as if the door was closed much earlier to that date — **Held,** that the actions of the accused were sufficient to cause annoyance to the complainant. **AIR 1955 NUC (Pat) 1312.**

——**Ss. 448, 441, 451** — Accused entering complainant's house at mid-night with intent to commit adultery with complainant's wife— Complainant absent at relevant time — **Held,** although intention to insult, intimidate or annoy may be absent, accused can be convicted either under Section 448 or 451 as he intended to commit offence. See Penal Code (1860), S. 441. **1965 (2) Cri LJ 673: AIR 1965 Raj 191.**

3. Illustrative cases.

——**S. 448** — Actual possession of disputed premises delivered to complainant from accused tenant in execution of decree for ejectment — Re-entry by accused in absence of complainant by breaking lock — Complainant threatened by accused when former lodged protest with the latter — **Held,** accused was guilty under S. 448, read with second part of S. 441. See Penal Code (1860), S. 441. **1965 All LJ 747.**

——**S. 448** — Land given on rent by complainant to accused — Structures raised by accused over the land — Decree for arrears of rent and ejectment of accused, obtained by complainant — Households and structures removed in execution of decree and possession of land delivered to complainant — Re-entry by accused on the land whether makes him liable under Section 448 — **Held,** on the facts of the case that the conviction of the accused as recorded by the Magistrate was wholly misconceived because the complainant got only a formal possession of the site of hutments which continued to remain in actual possession of the respondents. See Penal Code (1860), S. 442. **1965 All LJ 736.**

——**Ss. 448 and 454 — Suit for partition — Receiver appointed for suit property including shop in possession of accused — Receiver not entitled to take possession wrongly putting his own locks on the shop — Entry by accused into shop not an offence.**

In a suit for partition a receiver was appointed for the suit property including a shop in possession of the accused. There was, however, no order of the Court directing him to take possession of the shop in dispute. The Receiver sealed the locks of the accused which were on the shop and put on his own locks. The accused who were informed that their locks on the shop had been tampered with, entered the shop to find out whether any articles had been removed or not. The accused were prosecuted under Ss. 448 and 454, Penal Code for interfering with receiver's possession.

Held, that no offence under Sections 448 and 454 was committed by the accused. The entry of the accused into the shop in dispute was not even unlawful and therefore much less a criminal offence. An order under Order 40, Rule 1, C. P. Code, directing the Receiver to take possession, was absolutely necessary to entitle him to take possession of the property. In the absence of such an order his sealing the locks of the accused and putting his own locks on the shop was wrongful and did not dispossess the accused. AIR 1923 Nag 6, Rel. on. The possession by the Receiver was also not in accordance with law as he had not followed the procedure laid down in Order 21, Rule 35, C. P. C., for obtaining possession, but simply sealed the locks of the accused and put his own locks on it. Therefore the Receiver could not, in law, be said to have been in possession of the shop when the accused entered the shop. AIR 1959 Punj 468, Rel on. Further, as the nature of the suit itself showed that the accused had some title in the shop in dispute, the Receiver must, in law, be held to be in possession, if he was in possession at all, on behalf of the accused as well as the other parties and therefore they could not possibly be deemed to have committed criminal trespass by entering the shop. AIR 1926 Cal 385 and AIR 1918 All 365 and AIR 1933 All 816 and AIR 1960 Cal 189, Rel. on. **1963 All LJ 501: 1963 All WR (HC) 408: 1963 All Cr R 215: 1964 (1) Cr LJ 324: AIR 1964 All 103 (104, 105) (Pt A) (Prs 5 to 7, 9).**

——**Ss. 448, 441 — "Unlawfully remains there".**

Where the accused took possession of the rooms belonging to the complainant when the latter had left for another place for a short-while by breaking open the padlocks, but refused to vacate them when on his return the complainant asked him to vacate, the latter part of Section 441 applies and the accused is guilty under Section 448. **85 Cal LJ 200: 51 Cri LJ 1496: AIR 1950 Cal 410 (410) (Pr 4).**

——**S. 448 — Accused ejected upon court delivery to complainant — Accused forcibly entering into building is guilty of criminal trespass.**

Where a court effects delivery the court really puts such a person in physical possession of the property delivered. Aggrieved persons will have to seek re-delivery or to bring a fresh suit and not bring together their comrades to disturb the peaceful possession of the property delivered over. The criminal court is bound to respect such a record and give due importance to the same. Persons ejected upon delivery are guilty of criminal trespass, when they forcibly enter the building. **1959 Ker LT 501: 1959 Ker LR 457: 1959 Ker LJ 489: 1959 Mad LJ (Cri) 861.**

——**Ss. 448, 441** — "To annoy" — Entry into tenant's house to demand rent is lawful — But if accused remains on house after refusal to pay rent, and throws out effects of tenant, the accused commits criminal trespass. See Penal Code (1860), S. 441. **AIR 1955 NUC (Madh Bha) 3780.**

——**Ss. 448 and 452** — Accused entering the house of A and B to intimidate B to withdraw a case filed by him — Scuffle taking place resulting in injuries to both accused and A and B — No evidence to show that the accused committed house trespass after making preparations for causing hurt or assault— No indication also that the accused really intended or attempted to cause any deadly injury to B—The offences committed by the accused fall under Sections 324 and 448, Penal Code and not under Sections 307 and 452, Penal Code and are therefore compoundable. See Criminal P. C. (1898), S. 345. **1964 BLJR 660.**

——**Ss. 448, 441, 442** — "In the possession of another" — Petitioners in occupation for more than two years, of vacant house not in possession of opposite party — No offence under Section 448 read with Sections 441 and 442 held committed — Criminal trespass is different from civil trespass which is not within jurisdiction of Gram-Kutchery — (Constitution of India, Article 227). See Penal Code (1860), S. 441. **AIR 1955 NUC (Pat) 4897.**

——**Ss. 448, 441** — Entry under bona fide claim of right — When the accused claims that he entered a certain house under bona fide claim of right he could be held guilty of an offence under the section if it is found that the dominant intention was to commit an offence or insult, intimidate or annoy the person in possession. If the intention is found to be merely to make an entry peacefully no offence could be held to have been made out. See Penal Code (1860), S. 441. **1958 Cri LJ 1099: AIR 1958 Raj 214.**

——**Ss. 448, 441, 447 and 504** — Accused entering complainant's house for demanding their dues — On refusal to pay accused abusing complainant in filthy language and continuing to do so in spite of restraint shown by complainant — Intention to insult, intimidate or annoy or to provoke complainant to break peace— Inference of — Accused held guilty under Sections 448 and 504. See Penal Code (1860), S. 441. **1965 (1) Cri LJ 86: AIR 1964 Tripura 69.**

4. Evidence and proof.

——**S. 448 — Intention — Evidence.**

To establish a charge under S. 448, Indian Penal Code, there must be an unlawful entry and there must be proof of one or other of the intentions mentioned in Section 441 of the Code. It has to be found upon evidence that the person concerned entered a place which was in the possession of another and that the entry was made with a view to causing insult, annoyance or injury to the person concerned. **1956 Cr LJ 524: 97 Cal LJ 32: AIR 1956 Cal 118 (120) (Pt B) (Pr 7).**

——**Ss. 448, 354** — Case under Ss. 354, 448 — Testimony of prosecutrix — What she said at or about time of occurrence being part of 'res gestae' can be corroborative evidence of her evidence — Conviction can be based on such testimony — (Evidence Act (1872), Ss. 6 and 133). See Penal Code (1860), S. 354. **1953 Cri LJ 748: AIR 1953 Cal 332.**

5. Practice and procedure.

——**Ss. 448, 147 and 341 — 'To commit an offence' — Proof of — Trial under Ss. 448, 147 and 341 — Acquittal under Ss. 147 and 341 — Effect.**

The accused persons in trial Court were convicted under Sections 147, 341 and 448, Penal Code, but on appeal, while their convictions under Sections 147 and 341 were set aside, the conviction under Section 448 was maintained. There was no finding that there was intention on the part of the accused persons to intimidate, or to insult or annoy the complainant.

Held, that an acquittal on a charge means the elements necessary to constitute the offence charged have not been proved by the evidence called. Consequently when the Judge held that the charges of rioting and of wrongful restraint had not been proved, that meant and implied that the elements of these offences had not been established. It would be speculation of the worst type to hold that although the evidence fell short of the proof of rioting or of wrongful restraint, the intent to commit some unnamed offence survived the acquittals. Such speculation could never be indulged in administering criminal law. In the absence of a definite finding that some specific offence was intended to be committed as shown by the evidence, it could not be said that the element of Section 448, relating to intent to commit an offence had been established. It was not open to the Court to find that there was some sort of intent to commit some offence. The Court's duty was to find what that offence was before it could convict the accused under S. 448. **AIR 1955 NUC (Cal) 5921.**

——**S. 448 — Charge under — Omission to state intention — Effect — (Criminal P. C. (1898), S. 225).**

In a charge under Section 448, I. P. Code, the Magistrate should state the intention with which the accused person trespassed into the house of the complainant as contemplated under Ss. 441 and 442, I. P. Code. Omission to state it renders the charge defective and the whole proceeding is vitiated. **1957 Cri LJ 988: AIR 1957 Orissa 190 (191) (Pt B) (Pr 5) (DB).**

6. Sentence.

——**S. 448** — Appreciation of evidence — Part of evidence of witness untrue — Entire testimony need not be discarded — Charge under Ss. 448, 354 and 323, I. P. C. **1960 Ker LJ 649.**

——**S. 448** — Sentence — Re-entry by ex-tenant. If an ex-tenant quietly re-enters the premises with the intention of asserting his rights, he does not deserve any indulgence. **AIR 1951 Kutch 76 (77) (Pt C) (Pr 10).**

——**Ss. 448, 426 and 186** — Sentence — Where, in the trial under Sections 448, 426 and 186, the allegations were that during the elections the accused led a procession to the office of the Sub-Divisional Officer and committed acts of mischief, and the accused frankly admitted the guilt, a sentence of 15 days' simple imprisonment was adequate. **(1962) 4 Orissa JD 367: ILR (1963) Cut 42.**

——**S. 448** — Removal of meter under Electricity Act — Entry not unlawful — No intention to insult or annoy — No offence. **(1958) 24 Cut LT 408.**

——**S. 448** — Sentence — Trial under Ss. 448 and 380, I. P. Code — Conviction under S. 488 and acquittal under Section 380 — Sentence of 6 months' R. I. and fine of Rs. 50 and in default imprisonment — Accused under-trial prisoner for several days in respect of charge under S. 380 — Substantive sentence remitted maintaining remaining sentence — (Criminal P. C. (1898), Section 32). **AIR 1955 NUC (Pat) 1312.**

SECTION 449

●——**S. 449 — Applicability — Murder not committed — Section applies.**

An act can be said to be committed 'in order to the committing of an offence' even though the offence may not be completed. Thus, if a person commits a house trespass with the purpose of the committing of theft but has failed to accomplish the purpose, it will be proper to say that he has committed the house trespass in order to the committing of theft. There can be no doubt that the words 'in order to' have been used to mean 'with the purpose of'. If the purpose in committing the house trespass is the commission of an offence punishable with death the house trespass becomes punishable under Section 449 of the Penal Code. Hence the fact that the murder was not actually committed will not affect the applicability of Section 449 of the Penal Code. Matiullah Sheikh v. State of West Bengal. **(1964) 6 SCR 978: 1965 All WR (HC) 93: 1965 Mad LJ (Cri) 102: (1965) 1 SCJ 216: 1965 All Cri R 106: 1965 Mad WN 3: (1964) 1 SCWR 501: 1964 SCD 766: 1965 (1) Cr LJ 126: AIR 1965 SC 132 (133) (Pt A) (Prs 4, 6).**

——**Ss. 449, 500** — Constitution of India, Art. 19 (1) (a) — Scope — Exercise of right should not infringe upon rights of others — Article by student held infringed rules of discipline of

college and also was against law of country — Rustication from college for one year held justified. See Constitution of India, Art. 19 (1) (a). **52 Cri LJ 403: AIR 1951 Pepsu 59.**

● ——**Ss. 449, 307, 324 — Intention of accused — Test — Firing of gun after house trespass — Effect.**

In every case the intention of the accused should be judged by taking into consideration all the circumstances of the case. Simply because a gun is fired, it is not necessary to infer that it was done with no other intention except that of committing murder. When a thief or a dacoit is pursued for his arrest and when he turns round and fires at the pursuer it may be inferred that he intended either to murder him or to cause him injuries with the intention or knowledge given in Sections 299 and 300, Penal Code.

Held, in the circumstances of the case that it was proper to infer that the accused intended to cause only that injury which he actually did and no more and, therefore, he should be convicted with the offence under Section 324 and not Section 307, Penal Code, and, therefore, his conviction under Section 449, Penal Code, could not be maintained. **(1951) 52 Cr LJ 276: AIR 1951 Raj 42 (44) (Pt C) (Pr 10) (DB).**

SECTION 451

● ——**Ss. 451, 380** — Offences under, committed in 1948 in Jhabua State which subsequently became part of Madhya Bharat — Law in force in that State was Indian Penal Code which was subsequently continued in force by Regulation of Government Act (14 of 1948) and Part B States (Laws) Act (3 of 1951) after it became part of Madhya Bharat — Accused can be tried and punished in respect of those offences in 1955. See Penal Code (1860), S. 380. **1962 SCD 593.**

——**Ss. 451, 341** — Landlord merely going to premises let out and demanding arrears of rent from tenant after asking him to vacate premises without entering premises — There is no offence under Section 451 — But if landlord locks up premises from outside, it amounts to offence under Section 341. **1963 All LJ 238: 1963 All Cr R 119: 1963 All WR (HC) 196: 1963 (2) Cr LJ 543 (545) (Pt B) (Prs 17, 18) (All).**

——**Ss. 451, 456** — Applicability — Accused entering house of a person with common intention of abducting his wife — No evidence of precaution by accused to conceal their presence — Woman abducted by accused — Accused held guilty of an offence under S. 451. **AIR 1954 All 249 (251) (Pt B) (Pr 12).**

——**Ss. 451, 441** — Bona fide claim by accused — Acquittal — Interference in revision — Criminal P. C. (1898), S. 439 — The mere fact that accused put forward a bona fide claim to the property would not save him from the consequences of the entry into the house in possession of the complainant if his intention was to take the property out of the complainant's possession without her consent. **51 Cri LJ 1167: AIR 1950 All 653 (654, 655) (Prs 5, 6).**

——**Ss. 451, 441** — Charge of criminal trespass — Intention to annoy not specified in charge — Defect will not vitiate conviction in the absence of prejudice. See Penal Code (1860), S. 441, **(1961) 2 Guj LR 256.**

——**S. 451 read with S. 149** — Criminal P. C. (1898), Ss. 233, 535 and 537 — Charges against several accused under Ss. 148, 323, 326, 324 & 451 read with S. 149, I. P. C. — Acquittal of the accused on charges of unlawful assembly but conviction for specific individual act under different sections — Absence of separate charges for specific offences in the alternative — Prejudice — Conviction for individual specific offences held proper in the circumstances of the case. See Criminal P. C. (1898), S. 233. **1962 Ker LJ 793.**

——**S. 451** — Lawful and innocent entry in house — No offence under S. 451 — Offence committed after lawful entry does not fall under S. 451. **AIR 1955 NUC (Madh Bha) 3784 (DB).**

——**S. 451** — Criminal P. C. (1898), Ss. 223, 238, 225, 537 — Charge of house trespass with intent to commit indecent assault on complainant's wife — Accused admitting criminal intimacy with her prior to incident — Accused can be charged and convicted under S. 451, I. P. C. — Error in charge — Validity of trial not affected. See Criminal P. C. (1898), S. 223. **1960 Cri LJ 1611: AIR 1960 Madh Pra 375 (DB).**

——**S. 451** — Applicability — The act of accused in taking out the receipt book for collecting subscription from the constables for the banned association after entering the police barrack is sufficiently proximate to the commission of the offence and hence he can be convicted under Section 451. **1959 Cr LJ 1014: AIR 1959 Pat 376 (377) (Pr 7).**

——**Ss. 451, 441, 448** — Accused entering complainant's house at mid-night with intent to commit adultery with complainant's wife — Complainant absent at relevant time — **Held,** although intention to insult, intimidate or annoy may be absent accused can be convicted either under Section 448 or 451 as he intended to commit offence. See Penal Code (1860), S. 441. **1965 (2) Cri LJ 673: AIR 1965 Raj 191.**

——**S. 451** — A peeping into room through the door at night where B and C were resting — A asked to enter — Entry held amounts to house trespass despite the fact that A was told to enter — That was said innocently and does not amount to an invitation to enter — A remaining in room with intent to commit offence and intimidate occupants — **Held,** assuming entry was lawful at inception, A did commit house trespass under S. 451. **AIR 1953 Sau 85 (86) (Pt A) (Pr 2) (DB).**

SECTION 452

——**S. 452 — Ingredient of offence.**

For a conviction under Section 452, Penal Code, it is necessary to prove that the dominant intent of the accused was to cause hurt to or to assault or to wrongfully restrain any person. The fact that the accused had the intention to intimidate or hurt in forcibly carrying his wife does not mean that he went to the house of her parents for the purpose of causing hurt to or assaulting or wrongfully restraining any inmate of the house. **1959 Jab LJ 570: 1959 MPC 738: 1960 Cr LJ 83: 1959 MPLJ 1193: AIR 1960 Madh Pra 24 (26) (Pt C) (Pr 8).**

——**S. 452** — Applicability — A and his companions armed with lathis and dagger trying to take away A's wife — A striking his dagger in his daughter's abdomen in scuffle — Death — Offence held, committed. See Penal Code (1860), S. 300. **1957 Cr LJ 1405 (2): AIR 1957 Madh Pra 217.**

——**S. 452** — Sentence — Prison sentence necessary — Court would commit error of law in imposing only a sentence of fine. **1965 (2) Cr LJ 832 (1) (832) (Pr 3) (Pat) (DB).**

——**S. 452 — Building.**

A Courtyard of a house where a person lives and tethers his cattle is a building and entry into such a place with a view to commit theft

amounts to an offence under Section 452. **1956 Cri LJ 654: AIR 1956 Punj 122 (123, 124) (Pt A) (Pr 5) (DB).**

——**S. 452 — Sentence.**

The sentence of two years' rigorous imprisonment cannot be considered to be excessive when one of the offenders was armed with a pistol and two of them were armed with spears. **ILR (1956) Punj 119: 1956 Cr LJ 654: AIR 1956 Punj 122 (123) (Pt B) (Pr 5) (DB).**

——**S. 452 — House trespass after preparation for hurt — Evidence of preparation should be offered.**

There must be clear evidence of preparation for causing hurt to sustain a conviction under Section 452 of the Penal Code. The fact that a person enters another man's house and commits an assault does not necessarily presuppose such preparation, for it may be a case of post hoc ergo propter hoc. **1964 Raj LW 524: ILR (1964) 14 Raj 1141: 1966 Cri LJ 236 (238) (Pt A) (Pr 5) (Raj).**

——**S. 452** — Complaint for offence under Sections 452, 323, 504, 147, Penal Code — Police Challan also put up before same Magistrate against same accused for offence under Sections 452 and 440, Penal Code, in respect of same occurrence — Case on complaint dropped from register but tagged with challan case — Challan case proceeded with under Section 251-A and accused convicted under Sections 452 and 427, Penal Code — **Held,** there was no consolidation of complaint case with challan case and trial under Section 251-A was not illegal. See Cr. P. Code (1898), Section 252. **1961 Raj LW 191.**

SECTION 453

——**Ss. 453, 441** — House trespass—Intention—Inference. See Penal Code (1860), Section 441. **1961 Ker LJ 674.**

——**S. 453** — Conviction under — Intention must be proved — Civil suit pending — Proceeding under Section 145, Cr. P. C. started and dropped — Accused acquitted under Sections 147 and 380 — Accused did not come under mischief of Section 453. **(1960) 26 Cut LT 70.**

SECTION 454

——**Ss. 454, 448** — Suit for partition — Receiver appointed for suit property including shop in possession of accused — Receiver not entitled to take possession, wrongly putting his own locks on the shop — Entry by accused into shop not an offence. See Penal Code (1860), Section 448. **(1964) (1) Cri LJ 324: AIR 1964 All 103.**

——**S. 454** — Criminal P. C. (1898), Section 341 — Applicability — Deaf and dumb accused — Rule as to trial — Accused able to understand proceeding — Section 341 will not apply — Conviction for offences under Sections 454 and 380, I. P. C., on mere gestures is bad. See Criminal P. C. (1898), Section 341. **AIR 1955 NUC (Mad) 2448.**

——**Ss. 454, 380** — Theft — Bona fide claim of right — A breaking open lock and removing ornaments of B, his sister-in-law, in belief that ornaments were joint family property — A's claim proved colourable pretence — Conviction held proper — Sentence, however, held should be reduced. **51 Cri LJ 510: 1950 Nag LJ 346: ILR (1950) Nag 526: AIR 1950 Nag 92 (94, 95) (Prs 8, 12, 14).**

——**S. 454 — Criminal trespass — What constitutes — Mere entry on property is not criminal trespass — Intention to cause annoyance, intimidation or insult must be present.**

To make out a case of criminal trespass, it is not enough to show that the accused persons merely effected an entry on the property of another, but what is necessary to find out is whether their main intention was to cause annoyance, intimidation or insult. That such annoyance, intimidation or insult may be the necessary consequence of such an act of entry, but that is not enough. In order to establish that the entry on the property was with the intent to annoy, intimidate or insult, it is necessary for the Court to be satisfied that causing such annoyance, intimidation or insult was the aim of the entry and that it is not sufficient for the purpose to show merely that the natural consequences of the entry was likely to be annoyance, intimidation or insult and that this likely consequence was known to the persons entering. AIR 1964 SC 986, Applied.

Hence, where certain municipal servants entered upon the shop premises of the petitioner — who had failed to comply with the requirements of the municipal licence and was asked to vacate the premises — and gave possession of the premises to another by breaking open the lock, in accordance with an order from the Executive Officer:

Held, that the municipal servants merely carried out the order of the Executive Officer, their dominant intention being to execute the order and not to cause any annoyance, intimidation or insult to any person. Section 454 of the Penal Code was, therefore, not attracted. **31 Cut LT 438: 1965 (2) Cr LJ 791: AIR 1965 Orissa 212 (213, 214) (Prs 6, 7, 8).**

——**S. 454** — Conviction based on evidence of recovery of property — Information from accused which was relied upon for conviction not leading to any discovery — Conviction in the absence of any other evidence — **Held,** not proper. See Evidence Act (1872), Section 27. **AIR 1955 NUC (Raj) 2546.**

SECTION 455

——**S. 455 — Intention in criminal cases can be gathered from acts and circumstances — Forcibly ejecting the person possessing property since long is offence — Highhanded act can be saved as bona fide claim for property — Conviction under Section 455 is not vitiated for want of specification of intention in charge.**

Held, on facts that both the accused effected their entry in the house after breaking open the lock of the house of the complainant and caused him injury. The complainant was in possession of the house from a long time before the date of occurrence.

Original intent could be gathered from the acts of the accused. AIR 1952 Hyd 38, Foll. Intention had in most cases to be inferred from the circumstances and where the probable consequence of the act alleged to be criminal trespass was to cause annoyance to the person in possession, it would be presumed that it was committed with that intention. AIR 1953 Pepsu 13 and AIR 1950 All 157, Foll. It was a question of fact whether the presumption of intent was disclosed by proof of any independent act. Where a person had been in peaceful possession of property for a fairly long time, it was not open to a claimant of the property claiming bona fide title to resort to force for the purpose of ejecting him.

In the instant case the complainant had been in peaceful possession of the property for a long time and possession of the house was taken by

causing him injury and putting him in fear thus intimidating him; also causing annoyance to him in a high-handed manner. The act of the accused was not done in the exercise of a bona fide claim of right.

Though a conviction under Section 457, Penal Code could not be sustained without specification of the intention in the charge, yet a conviction under Section 455 was not vitiated due to the want of specification of the intention in the charge. All that was required under the law was that the guilty intention under the section had to be proved but it was not necessary to prove specifically which of the several guilty intentions the accused had. AIR 1917 Cal 824, Foll.

The intention was a question of fact and the concurrent findings of the Courts below could not be disturbed in the absence of grave reason to the contrary in revision. **1962 MPLJ (Notes) 337.**

SECTION 456

——**S. 456** — Applicability — Accused entering house of a person with common intention of abducting his wife — No evidence of precaution by accused to conceal their presence — Woman abducted by the accused — Accused held guilty of an offence under Section 451. See Penal Code (1860), Section 451. **AIR 1954 All 249.**

——**Ss. 456, 441** — House trespass — Where the accused entered the house of the complainant at night on the invitation of a married woman with intent to commit an offence under Section 497 it was held that he was guilty under Section 456. See Penal Code (1860), Section 441. **1953 Cri LJ 1882: AIR 1954 All 17.**

——**S. 456** — Charge — Whether person who entered complainant's house was accused or someone else doubtful — No evidence to show what offence was actually intended to be committed by accused in trespassing into house at night — Accused held was entitled to benefit of doubt — (Criminal P. C. (1898), Section 367) — (Evidence Act (1872), Section 1). **AIR 1955 NUC (Assam) 3643.**

——**Ss. 456 and 457** — Accused charged under Section 457 — He can be convicted under Section 456 where no prejudice is caused. See Criminal P. C. (1898), Section 238. **1962 (1) Cr LJ 433: AIR 1962 Ker 81.**

——**S. 456 — Conviction under — Guilty intention need only be proved.**

To sustain a conviction under Section 456 it is not necessary to specify the criminal intention in the charge as it should be in a charge under Section 457, Penal Code. It is sufficient if a guilty intention is proved, such as is contemplated by Section 441. **1961 Ker LJ 844: 1963 Mad LJ (Cri) 124: 1961 Ker LT 835: 1962 (1) Cr LJ 433: AIR 1962 Ker 81 (83) (Pt B) (Pr 12).**

——**S. 456 — Intention — Determination of.**

A Court can, under relevant circumstances, come to the necessary conclusion that the entry of an accused in a house was effected with, an intent such as is provided by Section 441, Penal Code. The intention may be determined as well from direct evidence as from the conduct of the accused and the attendant circumstances. Therefore, if the circumstances of a particular case warrant the inference that the entry was with intent to commit any offence within the meaning of Section 441, conviction under Section 456 will be proper. ILR 22 Cal 391 and AIR 1959 Ker 146 and 33 Mad LJ 729; AIR 1918 Mad 136 (2) (FB), Rel. on. **1961 Ker LJ 844: 1963 Mad LJ (Cri) 124: 1961 Ker LT 835: 1962 (1) Cr LJ 433: AIR 1962 Ker 81 (83, 84) (Pt C) (Prs 14 to 16).**

——**Ss. 456 and 497 — House trespass with intent to commit adultery — Evidence and proof.**

For a conviction for the offence of house trespass under Section 456, Penal Code, with intent to commit adultery, it is necessary to establish the ingredients of Section 497, Penal Code, in regard to the intended act of sexual intercourse. It is necessary, therefore, to prove that the woman with whom the accused intended to have sexual intercourse was the wife of another man, that the accused had knowledge or had reason to believe that she was the wife of another man and that the intended intercourse was without the consent or connivance of the husband. 19 All 74, Rel. on; AIR 1954 All 17, Distinguished. **1956 Cr LJ 231: ILR (1956) Madh Bha 153: Madh BLR 1955 Cr 318: Madh BLJ 1955 HCR 1515: AIR 1956 Madh Bha 69 (69) (Pr 3).**

——**S. 456** — Applicability — Accused not taking any precautions to conceal his presence from one who might be said to have right to exclude accused from house — Accused cannot be convicted of offence of lurking trespass. **AIR 1955 NUC (Madh Bha) 3784 (DB).**

——**Ss. 456, 441** —Intent to annoy — Where the accused visited the complainant's house at night in response to an invitation from the latter's daughter and in view of the strained relations between the complainant and accused the latter had not the slightest intention of annoying the former and was, keenly desirous of not having his visit discovered by him — **Held,** that the charge under S. 456 could not be sustained. See Penal Code (1860), S. 441. **AIR 1954 Nag 18.**

——**Ss. 456 and 457** — Charge under Section 457 — Conviction under S. 456 — Legality — No inflexible rule exists that a person charged under S. 457 can never be convicted under S. 456 — An accused can be convicted under Section 456 though the specific offence in Section 457 is not proved against him by virtue of Section 238 Criminal P. C. if he is not prejudiced at the trial. See Criminal P. C. (1898), Section 238. **1957 Cr LJ 286 (Orissa).**

——**S. 456 — Charge under — Finding as to — Intention — Specific mention — Necessity — (Criminal P. C. (1898), Section 367).**

To sustain a charge under Section 456, Penal Code, a Court must come to a definite inference as to what was the particular intention with which the entry was effected. If the intention was to annoy the inmates such a finding should be clearly mentioned in the judgment. If, on the other hand, the intention was to commit some other offence such as adultery or unnatural offence with the inmates of the house, a finding to that effect must be recorded, based on evidence. A vague statement that the petitioner must have intended to annoy or insult the inmate would not suffice. **ILR (1956) Cut 502: 22 Cut LT 475: 1957 Cr LJ 286 (286, 287) (Pt A) (Pr 4) (Orissa).**

SECTION 457

——**S. 457** — Evidence and proof — Evidence that accused were found concealing themselves in a house of another accused — No proper question on point put to accused at the time of his examination under Section 342 Criminal P. C. — Only prosecution evidence against accused that they were in possession of stolen property — Evidence found discrepant — Evidence held short of sufficient proof — Accused held entitled to benefit of doubt — Criminal P. C. (1898), Sec-

tions 342, 367 — Evidence Act (1872), Section 3. **1956 AMLJ 12.**

——**S. 457** — Offence under, S. 3 of U. P. First Offenders' Probation Act does not apply. See U. P. First Offenders' Probation Act (6 of 1938), Section 3. **1960 All LJ 209.**

——**S. 457** — Offence of lurking house trespass or house breaking by night — Summary trial not always appropriate. See Criminal P. C. (1898), Section 260 (1) (i). **1960 All LJ 209.**

——**S. 457** — Sentence — Accused found guilty of offence under Sections 380 and 457, Penal Code, property involved being price worth Rs. 10 three months' rigorous imprisonment held sufficient. **AIR 1955 NUC (Andh Pra) 3614.**

——**S. 457 — Applicability and scope.**

The thana house is a public property and the Officer-in-charge must be presumed to have the overall charge of possession thereof. The entry of an A. S. I. attached to the thana is a legalised act only for the purpose of carrying out official duties and not for perpetration of an illegal act. Therefore, where if the prosecution case is true the accused attached to the thana as an A. S. I. entered into the office room of the thana at night taking precaution to conceal his entry and participated in the commission of the offence of the theft of the money deposited in a safe in thana by the post office it would clearly come within the scope of Sec. 457, Indian Penal Code.

Held, further that where the action of the accused amounted to an offence under Section 457, his conviction cannot be considered to be illegal merely because the principles established by English cases have also been considered. **1957 Cr LJ 1231: AIR 1957 Assam 168 (172) (Pt A) (Pr 8) (DB).**

——**Ss. 457 and 380, 411 — Applicability — Conviction — Evidence.**

Where the fact of the accused charged with offences under Sections 457 and 380, Penal Code leading the police to the spot of concealment not only proves that he knew where the incriminating articles were, but would materially support the story given by the approver that the accused took part in the offence of theft, it cannot be said that the accused could be convicted only under Section 411 and not under Section 380 or 457, because the only thing found proved against him was the discovery of the stolen articles. **1957 Cr LJ 1231: AIR 1957 Assam 168 (173) (Pt C) (Pr 14) (DB).**

——**Ss. 457 and 460** — Scope — Constructive liability — Circumstances creating constructive liability not established — Yet if it can be found that the accused had committed house breaking by night he can be convicted under Section 457 or Section 458 as the case may be. See Penal Code (1860), Section 460. **AIR 1955 NUC (Madh Bha) 3868 (DB).**

——**S. 457** — Applicability — Accused charged under Sections 457 and 380 — Evidence only of recovery of property — Effect — He is guilty under Section 411 and not under Section 457 or 380. See Penal Code (1860), Section 411. **AIR 1955 NUC (Madh Bha) 3375.**

——**Ss. 457, 380** — Articles (toda) which were alleged to have been stolen recovered on information supplied by accused — Accused claiming it as his own — Articles of common use amongst people of community of accused — Alleged owner of articles identifying them as his own — No special identification mark indicated — Weight of article not known — It is not sufficient evidence of identification — Evidence Act (1872), Section 9. **1955 MBLJ (HCR) 1194: MBLR 1955 Cri 196.**

——**S. 457** — Evidence — Accuseds' presence in house of neighbour at untimely hour at night proved — In the absence of satisfactory explanation on their part, it has to be presumed that the accused trespassed into the house with the intention of committing an offence — (Evidence Act (1872), Section 114). **AIR 1955 NUC (Mys) 1842 (DB).**

——**S. 457 — Object alleged in charge not established — Conviction for offence based on different object — Legality.**

It will not be proper for a Court to indulge in surmises to find out if the entry was made for some other purpse, say for the purpose of causing annoyance to the inmates and then to convict the accused on the basis of such surmises, especially when the facts alleged do not also support such surmises. **('59) 25 Cut LT 200.**

——**Ss. 457, 380** — Sentences — Offences under Sections 380 and 457 committed at night in industrial area — Property worth Rs. 15,000 stolen — Deterrent sentence should be passed — Sentence of one month on each count is ludicrous. **1965 BLJR 555.**

——**S. 457** — Sentence — Accused not successful in committing theft of any article — Substantive sentence of rigorous imprisonment for nine months held to be too severe and reduced to three months — Sentence of fine of Rs. 50 allowed to stand. **1961 Pat LR 86: 1961 (2) Cr LJ 540: AIR 1961 Pat 409 (410) (Pt B) (Pr 10).**

——**Ss. 457 and 459 — Applicability — Offence of lurking house trespass completed — Subsequent causing of grievous hurt — Accused should be convicted under Section 457 and not under Section 459.**

Where the accused had already effected his entry into the house after making a hole through the wall of the house, the offence of house breaking and trespass was completed and any grievous hurt subsequently caused by the accused to the deceased could not be said to be a grievous hurt caused while he was committing lurking house trespass within the meaning of S. 459, Penal Code. The accused would be guilty only under Section 457 and not under S. 459, Penal Code. AIR 1927 All 536, Rel. on. **1963 All WR (Supp) 21: 65 Pun LR 17: 1963 All Cri R 35 (Punj).**

——**S. 457** — Applicability — Person found with stolen articles immediately after theft knowing them to be stolen — Presumption of lurking house-trespass — If arises — There is no rule of law which permits, from the possession of stolen goods, a presumption of an offence of lurking house-trespass by night, as is contemplated by Section 457. See Evidence Act (1872), Section 114. **1960 Cr LJ 653: AIR 1960 Punj 286.**

——**S. 457** — Sentence — Conviction and sentence of boy of ten years — While sentencing a boy of ten years for an offence under Section 457 the Magistrate should consider the provisions of Section 31 Reformatory School Act 1897, and the rules thereunder under which the youthful offender who is below the age of 13 has to be sentenced to five years' detention in the Reformatory School. **AIR 1955 NUC (Punj) 1330.**

——**S. 457** — Evidence — Stolen property found in house in which accused was living with his wife — Presumption — **Held,** that in the circumstances the conviction of the accused under Section 457 Penal Code could not be sustained — No presumption about theft could be drawn when the possession of the stolen property itself was not clear. **AIR 1955 NUC (Raj) 2547.**

——S. 457 — Accused entering house by scaling or by climbing over wall during night, and through passage and Courtyard entering into one of rooms of the house — Offence under S. 457 held committed. **1951 Raj LW 386: ILR (1951) 1 Raj 526 (DB).**

——S. 457 — Intention must be precisely specified. **AIR 1955 NUC (Sau) 1651 (DB).**

SECTION 458

——S. 458 — Assault outside house — Offence — Even if the assault took place outside the house it does not matter if the entry into the house after making preparations for the assault is established. **AIR 1955 NUC (Assam) 5536 (DB).**

——S. 458 — "House" — House means building, tent or vessel — Building means place surrounded by walls and covered over with roof — Building connotes something exclusively used for human habitation. **AIR 1955 NUC (Madh Bha) 3868 (DB).**

——S. 458 — Constructive liability — Circumstances creating constructive liability not established — Conviction under Section 457 or Section 458 — Yet if it can be found that the accused had committed house breaking by night he can be convicted under Section 457 or Section 458 as the case may be. See Penal Code (1860), Section 460. **AIR 1955 NUC (Madh Bha) 3868 (DB).**

——S. 458 — Absence of charge — Conviction — Legality — Charge under Sections 395 and 398 — Effect.

Where the accused was charged under Sections 395 and 398 Penal Code, but the evidence showed that he committed an offence under Section 458 and there was no confusion in the mind of the accused in regard to the allegations and he tried to meet all the ingredients constituting the offence under Section 458 the case comes under Section 237, Criminal P. C. and a conviction under Section 458 is saved by Section 535 Criminal P. C. and there is no prejudice. **1959 Cr LJ 47: AIR 1959 Madh Pra 6 (7) (Pt C) (Prs 4, 6).**

——S. 458 — Accused caught entering another's house at night armed with fire-arm — Conviction under Section 458 is legal. **1959 MPLJ 949: 1959 Jab LJ 166: 1958 MPC 537: 1959 Cr LJ 47: AIR 1959 Madh Pra 6 (7) (Pt C) (Prs 4, 6).**

SECTION 459

——Ss. 459 and 457 — Applicability — Offence of lurking house trespass committed — Subsequent causing of grievous hurt — Accused should be convicted under Section 457 and not under Section 459. See Penal Code (1860), Section 457. **1963 All WR (Supp) 21 (Punj).**

SECTION 460

——S. 460 — Applicability — House-breaking by three persons — One of them causing death — It is offence under Section 460 — Every person jointly concerned in committing house-trespass or house-breaking shall be punishable as provided in the Code — AIR 1954 Mad 152, Rel. on. **1959 All WR (HC) 500: 1959 All Cr R 418: 1959 All LJ 694.**

——S. 460 — Scope — Person actually committing offence of grievous hurt — Liability of.

Section 460 makes those, who join the person who voluntarily causes or attempts to cause death or grievous hurt while committing lurking house trespass or house-breaking at night, liable to enhanced punishment for their own conduct of simply committing such lurking house-trespass by night or house-breaking by night. The person who actually acts in that manner will not be liable for that conduct of his under Section 460, Penal Code, but will be liable under other sections making that conduct an offence.

(Accused while committing lurking house-trespass by night along with others causing death— Retrial under Section 302 ordered. AIR 1952 All 369, Rel. on). **1953 All LJ 501: 1953 All WR (HC) 596: 1954 Cr LJ 168: AIR 1954 All 99 (100, 101) (Pt A) (Prs 4, 9, 10) (DB).**

——S. 460 — Applicability.

Section will not apply to the case of a single individual who alone commits lurking house-trespass and during such commission causes or attempts to cause death or grievous hurt to any person. **1953 All LJ 501: 1953 All WR (HC) 596: 1954 Cr LJ 168: AIR 1954 All 99 (100) (Pt B) (Pr 6) (DB).**

——S. 460 — Charges and conviction under Sections 460 and 304 — Criminal P. C. (1898), Section 235.

Where the charge against the accused was that he with others committed house-breaking by night and that he along with others at the time of committing this offence voluntarily caused the death of the deceased, a separate conviction under Section 304 Part II read with Sec. 34, Penal Code In addition to his conviction under Section 460, Penal Code is not sustainable. The accusation against him that in furtherance of the common intention of all he committed an offence under S. 304 read with S. 34, is a repetition of one of the ingredients of the offence under Section 460. **52 Cri LJ 390 (1): AIR 1951 Assam 60 (61) (Prs 4, 5) (DB).**

——Ss. 460, 457 and 458 — Scope — Constructive liability — Circumstances creating constructive liability not established — Accused may be convicted under Section 457 or Section 458 as the case may be. **AIR 1955 NUC (Madh Bha) 3868 (DB).**

——S. 460 — Applicability.

Section 460 can be invoked only, if, from the evidence, it is clearly possible to conclude that before the commission of the lurking house-trespass by night, or house-breaking by night, the offenders did not have a common intention of committing anything other than the above-mentioned offences and that if during the course of the commission of such an offence one of the persons causes death or grievous hurt to any person, then only, every person jointly concerned in committing lurking house-trespass by night or house-breaking by night shall be guilty of an offence under Section 460, Penal Code. If on the other evidence Court is satisfied that the accused are guilty of murder, then Section 460, Penal Code is out of place. In such case the invocation of Section 460, Penal Code is irregular.

(Accused held guilty under Section 302 read with Section 34). **1953 Mad WN 572: (1953) 2 MLJ 526: 66 Mad LW 795: 1954 Cr LJ 115: ILR (1954) Mad 602: AIR 1954 Mad 152 (154, 156) (Pt A) (Prs 5, 11) (DB).**

——S. 460 — Criminal P. C. (1898), Sections 297 and 537 — Misdirection — Offence under Section 460, Penal Code — Charge specifying name of B as causing death — Sessions Judge charging Jury that although prosecution stated that B stabbed the deceased both A and B will be liable under Section 460 — Specification of accused causing death held was not necessary — Hence,

there was no misdirection — Even if there was any defect it was curable under Section 537. **AIR 1954 Pat 37 (38) (Pt B) (Pr 6) (DB).**

——S. 460 — Applicability.

For a conviction under Section 460 it is not necessary to ascertain the identity of the person who causes or attempts to cause death or grievous hurt. **1953 BLJR 341: 1954 Cr LJ 4: AIR 1954 Pat 37 (38) (Pt A) (Pr 5) (DB).**

——Ss. 460 and 302 — Person committing house-breaking by night — Murder committed during occurrence — Punishment under Section 302 cannot be escaped.

Section 460 merely provides for constructive liability of persons committing or concerned in, inter alia house-breaking by night in the course of which death is caused by one of the offenders and it prescribes enhanced penalty for the joint offenders. To attract this section it matters little as to who actually causes the death, for, everyone jointly concerned in committing the house-breaking is liable to the enhanced penalty if death is caused in the course of the offence, no matter who is really responsible for the death. That section does not serve as an exception to Section 302, Penal Code. Therefore, if a person committing house-breaking by night also actually commits murders he must attract the penalty for the latter offence under Section 302. He cannot escape the punishment provided for murder merely because the murder was committed by him while he was committing the offence of house-breaking. Neither the language of Section 460 nor the scheme of the Penal Code nor logic and commonsense would support such contention. AIR 1954 Pat 37 and AIR 1951 Assam 60 and AIR 1936 Lah 911, Disting.; AIR 1940 Lah 281 and AIR 1954 Mad 152 and 11 Ind Cas 579 (All), Rel. on. **66 Punj LR 30: 1964 (1) Cr LJ 353: AIR 1964 Punj 130 (134) (Pt B) (Pr 14) (DB).**

SECTION 461

——S. 461 — Domestic servant decamping with master's ornaments worth Rs. 10,000—Inadequate sentence — High Court will interfere. See Penal Code (1860), Section 381. **1959 Jab LJ 738: 1959 MPC 441: 1959 MPLJ 800.**

SECTION 463

——Ss. 463, 193 — Distinction pointed out. See Criminal P. C. (1898), S. 479-A. **1964 (1) Cr LJ 555: AIR 1964 SC 725.**

——S. 463 — Person endorsing Post Office National Saving Certificates in favour of Ration Department as security — Person dying — Heir of deceased getting transfer of certificate in name of deceased and encashing them, by signing the name of deceased and attesting the same — Heir commits forgery.

If a person who has given postal certificates as security to a department by taking them in the name of the said department dies, his heir can get the said amount by following two procedures, namely, (1) after obtaining a succession certificate, he can apply to the department concerned to release the security and then apply to the postal department for getting the certificates cashed, and (2) if the current value of the certificates at the time of the death of the holder does not exceed Rs. 5,000 he can, after the expiry of three months from the date of the death of the holder, satisfy the Postmaster-General that he is the sole heir of the holder and after making the relevant declaration recover the said money. In one case he has to incur expenses for obtaining the succession certificate, and in the other he has to wait for three months and thereafter produce evidence to the satisfaction of the Postmaster-General that he is the sole heir of the deceased holder of the certificates.

On the facts, the intention of the accused at the time when he made out the false documents was to short-circuit the alternative procedure open to him and receive the money without going through the expense and trouble involved therein. On the said facts there is no doubt that the heir had made the false documents with an intention to cause wrongful gain to himself. He secured an advantage by resorting to the device by which he was relieved of the trouble of satisfying the ration authority and the postal authority that he was the sole heir of the deceased and avoided the risk of their refusal, which would have entailed further delay, In that event he had secured an uneconomic advantage; in the former case he had made the false documents dishonestly and in the latter case fraudulently. In either case he committed forgery within the meaning of Section 463 of the Penal Code. AIR 1963 SC 1572, Dist. G. S. Bansal v. the Delhi Administration, **(1963) 2 Ker LR 169: 1963 Mad WN 670: 1964 All Cri R 49: (1964) 2 SCR 470: 66 Punj LR 60: 1964 All WR (HC) 9: 1963 (2) Cr LJ 439: AIR 1963 SC 1577 (1579) (Pt B) (Pr 9).**

——Ss. 463, 465, 466 — Applicability — Document antedated — Offence.

Document bearing a certain date brought into existence on a later date — Accused held guilty of forgery. Shiv Bahadur Singh v. State of V. P., **1954 SCR 1098: 1954 SCJ 362: 1954 Cr LJ 910: 1954 SCA 1316: AIR 1954 SC 322 (330, 332) (Pt I) (Prs 17, 21, 22).**

——Ss. 463 and 464 — 'Fraud' — Intention to cause injury to another need not be proved. **1959 Cri LJ 268: AIR 1959 All 149 (157) (Pt H) (Pr 32).**

——S. 463 — Evidence Act (1872), Ss. 47, 45 — Handwriting, proof of — Forgery — Opinion of hand-writing expert — Not sufficient by itself to prove genuineness of handwriting — Substantial corroboration necessary. See Evidence Act (1872), S. 47. **(1962) 1 Andh LT 57.**

——Ss. 463, 464 and 466 — Applicability — Ingredients of offences under — Cr. P. Code (5 of 1898), Section 195 (1) — Applicability — "In relation to" — Meaning.

In order that document should be a false document within the meaning of first part of Section 464, I. P. C., it must appear that it was made with the intention of inducing the belief that such document was made by or by the authority of one who did not make it or give such authority. In other words, the document must purport to have been made, signed or sealed by a person who did not in fact make it. It is essential that the signature, seal or date of the document should be false. Section 466 will not apply to cases where a public officer or a person acting for a public officer whose duty it is to make entries in public books knowingly makes a false entry; but it would certainly apply to cases, where the document was forged by some unauthorised person with a view to make it appear that it was duly issued by a public officer. Thus the mere fact that a document contains false recitals or statements would not make it an offence of forgery within the meaning of Section 463, I. P. Code. The second part of Section 464 relates to unlawful alteration of a document in any material part by cancellation or otherwise

without any lawful authority, with dishonest or fraudulent motive, whether it has been made or executed by him or by any other person. This part does not cover a case where a separate document has been prepared by the person under lawful authority. The alteration should be in the document which had already been made or executed, whether it be by way of cancellation or in any other manner, and such alteration must be without any lawful authority. In order that the case may come within the ambit of this provision, the alleged offence should be committed in or in relation to any proceeding in Court. The section covers cases where false evidence is fabricated for a contemplated suit. All that is necessary to attract its provisions is that the offence might have come to light in the course of the proceedings itself. That Section 195, Cr. P. Code., would certainly apply if the proceedings in the Court in or in relation to which the offence is alleged to have been committed have started and the complaint must be by the Court in which those proceedings are pending. Even if the civil proceeding is disposed of by the order of the Court before the prosecution is launched, Section 195, Cr. P. Code, will still have application. It is so even where the suit has ended as a result of withdrawal, without being heard. If a complaint is lodged after the civil proceeding had been started in relation to which the offence was committed, no Court shall take cognizance of the same except on the complaint in writing by such Court as a Court to which such Court is subordinate. If there is a distinct offence disclosed by the same facts, the ingredients of which are not the same as the ingredients of an offence which is enumerated in Section 195, Cr. P. Code that section will not be a bar to the trial of that offence; but the provisions of Section 195 cannot be evaded by resorting to a mere device. **(1958) MLJ (Cri) 854: (1958) 2 An WR 489.**

——Ss. 463, 464 (First clause) — "False document" — Essentials.

To constitute an offence of forgery the document must be purported to have been signed, made or sealed by a person who did not in fact do it. It is of the essence of making a false document that the signature, seal or the date of it should be false. The fact that a document contains false recitals or statements which induce a person so deceived to part with or deliver property would not make it an offence of forgery. **1956 Andhra LT 678: 1956 Andhra WR 805.**

——S. 463 — Forgery — Interpolation — Persons who want to interpolate documents often resort to pencil writings. **1963 Cal LJ 43: AIR 1963 Cal 163 (173, 174) (Pt D) (Pr 61).**

——Ss. 463 and 471 — Material document in custody of another Court not produced by prosecution — Discharge of accused held illegal. See Criminal P. C. (1898), Section 209. **ILR (1959) 2 Cal 679.**

——S. 463 — Ingredients of offence — Intent — Necessity.

Unless there is an element of fraud, the making of a false document does not amount to a forgery because one of the intents contemplated by Section 463 is that the false documents must be made with intent to commit fraud or that fraud may be committed. **1957 Cr LJ 442: AIR 1957 Cal 222 (224) (Pt A) (Pr 6)**

——Ss. 463 and 464 — Making a false document.

What constitutes a false document, or part of a document, is not the writing of any number of words which in themselves are innocent, but the affixing the seal or signature of some person to the document or part of a document knowing that the seal or signature is not his, and that he gave no authority to affix it. In other words, the falsity consists in the document or part of a document being signed or sealed with the name or seal of a person who did not in fact sign or seal it. 7 Cal 352, Rel. on.

Until a false document is made either in whole or in part there cannot be any forgery. Mere preparation for the commission of a possible crime of forgery without a false document in part or in whole cannot itself be either forgery or abetment of forgery. **52 Cri LJ 1480: ILR (1953) 1 Cal 81: AIR 1951 Cal 581 (582) (Pt A) (Pr 8) (DB).**

——Ss. 463, 464 and 110 — A writing out petition for withdrawal of certain appeal on advice of B who had been employed as tadbirkar to look after the appeal by the appellant — Petition not signed by B but bearing endorsement in his handwriting and signed by him to the effect that he had authority to file this petition and that he was handing it over to the lawyer — Application signed by pleader and filed — B's auhority to file petition not proved — Endorsement on petition consistent with B's belief that he had such authority — B held could not be convicted of abetment of forgery. **52 Cri LJ 1480: ILR (1953 1 Cal 81: AIR 1951 Cal 581 (584) (Pt F) (Pr 13) (DB).**

——Ss. 463, 467 and 25 — Essentials of offence — Intention to defraud, what constitutes indicated. **AIR 1955 NUC (Mad) 3172 (DB).**

——Ss. 463 and 477-A — Forgery and falsification of accounts — Scope.

Since there can be no forgery within the meaning of Section 463 of the Indian Penal Code, unless there is a dishonest and fraudulent preparation of a false document or part thereof, it was necessary for the charge to state that Exhibit P-8 was a false document prepared dishonestly or fraudulently. It should have further stated if the prosecution case was that the document was prepared dishonestly whether the intention with which the document was prepared was to cause wrongful gain to some one or wrongful loss to another. A false document is made not only when the whole of it is made but even in a case where a person makes only a part of it. No act amounts to falsification of account unless as provided by Section 477-A there is an intent to defraud or there is a wilful and international falsification of accounts. **Held,** that there was no legal evidence in the case to support the conviction of the appellant. **(1965) MLJ (Cri) 463: 1967 Cri LJ 787: AIR 1967 Mys 86 (98) (Pt C) (Prs 49, 50).**

——Ss. 463, 464, 465, 466 — Person accused of making forged permits and filing them — Evidence that accused engaged himself in getting up forged permits — Writing on permits proved to be in handwriting of accused — Signature on permits not those of persons of whom they purported to be — Thumb marks on reverse of permits found to be those of accused — All these factors could be taken together and the accused held guilty of "making" these documents even though it was not proved that the signature was in his handwriting. Section 466 applies not only to cases where a document in its entirety was made but also to cases where parts of a document were made. AIR 1951 Cal 581, AIR 1953 Cal 798, Distinguished; ILR 7 Cal 352, Dissented from; AIR 1951 Pat 86; AIR 1925 Bom 327, Ref. AIR 1951 Pat 86, Relied on. **(1962) 40 Mys LJ 880.**

——S. 463 — "Forged document" — Document not proved is not. **AIR 1955 NUC (Mys) 5678 (DB).**

——**Ss. 463, 464, 465 and 29 — Essentials of offence — Printing and distributing false marriage invitations.**

The two essential elements to constitute the offence of forgery under Section 463, Penal Code are that there must be deceit or intention to deceive; secondly actual or possible injury caused to some person or persons.

What constitutes 'making' of a document, depends essentially upon the nature and the use it is intended for. Indeed the definition of a document does not necessarily require that it should be in every case to be in the writing or contain the signature or facsimile of any person but includes what is done by way of printing.

The accused got printed false marriage invitations issued under the names of two persons announcing the celebration of marriage of the accused with the complainant who was a young woman of about 20 years inheriting property worth about thirty to forty thousand. Neither the complainant nor the persons under whose names they were issued had authorised the accused to print such invitations and in fact no marriage was fixed between the accused and the complainant. The accused distributed these invitations to friends and relatives and also caused them to be published in the newspapers with intent to deceive and cause injury to the complainant.

Held, that the marriage invitations were forged instruments and fell within the definition of false documents under Section 464, Penal Code and the accused was guilty of the offence of forgery under Section 463, Penal Code. (1897) 2 Mys CCR 252, Dist. **1954 Cr LJ 1235: ILR (1953) Mys 667: 33 Mys LJ 181: AIR 1954 Mys 119 (120, 121) (Prs 5, 6).**

——**S. 463 — Gist of offence — Counterfeiting document to support legal claim.**

The gist of the offence under Section 463 is the intention to cause damage or injury and it is immaterial whether damage, injury or fraud is actually caused or not.

Even if a man has a legal claim or title to property he is guilty of forgery if he counterfeits documents in order to support it. **1953 Cri LJ 979: 1954 Nag LJ 97: AIR 1953 Nag 165 (165) (Pt A) (Pr 10).**

——**Ss. 463 and 464 — Scope — False recitals in document — Effect.**

For the purpose of the charge of forgery it is immaterial that the document contains recitals which may be false in other respect, if it is not the case of the prosecution that the signature appearing on the document is not that of the person whose signaure it purports to be. **ILR (1951) Nag 764: 1952 NLJ 13: 1952 Cr LJ 98: AIR 1952 Nag 12 (15) (Pt E) (Prs 23, 24) (DB).**

——**Ss. 463, 467 and 471** — Facts alleged making out offences under Section 193 as well as under Sections 463, 467 and 471, Penal Code — Proper procedure for filing complaint for offence under Sections 463, 467 and 471 — Procedure under Section 476 not illegal. See Cr P. Code (1898), Section 476. **1962 (2) Cr LJ 89: AIR 1962 Pat 282.**

——**Ss. 463, 419 and 464** — Forgery — Conviction for — Fraud, essential elements for—Inquiry not an essential element. See Penal Code (1860), Section 419. **ILR (1960) 2 Punj 424.**

SECTION 464

——**Ss. 464 and 468** — Accused purporting to run institutions, for holding examinations in Hindi and Sanskrit literature and Ayurveda and inviting applications — Pamphlet containing rules giving out that institutions were recognised by Government — Certificates conferring degrees issued on payment of money without holding any examinations — Institutions found to be bogus and not in existence — Certificates found to be ante-dated and containing roll numbers and divisions — Accused held guilty of offence under Section 420, on ground of fraudulent representation that institutions were recognised by Government — Offence under Section 468 held not made out on ground that certificate although false were not made dishonestly or fraudulently vis-a-vis recipients of certificate. See Penal Code (1860), Section 420. **1962 (2) Cr LJ 722: AIR 1962 All 582 (DB).**

——**S. 464 — Document ante-dated to defeat provisions of Act — Whether amounts to making false document.**

Ante-dating a document to defeat the provisions of an Act, in absence of proof that this was done dishonestly or fraudulently regarding the persons affected by it, is not making a false document under Section 464. **1962 (2) Cr LJ 722: 1962 All LJ 639: 1962 All WR (HC) 507: 1962 All Cr R 285: AIR 1962 All 582 (585) (Pt E) (Pr 25a) (DB).**

——**Ss. 464, 463** — Fraud — Intention to cause injury need not be proved. See Penal Code (1860), Section 463. **1959 Cri LJ 268: AIR 1959 All 149.**

——**S. 464** — Applicability — Ingredients to offences under indicated — Cr. P. Code (5 of 1898), Section 195 (1) — Applicability — "In relation to" — Meaning — Document to be a false document must purport to have been made, signed or sealed by a person who did not in fact make it. See Penal Code (1860), Section 463. **(1958) MLJ (Cri) 854: (1958) 2 Andh WR 489.**

——**S. 464 (First Clause)** — "False document" — Essentials, indicated. See Penal Code (1860), Section 463. **1956 Andh WR 805: 1956 Andh LT 678.**

——**Ss. 464, 465 — Essential ingredients — 'By whom or by whose authority he knows that it was not made'.**

Under Section 464, I. P. Code, what is essential is that the accused person must make a document with the intention of making it to be believed that it was signed by or by the authority of some one else while he knows that it was not so made or authorised by that person.

Where the accused did not make the bills purporting to be made by or authorised by some person although his intention in issuing the bills may be fraudulent and he may be punishable for some other offence, no offence under Section 465 can be said to have been committed. (1888) ILR 12 M 114, Relied on. **1955 Cr LJ 769: 1954 Mad WN 1013: 1954 Andh LT (Cri) 49: (1954) 2 MLJ (Andhra) 103: AIR 1955 Andhra 82 (83) (Pt A) (Pr 3).**

——**S. 464 — Applicability — Document signed at a time at which executant knows it was not signed.**

Where in an income-tax proceeding relating to assessment years 1946-47 the original return is found removed from the file and new one substituted on forms which admittedly are printed on the 4th of May, 1949 it is clear that the return in question is ante-dated; but if there is no evidence to suggest that the date is in the handwriting of the assessee or that the date was there

when he put his signatures on the return, then no case is made out that the assessee dishonestly or fraudulently executed the return with the intention of causing it to be believed that it was signed by him at a time at which he knew that it was not signed by him. **1957 Cr LJ 442: AIR 1957 Cal 222 (224) (Pt B) (Pr 7).**

——S. 464 — Applicability — Making a false document.

A person to be guilty of forgery under the first clause of S. 464 must make a false document or part of a false document and not merely cause it to be made. 17 CWN 354, Rel. on; 7 Cal 352 and AIR 1951 Cal 581, Referred to.

Facts proved by prosecution not sufficient to hold accused guilty of making a false document— Jury recording a verdict of guilty due to Judge's failure to explain the meaning of "making a false document" — **Held,** there was non-direction amounting to misdirection which induced the erroneous verdict of the jury and hence the conviction and sentence which followed must be set aside. **1953 Cr LJ 1826: 1953 All WR (Sup) 105: 57 CWN 891: AIR 1953 Cal 798 (799) (Prs 4, 5) (DB).**

——Ss. 464, 463 — Making a false document — Falsity consists in the document or part of a document being signed or sealed with the name or seal of a person who did not in fact sign or seal it — Until a false document is made either in whole or in part there cannot be any forgery. See Penal Code (1860), Section 463. **52 Cri LJ 1480: AIR 1951 Cal 581 (DB).**

——Ss. 464, 463 and 110 — A writing out petition for withdrawal of certain appeal on advice of B who had been employed as tadbirkar to look after the appeal by the appellant — Petition not signed by B but bearing endorsement in his handwriting and signed by him to the effect that he had authority to file this petition and that he was handing it over to the lawyer — Application signed by pleader and filed — B's authority to file petition not proved — Endorsement on petition consistent with B's belief that he had such authority — B held could not be convicted of abetment of forgery. See Penal Code (1860), Section 463. **52 Cri LJ 1480: AIR 1951 Cal 581 (DB).**

——S. 464 — Absence of authority — Proof of intention.

In every case of forgery, where the question of authority is raised, it is essential to prove not only lack of authority but also the dishonest intention with probably more than usual care. The reason is that mere abuse of authority would not necessarily lead to a conclusion that there is a forgery. Abuse of authority can be in various forms and every abuse of authority is not a crime. It is not forgery where the act is done under the honest belief that the party doing it had a right to do it although in point of fact he had really no such authority. **1952 Cri LJ 1480: ILR (1953) 1 Cal 81: AIR 1951 Cal 581 (583) (Pt B) (Pr 9) (DB).**

——Ss. 464, 467 — False recitals or false statement in document is not forgery — Attesting forged signature is not forgery. See Penal Code (1860), Section 467. **1961 (2) Cri LJ 76: AIR 1961 Gul 117.**

——S. 464 — Criminal P. C. (1898), Section 96 — Search warant — Forgery — Document relating to property — Production of property in Court not necessary. See Criminal Procedure Code (1898), Section 96. **1956 MBLR (Cri) 181.**

——Ss. 464 and 465 — 'Fraudulently'.

From Sections 29, 453 and 464, Penal Code, it is clear that in order to sustain a charge under Section 465, it is necessary that the act of the accused must either be dishonest or fraudulent.

The term 'fraudulently' in Criminal Law means that there must be (1) deception actual or intended; (2) and injury or risk of injury though not to any particular person. (Case-law discussed).

A tenant applied to the Electricity Department for fixing electric connection in his premises As the Department according to its rule of practice would not give him the connection without the consent of the landlord the tenant by a forged letter concocted the consent.

Held, that though apparently no injury or loss to the Electric Department was discernible because the Department would get the lawful charges for the electricity consumed, yet it was certain that in making a rule of practice which required a consent of the owner of premises the Department intended to save itself from risk of obstruction or unnecessary litigation with the unwilling owner which may result in some injury and, therefore, the element of injury or risk of injury was present in the case. The considerations that the tenant would be paying for the electricity consumed and that the landlord would not materially suffer if an electric connection which was an ordinary modern amenity was fixed in the leased portion of his house were those that may affect the sentence, but not the criminality of the Act. **1954 Cr LJ 788: ILR (1953) MB 204: AIR 1954 Madh Bha 73 (76) (Prs 23, 24).**

——S. 464 — "Forges a document" — Evidence — Proof of — Two persons jointly charged for the same offence — Acquittal of one of them on mere statement under Section 342, Criminal P. C. — Effect.

The two elements which impress upon a document the character of a false document are these. It must be a document dishonestly or fraudulently made and it should have been made with the intention of causing a belief that it was made or executed by or by the authority of a person who did not make or execute it and with the knowledge that it was not so made or executed.

A false document is made not only when the whole of it is made but even in a case where a person makes only a part of it, so that where the charge is of forging a false resolution of a Society, the person who merely writes out the body of the resolution can be said to have prepared a false document within the meaning of Section 464. (1962) 40 Mys LJ 880, Foll.

As the charge against the accused 1 was of forging a resolution of the Board of Directors of the society of which he was only an Assistant Secretary, he could be convicted of the offence of forgery only if the prosecution proved that when the forged copy was prepared the accused knew that the resolution was not passed by the Directors at all.

In the instant case, from the materials on the record, it was clear that it was no part of the Assistant Secretary's duties to keep himself acquainted with the resolutions of the Board of Directors or to post himself with knowledge about the resolutions passed by them from time to time but there was undisputed evidence that the person who would be conversant with the resolutions of the Board of Directors was the Ex-officio Secretary, Accused 2, who was acquitted by the trial Court on his own statement under Section 342, Criminal P. C. It was not possible to say merely by reason of the fact that the resolution referred to therein was proved to be a fictitious resolution, that Accused 1 had knowledge

that it was a fictitious resolution, especially when Accused 2 whose duty it was to attend the meetings of the Board of Directors and to be present in those meetings authenticated the same to be a true copy of the resolution, and, therefore, the conviction of Accused No. 1 was not proper.

Where two accused were charged with having in concert brought into existence a forged document and each one of them tried to shift the blame on the other, the exculpation of one and not of the other merely on the statement made by him under Section 342 of the Code of Criminal Procedure, could not be said to have the support of either reason or justice. **1965 Mad LJ (Cri) 463.**

——**S. 464 — Forgery — Making of false document — If it should be proved that the accused had written either the whole or part of the document in question or that he had signed or sealed or executed it.**

The word 'makes' in Section 464, Penal Code, does not mean anything other than 'makes' that is to say, 'creates or brings into existence'. AIR 1951 Patna 86, Approved. A person is said to make a false document, who dishonestly or fraudulently signs, seals or executes a document or a part of a document or makes any mark denoting the execution of a document with the intention mentioned in Section 464, Indian Penal Code. 'Document' is defined under Section 29, Indian Penal Code. ILR 7 Cal 352 and AIR 1953 Cal 798, Not approved: AIR 1925 Bom 327 and AIR 1951 Patna 86, Foll. **(1964) MLJ (Cr) 395: 40 Mys LJ 880.**

——**Ss. 464, 463, 465, 466** — Person accused of making forged permits and filing them — Evidence that accused engaged himself in getting up forged permits — Writing on permits proved to be in handwriting of accused — Signature on permits not those of persons of whom they purported to be thumb marks on reverse of permits found to be those of accused — All these factors could be taken together and the accused held guilty of making these documents even though it was not proved that the signature was in his handwriting — Section 466 applies not only to cases where a document in its entirety was made but also to cases where parts of a document were made. See Penal Code (1860), Section 463. **(1962) 40 Mys LJ 880.**

——**S. 464** — Applicability — Making a false document. **Held,** that the marriage invitations were forged instruments and fell within definition of false documents under Section 464 and accused was guilty of forgery under Section 463. See Penal Code (1860), Section 463. **1954 Cri LJ 1235: AIR 1954 Mys 119.**

——**S. 464 — False document — Proof of — Signatures on sale form genuine — No evidence that it was not executed on that date — Sale not taking place on that date — Effect.**

For the purpose of the charge of forgery, it is immaterial that the document contains recitals which may be false in other respects.

Thus where the prosecution does not allege that the signatures on a document purporting to be a sale form evidencing auction sale of certain cattle in a cattle-pound are not those of persons whose signatures they purport to be nor is there any evidence that the document was made on any day other than the date shown on it, the mere fact that no sale did in fact take place on that date does not render it a false document within Section 464, Penal Code. AIR 1924 Cal 536, Ref. **1952 Cri LJ 98: 1952 Nag LJ 13: ILR (1951) Nag 764: AIR 1952 Nag 12 (15) (Pt E) (Prs 23, 24) (DB).**

——**Ss. 464, 467, 468, 471, 420 — Forged document, what is — False bill made, signed and submitted by accused for work done as Assistant Public Prosecutor and encashed — Bill held 'forged document' although signatures on it were not forged — Accused held guilty under Sections 467, 471 and 420 — Case not fit to be dealt with under Probation of Offenders Act, 1958 — Applicability of Sections 3 and 4 — Appending signatures to official receipt for payment of money for Government work — Presumption — Evidence Act (1872), Section 114, Illus. (e).**

A document is forged if it is a false document within the meaning of Section 464. Under this section, the making of a false document is not restricted to the act of signing it. The section is wide enough to cover the making of a document, which really means creating or bringing it into existence, provided the act of signing or marking the document is done dishonestly or fraudulently and with the intention of causing it to be believed that the document or any part of it was made, signed, sealed or executed by the authority of a person, by whose authority the maker knows that it was not made, signed, sealed or executed. The fact that a document bearing even the genuine signature of the maker may be a forged document is apparent from illustration (e) appended to Section 464, Penal Code, as also Illustration (d) to Explanation 1 thereof. AIR 1951 Pat 86, Rel. on.

Held, (i) that the intention of the accused in making and signing the bill, was to cause it to be believed that he had done so by or under the authority of the Deputy Commissioner which to his knowledge never existed. It was, therefore, a false document within the meaning of Section 464, which the accused had made and signed. The accused also successfully caused wrongful loss to the State and wrongful gain to himself by his acts. Having forged the bill for the purpose of cheating, he had used the same as genuine and had by his act cheated the State officers concerned. The accused was, therefore, guilty under Sections 467, 468, 471 and 420, Penal Code. The accused did have the requisite mens rea for commission of the offence of cheating under Section 420 as well as the other offences under Sections 467, 468 and Section 471/467. AIR 1957 SC 466, Disting. (ii) Considering the serious nature of the offences found to have been committed by the accused, the case was not fit to be dealt with under the Probation of Offenders Act, 1958. Sec. 3 did not apply to the facts of the case and Section 4 could not be called in aid of the accused.

Per Anant Singh, J.— The mere assertion of a false claim in a document under one's own signature supported by false and got-up references with a dishonest intention to defraud any one as it was done in this case, would surely amount to making of false document within the meaning of Section 464 of the Penal Code. **1963 (2) Cr LJ 36: AIR 1963 Pat 262 (265 to 268) (Pt A) (Prs 11 to 15, 19, 20) (DB).**

——**S. 464 — Proceeding under Section 144, Criminal P. C. between raiyat and his bataidar — Ante-dated deed of exchange of title between him and another raiyat but not containing recital as to past possession produced by raiyat — Raiyat is not guilty under Section 464.**

The fundamental pre-requisite of Section 464, Penal Code, is that the document must be fraudulent in the sense that it has direct tendency to injure the interest of a third person. Where in a proceeding between a raiyat and his bataidar under Section 144, Criminal P. C. the raiyat pro-

duces a deed of exchange of title between him and another raiyat but which contains no recital as to past possession, the deed of exchange even if ante-dated cannot be said to have any prejudical effect upon the interest of the bataidar who claims to be in possession and, therefore, the deed of exchange, even if ante-dated, cannot amount to a false document under Section 464, Penal Code. **1955 BLJR 453: 1956 Cr LJ 647: AIR 1956 Pat 154 (158) (Pt B) (Pr 12).**

——S. 464 — 'Makes' — Meaning of — (False document — Making of).

Making of a document does not necessarily mean signing or otherwise executing it. It only means creating or bringing into existence. **52 Cri LJ 771: AIR 1951 Pat 86 (88) (Pt A) (Pr 10) (DB).**

——Ss. 464, 419, 465 — Forgery — Conviction for — Fraud, essentia lelements of — Inquiry not an essential element. See Penal Code (1860), Section 419. **ILR (1960) 2 Punj 424.**

[**Reversed** in AIR 1963 SC 1572.]

——Ss. 464, 466, 167 — False document — Making of wrong entries initially not to constitute false document.

To bring the case within Clause (1) of Section 464, Penal Code, it is necessary to establish that the accused intended to induce a belief that a document was made, signed, sealed or executed by the authority of a person who did not make, sign, seal or execute it or that it was made, signed, sealed or executed at a time when it was not so done. Evidently Section 464 cannot be invoked to cases where a public officer knowingly makes false entries initially in the public record on his own authority. Where the prosecution case is not one of subsequent alteration of the document but is essentially one of making initial incorrect and unauthorised entries in the revenue record the making of such entries cannot be said to constitute the making of false document under Section 464. AIR 1914 Lah 586, Dist.; AIR 1955 Andhra 82, Rel. on. **1964 Raj LW 501: 1965 (1) Cri LJ 213: ILR (1964) 14 Raj 1100: AIR 1965 Raj 9 (10) (Pt B) (Pr 5).**

——Ss. 464 and 465 — Scope — Accused making unauthorised alteration in T. A. Bill — No dishonest intention or intention to defraud any one — Offence of forgery is not committed. **AIR 1955 NUC (Sau) 5991.**

SECTION 465

——Ss. 465, 463, 466 — Document ante-dated.

Document bearing a certain date brought into existence on a later date — Accused held guilty of forgery. **AIR 1954 SC 322 (330 to 332) (Pt I) (Prs 17, 21, 22).**

——Ss. 465 and 471 — Demolition of construction — Order obtained by accused of Vice-Chairman of Municipality to stay demolition — Accused presenting it to Municipal Overseer — Certain words found interpolated in the order — Prosecution failing to show how accused was interested in interpolating those words — Benefit of doubt given to accused — His conviction under Sections 465 and 471 was set aside **(1951) 25 AMLJ 89.**

——S. 465 — Evidence of handwriting expert — Sufficiency of — Conviction for forgery — **Held,** opinion of witness which was not based on any scientific examination of documents but merely on a comparison of shape and design of various writings, could hardly be considered reliable and sufficient. **1957 All WR (HC) 558.**

——Ss. 465, 477 and 409 — Criminal P. C. (1898), Section 197 — Offence committed not as public duty nor while acting in discharge of official duty — Sanction not necessary. See Criminal P. C. (1898), Section 197. **AIR 1955 NUC (All) 2727.**

——Ss. 465, 193 — Criminal P. C. (1898), Section 195 (b) — Offence under Section 193, Penal Code — Absence of complaint by Court — Accused cannot be tried for offence under Section 465, Penal Code. See Criminal P. C. (1898), Section 195 (b). **51 Cri LJ 1235: AIR 1950 All 465.**

——Ss. 465 and 464 — Essential ingredients stated — Accused not making bills purporting to be made by or authorised by some person — No offence under Section 465 held committed, though his intention in issuing bills might have been fraudulent and he might have committed other offence. See Penal Code (1860), Sec. 464. **1955 Cri LJ 769: AIR 1955 Andhra 82.**

——Ss. 465, 419, 420 — Charge under — Acquittal under Sections 419 and 420 — Conviction under Section 465, held not legal — Section 465 requires fraudulent intent — Magistrate having refused to believe only evidence of fraud and dishonesty implied in charges under Sections 419 and 420, could not convict under Section 465 — Charges had to be considered as one wholly and not compartmentally. See Penal Code (1860), Section 419. **1955 Cri LJ 1246: AIR 1955 Cal 473 (DB).**

——Ss. 465 and 471 — Accused forging gift deed in his favour — Part of property comprised in deed sold by accused under sale deed — Gift deed in respect of remaining property — Accused cannot be convicted under Sections 465 and 471 with respect to latter two deeds. **1959 Ker LJ 651: ILR (1959) Ker 749: 1959 Ker LT 829: 1960 Cr LJ 75: AIR 1960 Ker 29 (30) (Pt A) (Pr 5) (DB).**

——S. 465 — Sentence — Amount involved being only Rs. 100 — Crime committed more than six years ago — Accused being under suspense of protracted trial — Sentence of 5 years' rigorous imprisonment held unduly severe and reduced to one year. See Penal Code (1860), Section 409. **(1959) Ker LR 847.**

——S. 465 — Criminal P. C. (1898), Ss. 516-A and 520 — Offence of forgery — Production of property covered by forged document in Court is not essential — Order refusing to direct surety to produce property in Court not interfered with in revision. See Criminal P. C. (1898), S. 516-A. **1956 MBLJ (HCR) 1445.**

——Ss. 465, 464 — "Fraudulently"—It means that there must be (1) deception actual or intended; (2) and injury or risk of injury though not to any particular person. See Penal Code (1860), Section 464. **AIR 1954 Madh Bha 73.**

——S. 465 — Evidence of handwriting expert without corroboration held was insufficient to bring home the guilt to the accused — Court merely considering similarities between disputed and admitted handwriting but not comparing dissimilarities — Evidence held wholly insufficient for conviction — Evidence Act (1872), Sec. 45. **(1962) 40 Mys LJ 880.**

——Ss. 465, 463, 464 and 466 — Person accused of making forged permits and filing them — Evidence that accused engaged himself in getting up forged permits — Writing on permits proved to be in handwriting of accused — Signature on permits not those of persons of whom they purported to be — Thumb marks on reverse of permits found to be those of accused — All these factors could be taken together and the accused

held guilty of making these documents even though it was not proved that the signature was in his handwriting — Section 466 applies not only to cases where a document in its entirety was made but also to cases where parts of a document were made. See Penal Code (1860), Section 463. **(1962) 40 Mys LJ 880.**

——Ss. 465, 463, 464 and 29 — Forgery — Essentials — Printing and distributing false marriage invitations.

Held, that the marriage invitations were forged instruments and fell within definition of false documents under Section 464 and accused was guilty of forgery under Section 463. **AIR 1954 Mys 119 (120, 121) (Prs 5, 6).**

——Ss. 465, 463, 471 — "Forged document" — Document though antedated brought into existence at later date — Offence.

A person bringing into existence a document, bearing a certain date, but brought into existence on a later date, by antedating it, is guilty of the offence of forgery under Section 465: AIR 1954 SC 322, Rel. on.

Thus the fact that a patta, purported to have been executed in 1906, was affixed with a revenue stamp, bearing not the face of King Edward the Seventh, who was then the reigning Emperor of India, but the face of either King George the Fifth or King George the Sixth, who were the reigning Emperors after 1906, ex facie, showed that it was a forged document within the meaning of Section 471 read with Sections 463 and 470 of the Penal Code. **1961 BLJR 369: 1961 (2) Cri LJ 139 (142) (Pt B) (Prs 12, 13) (Patna).**

——Ss. 465, 464 — Accused making unauthorised alteration in T. A. Bill — No dishonest intention or intention to defraud any one — Offence of forgery is not committed. See Penal Code (1860), Section 464. **AIR 1955 NUC (Sau) 5991.**

SECTION 466

——Ss. 466, 463, 465 — Document antedated.

Document bearing a certain date brought into existence on a later date — Accused held guilty of forgery. Shiv Bahadur Singh v. State of Vindh Pra, **1954 SCJ 362: 1954 Cri LJ 910: 1954 SCA 1316: 1954 SCR 1098: AIR 1954 SC 322 (330, 332) (Pt I) (Prs 17, 21, 22).**

——Ss. 466 and 471 — Complaint under, in respect of offence under Section 193, I. P. C. — Accused can be convicted of offences under Section 466/471, I. P. C. See Cr. P. Code (1898), Section 476. **1962 (1) Cr LJ 229: AIR 1962 All 132 (DB).**

——Ss. 466, 417 and 511 — Criminal P. C. (1898), Sections 197 (1), 207-A, 208 and 209 — Madras Village Panchayats Act (10 of 1950), Section 106 — Complaint by President of Panchayat Board against P, public servant under Sections 411 and 511 — Complainant alleging that P intentionally deceived him and thereby dishonestly and fradulently induced him to sign on some blank paper — Magistrate taking complaint on file under Section 466 of Penal Code — P filing petition for dismissal of complaint for want of proper sanction under Sec. 197 (1) of Cr. P. C. and S. 106 of Madras Act (10 of 1950) — **Held,** Sections 197 (1) and 106 both contemplated same requirements — Substance of offence alleged in complaint was cheating under Section 477, because if signature of President in document had not been obtained by P, by cheating him, there would not have been offence of forgery regarding document — Offence of forgery could not be treated as one under Section 466 separated from element of cheating which is substance of complaint — Act of cheating had no reasonable connection with discharge of official duties of P and therefore no sanction for his prosecution was necessary for offences alleged whether under Section 197 (1) or Section 106 — This was unaffected by fact that case was taken on file under Section 466 — Procedure to be followed by Magistrate was not under Section 207-A but under Section 209: AIR 1960 SC 266, Foll. See Criminal P. C. (1898), S. 197 (1). **ILR (1963) AP 1040.**

——S. 466 — Criminal P. C. (1898), Section 423 — Retrial — When will not be ordered — Offence of using a forged document is a serious matter, and if proved, accused ought not to escape — But having regard to inordinate and inexcusable delay in launching prosecution and the accused having already suffered some portion of imprisonment, retrial not ordered. See Criminal P. C. (1898), Section 423. **1960 Cri LJ 889: AIR 1960 Andh Pra 375.**

——S. 466 — Part B States (Laws) Act (1951), Section 6 — Offence committed in Hyderabad State before commencement of Act — Trial must be held under Hyderabad Codes — (Hyderabad Penal Code (5 of 1324-F), Section 395). See Part B States (Laws) Act (1951), Section 6. **1960 Cri LJ 889: AIR 1960 Andh Pra 375.**

——S. 466 — Applicability.

Section 466 will not apply to cases where a public officer or a person acting for a public officer whose duty is to make entries in public books knowingly makes a false entry. See Penal Code (1860), Section 463. **(1958) MLJ (Cri) 854: (1958) 2 Andh WR 489.**

——Ss. 466, 464 and 463 — Person accused of making forged permits and filing them—Evidence that accused engaged himself in getting up forged permits—Writing on permits proved to be in hand writing of accused — Signature on permits not those of persons of whom they purported to be — Thumb marks on reverse of permits found to be those of accused — All these factors could be taken together and the accused held guilty of making these documents even though it was not proved that the signature was in his handwriting — Section 466 applies not only to cases where a document in its entirety was made but also to cases where parts of a document were made. See Penal Code (1860), Section 463. **(1962) 40 Mys LJ 880.**

——S. 466 — Whoever forges a document purporting to have been made by a public servant in his official capacity, is guilty of an offence under Section 466, I. P. C. **(1962) 40 Mys LJ 880.**

——Ss. 466, 471 — Accused securing service on allegations that he had passed certain examinations and that he was discharged person from Army and Police service — Accused producing certificates in support — Certificates found forged and not genuine — Accused held guilty of offence under Section 471 — Sentence of six years' rigorous imprisonment and fine upheld. See Penal Code (1860), Section 471. **1965 (2) Cri LJ 394: AIR 1965 Pat 364.**

——Ss. 466, 464, 167 — False document — Making of wrong entries initially not to constitute false document. See Penal Code (1860), Section 464. **1965 (1) Cri LJ 213: AIR 1965 Raj 9.**

——S. 466 — Scope — Expression "to institute . . . . . Judgment" refers to 'authority' and not to other documents.

The section seeks to treat forgery of certain specified kind of document as an aggravated form of offence. The expression 'to institute or defend a suit, or to take any proceedings therein, or to confess judgment' has evidently to be associated with the words 'authority', preceding the expression. The expression cannot be associated with the other documents indicated in the section. **1964 Raj LW 501: 1965 (1) Cri LJ 213: ILR (1964) 14 Raj 1100: AIR 1965 Raj 9 (10) (Pt A) (Pr 4).**

——Ss. 466, 471 — Junagadh Influx From Pakistan Act (35 of 1948), Section 4 — Conviction under, for entering Junagadh State from Pakistan with alleged forged permit — **Held,** on evidence that conviction was not sustainable. **3 Sau LR 83: AIR 1950 Sau 9 (10) (Pr 5) (DB).**

SECTION 467

SYNOPSIS

(Penal Code (1860), S. 467.)

1. Scope.
2. "Forged document".
3. "Purports to be a valuable security".
4. "Receipt acknowledging the payment of money".
5. Evidence and proof.
6. Procedure.
7. Conviction and sentence.

1. Scope.

——Ss. 467 and 464 — Applicability — False recitals or false statement in document — Attesting forged signature — Offence.

Before there can be conviction for forgery, a false document must have been made as defined in Section 464. The mere making of a false statement in a document would not come within Section 464, and would not amount to forgery.

A person who merely attests a forged signature on a document of receipt cannot be convicted of forgery. Before an attestation can amount to forgery, one of the essential requirements is that it must be made or signed by a person by whom it does not purport to be made or signed. AIR 1929 Cal 539, Not foll.

The Explanation to Section 464 explains that the making of a false document amounts to forgery even if the false document made is in the name of a fictitious person. Explanation 2 does not otherwise widen the scope of Section 464. The main part of Section 464 has to be looked into to see if attestation amounts to making a false document. **(1961) 2 Guj LR 481: 1961 (2) Cr LJ 76: AIR 1961 Guj 117 (119, 120) (Pt B) (Prs 9a, 10, 11).**

——S. 467 — Forgery established — Inference as to offender — Person deriving benefit is the offender.

Once it is established that the signature of 'A' is a forgery and it is further established that the only person who benefited from the forgery is 'B' it is impossible to think of any alternative theory about someone else having committed the forgery without the knowledge and instigation of 'B'. Forgeries are not committed for the sake of mere joke and the reasonable view is that they are committed either by or at the instance of the person who derives some benefit from them. **(1960) 2 Ori JD 261.**

——Ss. 467, 420, 471 — Ingredients of — Physical presentation of forged document — Not an important ingredient — Reference to presentation of chalans in charge held inconsequential. See Penal Code (1860), Section 420. **1961 (2) Cri LJ 677: AIR 1961 Pat 451 (DB).**

——Ss. 467 and 471 — Forgery when complete — Forgery of document and its use as genuine form distinct offenecs — Criminal P. C. (1898), Sections 233, 234.

The offence of forgery or abetment thereof is complete, if a document, false in fact, is made with intent to commit a fraud: AIR 1926 Cal 581, Rel. on.

Forgery of a document or the abetment of forgery, as the case may be, and the use of the forged document as genuine, form distinct and different offences even though they are committed by one and the same person: AIR 1926 Cal 581; AIR 1936 Rang 174 and AIR 1932 Cal 545, Rel. on.

When the forger himself uses the forged document as genuine, there is no prohibition against convicting him of both offences. **1949 TCLR 113 (DB).**

2. "Forged document".

——S. 467 — Making a false document — What constitutes — Document purporting to have been issued under authority of high official — Accused getting them typed as though they purported to have been issued by such authority though in fact he knew that they were not so issued — Offence.

The definition of making a false document is very wide. It is not confined only to the execution of a document. It refers to dishonestly or fraudulently making, signing, sealing or executing a document or a part of a document with the intention of causing it to be believed that such document or part of a document was made, signed, sealed or executed by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed or executed or at a time at which he knows that it was not made, signed, sealed or executed.

Held, that the act of the accused in getting the matters contained in Exhibits P-1 and P-15 typed as though they were issued on the authority of the person who was purported to have issued them was sufficient to constitute making of a false document within the definition of Sec. 467 of the Indian Penal Code. **1963 Mys LJ (Supp.), 248 (DB).**

——Ss. 467, 468, 471, 420 — Forged document, what is — False bill made, signed and submitted by accused for work done as Assistant Public Prosecutor and encashed — Bill held 'forged document' although signatures on it were not forged — Accused held guilty under Sections 467, 471 and 420 — Case not fit to be dealt with under Probation of Offenders Act, 1958 — Applicability of Sections 3 and 4 — Appending signature to official receipt for payment of money for Government work — Presumption. See Penal Code (1860), Section 464. **1963 (2) Cri LJ 36: AIR 1963 Pat 262.**

——Ss. 467, 405, 409 and 477-A — Property — Meaning — Includes things purchased with money entrusted — A purchasing paddy from B on behalf of Government with the amount entrusted for procuring paddy — In place of voucher given by B, A fabricating false voucher for a lesser amount and forging on it B's signature — A held guilty under Section 467. See Penal Code (1860), Section 405. **1955 Cri LJ 1539: AIR 1955 Trav Co 271 (DB).**

3. "Purports to be a valuable security".

——Ss. 467, 30 — Share certificates, list of shares and deeds of transfer of shares are valuable

securities — Even if document purports to be a valuable security, it is sufficient — Assuming that transfer deeds cannot be acted upon for want of necessary entries, inasmuch as they purport to be documents whereby a legal right is being transferred, they purport to be valuable securities and are valuable securities within meaning of Section 467. **ILR (1962) 1 All 451.**

——**Ss. 467 and 471** — 'Valuable security' — Certificate in 'K' form prescribed under Section 9, Bombay Sales Tax Act is valuable security — Accused using as genuine forged 'K' form for purchasing cloth free of sales tax — Conviction under Sections 467 and 471 held proper. See Penal Code (1860), Section 30. **1960 Cr LJ 461: AIR 1960 Bom 146 (DB).**

——**Ss. 467 and 30** — "Valuable security" — Proposal of insurance duly signed by proposer stating that in event of proposal being accepted and proposer failing to take up policy, he shall pay to company the initial expenses incurred by it in connection with proposal — Is sufficient to make proposal a valuable security. See Penal Code (1860), Section 30. **1961 (2) Cri LJ 98 (Ker).**

4. "Receipt acknowledging the payment of money".

——**Ss. 467, 109 — Accused forging thumb impression of payee of money order—Money not received by payee — Burden of proof.**

Where the accused was prosecuted under Section 467, I. P. C. on the allegation that he had forged the thumb impression of the payee by putting his own thumb impression in token of payment to payee and it was established that the amount covered by the money order was not paid to the payee it is for the accused to prove that he did pay the amount covered by the money order to the payee and that the impression found on that voucher is that of the payee. If he fails to do that, he will be liable under Section 467 read with Section 109, I. P. Code. **1956 Mad WN 738: (1956) 2 Mad LJ 427: 1957 Cr LJ 73 (2): AIR 1957 Mad 47 (48) (Pt B) (Pr 5).**

——**S. 467** — Postman himself taking delivery of V. P. Parcels, by signing receipts himself, instead of delivering them to addressees — Postman held guilty under Sections 409, 467 and 471. See Penal Code (1860), Section 23. **1959 Cri LJ 881: AIR 1959 Mys 185 (DB).**

——**Ss. 467, 471 and 109** — Prevention of Corruption Act (1947), Sections 5 (1) (c) and 5 (2) — Payment of money order by village Postmaster to wrong person — Acknowledgment purporting to be of addressee obtained and attested by witness — Postmaster held not guilty under Sec. 471 or under Sections 5 (1) (c) read with Section 5 (2) — Attesting witness not guilty of charge under Section 467/109. See Penal Code (1860), Section 471. **(1962) 4 Ori JD 4.**

——**Ss. 467, 30** — Discharge receipt signed by fictitious nominee in insurance policy is on the face of it a valuable security within meaning of Section 30, or a "document purporting to be an acquittance or receipt acknowledging payment of money" within meaning of Section 467. **AIR 1956 Vindh Pra 30 (32) (Pt B) (Pr 7).**

5. Evidence and proof.

——**S. 467** — Criminal P. C. (1898), Sections 195 (1) (b) and 195 (1) (c) — Expressions "in relation to" in Section 195 (1) (b) and "in respect of" in Section 195 (1) (c) — Meaning of — Sale deed got executed fictitiously by three parties — One of them starting mutation proceedings on basis of such sale deed — Dismissal of mutation application — Private complaint under Sections 467 and 471, Penal Code — Bar of — Offence was in relation to mutation proceedings — Section 195 (1) (b) held applied — Even if allegations disclosed offences under Sections 467 and 471 and not under Section 193, Penal Code, private complaint would be barred under Section 195 (1) (c). See Criminal P. C. (1898), Section 195 (1) (b). **1965 All WR (HC) 82: 1965 All Cri R 93: AIR 1966 All 124.**

——**S. 467 — Evidence Act (1872), Section 133 — Corroboration — Sufficiency.**

The degree of suspicion which will attach to the evidence of an accomplice varies according to the extent and nature of the complicity. It was held that there was sufficient corroboration of the evidence of accomplice and the accused was guilty under Section 467. **1957 Cri LJ 1424: AIR 1957 Mad 796 (798) (Pt B) (Pr 7).**

——**Ss. 467, 471, 474, 420 and 511** — Charge under — Search by Police Officer — Charge of selling fake railway tickets — Railway servants employed as witnesses — Search conducted in absence of accused — Evidence of recoveries made cannot be relied upon. See Criminal P. C. (1898), Section 96. **(1962) 64 Pun LR 874.**

——**S. 467** — Evidence and proof — Presentation for encashment of National Savings Certificates by one not the real holder — Clerk in post office identifying such person — Fact that he knew that person encashing the certificates was personating for real holder must be proved. See Penal Code (1860), Section 419. **1962 Raj LW 263.**

6. Procedure.

——**S. 467** — Charge — Forgery in sale-deed sought to be used in mutation proceedings — Framing of charge — Document being a valuable security there should be a charge under Sec. 467. See Cr. P. Code (1898), Section 221. **AIR 1955 NUC (Assam) 2829.**

——**Ss. 467 and 471** — Prosecution under Sections 120-B, 420, 467 and 474, Penal Code — State filing second case against same accused under same sections — Separate trials, legality of — There may not be any bar to trial of more than three offences at the same trial by virtue of Section 235, Cr. P. C. — But separate trials may also be continued if no prejudice is caused to accused by separate trials. See Criminal P. C. (1898), Section 235. **1965 (2) Cri LJ 351: AIR 1965 Cal 457.**

——**S. 467** — Conviction — Misdirection to jury held led to erroneous verdict — Conviction set aside. See Penal Code (1860), Section 471. **1955 Cri LJ 513: AIR 1955 Cal 175 (DB).**

——**Ss. 467 and 471** — Document produced by defendant in civil suit for being filed — Plaintiff removing document from record before it is actually exhibited and inserting another document forged by him in its place — Document is 'produced' — Complaint by Court concerned necessary for prosecution of plaintiff for offences under Sections 467 and 471 but not for offence under Section 380. See Cr. P. Code (1898), Section 195 (1) (c). **1963 (2) Cr LJ 558 (Guj).**

——**Ss. 467 and 468** — Conspiracy to commit cheating — Forgery also committed — Section 196-A, Cr. P. C. is not applicable. See Cr. P. Code (1898), Section 155 (2). **1964 MPLJ (Notes) 62.**

——**Ss. 467, 471 and 193** — Applicability — Complaint containing allegations that the accused as

guardian of his minor daughter had filed a suit against complainant on basis of a will forged by him amending that such will may cause the Judge to form an opinion that the will is genuine one and therefore his minor daughter was entitled to property — **Held,** that the complaint disclosed offence under Section 193 as well as under Sections 467 and 471. **1955 Cri LJ 716: AIR 1955 Mad 237 (238) (Pt B) (Pr 2).**

——**Ss. 467, 193, 196, 463 and 471** — Criminal P. C. (1898), Sections 476, 479-A and 235 — Facts alleged making out offences under Section 193 as well as under Sections 463, 467 and 471, Penal Code — Proper procedure for filing complaint for offence under Sections 463, 467 and 471 — Procedure under Section 476 not illegal. See Criminal P. C. (1898), Section 476. **1962 (2) Cri LJ 89: AIR 1962 Pat 282.**

7. Conviction and sentence.

●——**S. 467** — Charges for two distinct offences (under Sections 467 and 109, Penal Code and Section 82 (c) of Registration Act) based on same evidence — Acquittal for offence under Sec. 82 (c), Registration Act — Conviction in respect of offences under Sections 467 and 109 on same evidence held valid. See Cr. P. Code (1898), Section 403. **1964 (1) Cr LJ 733 (SC).**

●——**Ss. 467, 468, 24, 25 — 'Defraud' involves two elements — Deceit and injury to person deceived — No injury to person deceived — Accused held not guilty under Ss. 467 and 468.**

The expression 'defraud' involves two elements, namely, deceit and injury to the person deceived. Injury is something other than economic loss that is, deprivation of property, whether movable or immovable, or of money, and it will include any harm whatever caused to any person in body, mind, reputation or such others. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied.

Held, on facts that the accused certainly was guilty of deceit for though her name was V she signed in all the relevant papers as N, and made the insurance company believe that her name was N, but the said deceit did not either secure to her advantage or cause any non-economic loss or injury to the insurance company. In the charge framed, she was alleged to have defrauded the insurance company and the only evidence given was that if it was disclosed that N was a minor the insurance company might not have paid the money. On the evidence as disclosed, neither was she benefited nor the insurance company incurred loss in any sense of the term.

In the result the accused was not guilty of the offences under Sections 467 and 468 of Penal Code. ILR (1960) 2 Punj 424, **Reversed.** Dr. Vimla v. The Delhi Administration, **1963 SCD 802: 1963 Mad WN 396: (1963) Supp 2 SCR 585: (1963) All LJ 999: 1963 Mad LJ (Cr) 560: (1963) 2 SCJ 559: (1963) 33 Com Cas 279: 1963 (2) Cr LJ 434: AIR 1963 SC 1572 (1576, 1577) (Prs 14 to 16).**

●——**Ss. 467, 477-A** — Charge against Government servant under Section 467 for making false entries in transport permits, with intent to defraud Government — Conviction for contravention of Section 477-A not illegal though the permits may not amount to accounts — (Cr. P. Code (1898), Sections 236, 237). Sharma, G. D. v. State of U. P., **1960 Cri LJ 541: AIR 1960 SC 400 (402) (Pt B) (Pr 9).**

●——**Ss. 467 and 471 — Sentence.**

The accused, a Head Constable of Police, who was posted as an accountant in the National Volunteer Corps office withdrew from the Treasury a sum of Rs. 11,579-8-0 on the strength of a contingent voucher being a subsistence allowance for certain month, purporting to be signed by the Senior Superintendent of Police. These signatures were found to be forged and he was convicted of an offence under Section 467 read with Section 471, Penal Code. The embezzlement charge which was levelled against him in regard to this sum of Rs. 11,579-8-0 however ultimately failed. The High Court in appeal confirmed the sentence of 4½ years' rigorous imprisonment awarded by the trial Court and also imposed an additional fine of Rs. 11,579-8-0 on the accused. The accused appealed to the Supreme Court.

Held, that the sentence of 4½ years' rigorous imprisonment was a deterrent sentence deliberately imposed on the accused. The embezzlement charge regarding Rs. 11,579-8-0 had also failed. In these circumstances the High Court should not have imposed this additional fine on the accused. Ram Narain v. State of Punjab, **1955 Cr LJ 871: AIR 1955 SC 322 (324) (Pt C) (Pr 8).**

●——**Ss. 467 and 409** — Sentence — Embezzlement and forgery by public servant — Conviction under Sections 409 and 467 and sentenced to 7 years' and 4 years' rigorous imprisonment for respective offences — Sentences reduced to three years' rigorous imprisonment in each case. See Penal Code (1860), Section 409. **1954 Cri LJ 1797: AIR 1954 SC 715.**

——**Ss. 467 and 30** — Forgery of copy of valuable security — Conviction under Section 467 bad. **1962 (1) Cr LJ 316: AIR 1962 Cal 174 (175) (Pr 4) (DB).**

——**S. 467** — Offences of forgery and embezzlement by postman — Deterrent sentence deserved — Circumstances to weigh sentence pointed out. See Penal Code (1860), Section 409. **1964 MPLJ (Notes) 158.**

——**Ss. 467 and 471** — Accused producing forged receipt before Court in revenue recovery proceedings — Complaint not made by that Court — Conviction is illegal. **1959 MPLJ (Notes) 34.**

——**S. 467 — Sentence — Consideration.**

Evidence showing that accused was a mere tool in the hands of another person who was principal offender and still absconding — Accused already inside jail nearly for 7 months after conviction and in remand for 8 or 9 months prior to conviction — Ends of justice held will be met by reducing one year's sentence to period already undergone. (Cr P. Code (1898), Section 32). **(1957) Mad LJ (Cr) 209: 1957 Mad WN 162: 1957 Cr LJ 1424: AIR 1957 Mad 796 (798) (Pt C) (Pr 8).**

——**S. 467** — Trial for offences under S. 467, Penal Code and Section 82, Registration Act — Acquittal for offence under Section 467 — Accused can be tried subsequently on same facts under Section 82, Registration Act as the offences committed are distinct. See Criminal P. C. (1898), Section 403. **52 Cri LJ 430: AIR 1951 Mys 33.**

——**Ss. 467, 193, 471** — Forged thumb impression — Acquittal on charges under Sections 467 and 471 — Accused can be convicted under Section 193. See Penal Code (1860), Section 193. **1960 Raj LW 521.**

SECTION 468

●——**Ss. 468, 467, 24, 25** — "Defraud" involves two elements — Deceit and injury to person de-

ceived — No injury to person deceived — Accused held not guilty under Sections 467 and 468. See Penal Code (1860), Section 467. **1963 (2) Cri LJ 434: AIR 1963 SC 1572.**

——**Ss. 468, 420, 464, 24, 25** — Accused purporting to run two institutions, for holding examinations in Hindi and Sanskrit literature and Ayurveda and inviting applications — Pamphlet containing rules giving out that instiutions were recognised by Government — Certificates conferring degrees issued on payment of money without holding any examinations — Institutions found to be bogus and not in existence — Certificates found to be ante-dated and containing roli-numbers and divisions — Accused held guilty of offence under Section 420, on ground of fraudulent representation that institutions were recognised by Government — Offence under Section 468 held not made out as certificates although false were not made dishonestly or fraudulently vis-a-vis recipients of certificates. See Penal Code (1860), Section 420. **1962 (2) Cri LJ 722: AIR 1962 All 582 (DB).**

——**S. 468** — Process server authorised to recover only process fee — Recovery of excess amounts under false representation — Official counterfoil of receipt book mentioning amounts of only process fee — Process server is guilty of offences under Sections 420 and 468, I. P. Code — Formal complaint by Court not necessary. See Penal Code (1860), Section 420. **(1964) 30 Cut LT 253.**

——**Ss. 468, 409 — Accused writing accounts under direction of complainant—Intention to defraud not established—Accused held not guilty.**

Unless the intention to defraud or dishonest intention is established, even if the accounts are said to have been maintained by the accused the offence under Section 468 will not be made out. If the charge of criminal breach of trust fails then merely because the accused wrote out the accounts under the direction of the complainant or his son, he cannot be held guilty under Section 468. **1963 All WR (Sup) 45: 29 Cut LT 651.**

——**Ss. 468, 420** — Charge under Sections 420 and 468 — Accused acquitted under Section 468 — On assumption that prosecution case was true and not on disbelief of prosecution evidence — Acquittal does not affect conviction under Section 420. See Penal Code (1860) S. 420. **(1960) 2 Orissa JD 246.**

——**Ss. 468, 464, 467, 471, 420** — Forged document, what is — False bill made, signed and submitted by accused for work done as Assistant Public Prosecutor and encashed — Bill held 'forged document although signatures on it were not forged — Accused held guilty under Sections 467, 471 and 420 — Case not fit to be dealt with under Probation of Offenders Act, 1958 — Applicability of Sections 3 and 4 — Appending signature to official receipt for payment of money for Government work — Presumption — Evidence Act (1872), Section 114, Illus. (e). See Penal Code (1860), Section 464. **1963 (2) Cri LJ 36: AIR 1963 Pat 262.**

——**S. 468** — Cr. P. Code (1898), Section 195 (1) (c) —Applicability — 'Party to the proceedings' — Meaning of — Agent of party not included — Protection of the section not available to an agent. See Cr. P. Code (1898), Section 195 (1) (c). **1963 Raj LW 416.**

——**Ss. 468, 415, 419** — Applicability — Damage necessary — Travancore Penal Code, Sections 416, 420 and 469 — Accused A made accused B falsely personate the complainant and execute a document of sale in his favour of property not belonging to B but which was property of complainant — A took B to Sub-Registrar's office and document was registered by B — **Held,** in circumstances conviction and sentence under Section 419 could not be supported — But case under Section 468 had been fully made out. **1953 Cri LJ 275: AIR 1953 Trav Co 34 (35) (Prs 4, 4a) (DB).**

SECTION 471

SYNOPSIS

(Penal Code (1860), Section 471).

1. "Dishonestly".
2. Nature of user.
3. Use of copies of forged document.
4. Illustrative cases.
5. Evidence and proof.
6. Procedure.
7. Sanction for prosecution.
8. Conviction and sentence.

1. "Dishonestly".

——**Ss. 471, 24** — "Dishonestly" — Wrongful gain — 'Dishonestly' must relate to an advantage to which a party perpetrating a deceit is not legally or equitably entitled. See Penal Code (1860), Section 24. **AIR 1953 Nag 165.**

2. Nature of user.

——**Ss. 471, 467** — Ingredients of — Physical presentation of forged document — Not an important ingredient — Reference to presentation of chalans in charge held inconsequential. See Penal Code (1860), Section 420. **1961 (2) Cri LJ 677: AIR 1961 Pat 451 (DB).**

——**S. 471 — Essential ingredients — "Use".**

The essential ingredients of Section 471, are (i) fraudulent or dishonest use of a document as genuine, and, (ii) knowledge or reasonable belief on the part of the person using the document that it is a forged one.

To constitute a use as contemplated by Section 471, it is not necessary that the forged document should be used as evidence in a Court. It is sufficient that it is used in order that it may ultimately appear in evidence or used dishonestly or fraudulently. The nature of the user is not material. Therefore, in order to bring a person within the purview of Section 471, it is enough if he files a forged document, which he knows or has reason to believe to be forged document **1961 BLJR 369: 1961 (2) Cr LJ 139 (142, 143) (Pt A) (Prs 11, 15, 16, 24).**

——**S. 471 — Use of certified copies of forged documents — Nature of user — (Criminal P. C. (1898), Section 195 (1) (c)) — (Evidence Act (1872), Section 63).**

The mere filing of a certified copy of a forged document may not amount to user of the forged document within the meaning of Section 471, I. P. Code. But the filing of the certified copy with the knowledge that it is a copy of a forged document would amount to user of the document because when a person files a copy he is using in substance the original itself if the filing is with the knowledge that the copy is the copy of the forged document.

The accused filed certified copies of certain documents on the record of the High Court with the knowledge that they were copies of forged documents with a petition to the effect that they were being filed not as evidence in the case but for the purpose of calling for the originals from the

High Court. This petition was not in fact disposed of by the Sessions Judge and his request to the High Court for sending the necessary documents in the ordinary course was not complied with.

Held, that in the circumstances it could not be held that the accused produced the documents in question or used them within the meaning of Section 471, I. P. Code, or in terms of Sec. 195 (1) (c), Cr. P. Code.

Per Sahai, J. — Section 471 provides for punishment of a person who fraudulently or dishonestly uses as genuine any document which he knows or has reason to believe to be a forged document. Section 195 (1) (c) of the Code of Criminal Procedure lays down, among other things, that no Court shall take cognizance of an offence under Section 471 of the Penal Code without a complaint in writing by a Court in which the forged document in question is produced or given in evidence. This shows that a person may be said to have used a document even though he has merely produced it in a Court but it is clear that the offence will be complete only when he produces the document for using it. All cases of production of forged documents by a person will not, therefore, amount to their user within the meaning of Section 471 of the Penal Code. **1955 BLJR 641: 1956 Cr LJ 1091: AIR 1956 Pat 354 (357 to 359) (Pt B) (Prs 7, 10, 14, 15) (DB).**

3. Use of copies of forged document.

●——**S. 471 — Attested copy of forged document — Production of attested copy of document before Assistant Settlement Officer allowed under rules under Act 44 of 1954 — Such copy of forged document produced — Offence under Section 471 is committed — Distinction between this Section and Section 195 (1) (c) of Cr. P. Code.**

What Section 471 requires is the use as genuine of any document which is known or believed to be a forged document; it does not lay down that such use can only occur when the original itself is produced, for the Section does not require the production of the original. Where for example, under the Rules under the Displaced Persons (Compensation and Rehabilitation) Act (44 of 1954), an attested copy would suffice, the production of an attested copy would amount to use of the original document as genuine if it is known or is believed to be a forged document. The difference between Section 471 of the Penal Code and Section 195 (1) (c) of the Code of Criminal Procedure is that while Section 195 (1) (c) requires the production of the forged document itself in a Court to make it necessary for a complaint to be filed before a person can be prosecuted for forging or using such document as genuine, Section 471 does not require the production of the original forged document. Where it is possible to produce an attested copy of the forged document and that attested copy will serve the purpose of the original forged document, there would be use of the original forged document as genuine, through the attested copy. Where therefore an attested copy of a forged document was produced before the Assistant Settlement Officer, it must be held that there was use of the document, which was known or was believed to be forged document within the meaning of Section 471. Budhu Ram v. State of Rajasthan, **1963 SCD 186: 1963 3 SCR 376: 1963 (2) Cr LJ 698 (701) (Pt B) (Pr 7).**

——**S. 471** — Evidence — Direct evidence — Necessity — Use of copy of forged document is offence. **AIR 1955 NUC (All.) 2758 (DB).**

4. Illustrative cases.

●——**Ss. 471 and 474** — Conviction and sentence — Possessing and using a forged permit knowing it to be forged — Liability of owner where permit seized from driver — Owner cannot shake off liability saying that he had nothing to do — Accused was guilty of an offence under Section 474 from the moment he had in his possession the forged permit — Offence could be tried at A where it was issued and the offence under Section 471, which was the desired consequence could also be tried at A in view of Section 179, Cr. P. C. See Criminal P. C. (1898), Section 179. **1965 (2) Cri LJ 822: AIR 1965 SC 1921.**

●——**S. 471** — Prior to amendment of 1952 — Notification under Section 3-A declaring single point taxation on imports of vegetable ghee — Ineffective in absence of rules framed under Section 3-A — Assessee firm not including transactions of purchase of vegetable ghee in his turnover on ground that purchases were from outside U. P. taking advantage of ineffective notification — Forged invoices producted in support of claim — Evasion of claim — Evasion of tax under Section 3 — Offence — Assessee cannot be heard to say that he was required to prove his case by best evidence and because he was so required he produced forged documents. See Sales Tax — U. P. Sales Tax Act (15 of 1948), Section 3. **1963 (1) Cr LJ 330: AIR 1963 SC 416.**

——**Ss. 471, 30, 467** — 'Valuable security' — Certificate in 'K' form prescribed under Section 9, Bombay Sales Tax Act is valuable security — Accused using as genuine forged 'K' form for purchasing cloth free of sales tax — Conviction under Sections 467 and 471 — (Sales Tax — Bombay Sales Tax Act (3 of 1953), Sections 7, 9, Proviso, Clause (1), and 45) — (Sales Tax — Bombay Sales Tax (Registration, Licensing and Authorisation) Rules (1954), Rule 13 (2)). See Penal Code (1860), Section 30. **1960 Cri LJ 461: AIR 1960 Bom 146 (DB).**

——**S. 471** — "Corruptly" — Meaning of — Person filing false receipts to claim tenancy does not commit offence under Section 471 but is guilty of corruptly using as true or genuine evidence which he knows to be false within meaning of Section 196. See Penal Code (1860), Section 196. **AIR 1955 NUC (Cal) 562.**

——**S. 471** — Accused forging gift deed in his favour — Part of property comprised in deed sold by accused under sale deed — Gift deed in respect of remaining property — Accused cannot be convicted under Sections 465 and 471 with respect to latter two deeds. See Penal Code (1860), Section 465. **1960 Cr LJ 75: AIR 1960 Ker 29 (DB).**

——**Ss. 471, 467 and 193** — Applicability — Complaint containing allegations that the accused as guardian of his minor daughter had filed a suit against complainant on basis of a will forged by him intending that such will may cause the Judge to form an opinion that the will is genuine one and therefore his minor daughter was entitled to property — **Held,** that the complaint disclosed offence under Section 193 as well as those under

Sections 467 and 471. **1955 Cri LJ 716: AIR 1955 Mad 237 (238) (Pt B) (Pr 2).**

——**Ss. 471, 467 and 109** — Prevention of Corruption Act (1947), Sections 5 (1) (c) and 5 (2) — Payment of money order by village Post Master to wrong persons — Acknowledgment purporting to be of addressee obtained and attested by witness — Addressee, the Post Master and attesting witnesses each belonging to different villages — Post office situated in another village — Absence of evidence that addressee often came to Post Office — Plea of mistaken identity by Post Master — Incriminating statements in departmental enquiry not sufficient to prove charge — Post Master not guilty under Section 471, I. P. Code or under Section 5 (1) (c) read with Section 5 (2) of Prevention of Corruption Act — Attestation of acknowledgment stated to be on representation of Post Master — Attesting witness not guilty of charge under Sections 467/109, I. P. Code — Prevention of Corruption Act (2 of 1947), Sections 5 (1) ((c) and 5 (2). **(1962) 4 Ori JD 4.**

——**Ss. 471, 464, 467, 468, 420** — Forged document, what is — False bill made, signed and submitted by accused for work done as Assistant Public Prosecutor and encashed — Bill held 'forged document' although signatures on it were not forged — Accused held guilty under Sections 467, 471 and 420 — Case not fit to be dealt with under Probation of Offenders Act, 1958 — Applicability of Sections 3 and 4 — Appending signature to official receipt for payment of money for Government work — Presumption — Evidence Act (1872), Section 114, Illus. (e). See Penal Code (1860), Section 464. **1963 (2) Cri LJ 36: AIR 1963 Pat 262.**

——**Ss. 471 and 466** — The accused who came to Junagad from Pakistan with a permit was charged under Sections 466 and 471, Penal Code and Section 4, Junagad Act (35 of 1948) on the ground that the permit was not valid inasmuch as (1) the book out of which this permit was given had been stolen and (2) that the rubber stamp of the official of the High Commissioner's Office as well as that of the office itself, seemed to have been forged by somebody, and that the accused must have knowingly used the forged permit for the purposes of entering the Indian Dominion. The only evidence for proving that the permit book was lost was a report made by the High Commissioner's Office to the Government of India, that the permit book had been stolen. The stamp of the official signature as well as the stamp of the office on this permit, did not show in any way that somebody used a different stamp, because both the stamps tallied with the stamps which were affixed on valid permits :

Held, that these facts did not establish that the accused was necessarily privy to the transacion of the theft or that he secured the permit after having known that it was given to him by somebody who was a party to the theft of the permit book. As the rubber stamps were genuine, it could not be said that the permit had been forged by anybody, or that even if it was forged, the accused came into possession after having known that it was forged. The conviction of the accused was, therefore, not sustainable. **3 Sau LR 83: AIR 1950 Sau 9 (10) (Pr 5) (DB).**

5. Evidence and proof.

——**S. 471** — Material documents in custody of another Court not produced by prosecution — Discharge of accused held illegal. See Criminal P. C. (1898), Section 209. **ILR (1959) 2 Cal 679.**

——**S. 471 — Applicability — Essential ingredients — Mere negligence or want of prudence not sufficient.**

In order to bring a case within the four corners of Section 471, Penal Code, it must be established that the accused knew or had very good reason to believe that it was not the signature of the person by whom the document is said to have been written. If it had been proved that he had been a party to the concoction then also the case under Section 471 would be made out. Where, therefore, both the ingredients are absent the mere negligence or want of prudence where it falls short of the statutory intentions would not be sufficient to bring it within Section 471. The use of a forged document which involves a representation by the accused that it is genuine coupled with a knowledge on the part of the user that it is forged will alone bring it within the purview of Section 471. The mere fact that the document bears a suspicious appearance on the face of it cannot be regarded as prima facie evidence of guilty knowledge of the accused that it is not a genuine document but a forged one. **ILR (1951) Hyd 778: 1952 Cri LJ 215: AIR 1952 Hyd 7 (8) (Pt B) (Pr 6) (DB).**

——**S. 471 — Use of forged document — Forgery must be proved.**

Forgery cannot be presumed as a matter of law. It must be established as any other fact. The mere fact that the purchaser of a property is in possession of a document which is shown to be a forgery would be no evidence of the guilt of the purchaser. **ILR (1951) Hyd 778: 1952 Cri LJ 215: AIR 1952 Hyd 7 (8) (Pt C) (Pr 6) (DB).**

——**Ss. 471, 474** — Knowledge or belief that document was forged — Evidence and proof — **Held,** that prosecution had not succeeded in establishing that the accused was having possession of document, knowing it to be forged. See Penal Code (1860), Section 474. **1957 Cri LJ 755: AIR 1957 Ker 78.**

——**S. 471 — Documents forged — No knowledge imputed to accused — Offence under Section 471 not made out — Knowledge means mental cognition.**

For conviction under Section 471, I. P. Code, the mere fact that the documents were forged would not conclude the matter, unless it is also established that he was a party to the forgery. It is incumbent on the prosecution to establish beyond reasonable doubt that the accused knew or had reason to believe that the certificates were forged. 'Knowledge' means a mental cognition and not necessarily visual perception., AIR 1927 Nag 40, Rel. on. A person 'has reason to believe' under Section 26, I. P. Code if he has sufficient cause to believe the thing but not otherwise. The mere fact that the suspicions of a pleader ought to have been aroused by the sight of the document was not prima facie evidence that he knew or had reason to believe the document to be forged. **1960 MPLJ (Notes) 10: 1960 Jab LJ 563: 1960 MPLJ 649: 1960 MPC 456: 1960 Cr LJ 1217 (2): AIR 1960 Madh Pra 269 (270) (Pt B) (Prs 7, 8).**

——**S. 471** — Evidence and proof — Presentation for encashment of National Savings Certificates by one not the real holder — Clerk in post office

identifying such person — Fact that he knew that person encashing the certificates was personating for real holder must be proved. See Penal Code (1860), Section 419. **1962 Raj LW 263.**

6. Procedure.

●——**S. 471** — Prosecution under — Procedure for — Section 479-A (1), Cr. P. C. not applicable — Resort to Section 478, Cr. P. C. proper. See Criminal P. C. (1898), Section 479-A. **1964 (1) Cri LJ 555: AIR 1964 SC 725.**

●——**S. 471** — Copy of forged document produced — No complaint of Court is necessary. See Criminal P. C. (1898), Section 195 (1) (c). **1963 (2) Cr LJ 698 (SC).**

——**S. 471** — Expressions "in relation to" in Section 195 (1) (b) and "in respect of" in Section 195 (1) (c) — Meaning of — Sale deed got executed fictitiously by three parties — One of them starting mutation proceedings on basis of such sale deed — Dismissal of mutation application — Private complaint under Sections 467 and 471, Penal Code — Bar of —Offence was in relation to mutation proceedings — Sec. 195 (1) (b) held applied — Even if allegations disclosed offences under Sections 467 and 471 and not under Section 193, Penal Code, private complaint would be barred under Section 195 (1) (c). See Criminal P. C. (1898), Section 195 (1) (b). **1965 All WR (HC) 82: 1965 All Cri R 93: AIR 1966 All 124.**

——**S. 471** — Criminal P. C. (1898), Section 476 — Complaint under, in respect of offence under Section 193, I. P. C. — Accused can be convicted of offences under Section 466/471, I. P. C. See Criminal P. C. (1898), Section 476. **1962 (1) Cri LJ 229: AIR 1962 All 132 (DB).**

——**S. 471** — Accused prosecuted under Sections 120-B/420, 420, 467/471, Penal Code — State filing second case against same accused under same sections — There may not be any bar to trial of more than three offences at the same trial by virtue of Section 235, Cr. P. C. but separate trials may also be continued if no prejudice is caused to accused by separate trials. See Criminal P. C. (1898), Section 235. **1965 (2) Cri LJ 351: AIR 1965 Cal 457.**

——**Ss. 471, 467 and 420 — Conviction — Misdirection to jury.**

In a trial for offences under Section 467, Sections 471/467 and Section 420, I. P. Code the prosecution case was that after the death of A in whose favour compensation for lands acquired in Land Acquisition proceedings had been awarded, the accused presented an application purporting to be by A supported by a Muktearnama purporting to have been executed by A and thereby induced the authorities to pay out to him the money awarded. It was alleged that at the time he used the documents he knew or had reason to believe that these documents were forged and it was by using them he committed cheating. The verdict of the jury on the charge under Ss. 471/467, I. P. Code was that the accused had not been proved to have used the forged documents with knowledge or reason to believe that it was forged, but the accused was convicted for an offence under Section 420, I. P. Code.

Held, that the verdict of the jury that he was not guilty of the offence under Section 471/467, I. P. Code, was inconsistent with the verdict that he was guilty under Section 420, I. P. Code.

(2) That the misdirection in the Judge's charge to the Jury had led to the erroneous verdict. The conviction was, therefore, set aside. **1965 Cr LJ 513: AIR 1955 Cal 175 (176) (Prs 1, 3, 7) (DB).**

——**S. 471** — Offence under Section 471, I. P. C. not covered by Section 479-A — Procedure prescribed under Section 476 not excluded — Magistrate can file complaint in respect of offence under Section 471 — Belated complaint by private party — Interests of justice do not require complaint to be made. See Criminal P. C. (1898), Section 195. **1965 (2) Cr LJ 783: AIR 1965 Mad 539.**

——**S. 471** — Holding preliminary enquiry is matter of discretion — Magistrate hearing parties and on materials deciding to file complaint — Magistrate does not exercise discretion wrongly. See Criminal P. C. (1898), Section 476. **1965 BLJR 81: 1965 (2) Cri LJ 837 (Pat).**

——**S. 471** — Complaint against person alleged to have committed offence along with parties to proceeding in the course of same transaction. See Criminal P. C. (1898), Section 476. **1965 BLJR 81: 1965 (2) Cri LJ 837 (Pat).**

——**Ss. 471, 467, 463, 193 and 196** — Criminal P. C. (1898), Sections 476, 479-A and 235 — Fact alleged making out offences under Sec. 193 as well as under Sections 463, 467 and 471, Penal Code — Proper procedure for filing complaint for offence under Sections 463, 467 and 471 — Procedure under Section 476, not illegal. See Criminal P. C. (1898), Section 476. **1962 (2) Cri LJ 89: AIR 1962 Pat 282.**

——**S. 471** — Charge under — Search by Police Officer — Charge of selling fake railway tickets — Railway servants employed as witnesses — Search conducted in absence of accused — Evidence of recoveries made cannot be relied upon. See Criminal P. C. (1898), Section 96. **1962 All Cr R 351: 1962 All WR (Sup) 83: 64 Pun LR 874.**

——**S. 471** — Forged thumb impression — Acquittal on charges under Sections 467 and 471 — Accused can be convicted under Section 193. See Penal Code (1860), Section 193. **1960 Raj LW 521.**

7. Sanction for prosecution.

——**Ss. 471 and 427** — Criminal P. C. (1898), Section 197 — In discharge of official duty — It is no part of the official duty of a public servant to use as genuine a forged document which is known to have been forged or to commit mischief in respect of original document — Consequently for trial of a public servant under Sections 471 and 427, no sanction is required. **6 Sau LR 398: 1954 Cr LJ 1559: AIR 1954 Sau 132 (137) (Pt C) (Pr 11) (DB).**

8. Conviction and sentence.

●——**S. 471** — Sentence — Accused, a Head Constable of police, withdrawing from treasury a certain sum on strength of a contingent voucher, purporting to be signed by Senior Superintendent of Police — Signature found to be forged and he was convicted under Section 467 read with Sec. 471 — **Held,** that the sentence of 4½ years' rigorous imprisonment was a deterrent sentence

deliberately imposed on accused — Embezzlement charge regarding the sum withdrawn having failed, High Court should not have imposed on him additional fine of that amount. Ram Narain v. State of Punjab, **1955 Cri LJ 871: AIR 1955 SC 322 (324) (Pt C) (Pr 8).**

——**S. 471** — Sentence — Offence of forgery — Gravity does not depend on amount for which forgery is committed — Act of forgery itself matters — Law takes serious notice of offence, however small the amount. (Cr. P. Code (1898), Section 32). **AIR 1955 NUC (All) 2010.**

——**S. 471** — Sentence — Length of sentence or its security have to be determined by circumstances of case, character and previous record of accused — Seriousness of offence is not criterion — (Cr. P. Code (1898), Section 32). **AIR 1955 NUC (All) 1263.**

——**Ss. 471, 23, 24, 409, 467** — Postman himself taking delivery of V. P. Parcels, by signing receipts himself, instead of delivering them to addressees — Offence — Accused held guilty under Sections 409, 467 and 471 — Sentence of three years' R. I. on each count held not severe. See Penal Code (1860), Section 23. **1959 Cri LJ 881: AIR 1959 Mys 185 (DB).**

——**Ss. 471, 466** — Accused securing service on allegations that he had passed certain examinations and that he was discharged person from Army and Police Service — Accused producing certificates in support — Certificates found forged and not genuine — Accused held guilty of offence under Section 471 — Sentence of six years' rigorous imprisonment and fine upheld. **1965 (2) Cri LJ 394: AIR 1965 Pat 364 (366) (Prs 6, 7).**

——**Ss. 471, 467** — Forgery when complete — Forgery of document and its use as genuine form distinct offences — When forger himself uses forged document as genuine, there is no prohibition against convicting him of both offences. See Penal Code (1860), Section 467. **1949 TCLR 113 (DB).**

SECTION 474

● ——**Ss. 474, 471** — Offences under Ss. 471 and 474, Penal Code — Possessing and using a forged motor transport permit knowing it to be forged — Place of trial — Liability of owner where permit seized from driver — Conviction and sentence. See Criminal P. C. (1898), Section 179. **1965 (2) Cri LJ 822: AIR 1965 SC 1921.**

——**Ss. 474, 471 — Knowledge or belief that document was forged — Evidence and proof.**

The conclusion that the accused (a tenant) had possession of a lease-deed knowing it to be a forged document does not necessarily follow from the finding that the document was a forged one.

Where it appeared from the circumstances of the case that the complainant's son, who was an advocate, and his clerk might have brought it into existence with some sinister purpose and the complainant's son and his clerk were not found very reliable regarding the circumstances under which the document passed hands and the object with which they took part in bringing it into existence :

Held, that the prosecution had not succeeded in establishing that the accused was having possession of the document, knowing it to be forged. **1957 Ker LT 293: ILR (1957) Kerala 277: 1957 Ker LJ 329: (1957) Mad LJ (Cr) 227: 1957 Cr LJ 755: AIR 1957 Kerala 78 (79) (Pt A) (Pr 5) (DB).**

——**S. 474** — Charge under — Search by Police Officer — Charge of selling fake railway tickets — Railway servants employed as witnesses — Search conducted in absence of accused — Evidence of recoveries made cannot be relied upon. See Criminal P. C. (1898), Section 96. **1962 All Cr R 351: 1962 All WR (Sup) 83: 64 Pun LR 874.**

SECTION 475

——**S. 475** — Criminal P. C. (1898), Section 260 (1) (i) — Offence of lurking house trespass or house breaking by night — Summary trial not always appropriate. See Criminal P. C. (1898), Section 260 (1) (i). **1960 All WR (HC) 155.**

SECTION 477

——**S. 477** — 'Valuable security' — What constitutes — Offence of destruction of valuable security — Essentials — Suit for malicious prosecution — Application filed by defendant admitting that complaint filed by him was false and agreeing to pay damages to plaintiff — Court not accepting it as part of record but returning it to defendant for reconsideration in consultation with his counsel — Defendant tearing off application outside Court in good faith — Defendant held not guilty of any offence — Application held not a valuable security. See Penal Code (1860), Section 30. **1963 (1) Cr LJ 279: AIR 1963 All 131.**

——**S. 477** — Offence committed not as public duty nor while acting in discharge of official duty — Sanction not necessary. See Criminal P. C. (1898), Section 197. **AIR 1955 NUC (All) 2727.**

——**Ss. 477 and 30** — No entries signed by constituents acknowledging liability — Account books are not valuable security. See Penal Code (1860), Section 30. **1953 Cri LJ 1496: AIR 1953 All 660 (DB).**

——**Ss. 477 and 30 — Concealment of account books — Account books are not valuable security ordinarily.**

Section 30 of the Penal Code means that to become a 'valuable security' the document itself should create the right or liability. Ordinarily speaking, account books do not by themselves create any such right or liability, though they may evidence the existence of such rights or liabilities In other words an account book generally speaking may be valuable evidence but is not valuable security within the definition given in Section 30. That is not to say that under no circumstances can an account book be considered valuable security. For instance, if such books contained entries showing that certain amounts have been received from customers as sales-tax which would be an acknowledgment by the dealer of his liability to turn over those amounts to the Sales-tax Department, then it can be rightly argued that the books themselves are valuable security. **1962 Ker LJ 1075: 1962 Ker LT 815: (1962) 13 STC 1022: 1963 (1) Cr LJ 180: AIR 1963 Ker 68 (69) (Pt A) (Pr 4) (DB).**

——**Ss. 477 and 30 — Valuable security — Account books — Section 12, Kerala General Sales Tax Act is of no help in proving account books as valuable security.**

It is not correct to argue that even without knowing the contents of the account books it is open to the Court to hold that they are valuable security because under the Kerala General Sales Tax Act account books provide a dealer with a right to establish the correctness of his return. All that Section 12 of the Act provides is that an assessing authority before making 'a best of judgment' assessment, shall give the dealer an opportunity to prove the correctness of his return. The dealer's right to prove the correctness of his return is provided by the statute and not by the book which at best can only support his claim that his figures are correct. AIR 1960 Bom 146, Disting. **1962 Ker LJ 1075: 1962 Ker LT 815: (1962) 13 STC 1022: 1963 (1) Cr LJ 180: AIR 1963 Ker 68 (69) (Pt B) (Pr 5) (DB).**

——**S. 477** — Jurisdiction — Magistrate taking cognizance — Evidence disclosing offence beyond Magistrate's competence — Complaint cannot be returned — Procedure. See Criminal P. C. (1898), Section 201. **1957 MPLJ (Notes) 177.**

——**Ss. 477 and 409** — Magistrate trying offences under Sections 477 and 409, I. P. C. — Former offence triable by Sessions Judge — Proceedings relating to offence under Section 477 are void. See Criminal P. C. (1898), Section 530 (p). **1960 Cri LJ 496: AIR 1960 Mys 86 (DB).**

SECTION 477-A

SYNOPSIS

(Penal Code (1860), Section 477-A.)

1. Scope and applicability.
2. "Falsify".
3. "Intent to defraud".
4. Conviction and sentence.
5. Procedure.

1. Scope and applicability.

●——**S. 477-A** — Servant — Person being agent of A company and receiving payment for doing its work as agent — Person is agent of A company — Fact of his being full time servant of B company does not mean that he could not be a servant of any other company or other employer. R. K. Dalmia v. Delhi Administration, **(1963) 1 SCR 253: (1962) 32 Com Cas 699: 1962 (2) Cr LJ 805: AIR 1962 SC 1821 (1852) (Pt M) (Pr 186).**

——**S. 477-A — Applicability — Clerk — Persons maintaining kaccha drafts of accounts.**

Only person employed as clerk, officer or servant, either on salary or honorary, is liable — There must be relationship of master and servant — Account drafts maintained by person managing the firm — No liability on basis of drafts until signed by third named person — Person maintaining drafts does not come under Section 477-A — Merely performing the work of a clerk does not make him liable under S. 477-A. AIR 1932 Cal 464; AIR 1925 Sind 328, Distinguished. **1953 All LJ 318: 1953 Cr LJ 1496: ILR (1955) 1 All 749: AIR 1953 All 660 (661) (Pt B) (Pr 7) (DB).**

——**S. 477-A — Liability to customer of bank.**

A manager or director of a bank cannot be made liable under Section 477-A by the customer of the bank. **1950 ALJ 808: 1951 All Cri C 12: 1951 All WR (HC) 85.**

——**S. 477-A — Applicability — Partner of firm — Liability to conviction.**

A partner in a firm if appointed as such to manage the business of the firm or to write its accounts acts as its servant. If he falsifies accounts he is liable to be convicted and punished under Section 477-A. AIR 1953 All 660, Dissented from. **69 Bom LR 1413: 1950 Nag LJ 41: ILR (1959) Bom 670: 1959 Cr LJ 1032: AIR 1959 Bom 486 (489) (Pt B) (Pr 15) (DB).**

——**S. 477-A — Applicability — Falsification of accounts by partner — Offence.**

In view of the wordings of Section 477-A, Penal Code, a partner cannot be guilty of the offence under that section. That offence can only be committed by somebody in the employ of another person as a clerk or officer or servant; the falsification can only be committed in respect of the books of accounts of employer. **1959 Cr LJ 964: AIR 1959 Cal 498 (499) (Pr 5).**

——**S. 477-A — Ingredients.**

Section 477-A refers to two kinds of offences namely (1) falsification of accounts; and (2) making of a false entry and, these two offences are distinct and not inter-dependent. The offence of falsification of accounts is one offence although it may cover several entries. **ILR (1965) Guj 1006: (1965) 6 Guj LR 925.**

——**S. 477-A** — Applicability — Person charged under must be "Clerk, officer or servant" — Position is different when charge of offence of conspiracy is concerned. **AIR 1955 NUC (Hyd) 415 (DB).**

——**S. 477-A — Essentials.**

It is necessary ingredient of the offence under Section 477-A that the person who is charged must be a clerk, officer, servant or an employee

But the position is different so far as the charge of the offence of conspiracy is concerned, as it is a distinct and separate offence. All that is necessary is the establishment of the agreement for the doing of the act which is so punishable. Its being punishable, because it is done by a person in a particular capacity, does not affect the liability of the conspirators for agreeing to commit the act through such other person. They are not liable to punishment for the main offence but for the conspiracy to perpetrate such an offence. **AIR 1955 NUC (Hyd) 415 (DB).**

——**S. 477-A — Clerk or servant.**

It is sufficient to satisfy the words of the section 477-A to prove that the person charged under the section is one who volunteers to perform and performs the duties of a clerk or servant whether in fact he is a clerk or servant or not and though he is under no obligation to perform such duties and receives no remuneration. **1957 MWN 495.**

——**S. 477-A** — Scope — Section 477-A consists of two distinct offences. **AIR 1955 NUC (Mad) 3922.**

——**S. 477-A** — Applicability — Offence by partner appointed in capacity of clerk, officer or servant, to manage business, falsifying accounts, is liable to punishment. **AIR 1955 NUC (Mad) 434.**

——**S. 477-A** — Applicablility — Abetment by employer — Offence by partner, acting as clerk, officer or servant — Other partners cannot commit substantive offence — Employer can commit offence of abetting the commission of such offence — Other partners taking active interest in falsification are guilty of abetment. **AIR 1955 NUC (Mad) 434.**

——**S. 477-A** — Banking Companies (Amendment) Act (20 of 1950), S. 11 — Scope — Prosecution on

direction of winding up Judge, in addition to orders of local Government in respect of offence under Section 477-A, Penal Code — Section 11 does not apply. See Banking Companies (Amendment) Act (20 of 1950), Section 11. **AIR 1952 Mad 727 (DB).**

2. "Falsify".

●——**S. 477-A** — Falsification to cover breach of trust — There is no question of immediate or remote connection with the commission of breach of trust which is sought to be covered up by the falsification, so long as the falsification is to cover that up. R. K. Dalmia v. Delhi Administration, **(1963) 1 SCR 253: (1962) 32 Com Cas 699: 1962 (2) Cr LJ 805: AIR 1962 SC 1821 (1878) (Pt X) (Pr 334).**

——**S. 477-A — 'Falsification of accounts' — Conviction for — Propriety.**

No act amounts to a falsification of account unless as provided by Section 477-A there is an intent to defraud or there is a wilful and intentional falsification of accounts.

Where accused No. 1 an Assistant Secretary of a Co-operative Society was charged with having made false entries in the cash book and a current deposit book and also by opening a current deposit account fraudulently in the name of a firm, in the Society's books of accounts, but the actual entries in the cash book and the current deposit book were proved to have been made by accused 3 who was acquitted and all that was established by evidence was that accused 1 had merely affixed his signature at the bottom of the pages in the Society's books in his capacity as its assistant Secretary, the mere fact that he opened a current deposit account could hardly be said to amount to a falsification of accounts, within Section 477-A of the Penal Code.

There was no material in the instant case from which it was possible to say that the opening of the current deposit account by the accused was actuated with any intention to defraud or was otherwise fraudulent or was wilfully made with intent to defraud and hence it was not possible to sustain the charge under Section 477-A, IPC against accused 1. **1965 Mad LJ (Cri) 463.**

——**S. 477-A — Falsification of accounts — Auditor's reports — How far can protect accused.**

Where the accused, who was managing a co-operative stores in a cotton mill and exclusively maintaining the accounts, misappropriated large sums and to cover them up, made false entries in account after deliberation and careful planning and the falsification was sought to be whittled down by suggesting that the accounts had been audited every year by Co-operative Department Officers but there was no evidence that the accounts of the stores had been checked by auditors with the actual entries in the account book and it was clear that the auditors had been misled by confirmation reports.

Held, that the falsification of accounts had been demonstrated beyond doubt and the fact that accounts had been audited every year made no difference. **1957 Mad WN 495.**

——**S. 477-A** — "Falsify" — Meaning of — Expression means "to render false" — (Words and Phrases). **AIR 1955 NUC (Mad) 3922.**

——**S. 477-A** — "Falsify" — Preparation of new account book containing false accounts — It is false document — Act in preparing this false document is falsification of document. **AIR 1955 NUC (Mad) 434.**

——**Ss. 477-A and 463** — Forgery and falsification accounts — Scope stated — No act amounts to falsification of accounts unless as provided by Section 477-A there is an intent to defraud or there is a wilful and intentional falsification of accounts. See Penal Code (1860) Section 463. **AIR 1967 Mys 86.**

——**Ss. 477-A. 405, 409, 467 — Property — Meaning — Includes things purchased with money entrusted.**

A, a special accountant of certain Pakutty, was entrusted with certain amount for procuring paddy. He purchased 60 paras of paddy from B but credited only 14 paras in the Goverment account and misappropriated the rest. In the receipt given to B the quantity of paddy purchased and amount paid thereof was shown correctly but in the counter-foil A entered only 14 paras. **Held,** A was guilty of an offence under the Section. **1955 Cri LJ 1539: AIR 1955 Trav-Co 271 (274, 275) (Prs 10, 11, 14) (DB).**

——**Ss. 477-A, 403 and 409** — Scope — Dishonest misappropriation and falsification of accounts by public servant — Accused an employee of post office not despatching money order and also omitting to enter amount in account books and registers — In counter-foil of receipt issued for the amount accused entering particulars of earlier money order. Accused held had dishonestly misappropriated amount entrusted to him and falsified the accounts. **1953 Cri LJ 1777: AIR 1953 Trav-Co 537 (538) (Pt A) (Pr 3) (DB).**

3. "Intent to defraud".

●——**S. 477-A — 'Intent to defraud' — Concealment of fraud already committed is fraud.**

If the intention with which a false document is made is to conceal a fraudulent or dishonest act which had been previously committed, that intention could not be other than an intention to commit fraud. The concealment of an already committed fraud is a fraud. A man who deliberately makes a false document in order to conceal a fraud already committed by him is undoubtedly acting with intent to commit fraud, as by making the false document he intends the party concerned to believe that no fraud had been committed. AIR 1933 All 525, Rel. on. R. K. Dalmia v. Delhi Administration, **(1963) 1 SCR 253: (1962) 32 Com Cas 699: 1962 (2) Cr LJ 805: AIR 1962 SC 1821 (1877) (Pt W) (Pr 333).**

——**S. 477-A — Intent to defraud — Entering of false bills in accounts — Act is fraudulent — Deprivation of property not necessary.**

Section 477A only requires the falsification of accounts with intent to defraud. It does not require any deprivation of property. Where therefore the President and a clerk of a Co-operative Society prepare false and bogus bills regarding sales of certain goods and enter them in the accounts of the society, their act is done with an intent to defraud and is fraudulent within S. 477A, I.P.C. even though nobody is actually deprived of any property. 25 Cal 512 and 35 Cal 450, Foll. **52 Cri LJ 1093: (1951) 1 Mad LJ 691: AIR 1951 Mad 894 (895) (Pt A) (Pr 2).**

——**S. 477-A** — "Intent to defraud" — Deposit entry shown not on date of transaction but on later date — Intention of false entry when with view to conceal previous fraudulent or dishonest act amounts to intention to defraud — Falsification of account to cover immediate or remote commission of criminal breach of trust falls within mischief of Section 477-A. AIR 1962 SC 1821, Rel. on. **32 Cut LT 31: (1965) 7 OJD 281 (Orissa).**

4. Conviction and sentence.

●——**Ss. 477-A, 467** — Charge under Section 467 against Government servant for making false entries in transport permits, with intent to defraud Government — Conviction for contravention of Section 477-A not illegal though the permits may not amount to accounts — (Criminal P. C. (1898), Sections 236, 237). See Penal Code (1860), Section 467. **1960 Cri LJ 541: AIR 1960 SC 400.**

——**S. 477-A — Sentence — Request to enhance substantive sentence but to reduce that awarded in default of payment of fine — Grounds for — (Cr. P. Code (1898), Sections 32 and 423).**

The accused was convicted under Section 477-A, Penal Code, on three charges and sentenced to two months' R. I. and a fine of Rs. 1,000 or in default to four months' R. I. on each charge. In appeal he requested that the substantive sentences passed upon him may be enhanced, but the sentences awarded to him in default of payment of fine may be reduced, so that if the substantive sentences are enhanced, he will get the advantage of remissions, to which he would be entitled under the jail rules.

Held, that this would not be a sufficient ground for reducing the sentences awarded to the accused in default of payment of fine. **1956 Cr LJ 1195: AIR 1956 Bom 671 (672) (Pr 3) (DB).**

——**S. 477-A** — Sentence — Amount involved being only Rs. 100 — Crime committed more than six years ago — Accused being under suspense of protracted trial — Sentence of 5 years' rigorous imprisonment held unduly severe and reduced to one year. See Penal Code (1860), Section 409. **1959 Ker LR 847.**

——**S. 477-A** — Sentence — Accused guilty of falsification of account and abetment in order to facilitate black-marketing and evasion of sales tax — Sentence of fine should be deterrent — Person should not be allowed to enjoy ill-gotten wealth — (Cr. P. Code (1898), Section 32). **AIR 1955 NUC (Mad) 434.**

——**S. 477-A — Intention to defraud — Proof — Criminal breach of trust and falsification of accounts — Charge under Section 477-A that accused falsified accounts to cover in his own defalcations — Charge of criminal breach of trust not proved — Conviction under Section 477-A held could not be sustained.**

In order to bring home the guilt under Section 477-A, I. P. C. the prosecution has to prove that the accused had falsified the account books or made false entries therein wilfully with intent to defraud the State. Where the case for the prosecution was that the accused falsified the account books with a view to cover up his own embezzlements and not somebody else's defalcations but the charge of breach of trust against him was not proved then the prosecution case that the accused intentionally and deliberately falsified the account books to cover up his embezzlement must also fail for want of proof. The rejection of the plea of the accused that he made those entries at the dictation of the Treasury Officer does in no way establish the prosecution case that the accused wilfully falsified the account books with the intent to defraud the State. Further there was no legal evidence to show that there was any wrongful removal of moneys from the Treasury. Therefore, the conviction of the accused under Section 477-A, I. P. C. cannot be sustained. **(1964) 1 Mys LJ 440: 1965 (1) Cri LJ 565: AIR 1965 Mys 128 (130) (Pt H) (Pr 46).**

——**S. 477-A** — Applicability — Misappropriation — Evidence — Alteration of document — Accused held could not be convicted under Section 477-A for want of proof that the alterations were in his handwriting. See Penal Code (1860), Section 405. **1957 Cr LJ 1431: AIR 1957 Orissa 268 (DB).**

5. Procedure.

●——**Ss. 477-A and 409** — Scope of — Sections are mutually exclusive — Joint trial of three embezzlements with three falsifications of corresponding entries in accounts not valid — (Interpretation of Statutes). See Criminal P. C. (1898), Section 233. **1956 Cri LJ 959: AIR 1956 All 466 (FB).**

——**S. 477-A** — Criminal P. C. (1898), Sections 233 and 234 — Charge under Section 477-A, Penal Code, relating to two series of entries — **Held,** neither the charge framed nor the trial infringed provisions of Section 233 read with Section 234 — Trial was not bad on that ground — Making of wrong entry was not a distinct offence. See Criminal P. C. (1898), Sections 233 and 234. **AIR 1950 All 639.**

——**S. 477-A** — Companies Act (1913), Sections 179 and 237 — Sanction for prosecution of managing agent, for offences under Sections 409 and 477-A, Penal Code is not necessary. See Companies Act (1913), Section 179. **1961 (2) Cri LJ 615: AIR 1961 Andh Pra 493.**

——**S. 477-A** — Criminal P. C. (1898), Sec. 337 — Offence alleged under Penal Code, Sec. 477-A — Tender of pardon — Accused committed to Sessions Court under Sections 420 and 120-B — Tender of pardon is valid if the committing Magistrate is one of the Magistrates mentioned in Section 337, Cr. P. C. See Criminal P. C. (1898), Section 337. **52 Cri LJ 1222: AIR 1951 Assam 122 (2) (DB).**

——**S. 477-A** — Several defalcations made at different times within course of one year can be joined together as one offence — Such charge can be joined with another charge under Section 477-A, Penal Code regarding false entries made for covering defalcations — Special Judge under Criminal Law Amendment Act (1952), can try accused under Section 477-A, Penal Code by reason of Section 7 (3) of the Act as case falls under Section 235 (1), Criminal P. C. See Criminal P. C. (1898), Section 233. **1963 (1) Cri LJ 162: AIR 1963 Guj 15 (DB).**

——**S. 477-A** — Misappropriation by servant of the goods of his master — Nature and burden of proof — It is not enough to establish facts which give rise to a suspicion and then by reason of Section 106, Evidence Act to throw onus on accused to prove his innocence. See Penal Code (1860), Section 409. **1964 Ker LT 681.**

——**Ss. 477-A and 409** — Criminal P. C. (1898), Sections 222 (2), 235 — Joinder of charges — Misappropriation with falsification of accounts — Charge is good, because both form part of the same transaction. See Criminal P. C. (1898), Section 222 (2). **52 Cri LJ 823: AIR 1951 Kutch 64.**

——**S. 477-A** — Criminal P. C. (1898), Section 439 — Retrial — Several persons connected with Bank charged under Section 120-B read with Sections 409 and 477-A, I. P. C. — Protracted trial for $2\frac{1}{2}$ years — Joinder of charges in way impossible to try — Retrial ordered after splitting up charges. See Criminal P. C. (1898), Section 439. **AIR 1952 Mad 727 (DB).**

——**Ss. 477-A, 94** — Falsification of accounts by clerk under orders of the President of Society — Plea of fear is not available if there

is no fear of instant death or instant grievous hurt. See Penal Code (1860), Section 94. **('51) 64 MLW 445: 52 Cri LJ 1093: AIR 1951 Mad 894.**

——**S. 477-A** — Charge of falsification of accounts under Section 477-A, I. P. C. — Particulars — Accused misappropriating various sums within one month's period — Single charge of falsification of accounts to cover up defalcations by making false entries in various account books without mentioning particulars as to time and place of alleged offences is highly vague and does not comply with Section 233, Criminal P. C. — Misjoinder of charges. See Criminal P. C. (1898), S. 222 (2). **AIR 1965 Mys 128.**

——**S. 477-A** — Charge under Section 477-A, Penal Code, of falsification of accounts during particular period — What prosecution should prove, stated — Evidence of similar false entries made previously — How far admissible, indicated. See Evidence Act (1872), Section 14. **1965 (1) Cri LJ 565: AIR 1965 Mys 128.**

——**Ss. 477-A and 408** — Offences under — Sanction of Registrar not required for prosecution under Section 408 though it may be necessary for prosecution under Section 477-A. See Co-operative Societies—Madras Co-operative Societies Act (6 of 1932), Section 56 (3). **24 Cut LT 135: ILR (1958) Cut 140.**

——**S. 477-A** — Criminal P. C. (1898), Sections 403, 235, 236, 237 — Previous conviction under Section 409, Penal Code — Subsequent trial under Section 477-A, Penal Code on same facts not barred. See Criminal P. C. (1898), Section 403. **1963 (1) Cri LJ 218: AIR 1963 Raj 14 (DB).**

——**Ss. 477-A and 409** — Criminal P. C. (1898), Sections 222 (2), 235 (1) — Misappropriation and falsification of accounts — Joint trial is proper since evidence in both cases will generally be same. See Criminal P. C. (1898), Section 222 (2). **1955 Cri LJ 1520: AIR 1955 Sau 91 (DB).**

SECTION 478

——**Ss. 478, 486 — "Trade mark" — Includes non-registered marks.**

In a prosecution under S. 486, the evidence of the complainant need not be confined only to the trade marks registered under the Trade Marks Act, 1940. The expression as defined by S. 478 applies to other marks also. The mere fact that a trade mark has been used for several years by any person is sufficient to hold that trade mark is his and an infringement of it is punishable even though such a trade mark is unregistered. **AIR 1955 NUC (All) 1996.**

——**S. 478 — Trade mark by reputation — When established.**

If the Court is not satisfied that the label which is to be found upon an article had been in existence for 10/12 years as made out by the complainant, it is not possible to hold that the label had acquired the reputation of a trade mark within the latter part of S. 478. **1956 Cri LJ 1302: AIR 1956 Bom 700 (703) (Pt A) (Pr 8) (DB).**

——**Ss. 478, 482 — Trade mark — Infringement of — Mark not registered — Evidence to establish ownership — Trade mark in surname.**

What the Court has to determine is whether the Trade Mark claimed by the complainant is distinctive mark, that is to say, a mark which is adopted to distinguish the goods of the proprietor of the particular Trade Mark from those of other persons. For that purpose it is necessary to ascertain the extent to which the user of that Mark has rendered it in effect distinctive of the goods in question.

A declaration of ownership for the purpose of registration is not evidence of legal ownership of a Trade Mark, for such a declaration represents nothing more than the opinion and claim of the declarant.

The right to a surname that a man uses is shared with every person who elects to use the same name and consequently he has no monopoly in it.

Where the complainant was a manufacturer of a fever mixture which had acquired a reputation in fever cases and was sold by the name of Burman's Jury Tap in a red coloured carton with a design which had not been registered, the evidence that is required is that the complainant had established a trade mark in the name Burman and that person bought the complainant's medicine because it was contained in his carton, that is to say, a person who received the complainant's carton would rely on finding in it the medicine which he intended to purchase. If there was no such evidence then any one selling medicine in a carton so similar to that of the complainant as to mislead a purchaser into believing that he was actually purchasing the complainant's medicine would not be infringing the complainant's Trade Mark. **AIR 1951 Pat 289 (290) (Pr 2).**

SECTION 480

——**S. 480** — Applicability — Person stocking goods wrapped in wrappers bearing marks which are colourable imitation of genuine marks—Cannot be held to have used any false trade mark or any false property within the meaning of Section 482 — Mere possession of such property does not amount to using such property in the manner contemplated by S. 480. See Penal Code (1860), S. 482. **1958 Cr LJ 1102: AIR 1958 All 643 (DB).**

——**Ss. 480, 482, 486 — Scope — Colourable imitation of trade-mark — Test.**

Section 486, I. P. C. refers to counterfeiting a trade mark or property mark. Where it is not a case of counterfeiting, but of a colourable imitation of the trade-mark, the offence will come under S. 480, I. P. C. punishable under S. 482, I. P. C. and not under S. 486.

The test is not that the trade mark in question is an exact or substantial copy of the trade-mark used by the complainant, but whether the imitation of the trade-mark of the complainant has been done in a manner likely to cause the trade-mark in question to be mistaken for the trade-mark of the complainant. It is the totality of impression which is likely to be left by the trade-marks in the mind of a probable purchaser that has to be considered; the differences on non-essential points are not important. Conviction and sentence altered from S. 486 to one under Section 482, I. P. C. AIR 1954 Pat 102, Disting. **1956 Cr LJ 183: 1955 All LJ 701: AIR 1956 All 132 (132 to 134) (Prs 2, 4).**

——**S. 480** — Question of intention depends on circumstances of each case. **ILR (1961) Bom 841: 1961 (2) Cri LJ 871: 63 Bom LR 563: 1961 Nag LJ 462: AIR 1962 Bom 29 (31) (Pt C) (Prs 13, 16) (DB).**

——**S. 480 — Intending purchaser need not be actually deceived.**

Section 480 of the Penal Code does not necessarily require that any intending purchaser should actually be deceived. It is sufficient if the deception in question is reasonably calculated to cause it to be believed that the goods so marked have a connection with the course of trade of a person with whom they have not any such connection. **1960 Cr LJ 220: AIR 1960 Cal 63 (63) (Pt A) (Pr 4) (DB).**

——S. 480 — **Question whether accused used wrappers with false trade mark — In absence of evidence, Court can come to its own conclusion.**

Where the question is whether the accused used wrappers with false trade-mark thereon, the Court is quite competent in the absence of any evidence to come to its own conclusion after looking at the two wrappers etc. It is within its competence to place itself in the position of an unwary purchaser. **1960 Cr LJ 220: AIR 1960 Cal 63 (63) (Pt B) (Pr 5) (DB).**

——S. 480 — Sentence — In appropriate cases only condign punishment will meet ends of justice. **1960 Cr LJ 220: AIR 1960 Cal 63 (64) (Pt C) (Pr 14) (DB).**

——S. 480 — **Offence of using false trade-mark — What prosecution has to prove — Trade-marks bearing different numbers — Offence.**

In order to establish a case under S. 480, the prosecution must prove that the accused marked his goods in a manner which reasonably showed to others that the goods so marked were the merchandise of some other person. If there is a distinguishing mark, such as different numbers on the labels, then it cannot be said with any justification that the accused is guilty of passing off. Where the labels fixed on the packages of the complainants' bidis bore No. "16" whereas the labels on the bundles of the bidis of the accused bore No. '19'.

Held, that the accused could not be held guilty under S. 480, I. P. C. **1958 MPC 60: 1958 Jab LJ 70: 1958 All LJ (Rev) 30: 1958 All WR (Sup) 47 (1): 1958 MPLJ 182: 1958 Cr LJ 1041: 1958 All Cr R 164: AIR 1958 Madh Pra 242 (243) (Prs 3, 4, 6).**

——Ss. 480, 482, 483, 486 — **Counterfeiting of trade mark — Test — Likelihood of deception of unwary purchaser is the real test — Test by comparison of marks side by side is not sound test.**

Where a manufacturer is selling his goods under a certain trade mark, the question, whether another manufacturer of such goods using similar mark is likely to deceive the public that they are purchasing the goods so manufactured by the former, is a question of fact to be decided on the evidence adduced; the vital element in such a case is the likelihood or possibility of deception or confusion.

Witnesses can be called to prove the circumstances and the place in which the articles are sold, the classes of persons who buy them, and whether they include persons who are illiterate or ignorant. The test of comparison of the marks side by side is not a sound one.

Section 480, Penal Code, does not necessarily require that any intending purchasers should actually be deceived. It is sufficient, if the deception in question is reasonably calculated to cause it to be believed that the goods so marked have a connection with the course of trade of a person with whom they have not any such connection. If it is clear, from a simple look, that the get-up of the offending labels or wrappers is closely similar to the get-up of the complainant's goods, and in general appearance, labels and colour section and other essential details of the wrappers of the offending mark so closely resemble those of the complainant's mark, that they are likely to deceive an unwary purchaser who is acquainted with the trade-mark and who trusts his memory in such a case, such use is an offence of counterfeiting trade mark punishable under Penal Code. (1940) 2 Mad LJ 151; AIR 1956 All 132, Rel. on. **1962 (1) Cr LJ 358: AIR 1962 Orissa 52 (53) (Pr 4).**

——Ss. 480, 482 — **Use of false trade-mark — Test of.**

The question in such cases is whether the alleged false trade-mark was likely to deceive the buyers in thinking that they were buying not the goods of actual manufacturer but that they were buying goods of some other manufacturer. The test in such cases is not that the trade-mark in question is an exact or substantial copy of the trade-mark used by the compalinant, but whether the imitation of the trade-mark of the complainant has been done in a manner likely to cause the trade-mark in question to be mistaken for the trade-mark of the complainant.

It is the totality of impression which is likely to be left by the trade-marks in the mind of a probable purchaser that has to be considered. The differences on non-essential points are not important; what is important is the main idea conveyed to the mind by the two trade-marks. If the marking on the goods or on the package in which the goods are marketed, are similar in design, shape, and colour scheme with the marking of the complainant, it must be held that, although there may be differences in details between the two markings, the markings used by the accused were calculated to mislead the buyers.

The test of comparison of the marks side by side is not a sound one, since a purchaser will seldom have the two marks actually before him when he makes his purchase; and marks with many differences may yet have an element of similarity which will cause deception, more especially if the goods are in practice asked for by a name which denotes the mark or the device on it. AIR 1940 PC 86, Rel. on. **1953 BLJR 418: ILR 32 Pat 515: 1954 Cr LJ 161: AIR 1954 Pat 102 (103 to 105) (Pt A) (Prs 8, 12) (DB).**

——Ss. 480, 482 — **Applicability — Seller or Stockist of manufacturer using false trade-mark — Liability of.**

Persons who merely sell or stock the goods of the manufacturer who uses a false trade-mark cannot be held to have either committed the offence under S. 480 or to have abetted the commission of it. **1953 BLJR 418: ILR 32 Pat 515: 1954 Cr LJ 161: AIR 1954 Pat 102 (105) (Pt C) (Pr 19) (DB).**

SECTION 482

SYNOPSIS

(Penal Code (1860), S. 482.)

1. **Applicability.**
2. **Procedure.**
3. **Counterfeiting — Meaning of.**
4. **Evidence and Proof.**
5. **Sentence.**

1. Applicability.

——S. 482 — **Applicability — Person stocking goods wrapped in wrappers bearing marks which are colourable imitation of genuine marks.**

Persons who stock goods wrapped in wrappers bearing marks which can be said to be a colourable imitation of genuine marks cannot be held to have used any false trade-mark or any false property mark within the meaning of S. 482, I. P. C. Something is actually to be done by a person before he can be said to have used it. Mere possession, therefore, does not amount to using such property in the manner contemplated by S. 482, I. P. Code. Cri. Revn. No. 118 of 1955, dated 13th July, 1956 (All), Approved. **1958 Cr LJ 1102: AIR 1958 All 643 (644) (Pt A) (Pr 5) (DB).**

——Ss. 482, 483, 485, 486, 488 — **Counterfeiting trade mark — Tests — Duty of Court — Mereh-**

andise Marks Act (1889), Ss. 6, 7 — Trade Marks Act (1940), Ss. 21, 25.

In all cases where it is alleged that the same kind of goods are being passed off under a counterfeit trade mark, it is the duty of the Court to find out whether or not the mark is counterfeit having due regard to the similarity or otherwise of the marks and the circumstances connected with the case. The principle in all these cases is, what is the effect of the particular trade mark on an unwary purchaser, and whether or not that purchaser would be deceived by the use of that particular trade mark. There may be some difference in the designs and yet the Court may come to the conclusion that the use of marks is calculated to deceive. It is this test which must be applied in considering the question at issue. (1942) 1 All ER 615, Rel. on.

Having due regard to the language of the sections used in the Penal Code, the test is the same. The sections do not require that the user of the mark must actually defraud anyone; the use must be reasonably calculated to cause any person to believe that the goods so marked or any goods contained in any such receptacle were of a nature or quality different from the real nature. **1961 (2) Cr LJ 871: 63 Bom LR 563: 1961 Nag LJ 462: ILR (1961) Bom 841: AIR 1962 Bom 29 (31) (Pt B) (Pr 13) (DB).**

——**S. 482** — Complaint against company and its two directors under Ss. 6 and 7 and Ss. 486, 485 and 482, I. P. C. — No proof of guilty intention against directors — Applying false description to goods — What is — Company held guilty under S. 6 — No offence by Directors. See Merchandise Marks Act (1889), S. 6. **(1959) 61 Bom LR 603.**

——**Ss. 482 and 485 — Applicability — Trade Marks Act (1940), Ss. 2 (f), 12, 44 (2) — Containers bearing complainant's trade mark recovered from shops of accused — Complainant's product removed and spurious stuff substituted — Offence.**

Held on facts that the charges under Ss. 482 and 485 were established against the accused and the burden was on accused to prove that he had acted without intent to defraud. **1961 (1) Cr LJ 488: ILR (1961) 1 Cal 598: AIR 1961 Cal 240 (246) (Pt H) (Prs 30, 32, 33) (DB).**

——**S. 482—Using a false trade mark — Question whether general get-up of bidi katta of accused is colourable imitation of Bidi Katta of complainant — Factor which Court has to take into consideration — Evidence of witnesses — Value of.**

In a prosecution under S. 482, Penal Code, for using a false trade mark, where the gravamen of the charge was that the accused marked the tissue paper containers of the Bidi kattas manufactured by them in a manner reasonably calculated to cause it to be delivered that they were the Bidi kattas of the complainant's firm, the Court has to decide for itself by looking at the two marks whether the general 'get-up' of the katta of the accused is a colurable imitation of the 'Katta' of the complainant.

The evidence of witnesses that the mark of the accused was a colourable imitation or calculated to deceive an unwary purchaser would only be their opinion on matter on which the Judge has to give his decision. He cannot surrender his own dependent judgment to any witness whatever.

Held, on a comparison of the two marks the mark of the accused was a colourable imitation of the mark of the complainant and was likely to deceive an unwary purchaser of the class which usually purchases the bidies in question. The difference in number was not such a prominent variation. **1962 Jab LJ 1091: 1962 MPC 228: 1962 MPLJ 709: 1962 (2) Cr LJ 551 (554) (Prs 8, 9, 11, 12) (Madh Pra) (DB).**

——**Ss. 482, 483, 486** — Scope — Trade Marks Act (1940), S. 68 — Offences under — **Held** that putting the two phials and the two cartons together, there is not the slighest doubt in spite of some petty differences, that the goods of the respondent are an imitation of the goods of the complainant's master and that unwary public are liable to be misled by the resemblance. **ILR 37 Pat 1100: 1959 Cr LJ 1463: AIR 1959 Pat 554 (555, 556) (Pt A) (Prs 8, 12) (DB).**

——**S. 482** — Seller or stockist of manufacturer using false trade-mark — Cannot be held to have either committed the offence under S. 480 or abetted the commission of it — In that view of the matter their conviction under S. 482/109 cannot possibly be upheld. See Penal Code (1860), S. 480. **AIR 1954 Pat 102 (DB).**

2. Procedure.

——**S. 482** — Trial for offence under Essential Commodities Act — Evidence also disclosing offence under Ss. 482 and 485, Penal Code — Magistrate can frame charge also under Ss. 482 and 485, without there being a complaint — There is no bar to the taking of cognisance of offence under Ss. 482 and 485, in the sense that there is no provision in Code of Criminal Procedure which obliges the person whose trade-mark rights have been infringed to be the complainant in the case. See Criminal P. C. (1898), S. 190. **1961 (1) Cri LJ 488: AIR 1961 Cal 240 (DB).**

——**S. 482** — Charge wrongly framed — Effect —Wherein a charge under S. 482 the word "uses" was not found, it was held that since no prejudice was caused to the accused the trial was not vitiated.

Even if a charge is wrongly framed the conviction is not liable to be quashed unless and until prejudice has occurred to the accused. AIR 1956 SC 116, Rel. on. See Criminal P. C. (1898), Section 537. **1961 (1) Cri LJ 488: AIR 1961 Cal 240 (DB).**

——**S. 482 — Charge — Defence — Registration under Trade Marks Act — If valid plea.**

The fact that trade-mark has been registered by the accused is no answer to the offence of using false trade-mark as defined in S. 480. Even in cases where a trade-mark has been registered under the Trade Marks Act, 1940, the Court is not bound by any opinion express or implied of the officer empowered to register the trade-mark; the Court must come to its own conclusions as to whether or not the trade-mark in question was likely to cause deception. **1953 BLJR 418: ILR ILR 32 Pat 515: 1954 Cr LJ 161: AIR 1954 Pat 102 (105) (Pt B) (Pr 16) (DB).**

——**S. 482** — Trade mark — Infringement of — Mark not registered — Evidence to establish ownership — Trade mark in surname — A declaration of ownership for the purpose of registration is not evidence of legal ownership of a trade mark, for such declaration represents nothing more than the opinion and claim of the declarant — The right to a surname that a man uses is shared with every person who elects to use the same name and consequently he has no monopoly in it. See Penal Code (1860), Section 478. **AIR 1951 Pat 289.**

3. Counterfeiting — Meaning of.

——**S. 482** — Scope — Colourable imitation of trade-mark — Test — Test is not that the trade-

mark in question is an exact or substantial copy of the trade-mark used by the complainant but whether the imitation of the trade-mark of the complainant has been done in a manner likely to cause the trade mark in question to be mistaken for trade mark of the complainant. See Penal Code (1860), S. 480. **1956 Cri LJ 183: AIR 1956 All 132.**

——**Ss. 482, 485** — Counterfeiting of trade-mark — It is by no means necessary that there should be absolute identity — The proper test is whether the general get up is ligely to deceive the unwary purchaser. **1961 (1) Cri LJ 488: ILR (1961) 1 Cal 598: AIR 1961 Cal 240 (247) (Pt I) (Pr 34) (DB).**

——**S. 482** — Counterfeiting of trade-mark — Test — Likelihood of deception of unwary purchaser is the real test — Test by comparison of marks side by side is not sound test — The matter must be considered from the point of view of the ordinary unwary purchaser and the totality of the impression gained on seeing the labels and wrappers in question when offered for sale. See Penal Code (1860), S. 480. **1962 (1) Cri LJ 358: AIR 1962 Orissa 52.**

——**S. 482** — Counterfeiting — Meaning of. See Penal Code (1860), S. 28 (2). **(1962) 4 OJD 47.**

——**S. 482** — Use of false trade-mark — Test of — Test of comparison of the marks side by side is not sound one — It is the totality of impression which is likely to be left by the trade-mark in the mind of a probable purchaser that has to be considered. See Penal Code (1860), S. 480. **1954 Cri LJ 161: AIR 1954 Pat 102 (DB).**

4. Evidence and Proof.

——**Ss. 482, 485** — Evidence — Customer aggrieved by use of counterfeit mark need not personally come before Court. ILR 22 Mad 488, Distinguished. **63 Bom LR 563: 1961 Nag LJ 462: 1961 (2) Cr LJ 871: ILR (1961) Bom 841: AIR 1962 Bom 29 (32) (Pt D) (Pr 17) (DB).**

——**S. 482** — Conviction for affixing counterfeit mark — Essentials. See Merchandise Marks Act (1889), S. 7. **(1959) 61 Bom LR 603.**

——**Ss. 482, 485 — Proof of actual sale not necessary.**

It is not necessary to prove actual sale for the purpose of bringing the charge under S. 482 or S. 485, home to the accused. It would be enough if circumstances are proved to establish that the tins bearing counterfeit trade mark were actually stored for sale. The elements of the offences charged do not require proof of any person having been actually deceived. It is enough if the circumstances proved are sufficient to establish that prospective buyers were likely to be deceived. **1961 (1) Cr LJ 488: ILR (1961) 1 Cal 598: AIR 1961 Cal 240 (247) (Pt J) (Pr 36) (DB).**

——**S. 482 — Nature of evidence.**

Whether similar marks used by the accused was likely to deceive the public that they were purchasing the goods of the complainant is a question of fact to be decided on the evidence on record. The question is the probability of deception, that is whether or not the accused were using a false mark in a manner reasonably calculated to cause it to be believed that the property or goods so marked, or any property or goods contained in any such receptacle so marked belong to a person to whom they do not belong. This may depend, on a number of matters, as well as the question of similarity of marks or of the get-up. AIR 1940 PC 86, Rel. on. **(1962) 4 Orissa JD 47.**

5. Sentence.

——**Ss. 482, 485 — Sentence — Merchandise Marks Act (1889), Ss. 6, 7.**

No protection can be afforded if persons are let off with light fines for offences of counterfeiting trade marks. There may be cases when the offence is committed inadvertently in which case a small fine may be justified. When however, there is systematic policy of pursuing another in using his trade mark it becomes a different matter. AIR 1936 Pat 579, Not foll. **1961 (2) Cr LJ 871: 63 Bom LR 563: 1961 Nag LJ 462: ILR (1961) Bom 841 : AIR 1962 Bom 29 (32) (Pt E) (Pr 20) (DB).**

——**Ss. 482, 486 and 487** — Applicability — False trade-mark on description to goods — Offence — Sentence — Deliberate false representation to public — Offence committed was not merely of a technical nature and hence it was necessary to impose deterrent punishment. See Merchandise Marks Act (1889), S. 2 (3) **52 Cri LJ 431: AIR 1951 Bom 45 (DB).**

SECTION 483

——**S. 483** — Counterfeiting trade-mark — Tests — Duty of Court indicated — In all cases where it is alleged that the same kind of goods are being passed off under a counterfeit trade mark, it is the duty of the Court to find out whether or not the mark is counterfeit having due regard to the similarity or otherwise of the marks and the circumstances connected with the case. The principle in all these cases is, what is the effect of the particular trade-mark on an unwary purchaser and whether or not the purchaser would be deceived by the use of that particular trade-mark. See Penal Code (1860), Section 482. **1961 (2) Cri LJ 871: AIR 1962 Bom 29 (DB).**

——**S. 483** — Counterfeiting of trade mark — Test — Likelihood of deception of unwary purchaser is the real test — Test by comparison of marks side by side is not sound test — The matter has to be considered from the point of view of the ordinary unwary purchaser. See Penal Code (1860), S. 480. **1962 (1) Cri LJ 358: AIR 1962 Orissa 52.**

——**S. 483** — Trade Marks Act (1940), S. 68 — Offences under, held committed, in the facts of the case — Design of carton of the respondent is exactly similar to that of the complainant with the very slight difference in name—In spite of this petty difference the respondent's goods are an imitation of the goods of the firm of complainant's master and that unwary public are liable to be misled by the resemblances. See Penal Code (1860), S. 482. **1959 Cri LJ 1463: AIR 1959 Pat 554 (DB).**

SECTION 484

——**S. 484 — Applicability — Agmark label — Use of — Offence.**

An Agmark label is really a label prescribed by the Central Government and cannot be said to be a mark used by a public servant. By using a counterfeit Agmark label a person cannot therefore be held to have committed an offence under Section 484, I. P. C. **1959 Cr LJ 38: ILR (1959) 1 Cal 63: AIR 1959 Cal 32 (35) (Pt C) (Pr 13) (DB).**

SECTION 485

——**S. 485** — Possession of property mark — Counterfeit labels and wrapping papers recovered from house of accused — House in occupation of several tenants — It is bounden duty of pro.

secution to prove by satisfactory evidence that recoveries were made from portion of house in possession of the accused — Criminal P. C. (1898), S. 244. **1964 All Cri R 93: 1964 All WR (HC) 105.**

——**S. 485** — Counterfeiting trade mark — Tests — Duty of Court indicated — In all cases where it is alleged that the same kinds of goods are being passed off under a counterfeit trade mark, it is the duty of the Court to find out whether or not the mark is counterfeit having due regard to the similarity or otherwise of the marks and the circumstances of the case. The principle in all these cases is, what is the effect of the particular trade-mark on an unwary purchaser and whether or not the purchaser would be deceived by the use of that particular trade-mark. The sections do not require that the user of the mark must actually defraud anyone; the use must be reasonably calculated to believe that the goods so marked were of a quality or nature different from the real nature. See Penal Code (1860), S. 482. **1961 (2) Cri LJ 871: AIR 1962 Bom 29 (DB).**

——**S. 485** — Evidence — Customer aggrieved by use of counterfeit mark need not personally come before Court. See Penal Code (1860), Sec. 482. **1961 (2) Cri LJ 871: AIR 1962 Bom 29 (DB).**

——**S. 485** — Sentence — No protection can be afforded if persons are let off with light fines for offences of counterfeiting trade-marks — Merchandise Marks Act (1889), Ss. 6, 7. See Penal Code (1860), S. 482. **1961 (2) Cri LJ 871: AIR 1962 Bom 29 (DB).**

——**S. 485** — Complaint against company and its two directors under Sections 6 and 7 and Sections 486, 485 and 482, I. P. C. — No proof of guilty intention against directors — Applying false description to goods — What is — Company held guilty under Section 6 — No offence by directors. See Merchandise Marks Act (1889), S. 6. **(1959) 61 Bom LR 603.**

——S. 485 — Conviction for affixing counterfeit mark — Essentials. See Marchandise Marks Act (1889), S. 7. **(1959) 61 Bom LR 603.**

——**S. 485** — Trade Marks Act (1940), Ss. 2 (f), 12, 44 (2) — Containers bearing complainant's trade mark recovered from shops of accused — Complainant's product removed and spurious substituted — Offence under Ss. 482, 485, held established. See Penal Code (1860), S. 482. **1961 (1) Cri LJ 488: AIR 1961 Cal 240 (DB).**

——**S. 485** — Trial for offence under Essential Commodities Act — Evidence also disclosing offence under Sections 482 and 485, Penal Code — Magistrate can frame charge also under Sections 482 and 485, without there being a complaint — It is not also necessary that the party aggrieved must himself make a complaint—Criminal P. C. (1898), S. 237. See Criminal P. C (1898), S. 190. **1961 (1) Cri LJ 488: AIR 1961 Cal 240 (DB).**

——**S. 485** — Counterfeiting of trade mark — It is by no means necessary that there should be absolute identity — The proper test is whether the general get-up is likely to deceive the unwary purchaser. See Penal Code (1860), S. 482. **1961 (1) Cri LJ 488: AIR 1961 Cal 240 (DB).**

——**S. 485** — Proof of actual sale is not necessary for bringing home to the accused charge under S. 482 or S. 485 — Elements of offences charged do not require proof of any person having been actually deceived. See Penal Code (1860), S. 482. **1961 (1) Cri LJ 488: AIR 1961 Cal 240 (DB).**

——**Ss. 485 — Burden of proof — S. 28, Expl. 2 — Scope.**

The first part of Section 485 is concerned with making or possessing any instrument for the purpose of counterfeiting a trade mark or property mark, whereas, the second part is concerned with possession of a trade mark or property mark for the purpose of passing off.

The general onus of making out the ingredients of the offence rests upon the prosecution and can be discharged by praying in aid the presumption which arises under Expl. 2 to Section 28. It is to be observed, however, that the prosecution must call relevant evidence to lay the foundation for a presumption under Expln. 2 as the presumption, whereby an intention to practise deception can be established, is rebuttable.

A drug company manufactured and sold certain drug in paper cartons with their registered trade mark thereon. On information that spurious drug was being sold with the counterfeit of the said trade mark, it lodged a complaint and in pursuance of a search warrant certain blocks for manufacturing the counterfeit of the trade mark as well as thick paper cartons with the counterfeit trade mark printed upon them were recovered from two printing presses and from the accused, who was charged under S. 485, I. P. Code, under both the parts.

Held, that the possession of the blocks and of a huge quantity of counterfeit cartons, in the circumstances of the case gave rise to the inference that such possession was either for the purpose of counterfeiting a trade mark or for the purpose of passing off.

(2) That the said counterfeit trade mark in the shape of cartons was for the purpose of passing off spurious goods for genuine goods, and that the accused was thus guilty of the offence under Section 485. **1954 Cr LJ 841: 58 Cal WN 96: AIR 1954 Cal 277 (278, 279) (Prs 7 to 9, 12) (DB).**

——**S. 485** — Constitution of India, Art. 20 (2) — Second prosecution based on different sets of counterfeit labels on different occasions at different places — Such prosecution held not in violation of Art. 20 (2) or S. 403, Criminal P. C. See Constitution of India, Art. 20 (2). **1960 Cri LJ 609: AIR 1960 Madh Pra 149.**

——**Ss. 485 and 486 — Applicability — Infringement of trade mark — Aggrieved party not taking action within time limited by S. 15, Merchandise Marks Act — Prosecution — If barred.**

Trade mark offences being principally offences against property are non-cognizable offences, the real complainant being the person directly affected by the infringement in question. If the sufferer, therefore, does not proceed to take action within time envisaged by the relevant provisions of a special Act embracing the field the penal provisions of Indian Penal Code cannot keep the remedy alive.

Where the prosecution for offences under Sections 485, 486, I. P. Code were started more than three years after its commission and the aggrieved persons whose trade marks had been infringed had not taken any action for all these years the prosecution would be barred in view of Section 15, Merchandise Marks Act. **1960 Cr LJ 1656: AIR 1960 Punj 641 (642) (Pt B) (Prs 5, 6).**

SECTION 486

SYNOPSIS

(Penal Code (1860), S. 486.)

1. Applicability.
2. Counterfeiting of trade mark — Tests.

3. Taking of precautions.
4. Burden of proof.
5. Innocently — Meaning of.
6. Counterfeit — Meaning of.
7. Procedure.

1. Applicability.

——**S. 486** — Complaint against company and its two directors under Ss. 6 and 7 and Sections 486, 485 and 482. I. P. C. — No proof of guilty intention against directors — Applying false description to goods — What is — Company held guilty under Section 6 — No offence by directors. See Merchandise Marks Act (1889). S. 6. **(1959) 61 Bom LR 603.**

——**S. 486** — Conviction for affixing counterfeit mark — Essentials. See Merchandise Marks Act (1889). S. 7. **(1959) 61 Bom LR 603.**

——**S. 486 — Offence under — Essentials — Long existence of label not proved — No imitation or infringement.**

It is not necessary to constitute an offence, under Section 486 that the label should be exactly identical. If there is similarity between the two labels so as to mislead an unsuspecting customer, the requirement of the law is satisfied. But where upon the evidence it is found that the complainant has not proved that his label had been in existence for 10 to 12 years as suggested by him, it is not possible to hold that the accused has committed an infringement of the label. If it had been shown by the complainant that his label was in existence for a long time, that is to say, for at least 10 to 15 years, then it would be possible to hold that there was a resemblance between the labels. **1956 Cr LJ 1302: AIR 1956 Bom 700 (703) (Pt B) (Pr 9) (DB).**

——**Ss. 486, 482 and 487** — False trade description — Description indicating false place of manufacture — Falls within the definition of "false trade description" as contained in S. 2 (3) of Merchandise Trade Marks Act — The accused were guilty under Sections 6 and 7 of that Act as well as under Ss. 482, 486 and 487 of I. P. C See Merchandise Marks Act (1889), S. 2 (3). **52 Cri LJ 431: AIR 1951 Bom 45 (DB).**

——**S. 486 — Applicability — Infringement of trade mark — Wrapper of certain soap — Protected marks not used by accused — No infringement — (Indian Merchandise Marks Act (1889), S. 7).**

Where, though the word 'Rexona' was registered under the Trade Marks Act and a label with certain marks shown in the certificate of registration was also found to have been protected by registration, the complainant-Company had not trade mark right in respect of the wrappers of 'Rexona', and no evidence was given that any purchaser was likely to be deceived by the wrappers used by the accused as the marks shown in the registration certificate of 'Rexona' did not appear on the wrappers of the 'Rihana' which was being manufactured by the accused.

Held, that the accused could not be convicted of an infringement of trade mark. **1960 Cr LJ 222: AIR 1960 Cal 119 (119) (Pr 5) (DB).**

——**S. 486** — Trade Marks Act (1940), S. 68 — Offences under, held committed, in the facts of the case — Resemblances in the cartons of the goods of complainant's master and those of the respondents are such as to mislead unwary public—In spite of the petty differences respondents' goods are an imitation of the goods of the complainant's master. See Penal Code (1860), S. 482. **1959 Cri LJ 1463: AIR 1959 Pat 554 (DB).**

2. Counterfeiting of trade mark — Tests.

——**Ss. 486, 28 — Counterfeit trade mark — What is — Article repainted including trade mark — Trade mark is not counterfeit.**

A counterfeit trade mark is one by means of which resemblance to a genuine article is intended to deceive or to lead a purchaser to imagine that the counterfeit is in reality the genuine article. Therefore, if a trade mark of a company is put on an article belonging to or manufactured by that company, then the trade mark is not counterfeit. An article does not cease to be the manufacture of a particular company merely because it has become old or the trade mark on it has faded. Thus if a "Hercules" bicycle is repainted including its trade mark it cannot be said that the trade mark is counterfeit. Similarly, if a trade mark label on a bottle is torn off and another is affixed, it cannot be suggested that the trade mark is counterfeit because the article being genuine, there can be no intention to deceive. (Ingredients of offence under Section 486 stated). **1962 All LJ 1038: 1962 All Cr R 455: 1962 All WR (HC) 821: 1963 (1) Cri LJ 282: AIR 1963 All 133 (134) (Pt A) (Pr 6).**

——**S. 486** — Scope — Colourable imitation of trade mark — Test — Test is not that the trade mark in question is an exact or substantial copy of trade mark used by complainant, but whether the imitation is likely to cause trade mark of question to be mistaken for the trade mark of the complainant — Offence of colourable imitation of trade mark falls under Section 480 and not under S. 486. See Penal Code (1860), S. 480. **1956 Cri LJ 183: AIR 1956 All 132.**

——**S. 486** — Counterfeiting trade mark — Tests — Duty of Court indicated — In all cases where it is alleged that the same kinds of goods are being passed off under a counterfeit trade mark, it is the duty of the Court to find out whether or not the mark is counterfeit having due regard to the similarity or otherwise of the marks and the circumstances connected with the case. The principle in all these cases is, what is the effect of the particular trade mark on an unwary purchaser, and that whether or not the purchaser would be deceived by the use of that particular trade mark. See Penal Code (1860), S. 482. **AIR 1962 Bom 29 (DB).**

——**S. 486** — Counterfeiting of trade mark — Test — Likelihood of deception of unwary purchaser is the real test — Test by comparison of marks side by side is not sound test — The matter must be considered from the point of view of ordinary unwary purchaser and the totality of the impression gained on seeing labels and wrappers in question when offered for sale. See Penal Code (1860), S. 480. **1962 (1) Cri LJ 358: AIR 1962 Orissa 52.**

3. Taking of precautions.

——**S. 486 (c)** — Failure to take reasonable precautions — Moreover accused having reason to suspect genuineness of mark upon goods sold by him — **Held,** accused's act did not fall under S. 486 (c). **54 Bom LR 795: 1953 Cri LJ 408: AIR 1953 Bom 85 (88) (Pt C) (Pr 7) (DB).**

——**S. 486 (a) — Taking of precautions — Question of gross negligence.**

The statute requires taking of precautions, and if precautions are not taken that is an infringement of the statute, if subsequently it is found that the article which was sold or kept for sale bore a counterfeit trade mark. That is apart from the fact that really speaking there is no

such thing from the real point of view as gross negligence. Negligence is the breach of duty to take proper care and once there is a breach of that duty, it does not make any difference from the legal point of view how gross or how small that breach is. **54 Bom LR 795: 1953 Cri LJ 408: AIR 1953 Bom 85 (88) (Pt D) (Pr 7) (DB).**

4. Burden of proof.

——S. 486 — Burden of proof — Trade mark on articles not proved to be counterfeit — There is no question of proving innocence of accused.

It is only when it is proved that an accused person has sold or exposed or had been in possession for sale or any purpose of trade or manufacture any goods or things with a counterfeit trade mark that the onus will lie on him to show that he acted honestly and did not commit an offence. Where it is not proved that the trade marks on the articles recovered from the accused are counterfeit, there can be no question of the accused proving his innocence. **1962 All LJ 1038: 1962 All Cr R 455: 1962 All WR (HC) 821: 1963 (1) Cr LJ 282: AIR 1963 All 133 (134) (Pt B) (Pr 7).**

——S. 486 — Onus of proof — Nature of.

Section 486, I. P. Code, casts an onus upon the person charged which has to be discharged in compliance with the provisions of the section itself. Once the prosecution has laid the foundation of a charge by proving generally the circumstances which would lead to a reasonable inference that an offence under Section 486 has been committed it becomes the duty of the person charged to prove the circumstances set out in the section in order that he might reasonably claim an acquittal. Ordinarily, speaking, the onus lies on the prosecution, but in a case of this kind where a specific provision in the Code, punishing the offence lays a burden on the person charged, he has to discharge the onus that has been laid upon him. In this sense, therefore, Section 486 is indeed different from the other sections of the Code. **1956 Cr LJ 738: AIR 1956 Cal 260 (262) (Pt C) (Pr 7).**

5. Innocently — Meaning of.

——S. 486 — "Reasonable precautions" — Meaning of — Mens rea — Proof — Necessity.

The offence of counterfeiting will be complete as soon as the various acts mentioned in the section as forming ingredients of the offence have been established. The section makes no reference to mens rea or a guilty state of mind. After the proof of the essential ingredients, the burden shifts on to the accused to prove the existence of circumstances, which will take the case either within the ambit of Clauses (a) and (b) or Clause (c). Clause (c) will apply only when first two clauses do not come into operation. The words "having taken all reasonable precautions" in Cl. (a) must be read in conjunction with the concluding words of that clause, namely 'had no reason to suspect the genuineness of the mark" That means that the precautions, which the accused is expected to take, have relation to the examination of mark and his coming to the conclusion that after having taken all reasonable precautions, he had no reason to suspect that the mark was a false or a counterfeit mark. The very fact that accused No. 1 (owner) thought it fit to give specific instructions to accused No. 2 his servant not to deal in objectionable goods, indicates that accused No. 1 had suspicion in that respect. It may also be said that he had a guilty conscience in that matter, where he was already prosecuted once and had given an undertaking that he would not deal in objectionable goods. **63 Bom LR 69: 1961 Nag LJ 71: 1961 (2) Cri LJ 66: ILR (1961) Bom 248: AIR 1961 Bom 203 (205) (Pt A) (Prs 9, 10) (DB).**

——S. 486 — Mens rea — If essential ingredient.

The language of Section 486 by necessary implication leads to the inference that mens rea in its ordinary sense, does not form an essential ingredient for an offence under Section 486. There should be mens rea in the sense of an intention to do a thing forbidden by law. The very fact, that the accused has kept in the shop goods containing counterfeit trade mark shows by necessary implication that he has an intention to do an act which is forbidden by the statute. (1925) 1 KB 129 and (1951) 2 KB 631 and AIR 1953 Bom 85, Rel. on. **63 Bom LR 69: 1961 Nag LJ 71: 1961 (2) Cri LJ 66: ILR (1961) Bom 248: AIR 1961 Bom 203 (206) (Pt B) (Pr 12) (DB).**

——S. 486 (c) — "That otherwise he had acted innocently" — Words explained — Innocently means 'without any intention to do the act which was forbidden by the statute', and the words "that otherwise he acted innocently" have application where the accused had acted inadvertently or under a misapprehension or mistake of fact. **54 Bom LR 795: 1953 Cri LJ 408: AIR 1953 Bom 85 (87, 88) (Pt A) (Prs 5, 6) (DB).**

——S. 486 — Burden of proof — "Innocently"— Meaning — Question of mens rea — Proof of.

In the case of a prosecution for offence under S. 486, I. P. Code, if the accused can show that he had taken all reasonable precautions against committing the offence and that he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the mark on the article his case comes within Cls. (a) and (b) of the section.

"Innocently" means "without any intention to do the act which was forbidden by the statute". What the statute forbids is the selling or keeping for sale of an article which has got upon it a counterfeit trade mark without making enquiries and without having any reason to suspect the genuineness of its trade mark. If therefore, no enquiries which ought to have been made and there is reason to suspect the genuinenes of the trade mark, it cannot be said that there is absence of any intention to do the act which was forbidden by the statute. In such cases mens rea for the statute is not the same as in cases where the prosecution had to show a particular state of mind. It is sufficient to show that there was an intention on the part of the accused to do the act forbidden by the section. **22 Bom Cri Cas 8: 54 Bom LR 795: 54 Cr LJ 408: AIR 1953 Bom 85 (87) (Pt B) (Pr 5) (DB).**

6. Counterfeit — Meaning of.

——S. 486 — 'Counterfeit' — Meaning — Colourable imitation — Exact imitation not essential — Existence of resemblance which might cause deception is enough to raise presumption of intention to deceive. See Penal Code (1860), S. 28. **1960 Cr LJ 1017: AIR 1960 SC 669.**

——S. 486 — 'Counterfeit' — Meaning of — Colourable imitation.

A counterfeit trade mark would be a trade mark which purports to be a genuine trade mark but is in reality not so and it would so purport only when it is a copy of the other,though not an absolutely exact copy in every detail.

A mark can be said to be a colourable imitation of another mark when it is not really an imitation of any other mark but just appears to be so and can pass off as such. Where the soap cakes recovered from the possession of the accused do not purport to be Sunlight soap, but the labels have different names and do not repeat all what is written or printed on the genuine label of the Sunlight soap, the labels recovered are therefore, colourable imitation of the genuine labels of Sunlight soap and are not counterfeit. AIR 1911 Sind 163. Rel. on. In view of this no offence under S. 486 can be said to have been committed by the accused. **1958 Cr LJ 1102: AIR 1958 All 643 (645, 648) (Pt B) (Prs 12, 31) (DB).**

7. Procedure.

——**S. 486** — Prosecution for infringement of trade mark — Evidence of instances recognising the trade mark and of assertion, is admissible — Agreement recognising such right is admissible — (Evidence Act (1872), S. 13). **AIR 1955 NUC (All) 1996.**

——**Ss. 486, 478** — "Trade mark" — Includes non-registered marks — In a prosecution under Sec. 486, the evidence of the complainant need not be confined only to the trade marks registered under Trade Marks Act — (Words and Phrases). **AIR 1955 NUC (All) 1996.**

——**S. 486** — 'In course of same transaction' — Offences under Ss. 420 and 486, I. P. C. — Joint trial—Offences under Ss. 420 and 486 are indeed distinct offences — But when they are committed in the course of same transaction joint trial for both the offences not illegal. See Criminal P. C. (1898), S. 235. **1956 Cri LJ 738: AIR 1956 Cal 260.**

——**S. 486** — Offences under, regarding infringement of trade mark — Trade mark offences being principally offences against property are non-cognisable offences — Aggrieved party not taking action within time limited by S. 15, Merchandise Marks Act — Penal provisions of the Penal Code cannot keep the remedy alive — Prosecution under Ss. 485 and 486, I. P. C. is barred. See Penal Code (1860), S. 485. **1960 Cri LJ 1656: AIR 1960 Punj 641.**

SECTION 487

——**Ss. 487, 486 and 482** — False trade description — Description indicating false place of manufacture together with quotation of prices in English currency — Description fell within the definition of false trade description defined in S. 2 (3), Merchandise Marks Act — Accused are guilty of offences under Ss. 6 and 7 of Merchandise Marks Act as well as under Ss. 482, 486 and 487, I. P. C. See Merchandies Marks Act (1889), S. 2 (3). **52 Cri LJ 431: AIR 1951 Bom 45 (DB).**

——**Ss. 487, 488 — Applicability — Trader having tins of ghee with false Agmark Labels — Labels also found in shop — Offence.**

Where it is found that a trader has used false Agmark labels on the tins of Ghee in a manner reasonably calculated to make any person to believe that the goods contained in the receptacles were of superior quality—a circumstance different from the real circumstance, and had also in his possession 296 labels, it shows that he had clearly acted with intent to defraud, and it must therefore, be held that he has failed to prove that he acted without intent to defraud and has also made use of a false mark in a manner prohibited by S. 487, I. P. Code. He is therefore, rightly convicted of an offence under Ss. 488 and 487, Indian Penal Code. **1959 Cri LJ 38: ILR (1959) 1 Cal 63: AIR 1959 Cal 32 (34) (Pt B) (Pr 12) (DB).**

SECTION 488

——**S. 488**—Counterfeiting trade mark — Tests—Duty of Court indicated. See Penal Code (1860), S. 482. **1961 (2) Cri LJ 871: AIR 1962 Bom 29 (DB).**

——**S. 488** — Same acts constituting offences under two statutes — No discrimination — Fact that an act which constitutes an offence under S. 488 also constitutes an offence under different statute does not render S. 488 or S. 4 of Act 1 of 1937 violative of Art. 14 of the Constitution. See Constitution of India, Art. 14. **1959 Cri LJ 38: AIR 1959 Cal 32 (DB).**

——**S. 488**—Trader having tins of ghee with false Agmark Labels — Labels also found in his shop — Offence under S. 488 is committed — Where it is found that a trader has used false Agmark labels on the tins of ghee in a manner reasonably calculated to make any person to believe that the goods contained in the receptacles were of a superior quality—a circumstances different from the real circumstance, and had also in his possession 296 labels, it indicates that he had clearly acted with intent to defraud and was rightly convicted under S. 488. See Penal Code (1860), Section 487. **1959 Cri LJ 38: AIR 1959 Cal 32 (DB).**

SECTION 489

——**S. 489** — Applicability — Section 489 relates to moveable property and judged on the definition of moveable property the section is only applicable to corporeal property. See Penal Code (1860), S. 427. **1955 Cri LJ 832: AIR 1955 Pat 228.**

——**S. 489** — Offence under — Summons case — Procedure — Duty of Magistrate — Magistrates must follow the provisions of S. 242, Cr. P. C. which are imperative. See Criminal P. C. (1898), S. 242. **1961 (1) Cri LJ 296: AIR 1961 Tripura 41.**

SECTION 489-A

——**S. 489-A — Offences under — Proof — Duty of Investigating officers during investigation — Criminal trial — Evidence.**

No doubt counterfeiters are pests of society and any attempt at exterminating them wih an iron hand will be commendable, but the theory of 'the end justifying the means' is not to be followed by Police Officers in the collection of evidence even though it may be extremely difficult to get really clever criminals convicted by honest investigation. Investigating Officers should bear in mind that investigation into criminal offences must always be free from any objectionable features or infirmities which may lead to grievance of accused that investigation was carried on unfairly or with ulterior motive. The administration of criminal justice requires that every act done by the agency responsible for the investigation of crime must be fair, upright and free from any fault of any sort. **ILR (1962) 2 Ker 492: (1962) 2 Ker LR 499: 1962 Ker LT 996: 1963 Ker LJ 86: 1963 (1) Cri LJ 669 (674) (Pt G) (Pr 33) (Kerala) (DB).**

SECTION 489-B

——**Ss. 489-B and 489-C** — Trafficking in counterfeit currency notes in pursuance of conspiracy — Consideration of different parts played by different conspirators irrelevant in considering charge under S. 489-B read with S. 120-B — Conviction under S. 489-B — Conviction under Sec.

tion 489-C redundant. See Penal Code (1860), S. 120-B. **1962 (2) Cr LJ 765: AIR 1962 Mys 275 (DB).**

——**Ss. 489-B and 489-C** — Facts doubtful as to whether accused could be charged under S. 489-B or S. 489-C, Penal Code — Accused charged under S. 489-B — Accused can be validly convicted under S. 489-C if he is shown to have committed that offence — Accused is not prejudiced as offence under S. 489-C is minor compared with offence under S. 489-B. See Criminal P. C. (1898), S. 236. **1964 Raj LW 404: ILR (1964) 14 Raj 905.**

——**Ss. 489-B, 489-C — Applicability — Suspicion about genuineness of currency note — Sufficiency for conviction.**

Under Ss. 489-B and 489-C, guilt is fastened on the ground of 'knowledge' or 'reason to believe'. The two are more or less ejusdem generis though knowledge will be on a slightly higher plane than reason to believe. But suspicion or doubt is not sufficient for fastening liability under S. 489-B or 489C. Nor can suspicion or doubt be raised to the level of reason to believe.

Suspicion whether the notes were genuine will not amount to sufficient cause to believe. The word 'believe' involves the necessity of showing that the circumstances were such that a reasonable man must have felt convinced in his mind that the note with which he was dealing was a forged one, and it was not sufficient to show that the accused was careless or he had reason to suspect or that he did not make sufficient enquiry to ascertain the fact.

Where uneducated rustic persons, in the usual course of business, get a currency note which they find to be suspicious and try to get rid of it, they are not guilty either under S. 489-B or 489-C. **1961 (2) Cr LJ 801: AIR 1961 Tripura 46 (48, 49) (Pt B) (Prs 19 to 21).**

SECTION 489-C

——**S. 489-C** — Persons charged of criminal conspiracy — Proof of their meeting together and deciding to commit illegal act is not necessary — This can be decided with reference to acts done by each of them — It is therefore, not necessary for the prosecution to prove that the different accused had met together and had entered into an agreement for purpose of smuggling and uttering forged notes before they could be convicted for the offence of criminal conspiracy. See Penal Code (1860), S. 120-A. **AIR 1955 NUC (All) 3583.**

——**Ss. 489-C and 120-A — Conspiracy to utter forged notes — Different accused joining at different stages — Conspiracy if one.**

Merely because different accused obtained forged notes from different persons and uttered them at different times and at different places, it cannot be said that there was no criminal conspiracy. The object of conspiracy being to print, smuggle and utter forged notes in different parts of the country through different agents, it is immaterial at what stage the accused joined the conspiracy. **AIR 1955 NUC (All) 3583.**

——**S. 489-C** — Charge under Ss. 120-B and 489-C — Legality — Where substantive offences all committed in pursuance of a conspiracy accused can charged with the substantive offences along with offence of criminal conspiracy — There is no illegality in a charge under Ss. 120-B & 489-C. See Penal Code (1860), S. 120-A. **AIR 1955 NUC (All) 3583.**

——**S. 489-C**—Ingredients of offence, viz., the accused knew or had reason to believe the currency notes to be counterfeit and his intention to use them as genuine — Proof by prosecution necessary — Need not be by direct evidence — Necessary knowledge or intention may be presumed from circumstances — AIR 1939 Mad 96 and AIR 1951 Mys 34, Rel. on. **(1961) 1 Cr LJ 617: AIR 1961 Andh Pra 213 (215) (Pr 15).**

——**S. 489-C** — Possession of counterfeit notes — Inference from circumstances — Accused leading police to place not his own and digging out bundle of notes from pit in earth — Absence of Explanation — Possession of counterfeit note with necessary intent — Presumption that the accused was in possession of notes and secreted them could be raised against him. See Criminal P. C. (1898), S. 342. **52 Cr LJ 415: AIR 1951 Mys 34 (DB).**

——**S. 489-C — Mens rea — Intention to use forged notes as genuine, or that they might be used as genuine, is essential.**

For an offence under S. 489-C, it is essential to establish that the accused intended to use the forged notes as genuine or that they might be used as genuine. Where at the time of recovery of the forged notes from the accused he was at his own house, sitting in his verandah all alone, it could not conclusively be inferred that, while possessed of the forged notes the accused also intended to use them as genuine or that they might be used as genuine and his conviction could not be upheld. **1961 (2) Cri LJ 536: AIR 1961 Pat 405 (405) (Pr 8).**

——**S. 489-C** — Burden of proof — Mere possession of forged notes not an offence — Sufficiency for conviction — Prosecution must establish beyond any reasonable doubts all the ingredients constituting the offence. **1960 BLJR 242.**

——**S. 489-C** — Facts doubtful as to whether accused could be charged under S. 489-B or Section 489-C, Penal Code — Accused charged under S. 489-B — Accused can be validly convicted under S. 489-C if he is shown to have committed that offence — Accused is not prejudiced as offence under S. 489-C is minor compared with offence under S. 489-B. See Criminal P. C. (1898), S. 236. **1964 Raj LW 404: ILR (1964) 14 Raj 905.**

——**Ss. 489-C** — Reason to believe — Meaning — Suspicion about genuineness of currency note not sufficient — Rustic person getting currency note in course of business and finding it suspicious, trying to get rid of it — Commits no offence under S. 489-B or S. 489-C. See Penal Code (1860), S. 489-B. **1961 (2) Cri LJ 804: AIR 1961 Tripura 46.**

SECTION 489-D

——**S. 489-D — Charge under — Unexplained possession of blocks for counterfeiting currency notes — Mens rea — Inference.**

It is not necessary that the outfit for counterfeiting should be perfect or complete. Possession of blocks for counterfeiting currency notes unaccounted for, may itself lead to an inference of guilty knowledge or intention. AIR 1958 Mad 392 and AIR 1925 Lah 22, Ref. **1959 An LT 562.**

——**S. 489-D — Requirements of offence under.**

A successful counterfeiting with the materials recovered is not a sine qua non for a conviction under S. 489-D. For constituting an offence under the section, all that is necessary is that the materials found must be part of the outfit for counterfeiting. Cumulative usefulness of all the materials found should be the guiding factor, while determining usefulness for counterfeiting: AIR 1928 All 754, Rel. on. **1960 Ker LJ 1343.**

——S. 489-D — Intention when can be inferred.

Where the accused are found to be in possession of the materials which are intended to be used for forging or counterfeiting any currency notes or bank notes or any portion thereof, they are guilty under S. 489-D of the Penal Code. When the prosecution successfully proves that the material objects found from possession of the accused and according to the opinion of the expert some of them can be used for forging counterfeit currency notes, the necessary inference that the accused intended to use the materials for the purpose of counterfeiting currency notes can be drawn. **('59) 25 Cut LT 307.**

——S. 489-D — Burden of proof.

The burden is on the prosecution to show that the accused was occupying the house wherefrom the instruments for forging currency notes were recovered and that he had joint possession or control over the instruments with the other accused or at least that they were brought there with his knowledge. **1953 Cr LJ 1249: AIR 1953 Trav-Co 225 (226) (Pt A) (Pr 6) (DB).**

——S. 489-D — "Has in his possession ..... or material".

Every case must depend upon its particular facts and the Court must consider each case and come to a conclusion whether it is proved that incriminating article was in the possession of any particular person or in the possession of more than one person. It is fallacious to think that the possession must be exclusive; it might well be possession of two or more persons. **1953 Cr LJ 1249: AIR 1953 Trav-Co 225 (228) (Pt B) (Pr 10) (DB).**

——S. 489-D — Sentence — Substantial term of imprisonment awarded — Sentence of fine in addition held was unnecessary. **1953 Cr LJ 1249; AIR 1953 Trav-Co 225 (228) (Pt C) (Prs 12, 13) (DB).**

SECTION 493

——S. 493 — Essentials of offence.

The essence of the offence under S. 493 consists in the practice of deception by a man on a woman, in consequence of which she is led to believe that she is lawfully married to him even though, in fact, they are not lawfully married. To prove deception it must be conclusively established that the accused either dishonestly or fraudulently concealed certain facts, or made a false statement knowing it to be false.

Where some sort of marriage ceremony took place between the petitioner, a Brahmin aged 22 years (with his wife living) and a Bhahmin widow, the woman being made to wear new clothes and put on new bangles and also vermillion mark on her forehead, there being also an exchange of garlands between the two, and the entire prosecution evidence was consistent with the view that both parties thought that those ceremonies would suffice to constitute a valid marriage, the element of deception is wanting in the case.

The petitioner's subsequent conduct in deserting her after she became pregnant and in even repudiating the marriage, though an important piece of evidence, will not suffice by itself to show that at the time when he participated in the ceremonies he intended to deceive her. **22 Cut LT 503: 1957 Cri LJ 989: AIR 1957 Orissa 198 (198, 199) (Prs 4, 5).**

SECTION 494

SYNOPSIS

(Penal Code (1860), S. 494.)

1. Scope and applicability.
2. Abetment.
3. Marriage while husband or wife is alive.
4. Apostacy of husband or wife.
5. Complaint.
6. Evidence and proof.
7. Defence.
8. Practice and procedure.

1. Scope and applicability.

——S. 494 — 'Whoever ..... marries' must mean 'whoever ..... marries validly' — For application of the section, marriage must come within 'Solemnised' marriage under S. 17, Hindu Marriage Act (1955). See Hindu Marriage Act (1955), S. 17. **1965 (2) Cr LJ 544: AIR 1965 SC 1564.**

● **——S. 494** — Punishment for bigamy — Whether subsequent marriage need be a valid marriage? (Quaere). Bhaurao v. State of Maharashtra. **1965 (2) Cri LJ 544: 1965 1 SCWR 579: 1965 SCD 543: (1965) 2 An LT 11: 67 Bom LR 423: 1965 Mah LJ 661: 1965 All WR (HC) 509: 1965 All Cri R 323: 1965 MPLJ 873: AIR 1965 SC 1564 (1567) (Pt B) (Pr 16).**

——S. 494 — Scope — Madras Act (6 of 1949), S. 4 (1), Proviso — Validity — If repugnant to S. 494, I. P. Code — It is not inconsistent with S. 494, I. P. C. See Madras Hindu (Bigamy Prevention and Divorce) Act (6 of 1949), S. 4 (1), Proviso. **1955 Cr LJ 1233: AIR 1955 Andhra 181.**

——S. 494 — Performance of ceremonies — Existence of previous wife — Validity of marriage.

In order that an offence under S. 494 may be committed it is necessary, at least, that all the ceremonies which are necessary to be performed in order that a valid marriage may take place, ought to be performed and, ordinarily, all these ceremonies would amount to a valid marriage but for the fact that the marriage becomes void on account of the existence of a previous wife. **60 Bom LR 428: ILR (1958) Bom 700: 1960 Cr LJ 1189: AIR 1960 Bom 393 (394) (Pt C) (Pr 9).**

——S. 494 — Applicability — Christain marrying again Hindu woman according to Hindu rites — Offence.

In order that a person may be convicted of an offence of bigamy, under S. 494, the second marriage must be a form of marriage recognised by law, otherwise it would be simply an adulterous union and it will not be hit by the provisions of S. 494. Where A, a born Christian and having a Christian wife living, marries once again a Hindu woman, the marriage being celebrated according to Hindu rites the subsequent marriage between A and the Hindu woman is a void marriage not because of the existence of the Christian wife of A but because of the fact that there cannot be a valid form of marriage between an Indian Christian and a Hindu woman celebrated according to Hindu rites. And as one of the essential ingredients of S. 494, namely, that the second marriage must be void by reason of its taking place during the lifetime of the husband or the wife of the first marriage, is not satisfied, A, when prosecuted under S. 494, deserves to be acquitted. AIR 1919 Lah 389; 18 Cal 264, Disting. **ILR (1957) 2 Cal 249: 1955 Cr LJ 1347: AIR 1955 Cal 533 (534) (Pr 7) (DB).**

——S. 494, read with Hindu Marriage Act (25 of 1955), S. 17 — Conviction and sentence under — Hindu Marriage Act (25 of 1955), S. 7 (1) and (2) — Second marriage contracted during the subsistence of first marriage — First marriage solemnised by tying 'Tali' according to caste custom and not observing 'saptapadi' — Effect — Whether non-performance of Saptapadi would render the first marriage null and void.

It is clear from S. 7 (1) of the Hindu Marriage Act, that a Hindu marriage may be solemnized, in accordance with the customary rites and ceremonies of either party thereto. Under S. 7 (2) of the Act, where such rites and ceremonies include the 'Saptapadi' that is the taking of the seven steps by the bridegroom and the bride jointly before the sacred fire, the marriage becomes complete where the seventh step is taken. This shows that, Saptapadi, is not a necessary ceremony in all Hindu marriages and that only in those marriages where Saptapadi is an essential ceremony the marriage becomes complete by the bridegroom and the bride taking seven steps. The evidence in the instant case is that the complainant was married to the petitioner according to the caste custom by tying 'Tali' and it was not even suggested to the complainant or other witnesses that Saptapadi is an essential ceremony for the validity of the marriage in the community of the parties. Thus the non-performance of Saptapadi would not render the first marriage null and void. **1963 Mad LJ (Cr) 84: 76 Mad LW 198: (1963) 1 MLJ 66.**

——**S. 494** — Reconversion to Hinduism — Right of convert — It is the law that a man on reconversion acquires the right of the religion which he re-enters subject to any law taking away particular right. Thus a native convert to Christianity may relapse in the Hindusim and marry a Hindu girl in spite of his marriage with a Christian girl when he was Christian. **64 Mad LW 469: 1951 Mad WN 440: (1951) 1 Mad LJ 694: 1951 Mad WN (Cri) 120: 52 Cri LJ 1085: AIR 1951 Mad 888 (889) (Pt A) (Pr 4).**

——**S. 494** — Second marriage — Mere keeping of concubine or mistress is not sufficient to attract provisions of S. 494. **30 Cut LT 294: 1964 All WR (Sup) 33: 1964 All Cr R 463: (1964) 6 Orissa JD 160.**

——**S. 494 — Applicability — Conditions.**

The expression 'marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife' merely means that the person who marries a second time during the life of his or her first spouse would be punished under S. 494 only if such second marriage is not recognised by the personal law by which he or she is governed. The section does not require that the second marriage with the person concerned must otherwise be valid according to law. AIR 1955 Cal 533, Dissented from. **ILR (1961) 1 Punj 153: 62 Pun LR 912: 1961 (1) Cr LJ 549: AIR 1961 Punj 167 (168) (Pr 3) (DB).**

——**S. 494** — Applicability — Conditions — Guilty knowledge about subsistence of first marriage is essential — Husband or wife must be alive at relevant period — Earlier marriage must also be subsisting. **AIR 1955 NUC (Trav-Co) 4132.**

2. Abetment.

——**Ss. 494 and 107** — Merely allowing one's premises to be used for the purpose of the marriage does not prove abetment of bigamous marriage. See Penal Code (1860), S. 107. **1960 Cri LJ 1189: AIR 1960 Bom 393.**

——**Ss. 494, 107, Explanation 2** — Holding of Antarpat by accused — A person holding the 'Antarpat' during marriage, with full knowledge of the fact that the marriage is void being bigamous is guilty of abetment of the offence of bigamy. The act falls within the purview of Expl. 2 to S. 107, even though the holding of Antarpat was done prior to the performance of the marriage. See Penal Code (1860), S. 107 Explanation 2. **1960 Cri LJ 1189: AIR 1960 Bom 393.**

3. Marriage while husband or wife is alive.

——**S. 494** — Section prohibits taking of second spouse during lifetime of first — Solemnisation of second marriage according to personal law not necessary. Hindu marrying Christian woman when first wife is alive — Offence under S. 494 is committed. AIR 1961 Punj 167, Foll.; AIR 1958 Mys 147; AIR 1950 Mys 26 and ILR 33 Mad 371, Dist. **(1962) 1 Andh LT 91: (1962) 1 An WR 123: 1962 Mad LJ (Cr) 146: 1962 (2) Cr LJ 596: AIR 1962 Andh Pra 446 (447) (Prs 4, 5).**

——**S. 494 — Bigamy — Previous valid subsisting marriage essential at time of second marriage to constitute offence — Hindu marrying second wife after Hindu Marriage Act during life-time of first wife — Marriage is void — Subsequent second marriage by wife with another husband — No offence of bigamy is committed.**

Where A, a Hindu, contracted a second marriage with B during the life-time of his first wife after the coming into force of the Hindu Marriage Act, the marriage would be void by virtue of the provisions of Ss. 5, 11 and 17 of the Hindu Marriage Act and if B thereafter marries a second husband during the lifetime of A, B cannot be held to be guilty of the offence of bigamy under S. 494, because in order that an offence of bigamy can be committed, there must be at the time of the second ceremony of marriage a previous valid subsisting marriage. Section 17 of the Hindu Marriage Act does not provide that Ss. 494 and 495, I. P. Code, will not be attracted unless a declaration as to nullity of marriage is obtained by either party to the marriage. AIR 1942 Sind 92 and AIR 1927 Cal 480 and AIR 1958 Mys 147, Rel. on. **1963 (1) Cr LJ 760: AIR 1963 Him Pra 16 (17, 18) (Prs 3, 4, 8).**

——**S. 494** — Second marriage during life-time of first wife — Offence — Effect of Hindu Marriage Act (1955) coming into force — The result of the Hindu Marriage Act is that a Hindu commits the offence of bigamy punishable under S. 494, I. P. C. if after the passing of this Act he marries a second wife during the lifetime of his first wife. See Hindu Marriage Act (1955), S. 5. **1959 Cr LJ 493: AIR 1959 Manipur 20.**

——**S. 494 — Hindu marrying second wife — Complaint by first wife — Maintainability — Hindu Marriage Act (1955), S. 17 — Effect of.**

The effect of S. 17 of the Hindu Marriage Act is to make S. 494 of the Penal Code applicable to Hindus. There is nothing in Act forbidding a prosecution for an offence punishable under Section 494 of the Penal Code not preceded by a declaration obtained under the provisions of the Act that the second marriage is void. **36 Mys LJ 171: ILR (1958) Mys 137: 1958 Cri LJ 1331: 1958 Mad LJ (Crl) 424: AIR 1958 Mys 147 (148) (Pr 7).**

——**S. 494 — Subsistence of first marriage — No evidence of divorce according to caste custom or according to S. 13, Hindu Marriage Act.**

In a charge under S. 494, the essential question is whether the complainant was the legally married wife of the accused, and the marriage is still subsisting and whether during subsistence of the said marriage the accused married another person as his second wife. Where marriage of the complainant with the accused was admitted and there was nothing to show that parties had taken recourse to S. 13 of Hindu Marriage Act (25 of 1955) or had secured valid divorce according to custom, the marriage must be considered to subsist. **30 Cut LT 294: 1964 All WR (Sup) 33: 1964 All Cr R 463: (1964) 6 Orissa JD 160.**

——S. 494 — Applicability and scope — (Muhammadan Law — Divorce).

Under Muhammadan Law, when there is a contract between husband and wife at the time of marriage, empowering the latter to divorce herself in specific contingencies and which she exercises at the happening of any of them, the divorce will take effect to the same extent, as if it had been pronounced by the husband. It does not require any declaration from a Court of law. The power given to her by the husband is in itself quite sufficient, and the marriage with the girl after such a divorce does not bring home offence under S. 494. **1953 Cr LJ 1504: AIR 1953 Tripura 6 (1) (6) (Pr 4).**

4. Apostacy of husband or wife.

——S. 494 — Hindu embracing Christianity and marrying Christian woman — His reconversion to Hinduism and marriage with Hindu girl while his Chistrian wife was alive—Intention to leave Christianity and re-embrace Hinduism inferred from his conduct — **Held,** he was properly discharged in proceeding started under S. 494. **1951 Mad WN 440: (1951) 1 Mad LJ 694: 1951 Mad WN (Cri) 120: 52 Cri LJ 1085: 64 MLW 469: AIR 1951 Mad 888 (890) (Pt B) (Pr 5).**

——S. 494 — Re-converted Hindu Christian marrying Hindu woman after reconversion while Christian wife is alive — No offence of bigamy is committed.

A Hindu Christian convert relapsing to Hinduism and marrying a Hindu woman during the lifetime of his first wife married to him when he was a Christian does not commit the offence of bigamy. Case law referred. **51 Cri LJ 909: 55 Mys HCR 279: AIR 1950 Mys 26 (29) (Pr 11).**

5. Complaint.

——S. 494 — Criminal P. C. (1898), Ss. 198, 4 (1) (h) — Abetment of offence under S. 494, I. P. C. — Section 198 applies — Deposition is not a complaint — Where an accused is challaned for offences under S. 366, I. P. C. the Court cannot frame charge under S. 494 read with S. 114 in the absence of a complaint by the husband of the girl. Though certain statements made in the deposition of the complainant may amount to a complaint of an offence under S. 494 they do not constitute a complaint within the meaning of S. 4 (h). See Criminal P. C. (1898), S. 198. **1955 Cri LJ 1359: AIR 1955 Madh Bha 176.**

——S. 494 — Criminal P. C. (1898), S. 198 — Offence under S. 4 (2), Madras Hindu (Bigamy Prevention and Divorce) Act — Section 198 applies — Procedure prescribed by S. 198, Criminal P. C. applies when Court is called upon to take cognizance of an offence under S. 494. An offence punishable under S. 494 even read with S. 4 (2) of the Madras Hindu (Bigamy Prevention and Divorce) Act is an offence falling under Ss. 493 to 496 within the meaning of S. 193, Cr. P. C. Court cannot therefore, take cognizance of an offece under S. 4 (2) of the Madras Act unless a complaint in respect thereof is filed by the aggrieved party. **1952 Cri LJ 434: AIR 1952 Mad 193 (DB).**

——S. 494 — Brother of deceased wife has no locus standi under S. 198, Cr. P. C., to file complaint under S. 494, I. P. C. against husband for offence of bigamy — Magistrate cannot take cognizance of the offence on such complaint — Expressions 'aggrieved party' and 'on behalf of' (explained). See Criminal P. C. (1898), S. 198. **1965 (2) Cri LJ 376: AIR 1965 Mys 235.**

6. Evidence and proof.

——S. 494 — Applicability — Plea of divorce — Custom of divorce — Proof — Evidence regarding existence of custom — Deed of Farkati — Effect.

The mere fact that the complainant's wife had stated in the complaint that no farkati (deed of divorce) had been passed by her cannot be treated as an admission that there was a customary right of divorce by farkati in her community. Though the statement in the Farkati deed that there is a customary right of divorce may be taken into consideration it cannot be conclusive in a criminal case when both the parties have led evidence on the point. Such statements cannot debar her from prosecuting her husband for bigamy. **1961 (2) Cr LJ 469 (470) (Pt A) (Pr 5) (Guj) (DB).**

——S. 494 — Plea of divorce — Custom of divorce — Antiquity — Proof.

Before a custom of private divorce can be held to be proved, it must be proved that it was observed continuously and uniformly for a long time and has thereby obtained the force of law in any local area, tribe, community, group or family. Instances which carry one back at the most 15 to 20 years are not sufficient to prove such a customary right of divorce. AIR 1941 PC 21 and AIR 1959 Bom 54, Rel. on. **1961 (2) Cr LJ 469 (470) (Pt C) (Pr 7) (Guj) (DB).**

——S. 494 — Scope — Invalidity of second marriage — Onus — Existence of deed of divorce — Effect — Duty of prosecution.

In a prosecution under S. 494, the prosecution has to prove (1) that there was a first marriage, (2) that the first marriage was not dissolved by law; (3) that the parties to the first marriage did not have the customary right of dissolution of marriage or that they did have the customary right of divorce but the marriage was not in fact dissolved by act of parties based on a customary right of divorce. In a case where there was a deed of divorce, the prosecution must prove that the marriage could not be dissolved by customary right of divorce. In a prosecution under S. 494 when reliance is placed by the defence on the deed of divorce between the parties, the burden is on the complainant to prove that there was no customary right to divorce in the community, and that therefore, the Farkati (deed of divorce) has no effect in law, that, therefore, the first marriage was not dissolved and that consequently the second marriage was void. **1961 (2) Cri LJ 462 (471) (Pt D) (Prs 8, 9) (Guj) (DB).**

——S. 494 — 'Marries' — Connotation of — Accused must have gone through legal form of marriage — Parties to second marriage Hindus — Ceremonies such as Saptapadi required by Section 7 (2), Hindu Marriage Act, to make marriage complete and binding not proved — Merely from presence of priest at alleged marriage presumption that all ceremonies must have been performed cannot be drawn — Offence of bigamy — Conditions to be proved by prosecution indicated. AIR 1962 Andh Pra 311, Dissented. **1965 Kash LJ 125: 1965 (2) Cri LJ 640: AIR 1965 J and K 105 (107, 108, 110) (Pt A) (Prs 11, 13, 14, 24) (DB).**

——S. 494 — Offence of bigamy — Evidence of second marriage — Second marriage must be clearly proved — Evidence Act (1872), Section 50, Proviso.

Though under S. 32 (5) of the Indian Evidence Act, the statement of a person who had special means of knowledge is relevant in proof of the existence of any relationship by blood, marriage or adoption and S. 50 has rendered that opinion as to relationship admissible, the proviso

to S. 50 makes such opinion insufficient to prove a marriage in proceedings under the Indian Divorce Act or in prosecutions under Ss. 494, 495, 497 or 498 of Indian Penal Code. That would mean that since the second marriage is an essential ingredient of the offence of bigamy, that marriage has to be clearly proved by the prosecution. ILR 5 Cal 566 (FB); ILR 5 All 233; ILR 20 All 166, Rel. on. **1962 Ker LT 487: ILR (1962) 2 Ker 89: 1962 Ker LJ 824.**

——S. 494 — Offence of bigamy — Form of marriage not opposed to customs of community or caste of parties — Presumption is that marriage was legal — Hindu Marriage Act (1955), S. 17.

When there is celebration or solemnisation of a marriage which has been intended by the parties to be binding on each other and the form of it has not been wholly opposed or against the customs of the community or the caste to which the parties belong, the presumption that the ceremonies were complete and the marriage is legal arises and the presumption of the marriage can be rebutted only by strong, satisfactory and conclusive evidence. (1808) 10 East 282; AIR 1914 All 214; AIR 1934 All 273; AIR 1947 PC 168; ILR 38 Cal 700 (PC); AIR 1962 Andh Pra 311, Rel. on. **1962 Ker LT 487: ILR (1962) 2 Ker 89: 1962 Ker LJ 824.**

——S. 494 — No satisfactory evidence of performance of ceremonies of valid marriage took place — Offence under S. 494 held not made out.

In order that an offence under Section 494 may be committed, it is necessary that all the ceremonies which are necessary to be performed in order that a valid marriage may take place, ought to be performed and ordinarily all the ceremonies would amount to a valid marriage but for the fact that the marriage becomes void on account of the existence of a previous wife.

When the evidence was not satisfactory to make out that any valid marriage took place between the accused R and L it cannot be said that an offence under S. 494, I. P. Code, had been made out against the accused. AIR 1955 Cal 533 and AIR 1960 Bom 393, Rel. on. **29 Cut LT 404: ILR (1963) Cut 464.**

——S. 494 — Conviction under — Satisfactory proof of valid marriage necessary — Beora ceremony whether sufficient for valid marriage in Mali community — Adequate proof not adduced by complainant — Marriage under Section 494 held not proved. **1961 Raj LW 60.**

——S. 494 — Conviction under S. 494— Evidence of relationship not sufficient to warrant conviction. See Evidence Act (1872), S. 50, Proviso. **1955 Raj LW 504.**

——S. 494 — Cases falling under S. 494, Penal Code — Strict proof of marriage ceremonies necessary. See Evidence Act (1872), S. 58, Proviso. **1955 Raj LW 504.**

7. Defence.

——S. 494 — Mens rea — Necessity.

A penal statute requires mens rea even if it contains no express words to that effect. If a person charged with bigamy believed that he was legally free to marry again it cannot be said that the crime was committed either intentionally or recklessly and the question whether the belief was unreasonable is irrelevant.

Thus, where the first accused took learned opinion that she could effectively divorce the complainant and went through the formalities thereof, she then gave notice to the complainant, waited for some time and then married the third accused.

Held, that there could be no criminal knowledge that her first marriage with the complainant was subsisting when she entered into the second marriage and so the accused 1 and 3 were not guilty of offence under Section 494. **1959 Mad LJ (Cr) 262: 1958 Ker LJ 1129: 1958 Ker LT 1042: ILR (1959) Ker 18: 1959 Cr LJ 591: AIR 1959 Ker 151 (153, 154) (Pt B) (Prs 12, 13) (DB).**

8. Practice and procedure.

——S. 494 — Applicability — Test — Bigamous marriage — Giving birth to child — Evidentiary value — In a case under Section 494 filed by a wife against her husband the circumstance that the co-respondent gave birth to child only amounts to evidence of the fact that she had sexual relationship with a man. It may be a circumstance to support the other evidence of a bigamous marriage if it exists. It is not a consequence within the meaning of Section 179 Cr. P. C. and does not give jurisdiction to the Court to try the offence under S. 494. See Cr P. Code (1898), S. 179. **1959 Cr LJ 14: AIR 1959 All 67.**

——S. 494 — Jurisdiction — Trial — Complainant's wife removed from his house in Kanpur District and remarried in Gonda District — Jurisdiction of Kanpur Court to try offence of bigamy — Kanpur Court has no jurisdiction. See Cr. P. Code (1898), S. 179. **1955 Cri LJ 897: AIR 1955 All 363.**

——S. 494 — Applicability — Charge under section — Onus — Ordinary rules of criminal jurisprudence — Applicability — Rule of presumption of innocence and the burden of proof in criminal cases should be applied to cases of bigamy with the same strictness and vigour as are applied to other criminal cases. See Madras Hindu (Bigamy Prevention and Divorce) Act (6 of 1949), S. 4 (2). **1959 Mad LJ (Cr) 170: (1959) 1 Andh WR 167.**

——Ss. 494, 497 — Criminal P. C. (1898), S. 403— Res judicata — Applicability of principle — Accused acquitted with regard to offence under Section 494 on finding that marriage of woman with complainant was not subsisting—His subsequent trial for offence under Section 497 is barred on principle of res judicata. See Criminal P. C. (1898), S. 403. **1963 MPLJ 781.**

——S. 494 — Criminal P. Code (1898), S. 198 — Abetment of offence under Section 494 Penal Code — Section applies. See Criminal P. C (1898), S. 198. **AIR 1952 Mad 193 (DB).**

——S. 494 — If during the continuance of a valid marriage a woman has a sexual intercourse, with another man, that would be illicit intercourse, even though she may have contracted a bigamous marriage with that person. Hence a charge under Section 498, Penal Code may be added to a charge under Section 494 for bigamy provided the evidence warrants it. **1950 Trav-Co LR 652.**

SECTION 495

——S. 495 — Conviction on uncorroborated evidence of woman enticed.

Evidence regarding the actual enticing away of the woman enticed though uncorroborated may be sufficient to found a conviction when the woman is neither a bad character nor is of a depraved nature. AIR 1939 Pat 536, Dist. **31 Mys LJ 97: 1952 Cri LJ 705: AIR 1952 Mys 34 (35) (Pt A) (Pr 5).**

SECTION 497

SYNOPSIS

(Penal Code (1860), S. 497.)

1. Scope and applicability.
2. Validity of Section.
3. "Wife of another".
4. Consent or connivance of husband.
5. Who can complain.
6. Evidence.
7. Charge.
8. Practice and procedure.
9. Sentence.

1. Scope and applicability.

——S. 497 — Ingredients.

Enticement or detention are not ingredients of an offence under Section 497, Penal Code. **1952 Cri LJ 258: AIR 1951 Him Pra 25 (28) (Pt B) (Pr 16).**

——S. 497 — Non-applicant committing adultery in houses situated near applicants' houses and threatening applicants — Proceedings under Section 107 at instance of applicants are competent — Section 199 does not apply. See Criminal P. C. (1898), S. 107. **1963 (2) Cr LJ 621: AIR 1963 J and K 56.**

——S. 497 — Living in adultery — Meaning of — 'Living in adultery' has in matrimonial cases a different and wide meaning than in Section 497 I. P. C. and Section 488, Cr. P. Code. In marital cases 'adultery' takes its fullest dictionary meaning and means nothing else than the sexual relations unfollowed by a marriage or legal union. For that a woman may not be the wife of anybody. She may be the mistress of the adulterer. See Hindu Marriage Act (1955), S. 13 (1) (i). **AIR 1965 Madh Pra 268 (DB).**

2. Validity of Section.

●——S. 497 — Validity — Discrimination solely on ground of sex — (Constitution of India, Articles 14, 15).

Sex is a sound classification and although there can be no discrimination in general on that ground, the Constitution itself provides for special provisions in the case of women and children by Cl. (3) of Art. 15. Articles 14 and 15 thus read together validate the last sentence of Section 497, Indian Penal Code, which prohibits the woman from being punished as an abettor of the offence of adultery. AIR 1951 Bom 470, Affirmed. Yusuf Abdul Aziz v. State of Bombay, **1954 SCJ 385: (1954) 1 MLJ 618: 67 MLW 610: 1954 Cr LJ 886: 1954 SCR 930: 1954 SCA 398: 56 PLR 190: 56 Bom LR 1179: AIR 1954 SC 321 (322) (Pr 6) (DB).**

——S. 497 — Validity — If void as contravening Arts. 14 and 15 of the Constitution.

Section 497, I. P. Code, does not contravene any of the fundamental rights laid down in the Constitution and cannot therefore be held to be bad or void under Article 13 of the Constitution. It cannot be said that Section 497 does not operate equally upon all persons as required by Article 14, in that women are absolved from any punishment under the section. Nor can it be said that the section offends against Article 15 (1) in that in enacting the section the Legislature discriminated in favour of women and against men on the ground of sex. There is no such contravention. But assuming it to be such the alleged discrimination in favour of women is saved by Article 15 (3). **ILR (1952) Bom 449: 1952 Cri LJ 23: 21 Bom Cr Cas 229: 53 Bom LR 736: AIR 1951 Bom 470 (471) (Pt A) (Pr 2) (DB).**

3. "Wife of another".

●——S. 497—Divorce Act (1869), Ss. 10, 7 — Adultery by husband — Woman with whom adultery is committed need not be a married woman. See Divorce Act (1869), S. 10. **AIR 1959 Cal 451 (SB).**

4. Consent or connivance of husband.

——S. 497 — For offence under S. 497, Indian Penal Code complainant should also establish that act was without his consent or connivance — Mere act of adultery is not penal under the section.

Held, that for a conviction under Section 497, Indian Penal Code, it is not enough to establish that the accused had committed adultery with the wife of the complainant. It must further be proved that complainant did not consent to or connive at the adultery. AIR 1953 Mad 422, Foll **1962 MPLJ (Notes) 339.**

——S. 497 — Connivance — What constitutes — Negligence by husband.

To constitute 'connivance' something more than mere negligence by the husband is necessary. The Court cannot draw an inference of connivance from the fact that the woman had been abandoned by her husband. **29 Cut LT 482: 1963 (1) Cr LJ 312: (1962) 4 Orissa JD 359: ILR (1962) Cut 941: AIR 1963 Orissa 60 (60) (Pt A) (Pr 4).**

5. Who can complain.

——S. 497 — Criminal P. Code (1898), S. 199 — Husband abandoning wife — Wife living in the same village with her father — Husband cannot be said to be absent — Father cannot be said to have care of the woman on behalf of her husband — Hence even if offence under S. 497, Penal Code, is proved on evidence against accused he cannot be convicted on basis of complaint by father. See Criminal P. C. (1898), Section 199. **1963 (1) Cri LJ 312: AIR 1963 Orissa 60.**

6. Evidence.

——Ss. 497 and 498 — Legal marriage — Proof — Onus — Opinion or evidence of witness — Evidence Act (1872), S. 50.

In order to make out an offence either under Section 497 or S. 498, Penal Code, the prosecution has to prove, not only that the accused had had sexual intercourse with the woman but also that she was and the accused knew or had reason to believe her to be the wife of another. The fact that she was the wife of another is a material element and, it must have been proved as strictly as any other material fact.

The evidence of witnesses which is no better than an opinion, is not sufficient to prove marriage in prosecutions under Ss. 497 and 498. **1951 RD (HC) 32: 1951 All WR (HC) 312.**

——S. 497 — Circumstantial evidence — Sufficiency for conviction.

In a prosecution under Section 497, I. P. Code it is very difficult to get actual eye-witnesses of the commission of adultery or sexual intercourse and the Court has to rely upon the circumstances and conduct of the persons concerned.

Where the charge rests mainly on the statement of the woman and the circumstances are that the accused, a young man, has been seen

on several occasions in the company of the woman in suspicious circumstances when the husband of the woman was away, the Court can accept the version of the woman as supplemented by other witnesses unless the accused succeeds in proving his denial of having committed the offence. **1961 (2) Cr LJ 459 (460) (Pt A) (Pr 3) (Assam) (DB).**

——**S. 497** — Charge for commission of adultery — Prosecution must prove marriage. See Penal Code (1860), S. 441. **(1961) 2 Guj LR 256.**

——**Ss. 497, 363, 366, 360, 361, 497, 498** — Prosecution under Sections 363 and 366 — Proof — In a prosecution under Section 363 age of the girl is material point because unless it is shown that she was below 18 years of age at the relevant time, there could be no case of kidnapping within the meaning of Section 363. In a prosecution under Section 497 the question of marriage must be proved strictly — (Evidence Act (1872), Ss. 101 to 104). **1957 Cri LJ 847: AIR 1957 Him Pra 42.**

——**Ss. 497, 456 — House trespass with intent to commit adultery — Evidence and proof.**

Prosecution must establish ingredients of S. 497 with regard to intended act of sexual intercourse — Prosecution must prove that the woman with whom the accused intended to have sexual intercourse was the married wife of another man and that the accused had knowledge or had reason to believe that she was the wife of another man and that the intended intercourse was without the consent or connivance of her husband. **Madh BLR 1955 Cri 318: Madh BLJ 1955 HCR 1515: ILR (1956) Madh B 153: 1956 Cri LJ 231: AIR 1956 Madh Bha 69 (69, 70) (Pr 3).**

——**S. 497 — Burden of proof.**

To sustain a conviction under Section 497 the complainant must not only prove that the accused had sexual intercourse with his wife but also that the act was done without his consent or connivance. **1953 Mad WN 9: 1953 Mad WN (Cri) 1: (1953) 1 MLJ 236: 66 Mad LW 80: 1953 Cr LJ 765: AIR 1953 Mad 422 (423, 424) (Prs 9, 10) (DB).**

——**S. 497** — Accusation of adultery— Establishment of — Evidence by spouse — Corroboration necessary — Statement of adulteress recorded in Government Maternity Home and Rescue registers can be used for corroboration. See Hindu Marriage Act (1955), S. 10 (1). **1964 (2) Cr LJ 686: AIR 1964 Mys 280 (DB).**

——**S. 497 — Adultery— Evidence — Wife along with her grown up daughters living in accused's house for long time — No evidence to show occupation of same room by wife and accused — No inference of sexual intercourse can be drawn.**

For proving the offence of adultery direct evidence of sexual intercourse is difficult to obtain in the majority of cases but this can be inferred from circumstances relating to the way of life of the man and the woman, such as the fact of their living alone in a bungalow for a considerable length of time or sleeping together on the same bed or at least in the same room. But where all that was established was that the wife of the complainant was living with her two grown up daughters for a long time in the house of the accused and there was no evidence to infer that the man and the woman used to occupy the same room, if not the same bed, no inference of sexual intercourse can be drawn. **1964 (1) Cr LJ 250 (251, 252) (Prs 6, 18) (Patna).**

——**S. 497** — Adultery — Consent or connivance — Burden of proof — Absence of consent or connivance to be inferred from facts and circumstances of each case — Strict proof not necessary. **1965 (2) Cri LJ 673: 1965 Raj LW 157: ILR (1965) 15 Raj 522: AIR 1955 Raj 191 (193) (Pt B) (Pr 6).**

7. Charge.

——**S. 497** — Criminal P Code (1898), Ss. 225, 232, 537 — Allegation of sexual intercourse based on mere surmise — Non-framing of charge under Section 497, Penal Code held did not therefore result in miscarriage of justice. See Criminal P. C. (1898), S. 225. **1952 Cri LJ 258: AIR 1951 Him Pra 25.**

——**S. 497 — Charge — Essentials — Specification of dates.**

In a charge of adultery under Section 497, it is not possible nor indeed necessary to specify the date. It is enough if the charge specifies the dates between which the offence was committed. **AIR 1951 Kutch 17 (18) (Pt A) (Pr 7).**

8. Practice and procedure.

——**Ss. 497, 366, 368, 376 — Cr. P. C. (1898), Ss. 199, 4 (h) — Report by husband to police about commission of offences under Ss. 366, 368, 376 by accused with reference to his wife — No complaint filed before Magistrate for action under S. 497 — Accused cannot be convicted under Section 497, although case under S. 497 is made out.**

Where the husband has lodged a report with the police alleging commission of offences under Sections 366, 368 and 376, I. P. C. by the accused with reference to his wife but has not filed a complaint before the Magistrate as provided by Section 199, Cr. P. C. for action being taken against the accused, and it was the police who had challaned the case and had taken subsequent action in the matter, the accused cannot be convicted under Section 497, I. P. C. even if the husband has appeared as a witness at the trial and a case under Section 497 has been made out against the accused. 5 All 233; 23 All 82; 29 Cal 415 (DB); 13 Cr LJ 287; AIR 1933 All 638; AIR 1940 All 201, Ref.; 20 Cal 483; 30 Cal 910 (FB), Not foll. **1965 (2) Cri LJ 455: 1964 All WR (HC) 230: 1964 All Cr R 156: AIR 1965 All 508 (510) (Pt A) (Pr 9) (DB).**

——**Ss. 497, 494** — Criminal P. C. (1898), S. 403— Res judicata — Applicability of principle — Accused acquitted with regard to offence under Section 494 on finding that marriage of woman with complainant was not subsisting—His subsequent trial for offence under Section 497 is barred on principle of res judicata. See Criminal P. C (1898), S. 403. **1963 MPLJ 781: 1962 Jab LJ 1138.**

——**S. 497** — Criminal P. Code (1898), S. 403 (2) — Distinct offence — Every act of sexual intercourse with another's wife is distinct offence — Conviction in respect of one cannot bar trial in respect of another act. See Criminal P. C. (1898), S. 403 (2). **AIR 1955 NUC (Sau) 5753 (DB).**

9. Sentence.

——**Ss. 497 and 53** — Sentence — Law when offence is committed should be considered. See Penal Code (1860), S. 53. **AIR 1951 Kutch 17.**

SECTION 498

SYNOPSIS

(Penal Code (1860), S. 498.)

1. Object and scope.
2. Enticing or taking away.
3. Intention.

4. Offence can be committed in respect of married woman only.
5. Concealment or detention.
6. Complaint.
7. Charge.
8. Evidence and proof.
9. Consent of woman.
10. Practice and procedure.
11. Sentence.

1. Object and scope.

——S. 498 — Applicability — Ranbir Penal Code, S. 498 — Married woman eloping with lover and staying with him of her own free will — Both guilty.

In the State of Kashmir an elopement which was the result of joint adventure by a married woman with a lover would, in view of the addition to Section 498, R. P. C. that in such cases the woman would be guilty as an abettor, certainly come within the mischief of Section 498, R. P. C. If a married woman whose husband is living were to elope with another person, both of them will be guilty under Section 498, R. P. C The fact that the woman with her own free will has chosen to stay with the accused and that she is a free agent to leave him any moment she likes, would make not the slightest difference, since the wife is also liable to be dealt with as an abettor. **1955 Cr LJ 1188: AIR 1955 J and K 18 (20) (Pr 5).**

——S. 498 — Object of.

The object of Section 498, Penal Code, is not so much to protect the husband as to inflict punishment on those who interfere with the sacred relation of marriage. 17 Cr LJ 363, Rel. on. **31 Mys LJ 97: 1952 Crl LJ 705: AIR 1952 Mys 34 (36) (Pt D) (Pr 10).**

2. Enticing or taking away.

——S. 498 — Taking — Allowing a woman to accompany and keeping her after she had left her father's protection does not constitute. **AIR 1951 Kutch 17 (18) (Pt C) (Pr 12).**

——S. 498 — There need not be enticement — "Taking away" of another's wife with necessary intention constitutes offence — Meaning of "taking away", explained.

In order that a person should be made liable for an offence under Section 498, it is not necessary that there should be any enticement. All that is required is that if any person "takes away" another man's wife with the intent that she may have illicit intercourse with him, then the offence is completed. There must be some influence operating on the woman, or co-operating with her inclination at the time the final step is taken which causes a severance of the woman from her husband, for the purpose of causing such step to be taken. AIR 1937 Cal 460 and AIR 1943 Bom 179, Rel. on; AIR 1937 Bom 186, Disting. **(1949) 1 Mad LJ 610: 62 Mad LW 400: 1949 Mad WN 278: 1949 All WR (Supp) 87: 51 Cri LJ 228: AIR 1950 Mad 13 (14) (Pr 4).**

——S. 498 — Complainant establishing fact of his previous marriage with the victim girl — Accused a relative of complainant and co-villager presumably knowing about relationship between complainant and victim girl as husband and wife. Accused seen going with her — Love letters written by accused to complainant's wife suggesting his intention to have illicit intercourse with her — **Held**, conduct of accused and spirit in which letters were written clearly established that he was taking or enticing away the woman with criminal intention of having illicit intercourse with her and as such accused was liable to be convicted under S. 498. **32 Cut LT 5: ILR (1965) Cut 530.**

3. Intention.

——S. 498 — Intention — Proof of — Surrounding circumstances — Sufficiency for inference.

For a conviction under Section 498, I. P. Code, the intention of the accused has of course to be made out. But such intention has to be gathered from the surrounding circumstances. The very fact that the accused and the woman have stayed together for a number of days as man and wife in a hotel is sufficient to show criminal intent on the part of the accused. AIR 1935 Cal 677, Ref. **31 Mys LJ 97: 1952 Cr LJ 705: AIR 1952 Mys 34 (35) (Pt B) (Pr 6).**

4. Offence can be committed in respect of married woman only.

——Ss. 498, 363, 366, 360, 361, 497 — Prosecution under Sections 363 and 366 — Proof — In a prosecution under Sections 497 and 498, by the husband the question of marriage of the woman with the complainant is material — (Evidence Act (1872), Ss. 101 to 104). See Penal Code (1860), S. 363. **1957 Cri LJ 847: AIR 1957 Him Pra 42.**

5. Concealment or detention.

——S. 498 — 'Detains' — Wife willingly leaving husband and taking shelter in the house of accused — Accused claiming to have 'married' her — Offence.

The provisions of Section 498, like those of Section 497, are intended to protect the rights of the husband and not those of the wife. The gist of the offence under Section 498 appears to be the deprivation of the husband of his custody and his proper control over his wife with the object of having illicit intercourse with her. The consent of the wife to deprive her husband of his proper control over her would not be material. It is the infringement of the rights of the husband coupled with the intention of illicit intercourse that is the essential ingredient of the offence under Section 498. The policy underlying the provisions of Section 498 may no doubt sound inconsistent with the modern notions of the status of women and of the mutual rights and obligations under marriage. That, however, is a question of policy with which courts are not concerned.

It is true that the word 'detains' may denote detention of a person against his or her will; but in the context of the section it is impossible to give this meaning to the said word. Detention in the context must mean keeping back a wife from her husband or any other person having the care of her on behalf of her husband with the requisite intention. Such keeping back may be by force; but it need not be by force. It can be the result of persuasion, allurement or blandishments which may either have caused the willingness of the woman, or may have encouraged, or co-operated with her initial inclination to leave her husband. It may be that the wife was dissatisfied with her husband and wanted voluntarily to leave her husband; but where the evidence is that she must have been encouraged or induced not to go back to her husband because she knew that she would find ready shelter and protection with the accused, and she must have looked forward to marry him

and the accused in fact claimed to have married her there can be no doubt that he intended to have illicit sexual intercourse with her. If having thus left the house of her husband she came to stay with the accused and he allowed her to stay with him, it can be said that he has 'detained' her within the meaning of Section 498. 43 Cal WN 980 and ILR (1939) Lah 148; AIR 1939 Lah 295; 40 Cr LJ 760, **Overruled;** AIR 1957 Pat 285, Affirmed. Alamgir v. State of Bihar, **1959 BLJR 514: 1959 All Cr R 243: 1959 All LJ 417: 1959 SCJ 457: 1959 Mad LJ Cr 293: 1959 Cr LJ 527: 1959 SCA 116: 1959 All WR (HC) 280: 1959 MPC 373: (1959) Supp SCR 464: ILR 38 Pat 334: AIR 1959 SC 436 (439, 440) (Pt A) (Prs 5, 6, 10).**

——S. 498 — "Detains" — Interpretation of.

Having regard to the fact that Section 498 deals with one of the offences relating to marriage, the word "detains" in that section means any act of the offender which has the effect of keeping the woman back from her husband. The mere fact of the woman keeping back from her husband would be immaterial unless it can be said to have been brought about by the alleged offender. And whether it has been so brought about must depend on the facts and circumstances of each case.

However, the effect in question will be deemed to have been brought about by the offender when it is his act however insignificant that turns the balance in favour of the woman keeping back from her husband. That being so, however determined may a woman be not to go back to her husband, whether due to ill-treatment, infidelity or any other cause, the offender will be deemed to have detained her if he offers her the facility, e.g., food and shelter, which enables her to keep back from her husband. AIR 1933 Bom 489; AIR 1934 Sind 72; AIR 1938 Pat 432, Rel. on. **1954 Cr LJ 845: AIR 1954 Him Pra 39 (39) (Pt B) (Pr 2).**

——S. 498 — Concealment or detention — What constitutes.

In order to constitute detention, there must be evidence to show that the accused did something which had the effect of preventing the woman from returning to her father. Where there is no such evidence, nor is there evidence of any concealment against her will no offence is committed. **AIR 1951 Kutch 17 (18) (Pt D) (Pr 12).**

——S. 498 — Detention — Meaning of.

Detention means keeping back. This may take place either by physical force, that is to say, the person detained is kept back by physical force or threat, or it may be due to deception practised on the person concerned, or it may be due to inducement or persuasion, that is to say, a rosy picture may be painted before the person concerned and on account of this rosy picture the person concerned remains in the house, or money may be offered by way of inducement, or it may be even an offer to marry. All this and many others may well be inducement or persuasion which would ultimately keep back the individual concerned and so long as that individual is under the influence of that persuasion or inducement and is thus kept back, he must be deemed to be detained. AIR 1938 Pat 432, Foll. AIR 1939 Lah 295, Dissent. from.

Where there is no evidence how the complainant's wife left the house but there is evidence that one of the accused married complainant's wife, this could only have been because he had offered to marry her and she had agreed to marry him. Thus, there was persuasion or inducement by reason of which she remained in the house of the accused. That being so, she was detained within the meaning of that word in Section 498. **1956 BLJR 184: ILR 35 Pat 93: 1957 Cr LJ 653: AIR 1957 Pat 285 (287) (Pt A) (Pr 6) (DB).**

[**Reversed** on another point in AIR 1959 SC 436.]

——S. 498 — "Detains".

The word "detains" in Section 498 implies some act on the part of the accused by which the woman's movements are restricted; this again implies unwillingness on her part. Mere persuasion by means of blandishments or similar inducements is not included in the word "detention". AIR 1939 Lah 295, Foll. **1958 Cr LJ 1802: AIR 1953 Punj 263 (264) (Pr 1).**

6. Complaint.

——S. 498 — Offence under — Proper complaint by husband— What is — 'Facts mentioned' must disclose offence. See Cr. P. Code (1898), S. 199. **1958 Cr LJ 11: AIR 1958 All 76.**

——Ss. 498, 398, 366 — Ossification test — Mother or girl not examined to prove her age— Effect — Cognizance of offence — Complaint by husband — Necessity.

Held, no cognizance of the offence could be taken without complaint of the husband as required by Section 199, Cr. P. Code and the accused could not be convicted under Section 498, I. P. C. **1961 MPLJ (Notes) 82.**

——S. 498 — Complaint by husband under Section 498, I. P. Code against mother-in-law for detention of wife — Wife produced before Magistrate by warrant under Section 100 — Magistrate ordering her to remain with husband till next date on bail — Order held illegal. See Cr. P. C. (1898), S. 100. **1962 (2) Cr LJ 159 (Tripura).**

7. Charge.

——S. 498 — Charge under Section 34, Penal Code, not framed — Conviction under S. 498/34, Penal Code not illegal. See Penal Code (1860), S. 34. **1957 Cr LJ 653: AIR 1957 Pat 285 (DB).**

[**Reversed** on another point in AIR 1959 SC 436.]

——S. 498 — If during the continuance of a valid marriage a woman has a sexual intercourse with another man that would be illicit intercourse, even though she may have contracted a bigamous marriage with that person. Hence a charge under Section 498 may be added to a charge under Section 494, provided the evidence warrants it. **1950 TCLR 652.**

8. Evidence and proof.

——Ss. 498, 497 — Burden of proof.

In order to make out an offence under Section 497 or Section 498, it must be proved that the accused had sexual intercourse with or enticed a woman "who is and whom he knows or has reason to believe to be the wife of another man". If the accused denies the fact altogether the prosecution is bound to prove both the fact of sexual intercourse and the fact that the accused knew that the woman was the wife of another man. The latter fact must be strictly proved as any other fact. Mere statement by witness that she was the wife of a certain person would not be enough. **1951 All WR (HC) 312.**

——S. 498 — Essentials — Detention and intention to have illicit intercourse must be established.

Even if marriage and offender's knowledge of it be taken as proved by the prosecution yet.

unless detention or intention to have illicit intercourse with the woman detained has been established the offender cannot be convicted under S. 498. **1954 Cr LJ 845: AIR 1954 Him Pra 39 39 (Pt A) (Pr 2).**

——S. 498 — Marriage — Proof — Evidence of relations — Value of — (Evidence Act (1872), S. 5) — (Cr. P. Code (1898), S. 367)— (Husband and Wife).

Held, that the Court was not prepared to reject the evidence of the witnesses related to the complainant merely because they were relations. After all it must be remembered that some witnesses had to be examined on the question of marriage and who else could prove the marriage better than the relations of the complainant himself. **1956 BLJR 184: ILR 35 Pat 93: 1957 Cri LJ 653: AIR 1957 Pat 285 (287) (Pt C) (Pr 8) (DB).**

[Reversed on another point in AIR 1959 SC 436.]

——S. 498 — Proof of marriage — Factum challenged and proved — Proof of formalities not necessary when it is nobody's case that formalities had not been observed. **AIR 1955 NUC (Pat) 4586.**

9. Consent of woman.

——S. 498 — Essentials — Gist of offence — Taking from the husband — What constitutes — Wife's complicity or willingness — Effect.

Section 498 of the Penal Code is intended to protect the husband and not intended for the benefit of the wife. It cannot be said that in a case where a woman is unwilling to live with her husband, may be even for good reasons, and she comes and lives with another person as husband and wife, the other person should not be held to have taken the wife within the meaning of Section 498 of the Penal Code. The wife's complicity in the transaction is no more material on a charge under this section than it is on a charge of adultery. (1865) 2 MHCR 331. Foll. **1952 Mad WN 604 (2): 1952 Mad WN (Cri) 176: (1952) 2 MLJ 212: 54 Cr LJ 607: AIR 1953 Mad 333 (336) (Prs 15, 16).**

10. Practice and procedure.

——S. 498 — Scope — Effect of non-compliance — Case registered under Section 498/379, I. P. C. — Magistrate having no jurisdiction to entertain complaint under Section 498 in view of S. 199, Cr. P. C. — Charge under Section 379 could be proceeded with. See Criminal P. C. (1898), Section 199. **AIR 1955 NUC (Ajmer) 3828.**

——S. 498 — Criminal P. Code (1898), S. 199 — Offence under Penal Code, Section 498 — Complaint by husband — Magistrate referring complaint to police — Process issued after receipt of police report — Jurisdiction of Magistrate to enquire into offence.

Held, that procedure adopted by the Magistrate in having referred the matter to police for investigation after recording the sworn statement should in effect be taken to be under S. 202, Cr. P. C. and not under Ss. 155 and 156.

The complaint which remained on the file and formed the basis for initiating the proceedings satisfied the requirement of Section 199, Cr. P. Code. **AIR 1952 Mys 34 (36) (Pt C) (Pr 9).**

11. Sentence.

——S. 498 — Sentence — Considerations in awarding — Enhancement of sentence— Woman dissatisfied and of loose character and willing to marry accused — Enhancement of sentence.

Since S. 498 does not purport to protect the rights of woman but safeguards the rights of husbands, in enhancing the sentence consideration that in India, woman whether chaste or unchaste must be protected, is not helpful or decisive when it is clear that the woman was of loose moral character, was dissatisfied with the husband and was willing to marry the accused. In such a case though the accused is guilty under Section 498 it is difficult to accept the view of the High Court that the sentence of two month's simple imprisonment imposed on him by the trial Court was so unduly or manifestly lenient as not to meet the ends of justice. It is not right for the High Court to inerfere with the sentence. Alamgir v. State of Bihar, **1959 Cr LJ 527: AIR 1959 SC 436 (442) (Pt B) (Pr 18).**

——S. 498 — Sentence.

Where for an offence under Section 498, the trial Court had imposed a sentence of 2 months' S. I., but the appellate Court reduced it to a fine of Rs. 50.

Held, that even if it be considered that the woman in question was an unchaste one, there could be no ground for people trying to detain other people's wives, and if did so, they must pay the penalty for it. Women in this country, whether chaste or unchaste, must be protected as intended by the Legislature, and it is the duty of the Court to see that they are given sufficient protection. (Sentence enhanced to 6 months' R. I.). **1956 BLJR 184: ILR 35 Pat 93: 1957 Cr LJ 653: AIR 1957 Pat 285 (288) (Pt F) (Pr 11) (DB).**

[Reversed in AIR 1959 SC 436.]

——S. 498 — Ranbir Penal Code (1989), S. 498 — Conviction under — Proof of valid and lawful marriage is condition precedent — Performance of marriage must be proved as a fact and presumption of marriage cannot be drawn— Jammu and Kashmir Evidence Act (1977), S. 60. **1965 Kash LJ 39: 1966 Cri LJ 477 (477, 478) (Pt A) (Pr 4) (J and K).**

SECTIONS 499 and 500

SYNOPSIS

(Penal Code (1860), Ss. 499 and 500.)

1. Scope and applicability.
2. Publication.
(A) Newspaper.
(B) Repetition of libel.
3. Explanation 2 — Imputation concerning class or collection of individuals.
4. "Intending to harm or knowing or having reason to believe that it will harm reputation."
5. Explanation 4 — "Harming reputation".
6. Exception 1 — Imputation of truth for public good.
7. Exception 2 — Opinion regarding public conduct of public servant.
8. Exception 4 — Publication of reports of proceedings of Court.
9. Exception 7 — Censure by person in authority.
10. Exception 8 — Statement to person in lawful authority.
11. Exception 9 — Imputation for protection of interest or for public good.
(A) Judicial proceedings — Privilege of counsel.
(B) Judicial proceedings — Privilege of witnesses.

12. Exception 10 — Caution for good of person to whom conveyed or for public good.
13. Evidence and proof.
See also Note 14.
(A) Defence.
(B) Good faith.
14. Burden of proof.
15. Practice and procedure.
(A) Sanction.
(B) Aggrieved person.
16. Conviction and sentence.

1. Scope and applicability.

——S. 499 — libel of Court and Contempt of Court — Distinction — S. 499, I. P. C. does not exclude action under Section 2 of Act 12 of 1926 — (Contempt of Courts Act (1926), S. 2).

A libellous reflection upon the conduct of a judge in respect of his judicial duties may certainly come under Section 499, I. P. C., and it may be open to the judge to take steps against the libeller in the ordinary way for vindication of his character and personal dignity as a judge; but such libel may or may not amount to contempt of Court, which is something more than mere defamation and is of a different character. What is made punishable in the Indian Penal Code is the offence of defamation as defamation and not as contempt of court. If the defamation of a subordinate Court amounts to contempt of Court, proceedings can certainly be taken under Section 2 of the Contempt of Courts Act, quite apart from the fact that other remedy may be open to the aggrieved officer under Section 499, I. P. C., ILR 10 Cal 109 and 1893 AC 138, Rel. on. Ramakrishna Reddy v. State of Madras, **90 Cal LJ 14: (1952) SCA 312: 1952 SCJ 137: 1952 SCR 425: 1952 Mad WN 393: 1952 Mad WN 97: 1952-1 Mad LJ 736: 65 Mad LW 314: 1952 SCA 131: AIR 1952 SC 149 (152) (Pt B) (Pr 11).**

——Ss. 499 and 500, Exceptions — 'Privilege' — If covered.

Every defamatory statement not coming within any of the exceptions is punishable under S. 500. None of the exceptions exempts a defamatory statement from punishment on the ground of any privilege; the word 'privilege' is not used in any of them. **1960 All LJ 109: 1960 All WR (HC) 141: 1960 All Cr R 118: 1960 Cr LJ 1296: AIR 1960 All 623 (624) (Pt A) (Pr 2).**

——S. 500 — Constitution of India, Art. 19 (1) (a), (2) — Right under Art. 19 (1) (a) is not absolute — S. 499, Penal Code does not contravene Art. 19. See Constitution of India, Art. 19 (1) (a). **1961 (1) Cri LJ 601: AIR 1961 Andh Pra 190 (DB).**

——S. 499 — Article describing Netaji Subhash Chandra Bose as traitor and quisling — **Held,** that the words amounted to defamation of Netaji irrespective of whether he was alive or dead. **68 Cal WN 654: 1964 (1) Cr LJ 367 (372) (Pt D) (Pr 39) (Cal).**

——S. 499 — Editor of Newspaper and ordinary citizen — Section makes no distinction.

Section 499 makes no distinction between an ordinary citizen and the editor of a newspaper and therefore the editor of a newspaper does not enjoy greater freedom in the matter of giving expression to his opinion than an ordinary citizen. (1914) 111 LT 324, Rel. on. **ILR (1957) 2 Cal 181.**

——Ss. 499 and 500 — Validity after commencement of Constitution — Constitution of India. Art. 19 (2).

Under Art. 19 (2), as it stood before its amendment in 1951, the existing law as to defamation prevailed and Sections 499 and 500, Penal Code, were part of the existing law on the date of the commencement of the Constitution. **55 Cal WN 745: 52 Cri LJ 1422: AIR 1951 Cal 176 (178) (Pt C) (Pr 24) (DB).**

——S. 499 — Applicability — Reply sent through lawyer containing defamatory statements — Offence.

One Parvati left her husband's house on account of ill-treatment at the hands of the accused. A registered notice was issued to the accused the husband and his father through lawyer demanding maintenance for her. To this a reply was caused to be sent by the accused through their lawyer denying the maintenance claim on account of Parvathi's unchastity. The reply went further and alleged that her father knew about her immoral conduct and also positively helped her in her immoral ways and that he deceived the accused into entering into the marriage alliance. It was for these allegations made against him that father of Parvati filed the complaint.

Held, that the presumption that so long as the reply of the accused stood proved the accused might be taken to have given instructions therefor was not inevitable seeing that Counsel's volition had intervened and it was unsafe to found criminal liability on the accused on such basis. **1959 Ker LR 453: 1959 Mad LJ (Cr) 274: 1959 Ker LT 451: 1959 Ker LJ 441: 1959 Cr LJ 1321: AIR 1959 Ker 342 (343) (Pr 3).**

——S. 500 — Report of a theft lodged with Police — Suspicion about a person alleged — In fact no theft took place — Allegation defamatory and malice can be presumed. **1964 MPLJ (Notes) 222.**

——Ss. 500, 499 — Defamation — Essential ingredients — Communication of libel to third person is material.

The gist of the offence of defamation lies in the dissemination of the harmful imputation. When a defamatory statement is published, it is not only the publisher, but also the maker, who becomes responsible and it is in that context that the word 'makes' is used in S. 499. It is of the essence that in order to constitute the offence of defamation it must be communicated to a third person because what is intended by the imputation is to arouse the hostility of others. If a person merely writes defamatory words and keeps the writing with himself, the offence is not made out. Likewise, if the libeller merely communicates the libel to the person defamed it does not constitute an offence under the said section although it may amount to an insult and may be punishable as such. The question whether the libel in fact has been communicated to a third person is material. It is not enough that the libeller posted it to a third person. **1962 MPLJ 927: 1962 (2) Cr LJ 760: AIR 1962 Madh Pra 382 (383) (Pr 5) (DB).**

——Ss. 499, 500 and 171-G — Speeches made during elections — How far privileged indicated — Statement of fact when falls under S. 171-G stated — (Elections) — (Criminal P. C. (1898), Section 196). See Penal Code (1860), S. 171-G. **1958 Cri LJ 647 (2): AIR 1958 Mad 240.**

[**Overruled** on another point in AIR 1967 SC 808.]

——Ss. 499 and 500 — Scope — Expression "Black marketeer" is per se defamatory within meaning of section. **AIR 1952 Mys 123 (124) (Pt A) (Pr 3).**

——Ss. 499, 500 — Applicability — Caste—Panchayat refusing to decide dispute unless com-

plainant paid fine for past transgression — Ex-communication for failure — Offence.

There is nothing objectionable if a Caste Panchayat whose help is sought for by the complainant refuses to decide the dispute unless he himself would be amenable to the caste discipline by paying a fine for his past transgression of the caste rules. His ex-communication for failure to pay the fine may, in some circumstances, amount to an offence under the Penal Code. **26 Cut LT 249: 1961 (1) Cr LJ 296: AIR 1961 Orissa 33 (34) (Pt A) (Pr 5).**

——**S. 499 — Essentials of offence.**

The essence of the offence of defamation, as given in S. 499 is that the imputation must have been made either with the intention of causing harm, or knowing or having reason to believe that such imputation would cause harm to a person.

In judging whether the accused had such intention or knowledge, the circumstances under which and the main object with which the application containing the defamatory statements was sent including the prayer asked for from the Minister, and the background of the dispute between the parties before the Endowment Department, should all be considered. If, after a careful consideration of all these facts it did not appear that the accused had the necessary intention or knowledge it was not proper to place him on trial for an offence under S. 500, Penal Code. **25 Cut LT 16: 1959 Cri LJ 1006: AIR 1959 Orissa 141 (143) (Pt B) (Pr 7) (DB).**

——**S. 499 — Defamation — Tests.**

Where some passage in a petition are alleged to be defamatory, the document should be read as a whole, with a view to find out the main purport, and too much importance should not be attached to a few isolated passages here and there. **25 Cut LT 16: 1959 Cri LJ 1006: AIR 1959 Orissa 141 (143) (Pt C) (Pr 8) (DB).**

——**S. 499** — Civil and Criminal liability — Difference in law in India and England pointed out. See Tort — Defamation. **1962 (1) Cr LJ 737: AIR 1962 Pat 229 (DB).**

——**S. 499** — Freedom of speech — Limitation on — Freedom of press is not higher than that of citizen — Use of this freedom so as to constitute infraction of law relating to defamation is not allowed. See Constitution of India, Art. 19 (2). **1963 (1) Cr LJ 609: AIR 1963 Punj 201.**

——**Ss. 499 and 500 — Essentials of offence.**

By the mere use of words 'dishonest and fraudulent' the accused committed no offence of defamation. For making out an offence of defamation it is necessary that by using certain expressions the intention is to harm the reputation of a certain person or the person using those expressions knew or had reason to believe that such imputation would harm the reputation of such person. **1953 Raj LW 203: AIR 1955 NUC (Raj) 469.**

——**Ss. 499 and 500** — Scope — By mere use of words "dishonest" and "fraudulent", accused commits no offence of defamation — Intention to harm reputation of certain person or knowledge or belief that it may be harmed, is necessary. **AIR 1955 NUC (Raj) 469.**

2. Publication.

(A) Newspaper.

(B) Repetition of libel.

2. Publication.

●——**S. 499** — Constitution of India, Art. 194 — Publication by member of question disallowed by speaker of Legislative Assembly — No absolute privilege. See Constitution of India, Art. 194. **1961 (1) Cri LJ 743: AIR 1961 SC 613.**

——**Ss. 499, 500** — Article in newspaper alleging that public servant concerned amassed tidy amount by way of bribe — **Held** imputation of bribe was calculated to harm the reputation of the public servant and was defamatory of him. **1961 All LJ 967: 1961 All WR (HC) 770: 1962 All Cr R 9: ILR (1962) 1 All 179: 1962 (2) Cr LJ 520.**

——**S. 499 — "Publication" — Imputation conveyed to complainant — Offence.**

When the alleged imputation is communicated only to the person defamed, (i.e.), the complainant and is not in any other way published to anybody else, an offence under S. 499, Penal Code is not committed. **1951 AWR (HC) 257.**

——**S. 499 — Publication — Meaning of — It is enough if communication was made to at least one person other than person defamed.**

The word 'makes' in S. 499 has been used in its etymological sense as connoting 'to make pubilc' or 'to make known to people in general.' Publication implies communication to at least one person other than the person defamed. 38 Cri LJ 806 (All), Rel. on. Where, therefore, the respondent wrote a letter to the President of Managing Committee of Takhat Harmandirji containing defamatory matter about one of the members of Supervising Committee, with the word 'Personal' appearing on the letter and the President made a note on it and directed the General Secretary to report to him about the affairs of the Gurudwara and the General Secretary put up that letter before the Managing Committee and sent a reply to the President.

Held, that there was 'publication' as contemplated in S. 499 of the Penal Code. The steps which the President and the General Secretary took after the receipt of the letter were not very material, inasmuch as the respondent might not have intended that the letter should be placed before the members of the Managing Committee but even without that there was communication of the deamatory statements to the President. **1965 (2) Cri LJ 693 (Pat).**

——**Ss. 499 and 500** — 'Publication' — Publication of defamatory article to complainant himself is no publication. **1959 Cr LJ 1310: AIR 1959 Cal 677 (678) (Pt A) (Pr 3) (DB).**

——**S. 499 — Applicability — Imputation made in good faith for public good — No offence.**

The accused had published an editorial in his weekly paper 'Damodar' criticising the mismanagement of an Electric Company of which the complainant was the Director and Managing partner.

Held, on a consideration of the article in question that there was no want of due care and caution in the publication of the editorial in question and its publication was made for the public good. It is well settled rule of interpretation that where a matter is of public interest the Court ought not to weigh any comment on it in a fine scale. Some allowance must be made on even intemperate language provided however, that the writer kept himself within the bounds of substantial truth and does not misrepresent or suppress facts. **1959 Cr LJ 1310: AIR 1959 Cal 677 (679) (Pt D) (Pr 7) (DB).**

——**S. 499** — Constitution of India, Art. 194 — Publication of proceedings in legislature by a member — Extent of privilege — Questions sought to be asked in Legislative Assembly but disallowed — Publication of — Member if can claim privilege in respect of such questions — **Held** that

alleged defamatory questions were never asked in house with the result that they could not be said to form part of the proceedings of the House as a result of disallowance by Speaker. See Constitution of India, Art. 194. **AIR 1956 Cal 433.**

——**Ss. 499 and 500** — Publication of photograph with false caption depicting persons therein as soldiers of 'Goonda war' — Publication per se defamatory — Knowledge of Publisher that it affects complainant immaterial — Every person photographed can file complaint — 'Goonda' — Meaning — Definition in C. P. Act (10 of 1946), Relied; (1929) 2 KB 331 and 1910 AC 20 and AIR 1935 All 743, Rel. on. **1961 Ker LJ 1212: 1961 Ker LT 1006: 1962 (2) Cr LJ 142: 1962 Mad LJ (Cr) 635.**

——S. 499 — Letter posted at particular place — It cannot amount to publication at that place — (Criminal P. C. (1898), S. 177).

When a letter enclosed in an envelope is posted at any particular place, it cannot amount to publication at the place where the letter is posted. The gist of the offence of defamation being publication of the defamatory matter, if the letter does not reach the other side, it cannot be said that defamation has been completed merely because the letter was posted at a particular place. There must, therefore, be evidence of the publication to constitute defamation and till the letter is published it cannot be said that defamation has been committed. AIR 1923 Mad 666; 44 Mad LJ 648 and AIR 1924 Mad 340; 45 Mad LJ 754, Dissented from. **1957 Mad WN 289: (1957) Mad LJ (Cr) 304: 1957 Cri LJ 983: AIR 1957 Mad 572 (572) (Pt A) (Pr 2).**

——S. 499 — Essentials — Ill-will or malice — If necessary.

To bring the publication of a scandalous imputation under the penal law, it is not necessary to prove that it was done out of any ill-will or malice or that the complainant had actually suffered from it. It would be sufficient to show that the accused intended, or knew or had reason to believe, that the imputation made by him would harm the reputation of the complainant. Every sane person is presumed to have intended the consequences which normally follow from his act. **1952 Cr LJ 1553: AIR 1952 Pepsu 165 (167) (Pt C) (Pr 5).**

——Ss. 499, 500 — Punjab Public Safety Act (2 of 1947), S. 21 (b) — "Publishes" — Meaning of —

Where a person sends an anonymous letter containing slanderous remarks maliciously made against a Government servant, to his superior with the object of prejudicing his chances of promotion the person cannot be convicted under S. 21 of Act (2 of 1947) as there is no publication within the meaning of Cl. (b) and the case is one which can be dealt with under S. 500, Penal Code. **AIR 1951 Punj 381 (382) (Pt B) (Pr 4).**

——S. 499 — Publication of defamatory statement — Publisher's liability.

The accused cannot justify the defamatory statement on the ground that similar reports had appeared or by saying, that rumours to that effect were afloat. Every republication of a libel is a new libel, and each publisher is answerable for his act to the same extent as if the calumny originated with him. The publisher of a libel is strictly responsible, irrespective of the fact whether he is the originator of the libel or is merely repeating it. **1961 (1) Cr LJ 710: 63 Punj LR 794: AIR 1961 Punj 215 (225) (Pt E) (Prs 48, 49).**

[**Reversed** on another point in AIR 1966 SC 97.]

——Ss. 499 and 500 — 'Publish', meaning of.

The use of the word 'publish' in S. 499, I. P. Code, does not contemplate those communications which one is bound to make to others in the normal course of his legal duties. Thus where accused No. 2 in his official capacity as General Manager had placed a report made by accused No. 1 about his subordinate before the Board of Directors who had appointed him and to whose direction and control he was subject, and it was not alleged by the complainant against accused No. 2 that he made any remarks of his own which might be defamatory against the complainant.

Held, that it was certainly a privileged communication and even if he had passed any censure against him in good faith, it would have been covered by Exception 7 of S. 499, I. P. Code. (1930) 1 KB 130, Disting. **ILR (1959) 9 Raj 1160: 1960 Cr LJ 1136: AIR 1960 Raj 213 (214) (Pt A) (Prs 5, 6).**

——S. 499 — "Publication" — Communication on post card is publication. **AIR 1955 NUC (Raj) 2198.**

2 (A). Newspaper.

——S. 499 — Report of proceedings of Legislature in newspaper — If privileged — Constitution of India, Art. 194.

Reports of proceedings of a Legislature in an Indian Newspaper, unless such are expressly authorised by the House, are not the subject-matter of privilege and may found a complaint for defamation under S. 500, Penal Code.

Article 194, Constitution of India does not prohibit proceedings in respect of the report in the newspaper.

The rule as to vicarious publication, however, cannot possibly apply to speeches made in the Assembly, and a person who makes a speech in a Legislature cannot possibly be held liable for its publication in newspaper when he has himself done nothing to cause such publication. **55 Cal WN 745: 52 Cri LJ 1422: AIR 1951 Cal 176 (178, 179) (Pt A) (Prs 18, 21, 22, 28) (DB).**

——Ss. 499 and 500 — Publication of libel in newspaper — Evidence of publication — Proof — Presumption regarding newspaper.

To maintain a prosecution for defamation in a particular Court there must be publication of the libel within the limits of the jurisdiction of that Court. Where it is a publication of a newspaper containing the libel it is sufficient to prove that the paper was delivered within the territorial jurisdiction of the Court and it need not be proved that the libellous matter was seen or read by any particular person as in the case of a letter. Newspaper is a commodity printed for the purpose of being read and it can be presumed that it was so read. ILR 15 Bom 286 and AIR 1928 All 222, Rel. on. **1961 Ker LJ 1212: 1961 Ker LT 1006: 1962 (2) Cr LJ 142: 1962 Mad LJ (Cr) 635.**

——Ss. 499 and 500 — Libel in Newspaper — Proof regarding the accused being Editor and Publisher — Declaration under S. 7 of Press and Registration of Books Act that accused was editor, printer and publisher of newspaper printed in newspaper — Sufficient. **1961 Ker LJ 1212: 1961 Ker LT 1006: 1962 (2) Cr LJ 142: 1962 Mad LJ (Cr) 635.**

——S. 499 — Article in newspaper calculated to harm reputation of Minister — Offence.

Where an article in a newspaper said that in pursuance of a scheme to back the electricity department with his own underlings by underhand means, the Minister had, in violation of the rules, appointed a certain person as an Accountant, and that this appointment was but a prelude to further appointments of the like naure and the concluding sentence of the article was obviously

an ironical statement implying that the Minister's administration was a bad administration riddled with corruption and nepotism.

Held, that the article was per se defamatory. **1958 Ker LT 1158: 1958 Ker LJ 1262: 1959 All WR (Sup) 29: 1959 Cri LJ 464: ILR (1959) Ker 195: 1959 All Cri R 158: (1959) MLJ (Cri) 930: AIR 1959 Ker 100 (102) (Pt A) (Pr 8) (DB).**

[**Overruled** on another point in AIR 1961 SC 387.]

——**S. 499** — Publication of defamatory matter in newspaper — Editior absent from duty for bona fide purpose at time of publication — Work of editing entrusted to sub-editor — Presumptive liability of editor displaced — Editor not guilty under S. 500 — ILR 9 Mad 387 and AIR 1928 All 400, Rel. on. **1961 MPLJ 119: 1962 Jab LJ 490: 1961 (1) Cr LJ 91: AIR 1961 Madh Pra 12 (13) (Pt A) (Pr 7).**

——**Ss. 499-500 — Degree of care and caution — Newspapers — Position of.**

In the matter of defamation the position of newaspapers is not any way different from that of members of the public in general. The responsibility in either case is the same. The degree of care and attention is no way less in the case of newspapers publications than that required from ordinary men. In the case of publication of a defamatory matter actual source of information on which the person accused has acted and the justifiability of his so acting ought to be considered. If he has not taken proper care and acted, on a gossip and the complainant is thereby defamed he ought not to escape consequences on the ground that he has promptly contradicted the incorrect report. The culpability in such cases does not depend on the circumstance whether he has tried to undo the wrong which he has committed or not but upon the fact whether he has acted with care and caution or has done so rashly or negligently. Attempt to undo the mischief may exhibit want of malice or fear of the consequences. But even if it indicates absence of malice that is not enough to prove good faith as defined under the Code. **1958 MPC 199: 1958 Jab LJ 252: 1958 MPLJ 405: 1958 Cri LJ 1036: AIR 1958 Madh Pra 216 (217) (Pt A) (Prs. 10, 11) (DB).**

——**Ss. 499, 501 — Freedom of press — Extent of — Constitution of India, Art. 19 (1) (a).**

The freedom of the journalists is an ordinary part of the freedom of the subject and to whatever lengths the subject in general may go, so also may the journalists, apart from statute law, their privilege is no other and no higher. **27 Cut LT 489: 1962 (2) Cr LJ 617: AIR 1962 Orissa 197 (202) (Pt D) (Pr 16).**

[**Reversed** on another point in AIR 1963 SC 1198.]

——**Ss. 499, 500, 501** — Publication of statement of political leader in newspaper — Imputation against Governor untrue and made without verification — Editor held guilty under S. 500 and printer and publisher held guilty under S. 501. **27 Cut LT 489: 1962 (2) Cr LJ 617: AIR 1962 Orissa 197 (201, 202) (Pt E) (Prs 10, 12, 14, 15).**

[**Reversed** on another point in AIR 1963 SC 1198.]

——**S. 500** — Scope — Person declaring to be printer and publisher — He would be liable for printing objectionable matter although he had entrusted the selection of news items to his editor. See Press and Registration of Books Act (1867), S. 7. **67 Pun LR 877: 1966 Cri LJ 292: AIR 1966 Punj 93.**

——**Ss. 500 and 501 — Publisher himself a printer of a newspaper— Although his case would be covered by S. 501 his liability under S. 500 would not be affected thereby.**

As a publisher of a newspaper makes known to the people in general and thus gives publicity to the news item printed in that newspaper, the case against him for the publication of a defamatory news item in the paper would legally and logically amount to defamation simpliciter and, as such he would be punishable under Section 500, Penal Code. If he is also the printer of the newspaper, the case would be covered by S. 501 too of the Penal Code. But his liability as a publisher under S. 500 of the Code, would in no way be affected. While S. 500 provides the penalty for the simple and plain act of defamation, S. 501 provides the punishment which may be imposed upon a person who prints or engraves any matter, knowing or having good reason to believe that it is defamatory of another. The definition of defamation, as given in S. 499 shows that a person publishing any imputation concerning another person intending to harm or knowing or having reason to believe that such imputation will harm the reputation of the other person, would be guilty of defaming the other person, unless the case is covered by the Exceptions. In the definition word 'publishes' is obviously used in its etymological sense and connotes 'to make public' or to make known to the people in general. **1966 Cri LJ 292: 67 Pun LR 877: AIR 1966 Punj 93 (95) (Pt A) (Pr 5).**

——**S. 499 — Editor of newspaper — Responsibility of during his absence.**

Where it is satisfactorily established that the editor was on leave and had entrusted his duties to a responsible person who had accepted the full responsibility for the publication of the libel, the editor cannot be held to be criminally liable. In such a case there is no necessity for the editor to adduce positive proof to show that he was on leave when the libel was published. **52 Cri LJ 623: ILR (1951) Trav-Co 77: AIR 1951 Trav-Co 105 (105) (Pt A) (Pr 3) (DB).**

2 (B). Repetition of libel.

——**Ss. 499, 500 — Repetition of defamatory statements in question form.**

Where after certain leaflets are distributed containing imputations against the complainant which are clearly defamatory the editor of a newspaper publishes them in the form of questions without any direct imputation against the complainant and asks the complainant to clear himself by answering the questions it amounts to a re-publication of the defamatory statements in the leaflets and the editor is guilty of defamation. **85 Cal LJ 57: 1950 All WR (Supp) 48: 51 Cri LJ 1293: AIR 1950 Cal 343 (343) (Pt A) (Pr 3).**

——**S. 499 — Repetition of libel — Every repetition is new libel.**

A defamatory statement cannot be justified on the ground that such report had appeared elsewhere or that rumours to that effect were afloat. Every repetition of a libel is a new libel and each publisher is answerable for his act to the same extent as if the calumny originated from him. The publisher of a libel is clearly responsible, irrespective of the fact whether he is the originator of the libel or is merely repeating it. **1964 Ker LJ 422: 1965 Mad LJ (Cri) 834: ILR (1964) 2 Ker 31: 1964 (2) Cr LJ 549: AIR 1964 Ker 277 (282) (Pt B) (Pr 11).**

——**S. 499 — Privilege — Members of Legislative Assembly and Parliament — Extent of privilege.**

The members of the Legislative Assembly and of the Parliament are absolutely privileged and they can make with impunity libellous statements

while participating in the deliberation of the House and the Court has no jurisdiction to entertain an action in respect of defamatory utterances by them as the Members, under the law, are not amenable to civil or criminal action, despite the fact that the statements are grossly defamaory and deliberately false. This privilege, however, does not extend to a statement published by a member outside the House. Each repetition is a fresh defamation. **1961 (1) Cr LJ 710: 63 Punj LR 794: AIR 1961 Punj 215 (225) (Pt F) (Prs 50, 52).**

[Reversed on another point in AIR 1966 SC 97.]

3. Explanation 2 — Imputation concerning class or collection of individuals.

●——**S. 499, Expln. 2 — Person includes collection of persons which is identifiable — Prosecution staff of U. P. Government at Aligarh can be subject of defamation and is covered by the explanation.**

The language of Explanation 2 to S. 499, I. P. Code is general and any collection of persons would be covered by it. Of course that collection of persons must be identifiable in the sense that one could, with certainly, say that this group of particular people has been defamed, as distinguished from the rest of the community. The prosecuting staff of Aligarh or as a matter of fact, the prosecuting staff in the State of Uttar Pradesh, is certainly such an identifiable group or collection of persons. There is nothing indefinite about it. This group consists of all members of the prosecuting staff in the service of the Government of Uttar Pradesh. Within this general group of Public Prosecutor of U. P. there is again an identifiable group of prosecuting staff, consisting of Public Prosecutors and Assistant Public Prosecutors, at Aligarh. This group of persons would be covered by Explanation 2 and could, therefore, be the subject of defamation. Sahib Singh Mehra v. State of U. P., **(1965) 1 SCWR 571: 1965 SCD 600: 1965 (2) Cri LJ 434: (1965) 2 Law Rep 486: (1965) 2 SCR 823: ILR (1965) 2 All 241: AIR 1965 SC 1451 (1453) (Pt D) (Pr 9).**

——**Ss. 499, Expl. 2 and 11 — Complaint by Corporation for defamation can be maintained — Imputation must cause special injury to property.**

Having regard to the provisions of S. 499 read with Explanation 2 and the definition of the word 'person' in S. 11 of the Penal Code it cannot be said that a complaint for defamation is not maintainable at all by a Corporation. But the scope of such a complaint by a Corporation is not the same as that by individuals. A Municipal Board per se has hardly a reputation. If the management is good it will be said that the Board is being run efficiently. But if the management is bad there is bound to be accusation of inefficiency and nepotism, etc. If a person makes any imputation so as to cause any special injury to the property of the board then the Board can maintain a complaint under S. 500. But where the minority party in the Board attacks the majority party for inefficiency then such an attack does not amount to defamation. (Such a case is covered by Exceptions 1 and 2 of S. 499).

The imputation held did not harm reputation of the Board, the intention being to improve the administration. **1952 All WR (HC) 32: 1952 All LJ 64: 1952 Cri LJ 282: 1952 All Cr C 12: AIR 1952 All 114 (115, 116) (Pt A) (Prs 4, 8).**

——**Ss. 499, 500 — Association of persons — Imputation lowering moral character of members collectively — Publication of, held amounts to defamation.**

In respect of an association of persons the law of defamation in India is not the same as the English law of defamation relating to a trading company or corporation.

Defamation of an association or collection of persons could be made by publication of an imputation affecting character or reputation. The contention that only an imputation lowering the credit of the person is the mode in which there can be any defamation of an association, is not correct, and an association may be defamed also by an imputation which lowers the moral character of the members of the association collectively AIR 1935 All 743; 36 Cr LJ 816, Rel. on.

Thus, where in certain newspaper, an item of news was published to the effect that because a certain Student's Welfare Association was hobnobbing with the police, many anti-social persons had obtained shelter and the real culprits were not being punished;

Held, that the publication amounted to defamation of the members of the association. **(1962) 66 Cal WN 24: 1961 Cal LJ 53: ILR (1961) 2 Cal 637.**

——**Ss. 499, 500 — Imputation per se defamatory — Plea of exception — Burden of proof.**

The imputation in the accusation, which the accused makes to the caste panchas, that the complainant had taken food with chamars is per se defamatory. The accused if at all can take shelter under the eighth or the ninth exception. To do so the presence of good faith is a necessary prerequisite. Since the accused himself had voluntarily gone to the caste panchas and made the accusation regarding the conduct of the complainant it was for him to prove that what he did was done in good faith. When there is no evidence that he had equipped himself with necessary information on proper grounds that the substance of the accusation was to his belief correct it cannot be said that he had acted as a reasonable and prudent man and therefore, with good faith in making the accusation. There can be no good faith when the accused can leave no reasonable ground to believe the truth of the statement he makes. 76 IC 393, Rel. on. **1958 MPLJ 248.**

——**S. 499 — Bank whether can be defamed.**

Dicta— An imputation against a company or an association or collection of persons as such amounts to defamation. Therefore, the mere fact that the reputation of a Bank is sought to be affected by the publication does not take it away from the mischief of a defamatory publication. **AIR 1950 Pat 545 (546) (Pt B) (Pr 5).**

——**S. 500 — Defamation — Imputation concerning any person — Identity of such person should be established.**

If the words complained of contain no reflection on a particular individual or individuals, but may equally apply to others belonging to the same class an action for defamation will not lie. The defamatory matter to be actionable must be such that it contains an imputation concerning some particular person or persons whose identity can be established. It is unnecessary that the person whose conduct is called in question should be described by name. It is sufficient if on the evidence it can be shown that the imputation was directed towards a particular person or persons who can be identified. AIR 1922 Pat 101; 78 ER

747; AIR 1937 All 677 and AIR 1925 Cal 1121, Rel. on. **1962 Ker LT 538: 1962 Ker LJ 796.**

4. "Intending to harm or knowing or having reason to believe that it will harm reputation".

——S. 499 — Intention.

Section 499 requires inter alia an intention on the part of the accused to harm the reputation of the complainant or the knowledge that the imputation made by him will harm such reputation. **1952 All WR (HC) 32: 1952 All LJ 64: 1952 Cri LJ 282: 1952 All Cr C 12: AIR 1952 All 114 (115) (Pt B) (Pr 5).**

——S. 499 — "Intending to harm or knowing" — Matter published per se defamatory.

In the case of news item published in a newspaper forming the subject of a proceeding under S. 500, where the matter published is per se defamatory, the only thing that the prosecution is called upon to prove in the first instance is the fact of the publication itself. When the tenor of the document shows that the publication tends to harm the reputation of any person, a Court would be justified in gathering from the terms of matter itself that the publishers intended to harm or knew or had reason to believe that such imputation would harm his reputation. **AIR 1950 Pat 545 (546) (Pt C) (Pr 5).**

——S. 499 — "Intending to harm" — Case on facts. **AIR 1955 NUC (Raj) 2198.**

5. Explanation 4 — "Harming reputation".

——S. 499, Expln. (4) — Defamation — What constitutes — Held use of word 'dalal' might indirectly lower moral and intellectual character.

Section 499, Expln. (4) seems to imply that what constitutes defamation has to be determined not upon an interpretation that may be found for a word by a laborious research in a Court of law but upon the meaning that might be conveyed by the word to a reasonable and fairminded man. A meaning that might be conveyed to a morbid or suspicious mind cannot be taken into account for this purpose. The word "others" in the explanation refers to a reasonable and fair minded man and not to a man with a morbid or suspicious mind. (1880) 56 PD 514; (1913) AC 386 and (1897) AC 68, Consd.

Held on considering circumstances that though the word "dalal" may have an innocent meaning the context in which it was used in the present case it might indirectly lower the moral and intellectual character of the complainant in the estimation of others by imputing to him a personal or pecuniary motive in attempting to get the Tales from Arabian Nights selected as a Rapid Reader of English for the year 1955. **ILR (1957) 2 Cal 181.**

——S. 499, Explanation 4, Exceptions 1, 3 and 9 — Applicability considered. **AIR 1055 NUC (Madh Bha) 3695.**

——S. 500 — Applicability — Intention — Words of scurrilous abuse or admonition or conveying disapproval of particular conduct — Offence.

The mere use of the word "chandal" cannot form the foundation of a charge or prosecution for defamation. It may amount at best to a form of scurrilous abuse and cannot be interpreted as conveying any imputation against the reputation of the person in respect of whom the word is used. The reputation of a person is certainly not affected by his being called a "chandal", and intention to cause loss of reputation which is the essential ingredient of the offence of defamation cannot be attributed to a person who indulges in abuse in a fit of excitement. The accused using the word "chandal" cannot be said to have the intention or motive to damage the reputation of the person who is so called so as to bring case within S. 500, I. P. Code. Further where the words uttered sound more in the nature of admonition, rather than purport to lower the reputation of the complainant cannot amount to defamation. So also words meant to convey disapproval of the conduct of the complainant cannot amount to defamation, as being intended to lower his reputation. **1952 Cr LJ 1640: 18 Cut LT 146: AIR 1952 Orissa 351 (352) (Pt B) (Prs 5, 6).**

——S. 499 — Harming reputation — Proof of actual harm not necessary if words are prima facie defamatory — Explanation 4 does not apply in such a case.

Explanation 4 to S. 499 would not apply when the words used and forming the subject-matter of the charge are per se defamatory.

It is not necessary to prove that actually harm was caused if the words are prima facie defamatory and it would be sufficient if it can be made out that the maker of the statement knew or had reason to believe that the imputation made by him would harm the reputation of the person against whom the imputation is made. When the expressions and words used in a particular letter or other document are clear enough to indicate that there would be a harm to the reputation, then one need not find out as to whether the imputation was likely to lower the moral or intellectual character of the person defamed. **1965 (2) Cri LJ 693 (Pat).**

6. Exception 1 — Imputation of truth for public good.

——S. 499, First and Second Exceptions — Defamation by publication of news item in newspaper about Lekhpal — Doctrine of fair comment —Its application to journalist — Held imputations made about Lekhpal were justified.

Exception 1 to S. 499, Penal Code, allows imputation which is true concerning a person if it be for the public good. If the imputation is contained in news item published in a newspaper then the doctrine of fair comment comes into play. The doctrine of fair comment is based on the hypothesis that the publication in question is one which broadly speaking, is true in fact, and is not made to satisfy a personal vendetta; and further that the facts stated therein are such as would go to serve the public interest.

A journalist possessed no higher right than an ordinary citizen has in respect of the freedom of speech. At the same time, by virtue of the special character of his profession the journalist owes certain duties to the public, the most important of which is the dissemination of news and views fully and truly expressed on matters affecting the public good. A newspaper editor, acts within his legitimate sphere when he offers criticism of what he considers and bona fide believes to be for the good of the community. But he is not protected if under the garb of criticism he employs language calculated to defame or degrade the character of

a public servant or a private citizen. In order to pass the test of fair comment the publication must be free from malice and made bona fide and in public interest. Mere exaggeration or inaccuracy in matters of details does not make a comment unfair so long as what is expressed there is materially true and for public benefit.

Held, that on the facts of this case the imputations contained in the news item published in the newspaper about Lekhpal could not be considered defamatory of the complainant Lekhpal as the imputations were justified. AIR 1917 Bom 62 (SB), Rel. on. **1965 (2) Cri LJ 334: AIR 1965 All 439 (441) (Pt B) (Prs 15, 16, 18) (DB).**

——S. 499, Exceptions 1, 3 and 9, S. 500 — Privilege — Good faith — Burden of proof — Newspaper article published in amidst controversy imputing corrupt and dishonest character to complainant without any basis — Article couched in wild and unrestrained language — Absence of good faith — Editor held guilty of defamation.

Before the benefit of any of the Exceptions 1, 3 and 9 of S. 499 can be given to an accused, there should be some basis for holding that the accused acted in good faith. The onus of showing that he had reasonable ground for believing the defamatory imputation to be true and was actuated in publishing such a statement not by malicious reasons but by an intelligent zeal for the public interest lies on the person who publishes such an imputation. Unless there is some substantial foundation for an imputation it cannot by any stretch of language be called a 'fair comment' which was made in 'good faith'. While logical infallibility is not required, the circumstances should, show that the maker or the publisher of the defamatory imputation exercised due care and caution. There is no warrant either in law or equity to hold that the Exceptions to S. 499 are to be interpreted in a different manner in the case of a journalist.

Held, on facts that the imputations were per se defamatory, lacked in good faith and were clearly malicious. (1863) 32 LJQB 185, Applied. **1962 (1) Cr LJ 122 (124, 125) (Pt A) (Prs 7, 8, 9, 14) (All).**

——S. 499, Exception 1 — Election — Objection to complainant's nomination — Statement that complainant is drunkard.

A statement in an objection to the nomination of the complainant that the complainant is drunkard is in no way relevant to the election and is defamatory to the complainant. **1958 All Cr R 201: 1958 All LJ 149: 1958 All WR (HC) 226: 1957 Cr LJ 1360: AIR 1957 All 777 (778, 779) (Pt B) (Prs 4, 5).**

——S. 499, Exceptions 1 and 2 — Imputation by member of minority party against municipal board of tyranny of majority party and nepotism and also of waste of public money in litigation — Case held covered by Exceptions 1 and 2. **1952 All WR (HC) 32: 1952 All LJ 64: 1952 Cri LJ 282: 1952 All Cr C 12: AIR 1952 All 114 (116) (Pt C) (Pr 8).**

——S. 499, Exception (1) — Essentials of exceptions — Statement made in good faith — What is — Member of Board of Secondary Education described as 'dalal' of a publisher — There was reasonable inference warranted by facts — Accused rendering valuable public service and acting in good faith — Hence acquitted of charge under Section 500. See Penal Code (1860), S. 52. **ILR (1957) 2 Cal 181.**

——S. 499, Exception 1 — "Any thing which is true."

It is sufficient if the accused can show that the statements are substantially true in regard to the material portion of the allegation or insinuation. **85 Cal LJ 57: 1950 All WR (Supp) 48: 51 Cri LJ 1293: AIR 1950 Cal 343 (345) (Pt B) (Pr 4).**

——S. 499, Exception 1 — Scope and applicability.

To say something of a person which holds him to contempt is defamatory. If what is said is true then that is a defence of justification under the exception. On the other hand, if there is a doubt as to whether it is true or not, there is no defence at all and as the matter tends to bring the person defamed into contempt it is defamatory under S. 500. **85 Cal LJ 144: 1950 All WR (Supp) 63: 51 Cr LJ 1288: AIR 1950 Cal 339 (339) (Pr 7).**

——S. 499, Exceptions 1, 9 — Burden of bringing the case under exception lies on accused — Nature and degree of proof required on the part of accused — Statement under S. 342, Cr. P. Code can be taken into account — Requirements for invoking Exception 1 — Public interest — Meaning of — Evidence Act (1872), Ss. 3, 105 — Cr. P. Code (1898), S. 342 — Words and Phrases — Public interest.

By virtue of Section 105 of the Evidence Act the Court is bound to presume the absence of circumstances which would bring the offence within any of the special exceptions contained in Section 499, I. P. Code and the burden would primarily rest on the accused to show that the exception applies. Burden cast on the accused in a criminal case by virtue of Section 105 of the Evidence Act is not so onerous as the primary burden cast on the prosecution to prove the offence beyond reasonable doubt: (1962) 2 SCJ 347; 1962 Mad LJ (Cr) 531; 1962 (1) Cr LJ 521: AIR 1962 SC 605, Rel. on. If a fact is to be held 'proved' the Court must either believe it to exist or consider its existence so probable that a prudent man ought under the circumstances of the particular case to act upon the supposition that it did exist. If on the evidence it appears probable that the defence set up is true he is entitled to a decision in his favour even though he may not have succeeded in proving the truth of his version beyond reasonable doubt. 1943 KB 607 and (1957) 3 WLR 330, Rel. on. The statement of the accused made under Section 342 of Cr. P. Code also may be considered in deciding whether the onus has been discharged by the accused. 1962 (2) Cr LJ 284; AIR 1962 SC 1204, Rel. on.

To come within the exception, the imputation should not only be proved to be true, but it must also be proved that it was for the public good that it was published. No amount of truth will justify a libel unless its publication was for the public good. AIR 1950 Cal 339, Rel. on.

Held, in the instant case that the publication was made in public interest or public good and as the allegations made about the manager were proved to be true the pamphlet was saved by Exception 1 to Section 499. **Held,** further, that there was no excessive publication to take the case out of the Exception. **1965 (1) Cri LJ 699: 1963 Ker LJ 1209: 1963 Ker LT 845: AIR 1965 Ker 161 (163 to 165) (Pt A) (Prs 6 to 8, 11 to 13).**

——S. 499, Exception 1 — Imputation of truth for public good — Truth as defence must extend to entire libel and not part only.

Exception 1 to Section 499, Penal Code, recognizes the publication of truth as a sufficient justification if it is made for the public good. When truth is set up as a defence it must extend to the entire libel and it is not sufficient that only a

part of the libel is proved to be true. **1965 Mad LJ (Cri) 834: 1964 Ker LJ 422: ILR (1964) 2 Ker 31: 1964 (2) Cr LJ 549: AIR 1964 Ker 277 (282) (Pt C) (Pr 11).**

7. Exception 2 — Opinion regarding public conduct of public servant.

——S. 499, Exception (2) — Essentials of exceptions — Statement made in good faith — What is — Member of Board of Secondary Education described as 'dalal' of a publisher — There was reasonable inference warranted by facts — Accused rendering valuable public service and acting in good faith — Hence acquitted of charge under Section 500. See Penal Code (1860), S. 52. **ILR (1957) 2 Cal 181.**

——S. 499, Exceptions 2, 3 and 9 — Fair comment — Defence of — Nature of.

A mere perusal of Exceptions 2, 3 and 9 is sufficient to show that these Exceptions which embody the defence compendiously known as 'fair comment', apply only to expressions of opinion or imputations on character, and not to assertions of fact. The latter can be justified only by truth. Comment must be on actual and not on imagined conduct; and even if the accused person genuinely believed the imputed conduct to be real that would be no defence. If the opinion or the imputation purports to be based on facts, then the person claiming the benefit of these Exceptions must prove those facts. It is not enough for him to say that he believed those facts. When the allegations of fact are in themselves defamatory and those allegations are not proved to be true no defence on fair comment can possibly arise. For 'fair comment' cannot justify a defamatory statement which is untrue in fact. A comment cannot be fair which is built upon facts which are not truly stated. **1958 Ker LT 1158: ILR (1959) Ker 195: 1958 Ker LJ 1262: 1959 All WR (Sup) 29: 1959 All Cri R 158: (1959) MLJ (Cri) 930: 1959 Cri LJ 464: AIR 1959 Ker 100 (103) (Pt D) (Pr 12) (DB).**

[**Overruled** on another point in AIR 1961 SC 387.]

——S. 499, Exceptions 2 and 3 — Fair comment — Editor of newspaper stating facts and drawing fair inferences — Comment in public interest without malice — Effect — Onus.

Actually, a newspaper writer should be more cautious than a private individual as his utterances are very widely published. The first and the foremost requirement is that the facts should be substantially true.

The next test is that the comments should be fair in the sense that they are inspired by genuine desire on the part of the writer to serve the public interest, and not by any intention of wrecking private spite.

The third criterion is that the criticism even if called for by the facts, should be in public interest, and should not be malicious. In determining the question of good faith, the Court should take into account the intellectual capacity of the accused and the surrounding facts.

The burden is on the accused to show that a statement that is prima facie defamatory is justified under Exception 2 or 3. But he can discharge the burden by pointing out the circumstances.

Held, that the offending editorial imputing regional bias in the matter of granting successive extensions to an officer and his contemplated appointment as I. G. P. was per se defamatory of the Minister in charge of the department but. the act of the accused fell within the ambit 'fair comment' and was thus saved by the Second and Third Exceptions to Section 499. **1961 MPC 61: 1961 MPLJ 329: 1961 1961 Jab LJ 577: 1961 (2) Cr LJ 114: AIR 1961 Madh Pra 205 (208 to 215) (Prs 15, 22, 28, 31, 32, 35) (DB).**

——S. 499, Exceptions 2 and 9 — Fair comment — Good faith.

The fact that the accused is a journalist does not make any difference, for the simple reason that the press have no special privileges and are in no better position than any other man. They have rather greater responsibilities and should be more cautious in making scandalous imputations. Their high position and status and the method of publication at their disposal are apt to do more harm than if the imputation was made or published by an ordinary individual. because some sanctity is generally attached to what is published in a newspaper. The defence of fair comment only protects statements of opinion; it does not extend to defamatory allegation of facts. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved facts of a public servant and another to assert that he has been guilty of particular acts of misconduct or misappropriation. One of the essential conditions for the application of either of the Exceptions 2 and 9 is that the accused should have acted in good faith. For that he has to establish that he acted in the exercise of due care and attention. In considering whether the privilege contemplated by the exceptions was exercised with due care and attention the Court has also to look, among other things, at the mode of publication which is adopted and to see whether it indicates a conscious and criminal disregard of the complainant's legal right and vitiates the privilege. **1952 Cri LJ 1553: AIR 1952 Pepsu 165 (168) (Pt E) (Pr 6).**

8. Exception 4 — Publication of reports of proceedings of Court.

——S. 499, Fourth Exception — Applicability — Conditions.

Under the Fourth Exception to Section 499, I. P. C., it is not necessary that the proceedings of a Court of justice should be published contemporaneously. All that is required is that the publication should be a substantially true report. It need not be true absolutely word for word but taking the whole thing it must be a substantially true account. Good faith has not been made an ingredient in the exception. **56 CWN 705: 54 Cr LJ 1168: AIR 1953 Cal 503 (504) (Prs 5, 6).**

9. Exception 7 — Censure by person in authority.

——Ss. 499, Exceptions 7 and 9 and 500 — Applicability — Caste community — Right to decide questions relating to usages of caste and to take decisions about conduct of members — Ex-Headman of community failing to hand over properties to newly appointed officers and to comply with demands made by community and Headman to hand over — Members assembling at meeting and deciding not to invite Ex-Headman to any functions in houses of members or to attend functions in his house till dispute was settled — If amounts to defamation of Ex-Headman.

There is no doubt that in the changing social order where individual liberty is recognised as pre-eminent right, decisions taken on the basis of custom, usage and religious or caste sentiments have to be appreciated in terms of the changing times. But this does not mean that where an individual has done something wrong or prejudicial to the interest of the community,

the members of his community which, by virtue of custom or usage, is competent to deal with such matters, cannot take a decision by common consent; and so long as such decision does not offend the law, it can be enforced by the will of the community.

Where the complainant the Headman of a community, who had tendered his resignation as Headman failed to hand over the properties to the newly appointed Headman or the community but claimed to manage them as hereditary trustee and did not comply with the demands made by the newly appointed Headman and the community to hand over the same the members of the community of which the complainant was a member assembled at a meeting and finding that the conduct of the complainant in not making over the properties to the newly appointed president, vice-president, or members of the community was reprehensible and by a unanimous decision the members of the community resolved not to attend the functions held in his house and not to invite him for functions held in the houses of the community members, till the dispute was over, and where the language of the resolution which was entered in the minutes book did not prima facie indicate that any social ostracism amounting to ex-communication had been intended.

Held, the manner in which the decision was taken showed that the president and vice-president had no individual part in it, and malice in law could not be attributed to them and the language of the resolution could not be construed as defamatory, and the president and vice-president could not therefore be held guilty of any offence under Section 500 of the Indian Penal Code. **ILR (1964) 2 Mad 416: (1964) MLJ (Cr) 597: (1964) 2 MLJ 433: 77 Mad LW 179: 1965 (1) Cr LJ 390 (392) (Prs 11, 12).**

——**S. 499** — Statement made by a person to police during investigation merely expressing suspicion as to complicity of a certain person in crime is privileged — Statement does not constitute defamation. 16 Mad 235 and AIR 1919 All 276, Rel. on. **1949 Nag LJ 604: 51 Cri LJ 267: 1950 All WR (Supp) 13: 1950 All Cri Cas 30: ILR (1950) Nag 208: AIR 1950 Nag 20 (22) (Pt B) (Pr 8).**

10. Exception 8 — Statement to person in lawful authority.

● ——**S. 499, Exceptions 8 and 9 — Punjab Gram Panchayat Act, 1952, S. 42 — Scope and effect.**

In order to establish a defence under Exception 8 to Section 499 of the Penal Code (45 of 1860), the accused must prove that the person to whom the complaint was made had lawful authority over the person complained against in respect of the subject-matter of the accusation. Likewise under Exception 9 to Section 499 of the Penal Code, besides the bona fides of the person making the imputation, the person to whom the imputation is conveyed must have a common interest with the person making it which is served by the communication. In the instant case, the communication cannot be said to satisfy the test stated above. Further under S. 42 of the Punjab Gram Panchayat Act, 1952, the complaint was excluded from the jurisdiction of the Panchayat since the appellant was a public servant. Thus the appellant was properly convicted of the offence. Kanwal Lal v. The State of Punjab. **(1964) 1 SCJ 320: (1963) 1 SCWR 122: 1963 All LJ 486: 1963 SCD 350: 1963 All WR (HC) 378: 1963 All Cr R 206: 1963 (2) Cr LJ 345: 1964 Mad LJ (Cr) 165: (1963) Supp 1 SCR 479: AIR 1963 SC 1317 (1318, 1319) (Prs 2, 4, 5).**

——**Ss. 499, Exception 8 and 500 — Good faith — False accusation — If excepted.**

Under Exception 8 to Section 499 it is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over him with respect to the subject-matter of the accusation. Once the accusation is found to be false, it follows that it was not made in good faith. No plea of good faith can be advanced in respect of a matter which was false within the knowledge of the person making it. **1960 All LJ 109: 1960 All WR (HC) 141: 1960 All Cr R 118: 1960 Cr LJ 1296: AIR 1960 All 623 (624) (Pt B) (Pr 2).**

——**S. 499, Exception 8 — Defamatory statement by witness — Evidence Act (1872), S. 132, Proviso — Distinction.**

The distinction between the eighth exception to Section 499, Penal Code, and the proviso to Section 132, Evidence Act is that the former excludes a statement from the definition of defamation altogether, whereas the latter excludes prosecution for defamation and bars proof of the accusation in a trial for defamation. The proviso to Section 132, Evidence Act assumes that the accusation contained in the answer is punishable as defamation under Section 500. Consequently, in order to consider whether the proviso is applicable or not, it is irrelevant to consider whether the answer contains defamation punishable under Section 500 or not. The proviso will apply even though the statement is not made in good faith and hence is not covered by Exception 8 to Section 499, Penal Code. **1960 Cr LJ 1285: 1960 All LJ 668: 1960 All WR (HC) 543: 1960 All Cr R 345: ILR (1960) 1 All 649: AIR 1960 All 606 (608) (Pt A) (Pr 4) (DB).**

——**S. 499, Exceptions 8 and 9, S. 500 — Applicability and scope — Good faith — Determination of.**

On complaint by a Government employee, that certain allegations made against him in the petitions sent by the accused to the Collector and other officers were defamatory, the Magistrate found that though the allegations were defamatory in character and they were duly published he was not liable to be punished as the terms of Exception 9 to Section 499, Penal Code, were duly satisfied. On appeal against the acquittal,

Held, (i) that the terms of Exception 9 were not complied with; for, it could not be held that the imputation was for the protection of his own interest or for the public good;

(ii) that as the accused believed in the truth of allegations which were made by him on the information supplied by others, and it was not proved by the prosecution that the accusations were made in bad faith, i.e., not with due care and attention, the accused was protected by Exception 8 to S. 499;

(iii) that as the Magistrate acquitted the accused holding that he acted in good faith it was not proper to interfere with his conclusion, in an appeal under Section 417, Cr. P. Code. 31 Bom 293; (1948) 1 MLJ 420; AIR 1948 Mad 469; AIR 1952 SC 52; 1952 SCJ 32; (1952) 1 MLJ 426 (SC), Rel. on. **1955 Andh WR 810: 1955 An LT (Crl) 215: 1957 Crl LJ 921: AIR 1957 Andh Pra 345 (346, 347) (Prs 6, 7, 9).**

——**S. 499, Excep. 8 — Applicability — Proof.**

It is quite clear from the wording of Exception 8 to Section 499, I. P. Code, that an accused person is not bound to prove that the allegations made by him are true. It is sufficient if he proves

that on reasonable grounds he believed the allegations to be true and in that belief he made the accusation to the lawful authority mentioned in the Exception. 4 C 124, Rel. on. **1952 Cr LJ 611: AIR 1952 Cal 228 (229) (Pr 4).**

——S. 499, Exception 8 — 'Lawful authority' — Public accusation by newspaper not lawful authority contemplated by Excep. 8 — Excessive publication — Privilege conferred by Excep. 8 cannot be availed of.

In order to establish a defence under Exception 8 to Section 499, the accused would have to prove that the person to whom the complaint was made had lawful authority over the person complained against in respect of the subject-matter of the accusation. Accusation before the public by publication in a newspaper is not the sort of lawful authority contemplated by the Exception.

Therefore, where an accused felt some suspicion about a society from the audit report and thought that the publication was necessary in that case and had made some embellishments, additions, etc., in the article probably to meet the taste of the public and to attract their pointed attention to the main facts so as to make it an interesting readable matter:

Held, that it was a case of excessive publication which would take the case out of the privilege conferred by Exception 8 to S. 499, Penal Code. ILR 19 Bom 703 and AIR 1943 Oudh 1, Rel. on. **1965 Mad LJ (Cri) 834: 1964 Ker LJ 422: ILR (1964) 2 Ker 31: 1964 (2) Cr LJ 549: AIR 1964 Ker 277 (283) (Pt E) (Pr 12).**

——S. 499, Exception 8 — "Lawful authority" — Meaning of.

No doubt in political theory in any democratic form of Government a Minister is, in the long run, responsible to the public. But that is not the sort of lawful authority contemplated by the Exception; nor is accusation before the public by publication in a newspaper the sort of accusation that the Exception speaks of. **1958 Ker LT 1158: 1958 Ker LJ 1262: ILR (1959) Ker 195: 1959 All Cri R 158: 1959 All WR (Sup) 29: 1959 Cri LJ 464: (1959) MLJ (Cri) 930: AIR 1959 Ker 100 (104) (Pt E) (Pr 15) (DB).**

[Overruled on another point in AIR 1961 SC 387.]

——Ss. 499 and 500 — Panchas deciding in their meeting to report to authorities against complainants — Report containing defamatory statements — Statements made in good faith — Right to protection under.

Applicants were Panchas of the village. They received reports with allegations of misbehaviour by the non-applicants. After a meeting they passed a resolution and sent a copy of the resolution to the authorities for taking such action as was thought necessary. On the basis of the report investigations were made and it was found that the report was not true. The imputations made by the applicants were defamatory and were admitted by them. They were convicted under S. 500, I. P. Code.

Held, that it was not a case of the complainant that the accused had made defamatory statements in the public. For the purpose of bringing in exceptions 8 and 9 of S. 499, I. P. Code it was not necessary that the accused must have established that there was no malice. If from the facts and circumstances of the case, it could be reasonably presumed that the accused might have made the statement in good faith, they were entitled to the benefit of Exceptions 8 and 9. (Conviction set aside as accused held to be entitled to protection under the exceptions). **1960 MPLJ (Notes) 169.**

——Ss. 499, Eighth Exception, 500 — Examination under S. 161, Criminal P. C.

Since a witness answering questions under the Section 161, Criminal P. C. is not bound to state truly, nor can he be prosecuted for refusal to answer, there is no privilege; at any rate, the privilege is not absolute. In order to appreciate the plea of privilege it is necessary for the Judge to come to definite findings as to the questions put to the accused and the answers by each of them. The judge has also to find whether these answers were given in good faith and whether the Sub-Inspector had lawful authority over the accused or any of them with respect to the subject-matter of the accusation. If the questions put by the Sub-Inspector were not relevant to the investigation he was making, the question of privilege would not arise. Case Law discussed. **1952 Cri LJ 438: 1952 Nag LJ 234: AIR 1952 Nag 68 (69) (Pr 7).**

——S. 499, Exception 8 — Persons in lawful authority — Who are.

The Commissioner and the Assistant Commissioner of Hindu Religious Endowments are subject to the administrative control of the Law Department of the State Government. The impression amongst the general public is that the Minister in charge of the Law Department could, by interfering in a proper manner, expedite the disposal of matters pending before these officers **25 Cut LT 16: 1959 Cr LJ 1006: AIR 1959 Orissa 141 (143) (Pt D) (Pr 9) (DB).**

——S. 499, Exception 8 — Lawful authority — Offences unconnected with Gurudwara alleged to be committed by member of Supervising Committee — President of Managing Committee of Gurudwara not lawful authority to take notice of those offences — Publication not covered by Exception 8. AIR 1938 Mad 904, Disting. **1965 (2) Cri LJ 693 (Pat).**

——S. 499, Exception 8 — Statement to person in lawful authority — Statements made to President of Association concerning Law Agent and member of Supervising Committee that they were utilising funds of Association for their own purposes — No defamation. **1965 (2) Cri LJ 693 (699) (Pt D) (Pr 10) (Pat).**

——S. 499 — Defamatory statement in first information report of cognizable offence is absolutely privileged. See Tort — Defamation. **1962 (1) Cr LJ 737: AIR 1962 Pat 229 (DB).**

——S. 499, Exception 8 — Defamation — Privilege — Qualified privilege — What is — Onus — Complaint to Superintendent of Police that the plaintiff, a Sub-Inspector of Police terrorises people of locality and asking for enquiry—**Held,** at best qualified privilege — Plea of qualified privilege cannot be raised for first time in appeal. See Tort — Defamation. **AIR 1961 Pat 164.**

——S. 499, Exception 8 — Defamatory statement in first information report — Extent of privilege.

Though a defamatory statement made in answer to questions put by an investigating officer during investigation is absolutely privileged, a statement in the first information report stands on a different footing and cannot enjoy that absolute immunity. Such statements fall within the 8th Exception of Section 499, I. P. Code, and the accused can claim privilege only if he can bring them within the purview of that Exception. That exception says that accusations preferred in good faith against a person to any of those who have lawful authority over that person with respect to the subject matter of accusations will not amount to defamation. Good faith of the person

making the accusations is, therefore, an essential condition of exemption from liability for defamation under this Exception. 16 Mad 235; AIR 1919 All 276; AIR 1950 Nag 20, Distinguished. **6 Sau LR 512: 1955 Cr LJ 259: AIR 1955 Sau 19 (20) (Pt B) (Pr 4) (DB).**

11. Exception 9 — Imputation for protection of interest or for public good.

(A) Judicial proceedings — Privilege of Counsel.

(B) Judicial proceedings — Privilege of witnesses.

11. Exception 9 — Imputation for protection of interest or for public good.

● **——S. 499, Exception 9 — Good faith and public good have both to be satisfied.**

Where to the charge of defamation under Section 500, Penal Code, the accused invokes the aid of Except. 9 to Section 499, good faith and public good have both to be established. The failure to prove good faith would exclude the application of the Ninth Exception in favour of the accused even if the requirement of public good is satisfied. Harbhajan Singh v. State of Punjab, **(1965) 2 SCA 413: (1965) 4 Law Rep 207: (1965) 3 SCR 235: (1965) 2 SCWR 722: 1966 Cr LJ 82: AIR 1966 SC 97 (101) (Pt B) (Pr 12).**

● **——S. 499, Except. 9** — Nature and scope of onus of proof which accused has to discharge — **Held,** accused was protected by Except. 9 to Section 499. AIR 1961 Punj 215, **Reversed;** ILR 4 Cal 124 and ILR 31 Bom 293, Rel. on. Harbhajan Singh v. State of Punjab, **(1965) 2 SCA 413: (1965) 4 Law Rep 207: (1965) 3 SCR 235: (1965) 2 SCWR 722: 1966 Cr LJ 82: AIR 1966 SC 97 (102, 103, 104, 108) (Pt D) (Prs 18, 19, 21, 25, 39).**

——S. 499, Exception 9 — Imputation for protection of interest or for public good.

In order to come within Exception 9 an accused person is not bound to prove that the imputation made by him is true. It is sufficient for him to prove that he made it in good faith for the protection of the interest of any person or for the public good. If he proves that on reasonable grounds be believed the imputation to be true and in that belief he 'bona fide' made it, he will be protected.

A stranger to the case standing by the side of the accused giving instructions to a counsel would well raise a genuine suspicion in the mind of Sub-Inspector who was directly concerned with the prosecution of that case that the stranger was to all intents and purposes acting as a 'Dalal' or a tout for the accused and if he drew the attention of the Magistrate that the stranger was standing in the Court-room and said that the was a "dalal," the imputation would be a 'bona fide' one made with a view to ensue a fair trial and with a view to the stopping of the undesirable interference with the case and would be protected under Exception 9. **1956 Cr LJ 470: AIR 1956 All 267 (268) (Pt A) (Pr 5).**

——S. 499, Exception 9 — Imputation for protection of interest or for public good.

Where a caste resolution ex-communicating a member of the caste is published by one of the members of the caste to the others the publication is covered by Excep. 9 as the member is bound both in his interest and in the interest of his caste to publish the resolution for saving himself and the caste from the defilement which would take place by acting against the verdict of ex-communication. **AIR 1950 All 619 (619) (Pr 4).**

——Ss. 499, Except. 9, 52 — Essentials of exceptions — Statement made in good faith — What is — Member of Board of Secondary Education described as 'dalal' of a publisher — There was reasonable inference warranted by facts — Accused rendering valuable public service and acting in good faith — Hence acquitted of charge under Section 500. See Penal Code (1860), S. 52. **ILR (1957) 2 Cal 181.**

——S. 499, Exceptions 8 and 9 — Good faith — Accused lodging information against complainant — No specific charge of theft of bicycle — Accused merely stating that two persons told him that complainant had taken away bicycle — Accused held came within Exceptions.

Where the accused merely stated in the information lodged by him at the thana that two persons told him that the complainant had taken away the bicycle and he asked the police to do the needful to get back the bicycle without specifically charging the complainant of theft and the lower appellate Court came to a definite finding that the accused believed in the statements made by the two persons that the complainant had taken away his bicycle:

Held, that on that finding alone the accused would be entitled to the benefit of the Exceptions 8 and 9 of Section 499. **51 Cri LJ 400: AIR 1950 Cal 77 (79) (Pt B) (Pr 5).**

——S. 499, Exception 9 — Allegations made at Panchayat of only caste people are excepted under Section 499 — It is not material as to whose instance the Panchayat was called. **1964 MPLJ (Notes) 141.**

——S. 499, Exception 9 — Imputation by person for protection of his interest or for public good — Good faith — Proof of — Funds of Society — Accounts not maintained — Reasonable grounds for making defamatory allegation against office-bearer.

An accused person is entitled to the protection under Exception 9 if the imputations, though subsequently found to be baseless and incorrect are made by him in good faith and for the public good. Mere good faith can be negatived on the ground of recklessness indicative of want of due care and attention. Good faith is relative to a great extent, and must be determined by the circumstances under which the imputation was made, the social status and level of education of the person making the imputations.

Where the imputation contained in a handbill was aimed at protecting the members of certain community from giving subscriptions to a person, who holding a responsible office, in the organisation, neither maintained the accounts, nor cared to supervise them nor even knew whether they were maintained or were destroyed, the imputation was covered by the Exception.

Every communication is privileged if it is made for the public good and it is for the public good that the society should be safe from being deprived of their money if no accounts are maintained of the funds to which they contribute. In such a case the accused in order to prove his bona fides has only to show that there was reasonable ground for bringing the allegations he made. **1962 MPLJ 995: 1963 (1) Cr LJ 186: (1963) Jab LJ 887: AIR 1963 Madh Pra 60 (61) (Pr 2) (DB).**

——S. 500, Excep. 9 to S. 499— Accused charging complainant on information received and believed to be true — Accused cannot be said to have acted without due care — Imputation covered by Exception 9 to S. 499.

Held, on facts that it was not contemplated that simply because an accused did not prove

that what he published was true, a conviction under Section 500, Indian Penal Code as a matter of course had to follow. It was true that it was for an accused to bring his case within any of the Exception to Section 499. All that he had to establish was that there was a reasonable ground for him to make a communication that he made and that he acted in good faith, that is, after due care and attention. The boys were not found by the Magistrate to be truthful. But whether they were telling the truth or not was not the point. What was relevant for the purposes of the case under Section 500, Indian Penal Code was whether the accused Tedi had reasonable grounds for entertaining the suspicion disclosed in his application. The state in which the dead body was found and what those two boy companions of the deceased were giving out, would afford reasonable basis to Tedi for his suspicion against the complainant. If Tedi made reference in his application to the suspicions with a view that detailed and proper enquiry should be made, he could not be said to have acted without due care and attention. **1962 MPLJ (Notes) 257.**

——**S. 500, Exception 9** — Complainant alleged to be keeping a mistress — Mistress securing maintenance order for the illegitimate child in criminal Court — Complainant's suit for declaration that he was not father of illegitimate child dismissed by civil Court — Imputation made in good faith and excepted from defamation. **1962 MPLJ (Notes) 256.**

——**S. 500, Exceptions 9 and 10 — Statement defamatory in Panchayat — Panchayat not exclusively caste Panchayat — Accused not protected.**

The privilege which will protect a defamatory allegation if made to a caste Panchayat consisting exclusively of the members of the community to which the parties belong, is not available if the Panchayat is not a caste Panchayat but one consisting of members of other communities as well. AIR 1917 PC 203. Rel. on; AIR 1950 Mad 409, Foll. **1962 MPLJ (Notes) 66.**

——**Ss. 499, 500 — "Public good."**

There can be no public good in telling the world that a person was killed when he died a natural death. Nor can there be any good to the public in telling them that a particular person has caused the death when that person was not in any way concerned with it. Possible mischief due to such hurried and careless publication is too obvious. **1958 MPC 199: 1958 Jab LJ 252: 1958 MPLJ 405: 1958 Cr LJ 1036: AIR 1958 Madh Pra 216 (218) (Pt C) (Pr 16) (DB).**

——**Ss. 499 and 500 — Applicability — Accusation in village panchayat — Offence.**

In villages Panchayats are held for taking decisions affecting communal matters. Law Courts have recognised the limited authority of the panchayats to decide their own questions or to settle their own disputes. Anything said in the panchayat would be privileged, as it would be in the public good and would be covered under the Second and Ninth Exceptions to Section 499. Penal Code. Conviction under Section 500 cannot be based on a statement before a Panchayat. **1958 MPLJ (Notes) 159.**

——**S. 499, Exception 9 — Applicability — Duty of accused to exercise care in publication.**

In the case of publication of a defamatory matter actual source of information on which the person accused has acted and the justifiability of his so acting ought to be considered. If he has not taken proper care, and acted on a gossip and the complainant is thereby defamed, he ought not to escape consequences on the ground that he has promptly contradicted the incorrect report. The culpability in such cases does not depend upon the circumstance whether he has tried to undo the wrong which he has committed or not, but upon the fact whether he has acted with care and attention or has done so rashly or negligently. In the matter of defamation, the position of 'newspapers' is not in any way different from that of members of the public in general. The responsibility in either case is the same. The degree of care and attention is in no way less in the case of newspaper publications than that required from ordinary men. It is no defence for the accused to say that he has acted on the information given to him by another. It is for him to establish that the source on which he acted was the proper source on which he is entitled to act and he did so with care and circumspection. When a suspected murder case was under investigation, advanced publication of news against the complainant with bold head-lines can hardly be said to be for public good. 41 IA 149, Foll. **(1957) MPLJ 407: 1957 MPC 401: 1957 Jab LJ 698: 1957 Cr LJ 1143: AIR 1957 Madh Pra 162 (164, 165) (Pt B) (Prs 26, 27, 29, 31).**

——**Ss. 499, Exception 9, 500 — Complainant, resigning from office of head-man of Community — Accused appointed by community as head-man and vice head-man — Complainant refusing to hand over trust properties belonging to community to accused — Members of Community unanimously resolving at meeting not to attend functions at complainants' house and not to invite him for their functions — Language of resolution found not defamatory — Case held to fall within Exception 9 to S. 499.**

Where an individual has done something wrong or prejudicial to the interests of his community, the members of his community, which, by virtue of custom or usage is competent to deal with such matters, it does not mean, cannot take a decision by common consent, and so long as such decision does not offend law, it can be enforced by the will of the community.

The complainant, who had tendered his resignation of the office of the head-man of the Padmasaliva Community refused to hand over the trust properties belonging to the Community to the accused who were appointed head-man and vice head-man respectively of the community. Thereupon, the members of the community, of which the complainant was a member, assembled at a meeting and on the complainant again refusing to hand over the properties to the new office-bearers, arrived at a decision that the conduct of the complainant was reprehensible and by a unanimous decision resolved not to attend the functions held at the complainant's house and not to invite him for functions held in their houses. The complainant filed a complaint under Section 500 against the accused. It was found that the language of the resolution could not of itself be considered to be defamatory.

Held, that (1) the manner in which the decision was taken clearly showed that the accused had no individual part in it and malice in law could not be attributed to them. (2) The case came within the Exception 9 to Section 499 and the accused could not be held guilty of any offence under S. 500. **(1964) 2 Mad LJ 433: 77 Mad LW 179: ILR (1964) 2 Mad 416: 1964 Mad LJ (Cr) 597: 1965 (1) Cr LJ 390 (392) (Prs 11, 12) (Mad).**

——**S. 499, Exception 9 — Applicability — Husband alleging unchastity against wife when pronouncing talak — Effect — Muhammedan Law — Marriage — Dissolution).**

Under Exception 9 to Section 499, I. P. Code, it is not defamation to make an imputation on the character of another, provided that the imputation be made in good faith for the protection of the interest of the person making it or for the public good.

Where a Muhammedan husband makes allegations of unchastity against his wife when pronouncing the talak it cannot be said that the allegations are made by him for protection of his interest because under the Muhammedan Law no reason need be given for pronouncing the talak. His case therefore does not fall within Exception 9 so as to protect him from a charge of defamation against him by the wife. **1957 Mad WN 275: (1957) Mad LJ (Cri) 149: AIR 1957 Mad 339 (340) (Pt A) (Prs 3, 4).**

——S. 499, Ninth Exception — Scope of privilege.

The Ninth Exception to Section 499, I. P. Code affords protection when a defamatory statement is made in good faith for the protection of the interests of the person making it. The exception covers not only such allegations of fact as could be proved true but also expressions of opinion and personal inferences. 11 Cr LJ 588 (Sind), Ref. to.

But in order to come within this exception the imputation must have been made or published by the accused (a) relevantly, (b) for the protection of his interest and (c) in good faith. 15 Bom 351; AIR 1929 Cal 346, Ref.

In good faith, an essential ingredient is honesty of purpose. The accused must firstly, honestly believe his imputation to be true, and, secondly, he must honestly make it from a sense of duty to himself. He must not exaggerate or say unnecessary things. He must not make his duty the cover for spreading the libel. The question for enquiry in such cases will be whether the accused had reasonable grounds for believing the imputations to be true and for believing that it was necessary for his safety to give publicity to them.

Of course in determining whether the accused should or should not have placed implicit reliance on the credibility of his source of information courts should not naturally insist upon exacting standards but should take into account the mental attitude of the person, his prejudices and predilections and the surroundings in which he was placed. These indicate the scope of the privilege of an accused or party in making or publishing through his lawyer or by himself —it makes no difference whatsoever—per se defamatory imputations.

In other words, the privilege conferred upon an accused or party under the Ninth Exception to Section 499, I. P. Code, is a qualified privilege and is not an absolute privilege as under the Common Law of England. On grounds of public policy attempts were made now and then by judges with strong predilections for engrafting English Common Law on purely Indian problems but it is now settled law that the Court cannot engraft in Exceptions to Section 499, I. P. Code the doctrine derived from the common law of England or based on public policy. **1954 Cr LJ 1239: AIR 1954 Mad 741 (748) (Pt C) (Prs 15, 16).**

——S. 499, Exception 9— Case by A against B — Transfer application by B — Application containing allegation against C, friend of A and Magistrate — Allegation held was covered by Exception 9.

In a case filed by A against B, B made an application for transfer, his case being that C on account of his influence which was secured in undesirable ways, was using it against B by securing witnesses against him and that he (C) was very friendly not only with A but with the Magistrate and was using this friendship to the detriment of B. It was also stated that C being rowdy and considered to be a bad element he (B) apprehended that he would not have a fair and impartial trial. On the perusal of the Police record the High Court found that the description of C amounted to his being rowdy.

Held, that it could not be said that the allegation was not made for the protection of the interest of B. The reputation of C bore out clearly the truth that B had made the allegation in good faith. The allegation was, therefore, clearly covered by Exception 9 of Section 499. **1951 Mad WN 597: 1951 Mad WN (Cr) 173: 1951-2 Mad LJ 229: 64 Mad LW 902: 1952 Cri LJ 399: AIR 1952 Mad 184 (184) (Pr 3).**

——S. 499, Exception 9 — Immorality of caste member — Right of caste panchayats to enquire — Composite panchayat — Effect.

A caste panchayat outcasting a member of that caste for a caste offence such as immorality committed by a member of the caste, may claim protection under the customary right of the panchayat to go into the allegation of such immorality in defence against prosecution for an offence of defamation, but such a privilege does not extend to a composite assembly consisting of members of many castes other than the interested caste. **63 Mad LW 145: 1950 Mad WN 155: (1950) 1 Mad LJ 194: 1950 All WR (Supp) 43: 51 Cri LJ 716: 1950 Mad WN (Cri) 39: AIR 1950 Mad 409 (409) (Pr 3).**

——Ss. 500, 499, 9th Exception — Probation of Offenders Act (1958), S. 3 — Petition by Administrator of palace of minor Maharaja under Section 10, Guardians and Wards Act, for being appointed guardian of minor Maharaja — Description of half-brother of minor, as illegitimate in petition held to amount to offence under Section 500 — Mere admonition instead of regular sentence held sufficient to meet ends of justice. **1964 (1) Cr LJ 408: AIR 1964 Manipur 20 (22, 23) (Pt A) (Prs 8 to 10, 12, 13).**

——Ss. 499, Exceptions 9 and 10 and 500 — 'Good faith' — Person ex-communicated for some social offence — Members of his caste reporting fact to prominent members of caste — Offence.

It is true that the Constitution does not recognize caste but social customs have not changed notwithstanding the provisions of the Constitution and if a person, in good faith, publishes any letter containing defamatory matter in the interests of the other members of his caste, he cannot be held guilty of defamation.

Where a person is ex-communicated for some social offence by members of his own caste the Mukhias of his village are in duty bound to report this fact to the other prominent members of their caste in the interest of all of them. Under these circumstances their good faith is apparent and both the 9th and 10th Exceptions to S. 499, I. P. Code would apply. In some cases even if the allegations against the person ex-communicated are not found to be true yet the good faith of the persons disseminating such allegations may be inferred if there are reasonable grounds for those persons to believe, after due care and attention, that the allegations were true. All that the 9th and 10th Exceptions to Section 499, I. P. Code require is that there should be good faith, i.e., the imputation must have been made after due care and attention even though on further

searching investigation it may not be found to be true. **24 Cut LT 417: 1958 Cr LJ 1426: AIR 1958 Orissa 259 (259, 260) (Prs 6, 7).**

——S. 499, Exception 9 — Printer and publisher can invoke the exception if the allegations are made in good faith and for public good — AIR 1965 SC 97, Rel. on.

Even if the allegations made by the newspaper are factually not correct the editor, printer and publisher of the newspaper would be protected if the allegations are made in good faith and for public good. Both these conditions, of good faith and for public good, have to be fulfilled before the benefit of Ninth Exception can be invoked. The definition of 'good faith' as given in S. 52 of the Code is at variance with the definition of 'good faith' under the General Clauses Act. According to the latter definition 'a thing shall be deemed to be done in good faith where it is in fact done honestly whether it is done negligently or not.' But for the purpose of Exceptions to Section 499, the definition of 'good faith' as given in Section 52 of the Penal Code would prevail as against the one given in the General Clauses Act. **67 Pun LR 877: 1966 Cri LJ 292: AIR 1966 Punj 93 (97, 98) (Pt C) (Prs 12, 14).**

——S. 499, Ninth Exception — 'Good faith' — Implication of — Conduct of accused during trial — Relevancy.

In the context of the law of defamation the requirement of good faith, in publishing an article derogatory to the character of the complainant, is not satisfied, by merely showing a belief on the part of the publisher in the truth of the publication.

A publisher of a defamatory statement can only be protected if he shows that he had taken all reasonable precautions and then had a reasonable and well-grounded belief in the truth of the statement. The plea of 'good faith' implies the making of a genuine effort to reach the truth, and a mere belief in the truth without there being reasonable grounds for such a plea, is not synonymous with good faith. (1899) 3 LRA 532, Rel. on.

The conduct of the accused during the course of the proceedings in a Court, is a relevant factor in determining his good faith; and if there are several imputations, good faith or truth must be proved with respect to every imputation, and, if he fails in substantiating truth or good faith in respect of any one imputation conviction must stand. AIR 1914 PC 116, Discussed and Rel. on. **1961 (1) Cr LJ 710: 63 Pun LR 794: AIR 1961 Punj 215 (223, 224) (Pt D) (Prs 38, 39, 43).**

[Reversed on another point in AIR 1966 SC 97.]

——S. 499, Exception 9 — Applicability.

Reliance upon rumours, even if widely current, is no defence to a charge of a criminal libel not being protected by Exception 9. The accused can only succeed on producing proof of the truth of the matter charged, as libellous, and not by leading evidence as to his own belief in its truth. If an information is shown to have been obtained from a supposedly reliable source and thereafter it is subjected to a reasonable investigation, a belief in its truth will mitigate the guilt. In order to earn complete imunity all the ingredients of the Ninth exception have to be substantiated before a libeller can be suffered to injure the complainant's good name. **1961 (1) Cr LJ 710: 63 Punj LR 794: AIR 1961 Punj 215 (226) (Pt G) (Pr 54).**

[Reversed on another point in AIR 1966 SC 97.]

——S. 499, Exception 9 — Publication in newspaper of libel containing charge of bribery against Magistrate — Publication held not for protection of any person or for public good — Public good held could be safeguarded by making representation to Government — Publication in newspaper held excessive and destroyed privilege. **52 Cri LJ 623: ILR (1951) Trav-Co 77: AIR 1951 Trav-Co 105 (106) (Pt C) (Pr 5) (DB).**

——S. 499, Exception 9 — Whether publication of libel is for protection of interest of particular person or for public good is question of law. **52 Cri LJ 623: ILR (1951) Trav-Co 77: AIR 1951 Trav-Co 105 (106) (Pt D) (Pr 5) (DB).**

11 (A). Judicial proceedings — Privilege of counsel.

——S. 499, Ninth Exception — Scope — Privilege of counsel to put defamatory questions to witness to protect client's interest.

The liability of an advocate charged with defamation in respect of words spoken or written in the performance of his professional duty depends on the provisions of S. 499, Penal Code; the Court will presume good faith unless there is cogent proof to the contrary. AIR 1926 Pat 499; AIR 1927 Cal 823; AIR 1927 Mad 379; 52 MLJ 269, Ref. to.

The privilege is not absolute but qualified, but the burden is cast upon the prosecution to prove absence of good faith.

There is no basis for the doctrine that the Legislature in enacting the Indian Penal Code, intended to leave untouched the provisions of the English Common Law on the question of defamation. This section is meant to be universal in its application. Consequently, for purposes of fixing criminal liability, the English Law of Absolute Privilege does not apply in this country to statements of advocates in judicial proceedings. 10 Mad 28 (FB); 36 Mad 216; AIR 1922 Pat 104, **Held** not good law.

When a complaint is made against an Advocate or Legal Practitioner for defamation in respect of a statement made in the course of a judicial proceeding, it is the duty of the Court to presume that the statement was made on instruction and in good faith and for the protection of his client's interest, and that unless circumstances clearly show that the statement complained of as defamatory was made wantonly or from malicious or private motive, the complaint should not be entered. AIR 1927 Cal 823; AIR 1927 Mad 379; 52 MLJ 269; AIR 1925 Rang 345, Rel. on.

Even the presence of malice will not override the presumption of good faith, when the statement was obviously necessary in the interest of the client, and where the lawyer could not omit to make it without gravely imperilling the interest of his client, and would in fact not be discharging his duty to his client unless he made it. Under Exception 9 it is not defamation to make an imputation on the character of a witness in good faith, and for the protection of the client. It is the duty of the Court, when a complaint is filed against an advocate, ordinarily to presume that the remarks or questions objected to were made on instructions and in good faith. There may be circumstances showing that the remark was made, or the question put, wantonly, or from malice or private motive, but the greatest care should be taken to enquire into the circumstances and an opportunity should be given to the Advocate to offer an explanation before summons is issued.

At the same time while Advocates have their privileges, they have also responsibilities, and they ought not to abuse their privileges. An Advocate should exercise his own discretion before putting

an offensive question. A pleader must use a certain amount of common-sense and caution in asking defamatory questions to witnesses. If he puts defamatory question to a witness with utter recklessness and without seeking whether there is any truth in them with a view to injure the reputation of the witness publicly rather than for the proper conduct of his case, he acts in bad faith and is not entitled to claim privilege. **1954 Cr LJ 1239: AIR 1954 Mad 741 (749) (Pt D) (Pr 17).**

——S. 499, Exception 9 — Judicial proceeding — Privilege of counsel — (Legal Practitioner).

A member of the Bar in India has no absolute privilege; the liability of an Advocate charged with defamation in respect of words spoken or written in the performance of his professional duties depends not on the common law of England but on the provisions of the statutory enactment in S. 499, Penal Code.

However, there is always a presumption in favour of an Advocate of his having acted in good faith and under instructions for defamatory statements uttered or written by him and that no Court should take cognizance of a complaint in such a case against an Advocate. But this is subject to the other condition that there should be no allegation of malice or improper motive on the part of the Advocate in having made the defamatory statements imputed to him. Cr. Rev. Petn. No. 260 of 1945-46 (Mys), Foll. **ILR (1955) Mys 401: 1955 Cr LJ 1512: AIR 1955 Mys 135 (136) (Pt C) (Prs 9, 10).**

11 (B). Judicial proceedings — Privilege of witnesses.

——S. 500 — Witness voluntarily making defamatory statement before Court — Prosecution barred merely basis of private complaint is not barred merely because statements also disclose offence under S. 193 and S. 195, Penal Code. See Cr. P. Code (1898), S. 195. **1965 (2) Cr LJ 705 (1): AIR 1965 All 597.**

——Ss. 500 and 499 — Evidence Act (1872), Section 132 — Section does not protect defamatory statements made by person during investigation under S. 161, Criminal P. C. — (Criminal P. C., (1898), S. 161). See Evidence Act (1872), S. 132. **1960 Cri LJ 1296: AIR 1960 All 623.**

——Ss. 499 and 500 — Evidence Act (1872), Section 132, Proviso — Scope — 'Compelled to give,' meaning of — Answers given by witness in examination-in-chief without any protest or hesitation and without any pressure from presiding officer — Proviso does not apply — Witness can be prosecuted for defamatory matter contained in such answers. See Evidence Act (1872), S. 132, Proviso. **1960 Cri LJ 1285: AIR 1960 All 606 (DB).**

——Ss. 499 and 500 — Defamatory statement by witness in Court — No absolute privilege — Evidence Act (1872), S. 132, Proviso — Extent of privilege which can be claimed by witness — 'Compelled to answer' — Meaning of.

As the Indian Law of defamation unlike the English law on the subject, has been completely codified in S. 499, I. P. Code and the exceptions have been enacted in the section itself, it is really not proper to go beyond them and to invoke the principles of the English law. A person giving evidence in a Court of law is not entitled to an absolute privilege in respect of the statement which he makes and consequently, he is not immune from a complaint of defamation by reason of words uttered on oath in the witness-box. AIR 1937 Nag 138, Rel. on. The proper course for the witness is to ask the Court if he was bound to answer, and if the Court still insisted, there would be compulsion attracting the proviso to S. 132, Evidence Act. But if the witness goes on without showing the least hesitation or asking the Court to excuse him, then on facts, there is no compulsion.

Where, in answer to a question put to the defendant while under cross-examination in a civil suit the defendant told that he knew the plaintiff as being the nephew of one who had become insolvent and had come to stay with plaintiff, such statement cannot in any manner be considered to be either one concerning the subject-matter of the judicial proceeding or one made under compulsion and the defendant would not be entitled to the protection under the proviso to S. 132, Evidence Act and would be guilty under S. 500, I. P. Code, unless he can bring his case within one of the exceptions to S. 499, I. P. Code. **1961 Jab LJ 1454: 1962 MPLJ 305: 1962 (2) Cr LJ 193: AIR 1962 Madh Pra 241 (242, 243) (Prs 3, 4, 5, 7) (DB).**

——S. 499, Exception 9 — Judicial proceedings — Privilege of witness — There is no absolute privilege regarding statement in witness-box (Evidence Act (1872), S. 132). **AIR 1955 NUC (Mad) 93.**

——S. 499 — Defamatory statement by witness whether privileged.

Witnesses cannot be sued in Civil Courts for damages for defamation in respect of evidence given by them on oath in a judicial proceeding but the question of absolute privilege to a witness does not arise in a criminal prosecution in view of S. 499, Penal Code. 36 Mad 216, **held overruled** by AIR 1926 Mad 906 (FB). **1950 Mad WN 878: 1950 Mad WN (Cri) 282: 52 Cri LJ 1270: 64 Mad LW 1040: ILR (1951) Mad 661: 1950-2 MLJ 686: AIR 1951 Mad 34 (38, 39) (Pt B) (Prs 8, 10) (FB).**

——Ss. 499 and 500 — Scope — Privilege of witness.

A witness cannot be prosecuted for defamation in respect of statements made by him when giving evidence in a judicial proceeding. This protection is not available to a complainant who deliberately makes a defamatory statement without the slightest justification. If a man is not allowed to speak out the truth in a Court of law under a penalty of being exposed to prosecution under S. 500 the administration of justice would indeed become impossible and it would be hampered to such a great extent that nobody would be prepared to come forward to depose to facts of which he has knowledge. AIR 1922 Bom 381, Rel. on. **1955 Cri LJ 991: AIR 1955 Punj 142 (143) (Prs 3, 4).**

12. Exception 10 — Caution for good of person to whom conveyed or for public good.

——S. 499, Excepts. 9 and 10 — Scope — Communication made true and to warn another caste fellow — Good faith — Presence of another person of different caste — Relevancy.

The fact that a person of different caste also happened to be present when a caste fellow was socially mixing with the complainant (an outcaste) would not negative the inference of good faith to be drawn from the facts established. If the communication alleging that the complainant was an outcaste is made to persons of a different caste, who are socially mixing with the outcaste, then it would not be in good faith. **1961 MPLJ (Notes) 62.**

13. Evidence and proof.
See also Note 14.
(A) Defence.
(B) Good faith.

13. Evidence and proof.

●——**S. 499, Except. 9 — Evidence and proof — Evidence Act (1872), S. 105 — Charge of defamation — Accused taking exception to charge under Except. 9 — Degree of proof that has to be offered by accused.**

There is consensus of judicial opinion in favour of the view that where the burden of an issue lies upon the accused he is not required to discharge that burden by leading evidence to prove his case beyond a reasonable doubt. This however, is the test prescribed while deciding whether the prosecution has discharged its onus of proving the guilt of the accused. It is not a test which can be applied to an accused person who seeks to prove substantially his claim that his case falls under an Exception. Where he is called upon to prove that his case falls under an Exception. law treats the onus as discharged if he succeeds in proving a preponderance of probability. As soon as the preponderance of probability is established the burden shifts to the prosecution which still has to discharge its original onus. Basically, the original onus never shifts and the prosecution has at all stages of the case, to prove the guilt of the accused beyond a reasonable doubt. (1935) AC 462, Rel. on. Where an accused person pleads an Exception he must justify his plea, but the degree and character of proof which he is excepted to furnish in support of the plea cannot be equated with the degree and character of proof excepted from the prosecution which is required to prove its case. The onus on the accused may well be compared to the onus on a party in civil proceedings; just as in civil proceedings the Court which tries an issue makes its decision by adopting the test of probabilities so must a criminal Court hold the plea made by the accused proved, if a preponderance of probability is established by the evidence led by him. (1921) 61 SCR 608 and (1936) 2 All ER 1138 and (1943) 2 All ER 156, Rel. on; AIR 1961 Punj 215, **Reversed.** Harbhajan Singh v. State of Punjab. **(1965) 2 SCA 413: (1965) 4 Law Rep 207: (1965) 3 SCR 235: (1965) 2 SCWR 722: 1966 Cr LJ 82: AIR 1966 SC 97 (101, 102) (Pt C) (Prs 14, 15, 17).**

——**Ss. 499 and 500** — Criminal P. C. (1898), S. 162 — Defamatory statement made during investigation of offence of bribery — It can be used as evidence against maker in his prosecution for offence of defamation. See Criminal P. C. (1898), S. 162. **1960 Cri LJ 1296: AIR 1960 All 623.**

——**S. 499 — Essentials — Facts to be proved.**

It is not enough to sustain a conviction under S. 499, Penal Code to prove that the alleged imputation was made. It must also be proved that it was made with the intention of harming or with the knowledge or reason to believe that it would harm the reputation of the person defamed (i.e.) the complainant. **1951 All WR (HC) 257.**

——**Ss. 499 and 500 — Evidence of general repute of person defamed — Evidence showing that complaint was not bona fide — Relevance — Duty of Court — Evidence Act (1872), S. 54.**

One of the main ingredients of the offence of defamation as defined in S. 499, is that the imputation must have been made with the intention of harming, or with the knowledge or reason to believe that it would harm the reputation of the person concerning whom it is made. While the complainant is entitled to lead evidence to prove this ingredient, the accused is entitled to produce evidence, or put questions in cross-examination of the complainant or his witnesses, to rebut it. In so doing, however, he cannot lead evidence of or put questions relating to rumours and suspicions to the same effect as the defamatory matter complained of, or particular facts tending to show the general character and disposition of the complainant. That being so, an important duty rests upon the trial Court to see, on the one hand, that the accused is not prejudiced in any manner by shutting out evidence, which he is entitled to produce, or disallowing questions, which he is entitled to put; and, on the other hand, that the complainant, who complains of defamation, is not unnecessarily harassed.

In a criminal prosecution for defamation, the accused is entitled to rebut the complainant's case that the alleged imputation was likely to harm his reputation. He can do that by showing that the complainant's reputation was, in view of certain acts of omission or commission, already at a low ebb. He is also entitled to show that the complaint was not bona fide.

Hence, the questions put to the complainant with that object in cross-examination cannot be disallowed on the ground that they are likely to defame the complainant further. **51 Cri LJ 964: 1950 All WR 481: 1950 All Cri Cas 158: 1950 All LJ 787: AIR 1950 All 455 (456 to 458) (Prs 2, 7, 12).**

——**S. 500** — Offence of defamation — Proof of actual harm to complainant's reputation not necessary. 22 Bom LR 1224, Rel. on; 17 Bom LR 82, Not foll. **1962 NLJ (Notes) 14.**

——**S. 499** — Matrimonial offence to be proved beyond reasonable doubt — Corroboration of version given by party necessary. **61 Bom LR 1549: ILR (1960) Bom 365: AIR 1960 Bom 418 (421, 422) (Pt C) (Prs 9, 12) (DB).**

[**Reversed** on facts in AIR 1964 SC 40.]

——**Ss. 499 and 500 — Defamation — Essentials to be proved.**

In order to constitute an offence under Section 500, I. P. C., mere making an imputation concerning a person is not enough. It must at the same time be proved that the writing of the defamatory matter was intended to be read by person or persons other than the person of whom it is written and that it was published. **68 Cal WN 654: 1964 (1) Cr LJ 367 (369) (Pt A) (Pr 23) (Cal) (DB).**

——**Ss. 499, 500, 52, Exceps. (1) (2) (3) and (9)— Essentials of exceptions—Statement made in good faith — What is — Member of Board of Secondary Education described as 'dalal' of a publisher —There was reasonable inference warranted by facts — Accused rendering valuable public service and acting in good faith — Hence acquitted of charge under S. 500.** See Penal Code (1860), S. 52. **ILR (1957) 2 Cal 181.**

——**S. 500 — Defamation — Imputation concerning any person — Identity of such person should be established.**

If the words complained of contain no reflection on a particular individual or individuals, but may equally apply to others belonging to the same class an action for defamation will not lie. The defamatory matter to be actionabe must be such that it contains an imputation concerning some particular person or persons whose identity can be established. It is unnecessary that the person whose conduct is called in question should be described by name. It is sufficient if on the evidence it can be shown that the imputation was directed towards a particular person or persons who can be identified. AIR 1922 Pat 101 and 78

ER 747 and (1959) 4 Rep 117 and AIR 1937 All 677 and AIR 1925 Cal 1121, Rel. on. **1963 Mad LJ (Cr) 637: 1962 Ker LJ 796: 1962 Ker LT 538: 1963 (1) Cr LJ 535 (536) (Pr 3) (Kerala).**

——**Ss. 499 and 500** — Offence under — Essentials — Scandalous publication — Ill-will or malice on part of publisher — Need not be proved — Intention or knowledge that imputation published would harm reputation sufficient — Journalist of some standing can be presumed to know or have reason to believe that the imputation published by him would harm the complainant's reputation. AIR 1924 All 566 and ILR 28 Cal 63 and 9 Ind Cas 775 (Burma) and ILR 9 All 420, Rel. on. **1961 Ker LJ 1212: 1961 Ker LT 1006: 1962 Mad LJ (Cr) 635: 1962 (2) Cr LJ 142 (143) (Pt B) (Pr 7) (Kerala) (DB).**

——**S. 499 — Evidence and proof — Defamatory speech — Proof of actual words used not necessary — Evidence indicating want of bona fides of complainant — Relevancy.**

In a case where the accused is alleged to have made an offending speech in a public meeting it is enough if the witnesses are agreed in a substantial measure on the words of imputation uttered. It is not necessary to reproduce every word or expression.

Where the speech is per se defamatory and the plea of the accused is that he did not make the speech, any evidence that would indicate the want of bona fide on the part of the complainant or the character and antecedents of the complainant has very little relevancy in deciding the issues in the case. **1962 All Cr R 278: 1962 All WR (Sup) 80: 1961 Ker LT 615: ILR (1961) 2 Ker 431: 1961 Mad LJ (Cr) 780: 1962 (1) Cr LJ 644 (645) (Prs 4, 5) (Kerala) (DB).**

——**S. 499 — Defamation — Essentials of offence — Case if comes within special exceptions — Burden lies on accused — Essentials of exception 9 to S. 499.**

To bring the publication of a scandalous imputation under the Penal Law it is not necessary to prove that it was done out of any ill will or malice or that the complainant had actually suffered from it. It would be sufficient to show that the accused intended or knew or had reason to believe that the imputation made by him would harm the reputation of the complainant.

The burden lies on an accused person to make out that his case comes within any of the exceptions to S. 499. By virtue of S. 105 of the Evidence Act the Court is bound to presume the absence of circumstances which would bring the offence within any of the special exceptions contained in S. 499 of the Penal Code. In order to bring it within exception 9 an accused person is not bound to prove that the imputation made by him is true. It is sufficient for him to prove that he made it in good faith for the protection of any person or for public good. If he proves that on reasonable grounds, he believed imputation to be true and in that belief he bona fide made it, he will be protected. Therefore, "good faith" is the essence of Exception 9. A reading of Exceptions 2, 3 and 9 would show that the exception applies only to expressions of opinion or imputations on character and not to assertions of fact. The latter can be justified only by truth. Comment must be on actual and not on imagined conduct and even if the accused person genuinely believed the imputed conduct to be real that would be no defence. If the opinion or the imputation purports to be based on facts, then the person claiming the benefit of these exceptions must prove those facts.

Absence of good faith is want of due care and caution. The accused has the duty to take due care and caution before he asserts the facts. **1962 Ker LT 502: 1962-2 Ker LR 47: 1962 Ker LJ 447.**

——**Ss. 499 and 500 — Evidence and proof — Slight variation between versions of witnesses not material — (Criminal P. C. (1898), S. 367).**

It is not necessary in all cases that identical words used by the accused should be reproduced by the witnesses. If the witnesses are to be believed and the words held to be defamatory, the fact that there is slight variation between the version given by the witnesses may not be material. **1959 Ker LJ 751: 1959 KLT 769: 1959 Ker LR 966.**

——**Ss. 499 and 500 — Evidence and proof — Proof of exact words used — If essential.**

There is no universal rule that in a defamation case the accused cannot be convicted unless the actual words used by the accused are proved. No doubt when the question whether certain words used are defamatory depends solely on the shade of their meaning in the context in which they were used, then it is very essential to prove the exact words used by the accused as also the exact context in which they were spoken. But the exact words used and their context are not material, in a case where a sufficiently clear account of the purport of the defamatory remarks would be enough to find the accused guilty. ILR 57 All 313, Rel. on. **Held,** further that the dismissal of the complaint on the ground that all the persons who were present at the time the accused was alleged to have made the statement were not examined and that there was a possibility of the complaint having been filed for an ulterior purpose was wholly unwarranted in the circumstances of the case. **1957 MPC 617: 1957 MPLJ 745: 1958 Cr LJ 520: ILR (1957) Madh Pra 689: AIR 1958 Madh Pra 83 (83, 84) (Prs 4, 5) (DB).**

——**S. 500** — Evidence and proof — Presumption that advocate will put questions only on instructions from client — Stronger evidence than such presumption is required for conviction under section. **AIR 1955 NUC (Mad) 3949.**

——**Ss. 499 and 500 — Evidence and proof — Necessity for proof of exact words used.**

To say that the witness should remember and reproduce the identical or the very same words in the order they were uttered and that even if there is some variation in the words used or trifling inconsistency in the words of different witnesses, such evidence should be discarded, would be to lay down rather a too broad or a too dangerous proposition. It is sufficient for the purposes of the section, if witnesses are agreed in a substantial measure on the words of imputation uttered as it is hardly possible or necessary to reproduce every word or expression used. **1952 Cri LJ 1633: ILR (1952) Mys 339: 31 Mys LJ 121: AIR 1952 Mys 123 (124) (Pt B) (Pr 4).**

——**Ss. 499 and 500 — Essence of offence of defamation — Necessity for proof of actual harm.**

The essence of the offence of defamation consists in the tendency to cause that description of pain which is felt by a person who knows himself to be the object of the unfavourable sentiments of his fellow creatures and those inconveniences to which a person who is the object of such unfavourable sentiments is exposed. It is not necessary to constitute the offence that actual harm should be caused. It is sufficient if it is proved that harm to the reputation of the person, to whom the imputation is directed, was intended: 35 Mys CCR 397, Rel. on. **1952 Cri LJ 1633: ILR (1952) Mys 339: 31 Mys LJ 121: AIR 1952 Mys 123 (125) (Pt C) (Pr 5).**

——**Ss. 500, 499 — Offence under S. 500— Proof — Substantial agreement between witnesses on words used by accused sufficient.**

For the purpose of an offence under S. 500, it is enough if witnesses are agreed in a substantial measure on the words of imputation uttered for it is not possible even for most honest witnesses to reproduce every such word or expression. AIR 1929 All 1 and AIR 1952 Mys 123. Rel. on. **ILR (1965) Cut 475: 31 Cut LT 879: 1966 Cr LJ 42: AIR 1966 Orissa 15 (16) (Pt B) (Pr 10).**

——Ss. 500, 499 — Offence under — Proof — It is not necessary to prove that complainant had been actually injuriously affected by the defamation.

It is the essence of the offence under S. 500 that the person making an imputation, should do so with intention of harming or knowing or having reason to believe that such imputation will harm the reputation of such person. It is not necessary that the evidence should show that the complainant has been injuriously affected by such alleged defamation. ILR 28 Cal 63 and AIR 1945 Pat 450 and AIR 1920 Bom 339, Rel. on. **ILR (1965) Cut 475: 31 Cut LT 879: 1966 Cr LJ 42: AIR 1966 Orissa 15 (17) (Pt C) (Pr 11).**

——Ss. 499, 500 — Intention to insult to be gathered from various circumstances — Accused in a meeting calling complainant 'Sala' Chora' etc. — **Held** accused was guilty under S. 500. 20 Cut LT 180, Rel. on; 24 Cut LT 299; AIR 1952 Orissa 351 and AIR 1932 Bom 193, Disting. **ILR (1965) Cut 475: 31 Cut LT 879: 1966 Cr LJ 42: AIR 1966 Orissa 15 (17) (Pt D) (Pr 15).**

——Ss. 499, 500 — Scope — Relevancy of question of reputation.

Reputation is not at all a necessary fact to be proved in a charge under S. 500 and hence it does not become a fact in issue. The accused is not entitled to ask questions in general concerning the character and reputation of the complainant so as to show that it was already of such a type that the news item or correspondence, complained of could not lower it further, and hence the publication by the editor did not bring him within the mischief of S. 500. 4 Lah 55; 7 All 906; AIR 1950 All 455. Dissented from. **ILR 32 Pat 278: 1954 Cr LJ 124: AIR 1954 Pat 84 (85, 89, 91, 92) (Prs 2, 12, 17, 19) (DB).**

——Ss. 499 and 500 — Complainant not named — Standard to be applied.

The standard to be applied in proof that the defamatory matter refers to the complainant is, would a reasonable man so understand it. A complainant can often be able to make good this part of his case even though his name is not mentioned in the libel. If the readers of the publication can know well who is aimed at, the very same injury is inflicted if his name was clearly mentioned. **1952 Cri LJ 1553: AIR 1952 Pepsu 165 (167) (Pt B) (Pr 4).**

——Ss. 499 and 500 — Ill-will or malice — Proof — Necessity.

To bring the publication of a scandalous imputation under the penal law it is not necessary to prove that it was done out of any ill-will or malice or that the complainant had actually suffered from it. It would be sufficient to show that the accused intended, or knew or had reason to believe, that the imputation made by him would harm the reputation of the complainant. Every sane person is presumed to have intended the consequences which normally follow from his act. The accused, a journalist of some standing, can very well be presumed to know or to have reason to believe that the imputation published by him would harm the complainant's reputation. **1952 Cri LJ 1553: AIR 1952 Pepsu 165 (167) (Pt C) (Pr 5).**

——S. 499 — Evidence of bad general reputation but not of particular facts — Admissibility.

In actions in tort claiming damages for libel a bad general reputation can be proved but not rumours or suspicions. It is not open to give evidence of particular facts showing bad character or disposition. Section 55, Evidence Act allows as admissible the evidence of general reputation and of general disposition but not of particular facts or of traits. The principles of law in a criminal prosecution for defamation are not different in this matter. In this respect in either case loss of reputation is the foundation for an action or prosecution. (1929) 2 KB 1, Rel. on. **1961 (1) Cr LJ 710: 63 Punj LR 794: AIR 1961 Punj 215 (226, 227) (Pt H) (Prs 58, 61).**

[**Reversed** on another point in AIR 1966 SC 97.]

13 (A). Defence.

——Ss. 499 and 500 — Defence — Similar accusation by others against complainant.

The mere fact that some such or similar accusation against the complainant had been made by some other person as well would not be a valid defence for the accused. Wrong is not to be justified or excused by wrong. Because one man does an unlawful act to any person other is not permitted to do similar act to the same person. That a couple of months after publication of the alleged libel another man took into his head to repeat the imputation would not go to show that the complainant had no reputation which he could have lost by the act complained of. If the complainant has been wronged by another person also, it does not absolve the accused from the responsibility. The accused could not be allowed to lead evidence of rumours and suspicions to the same effect as the defamatory matter complained of or of facts tending to show the general character of the complainant. **1952 Cri LJ 1553: AIR 1952 Pepsu 165 (167) (Pt A) (Pr 3).**

——S. 499, Exception I — Defence — Evidence of rumour.

If one chooses to write, print and publish libels imputing the commission by the complainant of a criminal offence he must be prepared to prove that all he has said is true in substance and in fact. This is an onerous burden and it is for the accused to discharge it. To say or prove that the accusation was one which the accused generally heard from others would be no justification for publishing it. Even if the libel is in the form "I heard a rumour to such and such effect" the accused must prove that the fact is true and not merely that it is true that he had heard the rumour. The stings of the libel should be made out. **1952 Cri LJ 1553: AIR 1952 Pepsu 165 (167) (Pt D) (Pr 5).**

——S. 499 — Ill-will or malice — Want of — If valid defence.

Neither ill-will nor malice is an ingredient of the offence of defamation, and want of either, cannot serve as a defence. An unproved plea of justification, injudicious cross-examination of the person aggrieved, and obstinately persisting in the libellous charge without any sufficient reason, may be taken into consideration as evidence of malice. Malice at law does not mean that the accused was actuated with hatred or ill will or even that he had on actual intent to vilify or defame such a person. It suffices that the statement was made wilfully or purposely or without any lawful excuse or justification. **1961 (1) Cr LJ 710: 63 Punj LR 794: AIR 1961 Punj 215 (228) (Pt K) (Pr 73).**

[**Reversed** on another point in AIR 1966 SC 97.]

13 (B). Good faith.

●——**S. 499, Except. 9** — Good faith — Element of honesty is not introduced in S. 52. See Penal Code (1860), S. 52. **(1965) 3 SCR 235: 1966 Cr LJ 82: AIR 1966 SC 97.**

●——**S. 499, Except. 9 and S. 52 — Good faith — Proof of — It is question of fact — Concurrent finding as to good faith by lower Courts — Supreme Court when will interfere in appeal.**

Whether or not good faith has been proved by an accused person who pleads in his defence the Ninth Exception under S. 499 to a charge of defamation under S. 500, I. P. Code is a question of fact. Even if it is assumed to be a mixed question of law and fact, where the Courts below give a concurrent finding on such a question, the Supreme Court does not generally re-examine the matter for itself when exercising its jurisdiction under Art. 136 of the Constitution.

Held, however, in the present case that in dealing with the question of good faith the High Court had misdirected itself materially on points of law, and that therefore, its finding could not be accepted. Harbhajan Singh v. State of Punjab, **(1965) 4 Law Rep 207: (1965) 3 SCR 235: (1965) 2 SCA 413: (1965) 2 SCWR 722: (1965) 3 SCR 235: 1966 Cr LJ 82: AIR 1966 SC 97 (101) (Pt A) (Pr 11).**

——**Ss. 499, Exceps. 9 and 52 — Ingredients of Exception 9 — Plea of good faith — Exception 9 covers proof of good intention and exercise of reasonable care and skill — 'Good faith' implies honest effort to reach truth — Mere subjective belief without objective basis not sufficient under ninth exception — Unnecessary aspersion indicative of want of good faith.**

The ingredients of the ninth exception to S. 499 are that the imputation on the character of another should be made in good faith and for the protection of the interests of the person making it or any other person or for the public good. So the accused has to prove that the publication was both in good faith and for the public good. If an act is not done with due care and attention it cannot be said to be done in good faith. Good faith contemplates an honest effort to ascertain the truth of the facts. Exception nine applies only to an expression of opinion regarding character and not to assertions of the fact which are in themselves defamatory.

A publisher of a defamatory statement can only be protected if he shows that he had taken all reasonable precautions and then had a reasonable and well-grounded belief in the truth of the statement. The plea of 'good faith' implies the making of a genuine effort to reach the truth, and a mere belief in the truth, without there being reasonable grounds for such a plea, is not synonymous with good faith. Exception 9, therefore, covers two matters, proof of good intention and the exercise of reasonable care and skill, having regard to the occasion and the circumstances. Mere subjective belief without any objective basis is not a dependable criterion for substantiating the ninth exception; an unnecessary aspersion is indicative of want of good faith. **1965 Mad LJ (Crl) 834: 1964 Ker LJ 422: ILR (1964) 2 Ker 31: 1964 (2) Cr LJ 549: AIR 1964 Ker 277 (283) (Pt D) (Pr 12).**

——**S. 499, Exceptions 2, 3, 8 and 9 — Good faith — Essence of Exceptions.**

Good faith is the essence of Exceptions 2, 3, 8 and 9. If a bare statement by the accused person that he believed that what he said was true were sufficient to prove good faith, a conviction for defamation could rarely be secured except in a plea of guilt. **1958 Ker LT 1158: 1958 Ker LJ 1262: 1959 All Cr R 158: 1959 All WR (Sup) 29: ILR (1959) Ker 195: 1959 Cri LJ 464: (1959) MLJ (Crl) 930: AIR 1959 Ker 100 (103) (Pt C) (Pr 11) (DB).**

[Overruled on another point in AIR 1961 SC 387.]

——**S. 499, Exception 9 — "Good faith'.**

Exception 9 applies only if the imputation is made in good faith for the protection of the interests of the person making it or of any other person or for public good. A person who has not established that he did an act after the exercise of due care and attention or even reasonable care cannot be said to have acted in good faith. **52 Cri LJ 623: ILR (1951) Trav-Co 77: AIR 1951 Trav-Co 105 (106) (Pt B) (Pr 4) (DB).**

14. Burden of proof.

——**S. 499** — Defamation — Exceptions — Burden of proof on accused to prove that case falls under exception — Burden sufficiently discharged if accused satisfies Court of probability of what he is to establish — Proof beyond reasonable doubt not necessary — Mere creation of doubt regarding truth of statement not sufficient. See Evidence Act (1872), S. 105. **1964 (2) Cr LJ 549: AIR 1964 Ker 277.**

——**S. 499 — Defamation — Plea of exceptions to the section by accused— Nature of proof required — Onus — Exception 9 — Scope — Evidence Act (1 of 1872), S. 105.**

The burden is on the accused primarily to make out that his case would come under any one of the exceptions to S. 499, Penal Code. Under Section 105 of the Evidence Act the burden of proving the existence of circumstances bringing the case within any of the general exceptions of the Penal Code or within any special exception is upon the accused and the Court shall presume the absence of such circumstances. It may be that the burden cast on the accused in a criminal case under S. 105 is not so onerous as the primary burden cast on the prosecution to prove the offence beyond reasonable doubt, but still proof there must be to claim the benefit of the exception. If there is doubt as to whether it is true or not, there is no defence at all. Unless the defence is able to prove that the allegation is true, Exception I will not apply.

'Good faith' requires due care and attention, i.e., care and attention expected from a reasonable man. In the case of publication of a defamatory matter actual source of information on which the accused has acted ought to be considered. If he had not taken proper care but acted on gossip and the complainant is thereby defamed the accused cannot escape the consequence by relying on exception. Exception 9 applies only to expressions of opinion regarding the character and not to assertions of fact. The latter can be justified only by truth. Comment must be on actual and not on imagined conduct and even if the accused person genuinely believed the imputed conduct to be real that would be no defence. If the opinion or the imputation purports to be based on facts, then the person claiming the benefit of these exceptions must prove those facts and it is not enough for him to say that he believed those facts. When the allegations of fact are by themselves defamatory and those allegations are not proved to be true no defence of fair comment can possibly arise; for fair comment cannot justify a defamatory statement which is untrue in fact. The question of good faith is to be proved by the accused. If good faith is not established, it is not strictly

necessary to consider if the public good was involved. AIR 1959 Cal 339, Rel. on. **(1965) MLJ (Cr) 98: 1963 Ker LT 1071.**

——**S. 499. Exceptions** — Burden of proof is on accused to make out that his case comes within Exceptions. **1959 Cr LJ 464: 1958 Ker LJ 1262: 1958 Ker LT 1158: ILR (1958) Ker 195: 1959 All WR (Sup) 29: 1959 All Cri R 158: (1959) MLJ (Cr) 930: AIR 1959 Ker 100 (102) (Pt B) (Pr 9) (DB).**

[**Overruled** on another point in AIR 1961 SC 387.]

——**S. 499. Ninth Exception — Applicability — Burden of proof.**

To bring the case within S. 499. Exception 9, the imputation on the character of the complainant must have been made: (1) in good faith, (2) for the protection of the interest of the person making it, or for the protection of the interest of any other person, or for the public good.

In a prosecution for defamation, the burden of proving that the ninth Exception applied to his case is on the accused though, in doing so he may take the help of all the evidence on record. **1960 MPLJ 1081: 1960 Jab LJ 922: 1960 Cr LJ 1613: 1960 MPC 666: AIR 1960 Madh Pra 386 (386) (Prs 4, 6) (DB).**

——**Ss. 499-500 — Burden of proof — (Evidence Act (1872), S. 105).**

In a case of defamation S. 105 of the Evidence Act casts the burden upon the accused to establish that the publication in question had been made in good faith i.e., with due care and caution. It is no defence in the matter of defamation for the accused to say that he has acted on the information given to him by another. It is for him to establish that the source on which he has acted was the proper source on which he is entitled to act and he did so with care and circumspection. **1958 MPC 199: 1958 Jab LJ 252: 1958 MPLJ 405: 1958 Cr LJ 1036: AIR 1958 Madh Pra 216 (218) (Pt B) (Prs 13, 16) (DB).**

——**S. 499, Exceptions** — Burden of proof — Burden of proving exception is on the accused. **ILR (1965) Cut 475: 31 Cut LT 879: 1966 Cr LJ 42: AIR 1966 Orissa 15 (16) (Pt A) (Pr 9).**

——**S. 499, Exception 8** — Statements made in good faith — Express malice or culpable negligence in statements — Statements made recklessly without due care and caution — Onus lies on accused to prove existence of reasonable grounds for making imputations — AIR 1952 Cal 228, Rel. on **1965 (2) Cri LJ 693 (698, 699) (Pt E) (Pr 10) (Pat).**

——**S. 499, Ninth Exception — Burden of proof.**

Once an imputation is shown to be prima facie defamatory, it is for the accused to show that any of the Exceptions protect him. The defences available to the accused under the Exceptions to S. 499 have to be proved as strictly as if the complainant was being tried for the offences imputed to him. In cases of criminal defamation the accused has not only to justify the whole of his libel but the plea taken has to be proved as strictly as if the complainant was being prosecuted for the offence. The accused seeking the protection of the ninth Exception has to show what enquiries had been made before the publication and what material there was at his disposal or within his knowledge at the time of the making of the imputations.

A Court is entitled to expect from the accused without discharging the onus placed upon him, of proving defence mentioned in the Exception—that he should adduce facts which would show due care and attention justifying honest belief in the truth of the allegations. **1961 (1) Cr LJ 710: 63 Punj LR 794: AIR 1961 Punj 215 (221, 227) (Pt A) (Prs 22, 23, 67).**

[**Reversed** in AIR 1966 SC 97.]

15. Practice and procedure.
(A) Sanction.
(B) Aggrieved person.

15. Practice and procedure.

●——**S. 499 — Persons filling public position — Vulgar criticism of — Prosecution — Expediency.**

Whoever fills a public position must accept an attack as a necessary, though unpleasant, appendage to his office. Public men in such positions may as well think it worth their while to ignore any vulgar criticisms and abuses against them rather than give an importance to the same by prosecuting the persons responsible for the same. 176 ER 166; (1879) 5 QBD 1: (1866) 1 QB 686, Rel. on. Kartar Singh v. State of Punjab, **1956 Pat LR (SC) 164: 1956 SCR 476: 1956 All WR (Sup) 109: 1956 Nag LJ 628: 1956 SCA 775: 1956 Cr LJ 945: ILR (1956) Punj 1190: 1956 SCJ 539: AIR 1956 SC 541 (543) (Pt B) (Pr 12).**

——**Ss. 499, 500** — Criminal P. C. (1898). Sections 198-B and 198 — Scope and object — Under S. 198-B, Criminal P. C. the accused gets the benefit of trial by a Court of Session — Such an accused is in no worse position than an accused in ordinary case of defamation tried by a magistrate as a warrant case. See Criminal P. C. (1898), S. 198-B. **1959 Cri LJ 6: AIR 1959 All 21.**

——**Ss. 499 and 500** — Limitation of six months — Defamatory article sent to newspaper before 28-4-1956, but published on that date — Sender of article committed offence under S. 500, Penal Code on that date — Complaint filed against publisher on 27-10-1956 is within time. See Criminal P. C. (1898), S. 198-B (4). **1962 (2) Cr LJ 520 (All).**

——**S. 500** — Facts constituting offences under Ss. 211 and 500, I. P. C. — Complaint only under S. 500 held maintainable. See Criminal P. C. (1898), S. 195. **52 Cri LJ 1269: AIR 1951 Bom 289 (DB).**

——**Ss. 500, 499** — Criminal P. C. (1898), S. 202 — Scope — Petition under — Opportunity to complainant to prove that allegations made by accused were 'mala fide', should be given — (Criminal Trial — Practice and Procedure). See Criminal P. C. (1898), S. 202. **AIR 1953 Cal 689.**

——**S. 500** — Offence of defamation — Joint complaint by father and son — Not maintainable in law — Court entertaining complaint and giving option to complainants to state as to which of two complainants would be the complainant — Proper order to pass when some witnesses have been examined is to discharge accused — Complainant can file, if so advised, fresh complaints. See Criminal P. C. (1898), S. 200. **1963 Ker LT 542.**

——**S. 499** — Defective judgment — Failure to consider evidence properly — Decision must be quashed and case remanded for fresh decision on evidence on record. See Criminal P. C. (1898), S. 367. **1959 Ker LJ 751.**

——**S. 499** — Applicability — Complaint under S. 198-B, Criminal P. C. for defamation against public servant — Imputation against class — Complaint held cannot be rejected as not maintainable S. 198-B, Criminal P. C. on ground that defamation is of a class. See Criminal P. C. (1898), Section 198-B (1). **1957 Cr LJ 454: AIR 1957 Madh Pra 4.**

——**S. 499** — Procedure — Defamation — Two offences committed at different places — They cannot be tried together at one place. See Cri-

minal P. C. (1898), S. 177. **1957 Cr LJ 983: AIR 1957 Mad 572.**

——**S. 499 — Scope— Whether wife can complain against husband or vice versa — Husband and wife whether constitute one person for purposes of criminal law — (Criminal P. C. (1898), Section 198) — (Husband and Wife).**

There is no presumption of law in India that a wife and husband constitute one person for the purpose of criminal law. Therefore, the English Common law doctrine of absolute privilege cannot prevail in India. It cannot, therefore, be said that a wife cannot complain against the husband and vice versa if one defames the other. ILR 17 Mad 401, Foll. **1957 Mad WN 275: (1957) Mad LJ (Cri) 149: AIR 1957 Mad 339 (340) (Pt B) (Pr 5).**

——**S. 500** — Putting defamatory questions to witness — Remedies at law pointed out — One of the remedies available is to file a suit for damages or file a complaint under S. 500 — (Evidence Act (1872), Ss. 146 to 143). **1954 Cri LJ 1239: AIR 1954 Mad 741 (749 to 751) (Pt E) (Prs 19, 24).**

——**S. 500** — Practice and procedure — Putting defamatory questions to witness — Steps to be taken by aggrieved witness indicated. **1954 Cri LJ 1239: AIR 1954 Mad 741 (751) (Pt F) (Prs 25, 26).**

——**S. 500** — Manipur State Courts Act (1947), S. 23 (b) (2) — Complaint under S. 500, Penal Code cannot be determined in Judicial Commissioner's Court — (Darbar Resolutions No. 1 dated 22-6-1938 and No. 6 dated 27-7-1936) — (Criminal P. C. (1898), Ss. 28, 190, 194). **AIR 1955 NUC (Manipur) 4546.**

——**S. 500 — Charge — Form and contents of — Necessity to set out actual words.**

In a trial for defamation it is essential that the words complained of as being defamatory in character should be precisely set out and when the charge is against more than one accused, they should be individually given notice of what each is charged with. Since it is the words so set out that would constitute the foundation for defamation, not only the words in question should be proved, but the charge also should set out the precise words complained of. A charge which is vague and general in character is not proper. **1952 Cr LJ 1640: 18 Cut LT 146: AIR 1952 Orissa 351 (351) (Pt A) (Pr 4).**

——**S. 499** — Contempt of Court — Statement being also defamatory does not oust jurisdiction of High Court to take cognizance of the act on basis of such statement as a contempt of Court. **1961 (1) Cr LJ 426: AIR 1961 Punj 113 (119) (Pt B) (Pr 18).**

——**S. 499** —Complaint of theft — Complainant's name mentioned as suspect — Shop of complainant searched and nothing found — Case kept on "dormant" file — Complaint for defamation before trial police report held maintainable, since the case as far as complainant was concerned was over. See Criminal P. C. (1898), Section 173. **1955 Cri LJ 259: AIR 1955 Sau 19 (DB).**

——**S. 499 and Exception 8** — Accusations constituting offence under Section 499 but not covered by Exception 8 to S. 499 — Acquittal — No interference in revision since quarrel is private and public has no interest whatever in that quarrel. **(1952) 5 Sau LR 1: 1953 Cri LJ 823; AIR 1953 Sau 87 (88) (Pr 4) (DB).**

15 (A). Sanction.

——**Ss. 500, 501, 502** — Criminal P. C. (1898), S. 198-B (3) (c) — Himachal Pradesh becoming part of Union Territory — Sanction for prosecution accorded by Lieutenant Governor held valid by virtue of Notification. See Criminal P. C. (1898), S. 198-B (3) (c). **1960 Cri LJ 1450: AIR 1960 Him Pra 19.**

——**Ss. 499 and 500** — Scope — Section 171-G — Difference — Section 171-G is not a species of the more general offence of defamation and the section cannot be said to have been carved out of Section 499 — There may be cases under Section 171-G which do not fall under S. 499 and vice versa — Therefore where statement is merely defamatory and does not fall under Section 171-G no sanction is necessary. See Penal Code (1860), S. 171-G. **1958 Cr LJ 647 (2): AIR 1958 Mad 240.**

[**Overruled** on another point in AIR 1967 SC 808.]

——**Ss. 500 and 504** — Expression while acting or purporting to act in the discharge of his official duty — Interpretation of — Question substantially one of fact — Act complained must be directly concerned with official duties — Duty of Magistrate in determining question of sanction. See Cr. P. Code (1898), S. 197. **1963 (2) Cr LJ 573 (Pat).**

15 (B). Aggrieved person.

——**S. 500 — Criminal P. C. (1898), S. 198 — Aggrieved person — Imputation of unchastity against daughter-in-law — Son absent — Father-in-law is aggrieved person.**

In a case where a false imputation of unchastity is made against the daughter-in-law, who is living with her father-in-law, the reputation of the entire family suffers, and if husband of the woman is absent, the father-in-law is an equally aggrieved person within the meaning of that expression in Section 198, Criminal P. C. and as such he is entitled to initiate the proceedings under Section 500, Penal Code. **52 Cri LJ 668: 1951 All Cri R 57: 1951 All WR (HC) 303: AIR 1951 All 585 (586) (Pr 8).**

——**Ss. 499, 500** — Criminal P. C. (1898), S. 198 — 'Person aggrieved by such offence', meaning of — Defamation imputing unchastity to complainant's mother and mute sister — Mother living separately with complainant's father who did not take any serious notice though informed about the offence — Complainant not swearing that mute sister who was living with him was under his care and protection even though her husband was living at time of complaint —**Held**, the complainant cannot be regarded as 'person aggrieved' and complaint could not be entertained in view of Section 198, Cr. P. C. See Cri. P. Code (1898), S. 198. **(1959) 28 Mys LJ 176 (DB).**

——**S. 500** — "Person aggrieved" — Defamation — Manager of Co-operative Bank is a person aggrieved as contemplated by Section 198, Cr. P. C. — Bihar and Orissa Co-operative Societies Act (6 of 1935), S. 2 (9). See Criminal P. C. (1898), S. 198. **AIR 1950 Pat 545.**

——**S. 500** — Complaint under S. 500, Penal Code — Dismissal of complaint at conclusion of trial on the ground of competency is not justified — 'Aggrieved person', meaning of — Person not directly named may be an 'aggrieved person'. See Cr. P. Code (1898), S. 198. **1963 (1) Cr LJ 706 (Punj).**

——**Ss. 499, 500** — Criminal P. C. (1898), S. 198 — "Person aggrieved by such offence" — Imputation of immorality against married woman who has left protection of her husband and is living separately by herself — Complaint by father is not maintainable as he is not an aggrieved person. **54 Pun LR 563: 1953 Cri LJ 575: AIR 1953 Punj 82 (83) (Pr 3).**

——S. 500 — Complaint by aggrieved party on charge both under Section 193 and Section 500, Penal Code — Court can take cognizance of latter offence. See Criminal P. C. (1898), S. 195 (1) (b). **AIR 1954 Sau 50 (DB).**

——S. 500 — Criminal P. C. (1898), S. 198 — Woman residing with her brother as a result of domestic quarrel with her husband but not under the brother's guardianship nor is he under any responsibility to take care of her good name — Husband imputing unchastity to wife — Court has no jurisdiction to take cognizance of complaint by her brother against his sister's husband. **1953 Cri LJ 963: AIR 1953 VP 9 (9, 10) (Pr 4).**

16. Conviction and sentence.

●——**S. 499, Exceptions 3 and 9 and S. 500 — Applicability — Sentence.**

Newspaper article containing per se defamatory remarks against Public Prosecutors and Assistant Public Prosecutors — Tenor of article not indicating that its object was public good — No evidence to show that defamatory remarks were made in good faith that is with due care and attention — Case is not covered by Exceptions 3 and 9 to Section 499 — Accused held was rightly convicted under Section 500, and there was no justification for reducing sentence of 6 months S. I. and a fine of Rs. 200. Sahib Singh Mehra v. State of U. P., **(1965) 1 SCWR 571: 1965 SCD 600: 1965 (2) Cri LJ 434: (1965) 2 Law Rep 486: (1965) 2 SCR 823: ILR (1965) 2 All 241: AIR 1965 SC 1451 (1454) (Pt E) (Pr 15).**

——**S. 500 — Sentence of imprisonment — Defamatory newspaper article imputing corrupt and dishonest character to complainant— Editor not disclosing name of writer on grounds of journalistic ethics — Principle if can prevail in Court of law — Plea of justification — Sentence of imprisonment if justified.**

Any principle of journalistic ethics according to which the editor of a newspaper refuses to disclose the name of the writer of a defamatory article, which is devised to defeat the ends of justice, cannot be accepted as ethical by any Court of law. The only conclusion that a Court can draw from such a conduct is that the publisher was in entire agreement with the writer and he was willing to take the full responsibility for the publication and face the consequences himself.

The character and reputation of a person is no less important than his body and if those who cause severe injuries to his body are normally sent to prison there is no reason why those who maliciously cast grave aspersions against his character and reputation should be treated differently and merely fined. **1962 (1) Cr LJ 122 (125, 126) (Pt B) (Prs 16, 18) (All).**

——**S. 500 — Imputation made in absence — Conviction under S. 500 cannot be made on mere impression on the mind of the witness about imputation.**

Held, that when the question to be determined was whether the words used by the accused were intended to harm or had the effect of harming the reputation of the complainant, the Court must know not only the words said to have been used by the accused but also the context in which they were used in order to find the intention and the effect of the words. A conviction under Section 500, Indian Penal Code could not be based on the impression left on the mind of a witness by a statement of the accused. The Court must be satisfied that certain words were used by the accused. A finding that the accused said something was not sufficient for a conviction under Section 500, Indian Penal Code. **1962 MPLJ (Notes) 229.**

——**S. 500 — Actual words spoken by accused must be determined — No finding as to actual words — Conviction cannot be sustained.**

To sustain a conviction under S. 500 Indian Penal Code there must be a clear finding as to what defamatory words were actually uttered by the accused. When the alleged defamatory imputations are made by uttering words, then those words themselves must be proved with sufficient accuracy so that the imputations complained of can be said to have been proved. Where the finding was not about the actual words said to have been uttered, but the substance of the meaning which the listeners gathered from the words which the accused allegedly uttered the conviction could not be sustained. **1962 NLJ (Notes) 14.**

——**Ss. 499, 500 — Measure of punishment.**

Where the accused had not been prompted by any malice or ill-will nor had they acted with wanton carelessness in allowing the mischievous statement to be at large without contradicting the same but on the other hand promptly published the contradiction the very next day,

Held, that a fine of fifty rupees was sufficient to meet the ends of justice. **1958 MPC 199: 1958 Jab LJ 252: 1958 MPLJ 405: 1958 Cri LJ 1036: AIR 1958 Madh Pra 216 (218) (Pt D) (Pr 21) (DB).**

——**S. 500 — Punishment.**

The paper in which the publication was made was a weekly newspaper and probably of a poor circulation. The petitioner had not been shown to be a habitual black-mailer; he had also tendered a written apology, though a qualified one, expressing regret.

Held, that the imprisonment that he had already undergone and the sentence of fine would be sufficient to act as an eye-opener and would meet the ends of justice. The object of the complainant was attained by getting a decision that the publication of the imputations was defamatory, and that had been held in unequivocal terms. Relief for damages can more appropriately be obtained by the Civil remedy available to the aggrieved party. The sentence of 2 months was consequently reduced to the imprisonment already undergone (one week) and a fine of Rs. 300/-. **1952 Cri LJ 1553: AIR 1952 Pepsu 165 (168) (Pt F) (Pr 7).**

——**S. 500 — Sentence — Conduct of accused — Relevancy of, in mitigation or aggravation of offence — Apology or expression of retraction — Effect of.**

The conduct of an accused person subsequent to the publication of a libel, before and during trial, may also be taken into consideration by the Court. It is within the power of the accused, in a case of defamation to mitigate his offence or even aggravate his guilt. In a civil action the defendant can mitigate the damages. By tendering apology or expressing contrition an accused person may lessen the gravity of offence. For sufficiency of retraction, it should manifest an honest intention to repair the harm done to the injured reputation of the complainant. The accused or the defendant, as the case may be, should admit that the charge was unfounded, made without proper information and express regrets for its publication.

The defence of justification of the libel has always been considered to be perilous for the accused, because, whenever there is failure of proof the plea is deemed as an aggravation of

the offence. **1961 (1) Cr LJ 710: 63 Punj LR 794: AIR 1961 Punj 215 (227) (Pt I) (Pr 69).**

[**Reversed** on another point in AIR 1966 SC 97.]

——**S. 500** — Libel containing charge of bribery against Magistrate published in newspaper having poor circulation — Accused acquitted in private complaint by Magistrate — Appeal by Government, since reputation of its officer was involved — Government not interested so much in punishment, as in obtaining decision of Court —Remedy by way of civil suit for damages open to complainant — Ends of justice held would be satisfied by sentencing accused to pay fine of Re. 1. **1950 KLT 663: 52 Cri LJ 623: ILR (1951) Tra-Co 77: AIR 1951 Tra-Co 105 (107) (Pt E) (Pr 6) (DB).**

SECTION 501

——**S. 501** — Criminal P. C. (1898), Ss. 233 and 235 — Complaint for offences under Ss. 501 and 502, Penal Code — Various defamatory news items published in two or more issues of newspapers — If they are more or less similar and relate to same person, each one of them separately and collectively form the subject of one charge. See Criminal P. C. (1898), S. 233. **1965 (2) Cri LJ 334: AIR 1965 All 439 (DB).**

——**Ss. 501, 502 and 500** —Criminal P. C. (1898), S. 198-B (3) (c) — Himachal Pradesh becoming part of Union Territory — Sanction for prosecution accorded by Lieutenant-Governor held valid by virtue of Notification. See Criminal P. C. (1898), S. 198-B (3) (c). **1960 Cri LJ 1450: AIR 1960 Him Pra 19.**

——**S. 501 — 'Having good reason to believe' — Meaning and effect of.**

No doubt, if the printed matter is plainly defamatory it is a good reason for the printer to know that it is defamatory, but where the accused was unable to read Malayalam in which the alleged defamatory matter was printed it cannot be said that the accused understood the nature of the matter printed. **1959 Ker LR 1001: 1959 Ker LT 1039: 1959 Ker LJ 1240: 1960 Cr LJ 479: AIR 1960 Ker 141 (141) (Pr 3).**

——**Ss. 501 and 499 — Freedom of press — Extent of — Constitution of India, Art. 19 (1) (a).**

The freedom of journalists is an ordinary part of the freedom of the subject and to whatever lengths the subject in general, may go so also may the journalists, apart from statute law, their privilege is no other and no higher. **1962 (2) Cri LJ 617: AIR 1962 Orissa 197 (202) (Pt D) (Pr 16).**

——**Ss. 501, 499, 500** — Publication of statement of political leader in newspaper — Imputation against Governor untrue and made without verification — Editor held guilty under S. 500 and printer and publisher held guilty under S. 501. See Penal Code (1860), S. 499. **1962 (2) Cri LJ 617: AIR 1962 Orissa 197.**

——**S. 501** — Scope — Person declaring to be printer and publisher — He would be liable for printing objectionable matter although he had entrusted the selection of news items to his editor. See Press and Registration of Books Act (1867), S. 7. **67 Pun LR 877: AIR 1966 Punj 93.**

——**Ss. 501, 500** — Publisher himself a printer of a newspaper — Although his case would be covered by Section 501 his liability under S. 500 would not be affected thereby. See Penal Code (1860), S. 500. **67 Pun LR 877: AIR 1966 Punj 93.**

SECTION 502

——**Ss. 502, 501 and 500** —Criminal P. C. (1898), S. 198-B (3) (c) — Himachal Pradesh becoming part of Union Territory — Sanction for prosecution accorded by Lieutenant-Governor held valid by virtue of Notification. See Criminal P. C. (1898), S. 198-B (3) (c). **1960 Cri LJ 1450: AIR 1960 Him Pra 19.**

SECTION 503

——**S. 503** — Charge against appellant of having committed criminal intimidation by threatening X and his daughter with injury to their reputation by having indecent photographs published with intent to cause alarm to them —Real intention of appellant not so much to cause alarm only as to make X pay hush money — Conviction under Section 506, Penal Code, not illegal. See Penal Code (1860), S. 383. **1960 Cr LJ 177: AIR 1960 SC 154.**

——**Ss. 503 and 504** — Intimidation —Assault — English and Indian Law — Collection of arrears of Land Revenue by village munsif — Threat by village munsif to distrain earrings worn by agriculturist — Village goldsmith called for — On arrival of goldsmith, one amongst those present paying amount of arrears, conduct of village munsif held did not amount to insult, intimidation or assault. See Tort — Insult. **AIR 1964 Andh Pra 382 (DB).**

——**Ss. 503, 506 — Scope of S. 503 — Expression 'whoever threatens another . . . . that person is interested' — Interpretation of — Threat need not be direct.**

Held, on facts, that the threat not only had direct reference to the injury to the property of the complainant, but it had reference to injury to his reputation also, as by the threat the good name of the business was sought to be injured. Even if it be said that it was a threat to third person the case came under the words 'Whoever threatens another with any injury to the reputation of anyone in whom that person is interested" in S. 503. **1964 (2) Cr LJ 85 (86) (Prs 3, 4) (Cal).**

——**Ss. 503 and 506** — Order of externment for acts constituting penal offences — Order held not invalid on ground that such acts could be enquired into and tried by Courts of law under Criminal P. C. See Public Safety — M. P. Public Security Act (25 of 1959), S. 3 (1) (a). **1964 (2) Cr LJ 160: AIR 1964 Madh Pra 175 (DB).**

——**S. 503 — Ingredients of offence.**

The most important ingredient of the offence of criminal intimidation as defined under S. 503, I. P. Code is that there should be intention to cause alarm or to cause the person threatened to do any act which he is not legally bound to do. In the words used by the accused, there should be a clear indication as to what the accused was going to do and the complainant must feel as a reasonable man that the accused was going to convert his words into action. **1961 MPLJ 1190: 1961 Jab LJ 557.**

——**Ss. 503 and 506 — Criminal intimidation — Intention.**

The accused told the complainant that she would be beaten and then alone she would vacate the house in which she was living, otherwise not.

Held, that this clearly amounted to an offence under Section 506. **1960 Jab LJ 449: 1960 MPC 303: 1960 MPLJ 632.**

——**S. 503** — Assault or Criminal intimidation — Test. Where the accused for the purpose of inducing the revenue inspector to desist from distraining his properties, threatened to kill the

revenue inspector, he is guilty of criminal intimidation under Section 503 and not under Section 352, I. P. C. when there is no evidence to show that the words were accompanied by any gesture, which is essential for constituting assault. See Penal Code (1860), S. 351. **1959 Cri LJ 1084: AIR 1959 Mad 342.**

——**S. 503** — Applicability — Accused abusing complainant — Latter running away pursued by accused with brickbat in hand — Conduct amounts to criminal intimidation. **1953 BLJR 258: 1953 Cr LJ 1132: ILR 32 Pat 436: AIR 1953 Pat 188 (190) (Pt E) (Pr 8) (DB).**

——**Ss. 503 and 506 — Criminal intimidation — Words uttered by accused that he will kill complainant and bury him — Accused an old sick man aged 74 years — None present alarmed — No intent proved — No conviction.**

The use of the words that he will kill the complainant and bury him uttered by an old and sick man aged 74 years may amount to threat of injury to the person of the complainant. But it must be shown, in order to prove criminal intimidation, that the threat was with intent to cause alarm to that person or to cause that person to do any act which he was not legally bound to do or to omit to do any act which he was legally entitled to do. Where such an intent is not proved but on the other hand the evidence discloses that nobody present when those words were uttered got actually alarmed, there can be no conviction of the aged accused under S. 506 for the offence of criminal intimidation. **1964 (1) Cr LJ 255 (256) (Pr 2) (Tripura).**

SECTION 504

SYNOPSIS

(Penal Code (1860), S. 504.)

1. Applicability.
2. Intention or knowledge.
3. Insult and provocation.
4. Abusive language.
5. Complaint.
6. Conviction and punishment.

1. Applicability.

——**S. 504** — Offence under S. 504 — Offence held did not attract application of S. 95. See Penal Code (1860), S. 95. **1955 Cri LJ 1318: AIR 1955 Assam 211 (DB).**

——**S. 504** — Criminal P. C. (1898), Ss. 262, 241, 251 and 537 — Adoption of wrong procedure — Effect — Joint trial under Sections 323, 504 and 506 (2), Penal Code — Procedure prescribed for summons cases followed — Accused acquitted under Sections 504 and 506 (2) — Convicted under Section 323 — No failure of justice— Trial not vitiated. See Criminal P. C. (1898), S. 262. **1962 (2) Cri LJ 68: AIR 1962 Guj 231.**

——**S. 504 — Insulting words uttered in absence of person concerned — No request to hearers to convey them to him — No offence under S. 504 is committed.**

The gravamen of the offence under S. 504 lies in the utterer provoking the victim by his words to commit an immediate breach of the peace. That can only occur if he utters the words in the presence of the victim or has them conveyed to him by letter or messenger. Few sane persons will commit a breach of the peace on mere hearsay evidence of abuse, and without even verification. If there is no evidence to show that the utterer asked the persons before whom he uttered the abuse to convey his insulting words, uttered in his absence, to the complainant, there is no offence committed under Section 504. Such a request is essential to make a prima facie case under Section 504. AIR 1930 Bom 120, Ref. **(1949) 2 Mad LJ 767: 1949 Mad WN 837: 51 Cri LJ 704: 1950 All WR (Supp) 27: AIR 1950 Mad 273 (273) (Pr 2).**

——**S. 504** — Scope — Use of word 'sala' is not always made for admonishing person — Significance would depend on circumstances — To use word against witness and to charge him with falsehood would rob the word of much of its offensiveness. **AIR 1955 NUC (Orissa) 5382.**

——**S. 504** — Complaint under Sections 323 and 504 Penal Code filed before Magistrate First Class — Magistrate recording evidence and on explicit finding that prima facie offence under Section 323 alone was made out and that offence under Section 504 was not disclosed, transferring the case to Panchayat for trial — **Held,** that there was no illegality or irregularity in the course followed by the Magistrate. See Punjab Gram Panchayat Act (4 of 1953), S. 41. **(1962) 64 Pun LR 1059.**

——**S. 504** — Complaint for offence under Sections 452, 323, 504, 147, Penal Code — Police Challan also put up before same Magistrate against same accused for offence under Ss. 452 and 440, Penal Code, in respect of same occurrence — Case on complaint dropped from register but tagged with challan case — Challan case proceeded with under Section 251-A and accused convicted under Sections 452 and 427, Penal Code — **Held,** there was no consolidation of complaint case with challan case and trial under S. 251-A was not illegal. See Criminal P. C. (1898), S. 252. **1961 Raj LW 191.**

2. Intention or knowledge.

——**S. 504 — Essentials — Insult without requisite intention — Offence — Complainant's reaction is immaterial.**

Mere abuse or even hurling of intentional insults and causing provocation thereby would not constitute an offence under Section 504. It is necessary that insults by which provocation is caused should either be intended or known to be likely to lead to a breach of the public peace or the commission of some other offence by the person insulted. The intention is a very necessary part of the offence. Without it, the insults, however provocative they may be, will not bring the offender within the mischief of Section 504. The complainant's reaction to the insult is not material. He may be a law-abiding citizen. He may have been terror-struck. He may have found it difficult to retaliate. These circumstances do not determine whether it was known that the insult would be likely to lead to a breach of the peace or not. AIR 1935 Cal 736; AIR 1950 Madh B 25 and AIR 1932 Bom 193, Dist. Case-law Discussed. **ILR (1954) 6 Assam 274: 1955 Cr LJ 1318: AIR 1955 Assam 211 (211, 213) (Pt A) (Prs 3, 5, 6) (DB).**

——**S. 504 — Applicability — Mere breach of good manners or remarks couched in uncultured language — Offence.**

It is not every insult that can be classed as 'intentional insult' coming within the purview of Section 504. Mere breach of good manners does not constitute an offence under S. 504.

Where the alleged insulting words came to be uttered towards the end of a conversation between the complainant and the accused under circumstances which made it impossible for the accused to continue the conversation and immediately after uttering these words the accused left the place, and the remarks though couched in uncultured language were nothing more than a pompous boast that no one in this wide world

could enter the accused's shop without his permission.

Held, that the remarks would at worst amount to vulgarity indicating want of good manners on the part of the accused, but could hardly be characterised as an insult. **1960 Ker LJ 203: (1960) 1 Ker LR 138: 1960 Ker LT 176: ILR (1960) Ker 320: 1960 Cr LJ 910: AIR 1960 Ker 236 (237) (Pt A) (Pr 7).**

——S. 504 — Intention — Necessity.

For an offence under Section 504, what is material is not the reaction of the complainant which might vary according to the sensitiveness of the individual insulted but the intention of the offender to provoke or his knowledge that he is likely to provoke the person insulted to commit an offence. **1960 Ker LJ 203: (1960) 1 Ker LR 138: 1960 Ker LT 176: ILR (1960) Ker 320: 1960 Cr LJ 910: AIR 1960 Ker 236 (237) (Pt B) (Pr 8).**

——S. 504 — Use of abusive language —Offence — Intentional insult — Intention or knowledge of likelihood of breach of peace — Necessity.

Section 504 does not make it an offence to use abusive language which may lead to a breach of the public peace. There must be an intentional insult. The words must amount to something more than what in English law is called 'mere vulgar abuse'. AIR 1932 Bom 193, Rel. on. To constitute 'intentional insult' a person using the words must intend to covery that he is really what is meant by the words used. When the petitioner used the words like 'Ghuakha' and 'Mutakha' he did not intend to convey that he really meant that the person abused is one who eats faeces or drinks urine. They are merely used as words of vulgar abuse. Where there is no finding in the judgment of the Magistrate that the insulting words were used with the intention of or knowing it to be likely that there is a likelihood of a breach of peace the accused cannot be held guilty under S. 504. In an ordinary abuse it cannot be presumed that the persons using those words used those words knowing the natural consequences of what those words mean. **(1958) 24 Cut LT 299.**

——S. 504 — Offence under — Essentials — Proof — Intentional insult must be proved for the purpose of an offence under the section — Mere illegal entry into premises or trespass not sufficient. **(1963) 65 Pun LR 953.**

3. Insult and provocation.

——Ss. 504, 95 — Advocate uttering insulting words against witness in cross-examination — Court stopping further cross-examination — Enmity between Advocate and witness — Held case was not covered by S. 95, but Advocate could be validly convicted under S. 504.

Where an Advocate, while cross-examining a witness, uses filthy words, exhibiting disrespect or indignity towards the witnesses' mother, his intention to insult is clear, and he could be convicted under Section 504 of the Code. He cannot seek the protection of Section 95 in such a case. It is not necessary that the complainant should commit either breach of peace or any other offence. The Court has merely to consider the standard of an ordinary reasonable man and see if the insult offered is such as is ordinarily sufficient to arouse passions and provoke retaliation by words or deed. The fact that the Court at once objected to the conduct of the Advocate and stopped further cross-examination of the witness shows how far the words used created a sudden and serious change in the atmosphere of the Court and could have occasioned a breach of the peace but for the restraint which the complainant seems to have exercised on that occasion. **1964 (2) Cr LJ 692: (1964) 1 Mys LJ 157: ILR (1964) Mys 518: AIR 1964 Mys 285 (286 to 288) (Prs 4 to 6, 8, 11) (DB).**

4. Abusive language.

——S. 504 — Abuse involving aspersions on chastity of complainant's mother and sister — Abuse falls within section. **1956 Cr LJ 500 (2): AIR 1956 Bom 239 (240) (Pt B) (Pr 5).**

——S. 504 — Applicability — Obscene words used to a woman by her landlord — Latter is guilty of offence under Section 504. AIR 1930 Bom 120 and AIR 1932 Bom 193, Dist. **(1961) 2 Guj LR 196.**

——S. 504 — Essential requirements of S. 504 — Provocation caused by abuse—Charge framed for offence under Section 504 should indicate words of abuse used — Complainant not provoked by abuses — Charge deserves to be quashed.

The essential ingredients of the offence under Section 504, Penal Code are (1) to intentionally insult any person, and (2) to provoke such person intending or knowing it to be likely that such provocation will cause him to break the public peace or to commit any other offence. Therefore, in order to come to a conclusion as to whether the abuses hurled were such as to provoke another person and to cause him to break the public peace or to commit any other offence, it is necessary to know as to what were the actual words which were uttered.

Where the evidence led on behalf of the complainant or the charge framed by the Magistrate does not specify the actual words alleged to have been used by the accused in abusing the complainant, it cannot be said that the abuses were likely to provoke the complainant and cause him to break the public peace or to commit any other offence. And if the complainant states that he was not agitated or excited when he was abused, the Magistrate is not justified in framing charge under Section 504. The High Court can, in such a case, quash the charge if framed. (1947) 1 Mad LJ 359; AIR 1948 Mad 9 (2) and AIR 1952 Cal 288 and AIR 1955 Assam 211 and (1961) 1 SCJ 59; 1961 Mad LJ (Cri) 21; AIR 1960 SC 855, Rel. on. **1962 (2) Cri LJ 543 (543, 544) (Prs 6, 9) (Him Pra).**

——S. 504 — Mere vulgar abuse is no offence.

Mere vulgar abuse does not amount to an insult or offence under Section 504. AIR 1932 Bom 193, Rel. on. **51 Cri LJ 764: AIR 1950 Madh B 25 (25) (Pr 2).**

——Ss. 504 and 506 — Applicability — Gestures accompanying words used, object of insult, company and the occasion have all to be taken into account, to see whether words were such as to provoke breach of peace — Complainant respectable lady and controlling herself is no reason to hold act of accused not to amount to offence. **AIR 1955 NUC (Orissa) 970.**

——S. 504 — Abusive language — Offence.

Where the outburst of abuses like "Sala, Bhandatia, Matruchod" was a result of ill-feeling between the parties over a paddy filed as a result of which there was litigation between them and the incident took place in a village amongst ordinary common folk with hardly any such education or culture as could be expected of them or sufficient power of self-control as to be able to control themselves in such an explosive situation caused by the abusive words which could have led to a breach of the public peace or any other offence arising from these abuses.

Held, that in the background, atmosphere and circumstances in which they were used, there

was every likelihood of a breach of the peace which is the determining test. The expressions, therefore, came within the mischief of S. 504, Penal Code. **ILR (1959) Cut 104: 25 Cut LT 184: 1959 Cri LJ 1096: (1959) 1 OJD 33: AIR 1959 Orissa 155 (156) (Pt A) (Pt 3).**

——Ss. 504 and 96 — Scope — Abuses and right of private defence.

There is no provision in the Penal Code, where an accused person can be excused for insulting outburst of abuses in the exercise of the alleged right of private defence. **(1959) 1 OJD 33: ILR (1959) Cut 104: 25 Cut LT 184: 1959 Cri LJ 1096: AIR 1959 Orissa 155 (157) (Pt B) (Pr 4).**

——Ss. 504, 447, 448 — Accused entering complainant's house for demanding their dues — On refusal to pay accused abusing complainant in filthy language and continuing to do so in spite of restraint shown by complainant — Intention to insult, intimidate or annoy or to provoke complainant to break peace— Inference of— Accused held guilty under Ss. 448 and 504. See Penal Code (1860), S. 441. **1965 (1) Cri LJ 86: AIR 1964 Tripura 69.**

5. Complaint.

——S. 504 — Criminal P. C. (1898), S. 4 — Complaint can be of offence committed — There cannot be complaint under Ss. 341, 447, 504 and 506, Penal Code, read with S. 106, Criminal P. C. See Criminal P. C. (1898), S. 4. **AIR 1951 All 494.**

——S. 504 — Essentials.

It is necessary that the actual words used or supposed to have been used by the accused which the complainant understood to be words of insult should be mentioned in the complaint. In the second place, the words used which amounted to intentional insult should be such as to give provocation for the commission of a breach of the peace.

Where no allegation has been made in the complaint that the intentional insult was such as to give provocation for any breach of the peace, Section 504 has no application at all. **1955 BLJR 183: 1955 Cr LJ 1382: AIR 1955 Pat 453 (456) (Pt D) (Pr 7).**

6. Conviction and punishment.

——Ss. 504 and 95 — Principle of S. 95 — Words causing no harm — One of the first principles of law is "de minimis non curat lex". This has found expression in S. 95, I. P. C. Intercourse in civilised society will come to an end if for certain words uttered a person found himself exposed to all the trouble and worry of a criminal trial:

Held, that an acquittal of the accused in a complaint under S. 506, I. P. C. for the words..... meaning "you are telling a lie" was fully justified by S. 95, I. P. C. See Penal Code (1860), S. 95. **AIR 1954 Cal 288.**

——S. 504 — Intention or knowledge — Non-mention of words used in charge or in evidence — Effect.

Before an accused can be found guilty of an offence punishable under S. 504, I. P. Code, for insulting a person by the use of words, it must be shown that he used those words intending or knowing it to be likely that it would result in such provocation as would cause that person to break the peace, etc. In the absence of all mention as to what words were used either in the charge when a charge is framed or in the record of the evidence; it is impossible for the High Court in revision to decide whether the words used indicated such intention or knowledge. In such circumstances, therefore, it is not possible for the High Court to uphold a conviction. **1952 Cr LJ 721: AIR 1952 Cal 288 (288) (Pr 2).**

——S. 504 — Insult and provocation.

In order to sustain a conviction under S. 504 it is sufficient for the complainant to prove that the abusive language was such as would ordinarily provoke the man or woman of his or her position to commit a breach of the peace. The mere forbearance of the person insulted being provoked is not sufficient to protect the offender. **1952 Mad WN 236: 1952 Mad WN Cr 60: 1952-1 Mad LJ 470: 1953 Cri LJ 744: AIR 1953 Mad 413 (413) (Prs 1, 2).**

SECTION 505

——S. 505 — Constitutionality — List of the offences — Freedom of speech and expression — Restrictions on, imposed by impugned provisions come within permissible limits under Art. 19 (2) of the Constitution. See Penal Code (1860), Section 124-A. **1962 (2) Cr LJ 103: AIR 1962 SC 955.**

——S. 505 (c) — Ingredients — Any definite class of citizens can be 'class'.

Offence under S. 505 (c) is constituted when (a) the accused published or circulated the statement in question, (b) he did so with the intent to incite or it was likely to incite some class or community of person to commit same offence against some other class or community. The word 'class' is significant. Any definite or ascertainable class of citizens of India will come within this section. Therefore, where the accused shouted slogans in praise of the assassin of Mahatma Gandhi.

Held, that that was likely to invite innumerable citizens who held great reverence for Mahatma Gandhi, and at least Congressmen to commit some offence against the Hindu Sabhaits including those who formed the rally and the offence under Section 505, Indian Penal Code was made out. **1963 Jab LJ 915: ILR (1962) Madh Pra 449: 1963 MP LJ (Notes) 247.**

——S. 505 (c) — 'Incitement to commit offence' — Grievances against local authorities expressed through publication of pamphlet — Offence — (Constitution of India, Art. 19 (1) and (2)).

Clause (c) of S. 505, Penal Code, penalises the publication or circulation of any statement with intent to incite or which is likely to incite any class or community of persons to commit any offence against any other class or community. Reading S. 505 along with the provisions in Art. 19 (1) and (2) of the Constitution which guarantees to the citizen his right of freedom of speech and expression and bearing in mind the principle that as S. 505 deals with the liberty of the subject it must be construed very strictly in favour of the defence, it follows that the legitimate ventilation of grievance, by means of publication of a pamphlet, which some sections of the public may have against the local authorities should not be checked by initiating a prosecution under S. 505, Penal Code. And unless the contents of the pamphlet amount to 'incitement to an offence' the persons who have published and circulated the same cannot be held guilty of offence under Section 505. 40 Cal WN 1218, Rel. on. **(1959) 1 OJD 569: ILR (1959) Cut 584: 25 Cut LT 538: 1960 Cr LJ 497: AIR 1960 Orissa 65 (66) (Prs 5, 6).**

——S. 505 — Offence under — Preliminary investigation by police officer under order of District Magistrate — In appropriate case, Investigating officer may arrest accused in course of investigation under authority of warrant — Warrant of arrest issued by Sub-divisional Magistrate to facilitate Inspector's investigation — Sub-divisional Magistrate does not act beyond jurisdiction. See Criminal P. C. (1898), S. 196-B. **1962 (1) Cr LJ 62: AIR 1962 Pat 2 (DB).**

SECTION 506

■ ——S. 506 — Per Raghubar Dayal J.:— Train standing on platform —Pointsman having grudge against guard threatening guard with sythe in hand — No evidence that guard was engaged in any particular duty at that time — There is no obstruction in discharge of his duty within Section 121, Railways Act — Conviction altered to one under S. 506, I. P. C. See Railways Act (1890), S. 121. **1963 (2) Cri LJ 408: AIR 1963 SC 1511.**

■ ——S. 506 — Charge against appellant of having committed criminal intimidation by threatening X and his daughter with injury to their reputation by having indecent photographs published with intent to cause alarm to them — Real intention of appellant not so much to cause alarm only as to make X pay hush money — Conviction under S. 506, Penal Code, not illegal. See Penal Code (1860), S. 383. **1960 Cr LJ 177: AIR 1960 SC 154.**

——S. 506 — Constitution of India, Art. 14 — Law creating additional offence with different incidents — Constitutional validity — Different laws punishing same act cumulative and not in the alternative — Difference in procedure in trials and punishments — No infringement of Art. 14 — Crimial Law Amendment Act (1932), S. 7 (1) (a) — Section 7 (1) (a) not ultra vires Art. 14. See Constitution of India, Art. 14. **1961 (2) Cri LJ 443: AIR 1961 All 522.**

——S. 506 — Tree belonging to complainant cut by accused — After some trouble about it, tree allowed to remain where it fell — Subsequently accused removing tree to his house — Complainant's servants, under his order, invading accused's house to romove the tree— While the tree was being removed, accused going to house of complainant with a gun and threatening him with serious results unless he called the invasion off— Complainant held could not by his own private action invade the house of the accused — Accused held could not be said to have committed an offence. **1952 All Cri R 81: 1952 All WR (HC) 295: 1953 Cri LJ 798: AIR 1953 All 372 (372) (Pr 7).**

——S. 506 — U. P. Panchayat Raj Act (26 of 1947), S. 55 — Accused jointly tried by Magistrate for offences under Ss. 143, 447 and 506, Penal Code — Case cannot be said to be cognizable by a Panchayati Adalat unless all the offences were cognizable by it — Offence under Section 143, Penal Code, not being cognizable by it, S. 55 did not apply and therefore, trial by Magistrate was not illegal. See Panchayats — U. P. Panchayat Raj Act (26 of 1947), S. 55. **AIR 1952 All 431.**

——Ss. 506 and 326 — Charge of offence under — Benefit of exception in Ss. 81 and 87 — When available — When the accused person acted bona fide, without any criminal intent, in order to save the complainant from serious consequences, resulting from his own indecent behaviour with his consent obtained in writing and for his benefit — No offence held by persons responsible for such acts. See Penal Code (1860), Ss. 81 and 87. **(1951) 52 Cr LJ 179: AIR 1951 All 500.**

——S. 506 — Criminal P. C. (1898), S. 4 — Complaint can be of offence committed — There cannot be complaint under Ss. 341, 447, 504 and 506, Penal Code, read with S. 106, Criminal P. C. See Criminal P. C. (1898), S. 4. **AIR 1951 All 494.**

——S. 506 — Contravention of S. 83 vitiates trial and conviction. See Panchayats — Bombay Village Panchayats Act (3 of 1959), S. 83. **1963 Mah LJ (Notes) 7.**

——S. 506 — Conviction — Evidence of complainant — Sufficiency. See Evidence Act (1872), Section 134. **1961 Nag LJ (Notes) 21.**

——S. 506 — Procedure — Offence under can be tried summarily. See Criminal P. C. (1898), Section 260 (1) (a). **1959 Nag LJ (Notes) 6.**

——S. 506, Part. II — Prosecution on charge under — Charge framed — Facts not disclosing offence — Conviction, under S. 323 — Sustainability. See Criminal P. C. (1898), S. 238 (1). **1958 Nag LJ (Notes) 61.**

——S. 506 (2) — Criminal P. C. (1898), Ss. 262, 241, 251 and 537 — Adoption of wrong procedure — Effect — Joint trial under Ss. 323, 504 and 506 (2), Penal Code — Procedure prescribed for summons cases followed — Accused acquitted under Ss. 504 and 506 (2) — Convicted under S. 323 — No failure of justice — Trial not vitiated. See Criminal P. C. (1898), S. 262. **1962 (2) Cri LJ 68: AIR 1962 Gui 231.**

——S. 506 — Ranbir Penal Code (12 of 1989), S. 506 — Offence under — Essentials — Intention to cause alarm must be established — Threats by accused to deter complainant from interfering with property of accused does not constitute an offence. **1963 Kash LJ 117: 1964 (1) Cr LJ 40: AIR 1964 J and K 4 (6) (Pt B) (Pr 9).**

——S. 506 — M. P. Public Security Act (25 of 1959), S. 3 (1) (a) — Scope — Order of externment for acts constituting penal offences — Order held not invalid on ground that such acts could be enquired into and tried by Courts of law under Criminal P. C. See Public Safety — M. P. Public Security Act (25 of 1959), S. 3 (1) (a). **1964 (2) Cri LJ 160: AIR 1964 Madh Pra 175 (DB).**

——S. 506 — Criminal intimidation — Intention — The accused told the complainant that she would be beaten and then alone she would vacate the house in which she was living otherwise not.

Held, that this clearly amounted to an offence under S. 506. See Penal Code (1860), S. 503. **1960 Jab LJ 449: 1960 MPC 303: 1960 MPLJ 632.**

——S. 506 — Applicability — Insult and provocation accompanied by gesture as if to hit. The words attributed to the accused the gestures accompanying the words used, the object of insult, the company and the occasion when the words were used, have all to be taken into consideration in deciding whether the words were such as to provoke a breach of the peace. The fact that the complainant is a respectable lady and could control herself, in spite of the provocation offered by the accused by use of filthy words is no reason why the act of the accused should be held as not to amount to an offence under S. 504, I. P. C. Where further the accused also proceeded towards the complainant in a temper and raised his hands as if to hit her, an offence under Section 506 is also disclosed. See Penal Code (1860), S. 504. **AIR 1955 NUC (Orissa) 970.**

——S. 506 — Criminal intimidation — Words uttered by accused that he will kill complainant and bury him — Accused an old and sick man aged 74 years — None present alarmed — No intent proved — No conviction. See Penal Code (1860), S. 503. **1964 (1) Cr LJ 255 (Tripura).**

SECTION 508

——S. 508 — Representation by candidate and his agent that he was Shalanti Vishnu and as such representative of Lord Jagannath and persons not voting for him would be sinning against the God and also be committing sacrilege against dharma — Candidate also appealing to voters in the name of caste and using symbols of the God in his propaganda — **Held,** that the representations fell within the scope of sub-section (2) and also constituted offences under Ss. 171-F, 171-C and Section 508, Penal Code — The appeal and use of

symbols came within sub-section (3) of S. 123 but were not offences under the Penal Code. See Representation of the People Act (1951), S. 123. **1964 (1) Cr LJ 57: AIR 1964 Orissa 1 (DB).**

SECTION 509

——**S. 509** — Intruding upon privacy of lady and making indecent gestures and removing her clothes — Attempt to commit rape not established — Accused is guilty under S. 509 and not under S. 376 read with S. 511. See Penal Code (1860), S. 376. **1961 (1) Cri LJ 330: AIR 1961 All 131.**

——**S. 509** — Applicability — To abuse a woman in obscene terms near a water tap would obviously amount to an offence falling under S. 509. **(1961) 2 Guj LR 196.**

SECTION 511

SYNOPSIS

(Penal Code (1860), S. 511.)

1. Applicability.
2. "Attempts".
3. Punishment.

1. Applicability.

●——**S. 511** — Applicability — Attempt to commit offence of cheating — Complainant feigning belief in false representation and delivering property, in order to trap accused — The fact that complainant was not deceived is immaterial — offence is one of attempt to cheat — ILR 16 Cal 310, Approved. See Penal Code (1860), S. 420/511. **1960 Cr LJ 1383: AIR 1960 SC 979.**

——**S. 511** — Attempt to slaughter and preparing for slaughter — Distinction — Mere preparation for slaughter of cow is no offence. See U. P. Prevention of Cow Slaughter Act (1 of 1956), S. 8. **1962 (1) Cr LJ 7: AIR 1962 All 22.**

——**Ss. 511, 376, 509** — Intruding upon privacy of lady and making indecent gestures and removing her clothes — Attempt to commit rape not established — Accused is guilty under S. 509 and not under S. 376 read with S. 511. See Penal Code (1860), S. 376. **1961 (1) Cri LJ 330: AIR 1961 All 131.**

——**S. 511** — Attempted rape — By virtue of Sch. II, Criminal P. C. that Court is entitled to try the accused for the offence of attempted rape which could have tried him for the offence of rape. Therefore, no distinction can be drawn between the offence of rape and attempted rape under S. 70 and though attempted rape is not mentioned in S. 70, the rule regarding trial by Court-martial does not obtain in such a case. See Army Act (1950), S. 70. **AIR 1955 NUC (All) 1721.**

——**Ss. 511, 417, 466** — Criminal P. C. (1898), Ss. 197 (1), 207-A, 208 and 209 — Madras Village Panchayats Act (10 of 1950), Section 106 — Complaint by President of Panchayat Board against P, public servant under Sections 411 and 511 — Complainant alleging that P intentionally deceived him and thereby dishonestly and fraudulently induced him to sign on some blank paper — Magistrate taking complaint on file under S. 466 of Penal Code — P filing petition for dismissal of complaint for want of proper sanction under S. 197 (1) of Criminal P. C. and S. 106 of Madras Act (10 of 1950) — **Held,** Sections 197 (1) and 106 both contemplated same requirements — Substance of offence alleged in complaint was cheating under S. 477, because if signature of President in document had not been obtained by P. by cheating him, there would not have been offence of forgery regarding document — Offence of forgery could not be treated as one under S. 466 separated from element of cheating which is substance of complaint— Act of cheating had no reasonable connection with discharge of official duties of P and therefore, no sanction for his prosecution was necessary for offences alleged whether under S. 197 (1) or Section 106 — This was unaffected by fact that case was taken on file under S. 466 — Procedure to be followed by Magistrate was not under S. 207-A but under S. 209. AIR 1960 SC 266, Foll. See Criminal P. C. (1898), S. 197 (1). **ILR (1963) AP 1040.**

——S. 511 — Attempt — What amounts to — Old man with intention to shoot at deceased raising gun — His son seeing that his hands were shaking, taking the gun himself and shooting the deceased — Old man is guilty under S. 511.

The crucial words in S. 511 are that the accused should have done the act towards the commission of the offence. There are three stages in the Commission of a crime; (i) intention to commit; (ii) preparation to commit; and (iii) attempt to commit. If he attempt results in the actual commission of the offence, the crime is complete. But the I. P. Code, makes the attempt also an offence, if the accused does any act towards the commission of the offence. The distinction between preparation and attempt may be clear in some cases, but in most of the cases, the dividing line is very thin. Nonetheless, it is a real distinction. The crucial test is whether the last act, if uninterrupted and successful, would constitute a crime. The illustrations in the section bring out such an idea clearly. The question is really one of fact depending upon the circumstances of each case. **1955 Cr LJ 917: 1955 Andh WR 53: AIR 1955 Andhra 118 (122) (Pt A) (Prs 17, 19) (DB).**

——S. 511 — Applicability — Attempt to commit offence under Imports and Exports Control Act — If punishable.

As S. 511, I. P. Code, is omitted from S. 40, I. P. Code, unless an attempt to commit an offence under a special or local law has been expressly made punishable under the special or local law, it cannot be punished under the Penal Code. A conviction for an attempt of an offence under the Imports and Exports Control Act (18 of 1947) is, therefore, not legal. **ILR (1951) Assam 12: AIR 1951 Assam 17 (18) (Pt A) (Pr 4) (DB).**

——**S. 511** — Attempt to deal with smuggled property — No offence. See Sea Customs Act (1878), S. 167 (81). **1962 (2) Cr LJ 43: AIR 1962 Cal 370 (DB).**

[Reversed in AIR 1966 SC 955.]

——**S. 511** — Applicability — Accused charged and tried for bribery — Conviction for attempting to commit bribery — Sustainability. See Penal Code (1860), S. 161. **1961 MPLJ 721.**

——Ss. 511, 415, 420 — Knowledge of falsehood of pretence — Attempt to cheat.

The accused told the complainant that he knew how to double currency notes — The complainant, however, did not believe this but he gave the currency notes to the accused with a view to entrap the accused:

Held, that as the complainant knew the falsehood of the pretence the accused could not be convicted of the offence of cheating. But making false pretence and asking for currency notes were in themselves sufficient for holding the accused guilty of the offence of attempt to cheat. **52 Cri LJ 644: AIR 1951 Madh Bha 100 (101) (Prs 7, 8).**

——S. 511 — Applicability —. Preparation and attempt — Distinction.

Mere preparation is an indifferent act possessing no definite indication of criminality. An attempt is an act of such a nature that it is in itself evidence of the criminal intent with which it is done. A criminal attempt bears the criminal intent upon its face. The thing speaks for itself.

The accused borrowed from P. W. 1 a sum of Rs. 800 and executed a pronote. He paid Rs. 36-8-0 on a certain date. According to an arrangement, a few days later the accused and P. W. 1 met at the house of P. W. 2 and the accused representing that he was going to pay a sum of Rs. 13-8 to make up Rs. 50 placed the money near P. W. 2 and wanted the pronote to endorse on the back of it this payment of Rs. 50 but instead of that entered a payment of Rs. 750 and when he was questioned asked P. Ws. 1 and 2 to come to his house to get the entire sum of money and went away on his bicycle and was chased in vain by them. When he was finally cornered he stated that what had been entered as payment had been entered as a payment and would not give any further satisfaction:

Held, that what the accused intended and did and achieved went beyond the stage of preparation and constituted a criminal attempt at cheating. 8 Cal WN 278, Disting. **1952 Mad WN 903: 1952 Mad WN (Cri) 259: (1952) 2 Mad LJ 771: 1953 Cri LJ 1152: AIR 1953 Mad 609 (610) (Prs 7, 11).**

——**S. 511** — Scope of — The question whether a certain act is merely one of preparation or one committed in the course of an attempt is a question of fact. The dividing line between a mere preparation and an attempt is sometimes thin and has to be decided on the facts of each case. An attempt is a direct movement towards the commission after the preparation has been made. There is a greater degree of determination in "attempt" as compared with preparation. See Bihar Essential Services Maintenance Act (1 of 1948), S. 5. **1959 Cri LJ 1014: AIR 1959 Pat 376.**

——**S. 511 — Scope — Elements of offence.**

Where the accused in a case of attempt to cheat by personation contended that he could not be found guilty because his act did not succeed and probably was not going to succeed as the deceit practised by him was either detected or was soon going to be detected by the person whom he intended to cheat.

Held, that the mind of the person to whom the false pretences were made should be affected thereby is not an essential element of the offence. As the accused had made false pretences intending thereby to get money he was guilty of the offence of attempt. **(1957) 8 STC 534: 1957 BLJR 66.**

——**S. 511** — Charge under — Search by Police Officer — Charge of selling fake railway tickets — Railway servants employed as witnesses — Search conducted in absence of accused — Evidence of recoveries made cannot be relied upon. See Criminal P. C. (1898), S. 96. **64 Pun LR 874: 1962 All Cr R 351: 1962 All WR (Sup) 83.**

2. "Attempts".

●——**S. 511** — Attempt to commit murder — What constitutes — The act towards commission of murder need not be the penultimate act — Course of conduct adopted by accused in order to accelerate his end constitutes attempt to commit murder. See Penal Code (1860), S. 307. **1961 (2) Cr LJ 848: AIR 1961 SC 1782.**

●——**S. 511** — Attempt to commit offence — What amounts to — Attempt and preparation — Distinction — On facts, accused held was rightly convicted under S. 420/511. See Penal Code (1860), S. 420. **1961 (2) Cr LJ 822: AIR 1961 SC 1698.**

●——**S. 511** — Attempt and preparation — Attempt to commit offence of cheating — Accused representing to complainant that he could duplicate currency notes — Complainant giving some currency notes to accused—It could not be said that accused had only made a preparation and not an attempt to commit offence of cheating—Two of the ingredients of the offence of cheating, false representation and delivery of property had taken place and they were acts done towards the commission of offence within the meaning of S. 511. See Penal Code (1860), S. 420/511. **1960 Cr LJ 1383: AIR 1960 SC 979.**

——**S. 511 — 'Attempt' — Meaning — Preparation and attempt — Distinction.**

'Attempt' in an intentional act which a person does towards the commission of an offence but which fails in its object through circumstances independent of the volition of that person.

Accused was prosecuted for an offence under S. 7 of the Essential Commodities Act for contravention of Cl. (3) of U. P. Wheat (Restriction on Movement) Order, 1949. He was however, acquitted in appeal on the ground that as the interception was midstream the act of the accused was only a preparation for transporting the grain and no offence under S. 7 of the Essential Commodities Act was committed:

Held, that the act of the accused amounted to an attempt to transport the grain to another block across the river in contravention of Cl. (3) of the Order, since but for the interruption the commission of the offence would have been complete. **1962 All LJ 13: 1962 All WR (HC) 46: 1962 All Cr R 58: 1962 (2) Cr LJ 161: AIR 1962 All 359 (362) (Pt A) (Prs 15, 16) (DB).**

——**S. 511** — Offence under S. 420 read with S. 511, I. P. Code — Attempt to cheat Insurance Company at Bombay by making false claim supported by false certificates — Policy and false certificates fraudulently secured and posted to company at Hyderabad—Court at Hyderabad has jurisdiction to try offence. See Criminal P. C. (1898), S. 179. **1962 (2) Cr LJ 21: AIR 1962 Andh Pra 257.**

——**S. 511** — "Attempt" — Meaning of — An attempt is the third of the stages of an act which is completed viz. intention, preparation, attempt and commission. It is an act or a series of acts which necessarily lead to the commission of an offence and stops short of the commission by frustration because something which the doer of the act neither foresaw or intended. See Penal Code (1860), S. 307. **1955 Cri LJ 1033: AIR 1955 Bhopal 9.**

——**S. 511** — Attempt to cheat — Offence when committed — An offence under S. 420 read with S. 511, would be committed by a person who attempts to cheat another person and thereby attempts to induce him to do one or the other of the acts mentioned in S. 420. See Penal Code (1860), S. 420. **56 Cr LJ 289: AIR 1955 Bom 82 (DB).**

——**S. 511** — Jammu and Kashmir Defence Rules, Rr. 68 (4) and 118 — Attempt to export ghee outside Jammu and Kashmir, when it was prohibited — Accused caught inside State far away from border, while carrying ghee tins in truck — Accused held entitled to benefit of doubt. See Public Safety — Jammu and Kashmir Defence Rules, R. 68 (4). **AIR 1953 J and K 19.**

——**S. 511**—J. and K. Egress and Internal Movement (Control) Ordinance (2005), S. 3 — Attempt to commit offence — What is — Accused going

towards border with intention to cross over to Pakistan — Arrest at 160 yards from border — **Held,** offence was not completed. See J. and K. Egress and Internal Movement (Control) Ordinance (2005), S. 3. **('50) 9 J and K LR 154: 1953 Cri LJ 166: AIR 1952 J and K 55.**

——**S. 511** — Attempt to commit offence under M. B. Food Grains Export Restriction Order — Attempt is constituted only when the accused does an act towards the commission of the offence. The act must be one immediately and directly standing to the execution of the principal crime. Where no act towards the commission of the offence of exporting or carrying juwar by rail or road outside M. B. was committed by the accused it cannot be said that the accused even attempted to export or carry juwar to any place outside M. B. See Madhya Bharat Food Grains Export Restriction Order (2005 Smt.), S. 2 (1). **AIR 1955 NUC (Madh Bha) 3403.**

——S. 511 — Attempt to export without permit — (Essential Supplies (Temporary Powers) Act (1946), S. 7) — (Madhya Bharat Foodgrains Export Restriction Order (Smt. 2005).

Accused carrying cart-load of Jowar and wheat without permit towards border of State — Accused stopped by authorities on the road leading towards a border village within State, at a place two furlongs from the border — Intention to export without permit not proved — **Held,** that no offence of attempting to export without permit was committed. **1953 Cr LJ 1381: AIR 1953 Madh Bha 216 (216) (Pr 2) (DB).**

——**S. 511** — Attempt to commit crime — Elements — Distinction between preparation and attempt — Attempt to murder — Accident intervening in death — Effect — Husband and wife determined to commit suicide, jumping into well with infant child—Child slipping from hands of mother as accused jumped, falling in and drowned. Accused held guilty only of attempt to murder child and not of murder. See Penal Code (1860), S. 302. **1961 (2) Cr LJ 781: AIR 1961 Mad 498 (DB).**

——**S. 511** — Preparation and attempt — Attempt is an act of such a nature that it is in itself evidence of criminal intent with which it is done. **AIR 1955 NUC (Mad) 3145.**

——**S. 511** — Attempt and preparation — Debtor endorsing a very much larger amount as paid by him on the back of a promissory note and contending that it was entered as payment — Act constitutes not preparation but a criminal attempt to cheat. **(1952) 2 MLJ 771: 1952 Mad WN 903: 1952 Mad WN (Cri) 259: 1953 Cr LJ 1152: AIR 1953 Mad 609 (610) (Prs 7, 10).**

——S. 511 — Attempt to commit offence, what constitutes — Mere forming intention to commit crime or mere preparation for offence is not punishable.

In order to constitute an attempt to commit an offence, there must first of all be an intention to commit the crime, a commencement of the commission, and an act done towards the commission. Neither the mere forming of the intention to commit the crime nor the mere preparation for an offence is punishable. The dividing lines between a mere preparation and an attempt to commit a crime may be rather thin in some cases and the question whether there has been an attempt or only a preparation to commit it is to be decided on the facts of each particular case. One important consideration in such cases is whether there was a locus paenitentiae: AIR 1932 Mad 507, Rel. on.

(**Held,** that there was no attempt to transport paddy in contravention of Madras Order 2660 A/45). **(1949) 2 Mad LJ 410: 1949 Mad WN 632: AIR 1950 Mad 44 (46) (Pt C) (Pr 6).**

——**S. 511 — Conviction — Attempt — When punishable.**

An accused is liable for attempt when his failure to commit an offence is not due to any act or omission of his own, but to the intervention of some factor independent of his own volition. 61 Cal 54, Foll. **1951 All WR (Supp) 45: ILR (1950) Nag 908: AIR 1951 Nag 315 (316) (Pt B) (Prs 11, 12).**

——**S. 511** — Cheating and attempt to cheat — Accused sending packet containing newspaper cuttings insured for amount due from him to complainant — Probability of using postal acknowledgment receipt as evidence in discharge of debt — Offence is attempt to cheat — Charge framed under S. 417 alone — Conviction under S. 417 read with S. 511 is permissible. See Penal Code (1860), S. 417. **(1961) 27 Cut LT 446.**

——S. 511 — Essential Supplies (Temporary Powers), Act (1946), S. 7 — Petitioner transporting food-grains in lorry from Orissa to Madras in contravention of Orissa Food Grains Control Order (1947) — Lorry caught near Madras border by police and grain seized — Facts if constitute attempt.

Held, that there was a clear case of attempt to transport rice in question without proper permit from the authorities. The mere possibility that before the lorry crossed Orissa border the petitioner might have changed his mind and thrown away the rice somewhere in Orissa would not suffice to indicate that the act complained of was still in a preparatory stage and had not ripened to an attempt. **17 Cut LT 154: 1952 Cri LJ 918: AIR 1952 Orissa 164 (165) (Pt B) (Prs 4, 5).**

——S. 511 — Attempt — What constitutes — Attempt and preparation.

Section 511 of the Indian Penal Code was not meant to cover only the penultimate act towards completion of an offence and not acts precedent, if those acts are done in the course of the attempt to commit the offence or done with the intent to commit it and done towards its commission. In every crime in India there is first an intention to commit; secondly there is preparation to commit; and, thirdly, an attempt to commit. When the third stage is completed and is successful, the crime becomes a complete one. According to English definitions, an "attempt" is definite act requiring consideration of its criminal nature, whereas, according to the Indian law, an "attempt" is a continuons proceeding which at one stage assumes a criminal character. When the accused has done something definite in pursuance of his design not for what he has done, but with regard to what he would have done if he had succeeded, he has done the act towards its commission. It will always remain a question of fact when the point would be reached under S. 511 of the Indian Penal Code at which an act is done towards the commission of an offence. **(1957) 8 STC 534: 1957 BLJR 66.**

——S. 511 — Attempt — What amounts to.

The conception of an attempt to commit an offence is a technical one. It is for the Court, on a consideration of facts proved, to come to a conclusion whether there was an attempt to commit an offence. Witnesses must depose to facts observed by them and not draw inference for the benefit of the Court. **1953 BLJR 455: 1953 Cr LJ 1744: AIR 1953 Pat 338 (339) (Pr 5) (DB).**

——**S. 511** — Attempt to commit rape — Conviction — Essentials — Intention of accused to gratify passions at all events — Necessary —

Absence of — Accused held guilty under S. 354. See Penal Code (1860), Section 354. **(1962) 64 Punj LR 62.**

——**S. 511** — "Attempt" — Husband deliberately starving and maltreating his wife—Wife on point of death but saved through escape and timely hospital treatment — Offence — Husband held guilty under S. 307. See Penal Code (1860), Section 307. **1959 Cr LJ 368: AIR 1959 Punj 134.**

——**S. 511** — Attempt and intention — Offence under S. 167 (51). Sea Customs Act. See Foreign Exchange Regulation Act (1947), S. 23. **(1959) 61 Pun LR 531.**

3. Punishment.

●——**Ss. 511 and 415** — Interpolation in document made in January 1944 — Contract with Government made on 2-3-1944 but to come into effect on 11-11-1943 — **Held,** the latter date could not be utilized to impute criminal liability to accused for act done by them before the contract was executed. See Penal Code (1860), S. 415. **1960 Cri LJ 532: AIR 1960 SC 391.**

——**Ss. 511, 53, 420** — Railway officer convicted under S. 420/511 — Sentence of one year, if too severe — Object of punishment — Criminal P. C. (1898), S. 32. One of the principal reasons for inflicting punishments is to deter others from repeating the crime. If corrupt railway officials could get off merely with dismissal from service after making money by unlawful means, that would be no punishment at all and there would be no deterrent effect in the punishment. Hence, the sentence of one year's rigorous imprisonment awarded to the Assistant Engineer of a railway for an offence of cheating under S. 420/511, Penal Code cannot be said to be too severe. See Penal Code (1860), S. 53. **AIR 1950 All 639.**

——**Ss. 511 and 295** — Accused, a Muhammadan throwing burning cigarette on 'Viman' an object sacred to Hindus — Cigarette striking Viman but falling on the ground — Accused held guilty under S. 295/511. See Penal Code (1860), Section 295/511. **1955 Cri LJ 1563: AIR 1955 Bhopal 23.**

——**S. 511** — Evidence — Eye-witnesses giving out that accused persisted in sexual act in their presence — Story held unbelievable — Conviction could not stand. See Penal Code (1860), S. 376. **1960 Jab LJ 178.**

——**S. 511** — Sentence — When the statute says that for an offence the offender shall be imprisoned, it normally means that he should be sent to jail. To impose a sentence of tmprisonment till the rising of the Court is an evasion of the statutory provisions and such an evasion would be justified only in very exceptional circumstances, as for instance, where the offence is found to be very severely technical or where there are extenuating circumstances possessing unusual force. See Penal Code (1860), S. 330. **1955 Cri LJ 1080: AIR 1955 Mad 424.**

——**Ss. 511, 415, 417** — "Fraudulently" — Fraud, meaning of — On facts held accused could be convicted under S. 417 read with S. 511. See Penal Code (1860), S. 415. **AIR 1951 Nag 315.**

——**S. 511** — Evidence of decoy witness supported by another trap witness about sale of spurious parts of cycle by accused — Not sufficient to sustain conviction of accused unless there is extraneous material wholly independent of police mechanisation to show that sale in question was pushed by petitioner of spurious cycle parts representing them to be genuine of Hercules or Phillips make. See Penal Code (1860), S. 420. **1960 Cr LJ 1656: AIR 1960 Punj 641.**

PENAL CODE (APPLICATION TO VINDHYA PRADESH) ORDINANCE (48 of 1949)

●——The amendment of S. 21, I. P. C., by Ordinance 48 of 1949 by the inclusion of a Minister of State within the definition of the public servant has not brought about any substanial change in law in Rewa State after its integration. Even prior to the passing of Ordinance 48 of 1949 a Minister of Vindhya Pradesh was an officer of the State and as such a public servant within the meaning of S. 21, I. P. C., as adapted. See Penal Code (1860), S. 21. **AIR 1953 SC 394.**

SECTION 2

●——**Ss. 2 and 3 (1) — Constitution of India, Art. 20 (1) — Applicability.**

In determining the constitutionality of any conviction under Vindhya Pradesh Ordinance, 48 of 1949 for an alleged offence committed during the period between 9-8-1948 (the date from which the Penal Code was deemed to have been in force in Vindhya Pradesh) and 11-9-1949 (the date of the enactment of the said ordinance), what is relevant for the application of Art. 20 (1) is not the result brought about by the repeal and retrospective operation thereof, but the factual state of law as it existed prior to the date (viz. 11-9-1949) when the repeal came into operation. The repeal itself posits the pre-existence of the law, and it is that law which is relevant for that purpose. Shiv Bahadur Singh v. State of V. P., **1953 SCA 803: 1953 SCJ 563: 1953 SCR 1188: 1953 Cri LJ 1480: AIR 1953 SC 394 (399) (Pt G) (Pr 12).**

PENAL LAW

See Statutory cross references under "Criminal law".

PENALTY

See (1) Contract Act (1872), S. 74.
(2) T. P. Act (1882), S. 60.

Breach of contract.
See Contract Act (1872), S. 74.

For concealment of income.
See Income-tax Act (1922), Section 28 (1) (c).

PEN-DOWN STRIKE

See Industrial Disputes Act (1947), Sections 2 (q) and 26.

PENSION

See (1) Bihar Pension Rules.
(2) Constitution of India, Art. 366 (17).
(3) Government Grants Act (1895).
(4) Madhya Pradesh New Pension Rules (1951).
(5) Pensions Act (1871).

Attachment of.
See Civil P. C. (1908), S. 60.

Commutation of.
See Pensions Act (1871), S. 10.

Defined.
See Constitution of India, Article 366 (17).

Transfer of.
See T. P. Act (1882), Section 6 (g).

PENSIONS ACT (23 of 1871)

SECTION 1

——**S. 1 — Pension Rules, Rule 2 (2) — Three months' notice — Notice and order of retirement need not be separate — (Constitution of India, Art. 311).**

The notice contemplated by the sub-rule in question is only to give to the Government servant concerned the specified time before he is

made to retire. That is not a kind of notice which is required to be served upon him under Article 311 of the Constitution of India. Where a Police Sub-Inspector was served with an order of the Inspector-General of Police, dated 20-1-1958, compulsorily retiring him from service with effect from 16-6-1958, the notice is proper. **1960 MPLJ 114: 1960 MPC 92: 1960 Jab LJ 100: ILR (1959) Madh Pra 351: AIR 1960 Madh Pra 117 (118) (Pt A) (Prs 2, 3) (DB).**

——**S. 1** — Constitution of India, Articles 245, 363, Sch. 8, List 2, Item 42 — Extension of, to Saurashtra — Act is intra vires and cannot be impugned as being in violation of any clause of Saurashtra covenant. See Constitution of India, Article 245. **AIR 1956 Sau 119 (DB).**

SECTION 4

——Ss. 4, 5 and 6 — Civil Service Regulations, Article 348-A — 'Pension', meaning of — Right to recover pension — If actionable — (Civil P. C. (1908), S. 9).

The word 'pension' has not been defined anywhere. However, it has been held that it implies periodical payments of money to a person. Two essentials are necessary in order to constitute a pension (1) it must be a periodical payment, and (2) it must be a grant not in respect of any right, privilege, perquisite or office but on political considerations or on account of past services or present infirmities or as a compassionate allowance. It is a periodical payment of money for past services or a bounty for past services rendered to the public or to the State. It is mainly designed to assist pensioner in providing his daily wants. The provisions of the Pensions Act, especially those of Sections 3, 5 and 6, clearly reveal that a claim to pension cannot be enforced in a Court of law and the proper remedy is to make departmental representations. The provisions of the Civil Service Regulations also point in the same direction. Thus, a person cannot claim pension as of right and in any case the right to recover pension is not actionable. **1959 All LJ 855: AIR 1959 All 769 (770, 771) (Prs 2, 3, 5, 6).**

——**S. 4** — Constitution of India, Article 226 — Other remedy open — Government refusing to pay pension — Maintainability of suit — Where the Government refuses to pay pension to the claimant it cannot be said that the claimant has an alternative remedy by way of suit available to him as from the scheme of Sections 4, 5 and 7 it is clear that no suit can be brought by the claimant for such recovery. See Constitution of India, Article 226. **AIR 1956 All 564 (DB).**

●——**S. 4** — Burden of proof — Plea of grant of land revenue — Proof of — Where the plaintiff wants to prove the fact that a grant had been made to his ancestors of land revenue alone and that they were not ordinary muafidars he should produce proper materials before the Court and facts mentioned in various judgments could not be used as evidence to prove his contention. **AIR 1955 All 1 (FB).**

●——**S. 4 — 'Pension' — Meaning of.**

The word "pension" has been held to mean a periodical allowance or stipend granted, not in respect of any right, privilege, perquisite or office, but on account of past service or particular merits or as compensation to dethroned princes, their families and dependants. In Section 4 onwards in the Pensions Act the word "pension" has been used in contradiction to the words "grant of money or land revenue". 4 Bom 432, Foll. Bankey Beharilal v. Lala Babu, **1954 All LJ 641: 1954 All WR (HC) 577: ILR (1955) 1 All 821: AIR 1955 All 1 (2) (Pt B) (Pr 9) (FB).**

——**Ss. 4 and 6 — Institution of suit without certificate under Section 6 — Effect — Production of certificate after expiry of limitation — Effect.**

Per Desai J. :— The absence of certificate under Section 6 goes to the root of the jurisdiction of the Civil Court and cannot be treated as a defect of a technical character: AIR 1937 Oudh 484, Not approved.

Where a suit claiming a share in certain properties including a share in the grant of land revenue is instituted in a Civil Court without the certificate required under Section 6, the Civil Court cannot take cognizance of the claim in respect of the grant of land revenue though it can entertain the suit in respect of the rest of the claim. A certificate obtained after the expiry of limitation for the suit is of no effect and the Court is precluded from taking cognizance of that claim.

Per Bhargava J. :— The receipt of a certificate under Section 6 need not precede the institution of suit. Where the certificate is received after the institution of the suit the Court is bound to take cognizance of the claim relating to the grant of land revenue irrespective of the fact that the claim is barred by time on the date of receipt of certificate. After taking cognizance the Court might reject the claim as barred by time. **1950 All LJ 185: 1950 All WR 250: ILR (1951) 2 All 38: AIR 1950 All 371 (372, 375) (Prs 3, 5, 19) (DB).**

——**Ss. 4, 5 and 6 — Distribution of pensions — Intention of Legislature — Intervention of civil Courts.**

It is plain from Sections 4, 5 and 6 that the legislature intended that the distribution of pensions should be left to the executive Government without the intervention of Civil Courts unless invited to do so by the concerned officer and that all claims put forward in regard to the pensions should be settled by them. **AIR 1959 Andh Pra 487 (489) (Pt A) (Pr 8) (DB).**

——**S. 4 — Scope.**

In order to fall within the mischief of Section 4, the claim must be in relation to grant of money or pension or land revenue. **62 Bom LR 735: ILR (1961) Bom 101: AIR 1961 Bom 11 (21) (Pt H) (Pr 19) (DB).**

——**S. 4** — Major of T. C. State Armed Forces released from Army after coming into force of the Constitution — Pension granted under T. C. State Rules — Claim for enhanced pension under Indian Army Rules is not enforceable in Civil Courts — Civil P. C. (1908), Section 91. AIR 1959 All 769; AIR 1959 AP 487; AIR 1959 Pat 17 and AIR 1963 Mad 49, Rel. on; AIR 1962 Punj 8. Dist. **1964 Ker LJ 700: ILR (1964) 2 Ker 389: 1964 Ker LT 406: AIR 1965 Ker 185 (186) (Pt B) (Prs 7, 8) (DB).**

——**S. 4** — Pension cannot be claimed as of right — Claim is not an actionable one — Constitution of India, Articles 14 and 16 — Reasonable classification — Absorption of Army Personnel of Travancore-Cochin State in Regular Indian Army after being screened and after being selected by Selection Board — Those graded as acceptable given commissions as officers in Regular Army — Between officers similarly situated there is no discrimination in matter of being subjected to screening — There is no violation of fundamental right guaranteed by Article 16. AIR 1952 Trav Co 7, Relied on. **1960 Ker LJ 1279: 1960 Ker LT 1148: (1961) 1 Lab LJ 68: ILR (1961) Ker 430: AIR 1961 Ker 155 (159) (Pt B) (Pr 19).**

——S. 4 — Applicability — Suit relating to grant of money.

Where the defendant receives the grants from the Collector on behalf of the plaintiff Mutt in his capacity as its agent and does not claim any right in himself to those monies, a suit by the plaintiff for the recovery of those monies is not one relating to any grant made by the Government and is not, as such, barred by Section 4, Pensions Act. 1 Bom 75 and 31 Bom 512 and AIR 1927 Bom 81, Distinguished. **37 Mys LJ 319: ILR (1959) Mys 25: AIR 1960 Mys 166 (168) (Pr 15).**

——Ss. 4, 5, 6 — Suit for arrears of pension — Jurisdiction of Civil Court — Claim held not maintainable — Civil P. C. (1908), S. 9).

The Civil Court's jurisdiction to entertain claims relating to pensions is ousted except to a limited extent, namely on reference made by the Collector in respect of claims made to him under Section 5 of Pensions Act. AIR 1937 PC 27, Rel. on; AIR 1959 Pat 17, AIR 1959 AP 487 and AIR 1959 All 769, Foll.; AIR 1962 Punj 8, Expl.

Where claim of arrears of pension for 12 years was preferred by a suit filed by an ex-permanent Government Servant in a Civil Court.

Held, that the claim for arrears of pension was not entertainable in Civil Court. **(1963) 5 OJD 89: ILR (1963) Cut 431.**

——Ss. 4 to 6 — Scope and object — Suit for recovery of plaintiff's share of pension wrongfully withdrawn by defendant — Jurisdiction of Civil Court — (C. P. Code (1908), S. 9).

The object of Sections 4 to 6 of the Pensions Act is that the Government should not be made ordinarily to pay the penison to a person who may not really be entitled to receive the same, but gets a decree with regard to the same from the Civil Court without his claim having been examined by the prescribed authority. Before the Government can be bound by a decree of the Civil Court in this matter, its officers as prescribed in Section 5 of the Act must have an opportunity to examine the claim of the parties in the suit. It is only for this object that provisions have been made for preferring the claim before such officers and for a certificate to be obtained from those officers for the trial of the case by the Civil Court. The words 'any suit relating to any pension' used in Section 4 of the Act are quite indicative of the position that all suits relating to such pension are barred under that section, and it is immaterial whether the Government is or is not a party to such suits.

The plaintiffs brought a suit for recovery of their share of the pension amount wrongfully withdrawn by defendant 1 from the Government on the allegation that the plaintiff was entitled to an eight annas share in the amount of pension which had been granted in favour of the ancestor of the parties who were pandas of a temple and which had been divided between them under a compromise decree in a previous suit between the parties. The defendants disputed the plaintiff's right to a share in the pension.

Held, that as the suit related to pension the Court had no jurisdiction to entertain the suit in view of Sections 4 to 6, Pensions Act. AIR 1945 Bom 496, Dist. **1958 Pat LR 343: ILR 37 Pat 1391: AIR 1959 Pat 17 (18, 19) (Pt A) (Prs 4, 7) (DB).**

——Ss. 4, 5 and 6 — Scope — Servant of former Gondal State in Saurashtra — Suit by, for recovery of pension accrued to him since 1948 brought in 1954 — Jurisdiction of Civil Court to entertain suit — (Civil P. C. (1908), Section 9).

Held, it is true that the Gondal State law does not contain any provisions in bar of the Civil Court's jurisdiction to entertain a suit for the recovery of a pension and if the suit had been instituted while that law was in force the Court's jurisdiction to entertain it could not possibly have been questioned but the suit was filed in 1954 when the Gondal State law was repealed by the Pensions Act and Court's jurisdiction will be governed by the provisions of that Act. The combined effect of Sections 4, 5 and 6, Pensions Act is that a person claiming pension from the Government has to prefer his claim to the authority mentioned in Section 5 and a competent Civil Court is authorised under Section 6 to take cognizance of such claim only on receiving the prescribed certificate. Even then the Court will not have jurisdiction to pass a decree which might affect the State's liability to pay such pension. As the suit is instituted without the requisite certificate the Civil Court's jurisdiction is clearly barred by Section 4 of the Act. **9 Sau LR 284: AIR 1956 Sau 119 (119) (Pt A) (Pr 4) (DB).**

SECTION 5

——Ss. 5, 4 and 6 — Civil Service Regulations Article 348-A — "Pension", meaning of — None can claim pension as of right — Right to recover pension is not actionable — (Civil P. C. (1908), Section 9) — (Words and Phrases — Pension) See Pensions Act (1871), Section 4. **AIR 1959 All 769.**

——S. 5 — Constitution of India, Article 226 — Other remedy open — Government refusing to pay pension — Maintainability of suit — When the Government refuses to pay pension to the claimant it cannot be said that the claimant has an alternative remedy by way of suit available to him as from the scheme of Sections 4, 5 and 7 of the Act it is clear that no suit can be brought by the claimant for such recovery. See Constitution of India, Article 226. **AIR 1956 All 564 (DB).**

——S. 5 — Constitution of India, Article 226 — Order granting pension — Whether amenable to certiorari — Where an order ganting pension is passed by the Government pursuant to the discretion reserved to themselves and not in exercise of any of the powers conferred by Section 5, Pensions Act the order cannot be regarded as a judicial determination made after hearing both the parties and is not therefore amenable to certiorari. See Constitution of India, Article 226. **AIR 1959 Andh Pra 487 (DB).**

——Ss. 5, 4 and 6 — Distribution of pensions — Intention of Legislature — Intervention of civil Courts — It is plain from Sections 4, 5 and 6 that the legislature intended that the distribution of pensions should be left to the executive Government without the intervention of Civil Courts unless invited to do so by the concerned officer and that all claims put forward in regard to the pensions should be settled by them. **AIR 1959 Andh Pra 487 (DB).**

——S. 5 — Claim relating to pension.

A claim involves the basic element of a legal right. Therefore the statutory duty cast upon the officers enumerated in that section is to determine the legal rights of persons concerned **AIR 1959 Andh Pra 487 (489) (Pt B) (Pr 8) (DB).**

——S. 5 — Grant of pension as matter of grace — Reconsideration by Government — If barred.

Where the basis of the grant of the pension is not in recognition of any right but as a matter

of grace or bounty taking into account the alleged want of the persons concerned, it is difficult to treat it as an order emanating from judicial proceedings incapable of being reconsidered. In such circumstances, there can be no doubt that the original order is made by the Government in an administrative capacity. When on a further enquiry they come to the conclusion that they proceeded on a misapprehension as to basic facts, viz., the financial status of such persons, surely, it is within the powers of the Government to reconsider that order. There is no impediment in the Government reconsidering the matter when it comes to their knowledge that the persons concerned were in no need of any maintenance having substantial income from other sources. It follows that Section 5 does not operate as a bar to the passing of such an order. **AIR 1959 Andh Pra 487 (490) (Pt C) (Pr 14) (DB).**

——S. 5 — Scope of inquiry.

The Pensions Act does not contemplate any elaborate enquiry as in the case of a Civil Court. Thus, there is no foundation for the grievance that the principle of natural justice was violated and that the maxim audi alterem was not given effect to. **AIR 1959 Andh Pra 487 (491) (Pt E) (Prs 20, 21) (DB).**

——Ss. 5, 4 and 6 — Suit for arrears of pension — Jurisdiction of Civil Court — Claim held not maintainable. See Pension Act (1871), Sec. 4. **(1963) 5 OJD 89.**

——Ss. 5, 4, 6 — Scope and object — Suit for recovery of plaintiff's share of pension wrongfully withdrawn by defendant — Jurisdiction of Civil Court — **Held,** that as the suit related to pension the Court had no jurisdiction to entertain suit in view of Sections 4 to 6, Pensions Act. (Civil P. C. (1908), Section 9). See Pensions Act (1871), Section 4. **AIR 1959 Pat 17 (DB).**

——Ss. 5, 4 and 6 — Scope — Servant of former Gondal State in Saurashtra — Suit by, for recovery of pension accrued to him since 1948 brought in 1954 — Jurisdiction of Civil Court to entertain suit. **Held** barred — (Civil P C. (1908), Section 9). See Pensions Act (1871), Section 4. **AIR 1956 Sau 119 (DB).**

SECTION 6

——Ss. 6, 4, 5 — Civil Service Regulations, Article 348-A — "Pension", meaning of — None can claim pension as of right — Right to recover pension is not actionable — (Civil P. C. (1908), Section 9) — (Words and Phrases — Pension). See Pensions Act (1871), Section 4. **AIR 1959 All 769.**

——S. 6 — Court-fees Act (1870), Section 7 (ii) (U. P.) and Article 17 (iii) — Applicability — Suit for declaration of plaintiff's right to certain pension and for arrears thereof — Article 17 (iii) applies. See Court-Fees Act (1870), Sec. 7 (ii) (U. P.). **AIR 1953 All 442.**

——Ss. 6, 4 — Institution of suit without certificate under Section 6 — Effect — Production of certificate after expiry of limitation — Effect — Per Desai, J.:— The absence of certificate under Section 6 goes to the root of the jurisdiction of Civil Court and cannot be treated as defect of a technical character — AIR (24) 1937 Oudh 484, Not approved — Per Bhargava, J.:— The receipt of a certificate under Section 6 need not precede the institution of suit — Where the certificate is received after the institution of suit the Court is bound to take cognizance of the claim relating to the grant of land revenue irrespective of the fact that the claim is bound by time on the date of receipt of certificate — After taking cognizance, the Court might reject the claim as barred by time. See Pensions Act (1871), Section 4. **AIR 1950 All 371 (DB).**

——Ss. 6, 4, 5 — Distribution of pensions — Intention of Legislature — Intervention of Civil Courts — It is plain from Sections 4, 5 and 6 that the Legislature intended that the distribution of pensions should be left to the Executive Government without the intervention of Civil Courts unless invited to do so by the concerned officer and that all claims put forward in regard to the pensions should be settled by them. **AIR 1959 Andh Pra 487 (Pt A) (DB).**

——Ss. 6, 4 and 5 — Suit for arrears of pension — Jurisdiction of Civil Court — Claim held not maintainable. See Pension Act (1871), Section 4. **(1963) 5 OJD 89.**

——Ss. 6, 4, 5 — Scope and object — Suit for recovery of plaintiff's share of pension wrongfully withdrawn by defendant — Jurisdiction of Civil Court — **Held,** that as the suit related to pension the Court had no jurisdiction to entertain the suit in view of Sections 4 to 6 of the Act — (Civil P. C. (1908), Section 9). See Pensions Act (1871), Section 4. **AIR 1959 Pat 17 (DB).**

——Ss. 6, 4, 5 — Scope — Servant of former Gondal State in Saurashtra — Suit by, for recovery of pension accrued to him since 1948 brought in 1954 — Jurisdiction of Civil Court to entertain suit **Held** barred — (Civil P. C. (1908), Section 9). See Pensions Act (1871), Section 4. **AIR 1956 Sau 119 (DB).**

——S. 6 — Scope — Subsequent sanction — Sufficiency — Sanction under Section 8, Travancore C. P. Code, during pending suit — Effect.

Sanction under Section 8, Travancore C. P. Code of 1100 obtained during the pendency of the suit is a sufficient compliance with that section. **1955 Ker LT 553: ILR (1955) TC 625: AIR 1955 TC 275 (276) (Pt A) (Pr 3).**

SECTION 7

——S. 7 — Constitution of India, Article 226 — Other remedy open — Government refusing to pay pension — Maintainability of suit — Where the Government refuses to pay pension to the claimant it cannot be said that the claimant has an alternative remedy by way of suit available to him as from the scheme of Sections 4, 5 and 7 of the Act, it is clear that no suit can be brought by claimant for such recovery. See Constitution of India, Article 226. **AIR 1956 All 564 (DB).**

SECTION 8

——S. 8 — Constitution of India, Article 226 — Mandamus — Existence of right — Right to claim pension under Pensions Act — There is a duty cast upon the Deputy Commissioner or the Collector to pay the money payable to the applicant as a pension or grant of money or land revenue and it is open to the appellant to enforce the duty by means of a writ of mandamus. **AIR 1956 All 564 (DB).**

SECTION 10

——S. 10 — Bihar Pensions Rules, Rules 253, 254, 256 and 259 — Commutation of Pension — Order for, becoming absolute — State Government has no power to rescind it.

There is no power in the State Government to rescind the order of commutation of pension after it has become absolute under Rule 253 ex-

cept as provided under Rule 254 of the Bihar Pension Rules framed under S. 14 of the Act.

Held, on facts that the option under R. 252 to withdraw the application for commutation of pension expired on the pensioner's appearance before the Medical Board and the order of commutation became absolute on 19th March, 1958. On that date his title to receive the commuted portion of the pension had ceased to have legal effect. The order of the State Government dated 1st July, 1959, cancelling its previous order, dated 30th September, 1958, was therefore, legally correct. Reading the Rules 256 and 259 together, it is manifest that whatever be the date of actual payment of the commuted value, the effect upon the pension will be the same as if the commuted value had been paid on the date on which the commutation became absolute. **1963 BLJR 738: AIR 1963 Pat 317 (318) (Prs 3, 4) (DB).**

SECTION 11

●——S. 11 — Scope — Sections 4 to 10 — Distinction.

Section 11 is narrower and deals only with pensions while the other Sections such as Sections 4 to 10, deal with pension or grant by Government of money or land-revenue. Bankey Beharilal v. Lala Babu, **1954 All LJ 641: 1954 All WR (HC) 577: ILR (1955) 1 All 821: AIR 1955 All 1 (2) (Pt C) (Pr 9) (FB).**

●——Ss. 11 and 12 — Applicability — Grant of land revenue — Crown Grants Act — Effect of — (Crown Grants Act (1895), Section 2).

Sections 11 and 12 of the Pensions Act do not apply to the grant of land revenue and even if, therefore, the plaintiff is a grantee of land revenue, he cannot claim that the transfers of the villages, the subjects of the alleged grant, to which he is a party are invalid and he is entitled in spite of those transfers, to claim the money as arrears of land revenue.

Even if the Crown Grants Act is applicable, plaintiff's suit for recovery of land revenue must fail as the transfers of the villages will in that case be invalid and the plaintiff will not be entitled to claim land-revenue from the transferee. 1902 All WN 161: AIR 1936 All 298: AIR 1936 All 666, Rel. on; AIR 1940 All 373 (FB). Expl. Bankey Beharilal v. Lala Babu, **1954 All LJ 641: 1954 All WR (HC) 577: ILR (1955) 1 All 821: AIR 1955 All 1 (4) (Pt E) (Prs 11, 12) (FB).**

——S. 11 — 'Property', meaning of — Provisions of Section 6 of T. P. Act and Sections 11 and 12 of Pensions Act do not derogate from pension being a property, if it otherwise is so. See Constitution of India, Article 226. **ILR (1965) 2 Punj 1.**

SECTION 12

●——S. 12 — Applicability to grant of land revenue — Sections 11 and 12 of the Act do not apply to the grant of land revenue and even if, therefore the plaintiff is a grantee of land revenue, he cannot claim that the transfers of the villages, the subjects of the alleged grant, to which he is a party are invalid and he is entitled, in spite of these transfers to claim the money as arrears of land revenue — Even if the Crown Grants Act is applicable the plaintiff's suit for recovery of land revenue must fail as the transfers of the villages within that case will be invalid and the plaintiff will not be entitled to claim land revenue for the transferee. **AIR 1955 All 1 (FB).**

●——S. 12 — Applicability and scope of.

Section 12 deals only with pension, pay or allowance mentioned in Section 11, and not with grants by Government of money or land revenue, nor with such pensions which may not come under Section 11. A comparison of Sections 8 and 9 makes it clear that grant of land-revenue is different from pension. While a right is given to bring a suit for the recovery of land-revenue, no such right is given with respect to pension. Bankey Beharilal v. Lala Babu, **1954 All LJ 641: 1954 All WR (HC) 577: ILR (1955) 1 All 821: AIR 1955 All 1 (2) (Pt D) (Pr 9) (FB).**

——S. 12 — Applicability — Defendant claiming deduction on the ground that by virtue of an agreement entered into between the ancestors of the parties about 75 years before the suit, the Dastaki was allowed to deduct Rs. 96 per annum from the amount received by way of pension in order to enable him to maintain the dignity of his office — **Held,** that this agreement was an assignment of future interest in a portion of a pension, and governed by Section 12 — Since an agreement of this kind was rendered void by Section 12 conduct of the plaintiff's predecessor-in-interest in accepting Rs. 15 per annum as his share of the pension, could not adversely affect the plaintiff's right to claim her full share — Evidence Act (1872), Section 115. **1953 Nag LJ 116: AIR 1953 Nag 221 (221) (Pt B) (Pr 7).**

——S. 12 — Compromise decree dividing amount of pension between parties to suit — Validity.

The object of Section 12 of the Pensions Act is to prevent, traffic in pension as it is opposed to public policy. If, therefore, by a compromise decree a division has been made between the parties with respect to the amount of the pension, it would amount to traffic in the pension and will come within the mischief of Section 23 of the Contract Act. Again, by allowing a decree to be passed on consent in a suit, which is not entertainable by a Civil Court, in view of Section 4, Pensions Act, the parties are doing what is forbidden by law, or if permitted, it would defeat the provision of law. Such a compromise decree is unlawful and under Section 12 of the Pensions Act is null and void. **1958 Pat LR 343: ILR 37 Pat 1391: AIR 1959 Pat 17 (20) (Pt B) (Prs 9, 10) (DB).**

——S. 12 — 'Property', meaning of — Provisions of Section 6 of T. P. Act and Sections 11 and 12 of Pensions Act do not derogate from pension being a property, if it otherwise is so. See Constitution of India, Article 226. **ILR (1965) 2 Punj 1.**

SECTION 13

——S. 13 — Four plaintiff's instituting four suits in different Courts claiming reward — Common defendant — Common question of law and fact — Suits should be transferred to one Court. See C. P. Code (1908), Section 24. **AIR 1960 Ker 199.**

PENSIONS RULES

——Pension Rules — Commutation of part of pension — Implications — Implies waiver of commuted portion of pension for rest of pensioner's life.

It is well known that a pension is periodical payment which is made to the pensioner after retirement, the basis being the service rendered by him to the employer and carried with it as a condition of service, the right to receive such payment for the rest of his life. According to the

Pension Rules, a pensioner is entitled to commute a portion and not the whole of his pension and the commuted value of that part of pension is dependent upon the expectation of life of the individual as ascertained by the Medical Board. The rules envisage that when a pensioner is paid a commuted amount which means a lump sum equivalent of a periodical payment for an uncertain duration, i. e., till the end of the life of the pensioner, the pensioner loses the right to receive that periodical payment. Instead of a periodical payment he gets a lump sum and the underlying implication is that by receipt of that amount he waives his right to the periodical payment. It is not the intention of the Rules that the commuted sum has to be set off against that part of the pension which the pensioner would otherwise have received, and that after the sum is so exhausted, he would become entitled to receive the full amount of pension. **(1965) 2 Lab LJ 70: (1965) 1 Mad LJ 382.**

RULE 2

——**R. 2 (2)** — Three month's notice — Notice and order of retirement need not be separate — (Constitution of India, Article 311). See Pensions Act (23 of 1871), Section 1. **AIR 1960 Madh Pra 117 (DB).**

PEOPLE, HOUSE OF

See statutory cross-references under "Constitution of India" and "Elections".

PEOPLE OF INDIA

See Constitution of India, Preamble.

PEPSU ABOLITION OF BISWEDARI ORDINANCE (23 of 2006)

See under "Tenancy Laws".

PEPSU ABOLITION OF OCCCUPANCY TENANT'S TENURE AND SETTLEMENT OF LAND DISPUTES (AMENDMENT) ACT (4 of 2007 BK)

See under "Tenancy Laws".

PEPSU ADMINISTRATION (AMENDMENT) ORDINANCE (13 of 2005 BK)

SECTION 3

——**S. 3 (2)** — Scope — Ordinance does not expressly exclude applicability of Section 4 of the Limitation Act (1908) — Plaintiff is entitled to the benefit of that section, since Section 29 of the Limitation Act (1908), excludes applicability of Section 4 only when a special or local law expressly excluded it. See Limitation Act (1908), Section 4. **AIR 1953 Pepsu 20.**

PEPSU ADMINISTRATION OF EVACUEE PROPERTY ORDINANCE (17 of 2006 BK)

SECTION 2

——**S. 2 (d)** — Administration of Evacuee Property Act (31 of 1950), Sections 8 (2), 16 (1), 57 — Rules under Section 57 — Administration of Evacuee Property (Central) Rules, 1950, Rule 37 — Person and his property ceasing to be evacuee and evacuee property respectively under Pepsu Ordinance (17 of 2006 Bk) — Restoration of property — **Held,** that neither Section 16 nor Section 8 (2) of the Act 31 of 1950 could have any application to the case as the petitioners were not evacuees and their lands were not evacuee property — (Patiala Evacuees (Administration of Property) Ordinance (19 of 2004 Bk), Section 5. See Administration of Evacuee Property Act (31 of 1950), Section 8 (2). **AIR 1956 Pepsu 54.**

SECTION 5

——**S. 5 (2)** — Administration of Evacuee Property Act (31 of 1950), Sections 8 (2), 16 (1), 57 — Rules under Section 57 — Administration of Evacuee Property (Central) Rules, 1950, R. 37 — Person and his property ceasing to be evacuee and evacuee property respectively under Pepsu Ordinance (17 of 2006 Bk) — Restoration of property — **Held,** that neither Section 16 nor Section 8 (2) of the Act 31 of 1950 could have any application to the case as the petitioners were not evacuees and their lands were not evacuee property — (Patiala Evacuees (Administration of Property) Ordinance (19 of 2004 Bk), Section 5. See Administration of Evacuee Property Act (31 of 1950), Section 8 (2). **AIR 1956 Pepsu 54.**

——**S. 5 (2) — 'Any evacuee property' — Meaning — (Words and Phrases).**

The words 'any evacuee property' in sub-section (2) of Section 5 of Pepsu Ordinance 17 of 2006, Bk. are to be interpreted in the light of the definition of evacuee property in Section 2 (d) of that very Ordinance and not in the light of any definition of that term in Section 2 (e) of the previous and repealed Pepsu Ordinance 13 of 2006, (Bk.). **ILR (1956) Pepsu 268: AIR 1956 Pepsu 54 (56) (Pt A) (Pr 6).**

——**S. 5** — Property belonging to Muslim evacuee automatically vests in custodian and continues to so vest — Effect of subsequent notification under Section 7 (1) of Act — Effect of — The mere fact that in 1953 that the notice under Section 7 (1) of the Act was issued for the first time will not have the effect of showing that the property had never vested in him. See Administration of Evacuee Property Act (1950), Section 7. **AIR 1963 Punj 494 (DB).**

SECTION 40

——**S. 40 (2) — Scope of — (Administration of Evacuee Property Ordinance (27 of 1949), Section 55).**

Where the petitioners' lands were evacuee property under Section 2 (e) of the Pepsu Ordinance 13 of 2006 (Bk.) and remained vested in the Custodian as evacuee property but are not evacuee property according to Section 2 (d) of the Pepsu Ordinance (17 of 2006, Bk), the lands do not continue to be evacuee property by virtue of the saving in Section 40 (2). Sub-section (2) of Section 40 makes the application of Pepsu Ordinance No. 17 of 2006, Bk., retrospective from the time when the property of the petitioners was declared evacuee property and that being so, since under Section 2 (d) of this Ordinance the petitioners' lands are not evacuee property those lands cannot be said to remain evacuee property because of the saving in sub-section (2) of Section 40. So far as the repealing of Section 40 of Pepsu Ordinance (17 of 2006, Bk.) is concerned the validity of any order relating to the lands of the petitioners is to be judged according to the provisions of that Ordinance and not according to the provisions of an earlier Ordinance repealed by that Ordinance. **ILR (1956) Pepsu 268: AIR 1956 Pepsu 54 (56) (Pt B) (Pr 6).**

PEPSU ADMINISTRATION OF EVACUEE PROPERTY (SUPPLEMENTARY) ACT (6 of 2007 BK)

SECTION 5

——**S. 5** — Order not revised by Custodian under Section 5 of Pepsu Administration of Evacuee Property (Supplementary) Act (6 of 2007, BK) and order of Claims Officers becoming final — Custodian-General has no power to revise order of Claims Officer under Section 27 of Act of 1950. See Administration of Evacuee Property Act (1950), Section 27. **(1962) 64 Punj LR 1024.**

PEPSU ADMINISTRATION ORDINANCE (1 of 2005 SAMVAT)

SECTION 3

——**S. 3** — Scope and effect of — Agreement between citizen and State before formation of Pepsu about payment of income-tax at concession rate — If abrogated — Acquisition of territory — Relationship between citizens of acquired territory and sovereign of acquiring territory — Covenant between East Punjab States to form Patiala Union — Obligation covenanting States to devolve on Union of Patiala States — Union formed and Raj Pramukh taking over — Covenant is act of State — Ordinance by Raj Pramukh repealing all laws and notifications of covenanting States and applying laws of Patiala State — Agreement between covenanting State and Public Limited Co. in that State where by company given such concession in rates of income-tax — Agreement held not binding on Raj Pramukh — Rates of Income-tax held applicable according to Patiala Act for period subsequent to formation of Union — Union subsequently acceding to Union of India — After accession Indian Income-tax Act applied — Agreement being abrogated before accession, question of, whether there was breach of fundamental rights did not arise. Dalmia Dadri Cement Co. Ltd. v. Commr. of Income-tax, **1958 SCJ 1041: (1958) 34 ITR 514: AIR 1958 SC 816 (823, 824, 825) (Prs 13, 14 and 17).**

——**S. 3** — Constitution of India, Article 363 — Exemption from income-tax under agreement with one of Covenanting Rulers — Binding effect on Pepsu State discussed — (Patiala Income-tax Act (7 of 2001), Section 1) — (Pepsu General Provisions (Administration) Ordinance (16 of 2005), Section 3). See Constitution of India, Article 363. **AIR 1955 Pepsu 3 (DB).**

——**S. 3 — Scope and effect of — Personal grant by Ruler of Indian State — Subsequent repudiation by Pepsu State at the merger — If Act of State — Jurisdiction of Court to question — Law.**

The Ruler of Nabha State made a rent free grant of Malwa House to the appellant, in the exercise of his sovereign powers. The Patiala and East Punjab States Union was formed on 20th August, 1948 by the merger of State of Nabha. In 1952 the new State of Pepsu repudiated the grant. On the question whether it could be challenged in Municipal Courts:

Held, that so long as it emanated from the Sovereign power, the grant was in item of personal law which was liable to be superseded by the laws of the new State of Pepsu by virtue of Pepsu Administration Ordinance 1 of Smt. 2005:

Held, further that the repudiation of the grant could cease to be justiciable only if it could be regarded as an act of State. The repudiation had taken place after the formation of the State of Pepsu. The repudiation could not therefore, be justified as an act of State and the repudiation could be challenged in the Municipal Courts: 1959 SCJ 705; (1954) 2 MLJ 369; AIR 1954 SC 447, Rel. on. **ILR (1959) Punj 2341: AIR 1960 Punj 644 (645) (Prs 4, 5).**

PEPSU AYURVEDIC AND UNANI PRACTITIONERS ACT (12 of 2008 BK)

SECTION 3

——**Ss. 3 (1) and 14 (1)** — Registrar of Board created under Act is not civil servant under Government and can be removed by Government at its pleasure — Article 311, has no application — (Constitution of India, Article 311). **AIR 1955 NUC (Pepsu) 1601.**

SECTION 14

——**Ss. 14 (1) and 3 (1)** — Registrar of Board created under Act is not civil servant under Government and can be removed by Government at its pleasure — Article 311, has no application — (Constitution of India, Article 311). **AIR 1955 NUC (Pepsu) 1601.**

PEPSU CIVIL SERVICE (CLASSIFICATION, CONTROL AND APPEAL) RULES (1952)

RULE 6-A

——**R. 6-A** — Scope — Rule 6-A added on 26-11-1953, does not expressly put an end or repeal, Rule 24 — Rule 6-A is in no way repugnant to or in contradiction to Rule 24. See Constitution of India, Article 309. **AIR 1954 Pepsu 98.**

RULE 12

——**Part II, R. 12** — Dismissal of employee on contingency staff — Conditions of service — No right to notice upon termination. See Constitution of India, Article 311. **AIR 1955 Pepsu 25.**

RULE 13

——**Part II, R. 13** — Dismissal of employee on contingency staff — Conditions of service — No right to notice upon termination. See Constitution of India, Article 311. **AIR 1955 Pepsu 25.**

RULE 22

——**Rr. 22, 24 and 25** — Scope — Proclamation by President on taking over administration — Effect on rules — Rules are not abrogated by Proclamation of President taking over administration of State of Pepsu. See Constitution of India, Article 309. **AIR 1954 Pepsu 98.**

RULE 24

——**R. 24** — Scope — If repealed by Rule 6-A — Rule 6-A, added on 26th November, 1953, does not expressly put an end or repeal, Rule 24 — Rule 6-A is in no way repugnant to or in contradiction to Rule 24. See Constitution of India, Article 309. **AIR 1954 Pepsu 98.**

RULE 25

——**R. 25** — Misbehaviour of Civil Servant — Departmental inquiry or criminal trial — Choice lies with Government. See Constitution of India, Article 311 (2), Proviso (a). **AIR 1955 Pepsu 97.**

——**R. 25** — Constitution of India, Article 309 — Rules are not abrogated by Proclamation of President taking over administration of State.

See Constitution of India, Article 309. **AIR 1954 Pepsu 98.**

PEPSU CIVIL SERVICES (SAFEGUARDING OF NATIONAL SECURITY) RULES (1954)

——Constitution of India, Article 14 — Equality before law — Meaning of — Reasonable classification — Applicability — Rules not hit by Article — (Words and Phrases). See Constitution of India, Article 14. **AIR 1956 Pepsu 19.**

——Constitution of India, Articles 309 and 310 — Right to be appointed or retained in service is not fundamental right — Public servant engaging in subversive activities — Rule that he will not be retained in service — Constitutionality of rule — Satisfaction of Governor or Rajpramukh — There would be nothing illegal or unconstitutional in such a rule. See Constitution of India, Article 309. **AIR 1956 Pepsu 19.**

RULE 3

——R. 3 (iii) — 'Associated with others in subversive activities' — (Words and Phrases).

The plain and simple meaning of this part of the rule is that the person be associated with others 'in their subversive activities'; his association with persons who are engaged in subversive activities alone would not be sufficient; it is his association in the subversive activities of theirs that is made punishable. A person cannot be punished under this rule merely because he meets, dines or is on visiting terms with persons who are engaged in subversive activities. An order clearly showing that the guilt found to be proved against the petitioner was that he had been associating with Communist and Kisan Sabha workers who were engaged in subversive activities is based upon a wrong interpretation of the rule. **ILR (1956) Pepsu 246: AIR 1956 Pepsu 19 (24, 26) (Pt D) (Prs 17, 30).**

——R. 3 — Satisfaction of Rajpramukh — Grounds of satisfaction — Court's power — (Constitution of India, Article 226).

The 'satisfaction' in Rule 3 is that of the Rajpramukh and it is not open to Court to substitute its own judgment for that of the State Government. Sufficiency or adequacy of facts on which the satisfaction is based is not a question that can be agitated in Court. But the Court is entitled to see whether the grounds have any relevancy to the requirements of the rule or fall within its ambit. The Court can also examine the material in order to ascertain whether the conclusion reached by the State Government is one which could possibly and reasonably be reached. **ILR (1956) Pepsu 246: AIR 1956 Pepsu 19 (26) (Pt E) (Pr 31).**

——R. 3 — Order under — Mala fides — (Constitution of India, Article 226).

Even though no dishonest motives can be imputed, the order may yet be mala fide if it is bad for want of necessary care and caution, or is passed for some purpose other than the one for which it could have been made. **ILR (1956) Pepsu 246: AIR 1956 Pepsu 19 (26) (Pt F) (Pr 33).**

PEPSU COURT OF WARDS ACT (1 of 2008 BK)

SECTION 5

——S. 5 (2) (d) — Constitutionality — The Law enacted in Section 5 (2) (d) is not saved by Article 19 (5) or by Article 31-A — It manifestly infringes the fundamental rights of the landholders and, therefore, is void to that extent. See Constitution of India, Article 19 (1) (f). **AIR 1957 Pepsu 5 (DB).**

——Ss. 5 and 14 — Release of property by Revenue Minister — Order, is no offence under Section 5 (1) (d), Prevention of Corruption Act. AIR 1955 NUC (Pepsu) 730.

——S. 5 (2) — Constitution of India, Arts. 15, 19 (1) (f) — Legislation for taking over management of estate on sole subjective satisfaction of Government or its officer — Discrimination against female on ground of sex — Ultra vires Articles 15 and 19 (1) (f). See Constitution of India, Article 15. **AIR 1963 Punj 9 (FB).**

SECTION 16

——S. 16 — Constitutional validity — Section 16 is unconstitutional as it imposes unreasonable restrictions on the rights of landholders to dispose of their property. See Constitution of India, Article 19 (1) (f). **AIR 1957 Pepsu 5 (DB).**

SECTION 44

——S. 44 — Release of Property by Revenue Minister — Order is no offence under Section 5 (1) (d), Prevention of Corruption Act. See Pepsu Court of Wards Act (1 of 2008, BK), Section 5. **AIR 1955 NUC (Pepsu) 730.**

PEPSU EVACUEES (ADMINISTRATION OF PROPERTY) ORDINANCE (13 of 2006 BK) (1949)

——Repeal of an Act or Ordinance — Whenever any Act repeals any enactment unless a different intention appears the repeal shall not apart from any other matters affect any legal proceeding or remedy in respect of any such right privilege obligation etc., and such legal proceeding or remedy may be continued as if the repealing Act had not been passed. See General Clauses Act (1897), Section 6. **(1962) 64 Punj LR 1024.**

SECTION 2

——S. 2 (d) — Evacuee holding land by virtue of sale in his favour — Land is evacuee property. AIR 1953 Pepsu 48 (48) (Pt B) (Pr 5).

SECTION 3

——S. 3 (1) — Retrospective operation — The language of Section 3 (1) leaves no doubt that it was meant to take away the jurisdiction of the Civil Courts to decide the particular matters even though they were involved in cases which had already been instituted — It is within the competency of the legisalture to give retrospective effect to a statute and that has been expressly done in Section 3 (1). AIR 1953 Pepsu 48 (48) (Pt A) (Pr 4).

——S. 3 (1) — Scope — Suit for possession of land sold to defendant by plaintiff's father — Defendant migrating to Pakistan during pendency of suit — Plaintiff disputing defendant's right to retain possession of land on basis of sale — Adjudication upon rights or interests of defendant in land necessary for disposal of suit — Suit held fell under Section 3 (1) and Civil Court had no jurisdiction to hear it. AIR 1953 Pepsu 48 (48) (Pt C) (Pr 5).

SECTION 10

——S. 10 (4) and (7) — Scope and effect of — Under Section 10 (7) of the Ordinance orders

passed by claims officers under Ordinance 9 of 2004 could be deemed to have been passed under Sec. 10 (4) of Ordinance 13 of 2006 only for the purpose of appeal and revision. See Administration of Evacuee Property Act (1950), Section 58 (3). **AIR 1961 SC 1425.**

SECTION 14

——**S. 14 (2) (3)** — Surrender of original lease of evacuee property in favour of Custodian and new lease — Expiry of new lease — Lessee holding over — Notification under Section 14 (2) — Effect of — Revival of lessee rights by subsequent Ordinances replacing Ordinance 13 of 2006 — Position of legal representative of original lessee stated — (Administration of Evacuee Property Act (1950), Section 9) — (T. P. Act (1882), Sections 111 and 106). **AIR 1953 Pepsu 26 (27 to 30) (Prs 3 to 6, 8, 13 to 17) (DB).**

——**S. 14 (2) and (3) — Cancellation of allotment by Deputy Custodian — Validity — Notification No. 1, Dated 5-7-1949, by Custodian — Interpretation of — Order by Deputy Custodian made without jurisdiction — Confirmation of by Custodian — Effect.**

The Deputy Custodian had no power to cancel an allotment under Section 14 (2) or (3) unless he had been authorised by the Custodian in this behalf. The authority given under the Notification No. 1, dated 5-7-1949, by the Custodian, was confined to the Deputy Commissioners and Assistant Custodians and no authority whatsoever was given to the Deputy Custodian. Besides, it was an authority merely to get the premises vacated by the allottees or lessees whose allotments or leases stood cancelled by virtue of the Notification. Hence, an order of cancellation of allotment made by the Deputy Custodian must be held to be without jurisdiction and, therefore, illegal.

The fact that the Deputy Custodian's order was confirmed on appeal by the Custodian could not improve matters in any way. The proceedings taken by the Deputy Custodian being without jurisdiction, and, therefore, void, it was not within the powers of the Custodian to validate them. **3 Pepsu LR 195: AIR 1952 Pepsu 115 (117, 118) (Pt A) (Prs 8, 10) (DB).**

PEPSU GENERAL PROVISIONS (ADMINISTRATION) ORDINANCE (16 of 2006 BK)

SECTION 3

●——**S. 3 — Scope — Agreement between citizen and State about payments of income-tax at concession rate — Effect of after formation of State — If abrogated.**

Held, agreement being abrogated before accession, question of whether there was breach of fundamental rights did not arise. Dalmia Dadri Cement Co. Ltd. v. Commr. of Income-tax, **(1958) 34 ITR 514: 1958 SCJ 1041: AIR 1958 SC 816 (823, 824, 825) (Prs 13, 14, 17).**

——**S. 3 — All Laws and rules — Ijlas-i-Khas Order — (Constitution of India, Article 372) — (Words and Phrases — 'Law').**

The Ijlas-i-Khas Order was merely an executive order issued by the Executive Head of the State with a view to lay down certain guiding principles in the matters of determining seniority of its subordinate officers. The mere fact that the Executive Head also enjoyed legislative powers for the State does not lead to the conclusion that every order passed by him, in whatever capacity, would have the status of 'law' or 'a provision having the force of law'. It is the nature of the order that would determine its source and the capacity in which it was made. The name assigned to it may not be very much material, but the purpose for which the order was made may be regarded as one of the decisive factors. Whatever might have been its significance in the primitive legal systems, in the modern developed system of societies, the 'law' is of statutory origin and is embodied in special enactments. Viewed on these principles the Order itself makes it abundantly clear that it is not possible to give the status of a 'law' to the Order.

As the Order or the Rules framed by it did neither amount to 'law', or 'Rules framed thereunder' nor 'a provision having the force of law' but was merely an executive Order, Section 3 (1) would have no application and the Rules could at any time be amended, superseded or annulled, as the exigency demanded, by the Rajpramukh, to the Executive Head of the Pepsu State. **ILR (1955) Patiala 703: AIR 1956 Pepsu 26 (28) (Pt A) (Pr 6).**

——**S. 3 (1)** — Effect on rights granted by sovereign ruler of acceding State before surrender of sovereignty and cession of territory to the new State of Pepsu. See Constitution of India, Article 51. **AIR 1955 Pepsu 20.**

——**S. 3** — No Right of Letters Patent appeal in suit when action was commenced — Right created by change in law during pendency of appeal — Suitor is governed by law as it stood when suit was filed and is not entitled to file Letters Patent Appeal — (Pepsu High Court Ordinance (2 of 2005), Section 52) — (Civil P. C. (1908), Preamble and Section 96). **AIR 1955 NUC (Pepsu) 2504 (DB).**

——**S. 3 (1), Proviso** — Pepsu Judicature Ordinance (10 of 2005, Smt.), Ss. 92 (1) and 116— Application under Jind Law transferred to Sub-Judge's Court under Ordinance 10 — Appeal from order lies to District Judge and not to High Court. See Pepsu Judicature Ordinance (10 of 2005 Smt.), Section 92 (1). **AIR 1952 Pepsu 8 (DB).**

——**S. 3 — Decree of Kapurthala State Court sought to be executed after enactment of Ordinance — Law applicable — Power of executing Court to grant instalments — Civil P. C. (1908), Order 21, Rule 11.**

Where a money decree by the erstwhile Kapurthala State Court was sought to be executed after the Pepsu Ordinance 16 of 2005 had come into force the law of the Patiala State must be applied and the executing Court has no power to modify the decree by granting instalments. **('50) 2 Pepsu LR 366: AIR 1951 Pepsu 86 (2) (87) (Pt A) (Pr 3).**

——**S. 3** — Suit — Meaning — The suit ends with the decree and a different process starts when an execution application is instituted — Words and Phrases — Suit. **('50) 2 Pepsu LR 366: AIR 1951 Pepsu 86 (2) (87) (Pt B) (Pr 3).**

——**Ss. 3 (1) and 14** — Premature retirement on pension of Lt. Colonel in contravention of regulation — Regulations 'existing law' by virtue of Section 3 (1) Pepsu General Provisions (Administrative) Ordinance — Firman-i-shahi D/- 2-1-1940 of Patiala State not barring suit in Municipal Court by member of Armed Services against termination of service — Suit not being expressly barred continues to be maintainable after merger of Patiala in Pepsu State — Pepsu General Provisions (Administration) Ordinance, Section 14 no bar to suit — Regulation 39 is

of mandatory nature — Order of retirement in contravention thereof held ultra vires. See Patiala State Forces Regulation (1930), Regulation 39. **1965 Cur LJ 269: ILR (1965) 1 Punj 752.**

SECTION 4

——S. 4 — Scope.

Section 4, did not mean to guarantee the continuance of service, nor did it amount to the exercise of only one of the options of Article 15 of the covenant which was entered into to form Pepsu. Moreover, the section has two riders placed on its operation. The arrangement was to continue 'save as otherwise provided by any competent authority' or 'unless otherwise directed by the Government of the Union'. **ILR (1955) Pepsu 327: AIR 1955 Pepsu 65 (68) (Pt D) (Pr 12) (DB).**

——S. 4 — Police officers appointed by various authorities in integrated States — Dismissal of after Constitution — Article 311, applies — (Constitution of India, Article 311). **AIR 1955 NUC (Pepsu) 2505 (DB).**

SECTION 10

——S. 10 (3) — Rules of business under, Rr. 5, 7 and 8 — Order of detention passed under Preventive Detention Act by the Minister and authenticated by Deputy Secretary and purported to be issued on behalf of His Highness the Raj Pramukh cannot be held to be illegal merely because the matter did not go to Raj Pramukh for consideration — Power to pass an order under the Act can be delegated by the Raj Pramukh to any of his ministers under the Rules of business and it is not necessary that Raj Pramukh should be personally satisfied as to necessity for passing order of detention. See Public Safety — Preventive Detention Act (4 of 1950), Section 3 (1). **52 Cri LJ 1215: AIR 1951 Pepsu 147.**

SECTION 14

——S. 14 — Constitution of India, Articles 320 (3) (c) and 311 (ii) — Pepsu Public Service Commission Ordinance (6 of 2006), Sections 8 and 9 (1) (c) — Regulations under Section 8 of Ordinance 6 of 2006, Regulation 5 — Reduction in rank of civil servant — Public Service Commission has to be consulted — Civil Servant has to be given opportunity of showing cause against reduction — Provisions are mandatory. See Constitution of India, Article 320 (3) (c). **AIR 1952 Pepsu 152 (DB).**

PEPSU GENERAL SALES TAX ORDINANCE (33 of 2006 BK)

See under Sales Tax.

PEPSU HIGH COURT ORDINANCE (2 of 2005 BK)

SECTION 52

——S. 52 — No right of Letters Patent Appeal in suit when action was commenced — Right created by change in law during pendency of appeal — Suitor is governed by law as it stood when suit was filed and is not entitled to file Letters Patent Appeal. See Pepsu General Provisions (Administration) Ordinance (16 of 2006 BK), Section 3. **AIR 1955 NUC (Pepsu) 2504 (DB).**

PEPSU HIGH COURT RULES

See under High Court Rules and Orders.

PEPSU HOLDINGS (CONSOLIDATION AND PREVENTION OF FRAGMENTATION) ACT (5 of 2007 BK) (1950)

See under "Tenancy Laws".

PEPSU JAIL MANUAL

RULE 455

——Rule 455 (b) — Imprisonment in two cases — Appeal in one — Setting aside of imprisonment — Effect — Criminal P. C. (1898), S 397.

The rule does not lay down the correct law. When a sentence awarded to a person in a case is set aside by a higher Court on appeal or revision, the effect is that it is washed away completely as if it was never awarded. So when a man is awarded imprisonment in two cases and the imprisonment in one is set aside the time which he spent in jail upto the date his imprisonment was set aside, must be credited to the imprisonment to which he was subjected in the second case. AIR 1942 Bom 342; AIR 1947 Sind 63, Rel. on; AIR 1932 Sind 159, Dissent. **ILR (1952) Patiala 12: AIR 1952 Pepsu 2 (3) (Pt B) (Pr 7) (DB).**

PEPSU JUDICATURE ORDINANCE (10 of 2005 BK)

SECTION 5

●——S. 5 — Law laid down by Judicial Committee of Union and by Supreme Court — Preference — Constitution of India, Art. 241.

If in a certain matter the Judicial Committee of the Union has laid down the law but that matter has not gone before the Supreme Court and consequently no occasion has arisen for that Court to lay down the law on the same point Section 5 of the Judicature Ordinance must be given effect to and the law laid down by the Judicial Committee must be followed by all the Courts in the Union, including the High Court. It is only when the law laid down by the Supreme Court on a certain point is different from that laid down by the Judicial Committee that Article 241 of the Constitution will come into operation and the former law will be preferred to the latter. Observations of the Judicial Committee which are of the nature of an obiter dictum, though entitled to great respect strictly speaking, they do not amount to the "law laid down" . Santu v. Sohan Lal. **2 Pepsu LR 245: AIR 1951 Pepsu 33 (36) (Pt B) (Pr 9) (FB).**

SECTION 25

●——Ss. 25, 116 — Scope — Letters Patent Appeal — Certificate of Judicial Committee — Neeessity — If make Ordinance retrospective.

Where an application for amendment of a decree was made on 2nd February, 1950 (no appeal being provided against the order amending or refusing to amend the decree under the C. P. Code) it cannot be said that the amendment is a continuation of the suit or proceedings therein. It is in the nature of an independent proceeding, though connected with the order of which amendment is sought. Such a proceeding is governed by the law prevailing on its date which admittedly was Pepsu Ordinance (10 of 2005), Section 52 of which makes a certificate of the single Judge whose judgment is sought to be appealed against, necessary for filing Letters Patent Appeal. It cannot be claimed that the Patiala

States Judicature Farman E. Shahi 1999, Bikarmi, under which no certificate is necessary applies.

Ordinance X has no retrospective effect and where the order sought to be appealed against was made on 18th January, 1949, and the appeal preferred on 19th February, 1940, the Patiala States Judicature Farman 1999, was in force on that date and the appellant had a right of appeal without a certificate and such right is not taken away by Ordinance (10 of 2005) (1948-1949). It cannot be said that Section 116 of the Ordinance contained an express provision to the contrary. Ganpat Rai Hira Lal v. Aggarwal Chamber of Commerce, Ltd., **1953 SCA 1: (1953) SCR 752: 66 LW 1: ILR (1953) Patiala 9: (1952) SCJ 564: AIR 1952 SC 409 (410) (Pt B) (Pr 9).**

SECTION 33

■——**S. 33** — Contempt of subordinate Courts — High Court's power to punish. See Contempt of Courts Act (1926), Section 2 (1). **51 Cri LJ 1219: AIR 1950 Pepsu 9 (SB).**

SECTION 49

——**Ss. 49 (1), 92 (1)** — Property sold in execution — Suit for possession valued at figure below Rs. 5000 under Section 7 (iv) (c), Court-fees Act — Court holding suit to be valued under Section 7 (v) — Appeal contesting decision — Forum of appeal should be on basis of original valuation and not on that put by Court — Appeal held lay to District Judge and not High Court under Section 92 (1) — (Suits Valuation Act (1887), Section 8). See Pepsu Judicature Ordinance (2005), Section 92 (1). **AIR 1955 NUC (Pepsu) 5706.**

——S. 49 (2) — Right of appeal when accrues — Section providing for second appeal on facts — Repeal of — Effect — (Code of Civil Procedure (Amendment) Act (1951), Section 20) — (C. P. Code (1908), Sections 100 and 101).

A right of appeal is a substantive right and accrues at the time of the suit. It follows that a second appeal arising out of a suit instituted on and after 1-4-51, the date from which C. P. C., was made applicable to Pepsu by Code of Civil Procedure (Amendment) Act repealing Sec. 49 (2) of the Ordinance, would not be competent on a question of fact, while a second appeal arising out of a suit instituted before 1-4-1951 would be governed by the law in force on the date of the suit in each case. **60 Punj LR 528: ILR (1958) Punj 2258: AIR 1959 Punj 123 (125, 126) (Pt A) (Prs 3, 6) (DB).**

——S. 49 — Repeal by Code of Civil Procedure (Amendment) Act — Extent of repeal — Code of Civil Procedure (Amendment) Act (1951), Section 20).

The Code of Civil Procedure (Amendment) Act did not repeal every provision contained in the Pepsu Ordinance but only repealed such laws as corresponded to the provisions of the Civil Procedure Code and in respect of Section 49 of the Pepsu Ordinance everything was not repealed. The only provision in Section 49 which corresponded to Sections 100 and 101 of the Code of Civil Procedure was contained in sub-section (2) and it is that sub-section which stood repealed by the amending Act. **60 Punj LR 528: ILR (1958) Punj 2258: AIR 1959 Punj 123 (126) (Pt B) (Pr 4) (DB).**

SECTION 51

■——**S. 51** — Revision — Power of Single Judge to enhance sentence to more than 7 years — Criminal P. C. (1898), Section 439. See Pepsu Judicature Ordinance (10 of 2005), Section 54, Proviso (b). **52 Cri LJ 1060: AIR 1951 Pepsu 120 (FB).**

SECTION 52

■——**S. 52** — C. P. Code (1908), Section 152 — Amendment proceedings — Nature of — Proceedings for amendment of order of Single Judge of Pepsu High Court filed after Pepsu Ordinance (10 of 2005, Smt.) came into force — Appeal — Certificate of fitness — Necessity — **Held,** that the proceedings were governed by the Pepsu Ordinance 10 of 2005 and that no appeal under Section 52 of the Ordinance lay from the order of the Single Judge dismissing the amendment petition to a Division Bench without a certificate that the case was a fit one for appeal. See C. P. C. (1908), Section 152. **AIR 1952 SC 409.**

■——**Ss. 52, 116** — Right of appeal vested under Patiala States Judicature Farman 1999 (Sm) — Not taken away by Pepsu Ordinance (10 of 2005) — (Interpretation of Statutes — Retrospective effect). AIR 1951 Pepsu 39, **Reversed.** See Pepsu Judicature Ordinance (10 of 2005, Sm), Section 116. **AIR 1952 SC 409.**

——**S. 52** — Oral application for certificate for appeal to Supreme Court, that the case involves interpretation of the Constitution is maintainable. **ILR (1955) Pepsu 136: AIR 1954 Pepsu 156 (158) (Pt B) (Pr 6).**

——**S. 52** — Scope — Certificate of fitness declined by Pepsu High Court — Appeal filed before Punjab High Court — Right of appeal not revived — Appeal held not maintainable. See States Reorganisation Act (1956), Section 63. **AIR 1960 Punj 29 (DB).**

——S. 52, Proviso 2 — Decision of Single Judge in revision — Appeal — Typographical omission in drafting — Court's power to take notice of mistake — (Interpretation of Statutes — Mistake in drafting) — Interpretation of Statutes.

The law in Patiala State (Patiala Judicature Farman 1999, Section 44) which was to be the law for the State of Pepsu, did not provide for an appeal against a judgment, decree or order made by a Single Judge in the exercise of revisional jurisdiction of the High Court. The High Court of Pepsu was established by the Pepsu High Court Ordinance (No. 2 of 2005, Bk). Section 21 of this Ordinance also did not provide for such appeal. The Patiala Judicature Farman 1999 and the Pepsu High Court Ordinance (No. 2 of 2005, Bk.), were repealed by Section 119 of the Pepsu Judicature Ordinance No. 10 of 2005, Bk., which came into force on 25-10-1948. The second proviso of Section 52 of this Ordinance is exactly the same as the second proviso of Section 44 of the Patiala Judicature Farman, 1999, and Section 21 (4) of the Pepsu High Court Ordinance (No. 2 of 2005, Bk.), except for the omission of the phrase "in the exercise of the revisional jurisdiction or". An attempt was always made to bring the laws of erstwhile State of Patiala and those of Patiala and the East Punjab State Union in conformity with the laws in force in the Punjab. The powers of the High Court in this connection in the earlier enactment of the Patiala State and that of the State of Pepsu were the same as those granted by Cl. (10) of the Letters Patent of the Lahore High Court.

Omission of the phrase "in exercise of the revisional jurisdiction or" in the second proviso of Section 52 of the Pepsu Judicature Ordinance seems to be due to some accidental mistake of the draftsman. A perusal of the relevant records

from the law Department leaves no doubt that it was purely an accidental omission, occasioned by a typographical mistake. Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used: AIR 1955 SC 830, Rel. on. Consequently an appeal under Section 52 of Ordinance No. 10 of 2005, Bk., against the decision of a Single Judge in the exercise of revisional jurisdiction of the Pepsu High Court would not be competent. **ILR (1958) Punj 2009: AIR 1959 Punj 601 (602, 603) (Prs 4 to 10) (DB).**

——S. 52 — Appeal — Limitation — Pepsu High Court Rules, Rule 6 — Retrospective effect — (Patiala Judicature Farman (1999), Clauses 9 (D) and 44) — (Interpretation of Statutes).

It is an accepted proposition of law that the rule of limiation applicable to a suit is that which is in force at the time the suit is brought. AIR 1937 Lah 9, Rel. on. It is of course within the competence of the rule-making power to to promulgate a new rule of limitation or to change the period of limitation previously fixed, but in the absence of express language to the contrary the new rule must be presumed to operate prospectively and to apply only to cases arising subsequent to its promulgation. It will be given a retrospective operation only if it can be established that it was clearly the intention of the rule-making power that it should so operate. **59 Punj LR 475: ILR (1957) Punj 1719: AIR 1957 Punj 317 (319) (Pt A) (Pr 8) (DB).**

SECTION 54

——Ss. 54, Proviso, Clause (b) and 51 — Revision — Power of Single Judge to enhance sentence to more than 7 years — Cr. P. C. (1898), S. 439.

A Single Judge while accepting a revision petition arising out of a case in which the accused is awarded imprisonment for seven years or less, is competent to enhance the sentence to more than seven years imprisonment, but not to transportation for life or death.

If in a particular case a Single Judge hearing a revision petition be of the opinion that it is desirable that it would be heard by a larger Bench it is open to him to move the Chief Justice to send the case to a larger Bench. Lal Singh v. State, **52 Cri LJ 1060: 2 Pepsu LR 346: AIR 1951 Pepsu 120 (121) (Pr 8) (FB).**

SECTION 60

——S. 60 — Appeal under Pepsu Rent Restriction Ordinance instituted before proper authority — Hearing by Additional Deputy Commissioner not invested with jurisdiction — Effect — **Held,** that there was want of initial and total jurisdiction in the Additional Deputy Commissioner to hear the appeal. See Houses and Rents — Pepsu Urban Rent Restriction Ordinance (8 of 2006, B K), Section 16. **AIR 1954 Pepsu 190.**

——S. 60 — Retrospective operation.

Section 60 of the Pepsu Ordinance (10 of 2005) which gave the Pepsu High Court power to issue writs of mandamus, prohibition, etc., is not retrospective. **ILR (1953) Patiala 651: AIR 1954 Pepsu 159 (159) (Pt B) (Pr 3).**

——S. 60 — Power of High Court to issue directions — Constitution of India, Article 226.

Power is given by Section 60 to the High Court to issue directions or orders in the nature of writs of habeas corpus, etc., or any one of them, for the enforcement of rights as are given by any law for the time being in force. Therefore as the right of the voters and the candidate for Municipal Elections is a right given by the Municipal Act the High Court has the power to grant proper relief to the petitioners petitioning the High Court against an illegal order of the Deputy Commissioner stopping the elections and polling sine die. This power is irrespective of the power given by Article 226 of the Constitution. **AIR 1951 Pepsu 141 (146) (Pt C) (Pr 14) (DB).**

——S. 60 — The relief claimed under a petition under Section 60 and Article 226 is discretionary and will not be granted where the order complained against is unjust and no wrong has been to the petitioner. See Constitution of India, Article 226. **('51) 3 Pepsu LR 266.**

——S. 60 — Where there is inordinate delay in making the application, the Court may in its discretion reject the application. See Constitution of India, Article 225. **(1950) 2 Pepsu LR 443.**

SECTION 68

——S. 68, Proviso — Grant of certificate and filing of L. P. appeal under Section 52 — Limitation — Rules 1 and 6 framed under Section 53 of Patiala State Judicature Farman — Applicability.

The limitation prescribed by Rules 1 and 6 framed under Section 53 of the Patiala State Judicature Farman, applies for the purpose of granting a certificate and for filing a Letters Patent appeal under Section 52 of Ordinance (10 of 2005), by reason of the proviso to Section 68 of the Ordinance. **AIR 1952 Pepsu 36 (37) (Pt A) (Pr 4) (DB).**

——S. 68, Proviso — Certificate and Appeal under Clause 52 — Applicability of Rules 1, 6 made under Clause 53 of Patiala State Judicature Farman (1999).

Clauses 44 and 53 fell under the second part of the Patiala Judicature Farman and Clauses 52 and 68 of the Ordinance No. 10 are both included in its third part. It, therefore, necessarily follows that rules framed for the purposes of Clause 44 of the Judicature Farman, would be applicable to Clause 52 of the Ordinance. The plain meaning of the proviso is that Clause 52 of Ordinance No. 10 of 2005 is to be read in place of 'Clause 44 of the Patiala Judicature Farman, 1999" when these words are used in Rules 1 and 6. The rules framed under the Farman remained in force for the purpose of getting a certificate and for filing a letters patent appeal under Clause 52 of Ordinance No. 10 of 2005. **3 Pepsu LR 718: AIR 1952 Pepsu 36 (37, 38) (Pt B) (Prs 3, 5) (DB).**

——S. 68 — Letters Patent Appeal — Ex parte grant of certificate — Validity, if can be questioned in appeal.

An ex parte grant of a certificate for a Letters Patent Appeal cannot preclude the respondent from raising the objection in the appeal that the application on which it was granted was not presented within the prescribed period and therefore the certificate was not valid. **3 Pepsu LR 365: AIR 1951 Pepsu 132 (133) (Pt A) (Pr 4) (DB).**

SECTION 76

——S. 76 — The word 'business' in the section should not be interpreted in a narrower or restricted sense — It includes all work pending before the District Judge — Principal Civil Court

of original civil jurisdiction — Suit under Section 92 C. P. C., instituted in Court of District Judge — District Judge transferring it to Additional District Judge — Latter has jurisdiction to dispose it in the same manner as the District Judge. AIR 1959 Punj 50, **Overruled.** See C. P. Code (1908), Section 24. **AIR 1965 Punj 472 (FB).**

SECTION 82

——Ss. 82 and 107 — Fixing of local limits of jurisdiction by implication.

Though in the absence of a clear Notification by the High Court laying down the local limits of jurisdiction of subordinate Civil Court it can be urged that the Courts are in a difficulty and cannot very well understand what the local limits of their jurisdiction are, since the circular letter No. 5125 of the High Court, dated 19-3-2006 refers to the delimitation effected by Schedule attached to Ordinance No. 4 of 2005 it can be said that by implication the High Court fixed the local limits of jurisdiction of Civil Courts in accordance with that delimitation and by virtue of Section 107 of the Ordinance each Sub-Judge when invested with criminal powers had jurisdiction to hear and try criminal cases within the respective area of his civil jurisdiction. **1953 Cri LJ 1375: ILR (1952) Pepsu 172: AIR 1953 Pepsu 143 (144) (Pr 3).**

SECTION 92

——Ss. 92 (1) and 49 (1) — Property sold in execution — Suit for possession valued at figure below Rs. 5,000 under Section 7 (iv) (c), Court-Fees Act — Court holding suit to be valued under Section 7 (v) — Appeal contesting decision — Forum of appeal should be on basis of original valuation and not on that put by Court — Appeal held lay to District Judge and not High Court under Section 92 (1) — (Suits Valuation Act (1887), Section 8). **AIR 1955 NUC (Pepsu) 5706.**

——Ss. 92 (1), 116 — Pepsu (General Provisions) Ordinance (16 of 2005), Section 3 (1), Proviso — Application under Jind law transferred to Sub-Judge's Court under Ordinance 10 — Appeal from order lies to District Judge and not to High Court.

Ordinance 10 of 2005 did not give or create a right of action but only provided the procedure to be adopted, and the jurisdiction to be exercised, by the different Courts in the Pepsu Union. The question of forum for a particular action and the jurisdiction of a particular Court are matters of procedure and have nothing to do with the substantive rights of the parties to the action. A party aggrieved by an order passed after the promulgation of the new law would not have a right to insist that his appeal should be heard by the Court which was competent to hear it under the old law, even though that Court has been deprived of the jurisdiction to hear the appeal or has become extinct.

Thus an appeal from an order dismissing an application under a special local law of the Jind State, sanction to sell certain land for Rs. 2,500 which was transferred to a sub-Judge's Court for trial from the Court of the District Judge under Section 80 of the Ordinance 10 of 2005, lies to the District Judge and not to the High Court. The Court of the District Judge would, for the purposes of these cases, be a Court of the status of the High Court of the erstwhile Jind State.

The same result would follow from the Proviso to Section 3 (1) of the Ordinance 16 of 2005, where the appeal is not pending on the appointed date but is filed long after it. The appeal is governed by the Law of the Union and not by the repealed law of the particular State 2 Pepsu LR 366, AIR 1950 Pepsu 43, Rel on.

Even if it be conceded that the right to file an appeal includes also the right to file it in a particular Court and the question of forum is, therefore, to be determined by the law that existed at the time the case was started and not by the law that exists at the time the order from which an appeal is sought to be preferred is made it cannot be disputed that the legislation can take away that right or modify it by amending the law and that Section 116 of the Ordinance 10 of 2005 is such an express provisions by which the Legislature has taken away the right to appeal to the High Court under the old law of the State : Civ. App. No. 493 of 2005, dated 25-4-1950, Rel. on. **3 Pepsu LR 566: AIR 1952 Pepsu 8 (9, 10) (Pt A) (Prs 3, 4, 6) (DB).**

——Ss. 92, 49 — Appeal against decree of Sub-Judge, 1st Class.

Where a suit for recovery of Rs. 5400 is decided by the Sub-Judge, 1st Class, Kapurthala under Ordinance, 10 of 2005, the appeal lies to the High Court and not to the District Judge. **AIR 1950 Pepsu 43 (43, 44) (Pt A) (Pr 1) (DB).**

SECTION 107

——S. 107 — Fixing of local limits of jurisdiction by implication — Since the Circular Letter No. 5125 of the High Court Dated 19-3-2006 refers to delimitation effected by Schedule attached to Ordinance No. 4 of 2005, it can be said that High Court has fixed the local limits of jurisdiction of Civil Courts — By virtue of Section 107 therefore each Sub-Judge when invested with criminal powers had jurisdiction to hear and try criminal cases within the respective area of his civil jurisdiction. See Pepsu Judicature Ordinance (10 of 2005), Section 82. **1953 Cri LJ 1375: AIR 1953 Pepsu 143.**

SECTION 116

● **——Ss. 116, 52 — Right of appeal vested under Patiala States Judicature Farman 1999 (Sm.) — If taken away — Interpretation of Statutes — Retrospective effect.**

The right of appeal from an order of a Single Judge to a Division Bench without a certificate, vested in a person under the Patiala States Judicature Farman, 1999 (Sm.) is not taken away by the passing of the Pepsu Ordinance (10 of 2005) (Sm.).

A person cannot be deprived of a vested right of appeal by a subsequent change in the law, unless the later enactment provides expressly or by necessary implication for retrospective effect being given.

Section 116 of the Pepsu Ordinance (10 of 2005) (Sm.) is a transitory regulation providing for a changeover of proceedings from one set of Courts in the Covenanting State to others of like status in the Union and for their continuance, etc., in the latter Courts. It does not say that the proceedings must be treated as having freshly commenced. What is contemplated in the latter part of the section is a notional commencement, if such a term could be used. The section obviously means that all rights which arose or are likely to arise in the future shall remain intact notwithstanding the new set-up, and that they

would be dealt with by the Union Courts in place of the Courts of the covenanting State. There is nothing in the section to justify the view that any taking away of a vested right of appeal retrospectively was intended. 1905 AC 369, Relon; AIR 1951 Pepsu 39. **Reversed.** Ganpat Rai Hiralal v. Aggarwal Chamber of Commerce, Ltd., **1953 SCA 1: (1952) SCJ 564: 66 Mad LW 1: ILR (1953) Patiala 9: (1953) SCR 752: AIR 1952 SC 409 (410) (Pt B) (Pr 9).**

——**Ss. 116 and 92 (1)** — Pepsu (General Provisions) Ordinance (16 of 2005), Section 3 (1) Proviso — Application under Jind Law transferred to Sub-Judge's Court under Ordinance 10 — Appeal from order lies to District Judge and not to High Court. See Pepsu Judicature Ordinance (10 of 2005 BK). Section 92 (1). **AIR 1952 Pepsu 8 (DB).**

——**S. 116 — Ordinary rule of appeal — Section 116, if affects rule.**

Ordinarily the right of appeal from an order made in a case should be determined by the law that existed at the time the case was started and not by the law that exists at the time the order from which an appeal is sought to be preferred is made, but the Legislature can take away the right of appeal or modify it by amending the law expressly or by making a provision from which such an intention can be inferred. Section 116 affects the ordinary rule of appeal by necessary intendment. **2 Pepsu LR 307: AIR 1951 Pepsu 39 (39 to 41) (Pr 1) (DB).**
[**Reversed** in AIR 1952 SC 409.]

PEPSU LAND ACQUISITION ACT (4 of 2006 BK)

PREAMBLE

——**Preamble** — Validity of Act — **Held,** that the contention that in the year 1952 Patiala Act No. 3 of 1995 BK was not law in Pepsu because it had been repealed by the Pepsu Acquisition of Land Act, was not acceptable as the latter Act 2006 BK was not a valid piece of legislation. See Constitution of India, Article 226. **AIR 1955 NUC (Pepsu) 2512.**

——**Preamble**—Validity of Act—Act not reserved for consideration of President — Act is not good law — Effect of Section 4 of Act 5 of 1953 on acquisitions made under Act 4 of 2006 — It validates acquisitions made or purported to have been made under that Act — (Constitution of India, Article 31 (3)) — (Pepsu Reclamation Act (5 of 1953). **AIR 1955 NUC (Pepsu) 1873.**

——**Preamble**—Validity of Act—The words 'such law' in Article 31 (3) refer to the law relating to acquisition and requisition as referred to in sub-article (2) of Article 31 — The Pepsu Land Acquisition Act 2006 BK was a law falling within the scope of sub-article (2) — If not having been reserved for the consideration of the President and thus not having received his assent was ineffective and inoperative law. See Constitution of India, Article 31 (3). **AIR 1954 Pepsu 174.**

SECTION 10

——**S. 10** — Object of — Section 10 is intended for benefit of owners of or persons interested in the land — Section is further meant to assist the Collector to prepare his award on basis of which compensation is to be paid — Non-observance of provisions of the section will not have the effect of vitiating order under Section 18 (1). **AIR 1955 NUC (Pepsu) 1873.**

SECTION 18

——**S. 18 (1)** — Validity of action taken under the section. See Constitution of India, Article 226. **AIR 1955 NUC (Pepsu) 2512.**

——**S. 18 (1)** — Scope — Non-observance of Section 10 — Does not have the effect of vitiating order under the section. See Patiala Land Acquisition Act (4 of 2006, Smt.), Section 10. **AIR 1955 NUC (Pepsu) 1873.**

——**S. 18 (1)** — Action taken under — Effect of — Land vests in Government as soon as it takes over possession which is normally taken after award is filed and compensation paid — In cases of urgency possession may be taken earlier. **AIR 1955 NUC (Pepsu) 1873.**

SECTION 20

——**Ss. 20, 27, 56 — Presumption under Section 27 — Appeal against award of District Judge is competent under Section 56 — Land not acquired under Act — Reference misconceived and without jurisdiction — Quashed under Article 227 of Constitution — C. P. Code (1908), Sections 2 (2), 2 (9) — Constitution of India, Article 227.**

Under Section 27 the award of a District Judge is to be deemed to be a decree and the statements of the grounds of the award a judgment within the meaning of Sections 2 (2) and 2 (9) of Civil P. C. respectively. An appeal against the said award is competent under Section 56 of the Act.

Where, therefore, the land had not been acquired under provisions of Pepsu Land Acquisition Act and the Collector after making the award referred the matter under Section 20 of the Act at the instance of the land owner, to the District Judge who after due enquiry affirmed the award of the Collector, the reference and the award of District Judge were bad in law. The award was, therefore, set aside under Section 56 of the Act as the District Judge was not vested with jurisdiction to entertain the reference and announce the award. The reference being misconceived and without jurisdiction was also quashed under Article 227 of the Constitution of India. **(1963) 65 Punj LR 130.**

SECTION 27

——**S. 27** — Presumption under — Appeal against award of District Judge is competent under Section 56 — Land not acquired under the Act — Reference misconceived and without jurisdiction — Quashed under Article 227 of the Constitution. See Pepsu Land Acquisition Act (4 of 2006 BK), Section 20. **(1963) 65 Punj LR 130.**

SECTION 56

——**S. 56** — Presumption under Section 27 — Appeal against award of District Judge is competent under Section 56 — Land not acquired under the Act — Reference misconceived and without jurisdiction — Quashed under Article 227 of the Constitution. See Pepsu Land Acquisition Act (4 of 2006 BK), Section 20. **(1963) 65 Punj LR 130.**

PEPSU LEGISLATURE (DELEGATION OF POWERS) ACT (22 of 1953)

SECTION 3

——**S. 3** — Scope — **Held,** Act 1 of 1953 being enacted by President by virtue of delegation under Section 3 of Act 22 of 1953 is not parliamentary legislation within Article 33. See Pepsu Police (Incitement to Disaffection) Act (1 of 1953), Section 3. **1962 (2) Cr LJ 247: AIR 1962 SC 1106.**

PEPSU MANUAL FOR THE SUPERINTENDENCE AND MANAGEMENT OF JAILS

See Pepsu Jail Manual.

PEPSU MONEY-LENDERS ACT (8 of 1956)

See under Debt Laws.

PEPSU MUNICIPAL ELECTION RULES (1949)

See under Municipalities.

PEPSU NOTIFICATION (33 of 2005 BK), Dated 2-9-1948

——Validity — (Constitution of India, Articles 13, 19, 31) — AIR 1953 Nag 40, Dissented from — Notification became void and proviso 2 to Section 9 of Pepsu Abolition of Biswedari Ordinance (23 of 2006) which was added to it by Section 5 of Act 4 of 2007 was void from its very inception by virtue of Article 23 of the Constitution — Since the said proviso is separable from the rest of the provisions of the Ordinance, it does not affect the constitutionality of the whole Ordinance. **AIR 1953 Pepsu 161 (175, 176, 177) (Pt I) (Prs 41, 44, 45) (DB).**

[**Overruled** on another point in AIR 1963 SC 222.]

PEPSU PANCHAYAT RAJ ACT (8 of 2008 BK)

See under Panchayats.

PEPSU POLICE (INCITEMENT TO DISAFFECTION ACT (1 of 1953)

SECTION 3

●——**S. 3 — Constitutionality — Constitution of India, Article 33 — Act being enacted by President by virtue of delegation under Section 3 of Act 22 of 1953 is not parliamentary legislation within Article 33 — Pepsu Legislature (Delegation of Powers) Act (22 of 1953), Section 3.**

In construing the validity of Section 3 of the impugned Act the provision contained in Article 33 of the Constitution has no relevance. No doubt, the impugned provision is concerned with ensuring discipline among the forces charged with the maintenance of public order but as the powers of the President were exercised by virtue of the delegation contained in Section 3 of Act 22 of 1953 under which only the powers of the State Legislature were vested in him, any law enacted by him would not have the force of Parliamentary legislation contemplated by Article 33. Dalbir Singh v. State of Punjab, **1962 SCD 893: (1963) 1 SCA 369: (1963) 2 SCJ 367: 1963 Mad LJ (Cri) 468: (1962) Supp 3 SCR 25: 1962 (2) Cr LJ 247: AIR 1962 SC 1106 (1108) (Pt A) (Pr 6).**

●——**S. 3 — Provision is not violative of Article 19 (1) (a) as it is saved by Article 19 (2) — Constitution of India, Article 19 (1) (a) and (2).**

The validity of Section 3 of the Pepsu Police (Incitement to Disaffection) Act cannot be challenged on ground of violation of Article 19 (1) (a) of the Constitution as it is saved by Article 19 (2). The impugned provision in so far as it penalised the creation of disaffection among members of the police force or the incitement of the members of the police force to withhold their services from the Government could properly be sustained as enacted in the interests of public order. So also attempts to induce indiscipline among the police do not stand on any different footing. The word 'discipline' or the phrase 'breach of discipline' in Section 3 is not vague. 1960 SCJ 567: 1960 Mad LJ (Cr) 340: AIR 1960 SC 633, Applied. Dalbir Singh v. State of Punjab, **1962 SCD 893: (1963) 1 SCA 369: (1963) 2 SCJ 367: 1963 Mad LJ (Cri) 468: (1962) Supp 3 SCR 25: 1962 (2) Cr LJ 247: AIR 1962 SC 1106 (1109) (Pt B) (Pr 9).**

PEPSU PRE-EMPTION ACT

SECTION 8

●——**S. 8 (2) — Applicability — Section 23 — Scope.**

The object of Section 23, Pre-emption Act was to prevent non-agriculturists from defeating the provisions of the Patiala Alienation of Land Act by having sales made in contravention of the Act and pre-empting them later on, and the sales that came within the ambit of that section stand entirely on a different footing from those exempted under Section 8. Then Section 8 applies only to those sales declared to be exempt from the right of pre-emption by Government and its operation cannot be extended to any other kind of sales Rulia Ram v. Sadh Ram, **ILR (1952) Pepsu 1: AIR 1952 Pepsu 190 (192) (Pt B) (Pr 6) (FB).**

SECTION 23

●——**S. 23** — Constitution of India, Article 19 (1) (f), (5) — Patiala Alienation of Land Act, Section 3 — Section is void — Patiala Alienation of Land Act, Section 3 — When Section 3 of Alienation Act itself has become void and the sale by a member of a statutory agricultural tribe to a non-agriculturist is as good as effective as any other sale that part of Section 23 of the Pre-emption Act which makes it obligatory on the part of a plaintiff in a pre-emption suit to satisfy the Court that the sale pre-empted by him is not in contravention of the Alienation of Land Act becomes meaningless and superfluous — The result is that if the pre-emptor is otherwise entitled to a decree, the Court cannot refuse to grant him the relief claimed under Section 23 (a) of the Pre-emption Act. **ILR (1952) Pepsu 1: AIR 1952 Pepsu 190 (FB).**

●——**S. 23** — Object and scope — The object of Section 23 was to prevent non-agriculturists from defeating the provisions of the Alienation of Land Act by having sales made in contravention of the Act and pre-empting them later on, and the sales that came within the ambit of that section stand entirely on a different footing from those exempted under Section 8. See Pepsu Pre-emption Act, Section 8 (2). **AIR 1952 Pepsu 190 (FB).**

●——**S. 23 (a)** — Alienation in contravention of Section 3, Patiala Alienation of Land Act — Pre-emptor's right to decree. See Patiala Alienation of Land Act, Section 3. **AIR 1952 Pepsu 190 (FB).**

PEPSU PUBLIC SAFETY ORDINANCE (7 of 2006 BK)

See under Public Safety.

PEPSU PUBLIC SERVANTS (INQUIRIES) ORDINANCE (28 of 2006 BK)

SECTION 3

——**S. 3** — Constitution of India, Article 311 (2) Proviso (a) — Pepsu Services Regulations, Appendix 5 — Pepsu Civil Services (Classification, Control and Appeal) Rules, 1952, Rule 25 — Misbehaviour of Civil Servant — Departmental inquiry or criminal trial — Choice lies with Government. See Constitution of India, Article 311 (2), Proviso (a). **AIR 1955 Pepsu 97.**

PEPSU PUBLIC SERVICE COMMISSION ORDINANCE (6 of 2006 BK)

SECTION 8

——**Ss. 8 and 9 (1) (c)** — Constitution of India, Arts. 320 (3) (c) and 311 (ii) — Pepsu General Provisions (Administration) Ordinance (16 of 2005), Sec. 14 — Regulations under Sec. 8 of Ordinance 6 of 2006, Regulation 5 — Reduction in rank of civil servant — Public Service Commission has to be consulted — Civil Servant has to be given opportunity of showing cause against reduction — Provisions are mandatory. See Constitution of India, Article 320 (3) (c). **AIR 1952 Pepsu 152 (DB).**

——**Ss. 8 and 9 (1) (c) — Regulation 5 — Civil servant reverted to lower rank — Need to consult P. S. C. and to give opportunity to show cause — Pepsu General Provisions (Administration) Ordinance, 2005, Section 14.**

Before an order reverting a civil servant of the State to a lower rank than the one which he was holding could be made, it is incumbent on the government to consult the Public Service Commission under Regulation 5 of the Regulations made by the Rajpramukh under Section 8 of the Pepsu Public Service Commission Ordinance (No. 6 of 2006) and to give the civil servant an opportunity to show cause against his proposed reversion under Section 14 of the Pepsu General Provisions (Administration) Ordinance (No. 16 of 2005). **ILR (1952) Pepsu 392: AIR 1952 Pepsu 152 (155) (Pt C) (Pr 12) (DB).**

SECTION 9

——**Ss. 9 (1) (c) and 8** — Constitution of India, Arts. 320 (3) (c) and 311 (ii) — Pepsu General Provisions (Administration) Ordinance (16 of 2005), S. 14 — Regulations under S. 8 of Ordinance 6 of 2006, Regulation 5 — Reduction in rank of civil servant — Public Service Commission has to be consulted — Civil servant has to be given opportunity of showing cause against reduction — Provisions are mandatory. See Constitution of India, Article 320 (3) (c). **AIR 1952 Pepsu 152 (DB).**

PEPSU PUBLIC SERVICE COMMISSION (LIMITATION OF FUNCTIONS) REGULATION (1951)

RULE 4

——**R. 4 (c) (ii)** — Reversion to substantive post as penalty and as administrative measure — According to Rule 4 (c) (ii) of the Regulation it is not necessary to consult the Commission "on any case relating to the discharge or reversion of an officer otherwise than as penalty". See Constitution of India, Article 311. **AIR 1954 Pepsu 98.**

PEPSU PURE FOOD ACT (5 of 1998 BK)

SECTION 23

——**S. 23, Rules under Rule 3 — Schedule in — Item regarding tea as amended in 1953 — Word 'and' — Interpretation of — (Interpretation of Statutes — Intention of legislature) — (Civil P. C. (1908), Preamble) — (Words and Phrases — 'And') — AIR 1955 NUC (Punj) 6088, Dissented from.**

The word 'and' should be read as 'or' in item of tea in schedule to Rule 3. The object of the Pepsu Pure Food Act being to control the preparation and sale of food, if the word 'and' is read disjunctively the object of the Act would be completely defeated. The intention of legislature appears to be that any one of the articles mixed in excess would constitute an offence. **ILR (1956) Patiala 290.**

PEPSU RECLAMATION OF LAND ACT (5 of 1953)

PREAMBLE

——Act not reserved for consideration of President—Act is not good law—Effect of Sec. 4 of Act 5 of 1953 on acquisitions made under Act 4 of 2006 — It validates acquisitions made or purported to have been made under that Act (Constitution of India, Art. 31 (3)). See Patiala Land Acquisition Act (4 of 2006 Smt.). **AIR 1955 NUC (Pepsu) 1873.**

PEPSU RULES OF BUSINESS

RULE 34

——**Rr. 34 and 35** — Order for compulsory retirement passed by Government while papers relating to the case were still pending for consideration before Raj Pramukh — Order is not invalid by reason of Rules 34 and 35. **AIR 1951 Pepsu 24 (25) (Pt C) (Pr 6) (DB).**

RULE 35

——**Rules 35, 34** — Order for compulsory retirement passed by Government while papers relating to the case were still pending for consideration before Raj Pramukh — Order is not invalid by reason of Rules 34 and 35. **AIR 1953 Pepsu 24 (Pt C) (Pr 5) (DB).**

PEPSU RULES OF EXECUTIVE BUSINESS (1953)

RULE 11

——**R. 11** — Validity of — Rules of business issued by President in exercise of his power of superintendence — Validity — **Held,** that R. 11 of the Rules is a valid rule and any action taken under and within the scope of the rule is an action by the Government according to law. See Constitution of India, Article 356. **AIR 1954 Pepsu 136 (DB).**

PEPSU RULES OF EXECUTIVE BUSINESS (VALIDATION) ACT (PRESIDENT'S ACT 6 of 1954)

SECTION 3

——**S. 3 — Scope — Rules of Executive Business of the Government of Pepsu (1953), Rule 11 — Powers of adviser, under.**

The Rules of Business and the subsequent validation of same, leaves no doubt at all that the Adviser had the powers to pass orders of suspension and the holding of inquiries against the delinquent officers. **AIR 1960 Punj 646 (650) (Pt D) (Pr 8) (DB).**

PEPSU SERVICE REGULATIONS

VOLUME 1, RULE 9

●——**Vol. 1, Rule 9 (1), 2nd Proviso — Proviso providing for compulsory retirement after 10 years' service — Validity — Scope and object of Art. 311 (2) of the Constitution — Exceptions to**

provisions in Art. 311 (2)—Art. 9 (1) as amended by Notification, dated 19th January, 1960 held invalid.

It is hardly necessary to emphasise that for the efficient administration of the State, it is absolutely essential that permanent public servants should enjoy a sense of security of tenure. The safeguard which Article 311 (2) affords to permanent public servants is no more than this that in case it is intended to dismiss, remove or reduce them in rank, a reasonable opportunity should be given to them of showing cause against the action proposed to be taken in regard to them. It seems that only two exceptions can be treated as valid in dealing with the scope and effect of the protection afforded by Art. 311 (2). If a permanent public servant is asked to retire on the ground that he has reached the age of superannuation which has been reasonably fixed, Article 311 (2) does not apply, because such retirement is neither dismissal nor removal of the public servant. If a permanent public servant is compulsorily retired under the rules which prescribe the normal age of superannuation and provide for a reasonably long period of qualified service after which alone compulsory retirement can be ordered that again may not amount to dismissal or removal under Article 311 (2) mainly because that is the effect of a long series of decisions of the Court. But where, while reserving the power to the State to compulsorily retire a permanent public servant, a rule is framed prescribing a proper age of superannuation, and another rule is added giving the power to the State to compulsorily retire a permanent public servant at the end of 10 years of his service, that cannot be treated as falling outside Article 311 (2). The termination of the service of a permanent public servant under such a rule though called compulsory retirement, is, in substance, removal under Article 311 (2) of the Constitution. Article 9 (1) of the Pepsu Service Regulations as amended by the Governor of Punjab by a notification issued on 19th January, 1960 enabling the State Government to compulsorily retire a permanent Government servant only after ten years of service, therefore, contravenes Article 311 (2) of the Constitution and is invalid. AIR 1964 SC 600, Rel. on. Gurdev Singh Sindhu v. State of Punjab, **1964 Cur LJ (SC) 259: (1965) 1 SCJ 287: (1965) 1 Lab LJ 323: (1965) 10 Fac LR 231: (1964) 7 SCR 587: (1964) 1 SCWR 783: 1964 (2) Cr LJ 481: AIR 1964 SC 1585 (1589) (Pt A) (Prs 12, 13).**

——Vol. I, R. 9 (1) and Vol. III, R. 5 (10) — Relative scope — Provisions are reconcilable.

The two provisions are easily reconcilable and can go together. The latter of them reserves to the Government the right to retire its employee at any time it likes, but that can be done for political or other reasons. In case of the former, the Govt. can, without assigning any reason, retire any of its servants on pension after he has served for 25 years. In one case the Government has to give reasons, while in the other 25 years' qualifying service is, by itself, a reason for retirement.

Where therefore a Government servant is retired because he could not be assimilated on any suitable post in the Union, he has no unqualified or indefeasible right to continue in service till he reaches a particular age or completes a particular period of service. **ILR (1955) Pepsu 327: AIR 1955 Pepsu 65 (67) (Pt C) (Pr 8) (DB).**

VOLUME 1, APPENDIX 5

——Vol. 1, Appendix 5 — Constitution of India, Art. 311 (2), Proviso (a) — Pepsu Public Servant's (Inquiries) Ordinance (28 of 2006 BK) Preamble and Section 3 — Pepsu Civil Services (Classification, Control and Appeal) Rules 1952, Rule 25 — Misbehaviour of Civil servant — Departmental inquiry or criminal trial — Choice lies with Government. See Constitution of India, Article 311 (2), Proviso (a). **AIR 1955 Pepsu 97.**

——Vol. 1, Appendix 5, R. 1 — Preliminary inquiry — Scope and object.

The purpose of a preliminary inquiry under Rule 1 of Appendix 5 is to satisfy the officer whether there is or is not sufficient material to order a departmental inquiry. The inquiry, if any, has to be a secret one and the person concerned is not required to take any part in it. Therefore even if the preliminary inquiry was in some way defective that by itself would not vitiate all the substantial proceedings and the dismissal order. **ILR (1955) Pepsu 416: AIR 1955 Pepsu 97 (99) (Pt B) (Pr 7).**

VOLUME 3, RULE 3

——Vol. III, R. 3 (2) — Scope.

The rule as it is placed and drafted does not appear to provide by itself the circumstances under which the Government may order the compulsory retirement of servants. **ILR (1955) Pepsu 327: AIR 1955 Pepsu 65 (67) (Pt B) (Pr 8) (DB).**

VOLUME 3, RULE 5

——Vol. III, Rr. 5 (10) and 9 (1) — Relative scope — Rules 5 (10) and 9 (1) are reconcilable See Pepsu Service Regulations (1952), Vol. I, Rule 9 (1). **AIR 1955 Pepsu 65 (DB).**

——Vol. III, R. 5 (10) — Scope.

Rule 5 (10), reserves to the Government the absolute right to retire any of its employees on pension for political or other reasons. Further, the sub-rule totally negatives the inference that a Government servant can claim as of right to continue in service till he attains the age of 55 or completes the qualifying service of 25 years. **ILR (1955) Pepsu 327: AIR 1955 Pepsu 65 (67) (Pt A) (Pr 7) (DB).**

PEPSU SERVICE RULES

RULE 9

——Rr. 9 (1) and 251 — Order under, of compulsory retirement of permanent Government servant — Validity — **Held,** that it was incumbent upon the Government to give the petitioner an opportunity of showing cause against it — That the amendment to Rule 9 (1) was inconsistent with the guarantee held out to all civil employees and accordingly the order was illegal — (Constitution of India, Article 311). **AIR 1953 Pepsu 24 (24, 25) (Pt B) (Pr 3) (DB).**

RULE 251

——Rr. 251, 9 (1) — Order under, of compulsory retirement of permanent Government servant — Validity — **Held,** that it was incumbent upon the Government to give the petitioner an opportunity of showing cause against it — That the amendment of Rule 9 (1) was inconsistent with the guarantee held out to all civil employees and ac-

cordingly the order was illegal — (Constitution of India, Article 311). See Pepsu Service Rules (P. S. R.), Rule 9 (1). **AIR 1953 Pepsu 24 (DB).**

PEPSU SIRHIND CANAL AND WESTERN JAMNA CANAL (ENFORCEMENT AND VALIDATION) ACT (4 of 1954)

SECTION 1

——**S. 1** — Constitution of India, Article 288 — Northern India Canal and Drainage Act (8 of 1873) and Pepsu Sirhind Canal and Western Jamna Canal (Enforcement and Validation) Act (4 of 1954) — Validity — It cannot be urged that the Validation Act 4 of 1954 is bad and inoperative since it was not reserved for and did not receive the assent of the President as required by Article 288. See Constitution of India, Article 288. **AIR 1956 Pepsu 40 (DB).**

SECTION 3

● ——**Ss. 3 and 4 — Unauthorised use of canal water is not an offence — Enhanced charge under Rules 32 and 33 of Pepsu Sirhind Canal Rules, is not penalty — Question of Sections 3 and 4 infringing Constitution, Article 20 (1) does not arise — Northern India Canal and Drainage Act (1873), Section 31 —Constitution of India, Article 20 (1) — Pepsu Sirhind Canal Rules, Rules 32 and 33.**

'Unauthorised use' of canal water from canal is not an 'offence' and imposition of enhanced water charge under Rules 32 and 33 of the Pepsu Sirhind Canal Rules is not 'a penalty' for such an 'offence'. There is no law forbidding the unauthorised user of the water which Section 31 of the Canal Act, 1873, provides, will be charged at rates that may be prescribed by rules. The word 'unauthorised use' in the section does not import any idea of prohibition. The intention of the law clearly is to obtain payment for water used and the fact that the rates prescribed may be high cannot alter this position.

Consequently the question of Sections 3 and 4 of the Pepsu Sirhind Canal and Western Jamna Canal Rules (Enforcement and Validation) Act, 1954 infringing the provisions of Article 20 (1) of the Constitution does not arise. Jawala Ram v. State of Pepsu. **1962 SCD 152: (1963) 1 SCJ 301: 1962 (2) Cr LJ 303: (1962) 2 SCR 503: AIR 1962 SC 1246 (1248) (Prs 9, 10).**

——**S. 3** — Constitution of India, Article 245 — Pepsu Sirhind Canal and Western Jamna Canal (Enforcement and Validation) Act, Section 3 — Validation — **Held,** that it is valid. See Constitution of India, Article 245. **AIR 1956 Pepsu 40 (DB).**

SECTION 4

● ——**Ss. 4, 3** — Unauthorised use of canal water is not an offence — Enhanced charge under Rules 32 and 33 of Pepsu Sirhind Canal Rules, is not penalty — Question of Sections 3 and 4 infringing Constitution, Article 20 (1) does not arise — Northern India Canal and Drainage Act (1873), Section 31 — Constitution of India, Article 20 (1) — Pepsu Sirhind Canal Rules, Rules 32 and 33. See Pepsu Sirhind Canal and Western Jumna Canal Rules (Enforcement and Validation) Act (4 of 1954), Section 3. **1962 (2) Cri LJ 303: AIR 1962 SC 1246.**

PEPSU SIRHIND CANAL RULES

RULE 32

——**Rr. 32 and 33** — Unauthorised use of canal water is not an offence — Enhanced charge under Rules 32 and 33 of Pepsu Sirhind Canal Rules, is not penalty — Question of Sections 3 and 4 infringing: Constitution, Article 20 (1) does not arise. See Pepsu Sirhind Canal and Western Jumna Canal Rules (Enforcement and Validation) Act (4 of 1954), Section 3. **1962 (2) Cr LJ 303: AIR 1962 SC 1246.**

RULE 33

——**R. 33** — Constitution of India, Preamble, Articles 20, 245 — Scope — Rule 33 of the Sirhind Canal Rules — Validity — Rule 33 of the Punjab Rules to which retrospective effect is given by the validation Act 4 of 1954 specifies the charge leviable for canal water in an unauthorised manner or suffered to run waste. The rule simply creates a civil liabiity in addition to criminal liability if any. It, therefore, does nol offend Article 20 (1) — (Interpretation of Statutes — Retrospective effect) — (Civil P. C. (1908), Preamble — Retrospective effect). See Constitution of India, Preamble. **AIR 1956 Pepsu 40 (DB).**

——**R. 33** — Northern India Canal and Drainage Act (8 of 1873), Section 3 (7) — Divisional Canal Officer — Executive Engineer Sangrur should by regarded as the Divisional Canal Officer of the territory within his jurisdiction for the purposes of the Canal Act. **AIR 1956 Pepsu 40 (DB).**

PEPSU SUGARCANE (REGULATION OF SUPPLY AND PURCHASE) ACT (10 of 1954)

SECTION 14

——**Ss. 14 and 21 (2) (m) — Pepsu Sugarcane (Regulation of Supply and Purchase) Ruels (1955), Rules 1 (2) and 38 — Liability to pay commission on Sugarcane purchased by occupier of factory arises only when rate is fixed under R. 38 and not retrospectively from date of Act.**

Section 14 (2) puts a limit to the maximum rate that may be prescribed, but it does not itself prescribe or determine the rate of commission chargeable. No doubt, Section 14 declared that the occupier shall have to pay a commission on sugarcane purchased, but unless and until rate of commission is prescribed and thus determined there is no liability. It is only when the rate is prescribed that the liability crystallises and arises. The rate when fixed by rule cannot be operative against purchases made earlier to its prescription.

Hence the liability to pay commission under Section 14 of the Act did not and could not arise until the liability was definitely stated and determined and it was not so until rule 38 was framed under that section. Rule 38 having been framed months after the purchase of sugarcane the petitioner is not liable to pay the commission under Section 14 of the Act read with that rule — (1816) 2 Price 381 and (1890) 24 QBD 557, Dist. **ILR (1956) Patiala 103.**

SECTION 21

——**S. 21 (2) (m)** — Rules under — Liability to pay commission on Sugarcane purchased by occupier of factory arises only when rate is fixed under Rule 38 and not retrospectively from date of Act. See Pepsu Sugarcane (Regulation of Supply and Purchase Act (10 of 1954), Section 14 **ILR (1956) Patiala 103.**

PEPSU SUGARCANE (REGULATION OF SUPPLY AND PURCHASE) RULES (1955)

RULE 1

——R. 1 (2) — Commencement of rules — Liability to pay commission on sugarcane purchased by occupier of factory arises only when rate is fixed under Rule 38 and not retrospectively from date of Act. See Pepsu Sugarcane (Regulation of Supply and Purchase) Act (10 of 1954), Section 14. **ILR (1956) Patiala 103.**

RULE 38

——R. 38 — Liability to pay commission on sugarcane purchased by occupier of factory arises only when rate is fixed under Rule 38 and not retrospectively from date of Act. See Pepsu Sugarcane (Regulation of Supply and purchase Act (10 of 1954), Section 14. **ILR (1956) Patiala 103.**

PEPSU TENANCY AND AGRICULTURAL LANDS ACT (8 of 1953)

See under "Tenancy Laws".

PEPSU TENANCY AND AGRICULTURAL LANDS ACT (13 of 1955)

See under "Tenancy Laws".

PEPSU URBAN RENT RESTRICTION ORDINANCE (8 of 2006, BK)

See under "Houses and Rents".

PEPSU VILLAGE COMMON LANDS (REGULATION) ACT (15 of 1955)

SECTION 3

——S. 3 — 'Shamlat Deh' — Meaning — Common land as defined in Pepsu Panchayat Raj Act — (Panchayats — Pepsu Panchayat Raj Act (8 of 2008, BK), Section 2 (1)). **61 Punj LR 839: ILR (1959) Punj 1929.**

PER CAPITA AND PER STIRPES SUCCESSION

See (1) Hindu Law — Succession.
(2) Hindu Succession Act (1956), S. 19.

PERFORMANCE OF CONTRACT

See (1) Contract Act (1872), Ss. 37, 56 and 63.
(2) Specific Relief Act (1877), Ss. 12-16, 18 25, 27, 28.
(3) T. P. Act (1882), S. 53-A.
(4) Statutory cross-references under "contract".

PERIODICALLY RECURRING RIGHT

Suit to establish.
—Limitation.
See Limitation Act (1908), Art. 131.

PERJURY

See (1) Criminal P. C. (1898), S. 195.
(2) Penal Code (1860), Ss. 191 and 193

PERMANENT APPOINTMENT

See Constitution of India, Arts 310, 311.

PERMANENT LEASE

See (1) T. P. Act (1882), S. 111 and
(2) Statutory cross-references under "Landlord and Tenant".

PERMANENT OCCUPANCY RIGHT

See Enactments under "Tenancy Laws".

PERMANENT SETTLEMENT

See (1) Bengal Permanent Settlement Regulation (1 of 1793).
(2) Government Grants Act (15 of 1895).
(3) Madras Permanent Settlement Regulation (25 of 1804).

PERMANENT TENANCY

See (1) Government Grants Act (15 of 1895) S. 3 — Land tenures.
(2) T. P. Act (1882), Ss. 105-108 and 111, and
(3) Enactments under "Tenancy Laws".

PERMIT

Private carrier.
See Motor Vehicles Act (1939), Ss. 52, 58

Public carrier.
See Motor Vehicles Act (1939), Ss. 54 to 56

Transport vehicle.
See Motor Vehicles Act (1939), Ss. 42, 57, 59-A

PERMIT SYSTEM RULES (1948)

——Father migrating to Pakistan — Minor son — Nationality — Acquisition of Indian nationality.

According to International law a child acquires the nationality of parents. Where a minor migrates to Pakistan along with his father the father does not have Indian nationality under Art. 7 of the Constitution and the minor also must be taken to have acquired the nationality of the father. Apparently he cannot retain Indian nationality unless according to the Permit System Rules he comes to the country with a permit for permanent residence or settlement. **1957 Cri LJ 537: AIR 1957 Punj 86 (DB).**

——Power to cancel permit.

Though the Permit System Rules of 1948 did not expressly confer upon the Government power to cancel a permit, such power was however implicit because an authority which can issue a permit has inherent jurisdiction to cancel the same. It is not necessary that the power to make a rule authorising the Government to cancel the permit should be expressly confered by the Act **AIR 1953 Sau 37 (39) (Pt C) (Pr 7) (FB).**

RULE 2

——R. 2 — Contravention of — Rules coming into force after accused came to India —Accused is guilty of staying thereafter. See Influx From Pakistan (Control) Act (23 of 1949), S. 5. **AIR 1955 NUC (Raj) 503-504 (DB).**

RULE 12

——R. 12 — Rule 12 was not retrospective. See Influx From Pakistan (Control) Act (1949). **1958 Cri LJ 176: AIR 1956 All 108 (DB).**

——Rr. 12 and 16-A (4) — Contravention of R. 12 — Permit System Rules (1949), R. 19.

The temporary permit was issued to the applicant on the 27th of October 1948 when the Permit System Rules, 1948, were in force. His application was for a permit for return to India. It was in view of Rule 16-A Clause 4 that he was given a temporary permit. The issue of a temporary permit did not, however, dispose of his application finally.

Held, that in the absence of any definite information on the point whether the Deputy High

Commissioner granted or rejected the application, it should be deemed that the Deputy High Commissioner had at least extended the period of the temporary permit till he was to be in a position to pass any final orders. It could not be said that the period of the temporary permit had come to an end and that applicant had contravened the conditions of his permit by staying on in India. It was necessary for the State to establish that his application had been finally rejected by the Deputy High Commissioner.

(Per Bhargava, J.) — The applicant had by his stay in India after January 1, 1949, not only contravened the provisions of Rule 19 of the Permit System Rules, 1949, but he had also committed breach of conditions of the permit, under which he returned to India. **1952 Cri LJ 353: ILR (1952) 1 All 513: AIR 1952 All 257 (260, 261, 269) (Pt B) (Prs 21, 22a, 23, 75a) (DB).**

RULE 16

——**R. 16 — Scope — Validity.**

Held, that R. 16 of the Rules dated 7-9-1948 or the corresponding R. 10 of the Rules of 20-5-1950 which provides for grant of permit for permanent residence after a personal scrutiny of the application and after securing agreement of the State when the applicant intends to resettle is a very reasonable one. See Constitution of India, Article 19 (1) (d). **1958 Cr LJ 418 (2): AIR 1958 Raj 65 (DB).**

RULE 29

——**R. 29 — Cancellation of permit after it is availed of — Validity — Hearing of party before cancellation — If necessary.**

Under Rule 29 of the Permit System Rules, a permit can be cancelled even after it is availed of. The rule does not provide for the hearing of a party before a permit is cancelled. Therefore the omission to hear the party before cancelling the permit and the omission to assign any reasons for cancelling the permit do not infringe the Permit System Rules. **ILR (1951) Nag 523: 1951 NLJ 304: AIR 1951 Nag 38 (41) (Pt D) (Pr 25) (DB).**

——**R. 29 — Validity — If in conflict with Articles 5 to 9 of Constitution — Absence of provision for hearing party before cancellation of permit — Principles of natural justice — If apply.**

Rule 29 of the Permit System Rules is not in conflict with Articles 5 to 9 of the Constitution. There is nothing in Arts. 5 and 6 of the Constitution which precludes Parliament from enacting a law imposing the requirement of a permit for return to India or of cancellation of such permit. Indeed, the proviso to Article 7 contemplates permits for resettlement or permanent return. The power to cancel a permit is implicit in the power to grant one and, therefore, it is competent to Parliament to provide for the cancellation of a permit. Such power inheres in every sovereign legislature and this matter has been placed beyond doubt by Article 11 which goes so far as to lay down that nothing in Part II shall derogate from the power of Parliament to make any provision for the termination of citizenship. It is also clear that the validity of the rule is not affected by the fact that a permit has been availed of by the grantee. To hold otherwise would be to place unwarranted limitation upon the sovereign powers of Parliament to enact such a law or to permit a rule of this kind being done. The argument that Rule 29 is opposed to the principles of natural justice in so far as it does not provide for the hearing of the party before the cancellation of his permit, has no force. These principles would only apply where a person is granted a right which is justiciable. Neither the Influx From Pakistan (Control) Act nor the rules confer on any person an absolute right to obtain a permit. It was within the competence of Parliament to grant a justiciable right or a limited right such as the one the Act and the rules framed thereunder confer. Whether to grant or refuse a permit rests solely within the discretion of the High Commissioner. That discretion cannot be questioned in a Court of law. Therefore, there is no scope for the applicability of the principles of natural justice. **ILR (1951) Nag 523: 1951 NLJ 304: AIR 1951 Nag 38 (42) (Pt E) (Pr 28) (DB).**

PERMIT SYSTEM RULES (1949)

RULE 5

——**R. 5** — Administration of Evacuee Property Act (1950), S. 52 — Notifications under, dated 3-7-1950 and 9-5-1954 issued by Government of India, Ministry of Rehabilitation — Applicability — **Held,** conditions in the notifications were not complied with. See Administration of Evacuee Property Act (1950), S. 52. **(1962) 64 Pun LR 1116.**

RULE 10

——**R. 10** — Constitution of India, Arts. 5 and 7 and proviso — Citizen of India — Wife migrating to Pakistan leaving husband in India — Unauthorised issue of invalid permit — Cancellation of — Applicability of proviso — **Held,** that the facts brought the case under Art. 7, that the proviso to Article 7 could have no application and that the lady was not a citizen of India and the order directing her to leave was valid. See Constitution of India, Art. 5. **AIR 1955 SC 282.**

RULE 19

——**R. 19** — Application to Hyderabad — Pakistani national overstaying after 20th July, 1950 — Conviction under Section 5 and R. 19 — Validity — **Held,** that such overstaying after the Act came into force constituted an offence under Section 5 of the Act read with R. 9, Permit System Rules and that the accused was properly convicted therefor. See Influx From Pakistan (Control) Act (1949) (as amended by Order No. 22 of 1950), S. 5. **56 Cr LJ 798: AIR 1955 Hyd 128 (FB).**

RULE 29

——**R. 29** — Constitution of India, Arts. 5 and 7 and proviso — Citizen of India — Wife migrating to Pakistan leaving husband in India — Unauthorised issue of invalid permit — Cancellation of — Applicability of proviso, **Held,** that the facts brought the case under Article 7, that the Proviso to Article 7 could have no application and that the lady was not a citizen of India and the order directing her to leave India was valid. See Constitution of India, Art. 5. **AIR 1955 SC 282.**

RULE 31

——**R. 31 (1) — Applicability — Persons entering India from East Pakistan.**

Sub-rule (1) of Rule 31 of the Permit System Rules, 1949, is subject to sub-rule (2), Cl. (d) of that rule which provides that persons domiciled

in India, who after a temporary visit to, or stay in West Pakistan, return to India through East Pakistan are not exempt from the possession of a permit as required by sub-rule (1) of Rule 31. It is, therefore, clear that whether a person entered India from East Pakistan or West Pakistan, he should have been in possession of a permit at the time of the entry. **1959 All WR (HC) 475: 1959 All Cri R 393: 1959 Cri LJ 4: AIR 1959 All 19 (20) (Pt A) (Pr 6).**

——**R. 31** — Nature of permit stated. See Constitution of India, Art. 5. **(1958) 62 Cal WN 589.**

PERMIT SYSTEM RULES (1950)

RULE 10

——**R. 10** — Scope — Validity — **Held,** that Rule 16 of the Rules dated 7-9-1948 or the corresponding Rule 10 of Rules of 20-5-1950 which provides for grant of permit for permanent residence after a personal scrutiny of the application and after securing agreement of the State or Province where the applicant intends to resettle is very reasonable one. See Constitution of India, Art. 19 (1) (d). **1958 Cr LJ 418 (2): AIR 1958 Raj 65 (DB).**

PERMIT TO USE MOTOR VEHICLE

Defined.
See Motor Vehicles Act (1939), S. 2 (20).

PERPETUAL INJUNCTION
See Specific Relief Act (1877), Ss. 54, 55.

PERPETUITY
See (1) Succession Act (1925), S. 114.
(2) T. P. Act (1882), S. 14.

PERPETUITY, RULE AGAINST
See (1) Succession Act (1925), S. 114.
(2) T. P. Act (1882), Ss. 14 and 18.

PERSON
See (1) Civil P. C. (1908), O. 33, R. 1.
(2) Constitution of India, Art. 14.
(3) General Clauses Act (1897), S. 3 (42)
(4) Words and Phrases.

Defined.
See (1) General Clauses Act (1897), S. 3 (42).
(2) Gift-tax Act (1958), S. 2.
(3) Income-tax Act (1922), S. 2 (9).
(4) Penal Code (1860), S. 11.
(5) T. P. Act (1882), S. 5.

Juristic person.
See statutory cross-references under "Person—Defined."

Living person.
See T. P. Act (1882), S. 5.

Person in existence.
See T. P. Act (1882), Ss. 5, 13, 14.

PERSONA DESIGNATA
See (1) Civil P. C. (1908), Ss. 2 (8), 9, 115.
(2) Criminal P. C. (1898), Ss. 6, 435.

PERSON AGGRIEVED
See (1) Constitution of India, Arts. 226 and 32.
(2) Criminal P. C. (1898), S. 198.

PERSONAL APPEARANCE
See (1) Civil P. C. (1908), O. 3, R. 1, O. 5, R. 3, O. 18, R 4, O. 19, R. 2 and O. 26, Rr. 1 and 4.
(2) Criminal P. C. (1898), S. 205.

Dispensing with.
See (1) Civil P. C. (1908), Ss. 132, 133, O. 19, R. 2, O. 26, R. 1.
(2) Criminal P. C. (1898), S. 205.

PERSONAL COVENANT
See T. P. Act (1882), Ss. 40, 58.

PERSONAL DECREE
Mortgage suit.
See Civil P. C. (1908), O. 34, R. 6.

PERSONAL EFFECTS
See Civil P. C. (1908), S. 60.

PERSONAL INAM
See Government Grants Act (15 of 1895).

PERSONAL KNOWLEDGE OF COURT
See (1) Civil P. C. (1908), O. 20, Rr. 4, 5.
(2) Criminal P. C. (1898), Ss. 190, 367

PERSONAL INTEREST OF JUDGE
See (1) Constitution of India, Arts. 226 and 32 — Natural justice.
(2) Criminal P. C. (1898), Ss. 526 and 556.

PERSONAL LAW
See (1) Christians.
(2) Constitution of India, Arts. 14, 15.
(3) Custom (Punjab) — Applicability.
(4) Hindu Law.
(5) Jewish Law.
(6) Mahomedan Law.

PERSONAL LIBERTY
See Constitution of India, Arts. 19, 21, 22

PERSONAL SECURITY
See Criminal P. C. (1898), Ss. 107 to 123, 144, 145.

PERSONATING A PUBLIC SERVANT
See Penal Code (1860), S. 170.

PERSONATION
See Penal Code (1860), Ss. 170, 171, 171-D, 171-F.

Cheating by.
See Penal Code (1860), S. 416.

PERSONATION AT ELECTIONS
See Penal Code (1860), Ss. 171-D, 171-F

PERSONATION IN SUIT OR PROCEEDING
See Penal Code (1860), S. 205.

PERSONS CONCERNED IN CRIMINAL ACT GUILTY OF SEVERAL OFFENCES
See Penal Code (1860), S. 38.

PETROLEUM ACT (30 of 1934)

SECTION 3

——**S. 3 (1)** — Bombay Municipal Corporation Act (3 of 1888) (as amended in 1962), Section 394 is not ultra vires Article 246 of Constitution of India — Provision is within Entry 1 of State List — Section does not violate provisions of Petroleum Act as it occupies a field not occupied by the latter Act — Section imposes only reasonable restrictions and is not, therefore, violative of Article 19 (1) (f) and (g) of Constitution

of India. See Municipalities — Bombay Municipal Corporation Act (3 of 1888) (as amended in 1962), S. 394 (1) (a) (ii). **67 Bom LR 484: ILR (1965) Bom 899 (DB).**

SECTION 4

——**S. 4 — Scope of** — Vendor of petroleum obtaining licence from Central Government under Petroleum Act — Effect of — His acquittal in prosecution under Section 121 of former Act was upheld See Municipalities — Punjab Municipal Act (3 of 1911), S. 121. **ILR (1962) 2 Punj 1.**

SECTION 11

——**S. 11** — Bombay Municipal Corporation Act (3 of 1888) (as amended in 1962), Section 394 is not ultra vires Article 246 of Constitution of India — Provision is within Entry 1 of State List — Section does not violate provisions of Petroleum Act as it occupies a field not occupied by the latter Act — Section imposes only reasonable restrictions and is not, therefore, violative of Article 19 (1) (f) and (g) of Constitution of India. See Municipalities — Bombay Municipal Corporation Act (3 of 1888) (as amended in 1962), S. 394 (1) (a) (ii). **67 Bom LR 484: ILR (1965) Bom 899 (DB).**

SECTION 31

——**S. 31** — Bombay Municipal Corporation Act (3 of 1888) (as amended in 1962), Section 394 is not ultra vires Article 246 of Constitution of India — Provision is within Entry 1 of State List — Section does not violate provisions of Petroleum Act as it occupies a field not occupied by the latter Act — Section imposes only reasonable restrictions and is not, therefore, violative of Article 19 (1) (f) and (g) of Constitution of India. See Municipalities — Bombay Municipal Corporation Act (3 of 1888) (as amended in 1962), S. 394 (1) (a) (ii). **67 Bom LR 484: ILR (1965) Bom 899 (DB).**

——**S. 31** — Scope of — Vendor of petroleum obtaining licence from Central Government under Petroleum Act — Effect of — His acquittal in prosecution under Section 121 of former Act was upheld. See Municipalities — Punjab Municipal Act (3 of 1911), S. 121. **ILR (1962) 2 Punj 1.**

PETTY CRIMINAL CASES

Competency of appeal.
See Criminal P. C. (1898), S. 413.

PETTY OFFENCES

See Penal Code (1860), S. 95.

PHOTOGRAPH

Defined.
See Copyright Act (1957), S. 2.

PHYSICAL POSSESSION

See (1) Criminal P. C. (1898), S. 145.
(2) Limitation Act (1908), Ss. 142 and 144.

PILGRIMAGE

See Hindu Law — Alienation — Legal necessity.

PIOUS OBLIGATION

See Hindu Law — Debts — Son's liability

PIRACY

See Constitution of India, Art. 51 — International Law.

PITH AND SUBSTANCE, DOCTRINE OF

See (1) Constitution of India, Arts. 246 and 254.
(2) Interpretation of Statutes

PLACE OF BIRTH

Discrimination, on ground of.
See Constitution of India, Arts. 14, 15.

PLACE OF INQUIRY AND TRIAL

See Criminal P. C. (1898), Ss. 16, 177-186, 188

PLACE OF PERFORMANCE

See (1) Civil P. C. (1908), S. 16.
(2) Contract Act (1872), Ss. 47 and 49

PLACE OF PUBLIC WORSHIP

Defined.
See Untouchability (Offences) Act (1955), S. 2.

PLACE OF TRIAL

For Statutory cross-references see under "Forum".

PLACE OF WORSHIP

See (1) Criminal P. C. (1898), S. 144.
(2) Hindu Law — Religous endowment.

PLACE OF WORSHIP, INJURING AND DEFILING OF

See Penal Code (1860), S. 295.

PLAINT

See (1) Civil P. C. (1908), S. 26, O. 4, R. 1, O. 6, O. 7 and.
(2) Statutory cross-references under "Practice."

PLANTATIONS LABOUR ACT (69 of 1951)

SECTION 30

——**Ss. 30, 2 (k) (as stood before amendment by Act 34 of 1960) — "Worker", — Includes both casual and permanent workers — Civil P. C. (1908), Pre. — Words and Phrases — "Worker" — Interpretation of.**

The management of a tea estate cannot disallow annual leave with wages admissible under the Act, to their workmen termed casual or Basti Daffa workers, on the ground that they are only casual workers and not permanent. So long as the worker is employed in the Tea Garden, he is entitled to all the privileges and to the use of all the benefits, such as, recreation and the leave benefit which the employor is bound to provide to his employees. There is nothing either in the Scheme of the Act or under the Rules which justifies the limiting of the definition of the word 'worker' to the permanent workers alone. The words are of very wide import and they include all the workers employed in the Estate. AIR 1958 SC 353, Rel. on; AIR 1960 Assam 67, Disting.

If the object of the Act (1951) is to provide certain benefits to persons employed in certain classes of industries, it cannot be said that it will be inconsistent with the object of the Act, if the word 'worker' is interpreted to include temporary workers also. The object of the Act will be better served if no distinction is made between a casual and permanent worker in so far as the benefits to the workers are concerned in the Act.

Merely because by a subsequent amendment, a particular class of casual workers has been excluded from the definition of the word "worker", it does not necessarily mean that even before amendment, the "worker" is limited to certain types of workers. If the casual workers were not included by the definition of the word "worker" in the unamended Act, it was not necessary for the legislature to expressly exclude by a subsequent amendment, the temporary

class of workers employed for a particular work. The subsequent amendment only supports the argument that unamended definition of the "worker" never contemplated any classification of "permanent" and "temporary" workers. **ILR (1964) 16 Assam 550 (DB).**

PLEA

See (1) Criminal P. C. (1898), Ss. 255, 256.
(2) Limitation Act (1908), S. 3 and
(3) Statutory cross-references under "Practice".

PLEADER

See (1) Advocates Act (25 of 1961).
(2) Bar Councils Act (38 of 1926).
(3) Bombay Pleaders Act (17 of 1920).
(4) Civil P. C. (1908), O. 3, R. 4.
(5) Criminal P. C. (1898), S. 340.
(6) Legal Practitioners Act (1879) and
(7) Statutory cross-references under "Legal practitioner".

Court and pleader.
See Criminal P. C. (1898), S. 340.

Defined.
See Criminal P. C. (1898), S. 4 (1) (r).

Right of accused to be defended by.
See Criminal P. C. (1898), S. 340.

PLEADER AND CLIENT

Contract between.
See Civil P. C. (1908), O. 3, R. 4.

PLEADINGS

See (1) Civil P. C. (1908), Ors. 6, 7 and 8 and
(2) Statutory cross-references under "Practice".

PLEA OF ACCUSED

See Criminal P. C. (1898), S. 255.

PLEA OF GUILTY

See Criminal P. C. (1898), S. 271.

Competency of appeal.
See Criminal P. C. (1898), S. 412.

PLEDGE

See (1) Contract Act (1872), Ss. 172, 173, 176, 180 and
(2) Statutory cross-references under "contract".

Contract of.
See Contract Act (1872), Ss. 148, 152, 157, 158, 160, 161, 164, 166, 172, 173, 176 to 180.

Defined.
See Contract Act (1872), S. 172.

Pawnee, defined.
See Contract Act (1872), S. 172.

Pawnee, rights of.
See Contract Act (1872), Ss. 173, 176, 177, 179.

POISON

See Poisons Act (12 of 1919).

Unlawful importation of.
See Poisons Act (12 of 1919), S. 6.

POISONS ACT (12 of 1919)

SECTION 5

——S. 5 — Argemone Mexicana.

Argemone Mexicana seed commonly known as Bhat Cativa is notified as a poison under the Poisons Act. **1953 All WR (HC) 367: 1953 All LJ 374 (1): 1953 Cr LJ 1628: AIR 1953 All 713 (714) (Pt A) (Pr 2) (DB).**

SECTION 6

——S. 6 — Intention — Presumption from possession — The mere fact that the accused was found in possession of a number of poisonous substances would not itself raise a presumption against him in every case to that effect that his possession of the same was for sale whether a presumption of that nature should arise under S. 114 of the Evidence Act or not should depend upon the circumstances of each case. See Evidence Act (1872), S. 114. **1957 Cri LJ 1191: AIR 1957 All 705.**

——S. 6 (1) (a) — Prosecution under — Contravention of R. 3 of Rules made by U. P. Government — Proof required to convict.

Under the rule framed by the U. P. Government under the Act punishment is provided for in two cases, namely (1) sale of a poisonous substance specified in the schedule without licence and (2) possession for sale of the poisons specified in the same schedule. Where it is conceded that the accused is not prosecuted for selling any poisonous substance without a licence he could only be convicted if it is proved that he was in possession of the said substance "for sale". The accused could not be convicted merely for the possession of the poisonous substances specified in the schedule. **1957 Cr LJ 1191: AIR 1957 All 705 (706) (Pt A) (Pr 7).**

——S. 6 — Rules under R. 3 — Nature of intention required under.

The intention required under R. 3, is intention of selling without licence, and not the intention of selling with licence. The mental condition of a person who intends to sell only if he gets the licence, and not to sell if he does not get it is both a negative as well as a positive one with the result that the position is neutralised. On the other hand, a person who intends to sell in any case adopts an attitude that is positive. The distinction between the two though fine is a clear one, and must be recognised by a criminal Court in the case of an offence which makes a special type of mens rea a necessary ingredient of the criminal wrong. **1957 Cr LJ 1191: AIR 1957 All 705 (707) (Pt C) (Pr 9).**

——S. 6 (2) — Applicability — Effect of acquittal.

The condition precedent for an order of confiscation under S. 6, sub-section (2) is that the accused should have been found guilty of having committed an offence in respect of such a poison. If the accused is acquitted in respect of it, it is not possible to sustain an order of confiscation. **1957 Cri LJ 1191: AIR 1957 All 705 (708) (Pt F) (Pr 15).**

——S. 6 (2) — What can be confiscated.

The words "vessles, packages or coverings" are wide enough to include a bag of mustard seeds mixed with argemone mexicana which is notified as a poison. Hence, it is not only the poison that can be confiscated but the mustard seeds also with which it is mixed. **1953 All WR (HC) 367: 1953 All LJ 374 (1): 1953 Cr LJ 1628: AIR 1953 All 713 (714) (Pt C) (Pr 4) (DB).**

POLICE

See (1) Bengal Police Act (7 of 1869).
(2) Bengal Police Regulations (1817), (1915) and (1943).
(3) Bihar and Orissa Police Manual.
(4) Bombay District Police Act (4 of 1890).
(5) Bombay Police Act (22 of 1951).
(6) Calcutta Police Act (14 of 1866).
(7) Calcutta Suburban Police Act (2 of 1866).
(8) Central Reserve Police Force Act (66 of 1949).

(9) Central Reserve Police Rules (1955).
(10) City of Bombay Police Act (4 of 1902).
(11) Delhi Special Police Establishment Act (25 of 1946).
(12) Madhya Bharat Police Act (2007 Smvt.) (1950).
(13) Madhya Pradesh Police Regulations.
(14) Madras City Police Act (3 of 1888).
(15) Madras District Police Act (24 of 1859).
(16) Madras Police Subordinate Service Discipline and Appeal Rules (1955).
(17) Marwar Police Act (11 of 1948).
(18) Mysore Police Act (5 of 1908).
(19) Orissa Police Manual (1940).
(20) Police Act (5 of 1861).
(21) Police (Incitement to Disaffection) Act (22 of 1922).
(22) Rajasthan Police Regulations (1948).
(23) Travancore-Cochin Police Act (2 of 1952).
(24) Travancore Police Act (4 of 1095 ME).

Preventive action by.
See Criminal P. C. (1898), Ss. 149-153.

POLICE ACT (5 of 1861)

PREAMBLE

——**Pre.** — Rules framed under the Act have statutory effect and are not administrative directions — Any violation is subject to challenge under Art. 226 of the Constitution. AIR 1966 SC 751, Ref. **(1964) 2 Lab LJ 320: 9 Fac LR 215: 1964 All LJ 432.**

——**Pre.** — Constitution of India, Art. 226 — Writ of mandamus — Application under S. 13 of Police Act—Prayer in application refused—Issue of writ — If the prayer is not granted, the petitioner can seek protection of his right under the provisions of Criminal P. C. or seek remedy in a Civil Court, and as another remedy is open to him a writ in the nature of mandamus cannot be granted. See Constitution of India, Article 226. **AIR 1952 Pat 386 (DB).**

——**Preamble** — Constitutional validity — If affected by Art. 246 of Constitution. All laws which were in force in the territory of India upon the commencement of the Constitution continued to remain in force under Art. 372 (1) and Art. 246 does not apply to any Act which was already in existence. See Constitution of India, Art. 245 **1957 Cri LJ 540: AIR 1957 Punj 91.**

——**Pre.** — Rajasthan Police Regulation (1948), Regn. 100 — Validity — Regulations have no statutory force and cannot prevail over Rules of 1950 — (Rajasthan Civil Services (Classification, Control and Appeal) Rules (1950). See Rajasthan Police Regulation (1948), Regn. 100. **AIR 1960 Raj 56 (DB).**

SECTION 1

● ——**Ss. 1, 17, 28, 29 and 35 — Magistrate and officer exercising powers of Magistrate — Difference — (Words and Phrases).**

There is a vital difference between the phrase "a Magistrate" and the phrase "an officer exercising the powers of a Magistrate". The bare word 'Magistrate' includes a person who does not enjoy all the powers of a Magistrate, but enjoys some of them, whereas the expression "an officer exercising the powers of a Magistrate" has a technical meaning assigned to it. Under Sections 28 and 29, the word 'Magistrate' means 'a Magistrate either of the First Class, or the Second Class or the Third Class'. But the words "an officer exercising the powers of a Magistrate" in S. 35 refer only to a Magistrate of the First Class. Hence, S. 35 is not rendered redundant by the provisions of Ss. 28 and 29. Mahendra Singh v. State of U. P., **1956 Cr LJ 174: (1955) 2 Lab LJ 750: 1955 All LJ 643: 1955 All WR (HC) 548: ILR (1956) 1 All 178: AIR 1956 All 96 (98) (Pt E) (Pr 11) (SB).**

——**S. 1 — Validity of — Effect of Art. 246 of the Constitution — (Constitution of India, Articles 246 and 372 (1)).**

The words "subject to the other provisions of this Constitution" in Art. 372 do not mean that laws which had been passed by the Central Legislature before 26-1-50, automatically ceased to have effect because the subject was not being made a State subject. All laws which were in force in the territory of India upon the commencement of the Constitution continued to remain in force under Art. 372 (1) and Art. 246 does not apply to any Act which was already in existence. The Police Act which was passed in 1861 at a time when there was no representative Government in India, therefore, remained in force at the commencement of the Constitution and its constitutionality cannot be challenged on the ground that, it being a Central Act, is not a valid Act in any particular State after the Constitution. AIR 1951 All 816 and AIR 1957 Punj 91, Rel. on. **AIR 1958 Cal 365 (373) (Pt F) (Pr 34).**

——**S. 1** — Government of India Act (1935), Sections 243 and 266 — Inspector of Police — Removal from service — Procedure — Police Regulations Nos. 223, 228-A — Inspector of Police belongs to subordinate rank of police force — Inquiry by Deputy Inspector General of Police — Consultation with Public Service Commission not necessary. See Government of India Act (1935), Section 243. **1952 Cri LJ 870: AIR 1952 Nag 172 (DB).**

——**Ss. 1 and 23** — Public Gambling Act (1887), S. 5 — Superintendent of Police invested with powers of District Superintendent of Police — Warrant issued by — Legality — There is, nothing wrong or illegal in investing the Superintendent of Police with powers of District Superintendent of Police to issue warrants under S. 5, Public Gambling Act. See Public Gambling Act (1887), S. 5. **1956 Cri LJ 1348: AIR 1956 Punj 226 (DB).**

——**Ss. 1 and 4** — Interpretation of Statutes — Interpretation clause — Application of in interpretation of Section. See Interpretation of Statutes. **1965 (1) Cr LJ 80: AIR 1965 Raj 5 (DB).**

——**Ss. 1, 2 and 4** — 'District Superintendent of Police' — Does not mean Additional Superintendent of Police — Warrant signed by latter — Presumption under Sec. 6 cannot be drawn. See Rajasthan Public Gambling Ordinance (1949), Section 5. **1965 (1) Cr LJ 80: AIR 1965 Raj 5 (DB).**

SECTION 2

●——**S. 2** — Three tier system prevalent in police force in State of Rajasthan does contravene Arts. 14 and 16 (1) of the Constitution. See Constitution of India, Article 14. **AIR 1964 SC 1559.**

●——**Ss. 2 and 12 — Scope — Standing Order No. 46, dated 20th October 1949 issued by Inspector-General of Ajmer — Has no statutory basis or legal efficacy as a service condition — Holder of officiating post reverted to his substantive post — There is no breach of condition of service.**

The orders and rules referred to in Section 12, Police Act have nothing to do with the determination of the service conditions of the officers recruited to the police force. The expression 'organisation' cannot include within its fold the conditions of service of those in the police force. Under Section 2, it is not the Inspector-General

of Police but the State Government that is empowered to frame rules regulating the conditions of service of members of the police force. In the absence of any statutory provision this power could not be delegated by the State Government to the Inspector-General of Police. Therefore, Standing Order No. 46, dated 20th October, 1949 issued by the Inspector-General of Police, Ajmer cannot be treated as a condition of service having legal efficacy and in the event of its non-observance could not be the subject of a complaint in Court. ILR (1961) 11 Raj 260. **Reversed.**

Standing Order No. 46 deals not with the order in which holders of officiating posts may be reverted but with that in which they could be considered for confirmation, so that in strictness of its language the clause would not constitute the reversion of the holder of an officating post to his substantive post as one in breach of its terms. State of Rajasthan v. Ram Saran. **(1964) 2 SCR 982: (1965) 1 Lab LJ 103: AIR 1964 SC 1361 (1363, 1364) (Pt A) (Prs 6, 7).**

●——**S. 2** — Rules under — Powers of Government to make employee compusorily retire — The language of Note 1 of Art. 465 makes it abundantly clear that the Government's right to compulsorily retire an officer is not derived from Note 1 of Art. 465. That right is derived from the Rules made by the State Government in exercise of the powers conferred by S. 2 of Police Act. The power conferred by the Rule is incorporated in Art. 465. Thus, the power to be applied against a police officer and referred to in Note 1 can be said to be a reproduction of the power contained in the Rules made under the Police Act. See Civil Service Regulations (as adapted in U. P.), Art. 465. **AIR 1965 All 142 (FB).**

●——**S. 2**—Civil Service Regulations (as adapted in U. P.), Art. 465, Note 1 — Power of Government to make employee compulsorily retire — Origin of — Power in Note 1 can be said to be reproduction of power contained in Rules made under Police Act — 'Retain' — Meaning of — AIR 1954 SC 369, Foll. Abdul Ahad v. Inspector-General of Police, U. P.. **1964 All LJ 791: 1964 All WR (HC) 467: (1964) 9 Fac LR 197: (1965) 1 Lab LJ 110: ILR (1964) 2 All 959: AIR 1965 All 142 (146, 147) (Pt B) (Prs 6, 7) (FB).**

●——**S. 2** — Civil Service — Regulations (as adapted in U. P.), Art. 465, Note 1 — Constitution of India, Arts. 311 (2) and 13 — Compulsory retirement under Art. 465, Note 1 is neither illegal nor unconstitutional — Article 13 of Constitution not applicable — AIR 1954 All 343; AIR 1957 SC 892 and AIR 1958 SC 232, Foll.; 1963 All LJ 934, Dissent. from. Abdul Ahad v. Inspector-General of Police U. P.. **1964 All LJ 791: 1964 All WR (HC) 467: (1964) 9 Fac LR 197: (1965) 1 Lab LJ 110: ILR (1964) 2 All 959: AIR 1965 All 142 (147, 148) (Pt D) (Prs 8, 9, 11) (FB).**

——S. 2 — Central Civil Service (Temporary Service) Rules (1949), Rr. 3, 5 — Notification of Chief Commissioner, Delhi, applying Rules to lower subordinates of Delhi police — Temporary constable appointed under Police Act in Delhi Police — Termination under R. 5 — Termination held was in conformity with rules.

A was recruited as a temporary foot constable in the Delhi Police under the Police Act. Subsequently, the Superintendent of Police 'Lines', Delhi, gave him one month's notice under R. 5 of the Central Civil Service (Temporary Service) Rules, 1949, terminating his services. His services were terminated immediately after one month from the date of the service of the notice on him. It was contended by A that his termination was bad in law as he was governed by the provisions of the Police Act and the Rules made thereunder and so his services could not have been terminated under R. 5 of the Central Civil Services (Temporary Service) Rules, 1949.

Held, that in view of the notification issued by the Chief Commissioner directing that the Central Services Rules should apply to all the lower subordinates of the Delhi Police, A's case fell within the ambit of those Rules. The Chief Commissioner was fully competent to issue the notification under S. 2 of Police Act. A having been recruited as a temporary foot constable, his case was governed by R. 5 of the Central Civil Services (Temporary Service) Rules, 1949. The provisions of this rule were fully complied with by Superintendent of Police before terminating the petitioner's services. Though A had put in more than three years' service he could not be deemed to have been in quasi-permanent service at the time of termination because the declaration as contemplated in R. 3 had not been issued. The order terminating A's services as a temporary constable in Delhi police was in conformity with the rules governing his case and it could not be assailed on any legitimate ground. AIR 1960 Cal 314, Rel. on. **(1964) 66 Pun LR 56.**

SECTION 3

——**S. 3** — Final Report by Police — Report negative — Report not to be superseded by executive order. See Criminal P. C. (1898), S. 190 (1) (b). **1965 Raj LW 352: 1966 Cr LJ 1202: AIR 1966 Raj 233 (DB).**

SECTION 4

——S. 4 — Scope — Powers of District Magistrate — (Punjab Police Rules (1934), Vol. III, Ch. 26, R. 262).

The statutory power given under Section 4, Police Act, to the District Magistrate is of general control and direction to the police. It does not override the provisions of the Code of Criminal Procedure nor can the rules made under the Police Act override the Criminal P. C. and as a matter of fact the rules do not provide anything which is contrary to the Criminal P. C.

Where the investigation is not sufficiently complete and the police have not arrived at any decision whether to prosecute the accused or not, the District Magistrate would not be justified without a careful scrutiny of the police diaries, in directing the police to arrest the accused and to put up a challan against them when the police have not made any report under S. 173, Criminal P. C., or sought the advice of the District Magistrate under Section 4, Police Act. **55 Punj LR 77: 1953 All WR (Sup) 33: 1953 Cr LJ 1018: AIR 1953 Punj 149 (152, 153, 155) (Pt B) (Prs 21, 23, 37).**

——**S. 4** — Rajasthan Public Gambling Ordinance (1949), Ss. 5, 6 — "District Superintendent of Police" — Does not mean Additional Superintendent of Police — Warrant signed by latter — Presumption under S. 6 cannot be drawn. See Rajasthan Public Gambling Ordinance (1949), S. 5 **1965 (1) Cri LJ 80: AIR 1965 Raj 5 (DB).**

——**S. 4** — Interpretation clause — Application of, in the interpretation of section. The interpretation clause cannot be applied in interpreting a section of the Act if there is something in the section itself which is repugnant to the definition contained in the interpretation clause. Obviously in S. 4 of the Police Act, District Superintendent of Police cannot have the wide connotation given in S. 1. See Interpretation of Statutes. **1965 (1) Cri LJ 80: AIR 1965 Raj 5 (DB).**

SECTION 5

——S. 5 — Scope — What the accused did, he did while acting or purporting to act in the discharge of his official duty is one of the conditions and not the only condition necessary to attract S. 197. The other condition is that the officer should not be removable from his office save by or with the sanction of the State Government in the case of a person employed in connection with the affairs of the State. A Sub-Inspector is removable from his office even by a D. S. P. under S. 7, Police Act. The view that by reason of the provisions of S. 35 read with S. 5 it is only the I. G. of Police, who is given the powers of a Magistrate, that could enquire into the charge sheet and dismiss him and that when there is no such officer in the State the State Government alone could do so is to ignore the provisions of S. 7 between which and the former sections there is really no conflict. See Criminal P. C. (1898), S. 197. **1957 Cr LJ 394: AIR 1957 Tripura 18.**

SECTION 7

SYNOPSIS

(Police Act (5 of 1861), S. 7.)

1. Applicability.
2. Departmental enquiry.
3. Powers of I. G., D. I. G. etc.
4. Police Regulations — Cases.
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   (B) Bombay.
   (C) C. P. and Berar.
   (D) Madhya Bharat.
   (E) Madhya Pradesh.
   (F) Punjab.
   (G) Rajasthan.
   (H) Uttar Pradesh.
5. Interference.

1. Applicability.

●——S. 7 — Statutory rules — Construction — Cannot be treated as mere administrative directions. See Interpretation of Statutes — Statutory Rules. **1961 (1) Cri LJ 773: AIR 1961 SC 751.**

●——S. 7 — Constitution of India, Arts. 309, 310 311, 313, 154 — Scope — Member of public service — Tenure of office — Limitations on — Principles stated — Police Act and Police Regulations whether still in force. Under Art. 313, the Police Act and the Police Regulations made in exercise of the powers conferred on the Government under that Act, which were preserved under S. 243 of the Government of India Act, 1935, continue to be in force after the Constitution so far as they are consistent with the provisions of the Constitution — See Constitution of India, Art. 309. **1961 (1) Cri LJ 773: AIR 1961 SC 751.**

——S. 7 — Rule authorizing termination of services of temporary Government servant on one month's notice — Termination under rule cannot conflit with provisions of S. 7, unless termination is by way of punishment — Rule by itself is not inconsistent with S. 7 — Constitution of India, Art. 311. **ILR (1962) 2 All 755: AIR 1966 All 92 (96) (Pt C) (Pr 7) (DB).**

——S. 7 — Order to deal with an assembly tactfully — Use of force — If authorised.

An officer who is under orders to deal with an assembly tactfully cannot invoke the powers under S. 128, Criminal P. C. because the injunction to use tact contains an implied command not to use force. It is impossible to conceive of an order which simultaneously requires a Police Official to use tact in dealing with a crowd and at the same time requires him to dispense it by force. An officer who gives an order under Section 128, Criminal P. C. commanding an assembly to disperse must leave all considerations of tact behind him, ignore any express direction to handle the crowd tactfully and must be prepared to take all such further measures including the use of Armed Forces, if necessary, to ensure that his command is obeyed by the assembly or the mob. **AIR 1960 All 304 (314) (Pt H) (Pr 40).**

——S. 7 — Negligence and remissness — What amounts to.

Disrespectful behaviour towards a superior and rudeness towards him by a subordinate police officer will always amount to remissness in the discharge of duty within meaning of S. 7. By reason of his employment and the rules governing his duties, he is expected not only to be respectful towards his superiors but display a sense of discipline and restraint also. **1960 All WR (HC) 272: 1960 All Cr R 192: (1960) 2 Lab LJ 279: 1960 All LJ 310.**

——S. 7 — Charge under — Contents — Particulars — Necessity — (Constitution of India, Article 311).

Section 7 of the Police Act makes remissness or negligence in the discharge of duty by a police officer punishable. Where according to the charges served on the police constable, he was accused of negligence and remissness in connection with his misbehaviour towards the Sub-Inspector on a certain date though the details of the alleged misbehaviour were not mentioned in the charges, the charges could not be said to be vague, when he knew what the accusation was and was aware of the details also against him when the evidence was led. It cannot, therefore, be urged that he was prejudiced in any manner by the absence of details in the charges. **1960 All WR (HC) 272: 1960 All Cr R 192: (1960) 2 Lab LJ 279: 1960 All LJ 310.**

——S. 7 — Departmental trial — Procedure — Section 42 — Applicability.

Section 42 is intended as a protection to Police Officers against action and prosecutions brought by a third party, in respect of anything done or intended to be done by them in the performance of their duties. It has no relation to departmental enquiries instituted under S. 7. AIR 1957 All 634, Rel. on. **1958 All LJ 277: 1958 All Cr R 238: 1958 All WR (HC) 306: (1958) 2 Lab LJ 25: 1958 Cr LJ 983: AIR 1958 All 560 (562) (Pr 4) (DB).**

●——**Ss. 7, 28 and 29 — Subjects of.**

The judicial trial mentioned in S. 28 or Section 29 does not end in the dismissal, suspension on or reduction in rank of police officer; it ends in his conviction and punishment according to the penal law of the land. The dismissal, suspension or reduction in rank is provided for in S. 7, and the two sections deal with two different subjects. Mahendra Singh v. State of U. P., **1956 Cr LJ 174: (1955) 2 Lab LJ 750: 1955 All LJ 643: 1955 All WR (HC) 548: ILR (1956) 1 All 178: AIR 1956 All 96 (98) (Pt C) (Pr 8) (SB).**

——S. 7 — Scope — Unfit to discharge duties — Matter is solely within jurisdiction of dismissing authority — Present offered to girl with immoral motive — Ground held sufficient for dismissal. **AIR 1955 NUC (All) 2704.**

——Ss. 7 and 35 (as amended by Act 10 of 1882) — Relative scope — Conflict between the sections — Which to prevail.

Section 7 clearly, and in so many words, confers powers on the officers enumerated in the section to dismiss or otherwise punish police officers of subordinate rank, which means police offi-

cers up to the rank of Inspector of Police. The provisions of S. 35 could be given effect to as long as S. 6 of the Act had not been deleted, but after the deletion of that section in 1882 its provisions become contradictory to the provisions of S. 7. The Legislature appears to have forgotten to delete S. 35 when it deleted S. 6. But there can be no doubt that the Legislature did intend to confer powers on the officers, enumerated in S. 7, to impose the penalities provided therein. Effect should, therefore, be given to the provisions of S. 7 in preference to the provisions of S. 35. AIR 1954 Cal 60, Dissent. from. **1955 All LJ 196: AIR 1955 All 400 (400) (Pr 5).**

——S. 7 — Construction — 'Think', meaning of.

Sapru, J.:— The use of the word 'think' in S. 7 is somewhat deliberate. One of the dictionary meanings is "to judge, to form or hold as an opinion, to consider." It is thus milder than the expression 'found' or 'established', for it requires a less degree of positive certainty than those words as regards the fact in controversy or dispute. The processes however, by which the Police Officers must think have been indicated by the Police Regulations. **1954 All WR (HC) 138: 1954 Cr LJ 874: 1954 All LJ 316: ILR (1954) 2 All 325: AIR 1954 All 438 (440) (Pt B) (Pr 13) (DB).**

——**Ss. 7 and 35** — Applicability — Proceedings under S. 7 and R. 861, Police Regulations — Section 35 is not attracted — AIR 1954 Cal 60, Foll. — (Bengal Police Regulations, R. 861). **58 Cal WN 952: AIR 1955 Cal 183 (186) (Pt B) (Pr 12).**

——**S. 7** — Constitution of India, Arts. 19 (1) (d), (5) and 21 — Validity of S. 7. Article 19 (1) (d) has to be read with Art. 21 which lays down that a person may be deprived of his personal liberty according to the procedure established by law, which means valid law. Section 7 of the Police Act, 1861 is valid law being saved by Article 19 (5). The restriction imposed by S. 7 is reasonable and is necessary in the interest of the general public. See Constitution of India, Article 19 (1) (d) (5). **AIR 1954 Cal 60 (DB).**

——**S. 7** — Validity — The classification made in S. 7 of the Police Act (1861) is both reasonable and necessary. Section 7 is not hit by Art. 14 of the Constitution. See Constitution of India, Art. 14. **AIR 1954 Cal 60 (DB).**

——Ss. 7, 35 — Applicability and scope of.

Sections 7 and 35 are different in their scope and application. The proceedings are not alternative but cumulative. There is no illegality in resorting to either or both proceedings. Even when charges laid against a person are of a serious nature departmental proceedings can be resorted to. **58 CWN 18: ILR (1955) 2 Cal 28: AIR 1954 Cal 60 (64, 65) (Pt J) (Prs 67, 74, 75) (DB).**

——**S. 7** — Government of India Act (1935), Sections 240 (3) and 243 — Dismissal of Foot Constable in Police Force — Suit challenging dismissal is governed by Police Act, S. 7 and Rules framed thereunder and not by Section 240 (3), Government of India Act (1935) — (Constitution of India, Article 311). See Government of India, Act (1935), Section 240 (3). **AIR 1956 Punj 106 (DB).**

2. Departmental enquiry.

●——**S. 7** — Constitution of India, Art. 226 — Judicial tribunal — Departmental enquiry under Police Act — Officer conducting inquiry, whether acts in judicial capacity — Bose J.:— The D. S. P. who conducts the departmental trial under the Police Act, of a personnel of the Police acts in a judicial capacity. The Departmental Rules that require an enquiry in such cases call the proceedings a "trial" and the procedure set out in them indicates the judicial nature of the enquiry. See Constitution of India, Art. 226. **AIR 1958 SC 86.**

——**S. 7** — Enquiry against a constable — Statement of witness disclosing commission of cognizable offence — Departmental enquiry is competent without investigation of alleged cognizable offence when no prima facie case is made out. **1964 All LJ 31.**

——**S. 7** — Scope — Departmental inquiry under — Nature of — If quasi-judicial in nature — The departmental enquiry under S. 7 of the Police Act read with Cl. 489 of the Police Regulations is quasi-judicial in nature. A charge-sheet has to be served on the accused officer. The proceedings are amenable to the jurisdiction of the High Court under Art. 226, and on sufficient cause being shown a writ of certiorari can issue. See Constitution of India, Art. 226. **AIR 1960 All 304.**

——**S. 7** — Police Regulations, Paras 490 (1), 479 (d) (e) (f) — Scope — Dismissal of Constable — Departmental enquiry — Deputy Superintendent of Police can record evidence of witnesses — There is no infringement of principles of natural justice in such case — After show cause notice constable not asking Superintendent of Police to examine witnesses afresh — He cannot raise question of prejudice later on. See Police Regulations, Paras 490 (1), 479 (d) (e) (f). **ILR (1960) 2 All 131.**

——**S. 7** — Statements in proceedings under S. 7, Police Act — Nature of — For the application of S. 124, Evidence Act, the first question which has to be decided is whether the communication which is to be disclosed was one made to the officer in public confidence. Where the previous statements of the witnesses were made in the proceedings under S. 7 of the Act in the presence of the complainants, and in the subsequent case against the complainants themselves. These statements were required for contradicting those very witnesses. **Held,** that it was neither the communication made in official confidence nor was it one affecting the public interest. Section 124, therefore, was not applicable. See Evidence Act (1872), S. 124 **1959 Cr LJ 1035: AIR 1959 All 543.**

——**S. 7** — Scope — Departmental enquiry by Tribunal — Administrative or quasi-judicial — The Departmental enquiry by the Tribunal Constituted under S. 7 of the Act, according to the rules prescribed by U. P. State Government is of a quasi-judicial nature, in respect of which a writ of certiorari can issue. See Constitution of India, Art. 226. **AIR 1958 All 607 (DB).**

——**S. 7** — Act or misconduct of police employee — Disciplinary proceedings — If prosecution — Section 47 — Section 42 does not apply to disciplinary proceedings against a police employee for any misconduct or any other acts enumerated in S. 7 on which proceedings could be started. Such a proceeding cannot be regarded as an action or prosecution against any person as contemplated in S. 42. See Police Act (1861), S. 42. **AIR 1957 All 634.**

——S. 7 — Violation of provisions of Government order — What is.

By Paragraph 3 of G. O. No. O-3237/II-B-32-52 of the U. P. Govt. dated 24-12-1953, it was provided that disciplinary action could be taken against a Government servant who without seeking redress from his department or Government authorities seeks a decision from Court in respect of grievances arising out of his employment or conditions of service.

A police officer against whom an enquiry was proceeding gave notice under S. 80, C. P. Code,

to the officer conducting the enquiry alleging that certain incidents which occurred on a particular day during the enquiry amounted to defamation of him.

Held, that his allegation was not a matter regarding the conditions of his employment or service and consequently any notice sent by the police officer could not amount to a breach of the provisions of the Government order and would not justify any disciplinary action against him. **1956 All WR (HC) 325: 1956 All LJ 447: (1956) 2 Lab LJ 146: 1956 Cr LJ 1147: AIR 1956 All 578 (580) (Pt C) (Pr 6).**

●——**S. 7 — Scope — Departmental enquiry — Rules as to.**

Section 7 does not in terms make provision for any enquiry: it merely provides that the exercise of disciplinary powers shall be subject to rules framed by the State Government. It is Chapter 32 of the Police Regulations which provides for a departmental trial for punishment to be inflicted under S. 7, Police Act. Mahendra Singh v. State of U. P., **1956 Cr LJ 174: (1955) 2 Lab LJ 750: 1955 All LJ 643: 1955 All WR (HC) 548: ILR (1956) 1 All 178: AIR 1956 All 96 (97) (Pt B) (Pr 6) (SB).**

——**S. 7** — Inquiry under — Procedure — Applicability of Civil Services Rules to Departmental trials under S. 7, Police Act. It has been expressly mentioned in R. 3 that the rules would not apply to persons for whose appointment and conditions of employment special provision is made by or under any law for the time being in force. The procedure provided in the Civil Services (Classification, Control and Appeal) Rules would not, therefore, apply to departmental trials of Police Officers under S. 7 of the Police Act. See Civil Services (Classification, Control and Appeal) Rules, R. 3. **AIR 1954 All 487 (DB).**

——**S. 7** — Enquiry under — Fair opportunity to defend — The dpartmental enquiries should be conducted without any unnecessary delay and the person whose conduct is being enquired into given a reasonable opportunity of defending himself not merely by calling defence witnesses but by testing the value of the prosecution evidence by cross-examination. See Constitution of India, Art. 226. **1954 Cri LJ 874: AIR 1954 All 438 (DB).**

——**Ss. 7 and 29** — Charge of cognizable offence against police officer in Assam — Departmental action before he has been tried by Court of law not illegal. See Constitution of India, Art. 311 (2). **1962 (1) Cri LJ 265: AIR 1962 Assam 34 (DB).**

——**S. 7 — Bengal Police Regulations, 1943 — Departmental proceedings by appointing authority — Validity — Constitution of India, Arts. 311 and 313.**

Where the appointing authority is the authority which conducts the departmental proceedings of the nature prescribed by the Regulations, which conform to the nature of enquiry or proceedings contemplated by Art. 311 (2) of the Constitution and as a result of the proceedings or enquiry decides to inflict the punishment of dismissal upon the person against whom the proceedings are taken, the proceedings cannot be said to be illegal or void. Article 313 of the Constitution preserves the Police Act and the Regulations. **AIR 1951 Cal 179 (181) (Pt B) (Pr 12).**

——**S. 7 — Departmental proceedings initiated by appointing authority — Validity.**

A departmental proceeding started by the appointing authority under the Police Act and the Regulations in respect of the alleged misconduct of a Police Sub-Inspector cannot be held to be illegal on the principle, that a prosecutor cannot be a judge in his own case. Many Statutory bodies having a duty to act quasi judicially act as judges in the matters in which they are themselves interested as parties: 1950 SCR 621, Rel.

Moreover it is in the fitness of things that the person who made the appointment of a particular employee should himself decide whether the employee is fit to continue in employment or not or whether he deserves any punishment or not. **AIR 1951 Cal 179 (182) (Pt D) (Pr 17).**

——**S. 7 — Police Regulation 241 — Scope — Dismissal of Police Officer on ground of offence of which he was acquitted by Criminal Court — Legality.**

Where a Police Officer has been dismissed from service by the District Superintendent of Police on the sole ground that he committed an offence of rape, and the Police Officer was acquitted of that charge by the Court of Session not on any technical ground but upon the view of the facts taken by the jury, the dismissal is contrary to Police Regulation 241. **1951 Nag LJ 593.**

——**S. 7 — Master and servant — Government servant — Departmental enquiry — No right to be represented by counsel.**

In a departmental enquiry a Government servant has not a right to be represented by counsel. AIR 1948 Mad 379, Rel. on. **ILR (1955) Punj 934: AIR 1955 Punj 118 (122) (Pt E) (Prs 14, 15).**

3. Powers of I. G., D. I. G. etc.

——**S. 7 — Police Regulations, Paras. 479 (e) (f), 490 (7), 491, 508 (1) (b), 513** — Deputy Superintendent of Police delegated powers of Superintendent of Police under Para. 479 (f) has no jurisdiction to dismiss or remove a constable — It is only when such officer recommends dismissal or removal that Superintendent of Police can record such an order after giving the constable, if this had not been already done, a copy of the findings of the enquiry officer and asking him to show cause within reasonable time why such punishment should not be imposed upon him — Superintendent of Police has no jurisdiction to impose such punishment when officer conducting enquiry has not recommended dismissal or removal, but only the punishment of reduction in grade for two years. **1964 All LJ 31.**

——**S. 7** — Certiorari — Acquiescence in jurisdiction — Dismissal order of police servant based on report of departmental proceedings conducted by Officer not having requisite qualifications — Objection to jurisdiction not raised before enquiring officer although opportunity to raise such objection, was offered — Omission debars police servant from challenging dismissal order on that ground by certiorari. See Constitution of India, Art. 226. **AIR 1962 All 114 (DB).**

——**S. 7** — Offence committed by Sub-Inspector — Enquiry by Superintendent of Police — Validity — There is nothing in the Police Regulations requiring the I. G. of Police himself to hold the trial in respect of an offence under S. 7 of the Act committed by a Sub-Inspector. It provides for the holding of such trials by a Superintendent of Police. See U. P. Police Regulations Rules, Rule 479. **AIR 1957 All 767 (DB).**

——**S. 7 — Head Constable — Charge against — Enquiry and punishment by Police Officer not possessing powers of Magistrate.**

For the purposes of S. 7, the Act did not make it necessary for the superior officers named therein to possess magisterial powers before they could take action against police officers of subordinate rank.

Therefore, a charge against head-constable may be enquired into and one or more of the punishments for which provision is made in S. 7, may be imposed by a police officer not possessing the powers of a Magistrate. **1956 Cr LJ 174: (1955) 2 Lab LJ 750: 1955 All LJ 643: 1955 All WR (HC) 548: ILR (1956) 1 All 178: AIR 1956 All 96 (98, 99) (Pt A) (Prs 7, 12).**

——**S. 7** — Scope — Power to look into character rolls — Superintendent of Police has power. **AIR 1955 NUC (All) 2704.**

——S. 7 — Scope — Governor's power to dismiss subordinate police officer — (Government of India Act, 1935, Ss. 243, 220 (2) and 240 (3) — (Constitution of India, Arts. 311 (2) and 217 (1)).

In India the paramount power of the Crown under the 1935 Act and of the President, Governor, or Rajpramukh as the case may be under the Constitution, is subject, and subject only, to such exceptions as are expressly provided by the Act or the Constitution itself.

The plain meaning of Section 243 of the 1935 Act is that if with regard to the conditions of services of the subordinate ranks of the police force (as determined by or under the Police Act) there is a conflict between such conditions and the provisions of Ss. 240, 241 or 242, the former will prevail. In other words, it is only to the extent to which the conditions or service of such police officers are inconsistent with the provisions of those sections that the operation of the latter will be excluded.

Section 7 of the Police Act provides that (subject to Art. 311 and to such rules the State Government may make) certain specified officers may dismiss a police officer of the subordinate ranks. There is nothing in the Act which touches on the power of the Crown to dismiss a police officer and nothing which is inconsistent therewith; on the other hand R. 479 (a) of the Police Regulations, which is a rule made under S. 7 of the Act, contains an express reservation of the Governor's powers of punishment with reference to all officers. The power vested by S. 7 in the Inspector-General and certain other officers to dismiss subordinate ranks of the police force is not a delegation to them of the Crown's power of dismissal at all but is a separate statutory power which is neither a substitute for nor restricts the constitutional power of the Crown to dismiss its servants at its pleasure.

Therefore, the provisions of S. 243 did not affect the power of the Governor to dismiss a police officer of the subordinate ranks at pleasure, subject only to the requirements of S. 240 (2). Putting on one side for the moment the question of the effect of Art. 320, under the Constitution the Governor has the power, subject to the provisions of Art. 311 (2), to dismiss at pleasure a police officer of the subordinate ranks. **AIR 1954 All 629 (631, 632) (Pt A) (Prs 11, 15, 16) (DB).**

——**S. 7** — Prevention of Corruption Act (1947), S. 6 — Sanction — "Competent to remove him from his office" — (Constitution of India, Article 311) — (Criminal P. C. (1898), S. 537) — (Words and Phrases — "Competent to remove him from his office"). The I. G. of Police has the statutory power under S. 7 to dismiss or remove any Police Officer of the subordinate ranks. But this power would be indirectly taken away if that particular officer was appointed by an authority superior to the I. G. of Police. This power of the I. G. is subject to the provisions of Article 311 of the Constitution and to such rules as the State Government may from time to time, make. See Prevention of Corruption Act (1947), S. 6. **AIR 1956 Bhopal 30.**

——**S. 7** — Departmental enquiry against Assistant Sub-Inspector — Constitution of tribunal — Retired Police Officer re-employed in another department recognised as branch of Police Organisation and holding rank of Deputy Superintendent not being "Police Officer" is not competent to hold enquiry. **65 Pun LR 964: AIR 1963 Punj 370 (Pt B) (Pr 16) (DB).**

——S. 7 — Standing Order issued by Inspector-General of Police is not a rule — It cannot operate retrospectively.

The Standing Order issued by the Inspector-General of Police cannot be considered to be a Police Rule under S. 7 of the Police Act. Under that section only the Provincial Government can make a rule and the order of the Inspector-General of Police, has no authority to do so. Even if it be considered to be a rule under S. 7, if it was made after the plaintiff had been dismissed it cannot retrospectively affect the plaintiff's position. **58 Punj LR 104: ILR (1956) Punj 77: AIR 1956 Punj 106 (108) (Pt C) (Pr 9) (DB).**

——**S. 7** — Government of India Act (1935), Sections 240 (2) and 243 — "Conditions of Service" in S. 243 include conditions regulating dismissal of subordinate ranks in police force — Sub-Inspector of Police appointed by Deputy Inspector-General of Police can be dismissed by senior Superintendent of Police. See Government of India Act (1935), S. 240 (2). **AIR 1952 Punj 337.**

——S. 7 — Scope — Dismissal of Sub-Inspector of Police — Power of District Superintendent.

Under S. 7 of the Police Act, the District Superintendent of Police has power to dismiss a Sub-Inspector of Police in the absence of any rule made by the State Government under section restricting his power to dismiss to any particular class of the subordinate ranks. **54 PLR 247: ILR (1952) Punj 486: AIR 1952 Punj 337 (339) (Pr 8).**

——**S. 7** — Government of India Act (1935), Sections 240 (2) and 243 — Conditions of Service in S. 243 includes conditions regarding dismissal of subordinate ranks in police force — Sub-Inspector of Police appointed by D. I. G. of Police can be dismissed by senior Superintendent of Police. See Government of India Act (1935), Section 240 (2). **('52) 54 Pun LR 247 (DB).**

——**S. 7** — Scope — If inconsistent with Ss. 5 and 35 — A Sub-Inspector is removable from his office even by a District Superintendent of Police under S. 7 of the Act. The view that by reason of the provisions of S. 35 read with S. 5 it is only the I. G. of Police, who is given the powers of a Magistrate, that could enquire into a charge-sheet and dismiss him and that when there is no such officer in the State the State Government alone could do so is to ignore the provisions of S. 7 between which and the former sections there is really no conflict. See Criminal P. C. (1898), S. 197. **1957 Cr LJ 394: AIR 1957 Tripura 18.**

4. Police Regulations — Cases.

(A) Bengal.
(B) Bombay.
(C) C. P. and Berar.
(D) Madhya Bharat.
(E) Madhya Pradesh.
(F) Punjab.
(G) Rajasthan.
(H) Uttar Pradesh.

4 (A). Bengal.

——**Ss. 7 (b) and 29** — Bengal Police Regulations (1943), R. 881 — Order under R. 881 requiring police officer under suspension to reside in police

lines for indefinite period amounts to confinement — Order is illegal — Rule 881 is illegal and ultra vires for such case. See Bengal Police Regulations (1943), R. 881. **1965 (2) Cri LJ 77: AIR 1965 Cal 347.**

——**S. 7** — Bengal Subordinate Service (Disciplinary and Appeal) Rules (1936), Rr. 4, 5 — Typist appointed by Special Superintendent of Police in Intelligence Branch and C. I. D. not a subordinate clerk within R. 5 — Regulation 768 (b) does not apply — His appointing authority being Special Superintendent of Police, disciplinary action by Superintendent, Government Railway Police not valid. See Constitution of India, Art. 311. **AIR 1965 Cal 169 (DB).**

——**S. 7 — Dismissal of inferior police officers — Appeal from dismissal order — Bengal Police Regulations, Rules 883 and 888 (a) (xiii) — Period of limitation prescribed for appeal by R. 883 — Delay in filing appeal — Appellate authority has no power to condone delay — Personal hearing is not obligatory.**

There is nothing in Bengal Police Regulations which indicates that the legislative intent is that the appellate authority should have power to condone delay, when such delay occurs in matters of appeal which have been specifically provided for in R. 883. This is a clear provision which limits the period of time of preferring an appeal to 37 days of the date of receipt of the order appealed from. It is not necessary to read this provision along with the one to be found in Cl. (xiii) of R. 888 (e) which is an entirely separate provision having nothing to do with appeals properly so called. Further, there is nothing in the rule that obliges the appellate authority to hear an appellant in support of an application for condonation of delay in preferring an appeal. There is, indeed no power in the appellate authority to excuse delay, and if it has no such power, it cannot acquire any at the appellant's request. **AIR 1963 Cal 6 (9) (Pt B) (Prs 15, 17) (DB).**

——**S. 7 — Police Regulations (Bengal) (1915), Rule 15 — Validity — Constitution of India, Articles 311 (1) and 313.**

Rule 15 of the Police Regulations, 1915 must now be held to be ultra vires as infringing Article 311 (1). The rule must be held to be inoperative under Art. 313 of the Constitution. **('51) 55 Cal WN 605: ILR (1952) Cal 254: AIR 1953 Cal 316 (318) (Pt B) (Pr 30).**

——**S. 7 (b)** — An order of District Superintendent of Police directing Police Sub-Inspector to join police lines at A and to remain under control of R. I. and obey all line discipline and Hajira as per P. R. B. rules is not ultra vires on ground that it infringes S. 7 (b) when the Sub-Inspector has not been asked to live in the Police lines — No question of any confinement arises under S. 7 (b). 58 Cal 1132, Disting. **AIR 1951 Cal 179 (182) (Pt E) (Pr 19).**

4 (B). Bombay.

——**S. 7** — Police Regulations, Regn. 64 — Misconduct outside employment — Police Officer — Rude behaviour with member of public in private life — Disciplinary action can be taken against Police Officer. See Constitution of India, Article 309. **AIR 1960 Bom 285 (DB).**

——**S. 7 — Rules under — (Bombay Police Manual — Rules for holding Departmental Enquiry, R. 3) — Construction — Defective drafting — Revision necessary.**

The rules are extremely badly drafted and it is time that some responsible person sits down and looks to the language of these rules and puts them in order. Difficulties are constantly caused by the inartistic and sometimes even inaccurate drafting of these rules. **AIR 1956 Bom 545 (546) (Pt A) (Pr 3) (DB).**

——**S. 7 — Rules under — (Bombay) Police Manual — Rules for holding Departmental Enquiry — Rules 3 (b), 3 (c) — Scope — If mandatory — Absence of enquiry — Effect.**

Although no mandatory language is used in Rr. 3 (b) and 3 (c), there is clear indication that a preliminary inquiry is mandatory and essential before a charge can be framed which charge the person alleged to be guilty of an offence has to meet. Further, R. 3 (b) does not lay down that the preliminary inquiry should be held by the same person who ultimately frames the charge. The person holding the preliminary inquiry may be different from the person who ultimately frames the charge, but the rule presupposes that there must be a preliminary inquiry upon which ultimately the charges served on the defaulter are based.

In cases falling under Item (ii) of R. 3 (a), an Inspector or a Deputy Inspector is authorised to hold a preliminary inquiry, but that preliminary inquiry can only proceed upto a particular stage. As soon as the Inspector or the Deputy Inspector discovers that there is a prima facie case against the defaulter, then he must not proceed with the preliminary inquiry but must report the matter to the Superintendent who would continue the inquiry.

Held, on facts that either there was a preliminary inquiry by an officer who was not authorised to hold that inquiry, or there was no preliminary inquiry at all. **AIR 1956 Bom 545 (546, 547) (Pt B) (Prs 3 to 5) (DB).**

4 (C). C. P. and Berar.

——**S. 7** — C. P. and Berar Police Regulations, Rr. 217 and 226 — Rude and improper behaviour by Police Constable in Vidarbha area with member of public in private life — Withholding of increment and reduction to lower stage in time scale not legal. **1959 Nag LJ 441: 61 Bom LR 1537: ILR (1959) Bom 1846: (1960) 1 Lab LJ 291: AIR 1960 Bom 285 (288, 289) (Pt B) (Prs 9, 14) (DB).**

——**S. 7** — Scope and applicability — Where a Police Officer has been dismissed from Service by the District Superintendent of Police on the sole ground that he committed an offence of rape, and the Police Officer was acquitted of that charge by the Court of Session not on any technical ground but upon the view of the facts taken by the jury, the dismissal is contrary to Police Regulation 241. See Constitution of India, Art. 311. **('51) 1951 Nag LJ 593 (DB).**

4 (D). Madhya Bharat.

——**S. 7 — Police Regulations, Regn. 850 — Powers of High Court.**

Under the Police Regulation No. 850 if the Superintendent of Police is led to believe on the information at his disposal that a particular individual is leading a life of crime, he is empowered to order surveillance. Whether the information, which led the Superintendent of Police to believe that the petitioner is leading a life of crime, is adequate or not is not for the High Court to enquire in proceedings under Art. 226 of Constitution. **ILR (1953) Madh Bha 162: AIR 1954 Madh Bha 63 (64) (Pt C) (Pr 5) (DB).**

4 (E). Madhya Pradesh.

——**S. 7** — C. P. and Berar Police Regulations, Regn. 229 — Removal of Police Sub-Inspector from service — Official competent to hold inquiry — Any responsible officer deputed by Inspector-General of Police can hold inquiry — Violation of Police Regulation 229 in forwarding report — Effect — Order of removal not vitiated. See Constitution of India, Art. 311. **AIR 1961 Madh Pra 365 (DB).**

——**S. 7** — C. P. and Berar Police Regulations, Regn. 190 — Person under suspension not reporting at a particular place — He is not a deserter — His name cannot be struck off the rolls without compliance with Art. 311 oof the Constitution. See Constitution of India, Art. 311. **(1961) MPLJ (Notes) 257.**

——S. 7 — Regn. 241 — Scope — Government servant prosecuted on criminal charge and honourably acquitted — Fresh proceedings in respect of same matter — Validity.

It is not open to the authorities thereafter to hold a departmental enquiry into a charge, the substance of which indicates that it is based on assumption of the Police Officer's fault in the criminal case. Once the Criminal Court came to the conclusion that the deceased did not die on that particular day, the same fact could not be taken as the basis for any departmental action for the purposes of framing any charge. Where an order of dismissal was based on the report of such departmental enquiry the very basis of the order of dismissal was unwarranted and illegal. Such an order based on unwarranted and unauthorised assumptions could not be said to be an order passed within powers or within jurisdiction of the authority. **1958 MPC 568: 1958 MPLJ 681: 1958 Jab LJ 822: (1959) 1 Lab LJ 47: AIR 1959 Madh Pra 46 (48, 49) (Pt A) (Prs 6, 7, 9).**

——**S. 7** — Police Regulations, Reg. 214 (iii), (vi) and (vii)—Constitution of India, Art. 311 (2) — Punishment under Reg. 214 (iii), (vi) and (vii) attracts Art. 311 (2). See Constitution of India, Art. 311 (2). **AIR 1956 Nag 162 (FB).**

——S. 7 — Regn. 214, Expl. II — Civil Service Regulations, Art. 465-A — Retirement contemplated by.

Compulsory retirement contemplated by Expl. II of Reg. 214 (added by Notifn. No. 77, dated 1st May, 1946), which is to be effected on the special grounds of inefficiency or unfitness for further service is not the same as retirement, after completing qualifying service of not less than 25 years, provided in Art. 465-A for the Civil Service Regulations. Shankar Datta Tiwani v. State of M. B., **1956 Nag LJ 112: ILR (1956) Nag 77: AIR 1956 Nag 162 (164) (Pt B) (Pr 8) (FB).**

——**S. 7** — C. P. and Berar Police Regulations, Regn. 427 — Evidence Act (1872), S. 35 — Birth entries in Police registers are relevant — Certified copies are admissible — Entries in vaccination report are also relevant. See Evidence Act (1872), S. 35. **AIR 1955 Nag 290 (DB).**

——**S. 7** — Regn. 232 — Enquiry against Police Officer — Proper procedure — The services of a Police Officer cannot be terminated without making an enquiry against him — The enquiry must be in accordance with the Police Regulations and the General Book Circulars in respect of an officer belonging to Madhya Pradesh Police Force — Further it must be by a person competent to hold it. See Madhya Pradesh Police Regulation, 228. **1955 Cri LJ 974: AIR 1955 Nag 160 (DB).**

——S. 7 — Regn. 232 — Jurisdiction of High Court — Dismissal of Government servant under Police Regulation.

The jurisdiction of the High Court is not restricted only to cases where there has been any infraction of the Constitution, but extends also to cases where the Police Act or Regulations have been infringed, in dismissing a Police Officer. See Constitution of India, Art. 226. **1955 Cri LJ 974: AIR 1955 Nag 160 (DB).**

——S. 7 — Regns. 228, 232 — Enquiry against Police Officer — Proper procedure — (Constitution of India, Art. 311).

The services of a Police Officer cannot be terminated without making an enquiry against him. The enquiry must be in accordance with the Police Regulations and the General Book Circulars in respect of an officer belonging to the Madhya Pradesh Police Force. Further, it must be by a person competent to hold it, that is, the person making it must necessarily be, at the time of the enquiry, on the police establishment of Madhya Pradesh and subordinate to the Inspector-General of Police, Madhya Pradesh. If an enquiry is held by anyone else, it cannot be regarded as an enquiry within the meaning of the Police Regulations. **ILR (1955) Nag 93: 1955 Cr LJ 974: AIR 1955 Nag 160 (162, 163) (Pt C) (Prs 12, 13) (DB).**

——S. 7 — Regn. 232 — Proper material to act upon — Report by unauthorised agent.

Before an officer or an authority can act under Constitution of India, Art. 311 (2), he must have before him the material on which he acts. A Sub-Inspector of Police from Madhya Pradesh deputed to Hyderabad — Enquiry against, by D. S. P. also a deputed officer from Madhya Pradesh but under Hyderabad laws — Report and relevant documents sent to D. I. G. of Madhya Pradesh. Notice to show cause issued under Article 311 (2) and order of dismissal passed. **Held,** that the report being made entirely by an unauthorised agency the D. I. G. could not act under Art. 311 (2). **ILR (1955) Nag 93: 1955 Cri LJ 974: AIR 1955 Nag 160 (163) (Pt E) (Pr 15) (DB).**

——**S. 7** — Regn. 228 — Probationer Sub-Inspector dismissed from service for specific fault — Case falls under Regulation 214, Expl. 2 — Departmental enquiry must be held — Dismissal without enquiry is illegal. See Madhya Pradesh Police Regulations, Regn. 214. **AIR 1955 Nag 107 (DB).**

——S. 7 — Regns. 214 and 228 — Probationer Sub-Inspector dismissed from service for specific fault — Dismissal without departmental enquiry is illegal — (Constitution of India, Art. 311).

According to Expl. 2, to Regn. 214 of the Police Manual, removal of a probationer Sub-Inspector of Police for some specific fault, e.g., misconduct, etc., amounts to removal or dismissal from service within the meaning of Regulation 214.

Such a case is brought within the purview of Regulation 228 of the Police Manual, which requires a previous departmental enquiry in every case of dismissal, etc.

Where the probationer has been removed from service for specific fault without holding a departmental enquiry as required by Regn. 228, his removal cannot be regarded as discharge at the end of the probationary period within the meaning of Expl. 1 to Regn. 214, when in fact no such order of discharge was passed and the probationer had continued to discharge his duty even after the probationary period, as his dismissal is not in accordance with law and must be set aside. **ILR (1954) Nag 670: 1954 Nag LJ 621: AIR 1955 Nag 107 (108, 109) (Prs 8, 10, 12) (DB).**

——S. 7 — C. P. and Berar Police Regulations, Regn. 762 — Criminal P. C. (1898), S. 40 — Offence committed in Madhya Pradesh — Offender arrested outside limits of M. P. — Arrest is legal — Even if there be any illegality in arrest, trial is not vitiated on that account. See Criminal P. C. (1898), S. 40. **AIR 1955 Nag 97 (DB).**

——S. 7 —Police Regulations, Regns. 223, 228-A —Government of India Act (1935), Ss. 243 & 266— Inspector of Police — Removal from service — Procedure — Inspector of Police belongs to subordinate rank of Police Force — Enquiry by Deputy Inspector General of Police — Consultation with Public Service Commission not necessary. See Government of India Act (1935), S. 243. **1952 Cri LJ 870: AIR 1952 Nag 172 (DB).**

——S. 7 — C. P. and Berar Police Regulations, Regn. 223 — Dismissal of Inspector of Police — Power of I. G. to delegate enquiry to D. I. G.

Under Police Regulation No. 223 the power to remove or dismiss from service an Inspector of Police is vested in the Inspector-General of Police. It is, however, not necessary for the Inspector-General of Police to make an enquiry against the Inspector himself but he can delegate that power to a Deputy Inspector-General of Police. **ILR (1952) Nag 118: 1952 NLJ 154: 1952 Cr LJ 870: AIR 1952 Nag 172 (174) (Pt B) (Pr 9) (DB).**

——S. 7 — Police Regulations, Regn. 241 — Police Officer tried and acquitted by Criminal Court on ground that facts alleged were not established — — Officer dismissed from service after departmental enquiry — Dismissal is contrary to Regn. 241. **1951 Nag LJ 593 (DB).**

——S. 7 — Police Regulations, Regns. 214 and 221 — Dismissal of Subordinate Police Officer by District Inspector of Police after departmental enquiry — Dismissal can be questioned before Court of law.

The Constitution of India, does not prevent a dismissal of a member of the Subordinate Police Service by the D. S. P. after a departmental enquiry, being questioned before a Court of law. See Constitution of India, Art. 311. **('51) 1951 Nag LJ 593 (DB).**

——Ss. 7 and 12 — Police Regulations (M. P.) R. 241 — Police officer tried and acquitted by Criminal Court on ground that facts alleged were not established — Officer dismissed from service after departmental enquiry — Dismissal is contrary to Regn. 241.

Under (M. P.) Police Regulation 241, the re-instatement of a police officer who has been tried and acquitted by a criminal Court is obligatory if the offence for which he was tried constitutes the sole ground of punishment unless (a) the acquittal is based upon technical grounds or (b) the facts established at the trial show that his retention in Government service is undesirable.

Where a Head Constable of Police was tried for rape and acquitted on the ground that the facts against him have not been held to be established by the jury, his dismissal from service after a departmental enquiry on the ground that he had committed rape, is contrary to Police Regulation 241. **('51) 1951 Nag LJ 593 (DB).**

4 (F). Punjab.

——S. 7 — Rules under — Punjab Police Rules, R. 16 (3) (1) (d) — Criminal proceedings against accused on charge of bribery — Departmental proceedings on charge of negligence based on facts disclosed in criminal proceeding — Maintainability.

The charge against the accused in criminal proceeding was that he had accepted bribe from certain persons and that this amount was recovered from his trouser's pocket. The accused pleaded that these persons whose relations he had been ordered to arrest had without his knowledge and surreptitiously put the currency notes in his trouser's pocket. The accused was acquitted but he was subsequently proceeded departmentally on the charge of negligence.

Held, that the departmental proceeding for the charge of negligence was maintainable as this charge had no connection with the charge of bribery and it was based on facts brought to light and discovered in evidence cited in the criminal case. **58 Punj LR 104: ILR (1956) Punj 77: AIR 1956 Punj 106 (108) (Pt A) (Pr 5) (DB).**

——S. 7 — Rules under Punjab Police Rules, R. 16.24 (ix) — Rule 16.24 (ix) must be complied with before order of dismissal.

Under S. 7, Police Act the Punjab Government has framed Police Rule 16.24 (ix) and, therefore, this rule must be considered to be part of the statute and being prohibitory in form, its provisions must be observed. The terms of Police R. 16.24 (ix) must be observed before a person in the Police Force could be legally dismissed. **58 Punj LR 104: ILR (1956) Punj 77: AIR 1956 Punj 106 (109) (Pt D) (Pr 10) (DB).**

——S. 7 — Scope — Rules under — Punjab Police Rules (1934), Ch. 16, R. 24 — Contravention — Right of action.

A contravention of rules in regard to procedure which were contained in R. 24 of Ch. 16, Punjab Police Rules, does not give to an aggrieved person a right of action. AIR 1954 Punj 134 and AIR 1951 Mad 882, Rel. on; AIR 1954 All 438 and AIR 1954 Assam 18, Dissented from. **ILR (1955) Punj 934: AIR 1955 Punj 118 (121, 122) (Pt D) (Prs 12, 15).**

4 (G). Rajasthan.

——S. 7 — Rajasthan Police Regulations (1948) —Scope— Regulations have no force of statutory rules — Disregard of Reg. 89 (T) which is directory cannot vitiate enquiry — Petty charge of corruption against Government servant cannot be considered as a serious charge within that Regulation. 1956 SCJ 259; AIR 1956 SC 285, Rel. on. **1964 Jab LJ 24: 1964 MPLJ 86: 1963 MPLJ (Notes) 20: (1964) 8 Fac LR 210: ILR (1964) Madh Pra 242: AIR 1964 Madh Pra 114 (116) (Pt C) (Pr 8) (DB).**

——S. 7 — Rajasthan Police Regulations (1948) Regulation 321 — Final Report by Police — Report negative — Report not to be superseded by executive order — By judicial order Magistrate can direct police to submit charge-sheet — Even on negative Final Report Magistrate can take cognizance of offence. See Criminal P. C. (1898), S. 190 (1) (b). **1965 Raj LW 352: 1966 Cri LJ 1202: ILR (1965) 15 Raj 719: AIR 1966 Raj 233 (DB).**

——S. 7 — Police Regulations (1948), Regns. 1 and 7 — 'District Superintendent of Police' — Does not mean Additional Superintendent of Police — Warrant signed by latter — Presumption under Section 6 cannot be drawn. See Rajasthan Public Gambling Ordinance (1949), S. 5. **1965 (1) Cr LJ 80: AIR 1965 Raj 5 (DB).**

——S. 7 — Police Regulations (1948) — Scope — These Regulations have not the force of law — They relate to the constitution of the Police force and allied matters. **1964 Raj LW 465: 1965 (1) Cr LJ 80: ILR (1964) 14 Raj 1024: AIR 1965 Raj 5 (7) (Pt C) (Pr 10) (DB).**

——S. 7 — Rajasthan Police Regulations (1948), R. 100 — Validity — If prevail over Rules of

1950 — (Rajasthan Civil Services (Classification, Control and Appeal) Rules (1950).

The Rajasthan Police Regulations were issued by the Chief Secretary to the Government of Rajasthan in September, 1949, without the sanction of the Rajpramukh and as such they have no statutory force. AIR 1958 Raj 284, Rel. on. The Police Act of 1861 was validly enforced in Rajasthan for the first time on the 19th July, 1950, when it was published in the Rajasthan State Gazette. As the Rajasthan Police Regulations 1948, were issued before the Police Act of 1861 received operation in this State, the said regulations cannot be said to have been issued under the Act of 1861 as adopted to Rajasthan and even otherwise they lack statutory force. These regulations under the circumstances can, at the best, be treated as administrative rules for the guidance of the Officers concerned and no more, and cannot prevail over the Rules of 1950 in so far as they may be found inconsistent with the latter. The Rajasthan Civil Services (Classification, Control and Appeal) Rules of 1950 which were indisputably issued by the Rajpramukh, who was the competent legislative authority at the time, in exercise of the power conferred by Art. 309 of the Constitution must prevail and receive their due effect and force. **ILR (1959) 9 Raj 654: 1959 Raj LW 523: AIR 1960 Raj 56 (58) (Pt A) (Pr 7) (DB).**

——S. 7 — Rajasthan Police Regulations (1948), R. 100 — Applicability to — (Rajasthan Civil Services (Classification, Control and Appeal) Rules (1950)) — (Constitution of India, Arts. 309, 310, 311).

Rule 100 of Rajasthan Police Regulation, 1948, which occurs in Ch. VI, is only applicable to the members of the Police Force and is not applicable to ministerial officers. The Inspector-General of Police therefore has no power to enhance the punishment of a ministerial officer awarded by the Deputy Inspector-General of Police. Even if it be assumed that Rule 100 of the Police Regulations was applicable to a ministerial officer these rules were completely superseded by the Rajasthan Civil Services (Classification, Control and Appeal) Rules, 1950, framed under Art. 309 of the Constitution so far as ministerial officers are concerned. But the order of the Deputy Inspector-General of Police imposing the punishment of witholding increment for a year on the ministerial officer of the department cannot prevent the Inspector-General of Police who was the appointing authority to reopen the case and to impose for the same misconduct a higher punishment which he alone was empowered to impose. It is only when the authority which actually imposes a minor punishment has not got the power of imposing a major punishment, that it is open to the higher authority to reopen the case and impose the major punishment in the absence of any power of enhancement. **1959 Raj LW 641: ILR (1958) 8 Raj 953: AIR 1958 Raj 284 (285) (Pt A) (Prs 5 to 9) (DB).**

——S. 7 — Rajasthan Police Regulations (1948), Regn. 89 (k) — Procedure — Departmental enquiry into charges of misconduct against Sub-Inspector of Police — Preliminary proceedings drawn up by Superintendent of Police — Part of evidence recorded by Assistant Superintendent — — Legality — Constitution of India, Art. 311 (2)).

Under Regulation 89, the drawing up of proceeding is to be distinguished from the recording of the evidence, Regulation 89 (k) only requires that the proceedings should be drawn up by the Superintendent of Police himself; it does not require that the evidence should also be recorded by him. Where the Superintendent of Police had himself drawn up the preliminary proceedings in a departmental enquiry against a Sub-Inspector of Police who was charged with serious misconduct and he had recorded some evidence but thereafter the rest of it was recorded by Assistant Superintendent of Police who drew up a fresh charge-sheet on the same lines as the charge-sheet drawn up by the Superintendent, there is infringement of Regn. 89 (k). **1957 Raj LW 243: ILR (1957) 7 Raj 593: AIR 1957 Raj 148 (150) (Pt B) (Pr 9) (DB).**

4 (H). Uttar Pradesh.

●——**S. 7** — U. P. Police Regulations, Regulations 165 and 166 — Gold and silver suspected to be stolen — Search and seizure — Disposal of property seized — Proper procedure. See Criminal P. C. (1898), S. 51. **1965 (2) Cri LJ 144: AIR 1965 SC 1039.**

●——**S. 7** — U. P. Police Regulations, Chap. 20, Regn. 236 — Regulations contained in Chap. XX have no statutory basis — They are not 'a law' which the State is entitled to make under Cls. (2) to (6) of Art. 19. See Constitution of India, Art. 19, Cl. (2). **1963 (2) Cr LJ 329: AIR 1963 SC 1295.**

●——**S. 7** — U. P. Police Regulations, Regn. 236, Cl. (a) — Secret picketing of house of suspect — Personal liberty of suspect how far affected or prejudiced. See Constitution of India, Art. 21. **1963 (2) Cr LJ 329: AIR 1963 SC 1295.**

●——**S. 7** — U. P. Police Regulations, Regn. 236, Cl. (b) is violative of Art. 21 of Constitution of India — It is invalid. See Constitution of India, Art. 19 (1) (d). **1963 (2) Cr LJ 329: AIR 1963 SC 1295.**

●——**S. 7** — U. P. Police Regulations, Regn. 236, Cls. (c) to (e) — These clauses do not infringe Arts. 19 (1) (d) and 21 of Constitution. See Constitution of India, Art. 19 (1) (d). **1963 (2) Cri LJ 329: AIR 1963 SC 1295.**

●——**S. 7** — U. P. Police Regulations, Regn. 236, Cl. (b) — Domiciliary visits — Meaning of—Such visits do not affect fundamental right under Article 19 (1) (d) but they affect personal liberty contemplated by Art. 21 of Constitution. See Constitution of India, Art. 19 (1) (d). **1963 (2) Cri LJ 329: AIR 1963 SC 1295.**

●——**S. 7 — U. P. Police Regulations, Regn. 236, Cl. (a) — 'Picketing' — Meaning of.**

The word 'picketing' in Cl. (a) of Reg. 236 is not used in the sense of offering resistance to the visitor — Physical or otherwise—or even dissuading him, from entering the house of the suspect but merely of watching and keeping a record of the visitors. Kharak Singh v. State of U. P., **1963 All LJ 711: (1964) 2 SCJ 107: (1964) 1 SCR 332: 1963 (2) Cr LJ 329: AIR 1963 SC 1295 (1300) (Pt D) (Pr 11).**

●——**Ss. 7 and 46(2)—Scope—U. P. Police Regulations, Regn. 490 and U. P. Disciplinary Proceedings (Administrative Tribunal) Rules (1947), Rr. 8 and 9 — Relative scope and distinction.**

Regulation 490 of the U. P. Police Regulations sets out the procedure to be followed in an enquiry by the police functionaries, and Rr. 8 and 9 of the Tribunal Rules set out the procedure to be followed by the Tribunal. There is no substantial difference between the procedures prescribed for the two forms of enquiry. The inquiry in its true nature is quasi-judicial. By Regn. 490, the oral evidence is to be direct, but even under R. 8 of the Tribunal Rules, the Tribunal is to be guided by rules of equity and natural justice and

is not bound by formal rules of procedure relating to evidence. Jagannath Prasad Sharma v State of U. P., **(1961) 2 Lab LJ 166: (1962) 1 SCR 151: (1963) 1 SCJ 115: ILR (1961) 2 All 167: AIR 1961 SC 1245 (1252) (Pt D) (Pr 15).**

——S. 7 — U. P. Police Regulations, Paras. 486, 489 — Scope — Magisterial enquiry—Subsequent departmental enquiry — Further information received in the interregnum — Effect.

A combined reading of the two paras. 486 and 489 indicates that para. 486 does not apply to a case where a magisterial inquiry is ordered, and that a police officer can be departmentally tried under S. 7 of the Police Act after such a magisterial inquiry. Where the departmental trial was held subsequent to the completion of the magisterial inquiry the case falls within the express terms of para. 489 (2). The fact that in the interregnum the police received further complaints or that the C. I. D. made further enquiries do not affect the question, if substantially the subject-matter of the magisterial inquiry and the departmental trial is the same. State of Uttar Pradesh v. Ajodhya Prasad, **1961 (1) Cr LJ 794: (1961) 2 SCR 672: ILR (1961) 2 All 205: AIR 1961 SC 773 (775) (Pr 7).**

●——S. 7 — U. P. Police Regulations and Police Act (1861), continue to be in force after the Constitution so far as they are consistent with the provisions of the Constitution. See Constitution of India, Art. 309. **1961 (1) Cr LJ 773: AIR 1961 SC 751.**

●——S. 7 — U. P. Police Regulations, Para. 486, R. 1 — Rule is mandatory. See Interpretation of Statutes. **1961 (1) Cr LJ 773: AIR 1961 SC 751.**

●——S. 7 — U. P. Police Regulations, Para. 486 — Construction — Offence under S. 409, Penal Code — Same being cognizable offence falls under R. 1 of Para. 486 and not under R. 3.

Action under S. 7 of the Police Act can be taken in respect of (i) offences only under S. 7 of the Police Act without involving any cognizable or non-cognizable offences, that is, simple remissness or negligence in the discharge of duty, (ii) cognizable offences, and (iii) non-cognizable offences. Rule 1 of Para. 486 of U. P. Police Regulations refers to a cognizable offence, R. 2 refers to a non-cognizable offence and R. 3 refers to an offence under S. 7 of the Police Act and to a non-congizable offence. Though the word 'only' is mentioned in R. 3, the offence under S. 7 of the Police Act can, in the context, mean an offence only under S. 7 of the said Act, i.e., an offence falling under the first category. An offence under S. 409, Penal Code which is a cognizable offence falls under R. 1 and not under R. 3. State of Uttar Pradesh v. Babu Ram Upadhya, **1961 (1) Cr LJ 773: (1961) 1 SCA 593: (1961) 2 SCR 679: ILR (1961) 1 All 509: AIR 1961 SC 751 (756) (Pt B) (Pr 7).**

●——S. 7 — U. P. Police Regulations—Judicial enquiry — Presiding officer himself giving evidence — Effect — Violation of principle of natural justce. See Constitution of India, Art. 226. **AIR 1958 SC 86.**

●——S. 7 — Departmental trial under U. P. Police Regulations—Officer holding trial — Gross irregularity — Officer himself as witness against petitioner — Order of dismissal — Legality of — Interference by trial. The "trial" is one held in gross violation of natural justice. The fact that the petitioner had gone in appeal against the order under Regn. 508 and also in revision against the appellate order, wherein the order of dismissal was maintained, and thus the petitioner had exhausted his remedies, will not bar his petition for the issue of writ of certiorari. See Constitution of India, Art. 226. **AIR 1958 SC 86.**

●——S. 7 — U. P. Police Regulations, Ch. XI, R. 109 — Police investigation — Irregularities in course of — Failure to comply with the rule relating to submission of police case diary. See Criminal P. C. (1898), S. 537. **1957 Cri LJ 294: AIR 1957 SC 142.**

●——S. 7 — U. P. Police Regulations, Ch. XI, R. 109 — Scope of — Rule has no statutory foundation.

Rule 109 has no statutory foundation but is only an injunction by the executive Government to the police officers as to how they must regulate their work and conduct themselves during the course of investigation. Niranjan Singh v. State of U. P., **1957 Mad WN (SC) 1: ILR (1956) 2 All 745: 1957 SCA 75: 1957 SCJ 69: 1956 SCR 734: 1957 All LJ 233: 1957 All WR (HC) 258: 1957 Cr LJ 294: (1957) Mad LJ (Cri) 1: AIR 1957 SC 142 (146, 147) (Pt B) (Pr 12).**

●——S. 7 — U. P. Police Regulations, Reg. 295 (15). See Police Act (1861), S. 44. **ILR (1965) 1 All 298: 1966 Cr LJ 498: 1964 All WR (HC) 529: 1964 All Cri R 425: AIR 1966 All 222.**

——S. 7—U. P. Police Regulations, Reg. 295 (14)—Impression gathered or circumstances ascertained by Police Officer at spot are not required to be entered in general diary — They are not relevant facts under Section 35, Evidence Act and hence not admissible in evidence. See Police Act (1861), Section 44. **1964 All Cri R 425: 1964 All WR (HC) 579: ILR (1965) 1 All 298: 1966 Cr LJ 498: AIR 1966 All 222.**

——S. 7 — U. P. Police Regulations, Para 486 II — Additional Sub-Divisional Magistrate has jurisdiction under Section 190 of Criminal P. C., in spite of Para. 486 II of U. P. Police Regulations — Police Act no bar — Nature of U. P. Police Regulations. See Police Act (1861), Section 29. **1965 (2) Cr LJ 330: AIR 1965 All 415.**

——S. 7 — U. P. Police Regulations, Para. 142 (1) — Para. 142 (1), Police Regulations is not mandatory. See Arms Act (1878), S. 19 (f). **1965 (1) Cr LJ 667: AIR 1965 All 260 (DB).**

——S. 7 — U. P. Police Regulations, Paras. 406 (4), 534 and 537 — Head Constable cannot claim post of Sub-Inspector according to seniority as of right. See Constitution of India, Article 311. **(1965) 10 Fac LR 278 (All).**

——S. 7 — U. P. Police Regulations, Para. 505, Second Proviso — Section of the Act restricts right of police officer to resign — No conflict between S. 9 and Para. 505—U. P. Government's Notification, dated 26-12-1959 inserting Para. 505 — No mention of Art. 309 of Constitution of notification Para. 505 held not invalid. See Police Act (1861), S. 9. **AIR 1964 All 121.**

——S. 7 — U. P. Police Regulations, Para. 490 — Proceedings under S. 7 — Statements written out by witnesses themselves merely handed over to Deputy Superintendent of Police who did not record them — Reliance on such statements held contrary to provisions of rule contained in R. 490 — Rule is mandatory and not directory — Departure from general rule — Reasons for must be recorded — Natural justice. **1964 All LJ 576: 1964 (8) Fac LR 411.**

——S. 7 — Police Regulations, Paras. 479 (e), (f), 490 (7), 491, 508 (1) (b) and 513 — Deputy Superintendent of Police delegated powers of Superintendent of Police under Para. 479 (f) has no jurisdiction to dismiss or remove a constable— It is only when such officer recommends dismissal or removal that Superintendent of Police can record such an order after giving the constable, if this had not been already done, a copy of the findings of the enquiry officer and asking him to show cause within reasonable time why such punishment should not be imposed upon him. Superintendent of Police has no jurisdiction to impose such punishment when officer conducting enquiry has not recommended dismissal or removal but only the punishment of reduction in grade for two years. **1964 All LJ 31.**

——S. 7 — Para. 61 of Police Regulations — Police Officer guilty of dereliction of duty, or misconduct is unfit to be retained in police force.

The nature of employment and service of a police officer is such that he should be constantly deemed to be on duty and any serious laches, dereliction or misconduct on his part would render him unfit for the proper discharge of his duties. If a peson belonging to police force abets or commits a crime or other acts involving moral turpitude he is certainly unfit for the discharge of his duty as a police officer and would also render himself unfit for retention in the police force by virtue of his own vicious act and conduct. **1964 All LJ 31.**

——S. 7 — Police Regulations, Para. 497 — Constable does not cease to be Police Officer by reason of his being suspended from office — Superintendent of Police can ask him to live in Police lines during period of his suspension. See Police Act (1861), S. 8. **1964 All WR (HC) 739.**

——S. 7 — U. P. Police Regulations, Para. 228 — Power under — Not unchartered or unregulated — Opening of history-sheet — When affects Art. 19. See Constitution of India, Art. 19. **1963 (2) Cri LJ 241: AIR 1963 All 408 (DB).**

——S. 7—Certiorari—Bias—Executive action, mala fide — Duty of High Court — U. P. Police Regulations, Para. 228 — Validity — Classification of history sheets is reasonable — Order sought to be quashed not referred or exhibited — Writ to close history sheet issued. See Constitution of India, Art. 226. **1963 (2) Cr LJ 241: AIR 1963 All 408 (DB).**

——S. 7 — U. P. Police Regulations Para. 58 — Constable in charge of Police outpost — No breach of duties laid down in Para. 58 of Police Regulations — Personal acts of the constable can render him unfit for being retained in the force.

Action under S. 7 of Police Act is essentially a disciplinary action. The very nature of the employment and service of a Police Officer is such that any grave laches or misconduct on his part renders him unfit for proper discharge of his duties. The intention of the legislature, when it enacted S. 7 of the Police Act was that if a person belonging to the police force is base or commits crimes he is certainly unsuited for discharging his duties and would render himself unfit for retention in the police force by his own improper act and conduct: AIR 1960 Bom 285, Foll.; AIR 1959 All 26, Distinguished. **1963 All LJ 1036.**

——S. 7 — U. P. Police Regulations, Para. 486 — Cognizable offence by constable not prima facie made out — Departmental inquiry is competent without following procedure prescribed in Chapter 14 of Criminal P. C. — Para. 486 of U. P. Police Regulations does not apply.

Where it cannot be said that there was a prima facie evidence against the head constable in charge of police outpost having committed a cognizable offence, departmental enquiry under S. 7 of Police Act is competent without following the procedure prescribed in Chapter 14 of Criminal P. C. Mandatory provisions of R. 1 of Para. 486 of U. P. Police Regulations do not apply. **1963 All LJ 1036.**

——S. 7 — U. P. Police Regulations, Paras. 483 and 484 — Complaint alleging misconduct and bribery against Police Sub-Inspector in U. P. received by District Magistrate — Power to order magisterial enquiry — Revisional jurisdiction of High Court — Non-compliance with proviso to S. 202 (1) by District Magistrate — Enquiry if vitiated. See Criminal P. C. (1898), S. 202 (1), Proviso. **1962 (2) Cri LJ 454: AIR 1962 All 456.**

——S. 7 — U. P. Police Regulations — Mandamus writ of — Administrative act — Disregard of mandatory provisions of law — High Court can interfere. See Constitution of India, Article 226. **1962 (1) Cri LJ 547: AIR 1962 All 216.**

——S. 7 — U. P. Police Regulations, Para. 479 — Jurisdiction of subordinate authority not questioned before the authority — Question of jurisdiction cannot be raised for first time before High Court, when it depends upon investigation of facts. Jurisdiction of Dy. S. P. to hold departmental inquiry not questioned before any of the subordinate authorities cannot be raised in writ petition. See Constitution of India, Art. 226. **AIR 1961 All 169.**

——S. 7 — U. P. Police Regulations, Chap. 32, Para. 486 — Information regarding committal of cognizable offence by petitioner a police officer — Non-registration of, is irregularity — Inquiry by Circle Inspector on orders of Superintendent of Police — No information laid before Magistrate — Departmental inquiry — No regular judicial trial — Petitioner held prejudiced — Criminal P. C. (1898), Chap. XIV, S. 157. AIR 1958 All 584, Rel. on. **AIR 1961 All 169 (170 to 173) (Pt B) (Prs 8, 11, 13, 17).**

——S. 7 — Police Regulations, Para. 486 — Dismissal of police officer — Procedure.

Where the police officers who were appointed to the Police Force under Section 2 of the Police Act were dismissed by the Police authorities as a result of a trial under Section 7 of the Police Act because they have been found guilty of remissness of duty and unfitness for the same, within the terms of Section 7 of that Act, the dismissal is not one in the exercise of general power but is in the exercise of power vested in them under the Police Act. The dismissal should be in conformity with the requirements of the Act and the rules framed thereunder. If the dismissal is not in conformity with the requirements of the Act or the rules, it must be held to be bad and cannot be allowed to stand. Even if there is any general power of dismissal, it is of no avail because it has not been exercised. AIR 1960 Bom 14 and AIR 1961 All 315, Distinguished. **1961 (2) Cr LJ 327 (All).**

——S. 7 — Police Regulations, Para. 486 (I) and (III) — Cognizable offence by police officer — Procedure.

The whole Para. 486 has to be read together and the third sub-paragraph has to be interpreted keeping in view the other two sub-paras. It can-

not, therefore be said that when an allegation about committal of a cognizable offence was made against a police officer it was open to the Superintendent of Police to start proceedings under sub-para. (III) without having any regard to the provisions of sub-para. (I). If the offence which the police officer was alleged to have committed was a cognizable offence, sub-para. (I) is attracted and without following its provisions, it is not open to the Superintendent of Police to start proceedings under sub-para. (III) against him. Where the provisions of Para. 486 (I) of the Police Regulations are not observed the proceedings against him stand vitiated. AIR 1958 All 584, Rel. on. **1961 (2) Cr LJ 327 (All).**

——**S. 7** — Police Regulations, Regn. 486, Para. 1 (6) — Criminal Law (Amendment) Act (1952), Ss. 7, 8 — Offence of bribery triable exclusively by Special Judge — Final report under S. 173, Criminal P. C., can be accepted by District Magistrate — Departmental Inquiry under Para. 486 of Police Regulation is not barred — (Prevention of Corruption Act (1947), S. 5 (2)) — (Penal Code (1860), S. 161) — (Criminal P. C. 1898), S. 173). See Criminal Law (Amendment) Act (1952), S. 7. **1960 Crl LJ 1290: AIR 1960 All 618 (DB).**

——S. 7 — U. P. Police Regulations, Chap. 32, Para. 486 — Scheme and scope of.

In the absence of prejudice to the police officer concerned, the omission to make a preliminary enquiry under Para. 486 (III) of U. P. Police Regulations does not invalidate the subsequent proceedings. **AIR 1960 All 304 (312) (Pt E) (Pr 30).**

——S. 7 — Police Regulations, Paras. 490 (1), 479 (d) (e) (f) — Scope — Dismissal of Constable — Departmental enquiry — Deputy Superintendent of Police can record evidence of witnesses — There is no infringement of principles of natural justice in such case — After show cause notice constable not asking Superintendent of Police to examine witnesses afresh — He cannot raise question of prejudice later on.

Paragraph 490 must be read in conjunction with Para. 479. The Deputy Superintendents of Police contemplated by Cl. (f) of Para. 479 are Superintendents for the purposes of recording the statements under Cl. 1 (b) of Para. 490. As the Police Regulations permit an enquiry or a departmental trial to be held by a Deputy Superintendent of Police, there can be no question of the infringement of any of the principles of natural justice on the ground that the enquiry was not held by the Superintendent of Police himself. It cannot be laid down as a rule for all time and for all cases that if the punishing authority had not the opportunity of seeing the demeanour of the witnesses a departmental enquiry or trial is vitiated. Further if the dismissed Police Constable had a right after the show cause notice had been issued to him to make a request to the Superintendent of Police that the statements of the witnesses who had been examined by the Deputy Superintendent of Police be recorded by the Superintendent of Police afresh, and he does not exercise such right he cannot later on say that he was prejudiced. AIR 1958 SC 398; AIR 1957 SC 232, Foll.; 1956 AWR 325, Dist.; AIR 1958 Cal 470, Diss. from. **ILR (1960) 2 All 131.**

——**S. 7** — U. P. Police Regulations, Para. 228 — Interference with administrative orders — Opening of history sheet under Para. 228, U. P. Police Regulations against person having only one prosecution — Action is without jurisdiction — High Court will interfere. See Constitution of India, Art. 226. **1960 All LJ 637.**

——**S. 7** — U. P. Police Regulations, Chapter XIV, Regns. 165 (vi) and 166 — Effect of — Gold, seized by police, and kept in police malkhana and not transferred to treasury — No violation of regulations. **1960 All WR (HC) 394: 1960 All LJ 529.**

——**S. 7** — U. P. Police Regulations, Ch. 31 — Rules under — Validity — If discriminatory — The rules mentioned in Ch. 31 of the Police Regulations are not discriminatory. See Constitution of India, Art. 14. **AIR 1959 All 569.**

——S. 7 — Dismissal of police officer — Departmental enquiry — Rules governing — Admissibility of hearsay evidence — (U. P. Police Regulations, Regn. 490, Rr. 1, 3) — (Constitution of India, Art. 311).

Section 7 makes it clear that the powers conferred upon the officers named therein are to be exercised subject to such rules as the State Government may make. Regulations 489 to 494 of the Uttar Pradesh Police Regulations are rules made by the State Government under that section with regard to the conduct of departmental trials. The powers of punishment vested in a police officer by S. 7 are, therefore, dependent upon the observance at the departmental enquiry of the provisions of these regulations. Further, Rules 1 and 3 of Regn. 490 make it sufficiently clear that hearsay evidence is inadmissible and that documents which it is proposed to make exhibits (unless they are certified copies of public records, or are of a formal nature or are admitted) must be proved. It cannot, therefore, be argued that in a departmental enquiry the tribunal is entitled to base its conclusions on such material as it thinks fit, including in particular hearsay evidence and documentary evidence the authenticity of which has not been established. A finding of the tribunal based on such inadmissible evidence cannot be sustained. **1958 All WR (HC) 758: 1958 All LJ 700: 1958 All Cr R 516: (1959) 1 Lab LJ 105: 1959 Cr LJ 411: AIR 1959 All 223 (224) (Prs 2, 3) (DB).**

——S. 7 — U. P. Police Regulations, Regn. 228 — Jurisdiction to start history-sheet of criminals — Requisites.

The jurisdiction to start a history-sheet of a criminal arises from the fact that the particular person is considered or thought to be a confirmed or professional criminal for which there should be some basis or material. Where there is complete absence of any such material the action in starting a history-sheet will not only be illegal but without jurisdiction too. **1960 All Cr R 302: 1960 All LJ 570: 1960 All WR (HC) 472: ILR (1959) 2 All 115.**

——S. 7 — U. P. Police Regulations, Regn. 490 (5) — Departmental enquiry — Discretion to refuse to call defence witenesses — (Constitution of India, Art. 311).

Sub-para. (5) of Regulation 490 vests the Superintendent of Police with the discretion to refuse to allow certain witnesses to be called to give evidence, and the High Court will not interfere under Art. 226 with the exercise of that discretion so long as it is not exercised arbitrarily or in an unjudicial manner. The Superintendent of Police may well be justified in declining to call a large number of witnesses who will all depose to the same matters, but if he comes to the conclusion that some only of the witnesses whom the officer charged desires to call should be summoned, then it is not he but that officer who should have the right to decide which are

to be the witnesses who should be called. Where the Superintendent of Police conducting the enquiry comes to the conclusion that some only of the defence witnesses should be summoned but does not afford any opportunity of selection to the officer charged, the officer charged is prejudiced in his defence and the order of dismissal passed on the basis of the enquiry cannot be sustained. **1958 All LJ 205: (1958) 2 Lab LJ 27: 1958 All WR (HC) 265: 1958 All Cri R 217: AIR 1958 All 607 (608) (Pt A) (Prs 2, 3, 4) (DB).**

——S. 7 — U. P. Police Regulations, Para. 486 — Non-compliance — Effect — (Criminal P. C. (1898), Ss. 157 and 173).

Where the allegation in the complaint made to the Superintendent of Police was that the Sub-Inspector of Police concerned wanted to search the potli containing the currency notes and, therefore, the complainant made over the potli to the officer and that the officer after counting the notes returned them to him but that he found that the total amount returned to him was short by a certain amount the allegation amounts not to a complaint of an offence under S. 403 but of an offence under S. 409 which is cognizable offence. If no complaint is, therefore, registered and no report under S. 157, Criminal P. C., is sent to the District Magistrate or accepted by him in the case against the Sub-Inspector and the Sub-Inspector is dismissed, there is a non-compliance with the express provisions of Para. 486 of U. P. Police Regulations and also a denial of opportunity to the officer to have the question of fact determined in his favour at a judicial trial. **ILR (1958) 1 All 187: 1958 All LJ 410: 1958 Cr LJ 994: 1958 All WR (HC) 549: 1958 All Cr R 353: AIR 1958 All 584 (586) (Pt A) (Pr 4) (DB).**

——S. 7 — U. P. Police Regulations, Para. 486 — Scheme of Para. 486 — Power of Superintendent of Police to hold departmental inquiry.

The facts which constitute an offence under S. 7, Police Act may also constitute a cognizable offence. In that event (unless the first proviso to sub-para. 1 applies) a case under the appropriate section must be registered in a police station under sub-para. of para. 486 dealt with under Chap. 14 of the Cri. P. C. The offender may not, however, be brought to trial for investigation may be refused under S. 157 (1) (b) of the Code or a prosecution may not be instituted on the ground that the evidence is insufficient. In either of these cases there is no reason why the Superintendent of Police cannot proceed departmentally against the officer concerned. **1957 All LJ 603: 1957 All WR (HC) 646: (1957) 2 Lab LJ 470: AIR 1957 All 767 (769) (Pt C) (Pr 12) (DB).**

——S. 7 — U. P. Police Regulations, Paras. 479 and 490 — Offence committed by Sub-Inspector under S. 7, Police Act — Enquiry by Superintendent of Police — Validity.

There is nothing in the Police Regulations requiring the Inspector-General of Police himself to hold the trial in respect of an offence under S. 7 of the Police Act committed by a Sub-Inspector. It provides for the holding of such trials by a Superintendent of Police. **1957 All LJ 603: 1957 All WR (HC) 646: (1957) 2 Lab LJ 470: AIR 1957 All 767 (770) (Pt F) (Pr 19) (DB).**

——S. 7 — U. P. Police Regulations, Para. 403 — Application for transfer filed by State — Affidavit in support of application. By whom to be shown — Prosecuting Inspector whether police officer — Affidavit sworn by — Propriety. See Criminal P. C. (1898), S. 526. **1957 Cri LJ 495: AIR 1957 All 278.**

——S. 7 — U. P. Police Regulations, Ch. 36, Para. 537 — Discharge from service — When amounts to dismissal or removal — Discharge of Police Sub-Inspector on probation under P. 537 — Amounts to removal by way of punishment — See Constitution of India, Art. 311 (2). **AIR 1957 All 241.**

——S. 7 — U. P. Police Regulations, Para. 490 — Preliminary enquiry before charge-sheet — Right to demand enquiry — (Constitution of India, Arts. 311 and 226). **AIR 1957 All 217 (218) (Pt A) (Prs 3, 4).**

——S. 7 — U. P. Police Regulations, R. 480 — Scope.

Rule 480 is in the nature of the First Offenders Act. When offence is of a petty nature and is only committed once or twice, the person concerned should be reprimanded. But where the person had been regularly indiciplined it cannot be said that recourse to R. 480 should be taken. **AIR 1957 All 217 (219) (Pt C) (Pr 6).**

——S. 7 — U. P. Police Regulations, R. 481 — Dismissal in cases where there is no conviction.

What R. 481 provides is that in case of conviction there would be no other penalty except the dismissal. But in other cases, where the officer considers that the conduct of the person concerned was of such a nature that his retention in the force was undesirable, the officer can certainly dismiss him. This is a matter of discretion of the officer and no hard and fast rule can be laid down as to what amount of indiscipline or misbehaviour will be enough to disqualify him for remaining in the force. **AIR 1957 All 217 (219) (Pt D) (Pr 7).**

——S. 7 — U. P. Police Regulations, Ch. 32 — Reasonable opportunity to produce defence — Discretion of enquiry authority.

Under the provisions of the Police Regulations it is open to the inquiring authority to permit the employee to produce defence witnesses whom for the reasons given in writing the inquiring authority considers necessary.

Held, that it was within the discretion of the inquiring auhority to consider whether the evidence of all the 32 witnesses intended to be produced by the applicant was relevant to the inquiry or not. After having considered the whole matter, the inquiring authority thought that for the purposes of the proper defence of the case, it was sufficient for the applicant to produce eight witnesses. Under the circumstances it cannot be said that no reasonable opportunity was given to the applicant to produce his defence. **1956 All WR (HC) 759: 1957 All LJ 62: (1957) 2 Lab LJ 9.**

——S. 7 — U. P. Police Regulations, Chap. 32, Para. 486 — Scheme and Scope of.

The entire scheme of Para. 486, appears to be that in cases of cognizable offences if the police receives information of the commission of an offence by a police officer the procedure under sub-section (1) is to be followed. In the cases of non-cognizable offences the procedure under sub-section (2) is to be followed. There is an additional power given to the Superintendent of Police to direct a preliminary inquiry by an officer if he thinks necessary to take action on his own knowledge or suspicion in respect of the offences under S. 7 or non-cognizable offence including one under S. 29. Paragraph 486 cannot be interpreted to mean that in cases of cognizable offences which is the subject-matter of a departmental trial under S. 7 necessarily the procedure under Para. 486 (1) is to be followed

before the departmental trial takes place and independently it is not open to the Superintendent of Police to act under sub-clause (3). All these clauses are independent. **1956 All WR (HC) 759: 1957 All LJ 62: (1957) 2 Lab LJ 9.**

——S. 7 — U. P. Police Regulations, Para. 490 — Scope of inquiry — Procedure.

The entire scheme of Para. 490 is that the first stage of inquiry is to be conducted by an officer other than the Deputy Inspector-General of Police and he has got to give his findings but as the Deputy Inspector-General is the officer who has to pass an order of removal he has to give his own findings after considering the materials submitted to him by the Superintendent of Police, and before he gives any such finding the condition necessary is that the statement of the officer should be recorded. He has further to give notice to the officer concerned to show cause against the punishment proposed. He can make up his mind as regards the appropriate punishment after the receipt of the recommendation of the Superintendent of Police and it is for that purpose that a special rule has been laid down in Para. 490 (8) (b) that a copy of the enquiry officer's finding is to be delivered to the officer concerned at least one week before he records his settlement.

Held, that there was proper compliance with the provisions of Para. 490 (8) (b) of the Police Regulations. **1956 All WR (HC) 759: 1957 All LJ 62: (1957) 2 Lab LJ 9.**

——S. 7 — U. P. Police Regulations, Para. 490 (1) (b) — Delegation of powers to record statements — Legality. **(1956) 2 Lab LJ 146: 1956 Cri LJ 1147: 1956 All WR (HC) 325: 1956 All LJ 447: AIR 1956 All 578 (579) (Pt A) (Pr 4).**

——S. 7 — U. P. Police Regulations, Para. 479 (f) — Authority of Deputy Superintendent of Police to conduct enquiry under S. 7 — Duration.

What Para. 479 (f) of the Police Regulations means is that the authority granted by the Deputy Inspector-General of Police of a particular range to a Deputy Superintendent of Police to conduct an inquiry under S. 7, Police Act is operative only so long as the Deputy Superintendent of Police is working within that range. As soon as he is transferred to some other range, the authority ceases to be operative. It is not a case of withdrawal of the authority. The authority in its own force becomes inoperative as soon as the Deputy Superintendent of Police is transferred to some other range. In such a case a fresh authority is necessary. **1955 All LJ 748: AIR 1956 All 172 (173) (Pt A) (Pr 6).**

——S. 7 — U. P. Police Regulations (1944), Para. 479 (b) — Powers under — Orders of dismissal of Sub-Inspector by I. G. of Police — Validity.

Powers of Inspector-General of Police and the Deputy Inspector-General of Police under paragraph 479 (b) with regard to punishment to be inflicted on Sub-Inspectors are concurrent and both have the right to punish Inspectors of Police. The Inspector-General of Police had therefore, even under the police regulations in force in 1944, the right to pass an order of dismissal of a Sub-Inspector of Police. **1954 All WR (HC) 246: 1954 All LJ 308: AIR 1954 All 487 (489) (Pt D) (Pr 12) (DB).**

——S. 7 — U. P. Police Regulations (1944), Para. 154 — Search — Requirement as to witnesses — Satisfaction of. See Criminal P. C. (1898), S. 51. **1954 Cri LJ 188: AIR 1954 All 106.**

——S. 7 — Government of India, Act (1935), Sections 240 and 243 — Government of India Act (1919), S. 96-B — Police Sub-Inspector appointed in 1931 by Inspector-General of Police dismissed by Deputy Inspector General — Dismissal order passed under Police Regulations made under Police Act (1861), S. 7, when old Government of India Act was in force — Police Regulations permitting dismissal of Crown servant by authority subordinate to appointing authority are invalid ab initio — Subsequent order of dismissal by Inspector-General — Sub-Inspector is not entitled to declaration that his dismissal was invalid and that he continued in service — Specific Relief Act (1877), S. 42. **AIR 1950 All 212 (DB).**

5. Interference.

——S. 7 — Punishment under — Discretion — Interference by High Court. It is not within the province of the High Court under Article 226 to interfere in the quantum of punishment awarded to a delinquent Government officer under Police Act. See Constitution of India, Art. 226. **1960 All LJ 310.**

——S. 7 — Punishment — Discretion — Power of Court to interfere.

Where the record and the behaviour of a member of the police force showed that the indiscipline mentality was lingering in him, it could not be said that the Deputy Inspector-General of Police while awarding the sentence of dismissal exceeded his powers given to him under S. 7 of the Police Act. What should be the punishment if there was negligence or indiscipline was a matter which could best be decided by the officers themselves and it was not for the Court to decide the nature and the amount of punishment. If Section 7 had not applied at all, then it would have been an entirely different matter. AIR 1957 **All 217 (218) (Pt B) (Pr 5).**

——S. 7 — Departmental enquiry and dismissal under Police Act, 1861 — Jurisdiction of Courts to interfere — It is not open to the Court to enter into or examine the correctness of the findings arrived at by the D. I. G. of Police or the Superintendent of Police in departmental enquiry conducted against a Sub-Inspector of Police, under the Police Act (1861) and the regulations thereunder, or the merits of the order of dismissal. See Civil P. C. (1908), S. 9. **AIR 1954 All 487 (DB).**

——S. 7 — Constitution of India, Art. 227 — Relief under — Nature of — Petition based on technical ground — Rules of natural justice not violated — No interference. See Constitution of India, Art. 227. **AIR 1956 Bom 545 (DB).**

SECTION 8

——S. 8 — Police Regulations, Para. 497 — Constable does not cease to be Police Officer by reason of his being suspended from office — Superintendent of Police can ask him to live in Police lines during period of his suspension. **1965 All Cri R 11: 1964 All WR (HC) 739.**

——S. 8 — Subordinate Police Officer — Conditions of service.

In the case of Subordinate Police Officer, (before Constitution) his conditions of service are governed by the Act relating to the subordinate police force. See Government of India Act (1935), S. 243. **AIR 1959 Pat 326 (DB).**

——S. 8 — Rules under Act, Rr. 828 (a), 829 — Dismissal of police servant— Procedure — (Government of India Act (1935), S. 243). (Case before Constitution).

In order to pass an order of dismissal against a member of the subordinate police force be

should be given an opportunity to show cause as to why he should not be dismissed and the order of dismissal cannot be legally passed in a proceeding where he is required to show cause as to why he should not be removed. Reading Section 243 of the Government of India Act together with the above provisions of the Police Act and the rules framed thereunder, it is clear that such an order of dismissal passed is illegal and void. **(1960) 2 Lab LJ 439: 1959 Pat LR 77: 1959 BLJR 279: AIR 1959 Pat 326 (327, 328) (Pt C) (Prs 6, 8) (DB).**

——S. 8 — Scope— Non-production of certificate — Presumption.

Section 8 requires a certificate under the seal of the I. G. to be given to the officer on his appointment to the Police force and in the absence of I. G. in the State when the officer was appointed it cannot be presumed that he was appointed by the State Government. See Criminal P. C. (1898), S. 197. **1957 Cr LJ 394: AIR 1957 Tripura 18.**

SECTION 9

——S. 9 — U. P. Police Regulations, Para. 505; Second proviso — S. 9 restricts right of police officer to resign — No conflict between S. 9 and Para. 505, U. P. Government's Notification, dated 26th December, 1959 inserting Para. 505 — No mention of Art. 309 of Constitution in notification — Paragraph 505 held not invalid— Constitution of India, Art. 309.

There is no conflict between the provision of Section 9 and Paragraph 505 of Police Regulations. Section 9 does not create independent right of resignation. On the contrary, it contains a restriction on the common law right of Police Officers to resign from service. It is not, therefore correct to say that Sec. 9 gives a Police Officer a right to resign on giving two months' notice without further restrictions. It is open to the competent authorities to place further restrictions on the right of police officers to resign from service.

Under Article 309 of the Constitution the Governor may make rules regulating conditions of service of persons employed in the State. A rule restraining the right of resignation is a rule regulating conditions of service such a rule could be made by the Governor under Art. 309. So although the Government notification, dated 26th December, 1959, amending the Police Regulations by inserting Para. 505 makes no mention of Article 309, Paragraph 505 of the Police Regulations may be sustained under Art. 309. The Second Proviso to Paragraph 505 of Police Regulations is valid. AIR 1962 SC 204, Foll. **(1963) 6 Fac LR 365: (1965) 1 Lab LJ 121: AIR 1964 All 121 (123) (Pt A) (Pr 20).**

——S. 9 — Interpretation of — Notice served along with resignation — Not proper — Notice must precede resignation. **(1965) 1 Lab LJ 121: (1963) 6 Fac LR 365: AIR 1964 All 121 (123) (Pt B) (Pr 22).**

SECTION 12

● **——Ss. 12 and 2** — Scope — Standing Order No. 46, D/- 20-10-1949 issued by Inspector-General of Ajmer — Has no statutory basis or legal efficacy as a service condition — Holder of officiating post reverted to his substantive post — There is no breach of condition of service. ILR (1961) 11 Raj 260, **Reversed.** See Police Act (1861), S. 2. **AIR 1964 SC 1361.**

——S. 12 — Police Regulation (M. P.), R. 241 — Police officer tried and acquitted by Criminal Court on ground that facts alleged were not established— Officer dismissed from service after departmental enquiry — Dismissal is contrary to Regualtion 241. See Police Act (5 of 1861), Section 7. **('51) 1951 Nag LJ 593 (DB).**

——S. 12 — Scope and applicability.

Where Police Officer has been dismissed from service by the D. S. P. on the sole ground that he committed an offence of rape, and the police officer was acquitted of that charge by the Court of Session not on any technical ground but upon the view of the facts taken by the jury, dismissal is contrary to Police Regulation 241. See Constitution of India, Art. 311. **('51) 1951 Nag LJ 593 (DB).**

——Ss. 12 and 23 — Punjab Police Rules, R. 23.4 — Surveillance Register No. 10 — Keeping of, not unconstitutional — (Constitution of India, Arts. 14 and 19 (1) (d)). See Punjab Police Rules, Rule 23.4. **1959 Cri LJ 900: AIR 1959 Punj 323 (DB).**

SECTION 13

——S. 13 — Scope and effect of — If imposes obligation on police officers which could be enforced by writ of mandamus.

Section 13 gives a statutory protection to the authorities if they act in the manner provided therein. It imposes no obligation on any of them to exercise the power if they do not consider it necessary to do so. It cannot be forced by writ of mandamus. See Constitution of India, Articles 132 (1) and 133 (1) (c). **53 Cr LJ 1639: AIR 1952 Pat 386 (DB).**

SECTION 15

● **——S. 15 (5) — Validity — If discriminatory.**

Where an exemption was granted under S. 15 (5) of the Police Act, to the Harijan and Muslim inhabitants of the villages in which an additional police force was stationed, from the levy of the cost of the additional force: **Held,** that the exemption discriminated against the law-abiding members of the other comminities and in favour of the Muslims and Harijan communities (assuming that every one of them was peace loving and law-abiding) on the basis only of "caste" or "religion". The exemption was therefore contrary to Article 15 (1) of the Constitution and must be struck down. AIR 1955 Raj 5, Affirmed. See Constitution of India, Art. 15 (1). **AIR 1960 SC 1208.**

——S. 15 (5)—Even though the provision of the Act may be widely worded, it is not necessarily void. In case, however, the discretion is abused such exercise of discretion can be challenged and annulled under Art. 14 of the Constitution. See Constitution of India, Art. 14. **AIR 1955 All 9 (DB).**

——S. 15 — Proclamation levying punitive tax under sub-section (1) — Validity of — Grant of exemption under sub-s. (5) — Procedure for — Exemption can only be granted to a person or class or section of inhabitants of disturbed area — Proclamation fixing liability for such tax only on persons mentioned in the proclamation — Reverses the process laid down by sub-ss. (3) and (5) and consequently illegal — Proclamation held discriminated against persons mentioned therein — Offended against Art. 14 of the Constitution.

The scheme of the various sub-sections in Section 15 of the Police Act (1861) indicates that exemption from payment of punitive tax can be granted to such inhabitants or class or section of such inhabitants, who were not responsible for the conduct which may have necessitated the

increase in the Police Force in that area. Hence proclamation, making only persons mentioned therein liable for the cost of additional Police Force quartered in the disturbed area concerned reverses the procedure to be followed under Section 15 of the Police Act (1861), in granting the exemption from payment of the costs and is not in accordance with what is required under Section 15 of the Act.

Held, on facts, that the order of the Government making only the persons specified in the notification liable to bear the cost of additional Police Force and exempting the members of the opposite faction living in the same area though there were several cases pending against them, was discriminatory and offended Article 14 of the Constitution. AIR 1960 SC 1208, Ref. W. Ps Nos. 520, 528, 547, 576, 581 and 585 of 1962; W. Ps. Nos. 342 and 555 of 1963 (Andh Pra), Applied. **Held,** further, that on the material on record it could not be held that the appellants had participated in the instances alleged against them, for not being granted the exemption from payment of the punitive tax and consequently Government's refusal to exempt them under S. 15 (5) of the Police Act was not justifiable. **(1965) 2 Andh WR 294: 1965 Mad LJ (Cri) 708: 1966 Cr LJ 741: AIR 1966 Andh Pra 204 (207, 208) (Prs 4, 5, 6, 8) (DB).**

——S. 15 — Validity — Section does not offend Art. 14 of the Constitution.

Section 15 of the Police Act is perfectly constitutional and does not offend Art. 14 of the Constitution. Regarding sub-section (1) no exception can be taken to it. Sub-section (2) is also an innocuous provision. Sub-section (3) does not impose any tax or penalty upon the inhabitants of the disturbed area. It only makes them liable for payment of the cost of stationing of the additional police force. The amount of cost is a fixed amount which can be ascertained and determined any moment. The State Government does not propose to realise from the inhabitants anything more than the actual cost for the employment of the additional police. Therefore, sub-section (3) cannot be challenged either on the ground of arbitrariness or on the ground of imposition of penalty. Sub-section (4) is equally good in law. Sub-section (5) has to be read and construed along with other provisions of Section 15. So construed the sub-section does not lay down any principle or policy for the guidance of the exercise of discretion by Government in respect of exemption. The policy and principle of exemption under sub-section (5) can be deduced from the purpose and object of stationing the police force, as indicated in sub-section (1) of S. 15. It cannot, therefore, be said that the State Government has been vested with absolute unfettered authority to grant exemption and that sub-s. (5) is discriminatory and violative of Article 14 of the Constitution. AIR 1958 SC 956 and AIR 1955 All 9 and AIR 1955 Raj 5, Rel. on; AIR 1956 Pat 137, Dist. **1962 BLJR 374: AIR 1962 Pat 303 (306, 307) (Pt B) (Pr 9) (DB).**

——S. 15 — Scope — Notice — Necessity.

Under the Police Act it is not essential to inform the villagers before they can be asked to pay the expenses of the additional police. S. 15 gives the State Government no option in the matter of the manner of notification. The proclamation has to be notified in the Official Gazette but with regard to any other means the State Government is given full liberty and if the State Government so chooses it may content itself with publication in the Official Gazette alone. Therefore, the mandatory provision is confined to the publication of the proclamation in the Official Gazette. The rest of the section is merely directory. AIR 1951 SC 467, Distinguished; (1901) 1 KB 673, Rel. on. **58 Punj LR 120: ILR (1956) Punj 128: AIR 1957 Punj 13 (13) (Pt A) (Prs 2, 3).**

——S. 15 — Imposition of punitive police force — Decision by Government — Interference by Court — (Constitution of India, Art. 226).

Under Section 15, Police Act, it is for the State Government to decide whether there is such conduct or misconduct of the inhabitants in an area because of which it is expedient to increase the number of police. It is beyond the jurisdiction of the Courts to interfere except where power has been exceeded or abused. (1903) 87 LT 732; AIR 1943 Lah 41 (44, 45), Foll. **1955 Cr LJ 733: 56 Punj LR 533: AIR 1955 Punj 103 (104) (Pr 4).**

——S. 15 — Validity — (Constitution of India, Art. 14).

In view of the clause of sub-section (1) of Section 15 of the Police Act, sub-section (5) of the same section does not offend against Art. 14 of the Constitution. **ILR (1954) 4 Raj 47: 1954 Raj LW 750: AIR 1955 Raj 5 (6) (Pt B) (Pr 3) (DB).**

——S. 15 — Rajasthan Government Order, dated 31-5-1952 — Validity — (Constitution of India, Art. 15).

The exemption from liability to bear any portion of the costs on account of the posting of any additional police force, granted to Harijan and Muslim inhabitants because they were Muslims or Harijans and therefore peaceful, cannot stand, as it offends against Art. 15 of the Constitution. Therefore, the order exempting Harijan and Muslim inhabitants of the area declared to be in a disturbed and dangerous state under the order of 31-5-1952, was illegal. **ILR (1954) 4 Raj 47: 1954 Raj LW 750: AIR 1955 Raj 5 (6) (Pt C) (Pr 4) (DB).**

SECTION 15-A

——S. 15-A (3) — Even though the provision may be widely worded, it is not necessarily void. In case, however, the discretion is abused such exercise of discretion can be challenged and annulled under Article 14 which includes within its purview both executive and legislative acts. See Constitution of India, Art. 14. **AIR 1955 All 9 (DB).**

SECTION 17

——Ss. 17, 1, 28, 29, 35 —Magistrate and office exercising powers of Magistrate — Difference — (Words and Phrases) — There is a vital difference between the phrase "a Magistrate" and the phrase "an officer exercising the powers of a Magistrate". The bare word "Magistrate" includes a person who does not enjoy all the powers of a Magistrate but enjoys some of them, whereas the expressions "an officer exercising the powers of a Magistrate" has a technical meaning assigned to it. Under Ss. 28 and 29, the word 'Magistrate' means 'a Magistrate either of the First class, or the Second class or the Third class. But the words "an officer exercising the powers of a Magistrate" in Section 35 refer only to a Magistrate of the First class. Hence, Section 35 is not rendered redundant by the provisions of Sections 28 and 29. See Police Act (1861), S. 1. **1956 Cri LJ 174: AIR 1956 All 96 (SB).**

——S. 17 — Offence justifying appointment of special police officers — Nature of.

The three offences mentioned in Section 17 of unlawful assembly, riot and disturbance of the peace appear to indicate that such appointment

of police officers should be made only when and where the public peace or tranquillity is threatened or disturbed. Therefore, the crimes or offences must be of such a nature that public peace or tranquillity is threatened.

In 1861 when the Police Act came into force there was no Criminal Procedure Code and no provision like the present Section 107 or S. 144 of the Code of Criminal Procedure. It is, therefore, necessary that a liberal and broad construction should be given to the meaning of the words "disturbance of peace" appearing in Section 17 of the Act. The Court should not be too astute to conceive limitations on the idea of "disturbance of peace" but must remain unfettered to decide on the facts of each case and determine whether in a particular case, disturbance of peace as commonly or ordinarily understood has taken place or is apprehended.

Thus where the affidavit filed by the District Magistrate showed that there were five cases of rioting arising out of a large number of wagon breaking cases and, in fact, the local patrol party employed for duty to prevent such tampering with the railway wagons had even to resort to firing in three such cases:

Held, that the condition of "disturbance of the peace" as specified in S. 17 of the Act existed to justify the appointment of special police officers. **AIR 1958 Cal 365 (368, 371) (Pt A) (Prs 13, 23).**

——S. 17 — Appointments under — Who are proper persons.

As regards the persons who are primarily intended to be appointed special police officers under Section 17, the express statutory requirement under Section 19 is that they have to be residents of the locality in which the disturbance has occurred or is threatened. A non-resident therefore, clearly is not a proper person to be appointed special police officer under the section. Further, a criminal cannot be considered to be a suitable person. Appointments of criminals to be special police officers under the Police Act do not make either for efficiency or even serve the primary object of reducing the crimes mentioned in S. 17 of the Act. It may gravely imperil the morale of the people and the police alike.

Held, on facts that as the Government had appointed the petitioner describing him mistakenly as criminal but in fact he was not found to be a criminal, the appointment was not bad. **Held,** further that after all, what Section 17 required was that a suitable person should be appointed as special police officer and so long as he was in fact suitable, the appointment could not be had on the ground that the Government proceeded on a different basis or a mistaken view of the fact. **AIR 1958 Cal 365 (370) (Pt B) (Pr 18).**

——S. 17 — Appointments under, after Constitution — Validity — (Interpretation of Statutes) — (Constitution of India, Art. 372, Seventh Schedule, List 2; Entries 1, 2).

A statute is not to be regarded as a deed or document of grant. So long as a statute of competent authority and validity creates an institution and so long as the statute itself remains effective, the subsequent disappearance of the original legislative authority does not make the statute ipso facto inoperative. It is still less so when the Constitution, by Article 372 (1), expressly provides for the continuance of laws existing at the time of passing of the Constitution. A statute is perpetual unless it is expressly or by necessary implication made temporary.

Thus an order appointing certain person as a special police officer under section 17 of the Police Act, 1861, made on the 28th July, 1954, is a valid appointment although made by the Superintendent of Police and the District Magistrate subsequent to the Constitution, because at the time when the Police Act was passed full powers had already been granted to these authorities like the Superintendent of Police and the District Magistrate to make these appointments and the force and vitality of the Police Act are continued by Article 372 (1) of the Constitution. The fact that under the Constitution the subjects 'public order' and 'police' have ceased to be Central subjects and are now State subjects cannot affect the validity of the exercise of the power granted under the Central Act. **AIR 1958 Cal 365 (371, 372) (Pt C) (Prs 26, 27).**

——S. 17 — Validity — If contravenes Arts. 19 (1) (g) and 19 (1) (d) — (Constitution of India, Arts. 19 (1) (d), 19 (1) (g), 19 (5), 19 (6)).

In a democratic State it is a worthy obligation of a resident of a lacality to be called up for service as a special police officer to help in removing the threat or breach of the peace of the locality in which he resides. It is a civil obligation of every citizen to discharge this duty to the State which gives him security, protection and opportunity. It cannot be an unreasonable restriction on the citizen's right to carry on his trade or business under Article 19 (1) (g) of the Constitution. Similarly the right of free movement under Article 19 (1) (d) is also qualified by sub-cl. (5) of that Article which permits operation of any existing law in so far as it imposes reasonable restrictions on the exercise of such rights. Therefore, both under Article 19 (1) (d) and Art. 19 (1) (g) of the Constitution, an order under Section 17 of the Police Act by which the authorities are empowered to conscript the voluntary service of the residents to become special police officers are justified under the meaning and doctrine of reasonable restrictions. **AIR 1958 Cal 365 (372) (Pt D) (Pr 27).**

——Ss. 17, 19 — Appointment under, as police officer — Validity — If contravene Art. 23 (1) — (Constitution of India, Art. 23).

The words "other similar forms of forced labour" in Article 23 (1) should be construed ejusdem generis. The kind of forced labour that is contemplated in the constitutional prohibition has to be something in the nature of traffic in human beings. Even if it were permissible to hold that such conscription is a kind of similar form of forced labour within the meaning of the constitutional prohibition contained in Art. 23 (1), this forced labour of conscription is permitted by sub-article (2) of Article 23 as a kind of compulsory service for public purposes. AIR 1953 Him Pra 18, Rel. on. **AIR 1958 Cal 365 (372) (Pt E) (Prs 28, 29).**

SECTION 19

——Ss. 19 and 17 — Appointment under, as police officer — Validity — Do not contravene Article 23 (1) — (Constitution of India, Art. 23) — (Words and Phrases). See Police Act (1861), S. 17. **AIR 1958 Cal 365.**

SECTION 20

——S. 20 — Offence under U. P. Excise Act — Report made by Police Station Officer — Magistrate if can taken cognizanee of offence.

Per Roy J.: — A Station Officer in charge of a Police Station is an "Excise Officer" within the meaning of Section 3 (2) read with S. 10, Excise Act, and Section 20, Police Act does not forbid the conferment of the powers under Sec-

tion 10, U. P. Excise Act on an officer in charge of a police station and such a police officer can make a complaint or report under Section 70, Excise Act. Consequently the Magistrate had jurisdiction to entertain the complaint upon the report of the station officer under Section 70 of the Act. See U. P. Excise Act (4 of 1910), S. 70. **AIR 1955 NUC (All) 3600 (DB).**

——Ss. 20, 23, 24 — Powers under — Station Officer — Power to report offence under — U. P. Excise Act.

The regulating of criminal procedure does not seem to be any of the objects behind the passing of the U. P. Excise Act and it cannot be said to have been passed for regulating criminal procedure. Therefore, under Section 20, a station-officer cannot exercise any authority conferred upon him under the U. P. Excise Act. But Section 20 permits him to exercise authority conferred upon him by the Police Act itself. So he can detect and bring offenders to justice and can lay any information before a Magistrate. Section 70 of the U. P. Excise Act specifically, and regardless of the provisions of the Police Act, permits a Magistrate to take cognizance of an offence on his report. It is of no consequence that he cannot validly exercise the powers of an Excise Officer; his ability to do so is not a condition precedent for his making a report, and his making a report is not necessarily exercising an Excise Officer's powers. His making a report can be treated as exercising his powers under the Police Act. **1953 All WR (HC) 680: 1954 Cr LJ 744: AIR 1954 All 342 (342) (Prs 1, 2).**

SECTION 23

——**S. 23** — Power under Section 23, Police Act is circumscribed by provisions of Section 151, Criminal P. C. See Criminal P. C. (1898), S 151. **1965 (1) Cri LJ 413: AIR 1965 All 161.**

——**Ss. 23, 24 and 20** — U. P. Excise Act (4 of 1910), Ss. 70, 10, 60 (b), 3 (2) — Offence under Section 60 (b) — Report made by Police Station Officer on whom limited power under Section 10 is conferred — He is not competen to file complaint in respect of Section 60 unless power is expressly conferred — He cannot be considered excise officer — But he was competent to lay complaint under powers under Section 20, Police Act — Magistrate can therefore, take cognizance of offence. See U. P. Excise Act (4 of 1910), S. 70. **AIR 1955 NUC (All) 3600 (DB).**

——**Ss. 23 and 46 (2)** — Penal Code (1860), Ss. 353 and 442 — Police in uniform doing surveillance entering accused's house and beaten — Accused held guilty under Section 353, I. P. C. — (Police Rules (U. P.) under Section 46 (2) Police Act, R. 236). See Penal Code (1860), S. 353. **AIR 1955 NUC (All) 2781 (DB).**

——**S. 23** — Station officer making report under Section 70 of the U. P. Excise Act — A station officer can detect and bring offenders to justice and can lay any information before a Magistrate. Section 70 of the U. P. Excise Act specifically, and regardless of the provisions of the Police Act, permits a Magistrate to take cognizance of an offence on his report. See Police Act (1861), S. 20. **1954 Cri LJ 744: AIR 1954 All 342.**

——**S. 23** — Evidence Act (1872), S. 25 — Police Officer — Police Patel in Andhra Pradesh is not police officer. See Evidence Act (1872), S. 25. **ILR (1962) Andh Pra 1280.**

——**S. 23** — Applicability — Subordinate violating order of superior police officer to vacate premises — Section does not apply. **AIR 1955 NUC (Cal) 5611.**

——**S. 23 — Applicability.**

The section has to be construed as a whole and it would be wholly unwarranted to tear off a phrase or clause from its proper context and to attempt to give it a meaning which it can never bear. The clause relating to the duty of a police officer to prevent the commission of an offence does not give power which can be used by a superior officer of the police to correct an erring subordinate by appeal to the words "prevent the commission of an offence". The violation of the order passed by the superior police officer directing his subordinate to vacate the premises which he had unlawfully occupied does not come within the purview of the section. **AIR 1955 NUC (Cal) 5611.**

——**S. 23 — Evidence Act (1872), S. 25 — Police officers — Meaning of — Members of C. R. P. Force — (Central Reserve Police Force Act (1949), Ss. 7 (1), 16) — (Words and Phrases) — (Bombay District Police Act (4 of 1890), S. 3 (b)).**

The words "Police officer" used in S. 25 is not to be considered in a strict sense but is to be given its more comprehensive and popular meaning. A member of the C. R. P. Force may not be a police officer within the meaning of the Bombay District Police Act; but it does not mean that he would not be a police officer within the meaning of S. 25 of the Indian Evidence Act. See Evidence Act (1872), S. 25. **AIR 1956 Kutch 1.**

——**S. 23 — Madras Maintenance of Public Order Act (1 of 1947), S. 2 (6) — No action taken under S. 2 (6) — Invocation of.**

Where beyond passing the detention order there is no evidence that action had been taken under Cl. (6) of S. 2, the defect cannot be got over by invoking Section 23 of the Police Act 1861. See Public Safety — Madras Maintenance of Public Order Act (1 of 1947), S. 2 (6). **1954 Cri LJ 396: AIR 1954 Mad 321.**

——**Ss. 23 and 12** — Punjab Police Rules, R. 23.4 — Surveillance Register No. 10 — Keeping of, not unconstitutional — (Constitution of India, Arts. 14 and 19 (1) (d)). See Punjab Police Rules, R. 23.4. **1959 Cri LJ 900: AIR 1959 Punj 323 (DB).**

——**S. 23** — The plea under S. 43 does not fortify a police officer against acts of contempt of Court. He cannot successfully seek protection under S. 23 also where the facts and circumstances of the case indicate that the act of contempt namely his interference with the possession of the receivers was deliberate and unlawful. See Police Act (1861), S. 43. **1958 Cr LJ 1529: AIR 1958 Punj 471.**

SECTION 24

——**S. 24 — Offence under U. P. Excise Act — Report made by Police Station Officer — Magistrate if can take cognizance of offence.**

Per Roy J.:— A station officer in charge of a Police Station is an "Excise Officer" within the meaning of S. 3 (2) read with S. 10, Excise Act, and S. 20, Police Act does not forbid the conferment of the powers under S. 10, U. P. Excise Act on an officer in charge of a police station and such a police officer can make a complaint or report under S. 70, Excise Act. Consequently the Magistrate has jurisdiction to entertain the complaint upon the report of the station officer under S. 70 of the Act. See U. P. Excise Act (4 of 1910), S. 70. **AIR 1955 NUC (All) 3600 (DB).**

——S. 24 — Station officer making report under S. 70 of the U. P. Excise Act.

Section 70 of the U. P. Excise Act specifically, and regardless of the provisions of the Police Act, permits a Magistrate to take cognizance of an offence on his report. It is of no consequence that he cannot validly exercise the powers of an Excise Officer; his ability to do so is not a condition precedent for his making a report, and his making a report is not necessarily exercising an Excise Officer's powers. His making a report can be treated as exercising his powers under the Police Act. See Police Act (1861), S. 20. **1954 Cri LJ 744: AIR 1954 All 342.**

——S. 24 — Non-cognizable offence — Offence under S. 160, Penal Code — Cognizance taken on report submitted by Station House Officer — Police Report whether 'complaint' within Section 4 (1) (h) — Default in appearance by prosecuting officer — Section 247, Criminal P. C. not attracted. See Criminal P. C. (1898), S. 247 **1962 (1) Cr LJ 80: AIR 1962 Raj 1 (DB).**

SECTION 25

——Ss. 25, 26 — Disposal of unclaimed property — Jurisdiction is that of District Magistrate and not of Sessions Judge. **1962 MPLJ 1094: 1962 Jab LJ 1022: 1963 (1) Cri LJ 442 (1): AIR 1963 Madh Pra 124 (124) (Pt A) (Pr 3).**

——Ss. 25, 26, 27 — Unclaimed property — Law relating to — Proceedings are of summary nature — Order of District Magistrate regarding disposal of property — Remedy of aggrieved person is civil suit.

The proceedings under Ss. 25, 26 and 27 are of summary nature. If the claimant satisfies the District Magistrate as to his claim, the District Magistrate shall pass an order that the property be handed over to him. But if the Magistrate is not satisfied that the claimant has any right to the property an order of the sale of the property shall be passed and the proceeds be placed at the disposal of the State under S. 27 of the Police Act. Any person considering himself aggrieved by the order of the District Magistrate may establish his right in the property in a Civil Court. **1962 MPLJ 1094: 1962 Jab LJ 1022: 1963 (1) Cr LJ 442 (1): AIR 1963 Madh Pra 124 (125) (Pt B) (Pr 4).**

——Ss. 25, 26 and 27 — Applicability — Sections 25 to 27 of the Police Act deal with tangible property and not actionable claims. See Criminal P. C. (1898), S. 523. **1955 MPLJ (Notes) 106.**

——Ss. 25, 26 and 27 — Proceedings under — Nature of — Revision — (Criminal P. C. (1898), Section 439).

The proceedings under the Police Act are of a summary nature. Any person considering himself aggrieved by the order of the Magistrate may establish his right to the property in the Civil Court. Where a Magistrate decided a claim under S. 26 of the Police Act he is undoubtedly expected to act judicially. A revision application under S. 439, Criminal P. C. lies against the order. **1956 Cr LJ 1253: AIR 1956 Vin Pra 39 (40) (Pt A) (Prs 2, 3).**

SECTION 26

——Ss. 26 and 25 — Disposal of unclaimed property—Jurisdiction is that of District Magistrate and not of Sessions Judge. See Police Act (1861), S. 25. **1963 (1) Cri LJ 442 (1): AIR 1963 Madh Pra 124.**

——Ss. 26, 25, 27 — Unclaimed property — Law relating to — Proceedings are of summary nature — Order of District Magistrate regarding disposal of property — Remedy of aggrieved person is civil suit. See Police Act (1861), S. 25. **AIR 1963 Madh Pra 124.**

——Ss. 26, 25 and 27 — Proceedings under — Nature of — Revision — (Criminal P. C. (1898), S. 439).

The proceedings under the Police Act are of a summary nature. Any person considering himself aggrieved by the order of the Magistrate may establish his right to the property in the Civil Court. Where a Magistrate decided a claim under S. 26 of the Act he is undoubtedly expected to act judicially. A revision application under S. 439, Criminal P. C. lies against the order. See Police Act (1861), S. 25. **AIR 1956 Vindh Pra 39.**

——S. 26 — Failure to issue proclamation — Effect of.

The failure of the District Magistrate to issue a proclamation as required by S. 26 is no doubt an irregularity. But a person cannot consider himself aggrieved by this irregularity if he himself appears before the District Magistrate and prefers a claim. **1956 Cr LJ 1253: AIR 1956 Vin Pra 39 (40) (Pt B) (Pr 6).**

SECTION 27

——Ss. 27, 25, 26 — Unclaimed property — Law relating to — Proceedings are of summary nature — Order of District Magistrate regarding disposal of property — Remedy of aggrieved peson is civil suit. See Police Act (1861), S. 25. **1963 (1) Cri LJ 442 (1): AIR 1963 Madh Pra 124.**

——Ss. 27, 26 and 25 — Proceedings under — Nature of — Revision — (Criminal P. C. (1898), Section 439).

The proceedings under the Act are of a summary nature. Any person considering himself aggrieved by the order of the Magistrate may establish his right to the property in the Civil Court. Where a Magistrate decided a claim under S. 26 of the Act he is undoubtedly expected to act judicially. A revision application under Section 439, Criminal P. C. lies against the order. See Police Act (1861), S. 25. **AIR 1956 Vindh Pra 39.**

SECTION 28

● ——Ss. 28, 29 and 7 — The judicial trial mentioned in S. 28 or 29 does not end in the dismissal, suspension on or reduction in rank of Police officer, it ends in his conviction and punishment according to the penal law of the land. The dismissal, suspension or reduction in rank is provided for in S. 7 and the two sections deal with two different subjects. See Police Act (1861), S. 7. **1956 Cri LJ 174: AIR 1956 All 96 (SB).**

● ——Ss. 28, 1, 17, 29, 35 — Magistrate and office exercising powers of Magistrate — Difference — (Words and Phrases). See Police Act (1861), S. 1. **1956 Cri LJ 174: AIR 1956 All 96 (SB).**

SECTION 29

SYNOPSIS

(Police Act (1861), S. 29.)

1. Applicability.
2. Jurisdiction.
3. Lawful order by competent authority.
4. Procedure.

1. Applicability.

● ——Ss. 29 and 35 — Scope — Departmental enquiry — If excluded.

Sections 29 and 35 nowhere exclude departmental enquiry. All that they lay down is that where an offence punishable under the Police Act is committed by a police officer above the rank of a constable and is to be tried by a Court of law it has to go before a First Class Magistrate. That does not mean that departmental enquiry cannot be held with respect to a matter where it is also possible to prosecute a police officer under the Police Act. Bhagat Singh v. State of Punjab. **ILR (1960) 2 Punj 846: (1961) 1 SCR 64: 1961 Mad LJ (Cr) 401: (1961) 2 SCJ 54: 1961 Andh LT 517: 1961 All WR (HC) 366: 1961 All Cr R 204: 1960 Cr LJ 1671: AIR 1960 SC 1210 (1213) (Pt B) (Pr 10).**

● ——**S. 29** — East Punjab Essential Services (Maintenance) Act (13 of 1947), S. 5 (b) — "Absents himself from work" — Constable on refresher course and not assigned any work absenting himself from Police Lines — He is not guilty under S. 5 (b). See East Punjab Essential Services (Maintenance) Act (13 of 1947), S. 5 (b). **1956 Cri LJ 1101: AIR 1956 SC 551.**

——**S. 29** — Penal Code, (1860), S. 409 — Policeman absconding with his kit — No evidence that he absconded with object of utilizing his kit when not in service — Offence is one under S. 29, Police Act and not under S. 409, I. P. C. **1952 Cri LJ 433: 1951 All LJ 70: AIR 1952 Ajmer 23 (2) (23) (Pr 2).**

● ——**Ss. 29, 1, 17, 28, 35** — Magistrate and officer exercising powers of Magistrate — Difference — (Words and Phrases). See Police Act (1861), S. 1. **1956 Cri LJ 174: AIR 1956 All 96 (SB).**

● ——**S. 29** — The judicial trial mentioned in S. 28 or S. 29 does not end in the dismissal, suspension or reduction in rank of Police Officer; it ends in his conviction and punishment according to the penal law of the land. The dismissal, suspension or reduction in rank is provided for in S. 7, and the two sections deal with two different subjects. See Police Act (1861), S. 7. **1956 Cri LJ 174: AIR 1956 All 96 (SB).**

——**S. 29 — Absence from barrack and at parade — Whether violation of duty — Proof.**

Before a conviction under Section 29 can be made, it has to be proved that the police officer was guilty of any violation of duty. Where the accused who belonged to a police force was convicted for remaining absent from his barrack and at parade for certain period, the prosecution has to prove that the absence of the police officer from the barrack or at the parade was violation of some duty or wilful breach or neglect of some rule or regulation or lawful order made by competent authority. Where the defence was that the accused was detailed for duty elsewhere and as such it could not be possible for him to be present at the barrack or at the parade, this could be proved only if the register was produced. When the register was called for but it was not produced;

Held, that the prosecution did not prove if there was actually any violation of duty and the conviction could not stand. **1965 (1) Cr LJ 9: AIR 1965 Assam and Nagaland 6 (7) (Pr 3).**

——**Ss. 29, 7 (b)** — Bengal Police Regulations (1943), R. 881 — Order under R. 881 requiring police officer under suspension to reside in police lines for indefinite period amounts to confinement — Order is illegal — Rule 881 is illegal and utra vires for such case. See Bengal Police Regulations (1943), R. 881. **1965 (2) Cri LJ 77: AIR 1965 Cal 347.**

——**S. 29 — Applicability.**

Before a conviction under S. 29 can possibly be made it has to be proved clearly that the order itself for violation of which a person is prosecuted was an order lawfully made. **AIR 1955 NUC (Cal) 5611.**

——**S. 29** — Bombay Police Act (22 of 1951), S. 23 — Officers on duty — Officers on leave and suspension are not on duty. See Bombay Police Act (22 of 1951), S. 23. **(1961) 2 Guj LR 643.**

——**S. 29 — Sentence.**

The accused who was convicted under S. 29, Police Act, appeared in the Magistrate's Court for the first time, on 29th May, 1952. There were as many as 30 hearings and the judgment was eventually delivered on 29th October, 1952. He had been discharged from police service and was employed under the District Board. In case he was sent to prison, he ran the risk of losing his present job. His character-roll showed that he was granted a commendation certificate for good work done.

Held, considering all the circumstances, that the ends of justice would be met by sentencing him to imprisonment till the rising of the Court and inflicting a penalty equivalent to one month's pay. **1955 Cr LJ 947: AIR 1955 Him Pra 29 (31) (Pt C) (Pr 7).**

——**Ss. 29 and 46 — Rules under S. 46, Rr. 16, 21 (1) — Police officer involved in criminal case — Suspension during pendency of case — Order to remain in police lines — Legality.**

There is nothing whatever illegal if a Superintendent of Police places a subordinate Police Officer, who is accused of a criminal offence, under suspension and orders him to remain in Police lines during the pendency of the case against him, so long as the accused is given facilities for attending Court on the days when his presence is required. Although a surety is entitled to have some control over the movements of an accused, the control cannot be unlimited in extent or over a protracted period. Hence the accused is not entitled to lawfully disobey such an order and plead that he was forced to place himself at the disposal of the person who had stood surety for him in connection with his bail in the criminal case. AIR 1948 All 72, Explained. **59 Pun LR 529: 1958 Cr LJ 92: AIR 1958 Punj 17 (18, 19) (Prs 8, 10) (DB).**

——**S. 29 — Proceedings under for contravention of R. 6 of Rajasthan Government Servants and Pensioners Conduct Rules, can be taken — Rajasthan Government Servants and Pensioners Conduct Rules, R. 6 — General Clauses Act (1897), Section 51.**

Police constables can be proceeded against under S. 29 Police Act, for the contravention of R. 6 of the Rajasthan Government Servants and Pensioners Conduct Rules, 1949.

The use of the words 'any rule or regulation' in S. 29, in the absence of any definition of "rule and regulation" in the Police Act, cannot be interpreted to refer to the rules that may be framed under the Police Act only. It will be proper to interpret them in terms of the provisions of the General Clauses Act and to extend them to all rules regulating the conduct of police servants that have been framed by any competent authority under any law.

The words "competent authority" as occurring in S. 29 also cannot be confined only to the Inspector General of Police. A competent authority in S. 29 has been used only in connection with lawful orders, the violation of which is sought to be punished under S. 29. It will be narrowly interpreting S. 29 to confine a rule or

regulation to only such rule or regulation as may be framed by the Inspector General of Police, under S. 12 of the Act. **1960 Raj LW 598: ILR (1960) 10 Raj 1407.**

2. Jurisdiction.

——S. 29 — Complaint under — Jurisdiction to take cognizance — Additional Sub-Divisional Magistrate has jurisdiction under S. 190, of Criminal P. C. in spite of Para. 486-II of U. P. Police Regulations — Police Act no bar — Nature of U. P. Police Regulations.

Under the Police Act there exists no bar to the taking cognizance by a Magistrate of a complaint of an offence under S. 29 of the Police Act. Consequently Section 190 of Criminal P. C. gives jurisdiction to a Magistrate as detailed thereunder to take cognizance of an offence under S. 29, of the Police Act. The Additional Sub-Divisional Magistrate is a Magistrate, though not the District Magistrate within the meaning of Section 1, of the Police Act and, therefore, has jurisdiction to try an offence under S. 29 of Police Act. The inference that any Magistrate can try an offence under S. 29 of the Police Act can be drawn from Ss. 29 and 35 of the Police Act. When the Police Act makes a clear provision that the offence under S. 29 of the Act can be tried by any Magistrate then the U. P. Police Regulations including Para. 486, II thereof even if framed under S. 46 of the Police Act, cannot take away the jurisdiction of the Magistrate which was conferred on him by the Legislature. Any rule repugnant to the enactment is void and ineffective. It is a different thing that the rule may be treated as an administrative order for the guidance of police officers. Such a rule cannot have the force of law and, in any case cannot take away the jurisdiction of Magistrates conferred on them under the general law and also under Ss. 29 and 35 of the Act. **1965 (2) Cri LJ 330: AIR 1965 All 415 (416) (Pt A) (Prs 5, 6, 7).**

3. Lawful order by competent authority.

——S. 29 — "Any rule or regulation made by competent authority" — Interpretation — Expression refers not only to rules made under the Act such as rules made by I. G. of Police under S. 12 or by State Government under S. 46 — It refers also to rules and regulations in general without such restriction—U. P. Government Servants' Conduct Rules made by the Governor in exercise of powers conferred by proviso to Article 309 of the Constitution are rules made by competent authority and come within scope of S. 29 — Hence breach of R. 25 of those Rules by a Police Officer is punishable under that section. AIR 1930 Pat 195, Disting. and Expl. **1962 All LJ 355: 1962 All WR (HC) 233: 1962 All Cri R 153 (2): (1962) 1 Lab LJ 700: 1962 (2) Cri LJ 459: AIR 1962 All 507 (508) (Pt A) (Pr 3).**

——S. 29 — Lawful order — Order by Superintendent of Police confining a Sub-Inspector to quarters for more than fifteen days — Order contravenes Para. 478 of the Police Regulations, Uttar Pradesh and is not a lawful order — Disobedience does not entail conviction under Section 29. **(1957) 1 Lab LJ 265: 1956 All WR (HC) 265: 1956 All LJ 181.**

——S. 29 — Applicability — Foot-constable performing duties of drill instructor — Disobedience to lawful orders of superior authority to perform guard duty — Offence — Punjab Police Rules, Ch. 17, Rr. 17, 1.

The accused who was appointed as a foot-constable was asked to perform the duties of drill instructor in accordance with R. 17 (1), Ch. 17, Punjab Police Rules. The accused on being asked to perform the duties of a guard refused to do so on ground that he was a drill instructor and not an ordinary constable. The accused was prosecuted under S. 29, Police Act.

Held, that the accused was guilty of the offence under S. 29, Police Act. The allotment of duties is necessarily a matter within the discretion of the higher authorities. The proper course for him would have been to perform the duty allotted to him and in case he felt aggrieved, he could have made a representation to the higher authorities. There was no justification for him to refuse to perform the duties allotted to him. **1955 Cri LJ 947: AIR 1955 Him Pra 29 (31) (Pt A) (Prs 3, 6).**

4. Procedure.

——Ss. 29 and 7 — Constitution of India, Article 311 (2) — Charge of cognizable offence against police officer in Assam — Departmental action before he has been tried by Court of law not illegal — Assam Police Manual, Part. III, R. 66 (III). See Constitution of India, Art. 311 (2). **1962 (1) Cri LJ 265: AIR 1962 Assam 34 (DB).**

SECTION 30

——S. 30 — District Magistrate acting under Section 30, Police Act declaring and demarcating route for Tazia procession — Legality — Route passing through Sahan of petitioners — Mandamus issued. See Constitution of India, Art. 226. **1960 All LJ 843.**

——S. 30 (1) — Construction — "As occasion requires".

Balakrishna Aiyar, J.:— The occasions on which powers under section may be exercised need not be religious but may be political, or economic, or social. In fact, the occasion may be anything, it may arise anyhow, it may arise at any time, it may be of varying duration, but nevertheless it must be an occasion. Sub-section (1) is not intended to control every-day conduct and something which happens every day is not an occasion. Where local parties are at war and some incident or other has brought factious felling to a boil, the situation may be described as an "occasion" but the mere existence of factions and the coming into being of a protracted state of what may be called cold war between factions would not be an "occasion" within the meaning of the sub-section. When the cold war becomes or threatens to become a hot war that would be an occasion" **(1953) 2 MLJ 602: 66 Mad LW 877: 1954 Cr LJ 290: 1953 Mad WN 562: ILR (1954) Mad 372: AIR 1954 Mad 249 (251, 252) (Pt A) (Prs 4, 5) (DB).**

——S. 30 — Construction — Thoroughfare — Meaning of.

Balakrishna Aiyar, J.:— The essential idea of a thoroughfare is the right of the public to pass and repass over it. A place to which the public are merely entitled to go and over which they have no right of way is not a thoroughfare. There may be thoroughfares across a public place, but nevertheless a thoroughfare is essentially different from a public place. In order to constitute a thoroughfare it is not however, essential that the public should have a right to ride or drive over it. AIR 1933 All 612; AIR 1951 Orissa 51, Rel. on.

Chandra Reddy, J.:— The term "thoroughfare" can include a public place which serves as a passage for the public. But every place of public resort cannot be a thoroughfare for purposes of S. 30 of the Act. It is only a place which is used by the public for passing from one place to another that will attract the provisions of S. 30 and the expression "thoroughfare" is not of such wide connotation as to include in its scope every place to which the public have a right to resort. AIR 1933 All 612; AIR 1951 Orissa 51, Rel. on. Ex. P. Ryan, (1889) 20 NS WLR 274, Distinguished. **(1953) 2 MLJ 602: 66 Mad LW 877: 1954 Cr LJ 290: 1953 Mad WN 562: ILR (1954) Mad 372: AIR 1954 Mad 249 (252, 256) (Pt B) (Prs 6, 23) (DB).**

——S. 30 — Issue of licence.

Balakrishna Aiyar, J.:— The Superintendent may, subject to the conditions laid down in sub-sections (2) and (3) require those who convene an assembly or take out a procession to obtain a licence from him. In that licence he may lay down detailed conditions for the conduct of the assembly or procession. So long as the conditions imposed are bona fide and fairly calculated to attain the purpose of preserving law and order and are not arbitrary or capricious, the Superintendent has an ample measure of discretion in the matter. **(1953) 2 MLJ 602: 66 Mad LW 877: 1954 Cr LJ 290: 1953 Mad WN 562: ILR (1954) Mad 372: AIR 1954 Mad 249 (252) (Pt C) (Pr 7) (DB).**

——S. 30 — Issue of notification — Duty of Police Officer.

The word used in the sub-section is "judgment" and not "apprehend" or "reason to apprehend" and it has a firmer connotation which requires that the Magistrate of the district or sub-division must have applied his mind to the matter and come to the considered conclusion that the assembly or procession if uncontrolled is likely to cause a breach of the peace before the police officers could exercise the power under sub-section (2). **(1953) 2 MLJ 602: 66 Mad LW 877: 1954 Cr LJ 290: 1953 Mad WN 562: ILR (1954) Mad 372: AIR 1954 Mad 249 (252, 256) (Pt D) (Prs 8, 26) (DB).**

——S. 30 (2) — Interpretation of.

Balakrishna Aiyar, J.:— The clause "which would, in the judgment of the Magistrate of the District, or of the sub-division of a district, if uncontrolled, be likely to cause a breach of the peace in the sub-section governs not only the word "procession" occurring immediately before it but qualifies also the word "assembly" occurring a little earlier. **(1953) 2 MLJ 602: 66 Mad LW 877: 1954 Cr LJ 290: 1953 Mad WN 562: ILR (1954) Mad 372: AIR 1954 Mad 249 (252) (Pt E) (Pr 8) (DB).**

——S. 30 — Scope — Forbidding procession — Legality.

Balakrishna Aiyar, J.:— As the section stands, the expression "in any such road, street or thoroughfare" applies only to the word "assembly". That being so a procession in any public place whether the place is a street, road, thorough fare or not—would be covered by the second sub-section. A procession, however, is only, an assembly in motion; an assembly that consciously intends to go from one place to another or to a place and back or may be even round a place. When the assembly becomes a procession, then even if it is not on a public road, street or thoroughfare it would become subject to control under sub-section (2). **(1953) 2 MLJ 602: 66 Mad LW 877: 1952 Cr LJ 290: 1953 Mad WN 562: ILR (1954) Mad 372: AIR 1954 Mad 249 (252) (Pt F) (Pr 8) (DB).**

——S. 30 — Issue of notification — Powers of Police.

Balakrishna Aiyar, J.:— In order to enable the Superintendent to act under sub-section (2) he must be satisfied on certain points. One is that any person or class of persons intend to collect an assembly or take out a procession. It is of course not necessary that he should know the names of the promoters. The requirements of the sub-section would be met if he is satisfied that a certain class of persons in a locality intended to take out a procession. But, he must be satisfied that they intend to do so. The powers conferred by the sub-section is not exhausted in respect of any occasion merely because it has been used in respect of a particular assembly or a procession. It can be used on the same occasion in respect of any number of assemblies or processions. The sub-section however does not contemplate a general order over a prolonged stretch of time so as to take in assemblies and processions which at the time the order is issued nobody has even thought of collecting or forming. What the sub-section visualises is something proximate, something concrete, some particular assembly or assemblies, some particular procession or processions. It does not empower a Superintendent to lay down a general interdict.

Chandra Reddi, J.:— According to sub-section (2) the officer concerned should be satisfied that any person or class of persons were intending to convene or collect a assembly or form a procession. The condition precedent to the promulgation of the order under this sub-section is a meeting or a procession in contemplation. It is something immediate or in prospect that is envisaged in the sub-section and not what is remote or something likely to happen in distant future. The object in requiring a licence to be obtained in a given situation is to direct the conduct of all the assemblies and processions on the public roads or in the public streets or in the thoroughfares in the interest of traffic and maintenance of order in those places by laying down conditions which have to be conformed to by the licensee. The police officers enumerated in the section have to deal with each case as it arises by applying their mind to it. A separate order must be passed as and when the police officer is satisfied that a public meeting is going to be convened or a procession is going to be taken out. Under S. 30 (2) it is utterly beyond the power of either the District or the Assistant District Superintendent of Police to pass an order which can be in operation for a particular period. Majority view in AIR 1923 Pat 1. Dissented; AIR 1919 Pat 173; AIR 1917 All 450, Distinguished. **(1953) 2 MLJ 602: 66 Mad LW 877: 1954 Cr LJ 290: 1953 Mad WN 562: ILR (1954) Mad 372: AIR 1954 Mad 249 (252, 256, 257) (Pt G) (Prs 8, 26, 31) (DB).**

——S. 30 — Issue of notification — Procedure.

Balakrishna Aiyar, J.:— The notice may be general or special, depending upon the circumstances of the case. Where the names and addresses of the persons intending to convene an assembly or promote a procession are known it will be more appropriate to issue a special notice, but where the persons intending to convene an assembly or promote a procession belonging to a class of persons, upon every one of whom it may not be practicable to serve a special notice, or where it is likely that a particular individual intending to collect an assembly or promote a procession is likely to evade the notice general notice may be issued. In the licences which he

issues the Superintendent may lay down detailed conditions for the conduct of the assembly or procession. **(1953) 2 MLJ 602: 66 Mad LW 877: 1954 Cr LJ 290: 1953 Mad WN 562: ILR (1954) Mad 372: AIR 1954 Mad 249 (252) (Pt H) (Pr 8) (DB).**

——S. 30 — Thoroughfare — Meaning — Comparison with public place — Words and Phrases.

If people gather as a matter of right in a particular place it may become a public place but it does not necessarily follow that the place is a thoroughfare". For a place to be thoroughfare there must be unobstructed transit. That is to say, the place must be used as a passage for the people to pass through. A "thoroughfare" is a wider expression than a "road" or a "street" but it is narrower than a "public place".

The foot of a hill close to a tank in the absence of evidence that it was used as a path by the public, cannot be held to be a thoroughfare even assuming that the public had a right to gather there. **ILR (1950) Cut 584: AIR 1951 Orissa 51 (52, 53) (Prs 5, 7) (DB)**

——Ss. 30 and 32 — Compliance with S. 342, Criminal P. C. — Accused not given opportunity to explain incriminating circumstances appearing against him — Prejudice caused — Trial vitiated. See Criminal P. C. (1898), S. 342. **1962 (1) Cri LJ 743: AIR 1962 Pat 244.**

——Ss. 30 and 32 — Compliance with — Provision is mandatory — For conviction of accused admission by accused must amount to offence. See Criminal P. C. (1898), S. 243. **1962 (1) Cri LJ 743: AIR 1962 Pat 244.**

——S. 30 (1) — Scope — Police have no power to ban processions.

Sub-section (1) of S. 30 gives the Police power to control and regulate processions; but the Police have no power thereunder to forbid or to ban the procession. The power to control does not include the power to forbid. As the promulgation banning the procession is ultra vires the powers of the police under S. 30 (1), the accused committed no offence by violating it. AIR 1926 Pat 173 and AIR 1935 All 657 and AIR 1951 Pat 418, Rel. on. **1962 BLJR 20: 1962 (1) Cri LJ 743: 1962 All Cr R 260: 1962 All WR (Sup) 681: AIR 1962 Pat 244 (249) (Pt D) (Prs 34, 35, 37, 38).**

——Ss. 30 (2), 32 — Offence under — Ingredients — Knowledge of the order under S. 30 (2) to the accused must be proved. See Police Act (1861), S. 32. **1964 (2) Cri LJ 366: AIR 1964 Tripura 52.**

——Ss. 30 (2), 32 — Notification under — Validity of — General order issued by D. S. P. — Propriety.

Where a notification issued under S. 30 (2) of the Police Act did not ban or forbid any procession absolutely but only required that persons intending to do so should apply 3 days prior to taking out of the procession along the public streets or thoroughfares, setting out therein the particulars mentioned in the notice, it could not be said that the notice contained anything in excess of the powers given to Superintendent of Police under S. 30 (2) of the Police Act, especially when the notice was issued after consulting the District Magistrate, who was of the opinion that such procession might cause breach of the peace. The notice issued in the circumstances could not be said to be in any way illegal. AIR 1962 Pat 244, Dist. Further a general notification issued by the Superintendent under the section is not invalid for the words of the section are sufficiently general to enable the Superintendent of Police to issue a general notification containing prohibition against convening or collecting assemblies or directing or promoting processions without licence. The terms of section are also wide enough to cover a prohibition without any limit of time. If the person or persons against whom the notice is directed convenes or convene or collects or collect an assembly or promotes or directs a procession without license, he or they will be punishable under S. 32 of the Act. **(1964) 2 Cri LJ 366: AIR 1964 Tripura 52 (53) (Pt A) (Prs 9, 12).**

——S. 30 (2) — Notification under regulating processions and assemblies — Can be regarded as 'law'.

When a notification is issued by an Executive Authority in exercise of a power conferred by statute, that notification is as much a part of the law, as if it had been incorporated within the body of the statute at the time of its enactment. The command is in every respect a command by the appropriate legislative authority. In the instant case, as the notification was in compliance with Section 30, sub-s. (2) of the Police Act, it was a law and certainly a legal process. AIR 1923 Pat 1 (FB), Foll. **1964 (2) Cr LJ 366: AIR 1964 Tripura 52 (54) (Pt B) (Pr 13).**

——S. 30 (2) — Offence under — Essentials of.

In order to bring an offence within the ambit of S. 30 (2) the prosecution must prove that the accused was directing or promoting the procession. To be an ordinary member of the procession, or at the head of the procession is no offence under S. 30 (2). **1964 (2) Cr LJ 366: AIR 1964 Tripura 52 (54) (Pt D) (Pr 14).**

SECTION 31

——S. 31 — "Thoroughfare" — Essentials of — "Public place" — When becomes thoroughfare — Proof requisite.

A "thoroughfare" is a wider term than a "road" or "street," but is narrower than a "public place". While a thoroughfare may be a public place the converse is not always true or correct. If people gather as a matter of right in a particular place, it may become a public place, but it does not necessarily follow that it is a thoroughfare. To be a thoroughfare it must be capable of unobstructed transit. That is to say, the place must be used as a passage for people to pass through. Every public place, therefore, will not necessarily become a thoroughfare unless the place is used as a passage for people to pass through. Even if it be assumed that a place such as the foot of a hill, near a temple and a tank, is a public place where people have a right to collect or gather, it cannot be held to be a thoroughfare in the absence of evidence that it was actually used as a path by the members of the public. **ILR (1950) Cut 584: AIR 1951 Orissa 51 (52, 53) (Prs 5, 7) (DB).**

SECTION 32

——S. 32 — Criminal P. C. (1898), Ss. 342, 537 — Compliance with S. 342 — Accused not given opportunity to explain incriminating circumstances appearing against him — Prejudice caused — Trial vitiated. See Criminal P. C. (1898), Section 342. **1962 (1) Cri LJ 743: AIR 1962 Pat 244.**

——S. 32 — Criminal P. C. (1898), S. 243 — Compliance with — Provision is mandatory — For conviction of accused admission by accused must amount to offence. See Criminal P. C. (1898), S. 243. **1962 (1) Cri LJ 743: AIR 1962 Pat 244.**

——**Ss. 32 and 30 (2) — Notification under — Validity of — General order issued by D. S. P. — Propriety.**

The person or persons against whom the notice is directed convenes or convene or collects or collect an assembly or promotes or directs a procession without license, he or they will be punishable under Section 32 of the Act. See Police Act (1861), S. 30 (2). **1964 (2) Cri LJ 366: AIR 1964 Tripura 52.**

——**Ss. 32, 30 (2)** — Offence under— Ingredients — Knowledge of the order under Section 30 (2) to the accused must be proved. **1964 (2) Cr LJ 366: AIR 1964 Tripura 52 (54) (Pt C) (Pr 14).**

SECTION 34

——**S. 34 — Penal Code (1860), Ss. 352, 353 — Applicability — Resistance to arrest by police officer without warrant — Offence.**

Section 34 of the Police Act does not give any authority to the Police Officer to pursue the petitioners and arrest them, even though no such offence as alleged or contemplated by Section 34 of the Act was said to have been committed by them within his view.

If, therefore, in such a case the petitioners resist the questioning by the police officer or the attempt to arrest them, in course of which the police officer is alleged to have received some injuries on his person, the petitioners cannot be held guilty of any offence within the meaning of Section 353 or 352 of the Penal Code. **ILR (1958) 10 Assam 73: 1960 Cr LJ 1420: AIR 1960 Assam 206 (206) (Pr 2).**

——**S. 34, Third** — Police is bound to ask for removal of obstruction before prosecuting under Section 34 of the Police Act. **1963 MPLJ (Notes) 230.**

——**S. 34, Seventh** — The fact that loud speaker arrangements had been made for the public out-side to hear what was going on inside a hall would surely not make the meeting public meeting or those premises places of public resort. See Mysore Police Act, S. 56 (o). **1954 Cri LJ 144: AIR 1954 Mys 12.**

——**S. 34, Seventh** — Mysore Police Act, S. 56 (o) — Place of public resort — Meeting in Hall which presumably belonged to Government. See Mysore Police Act, S. 56 (o). **AIR 1954 Mys 12.**

——**S. 34, Third — Offence under — Proof — Accused parking cycle in front of shop abutting on wide road — Act itself held not sufficient for raising inference of obstruction, etc.**

For conviction under Section 34-third, it is not sufficient merely to prove that a cattle or conveyance had been kept standing on a public road, place or thoroughfare for an unreasonable length of time, but the prosecution has further to prove that the act complained of had caused obstruction and inconvenience, annoyance, risk, danger or damage. In some cases, the act complained of may be such from which an inference of annoyance, inconvenience or obstruction, etc., can well be raised and no further evidence would be necessary to prove that the conduct attributed to the person complained against had resulted in inconvenience or annoyance or risk, but in other cases evidence has to be adduced to prove that the act complained of had occasioned inconvenience, annoyance, etc., to the residents or passengers. The nature of the act may be relevant in determining whether it had caused inconvenience or annoyance, etc., to the public. Where a cycle was parked in front of the shop of the accused which abutted on a wide road the case is not of that type in which an inference of obstruction or annoyance, etc., can be raised from the very act itself. AIR 1930 Pat 246, Rel. on. **1963 (1) Cri LJ 316: 64 Punj LR 1175: 1962 All Cri R 494: 1962 All WR (Sup) 114: AIR 1963 Punj 141 (141, 142) (Prs 4, 6, 7).**

——**S. 34 (6) —Offence involving moral turpitude — Conviction of police constable under S. 34, Police Act.**

If a member of the police force is guilty of having been found drunk at a public place or to have become habituated to liquor and if he is convicted by a Criminal Court under Section 34 of the Act, his conviction should be held as involving moral turpitude. See Constitution of India, Art. 311 (2), Proviso. **AIR 1957 Punj 97.**

SECTION 35

● ——**Ss. 35 and 29** — Scope — Sections do not exclude departmental enquiry. See Police Act (1861), S. 29. **1960 Cri LJ 1671: AIR 1960 SC 1210.**

● ——**Ss. 35, 1, 17, 28, 29 — Magistrate and officer exercising powers of Magistrate— Difference — (Words and Phrases).**

The words "an officer exercising the powers of a Magistrate" in Section 35 refer only to a Magistrate of the First class. Hence Section 35 is not rendered redundant by the provisions of Sections 28 and 29. See Police Act (1861), S. 1. **1956 Cri LJ 174: AIR 1956 All 96 (SB).**

● ——**S. 35 — Applicability and scope — Departmental enquiries — 'Charge,' meaning of — (Words and Phrases — 'Charge').**

Section 35 as it originally stood referred to judicial trials before a Magistrate and did not refer to departmental enquiries by the police. By the deletion of the words at the beginning of the Section in 1882 the Legislature did not intend to change the very basis of the section, that is to say, instead of its applying to a judicial trial before a Magistrate it should be made to apply not only to judicial trials but also to departmental enquiries and trials. The word 'charge' in S. 35 must retain the meaning which it had before the section was amended. Mahendra Singh v. State of U. P., **1956 Cr LJ 174: (1955) 2 Lab LJ 750: 1955 All LJ 643: 1955 All WR (HC) 548: ILR (1956) 1 All 178: AIR 1956 All 96 (98) (Pt D) (Prs 8, 10) (SB).**

——**S. 35** — Scope — Conflict with S. 7 — Effect — After amendment, provisions of Section 35 become contradictory to provisions of S. 7 — Effect should be given to Section 7 in preference to Section 35. See Police Act (1861) (as amended by Act (10 of 1882), S. 7). **AIR 1955 All 400.**

——**S. 35** — Applicability — Proceedings under Section 7 and R. 861 — Police Regulations — Section 35 is not attracted. See Police Act (1861), S. 7. **AIR 1955 Cal 183.**

——**S. 35** — Sections 7 and 35 are different in their scope and application. The proceedings are not alternative but cumulative. There is no illegality in resorting to either or both proceedings. Even when charges laid against a person are of a serious nature, departmental proceedings can be resorted to. See Police Act (1861), S. 7 **AIR 1954 Cal 60 (DB).**

——**S. 35 — Scope and applicability.**

Section 35, Police Act, does not require that every stage of the enquiry should be conducted by the Inspector-General himself. If at any stage of the enquiry the Inspector-General of Police participates in the enquiry as to the charges and comes to a decision as to the charges there is

sufficient compliance with S. 35. Until the proceedings come to a close it cannot be stated whether Section 35 has not been substantially complied with or not. Section 35 was intended to apply to a judicial enquiry into the charges and not to enquiries in the nature of departmental proceedings.

Consequently, where the departmental proceedings against a police Sub-Inspector have been initiated by a Sub-Divisional Officer of the Police at the instance of the Inspector-General of Police and have reached the preliminary stage of framing charges, they cannot be declared to be illegal or void. **AIR 1951 Cal 179 (181) (Pt A) (Pr 11).**

——S. 35 — Scope and object.

Section 35 contemplates a criminal charge against a Police Officer and the object of this section is to prevent a Magistrate of the 2nd or 3rd Class enquiring into offences against Police Officers above the rank of a constable. This section has no relevance to a departmental enquiry to which a Police Officer is subjected. **ILR (1956) Punj 361: AIR 1956 Punj 102 (104) (Pt B) (Pr 9).**

——S. 35 — Applicability to departmental enquiries.

Section 35 of the Police Act does not deal with departmental enquiries but must be read 'ejusdem generis' with the offences mentioned in Ss. 28 and 29 of the Police Act. The words 'officer exercising the powers of a Magistrate' have been defined to mean a 'Magistrate of the first class' in Section 3 (2), Criminal P. C. which is an Act later than the Police Act, and therefore Section 35 was intended to apply to a judicial enquiry into charges and not to enquiry in the nature of departmental proceedings. AIR 1951 Cal 179 and AIR 1954 Cal 60, Rel. on. **ILR (1955) Punj 934: AIR 1955 Punj 118 (120) (Pt C) (Pr 6).**

——S. 35 — Applicability to departmental enquiries — Section 35 is intended for judicial enquiries into charges under the Act and not to departmental enquiries which fall within the scope of Section 7 and which are to be held subject to the provisions of Art. 311 of the Constitution. AIR 1951 Cal 179, Rel. on. See Criminal P. C. (1898), S. 197. **1957 Cr LJ 394: AIR 1957 Tripura 18.**

SECTION 36

——S. 36 — Prosecution under Section 218, Penal Code, of Police Officer — Limitation prescribed by Section 42, Police Act, has no application. See Police Act (1861), S. 42. **1964 Mad LJ (Cr) 76: (1964) 1 SCJ 164: (1964) 2 Cr LJ 71 (SC).**

SECTION 42

——Ss. 42, 36 — Prosecution under S. 218, Penal Code of Police Officer — Limitation prescribed by Section 42 has no application.

The period of three months prescribed for commencing a prosecution under this section is only with respect to prosecution of a person for something done or intended to be done by him under the provisions of the Police Act or under general police powers given by the Act. S. 42 does not apply to prosecutions against any person for anything done under the provisions of any other Act or under Police powers conferred under any other Act. A combined reading of the provisions of Sections 42 and 36 leads to the conclusion that Section 42 only applies to a prosecution against a person for an offence committed under the Police Act. Section 44 imposes a duty on every officer in charge of a Police Station to keep a General Diary in such form as prescribed. If the officer does not discharge his duty in the matter of keeping a regular diary, he commits an offence under Section 29 of the Act. If he is prosecuted for such an offence, under Section 42, it should be done within the time laid down thereunder but where the prosecution is for an offence under Section 218 of the Penal Code which is an offence under a different Act and for which a much higher punishment is prescribed by reason of Section 3€ of the Police Act, S. 42 cannot apply. Maulud Ahmad v. State of U. P., **1963 All LJ 555: 1963 All WR (HC) 482: 1963 SCD 714: 1964 MLJ (Cr) 76: (1964) 1 SCJ 164: ILR (1963) 2 All 528: (1963) All Cr R 253: (1963) 1 SCWR 268: (1963) Supp 2 SCR 38: 1964 (2) Cr LJ 71 (73) (Pt B) (Prs 9, 10) (SC).**

——S. 42 — Applicability to departmental trial under Section 7 — Section 42 is intended as a protection to Police officers against actions and prosecutions brought by a third party, in respect of anything done or intended to be done by them in the performance of their duties. It has no relation to departmental enquiries instituted under Section 7 of the Act. See Police Act (1861), S. 7. **1958 Cri LJ 983: AIR 1958 All 560 (DB).**

——Ss. 42 and 7 — Applicability — Disciplinary proceedings in respect of misconduct.

Section 42 does not apply to a disciplinary proceeding against a police employee for any misconduct or any other acts enumerated in Section 7 on which such proceedings could be started. Such a proceeding cannot be regarded as an action or prosecution against any person as contemplated. **(1958) 1 Lab LJ 448: AIR 1957 All 634 (635) (Pt A) (Pr 4).**

——S. 42 — Applicability.

Section 42 refers to judicial proceedings and has no reference to a departmental enquiry. **58 Cal WN 952: AIR 1955 Cal 183 (188) (Pt I) (Pr 19).**

——S. 42 — Criminal P. C., S. 202 — Report under S. 202 what is — Report by Sub-Inspector of Police under Act — Defamatory Statement in — Prosecution for — Limitation.

Held, that the representations were not complaints that the report of Sub-Inspector was not a report under S. 202, Cr. P. C., but was one of administrative nature and that the complaint filed on 11-2-49, that is after expiry of three months from the date of the report of Sub-Inspector, was barred by Section 42, Police Act. See Criminal P. C. (1898), S. 202. **52 Cri LJ 1511: AIR 1951 Punj 135 (DB).**

——S. 42 — "Anything done or intended to be done".

Where a Sub-Inspector of Police makes a defamatory statement in a report submitted by him to his superior officer under the Police Act, the statement is covered by the expression "anything done or intended to be done under the provisions of the Act" and the period of limitation under Section 42 applies to a prosecution of the Sub-Inspector for such statement. AIR 1939 FC 43, Discussed. **('51) 53 PLR 124 : 52 Cri LJ 1511: ILR (1951) Punj 272: AIR 1951 Punj 135 (136) (Pt B) (Pr 5) (DB).**

——S. 42 — S. 42 how much repealed.

Section 42, Police Act, 1861, was amended in part by the Limitation Act, 1871. But the first schedule to that Limitation Act makes it clear that only so much of Section 42 was repealed as relates to the limitation of suits. The portion of the section relating to prosecutions was allowed to remain unaltered. **('51) 53 PLR 124: 52 Cri LJ 1511: ILR (1951) Punj 272: AIR 1951 Punj 135 (137) (Pt C) (Pr 7) (DB).**

——S. 42 — Applicability and scope.

Section 42 does not have any application with regard to prosecutions arising out of the exercise of powers under Criminal P. C. It is only with respect to actions and prosecutions against a police officer for something done or intended to be done by him under the provisions of the Police Act or under the general police powers given by the Act that Section 42 can come into play and not otherwise. AIR 1915 All 358, Explained and applied. **1956 Raj LW 285: 1957 Cr LJ 158 (160) (Pt A) (Prs 4, 5) (Raj).**

SECTION 43

——S. 43 —Magistrate having jurisdiction issuing search warrant — Irregularity committed by him does not make warrant illegal. See Judicial Officers Protection Act (1850), S. 1. **1965 (2) Cri LJ 225: AIR 1965 Mys 214 (DB).**

——Ss. 43, 23 — Contempt of Court — Plea under section in defence — If open.

The plea under Section 43 does not fortify a police officer against acts of contempt of Court He cannot successfully seek protection under Section 23 also where the facts and circumstances of the case indicate that the act of contempt, namely his interference with the possession of the receivers, was deliberate and unlawful. **ILR (1958) Punj 1822: 1958 Cr LJ 1529: 60 Pun LR 624: AIR 1958 Punj 471 (478) (Pt E) (Pr 37).**

SECTION 44

——S. 44 — U. P. Police Regulations, Reg. 295 (14) and (15) — Impression gathered or circumstances ascertained by police officer at spot are not required to be entered in general diary — They are not relevant facts under Section 35, Evidence Act and hence not admissible in evidence — Criminal P. C. (1898), S. 172 — Evidence Act (1872), S. 35.

Section 35 of Evidence Act says that an entry in any public or official book, register or record made by a public servant in the discharge of his official duty is itself a relevant fact. It is necessary that the entry must be made by a public servant in the discharge of his official duty. The making of an entry in a diary is enjoined on a police officer by Section 44 of the Police Act. But that section as well as the Regulations framed thereunder mention the specific matters which are to be recorded in the general diary. If a matter which is not covered by the provisions of Section 44 of the Police Act or Regulation 295 is nonetheless entered in the general diary it will not be an entry made in the discharge of the official duty. The impression gathered or the circumstances ascertained by a police officer at the spot are not required to be entered in the general diary and as such they will not be relevant facts under Section 35 of the Evidence Act. These matters are appropriately to be mentioned in the diary of the case under Section 172, Cr. P. C. Such matters have been specifically prohibited under Section 172, Cr. P C. from being used as evidence. Hence even though such matters have been recorded not in the diary of the case but in the general diary yet since they properly fall within the purview of Section 172 the prohibition will apply and they cannot be used as evidence in that case. AIR 1928 All 710 and AIR 1932 Oudh 137, Disting. AIR 1938 Lah 787, Rel. on. **1964 All WR (HC) 579: 1964 All Cri R 425: ILR (1965) 1 All 298: 1966 Cri LJ 498: AIR 1966 All 222 (223) (Pt A) (Pr 8) (DB).**

SECTION 46

——Ss. 46 (2) and 7 — U. P. Police Regulations, Regn. 490 — U. P. Disciplinary Proceedings (Administrative Tribunal) Rules (1947), Rules 8 and 9 — Enquiry against police officer for misdemeanours — No substantial difference between the procedures under the two sets of Rules. See Police Act (1861), S. 7. **AIR 1961 SC 1245.**

——S. 46 (2) (c) — U. P. Police Training College Manual, Pt. II, Rule 23 — Rules in the Manual — Whether statutory — Misconduct of cadet under training — Enquiry and expulsion from college — Cadet has no right to cross-examine witnesses at enquiry — Natural justice. Shesh Mani Nath Tripathi v. Deputy Inspector-General of Police. **1964 All WR (HC) 266: 1964 All Cr R 178: 1964 All LJ 554: 1964 (2) Cr LJ 625: (1965) 1 Lab LJ 4: (1964) 9 Fac LR 347: ILR (1964) 2 All 556: AIR 1964 All 540 (540 to 542) (Prs 8, 10, 22) (FB).**

——Ss. 46 (2) and 23 — Penal Code (1860), Sections 353 and 442 — Police in uniform doing surveillance entering accused's house and beaten — Accused held guilty under Section 353, I. P. C. — (Police Rules (U. P.) under S. 46 (2) Police Act, R. 236). See Penal Code (1860), S. 353. **AIR 1955 NUC (All) 2781 (DB).**

——Ss. 46 and 29 — Rules under Section 46, Rule 16.21 (1) — Police officer involved in criminal case — Suspension during pendency of case — Order to remain in police lines — Legality — Control of surety over movements of accused is no defence for disobedience. See Police Act (1861), S. 29. **AIR 1958 Punj 17 (DB).**

——S. 46 — Enforcement of Act in Rajasthan — Validity — The Police Act of 1861, held validly enforced in Rajasthan. See Constitution of India, Art. 372 (1). **AIR 1957 Raj 28 (DB).**

——S. 46 — Applicability to Rajasthan — Rajasthan Notification, Dated 18-7-1950 — Validity.

The Notification issued by the Rajpramukh enforcing the Police Act in Rajasthan by his order, dated 18-7-1950 is valid. **ILR (1954) 4 Raj 47: 1954 Raj LW 750: AIR 1955 Raj 5 (5) (Pt A) (Pr 2) (DB).**

POLICE ACT (3 of 1888)

SECTION 3

——S. 3 — 'State' — Meaning — Police Officers deputed to Part B State — Position of.

As provided for by the Adaptation Order, 1950, the word 'State' in the Police Act of 1888 means a Part A State or a Part C State. S. 3, therefore, does not contemplate the deputation of the Madhya Pradesh Police Officers to a Part B State and hence where a Police Officer is in fact lent or deputed to a Part B State he continues to belong to the establishment of the parent State. **ILR (1955) Nag 93: 1955 Cr LJ 974: AIR 1955 Nag 160 (162) (Pt B) (Pr 10) (DB).**

POLICE CADRE RULES (1950)

——Order of reversion passed by committee having no legal existence — Reversion by way of punishment — Opportunity to be heard should be afforded. See Constitution of India, Art. 311 (2). **AIR 1958 Cal 546.**

——Officiating appointment for extended term— Permissibility.

According to the Rules, either there could be a permanent appointment or appointment on probation and in case of probation upon a successful completion of the term of probation,

persons must be confirmed in the Indian Police Service. There is no provision for an officiating appointment for an extended term. **62 Cal WN 546: (1958) 2 Lab LJ 392: AIR 1958 Cal 546 (547) (Pt A) (Pr 3).**

POLICE CUSTODY

Confession of accused while in.
See Evidence Act (1872), S. 26.

POLICE DIARY

See (1) Criminal P. C. (1898), Ss. 161 and 162, 172.
(2) Evidence Act (1872), Ss. 145, 165. 167.
(3) Police Act (1861), S. 44.

POLICE FORCE

Causing disaffection amongst members of.
See Police (Incitement to Disaffection) Act (22 of 1922), S. 3.

POLICE (INCITEMENT TO DISAFFECTION) ACT (22 of 1922)

SECTION 3

——**S. 3** — Section 3 of the Police (Incitement to Disaffection) Act, 1922, is intra vires and falls within the protection of Cl. (2) of Art. 19 of the Constitution. AIR 1952 SC 196, Ref. See Constitution of India, Art. 19 (1) (a). **1960 Cr LJ 1192: AIR 1960 Bom 399 (DB).**

——**S. 3** — Constitution of India, Art. 19 (2) — Restriction imposed by Section 3 not unlimited and so not unreasonable. See Constitution of India, Art. 19 (2). **1960 Cr LJ 1192: AIR 1960 Bom 399 (DB).**

——**S. 3** — Constitution of India, Art. 19 (2) — Police Officer withholding his services or committing breach of discipline is punishable under Section 145 of the Bombay Police Act, 1951— To induce Police Officer to do so would amount to incitement to an offence — Hence restriction imposed by Section 3 of the Police (Incitement to Disaffection) Act is covered by Art. 19 (2) and is valid. See Constitution of India, Art. 19 (2). **1960 Cri LJ 1192: AIR 1960 Bom 399 (DB).**

——**S. 3 — 'To withhold services' — Meaning of.**

The expression 'to withhold services' means not merely to resign from the force but to deliberately refuse, to forbear or to refrain from performing tasks and duties enjoined upon the members of the police force by the rules governing them. 'To withhold services', means something more aggravated than even committing breach of a disciplinary rule. **62 Bom LR 206: 1960 Nag LJ 244: ILR (1960) Bom 305: 1960 Cr LJ 1192: AIR 1960 Bom 399 (403) (Pt F) (Pr 15) (DB).**

——**S. 3** — Scope. See Bihar Essential Services Maintenance Act (I of 1948), S. 5. **1959 Cr LJ 1014: AIR 1959 Pat 376.**

POLICE INTELLIGENCE BRANCH MANUAL OF INSTRUCTION

RULE 12

——**R. 12** — Bengal Subordinate Services (Disciplinary and Appeal) Rule (1936), Rr. 4, 5 and Schedule — Police Regulations, Regn. 768 (b) — Typist appointed by Special Superintendent of Police in Intelligence Branch and C. I. D. is not a subordinate clerk within Rule 5 — Regn. 768 (b) does not apply — His appointing authority being Special Superintendent of Police, disciplinary action by Superintendent, Government Railway Police not valid. See Constitution of India, Art. 311. **AIR 1965 Cal 169 (DB).**

POLICE INVESTIGATION

See Criminal P. C. (1898), Ss. 155, 161 and 162

POLICE MANUAL

RULE 851

——**R. 851 (b)** — Appellate authority can pass orders which the original authority could have passed — Original authority reverting petitioner though he could order dismissal — Appeal to State Government — State Government can order dismissal. (1941) 1 Mad LJ (Supp) 49; (1940) 3 MLJ (FC) 73: AIR 1941 FC 5, Rel. on. But before doing so, it must gave fresh notice to petitioner that it proposed to inflict higher penalty. 1915 AC 120; (1885) 10 AC 229; 1958 SCJ 798; AIR 1958 SC 398, Rel. on — If the State Government enhances the punishment without fresh 'show cause notice', order of dismissal is ultra vires and illegal — C. P. Code (1908) O. 41, R. 33 — Constitution of India, Art. 311. **1962 BLJR 453: (1962) 2 Lab LJ 409: (1962) 5 Fac LR 413: ILR 41 Pat 851: AIR 1962 Pat 276 (277 to 280) (Prs 4, 5) (DB).**

POLICE OFFICER

See (1) Criminal P. C. (1898), Ss. 161 and 162.
(2) Evidence Act (1872), Ss. 25, 26, 27.

Arrest by to prevent cognizable offence.
See Criminal P. C. (1898), S. 151.

Break open doors and windows, power to.
See Criminal P. C. (1898), S. 149.

Confession to.
See Evidence Act (1872), Ss. 25 and 26.

Officer in charge of police station.
See Criminal P. C. (1898), S. 4 (1) (p).

Prevention of cognizable offence.
See Criminal P. C. (1898), S. 149.

Search by.
See Criminal P. C. (1898), S. 165.

Stolen property, power to seize.
See Criminal P. C. (1898), S. 550.

POLICE REGULATIONS

See (1) Constitution of India, Art. 311 and
(2) Statutory cross-references under "Police."

POLICE REGULATIONS (STATES)

See Police Act (1861), S. 7.

POLICE REPORT

See Criminal P. C. (1898), Ss. 110-158.

POLICE SERVICE (APPOINTMENT BY PROMOTION) REGULATIONS (1955)

CLAUSE 4

——**Cls. 4 and 5 (2)** — Signing of statement set forth in schedule to U. P. Act (40 of 1948) — P, appointed as Adjutant in 1947 in Military Police, signing statement — Statement entitling P to have his services in the P. A. C. counted for promotion and pension in U. P. Police — Substantive appointment of P as Dy. S. P. in U. P. Police Cadre from 9th November, 1955 — Subsequent order fixing seniority of P in U. P. Police service on basis of his substantive appointment and not on basis of initial appointment —

Order challenged on ground, inter alia, of barring promotion to Police Service — Validity. See U. P. Provincial Armed Constabulory Act (40 of 1948), S. 4. **(1965) 10 Fac LR 301: 1965 All LJ 667.**

POLICE SERVICE (CADRE) RULES (1954)

RULE 2

● ——**Rr. 2 (a), 3 to 5, 8, 9 (b) and 10** — Reduction in rank — Indian Police Service — Member reverted from higher officiating post of Superintendent of Police to substantive junior post of Assistant Superintendent of Police for unsatisfactory conduct — Whether reduction in rank within Art. 311 (2). AIR 1962 Punj 516, **Reversed.**; AIR 1958 SC 36, Applied. See Constitution of India, Art. 311 (2). **AIR 1964 SC 423.**

RULE 3

● ——**Rules 3, 4 and 5** — Constitution of India, Article 311 (2) — Reduction in rank — Indian Police Service — Member reverted from higher officiating post of Superintendent of Police to substantive junior post of Assistant Superintendent of Police, for unsatisfactory conduct — Whether 'reduction in rank' within Art. 311 (2) —AIR 1962 Punj 516, **Reversed.** See Constitution of India, Art. 311 (2). **AIR 1964 SC 423.**

RULE 4

——**R. 4 (1) and R. 8** — Right to hold post when is acquired by Government servant — Promotion to cadre post in Indian Police Service — Person in substantive junior post promoted to higher officiating post — Reversion — Reversion held did not amount to reduction in rank — No punishment — Art. 311, not attracted. See Constitution of India, Art. 311. **AIR 1962 Punj 516 (DB).**

[**Reversed** in AIR 1964 SC 423.]

RULE 8

● ——**Rr. 8, 9 (b) and 10**—Constitution of India, Article 311 (2) — Reduction in rank — Indian Police Service — Member reverted from higher officiating post of Superintendent of Police to substantive junior post of Assistant Superintendent of Police, for unsatisfactory conduct — Whether 'reduction in rank' within Art. 311 (2) —AIR 1962 Punj 516, **Reversed.** See Constitution of India, Art. 311 (2). **AIR 1964 SC 423.**

POLICE SERVICE (FIXATION OF CADRE STRENGTH) REGULATIONS (1955)

● ——Reduction in rank — Indian Police Service — Member reverted from higher officiating post of Superintendent of Police to substantive junior post of Assistant Superintendent of Police. AIR 1962 Punj 516, **Reversed.** See Constitution of India, Art. 311 (2). **AIR 1964 SC 423.**

——Right to hold post when is acquired by Government servant — Promotion to cadre post in Indian Police Service — Person in substantive junior post promoted to higher officiating post — Reversion — Reversion held did not amount to reduction in rank—No punishment—Art. 311, not attracted. See Constitution of India, Art. 311 **AIR 1962 Punj 516 (DB).**

[**Reversed** in AIR 1964 SC 423.]

POLICE SERVICE (PAY) RULES (1954)

RULE 2

● ——**Rr. 2 (a), 3, 4 (2), 5 and 8** — Reduction in rank — Indian Police Service — Member reverted from higher officiating post of Superintendent of Police to substantive junior post of Assistant Superintendent of Police, for unsatisfactory conduct — Whether reduction in rank within Art. 311 (2). AIR 1962 Punj 516, **Reversed.** See Constitution of India, Art. 311 (2). **AIR 1964 SC 423.**

RULE 4

● ——**Rr. 4 (2), 3 and 5**—Constitution of India, Articles 311 (2) — Reduction in rank — Indian Police Service — Member reverted from higher officiating post of Superintendent of Police to substantive junior post of Assistant Superintendent of Police, for unsatisfactory conduct — Whether 'reduction in rank' within Art. 311 (2) —AIR 1962 Punj 516, **Reversed.** See Constitution of India, Art. 311 (2). **AIR 1964 SC 423.**

RULE 8

● ——**R. 8** — Constitution of India, Article 311 (2) — Reduction in rank — Indian Police Service — Member reverted from higher officiating post of Superintendent of Police to substantive junior post of Assistant Superintendent of Police, for unsatisfactory conduct — Whether 'reduction in rank' within Art. 311 (2) —AIR 1962 Punj 516, **Reversed.** See Constitution of India, Art. 311 (2). **AIR 1964 SC 423.**

POLICE SERVICE (RECRUITMENT) RULES (1954)

RULE 3

● ——**Rr. 3, 4, 6 and 9** — Reduction in rank — Indian Police Service — Member reverted from higher officiating post of Suprintendent of Police to substantive junior post of Assistant Superintendent of Police for unsatisfactory conduct — Whether reduction in rank within Art. 311 (2) See Constitution of India, Art. 311 (2). **AIR 1964 SC 423.**

RULES 4, 6, 9

● ——**Rr. 4, 6, 9** — Constitution of India, Article 311 (2) — Reduction in rank — Indian Police Service — Member reverted from higher officiating post of Superintendent of Police to substantive junior post of Assistant Superintendent of Police, for unsatisfactory conduct — Whether 'reduction in rank' within Art. 311 (2) —AIR 1962 Punj 516, **Reversed.** See Constitution of India, Art. 311 (2). **AIR 1964 SC 423.**

——**R. 4** — Right to hold post when is acquired by Government servant — Promotion to cadre post in Indian Police Service — Person in substantive junior post promoted to higher officiating post — Reversion — Reversion held did not amount to reduction in rank — No punishment — Article 311 not attracted. See Constitution of India, Art. 311. **AIR 1962 Punj 516 (DB).**

[**Reversed** in AIR 1964 SC 423.]

POLICE SERVICE (REGULATION OF SENIORITY) RULES (1954)

RULE 2

● ——**R. 2 (g)** — Reduction in rank — Indian Police Service — Member reverted from higher officiating post of Superintendent of Police to substantive junior post of Assistant Superintendent of Police, for unsatisfactory conduct — Whether reduction in rank within Art. 311 (2). AIR 1962 Punj 516, **Reversed.** See Constitution of India, Art. 311 (2). **AIR 1964 SC 423.**

POLICE STANDING ORDER

RULE 558

——**R. 558** — Criminal P. C. (1898), S. 167 — Omission to send case diaries at the time of remand — Inference from. From the omission to send the case diaries with the remand report in contravention of the mandatory provisions of Section 167 as well as the Police Standing Order No. 558 and the directions given in Police Gazette No. 48 D/. 28-11-1955, Part I, the reasonable

inference that can be drawn is that they were not in existence or if in existence, were not in the shape in which they are found, when produced in Court. AIR 1957 Andh Pra 561, Rel. on. See Criminal P. C. (1898) S. 167. **ILR (1959) Andh Pra 797.**

RULE 580

——R. 580 — Compliance with — Interview with prisoner — Order in writing of District Magistrate or Deputy Inspector General or Commissioner of Police necessary — Permission given by Judicial Second Class Magistrate for interview is not valid — Statement of prisoner taken on the basis of such permission is not admissible. **ILR (1959) Andh Pra 797.**

POLICE STATION

Defined.

See Criminal P. C. (1898), S. 4 (1) (s).

POLICE TENURE

See Government Grants Act (15 of 1895), S. 3.

POLICY OF FIRE INSURANCE

Transfer of.

See T. P. Act (1882), S. 135.

POLICY OF INSURANCE

Suit on.

—Limitation.

See Limitation Act (1908), Art. 86.

POLICY OF MARINE INSURANCE

Transfer of.

See T. P. Act (1882), S. 135-A.

POLITICAL AGENT

Certificate of, for inquiry into offence by Indian citizen committed out of India.

See Criminal P. C. (1898), S. 188.

Defined.

See General Clauses Act (1897), S. 3 (43).

POLL

See Representation of the People Act (1951), Ss. 57, 59.

POLLING AGENT

See Representation of the People Act (1951), S. 46.

POLLING OFFICER

See Representation of the People Act (1951), S. 28.

POLLING STATION

See Representation of the People Act (1951), S. 25.

POLYGAMY

See (1) Bombay Prevention of Hindu Bigamous Marriages Act (25 of 1946).
(2) Criminal P. C. (1898), S. 488.
(3) Hindu Marriage Act (1955), Ss. 5, 17.
(4) Madras Hindu (Bigamy Prevention and Divorce) Act (6 of 1949).
(5) Mahomedan Law — Marriage.
(6) Penal Code (1860), Ss. 494, 495.

PONDICHERRY (ADMINISTRATION) ACT (49 of 1962)

SECTION 4

——Ss. 4 and 7 — Pondicherry (Application of Motor Vehicles Act) Order (1959), Cl. 4 — Government of Union Territories Act (1963), S. 18 — Motor Vehicles Act (Delhi), S. 68 — Delhi Motor Vehicles Rules, R. 7 (12) — Madras District Municipalities Act (5 of 1920), S. 270 (B) — Municipality imposing enhanced levy for use of municipal bus stand on State-carriages from Pondicherry — Levy whether fee or tax — Fee when treated as tax — Enbancement of levy held ultra vires Municipality — French words 'droit' and 'permis' — Meaning of — Interpretation scope and operation of Art. 44 (6) of French Decree of 1880. **1965 Mad WN 328.**

SECTION 7

——S. 7 — Levy whether fee or tax.

There is well known principles laid down for distinguishing between a tax and a fee. Whereunder the guise of levying a fee, the legislature attempts to impose a tax, the Court would scrutinize the scheme of levy very carefully and determine whether there is a co-relation between the service and levy: (1954) 1 Mad LJ 596 (SC), Ref.; AIR 1961 SC 459, Rel. on. See Pondicherry (Administration) Act (1962), S. 4. **1965 Mad WN 328.**

SECTION 9

——Ss. 9 and 10 — Sentence — Reduction of — Interest of justice — No heavier sentence than the minimum be imposed. 1965 (2) Cri LJ 105: (1965) 2 Mad LJ 31: 1965 Mad LJ (Cri) 474: 1965 Mad WN 275: ILR (1964) 2 Mad 290: AIR 1965 Mad 329 (DB).

——Ss. 9 and 10 — Jurisdiction of High Court at Madras under — Nature and scope of — French Criminal Law — Property stolen within the French Territory and concealment in a foreign territory — Jurisdiction of French Courts to try the offence.

Under S. 180 of the Code of Criminal Procedure, a person accused of receiving or retaining stolen goods can be tried either by the Court within the local limits of whose jurisdiction the goods were stolen or by the Court within whose jurisdiction such goods were dishonestly received or retained. Under the French Law a person cannot be tried by Courts within the French Settlements for concealment of stolen property outside the territorial limits. Still where the articles are removed from French Territory by a stranger, which are or have been subject of theft in French territory, French tribunals will have jurisdiction to take cognizance of both the theft and the receipt of the stolen goods. Under Ss. 9 and 10 of the Pondicherry (Administration) Act, 1962 the High Court at Madras is not merely clothed with the powers of cessation but is vested with a general appellate jurisdiction. Hence the High Court at Madras has all the powers of an ordinary Court of criminal jurisdiction in relation to an appeal from Pondicherry and can, in suitable cases, reduce the sentence in the interests of justice. **1965 (2) Cri LJ 105: 1965 Mad WN 275: (1965) 2 MLJ 31: ILR (1964) 2 Mad 290: 1965 MLJ (Cr) 474: AIR 1965 Mad 329 (330, 331) (Pts A, B) (Prs 3, 6) (DB).**

——Ss. 9 and 10 — Scope — Criminal P. C. (5 of 1898), S. 439 — Applicability to Pondicherry — Jurisdiction of Madras High Court under Section 439, Criminal P. C. — Criminal P. C. (5 of 1898), S. 4 (1) (r) — Courts in Pondicherry — Power of Court to authorise any person to appear for an accused — Arrete which limited the Advocates in Pondicherry who could appear in French Indian Courts to named individuals — Effect — Advocates Act (25 of 1961) — Advocate enrolled in Madras State — If can appear before Courts in Pondicherry.

Under Ss. 9 and 10 of the Pondicherry (Administration) Act, the High Court at Madras has jurisdiction to entertain revision under S. 439 of the Criminal P. C. from Pondicherry Courts. Section 4 (1) (r) of the Criminal Procedure Code vests a judicial discretion in the Court to permit any other person to act in the proceedings in a proper case. This judicial discretion is to be exercised by Courts in Pondicherry without being influenced by any Arrete issued in Pondicherry. An Arrete has no doubt the force of

law within its own limit, but it cannot take away or abrogate the judicial discretion vested in Courts under S. 4 (1) (r) of the Criminal P. C. which has been extended to Pondicherry.

An Advocate of Madras State has no vested right to appear and plead before the Courts in Pondicherry State. Neither the earlier Bar Councils Act nor the recent Advocates Act has been made applicable to Pondicherry State and there is no question of fundamental right under the Constitution either. **(1964) 2 MLJ 194: 77 Mad LW 132: (1964) MLJ (Cr) 524: ILR (1964) 2 Mad 255.**

SECTION 10

——S. 10 — Conviction in absence of legal evidence — Power of Court to interfere in appeal — Dalloz Repertoive Pratique, Art. 694.

It is a cardinal principle of all systems of criminal jurisprudence, including French Criminal jurisprudence, that suspicion cannot displace proof, and that guilt cannot be inferred by guess work of any kind. Where a conviction is based on material which is totally destitute of legal elements of the crime, the High Court under powers in cessation, even apart from Section 10, can interfere in appeal. **77 Mad LW 403: (1964) 2 Mad LJ 261: ILR (1964) 2 Mad 811: 1964 Mad WN 426: 1965 (2) Cri LJ 224: AIR 1965 Mad 351 (352) (Pr 4) (DB).**

——Ss. 10 and 9 — Scope — Criminal P. C. (5 of 1898), S. 439 — Applicability to Pondicherry — Jurisdiction of Madras High Court under Section 439, Cr. P. C. — Criminal P. C. (5 of 1898), Section 4 (1) (r) — Courts in Pondicherry — Power of Court to authorise any person to appear for an accused — Arrete which limited the advocates in Pondicherry who could appear in French Indian Courts to named individuals — Effect — Advocates Act (25 of 1961) — Advocate enrolled in Madras State — If can appear before Courts in Pondicherry. See Pondicherry (Administration) Act (1962), S. 9. **ILR (1964) 2 Mad 255.**

PONDICHERRY (APPLICATION OF MOTOR VEHICLES ACT) ORDER (1959)

CLAUSE 4

——Cl. 4 — Clause 4 cannot, therefore, be deemed as having in any way modified the power of the municipality to levy charges for stands and parking places, whether the stands are constructed by the municipality or the private stands approved by it. Clause 4 cannot be considered as repealing the provisions corresponding to the District Municipalities Act, namely the Decree of French Republic 1880. **1965 Mad WN 328.**

PONDICHERRY (LAWS) REGULATION (1963)

SECTION 4

——Ss. 4 (2) (d) and 4 (1) — Scope — Procedure for trial of committal case where committal was after de facto but before de jure transfer of French territory to India — Section 4 (2) (d) has effect of preserving for purpose of procedure in Pondicherry area, provisions of French Criminal P. C. notwithstanding general rule that repealing and amending legislation for dealing with procedure will have retrospective effect — By force of Ss. 4 (2) (d) and 4 (1) pre-existing French Law has become established law in force in territory of India within Art. 13 (3) (a) of Constitution of India — Law given validity was orginally law in force in what was foreign territory would not affect question of its being established law in territory newly added to Indian Union: 1955 SCJ 174, Expl; 18 ER 66, Ref. to. Constitution of India, Arts. 13 (3) (a) and 21 — French Criminal P. C., Arts. 1, 133, 217 and 231 — Criminal P. C. (1908), Preamble — General Clause Act (1897), S. 6 — Civil P. C. (1908), Pre. — Interpretation of Statutes. **1965 Mad LJ (Cri) 729: (1965) 2 Mad LJ 332.**

POONA CITY MUNICIPAL CORPORATION RULES AND BY-LAWS

See under Municipalities.

POONA CITY MUNICIPALITY OCTROI RULES

See under Municipalities.

PORAMBOKE

See Tenancy Laws — Madras Estates Land Act (1908).

Assignment.

See T. P. Act (1882), S. 108.

PORBANDAR (CITY) HOTEL AND KETTLE DHARA

SECTION 1

——S. 1 — Porbandar (City) Hotel and Kettle Dhara duly published in Gazette — Publication ordered by Dewan of State — It may be presumed from fact of such publication that it had duly received assent of H. H. Maharana Saheb of Porbander. See Evidence Act (1872), S. 114. **AIR 1955 NUC (Sau) 3455 (DB).**

SECTION 6

—— S. 6 — Repeal of by Bombay District Municipal Act — Only rules and bye-laws are kept alive — Section 6 is not a rule or bye-law and is not saved — Conviction for contravening S. 6 in 1952, is illegal — (Municipalities — Bombay District Municipal Act (3 of 1901) (as adapted and applied to Saurashtra), Ss. 2 (1) (b) and 48 (1) (b) (as amended by Bombay Act 52 of 1949) **AIR 1955 NUC (Sau) 3455 (DB).**

PORBANDAR RULES OF HAZUR RAJ SABHA

SECTION 1

——S. 1 — Porbandar (City) Hotel and Kettle Dhara duly published in Gazette — Publication ordered by Dewan of State—It may be presumed from fact of such publication that it had duly received assent of H. H. Maharana Saheb of Porbandar. See Evidence Act (1872), S. 114. **AIR 1955 NUC (Sau) 3455 (DB).**

PORBANDAR STATE LAND REVENUE CODE (1940-41)

RULE 2

——R. 2 — Jurisdiction of Civil Courts — Civil P. C. (1908), S. 9.

The Porbandar State Land Revenue Code of 1940-41 does not debar the Civil Court from entertaining suits relating to revenue dispute. R. 2 of the Code refers to orders, notifications etc made in relation to provisions contained in the revised Code, and it does not save orders or notifications relating to matters not covered by the Code. The Code contains no provision regarding the jurisdiction of the Civil Courts or the exclusion thereof and the order of the Porbander State dated 6th April 1911 (P. 49 of the Porbander State Directory Vol. II) must be taken to have been abrogated: 3 Sau LR 66; AIR 1940 PC 105, Rel. on. **('51) 4 Sau LR 148 (DB).**

PORTS

See (1) Bombay Port Trust Act (6 of 1879).
(2) Calcutta Port Act (3 of 1890) (3 of (1860).
(3) Madras Port Trust Act (2 of 1905).

PORTS AND AERODROMES

Exemption from applicability of certain laws.

See Constitution of India, Art. 364.

POSSESSION

See (1) Civil P. C. (1908), O. 21, Rr. 35 and 95
(2) Criminal P. C. (1898), S. 145.
(3) Evidence Act (1872), Ss. 101-104 and 114.
(4) Limitation Act (1908), Arts. 142 and 144.
(5) Penal Code (1860), S. 378.
(6) Specific Relief Act (1877), Ss. 8 and 9.
(7) Tort — Trespass.

Adverse possession.
See Limitation Act (1908), Arts. 142 and 144.

Presumption.
See (1) Evidence Act (1872), S. 114.
(2) Opium Act (1878), S. 10.
(3) Penal Code (1860), S. 411.

Suit for.
—Court-fee.
See Court-fees Act (1870), Ss. 9, 10.
—Limitation.
See Limitation Act (1908), Arts. 142 and 144.

Suit for ejectment.
See T. P. Act (1882), S. 111.

Stolen property, possession of.
See Penal Code (1860), S. 411.
—Presumption.
See Evidence Act (1872), S. 114.

Title.
See (1) Evidence Act (1872), S. 118.
(2) Limitation Act (1908), Arts. 142 and 144.

POSSESSION OF WIFE, CLERK OR SERVANT

See Penal Code (1860), S. 27.

POSSESSORY LIEN

See (1) Contract Act (1872), Ss. 170, 171 and
(2) Statutory cross-references under "lien".

POSSESSORY RIGHT AND TITLE

See Statutory cross-references under "Possession."

POST

Service of process by.
See Civil P. C. (1908), O. 5, R. 20-A.

POSTAGE

See Post Office Act (6 of 1898).

POSTAGE STAMP

See (1) Post Office Act (1898), S. 2.
(2) Stamp Act (1899), S. 37.

POSTAL ARTICLES

Theft of.
See Post Office Act (1898), S. 52.

POSTAL COMMUNICATION

Presumption.
See Evidence Act (1872), S. 114.

POSTAL GUIDE

RULE 130

——**R. 130** — Contract Act (1872), S. 182 — Relationship between post office and sender of V. P. P. — V. P. Parcel delivered to addressee, but money not paid to sender — Post Office is liable for breach of contract. See Contract Act (1872), S. 182. **AIR 1960 All 672.**

POST AND TELEGRAPH DEPARTMENTAL RULES

——**Rule regarding authority competent to punish — Scope of rule — Sanction held not defective.**

The rule in question is quite general and is equally applicable to the case in which a person who was officiating in a post in grade A ceases to officiate and reverts to a post in grade B. **AIR 1952 All 122 (123) (Pt B) (Pr 17).**

POSTS AND TELEGRAPHS MANUAL VOL. 2, REGULATION 12

——**Vol. 2, Regns. 12-C (b) (2) and (c) — Breach of — Effect — (Constitution of India, Art. 311 (2)).**

Held, that the enquiry was not made in accordance with the regulations governing departmental enquiries laid down in Posts and Telegraphs Manual, Vol. II and therefore, the order of removal could not be upheld. There was breach of Regulation 12-C (b) (2) as the Enquiring Authority failed to record the evidence of witnesses in support of the charges and afford opportunity to the petitioner to cross-examine them. Cross-examination cannot be refused on the ground that no useful purpose would be served thereby. Further, the manner in which a witness was allowed to participate in the enquiry at the time of interview was not proper. He was only a witness and not an enquiring Officer. The Enquiring Officer was in error in combining the notice to show cause against the proposed punishment of dismissal with the charge-sheet Regulation 12-C (c) should have been strictly observed. **1957 Jab LJ 52: AIR 1957 Madh Pra 52 (54) (Pt B) (Prs 10, 11, 12).**

VOL. 2, REGN. 17

——**Vol. 2, Regn. 17 — Scope — 'Investigation', meaning of.**

The "investigation" in R. 17 embraces within its scope "any investigation" whether it is being conducted in a Court or by the police or by the officers of the department concerned. **AIR 1953 Cal 504 (505) (Pt A) (Pr 10).**

——**Vol. 2, Regns. 17 and 21** — Suspension of employee. **AIR 1953 Cal 504 (505) (Pt B) (Pr 10).**

——**Vol. 2, Regns. 17 and 21 — "Investigation" — Meaning of — Employee, when may be placed under suspension.**

The "investigation" referred to in Regulation 17 of the General Regulations contained in Posts and Telegraphs Manual, Vol. II, embraces within its scope "any investigation" whether it is being conducted in a Court or by the Police or by the officers of the department concerned. It is clear from this Regulation that it is only when an investigation is actually pending that the employee whose conduct is being investigated can be kept under suspension.

Where a postal employee is suspended on his arrest by the police on charges under I. P. Code, the order of suspension spends its force the moment he is discharged by the Magistrate to whom he is sent up for trial. He cannot subsequently be kept validly under suspension by virtue of that order although some time after his discharge by the Magistrate fresh criminal proceedings are started against him. In the absence of a fresh order of suspension, the continuance of the employee under suspension after his discharge by the Magistrate, is not warranted. **(1952) 56 CWN 676: AIR 1953 Cal 504 (505) (Pt C) (Prs 11, 12).**

VOL. 2, REGULATION 21

——**Vol. 2, Regn. 21 — Suspension of employee— Pendency of enquiry into employee's conduct is**

condition precedent to keeping him under suspension.

The order of suspension dt. 5-9-1950 spent its force the moment the petitioner was discharged on 13-10-1950. In absence of the fresh order of suspension continuance of suspension was not warranted. See Posts and Telegraphs Manual, Vol. 2, Regn. 17. **AIR 1953 Cal 504.**

——**Vol. 2, Regn. 21** — Order of suspension — Duration of its effectiveness. See Posts and Telegraphs Manual, Vol. 2, Regn. 17. **AIR 1953 Cal 504.**

VOL. 2, REGULATION 149-A

——**Vol. 2, Regn. 149-A — Effect of — Discharge of employee of criminal charge — Subsequent departmental enquiry — Propriety.**

Where a postal employee, who was suspended because of his arrest on charge under S. 409, Penal Code and S. 52 Post Office Act, was allowed by the department to rejoin the service after he was discharged of criminal charge for want of sufficient evidence, the department cannot be taken to have condoned his misconduct so as to prevent subsequent departmental inquiry against him. The Posts and Telegraphs Manual, General Regulations, are merely departmental instructions and have no statutory 'authority'. In any event there is nothing in Regulation 149-A which could prevent the authorities from proceeding with the departmental proceedings notwithstanding that the criminal case ended in a discharge. **58 Cal WN 492: AIR 1955 Cal 166 (168) (Pt A) (Pr 2).**

VOL. 3, SCH. 1-B, RULE 2

——**Vol. 3, Sch. 1-B, R. 2 (a) (iii)**—Schedule of administrative powers of the officers of the Indian Posts and Telegraphs Department. See Constitution of India, Art. 311 (1). **AIR 1961 Mad 166 (DB).**

——**Vol. 3, Sch. 1-B, Rr. 2 and 3** — Extra departmental branch Post-Master — Position of — Protection under Art. 311 (2) of the Constitution, if available — Under the departmental rules he is not entitled to the protection envisaged in Art. 311. See Constitution of India, Art. 311 (2). **AIR 1957 Orissa 112 (DB).**

[**Overruled** on another point in AIR 1967 SC 884.]

VOL. 3, SCH. 1-B, RULE 3

——**Vol. 3, Sch. 1-B, R. 3 — Constitution of India, Art. 311 (2) — Part-time employee — Right of protection under — Extra-departmental branch Post-master — Position of — Effect of express provisions — (Government of India Act (1919), S. 96-B) — (Government of India Act (1935), S. 240) — (Civil Services (Classification, Control and Appeal) Rules (1930), R. 55) — (Civil P. C. (1908), S. 2 (17)) — (Penal Code (1860), S. 21).**

The part-time employees were excluded from any protection from the very beginning ever since the Civil Services (Classification, Control and Appeal) Rules were framed under S. 96-B (2) of the Government of India Act, 1919. See Constitution of India, Art. 311 (2). **AIR 1957 Orissa 112 (DB).**

VOL. 3, SCH. 3

——**Vol. 3, Sch. 3** — Constitution of India, Article 226 — Mandamus — Posts and Telegraphs Manual, Rr. 32-A to 32-C in Vol. IV and Sch. 3 in Vol. III are executive instructions and not statutory rules—Writ of mandamus is issued only when statutory rules are violated. See Constitution of India, Art. 226. **AIR 1965 Cal 298.**

——**Vol. 3, Sch. 3** — Service conditions — They are variable when they depend on departmental instructions. **AIR 1965 Cal 298 (301) (Pt B) (Pr 8).**

VOL. 4, CHAP. II, RULE 38

——**Vol. 4, Chap. II, R. 38** — Fixation of seniority — Service Rules vesting discretion in authorities — No arbitrary exercise of discretion — Courts will not interfere with the order. See Constitution of India, Art. 310. **AIR 1962 Orissa 20 (DB).**

VOL. 4, CHAP. VIII, RULE 11

——**Vol. 4, (Establishment), Chap. VIII, R. 11, P. 91** — Reversion — Meaning of — Person holding substantive post as clerk appointed to "act" as Town Inspector — Post of Town Inspector tenable for three years — Transfe to substantive post before three years is not "reversion". See Constitution of India, Art. 311. **AIR 1957 Assam 143 (DB).**

VOL. 4, RULE 32-A

——**Vol. 4, Rr. 32-A to 32-C** — Constitution of of India, Article 226 — Mandamus — Posts and Telegraphs Manual, Rr. 32-A to 32-C in Vol. IV and Sch. 3 in Vol. III are executive instructions and not statutory rules — Writ of mandamus is issued only when statutory rules are violated. See Constitution of India, Art. 226 **AIR 1965 Cal 298.**

VOL. 6, CHAP. 1, RULE 45

——**Vol. 6, Chap. 1, R. 45 (4) and (5)** — Postal stamps supplied to stamp vendor — Transaction held amounted to entrustment and not loan. See Penal Code (1860), S. 403. **1960 All LJ 534.**

VOL. 6, RULE 445

——**Vol. 6, R. 445** — Applicability and scope of — Irregularity of postal clerk in allowing withdrawal of deposit — Suit to recover amount — Maintainability. See Post Office Savings Bank Rules for Guidance of Depositors, R. 21. **1957 All WR (HC) 19.**

APPENDIX 3

——**Appendix 3, S. IV** — The rules contained in the general regulations of Vol. II of the Posts and Telegraphs Manual are not statutory rules but are merely departmental instructions. Rules however, have been framed under statutory powers and the position under the rules which are found in S. IV in Appendix 3 of Vol. II, is that a Government Servant against whom proceedings have been taken for arrest for a debt or for a criminal charge, is automatically considered to be under suspension, during the time he is detained in custody or is undergoing imprisonment. See Constitution of India, Art. 226. **AIR 1955 Cal 365.**

POST DIEM INTEREST

See Civil P. C. (1908), S. 34, O. 34, Rr. 2 to 7 and 11.

POSTHUMOUS SON

See (1) Hindu Law — Alienation.
(2) Hindu Law — Succession.

POST MORTEM REPORT

See Criminal P. C. (1898), S. 509

POST OFFICE

Defined.

See Post Office Act (1898), S. 2.

Offence by officer of.

See Post Office Act (1898), S. 52.

POST OFFICE ACT (6 of 1898)

SECTION 2

——**Ss. 2 (e), 2 (k), 16 (1) and 16 (2)** — Postal stamps supplied to stamp vendor — Transaction held amounted to entrustment and not loan. See Penal Code (1860), S. 403. **1960 All LJ 534.**

——**S. 2 (b) — 'Inland' article — Meaning.**

In order that the despatch of packages containing cloth or yarn may be held to be a penal act under Cl. 3 of the Cotton Cloth and Yarn (Transmission by Post) Prohibition Order, 1946, the packages must fulfil the definition of inland postal articles as given in Section 2, Cl. (b) of Post Office Act, 1898. See Cotton Cloth and Yarn (Transmission by Post) Prohibition Order (1946), Cl. 3. **1959 Cr LJ 636: AIR 1959 Pat 207 (DB).**

——**Ss. 2 (i) and 52** — Postal article — Money entrusted to postman by Post Master for payment of money order is not "postal article" in course of transmission by post or anything contained therein as contemplated by S. 52. See Post Office Act (1898), S. 52. **AIR 1955 Trav-Co 247 (DB).**

SECTION 3

• ——**Ss. 3 (a) and 52 — 'In course of transaction by post" — Meaning — Delay in delivery of postal article — Not sufficient to hold that article has ceased to be in course of transmission.**

The mere fact that there is even a delay of several months in delivering a postal article to the addressee would not mean that the article had ceased to be 'in course of transmission'. The definition in Section 3 (a) clearly lays down that until an article despatched by post is delivered or can be said to be delivered it will be deemed to be 'in course of transmission'. Radha Kishan v. State of Uttar Pradesh, **(1963) 1 SCWR 158: (1963) Supp 1 SCR 408: 1963 Mad WN 221: (1963) 2 Lab LJ 667: 1963 All LJ 397: 1963 BLJR 353: 1963 All WR (HC) 304: 1963 (1) Cr LJ 809: 1963 All Cr R 156: AIR 1963 SC 822 (825) (Pt E) (Pr 9).**

——**Ss. 3 (c), 3 (a) and 52** — Secreting of postal article must be in the course of transmission — This can be proved by circumstantial evidence — Postal articles recovered from accused — He must show how he came by them — Evidence Act (1872), Ss. 3 and 106. See Post Office Act (1898), S. 52. **1961 (1) Cr LJ 595 (598, 599) (Pt B) (Prs 19, 25) (All) (DB).**

[**Reversed** in AIR 1963 SC 822.]

SECTION 3-A

——**S. 3-A** — Secreting of postal article must be in the course of transmission — This can be proved by circumstantial evidence — Postal articles recovered from accused — He must show how he came by them — Evidence Act (1872), Ss. 3 and 106. See Post Office Act (1898), S. 52. **1960 All LJ 365: 1960 All WR (HC) 226: 1960 All Cri R 159: 1961 (1) Cr LJ 595 (All).**

[**Reversed** in AIR 1963 SC 822.]

SECTION 6

——**Ss. 6 and 30** — Envelope containing railway receipt sent by V. P. P. not delivered to addressee but was returned to sender in damaged condition, with R/R missing from it — Central Government is protected under Section 6 and cannot be made liable for loss — AIR 1960 All 672, Dissented from. **AIR 1965 All 184 (186) (Pt A) Pr 10).**

——**S. 6 — Liability of Post Office — V. P. Article not delivered to addressee and not traceable — Presumption.**

Section 6 of the Post Office Act providing that Government shall not be liable for loss, damage, non-delivery or misdelivery of postal articles entrusted to its charge was intended by the legislature to serve as shield for the protection of the Post Office and its officials in the legitimate discharge of their functions, but the shield cannot be converted into a weapon of inequity in the hands of Government Department enjoying a monopoly of an essential service. Apart from its liability under the Post Office Act, Government cannot repudiate its responsibility for the property of any person under its custody and control, except to the extent that it has been exempted under the Act. But the exemptions do not give it the right to do what it likes with the articles entrusted to its care.

Where the V. P. article was not delivered to the addressee there is no question of the sender being entitled to a decree for money had and received on his behalf. The disappearance of a postal article raises no presumption that it has been 'lost' within the meaning of Section 6. In the absence of further evidence, the Court will hold that it is just as likely as not that the missing articles have been misappropriated by some one within the department.

Where it was admitted that the parcel was never delivered to the addressee it must be held that the Government department cannot claim that it functioned in a normal manner. The failure to return the article to the sender speaks for itself and displaces the presumption that the post office functioned in a normal manner. The post office must give a detailed account of what happened to the article from the date when it was entrusted to its custody to the date when it claims to have lost possession of it. The Court will make the maximum presumption against it for its failure to disclose facts. (1722)1 Str. 505, Relied on. Where it has not so disclosed, the post office is liable to the sender for the value of the article which was entrusted to its care and in respect of which it cannot claim exemption under S. 6. **AIR 1960 All 672 (682, 683) (Pt C) (Prs 38, 40 to 44).**

——**S. 6 — Loss — Meaning of.**

Loss in Section 6 does not mean pecuniary or other loss by the owner of the goods though being wrongfully deprived of the possession or enjoyment thereof but means loss by the postal department of the Government and such loss occurs whenever the department involuntarily or through inadvertence loses possession of the goods and for the time being is unable to trace them.

In this view, the Government of India cannot escape liability to pay compensation for loss caused by non-delivery of an article it received for carriage and delivery where the article has not been proved to be lost by the Government **59 Cal WN 254: AIR 1955 Cal 371 (372) (Prs 8, 9) (DB).**

——**Ss. 6 and 33** — Liability of Post Office — Damage to insured postal article — Liability is not contractual but purely statutory — Post Office is not common carrier — Limitation — Limitation Act (1908), Art. 30 or 31 cannot ap-

ply. See Post Office Act (1898), S. 33. **AIR 1965 Orissa 118 (DB).**

——S. 6 — Applicability — Insured parcel containing attar bottles — Damage due to leakage — Exemption from liability — Post Office Rules (1933), Rr. 35, 76 and 81 — Scope of.

Rule 35 and the other connected rules in Part II deal with ordinary postal parcels. First Section of Part IV from Rule 72 to Rule 83-A deals with insurance of Inland postal articles. For the purposes of Rule 81, method of packing that is to be considered is the manner of packing as provided in the section relating to insurance of inland postal articles. The manner of packing in such cases is provided for in Clause (2) of Rule 76 and where packing is improper and insecure having regard to the provisions of that clause, the defendant is absolved from liability under Clause (e) of Rule 81. In consideration of Clause (e) of Rule 81, a rule like Rule 35 cannot be picked up from another part of the rules not connected with rules on insurance of postal articles and then used to show that there is no liability under Clause (e) of the Rule 81. So what has to be seen for the application of Cl. (e) of Rule 81 is whether the packing was in accordance with Cl. (2) of Rule 76.

An insured parcel containing attar bottles packed securely in accordance with provisions of Rule 76 (2) was despatched from Delhi to Bombay where it reached in a leaking condition. The plaintiff refused to take delivery as the postal authorities were not prepared to give open delivery after preparing an inventory with a complete and accurate measure of the contents of the bottles. The plaintiff sued the Union of India for damages.

Held, that the defendant was not exempt from liability under Rule 81, Post Office Rules. Since the packing was neither improper nor insecure Clause (e) of Rule 81 had no application. So also the covers or seals of the parcels being visibly damaged, R. 81 (f) had also no application. The plaintiff was therefore entitled to the damages claimed by him. **ILR (1958) Punj 367: AIR 1958 Punj 174 (176) (Prs 5, 6) (DB).**

SECTION 7

——Ss. 7 and 9 and Sch. I — Post Office Rules, R. 30 — Application for registration or renewal of registration as newspaper — Conditions — Subjective satisfaction of exeecutive authority — If justiciable by Court — Constitution of India, Art. 226 — Interference with administrative or executive order — Grounds — Mandamus.

An application for registration as registered newspapers as also an application for renewal of registration must fulfil all the provisions of sub-clause (2) of Section 9 and the conditions in sub cls. (1) and (2) of Rule 30. As regards the question of right of hearing or an obligation to state reasons for any decision made for an appeal, the question is left to be determined by subjective satisfaction of the executive authority. Even though a publication, periodical, etc., falling under the connotation of word newspaper as mentioned in sub-section (2) of Section 9 are entitled to the right of transmission at concessional rates as registered newspaper, the question of enforcement of such right is left for the determination and final disposal of the Post Master General by reason of the provisions in the statutory rules and the note under R. 30 (3).

The 'enquiries' referred to in Rule 30 (3) are made departmentally and for satisfaction of the authority. In a matter left to be determined by executive discretion and satisfaction there is no question of principles of natural justice being observed.

Where the application for renewal of registration as newspaper is refused by the Post Master General on stated grounds the only grounds on which a court of law woud be justified in interfering with the decision of the executive authority are that the decision is mala fide, arbitrary or capricious or altogether extraneous and outside the purpose of the Act. The decision of the Post Master General being purely administrative and ministerial the petitioner is not entitled to any writ of mandamus unless the decision is extraneous to the purpose of the Act. **62 Bom LR 832: 1960 Nag LJ 717: AIR 1961 Bom 105 (108, 109, 110, 111) (Pt A) (Prs 14, 15, 18, 23, 28).**

SECTION 9

——S. 9 — Rules under R. 30 — Condition for registration of a publication as a newspaper — Powers of Post Master-General.

From a reading of Rule 30 (5) along with Section 9 it is clear that the conditions specified in sub-section (2) of Section 9 referred to in that rule only mean the conditions, namely:—(a) that it is published in numbers at intervals of not more than thirty-one days: and (b) that it has a bona fide list of subscribers. If any of these two conditions cease to continue to be fulfilled the registration may be cancelled. The Post Master-General may have to enter into an enquiry as regards the nature of the contents of the periodical when the first registration is granted or when the renewal application is made after the expiry of the period of the first registration.

But there is no such power given to the Post Master-General when the application for renewal has been made within time under Rule 30, sub-rule (3), with the note added by order, dated 3-1-1955. It is inconceivable that a power should be given to successive Post Master-General to take different view regarding the contents of a periodical every time when the period of registration is about to expire.

There is no power in the Post Master-General to refuse the renewal of registration on the ground that in his opinion the contents of the magazine did not fulfil the requirements of Section 9 (2). **ILR (1957) 2 All 328: AIR 1957 All 662 (666) (Pt B) (Prs 12, 14).**

——S. 9 (2) — Periodical when to be deemed as newspaper — Articles relating to political or other news or to other current topics — Meaning of.

It is not possible to give any exhaustive meaning of the words 'articles relating to political or other news or to other current topics'. The definition of a newspaper in Section 9 is obviously larger in its import than the dictionary meaning of the word "Newspaper" but it is not possible to give the full scope of the word "newspaper" as defined in Section 9 (2). Each periodical will have to be examined and it may be possible to say on examination whether it comes within the definition of a newspaper or not. **ILR (1957) 2 All 328: AIR 1957 All 662 (666) (Pt C) (Pr 14).**

——S. 9 (2) — "Current topics" — Meaning of — (Words and Phrases).

A current topic necessarily implies a topic relating to matters on events which are current. The words "current topics" do not necessarily imply that it must relate to current events. Events, which have happened in the past, may have, due to certain circumstances, become of interest to the public. If the general public takes

interest in any topic, such a topic can be regarded as a current topic, even though it may deal with events which happened in the past. **1956 All LJ 886: AIR 1956 All 87 (88) (Pt A) (Pr 6).**

——S. 9 (2) — Component parts of section — Latter part a separate category — Topic relating to development of art and culture.

Section 9 (2) covers two distinct categories. The first part of the section deals with publications consisting wholly or in great part of political or other news or of articles relating thereto, and the second part deals with articles relating to other current topics. If the latter part only means that the current topic must relate to current news, it was not necessary for the Legislature to have used two different categories in the section. The public may have acquired interest in the art and culture and it may be that the topic relating to the development of art and culture and suggesting improvements in the art may be matters of current topic. In order to discuss any such topic, it may sometimes be necessary to refer to the historical background. **1956 All LJ 886: AIR 1956 All 87 (88) (Pt B) (Pr 6).**

——S. 9 (2) — Post and Telegraphs Manual, R. 30 (5) — Power of Post Master-General to cancel registration of magazine during period of registration — Scope of Rule 30 (5).

When the registration is to be renewed or is to be granted originally it may be open to the Post Master-General to come to the conclusion that the Magazine, registration of which is sought, cannot be regarded as a newspaper for purposes of Section 9; but, after having once held that it does come within the purview of Section 9 of the Post Office Act, it is not open to the Post Master-General, on the same set of facts, to come to a different conclusion sometimes afterward during the period when the registration is in force and cancel the registration on that ground.

The power to cancel is given by Rule 30 (5), Post and Telegraphs Manual, only when subsequent to the registration the publication has failed to continue to conform to the provisions of Section 9; but the Rule does not give power to the Post Master-General to cancel a registration, if during the course of the period of registration it appears to the Post Master-General that the registration has not been properly granted. In a case of renewal, the position may be different. In that case the words 'continued to be fulfilled' necessarily mean that in the past it may have complied with the provisions of Section 9 but at the time when the renewal is sought, it may have ceased to conform to the provisions of S. 9.

The registration of a publication as a newspaper may depend upon the discretion of the Post Master-General but it cannot be left to the sweet will of every Post Master-General every month to form a different opinion about a particular publication. The Rule, which gives power to the Post Master-General to cancel a registration, does not authorise the Post Master-General to change his opinion subsequently and to hold that a publication already registered did not come within the scope of Section 9 of the Act at the time of the registration. **1956 All LJ 886: AIR 1956 All 87 (88, 89) (Pt C) (Prs 7, 8).**

——S. 9 — Post Office Rules, R. 30 — If ultra vires.

The right of the petitioner to get his publications registered as newspaper does not only arise under the sections of Post Office Act but also under those rules. Statutory rules cannot be held to be ultra vires merely because they provide for final determination of statutory rights by executive authority. **62 Bom LR 832: 1960 Nag LJ 717: AIR 1961 Bom 105 (110) (Pt C) (Pr 25).**

SECTION 16

——Ss. 16 (1) and 16 (2) — Postal stamps supplied to stamp vendor — Transaction held amounted to entrustment and not loan. See Penal Code (1860), S. 403. **1960 All LJ 534.**

SECTION 18

——S. 18 — Sending of cheque by post on request of creditor — Effect — Post Office if agent of addressee or sender — There can be no doubt that as between the sender and the addressee it is the request of the addressee that the cheque be sent by post that makes the post office the agent of the addressee. See Contract Act (1872), S. 50. **AIR 1954 SC 429.**

——Ss. 18 (2), 32 (3) and 33 — Contract Act (1872), S. 2 (d) — Insured cover sent by post not delivered to addressee — Third party benefited under contract has right to bring suit against promissor — Addressee also has such right. See Contract Act (1872), Section 2 (d). **AIR 1955 Pat 442.**

SECTION 30

——Ss. 30 and 6 — Envelope containing railway receipt sent by V. P. P. not delivered to addressee but was returned to sender in damaged condition with R/R missing from it — Central Government is protected under S. 6 and cannot be made liable for loss. See Post Office Act (1898), S. 6. **AIR 1965 All 184.**

SECTION 32

——Ss. 32 (3), 18 (2) and 33 — Contract Act (1872), S. 2 (d) — Insured cover sent by post not delivered to addressee — Third party benefited under contract has right to bring suit against promissor — Addressee also has such right. See Contract Act (1872), Section 2 (d). **AIR 1955 Pat 442.**

SECTION 33

——S. 33 — Scope — Compensation payable for shortage — Right of addressee to claim — If barred.

Section 33 lays down the general rule under which compensation will be payable normally to the sender in the event of loss of the postal article or its contents or in the event of any damage caused to it in the course of transmission by post But that will not debar the rightful owner (addressee) from claiming compensation for the article lost. **(1958) 62 Cal WN 276.**

——Ss. 33 and 6 — Liability of Post Office — Damage to insured postal article — Liability is not contractual but purely statutory — Post Office is not common carrier — Limitation — Limitation Act (1908), Art. 30 or 31 cannot apply.

From a scrutiny of the provisions of the Indian Post Office Act, it will be noticed that the post office is a mere department of the State and not a common carrier. Section 6 of the Act exempts the Government from any liability by reason of loss or delay or damage to, any postal article, in the course of its transmission, except in so far as in express terms that liability is undertaken by Government as provided in the succeeding sections of the Act and no officer of the

Post Office shall incur any liability unless he has caused the same fraudulently or by his wilful act or default. Though postage is not expressly defined as 'revenue' nevertheless the use of the expression 'fees' in some of the provisions of the Act seems to indicate that though postage and fee are charged for specific services rendered, nevertheless they form part of the revenue of the Union Government. Moreover, the postal authorities have extensive Police powers of opening and examining any packet and withholding delivery of certain articles transmitted by post, including, in extreme cases, destruction of the same or handing them over to the Customs authorities. They are also subject to heavy penalties prescribed in Chapter X of the Act, for certain acts of misconduct. It is thus clear that the Postal Department is not a common carrier and that it does not enter into any contractual obligations while accepting letters and packets for transmission by Post: (1778) 2 Cowp 754 and 1906 KB 178 and (1957) 2 All ER 387, Rel. on.

If the intention of the Legislature was that there was contractual relationship between the Postal Department on the one hand and the person who transmits a package by post, on the other, they would surely have inserted an appropriate provision on the lines of S. 72 of the Indian Railways Act. The deliberate omission to insert such a provision leads to the reasonable inference that the Legislature intended that the liability between the post office and the sender of the package by post is not of a contractual nature but is purely statutory.

It is true that by the express provisions contained in S. 33 of the Act the post office is bound to pay compensation to the sender of the insured article for the loss of the article or its contents or for damage caused to it in the course of its transmission by post. But this liability does not arise by virtue of the general law of contract but by virtue of the express provision contained in that section read with S. 6 of the Act.

Therefore, the Post Office is not a carrier and Art. 30 or 31 of the Limitation Act (1908), cannot apply. **ILR (1964) Cut 907: 31 Cut LT 387: AIR 1965 Orissa 118 (120, 121) (Prs 9, 10, 13, 14) (DB).**

——S. 33 — Post Office Rules, R. 81 — Post Office Guide (corrected up to 30-6-1960), Part I, Para. 175 — Insured cover delivered to addressee with no visible damage to cover or seals—Cover found to contain only blank pieces of paper — Central Government not liable — Intactness of seal is conclusive on question of tampering by postal authorities.

No compensation is payable by the Central Government where there is no visible damage to the insured cover or the seals although the addressee finds only blank pieces of paper inside the cover. Intactness of the seals is conclusive on the question of tampering by postal authorities.

When the seals are found intact no inference that the currency notes were replaced by the postal employees during transit can be drawn from the mere fact that the paste on the flap which was pasted by the sender after putting in the contents, had spread or found besmered on the contents. The presence of the seals in the same position as before is sufficient to destroy the theory of tampering by postal authorities. The spreading of paste can at best raise some suspicion but cannot displace the conclusion afforded by the seals.

The fact that there is no hole in any of the contents though the cover had been sewn with thread in the middle before the seal was put or that the weight of the cover exceeded the weight as noted on the cover by about 2 per cent is not also sufficient to displace the conclusion afforded by the seals. **AIR 1963 Pat 216 (217 to 219) (Pt B) (Prs 8, 10, 11, 16) (DB).**

——Ss. 33, 18 (2) and 32 (3) — Contract Act (1872), S. 2 (d) — Insured cover sent by post not delivered to addressee — Third party benefited under contract has right to bring suit against promissor — Addressee also has such right. See Contract Act (1872), S. 2 (d). **AIR 1955 Pat 442.**

SECTION 34

——S. 34 — Contract Act (1872), S. 182 — Relationship between post office and sender of V. P. P. — V. P. Parcel delivered to addressee, but money not paid to sender — Post Office is liable for breach of contract. See Contract Act (1872), S. 182. **AIR 1960 All 672.**

——S. 34 — Interpretation of.

The provision in S. 34 means that the Government shall incur liability in respect of the sum specified for recovery (in case of V. P. Articles) only if and after it has recovered it **AIR 1960 All 672 (682) (Pt D) (Pr 39).**

——S. 34 — V. P. P. delivered to Post Office — Parcel delivered to addressee but money not recovered — Liability for money had and received.

The plaintiff proved and the Post Office admitted that he had delivered the V. P. article to the post office for transmission to the addressee. The post office transmitted it for purpose of delivery to the addressee. The plaintiff also proved that on the same day he delivered four parcels to the post office of which three were delivered in due course to the respective addressee. The plaintiff alleged in his plaint that the addressee had informed him that he had received the article and made payment to the post office. In reply to this allegation, the post office stated in its written statement that the allegation did not concern it and was 'therefore, not admitted'. The plaintiff alleged that he never received the amount due on this parcel and filed a suit for its recovery.

Held, that, the plaintiff was entitled to rely on the presumption raised under S. 114 of the Evidence Act that the common course of business has been followed in this case and the parcel was duly delivered and payment received by the post office. The onus would shift to the Post Office to prove by cogent evidence that the normal course of business went wrong and that it did not in fact deliver the article or receive the price; and in the absence of proof the Court will presume that the article was delivered and the price received by the Post Office. That being so, it was liable, under the proviso to S. 34 of the Post Office Act to hand over the amount which it received on behalf of the plaintiff. The plaintiff was also entitled to recover the amount as money had been paid and received. If, on the other hand, it delivered the parcel without demanding payment from the addressee, it is liable for breach of contract as laid down by the Supreme Court in 1960 SCJ 153; AIR 1959 SC 1394. **AIR 1960 All 672 (683, 684) (Pt E) (Prs 45, 46, 47).**

——Ss. 34, Proviso and 48 (c) — Applicability — Value payable articles — Money recovered from addressees but withheld by Pakistan Government — Liability of Indian Government.

Proviso to S. 34 can protect the Central Government only when the money has not been re-

ceived from the addressee of the value payable articles by it. Where, therefore, the money is received from the addressee but it had been withheld by the Pakistan Government due to monetary deadlock between the two Governments, the Indian Government cannot plead that it has not received the money from the addressee. The post offices in Pakistan in the circumstances, must be held to have been acting as agent of the Indian Government and the omission of its agent to hand over the amount to it could not affect the sender's right to get the money from the Indian Government. The Proviso to Section 34 cannot be of any avail to the Government. Further the Government cannot in this case invoke Clause (c) of Section 48 as it deals with money orders only and not with the claims in respect of value payable articles. **AIR 1958 All 148 (149) (Prs 10, 13).**

——S. 34 and Proviso — Liability of Post Office in case of V. P. Articles.

When the post office accepts a V. P. article it enters into a contract with the sender to deliver the Article only, against payment by the addressee of the sum specified by the sender. The proviso to Section 34 of the Post Office Act does not absolve the Post Office from liability to pay damages if, in contravention of its contract, it neglects to collect the specified sum on delivery. ILR 28 Mad 213, Foll. **1951 AWR (HC) 269: AIR 1951 All 617 (618) (Pr 3).**

SECTION 35

——S. 35 — Income-tax Act (1922), Sec. 4 — Assessee doing business in part B State sending goods by V. P. P. & Railway on self-addressed Railway Receipts to be paid for upon delivery, to places in Part A and C States — Price which included assessee's profits held deemed to have been received in Part A and C States — (Post Office Rules, R. 25 (1)) — (Contract Act (1872), Ss. 148 and 182) — AIR 1957 Madh Bha 64, **Reversed.** See Income-tax Act (1922), S. 4. **AIR 1959 SC 1394.**

——S. 35 — Income-tax Act (1922), S. 4 — Part B States Taxation Concessions Order (1950), Para 6 — Goods ordered by V. P. P. from trader at Ratlam — Goods delivered in Part A and C States — Amount collected through respective Post Offices and through Bank at Bombay — Place of receipt of income — (Sale of Goods Act (1930), S. 23 (2) — (Negotiable Instruments Act (1881), S. 85-A).

The value of the parcels and receipts of sale proceeds at Ratlam (which include the assessee's profits) in respect of the goods sent by him amount to receipt of income, profits or gains at Ratlam in Part B State. Similarly, where payment is made by Bank draft, the place where the payment is received is in law the place where the drafts are received by the assessee. The payment must therefore, be, held to have been received at Ratlam and though the drafts are encashed through the assessee's bankers at Bombay, it does not constitute receipts in Part A State. See Income-tax Act (1922), S. 4. **AIR 1957 Madh Bha 64 (DB).**

——S. 35 — Rules under, R. 133 — Object and scope — Goods sent by V. P. P. — Agency of Post Office — Test.

A plain reading of R. 133 shows that the V. P. System was introduced to serve the convenience of either party and from the rule itself it cannot be said that the post office is an agent of the trader or the buyer when the goods are sent by V. P. P The Post Office is in the position of a carrier in respect of parcels delivered for transmission and must be deemed to be the agent of the party at whose instance or on whose order the parcels were delivered to it. AIR 1954 SC 429, Rel. on; ILR 28 Mad 213, Distinguished. Where the goods are supplied to the buyers in pursuance of orders placed by them either directly or through the assessee's travelling agents and the goods are delivered to the post office at Ratlam according to the specific directions of the buyers, it must be held that the post office was acting as the buyer's agent in collecting the value of the parcels. **ILR (1956) Madh B 169: AIR 1957 Madh Bha 64 (65, 66) (Pt A) (Prs 6, 12) (DB).**

[**Reversed** on another point in AIR 1959 SC 1394.]

SECTION 43

——Ss. 43 and 44 — Rules, under S. 43, R. 297 —Money order amount in course of transmission in hands of postal authorities — Payee has no attachable interest — Privity of contract exists between remitter and postal authorities. See Post Office Act (1898), S. 44. **(1962) 3 Guj LR 987.**

SECTION 44

——S. 44 — Civil P. C. (1908), S. 47 — Compromise decree directing lesser payment into Court within stipulated time in full satisfaction — In case of default decree for full amount to be executed — J. D. sending amount by money order within time — Receipt by Court after stipulated time — Condition in decree held not satisfied — Post Office not agent of payee. See Civil P. C. (1908), S. 47. **AIR 1960 All 747.**

——Ss. 44 and 43 — Rules under S. 43, R. 297 — Money order amount in course of transmission in hands of postal authorities — Payee has no attachable interest — Privity of contract exists between remitter and postal authorities — Contract Act (1872), S. 211.

Under the general law and the provisions of Section 44 of Post Office Act a payee has no attachable interest in the amount of the money order during the course of its transmission and whilst it is still in the hands of the postal authorities. Having regard to provisions of S. 44 and R. 297 of the Rules made by the Central Government under S. 43 of the Act a money order amount in the hands of the postal authorities in the course of transmission is at the disposal of the remitter and does not cease to be the property of the remitter. It does not become the property of the payee. In spite of the amount having been handed over to the postal authorities by the remitter, he is entitled to recall the amount at any time before it is paid into the hands of the payee. There is no privity of contract between the postal authorities and the payee. The privity of contract is between the remitter and the postal authorities and, broadly speaking, it is the remitter who constitutes the postal authorities his agent for paying the amount to the payee so that so long as the agent has not carried out he instructions and fulfilled the mission, the principal has the right of directing to his agent as to how the amount shall be disposed of and the agent can ignore the instructions only at his peril. AIR 1954 SC 429, Dist. **(1962) 3 Guj LR 987.**

——S. 44 — Remittance by money order — When operates as valid tender.

Mere remittance of the amount by Money Order within the time limit does not constitute a lawful tender. Until and unless the tenant proves that the amount was actually taken to the land-lord and offered to him for payment, there cannot be said to have been any lawful tender. See Houses and Rents — Travancore-Cochin Buildings (Lease and Rent) Control Order, 1950, Cl. 18. **AIR 1955 NUC (Trav-Co) 1669.**

SECTION 47

——S. 47 — Applicability — Money order paid to person entitled — Postal authorities required to pay amount back to another — Amount paid to original payee — Recoverability as arrears of land revenue — Remedy.

Section 47, Post Office Act is meant for cases, e.g., where a money order is sent to 'A' and there are two persons having the same name 'A' and the amount of the money order is paid to that 'A' for whom the money order was not really meant. Then if that 'A' neglects or refuses to refund the amount of the money order, the Post Office authorities can avail of the provisions of this section and recover the amount from him as arrears of land revenue.

In a case where the Post Office Authorities have made payment of money order amount to a person who was entitled to receive it but if due to some other reasons such person cannot keep this amount with him or he is bound under law to pay it back to the postal authorities the Postal authorities should bring a regular suit for the recovery of this amount. They cannot use the provisions of S. 47 of the Act to recover the amount as arrears of land revenue. **ILR (1960) 2 Punj 545: AIR 1961 Punj 436 (437) (Prs 10, 11).**

SECTION 48

——Ss. 48 (c) and 34, Proviso — Applicability — Value payable articles — Money recovered from addressees but withheld by Pakistan Government — Liability of Indian Government.

The Post Offices in Pakistan in the circumstances, must be held to have been acting as agents of the Indian Government and the omission of its agent to hand over the amount to it could not affect the sender's right to get the money from the Indian Government. The Proviso to S. 34 cannot be of any avail to the Government. See Post Office Act (1898), S. 34. **AIR 1958 All 148.**

SECTION 52

●——S. 52 — Charge of secreting postal articles against postman — Articles found in almirah of house in which accused living jointly with his father and of which key was produced by father — Exclusive possession of articles not established. See Evidence Act (1872), S. 114, Illus. (a). **1963 (1) Cr LJ 800: AIR 1963 SC 822.**

●——Ss. 52 and 3 (a) — "In course of transmission by post" — Meaning — Delay in delivery of postal article — Not sufficient to hold that article has ceased to be in course of transmission See Post Office Act (1898), S. 3 (a). **1962 (1) Cri LJ 809: AIR 1963 SC 822.**

●——S. 52 — Scope of — Entrustment of postal article, not essential for offence under S. 52 — 'Secretes' — Meaning.

Bearing in mind the fact that an officer of the Post Office having in the course of his duties access to postal articles kept or lying in the Post Office, the Legislature has deliberately enlarged the scope of Section 52 so as to encompass secretion, destruction or throwing away of postal articles by an officer of the Post Office even though they may not have been entrusted to him or even though they are not articles with which he is required or is competent to deal in the course of his duties. The object of the provision is to prevent postal articles in course of transmission by post from being tampered with and so the 'secreting, destruction', etc. of postal articles to which the provision is directed is to such secreting, destruction, etc., as would frustrate or tend to frustrate their delivery to the addressee.

To secret means according to the dictionary, 'to hide'. In connection with a postal article addressed to some person, the fact that it is retained in his possession by an officer of the Post Office in an almirah and that too for an inordinately long period may be tantamount to hiding that article. Of course, what act amounts to 'secreting' would necessarily depend upon the facts of each case. Radha Kishan v. State of Uttar Pradesh, **(1963) 1 SCWR 158: (1963) 1 Mys LJ (SC) 47: 1963 Mad WN 221: (1963) 2 Lab LJ 667: 1963 All LJ 397: 1963 BLJR 353: 1963 All WR (HC) 304: 1963 (1) Cr LJ 809: 1963 All Cr R 156: AIR 1963 SC 822 (825) (Pt D) (Prs 7, 10).**

——S. 52 — 'Secreting, destroying or throwing aaway postal article' — No fraudulent or dishonest intention is required.

Under Section 52 for an act involving the secreting destroying or throwing away of any postal article in order to be an offence under the section it is not necessary for the prosecution to prove any fraudulent or dishonest intention on the part of the officer of the Post Office concerned. **1960 All LJ 365: 1960 All WR (HC) 226: 1960 All Cr R 159: 1961 (1) Cr LJ 595 (598) (Pt A) (Pr 18) (All) (DB).**

——S. 52 — Offence under— Search of a house of postman who was accused — Postman not present during search — Accused held had opportunity and motive to secret postal articles in locked almirah. See Criminal P. C. (1898), Section 103. **1960 All LJ 365: 1960 All WR (HC) 226: 1960 All Cri R 159: 1961 (1) Cr LJ 595 (All).**

[Reversed in AIR 1963 SC 822.]

——Ss. 52, 3 (a), 3 (c) — Secreting of postal article must be in course of transmission —This can be proved by circumstantial evidence — Postal articles recovered from accused — He must show how he came by them — Evidence Act (1872), Ss. 3 and 106.

Held, on facts that it was proved that the articles were secreted in the course of transmission by post. Proof need not be direct evidence of the addressees, that the articles were not received by them. That the articles were not delivered could be proved by circumstantial evidence. Under Section 106, Evidence Act, it was for the accused (a postman) to show, how the registered articles came into his possession. Failure to give reasonable explanation, was a circumstance to show that the articles were in the course of transmission. AIR 1959 All 727, Rel. on. **1960 All LJ 365: 1960 All WR (HC) 226: 1960 All Cr R 159: 1961 (1) Cr LJ 595 (598, 599) (Pt B) (Prs 19, 25) (All) (DB).**

[Reversed in AIR 1963 SC 822.]

——S. 52 — Scope — Section deals with misappropriation of articles and not charges. **AIR 1955 NUC (All) 3580.**

——S. 52 — Charge of secretion is made out when person does physical act of removing letters and other postal articles — Letters deli-

vered to addressee — They cannot be said to have been secreted, because he realised charges of bearing letters — He might be liable for misappropriation. **AIR 1955 NUC (All) 3580.**

——S. 52 — "Transmissible" meaning of.

"Transmissible" in Section 52 means nothing more than that it is capable of being transmitted or conveyed from one person or place to another or having the quality of being transmissible, like the transmission of freight across a river. Case law and AIR Manual Ref. **AIR 1959 Mad 544.**

——S. 52 — Articles found in search should be those in course of transmission by post.

To make out a case under Section 52 of the Post Office Act, it is necessary to establish that the postal articles were in the process of transmission. And, further, all these articles must be found from the exclusive possession of the accused and not from a place which is accessible to many others. **('65) 31 Cut LT 644.**

——S. 52 — Postal articles found in postman's house — House should be proved to be in exclusive possession of accused postman.

In order to bring a case under Section 52, Post Office Act, 1898, it is necessary to prove that the house from which the postal articles are alleged to have been recovered was in fact in sole occupation of the accused postman, where the prosecution has been able to prove that those articles were found in an almirah of the house in which the accused lived along with his son and of which the key was furnished by the son in the absence of his father, in the circumstances it is not legitimate to infer that almirah was in the accused's joint, much less in his exclusive possession. In the absence or any evidence it cannot be held that the accused in fact handed over the key to his son, or he himself was in exclusive possession of the articles. AIR 1963 SC 822, Foll. **('65) 31 Cut LT 644.**

——Ss. 52, 2 (1) — Applicability — "Postal article".

The money entrusted to a postman by the Post Master for payment of the money order cannot be said to constitute a 'postal article' in course of transmission by post or anything contained therein as contemplated by Section 52, Post Office Act. **ILR (1954) TC 333: 1955 Cr LJ 1407: AIR 1955 T-C 247 (248) (Pr 4) (DB).**

SECTION 53

——S. 53 — 'Wilfully detains or delays' — Meaning of — Detention must be deliberate and for some purpose.

Per majority, Raghubar Dayal, J., Contra.

The meaning to be attached to the words 'wilful' and 'wilfully' has to be ascertained on a close examination of the scheme and the nature of the legislation in which the words appear and the context in which they are used. (1885) 31 Ch. D. 168 and 1933 (2) KB 669 and (1933) 78 Law Ed 381; AIR 1929 All 826 and 1951 (2) STC 26 (Mad) and AIR 1949 Mad 95, Rel. on.

Section 53 which makes punishable the wilful detention or delay of a postal article by an officer of the post office is one of the several sections which create offences under the Act. Comparison of various sections in Chapter 10 clearly shows that the legislature took a more serious view of the offence of wilful detention of a postal article (S. 53) than of many other offences in this Chapter. Wilful detention of a postal article is made, punishable with imprisonment extending to two years. The very fact that this comparatively heavy punishment of two years' imprisonment has been prescribed for wilful detention while lighter punishment has been prescribed under Sections 49, 50 and 51 justifies the conclusion that the word 'wilful' was used by the legislature to mean only such detention which was deliberate and for some purpose. Where the detention was not deliberate and on purpose, but as a result of either inadvertence or carelessness or negligence, the accused cannot be said to have detained or delayed the article 'wilfully'. Crl. Appeal No. 213 of 1961, dated 1st August, 1962 (Mys) **Reversed.** Ramachandra Narasimha Kulkarni v. State of Mysore, **1964 SCD 1024: (1965) 2 SCJ 337: 1965 Mad LJ (Cr) 596: (1964) 7 SCR 606: 1964 All LJ 822: 1964 (2) Cr LJ 609: (1964) 2 SCWR 9: 1964 SCD 1024: AIR 1964 SC 1701 (1703) (Prs 7 to 9, 11).**

SECTION 68

——S. 68 — A receiving B's insured cover as his own — Allegation that it contained more amount — A ready to return cover with amount specified thereon — Nature of offence.

In cases where originally a property is received bona fide and subsequently after having come to know who the owner of the property was, the person who receives the property repudiates the ownership or converts it to his own use without making efforts to hand it back to the owner, an offence under Section 403, I. P. C. is made out, but in cases where the person who is alleged to have received the property denies that he ever received possession of the property, he may be convicted for theft or cheating but he cannot be convicted under Section 403, I. P. C. See Penal Code (1860), S. 403. **AIR 1955 NUC (All) 1743.**

SECTION 72

——S. 72 — Applicability.

What is required by Section 72 is a complaint made by order of or under authority from the Director-General or the Post-Master General, and not a mere letter of authority from the Superintendent to the Inspector to prosecute the accused or take legal steps against him if there is prima facie case. Further Section 72 does not authorise the Director General and the Post Master General to delegate to another person the powers conferred on them by it. **1953 Ker LT 364: ILR (1953) Trav-Co 600: 1953 Cr LJ 1777: AIR 1953 Trav-Co 537 (538) (Pt B) (Pr 4) (DB).**

SCHEDULE 1

——Sch. 1 — Applicability of Motor Transport Workers Act to Motor Service maintained by Post and Telegraph Department.

Motor Service of the Department is not Motor Transport undertaking — Nor a private carrier — Section 13 of M. T. Workers Act prescribing working hours cannot be applied to drivers in Motor Service maintained by Posts and Telegraphs Department. See Motor Transport Workers Act (1961), S. 1 (4). **AIR 1965 Bom 120.**

——Sch. 1 and Ss. 9, 7 — Post Office Rules, R. 30 — Application for registration or renewal of registration as newspaper — Conditions to be satisfied by periodical — Subjective satisfaction of executive authority — Question not justiciable by Court — No right to hearing or to any notice of hearing is given to applicants — Constitution of India, Art. 226 — Interfer-

ence with administrative or executive order — Grounds — Mandamus when can issue.

The only grounds on which a Court of law would be justified in interfering with the decision of the executive authority are that the decisions are mala fide arbitrary or capricious or altogether extraneous and outside the purpose of the Act. The decision of the P. M. G. being purely administrative and ministerial the petitioner is not entitled to any writ of mandamus unless the decision is extraneous to the purpose of the Act. See Post Office Act (1898). S. 9. **AIR 1961 Bom 105.**

POST OFFICE GUIDE

——(Corrected upto 30-6-1960), Part I, Para. 175 — Insured cover delivered to addressee with no visible damage to cover or seals — Cover found to contain only blank pieces of paper — Central Government not liable — Intactness of seal is conclusive on question of tampering by postal authorities. See Post Office Act (1898), S. 33. **AIR 1963 Pat 216 (DB).**

POST OFFICE RULES (1933)
RULE 30

——R. 30 — Post Office Act (1898), Ss. 9, 7 and Sch. 1 — Application for registration or renewal of registration as newspaper — Conditions to be satisfied by periodical — Subjective satisfaction of executive authority — Question not justiciable by Court — No right to hearing or to any notice of hearing is given to applicants — Constitution of India, Art. 226 — Interference with administrative or executive order — Grounds — Mandamus when can issue.

The only grounds on which a Court of law would be justified in interfering with the decision of the executive authority are that the decisions are mala fide, arbitrary or capricious or altogether extraneous and outside the purpose of the Act. The decision of the P. M. G. being purely administrative and ministerial the petitioner is not entitled to any writ of mandamus unless the decision is extraneous to the purpose of the Act. See Post Office Act (1898), S. 9. **AIR 1961 Bom 105.**

——R. 30 — Not ultra vires the Act. See Post Office Act (1898), Section 9. **AIR 1961 Bom 105.**

RULE 35

——Rr. 35, 76, 81 — Scope — Insured parcel containing attar bottles — Damage due to leakage — Exemption from liability under S. 6 read with Rule 81.

Held, that the defendant was not exempt from liability under Rule 81, Post Office Rules. Since the packing was neither improper nor insecure Cl. (e) of Rule 81 had no application. So also the covers or seals of the parcels being visibly damaged, Rule 81 (f) had also no application. The plaintiff was therefore entitled to the damages claimed by him. See Post Office Act (1898), S. 6. **AIR 1958 Punj 174 (DB).**

RULE 76

——Rule 76 — Post Office Act (1898), S. 6 — Rules under Act — Rr. 35, 76, 81 — Scope — Insured Parcel containing attar bottles — Damage due to leakage — Exemption from liability under Section 6 read with Rule 81 — The defendant was not exempt from liability under Rule 81. See Post Office Act (1898), S. 6. **AIR 1958 Punj 174 (DB).**

RULE 81

——R. 81 — Post Office Guide (Corrected up to 30-6-1960), Part. I, Para. 175 — Insured cover delivered to addressee with no visible damage to cover or seals — Cover found to contain only blank pieces of paper — Central Government not liable — Intactness of seal is conclusive on question of tampering by postal authorities. See Post Office Act (1898), S. 33. **AIR 1963 Pat 216 (DB).**

——R. 81 — Post Office Act (1898), S. 6 — Rules under Act — Rules 35, 76, 81 — Scope — Insured Parcel containing attar bottles — Damage due to leakage — Exemption from liability under Section 6 read with Rule 81 — The defendant was not exempt from liability under Rule 81. See Post Office Act (1898), Section 6. **AIR 1958 Punj 174 (DB).**

RULE 133

——R. 133 — Income-tax Act (1922), S. 4 — Assessee doing business in Part B State sending goods by V. P. P. and Railway on self-addressed Railway Receipts to be paid for upon delivery, to places in Part A and C States — Price which included assessee's profits held deemed to have been received in Part A and C States — (Post Office Act (1898), S. 35) — (Sale of Goods Act (1930), Ss. 23 (2), 25 (1)) — (Contract Act (1872), Ss. 148 and 182) — AIR 1957 Madh Bha 64, **Reversed.** See Income-tax Act (1922), S. 4. **AIR 1959 SC 1394.**

RULE 297

——R. 297 — Post Office Act (1898), Ss. 44 and 43 — Rules, under S. 43, R. 297 — Money order amount in course of transmission in hands of postal authorities — Payee has no attachable interest — Privity of contract exists between remitter and postal authorities. See Post Office Act (1898), S. 44. **(1962) 3 Guj LR 987.**

POST OFFICE SAVINGS BANK RULES FOR THE GUIDANCE OF DEPOSITORS

RULE 21

——R. 21 — Applicability — Post and Telegraph Manual Vol. VI, R. 445 — Irregularity of postal clerk in allowing withdrawal of deposit — Suit to recover amount — Maintainability — (Civil P C. (1908), Section 9).

Rule 21 of the Rules for the Guidance of Depositors exempts the post office from a liability only it the obtaining possession of the pass-book and the fraudulent withdrawal of money are both effected through the negligence of a depositor.

A had an account in Postal Savings Bank under the Guardianship of his father B. On 15-7-1948, after withdrawal of certain amount the pass book was left with the clerk concerned for entry of interest. In December, 1948 when B asked for the pass book it was untraceable and on obtaining a duplicate B discovered that a certain sum had been withdrawn by some unknown person. In a suit to recover that amount

Held, that the signatures on the relevant withdrawal form were suspicious. The certificate as required by Rule 445 of the P. and T. Manual Vol. VI was not signed by B. This irregularity

being of a serious nature the person responsible could not have allowed withdrawal. The payment made on such a suspicious and defective withdrawal form could be attributable only either to the connivance or extreme inefficiency and carelessness of the officials concerned. In these circumstances it was not possible to accord any protection to the person at fault on the ground of good faith. There being no evidence relating to negligence or to the effect that the person who obtained the pass book through the negligence of A or B was the person who made the withdrawal Rule 21 could not be a bar to the suit. **(1957) All WR (HC) 19.**

POUNDAGE

See (1) Civil P. C. (1908), O. 21, R. 93.
(2) High Court Rules and Orders — Madras Civil Rules of Practice.

POWER

Administrative.
See Constitution of India, Articles 226 and 32.

Delegation of.
See Constitution of India, Article 245.

Exercise of.
See (1) Civil P. C. (1908), S. 115.
(2) Constitution of India, Articles 226 and 32, 227.
(3) General Clauses Act (1897), S. 14.

Inherent.
See (1) Civil P. C. (1908), S. 151.
(2) Criminal P. C. (1898), S. 561-A.

Mode of conferring of.
See Criminal P. C. (1898), S. 39.

POWER OF APPELLATE COURT

See Appellate Court — Powers of.

POWER OF ATTORNEY

See (1) Civil P. C. (1908), O. 3, Rr. 2 and 4.
(2) Contract Act (1872), S. 182.
(3) Evidence Act (1872), S. 85.
(4) Power of Attorney Act (1882), S. 2.
(5) Stamp Act (1899), Sch. I, Art. 48 (b).

Constitution of.
See Contract Act (1872), S. 188.

Stamp duty.
See Stamp Act (1899), Sch. I, Art. 48.

POWER OF ATTORNEY ACT (7 of 1882)
SECTION 2

●——**S. 2** — Income-tax Act (1922), Secs. 26-A, 59 — Powers of — Attorney Act (1882), S. 2 — Income-tax Rules (1922), Rules 2, 6 — No repugnancy between S. 2 of Powers of Attorney Act and Section 26-A of Income-tax Act — Rules not ultra vires. Rayulu Subbarao v. Commissioner of Income-tax, Madras, **(1956) 30 ITR 163: 1956-2 Mad LJ (SC) 43: 1956 SCR 577: 1956 SCJ 591: 1956 SCA 1025: AIR 1956 SC 604.**

——**S. 2** — Revocation — Agent having interest in subject-matter of agency — Agency cannot be revoked. **AIR 1964 All 441 (442) (Pr 2) (DB).**

——**S. 2** — Power of attorney authorising Bank to collect bills due to a contractor from military officers — Operation as assignment of debt — Notice to debtor. See Transfer of Property Act (1882), Section 130. **AIR 1954 Assam 23 (DB).**

——**S. 2** — When a person executes a power-of-attorney in favour of a lawyer, it is not that he cannot appear in person before a Court of law, **AIR 1954 Assam 23 (25, 26) (Pt A) (Prs 7, 9, 13) (DB).**

——**S. 2** — Calcutta High Court (O. S.) Rules, Chapter 35, Rule 15 — Court granting to applicant letters of Administration only on execution of personal land of applicant — It means administrator's own bond signed by him personally —Execution of personal bond of applicant by his authorised attorney cannot be a substitute — Word "personal" cannot be extended to cover authorised act of agent; which is deemed to be as good as the principal's under the law of agency and power-of-attorney Act. See High Court Rules and Orders — Calcutta High Court Original Side Rules, Chapter 35, Rule 15. **AIR 1953 Cal 606.**

——**S. 2** — Construction. See Registration Act (1908), Section 2 (10). **AIR 1963 Madh Pra 286 (DB).**

——**S. 2 — Principal and agent — Power of attorney — Construction — Special power to conduct pending suit in particular Court — Power to present it in proper forum — Civil P. C., Order 3, Rule 2 — Deed — Construction.**

Where a special power of attorney said that the plaintiffs had filed a suit for possession of lands etc., on the file of the Court of the District Munsif of Tirupathi and as it was not possible for them to conduct the same personally, they appointed N. N. as an agent to conduct the said suit. He was also authorised to conduct the entire proceedings which had to be taken in the said suit :

Held, that the document conferred an express power on N. N. to conduct a particular suit pending in a particular Court. It did not expressly engage the attorney for the purpose of conducting the litigation generally in respect of the plaint schedule properties. Hence where the District Munsif returned the plaint on the ground that it was beyond the pecuniary jurisdiction of his Court the agent had no power to institute and conduct the suit in a proper forum.

(Principles governing construction of a power of attorney stated). **1951 Mad WN 350: (1951) 2 Mad LJ 43: AIR 1952 Mad 559 (560) (Pr 4).**

——**S. 2** — Income-tax Act (1922), Sections 26-A, 59 — Income-tax Rules, Rules 2 and 6 — Authorised agent of partner cannot file application for renewal of registration of partnership — Rules to this effect not 'ultra vires', though in conflict with Power of Attorney Act (7 of 1882), Sec. 2 — Legislation by delegation authority — Principles of — Constitutional law — Delegated legislation. See Income-tax Act (1922), Section 26-A. **AIR 1952 Mad 127 (DB).**

——**S. 2** — Civil P. C., O. 3, R. 2 — Attorney bringing suit on behalf of minor, represented by minor's next friend without consent of next friend — Power of attorney executed for doing all acts and things necessary in connection with suits — Attorney has implied authority to bring suit on behalf of minor represented by next friend and suit is maintainable. See Civil P. C. (1908), Order 3, Rule 2. **AIR 1965 Mys 272 (DB).**

——**S. 2** — Construction — Joint Hindu trading family — Manager — Power of attorney to alienate family properties — Specific and general powers — Ejusdem generis — Construction not always applicable. **26 Cut LT 346: AIR 1960 Orissa 199 (202) (Pt A) (Prs 6, 7) (DB).**

——**S. 2** — Contract Act (1872), Section 10 — Construction of — Power of Attorney. See Contract Act (1872), S. 10. **AIR 1958 Pat 63 (DB).**

——S. 2 — Indian Stamp Rules (1925), R. 18 — Suit through attorney — Power of attorney bearing stamp of sufficient amount but of improper description — Irregularity in description can be cured by payment of duty and power would become valid from date of its execution — Suit cannot be thrown out on that ground. See Stamp Act (1899), Section 37. **1965 Cur LJ 485 (Punj).**

——S. 2 — Construction — Rules.

Powers of attorney must be strictly pursued, and are construed as giving only such authority as they confer expressly or by necessary implication. The following are the most important rules of construction: (1) The operative part of the deed is controlled by the recitals. (2) Where authority is given to do particular acts, followed by general words, the general words are restricted to what is necessary for the proper performance of the particular acts. (3) General words do not confer general powers, but are limited to the purpose for which the authority is given, and are construed as enlarging the special powers only when necessary for that purpose. (4) The deed must be construed so as to include all medium powers necessary for its effective execution. **1952 Comp Cas 146: AIR 1952 Punj 99 (101, 102) (Pt A) (Prs 8, 14).**

——S. 2 — Power of Attorney — Construction — Rules of.

Powers of attorney have to be strictly construed and have to be construed as giving only such authority as they confer expressly or by necessary implication. It is one of the rules of construction that the operative part of the deed is controlled by the recital. **52 Pun LR 471: AIR 1951 Punj 371 (373) (Pt C) (Pr 9).**

POWER OF LEGAL PRACTITIONER

See (1) Advocates Act (1961), Sections 30, 32, 35 and 36.
(2) Bar Councils Act (1926), S. 14.
(3) Civil P. C. (1908), O. 3, R. 4, O. 23, Rule 3
(4) Legal Practitioners Act (1879), Ss. 4, 10.

POWERS, PRIVILEGES AND IMMUNITIES

Houses of Parliament of.
See Constitution of India, Art. 105.

Legislative Assembly, of.
See Constitution of India, Article 194.

PRACTICE

Abandonment of plea.
See Civil P. C. (1908), O. 41, R. 1.

Additional evidence.
See Civil P. C. (1908), O. 41, R. 27.

Adjournment.
See (1) Civil P. C. (1908), O. 17.
(2) Criminal P C (1898), Sections 344 and 526.

Administration.
See Civil P. C. (1908), Order 20. R. 13.

Administrative orders.
See Constitution of India, Articles 226 and 32.

Admissions.
See (1) Civil P. C. (1908), O. 12.
(2) Evidence Act (1872), Sections 18, 19, et seq.

Amendment.
—Judgment and decree, of.
See Civil P. C. (1908), Sections 151, 152 and 153.

—Mistake or error of Court.
See Civil P. C. (1908), Sections 151, 152, 153.

—Pleadings, of.
See Civil P. C. (1908), O, 6, R.17.

Appeal
See (1) Civil P. C. (1908), Ss. 2, 96, 100, 101, 105, 107, 109, 110, 111, Order 41 and Order 43, Rule 1, Order 45.
(2) Constitution of India, Arts. 132 to 136.

Appellate Court.
See Civil P. C. (1908), Section 107, Order 41.

Arguments.
See Civil P. C. (1908), O. 18, R. 2, O. 20, R. 1.

—Written.
See Civil P. C. (1908), Order 41, Rule 16.

Bar of suit.
—Res judicata.
See Civil P. C. (1908), Section 11.

—Suit for compensation for injury to workman.
See Workmen's Compensation Act (1923), S. 3.

—Suit to ascertain amount of compensation under Northern India Ferries Act.
See Northern India Ferries Act (17 of 1878), Section 34.

—Suit to recover wages.
See Minimum Wages Act (1948), Section 24.

Burden of proof.
See (1) Civil P. C. (1908), Order 18, Rule 1, Order 21, Rr. 58, 63.
(2) Evidence Act (1872), Ss. 101 to 105.

Cause of action.
See Civil P. C. (1908), Sections 11, 20, Order 2, Rules 1 and 2.

Civil dispute.
See (1) Criminal P. C. (1898), S. 145.
(2) Penal Code (1860), Sections 378-379.

Civil rights.
See Civil P. C. (1908), S. 9.

Commission.
See (1) Civil P. C. (1908), O. 26.
(2) Criminal P. C. (1898), Ss. 503, 504 and 506.

Consolidation.
See Civil P. C. (1908), O. 41, R. 1, O. 45, R. 4.

Contempt.
See (1) Constitution of India, Articles 129 and 215.
(2) Contempt of Courts Acts (1926) and (1952).
(3) Criminal P. C. (1898), Sections 195, 480-487.
(4) Penal Code (1860), Section 172.

Costs.
See Civil P. C. (1908), Sections 35, 35-A, O. 34, R. 10.

Court.
—Mistake or error of.
See Civil P. C. (1908), Sections 151, 152, 153.

Court-fees.
See (1) Court-fees Act (1870).
(2) (State) Court-fees and Suits Valuation Acts.

Criminal trial.
See Statutory cross-references under "Criminal Trial".

Decree.
See (1) Civil P. C. (1908), Sections 2 (2), 33 and Order 20 and
(2) Statutory cross-references under "Decree".

Discretion.
See (1) Civil P. C. (1908), Sections 115, 151.
(2) Constitution of India, Articles 226 and 32, 227.

Duty of counsel.
See Civil P. C. (1908), Order 3, R. 4.

Duty of Court.
See (1) Civil P. C. (1908), Sections 33, 45; Order 20, Rules 1-4.
(2) Criminal P. C. (1898), S. 367.
(3) Evidence Act (1872), Section 81.

—Superior and subordinate tribunals.
See Civil P. C. (1908), Order 41, R. 25.

Ejectment suit.
See (1) Civil P C. (1908), S. 9. and
(2) Statutory cross-references under "Landlord and Tenant".

English law.
See "Precedents".

Evidence.
See also (1) Civil P. C. (1908), O. 18, O. 20, Rule 14 and
(2) Statutory cross-references under "Evidence".

—Additional.
See Civil P. C. (1908), Order 41, R. 27.

—Affidavit.
See (1) Civil P. C. (1908), Order 19.
(2) Constitution of India, Articles 226 and 32.
(3) Criminal P. C. (1898), Sections 510-A and 539.
(4) Evidence Act (1872), Section 1.

—Appreciation of.
See (1) Civil P. C. (1908), Sections 100-101, 104, Order 41, Rule 27.
(2) Criminal P. C. (1898), Sections 367, 540, 509 to 512.
(3) Evidence Act (1872), S. 3.

—Documentary.
See Civil P. C. (1908), O. 13, R. 4.

—Public documents.

Execution.
See (1) Civil P. C. (1908), S. 47 and O. 21 and
(2) Statutory cross-references under (1) "Decree", (2) "Executing Court", (3) "Execution Sale".

Ex parte hearing.
See (1) Civil P. C. (1908), O. 9.
(2) Constitution of India, Articles 226 and 32 — Natural justice.

Forum.
See Civil P. C. (1908), Sections 9, 17, 20, 22 and 24.

High Court.
See under "High Court Rules and Orders".

—Duty of.
See Civil P. C. (1908), Section 122.

—Procedure.
See Civil P. C. (1908), S. 128.

Inconsistent pleas.
See (1) Civil P. C. (1908), Order 6 and O. 7.
(2) Evidence Act (1872), S 115.

Injunction.
See (1) Civil P. C. (1908), S. 151 and Order 39.
(2) Specific Relief Act (1877), Ss. 54 to 57.

Interest.
See (1) Civil P. C. (1908), Section 34, O. 34 Rule 11.
(2) Debt Laws — Interest Act (32 of 1939)

Issues.
See Civil P. C. (1908), O. 11 and O. 14.

Judge.
See (1) Civil P. C. (1908), Sections 33, 45, Order 20, Rule 4.
(2) Arbitration Act (1940).

Judgment.
See (1) Civil P. C. (1908), Order 20, Rr. 1 to 4, Order 41, Rule 31.
(2) Criminal P. C. (1898), Sections 367, 439, 561-A.
(3) Letters Patent (Bombay, Calcutta and Madras), Clause 15.

Judicial order.
See (1) Civil P. C. (1908), S. 15,
(2) Constitution of India, Articles 226 and 32, 227.

Jurisdiction.
See Civil P. C. (1908), Sections 9, 16 to 21.
See also Statutory cross-references under "Criminal Trial".

—Small cause suits.
See (1) Presidency Small Cause Courts Act (15 of 1882), Ss. 18, 19.
(2) Provincial Small Cause Courts Act (1887), Sections 15 and 16.

Justice, equity and good conscience.
See (1) Civil P. C. (1908), S. 151.
(2) Criminal Procedure Code (1898), Section 561-A.
(3) Constitution of India, Articles 226 and 32.

Legal practitioner.
See (1) Advocates Act (25 of 1961).
(2) Bar Councils Act (38 of 1926).
(3) Civil P. C. (1908), Order 3, R. 4.
(4) Legal Practitioners Act (1879).

—Professional conduct.
See Legal Practitioners Act (1879), Sections 13 and 14.

—Relations between Bench and Bar.
See (1) Civil P. C. (1908), Order 3, R. 4.
(2) Legal Practitioners Act (1879), S. 4.

—Right to practice.
See (1) Advocates Act (1961), Sections 30, 32, 35 and 36.
(2) Bar Councils Act (1926), S. 14.
(3) Legal Practitioners Act (1879), Ss. 4, 10.

Legal representative.
See Civil P. C. (1908), Ss. 2 (11), 50, 53, O. 22, Rules 3 to 5.

Limitation.
See (1) Civil P. C. (1908), S. 48.
(2) Limitation Acts (1908) and (1963).

Mistake of Court.
See Civil P. C. (1908), Section 151.

Natural justice.
See (1) Constitution of India, Articles 226 and 32 and 310 and 311.
(2) Criminal P. C. (1898), Section 439.

New plea.
See (1) Civil P. C. (1908), Sections 100-101, 107, 109, 111, Order 41, Rule 2.
(2) Constitution of India, Articles 132 to 136.

Notice of hearing.
See Civil P. C. (1908), Order 41, Rr. 11-15-A.

Official translation of documents.
See (1) Civil P. C. (1908), Section 137, O. 18, Rr. 5, 7, 9.
(2) Criminal P. C. (1898), Section 218.

Paper book.
See Civil P. C. (1908), Section 122.

Parties.
See (1) Civil P. C. (1908), Order 1; O. 34, Rule 1 and

(2) Statutory cross-references under "Parties".

Partition suit.

See Civil P. C. (1908), Order 20, Rule 18.

Plaint.

—Admission of.
See Civil P. C. (1908), Order 7, Rule 9.
—Court-fee payable.
See Court-fees Act (1870), Schedule 1, Art. 1.
—Documents not in possession or power.
See Civil P. C. (1908), Order 7, Rule 15.
—Documents, not produced with plaint, inadmissibility of.
See Civil P. C. (1908), Order 7, Rule 18.
—Documents sued upon.
See Civil P. C. (1908), Order 7, Rule 14.
—Grounds of exemption from limitation.
See Civil P. C. (1908), Order 7, Rule 6.
—Lost negotiable instrument, suit on.
See Civil P. C. (1908), Order 7, Rule 16.
—Money suit.
See Civil P. C. (1908), Order 7, Rule 2.
—Particulars in.
See Civil P. C. (1908), Order 7, Rule 1.
—Presentation of.
See Civil P. C. (1908), Order 4, Rule 1.
—Rejection of.
See Civil P C. (1908), Order 7, R. 11.
Fresh plaint.
See Civil P. C. (1908), Order 7, Rule 13
Procedure on.
See Civil P. C. (1908), Order 7, Rule 12.
—Relief.
See Civil P. C. (1908), Order 7, Rules 7, 8.
—Representative suit.
See Civil P. C. (1908), Order 7, Rule 4.
—Return of.
See Civil P. C. (1908), Order 7, Rule 10.
—Suit relating to immovable property.
See Civil P. C. (1908), Order 7, R. 3.

Plea.

See (1) Civil P. C. (1908), Order 6. and
(2) Statutory cross-references under "Practice — Pleadings".

Pleader and client.

See (1) Civil P. C. (1908), Order 3, Rule 4 and
(2) Statutory cross-references under "Legal practitioner".

Pleader's fees.

See (1) Civil P. C. (1908), Section 35, O. 3, Rule 4.
(2) Legal Practitioners Act (1879), Section 27.

Pleadings.

See Civil P. C. (1908), Order 6, Rule 2.
—Abandonment of plea.
See Civil P. C. (1908), Order 41, Rule 1.
—Amendment of.
See Civil P. C. (1908), Order 6, R. 17.
—Condition precedent, pleading of
See Civil P. C. (1908), Order 6, Rule 6.
—Denial of contract.
See Civil P. C. (1908), Order 6, Rule 8.
—Departure.
See Civil P. C. (1908), Order 6, Rule 7.
—Forms of.
See Civil P. C. (1908), Order 6, Rule 3.
—Further and better particulars.
See Civil P. C. (1908), Order 6, Rule 5.
Malice, knowledge, etc.
See Civil P. C. (1908), Order 6, Rule 10.
—Material facts.
See Civil P. C. (1908), Order 6, R. 2.
—Meaning of.
See Civil P. C. (1908), Order 6, Rule 1.
—New ground of claim.
See Civil P C. (1908), Order 6, Rule 7.
—New plea.
See (1) Civil P. C. (1908), Sections 100, 101, 107, 109, 111, Order 41, Rule 2.
(2) Constitution of India, Articles 132 to 136.
—Notice.
See Civil P. C. (1908), Order 6, Rule 11.
Particulars.
See Civil P. C. (1908), Order 6, Rule 4.
—Presumption of law.
See Civil P. C. (1908), Order 6, Rule 13.
—Signature.
See Civil P. C. (1908), Order 6, Rule 14.
—Striking out.
See Civil P. C. (1908), Order 6, Rule 16.
—Subsequent pleading.
See Civil P. C. (1908), Order 6, Rule 9.
—Variance with proof.
See Civil P. C. (1908), Order 6, Rule 2.
—Verification.
See Civil P. C. (1908), Order 6, Rule 15.

Precedents

See (1) Constitution of India, Articles 141, 372.
(2) Precedents.

Privy Council.

See (1) Abolition of Privy Council Jurisdiction Act 1949 (5 of 1949) and
(2) Precedents.

Record.

See (1) Civil P. C. (1908), Order 13, Rules 7, 10.
(2) Supreme Court Rules (1950), Order 15
—Re-construction of records.
See Civil P. C. (1908), Section 151.

Reference.

See Civil P. C. (1908), Order 46, Rule 1.

Relief.

See (1) Civil P. C. (1908), Order 2, Rule 2, Order 7 and
(2) Statutory cross-references under "Specific performance and specific relief".
—Alternative.
See Civil P. C. (1908), Order 2, Rule 3, Order 7, Rules 7, 8.
—Deletion of.
See Civil P. C. (1908), Order 1, Rule 10.
—General relief.
See Civil P. C. (1908), Order 7, Rule 7.
—Joinder of.
See Civil P. C. (1908), Order 2, Rules 2, 3.
—Subsequent events, relief based on.
See Civil P. C. (1908), Section 151, Order 7, Rule 7, Order 8, Rule 8, O. 20, R. 18.

Remand.

See Civil P. C. (1908), Section 107, Order 41, Rules 23, 25.

Restoration of proceedings.

See Civil P. C (1908), Order 9, R. 13.

Review.

See Civil P. C. (1908), Section 151, O. 47.

Revision.

See (1) Civil P. C. (1908), S. 115.
(2) Constitution of India, Article 227.
(3) Provincial Small Cause Courts Act (1887), Section 25.

Rules of procedure.

—Duty of Court to observe.
See Civil P. C. (1908), Order 41, Rule 1.

Sanction.
See (1) Civil P. C. (1908), S. 115, Order 32, Rule 7.
(2) Criminal P. C. (1898), Sections 195, 439 and
(3) Statutory cross-references under "Criminal trial".

Second appeal.
See Civil P. C. (1908), Sections 100-101.

Small Cause Court.
See (1) Civil P. C. (1908), Section 102, O. 20, Rule 4.
(2) Presidency Small Cause Courts Act (1882).
(3) Provincial Small Cause Courts Act (1887).

Solicitor.
See Statutory cross-references under "Legal practitioner".

Subordinate Courts.
See (1) Civil P. C. (1908), Sections 3, 24, 115.
(2) Constitution of India, Articles 226 and 227.

—Duty of.
See (1) Civil P. C. (1908), S. 151.
(2) Constitution of India, Article 227.

Subsequent events.
See Civil P. C. (1908), Sections 150, 151, O. 7, Rule 7, Order 8, Rule 8, Order 41, Rule 23.

Subsequent events, power of Court to take note of in passing decree.
See Civil P. C. (1908), Section 151.

Summons.
See Statutory cross-references under (1) "Process" (2) "Summons".

Supreme Court.
See (1) Civil P. C. (1908), Sections 109, 110, Order 45.
(2) Constitution of India, Articles 132-136.
(3) Supreme Court Rules (1950).

Trial in camera.
See Civil P. C. (1908), S. 151.

Valuation.
See (1) Suits Valuation Act (7 of 1887).
(2) (State) Court-fees and Suits Valuation Acts.

Witness.
See (1) Civil P. C. (1908), Section 135, O. 16, Rules 1, 10, Order 18, Rules 7, 5, Order 20, Rule 4; Order 26, Rules 1, 2, 12, 16 and 7.
(2) Evidence Act (1872), Sections 118-126, 131-166.

Writ appeal.
See Constitution of India, Articles 226 and 32.

Writ jurisdiction.
See Constitution of India, Articles 226 and 32

PRADHANI TENURE

See (1) Government Grants Act (1895), S. 3 — Land tenure.
(2) Tenancy Laws — Chota Nagppur Tenancy Act (1908).

PREAMBLE

Reference to, for interpretation of statutes.
See (1) Civil P. C. (1908), Preamble and
(2) Interpretation of Statutes.

PRECEDENTS

SYNOPSIS

1. Rule of stare decisis.
2. Application of precedents — Duty of Court.
(A) Extent of authority.
(B) Decision on other enactments.
(C) Interpretation of precedent.
See also Note 2 (A).
(D) Obiter dicta and observations.
See also Notes 3 (B), 4 (A), 6 (A) and and 8 (D).
(E) Decision on construction of document and questions of facts.
(F) Decision on concession or assumption.
(G) Ratio decidendi.
(H) Overruling previous decision — Effect.
3. Supreme Court decision.
See also Constitution of India, Art. 141.
(A) Not binding on Supreme Court.
(B) Obiter dicta and observations.
4. Privy Council decision.
See also (1) Abolition of Privy Council Jurisdiction Act, 1949.
(2) Constitution of India, Art. 372
(A) Obiter dicta.
5. Privy Council and Supreme Court.
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(A) Obiter dicta.
7. Privy Council and Federal Court.
8. High Court decisions.
(A) Single Judge.
(B) Division Bench.
(C) Full Bench.
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(E) Co-ordinate Benches and Courts.
See also Note 3 (A).
(F) Special Bench.
(G) Pre-constitution decisions.
9. Duty of subordinate Courts and Tribunals.
10. Decisions of other High Courts.
11. Judicial Commissioner's Court at Ajmer.
12. Andhra and Madras High Courts.
13. Madhya Pradesh and Madhya Bharat High Courts.
14. Nagpur, Madhya Pradesh and Bombay High Courts.
15. Bombay and Gujarat High Courts.
16. Kerala and Travancore-Cochin High Courts.
17. Lahore and Simla High Courts.
18. Orissa and Patna High Courts.
19. Mysore High Court.
20. High Courts of Covenanting States.
21. Conflicting decisions of Superior Court.
See also Note 8 (E).
22. Board of Revenue and other Tribunals.
23. Law Reports.
24. English and American decisions.
(A) Indian statute in same terms and on same lines.
(B) Decisions based on justice, equity and good conscience.
(C) Absence of Indian statute law.

1. Rule of stare decisis.

●——**Stare decisis — Supreme Court.** In a proper case, the Supreme Court has inherent jurisdiction to reconsider and revise its earlier decisions. In exercising this inherent power, however, it would naturally like to impose certain reasonable limitations and would be reluctant to entertain pleas for the reconsideration and revision of its earlier decisions, unless it is satisfied that there are compelling and substantial reasons to do so.

When it is urged that the view already taken by the Supreme Court as to the construction of a statutory provision, should be reviewed and revised by it, it may not necessarily be an adequate reason for such review and revision to hold that though the earlier view is a reasonably possible view, the alternative view which is pressed on the subsequent occasion is more reasonable. In reviewing and revising its earlier

decision Supreme Court should ask itself whether in the interest of the public good for any other valid and compulsive reasons, it is necessary that the earlier decision should be revised. When the Supreme Court decides questions of law, its decisions are, under Article 141, binding on all Courts within the territory of India, and so, it must be the constant endeavour and concern of it to introduce and maintain an element of certainty and continuity in the interpretation of law in the country. Frequent exercise by Supreme Court of its power to review its earlier decisions on the ground that the view pressed before it later appears to it to be more reasonable, may incidentally tend to make law uncertain and introduce confusion which must be consistently avoided.

It is not possible or desirable, and in any case it would be inexpedient to lay down any principles which should govern the approach of the Supreme Court in dealing with the question of reviewing and revising its earlier decisions. It would always depend upon several relevant considerations :— What is the nature of the infirmity or error on which a plea for a review and revision of the earlier view is based? On the earlier occasion, did some patent aspects of the question remain unnoticed, or was the attention of the Court not drawn to any relevant and material statutory provision, or was any previous decision of this Court bearing on the point not noticed ? Is the Court hearing such plea fairly unanimous that there is such an error in the earlier view ? What would be the impact of the error on the general administration of law or on public good ? Has the earlier decision been followed on subsequent occassions either by this Court or by the High Court ? And, would the reversal of the earlier decision lead to public inconvenience, hardship or mischief ? These and other relevant considerations must be carefully borne in mind whenever the Supreme Court is called upon to exercise its jurisdiction to review and revise its earlier decisions. These considerations become still more significant when the earlier decision happens to be a unanimous decision of a Bench of five Judges. AIR 1955 SC 661 and AIR 1965 SC 845, Ref.

In the case, it was urged that Supreme Court should revise its view as to construction of Section 66 (4), Income-tax Act 1922, in two earlier decisions, AIR 1959 SC 1177 and AIR 1963 SC 1484 (The latter was a unanimous decision of a Bench of five Judges). The Supreme Court conceded that the alternative view pressed for revising the earlier decisions was a reasonably possible view; but refused to revise the earlier decisions on ground that the earlier view had been followed by the Supreme Court on several occassions and had regulated the procedure on reference proceedings in the High Courts ever since the decision in AIR 1959 SC 1177, and that no reported decision was cited to support the alternative view. Keshav Mills Co., Ltd. v. Commissioner of Income-tax, Bombay, **(1965) 2 SCA 101: 56 ITR 365: (1965) 2 SCJ 75: (1965) 1 ITJ 853: AIR 1965 SC 1636 (1643, 1644, 1645, 1646) (Pt A) (Prs 23, 28, 34).**

●——Stare decisis — Supreme Court — How far bound by its own decisions.

Per Gajendragadkar, C. J., Wanchoo and Raghubar Dayal JJ. :—

The Constitution does not place any restriction on the powers of Supreme Court to review its earlier decisions or even to depart from them and in matters relating to decision of constitutional points which have a significant impact on the fundamental rights of citizens, it would be prepared to review its earlier decisions in the interest of public good. The doctrine of stare decisis may not strictly apply in this context and the said doctrine should not be permitted to perpetuate erroneous decision pronounced by the Supreme Court to the detriment of general welfare. Even so, the normal principle that judgments pronounced by the Supreme Court would be final, cannot be ignored and unless considerations of a substantial and compelling character make it necessary to do so, the Supreme Court should be slow to doubt the correctness of previous decisions or to depart from them.

In such a case the test should be, is it absolutely necessary and essential that the question already decided should be re-opened ? The answer to this question would depend on the nature of infirmity alleged in the earlier decision, its impact on public good and the validity and compelling character of the considerations urged in support of the contrary view if the said decision has been followed in a large number of cases, that again is a factor which must be taken into account. Sajjan Singh v. State of Rajasthan, **(1965) 1 Mad LJ (SC) 57: (1965) SCJ 377: (1965) 1 SCWR 593: (1965) 1 SCA 875: (1965) 1 Andh WR (SC) 57: AIR 1965 SC 845 (855) (Pt E) (Prs 21, 22).**

●——Principles of stare decisis — Applicability in India — Binding effect of decisions of High Court — Supreme Court can reconsider even its own decision — Decision not dissented from for long time — Not immutable.

Mudholkar, J. :— In so far as the principle of stare decisis is concerned, it is nothing more than a precipitate of the notion of legal justice. In other words it is the principle that judicial decisions have a binding character. But in India the position is not quite the same. Here the decision of a High Court is not even always binding upon it in the sense that it can be reconsidered by a Full Bench. In any case, the decision of a High Court has no more than persuasive character in so far as the Supreme Court is concerned In that view the decision of any High Court, even though it may not have been dissented from since the time it was rendered, cannot, in the proper sense of the term be regarded as stare decisis. What could be stare decisis in the Supreme Court would be its own previous decisions. But even here instances are not wanting where, unlike perhaps the House of Lords, the Supreme Court has considered themselves free to go back on previous decisions. Finally, even where a decision has not been dissented from for a long time, but has on the other hand been followed, it is not entitled to be treated as immutable, particularly where it deals only with a question appertaining to the adjective law, such as the law of limitation. Vidyacharan Shukla v. Khubchand Baghel, **(1964) 2 SCA 505: (1964) 6 SCR 129: AIR 1964 SC 1099 (1116, 1117) (Pt F) (Pr 40).**

●——Supreme Court — Powers of — Supreme Court is not precluded from considering the correctness of the decision of the High Court notwithstanding its having held the field for over forty years without question. C. Abdul Shakoor Saheb v. Aru Papa Rao, **(1964) 1 SCJ 168: (1964) 1 Mad LJ (SC) 49: (1964) 1 Andh WR (SC) 49: (1963) Supp (2) SCR 55: AIR 1963 SC 1150 (1158) (Pt J) (Pr 22).**

■——Sharp conflict in views of different High Courts on a given point — Question before Supreme Court to resolve the conflict — Supreme Court must independently construe the provision and divide which of the conflicting views

should prevail — In such a case it would be singularly inappropriate to involve the doctrine of stare decisis and follow the view of the majority of High Courts. **AIR 1961 SC 1795 (1801) (Pt B) (Pr 13).**

● **——Stare decisis — Doctrine of — Applicability.**

Under the stare decisis rule, a principle of law which has become settled by a series of decisions generally is binding on the Courts and should be followed in similar cases. This rule is based on expediency and public policy, and, although generally it should be strictly adhered to by the Courts it is not universally applicable. But previous decisions should not be followed to the extent that grievous wrong may result; and accordingly the Courts ordinarily will not adhere to a rule or principle established by previous decisions which they are convinced is erroneous. The rule of stare decisis is not so imperative or inflexible as to preclude a departure therefrom in any case, but its application must be determined in each case by the discretion of the Court and previous decisions should not be followed to the extent that error may be perpetuated and grievous wrong may result. Where the correctness of the decision has been challenged from time to time and in fact had been reversed and its decision has been considerably impaired by a Privy Council decision, the doctrine of stare decisis is not applicable. Maktul v. Mst. Manbhari, **1958 SCJ 1268: ILR (1958) Punj 2305: 1959 SCR 1099: AIR 1958 SC 918 (922, 923) (Pt B) (Prs 9, 10).**

● **——Principle of stare decisis — Does not involve mechanical adherence to earlier decisions — High Court can differ from earlier decisions by reference to larger Bench.**

The principle of stare decisis is a principle of policy. It is not a mechanical formula of adherence to the latest decision. There must no doubt be certainty about the law but if this certainty leads to the conclusion that an error once having been made in a judgment must be followed in all subsequent cases, then it would be a false certainty.

In India a High Court is not bound to follow its own earlier decision but may depart from it. The departure is done by a Bench of a large number of Judges. When there is a conflict among two decisions of Benches or a Bench does not agree with the decision of another Bench, it refers the case to a Bench of a larger number of Judges. Where, therefore, a larger Bench has been constituted specially to consider which of the two earlier Full Bench decisions should be followed it is the duty of the larger Bench to which the question is referred to consider each of the cases and to decide to the best of its own judgment which of them lays down the sounder law. A decision, even if given by a Full Bench, is not a statute and the effect of overruling a decision is not that of invalidating a statute. Overuling a decision only means reassertion or vindication of the law. State of U. P. v. Firm Deo Dutt Lakhan Lal, **1965 All WR (HC) 546: 1965 All LJ 862: 1965 All Cr R 348: ILR (1965) 2 All 917: AIR 1966 All 73 (79, 82) (Pt C) (Prs 22, 29) (FB).**

——Stare decisis — Two persons prosecuted under same charge — Offences committed in same transaction — Basis of evidence same — Acquittal of one must lead to acquittal of the other on the basis of stare decisis. AIR 1956 SC 415, Foll. **1965 All LJ 11: 1965 All WR (HC) 113: 1965 All Cr R 117: 1966 Cri LJ 2: AIR 1966 All 19 (21, 22) (Prs 6, 7).**

——Stare decisis — Principle of stated. **AIR 1958 All 101 (DB).**

——Long established practice — Upsetting of.

No doubt that there should be finality in the matter but the Court must not lose sight of another salutary rule, that Courts should not be debarred from correcting their decisions in the event of their finding that they had gone wrong. When there is a competition between a rule of expediency and the rule of what may be called absolute justice, then the latter rule should prevail. **AIR 1955 NUC (All) 2294 (DB).**

——Stare decisis.

Points covered and decided by Supreme Court and Full Bench cannot be re-agitated. **1952 RD (HC) 340: 1952 All WR (HC) 599: 1952 All LJ 677: AIR 1953 All 92 (95) (Pt C) (Pr 16) (DB).**

——Stare decisis — Precedent not followed for some time — Weight of.

It is not correct to say that merely because there was no occasion for a Court to follow the precedent of the same Court for some time those decisions should be treated with no respect and should be disregarded. **(1958) 2 Andh WR 527: 1958 Andh LT 1008: AIR 1958 Andh Pra 705 (706) (Pt A) (Pr 6) (DB).**

● **——Application of principle.**

There is always force in the argument of stare decisis and a Court of law should never be in a hurry to later well settled law which may result in disturbing titles based upon the laws as understood by the litigant. Bahubali Vasant Katage v. Gundappa Tatya Duge, **56 Bom LR 501: ILR (1954) Bom 1026: AIR 1954 Bom 451 (456) (Pt D) (Pr 16) (FB).**

——Stare decisis — Civil P. C. (1908), Preamble.

Certainty (as well as justice) is the object of the law, and it is more so when questions of title to property are involved, Law which has been laid down by the Courts and which has been followed by subjects within jurisdiction should not be lightly unsettled.

The principle of stare decisis has been accepted not only in regard to the decisions of the Courts of co-ordinate jurisdiction but also in regard to the decisions of Courts, which have only a conditional authority as precedents.

Even a case where the appellate Court would be normally entitled to overrule a decision reached by a subordinate Court it would apply to principle of stare decisis and not overrule the same after lapse of time subjects acting upon that decision and the like considerations making it more expedient for the appellate Court not to unsettle the law which had been pronounced at one time and acted upon by the subjects. **53 Bom LR 192: ILR (1951) Bom 576: AIR 1951 Bom 57 (66, 67) (Pt C) (Prs 22, 23) (DB).**

● **——Long courses of decisions — Effect of.**

The Court will not take a contrary view even if it be more logical where by doing so it would upset a series of decisions spread over a considerably long period and thereby offend against the doctrine of stare decisis which is always more important and more to be respected than any logical doctrine resulting from any particular view as to the strict law. Sakarchand v. Narayan, **ILR (1951) Bom 217: 52 Bom LR 888: AIR 1951 Bom 10 (12, 13) (Pt B) (Pr 10) (FB).**

——Stare decisis.

If a particular procedure has been held and declared to be the correct procedure by judicial decisions speard over almost half a century contrary it would not be proper to seek to re-open the question over again, unless some very strong reasons could be made out. **AIR 1954 Cal 389 (392) (Pt A) (Pr 11) (DB).**

●——It would not be proper to unsettle a well entrenched practice and create hardships. C & I. Bank v. M. S. Ali Khan. **ILR (1955) Hyd 79: AIR 1956 Hyd 65 (70) (Pt B) (Pr 13) (FB).**

■——**Principle of stare decisis — Applicability.**

Per Monohar Pershad J.:— The principle of stare decisis is applicable only where the effect of departing from an establishment rule of decision will be to unsettle transactions which have been previously supposed to be finally settled. That principle does not come into operation where the result of departing from an incorrect view of law is merely this, that in dispute on a subject to which the law applies, a new set of defence would be put forward in the Courts. Case law referred.

Per Alikhan J.:— The principle of stare decisis can be departed from when there is a clear balance of convenience and when it does not upset transactions. Case law referred. Basappa v. Parwatamma, **ILR (1952) Hyd 245: AIR 1952 Hyd 99 (102, 103, 111) (Pt B) (Prs 6, 40) (FB).**

●——**Overruling of cases — Decisions unchallenged for many years.**

Per Qumar Hasan J.:— The Courts must always hesitate to overrule decisions which are not manifestly erroneous and mischievous, which have stood for many years unchallenged and which from their nature may reasonably be supposed to have affected the conduct of a large portion of the community in matters relating to rights of property. AIR 1951 Bom 10, Rel. on. Basappa v. Parwatamma, **ILR (1952) Hyd 245: AIR 1952 Hyd 99 (107) (Pt C) (Pr 24) (FB).**

——**Stare decisis.**

The principle of stare decisis cannot be applied when the view taken in a series of decisions comes in conflict with a dictum of the Supreme Court, and when it does not stand the test of reason. **1960 Jab LJ 222: 1960 MPLJ 879: 1960 MPC 441: AIR 1960 Madh Pra 237 (238) (Pt B) (Pr 10).**

——**Stare decisis— Applicability.**

Held, on facts that (i) according to the State of law as understood before 1897 when A died, there is no doubt that Judicial Commissioner's Court of Nagpur specifically excluded the rule of survivorship and coparcenary in the matter of devolution to tenancy holdings. As such it could not be said that G and S sons of A who were members of a joint family inherited the suit property as joint tenants after their father's death. They could only inherit as tenants in common, with the result that, upon the death of G, his interest would devolve on his daughters and not on the surviving joint coparcener S. (ii) From the circumstances in the case it was clear that the parties for a long time from the year 1897 to the year 1954, acted on the view of the law as declared by the Court of the Judicial Commissioner. Otherwise there was no occasion for S to give to the daughters of G their share of the crop produce. Therefore, this case would be a suitable case for the application of the principle of stare decisis so as not to unsettle the vested and settled rights of the parties on account of a subsequent authoritative interpretation of the law in AIR 1941 FC 72 or on account of the later C. P Tenancy Amendment Acts introducing the rule of survivorship. Hence the question whether G and S inherited the tenancy lands of their father before 1897 as tenants in common or as joint tenants ought to be decided on the principle of stare decisis and not on the principle of the general Hindu law or the later exposition of the Hindu law by the Federal Court in AIR 1941 FC 72. (iii) Plaintiffs, therefore, became tenants in common along with the daughters of S and as such they had a right to claim partition to the extent of their half share. **1959 MPC 400: 1959 MPLJ 1011-: 1960 Jab LJ 729: ILR (1959) Madh Pra 43: AIR 1959 Madh Pra 301 (303, 304) (Pt A) (Prs 13, 14, 19) (DB).**

——**Stare decisis — Principle of — Equitable doctrine on which it is based.**

The principle of stare decisis is based on the equitable doctrine that parties act on the basis of the view of the law as declared by the law Courts from time to time and if the law has been declared in a particular way by the law Courts for a long time, which has been the accepted view of that Court, the settled rule should not be unsettled, merely because subsequently a different view of the law is taken or because the law is amended. **1959 MPC 400: 1959 MPLJ 1011: 1960 Jab LJ 729: ILR (1959) Madh Pra 43: AIR 1959 Madh Pra 301 (303) (Pt B) (Pr 12) (DB).**

●——**Stare decisis — On change in law, contrary decision of superior Court, or subsequent discovery of serious error, even Full Bench decisions may be re-considered — Judge taking different view is no ground for re-consideration.**

It may be necessary at times to re-consider even a Full Bench decision, for example, owing to a change in the law or owing to a contrary decision of a superior Court or some palpable and serious error affecting the decision discovered subsequently; but such occasions are very rare. But no Judge can ask for re-consideration of such a case merely because he happened to take a different view. Dagdu v. Tulsiram, **(1950) 1 Madh BLR 81: AIR 1950 Madh B 31 (34) (Pt B) (Pr 14) (FB).**

——**Old judicial precedents — Blind adherence to them is not proper.**

However valuable old judicial precedents may be, a blind and devotional adherence to them without proper adopting to the present realities of living conditions may lead to miscarriage of justice. **1962 Mad WN 668: 75 Mad LW 676: (1962) 2 Mad LJ 490: AIR 1963 Mad 103 (104) (Pt B) (Pr 5).**

■——**Stare Decisis.**

Per Raghava Rao J.:— The Rule of Stare Decisis only means that where a rule has become settled law it is to be followed although some possibe inconvenience may grow from a strict observance of it, or although a satisfactory reason is wanting, or although the principle and the policy of the rule may be questioned. The rule can bear no application to a situation in which there is conflict between two Full Bench decisions of equal strength. Permanayakam Pillai v. Sivaraman. S. T. **1952-1 Mad LJ 308: ILR (1952) Mad 835: AIR 1952 Mad 419 (453) (Pt C) (Pr 80) (FB).**

——**Section based on customs and manners — Change in customs — Old precedents cannot be followed — Duty of Judges — Civil P. C. (1908), Section 132.**

When the section itself is based on customs and manners of the country which cannot but change it is extremely difficult to fall back upon judicial precedents when customs and manners in public opinion as regards them were widely different. If the Judges continue to follow judicial precedents of several years ago in the matter of interpreting a section like Section 132, Civil P. C., without keeping abreast of changing times they shall be exposing themselves to the criticism of being janitars of the purda system and acting as impediments in the way of the eman-

cipation of women from its confines. **1949 Mad WN 678: (1949) 2 Mad LJ 517: AIR 1950 Mad 151 (153) (Pt B) (Pr 7).**

[**Overruled** on another point in AIR 1951 Mad 311.]

——Well settled decision — Transaction entered on its basis — Setting aside decision not desirable. See Registration Act (1877), Section 17 (2) (vi). **AIR 1963 Mys 332 (DB).**

——Position of law which has held the field since long — Court will decline to disturb that position even if it is satisfied that the position is not correct — There should be finality in law. **38 Mys LJ 104: ILR (1959) Mys 102: AIR 1960 Mys 176 (177) (Pt B) (Pr 4) (DB).**

——Stare Decisis — Law laid down in old decision neither unjust nor opposed to public interest — Change likely to affect number of transactions — Re-opening of law by reference to Full Bench is improper.

When there is nothing in the view of the law adopted in a decision which is in itself unjust or opposed to the public interest, and the case was decided many years ago so that it is not improbable that many transactions have been made in the light of that decision, it would be improper to re-open such a question by a reference to a Full Bench and so possibly create confusion and unsettlement: 40 Mys HCR 435, Foll. **55 Mys HCR 263: AIR 1950 Mys 13 (17) (Pt C) (Pr 13) (DB).**

——Reference casting doubt on correctness of a reported decision.

In the absence of conflict of authority, a reference, casting a doubt on the correctness of a reported decision of the Court, but not formulating a reasoned criticism of the view accepted therein or offering an alternative to it, disturbs the comity of the Court. This would only lead to an uncertainty of the law and should be avoided. **ILR (1956) Nag 630: AIR 1956 Nag 115 (117) (Pt C) (Pr 11) (DB).**

●——Stare decisis — Principle of — Grant of leave to appeal under Letters Patent — Effect of.

Where Judges following the decision of a single Judge think fit to grant leave for appeal under the Letters Patent, the appellate Court cannot on the principle of stare decisis refuse to examine the foundation on which the Court below rested its decision. The very object of granting leave to appeal is to bring the decision under the review of an appellate Court. Ramdeo v. Mst. Gangubai, **ILR (1951) Nag 830: 1952 Nag LJ 1: AIR 1952 Nag 51 (54) (Pr 25) (FB).**

——Stare decisis — Previous F. B. decision of High Court wrong but followed by many decisions — Many transactions and rights in the state adjusted and determined on basis of the long established authority — The decision of the Full Bench must be followed. **AIR 1958 Pat 399 (400, 401, 404, 405) (Pt A) (Prs 5, 8, 9, 24, 30, 31, 34) (DB).**

●——Stare decisis — Authority of long established decisions.

A Court should not depart from the authority of long established decided cases unless the decisions are manifestly or plainly wrong. Bhagwat Sharma v. Baijnath Sharma, **1954 BLJR 313: ILR 33 Pat 423: AIR 1954 Pat 408 (414) (Pt J) (Pr 18) (FB).**

——Stare decisis — Value — Precedents.

Binding judicial decisions or stare decisis has rightly been described to constitute a sort of a viaduct over which law travels in transporting the cargo of justice. Accordingly whenever a doubt is raised, prudence and sense of duty dictates, that the piers of this viaduct must be tested to make certain that they are sound, strong, free from serious infirmity and capable of properly supporting the weight. Adopting of such a course also tends to strengthen the citizens' faith in our judicial process. This rule of practice is of considerable value in a set-up controlled by rule of law. **1965 Cur LJ 330 (Punj).**

2. Application of precedents — Duty of Court.
(A) Extent of authority.
(B) Decision on other enactments.
(C) Interpretation of precedent.
See also Note 2 (A).
(D) Obiter dicta and observations.
See also Note 3 (B), 4 (A), 6 (A) and 8 (D).
(E) Decision on construction of document and questions of facts.
(F) Decision on concession or assumption.
(G) Ratio decidendi.
(H) Overruling previous decision — Effect.

2. Application of precedents — Duty of Court.

●——Binding effect of decisions.

Per Majority:— The binding effect of a decision does not depend upon whether a particular argument was considered therein or not, provided that the point with reference to which an argument was subsequently advanced was actually decided. Somawanti v. State of Punjab, **(1963) 1 SCA 548: (1963) 33 Com Cas 745: (1963) 2 SCR 774: (1963) 2 SCJ 35: (1963) 2 Mad LJ (SC) 18: (1963) 2 Andh WR (SC) 18: (1963) 2 SCR 774: AIR 1963 SC 151 (160) (Pt B) (Pr 22).**

——Constitution of India, Articles 22 (1) and 22 (5) — Decisions under Article 22 (5) will be of much assistance in interpreting Article 22 (1). **1956 Cri LJ 13: AIR 1956 All 56 (59) (Pt B) (Pr 19) (DB).**

——Practice contrary to law.

Practice contrary to law is no warrant for its validity. It is the practice which is vitiated and not the law that is submerged by a wrong practice. **1952 All LJ 641: 1953 Cri LJ 186: AIR 1953 All 24 (24) (Pt B) (Pr 5).**

——Revenue decisions — Mere omission on the part of the Revenue Board U. P. to include a decision among Selected Decisions would not detract its value. **1952 All WR (Rev) 3: 1951 RD (BR) 257.**

——Plaintiffs not parties to judgment which covered dispute as to validity of resumption of certain Tope Inam — Decision is not binding as res judicata but can be relied on as precedent. See Civil P. C. (1908), Section 11. **ILR (1963) Andh Pra 517.**

——Ipse Dixits — Value of.

Ipse dixits in casual orders of Courts passed in a summary disposal of matters, are hardly of any assistance to judges in deciding cases on their merits. **1961 Andh LT 404: AIR 1961 Andh Pra 461 (464) (Pt C) (Pr 10).**

——Authority of — Precedent cannot be pressed into service in support of proposition which it does not expressly lay down. **AIR 1955 NUC (Andh) 15.**

——Authority of — Method of application — Facts of case should justify application of a ruling. **AIR 1955 NUC (Assam) 4233 (DB).**

——Applicability.

It is to be remembered that a decision in a particular case is given in the context of the

particular facts of that case. If the said decision is taken out of that context and grafted upon a set of different facts, difficulties might arise. **59 Bom LR 449.**

——Binding nature — The binding nature of the finding on a point of law does not depend upon the findings being incorporated into a decree. **(1965) 6 Guj LR 177: ILR (1965) Guj 277: AIR 1966 Guj 40 (44, 45) (Pt C) (Pr 5).**

——Binding effect — No judgment except that of Supreme Court is binding on High Court Judges. **(1963) 4 Guj LR 609: AIR 1963 Guj 175 (177) (Pt B) (Pr 11).**

——Mere precedents are not by themselves a sufficient guide; the wordings of the sections are to be examined with thoroughness and if on a reasonable construction a more desirable and equitable view can be taken, it should be taken and mere technicalities should not be allowed to prevail. **1952 Cri LJ 1425: AIR 1952 Madh Bha 161 (163) (Pt B) (Pr 16).**

[**Overruled** on another point in AIR 1954 Madh Bha 113.]

——Value of.

Precedents are only stepping stones and not halting places. **(1955) 1 MLJ 25: 67 Mad LW 420: AIR 1954 Mad 713 (722) (Pt G) (Pr 46) (DB).**

[**Overruled** on another point in AIR 1956 Mad 337.]

——Courts do not create law, only declare it — Reference declared illegal by certain decisions — Reference does not become illegal because of the decisions.

It is obvious that Courts only declare the law, which is deemed to have existed always and that they cannot create a law when pronouncing judgments, much less alter it.

Certain accused who were prosecuted for lock-out during the pendency of a reference of their dispute to the Industrial Tribunal, pleaded on the basis of certain subsequent High Court rulings that the reference was vague and illegal and hence they committed no offence by locking out their concern. It was contended that the accused could not rely on decisions which were subsequent to their alleged offence;

Held, that the reference was illegal and void even when it was made and even before the Court's rulings were issued proving it to be illegal and void and that beings so, it was clear that accused did not commit any offence. **62 Mad LW 866: (1949) 2 Mad LJ 800: 51 Cri LJ 589: 1949 Mad WN 842: (1949) 1 FJR 242: AIR 1950 Mad 231 (233) (Pt C) (Pr 4).**

——Value of.

Per Dua, J.:— Precedents are employed, as is often said, only to discover principles and principles are employed only to discover justice. To discover the true ratio decidendi is, therefore, ethical and is creative evaluation as opposed to mechanical application of a precedent. A rule of law defined by precedent in its further extension is essentially subject to review in the light of varying analogies and differences of facts and concepts involved in new cases. A rule of law acted upon by a Judge while deciding a controversy, is rarely, if at all stated with the completeness of a statutory draftsman, confining his successors to mere interpretation, with the result that it is always open to later Courts to consider to what extent the earlier judicial statement can safely be applied to materially different facts. Santa Singh v. Rajinder Singh, **ILR (1965) 2 Punj 97: 1965 Pun LR (Supp) 1: AIR 1965 Punj 415 (427, 430) (Pt F) (Prs 42, 52) (FB).**

——Reliability — Precedents, it may be pointed out are authorities on their own facts and on the provision of law which they are called upon to construe for solving the particular problem facing the Court — Not everything contained in a judicial decision is a source of law for subsequent cases — If the facts are different and the legal provision is differently worded and designed or meant to achieve a different object, then isolated passages from such earlier decisions instead of assisting and guiding the subsequent Court in judicial thinking on the right lines may tend to mislead it. **ILR (1964) 2 Punj 450.**

——Importance of respecting judicial precedents.

A single Judge is bound by the decision of a Bench of two or more judges and a Division Bench is bound by the decision of another Division Bench and he cannot ignore or disregard the earlier decision, unless such decision has been overruled by a Full Bench or the Supreme Court. Subordinate Courts are bound by the decisions of the High Court. Jaiwant Rao v. State of Rajasthan, **1960 Raj LW 687: ILR (1960) 10 Raj 1703: AIR 1961 Raj 250 (265) (Pt F) (Pr 51) (FB).**

——Judgment of High Court — Value as judicial precedent — Advocate has right to apply for its copy — Judgments being public records their copies should be available as a matter of right to all persons prepared to pay the prescribed fee — Judicial decisions form important part of Indian law and the authority of precedent is so potent and pervading in Indian Courts that any restriction on the access to those decisions cannot but affect adversely the proper administration of justice. See High Court Rules and Orders — Civil Rules of Practice (Travancore-Cochin), Rule 212. **AIR 1957 Trav-Co 31 (DB).**

2 (A). Extent of authority.

——Decision on section different from one under scrutiny — Cannot be safe guide.

Authorities on a section different from the one under scrutiny cannot be safe guides in determining the question that the Court has to answer. **1962 All LJ 811.**

——Authority of.

It is trite proposition that each case is authority for itself and no more; unless a case lays down a broad proposition of law it cannot have even a persuasive value. **ILR (1959) 2 All 25: 1959 All LJ 536: AIR 1959 All 463 (464) (Pt A) (Pr 4) (DB).**

——Authority of decision.

Every case is an authority for the proposition that it lays down. **1959 All LJ 167.**

——Evidentiary value of — Reliance on facts — Proof of.

The ruling of a case is an authority for the proposition of law contained therein. If it is sought to rely on any facts contained in the judgment of a case published in a Law Report then the party should file that as a piece of evidence in the case in order to enable the other side to file any documents in rebuttal of the same.

Held, that in the circumstances of the case, the party filing a judgment in its support could not rely on the admission of certain fact contained therein. **1952 All LJ 310: AIR 1953 All 378 (379) (Prs 5, 6).**

——Judgment — Authority.

The exposition of law in a judgment must be qualified by the particular facts of the case. **1950 All LJ 673: ILR (1952) 1 All 607: AIR 1950 All 617 (618) (Pt B) (Pr 6) (DB).**

——Extent of authority — A case is an authority for what it actually decides and the general observations made in it should be read with reference to its own facts. **51 Cri LJ 571: 1950 All LJ 155: ILR (1950) All 1256: AIR 1950 All 167 (173) (Pt B) (Pr 17) (DB).**

——Decisions on old law upon interpretation of expressions in the old law have no application to interpret the new law, in so far as they were based upon those expressions in the old law. See Income-tax Act (1922), Section 34 (1) (b) (as amended in 1948). **AIR 1960 Andh Pra 92 (DB).**

——Authority of.

Every decision is authority only for what it actually decides and the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. **ILR (1959) Andh Pra 531: (1959) 2 Andh WR 341: AIR 1959 Andh Pra 512 (515) (Pt B) (Pr 25) (DB).**

——Value of overruled decision.

A precedent overruled is definitely and formally deprived of all authority. It becomes null and void, like a repealed statute, and a new principle is authoritatively substituted for the old. Salmond's "Jurisprudence", 10th Edn., p. 189, Foll. **AIR 1957 Andhra Pra 447 (449) (Pt B) (Pr 7).**

——Authority of.

Decisions cannot be pressed into service in support of propositions which they do not expressly lay down. **AIR 1955 NUC (Andh Pra) 15.**

——Authority of.

A decision is an authority and is valuable as a precedent only on the facts on which it is based, and where the facts are different, they are of no avail to the assessees. **(1957) 8 STC 258: AIR 1957 Assam 31 (33) (Pt B) (Pr 11) (DB).**

● **——Value of — Extension of particular decision — Permissibility.**

A precedent is a precedent for the case which it decides, and the jurisprudence which believes in law being made by precedents does not accept the proposition that there should necessarily be a logical extension of a particular decision given by the Courts. Narayan Vyankatrao v. Ramchandra Narayanrao, **59 Bom LR 763: 1957 Nag LJ 267: ILR (1957) Bom 724: AIR 1957 Bom 146 (146) (Pt B) (Pr 3) (FB).**

——Decisions under another statute — Reliance on — Propriety.

It is never safe to rely on decisions under one statute for construing the language used in another statute. **58 Bom LR 572: (1956) 7 STC 497: ILR (1956) Bom 898: AIR 1956 Bom 673 (674) (Pt C) (Pr 4) (DB).**

——Decision of highest Court — Authority of — Corollary following from it — Force of.

A decision of the higest Court is a decision which is true with regard to the facts on which that decision is based. Logical corollary may follow from that decision and a Court may be asked to accept the logical corollary and to extend the principle of that decision, but the binding nature of the decision depends upon what is the ratio which applies not only to the facts in that particular case but would be applicable to other facts as well. It is perfectly true that no two decisions can have identical facts and it is not in that sense that one decision should be distinguished from another. But once the ratio is discovered then the case is not an authority for a proposition that may seem to follow logically from it. **58 Bom LR 709: ILR (1956) Bom 693: (1956) 30 ITR 753: AIR 1956 Bom 586 (590) (Pt C) (Pr 10) (DB).**

● **——Finality of decision.**

Decision of a Full Bench or of any Court for the matter of that, is binding provided it is a considered decision. But when a decision has been given without the pros and cons of the question being considered, it cannot posibly be urged that such a decision acquires a finality which cannot be interfered with by any subsequent decision. Parappa Ningappa Khaded v. Mallappa Kallappa, **58 Bom LR 404: ILR (1956) Bom 546: AIR 1956 Bom 332 (333) (Pt A) (Pr 6). (FB).**

——Appeal dismissed by Tribunal as barred by Limitation — Decision contrary to law declared by High Court in subsequent judgment — Decision of Tribunal must be considered to be wrong — When decision is given by High Court on question of law, the Court does not purport to legislate but only declares the law. **AIR 1955 NUC (Bom) 5303 (DB).**

● **——Precedent — Point not argued — Inference of decision.**

It is not proper to infer from a judgment a decision on a point which was never argued or considered. Tarak Chandra Mukherjee v. Ratan Lal Ghosal, **61 Cal WN 263: AIR 1957 Cal 257 (265) (Pt H) (Pr 21) (FB).**

——Authority of decision — Case is only authority for what it actually decides and not for the proposition that seems to follow logically from it. **AIR 1955 NUC (Cal) 5617.**

——Value of judicial precedent — Case is only an authority for the proposition it decides and not for what appears to follow from it. **AIR 1955 NUC (Cal) 5559.**

——Failure to notice ruling authority — Decision loses its binding force.

A decision, which fails to notice the ruling authorities of the Court on the point, loses much of its binding character and has little persuasive force. In this view, a Division Bench decision on a point, which has not noticed ruling authorities on the point, is not binding on the Single Judge. **90 Cal LJ 25: AIR 1953 Cal 1 (6) (Pt A) (Pr 33).**

——Each case is an authority for the particular facts arising therein and cannot govern a different set of facts — Civil P. C. (1908), Pre. **55 Cal WN 333: AIR 1951 Cal 129 (131) (Pt B) (Pr 10).**

——Authority of — Decision merely based on concession of a pleader — Decision is not binding. **54 Cal WN 940: ILR (1951) 2 Cal 186: AIR 1950 Cal 473 (474) (Pt B) (Pr 13) (DB).**

——Decision based on weight of authority — Value of. See Constitution of India, Article 219. **AIR 1963 Guj 291.**

——Authority of decision — Decision is authority for point it actually decides.

A decision is only an authority for the point it actually decides, and general propositions propounded in the judgment should be looked into in the light of the particular circumstances of that case, and they should not be applied by implication to questions which had not arisen in that case. **ILR (1955) Hyd 362: AIR 1955 Hyd 150 (153) (Pt D) (Pr 11) (DB).**

——Authority of a decision — Case is an authority for the case it decides — However weighty and accurate a general observation or reasoning may be, it may yet be a comprehensive statement with regard only to the laws, the operation of which is attracted by the facts and the contentions of that case. **AIR 1955 NUC (Hyd) 5624 (DB).**

——**Decision based on repealed law.**

Decision laying down particular procedure based on repealed Code, has no binding effect. **AIR 1955 NUC (Hyd) 2084.**

●——**Ruling not taking into consideration certain provision of law — Binding nature.**

Where a certain point of law is not brought to the notice of the Court in determining the cause, the decision is not a precedent calling for the same decision in a similar case in which the point is brought before the Court. Hence, where the ruling of the Board of Judicial Advisers (Kashmir) has not taken into consideration a certain provision of law, the ruling is not binding on the High Court of Jammu and Kashmir. Ghenam Rasul v. State of Jammu and Kashmir, **AIR 1956 J & K 17 (22) (Pt D) (Pr 25) (FB).**

[**Reversed** on another point in AIR 1961 SC 1301.]

●——Precedents — Jammu and Kashmir — Decision of His Highness in summary mutation preceedings, is not binding on any Civil Court. Mst. Saja v. Ahad Sheikh, **(1950) 9 JKLR 104 (FB).**

●——Applicability — Every judgment must be read as applicable to the particular facts proved or assumed to be proved. 1901 AC 495 and AIR 1940 PC 230, Rel. on. Chacko Mathew v. Ayyappan Kutty, **1962 Ker LJ 177: ILR (1962) 1 Ker 242: 1962 Ker LT 61: (1962) 1 Ker LR 413: AIR 1962 Ker 164 (178) (Pt B) (Pr 63) (FB).**

——**Judicial decision — Authority of.**

A case can be regarded as authority for the real question that it decides therein. 1901 AC 495, Rel. on. **1965 Madh BLJ 609: Madh BLR 1956 Civil 447: (1957) 1 Lab LJ 76: ILR (1956) Madh Bha 307: AIR 1956 Madh Bha 183 (191) (Pt F) (Pr 15) (DB).**

●——**Circumstances which lessen authority of precedent.**

The following circumstances tend to lessen the authority of a precedent:— (a) Where the question passes sub silentio without argument at the bar; (b) Where the reasoning is defective; and (c) Where its result is embarrassing or unjust. Chandulal v. Baboolal. **ILR (1952) Madh Bha 1: AIR 1951 Madh Bha 171 (173, 174) (Pt C) (Pr 10) (FB).**

——**Application of decision.**

Every judgment must be read as applicable to the particular facts proved or assumed to be proved. The generality of the expressions which may be found in a judgment are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. (1901) AC 495, Rel. on. **(1965) 57 ITR 213: 1965 MPLJ 456.**

——**Binding effect — Extent of.**

It is not always safe logically to extend a ratio to be deducted from a particular case decided by a particular tribunal. A decision is good with regard to the facts found in a particular case and the principle that emerges on a consideration of those facts. Different facts may lead to a different decision and it is not proper to apply a principle based on the facts of one case to the facts of another case merely because relentless logic may so require. AIR 1950 Bom 360 (FB), Foll. **1959 Jab LJ 424: 1959 MPLJ 875: 1959 MPC 635: 1960 Cri LJ 79: AIR 1960 Madh Pra 12 (14) (Pt B) (Pr 13) (DB).**

——**Decision — Binding force of.**

A decision does not lose its binding force simply because it does not give or discuss the provision of law under which a particular order can be made. **70 Mad LW 212: 1957 Mad WN 197: AIR 1957 Mad 353 (354) (Pt C) (Pr 5).**

——Authority of — Each case must be decided on its own circumstances. **AIR 1955 NUC (Mad) 3159.**

——**Authority of case.**

A case is an authority for what it decides and not for what might be deduced from it. **ILR (1955) Nag 108: (1955-56) 8 FJR 67: (1955) 2 Lab LJ 220: AIR 1955 Nag 148 (152) (Pt B) (Pr 24) (DB).**

●——**Authority of decision — Per incuriam decision — Binding nature.**

When a decision is given by a Court per incuriam it is not binding on a subsequent Court. (1944) 1 KB 718 and opinion of Denning, LJ (1950) 1 All ER 804, Rel. on. Kanglu Baula v. Chief Executive Officer, **ILR (1954) Nag 875: AIR 1955 Nag 49 (64) (Pt G) (Pr 47) (FB).**

●——**Value of.**

Per Sinha, C. J.:— A case is an authority for what it actually decides and not what may logically follow from that decision. Rukhamabai v. Krishnarao Shankararo, **1952 Nag LJ 450: ILR (1952) Nag 243: AIR 1952 Nag 145 (153) (Pt D) (Pr 43) (FB).**

——**Precedents — Retrospective operation — Applicability of principle in regard to statutes.**

When legislation is amended except in matters procedural the amendment is not retrospective unless a specific provision therefor is made, and interests acquired under the Act as it stood before the amendment are not disturbed, this principle is applicable in respect of the law as laid down by highest judicial authority. Where decree-holder had obtained his final decree for foreclosure and had acquired a definite and absolute interest based on the view of the law stated by the highest tribunal in ILR (1942) Nag 357 at the time, which the Court granting the final decree was bound to follow, the right so obtained cannot be disturbed by subsequent overruling of the decision by a Full Bench (AIR 1944 Nag 289) during the pendency of the appeal. **AIR 1951 Nag 433 (433, 434) (Pr 3).**

——Precedents — Value of — Decision not involving determination of principle is useless as precedent. **ILR (1951) Cut 576: 18 Cut LT 207: 1953 Cri LJ 737: AIR 1952 Orissa 99 (104) (Pt D) (Pr 19) (DB).**

——Case is an authority for what it actually decides and not for what logically follows from it. **ILR 29 Pat 381: AIR 1950 Pat 309 (311) (Pt D) (Pr 6) (DB).**

●——Ratio and reasoning of previous decision not shown erroneous—Decision could not be overruled though another view is equally possible view. **1965 Cur LJ 598: 67 Punj LR 849: ILR (1965) 2 Punj 480: AIR 1966 Punj 36 (FB).**

——**Authority of —Logical extension.**

A precedent is an authority on its own facts and the jurisprudence which believes in law being made by precedent does not accept logical extension of the particular decision more so when the consequences following such extension are not only inconvenient but deprive a citizen of a valuable right. **63 Punj LR 107: ILR (1961) 1 Punj 96: AIR 1961 Punj 8 (10) (Pt B) (Pr 11).**

——**Authority of the case — Extent of.**

The observations in decided cases must be read in their own context and must not be considered in isolation or detached from and taken out of their context. A precedent is an authority on its own facts and to understand and apply the ratio of a decision it is necessary to see what were the facts on which the decisioin was given

and what was the point which had to be decided **63 Punj LR 308: ILR (1960) 2 Punj 468.**

——Judgment — Extent of authority — (Civil P. C. (1908), Preamble).

Every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there, are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. 1901 AC 495, Rel. on. **ILR (1957) Punj 98.**

——'Ex parte' judgment — Value of.

An ex parte judgment of the High Court whether it is an instance of custom or opinion on a question of law does not become less valuable merely on the ground of the absence of a respondent. **54 Pun LR 255: AIR 1952 Punj 356 (359) (Pt C) (Pr 23).**

——Judgment of Court — Extent of authority as precedent..

Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there, are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found.

Further, a case is only an authority for what it actually decides and cannot be quoted for a proposition that may seem to follow logically from it. 1901 AC 495, Rel. on. **1963 Raj LW 236: (1963) 2 Lab LJ 187: ILR (1963) 13 Raj 638.**

●——Value of.

Per Dave, J. :— Every judgment must be read as applicable to the particular facts proved or assumed to be proved. The generality of the expressions which may be found there, are not intended to be expositions of the whole law, but governed or qualified by the particular facts of the case in which such expressions are to be found. The general principle equally applies to the judgment of the Supreme Court. AIR 1940 P C 230 and 1901 AC 495, Foll. State of Rajasthan v. Shamlal, **1960 Raj LW 257: ILR (1960) 10 Raj 652: AIR 1960 Raj 256 (270) (Pt E) (Pr 27) (FB).**

——Authority of decisions — Judgment must be read as applicable to facts proved. **AIR 1955 NUC (Raj) 4051 (DB).**

2 (B). Decision on other enactments.

●——Cases on construction of statute — Cases on the construction of one statute are rarely of value in construing another statute, for each case turns on the langage with which it is concerned and statutes are not often expressed in the same language. Ahmedabad Manufacturing and Calicloth Printing Co., Ltd. v. S. G. Mehta, **(1963) Supp 2 SCR 92: (1963) 48 ITR (SC) 154: (1963) 1 SCJ 491: (1963) 1 ITJ 328: AIR 1963 SC 1436 (1443) (Pt C) (Pr 20).**

●——Decision construing Act — Value in construing another Act.

It is well settled that observations made by a Court with reference to the construction of one statute cannot be applied with reference to the provisions of another statute which is not in pari materia with the statute which forms the subject-matter of the previous decision. Lila Vati Bai v. State of Bombay, **1957 SCJ 557: 1957 SCR 721: 59 Bom LR 934: 1957 SCA 465: AIR 1957 SC 521 (527) (Pt B) (Pr 9).**

——Value of — Power of Courts of law to overrule and set aside.

A decision under an Act cannot be a safe guide for the decision of a question under other Act when the provisions in the two statutes are not in pari materia. **60 Bom LR 489: 1958 Nag LJ 165: (1958) 1 Lab LJ 751: (1958-59) 14 FJR 411: ILR (1959) Bom 188: AIR 1958 Bom 332 (335) (Pt C) (Pr 14) (DB).**

[**Reversed** on another point in AIR 1960 SC 1068.]

—— Relying on rulings based on provisions of law not in pari materia, especially when provisions of law under consideration are quite clear is not proper. **AIR 1963 Him Pra 49 (52, 53) (Pt C) (Pr 26).**

●——Decisions under one enactment can in the very nature of things be of little or no assistance for the decision of the question under another enactment. N. K. Dharmdas v. State Transport, **1962 Ker LT 505: ILR (1963) 2 Ker 253: 1962 Ker LJ 1133: AIR 1963 Ker 73 (74) (Pt B) (Pr 9) (FB).**

——Finding on question of law for the purpose of one statute — No bar to examination of that question in context of another statute.

A finding on a question of law for the express purpose of one of the statutes need not necessarily conclude the question when it is examined in the context of another statute. **1962 Mys LJ (Supp) 49: ILR (1961) Mys 807: AIR 1963 Mys 66 (72) (Pt C) (Pr 16) (DB).**

——Decision of Madras High Court on interpretation of Madras Hindu Religious Endowments Act 2 of 1927 will be helpful in construing the word "dispute" in Orissa Hindu Religious Endowments Act 2 of 1952, which Act is modelled on the Madras Act. See Orissa Hindu Religious Endowment Act, 1951 (2 of 1952), Section 36 (1). **AIR 1957 Orissa 180 (DB).**

——Clauses of Article, Article 133 (1) are independent entities — Earlier decisions under Section 110 of Civil P. C. as to the precise meaning and application of the wording of the section must now be read subject to this vital difference. See Constitution of India, Article 133 (1). **AIR 1956 Raj 169 (DB).**

2 (C). Interpretation of precedent.

See also Note 2 (A).

——Construction — Observations of Courts are not statutory enactments — They are to be understood with reference to facts of the case. **AIR 1955 NUC (All) 3304 (DB).**

●——Observation of judge — Interpretation.

Observations of judges are not to be construed as words of a statute. They are always to be construed with reference to the facts of the particular case in which they were made. **ILR (1952) 2 All 605: 1952 All LJ 457: 1952 All WR (HC) 398: AIR 1952 All 942 (949) (Pt C) (Pr 35) (FB).**

[**Overruled** on another point in AIR 1961 SC 1795.]

——Observations in a case have to be read along with facts thereof. **1952 All WR (HC) 284: 1952 All LJ 293: ILR (1953) 1 All 29: AIR 1952 All 746 (747) (Pt A) (Pr 7) (DB).**

——Judgment — Interpretation of — While interpreting every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. Further, a case is only an authority for what it actually decides. It cannot be quoted for

a proposition that may seem to follow logically from it. (1901) AC 495, Foll. **60 Bom LR 279: ILR (1957) Bom 218.**

——General observations which are to be found in the various authorities have got to be construed with reference to the facts and circumstances of the cases in which they have been made. **52 Bom LR 643: AIR 1951 Bom 249 (251) (Pt B) (Pr 2).**

——Construction of decision.

A judicial decision is not to be construed like a statute. **(1953) 24 ITR 70: 92 Cal LJ 94: AIR 1954 Cal 225 (232) (Pt G) (Pr 24) (DB).**

——Passage in judgment has to be read in its context.

The words in the judgment must be read in the context in which they are used and in the context of the point with which the judge was dealing. **(1962) 3 Guj LR 512.**

——Judgment of Supreme Court — Binding authority —Judgment should be read as a whole. **AIR 1965 Pat 124.**

——Authority of — Construction of decision.

Decisions have to be read in the light of the facts of each particular case. **1955 BLJR 506: ILR 34 Pat 767: AIR 1955 Pat 499 (502) (Pt D) (Pr 14) (DB).**

●——Authority of — Judicial declaration — Effect.

A judicial declaration of the unconstitutionality of a statute neither annuls nor repeals the statute and has the effect of ignoring or disregarding it only so far as the determination of the rights of parties is concerned. Brij Bhukan v. S. D. O., Siwan, **ILR 33 Pat 690: 1954 BLJR 513: AIR 1955 Pat 1 (38) (Pt ZI) (Pr 42) (SB).**

——Observations in judgment — Use of.

Observations of the Judge in a case have to be read and interpreted in the light of the facts of the particular case. **ILR (1955) Pepsu 161: AIR 1955 Pepsu 87 (89) (Pt A) (Pr 4) (DB).**

——One must necessarily look to the facts and the proposition of law with which the precedent is concerned in order to see whether or not to follow it — Judicial Precedent. **(1962) 66 Punj LR 865.**

——Use of — Should be read in context of facts and circumstances of particular case — Civil P. C. (1908), Preamble.

Every observation, which is made by the Court in their Judgments should be understood in the context of the facts and circumstances of that particular case. The observations made in a particular case cannot be applied to another case by ignoring the background in which it is made. **1965 Raj LW 444.**

——Precedents — Use of.

It is necessary while relying upon the decisions of various iHgh Courts to go into the facts carefully and not to be led away only by the headnotes or by mere impression which the Court forms in relation to them. **ILR (1959) 9 Raj 242: 1959 Raj LW 131.**

——Value of.

General words used in a particular judgment are always subject to the circumstances of the particular case. **1956 Raj LW 542: ILR (1955) 5 Raj 876.**

●——Construction of decision — General words used in judgment.

The generality of the words used in a judgment are always controlled by the particular facts and circumstances of the case. Govinda v. Board of Revenue, Rajasthan, **1954 Raj LW 259: ILR (1954) Raj 97: AIR 1954 Raj 141 (144) (Pt C) (Pr 12) (FB).**

2 (D) —Obiter dicta and observations.

See also Notes 3 (B), 4 (A), 6 (A), 8 (D)

——Obiter dictum of division Bench — Not binding on single Bench. **1964 All WR (HC) 247: AIR 1965 All 172 (175) (Pt B) (Pr 14).**

——Obiter dictum — Duty of subordinate Courts to follow obiter dicta of its own High Court in preference to decision of other High Courts. **ILR (1961) 2 All 95.**

——Law deliberately pronounced.

It is true that where a point has not been argued and certain general observations have been made which may seem to cover points not argued before the Court, may not be considered to be binding, and in such cases the binding nature of the observation of the Court may be limited to the points specifically raised and decided by the Court. It is also true that pronouncements made on concessions of counsel, when a point is not argued, are not binding but otherwise even what is generally called an 'obiter dictum', provided it is upon a point raised and argued, is binding upon the Courts in India. **1953 All LJ 273: 1953 All WR (HC) 257: 1953 Cri LJ 1384: ILR (1953) 2 All 735: AI R1953 All 613 (616) (Pr 13) (DB).**

——Judicial precedent and obiter dictum.

An appeal may present two distinct questions for decisions Both these questions may be equally potent and a determination of any one of them in favour of the appellant may well result in the appeal being allowed. Yet, the Court of appeal may very properly deal with both the questions and express its conclusions on them. This a Court is surely entitled to do; it is indubitably proper to do so and no allegation of judicial irrelevancy can attach to its decision on either of the points. There is, in such a case, no travelling beyond the scope of the appeal, no dealing with anything immaterial or irrelevant and no effort which is not directed to an adjudication of the appeal. The decision on both the points will therefore have the full weight of judicial precedent. **(1964) 2 Andh WR 426: AIR 1965 Andh Pra 115 (118) (Pt C) (Pr 12).**

——Obiter — More than one point urged and considered — Observations on them are not obiter.

Obiter dictum is one which is not necessary for the decision of the case. Where more than one point which fell for determination had been urged and considered, and though the case could be disposed of on one point, but it has been disposed of on all the points, it cannot be said that the disposal on the other points was not necessary or that the observations in relation thereto are obiter **(1961) 1 Andh WR 202: 1961 Andh LT 233: ILR (1961) 1 Andh Pra 499: AIR 1961 Andh Pra 305 (308) (Pt C) (Pr 7) (DB).**

——Obiter dicta.

An obiter dictum is an expression of opinion on a point which is not necessary for the decision of a case. This very definition draws a clear distinction between a point which is necessary for the determination of a case and a point which is not necessary for the determination of the case. But in both cases points must arise for the determination of the tribunal. The question which was necessary for the determination of the case would be the ratio decidendi; the opinion of the tribunal on the question which was not necessary to decide the case would be only an obiter dictum. Obiter dicta must lay down a

rule. It is not sufficient that they should be merely dicta of a superior Court, but from the dicta one must be in a position to deduce a rule laid down by the higher authority. No difference in principle exists between a definite opinion arrived at by the Tribunal itself and an opinion based upon a concession made at the bar. **56 Bom LR 1156: ILR (1955) Bom 318: 1955 Cri LJ 423: AIR 1955 Bom 113 (115, 116) (Pt B) (Prs 6, 7, 8) (DB).**

——Obiter dictum of Superior Court.

Even obiter dicta of superior Courts are binding on a Court subordinate to them, but in order that a particular statement may be so binding, it has, in the first instance, to be an obiter dictum. **62 Cal WN 765: AIR 1958 Cal 657 (660) (Pt D) (Pr 15) (DB).**

——Same High Court — Obiter.

Obiter of the previous Division Bench though entitled to utmost consideration by the subsequent Division Bench, it would not be binding unless found sound on principle. **58 Cal WN 1000: 95 Cal LJ 135: ILR (1956) 2 Cal 469: AIR 1955 Cal 21 (25) (Pt D) (Pr 24) (DB).**

● **——Obiter dicta.**

In considering the weight of a precedent, it is necessary to see that the judicial pronouncement, which is sought to be made the precedent, was based on the material facts as found in the case If a conclusion was not necessary on the particular facts as found, it is obvious that any principle enunciated, which does not arise on the said facts, can only be treated as an obiter dictum. Sailum Eshwarayya v. Thakur Devi Singh, **ILR (1953) Hyd 510: AIR 1953 Hyd 289 (291) (Pt A) (Pr 6) (FB).**

——Observations in case — Observations in a case are to be understood having regard to context in which they were made. 1901 AC 495, Rel on. **1963 Jab LJ 120: 1963 MPLJ 191: AIR 1963 Madh Pra 286 (291) (Pt C) (Pr 30) (DB).**

——Obiter dicta.

Where in an appeal under Order 43, Rule 1 against an order dismissing the plaintiff's suit, on the ground that the dismissal was the result of fraud practiced on the Courts the High Court dismissed the appeal as not competent under O. 43, Rule 1, and observed that the plaintiff might file regular appeal against the decree framed upon dismissal in the suit, the observations indicating the proper remedy are in the nature of obiter and are not binding either on the parties or on the Court and cannot be pressed as a precedent. The plaintiffs are therefore free to take recourse to any other remedy as they are advised. **1960 MPC 517: 1960 Jab LJ 209: 1960 MPLJ 33.**

——Obiter dicta — Has no binding effect — No reference to Division Bench necessary. **1959 MPLJ (Notes) 159.**

● **——Meaning of — Dicta and obiter dicta — Distinction.**

A precedent is a judicial decision which contains in itself, a principle. The underlying principle, which thus forms its authoritative element is often termed the ratio decidendi. The concrete decision is binding between the parties to it, but it is the abstract ratio decidendi which alone has the force of law as regards the world at large. The only judicial principles which are authoritative are those which are thus relevant in their subject-matter and limited in their scope. All others, at the best, are of merely persuasive efficacy, They are not true ratio decidendi and are distinguished from them under the name of dicta or obiter dicta, things said by the way. The prerogative of judges is not to make law promulgating and declaring it — this pertains to the legislature — but to make law by applying it. Judicial declaration, unaccompanied by judicial application, is not of binding authority.

Passages from Salmond on Jurisprudence, 11th Edn. pp. 223 and 224 quoted.

Obiter dicta though they may have great weight as such, are not conclusive authority. Obiter dicta in this context mean that what the words literally signify — namely statements by the way. If a Judge thinks it desirable to give his opinion on some point which is not necessary for the decision of the case that has not the binding weight of the decision of the case and the reasons for the decisions: (1934) 2 KB 132 (154), Foll; Stroud's Judicial Dictionary cited. Shaik Dawood v. Collector of Central Excise, Madras, **1960 Mad WN 598: 73 Mad LW 491: 1960 Mad LJ (Cr) 626: (1960) 2 Mad LJ 230: ILR (1960) Mad 961: 1961 Cr LJ 96: AIR 1961 Mad 1 (5) (Pt A) (Prs 13, 15) (FB).**

——Ratio decidendi and dicta — Binding effect.

That part alone of a decision of a Court of law is binding upon Courts of co-ordinate jurisdiction and inferior Courts which consists of the enunciation of the reasons or principles upon which the question before the Court has really been determined. This underlying principle which forms the only authoritative element of a precedent is often termed as the ratio decidendi. Statements which are not necessary to the decisions, which go beyond the occasion and lay down a rule that is unnecessary for the purpose in hand (usually termed dicta) have no binding authority on another Court, though they may have some merely persuasive efficacy. **1956 Nag LJ 261: ILR (1956) Nag 246: 1959-29 ITR 1013: AIR 1960 Nag 84 (85) (Pt B) (Pr 9) (DB).**

● **——Obiter dicta — Value as precedent**

Any judgment of any Court is authoritative only as to that part of it called the 'ratio decidendi', which is considered to have been necessary to the decision of the actual issue between the litigants.

Every expression of opinion in a judgment is not a binding authority or a precedent in a subsequent case and it is open to the judge dealing with such a case to distinguish for himself between what was and what was not essential to the prior decision.

Observations of the judges in a judgment, which are not the foundation of their decision, must be regarded as obiter dicta. Such dicta cannot be regarded as a precedent binding in subsequent cases. Nature and sources of the law by Prof. J. C. Gray, (1921) 2nd Edition, page 193, and Allein's Law in the Making page 227, quoted. Kanglu Baula v. Chief Executive Officer. **ILR (1954) Nag 875: AIR 1955 Nag 49 (63) (Pt F) (Prs 45, 46) (FB).**

——'Obiter' observations in Division Bench ruling — Privy Council rulings to the contrary — Subsequent Division Bench is bound by Privy Council rulings. **ILR (1949) Nag 640: AIR 1952 Nag 259 (262) (Pt C) (Pr 19) (DB).**

——Obiter of Division Bench — Binding effect.

It would not be proper for a later Division Bench to differ from a previous Division Bench of the same High Court on the same point. But the obiter of a previous Division Bench, though entitled to utmost consideration by a subsequent Bench of the same Court, would not be binding unless fundamentally based on sound principles. AIR 1955 Cal 21 and AIR 1960 SC 936 and AIR 1960 SC 1118, Rel. on. **ILR**

(1961) Cut 150: AIR 1961 Orissa 158 (160) (Pt B) (Pr 11) (DB).

——Obiter dictum — Prima facie view.

There is a real distinction between an obiter dictum of a superior Court and a prima facie view taken by the superior Court. A prima facie view expressed on any question of law by a judge is only his tentative view based on first impression whereas his obiter dictum is an expression of his definite opinion, though it was not necessary for the decision of the case before him. **19 Cut LT 387: AIR 1954 Orissa 54 (56) (Pt B) (Pr 8) (DB).**

——Authority of — Extent of — Ratio and obiter — Distinction.

The principle of a case is limited to the sum of all the facts held by the Court to be material in that case, and all observations of a general nature are merely obiter. The distinction between what is ratio and what is mere obiter should always be borne in mind when following a precedent. It is the abstract ratio decidendi which alone has the force of law. **AIR 1951 Orissa 71 (75) (Pt B) (Pr 10) (DB).**

● **——Obiter dictum.**

Opinion given in Court if not necessary to the judgment is no judicial opinion. Rameshwar Prasad v. Meghan Garain, **AIR 1951 Pat 137 (139) (Pt B) (Pr 16) (FB).**

——Obiter dictum — Test to decide whether dictum is obiter.

The test for determining whether a proposition is obiter is whether the decision would have been the same if a word has been inserted in the proposition reversing its meaning. **AIR 1950 Pat 484 (486) (Pt B) (Prs 9, 11) (DB).**

● **——Obiter dicta — Decision based on two grounds — Decision upon one ground is not obiter because decision upon other is itself sufficient.**

Per Meredith J.:— When a Court bases its decision upon a point which it has to decide, upon two separate grounds, it cannot be said that the decision upon one of those grounds is obiter merely because the decision upon the other ground would be itself sufficient. Kishori Lal v. Debi Prasad, **31 Pat LT 14: ILR 29 Pat 71: AIR 1950 Pat 50 (61) (Pt E) (Pr 34) (FB).**

● **——Dicta in judicial pronouncements — True meaning — How to be ascertained.**

Per Dua, J.:— The observations from the decision of a Court of justice however high, must not be detached or isolated and taken out of context, for such a process may at times tend to be misleading and to create confusion in the discovery of the true ratio decidendi. The formulation of a rule in a judicial pronouncement is invariably imbedded in the rest of judgment and the entire context must always be examined in order to discover the true intended meaning of a given passage in a judicial decision. Somta Singh v. Rajinder Singh, **ILR (1965) 2 Punj 97: 1965 Pun LR (Supp) 1: AIR 1965 Punj 415 (429) (Pt G) (Pr 49) (FB).**

● **——Obiter dicta — What is — Alternative trains of reasoning — Neither of them can be regarded as obiter.**

A dictum which does not form the integral part of the train of reasoning directed to the question decided may be regarded as obiter. In cases where the Court gives alternative trains of reasoning, both of them constitute ratio decidendi and one or the other of such reasonings cannot be regarded as obiter. Jaiwant Rao v. State of Rajasthan, **1960 Raj LW 687: ILR (1960) 10 Raj 1703: AIR 1961 Raj 250 (258) (Pt A) (Pr 28) (FB).**

● **——Obiter dicta — Value of.**

A casual observation made in a case on a question which was beyond the scope of the suit cannot be taken as a considered decision of the question. Padmanabha Pillai Aiyappan Pillai v. Velayudhan Pillai Sivarama Pillai, **1956 Ker LT 570: ILR (1956) Trav-Co 755: AIR 1957 Trav-Co 32 (38) (Pt C) (Pr 10) (FB).**

2 (E). Decision on construction of document and questions of facts.

● ——Interpretation of will — Precedents are of no help — Each will has to be construed upon its own terms and setting in which the clauses appear. See Will—Construction. **AIR 1964 SC 1323.**

——Value of — Question of fact.

A case cannot be an authority on a point of fact, and each case will have to be examined in the light of the circumstances existing in it. **64 Punj LR 694: 1962 Supp (2) SCR 623: (1962) 2 SCJ 270: AIR 1963 SC 499 (502) (Pt C) (Pr 9).**

● **——Decision on questions of fact — Value of.**

Decisions even of the highest Court on questions which are essentially questions of fact, cannot be cited as precedents governing the decision of other cases which must rest in the ultimate analysis upon their own particular facts. The general principles governing appreciation of circumstantial evidence are well established and beyond doubt or controversy. The more difficult question is one of applying those principles to the facts and circumstances of a particular case coming before the Court. That question has to be determined by the Court as and when it arises with reference to the particular facts and circumstances of that individual case. It is no use, therefore, appealing to precedents in such matters. No case on facts can be on all fours with those of another. Prakash Chandra Pathak v. State of U. P., **1960 Cri LJ 283: AIR 1960 SC 195 (197) (Pr 8).**

● **——Value of — Decision construing deed.**

Usefulness of precedents which only construe documents is naturally limited. M. P. Davis v. Commissioner of Agricultural I. T., **(1959) 35 ITR 803: AIR 1959 SC 719 (721) (Pt B) (Pr 4).**

● **—Authority of decision involving interpretation of words of statute — Decisions not unanimous — Weight of.**

The argument that in accordance with the current authority of the different Courts of India, a different interpretation should not be placed on the words of the section is of little avail in a case where the decision has not been acquiesced in for long or the authorities are not absolutely unanimous and moreover it is not a case of disturbing the course of construction which has continued unchallenged for such a length of time as to acquire the sanction of continued decisions over a very long period and in such a case therefore there is no principle which will preclude the Supreme Court from correcting the error. (1889) 14 AC 209, (1889) 14 AC 417 and (1915) AC 1100 Rel. on. The Central India Spinning and Weaving and Manufacturing Co., Ltd. v. The Municipal Committee, Wardha, **1958 MPLJ 775: 1958 Nag LJ 595: 1958 SCR 1102: 1958 SCJ 604: AIR 1958 SC 341 (346) (Pt B) (Pr 19).**

● **——Decisions on question of fact — Value of.**

Reference to reported case when facts alone are involved can be by way of illustration only and not by way of an appeal to precedent, because on facts no two cases can be similar. Each case has its own peculiar facts and it is therefore always risky to appeal to precedents on question of fact. Gurucharan Singh v. The State of

Punjab, **1956 Cri LJ 827: AIR 1956 SC 460 (462, 463) (Pt B) (Pr 9).**

●——Civil P. C. (1908), Section 11 — Document construed by Privy Council — Decision is not binding on person not party to litigation — But it operates as judicial precedent. See Civil P. C. (1908), Section 11. **AIR 1955 SC 481.**

●——Question is one of fact and not of law — Discretion of Court — Discretion of inferior Courts in the matter cannot be taken away by High Court by laying down rules to be followed by them regardless of circumstances. **1963 (1) Cri LJ 404: AIR 1963 All 101 (FB).**

——Criminal case — Question of fact — Duty of Court.

Decision even of the highest Court on questions which are essentially questions of fact, cannot be cited as precedents governing the decision of other cases, which must rest in the ultimate analysis upon their own particular facts. The general principles governing appreciation of circumstantial evidence are well established and beyond doubt or controversy. The more difficult question is one of applying those principles to the facts and circumstances of a particular case coming before the Court. That question has to be determined by the Court as and when it arises with reference to the particular facts and circumstances of that individual case. It is no use, therefore, appealing to precedents in such matters No case on facts can be on all fours with those of another. **1959 All LJ 519: 1959 All WR (HC) 394: 1959 All Cr R 312: 1959 Cri LJ 1274: AIR 1959 All 727 (730) (Pt E) (Pr 17) (DB).**

●——Decision in prior proceedings not operating as res judicata — Interpretation of material document in prior proceedings will still amount to a judicial precedent. Anjaneyulu v. Ramayya, **(1965) 1 Andh WR 159: (1965) 1 Andh LT 149: AIR 1965 Andh Pra 177 (181) (Pt B) (Pr 21) (FB).**

——Precedent on facts — (Civil P. C. (1908), Preamble).

No case can be accepted as a precedent on facts, as the facts of each case differ from the facts of any other. **1959 Andh LT 855.**

——Lease — Construction of — Decision on question of — Value.

A decision on construction of a lease in common form though not technically binding is not to be lightly departed from. A decision on a question of construction of a lease couched in a different language though useful in informing the mind of the Court by way of illustration and annalogy is not a binding precedent. **AIR 1957 Cal 217 (220) (Pt D) (Pr 26).**

——Value of — In previous litigation entries in documents interpreted in certain way — That interpretation would be binding on the parties, in subsequent litigation, though not exactly on the principle of res judicata but as a judical precedent. AIR 1955 SC 481, Foll. **1960 MPLJ 638: 1960 Jab LJ 683: ILR (1959) Madh Pra 887: AIR 1960 Madh Pra 250 (251, 252) (Pt B) (Pr 10) (DB).**

●——**Decision on construction of contract — Value of.**

It is no doubt true that a decision upon the construction of one contract cannot be regarded as an authority upon the construction of another contract in different words and entered into in different circumstances and that each case must be decided on the construction of the particular document. But the general principle underlying the cases can be looked into and applied. Gulabchand Gambhirmal v Kudilal Govindram, **1959 MPC 143: 1959 Jab LJ 78: 1960 MPLJ 334: AIR 1959 Madh Pra 151 (161) (Pt G) (Pr 18) (FB).**

——Reference to, on question of fact.

Reference to a reported case can only be by way of an illustration. Each case has its own peculiar facts and it is, therefore, always risky to appeal to precedents on questions of fact. AIR 1956 SC 460, Foll. **1957 Jab LJ 444: 1957 MPC 366: 1957 MPLJ 481: AIR 1957 Madh Pra 174 (175) (Pt B) (Pr 3).**

——Constructions of deeds — Decision of Bench when binding.

No decision of any Bench on the construction of any particular document can be binding authority for the construction of another document — But where the decision of a Bench lays down a principle of interpretation of certain words on the basis of a decision of higher authority which enters into the construction of any document containing such words which come before the Court in any other given case, that principle of interpretation must be treated as binding on the Court in such other case, unless on other relevant facts and circumstances the principle is to be denied the effect, which it must otherwise have. **1950-2 Mad LJ 466: 1950 Mad WN 691: 63 Mad LW 1006: AIR 1951 Mad 318 (320) (Pt B) (Pr 5).**

——Value of, in discretionary matters.

In matters of discretion, other decided cases cannot constitute binding precedents, they can only serve as helpful illustrations. From its very nature, discretion has to be exercised after weighing all the circumstances of the particular case and it is seldom that one can come across exactly similar facts in two cases. **64 Punj LR 456: ILR (1962) 2 Punj 439: AIR 1962 Punj 490 (491) (Pt B) (Pr 2).**

——Previous decision based on personal knowledge of the Judge is not of any value at all. **ILR (1958) 8 Raj 942: AIR 1958 Raj 186 (188) (Pt B) (Pr 16) (DB).**

——Valuation — Suit for recovery of paddy — Rate of.

In suits for recovery of paddy, the paddy has to be valued at the commutation rate prevailing on the date when the suit was instituted. 1948 TLR 110 (FB), Foll. 35 TLJ 140, Diss. **1950 TCLR 425 (DB).**

2 (F). Decision on concession or assumption.

——Statement by Supreme Court on concession by counsel has no sanctity of an endorsement of a particular legal position of their lordships of the Supreme Court. **1958 Andh LT 782: (1958) 2 Andh WR 534: ILR (1958) Andh Pra 516.**

——Authority of — Decision based on concession — Binding nature.

In order that decision of a Court on a concession should be considered to be a binding decision and a decision which should bind Courts of co-ordinate jurisdiction two conditions are necessary. The first is that the concession must be necessary for the decision of the case. The other condition is that the Court must accept that concession and put its own imprimatur upon that concession and must accept that concession as the true statement of the law. **56 Bom LR 873: AIR 1954 Bom 518 (524) (Pt E) (Pr 13) (DB).**

——Privy Council — Obiter dicta — Statement made on concession made by counsel is not even an obiter dicta and will not have the sanctity of an endorsement of a particular legal position by their Lordships of the Privy Council. **53 Bom LR 192: ILR (1951) Bom 576: AIR 1951 Bom 57 (63) (Pt B) (Pr 15) (DB).**

——Assumption in course of arguments — Value of.

When during the course of arguments, Judges in order to elicit the scope of an issue, or limit a proposition or to clarify the meaning or interpretation of any section or Act or for any other purpose, put questions or assume a position for the purposes of argument, anything said cannot be deemed to be an agreement with the persons making a particular submission so as to be binding. What is binding is what is stated in the order or judgment after due consideration of the arguments and the points involved in the case. ILR (1960) Hyd 648: AIR 1956 Hyd 186 (188) (Pt D) (Pr 6) (DB).

2 (G). Ratio decidendi.

——Decision of High Court in suit between A and Government that recovery of certain forest dues as land revenue from A is illegal. Ratio of decision is binding on Government and they cannot collect similar dues from B on ground that B was not party to decision in suit between A and Government. See Civil P. C. (1908), Section 11. AIR 1952 Madh Pra 139 (DB).

——Extent of authority.

Per Raghava Rao J.— No case is binding authority except for what is actually decides. In considering the binding force of the judgment in a decided case sought to be used as precedent regard must be had to what is called the ratio decidendi. The ratio decidendi which ought to be neither unduly whittled down nor unduly extended consists of the enunciation of the reason or principle upon which the question before the Court has been actually determined. 1951 Mad WN 686: 64 Mad LW 689: 1951-2 Mad LJ 209: AIR 1952 Mad 1 (5) (Pt B) (Pr 16) (DB).

——Ratio decidendi and dicta — Binding effect.

That part alone of a decision of a Court of law is binding upon Courts of co-ordinate jurisdiction and inferior Courts which consists of the enunciation of the reasons or principles upon which the question before the Court has really been determined. This underlying principle which forms the only authoritative element of a precedent is often termed as the ratio decidendi. Statements which are not necessary to the decisions, which go beyond the occasion and lay down a rule that is unnecessary for the purpose in hand (usually termed dicta) have no binding authority on another Court, though they may have some merely persuasive efficacy. 1956 Nag LJ 261: ILR (1956) Nag 246: 1956-29 ITR 1013: AIR 1956 Nag 84 (85) (Pt B) (Pr 9) (DB).

——Formulation of ratio of judicial decision — Not isolated part but entire context of judgment must be taken into account.

The formulation of a rule in a judicial decision is invariably embedded in the rest of the judgment and the entire context must be taken into account to discern the Court's intended meaning rather than take the formulation in isolation. AIR 1965 Punj 362 (365) (Pt B) (Pr 8) (DB).

——Authority of — Ratio decidendi always qualified by facts of the case — Not an authority for what logically follows from it.

It is well settled that a precedent is an authority on its own facts and for the legal proposition or principle of law enunciated therein, in order, therefore, to understand and apply the true ratio decidendi of a decided case it is always necessary to see its facts and the precise point which had to be decided. The generality of expressions found in a judgment can scarcely be intended to be the exposition of the whole law and they must always be governed and qualified by the particular facts of the case in which they are found. A precedent may not safely be quoted as binding authority for what may be argued to be merely a logical extension of the ratio decidendi. ILR (1964) 2 Punj 150: AIR 1964 Punj 533 (541) (Pt F) (Pr 22) (DB).

——Ratio decidendi, what amounts to.

To discover the ratio decidendi of a judicial decision is ethical and is creative evaluation rather than mechanical application of the precedent. Not everything contained in a judicial decision is a source of law for later cases. Observations upon some broader aspects of the law relating to the problem posed before a Court for answers on hypothetical questions canvassed during arguments or some comments on social or other questions may be found in prior judicial decisions; but the ratio decidendi of a decision binding for later cases is to be found in the principle of law formulated in the earlier decision which forms the basis for deciding the problem before the Court. Further extension of a precedent is subject to a continuous review in the light of logical analysis and differences of facts etc., involved in subsequent judicial controversies. 66 Pun LR 392: AIR 1964 Punj 456 (460) (Pt B) (Pr 7) (DB).

2 (H). Overruling previous decision — Effect.

——Authority of previous decision overruled — Overruling, if retrospective.

That overruling of a previous decision is a declaration that the supposed rule never was law. Hence any intermediate transactions made on the strength of the supposed rule are governed by the law established in the overruling decision. The overruling is retrospective, except as regards matters that are res judicata or accounts that have been settled in the meantime. If the trial Court comes to a particular decision relying on a view of law laid down in a certain decision which before the matter is finally decided in second appeal is overruled, the second appellate Court is bound to apply the overruling decision to the facts of the case. 1952 Nag LJ 592: ILR (1952) Nag 991: AIR 1953 Nag 126 (127) (Prs 4, 5) (DB).

3. Supreme Court decision.

See also Constitution of India, Article 141.

(A) Not binding on Supreme Court.

(B) Obiter dicta and observations.

3. Supreme Court decision.

See also Constitution of India, Article 141.

□——English decisions at variance with Supreme Court decisions — This does not justify application for reconsideration of Supreme Court decision. Manipur Administration v. Bira Singh 1965 (1) Crl LJ 120: 1965 All Crl R 230: 1965 Mad LJ (Crl) 232: (1965) 1 Crl LJ 120: 1965 SCD 8: (1965) 1 An LJ 96: (1965) 1 SCJ 451: (1964) 7 SCR 123: AIR 1965 SC 87 (91) (Pt A) (Pr 10).

□——Stare decisis — Case before Supreme Court to resolve conflict of views between High Courts on a question of construction of provision in a Statute — Supreme Court should decide independently of majority view.

In construing a particular provision of a statute, the Supreme Court would carefully have to bear in mind the views expressed by the majority of the High Courts; but where there is sharp conflict of opinion on the point and in almost all the High Courts different views have been expressed at one time or the other, and the matter has been brought to the Supreme Court for resolving the said difference of opinion,

it would be singularly inappropriate to invoke the doctrine of stare decisis. In such a case it is open to the Supreme Court and indeed it is its duty, to construe the relevant provision and decide which of the two conflicting views should hereafter prevail. Tirumalachetti Rajaram v. Tirumalachetti Radhakrishnavva Chetty, **(1962) 1 SCA 68: (1962) 1 SCJ 568: (1962) 1 Mad LJ (SC) 248: (1962) 1 Andh WR (SC) 248: (1962) 2 SCR 452: 1961 All LJ 841: AIR 1961 SC 1795 (1801) (Pt B) (Pr 13).**

——Supreme Court Rulings — These are absolutely binding on the Ajmer Judicial Commissioner's Court. **52 Cri LJ 1530: AIR 1951 Ajmer 100 (101) (Pt C) (Pr 5).**

——Supreme Court decision — Not to be disregarded by lower Courts on insufficient grounds. **1963 All WR (HC) 770: 1963 All Cri R 471: 1964 All LJ 61: 1965 (2) Cri LJ 179: AIR 1965 All 372 (373) (Pt B) (Pr 6).**

●——Judgment of Supreme Court is declaration of law binding upon lower Courts. Abdul Ahad v. Inspector General of Police, U. P., **1964 All LJ 791: 1964 All WR (HC) 467: (1964) 9 Fac LR 197: (1965) 1 Lab LJ 170: ILR (1964) 2 All 959: AIR 1965 All 142 (150) (Pt H) (Pr 15) (FB).**

——Decision of Superior Court — Binding force of — (Constitution of India, Article 141).

Once a principle is well established and is laid down by the highest Court of the land, it is the law and can only be displaced by legislation. **(1959) 1 Andh WR 16: 1959 Cri LJ 813: 1959 Mad LJ (Cr) 1: AIR 1959 Andh Pra 333 (337) (Pt B) (Pr 5).**

——Statement by Supreme Court on concession made by counsel — Value of — Binding force.

A statement made by the Supreme Court merely on a concession made by counsel at the bar would not have the sanctity of an endorsement of a particular legal position by their Lordships of the Supreme Court. AIR 1951 Bom 57 and AIR 1953 All 613, Rel. on. **1958 Andh LT 782: (1958) 2 Andh WR 534: ILR (1958) Andh Pra 516.**

——Supreme Court decision — Dissenting judgment — Adjudication in dissenting judgment of an aspect on which majority has expressed no view but has proceeded on assumption that it is correct, is binding on High Courts. **AIR 1963 Ker 155 (176) (Pt B) (Pr 170).**

●**——Constitution of India, Article 141** — Supreme Court decisions — Under Article 141 of the Constitution, law declared by the Supreme Court is binding on all Courts in India and must now be followed in preference to any other view which might have been taken by the Mysore High Court. **32 Mys LJ 33: ILR (1954) Mys 70: AIR 1954 Mys 93 (99) (Pt C) (Pr 24) (FB).**

——Constitution of India, Article 141 — High Court of Mysore is now bound by the law laid down by the Supreme Court. **31 Mys LJ 38: ILR (1953) Mys 79: 1953 Cri LJ 1064: AIR 1953 Mys 75 (78) (Pt B) (Pr 12) (DB).**

——Judgment of Supreme Court — Binding authority — Judgment should be read as a whole. **1964 BLJR 870: AIR 1965 Pat 124 (126) (Pt B) (Pr 7) (DB).**

——Ruling of Supreme Court — Decision on particular facts — No discussion of legal points — High Court not bound to follow its course. **52 Pun LR 429: 52 Cri LJ 17: AIR 1951 Punj 157 (159) (Pt C) (Pr 5) (DB).**

——Retrospective effect of decisions of Supreme Court or High Courts — Decisions declare existing law and do not purport to enact fresh laws — There can be no contention that those decisions should have prospective effect and cannot be given retrospective effect. **1964 Raj LW 510: 1965 (1) Cri LJ 338: ILR (1964) 14 Raj 1124: AIR 1965 Raj 70 (72) (Pt C) (Pr 8).**

3 (A). Not binding on Supreme Court.

●——Constitution of India, Art. 141 — Supreme Court has power to overrule its previous decision. Bengal Immunity and Co. v. State of Bihar, **1955 SCA 1140: 34 Pat 905: 1955-2 Mad LJ (SC) 168: 1955 SCJ 672: 1 Com 1955-6 SCT 446: 1955-2 SCR 603: AIR 1955 SC 661 (672, 673, 699, 711, 715, 716, 718, 742, 743, 754) (Pt F) (Prs 15, 19, 83, 115, 121, 122, 129, 185, 186, 213).**

●**——Supreme Court if bound by its own decisions — (Constitution of India, Article 141).**

Per S. R. Das, J.— Accepting that the Supreme Court is not bound by its own decisions and may reverse a previous decision especially on constitutional questions, the Court will surely be slow to do so unless such previous decision appears to be obviously erroneous. Dwarkadas Shrinivas v. Sholapur Spinning and Weaving Co., Ltd., **(1954) 1 MLJ 355: 1954 SCJ 175: 67 Mad LW 176: 1954 Com Cas 103: 56 Bom LR 681: 1954 SCR 674: AIR 1954 SC 119 (137) (Pt J) (Pr 53).**

3 (B). Obiter dicta and observations.

●——Constitution of India, Article 141 — Supreme Court decision — Obiter dicta in, are entitled to great weight. I. T. Commr. v. Vazir Sultan and Sons, **(1959) Supp (2) SCR 375: (1960) 2 Mad LJ (SC) 73: (1960) 2 Andh WR (SC) 73: (1959) 2 SCA 184: 1960 SCJ 1176: (1959) 36 ITR 175: AIR 1959 SC 814 (821) (Pt B) (Pr 30).**

——Observations of Supreme Court in AIR 1959 SC 1331 were not merely obiter dicta — Even if they were obiter dicta, they would require to be given greatest weight and followed. AIR 1960 Punj 131, Expl. and held obiter. **1965 All LJ 763: AIR 1966 All 266 (268) (Pt B) (Pr 8).**

——Obiter dicta — Appellate order of High Court in criminal case — Whether order was a proper order, the question before the Supreme Court — Supreme Court required in that connection to decide whether High Court had power under Section 561-A, Criminal P. C. to rehear matter on merits — Its decision of the question cannot be treated as obiter dicta — In any case the observations of the Supreme Court would amount to declaration of law within the meaning of Art. 141 of the Constitution and as such binding on all Courts in India. **1961 All LJ 509: 1961 All WR (HC) 420: 1961 All Cri R 238: 1962 (1) Cri LJ 390: ILR (1961) 2 All 725: AIR 1962 All 193 (197) (Pt C) (Pr 25) (DB).**

——Supreme Court decisions — Obiter of Supreme Court is binding on courts in India. See Constitution of India, Art. 141. **AIR 1961 All 287.**

——Supreme Court decision — Scope of — 'Declaration of law' — Obiter dicta is entitled to great respect. See Constitution of India, Article 141. **AIR 1960 All 672.**

——Judicial precedents — Obiter dicta of Supreme Court is entitled to highest respect and is binding on all Courts in India. **1959 Cri LJ 541: AIR 1959 All 313 (314) (Pt C) (Pr 5).**

——Constitution of India, Article 141 — Supreme Court — Obiter — It is binding on Courts in India. **AIR 1955 All 543 (545) (Pt B) (Pr 10).**

——Law deliberately pronounced.

Where the Supreme Court deliberately with the intention of settling the law pronounces upon a question, the pronouncement is the law declar-

ed by the Supreme Court within the meaning of Article 141 and is binding on all Courts in India. It cannot be treated as a mere 'obiter dictum'.

It is true that where a point has not been argued and certain general observations have been made which may seem to cover points not argued, before the Court, may not be considered to be binding, and in such cases the binding nature of the observation of the Court may be limited to the points specifically raised and decided by the Court. It is also true that pronouncements made on concessions of counsel, when a point is not argued, are not binding but otherwise even what is generally called an "obiter dictum", provided it is upon a point raised and argued, is binding upon the Courts in India. 1958 All WR (HC) 257: 1958 All LJ 278: ILR (1958) 2 All 725: 1958 Cri LJ 1364: AIR 1958 All 613 (615, 616) (FB) (Pts 11, 13) (DB).

——Obiter dicta of Supreme Court — (Constitution of India, Article 141).

The observations of their Lordships of the Supreme Court, if they were made obiter, would be entitled to the highest esteem from the High Court. This would be more so when the High Court finds itself in respectful agreement with the view which prevailed with their Lordships. ILR (1955) 7 Assam 510: AIR 1956 Assam 48 (52) (FB) (Pt C) (Pr 11) (FB).

[Overruled on another point in AIR 1957 SC 877.]

—— Obiter dictum of Supreme Court.

Even an obiter of the Supreme Court deserves the highest respect and it is incumbent upon the High Court to accept even the obiter as correctly laying down the law. When in a case, a particular clause of a section or an Article calls for interpretation and in order to interpret it the Supreme Court interprets the whole section or Article and lays down the proper canon of construction, it is impossible to contend that that interpretation is not binding upon the High Court, unless of course the Supreme Court in any subsequent decision has departed from the interpretation laid down by it in the decision. (A Bom LR 290: (1960) 30 Comp Cas 72: ILR (1959) Bom 965: AIR 1959 Bom 221 (227) (FB) (Pt C) (Pr 15) (DB).

——Dicta of Supreme Court — Weight of.

The Lower Courts are bound by the dicta of Supreme Court. 60 Bom LR 244: 1957 Cri LJ 1107: ILR (1958) Bom 1032: AIR 1957 Bom 290 (291) (FB) (Pt C) (Pr 10) (DB).

——Obiter dicta.

At a time when the Judicial Committee of the Privy Council was the highest judicial tribunal in the Empire, as it then was, the Courts in India felt that it would be in the interests in judicial uniformity and judicial discipline that not only they accepted the decisions of the Privy Council, which indeed were binding upon them, but also accepted the obiter dicta of the Privy Council as binding upon them. The Supreme Court has now taken the place of the Privy Council and the Courts must show the same respect for the obiter dicta of the Supreme Court that the Courts did for those of the Privy Council. The Supreme Court is the highest judicial tribunal in India today and it is as much necessary in the interests of judicial uniformity and judicial discipline that all the High Courts must accept as binding the obiter dicta of the Supreme Court in the same spirit as the High Courts accepted the obiter dicta of the Privy Council. ILR (1955) Bom 848: 58 Bom LR 1156: 1956 Cri LJ 423: AIR 1956 Bom 110 (115) (FB) (Pr 5) (DB).

——Obiter dicta of Supreme Court — Binding character.

Observations of their Lordships of the Supreme Court are binding upon the High Court even though they may be in the nature of obiter dicta. 62 Cal WN 701: 1958 Cal LJ 332: AIR 1959 Cal 81 (82) (FB) (Pr 5) (DB).

——Dissenting Judgment — Value of.

The observation of a dissenting Judge in a Supreme Court decision unless it is negatived by the majority, either expressly or impliedly, is entitled to respect. Whether or not such an observation by a minority judge of the Supreme Court is a compelling decision on the High Court, there is no question that the decision has very great persuasive authority. 62 Cal WN 892: (1958) 1 Cal LJ 144: (1959) 1 Lab LJ 128: ILR (1960) 1 Cal 138: AIR 1958 Cal 531 (553) (FB) (Pr 11).

——Obiter of Supreme Court — (Constitution of India, Article 141).

Even an obiter of the Supreme Court is binding upon the High Court only if the Supreme Court has enunciated or declared some principle of law. (1956) 2 Lab LJ 160: 59 Cal WN 1050: ILR (1957) 2 Cal 309: AIR 1958 Cal 45 (56) (FB) (Pr 11).

——Obiter dicta of Supreme Court — Binding effect.

Even as obiter dicta, the observations made by Supreme Court are entitled to the highest respect at the hands of subordinate Courts. AIR 1962 Him Pra 24 (28) (FB) (Pr 3).

[Reversed on another point in AIR 1967 SC 990.]

——Obiter dicta of Supreme Court is entitled to great respect. AIR 1961 Him Pra 2.

——Obiter dicta of Supreme Court — Value of — Duty of inferior Court. See Constitution of India, Article 141. 1957 MPLJ 733: AIR 1958 Madh Pra 103 (108) (FB) (Pr 3) (FB).

——Obiter dicta of Supreme Court — Value of.

The obiter dicta of a Judge of the Supreme Court, even in a dissenting judgment are entitled to high respect, especially if there is no direct decision to conclude the question at issue. 1957 Mad WN 50: 70 Mad LW 166: (1957) 8 STC 210: AIR 1957 Mad 283 (285) (FB) (Pr 16) (DB).

——Obiter dicta of Supreme Court — The Judicial Commissioner's Court has to follow observations of the Supreme Court even if they are obiter dicta. 1962 (2) Cri LJ 147 (Manipur).

——Supreme Court decision — Obiter observations — Are binding on High Courts — Constitution of India, Article 141. (1963) 2 Mys LJ 306: ILR (1963) Mys 1020: AIR 1964 Mys 132 (133) (FB) (Pr 15) (DB).

——Obiter dicta of Supreme Court — Is binding on High Courts.

It is not necessary for a proposition of law declared by the Supreme Court to be binding on High Court that the actual decision of the case should have proceeded on that proposition. Nor is it necessary for such a proposition to be the law declared by the Supreme Court that all the Judges shall express their views one way or the other on the point. If the majority of the Judges of the Supreme Court in particular express a view on a proposition of law than that view of the majority of Judges would be the law declared by the Supreme Court and binding on the High Court. (AIR 1958 SC 468, Held, overruled on another point by majority view in AIR 1968 SC 646). AIR 1961 Mys 3 (7) (FB) (Pr 10) (DB).

——Supreme Court or Privy Council obiter — Binding on all subordinate Courts See Constitution of India, Article 141. **1965 (1) Cri LJ 56: AIR 1965 Orissa 7.**

——Obiter dictum.

Even the obiter dictum of a Superior Court is binding on subordinate Court. **19 Cut LT 387: AIR 1954 Orissa 54 (56) (Pt A) (Pr 7) (DB).**

●**——Obiter dictum.**

Though obiter dictum of Superior Court is entitled to great respect, strictly speaking they do not amount to "law laid down" within meaning of Article 291 of the Constitution. Santu v. Sohan Lal, **2 Pepsu LR 245: AIR 1951 Pepsu 33 (37) (Pt C) (Pr 11) (FB).**

——General observations of the Supreme Court in judgment are also entitled to great weight. **AIR 1957 Raj 189 (197) (Pt E) (Pr 21) (DB).**

4. Privy Council decision.

See also (1) Abolition of Privy Council Jurisdiction Act, 1949.
(2) Constitution of India, Art. 372.

(A). Obiter dicta.

4. Privy Council decision.

See also (1) Abolition of Privy Council Jurisdiction Act, 1949.
(2) Constitution of India, Art. 372.

●——Privy Council — Law declared by Privy Council continues to be binding even after Constitution unless altered or repealed. **AIR 1965 All 65 (FB).**

——Privy Council decisions are binding on High Court. See Constitution of India, Article 225. **(1961) 2 Lab LJ 197 (All).**

——Privy Council decisions — High Courts are not bound by them after India became Sovereign Democratic Republic. See Constitution of India, Article 141. **AIR 1955 Andhra 49.**

[**Overruled** on another point in AIR 1955 Andh Pra 87 **Reversed** on another point in AIR 1961 Andh Pra 430.]

——Privy Council decisions.

After the passing of the Constitution, the decisions of the Privy Council are not binding but are only of persuasive value. AIR 1954 SC 245, Foll. **AIR 1955 NUC (Andh Pra) 1773.**

●**——Privy Council decisions.**

Per Sarjoo Prosad, C. J.— The pronouncement of the Judicial Committee which, even if not completely binding on us, is still entitled to all the respect and attention which it deserves and which it has, on its own merits ex proprio vigore, always commanded. Onkarmal Jwalaprosad v. Commissioner of Taxes, Assam, **ILR (1953) 5 Assam 389: 58 Cal WN 111: AIR 1954 Assam 139 (142) (Pt C) (Pr 22) (FB).**

●**——Privy Council decisions if binding on High Courts — (Constitution of India, Article 141).**

So long as the Supreme Court does not take a different view from the view taken by the Privy Council, the decisions of the Privy Council are still binding upon the High Courts. What is binding is not merely the point actually decided but an opinion expressed by the Privy Council which opinion is expressed after careful consideration of all the arguments and which is deliberately and advisedly given. State of Bombay v. Chhaganlal, **ILR (1955) Bom 203: 56 Bom LR 1084: AIR 1955 Bom 1 (5) (Pt E) (Pr 10) (FB).**

——Decision by Privy Council — Subsequent decision by House of Lords taking contrary view — Indian Courts not bound by latter decision — Privy Council decision being binding on them should be followed. **54 Bom LR 765: AIR 1953 Bom 209 (212) (Pt E) (Pr 11).**

——Privy Council decisions.

All decisions, and even obiter dicta of their Lordships of the Privy Council, are entitled to be respected by the Courts in India, but where there is an express provision contained in a statute enacted by the Indian Legislature, even the weighty pronouncements of their Lordships of the Privy Council must give way to such enactment of the Legislature. **52 Bom LR 231: AIR 1950 Bom 230 (231) (Pt B) (Pr 4).**

——Privy Council decision — Binding on all Courts in India except Supreme Court. **68 Cal WN 84: (1964) 1 ITJ 101: (1964) 53 ITR 717: AIR 1964 Cal 396 (399) (Pt B) (Pr 15) (DB).**

——Earlier Privy Council decision laying down laws giving good reasons — Later decision expressing contrary view, without adverting to the earlier decision and without giving any reasons — Courts will prefer to follow earlier decision — An ipse dixit emanating even from the Privy Council need not bind the Court from following the earlier decision that has been consistently followed for well over 50 years. **(1961) 65 Cal WN 324.**

——Privy Council decisions — Absence of reasons — Decisions of High Court simply affirmed — Authority of Privy Council ruling is in no way lessened. **1958 Cal LJ 123: AIR 1959 Cal 243 (246) (Pt C) (Pr 18) (DB).**

——Privy Council decisions — Binding authority after Independence — (Abolition of Privy Council Jurisdiction Act (1949), S. 8) — (Constitution of India, Art. 372).

S. 8 of the Abolition of Privy Council Jurisdiction Act, 1949, attached the binding value only to the decree and the order of the Privy Council and to nothing more. The reasoning and the rules laid down in the decision appear to have been deliberately excluded from having such effect. The reasoning and conclusions in the Privy Council decisions; therefore, do not have now the compelling force which they had before 26th January, 1950. They are, however, entitled to great respect and while they are no longer binding on the Courts in this country, still retain, like the decisions of any other country, whatever persuasive value they may intrinsically have. AIR 1950 SC 218, Rel. on.

The rules laid down by the previous Privy Council decisions are not continued as 'existing India law', under Art. 372 of the Constitution or under S. 18 (1), Indian Independence Act, 1947 as that term does not include the declaration of law by a Court. **1955 Cri LJ 792: ILR (1956) 2 Cal 710: AIR 1955 Cal 282 (284, 288) (Pt C) (Prs 7, 8, 17) (DB).**

[**Reversed** on another point in AIR 1960 SC 1355.]

——Decision of Judicial Committee — Binding effect.

Courts in India are bound by decisions of Judicial Committee in so far as they lay down the law on any subject. It is the ratio decidendi of such decisions that matters. If the ratio decidendi of an earlier decision of their Lordships is expressly or impliedly abandoned or disssented from in a subsequent decision of their Lordships, the duty of the Courts in India is to treat the earlier decision as obsolete. If they cannot consistently follow both the decisions, they must follow the later of the decisions. **63 Mad LW 258: (1950) 1 Mad LJ 350: ILR (1950) Mad 1084: AIR 1950 Mad 680 (686) (Pt B) (Pr 18) (DB).**

——Privy Council decision — Courts in India cannot whittle down the decision in any manner.

It is not open to any Court in India to whittle down or eviscerate the decision of the Judicial Committee in any manner. That the pronouncement was made in a short judgment or on an application heard ex parte is hardly any ground for any Indian High Court to refuse to follow and give effect to their Lordships' clear and categorical language. **(1949) 2 Mad LJ 343: 63 Mad LW 1089: 1950 Mad WN (Cri) 115: ILR (1950) Mad 381: AIR 1950 Mad 124 (128, 129) (Pt D) (Pr 8) (DB).**

——Constitution of India, Arts. 141 and 225 — Privy Council decisions are binding after commencement of Constitution if they are not in conflict with those of Supreme Court — (Government of India Act (1935), Sec. 212). **1955 Nag LJ 32: ILR (1954) Nag 805: AIR 1955 Nag 293 (296) (Pt B) (Pr 14) (DB).**

●——**Value of.**

A decision of the Privy Council is entitled to very great respect, apart from whether it is now binding on the Courts in India, after the coming into force of the Constitution of India. Mahendra Raut v. Darsan Raut. **ILR 31 Pat 446: AIR 1952 Pat 341 (345) (Pt B) (Pr 16) (SB).**

4 (A). Obiter dicta.

●——Obiter — Observations by a Judge of eminence in Privy Council case — Obsevations in keeping with provisions of statute and directly arising on arguments made before Privy Council —Observations are entitled to great weight. Nanak Chand v. State of Punjab. **1955 Mad WN 326: 1955 SCA 272: 1955 Cri LJ 721: (1955) 1 Mad LJ (SC) 141: 1955 Andh WR (SC) 141: (1955) 1 SCR 1201: 1954 All WR (Sup) 54: ILR (1955) Punj 154: 1955 SCJ 241: AIR 1955 SC 274 (277) (Pt D) (Pr 7).**

——**Privy Council — Obiter dicta.**

Even an obiter dictum of the Privy Council is entitled to utmost respect. **1956 All WR (HC) 343: 1956 All LJ 872: AIR 1956 All 680 (684) (Pt D) (Pr 31) (DB).**

——**Obiter dicta of Privy Council — Binding effect.**

An obiter dictum of the Privy Council, containing an enunciation of principle or exposition of a rule of law, would be binding on the Courts in India, unless and until the law is held to be different by the Supreme Court. **62 Cal WN 493: ILR (1959) 1 Cal 423: AIR 1958 Cal 530 (532) (Pt B) (Pr 12) (DB).**

——**Obiter dicta of Privy Council — Binding nature.**

While every observation of a superior Court is entitled to the highest respect from the inferior Courts in India and though the Privy Council itself has laid down that its obiter dicta are binding it is only dicta which purport to lay down some law, even though they may be obiter, which can be considered authority; and observations which the Privy Council may make not by way of stating the law should not be clothed with such authority. **60 Cal WN 778: 96 Cal LJ 118: AIR 1956 Cal 308 (310) (Pt B) (Pr 10) (DB).**

——Privy Council — Obiter dicta of — High Courts in India are bound by it unless the Supreme Court has modified or dissented from that view — (Per Tare, J., in final order). **1961 MPC 17: 1961 Jab LJ 250: 1961 MPLJ 685: ILR (1961) Madh Pra 557: AIR 1961 Madh Pra 223 (230) (Pt E) (Pr 34).**

——Even obiter remark of the Privy Council is binding upon Courts in India provided the remark would be made applicable to the facts of the case. **ILR (1949) Nag 330: 1949-17 ITR 454: 1950 Nag LJ 86: AIR 1952 Nag 205 (207, 210) (Pt C) (Prs 26, 41).**

●——Privy Council — Even obiter dicta is entitled to great weight — (Per Sen J.J. Kantilal Moti-chand v. Balkrishna. **1950 Nag LJ 463: ILR (1950) Nag 239: AIR 1950 Nag 132 (134) (Pt B) (Pr 10) (FB).**

●——Constitution of India, Article 372 (1) — 'Obiter dicta' of Privy Council must be treated as binding on Indian Courts — Position is the same even after the advent of the Constitution of India, in the absence of a contrary decision of the Supreme Court, Jagadindra Kumar v. Revenue Commissioner, Orissa. **ILR (1953) Cut 12: AIR 1953 Orissa 117 (119) (Pt C) (Prs 6, 7) (SB).**

——**Privy Council — Obiter dicta — Value of.**

Even the obiter dicta of the Privy Cuoncil are entitled to weight and respect. **ILR (1952) Patiala 242: AIR 1954 Pepsu 76 (77) (Pt B) (Pr 4).**

5. Privy Council and Supreme Court.

●——**Privy Council.**

Decision of Privy Council is not binding on Supreme Court — Supreme Court can declare Privy Council ruling as not sound. Shrinivas Krishnarao Kango v. Narayan Devji Kango, **1954 SCA 408: (1954) 1 Mad LJ 630: 1954 SCJ 408: 67 Mad LW 515: (1955) 1 SCR 1: 57 Bom LR 678: AIR 1954 SC 379 (387) (Pt E) (Pr 25).**

●——**Decision of predecessor Court — Former Federal Court and Privy Council decisions.**

The Supreme Court of India is in no way bound by the decisions given by the former Federal Court of India or by the Privy Council. State of Bihar v. Abdul Majid, **1954 SCJ 300: 1954 SCA 226: (1954) All LJ 280: 67 Mad LW 550: 1954 SCR 272: 56 Punj LR 143: 1954 BLJR 183: AIR 1954 SC 245 (248) (Pt D) (Pr 9).**

●——**Special leave to appeal—Decisions of Privy Council — Binding effect on question of granting special leave.**

Though the Supreme Court is not bound to follow the decisions of the Privy Council too rigidly since the reasons constitutional and administrative, which sometimes weighed with the Privy Council, need not weigh with the Supreme Court, yet some of those principles are useful as furnishing in many cases a sound basis for invoking the discretion of the Court in granting special leave. Pritam Singh v. The State. **86 Cal LJ 120: 63 Mad LW 875: 51 Cri LJ 1270: 1950 Mad WN 605: 53 Pun LR 1: 1950 Mad WN (Cri) 236: 1950 SCR 453: 1950 Raj LW 378: AIR 1950 SC 169 (171) (Pt D) (Pr 9).**

——**Privy Council decision — Value of after 1950 — (Constitution of India, Article 141).**

The position after 1950, as far as the Privy Council is concerned, is different from the position which it occupied before 1950. Before 1950 the law laid down by the Privy Council was the law of the country. After 1950, the Privy Council's decisions are only of a persuasive authority. The only final tribunal which can lay down the law in this country is the Supreme Court; and if the Supreme Court has not laid down the law, then the final authority in Bombay State is the High Court of Bombay, and it was not open to the Tribunal to consider the decision of the Privy Council if it was at variance with decision of the High Court, but to follow its decision till the Supreme Court laid down the correct principle

(1958) 34 ITR 30: 60 Bom LR 920: ILR (1958) Bom 1153: AIR 1959 Bom 51 (52) (Pt C) (Pr 7) (DB).

●——Supreme Court Authority can overrule authorities of Privy Council as well as of Board of Judicial Advisers of J. and K. State. Sewanath v. Faqir, **1965 Kash LJ 105: AIR 1965 J and K 62 (66) (Pt B) (Pr 21) (FB).**

6. Federal Court.
(A) Obiter dicta.

6. Federal Court.

——Constitution of India, Articles 374 (2), 141 — Federal Court — Decision of — Binding effect after 26-1-1950.

The decisions of the Federal Court on points of law given prior to the 26th January, 1950 are binding on all the Courts within the territory of India after 26-1-1950. **52 Cri LJ 396: AIR 1951 Mad 115 (119) (Pt B) (Pr 13) (DB).**

●——**Federal Court decision — How far binding on High Court.**

Per Hidayatullah J.:— It is not open to the High Court to depart from any principle laid down by the Federal Court but it is open to examine the facts on which that decision rested and to discover how far the principle on which stress is laid applies to the facts of the case it is dealing with. Laxmibai v. State of Madhya Pradesh, **1951 Nag LJ 377: ILR (1951) Nag 563: AIR 1951 Nag 94 (109) (Pt E) (Pr 121) (FB).**

[**Held, overruled** on another point by AIR 1951 SC 332 in AIR 1953 Nag 58.]

●——**Interpretation of Privy Council decision by Federal Court — Interpretation is binding on High Courts.**

Where the Federal Court places an interpretation upon Privy Council decisions after considering them, the High Courts should accept that interpretation as binding upon them whether it appeals to their reason or not. Kishorilal v. Debi Prasad, **31 Pat LT 14: ILR 29 Pat 71: AIR 1950 Pat 50 (64) (Pt G) (Pr 49) (FB).**

——Privy Council and Federal Court.

Federal Court — Judgments of Federal Court earlier in point of time cannot have precedence in authority over later Privy Council judgments. **54 Punj LR 472: AIR 1953 Punj 174 (175) (Pt B) (Pr 6) (DB).**

6 (A). Obiter dicta.

——Obiter dicta of Federal Court — Present authority — (Constitution of India, Articles 141, 374 (2)).

Even the obiter of a Federal Court is binding on the High Court unless they make it clear by appropriate expression that the view is a tentative one. **ILR (1955) Cut 405: AIR 1955 Orissa 160 (162) (Pt B) (Pr 11) (DB).**

——Obiter dicta — Federal Court.

Per Panigrahi, J.:— Even an obiter dictum of the Federal Court is binding upon the High Court and when a Superior Court held that an Act is "prima facie prospective" it is not open to subordinate Court to canvass the import or implication of that dictum. The use of the word "prima facie" would indicate that there is no possibility of an alternative construction being put on the Act, for it is on the face of it prospective. AIR 1951 Orissa 378, Commented. **19 Cut LT 44: ILR (1953) Cut 24: AIR 1953 Orissa 240 (243) (Pt D) (Pr 14) (DB).**

7. Privy Council and Federal Court.

——Conflict between Privy Council and Federal Court — Law before and after the Constitution — Constitution of India, Article 141.

Where, before the coming into force of the Constitution of India, there was a conflict between the view of the F. C. and the view of the P. C. of a later date the Courts were bound, under Section 212, Government of India Act, 1935, to follow the view of the P. C. The passing of the Constitution, however, cannot make the law declared by the F. C. prevail against that declared by the P. C. as Article 141 of the Constitution refers to the law declared by the Supreme Court and not to that declared by the F. C. **ILR (1952) 2 All 467: AIR 1951 All 205 (218, 221) (Pt G) (Prs 30, 42, 43) (DB).**

[**Reversed** on another point in AIR 1955 SC 600.]

——Privy Council and Federal Court — (Constitution of India, Article 374 (2)) — (Government of India Act (1935), Sections 212, 205, 208).

High Courts in India must follow the subsequent decision of the Privy Council and not the earlier decision of the Federal Court to the contrary, as long as there is no pronouncement by the Supreme Court on the question.

What Section 212, Government of India Act, really means is that the law declared by the Federal Court to the extent that the Federal Court is the ultimate authority, and the law declared by the Privy Council to the extent that the Privy Council is the ultimate, authority shall prevail. But Courts have got to look to the other section of the Government of India Act in order to decide which is the ultimate authority with regard to any particular case decided. For that purpose that must look at Sections 205 and 208.

The final authority as far as the Government of India Act was concerned in constitutional matters was not the Federal Court, but if an appeal was entertained by the Privy Council, it was the Privy Council that was the ultimate authority It was only when no leave was granted by the Federal Court and no special leave was granted by the Privy Council that the decision of the Federal Court became final and effect was given to it under Section 212. Where the Federal Court took a particualr view in a case, and that very point came up before the Privy Council and the Privy Council took a contrary view, it is that contrary view which must prevail under Section 212 and not the view of the Federal Court.

The judgments and orders of the Federal Court referred to in Article 374 (2) of the Constitution are judgments and orders which were delivered by the Federal Court in those suits, appeals and proceedings which were transferred to the Supreme Court. The provision does not mean that all judgments of the Federal Court delivered before the Constitution have been given the same efficacy and the same binding authority as the judgment of the Supreme Court delivered after the Constitution came into force.

Prior to the Constitution it would depend upon the Government of India Act as to the decisions of which Court shall have a binding effect upon the Courts, and there can be no doubt that before the Constitution was enacted the Privy Council was the final judicial authority in India whose decisions were binding on all Courts. After the Consitution has been enacted it is open to the Supreme Court to lay down the law contrary to the view expressed by the Privy Council prior to the enactment of the Constitution. **56 Bom**

LR 57a: ILR (1955) Bom 915: AIR 1954 Bom 251 (257) (Pt C) (Pre 12, 14) (DB).

[Impliedly overruled on another point in AIR 1955 SC 375.]

○——Federal Court — Principle in clear terms laid down by Federal Court — Principle must be followed, though obiter.

Per Meredith, J.:— Where the Federal Court has laid down a principle in clear terms, it is for all the subordinate Courts to follow it although observations are obiter. The Federal Court has taken over the functions of the Privy Council. It is the highest Court now existing for India even though the new Constitution has not come into force. It is of the utmost importance at this stage of constitutional development in India, when the foundations are actually being laid for the future sound development of the judiciary, that a tradition should become established of treating the pronouncements of the Federal Court with the utmost respect, so that it may successfully step into the shoes of the Privy Council. Kishori Lal v. Debi Prasad, 31 Pat LT 12: ILR 32 Pat 71: AIR 1953 Pat 30 (61) (Pt F) (Pr 35) (FB).

2. High Court decisions.

(A) Single Judge.
(B) Division Bench.
(C) Full Bench.
(D) Other of Full Bench.
(E) Co-ordinate Benches and Courts.
See also Note 3 (A).
(F) Special Bench.
(G) Pre-Constitution decisions.

3. High Court decisions.

○——Conflict of decisions — Division Bench and Single Judge — Duty of.

A single Judge is bound by a decision of a Divisional Bench exercising appellate jurisdiction. If there is a conflict of Bench decisions, he should refer the case to a Bench of two Judges who may refer it to a Full Bench. A single Judge cannot differ from a Divisional Bench unless a Full Bench or the Supreme Court overruled that decision specifically or laid down a different law on the same point. But he cannot ignore a Bench decision on the ground that some observations of Supreme Court made in a different context might indicate a different line of reasoning. A divisional Bench must ordinarily respect another Divisional Bench of Co-ordinate Jurisdiction; but if it differs, the case should be referred to a Full Bench. This procedure would avoid unnecessary conflict and confusion that otherwise would prevail. AIR 1955 Mad 551: (1955) 1 MLJ 49. Rel. on.

Even a single Judge shall not differ from a Judgment of another Judge of the same Court. If he does not agree, the proper course for him is to refer the case to a Bench of two Judges. If this procedure is followed from the beginning, there will not be any confusion created by conflict of decisions. The public will know their rights and the subordinate Courts will be in a position to administer the settled law without any difficulty: In the interests of the smooth and efficient judicial administration of the State the Andhra High Court will in future follow strictly the aforesaid procedure without any deviation. M. Subbarayudu v. State, 1955 Cri LJ 770: 1955 Andh WR (Cri) 58: 1955 Andh LT (Cri) 58: ILR (1955) Andh Pra 1: AIR 1955 Andhra 87 (94) (Pt C) (Pr 22) (FB).

——Authority of.

Judicial precedents of a High Court should not be lightly brushed aside nor distinguished unless on very substantial grounds. It may be that the judgment in a particular case may have been delivered by one of the other Judges of the High Court, but the decisions are decisions of the High Court and binding as precedents. ILR (1957) 9 Assam 1: AIR 1958 Assam 93 (102) (Pt V) (Pr 14) (DB).

○——Decision on constitutional problems — Attempt to summarise constitutional law should be avoided.

Observations Per P. B. Mukharji, J.:— In deciding constitutional problems, the judge should refrain from making any attempts to summarise the constitutional law on the points. Surajmull Nagarmull v. Commr. of Income-tax, AIR 1954 Cal 578 (584) (Pt E) (Pr 24) (SB).

——Judgment of High Court — Not binding on Judges of same High Court or of other High Courts — Constitution of India, Art. 219 — Evidence Act (1872), Ss. 43 and 165.

A judgment of a High Court is not binding on the other Judges of the same Court or upon the Judges of any other High Court. This is so, because of S. 43 and S. 165 of the Evidence Act and also because of Art. 219 of the Constitution of India and the oath taken by High Court Judges under that Article that they will act according to their judgment and not according to the judgment of others. It is open to a High Court Judge to agree with the judgment of another, but if he does not agree he must follow his own judgment.

For a High Court Judge, to treat a judgment of a High Court as binding on him and to decide a case in accordance with such judgment would contravene the provisions of Article 219 of Constitution and the oath taken by him in accordance with that Article that he will perform his duties to the best of knowledge and judgment. The conclusions contained in his judgment must be based on his judgment and not on a judgment of another High Court Judge or another Bench of High Court Judges. But before coming to his judgment he may consider various authorities and having considered various authorities, he must come to his own judgment. He may accept the view of another High Court Judge or of a Bench or of another Bench of High Court Judges but the conclusion must be his own and must be based on his own judgment. Of course, he has to apply the laws of India and one of the laws of India is contained in Article 141 of the Constitution of India, which provides that the law declared by the Supreme Court shall be binding on all Courts within the territory of India. Except when there is a judgment of the Supreme Court declaring the law to be applied, High Court Judges must use their own judgment even if they consider various decisions before forming their judgment. But without forming their individual judgment, to say that they come to a certain conclusion because a certain judgment of a High Court is binding on them would be to contravene the oath taken under Article 219 of the Constitution of India. The principle of the independence of the judiciary is enshrined in the oath taken by Judges and that principle cannot be overridden by any other principle. 1954 (2) Cri LJ 541: AIR 1954 Cal 223 (226, 229) (Pt B) (Pr 12, 34).

——Judgment of High Court — Not binding on another Judge of the High Court.

A judgment of a High Court cannot be binding on another Judge of the High Court and only the judgments of the Supreme Court which declare the law are binding on other Courts. A Bench consisting of three Judges or five Judges continues to be a Division Bench under the High Court Charter. Civil Revn. Applin. No. 1122 of,

1960 (Guj) Rel. on. Further for a judge to treat a judgment of the same High Court as binding and decide the case before him in accordance with such a judgment would contravene the provisions of S. 165, Evidence Act and Art. 219 of the Constitution.

The question of the binding nature of the judgments has been dealt with in the Constitution of India and it merely makes a judgment of the Supreme Court declaring the law as binding. There is no provision anywhere in the law to the effect that a judgment of a Division Bench of a High Court is binding on a Division Bench of two Judges but not binding on a Division Bench of three judges. It is not open to the Courts to create or add to the law of the land because Courts are not law-makers or law givers. They only interpret the law.

At the same time if there is a judgment of a Division Bench of the same High Court and a case comes up before another Division Bench which is not inclined to agree with that view, the Division Bench may request the Chief Justice to refer the entire case to another Division Bench and the Chief Justice may transfer the case to another Division Bench. But when there is a judgment of the Supreme Court as to the interpretation of a provision of law, it is not open to the Indian Courts to refer to judgments of other High Courts. The law as declared by the Supreme Court is binding on all Courts. **AIR 1963 Guj 305 (309, 310) (Pt B) (Prs 8, 13 to 15).**

——Decision of Division Bench of High Court — Who can overrule.

The decisions of one Division Bench of a High Court can only be overruled by the Supreme Court. No Division Bench of any High Court whether it consists of 3 Judges, 5 Judges or 7 Judges is given the power by High Court Charter to overrule the decisions of another Division Bench even if it consists of 2 Judges. **(1963) 4 Guj LR 1096: AIR 1963 Gui 256 (257) (Pt B) (Pr 2).**

——Division Bench decision — Power to overrule rests only with Supreme Court and none else. **(1963) 4 Guj LR 242: AIR 1963 Guj 28 (29) (Pt B) (Pr 3).**

——Difference in opinion between two Judges — Case referred under Section 429, Criminal Procedure Code, to third Judge — Opinion of third Judge constitutes judgment, not the opinion of the differing Judge. **1962 MPLJ (Notes) 317: 1963 Jab LJ 137.**

——Duty of Court to follow.

That a certain prior decision of the High Court did not consider the decision of another High Court taking a contrary view, is by itself not a sufficient ground for disagreeing with the view taken in the prior decision and referring the case in question to a larger Bench for determination. **1957 MPC 367: 1957 Jab LJ 261.**

——Decision of High Court — Binding effect.

A decision of a Court does not depend for its validity on the number of years it has been in force, and the number of decisions in favour of the particular point. The moment a valid and binding decision of a High Court is given, the days of non-decision disappear automatically, and this decision takes its place till it is displaced or overruled. **1957 Mad WN 197: 70 Mad LW 212: AIR 1957 Mad 353 (354) (Pt A) (Pr 3).**

——Erroneous decision of High Court — Binding effect — Procedure to get it reversed — (Civil P. C. (1908), Pre.).

A judgment of the High Court may sometimes be erroneous due to the omission on the part of counsel to place before the Judge the latest case law on the subject and to invite the attention to the latest amendments made to a statutory provision bearing on the case. In such circumstances, when the judgment has been reported the obvious method of clarifying the position of law is to request the High Court to constitute a larger Bench to reconsider the matter when another case involving the same question is taken up before the High Court. A private party may take recourse to this step if he is aggrieved by another judgment based on that decision, but if the quession is of far-reaching administrative importance, likely to affect several cases pending in the files of subordinate Magistrates and also cases that are likely to be instituted in the future, the Government themselves may, when the matter is brought to their notice through the Advocate-General, move the High Court for constituting a larger Bench to clarify the legal position.

A reported decision of the High Court is binding on everybody within the State, and the mere fact that like any other party Government is entitled to take appropriate steps to challenge its correctness before a proper Tribunal and get it reversed does not make it any the less binding on them. **ILR (1958) Cut 496.**

●**——Different precedents for different territorial jurisdictions.**

On a general question of law the High Court cannot have a precedent applicable to one portion of its territorial jurisdiction and a different precedent on the identical question applicable to the remaining portion of its territorial jurisdiction. Padmanabha Pillai Aivyappan Pillai v. Velayudhan Pillai Sivarama Pillai, **1956 Ker LT 570: ILR (1956) Ker 755:** AIR **1957 Trav-Co 32 (38) (Pt B) (Pr 9) (FB).**

8 (A). Single Judge.

●——Single Judge of High Court inclined to differ from view taken by earlier Division Bench or a single Judge of the High Court—He should refer matter to larger Bench or place papers before Chief Justice to enable him to constitute larger Bench. Lala Shri Bhagwan v. Ram Chand, **1965 All LJ 353: 1965 All WR (HC) 304: (1965) 2 SCWR 318: (1965) 4 Law Rep 194: (1965) 2 SCA 844: (1965) 3 SCR 218: ILR (1965) 2 All 548: AIR 1965 SC 1767 (1773) (Pt C) (Pr 18).**

——Obiter dictum of Division Bench is not binding on Single Bench. **1964 All WR (HC) 247: AIR 1965 All 172 (175) (Pt B) (Pr 14).**

——High Court judgments — Single Judge bound by view of Division Bench only if it does not conflict with an earlier decision of another Division Bench. **AIR 1964 All 136 (138) (Pt B) (Pr 8).**

——Bench decision of High Court overruling view of Single Judge — Duty of Single Judge to follow.

If a Division Bench clearly overrules the view of a Judge, its decision is binding on him even if it does not give any detailed reasons on which the superseded view was based. What matters is not the reasoning but the conclusion of the larger Bench which can be overruled only by a still larger Bench. **1964 All WR (HC) 342 (1).**

——Binding character—Decision by Single Judge in proceeding for company's winding up — Preliminary point decided by Division Bench on reference — Division Bench exercises jurisdiction vested, in single judge also and thus exercises concurrent jurisdiction — Decision of Division Bench is in exercise of same jurisdiction vested in Single Judge and should be treated as part of Single Judge decision by which winding up peti-

Cas. is finally disposed of. See Companies Act (1913), S. 222. AIR 1958 All 276 (DB).

——Single Bench differing from decision of Division Bench of same High Court, must refer question to Full Bench.

A Single Judge shall not differ from a judgment of another Single Judge of the same Court, and, if he does not agree, the proper course is for him to refer the case to a Bench of two Judges. Further a Single Judge is bound by a decision of a Division Bench exercising appellate jurisdiction and if there is a conflict of Bench decisions, he should refer the case to a Bench of two Judges who may refer it to a Full Bench. A Division Bench must ordinarily respect another Division Bench of co-ordinate jurisdiction; but if it differs, the case should be referred to a Full Bench. AIR 1955 Andh 57 (FB). Full: 1956 ALT 357. Rel. on. (1951) 1 Andh WR 202: 1951 Andh LT 253: ILR (1951) 1 Andh Pra 449: AIR 1951 Andh Pra 205 (207) (Pt B) (Pr 6) (DB).

——Single Bench and Division Bench decision — Binding effect.

A single Judge cannot differ from a Divisional Bench unless a Full Bench or the Supreme Court has overruled that decision specifically or laid down a different law on the same point. He cannot ignore a Bench decision on the ground that some observations of the Supreme Court made in a different context indicate a different line of reasoning. A Divisional Bench must ordinarily respect another Divisional Bench but if it differs the case should be referred to a Full Bench. 1955 Andh LT (Cri) 53 (FB). Rel. on. (1950) 1 Andh WR 205: 1950 Mad LJ (Cri) 256: 1950 Andh LT 304: 1951 (1) Cri LJ 919: ILR (1950) 1 Andh Pra 311: AIR 1951 Andh Pra 73 (85) (Pt E) (Pr 10) (DB).

——Decision given by Single Judge of High Court has not the same authority as that of a Larger Bench. (1950) 1 Pat LR 95: 52 Bom LR 425: (1950) 2 Lab LJ 301: ILR (1951) Bom 580: AIR 1951 Bom 157 (162) (Pt D) (Pr 10).

——Same High Court — Division Bench and a Single Judge.

Any observation on a question of law of any Judge of the High Court must be entitled to respect, but a Division Bench can differ from the view taken by the Judge and it would be open to it to take a contrary view. 56 Bom LR 878: AIR 1954 Bom 615 (622) (Pt D) (Pr 9) (DB).

——Division Bench decision is binding on Single Judge — AIR 1949 Cal 323 and AIR 1953 Cal 252, Rel. on. 63 Cal WN 86: AIR 1959 Cal 648 (647) (Pt C) (Pr 16).

——Decision of Single Judge — Binding authority.

The decision of a Single Judge on his brother Judges is only a persuasive and not a compelling authority. 1959 Cal LJ 269: AIR 1959 Cal 302 (304) (Pt C) (Pr 9).

——Bench decision in Original Side appeal — It is equally binding upon all Judges sitting singly.

A Bench decision, pronounced on either Side of the High Court is nevertheless a Bench decision of the High Court and is, as such equally binding upon all its Judges, sitting singly. 62 Cal LJ 116: AIR 1958 Cal 362 (374) (Pt B) (Pr 8).

——On principle of comity of judgments, Single Judge of High Court is bound by decision of Division Bench. AIR 1956 Cal 1 (2) (Pt E) (Pr 7).

—— Same High Court.

Single Judge of High Court is bound to follow Division Bench case of that High Court. Madh BLR 1955 Cty 298: Madh BLJ 1956 HCR 154: AIR 1955 Madh Bha 181 (182) (Pt B) (Pr 8).

——Precedents — Same High Court — Single Judge is bound to follow Division Bench.

A Single Judge of a High Court is bound to follow the Bench decision of that Court in preference to the decisions of other Courts, whether of a Division Bench or a Full Bench, and if in his opinion, the Bench decision requires reconsideration, the proper course is to place the papers before the Chief Justice for constituting a Full Bench and considering the correctness of the Bench decision. 1954 Mad WN 738: AIR 1955 Mad 1029 (1028) (Pt F) (Pr 8) (DB).

——Division Bench — Single Judge — Single Judge is bound to follow ruling of Division Bench.

A Single Judge is bound by a decision of a Divisional Bench of the same High Court exercising appellate jurisdiction. If there is a conflict of Bench decisions, he should refer the case to a Bench of two Judges who may refer it to a Full Bench. A single Judge cannot differ from a Divisional Bench unless a Full Bench or the Supreme Court overruled that decision specifically or laid down a different law on the same point. But he cannot ignore a Divisional Bench decision, on the ground that some observations of Supreme Court made in a different context might indicate a different line of reasoning. A Divisional Bench must ordinarily respect another Divisional Bench of co-ordinate jurisdiction, but if it differs, the case should be referred to a Full Bench. Case-law, ref. (1953) 1 Mad LJ 49: 66 Mad LW 127: AIR 1953 Mad 351 (353) (Pt D) (Pr 22).

——Orissa High Court Rules, Chap. III R. 1, Proviso (b) — Reference under to Division Bench — Decision of Division Bench is binding on Single Judge. See High Court Rules and Orders — Orissa High Court Rules, Chap. 3, R. 1, Proviso (b). AIR 1958 Orissa 121 (DB).

——Division Bench — Single Judge — Decisions of — Value of — Criminal Revisions.

Normally speaking, it would indeed be proper that if on a revision preferred by some of the accused persons, a Judge of the High Court sitting in Single Bench has taken a view favourable to them and acquitted them, another Judge dealing with another revision on a subsequent occasion by a different set of the accused persons should, as far as possible, fall in line with the view which has already prevailed on the previous occasion but if he finds, with due deference to the Judge who dealt with the case on that occasion, that it is not possible to do so, then he is at liberty to strike a different line altogether. But a Division Bench is not at all fettered and is free to disregard altogether the view taken by a Judge sitting alone. 1951 Raj LW 5: AIR 1951 Raj 61 (61) (Pt A) (Pr 2) (DB).

8 (B). Division Bench.

——Decision of a single Judge — Cannot be given much weight in view of decisions of Division Benches of the same High Court and of other High Courts. 1958 All LJ 505: ILR (1958) 2 All 230 (DB).

——Division Bench — Views expressed by one Judge on certain point — Other Judge neither expressing concurrence nor dissent — Later Division Bench — If bound by that view.

Where a Judge of a Division Bench nowhere in his judgment expressed his concurrence with the views expressed by the other Judge on a certain point nor express dissent and his silence on the point indicated that in his opinion it was not

necessary for the decision of the appeal to enter into the question at all, the views expressed by the other Judge must be held to be the views of a Single Judge and not of the Bench as a whole and a later Division Bench can reconsider the views so expressed by a single Judge; it is not necessary to refer the question to a larger Bench. **1958 Cri LJ 1556: 1957 All LJ 11: 1957 All WR (HC) 129: AIR 1957 All 239 (240) (Pt A) (Pr 4) (DB).**

——Precedents — Authority of decision — Bye-law of Municipality held ultra vires by single Judge — Subsequent Division Bench holding similar bye-law of another municipality as intra vires and overruling previous decision — It cannot be contended hereafter that similar bye-law of another municipality is ultra vires — (Precedents). AIR 1933 All 593. **Held, overruled** in AIR 1948 All 1. **AIR 1955 NUC (All) 4429.**

●——Division Bench — Single Judge — Single Judge of High Court cannot differ from or doubt decision of Division Bench which has not been overruled. Bhikhabhai v. Chimanlal, **55 Bom LR 641: ILR (1953) Bom 1071: AIR 1953 Bom 437 (440) (Pr 6) (FB).**

——Decision of Division Bench existing — A referee judge under S. 429, Criminal P. C. and Cl. 36 of Letters Patent does not constitute Division Bench and as such cannot differ from it — Although the decision of D. B. has not been reported it does not lose its binding character. **ILR (1960) 2 Cal 146.**

——Difference of opinion between two judges — Case referred to third judge under S. 429, Criminal P. C. — Opinion of third judge is decision of the case — View not supported by third judge — Does not become decision of Division Bench — Criminal P. C. (1898), S. 429. **1963 Jab LJ 137: 1962 MPLJ (Notes) 317: 1964 (1) Cri LJ 596 (598) (Pt C) (Pr 8) (MP) (DB).**

■ **——Division Bench — Decision of— Difference of opinion between Judges — Rule.**

Per Das, C. J.:— Where the two judges constituting a Division Bench hold two different views on the question of law, their views do not constitute by themselves, any binding authority for the lower Courts so as to be the cause for any confusion on their part. Each of the views is entitled to respect and neither can be binding The lower Courts will be left to determine for themselves, on the authority of the binding decisions, if any, as to what is the law which is to be followed by them. State of Orissa v. Miniketan Patnik, **ILR (1952) Cut 678: 1953 Cri LJ 1084: AIR 1953 Orissa 160 (165) (Pt D) (Pr 6) (SB).**

——Division Bench decision — Binding on subordinate Courts.

A clear enunciation of law by a Division Bench of the High Court cannot be disregarded with impunity by the subordinate Courts. **1963 Cur LJ 371: 1964 (1) Cri LJ 483 (485) (Pt B) (Pr 12) (Punj).**

——Same High Court — Binding nature of decision of Bench.

Ordinarily an order passed by one Bench of a High Court is final in the same proceedings, and no other Bench of the same Court can pass a different order in the matter, either on its own motion or on that of a party. **1954 Cri LJ 1298: AIR 1954 Vin Pra 33 (33) (Pt C) (Pr 4).**

8 (C). Full Bench.

■ **——Practice — Full Bench decision of High Court discarded by Single Judge of that Court — Such practice deprecated.**

Dictum — "There was a decision of the Full Bench (viz.), AIR 1946 Mad 287 (FB), which interpreted the texts and laid down the law on the topic and it is somewhat surprising that the learned Single Judge of the Court thought it proper to refuse to be bound by the judgment and proceeded on his own line of reasoning based on authorities several of which were discussed by the Full Bench relying merely on the statement by the Editor or Mayne's Hindu Law that the decision required reconsideration. We cannot but deprecate this practice as it destroys the certainty of the law which the theory of judicial precedent seeks to establish. Not merely convention but rules framed by several High Courts require that where a learned Single Judge or a Division Bench does not agree with a Full Bench decision he or they either make a reference to the Full Bench or place the papers before the Chief Justice for such a reference being made. But that was not, however, what the learned Single Judge did in the present case. He took the unusual step of practically overruling the Full Bench and refusing to be bound by it.". Kamalammal v. Venkatalakshmi Ammal, **(1965) 2 SCJ 638: (1965) 2 Andh WR (SC) 122: (1965) 2 Mad LJ (SC) 122: (1965) 2 SCWR 1011: AIR 1965 SC 1349 (1358) (Pt D) (Pr 21).**

● **—— Full Bench decision — Effect — Division Bench cannot differ from it.**

Though a Full Bench decision may not state in so many words that certain cases were wrongly decided, when a Full Bench decides a question in a particular way every previous decision which had answered the same question in a different way cannot but be held to have been wrongly decided. A subsequent Division Bench cannot disagree with a previous decision of the Full Bench of the same Court. AIR 1949 EP 328, Disapproved. Jai Kaur v. Sher Singh, **(1960) 3 SCR 975: (1961) 2 SCJ 62: ILR (1960) 2 Punj 615: AIR 1960 SC 1118 (1122) (Pt C) (Pr 10).**

——Full Bench decision — Weight of — Division Bench cannot question reasoning.

A Division Bench of the High Court has to accept the answers of the Full Bench as they are and not to sit in judgment over the reasonings adopted by the Full Bench in arriving at those answers. It cannot enter into the merits of those answers. **AIR 1958 All 54 (57) (Pt A) (Pr 9) (DB).**

[Reversed on another point in AIR 1965 SC 920.]

——Decisions of Full Bench — Weight and binding force of indicated. See Debt Laws — Madras Agriculturists Relief Act (4 of 1938), S. 8 (1). **(1960) 2 Andh WR 514.**

● **——Full Bench decision — Power of Single Judge to doubt and refer it for reconsideration.**

In view of S. 29 (b) of the M. B. High Court Judicature Act, 1949, it is clear that a Single Judge can entertain a doubt in respect of a Full Bench ruling and write to the Chief Justice for reconsideration of it by a larger Full Bench. But in the reference the Single Judge can express his doubts but is not authorised to state that, that decision is erroneous. Chandulal v. Babulal, **ILR (1952) Madh B 1: AIR 1952 Madh Bha 171 (171, 172) (Pt A) (Prs 3, 5) (FB).**

● **——Full Bench decision — Binding effect — Can be disregarded by subsequent Full Bench of more Judges.**

The rule of practice laid down by every High Court and now very well settled is that a Single Judge is bound by a Division Bench ruling and the Division Bench is bound by a ruling of the

Full Bench irrespective of the fact whether it is a unanimous decision or only a majority decision. Similarly a practice had grown up and is very well established that a former ruling of Full Bench of less number of Judges can be 'disregarded' by a subsequent majority opinion of the Full Bench consisting of more number of Judges. Though it is doubtful whether the subsequent Full Bench can in the strict sense of the term overrule the former Full Bench ruling; it does not imply that they cannot examine the matter or that it is not competent to them to take a contrary view, if they are convinced that the decision is erroneous.

So far as Full Bench decisions are concerned in India the practice has been that till a Superior Court sanctions one as a good law and overrules the other the High Court concerned and the Inferior Courts under the High Court are bound by the later ruling of a Full Bench consisting of more Judges. Chandulal v. Baboolal, ILR (1952) Madh B 1: AIR 1952 Madh Bhr 171 (172, 173) (Pt 2) (Pts 2, 3, 5) (FB).

——Full Bench decisions should, as far as possible, be held to be binding unless they be so glaringly bad as not being in conformity with any statute or with any decision of a superior Court like the Supreme Court. See Debt Laws — Madras Agriculturists Relief Act (IV of 1938), S. 13. AIR 1954 Mad 648 (DB).

○——Full Bench — Power to overrule Division Bench ruling of long standing.

A Full Bench of the Mysore High Court has undoubtedly power in proper cases to correctly expound the law and over-rule decisions to the contrary of Division Benches of the High Court, even though such decisions are longstanding. (1950) 28 Mys LJ 271: 54 Mys HCR 12 (FB).

——Rajasthan High Court Rules (1952), R. 53 — Scope of — Does not determine authority of precedents — Full Bench decision is binding on Division Bench — It is competent for a Full Bench to overrule Division Bench decision — Rule 53 cannot be taken to enable a Division Bench to ignore a Full Bench decision — If a party has any grievance remedy is not to requestion the Division Bench or to ignore the Full Bench decision. ILR (1960) 10 Raj 269: AIR 1960 Raj 240 (241) (Pt 5) (Pr 5) (DB).

○——Full Bench — Duty of.

The Full Bench has to give a clear and definite answer to the question. The answer should not be in the form of alternatives. Pappathi Ammal v. Sivagnanam, ILR (1954) Trav-Co 920: 1954 MLT 697: AIR 1954 Trav-Co 526 (535) (Pt 6) (Pr 16) (FB).

○——Full Bench decision.

Per Majority (Subramania Iyer, J., Contra) — When specific questions of law are referred to a Full Bench for decision, the Full Bench is bound to give its verdict on those questions, irrespective of any consideration as to whether the questions are separately and independently referred or whether the questions are referred along with the case which gave rise to the order of reference. Where the case is also referred, the Full Bench will have to decide the case in the light of the answers to the questions referred, and on a consideration of the evidence on record. Even if the question of law referred to the Full Bench for decision does not strictly arise from the facts of the case, the decision of the Full Bench on those questions cannot be relegated to the position of obiter dicta. On the other hand, the decision will have to be accepted, as the decision will have to be accepted as the authoritative ruling of the Full Bench on the question which it was expressly called upon to decide. Kumaran Rama v. Varkichu Joseph, ILR (1952) Trav-Co 764: 1952 Ker LT 589: AIR 1953 Trav-Co 77 (81, 82, 87) (Pt 13) (Pts 19, 33, 34) (FB).

8 (D). Obiter of Full Bench.

○——Whether Obiter Dictum of Full Bench is binding on Single Judge or Division Bench (Quere). Per Dwivedi, J.). 1964 All WR (HC) 317: 1964 All LJ 458: ILR (1964) 1 All 548: AIR 1965 All 493 (500) (Pt C) (Pr 5) (FB).

——Obiter dictum of Full Bench is entitled to highest respect. AIR 1955 NUC (Cal) 1212.

○——Obiter dicta of previous Full Bench is not binding in subsequent Full Bench though the latter be a smaller Bench. Tahira Begum v. State of Hyderabad, MLR (1963) Hyd 13: AIR 1963 Hyd 195 (199) (Pt B) (Pr 5) (FB).

8 (E). Co-ordinate Benches and Courts.
See also Note 8 (A).

○——One division bench decision is binding on another division bench. A. Kepharoumia v. Chamcharmma, (1964) 1 SCA 5238: (1964) 2 SCR 933: AIR 1964 SC 1285 (1290) (Pt E) (Pr 29).

——Conflict among decisions of Benches of same High Court — Practice to be followed.

When a Bench of the High Court gives a decision on a question of law, it should, in general be followed by other Benches unless they have reasons to differ from it, in which case the proper course to adopt would be to refer the question for the decision of a Full Bench.

It is desirable that in case of difference of opinion, the question should be authoritatively settled. It sometimes happens that an earlier decision given by a Bench is not brought to the notice of a Bench hearing the same question, and a contrary decision is given without reference to the earlier decision. When two such conflicting decisions are placed before a later Bench, the correct procedure to follow in such a case would be for the Bench hearing the case to refer the matter to a Full Bench in view of the conflicting authorities without taking upon itself to decide whether it should follow the one Bench decision or the other. Jafari Sahu v. Kaldewan Dubey, 1962 MLR 158: (1962) 1 SCJ 573: (1962) 1 Mad LJ (SC) 255: 1962 All WR (HC) 355: (1962) 1 Andh WR (SC) 255: (1962) 2 SCR 255: ILR 41 Pat 100: AIR 1962 SC 93 (97, 98) (Pt B) (Pts 9, 10).

○——Division Bench disagreeing with view of previous Division Bench of same High Court — Procedure — Reference to larger Bench.

A Division Bench should not take upon itself to say that an earlier Division Bench ruling of the same High Court cited before it, is wrong, but should follow the usual procedure in case of difference of opinion with an earlier decision, of referring the question to a larger Bench. Judicial discretion no less than legal propriety forms the basis of judicial procedure. Similarly, a Single Judge differing from a decision of another Single Judge in a previous case on a question of law should refer the case to a larger Bench instead of deciding the case in accordance with his own view. It is the uniform practice in all the High Courts in India that if one Division Bench differs from an earlier view on a question of law of another Division Bench, a reference is made to a larger Bench. In Calcutta High Court a rule to the effect has been in existence since 1867. Mahadeo Lal Kabodia v. Administrator-General of

West Bengal, **(1960) 3 SCR 578: (1961) 1 Ker LR 64: 1961 SCD 147: (1960) 1 SCJ 15: AIR 1960 SC 936 (946, 947) (Pt C) (Prs 19, 20).**

●——Conflict of views between Full Benches of equal strength — Procedure.

Where a Full Bench of three Judges is inclined to take a view contrary to that of another Full Bench of equal strength, the better course would be to constitute a larger Bench. Such a course becomes necessary in view of the fact that otherwise the subordinate Courts are placed under the embarrassment of preferring one view to another, both equally binding upon them. Atma Ram v. State of Punjab, **1959 SCJ 407: 1959 Supp (1) SCR 748: AIR 1959 SC 519 (526) (Pt C) (Pr 12).**

——Observations of Division Bench, without considering earlier decision on the point — Binding nature of.

A judge, sitting singly, is not bound by the observation of a Division Bench which were made without considering an earlier decision of a Division Bench in which the principles of law were laid down in a matter directly in issue, and he can follow the earlier decision which is in accord with his own opinion. **1963 All WR (HC) 400: 1963 All LJ 620: AIR 1964 All 210 (212) (Pt C) (Pr 8).**

[**Overruled** on another point in AIR 1965 All 498.]

●——Conflicting decisions — Reference to Full Bench — Object of.

The object of reference to Full Bench is to clarify the law for the guidance of the lower Courts. The existence of conflicting rulings on a point always puzzles and perplexes the Courts below who are at a loss to understand which decision to follow. It is desirable that the law should be clarified as early as possible. Sri Ram Varma v. State, **1956 All WR (HC) 395: 1956 All LJ 489: 1956 Cri LJ 959: ILR (1956) 2 All 551: AIR 1956 All 466 (471) (Pt B) (Pr 28) (FB).**

——Same High Court — Division Bench cannot embody in its judgment conclusion contrary to that of another Bench of co-ordinate jurisdiction. **51 Cri LJ 571: 1950 All LJ 155: ILR (1950) All 1256: AIR 1950 All 480 (482) (Pt B) (Pr 8) (DB).**

——Conflicting decisions — Which to prevail — Rule.

If two conflicting decisions of Court cannot be reconciled, the authority, which is at once the more recent and the more consistent with general principles, ought to prevail. **(1959) 2 Andh WR 458: ILR (1959) Andh Pra 1079: AIR 1960 Andh Pra 101 (104) (Pt B) (Pr 12).**

●——Single Judge of Andhra High Court should strictly follow the rules of procedure laid down by the Full Bench of the Andhra High Court, to the effect that if there is conflict of Bench decisions, a Single Judge should refer the case to a Bench of two Judges who may refer it to a Full Bench. Satyanarayana v. State of Madras, **1957 Andh LT 746: (1957) 2 Andh WR 438: 1957-1 Mad LJ (Cri) 635: ILR (1957) Andh Pra 643: AIR 1957 Andh Pra 1027 (1028) (Pt B) (Pr 4) (FB).**

●——Conflicting decisions — Bench decision and decision of single judge — Preference.

Per Ramaswami, J. — (Order of reference to Bench): When there are two conflicting decisions of the same High Court on the point in controversy, a Bench decision and a decision of a single judge, the Bench decision has got to be followed until the matter is further considered by another Bench or a Full Bench. Satyanarayana v. Venkata Subbiah, **1957 Andh LT 369: ILR (1957) Andh Pra 1: (1957) 1 Andh WR 318: AIR 1957 Andh Pra 172 (175) (Pt A) (Pr 10) (FB).**

——Value of — Judgment of single judge — Binding nature.

A judgment given by a single Judge is nevertheless a judgment of the High Court, and unless there are strong grounds for differing from that conclusion, another Bench of the High Court would be bound to follow that decision even if it be a decision of a single Judge. **59 Bom LR 1036: ILR (1957) Bom 818: AIR 1958 Bom 62 (65) (Pt C) (Pr 6) (DB).**

——Decisions of Courts of co-ordinate jurisdiction.

Where there are two decisions of a High Court which seem to be apparently in conflict and both decisions are decisions given by Courts of co-ordinate jurisdiction it is open to the Court in a later case sitting as a Court of co-ordinate jurisdiction to follow any one of the two decisions. **59 Bom LR 633: ILR (1958) Bom 667: AIR 1957 Bom 280 (283) (Pt E) (Pr 8) (DB).**

——Decision of Division Bench is binding on subsequent Benches.

If a Divisional Bench decides a question of law, it is binding on subsequent Benches unless it is possible to distinguish the decision on the facts of that particular case. **51 Bom LR 830: ILR (1949) Bom 741: AIR 1950 Bom 94 (97) (Pt B) (Pr 7) (DB).**

——Supreme Court considering and explaining its own earlier decision — Duty of inferior Courts to follow later decision. **1965 (2) Cri LJ 79: AIR 1965 Cal 348 (Pt E) (DB).**

——More than one decision of Supreme Court on same point — Duty of High Court Judge to reconcile them.

It is no doubt true that the task of the Judges of the High Court becomes very heavy where there are more than one decision of the Supreme Court on the same point, not following or overruling or explaining the other. The subsequent decision where the earlier decision has been explained and/or distinguished by their Lordships of the Supreme Court presents no difficulty, but where in the later decision the attention of their Lordships of the Supreme Court to the earlier decision was not at all drawn or where in the later decision though the earlier decision is noted but it is neither expressly overruled, explained or followed, the task of the Judges of the High Court becomes still heavier. In such circumstances it is the duty of the High Court Judges to attempt to reconcile and harmonise all the decisions of the Supreme Court given on the same point, though the most part of their time might be occupied in attempting the said reconciliation, instead of giving their attention to the main problem arising in the case. No attempt should be made by them by ignoring or bypassing or by not taking notice of all the Supreme Court decisions relevant on the point, however much time the hearing of the case might take, causing the piling up of the alleged arrears of work. To do the contrary, might utmost amount to disposals but not decisions **(1964) 1 ITJ 246: 68 Cal WN 281: (1964) 54 ITR 54: AIR 1964 Cal 254 (257) (Pt B) (Pr 11) (DB).**

——Earlier Privy Council decision laying down law giving good reasons — Later decision expressing contrary view — Which prevails.

When an earlier Privy Council decision lays down the law and legal principles by giving

good reasons therefor and another Privy Council decision expresses a contrary view without adverting to the earlier decision at all, and without giving much reason for its dictum then the Court will prefer to follow the earlier one that has given reason. An ipse dixit emanating even from Privy Council need not bind the Court from following an earlier Privy Council decision that has been followed consistently for well over 50 years. (1961) 65 Cal WN 324.

——Conflicting High Court decisions — Later Supreme Court decision — Reference to Full Bench is unnecessary. AIR 1958 Cal 510 (516) (Pt D) (Pr 23).

——Division Bench Ruling — Duty of later Bench — One of Judges of later division bench agreeing with while other Judge not approving it — Procedure — Not to be referred to a larger Bench — Prior Division Bench ruling has to be followed. 62 Cal WN 576: AIR 1955 Cal 313 (317) (Pt D) (Pr 16) (DB).

——Decision of Single Judge of High Court.

A Judge of the High Court sitting singly ought not to differ from the decision given by another Judge of the same Court unless the former decision can be said to have been given 'per incurriam'. 54 Cal WN 832. Foll. AIR 1956 Cal 1 (9) (Pt F) (Pr 27).

——Conflicting decisions of two Courts.

Where there are two conflicting decisions of two Courts the rule is that the order of the higher Court must prevail. 58 Cal WN 443: AIR 1955 Cal 85 (87) (Pt F) (Pr 7).

——Decision of Single Judge — How far binding on another Single Judge.

It is true that Judges are not entitled to bind their successors to a construction of an Act which the language plainly does not justify but a Judge sitting singly is generally bound to follow a decision of another single Judge of the same High Court on a question of law leaving it to the Court of Appeal to say whether or not that decision is wrong. 55 Cal WN 693: ILR (1953) 1 Cal 71: AIR 1952 Cal 118 (121) (Pt G) (Pr 17).

——Binding effect — Decision of one Division Bench not binding on another Bench.

When a Division Court gives a decision, it is acting on behalf of the High Court and the decision of the High Court cannot be overruled or treated as incorrect by the same High Court. One Division Court cannot sit in appeal over the decision of another Division Court. To hold that a Division Court of more than two Judges can overrule a Division Court consisting of two Judges is not justified by the Constitution of the High Court, would also lead to anomalies, and would also result in chance and accident. Where the law is written law as in India, the binding nature of the written law cannot be superseded by decisions of Courts of co-ordinate jurisdiction. At the same time, there is no doubt that previous decisions of the Courts of co-ordinate jurisdiction are entitled to the greatest and most profound respect and must as far as possible be followed if the reasoning adopted is convincing. Though one Division Court cannot overrule or declare as incorrect the decision of another Division Court it has the liberty of differing, if necessary. It is not competent for one Division Court even if it is a Full Bench, to give directions to another Division Court as to in what manner it should come to a conclusion or exercise its judgment. AIR 1941 Bom 405, Not Foll. 1962 (2) Crl LJ 360: AIR 1962 Guj 250 (252, 254 to 257) (Pt B) (Prs 5, 13, 16, 17, 19) (DB).

——Extent of binding character of precedents in India — Principle of superiority of numerical strength — Applicability to Full Benches.

Per Bhagwati, J.: — The doctrine of judicial precedents as developed and formulated in England has achieved some measure of certainty in law but has led itself open to the criticism of rigidity. The position in India is, however, different and the doctrine as it prevails in India has achieved a certain amount of balance between the opposing point of view and without sacrificing the merit of certainty, it removes to a large extent the vice of rigidity in law by accepting in principle of superiority of numerical strength in its application to the High Courts in India. The rule which requires a Court to abide by the decision of another Court of co-ordinate jurisdiction is sacrificed in favour of the principle of superiority of numerical strength in the case of Single Judges and Division Benches of the High Court. A Division Bench of the High Court is not bound by the previous decisions of a Single Judge of the High Court and can in effect overrule such decision by pronouncing it to be incorrect and, similarly, a Full Bench of the High Court is not bound by the previous decision of a Division Bench of the High Court and can examine the correctness of such decision and declare that the law is not correctly laid down in such decision. In these cases, the principle of superiority of numerical strength amongst Benches of co-ordinate jurisdiction is recognised and given effect to and a departure is made from the rule which requires that a court should hold itself bound by the decision of another of co-ordinate jurisdiction.

The same principle of superiority of numerical strength among Benches of co-ordinate jurisdiction prevails so far as Full Benches of the High Court are concerned. It is of course axiomatic that a Full Bench constituted of three Judges of the High Court, which is the minimum strength of a Full Bench, is bound by the previous decision of another Full Bench constituted of three Judges of the High Court. That this should be so is clear from the fact that both the Full Benches are Benches of co-ordinate jurisdiction and the numerical strength of the Judges composing both the Full Benches is the same. But a Full Bench consisting of a larger number of Judges can override the decision of another Full Bench consisting of a lesser number of Judges and declare that the law was not correctly laid down in such decision.

The result in all such cases of course would be that the previous decision of a Single Judge, Division Bench or Full Bench would cease to be a binding authority and would, for all practical purposes, be regarded as overruled by the later decision of the Division Bench, Full Bench or Full Bench consisting of larger number of Judges. State of Gujarat v. Gordhandas Keshavji Gandhi. (1961) 3 Guj LR 266: AIR 1962 Guj 128 (171, 172) (Pt B) (Pr 117) (FB).

——Previous inconsistent decisions — High Court free to follow either.

Where there are previous inconsistent decisions of its own, the High Court is free to follow either. It can follow the earlier, but equally, if it thinks fit, it can follow the later. (1962) 3 Guj LR 500.

——Principle of comity of judgments — Exception to — Decision given per incuriam — What is.

One of the well-recognised exceptions to the rule that a decision of a court of co-ordinate jurisdiction should be followed by another court similarly constituted, is that a judgment defi-

vered per incuriam is not binding on a court of co-ordinate jurisdiction.

The doctrine of binding precedent of a co-ordinate court is not absolute, in its applicability. It does, however, rest strongly on the principle of comity which requires uniformity of decisions of courts and certainty about the law. Precedents of a court of co-ordinate jurisdiction should be respected and followed unless there is strong permissible reason for not doing so, for instance, in case of a decision delivered incuriam. It is not, however, every relevant consideration or aspect or fact of a question or point for determination about which there may have been some mistake or misapprehension or which might have been overlooked by the court which decided the question or point that can be regarded as adequate ground for treating the decision as per incuriam. **(1960) 1 Guj LR 242: (1961-62) 21 FJR 573: (1962) 2 Lab LJ 194: AIR 1961 Guj 22 (26) (Pt C) (Prs 10, 11) (DB).**

[**Overruled** on another point in AIR 1962 SC 1500.]

——Authority of Division Bench.

It is not within the power of a Division Bench of a High Court to sit in appeal on the judgment or orders passed by a previous Division Bench. **52 Cri LJ 487: AIR 1951 Hyd 74 (74) (Pt B) (Pr 3) (DB).**

● **——Full Bench decisions of same High Court** — So far as the same High Court and inferior Courts are conerned, they are bound by the later ruling of a Full Bench consisting of more Judges, till a superior Court sanctions one as good law and overrules the other. Chandulal v. Babulal, **ILR (1952) Madh B 1: AIR 1952 Madh B 171 (173) (Pt B) (Prs 8, 9) (FB).**

——Single Judge differing from decision of another single Judge — Duty to refer to larger Bench.

A Judge has always the right of expressing his own opinion and indicating that he is not in agreement with an authority binding on him, but he is nevertheless in duty bound to follow it. A Single Judge differing from a decision of another Single Judge in a previous case should refer the case to a larger Bench instead of deciding the case in accordance with his own view. The same procedure should be followed by a Division Bench if it is inclined to disagree with an earlier decision of another Division Bench on a question of law. **1963 Jab LJ 390: 1963 (2) Cri LJ 375: 1963 MPLJ 429: AIR 1963 Madh Pra 276 (281) (Pt B) (Pr 13) (DB).**

——Division Bench of High Court — If it is of contrary opinion to that of another division Bench of same High Court has power and duty only to make a reference to Full Bench. **ILR (1964) 1 Mad 327: (1965) 1 Mad LJ 486: (1965) Mad LJ (Cri) 258: 1965 (1) Cri LJ 714: AIR 1965 Mad 225 (230) (Pt C) (Pr 12).**

——Single Judge — Judgments of — If binding on another Judge of same High Court.

A judgment of a single Judge of the High Court is binding on another single Judge of that High Court and if the latter is not inclined to agree with it, he should refer the matter to a Division Bench or place the papers before the Chief Justice for further orders. **(1958) 2 Mad LJ 561: 72 Mad LW 665: ILR (1959) Mad 149: AIR 1959 Mad 75 (75, 76) (Pt B) (Pr 3) (DB).**

——Authority of — Bench decision — A point cannot be overruled by Bench of co-equal authority. **70 Mad LW 715: 1957 Mad WN 558: (1958) 28 Comp Cas 71 :ILR (1957) Mad 1058: (1957) 2 Mad LJ 517: AIR 1957 Mad 702 (711) (Pt E) (Pr 27) (DB).**

● **——Two conflicting Full Bench decisions — Effect — Civil P. C. (1908), Pre.**

Per Raghava Rao J.: — The fact that a Full Bench decision of four Judges has not been accepted by another Full Bench of four Judges does not certainly show that the former has ceased to be and that the latter has, in its place, become binding authority on the point. Nor does the mere fact that later Divisional Benches have accepted the later Full Bench ruling and refused to consider themselves bound by the earlier Full Bench ruling make any difference to the continuing existence of the conflict between the two Full Bench decisions unless one of them is upheld and the other overruled formally and in an appropriate manner. If there are two conflicting Full Bench decisions of equal strengh on any point, it is necessary that the conflict should be submitted to fuller Bench for determination in any case in which the question on which the conflict exists does arise for decision. If this course is not adopted, courts subordinate to the High Court are left without guidance as to which Full Bench ruling to follow and which to reject. Peramanayakam Pillai v. Sivaraman, **(1952) 1 Mad LJ 308: ILR (1952) Mad 835: AIR 1952 Mad 419 (453) (Pt B) (Pr 80) (FB).**

——Decision of Division Bench is binding on another Division Bench.

The decision of a Division Bench is binding on another Division Bench as much as it is binding on a single Judge. A Division Bench cannot pronounce on the correctness of a decision of another Division Bench. If it is necessary to reconsider a Division Bench ruling the only course open to a Division Bench is to make a reference to the Chief Justice with a recommendation that the case be placed before a Full Bench. AIR 1943 Nag 340 (FB). **ILR (1956) Nag 630: AIR 1956 Nag 115 (117) (Pt B) (Pr 11) (DB).**

——Desirability of avoiding conflicting decisions by Single Judges.

If a single Judge of a High Court finds that the decision of another single judge reported or otherwise, has taken a view which does not commend itself to that Judge, the best course to follow is to refer the case for decision by a larger Bench and bring it to the notice of the Chief Justice. Otherwise, there is the danger of conflicting precedents confusing the subordinate judiciary.

The view taken by a single Judge is either correct or otherwise. If it is correct it has got to be followed by another single Judge or even by a larger Bench. If it is erroneous, then the proper course is to have that opinion revised by a larger Bench, so that the subordinate judiciary may know where they stand. The most essential quality of precedents is that they should render the law clearly ascertainable by lawyers who advise litigants and not to add to the confusion, which very often does arise as a result of conflicting decisions given by single Judges. **1952 Nag LJ 488: ILR (1952) Nag 453: AIR 1953 Nag 38 (39) (Pt B) (Pr 7) (DB).**

——Conflicting decisions of Court of co-ordinate jurisdiction — Civil P. C., Pre.

In cases of conflicting decisions of Courts of co-ordinate jurisdiction a Court is entitled to take its own view. AIR 1939 Bom 277. Foll. **1952 Nag LJ (Notes) 83.**

——Division Bench decision — Binding nature.

A subsequent Division Bench cannot declare wrong the view of law expressed by an earlier

Division Bench. Normally the question should be referred to a Full Bench.

Held, however, that since the earlier Division Bench had not discussed the law and its attention was not invited to Section 32 (2) of the Evidence Act and the observations therein were based merely on the concession of the counsel, it was not necessary to refer the case to a Full Bench. **31 Cut LT 823: ILR (1965) Cut 403: 1966 Cri LJ 45: AIR 1966 Orissa 21 (22) (Pt B) (Pr 6) (DB).**

——Decision of High Court in writ proceedings is binding on parties — As regards persons not parties to proceedings, it becomes a valuable precedent on any disputed point of law not merely as a guide but as an authority to be followed by all Courts of co-ordinate or inferin jurisdiction administering the same system until it is overruled by a Court of superior jurisdiction or by a validly enacted statute. **AIR 1960 Orissa 46 (53) (Pt C) (Pr 13) (DB).**

[**Reversed** on another point in AIR 1962 SC 945.]

——Same High Court — Decision of Division Bench — How far binding on later Division Bench.

A Division Bench of a High Court cannot overrule an earlier decision of another Division Bench of the same Court. But where the decision of the previous Bench was not based on complete unanimity between the two Judges who constituted that Bench, it will be open to a later Division Bench to examine the same. Moreover, even a Division Bench decision of the Court may have to be ignored if it is subsequently found that it was based on a failure to take into consideration the principles laid down by the Supreme Court. **ILR (1956) Cut 573: 22 Cut LT 419: 1957 Cri LJ 78: AIR 1957 Orissa 10 (14) (Pt D) (Pr 17) (DB).**

——Division Bench cannot overrule or doubt decision of another Division Bench. **(1949) 17 ITR 247: AIR 1952 Orissa 109 (110) (Pt B) (Pr 12) (DB).**

——Two conflicting decisions of Division Bench — Earlier decision prevails. AIR 1955 Pat 124. Rel. on. **ILR 39 Pat 909: AIR 1961 Pat 178 (186 to 189) (Pt B) (Prs 54, 61, 69, 82, 83, 85, 86) (DB).**

——Division Bench cases — Earlier and later decisions — Conflict — Rule.

Where an earlier decision of Division Bench was in conflict with the decision in a Division Bench case of later date but the later case was in conformity with other Division Bench cases decided even prior to the earlier case and those decisions had not been considered in the earlier case:

Held, that the earlier Division Bench decision was not binding on the Court. **AIR 1958 Pat 577 (578) (Pt B) (Pr 6).**

——Conflicting decisions — Preference.

If there are two conflicting decisions of Division Benches of a High Court, the opinion expressed by the first Division Bench must prevail **1955 BLJR 64: ILR 33 Pat 1009: AIR 1955 Pat 124 (124) (Pt C) (Pr 2) (DB).**

——Decision of Division Bench — Another Division Bench cannot pronounce on correctness of such decision. **AIR 1955 NUC (Pat) 1599 (DB).**

[**Overruled** on another point in AIR 1958 Pat 386.]

——Conflicting decisions — Duty of Court.

The view that in case of conflict of opinion the Courts in Pepsu are to prefer the Punjab view is not correct. When a question of law on which judicial opinion is not uniform comes up for decision, the Courts must apply their own mind to the question before them, arrive at the their own conclusions and give reasons for the same. Assistance may of course be derived from decided cases, but it is for the Courts to give reasons for following a particular view expressed in a particular case. **1956 Cri LJ 100: AIR 1956 Pepsu 1 (2) (Pt C) (Pr 9) (DB).**

——A single Judge differing from a decision of another single Judge in a previous case on a question of law should refer the case to a larger Bench instead of deciding the case in accordance with his own view. AIR 1960 SC 936, Foll. **66 Pun LR 109: ILR (1964) 1 Punj 581: 1965 (2) Cri LJ 237: AIR 1965 Punj 337 (338) (Pt B) (Pr 4) (DB).**

——Conflicting decisions — View adopted consistently has to be given due weight. **1965 Cur LJ 330 (Punj).**

——Conflicting Single Bench decisions — Practice — Grover, J., in order of Reference.

It would create a good deal of difficulty for the subordinate Courts if conflicting decisions are given by Single Judges. When a Single Bench differs from a previous decision of another Single Bench the matter should be referred to a larger Bench for final decision AIR 1960 SC 1118, Applied. **65 Punj LR 328: AIR 1963 Punj 494 (494) (Pt A) (Pr 1) (DB).**

——Decision of single Judge — Reference to larger Bench — Practice.

It is true that a single Judge of a High Court should ordinarily follow other single Bench decisions and that in case the former does not agree with the view taken therein he should refer the matter to a larger Bench. Where however though there were single Bench decisions holding that there was inherent power of review vesting in the tribunals under the Motor Vehicles Act there was no grave or serious manifest injustice in the matter and there was therefore no occasion for the exercise of the discretionary power of granting a prerogative writ against the order of review, the High Court did not refer the matter to a larger Bench and the case was remanded back to the Appellate Authority for considering the whole matter over again. **64 Punj LR 884: AIR 1963 Punj 92 (94, 95) (Pt B) (Pr 7).**

——Authority of — Extent of — Judge disagreeing with judgment of single Judge of the same High Court — Question should be referred to larger bench.

A precedent is an authority on its own facts and it is permissible to refuse to accept a mere logical extension of a given decision. The doctrine of precedents is not something to be developed by analogy.

A judgment of a single Judge on a point of law, though technically not binding on another Single Judge, is entitled to respect and should in the interest of uniformity and certainty be followed. In case the correctness of the law laid down by a single Judge is doubted by another single Judge, the matter should unhesitatingly be referred to a larger Bench for an authoritative decision. When the legal proposition laid down in the earlier decision is in conflict with the law laid down by a higher or superior Court or by a larger Bench of the same High Court, the more authoritative decision undoubtedly commands greater respect and priority, being binding on both the Courts. Another exception is when a decision of a court of coordinate jurisdiction determines something per incuriam. AIR 1960 SC 936, Rel. on. **64 Punj LR 235: ILR (1962) 1 Punj 799.**

——Powers of Bench of High Court — Has no jurisdiction to sit in judgment on decision of another Division Bench. AIR 1958 SC 143. Foll. **AIR 1960 Punj 521 (523) (Pt A) (Pr 7) (DB).**

——Decision of single Judge — Binding effect.

It is true that strictly speaking one Single Judge is not bound by the decision of another Single Judge, but a Judge ought in the interest of consistency to follow a decision of Court of co-ordinate jurisdiction as to the construction of an Act of the legislature. **61 Pun LR 208: AIR 1959 Punj 206 (208) (Pt B) (Pr 4).**

8 (F). Special Bench.

——Authority of Special Bench decision, whether has same binding force as that of a decision of a Full Bench constituted under the Appellate Rules for resolving conflict of opinion (Quaere). **1956 Andh WR 360: 1957 Cri LJ 930: AIR 1957 Andh Pra 456 (457) (Pt A) (Pr 3) (DB).**

● **——Full Bench decision of three Judges is not binding on subsequent Special Bench consisting of three other judges of the High Court.**

A Full Bench decision by three Judges of the High Court will certainly be a binding authority on a Division Bench of the High Court but a Special Bench consisting of three other Judges of the High Court is not bound by that decision though that decision is entitled to great respect and the question can be examined by this Bench apart from the decision of the Full Bench Jyotish Chandra Nath v. Ejdani Mea Majumdar. **ILR (1963) 15 Assam 173: AIR 1963 Assam 49 (51) (Pt A) (Pr 4) (SB).**

● **——High Court — Special Bench of five Judges — Decision by — Authority of.**

A decision of a Special Bench of the High Court, though consisting of five Judges, has only the authority of a decision of a Division Bench and not that of a Full Bench. Dhirendra Nath Bera v. Nurul Huda, **56 Cal WN 1: 52 Cri LJ 1226: ILR (1952) 2 Cal 390: AIR 1951 Cal 133 (135, 136) (Pt B) (Pr 18) (FB).**

——Special Bench decision — Majority view expressed in separate judgments — Ratio of majority decision.

Where the majority view of the Special Bench on the question referred, is taken by four (A, B, C and D) of the five Judges composing the Bench, but two judgments are delivered by the Judges composing the majority, one judgment delivered by A, with which B and C fully concur, and the other judgment by D, unless it can be shown that the reasoning which D has given is adopted by the other three Judges (A, B and C), that reasoning cannot be regarded as constituting the ratio of the majority decision of the Special Bench. The ratio of the decision has to be found in the judgment delivered by A. **(1963) 4 Guj LR 405: AIR 1963 Guj 80 (87) (Pt C) (Pr 15) (DB).**

8 (G). Pre-Constitution decisions.

● **——Precedents — Decision of predecessor Court — Decisions of erstwhile Hyderabad High Court.**

Whether or not the present High Court of Hyderabad is bound to follow the decisions of the erstwhile Hyderabad High Court, they are entitled to the highest weight. Molugu Paniah v Molugu Ramanathan, **ILR (1953) Hyd 762: AIR 1954 Hyd 66 (70) (Pt B) (Pr 20) (FB).**

——Decesion of predecessor Court — Ruling of Pre-Constitution State High Courts.

Decisions of the former Travancore and Cochin High Courts are only of persuasive value for the post-Constitution High Court of Travancore and Cochin and those decisions do not bind it. **ILR (1953) Trav-Co 206: 1953 Ker LT 430: AIR 1953 Trav-Co 283 (285) (Pt D) (Pr 10) (DB).**

9. Duty of Subordinate Courts and Tribunals.

——Duty of subordinate Courts.

Subordinate Courts are bound to follow implicitly the decision of their own High Court — AIR 1946 All 509. Rel. on. **1966 All WR (HC) 155: 1960 All Cr R 125: 1960 All LJ 216.**

——Lower Court to follow ruling of High Court specifically dealing with the point and not those impliedly dealing with it. See Civil P. C. (1908), Preamble. **AIR 1954 All 486.**

——Subordinate Courts — Duty to follow ruling of High Court.

When there is a specific ruling dealing with the point, the Sessions Judge is not justified in following the other cases which only impliedly accepted that point. The principle always is that a decision of the High Court is a ruling on a point which is specifically decided in that case and where such a specific decision is available cases, in which action may have been taken contrary to that view, should not be followed. It is only when there is no specific decision by the High Court that it may be possible for the lower Courts to follow the course adopted by the Court impliedly in other cases. **1954 All WR (HC) 175: 1954 All LJ 185: 1954 Cri LJ 1031: AIR 1954 All 486 (486) (Pt A) (Pr 2).**

● **——Duty of subordinate Courts.**

Subordinate Courts are bound to follow bench decisions of their High Court even if they do not agree with it. Bankey Lal v. Babu, **1953 All LJ 349: 1953 All WR (HC) 293: ILR (1953) 2 All 299: AIR 1953 All 747 (748, 749) (Pt C) (Pr 15) (FB).**

——Magistrate is bound to follow authority of his High Court — Disregard of authority amounts to insubordination.

A Magistrate is bound to follow the authority of the High Court to which he is subordinate. Whenever, therefore, he is called upon to decide a question of law it becomes his duty to ascertain whether any pronouncement of the High Court exists on the point. Omission to do so is as much dereliction of duty as omission to refer to sections of the statute. The disregard of authority is, however, something still more objectionable. It amounts to an act of insubordination. **51 Cri LJ 436: 1949 All LJ 413: ILR (1950) All 935: AIR 1950 All 134 (137) (Pt B) (Pr 11).**

——Practice — Duty of Bench and Bar — Subordinate Courts must refer to decisions binding on them — Bench and Bar must keep themselves informed of march and progress of law, both statutory and case law — They should read law reports regularly — When ignorance of law is no excuse in case of illiterate person, it is much more so with them who are concerned with administration of law. **(1954) 2 Mad LJ (Andh) 195: 1954 Andh LT (Civil) 163: AIR 1955 Andhra 49 (54) (Pt E) (Pr 27) (DB).**

[**Overruled** on another point in AIR 1955 Andhra 87, **Reversed** on another point in AIR 1961 Andh Pra 430.]

● **——Special Tribunal — Duty of.**

Income-tax tribunal is bound by decision of High Court to which reference lies, unless the decision was overruled or modified: Per Ram

Labhaya, J.— Proper course for tribunal is to follow the ruling and then make a reference to the High Court at the instance of the Commissioner if it felt aggrieved by the decision. Sm. Jyotikana v. Commissioner of Income-tax, Assam, **(1954) 26 ITR 424: AIR 1954 Assam 113 (115, 116) (Pt A) (Prs 4, 7) (SB).**

[**Reversed** on another point in AIR 1958 SC 19.]

——Supreme Court considering and explaining its earlier decision — Duty of inferior Courts to follow later decision. **1965 (2) Cri LJ 79: AIR 1965 Cal 348 (DB).**

——Decision of High Court — Binding nature of — Subordinate Courts and Tribunals, duty of, to follow. **(1965) 69 Cal WN 249.**

——Interpretation of provision of section of statute by Judge — It has a binding force and due weight must be given to it in subsequent cases — Precedent.

If a particular case has interpreted the provisions of a particular section of a statute whether it is in course of a civil proceeding or in course of a criminal prosecution the interpretation so put will have a binding force and a due weight may be given to the effect of such interpretation by Judges who are confronted with similar questions in subsequent cases coming up before them for determination. **('64) 68 Cal WN 974.**

——Special Tribunal — Duty of Income-tax Tribunal — (Income-tax Act (1922), S. 33).

The Tribunal cannot disregard the decision in a case arising in the State of West Bengal. Its clear duty is to follow it, irrespective of what views it might itself hold and leave it to the Commissioner to bring up the matter on a reference to the High Court, if he was so advised. **(1953) 24 ITR 70: 92 Cal LJ 94: AIR 1954 Cal 225 (231) (Pt I) (Pr 19) (DB).**

——Extent of authority — Earlier and later decisions.

A judicial decision on a question of law is not a piece of legislation but only an exposition or correct interpretation of what the law on the subject is. The fact that there was a previous judicial decision in which another view was taken does not make the view taken in the later decision a fresh piece of legislation. The later decision only says what the correct law is and amounts in effect only to a pronouncement that the earlier case was decided wrongly. Therefore, the subordinate Courts would be acting wrongly in not following the later decision. **1958 KLT 83: 1958 Ker LJ 83.**

——Tendency to refer decisions of other High Courts to decisions of one's own High Court deprecated.

The growing tendency on the part of the subordinate Courts as well as of the lawyers to take recourse to the decisions of other High Courts in matters covered by decisions of their own High Court must be deprecated. **Madh BLJ 1955 HCR 1941: AIR 1956 Madh Bha 44 (47) (Pt B) (Pr 6) (DB).**

——Contempt of Courts Act (1926), S. 1 — Criticism of High Court's decision by inferior judicial officer or Magistrate — Amounts to contempt. See Contempt of Courts Act (1926), Section 1. **AIR 1953 Madh Bha 60.**

——Subordinate Courts are bound to follow decisions of the High Court. **1965 Mah LJ (Notes) 108.**

——Binding nature of — Disregard of — Effect.

When the High Court interprets a statutory provision and declares the law it is binding on all the administrative officers and they are obliged to follow it. Where the Regional Transport Authority indulged in sort of juggling in order to by-pass the two decisions of the High Court the attempt was held condemnable. **(1964) 2 Mad LJ 305: 1964 Mad WN 466: ILR (1965) 1 Mad 376.**

■ **——Conflict between decisions of High Court — Rule to be adopted by subordinate Courts.**

The normal rule as to the precedents is that subordinate Courts are bound, in the absence of any decision of the Supreme Court, to follow the decision of the High Court to which they are subordinate. Where, however, there is a conflict between two decisions of the High Court, the rule to be adopted is as follows. Where the conflict is between the judgment of a single Judge and a Bench or between a Bench and a larger Bench, the decision of the Bench or the larger Bench, as the case may be, will have to be followed. But where the conflict is between two decisions both pronounced by a Bench consisting of the same number of Judges and the Subordinate Court after a careful examination of the decisions comes to the conclusion that both of them directly apply to the case before it, it will then be at liberty to follow that decision which seems to it more correct, whether such decision be the later or the earlier one. To enable the subordinate Court to do so, the two apparently conflicting decisions must directly relate to and expressly decide the question that arises before the Court; otherwise a Subordinate Court should follow that ruling which specifically deals with the point. Rama Subbarayalu Reddiar v. Rengammal, **1962 Mad WN 489: ILR (1962) Mad 1001: 75 Mad LW 452: (1962) 2 Mad LJ 318: AIR 1962 Mad 450 (452) (Pt A) (Pr 4) (FB).**

——Disregard of decisions.

Disregard of decisions which are binding would amount even to dereliction of duty. **1956 Cr LJ 1202: 69 Mad LW 788: 1956 All WR (Supp) 114: (1956) 2 MLJ 43: AIR 1956 Mad 536 (540) (Pt F) (Pr 23) (DB).**

——Disregard of reported decisions.

Dictum— Disregard of the reported decisions of the High Courts is highly objectionable on the part of the lower Courts and prosecutors and, as has been repeatedly pointed out, amounts to an act of insubordination. **1953 Mad WN 929: 1956 Cr LJ 1079: AIR 1956 Mad 452 (453) (Pt C) (Pr 9).**

——Duty of subordinate Courts — Disregard of reported decisions is highly objectionable and amounts to act of insubordination. **AIR 1955 NUC (Mad) 433.**

——Subordinate Courts — Duty of.

Every Magistrate is bound to follow the authority of his High Court and it is his duty to keep himself informed of the current decisions of at least his own High Court. Omission to do so is as much dereliction of duty as omission to refer to sections of the statute. **(1953) 2 MLJ 28: 1953 Mad WN 494: 1953 Mad WN (Cri) 174: AIR 1955 NUC (Mad) 424.**

——Duty of Court — Rules guiding Courts in following decisions of Courts of co-ordinate or appellate jurisdiction stated. See Houses and Rents

Madras Buildings (Lease and Rent Control) Act, S. 13. **AIR 1953 Mad 351.**

● **——Decision of superior Court — Binding effect — Extent.**

Per Mudholkar J.: — Where a decision of a superior Court is based upon more than one ground or supported by more than one reason, it is not open to an inferior Court, which is bound to follow its decision, to treat either of the reasons given as an obiter. Laxmibai v. State of M. P., **1951 Nag LJ 377: ILR (1951) Nag 563: AIR 1951 Nag 94 (117) (Pt G) (Pr 167) (FB).**

[Held overruled on another point by AIR 1951 SC 332 in AIR 1953 Nag 58.]

——Subordinate Courts — Duty of.

Courts are bound implicitly to follow the decisions of the High Court to which they are subordinate. To render a decision of the High Court binding upon the Subordinate Courts, it is unnecessary that it should have been reported. An unreported decision is not any-the-less authority. To enable a Subordinate Court to find the law as laid down by the High Court, the production of a certified copy of the judgment is enough. **ILR (1953) Trav-Co 905: 1954 KLT 941: AIR 1954 Trav-Co 226 (229, 230) (Pt G) (Prs 12, 14) (DB).**

——Subordinate Courts — Duty of.

There is a duty on the part of the judiciary to keep themselves informed of the current decisions of at least the High Court to which they are subordinate. AIR 1947 Mad 106, Ref. **1950 TCLR 398: AIR 1952 TC 92 (94) (Pt B) (Pr 6) (DB).**

10. Decisions of other High Courts.

——Single Judge ruling of its own High Court should be followed and not later Division Bench ruling of another High Court. **ILR (1954) 2 All 23: 1953 All LJ 221: 1953 Cr LJ 1255: 1953 All WR (HC) 302: AIR 1953 All 523 (523) (Pt B) (Pr 2) (DB).**

● ——Unreported decision of another High Court cannot ordinarily be the basis for referring points finally decided by Division Bench of the Andhra High Court to a Full Bench. Satyanarayana v. State of Madras, **(1957) 2 An WR 438: 1957 Mad LJ (Crl) 635: AIR 1957 Andh Pra 1027 (1028) (Pt B) (Pr 4) (FB).**

——Practice of Bombay High Court is to fall in line with decisions of other High Courts in the matter of interpreting Income-tax Act which is an all-India Act. But when it finds that a view is taken which is contrary to the provision of a section of the Income-tax Act, it cannot fall in line with such a view. More than authorities it is its duty to give effect to the provisions of the Act itself and when these are clear, no authority can persuade it to take a contrary view. (Civil P. C. (1908), Preamble). **(1956) 29 ITR 903: 58 Bom LR 697: ILR (1956) Bom 648: AIR 1956 Bom 321 (323) (Pt C) (Pr 6) (DB).**

——Rival views — That which gives Court wider powers to remedy defects and meet ends of justice should be followed. **1962 Kash LJ 115: AIR 1963 J and K 10 (10) (Pt B) (Pr 2).**

——Conflict of decisions of different High Courts — Law to be followed — Practice in Kutch.

In Kutch, the decisions of the Bombay High Court are usually preferred where there is a conflict of opinion with the other High Courts and if a Court differs from that High Court it is desirable to state briefly the reasons for it. **AIR 1952 Kut 14 (14) (Pt A) (Pr 5).**

——Decision of other High Court to be followed in the absence of any conflicting decision of M. P. High Court.

The executing Court refused to follow a case direct on the point on the ground that it was a decision of another High Court.

Held, that the question of following or not following decisions of another High Court arose only when there was a conflict between the decisions of M. P. High Court and the decisions of other High Courts. In the instant case no conflict existed so the decision of other High Court was to be followed. **1962 MPLJ (Notes) 302.**

——Different High Court — Decision of— Value of.

The Courts should ordinarily follow a decision of an other High Court in matters such as income-tax when it is desirable to lay down a common policy. But where the wording of the section is not clearly in favour of a decision against the tax-payer and it is, to say the least, a case of doubt, the statute has to be interpreted in favour of the subject when the Court is dealing with a case of fiscal enactment. AIR 1946 Nag 216, Ref **35 Mys LJ 39: (1955) 27 ITR 549: ILR (1955) Mys 20: AIR 1955 Mys 49 (58) (Pt C) (Pr 26) (DB).**

[Reversed on another point in AIR 1958 SC 795.]

11. Judicial Commissioner's Court at Ajmer.

——Practice of Judicial Commissioner's Court at Ajmer — Practice at J. C.'s Court at Ajmer, in case of difference of opinion between High Courts, is to follow the views of the Allahabad High Court. **AIR 1954 Ajmer 82 (82) (Prs 2, 3).**

12. Andhra and Madras High Courts.

——Decisions of undivided Madras High Court — Binding on Andhra Pradesh High Court. **(1964) 2 Andh WR 337: ILR (1966) Andh Pra 616: AIR 1965 Andh Pra 8 (9) (Pt B) (Pr 2).**

——Decisions of Madras High Court before 5-7-1954 are binding on Andhra High Court.

The High Court of Andhra is bound by the decisions of the Madras High Court delivered before 5th July, 1954, not only on the ground that the High Court of Madras and the High Court of Andhra were of co-ordinate jurisdiction, but also on the ground of stare decisis: AIR 1955 Andh 87: 1955 An WR 150 (FB), Foll. **(1961) 1 Andh WR 202: 1961 Andh LT 233: ILR (1961) 1 Andh Pra 499: AIR 1961 Andh Pra 305 (307) (Pt A) (Pr 6) (DB).**

● **——Decisions of Madras High Court before 5th July, 1954 — Binding effect on Andhra Pradesh High Court — Decision reversed by Full Bench decision of Madras High Court after inauguration of Andhra High Court — Effect — Value of Full Bench decision — Reference to Full Bench of Andhra Pradesh High Court.**

In the Order of Reference— Bench decision of the Madras High pronounced before 5th July, 1954, is binding on the Andhra High Court. A precedent overruled is definitely and formally deprived of all authority. It becomes null and void like a repealed statute. If the judgment of a Division Bench of the Madras High Court is reversed by a Full Bench of that High Court after 5th July, 1954, the Division Bench of the Andhra Pradesh High Court might, if they agree with the decision of the Full Bench refer the matter to a Full Bench of the Andhra Pradesh High Court: AIR 1955 Andhra 87; 1955 Andh WR 150 (FB), Rel. on.

Per Full Bench — Full Bench decision of the Madras High Court after the inauguration of the Andhra High Court is not a binding authority on the Andhra (now Andhra Pradesh) High

Court, though of great persuasive effect. Thenka Veeriah v. Thammisetti Nagiah, **(1959) 2 Andh WR 166: 1959 Andh LT 634: AIR 1959 Andh Pra 547 (548, 549) (Pt B) (Prs 3, 4, 8) (FB).**

——Conflict between the two Division bench decisions of Madras High Court — Andhra High Court is not bound to refer it to Full Bench — AIR 1940 Mad 356; (1940) 1 MLJ 400 (FB). Foll **(1958) 2 Andh WR 608: ILR (1959) Andh Pra 227.**

——Value of — Andhra High Court — Prior bench decisions standing side by side conflicting with later Bench decisions of Madras High Court — Andhra High Court not bound to refer matter to Full Bench but is entitled to prefer and follow later decisions of Madras High Court which are in accordance with legal principle — AIR 1955 Pat 124, Diss. **(1958) 1 An WR 40: ILR (1958) Andh Pra 54: 1958 An LT 449: AIR 1958 Andh Pra 218 (221, 222) (Pt D) (Prs 13, 14) (DB).**

——Decision of Bench — Value of.

A decision of a Division Bench of the Madras High Court delivered before 5th July, 1954, is binding on the High Court of Andhra Pradesh **(1958) 33 ITR 123: AIR 1958 Andh Pra 143 (144) (Pt C) (Pr 3) (DB).**

——Conflict between two bench decisions of Madras High Court — Duty of single Judge of Andhra High Court.

The decisions of the Madras High Court rendered before 5th July, 1954, are binding upon the Andhra High Court and if there is a conflict between two binding Bench decisions, it should be resolved by a Full Bench. It is not open to a Single Judge to prefer to follow "the Bench decision which is in accordance with justice and legal principles". 1955 Andhra WR 150: AIR 1955 Andhra 87 (FB). Foll. **1956 Andhra WR 1082: ILR (1956) Andh Pra 1076: AIR 1957 AP 981 (984) (Pt C) (Pr 10) (DB).**

——Conflict between decisions.

When there is a conflict between two Bench decisions of the Madras High Court rendered before 5-7-1954, it is open to the Andhra High Court to prefer and follow the Bench decision which is in accordance with justice and legal principles. **1955 Andh LT (Civil) 243: 1955 Andh WR 271: AIR 1955 Andhra 215 (217) (Pt C) (Pr 9).**

[Reversed in AIR 1957 Andh Pra 981.]

● **——Decisions of Madras High Court delivered prior to 5th July, 1954, how far binding on Andhra High Court — Courts of co-ordinate jurisdiction — Meaning of.**

Per Full Bench— The binding nature of the precedents of one Court on another depends upon whether such Courts are Courts of co-ordinate jurisdiction or not. Co-ordinate jurisdiction does not connote the same idea as concurrent jurisdiction or simultaneous jurisdiction. It would not be inappropriate to call a successor Court a Court of co-ordinate jurisdiction with its predecessor, if their jurisdictions at the point of time they exercised it are similar to or co-extensive with each other.

The test to ascertain whether two High Courts are of the co-ordinate jurisdiction or not, is whether the two Courts are of equal rank and status or of equal authority and exercise similar jurisdiction.

The Andhra High Court is in a real sense an offshoot of the Madras High Court exercising the same jurisdiction and administering the same laws, which the Madras High Court had exercised before the 5th July, 1954, in the territories included in the Andhra State. To use a convenient terminology, the Andhra High Court may be treated as one succeeding to the High Court of Madras and exercising all the powers and administering the same law which the Madras High Court exercised in the territories comprised in the Andhra State. The Andhra High Court and the Madras High Court prior to 5th July, 1954, are therefore, Courts of co-ordinate jurisdiction; even if the two High Courts are deemed to be not Courts of co-ordinate jurisdiction, the Andhra High Court shall follow the Madras decision on the principle of stare decisis in the same manner that the Madras High Court follows its own decisions and subject to the same limitations. AIR 1955 Andhra 49: (1954) 2 MLJ 195 (Andhra). **Overruled.**

Per Bhima Sankaram, J.:— Where territories under the jurisdiction of one High Court are divided into two, each to be under the jurisdiction of a separate High Court, it seems to me that the principle underlying the rule of precedents requires the continuity of case-law to be maintained, because there is no reason at all why the certainty of the law should be affected. The Andhra High Court is in one sense, new of course, but its jurisdiction is a jurisdiction which once was subject to one High Court and until 5th July, 1954, governed by the case law as laid down by that High Court. A Court should be reluctant to favour innovations unless they are indispensable.

There may be cases where decisions rendered by the Madras High Court before 5th July, 1954, may be overruled by the Madras High Court itself, but in such cases where it is brought to the notice of this Court that the earlier decisions have been departed from, in Madras, this Court will re-consider them in the light of the subsequent rulings. M. Subbarayudu v. The State, **1955 Cr LJ 770: 1955 Andh WR 150: 1955 Andh LT (Cri) 53: ILR (1955) Andhra 1: AIR 1955 Andhra 87 (90 to 95) (Pt A) (Prs 7, 12, 16, 17, 18, 21, 31, 33) (FB).**

——Full Bench decision of Madras High Court— Not binding on Andhra High Court.

The Andhra High Court which was inaugurated in July, 1954, is not bound by the Full Bench of the Madras High Court or other High Courts and is at liberty to examine the question in the light of well-established legal principles and arrive at a proper conclusion. **1954 Andh LT (Civil) 163: (1954) 2 MLJ (Andhra) 195: AIR (1955) Andhra 49 (54) (Pt D) (Pr 25).**

[Overruled in AIR 1955 Andhra 87, **Reversed** on another point in AIR 1961 Andh Pra 430.]

——Decisions of Madras High Court — Duty of Subordinate Courts in Andhra State.

The Andhra High Court which was inaugurated in July 1954, is not bound to blindly follow all the decisions of the Madras High Court and is entitled to examine the soundness or the correctness of those decisions in proper and appropriate cases. But those decisions are entitled to the greatest respect and weight. The Subordinate Courts in Andhra State are primarily bound to follow the decisions of the Andhra High Court. If there are no decisions of the Andhra High Court directly governing the case, they ought to follow the decisions of the Madras High Court as they have been previously doing in preference to the decisions of other High Courts. It is only when there are no decisions of the Andhra High Court or the Madras High Court dealing with the point that they are free to follow the decisions of other High

Courts. **1955 Cr LJ 339: 1954 Andh LT (Cri) 38: (1954) 2 MLJ (Andhra) 158: AIR 1955 Andhra 33 (36) (Pt B) (Prs 10, 11).**

——Decision of predecessor Court — Andhra High Court to normally follow Madras Full Bench and Division Bench rulings. **(1954) 2 MLJ (Andh) 170: AIR 1955 Andhra 5 (7 to 9) (Pt A) (Prs 7, 8, 9).**

——Decision of predecessor Court — Decisions of Madras High Court — Binding effect of Andhra High Court — (Constitution of India, Art. 141).

So far as the Andhra High Court which was constituted on 5-7-1954 under Act 30 of 1953 is concerned, the only decisions which are of binding value are the decisions of the Supreme Court and a decision of Division or Full Bench of Andhra High Court. The decision of other High Courts including the Madras High Court, have only persuasive effect and will certainly be referred to with great respect in arriving at the correct principles, even though they are not binding upon the Andhra High Court. **(1954) 2 Mad LJ (Andh) 95: 1954 Andhra LJ (W) (HC) 75: 67 Mad LW 922: AIR 1954 Andhra 29 (32) (Pt E) (Pr 12).**

13. Madhya Pradesh and Madhya Bharat High Courts.

——M. P. High Court — M. B. High Court decisions are not binding. **1959 Jab LJ 480: 1960 Cr LJ 236: 1960 MPLJ 684: AIR 1960 Madh Pra 54 (55) (Pt B) (Pr 7).**

[**Overruled** on another point in AIR 1963 Madh Pra 276.]

——Decision of Madhya Bharat High Court — If binding on Madhya Pradesh High Court.

Although decisions of the Madhya Bharat High Court are not binding on the High Court of Madhya Pradesh, yet they are certainly entitled to great respect. **1960 Jab LJ 209: 1960 MPC 517: 1960 MPLJ 33.**

——Decisions of High Court.

After the re-organisation of States, the rulings of Nagpur High Court have binding authority on all subordinate Courts of Madhya Pradesh. **1959 MPLJ 388: 1959 MPC 297: 1959 Jab LJ 513: AIR 1959 Madh Pra 253 (255) (Pt C) (Pr 10).**

——Authority of — Full Bench decision of Madhya Bharat High Court — Binding effect on Madhya Pradesh High Court.

A Full Bench decision of the now defunct M. B. High Court is persuasive, and is to be given due consideration, but is not binding, and it is open in appropriate case for a Division Bench of the new Madhya Pradesh High Court to differ from it. **1958 MPC 808: 1959 Jab LJ 184: 1959 MPLJ 589.**

14. Nagpur, Madhya Pradesh and Bombay High Courts.

——Bombay High Court not bound to follow decision of Nagpur High Court as it is not binding on it. **1958 NLJ 294: 60 Bom LR 1247: ILR (1959) Bom 113.**

——M. P. High Court and Courts subordinate to it must follow decisions of old Nagpur High Court. **1961 MPLJ (Notes) 310: 1965 Jab LJ 1097: ILR (1961) Madh Pra 173: AIR 1961 Madh Pra 220 (223) (Pt B) (Pr 17).**

13. Bombay and Gujarat High Courts.

●——Division Bench decision of Bombay High Court — Though entitled to highest consideration is not binding on Full Bench of Gujarat High Court — (Per Bhagwati, J.) Patel v. State of Gujarat. **ILR (1965) Guj 1204: AIR 1965 Guj 23 (50) (Pt C) (Pr 42) (FB).**

——Decisions of Bombay High Court given prior to bifurcation of former Bombay State — Decisions are binding on High Court of Gujarat, **ILR (1965) Guj 701: (1965) 6 Guj LR 228.**

——Decisions of Bombay High Court before formation of Gujarat High Court — Decisions are binding on Gujarat High Court. **(1966) 61 ITR 30: (1965) 1 ITJ 718 (Guj).**

●——'Law in force' — Whether includes case law — Decisions of Bombay High Court given prior to 1-5-1960 — Decisions are binding on Gujarat High Court as successor Court on principles of judicial comity and not as 'law in force' within S. 87, Bombay Reorganisation Act, 1960. **(1962) 3 Guj LR 259: AIR 1962 Guj 128 (132, 134, 138, 162) (Pt A) (Prs 3, 8, 27, 28, 105) (FB).**

——Decision of Bombay Court rendered prior to 1st May, 1960, i.e., bifurcation of former State of Bombay is binding on Gujarat High Cort. **(1961) 2 Guj LR 343: AIR 1961 Guj 151 (158) (Pt B) (Pr 12) (DB).**

[**Reversed** on another point in AIR 1964 SC 1043.]

——Judgments delivered by Bombay High Court before 1st May, 1960 — Are binding on Gujarat High Court. AIR 1960 Guj 40 (FB), Rel on. **(1960) 1 Guj HCR 151: (1960) 1 Guj LR 190: AIR 1961 Guj 7 (7, 8) (Pt B) (Pr 5).**

●——Decisions of Bombay High Court prior to 1-5-1960 — Binding on Gujarat High Court — Bombay Reorganisation Act (1960), S. 87 — Law in force — Connotation of.

The decisions of the High Court of Bombay given prior to the appointed day, viz., 1-5-1960 are binding on the Gujarat High Court. The expression 'any law in force immediately before the appointed day' in Section 87 of the Bombay Reorganisation Act, 1960, must lead to the conclusion that decisions of the High Court of Bombay given before the appointed day are binding on Gujarat High Court as the law in force.

Simply because the Gujarat High Court is in a sense a successor to the High Court of Bombay in respect of the territories which now form part to the State of Gujarat, it cannot be a Court of co-ordinate jurisdiction with that predecessor. Anand Municipality v. Union of India, **(1960) 1 Guj LR 82: (1960) 1 Guj HCR 92: AIR 1960 Guj 40 (42, 43) (Prs 4, 6 to 9) (FB).**

16. Kerla and Travancore-Cochin High Courts.

●——Conflict between two Full Bench decisions — Subsequent Division Bench not referring question to larger Bench — Refusal on ground that earlier decision did not fully discuss the question and that it was noticed in later decision — Refusal not justified.

When a Division Bench finds that there is a conflict between two Full Bench decisions, their refusal to refer the case to a larger Bench is not justified by the fact that the question was not as elaborately discussed in one decision as in the other or that the earlier Full Bench decision had been noticed in the later dicision. The necessity for reference to a larger bench arises only from a conflict and if there would have been a conflict if the earlier decision had not been noticed in the later decision, it would exist even if it had been noticed. State of U. P. v. Firm Deo

Dutt Lakhan Lal. **1955 All WR (HC) 546: 1965 All LJ 862: 1965 All Cr R 348: ILR (1965) 2 All 917: AIR 1966 All 73 (79) (Pt A) (Pr 19) (FB).**

——Kerala High Court — Single Judge of Kerala High Court can dissent from a Bench decision of the former Travancore-Cochin High Court. **(1964) 2 Ker LR 451: 1964 Ker LT 532: 1964 Ker LJ 812: AIR 1965 Ker 29 (30) (Pt C) (Pr 3).**

——Kerala High Court is a new High Court of a new State and is not a successor of either Travancore-Cochin High Court or Madras High Court, and is not therefore bound by decisions of these High Courts — Their views have only persuasive value. **1960 Ker LJ 1023: 1960 Ker LT 955: ILR (1960) Ker 1191: AIR 1961 Ker 75 (77) (Pt A) (Pr 7).**

17. Lahore and Simla High Courts.

——Decision of predecessor Court — Decisions of Lahore High Court — Binding effect on Simla High Court.

The Simla High Court is a successor and a continuation of the High Court at Lahore and the decisions of that Court ought to be followed in the application of the principle of stare decisis, unless those decisions are manifestly erroneous. **56 Punj LR 109: ILR (1954) Punj 963: AIR 1954 Punj 173 (174) (Pt B) (Pr 5).**

18. Orissa and Patna High Courts.

——Practice prevalent in north Orissa — Decision of Calcutta High Court in absence of decision to contrary of Patna or Orissa High Courts are to be followed by the Subordinate Courts. **AIR 1955 NUC (Orissa) 709.**

——Decision of High Court — Binding nature.

All persons within the State of Orissa are bound to follow the decisions of this Court until they are subsequently overruled either by a larger Bench of this Court or by a decision of the Supreme Court or by an enactment passed by the Legislature. **ILR (1958) Cut 549: 1959 Cr LJ 884: AIR 1959 Orissa 116 (117) (Pt C) (Pr 4) (DB).**

——Orissa High Court — Absence of decision in point — Duty of subordinate Courts.

In the absence of any direct decision of the Court on the question, the subordinate Courts of Orissa State should follow the decisions of the Patna High Court in preference to the decisions of other High Courts. **25 Cut 39: ILR (1959) Cut 1.**

——Practice — Orissa High Court — In matters of Court-fee practice of Patna High Court should be followed. **AIR 1951 Orissa 10 (11) (Pt B) (Pr 3).**

19. Mysore High Court.

● ——Mysore High Court — Not bound by decisions of former Chief Court and High Court of Mysore. Basappa v. State, **1958 Mad LJ (Cr) 770: 36 Mys LJ 580: 1959 Cr LJ 57: ILR (1958) Mys 288: AIR 1959 Mys 1 (3, 4, 6, 8) (Prs 9 to 11, 18, 25) (FB).**

——Constitution of India, Art. 141 — High Court of Mysore is now bound by the law laid down by the Supreme Court. See Constitution of India, Art. 141. **AIR 1953 Mys 75 (DB).**

20. High Courts of covenanting States.

——Decisions of erstwhile Hyderabad High Court — Weight of.

Though the decisions of the erstwhile Hyderabad High Court are not binding upon the High Court of Andhra Pradesh, they are persuasive precedents entitled to respect. **(1957) 2 Andhra WR 91: 1958 All WR (HC) 255: ILR (1957) Andh Pra 837: AIR 1957 Andh Pra 714 (723) (Pt B) (Pr 18) (DB).**

● **——Judgments of erstwhile Hyderabad State Judicial Committee — How far binding on present Hyderabad High Court.**

It is true that the opinion expressed in the Hyderabad State Judicial Committee should be confined to the decision in that particular case and the firman of the Nizam confirming the advice tendered by the Judicial Committee relates only to the operative order of the advice tendered to him. Though this is so the views expressed by the erstwhile Judicial Committee have always been treated with great respect and there is no reason to differ from this practice. Commercial and Industrial Bank, Ltd. v. Mir Sarfaraz Alikhan. **ILR (1956) Hyd 79: AIR 1956 Hyd 65 (69) (Pt C) (Pr 12) (FB).**

● **——Value of — Decisions of Travancore and Cochin High Courts — Binding effect on Travancore-Cochin and Kerala High Courts.**

To the Travancore-Cochin High Court and to the Kerala High Court the decision of the Travancore and Cochin High Courts have only a persuasive effect and when the concerned decisions themselves say that the view taken in them is not very logical and are only by way of attempts to reconcile conflicting ideologies their persuasive value amounts to little or nothing. Lakshmikutty Amma v. Madhavan Pillai. **1957 Ker LJ 1119: 1957 Ker LT 1196: ILR (1958) Ker 1: AIR 1958 Ker 111 (113) (Pt A) (Pr 5) (FB).**

——Decision of Judicial Committee, Gwalior — Binding effect in Madhya Bharat.

It is true that since the merger of the former Gwalior territory into Madhya Bharat, the decisions of the Judicial Committee, Gwalior, are no more binding, but they are to be treated with respect and are not be departed from unless very good reasons exist. AIR 1951 All 205, Rel. on. **1956 MBLJ (HCR) 1595.**

——Decisions of High Courts in Covenanting States prior to integration are not binding on Madhya Bharat High Court. **AIR 1955 NUC (Madh B) 3031.**

● **——Decisions of High Courts of covenanting States forming Madhya Bharat — Binding effect — Duty of subordinate Courts— Held that (1949) 1 Madh BLR 81: AIR 1950 MB 31 (FB), should be disregarded.**

By no stretch of imagination Madhya Bharat High Court can be looked upon as successor to Indore High Court or any High Court of any Covenanting States. It was in fact a voluntary merger of 22 smaller units, some of them, of course, with distinct progressive outlook but all with autocratic rule, to form a larger unit of Madhya Bharat in order to fall in line with other sister States of India with democratic institutions. It is true that these smaller units had integrated to form the new Madhya Bharat State; but it is not true that the High Courts of Covenanting States had also integrated to form the present Madhya Bharat High Court. In fact the High Courts in Covenanting States were altogether abolished and an independent High Court with power and stability and fresh outlook had come into existence. Consequently High Courts of former Covenanting States cannot be regarded as of equal rank with the present Madhya Bharat High Court.

If rulings of any High Court of Covenanting States are cited before the subordinate Courts and if any guidance is needed, they should be asked to consider them on their own merits. Where

there is no ruling of the Madhya Bharat High Court or of the Supreme Court, and if a ruling of a High Court in India differs from a ruling of a High Court in a Covenanting State, the subordinate Courts should follow that ruling which, in their own judgment, appears to be the better ruling, but it does not imply that they are bound to follow a ruling of any High Court, if in the exercise of their own reason and judgment they come to a different conclusion.

Held, that the Full Bench decision in (1949-1 Madh B LR 81; AIR 1950 MB 31 FB) should be disregarded and that the decision of former Indore High Court should not be held binding on the Madhya Bharat High Court or on the Courts subordinate to it. Chandulal v. Babulal, **ILR (1952) MB 1: AIR 1952 Madh Bha 171 (173, 174) (Pt D) (Prs 12, 13, 14) (FB).**

● **——Full Bench decision of Indore High Court —Decision is binding on all Courts including Division Benches and single Judge of Madhya Bharat High Court — Madhya Bharat Ordinance (1 of 1948), Cl. (3) — Madhya Bharat Ordinance (2 of 1948), Cl. 5.**

Decisions of the Indore High Court, being of a tribunal of co-ordinate jurisdiction, are binding authorities in the same manner as though they are decisions of the Madhya Bharat High Court, and should be followed by all subordinate Courts in respect of matters decided therein. So far as the Madhya Bharat High Court itself is concerned, they are binding on Division Benches and single Judges and no single Judge or a Division Bench can dissent from them merely because they are inclined take a different view. AIR 1927 Rang 4, Rel. on; AIR 1920 Lah 321; AIR 1925 Lah 466; AIR 1929 Lah 174 and AIR 1934 Oudh 360, Ref.

This is also in consonance with the intention of the Madhya Bharat Ordinances I and II of 1948 to treat the principles established by the decisions of the High Courts in the Covenanting States on the same footing as the laws, usages, rules, regulations etc., referred to in them i.e., to follow them until they are modified by any competent authority. Dagdu v. Tulsiram, **1 Madh BLR 81: AIR 1950 Madh B 31 (33, 34) (Pt A) (Prs 12, 13) (FB).**

——Decision by Gwalior State High Court — That judgment, right or wrong, binds the parties — High Court of Madhya Pradesh cannot sit in appeal on that judgment. **1962 Jab LJ 764: 1962 MPLJ 1102: 1962 MPC 428: ILR (1964) Madh Pra 721: AIR 1963 Madh Pra 51 (55) (Pt E) (Pr 38) (DB).**

——Decisions of Judicial Committee of former Patiala State are not binding on Pepsu High Court.

The decisions of the Pepsu Judicial Committee are binding on the High Court unless the Supreme Court lays down different law; but the decisions of the Judicial Committee of the former Patiala: State are not binding upon the Pepsu High Court, at the most those decisions are only persuasive precedents. **ILR (1955) Patiala 572: AIR 1956 Pepsu 7 (9) (Pt C) (Pr 7).**

● **——Law laid down by Supreme Court—Constitution of India, Art. 141.**

Where in certain matters the Judicial Committee of Pepsu has laid down the law but that matter has not gone before the Supreme Court and consequently no occasion has arisen for that Court to lay down the law on the same point, Section 5 of the Pepsu Judicature Ordinance (10 of 2005) must be given effect to and the law laid down by the Judicial Committee must be followed by all Courts in Pepsu, including the High Court. It is only when the law laid down by the Supreme Court is different from that laid down by the Judicial Committee, that Art. 141 of the Constitution will come into operation, Santu v. Sohan Lal, **2 Pepsu LR 245: 1951 BLR (Pepsu) 26: AIR 1951 Pepsu 33 (36, 37) (Pt B) (Pr 5) (FB).**

——Value of — Rajasthan High Court — Decision of Judicial Committee of former State of Bikaner based on personal knowledge of Judges — Not of any value.

The High Court of Rajasthan is not bound by the decision of the Judicial Committee of the former State of Bikaner. Where such a decision is based on the personal knowledge of the Judges, the decision is not of any value at all. **ILR (1958) 8 Raj 942: AIR 1958 Raj 186 (188) (Pt B) (Pr 16) (DB).**

● **——Decisions of late Chief Court of Jodhpur if binding on Rajasthan High Court — Civil P. C. (1908), Pre.**

The late Chief Court of Jodhpur as constituted in 1912 not being a Court of Record is not a Court of co-ordinate jurisdiction with the High Court of Rajasthan which is declared to be a Court of Record by the Rajasthan High Court Ordinance (15 of 1949) and as such the judgments of the former Court are not binding on the latter. Hasti Mal v. Shanker Dan, **ILR (1951) 1 Raj 297: AIR 1952 Raj 7 (8) (Pt A) (Pr 5) (FB).**

——Rajasthan High Court — Decisions of Bikaner High Court — Binding effect — Though not binding are entitled to respect as decisions of other High Courts. **AIR 1951 Raj 148 (149) (Pt A) (Pr 2).**

● ——Decision of former Travancore High Court has no force as a binding precedent so far as present Travancore-Cochin High Court is concered. **AIR 1953 Trav-Co 1 (10) (Pt G) (Pr 24) (FB).**

21. Conflicting decisions of Superior Court.

See also Note 8 (E).

——Conflict of views in Supreme Court decisions —High Court is bound to follow later pronouncement. **1963 Mah LJ 295: 65 Bom LR 420: (1963) 7 Fac LR 112: (1963) 2 Lab LJ 247: ILR (1963) Bom 561: AIR 1963 Bom 236 (240) (Pt B) (Pr 11) (DB).**

——Privy Council expressly or impliedly abandoning or dissenting from ratio decidendi of their earlier decision — Duty of Courts in India is to treat earlier decision as obsolete. If they cannot consistently follow both the decisions, they must follow the later decision. **AIR 1950 Mad 680 (686) (Pt B) (Pr 18) (DB).**

——Supreme Court decisions — Conflict of views in — Latest view overrides contrary views expressed in earlier decision and would be binding on all Courts. AIR 1958 SC 468 **held overruled** on another point by AIR 1959 SC 648. **AIR 1961 Mys 3 (7) (Pt A) (Pr 11) (DB).**

22. Board of Revenue and other Tribunals.

——Committees of Houses of Legislature are sovereign bodies — Rules of procedure made by them are merely their handmaids; they can ignore them with impunity. **(1965) 1 Andh WR 241: AIR 1965 Andh Pra 306 (310) (Pt B) (Pr 10).**

——High Court decisions — Are binding on tribunals situated within its territorial jurisdiction — To ignore them would be to ignore terms of Art. 227 of the Constitution — Tenancy Laws — Madras Estates (Abolition and Conversion into

Ryotwari) Act (26 of 1948), S. 12 (b) (iii) — Constitution of India, Art. 227.

The decisions of the High Court have not only a persuasive but also have a binding force on all the Courts subordinate to the High Court as well as the tribunals situated within the territorial jurisdiction of the High Court. The Tribunals constituted under Andhra Pradesh (Andhra Area) Estates (Abolition and Conversion into Ryotwari) Act cannot therefore ignore the decisions of the High Court. To ignore them is to ignore the terms of Art. 227. Where, therefore, the High Court in a previous litigation had held that certain lands were private lands of the landholder, the landholder would be entitled to a ryotwari patta in his favour in the proceedings under Section 12 (b) (iii) in respect of the same lands. 1955 Andh WR 251; AIR 1955 Andhra 240; (1958) 1 Andh WR 290, Rel. on. **(1965) 2 Andh WR 191.**

——Tenancy appeal — Revenue Board's opinion — Has no statutory force — Not binding on Collector.

The opinion of the Board of Revenue cannot have any statutory force nor is it binding on the Collector. **(1962) 2 Andh WR 195: (1962) 2 Andh LT 452.**

——Revenue Courts in Assam must follow Calcutta High Court decisions until they have been reversed by higher Courts or by the Assam High Court. **AIR 1955 NUC (Assam) 622.**

——Decisions of highest Taxation Tribunal — Advisability of following previous rulings — Sudden and unreasonable change of view deprecated.

Even apart from the question whether the doctrine of precedents could apply in full vigour to Tribunal of the nature of Board of Revenue, it is certainly a consideration of natural justice that the authorities in the sphere of taxation cannot hold the citizen to the whims and caprices in matters, concerning essential practices of trade and business allowing deductions under certain statutory provisions in some cases and disallowing such deductions in some others, although the circumstances, appertaining to both the categories, were exactly similar. In the matter of operation of Acts like the Sales Tax Act, the Board of Revenue is, ordinarily, the highest authority and decisions of that Tribunal are binding on the taxing authorities. It is only just and fair that the citizen who has taken his guidance from the earlier decisions of the Board shall not be allowed to be prejudiced or victimised by sudden and unreasoned reversal of the view point of that highest authority. **67 Cal WN 179: (1964) 15 STC 186: AIR 1963 Cal 409 (415) (Pt E) (Pr 24) (DB).**

——Customs — Authorities — Tariff Rulings — Weight of — Power of law to overrule and set aside.

The Customs are bound by their own precedents in administering taxing statutes involving the very basis of taxation in respect of particular article. They should not modify their own previous decisions but should apply to Courts or Parliament of Legislature as the case may be, to put the law beyond doubt. Tariff Rulings are in the nature of administrative directions or guides. These departmental instructions, guides or ruilngs can always be examined by Courts of law and, if found wrong in law, can be overruled and set aside by the Court. **62 Cal WN 661: AIR 1958 Cal 630 (632) (Pt C) (Pr 8).**

——Board of Revenue bound by decisions of High Court and Supreme Court. **1956 MBLJ (HCR) 1475.**

——Revenue Courts.

Revenue proceeding — Single Bench of Revenue Board should accept decision of Division Bench of Board. **AIR 1955 NUC (Nag) 1428.**

——Board of Revenue — Practice — (Constitution of India, Art. 226).

The High Court cannot take upon itself the burden of directing the Board of Revenue as to what rulings they are bound to follow and what they are not. It is for them to decide for themselves as to what shall be the cursus curiae of that tribunal. Where the Board of Reveune has not followed its previous ruling it cannot be said that order impugned had gone beyond the powers conferred on the member, Board of Revenue. **ILR (1954) Nag 320: 1954 Nag LJ 345: AIR 1954 Nag 191 (192) (Pt C) (Pr 5) (DB).**

23. Law Reports.

● **——Law reports — Reporting rules — Decisions on question of fact — Reporting deplored — Precedents.**

The practice of reporting decisions on questions of fact, which do not materially assist future Courts, has to be deplored. To report a case of "very special facts" is to mislead the profession. A case deciding only question of fact is no better reportable then a case deciding a question of law but of "very special facts".

A case is an authority for what it actually decides and not for cases to arise in future and a proposition of law contained in a judgment, however widely it may be expressed, is applicable only to the facts of the case.

Judicial declaration unaccompanied by judicial application is not authority. Jawala Mohan v. State. **1962 All LJ 1119: 1962 All Cri R 471: 1962 All WR (HC) 880: 1963 (1) Cri LJ 404: ILR (1963) 1 All 585: AIR 1963 All 161 (165) (Pt C) (Prs 6, 7) (FB).**

——Law reports — Authority of — Proposition of law only — Facts stated in a reported ruling — If proved by.

The ruling of a case is an authority for the proposition of law contained therein. Facts (such as admissions) contained in the judgment published in a Law Report are to be proved by filing the same as a piece of evidence to enable the other side to adduce rebutting evidence of the said facts. **1952 ALJ 310: AIR 1953 All 378 (379) (Pr 6).**

——Law reporting — Necessity of reporting High Court decisions.

Decisions of High Court dealing with questions of law deserve due publicity and should be liberally reported in the Law Reports. If some one were to produce certified copies of the unreported Bench decisions of the High Court and the reported Bench decisions were also to be cited the subordinate Court might well find itself in somewhat embarrassing position for it may not be an easy task to deduce agreed ratio from the observations contained in these decisions. It is true that sometimes even the reported decisions may not be cited but then such lapses cannot be helped. One must remember that this Republic is under the rule of law which has certain fundamental requisites. Two of such requisites are: (i) that law must be certain so that people can act safely on it and (ii) law is readily ascertainable so that people may know what their rights and duties are. These requisites may well be considered to constitute the basic structure—or at least a substantial part of it—on which the rule of law depends. Liberal reporting of judgments helps to bring them to the notice of the bar, the Courts and the people whereas unduly restricted

reporting tends to keep the law concealed in the Court record rooms. A Court decision rightly decided deserves publicity on its own merit, a decision which may be considered by some to be wrong must also be open to easy access and scrutiny so that it may be reconsidered and the correct principle of law finally laid down by the superior tribunal. **1964 Cur LJ 192: AIR 1964 Punj 346 (Pt C) (Pr 13) (DB).**

——Necessity of unrestricted reporting — Judicial precedents.

One cannot over-emphasise the importance of certainty and easy ascertainability of law in all legal systems; more so in our system of administration of justice where judicial precedents play a vital role in interpreting the existing law, conflicting judicial precedents must not, so far as possible, be allowed to remain in the field and it is eminently desirable in the interest of rule of law to strive to sustaim uniformity in this domain, so that law may be both certain and predictable. The proper functioning of the rule of law requires liberal and not restricted report ing of decisions laying down law for the guidance of the citizens, the bar and the Courts. **(1962) 66 Punj LR 421.**

24. English and American decisions.

(A) Indian statutes in same terms and on same lines.

(B) Decisions based on justice, equity and good conscience.

(C) Absence of Indian statute law.

24. English and American decisions.

——English cases — English decisions have only persuasive value in India. Bondada Gajapathi Rao v. State of Andhra Pradesh. **(1965) 1 SCJ 465: 1965 Mad LJ (Cri) 240: 1965 SCD 390: (1964) 7 SCR 251: 1965 Mad WN 161: (1965) 1 SCWR 1014: 1965 All WR (HC) 445: 1965 All Cr R 288: 1964 (2) Cr LJ 598: AIR 1964 SC 1645 (1646, 1647) (Pt B) (Pr 2).**

——English decisions — Undue influence at elections — Law in England not same as in India, as contained in S. 123 (2), Representation of the People Act (1951) — Decisions of the English Court based on words of the English statute, which are not strictly pari materia with the words of the Indian statute cannot be used as precedent in India. See Representation of the People Act (1951), S. 123 (2). **AIR 1959 SC 855.**

——Foreign decisions.

The Court can derive no assistance from decisions that deal with laws made in other countries to deal with situations that do not necessarily arise in India. Pratap Singh v. Sri Krishna Gupta. **1956 SCJ 143: 1956 SCA 366: 1956 SCC 91: (1956) 2 SCR 1029: AIR 1956 SC 140 (142) (Pt C) (Pr 12).**

——English decisions — Value of.

Supreme Court is not bound by the dicta and authority of English Cases. Chatturbhuj Vithaldas, Jasani v. Moreshwar Parashram. **1954 SCJ 315: 1954 SCR 817: AIR 1954 SC 236 (242) (Pt F) (Pr 34).**

——Precedents — English decisions.

It would be quite wrong for Indian Courts to follow the English practice without knowing the circumstances which gave rise to, and justified, the practice. Raja Ram v. State. **1953 All LJ 644: 1953 All WR (HC) 657: 1954 Cr LJ 438: ILR (1954) 1 All 379: AIR 1954 All 204 (207) (Pt D) (Pr 14) (FB).**

——English decisions.

It is not always safe to seek for guidance from English decisions on matters where Courts are governed by the provisions of a statute. AIR 1930 PC 59, Foll. **56 Bom LR 365: ILR (1954) Bom 615: AIR 1954 Bom 370 (378) (Pt G) (Pr 15) (DB).**

——English decisions.

Sen, J.:— Caution is necessary in respect of English decisions on point of law on which Indian law is codified because in such cases, the code or the statute alone will govern the Indian law and the English decision may be used only to help to interpret the words of the statute, if obscure.

House of Lord's decision laying down the law on the particular point of law of evidence is of the highest binding force on all Courts in England but where the provisions of the Code under which the Indian Courts are governed are different, the House of Lord's decision cannot be followed in India. **AIR 1954 Cal 258 (263) (Pt A) (Pr 18) (DB).**

——English decisions — Decisions of House of Lords and Court of appeal.

The Courts in India are not bound by the decisions of either the House of Lords or the Court of Appeal and if the reasoning of the earlier decisions of the Court of Appeal appeared to be the better reasoning, there is nothing to prevent them from following those decisions rather than the later decision of that Court or the decisions of the House of Lords. **ILR (1953) 2 Cal 239: 57 CWN 149: AIR 1953 Cal 516 (518) (Pt C) (Pr 13) (DB).**

——Rulings of House of Lords and Court of Appeal in England, though not binding on Indian High Court, are entitled to highest respect — Judgments of Privy Council are, however, binding. **AIR 1952 Cal 335 (337) (Pt A) (Pr 18).**

——English decisions — English decisions are powerful persuasive precedents though Courts in India are not bound by them. **55 Cal WN 147: AIR 1951 Cal 78 (82) (Pt C) (Pr 34) (DB).**

[Overruled on another point in AIR 1956 Cal 321 **(FB).]**

——Case arising under Hindu Marriage Act (1955) — Use of English decisions as precedents.

English decisions on the point of medical examination of the other party can have no application in this country to a case arising under the Hindu Marriage Act, because under the Matrimonial causes rules in England specific provision has been made for examination by medical inspectors. There is no such provision in our country regarding the appointment of medical inspectors. AIR 1921 Cal 459, Distinguished. **(1963) 4 Guj LR 890: AIR 1963 Guj 250 (252) (Pt A) (Pr 9).**

——English decisions— Value of, in construing Indian Statute.

It would be dangerous to apply the decision of an English Court construing an English Act of Parliament not in pari materia with the Indian statute and not even forming the foundation of those statutes and allow it to prevail over Indian decisions interpreting very similar enactments. AIR 1932 PC 207; AIR 1951 All 736 (FB), Rel. on. **ILR (1952) Hyd 95: AIR 1952 Hyd 58 (61) (Pt B) (Pr 8) (FB).**

[Overruled on another point in AIR 1955 Hyd 113 **(FB).]**

——Where point for decision arises under the Indian law (Carriers Act, 1865), references to the English Law of Carriers is not very necessary. **AIR 1963 Ker 198 (199) (Pt A) (Pr 4).**

——English cases — Interpretation of Act — English cases — No authority. **1962 Ker LJ 938.**

——English decisions — Expressions used in Hindu Marriage Act (1955) — English decisions not to be blindly followed. See Hindu Marriage Act (1955), S. 10 (1) (b). **1965 MPLJ 549: 1965 Jab LJ 687: AIR 1966 Madh Pra 205 (DB).**

——Decisions of American Courts — Value of, in interpreting Articles of the Constitution — (Constitution of India, Arts. 25, 26).

There is no room for too much reliance upon American and Australian precedents. Our Constitution makers have embodied the limitations which have been evolved by judicial pronouncements in America or Australia in the Constitution itself and the language of Arts. 25 and 26 is sufficiently clear to enable us to determine without the aid of foreign authorities as to what matters come within the purview of religion and what do not. AIR 1954 SC 282: 1954 SCJ 335: (1954) 1 MLJ 596. Foll. **(1957) MPLJ 1 (Nag).**

——English decisions — Income-tax Act, 1922 — Certain expression in Indian Statute — Mode of construction — Construction put under English Statutes by English decisions need not be followed. **(1965) 1 Mad LJ 251: (1965) 1 ITJ 264: (1965) 57 ITR 546: AIR 1966 Mad 103 (106, 107) (Pt B) (Prs 13, 14, 15) (DB).**

——English decisions, use of in writ petitions.

Article 226 is not confined to the particular forms of writs obtained in England and mentioned in the Article but covers a much wider ground and jurisdiction. It will not, therefore, be proper to understand and interpret the scope and ambit of Art. 226 and the nature, width and content of the powers conferred by that Article, in the light or by application of the English principles of the Court's jurisdiction either in actions or writs or other proceedings. Having regard to the language of Art. 226 and the variety of matters which it may comprehend and the purposes, which are not defined, for which directions can be given under the Article, no question of maintainability of the petition as such under the Article can normally arise and the grant or refusal of a petition under the Article will largely be a matter of discretion and undoubtedly vested in the Court. **(1963) 2 Lab LJ 304: AIR 1964 Mad 335 (338, 346) (Pt A) (Prs 4, 14).**

——English decisions — Codified Indian law — Interpretation of — Reference to English Law and precedents.

Where a principle has been embodied in a statute in this country, the wording of the section is of greater importance than a reference to the back-ground of the English authorities which may undoubtedly be of great value, but which may be equally misleading in certain contingencies. Codification has its own advantages and disadvantages but it is a well-settled rule of interpretation of the Indian Law, that the Courts must primarily look to our own enacted law and its terms and refer to the back-ground of the English common law and precedents, only where there is no repugnancy or in order to throw futher light upon the principle taken from that source in order to make it part of the codified law in this country. **AIR 1960 Mad 452 (455) (Pt B) (Pr 7) (DB).**

——English and American decisions.

The judgments of the superior Courts of England and United States of America are only persuasive precedents. The Judges of India are under no obligation to follow them but, in many cases they have followed them though they have not hesitated to differ from them when they conflict with the statutory provisions contained in Indian Acts and Civil P. C. **AIR 1955 Mad 430 (432) (Pt B) (Pr 10).**

● **——American decisions – Use of, in interpreting Constitution.**

American decisions are not directly applicable in construing Arts. 15 (1) and 29 (2) of the Indian Constitution, though they may have same bearing in construing Art. 14 of the Constitution.

Implicit reliance should not be placed on American precedents without due regard to the fact that the Indian Constitution, unlike the American, runs into details and considerably narrows the scope of judicial interpretation and without paying due attention to the difference in language between the article of the two constitutions. Srimathi Champakam Dorairajan v. State of Madras, **AIR 1951 Mad 120 (124, 129) (Pt C) (Prs 13, 28) (FB).**

● **——American precedents — Use of, in examination of constitutionality of Indian Acts.**

The framers of the Indian Constitution have sedulously avoided the phrase 'due process' and put instead 'authority of law' 'according to procedure established by law'. The Constitution does not also leave it to the Court what is within 'police power' and what is not. Wherever rights are guaranteed there is also an indication of the limits of the guarantee and the qualifications to which it is subject. By avoiding the term 'due process' and by prescribing action 'according to law' the inquiry has been limited to the content of the power of the legislature except where the Constitution itself says that the reasonableness of the restriction is the test. With a constitution so explicit the Courts in India cannot borrow light from America to interpret the Constitution. Sheoshanker v. State of M. P., **52 Crl LJ 1140: ILR (1951) Nag 646 : AIR 1951 Nag 58 (72) (Pt E) (Prs 94, 96) (FB).**

——American decisions.

It is not always safe to rely upon American decisions, and great care should be taken in applying them in the interpretation of our Constitution. **(1963) 5 Orissa JD 71: ILR (1963) Cut 29 : (1963) 14 STC 220 : AIR 1963 Orissa 107 (109, 110) (Pt C) (Pr 12) (DB).**

——English cases.

Per Naqui Imam, J. — Citing an English case is always dangerous unless one is definitely sure of all the facts and circumstances and the law concerning that case. **1954 BLJR 594: 1955 Cr LJ 501: ILR 33 Pat 996: AIR 1955 Pat 118 (120) (Pt H) (Pr 5) (DB).**

——It is always dangerous to apply English decisions to the construction of an Indian Act where the clauses under consideration are not the same. But English decisions may be referred to where the corresponding provisions have a close parallel. AIR 1932 PC 207, Rel. on. **66 Pun LR 109: ILR (1964) 1 Punj 581: 1965 (2) Cri LJ 237: AIR 1965 Punj 337 (339) (Pt C) (Pr 7) (DB).**

——English decisions — Court of appeal.

Court of Appeal in England — Judgment of — Cannot and should not be preferred to that of Privy Council by Courts in India. **ILR (1953) Punj 140: AIR 1953 Punj 3 (13) (Pt B) (Pr 41) (DB).**

——Use of English decisions.

The English decisions may well have been influenced by considerations peculiar to England and cannot be applied in India where the conditions are different and where the law with regard to the authority of a Full Bench vis-a-vis the other Benches is settled. Further, if the appellants had any grivance against the decision of the Full Bench, the remedy cannot be by

way of request to the Division Bench to ignore the Full Bench decision. **ILR (1960) 10 Raj 360: AIR 1960 Raj 219 (221) (Pt C) (Pr 9) (DB).**

——American decisions.

American decisions on "due process" clause — There is no "due process" clause in the Indian Constitution and the considerations which govern the interpretation of the "due process' clause in the American Constitution as reported in the American decisions need not be imported by the Courts when dealing with Art. 14 of the Constitution of India. Sher Singh v. Rajasthan State, **1954 Raj LW 296: ILR (1954) 4 Raj 365: AIR 1954 Raj 65 (68) (Pt B) (Pr 15) (FB).**

24 (A). Indian statutes in same terms and on same lines.

——Income-tax Act — Interpretation — Decisions under English law.

The Indian Income-tax Act is not in pari materia with the English Income-tax statutes. But the authorities under the English law which deal not with the interpretation of any specific provisions, but on the concept of income, may not be regarded as proceeding upon any special principles peculiar to the English Acts so as to render them inapplicable in considering problems arising under the Indian Income-tax Act. Kettlewell Bullen and Co., Ltd. v. Commissioner of Income-tax, Calcutta. **(1964) 53 ITR 261: (1964) 8 SCR 93: (1964) 2 SCWR 631: (1964) 2 ITJ 193: (1964) 2 SCJ 381: AIR 1965 SC 65 (73) (Pt B) (Pr 12).**

——American decisions, reference to construing Article 14 of the Constitution.

Article 14 of the Constitution is adopted from the last clause of S. 1 of the 14th Amendment of the U. S. A. Constitution and it may reasonably be assumed that the Indian Constitutent Assembly was aware of its content delimited by judicial interpretation in the U. S. A. In considering the authorities of the superior Courts in the U. S. A. the Courts in India would not, therefore, be incorporating principles foreign to Indian Constitution or he proceeding upon the slippery ground of apparent similarity of expressions or concept in an alien jurisprudence developed by a society whose approach to similar proceeding on account of historical or other reasons differ from India. State of U. P. v. Deoman, **1960 Cri LJ 1504: AIR 1960 SC 1125 (1131) (Pt A) (Pr 14).**

——English decisions on income-tax law.

In dealing with cases expounding the English Income-tax Law, it must always be borne in mind that the scheme of legislature there is not the same as in India. No doubt, certain amount of assistance can, with caution be taken from them, but the problem under Indian Laws must be resolved, in the ultimate analysis with reference to Indian Laws, English decisions should be read with considerable caution. Indian Molasses Co. v. I.-T. Commr., **(1959) Supp (2) SCR 964: AIR 1959 SC 1049 (1058) (Pt A) (Pr 27).**

——Law of trade mark — English decisions — Use of.

As the law of Trade Marks adopted in the Indian Trade Marks Act merely reproduces the English Law with only slight modification, a reference to the judicial decisions on the corresponding section of the English Act is apposite and helpful. Registrar of Trade Marks v. Ashok Chandra Rakhit, Ltd., **1955 Mad WN 935: 1955 SCJ 562: (1955) 2 MLJ (SC) 76: 1955 Andhra WR (SC) 330: (1955) SCA 1043: (1955) 2 SCR 252: AIR 1955 SC 558 (561) (Pt C) (Pr 6).**

——English decisions.

Decisions of the English Courts given under the Finance Act, the scheme of which is different from the Indian Income-tax Statutes, are not always very helpful in dealing with matters arising under the Indian law and analogies and inferences drawn from those decisions are at times misleading. Commr. of Excess Profits Tax Bombay City v. Lakshmi Silk Mills, Ltd., **1951-20 ITR 451: 1951 SCJ 730: 54 Bom LR 1: 1952 SCR 1: AIR 1951 SC 454 (456) (Pt B) (Pr 9).**

——English decisions — Binding nature.

Even though the decisions of the English Courts are not binding, they are of weight, especially when they deal with questions of general principle in regard to which the law could not possibly be different in England and India. **('51) 53 Bom LR 333: 21 Bom Cri Cas 112: 52 Cri LJ 779: ILR (1951) Bom 318: AIR 1951 Bom 105 (110) (Pt B) (Pr 9) (DB).**

——English decisions on statutes held to be pari materia with Indian statute can be referred to for purposes of construction of Indian Act. They are not compelling decisions but are certainly persuasive. **AIR 1959 Cal 213 (215) (Pt E) (Pr 9).**

——English decisions.

Sections 41 and 42 closely resemble the provisions of the English Sale of Goods Act (1893), Interpretation put upon the section of the English Act by the Judges in England ought, in the absence of good reason to the contrary, to be respected and followed in India. **ILR (1958) 2 Cal 441.**

——Income-tax Act — Decisions under English law.

It is true that the scheme of the English Income-tax Act is different from the scheme of the Indian Income-tax Act but where there are observations made which are of a general nature and which do not depend for their validity on any particular provision of the English Statute, there is no reason why Courts in India should not receive light from them. **(1965) 1 ITJ 155: (1965) 56 ITR 152: AIR 1965 Guj 262 (268) (Pt B) (Pr 16) (DB).**

——Provincial Insolvency Act (1920), S. 54 — Interpretation — Value of English decisions — (Presidency Towns Insolvency Act (1909), S. 56).

The insolvency law is one borrowed from England, and the language of the enactment being in terms corresponding to the English statute, English decisions on the interpretation of the terms of the enactment can be safely applied to cases arising in India under S. 54, Provincial Insolvency Act. **AIR 1956 Mad 33 (37) (Pt A) (Pr 13-A) (DB).**

——English decision.

Generally in interpretation of Indian Income-tax Act, it is not desirable to rely on English decisions on interpretation of English Income-tax statute since these two are not in pari materia— Arrangement and language differ greatly — English authorities have to be examined with caution but where observations are made by eminent Judges expounding and illumining similar principles, they may be referred to as valuable guide to our Courts. **ILR (1962) 2 Punj 352: (1963) 50 ITR 513: AIR 1963 Punj 411 (415) (Pt D) (Pr 11) (DB).**

24 (B). Decision based on justice, equity and good conscience.

——English decisions — Value of — English Law — When to be applied.

Where there is a statute in Indian law there is no reason to go to the English law. But when there is no statute English cases are helpful in showing how English Courts have decided cases under similar circumstances. **('60) 64 Cal WN 952: ILR (1961) 2 Cal 14.**

——English decisions.

Courts in India have often been called upon and indeed, their powers in this respect have seldom been questioned, to decide cases according to principle of justice, equity and good conscience. Normally no doubt, English decisions and the principles, underlying them or derived from English equity cases, have served and do serve as useful guides in this matter, but the Courts are reluctant to introduce English principles which are admittedly unjust and inequitable into Indian system of justice, equity and good conscience in the absence of compelling authority or to extend their application beyond the rigid limits of such authority. **59 Cal WN 1131: ILR (1957) 1 Cal 371: AIR 1956 Cal 36 (39) (Pt C) (Pr 15) (DB).**

24 (C). Absence of Indian statute law.

——Carrier by air — Indian Air Lines Corporation — Carriage of goods by air inland — Liability for damage to goods — Law, applicable — Not governed by Carriers Act, 1865, or Contract Act, 1872, but by English Common Law as administered in India. **AIR 1961 Cal 383.**

PRECEPTOR

See Hindu Law — Succession.

PRECEPTS

See Civil P. C. (1908), S. 46.

PRE-CONSTITUTION LAW

Repugnancy with.

See Constitution of India, Art. 254.

PRE-CONSTITUTION TAXES, DUTIES ETC., LEVIED BY STATE

Provision to contrary made by Parliament.

See Constitution of India, Art. 277.

PRE-EMPTION

See (1) Agra Pre-emption Act (1922), S. 5.
(2) Alwar State Pre-emption Act (7 of 1946).
(3) Berar Land Revenue Code (1928), Sections 174, 176-184.
(4) Bhopal Pre-emption Act (3 of 1934).
(5) Constitution of India, Art. 19.
(6) Custom.
(7) Easements Act (1882), S. 18.
(8) Evidence Act (1872), S. 13.
(9) Gwalior Pre-emption Act (1992) Smvt.)
(10) J. & K. Right of Prior Purchase Act (1993 Smvt).
(11) Mahomedan Law.
(12) Marwar Pre-emption Act (1922).
(13) Oudh Laws Act (1876).
(14) Punjab Pre-emption Act (1 of 1913).
(15) Rewa State Pre-emption Act (1946).

Decree for.

See Civil P. C. (1908), O. 20, R. 14.

Suit for.

—Court-fee.

See Court-fees Act (1870), S. 7 (vi).

—Limitation.

See Limitation Act (1908), Art. 10.

PREFERENCE

See (1) Presidency Towns Insolvency Act (1909), S. 56.
(2) Provincial Insolvency Act (1920), Section 54.
(3) T. P. Act (1882), S. 53.

PREFERENTIAL HEIR

See (1) Custom (Punjab).
(2) Mahomedan Law — Succession

PREGNANCY

See (1) Evidence Act (1872), S. 112.
(2) Hindu Marriage Act (1955), S. 12 (1) (d).

PRELIMINARY DECREE

See (1) Civil P. C. (1908), Ss. 2 (2), 97, O. 20, Rr. 12 to 18, O. 34, Rr. 2, 4, 7 and
(2) For Statutory cross-references: See under "Decree — Preliminary decree"; "Decree — Mortgage decree".

PRELIMINARY ENQUIRY

See (1) Constitution of India, Arts. 310-311, 226 and 32.
(2) Criminal P. C. (1898), Ss. 195 and 476.
(3) Industrial Disputes Act (1947), Sch. II, Item 6.

PRELIMINARY ENQUIRY OR INVESTIGATION BEFORE ISSUING PROCESS ON COMPLAINT

See Criminal P. C. (1898), S. 202.

PRELIMINARY INQUIRY UPON COMPLAINT BY COURT

See Criminal P. C. (1898), S. 476.

PRELIMINARY OBJECTION

See Civil P. C. (1908), O. 41, R. 23.

PRELIMINARY ORDER IN DISPUTE REGARDING IMMOVABLE PROPERTY

See Criminal P. C. (1898), Ss. 145 and 147.

PRELIMINARY ORDER IN SECURITY PROCEEDING

See Criminal P. C. (1898), S. 112.

PREPARATION, FACTS SHOWING

Relevancy of, in evidence.

See Evidence Act (1872), S. 8.

PREROGATIVE

See (1) Civil P. C. (1908), S. 9 — Act of State.
(2) Constitution of India, Arts. 51, 72, 136, 161, 309, 310, 333.
(3) Criminal P. C. (1898), Ss. 401, 402.

PREROGATIVE WRITS

See Constitution of India, Arts. 226 and 32.

PRESCRIPTION

See (1) Easements Act (1882), S. 15.
(2) Limitation Act (1908), S. 26 and Articles 142 and 144.

PRESENTMENT OF NEGOTIABLE INSTRUMENT

See Negotiable Instruments Act (1881), Ss. 61, 64, 68, 69, 70, 74, 76.

PRESIDENCY MAGISTRATE

Judgment of.

For statutory cross-references: See under "Judgment".

Local limits of jurisdiction, of.

See Criminal P. C. (1898), S. 20.

PRESIDENCY SMALL CAUSE COURTS ACT (15 of 1882)

SECTION 8-A

——S. 8-A — Application for new trial — Acting Chief Judge cannot hear an application under Section 38 for a new trial, unless he has been appointed as the Chief Judge by the State Gov-

ernment under Section 8-A. See Presidency Small Cause Courts Act (1882), Section 38. **AIR 1955 NUC (Cal) 5349 (DB).**

——**S. 8-A** — Application under Section 38 — Hearing of — Constitution of Bench — Validity — Direction under Rule 4 necessary. See Presidency Small Cause Courts Act (1882), Section 38. **AIR 1955 NUC (Cal) 5349 (DB).**

SECTION 9

——**S. 9** — Jurisdiction to entertain suit — Objection under Order 21, Rule 58, Civil P. C. in City Civil Court in execution of decree passed by itself — Suit under Order 21, Rule 63 will be cognizable by that Court and not by Presidency Small Cause Court. See Civil P. C. (1908), O. 21, Rule 58. **AIR 1961 Bom 112.**

——**S. 9 — Rules under — Rules of Practice and Procedure (Calcutta), Ch. 23, R. 1 (3) and Ch. 33, Rule 1 — Withdrawal of application to sue as poor person without leave of Court to bring fresh application — Second application not barred — Civil P. C. (1908), Section 8.**

Under the Rules of Practice and Procedure framed under Section 9 of the Presidency Small Cause Courts Act, rules under Chapter 33 are made for "suits by poor persons". It is clear from these rules that unlike the Civil Procedure Code scheme under Order 33, here there is no combined application to sue as a poor person with particulars of plaint stated therein. The application to sue as a poor person is kept separate from the plaint. The application has to be presented with the plaint. The application is first to be granted and then the plaint presented along with it will be dealt with as a plaint duly presented and not before and not otherwise. Hence, withdrawal of an appliction to sue as a poor person cannot mean withdrawal of the suit itself. Therefore, under the special procedure recognized by the Rules of Practice and Procedure made under Section 9 of the Presidency Small Cause Courts Act read with Section 8 of the Civil Procedure Code a withdrawal of an application to sue as a poor person does not bar a second appliction to sue as such poor person and such a withdrawal without leave of the Court to bring a fresh application for suit is not hit by either Order 23, Rule 1 (3) of the Code of Civil Procedure or by Rule 1 (3) of Chapter 23 of the Rules of Practice and Procedure under Section 9 of the Presidency Small Cause Courts Act. Even assuming that Order 33, Rule 15 of Civil P. C. is applicable to the procedure to suits by poor persons under the Presidency Small Cause Courts Act, the word 'refuse' in that rule means "refusal on merits" and does not cover a case where the appliction has been simply withdrawn by the applicant. AIR 1931 Rang 79 (2), Rel. on. **69 Cal WN 580: AIR 1965 Cal 233 (235) (Prs 8, 9, 11).**

——**Ss. 9 (1) (aa) and 41** — Rules under Section 9 (1) (aa) by Calcutta High Court, Rule 107 — Scope of — Application for possession of immovable property is to be treated as suit — Proceedings not defended — Registrar gets jurisdiction to deal with it under Section 41 of the Act and in default of an appearance of the defendant can pass an ex parte order. **AIR 1955 NUC (Cal) 648.**

SECTION 18

——**S. 18** — It is not open to the Court of Small Causes to grant leave for amendment of plaint in respect of a substantially different cause of action which was not considered by the Court when granting the original leave to sue. Leave to sue which is granted by the Court in respect of one cause of action will not be available to confer jurisdiction on the Court in respect of substantially different cause of action, the reason being that the cause of action as sought to be amended was not judicially considered at the time when the first leave was granted. ILR 15 Bom 93 and AIR 1939 Bom 345, Applied.

Plaintiff originally claiming on basis of commission agency on subsisting account — Amendment seeking to base claim on pucca adatiya basis and on open, current and mutual account — Amendment held would alter original cause of action into substantially different cause of action and would not be allowed. 7 Bom LR 57, Relied on. **63 Bom LR 169: ILR (1961) Bom 659: AIR 1961 Bom 284 (285, 286) (Prs 5, 6).**

——**S. 18 (b) — Expression "carry on business" meaning of.**

Reading Section 18 (b) as a whole, the context requires a somewhat narrow and restricted meaning to be placed on the word "business" used in the expression "carry on business". In its wider denotation, the word "business" may have a more extensive meaning than the word "trade". But in the context of Section 18 (b), it means commercial business; what may be treated as commercial in the hands of private agencies would not necessarily continue to partake of the same character when they are undertaken by the Government in pursuit of its welfare policies. For example, the running of the Railway would be treated as a business in the hands of the Railway Company but it would not necessarily show that it is business when it is undertaken by the Government or the State.

In this view, the Union of India, which represents the B. B. and C. I. Railway having its Head Office at Bombay could not be said to carry on business within the meaning of Section 18, sub-section (b), and the suit, cause of action for which had arisen wholly outside Bombay, could not be entertained by the Court of Small Causes at Bombay. **55 Bom LR 746: ILR (1953) Bom 1157: AIR 1954 Bom 129 (131) (Pt B) (Prs 7, 8) (DB).**

[**Held,** Impliedly **overruled** by AIR 1963 SC 1681 in AIR 1967 Cal 205.]

●——**S. 18 (a) — "Cause of action" — Notice under Section 77, Railways Act.**

The facts constituting the cause of action must precede the suit. Section 77 of the Railways Act refers to certain requirements which are to be fulfilled before the Court will pass a decree entitling the plaintiff to refund or compensation. The expression 'entitled to a refund or to compensation" does not connote that the suit cannot be filed till notice of the claim is given. The fact that the notice of a claim under Section 77 of the Railways Act need not precede a suit for a refund or for compensation necessarily leads to the conclusion that the service of such notice cannot form part of the cause of action within Section 18 (a). ILR (1941) 2 Cal 160; 84 Cal LJ 175; AIR 1949 Cal 662 and 55 CWN 113; AIR 1951 Cal 37, **Overruled.** Bansi v. Governor-General of India in Council, **89 Cal LJ 1: 56 Cal WN 83: ILR (1953) 1 Cal 162: AIR 1952 Cal 35 (37) (Prs 35, 39, 40, 43) (FB).**

——**S. 18 (c) — Scope — Carriage by Railway — Civil P. C. (1908), Section 20.**

Where a railway impleaded as defendant in the suit is owned by the Central Government and is represented by the Governor-General-in-Council the latter cannot be said to voluntarily

reside or carry on business or personally work for gain in carrying on the administration of the Railway. ILR (1941) 2 Cal 160, Dissented. **55 Cal WN 113: AIR 1951 Cal 37 (37) (Pt A) (Pr 4) (DB).**

[**Overruled** on another point in AIR 1952 Cal 35 (FB).]

——S. 18 (a) — "Cause of action" — Civil P. C. (1908), Section 20.

Service of notice under Section 77 of Railways Act, is certainly part of the cause of action in a suit for recovery of price of goods lost against the railway because service of notice is one of the facts which it is necessary for the plaintiff to prove in order to support his right to judgment of the Court. **55 Cal WN 113: AIR 1951 Cal 37 (38, 39) (Pt B) (Prs 6, 7) (DB).**

[**Overruled** in AIR 1952 Cal 35 (FB).]

——S. 18 — A suit for a declaration of maintenance right comes within the saving of Section 19 (1) (s) — Its entertainment by the City Civil Court is, therefore, not forbidden. See Presidency Small Cause Courts Act (1882), Section 19 (1) (s). **AIR 1951 Mad 360.**

SECTION 19

——S. 19 — Applicability — Suit for recovery of Income-tax due — Cognizance by Presidency Small Cause Court — Bar of — Income-tax Act (1922), Ss. 29 and 45 and 46 (2).

The amount of Income-tax, as assessed may become due after demand is made under Section 29 and Section 45 of the Indian Income-tax Act. It may, thereafter, become a debt due to the Crown. As such debt it may be realised under the Public Demands Recovery Act. But because it becomes a debt, it does not lose its character as arrear of revenue. A suit for recovery of outstanding balance of Income-tax is a suit for recovery of debt, due as an arrear of revenue, for the realisation of which the Presidency Small Cause Court is not a proper forum and the Court has, therefore, no jurisdiction to try it. **(1961) 65 Cal WN 1090: (1962) 45 ITR 622: 67 Cal WN 373: ILR (1962) 2 Cal 202.**

——S. 19 (p) — Suit for accounts simpliciter.

The expression "a suit for an account of property and its due administration" refers to one particular type of cases, viz., a suit for administration of an estate where an account has to be taken of property which is to be administered. The expression does not include "a suit for accounts simpliciter in which there is no prayer for administration. ILR 55 Cal 1292, Rel. on. **55 Cal WN 742: ILR (1953) 2 Cal 8: AIR 1952 Cal 281 (282) (Pr 6) (DB).**

——Ss. 19 (g), 41, 43 — Proceedings under Section 41 — Right of sub-tenant to apply under Section 11 (3) of West Bengal Premises Rent Control (Temporary Provisions) Act (38 of 1948).

In view of the summary character of the jurisdiction of the Small Cause Court in proceedings under Chapter VII, the Presidency Small Cause Court will have no jurisdiction to entertain an application under Section 11 (3) of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1948. Moreover, as the right which the sub-tenant seeks to enforce is a right of statutory tenancy in the premises the Presidency Small Cause Court has no jurisdiction to enter into that question under Section 19 (g): 53 CWN 474, Rel. on. **(1951) 87 CLJ 181 (DB).**

——Ss. 19 (g) and 41 — Applicability — Landlord terminating lease under forfeiture clause — Application for ejectment — Tenant disputing validity of termination — Jurisdiction of Small Cause Court.

Section 19 (g) of the Presidency Small Cause Courts Act applies only to suits properly so called and does not apply to applications under Section 41 of the Act. Chapter VII of the Act, which contains Section 41, is a complete Code in regard to applications filed under Section 41. An application under Section 41, though it is to be in the form of a plaint, does not become a suit; it is only an application.

Where a landlord, after terminating a tenancy applies under Section 41 for ejectment of the tenant, and the tenant pleads that the tenancy has not been validly terminated and that the lease still subsists, it cannot be said that there is a dispute as to title and, therefore, the jurisdiction of the Small Causes Court is excluded. The termination of a tenancy based upon the landlord taking advantage of a forfeiture clause falls within Section 41 and the Court has jurisdiction to decide the question. The fact that the defence raises the question of title in that the tenancy has not been validly terminated does not oust the jurisdiction of the Court which is bound to decide the question under Chapter VII of the Act. ILR (1945) Bom 1038, Rel. on. **(1958) 2 MLJ 417: 71 Mad LW 472: ILR (1957) Mad 913.**

——Ss. 19 (s) and 18 — A suit for a declaration of maintenance right comes within the saving of Section 19 (1) (s) — Its entertainment by the City Civil Court is, therefore, not forbidden. **AIR 1951 Mad 360 (361) (Pt B) (Pr 3).**

SECTION 21

——S. 21, as amended by Section 5 of W. B. Act 10 of 1958 — Suit to recover amount exceeding Rs. 100 but not exceeding Rs. 2,000 — High Court's jurisdiction to entertain not taken away — (Letters Patent, Cl. 12) — (Bengal, Agra and Assam Civil Courts Act (12 of 1887), Section 21). **AIR 1960 Cal 443 (443) (Prs 6, 7).**

SECTION 31

——S. 31 — Decree of Presidency Small Cause Court — Execution — Section 52 of Bengal Act 7 of 1936 does not apply — Exclusion of period of proceedings before Board cannot be allowed. See Debt Laws — Bengal Agricultural Debtors Act (7 of 1936), Section 52. **AIR 1955 NUC (Cal) 2902 (DB).**

——S. 31 — Decree of Presidency Small Cause Court — Can be transferred directly for execution to another Civil Court. See Civil P. C. (1908), Section 8. **AIR 1962 Pat 272.**

SECTION 38

——S. 38 — Jurisdiction of Full Court.

The comment that the trial Court had not applied its mind can be made with justification only where the Full Court is satisfied that the comment can be properly made. This formula cannot be used for interfering with questions of fact in a matter that comes before the Full Court merely because the Full Court takes a different view of facts in that particular case. One can say that a Judge has not applied his mind to the points of evidence before him only where it appears clearly that some important and salient features of the case have completely escaped the attention of the Judge.

Where the Advocate acting on behalf of both the defendants in his reply solemnly told the

plaintiff that defendants 1 and 2 were partners concerned with the production of the picture "Sinbad the Sailor" and the trial Judge did not consider the significance and the effect of this admission, it was open to the Full Court to say that one very important fact on which the plaintiff relied had escaped the attention of the trial Judge completely. It could not, therefore, be said that in coming to this conclusion, in the light of the fact that the trial Court had completely failed to consider one important fact, the Full Court had exceeded its jurisdiction. AIR 1944 Bom 189, Rel. on. **AIR 1956 Bom 125 (126) (Prs 3, 5).**

——**S. 38** — Language of Section 38 does not limit the proceeding to only questions of law — Jurisdiction of Full Bench under Section 38 is not limited to questions of law — Full Bench admitting facts of trial Judge and drawing different inference — Full Bench also applying Sections 29 and 40, Contract Act — **Held,** those were questions of law. **AIR 1965 Cal 446 (448, 449) (Prs 10 to 13).**

——**S. 38** — Iron safe attached in execution of decree — Claim preferred under Vol. I, Chap. XXI Part III, Rule 47 of Calcutta Small Causes Court Manual — Question of possession involved — claim dismissed — Application for new trial by unsuccessful claimant — Full Bench under Section 38 has no jurisdiction to differ from trial judge on question of fact, viz., the possession of iron safe. **(1962) 66 Cal WN 251.**

——**Ss. 38, 8-A** — High Court Rules and Orders (Calcutta), Chapter 39, Rule 4 — Application under Section 38 — Hearing of — Constitution of Bench — Absence of Judge who heard the matter — Direction under Rule 4 is necessary. **AIR 1955 NUC (Cal) 5349 (DB).**

——**Ss. 38, 8-A** — Application for new trial — Acting Chief Judge cannot hear unless he has been appointed a Chief Judge by the State Government under Section 8-A. **AIR 1955 NUC (Cal) 5349 (DB).**

——**S. 38** — Powers of Full Bench — Re-hearing on one issue only — Full Bench can transmit case for re-hearing on one issue only. **AIR 1955 NUC (Cal) 3671.**

——**S. 38 — Powers of Bench — Alteration of finding.**

Assuming that the powers of a Full Bench of the Small Causes Court at a new trial are only revisional, the Bench certainly has jurisdiction to alter a finding if it was arrived at on a clear misunderstanding of the evidence. Misappreciation of evidence would not entitle a revisional Court to interfere with findings of fact, but a misunderstanding of evidence certainly will. **AIR 1951 Cal 470 (471) (Pt A) (Pr 3).**

——**S. 38 — New trial application — Scope of power of Court — Perfunctory order dismissing new trial application — If justified — Civil P. C. (1908), Sections 2 (9), 8, Order 20, Rule 4 — Small Cause Court Rules (Madras), Order 1-A, Rule 4 (6), Order 41, Rule 12.**

Though the wording of Section 38 of the Presidency Small Cause Courts Act is very wide it is now settled by a number of decisions over a long period that the New Trial Court of the Presidency Small Causes Court can dismiss an application under Section 38 on the ground that there is no error of law in the judgment under appeal. But errors of law can be of various descriptions and the New Trial Court must say in its judgment, what is the question of law raised before it and give its opinion on it. A blanket judgment that there is no error of law is no judgment at all. The term "judgment" in the Small Cause Courts Act has to be understood in the same sense in which it is used in the Civil Procedure Code. 32 Mad LJ 213; AIR 1917 Mad 135 (2), Rel. on. **(1962) 2 MLJ 443: 75 Mad LW 620: ILR (1963) Mad 905: AIR 1963 Mad 87 (87 to 89) (Prs 2 to 5).**

——**S. 38** — Judges constituting the Full Bench on the terms of Section 38 are not competent to give a finding of fact. **72 Mad LW 69: 1959 Mad WN 122: ILR (1959) Mad 439: (1959) 2 MLJ 373: AIR 1959 Mad 285 (286) (Pt A) (Pr 2).**

——**S. 38 — Full Bench — Powers of — Question of fact raised for first time in the New Trial application — If can be decided.**

A Full Bench of the Court of Small Causes under Section 38 of the Presidency Small Cause Courts Act has no power to decide question of fact when it first arises before it in consequence of its finding on another question of fact or law. If an occasion should arise before the Full Bench to come to a conclusion on a new question of fact, the proper procedure is not to give its fresh findings of fact, but to order a retrial at which the facts may be gone into afresh: 1956 MWN 535 and AIR 1956 Bom 125, Dist. **(1958) 2 MLJ 437: 71 Mad LW 743.**

——**S. 38** — Suit on accounts — Burden of proof is on plaintiff to prove that moneys are due to him from defendant. See Evidence Act (1872), Sections 101-103. **AIR 1955 NUC (Mad) 3160.**

——**S. 38** — Interference — Grounds — Misunderstanding of evidence is ground for interference in revision — The power exercised by the Full Bench is substantially in the nature of revisional jurisdiction though not limited to matters mentioned in Section 115 Civil P. C., and is not limited to points of law and in the guise of revision, it cannot treat the new trial application as an appeal.

Though misappreciation of evidence would not entitle a revisional Court to interfere with findings of fact, a misunderstanding of evidence certainly will. **AIR 1955 NUC (Mad) 3160.**

——**S. 38 — Order, meaning of — Order returning plaint for presentation to proper Court is not order within Section 38.**

An order passed by a Presidency Small Causes Court after hearing both sides and discussing many contentions and issues, returning the plaint for presentation to the proper Court having jurisdiction is not an order entitling the party for a new trial under Section 38, Presidency Small Cause Courts Act.

Every order in a suit, even if passed after contest, will not be an order in respect of which a new trial can be claimed under Section 38, only when the merits of the suit claim are gone into and an order passed, can the order come within the meaning of the word 'Order' in Section 38. The phrase 'new trial' itself implies an old trial and disposal on merits. 26 Mad 163; ILR (1938) 2 Cal 637, Rel. on.

It is wrong to contend that the orders which could be brought up for revision under Section 25 of the Provincial Small Cause Courts Act could also be brought up for new trial under the Presidency Small Cause Courts Act. The two Acts and sections are different, and Section 25 of the Provincial Small Cause Courts Act, dealing with revisions to the High Court, cannot be relied on for bolstering up a new claim for a new trial under Section 38 of the Presidency Small Cause

Courts Act. **1952 Mad WN 172: 65 Mad LW 156: (1952) 1 Mad LJ 171: AIR 1952 Mad 594 (595) (Prs 4, 5).**

——S. 38 — Application to set aside order of dismissal for default — Competency of Full Bench to entertain.

A bench of the Small Cause Courts has no power to entertain an application to restore a matter under Section 38 of the Presidency Small Cause Courts Act that has been dismissed for default.

A proceeding under Section 38 of the Presidency Small Cause Courts Act cannot be treated as a suit or a proceeding in the nature of a suit. The jurisdiction of the Small Cause Court under Section 38 is substantially in the nature of revisional jurisdiction. **64 Mad LW 137: 1951 Mad WN 50: (1951) 1 MLJ 81: AIR 1951 Mad 672 (672, 673) (Prs 2, 5).**

——S. 38 — Suit for recovery of money — Fact whether plaintiff put her thumb impression on counterfoil of receipt of vital importance in suit — Trial Judge not applying his mind to this circumstance — Judge held committed error of law — Defendant held was entitled to apply under Section 38.

Where in a suit for recovery of money the fact as to whether it was true or not that the plaintiff put her thumb impression on the counterfoil of a receipt was of vital importance in determining as to who, the plaintiff or the defendant was speaking the truth in the case, but the trial Judge did not apply his mind to this relevant circumstance before he made up his mind to believe one of the versions:

Held, that in so far as the trial Judge failed to perform this duty and simply contended himself by saying that he had no means of verifying whether the thumb impression was really that of the plaintiff or not, while actually ample means were readily available to him he must be considered to have committed an error of law, the error consisting in that he failed to determine the question of fact when it was vital to the decision in the case and it would not be sufficient explanation that the attention of the trial Judge was not drawn to the existence or availability of the material on record to enable the required comparison of the impressions and the defendant against whom a decree was passed was entitled to take up the matter before the Full Bench of the Court of Small Causes by way of a new trial application under Section 38 of the Act and the rules framed thereunder: AIR 1943 PC 208, Foll. **(1949) 2 Mad LJ 737: 63 Mad LW 58: AIR 1950 Mad 269 (270) (Pt A) (Pr 4).**

——S. 38 — Findings of trial Court not supported by evidence and justifying interference in revision — Proper course is to send back matter to trial Court for fresh trial.

Whenever it is found that the findings of the trial Court are not supported by the evidence and are such as to justify interference in revision, the proper course for the Full Bench of the Small Cause Court would be to send back the matter to the trial Court for fresh trial and decision according to law. The jurisdiction of the Full Bench of the Presidency Small Cause Court is not always confined to questions of law alone: AIR 1941 Mad 769, Foll. **(1949) 2 Mad LJ 737: 63 Mad LW 58: AIR 1950 Mad 269 (270) (Pt B) (Pr 4).**

CHAPTER 7

——Chap. 7 (Sections 41-49) — Nature of jurisdiction conferred on Court under Chapter 7.

The jurisdiction conferred on the Small Cause Court under Chapter 7 is a very special and limited jurisdiction. It entitles parties to recover possession by a summary procedure. There is nothing to prevent a party from obtaining possession in the ordinary Courts of the land if he has a right to possession under the ordinary law. But when a party comes to the Small Cause Court under Chapter 7 and makes an application, he must satisfy the Court that his application is maintainable and that he is entitled to the order as provided by that Chapter. **60 Bom LR 1282: ILR (1958) Bom 1416: AIR 1960 Bom 18 (19) (Pt A) (Pr 4) (DB).**

——Chap. 7 (Ss. 41-49) — Suits under Section 28 and proceeding under Chapter VII — Distinction pointed out — Appeal lies in suit under Section 28 but no appeal lies from order in proceedings under Chapter VII. See Houses and Rents — Bombay Rents, Hotel and Lodging House Rates (Control) Act (57 of 1947), Section 28. **AIR 1953 Bom 200.**

——Chap. 7 (Ss. 41-49) — Decree for recovery of possession — Expression includes order for possession under Chapter VII of Presidency Small Cause Courts Act. See Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (1950), Section 18 (1). **AIR 1952 Cal 533 (SB).**

——Chap. 7 (Ss. 41-49) — Order under Chap. VII — Section 18 of W. B. Act 17 of 1950 applies to it. See Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), Section 18. **AIR 1952 Cal 120.** [Overruled in AIR 1953 SC 148.]

——Chap. 7 (Ss. 41-49) — Proceedings under Chapter VII — Nature of — Order for possession under Section 43 — Application under Section 47, Civil P. C. for stay of proceedings on the ground that the order for possession has been satisfied or otherwise disposed of is maintainable and cannot be dismissed as premature. **AIR 1951 Cal 395 (396) (Pr 1).**

SECTION 41

SYNOPSIS

(Presidency Small Cause Courts Act (1882), Section 41.)

1. Nature of proceedings under.
2. Jurisdiction.
3. Limitation for execution of order.
4. Parties to proceedings.
5. Right to remove fixtures.
6. Revision.
7. Decree and building — Meaning of.

1. Nature of proceedings under.

——S. 41 — Applicability — English mortgage — Possession of property under an English mortgage A mortgagee is entitled to the same rights as the mortgagor himself had in the property and one of the most important rights is the right of possession. Under such circumstances the mortgagee is entitled under Section 41 to institute proceedings for ejectment. (1881) 6 QBD 345, Rel. on.; AIR 1939 PC 14 Dist., and explained. See Transfer of Property Act (1882), Section 58. **AIR 1954 Bom 81.**

——S. 41 — Applicability — Application for ejectment under Section 41, Presidency Small

Cause Courts Act — Occupant, alleged licensee, refusing to vacate on notice — Defence claim for protection of Act on basis of tenancy — Order for ejectment — Decree against the defendant must be treated as one under Section 28 of Bombay Rent Act and appealable under Section 29 of that Act. See Houses and Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), Section 28. **AIR 1951 Bom 294.** [**Overruled** by AIR 1951 Bom 390.]

——**Ss. 41 and 44** — Order for possession made under Section 41 — Person having independent title threatened to be dispossessed under Sec. 44 —Such person is not bound by an order under Section 41 of the Act — But he has little protection under that Act for maintaining his rights — Even if the bailiff gives possession by force to the person directed in the summons, no action lies against him and summary proceeding under Order 21, Rule 100, C. P. C. for recovery of possession does not lie. **AIR 1955 NUC (Cal) 1021.**

——**Ss. 41, 43 and 47** — Proceedings for recovery of possession — Order for possession by consent of occupant — Application by occupant for stay on ground of intention to file suit in High Court — Application held should be granted **AIR 1955 NUC (Cal) 664.**

——**S. 41** — Rules under Section 9 (1) (aa) by Calcutta High Court, Rule 107 — Scope of R. 107 — Application for possession of immovable property — Proceedings — Nature of — Registrar dealing with it — If proceeding on such an application for possession of an immovable property is not defended it becomes an undefended suit within Section 9 (1) (aa) and the Registrar gets jurisdiction to deal with it under Section 41 and in default of appearance of the defendant can pass an ex parte order. See Presidency Small Cause Courts Act (1882), Section 9 (1) (aa). **AIR 1955 NUC (Cal) 648.**

——**S. 41** — Proceedings under Chapter VII are not a suit. **54 Cal WN 376: ILR (1951) 1 Cal 350: AIR 1950 Cal 244 (245) (Pt A) (Pr 5).**

——Ss. 41, 43, 47 — Proceedings under Sec. 41 by landlord — Subsequent suit by tenant for relief under Section 47 — Delivery of possession to landlord during pendency of suit — Such delivery can only be subject to the result of the suit.

On 8th November, 1948, landlord who had by then terminated the lease in favour of the tenant filed an application under Section 41 for eviction of the tenant. An order was passed directing him to delivery vacant possession by 1st August, 1950. On that date the tenant applied to the Court under Section 47 of the same enactment for stay of further proceedings, undertaking to institute a suit to establish his right to continue in possession of the property and the Court granted stay until the suit under Section 47 was disposed of. The tenant filed the suit for relief specified in Section 47 and claimed in that suit that the lease as well as the construction of the superstructure on the property were prior to the year 1921, and that he being entitled to the benefits of the Madras City Tenants Protection Act, the order for eviction passed by the Court of Small Causes contrary thereto was invalid. He also applied for an interim injunction during the pendency of the suit against the landlord from enforcing the order for eviction. That application, however, proved fruitless. The landlord thereupon applied to the Court of Small Causes and obtained an order for delivery of the land after removing the superstructure. That delivery was effected on 6th February, 1953.

Held, that the delivery of possession made to the landlord during the pendency of the litigation could only be subject to the result of it. The suit could be regarded only as a continuation of the proceedings initiated under Section 41. Therefore, if in the suit it were to be held that the tenant could not be evicted, the order under Section 43 would stand vacated and any possession obtained thereunder would have to be restored to the tenant on the principle of restitution. For the application of this principle it would make no difference whether the tenant obtained the decree in a suit filed under Section 47 upholding his right to possession on the basis of facts or law existing on the date of suit or by reason of any right conferred on him pending an appeal. **76 Mad LW 381: ILR (1963) Mad 1054: AIR 1963 Mad 369 (372) (Pt D) (Pr 11) (DB).**

——**S. 41** — Scope of — Lease of land with superstructure followed later by new lease of vacant land forming part of land and superstructure already leased — Eviction of lessee from land under second lease — Jurisdiction of Small Cause Court. See Houses and Rents — Madras Buildings (Lease and Rent Control) Act (25 of 1949), Section 2 (1). **('57) 70 Mad LW 295.**

2. Jurisdiction.

●——**Ss. 41, 47 and 49** — Suit for declaration that plaintiff is tenant of sub-tenant of defendant and for injunction restraining defendant from proceeding under Section 41 or from executing order passed on application under that section — City Civil Court, Bombay has no jurisdiction to entertain suit of the nature specified herein — Section 28 of Bombay Rent Act (57 of 1947) will prevail over Sections 47 and 49 of Small Cause Courts Act. See Houses and Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), Section 28. **AIR 1965 Bom 177 (FB).**

——**Ss. 41, 47 and 49** — Order for evicting plaintiff passed in favour of defendant under Section 41, Presidency Small Cause Courts Act — Suit by plaintiff to declare that he is tenant and for an injunction restraining defendant from executing the order—City Civil Court has no jurisdiction to entertain the suit. See Civil P. C. (1908), Section 9. **AIR 1964 Bom 85 (DB).**

——Ss. 41, 46 and 47 — Scope — Suit for declaration that defendant's application under Section 41 amounts to act of trespass and for damages — Plaintiff also claiming protection under Bombay Act (57 of 1947) — Jurisdiction of Bombay City Civil Court.

A suit for declaration that the defendant's application for ejectment against the plaintiff under Section 41, Presidency Small Cause Courts Act, was an act of trespass and for damages is essentially a suit falling under Sections 46 and 47 of the Presidency Small Cause Courts Act and the Bombay City Civil Court has jurisdiction to entertain it. The question whether the defendant is or is not entitled to an order for possession under the summary procedure under Chapter VII of the Presidency Small Cause Courts Act cannot attract the exclusive jurisdiction of the Courts specified in Section 28 of the Bombay Rent Act. The fact that the plaintiff alleged that he was a lawful sub-tenant of the defendant since before the Rent Act came into force and that he was entitled to protection under the Rent Act would not change the nature of the suit as framed. Even though the plaintiff has claimed alternatively that as the alleged licence given to him was not duly determined, defendant was not entitled to

obtain the order of ejectment against him, that would not come in the way of the Bombay City Civil Court entertaining the suit as the Small Causes Court had decided that point against him. Such a suit will not fall within the ambit of Section 28 of the Rent Act. **61 Bom LR 1223: ILR (1960) Bom 103: AIR 1960 Bom 338 (341) (Pr 12) (DB).**

[**Overruled** in AIR 1965 Bom 177 (FB).]

——**S. 41** — Ejectment proceedings against licensee — Jurisdiction of Small Cause Court. See Houses and Rents - Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), Section 28. **AIR 1955 Bom 166.**

——**Ss. 41 to 43 — Jurisdiction of Small Cause Court — Application by sub-tenant under Section 11 (3) of W. B. Premises Rent Control Act, 1948.**

In view of the summary character of the jurisdiction of the Small Cause Court in proceedings under Chapter VII of the Presidency Small Cause Courts Act, the Presidency Small Cause Court will have no jurisdiction to entertain an application by a sub-tenant under Section 11 (3) of the W. B. Premises Rent Control (Temporary Provisions) Act, 1948. Moreover, under Section 19 (g) of the Presidency Small Cause Courts Act, the Small Cause Court cannot determine any question of right to or interest in immovable property. The right of the sub-tenant is a right of statutory tenancy in the premises and the Presidency Small Cause Court has no jurisdiction to enter into that question. **(1951) 87 CLJ 181.**

——**Ss. 41 and 43 — Summary eviction — Order — Need to conform to judicial standards — Jurisdiction under Section 43 — Nature of.**

It is no doubt true that the proceedings under Section 41 of the Presidency Small Cause Courts Act is a summary one and no elaborate judgment of the Court need be expected in such matters. It is equally true that merely because a tenant sought to be evicted might apply under Sec. 9, of the Madras City Tenants' Protection Act the jurisdiction of the Small Cause Court to make an order under Section 43, of the Presidency Small Cause Courts Act is not in any way affected.

But however summary the procedure or however brief the order of judgment might be, it should be passed only upon consideration of the merit of the respective contentions and it should be legally adequate and conform to principles of justice. So long as there is an order that can be the subject of the exercise of the revisional powers of the High Court and it is made by a subordinate Court or Tribunal and further it is not an ex parte order but one on the merits, it must bear on the face of it evidence of the application of the judicial mind to the merits. The Court cannot merely rest its decision on its subjective satisfaction without reference to the grounds of that decision. **78 Mad LW 528: (1965) 2 Mad LJ 166.**

——**S. 41** — Jurisdiction of Court — Question of title — Application for ejectment of tenant — Tenant disputing validity of notice terminating lease — Effect. See Presidency Small Cause Courts Act (1882), Section 19 (g). **(1958) 2 Mad LJ 417.**

3. Limitation for execution of order.

——**Ss. 41, 43 and 48 — Suit in ejectment — Decree directing delivery of possession by specified date — Execution after expiry of date fixed.**

Under Sec. 48 of the Presidency Small Cause Courts Act all the provisions of the Civil Procedure Code including the provisions of Order 21 will apply to matters provided for in that chapter. Hence a decree in ejectment made by a Presidency Small Cause Court under Section 43 of the Act could be executed like any other decree within the period of limitation. **(1961) 1 MLJ 136: ILR (1961) Mad 605: 74 Mad LW 827: 1961 Mad WN 21: AIR 1961 Mad 408 (408) (Pr 3).**

4. Parties to proceedings.

——**S. 41** — Parties — Application in ejectment by lessee against sub-lessee — Sub-lessee applying for transfer of lessee's interest — Owner of land if necessary or proper party. See Tenancy Laws — Madras City Tenants' Protection Act, 1921 (3 of 1922), Section 9 (1). **(1958) 1 Mad LJ 310.**

5. Right to remove fixtures.

——**Ss. 41, 43 and 48 — Power to order bailiff to remove fixtures and give vacant possession.**

Where a Court directs, by a decree or order, vacant possession of land, that decree could be made effective by directing its own officers to remove the superstructures in the property and deliver vacant possession of the properties to the decree-holder. It is unnecessary to have any specific power in that behalf. The power to remove the superstructures is an incidental necessary and ancillary power to the power to deliver possession of the property. If there is obstruction by the tenant the machinery provided by Rule 97 onwards of C. P. Code has to be followed and the obstruction must be removed.

Under S. 48 of the Presidency Small Cause Courts Act, the provisions of the C. P. Code are made applicable to all proceedings under Ch. VII. The machinery provided therefore under the C. P. Code for delivery of possession of immovable property in cases where a decree for possession was granted, is attracted by virtue of S. 48 to proceedings under S. 41 of the Provincial Small Cause Courts Act. **1954 Mad WN 522: (1954) 2 MLJ 282: 67 Mad LW 489: ILR (1955) Mad 774: AIR 1954 Mad 985 (986) (Pt A) (Pr 6).**

——**S. 41 — Right of tenant to remove fixtures on land ordered to be vacated.**

Under law as provided in the Transfer of Property Act Clause (h) of Section 108 after the determination of the lease, the lessee is given the right, while he is in possession of the property, to remove all things which he has attached to the earth. This right however enures to him so long as he is in possession of the property leased but not afterwards. Notwithstanding the determination of the lease, so long as he is in possession of the property, he is entitled to remove it but, if he leaves the property he has no right to the property and to remove it and the fixtures become the property of the lessor. Under this principle of law, when once an order for possession is made after the termination of the tenancy under Section 41 of Presidency Small Cause Courts Act for delivery of possession of the property, it is open to the lessee in possession to remove the articles before he leaves possession of the property. If he does not the lessor is entitled to delivery of possession of the property along with the fixtures. **1954 Mad WN 522: (1954) 2 MLJ 282: 67 Mad LW 489: ILR (1955) Mad 774: AIR 1954 Mad 985 (986) (Pt B) (Pr 4).**

6. Revision.

——**S. 41** — Ex parte decree of Registrar — Registrar refusing to set it aside — Record showing that he considered the evidence and came to

conclusion that summons was duly served — Peon who served summons examined — Petition for setting aside ex parte decree vague — High Court will not interfere with order under Section 115, Civil P. C. **AIR 1955 NUC (Cal) 648.**

——S. 41 — Scope of inquiry — Proceedings against tenant — Latter not filing statement and not appearing — Application by sub-tenant to be made party — Order rejecting — Propriety — Revision — C. P. Code, Section 115.

Plaintiff started a proceeding under Section 41 of the Presidency Small Cause Courts Act for recovery of possession against the tenant-defendant and the proceeding was registered as a suit. When the suit was taken up for hearing the petitioner filed an application to the Court alleging that the plaintiff and the defendant were colluding with each other for the purpose of evicting the petitioner who was a statutory sub-tenant under the provisions of Sec. 11 (3) of the W. B. Premises Rent Control Act, 1948. The Court rejected this application on the ground that it was premature and that the petitioner might apply for relief when the plaintiff wanted to take delivery of possession on the basis of the order for possession that might be passed by the Court. The tenant-defendant did not file any written statement to the suit and did not also appear in Court on the date of hearing.

Held, that in the special facts of the case it was necessary for the Court to add the petitioner as a party defendant in the suit in order to effectually and completely adjudicate upon all the questions involved in the suit, and that the Court exercised its jurisdiction with material irregularity in rejecting the petitioner's application. **55 CWN 324: AIR 1953 Cal 348 (349) (Pt B) (Pr 6).**

7. Decree and building — Meaning of.

●——S. 41 — Decree for recovery of possession includes orders made by Small Cause Court under Section 41. See Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950) as amended by Act (62 of 1950), Section 18 (1). **AIR 1952 Cal 273 (FB).**

——S. 41 — "Building" — Lease of vacant land forming part of land and superstructure already leased — Whether lease of a building — **Held,** that the vacant piece of land under second lease did not fall within the scope of the definition of the term 'building' as contained in the Madras Rent Control Act — The Rent Controller did not have in such cases any jurisdiction and the proper Court for the petitioner to seek his remedy would be the Small Cause Court when the lease pertained merely to the land without any superstructure. See Houses and Rents — Madras Buildings (Lease and Rent Control) Act (1949), Section 7. **(1957) 70 Mad LW 295.**

SECTION 42

——S. 42 — Jurisdiction of Small Cause Court — Application by sub-tenant under Section 11 (3) of W. B. Premises Rent Control Act, 1948 — The right of the sub-tenant is a right of statutory tenancy in the premises and the Presidency Small Cause Court has no jurisdiction to enter into that question. See Presidency Small Cause Courts Act (1882), Section 41. **(1951) 87 Cal LJ 181.**

——S. 42 — Extension of time. See Presidency Small Cause Courts Act (1882), Section 43. **('51) 55 Cal WN 305.**

SECTION 43

●——S. 43 — **Order for delivery of possession — If decree.**

Although under the rules framed under the Act the application under Section 41 is initiated by a plaint, the proceeding is not a suit and the order for delivery of possession under Section 43 does not strictly speaking amount to a decree for recovery of possession: AIR 1927 Bom 556, Ref Nalinakhya Bysack v. Shyam Sunder Haldar, **(1953) SCJ 201: 1953 SCA 191: 1953 SCR 533: AIR 1953 SC 148 (149) (Pt A) (Pr 3).**

●——S. 43 — **W. B. Premises Rent Control (Temporary Provisions) Act (1950), Sec. 18 (1) (as amended by W. B. Act 62 of 1950) does not apply to order for possession under Section 43.**

A decree for recovery of possession within the meaning of Section 18 (1) of W. B. Rent Act 1950 means a decree in a suit for recovery of possession and does not cover an order for possession under Section 41 of Presidency Small Cause Courts Act, 1882. AIR 1951 Cal 32; 55 Cal WN 347; 55 Cal WN 421; AIR 1952 Cal 126 and AIR 1952 Cal 273 (FB), **Overruled;** AIR 1952 Cal 199, **Reversed.** See Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950) (as Amended by W. B. Act 62 of 1950), S. 18 (1). **AIR 1953 SC 148.**

——Ss. 43, 46 and 47 — Explanation to Section 43 should be read into Section 46 — When can occupant of premises file suit under Section 47 and complaint of trespass.

The object of filing the suit under Section 47 is substantially to challenge the order passed under Section 41. In this respect Sections 43 and 46 must be reconciled and the only way these two sections can be reconciled is by reading the Explanation to Section 43 into Section 46. In other words, by reason of this reconciliation between the two sections the position in law would be that if an applicant cannot obtain an order for possession by reason of his title having determined and by reason of the Explanation to Section 43, then if he makes an application under Section 41 such an application constitutes trespass within the meaning of Section 46 and the occupant can file a suit and complain of that trespass and succeed in obtaining compensation. **60 Bom LR 1282: ILR (1958) Bom 1416: AIR 1960 Bom 18 (19) (Pt B) (Pr 6) (DB).**

——S. 43, Explanation — Explanation to Section 43 contemplates title in premises and not personal right that is given under Section 14, Rent Act — (Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), Section 14).

The protection which the Rent Act gives to tenant or a sub-tenant under Section 14 is a personal right and not a right in property, and what the Explanation to Section 43, Presidency Small Cause Courts Act contemplates is title and not a personal right. Hence with the determination by the landlord of the tenancy in the premises any title in the third party created by the tenant or sub-tenant is also determined. It is only after determination of the contractual right the Rent Act steps in and gives protection to the tenant or sub-tenant. **60 Bom LR 1282: ILR (1958) Bom 1416: AIR 1960 Bom 18 (19, 20) (Pt C) (Prs 7, 8) (DB).**

——S. 43, Explanation — Reason for Explanation.

The reason for the Explanation to Section 43 is to prevent the Small Cause Court, which is a Court of summary jurisdiction, from inquiring into and investigating into questions of fact. If

an application under Chapter 7 can be maintained by a person not under the original title but under a different or subsequent title, then the Small Cause Court would have to go into questions of title and that exactly is what the Legislature wanted to prevent. **60 Bom LR 1282: ILR (1958) Bom 1416: AIR 1960 Bom 18 (20) (Pt D) (Pr 9) (DB).**

——S. 43 — Discretion to give time to occupant — Discretion in revision — (Civil P. C. (1908), Section 115).

The question as to what time should be granted to the occupants for vacating would ordinarily be a question to be decided by the trial Judge in his discretion, and in matters which are left to the discretion of the trial Judge the High Court would be very reluctant to interfere in the exercise of its revisional jurisdiction. In exercising the discretion vested in the trial Court under Section 43, it is of utmost importance to see that an order based upon the provisions of Section 43 does not defeat the very object of excluding the local bodies from the operation of the Rent Act. The discretion in question must be judiciously and reasonably exercised and though reasonable time may and should be given to the tenant who is ordered to be evicted, giving an unduly long time to the tenant might amount to the frustration of the decree itself and would clearly be inconsistent with the spirit of the section. The time given should not be so long that the tenants would thereby be encouraged not to take any steps in the direction of finding alternative accommodation on their own. **AIR 1956 Bom 229 (229, 230) (Prs 3 to 5).**

——S. 43 — Scope — Under Section 43 orders for delivery of possession may be passed both in the absence of occupant and after he has appeared. **52 Bom LR 349: ILR (1950) Bom 453: AIR 1950 Bom 321 (323) (Pt A) (Pr 4) (DB).**

——S. 43 — Order for dispossession under Section 43 — Jurisdiction to order stay under Section 47 — So long as the proceedings are pending, it is open to an occupant intending to file suit for compensation for trespass to ask for stay of proceedings before the Small Cause Court even if order for dispossession has been passed under S. 43. See Presidency Small Cause Courts Act (1882), S. 47. **AIR 1950 Bom 321 (DB).**

——Ss. 43, 41 — Order under Section 43 fixing date for delivery of possession — Power of Court to extend — Scope of proceedings.

Per Das Gupta and Bachawat, JJ.— The date for giving possession of the property named in the order under Section 43 of the Presidency Small Cause Courts Act, 1882, can be varied by a subsequent order.

Once the proceeding has started it becomes the duty of the Court till the proceedings terminate to pass not one single order but as many orders as may be necessary, to make the proceeding effective. This duty of the Court does not disappear merely because the date previously fixed has expired. The proceeding commenced under Section 41 of the Act remain pending till the relief has been worked out and when the scheme of the legislation in Chapter VII is considered as a whole, it is proper to hold that it is implicit in Section 43 that successive order fixing different dates of possession can be passed by the Court. The orders passed 'extending' the date should be considered to be in substance fresh orders fixing different dates of possession. AIR 1954 Cal 14, Rel. on. and 46 Cal WN 11 and 41 Cal WN 656 and 55 Cal WN 305, Dissented from.

Per Bachawat, J.— Under Section 148, Civil P. C., as amended by the High Court Notification dated 3rd January, 1949, issued under Sec. 8, Civil P. C., the Court of Small Causes has power to vary the date named in the order for possession under Section 43. Presidency Small Cause Courts Act. The power of varying the date fixed for the giving of possession under Section 43 of the Presidency Small Cause Courts Act, should be exercised sparingly and with great caution. **60 Cal WN 312: AIR 1956 Cal 425 (427, 428) (Prs 10, 14, 15, 25, 28) (DB).**

——S. 43 — Scope — Order for possession by consent of occupant — Application by occupant for stay — **Held,** that the Small Cause Court was bound to stay the proceedings till the disposal of the suit even if the order under Section 41 was by consent. See Presidency Small Cause Courts Act (15 of 1882), Section 41. **AIR 1955 NUC (Cal) 664.**

——S. 43, Chap. 7 — 'Decree for recovery of possession' — Expression should be broadly construed so as to include an order for recovery of possession under Section 43. See Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), Section 18 (1). **AIR 1951 Cal 32 (DB).**

[**Overruled** in AIR 1953 SC 148.]

——Ss. 43 and 47 — Person not occupant — Locus standi to apply for stay.

A person who is not an occupant within the meaning of Section 47 of the Presidency Small Cause Courts Act has no locus standi to maintain any application for time for giving possession. 53 CWN 187 and 708, Referred to. **(1951) 55 CWN 305.**

——Ss. 43, 42 — Extension of time.

The Court has no jurisdiction to extend subsequently the time appointed under Section 43 for giving possession: 46 CWN 11, Foll. **(1951) 55 CWN 305.**

——Ss. 43, 41 — Proceedings under Section 41 — Right of sub-tenant to apply under Section 11 (3) of West Bengal Premises Rent Control (Temporary Provisions) Act (38 of 1948). See Presidency Small Cause Courts Act (1882), Section 19 (g). **(1951) 87 Cal LJ 181 (DB).**

——S. 43 — Summary eviction — Order — Need to conform to judicial standards — Jurisdiction under Section 43 — Nature of. See Presidency Small Cause Courts Act (1882), Section 41. **(1965) 2 Mad LJ 166: 78 Mad LW 528.**

——S. 43 — Proceedings under Section 41 by landlord — Subsequent suit by tenant for relief under Section 47 — Delivery of possession to landlord during pendency of suit — Such delivery can only be subject to the result of the suit. See Presidency Small Cause Courts Act (1882), Section 41. **AIR 1963 Mad 369 (DB).**

——S. 43 — Ejectment decree under Section 43 — Decree-holder can apply for execution within time prescribed by law — Under Section 48 all the provisions of the Civil P. C. including those contained in Order 21 will apply to matters provided for in that Chapter — Civil P. C. (1908), Order 21. See Presidency Small Cause Courts Act (1882), Section 48. **AIR 1961 Mad 408.**

——S. 43 — Tenant ordered to vacate under Section 41 — Power to order bailiff to remove fixtures and give vacant possession — Such power is incidental, necessary and ancillary power to the power to deliver possession of the property — It is unnecessary to have specific power in that behalf. See Presidency Small Cause Courts Act (1882), Section 41. **AIR 1954 Mad 985.**

SECTION 44

——S. 44 — Order for possession made under Section 41 — Person having independent title

threatened to be dispossessed under Section 44 — Remedy — Civil P. C., Order 21, Rule 100 does not apply. See Presidency Small Cause Courts Act (1882), Section 41. **AIR 1955 NUC (Cal) 1021.**

SECTION 45

——**S. 45** — Application for ejectment under Section 41 — Occupant, alleged licensee, refusing to vacate on notice — Defence claim for protection of Act on basis of tenancy — Order for ejectment — Decree against the defendant must be treated as one under Section 28 of Bombay Rents Act and hence appealable under Section 29 of that Act See Houses and Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), Section 28. **AIR 1951 Bom 294.**

[Held, overruled by AIR 1951 Bom 390.]

SECTION 46

——**S. 46** — Suit for declaration that defendant's application under Section 41 amounted to act of trespass and for damages — Plaintiff also claiming protection under Bombay Act 57 of 1947 — Suit does not fall within Section 28 of Bombay Act 57 of 1947 — Bombay City Civil Court has jurisdiction to entertain it. See Presidency Small Cause Courts Act (1882), Section 41. **AIR 1960 Bom 338 (DB).**

[**Overruled** in AIR 1965 Bom 177 (FB).]

——**S. 46** — Explanation to Section 43 should be read into Section 46 — When can occupant of premises file suit under Section 47 and complain of trespass — The object of filing a suit under Section 47 is substantially to challenge the order passed under Section 41 — If an applicant cannot obtain an order for possession by reason of his title having determined and by reason of the Explanation to Section 43, then if he makes an application under Section 41 such application constitutes trespass within the meaning of Section 46 and the occupant can file a suit and complain of that trespass and succeed in obtaining compensation. See Presidency Small Cause Courts Act (1882), Section 43. **AIR 1960 Bom 18 (DB).**

——**S. 46** — Order for dispossession under Section 43 — Jurisdiction to order stay under Section 47 — Occupant intending to file a suit for compensation for trespass to ask for a stay of the proceedings before the Small Cause Court even if the order for dispossession has been passed under Section 43. See Presidency Small Cause Courts Act (1882), Section 47. **AIR 1950 Bom 321 (DB).**

SECTION 47

SYNOPSIS

(Presidency Small Cause Courts Act (1882), S. 47.)

1. Scope of inquiry under.
2. Stay of proceedings.
3. Trespass.
4. Occupant — Meaning of.
5. Jurisdiction.
6. Miscellaneous.

1. Scope of inquiry under.

——**S. 47 — Scope of inquiry.**

In a suit under Section 47 only certain issues can arise and only certain points can be agitated. Proceedings under Chapter VII are not in the nature of suits, and orders passed are not in the nature of decrees. The Legislature has provided a summary remedy to a landlord to obtain possession from his tenant, but the Legislature has also afforded a protection to the tenant and that protection is that the order passed by the Small Cause Court under Chapter VII is not a conclusive order. It is open to the tenant to challenge that order by coming to the High Court and establishing his right to be in possession at the date when the landlord instituted proceedings against him. **ILR (1955) Bom 57: 56 Bom LR 1065: AIR 1955 Bom 64 (65) (Pt B) (Pr 2) (DB).**

——**S. 47 — Scope — Mandatory character.**

The provisions of Section 47 are mandatory. If an application is made and if bonds are executed as provided in Section 47, the Small Cause Court has no discretion; it must stay the proceedings and the operation of the ejectment order. **ILR (1955) Bom 57: 56 Bom LR 1005: AIR 1955 Bom 64 (65) (Pt C) (Pr 2) (DB).**

——**S. 47** — Scope — Order for possession by consent of occupant — Application by occupant for stay — Maintainability. See Presidency Small Cause Courts Act (15 of 1882), Section 41. **AIR 1955 NUC (Cal) 664.**

——**S. 47** — Scope — Provisions of the section are mandatory. **ILR (1963) Mad 1054: 76 Mad LW 381: AIR 1963 Mad 369 (371) (Pt B) (Pr 4) (DB).**

2. Stay of proceedings.

——**S. 47 — Stay of proceedings — Duty of Court.**

Under Section 47 it is incumbent upon the Small Cause Court to stay the proceedings when an application is made. It is not open to the Small Cause Court to go into the merits of the application. **ILR (1955) Bom 168: 56 Bom LR 1169: AIR 1955 Bom 207 (208) (Pt B) (Pr 3).**

——**Ss. 47, 43 and 46 — Order for dispossession under Section 43 — Jurisdiction to order stay under Section 47.**

It is open to an occupant intending to file a suit for compensation for trespass to ask for a stay of the proceedings before the Small Cause Court even if an order for dispossession has been passed under Section 43, so long as that order has not been executed, i. e., while the proceedings are still pending : AIR 1950 Bom 120, Dissent. AIR 1923 Mad 323 and C. R. A. No. 827 of 1948, dated 5th April 1949, Appr. **52 Bom LR 349: ILR (1950) Bom 453: AIR 1950 Bom 321 (325) (Pt B) (Pr 7) (DB).**

——**S. 47** — Application under — Whether can lie after order under Section 43 is passed (Quaere). **51 Bom LR 842: ILR (1950) Bom 281: AIR 1950 Bom 120 (123) (Pt C) (Pr 7).**

——**S. 47 — Right to apply for stay — Time for exercise of.**

The right to apply under Section 47 of the Act for stay of proceedings under Section 41 of the Act can enure till the proceedings under Section 41 come to an end. The proceedings under Section 41 cannot be said to have terminated till the relief contemplated by that section is properly worked out viz., when the possession is taken in pursuance of an order under Section 43 and not earlier. Consequently Section 47 must be construed so as to permit the filing of an application under that section even after an order under Section 43 has been made. The mere making of such order does not preclude an application under Section 47. AIR 1923 Mad 323; AIR 1950 Bom 321, Rel. on.

The word 'trespass' in Section 47 must be given its ordinary meaning subject to the reservation that the meaning must be limited by the necessary implications contained in the section, namely, that once possession is taken the right to make an application under that section is no longer available to the occupant. **57 Cal WN 738: ILR (1955) 1 Cal 371: AIR 1954 Cal 14 (15, 16) (Pt A) (Prs 7, 11, 13, 14, 16) (DB).**

——S. 47 — Waiver of right to apply for stay. The mere passing of an order allowing time to vacate the premises on an application made by the occupant opposite party in a proceeding under Section 41 cannot operate as a waiver of the right to apply for stay under Section 47 of the Act. **57 CWN 738: ILR (1955) 1 Cal 371: AIR 1954 Cal 14 (16) (Pt B) (Pr 18) (DB).**

——S. 47 — Person not occupant — Locus standi to apply for stay — A person who is not an occupant within the meaning of Section 47 has no locus standi to maintain an application for time for giving possession. 53 CWN 187 and 708, Ref to. See Presidency Small Cause Courts Act (1882), Section 43. **(1951) 55 Cal WN 305.**

——S. 47 (before and after amendment by Madras Act 16 of 1956) — Power to revoke order of stay.

The Court which granted a stay of execution under Section 47 will have an inherent power to revoke it whenever it finds that the application for it was intended as an abuse of process of Court. There will however be no need to apply that rule after the amendment effected to that section in the year 1956, as it obliges the tenant to file the suit within a month. **76 Mad LW 381: ILR (1963) Mad 1054: AIR 1963 Mad 369 (372) (Pt C) (Pr 10) (DB).**

3. Trespass.

——S. 47 — Suit for declaration that defendant's application under Section 41 amounted to act of trespass and for damages — Plaintiff also claiming protection under Bombay Act 57 of 1947 — Suit does not fall within Section 28 of Bombay Act 57 of 1947 — Bombay City Civil Court has jurisdiction to entertain it. See Presidency Small Cause Courts Act (1882), Section 41. **AIR 1960 Bom 338 (DB).**

[**Overruled** in AIR 1965 Bom 177 (FB).]

——S. 47 — Explanation to Section 43 should be read into Section 46 — When can occupant of premises file suit under Section 47 and complain of trespass — When an application is made under Section 47 by an applicant whose title is determined it constitutes trespass within the meaning of Section 46 and the occupant can file a suit and complain of that trespass and succeed in obtaining compensation. See Presidency Small Cause Courts Act (1882), Section 43. **AIR 1960 Bom 18 (DB).**

——S. 47 — Trespass — Date of.

Under Section 47, the trespass has to be at the date when the application for ejectment is made and not when the ejectment order is passed. **ILR (1955) Bom 57: 56 Bom LR 1005: AIR 1955 Bom 64 (65) (Pt A) (Pr 2) (DB).**

——S. 47 — Scope — Suit filed under Section 47 — Effect of.

In a suit filed under Section 47 if the occupant obtains a decree, such decree shall supersede the order made under Section 47. Therefore, not only is the operation of the ejectment order stayed, but the ejectment order is completely wiped off, as it were, if in the substantive suit filed by the occupant under Section 47 he succeeds in getting an order that there was a trespass and the applicant had no right to be in possession of the premises. **ILR (1955) Bom 57: 56 Bom LR 1005: AIR 1955 Bom 64 (65) (Pt D) (Pr 2) (DB).**

——S. 47 — Scope of — Suit under.

In a suit under Section 47 no other title can be agitated except the title contemplated by that section itself. Suits under Section 47 are special suits of a limited character for a limited purpose, and the Courts' jurisdiction to try the suits under Section 47 is limited to try issues that arise under that Section.

This being a special suit the plaintiff cannot, like in an ordinary suit under the Civil P. C combine the two reliefs, namely, one an action for trespass under Section 47 and the other on title which accrued to him subsequently and give up the first and agitate only the second. **ILR (1955) Bom 57: 56 Bom LR 1005: AIR 1955 Bom 64 (65, 66) (Pt E) (Prs 2, 3) (DB).**

4. Occupant — Meaning of.

——S. 47 — Occupant — Meaning of — Term does not include sub-tenant in possession who was not made party to application under Section 41.

The expression 'occupant' used in Section 47, Presidency Small Cause Courts Act, means only a person who was a party to the proceedings filed under Section 41 and not a person who is or claims to be in possession, either at the time of the institution of those proceedings or thereafter, but who has not been sued. A sub-tenant, therefore, who is in possession but was not made party to the proceedings under Section 41 is not entitled to apply under Section 47 relying solely upon his occupation: AIR 1949 Cal 248, Rel. on. **51 Bom LR 842: ILR (1950) Bom 281: AIR 1950 Bom 120 (123) (Pt A) (Pr 6).**

——S. 47 — "Occupants".

The opposite parties have no locus standi to maintain any application for time if they are not occupants within the meaning of Section 47 as explained in 53 CWN 708. **(1951) 55 CWN 305.**

5. Jurisdiction.

●——S. 47 — Suit for declaration that a sub-tenancy was created in favour of plaintiff by defendant tenant and for injunction restraining defendant from interfering with his possession as sub-tenant — Suit for declaration that plaintiff is tenant or sub-tenant of defendant and for injunction restraining defendant from proceeding under Section 41 of Small Cause Courts Act or from executing order passed on application under that section — City Civil Court, Bombay has no jurisdiction to entertain either of the two suits — Section 28 of Bombay Rents Act will prevail over Sections 47 and 49 of Small Cause Courts Act — AIR 1960 Bom 338, **Overruled.** See Houses and Rents — Bombay Rent, Hotel and Lodging House Rates Control Act (57 of 1947), Section 28. **AIR 1965 Bom 177 (FB).**

——S. 47 — Order for evicting plaintiff passed in favour of defendant under Section 41 — Suit by plaintiff to declare that he is tenant and for an injunction restraining defendant from executing the order — City Civil Court has no jurisdiction to entertain the suit as having been barred by Section 28 of Bombay Rents Act 1947. See Civil P. C. (1908), Section 9. **AIR 1964 Bom 85 (DB).**

6. Miscellaneous.

——S. 47 (as amended in 1953) — Retrospective operation.

The right that an occupant gets under Section 47 is a substantive right. The effect of the amendment introduced by the Amending Act 59 of 1953 is not at all procedural. The effect is to take away rights of parties who do not make an application within a certain time. Therefore, it

is clear that Act 59 of 1953 can only apply to those applications for ejectment which were filed after the Act came into force. With regard to the applications which were filed earlier, the amendment would not apply. **ILR (1955) Bom 168: 56 Bom LR 1169: AIR 1955 Bom 207 (208) (Pt A) (Pr 2).**

——**S. 47** — Reference to English statute — Terms not identical — Interpreting Indian statute by such reference is unsafe. See Interpretation of Statutes. **AIR 1950 Bom 120.**

——**S. 47** — Proceedings under Section 41 by landlord — Subsequent suit by tenant for relief under Section 47 — Delivery of possession to landlord during pendency of suit — Such delivery can only be subject to the result of the suit — Therefore, if in the suit it were held that the tenant was not liable to be evicted, the order under S. 43 would stand vacated and any possession obtained thereunder shall have to be restored to the tenant on the principle of restitution — It makes no difference whether the tenant succeeded on the facts and law existing on the date of suit or by reason of right conferred on him pending an appeal. See Presidency Small Cause Courts Act (1882), Section 41. **AIR 1963 Mad 369 (DB).**

SECTION 48

——**S. 48** — Scope — Remedy of aggrieved party — Second appeal and not revision is the proper procedure against an appellate order of the Small Cause Court. **57 CWN 296: AIR 1953 Cal 624 (624) (Pt A) (Pr 1).**

——**S. 48 — Decree for ejectment against tenant — Remedy of sub-tenant claiming under Section 11 (3), West Bengal Act 38 of 1948 — Procedure — Civil P. C. (1908), Section 141 — Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (38 of 1948), Section 11 (3).**

Where, in a proceeding under Chapter VII, for recovery of possession, a decree for ejectment is passed against a tenant, a sub-tenant, who considers that by virtue of Section 11 (3), West Bengal Premises Rent Control (Temporary Provisions) Act (1948), he is in no way bound by the order, cannot apply for rescinding or varying the decree under Section 11 (3), and Section 8, West Bengal Act and for staying of the execution. The correct procedure for the sub-tenant to follow is to come to the Court under the appropriate provisions of Order 21, Civil P. C., which provisions are automatically brought into operation by Section 48. **54 Cal WN 376: ILR (1951) 1 Cal 359: AIR 1950 Cal 244 (245) (Pt B) (Pr 10).**

——**Ss. 48, 43** — Ejectment decree under Section 43 — Decree-holder can apply for execution within time prescribed by law — Civil P. C. (1908), Order 21. **(1961) 1 Mad LJ 136: 74 Mad LW 827: ILR (1961) Mad 605: AIR 1961 Mad 408 (408) (Pr 3).**

——**S. 48** — Order under Section 41 — Enforcement of — Applicability of Order 21, Rule 35 and Rule 97, etc., Civil P. C. — Power to order bailiff to remove fixtures and give vacant possession — If the tenant continues in possession of the property after an order under Section 41, it is open for the Court to remove him from possession of the land — If there is obstruction by him the machinery provided by R. 97 onwards of O. 21, Civil P. C., has to be followed and the obstruction removed. See Presidency Small Cause Courts Act (1882), Section 41. **AIR 1954 Mad 985.**

SECTION 49

●——**S. 49 — Scope — (Houses and Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), Sections 28 and 29-A).**

The provisions of Section 49 render no assistance in the matter of interpretation of Section 28 or Section 29-A, Bombay Rents, Hotel and Lodging House Rates Control Act. Babulal Bhuramal v. Nandram Shivram. **36 Mys LJ 543: 1959 SCR 367: (1959) 1 SCA 152: 1958 SCJ 880: 60 Bom LR 954: AIR 1958 SC 677 (682) (Pt C) (Pr 10).**

●——**S. 49** — Suit for declaration that a sub-tenancy was created in favour of plaintiff by defendant tenant and for injunction restraining defendant from interfering with his possession as sub-tenant — Suit for declaration that plaintiff is tenant or sub-tenant of defendant and for injunction restraining defendant from proceeding under Section 41 of Small Cause Courts Act or from executing order passed on application under that section — City Civil Court, Bombay has no jurisdiction to entertain either of the two suits — Section 28 of Bombay Rents Act will prevail over Sections 47 and 49 of Small Cause Courts Act — AIR 1960 Bom 338, **Overruled.** See Houses and Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (1947), Section 28. **AIR 1965 Bom 177 (FB).**

——**S. 49** — Order for evicting plaintiff passed in favour of defendant under Section 41, Presidency Small Cause Courts Act — Suit by plaintiff to declare that he is tenant and for an injunction restraining defendant from executing the order — City Civil Court has no jurisdiction to entertain the suit. See Civil P. C. (1908), Section 9. **AIR 1964 Bom 85 (DB).**

SECTION 53

——**S. 53** — 'Duly constituted attorney' is person holding general or special power of attorney and not ordinary Advocate having vakalatnama. **AIR 1955 NUC (Cal) 2927.**

SECTION 55

●——**S. 55** — Application by official assignee under Section 55, Presidency-Towns Insolvency Act, to declare deed of gift executed by insolvent void — Oral evidence by donees representatives-in-interests of executant, to show transfer was for consideration — Admissibility — Official assignee not representative-in-interest of insolvent — AIR 1955 Bom 122, **Reversed.** See Evidence Act (1872), Section 92. **AIR 1958 SC 448.**

SECTION 69

——**S. 69 — Power of High Court under — Application under Section 38 — Reference under Section 69 — Questioning competency of application.**

The powers of the High Court in hearing a Reference under Section 69 of the Presidency Small Cause Courts Act are regulated inter alia by the provisions of Order 46, Rule 3 of the Code of Civil Procedure. The competence of the Reference made to High Court may also be a point for reference under Section 69 but the competence of an application for a new trial made under Section 38 cannot be canvassed at the hearing of the Reference in that Court. That is a matter which should be raised before the Judges who heard the application for a new trial. **56 Cal**

WN 299: AIR 1952 Cal 671 (672) (Pt A) (Pr 6) (DB).

SECTION 74

——S. 74 — Application for leave to sue as pauper — Separate document as plaint not contemplated — (Civil P. C. (1908), Order 33, Rule 8).

Section 74 contemplates a single document which, besides containing a prayer for being allowed to sue as a poor person, also contains a statement of the claim. There is no provision which requires that pauper has to file two documents: (1) an application for leave to sue as a pauper and (2) a plaint. After the Deputy Registrar has granted leave to the applicant to sue as pauper and after the suit was ordered to be registered, it could not be said that there was no plaint, of which the applicant could not seek amendment. **61 Bom LR 497: ILR (1959) Bom 1106.**

PRESIDENCY TOWNS INSOLVENCY ACT (3 of 1909)

SECTION 2

——Ss. 2 (i) and 9 (b) — Transfer of property — Lease of machinery by insolvent on payment of monthly rent if constitute transfer within Section 9 (b).

It is entirely an erroneous contention to put forward that under Section 9 (b) a transfer is constituted only when the insolvent ceases to be the owner of the property. What Section 9 (b) requires is that some interest in the property must be transferred by the insolvent. That interest may not be large enough to constitute all the rights of ownership, that interest may be less than the totality of rights which constitute ownership, but so long as the insolvent deprives himself of certain rights or interests in his own property and transfers those rights and interests to someone else, the transaction constitutes a transfer which falls within Section 9. **57 Bom LR 979: ILR (1955) Bom 941: AIR 1956 Bom 38 (39) (Pt A) (Pr 3) (DB).**

——S. 2 (a) — 'Creditor' includes assignee of a decree-holder. See Presidency Towns Insolvency Act (1909), Section 9 (1). **AIR 1955 Bom 77 (DB).**

SECTION 7

●——S. 7 — Scheme of composition — Bank secured creditor, allowed 12 per cent. simple interest under scheme — Carrying out of scheme guaranteed by certain persons who were to transfer their properties to Official Assignee — Deed of transfer of trust embodying agreement to allow compound instead of simple interest to bank — Amendment not approved by Court and unsecured creditors — Suit by bank claiming compound interest — Suit dismissed by High Court — Appeal to Privy Council — Appeal opposed by one of insolvents, sons of deceased guarantor and Official Assignee — Contesting respondents held had right to be heard — Agreement to pay compound interest held could not be enforced without consent of all creditors and approval of Insolvency Court — Civil Court held had no jurisdiction to try suit — Presidency Towns Insolvency Act (1909), Sections 28 and 30 (1).

Insolvents who were indebted inter alia to a bank whose debt was secured by mortgages made proposals for a composition in settlement of their debts. The proposals were approved by the majority of the creditors and by the Insolvency Court. The carrying out of the scheme of composition was guaranteed by certain persons, who were to transfer to the Official Assignee their shares in certain properties. Special provisions were made in the scheme for the payment of the debt due to the bank, one of the provisions being that the bank was to receive 12 per cent. simple interest on its debt. One of the guarantors having declined to execute the proposed deed of transfer and it being necessary to satisfy the bank, it was agreed between the bank, certain of the guarantors, the insolvents and the Official Assignee that the scheme should be so amended as to allow the bank 12 per cent. compound interest instead of 12 per cent. simple interest. The amendment was embodied in the deed of transfer, also called the deed of trust, but was not approved of by the unsecured creditors and the Insolvency Court. The bank having received its debt with simple interest instituted a suit in the Civil Court to enforce the agreement as to compound interest. The High Court having dismissed the suit in appeal the bank appealed to the Privy Council contending first, that the contesting respondents, who were one of the insolvents, sons of a deceased guarantor and the Official Assignee, had no right to be heard because they were saying that the agreement to pay compound interest amounted to a fraudulent preference to the bank and to allow them to oppose the appeal on this ground would amount to allowing them to plead their own fraud, they being parties to the agreement and secondly, that the agreement was outside the scheme of composition and, therefore, could be enforced in a Civil Court:

Held, (1) that the agreement might amount to a fraudulent preference within the meaning of the insolvency laws, but there was no intention to defeat the unsecured creditors and agreement to pay compound interest was entered into in all innocence to save the scheme. The bank was a party to the agreement and if there was illegality attaching to it the bank must share the responsibility. Moreover, the Official Assignee was allowed to appear in the appeal to the High Court and he was directed by the Insolvency Court to contest the appeal to His Majesty in Council. In these circumstances he and the opposing respondents were entitled to be heard;

(2) that as the agreement to pay compound interest instead of simple interest constituted an amendment to the scheme it could not be enforced without the consent of all classes of creditors and the approval of the Insolvency Court: (1839) 2 Beav 385; (1807) 13 Ves 581 and (1881) 18 Ch D 464, Ref.

(3) that the Civil Court had no jurisdiction to try the suit. The deed of trust which embodied the agreement to pay compound interest instead of simple interest was undoubtedly part and parcel of the scheme of composition, and this being the case the only Court which could deal with the matter was the Insolvency Court. Benaras Bank Ltd. v. The Official Assignee of Calcutta, Trustee for the Estate of M. L. Laik, **'950 Mad WN 178: (1950) 1 Mad LJ 423: 52 Bom LR 488: 63 Mad LW 1166: ILR 29 Pat 564: AIR 1950 PC 75 (79, 80) (Prs 15, 17, 18).**

——S. 7 — Power of Court — Judgment-creditor receiving money after adjudication — Power to order refund — Section 53.

Where the judgment-creditor has received money realised in execution after the date of the order of adjudication the Insolvency Court under Section 7 has jurisdiction to direct him to refund the money. AIR 1933 Lah 477, Rel. on.

60 Cal WN 61: AIR 1956 Cal 656 (658) (Pt B) (Pr 19).

——Ss. 7 and 17 — Petition against Hindu father — Partition — Attachment by Creditor of son's share before filing of such petition — Assignee entitled to sell son's share to satisfy father's debts not tained with illegality or immorality — Hindu Law — Debt — Pious obligation of son.

In a partition suit provision has to be made for the father's just debts before the partition can be effected and the purchaser of the son's share will be subject to this liability to satisfy the father's debts first before he can get the son's share. Such an adjustment and provisions for the father's debt can be made even in a proceeding under Section 7 of the Presidency Towns Insolvency Act, irrespective of the pendency of the partition suit. Consequently where some of the creditors of the father have already attached the share of the son in proceedings in execution of the decrees obtained by them against the father or against the father and the sons, on a presentation of application under Section 7, provision will have to be made first to satisfy the debts which have been declared to be binding on the minor before a partition can be effected and only in what remains the creditors who have attached the son's share can lay their claims. The Official Assignee can sell the son's share too for this purpose. AIR 1931 Mad 317, Foll.; AIR 1931 All 512; AIR 1959 SC 282; AIR 1928 Mad 735 (FB), Rel. on; AIR 1942 Mad 330; ILR (1958) Ker 1039 and AIR 1943 Nag 101; AIR 1928 Mad 479 (1); AIR 1936 Mad 193; AIR 1939 Mad 572; AIR 1939 Mad 276, Dist. In such cases the principle that comes into play is that the purchaser of the share of the son in a joint Hindu family has only an equity to step into the shoes of the son and enforce partition but when such partition comes to be effected, provision has first to be made for the discharge of the just debts of the father, that is, debts not tainted with illegality and immorality. **77 Mad LW 195: (1964) 2 Mad LJ 568: AIR 1965 Mad 60 (62) (Prs 5, 6, 8).**

●——S. 7, Proviso — 'Any matter arising under Section 36' — Meaning: AIR 1937 Mad 775, Overruled.

Per Satyanarayana Rao and Panchapagesa Sastri JJ. (Raghava Rao J. dissenting). The object of Section 36, Presidency Towns Insolvency Act, 1909, is to enable the Official Assignee to gather the necessary information as regards the whereabouts of the properties belonging to the insolvent and also to discover what all his properties are. There is no reason to confine the words 'any property belonging to the insolvent' in sub-section (1) of Section 36 only to properties 'admittedly or undisputably belonging to him'. A person examined under Section 36 may admit to have in possession any property belonging to the insolvent, in which case sub-section (5) of Section 36 will apply, or may dispute the insolvent's title to the same. The latter case, namely, the case where there is a dispute as regards the property in possession of the person examined under Section 36, is included within the expression "any matter arising under Section 36" in the proviso to Section 7 and hence the insolvency Court has jurisdiction to determine this matter only if the parties thereto agree to such a course. If the parties do not consent, the only course open to the Official Assignee is to enforce his claim by a regular suit in ordinary Courts. The decision in AIR 1937 Mad 775 which holds that Section 36 (5) relates only to the property admittedly belonging to the insolvent and not to the property of which the ownership is disputed and that, therefore, the proviso to Section 7 does not apply where there is a dispute, is not correctly decided in view of the Full Bench decision in AIR 1929 Mad 705: Case law fully discussed; AIR 1929 Mad 705 (FB), Foll.; AIR 1937 Mad 775, **Overruled.**

Per Raghava Rao J.— The 'matter arising under Section 36' which is contemplated by the proviso to Section 7 is a a matter arising for decision under Section 36 and thus means the matter arising for an order to be made of the kind contemplated by sub-sections (4) and (5) of Section 36, which is none the less a decision because made on an admission of the kind contemplated by these sub-sections in a 'secret' and not a 'litigious' proceeding. The matter arising for decision under Section 36 is a question either of possession of property belonging to the insolvent or of the existence of a debt due to the insolvent, so that when in the former case the title of the insolvent to the property is not admitted, there is no order to be made under sub-section (5) of the kind which is within its purview or its intendment The factum of disputed title to property admittedly in possession of the person examined under S. 36, puts the case outside the pale of the section and excludes it altogether from the range of any decision or order thereunder. The proviso to Section 7 interpreted in this manner limits the operation of Section 7 to the determination of questions other than those falling within the ambit of Section 36, unless the parties otherwise agree. In this view of the sections, the two decisions can well stand together. Mrs. N. Lakshmi v. The Official Assignee of Madras. **63 Mad LW 115: (1950) 1 Mad LJ 123: ILR (1950) Mad 895: AIR 1950 Mad 410 (418, 420, 424, 426) (Pt A) (Prs 19, 22, 23, 36, 37) (FB).**

●——S. 7 — Application under, after disposal of proceedings under Section 36 — Effect of proviso.

Per Panchapagesa Sastri J.— On a true interpretation of the proviso, where there has been a prior examination of a witness under Section 36, even a subsequent and independent application taken out under Section 7 of the Act is barred by the proviso in so far as it calls for a decision of any matter arising under Section 36: AIR 1929 Mad 705 (FB), Foll. Mrs. N. Lakshmi v. The Official Assignee of Madras, **63 Mad LW 115: (1950) 1 Mad LJ 123: ILR (1950) Mad 895: AIR 1950 Mad 410 (422) (Pt B) (Prs 30, 31) (FB).**

SECTION 8

——Ss. 8, 92 — Scope of.

It is true that Section 92 refers only to a subsisting petition and the order of substitution of other creditors as petitioners contemplated by that section can only be made in a petition which is pending before the Court. But where the Insolvency Judge rescinded the order of dismissal of the petition and the same being revived he allowed other creditors under Section 92 to be substituted as petitioners, the Judge in substance exercised the jurisdiction under Section 8 (1) and the order of substitution under Section 92 was competent. **55 Bom LR 562: ILR (1953) Bom 1168: AIR 1953 Bom 430 (431) (Pt A) (Pr 2) (DB).**

——S. 8 — Jurisdiction of Court.

The jurisdiction conferred by Section 8 is a very wide and far-reaching jurisdiction. It is also a very salutary jurisdiction. It must never be forgotten that when a petitioning creditor files a petition for adjudication of a person insolvent he is not in the same position as a plaintiff in a suit. A plaintiff in a suit is dominus lite and

he has every right to proceed with the suit or to withdraw it or to allow it to be dismissed for default, but a petitioning creditor is not a dominus lite in that sense. Once he presents a petition, the order that he seeks is not only for his benefit but for the benefit of the general body of creditors, and the Insolvency Court at all times has jurisdiction over that petition and can control it and regulate it under Section 8. If the Court is satisfied that the order made by it formerly is not a proper order and that it should not have been made, it has got jurisdiction under Section 8 (1) to rescind that order and to restore the petition which was dismissed. **55 Bom LR 562: ILR (1953) Bom 1168: AIR 1953 Bom 430 (431) (Pt B) (Pr 2) (DB).**

——Ss. 8, 12 and 92 — Power of Court to review, rescind or vary orders.

The Insolvency Judge has the jurisdiction under Section 8 (1) to set aside the order of dismissal passed previously and to substitute other creditors in place of petitioning creditors under Section 92 even though other creditors could not have availed themselves of the act of insolvency on which the original petitioning creditors relied as the foundation of their petition under Section 12. (1888) 21 QBD 21; (1895) 1 QB 194, Distinguished. Case-law referred. **55 Bom LR 562: ILR (1953) Bom 1168: AIR 1953 Bom 430 (432) (Pt C) (Pr 5) (DB).**

——S. 8 — Nature and extent of jurisdiction.

The jurisdiction under Section 8 (1) is so wide that the Insolvency Court can exercise that jurisdiction sue motu even without the application of any party. The order being for the general body of creditors, whatever laches the respondents may be guilty of, the order made by the Insolvency Judge will not be interfered with. **55 Bom LR 562: ILR (1953) Bom 1168: AIR 1953 Bom 430 (432) (Pt D) (Pr 7) (DB).**

SECTION 9

●——Ss. 9 (1), Proviso and 90 (5) (as amended by Bombay Act 15 of 1939 and Bombay Ordinance 3 of 1948) — Bombay High Court Rules, Rule 52-B (3) — Insolvency notice requiring debtor to set up counter claim within seven days — Notice is not invalid or illegal — Debtor is not prevented from setting up counter claim within 30 days if such right is acquired after seven days.

The rule contained in Bombay High Court Rules, Rule 52-B (3) (b) about filing the affidavit within 7 days is evidently a mere procedural rule which is framed to enable the parties to take all steps necessary for speedy adjudication of the matter. The provision in question is based on the supposition that normally a debtor would be armed with a counter claim within seven days of the notice; but it does not debar him, in those cases where he secures such a claim after the expiry of seven days, from putting it forward within the period within which he is required under Section 9 (i) Proviso to salisfy the Court in regard to the counter-claim.

The rights such as a right to set up a counter claim within 30 days in answer to a bankruptcy notice which a debtor has in law under Section 9 (i) Proviso could not be curtailed by the terms of any notice. Rule 52-B (3) being evidently a procedural rule cannot override the rights of the debtor and should be so construed as to be consistent with the recognition of those rights When that rule is read with Section 90 (5). Insolvency Act, it is clear that it is not intended to take away any rights conferred by the Act. (1903) 2 KB 340 and (1914) 3 KB 726. Rel. on.

Further, the effect of Section 3, Bombay Ordinance, 3 of 1948 which has a retrospective operation is to validate among others Rule 52-B (3) requiring the debtor to file an affidavit in regard to a counter-claim within seven days of the service of the notice.

Hence, a bankruptcy notice requiring a debtor to file an affidavit in regard to a counter-claim within seven days of the service of the notice is not illegal or invalid on the ground that it is repugnant to the main provisions of the notice according to which the Court is to be satisfied in regard to a counter-claim within 30 days Kaikhushroo Pirojsha Ghiara v. C. P. Syndicate Ltd. Nagpur. **52 Bom LR 189: 1949 FLJ 407: 1949 FCR 501: AIR 1950 FC 8 (13, 14) (Pt B) (Prs 15, 18, 20).**

●——S. 9 (1) (as amended by Bombay Act 15 of 1939) — Construction — Consent decree — Reciprocal promises — Suit by private company (respondent) against one share-holder (appellant) — Other share holders joining as plaintiffs — Consent decree directing appellant to pay certain sum in instalments to respondent company — On payment, company to assign debenture shares in oil company and agency of oil company absolutely to appellant — On default in payment of first instalment by appellant whole amount to become due — Held, there was no contract of reciprocal promises to be simultaneously performed — Assignment of shares was to follow payment by appellant — Though consent decree was composite decree respondent was entitled to execute it — Contract Act (1872), Section 51 — Civil P. C. (1908), Order 21, Rule 15. Kaikhushroo Pirojsha Ghiara v. C. P. Syndicate Ltd. Nagpur, **52 Bom LR 189: 1949 FLJ 407: 1949 FCR 501: AIR 1950 FC 8 (10 to 12) (Pt A) (Prs 7, 9, 11).**

——S. 9 (c) — 'Sold in execution' — Meaning of.

The selling of property in execution of the decree contemplated by Section 9 (1) (c) of the Presidency-Towns Insolvency Act is the selling of the property in the sense of its being knocked down to the highest bidder as an act of insolvency, and not the sale becoming confirmed or becoming absolute under O. 21, R. 92 of the Civil Procedure Code. **61 Bom LR 110: ILR (1959) Bom 822: AIR 1959 Bom 289 (291) (Pt B) (Pr 3) (DB).**

——S. 9 (b) — Transfer of property — Lease of machinery by insolvent on payment of monthly rent if constitutes transfer within Section 9 (b) See Presidency Towns Insolvency Act (1909), Section 2 (i). **AIR 1956 Bom 38 (DB).**

——S. 9 (i) (as amended by Bombay Act 15 of 1939 and Bombay Act 51 of 1948) and Section 2 (a) — 'Creditor' includes assignee of a decree-holder.

The definition of 'Creditor' in Section 2 (a) is an inclusive and not an exhaustive definition and it includes an assignee of a decree-holder. In Section 9 (1) also the expression 'Creditor' means not only a decree-holder but also an assignee of a decree-holder. An equitable assignee of a decree passed against a debtor can therefore, maintain an insolvency notice against him. **56 Bom LR**

905: ILR (1954) Bom 1004: AIR 1955 Bom 77 (78) (Prs 1, 3, 4) (DB).

——S. 9 (1) — Suit against dissolved firm — Service only on one partner — Insolvency notice against firm — Validity.

Where in a suit against a dissolved firm, only one partner was served but the decree was passed against the firm and the creditor took out an insolvency notice against the firm calling upon the firm to pay the decretal amount within a specified time;

Held, that Order 21, Rule 50 (2), Civil P. C., constituted a statutory stay of execution of the decree against partners other than those who had been served in the suit and as only one partner had been served in the case, insolvency notice could not be served in respect of the decree against the other partners who were not served in the suit. No such notice could, therefore, be taken out in respect of all the partners of the firm. 23 Cal 26 (PC), Distinguished.; (1900) 2 QB 698, Rel. on. **55 Bom LR 857: ILR (1954) Bom 304: AIR 1954 Bom 91 (92, 93) (Pt A) (Prs 3, 7, 8) (DB).**

——S. 9 (e) — Property in possession of Receiver — Attachment without leave — Not valid — Such attachment not an act of insolvency.

The conditions under which the creditor may file an insolvency petition against the debtor are that there is a lawful act of insolvency within the meaning of the statute. An attachment without leave when the properties are in the possession of the Receiver is not a valid attachment. It is not an attachment on which the statutory jurisdiction can be attracted as the foundation of the act of insolvency. Obtaining leave subsequently with regard to the attachment does not render the attachment as an act of insolvency within the meaning of the Act. AIR 1942 Mad 306, Distinguished. **AIR 1963 Cal 25 (26) (Pr 5).**

●**——S. 9 (e) — Act of insolvency — Attachment of property in execution of decree subsisting for twenty-one days prior to insolvency petition — Subsequent dismissal of execution petition as withdrawn or setting aside in appeal — Effect — Section 13 (5) — Adjudication of debtor — Discretion must be judicially exercised — Civil Procedure Code (5 of 1908), Order 38, Rule 11 and Order 21, Rule 57 — Scope — Attachment before Judgment — Enures and continues after decree — Dismissal of execution petition for default — Executing Court — Duty to record cessation of attachment — Practice — Subsequent events — Duty of Court to take note of — Principles — AIR 1942 Mad 306, Overruled.**

Where there was a valid order of attachment in execution of a money decree for twenty-one days prior to the filing of the insolvency petition and the validity of that attachment was in no way shaken or affected by the dismissal of the Execution Petition for default, the order of attachment would constitute an act of insolvency within the meaning of Section 9 (e) of the Presidency-Towns Insolvency Act. The attachment ceased as the decree-holder did not choose to pursue the execution, and when it ceased the cesser did not relate back to the date of the execution petition.

The attachment must be valid in law. If the order of attachment is cancelled in due course of judicial proceedings on the ground that the attachment ought not to have been made, the act of attachment must be deemed to have had no judicial existence, and can be treated as non est in law. No rights can flow from them and accrued rights, if any, on foot of them must also cease. The act of insolvency grounded on an attachment in execution of money decree loses its foundation the moment such attachment is wiped out as a result of judicial adjudication.

The Court has got a discretion in the matter of adjudication. But the discretion should be judicially exercised and should, of course, be not arbitrary or capricious.

The order of attachment before judgment made under Order 38, Rule 11, of the Civil Procedure Code, would enure and continue in the course of execution proceedings. Where the execution petition is dismissed due to the act of the decree holder placing the Court in such a position as to prevent it from proceeding with the execution, the attachment ceases and it is the duty of the Execution Court to record the cessation of the attachment. The discretion of the Court, under its inherent powers, to adjust the rights of parties on the basis of events after the starting of the action, is well recognised and accepted as a rule of justice, equity and good conscience. In some cases, it is almost the duty of the Court to advert to the subsequent events brought to its notice lest it should fail to do substantial justice between the parties. The substratum of insolvency petition is the act of insolvency. If what was visibly an act of insolvency on the date of the petition cannot be attributed that character when the petition comes on for orders because of subsequent events, it is legitimate and proper that the Court should take stock of the actual situation as on the date of the disposal, instead of relying upon the past state of affairs which has ceased to exist. Any adjudication that may be made, leaving out of account the change of circumstances affecting the act of insolvency would be futile, as it would be annulled under Section 21 of the Presidency Towns Insolvency Act. AIR 1942 Mad 306, **Overruled;** O. S. A. No. 38 of 1960, Approved. Sundaram Iyer, In re., **1963 Mad WN 117: (1963) 1 MLJ 113: 76 Mad LW 40: ILR (1963) Mad 194: AIR 1963 Mad 217 (219, 221) (Pt A) (Prs 6, 14) (FB).**

●**——S. 9 (e) —** Attachment of property existing at time of filing of insolvency petition — Subsequent termination of attachment has no effect on insolvency petition. Sundaram Iyer, In. re., **(1963) 1 Mad LJ 113: 76 Mad LW 40: ILR (1963) Mad 194: AIR 1963 Mad 217 (220, 222) (Pt E) (Prs 12, 17) (FB).**

——Ss. 9 and 10 — Petition by creditor filed within three months of alienation by debtor — Application to implead alienee and to set aside alienation filed beyond three months — Competency — Notice served on alienee beyond three months — If bar to adjudication of debtor or to setting aside alienation — Presidency-Towns Insolvency Rules (before amendment) Order 3, Rule 6-A — (Rule 9 of New Rules, 1958).

Held, on facts that once the insolvency petition has been filed in time, the subsequent dates on which notice of the petition is served on the alienee and other parties interested are not relevant. Because of delays in Court, notice is not actually served on the alienee within three months of the expiry of the date of the alienation in

his favour, it cannot be said that the alience completely escapes from an attack on the validity of the alienation in his favour. **(1960) 2 Mad LJ 361: 73 Mad LW 450: ILR (1960) Mad 1072.**

——**S. 9 (e)** — Scope — If ultra vires — Section 6 (e), Provincial Insolvency Act — Reasonable classification — The entire economical structure and the tempo of life in Presidency Towns and outside are different — The distinction between the provisions of Section 9 (e) of Presidency Towns Insolvency Act and Section 6 (e) of the Provincial Insolvency Act is one which can be traced to a just, rational and reasonable classification — Section 9 (e) of the Presidency Towns Insolvency Act is not therefore ultra vires on the ground that it is hit by Article 14. See Constitution of India, Article 14. **AIR 1957 Mad 403 (DB).**

——**S. 9** — Act of insolvency — Proof — Insolvent himself admitting that his properties have been attached and that attachment was in existence for more than 21 days — It constituted an act of insolvency within Section 9 (e) and there was no necessity of any formal proof of the act of insolvency by anybody. See Presidency-Towns Insolvency Act (1909), Section 13. **AIR 1954 Mad 272 (DB).**

SECTION 9-A

——**S. 9-A (Bombay) — Misstatement as to amount due — Effect of.**

Sub-section (1) of the section requires and it is a peremptory requirement that the insolvency notice shall be in the prescribed form and the form requires that the amount due under the decree must be specified in the notice. If the amount is not correctly specified the notice would be bad. The word 'misstatement' in the sub-section is not of such wide import to give shelter to one who makes an unjustified claim. That word has to be read in a reasonable manner and in a manner which would be consistent with the scope and object of the provisions of the section. **59 Bom LR 1224: ILR (1958) Bom 360: AIR 1958 Bom 253 (253, 254) (Pt A) (Prs 3, 5) (DB).**

——**S. 9-A (Bom)** — Delay in making motion for setting aside notice under the section — Condonation of — Discretion of Court — Interference in appeal — It is not for the appellate Court to say what view they would take of the facts stated in affidavit in support and interfere with the discretion exercised by the lower Court. See Civil P. C. (1908), Section 107. **AIR 1958 Bom 253 (DB).**

SECTION 10

——**S. 10** — Bankrupt trustee can act as trustee. See Trusts Act (1882), Section 70. **AIR 1954 Cal 432.**

——**Ss. 10, 9** — Petition by creditor filed within three months of alienation by debtor—Application to implead alienee and to set aside alienation filed beyond three months — Competency — Notice served on alienee beyond three months — If bar to adjudication of debtor or to setting aside alienation. See Presidency-Towns Insolvency Act (1909), Section 9. **(1960) 2 Mad LJ 361: 73 Mad LW 450: ILR (1960) Mad 1072.**

SECTION 11

——**S. 11 (d) — 'Has carried on business' — Person doing leather business outside Madras coming to Madras often to sell and purchase leather and staying in Madras.**

Where a person who was a sole proprietor of a firm doing leather business at Vanivambadi (outside Madras) came to Madras now and then in connection with his business and purchased and sold things here on those occasions and sleeping in a house in Madras.

Held, that he was carrying on business at Madras and so long as his liabilities in Madras remained undischarged he must be deemed to be carrying on business even though he had closed his business earlier. 46 Cal WN 664, Distinguished. **Held,** further that he could be adjudicated insolvent in Madras and also at Vaniyambadi under Provincial Insolvency Act for act of insolvency committed there. **70 Mad LW 367: AIR 1957 Mad 403 (404) (Pt B) (Pr 3) (DB).**

——**S. 11 (b) — 'Resided' — Meaning of — Adjudication of non-resident debtor — Validity.**

A man driving a train to Madras or a bus to Madras, or flying over Madras in an aeroplane, without having any permanent residence in Madras cannot be said to be a resident of Madras, any more than a man passing in a plane or train through several towns can be said to be resident of those various towns. The position may be different if it was proved that he actually resided in Madras either with his wife or without his wife in a house within the jurisdiction. The adjudication of such a non-resident in Madras must be annulled. **(1953) 2 MLJ 166: AIR 1953 Mad 928 (928) (Pr 1).**

SECTION 12

——**S. 12** — Court can review, rescind or vary its orders under sub-section (1) of Section 8 even though other creditors could not have availed themselves of the act of insolvency on which the original petitioning creditor relied as foundation of their petition under Section 12. See Presidency Towns Insolvency Act (1909), Section 8. **AIR 1953 Bom 430 (DB).**

——**S. 12** — "Other sufficient cause" — Words not to be interpreted ejusdem generis — Application by creditor not bona fide but made out of spite liable to be dismissed. See Presidency Towns Insolvency Act (1909), Section 13 (4) (b). **AIR 1963 Mad 181 (DB).**

——**Ss. 12 and 13 — Debtor willing to pay particular creditor who insists on payment — Whether ground for not adjudicating him insolvent — (Provincial Insolvency Act (1920), Section 9).**

When a person is adjudicated insolvent, it is not a particular creditor alone whose interests are to be protected by the Court but the entire body of creditors, secured and unsecured. The fact that the debtor who professes to possess assets worth over a lakh of rupees alleges that the debts amount to only Rs. 25,000 and that none of the creditors except the respondent whose debt amounts to Rs. 400 insists to recover his debt at once and that the debtor is willing to pay off this debt within 24 hours, is no reason why he should not be adjudged insolvent when the debt of Rs. 400 has remained unpaid like other debts for four years and the debtor has not given a schedule of creditors and the amount of debts due to them. **70 Mad LW 367: AIR 1957 Mad 403 (405) (Pt D) (Pr 5) (DB).**

SECTION 13

——**S. 13** — Original Side decree without provision for costs — Executability — Can be basis

for insolvency notice — Effect of Rule 289 — Applicability of Section 118, Civil P. C. — Plea of invalidity of decree — If can be raised at stage of notice — Powers of Insolvency Court — (Civil P. C. (1908), Sections 2 (2), 118) —(High Court Rules and Orders — (Bombay) High Court Rules, Rule 289 — (Bombay Insolvency Rules (1910), Rule 52-B (5) (c)). **60 Bom LR 963: ILR (1958) Bom 1344: AIR 1959 Bom 357 (357 to 359) (Prs 2, 4) (DB).**

● **——S. 13 (5) —** Adjudication is discretionary — But discretion has to be judicially exercised so as to further object of Act. Sundaram Iyer, In re., **(1963) 1 Mad LJ 113: 76 Mad LW 40: ILR (1963) Mad 194: AIR 1963 Mad 217 (222) (Pt F) (Pr 18) (FB).**

——Ss. 13 (4) (b), 12 — "Other sufficient cause" — Words not to be interpreted ejusdem generis — Application by creditor not bona fide but made out of spite liable to be dismissed.

The words "other sufficient cause" in Section 13 (4) (b) should be interpreted in the widest possible manner and not ejusdem generis in relation to the earlier clauses in the section. Under Section 12, a debtor would be liable to be adjudicated insolvent by an unsecured creditor having a claim for more than Rs. 500, if the former had committed an act of insolvency within three months of the petition. But the right of such a creditor to adjudicate the debtor a bankrupt is not a weapon available to him to be used to serve any ulterior purpose or to be used vindictively. Section 13 gives power to the Court in those cases to dismiss it. AIR 1943 Mad 355, Relied on.

It cannot be said that adjudication of a debtor as insolvent is one of the remedies open to a creditor and it will be for him to choose whether he is to take the thorny path of execution of the decree or adopt a short cut of adjudicating the debtor an insolvent. An adjudication of a debtor as a bankrupt is not a method of collecting a debt, though as a result of it, the creditor may get paid. Essentially an adjudication brings about a change in the status of a debtor and enables the Official Assignee or receiver in whom the property of the debtor gets vested to administer or sell it to pay off his creditors. It is only a particular class of creditors (vide Section 12) that can file a petition for adjudication. And no absolute right is given to them to obtain an adjudication as the Court will dismiss the petition if the conditions laid down in Section 13 (4) are **satisfied.**

Held, that the fact that the debtor had been a recalcitrant debtor and was unable to pay his debts could not justify the creditor, purely out of spite and with no other object in view, to adjudge him bankrupt. The application for adjudication could not be regarded as a bona fide one and had, therefore, to be dismissed. **Held, further** that the suits for partition by the minor sons of the debtor could not at all have any effect upon the creditor realising his dues which were not avyavaharika from the debtor. **75 Mad LW 723: 1962 Mad WN 713: (1963) 1 Mad LJ 37: AIR 1963 Mad 181 (181, 182, 183) (Prs 1, 7 to 9) (DB).**

——S. 13 — Debtor willing to pay particular creditor who insists on payment — It is no reason for not adjudicating him as insolvent when that debt has remained unpaid or other debts for four years and the debtor has not given a schedule of creditors and amount of debts due to them — (Provincial Insolvency Act (1920), Section 9). See Presidency Towns Insolvency Act (1909), Section 12. **AIR 1957 Mad 403 (DB).**

——Ss. 13, 9 — Act of insolvency — Proof.

Section 13 (2) (b) contemplates a stage before notice is issued to the insolvent. Where notice was issued before adjudication and at the hearing date there was no oral evidence regarding the act of insolvency but the insolvent himself admitted that his properties have been attached and such an attachment was in existence for more than 21 days.

Held, that the case came within Section 9 (e). On the admission of the insolvent himself, an act of insolvency was committed, and there was no necessity for any formal proof of the act of insolvency by anybody on behalf of the petitioning creditor. **(1953) 2 MLJ 523: 1953 Mad WN 709: 66 Mad LW 874: AIR 1954 Mad 272 (272) (Pr 1) (DB).**

SECTION 16

——S. 16 — Joint family — Insolvency of Karta — Power to direct ad interim Receiver to take possession of joint family property. See Provincial Insolvency Act (1920), Section 20. **AIR 1954 Pat 459 (DB).**

SECTION 17

●**——Ss. 17 and 51 — Effect of adjudication — Adjudication made by two Courts of same insolvent under Presidency Towns and Provincial Insolvency Acts — Doctrine of relating back — Its applicability — Vesting of insolvent's property — Precedence in — Property vested cannot be divested.**

On an adjudication order passed under the provisions of the Presidency Towns Insolvency Act, 1909, the property of the insolvent vests in the Official Assignee by virtue of the operation of Section 17 of the Act. Section 17 provides for the vesting of the property on the making of the order of adjudication. Where, therefore, an order of adjudication in respect of the same insolvent is made by a District Court at another place on a subsequent date under Section 28 (2) of the Provincial Insolvency Act, 1920, Section 28 (2) cannot in law operate in respect of the insolvents' property because the said property had by virtue of the statutory provision contained in Section 17 of the Presidency Towns Insolvency Act, 1909, already vested in the Official Assignee. The doctrine of relating back on which Section 28 (7) of the Provincial Insolvency Act, 1920, and Section 51 of the Presidency Towns Insolvency Act, 1909 are based, can have no application in such a case because the vesting in the Official Assignee is the result of a statutory provision; and so, in the absence of any provision in the Provincial Insolvency Act, 1920, for the divesting of the property which has already vested in the Official Assignee, it cannot be said that the doctrine of relating back has that effect.

The reasonable way to reconcile Section 28 (2) read with Section 28 (7) of the Provincial Act with Sections 17 and 51 of the Presidency Act is to hold that the doctrine of relating back prescribed by Section 28 (7) has no application to cases where the insolvent's property has already vested in the Official Assignee. AIR 1919 Mad 566, Rel. on. Official Assignee High Court, Bombay v. Haradagiri Basavanna Gowd, **(1963) 1 SCWR 211: (1964) 1 SCJ 322: (1964) 1 Mad LJ (SC) 99: (1964) 1 Andh WR (SC) 99: (1963) Supp (1) SCR 809: AIR 1963 SC 754 (757, 758) (Pt A) (Prs 11, 12).**

——S. 17 — Amount standing to the credit of employee — Not claimable by Official Assignee — So long as it is with the Regional Provident Fund Commissioner and has not been paid to the insolvent. See Employees' Provident Funds Act (1952), Section 10 (1). **67 Bom LR 654: 1965 Mah LJ 807: (1965) 2 Lab LJ 478: (1965) 11 Fac LR 365: (1965-66) 29 FJR 199: AIR 1966 Bom 121 (DB).**

——S. 17 — Decree creating — Floating charge — Attachment by seizure of goods of J. D. in execution — Subsequent insolvency of J. D. — Attached property does not vest in Official Assignee — Subsequent withdrawal of attachment — It does not have the effect of vesting the property in the Official Assignee as the property was not in possession, order or disposition of the insolvent at the commencement of the insolvency — (Civil P. C. (1908), Section 64, Order 21, Rules 43 and 64). See Presidency Towns Insolvency Act (1909), Section 52 (2) (c). **AIR 1953 Bom 101.**

——S. 17, Proviso — Bengal Public Demands Recovery Act (3 of 1913), Sections 7, 8 (b) — Certificate-holder becomes secured creditor — His rights are not affected by adjudication of certificate-debtor subsequent to notice under Section 7 of the Bengal Public Demands Recovery Act, upon certificate-debtor.

The certificate-holder is made a secured creditor under the provisions of Section 8 (b). The proviso to Section 17 of the Presidency Towns Insolvency Act says that though the property of the insolvent wherever situate shall vest in the Official Assignee from the date of adjudication, it shall not affect the power of any secured creditor to realise his security. Where the charge of the certificate-holder by service of notice under Section 7 of the Bengal Public Demands Recovery Act was created prior to the date of adjudication of the Certificate-debtor, the claim of the certificate-holder in execution of that charge or of the auction-purchaser at the sale held in execution of the certificate becomes paramount to that of the Official Assignee, and it cannot be contended that the auction-purchaser at the certificate sale has acquired nothing because the property of the certificate-debtor had vested in the Official Assignee prior to the date of the certificate sale. **(1965) 69 Cal WN 7: (1965) 58 ITR 579: AIR 1965 Cal 492 (498) (Pt D) (Pr 35) (DB).**

——S. 17 — Representative of judgment-debtor — Official Assignee — Vesting order made after attachment. See Civil P. C. (1908), Section 47 **AIR 1956 Cal 656.**

——Ss. 17, 46 (3) — Creditor's proceedings and leave of Court — Suit to enforce obligation incurred before date of adjudication as insolvent.

Debts incurred by a partner after his co-partner's adjudication but before his discharge on behalf of the firm are provable in insolvency by virtue of Section 46 (3), the obligation arising out of his membership of the partnership having been incurred before the date of such adjudication, although the debts were incurred after adjudication. To such case the provisions of Section 17 of the Presidency Towns Insolvency Act apply, and no suit can be filed without the consent of the Court. **AIR 1964 Guj 101 (102) (Pt B) (Pr 5).**

——S. 17 — Madras Buildings (Lease and Rent Control) Act (18 of 1960), Section 2 (8) — Statutory tenant — Tenancy is only personal right and not property — Tenant adjudged insolvent — Official Assignee cannot take possession of premises — Houses and Rents — Madras Buildings (Lease and Rent Control) Act (18 of 1960), Section 2 (8) — Property — Tenancy rights of statutory tenant.

Where a tenant becomes a statutory tenant under the Madras Buildings (Lease and Rent Control) Act and the relationship between him and the landlord would be governed by the provisions of that Act, he has only a personal right to occupy the premises as a tenant and this personal right is not property within the meaning of Section 17 of the Presidency Towns Insolvency Act, which would vest in the Official Assignee on the adjudication of such tenant as insolvent and hence the Official Assignee has no right to retain the keys of the premises taken from the possession of the insolvent: AIR 1945 Bom 173; 1949 WN 249 and (1961) 1 Mad LJ 217, Rel. on (1946) 2 All ER 256, Distinguished. Further, the Official Assignee on whom the property of the insolvent would devolve under Section 17 of the Insolvency Act cannot come within the definition of tenant under Section 2 (8) of the Rent Control Act. **(1964) 77 Mad LW 528: 1964 Mad WN 407: (1965) 1 Mad LJ 221: ILR (1968) 1 Mad 190: AIR 1965 Mad 334 (335, 336) (Prs 3, 6).**

——S. 17 — Insolvent acquiring decree before discharge — Intervention by official receiver in suit — Decree would vest in him. See Presidency Towns Insolvency Act (1909), Section 52 (2) (a). **AIR 1965 Mad 266.**

——S. 17 — Petition against Hindu father — Partition — Attachment by creditor of son's share before filing of such petition — Assignee entitled to sell son's share to satisfy father's debts not tainted with illegality or immorality. See Presidency Towns Insolvency Act (1909), Section 7 **AIR 1965 Mad 60.**

——Ss. 17, 51 and 57 — Creditor's petition to adjudicate debtor insolvent adjourned from time to time to enable settlement to be effected by debtor — Payments made to petitioning creditor after presentation of petition — Another creditor substituted and debtor adjudicated insolvent — Liability of original petitioner to repay the amounts received by him.

A, a creditor, filed a petition on 8th February, 1963, to adjudicate the insolvent and the act of insolvency alleged was the debtor's notice, dated 7th February, 1963, of suspension of payment of his debts. The petition was adjourned from time to time to enable a settlement being effected by the debtor so as to avert the insolvency. In the course of such adjournments the debtor paid in all a sum of Rs. 2,000 to A. Subsequently in December, 1963, another creditor was substituted in the place of A and the order of adjudication was made in January, 1964.

Held, the insolvency of the debtor relates back under Section 51 of the Presidency Towns Insolvency Act to the time of the commission of the act of the insolvency on which the order of adjudication was made. Payments received by A subsequent to that date must be repaid to the Official Assignee in whom the estate vests. As the petition itself was filed by A he had notice of presentation of the petition and is not entitled to claim protection under Section 57 of the Presidency Towns Insolvency Act as the Proviso to that section hits A directly. **(1964) 2 Mad LJ 509: 77 Mad LW 527: ILR (1965) 1 Mad 558.**

——S. 17 — Arbitration in suit — Insolvency of defendant pending arbitration — Receiver not made party to arbitration proceeding — Award cannot bind the Official Receiver. See Arbitra-

tion Act (1940), Section 30. **(1954) 1 MLJ 287: AIR 1955 NUC (Mad) 1825 (DB).**

——**S. 17** — Rights and disabilities of insolvent — There is nothing in the provisions of the Act which prohibits an insolvent from borrowing or entering into contracts giving rise to financial liability. See Provincial Insolvency Act (1920), Section 28. **AIR 1954 Mad 508 (DB).**

——**S. 17 — Power of undischarged insolvent to contract debt — Provincial Insolvency Act (1920), Section 28 (2).**

An undischarged insolvent is not legally incapacitated from incurring any debt and creditor is not prevented from recovering on the basis of a debt so incurred by way of a suit or otherwise. ILR 52 All 439, Rel. on. Case law referred. Judgment in Application No. 552 of 1949 in I. P. No. 71 of 1940, **Overruled. ILR (1952) Mad 312: (1952) 1 Mad LJ 662: 65 Mad LW 640: AIR 1951 Mad 1045 (1047) (Pr 6) (DB).**

——**Ss. 17 and 46 (3), Expln. — Scope — Suit for accounts of dissolved partnership and recovery of money — One of defendants partners undischarged insolvent — Absence of leave of insolvency Court — Suit not maintainable.**

A suit by one of the partners of a dissolved firm for rendition of accounts and recovery of money as may be found due to him against the other partners one of whom is an undischarged insolvent, is not maintainable as against the undischarged insolvent in the absence of leave of the insolvency Court by virtue of Section 17 read with Section 46 (3) of the Presidency Towns Insolvency Act. Since all the partners are necessary parties to such suit, the suit would be equally incompetent against the other partners. The debts and liabilities of the insolvent partner arising out of the partnership which is dissolved prior to his adjudication, even assuming that such liabilities were not ascertained sums of money, are provable in insolvency within the meaning of Section 46 (3) and the plaintiff would occupy the position of a creditor for purposes of Section 17, Presidency Towns Insolvency Act.

Where a partner in a firm has been adjudged an insolvent, he ceases to be a partner by virtue of Section 34 of the Partnership Act, and, such firm is also dissolved under Section 42 of that Act. On the adjudication of a partner as insolvent, his share in the partnership business along with his separate property vests in the insolvency Court. Once this vesting takes place, the provisions of Section 17 of the Presidency Towns Insolvency Act come into play, and no creditor with respect to a debt provable in insolvency can proceed against the insolvent except by recourse to the insolvency Court, nor can he file any independent suit for the recovery of his debts except with the leave of the insolvency Court. **1962 Raj LW 135: ILR (1960) 10 Raj 1502: AIR 1961 Raj 81 (84, 85) (Pt B) (Prs 7, 8).**

SECTION 21

——**S. 21** — Time factor in determining rights of parties — Subsequent events — Power of Court to take notice of — Insolvency petition by creditor — Grounds of petition those as are mentioned in Section 9 (e) — Court can while disposing of petition take notice of subsequent events by which grounds have ceased to exist — AIR 1942 Mad 306, **Overruled.** See Presidency Towns Insolvency Act (1909), Section 9 (e). **AIR 1963 Mad 217 (FB).**

SECTION 22

——**S. 22** — Successive orders of adjudication by two Courts A and B — Effect of prior order — Proper procedure — Application by Official Assignee of B Court for transfer of assets from A Court to B Court made to A Court — Not maintainable — Absence of letter of request from B Court — Assets in the hands of A Court cannot be transferred to B Court. See Provincial Insolvency Act (1920), Section 36. **AIR 1957 Andh Pra 649 (DB).**

SECTION 23

——**S. 23** — Arbitration in suit — Receiver not brought on record on insolvency of defendant pending arbitration — Adjudication set aside but property vested in receiver — Award made filed in Court before re-adjudication of defendant—Receiver not bound by award. See Arbitration Act (1940), Section 30. **AIR 1955 NUC (Mad) 1825 (DB).**

——**S. 23** — Applicant insolvent and property in hands of Receiver on relevant date — Subsequent annulment of adjudication — Applicant should be deemed to have had property on relevant date — Provincial Insolvency Act (1920), Section 37 — **Held,** that the effect of the annulment of the adjudication was to bring about the state of affairs as if there had never been an adjudication and that the property was deemed to have been the property of the applicant. See Debt Laws — Madras Agriculturists' Relief Act (4 of 1938), Section 10. **AIR 1951 Mad 581 (DB).**

SECTION 28

——**Ss. 28 and 7** — Scheme of composition — Bank secured creditor, allowed 12 per cent. simple interest under scheme — Carrying out of scheme guaranteed by certain persons who were to transfer their properties to Official Assignee — Deed of transfer of trust embodying agreement to allow compound instead of simple interest to bank — Amendment not approved by Court and unsecured creditors — Suit by bank claiming compound interest—Suit dismissed by High Court — Appeal to Privy Council — Appeal opposed by one of insolvents, sons of deceased guarantor and Official Assignee — Contesting respondents held had rights to be heard — Agreement to pay compound interest held could not be enforced without consent of all creditors and approval of Insolvency Court — Civil Court held had no jurisdiction to try suit. See Presidency Towns Insolvency Act (1909), Section 7. **AIR 1950 PC 75.**

SECTION 30

——**Ss. 30 (1) and 7** — Scheme of composition — Bank, secured creditor, allowed 12 per cent. simple interest under scheme — Carrying out of scheme guaranteed by certain persons who were to transfer their properties to Official Assignee — Deed of transfer of trust embodying agreement to allow compound instead of simple interest to bank — Amendment not approved by Court and unsecured creditors — Suit by bank claiming compound interest — Suit dismissed by High Court — Appeal to Privy Council — Appeal opposed by one of insolvents, sons of deceased guarantor and Official Assignee — Contesting respondents held had right to be heard — Agreement to pay compound interest held could not be enforced without consent of all creditors and approval of Insolvency Court — Civil Court held had no jurisdiction to try suit. See Presidency

Towns Insolvency Act (1909), Section 7. **AIR 1950 PC 75.**

SECTION 33

——**S. 33** — Contempt proceedings under — Procedure — Order 21 of the Original Side Rules relating to contempt of Court cannot be read as in any way curtailing or reducing the jurisdiction conferred on the Court by the Insolvency Act — Therefore the procedure laid down would apply only where an application is taken out by a party and would not in terms apply where the Court itself directs the issue of a notice. See High Court Rules and Orders — Madras High Court Original Side Rules. Order 21, Rule 1. **AIR 1959 Mad 484.**

——**S. 33 (4) — 'Property' — Money if included.**

What Section 33 (4), requires is that the insolvent should 'deliver up possession of any part of his property'. The word 'property' is certainly large enough to include money. In fact there are many people who consider money to be the most desirable form of property. The expression 'deliver up possession' of property does not exclude money. Normally where there is an order for payment of money a Court leaves it to the person interested to take out execution and it will not ordinarily permit him to invoke the jurisdiction of the Court relating to contempt. But, the procedure relating to execution would not ordinarily be available where the person proceeded against has been adjudicated insolvent and his estate has vested in the Official Assignee. To say that an order for the payment of money made against an insolvent by Court can be enforced — whatever the circumstance may be — only by proceedings in execution would be tantamount to saying that no such order can in practice be executed. Therefore even orders for payment of money can be enforced by contempt proceedings. **71 Mad LW 768: AIR 1950 Mad 484 (487) (Pt B) (Prs 14, 15).**

——**S. 33 — Insolvent ordered to deposit money in his possession in Court — Disobedience — Contempt proceedings — Facts to be proved.**

Where an order was made on the insolvent to deposit the money in his hands in the Court and the insolvent disobeys that order, before the insolvent can be punished by committal under Section 33, it must be shown that at the time the order is made the insolvent is in possession of money and that his refusal to bring in the money is wilful. Where it was found as a result of an inquiry, that the insolvent had failed to account for a certain sum, this was equivalent to a finding that the insolvent was retaining that amount. In effect and substance, therefore, there is a finding that he had the money. When it is shown that a person was in possession of money on a certain date and he does not give an explanation which can be believed about the disposal of that money, the reasonable inference is that he continues to be in possession of the money. **71 Mad LW 768: AIR 1950 Mad 484 (488) (Pt C) (Pr 16).**

——**Ss. 33 (2) (a) and 78** — False statement made before Official Assignee — Insolvency proceeding pending in High Court — 'Judicial proceedings'—If a false statement is made by the insolvent in his examination by the Official Assignee under Section 33 (2), he does so in a judicial proceeding as defined in Section 4 (1) (m), Cr. P. C. — Offence of giving false evidence — Complaint against petitioner can be laid before the Chief Presidency Magistrate in respect of that offence. See Criminal P. C. (1898), Section 476. **1958 Cri LJ 1197: AIR 1958 Mad 69.**

SECTION 36

——**S. 36 (1) — Motion for issue of summons — Persons against whom order should be issued.**

Where during the public examination of the insolvent certain facts relating to his dealings with some persons is disclosed, an order should be passed under Section 36 (1) for the examination of those persons and calling upon them to produce the documents and papers mentioned in the notice of motion put in for an order to summon them before Court. **AIR 1953 Bom 19 (20) (Pt A) (Pr 3).**

——**S. 36** — Examination under — Object and nature of — Examination is not in the nature of a witness in a proceeding between parties who are litigating their dispute before a Court — It is by the Court and not by parties before the Court — Examination for all purposes is by the Court even though the Court may allow parties appearing before it to examine and put some questions to such person. **AIR 1953 Bom 19 (21) (Pt B) (Pr 15).**

——**S. 36 (1)** — Order under — Nature of — Condition necessary for issuing order — An order for examination is passed for the general body of creditors and not for any individual creditor — Such an order is a discretionary order and is passed only when the person applying for it establishes a prima facie probability that some benefit will result from proposed examination. **AIR 1953 Bom 19 (21) (Pt C) (Pr 16).**

——**S. 36** — Persons summoned under Sec. 36 — Applicability of Order 16, Rule 19, C. P. C. — Person summoned under Section 36 is not in the position of an ordinary witness to whom the provisions of Order 16 Rule 19 would apply — Court on proper considerations of convenience of the person to be summoned order him to appear before it notwithstanding that he resides at a place beyond 200 miles from the place where the Court sits and he is outside the jurisdiction of the Court. See Civil P. C. (1908), Order 16, R. 19. **AIR 1953 Bom 19.**

SECTION 41

——**S. 41 — Annulment — Meaning — Person whose insolvency has been annulled for failure to apply for discharge — If can be appointed hereditary trustee — Madras Hindu Religious Endowments Act (2 of 1927), Sections 54 (1) (b) and 84 (2).**

An annulment of an adjudication under Section 41 of the Presidency Towns Insolvency Act is not tantamount to removal of a disability and therefore continues to be a disqualification contemplated by Section 54 (1) (b) of the Madras Hindu Religious Endowments Act. The Board cannot in view of 'annulment' under Section 41, appoint as a hereditary trustee a person who has been adjudicated an insolvent and whose adjudication has been annulled because he has not performed his elementary obligation under the Act of even applying for his discharge within the time prescribed. **(1953) 2 MLJ 518: 66 Mad LW 794: AIR 1954 Mad 88 (88) (Pr 3).**

SECTION 46

——**S. 46** — Principles relating to equitable assignments — Mere agreement for valuable consideration, without nothing more, will not amount to equitable assignment — Agreement between debtor and his creditors for payment of dues from

dividends on debtor's shares in company under Liquidation, held on facts of case, not to amount to equitable assignment. See Transfer of Property Act (1882), Section 6. **AIR 1964 Cad 470 (DB).**

——**S. 46** — Promissory note debt incurred by insolvent after presentation of petition and before adjudication — Is a post-insolvency debt, not provable in insolvency — There is nothing in the Insolvency Acts which prohibits an insolvent from borrowing or entering into contracts giving rise to financial liability. See Provincial Insolvency Act (1920), Section 28. **AIR 1954 Mad 508 (DB).**

——**S. 46 (3), Expln.** — Debts provable in insolvency — Suit for accounts of dissolved partnership and recovery of money — One of defendants partners undischarged insolvent — Absence of leave of insolvency Court — Suit not maintainable in absence of leave of Insolvency Court by virtue of Section 17 read with Section 46 (3) — Partnership Act (1932), Sections 34 and 42. See Presidency Towns Insolvency Act (1909), Section 17. **AIR 1961 Raj 81.**

SECTION 47

——S. 47 — Set off of debt jointly due to A and B — Cannot be allowed to be set off against separate debt due from A in a suit by X against A to recover his separate debt. See Civil P. C. (1908), Order 8, Rule 6. **AIR 1954 Cal 303.**

——**S. 47 — Right of set-off — Companies Act (1913), S. 229.**

The right of set off given by the bankruptcy law is wider than that given by the general law. The Bankruptcy Acts generally enlarge the scope of the subject-matter of the plea of set off. (1892) 2 QB 573, Rel. on.

Thus, in bankruptcy and in winding-up of insolvent companies the subject-matter of set-off is wider and unliquidated damages may be set off against a debt. There is, therefore, no doubt that in bankruptcy and in winding up of insolvent companies the surety's liability under a guarantee may be set off against a debt due to the surety by the company. 6 Rang 46; 9 QBD 113; (1942) 2 Ch D 339, Rel. on. **ILR (1952) 2 Cal 16: AIR 1951 Cal 519 (521, 522) (Pt B) (Prs 8, 19).**

——**S. 47 — Right of set-off — Fixation of date for ascertainment of — Companies Act (1913), S. 229.**

The Presidency Towns Insolvency Act does not state on what date the right of set-off is to be ascertained. Section 46 of that Act, however, shows that all debts and liabilities to which the debtor is subject when he is adjudged an insolvent may be proved. The dividing line, therefore, in the case of a proof of debt is the date of adjudication. (1900) 1 QB 546, Rel. on.

The equivalent of adjudication in the case of the company is the order for winding-up. The right of proof and set-off in the case of an insolvent company in the course of winding up in a Presidency Town must therefore be defined and ascertained as at the date of the order of winding up. (1924) 2 Ch D 339, Rel. on. **ILR (1952) 2 Cal 16: AIR 1951 Cal 519 (521) (Pt C) (Pr 12).**

——S. 47 — Mutual dealings between surety and bankrupt Co. — Set off — Such dealings must be set off against each other under Section 229 of the Companies Act read with Section 47 of the P. T. Insolvency Act. See Companies Act (1913), Section 229. **AIR 1951 Cal 519.**

——**S 47** — A debtor to bank — B guarantor of A— Bank debtor of B — **Held,** that there were mutual dealings between B and the Bank and the debt due to him from the Bank must be set off against his liability as guarantor for the debt of A. See Companies Act (1913), Section 229. **AIR 1951 Cal 519.**

SECTION 49

——**S. 49 (1) — Government's right to priority — Right of private party to insist on exercise of right by Government.**

Section 49 (1) of the Presidency Towns Insolvency Act does not confer any right on a private party to insist upon the Government exercising their right of priority in respect of debts payable to them from an insolvent's estate. **1958 Mad WN 720: (1958) 2 MLJ 560.**

——**S. 49** — Scope of — Section 229 of the Companies Act 1913 will not justify a resort to Section 49 of the P. T. Insolvency Act because Section 230 of the Companies Act makes express provision in respect of all categories or heads of claims dealt with in Section 49.

Under Section 49 (c) of the P. T. Insolvency Act the landlord is entitled to priority only in respect of one month's rent; but by virtue of Clauses (4) and (5) of Section 230 of the Companies Act a landlord will be entitled to priority — though a qualified one — in respect of a longer period. See Companies Act (1913), Sections 229 and 230. **AIR 1957 Mad 162.**

SECTION 51

●——**S. 51** — Effect of adjudication — Adjudication made by two Courts of same insolvent under Presidency Towns and Provincial Insolvency Acts — Doctrine of relating back — Its applicability — Vesting of insolvent's property — Precedence in — Property vested cannot be divested — Doctrine of relation back has no application to cases where the insolvent's property has already vested in the Official Assignee. See Presidency Towns Insolvency Act (1909), Sec. 17. **AIR 1963 SC 754.**

——**Ss. 51, 55, 56 and 57 — Section 57 is not only subject to Sections 55 and 56 but also to Section 51.**

Section 51, does deal with the avoidance of transfers because by embodying the doctrine of relation back in that section it makes the title of the Official Assignee prevail against the title of any stranger and permits the Official Assignee by reason of that doctrine to avoid any transaction which was entered into by the insolvent and which constituted the act of insolvency. Hence Section 57 is not only subject to the provisions of Sections 55 and 56 but is also subject to Section 51.

No transaction can be considered a bona fide transaction which itself constitutes an act of insolvency. If the transfer constitutes an act of insolvency, it is liable to be avoided by the Official Assignee, Section 57 in terms excludes such a transaction from its protection. It would seem that even transactions which are against the policy of the Insolvency Act would not come within the protection of Section 57, because in no view of the case could such transactions be considered to be bona fide transactions. **57 Bom LR 979: ILR (1955) Bom 941: AIR 1956 Bom 38 (40) (Pt C) (Pr 5) (DB).**

——Ss. 51 and 65 — Distinction between.

Section 65 gives the power to the Insolvency Court to rescind contracts where contracts are considered by the Official Assignee to be onerous, but the contracts which the Court can cancel under Section 65 are contracts which were valid when they were made by the insolvent. It is only on the cancellation by the Court that the contract ceases to have force. The scheme of Section 51 is entirely different. Section 51, is enacted for avoidance of contracts or transfers when they were entered into or affected. In other words, whereas under Section 51, what the Official Assignee has to satisfy the Court is that by reason of his superior title the transfer made by the insolvent was void, under Section 65, the Official Assignee is not relying upon his superior title but on the contrary he accepts the position that the insolvent had the right to enter into the contract but because of the nature of the contract he does not wish to be bound any longer by it. **57 Bom LR 979: ILR (1955) Bom 941: AIR 1956 Bom 38 (40) (Pt D) (Pr 7) (DB).**

——S. 51 — Creditor's petition to adjudicate debtor insolvent adjourned from time to time to enable settlement to be effected by debtor — Payments made to petitioning creditor after presentation of petition — Another creditor substituted and debtor adjudicated insolvent — Liability of original petitioner to repay the amounts received by him. See Presidency Towns Insolvency Act (1909), Section 17. **(1964) 2 Mad LJ 509: 77 Mad LW 527.**

SECTION 52

——S. 52 (2) — Hindu Joint family — Insolvency of father — What vests in official receiver — Father's power to sell son's share for his personal debts comes to end when son files suit for partition or his share is attached by creditor — Power of receiver being co-extensive also comes to end — Decree-holder can execute decree against son's share without leave of insolvency Court. See Provincial Insolvency Act (1920), Section 28-A. **AIR 1965 Andh Pra 451 (DB).**

——Ss. 52 (2) (c) and 17 — Decree creating — Floating charge — Attachment by seizure of goods of Judgment-debtor in execution — Judgment-debtor subsequently adjudicated insolvent — Attached property does not vest in Official Assignee as the attached goods were not in the possession, order or disposition of B who was subsequently adjudged insolvent and therefore not available to the Official Assignee under Section 52 (2) (c) — Subsequent withdrawal of attachment has not the effect of vesting the property in the Official Assignee — (Civil P. C. (1908), Section 64, Order 21, Rules 43 and 64). **54 Bom LR 708: AIR 1953 Bom 101 (103, 104, 105) (Pt B) (Prs 9, 12, 13, 14).**

——S. 52 — Equitable assignment — Transfer by share-holder of his right to receive moneys in respect of shares of company in liquidation — Shareholder adjudged insolvent — Effect — Official Assignee if entitled to claim moneys in respect of those shares — Right of assignee — Where future debts are assigned and the assignor becomes an insolvent after an assignment, the Official Assignee's rights may or may not be subject to the assignment — His rights are subject to the assignment if the debts are due at the date of bankruptcy but are not payable until a future time — The assignee loses his rights upon insolvency if the debt is one that will only become due if certain conditions are fulfilled in future on behalf of the insolvent. See Provincial Insolvency Act (1920), Section 28. **AIR 1963 Cal 122.**

——S. 52 (1) (a) — Property wholly held in trust by the insolvent cannot be one of his assets liable to distribution upon his own insolvency as he has no beneficial interest in it — Property held in trust is not asset of company — It is implied in the Companies Act that such property is not liable to be distributed among its creditors in liquidation of the company — (Provincial Insolvency Act (1920), Section 28 (5)). See Companies Act (1913), Section 229. **AIR 1956 Cal 188 (DB).**

——S. 52 (1) (a) — Property held by company for specific purpose — Insolvency of company — Such property is outside divisible property assets of company — Party who put it in the hands of the company can claim it back in winding up proceedings — (Provincial Insolvency Act (1920), Section 28 (5)). See Companies Act (1913), Section 229. **AIR 1956 Cal 188 (DB).**

——S. 52 (1) (a) — Property held by company for itself and another — Company becoming insolvent — Proportion, in which such property is divisible among creditors passes to the trustee in his bankruptcy and becomes divisible among his creditors — (Provincial Insolvency Act (1920), Section 28 (5)). See Companies Act (1913), Section 229. **AIR 1956 Cal 188 (DB).**

——Ss. 52 (2) (a), 17 — Insolvent acquiring decree before discharge — Intervention by Official Assignee in suit — Decree would vest in him.

Under Section 52 (2) (a) of the Presidency Towns Insolvency Act, it is provided that the property of the insolvent divisible among his creditors shall comprise of all such property as may belong to or be vested in the insolvent at the commencement of the insolvency or may be acquired by, or devolve on him before his discharge. Under Section 17 of the said Act the whole of the property of the insolvent vests in the Official Assignee on the making of an order of adjudication. But the property acquired by the insolvent after adjudication does not vest in the Official Assignee until he intervenes, that is, he takes active steps to assert his title thereto. If the Official Assignee intervenes, the property indefeasibly vests in him. Where the Official Assignee has been impleaded in a suit by the insolvent for recovery of damages against his bank as the second defendant and he has asked for a decree in his favour, this is sufficient intervention on his part to vest in him such rights in the decree in the suit as the plantiff might get as an after-acquired property. **ILR (1964) 1 Mad 1012: (1965) 2 Com LJ 37: AIR 1965 Mad 266 (282) (Pt L) (Pr 69).**

——S. 52 (2) (c) — Reputed ownership — Creditor claiming to be owner of tractor under hire purchase agreement executed in his favour by debtor — Creditor filing suit for recovery of money against debtor and attaching tractor — Debtor adjudged insolvent — As condition of possession is satisfied by creditor he is to be treated as secured creditor in respect of his claim over tractor.

Held, on facts, (1) that the claim of A the owner of the tractor that because the hire purchase agreement described him as owner of the vehicle, he must in law be treated as owner and as such entitled on that ground alone to the sum

for the benefit of the estate. **1950 Mad WN 98: (1950) 1 Mad LJ 117: 63 Mad LW 217: AIR 1950 Mad 755 (756) (Pr 4).**

SECTION 90

●——**S. 90 (5)** — Insolvency notice requiring debtor to set up counter claim within seven days — Notice is not invalid or illegal — Debtor is not prevented from setting up counter claim within 30 days if such right is acquired after seven days. See Presidency Towns Insolvency Act (1909), S. 9 (1), Proviso. **AIR 1950 FC 8.**

——**S. 90 — Procedure — Dismissal of petition — Rule.**

The necessity for a rule of practice to advertise the fact that the petitioning creditors want to apply for dismissal of their petition suggested. **55 Bom LR 562: ILR (1953) Bom 1168: AIR 1953 Bom 430 (432) (Pt E) (Pr 8) (DB).**

SECTION 92

——**S. 92** — Scope of — Order of substitution of creditors as petitioners — Competency — Insolvency Judge rescinding order of dismissal of petition — Effect — Same is revived — Substitution of other creditors under S. 92 — Judge in substance exercised jurisdiction under S. 8 (1) and hence the order of substitution under S. 92 was competent. See Presidency Towns Insolvency Act (1909), S. 8. **AIR 1953 Bom 430.**

——**S. 92** — Court can review, rescind or vary its orders under Section 8 (1) and order substitution of other creditors who could not have availed themselves of the original act of insolvency on which the petition was based. See Presidency Towns Insolvency Act (3 of 1909), S. 8. **AIR 1953 Bom 430 (DB).**

SECTION 99

——**S. 99 — Scope and applicability.**

Section 99 is only a procedural section. It does not confer any new rights or impose any new liability. It proceeds on the assumption that each of the partners of a firm has committed an act of insolvency and allows proceedings to be taken in the name of the firm instead of its individual partners. It cannot apply to a case where a decree against a firm cannot be executed against all the partners of the firm. **55 Bom LR 857: ILR (1954) Bom 304: AIR 1954 Bom 91 (93) (Pt B) (Pr 6) (DB).**

SECTION 101

——**S. 101 — Period of limitation — Whether to be reckoned from the date of the order or from the date of the communication of the order.**

There is nothing in the provisions of the Presidency Towns Insolvency Act, which required the Official Assignee to pronounce an order, as is being done in the case of judgment of Courts. But the normal practice is to communicate such orders to the party, and that was the course which was actually adopted in the instant case. In such case, justice requires that the period of 20 days mentioned in Section 101 of the Act should commence only from the date of the receipt of the copy of order by the party. Otherwise, it may happen that even before he comes to know of the order passed against him, the period of 20 days would have expired. ILR (1951) Mad 815 and ILR 6 Mad 189, Rel. on: AIR 1951 Mad 204; ILR 6 Mad 189, Foll. Further, in the instant case; it is not suggested that the appellant knew or could have known the order in question prior to the date of communication of the Order to him. **(1964) 2 MLJ 307: 77 Mad LW 394: ILR (1964) 2 Mad 984.**

SECTION 103-A

——**S. 103-A** — Bankrupt trustee can act as trustee. See Trusts Act (1882), S. 70. **AIR 1954 Cal 432.**

SECTION 119

——**S. 119** — Bankrupt trustee can act as trustee — When his order of adjudication is in operation and has not been annulled, he is competent to sell trust property as trustee. See Trusts Act (1882), S. 70. **AIR 1954 Cal 432.**

SECTION 126

——**S. 126** — Successive orders of adjudication by two Courts A and B — Effect of prior order — Proper procedure — Application by Official Assignee of B Court for transfer of assets from A Court to B Court made to A Court — Maintainability —Absence of letter of request from B Court — Transfer of assets by Official Assignee of B Court made directly to A Court is not sustainable. See Provincial Insolvency Act (1920), S. 36. **AIR 1957 Andh Pra 649 (DB).**

SECTION 127

——**S. 127 — Unclaimed amount with Official Assignee — Insolvent not finally discharged — Claim by his heir for payment — Whether can be allowed.**

The right of an insolvent or his heirs to be entitled to any surplus in the hands of the Official Assignee arises only when there is a surplus after payment in full with interest the claims of the creditors either under the Indian Insolvency Act of 1848, or under Section 78 of Act (3 of 1909). Where therefore certain amount is standing to the credit of an insolvent's estate who had died without obtaining a final discharge as provided by the Act of 1848 and the proceedings are still pending without any payment to the creditors, neither the insolvent nor his heirs are entitled to the amount and as such, an application by the heir of the insolvent for payment of the amount under Section 87 of the Act of 1848, cannot be entertained.

In such circumstances, under the Act of 1848, the assignee should seek the directions of Court under Section 44 (or under Order 11, Rule 13 of the Insolvency Rules framed under the Act 3 of 1909) and act according to the directions of the Court as to the disposal of the money due to such creditors. **AIR 1952 Mad 89 (89) (Prs 4, 5).**

SCHEDULE 2, RULE 18

——**Sch. II, Rule 18** — Application under by secured creditor is maintainable — Mortgaged property sold in winding up — Payment out of sale proceeds — Court need not order fresh sale — If Rule 18 is satisfied and mortgage established liquidator can be directed to satisfy claim out of sale proceeds — Mortgagee can follow sale proceeds — English law has no application in presence of specific provision in Rule 18. **AIR 1955 NUC (Cal) 410.**

PRESIDENCY TOWNS INSOLVENCY RULES

RULE 6-A

——**O. 3, R. 6-A (before amendment)** — Petition by creditor filed within three months of

alienation by debtor — Application to implead alienee and to set aside alienation filed beyond three months — Competency — Notice served on alienee beyond three months — If bar to adjudication of debtor or to setting aside of alienation. See Presidency Towns Insolvency Act (1909), S. 9. **(1960) 2 Mad LJ 361: 73 Mad LW 450: ILR (1960) Mad 1072.**

RULE 52-B

——R. 52-B (5) (b) (Bombay) — Right to claim specific performance of contract of indemnity does not amount to counterclaim.

A mere right to claim specific performance of the contract of indemnity cannot be regarded as a counterclaim at all. This right may mature into a counterclaim if the indemnity-holder actually pays the amount to his creditor or if and after he obtains a decree for the payment of the amount in a Court of competent jurisdiction. Where, therefore, the amount has not been paid and the decree for the payment of the amount in question is yet to be passed, the right which can be properly regarded as a counterclaim, does not vest in the person claiming to be indemnified. In such a case, his claim that the insolvency notice which has been served on him should be set aside on the ground that he has a counterclaim which exceeds the decretal amount ordered to be paid by him is not justified under Rule 52-B (5) (b) of the Rules framed by the Bombay High Court under the Presidency Towns Insolvency Act, 1909. **ILR (1956) Bom 60: 57 Bom LR 1122: AIR 1956 Bom 106 (109) (Pt B) (Pr 7) (DB).**

PRESIDENTIAL AND VICE PRESIDENTIAL ELECTIONS ACT (31 of 1952)

SECTION 14

●——**S. 14 — Doubt concerning validity of election — How material — Election petition — Compliance with Act and Supreme Court Rules — (Supreme Court Rules, O. 37-A, Rr. 3 and 12).**

When once an election has been held, any doubt concerning its validity is material only as a ground for setting aside the election. Where in substance the petition is one calling the election in question, it must satisfy the requirements of the Act and of the Rules which it does not do when the petitioner is not a person entitled to apply under Section 14 of the Act and the petition does not comply with the requirements of Rules 3 and 12 of O. 37-A. Dr. N. B. Khare v. Election Commission of India. **1958 SCJ 278: 1958 SCA 287: 1958 SCR 648: AIR 1958 SC 139 (140) (Pt A) (Prs 2, 3).**

SECTION 18

●——**S. 18** — Presidential and Vice-Presidential Elections Act and Order 37-A Supreme Court Rules, if ultra vires — Supreme Court Rules, O. 37-A — Article 71 (1) merely prescribes the forum in which disputes in connection with election of the President and the Vice-President would be inquired into. It does not prescribe the conditions under which the petition for setting aside an election could be presented. Presidential and Vice-Presidential Election Act, Section 18 of which prescribes such conditions and the Rules in Order 37-A of the Supreme Court Rules, therefore, do not derogate from the jurisdiction of the Supreme Court under Article 71 (1) and are not ultra vires. See Constitution of India, Art. 71 (1). **AIR 1958 SC 139.**

●——**S. 18** — Enquiry under Art. 71 (2) as to and decision of "doubts and disputes arising out of or in connection with election" — Time for enquiry after entire process of election is completed. See Constitution of India, Art. 71 (1). **AIR 1957 SC 694.**

●——**S. 18** — Member representing territorial constituencies deprived of right to exercise vote at Presidential election — Fixing of election of constituencies after date of Presidential election — Validity — No discrimination. See Constitution of India, Art. 14. **AIR 1957 SC 694.**

PRESIDENT OF INDIA

See Statutory cross-references under "Constitution of India".

PRESIDENT'S REMOVAL OF DIFFICULTIES ORDER

NO. 212-A

●——**No. 212-A (2)** — Nizam's powers — Nizam as Rajpramukh had under the Constitution, Art. 385 and Order No. 212-A (2) power to legislate but in conformity with Art. 246, the lists and fundamental rights. See Constitution of India (1950), Art. 385. **AIR 1953 SC 91.**

PRESS AND REGISTRATION OF BOOKS

Publication without name of Printer and Publisher.

See Press and Registration of Books Act (1867), Ss. 3 and 12.

PRESS AND REGISTRATION OF BOOKS ACT (25 of 1867)

PREAMBLE

——Preamble — Object.

The title and the preamble of the Act show that the Act was passed for regulating printing presses and newspapers, for the preservation of copies of every book and newspaper printed in India and for the registration of such books and newspapers. It is clear that the object in passing this enactment was not for establishing control over printing presses and newspapers, but the primary concern of the Legislature was to pass an enactment which would help regulate printing presses and newspapers and the preservation of copies of books and newspapers printed in the country. **(1965) 5 Gul LR 825: AIR 1964 Guj 278 (280) (Pt B) (Pr 8).**

——Pre. — Object of Act — Object was regulation of presses and newspapers. **AIR 1955 NUC (Madh B) 3869 (DB).**

SECTION 1

——Ss. 1, 3 and 21 (as amended by Act LV of 1955) — 'Paper' — Meaning of — 'Document' — (General Clauses Act (1897), S. 3 (18)).

Any decipherable information which is set down in a lasting form would be a 'document' and if it is printed within India, it is hit by Section 3 of the Act. In view of the definition of 'paper' inserted in Section 1 by Act (LV of 1955), it is no longer open to say that the word 'paper' in Section 3 is synonymous with 'newspaper' or must contain matter which is of literary or historical or cultural value. It is true that every printed invitation to a dinner or to

a party of any sort and even every printed visiting card would now be a 'paper', which if printed in this country has to conform to Section 3 of the Act. The resulting general inconvenience is a matter calling for remedial action under Section 21, which empowers the State Government to exclude any class of books and papers from the operation of the Act. **1960 Cr LJ 452: (1960) 1 Andh WR 400: 1960 Mad LJ (Cri) 303: ILR (1959) Andh Pra 1391: AIR 1960 Andh Pra 176 (177) (Pt A) (Pr 4).**

——S. 1 — Pamphlet — Meaning of.

In the Concise Oxford dictionary 'pamphlet' is defined as a small unbound treatise specially on subject of current interest. The leaflet in question was a defamatory leaflet of 4 pages which was not stitched. It contained a large number of allegations against two individuals.

Held, that merely because the subject of composition was defamatory it would not be taken out of the definition of 'treatise'. Literature need not always be philosophical or moral. It can equally be immoral. The leaflet in question was a 'pamphlet' and was therefore a 'book' within the meaning of the Press and Registration of Books Act, 1867. AIR 1955 All 524, Dist. **1958 Cr LJ 1547: ILR (1958) 8 Raj 1104: 1959 Raj LW 276: AIR 1958 Raj 350 (351) (Pt B) (Prs 4, 5).**

SECTION 3

——Ss. 3, 2—Applicability — Ss. 3, 12—Printer of book not printing his name and place of printing on the book, but printing somebody else's name and some other place — Printer commits offence under Section 12. **1960 Cr LJ 1037: AIR 1960 All 450 (452) (Pt A) (Pr 5).**

——Ss. 3, 12 — Outer cover showing name of different person as printer — Inner cover showing the name of printer who actually printed the book including the outer cover — No offence.

If the whole of a volume is printed by one man at one place the whole is one book, and if the names of the printer and the place of printing are printed legibly at any place of it, Section 3 is fully complied with. The names are required to be printed at only one place of a book and not at two or more places. The definition of 'book' includes a part of a volume but that applies only when different parts of a volume are printed by different men or at different places. Every volume or every part of a volume printed by one man at one place is a book. Where the outer cover and the inner cover are both printed by the applicant at his press, it cannot be said that they form two books and that the former should have contained an imprint separate from the imprint on the latter.

The fact that the outer cover contains names of the printer and the press different from the names printed in the inner cover, might convey to the public the idea that the outer cover was printed at the place and by the person mentioned thereon. The printer might be guilty of cheating the pubilc by so conveying the idea but he cannot be guilty under S. 3.

A book bearing any name can be printed by any person at any place. If the applicant had not printed his name and the place of printing on the inner cover he would have infringed Section 3 on the ground of not printing at all the name of the printer and the place of printing and not on the ground that he printed on the outer cover the name of a person who was not the printer and the place which was not the place of printing. **1960 Cr LJ 1037: AIR 1960 All 450 (452) (Pt B) (Pr 6).**

——Ss. 3, 12 — Name of the human being who printed the book should be printed.

Section 3 requires the names of the human beings who print and publish the book and not the names of shops which can be changed at will. 'Published by Kutubkhan' without mentioning the name of the human being is not enough. **1960 Cr LJ 1037: AIR 1960 All 450 (452) (Pt C) (Pr 8).**

——Ss. 3 and 12 — Non-compliance with S. 3 — Publisher's liability.

Section 3 only refers to the printing of a book and not its publication. Hence, the words in Section 12 'or publish any book otherwise than in conformity with the rule contained in Section 3' make no meaning. The words 'or publish' in Section 12 must therefore, be ignored. Hence the publication of a book which is not printed in conformity with the rule contained in Section 3 is not an offence under Section 3 read with Section 12. Attention drawn to difference in wording of corresponding English Act, Nos. 2 and 3 Vict. C. 12, S. 2 and (1920) 1 KB 650, Distinguished. AIR 1937 Bom 28, Dissented from. **1960 Cr LJ 1037: AIR 1960 All 450 (453) (Pt D) (Pr 9).**

——S. 3 — Abetment by publisher.

Publishing a book even though it did not comply with the requirement of S. 3 in the matter of printing the name of the printer cannot amount to abetting the infringement of the provisions of Section 3 already done by the other printer. **1960 Cr LJ 1037: AIR 1960 All 450 (453) (Pt E) (Pr 10).**

——S. 3 — 'Paper' — Interpretation of.

A penal provision must be clear and unambiguous before effect can be given to it. AIR 1954 All 183, Rel. on.

The word 'paper' was intended to cover all those papers which could not be defined as 'books' or 'newspapers' but which had historical cultural or literary value. It does not include the notice announcing the holding of a public meeting to oppose the transfer of the Deputy Commissioner. AIR 1931 Pat 351 (2), Dissented from. **1955 All LJ 762: 1955 All WR (HC) 686: 1955 Cr LJ 1308: AIR 1955 All 524 (525) (Prs 7, 8) (DB).**

——Ss. 3 and 21 (as amended by Act 55 of 1955) — Document — Meaning of — Any decipherable information which is set down in a lasting form would be a document and if it is printed within India it is hit by S. 3 of the Act— Paper — Effect of definition — It is no longer open to say that the word paper in Section 3 is synonymous with 'newspaper' or must contain certain matter which is of literary or historical or cultural value. Every printed invitation to adviser or to a party of any sort or even a printed visiting card would now be a paper which if printed in India has to conform to Section 3 of the Act. General Clauses Act (1897), S. 3 (18)—(Words and Phrases). See Press and Registration of Books Act (1867) (as amended by Act 55 of 1955), S. 1. **1960 Cri LJ 452: AIR 1960 Andh Pra 176.**

——S. 3 (as amended by Act 35 of 1955) — 'Publisher' — Meaning of.

The publisher is a person who both arranges with the printer for a book or paper to be produced and causes it to be offered to the public. **1960 Cr LJ 452: (1960) 1 Andh WR 400: 1960 Mad LJ (Cr) 303: ILR (1959) Andh Pra 1391: AIR 1960 Andh Pra 176 (177) (Pt B) (Pr 6).**

——S. 3 (as amended by Act 55 of 1955) — Duty of publisher.

The duty of a publisher is not merely to give his name and place of publication for being printed. It is also his duty to see that the book or paper complies with Section 3 and to refrain from publishing it if the requirements are not satisfied.

Where therefore a printed leaflet, which contained an appeal to the policeman on behalf of an institution, merely disclosed the names of the persons that issued the appeal and their 'camp' from which they issued the appeal, but the names of the printer and publisher and the place of printing and of publication were not printed thereon.

Held, that the requirements of Section 3 were not complied with. ILR 16 Mad 443 and 2 Ind Cas 978 (Lah), Rel. on. **1960 Cr LJ 452: (1960) 1 Andh WR 400: 1960 Mad LJ (Cr) 303: ILR (1959) Andh Pra 1391: AIR 1960 Andh Pra 176 (177) (Pt E) (Pr 5).**

——S. 3 — Indian Penal Code, Ss. 378 and 380 — Removal of press cannot be bona fide if having regard to the provisions of the Press and Registration of Books Act the accused could not lawfully keep the press in their possession at the time of its removal — Plea of bona fide removal whether available to accused. See Penal Code (1860), S. 378. **1959 Cri LJ 1141: AIR 1959 Andh Pra 530.**

[**Reversed** on facts in AIR 1962 SC 586.]

——S. 3 — Scheme of Act — 'Paper' in S. 3 should be construed ejusdem generis with 'book' — Provision in Section 3 is solely for benefit of authors, scholars, etc. — Election poster is not analogous to book, volume, etc. within meaning of Act — AIR 1931 Pat 351 (2), Dissented from. **AIR 1955 NUC (Madh B) 3869.**

——S. 3 — Object of.

The intention of Section 3 requiring that the name of the printer and the place of printing and the name of the publisher and the place of publication should be printed legibly on every book or paper is to inform the public who the responsible printer or publisher was and to convey that information on the face of the paper. **(1957) Mad LJ (Cr) 53: (1957) 1 MLJ 136: 1957 Mad WN 10 (2): AIR 1957 Mad 427 (429) (Pt A) (Pr 5).**

——Ss. 3 and 12 — 'Publisher' — Meaning of.

The word 'publisher' has been used in the Act in a restricted sense and does not include the vendor of the newspaper or books. Section 12 read with Section 3 clearly indicates that such persons are not included in 'publishers'. But a man who causes a book to be printed and offers it to the public for sale is a publisher within the meaning of Section 3 and Section 12 of the Act. **(1957) 1 MLJ 136: (1957) 1 Mad LJ (Cri) 53: 1957 Mad WN 10 (2): AIR 1957 Mad 427 (429) (Pt B) (Pr 5).**

——S. 3 — Scope — Does not restrict freedom of press and therefore valid — 'Freedom of Press' — Meaning of — Courts have in general construed freedom of press so as to preserve the fundamental values intended to be protected by the Constitutional provisions protecting them. See Constitution of India, Art. 19 (1) (a). **AIR 1957 Mad 427.**

——Ss. 3 and 12 — Omission to print name of printer and place of printing — Amounts to violation of statutory duty on part of master of press — Offence is complete — Proof of mens rea not necessary — Printing of initials of Press not sufficient. **1962 (1) Cr LJ 824 (826) (Prs 6 to 9) (Manipur).**

——Ss. 3, 7, 4, 18 — Names of author and publisher printed on book — There is no presumption that they are publishers. See Press and Registration of Books Act (1867), S. 7. **1960 Cri LJ 1116: AIR 1960 Orissa 126.**

SECTION 4

●——S. 4 — Declared keeper of press — Not necessarily an owner of press.

A declared keeper of the press is not necessarily the owner thereof so as to be able to confer title to the press upon another. The ownership of the press is a matter of the general law and must follow that law. Suvvari Sanyasi Apparao v. Boddepalli Lakshminarayana. **1962 Supp (1) SCR 8: 1962 SCD 146: 1962 All WR (HC) 284: 1962 All Cri R 177: (1962) 2 SCJ 469: (1962) 2 Mad LJ (SC) 109: (1962) 2 Andh WR (HC) 109: 1962 Mad LJ (Cri) 629: 1962 (1) Cri LJ 518: AIR 1962 SC 586 (588) (Pt B) (Pr 9).**

——S. 4 — Removal of press cannot be bona fide if having regard to the provisions of the Press and Registration of Books Act the accused could not lawfully keep the press in their possession at the time of its removal — Plea of bona fide removal whether available to accused. See Penal Code (1860), S. 378. **1959 Cri LJ 1141: AIR 1959 Andh Pra 530.**

[**Reversed** on facts in AIR 1962 SC 586.]

——S. 4 — Cancellation of declaration.

There is no provision in the Act for the Magistrate to direct the cancellation of any declaration. **57 CWN 819: AIR 1953 Cal 772 (772) (Pr 4) (DB).**

——Ss. 4 and 14 — Declaration under S. 4 — No power to Magistrate either to suspend or cancel it.

Once a declaration as provided under S. 4 is made and lodged with the District Magistrate, there is no power under the Act for the Magistrate either to suspend or cancel it or to declare it to be inoperative or to decide the question of ownership or title in regard to the press or the question of the right of possession thereof. The duty to receive a declaration under Section 4 is purely a ministerial one and not a judicial one, enabling the Magistrate to hold an enquiry and decide whether to permit a person to make such a declaration or not. Such a power does not appear to have been given to a Magistrate in respect of declarations to be made and subscribed under S. 4.

Where a Magistrate finds, that two individuals have made and subscribed declarations in respect of the same press, claiming to be in exclusive possession thereof and the District Magistrate finds that one of them at least must have made a false declaration or statement, he can, acting under the provisions of Section 14, file a complaint against such a declarant and if such a declarant is convicted, he would be liable to the penalty prescribed in Section 14 of the Act. But there is no provision in the Act which empowers a District Magistrate to hold an enquiry and decide the question of title or ownership or the right of possession and then pass an order suspending or cancelling a declaration made by a party or declaring the declaration to be inoperative, thereby disabling such a party from carrying on the business as a keeper of a press. AIR 1953 Cal 772 and AIR 1959 Mad 519, Foll. **(1964) 5 Guj LR 825: AIR 1964 Guj 278 (281) (Pt A) (Pr 10) (DB).**

——Ss. 4 and 6 — Obligation of keeper of press.

Provisions for authentication under Section 6 apply to a declaration made under Section 5 and not to a declaration made under Section 4.

The only obligation of a keeper of a press is to make and subscribe a declaration as provided by Section 4 and such a declaration does not need any authentication provided under S. 6. **(1964) 5 Guj LR 825: AIR 1964 Guj 278 (281) (Pt C) (Pr 9).**

——**S. 4** — Declarant in jail long before and at time of publication of objectionable article — No control over press — He cannot be convicted for publication of article — Penal Code (1860), Section 124-A. **1951 Mad WN (Cr) 17: 1951 Mad WN 69: 1951 All WR (Sup) 32: (1950) 2 Mad LJ 776: 52 Cri LJ 713: AIR 1951 Mad 714 (714) (Pr 3).**

——**Ss. 4, 7, 3, 18** — Names of author and pubsher printed on book — There is no presumption that they are publishers. See Press and Registration of Books Act (1867), S. 7. **1960 Cri LJ 1116: AIR 1960 Orissa 126.**

SECTION 5

——**S. 5** — Removal of press cannot be bona fide if having regard to the provisions of the Press and Registration of Books Act the accused could not lawfully keep the press in their possession at the time of their removal — Plea of bona fide removal whether available to accused. See Penal Code (1860), S. 378. **1959 Cri LJ 1141: AIR 1959 Andh Pra 530.**

[**Reversed** on facts in AIR 1962 SC 586.]

——Ss. 5 (2), 6, Proviso and 8-B — Scope — Choice of title of newspaper — Magistrate has discretion to authenticate or cancel declaration — Order refusing to cancel declaration not quasi-judicial — No interference by High Court under Art. 226 of Constitution of India.

Section 5 (2) of the Act does not put any restriction in the matter of selection of title or name of the newspaper if there is no newspaper of that name either in the same language in India or in the same State. The proviso to Section 6 puts a restriction on the choice of title of a newspaper if there is already a newspaper owned by a different person and of the type described in the proviso. A Magistrate cannot, therefore, refuse to authenticate a declaration unless he is satisfied on enquiry from the Press Registrar that the proviso to Section 6 is attracted. As is clear from the wording of the proviso to S. 6 the decision of the question whether there is any other newspaper published in the same language or in the same State having the same name by some other person depends entirely on the satisfaction of the Magistrate in regard to those matters. So also, the cancellation under Section 8-B of declaration once made, depends on the subjective opinion of the Magistrate that the declaration should be cancelled and on his satisfaction in regard to any of the matters mentioned in Section 8-B. This is clear from the wording of S. 8-B.

Thus the Legislature has made the formation of opinion by the Magistrate as to revocation of a declaration dependent on the conditions mentioned in Cls. (i) to (iv) of Section 8-B. But the existence or absence of those conditions is left to the 'satisfaction' of the Magistrate. This is clear from the words 'he is satisfied that' used in Section 8-B before the enumeration of Cls. (i) to (iv). The existence of the matters mentioned in Cls. (i) to (iv) being dependent on the subjective satisfaction of the Magistrate the argument that the cancellation of a declaration or refusal to cancel it by the Magistrate after forming the opinion that the declaration should or should not be cancelled is a matter determined by the Magistrate in a quasi-judicial manner and consequently it would be open to the High Court under Art. 226 to interfere into the grounds of the 'opinion' or the 'satisfaction' formed by the Magistrate or to consider the reasonableness or otherwise of that opinion, cannot be accepted. If the Magistrate has formed an 'opinion' and arrived at the requisite 'satisfaction' honestly, then the High Court cannot substitute its own opinion or satisfaction for that of the Magistrate, or enquire into the validity of the grounds on which that 'opinion' or 'satisfaction' was formed. **1965 MPLJ 227: 1965 Jab LJ 479: AIR 1965 Madh Pra 128 (130) (Pt A) (Pr 6) (DB).**

——Ss. 5 (2) and 6, Proviso (as amended by Act 55 of 1955) — Scope and effect of — Application for making declaration as Publisher of Journal — Scope of inquiry — Jurisdiction of Magistrate — Rival claimant applying later — Power of Magistrate to assess comparative merits and to decide about right to use name or title or publication.

Under S. 5 (2) of the Press and Registration of Books Act, 1867, as amended by Act 55 of 1955, it is open to any person to declare his intention to start a newspaper. There is no restriction in the choice of a title or name of his newspaper, so long as there has been no newspaper of that name either in the same language in India or in the same State. If there were none such, there is no discretion left in the Chief Presidency Magistrate to direct the publisher to adopt any other name. Section 5 does not invest the Chief Presidency Magistrate with jurisdiction to decide the matter as to who would be entitled to make declaration. There is a limited jurisdiction given to the Magistrate under the Proviso to S. 6 of the Act to enquire as to whether there is any other newspaper in the same language or in the same State having the same name by some other person; but the Proviso to S. 6 does not invest the Magistrate with jurisdiction to decide between two rival claimants for using the same name or title for their newspapers. The duty of the Magistrate is merely administrative, i.e., to record the declaration or to refuse to authenticate it in the event of there being a newspaper of the kind referred to in the Proviso to S. 6. If, on the date when a person applies to make a declaration with respect to his journal under a title or name there was no published newspaper having the same or a similar title, he would be entitled to make the declaration under S. 5 (2) and there would be no jurisdiction in the Magistrate to assess the comparative merits between him and his rival who applied later and decide as to which of them would be entitled to the name or title.

Section 5-(2) is not concerned with adjudication of rights. The question whether the applicant has acquired a right to use a particular name for his publication either by reputation or under the Trade Marks Act cannot be considered in proceedings under S. 5 (2); the remedy in such a case lies in the Civil Court. **1959 Mad WN 451: 72 Mad LW 416: (1959) 2 Mad LJ 314: 1959 Mad LJ (Cr) 743: ILR (1959) Mad 978: 1959 Cri LJ 1441: AIR 1959 Mad 519 (521) (Pt B) (Pr 11).**

——**S. 5 (2)** — Whether petitioner had property in name of newspaper — Question cannot be considered in proceedings under section 5 (2) which is not concerned with adjudication of rights — Remedy lies in Civil Court. **(1959) 2 Mad LJ 314: 1959 Mad LJ (Cri) 743: ILR (1959) Mad 978: 1959 Cri LJ 1441: AIR 1959 Mad 519 (521) (Pt C) (Pr 12).**

SECTION 6

——Ss. 6 and 4 — Obligation of keeper of press — Provision for authentication under S. 6 apply to a declaration made under S. 5 and not to a declaration under S. 4. The only obligation of a keeper of a press is to make and subscribe a declaration as provided by S. 4 and such a declaration does not need any authenticaton provided under S. 6. See Press and Registration of Books Act (1867), S. 4. **AIR 1964 Guj 278 (DB).**

——Ss. 6, Proviso and 5 (2), 8-B — Scope — Choice of title of newspaper — Magistrate has discretion to authenticate or cancel declaration — Order refusing to cancel declaration not quasi-judicial — No interference by High Court under Art. 226 of Constitution of India. See Press and Registration of Books Act (1867), S. 5 (2). **AIR 1965 Madh Pra 128 (DB).**

——S. 6, First Para, Proviso — Object.

The proviso was evidently intended to prevent unfair competitions between two newspapers published by different persons under the same name and title. The proviso would have the effect of protecting an existing newspaper in regard to its name. **27 Mad LW 416: (1959) 2 Mad LJ 314: 1959 Mad LJ (Cri) 743: ILR (1959) Mad 978: 70 Mad LW 746: 1957 Mad LJ (Cri) 649: 1959 Cri LJ 1441: AIR 1959 Mad 519 (521) (Pt A) (Pr 10).**

——Ss. 6, First Para, Proviso and 5 (2) — Petitioner applying for declaration respecting his journal with particular name — No published newspaper having same title — Petitioner is entitled to make declaration. See Press and Registration of Books Act (25 of 1867), S. 5 (2). **AIR 1959 Mad 519.**

SECTION 7

——S. 7 — Libel in newspaper — Proof regarding the accused being Editor and Publisher — Declaration under S. 7 of Press and Registration of Books Act printed in newspaper — Sufficient. See Penal Code (1860), S. 499. **1962 (2) Cr LJ 142 (Ker).**

——S. 7 — Presumption under — Belief in statement of fact — Assuming that the presumption under S. 7, Press and Registration of Books Act is attracted to election proceedings and that it has not rebutted, it has still to be established that the respondent believed the statements to be false or did not believe them to be true. See Representation of the People Act (1951), Section 123 (4). **AIR 1959 Ker 120 (DB).**

——Ss. 7, 3, 4, 18 — Names of author and publisher printed on book — There is no presumption that they are publishers.

So far as newspapers are concerned, under S. 7 a copy of a declaration made under S. 6 shall be held (unless the contrary be proved) to be sufficient evidence as against the person whose name shall be subscribed to such declaration, that the said person is the printer or publisher of every portion of the newspaper. There is no similar provision in the Act with regard to books. The names printed in the books cannot be taken as prima facie evidence unless it is rebutted by the persons concerned. It is open to the complainant to produce a copy of the entry made in the Register under S. 18 of the Act. There is no presumption that it is written by the man who is described as the author, unless it is one of the limited class of books covered by S. 87 of the Evidence Act read with S. 57 (3) of the Act. So far as the printers and publishers are concerned, the complainants should call for and prove the certified copy of the declaration made under S. 4 of the Act and of the entries made under S. 18 of the Act. **ILR (1959) Cut 685: 1960 Cri LJ 1116: AIR 1960 Orissa 126 (127) (Pt A) (Prs 6, 7).**

——S. 7 — Person declaring to be printer and publisher — He would be liable for printing objectionable matter although he had entrusted the selection of news items to his editor.

Where a person files a declaration that he is the printer and publisher of a paper, the presumption is that he was aware of what was printed and published in the issue of the paper. The declaration is prima facie evidence of the publication by the person all the news items in the paper. He will not be absolved for the publication of objectionable matter, by the mere fact that in daily routine he had asked the Editor to select the news item. **67 Pun LR 877: AIR 1966 Punj 93 (95) (Pt B) (Pr 6).**

——S. 7 — Declaration about ownership of newspaper — Evidentiary value.

Where in a statement about the ownership and other particulars of a newspaper published in its issue, R was shown as the owner of the newspaper, the statement is not binding on R under S. 7. According to S. 7 the printing of the name of the editor is sufficient evidence only against the editor to the extent that he was the editor of every portion of that issue of which a copy is produced. So far as R is concerned, it has no such binding effect. **ILR (1959) 9 Raj 524: AIR 1959 Raj 280 (286) (Pt G) (Pr 29) (DB).**

SECTION 8-B

——Ss. 8-B, 6, Proviso and 5 (2) — Scope — Choice of title of newspaper — Magistrate has discretion to authenticate or cancel declaration — Order refusing to cancel declaration not quasi-judicial — No interference by High Court under Art. 226 of Constitution of India. See Press and Registration of Books Act (1867), S. 5 (2). **AIR 1965 Madh Pra 128 (DB).**

——Ss. 8-B and 8-C — Application under Article 226 for review of order of Magistrate under S. 8-B — Petitioner not aggrieved — Petition, if granted likely to affect right of appeal of opposite party under S. 8-C — Petition not granted. See Constitution of India, Art. 226. **AIR 1965 Madh Pra 128 (DB).**

SECTION 12

——Ss. 12, 3 — Printer of book not printing his name and place of printing on the book, but printing somebody else's name and some other place — Printer commits offence under S. 12. See Press and Registration of Books Act (1867), S. 3. **1960 Cri LJ 1037: AIR 1960 All 450.**

——Ss. 12, 3 — Outer cover showing name of different person as printer — Inner cover showing the name of printer who actually printed the book including the outer cover — No offence under Act. See Press and Registration of Books Act (1867), S. 3. **1960 Cri LJ 1037: AIR 1960 All 450.**

——Ss. 12, 3 — Name of the human being who printed the book should be printed. See Press and Registration of Books Act (1867), S. 3. **1960 Cri LJ 1037: AIR 1960 All 450.**

——Ss. 12 and 3 — Section 3 only refers to the printing of a book and not its publication. Hence the words in S. 12 "or publish any book otherwise than in conformity with the rule contained in S. 3" make no meaning. The words 'or published' in S. 12 must therefore be ignored. Hence non-compliance with S. 3 is not an offence under S. 3 read with S. 12 — Publisher

cannot be punished. See Press and Registration of Books Act (1867), S. 3. **1960 Cri LJ 1037: AIR 1960 All 450.**

——**S. 12** — Abetment —Publishing a book even though it did not comply with the requirement of S. 3 in the matter of printing the name of the printer cannot amount to abetting the infringement of the provisions of S. 3 already done by the other printer. See Press and Registration of Books Act (25 of 1867), S. 3. **AIR 1960 All 450.**

——**S. 12** — 'Publisher' — Meaning of — The term is used in a restricted sense and does not include the vendor of the newspaper or books. But a man who causes a book to be printed and offers it to the public for sale is a publisher within the meaning of S. 3 and S. 12 of the Act. See Press and Registration of Books Act (1867), S. 3. **AIR 1957 Mad 427.**

SECTION 14

——**Ss. 14 and 4** — Declaration under S. 4 — No power to Magistrate either to suspend or cancel it. See Press and Registration of Books Act (1867), S. 4. **AIR 1964 Guj 278 (DB).**

SECTION 18

——**Ss. 18, 7, 3, 4** — Names of author and publisher printed on book — There is no presumption that they are publishers. See Press and Registration of Books Act (1867), S. 7. **1960 Cri LJ 1116: AIR 1960 Orissa 126.**

SECTION 21

——**Ss. 21 and 1, 3 (as amended by Act 55 of 1955)** — Document — Meaning of — Paper — Effect of definition — The general inconvenience caused by the definition of papers inserted in S. 1 by Act 55 of 1955 is matter calling for remedial action under S. 21 which empowers the State Government to exclude any class of books and papers from the operations of the Act — (General Clauses Act (1897), S. 3 (18)) — (Words and Phrases). See Press and Registration of Books Act (1867) (as amended by Act 55 of 1955), S. 1. **1960 Cri LJ 452: AIR 1960 Andh Pra 176.**

PRESS (EMERGENCY POWERS) ACT (23 of 1931)

SECTION 2

——**Ss. 2 (6) and 18 — News-sheet, meaning of — Publication without permission.**

Where the contents of a pamphlet are in the form of presentation of novel items of information which are intended to be regarded as such by the ordinary readers, the pamphlet would be a news-sheet within the meaning of S. 2 (6) even though some parts of it are relating to matters of history or common knowledge and are already published in other newspapers. A publication of such a pamphlet without the previous sanction required by S. 15 would constitute an offence under S. 18 (1) of the Act. **52 Bom LR 229: 1950-51 Cri LJ 1230: 1949 Bom Cri Cas 154: ILR (1950) Bom 181: AIR 1950 Bom 246 (247) (Pr 4) (DB).**

SECTION 3

●——**S. 3 (3) — Government not forfeiting security — Order under S. 3 (3), if justified.**

Before Government can act under S. 3 (3), there must be an application by the keeper and actual refund by Government. Till such an eventuality happens, the deposit may continue to remain as security with Government, and Government can forfeit the security. If the Government does not forfeit the security, an order under S. 3 (3) is not justified. Manohar Damodar Patil v. The Government of Bombay, **52 Bom LR 275: 51 Cri LJ 829: 1950 Bom Cri Cas 164: AIR 1950 Bom 210 (210) (Pt A) (Pr 2) (SB).**

——**S. 3 (1) — Validity - Constitution of India, Art. 19 (1) (a), (g) and (2).**

A provision like S. 3 (1) of the Indian Press (Emergency Powers) Act cannot be allowed to remain on the Statute Book after the coming into force of the Constitution. It is inconsisent with Art. 19 (1) (a) and (g) of the Constitution. It is not saved by Art. 19 (2), or 19 (6). 1950 SCJ 418; 1950 SCJ 425, Rel. on.

Section 3 (1) itself cannot obviously be an enactment relating to any matter which undermines the security of and tends to overthrow the State within the meaning of Art. 19 (2) of the Constitution.

Section 3 (1) cannot be upheld as a preventive provision because Art. 19 (2) would not justify preventive legislation. There must be matter to which the law could relate. The contingency of matter coming into existence cannot be covered by Art. 19 (2). **(1951) 2 Mad LJ 101: 64 Mad LW 666: 1951 Mad WN 593: 1952 Mad WN (Civ) 169 : AIR 1951 Mad 950 (951, 952) (Prs 4, 5, 7) (DB).**

●——**Ss. 3 (3) and 4 (1) (a) — Validity — Constitution of India, Art. 19 (1) (a) and (2).**

Per Govinda Menon and Basheer Ahmed Sayeed JJ., Panchapagesa Sastri J. Contra — Sections 3 (3) and 4 (1) (a), Press (Emergency Powers) Act are not repugnant or inconsistent with the Constitution, but are saved by the reservations contained in Art. 19 (2) of the Constitution, assuming at the same time that, by reason of the exercise of the powers vested in the State Government under S. 3 (3), the right of "freedom of speech and expression" guaranteed by Art. 19 (1) (a) is sought to be curtailed or abridged.

Even the incitement or encouragement to a single case of murder, or a single cognizable offence involving violence, might have a tendency to overthrow the States; as for example, if the incitement or encouragement is to commit a cognizable offence or to murder a very high functionary of the State whose disappearance itself might tend to or undermine the security of the State, it cannot be held that such incitement cannot come within Cl. (2) of Art. 19. It is very difficult to postulate with any definiteness that the classes of offences mentioned in S. 4 (1) (a) will not undermine the security of the State or may not tend to overthrow it.

Per Panchapagesa Sastri J. — Section 4 (1) (a) of the Act is in conflict with Art. 19 (1) (a) of the Constitution and is not saved by Art. 19 (2). It is therefore, void under Art. 13.

Even if the newspaper, book, or document, contains words which incite, or encourage or tend to incite or encourage the commission of an offence of murder, or of any cognizable offence involving violence, and even if such incitement and encouragement might undermine the security of the State or tend to overthrow the same, still S. 4 (1) (a) would be ultra vires because as the section now stands incitements which do not undermine the security of the State or tend to overthrow the same come within its ambit and since it is impossible to separate the two different categories of the incitements

the entire section should be held to be invalid and ultra vires. Srinivasa Bhat v. State of Madras, **64 Mad LW 82: (1951) 1 Mad LJ 115: AIR 1951 Mad 70 (73, 78, 83, 91) (Pt C) (Prs 6, 17, 27, 46) (DB).**

● **——Ss. 3 (3), 4 and 23 —Notice under — Contents of — Non-attachment and non-specification of offending matter — Effect on validity of notice.**

Though it is desirable that notice under Section 3 (3) of the Press (Emergency Powers) Act, 1931, should have attached to it a copy of the offending matter (leaflet or pamphlet) or specify the 'words, signs or visible representations' contained in the offending document which in the opinion of the State Government constituted an incitement to or encouraged or tended to incite or encourage the commission of any offence of murder, etc., as contemplated by S. 4 (1) (a) yet the omission to so attach the leaflet or pamphlet to the notice or to specify the 'words, signs or visible representations in the notice, does not affect the validity of the notice itself. It is only an irregularity. Shaila Bala Devi v. Chief Secretary to the Government of Bihar, **ILR 30 Pat 31: 52 Cri LJ 309: AIR 1951 Pat 12 (15) (Pt B) (Pr 7) (SB).**

[Reversed on another point in AIR 1952 SC 329.]

SECTION 4

SYNOPSIS

(Press (Emergency Powers) Act (1931), S. 4.)

1. Sub-section (1).
2. Sub-section (1), Cl. (a).
3. Sub-section (1), Cl. (d).
4. Sub-section (1), Cl. (f).
5. Sub-section (1), Cl. (h).
6. May issue a notice in writing.
7. Explanation 2.
8. Power of High Court to issue writ.

1 Sub-section (1).

● **——S. 4 (1) — Construction of document — Writing has to be considered as a whole — (Document — Construction of).**

In order to determine whether a particular document falls within the ambit of any of the clauses of S. 4 (1), the writing has to be considered as a whole and in a fair and free and liberal spirit, not dwelling too much upon isolated passages or upon a strong word here and there, and an endeavour should be made to gather the general effect which the whole composition would have on the mind of public. AIR 1941 Pat 132 (SB), Distinguished.

Per Mukherjea, J.:— Account should also be taken of the place, circumstances and occasion of the publication, as a clear appreciation of the background in which the words are used is of very great assistance in enabling the Court to view them in their proper perspective. State of Bihar v. Shailabala Devi. **1952 SCJ 465: 1952 Cri LJ 1373: 1952 Mad WN 545: (1952) 2 Mad LJ 323: 1952 Mad WN (Cri) 169: 1952 SCR 654: 1953 SCA 152: ILR 31 Pat 544: AIR 1952 SC 329 (332, 333) (Pt C) (Prs 9, 14).**

● **——S. 4 (1), — Article how should be read.**

In considering whether the matter complained of offended against S. 4 the Court should in every case consider the writing as a whole and in a fair, free and liberal spirit, not dwelling too much upon isolated passages or upon a strong word here and there, which may be qualified by the context but endeavouring to gather the general effect which the whole composition would have on the minds of the public.

Per Banerjee, J.:— It is impossible to lay down any hard and fast rule as to how an article should be read, but there is no doubt that it must be read by the Court carefully, liberally and not with a view to find fault with it. The Court must read the article as a whole, giving due weight to every part. The Court must make due allowance for all kinds of ornamental phrases or fine words or figure of speech which sometimes are permitted and which nobody seriously takes into consideration. And after making all due allowances, the Court must find out the true sense of the article. The first thing the Court has to do is not to take the words in vacuo, so to speak, and attribute to them what is called their natural or ordinary meaning. The method of construing the words is to read them as a whole and ask oneself the question: "In this context, relating to this subject-matter, what is the true meaning of the words?" If reading the article in that way, the Court thinks that it was intended to be a criticism of the policy or the administration of the Government, with a view to obtain its change or reform, the article is safe. But if, on the other hand, the Court comes to the conclusion that the article was really meant to be an attack on the Government beyond the permitted limits of criticism, the article comes within the mischief of the Act, and then no argument can be heard on the basis that the Act does not exist or what the Act should have been. "Saptaha" a Bengali Bi-weekly Newspaper In the Matter of, **54 Cal WN 334: ILR (1951) 1 Cal 1: AIR 1950 Cal 444 (448, 456) (Pt B) (Prs 16, 73) (SB).**

● **——S. 4 (1) — Distinction between this section and S. 124-A, Penal Code — Penal Code (1860), S. 124-A — Travancore Newspapers Act (5 of 1101), S. 5 (1) — Travancore Penal Code, Section 117.**

A comparative study of S. 5, Travancore Newspapers Act and S. 117, Travancore Penal Code, shows that the case contemplated is the same under the two provisions except that while Section 117 punishes words which excite disaffection or bring into hatred or contempt the Government, the Newspapers Act is wider in scope as it hits not only cases contemplated by the Penal Code but also other cases which are "likely" or may have a "tendency" directly or indirectly to excite disaffection, etc. A. E. Rama Kurup, Editor "Malayali" v. The United State of Travancore-Cochin. **1949 Ker LT 27: 1949 TC LR 190: 51 Cri LJ 1536: AIR 1950 Trav-Co 83 (85) (Pt B) (Pr 3) (FB).**

2. Sub-section (1), Cl. (a).

● **——S. 4 (1) (a) — Restrictions imposed by S. 4 (1) (a) are within ambit of Constitution of India, Art. 19 (2).**

Clause (a) of S. 4 (1) deals with words or signs or visible representations which incite to or encourage, or tend to incite to or encourage the commission of any offence of murder or any cognizable offence involving violence. Speeches or expressions on the part of an individual which incite to or encourage the commission of violent crimes, such as murder, cannot but be matters which would undermine the security of the State and come within the ambit of a law sanctioned by Art. 19 (2) of the Constitution. Hence, Section 4 (1) (a) is not repugnant to the Constitution. AIR 1950 SC 124, Expl. AIR 1950 SC 129; AIR 1951 Pat 12 (SB) **Reversed.** State of Bihar v. Shailabala Devi. **1952 Mad WN 545: (1952) 2 Mad LJ 323: 1952 Mad WN (Cri) 169: 1952 SCR 654: 1953 SCA 152: ILR 31 Pat 544: 1952**

SCJ 465: 1952 Cri LJ 1373: AIR 1952 SC 329 (330) (Pt A) (Pr 4).

● **——S. 4 (1) (a) — "Sangram" — Applicability of S. 4 (1) (a) to printer of.**

A leaflet, entitled "Sangram" or struggle, was written in high flown Bengali prose with a large mixture of poetic expressions borrowed at random from the writings of some well-known poets of Bengal. The object of the writing as far as could be gathered from the leaflet was to give a poetic or idealistic picture of what is meant and connotated by 'struggle' or revolution. The aim and end of 'struggle', as stated in the leaflet, was to wipe out "oppression, injustice or wrong" which is "pervading all over the world from the past to the future", and it was only after all wrongs, injustice and oppression have perished that a new world would be built up.

Held, that in the absence of any evidence whatsoever for connecting the leaflet with any agitation or movement at the time it was written in the locality and in the face of the State Government to prove the attendant circumstances and the actual background of the publication it could not be held that leaflet fell within the mischief of S. 4 (1) (a) and that no security order could be passed against the keeper of the press under that section. AIR 1947 Nag 1 (SB), Ref. State of Bihar v. Shailabala Devi, **(1952) 2 Mad LJ 323: 1952 Mad WN (Cri) 169: 1952 SCR 654: 1953 SCA 152: 1952 SCJ 465: 1952 Cri LJ 1373: 1952 Mad WN 545: ILR 31 Pat 544: AIR 1952 SC 329 (331) (Pt D) (Prs 7, 8).**

● **——S. 4 (1) (a) and (d) — Applicability.**

A pamphlet entitled 'Sangram' written in Bengali contained a clear invocation to the readers to join a total and deadly struggle to bring about a revolution by violence resulting in complete annihilation of those whom the writer considered as 'oppressors' or who were directors of wrong and injustice or who took part in parochial national politics or who brought into disgrace the mother tongue. There were no words in the pamphlet which could be said to refer to the State Government. The persons against whom the attack was made were not clearly defined and could not be said to be 'a definite or ascertained class".

Held, on a consideration of the entire pamphlet that it fell within the mischief of S. 4 (1) (a) and not S. 4 (1) (d). In re Bharati Press, **52 Cri LJ 309: ILR 30 Pat 31: AIR 1951 Pat 12 (15, 17, 26) (Pt C) (Prs 7, 8, 24) (SB).**

[**Reversed** on another point in AIR 1952 SC 329.]

● **——S. 4 (1) (a) and (b) — Validity of Constitution of India, Arts. 13 and 19.**

(Per Sarjoo Prasad and Ramaswami JJ.; Shearer J., dissenting). Clauses (a) and (b) of S. 4 of the Press Act are worded in general terms and apply both to aggravated forms of offences like political assassinations as also to ordinary murders or cognizable offences involving violence. They are not directed mainly and solely towards crimes of violence and political assassinations which undermine the security of, or tend to overthrow the State. They are inconsistent with the fundamental right given under Art. 19 (1) (a) of the Constitution and as such void by virtue of Art. 13 (1) and are not saved as permissible legislation under Art. 19 (2) of the Constitution as the language of these clauses is not severable. AIR 1950 SC 124 and AIR 1950 SC 129, Rel. on.

The provisions of S. 4 (1) (a) and (b) cannot be justified under Art. 19 (2) of the Constitution on the ground that they relate to matters which offend 'against decency and morality' as these expressions have been given narrower connotation in the Penal Code and may be deemed to have been used in the same sense in Art. 19 (2) of the Constitution as well.

(Note:— In so far as this case holds that Cl. (a) of S. 4 (1), Press (Emergency Powers) Act 1931 is inconsistent with Art. 19 (1) (a) of the Constitution and also is not justified under Art. 19 (2), it has been reversed in AIR 1952 SC 329-Ed).

Consequently an order demanding security under S. 3 (3) of the Press Act for violation of S. 4 (1) (a) of that Act is void and must be quashed.

Per Shearer J.:— The provisions of S. 4 (1) (a) and (b) which enable security to be demanded from the keeper of a printing press, are not inconsistent with the fundamental right of freedom of speech and expression conferred by Art. 19 (1) (a) of the Constitution. The taking of security is not something alien and repugnant to the concept of the freedom of the press. The word 'expression' in Art. 19 (1) (a) does not give an implied right to the writers and authors to obtain the services of printers to enable them to reach the widest possible public. Even if it be assumed that these clauses impose a restriction on the fundamental right possessed by the printer they are part of the law relating to seditious libel and therefore, are saved by Art. 19 (2) of the Constitution, In re, Bharati Press, **52 Cri LJ 309: ILR 30 Pat 31: AIR 1951 Pat 12 (19, 20, 21, 23, 24, 28, 29) (Pt D) (Prs 11, 12, 17 to 19, 30, 32, 35) (SB).**

3. Sub-section (1), Cl. (d).

● **——S. 4 (1) (d) — Government established by law — Government of majority party — Section, if has application to present Government.**

Since Independence, conditions have changed and the form of Government at the Centre and in all the Provinces is now the democratic form of Government. The party commanding the majority in the Legislature is the party in power and forms the ministry A Government is a Government of the majority party, but that does not make it any the less a Government by law established in British India. Whilst that party maintains a majority it remains in power and whilst it is in power it is the lawful Government of the Centre or of the Provinces. Though the Government is a Government by members of the majority party, the Government as such has its existence quite apart from the party. A criticism of the Government in power in any Province is a criticism of the Government by law established in that Province, though incidentally it may be a criticism of the policy of the majority party. The fact that the form of Government at the Centre and in the Provinces has changed does not make the Press Act inapplicable. That being so it cannot be contended that S. 4 of the Press Act can have no application to Government as constituted in the present day. In the Matter of "Saptaha", **54 Cal WN 334: ILR (1951) 1 Cal 1: AIR 1950 Cal 444 (447) (Pt A) (Prs 12, 13) (SB).**

● **——S. 4 (1) (d) and Explanation 2 — Criticism of measures with view to obtain their alteration — Such criticism, if can come within mischief of section — Section criticised in light of changed conditions.**

Though the object of the critic may be merely to obtain the alteration of the measures criticised by lawful means, nevertheless, the matter may come within the mischief of the section if the criticism excites or attempts to excite hatred,

contempt or disaffection towards the Government. It was a matter of considerable difficulty to apply this section to criticism of measures of Government before India obtained Independence. But since Independence and the adoption of a democratic form of Government it is practically impossible to place a construction on S. 4 of the Press Act which will not stifle a good deal of legitimate criticism of Government. The right to criticise is inherent in a democracy. The opposition are entitled, and indeed it is their duty in proper cases, to expose the misdeeds or acts or omission of the Government in power and this they are entitled to do with a view to winning over the electorate so that the Government in power will be thrown out and the opposition placed in power after securing a majority in an election. However, if the words in S. 4 of the Press Act are strictly applied then newspapers supporting the opposition to the Government in power are muzzeld and can indulge in nothing but very mild criticism. Further, opposition newspapers might find it difficult to publish facts concerning the Government which wre true because the publication of such facts might well tend to bring the Government into hatred or contempt or to excite disaffection against such Government. In the Matter of "Saptaha", **54 Cal WN 334: ILR (1951) 1 Cal 1: AIR 1950 Cal 444 (448) (Pt C) (Prs 20, 21) (SB).**

● **——S. 4 (1) (d) — Truth of what is stated in article and purpose of writing, if material.**

It is quite immaterial whether what is stated in an article is true or not provided that the tendency of the article is to excite hatred and contempt of Government or disaffection towards Government. Further, the purpose of writing the article is also immaterial. In the Matter of "Saptaha", **54 Cal WN 334: ILR (1951) 1 Cal 1: AIR 1950 Cal 444 (449) (Pt D) (Prs 25, 26) (SB).**

● **——S. 4 (1) (d) — Writer charging Provincial Governments with wicked, callous and inhuman conduct — Article held came within section.**

A writer charged the Provincial Governments with conduct which could only be described as wicked, callous and inhuman. According to the writer they deliberately allowed detained political prisoners, who were ill, to remain without treatment and thus hastened their death and deliberately withheld medical treatment from such political prisoners if they were injured by any aggressive action on the part of the prison or police authorities. They were also charged with causing hardship and even starvation to the relatives of such prisoners:

Held, that though the article was intended as a criticism of the Provincial Government it did exceed the bounds of fair and legitimate criticism and did tend to excite hatred and contempt and disaffection towards Government. The article, therefore, fell within the provisions of S. 4 (1) (d). In the Matter of "Saptaha", **54 Cal WN 334: ILR (1951) 1 Cal 1: AIR 1950 Cal 444 (450, 451) (Pt E) (Prs 32, 33, 34) (SB).**

● **——S. 4 (1) (d) — Police sentiment and surrounding circumstances, if can be considered.**

Per Banerjee J.:— In applying the Act to any article appearing in a newspaper, the Court will take into consideration the public sentiment and the surrounding circumstances to find out whether the words used in the article tend, directly or indirectly, to bring into hatred or contempt the Government established by law in the land or to excite disaffection towards it. In the matter of "Saptaha", **54 Cal WN 334: ILR (1951) 1 Cal 1: AIR 1950 Cal 444 (455) (Pt H) (Pr 63) (SB).**

● **——S. 4 (1) (d) — 'Disaffection" — Term explained.**

Per Banerjee J.:— The word "disaffection" signifies political alienation or discontent, that is to say, a feeling of disloyalty to the existing Government, which tends to a disposition not to obey, but to resist and subvert the Government. In the Matter of "Saptaha", **54 Cal WN 334: ILR (1951) 1 Cal 1: AIR 1950 Cal 444 (457) (Pt I) (Pr 82) (SB).**

● **——S. 4 (1) (b), (d) and (h) — Provisions must be liberally interpreted in favour of subject — Incitement to violence or disorder is not essential for offence of sedition — Reasonable criticism of Government not leading to hatred, contempt or disaffection, is permissible — Penal Code (1860), S. 124-A.**

The similarity of the phraseology employed in Section 124-A, Penal Code, Rule 34 (6) (e), Defence of India Rules, and Cl. (d) of S. 4 (1), Press (Emergency Powers) Act, shows that the offence of sedition described in the Penal Code has for its ingredients the same elements which constitute a prejudicial act within the meaning of Rule 34 (6), Defence of India Rules, and these ingredients are also common to the mischief envisaged by Cl. (d) of Section 4 (1), Press Act. In other words, if the utterance of a person is seditious it may also amount to a prejudicial act and may be taken as tending to bring into hatred or contempt or excite disaffection towards the Government. In England it has been held that in order to constitute sedition the words, etc., must evoke such a degree of hatred or contempt or excite so much disaffection that public disorder or violence may result. The Indian law of sedition, however, is not so liberal and it has been held that incitement to violence or disorder is not an essential ingredient of the offence of sedition. The provisions of the Press Act must be interpreted liberally and in favour of the subject. The section taken and read as a whole is not to be regarded as intended to minister to the mere vanity or susceptibilities of the Government or its officers but permit reasonable criticisms, comments and ventilation of grievances although the same may generate or excite some amount of resentment or disapprobation against the Government provided that such resentment or disapprobation does not generate or excite the more intense or deeper passion of hatred, contempt or disaffection. To put the same thing in another way, the hatred, contempt and disaffection made culpable by the section must, in its intensity and depth, be more than a mere feeling of resentment or disapprobation which is generated by legitimate comments, criticisms or ventilation of genuine grievances. The explanations to S. 4 clearly contemplate and indicate that one may strongly criticise without being hateful, may severely comment without being contemptuous or may openly disapprove without being disaffectionate.

(**Held,** that none of the passages objected to amounted to anything more than reporting of news or permissible criticism of Governmental policy). In the Matter of Newspaper — "The Daily Pratap", **51 Pun LR 356: 51 Cri LJ 725: AIR 1950 East Punj 150 (152, 154) (Pt A) (Prs 10, 11, 20) (SB).**

● **——S. 4 (1) (d) and (h) — Falsity of news is not sufficient to bring it within mischief of Cl. (d) — Reference to past history, though necessary does not fall within mischief of either Cl. (d) or Cl. (h).** In the Matter of Newspaper

"The Daily Pratap". **51 Pun LR 356: 51 Cri LJ 725: AIR 1950 East Punj 150 (152, 154) (Pt B) (Prs 13, 19) (SB).**

● ——**Ss. 4 (1) (a) and 3 (3)** — Validity—The provisions are not repugnant or inconsistent with the Constitution but are saved by reservations contained in Constitution of India, Art. 19 (1) and (2). See Press (Emergency Powers) Act (23 of 1931), S. 3 (3). **AIR 1951 Mad 70 (SB).**

● ——**S. 4 (1) (d) — Validity — Constitution of India, Art. 19 (1) (a) and (2).**

Section 4 (1) (d) as it stands amounts to a restriction on the "freedom of speech and expression" guaranteed to the citizen under Article 19 (1) (a) and must be held to be an unconstitutional limitation not warranted by Art. 19 (2) of the Constitution. Srinivasa Bhat v. State of Madras, **64 Mad LW 82: (1951) 1 Mad LJ 115: AIR 1951 Mad 70 (73, 93) (Pt D) (Prs 5. 49) (SB).**

——**S. 4 (1) (d)** — Prosecution for publication and distribution of unauthorised pamphlet — Prosecution has to prove that pamphlet is news sheet containing matter covered by S. 4 (1) (d) — Scope of S. 4 (1) (d) — Intention to cause hatred and contempt not necessary — Actual effect of words enough. See Press (Emergency Powers) Act (1931), S. 18. **51 Cri LJ 241: AIR 1950 Mad 27.**

● ——**S. 4 (1) (d) — "To bring into hatred or contempt the Government established by law".**

The words "to bring into hatred or contempt the Government established by "law" connote something more than mere criticism of the various branches of administration with a view to improve them and not with a view to overthrow the Government itself. The hatred or contempt preached must be of such a nature as to excite a feeling tending towards overthrow of the existing system of Government. Where in booklet no hatred or contempt has been preached against the Government itself and the booklet read as a whole leaves only one impression namely, the lapses of the followers of Mahatma Gandhi since they actually came into power and it depicts how they have neglected the great ideal of selfless service and how they have indulged in self-seeking and self-profiteering the book does not bring itself within the mischief of S. 4 (1) (d). AIR 1939 Cal 529 (FB), Rel. on; AIR 1950 Sau 1 and AIR 1948 Lah 6 (FB), Refd. Chanderdeo Sharma v. State of Bihar, **52 Cri LJ 799: AIR 1951 Pat 75 (79) (Pt A) (Pr 24) (SB).**

● ——**S. 4 (1) (d)—"To bring into hatred or contempt the administration of justice."**

The phrase "to bring into hatred or contempt the administration of justice" connotes something as one preached during the time of the non-co-operation movement when the followers of the movement openly used to preach disregard of the Court of law. This and similar actions might be called acts which bring into hatred or contempt the administration of justice. But the suggestion that the appointment of Judges should be taken out of the hands of the executive authority and be placed in the hands of judicial authority is not such a statement as to bring it within the purview of S. 4 (1) (d). So also where a booklet deals more with the interference by members of the Congress party in judicial matters rather than the failing of the Judges and refers to some Judge, having been influenced, does not amount to bringing into hatred or contempt the administration of justice in the Dominion of India: AIR 1918 Cal 988 (SB) and AIR 1932 Cal 547; AIR 1918 Mad 1210 (SB) and AIR 1942 Lah 105 (FB), Distd. Chanderdeo Sharma v. State of Bihar, **52 Cri LJ 799: AIR 1951 Pat 75 (80) (Pt B) (Pr 25) (SB).**

● ——**S. 4 (1) (d) — (Criticism of individual).**

(Per Sarjoo Prasad J.):— The fact that a booklet purports to be a bitter satire and at places it even degenerates into scurrilous and personal attacks on individuals by itself does not amount to bringing into hatred or contempt Government established by law in the State or the administration of justice therein. A mere criticism of man and measures or of the persons running the administration, however, bitter that criticism may be and even if the criticism is misguided, does not necessarily amount to bringing into contempt the Government of the State or the administration of justice. Chanderdeo Sharma v. State of Bihar, **52 Cri LJ 799: AIR 1951 Pat 75 (82) (Pt D) (Pr 34) (SB).**

——**S. 4 (1) (d), (f) — Validity — Constitution of India, Art. 19 (1) (a) (2).**

Clause (1) (d) of S. 4 is inconsistent with the fundamental right of freedom of speech and expression guaranteed by Art. 19 (1) (a) of the Constitution and does not come within the purview of the saving legislation contemplated by Cl. (2) of Art. 19. Every news sheet which brings into hatred and contempt Government does not necessarily undermine the security of the State or tend to overthrow it and as the clause is capable of including within its ambit many news sheets which may bring into hatred and contempt the Government but at the same time not undermine the security of the State or tend to overthrow it, the clause cannot be held to come within the limits of the permissible legislation under Cl. (2) of Art. 19. The same argument applies with greater force so far as the validity of sub-clause (f) of S. 4 (1) is concerned. Every Act of interference with the administration of law and the maintenance of law and order does not necessarily undermine the security of the State or tend to overthrow it. Clauses (d) and (f) of S. 4 (1) have ceased to be operative in view of the present Constitution: AIR 1950 SC 124; AIR 1950 SC 129, Foll.; AIR 1951 Mad 70 and AIR 1951 Pat 12, Rel. on. **1952 Cri LJ 506: AIR 1952 Sau 25 (28) (Pt A) (Pr 6) (DB).**

● ——**S. 4 (1) (d)** — Article merely making a suggestion that influential persons in Saurashtra take advantage of their influence and are employed in the Public Service Commission — Article held did not come within section. Bhanushankar L. Joshi v. The State, **(1950) 3 Sau LR 103: 52 Cri LJ 859 : AIR 1950 Sau 1 (1) (Pt A) (Pr 3) (SB).**

● ——**S. 4 (1) (d)** — Criticising management of Food Department — Gist of criticism being that part of grain stored had deteriorated and that people had suffered for want of foodgrain — Criticism not directed generally against Government — Article though expressed in flowery language and giving exaggerated account held did not come within section. Bhanushankar L. Joshi v. The State, **(1950) 3 Sau LR 103: 52 Cri LJ 859: AIR 1950 Sau 1 (2) (Pt B) (Pr 4) (SB).**

● ——**S. 4 (1) (d)** — Criticism of Government for failure to protect people against robberies committed by outlaws though expressed in strong language held did not come within section. Bhanushankar L. Joshi v. The State, **(1950) 3 Sau LR 103: 52 Cri LJ 859: AIR 1950 Sau 1 (2) (Pt C) (Pr 5) (SB).**

●——S. 4 (1) (d) — Criticism must be against Government and not merely against Ministers — Article criticising Ministers for their boastings and policy, though strongly worded, held could not be said to bring into hatred or contempt Government established by law. Bhanushankar L. Joshi v. The State. **(1950) 3 Sau LR 103: 52 Cri LJ 859: AIR 1950 Sau 1 (2) (Pt D) (Pr 6) (SB).**

●——S. 4 (1) (d) — Cartoon merely depicting a picture that police department of Saurashtra is too small to check number of outlaws, held, did not come under section. Bhanushanker L. Joshi v. The State. **(1950) 3 Sau LR 103: 52 Cri LJ LJ 859: AIR 1950 Sau 1 (2) (Pt E) (Pr 7) (SB).**

●——**S. 4 (1) (d) — Incitement to people to rebellion, if necessary to bring publication within section — Penal Code (1860), S. 124-A — Travancore Newspapers Act (5 of 1101), S. 5 (i) — Travancore Penal Code S. 117.**

To constitute sedition or, more properly, to bring a newspaper publication within the mischief of the section it is enough if it is proved that the publication tends to or is likely to create feelings of disaffection, hatred or contempt towards Government and not necessarily to incite people to rebellion. But on the point as to what would constitute disaffection towards a Government or hatred or contempt of a Government there is considerable scope for speculation especially where forms of Government are changing and the freedom of the press and the platform are in a state of flux. The Court's only function is to apply the law as it is and not to embark on any discussion as to how it can be improved upon or modified in anticipation of any change — political, constitutional or legal. Rama Kurup v. U. S. of Travancore-Cochin. **1949 KLT 27: 1949 TCLR 190: 51 Cri LJ 1536: AIR 1950 Trav-Co 83 (85) (Pt C) (Pr 3) (FB).**

●——**S. 4 (1) (d) — Article attempting to lower Minister in public estimation — Penal Code (1860), S. 124-A — Travancore Newspapers Act (5 of 1101), S. 5 (i) (a) — Travancore Penal Code S. 117.**

An article which attempts to lower a Minister in the estimation of the public is libellous of the Minister but not seditious of Government. Rama Kurup v. U. S. of Travancore-Cochin. **1949 Ker LT 27: 1949 TCLR 190: 51 Cri LJ 1536: AIR 1950 Trav-Co 83 (92) (Pt D) (Pr 18) (FB).**

●——**S. 4 (1) (d) — Attack on Ministry if attack on Government — Penal Code (1860), Section 124-A — Travancore Newspapers Act (5 of 1101), S. 5 (i) (a) — Travancore Penal Code, Section 117.**

The question whether Ministers form the Government depends in each case upon the provisions of the relevant statute under which the Ministries are constituted and not upon any innate defect in the legal constitution of Ministries in general.

A Government in connection with the offence of sedition denotes the person or persons authorised by law to administer executive Government in the State. In the constitution of Government under the Travancore Interim Constitution Act the Ministers form such an integral part of it that one cannot be divorced from the other. Therefore, the Council of Ministers represent the Government under the Interim Constitution Act and an attack on the Ministry is an attack on Government for purposes of sedition under the Newspapers Act and S. 117, Travancore Penal Code. Rama Kurup v. U. S. of Travancore-Cochin, **1949 Ker LT 27: 1949 TCLR 190: 51 Cri LJ 1536: AIR 1950 Trav-Co 83 (92, 93) (Pt E) (Prs 19, 20) (FB).**

4. Sub-section (1), Cl. (f).

●——**S. 4 (1) (f) — Newspaper article advocating revolution.**

Where an article in a newspaper states that the working class and the toiling masses can get hold of power through the path of revolution, the revolution preached is not necessarily a violent revolution. It is open to a writer to suggest that the ordinary revolutionary method is either too slow or not adequate to achieve a particular purpose and that purpose can only be achieved by a revolution. But by advocating revolution, it does not necessarily follow that he is advocating a type of revolution which would come within the mischief of S. 4 (1) (f). **52 Bom LR 275: 51 Cri LJ 829: 1950 Bom Cri Cas 164: AIR 1950 Bom 210 (212) (Pt B) (Pr 7) (SB).**

●——S. 4 (1) (f) — Editor asking readers in strong language to eliminate bad influence existing in country does not necessarily come within mischief of Act. **52 Bom LR 275: 51 Cri LJ 829: 1950 Bom Cri Cas 164: AIR 1950 Bom 210 (213) (Pt C) (Pr 8) (SB).**

●——**S. 4 (1) (f) — Party placing its communist views before people — Court, if can interfere.**

In democracy it is essential that the masses should be politically educated, and they are entitled to know the pros and cons of every political system and every political ideology. And so long as it is legal for a particular party to place its views and its principles before the people, there is nothing in law to prevent the Communists from carrying on propaganda with regard to their own philosophy and to extol its own ideology as against the Socialist or Congress ideologies. Manohar Damodar Patil v. Government of Bombay. **52 Bom LR 275: 51 Cri LJ 829: 1950 Bom Cri Cas 164: AIR 1950 Bom 210 (212, 213) (Pt D) (Prs 5, 9) (SB).**

5. Sub-section (1), Cl. (h)

●——**S. 4 (1) (h) — Non-Bengalis, whether a 'class'.**

In order that persons should form a class there must be a number of common attributes which bind them together to form a kind of unit.

Non-Bengalis can only be said to have one common attribute and that of a negative character, namely, that they are not Bengalis. They are an indeterminate body having no common characteristics of race, religion or language and cannot be described as a 'class' within the meaning of S. 4 (1) (h), Press (Emergency Powers) Act. In the matter of Paschim Banga Patrika. **ILR (1951) 1 Cal 235 (SB).**

●——**S. 4 (1) (h) and Expln. (4) — Article containing attack on Brahmanism — If offensive.**

In deciding whether a newspaper did or did not contain any words of the nature described in S. 4 (1) (h), the Court should consider the writing as a whole in a fair, free and liberal spirit, without attaching undue weight to isolated passages, sentences or phrases. The Court should gather the general effect which the whole composition is likely to produce upon persons who may be normally expected to read the newspaper in question. Flamboyant and exaggerated language and violence of expression ought to be certainly taken into account, but they can never be conclusive in determining whether the writing as a whole falls within the ambit of the enactment.

The Court is not concerned with the tenability of the opinions expressed by the writer of the of

fending article. In all controversial matters, there is bound to be two opposing opinions and it is not the province of the Court to examine the soundness or otherwise of the reasons which the writer may give in support of a particular view. The only question is to find out if there is anything in the article which tends directly or indirectly to promote feelings of enmity and hatred between different classes.

When a writer sets out to ventilate the grievances of a class or community there is ex necessitiae a likelihood of criticising adversely the action of the class or community which is alleged to have an unfair advantage, In all such cases it would be wrong to say that writing which ventilates the grievances of a particular class or community would fall within the mischief of the enactment.

Enmity and hatred are strong words. In a world of conflicting claims, it would be manifestly unfair to characterise every expression of dissatisfaction and every ventilation of grievances as tending to the promotion of enmity and hatred. To point out facts and circumstances to serve as an incentive to unity among the members of one class is not to create hatred or enmity between classes.

As the security provisions of the Press Act are in a sence penal, the benefit of the doubt, if there is any, should always be given to the person against whom action is taken.

One of the articles in question contained an attack on a group composed of Brahmins within the Congress Party, for their alleged unreasonable opposition to the election of a non-Brahmin candidate as the leader of the Congress Legislative Party.

The other article, which was a dissertation on communalism, contained an attack on the system of Brahminism, which according to the writer, had led to the superior position in society of the Brahmins. Nowhere in the article did the writer say that the Brahmins of the present day had actually done anything. His complaint was that the system had in the last several thousand years spread and struck root. The writer stated that he had no hatred against the Brahmins as individuals but pleaded that it was the system which should be destroyed. There was no incitement anywhere of he non-Brahmins to act in any inimical way or to inspire them with hatred against the Brahmins. According to the writer, the only way of destroying the system was for the majority community to cast off their inferiority complex and to cultivate unity, discipline and self-respect:

Held, that first article contained no attack on the entire community of the Brahmins, and could not be described as tending directly or indirectly to promote enmity and hatred between Brahmins and non-Brahmins in general. The second article contained no imputation upon the Brahmins. There was no language to excite or contempt of persons. Explanation 4 covered the case in question. The articles, therefore, did not contain words of the nature described in S. 4 (1) (h). In the matter of Dravidanadu. **63 Mad LW 633: (1950) 2 Mad LJ 189: 1950 Mad WN 861: 1950 Mad WN (Cri) 265: ILR (1951) Mad 8: AIR 1950 Mad 742 (743 to 746) (Prs 3, 5, 8, 9, 11, 12, 14) (FB).**

●——**S. 4 (1) (h) — If ultra vires — Constitution of India, Arts. 13, 19.**

(Per Khosla and Harnam Singh JJ; Kapur J. Dissenting): Section 4 (1) (h) of the Press Act is a law restricting freedom of speech and expression guaranteed by Article 19 (1) (a) of the Constitution. Since Section 4 (1) (h) makes no reference to undermining the security of the State or tending to overthrow it and covers publications which do not undermine the security of the State or tend to overthrow it, it cannot be said that it is directed solely for that purpose. The possibility of its being applied for purposes not sanctioned by the Constitution not being ruled out, it falls outside the scope of authorised restrictions under Article 19 (2) and therefore is ultra vires and void under Article 13 (1). AIR 1950 SC 124, Rel .on.

Per Kapur J. — The test for determining the validity of an Act is not the possibility of the abuse of the power given by law but the present application of it.

Section 4 (1) (h) does not cover cases of mere academic discussion. Inciting hatred or enmity between the different classes of citizens of India is not mere propagation of abstract doctrine but is a deffnite act which must undermine the State and as such Section 4 (1) (h) falls within the authorised restrictions under Article 19 (2) and is not hit by the Constitution. AIR 1950 SC 124, Expl. Amar Nath v. State, **52 Cri LJ 261: AIR 1951 Punj 18 (20, 22, 26, 27) (Pt B) (Prs 8, 22. 46, 49) (SB).**

●——**S. 4 (1) (h)** — Book named 'Now it can be told' narrating some of the events following partition of India and describing riots which took place in West Punjab in which Muslims attacked Sikhs and Hindus — Certain passages containing matter hostile to Dominion of Pakistan and also to Muslim League but no aspersions cast on Muslim citizens of India — Book held did not contain any matter which would promote feelings of enmity or hatred between different classes of Indian citizens and as such did not come within S. 4 (h). Amar Nath v. State, **52 Cri LJ 261: AIR 1951 Punj 18 (20, 22) (Pt D) (Prs 9, 27) (SB).**

●——**S. 4 (1) (h)** —Newspaper articles — Statement therein that one section of community is in greater power than another — Statement cannot be said to create hatred against former — Travancore Newspapers Act (5 of 1101), S. 5 (i) (e). Rama Kurup v. U. S. of Travancore-Cochin, **1949 Ker LT 27: 1949 TCLR 190: 51 Cri LJ 1536: AIR 1950 Trav-Co 83 (95) (Pt H) (Pr 35) (FB).**

6. May issue a notice in writing.

●——**S. 4 (1)— Requirements of section— Statement in notice that all publications contravene all clauses of section if sufficient compliance — Travancore Newspapers Act (5 of 1101), S. 5 (1).**

The requirements of Section 5, Travancore Newspapers Act, would be satisfied by indicating or describing such words whicb in the opinion of Government contravene one or all the several provisions of this section. It is not incumbent on Government when they issue a notice to indicate with precision the respective articles which fall within the mischief of the respective provisions of the section and a statement that all the publications contravene all the several clauses of the section is not insufficient compliance with the statutory requirements of the section. Rama Kurup v. U. S. Travancore-Cochin, **1949 Ker LT 27: 1949 TCLR 190: 51 Cri LJ 1536: AIR 1950 Trav-Co 83 (84) (Pt A) (Pr 2) (FB).**

7. Explanation 2.

●——**S. 4 (1), Expls. II and III — Right to criticise Government — Limits — Penal Code (1860), S. 124-A, Expls. II and III — Travancore**

Newspapers Act (5 of 1101), S. 5 (i) — Travancore Penal Code, S. 117, Expls. II and III.

The law recognises a certain amount of liberty in the citizen to criticise Government with reference to its measures but it was at no time considered to be unlimited. One rule which guarantees liberty is to construe the articles in a liberal spirit and not to over-emphasize any word here or there. The Court will then consider whether there was any deliberate transgression of the limits which the law imposes. Rama Kurup v. U. S. Travancore-Cochin, **1949 Ker LT 27: 1949 TCLR 190: 51 Cri LJ 1536: AIR 1950 Trav-Co 83 (93) (Pt G) (Pr 21) (FB).**

8. Power of High Court to issue writ.

●——**S. 4 (1) (a) and (d) — If invalid as affecting fundamental rights under Art. 19 (1) of the Constitution — Power and jurisdiction of High Court to issue writs to persons living outside its original jurisdiction — Constitution of India (1950), Arts. 19 (1) and (2) and 226.**

Section 4 (1) (d) of the Press (Emergency Powers) Act has to be held ultra vires the fundamental rights conferred under Article 19 (1) of the Constitution. S. 4 (1) (d) cannot be claimed to be consistent with the Constitution, nor could it be said that S. 4 (1) (d) is saved by the reservations relating to permissive legislation contemplated by Article 19 (2) of the Constitution.

Freedom of speech and expression in Art. 19 (1) of the Constitution would include the liberty to propagate not only one's own views but also the right to print matters which are not one's own but have either been borrowed from someone else or are printed under the direction of that person. (1950) SCJ 418; (1950) 2 MLJ 390 and (1950) SCJ 428; (1950) 2 MLJ 431, Followed.

Govinda Menon, J.:— I do not think that Section 4 (1) (a) of the Press (Emergency Powers) Act can be held to be ultra vires in a case where the incitement in question is intended to overthrow by force the State and undermine its security.

Panchapagesa Sastri, J.:— As Section 4 (1) (a) stands at present it cannot be regarded as constitutionally valid as it conflicts with Art. 19 (1) (a) of the Constitution.

Basheer Ahmed Sayeed, J.:— Sections 3 (3) and 4 (1) (a) of the Act are not repugnant of inconsistent with the Constitution but are saved by reservations contained in Article 19 (2) of the Constitution, assuming at the same time that, by reason of the exercise of the powers vested in the State Government under Section 3 (3) the right of "freedom of speech and expression guaranteed by Article 19 (1) (a) is sought to be curtailed or abridged".

Held (by the full Court): The High Court has both the power and jurisdiction to issue the writs specified in Article 226 of the Constitution not only within the limits of its original jurisdiction but throughout the territories of the Madras State. Srinivasa Bhat v. The State of Madras, **64 Mad LW 82: (1951) 1 Mad LJ 115: AIR 1951 Mad 70 (73, 78, 83, 91) (Pt C) (Prs 6, 17, 27, 46) (SB).**

SECTION 7

——**S. 7 (1) — If ultra vires — Constitution of India, Art. 19 (2).**

The Press Act deals with dangerous utterances and provision is made for demanding security from publishers who are likely to indulge in such utterances. It is a legislation touching very closely sedition and matters of that kind and Section 7 (1), Press (Emergency Powers) Act requiring security falls within Cl. (2) of Art. 19 of the Constitution and therefore is not ultra vires. **55 Cal WN 139: 52 Cri LJ 458 (1): AIR 1951 Cal 36 (36) (Pr 4) (DB).**

●——**S. 7 (1) — Section, if void under Art. 13 (1) of Constitution — Constitution of India, Articles 13 (1) and 19 (1) (a).**

Section 7 (1) does not lay down any condition within the ambit of which the District Magistrate may exercise the power to require security to be furnished. This power is consequently an unlimited restriction on the fundamental rights. The section is, therefore, repugnant to Article 19 (1) (a) of the Constitution and has become void under Article 13 (1) after coming into force of the Constitution. Bhanusankar v. State, **1952 Cri LJ 937: AIR 1952 Sau 57 (59) (Prs 7, 8) (FB).**

SECTION 8

● ——**S. 8 (1) — Service of notice on publisher.**

Section 8 (1) requires the Provincial Government to serve notice of the intention to forfeit the deposit not on the publisher of the paper at the time when the notice is served, but on the person who was the publisher at the time the offending article was written. If this were not so, it would be possible for a publisher to avoid forfeiture of a deposit by ceasing to publish immediately after writing a most scathing, unjust and seditious article. In the matter of "Saptaha". **54 Cal WN 334: ILR (1951) 1 Cal 1: AIR 1950 Cal 444 (452) (Pt F) (Pr 38) (SB).**

SECTION 15

——**Ss. 15, 18 — Scope — If offends Art. 19 of the Constitution — (Constitution of India, Articles 19 (1) (a) and 19 (2) (Before and after amendment)).**

Sections 15 and 18 of Act 23 of 1931 provide for the obtaining of a permit by every person who wants to publish any news-sheet and for punishment for making, selling, distributing and keeping for sale, distribution, etc., any unauthorised news-sheet. This is prior restraint or censorship on the publication of news-sheets and amounts to an infringement of the freedom of speech and expression guaranteed under Art. 19 (1) (a). The provisions would, therefore, be valid after the 26th January, 1950, only if they are covered by the saving clause in Art. 19 (2).

The law that is saved by Article 19 (2) is one that relates exclusively, or at least principally, to any of the matters specified therein. The object of the impugned Act is stated to be 'to provide for the better control of the press'. Thus the express object of the Act has nothing to do with the security of the State. Besides, it is only one of the several objects to be achieved by the Act.

Even if it be said that the object behind the impugned provisions was to control matters which may undermine the security of or tend to overthrow, the State, they cannot be said to relate to such matters. The impugned Ss. 15 and 18 are not confined to documents containing only the objectionable matters, but govern all news-sheets regardless of their contents. Merely because they apply to all news-sheets including those containing matters which undermine the security of or tend to overthrow the State, they cannot be said to relate to matters undermining the security, etc., and are not saved by Art. 19 (2). The sections have thus become void on 26-1-1950.

Further the impugned provisions are not even covered by the Amendment in Article 19 (2). It

cannot be said that the restrictions imposed by the sections are reasonable, because Section 15 confers absolute discretion to the District Magistrate to grant or refuse permit to anyone and there is absolutely nothing to guide him in his discretion. Another reason is that the section does not require the District Magistrate to give any reason for his order and no judicial review is provided against it. Therefore, the amendment in Article 19 (2) does not help and does not save the Act from becoming void under Article 13. Case-law referred. **1954 All WR (HC) 334: 1954 Cr LJ 1212: AIR 1954 All 562 (568) (Pt B) (Pr 12) (DB).**

——**S. 15** — Constitution of India, Art. 13 — Invalidity of part of law — Effect — Article 13 (1) does contemplate the judging of the constitutionality of an enactment in parts. If there is inconsistency, the law is void only to the extent of such inconsistency; the other law remains intact. The constitutionality of Ss. 15 and 18 of the Press (Emergency Law) Act, 1931 did not depend upon the constitutionality of the other provisions as the section formed a separate Part of the Act. See Constitution of India, Article 13. **AIR 1954 All 562 (DB).**

——Ss. 15, 18 — Possession of unauthorised news-sheets on 11-6-50 — Conviction under Section 18 on 23-2-1951 — Validity — (Constitution of India, Arts. 19, 20).

Sections 15 and 18 of the Act became void on 26-1-50 as infringing provisions of Articles 19 (1) (a) and 14 and not being saved by the provisions in Article 19 (2), either before or after the amendment, the accused committed no offence by having in his possession the news-sheets on 11-6-1950. Even if the impugned provisions were valid by virtue of the amendment to Art. 19, the applicant could not be convicted for doing the act before the Article was amended. As there is nothing in the amendment to suggest that Article 20 was not to apply or that a person could be convicted for violating an Act that had actually become void but is now deemed not to have become void. It is a well-known principle that no greater retrospective effect should be given to an Act than is warranted by its language. **1954 All WR (HC) 334: 1954 Cr LJ 1212: AIR 1954 All 562 (567, 570) (Pt F) (Prs 9, 10, 15) (DB).**

——Ss. 15, 18 — Validity — (Constitution of India, Art. (14).

It is not necessary that the legislature should have intention to deny the equal protection of the law. Even if this denial results from or arises on the express terms of the statute itself, it is void and if a selection is left to absolute and unfettered discretion of the executive Government with nothing to guide or control its action, it is arbitrary selection. AIR 1952 SC 75; 1952 SCJ 55, Rel. on.

Sections 15 and 18 of the Act contravened Articel 14 of the Constitution as they divided the public into two classes, one of persons who could publish news-sheets without being liable to be punished and the other or others who could not publish news-sheets without such liability. Section 15 itself brought into existence those two classes by directing District Magistrates to permit some persons to publish news-sheets. There was nothing to guide the District Magistrates in putting persons in one class or the other. The consequence was that some persons became liable to be punished for doing an act for which others were not liable. There was thus a denial of the equal protection of laws brought into existence by these provisions and hence they are void under Article 14. Case-law referred. **1954 All WR (HC) 334: 1954 Cr LJ 1212: AIR 1954 All 562 (569) (Pt G) (Pr 13) (DB).**

SECTION 18

●——**S. 18 (1)** — Proceedings instituted under before the commencement of the Constitution of India — If can be proceeded with after the Constitution came into force. See Constitution of India (1950), Art. 13 (1). **52 Cri LJ 860: AIR 1951 SC 128.**

——S. 18 (1) — Search without warrant under Section 16 (2) — Conviction on search report can be ordered.

Even though search and seizure without a search warrant are illegal and a Magistrate cannot pass a forfeiture order on report of such search, he is not prevented from passing an order of conviction on report of such search. AIR 1926 All 188, Rel. on; AIR 1933 Cal 792, Expl. **51 Cri LJ 499: AIR 1950 Ajmer 15 (1) (15) (Pr 4).**

——**S. 18** — Possession of unauthorised news-sheets on 11-6-50 — No offence — Conviction under Section 18 of the Press Act, 1931, on 23-2-1951 — Not valid. See Press (Emergency Powers) Act (1931), S. 15. **1954 Cri LJ 1212: AIR 1954 All 562.**

——**Ss. 18 and 15** — Validity — Sections 15 and 18 of the Act contravened Article 14 of the Constitution as they divided the public into two classes. The consequence was that some persons became liable to be punished for doing an act for which others were not liable. There was thus a denial of the equal protection of laws brought into existance by these provisions and hence they are void under Article 14 — Constitution of India, Article 14. See Press (Emergency Powers) Act (23 of 1931), S. 15. **AIR 1954 All 562 (DB).**

●——**S. 18 (1)** —General Clauses Act — Applicability — Section 6 if applies to laws which have become void by reason of their being inconsistent with Part III of Constitution — Prosecution under, started prior to Constitution is not affected by reason of Section 18 (1) becoming void under Article 13 (1) of Constitution — Constitution of India, Arts. 13 (1), 367, 395. See General Clauses Act (1897), S. 6. **52 Cri LJ 30: AIR 1951 Bom 188 (FB).**

——**S. 18** — Contents of pamphlet in the form of novel items of information to be regarded as such by the ordinary readers — Pamphlet is a news-sheet within S. 2 (6) — Publication of such pamphlet without the previous sanction required by Section 15 would constitute an offence under Section 18 (1) of the Act. See Press (Emergency Powers) Act (1931), S. 2 (6). **1950-51 Cri LJ 1230: AIR 1953 Bom 246 (DB).**

——Ss. 18 and 4 (1) (d) — Prosecution for publication and distribution of unauthorised pamphlet — Prosecution has to prove that pamphlet is news sheet containing matter covered by S. 4 (1) (d) — Scope of S. 4 (1) (d) — Intention to cause hatred and contempt not necessary — Actual effect of words enough.

In a prosecution under S. 18 for publication and distribution of an unauthorised pamphlet, the prosecution need only prove that a document other than a newspaper has been intentionally made and published and that it contains either published news or comments on published news or any matter described in sub-section (1) of S. 4, without obtaining the necessary permission of the Magistrate under Section 15. The main point which falls to be determined is whether the

matters contained in the pamphlet will fall within the purview of Section 4 (1) (d) and whether the pamphlet will constitute an unauthorised 'news-sheet'. And while determining this fact it is to be noted that sub-section (1) (d) of S. 4 does not mention anything about the intention or motive in publishing such words, etc., but simply says that the document in question should contain words, signs or visible representations which tend directly or indirectly to bring into hatred or contempt the Government established by law. Thus, it is the effect of the contents of the document, the objective aspect, that is covered by S. 4 (1) (d), and not the intention or motive or the subjective aspect or the mens rea in uttering or publishing those words.

(Decisions as to what constitutes "sedition" held not applicable on this point).

In this case, the accused was prosecuted in respect of a certain pamphlet in which he attacked the Congress Governments in the country. He contended that his object was not to bring the Government into hatred and contempt but to bring about a reform of the Congress organization by making Congressmen think deeply over the principles and policies of Mahatma Gandhi. It was held that the motive or intention of the accused was immaterial.

Politicians exceeding the limits laid down by the law take the risk of being convicted for offences under the law, as they have been all through the ages. Nor can they ask Courts dealing with a particular pamphlet under S. 18 to read all their prior pamphlets to see the purity of their motives and their burning desire to reform the Government of the land. **62 Mad LW 588: (1949) 2 Mad LJ 300: 51 Cri LJ 241: 1949 Mad WN 834: AIR 1950 Mad 27 (28, 29) (Prs 4, 7).**

SECTION 19

●——S. 19 — Notification under — Statement of grounds.

All that Section 19 requires is that the notification must state the grounds upon which the order of forfeiture is based and it is sufficient compliance with this requirement if the relevant clause of Section 4 (1) is mentioned in this case, Section 4 (1) (h), so that upon a reference to it, at once becomes clear why the notification ordering the forfeiture of the book was issued. It is not necessary to set out in full the reasons and the grounds for making an order under S. 19. Amar Nath v. State, **52 Cri LJ 261: AIR 1951 Punj 18 (19) (Pt A) (Pr 6) (SB).**

SECTION 23

●——S. 23 — Madhya Bharat Press (Emergency Powers) Act (60 of 1950), S. 24 (1) — Order for deposit of security under Section 3 (3) — Appln. under S. 24 (1) — Maintainability.

Under S. 24 (1) the High Court has been given the power of setting aside any order passed by the Government on the footing that a certain article or publication comes within the mischief of Section 4 (1) whether it is merely of demanding security under Section 3 (3) or under S. 7 (3), or it is of forfeiture under Sections 4, 6, 8, 10 or 20 of the Act, if the High Court is of the opinion that the article or the publication does not contain words of the nature described in Section 4 (1). Consequently an application under S. 24 (1) is maintainable against an order demanding security under S. 3 (3) from the keeper of a press. Ram Dayal Singh v. State of Madhya Bharat, **AIR 1951 Madh Bha 116 (117) (Pt B) (Pr 9) (SB).**

●——Ss. 23 and 24 — Application under S. 23 before a Special Bench constituted under S. 24— Special Bench has no jurisdiction to consider the question as to validity of Section 4. See Press (Emergency Powers) Act (23 of 1931), Section 24. AIR 1951 Mad 70 (SB).

●——Ss. 23 and 4 (1) — Notice specifying that the offending pamphlet was of the nature described in Cl. (a) to S. 4 (1) — Objection in notice referring to entire pamphlet and not to any particular words or passages used — Court has power under Section 23 to enquire whether the offending pamphlet comes under any other clause of Section 4 (1) even though it is not mentioned in the notice — Defect in frame of notice of such character is of no consequence. See Press (Emergency Powers) Act (1931), S. 4 (1). 52 Cri LJ 309: AIR 1951 Pat 12 (SB).

[**Reversed** on another point in AIR 1952 SC 329.]

●——S. 23 — Where the order under Section 19 Press (Emergency Powers) Act was notified in the Bihar Gazette before the Constitution of India came into force, the validity of the order cannot be called into question with reference to a higher right granted to a citizen of the Indian Union by the Constitution. See Constitution of India Art. 13. 52 Cri LJ 799: AIR 1951 Pat 75 (SB).

SECTION 24

●——Ss. 24, 23 — Special Bench — Jurisdiction of — Question as to validity of S. 4 — If can be raised.

Per Panchapagesa Sastri J. — In an application under Section 23 praying that certain orders demanding security might be quashed, the jurisdiction of the Special Bench constituted under Section 24 is limited to a consideration of the question whether the extracts complained of did not fall within the scope of Section 4 (1) and the Court has no jurisdiction to consider the question of the constitutionality of Section 4 of the Act. Srinivasa Bhat v. State of Madras, **64 Mad LW 82: (1951) 1 Mad LJ 115: AIR 1951 Mad 70 (73) (Pt F) (Pr 7) (SB).**

SECTION 28

●——S. 28 — Service of notice by affixing a copy on press — Copy of offending pamphlet mentioned in schedule to notice not attached to copy of notice — Omission does not affect validity of notice itself — Irregularity, if any, does not vitiate legality of order demanding security when there is no prejudice from such omission. In re Bharati Press, 52 Cri LJ 309: ILR 30 Pat 31: AIR 1951 Pat 12 (13) (Pt A) (Pr 5) (SB).

[**Reversed** on another point in AIR 1952 SC 329.]

PRESS (OBJECTIONABLE MATTER) ACT (50 of 1951)

PREAMBLE

——Pre. — Penal Code, S. 292 — Section 292 is not impliedly repealed by Press (Objectionable Matter) Act (1951) — (General Clauses Act (1897), S. 26) — (Constitution of India, Art. 254) — (Interpretation of Statutes — Repeal — Implied repeal — 'Repugnancy' — (C. P. C. (1908), Preamble). See Penal Code (1860), S. 292. 1956 Cri LJ 415: AIR 1956 Punj 85 (DB).

SECTION 1

——S. 1 — Constitution of India, Arts. 19 (1) (a) and (g), (2) and (6) — Provisions of Press (Ob

jectionable Matter) Act — Provisions are in interests of decency and morality — Provisions are reasonable restrictions in interests of general public. See Constitution of India, Art. 19 (1) (a). **AIR 1955 Mad 498 (DB).**

SECTION 2

——**Ss. 2 (c), 23 and 4** — Dismissal of application filed by Commissioner of Police under Section 4 — Right to prefer appeal — Competent authority is the Commissioner of Police and no additional power was required to be conferred upon him by another notification. See Press (Objectionable Matter) Act (1951), S. 23. **1956 Cri LJ 864: AIR 1956 Bom 447 (DB).**

SECTION 3

——**S. 3 (v)** — Complaint under — Previous detention and release under Preventive Detention Act for publishing an article — Complaint under Section 3 (v), 4 and 7 read with S. 16 of the Press (Objectionable Matter) Act that the editor should furnish security — Objection that it was punishment for same offence — **Held,** there was neither prosecution nor punishment for writing the article when he was detained — Therefore Art. 20 of the Constitution was not contravened for same offence. See Constitution of India, Art. 20 (2). **1954 Cr LJ 549: AIR 1954 Ajmer 19.**

——**S. 3 (v) — Validity — (Constitution of India, Arts. 13 and 19).**

The matter for anything which promotes feelings of enmity or hatred between different sections of the people of India something which is likely to affect the interests of public order in asmuch as it may lead to a riot, commotion or commission of other offences. Section 3 (v), therefore does not offend Article 19 (1) (a) as it is saved by Clause (2) of the Article. The section is therefore not ultra vires the Constitution and void under Art. 13. **1954 AMLJ 74: 1954 Cr LJ 549: AIR 1954 Ajmer 19 (20) (Pt A) (Pr 4).**

——**S. 3**—'With a view to their removal—Words pointing out matters which are producing or have a tendency to produce feelings of enmity or hatred are not to be deemed objectionable matters as this pointing out of the matters is done with a view to their removal. **1954 AM LJ 74: 1954 Cr LJ 549: AIR 1954 Ajmer 19 (21) (Pt E) (Pr 9).**

——**S. 3 (v) — Applicability.**

The article in paper which amounted to virtual Incitement to Hindus to act as Balochis were acting in Baluchistan amounted to an 'objectionable matter'. **1954 Cri LJ 549: 1954 AMLJ 74: AIR 1954 Ajmer 19 (21) (Pt G) (Pr 12).**

——**S. 3, Expl. I — Objectionable matter — Meaning — Criticism of Government policy — Offence.**

Explanation I appended to S. 3 makes it clear that criticism of any policy or administrative notice of the Government, if done with a view to obtain an alteration of the policy or a redress by lawful means, does not amount to an 'objec tionable matter' within the meaning of S. 3. Where the main purpose of the writer of an article in a newspaper was to disapprove the conduct of the Government and of the police authorities in acting in an alleged high-handed manner and there was nothing in the words to suggest an incitement or encouragement to violence or promotion of feelings of enmity, the article cannot be held to be an "objectionable matter' within the meaning of S. 3. **1958 Cri LJ 7: AIR 1958 All 29 (20) (Pt A) (Pr 1).**

——**S. 3 — Duty of prosecuting agency.**

If a person is charged of having published 'objectionable matter' it is the duty of the complainant or the prosecution agency to indicate clearly the matter alleged to be 'objectionable matter' so that he may be able to explain the matter or show the circumstances under which it was written as also the possible effects of it, **1958 Cri LJ 7: AIR 1958 All 29 (30) (Pt B) (Pr 2).**

●——**S. 3 (v) — 'Capitalist' and 'Capitalism'.**

The words 'capitalism or capitalist' do not denote any determinate section of people so as to attach the application of Cl. (v) of S. 3 to such cases. (Section 3 (v) held had no application to the case). AIR 1949 EP 305 (SB); AIR 1951 Pat 12 (SB), Rel. on. Gopal Das v. State of Assam, **1954 Cri LJ 1570: ILR (1954) Assam 399: AIR 1954 Assam 193 (197) (Pt B) (Pr 7) (SB).**

●——**S. 3 — Explanations — Principle of — Advocacy of revolution for removal of administrative ills — Article has to be read as whole.**

The underlying principle of the Explanations is that the document has to be freely and fairly construed and mere criticism of a particular system or policy or administrative measure, even if couched in harsh, exaggerated or indiscreet language, should not be held to be objectionable unless it definitely incites or is likely to lead to violence. To see if the document is offensive, as such, one has to read the document as a whole. The Courts, in a case of this kind, have to put themselves, as far as possible, in the place of a jury and to take a broad view without refining overmuch any particular words or phrases used in the document. The Court should in every such case consider the book or newspaper article as a whole and in a fair, free and liberal spirit, not dwelling too much upon isolated passages or upon a strong word here and there which may be qualified by the context, but endeavouring to gather the general effect which the whole composition is likely to produce on the mind of the reader.

There is nothing in law to prevent a particular party in placing its philosophy and programme before the public, so long as it does not directly or indirectly incite violence or subversion of the Government established by law. A party may even criticise the machinery of the State, may suggest that the old State machine is bound by thousands of threads to the bourgeois and permeated through and through with routine and inertia and, therefore, that machine has to be destroyed and replaced by a new one. This need not necessarily lead to the inference that the author advocates violent revolution.

The word 'revolution' itself need not be a bugbear in the present age and conjure up all those hideous images of blood and carnage in the mind with which it was wont to be associated earlier. With the advance of political knowledge and consciousness, revolution may mean nothing than a rapid and radical change of ideas and ideals necessistating reorientation of the society, polity and the State machinery on the lines of those changes. All this may come about without resort to violence.

Held, on consideration of the book as a whole that it did not fall within definition of 'objectionable matter' under S. 3 (1), that the booklet was mere thesis on the virtues of socialism. It sought to analyse the various evils of society, attributed all those evils to capitalistic exploitation and suggested that the only panacea was socialism. It, therefore, placed for the introduc-

tion of socialism with the utmost speed and expedition and thus advocated an all-round revolution in the country. There was nothing either directly or indirectly to indicate that this revolution must be brought about by violent means. Many of the criticisms which were levelled against the prevailing conditions of society and politics at the time when the booklet first came into being had been out-dated and that it was impossible to find fault with the discussions in the book on the ground that they did or were likely to incite or encourage violence and that much of the criticism of administration was saved by the explanation to the section. AIR 1950 Bom 210 (SB), Ref. Gopal Das v. State of Assam, **1954 Cr LJ 1570: ILR (1954) Assam 399: AIR 1954 Assam 193 (197, 200, 201) (Pt C) (Prs 7, 9, 11) (SB).**

——S. 3 — Scope — Matter to be considered.

In ascertaining the scope of S. 3, two considerations arise. The first is the freedom of the press and the other is the limits within which the freedom of the press may be allowed to be enjoyed. These two considerations are set out in the section and the explanations attached to the section. **1956 Cri LJ 704: ILR (1956) Bom 305: 58 Bom LR 75: AIR 1956 Bom 357 (358) (Pt A) (Pr 6) (DB).**

——S. 3 (v) — Scope — Principles.

In considering the question whether a given article comes under S. 3 (v) in the first place, one has to read the writing quietly and attentively. The writing is to be read as a whole and not merely isolated passages here and there. It is not right to pick up a strong expression here and a strong expression there. The general tenor and the drift of the writing is to be considered. The Court, is not concerned with the correctness or otherwise of the views expressed by the writer. AIR 1916 Bom 9, Rel. on. **1956 Cr LJ 704: ILR (1956) Bom 305: 58 Bom LR 75: AIR 1956 Bom 357 (359) (Pt B) (Pr 8) (DB).**

——S. 3 (v) and Expln. I — Applicability.

To say that the Muslims as community are inheritors to the tradeition (Alamgiri traditions) of imprisoning fathers, assassinating brothers and having immoral intentions towards sister-in-law and of betrayals, rapes and lust; to say that it would have been an anti-human motherhood, in that the wife would have nursed and reared the Alamgiri traditions of rapes and betrayals of women with her blood and flesh; and to say that for a Hindu women to marry a Muslim was a betrayal of womanhood, a betrayal of nation, a betrayal of one's self and a betrayal of humanity are all statements per se inflamatory of communal hatred. To accuse the Muslims as a community that they detain women in purdah, regard them merely as a thing of enjoyment and to characterise the marriage of a Hindu with a Muslim as being a marriage which raises a question of communal strife and represents as conflict between truth and falsehood, good and bad, God and Devil, sin and merit, are statements calculated to arouse the passions of the Muslims generally and exasperate the Muslim community. Statements such as those saying that the ways of the Muslim harem are infernal, that Pakistan is Papastan (the literal meaning being 'the abode of sin'), that the wife had got the dreadful experience of Islam and would have become the mother of unborn generations of 'inconclasts' (idol-breakers), that the Muslims are a fanatic nation of Papastanm, that the flame of Islam was intolerent and that the burning water of Islam had been sprinkled upon the Hindu body of the wife cannot lead to any other result, but communal tension, hatred and bitterness.

Held, that the article fell clearly within the mischief of S. 3, Cl. (v); the article would not be protected by Expln. I to S. 3. **1956 Cri LJ 704: ILR (1956) Bom 305: 58 Bom LR 75: AIR 1956 Bom 357 (362, 364) (Pt C) (Prs 15, 23) (DB).**

——S. 3 (vi) — Obscene — Test.

The test of obscenity is this, whether the tendency of the matter charged as obscene is to deprave and corrupt those, whose minds are open to such immoral influences, and into whose hands a publication charged as obscene may fall. (1868) 3 QB 360, Foll. In considering whether a publication is obscene, the class of persons who are likely to read such a publication must also be taken into consideration. In applying the test, one has also to consider the effect which the book would produce on an ordinary average person, and not on a person with depraved mentality. A publication cannot be said to be obscene merely because it deals frankly with sex matters, provided of course, that the language used is not such as to excite sensual feelings or give rise to thoughts of lust. **ILR (1955) Bom 932: 1956 Cri LJ 206: 57 Bom LR 952: AIR 1956 Bom 32 (32, 33) (Prs 2, 3) (DB).**

——S. 3 (5) — Validity — Competency of Parliament to enact S. 3 (5) — (Constitution of India, Art. 246, Sch. VII, List III, Entry 39).

Where the question is of the trespass of one Legislature upon the powers of another, the proper approach is to consider the pith and substance of the legislation. The pith and substance of the Press (Objectionable Matter) Act is not public order, but is "newspapers, books and printing presses." The subject of "newspapers, books and printing presses" falls in the Concurrent List under Entry 39. All these entries in the different Lists must be liberally construed and the Legislature must be deemed to have the power and the competence not only to legislate with regard to these topics but with regard to all matters which are subsidiary or ancillary to these topics. In declaring a particular matter appearing in a newspaper or a book as objectionable matter the Legislature was not dealing with "public order" but was dealing with 'newspapers and books" and incidentally with questions of "public order". If a Legislature is legislating on a topic with regard to which it has competence, a mere incidental trespass upon the field of another Legislature will not constitute a trespass which will make the law passed by the former Legislature unconstitutional and even assuming that there is some trespass by Parliament upon the field of the State Legislature, that trespass is a very minor trespass, a very incidental trespass and does not constitute a real encroachment upon the field reserved for the State Legislature. The Parliament was, therefore, competent to legislate with regard to S. 3 (5). **56 Bom LR 709: 1954 Cr LJ 1549: ILR (1954) Bom 1245: AIR 1954 Bom 508 (510, 511) (Pt B) (Prs 9, 10) (DB).**

——S. 3 (6) — Objectionable matter — Interpretation of.

The three 'or's used in Cl. (6) of S. 3 make it quite clear that four distinct kinds of objectionable matters are included in this clause. It may very well he that some scurrilous words may be used wth the intention of blackmailing the persons abused. In that case, the words will be "objectionable matters" within the Act as 'scurrilous' and also as 'intended for blackmail', but that is no reason for thinking that the Legislature intended that any scurrilous words which are in-

tended for blackmail are objectionable matters and not scurrilous words not intended for blackmail. The ordinary grammatical meaning of the words is that, words which are grossly indecent are within the definition; words which are obscene are within the definition; and the words which are intended for blackmail are within the definition of "objectionable matters". **1954 Cri LJ 1427: 58 CWN 497: ILR (1955) 2 Cal 489: AIR 1954 Cal 488 (489) (Pt A) (Pr 6) (DB).**

——S. 3 (v) and Expln. 1 — Scope and applicability — Promoting feeling of enmity between different sections of people of India — Sufficiency — Intention — Penal Code, S. 153-A.

In order to determine whether the impugned article comes within the mischief of S. 3 (v), it is not enough to show that it is likely to promote feelings of enmity between different classes of people but the attending circumstances have to be established by the State Government so that the intention of creating enmity or hatred between different sections can be inferred. AIR 1952 SC 329, Discussed. AIR 1954 Ajmer 19, Not foll.

An article headed "the boat of oppression is bound to sink" was published in an Urdu daily newspaper of which the accused was the editor, printer and publisher.

Held, that though the article in question expresses a disapprobation and criticism of what the author considers to be the communalist policy or administrative action of the Government in strong words yet this is done with a view to obtain its alteration or redress by lawful means; hence, even though the words may have a tendency to produce the feelings of enmity or hatred between the different sections, they cannot be deemed to be objectionable matter within the meaning of S. 3 (v). The investive against oppression, the denunciation of evil acts and the praise of Right and truth with condemnation of communalism, and the statement that the Prime Minister disfavours communalism and the Muslim should strengthen his hands to end it, means clearly that redress by lawful means alone is sought. There is no incitement to violence in the whole article. Thus in this way the article comes under the very words of explanation No. 1 of the Act, and is thus not objectionable. **ILR (1956) Hyd 228: 1956 Cri LJ 1199: AIR 1956 Hyd 151 (152, 153) (Prs 5 to 7, 10) (DB).**

——S. 3 (vi) — Scope — (Interpretation of Statutes).

No doubt certain immediate circumstances might furnish the reason for a particular piece of legislation. But on that ground, it is wrong to construe the actual language used in the enactment in a restricted manner so as to confine it to those special circumstances. It is not permissible to construe a statute so as to confine its operation to incidents and circumstances which the Legislature is supposed to have contemplated that the statute would apply to.

It cannot, therefore, be said that Cl. (vi) of S. 3 does not cover matter which may ordinarily be held to fall within the categories mentioned therein, namely, indecent, obscene etc., but that the clause refers only to one particular type of objectionable matter which concerns, and is directed against, persons in public life, especially holding responsible positions in the Government, because the statement of objects and reasons for the Bill says that this provision was intended to enable the Government to deal with abuse of persons in authority. **(1955) 2 Mad LJ 106: 68 Mad LW 426: 1955 Mad WN 469: ILR (1956) Mad 161: AIR 1955 Mad 498 (500) (Pt D) (Pr 7) (DB).**

——S. 3 (vi) — Obscenity — Test.

The test of obscenity is this: whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall. (1868) 3 QB 360, Foll. If a book has got the effect of inciting libidinous or lustful thoughts, the test would be satisfied, though the author or publisher of the book might not have intended this effect. **(1955) 2 Mad LJ 106: 68 Mad LW 426: 1955 Mad WN 469: ILR (1956) Mad 161: AIR 1955 Mad 498 (501) (Pt F) (Pr 10) (DB).**

——Ss. 3 (vi) and 11 — No action taken in respect of publications of similar nature — Effect.

It cannot be contended in defence to the action taken under the Act that other publications of a very similar nature are in circulation without any action being taken by the State Government under the Act and that they furnish evidence as to the nature of the book in question namely, that it does not come within the category of S. 3 (vi). 1954 All ER 741, Foll. **(1955) 2 Mad LJ 106: 68 Mad LW 426: 1955 Mad WN 469: ILR (1956) Mad 161: AIR 1955 Mad 498 (502) (Pt G) (Pr 15) (DB).**

——S. 3 (vi) — Penal Code, S. 292 — 'Obscene' — Test — The Press (Objectionable Matter) Act (1951) does not provide for punishment for printing and publishing obscene matter but provides only against the repetition of such publication. It is preventive in nature regarding objectionable matters and not penal. Taking the two Acts together it cannot be said that S. 292, I. P. C. cannot be read together with the 1951 Act. See Penal Code (1860), S. 292. **1956 Cri LJ 415: AIR 1956 Punj 85 (DB).**

——S. 3 — If ultra vires — (Constitution of India, Arts. 19 (1) (a) and 19 (2)).

The definition of objectionable matter under S. 3 (vi) of the Act, so far as it includes words which may be grossly indecent, scurrilous or obscene and Ss. 4 and 7 of the Act are within the legislative competence of the Parliament under Cl. (2) of Art. 19 and they embody reasonable restrictions on the fundamental right of freedom of speech and expression. **6 Sau LR 457: 1954 Cr LJ 410: AIR 1954 Sau 28 (30) (Pt A) (Prs 6, 7) (DB).**

——S. 3 (vi) — 'Scurrilous' article.

Viewing nude pictures of women or nude statues may by itself be neither indecent nor obscene for such pictures and statues are oftentimes prized as works of art or are considered to have religious significance. But if in its context with other portions of the passage the allegation is held to impute lewdness, lasciviousness, lustfulness or such other moral depravity to the Ministers it becomes 'obscenely abusive" (The allegation that the Ministers see films of naked women secretly in their residences in the context of allegations of similar acts of immorality being indulged in is grossly or obscenely abusive and must be construed as scurrilous). **1954 Cr LJ 410: 6 Sau LR 427: AIR 1954 Sau 28 (31) (Pt C) (Pr 10) (DB).**

SECTION 4

——S. 4 — Complaint under — Previous detention and release under Preventive Detention Act for publishing an article — Complaint under Ss. 3 (v), 4 and 7 read with S. 16 of the Press (Objectionable Matter) Act that the editor should furnish security — Objection that it was punishment for same offence — **Held** — There was neither prosecution nor punishment for writing the article when he was detained — Therefore

Art. 20 of the Constitution was not contravened — Demand for security was not second punishment for the same offence. See Constitution of India, Art. 20 (2). **AIR 1954 Ajmer 19.**

——Ss. 4, 7 — Evidence.

In an enquiry under the Act all that the Court has to see is not what actual effect the article had, but what effect it was 'likely' to have in the circumstances. **1954 Cr LJ 549: 1954 AMLJ 74: AIR 1954 Ajmer 19 (21) (Pt F) (Pr 10).**

——S. 4 — Sufficient grounds.

Where it was found by the Sessions Judge that the article complained of was objectionable matter and that the respondent had persisted in his course despite warning, the Sessions Judge in taking action against him must have been of opinion that there were sufficient grounds for demanding security and it was not necessary that before demanding security he should have specifically recorded the fact that in his opinion sufficient grounds existed for taking action. **1954 Cr LJ 549: 1954 AMLJ 74: AIR 1954 Ajmer 19 (21) (Pt H) (Pr 13).**

——S. 4 — 'is used' — Interpretation of — Date of application or date of order in appeal.

The expression 'is used' must relate to a time proximate to the time at which the application has been preferred. An appeal filed against the order is nothing but a rehearing of the application under S. 4, and there is no reason for holding that the High Court hearing an appeal must satisfy itself that at the time when it passes an order demanding security the printing press is used for printing or publishing objectionable matter. **1956 Cri LJ 864: 58 Bom LR 295: AIR 1956 Bom 447 (448) (Pt B) (Pr 4) (DB).**

SECTION 7

——S. 7 — Constitution of India, Art. 20 (2) — Applicability and scope— Previous detention and release for writing an article — Complaint under Ss. 3 (v), 4 and 7 read with S. 16 of the Press (Objectionable Matter) Act that the editor should furnish security — Objection that it was punishment for the same offence — Here there was neither prosecution nor punishment for writing the article when he was detained — Therefore, Art. 20 of the Constitution was not contravened. See Constitution of India, Art. 20 (2). **AIR 1954 Ajmer 19.**

——S. 7 — Evidence — In an enquiry under the Act all that the Court has to see is not what actual effect the article had, but what effect it was 'likely' to have in the circumstances. See Press (Objectionable Matter) Act (1951), S. 4. **AIR 1954 Ajmer 19.**

——S. 7 — Sufficient grounds — Consideration of.

No idication is given in the Act itself as to what should be considered to be sufficient grounds for ordering deposit of security. That is left entirely for judicial determination. In this position the consideration of the interest of the country at large can be the only thing that can weigh with the Judge to satisfy him that there are reasonable grounds for ordering deposit of security. On the one hand the Judge has to remember that the interest of a democracy such as our demands that the Press should be free to publish news and views as regards happenings at home and abroad; on the other hand he has to remember that the publication of some news and some views may cause great injury to the interests of the country; and it is only when an apprehended injury to the country by the publication is so great as to outweigh in his judgment the benefit to the country's interest by unrestricted freedom to publish news and views, that the Judge can be satisfied that there are sufficient grounds for an order to deposit security.

While the Courts of law are not ordinarily concerned with the rights or wrongs of the foreign policy that has been pursued by India, they should, for finding a correct answer to the above question, bear in mind the realities of the situation in which India finds itself in the international field.

Held, on the facts of the case, that India's own interest demanded that publication of the news such as in this case, should be prevented and there were, therefore, sufficient grounds for demanding deposit from the publisher.

(Considering however the circulation of the paper and the nature of the objectionable matters the amount of security to be deposited was reduced from Rs. 5,000 to Rs. 2,000). **1954 Cr LJ 1427: 58 Cal WN 497: ILR (1955) 2 Cal 489: AIR 1954 Cal 488 (490) (Pt B) (Prs 9, 11, 14, 16) (DB).**

——S. 7 — Security — Interference — Sufficiency or otherwise of the grounds for taking action against the publisher of a newspaper under S. 4 and S. 7 is primarily one of discretion for the Sessions Judge and Jury — Sessions Judge placing all the circumstances before the Jury — Jury deciding that security should be demanded — Sessions Judge fixing the amount of security on the recommendations of the Jury — High Court will not interfere with the exercise of the discretion. See Press (Objectionable Matter) Act (1951), S. 23. **1954 Cri LJ 410: AIR 1954 Sau 28 (DB).**

SECTION 10

——S. 10 — Amount of security.

Section 10 does not lay down any particular amount as the amount of security and this would be natural because the amount of security must depend upon the facts of each case.

The circulation of the newspaper was about 3,000 copies per week.

Held, that the circulation was fair indication of its popularity. It could not be suggested that a circulation of 3,000 copies was in any sense, a wide circulation, and on the whole, the amount of Rs. 1,500 was excessive and the amount of security should be Rs. 750. **1956 Cri LJ 704: ILR (1956) Bom 305: 58 Bom LR 75: AIR 1956 Bom 357 (360) (Pt E) (Pr 12) (DB).**

SECTION 11

——Ss. 11 and 24 — Order under S. 11 by Assam Government on certificate by Legal Remembrancer — Validity — Validity of S. 11 — (Constitution of India, Arts. 19 (1) (a) (g) and 19 (2)).

The fact that the law does not provide that before passing the order under S. 11, Government should give any notice to the persons affected thereby to show cause against the action proposed to be taken would not necessarily render Section 11 void as imposing an unreasonable restriction on the fundamental rights of freedom of speech and expression or the pursuit of any lawful avocation, provided the safeguards mentioned in the Act are adequate and reasonable.

The very essence of the power under S. 11 is that it should be exercised promptly and expeditiously. There must be, however, ample and reasonable check upon this power of the execu-

tive and so long as there is some ultimate judicial corrective on the exercise of the power, it cannot be held to be unreasonable. It must, therefore, be seen whether there are such safeguards, if any, and whether those safeguards are real and substantial or merely illusory.

The two safeguards provided by the Act itself are that the Governor cannot act under S. 11 unless the Principal Law Officer or the Advocate-General of the State, as the case may be, or the Attorney-General of India cerifies that the offending booklet or pamphlet contains 'objectionable matter' and the other, that under Section 24 of the Act the person aggrieved by the order of Government can move the High Court against that order within sixty days of the date of such order. If these safeguards are real, then it must be held that the restrictions imposed on the fundamental rights of speech and expression by virtue of S. 11 are reasonable restrictions and the provision would be saved under Art. 19 (2) of the Constitution.

So far as Assam is concerned, Advocate General of Assam is the Principal Law Officer of the State. The Legal Remembrancer is not. Moreover, it is only in the States where there is no Advocate-General, e.g., Part C States, that the certificate of the Principal Law Officer is required. But where there is an Advocate-General the certificate must be from him. The words 'as the case may be' which qualify the disjunctive terms, the 'Advocate-General' or the 'Principal Law Officer of the State' clearly show that they have reference only to those States where there is no Advocate-General.

Where, therefore, the Government of Assam issues an order under S. 11, upon a certificate by the Legal Remembrancer of the State, the order of forfeiture is illegal and ultra vires S. 11. The certificate of the Advocate-General is the very foundation of the jurisdiction conferred on the Governor or, for the matter of that, on the Government of the State, to make the order of forfeiture under S. 11 of the Act, and there being no such foundation for the order, it cannot stand.

Obiter:— Ordinarily, under the General-Clauses Act, a notification in the Official Gazette would be, in law, deemed to be sufficient notice, specially where the notification is of a general character intended for the members of the public, and not for any particular set of individuals. In the absence of any provision in the law for any service of notice of the order on the person aggrieved it is possible to conceive of cases where the period of limitation may run out without any knowledge of the order passed against him, and, as such, he may be deprived of his remedy to move the High Court against the order in question. It is essential in such cases to provide for service of the order containing the Government declaration upon the persons affected thereby, in particular, upon the author of the document and the printer and the publisher thereof.

(High Court, however, refrained from expressing any final opinion in the matter and from declaring on this ground, that Sec. 11 of the Act is ultra vires Article 19 (1) (a) and (g) of the Constitution). Gopal Das v. State of Assam. **1954 Cr LJ 1570: ILR (1954) Assam 399: AIR 1954 Assam 193 (195, 196) (Pt A) (Prs 3, 4, 6) (SB).**

——S. 11 — Validity — (Constitution of India, Arts. 19 (1) (a) and 19 (2)).

While giving the power to the executive under Section 11 to pass an order of forfeiture, the Legislature has provided for the opinion of a law officer as a corrective and also the decision of the High Court as a judicial corrective. Therefore, the exercise of the power under Section 11 is not arbitrary and the restriction upon freedom of speech and expression is not an unreasonable restriction. **56 Bom LR 709: ILR (1954) Bom 1245: 1954 Cr LJ 1549: AIR 1954 Bom 508 (509) (Pt A) (Pr 5) (DB).**

——S. 11 — No action taken in respect of publications of similar nature and that they furnish evidence as to the nature of the book in questions, namely that it does not come within the category of Section 3 (vi) is no defence to the action taken under the Act. See Press (Objectionable Matter) Act (1951), S. 3 (ii). **AIR 1955 Mad 498 (DB).**

——S. 11 — Notification not specifying nature of objectionable matter — Objection to notification.

Though the notification may be said to be defective in that it does not specify the nature of the objectionable matter contained in the book, the notification cannot be objected to on that ground if the petitioner was not taken by surprise, as where he is obviously aware on what ground the Government has declared that it contains objectionable matter. **(1955) 2 MLJ 106: 68 Mad LW 426: 1955 Mad WN 469: ILR (1956) Mad 161: AIR 1955 Mad 498 (500) (Pt A) (Pr 6) (DB).**

——Ss. 11 and 24 — Notice before notification — Necessity of.

The objection that no notice was given to the petitioner before the notification was published is without force, in view of the ample safeguard provided by Section 4 of the Act to canvass the correctness and propriety of the action of the Government by applying to the High Court which is given the power to examine the case on the merits. **(1955) 2 Mad LJ 106: 68 Mad LW 426: 1955 Mad WN 469: ILR (1956) Mad 161: AIR 1955 Mad 498 (500) (Pt B) (Pr 6) (DB).**

——S. 11 — Petitioner if entitled to copy of certificate given by Advocate-General.

A petitioner is not entitled to a copy of certificate given by the Advocate-General, as that is only required as a condition precedent to the taking of action by the Government. Of course, in a particular case, if it is alleged that no certificate of the Advocate-General had been obtained by the Government, then it is for the Government to prove that such a certificate was given. **(1955) 2 Mad LJ 106: 68 Mad LW 426: 1955 Mad WN 469: ILR (1956) Mad 161: AIR 1955 Mad 498 (500) (Pt C) (Pr 6) (DB).**

——S. 11 — Prosecution under Section 292, I. P. C. does not amount to evasion of S. 11 of Press (Objectionable Matter) Act, 1951 — That does not repeal any provisions of Penal Code and is no bar to a prosecution under Section 292, I. P. C. See Penal Code (1860), S. 292 **AIR 1953 Mad 418.**

SECTION 16

——S. 16 — Previous detention for an article published —Complaint by Magistrate under Sections 3 (v), 4 and 7 read with Section 16 of the Press (Objectionable Matter) Act — Demand for security for same offence — Objection that it was punishment for same offence — Held, previous detention was neither prosecution nor punishment — Article 20 (2) of the Constitution not contravened. See Constitution of India, Art. 20 (2). **1954 Cri LJ 549: AIR 1954 Ajmer 19.**

SECTION 18

——S. 18 (2) — Procedure — On a complaint under Section 3, 4 and 7 of the Press (Objectionable Matter) Act it is an enquiry and not a trial and that the person proceeded against is a respondent and not an accused should not be lost sight of. The procedure laid down in Chapter 20, Cr. P. C. made applicable by S. 18 (2) to an enquiry under Press O. M. Act will not apply in its full vigour but only its general principles will apply. See Criminal P. C. (1898) S. 247. **1954 Cri LJ 549: AIR 1954 Ajmer 19.**

——S. 18 — Examination of complainant not necessary. See Criminal P. C. (1898), S. 244. **1954 Cri LJ 549: AIR 1954 Ajmer 19.**

——**S. 18 (2) — Procedure — Applicability of S. 247, Cr. P. Code to enquiries.**

Since the wording of Section 117 (2), Cr. P. Code and the wording of this section are similar there is no reason why 28 Cr. LJ 479 should not be applied to cases falling under this Act and it be held that Section 247 of the Cr. P. Code does not apply to enquiries under this Act. Consequently the case is not one where a certificate under Article 134 (1) (c) could be granted on the ground that Section 247, Cr. P. Code was wrongly applied to the enquiry. **1954 Cr LJ 1022: AIR 1954 Ajmer 41 (42) (Pt B) (Pr 5).**

SECTION 19

——S. 19 — Examination of complainant not necessary. See Criminal P. C. (1898), S. 244. **1954 Cri LJ 549: AIR 1954 Ajmer 19.**

SECTION 22

——**S. 22 — Scope.**

Section 22, evidently means that in order to appreciate the true nature and effect of the article impugned, it is open to the Court to look at any previous or subsequent issue of the newspaper. **1956 Cr LJ 704: ILR (1956) Bom 305: 58 Bom LR 75: AIR 1956 Bom 357 (360) (Pt D) (Pr 10) (DB).**

SECTION 23

——**Ss. 23, 2 (c) and 4 — Right to appeal — Dismissal of application under S. 4 — Competent authority to appeal.**

By a notification of the Government of Bombay, dated 1st February, 1953, the Commissioner of Police for Greater Bombay is empowered to exercise the powers of a competent authority under Sections 4, 5, 6 (2), 7, 8 and 17 of the Act. Therefore, where it was the Commissioner of Police who filed the application under Section 4 of the Act and on the dismissal of that application the appeal also had been preferred by the Commissioner of Police:

Held, that the Commissioner of Police being a competent authority the right to prefer an appeal must be regarded as having been conferred upon him by the Legislature and no additional power was required to be conferred upon him by another notification before he could exercise that right. **1956 Cr LJ 864: 58 Bom LR 295: AIR 1956 Bom 447 (448) (Pt A) (Pr 3) (DB).**

——S. 23 — Limitation Act, Ss. 5, 29 (2), Article 155 — Applicability — Appeal under Press (Objectionable Matter) Act filed beyond 60 days — Section 5 held not applicable. See Limitation Act (1908), S. 5. **1956 Cri LJ 864: AIR 1956 Bom 447 (DB).**

——S. 23 — Right of appeal under — State has no right of appeal against order. **AIR 1955 NUC (Bom) 5327 (DB).**

——**S. 23 — Scope.**

Case before High Court in appeal — High Court has full power under Section 23 to deal with the matter and vary the order as it may deem fit. **6 Sau LR 457: 1954 Cr LJ 410: AIR 1954 Sau 28 (30) (Pt B) (Pr 8) (DB).**

——**Ss. 23 and 7 — Security — Interference.**

The question whether there are sufficient grounds for taking action against the publisher of a newspaper under Sections 4 and 7 is primarily one of discretion for the Sessions Judge and the jury. Where in the charge to the jury the Sessions Judge had fairly placed all the circumstances before them for their consideration, but the jury nevertheless expressed the opinion that security should be demanded from the accused and the Sessions Judge accepted their opinion, and fixed the amount of the security on the recommendation of the jury, the High Court will not interfere with the exercise of their discretion. **6 Sau LR 457: 1954 Cr LJ 410: AIR 1954 Sau 28 (31) (Pt D) (Pr 11) (DB).**

SECTION 24

——S. 24 — Notice under Section 11, Press (Objectionable Matter) Act by Assam Government on certificate by Legal Remembrancer — In view of the two safeguards provided in the Act in Section 11 and S. 24 it must be held that the restrictions imposed on the fundamental rights of speech and expression by virtue of Section 11 are reasonable restrictions and the provisions would be saved under Art. 19 (2) of the Constitution. See Press (Objectionable Matter) Act (1951), S. 11. **1954 Cri LJ 1570: AIR 1954 Assam 193 (SB).**

——S. 24 — Notice before notification — Necessity of. See Press (Objectionable Matter) Act (1951), S. 11. **AIR 1955 Mad 498 (DB).**

SECTION 37

——S. 37 (2) — Scope — The provisions as to any restriction of printing, publication or distribution of any newssheet or book or document as contained in the Assam Maintenance of Public Order Act, 5 of 1947 stood repealed by virtue of Section 37 of Press (Objectionable Matter) Act, 1951. The Assam Act 5 of 1947 was brought in time with the Press Act and by an amendment, Clause (f) of Section 8-B thereof was deleted. That being so, charge under Section 11 of the Assam Act 5 of 1947 cannot be sustained against the petitioners and the proper procedure for the authorities would be to take appropriate action under the Press (Objectionable Matter) Act which also applies to the Autonomous Districts of Assam. See Public Safety — Assam Maintenance of Public Order Act (5 of 1947), S. 8-B (f). **1960 Cr LJ 319: AIR 1960 Assam 43 (DB).**

PRESUMPTION

See Statutory cross-references under (1) "Evidence" and (2) "Negotiable Instruments".

PRESUMPTION OF INNOCENCE

See (1) Criminal P. C. (1898), Ss. 367 and 423.
(2) Evidence Act (1872), Ss. 101 to 104.

PREVENTION OF CORRUPTION ACT (2 of 1947)

SECTION 1

——S. 1 — Applicability to Gwalior — Railway lands at Mandsaur — Retrocession of to former Gwalior State — Gwalior State laws — Applicability — Whether law in force in retroceded territory from November, 1947 to May, 1948. See Gwalior Railway Lands Ordinance (S. M. 2004), Pre. **1957 Cr LJ 189: AIR 1957 Madh B 58 (DB).**

——S. 1 (d) — Trap cases — Caution to be taken — Simply saying that currency notes were found somewhere in house of public servant cannot attribute possession to him — Courts have to be satisfied that notes were put there by him or at his instance — Penal Code (1860), S. 161. **1962 MPLJ (Notes) 211.**

SECTION 2

● ——**S. 2 — Chairman of managing committee of municipality — If public servant.**

The Chairman of the managing committee of a municipality is a public servant within the meaning of the section as he has power under Rule 68 framed under the Bombay District Municipal Act, 3 of 1901 to expend money of the municipality on payment of bills for fixed recurring charges and therefore comes within the tenth Clause of Section 21 of the Penal Code. Maharudrappa Danappa Kesarappanavar v. State of Mysore, **1961 SCD 270: (1962) 1 SCR 129: 1962 Mad LJ (Crl) 284: (1962) 1 SCJ 454: (1962) 1 SCA 513: 1961 (1) Cr LJ 857: 39 Mys LJ 464: 1961 All WR (HC) 348: 1961 All Cr R 196: (1961) 2 Lab LJ 402: AIR 1961 SC 785 (788) (Prs 4, 5).**

● ——**S. 2 — Railway servant — If public servant — (Railways Act (1890), S. 137) (Before amendment in 1955) — (Penal Code (1860), Section 21).**

What Section 137 (4) of the Railways Act provides is that if a railway servant is charged for an offence under the Penal Code and the said offence is outside Ch. 9 of the Code he cannot be treated as a public servant. In respect of offences which are outside the Penal Code neither sub-section (1) nor sub-section (4) of Section 137 of the Railways Act would apply. The effect of Section 2, of the Prevention of Corruption Act is that the status of accused persons has to be determined by the application of Section 21, of the Penal Code as if the said section had been included in the Act. Person employed by a Railway owned and managed by the Government of India is a public servant within the meaning of Section 21 of the Penal Code. ILR (1955) Punj 9; AIR 1954 Punj 187; 1954 Cr LJ 1290, **Overruled;** AIR 1956 SC 476 and AIR 1957 SC 13, Not followed. P. R. Choudhary v. State of U. P., **1959 Mad WN (SC) 41: 1959 Cr LJ 1497: 1960 All WR (HC) 1: 1960 All Cr R 24: 1960 Mad LJ (Cr) 78: 1960 SCJ 122: ILR (1959) 2 All 336: (1960) 1 SCR 200: AIR 1959 SC 1310 (1312) (Prs 7, 8, 9).**

● ——**Ss. 2 and 5 (1) (d)** — Scope — Person employed as chaser in Railway carriage workshop is a public servant. See Penal Code (1860), S. 21 (9). **1957 Crl LJ 1: AIR 1957 SC 13.**

——**S. 2 — Public Servant — Railway servant — (Penal Code (1860), S. 21).**

Having regard to Section 2, Prevention of Corruption Act, read with Section 21, Penal Code, a Railway servant is a public servant within the meaning of Act 2 of 1947, and proceedings may be taken against him under the Act. Criminal Appeals Nos. 374 and 376 of 1954 (All) Foll. **1956 Cr LJ 687: AIR 1956 All 358 (361) (Pt A) (Pr 24).**

——**S. 2** — 'Public servant' — Railway servant — Status of — He could be deemed to be a public servant for purpose of Chap. 9 of Penal Code. See Penal Code (1860), S. 161. **1957 Cr LJ 1127: AIR 1957 Ker 134 (DB).**

——**S. 2** — Public servant — Sarpanch of Gram Panchayat holding an office under the provisions of the M. B. Village Panchayat Act is a public servant — (Penal Code (1860), Sections 21, 161). **Madh BLJ 1955 HCR 1703: Madh BLR 1955 Crl 335: 1956 Cr LJ 227: AIR 1956 Madh B 51 (52) (Pt C) (Pr 10).**

——**S. 2** — Public servant — Municipal employee — Assistant in Laboratory of Municipal Committee of Simla is a public servant— (Penal Code (1860), S. 21) — (Municipalities — Punjab Municipal Act (3 of 1911), S. 19). **AIR 1955 NUC (Punjab) 459 (DB).**

——**S. 2** — 'Public Servant' — Railway Servant Committing offence under Section 408, Penal Code — Applicability of Act — Under S. 137 Railways Act (1890), a railway servant is deemed to be a public servant for purposes of Chap. 9 of Penal Code which consists of Sections 161 to 171 only — For offences under S. 408, I. P. C. he cannot be called a public servant — No question of application of Prevention of Corruption Act arises as he is not public servant within the meaning of S. 2 of that Act. See Railways Act (1860), S. 137. **1954 Crl LJ 1290: AIR 1954 Punj 189 (DB).**

[**Overruled** in AIR 1959 SC 1310.]

SECTION 3

● ——**S. 3, Proviso, S. 5 (4)** — Investigation by Police Officer — Non-compliance with provisions of Act — Objection cannot be raised in appeal by Special Leave before Supreme Court for first time — Conviction not vitiated by such compliance. Din Dayal Sharma v. State of U. P., **1959 All LJ 470: 1959 All WR (HC) 403: 1959 SCJ 922: 1959 Mad LJ (Cr) 599: 1959 All Cr R 319: 1959 Cr LJ 1120: (1959) Supp (2) SCR 776: AIR 1959 SC 831 (832) (Pt A) (Pr 3).**

● ——**Ss. 3 and 6** — Taking cognizance — What amounts to — Issue of warrant for arrest by Magistrate under Section 3, Prevention of Corruption Act, does not amount to taking cognizance. See Criminal P. C. (1898), S. 190. **52 Crl LJ 775: AIR 1951 SC 207.**

● ——**S. 3, Proviso — Scope — Authority to investigate.**

(Brij Mohan Lall, J., in the order of reference) :— Ordinarily an officer below the rank of a Deputy Superintendent of Police is not to conduct the investigation. But an exception is possible if sanctioned by a Magistrate of the first class. Raja Ram v. State, **1953 All LJ 644: 1953 All WR (HC) 657: 1954 Cr LJ 438: ILR (1954) 1 All 379: AIR 1954 All 204 (205) (Pt A) (Pr 3) (FB).**

——**S. 3** — Offence under Section 161, Penal Code — Investigation by officer not authorised under proviso to Section 3, Prevention of Corruption Act — Proceedings cannot be called in question by virtue of Section 156 (2), Cr. P. C. See Criminal P. C. (1898), S. 156. **52 Cr LJ 197: AIR 1951 All 546 (DB).**

——**Ss. 3, 5-A, 5 (2), 5 (1) (c) and (d) — Criminal P. C. (1898), Ss. 155 (2), 4 (n), 4 (f) — Offences under S. 5 are cognisable offences by virtue of Section 5-A, under all circumstances — Applicability of S. 155(2), Cr. P. C.**

Of the four offences to which Section 5-A is applicable Section 161 and Section 165 of I. P. C. are cognisable by virtue of Schedule II, Cr. P. C. Originally they had been shown as non-cognizable in the schedule to the Cr. P. C. but made cognizable by Section 3 of the Prevention of Corruption Act. Section 165-A, I. P. C., was made cognizable by virtue of the provision of Section 3 of the Act. Still, Section 5-A expressly applies to those three offences which are cognizable offences unconditionally and under all circumstances. It is obvious that they cannot be treated as non-cognizable offences when investigated by an officer below the rank of Deputy Supdt. of Police simply on the ground that such investigation cannot be done without the order of a Presidency Magistrate or a Magistrate of the First Class. In the same way, offence under Section 5 of the Act cannot be treated as non-cognizable even when investigated by a low rank officer. Thus, the provision in Section 5-A is of the nature of a special provision which applies to offences specified therein which are cognizable offences including those under S. 5 under all circumstances.

Under Section 155 (2), Criminal P. C. a non-cognizable case cannot be investigated without the order of a Magistrate specified in that section. It cannot be said that the converse principle also must hold good as a law in force namely, that if a case cannot be investigated without the order of a specified Magistrate then it is a non-cognizable case. Section 155 (2), Cr. P. C. applies to every non-cognizable case and does not apply to every non-cognizable offence.

Section 5 (2) of the Prevention of Corruption Act is a cognizable offence under Schedule II of the Cr. P. C. and it is on the same footing as Section 161 and Section 165, I. P. C., as they stand after amendment by Cr. P. C. Amendment Act 26 of 1955. Cognizable offences under Section 161 or Section 165, I. P. C. and a cognizable offence under Section 165-A, I. P. C., which is made specifically cognizable by Section 3 of the Act, stand as cognizable, unaffected by the provision in S. 5-A of the Act.

In the same way, offence under Section 5 (2) stands cognizable under Sch. II of the Criminal Procedure Code unaffected by the provision in Section 5-A of the Act. AIR 1957 Madh Bha 43, Expl.; AIR 1959 SC 707 and AIR 1955 SC 196, Rel. on. Offence under Section 5 (2) of the Prevention of Corruption Act is a cognizable offence whether it is investigated by Officer of rank not below Deputy Superintendent of Police or by Police Officer of lower rank with valid order of a Magistrate under Section 5-A and there is no need for an order of a competent Magistrate under Section 155 (2), Cr. P C. apart and distinct from an order contemplated by Section 5-A of the Act. **(1965) 2 Andh WR 44: 1965 Mad LJ (Cr) 489: 1965 (2) Cri LJ 585: AIR 1965 Andh Pra 372 (377) (Pt A) (Prs 7, 8) (DB)**

——S. 3, Proviso — Proper interpretation of — Officer carrying investigation or arrest without warrant, below rank of Deputy Superintendent of Police — He should obtain order of 1st Class Magistrate. **AIR 1955 NUC (Assam) 2795.**

——S. 3 — Offence under is cognizable — Section 5-A. does not limit its nature. See Criminal P. C. (1898), S. 4 (1) (f). **1962 (2) Cri LJ 598: AIR 1962 Bom 263 (DB).**

——Ss. 3, 5-A — Fact that investigation in Presidency town of Bombay is to be by police officer not below Superintendent of Police, does not make offence non-cognizable — First information and investigation — Admissibility of first information — (Criminal P. C. (1898), Sections 154, 157). See Penal Code (1860), S. 165-A. **1958 Cri LJ 481: AIR 1958 Bom 125 (DB).**

——S. 3, Proviso — Non-compliance — Effect.

The effect of the proviso to Section 3, Prevention of Corruption Act, is that Section 156, Cr. P. Code, is made inapplicable to investigation of an offence under Section 161 of the Penal Code.

The failure to comply with the mandatory provisions of the proviso to Section 3 of the Prevention of Corruption Act is not a mere irregularity but an illegality, the effect of which is that the entire proceedings based on the charge-sheet reported by the officer who was not competent to investigate must fail and must be quashed. 52 Cr LJ 197 (All) Diss. from. **1953 Cr LJ 556: AIR 1953 Cal 226 (226) (Prs 2, 4) (DB).**

[**Overruled** in AIR 1956 Cal 56 in so far as it decided that the entire proceedings in Court would be vitiated in such circumstances.]

——S. 3, Proviso (as it stood before amendment) — Sanction for investigation — Sanction accorded by Magistrate First Class under S. 155 (2), Criminal P. C. — Validity — (Criminal P. C. (1898), Ss. 4 (1) (f) and 155 (2)).

In effect the Proviso to Section 3 makes an offence under Section 161 or 165, Penal Code cognizable to a limited extent and still retains it in the region of non-cognizable offences in so far as police officers below the rank of a Deputy Superintendent of Police are concerned. In that view, a Magistrate, First Class can, under Section 155 (2) of the Criminal P. C., grant sanction to such police officer to investigate into an offence under S. 161, Penal Code.

All that the Proviso to Section 3, Prevention of Corruption Act, requires is an order of a Magistrate of the First Class. However, it does not seem necessary that a Magistrate of the First Class making such an order must expressly say that he is acting under the proviso. In this view, a sanction accorded by a Magistrate First Class under S. 155 (2), Criminal P. C. is also referable to and can be sustained under the Proviso to S. 3 of the Prevention of Corruption Act, since he had the power to do the identical thing under the Proviso.

Where there was material before the Magistrate on which he could base his order it would be legitimate to infer that the sanction to investigate given by him was so given after due consideration of all the relevant matters. AIR 1955 SC 196, Ref. **1957 Nag LJ 329.**

——S. 3 — Permission to investigate — Form of.

Section 3 does not require the permission to be in any particular form, nor even to be in writing. Further, Illustration (e) appended to Section 114, Evidence Act, provides that the Court may presume that judicial and official acts have been regularly performed. In the illustration the words 'regularly performed' mean done with due regard to form and procedure.

Thus where no objection was raised in the trial Court that the permission to investigate given under Section 3 was defective or that the Magistrate did not consider the facts of the case before granting the permission and hence the Magistrate was not examined as witness in the trial, the objection taken in appeal could not be sustained. **1955 Cr LJ 609: 56 Punj LR 260: ILR (1954) Punj 75: AIR 1955 Punj 65 (73) (Pt A) (Pr 32) (DB).**

——S. 3 — Procedure — Court which should try.

In cases where a public servant is tried for an offence of corruption under the Prevention of Corruption Act and Section 161, Penal Code it is only right that an accused person should be tried not by a Section 30 Magistrate but by a judicial officer of the standing of the District and Sessions Judge. **AIR 1952 Punj 53 (55) (Pt D) (Pr 9).**

——**S. 3** — Criminal P. C. (1898), S. 4 (1) (f) and Sch. II — 'Under any law for the time being in force' — Offence under Section 161 read with Section 116 Penal Code is cognizable. See Criminal P. C. (1898), S. 4 (1) (f). **AIR 1956 Raj 37.**

——**S. 3** — Scope — Offence under S. 161 read with Section 116, Penal Code is cognizable. See Criminal P. C. (1898), S. 4 (1) (f). **AIR 1955 NUC (Raj) 4672.**

——**S. 3, Proviso** — Investigation by D. S. P. — D. S. P. making F. I. R to Sub-Inspector — Sub-Inspector sending up charge-sheet — Sub-Inspector not making investigation — Proviso to Section 3 held complied with — (Criminal P. C. (1898), S. 4 (1). **AIR 1955 NUC (Sau) 4690 (DB).**

——S. 3, Proviso — Investigation — (Cr. P. Code, (1898), S. 4 (1)).

Deputy Superintendent of Police laying trap — Accused caught while accepting bribe — Panchanama arranged by Deputy Superintendent of Police — Deputy Superintendent present at scene of offence with Police party — Accused arrested after searching him and recovering marked currency notes from his person — Investigation held substantially conducted by Deputy Superintendent of Police although he had lodged the formal first information before Sub-Inspector of Police for launching prosecution. **6 Sau LR 216: 1954 Cr LJ 688: AIR 1954 Sau 62 (63) (Pt C) (Pr 6) (DB).**

——Ss. 3, Proviso, 5-A — Non-compliance — Effect.

The failure to comply with the Proviso to Section 3 is not a mere irregularity coming within the saving provision contained in sub-s. (2) of Section 156, Cr. P. Code, but it amounts to an illegality vitiating the entire proceedings. The position will be still stronger in the case of a violation of the mandatory provision contained in Section 5-A, Prevention of Corruption Act, as amended in the year 1952. In view of the express exclusion of the general provision contained in Cr. P. Code, there is no scope for contending that an infringement of the mandate contained in Section 5-A would be saved by sub-section (2) of Section 156, Cr. P. Code. Any such infringement would undoubtedly be an illegality. 1953 Cr LJ 556 (Cal) and AIR 1953 Cal 226; AIR 1954 Punj 42, Rel. on. **1954 Cr LJ 1604: 1954 Ker LT 455: ILR (1954) TC 856: AIR 1954 Trav-Co 492 (494) (Pt A) (Pr 4) (DB).**

SECTION 4

SYNOPSIS

(Prevention of Corruption Act (2 of 1947), S. 4)

1. Acceptance of gratification.
2. Burden of proof.
3. Presumption under.
4. Rebuttal of presumption by accused.
5. Constitutional validity of the section.

1. Acceptance of gratification.

——S. 4 (1) — 'Gratification' — Mere payment of money.

The mere payment of money is gratification within the meaning of Section 4 (1); it does not mean a reward or recompense or gratuity. Under Section 4 (1), therefore, the prosecution has not to establish anything more than mere payment of money. AIR 1958 SC 61 and AIR 1951 All 546, Foll.; AIR 1959 Bom 30, Dissented from. **1960 Cr LJ 1050: AIR 1960 All 470 (472) (Pt B) (Pr 10) (DB).**

——S. 4 — 'Gratification' — Meaning of, stated.

Voluntary acceptance of an amount of money or a valuable thing by a public servant will not amount to acceptance of gratification. **1959 Cr LJ 1421: AIR 1959 Bom 543 (DB).**

——S. 4 — "For any other person" — Unconscious bearer.

Even if one accepts a gratification or a valuable thing for any other person he comes within the plain meaning of the words of the section but an unconscious and unknowing transmitter or bearer would not come within the section There must go along with the idea of acceptance a conscious mind that the gratification or the valuable thing is for another person before such acceptance can come within the operation of the section. **52 Cri LJ 1116: 88 Cal LJ 14: ILR (1952) 2 Cal 243: AIR 1951 Cal 524 (527) (Pt B) (Pr 20) (DB).**

——S. 4 (1) — Acceptance of gratification — Presumption — Nature and scope of — Rebuttal of presumption — Burden of proof must be discharged by proof in accord with S. 3, Evidence Act.

The word 'gratification' in Section 4 (1), must be given its literal dictionary meaning. In the case of a public servant when it is shown that he has received a certain sum of money, which was not a legal remuneration, condition prescribed by Section 4 (1) is satisfied and the presumption must be raised by the Court as mentioned in that section. Once this presumption is raised, the burden of rebutting that presumption is on the accused and this burden cannot be said to have been discharged merely by an explanation offered by the accused, which explanation might be reasonable and probable For discharging the burden, the accused, besides offering an explanation, which, may be reasonable and probable, must show that the explanation is a true one and for that purpose it must be borne in mind that the presumption has to be rebutted by proof and not by a bare explanation, which is merely plausible. In this context the Court must bear in mind the definition of the word 'proved' occurring in S. 3 of the Evidence Act. **(1963) 4 Guj LR 886: ILR (1963) Guj 837: 1964 (2) Cr LJ 291: AIR 1964 Guj 206 (208) (Pr 8) (DB).**

——Ss. 4, 5 (1) — Prosecution under Ss. 4, 5 (1) (d) and (2) of Prevention of Corruption Act —Accused receiving money from complainant not by way of legal remuneration — Presumption under Section 4 that the said money was received by the accused as a reward a motive within the meaning of Section 161, I. P. C. arises against the accused — Presumption can be rebutted by the accused giving a reasonably probable explanation. **1962 Raj LW 421: ILR (1962) 12 Raj 504.**

2. Burden of proof.

——S. 4 (1) — Burden to disprove facts to be presumed — (Evidence Act (1872), Ss. 101 to 104).

Section 4 (1) raises a presumption of law, and it is for an accused person, positively to disprove the facts which the Court has to con-

sider as proved by virtue of that presumption. 1958 Mad LJ (Cr) 299; 1958 SCJ 335; AIR 1958 SC 61, Foll. **1960 Cr LJ 1050: AIR 1960 All 470 (472) (Pt A) (Pr 9) (DB).**

——S. 4 (1) — Presumption under — Burden of proof to disprove presumption.

The burden is on the accused to disprove the presumption arising under Section 4 (1) of the Act and in such a case it is not necessary for the prosecution to affirmatively prove anything more to show that the amount was received by him as a bribe or illegal gratification. **1959 Cri LJ 457: AIR 1959 Ker 88 (93) (Pt A) (Prs 12, 13) (DB).**

——S. 4 — Burden of proof — Dischage of.

Under Section 4 the burden, no doubt, is upon the accused to prove that he came by the amount innocently. But that burden is, unlike the burden resting upon the prosecution, not so heavy. That burden is like one in a civil proceeding discharged by indicating the balance of probabilities. **1956 Cr LJ 227: Madh BLJ 1955 HCR 1703: Madh BLR 1955 Cr 335: AIR 1956 Madh B 51 (53) (Pt E) (Pr 27).**

——S. 4 — Burden of proof.

The presumption under S. 4, arises as soon as the prosecution has proved that the accused has accepted or agreed to accept an amount not covered by the proviso as gratification. If unrebutted and until the contrary is proved, the gratification will be deemed to have been paid or given or received corruptly as inducement or reward as is mentioned in the Act. But in such cases the burden of proof on the accused is less stringent than that laid on the prosecution in proving guilt and corresponds to that which rests upon a plaintiff or defendant who is required to prove an issue in a civil proceeding, i.e., preponderance of probabilities. **1958 Mad WN 561: 1960 Mad LJ (Crl) 552: 1959 Crl LJ 484: AIR 1959 Mad 166 (172) (Pt D) (Pr 26).**

3. Presumption under.

● **——S. 4 (1) — Presumption under — When can be raised — Money paid need not be by way of bribe.**

Paragraph 3 of Section 161 of the Code provides that the word 'gratification' is not restricted to pecuniary gratification or to gratifications estimable in money. What the prosecution has to prove before asking the Court to raise a presumption against an accused person is that the accused person has received a 'gratification other than legal remuneration'; if it is shown that the accused received the stated amount and that the said amount was not legal remuneration then the condition prescribed by the section is satisfied.

Further, the relevant clause in S. 4 (1), which deals with the acceptance of any 'valuable thing' under Section 165, I. P. Code, plainly requires the presumption to be raised, whenever it is shown that the valuable thing has been received by the accused, without anything more. It would be unreasonable to hold that the word 'gratification' in the same clause imports the necessity to prove not only the payment of money but the incriminating character of the said payment. 1958 Raj LW 68; AIR 1957 Raj 138; 1957 Cr LJ 541 and 60 Bom LR 811; AIR 1959 Bom 30; 1959 Cr LJ 34, **Overruled.** C. I Emden v. State of Uttar Pradesh. **1960 Mad WN 233: (1960) 1 Ker LR 413: 1960 SCJ 368: 1960 Mad LJ (Cr) 228: 1960 Cr LJ 729: (1960) 2 SCR 292: AIR 1960 SC 548 (551, 552) (Pt B) (Prs 9, 10).**

● **——S. 4 (1) — Presumption under— Rebuttal by accused — Degree of proof — Whether** Court should accept the explanation given by accused where it is reasonably probable, or should it insist on strict proof — (Quaere). **AIR 1960 SC 548 (552) (Pt C) (Prs 11, 12).**

● **——S. 4 (1) — Scope — Presumption under — When to be raised.**

When there is no indication whatever that any public servant was to be approached or influenced by the accused there can be no question of making a presumption that the payment was as a motive or reward for rendering service with any public servant. State of Ajmer (now Rajasthan) v. Shivjilal. **37 Mys LJ 878: 1959 Mad WN (SC) 72: 1959 All WR (HC) 376: 1959 All Cr R 303: 1959 Cr LJ 1127: 1959 Mad LJ (Cr) 589: (1960) 1 Lab LJ 239: (1959) Supp (2) SCR 739: 1959 SCJ 911: AIR 1959 SC 847 (850) (Pt D) (Pr 7).**

[**Overruled** on another point in AIR 1962 SC 195.]

● **——S. 4 — Nature of presumption under — (Evidence Act (1872), S. 4 — 'Shall presume') — (Interpretation of Statutes — Acts in pari materia).**

The presumption under S. 4, Prevention of Corruption Act, is a presumption of law and it is obligatory on the Court to raise this presumption in every case brought under S. 4. It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on the accused. The legislature has chosen to use the words 'shall presume' and not 'may presume', the former a presumption of law and latter of fact. Both these phrases have been defined in the Indian Evidence Act, no doubt for the purpose of that Act but S. 4 of the Prevention of Corruption Act is in pari materia with the Evidence Act because it deals with a branch of law of evidence, e.g., presumptions, and therefore, should have the same meaning. State of Madras v. A. Vaidyanath Iyer, **1958 SCJ 335: 1958 Mad WN (SC) 34: 1958 Crl LJ 232: (1958) Mad LJ (Crl) 299: 1958 All Crl R 267: 1958 SCR 580: (1958) 1 An WR (SC) 136: (1958) 2 Lab LJ 653: (1958) 1 Mad LJ (SC) 136: 1958 All WR (HC) 371: AIR 1958 SC 61 (64) (Pr 14).**

——S. 4 — Scope of — Presumption — Nature and extent of.

Section 4 only lays down that, if it is proved by the prosecution that the accused did receive gratification, then there will be a presumption that the gratification was received by the accused as a motive or reward as mentioned in S. 161, I. P. Code. Before relying upon the presumption laid down in S. 4 of Act 2 of 1947), the prosecution must prove that the accused accepted or obtained any gratification other than legal remuneration. **1956 All LJ 662: 1956 All WR (HC) 680: 1957 Crl LJ 42 (44) (Pt A) (Pr 16).**

——S. 4 — Presumption under — When can be raised — What prosecution should prove stated. **AIR 1955 NUC (All) 2726.**

——S. 4 — Accused owning large assets — No proof of guilt except in case under Prevention of Corruption Act. **AIR 1955 NUC (All) 386 (DB).**

——S. 4 — Applicability — Charge under Section 5 (1) — Presumption, if can be invoked.

The presumption under S. 4 is also available in cases where the accused is charged under some other section than S. 161, I. P. Code. Section 5 (1) provides for the same type of offence—the gravamen of the charge being the same—as in S. 161, I. P. Code and, therefore, where the accused is charged under S. 5 (1) of the Act, the Court is fully justified in relying upon the presumption available under S. 4. **1953 All Crl R**

1: 1952 RD (HC) 375: 1953 All WR (HC) 4: 1953 Cri LJ 340: 1953 All LJ 193: ILR (1954) 1 All 45: AIR 1953 All 110 (113) (Pt D) (Pr 18).

——Ss. 4, 6, 7 — Applicability to provisions of Penal Code.

Neither S. 6 nor Ss. 4 and 7 make any mention of any other section of the Penal Code and if the accused is, therefore, not charged under Section 161 or 165 of the Penal Code but under certain other sections of the Penal Code, the provisions of the Prevention of Corruption Act would not apply to these sections. **1952 All LJ 21: ILR (1954) 1 All 1: 1952 Cri LJ 236: 1952 All WR (HC) 98: AIR 1952 All 35 (38) (Pt C) (Pr 16) (DB).**

——S. 4 — 'Gratification' — Meaning — Presumption under S. 4 when arises.

The word 'gratification' in S. 4 has been used in the section in its primary dictionary meaning as 'satisfaction' and not in the sense of reward or recompense".

The presumption referred to in S. 4 arises as soon as the prosecution has proved that the accused person has accepted or obtained, or has agreed to accept or attempted to obtain, for himself or for any other person any gratification in the above sense or any valuable thing, from any person provided however illogical it may be that in the former case it has further proved that such gratification was not accepted or obtained or agreed to be accepted or attempted to be obtained, by way of legal remuneration: **1949 All LJ 441: 1949 All Cr C 111: 1949 All WR (HC) 454: ILR (1950) 5 All 382: 52 Cri LJ 197: AIR 1951 Al 546 (547, 548) (Pt B) (Prs 4, 15) (DB).**

——S. 4 (1) — Trial under S. 161, I. P. Code — Statutory presumption of motive of payment ignored — Appeal from acquittal — Acquittal cannot stand — (Penal Code (1860), S. 161). See Criminal P. C. (1898), S. 423. **1959 Cri LJ 1421: AIR 1959 Bom 543 (DB).**

——S. 4 (1) — Presumption under S. 4 when arises indicated — Presumption however is not one which is required to be rebutted by evidence establishing the defence of accused beyond reasonable doubt. See Penal Code (1860), S. 161. **1959 Cr LJ 1421: AIR 1959 Bom 543 (DB).**

——S. 4 — Conditions necessary for raising presumption — Nature of presumption.

It is only when the prosecution has proved that the accused has accepted any gratification other than legal remuneration, the Court shall presume that the accused person accepted that gratification as motive or reward. It is necessary for the prosecution to prove that not merely a payment of money or in kind was made over to the accused but it must be further proved by the prosecution itself that such payment amounted to gratification other than legal remuneration. A mere payment without more would not amount to a gratification other than legal remuneration and if it does not amount to gratification other than legal remuneration there is no scope for raising the presumption under S. 4 of the Prevention of Corruption Act.

Section 4 refers to two offences— one under S. 161 and the other under S. 165, Penal Code The words 'any gratification' in the section must be read with reference to the offence under Section 161 and the words 'any valuable thing' occurring in the section must be read in reference to the offence under S. 165. AIR 1951 All 546, Dissented from; AIR 1951 Cal 524, Rel. on.

If the presumption arises under S. 4 then it is the bounden duty of the accused, on whom the burden of proof is thereafter cast, to show that what was accepted by him as gratification was not as accepted by him as gratification was not as a motive or a reward. But for the purpose of considering whether the amount paid by the complainant to the accused was a gratification or not the case that it tried so be made out by the accused will have some bearing. **ILR (1959) Bom 243: 59 Bom LR 811: 1959 Cri LJ 34: AIR 1959 Bom 30 (32, 33) (Pt A) (Prs 5, 6) (DB).**

[**Overruled** in AIR 1960 SC 548.]

——S. 4 — Presumption and onus — Presumption that accused accepted gratification for corrupt motive arises when prosecution proves beyond reasonable doubt that accused accepted gratification — Burden of displacing presumption is ordinarily on accused, i.e., of raising reasonable doubt — Evidence Act (1872), Ss. 101-103. **AIR 1955 NUC (Cal) 745 (DB).**

——S. 4 — Burden of proof — Standard of proof required — Evidence Act, Ss. 3, 101 to 103 — Penal Code (1860), Ss. 161, 165.

Ordinarily, the prosecution would be ilable to prove the motive or reward under S. 161, Penal Code, or absence or inadequacy of consideration under S. 165, Penal Code, because such motive or reward or such absence or inadequacy of consideration is part of the very offence under Section 161 or S. 165, Penal Code respectively. But now by reason of Section 4, Prevention of Corruption Act, 1947, that presumption will be made against the accused the moment the prosecution proves that the accused accepted or agreed to accept or obtained or attempted to obtain any gratification or valuable thing. This does not mean that the burden of proof on the prosecution to establish the acceptance or the agreement to accept or the obtaining or the agreement to obtain the gratification or the valuable thing is at all displaced by this section. That burden still remains on the prosecution. This proof must be in accordance with the standard of proof laid down by S. 3, Evidence Act. Any other standard of proof by percentage or plausibility cannot be accepted. **52 Cri LJ 1116: 88 Cal LJ 14: ILR (1952) 2 Cal 243: AIR 1951 Cal 524 (527) (Pt A) (Prs 18, 19) (DB).**

——S. 4 — Presumption.

Under S. 4 of the Prevention of Corruption Act the Court must presume that the accused under the circumstances, accepted the money as a motive or reward as contemplated under S. 161, I. P. Code. AIR 1953 All 110; AIR 1952 Bom 58, Rel. on. **1955 Cri LJ 1585: AIR 1955 Him Pra 51 (53) (Pt B) (Pr 13).**

——S. 4 — It is unnatural to expect that the accused would demand a bribe in the presence of a person about whom he was not sure — (Penal Code (1860), S. 161). **1956 Cri LJ 227: Madh BLJ 1955 HCR 1703: Madh BLR 1955 Cr 335: AIR 1956 Madh Bha 51 (54) (Pt F) (Pr 30).**

——S. 4 — Evidence — Presumption under Section 4 — Public servant proved to have accepted gratification other than legal remuneration —Presumption is that he accepted it as motive or reward is mentioned in S. 161, I. P. Code — In absence of rebuttal it could be held that the sum was accepted as bribe. See Penal Code (1860), S. 161. **AIR 1955 NUC (Madh Bha) 4861.**

——S. 4 (4) — Presumption under — Effect on onus — Duty of prosecution to prove guilt of accused — Presumption of law created by Section 4, is not unlike other presumptions of law, rebuttable (as one contained in S. 105, Evidence Act). See Penal Code (1860), S. 161. **1959 Jab LJ 757.**

——S. 4 (2) — Presumption under — Nature — 'Proof to the contrary' — What is.

The presumption under S. 4 (2) of the Prevention of Corruption Act (2 of 1947) is rebut-

table and the 'proof to the contrary' for the purpose of rebutting the presumption may be afforded by the statement of the accused himself, if it is probable under the circumstances of the case as also by the other circumstances established in the case. AIR 1951 Cal 524; AIR 1952 Orissa 267, Foll. **1957 MPLJ (Notes) 195.**

——S. 4 — 'Shall be presumed' — Meaning.

The term "shall be presumed" means that the Court is bound to take the fact as proved until evidence is adduced to disprove it and the party interested in disproving it must produce such evidence if he can. **1958 Mad WN 561: 1960 Mad LJ (Cri) 552: 1959 Cri LJ 484: AIR 1959 Mad 166 (171) (Pt C) (Pr 23).**

——S. 4 — Accused in his capacity as supervisor recommending to his superior for retention of services of certain persons discharged from service — Accused receiving from such persons sums of money as a reward for his services — Accused is guilty under S. 161 of Penal Code in view of presumption arising under S. 4, Prevention of Corruption Act. See Penal Code (1860), S. 161. **51 Cri LJ 386: AIR 1950 Mad 93.**

——S. 4 (1) — Presumption under — Scope — (Penal Code (1860), S. 165) — (Evidence Act (1872), Ss. 101 to 104).

The only presumption which can be drawn by virtue of S. 4 (1) is that the thing was obtained without consideration or for a consideration which the accused knew to be inadequate. A presumption that it was obtained from any person whom he knew to be interested in or related to the person so concerned, is not covered by this provision. It is for the prosecution to prove by positive evidence that the accused obtained the thing from a person who is known to be related to the concerned person. **(1957) 1 Lab LJ 650: 22 Cut LT 397: ILR (1956) Cut 517: 1956 Cri LJ 1341: AIR 1956 Orissa 201 (203) (Pr 11) (DB).**

——S. 4 — Scope — Presumption of innocence of accused is not displaced by S. 4 — Penal Code (1860), S. 161.

Per Panigrahi, J.:— Section 4 lays down that if the prosecution proves that the accused person has accepted, or agreed to accept, any gratification, it shall be presumed, unless the contrary is proved, that he accepted or agreed to accept with a corrupt motive. This raises a rebuttable presumption and the contrary may be proved to displace the presumption contained in the section. The section purports to lay down that the Court shall draw a particular inference from a particular proved fact. It is only an inference and not evidence, and may be overcome by evidence. It would be an outrage on commonsense and reason to infer that the presumption of innocence of the accused has itself been displaced and that the offence of bribery must be held to be established the moment the money passed into the possession of the accused without further proof that the money was "accepted" or "agreed to be accepted" for corrupt purposes. When the law raises a presumption against the accused and calls upon him to prove the contrary, the quantum and degree of proof required to displace that presumption are just those required in a civil case; and the contrary can be said to be proved if the accused succeeds in establishing that the act attributed to him is capable of an interpretation other than that suggested by the prosecution. In such an event the Court is bound to hold that the prosecution has failed to displace the presumption of innocence beyond reasonable doubt.

In this view, the mere proof of the passing of money from A to B, charged with bribery, is not enough to displace the presumption of B's innocence.

Section 4 requires that the prosecution should prove that the accused accepted or agreed to accept the amount as a gratification. "Accept" mean "to take or receive with a consenting mind". It is, therefore, upon the prosecution to prove not only the passing of money into the hands of the accused but also that he took it with a 'consenting mind'. This would necessitate proof of either an agreement to accpet prior to the actual acceptance, or of his consent to accept the same as gratification at the time the money was offered.

Proof of the contrary need not be by evidence oral or documentary: The proof may be afforded, by the statement of the accused himself or by the circumstances of the case.

Per Narasimham, J.:— As soon as the prosecution had proved that the public officer accepted the sum offered which was admittedly not part of the legal remuneration, the presumption under S. 4 of the Prevention of Corruption Act, 1947 (Act 2 of 1947) would apply and in the absence of any evidence on the side of the accused it must be held that the sum was accepted as bribe. **1952 Cri LJ 1393: ILR (1952) Cut 364: AIR 1952 Orissa 267 (272, 273, 278) (Pt D) (Prs 8 to 10, 29) (DB).**

——S. 4 — Scope — Presumption — When arises.

Where it is admitted by the accused that he received the money which was not the legal remuneration, the presumption under S. 4 that he received the money as a motive or reward such as is mentioned in S. 161, Penal Code arises against him. The section introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused. It is a presumption of law and therefore it is obligatory on the Court to raise this presumption in every case brought under Section 4 because unlike the case of presumption of fact, presumptions of law constitute a branch of jurisprudence. AIR 1958 SC 61 and AIR 1960 SC 548, Foll. **1961 BLJR 633: 1961 (1) Cri LJ 544 (547) (Pt A) (Prs 9, 11) (DB) (Pat).**

——Ss. 4, 5 — Presumption under S. 4 cannot arise in prosecution under S. 5 (2) — AIR 1953 All 110, Dissented from. **AIR 1955 NUC (Punj) 4021.**

——S. 4 — Presumption under — Benefit of — When arises — (Penal Code (1860), S. 161) — Evidence Act (1872), Ss. 101-103).

In order to bring home the charge of bribery against a public servant, it is essential to prove that there is (1) acceptance of or attempt to obtain a gratification and (2) as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show any favour or disfavour in the exercise of his official functions. So far as the first part is concerned, namely acceptance of or attempt to obtain gratification, that has still to be proved by the prosecution under S. 4 (1). Once that has been proved, the presumption arises as to the motive with which money was received and it would then be for the accused to prove that he did not receive the gratification as a motive or reward for exercising any official favour or disfavour. 1955 Raj LW 51, Rel. on; AIR 1951 Cal 524, Distinguished; (1943) 1 KB 607, Rel. on. **ILR (1957) 7 Raj 338: 1958 Raj LW 68: 1957 Cr LJ 541: AIR 1957 Raj 138 (140, 141) (Prs 13, 15, 17) (DB).**

[Overruled in AIR 1960 SC 548.]

——S. 4 (as amended in 1952) — Presumption under, stated (Obiter) — (Penal Code (1860), Section 161). AIR 1955 NUC (Raj) 1192.

——S. 4 (1) — Presumption under, when arises — What prosecution has to prove in first instance.

Under S. 4 (1) Prevention of Corruption Act 1947, the general presumption of innocence of the accused is displaced once it is proved that he has accepted the money which is not legal remuneration and instead the presumption will arise that he took it as a bribe. In order that this should happen, the prosecution has to prove first that the money has passed into the possession of the accused person and, second, that this money was illegal remuneration. Therefore, the find of the money from the possession of the accused is by itself not enough and the other ingredient that it was by way of illegal gratification has also to be proved by the prosecution. But if that is done, then the accused must account for his possession of the money and if he fails to do so it must be held that the sum was taken by him as a bribe. **('56) 9 Sau LR 211.**

——S. 4 (2), (3) (as amended in 1952) — Applicability.

Held, that in the nature of the prosecution evidence in this case the Court was fully justified in drawing the presumption as provided for in S. 4 (2). The sum of Rs. 35 tendered by the accused to P. W. 1 in this case could not be taken to be so trivial as to attract the saving provision contained in sub-section (3). **1954 Cri LJ 1604: 1954 Ker LT 455: ILR (1954) TC 856: AIR 1954 Trav-Co 492 (494) (Pt F) (Pr 6) (DB).**

4. Rebuttal of presumption by accused.

■ ——S. 4 (1) — Accused shown to have accepted money which was not legal remuneration — Presumption can be raised — Rebuttal must be by explanation which must be true and not merely plausible — Presumption under S. 4 (1) and Evidence Act, S. 114, distinction between — Whether presumption is rebutted is question of fact — Supreme Court will not interfere — Constitution of India, Art. 136 — (Section 4 renumbered as sub-section (1) of that section by the Amendment Act (59 of 1952)).

In order to raise the presumption under Section 4 (1), Prevention of Corruption Act what prosecution has to prove is that the accused person has received 'gratification other than legal remuneration' and when it is shown that he has received a certain sum of money which was not a legal remuneration, then the condition prescribed by this section is satisfied and the presumption thereunder must be raised. AIR 1960 SC 548, Rel. on.

Whereas under S. 114 of the Evidence Act, it is open to the Court to draw or not draw a presumption as to the existence of one fact from the proof of another fact and it is not obligatory upon the Court to draw such presumption, under sub-s. (1) of S. 4 Prevention of Corruption Act, however, if a certain fact is proved; that is; where any gratification (other than legal gratification) or any valuable thing is proved to have been received by an accused person the Court is required to draw a presumption that the person received that thing as a motive of reward such as is mentioned in S. 161, I. P. Code. Therefore, the Court has no choice in the matter, once it is established that the accused person has received a sum of money which was not due to him as a legal remuneration. Of course, it is open to that person to show that though that money was not due to him as legal remuneration it was legally due to him in some other manner or that he had received it under a transaction or an arrangement which was lawful. The burden resting on the accused person in such a case would not be as light as it is where a presumption is raised under S. 114 of the Evidence Act and cannot be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable. It must further be shown that the explanation is a true one. The words 'unless the contrary is proved' which occur in this provision make it clear that the presumption has to be rebutted by proof and not by a bare explanation which is merely plausible. A fact is said to be proved when its existence is directly established or when upon the material before it the Court finds its existence to be so probable that a reasonable man would act on the supposition that it exists. Unless, therefore, explanation is supported by proof, the presumption created by the provision cannot be said to be rebutted. AIR 1943 PC 211, Distinguished; AIR 1958 SC 61, Rel. on.

The question whether a presumption of law or fact stands rebutted by the evidence or other material on record is one of fact and not of law and the Supreme Court is slow to interfere with the view of facts taken by the High Court. No doubt, it will be open to the Supreme Court to examine the evidence for itself where the High Court has proceeded upon in erroneous view as to the nature of the presumption or, again, where the assessment of facts made by the High Court is mainfestly erroneous. Dhanvantrai Balwanti Desai v. State of Maharashtra, **1963 Mad WN 246: (1963) 1 Mys LJ 66: (1963) 1 SCWR 178: (1963) Supp 1 SCR 485: 1964 MLJ (Cr) 65: (1964) 1 SCJ 133: 1963 All WR (HC) 358: 65 Bom LR 332: (1963) All Cr R 185: (1963) 2 Lab LJ 415: AIR 1964 SC 575 (578 to 580) (Prs 10, 12, 13).**

——S. 4 — Presumption under — Rebuttal of — Onus.

Once the prosecution establishes the receipt of the tainted money by an accused person, then an onus is cast on the accused to rebut the presumption against him and offer an explanation. Where the accused in his attempt to rebut the presumption takes several stands the very multiplicity of the stands destroy the bona fides of them and they become inadequate to rebut the presumption. **ILR (1959) 1 All 508: 1959 All WR (HC) 589: 1959 All Cr R 491: 1959 Cr LJ 924: AIR 1959 All 483 (485) (Pt A) (Pr 5).**

——Ss. 4 (1), 5 (1) (d), 5 (2) and 5 (3) — Penal Code (45 of 1860), S. 161 — Accused charged under S. 161, Penal Code, and S. 5 (2) of the Act — Failure of charge under S. 161 — Conviction under S. 5 (2) — Requirements of — Presumption under S. 4 (1) — Applicability — Rule of evidence applicable for conviction — Criminal P. C. (5 of 1898), S. 258 (1) — Accused charged under S. 161, Penal Code and S. 5 (2), Prevention of Corruption Act — Failure of charge under S. 161 and conviction only under S. 5 (2) — Absence of finding on former charge cannot amount to acquittal.

The accused appellant, an Assistant Draughtsman in the Southern Railway, was charged with offences under S. 161, Penal Code and S. 5 (1) (d) read with S. 5 (2) of the Prevention of Corruption Act, on the allegation that he took a bribe of Rs. 100 from a Railway contractor. The Special Judge, rejecting the explanation of the accused that he did not receive it as bribe, but that the contractor gave it to him as marriage presentation, in spite of his protest, held that it amounted to taking illegal gratification under

S. 5 (1) (d) and accordingly convicted him under S. 5 (2) of the Act. The Judge did not record any finding under S. 161, Penal Code. The accused thereupon preferred the appeal to the High Court.

Held, the Special Judge is in error in applying the presumption under S. 4 (1) of the Prevention of Corruption Act for a conviction under S. 5 (2), because these presumptions apply to different specific offences, and cannot be used for an offence to which it is not related. Since the accused had been charged under S. 5 (1) (d) of the Act, the presumption under S. 5 (3) of the Act alone is applicable, if the facts and circumstances warrant its application. It cannot be laid down as an absolute rule in rebutting the presumption placing the onus upon the accused either under S. 4 (1) or S. 5 (3) of the Act, that he must adduce evidence aliunde, and that his explanation taken with other circumstances which might appear in the prosecution evidence will not afford a rebuttal of that presumption. While the explanation of the accused may be taken into consideration and treated as evidence in the case in order to rebut such a presumption, it is not sufficient that the version given by him is merely reasonable or probable. In order to rebut the presumption, the statement of the accused taken with other circumstances must be accepted as true, or should amount to 'proof' within the meaning of S. 3 of the Evidence Act.

In the instant case, the possibility of the currency notes being given as alleged by the accused cannot be ruled out. If such a gift is given and taken, it cannot be said that it has been taken by any corrupt motive, nor does the presumption under S. 5 (3) apply. The offence under Section 5 (1) (d) is not established, and the accused is entitled to an acquittal on that count.

Suppose in a case where an accused has been charged with several offences, the Court has found him guilty of an offence and passed a sentence specifically saying that it is not necessary to give a finding on other offences, though this may amount to non-compliance with the mandatory provisions, nonetheless, it cannot be said that the omission to give a finding is tantamout to recording a finding of 'not guilty'. In view of the fact that there is no positive finding by the trial Court, the safer course would be to direct a retrial on the first charge under S. 161, Penal Code. This is necessary, though the Court has held under S. 5 (2) that the explanation of the accused that he had gone there for extending marriage invitation was probable. For the purpose of S. 161, Penal Code read with S. 4 of Act this finding will not be sufficient, as it has got to be found that the statement of the accused is true, or is such as to amount to proof of his case. **(1965) 1 Andh WR 9: 1965 MLJ (Cr) 5: 1965 (1) Cri LJ 281: AIR 1965 Andh Pra 105 (112) (Pt A) (Prs 29, 30) (DB).**

——S. 4 — Presumption under — How rebutted.

The presumption against the accused under S. 4, Prevention of Corruption Act, regarding the motive or reward or absence or inadequacy of consideration is a rebuttable presumption. That presumption may be rebutted by the accused not only by any oral testimony of witnesses called on behalf of the accused but also by a statement of the accused under S. 342, Criminal P. C., and by any document produced on behalf of the defence or by the surrounding circumstances. **88 CLJ 14: ILR (1952) 2 Cal 243: 52 Cr LJ 1116: AIR 1951 Cal 524 (527) (Pt C) (Pr 21) (DB).**

——S. 4 (1) — Presumption — Rebuttal.

The presumption under S. 4 (1) arises not only when the accused has accepted or obtained for himself or for any other person any gratification but also when he has accepted or obtained for himself or for any other person any valuable thing from any person. Currency notes are valuable things. This being a presumption of law, when the facts necessary for raising the presumption are either proved or admitted, the Court has to proceed on the basis that the gratification obtained by the accused was accepted by him as a motive or reward such as is mentioned in S. 161 of the Penal Code until the contrary is proved by the accused. When the prosecution has proved that the accused public servant has received money from any person which is not legally due to him or that fact is admitted by the accused himself, the burden is on him to disprove the presumption arising under S. 4 (1) of the Prevention of Corruption Act and in such a case it is not necessary for the prosecution to affirmatively prove anything more to show that the amount was received by him as a bribe or illegal gratification.

The degree of proof required to rebut the presumption must, of course, depend upon the facts and circumstances of each case. But in view of the imperative provision in S. 4 (1) the presumption cannot be held to have been rebutted without sufficient material before the Court which would ordinarily carry conviction to a judicial mind. As the contrary has to be proved it will not be sufficient for the accused merely to create a doubt.

A mere explanation by the accused, which is not inconsistent with the proved or admitted fact that he had received money from a person with whom he had dealings officially which was not legally due to him, would not therefore, be sufficient, without corroboration by other evidence either direct or circumstantial, to rebut the presumption under S. 4 (1). **1958 Ker LT 676: 1959 Ker LJ 425: 1958 Mad LJ (Cr) 758: 1959 Cr LJ 457: AIR 1959 Ker 88 (93) (Pt A) (Prs 12, 13) (DB).**

——S. 4 — Presumption — Rebuttal — (Penal Code (1860), S. 165) — (Evidence Act (1872), Ss. 101 to 104).

It cannot be said that it must first be proved that the acceptance of the valuable thing was as a gratification other than legal remuneration before the presumption under S. 4 can be drawn so as to throw the burden on the accused. It is not enough for the accused to offer an explanation which has not been disproved or to create some doubt in the mind of the Court. The burden cast on the accused is however less stringent than that laid on the prosecutor in proving guilt, and corresponds to that which rests upon a plaintiff or defendant who is required to prove an issue in civil proceedings. **ILR (1958) Ker 498: 1958 Ker LJ 8: (1958) 2 Lab LJ 728: 1958 Cri LJ 640: 1957 Ker LT 1277: AIR 1958 Ker 136 (137, 138) (Prs 3, 4, 5, 9) (DB).**

——S. 4 — Penal Code (1860), S. 161 — Presumption of motive — Rebuttal of — 'Proof to the contrary' — Extent of burden of proof on accused—(Evidence Act (1872), Ss. 101-103 (3)) — (Criminal P. C. (1898), S. 367).

It is clear from S. 4, Prevention of Corruption Act that the moment it is proved that the accused has received a sum of money from the complainant it shall be presumed unless contrary is proved that he accepted it as a motive or reward such as one mentioned in S. 161, I. P. Code. This presumption being there the burden lies heavily upon the accused to prove to the contrary.

Although a burden is cast upon the accused by reason of S. 4, this burden is not so heavy as upon the prosecution in other cases where no such presumption arises but is akin to burden placed upon a litigant in civil cases and can be discharged by proving preponderance of possibilities.

The considerations that a charge under S. 161, I. P. Code, is one which is easily and may often be lightly made but is in the very nature of things difficult to establish, cannot be suffered to relieve the prosecution of any part of the burden which rests upon it to establish charge beyond reasonable doubt. If after everything that can legitimately be considered has been given its due weight, room still exists for taking the view that, however strong the suspicion raised against the accused, every reasonable possibility of innocence has not been excluded, he is entitled to an acquittal. AIR 1944 FC 66, Rel. on. Test, under both English and Indian law, regarding probabilities of a fact is that of a prudent man. **1956 Cr LJ 233: Madh BLJ 1955 HCR 1333: AIR 1956 Madh Bha 86 (92, 93) (Pt C) (Prs 55, 56, 58, 65, 67) (DB).**

——S. 4 (1) — Presumption under — Rebuttal of.

The Legislature has, by the words, 'shall presume' used in S. 4 (1) of the Prevention of Corruption Act, made it obligatory on the Court to raise a presumption in every case brought under the Prevention of Corruption Act that the accused received or accepted the money as an illegal gratification unless he rebutted the same. For rebutting the presumption under S. 4 (1) it is not enough for the accused to offer an explanation which has not been disproved or to create some doubt in the mind of the Court, but it is necessary for the accused to prove that he did receive the money otherwise than as illegal gratification or bribe i.e., innocently.

The burden of proof required to be discharged by the accused in such cases is less than that required at the hands of the prosecution in proving the case beyond reasonable doubt. This burden may be discharged by the evidence satisfying the Court of the probability of that which the accused is called upon to establish. **1959 Mad LJ (Cr) 606: 1959 Mad WN 441: (1959) 2 Mad LJ 141: 1960 Cr LJ 92: AIR 1960 Mad 27 (31) (Pt A) (Pr 17).**

——S. 4 (1) — Presumption under is rebuttable — It may be rebutted by oral testimony of accused's witnesses and by his statement under S. 342, Criminal P. C. **AIR 1955 NUC (Orissa) 3978.**

——Ss. 4, 5 (1) (d) and (2) — Prosecution under —Accused receiving money from complainant not by way of legal remuneration — Presumption arising under S. 4 — Rebuttal — Penal Code (1860), S. 161.

Where in a prosecution under S. 161, I. P. C. and S. 5 (2) read with S. 5 (1) (d), Prevention of Corruption Act, it is proved that the accused had received a sum of money from the complainant and it was nobody's case that this is part of accused's legal remuneration, a presumption under S. 4 of the Act arises against the accused that unless he proves to the contrary, he must be treated as having received the said money as a motive or reward within the meaning of S. 161, I. P. Code; such a presumption would be rebutted even if the explanation given by the accused for receiving the money is a reasonably probable one. AIR 1960 SC 548, Applied. **1962 Raj LW 421: ILR (1962) 12 Raj 504.**

——S. 4 — Presumption under — Rebuttal.

All that is required from the accused in a bribery case and having regard to S. 4 is to establish by evidence satisfying the Judge of the probability that the amount he received or obtained was received or obtained by him innocently. If he establishes that probability he has rebutted the presumption and is entitled to be acquitted. **1955 Cri LJ 1387: ILR (1956) Pepsu 223: AIR 1955 Pepsu 156 (158) (Pt D) (Pr 10).**

5. Constitutional validity of the section.

● **——S. 4** — Constitutional validity — Not unconstitutional as S. 4 lays down "procedure established by law" within Art. 21 of Constitution. See Constitution of India, Art. 21. **1961 (2) Cri LJ 811: AIR 1961 SC 1629.**

● **——S. 4 (1) — Validity — Article 14 of Constitution — If violated.**

Article 14 does not forbid reasonable classification for the purposes of legislation; no doubt it forbids class legislation; but if it appears that the impugned legislation is based on a reasonable classification founded on intelligible differentia and that the said differentia have a rational relation to the object sought to be achieved by it, its validity cannot be successfully challenged under Art. 14.

The basis adopted by the Legislature in classifying one class of public servants who are brought within the mischief of S. 4 (1) is a perfectly rational basis. It is based on an intelligible differentia. The object which the Legislature wanted to achieve is the eradication of corruption from amongst public servants, and between the said object and the intelligible differentia on which the classification is based there is a rational and direct relation. Hence, S. 4 (1) is not ultra vires under Art. 14 of the Constitution. C. I. Emden v. State of Uttar Pradesh, **1960 Mad WN 233: (1960) 1 Ker LR 413: 1960 Mad LJ (Cr) 228: 1960 SCJ 368: 1960 Cr LJ 729: (1960) 2 SCR 592: AIR 1960 SC 548 (550) (Pt A) (Pr 5).**

SECTION 5

SYNOPSIS

(Prevention of Corruption Act (2 of 1947), S. 5.)

1. Scope and object.
2. Public servant.
   See also Prevention of Corruption Act (1947), S. 6.
3. Sub-section 5 (1) (a).
4. Sub-section 5 (1) (b).
5. Sub-section 5 (1) (c) — General.
6. Dishonest and fraudulent misappropriation — Sub-section 5 (1) (c).
7. Misappropriation — Evidence of — Sub-section 5 (1) (c).
8. Sub-section 5 (1) (d).
9. Sub-section 5 (2).
10. Sub-section 5 (3) — General.
11. "Satisfactorily account" — Sub-section 5 (3).
12. "Disproportionate to his known source of income" — Sub-section 5 (3).
13. Burden of proof — Sub-section 5 (3).
14. Sub-section 5 (4).
15. Acceptance of bribe — Proof of.
16. Sentence.
17. Evidence recorded by predecessor — Conviction by successor, if legal.
    See Criminal P. C. (1898), S. 350.
18. Charge under S. 5 (1) (a) — Presumption under S. 4.
    See Prevention of Corruption Act (1947), Section 4.

1. Scope and object.

●——**S. 5 (3)** — Sub-section (3) is not retrospective — To take into consideration pecuniary resources and property acquired before March 11, 1947 when Act came into force, does not make Act retrospective. Sajjan Singh v. State of Punjab, **1964 Mad WN 207: (1964) 4 SCR 630: 1964 Cur LJ (SC) 37: 1964 SCD 874: 1965 (1) Cr LJ 310: AIR 1964 SC 464 (468) (Pt B) (Prs 12, 13).**

——**S. 5 (2)** — Criminal Law (Amendment) Act, Ss. 7, 8 — Offence of bribery triable exclusively by Special Judge — Final report under S. 173, Criminal P. C., can be accepted by District Magistrate though the offence is exclusively triable by a Special Judge — Departmental Inquiry under Regn. 486 of Police Regulations is not barred — (Penal Code (1860), S. 161) — (Criminal P. C. (1898), S. 173) — (Police Regn. 486, Para 1 (6)). See Criminal Law (Amendment) Act (1952), S. 7. **1960 Cri LJ 1290: AIR 1960 All 618 (DB).**

——**S. 5 — Constitutional validity — (Constitution of India, Art. 20).**

The accused was found to be in possession of an amount in September, 1952. The accused who was not able to explain satisfactorily the innocent acquisition thereof pleaded that even if that had been acquired by him by corrupt means that might be before the Constitution came into force. At that time such an acquisition was not punishable in any manner. As a result of sub-section (3) which was enacted later after the Constitution came into force even such act which was not punishable at the time it was committed was punished under sub-section (2). Hence the sub-section were hit by the provisions of Article 20 (1) of the Constitution.

Held, that the accused's contention was untenable. The conduct which was described in Cls. (a) to (d) of sub-section (1) had always been considered to be criminal and punishable. Hence, it could not be said that sub-section (2) made some act which was not punishable at the time at which it was committed punishable. Sub-section (3) only laid down a rule of evidence and did not create any substantive offence. The offence was defined in sub-section (1) and it was punishable under sub-section (2). As sub-section (3) only provided a rule of evidence there could be no question of such a rule being hit by Art. 20 (1). Hence there was no force in the plea that sub-section (2) was ultra vires because they contravened Art. 20 (1). **1958 All LJ 424: 1958 All WR (HC) 526: 1958 All Cr R 335: (1958) 2 Lab LJ 669.**

[Reversed on another point in AIR 1961 SC 583.]

——**Ss. 5 (1) and 4** — Charge under S. 5 (1) — Presumption under S. 4 can be invoked — The presumption under S. 4 is not confined to those cases only where the accused is, in fact, charged under S. 161, I. P. Code but is also available in cases where, the accused is charged under some other section where the gravamen of the charge is the same as that under S. 161, I. P. Code. See Prevention of Corruption Act 1947, S. 4. **1953 Cri LJ 340: AIR 1953 All 110.**

——**S. 5 — Applicability.**

Section 5 not only applies to habitual offenders but also applies to a case where the accused is charged with having taken illegal gratification on a solitary occasion as is provided for in S. 5 (1) (d). **1953 All Cri R 1: ILR (1954) 1 All 45: 1952 RD (HC) 875: 1953 All WR (HC) 4: 1953 Cri LJ 340: 1953 All LJ 193: AIR 1953 All 110 (112) (Pt B) (Pr 15).**

——**S. 5 — Offence punishable both under this Act and Penal Code — Criminal P. C. (1898), Section 237.**

Where, a new offence has been created under the Act the accused must be proceeded against in accordance with the provisions of this Act. Where, however, the offence is one which was punishable under the Penal Code and is now made punishable under this Act also, it is open to the prosecution to proceed against the accused under the Penal Code. Thus, where the accused was prosecuted for offences under Ss. 409, 420, 465, 468, 471 and 477-A, Penal Code and in the charge-sheet no mention had been made of the Prevention of Corruption Act and the trial, had proceeded in accordance with the provisions of the Criminal P. C., the accused must be convicted, if his guilt is proved, in accordance with the provisions of the Penal Code and it cannot be said that Court convicting the accused can apply sub-section (2) of S. 5 of the Prevention of Corruption Act and sentence him to seven years' rigorous imprisonment where the section under which he is charged provides for a lesser sentence. The applicant not having been charged under sub-section (2) of S. 5, Sections 4 and 7 of the Act cannot be made applicable to him. AIR 1932 All 18, Rel. on; AIR 1925 All 230, **Overruled. 1952 All LJ 21: 1952 Cri LJ 236: 1952 All WR (HC) 98: 1952 All Cr R 35: ILR (1954) 1 All 1: AIR 1952 All 35 (37) (Pt B) (Prs 11, 15) (DB).**

——**Ss. 5 (1), (c), (d) and (2), 3, 5-A** — Criminal P. C. (1898), Ss. 155 (2), 4 (n), 4 (f) — Offences under S. 5 are cognizable offences by virtue of S. 5-A, under all circumstances — Applicability of Section 155 (2), Criminal P. C. See Prevention of Corruption Act (2 of 1947), S. 3. **1965 (2) Cri LJ 585: AIR 1965 Andh Pra 372 (377) (Pt A) (Prs 7, 8) (DB).**

——**S. 5 (1) (c) and (d)** — Offences falling under — Committed by army officer — Might fall under Section 52 (b) of the Army Act and not under Section 52 (f) of that Act the Army Act does not exclude the jurisdiction of special Judge functioning under Criminal Law Amendment Act 1952 where the offence covered by Sections 34 and 8 of the Act also falls within the provisions of I. P. C. or other penal law — Nature of — Procedure for trial — Army Act, Section 52 (f). See Army Act (1950), S. 52 (b). **1958 Cr LJ 1144: AIR 1958 Bom 354 (DB).**

——**S. 5 (2) — Offences committed by public servants under Cls. (c) and (d) of S. 5 (1) — Charge against persons not public servants with aid of S. 34, I. P. Code — Legality — (Cr. P. Code (1898), S. 235).**

It is an error in law to have charged accused who are not public servants with having committed the offences under Section 5 (1) (c) and Section 5 (1) (d) punishable under S. 5 (2) of the Prevention of Corruption Act read with Section 34 of the Penal Code. The punishing section being Section 5 (2) alone, the addition of Section 34, Penal Code, does not make those accused liable under Section 5 (1) (c) and Section 5 (1) (d) of the Prevention of Corruption Act. But when these offences are said to have been committed in pursuance of the criminal conspiracy then it would be proper if a charge under Section 5 (1) (c) and (d) read with Section 109 of the Penal Code is framed against those accused. And if such accused happen to be charged with having committed these offences in pursuance of the conspiracy, read with Section 34 of the Penal Code, it would not be illegal to alter the charge against them to one of

abetment of the offence of criminal misconduct, if the appellate Court is satisfied that no prejudice is likely to be caused to any of the accused by doing so. AIR 1924 Bom 432 and 11 Bom HCR 240 and AIR 1924 Bom 502, Rel. on. **60 Bom LR 159: 1958 Cr LJ 1144: AIR 1958 Bom 354 (360) (Pt D) (Pr 7) (DB).**

——**S. 5 (1) (d) and (2)** — No restrospective operation — Acts done prior to the coming into force of the Prevention of Corruption Act cannot be made punishable under the Act. **AIR 1951 Bom 233 (241) (Pt C) (Pr 25) (DB).**

——**S. 5 (1) and (2) — Scope — Charge under S. 5 (1) (a) — Whether implies charge under S. 161, Penal Code — (Penal Code (1860), Section 161).**

Clauses (a) to (d) of sub-section (1) of Section 5 of the Prevention of Corruption Act, specify the different offences which would amount to criminal misconduct by a public servant in the discharge of his official duty and punishable under sub-section (2) of Section 5. Every one of the offences specified in Cls. (a) to (d) is an offence made punishable under the Penal Code also. The essential ingredients of the offence under Section 5 (1) (a) of the Prevention of Corruption Act are the same as the ingredients of the offence under Section 161 of the Indian Penal Code subject to one difference, viz., that the offence under Section 5 (1) (a) is an aggravated from of the offence under Section 161. Repetition of the offence under S. 161 of the Indian Penal Code, would amount to the offence of criminal misconduct under Section 5 (1) (a) of the Prevention of Corruption Act. It follows therefore that the charge framed against the accused in this case that he has committed the offence under Section 5 (1) (a) of the Prevention of Corruption Act necessarily implies that he has committed the offence, punishable under Section 161 of the Indian Penal Code. **(1959) 1 Lab LJ 28: 1957 Ker LJ 476: ILR (1957) Ker 559: (1957) Mad LJ (Cr) 443: 1957 Cr LJ 1127: 1957 Ker LT 784: AIR 1957 Ker 134 (139) (Pt D) (Pr 10) (DB).**

——**Ss. 5 (2), 5-A (as amended in 1952) —Scope and object — Cognizance of offence — Penal Code (1860), S. 161.**

Even after the amendment of 1952 in the Prevention of Corruption Act, the position regarding an offence under Section 161, I. P. Code and under sub-section (2) of Section 5, Prevention of Corruption Act is that it is cognizable so far as officers of the rank of a Deputy Superintendent of Police and above are concerned. But so far as the officers below the rank of a Deputy Superintendent of Police are concerned, the said offences are non-cognizable in so far as they cannot investigate them without the permission of a Magistrate of the First Class. All that Section 5-A enjoins is that if investigation is to be conducted by a Deputy Superintendent of Police he does not require any order from a Magistrate. But if investigation is to be conducted by an officer of the lower rank then permission of a Magistrate of the First Class is necessary. The object underlying both the cases is to save public servants from frivolous and vexatious harassment at the instance of disgruntled persons. Where the Magistrate perused the F. I. R. before giving permission it could not be said, that he did not satisfy himself regarding good and sufficient reasons to conduct the investigation. **Madh BLR 1956 (Cr) 395: 1957 Crl LJ 184: AIR 1957 Madh Bha 43 (44 to 47) (Pt B) (Prs 6, 7, 11, 12) (DB).**

——**S. 5 (1) — Corruption — Meaning of — A** single instance of attempt to obtain a bribe where no amount is actually received does not amount to an offence of 'criminal misconduct in the discharge of duty' which is designated as 'corruption' in Disciplinary Proceedings Tribunal Rules. (Prevention of Bribery and Corruption Act (1947), S. 5 (1)—(Words and Phrases — Corruption). See Madras Civil Services Disciplinary Proceeding Tribunal Rules (1948). **AIR 1956 Mad 613 (DB).**

——**S. 5 — Ingredients of offence — Conduct newly made punishable.**

Conduct which was not previously punishable but which is made punishable by Section 5 of the Prevention of Corruption Act, 1947, really consists of two matters: (1) allowing some one else to misappropriate property entrusted to or under the control of a public servant, and (2) obtaining a valuable thing or pecuniary advantage by abuse of official position. These two are really the new additions made to the list of offences previously punishable: **1954 Mad WN 139: 56 Cri LJ 691: (1954) 1 Mad LJ 643: AIR 1955 Mad 214 (217) (Pt A) (Pr 16).**

——**S. 5 (1) — Charge — Contents — Specific period.**

The charge under Section 5 (1) must refer to some specific period during which the accused is alleged to have committed the offence. The period may be one year, may be two years, may be perhaps a little more, but it cannot be so wide as to amount to an abuse of the process of the Court. AIR 1952 Orissa 289, Rel. on. **56 Cr LJ 691: 1954 Mad WN 139: (1954) 1 MLJ 643: AIR 1955 Mad 214 (218) (Pt D) (Pr 19).**

——**S. 5 — "Corruption" — Meaning.**

An attempt to obtain a bribe in a single case which was never paid does not fall under Cls. (a), (b) or (d) of Section 5 (1), and therefore is not "corruption' within the meaning of that Act. **1954 Mad WN 837: AIR 1955 Mad 182 (185) (Pt C) (Pr 11).**

[Reversed on another point in AIR 1956 Mad 613.]

——**S. 5 (1) and (2)** — Accused granting bail to complainant without demanding tip — Tip demanded thereafter — No offence under Section 5 (2) read with Section 5 (1) held was committed. See Penal Code (1860), S. 161. **67 Pun LR 939: 1966 Cr LJ 796: 1965 All Cri R 436: 1965 All WR (Sup) 26: AIR 1966 Punj 302.**

——**S. 5 (2) — Scope — If retrospective — Charge for misconduct prior to Act — Legality.**

Acts of criminal misconduct by a public servant done prior to the coming into force of the Act cannot be made punishable under Section 5 (2) of the Act. AIR 1961 Bom 233, Foll. **63 Punj LR 321: (1961) 2 Cr LJ 268 (269, 270) (Pt A) (Prs 9, 15).**

2. Public servant.

See also Prevention of Corruption Act (1947), Section 6.

●——**S. 5 (1) (d)** — Railways Act, S. 137 (1) (as amended by Act 17 of 1955) — Offence under Section 5 (1) (d) — Railway servant is public servant — (Penal Code (1860), S. 21). See Railways Act (1890), S. 137 (1) (as amended by Act (17 of 1955)). **AIR 1956 SC 476.**

——**S. 5 (1) (c)** — General Clauses Act, S. 26 — Applicability — Railway clerk selling tickets, receiving money and misappropriating it — Option to prosecute under Section 5 (1) (c), Prevention of Corruption Act or Section 408,

Penal Code — If the accused is not a public servant Section 26, General Clauses Act, will not apply and the accused will be tried only under Section 408, I. P. C. — Railway clerk is not a public servant by virtue of Section 137 of Indian Railways Act — In the instant case there was therefore no option to try the case either under Section 408, I. P. C. or Section 5 (1) (c) of Act 2 of 1947 — (Penal Code (1860), S. 408). See General Clauses Act (1897), S. 26. **1957 Cri LJ 1078: AIR 1957 Andh Pra 663 (DB).**

——**S. 5** — Railway Servant demanding and accepting bakshis of 8 annas for service rendered — Provisions of Penal Code (1860), do not apply — Railway Establishment Code applies. See Railway Establishment Code, Vol. I. R. 1701, Para. 2 (1). **AIR 1964 Orissa 253 (DB).**

——**Ss. 5 (1) (d) and 5 (2)** — 'Public Servant' — Stamp clerk appointed by Government treasurer and paid out of contingent bill of Deputy Commissioner in the name of the treasurer is a 'public servant' — Liable for offences under Sections 5 (1) (d) and 5 (2) of Prevention of Corruption Act. See Penal Code (1860), S. 21. **(1963) 65 Pun LR 958.**

3. Sub-section 5 (1) (a).

● ——**Ss. 5 (1) (a) and (d), 6** —Sanction falling both under Section 5 (1) (a) and Section 5 (1) (d) — Charge and conviction under Section 5 (1) (a) is valid. See Prevention of Corruption Act (2 of 1947), S. 6. **1960 Cri LJ 676: AIR 1960 SC 487.**

● ——**S. 5 (1) (a) and S. 5 (1) (d) — Scope — Power of High Court.**

Held, construing the judgment of the High Court that it had not altered a conviction under Section 5 (1) (a) to one under Section 5 (1) (d). The accused had abused his position and helped other persons to derive a pecuniary advantage thereby. He had done this consistently for over several months. This would amount to his habitually obtaining in the discharge of his duty gratification from other persons. The High Court's judgment was therefore consistent with the charge framed under Section 5 (1) (a) and could not be held to be an alteration of the conviction under Section 5 (1) (a) to one under Section 5 (1) (d). Bhagwan Sahai v. State of Punjab, **1960 Cr LJ 676: AIR 1960 SC 487 (489, 490) (Pt B) (Prs 5, 6).**

● ——**Ss. 5 (1) (a) and (d) and 5 (3) — Charge under S. 5 (1) (a) — Failure of, does not necessarily mean failure of charge under S. 5 (1) (d).**

As soon as the requirements of sub-section (3) of Section 5, have been fulfilled, the Court will not only be justified in making but is called upon to make, the presumption that the accused person is guilty of criminal misconduct within the meaning of Section 5 (1) (d). In order to succeed in respect of the charge under Section 5 (1) (a), the prosecution has to prove that the accused person had accepted or obtained or agreed to accept or attempted to obtain from any person any gratification by way of bribe within the meaning of Section 161, of the I. P. Code. The charge under S. 5 (1) (d) does not require any such proof. If there is evidence forthcoming to satisfy the requirements of the earlier part of sub-section (3) of Section 5, conviction for criminal misconduct can be had on the basis of the presumption which is a legal presumption to be drawn from the proof of facts in the earlier part of the sub-section (3) aforesaid. Hence, the failure of the charge under Cl. (a) of sub-section (1) of Section 5, does not necessarily mean the failure of the charge under Section 5 (1) (d). C. S. D. Swami v. State, **1960 Mad WN 149: 1960 Cr LJ 131: 1960 SCJ 160: 1960 MLJ (Cr) 91: (1960) 1 SCR 461: 1960 Pat LR (SC) 21: ILR (1959) Punj 1955: AIR 1960 SC 7 (12) (Pt F) (Pr 8).**

● ——**S. 5 (1) (a) — Charge under — Particulars.**

No particulars need be set out in the charge as the offence under Section 5 (1) (a) does not consist of individual acts of bribe-taking as in Section 161 of the Penal Code but is of a general character. Individual instances may be useful to prove the general averment in particular cases but it is by no means necessary because of the presumption which Section 5 (3) requires the Court to draw. Biswabhusan Naik v. State of Orissa. **1954 Mad WN 465: (1955) 1 SCR 92: 1954 SCJ 537: (1954) 2 MLJ 79: 20 Cut LT 366: 1954 All WR (HC) 395: ILR (1954) Cut 427: 1954 SCA 928: 1954 Cr LJ 1002: AIR 1954 SC 359 (361) (Pt C) (Pr 13).**

——**S. 5** — Prosecution of Police officer under Section 161, I. P. C. and Section 5 of Prevention of Corruption Act — Limitation contained in Bombay Police Act, Section 161 that the act should have been done under colour of duty or in excess of duty etc. does not apply. See Bombay Police Act (22 of 1951), S. 161. **1965 (2) Cri LJ 193: AIR 1965 Bom 124 (DB).**

——**Ss. 5 (f) (a) and (d) 5 (2)**—Criminal P. C., S. 494 — Withdrawal of charge before charge has been framed — Order of discharge not passed — Accused would still be deemed to have been discharged — (Penal Code (1860), S. 161). See Criminal P. C. (1898), S. 494. **AIR 1955 NUC (Madh Bha) 3883.**

——**S. 5 (1) (a) and (b) — Cases falling under Cls. (a) and (b) — Omission to specify particular items of bribery in charge — Legality of trial — (Criminal P. C. (1898), S. 225).**

It is ordinarily desirable that prosecution of public servants for offence of criminal misconduct should mention the specific act or acts sought to be relied upon in proof thereof and to state, in cases falling under Cls. (a) and (b), that all or such of the instances as may be held proved, are intended to be relied upon as proof of the habit. But a trial cannot be held to be illegal on the ground that particular items of bribery have not been specified in the charge, if the omission has not occasioned a failure of justice. **1952 Cri LJ 1533: ILR (1952) Cut 109: AIR 1952 Orissa 289 (294) (Pt C) (Pr 10) (DB).**

4. Sub-section 5 (1) (b).

——**S. 5 (1) (b)** — Proof — Public servant receiving gifts from firm with which he had official dealings — Offence under section is proved. **AIR 1955 NUC (Punj) 4021.**

5. Sub-section 5 (1) (c) — General.

● ——**S. 5 (2) — Scope — Effect on S. 409, Penal Code — (Penal Code (1860), S. 409) — (General Clauses Act (1897), Ss. 6, 26) — Interpretation of Statutes — Repeal.**

An offence under Section 5 (1) (c), Prevention of Corruption Act, is almost identical with an offence under Section 409, I. P. Code, when it is committed by a public servant. For all practical purposes they are one and the same offence.

Two laws under which the same act or omission is punishable can co-exist side by side. Where a new law makes an act punishable, which is already penal under an existing law and there is nothing in the latter enactment which either expresses or implies that the operation of the earlier law is excluded, an offender can be prosecuted and punished under either of the two enactments. The earlier law will not be put out of operation merely because there is some change in procedure or some difference in penalties. The effect of the new enactment is to add a remedy and not to repeal the former remedy. AIR 1952 Punj 89, Dissented from.

The Prevention of Corruption Act has not expressly repealed any of the provisions of the Indian Penal Code. There is nothing in the Act from which a repeal by implication can be inferred. A repeal by implication can only be inferred if it is consistent with the object and purpose which necessitated the new enactment. But where it is in direct conflict with this object and purpose, it is impossible to infer such an intention. The Prevention of Corruption Act was intended to be only a supplementary measure and it did not repeal Section 409, I. P. Code by implication. Thus Section 5 (2), Prevention of Corruption Act, does not pro tanto repeal Section 409, I. P. Code, and it is open to the State to prosecute a public servant for committing criminal breach of trust under Section 409, I. P. Code. AIR 1954 SC 715, Foll. Om Prakash v. The State, **1955 All LJ 224: 1955 Cr LJ 754: AIR 1955 All 275 (280, 281, 282) (Pt A) (Prs 20, 23, 24, 25, 26, 28) (FB).**

——S. 5 (1) (c) — Procedure for trial — Joint trial — Offence under S. 477-A, I. P. Code — Propriety — Fraudulent and dishonest intention — Inference — Statements recorded in preliminary enquiry — Failure to furnish — Effects.

The specific provisions of sub-section (3) of Section 7 of the Criminal Law (Amendment) Act (46 of 1952) admit of no doubt in authorising Special Judges to try any offence other than the offences specified in Section 6, with which the accused may, under the Criminal Procedure Code, be charged. The only limitation is that prescribed by the provisions relating to joinder of charges under Sections 233 to 236, Criminal Procedure Code. The offences under S. 477-A, Indian Penal Code, could be tried along with the offences under Section 5 (2) (1) of the Prevention of Corruption Act at one trial. (1958) 2 Andh WR 523, Correctness doubted. While the prosecution can give up any witness it likes, it must conduct itself in a fair manner and should not manoeuvre or adopt tactics with a view to forcing the accused to put witnesses it should have examined in the box.

The three ingredients in Section 5 (1) (c) of the Prevention of Corruption Act are that the accused must be a public servant at the time of the commission of the offence, that he dishonestly or fraudulently misappropriates or otherwise converts to his own use any property entrusted to him or under his control or allows any other person so to do. There is no doubt that the accused was a public servant at the time of the alleged offence and that the property was entrusted to him. If the accused, who alone could say what he did with the property entrusted to him, gives an explanation which is found to be false, the setting up of that false defence would impute to him a fraudulent and dishonest intention.

An investigation will be deemed to have commenced whether or not the F. I. R. has been registered. Though an investigation may be declared to be illegal for non-conformity with any apecific provision of law, it cannot anytheless be said that the statements were not recorded during the course of an investigation. In cases where the investigating officer does not register a case and issues an F. I. R. but carries on a preliminary enquiry which is in fact an investigation, statements recorded during this irregular proceedings are nonetheless hit by Section 162. In the instant case, there is not the slightest doubt that the investigation had commenced on receipt of Exhibit P. 18 and all the statements of witnesses recorded by the investigating officer are hit by Section 162, Cr. P. Code. The accused should have been furnished with copies of these statements under S. 173, Cr. P. Code. The accused is fully justified in complaining that the non-furnishing of these copies has prejudiced his trial. The omission and refusal to furnish copies of the statements recorded in the preliminary enquiry has prejudiced the accused and the trial on that account is vitiated. **(1960) 2 Andh WR 73: (1960) MLJ (Cr) 477: 1961 Cr LJ 33: AIR 1961 Andh Pra 3 (5) (Pt B) (Pr 8).**

——S. 5 (1) (c) (before amendment in 1952) — Scope and effect of — Whether pro tanto repeals S. 409, I. P. Code.

Section 5 (1) (c), Prevention of Corruption Act, as it stood prior to its amendment in 1952, did not repeal, pro tanto, Section 409, I. P. C. The two provisions create two distinct and separate offences and there can be no question of Section 5 (1) (c) repealing Section 409, I. P. Code. AIR 1957 SC 458; 1957 SCJ 289; 1956 An LT 169, Foll.; AIR 1955 All 275; AIR 1954 Bom; 549 (FB); AIR 1953 Hyd 573, Rel. on; ILR (1954) Hyd 558; AIR 1952 Punj 89, held not good law. **(1957) 2 Andh WR 352: (1957) MLJ (Cr) 599: 1958 Cr LJ 15: AIR 1958 Andh Pra 29 (30) (Pt A) (Pr 6) (DB).**

——Ss. 5 (1) (c) and 6 — Offence falling under S. 5 (1) (c) and requiring previous sanction for prosecution — Prosecution cannot by ignoring that accused is public servant evade requirement of previous sanction by filing complaint under S. 408, Penal Code — (Criminal P. C. (1898), Section 195).

If the facts constitute an offence requiring either the sanction of a superior authority or the filing of a complaint by a Court, it cannot be evaded by adopting the device of omitting one of the ingredients of the offence and prosecuting him under some other section. To illustrate, if a public servant receives amounts on behalf of the State and dishonestly misappropriates them the offence directly falls under Section 5 (1) (c) of the Prevention of Corruption Act. He can be prosecuted only with the previous sanction of his superior authority. The prosecution cannot by adopting the device of ignoring the fact that the accused is public servant, evade the requirement of previous consent by filing a complaint under Section 408, Penal Code. **1956 Andhra WR 73: 1956 Andhra LT 169: 1957 Cri LJ 1078: AIR 1957 Andh Pra 663 (670) (Pt C) (Pr 24) (DB).**

——S. 5 (1) (c) (4) (before amendment in 1952) — If repeals S. 409, I. P. Code.

Section 5 (1) (c) of the Prevention of Corruption Act, 1947, does not repeal Section 409, Indian Penal Code, in so far as public servants are concerned. The prosecution of the accused under Section 409, Indian Penal Code, is not bad in law and the accused cannot be held to have been prejudiced by such prosecution. Case-

law discussed. AIR 1952 Punj 89; AIR 1953 Punj 249, Dissented from. **1955 Cr LJ 1559: AIR 1955 Bhopal 17 (18) (Pt A) (Prs 7, 8).**

——S. 5 (2) — Penal Code (1860), Ss. 409, 120-B, 467, 471 — Criminal P. C. (1898), Section 196-A — Forgery of documents committed in furtherance of conspiracy to commit misappropriation — Sanction under S. 196-A, Criminal P. C., not necessary.

Where the main object of criminal conspiracy was to commit criminal misappropriation, an offence punishable under Section 409, I. P. C., or Section 5 (2) of the Prevention of Corruption Act and when that was the domninant object of the conspirators and the forgery of certain documents and their use as genuine were not committed for their own sake but in furtherance of the conspiracy to commit the misappropriation, that is, to commit a cognizable offence which did not require sanction under S. 196-A, the forging of the documents and use of the same in furtherance of the main object of misappopriation being subsidiary objects of the conspiracy, sanction under Section 196-A is not necessary. AIR 1947 Cal 32 and AIR 1939 Bom 129 and AIR 1946 Mad 7, Rel. on. **1962 Ker LJ 881: ILR (1962) 2 Ker 362: (1962) 2 Lab LJ 301: 1962 Ker LT 690: 1963 (1) Cri LJ 675 (681, 682) (Pt H) (Pr 29) (DB).**

——S. 5 (2) read with S. 5 (1) (c) — Criminal misconduct by committing misappropriation need not be in discharge of duties as public servant.

It is not necessary to constitute an offence under Cl. (c) of Section 5 (1) that the public servant must do something in connection with his own duty and thereby obtain any valuable thing or pecuniary advantage.

Criminal misconduct by committing misappropriation need not be in the discharge of the duties of the accused as a public servant. Where, therefore, the accused who is in service in the audit section of the Co-operative Department of the State, collects arrears of audit fees payable by some societies, although it is not a part of his duties, during the course of audit, and instead of crediting the money which comes under his control, misappropriates it and deprives the owner namely the State of that property, an offence under Section 5 (1) (c) is complete. AIR 1962 SC 195, Rel. on: AIR 1959 SC 847, Since **overruled** in AIR 1962 SC 195 and hence Not foll.: AIR 1959 SC 1390, Ref. **1962 Ker LT 467: 1962 Ker LJ 692.**

——S. 5 (1) (c) — 'Allowed', meaning and import of — Words and Phrases — 'Allowed' — Penal Code (1860), S. 405.

The word 'allowed' as used in the section is much wider in its import than the expression 'wilfully suffering any person to misappropriate the property entrusted' in Section 405 of the Penal Code.

The word ordinarily involves permission, express or implied, and before a person can be said to allow anything there must be something in the nature of actual knowledge or connivance on his part. However wide the import of the word 'allow' in the section, there must be some evidence that the accused had known of misappropriation and that by some act or omission of his he made it possible or easy for another person to misappropriate. His failure to bring the accused to book or his gross negligence in detecting the fraud that was committed would not by itself lead the inference that he allowed the fraud to be perpetrated within the meaning of the section. AIR 1932 Bom 474; AIR 1924 Cal 985, Rel. on; (1910) 85 LT 549 and 1910 VLR 185, Applied. **1960 Ker LJ 1056.**

——S. 5 (1) (c) — Scope whether repeals Section 409, Penal Code.

Section 5 (1) (c), Prevention of Corruption Act, does not create any new offence. Read with sub-section (2) of Section 5, it only makes an act already punishable under Section 409, I. P. Code, punishable as a criminal misconduct under the Act.

The difference in the punishment, the requirement as to sanction and the special rules of evidence cannot make it a new offence.

Section 5 (1) (c), Prevention of Corruption Act, 1947, as it stood prior to the Prevention of Corruption (Second Amendment) Act, 1952, did not pro tanto repeal S. 409, Penal Code, so far as it relates to offences by public servants. Therefore a public servant could be prosecuted under Section 409, Penal Code, notwithstanding S. 5 (2) of that Act. This is now expressly made clear by Section 5 (4) of that Act. AIR 1952 All 36 and AIR 1953 Mad 137, Rel. on. **1953 Cr LJ 932: ILR (1953) Madh Bha 370: AIR 1953 Madh B 139 (141, 142) (Pt A) (Prs 4, 5, 7, 8).**

——S. 5 (1) (c) — Failure of postal clerk to verify cash balance daily — Submission of incorrect return — Conversion and not negligence must be inferred. See Penal Code (1860), S. 409. **(1963) Jab LJ 142.**

——S. 5 (1) (c) — Scope — If repeals S. 409, I. P. Code.

It cannot be held that Section 5 (1) (c) of the Prevention of Corruption Act repeals S. 409, I. P. Code. AIR 1952 Punj 89, Dissented from.

The general principle of law is that the Penal Code would apply if the acts fall within the I. P. Code, though there may be specific offences and penalties under the special Act. It is idle to contend that a special law repeals the provisions of the I. P. Code because both of them deal with offences arising under both the Acts. There are two restrictions: (1) No prosecution under the special law is admissible, if it appears upon the whole frame of the special Act that it was intended to be complete in itself and to be enforced by the penalties created by it. If the Magistrate proceeds under the Penal Code, it is better to drop the charges under the Local Act. (2) A person cannot be punished under both the Penal Code and the special law for the same offence. **1952 Mad WN (Cri) 269: 1952 Mad WN 957: 65 Mad LW 1120: (1952) 2 MLJ 777: 1953 Cr LJ 309: AIR 1953 Mad 137 (137) (Prs 3, 4).**

——S. 5 (1) (c) — Offence of criminal conspiracy — Section 5 (1) (c) not applicable. **AIR 1955 NUC (Nag) 5680 (DB).**

——S. 5 (1) (c) — Accused postmaster receiving amounts from four persons during one month for remittance by money orders — Accused making delay in crediting it in register — Charge and single trial in respect of all items under Section 5 (1) (c), Prevention of Corruption Act is not improper and is not hit by Section 234 (1) of Cr. P. Code. See Criminal P. C. (1898), S. 234 (1). **1964 (1) Cr LJ 688: AIR 1964 Orissa 152.**

——Ss. 5 (1) (c) and 5 (2) — Prevention of Corruption Act (1947), Ss. 5 (1) (c) and 5 (2) —Payment of money order by village post-master to wrong person — Acknowledgment purporting to be of addressee obtained and attested by witness — Addressee, the Post Master and attesting witnesses each belonging to different villages — Post Office situated in another village — Absence of evidence that addressee often came to Post Office — Plea of mistaken iden-

tity by Post Master — Incriminating statements in departmental enquiry not sufficient to prove charge — Post Master not guilty under S. 471, I. P. Code or under S. 5 (1) (c) read with Section 5 (2) of Prevention of Corruption Act — Attestation of acknowledgment stated to be on representation of Post Master — Attesting witness not guilty of charge under Ss. 467/109, I. P. Code. See Penal Code (1860), S. 471. **(1962) 4 Ori J D 4.**

——Ss. 5 (1) (c) and 6 — Sanction mentioning facts constituting offence under first part of Section 5 (1) (c) only — Conviction under second part of section is unsustainable. **1959 BLJR 232: 1959 Cri LJ 888: AIR 1959 Pat 311 (314) (Pt B) (Pr 13).**

——S. 5 (1) (c) — Section does not repeal Section 409 — Penal Code (1860), S. 409—General Clauses Act (1897), S. 26).

The Prevention of Corruption Act does not expressly repeal any of the provisions of Penal Code, nor did Section 5 (1) (c), Prevention of Corruption Act, as it stood before the amendment of 1952, impliedly repeal any of the provisions of Section 409, I. P. C. AIR 1952 Punj 89, Dissented from. There is no repugnancy or inconsistency between the two enactments. The one is enacted as supplementary measure to the other, with a different and special object. The fact that the Prevention of Corruption Act provides for a different mode of procedure for trial or makes the offence differently punishable does not involve any inconsistency with the earlier enactment. The two provisions can co-exist side by side even though the one may, to some extent, overlap the other. **1956 Cr LJ 100: AIR 1956 Pepsu 1 (2, 3) (Pt A) (Prs 3, 10) (DB).**

——S. 5 (1) (c) — Whether ultra vires — If denies equal protection of laws — (Constitution of India, Art. 14) — (Cr. P. Code (1898), Section 197) — (Penal Code (1860), S. 409) — (Evidence Act (1872), S. 114).

Section 5 (1) (c) of the Prevention of Corruption Act is intra vires and does not offend against Art. 14 of the Constitution. The offence referred to in Section 409, Penal Code, is essentially the same as the offence referred to in Section 5 (1) (c) of the Prevention of Corruption Act. The procedure provided under the Prevention of Corruption Act is in some respects different from the procedure according to which a person charged under Section 409, Penal Code is tried. The differences are in the main five relating to (1) mode of sanction; (2) maximum sentence which can be awarded; (3) the forum; (4) presumptions arising under Section 4 and Section 5 (3) of the Prevention of Corruption Act, and (5) competence of the accused to appear as a witness.

The Prevention of Corruption Act does not lay down which Government servant must be tried under the Act and which upon a charge under Section 409, Penal Code, according to the ordinary procedure, and the Government has been given the absolute discretion to make a decision in this respect. Therefore if any disadvantage attaches to one kind of trial, the person aggrieved may genuinely complain that he has been denied equal protection of the laws in that there is no basis for classification (and the Government has been given the discretion to choose) but would be subjected to a more disadvantageous procedure. The essence of discrimination is that of persons similarly situated; some may be subjected to a more disadvantageous treatment. If the presumptions which must be imported into the case under the provisions of Section 4 and Section 5 (3) of the Prevention of Corruption Act entail a real disadvantage then the Act is discriminatory and bad.

Examination of Section 197, of the Criminal Procedure Code and Section 6, of the Prevention of Corruption Act would show clearly that really there is no essential difference with regard to the mode of granting sanction. On this ground, therefore, the vires of S. 5 (1) (c), cannot be challenged.

In the matter of punishment also a person who is being tried under the Prevention of Corruption Act cannot have any grievance and cannot complain that he has been denied equal protection of laws by being subjected to a harsher treatment under the special law. There is a distinct advantage to the person who is being tried under the Prevention of Corruption Act, although it will appear that by reason of the provisions of Section 71, of the Penal Code a person charged under Section 409, Penal Code cannot be awarded a higher sentence than the sentence permissible under Section 5 (2) of the Prevention of Corruption Act. If the procedure in the Court of a Special Judge is to be the same as in the Court of a Magistrate, then the trial in the Court of the Special Judge would not amount to a denial of equal protection of the laws. The denial lies in the deprivation of certain rights with regard to procedure or substantive law. Therefore, in order to determine whether the provisions of Art. 14 of the Constitution have been violated, the nature of the procedure and not the nature of the forum must be considered.

In the matter of presumption, S. 114, of the Evidence Act is very wide in its terms, and when a public servant is charged with criminal misappropriation of a large sum of money and he is found to have in his possession pecuniary resources which he could not have acquired honestly, the Court may in a fit case presume that there is a nexus between the resources of the accused person and the factum of misappropriation. There are distinct advantages which an accused person enjoys under the Prevention of Corruption Act and only one disadvantage with regard to the presumption which must be drawn under Section 5 (3). Section 5 (3) is not so far reaching as to undo the effect of the other provisions that place the accused person at a distinct advantage particularly his competence to give evidence as his own witness. Weighing the advantages against a single disadvantage, the scales incline slightly in favour of advantages and it therefore cannot be said that a person tried under the Prevention of Corruption Act for an offence defined in Section 5 (1) (c) is denied equal protection of the laws. **59 Punj LR 133: 1957 Cr LJ 659: ILR (1957) Punj 618: AIR 1957 Punj 110 (112 to 116) (Prs 1, 5, 6, 8, 9, 10, 11, 12, 13, 16, 17, 27, 28) (DB).**

6. Dishonest and fraudulent misappropriation — Sub-section 5 (1) (c).

● ——S. 5 (1) (c) — Offence under — Ingredients — Proof and onus — Evidence Act (1 of 1872), S. 106 — Scope.

The offence under Section 5 (1) (c) of the Prevention of Corruption Act is the same as embezzlement, which in English law is constituted when the property has been received by the accused for or in the name or on account of the master or employer of the accused and it is complete when the servant fraudulently.

misappropriates that property. So the essence of the offence is that after the possession of the property the accused dishonestly or fraudulently appropriated the property entrusted to him or under his control as a public servant and deprived the owner of that property. The question is one of intention and not a matter of direct proof but giving a false account of what he has done with the goods received by him may be treated as a strong circumstance against the accused person. The elements of criminal offence of misappropriation will be established if the prosecution proves that the servant received the goods, that he was under a duty to account to his master and had not done so. If the failure to account was due to an accidental loss then the facts being within the servant's knowledge, it is for him to explain the loss. Of course the prosecution has to establish a prima facie case in the first instance, Shri Krishna Kumar v. The Union of India, **1959 Mad WN (SC) 41: (1959) MLJ (Cr) 974: 1959 Cr LJ 1508: 1960 SCJ 1: 1960 All WR (HC) 48: 1960 All Cr R 65: ILR (1959) Punj 1944: (1960) 1 SCR 452: AIR 1959 SC 1390 (1392 to 1394) (Prs 7, 9, 11, 12).**

——S. 5 (1) (c) — Charge of dishonest misappropriation of money — Charge for period exceeding one year — Judge should himself split up items of misappropriation so as to fall within period of one year — He should not send back record for reinvestigation and for submitting fresh charge sheet as required under Section 222. Cr. P. C. (1898). See Criminal P. C. (1898), S. 222 (2), Proviso. **(1965) 6 Guj LR 648.**

——S. 5 (2) — Criminal misconduct.

The prosecution case was that the accused, in his capacity as booking-clerk at Mandi, received, on or after 26th April, 1956, the sums in question, from the drivers of various transport vehicles, for deposit with the adda cashier. The accused, however, failed to deposit the sums. It was only several days after he was placed under suspension, that the missing sums were handed over by him to the adda cashier. **Held,** that the conduct of the accused in retaining the money unduly long, his failure to hand over the same to the cashier, when required to do so by the Regional Manager and his abrupt departure for Bilaspur without permission and without handing over charge of his records and the sums, in question were a clear pointer to his dishonesty. The accused is guilty of dishonest misappropriation, although it was only temporary, punishable under Section 5 (2) of Prevention of Corruption Act. **1959 Cri LJ 973: AIR 1959 Him Pra 14 (16, 17) (Prs 12, 14 to 17, 20).**

——S. 5 (2) — Applicability — Amount withdrawn from bank by Contingent clerk for specific purpose but retained by him for 4½ months and then paid by him only in part — Offence— (Penal Code (1860), S. 409).

The fact that money entrusted to be used for a particular purpose was not used for such purpose and that there was retention for a sufficiently long time, would justify the inference that the accused did not intend to pay. Where a contingent clerk in the office of Superintendent of Police withdraws money from the bank for specific purpose of paying it to certain person but retains it for 4½ months and even then pays it to that person only in part, it can be said that the contingent clerk retained the sum with dishonest intention. He is therefore guilty under Section 5 (2) of the Prevention of Corruption Act. AIR 1934 Cal 532 and AIR 1936 Pat 350, Rel. on. **1957 Cr LJ 131 (133) (Pt B) (Prs 9, 12) (Him Pra).**

——S. 5 (1) (c) — Scope — Penal Code (1860), S. 409 — Distinction.

Section 5 (1) (c), Prevention of Corruption Act, is more or less similar to Section 409, Penal Code, except with respect to the mens rea which is enlarged for the purposes of Section 5 (1) (c). For a breach of trust the act or omission of the accused should be dishonest, while under Section 5 (1) (c) it may be dishonest or fraudulent. The words 'dishonestly' and 'fraudulently' do not mean exactly the same thing. A dishonest act is not necessarily a fraudulent act. The elements which make an act fraudulent are deceit or intention to deceive and in some cases even mere secrecy. Where there is neither the intention to deceive nor secrecy, the act though dishonest is not fraudulent. **1954 Cr LJ 464: ILR (1953) Hyd 573: AIR 1954 Hyd 56 (59) (Pt D) (Pr 7) (DB).**

——S. 5 (2) read with S. 5 (1) (c) — Criminal breach of trust by public servant — Proof of precise mode of conversion or misappropriation, not necessary — Penal Code (1860), S. 409.

Wrongful gain includes wrongful retention and wrongful loss includes being kept out of property as well as being wrongfully deprived of property. Therefore when a particular thing has gone into the hands of a servant, he will be guilty of misappropriating the thing in all circumstances which show malicious intent to deprive the master of it. AIR 1959 SC 1390, Ref.

To establish a charge of criminal breach of trust, the prosecution is not obliged to prove the precise mode of conversion, misappropriation or misapplication by the accused of property entrusted to him or over which he has dominion.

The principal ingredient of the offence, being dishonest misappropriation or conversion, which may not ordinarily be a matter of direct proof, entrustment of property or failure in breach of obligation to account for the property if entrusted, it proved, may, in the light of other circumstances, justifiably lead to an inference of dishonst misappropriation or conversion. **1962 Ker LT 467: 1962 Ker LJ 692.**

——S. 5 (1) (c) — 'Or allows any other person so to do' — Dishonest or fraudulent mind — Absence of — Effect of.

If dishonest or fraudulent mental element is proved to have been absent in any given case the crime is not committed. It would indeed be anomalous to hold that while in the case of misappropriation and conversion the section requires that it must be done either dishonestly or frudulently, a person morally inprocent of blame could be held vicariously liable for an assistant's crime without there being a dishonest or a fraudulent mind. **1959 BLJR 232: 1959 Cri LJ 888: AIR 1959 Pat 311 (313) (Pt A) (Pr 10).**

7. Misappropriation — Evidence of Sub-section 5 (1) (c).

——S. 5 (1) (c) and (2) — Scope — Criminal misconduct by public servant by misappropriating money — Misappropriation need not be in discharge of his duty as public servant — Public servant collecting audit fees due to Government from Co-operative Societies — Failure to remit into treasury for a period — Proof of misappropriation.

Section 5 (2) is a new offence created by the Act in addition to those mentioned in Ss. 161 and 409, Indian Penal Code. The Legislature advisedly widened the scope of the

offence by giving a very wide definition in Section 5 with a view to punish those who holding public offices come by money and misappropriate the same or who taking advantage of his official position obtains for himself or for any other person any valuable thing or pecuniary advantage. Criminal misconduct by committing misappropriation need not be in the discharge of his duties as a public servant. If after the money had come under his control as a public servant he fraudulently misappropriates it, the offence would be complete. AIR 1962 SC 195, Foll.

Held, on facts that the accused was guilty of criminal misconduct punishable under S. 5 (2) read with Section 5 (1) (c) of the Prevention of Corruption Act and the mere fact that he subsequently remitted the amounts into the treasury will not exonerate him. To establish a charge of criminal breach of trust, the prosecution is not obliged to prove the precise mode of conversion, misappropriation or misapplication by the accused of the amount properly entrusted to him or over which he has dominion. The principal ingredient of the offence being dishonest misappropriation or conversion which may not ordinarily be a matter of direct proof entrustment of property and failure in breach of an obligation to account for the property entrusted, if proved, may in the light of other circumstances, justifiably lead to an inference of dishonest misappropriation or conversion. **1962 Ker LJ 692: 1962 Ker LT 467: 1963 Mad LJ (Cr) 639: 1963 (1) Cr LJ 360 (362, 363) (Prs 6, 10, 11).**

——S. 5 (1) (c) — Offence under — Nature and essentials of — Evidence — Direct proof neither possible nor necessary.

It is neither necessary nor possible in every case of breach of trust to prove in what precise manner the money was spent or appropriated by the accused. The question is one of intention and not a matter of direct proof; but giving a false account of what he has done with the money received by him may be treated as a strong circumstance against the accused.

The offence under the section is the same as embezzlement which in English Law is constituted when the property has been received by the accused for or in the name or on account of the master or employer of the accused and is complete when the servant fraudulently misappropriates that property. **1960 Ker LJ 1056.**

——S. 5 (1) (c) — Post-master delaying entries in relevant registers regarding money received for remittance by money order — Conviction under section proper — Proper inference arising from his conduct is that he has committed misappropriation and it is for him to establish his innocence.

Where the prosecution fully establishes that the accused, a post-master on receipt of amount for remittance by money orders, did not make the relevant entries in the daily account book as required by R. 139 (4) of the Rules for Branch Post Offices and made delay of seven days, though in the meantime, the had made other entries in the account book and the accused has no satisfactory explanation to offer for the delay, the only inference that can be drawn from the conduct of the accused is that he committed temporary misappropriation of the amounts which were entrusted to him for remittance and hence his conviction under S. 5 (1) (c) must be upheld. It is well settled that it is not necessary or possible in every case to prove in what precise manner the accused person has dealt with or misappropriated the goods of his master. The question is one of intention and not a matter of direct proof. It is not the law of the country that the prosecution has to eliminate all possible defence of circumstances which may exonerate him. All that the prosecution has to do is to establish a prima facie case in the first instance. It is enough to establish facts which give rise to suspicion and then by reason of S. 106, Evidence Act, to throw the onus upon the accused to prove his innocence. AIR 1959 SC 1390, Rel. on. **30 Cut LT 29: ILR (1964) Cut 57: 1964 (1) Cr LJ 688: (1964) 2 Lab LJ 522: AIR 1964 Orissa 152 (155, 156) (Pt A) (Prs 6, 9).**

8. Sub-section 5 (1) (d).

● **——Ss. 5 (1) (d), (2), 6** — Original charge against accused that he abused his position as public servant and obtained for other persons pecuniary advantage — Subsequent amendment of charge that the accused obtained pecuniary advantage for himself — Objection that Court was not competent to amend charge in this way as sanction given for prosecution of accused did not state that he had abused his position for his personal gain — **Held,** that it was still open to the prosecution to lead evidence to the effect that the sanction given for the prosecution was based on facts which referred to his obtaining money for himself — It might also be open to the prosecution to urge that it was a matter of inference from the alleged conduct of accused that he obtained benefit for himself. Banwarilal Jhunjhunwala v. Union of India, **(1963) 1 SCWR 300: (1963) Supp (2) SCR 338: 1963 (2) Cr LJ 529: AIR 1963 SC 1620 (1625) (Pt C) (Pr 22).**

● **——S. 5 (1) (d)—Scope—Public servant causing wrongful loss to Government by benefiting third party — Section 5 (1) (d) applies.**

As the Act is a socially useful measure conceived in public interest, it should be liberally construed so as to bring about the desired object, i.e., to prevent corruption among public servants and to prevent harassment of the honest among them. It will not be correct to say that S. 5 (1) (d) would only take in cases of direct benefit obtained by a public servant for himself or for any other person from a third party in the manner described therein and does not cover a case of a wrongful loss caused to the Government by abuse of his power. Taking the phraseology used in the clause the case of a public servant causing wrongful loss to the Government by benefiting a third party squarely falls within it. The Act was brought in to purify public administration. When the Legislature used comprehensive terminology in S. 5 (1) (d) to achieve the said purpose, it would be appropriate not to limit the content by construction when particularly the spirit of the Statute is in accord with the words used therein.

The juxtaposition of the word 'otherwise' with the words "corrupt or illegal means", and the dishonesty implicit in the word "abuse" indicate the necessity for a dishonest intention on the part of the public servant to bring him within the meaning of the clause. 1956 SCJ 432; (1956) 2 MLJ (SC) 4; (1956) 2 An WR (SC) 4; AIR 1956 SC 476; (1962) 2 SCJ 538; (1962) 2 MLJ (SC) 164; (1962) 2 An WR (SC) 164; 1962 MLJ (Crl) 645; AIR 1962 SC 195; (1872) 4 AC 184, Rel. on. M. Narayanan Nambiar v. State of Kerala. **1963 Ker LJ 668: (1963) 1 SCWR 343: 1963 Mad WN 436: 1963 SCD 667: (1963) Supp (2) SCR 724: 1963 Ker LT 1015: (1963) 2 SCJ 582: 1963 Mad LJ (Crl) 581: (1963) 2 Lab LJ 660: 1963 (2) Crl LJ 186: AIR 1963 SC 1116 (1118) (Pt A) (Prs 9, 10).**

● ——**S. 5 (1) (d) — Misconduct by public servant need not be in connection with his own official duty.**

The offence under S. 5 is wider than the offence of bribery as defined in S. 161, I. P. Code. In order to bring the charge home to an accused person under Cl. (d) of S. 5 (1), it is not necessary that the public servant in question, while misconducting himself, should have done so in the discharge of his duty. It is not necessary to constitute the offence under Cl. (d) of the section that the public servant must do something in connection with his own duty and thereby obtain any valuable thing or pecuniary advantage. It is equally wrong to say that if a public servant were to take money from a third person, by corrupt or illegal means or otherwise abusing his official position, in order to corrupt some other public servant, without there being any question of his misconducting himself in the discharge of his own duty, he has not committed an offence under S. 5 (1) (d). It is also erroneous to hold that the essence of an offence under S. 5 (2), read with S. 5 (1) (d), is that the public servant should do something in the discharge of his own duty and thereby obtain a valuable thing or pecuniary advantage. (1959) Supp (2) SCR 739; AIR 1959 SC 847, **Overruled.** Dhaneshwar Narain Saxena v. Delhi Administration, **(1962) 3 SCR 259: (1962) 1 Lab LJ 142: (1962) 2 SCA 313: (1962) 2 Mad LJ (SC) 164: (1962) 2 Andh WR (SC) 164: 1962 Mad LJ (Cri) 645: (1962) 2 SCJ 538: 1961 All LJ 972: 1961 All WR (HC) 750: 1962 All Cr R 1: 1962 BLJR 29: 1962 (1) Cr LJ 203: AIR 1962 SC 195 (198) (Pr 4).**

● ——**S. 5 (1) (d) and (2) — Government teacher taking money for procuring job in Railway Running Shed — Offence.**

Mere receiving of money by public servant even if it be by corrupt means is not sufficient to make out an offence under S. 5 (2) read with S. 5 (1) (d). The words "by otherwise abusing his position" read along with the words "in the discharge of his duty" appearing in Section 5 (1) (d) make it quite clear that an offence under that section requires that the public servant should misconduct himself in the discharge of his own duty. It is no part of the duty of a Government teacher to make appointments in a Railway Running Shed. There would, therefore, be no question of his committing misconduct in the discharge of his duty when he takes money for procuring a job for a person in the Running Shed. State of Ajmer (now Rajasthan) v. Shivji Lal, **37 Mys LJ 878: 1959 Mad WN (SC) 72: 1959 SCJ 911: 1959 Mad LJ (Cri) 589: 1959 All Cri R 303: 1959 Cri LJ 1127: 1959 All WR (HC) 376: (1960) 1 Lab LJ 230: (1961) 1 SCA 288: (1959) Supp (2) SCR 739: AIR 1959 SC 847 (849) (Pt B) (Pr 5).**

[**Overruled** in AIR 1962 SC 195.]

● ——**S. 5 (1) (a) and (d) — Scope — Charge and trial for habitually receiving bribe (Section 5 (1) (a)) — Conviction for receiving one bribe (S. 5 (1) (d)) — Sanction obtained under S. 6 for offence under S. 5 (1) (d) — Legality of conviction.**

It was contended in this case that as the sanction under S. 6 was only for receiving Rs. 50 as illegal gratification from P and therefore, an offence under S. 5 (1) (d), the prosecution, the charge and conviction should have been under that provision, but as the accused was tried under S. 5 (1) (a) for the charge of being a habitual receiver of bribes and the sanction was only for one single act of receiving illegal gratification, the trial was wholly void as it was a trial by Court without jurisdiction:

Held, that the prosecution for offence under S. 5 (1) (d) was not barred because the proceedings were not without previous sanction which was validly given for the offence of receiving a bribe; but the offence of habitually receiving illegal gratification could not be taken cognizance of, and the prosecution and trial for that offence was void for want of sanction which was a condition precedent for the Courts taking cognizance of the offence alleged to be committed. The want of sanction for the offence of habitually accepting bribes, therefore, did not make the taking of cognizance of the offence of taking a bribe of Rs. 50 void nor the trial for that offence illegal and the Court, a Court without jurisdiction. **Held,** further that the accused had not been prejudiced in the conduct of his defence. Jaswant Singh v. State of Punjab, **36 Mys LJ 118: 1958 Mad WN (SC) 59: 1958 SCJ 355: 1958 BLJR 31: 1958 MPC 65: (1958) 2 Lab LJ 269: 1958 All LJ 58: 1958 All Cri R 109: 1958 Cri LJ 265: 1958 SCA 407: (1958) Mad LJ (Cri) 316: ILR (1958) Punj 572: 1958 All WR (HC) 127: 1958 SCR 762: AIR 1958 SC 124 (127) (Pt C) (Prs 5, 7).**

● ——**S. 5 (1) (d) — Offence under Bribery — Distinction — 'Obtains' — Meaning of — Acceptance on voluntary offer—Offence — (Penal Code (1860), Ss. 161, 162, 165).**

The word 'obtains' in S. 5 (1) (d) does not eliminate the idea of acceptance of what is given or offered to be given, though it connotes also an element of effort on the part of the receiver. One may accept money that is offered, or solicit payment of a bribe, or extort the bribe by threat or coercion; in each case he obtains a pecuniary advantage by abusing his position as a public servant.

If a man obtains a pecuniary advantage by the abuse of his position, he will be guilty under Clause (d) of Sec. 5 (1). Sections 161, 162 and 163 of the Penal Code, refer to a motive or reward for doing or forbearing to do something, showing favour or disfavour to any person, or for inducing such conduct by the exercise of personal influence. It is not necessary for an offence under Cl. (d) to prove all this. It is enough if by abusing his position as a public servant a man obtains for himself any pecuniary advantage, entirely irrespective of motive or reward for showing favour or disfavour. No doubt, to a certain extent the ingredients of the two offences are common. But to go further and contend that the offence as defined in Cl. (d) does not come within the meaning of bribery is to place too narrow a construction on the sub-clause. Ram Krishna v. State of Delhi, **1956 SCJ 432: 1956 Mad WN 480: 1956 SCR 182: 69 Mad LW 1002: (1957) 1 Lab LJ 4: 1956 All WR (Sup) 95: 1956 SCC 247: 1956 Cr LJ 837: 1956 Andhra LT 512: (1956) 2 Mad LJ (SC) 4: 1956 SCA 577: ILR (1956) Punj 1163: AIR 1956 SC 476 (478) (Pt A) (Pr 9).**

● ——**S. 5 (1) (d)** — Court to look to language employed — (Civil P. C. (1908), Pre). See Interpretation of Statutes. **AIR 1956 SC 476.**

——**S. 5 (1) and (2) — Misconduct in discharge of duties.**

A misconduct, which is punishable under sub-section (2) is a misconduct in the discharge of duties as a public servant and therefore, where the accused, a Medical officer is not acting as a public servant but in the exercise of his right as a private practitioner, he cannot be regarded as having committed misconduct in the discharge of his duty as a public servant nor can he be re-

garded to have obtained any pecuniary advantage by corrupt or illegal means or by abusing his position as a public servant. **1956 All WR (HC) 330: 1956 All LJ 466: 1956 Cr LJ 1276: AIR 1956 All 673 (676) (Pt B) (Pr 6) (DB).**

——S. 5 (1) (d) and (2) — Applicability — Accused, if should function as public servant at the moment at which pecuniary advantage is obtained.

For purposes of Cl. (d) of sub-section (1) of S. 5 of Act 2 of 1947, it is not necessary that the accused should function as a public servant at the moment at which pecuniary advantage is obtained. For purposes of Cl. (d), it is sufficient if the accused obtained pecuniary advantage by abusing his position as a public servant. Where a clerk in the Resident Engineer's office abusing his position as a public servant, forged cash order form and subsequently obtained payment on its basis, his case falls under S. 5 (1), (d), and he is punishable for offence punishable under S. 5 (2), read with S. 5 (1) (d). **1956 All WR (HC) 724: (1957) 2 Lab LJ 177: 1956 All LJ 910: 1957 Cr LJ 108 (111) (Pt B) (Pr 19) (All).**

——S. 5 (1) (d) — "Pecuniary advantage" — Words are wide enough to include cases of cash payment. **1952 RD (HC) 375: 1953 All Cri R 1: 1953 All WR (HC) 4: 1953 Cri LJ 340: 1953 ALJ 193: ILR (1954) 1 All 45: AIR 1955 All 110 (112) (Pt C) (Pr 16).**

——S. 5 (1) (d) — Scope — Section does not exclude offences under I. P. Code.

Section 5 (1) (d) cannot be so construed as to exclude from its purview offences provided for by the Indian Penal Code, as it is a common feature of criminal legislation to look at the same act from different points of view and to define it as different offences considered from such different points of view, whether under the same enactment or under different enactments. **1951 All Cri Cas 73: 1951 All WR (HC) 411: AIR 1952 All 597 (601) (Pt B) (Pr 22).**

——S. 5 (1) (d) — "Abusing his position as a public servant" — Accused need not be in charge of contract-work done by complainant on day of offence — Future possibility sufficient. **AIR 1965 Andh Pra 105 (113) (Pt B) (Pr 31) (DB).**

——S. 5 (1) (d) — Criminal P. C. (1898), Section 162 — Panchnama in a corruption case — Admissibility of — When hit by S. 162 — Panchanama is merely a record of facts which took place in the presence of panchas and not a record of statement communicated to a police officer — Admissible in evidence and not hit by S. 162, Cr. P. C. See Criminal P. C. (1898), S. 162. **1963 (2) Cri LJ 14: AIR 1963 Guj 145 (DB).**

——S. 5 (2) — Criminal P. C., Ss. 177, 179, 180, 182 —Criminal Law Amendment Act (1952), Sections 7 (3), 6 (1), 7 (2) — Conspiracy by a contractor and a Government servant to cheat Central Government Officer giving a false certificate that the goods were of the contract quality — This conduct amounts to criminal misconduct in the discharge of official duty within the meaning of S. 5 (1) (d) and punishable under S. 5 (2) of the Prevention of Corruption Act — Applicability of Chap. XV of Criminal P. C. — Conspiracy outside Kerala — Consequences in Kerala — Jurisdiction of Special Judge in Kerala — Deception begun in Kerala but completed outside — Territorial jurisdiction — Kerala Special Judge has jurisdiction to try the offence — (Criminal Law Amendment Act (1952), Ss. 6 (1), 7 (2), 7 (3)) — (Penal Code (1860), S. 120-B). See Criminal P. C. (1898), S. 177. **1959 Cri LJ 1172: AIR 1959 Ker 311.**

——S. 5 (1) (d) — Pecuniary advantage— The words 'pecuniary advantage' are wide enough to include cases of each payment. **1960 Cri LJ 934: 38 Mys LJ 265 : 1962 Mad LJ (Cri) 222: ILR (1960) Mys 26: AIR 1960 Mys 111 (135) (Pt P) (Pr 18) (DB).**

——Ss. 5, 6 — Applicability — Complaint disclosing offence requiring sanction — Trial for offence not requiring sanction — Validity.

Where the facts mentioned in the complaint give rise to two offences one of which required either a complaint by the Court concerned or a sanction by the prescribed authority, the prosecution cannot be started under the section which did not require any complaint by the Court or sanction necessary in law for taking cognizance of the case and thus evade the provisions of sanction. AIR 1953 SC 293 and AIR 1954 Mad 561, Rel. on.

Thus, where the offence disclosed in the complaint is in truth and substance an offence under S. 161 of the Penal Code or S. 5 (1) (d) of Act 2 of 1947 which might also come under S. 384 of the Penal Code and the prosecution under the first two sections requires sanction under S. 6 of Act 2 of 1947 while the offence under S. 384 did not require any such sanction, the law relating to sanction cannot be evaded by proceedings against the accused for an offence under S. 384, I. P. Code. Such a trial is without jurisdiction. **1955 BLJR 183: 1955 Cri LJ 1382: AIR 1955 Pat 453 (455) (Pt A) (Pr 4).**

——S. 5 (1) (d) — Criminal P. C., S. 161 — 'Obtaining or attempting to obtain' — Meaning— Includes threat by public servant — The mere fact that the complainant said that accused by putting the complainant in fear of injury and of threat to implicate him in a criminal case obtained the illegal gratification does not take the offence outside the scope of S. 161, I. P. C. or S. 5 (1) (d) of Act 2 of 1947 — (Words and Phrases). See Penal Code (1860), Section 161. **1955 Cri LJ 1382: AIR 1955 Pat 453.**

——S. 5 (1) (d) — Release of property by Revenue Minister from the management of Court of Wards — Revenue Minister in charge of Court of Wards Department constitutes Government and is competent to direct the release of the property — Order, if erroneous not an offence under Section 5 (1) (d), Prevention of Corruption Act unless it was proved that it was passed with guilty knowledge and to obtain pecuniary advantage. See Pepsu Court of Wards Act (1 of 2008, B. K.), S. 5. **AIR 1955 NUC (Pepsu) 730.**

9. Sub-section 5 (2).

● **——S. 5 (1) (c) and (2)** — Criminal P. C., S. 537 — Accused persons charged under Section 5 (1) (c) of the Prevention of Corruption Act (1947) — Some of the accused not public servants — Accused who was public servant convicted under S. 5 (2), Prevention of Corruption Act instead of under that provision read with S. 34, Penal Code — Section 537, Criminal P. C. held applied to such a case — **Held** there was no failure of justice. See Criminal P. C. (1898), S. 537. **1961 (2) Cri LJ 828: AIR 1961 SC 1762.**

● **——S. 5 (2)** — Procedure — Prosecution under S. 161, I. P. Code and S. 5, Prevention of Corruption Act — Case transferred to Munsif Magistrate at Patna at the request of the accused — Passing of Criminal Law Amendment Act 1952 — Special Bench created — Case transferred to

Special Bench Patna — Contention that case should have been transferred to Special Bench Manbhoom—**Held** by virtue of S. 8 (3), Criminal Law Amendment Act 1952, S. 526, Criminal P. C. applied to the case and the High Court could transfer any case from a criminal Court subordinate to it to any Court competent to try it. These powers applied to Special Judge also. See Criminal Law (Amendment) Act (1952), S. 7. **1961 (2) Cri LJ 811: AIR 1961 SC 1629.**

●——**S. 5 (2) and (3)** — Section 5 (2) or (3) does not create any offence — Accused only charged with misconduct under S. 5 (1) (c) — Accused acquitted — Accused cannot be convicted under S. 5 (2) of any other type of misconduct not charged, by calling in aid the rule of presumption laid down in S. 5 (3). 1958 All LJ 424, **Reversed.** Surajpal Singh v. State of Uttar Pradesh. **(1961) 1 Mad LJ (SC) 86: (1961) 1 Andh WR (SC) 86: 1961 BLJR 344: 1961 SCJ 293: (1961) Mad LJ (Cr) 537: 1961 All Cr R 131: 1961 All WR (HC) 275: 1961 MPC 497: (1961) 2 Lab LJ 158: (1961) 1 Ker LR 365: 1961 All LJ 298: 1961 (1) Cri LJ 730: (1961) 3 Fac LR 258: 1961 Mad WN 538: ILR (1961) 1 All 565: AIR 1961 SC 583 (585) (Pr 8).**

——**S. 5 (2) and (3)** — Charge under S. 5 (1) (c)—Accused-appellant convicted under S. 5 (2) — High Court maintained the conviction holding that S. 5 (3) became applicable when it was proved that the sum was actually recovered from the appellant, that the sum was disproportionate to his source of income. **1958 All LJ 424.**

[**Overruled** on another point in AIR 1961 SC 583.]

——**S. 5 (2)** — Criminal P. C., S. 537 — Error in charge — Defect being petty, irregularity is curable when there is no prejudice to accused. See Criminal P. C. (1898), S. 537. **AIR 1953 All 110.**

——**S. 5 (3)** — Scope — Presumption under — Rebuttal — Accused need not adduce evidence — His explanation taken with other prosecution evidence can be considered — Explanation must amount to proof — Presumption under S. 4 (1) cannot be used for offence under S. 5 (2) of the Act. See Prevention of Corruption Act (2 of 1947), S. 4 (1). **1965 (1) Cri LJ 281: AIR 1965 Andh Pra 105 (DB).**

——**S. 5 (2)** — Scope — Section prohibits punishment for same set of facts under two sections — Trial however, not prohibited. See General Clauses Act (1897), S. 26. **1962 (2) Cri LJ 598: AIR 1962 Bom 263 (DB).**

——**S. 5 (2)** — Joint trial — Joint trial involving offences under S. 406, I. P. C. committed on five different dates read with S. 5 (2) of Prevention of Corruption Act — Joint trial is not bad but there should be separate charge for each items and the trial should be regulated in the manner prescribed by S. 234, Cr. P. C. See Criminal P. C. (1898), S. 234. **1954 Cri LJ 1837: AIR 1954 Him Pra 83.**

——**S. 5 (2) — Penal Code (1860), Ss. 409, 120-B, 467, 471 — Criminal P. C. (1898), S. 196-A — Forgery of documents committed in furtherance of conspiracy to commit misappropriation — Sanction under S. 196-A, Criminal P. C., not necessary.**

Where the main object of criminal conspiracy was to commit criminal misappropriation, an offence punishable under S. 409, I. P. C. or Section 5(2) of the Prevention of Corruption Act, and when that was the dominant object of the conspirators and the forgery of certain documents and their use as genuine were not committed for their own sake but in furtherance of the conspiracy to commit the misappropriation, that is, to commit a cognizable offence, which did not require sanction under S. 196-A, the forging of the documents and use of the same in furtherance of the main object of misappropriation being subsidiary objects of the conspiracy sanction under S. 196-A is not necessary. AIR 1947 Cal 32; AIR 1939 Bom 129; AIR 1946 Mad 7, Rel. on. **1962 Ker LT 690: (1962) 2 Lab LJ 301: 1962 Ker LJ 881: ILR (1962) 2 Ker 362.**

——**S. 5 (1) (a)** — Scope — Charge under Section 5 (1) (a) — Enumeration of nine instances of accepting illegal gratification — Proof of only one instance — Conviction under S. 161, Penal Code was legal and warranted by S. 238, Criminal P. C. See Criminal P. C. (1898), S. 238. **1957 Cr LJ 1127: AIR 1957 Ker 134 (DB).**

——**S. 5 (2)** — Trap laid against accused — Precautions to be observed in conducting search. **1961 MPLJ 721.**

——**S. 5** — Criminal P. C., S. 238 — Three complete minor offences of bribe-taking committed within space of 12 months included — Only one offence proved — Acquittal under S. 5 (2) — Accused can be convicted under S. 161, I. P. C. — (Penal Code (1860), S. 161). See Criminal P. C. (1898), S. 238. **AIR 1953 Mad 785.**

——**S. 5** — Jurisdiction — Accused committed for offences under S. 120-B, I. P. Code and Section 5 (2) read with S. 5 (1) (c) of Act 2 of 1947, before passing of Act 46 of 1952 to trial by Court of Session — High Court's jurisdiction after coming into force of Act (46 of 1952) not affected. See Criminal Law (Amendment) Act (46 of 1952), Section 7. **54 Cri LJ 882: AIR 1953 Mad 451.**

——**S. 5 (2)** — Criminal P. C., Section 234 — Applicability — Offence under Section 5 (2), Prevention of Corruption Act — Trial for the single new offence of criminal misconduct under sub-section (2) of S. 5 of Prevention of Corruption Act and not for specific offences under S. 161, I. P. C. — The limitation under S. 234, Criminal P. C. are not applicable — The policy of that section, however, has got to be given effect to as far as possible. See Criminal P. C. (1898), S. 234. **1952 Cri LJ 1533: AIR 1952 Orissa 289 (DB).**

——**Ss. 5 (2), 5-A and 6** — Cognizance under S. 8 (1) — Not confined to police report — Offence under S. 5 (2) of Act 2 of 1947 — No investigation by officers specified in S. 5-A — Cognizance taken on complaint by Circle Inspector is valid. See Criminal Law (Amendment) Act (1952), S. 8 (1). **1965 BLJR 485: 1966 Cri LJ 50: AIR 1966 Pat 15 (DB).**

——**S. 5 (2) — Offence under — Court, triable by — Criminal P. C. (1898), S. 29.**

An offence charged under S. 5 (2) is exclusively triable by the Court of Session under the provision of S. 29 read with Sch. II, Criminal P. C. **ILR 29 Pat 935: AIR 1950 Pat 550 (551) (Pt E) (Pr 5) (DB).**

——**S. 5 (2)** — Accused, resident of place in Punjab, committing acts of misappropriation in 1948 — Place transferred to Pepsu under Enclaves Order — Act not in force in Pepsu — Accused tried and convicted under S. 5 (2) — Conviction held not legal — Section 6 (e), General Caluses Act does not apply — (General Clauses Act (1897), S. 6 (e)) — (Provinces and States (Absorption of Enclaves) Order (1950), Art. 8, Proviso). **AIR 1955 NUC (Pepsu) 2509.**

——**S. 5** — Presumption under S. 4 — Can arise only when the trial is for an offence punishable under S. 161 and S. 165, I. P. Code and not in

the case of a prosecution under S. 5 (2) of the Act 2 of 1947. See Prevention of Corruption Act (1947), S. 4. **AIR 1955 NUC (Punj) 4021.**

——**S. 5 (2)** — Section 5 (2) entitles a Court to presume that when a person receives the money he receives it as an illegal gratification. **1951 All WR (Supp) 87: 52 Cri LJ 944: AIR 1951 Punj 424 (425) (Pt B) (Pr 7).**

10. Sub-section 5 (3) — General.

●——**S. 5 (3) — Presumption and proof under — Liberal construction in favour of accused.**

Sub-section (3) of S. 5, provides an additional mode of proving an offence punishable under sub-section (2) for which any accused person is being tried. This additional mode is by proving the extent of the pecuniary resources or property in the possession of the accused or any other person on his behalf and thereafter showing that this is disproportionate to his known sources of income and that the accused person cannot satisfactorily account for such possession. If these facts are proved, the section makes it obligatory on the Courts to presume that the accused person is guilty of criminal misconduct in the discharge of his official duty, unless the contrary; i.e., that he was not so guilty is proved by the accused. The section goes on to say that the conviction for an offence of criminal misconduct shall not be invalid by reason only that it is based solely on such presumption.

This is a deliberate departure from the ordinary principle of criminal jurisprudence, under which the burden of proving the guilt of the accused in criminal proceedings lies all the way on the prosecution. Under the provision of this sub-section, the burden on the prosetution to prove the guilt of the accused must be held to be discharged if certain facts as mentioned therein are proved; and then the burden shifts to the accused and the accused has to prove that in spite of the assets being disproportionate to his known sources of income, he is not guilty of the offence. There can be no doubt that the language of such a special provision must be strictly construed. If the words are capable of two constructions, one of which is more favourable to the accused than the other, the Court will be justified in accepting the one which is more favourable to the accused. There can be no justification however, for adding any words to make provision of law less stringent than the legislature has made it. Sajjan Singh v. State of Punjab, **1964 Mad WN 207: (1964) 4 SCR 630: 1964 Cur LJ (SC) 37: 1964 (1) Cri LJ 310: 1964 SCD 874: AIR 1964 SC 464 (467, 468) (Pt A) (Prs 10, 11).**

●——**S. 5 (3)** — Does not create new offence — Sub-section is not retrospective — Conviction in respect of property acquired before Act — No breach of fundamental right under Art. 20 (1) of Constitution. Sajjan Singh v. State of Punjab, **1964 Mad WN 207: (1964) 4 SCR 630: 1964 Cur LJ (SC) 37: 1964 (1) Cr LJ 310: 1964 SCD 874: AIR 1964 SC 464 (468) (Pt C) (Pr 13).**

●——**S. 5 (3)** — Pecuniary resources and property acquired before the Act can be taken into consideration. Sajjan Singh v. State of Punjab, **1964 Mad WN 207: (1964) 4 SCR 630: 1964 Cur LJ (SC) 37: 1964 (1) Cr LJ 310: 1964 SCD 874: AIR 1964 SC 464 (469) (Pt D) (Pr 16).**

●——**S. 5 (3)** — Section is not meaningless. sajjan Singh v. State of Punjab. **1964 Mad WN 207: (1964) 4 SCR 630: 1964 SCD 874: 1964 Cur LJ (SC) 37: 1964 (1) Cri LJ 310: AIR 1964 SC 464 (469) (Pt E) (Pr 16).**

●——**S. 5 (3) — Sub-section does not create new offence but lays down rule of evidence.**

Section 5 (3) does not create a new offence but only lays down a rule of evidence, enabling the Court to raise a presumption of guilt in certain circumstances — a rule which is a complete departure from the established principle of criminal jurisprudence that the burden always lies on the prosecution to prove all the ingredients of the offence charged, and that the burden never shifts on to the accused to disprove the charge framed against him. C. S. D. Swami v. State, **1960 Cri LJ 131: 1960 Mad WN 149: 1960 SCJ 160: 1960 MLJ (Cr) 91: (1960) 1 SCR 461: 1960 Pat LR (SC) 21: ILR (1959) Punj 1955: AIR 1960 SC 7 (9) (Pt A) (Pr 4).**

●——**S. 5** — Scope — Charge of criminal misconduct under Section 5 (1) — Existence of property in excess of official remuneration — Presumption is that the amassing of such wealth was due to bribery or corruption — Such a presumption cannot be drawn in the case of a prosecution under Ss. 161, 165 and 409 of I. P. C. See Penal Code (1860), S. 161. **1957 Cri LJ 575: AIR 1957 SC 458.**

——**Ss. 5 (1) (d), 5 (3) — Corrupt and illegal means — Assets which cannot be accounted for by savings from legitimate income must be presumed to have been obtained by such means.**

A Government servant whose assets cannot be satisfactorily accounted for by saving from his legitimate income must be presumed to have obtained some amount "by corrupt and illegal means" and he can be held liable for an offence of criminal misconduct in the discharge of his official duty within the meaning of S. 5 (1) (d). **(1956) 2 Lab LJ 1 (All): 1956 All LJ 193: ILR (1957) 1 All 206.**

——**S. 5 (3) — Scope — If creates separate offence — Only a rule of evidence.**

Section 5 (3) does not create any offence. It does not speak of any specific individual act of a person or his attempt at any specific act, but refers to a state of his pecuniary position as contrasted with his known earnings, which might be a cumulative result of acts done by him, which might fall under Section 5 (1). In enacting sub-section (3) of Section 5, the Legislature did not intend to create an offence, separate from the one created under sub-section (1), but intended to lay down a rule that if a person's pecuniary resources, as compared to his known or legitimate sources of income reached a point which was disproportionate to the said income, it shall be presumed unless the person concerned accounted satisfactorily for it, that he had acquired those pecuniary resources by the commission of an act or series of acts under S. 5 (1).

Possession of pecuniary resources disproportionate to the known sources of a person's income is not one particular act of a person, but is a consequence arising out of his habitual acceptance of bribes, in other words, a consequence of habitual commission of offences by him under Section 5 (1). Acquisition of such a pecuniary position is not and cannot be, a separate or distinct offence from an offence under Section 5 (1). In short, Section 5 (3) does not create a separate offence of criminal misconduct independently of sub-section (1), but is only a rule of evidence. AIR 1952 Orissa 289, Dissented from. **58 Bom LR 317: ILR (1956) Bom 489: 1956 Cr LJ 1310: AIR 1956 Bom 717 (718) (Pr 4) (DB).**

——**S. 5 (1) (3) — Scope of sub-section (3) of S. 5 — Presumption under sub-s. (3) of S. 5, when arises.**

In enacting sub-section (3) of Section 5, the Legislature did not intend to create an offence, separate from the one created under sub-section (1) but intended to lay down a rule that if a person's pecuniary resources, as compared to his known or legitimate sources of income, reached a point which was disproportionate to the said income it shall be presumed, unless the person concerned accounted satisfactorily for it, that he had acquired those pecuniary resources by the commission of an offence mentioned in Section 5 (1) of the Act. The sub-section lays down a rule of evidence enabling the Court to raise the presumption of guilt in certain circumstances — rule which is a complete departure from the established principle of criminal jurisprudence that the burden always lies on the prosecution to prove all the ingredients of the offence charged, and that the burden never shifts on to the accused to disprove the charges framed against him. Under sub-section (3) of Section 5 the Court has, therefore, to see as to what are the pecuniary resources or property, which are in the possession of the accused or of any other person on his behalf; secondly, what are his known sources of income; and thirdly, are the resources disproportionate to the known sources of income and, if they are disproportionate to the known sources of income, the Court is bound to raise the presumption unless the accused satisfactorily accounts for such possession. AIR 1958 SC 61, Ref. **1962 Ker LJ 881: ILR (1962) 2 Ker 362: (1962) 2 Lab LJ 301: 1962 Ker LT 690: 1963 (1) Cri LJ 675 (682) (Pt I) (Pr 58) (DB).**

——S. 5 (3) — Scope — 'Unless contrary is proved' — Burden of proof lying on accused.

The requirement of sub-section (3) of S. 5 is that the accused person shall be presumed to be guilty of criminal misconduct in the discharge of his duties 'unless the contrary is proved'. The words of the statute are peremptory and the burden must lie on the accused to prove the contrary. After the conditions laid down in the earlier part of sub-section (3) of Section 5 have been fulfilled by evidence to the satisfaction of the Court, the Court has got to raise the presumption that the accused is guilty of criminal misconduct in the discharge of his duties and this presumption continues to hold the field, unless the contrary is proved, that is to say, unless the Court is satisfied that the statutory presumption has been rebutted by cogent evidence. Not only that, Section 5 (3) goes further and lays down in forceful words that 'his conviction therefor shall not be invalid by reason only that it is based solely on such presumption. **1962 Ker LJ 881: ILR (1962) 2 Ker 362: (1962) 2 Lab LJ 301: 1962 Ker LT 690: 1963 (1) Cri LJ 675 (683) (Pt L) (Pr 71) (DB).**

——S. 5 (1), (3) — Scope of sub-section (3) of Section 5 — Presumption under sub-section (3) of S. 5, when arises.

In enacting sub-section (3) of S. 5, the Legislature did not intend to create an offence, separate from the one created under sub-section (1) but intended to lay down a rule that if a person's pecuniary resources, as compared to his known or legitimate sources of income, reached a point which was disproportionate to the said income, it shall be presumed, unless the person concerned accounted satisfactorily for it, that he had acquired those pecuniary resources by the commission of an offence mentioned in S. 5 (1) of the Act. The sub-section lays down a rule of evidence enabling the court to raise the presumption of guilt in certain circumstances — rule which is a complete departure from the established principle of criminal jurisprudence that the burden always lies on the prosecution to prove all the ingredients of the offence charged, and that the burden never shifts on to the accused to disprove the charges framed against him. Under sub-section (3) of S. 5 the Court has, therefore, to see as to what are the pecuniary resources or property, which are in the possession of the accused or of any other person on his behalf, secondly, what are his known sources of income, and thirdly, are the resources disproportionate to the known sources of income and, if they are disproportionate to the known sources of income, the court is bound to raise the presumption unless the accused satisfactorily accounts for such possession. AIR 1958 SC 61, Ref. **1962 Ker LT 690: (1962) 2 Lab LJ 301: 1962 Ker LJ 881: ILR (1962) 2 Ker 362.**

——S. 5 (3) — Rule of evidence laid down in Section 5 (3) enables the prosecution to prove more easily than otherwise various offences defined in sub-section (1) in a particular manner – Purpose of, stated. **1954-1 Mad LJ 643: 1954 Mad WN 139: 1955 Cri LJ 691: AIR 1955 Mad 214 (217) (Pt B) (Prs 16, 17).**

——S. 5 (3) — Evidence — Possession of unexplained resources — Value of, as corroboration.

To the question whether the possession of unexplained resources could be used to corroborate the evidence adduced by the prosecution to show that on a particular occasion a particular bribe was received, it is not possible to give a general answer. The answer will depend upon the circumstances of each case. **(1954) 1 MLJ 643: 1954 Mad WN 139: 1955 Cr LJ 691: AIR 1955 Mad 214 (218) (Pt E) (Pr 20).**

——S. 5 — Criminal misconduct by habitually obtaining illegal gratification — Failure of prosecution to prove affirmatively truth of allegation of bribes on earlier occasions — Effect.

The failure of the prosecution to prove affirmatively the truth of the allegations in regard to the bribes on earlier occasions, does not justify a finding that they are probably false. Further, even in a case where it is found that the prosecution had failed to prove the particular facts and circumstances of criminal misconduct, the presumption under sub-section (3) cannot be avoided, if the prosecution has satisfied the requirements of that sub-section. **1960 Cr LJ 934: 38 Mys LJ 265: 1962 Mad LJ (Cri) 222: ILR (1960) Mys 26: AIR 1960 Mys 111 (134) (Pt N) (Pr 16) (DB).**

——S. 5 (3) — Sub-section virtually creates distinct head of offence of criminal misconduct — (Criminal P. C. (1898), Section 221 (3)).

It is partly true that sub-section (3) of S. 5 does not create an offence by itself but is only in the nature of a rule of evidence as to what constitutes criminal misconduct; but in view of the provisions that on proof of unexplained possession of resources or property disproportionate to known sources of income, a presumption of misconduct is to be made against the accused and a conviction can be based solely on that presumption, it is virtually the creation of a distinct head of the offence of criminal misconduct.

A charge, therefore, which specifies "being in possession of property disproportionate to your known resources" as an offence by itself is not open to the objection that no such offence has been created by the Act. **1952 Cri LJ 1533: ILR (1952) Cut 109: AIR 1952 Orissa 289 (293) (Pt A) (Prs 7, 8) (DB).**

——S. 5 (3) — Presumption of criminal misconduct — When to be drawn — Rebuttal of presumption — Burden of proof.

Under Section 5 (3) once the disproportionate possession is made out, the accused has two opportunities, viz., one that of satisfactorily accounting for this disproportion and the other of rebutting the presumption of criminal misconduct arising therefrom, if the explanation is found unsatisfactory. The presumption against the accused under this sub-section is not to be drawn until the explanation of the accused for the disproportionate possession and the evidence bearing on it is considered and found unsatisfactory. At that stage of the consideration of case, the normal principle will apply, viz., that the accused is entitled to the benefit of doubt and that where reasonable explanation is offered, which is acceptable and raises a doubt that the prosecution has not discharged the burden, though the accused may not have proved the explanation. But where the Court feels justified in drawing the presumption against the accused after a due consideration of the explanation, then the burden is on the accused to displace the presumption of criminal misconduct, always remembering that the burden of proof on the accused in such cases is less than that on the prosecution and that it is enough for the accused to make out the truth of his defence in all reasonable probability though not clearly beyond doubt. (1915) 84 LJKB 396 and 1935 AC 462, Ref. to (1943) 1 KB 607, Rel. on. **1952 Cri LJ 1533: ILR (1952) Cut 109: AIR 1952 Orissa 289 (294) (Pt D) (Pr 11) (DB).**

——S. 5 (3) — Charge — Frame and contents of — Basis of conviction.

Section 5 (3), Prevention of Corruption Act, does not create an offence by itself but is only in the nature of a rule of evidence as to what constitutes criminal misconduct. But in view of the provisions that on proof of unexplained possession of resources or property disproportionate to known sources of income a presumption is to be made against the accused and a conviction can be based solely on that presumption, it is virtually the creation of a distinct head of the offence of criminal misconduct.

In a case where trial of the accused is only for the single offence of criminal misconduct under Section 5 (3) of the Act and not for specific offences under Section 161, Penal Code, limitations under Section 234, Cr. P. Code are not applicable. The policy of Section 234 is to prevent undue embarrassment and confusion to the accused in the trial by evidence being given of a large number of items spread over a long period. If in any particular case the Court finds that the prosecution attempts to give evidence of quite a large number of instances covering over a long period in proof of an alleged habitual misconduct, the Court has the power to require the prosecution to limit itself to a reasonable number of instances extending over a reasonable period in order to prevent abuse of process and harassment to the accused and in order also to prevent any prejudice arising in the mind of the Court by mere allegation of numerous items. **ILR (1952) Cut 109: 1952 Cr LJ 1533: AIR 1952 Orissa 289 (306) (Pt J) (Prs 63, 64) (DB).**

——S. 5 (3) — Presumption as to accused being guilty of criminal misconduct.

Where the accused who was Inspector of Factories was found, on a particular day, while in camp in the course of his official duty, to have been in possession of a heavy amount of money and the same was found to be disproportionate to his known sources of income, and was not satisfactorily explained, but on the other hand, the defence thereof was false.

Held, that it must be presumed that the accused was guilty of criminal misconduct. **1952 Cri LJ 1533: ILR (1952) Cut 109: AIR 1952 Orissa 289 (307) (Pt K) (Pr 66) (DB).**

——S. 5 (2), (3) — Presumption under sub-section (3) — Conviction for criminal misconduct can be based on presumption under sub-section (3). AIR 1960 SC 7, Rel. on. **1961 BLJR 611: 1961 (2) Cr LJ 385 (390, 391) (Pt B) (Prs 17, 18) (DB).**

——S. 5 (3) — Presumption under, which can be drawn.

Before drawing a presumption as contemplated by sub-section (3) of Section 5, it must be shown that the accused is a public servant, that he is alleged to have committed criminal misconduct within the meaning of sub-section (1) of Section 5 and that he is being tried for an offence punishable under sub-section (2) of the section. The presumption under Section 5 (3) can be drawn only in a trial of an offence punishable under sub-section (2) of the Act and not otherwise. A Court must first find that the public servant concerned is being tried for an offence punishable under sub-section (2) and then in appropriate circumstances proceed to draw a presumption. Observations to the contrary in AIR 1952 Orissa 289, Dissented from. Section 5 (3) cannot be held to create a separate offence and therefore it is wrong to say that without putting the accused on trial for having committed criminal misconduct within the meaning of Section 5 (1) (a), (b), (c) or (d) a presumption as permitted under Section 5 (3) of the Act can be drawn.

Where the charge framed read as a whole showed that the accused had been put on trial, not because he had committed criminal misconduct within the meaning of Section 5 (1) (a), (b), (c) or (d), but because he was found to be in possession of property which was disproportionate to his known sources of income it cannot be said that he is charged with criminal misconduct. It is necessary to charge the accused for having committed criminal misconduct within the meaning of any of the four clauses of Section 5 (1), and then if he is found to be in possession of property which is disproportionate to his known sources of income, a presumption under Section 5 (3) of the Act is permissible. Without there being a charge, it is not possible to say in which of the four circumstances, as mentioned in Section 5 (1), (a) to (d), the accused was being tried for having committed criminal misconduct. It is not permissible to assume that he is being tried under one or all the four conditions laid down in S. 5 (1), (a) to (d) without further saying so. AIR 1957 SC 458 and AIR 1954 SC 359, Rel. on. **1958 BLJR 228: 1958 All LJ (Rev) 84: 1958 All WR (Sup) 87: 1958 Cr LJ 925: 1958 Pat LR 50: 1958 All Cr R 290: (1958) 2 Lab LJ 451: AIR 1958 Pat 374 (376 to 378) (Prs 8, 12, 13) (DB).**

——S. 5 (2) and (3) — Court when bound to presume accused guilty under S. 5 (2).

"Sub-section (3) of Section 5 sets out a new rule of evidence. Therefore all that the prosecution has to do is to show that the accused or some person, on his behalf, is in possession of pecuniary resources or property disproportionate to his known sources of income and for which the accused cannot satisfactorily account. Once that is established then the court has to presume, unless the contrary is proved, that the accused is guilty of the new offence created by

Section 5 namely criminal misconduct in the discharge of his official duty". AIR 1954 SC 359, Rel. on.

Hence in a case where Section 5 (3) of the Prevention of Corruption Act 1947, is not attracted the Court is not bound to presume that the appellant was guilty under Section 5 (2) of the Act. **1957 BLJR 275.**

——S. 5 (3) — Presumption under — Scope of.

The rule of law laid down in Section 5 (3) is a departure from the normal law of the land that no person can be convicted on a mere presumption of his having committed an offence. The normal rule of law is that an accused is presumed to be innocent until his guilt is established, and the onus of establishing the guilt is always on the prosecution. Under sub-section (3) however, a presumption of criminal misconduct may be drawn if the accused person or any person on his behalf is in possession of pecuniary resources or property disproportionate to his known sources of income for which resources the accused person cannot satisfactorily account and unless the contrary is proved the presumption is that the accused person is guilty of criminal misconduct in the discharge of his official duty and his conviction shall not be invalid by reason only that it is based solely on such presumption. No doubt evidence can be adduced under the sub-section in respect of a specific charge under any of the clauses of Section 5 (1), but in order that an accused can be tried on that specific charge a sanction has to be given at the outset. The rule in sub-section (3) has nothing to do with sanction. **6 Sau LR 398: 1954 Cr LJ 1559: AIR 1954 Sau 132 (135) (Pt B) (Pr 7) (DB).**

11. "Satisfactorily account" — Sub-section 5 (3).

● **——S. 5 (3) — 'Satisfactorily account'.**

The Legislature has advisedly used the expression 'satisfactorily account'. The emphasis must be on the word 'satisfactorily', and the Legislature has, thus, deliberately cast a burden on the accused not only to offer a plausible explanation as to how he came by his large wealth, but also to satisfy the Court that his explanation was worthy of acceptance. C. S. D. Swami v. State, **1960 Cr LJ 131: 1960 Mad WN 149: 1960 SCJ 160: 1960 MLJ (Cr) 91: (1960) 1 SCR 461: 1960 Pat LR (SC) 21: ILR (1959) Punj 1955: AIR 1960 SC 7 (10) (Pt C) (Pr 5).**

12. "Disproportionate to his known source of income" — Sub-section 5 (3).

● **——S. 5 (3) —** 'Known sources' means known to prosecution on investigation and not sources known to accused. Sajjan Singh v. State of Punjab, **1964 Mad WN 207: (1964) 4 SCR 630: 1964 S C D 874: 1964 Cur LJ (SC) 37: 1964 (1) Cr LJ 310: AIR 1964 SC 464 (470) (Pt G) (Pr 27).**

● **——S. 5 (3) — Disproportion between pecuniary resources and known sources of income — Tests.**

The legislature had not chosen to indicate what proportion would be considered disproportionate and the Court should take a liberal view of the excess of the assets over the receipts from the known sources of income.

Held, however, that taking the most liberal view it was not possible for any reasonable man to say that assets to the extent of Rs. 1,20,000 was anything but disproportionate to a net income of Rs. 1,03,000 out of which at least Rs. 36,000 must have been spent in living expenses. Sajjan Singh v. State of Punjab, **1964 SCD 874: 1964 Mad WN 207: (1964) 4 SCR 630: 1964 Cur LJ (SC) 37: (1964) (1) Cr LJ 310: AIR 1964 SC 464 (471) (Pt H) (Pr 30).**

● **——S. 5 (3) — 'Known sources of income' — Expression explained — Affairs of accused are matters 'specially within the knowledge' of accused within S. 106, Evidence Act — (Evidence Act (1872), S. 106).**

The expression 'known sources of income' must have reference to sources known to the prosecution on a thorough investigation of the case. It cannot be contended that 'known sources of income' means sources known to the accused. Those will be matters 'specially within the knowledge' of the accused within the meaning of Section 106 of the Evidence Act. The prosecution can only lead evidence to show that the accused was known to earn his living by service under the Government during the material period. The source of income of a particular individual will depend upon his position in life with particular reference to his occupation or avocation in life. In the case of a Government servant, the prosecution would, naturally, infer that his known source of income would be the salary earned by him during his active service. His pension or his provident fund would come into calculation only after his retirement, unless he had a justification for borrowing from his provident fund. C. S. D. Swami v. State, **1960 Mad WN 149: 1960 Cr LJ 131: 1960 SCJ 160: 1960 MLJ (Cr) 91: (1960) 1 SCR 461: 1960 Pat LR (SC) 21: ILR (1959) Punj 1955: AIR 1960 SC 7 (11) (Pt D) (Pr 6).**

——S. 5 (3) — 'Known sources of income' — Meaning of expression.

The expression 'known sources of income' has reference to sources known to the prosecution on a thorough investigation of the case and not sources known to the accused. The prosecution cannot, in the very nature of things, be expected to know the affairs of an accused person. Those will be matters 'specially within the knowledge' of the accused within the meaning of Section 106 of the Evidence Act. The source of income of a particular individual will depend upon his position in life with particular reference to his occupation or avocation in life. In the case of a Government servant, the prosecution would, naturally infer that his known source of income would be the salary earned by him during his active service. His pension or provident fund would come into calculation only after his retirement unless he had a justification for borrowing from his provident fund. 1960 SCJ 160: 1960 MLJ (Cri) 91; AIR 1960 SC 7, Foll. **1962 Ker LJ 881: ILR (1962) 2 Ker 362: (1962) 2 Lab LJ 301: 1962 Ker LT 690: 1963 (1) Cri LJ 675 (682, 683) (Pt J) (Pr 68) (DB).**

——S. 5 (3) — 'Known sources of income' — Meaning of expression.

The expression 'known sources of income' has reference to sources known to the prosecution on a thorough investigation of the case and not sources known to the accused. The prosecution cannot, in the very nature of things, be expected to know the affairs of an accused person. Those will be matters 'specially within the knowledge' of the accused within the meaning of Section 106 of the Evidence Act. The source of income of a particular individual will depend upon his position in life with particular reference to his occupation or avocation in life. In the case of a Government servant, the prosecution

would, naturally, infer that his known source of income would be the salary earned by him during his active service. His pension or provident fund would come into calculation only after his retirement unless he had a justification for borrowing from his provident fund. **1962 Ker LT 690: (1962) 2 Lab LJ 301: 1962 Ker LJ 881: ILR (1962) 2 Ker 362.**

——S. 5 (3) — Sources of income — Travelling allowance.

Any travelling allowance given to a whole-time Government servant who draws a regular monthly salary, is for the purpose of covering incidental expenses during travelling on Government duty and not intended to be a source of profit. 1960 SCJ 160; 1960 MLJ (Cr) 91; AIR 1960 SC 7, Foll.; AIR 1952 Orissa 289, Rel. on. **1960 Cr LJ 934: 38 Mys LJ 265: 1962 Mad LJ (Cri) 222: ILR (1960) Mys 26: AIR 1960 Mys 111 (132) (Pt L) (Pr 15) (DB).**

13. Burden of proof — Sub-section 5 (3).

● **——S. 5 (3) — Prosecution adducing other evidence can also rely on presumption under sub-section (3).**

Presumption under S. 5 (3) can arise even if the prosecution has adduced other evidence in support of its case. Section 5 (3) is not an alternative mode of establishing the guilt of the accused which can be availed of only if the usual method of proving the guilt by direct and circumstantial evidence is not used. There is no warrant for the proposition that where the law provides that in certain circumstances a presumption shall be made against the accused the prosecution is barred from adducing evidence in support of its case if it wants to rely on the presumption. (1935) 296 US 280: 80 Law Ed 229 and (1961) 3 All ER 523, Distinguished. Sajjan Singh v. State of Punjab, **1964 Mad WN 207: (1964) 4 SCR 630: 1964 Cur LJ (SC) 37: 1964 (1) Cr LJ 310: 1964 SCD 874: AIR 1964 SC 464 (469) (Pt F) (Pr 21).**

● **——S. 5 (3) —** Presumption under, raised against accused — It is the duty of Court to convict accused even when the other evidence produced does not prove guilt of accused — The fact that the prosecution has failed to prove by other evidence the guilt of the accused, does not entitle the Court to say that the accused has succeeded in proving that he did not commit the offence. AIR 1961 SC 583, Expl. and Distinguished. Sajjan Singh v. State of Punjab. **1964 Mad WN 207: (1964) 4 SCR 630: 1964 Cur LJ (SC) 37: 1964 (1) Cri LJ 310: 1964 SCD 874: AIR 1964 SC 464 (471, 472) (Pt I) (Prs 32, 35).**

● **——S. 5 (3) — 'Unless the contrary is proved' — Burden is on accused to prove contrary.**

The requirement of S. 5 (3) is that the accused person shall be presumed to be guilty of criminal misconduct in the discharge of his official duties 'unless the contrary is proved'. The words of the statute are peremptory and the burden must lie all the time on the accused to prove the contrary. After the conditions laid down in the earlier part of sub-section (2) of S. 5 have been fulfilled by evidence to the satisfaction of the Court, the Court has got to raise the presumption that the accused person is guilty of criminal misconduct in the discharge of his official duties, and this presumption continues to hold the field unless the contrary is proved, that is to say, unless the Court is satisfied that the statutory presumption has been rebutted by cogent evidence. Not only that, the section goes further and lays down in forceful words that 'his conviction therefor, shall not be invalid by reason only that it is based solely on such presumption'. C. S. D. Swami v. State, **1960 Mad WN 149: 1960 Cri LJ 131: 1960 SCJ 160: 1960 MLJ (Cr) 91: (1960) 1 SCR 461: 1960 Pat LR (SC) 21: ILR (1959) Punj 1955: AIR 1960 SC 7 (11) (Pt E) (Pr 7).**

——S. 5 (3) — Evidence — Duty of prosecution.

Sub-section (3) of S. 5 sets out a new rule of evidence. Therefore, all that the prosecution has to do is to show that the accused, or some person on his behalf, is in possession of pecuniary resources or property disproportionate to his known sources of income and for which the accused cannot satisfactorily account. Once that is established then the Court has to presume, unless the contrary is proved, that the accused is guilty of the new offence created by S. 5, namely, criminal misconduct in the discharge of his official duty. Biswabhusan Naik v. State of Orissa, **1954 Mad WN 465: 1954 SCJ 537: (1954) 2 MLJ 79: 1954 Cr LJ 1002: 20 Cut LT 366: 1954 AWR (HC) 395: ILR (1954) Cut 427: 1954 SCA 928: AIR 1954 SC 359 (361) (Pt B) (Prs 9, 10, 11).**

——S. 5 (3) — Evidence — Presumption against accused unless "contrary is proved" — Quantum of burden of proof on prosecution.

Where some matter is presumed by the statute against an accused person "unless the contrary is proved" within S. 5 (3), Prevention of Corruption Act (1947), the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt and the burden of proof may be discharged by evidence satisfying the Court of the probability of that which the accused is called upon to establish. **(1963) 1 Cri LJ 675 (683) (Pt K) (Pr 70) (Ker).**

——S. 5 (3) — Scope — "Unless contrary is proved" — Burden of proof lying on accused.

The requirement of sub-section (3) of S. 5 is that the accused person shall be presumed to be guilty of criminal misconduct in the discharge of his duties "unless the contrary is proved". The words of the statute are peremptory and the burden must lie on the accused to prove the contrary. After the conditions laid down in the earlier part of sub-section (3) of S. 5 have been fulfilled by evidence to the satisfaction of the Court the Court has got to raise the presumption, that the accused is guilty of criminal misconduct in the discharge of his duties and this presumption continues to hold the field unless the contrary is proved, that is to say, unless the Court is satisfied that the statutory presumption has been rebutted by cogent evidence. Not only that, Sec. 5 (3) goes further and lays down in forceful words that "his conviction therefor shall not be invalid by reason only that it is based solely on such presumption". **1962 Ker LT 690: (1962) 2 Lab LJ 301: 1962 Ker LJ 881: ILR (1962) 2 Ker 362.**

——S. 5 (3) — Construction and scope — Account by accused to whom to be rendered.

Section 5 (3) speaks of the accused person satisfactorily accounting for his pecuniary resources. Regard being had to the context in which the words occur, and also to the fact that it is the Court which is required to presume that he is guilty, there is no doubt that S. 5 (3) requires that the accused should satisfactorily account for his possession of disproportionate resources not to some one else but to the Court before which he is being tried. **(1954) 1 MLJ 643: 1954 Mad WN 139: 1955 Cri LJ 691: AIR 1955 Mad 214 (218) (Pt C) (Pr 18).**

——S. 5 (3) — Applicability — Presumption — Conditions for raising — Duty of prosecution.

In the case of a whole-time Government servant, the known source of his income is generally the salary; by rules governing the conduct of Government servants and by conditions of service, full-time Government servant is generally prevented from following any other occupation or profession.

Before the presumption under sub-section (3) of S. 5 could arise, it has to be seen whether the assets acquired by the accused after he entered Government service and in his possession on the date of offence, were disproportionate to his known sources of income.

If the prosecution has failed to disclose all the sources of income of an accused person, it is always open to him to prove those other sources of income which have not been taken into account or brought into evidence by the prosecution. **1960 Cr LJ 934: 38 Mys LJ 265: 1962 Mad LJ (Cri) 222: ILR (1960) Mys 26: AIR 1960 Mys 111 (132) (Pt K) (Pr 14) (DB).**

——**S. 5 (3)** — Burden of proof — Discharge — The burden cast on the accused by sub-section (3) of S. 5, to prove the contrary of the presumption, cannot be discharged by mere probabilities or bare statements of the accused. **1960 Cri LJ 934: 38 Mys LJ 265: 1962 Mad LJ (Cri) 222: ILR (1960) Mys 26: AIR 1960 Mys 111 (132) (Pt M) (Pr 15) (DB).**

——**S. 5 (2) (3)** — Money recovered from house of Government servant, disproportionate to his salary — Burden of proof that it was acquired by honest means would shift to the public servant in a departmental enquiry and also in a criminal prosecution — Explanation how he got the same not accepted by Government in departmental enquiry — It cannot be said that the view taken by Government is based on no evidence — Distinction between criminal proceedings and departmental inquiry in this matter pointed out. See Constitution of India, Art. 311 (2). **AIR 1963 Orissa 73 (DB).**

14. Sub-section 5 (4).

● ——**S. 5 (2)** — Constitution of India, Art. 134 (1) (c) — High Court's power to grant certificate under Article — Trial of offence under S. 409, Penal Code, along with S. 5, Prevention of Corruption Act — Trial before Magistrate — Objection to the jurisdiction of Magistrate to try offence under S. 409 allowed — Appeal to the High Court by the State — Appeal disallowed but High Court granted certificate under Article 134 (1) (c) to appeal to the Supreme Court — Respondent (accused) could be tried under S. 409 — (Penal Code (1860), S. 409). See Constitution of India, Art. 134 (1) (c). **1960 Cri LJ 539: AIR 1960 SC 397.**

● ——**S. 5 (2)** — Offence under S. 5 (2) of Prevention of Corruption Act and S. 409, Penal Code are not identical. See Criminal P. C. (1898), S. 403. **1957 Cri LJ 892: AIR 1957 SC 592.**

● ——**S. 5 — Scope — If repeals either Ss. 161 and 162 or 405, Penal Code — Prosecution under S. 409 — Sanction if offends provisions of Article 14 of the Constitution — Section 6 — (Penal Code (1860), Ss. 161, 162, 405, 409) — (General Clauses Act (1897), S. 6) — (Criminal P. C. (1898), S. 197).**

The Prevention of Corruption Act being a temporary Act, the legislature would not have intended in the normal course of things that a temporary statute like that should supersede an enactment of antiquity, viz. the Penal Code even if the matter covered the same field. Under S. 6 (a) of the General Clauses Act if by efflux of time the period of a temporary statute which had repealed an statute earlier expires, there would not be a revival of the earlier one by the expiry of the temporary statute.

Section 405, Penal Code and S. 5 (1) (c) of Prevention of Corruption Act are not identical in essence, import and content and this conclusion gathers much force from the Amending Act of 1952 which added sub-section (4) to S. 5. The words used in sub-section (4) "any other law" made the position quite clear and explicit. "Other law" does not mean identical law. An offence under S. 405 of the I. P. Code is separate and distinct from the one under S. 5 (1) (c). There are three points of difference between S. 405 of the Indian Penal Code and S. 5 (1) (c). The dishonest misappropriation contemplated in Section 405 of the I. P. Code is different; whereas that under S. 5 (1) (c) is either dishonest misappropriation or fraudulent misappropriation. In S. 405 of the I. P. Code the words used are "in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract express or implied". There are no such expressions in S. 5 (1) (c). The word 'dominion' is not in S. 5 (1) (c). The word 'fraudulently" is not present in S. 405 and in S. 5 (1) (c) the gist of the offence can also be made out if the offender allows any person so to do, i.e., allows any person to derogate from the law as contemplated in the earlier portion of the section. In any event, allowing other persons so to do does not find a place in S. 405 of the I. P. Code. Therefore, the offence created under S. 5 (1) (c) of the Prevention of Corruption Act is distinct and separate from the one under S. 405 of the I. P. Code and, therefore, there can be no question of S. 5 (1) (c) repealing S. 405, I. P. Code. AIR 1955 Cal 236. Approved. ILR (1954) Punj 35; AIR 1952 Punj 89. **Overruled.**

Sections 5 (1) (a) and 5 (1) (b) are aggravated forms of Ss. 161 and 162 of the Indian Penal Code and the intention cannot be to abrogate the earlier offence by the creation of the new offence. These two offences can co-exist and the one will not be considered as overlapping the other.

As S. 405, Penal Code is not repealed by Section 5 (1) (c), Prevention of Corruption Act the application of S. 409 which is an aggravated form of offence to a public servant is not barred by Art. 14 of the Constitution. No sanction is necessary to prosecute the public servant as he does not normally act in his capacity as a public servant when committing criminal breach of trust View of Mulla, J. to contrary overruled. Om Parkash Gupta v. State of U. P., **1957 Cr LJ 575: 1957 SCA 337: 1957 SCJ 289: (1957) Mad LJ (Cr) 237: 1957 MPC 433: 1957 All WR (HC) 401: 1957 SCR 423: 1957 BLJR 502: 1957 All LJ 585: 1957 SCC 214: ILR (1957) 2 All 468: AIR 1957 SC 458 (463, 464) (Pt A) (Prs 22, 27, 28, 29, 30).**

——**S. 5 (1) (c) — Criminal breach of trust by public servant — Power of State to prosecute under S. 409, Penal Code — Applicability of Ss. 6 and 7, Criminal Law Amendment Act (1952) — (Criminal Law Amendment Act (1952), Sections 6, 7) — (Penal Code (1860), S. 409).**

Section 5 (1) (c), Prevention of Corruption Act, 1947, has not the effect of repealing S. 409 of the Indian Penal Code in its application to public servant for committing criminal breach of trust under S. 409, Penal Code. Sections 6 and 7 of the Criminal Law Amendment Act (1952) have got no application to such a case, and it is not necessary that the case should have been sent to Special Judge for trial under the special pro-

cedure laid down under the Criminal Law Amendment Act of 1952.

Having regard to the amendment of sub-section (4) of S. 5 of the Prevention of Corruption Act, 1947, by the Prevention of Corruption Act (Second Amendment) Act, No. LIX of 1952, the provisions of S. 5 of the principal Act shall be in addition to, and not in derogation of, any other law for the time being in force and nothing contained in S. 5 of the principal Act shall exempt any public servant from any proceeding which might, apart from S. 5 itself, be instituted against him. AIR 1955 All 275 (FB), Foll. **1955 All LJ 767: AIR 1956 All 197 (199) (Pr 6).**

——**S. 5 (1) (c)** — Accused proceeded against under S. 409, I. P. C. instead of under S. 5 (1) (c) of Act 2 of 1947 — It cannot be said that there was discrimination against him — Provisions of S. 409, Penal Code do not go against Art. 14 and are not void in view of Art. 13 (1) of the Constitution. See Penal Code (1860), Section 409. **1954 Cri LJ 96: AIR 1954 All 80 (DB).**

[**Overruled** on another point in AIR 1955 All 275.]

——S. 5 (4) — Option to proceed under S. 5 (1) (c), Prevention of Corruption Act or S. 408, Penal Code.

Sub-section (4) should necessarily be confined to the offence committed by a public servant qua public servant. The necessary condition for the application of sub-section (4) of S. 5 is that the liability to be proceeded against for any offence shall be on him as a public servant and not in his personal capacity. In this view sub-section (4) of S. 5 does not confer any option on the prosecution to proceed against a public servant under S. 5 (1) (c) or under S. 408, Penal Code. **1956 Andhra WR 73: 1956 Andhra LT 169: 1957 Cri LJ 1078: AIR 1957 Andh Pra 663 (667) (Pt A) (Pr 13) (DB).**

● ——**S. 5 (4)** — Scope and effect of — Section 409, Penal Code, not repealed by Prevention of Corruption Act — Prosecution could be launched either under S. 409, I. P. C. or Section 5 (2), Prevention of Corruption Act (even before the amendment of the latter Act) — Sanction for prosecution under S. 409 I. P. Code not necessary (under the provision of Criminal P. C.) — Prosecution under S. 409 without sanction is proper though sanction would have been necessary if prosecution would have been launched under S. 5 (2) of Act 2 of 1947. See Penal Code (1860), S. 409. **ILR (1955) Bom 984: AIR 1955 NUC (Bom) 4256 (FB).**

● **——S. 5 (4) — Scope and effect of — Offence by public servant under S. 409, Penal Code — Jurisdiction of ordinary Courts — (Criminal Law Amendment Act (1952), S. 10) — (Criminal P. C. (1898), S. 190).**

The provisions of S. 5, Prevention of Corruption Act, 1947 do not derogate from any other provision of law. They do not derogate from the provisions of S. 409, Penal Code, or the Criminal P. C. with regard to that section. The special procedure set up under the Prevention of Corruption Act does not entitle a public servant to insist that the only proceeding which could be instituted against him must be under the special Act and not under the Criminal P. C. Therefore, the Courts would have jurisdiction as they had before to proceed against a public servant under S. 409 according to the procedure laid down under the Criminal P. C. notwithstanding the special provisions contained in the Prevention of Corruption Act, 1947 and the Criminal Law Amendment Act, 1952. State v. Sahebrao Govindrao Jadhav, **56 Bom LR 980: ILR (1955) Bom 159: 55 Cri LJ 1745: AIR 1954 Bom 549 (549) (Pr 2) (FB).**

——S. 5 (4) (as amended in 1952) — Implied repeal of S. 409, Penal Code — General Clauses Act (1897), S. 6.

It cannot be held that the Prevention of Corruption Act by implication repeals the provisions of S. 409, Penal Code as far as public servants are concerned in view of the amendment of Section 5, sub-section (4). AIR 1952 Punj 89, **Held,** no longer good law. **1955 Cri LJ 784: ILR (1956) 2 Cal 625: AIR 1955 Cal 236 (239) (Pt C) (Pr 8) (DB).**

——S. 5 (1) (c) and (4) — Prosecution of public servant — Option — Section 5 (1) (c) or Penal Code (1860), S. 409.

In face of the amendment made in S. 5 of the Prevention of Corruption Act, 1947, by the substitution of a new sub-section (4) in place of the old one by the Amending Act LIX of 1952, it cannot be argued that the operation of that Act II, in the case of a public servant, excludes the operation of S. 409 of Penal Code. The amendment makes that the prosecution can elect to charge a public servant either under S. 409 of the Penal Code or under S. 5 (1) (c) of the Prevention of Corruption Act, 1947. Hence, the trial of a public servant before a special Judge under S. 409 of the Penal Code is held valid. AIR 1952 Punj 89, susperseded by amending Act LIX of 1952. **1953 Cri LJ 1523: 57 CWN 678: AIR 1953 Cal 681 (682) (Pt A) (Pr 4) (DB).**

——**S. 5 (1) (d)** — Constitution of India, Article 226 — Departmental enquiry — Charge sheet worded in language of S. 5 (1) (d), Prevention of Corruption Act — Objection as to jurisdiction not maintainable — No ground for interference by High Court by a writ under Art. 226 of the Constitution — (Central Civil Services (Classification, Control and Appeal) Rules (1957), R. 15) — (Criminal Law Amendment Act (1952), S. 7). See Constitution of India, Art. 226. **AIR 1959 Him Pra 12.**

——**S. 5** — Scope of — Section 409, Penal Code — Not repealed. See Penal Code (1860), S. 409. **1954 Cri LJ 1481: AIR 1954 HP 76.**

——S. 5 (4) (as amended by Act 59 of 1952) — Does not repeal Section 409, Penal Code — Both S. 5 of the Prevention of Corruption Act and S. 409, I. P. Code can operate side by side — See Penal Code (1860), S. 409. **AIR 1955 NUC (Hyd) 5923 (DB).**

——S. 5 (4) (as amended by Act 59 of 1952) — Scope — Retrospective operation — The new sub-section (4) of S. 5 added by the amendment of 1952 cannot have any retrospective effect — Offence before amendment in August 1952 — Judgment of the Sessions Judge which took the view that S. 5, Prevention of Corruption Act repealed S. 409, I. P. Code was allowed to stand. **AIR 1955 NUC (Hyd) 5923 (DB).**

——**S. 5 (1) (c)** — Scope of — Section 409, Penal Code — Not repealed. See Penal Code (1860), S. 409. **1954 Cr LJ 464: AIR 1954 Hyd 56 (DB).**

——S. 5 (4) — Procedure — Offence committed by public servant — Option of prosecution.

Where an act or omission constitutes an offence both under the Penal Code and under the Prevention of Corruption Act, it is not obligatory to charge the accused with an offence under the latter Act, and unless an accused is so charged under the Prevention of Corruption Act, the procedure laid down under that Act as well as under Ss. 6 and 7 of the Criminal Law Amendment Act, 1952, cannot apply. **1954 Cri LJ 464: ILR (1953) Hyd 573: AIR 1954 Hyd 56 (64) (Pt B) (Pr 23) (DB).**

——S. 5 (4) (as amended by Act 59 of 1952) — Applicability to pending proceedings.

Section 5 (4) is not retrospective in operation and does not apply to proceedings pending when the amendment came into force. **55 Punj LR 302: 1953 Cri LJ 1632: ILR (1954) Punj 139: AIR 1953 Punj 249 (249, 250) (Prs 2a, 6) (DB).**

——S. 5 (1) (c) — Provisions of S. 409, Penal Code, concerning public servants are repealed by S. 5 (1) (c) — Penal Code (1860), S. 409.

As long as S. 5 of Act 2 of 1947 remains in force the provisions of S. 409, Penal Code, so far as they concern offences by public servants are pro tanto repealed by S. 5 (1) (c) of Act 2 of 1947.

In view of changes introduced by Act 2 of 1947, particularly regarding the necessity for previous sanction of the appropriate authority for prosecution, the right of the accused to give evidence as a witness and the change of sentence, it is not open to the authorities concerned, when a public servant is accused of committing an offence which would be punishable either under S. 409, Penal Code, or S. 5 (1) (c) of the Act, to choose which of these two sections the offender should be prosecuted under, and, by choosing to proceed under S. 409, Penal Code, to dispense with the necessity for any previous sanction in the case of a public servant removable from office by an authority subordinate to the Provincial or Central Govt. and also to deny him the privilege of giving evidence on oath as a competent witness on his own behalf. **1952 Cri LJ 316: 53 Pun LR 198: ILR (1954) Punj 35: AIR 1952 Punj 89 (92, 93) (Pt A) (Prs 5, 7) (DB).**

[Overruled in AIR 1957 SC 458.]

——S. 5 (1) (c) — Scope — Section 409, Penal Code — Not repealed. See Penal Code (1860), S. 409. **55 Cri LJ 1446: AIR 1954 Raj 211 (DB).**

——S. 5 (1) (c) — Scope — Prosecution under Section 409 instead of S. 5 (1) (c) of Act 2 of 1947 is maintainable. See Penal Code (1860), Section 409. **55 Cri LJ 1446: AIR 1954 Raj 211 (DB).**

——S. 5 (4) — Where criminal breach of trust charged amounts to an offence under S. 409, I. P. Code as also under S. 5 (1) (c) of Act 2 of 1947 the accused is liable to be prosecuted either under Penal Code or under Act 2 of 1947. See Penal Code (1860), S. 409. **AIR 1955 NUC (Sau) 5768 (DB).**

15. Acceptance of bribe — Proof of.

——S. 5 (2) — Proof of offence — Recovery of money from accused is an important link in proving the case in prosecutions under S. 161, I. P. Code and S. 5 (2) of Prevention of Corruption Act and if the recovery becomes doubtful no conviction can be maintained — Effect of. See Penal Code (1860), S. 161. **1958 Cri LJ 586: AIR 1958 All 334 (DB).**

——S. 5 — Evidence Act (1872), S. 133, S. 114, Illus. (b) — Accomplice, who is — Bribery cases — Charge of conspiracy and bribery against railway servants in allotting wagons and booking goods — Forwarding agents and commission agents paying bribes to secure advantage over others who did not pay must be treated as accomplices — Evidence of such witnesses must be corroborated by independent evidence — Necessity, nature and extent of corroboration — (Penal Code (1860), S. 161). See Evidence Act (1872), S. 133. **AIR 1956 All 358.**

——Ss. 5 (1), 5 (2) — Decoy or trap witness — Appreciation of his testimony — Necessity of corroboration — Duty of Court — Evidence — Appreciation — Credibility — Trap witness — Evidence Act (1872), S. 5 — Appreciation — Credibility — Trap witness.

The trap witnesses who are members of the raiding party may be treated as partisan witnesses but as regards partisan witnesses there is no rule of law that their evidence cannot be accepted in the absence of independent corroboration in material particulars. There cannot be such a rule of law when even the evidence of an accomplice is not by law required to be corroborated. It is only as a rule of prudence that the evidence of an accomplice is required to be corroborated. The object of corroboration is to produce mental satisfaction in the mind of the Court that the accomplice is a witness of truth. The rulings go to show that in a trial by jury if the Judge draws the attention of the jury to this rule of prudence in respect of the evidence of an accomplice and cautions it and the jury thereafter accepts the evidence of the accomplice as sufficient, a conviction based on such a verdict cannot be said to be wrong. Therefore, the true position is that a decoy need not be corroborated but the weight to be attached to his evidence will depend on his character, his standing, his position, the circumstances under which he became a decoy and how he has fared in the witness box. The considerations in the light of which his evidence is to be tested will naturally vary from case to case. AIR 1964 SC 1762; AIR 1958 SC 500, discussed and relied on. Case Law Ref. **(1965) 6 Guj LR 958.**

——S. 5 (2) — Penal Code, S. 161 — Bribery — Proof of acceptance of currency notes by accused — Use of Anthracene powder and ultra-violet rays by police for detecting crime — Duty of prosecution and nature of expert evidence required indicated. See Penal Code (1860), Section 161. **1960 Cri LJ 1207: AIR 1960 Guj 7 (DB).**

——S. 5 — Bribe-giver — Not an accomplice — Evidence of — Corroboration if considered necessary a less strict standard may be applied than in the case of accomplices — In the instant case corroboration was found necessary. See Evidence Act (1872), S. 114. **1961 (1) Cri LJ 505: AIR 1961 Ker 99 (FB).**

——S. 5 (2) — Evidence — Decoy witness — There should be independent corroboration of his statement — (Penal Code (1860), S. 161) — (Evidence Act, Ss. 133 and 114). **AIR 1955 NUC (Madh Bha) 3044.**

——S. 5 (1) (a) — Evidence of bribe-giver — Reliance on, for purpose of demand of bribe — (Evidence Act, (1872), S. 133).

If the evidence of a person, who on his own showing may be taken to be an accomplice, cannot be relied upon for the purpose of payment of a bribe, it would be equally unsafe to rely on it even for the purpose of the demand of the bribe, because, the two really go together so far as the evidence is concerned. **1952 Cri LJ 1533: ILR (1952) Cut 109: AIR 1952 Orissa 289 (300) (Pt H) (Pr 44) (DB).**

——S. 5 — Evidence — Testimony of executive Magistrate participating in a trap in bribery case — Value — (Penal Code (1860), S. 161).

In Pepsu, Judicial Magistrate has been separated from the executive Magistrate since its formation and the observations of the Supreme Court in AIR 1954 SC 322 do not aptly apply to an executive Magistrate. Hence the testimony of a sub-divisional Magistrate who is an Executive Magistrate participating in a trap in a bribery case cannot be ignored. AIR 1954 SC 322; 1954 SCJ 362, Disting. **1955 Cr LJ 1387: ILR (1956)**

Pepsu 223: AIR 1955 Pepsu 156 (158) (Pt B) (Pr 8).

——S. 5 — Prosecution witnesses deposing to events prior to the arrest of accused for accepting bribe — Evidence cannot be rejected on the ground that it consisted of statements made in the course of investigation. See Criminal P. C. (1898), S. 162. **(1964) 66 Pun LR 877.**

——S. 5 (2) and (3) — Habitual corruption — Proof — Evidence of corruption prior to Act — Value of.

Where there is no evidence of any improper acquisitions after the Act came into force, previous acquisitions cannot be relied on as raising a presumption of habitual corruption during the period (regarding which the charge can legally be brought) after the commencement of the Act, though possibly, if habitual corruption is proved on the basis of S. 5 (3) regarding the period after the Act came into force, evidence of previous corruption might be regarded as furnishing some corroboration. Criminal Revn. No. 60-D of 1956, dated 26-3-57 (Punj.), Disting. **(1961) 63 Punj LR 321: 1961 (2) Cri LJ 268 (270, 271) (Pt B) (Pr 16).**

——S. 5 (2) — Every case of bribery in which decoys are used must be decided on its peculiar facts and no general principles as to corroboration can be laid down. Informers, that is persons, who have joined in, or even provoked, the crime as police spies have not been regarded as accomplices. See Evidence Act (1872), S. 133. **52 Cri LJ 944: AIR 1951 Punj 424.**

——S. 5 (2) — Accomplice's evidence — Rules of law and practice — Person compelled to give bribe stands on a higher footing as regards his credibility than a person giving a bribe voluntarily and a slight corroboration would be sufficient to render his evidence credible. See Evidence Act (1872), S. 133. **AIR 1955 NUC (Sau) 955 (DB).**

16. Sentence.

——S. 5 (2) — Minimum sentence is of one year's imprisonment.

Under S. 5 (2) the minimum sentence has to be one year's imprisonment subject to the proviso that the Court may, for special reasons to be recorded in writing, impose a sentence of imprisonment of less than one year. Saijan Singh v. State of Punjab, **1964 Mad WN 207: (1964) 4 SCR 630: 1964 Cur LJ (SC) 37: 1964 SCD 874: 1964 (1) Cri LJ 310: AIR 1964 SC 464 (472) (Pt J) (Pr 36).**

——S. 5 — Sentence — Accused not converting money of Municipal Board to his own use but using same for advances to officers of Board — Sentence already undergone held sufficient.

It was the duty of the accused as the cashier of the Municipal Board to deposit the cash in treasury when the amount exceeded Rs. 4,000 but he failed to do so.

Held, that there was force in the contention on behalf of the accused that he was more sinned against than sinning and that the misappropriation took place because he had to oblige these officers and servants of the Board or otherwise incur their displeasure which he could hardly do. Ordinarily the Supreme Court does not interfere in the matter of sentence in appeals under Art. 136; but in the circumstances disclosed in the present appeals when the officers and servants of the Board including the highest officer were behaving as if the moneys of the Board were their private property and the misappropriation took place mainly because the accused was obliging these officers and servants of the Board, the sentence already undergone by the accused would meet the ends of justice. Munnalal v. State of Uttar Pradesh, **1964 SCD 21: (1964) 3 SCR 88: ILR (1963) 2 All 916: 1964 (2) SCJ 307: 1964 Mad LJ (Cr) 491: 1964 (1) Cri LJ 11: AIR 1964 SC 28 (32) (Pt D) (Pr 10).**

——S. 5 (2) — Sentence of 1 year's imprisonment for corruption by a public servant cannot be considered as unduly severe. Din Dayal Sharma v. State of U. P., (1959) Supp (2) SCR 776: 1959 All LJ 470: 1959 All Cri R 319: 1959 SCJ 922: 1959 All WR (HC) 403: 1959 Mad LJ (Cri) 599: 1959 Cri LJ 1120: AIR 1959 SC 831 (833) (Pt C) (Pr 6).

——S. 5 — Penal Code (1860), S. 161 — Acceptance of bribe — In a case which is not one of laying a trap in the usual way, for a man who was demanding bribe but of deliberately tempting a man to his undoing after his suggestion about breaking the law had been finally and conclusively rejected, and where the circumstances were such that raised a doubt, the accused was acquitted. See Penal Code (1860), S. 161. **AIR 1956 SC 643.**

——S. 5 (1) (d) — Sentence — Trap laid for detection of offence — If justifies lenient sentence — (Penal Code (1860), S. 161).

It cannot be laid down as an absolute rule that the laying of traps must be prohibited on the ground that by so doing an invitation is held out for the commission of offences. The detection of crime may become difficult if intending offenders, especially in cases of corruption, are not furnished opportunities for display of their inclinations and activities. Where matters go further and the police authorities themselves supply the money to be given as a bribe, severe condemnation of the method is merited. But whatever the ethics of the question might be, there is no warrant for the view that the offences committed in the course of traps are less grave and call only for lenient or nominal sentences. Ram Krishan v. State of Delhi, **1956 Mad WN 480: 1956 SCA 577: (1957) 1 Lab LJ 4: 69 Mad LW 1002: 1956 SCR 182: 1956 SCC 247: 1956 All WR (Sup) 95: (1956) 2 Mad LJ (SC) 4: 1956 Andhra LT 512: 1956 Cri LJ 837: 1956 SCJ 432: ILR (1956) Punj 1163: AIR 1956 SC 476 (479) (Pt D) (Pr 11).**

——S. 5 — Sentence — Embezzlement and forgery by public servant — Prosecution under Sections 409 and 467 of I. P Code — Sentence of 7 years and 4 years for respective offence reduced to 3 years in each case taking into consideration the fact that if he had been prosecuted under Act 2 of 1947 the maximam sentence could have been only 7 years. See Penal Code (1860), S. 409. **1954 Cri LJ 1797: AIR 1954 SC 715.**

——S. 5 — Offence punishable both under this Act and Penal Code — Accused can be proceeded either under I. P. Code or under this Act — Prosecution under Penal Code sections — Conviction and sentence should be only under Penal Code section — Criminal P. C. (1898), S. 237. AIR 1925 All 230, **Overruled. 1952 Cri LJ 236: AIR 1952 All 35 (37) (Pt B) (Prs 11, 15) (DB).**

——S. 5 (2) — Sentence — Nature of punishment.

Section 5 (2) of the Prevention of Corruption Act in fact makes the sentence under Ss. 161 and 165, Penal Code more severe and the sentence for an offence under S. 5 (1) (c) is made less severe by prescribing a punishment extending to

seven years or with fine or with both. **1954 Cri LJ 464: ILR (1953) Hyd 573: AIR 1954 Hyd 50 (59) (Pt E) (Pr 8) (DB).**

——**S. 5 (2) — Penal Code (1860), S. 409 — Offences of breach of trust and criminal misconduct proved — Sentence — Discretion of Court — Interference by High Court.**

Breach of trust and criminal misconduct by a public servant are certainly serious offences calling for a deterrent sentence but the question of sentence is a matter of discretion and when that discretion has been exercised by the trial Judge, the High Court would rarely interfere even if it were of opinion that, had the case been tried by itself it would have imposed a heavier sentence than that imposed by the Trial Court, and, particularly so, in a case where the State has not chosen to apply for enhancement of the sentence. **1962 Ker LJ 881: ILR (1962) 2 Ker 362: (1962) 2 Lab LJ 301: 1962 Ker LT 690: 1963 (1) Cri LJ 675 (684) (Pt M) (Pr 74) (Kerala) (DB).**

——**S. 5 (2) — Penal Code (1860), S. 409 — Offences of breach of trust and criminal misconduct proved — Sentence — Discretion of Court — Interference by High Court.**

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——**S. 5 (1) and (2) — Offence under — Separate sentences under S. 5 (2) of Prevention of Corruption Act and S. 161, Penal Code are not legal as there is only one offence under two enactments. 1959 Mad WN 441: 1959 Mad LJ (Cri) 606: (1959) 2 Mad LJ 141: 1960 Cri LJ 92: AIR 1960 Mad 27 (32) (Pt B) (Pr 20).**

——**S. 5 — Punishment — Infliction of lenient sentence will defeat object of the Act. 1961 Mad LJ (Cr) 692: 1961 (1) Cri LJ 285: 39 Mys LJ 37: ILR (1960) Mys 1389: AIR 1961 Mys 44 (49) (Pt E) (Pr 11) (DB).**

——**S. 5 (2) — Sentence — Minimum sentence is one year unless there are special reasons, for imposing lesser sentence. 1961 BLJR 633: 1961 (1) Cri LJ 544 (549) (Pt E) (Pr 29) (Pat) (DB).**

——**S. 5 (2) — Sentence — Sentence should be consistent with enormity of offence — Loss of post and anguish of long trial cannot be mitigating circumstances. AIR 1955 NUC (Punj) 4021.**

——**S. 5 (2) — Sentence — Same act constituting offence under S. 161, I. P. Code and S. 5 (2), Prevention of Corruption Act, 1949 — Separate sentences under each section are illegal since there is only one act which constitute an offence under two enactments. See General Clauses Act (1897), S. 26. 1954 Cri LJ 1465: AIR 1954 Sau 121 (DB).**

——**S. 5 (2) — Sentence — Fine of Rs. 200 for taking illegal gratification of Rs. 300 is ridiculous. — (Penal Code (1860), S. 161). 6 Sau LR 216: 1954 Cri LJ 688: AIR 1954 Sau 62 (64) (Pt F) (Pr 8) (DB).**

17. Evidence recorded by predecessor — Conviction by successor, if legal.

See Criminal P. C. (1898), S. 350.

18. Charge under S. 5 (1) (a) — Presumption under S. 4.

See Prevention of Corruption Act (1947), Section 4.

SECTION 5-A

SYNOPSIS

(Prevention of Corruption Act (1947), S. 5-A.)

1. Scope and applicability.
2. This Act and C. P. and Berar Special Police Establishment Act (17 of 1947).
3. 'Police officer'.
4. Compliance with the section.
5. Non-compliance with section — Effect.
6. Permission of Magistrate for investigation.
7. Nature of offence.
8. Objection to the permission of Magistrate.

1. Scope and applicability.

● ——**S. 5-A — Object in enacting S. 5-A.**

Section 5-A of the Prevention of Corruption Act, 1947 is enacted for preventing harassment to a Government servant and with this object in view investigation, except with the previous permission of a Magistrate, is not permitted to be made by an officer below the rank of a Deputy Superintendent of Police. The said statutory safeguards must be strictly complied with, for they were conceived in public interest and were provided as a guarantee against frivolous and vexatious prosecution. 1959 MLJ (Cr) 571: 1959 SCJ 843: (1959) 2 An WR (SC) 105: (1959) 2 MLJ (SC) 105: AIR 1959 SC 707, Reiterated. State of U. P. v. Bhagwant Kishore Joshi, **(1964) 3 SCR 71: 1963 All LJ 982: 1963 SCD 863: 1963 All Cr R 447: 1963 All WR (HC) 749: 1964 (1) Cr LJ 140: 1964 (1) Lab LJ 60: ILR (1963) 2 All 900: AIR 1964 SC 221 (225) (Pt B) (Pr 10).**

● ——**S. 5-A (as amended by Act 59 of 1952) — Sections 3, Proviso and 5 (4) prior to amendment) — If mandatory — Effect of violation.**

Section 5 (4) and proviso to Section 3 of the Prevention of Corruption Act as it stood prior to its amendment by Act 59 of 1952 and the corresponding Section 5-A as inserted by Amending Act 59 of 1952 are mandatory and not directory and the investigation conducted in violation thereof bears the stamp of illegality.

According to the scheme of the Cr. P. Code, investigation is a normal preliminary to an accused being put up for trial for a cognizable offence.

It is in the light of the scheme of the Code that the scope of a provision like Section 5 (4) of the Act has to be judged. Having regard therefore to the peremptory language of sub-sec. (4) of Section 5 of the Act as well as to the policy apparently underlying it, it is reasonably clear that the said provision must be taken to be mandatory and not merely directory.

There is, however, no reason to think that the policy comprehends within its scope only some and not all the steps involved in the process of investigation. It is to be borne in mind that the Act creates two new rules of evidence one under Section 4 and the other under Section 5 (3), of an exceptional nature and contrary to the accepted canons of criminal jurisprudence.

What sub-section (2) of Section 156, Cr. P. Code cures is investigation by an officer not empowered under that section, i.e., with reference to sub-sections (1) and (3) thereof. Sub-sec. (1) of Section 156 is a provision empowering an offi-

cer in charge of a police station to investigate a cognizable case without the order of a Magistrate and delimiting his power to the investigation of such cases within a certain local jurisdiction. It is the violation of this provision that is cured under sub-section (2). Obviously sub-section (2) of Section 156 cannot cure the violation of any other specific statutory provision prohibiting investigation by an officer of a lower rank than a Deputy Superintendent of Police unless specifically authorised. But apart from the implication of the language of Section 156 (2), it is not permissible to read the emphatic negative language of sub-section (4) of Section 5 of the Act or of the proviso to Section 3 of the Act, as being merely in the nature of an amendment of or a proviso to sub-section (1) of Section 156, Cr. P. Code. H. N. Rishbud v. State of Delhi, **1955 Mad WN 232: (1955) 1 SCR 1150: 1955 Cr LJ 526: ILR (1955) Punj 135: 1955 Andhra WR (SC) 173: 1955 SCA 258: 57 Punj LR 235: 1955 SCJ 283: (1955) 1 MLJ (SC) 173: AIR 1955 SC 196 (200, 202, 203) (Pt A) (Prs 5, 6, 7, 8).**

——Ss. 5-A and 6 — **Sanction for investigation — Validity — Demand and acceptance on different dates — Sanction obtained after demand — Investigation — Validity — Subsequent trial — Legality — Criminal P. C. (1898), Sections 156 (2), 190, 520 and 537 — Penal Code (1860), Section 161.**

A sanction for investigation for an offence under Section 161, Penal Code issued immediately after a demand has been made does not become an anticipatory sanction even if the payment in pursuance of such demand is made on different date. One reason is that although under Section 161, Penal Code a demand as by itself is made an offence, where that demand has been effectively carried out by compelling payment and acceptance of money the whole series of transactions forms one offence, demand being the beginning and acceptance the end. The words of Section 161, Penal Code and Section 5-A, Prevention of Corruption Act are wide enough to include investigation into an 'intended offence or offence imminently likely to take place'.

Even assuming that such sanction is anticipatory there being nothing in the Prevention of Corruption Act which makes Section 156 (2) and Sections 529 and 537 of the Criminal P. C. inapplicable, the subsequent entertainment of the complaint and the ultimate trial of the accused cannot be affected unless the accused is able to show that prejudice has been caused to him because of such illegal investigation. AIR 1955 SC 196, Foll.; AIR 1955 Sau 42, Dissented from; AIR 1949 All 483 (FB), Dist. **64 Bom LR 274: 1962 Nag LJ 345: 1962 (2) Cri LJ 598: ILR (1962) Bom 483: AIR 1962 Bom 263 (265 to 267) (Pt B) (Prs 7, 8, 11) (DB).**

2. This Act and C. P. and Berar Special Police Establishment Act (17 of 1947).

——S. 5-A — C. P. and Berar Special Police Establishment Act (17 of 1947), Section 3 — Notification under — Jurisdiction of Criminal Courts — Effect of Section 5-A of Prevention of Corruption Act — Provisions of Section 5-A not overridden by C. P. and Berar Act 17 of 1947. See Criminal P. C. (1898), Section 5. **1961 Jab LJ 1280.**

3. 'Police Officer'.

——S. 5-A — Offences mentioned in Section 5-A of Prevention of Corruption Act (1947) — Investigation by P. S. Inspector of Anti-Corruption Department even after obtaining sanction under Section 5-A, Prevention of Corruption Act is illegal. See Criminal P. C. (1898), Section 156. **1962 (1) Cr LJ 142 (Guj).**

4. Compliance with the section.

——**Ss. 5-A, 5 (1) (d), 5 (2) and 6 (1) — Charge under Section 5 (2) read with Section 5 (1) (d) and Section 161, Penal Code — Investigation made by Circle Inspector of Special Police Establishment — Legality — Officer who laid the trap — Power to investigate into offence — Circle Inspector of Special Police Establishment — If Station Officer — Police Establishment Act (25 of 1946), Section 3 (2) — Circle Inspector is Station Officer.**

The Circle Inspector who investigated the matter belongs to the Special Police Establishment which is governed by the Police Establishment Act (25 of 1946). In such a case an Officer not below the rank of Inspector of Police of the Delhi Special Police Establishment authorised by the Inspector General of Police of that Establishment can investigate into these offences as provided for under Section 5-A of the Prevention of Corruption Act. The Notification published in the Gazette made the necessary authorization under Section 3 of the said Act. The investigation by the Officer is governed by the Proviso to Section 5-A of the Corruption Act. The only condition in such a case of investigation is that the investigating officer should have sent a report of the investigation to a Magistrate of the First Class. The laying of a trap or the apprehension of a person while committing an offence cannot preclude or prevent the same Officer from investigating the offence. From Section 3 (2) of the Police Establishment Act, it can be found that the Circle Inspector of the Special Police Establishment is also to be taken as a Station Officer for certain purposes. **(1959) 2 An WR 317: 1959 MLJ (Cri) 754.**

●——**S. 5-A — Scope — Criminal P. C. (1898), Sections 154, 157, 162 — Investigation by Circle Inspector and first information by Deputy Superintendent of Police — Legality.**

It cannot be said that in view of the mandatory provisions of Section 5-A of the Prevention of Corruption Act insisting on the investigation of the case by an officer not below the rank of a Deputy Superintendent of Police, any enquiry that is made by a Circle Inspector of Police does not have the legal effect of an investigation and as such the taking of signed statements during such enquiry by him is not hit by Section 162, Criminal P. C., which only prohibits the taking of such statements during investigations. The Circle Inspector acts in violation of Section 162 of the Criminal P. C. when he takes down the statement of the witnesses and gets their signatures thereto.

Delay in investigation of cognizable cases and that of eight months is a serious neglect of duty which invariably leads to failure of justice. AIR 1955 SC 196, Relied on. State of Kerala v. Samuel, **1960 Ker LT 666: 1960 Ker LJ 821: ILR (1960) Ker 783: 1960 Mad LJ (Cr) 695: 1961 (1) Cr LJ 505: AIR 1961 Ker 99 (103, 104) (Pt C) (Prs 10, 11) (FB).**

——**S. 5-A (as amended in 1952) — Investigation by Assistant Superintendent of Police — Legality.**

Rank of Assistant Superintendent of Police as a Police Officer is just below that of a District Superintendent of Police, and definitely above the Inspector of Police. His designation as Assistant Superintendent does not and will not

by itself make out that he is an officer inferior in rank to a Deputy Superintendent. It appears that an officer holding the rank of Deputy Superintendent of Police is designated in some jurisdictions as Assistant Superintendent. In the absence of any evidence to support, the contention that the rank of the Assistant Superintendent of Police is inferior to that of a Deputy Superintendent, it cannot be said that the investigation by him was in violation of Section 5-A. **1954 Cr LJ 1604: 1954 Ker LT 455: ILR (1954) TC 856: AIR 1954 Trav-Co 492 (494) (Pt B) (Pr 5) (DB).**

5. Non-compliance with section — Effect.

●——**S. 5-A** — Investigation by police — What amounts to — Inquiry made by Sub-Inspector of Police before obtaining permission under Section 5-A of Prevention of Corruption Act, 1947 — Such enquiry amounts to investigation under Section 4 (1) of Criminal P. C. — Irregularity if any held did not prejudice accused and was curable — In the instant case there was further detailed investigation after obtaining sanction under S. 5-A of Act 2 of 1947. See Criminal P. C. (1898), Section 156. **1964 (1) Cr. LJ 140: AIR 1964 SC 221.**

●——**S. 5-A — Provision is mandatory — Investigation in violation of the provision is illegal — Trial is however not vitiated in absence of miscarriage of justice.**

Originally the entire investigation was done by sub-inspector of police and thereafter the case under Sections 409/406 of the Penal Code was instituted against the accused, and other persons. That case was however later withdrawn and it was thereafter that sanction was granted for the prosecution of the accused under Section 5 (2) of the Prevention of Corruption Act and investigation was made as required by Section 5-A. But this investigation merely consisted of this that duly authorised investigating officer went through the papers of the earlier investigation made by the sub-inspector and decided to file four prosecutions on the basis of the earlier investigation:

Held, that though the letter of S. 5-A of the Act was complied with, its spirit was not, for in reality there was no investigation by the officer authorised under that section, and the real investigation was by a sub-inspector of police who was never authorised. Section 5-A is mandatory and not directory and an investigation conducted in violation thereof is illegal. Even if however there was irregularity in the investigation and Section 5-A was not complied with in substance, the trials could not be held to be illegal unless it was shown that miscarriage of justice had been caused on account of the illegal investigation. There was no miscarriage of justice in these cases at all due to the irregular investigation. As a matter of fact on the alternative case put forward by the accused the substance of the prosecution case was practically admitted by him and he merely pleaded certain mitigating circumstances. No objection was taken at the trial when it began and it was allowed to come to an end. AIR 1955 SC 196, Rel. on; AIR 1959 SC 707, Distinguished. Munnalal v. State of Uttar Pradesh, **(1964) 3 SCR 88: 1964 SCD 21: ILR (1963) 2 All 916: (1964) 2 SCJ 307: 1964 Mad LJ (Cr) 491: 1964 (1) Cr LJ 11: AIR 1964 SC 28 (31) (Pt A) (Pr 7).**

●——**S. 5-A, Proviso — Non-compliance with — Investigation is illegal — Illegality however does not affect result of trial in absence of miscarriage of justice.**

Where the two conditions laid down in the proviso to Section 5-A have not been complied with by the Inspector of Police conducting the investigation, the investigation is illegal, but the illegality committed in the course of the investigation does not affect the competence and jurisdiction of the Court for trial and where cognizance of the case has in fact been taken and the case has proceeded to termination, the invalidity of the preceding investigation does not vitiate the result unless miscarriage of justice has been caused thereby. AIR 1955 SC 196, Rel. on, Major E. G. Barsay v. State of Bombay, **(1962) 1 SCA 106: (1962) 1 SCJ 231: 1962 Mad LJ (Cri) 153: (1962) 2 SCR 195: 1961 (2) Cr LJ 828: AIR 1961 SC 1762 (1777) (Pt G) (Pr 28).**

●——**S. 5-A** — Criminal P. C., S. 4 (1) (l) — Investigation — Steps involved stated — **Held,** on facts that the Police Officer had started investigation before he obtained permission of the Magistrate under S. 5-A and has thus contravened its provisions. Fresh investigation by D. S. P. was directed. See Criminal P. C. (1898), Section 4 (1). **1959 Cri LJ 920: AIR 1959 SC 707.**

●——**Ss. 5-A, 5 (4) (prior to Amendment Act 59 of 1952)** — Non-compliance — Effect — Jurisdiction of Special Magistrate to try — By virtue of Section 5 (4) of the Act 2 of 1947 as it stood prior to amendment in 1952 no Police Officer below the rank of Deputy Superintendent of police could investigate any offence punishable under Section 5 (2) without an order of a first class Magistrate — Investigation without the permission of the Magistrate — **Held,** the defect in investigation could not take away the jurisdiction of the Special Magistrate under Section 7 of Act 2 of 1947 to try the case. See Prevention of Corruption Act (1947), Section 7. **1957 Cri LJ 892: AIR 1957 SC 592.**

●——**S. 5-A — Criminal Law Amendment Act, 1952, Section 7 — Non-compliance with Section 5 (4) (prior to the amendment by Act 59 of 1952) — Jurisdiction of Special Magistrate to try.**

Obiter — Even though the provisions of sub-section (4) of Section 5 of the Prevention of Corruption Act to the effect that no police officer below the rank of Deputy Superintendent of Police shall investigate any offence punishable under sub-section (2) of Section 5 without an order of a 1st Class Magistrate, had not been complied with, the defect in the investigation would not take away the jurisdiction of the Special Magistrate under Section 7 to try the case. State of Madhya Pradesh v. Vireshwarrao Agnihotri, **1958 Pat LR (SC) 17: 1957 MPC 388: 1957 BLJR 370: 1957 Cr LJ 892: (1957) Mad LJ (Cr) 482: 1957 All LJ 567: 1957 Jab LJ 801: 1957 All WR (HC) 488: 1957 MPLJ 640: (1957) SCJ 519: (1957) Nag LJ 503: 1957 SCC 317: AIR 1957 SC 592 (592, 593) (Pt D) (Prs 2, 4).**

——**S. 5-A — Section 5 (4) (prior to the Amendment by Act 59 of 1952) — Investigation by officer below Deputy Superintendent of Police — Effect — Criminal P. C. (1898), Section 156.**

No doubt sub-section (4) of Section 5 opens with the words "notwithstanding anything contained in the Code of Criminal Procedure" but that exception is designed to overcome the provisions of Section 156 (1), Criminal P. C. which permits all cognizable offences to be investigated by an officer-in-charge of a police station. The words however do not go any further because Act 2 of 1947 does not lay down any rules governing investigation and the rules contained in the Code of Criminal Procedure continue to govern investigations even in cases under the Act.

Thus the investigation by an officer below the rank of Deputy Superintendent of Police, however undesirable, is a mere irregularity and not an illegality vitiating the investigation and the complaint based upon it: 1951 Cr LJ 197, Rel. on. **1951 All WR (HC) 493: 1951 All Cri R 120: 1952 Cri LJ 292: AIR 1952 All 122 (124) (Pt C) (Pr 21).**

——**S. 5-A** — Criminal P. C., Sections 154 and 162 — First information report about offence under Section 5 (1) (a), Prevention of Corruption Act — Commencement of investigation without registration of F. I. R. and permission of Magistrate under Section 5-A of Act 2 of 1947 — Statements recorded are hit by Section 162 Criminal P. C. — Effect of subsequent registration of F. I. R. and permission of Magistrate under Section 5-A would not affect the question. See Criminal P. C. (1898), Section 154. **1961 (1) Cri LJ 33: AIR 1961 Andh Pra 3.**

——**S. 5-A** — Special Judge — Powers of, to take cognizance of offences specified in Section 6 — Wide and unlimited — Investigation carried out by police officer in violation of Section 5-A, Prevention of Corruption Act — Cognizance taken by Special Judge on charge sheet submitted by such police officer — No illegality — Power of Special Judge to direct re-investigation — Effect of re-investigation. See Criminal Law Amendment Act (1952), Section 8 (1). **1962 (2) Cr LJ 326: AIR 1962 Bom 205 (DB).**

——S. 5-A — Irregularities in investigation — Order contemplated by Section 5-A not on record — Effect — (Criminal P. C. (1898), Section 156).

An illegality committed in the course of investigation does not affect the competence and the jurisdiction of the Court for trial. Where the cognizance of the case had in fact been taken and the case had proceeded to termination, the invalidity of the precedent investigation does not vitiate the result, unless miscarriage of justice had been caused thereby. AIR 1955 SC 196, Foll. **58 Bom LR 90: 1955 Cr LJ 585: ILR (1956) Bom 343: AIR 1956 Bom 287 (297) (Pt G) (Pr 17) (DB).**

● ——**S. 5-A — Police Officer below rank of D. S. P. investigating offence under Section 120-B read with Section 420, Penal Code and Section 5 (2), Prevention of Corruption Act without complying with Section 5-A — This does not vitiate entire proceedings.**

When a Police Officer below the rank of a Deputy Superintendent of Police investigates an offence under Section 120-B, read with Section 420, Penal Code and Section 5 (2), Prevention of Corruption Act of 1947 without complying with the provisions of Section 5 (4) (now Section 5-A) of the latter Act such failure would not vitiate the entire proceedings in Court based on the charge-sheet submitted by the Investigating Officer. Hence, the case of 'AIR 1953 Cal 226' in so far as it decided that the entire proceedings in Court would be vitiated in such circumstances, was not rightly decided. It does not, however, follow that the invalidity of the investigation is to be completely ignored by the Court during trial.

When the breach of such a mandatory provision is brought to the knowledge of the Court at a sufficiently early stage, the Court while not declining cognizance, will have to take the necessary steps to get the illegality cured and the defect rectified, by ordering such reinvestigation as the circumstances of an individual case may call for.

The stage contemplated is a stage when question of taking or declining cognizance is still relevant. AIR 1955 SC 196, Foll.; AIR 1953 Cal 226, **Overruled.** Debi Prasanna v. The State, **1956 Cr LJ 396: ILR (1957) 2 Cal 993: AIR 1956 Cal 56 (56, 57) (Prs 1 to 6) (FB).**

● ——**S. 5-A** — Scope — Investigation by officer of rank below Deputy Superintendent of Police — Investigation is hit by Section 162, Criminal P. C. and is not legal — Statements of witnesses taken down and signatures of deponents taken thereto not legal. See Criminal P. C. (1898), Sections 154, 157, 158 and 162. **1961 (1) Cri LJ 505: AIR 1961 Ker 99 (FB).**

——S. 5-A — Investigation — Effect of illegality in — Non-compliance with section — Defect curable under Section 537, Criminal P. C.

Failure to comply with the mandatory provisions of the section does not necessarily vitiate the trial, as the omission of this type falls within the category of curable irregularities under Section 537, Criminal P. C. The invalidity of the precedent investigation does not vitiate the result unless miscarriage of justice has been caused thereby. AIR 1955 SC 196; AIR 1959 SC 831, Followed. **1960 Ker LJ 1056.**

——S. 5-A — Failure to obtain permission to investigate offence under Section 165-A, Penal Code — Effect on trial — (Penal Code (1860), Section 165-A).

Where cognizance of an offence under Section 165-A, Penal Code, is taken and the trial has proceeded to termination the invalidity of the investigation, by reason of failure to obtain permission to investigate it, necessary under Section 5-A, Prevention of Corruption Act, 1947, will not vitiate the result, unless miscarriage of justice has been caused thereby. AIR 1955 SC 196; 1955 SCJ 283; (1955) 1 MLJ (SC) 173, Rel. on. **1958 Cr LJ 1053: AIR 1958 Manipur 17 (18) (Pt A) (Pr 6).**

——S. 5-A — Investigation by Inspector of Police — If illegal — Duty of Magistrates before granting permission.

Section 5-A of the Prevention of Corruption Act is a mandatory provision and any investigation conducted in violation thereof bears the stamp of illegality. It is no doubt true that in the decisions it is also laid down that contravention of Section 5-A is curable under Section 537 of Criminal Procedure Code if no prejudice is caused to the accused. Before granting permission under Section 5-A the Magistrates should decide two points, viz. (1) that the facts placed before them justified an investigation into them and (2) that there are good reasons, such as administrative exigencies to permit officers lower in rank than those designated in Section 5-A to investigate into the complaints made. **1962 Mad LJ (Cr) 479: 1962 (1) Cri LJ 55 (56) (Pt A) (Pr 5) (Mys) (DB).**

——**S. 5-A** — Investigation conducted by Officer holding post inferior to that of Deputy Superintendent of Police in violation of Section 5-A — Trial that follows such investigation is not vitiated. AIR 1955 SC 196, Foll. **1961 Mad LJ (Cr) 692: 1961 (1) Cr LJ 285: 39 Mys LJ 37: ILR (1960) Mys 389: AIR 1961 Mys 44 (48) (Pt B) (Pr 10) (DB).**

——S. 5-A (c) — Non-compliance — If necessarily vitiates trial.

The failure to comply with the mandatory provisions of Section 5-A (c) would not necessarily vitiate a trial as the omission of this type falls within the category of curable irregularities. It is not right to regard the entire proceedings based on the charge-sheet reported by an officer who was not competent to investigate to be bad if the evidence tendered has been found to be uninfluenced by the investig..on and independent-

ly leads to a particular conclusion. AIR 1951 All 546, Considered; AIR 1953 Cal 226, Dissent. **1955 Cr LJ 1201: ILR (1955) Nag 882: AIR 1955 Nag 204 (206) (Pt B) (Pr 12) (DB).**

——**S. 5-A** — Criminal Law Amendment Act (1952), Section 8 (1) — Cognizance under — Not confined to police report — Offence under Section 5 (2) of Act 2 of 1947 — No investigation by officers specified in Section 5-A — Cognizance taken on complaint by Circle Inspector is valid — Prevention of Corruption Act (1947), Sections 5 (2), 6, 5-A — Criminal P. C. (1898), Section 190. See Criminal Law (Amendment) Act (1952), Section 8 (1). **1965 BLJR 485: AIR 1966 Pat 15 (DB).**

●——**S. 5-A (as amended in 1952) — Non-compliance with — Effect — (Criminal P. C. (1898), Sections 75, 156, 537).**

Non-compliance with the provisions of Section 5-A, Prevention of Corruption Act, in the matter of investigation does not bar the trial based on the report of a Police-Officer not empowered by Section 5-A to investigate. Such non-compliance does not vitiate the proceedings based on the report of a Police Officer not empowered by the section to investigate. Non-compliance with the provisions of the section in the matter of investigation is curable within Section 537, Criminal P. C.; and the arrest of an offender for an offence punishable under Sections 161, 165 or 165-A, Penal Code or Section 5 (2), Prevention of Corruption Act, without warrant does not vitiate the proceedings in the trial. Case-law discussed. Krishen Kumar v. State, **57 Punj LR 206: 1955 Cr LJ 1101: ILR (1955) Punj 226: AIR 1955 Punj 151 (154 to 156) (Pt A) (Prs 20, 36, 49, 52, 53) (FB).**

●——**S. 5-A** — Criminal P. C., Section 156 — Irregularities in investigation following under Section 159, indicated — Contravention of Section 5-A, Prevention of Corruption Act (1947), does not fall within Section 156 (2). See Criminal P. C. (1898), Section 156. **1955 Cri LJ 1101: AIR 1955 Punj 151 (FB).**

——**S. 5-A — Section 5 (4) (prior to the Amendment by Act 59 of 1952) — Non-compliance — Effect.**

Where the investigation has not been carried out in accordance with the provisions of Section 5 (4), such investigation is not a mere irregularity falling under Section 156 (2) of the Criminal P. C but is an illegality and the entire proceedings based on the charge-sheet reported by the officer not competent to investigate must fail. AIR 1953 Cal 226, Rel. on. AIR 1951 All 546, Dissent. from. **1954 Cr LJ 310: 55 Punj LR 475: ILR (1954) Punj 682: AIR 1954 Punj 42 (43, 44) (Prs 2, 3).**

——**S. 5-A — Section 5 (4) (prior to the Amendment by Act 59 of 1952), 6 — Unauthorised investigation — Effect — Trial — Validity — Magistrate's jurisdiction is not affected.**

The provisions of Section 5 (4) are mandatory but they are in the nature of a direction to the Police and though the Police Officer conducting unauthorised investigation may expose himself to other penalties for contravening it, the jurisdiction of the Court to take cognizance of the offence and try it cannot be questioned.

The legality of a trial depends upon whether the Court taking cognizance of the offence had jurisdiction to do so and has nothing to do with investigation which is antecedent to the trial and does not form part of it. Under the Prevention of Corruption Act the jurisdiction to take cognizance of an offence is conferred on the Court by the sanction to prosecute the accused granted under Section 6 (1). If the sanction is a proper and valid sanction the Court is invested with jurisdiction to take cognizance of the case and the fact that the investigation preceding the sanction was irregular or was conducted by an officer not properly authorised to investigate the offence will not affect the jurisdiction of the Court to take cognizance of the offence and after taking cognizance to try the accused. AIR 1953 Cal 226 and AIR 1954 Punj 42, Not followed. AIR 1951 All 546 and AIR 1952 All 122, Foll. 8 **Sau LR 266: 1955 Cr LJ 1520: AIR 1955 Sau 91 (92) (Pt A) (Pr 4) (DB).**

——**S. 5-A** — Non-compliance with the provisions of Section 5-A would be an illegality. See Prevention of Corruption Act (2 of 1947), Section 3, Proviso. **AIR 1954 Trav-Co 492 (DB).**

6. Permission of Magistrate for investigations.

●——**S. 5-A (as amended by Act 59 of 1952) — Investigation by officer other than designated one — Permission by Magistrate — Essentials — Duty of prosecution.**

In a case where an officer, other than the designated officer, seeks to make an investigation he should get the order of a Magistrate empowering him to do so before he proceeds to investigate and it is desirable that the order giving the permission should ordinarily, on the face of it, disclose the reasons for giving the permission. For one reason or other, if the said salutary practice is not adopted in a particular case, it is the duty of the prosecution to establish, if that fact is denied, that the Magistrate in fact has taken into consideration relevant circumstances before granting the permission to a subordinate police officer to investigate the case. State of Madhya Pradesh v. Mubarak Ali, **1959 Pat LR (SC) 54: 1959 Mad WN (SC) 45: 1959 MPC 453: 1959 Cr LJ 920: 1959 All Cr R 307: 1959 All LJ 578: (1959) SCJ 843: 1959 Pat LR (SC) 54: (1959) MLJ (Cr) 571: (1959) 2 Andh WR (SC) 105: (1959) 2 Mad LJ (SC) 105: 1959 All WR (HC) 386: (1960) 1 Lab LJ 36: (1960) 1 SCA 95: (1959) Supp (2) SCR 201: AIR 1959 SC 707 (709, 710) (Pt A) (Prs 5, 6).**

●——**S. 5-A — Discretion of Magistrate.**

When a Magistrate is approached for granting permission under Section 5-A he is expected to satisfy himself that there are good and sufficient reasons for authorising an officer of a lower rank to conduct the investigation. The granting of such permission is not to be treated by a Magistrate as a mere matter of routine but it is an exercise of his judicial discretion having regard to the policy underlying it. H. N. Rishbud v. State of Delhi. **1955 Mad WN 232: 1955 Cr LJ 526: ILR (1955) Punj 135: 1955 SCA 258: 57 Punj LR 235: 1955 SCJ 283: (1955) 1 MLJ (SC) 173: 1955 Andhra WR (SC) 173: (1955) 1 SCR 1150: AIR 1955 SC 196 (204) (Pt E) (Pr 10).**

●——**S. 5 (4) (prior to amendment by Act 59 of 1952) — Contravention of — Effect.**

During the course of an investigation started on 2-5-1949, by an Inspector of Police in respect of offences punishable under Section 420, Penal Code and Section 6, Essential Supplies (Temporary) Powers Act committed by a certain person who was not a public servant, it was found that some persons who were public servants were liable to be prosecuted under Section 5 (2), Prevention of Corruption Act. The Inspector then made an application to the Magistrate for sanction for investigation under Section 5 (4) of the Act against such public servants. The sanction

was given on 20-3-1951 and a charge-sheet was filed on 15-11-1951.

Held, that in the circumstances of the case the continuance of such portion of the investigation as remained, as against the public servants concerned by the same officer after obtaining the permission of the Magistrate was reasonable and legitimate and, therefore, there was no such defect in the investigation as to call for interference. H. N. Rishbud v. State of Delhi, **1955 Mad WN 232: 1955 Cr LJ 526: ILR (1955) Punj 135: 1955 SCA 258: 57 Punj LR 235: 1955 SCJ 283: (1955) 1 MLJ (SC) 173: 1955 Andhra WR (SC) 173: (1955) SCR 1150: AIR 1955 SC 196 (205) (Pt F) (Pr 12).**

——S. 5-A — Order entrusting investigation to Police Officer of lower rank must show reasons — Duty of prosecution to establish that Magistrate considered relevant circumstances — Breach of Section 5-A — Order of acquittal is not proper.

Before giving permission under Section 5-A, the Magistrate should satisfy himself that there are good and sufficient reasons for authorising an officer of a lower rank to conduct investigation. The reasons should be disclosed on the face of the order. Where the order does not expressly show that the Magistrate felt satisfied that there was sufficient reason to entrust an officer subordinate in rank to the Deputy Superintendent with the investigation it is open to the prosecution to establish that the Magistrate in fact took into consideration relevant circumstances before granting permission to the Inspector of Police to investigate the offence. AIR 1959 SC 707 and AIR 1955 SC 196, Rel. on. Where the Magistrate giving permission is cited in the charge-sheet as a witness it would be open to the Special Judge to consider, with reference to the evidence let in, whether the permission had been, in fact granted by the Magistrate after properly taking into consideration the relevant facts and circumstances. Even if ultimately he found that the order had not been granted properly and that there was a breach of the provisions of Section 5-A, he would have to consider the nature and extent of the violation and pass appropriate orders for re-investigation. But, in any case, it would not be open to the Special Judge to discharge the accused under Section 251-A (2), Criminal P. C. on the ground of breach of the provision of Section 5-A regarding investigation by appropriate police officer. AIR 1955 SC 196, Rel. on. **1965 (2) Cri LJ 585: (1965) 2 Andh WR 444: 1965 Mad LJ (Cr) 489: AIR 1965 Andh Pra 372 (380) (Pt B) (Pr 12) (DB).**

——S. 5-A — Sanction — Facts in respect of which it is given not set out — Sanction not necessarily defective.

Where there is adequate extraneous evidence to show that the District Magistrate passed the order of sanction after studying the records and after applying his mind to it, the order of sanction cannot be said to be defective because the facts in respect of which it is given are not set out in the order. **(1962) 1 An LT 57: 1963 (2) Cr LJ 546 (548) (Pt A) (Pr 7) (Andh Pra).**

——S. 5-A — Permission to officer of a lower rank to investigate — Duty of Magistrate.

When a Magistrate is approached for granting permission he is expected to satisfy himself that there are good and sufficient reasons for authorising an officer of a lower rank to conduct the investigation. A Magistrate cannot surrender his discretion to a police officer, but must exercise it having regard to the relevant material made available to him at that stage. He must also be satisfied that there is sufficient reason, owing to the exigencies of administrative convenience, to entrust a subordinate officer with the investigation. AIR 1955 SC 196 and AIR 1957 SC 592 and AIR 1959 SC 707, Foll. **(1961) 2 Guj LR 664: 1962 (1) Cr LJ 142 (146) (Pt B) (Pr 8) (Guj) (DB).**

——S. 5-A — Investigation — According of sanction under, to police officer of lower rank, not routine matter — Duty of Magistrate — Reason behind provision — Section mandatory — Criminal P. C. (1898), Section 195 — Sanction.

When a Magistrate is requested to accord sanction under Section 5-A, he is expected to satisfy himself from all the available materials that there are good and sufficient reasons for authorising an officer of lower rank to conduct the investigation. The granting of permission is not to be treated as a mere matter of routine but it is an exercise of his judicial discretion. Under the Criminal P. C. most of the offences against public servants are non-cognizable; but so far as offences under Section 5 of the Prevention of Corruption Act, the legislature thought fit to remove this ban and hence it was thought fit to provide a safeguard by requiring that the investigation should be conducted only by a police officer of a designated high rank.

Having regard to the peremptory language of the section and the policy underlying it, it is clear that the provisions of the section are mandatory. **1960 Ker LJ 1056.**

——S. 5-A — Sanction for prosecution — District Magistrate not to grant sanction mechanically without applying his mind to question whether permission ought to be given — Sanction by General Manager of Railway — From the fact that original documents were not before the General Manager it does not follow that he gave sanction mechanically — AIR 1959 SC 707, Foll. **1959 Ker LT 872: 1959 Ker LJ 1143: 1959 Mad LJ (Cri) 816: 1959 Ker LR 1274.**

——S. 5-A — Additional District Magistrate participating in trap — Laying of trap is no part of investigation of the offence of taking illegal gratification — He is still competent to pass orders under Section 5-A authorising investigation by officer below rank of Deputy Superintendent of police.

Where the accused is being prosecuted for actually taking illegal gratification the first information could be given and the investigation commenced only after illegal gratification was actually taken. The laying of the trap was no part of the investigation of this offence. Where immediately upon recovery of Rs. 50 from the accused, the Additional District Magistrate ordered the Circle Inspector of Police to investigate the case, the case may be said to have been investigated from the start by a properly authorised police officer. Hence it is not correct to say that the Additional District Magistrate, who had participated in laying the trap, was incompetent to pass an order under Section 5-A. **1960 Jab LJ 141: 1960 MPC 192: 1960 MPLJ 163.**

——S. 5-A — Offence under Section 161, I. P. Code — Investigation by Sub-Inspector — Permission by 1st Class Magistrate — Jurisdiction of Magistrate to try case, if affected — Irregularity — Curability — (Cr. P. Code (1898), Section 537) — (Penal Code (1860), Section 161).

Where after investigating a part of the case the Sub-Inspector of police presented an application, unaccompanied by any papers relating to the case, before the City Magistrate to accord him permission to investigate the offence under Section 161, I. P. C., as required by Section 5-A

of the Prevention of Corruption Act, wherein he stated that he was deputed to investigate the case, and the City Magistrate without applying his mind, merely wrote on the application, "permission granted".

Held: The permission having been granted mechanically and the case having been conducted partly before the so-called permission and partly after, there was an illegality. AIR 1955 SC 196, Relied on. But the illegality committed in the course of investigation did not affect the competency and the jurisdiction of the Court. Such a defect being an irregularity is curable under Section 537 of the Criminal Procedure Code. AIR 1955 SC 196 and AIR 1944 PC 73 and AIR 1950 PC 26, Relied on. But the question of curability under Section 537, Cr. P. C. arises where the trial has proceeded to conclusion. But where the trial has not been completed, different considerations would prevail.

(Without quashing the proceedings, in which the point of jurisdiction was raised as a preliminary point, it was ordered that the matter should be reinvestigated by competent authority. AIR 1955 SC 196, Relied on). **1958 MPC 72: 1958 All LJ (Rev) (Sup) 32: 1958 Jab LJ 162: 1958 All WR (Sup) 49: 1958 MPLJ 166: 1958 Cri LJ 764: 1958 All Cr R 184: AIR 1958 Madh Pra 157 (159, 160) (Pt A) (Prs 7 to 9, 13, 14).**

——S. 5-A — Investigation under — Duty of Magistrate according permission to officer below rank of Deputy Superintendent.

Magistrate before granting permission under Section 5-A should decide two points, i.e., (1) that the facts placed before them justified an investigation into them; and (2) that there are good reasons, such as administrative exigencies, to permit officers lower in rank than those designated in Section 5-A to investigate into the complaints made. AIR 1959 SC 707, Foll. AIR 1954 SC 322, Rel. on. **1962 Mad LJ (Cr) 479: 1962 (1) Cr LJ 55 (56) (Pt B) (Pr 5) (Mys) (DB).**

——S. 5-A — Investigation by officer below designated rank — Sanction by magistrate — Discretion not to be surrendered to the police officer.

An order of the magistrate which empowers a police officer below the designated rank is invalid where it does not indicate that the magistrate was satisfied that the investigation of the case could not be taken by an officer of the designated rank and that it was necessary in the interest of administrative convenience or otherwise that he should empower such other officer to investigate into the matter.

The Legislature when it removed the protection from public servants in so far as it related to the investigation of the offences comprised in the Act by making them cognisable provided a substituted safeguard from undue harassment by requiring that the investigation is to be conducted normally by a police officer of a designated rank. In the case of an officer of assured rank and statuts the legislature was prepared to believe them implicitly but it prescribes an additional guarantee in the case of officers below that rank, namely, the previous order of a Presidency magistrate or a magistrate of the first class as the case may be so that the magistrate's status can give assurance to the bona fides of the investigation. AIR 1959 SC 707, Rel. on.

The point before the Magistrate when he is considering the question of sanction under Section 5-A is not whether the grounds urged in the petition disclosed an offence punishable under Section 181 of the Indian Penal Code and Sec. 5 (2) of the Prevention of Corruption Act, and whether it is necessary to investigate into the matter, but whether it is necessary in the circumstances of the case to empower an officer below the designated rank to carry on the investigation.

When a Magistrate is approached for granting permission to lay a trap or to investigate a case under the Act, he is expected to satisfy himself that there are good and sufficient reasons for authorising an officer of a rank lower than the designated officer to conduct the investigation. A Magistrate should not surrender his discretion to a Police Officer but must exercise it having regard to the relevant material made available to him at that stage. He cannot mechanically accord sanction without applying his mind to the facts of the case and satisfying himself that it is necessary in the circumstances of the case that an officer below the rank of a Deputy Superintendent of Police should be permitted to investigate the case.

It is, therefore, necessary that when a police officer below the rank of a Deputy Superintendent of police approaches a Magistrate for permission to investigate into the allegations against a public servant he should give all the necessary facts in his application to enable the Magistrate to apply his mind to them and accord his sanction. The order passed by the Magistrate should also contain the necessary facts which induced him to permit a police officer below the rank of a Deputy Superintendent of Police to investigate the case. In other words, the order passed by the Magistrate permitting the Officers should be a speaking order. **(1963) 1 Mys LJ 395.**

——S. 5-A — Scope — Assistant Superintendent of Police — If inferior in rank to Deputy Superintendent of Police requiring permission of a Magistrate to investigate.

An Assistant Superintendent of Police is not inferior in rank to a Deputy Superintendent of Police and he need not obtain any permission of a Magistrate under Section 5-A of the Prevention of Corruption Act to investigate a case of corruption by a public servant.

In any event the trial following such investigation has not been vitiated in the instant case. **(1961) MLJ (Cr) 692: 1961 (1) Cr LJ 285: 39 Mys LJ 37: ILR (1960) Mys 1389: AIR 1961 Mys 44 (48) (Pt B) (Pr 10) (DB).**

——S. 5-A — First Class Magistrate — Jurisdiction to issue orders for investigation of a case under Section 161 of Penal Code (1860), if the offence is committed outside the local area.

Section 5-A of the Prevention of Corruption Act does not say that a Magistrate issuing orders under that section should be a Magistrate having power to try that case. The powers under Section 5-A of the Act are not the powers conferred on him under the Cr. P. Code. That being so, any Magistrate of the First Class appointed to a District, can exercise that power in respect of all offences committed in the District to which he is appointed. **38 Mys LJ 529: (1960) Cr LJ 1226 (2): (1960) Mad LJ (Cri) 601: AIR 1960 Mys 242 (242) (Pr 2).**

——S. 5-A (c) — Sub-Inspector of Police investigating offence under Section 161, Penal Code, after obtaining permission of First Class Magistrate — Investigation — If illegal.

What Clause (c) of Section 5-A of the Prevention of Corruption Act means is that no police officer below the rank of a Deputy Superintendent of Police (who is the same as Assistant Superintendent of Police in the State of Mysore) can investigate into offences coming under Sec-

tions 161, 165 and 165-A of the Indian Penal Code without an order of a Presidency Magistrate or a Magistrate of the First Class as the case may be.

A Deputy Superintendent of Police or an Asistant Superintendent of Police need not obtain permission of any Magistrate to investigate into offences coming under these sections.

Where the permission of the First Class Magistrate as contemplated in Section 5-A (c) had been obtained by the Sub-Inspector who investigated into a case under Section 161, Penal Code, he has the authority or jurisdiction to investigate into this case and the investigation under these circumstances cannot be said to be illegal. **(1957) Mad LJ (Cr) 299: 1957 Cr LJ 463: ILR (1956) Mys 301: AIR 1957 Mys 38 (39) (Prs 6, 7).**

——S. 5-A — Authority contemplated under.

Where during investigation of an offence under Section 165-A, Penal Code, on the attention of the District Magistrate being drawn to Sec. 5-A by the District Superintendent of Police, the former replies by a memorandum that steps be taken and a challan be put up after completing the enquiry :

Held, that this does not amount to the necessary authority contemplated under Section 5-A. **1955 Cr LJ 1201: ILR (1955) Nag 882: AIR 1955 Nag 204 (205) (Pt A) (Pr 5) (DB).**

——S. 5-A — Section 5 (1) (c) read with Section 5 (2) — Investigation by Police Officer below rank of Deputy Superintendent of Police — Permission of first class Magistrate is essential — Magistrate must exercise his discretion. **(1959) 1 Orissa JD 573.**

——S. 5-A (c) — Scope — Sub-Divisional Magistrate participating in trap in bribery case — Competency to order investigation.

Merely because a Sub-Divisional Magistrate who has participated in a trap in a bribery case is present when the bribe money is recovered from the accused, that does not mean that in law he has ceased to be a Sub-Divisional Magistrate. He is therefore competent to order the Sub-Inspector of Police to carry on the investigation and the order is a valid order under Section 5-A (c), Prevention of Corruption Act. **1955 Cr LJ 1387: ILR (1956) Pepsu 223: AIR 1955 Pepsu 156 (158) (Pt C) (Pr 9).**

——S. 5-A (as amended in 1952) — Investigation by Police Officer inferior to Deputy Superintendent of Police — Legality.

It is only where there has been no order by a competent Magistrate that the investigation should be conducted by a Police Officer not inferior in rank to that of a Deputy Superintendent. Where there is the order by the District Magistrate directing the Police to take the necessary action the legality of the investigation is not liable to any objection at all. Ouseph Varkey v. State, **1954 Cr LJ 1604: 1954 Ker LT 455: ILR (1954) TC 856: AIR 1954 Trav Co 492 (494) (Pt C) (Pr 5) (DB).**

7. Nature of offence.

——Ss. 5-A, 3, 5 (2), 5 (1) (c) and (d) — Criminal P. C. (1898), Sections 155 (2), 4 (n), 4 (f) — Offences under Section 5 are cognizable offences by virtue of Section 5-A, under all circumstances and there is no need for an order of a competent Magistrate under Section 155 (2) Cr. P. C. apart and distinct from an order contemplated by Section 5-A of the Act 2 of 1947 — Applicability of Section 155 (2), Cr. P. C. See Prevention of Corruption Act (2 of 1947), Section 3. **1965 (2) Cri LJ 585: AIR 1965 Andh Pra 372 (DB).**

——S. 5-A — Offence under, is cognizable — Section 5-A, does not limit its nature. See Criminal P. C. (1898), Section 4 (1) (f). **1962 (2) Cri LJ 598: AIR 1962 Bom 263 (DB).**

——S. 5-A — Penal Code (1860), Section 165-A — Fact that investigation in Presidency town of Bombay is to be by police officer not below Superintendent of Police, does not make offence non-cognizable — First information and investigation — First information admissible in evidence — Section 3, Prevention of Corruption Act, effect of — An offence under Section 165-A Penal Code has to be deemed to be cognizable offence for the purposes of the Code of Criminal Procedure. (Prevention of Corruption Act (1947), Ss. 3, 5-A) — (Criminal P. C. (1898), Ss. 154, 157). See Penal Code (1860), Section 165-A. **1958 Cri LJ 481: AIR 1958 Bom 125 (DB)**

——S. 5-A — Cognizance of offence under — Even after the amendment of 1952 it is cognizable so far as the officers of the rank of D. S. P. and above are concerned — In so far as officers below the rank of D. S. P. are concerned the said offences are non-cognizable in so far as they cannot investigate them without the permission of a Magistrate of the First class. See Prevention of Corruption Act (1947), Section 5 (2). **1957 Cri LJ 184: AIR 1957 Madh B 43 (DB).**

——Ss. 5-A, 5 (1) (c) — Investigation by Police Officer below rank of Deputy Superintendent of Police — Permission of First Class Magistrate is essential — Magistrate must exercise his discretion.

Section 5-A introduced the safe-guards that no police officer below the rank of a Deputy Superintendent of Police elsewhere than in the Presidency Towns of Bombay, Madras and Calcutta shall investigate an offence punishable under Section 161 or 165, I. P. C. or Section 5 (2) of Act 2 of 1947 without the permission of a First Class Magistrate. 1959 SCJ 234, Ref. (Permission granted held valid).

Since the accused was also convicted under Sections 468 and 420, I. P. C. which, required no permission, and the sentences were to run concurrently, it was held that even if the permission granted for investigation of offence under S. 5 (1) (c) read with Section 5 (2) were invalid that would not affect the conviction under Sections 468 and 420, I. P. C. **1959 Orissa JD 573.**

8. Objection to the permission of Magistrate.

——Ss. 5-A, 5 (4), 3, Proviso (prior to Amendment by Act 59 of 1952) — Investigation by Police Officer — Non-compliance with provisions of Act — Objection cannot be raised before Supreme Court for first time — Conviction not vitiated — (Constitution of India, Articles 134 and 136). See Prevention of Corruption Act (2 of 1947), Section 3, Proviso. **1959 Cri LJ 1120: AIR 1959 SC 831.**

——S. 5-A — Non-compliance — Effect on trial — Non-compliance brought to the notice of the Court at an early stage — The Trial Court will have to consider the nature and extent of the violation and pass appropriate orders for such investigations as may be called for, wholly or partly and by such officer as it considers appropriate with reference to the requirements of the Act — Irregularity if curable under Sec. 537. See Cr. P. Code (1898), Section 190. **1955 Cri LJ 526: AIR 1955 SC 196.**

——S. 5-A (c) — Scope of inquiry — Power of Court — Magistrate giving permission to Police Officer of lower rank — Power of trial Judge to go into — (Cr. P. Code (1898), Section 537).

In view of the fact that an objection as to the error, omission or irregularity is to be raised at an early stage of the proceedings under Section 537, Criminal P. C., the trial Judge in a criminal proceeding under Prevention of Corruption Act has the power to go into the question whether the Magistrate, in giving permission to a police officer of the lower rank under Section 5-A (c) has committed any irregularity or not. AIR 1955 SC 196, Relied on. **Madh BLR 1956 (Cr) 395: 1957 Cri LJ 184: AIR 1957 Madh B 43 (44) (Pt A) (Pr 5) (DB).**

——**S. 5-A** — Investigation into offence done by Sub-Inspector after taking permission of District Magistrate as required by Section 5-A — Application for permission clearly disclosing allegations against accused — Order granting permission though not giving reasons cannot be held invalid on ground that all facts were not disclosed and permission was granted by District Magistrate without applying his mind thereto — Objection to invalidity of permission on this ground held could not be sustained for first time in appeal. AIR 1959 SC 707, Dist. **1962 Raj LW 421: ILR (1962) 12 Raj 504.**

SECTION 6

SYNOPSIS

(Prevention of Corruption Act (1947), S. 6.)

1. Scope and applicability.
2. Essentials of sanction.
3. Authority competent to remove.
4. Public servant.
See also Prevention of Corruption Act (1947), S. 5.
5. Absence of sanction.
6. Grant of sanction.
7. Validity of sanction.
8. Form of sanction.
9. Burden of proof.
10. Proof of sanction.
11. Taking cognisance.
12. Sanction in the case of any other person — Sub-section (1) (c).
13. Sanction under Section 197, Cr. P. C. and this section.
14. Valid sanction — Illustrations.
15. Invalid sanction — Illustrations.
16. Doubt about sanctioning authority — Sanction — Sub-section (2).
17. Charge under two sections, one requiring sanction — Want of sanction — Conviction under the other section if valid.
18. Sanction for offence covering specific facts — Whether enures for conviction covering different facts.
19. Facts falling under Section 409, I. P. C. and Section 5 (2) — Prosecution under S. 409 without sanction if permissible.
See also Prevention of Corruption Act (1947), S. 5.
20. Conviction for acts covering particular period — Prosecution for similar acts covering different period not barred.
21. Sanction — Objection to.

1. Scope and applicability.

●——**S. 6** — Four cases filed before Special Judge with proper sanction — Four cases subsequently split into seven in view of Section 239, Cr. P. Code — Original sanction held would cover the three cases split out of original four cases. Munnalal v. State of Uttar Pradesh, **1964 SCD 21: (1964) 3 SCR 88: ILR (1963) 2 All 916: (1964) 2 SCJ 307: 1964 Mad LJ (Cr) 491: 1964 (1) Cr LJ 11: AIR 1964 SC 28 (32) (Pt B) (Pr 8).**

●——**S. 6 — Applicability — Essentials — Accused ceasing to be public servant at time of trial — Effect — Interpretation of Statutes — Principle — Use of precedents under Section 197, Cr. P. Code — (Interpretation of Statutes).**

In construing the provisions of a statute, it is essential for a Court, in the first instance, to give effect to the natural meaning of the words used therein, if those words are clear enough. It is only in the case of any ambiguity that a Court is entitled to ascertain the intention of the legislature by construing the provisions of the statute as a whole and taking into consideration other matters and the circumstances which led to the enactment of the statute. Section 6 must be construed with reference to the words used therein independent of any construction which may have been placed by the decisions on the words used in Section 197, Cr. P. Code.

If a general power to take cognizance of an offence is vested in a Court, any prohibition to the exercise of that power, by any provision of law, must be confined to the terms of the prohibition. In enacting a law prohibiting the taking of cognizance of an offence by a Court, unless certain conditions were complied with, the legislature does not purport to condone the offence. Thus, in giving effect to the ordinary meaning of the words used in Section 6, the conclusion is inevitable that at the time a Court is asked to take cognizance not only the offence must have been committed by a public servant but the person accused is still a public servant removable from his office by a competent authority before the provisions of Section 6 can apply.

Where, therefore, the accused have ceased to be public servants at the time the Court takes cognizance of the offences alleged to have been committed by them as public servants the provisions of Section 6 do not apply and the prosecution against them is not vitiated by the lack of a previous sanction by a competent authority. S. A. Venkataraman v. The State, **1958 Mad WN (SC) 27: 30 Mys LJ 189: 1958 SCJ 594: (1958) Mad LJ (Cr) 473: (1958) 2 Lab LJ 1: 1958 All WR (HC) 602: 1958 All Cri R 397: (1958) 2 MLJ (SC) 45: (1958) 2 An WR (SC) 45: 1958 Cri LJ 254: ILR (1958) Punj 986: 1958 SCR 1037: AIR 1958 SC 107 (109, 110, 112) (Prs 10, 11, 12, 16).**

●——**Ss. 6, 5 (2)** — Criminal P. C., Ss. 197 and 537 — Sanction for prosecution under S. 409, I. P. C., of one accused only, on charge of conspiracy to commit criminal breach of trust, with other accused — Sanction to prosecute both accused under Section 5 (2), Prevention of Corruption Act — Sanction will not cover prosecution of other accused under Section 409, I. P. C. — (Penal Code (1860), Section 409). See Criminal P. C. (1898), Section 197. **1955 Cri LJ 857: AIR 1955 SC 287.**

——**S. 6 — Sanction — Necessity.**

Previous sanction from the competent authority is a condition precedent to confer jurisdiction on any particular Court to try a person accused of an offence under Section 161 or Section 165, I. P. C. or under sub-section (2) of Section 5 of the Prevention of Corruption Act where the offence has been committed by a public servant. **1957 All LJ 211: 1957 All WR (HC) 248 (1): (1957) 2 Lab LJ 185.**

——**S. 6 — Applicability to ex-public servants.**

An offender cannot invoke the protection of Section 6 unless two conditions are fulfilled: (1) He was a public servant when the offence charged against him was committed, (2) On the date

when he is prosecuted there is some authority who could remove him from his office. Section 6 affords protection only to those public servants who were in office both on the date of the commission of the offence charged and the date when a Court is asked to take cognizance. Section 6 is enacted only for the protection of public servants and not ex-public servants. AIR 1952 Nag 12, Dissented from. **1955 All LJ 791: 1955 Cr LJ 1310: AIR 1955 All 531 (533) (Pt D) (Pr 6).**

●——**S. 6 — Applicability — Prosecution under Section 409, Penal Code — Previous sanction.**

Per majority, Mulla, J., Contra :— It is a well recognised principle that a statute should be interpreted according to the plain meaning of the words and should not be given a wider meaning than what the words would actually denote.

By omitting to mention Section 409 it is plain that the Legislature intended that the provision for sanction as laid down in Section 6, Prevention of Corruption Act did not apply to an offence punishable under Section 409, I. P. Code. It is not competent for a Court to extend the meaning so as to include Section 409 which is not there. Thus the rule about sanction as laid down in Section 6, Prevention of Corruption Act has no application when a public servant is prosecuted under the general law for an offence under Section 409, I. P. Code. AIR 1952 All 35, Approved; AIR 1954 Bom 549 (FB), Rel. on. Om Prakash v. State, **1955 ALJ 224: 1955 Cr LJ 754: AIR 1955 All 275 (278, 279, 285, 286) (Pt F) (Prs 11, 12, 15, 44, 46) (FB).**

——**S. 6** — Scope — Sanction is necessary only to take cognizance. See Penal Code (1860), Section 161. **1954 Cri LJ 459: AIR 1954 All 223.**

——**S. 6** — Applicability — Prosecution of person after termination of his services and when he is not in employ of Government — No sanction is required. AIR 1933 Sind 177, Dissented from. AIR 1937 Nag 293, **Held, overruled** in 1952 Cr LJ 99. **1953 All LJ 157: 1953 All WR (HC) 127: 1953 Cr LJ 1052: AIR 1953 All 470 (470) (Pt B) (Pr 5) (DB).**

——**Ss. 6, 4, 7** — Applicability to provisions of Penal Code — These sections of the Act do not apply to a case where an offence charged is other than Sections 161 and 165, I. P. C. See Prevention of Corruption Act (1947), Section 4. **1952 Cri LJ 236: AIR 1952 All 35 (DB).**

——**S. 6 — Sanction to prosecute — Retrospective operation — Interpretation of Statutes.**

The rule requiring sanction before a Court can take cognizance of an offence is a rule of procedure which applies retrospectively to all complaints, whatever be the date of the commission of the offence to which they relate. The procedure to be followed is the procedure that prevails on the date of the complaint. If at the date of the complaint the law makes it incumbent upon a Court to take cognizance only of such offences for which there is a previous sanction, then unless the sanction to prosecute is produced, no Court will take cognizance of the offence, even though the offence may have been committed before the Act requiring sanction came into force. **1950 All LJ 383: 1950 All WR 544: 1950 All Cri Cas 201: 51 Cri LJ 1323: AIR 1950 All 494 (495) (Pt A) (Pr 5).**

——**S. 6** — Sanction for prosecution obtained — Prosecution set aside due to invalidity of notification under Section 6, Criminal Law Amendment Act, appointing Special Judge to try the case — Subsequent valid notification — No fresh sanction is required — Original sanction does not cease to be in force by lapse of time — AIR 1958 SC 107, Distinguished. **(1965) 2 Andh WR 44: 1965 Mad LJ (Cr) 489: 1965 (2) Cri LJ 585: AIR 1965 Andh Pra 372 (381) (Pt D) (Pr 18) (DB).**

——**S. 6 — "Public servant" — Meaning of.**

The words "public servant" in Section 6 (1) means a person who is in service at the time when the Court is called upon to take cognizance of the offence. Section 6 (1) has consequently no application to the case of the public servant who is no longer in service. **55 Bom LR 719: 1954 Cr LJ 284: AIR 1954 Bom 109 (112) (Pt A) (Pr 10) (DB).**

——**S. 6 — Construction — Marginal note — Effect of — (Interpretation of Statutes — Marginal notes).**

The marginal note to Section 6 is perfectly general, and it throws no light whatsoever upon the meaning of the section, when taken by itself. It cannot therfore be taken into consideration in the interpretation of the language of the statute. **55 Bom LR 719: 1954 Cr LJ 284: AIR 1954 Bom 109 (112) (Pt B) (Pr 11) (DB).**

——**S. 6 — Applicability — Prosecution under Section 409, Penal Code — Sanction — (General Clauses Act (1897), S. 26).**

The Act creates a new offence altogether, an offence termed criminal misconduct in the discharge of official duty and although Clause (c) of Section 5 (1) overlaps to some extent the definition of criminal breach of trust it is one form of criminal misconduct as defined by the section. The main item on which the Act introduces a departure from the ordinary criminal law consists, in the first place in creating certain presumption under Section 4 (1) and a presumption again under Section 5 (3). The presumption under Section 4 (1) is only in connection with an offence punishable under Section 161 or Sec. 165, Penal Code, but the presumption under Section 5 (3) is in respect of all kinds of offences which come within the definition of criminal misconduct in the discharge of official duty. Another important departure from the ordinary criminal law is the provision of Section 7 whereby an accused person, if he chooses to examine himself as a witness for the defence may do so.

For embarking on a prosecution under the Act where the presumptions have to be invoked, the previous sanction of the authority concerned has to be taken; but as Section 6 stands it would be only when there is prosecution under the Act and not otherwise.

Under Section 26 of the General Clauses Act the choice lies with the prosecutor as to whether the offender should be prosecuted and punished under one or other of the two enactments under both of which the act or omission complained of might fall. This choice of the prosecutor is always there and if the authorities in any particular case decide on a prosecution under the Prevention of Corruption Act then and then only the question of sanction would arise and not otherwise. Hence it cannot be held that although the accused was prosecuted under Section 409, Penal Code, it is really an offence covered by Section 5 (1) (c) of the Prevention of Corruption Act and is punishable under Section 5 (2) of that Act and as the accused was prosecuted without any sanction under Section 6 the prosecution is bad. **1955 Cr LJ 784: ILR (1956) 2 Cal 625: AIR 1955 Cal 236 (239) (Pt B) (Prs 7, 8) (DB).**

——**Ss. 6 and 5 (2)** — Criminal Law Amendment Act (1952), Section 7 — Trial of allied offence under Section 7 — Special Judge must have

jurisdiction to try offence under Section 5 (2) of Prevention of Corruption Act by obtaining previous sanction under Section 6. Prevention of Corruption Act. See Criminal Law Amendment Act (1952), Section 7. **(1963) 4 Guj LR 563: (1963) 2 Lab LJ 540: 1963 (2) Cr LJ 556 (Guj).**

——**S. 6** — Previous sanction — Necessity — Charge under Section 165-A, I. P. Code — No previous sanction is necessary — (Penal Code (1860), Section 165-A). **AIR 1955 NUC (Him Pra) 1295.**

——**S. 6 — Protection afforded by Section 6 — When available.**

Section 6 affords protection to those public servants who were in office both on the date of the commission of the offence and the date when the Court is asked to take cognizance. In neither of the following cases, would the servant be protected by Section 6 and sanction for his prosecution would not be necessary. Firstly, when the offence charged is alleged to have been committed before he became a public servant, although the prosecution is launched while he is holding a public office; and secondly where the alleged offence was committed on a date when he was a public servant but the prosecution was launched after he ceased to be a public servant. **1962 Ker LJ 881: ILR (1962) 2 Ker 362: (1962) 2 Lab LJ 301: 1962 Ker LT 690: 1963 (1) Cri LJ 675 (681) (Pt F) (Pr 26) (Kerala) (DB).**

——**S. 6 — Protection afforded by S. 6 — When available.**

Section 6 affords protection to those public servants who were in office both on the date of the commission of the offence and the date when the Court is asked to take cognizance. In neither of the following cases, would the servant be protected by Section 6 and sanction for his prosecution would not be necessary. Firstly, when the offence charged is alleged to have been committed before he became a public servant although the prosecution is launched while he is holding a public office; and secondly where the alleged offence was committed on a date when he was a public servant but the prosecution was launched after he ceased to be a public servant. **(1962) 2 Lab LJ 301: 1962 Ker LT 690: 1962 Ker LJ 881: ILR (1962) 2 Ker 362.**

——**S. 6** — Necessity of sanction — Prosecution under Section 409 — Sanction not necessary. AIR 1952 Punj 89. Dissented from. **AIR 1955 NUC (Nag) 5680 (DB).**

——**S. 6** — Temporary employee in postal department charged and tried under Section 5 — Services of accused terminated before cognizance of the offence was taken — **Held,** no sanction under the section was necessary and the trial was not illegal: AIR 1953 All 470 and AIR 1954 Bom 109 and AIR 1962 SC 1573, Rel. on. **30 Cut LT 29: ILR (1964) Cut 57: 1964 (1) Cr LJ 688: (1964) 2 Lab LJ 522: AIR 1964 Orissa 152 (156) (Pt B) (Pr 8).**

——**S. 6 — Prosecution of public servant discharged from service — Sanction — Criminal P. C. (1898), S. 197.**

The protection afforded by Section 197, Criminal P. C. or Section 6, Prevention of Corruption Act (1947) is only intended to be enjoyed by Judges, Magistrates and other public servants while still in office and no sanction is necessary for the prosecution of a Government servant who had already been discharged from service before the case was brought against him. AIR 1938 All 776: AIR 1943 Cal 527 and AIR 1948 Bom 248, Rel. on: AIR 1932 Sind 177 and AIR 1937 Nag 293, Dissent. **(51) 53 PLR 198: 1952 Cri LJ 316: ILR (1954) Punj 35: AIR 1952 Punj 89 (93) (Pt B) (Pr 8).**

[Overruled on another point in AIR 1957 SC 458.]

——**S. 6 — Sanction — Validity — Public servant to claim protection under Section 6 must be public servant both at time when he committed offence and when cognizance of offence is taken against him.**

Before sanction under Section 6 becomes necessary, it must not only be that the offence was committed by a person when he was a public servant but that such accused person should still be a public servant at the time the Court took cognizance of the offence alleged to have been committed by him, and unless both these conditions are fulfilled, the provisions of Sec. 6 do not come into play at all. If the accused ceases to be a public servant when cognizance of the offence is taken against him, he cannot be heard to say that he enjoys any immunity from prosecution without sanction. AIR 1958 SC 107, Rel. on. **1962 (2) Cri LJ 786: ILR (1962) 12 Raj 327: 1962 Raj LW 307: AIR 1962 Raj 250 (254, 256) (Pt E) (Prs 8, 14) (DB).**

2. Essentials of sanction.

——**S. 6 — Sanction — Essentials — Form of sanction — Routine order of passing on charge-sheet to Court — If sufficient compliance with Section 6 — Criminal P. C. (1898), S. 197.**

It is true that the Act does not prescribe any particular form of sanction; but sanction to prosecute a particular person for an offence implies, first, a full knowledge of the facts upon which it is sought to prosecute him and, secondly, a deliberate decision of the sanctioning authority that he may be prosecuted. These two things are necessary to be proved before it can be said that a particular order amounts to a sanction for prosecution. Furthermore, it is necessary that the sanction should be given after all the facts have been collected against an accused so that the sanctioning authority has before it the materials upon which the prosecution is to be launched.

A request by the authority whose sanction was necessary for leave to investigate the case cannot be said to be a sanction to prosecute. Nor does the routine order passed in the usual course of business that the charge sheet be submitted to the Court, amount to a 'previous sanction' as contemplated by Section 6. Such sanction must be something more deliberate and formal than a mere routine order of passing on a charge-sheet to the Court. **1950 All LJ 383: 1950 All WR 544: 1950 All Cri Cas 201: 51 Cri LJ 1323: AIR 1950 All 494 (495, 496) (Pt B) (Prs 6, 7).**

——**S. 6** — Sanction — Validity — What is essential for a valid sanction for prosecution under Section 161, Penal Code and Section 5 (2) of the Act 2 of 1947 is that the nexus between the sanction and the fact constituting the offence charged must be clear from the terms of the sanction itself or must be established by extraneous evidence — The Court is not concerned with the question whether the matters placed before the authority were adequate or not or whether the sanction was accorded after a real consideration of the facts. See Prevention of Corruption Act (1947), Section 5. **AIR 1955 NUC (Madh Bha) 852.**

——Ss. 6 (1), 5 (2) — Penal Code, Sec. 161 — Cognizance under Section 161, Indian Penal Code or Section 5 (2) of Prevention of Corruption Act against a person can be taken only on previous sanction by authority competent to remove such person from office — The sanction itself or other evidence should clearly show that sanctioning authority applied its mind and gave sanction after consideration of all circumstances — Lack of proper sanction vitiates the trial. AIR 1958 SC 124 and 73 IA 30; AIR 1948 PC 82, Rel. on. **1963 MPLJ (Notes) 255.**

——S. 6 — Requisites of valid sanction — Evidence — Onus of proof — (Criminal P. C. (1898), Section 197).

A valid sanction is regarded as a condition precedent to a valid prosecution under Section 6 of the Prevention of Corruption Act. The burden of proving that the requisite sanction has been obtained rests on the prosecution and such burden includes proof that the sanctioning authority had given the sanction in reference to the facts on which the prosecution was to be based. All these facts must appear on the face of the sanction or might be proved by extraneous evidence. It is not necessary that sanction should contain particulars of the offence or essential evidence on which the accused is to be prosecuted. **1957 Jab LJ 786: 1958 Cri LJ 41: AIR 1958 Madh Pra 2 (4, 5) (Pt B) (Prs 19, 34).**

——S. 6 — Sanction — Form and contents of.

All that the order of sanction must show is that all relevant materials were placed before the authority sanctioning the prosecution and that the authority considered those materials and the order sanctioning prosecution resulted therefrom. The sanction need not set out the reasons for the sanction. The object of this sanction is nothing more than to ensure the discouragement of frivolous, doubtful and impolitic prosecutions (Sanction held proper). **1953 Mad WN 291: (1953) 1 MLJ 636: 1953 Cr LJ 1429: AIR 1953 Mad 785 (786) (Pt B) (Pr 5).**

——S. 6 — Sanction — Requirement of law.

The law relating to requirements of sanction is that correlation between the sanction and the offence to be taken cognizance of in, respect of essential facts of the offence, has to be made out. It is not necessary that the particulars of the offence or the essentials of the evidence relating thereto should be set out in the sanction or should be proved to have been placed before the sanctioning authority. It is sufficient that the sanction sets out the offence and the essential factual ingredients thereof in such manner as to indicate that taking cognizance of the charge which is before the Court is authorised. AIR 1948 PC 82, Considered. Case law discussed.

Where, therefore, the District Magistrate wrote a letter to the Chief Secretary to the Government of Orissa wherein he set out that according to his information the accused in the course of his visit to rice mills as Inspector of Factories had been collecting heavy sums as illegal gratification from the managers or the proprietors of the mills under threat or mischief to the mill owners and that a heavy sum of money had been seized from his possession but the various instances of bribery were not referred to in the letter and the sanction to prosecute the accused was granted on the basis of that letter.

Held, that the sanction was perfectly valid. **1952 Cri LJ 1533: ILR (1952) Cut 109: AIR 1952 Orissa 289 (306) (Pt J) (Prs 63, 64) (DB).**

——S. 6 (1) (c) — Sanction under — Essentials — Facts on which prosecution is based must appear on face of sanction or must be proved — Sanction not valid in absence of such statement or proof — AIR 1954 SC 637, Rel. on; (1961) 1 Cr LJ 544 (Pat), Distinguished. 1965 BLJR 485: 1966 Cr LJ 50: AIR 1966 Pat 15 (16) (Pt B) (Pr 17) (DB).

——S. 6 — Validity of sanction — Consideration of facts of case by sanctioning authority.

Even where the facts of the case have clearly not been referred to on the face of the sanction for prosecution given under Section 6, yet if the prosecution proves by extraneous evidence that all the facts necessary to enable the sanctioning authority to decide whether sanction should be accorded or not were before him, then the sanction fulfils all that the law requires. **1954 BLJR 577: 1955 Cr LJ 1089: AIR 1955 Pat 317 (319) (Pt A) (Pr 8).**

——S. 6 — Essentials of sanction — Necessity to place essential facts before sanctioning authority.

In a charge of criminal misconduct by a public servant in the discharge of his duty by habitual acceptance of illegal gratification, the instances of bribe-taking would no doubt constitute evidence of the offence and it may not be necessary to bring to the notice of the sanctioning authority particular instance of bribe-taking; but, it cannot be said that the same principle applies where the accused is charged with accepting illegal gratification from a specified person on a specified occasion. In such a case, the factual constituent of the offence is the instance itself and, therefore, the necessity of placing essential facts constituting the offence for which the accused is to be prosecuted cannot be dispensed with. AIR 1952 Orissa 289, Ref. to. **1953 Cr LJ 1237: AIR 1953 Sau 130 (131) (Pt A) (Pr 5) (DB).**

3. Authority competent to remove.

——S. 6 (c) — "Authority competent to remove" — (Constitution of India, Art. 311 (1)) — (Penal Code (1860), Section 161) — (Railway Establishment Code, Vol. 7 (1951 Edn.), Rule 1705 (c)).

Article 311 (1) of the Constitution and R. 1705 (c) of the Railway Establishment Code cannot be read as implying that the removal must be by the very same authority who made the appointment or by his direct superior. It is enough that the removing authority is of the same rank or grade. Mahesh Prasad v. State of U. P., **1955 Andh LT (Cri) 166: 1955 Mad WN 240: 1955 Cr LJ 249: 1955 BLJR 98: 1955 All WR 245: 1955 All LJ 87: 1955 SCA 65: 1955 SCJ 153: (1955) 1 MLJ (SC) 83: 1955 Andhra WR (SC) 83: 1955 Nag LJ 375: (1955) 1 SCR 965: AIR 1955 SC 70 (72) (Pt C) (Pr 5).**

——S. 6 — 'Sanctioning authority' — Director of Panchayats.

Held, that the rules which were framed under the Panchayat Raj Act of 1947 and were in force at the relevant time had made the Director of Panchayats the prescribed authority to remove a panch from office. **1957 All LJ 28: 1957 All WR (HC) 132 (2).**

——S. 6 (1) (c) — "Authority competent to remove him from his office" — Offence under Section 5 (2) committed by Supplies Assistant in Indian Airlines Corporation — Assistant Controller of Stores is competent authority to appoint and remove from service a Supplies Assistant. **(1965) 2 Andh WR 428: (1962) 2 Andh LT 392: 1965 Mad LJ (Cri) 873: 1966 Cri LJ 126: AIR 1966 Andh Pra 35 (37) (Pt A) (Pr 6) (FB).**

——S. 6 (c) — Authority competent to remove from office — Assam General Clauses Act (2 of 1915), Section 18.

The power to appoint Upper Division Clerks in permanent vacancies in the existing divisions vests in the Executive Engineer of the Division concerned and not in the Chief Engineer though the latter exercises supervision in the matter of filling up these vacancies by requiring his approval to the appointment. The Executive Engineer being the authority competent to appoint, he is also the proper authority to remove the clerk from his office and, is therefore, the proper authority to sanction prosecution under Section 6 (c). **('50) ILR (1950) 2 Assam 344: AIR 1951 Assam 42 (42) (Prs 2, 3) (DB).**

——S. 6 — Sanction — 'Competent to remove him from his office' — Meaning of — (Constitution of India, Article 311) — (Criminal P. C. (1898), Section 537) — (Police Act (1861), Section 7).

The words "competent to remove him from his office" would clearly show that the authority contemplated therein is the one competent to remove that public servant from his office and not any public servant holding the office held by the accused person. Section 6, Prevention of Corruption Act cannot override the provisions of the Constitution and consequently, sub-section (2) thereof can be made applicable to only such cases where it cannot be ascertained with reasonable certainty as to who had actually appointed the accused person, or where by change in rules, the authority who had actually appointed him was no longer competent to remove him from his office.

The Inspector-General of Police has the statutory power under Section 7, Police Act (1861) to dismiss or remove any police officer of the subordinate ranks. But this power would be indirectly taken away if that particular officer was appointed by an authority superior to the Inspector-General of Police. This power of the Inspector-General is subject to the provisions of Article 311 of the Constitution and to such rules as the State Government may, from time to time, make under this Act. Where the accused was originally appointed as a Police constable in the Police Force of Uttar Pradesh and was in due course promoted as a Head Constable and for a certain period officiated as a Police Sub-Inspector prior to his being sent on deputation to the State of Bhopal for appointment as a Police Sub-Inspector and after he had worked for a few years, he was absorbed in the cadre of Sub-Inspectors of Bhopal State with effect from 1st April, 1952, the competent authority of Uttar Pradesh would be the authority who had made his appointment but after his absorption in the cadre of Police Sub-Inspectors of Bhopal State, he would be deemed to have been appointed by the person competent to make such an appointment and who had, in fact, appointed him as such. Therefore, the authority competent to appoint him or who had actually appointed him will have to be determined from the date of his absorption and from the orders whereunder he was absorbed in the services of the Bhopal State as a Police Sub-Inspector. Thus any order passed prior to first April, 1952, can be disregarded in determining the authority who had in fact, appointed the accused.

The accused was absorbed in the Bhopal Police under G. O. 1239, dated 28th January, 1954, though the order was to take effect from 1st April, 1952. In these circumstances only the Government of Bhopal, that is, the Chief Commissioner, was competent to appoint the accused as a Police Sub-Inspector. When he was so appointed by the Chief Commissioner the authority competent to remove him from his office would, by virtue of Article 311 of the Constitution, be not one subordinate to the Chief Commissioner. Consequently the sanction for prosecution as required under Section 6, Prevention of Corruption Act must be by the Chief Commissioner and not by an authority subordinate to him. The sanction of the Chief Secretary could be of no help to the prosecution. The Chief Secretary was subordinate to the Chief Commissioner and consequently the sanction of the former cannot be deemed to be the sanction of the Chief Commissioner.

As there was nothing on the record to show, that the Chief Commissioner had given his sanction for the criminal prosecution of the accused of the offences of which he had been convicted and as no legal sanction had been given, the Special Judge had no jurisdiction to take cognizance of the case. The trial was thus ab initio invalid and was liable to be quashed. **1956 Madh BLJ (Bhopal) 65: 1965 Cr LJ 975: AIR 1956 Bhopal 36 (38, 39, 40) (Pt B) (Prs 4, 6, 10, 11, 12).**

——S. 6 — "Authority competent to remove" — Offence committed by nakadars — Sanction to prosecute by President of Municipality — Validity.

Even though the sanction of the General Board is required before a nakadar can be appointed or removed, yet the actual power of appointment or removal is with the President of the Municipality and consequently he can sanction the prosecution of the nakadars (persons employed to collect octroi duty at the octroi outpost). **8 Sau LR 306: 1955 Cr LJ 1633: AIR 1955 Sau 117 (118) (Pt A) (Pr 3) (DB).**

4. Public servant.

See also Prevention of Corruption Act (1947), Section 5.

——S. 6 — Penal Code (1860), Section 21, Cl. (12) — Offence of criminal misconduct committed prior to 27-2-1958 — Accused is not 'public servant'.

Clause (12) of Section 21, Penal Code, was added to Section 21 by the Criminal Law Amendment Act 1958 and it came into force only on 27-2-1958. An officer described in Clause (12) would come into the category of a public servant only from 27-2-1958 for the first time and if he is alleged to have committed the offence of criminal misconduct prior to that date, he would not be a public servant. **1962 Ker LJ 881: ILR (1962) 2 Ker 362: (1962) 2 Lab LJ 301: 1962 Ker LT 690: 1963 (1) Cri LJ 675 (681) (Pt G) (Pr 27) (Kerala) (DB).**

——S. 6 — Penal Code (1860), Section 21, Cl. (12) — Offence of criminal misconduct committed prior to 27-2-1958 — Accused is not 'public servant'.

Clause (12) of Section 21, Penal Code, was added to Section 21 by the Criminal Law Amendment Act 1958 and it came into force only on 27-2-1958. An officer described in Clause (12) would come into the category of a public servant only from 27-2-1958 for the first time and if he is alleged to have committed the offence of criminal misconduct prior to that date, he would not be a public servant. **1962 Ker LT 690: (1962) 2 Lab LJ 301: 1962 Ker LJ 881: ILR (1962) 2 Ker 362.**

——S. 6 — Public servant — Kotwar — Previous sanction for prosecution — (Penal Code (1860), Sections 21 and 165) — C. P. Land Revenue Act (2 of 1917), Section 100).

Kotwar in the former Madhya Pradesh was a public servant within the meaning of Clause (8) to Section 21 of the Indian Penal Code. Under Section 6 of the Prevention of Corruption Act, previous sanction is necessary for prosecution under Section 165-A, Penal Code, as he was a public servant. **1957 MPLJ (Notes) 173.**

——**S. 6** — Chairman of District Board is public servant. See Jaipur District Boards Act (33 of 1947), Section 57. **1962 (2) Cri LJ 786: AIR 1962 Raj 250 (DB).**

——**S. 6 — Public servant — Member of District Board under Rajasthan District Boards Act (1954) is public servant.**

In so far as Section 203 of the Rajasthan District Boards Act vests the power of inspection in the members of the District Board qua members without more, it is sufficient to bring the case of a member of a District Board constituted under the Act of 1954 within the four walls of the tenth clause of Section 21 of the Penal Code. 56 Mad LJ 157; AIR 1929 Mad 8, Rel. on. **1962 (2) Cri LJ 786: ILR (1962) 12 Raj 327: 1962 Raj LW 307: AIR 1962 Raj 250 (257) (Pt H) (Pr 16) (DB).**

5. Absence of sanction.

——**S. 6** — Trial without sanction — Effect — Subsequent trial with proper sanction not barred. See Criminal P. C. (1898), Section 403. **1957 Cri LJ 597: AIR 1957 SC 494.**

——**S. 6** — Scope and effect of — Under Section 6 of the Prevention of Corruption Act, 1947, before a Court can take cognizance of an offence under Section 161, Penal Code, against a police constable, the sanction of the authority, competent to dismiss the constable is necessary — In the absence of such sanction no Court is entitled to take cognizance of the case. See Penal Code (1860), Section 161. **ILR (1950) All 670.**

——**S. 6** — Criminal P. C., Section 537 — Want of sanction for prosecution — Trial would be ab initio void — A fresh trial after a proper sanction and submission of a fresh charge sheet would be possible — (Constitution of India, Article 311). See Criminal P. C. (1898), Section 537. **AIR 1956 Bhopal 36.**

——**S. 6** — Scope — Defect in sanction — Effect of — Magistrate cannot legally take cognizance of the case. See Prevention of Corruption Act (1947), Section 5 (2). **AIR 1955 NUC (Cal) 829 (DB).**

——**S. 6** — Invalid sanction — It is not compliance with Section 6 — Sanction is invalid if there is nothing to show that sanctioning authority had facts constituting offence, before it — Trial on invalid sanction is without jurisdiction — Defect cannot be cured. **AIR 1955 NUC (Mad) 3258.**

——**S. 6** — Proceeding for an offence under Section 5 (2) without sanction under Section 6 is no trial at all — Special Judge has no jurisdiction under Section 7 (3) of the Criminal Law Amendment Act to try the offence under Section 409, Penal Code also — The trial for that offence being without jurisdiction is null and void. See Criminal Law Amendment Act (1952), Section 7 (1). **1961 (1) Cr LJ 694: AIR 1961 Pat 203 (DB).**

——**Ss. 6 and 5 (2) — Procedure where Special Judge finds sanction invalid.**

Where a Special Judge comes to the conclusion that there is no valid sanction under Section 6 of the Prevention of Corruption Act, 1947, he should hold that the entire proceeding before him with regard to the offence under Section 5 (2) of that Act is null and void. That being so, he cannot pass an order, either of acquittal or of conviction. **1960 Pat LR 206: 1960 BLJR 688: 1961 (1) Cr LJ 694: AIR 1961 Pat 203 (204) (Pt C) (Pr 9) (DB).**

——**S. 6 — Sanction — Contents of sanction — Contents must relate to specific offence — (Criminal P. C. (1898), Section 537).**

It is quite necessary that the sanction should relate the facts constituting the offence and for which the person is to be prosecuted, and this it must do in respect of all the offences for which he is to be prosecuted.

Where the sanction under Section 6 related to the specific allegation in respect of the illegal gratification of Rs. 5,700 and it was in respect this sum that the Chief Secretary had sanctioned the prosecution of the accused for offence under Section 161, Penal Code and Section 5 (2), Prevention of Corruption Act, apart from Section 120-B, Penal Code, the sanction, by no stretch of reasoning can be extended to the facts constituting another distinct offence in relation to another sum, of attempt to receive the amount as illegal gratification even though it was an act which was in the nature of a step in the process of the bribe taking. If the accused is to be prosecuted in respect of the offence in relation to the other sum then evidently sanction for the same is essential. Similarly the offence of habitual bribe taking falling under Section 5 (1) (a) of the Prevention of Corruption Act too is a distinct than the former one and in respect of this offence too sanction is absolutely necessary. Thus the sanction does not cover the offence in respect of the other sum nor the offence of habitual bribe taking falling under Section 5 (1) (a) of the Prevention of Corruption Act, and that being so, the Court has no jurisdiction to take cognizance of these offences.

The illegality cannot be cured under Section 537, Criminal P. C.

The whole trial which is held by the Special Judge without a jury would be void if prejudice is caused to the accused in respect of offences not covered by the sanction.

Held, that grave prejudice had been caused to the accused in this case by the joinder of the two charges not covered by the sanction and the whole trial was, therefore, vitiated and became void altogether. **1954 Cr LJ 1559: 6 Sau LR 398: AIR 1954 Sau 132 (135, 136) (Pt A) (Prs 7, 8, 10) (DB).**

——**S. 6** — Scope — Absence of sanction — Effect — Charges under Sections 342 and 384 and 161, Penal Code — Charges under Sections 342 and 384, Penal Code added subsequently — Passing of Criminal Law Amendment Act 46 of 1952 — In view of Section 10 of that Act case transferred to the Special Judge by the order of Sessions Judge — Special Judge returning the case to the Magistrate on the ground that there was no sanction for the prosecution under Section 161 in view of Section 6 of Act 2 of 1947 and hence he had no jurisdiction to try offences under Section 161 or connected offences under Sections 342 and 384 — **Held,** that the transfer of the case by the Special Judge to the Magistrate who had jurisdiction to try those offences could not be said to be a transfer under the law — Correct view is that the Magistrate never lost the jurisdiction to try the offences other than that under Section 161 was concerned — In any case his jurisdiction to try the case under those sections was revived. See Criminal P. C. (1898), Section 528. **1957 Cri LJ 394: AIR 1957 Tripura 18.**

6. Grant of sanction.

●——S. 6 — Deputy Secretary having power to make some orders in his own right and to authenticate other orders issued in the name of the President — Deputy Secretary having power to accord sanction under Section 197, Criminal P. C. and Section 6 (1) (a) of the Prevention of Corruption Act (1947) in his own right — Order giving sanction ex facie showing that he did not authenticate it by order of the President — It must be held that he gave sanction in his own right. See Constitution of India, Article 77. **1961 (2) Cr LJ 828: AIR 1961 SC 1762.**

●——**S. 6 (1) — Sanction — Grant of — Strict compliance — (Criminal P. C. (1898), Section 197).**

The sanction under the Prevention of Corruption Act is not intended to be nor is in automatic formality and it is essential that the provisions in regard to sanction should be observed with complete strictness. AIR 1945 FC 16, Ref. Jaswant Singh v. State of Punjab. **36 Mys LJ 118: 1958 Mad WN (SC) 59: 1958 SCJ 355: 1958 BLJR 31: 1958 MPC 65: (1958) 2 Lab LJ 269: 1958 All LJ 58: 1958 All Cri R 109: (1958) Cr LJ 265: 1958 SCA 407: (1958) Mad LJ (Cri) 316: 1958 All WR (HC) 127: 1958 SCR 762: ILR (1958) Punj 572: AIR 1958 SC 124 (126) (Pt A) (Pr 4).**

——**S. 6 (c) — Sanction — Formalities in granting.**

Where the authority went through the enclosures of the letter sent by the Dy. Superintendent of Police and then accorded the sanction: **Held**, that though the authority might have been a little mechanical in granting a sanction it had all the necessary material before it and it must be deemed to have exercised its mind about it. AIR 1948 PC 82; AIR 1950 All 494, Distinguished. **1953 Cr LJ 1310: 1953 AMLJ 29: AIR 1953 Ajmer 17 (18) (Pt B) (Pr 9).**

[Reversed on another point in AIR 1956 SC 404.]

——**S. 6 — Sanction — Validity.**

The sanction for prosecution by the officer concerned under Section 6 should not be granted as a matter of routine, merely on the request of the prosecuting authority. Where the sanction is accorded without the application of his mind by the officer concerned and without ascertaining full facts, the sanction is not properly and validly given and the whole trial is vitiated. **1961 All WR (HC) 317: 1961 All Cr R 169: 1961 All LJ 182: 1961 (2) Cr LJ 51: ILR (1961) 1 All 416: AIR 1961 All 368 (370, 371) (Pt B) (Prs 10, 11) (DB).**

——S. 6 — Sanction — Validity — Presumption as to official acts — Sanction of Superintendent of police to prosecute produced — Court can presume that police report was placed before him and that he considered it and that it was he who signed the sanction — Presumption can be rebutted. See Penal Code (1860), Section 161. **1954 Cri LJ 459: AIR 1954 All 223.**

——S. 6 — Discretion to sanction prosecution under S. 6 is vested solely in the sanctioning authority and is absolute — Its exercise cannot be questioned in a Court of Law. **AIR 1953 All 37 (40) (Pt B) (Pr 13).**

——**S. 6 — Scope of — Sanction to prosecute — Facts necessary before the authority — Sanction accorded for prosecution under Section 161, Penal Code — Conviction on prosecution under Section 5 (2) — Legality.**

B was tried and convicted of the offence under Section 5 (1) and sentenced under Section 5 (2) on a sanction accorded by the District Magistrate, who was appraised of the material particulars of the case for prosecution under Section 161, Penal Code by the police challan submitted to him for the purpose. In the appeal against it the contention was that the sanction was invalid for the reasons; (1) that it did not disclose the facts that would have enabled the District Magistrate to properly grant the sanction; and (2) the sanction for prosecution under Section 161, Penal Code, could not support the prosecution under Section 5 of the Act.

Held: The law does not lay down what minimum facts are to be laid before the sanctioning authority. Sanction is intended for the protection of the public servant in the larger interests of the State. The discretion to grant sanction under Section 6 of the Act is solely vested in the authority and it is absolute. He is the judge, if the facts are sufficient and his exercise of discretion is purely subjective and cannot be questioned in a Court of law. The Court is concerned with the only matter if sanction is accorded by the proper authority.

The conviction and sentence for a major offence can be altered to one under a minor offence under Section 238, Criminal P. C., only in a case where the trial for the major offence was valid in law. For want of sanction to prosecute under Section 5 of the Act (a separate offence) the trial in the case is not valid and the conviction cannot, therefore, be altered into one for the minor offence under Section 161, Penal Code. **1952 ALJ 541: 1952 AWR (HC) 474: 1952 All Cri Cas 118: 1953 Cri LJ 192: AIR 1953 All 37 (41) (Pt C) (Prs 15, 17).**

——S. 6 — Satisfaction of sanctioning authority is subjective. **AIR 1955 NUC (Assam) 2795.**

——**S. 6 — Sanction granted on basis of material illegally collected — Fresh investigation ordered — Effect — Fresh sanction after re-investigation not necessary — Criminal P. C. (1898), S. 197.**

A sanction granted under Section 6 on the basis of invalid investigation is not illegal. The sanctioning authority can proceed on any material, which, according to him, is sufficient or trustworthy. He is not concerned to find out even the truth or otherwise of the facts disclosed to him. All that is necessary for the sanctioning authority to do is to apply his mind to the facts as disclosed to him. The grant of sanction is not a judicial act. It is purely an executive act: **ILR** 27 Mad 54, Rel. on.

A sanction already accorded under Section 6 does not lapse by reason of the fact that a fresh investigation has taken place. The sanction that was already granted remains valid and there is no need of any fresh sanction after re-investigation. Even if fresh material is assumed to have been collected in the course of fresh investigation, it would not affect the sanction accorded earlier. AIR 1958 SC 148 (151), Rel. on. **64 Bom LR 188: 1962 (2) Cr LJ 326: 1962 Nag LJ 654: ILR (1962) Bom 778: AIR 1962 Bom 205 (214) (Pt B) (Pr 11) (DB).**

——**S. 6 — Sanction — Duty of sanctioning authority.**

It is essential that persons charged with the responsible duty of granting sanction, which is a duty of deciding whether or not the credit and reputation of another citizen should be put in peril by means of a criminal prosecution, should bring to the discharge of their duty a sense of responsibility and the industry required to examine the relevant materials. The duty of granting a proper sanction can hardly be imagin-

ed to have been properly discharged by merely putting one's signature on a ready-made sanction presented by the police. **1955 Cr LJ 1169: AIR 1955 Cal 430 (431) (Pt A) (Pr 7) (DB).**

——S. 6 — Sanction — Grant of — Enquiry as to truth of facts alleged, if necessary.

All that the sanctioning authority is required to do is that he should apply his mind to the facts of the case as stated to him and decide whether on such facts there should be a prosecution. It is not necessary that he should hold any enquiry to satisfy himself as to the truth of the facts alleged. AIR 1948 PC 82, Foll. **1955 Cr LJ 433: AIR 1955 Cal 129 (130) (Pt A) (Pr 5) (DB).**

——S. 6 — Sanction not giving facts of case but referring to first information report which was placed before sanctioning authority — Sanction held was granted upon consideration of facts. (1948) 1 MLJ 243; AIR 1948 PC 82 and AIR 1954 SC 359 and AIR 1958 SC 124 and AIR 1958 SC 148, Relied on. **1961 BLJR 633: 1961 (1) Cr LJ 544 (548) (Pt C) (Pr 27) (Pat) (DB).**

——S. 6 — Validity of sanction — Grant of sanction depends on subjective satisfaction of sanctioning authority.

The grant or refusal of sanction is an administrative function and is entirely a matter for the subjective satisfaction of the sanctioning authority. The sanctioning authority is the judge of the material that should be placed before him to enable him to accord the sanction. **1964 Raj LW 478: ILR (1964) 14 Raj 1108.**

7. Validity of sanction.

——S. 6 (c) — Sanction — Validity — Order sanctioning prosecution signed as "Additional District Magistrate" and not "Additional Collector" — Mistake held technical not affecting prosecution. (Penal Code (1860), Section 161). **AIR 1955 NUC (All) 3570.**

——S. 6 — Sanction to prosecute — One officer holding two offices — Sanction accorded as Collector — Officer describing himself as District Magistrate — Effect — Criminal P. C. (1898), Section 197.

Where one officer holding two offices of the District Magistrate and the Collector in charge of the District, acts as a Collector in according the sanction to prosecute required under Section 6 it does not matter that he describes himself as the District Magistrate provided his action is of an officer acting as Collector.

Where there is no reason to suppose that the officer did not read the charge sheet which contained all the material particulars of the case when he accorded the sanction, the sanction is not vitiated on the ground that he has not applied his mind to the case. Use of abbreviated forms such as "Sd", to indicate 'sanctioned' is not a desirable practice, but is not a defect in the sanction. **1950 All LJ 764: 51 Cri LJ 1363: AIR 1950 All 507 (508) (Pt A) (Prs 5 to 7).**

——S. 6 — Sanction — Sanction not showing that it related to acts in respect of which prosecution launched — Validity.

Where a sanction to prosecute under the section does not show that it relates to the acts in respect of which the prosecution was launched and the prosecution does not give any extraneous evidence either to show what facts were put before the sanctioning authority on the basis of which he granted the permission for prosecution, the sanction is invalid and the Court has no jurisdiction to take cognizance of the case. **1950 All WR 205: 1950 All Cri Cas 73: 1950 All LJ 639: 51 Cri LJ 1031: AIR 1950 All 377 (378) (Pr 3).**

——S. 6 — Demand for money — Sanction for investigation before payment but immediately after demand is not an anticipatory sanction — Valid — Demand and acceptance on different dates — The words of Section 161, I. P. C. and Section 5-A, Prevention of Corruption Act are wide enough to include investigation into an intended offence — Subsequent trial — Legality — Criminal P. C. (1898), Sections 155, 156 (2), 190, 529 and 537 — Penal Code (1860), Section 161. See Prevention of Corruption Act (1947), Section 5-A. **1962 (2) Cri LJ 598: AIR 1962 Bom 263 (DB).**

——S. 6 (1) — Order sanctioning prosecution — Validity.

Where the evidence shows that all the facts are placed before the sanctioning authority and it is only after fully satisfying itself that the sanction was accorded by it, the sanction order is perfectly in order. **1963 Ker LJ 881: ILR (1962) 2 Ker 362: (1962) 2 Lab LJ 301: 1962 Ker LT 690: 1963 (1) Cri LJ 675 (680) (Pt E) (Pr 25) (Ker) (DB).**

——S. 6 — Valid sanction — Meaning of — Relevant facts not appearing on face of sanction — Duty of prosecution.

A valid sanction means sanction given after a consideration of all relevant facts. Those facts may appear on the face of the sanction itself, and where they do so appear on the face of the sanction itself, the task of the prosecution is easy. Where they do not appear on the face of the sanction, the prosecution has the liberty of proving such facts by other evidence, but it is not liberty alone. It is also a duty, because unless the prosecution proves by reference to other evidence that the sanctioning authority had in fact applied his mind to the relevant facts, a proper sanction cannot be made out and it cannot be proved that the foundation of the prosecution had been well and truly laid. **1955 Cr LJ 1169: AIR 1955 Cal 430 (432) (Pt B) (Pr 8) (DB).**

——S. 6 — Scope — Sanction — Defect in form held did not vitiate sanction — (Constitution of India, Article 77) — (Criminal P. C. (1898), Section 197).

The document containing the contents of a sanction, required under Section 6, Prevention of Corruption Act, (1947), to prosecute an accused an employee of the Central Government, was not expressed to be made in the name of the President though it was mentioned at the foot that it was made by the order of Central Government. On behalf of the prosecution a witness, an Assistant, Ministry of Home Affairs, Police Section, was examined. He stated that the document bore the signature of the Deputy Secretary, Ministry of Home Affairs and that he was authorised to issue sanction in question on behalf of the Government (Central).

Held, that the statement of this witness who had requisite means of knowledge was enough under the circumstances to remove any doubt created by the use of a form though compliance with the provisions of the Prevention of Corruption Act was not in strict conformity with Article 77 (1) of the Constitution and that the departure did not vitiate the order. AIR 1952 SC 181: 1952 SCJ 235: (1952) 2 MLJ 119 and AIR 1952 SC 317: (1952) 2 MLJ 338; AIR 1945 FC 16; 1945 FLJ 45: (1945) 1 MLJ 369, Rel. on. **1954 Cr LJ 966: Madh BLJ 1954 (HCR) 474: AIR 1954 Madh Bha 101 (108) (Pt E) (Pr 58).**

——S. 6 — Validity of sanction — Variation between facts stated in sanction order and those sought to be proved at trial — (Cr. P. Code (1898), Section 197).

Where it is alleged that there is a material difference between the facts represented to the sanctioning authority and those sought to be proved at the trial the crucial question to be considered in such a case is, is the departure such as might reasonably be taken to affect the judgment of the sanctioning authority on the question of sanction with regard to the matter placed before it? If the variations are not so substantial as might reasonably be taken to have affected the judgment of the sanctioning authority, then the order of sanction is not vitiated. AIR 1948 PC 82, Expl. **1954 Cr LJ 966: Madh BLJ 1954 (HCR) 474: AIR 1954 Madh B 101 (109) (Pt F) (Pr 61).**

——S. 6 — Sanction for prosecution — Validity — Conditions — Resolution of the cantonment Board for prosecution of members of the staff — Meeting presided over by Vice-president — Sanction signed by the Vice-president — **Held,** the failure of the Board to strictly comply with the provisions of the Cantonments Act and rules framed thereunder would not make the sanction invalid. See Cantonments Act (1924), Section 42. **1958 Cr LJ 41: AIR 1958 Madh Pra 2.**

——S. 6 — Criminal P. C. (1898), Section 197 (1) and (2) — Mysore Prevention of Corruption Act (1948), Section 12 — Sanction for prosecution under Section 161, Penal Code and Sections 5 (2), 5 (1) (a), Prevention of Corruption Act — Sanction not required — Specification of Court of trial is unnecessary — Sanction does not take away ordinary jurisdiction of Court to commit accused to Sessions — Sanction is required under Section 12, Prevention of Corruption Act but no specification of Court is necessary — Penal Code (1860), Section 161. See Criminal P. C. (1898), Section 197 (1) and (2). **1952 Cri LJ 919: AIR 1952 Mys 42 (DB).**

——S. 6 — Sanction — Contents.

Where the facts alleged against a Government servant, the nature of the offence committed by him and also the date on which it was so committed, are clear from the sanction given under Section 6 of the Prevention of Corruption Act, there is sufficient material from which it can be inferred that the authority which granted sanction did not act mechanically but considered all matters and only then accorded its sanction. The validity of such a sanction cannot be challenged on the ground that it does not contain sufficient details. AIR 1948 PC 82, Dist. **ILR (1952) Nag 52: 1952 Cr LJ 845: 1952 NLJ 221: AIR 1952 Nag 170.**

——S. 6 — Sanction is not invalid merely on the ground that the clause of Section 5 (1), Prevention of Corruption Act, which describes the particular offence for which the accused is to be prosecuted, is not mentioned in the sanction order. AIR 1954 SC 359, Foll. **1961 BLJR 633: 1961 (1) Cr LJ 544 (549) (Pt D) (Pr 28) (Pat) (DB).**

——Ss. 6 and 5 (2) — Offence under Section 5 (2) —Sanction — Facts constituting offence not put before sanctioning authority — Sanction held not valid under Section 6 — (Cr. P. Code (1898), Section 197). **AIR 1955 NUC (Pepsu) 3427.**

——S. 6 — Sanction — Validity — Offence under Section 5 (2) — In the trial the facts constituting the offence not placed before the sanctioning authority and no extraneous evidence led at the trial to show that such facts were placed before him — **Held,** the sanction could not be held valid — The trial Court had no jurisdiction to take cognizance of the case — Sanction — Validity. See Prevention of Corruption Act (1947), Section 5 (2). **AIR 1955 NUC (Pepsu) 3427.**

——S. 6 — Previous sanction for prosecution — Essentials of sanction — Its purpose.

In respect of a valid sanction for the prosecution of an accused for offence under the Prevention of Corruption Act, 1947, the following principles can be deduced from the decisions, namely, (1) the sanction to prosecute is an important matter. A valid sanction is a condition precedent to the valid prosecution of an accused; (2) the provision of sanction is a most salutary safeguard. The sanctioning authority is placed somewhat in the position of a sentinel at the door of criminal Courts in order that no irresponsible or malicious prosecution can pass the portals of the Court of justice; (3) to constitute a valid sanction it must be established that the facts constituting an offence were placed before the sanctioning authority and that the sanctioning authority applied its mind before giving consent; (4) the facts constituting the offence should either appear in the order sanctioning the prosecution or they should be proved by the prosecution by extraneous evidence during the course of trial; and (5) the question of validity or the sufficiency of the sanction may be raised by the accused at any stage before the final decision. **1964 Raj W 478: ILR (1964) 14 Raj 1108.**

——S. 6 — Sanction — Validity.

The sanction to prosecute the accused under Section 161, Penal Code, did not state the facts which constituted the offence nor did the prosecution offer any extraneous evidence to show that the facts on which the opponent had been prosecuted were placed before the sanctioning authority.

Held, that there was no valid sanction for prosecuting the accused. AIR 1948 PC 82, Foll. **1953 Cr LJ 1268: AIR 1953 Sau 139 (140) (Prs 5 to 8) (DB).**

8. Form of sanction.

● **——S. 6 (1) — Object of sanction — Form of sanction — (Cr. P. Code (1898), S. 197).**

The object of the provision for sanction is that the authority giving the sanction should be able to consider for itself its evidence before it comes to a conclusion that the prosecution in the circumstances be sanctioned or forbidden. It should be clear from the form of the sanction that the sanctioning authority considered the evidence before it and after a consideration of all the circumstances of the case sanctioned the prosecution, and therefore unless the matter can be proved by other evidence, in the sanction itself the facts should be referred to indicate that the sanctioning authority had applied its mind to the facts and circumstances of the case. AIR 1948 PC 82, Rel. on. Jaswant Singh v. State of Punjab, **1958 SCJ 355: 30 Mys LJ 118: 1958 Mad WN (SC) 59: 1958 BLJR 31: 1958 MPC 65: (1958) 2 Lab LJ 269: 1958 All LJ 58: 1958 All Cri R 109: 1958 Cri LJ 265: 1958 SCA 407: (1958) Mad LJ (Cr) 316: 1958 All WR (HC) 127: ILR (1958) Punj 572: 1958 SCR 702: AIR 1958 SC 124 (126) (Pt B) (Pr 4).**

● **——S. 6 — Essentials of sanction.**

It is not necessary for the sanction under the Prevention of Corruption Act to be in any particular form, or in writing or for it to set out the facts in respect of which it is given. The desirability of such a course is obvious because when the

facts are not set out in the sanction proof has to be given aliunde that sanction was given in respect of the facts constituting the offence charged but an omission to do so is not fatal so long as the facts can be, and are, proved in some other way. Biswabhusan Naik v. State of Orissa, **1954 Mad WN 465: 1954 SCJ 537: (1954) 2 MLJ 79: 1954 Cr LJ 1002: 1954 SCA 928: 20 Cut LT 366: 1954 AWR (HC) 395: ILR (1954) Cut 427: (1955) 1 SCR 92: AIR 1954 SC 359 (360, 361) (Pt A) (Prs 6, 8).**

——**S. 6** — Sanction under — No prescribed form of — Facts to be placed before sanctioning authority — Test of sufficiency — No hard and fast rule can be laid down as to what facts are necessary to be brought to the notice of the sanctioning authority. **AIR 1953 All 37 (39, 40) (Pt A) (Prs 7, 13).**

——**S. 6** — Requisites of sanction for prosecution — No time for obtaining sanction — No particular form — Sanctioning authority should be in know of nature of charge and materials on which it is based. **AIR 1955 NUC (Assam) 2795.**

——**S. 6 (1) — Order sanctioning prosecution — Requisites explained.**

Although sanction under the Act is not intended to be nor is it an automatic formality and it is essential that the provisions in regard to sanction should be observed strictly, no specific type, design, form or particular words have been prescribed for a sanction order. Therefore, in accordance with the common sense and the requirements of justice, all that the order of sanction must show is that all the relevant materials were placed before the sanctioning authority and the authority considered those materials and the order sanctioning the prosecution resulted therefrom. The sanction order need not set out the full facts or the reasons why sanction was accorded. The object of sanction is nothing more than to ensure the discouragement of frivolous, doubtful and impolitic prosecutions. It should be clear from the order that the sanctioning authority considered the materials before it and after a consideration of all the circumstances of the case, sanctioned the prosecution. AIR 1948 PC 82, Disting.

The Court may presume under Section 114 (e) of Evidence Act that judicial and official acts have been regularly performed. **1962 Ker LJ 881: ILR (1962) 2 Ker 362: (1962) 2 Lab LJ 301: 1962 Ker LT 690: 1963 (1) Cri LJ 675 (680) (Pt D) (Prs 22, 23) (Kerala) (DB).**

——**S. 6 (1) — Order sanctioning prosecution — Requisites explained.**

Although sanction under the Act is not intended to be nor is it an automatic formality and it is essential that the provisions in regard to sanction, should be observed strictly, no specific type, design, form or particular words have been prescribed for a sanction order. Therefore, in accordance with the common sense and the requirements of justice, all that the order of sanction must show is that all the relevant materials were placed before the sanctioning authority and the authority considered those materials and the order sanctioning the prosecution resulted therefrom. The sanction order need not set out the full facts or the reasons why sanction was accorded. The object of sanction is nothing more than to ensure the discouragement of frivolous, doubtful and impolitic prosecutions. It should be clear from the order that the sanctioning authority considered the materials before it and after a consideration of all the circumstances of the case sanctioned the prosecution. AIR 1948 PC 82, Disting.

The Court may presume under Section 114 (e) of Evidence Act that judicial and official acts have been regularly performed. AIR 1948 PC 82, Disting. **1962 Ker LT 690: (1962) 2 Lab LJ 301: 1962 Ker LJ 881: ILR (1962) 2 Ker 362.**

——**S. 6 — Sanction — No form prescribed for — Giving reasons in the order not necessary — Object of sanction.**

No specific type, design, form or set of words have been prescribed for according sanction under Section 6. All that the order of sanction must show is that all relevant materials were placed before the sanctioning authority and that the authority considered the materials and the order sanctioning prosecution resulted therefrom. The sanction order need not set out the reasons for the sanction.

The object of sanction is nothing more than to ensure discouragement of fraudulent, doubtful and impolitic prosecutions. AIR 1954 SC 359, Relied on; AIR 1948 PC 82, Disting. **1960 Ker LJ 1056.**

——**S. 6 — Sanction for prosecution — Validity.**

Where the sanction stated that the accused (Sar Panch of Gram Panchayat) had accepted marked currency notes as a bribe for granting permission to the complainant for building his house, it cannot be urged that the sanction does not indicate that the necessary facts which were essential for the sanctioning authority to know to make up his mind were not placed before him. **Madh BLJ 1955 HCR 1703: Madh BLR 1955 Cr 33: 1956 Cr LJ 227: AIR 1956 Madh B 51 (53) (Pt B) (Prs 16, 17).**

——**S. 6** — Sanction, form of — No form of any kind has been prescribed for sanction to be given under Section 6 of the Prevention of Corruption Act. See Penal Code (1860), Section 161. **AIR 1955 NUC (Pat) 1030.**

——**S. 6 — Facts not referred to on face of sanction — Sanction is not rendered invalid.**

Section 6, Prevention of Corruption Act, does not require the sanction to be in any particular form, or that it should be in writing. However desirable it may be that the facts should be referred to on the face of the sanction, the mere lack of it does not render the sanction invalid. In that case, the prosecution may prove by extraneous evidence that the material facts constituting the offence were placed before the sanctioning authority and that the facts related to the offence charged. **1956 Cr LJ 103: ILR (1956) Pepsu 1: AIR 1956 Pepsu 12 (13) (Pt B) (Pr 6).**

——**S. 6 — Sanction — Validity — (Criminal P. C. (1898), Section 197).**

The sanction to prosecute is an important matter; it constitutes a condition precedent to the institution of the prosecution and the Government have an absolute discretion to grant or withhold their sanction. Though it is plainly desirable that the facts should be referred to on the face of the sanction, it is not essential since Section 6 does not require the sanction to be in any particular form, nor even to be in writing. But if the facts constituting the offence charged are not shown on the face of the sanction, the prosecution must prove by extraneous evidence that those facts were placed before the sanctioning authority. AIR 1948 PC 82, Rel. on. **1955 Cr LJ 609: 56 Punj LR 260: ILR (1954) Punj 75: AIR 1955 Punj 65 (73) (Pt B) (Pr 34) (DB).**

——**S. 6 — Forum for trial of offence.**

In cases under the Prevention of Corruption Act, it is only right that an accused person should be tried not by a Section 30 Magistrate

but by a Judicial Officer of the standing of the District and Sessions Judge. **AIR 1952 Punj 53 (55) (Pt D) (Pr 9).**

●——**S. 6 — Form of sanction.**

It is not necessary for the sanction under the Prevention of Corruption Act to be in any particular form or in writing or for it to set on facts in respect of which it was given. It is, however, desirable to mention the facts. But the omission to mention the facts in the order does not invalidate the sanction. AIR 1954 SC 359, Foll. **8 Sau LR 306: 1955 Cr LJ 1633: AIR 1955 Sau 117 (118) (Pt B) (Pr 3) (DB).**

9. Burden of proof.

——**S. 6 (1) — Order sanctioning prosecution — Validity.**

Where the evidence shows all the facts are placed before the sanctioning authority and it is only after fully satisfying itself that the sanction was accorded by it, the sanction order is perfectly in order. **1962 Ker LT 690: (1962) 2 Lab LJ 301: 1962 Ker LJ 881: ILR (1962) 2 Ker 362.**

——**S. 6** — Burden of proof as to proper sanction is on prosecution — Facts must appear on face of sanction or that sanction was in reference to facts might be proved by extraneous circumstances — (Evidence Act (1872), Sections 101 to 103). **AIR 1955 NUC (Mad) 3253.**

——**S. 6 — Validity of sanction — Burden of proof — Prosecution to prove that sanctioning authority was competent to sanction prosecution and had applied its mind to the facts of the case — Facts constituting offence not appearing on face of order sanctioning prosecution — Prosecution must prove same by other evidence.**

The burden of proof that the sanctioning authority had applied its mind to the question before it and had all the relevant papers in that connection before it while according the sanction, lies on the prosecution and this burden must be squarely discharged by it. The requirement of previous sanction is not a formal or technical one; it goes to the very root of the jurisdiction of the Court trying the case. The burden which rests on the prosecution in such a case includes proof that the authority sanctioning the prosecution was competent to do so and further that it had given the sanction with reference to the facts on which the proposed prosecution was based and that it had applied its mind to the same.

Therefore, where the facts constituting the offence do not appear on the face of the order sanctioning the prosecution, or where the order omits to show that such facts were brought to the notice of the authority which actually sanctioned the prosecution, then the proper course for the prosecution to adopt is that it should prove by other evidence that the material facts constituting the offence were placed before the sanctioning authority, and where this is not done, the sanction cannot but be held to be illegal, and the want of a valid sanction must have the effect of vitiating the entire trial and leave the Court without jurisdiction to try the case. (1943) 2 Mad LJ 468; AIR 1953 FC 75 and (1945) 2 Mad LJ 325; AIR 1945 PC 156 and (1948) 1 Mad LJ 243; AIR 1948 PC 82; AIR 1954 SC 637 and 1958 SCJ 355; 1958 Mad LJ (Cri) 316, AIR 1958 SC 124, Rel. on. **1962 (2) Cri LJ 786: ILR (1962) 12 Raj 327: 1962 Raj LW 307: AIR 1962 Raj 250 (253) (Pt B) (Pr 6) (DB).**

——**S. 6 (1) (c) — Authority competent to remove public servant — Railway taken over by Government — Appointing authority — Who is.**

According to the provisions of Article 311 of the Constitution, or for that matter those of Clause (c) of Rule 1705, (Page 179 of the Railway Establishment Code, Volume 1 of 1951), the accused could be removed only by an authority who appointed him or who was superior to that authority, and not by an authority lower than that by which he was appointed to the post held by him substantively. It had therefore to be examined as to by what authority the accused was appointed at the time when he was taken into Government Service after taking over the management of the B. B. and C. I. Railway by the Government of India. As to what authority appointed him when the management was in the hands of the B. B. and C. I. Railway Company was immaterial.

Where sanction had been given by the Regional Traffic Superintendent the sanction would be valid only if the appointment was made by the Regional Traffic Superintendent, or an officer of equal or lower rank. It was for the prosecution to show that valid sanction had been given and it was, therefore, the duty of the prosecution to prove that the accused was appointed under the Government of India by Regional Traffic Superintendent, or an officer of equal rank or lower rank. **ILR (1958) 8 Raj 688: 1959 Cr LJ 1115: 1959 Raj LW 644: AIR 1959 Raj 214 (216, 217) (Pt A) (Prs 14, 16).**

10. Proof of sanction.

●——**S. 6 (1) (c) — Sanction — Validity — Facts on which proposed prosecution is based must be proved to have been put before the sanctioning authority — (Penal Code (1860), Section 161).**

The burden of proving that the requisite sanction has been obtained rests on the prosecution and such burden includes proof that the sanctioning authority had given the sanction in reference to the facts on which the proposed prosecution was to be based; and these facts may appear on the face of the sanction or may be proved by extraneous evidence. Where the facts constituting the offence do not appear on the face of the letter sanctioning prosecution, it is incumbent upon the prosecution to prove by other evidence that the material facts constituting the offence were placed before the sanctioning authority. Where this is not done, the sanction must be held to be defective and an invalid sanction cannot confer jurisdiction upon the Court to try the case. AIR 1948 PC 82 (84), Relied on. Madan Mohan Singh v. State of U. P., **1954 Cr LJ 1656: AIR 1954 SC 637 (641) (Pt B) (Pr 8).**

——**S. 6 — Sanction for prosecution — Proof.**

The original sanction was produced. It purported to be under seal and the officer, who obtained it, was examined and he stated that he had obtained the same from the Collector who was the sanctioning authority.

Held, that the sanction could not be said to be defective or not proved. AIR 1956 Madh B 50 and 1949 Madh BLR 423, Disting. **1956 Cr LJ 227: Madh BLJ 1955 HCR 1703: Madh BLR 1955 Cr 335: AIR 1956 Madh B 51 (53) (Pt A) (Pr 15).**

——**S. 6** — Evidence Act, Section 74 — Sanction to prosecute requires no formal proof. See Evidence Act (1872), Section 74. **AIR 1952 Pepsu 12.**

——**S. 6** — Sanction — Validity — Evidence — Prosecution having more than ample opportunity to lead the requisite evidence if it wanted to

prove the validity of the sanction in the manner required but miserably failing to avail itself of the same —Prosecution held not entitled to opportunity in appeal and revision in High Court to prove the same by leading fresh evidence. **1962 (2) Cri LJ 786: ILR (1962) 12 Raj 327: 1962 Raj LW 307: AIR 1962 Raj 250 (258) (Pt J) (Pr 21) (DB).**

——S. 6 — Absence of sanction — Plea of — When to be raised.

Just as it is the duty of the Judges and Magistrates to consider the question of sanction whenever public servants are charged before them, it is also the duty of the lawyers to take the point about sanction at the earliest stage and invite the Judge or the Magistrate to decide it before proceeding to deal with the merits of the prosecution case. **1955 Cr LJ 1559: 6 Sau LR 398: AIR 1954 Sau 132 (138) (Pt E) (Pr 15) (DB).**

11. Taking cognizance.

● ——Ss. 6, 3 — Criminal P. C., Sections 190, 197 — Taking cognizance — What amounts to — Issue of warrant for arrest by Magistrate under Section 3, Prevention of Corruption Act — Reading Sections 197 and 190 of Cr. P. C. and Sec. 6 of the Prevention of Corruption Act in the light of the wording of S. 3 proviso it is clear that the stage at which a warrant is asked for under the proviso to Sec. 3 of the Act is not on cognizance of the offence by the Magistrate as contemplated by the other three sections. See Criminal P. C (1898), Section 190. **52 Cri LJ 775: AIR 1951 SC 207.**

——S. 6 — Penal Code (1860), Section 161 — Sanction — Valid sanction to prosecute by Superintendent, Watch and Ward — Magistrate thinking wrongly that sanction to investigate given by District Magistrate, to be sanction to prosecute — Mistake of Magistrate held did not matter as long as there was valid sanction. See Penal Code (1860), Section 161. **AIR 1954 All 223.**

● **——S. 6 — Scope — Stage at which sanction is necessary — Legality — (Brij Mohan Lall, J., in order of reference).**

Sanction prescribed by Section 6 was given on 25-8-1950. On 6-6-1950 the case was brought to the notice of the District Magistrate that the accused was demanding illegal gratification and the District Magistrate ordered another Magistrate to lay a trap.

Held, that this did not amount to taking cognizance of any case. As a matter of fact, no case was pending at that time. Nor had any offence been committed till then. The District Magistrate really directed his subordinate to find out whether the offence was going to be committed or not. Raja Ram v. State. **1954 Cr LJ 438: 1953 All LJ 644: 1953 All WR (HC) 657: ILR (1954) 1 All 379: AIR 1954 All 204 (205) (Pt B) (Pr 4) (FB).**

——S. 6 — Criminal P. C., Section 190 (1) (b) and Section 173 — Taking of cognizance is different from initiation of proceedings — Report of Police Officer under Section 173 requesting Magistrate to issue B summary — Magistrate issuing A summary — His action is not taking cognizance — (Criminal Law Amendment Act (1952), Section 7 (1)). See Criminal P. C. (1898), Section 190 (1) (b). **1959 Cri LJ 1153: AIR 1959 Bom 437 (DB).**

——Ss. 6, 5 (2), 5-A — Criminal Law Amendment Act, Section 8 (1) — Cognizance under — Not confined to police report — Offence under Section 5 (2) of Act 2 of 1947 — No investigation by officers specified in Section 5-A — Cognizance taken on complaint by Circle Inspector is valid — Criminal P. C. (1898), Section 190. See Criminal Law Amendment Act (1952), Section 8 (1). **1965 BLJR 485: AIR 1966 Pat 15 (DB).**

——S. 6 — 'Taking cognizance' — Sanction — If condition precedent — (Criminal P. C. (1898), Section 190 (1)).

Where the Magistrate had before him the charge-sheet against the petitioners some of whom he removed from the category of witnesses to the category of accused persons and enlarged the petitioners on bail and decided that they were to be tried for offences under Section 161, Penal Code and Section 5 (2) of the Prevention of Corruption Act and sanction was thereafter given :

Held, that the Magistrate took cognizance of the offences without the necessary sanction and therefore the commitment of the petitioners was bad in law. AIR 1945 FC 16, Distinguished. **1953 Cr LJ 1289: AIR 1953 Pat 225 (227) (Pt A) (Pr 7).**

——S. 6 — Scope — Subsequent sanction — Sufficiency — (Criminal P. C. (1898), S. 537).

Where the Court takes cognizance of the offence in the absence of the sanction, and if the proper sanction is subsequently obtained, while the proceedings are not yet over, the irrgularity may be cured under Section 537, Criminal P. C. But if the whole trial is completed in the absence of a proper sanction then the trial is vitiated as having taken place in contravention of Section 6 of the Act. **1953 Cr LJ 1237: AIR 1953 Sau 130 (132) (Pt B) (Pr 6).**

12. Sanction in the case of any other person — Sub-section (1) (c).

——S. 6 — Police constable committing offence under Section 161, Penal Code — Section 6 (c) applies — Sanction of Superintendent of Police is necessary before Court can take cognizance of offence. **1949 All WR (HC) 485: 1949 All Cri Cas 122: 51 Cri LJ 222: ILR (1950) All 1113: AIR 1950 All 5 (6) (Pt B) (Pr 6).**

13. Sanction under Section 197, Cr. P. C. and this section.

——S. 6 — Penal Code (1860), Section 161 — Prosecution of public servant for taking bribe — No sanction under Section 197, Cr. P. C. is required — Public servant not removable except by previous sanction of Provincial Government — Sanction for his prosecution is required under Section 6 of Prevention of Corruption Act — (Criminal P. C. (1898), Section 197). See Penal Code (1860), Section 161. **AIR 1952 Orissa 220 (DB).**

——S. 6 — Applicability — Offence under Section 161, Penal Code — Sanction.

The accused moved the Sessions Court to quash the proceedings in a case under Section 161, Penal Code and the Sessions Judge made a reference recommending the same.

Held : There is a distinction between Section 197, Cr. P. Code and Section 6 of Act 2 of 1947. Under Section 197 sanction for prosecution for an offence under Section 161, Penal Code, it is stated, was required only when the public servant is accused of the offence while acting in the discharge of his official capacity. But Section 6 of the Act makes no such distinction and the Acts being applied to Tripura State by the

Part C States (Laws) Act 1950, sanction is a necessity irrespective of the question whether the public servant was acting or purporting to act in discharge of his official duty. AIR 1952 Punj 89, Rel. on.

Sanction for prosecution under Section 161, Penal Code to be legal must be clearly evidenced from the order granting the sanction or other documentary evidence placed before the Court. The theory of implied sanction is unknown to law. (AIR 1951 M 255, Rel. on).

It is not incumbent on the accused to raise the objection; it is the duty of the Magistrate to satisfy himself before taking cognizance. Section 537, Cr. P. Code, cannot cure the want of sanction as it cuts at the basis of prosecution. **1952 Cr LJ 1648: AIR 1952 Tri 21 (21, 22) (Prs 3, 4).**

14. Valid sanction — Illustrations.

●——**Ss. 6, 5 — Sanction stating that accused had received money and had embezzled it and was, therefore, guilty under Sections 409/406, Penal Code and Section 5 (2) of the Act — Sanction held sufficient for trial under Section 5 (1) (c).**

The sanction said that the accused had received money and misappropriated it by not crediting the same into the treasury and embezzled it and was therefore guilty of criminal misconduct and liable to prosecution under Sections 409/406, Penal Code and Section 5 (2) of the Act.

Held, that the allegations made clearly showed that the sanctioning authority had Section 5 (1) (c) of the Act in mind because the sanction spoke of misappropriation and embezzlement of the moneys and misappropriation and embezzlement was only to be found in Section 5 (1) (c). There was nothing in the words 'misappropriation and embezzlement' to imply that this was only with reference to conversion by the accused to his own use. As the words of the sanction stood they would cover a case of misappropriation or conversion to his own use by the accused himself or by allowing others to do so. There was therefore sanction for prosecution of the accused under Section 5 (1) (c). Munnalal v. State of Uttar Pradesh, **1964 (1) Cr LJ 11: (1964) 3 SCR 88: 1964 SCD 21: ILR (1963) 2 All 916: (1964) 2 SCJ 307: (1964) Mad LJ (Cr) 491: AIR 1964 SC 28 (32) (Pt C) (Pr 9).**

●——**Ss. 6, 5 — Letter for sanction and the first information giving all facts — Both documents before sanctioning authority — Sanction showing that authority considered these facts — Sanction is not invalid because facts were not mentioned therein — Sanction for prosecution under sub-section (2) read with sub-section (3) of Section 5 — Conviction under sub-section (1) of Section 5 read with sub-section (3) is not bad — Cr. P. Code (1898), Section 197.**

The Superintendent of Police, after giving in his letter for sanction, requested the Government to give sanction under Section 6 of the Prevention of Corruption Act and Section 197 of the Cr. P. Code for the prosecution of the appellant under Section 5 (2) and (3) of the Prevention of Corruption Act. The First Information Report and the letter gave all the necessary facts to satisfy the mind of the sanctioning authority that the appellant was habitually receiving gratification other than legal gratification within meaning of Section 5 (1) (a) of the Act, and that he by his corrupt and illegal means or otherwise was abusing his position as public servant to obtain for himself pecuniary advantage within the meaning of Section 5 (1) (d) of the Act. The orders issued by the Government showed that it gave the sanction under sub-section (2), read with sub-section (3) of Section 5 of the Act, after considering the facts disclosed in the said two documents. Upon this sanction the appellant was convicted under sub-section (1) of Section 5 read with sub-section (3):

Held, that all the relevant facts necessary to satisfy the mind of the sanctioning authority were placed before it. Though the sanction ex facie did not disclose the facts, the documents which were exhibited in the case gave all the necessary relevant facts constituting the offence. AIR 1948 PC 82, Rel. on; AIR 1954 SC 637, Distinguished. **Held,** further, that sub-section (1) describes the ingredients of the offence of criminal misconduct. Sub-section (2) is the penal section, that is the section which imposes punishment for such a criminal misconduct. The sanction referred to sub-section (2) which is the provision that makes criminal misconduct punishable. The sanction ex hypothesi must have reference only to criminal misconduct as defined in sub-section (1). The sanction, therefore, though in terms it referred to sub-section (2), in effect must be deemed to relate to sub-section (1) read with sub-section (2) for the expression criminal misconduct in sub-section (2) takes in the definition of criminal misconduct. Therefore the contention that because the sanction was given for prosecuting the appellant under sub-section (2) read with sub-section (3) of Section 5 of the Act, his conviction under sub-section (1) of Section 5 read with sub-section (3), was bad, had no merits. AIR 1954 SC 359, Relied on; AIR 1958 SC 124, Distinguished. **Held,** also, that the contention that the sanction was given under sub-section (3) of Section 5 which lays down only a rule of evidence on a wrong assumption that the said sub-section created an offence, had also no merits. When the sanction was given under sub-section (2) read with sub-section (3) it only meant that on the facts disclosed in the said two documents, a case has been made out for drawing a presumption of guilt against the appellant. Ram Sagar Pandit v. State of Bihar, **1963 SCD 617: 1963 BLJR 914: (1963) 2 Lab LJ 466: 1963 Mad LJ (Cr) 569: (1963) 2 SCJ 565: ILR 42 Pat 565: (1963) Supp 2 SCR 652: 1964 (2) Cr LJ 65 (67 to 70) (Pt A) (Prs 4, 7, 9, 11, 16, 17) (SC).**

●——**S. 6 — Sanction for prosecution — Validity.**

A sanction for prosecution granted by a competent authority under Section 6, Prevention of Corruption Act clearly stated that the accused had demanded, on 12th May, 1952 as bribe the sum of Rs. 100 from Doraiswamy and had accepted the sum as a motive or reward for speedy and favourable settlement of the claim cases, that the sanctioning authority had applied his mind to the facts and the circumstances of the case and was satisfied that in the interests of justice, the accused should be put on his trial in a Court of competent jurisdiction for offences under Section 161 of the Indian Penal Code and Section 5 (2) of the Act, alleged to have been committed by him. In his evidence in Court the sanctioning Authority stated that the sanction was prepared by the police and put before him by the personal branch of his office and that before according sanction he went through all the relevant papers put before him.

Held, that the sanction granted under Section 6 was perfectly valid. It was not for the sanctioning authority to judge the truth of the

allegation made against the accused by calling for the records of the connected claim cases of other records in connection with the matters from his office. Indu Bhusan Chatterjee v. State of West Bengal, **1958 Cri LJ 279: 1958 SCJ 581: 1958 MLJ (Cri) 448: 1958 All Cr R 356: 1958 All WR (HC) 557: 1958 SCA 348: 1958 SCR 999: AIR 1958 SC 148 (150 to 152) (Prs 9, 10).**

●——**S. 6 (c) — Burden of proof — Sanction — Validity — Onus.**

Letter of sanction signed by Personal Assistant of Sanctioning authority — Personal Assistant examined as witness, proving another document which purported to be draft of letter of which sanctioning letter was copy — Draft signed by Sanctioning authority, below the word "approved" — Sanction held was in fact given, though the form was not proper. Madan Mohan Singh v. State of U. P., **1954 Cr LJ 1656: AIR 1954 SC 637 (640) (Pt A) (Pr 7).**

——**S. 6 (c) — Previous sanction for prosecution — Validity of sanction — Change in designation of authority competent to remove.**

A station master was appointed on 14-1-1918 by the District Traffic Superintendent of Bareilly when the branch of the Railway on which the said station master was working was called the O. R. R. There was subsequently an amalgamation of the O. R. R. with the E. I. R., and when the railways were later regrouped the erstwhile E. I. R., became the Northern Railway and the designation of the District Traffic Superintendent was dropped and three officers were appointed in his place. These three Officers were the Divisional Personnel Officer, the Divisional Commercial officer and the Divisional Transport Officer, and all the three were under the Divisional Superintendent. This Divisional Superintendent gave the sanction under Section 6, Prevention of Corruption Act, for the prosecution of the said Station Master for accepting bribe.

Held, that as the Authority who gave the sanction was an officer superior to the District Traffic Superintendent of 1918 who had appointed the Station Master, there was no flaw in the sanction for the prosecution of the Station Master. **1958 All Cri R 51: 1958 All WR (HC) 47.**

——**S. 6 (c)** — Sanction — Form of — No particular form in which sanction is to be requisitioned or should be given — Sending of report of offence to A. D. M. held amounted to request for sanction — That accused should be prosecuted in particular Court is mentioned in sanction — Nonetheless, the order held to be order sanctioning prosecution. (Penal Code (1860), Section 161). **AIR 1955 NUC (All) 3570.**

——**S. 6 — Sanction — Form of — Separate order — Necessity — (Criminal P. C. (1898), Section 197.**

A contingent clerk in the office of the Superintendent of Police committed an offence under Section 5 (2) of the Prevention of Corruption Act. The Sub-Inspector of Police submitted a report to the Superintendent of Police in which, after giving the necessary details, he requested the Superintendent of Police to accord sanction to the prosecution of the contingent clerk of an offence under Section 5 (2), Prevention of Corruption Act and Section 409, Penal Code. The Superintendent of Police without passing a separate order, wrote on the margin against the last paragraph of the report that the contingent clerk might be prosecuted.

Held, that although it might have been better if the Superintendent of Police had recorded his sanction separately, nevertheless, the procedure adopted by him did not invalidate the sanction. **1957 Cri LJ 131 (Him Pra).**

——**S. 6 (1) — Constitution of India, Arts. 356, 166, Clauses (2) and (3) — Assumption of administration of State by President — Rules made by Governor under Clause (2) of Article 166 continue to be in force — Order sanctioning prosecution purporting to have been issued in name of Government, signed by Additional Secretary is valid.**

Although as the result of the administration of a State having been taken over by the President under Article 356, Clause (3) of Article 166 is suspended, Clause (2) of Article 166 is not suspended and the Rules framed by the Governor under Clause (2) of Article 166 continue to be in force until they are amended or substituted by the Governor himself.

Where, therefore, one of the Rules of Business framed by the Governor provides that "Every order or instrument of the Government of the State shall be signed by a Secretary, an Additional Secretary, a Joint Secretary, a Deputy Secretary, an under-Secretary or an Assistant Secretary of by such other officer as may be specifically empowered in that behalf and such signature shall be deemed to be the proper authentication of such order or instrument", an order according sanction under Section 6 (1) of Prevention of Corruption Act for prosecution of offences under the Act, purporting to have been issued in the name of the Government and signed by the Additional Secretary to the Government by the order of the Governor is valid, having been expressed to be taken in the name of the Governor and having been authenticated by a person duly authorised and is immune from challenge in a Court of law on the ground that it is not an order of the Governor. **1962 Ker LJ 881: ILR (1962) 2 Ker 362: (1962) 2 Lab LJ 301: 1962 Ker LT 690: 1963 (1) Cri LJ 675 (679, 680) (Pt C) (Prs 15, 20, 21) (Kerala) (DB).**

——**S. 6 (1) — Validity of sanction — Constitution of India, Article 356, sub-clause (1) — Order by President assuming functions of Government of State making power of President exercisable by Governor — Sanction for prosecution accorded by Governor is valid.**

Where the order passed by the President in exercise of his powers under Article 356 sub-clause (1) of the Constitution, after assumption of the functions of the Government of a State by a Proclamation, makes it clear that the power taken over by the President has been made over and made exercisable by the Governor of the State, subject, of course, to the superintendence, direction and control of the President, it must be taken, in absence of any restriction on the powers to be exercised by the Governor, that the Governor had been invested with all the powers exercisable by the President and sanction under Section 6 (1) of Prevention of Corruption Act for prosecution accorded by the Governor is proper sanction. AIR 1954 Pepsu 136, Disting. **1962 Ker LJ 881: ILR (1962) 2 Ker 362: (1962) 2 Lab LJ 301: 1962 Ker LT 690: 1963 (1) Cr LJ 675 (678) (Pt A) (Pr 12) (Kerala) (DB).**

——**Ss. 6, 5** — Sanction — Validity — Nexus between sanction and facts constituting offence must be clear from sanction itself or by extraneous consideration — Court is not concerned whether all the facts before sanctioning authority were or were not sufficient or whether sanction was accorded after real consideration of facts — Letter giving out facts written to sanctioning authority — Sanctioning authority referring to

letter in his sanction — Letter proved — Sanction held valid — (Penal Code (1860), Section 161). **AIR 1955 NUC (Madh Bha) 852.**

——**S. 6** — Sanction to prosecute under — Facts on which proposed prosecution is based must be put before sanctioning authority — Condition satisfied — Sanction held was valid. See Penal Code (1860), Section 161. **(1957) 23 Cut LT 31.**

——**S. 6 — Sanction for prosecution — Mention of wrong sub-section — If vitiates sanction.**

Sub-section (2) of Section 5 is the penal provision, but before a cognizance is taken of an offence under this sub-section, it is imperative that there should be a sanction as required by Section 6 for the said prosecution. The Superintendent of Police alleged in his letter for sanction that the accused showed undue favours obtained money by corrupt or illegal means and received a sum of Rs. 400 as illegal gratification from the proprietor of a firm and these facts were placed before the sanctioning authority. The sanctioning authority, accorded sanction for the prosecution of the accused in respect of the offence under sub-section (2) of Section 5.

Held, that though the sanctioning authority mentioned sub-section (3) while granting the sanction, sub-section (3) must be deemed to be a surplusage. The effect of the sanction was not to limit the offence committed by the accused to one under sub-section (3) only of Section 5 and the sanction was not invalid. AIR 1958 Pat 374 and (1948) 1 MLJ 243; AIR 1948 PC 82 and AIR 1954 SC 637 and 1958 SCJ 355; 1958 MLJ (Cr) 316; AIR 1958 SC 124 and AIR 1954 Sau 132, Dist. **1961 BLJR 611: 1961 (2) Cr LJ 385 (390) (Pt A) (Pr 15) (Pat) (DB).**

——**S. 6 — Scope — Sanction by higher authority — Validity.**

The accused, a prosecuting Sub-Inspector, was tried for an offence under the Act. While the Assistant Inspector-General, who ranked with a Superintendent of Police, was the authority who appointed him the sanction for the prosecution was given by the Deputy Inspector-General, an authority higher in rank than a superintendent.

Held, that the sanction did not contravence the provisions of Clause 1 (c) of the section. AIR 1949 PC 112, Distinguished. **ILR (1956) Punj 1377: 1957 Cr LJ 540: AIR 1957 Punj 91 (92) (Pt A) (Pr 4).**

——**S. 6 — Form of sanction — Construction of sanction.**

Section 6 of the Act does not prescribe the form in which the sanction should be conveyed. It follows that in construing sanction the approach of the Court must be realistic and reasonable and should not be clouded by an over strict insistence on statement of facts with mathematical accuracy and logical precision, nor should the Court expect a strict observance of very nice and subtle distinctions in the forms of expressions.

Held, on construction, that the sanctioning authority having taken into consideration the record of the case had before him the facts constituting the offence and that the sanction did not suffer from any substantial defect or infirmity. AIR 1954 MB 101, Rel. on. **1964 Raj LW 478: ILR (1964) 14 Raj 1108.**

——**S. 6** — Bar under — Scope of — Provisions relating to mode of exercise of executive power and delegation can be questioned in Court of law — Sanction by Chief Minister held proper — Government of Rajasthan Rules of Business, R. 31. See Constitution of India, Article 166 (2). **1963 Raj LW 8.**

——**Ss. 6 (1) (c), 5 (2)** — Applicability — Prosecution of patel — Sanction given by Collector who appointed the patel, held valid — (Penal Code (1860), Section 161). **AIR 1955 NUC (Sau) 955 (DB).**

——**S. 6 (3) — Sanction — Delegation of power — Power of Rajpramukh is not exhausted — (Penal Code (1860), Section 161).**

The delegation of authority by the principal which is in its essence revocable cannot have the effect of divesting the donor of the power permanently — Rajpramukh delegating authority of appointment and dismissal of clerks in P. W. Department to Chief Engineer — Prosecution of a clerk in the department under the Act — Sanction by Rajpramukh is valid — His power to sanction not being exhausted by its delegation — Rajpramukh can exercise the same power himself on the general law that a principal can always exercise the power which he delegated to his agent, if the principal can at any moment revoke the authority of the agent. **6 Sau LR 216: 1954 Cr LJ 688: AIR 1954 Sau 62 (64), (Pt D) (Pr 7) (DB).**

——**S. 6** — Accused appointed Executive Engineer for Tripura State Road by order of Governor of Assam — Accused later on put in charge of certain Division, by order of Governor — Since generally power to appoint carries power to dismiss, in the absence of power to dismiss, Governor of Assam had power to dismiss accused — Sanction given by the Governor under signature of Chief Engineer and Secretary P. W. D. Assam for prosecution of accused for taking bribe held legal and the prosecution held valid. **1952 Cri LJ 1201: AIR 1952 Tripura 1 (5) (Pt I) (Pr 27).**

15. Invalid sanction — Illustrations.

——**S. 6 (1) — Panchayats — Maharashtra Zilla Parishads and Panchayat Samities Act (5 of 1962), Section 242 — Penal Code, Section 161.**

Prosecution of accused, a Government servant, whose services were allotted to Zilla Parishad, is illegal if sanction of the Collector is not obtained — Sanction given by Executive Officer does not make trial legal. **1965 Mah LJ (Notes) 30.**

——**S. 6 — Sanction — Validity — (Indian Railways Establishment Code, 1951 — Discipline and Appeal Rules, Rules 1704, 1705).**

In the case of a Class III railway servant it is the General Manager of the Railways who is the appointing authority and who normally can take disciplinary action of suspending or dismissing the servant from service. The opening words of Rule 1704 of Discipline and Appeal Rules under the Indian Railways Establishment Code 1951 "subject to the provisions of Rule 1705" govern the provisions of Rule 1704 (i) and Rule 1704 (ii), so that the delegation which the General Manager purported to make in favour of the Traffic Superintendent is subject to the provisions of Rule 1705. Under Clause (c) of Rule 1705 the only authority that could remove or dismiss the railway servant is the General Manager and not the Traffic Superintendent, so that it is clear that in regard to the power to dismiss a railway servant a delegate cannot exercise his authority having regard to the fact that the delegation is subject to the provisions of Rule 1705. Hence, the sanction by Traffic Superintendent must be taken to be granted by an officer who was not competent to dismiss the servant and is not valid. **1956 Cr LJ 879: AIR 1956 Bom 504 (505) (Pt A) (Pr 4) (DB).**

——Ss. 6, 5 (2) — **Prosecution of Sar Panch — Sanction by Collector — Panchayat Mandal proper authority to remove Sar Panch — Sanction is not valid — Trial before Special Judge is vitiated — Bombay Village Panchayats Act (3 of 1959), Sections 39, 187.**

Under Section 6 of the Prevention of Corruption Act, no Court can take cognizance of an offence punishable under Section 5 (2) of the Act except with the previous sanction of the authority competent to remove the public servant from his office.

The power to remove a Sar Panch of a Panchayat from office vests only in the Panchayat Mandal under Section 39 of the Bombay Village Panchayats Act and the power to suspend a Sar Panch during the pendency of criminal proceedings vests in the Collector of the District under Section 41 of the Act. Apart from Section 39, there is no other provision under this Act, which provides for removal of a Sar Panch from his office.

But, under the powers conferred upon it by Section 187 of the Act, the Government of Bombay published a notification, dated September 19, 1959. The Collector was given powers under Section 39, until the Mandals were duly constituted. Therefore, sanction under Section 6 of the Prevention of Corruption Act given by the Collector, for the prosecution of the Sar Panch for the offence under Section 5 (2) of the Prevention of Corruption Act, after the constitution of the Mandal, is not valid, and the Special Judge does not get any jurisdiction to entertain the matter so far as the offence punishable under Section 5 (2) of the Prevention of Corruption Act is concerned. The Special Judge also has no jurisdiction to try the offence under Section 409, Penal Code. Since this is a question of want of jurisdiction, it is obvious that the entire trial before the Special Judge is vitiated. **(1963) 2 Lab LJ 540: (1963) 4 Guj LR 563: 1963 (2) Cr LJ 556 (556 to 558) (Pt B) (Prs 2 to 6) (Guj) (DB).**

——S. 6 — Sanction — Validity — Affidavit by Deputy Secretary having no personal knowledge of matter — It is incumbent on him to disclose his source of information — Deputy Secretary verifying as "solemnly affirmed" and failing to state that material contents of affidavit except in so far as they related to matters of law were true to his personal knowledge or otherwise — Affidavit held to be bad and rejected. AIR 1952 SC 317, Rel. on. **1962 (2) Cr LJ 786: ILR (1962) 12 Raj 327: 1962 Raj LW 307: AIR 1962 Raj 250 (254) (Pt C) (Pr 7) (DB).**

16. Doubt about sanctioning authority — Sanction — Sub-section (2).

——S. 6 — **'Employed' — Means permanently employed — Public servant under Assam Government — Services lent to Central Government — Offences under Sections 161 and 165, I. P. C. committed whilst in service under Central Government — Clause (c) and not Clause (a) or (b) of Section 6, applies — Sanction given by Governor-General is invalid — Trial is vitiated.**

Clauses (a) and (b) of Section 6, Prevention of Corruption Act, 1947 (as it stood in 1949) deal with persons permanently employed in connection with the affairs of the Federation or in connection with the affairs of the Province respectively, and in regard to them, the appropriate authorities who can grant the sanction are the Central Government and the Provincial Government. The case of a public servant whose services are loaned by one Government to the other, does not fall either under Clause (a) or under Clause (b), but it falls under Clause (c). The word 'employed' in the context must mean permanently employed. The employment referred to in Clauses (a) and (b) must mean the employment of a permanent character and would not include the ad hoc or temporary employment of an officer whose services have been loaned by one Government to the other.

Held, on facts that the case of the accused fell under Clause (c) of Section 6 and that it was only the Provincial Government of Assam which could have given a valid sanction under Sec. 6. The sanction given by the Governor-General was therefore invalid and the consequent trial in respect of offences under Sections 161 and 165, I. P. C., was without jurisdiction and invalid. AIR 1959 All 149, **Reversed.** R. R. Chari v. State of Uttar Pradesh. **1962 (2) Cri LJ 510: 1962 All Cri R 403: 1962 All WR (HC) 732: 1962 Mad WN 553: 1962 SCD 913: (1963) 1 SCR 121: ILR (1962) 2 All 904: AIR 1962 SC 1573 (1581) (Pt E) (Pr 21).**

——S. 6 — **Sanction for prosecution of a civil servant — Sanction to be from competent authority — Competency to be determined with reference to appointing authority under Article 311 (1) of Constitution of India.**

Sanction under Section 6 of Prevention of Corruption Act in respect of a civil servant who is sought to be prosecuted for offences under S. 5 (1) (d) and Section 5 (2) read with Section 161 of the Penal Code is to be obtained from that Government or officer who is an appointing authority within the meaning of Article 311 (1) of the Constitution of India. One of the requirements of Article 311 (1) is that the authority that orders dismissal or removal should not be one subordinate in rank to that by which the civil servant in question was appointed. Section 6 of the Prevention of Corruption Act cannot override the provisions of the Constitution and consequently sub-section (2) thereof can be made applicable to only such cases where it cannot be ascertained with reasonable certainty as to who had actually appointed the accused person. Thus, where the civil servant was appointed by the former Cochin Government, it is only the successor Kerala Government who has got the right to dismiss the accused from service and under Section 6 (1) (c) it is only that authority which is competent to remove him from his office who can validly accord sanction. **ILR (1961) 1 Ker 512: 1961 Ker LT 445: 1961 Mad LJ (Cr) 535: (1961) 2 Lab LJ 484: 1962 (1) Cr LJ 334: AIR 1962 Ker 50 (52) (Prs 6, 7).**

——S. 6 (1) — **Constitution of India, Article 356, sub-clause (1) — Order by President assuming functions of Government of State making power of President exercisable by Governor — Sanction for prosecution accorded by Governor is valid.**

Where the order passed by the President in exercise of his powers under Article 356, sub-clause (1) of the Constitution after assumption of the functions of the Government of a State by a Proclamation makes it clear that the power taken over by the President has been made over and made exercisable by the Governor of the State, subject, of course, to the superintendence, direction and control of the President, it must be taken, in absence of any restriction on the powers to be exercised by the Governor, that the Governor has been invested with all the powers exercisable by the President and sanction under Section 6 (1) of Prevention of Corruption Act for prosecution accorded by the Governor is proper sanction. AIR 1954 Pepsu 136, Disting. **1962**

Ker LT 690: (1962) 2 Lab LJ 301: 1962 Ker LJ 881: ILR (1962) 2 Ker 362.

——S. 6 (1) — Constitution of India, Articles 356, 165, Clauses (2) and (3) — Assumption of administration of State by President — Rules made by Governor under Clause (2) of Article 166 continue to be in force — Order sanctioning prosecution purporting to have been issued in name of Government, signed by Additional Secretary is valid.

Although as the result of the administration of a State having been taken over by the President under Article 356, Clause (3) of Article 166 is suspended, Clause (2) of Article 166 is not suspended and the Rules framed by the Governor under Clause (2) of Article 166 continue to be in force until they are amended or substituted by the Governor himself.

Thus an order according sanction under Sec. 6 (1) Prevention of Corruption Act for prosecution of offences under the Act, purporting to have been issued in the name of the Government and signed by the Additional Secretary to the Government by the order of the Governor is valid, having been expressed to be taken in the name of the Governor and having been authenticated by a person duly authorised and is immune from challenge in a Court of law on the ground that it is not an order of the Governor. AIR 1954 Mad 284; AIR 1957 Mad 48; AIR 1953 SC 317; AIR 1955 SC 160; AIR 1961 SC 1762. Ref. **1962 Ker LJ 881: 1962 Ker LT 690: (1962) 2 Lab LJ 301: ILR (1962) 2 Ker 362.**

——S. 6 — Sanction for prosecution — Validity — Authority competent to remove — Determination of — Article 311 (1) of the Constitution has to be taken into consideration — Servant of former Bikaner State Railway absorbed in Northern Railway—Authority competent to remove is General Manager, Northern Railway — Sanction granted by Divisional Engineer is invalid — Railway Establishment Code, Volume 1, Rule 134 — Discipline and Appeal Rules for Non-gazetted Railway Servants, Rule 19, Note (c).

The appellant who was originally a servant of the Bikaner State Railway but subsequently absorbed in the services of the Northern Railway was prosecuted and convicted under Section 161, I. P. C. and Section 5 (2), Prevention of Corruption Act on a sanction granted by the Divisional Engineer in the Bikaner Division of the Northern Railway.

Held, that on a consideration of the combined effect of Section 6 of the Prevention of Corruption Act and Article 311 of the Constitution, the General Manager alone could validly sanction the appellant's prosecution. Hence, the sanction for prosecution granted by the Divisional Engineer was not valid in law and the prosecution of the appellant was unauthorised. **1963 (2) Cr LJ 44: ILR (1963) 13 Raj 21: 1962 Raj LW 682: AIR 1963 Raj 126 (128, 129) (Prs 9, 14, 16).**

17. Charge under two sections, one requiring sanction — Want of sanction — Conviction under the other section, if valid.

——S. 6 — Criminal P. C., Section 235 — Joinder of charges — Joint trial of offences under Sections 161 and 218, Penal Code — Previous sanction under Section 6, Prevention of Corruption Act, 1947, not obtained for former offence — Evidence of demand and acceptance of illegal gratification for making false entry relevant for both offences — Accused is not prejudiced by joint trial and conviction for latter offence is valid — Penal Code (1860), Sections 161, 218. See Criminal P. C. (1898), Section 235. **52 Cri LJ 184: AIR 1951 All 502.**

——S. 6 (1) — Sanction showing that sanctioning authority examined all materials and allegations — Sanction is valid — Invalid sanction only affects conviction under Prevention of Corruption Act — (Criminal P. C. (1898), Section 537).

Where the sanctioning authority says in the sanction authorising prosecution, that he fully and carefully examined all the records and materials in connection with the allegation against the accused, it is difficult for the Court to hold that he had not applied his mind to the case. The sanction therefore is valid.

Since the accused was convicted under Sections 468 and 420, I. P. C., besides Section 5 (1) (d) read with Section 5 (2) of the Prevention of Corruption Act (2 of 1947) and no sanction was required for prosecution under Sections 460 and 420, I. P. C. and the sentences were to run concurrently even if the sanction were held to be invalid, it affected only the conviction under Section 5 (1) (d) read with Section 5 (2) and the accused could not therefore be said to have been prejudiced. **(1959) 1 Orissa JD 573.**

——Ss. 6, 5 — Penal Code (1860), Sections 161, 384 — Complaint disclosing offence requiring sanction — Trial for offence not requiring sanction is not valid. See Prevention of Corruption Act (2 of 1947), Section 5. **1955 Cri LJ 1382: AIR 1955 Pat 453.**

18. Sanction for offence covering specific facts — Whether enures for conviction covering different facts.

● **——Ss. 6, 5 (1) (d), (2)** — Original charge against accused that he abused his position as public servant and obtained for other persons pecuniary advantage — Subsequent amendment of charge that the accused obtained pecuniary advantage for himself — Objection that Court was not competent to amend charge in this way as sanction given for prosecution of accused did not state that he had abused his position for his personal gain — **Held,** that it was still open to the prosecution to lead evidence to the effect that the sanction given for the prosecution was based on facts which referred to his obtaining money for himself — It might also be open to the prosecution to urge that it was a matter of inference from the alleged conduct of accused that he obtained benefit for himself. See Prevention of Corruption Act (2 of 1947), Section 5 (1) (d). **1963 (2) Cri LJ 529: AIR 1963 SC 1620.**

● **——S. 6** — Scope of — Sanction for an offence of receiving a bribe — Charge and trial for habitually receiving bribe (Section 5 (1) (a)) — Conviction for receiving one bribe (S. 5 (1) (d)) — Conviction not bad as there was a valid sanction for the offence — The prosecution for habitually receiving bribe was void for want of sanction and could not be taken cognizance of — No prejudice. See Prevention of Corruption Act (1947), Section 5 (1) (d). **1958 Cr LJ 265: AIR 1958 SC 124.**

——S. 6 — Scope and object of — Offences under Section 5 (2) of the Act and under Section 161, Penal Code — Sanction to prosecute given under Section 161, Penal Code, only — Validity of trial under Section 5 (2), Prevention of Corruption Act — Applicability of Section 230, Cr. P. Code.

The rule of sanction as incorporated in Sec. 6, Prevention of Corruption Act, is based on the principle that public servants should be protected from malicious and irresponsible prosecutions.

A valid sanction is necessary only for taking cognizance of a case but once a proper cognizance is taken, the Court can exercise and should exercise all the rights given to it under the Criminal Procedure Code. It is the duty of the Court to try the offender under that section which in its opinion most appropriately covers the illegal act or omission of the offender. The discretion is given under the provisions of S. 230, Cri. P. C. Thus, a Court acts within its rights when it tries the accused under Section 5 (2) of the Prevention of Corruption Act, even though the sanction to prosecute him was given only for an offence under Section 161, Penal Code. AIR 1948 PC 82 and AIR 1954 All 223, Rel. on; AIR 1953 All 37, Dissent. from. **1958 Cri LJ 827: ILR (1958) 1 All 133: AIR 1958 All 481 (486 to 488) (Pt A) (Prs 22, 25, 27, 29).**

——**S. 6** — Sanction to prosecute for offence under Section 161, Penal Code — The sanction cannot be availed of by the prosecution for the prosecution for offence under Section 5 (1) — Analogy of Section 238, Criminal P. C., not applicable and if there is no sanction to prosecute under Section 5 (2) accused cannot be convicted under Section 161 as the trial itself was vitiated for want of sanction — (Criminal P. C. (1898), Section 238). **AIR 1953 All 37 (41) (Pt C) (Prs 15, 17).**

——S. 6 — Sanction for prosecution for offence under Section 161, Penal Code — Sanction is not valid for prosecution under Section 5 (2).

Sanction relating to prosecution under Section 161 of the Penal Code cannot be a valid sanction relating to prosecution for a quite different offence covered by Section 5 (2) of the Prevention of Corruption Act, 1947. AIR 1953 All 37, Rel. on. **1960 Pat LR 206: 1960 BLJR 688: 1961 (1) Cr LJ 694: AIR 1961 Pat 203 (204) (Pt B) (Pr 8) (DB).**

——**Ss. 6 and 5 (1) (c)** — Sanction mentioning facts constituting offence under first part of Section 5 (1) (c) — No extraneous evidence to show that all the facts constituting an offence under the second part of Clause (c) of Sec. 5 (1) were placed before the sanctioning authority or considered by him — Accused cannot be convicted for offence under second part of section. See Prevention of Corruption Act (2 of 1947), Section 5 (1) (c). **1959 Cri LJ 888: AIR 1959 Pat 311.**

19. Facts falling under Section 409, I. P. C. and Section 5 (2) — Prosecution under Section 409, I. P. C. without sanction if permissible.

See also Prevention of Corruption Act (1947), Section 5.

●——**S. 6** — Scope — Prosecution of accused under Section 409, Penal Code — Sanction not necessary — Does not offend Article 14 of the Constitution. See Prevention of Corruption Act (1947), Section 5. **1957 Cri LJ 575: AIR 1957 SC 458.**

——**Ss. 6 and 5 (1) (c)** — Offence falling under Section 5 (1) (c) and requiring previous sanction for prosecution — Prosecution cannot, by ignoring that accused is public servant, evade requirement of previous sanction by filing complaint under Section 408, Penal Code — (Criminal P. C. (1898), Section 195) — (Penal Code (1860), Section 408). See Prevention of Corruption Act (2 of 1947), Section 5 (1) (c). **1957 Cri LJ 1078: AIR 1957 Andh Pra 663 (DB).**

——**S. 6** — Penal Code, Section 409 — Offence covered by Section 409 and Section 5 (1) (c), Prevention of Corruption Act — Prosecution under Section 409 without a sanction is maintainable instead of a prosecution under Section 5 (1) (c) of the Prevention of Corruption Act — Prevention of Corruption Act (1947), Sections 5 (1) (c) and (4) — (General Clauses Act (1897), Section 26). See Penal Code (1860), Section 409. **AIR 1954 Raj 211 (DB).**

20. Conviction for acts covering particular period — Prosecution for similar acts covering different period not barred.

——**S. 6** — Accused tried under Section 5 (2) Prevention of Corruption Act (2 of 1947) for misappropriation for items covering period 1951-52 — Sanction obtained — Conviction — Second trial for items covering period 1949-50 which were not subject matter of the previous trial — Some charges under different provisions — Some accused newly impleaded in second trial — The principle underlying the doctrine of autrefois convict could not be extended to the facts of the case — Section 403 Cr. P. C., or Article 20 of the Constitution did not apply. See Constitution of India, Article 20. **1958 All Cr R 179: 1958 All WR (HC) 195: 1958 All LJ 111.**

2. Sanction — Objection to.

——S. 6 — Sanction — Validity — Question as to — When can be raised.

The question of the validity or sufficiency of the sanction may be raised by the accused at any stage before the final decision is given by the trial Court: AIR 1960 SC 487, Foll. **1961 All LJ 182: 1961 (2) Cr LJ 51: 1961 All WR (HC) 317: 1961 All Cr R 169: ILR (1961) 1 All 416: AIR 1961 All 368 (370) (Pt A) (Pr 9) (DB).**

——**S. 6** — Scope — Certificate of fitness for appeal — Question whether there was proper sanction in the case is a question serious enough to justify giving the petitioner leave to appeal to Supreme Court. See Constitution of India, Article 134 (1) (c). **1955 Cri LJ 1169: AIR 1955 Cal 430 (DB).**

——S. 6 — Sanction — Objection to — When sustainable.

No objection can be taken to a sanction when, before according it, the sanctioning authority has examined the facts and it is after considering the whole matter that the sanction is given. AIR 1954 SC 637 and AIR 1948 PC 82, Distinguished. **1957 MPC 619: 1957 Cri LJ 1411: 1958 MPLJ 62: AIR 1957 Madh Pra 225 (226) (Pt C) (Pr 11).**

——**S. 6** — Scope — Sanction under Section 6 (1) (b) of Prevention of Corruption Act (1947) — Validity — Article 166 is not complete bar to questioning of validity of sanction — Sanction can be questioned on ground that sanctioning authority had not applied its mind to the facts of the case. See Constitution of India, Article 166. **1962 (2) Cri LJ 786: AIR 1962 Raj 250 (DB).**

——**S. 6** — Validity of sanction — Can be questioned by accused at trial. **ILR (1958) 8 Raj 688: 1959 Cr LJ 1115: 1959 Raj LW 644: AIR 1959 Raj 214 (218) (Pt B) (Pr 18).**

SECTION 7

●——**S. 7 — Scope — Criminal P. C. (1898), Section 342) — (Penal Code (1860), Sections 161 and 165-A).**

Section 7 is a departure or deviation from the procedure till then obtaining in a criminal case

and thereby an accused person is held competent to be a witness on his behalf. Whereas under Section 342, as it stood before the recent amendment, no accused person was entitled to be administered an oath and thereby competent to testify in a Court of law in a case in which he is accused; under Section 7, any person charged with an offence punishable under Section 161 or Section 165-A of the I. P. Code, or under sub-section (2) of Section 5, of the Prevention of Corruption Act, is a competent witness for the defence and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial; and there are also certain safeguards provided in the matter of giving such testimony. Om Parkash Gupta v. State of U. P., **1957 Cr LJ 575: 1957 SCA 337: 1957 SCJ 289: (1957) Mad LJ (Cr) 237: 1957 MPC 433: 1957 All WR (HC) 401: 1957 BLJR 502: 1957 All LJ 585: 1957 SCR 423: 1957 SCC 214: ILR (1957) 2 All 468: AIR 1957 SC 458 (462) (Pt C) (Pr 13).**

——**S. 7** — Scope — Not affected by Criminal Law Amendment Act — (Criminal Law Amendment Act (1952), Section 8) — (Criminal P. C. (1898), Section 1) — (Penal Code (1860), Section 161). **AIR 1955 NUC (All) 3590.**

——**S. 7** — Scope — Right of accused — Prosecution under Section 161, I. P. C. — Accused has a right to examine himself in defence — Court not bound to inform the accused of his right — Conviction cannot be quashed merely on the ground of refusal or failure of the Court to inform the accused of his right. See Penal Code (1860), Section 161. **1954 Cri LJ 459: AIR 1954 All 223.**

● ——**S. 7 — Duty of Court under.**

The failure of a Court to inform an accused of the right conferred by Section 7 of the Act is not an irregularity and it is not obligatory on the part of the Court trying case under Section 161 or 165, I. P. Code to inform the accused that he can appear as a witness for himself. The right may be of great value to the accused and the Court may have to be jealous to safeguard it, but it does not follow that the Court must inform the accused that he possesses it. It is for him to know what his rights are and to seek to exercise them; the Court's duty is to see that he has every reasonable opportunity of exercising them and nothing more. AIR 1953 All 110, Approved. Raja Ram v. State. **1953 All LJ 644: 1953 All WR (HC) 657: 1954 Cr LJ 438: ILR (1954) 1 All 379: AIR 1954 All 204 (208) (Pt C) (Pr 15) (FB).**

——**S. 7 — Scope and effect of.**

The section never contemplated Courts giving a kind of warning or offering a kind of reminder to the accused about the right or privilege conferred upon him by the section. The provisos to the section clearly indicate that a Court cannot ask the accused to appear as a witness for himself, nor can the Court draw a presumption against the accused, if the accused has chosen not to appear as a witness for himself. **1953 All Cri R 1: 1952 RD (HC) 375: 1953 All WR (HC) 4: 1953 Cr LJ 340: 1953 All LJ 193: ILR (1954) 1 All 45: AIR 1953 All 110 (113) (Pt F) (Prs 22, 23).**

——**Ss. 7, 4, 6** — Applicability to provisions of Penal Code — These sections do not apply to a case where the offence charged is other than Section 161 or Section 165 of I. P. C. See Prevention of Corruption Act (2 of 1947), Section 4. **AIR 1952 All 35 (DB).**

——**S. 7** — Failure of Court to inform accused of his right to give evidence on oath in disproof of the charge under Section 161 or Section 165, I. P. C. is a grave irregularity — The effect of which must depend upon whether it has in fact occasioned a failure of justice — Effect — Criminal P. C. (1898), Section 537. **AIR 1951 All 546 (548) (Pt C) (Pr 18) (DB).**

——**S. 7** — Non-compliance — Effect of not informing accused of his right to give statement on oath is not to prejudice him when he is represented by counsel whose advice he could take. **AIR 1955 NUC (Him Pra) 1295.**

——**S. 7 (a) — Duty of Court to inform accused that he is a competent witness.**

It is not the duty of the Court to inform the accused that he is a competent witness. Since the request is to come from the accused it would not be proper for the Court to invite the request. It is not business of the Court to advice the accused as to his rights. His failure to give evidence is not a matter to be commented upon and if the Court were to ask the accused whether he would like to tender evidence on his own behalf, his reply in the negative may prejudice the Court. AIR 1951 All 546, Dissented from. **1958 MPLJ 62: 1957 MPC 619: 1957 Cri LJ 1411: AIR 1957 Madh Pra 225 (226) (Pt B) (Pr 10).**

PREVENTION OF CRUELTY TO ANIMALS ACT (11 of 1890)

SECTION 3

——**Ss. 3 (a) and 3-A — Ingredients of offence — 'Overloading'.**

What is made punishable under Section 3 (a) is 'overdriving, beating, or otherwise treating any animal so as to subject it to unnecessary pain or suffering'. From the manner in which this sub-section is worded, it is obvious that overdriving by itself is not made punishable. To constitute an offence under this sub-section, it must be shown that the overdriving was such as to subject the animal to unnecessary pain or suffering. Overloading is not the same as overdriving. The fact that bulls appeared to be weak and to be struggling hard to drag the cart, is not sufficient to make out that the bulls were subjected to unnecessary pain or suffering. **1958 Ker LJ 159: 1958 Ker LT 866: 1959 Cr LJ 1182: AIR 1959 Ker 325 (325) (Pt A) (Pr 2).**

SECTION 3-A

——**S. 3-A (as added by Act 25 of 1938) — Overloading — Proof — Duty of prosecution.**

In a case for an offence under Section 3-A where the charge is one for overloading, the prosecution has necessarily to prove the actual weight of the load. In a Criminal prosecution there is very little scope for any presumption being drawn as to the weight of the goods loaded in a cart. It will be wrong and unsafe to enter a conviction against the accused on the strength of any such presumption. **1958 Ker LJ 159: 1958 Ker LT 866: 1959 Cr LJ 1182: AIR 1959 Ker 325 (326) (Pt B) (Pr 3).**

PREVENTION OF FOOD ADULTERATION ACT (37 OF 1954)

See also State Acts.

PREAMBLE

——**Pre.** — Importance of legislation for preventing food adulteration under increasing tempo of industrialisation and urbanization — Duty of offi-

cers enforcing anti-food-adulteration measures to be vigilant. 1965 (2) Cr LJ 571 (573) (Pt B) (Pr 10) (Punj) (DB).

SECTION 2

SYNOPSIS

(Prevention of Food Adulteration Act (1954), S. 2.)

(See also notes to S. 16 supra).

1. "Adulterated" — Sub-sec. (i) (a).
   (A) "Contains any other substance' — Sub-sec. (i) (b).
   (B) Quality or purity falls below the standard — Sub-sec. (i) (l).
2. Food — Sub-sec. (v) (a).
3. "Local area" — Sub-sec. (vii).
4. "Local authority" — Sub-sec. (viii).
5. "Misbranded" — Sub-sec. (ix).
6. "Sale" — Sub-sec. (xiii).

See also Prevention of Food Adulteration Act (1954), S. 7.

1. "Adulterated" — Sub-sec. (i) (a).
   (A) Contains any other substance — Sub-sec. (i) (b).
   (B) Quality or purity falls below the standard — Sub-sec. (i) (l).

1. "Adulterated" — Sub-sec. (i) (a).

——S. 2 (i) — Article found conforming to standard of quality prescribed — It can be tested for purity — On further test by hexabromide test public analyst finding article (ground-nut oil) mixed with linseed oil — Article is adulterated. 1963 (2) Cri LJ 132: AIR 1963 Cal 460 (462, 463) (Prs 9, 14, 15, 17) (DB).

——S. 2 (i) (a) and (h) — Kesari Dhall supplied when different article demanded — No prohibition for sale of kesari dhall — Article still is adulterated its consumplion, being injurious to health.

Kesari dhall supplied to a purchaser who asks for "thoranparipu" being of an entirely different substance than the one demanded is adulterated within the meaning of Sec. 2 (i) (a) and the fact that there is no prohibition for the sale of kesari dhall is of little consequence when it is made out that the consumption of the said article is injurious to health and is to be deemed to be adulterated. (1960) 2 Ker LR 717.

1 (A). Contains any other substance — Sub-sec. (i) (b).

——Ss. 2 (i) (a), 7 — Pepper sold as good pepper — Pepper found mixed with 50 p. c. of pepper shell — No standard of good pepper — No evidence that the admixture of empty shells could have any injurious effect when consumed — Conviction for its sale under S. 7 is not sustainable. See Prevention of Food Adulteration Act (1954), S. 7. 1959 Cri LJ 930: AIR 1959 All 500 (DB).

——S. 2 (i) read with S. 7 — Adulterated article of food — What constitutes — Mixture of Bengal-gram flour with Pea-powder — Nature of.

An article of food purchased by the Food Inspector was sold to him as Bengal-gram flour. On analysis it was found to contain fifty per cent. of Pea-powder. The Pea-powder, so mixed, was found to be a costlier substance than Bengal-gram flour. On the question whether an offence under Sec. 7 of the Prevention of Food Adulteration Act can be said to have been committed by the accused in selling the combination of these two powders:

Held, the gravamen of the charge, when a person is accused of adulterating an article of food, is that, such adulteration prejudices the vendee or injuriously affects the nature, substance or quality of the article of food. It is not always that the mixture of article of food that invariably makes an offender liable for an offence under Sec. 7 (1) on the ground that there was sale of an adulterated food. The lack of evidence that the Pea-powder, when mixed with Bengal-gram flour, is injurious or injuriously affects the nature, substance or quality of the Bengal-gram powder, makes it impossible to bring the mixing of these powders as 'adulteration' falling under Clause (c) or (b) of Sec. 2 (i) of the Act. 1963 Mad LJ (Cri) 220: (1963) 1 Andh WR 265: (1963) 1 Andh LT 350.

——S. 2 (i) — Adulteration — Extraneous matter mixed with article of food being injurious to health, not necessary.

It is not necessary in order to make an article of food adulterated that extraneous matter mixed in it must be injurious to health.

Tea in which gram husk or coffee is mixed falls below the quality or purity prescribed for it and is therefore to be deemed adulterated apart from any consideration as to whether such extraneous matter is injurious to health. 1962 Ker LT 415: 1LR (1962) 2 Ker 105: 1962 Ker LJ 1005.

——Ss. 2 (i) and 16 (1) (a) — Adulterated — Vinegar found containing sulphuric acid — Presence of sulphuric acid specifically prohibited — Public Analyst need not mention exact quantity of sulphuric acid present.

If synthetic vinegar contains sulphuric acid in any quantity it shall be deemed to be adulterated and its sale or storage for sale will be a contravention of the provisions of the Act and rules made thereunder and as such punishable under Sec. 16 of the Act. It is not necessary for the Public Analyst to mention the quantity of sulphuric acid that is present in the sample. AIR 1957 Punj 56, Distinguished. ILR (1962) 2 Punj 527: 64 Pun LR 799: 1962 (2) Cri LJ 778: AIR 1962 Punj 524 (525) (Prs 5, 6) (DB).

1 (B). Quality or purity falls below the standard — Sub-sec. (i) (l).

——S. 2 (i) (l) — Butter — Meaning — Butter prepared from curd comes within the definition — If required standard is not maintained the butter is deemed to be adulterated. See Prevention of Food Adulteration Rules (1955), Appendix B-A. 11.05. 1961 (2) Cri LJ 696: AIR 1961 SC 1494.

——Ss. 2 (i) and 7 — Prevention of Food Adulteration Rules (1955), Rule 44 and App. B. R A. 11.14 — Sample of ghee containing large proportion of vegetable fat — Sample is adulterated — Accused is liable under Act.

Where according to the report of the Public Analyst the sample of ghee contained a large proportion of vegetable fat or oil foreign to pure ghee keeping in view the requirements of R. 44 and of R, R. 11.14 in Appendix B of the Prevention of Food Adulteration Rules, 1955, there can

be no escape from the conclusion that the sample in question does not conform to the prescribed specification. It cannot be contended that because the sample was not found to be below standard so far as the content of oleic acid and moisture was concerned it should not be held to be adulterated. The sample in question must be held to be adulterated and the accused liable to be punished under the Act. AIR 1943 Cal 468 and AIR 1958 Andh Pra 681. Disting. **1965 All WR (HC) 109: 1965 All Cr R 109: 1966 Cr LJ 113: AIR 1966 All 64 (65) (Pt C) (Pr 6).**

●——Ss. 2 (i), 7, 16, 23 — 'Adulterated milk' — Sale of mixture of buffalo milk and cow milk — Proportion of mixture not known — On analysis sample found to contain less than prescribed minimum of non-fatty solids for cow milk — No maximum for water is prescribed — Mixture is adulterated milk within meaning of Sec. 2 (i) (l) — Accused is guilty under Sec. 16 read with Sec. 7 — Court has the function to determine what is the maximum of water permissible in unadulterated milk and then decide whether sample contained more than it — When no standard is fixed Court has to fix the standard — Criminal Appeal No. 1940 of 1960 (All) and AIR 1960 All 504: 1960 Cr LJ 1036 (2), **Overruled.** (1894) 1 QB 296, (1894) 1 QB 478, (1896) 1 QB 202; (1897) 1 QB 80 and 1955 Cal LR 778, Rel. on., Prem Das v. State, **1961 (2) Cr LJ 737: 1961 All LJ 483: 1961 All WR (HC) 405: 1961 All Cr R 228: ILR (1961) 2 All 229: AIR 1961 All 590 (591, 592, 594) (Pt A) (Prs 3, 4, 5, 7, 8) (FB).**

——Ss. 2 (i) (1), 7 and 16 — Prevention of Food Adulteration Rules (1955), Rr. 43 and 44 and App. B under item No. A 11.05 dealing with definitions and standards of quality — Prescribed standard of article — Butter for sale found below standard prescribed — Butter is adulterated — Person selling such butter comes under penal provision of Sec. 16 read with Sec. 7 and is liable to be convicted and sentenced — Rr. 43 and 44 are not applicable. **ILR (1962) Bom 118: 63 Bom LR 880: 1961 Nag LJ 735: 1962 (1) Cr LJ 562: AIR 1962 Bom 104 (105) (Pt A) (Pr 3).**

——S. 2 (i) — Analysis of article — Percentages at variance with prescribed specifications — Purity falls below prescribed standard. **1959 Nag LJ (Notes) 31.**

——S. 2 (i) — Non-mixing of preservative in milk in sufficient quantity makes the sample unfit for analysis and examination but that by itself cannot bring about a reduction in the fat or non-fat solid contents of the sample of milk. See Prevention of Food Adulteration Act (1954), S. 10. **1964 (1) Cr LJ 334: AIR 1964 Him Pra 10.**

——S. 2 (i) (l) — No indication whether milk is that of buffalo or cow — Percentage of fats less than that prescribed — Milk is adulterated — Percentage of water contents is no test. See Prevention of Food Adulteration Act (1954), S. 16. **1962 (1) Cr LJ 150 (Him Pra).**

——S. 2 — Sale of honey — Standard prescribed by rule framed under Act — Quality of honey sold falling below standard — Honey shall be deemed to be adulterated. AIR 1961 SC 1494, Foll. **1961 Ker LT 980: ILR (1962) 1 Ker 209: 1962 Ker LJ 488: 1962 (2) Cr LJ 433 (434, 435) (Pt A) (Pr 4).**

——Ss. 2 (i) (l), 7 (1), 16 (1) (a) and 19 — Ghee of 'S. G.' mark brand sold from sealed tins — Ghee found to be adulterated — Vendor guilty of offence under S. 7 — That the vendor was ignorant about quality of ghee is no defence under S. 19.

Held, that under S. 2 (i) (l) of the Act an article of food was deemed to be adulterated 'if the quality or purity of the articles falls below the prescribed standard or its constituents are present in quantities which are in excess of the prescribed limits of variability. The Act aimed at prohibition of sale of adulterated food in larger interests of maintenance of public health and with that aim prohibited totally, under S. 7, the manufacture, sale, distribution or storage of any adulterated food. Further, S. 19 of the Act laid down that it would be no defence to allege merely that the vendor was ignorant of the nature, substance or quality of food sold by him or that the purchaser was not prejudiced by the sale. **1964 MPLJ (Notes) 81.**

——Ss. 2 (i) and 23 — Law prescribing minimum contents of milk — Variability of contents — Considerations.

The contents of the milk, whether of fat or of non-fat solids, do vary. That is exactly why the law has not prescribed a cast-iron percentage, but has said that, to be within the standard, these ingredients should not fall below a particular percentage. One cannot go beyond it and still assume that in certain circumstances the contents may go lower than the prescribed minimum. **1959 Jab LJ 562: 1960 Cr LJ 487: 1960 MPLJ 290: AIR 1960 Madh Pra 125 (126) (Pt C) (Pr 7).**

——S. 2, Appendix B, Item A, 11-14 — Prevention of Food Adulteration Rules (1955), Rr. 44, 46 — Ghee — Sub-standard by definition — Prosecution for offence under Rr. 44, 46.

When the rules say that any deficiency in the Reichert value below a particular stipulated figure means a sub-standard quality and such sub-standard quality is by definition an act of adulteration, the Court cannot embark on an academic investigation about the Reichert value and its bearing upon the quantum of fat in ghee in different areas in this country. If the quality or purity of ghee falls below the standard prescribed by the rules or its constituents are in excess of the prescribed limits of variability, the ghee shall be deemed to be adulterated within the meaning of S. 2 of the Act. When the prescribed standard is not attained, the statute treats such ghee, by fiction, as an adulterated food, though in fact it is not so. When a complaint is filed under Sections 7 and 16 of the Act read with Rules 44 (c) and 46 or with Rule 41 (b), it must be deemed that the sanctioning authority has exercised his mind in considering the analyst's report, the elements constituting the offence. Therefore, the want of specific sanction for contravention of the items in terms defined in Appendix B would not affect a prosecution when the offence contemplated by the non-conformity with the definitions and standards of quality are those mentioned in Rr. 44 and 46. AIR 1961 SC 1494, Rel. on; Cr. R.C. 452 of 1961, dated 5-9-1962 (Mad.), Foll. (1965) 2 Mad LJ 403: (1965) Mad

LJ (Cri) 796: 1966 Cri LJ 668: AIR 1966 Mad 194 (196, 197) (Pt B) (Prs 7, 9, 10).

——S. 2 (l) (j) — Prevention of Food Adulteration Rules (1955), R. 28 — Ahar Dal coloured with metalin yellow — Held adulterated — Its use even as preservative not permitted. AIR 1964 Ker 107 and AIR 1964 All 270, Rel. on. (1965) 7 OJD 215: 32 Cut LT 83: ILR (1965) Cut 813: 1966 Cri LJ 333 (334) (Pt A) (Prs 9, 10).

——Ss. 2 and 7 — Stuff sold by accused not as butter — Accused never alleging butter to be wholly or partly the product of goat milk — Sample not conforming to requirements prescribed by Item A 11.05 of Apendix D to the Rules framed under the Act — Article must be deemed to be adulterated and accused is liable for punishments under S. 7. AIR 1961 Mad 198 and AIR 1940 Mad 221, Distinguished. 1964 Cur LJ 317: 66 Punj LR 566: 1965 (1) Cr LJ 77: AIR 1965 Punj 30 (30, 31) (Pt A) (Prs 4, 6).

——Ss. 2 (i) (l), 7 (i), 16 (1) (a), 25 (2) — Punjab Prevention of Food Adulteration Rules (1955), Appendix B, Items A 11.01.01 — Mixed milk of cow and buffalo containing 8.2 per cent of milk solids not fat — Mixture is adulterated— Punjab Pure Food Rules (1930), R. 3 (as amended in 1952). AIR 1961 All 590 (FB), Rel. on 1964 Cur LJ 260: 1964 (2) Cr LJ 202: ILR (1964) 2 Punj 143: AIR 1964 Punj 332 (333) (Pr 2) (DB).

2. "Food" — Sub-sec. (v) (a).

——S. 2 (v) — 'Ghee' is article of food.

'Ghee' is an article of food for human consumption and ordinarily is used in the preparation of human food. 1965 All WR (HC) 109: 1965 All Cr R 109: 1966 Cr LJ 113: AIR 1966 All 64 (65) (Pt A) (Pr 4).

——Ss. 2 (v), 7, 16 — 'Food' — Prevention of Food Adulteration Rules (1955), R. 47 — Aerated water is article of food under S. 2 (v) and R. 47 applies — Aerated water sweetened by admixture of saccharin with sugar under declaratory label — No offence under Ss. 7, 16. 1964 All WR (HC) 314: 1964 (2) Cri LJ 375: AIR 1964 All 455 (456) (Prs 9, 10).

●——S. 2 (v) (a) — Linseed oil is "food" within S. 2 (v) (a) — "Ordinarily" — Meaning—Words and Phrases — Interpretation of Statutes — 1960 All LJ 94, Overruled.

Per majority (Sharma, J., contra): Linseed oil is comprehended by the definition of "food" given in S. 2 (v) (a) of the Act, inasmuch as linseed oil is used in some parts of the country in the preparation of human food. 1960 All LJ 94, Overruled.

That it is not so used in Uttar Pradesh is immaterial because the Act is an all India Act, and if linseed oil can be considered to be food in areas where it is used as a cooking medium or for other food purposes, it would be deemed to be 'food' in Uttar Pradesh also.

The same word in a statute cannot have two different and diametrically opposite meanings in two different local areas governed by the same statute.

It is in the sense of non-exceptional or usual that the word 'ordinarily' has been used in sub-cl.(a) of S. 2 (v) of the Act. The word 'ordinarily' does not mean "primarily" nor does it mean "universally". It does not also mean "generally'. By the use of the word 'ordinarily' the Legislature intended to provide that if an article enters into or is used in the composition or preparation of human food even by some people usually and not as exception, it would be deemed to be 'food'.

The word "ordinarily" qualifies both "enters into" and also "is used".

An article may have more than one use and it may ordinarily be used for more than one purpose. The mere fact that linseed oil is also used for making varnishes and paints would not make it any the less an article of food as defined in S. 2 (v) of the Act.

The fact that linseed oil has been treated as an item of food under the Rules (R. 5) framed under S. 23 of the Act also lends support to the conclusion that it is food within the meaning of S. 2 (v) (a) of the Act. AIR 1951 All 595, Expl.; 1953 All LJ 499, Ref. Municipal Board Kanpur v. Jankiprasad, ILR (1962) 2 All 589: 1963 All LJ 86: 1963 All Cri R 71: 1963 All WR (HC) 73: 1963 (2) Cri LJ 244: AIR 1963 All 433 (435, 436) (Prs 2 to 5) (FB).

——Ss. 2 (v), 7 (iii), 16 — Applicability — Sale of adulterated linseed oil as oil for lighting purposes only — Offence.

If the definition in S. 2 (v) is read as a whole, it appears that an article which is not ordinarily used as food or drink is not to be treated as food. Linseed oil is not a common article of food in the country, at least in Uttar Pradesh. It does not, therefore, amount to 'food' as defined by the Act and there is no question of its storing as adulterated food for sale within S. 7. AIR 1951 All 595, Rel. on.

Further, when the seller does not represent to the Inspector that the article contained in the tin is linseed oil or pure linseed oil, but on the other hand, there is a distinct label on the tin that the oil is for lighting purposes only, there can be no serious objection to the exposure of such an article meant for lighting purposes only. 1960 All LJ 94.

[Overruled in AIR 1963 All 433.]

——Ss. 2 (v) (a), 2 (xiii), 16 (1) (a) read with 7 (i) and 19 — Respective scope — Adulteration of coconut oil — Coconut oil, if an article of food— Sale and purchase for 'analysis' and 'human consumption' — Relevancy — AIR 1958 Andh Pra 681, Overruled.

There is nothing in the Prevention of Food Adulteration Act which posits that an article of food may be adulterated with impunity provided it is not used as food throughout the length and breadth of the country. On the contrary, there is every indication in the Act that it seeks to protect the public by preventing adulteration of any article or substance which is used as food in any part of the country. It is immaterial whether a given article or substance is not used at all as food in a particular region, or is used only by a section of the people in a given region. The word 'ordinarily' occurring in sub-clause (a) of Clause (v) of S. 2 of the Act, does not mean universally or generally but is apparently used in contradistinction to 'exceptionally' or 'unusually'; nor is the word used in relation to a particular re-

gion or a particular section of the people in a region. When an article of substance is used as an ingredient in the preparation of food, even by some inhabitants of this country, usually and not as something exceptional or out of the ordinary, it would come within the definition of 'food'. By the definition in S. 2 (xiii) of the Act, a sale is not any the less a sale because it is for analysis; it need not necessarily be for human consumption or for human use. The purchase of a sample by a Food Inspector is not for his personal consumption or use but is only for the purpose of detecting if the article of food is adulterated. It is obviously for this reason that S. 19 of the Act, which sets out the defences open to accused persons in prosecutions under the Act, expressly rules out a plea that the purchaser of an article of food for analysis was not prejudiced by the transaction. Therefore, the lower Court was in error in insisting on proof of an additional element not contemplated by the Act, viz., that the respondent had sold the sample of coconut oil to the Food Inspector as an article of food. In doing so, it obviously lost sight of the important circumstance that in the instant case, the sale was for analysis and not for human consumption or use. AIR 1958 Andh Pra 681, Overruled; AIR 1963 All 433 (FB), Rel. on; Crl. App. No. 320 of 1959 (Andh. Pra.), Approved. **(1965) Mad LJ (Cri) 251: (1965) 2 Andh LT 452: 1965 (1) Cri LJ 420: (1965) 1 Andh WR 215: AIR 1965 Andh Pra 118 (120, 121) (Pt A) (Prs 16, 18, 19) (DB).**

——Ss. 2 (v), 7 (i), 16 (1) (a) and 23 — Cocoanut oil whether 'food' — Cocoanut oil found to be adulterated — Vendor held guilty. **1964 MPLJ (Notes) 91.**

——S. 2 (v) — To constitute 'food' article must be usable as food — Court not concerned with its actual use — 'Used' means capable of being used.

In view of the definition of 'food' which is to be found in S. 2 (v) of the Act, the Court is not concerned with the actual use to which the article in question may be put. To constitute 'food' for the purpose of the Act, it is enough that the article in question is usable as food or drink for human consumption. The word 'used' which is to be found in S. 2 (v) of the Act obviously means usable or capable of being used, and not to be used or for the purpose of being used: AIR 1958 Andh Pra 681, Diss. **1964 BLJR 754: 1964 (2) Cri LJ 715: AIR 1964 Pat 565 (566) (Pt B) (Pr 7).**

——Ss. 2 (v), 7, 16—Occasional use of asafoetida (Hing) for agricultural purposes does not take it out of category of food. AIR 1963 All 433 (FB), Rel. on. **66 Punj LR 871: 1964 (2) Cri LJ 449: AIR 1964 Punj 427 (427) (Pr 5).**

3. "Local area" — Sub-sec. (vii).

——S. 2 (vii) — 'Local area' — 'Hat' is not local area as defined in sub-clause (1) of S. 2 (viii). **(1965) 7 OJD 17: 31 Cut LT 100: ILR (1964) Cut 778.**

——S. 2 (vii) — Declaration by the Chief Commissioner of Delhi of area as 'Local area' — Validity.

Where by the notification issued by the Government of India on 1st November 1956 all the powers delegated by the Government of India to the Chief Commissioner of Delhi before the amendment of Art. 239 of the Constitution were saved and he was allowed to exercise them as before, the declaration of Delhi Municipal Corporation Area as 'local area' by the Chief Commissioner after the amendment of Art. 239 of Constitution is not incompetent. **(1964) 66 Pun LR 191.**

——S. 2 (vii) and (viii) — Local area—Declaration of — Declaration need not refer to municipality or cantonment as separate unit — Local area declared may include several municipalities or cantonments — Local authority may be determined accordingly. **1963 Raj LW 634: ILR (1964) 14 Raj 19: 1964 (1) Cri LJ 702: AIR 1964 Raj 123 (125) (Pt A) (Prs 5, 6) (DB).**

4. "Local authority" — Sub-sec. (viii).

——S. 2 (vii) and (viii) — 'Local area' and 'local authority' — When the Prevention of Food Adulteration Act was passed, it did not repeal the definition of 'local authority' so far as it related to the municipalities, cantonments and notified areas but accepted and confirmed the existence of these local authorities and it also accepted the municipalities, cantonments and notified areas as local areas within the meaning of Central Act — The definition of 'local authority' in so far as related to municipal board which existed in the U. P. Food Act, 1950, was incorporated in the U. P. Pure Food Act, 1950, was incorporated in the Prevention of Food Adulteration Act, 1954 and was not repealed — Prosecution by the Lucknow Municipality under Sec. 20, Prevention of Food Adulteration Act, 1954, was proper, even though fresh notification was not issued by the State Government. See Prevention of Food Adulteration Act (1954), S. 20. **1960 Cri LJ 199: AIR 1960 All 119 (DB).**

——S. 2 (viii) — 'Local authority' — 'Administrator' of a municipality which is superseded under S. 554, Bengal Municipal Act (15 of 1932) not "local authority" within the meaning of S. 2 (viii) of the Prevention of Food Adulteration Act. See Prevention of Food Adulteration Act (1954), S. 20 (1). **1958 Cri LJ 169 (2) (Cal).**

——Ss. 2 (viii), 7 (1) and 20 — "Local Authority" — Offence committed within municipal limits — Municipality is the local authority — Commissioner of Corporation not a local authority within meaning of S. 20. **1964 Mad LJ (Cri) 437: (1962) 40 Mys LJ 557.**

——S. 2 (viii) — 'Local Authority' — District Health Officer is local authority also in mofussil area — 'Person' and 'Local authority' — Distinction. See Prevention of Food Adulteration Act (1954), S. 20 (1). **(1965) 7 Orissa JD 17: 31 Cut LT 100: ILR (1964) Cut 778.**

——Ss. 2 (viii) (1) (a) and 20 — 'Local authority' — Meaning of — Municipality superseded—Administrator appointed is local authority—S. 18, General Clauses Act, is applicable to such case.

An Administrator of a superseded Municipality is a 'local authority' within the meaning of S. 295 (5) (b) of Rajasthan Municipalities Act and he has, therefore, the power under S. 20 to authorise any person to launch prosecution under the Prevention of Food Adulteration Act. AIR 1961 SC 1 and 1963 Raj LW 43 and AIR 1960 Ker 356 and 1958 Cri LJ 169 (Cal), Disting. **1963 Raj LW 413: ILR (1963) 13 Raj 820: 1963 (2) Cri LJ 589 591) (Pt A) (Prs 8, 9, 10).**

——S. 2 (viii) — Administrator appointed after supersession of municipality — He is 'local authority' within the meaning of S. 2 (viii) — Sanction given by him under S. 20 (1) for prosecution is valid. See Prevention of Food Adulteration Act (1954), S. 20 (1). **1961 (2) Cri LJ 807: AIR 1961 Tripura 52.**

5. "Misbranded" — Sub-sec. (ix).

——S. 2 (ix) — Prevention of Food Adulteration Rules, R. 40 (2) — Aerated water — No fruit juice but only synthetic essence used — Use of label leading consumer to believe that it is fruit product — R. 40 (2) is infringed. See Prevention of Food Adulteration Rules, R. 40 (2). **ILR (1964) 2 Ker 644.**

——S. 2 (v) and (ix) — Applicability — 'Food'— 'Misbranded food' — Article containing 95.9 per cent calcium corbonate and rest sand offered for sale to public as black gram flour is "misbranded food" and not 'food' as defined in S. 2 (v) and a conviction under S. 7 (1) read with S. 16 (1) (a) should follow. Clause (a) to S. 2 (ix) would apply in terms to the article. See Prevention of Food Adulteration Act (1954), S. 7 (1). **1959 Cri LJ 840: AIR 1959 Ker 217 (DB).**

——S. 2 (ix) (g) — Misbranding per se is offence — As far as S. 2 (ix) (g) is concerned, even if mustard oil of one brand is passed off as the mustard oil of another brand in sealed tins, it will amount to misbranding — Accused caught, filling empty tins with embossed marks of different particular brands displayed on them, with mustard oil from a barrel bearing no particular brand—After filling, tins sealed — Accused are guilty of offence of misbranding without proof of adulteration or any intention to mislead or deceive the public — Question is whether the public are likely to be deceived. **1961 (2) Cri LJ 152: AIR 1961 Tripura 18 (Pt C) (Prs 14, 17, 18).**

6. "Sale" — Sub-sec. (xiii).

See also Prevention of Food Adulteration Act (1954), S. 7.

●——S. 2 (xiii) — Sale to Food Inspector for analysis — Transaction though not consensual is still a sale under Act. See Prevention of Food Adulteration Act (1954), S. 11. **(1965) 2 SCWR 561: (1965) 2 SCA 530: (1965) 2 SCR 895: AIR 1966 SC 128.**

——S. 2 (xiii) — Sale for analysis is 'sale'.

The definition of 'sale' is of wide amplitude. It also embraces a sale for analysis. A sale of a sample of ghee to the Food Inspector is a sale under the Act. A dealer cannot escape the clutches of law by merely describing an article of food at the time of its sale to the Food Inspector as 'Akhadya', i.e., non-edible. **1965 All WR (HC) 109: 1965 All Cri R 109: 1966 Cri LJ 113: AIR 1966 All 64 (65) (Pt B) (Pr 4).**

——Ss. 2 (xiii), 7 and 10 (1) (a) (i) — Sale includes sale to Food Inspector — Necessity to prove mens rea.

A sale, as defined in S. 2 (xiii) includes a sale to a Food Inspector. After a transaction has been held to be a sale, the question of any other intention of the accused, who has actually sold an adulterated article of food does not matter at all. The requisites of mens rea in such a case are satisfied if there is intention to sell irrespective of the purpose for which the milk may be really intended.

Where the evidence proved satisfactorily and beyond reasonable doubt that the accused intended to sell milk to the Food Inspector and he did sell it and the milk sold was adulterated.

Held, that the evidence justified conviction of the accused under S. 7. AIR 1959 Mad 333 and AIR 1962 All 82 and AIR 1960 Andh Pra 366 and AIR 1959 Ker 190, Disting. **1964 All WR (HC) 13: 1964 All LJ 169: 1964 All Cri R 54: 1965 (1) Cri LJ 3: AIR 1965 All 39 (40) (Pt A) (Prs 5, 6).**

——Ss. 2 (xiii), 7, 10, 16 — 'Sale' — Mere storing of milk of quality below the prescribed standard not offence — 'Sale' of such milk even to Food Inspector for analysis is offence, though it may be technical. AIR 1962 All 82, Rel. on. **ILR (1964) 1 All 899: 1963 All LJ 1012: 1964 (1) Cri LJ 502: AIR 1964 All 199 (200) (Pt A) (Prs 5, 7, 9) (DB).**

——Ss. 2 (xiii) and 7 — 'Sale' — Even sale for analysis is 'sale' and is offence under S. 7: 1963 All LJ 1012, Rel. on. **1964 All Cri R 238: 1964 All WR (HC) 352.**

——Ss. 2 (xiii), 7 (i), 16 and 19 — Sale of adulterated article by servant on behalf of master — Conviction of servant — Validity — Master and servant.

For conviction under S. 16 (1) (a) of the Prevention of Food Adulteration Act (37 of 1954), it is not necessary that a person must make a sale on his own behalf. The section punishes any person who sells an adulterated article and a servant selling an adulterated article on behalf of his master can be convicted under S. 7 (i) read with S. 16 (1) (a) of the Act. The reason is that in view of S. 19 of the Act, mens rea is not necessary and the definition of sale in S. 2 (13) of the Act is wide enough to cover the case of a servant having in his possession article for sale and also exposure of the article for sale by a servant on behalf of his master. AIR 1960 Ker 13, Dissented from. **ILR (1961) 2 All 95.**

——Ss. 2 (xiii), 7, 10 and 16 (1) — 'Sale' — Carrier of milk to be delivered to hotel-keeper — Carrier merely an agent having no authority to sell milk — Food Inspector obtaining milk from agent — Milk found adulterated — Held there being no sale, agent could not be convicted.

Where a person coming under item (ii) of Cl. (a) of S. 10 (1), Prevention of Food Adulteration Act, 1954, is one who is a mere carrier taking the article to a person who had already purchased and who has no power to dispose of the goods or part with the goods, he will not ordinarily allow the Food Inspector to take a sample except by the latter exercising his power under S. 10 of the Act to take sample against the will of the person. And if an article is seized by a Food Inspector by using his powers under S. 10 of the Act and compelling a person in possession of that article to deliver it to him (against his will) for analysis, it will not be a sale for the purpose of S. 2 (xiii) of the Act. 1962 (1) Cri LJ 152 (Ker) and AIR 1965 Mad 146 and AIR 1965 Andh Pra 118, Considered.

Held, on facts of the case that the carrier agent had no authority to represent the hotel-keeper, the purchaser of milk, for the purposes of selling the milk to the Food Inspector for analysis, that there was no voluntary sale and that the accused (agent) could not be convicted of the offence under Sections 16 (1) and 7 of the Act and Rule 44 (b) of the rules framed under the Act. **(1965) 2 Andh LT 282: (1965) 2 Andh WR 476: 1965 Mad LJ (Cri) 882: 1966 Cri LJ 1122: AIR 1966 Andh Pra 302 (302, 304, 305) (Pt A) (Prs 4, 11, 15, 16).**

——S. 2 (xiii) and S. 10 — Sale of article to Food Inspector — Question whether it is voluntary or compulsory is one of fact. (1965) 2 Andh LT 282: (1965) 2 Andh WR 476: 1965 Mad LJ (Cri) 882: 1966 Cri LJ 1122: AIR 1966 Andh Pra 302 (305) (Pt B) (Pr 12).

—S. 2 — Scope — 'Sale' includes selling of sample for analysis to Food Inspector.

The words of S. 2 of Prevention of Food Adulteration Act are wide enough to cover a forced or a compulsory sale as much as a voluntary sale and a sale of sample to the Food Inspector for the purpose of analysis is covered by the definition of the section. **66 Cal WN 102: ILR (1961) 2 Cal 257.**

●——Ss. 2 (5), 2 (13), 16 (1) (a) and 23 (1) (f)— The word 'sale' in Act and in R. 44-A — The word 'sale' in the Act itself is not to be read as meaning an Act sale where the context otherwise requires. The word 'sale' in rules must also have the same meaning. The context requires that the word 'sale' in the Rule 44-A should be read as meaning an ordinary sale and not an Act sale. See Prevention of Food Adulteration Act (1954), S. 16 (1) (a). 1965 (1) Cri LJ 446: AIR 1965 Ker 123 (FB).

——S. 2 (xiii) — Voluntary sale of article to Food Inspector for analysis is sale.

A voluntary sale of an article for money is a 'sale' even though the vendee is a Food Inspector and the article sold is meant for the purposes of analysis. 1962 Ker LT 206, Foll.; 1961 Ker LT 308, Disting. **1962 Ker LT 415: ILR (1962) 2 Ker 105: 1962 Ker LJ 1007.**

——Ss. 2 (xiii), 10, 16 (1) (b) — Sale of article of food for purpose of analysis comes within ambit of S. 2 (xiii).

When a person exhibits articles in his shop, he is making a general offer to sell them and any person who comes to the shop and offers the price and the seller accepts his offer and if possession is handed over, it would be a sale irrespective of the purpose for which the purchase is made.

Where, therefore, a Food Inspector goes to a person who offers or exposes for sale any article of food and demands the article and buys the article paying its price, it will not cease to be a sale, even though he be a Food Inspector and the purchase be for analysis. It cannot be presumed in all such cases that it was because of the power given to the Food Inspector under S. 10 and the sanction provided in S. 16 (1) (b) that the article was handed over to the Food Inspector. 1961 Ker LT 308, AIR 1928 Cal 320, Disting.; AIR 1933 Cal 598, AIR 1953 Cal 483, AIR 1948 Mad 329, AIR 1953 Mad 241, AIR 1953 Mad 852 and AIR 1954 Bom 216, Ref.

Nor can a presumption be made that the seller would not have parted with the goods voluntarily. When he knew that they would be used for prosecuting him. AIR 1942 Mad 609, Dissented from. **1962 Ker LT 206: 1962 Ker LJ 214: ILR (1962) 1 Kerala 359.**

——S. 2 (xiii) — Sale — Accused admitting that the commodity out of which Inspector purchased a small quantity had been obtained from a wholesale dealer and had been exposed for sale in his shop — Transaction held amounted to sale. 1961 Ker LT 308, Dist. **1962 Ker LT 199: (1962) 1 Ker LR 516.**

——Ss. 2 (xiii), 10 — Accused taking milk for sale to hotel — Purchase of milk from him by Food Inspector in exercise of his statutory powers under S. 10 — Purchase amounts to sale under the Act. 1962 (1) Cri LJ 152, Disting. **1961 Ker LT 735: (1961) 2 Ker LR 349: 1962 Mad LJ (Cri) 31: 1962 (1) Cri LJ 154 (155) (Pt A) (Pr 4).**

——Ss. 2 (xiii), 10 and 16 (1) (a) (ii) — Sample taken under S. 10 — Transaction is not a sale— Person from whom sample has been taken cannot be convicted of offence under S. 16 (1) (a) (ii).

When a Food Inspector obtains a sample under S. 10 of the Act, there is no sale. Of course, it is possible for a Food Inspector, just like any other human being, to effect a purchase in the ordinary course, and the transaction would be a sale notwithstanding that the purchaser is a Food Inspector and that his purpose is to have the article analysed with a view to prosecution. But, if he obtains the article not by a voluntary exchange for a price but in exercise of his statutory power under S. 10 of the Act, the transaction is not a sale notwithstanding that in obedience to sub-sec. (3) of S. 10 its cost is paid to the person from whom the sample is taken. AIR 1953 Mad 862, Dissented from; AIR 1938 Mad 541 and AIR 1942 Mad 609, Rel. on.

Hence, the person from whom the sample has been taken cannot be convicted for an offence under S. 16 (1) (a) (ii). **1961 Ker LT 308: 1961 Ker LJ 349: (1961) 1 Ker LR 484: 1962 (1) Cri LJ 152 (153, 154) (Pr 7).**

[Overruled in AIR 1966 SC 128.]

——Ss. 2 (xiii), 16 (1) (a), 7 (1) — Storing of goods in shop — Presumption of sale — Burden

of proof — Purchase of samples for cash — Held amounted to sale — (Evidence Act (1872), S. 114).

Goods stocked in a shop are normally stored there for sale, and ordinarily such a presumption can legitimately be drawn by the Court under Section 114 of the Evidence Act. It would then be for the person asserting the contrary to displace the presumption.

Thus, where a Food Inspector went to the shop of the accused, took three samples of tea dust, paid for them and obtained a cash bill from the accused shopkeeper and on analysis the tea was found to be adulterated with coffee and gram dust:

Held, that the transaction was nothing other than an ordinary sale and purchase.

(2) That a purchase, even if it be for the purpose of analysis, did not cease to make a sale as is expressly laid down in Section 2 (xiii) of the Act, and it follows that the accused did sell adulterated tea, and that he did thereby commit an offence under Section 16 (1) (a) read with S. 7 (i) of the Act. **ILR (1959) Ker 1.**

——S. 2 (xiii) — Purchase of milk by Food Inspector and cash paid on the spot — It amounts to a 'sale' within the meaning of the Act. **1964 Mad WN 166: (1964) 1 Mad LJ 443: 1964 Mad LJ (Cri) 357: 1964 (2) Cri LJ 560: AIR 1964 Mad 490 (490) (Pt A) (Pr 2).**

——Ss. 2 (xiii), 10 — Definition of sale in S. 2 (xiii) — Sale to Food Inspector under S. 10 is included: AIR 1961 SC 631 and AIR 1964 SC 1135, Rel. on. **(1965) 7 OJD 215: 32 Cut LT 83: ILR (1965) Cut 813: 1966 Cri LJ 333 (336) (Pt D) (Pr 24).**

——S. 2 (xiii) — Sale — Inspector purchasing milk from vendor for purposes of analysis—Transaction is sale.

Definition of sale given in the Act makes it clear that the purchase of milk for analysis by Food Inspector would be a sale and would bring into operation the provisions of the Act. **64 Pun LR 949: 1962 Cur LJ 487: 1963 (1) Cri LJ 475: AIR 1963 Punj 175 (177) (Pt B) (Pr 7) (DB).**

——S. 2 (xiii) — Purchase of sample of milk for analysis by Food Inspector amounts to sale. **(1963) 65 Punj LR 939.**

SECTION 7

SYNOPSIS

(Prevention of Food Adulteration Act (1954), S. 7.)
See also Prevention of Food Adulteration Act (1954), S. 16.

1. Applicability.
2. "Sell or distribute".
   (See also Prevention of Food Adulteration Act (1954), Ss. 2 and 16.)
   (A) "Store."
3. Sale by servant—Liability.
4. Sale by servant of co-operative society — Liability.
5. Commission agent in possession of article — Liability.
6. Knowledge of adulteration or misbranding, if necessary.
7. Sale under a licence.
8. Sale of mixed milk — Standard of purity applicable.
9. Adulteration or misbranding.
10. Sale of food need not be as article of food.
11. No adulteration — No conviction.
12. Prosecution—
    (A) Objection under S. 11 (4), if can be raised.
    (B) Non-compliance with S. 242, Cr.P.C.— Effect.
    (C) Order under S. 249, Cr.P.C., no bar to fresh complaint.
    (D) Absence of complaint for some days.
    (E) Simultaneous detection — Conviction in one bars other prosecutions.

1. Applicability.

——S. 7 (i) and (vi) — Prevention of Adulteration Rules (1955), R. 44 (e) — Sale of mustard oil found to contain foreign ingredients — Offence.

Where a person sells mustard oil which is found to be mixed not with other edible oils but with a foreign ingredient, it is true he does not infringe R. 44, but he infringes S. 7 (i) which is an entirely different provision. **1961 All LJ 67: 1961 All WR (HC) 97: 1961 All Cri R 45: 1961 (2) Cri LJ 447 (447) (Pt A) (Pr 2).**

——S. 7 — Mixture of articles of 'food' — When amounts to adulteration — Bengal-gram flour found mixed with pea powder — Held no adulteration.

The gravamen of the charge, when a person is accused of adulterating an article of food, is that such adulteration prejudices the vendee or injuriously affects the nature, substance or quality of the article of food. Such being the case, it is not always that the mixture of articles of food that invariably make an offender liable for an offence under S. 7 (i) on the ground that there was sale of an adulterated food.

Thus, where the flour sold to the purchaser as Bengal-gram flour was, on analysis, found to contain 50 per cent of pea powder which was costlier than the former flour and there was no sufficient evidence to bring out that the pea powder, when mixed with Bengal gram, was injurious or injuriously affected the nature, substance or quality of the Bengal-gram powder or that the purchaser had been prejudicially affected, the mixing of the powders could not be held to be 'adulteration' within Cls. (a), (b) or (c) of S. 2 (ii) so as to make out an offence under S. 2 (i) (a) read with S. 7 (1) of the Act. **(1963) 1 Andh WR 265: (1963) 1 Andh LT 350: 1963 Mad LJ (Cri) 220: 1964 (1) Cri LJ 448 (448) (Prs 1, 2) (Andh Pra).**

——S. 7 — Milk not becoming property of accused at the time when sample was taken by food inspector — Food inspector taking sample in exercise of his statutory powers — Accused not guilty. **1964 (1) Cr LJ 334: AIR 1964 Him Pra 10.**

2. "Sell or distribute."

(See also Prevention of Food Adulteration Act (1954), Ss. 2 and 16).

(A). "Store."

2. "Sell or distribute."

(See also Prevention of Food Adulteration Act (1954), Ss. 2 and 16).

——Ss. 7, 16 — Conviction of person for selling foodstuff mixed with prohibited colour-matter,

under Sec. 7/16, Prevention of Food Adulteration Act. The offence does not involve moral turpitude and the accused can stand for the election of panchayat. See Panchayats — U. P. Panchayat Raj Act (26 of 1947), S. 5 (1) (h). 1965 (2) Cri LJ 306: AIR 1965 All 382 (FB).

——S. 7 — Sale of Dal Kesari for analysis purpose is not an offence under Act — Sale — Meaning of — Storing of Dal Kesari also not an offence. See Prevention of Food Adulteration Act (1954), S. 16. 1965 (1) Cri LJ 537: AIR 1965 All 231.

——S. 7 — Mere storing of milk of quality below the prescribed standard not offence — Sale of such milk even to Food Inspector for analysis is offence. See Prevention of Food Adulteration Act (1954), S. 2 (xiii). 1964 (1) Cri LJ 502: AIR 1964 All 199 (DB).

——Ss. 7 (1), 16 (1) — Accused found selling foodstuff coloured with coal-tar dye — Accused is guilty under Sec. 7 (1) read with Sec. 16 (1). 1964 All WR (HC) 438: 1964 All WR 305.

——S. 7 — 'Sale' — Even sale for analysis is 'sale' and is offence unde Sec. 7. See Prevention of Food Adulteration Act (1954), S. 2 (xiii). 1964 All WR (HC) 352.

——Ss. 7, 2 (xiii), 10 and 16 (1) — "Sale" — Carrier of milk to be delivered to hotel keeper — Carrier merely an agent having no authority to sell milk — Food Inspector obtaining milk from agent — Milk found adulterated — Held, there being no sale, agent could not be convicted. See Prevention of Food Adulteration Act (1954), S. 2 (xiii). (1965) 2 Andh WR 476: 1966 Cri LJ 1122: AIR 1966 Andh Pra 302.

——Ss. 7 (i), 16 (1) (a) and 2 (xiii) — That the article was sold as article of food, need not be proved. See Prevention of Food Adulteration Act (1954), S. 16 (1) (a). 1965 (1) Cri LJ 420: AIR 1965 Andh Pra 118 (DB).

——Ss. 7, 2 (i), 16 (1) — Prevention of Food Adulteration Rules, Rr. 5, 44 (e) — Sale of adulterated oil not coming under R. 44 (e) — Offence.

An act of adulteration proved under Sec. 2 (i) is committed by contravention of R. 5 read with paragraph A-17-11 of Appendix B. R. 44 does not affect R. 5. Selling food which is of the category of 'adulterated food' under Sec. 2 (i) is prohibited by Sec. 7 (i) and is, therefore, punishable under Sec. 16, independent of R. 44 (e) and even if there be no contravention of R. 44 (e). 1963 (1) Cr LJ 109 (111) (Pt B) (Pr 9) (Andh Pra).

——Ss. 7, 2 (1) (l) and 16 — Prevention of Food Adulteration Rules (1955), Rules 43 and 44 and App. B, Item A. 11.05 — Prescribed standard of article — Butter for sale found below standard prescribed — Butter is adulterated — Person selling such butter comes under penal provision of Sec. 16 read with Sec. 7 — Rules 43 and 44 are not applicable. See Prevention of Food Adulteration Act (1954), S. 2 (1) (l). 1962 (1) Cri LJ 562: AIR 1962 Bom 104.

——S. 7 — Carrying or conveying adulterated food is an offence — Evidence of Food Inspector — Admissibility — Quantity of stuff carried is not material. 66 Cal WN 102: ILR (1961) 2 Cal 257.

——S. 7 — Sale of sample of adulterated food to Food Inspector — Offence is committed — Quantity from which sample was taken need not be shown to be intended for sale.

If a sample of adulterated food is sold to the Food Inspector, that would be an offence under Sec. 7 and it is not necessary to prove that the sample was taken out of a larger quantity which was also intended for sale. Even one act of sale or distribution would come within that section. AIR 1959 Mad 333 and AIR 1962 All 82, Dissented from. (1964) 5 Guj LR 78: 1964 (2) Cr LJ 290: AIR 1964 Guj 191 (192) (Prs 6, 7).

——Ss. 7, 16, 2 (xiii), 10 — Milk not becoming property of accused at the time when sample was taken by Food Inspector — Food Inspector taking sample in exercise of his statutory powers — Accused held not guilty — (1962) 1 Cr LJ 152 (Ker) and AIR 1955 NUC 455 (Pat) and AIR 1963 Cal 485, Rel. on. AIR 1954 Bom 216, Not foll. 1964 (1) Cr LJ 334: AIR 1964 Him Pra 10 (11, 12) (Pt A) (Prs 6, 7, 9, 12).

——Ss. 7 (i), 16 (1) and Appendix B, Cl. A. 11.03 — Adding water to butter-milk and selling product — Whether amounts to an offence — Non-specification of a standard — Effect.

It cannot be disputed that butter-milk is a product of milk. Butter-milk is defined in Cl. A. 11.03 of Appendix B. It says butter-milk means the product obtained after removal of butter from curd by churning or otherwise. It is true that no separate standard is prescribed, but it is not necessary as the standard is implicit in the definition itself. To amount to butter-milk it should be a product obtained after removal of the butter from the curd. Thus due regard being had to the definitions and standards prescribed for milk, curd, butter and the definition of butter, as the residue left after removal of butter from curds it can be easily gathered what standard of butter-milk is to satisfy and that is the reason why it was felt not necessary to prescribe the standard of the butter-milk separately. In any case the non-specification of a standard for butter-milk does not absolve a vendor from conforming to the standard that is necessarily implied in respect of butter-milk. If water can be freely added one fails to see what the need was for defining buttermilk at all. As such it has to be held that the addition of water in curd and reducing the solids-not-fat contents and selling the same as butter-milk will be an offence under the Act. (1965) Mad LJ (Cri) 294: 1964 Ker LT 238: ILR (1964) 1 Ker 304.

——S. 7 (i) — Storing of goods in shop — Presumption of sale — Burden of proof — Purchase of samples for cash — Held, amounted to sale. See Prevention of Food Adulteration Act (1954), S. 2 (xiii). ILR (1959) Ker 1.

——S. 7 — Sale — Meaning of — Compulsory seizure of adulterated food-stuffs, on payment, by Food Inspector — Does not amount to sale.

There is no offence under Sec. 7 of the Act, if there is merely a compulsory seizure of a sample by an officer of the department, because such seizure, even if money be paid therefor will not amount to a sale: (1962) (1) Cr LJ 152 (Ker) and AIR 1942 Mad 609, Rel. on. A Food Inspector may purchase a sample in the ordinary course of business, though he intends it for analysis, yet it is voluntary sale and purchase. But, if the vendor

is aware that the sale is a forced one, in the sense that an official of the department is compelling the vendor, to part with the sample, because of the statutory obligation and further because a prevention of the taking of such a sample by the Food Inspector is itself an offence under Sec. 16 (1) (b) of the Act, then there is no 'sale'; this is only a case of a seizure or compulsory acquisition though it may externally wear the form or semblance of a sale. Upon this interpretation, even if the sample has been adulterated, this single act of delivery of the food-stuff to the official, will not render the person in possession of the food-stuff liable for the offence of a sale of adulterated food. **1964 Mad WN 325: 1965 (1) Cri LJ 452: 1964 Mad LJ (Cr) 679: (1964) 2 Mad LJ 543: AIR 1965 Mad 146 (147) (Prs 5, 6).**

——Ss. 7 (v), 2 (v) (a), 2 (xiii) and 16 (1) — Prevention of Food Adulteration Rules (1955), Rule 29 (as amended) — Sale of adulterated asafoetida for analysis — Sale used to be made on understanding that it is not for human consumption — Crux of offence is in sale of food — "Sale" covers not merely sale for human consumption. See Prevention of Food Adulteration Act (1954), S. 2 (v) (a). **(1965) (1) Cri LJ 309: AIR 1965 Mad 98.**

——S. 7—Prosecution under, for selling adulterated food — Essentials.

In a prosecution under the Prevention of Food Adulteration Act, the essential requisite to be established is that the commodity alleged to be adulterated should be one intended for sale. Where it is found that the accused was merely taking the milk got from the buffaloes owned by his brother to his (brother's) hotel and it was not intended for sale as such, the accused cannot be guilty of an offence under the Act even if the milk is proved to be adulterated. It may be that the quantity of milk that was given to the Sanitary Inspector on demand might amount to a sale, but what has to be really decided is whether the milk which the accused was taking was intended for sale. But the hotel-keeper who sells such milk, though it is used for coffee, might be guilty of an offence under the Act. **1959 Mad WN 339: (1959) 1 Mad LJ 234: 1959 Mad LJ (Cr) 239: 1959 Cr LJ 997: AIR 1959 Mad 333 (333) (Pr 1).**

——Ss. 7 (1), 16 and 2 (xiii) — Sale of alleged adulterated food to Food Inspector for analysis proved — Provisions of Act attracted. **1965 (2) Cr LJ 571 (573) (Pt A) (Pr 12) (Punj) (DB).**

2 (A). "Store".

——Ss. 7, 2 (xiii) — Articles of food found in possession of person in habit of manufacturing or storing like articles — Presumption.

That articles were really offered or exposed for sale and possession was for the purpose of sale cannot, in all cases, be proved by direct evidence and is a matter which could reasonably be inferred from the circumstances of a particular case. If articles of food are found in the possession of a person who is in the habit of manufacturing or storing like articles for sale then it may reasonably be presumed that he had manufactured or stocked them for sale and a Court would be justified in inferring that the possession of the articles was for the purposes of sale. **1962 Ker LT 206: 1962 Ker LJ 214: ILR (1962) 1 Ker 359.**

——Ss. 7 (i) and 16 (1) (a) — Article containing 95.9 per cent. Calcium Carbonate and rest sand offered for sale to public as black-gram flour — Offence — S. 2 (v) and (ix).

If an accused, a dealer in black-gram flour, was found to have stored and exposed for sale to the public in his shop some article purporting to be black-gram flour, a sample recovered from which, on chemical analysis, was found to contain 95.9 per cent. calcium carbonate and 3.6 per cent. sand with no black-gram flour in it at all, the accused stored in his shop 'misbranded food' although the article stored did constitute 'food' as defined in Sec. 2 (v) and a conviction under Sec. 7 (i) read with Sec. 16 (1) (a) should follow. Cl. (a) to S. 2 (ix) would apply in terms to the article.

(As the prosecution evidence was not believed and it was not accepted by the Court that something which did not contain a particle of black-gram flour could be sold as black-gram flour, the accused was not convicted on the ground that this was either a case of honest bungling or of calculated mischief and foul play.) **1959 Cr LJ 840: AIR 1959 Ker 217 (217) (Pr 4) (DB).**

——S. 7 — Store for sale — Presumption.

Where on searching the premises of an exporter of pepper it was found that a number of bags were filled with pepper and marked with the name of the city of Calcutta and that the pepper found in the bag was adulterated with deteriorated and light berries:

Held, that in the circumstances it was proper to presume, under Sec. 114, Evidence Act that the accused who was admittedly an exporter of pepper had packed the pepper in the bags for the purpose of exporting it to Calcutta in the course of sale and therefore had stored the pepper for sale. **1958 Ker LT 983: 1953 Ker LJ 1150: ILR (1959) Ker 56: 1959 Cr LJ 712: AIR 1959 Ker 190 (192) (Pt A) (Prs 8) (DB).**

——Ss. 7 and 16 — Conviction for storing adulterated food — Storing must be for sale. **1958 Ker LT 983: 1958 Ker LJ 1150: ILR (1959) Ker 56: 1959 Cr LJ 712: AIR 1959 Ker 190 (194) (Pt B) (Prs 20, 21) (DB).**

——S. 7 (ii) — Tea packets exposed in almirah in shop — Not labelled as samples — No evidence to show that they were not received with the Tea received in the shop for sale — Implication is that these packets also are for sale — Offence under Sec. 16 (1) (a). See Prevention of Food Adulteration Act (1954), S. 2 (ix) (j). **1964 Mad LJ Cr 695.**

——Ss. 7, 2 (v), 16 — Occasional use of Asafoetida (Hing) for agricultural purposes does not take it out of category of food — Samples taken from godown — Article found adulterated — Plea that the Hing was meant for agriculteral purposes — **Held,** Hing was an article of food — Accused held guilty under Sec. 7 read with S. 16. See Prevention of Food Adulteration Act (1954), S. 2 (v). **1964 (2) Cri LJ 449: AIR 1964 Punj 427.**

——Ss. 7, 16 (1) (a) — Adulterated goods stored not for purposes of sale — No offence.

The word 'store' in Sec. 7 means storing for sale and storing of adulterated food for purposes other than sale (e. g., merely as security) does not constitute an offence under Sec. 16 (1) (a). **1961 All LJ 663: 1961 All WR (HC) 495: 1961 All Cr R**

292: 1962 (1) Cr LJ 120: ILR (1962) 1 All 305: AIR 1962 All 82 (83) (Pr 11) (DB).

——S. 7 (iii) — An article which is not evidently used as food or drink is not to be treated as food. Linseed oil is not a common article of food in the country at least in U. P. It does not therefore amount to 'food' as defined in the Act and there is no question of its storing as adulterated food for sale within the meaning of S. 7. See Prevention of Food Adulteration Act (1954), S. 2 (v). 1960 All LJ 94.

——S. 7 (i) — Read with R. 46 — Scope of — Storage of adulterated article of food not meant for sale as such — Offence.

Having regard to the language of Sec. 6, of the Prevention of Food Adulteration Act, the possession of adulterated ghee by a person who does not sell it cannot in any sense be 'storing of an adulterated food' and would not fall within the purview of this section.

Mere intention to mix does not constitute the offence; for, the possibility of locus paenitentiae cannot be altogether ruled out in such a case. (1960) 1 An WR 209: 1960 Mad LJ (Cr) 222: 1960 Cr LJ 886: 1960 Andh LT 391: AIR 1960 Andh Pra 366 (366, 367) (Prs 2, 3).

——Ss. 7 and 16 — 'Store' — Meaning of.

In Ss. 7 and 16 of the Prevention of Food Adulteration Act, 1954, the word 'store' is not qualified; and if ghee is stored, the offence is complete. It is not necessary for the prosecution to prove that it is stored with a view to sell it in future. 1963 (1) Cri LJ 349: ILR (1963) 15 Assam 75: AIR 1963 Assam 28 (29) (Pt A) (Pr 6).

3. Sale by servant — Liability.

——S. 7 — Scope — Person selling foodstuffs on behalf of master also comes within mischief of section. 1964 All LJ 1147: 1965 (2) Cr LJ 346: AIR 1965 All 463 (464) (Pt B) (Pr 5).

——Ss. 7 (i) — S. 16 (1) (a) punishes any person who sells an adulterated article and a servant selling an adulterated article on behalf of his master can be convicted under S. 7 (i) read with Section 16 (1) (a) of the Act. See Prevention of Food Adulteration Act (37 of 1954), S. 2 (xiii). ILR (1961) 2 All 95.

——Ss. 7 and 16 — Liability of principal for act of agent.

The provisions of Ss. 7 and 16 make it quite clear that the person who can be punished for committing the offence is not only the person who actually sells the adulterated food, but also the person on whose behalf the adulterated food is sold. 1960 All LJ 118: 1960 All WR (HC) 127: 1960 All Cr R 112: ILR (1959) 2 All 121: 1960 Cr LJ 198: AIR 1960 All 117 (118) (Pt A) (Pr 5) (DB).

[Overruled an another point in AIR 1960 All 546 (FB).]

——Ss. 7, 16 (1) (a) — Sale of adulterated article of food by servant — Liability of master — Master would be liable for acts of servant committed in course of ordinary duties — S. 2 (1) (a). 61 Bom LR 444: 1959 Nag LJ 260: ILR (1959) Bom 1108: 1959 Cr LJ 1036: AIR 1959 Bom 497 (498) (Pr 4).

——S. 7 — Applicability — Owner of articles sold — Liability.

The phrase "himself or by any person on his behalf" occurring in Sec. 7 was obviously included in the section to include also the owner of the articles sold who but for that phrase might have escaped or tried to escape. AIR 1961 SC 631 and AIR 1930 Cal 295 and Criminal Appeal No. 239 of 1959, dated 6-2-1961 (Cal), Foll.: AIR 1960 Ker 13 and AIR 1959 Mad 185, Diss. from. 1963 (1) Cr LJ 658 (660) (Pt A) (Prs 6, 7) (Cal).

——Ss. 7, 16 — Liability of servant — Servant is not liable under the provisions.

The expression 'himself or by any person on his behalf' in Ss. 7 and 16 (1) of the Act must imply that the person contemplated is the master or the principal, and not the servant. On a plain reading, it is quite clear, that it is only the person who can be deemed to sell himself, or by another on his behalf, who is interdicted from selling by Sec. 7 and who is made punishable by Sec. 16 (1) of the Act. No absolute liability can be fastened on a servant under Sec. 16 (1) read with Sec. 7 of the Act. 1959 Ker LT 574: 1959 Ker LJ 588: ILR (1959) Ker 640: 1959 Ker LR 983: 1960 Cr LJ 69: 1959 Mad LJ (Cri) 871: AIR 1960 Ker 13 (13, 14, 15) (Prs 2, 3, 9) (DB).

——Ss. 7, 16 — Servant selling adulterated food on behalf of master — Liability of.

The servant selling adulterated food on behalf of the master and not for his own benefit cannot be found guilty under Ss. 7 and 16 of the Prevention of Food Adulteration Act. (1960) 2 Ker LR 161: (1961) Mad LJ (Cri) 100: 1960 Ker LT 773.

——Ss. 7 and 16 — Applicability to servant.

Sections 7 and 16 will not primarily apply to the servant, the secondary seller of adulterated food, unless he sold it for his own benefit, and the servant selling the food on behalf of his master can only be made liable for aid or abetment of the offence on proof of guilty knowledge express or implied. AIR 1930 Cal 295, Dissented from. 72 Mad LW 117: 1959 Cr LJ 608: ILR (1959) Mad 418: (1959) 2 Mad LJ 49: 1959 Mad LJ (Cr) 491: 1959 Mad WN 161: ILR (1959) Mad 418: AIR 1959 Mad 185 (188) (Pt B) (Pr 14) (DB).

[Overruled in AIR 1961 SC 631.]

——S. 7 — Servant selling adulterated food on behalf of master — Liability — (Master and Servant).

Where it is proved that a person was selling adulterated food only on behalf of the master, both the seller, the servant, as well as the person on whose behalf the food was sold, viz., the master, are liable. 1957 Mad WN 485: 1957 Cr LJ 1148: (1957) Mad LJ (Cr) 512: 1957 Ker LT 966: AIR 1957 Mad 631 (631) (Pr 1).

——Ss. 7 and 16 — Applicability — Servant not liable under the provisions unless he sells for his own benefit — Servant selling on behalf of master liable only as abettor. AIR 1959 Mad 185 and AIR 1960 Ker 13, Rel. on; AIR 1930 Cal 295, Disting. AIR 1960 Mys 80, Dissented from. ILR (1962) 2 Punj 312: 1962 (2) Cr LJ 400: AIR 1962 Punj 419 (420) (Pt B) (Prs 6, 7).

——Ss. 7 (i) and 16 (1) (a) — Sale of adulterated article of food — Person selling is liable to be punished though he is not owner of article

1965 Raj LW 382: ILR (1965) 15 Raj 820: 1966 Cr LJ 1057: AIR 1966 Raj 203 (207) (Pt B) (Pr 5).

——Ss. 7 (i) and 16 (1) (a) — Sale of adulterated milk belonging to another person—Selling is liable to be punished. 1965 Raj LW 328: ILR (1965) 15 Raj 458.

——S. 7 — Liability of master and servant — There is no distinction. See Prevention of Food Adulteration Act (1954), S. 16. 1960 Raj LW 369.

4. Sale by the servant of co-operative society — Liability.

——Ss. 7, 16 (1), 17 — Sale of adulterated food by servant of society is sale by Society — Liability of Society not affected by Sec. 17 — Questions of intention, mens rea and knowledge do not arise.

The word 'person' in Sec. 7 includes any company or association or body of individuals whether incorporated or not. A Co-operative Society as a corporate body has a separate existence apart from its individual members and when any adulterated food belonging to such Society is sold, the Society makes itself liable to the penalties provided in Sec. 7. A sale by the servant of the society is sale by the Society. AIR 1948 Mad 329 and AIR 1958 Mad 183 and AIR 1960 Mys 80, Rel. on.

The liability of the Society is not affected by Sec. 17. It is only when a director or officer of the society other than the Society as such or the person who actually sold the article on behalf of the Society is prosecuted and sought to be made liable that Sec. 17 really comes into play. Cr. Rev. P. No. 344 of 1961 (Kerala), Rel. on. It is not necessary for the prosecution to prove that the Society knew that the article offered for sale was adulterated. It is not a question of intention, of mens rea or of knowledge; it is the sale of the adulterated food which the Act makes penal. The fact that no such words as 'knowingly' or 'intentionally' occur 'before the word 'sells' in Ss. 7 and 16 clearly shows that the intention of the Legislature in enacting these provisions was that the state of mind of the person who committed the offence was immaterial and irrelevant. 1962 Ker LT 667: 1962 Ker LJ 1120: 1963 Mad LJ (Cri) 421: 1963 (2) Cri LJ 451 (452, 454) (Prs 5, 11, 13, 14) (Ker).

——Ss. 7 and 16 (1) — Sale of adulterated milk by salesman of co-operative milk supply society — Salesman cannot be convicted under Ss. 7 and 16 (1). (1960) 2 Ker LR 161: 1961 Mad LJ (Cr) 100: 1960 Ker LT 773.

——S. 7—Liability of vendor of food is absolute — Sale by committee member of co-operative society — Nature of liability — Prevention of Food Adulteration Rules (1955), Rr. 7 and 17 — Report of the Analyst that the seals were found intact — Presumption to be drawn.

There is clinching evidence in the case that the accused sold the adulterated food to the Food Inspector and as the liability of the vendor is absolute under the Act, the question whether he is the servant of the co-operative society or a committee member is irrelevant. There is the report of the Analyst that seals were found intact and it has to be presumed that he compared the seal with the specimen seal. He could not certify to that effect without making himself sure that there was no tampering of any sort in the seal. If the accused wanted to challenge the fact or establish that the sample sent for analysis was tampered with it was open to him to send the sample with him for analysis as provided in Sec. 12 of the Act. (1965) Mad LJ (Cri) 461: 1965 Ker LT 402: (1965) 1 Ker LR 287: 1965 Ker LJ 475: ILR (1965) 2 Ker 71.

5. Commission agent in possession of article — Liability.

——S. 7 (i) — Offence under — Liability for — Even a commission agent is liable for contravention of the provisions. ILR (1963) Andh Pra 739.

——Ss. 7 and 8 — Commission agent selling adulterated oil would be liable to prosecution under the Act. AIR 1961 SC 631, Rel. on. 1962 MPLJ (Notes) 264.

6. Knowledge of adulteration or misbranding, if necessary.

——Ss. 7, 16, 19 — Sale of adulterated article by servant of owner — Servant is liable without proof of mens rea. If the owner of a shop in which adulterated food is sold is without proof of mens rea liable to be punished for sale of adulterated food, there is no reason why an agent or a servant of the owner is not liable to be punished for contravention of the same provision without proof of mens rea. AIR 1959 Mad 185, Overruled. Sarjoo Prasad v. State of Uttar Pradesh, 1961 Andh LT 375: (1961) 1 SCJ 484: (1961) 2 SCA 456: 1961 Mad LJ (Cr) 284: (1961) 1 Mad LJ (SC) 133: (1961) 1 An WR 133: 1961 (1) Cr LJ 747: 1961 All WR (HC) 199: 1961 All Cr R 82: 1961 All LJ 199: 1961 MPC 206: 1961 Ker LT (SC) 34: 1961 BLJR 214: (1961) 1 Ker LR 396: 1961 Mad WN 494: (1961) 3 SCR 324: ILR (1961) 1 All 603: AIR 1961 SC 631 (632) (Pr 5).

——Ss. 7, 2 (13) and 10 (1) (a) (i) — Sale includes sale to Food Inspector —Necessity to prove mens rea does not arise. See Prevention of Food Adulteration Act (1954), S. 2 (13). 1965 (1) Cri LJ 4: AIR 1965 All 39.

——Ss. 7, 2 (i), 16, 23 — "Adulterated milk" — Sale of mixture of buffalo milk and cow milk — Proportion of mixture not known — On analysis sample found to contain less than prescribed minimum of non-fatty solids for cow milk — Mixture is adulterated milk within meaning of Sec. 2 (i) (1) — Accused is guilty under Sec. 16 read with S. 7. See Prevention of Food Adulteration Act (1954), S. 2 (i). 1961 (2) Cri LJ 737: AIR 1961 All 590 (FB).

——Ss. 7, 17, 16 and 2 (j) — Scope — Offence committed by a company — Prosecution of every person in charge of company at time of the offence or responsible for the conduct of business —Validity.

Under S. 17 of the Prevention of Food Adulteration Act, where an offence under this Act has been committed by a Company, every person who at the time the offence was committed was in charge of or was responsible to the company for the conduct of the business of the company could also be prosecuted for the same offence and shall be deemed to be guilty of the offence along with the company and shall be liable to be prosecuted

and punished accordingly, provided it is established that the offence in question had been committed with the consent or connivance of the said director, manager, secretary, or other officer in charge of or responsible to the company for the conduct of its affairs or when it is proved that the offence is attributable to any neglect on the part of such director, manager, etc. The Explanation to the section makes it clear that the expression director includes a partner of a firm who is in charge of the affairs of the firm in question. Where, therefore, a complaint was filed by the Food Inspector for alleged offences punishable under S. 16 read with Ss. 7 and 2 (ix) (j) of the Act against the accused:

Held, S. 7 which prohibits the storing, selling and distribution of misbranded food, clearly implies that the selling, storing and distribution must have taken place with the knowledge that the food in question was misbranded. For, if a person innocently believed that it was not misbranded goods that he was selling, the offence could not be said to have been committed. On the facts of the instant case, held, the acquittal of the accused is correct. (1959) 2 Andh WR 509: 1959 Mad LJ (Cri) 899: 1960 Cri LJ 1417: AIR 1960 Andh Pra 584 (586, 587) (Pt B) (Prs 8, 10 12).

●——Ss. 7, 16 — Mens rea — Necessity — Liability of servant.

A servant can be held liable for an offence under S. 7 read with S. 16 for selling oil which was found to be adulterated, even if he was not aware of the contents. AIR 1961 SC 631, Foll. AIR 1959 Madras 185, Held not good law. Dr. Nirmal Kumar Purkayastha v. Narayan Chandra Saha, (1961) (2) Cri LJ 456: (1960) 1 Assam LR 200: ILR (1961) 13 Assam 411: AIR 1961 Assam 128 (129) (Pt A) (Pr 4) (SB).

——Ss. 7, 19 and 16 (1) (a) — Offence under — Mens rea — Not essential. AIR 1961 SC 631, Rel. on. 1963 (1) Cri LJ 658 (662) (Pt C) (Pr 10) (Cal).

——Ss. 7 and 16 (1) — Offence for sale of adulterated articles — Mens rea not necessary.

Section 16 of the Act does not require that the vendor of foodstuff should know that it is adulterated. The Act is intended to protect public health and there is no ingredient in Ss. 7 and 16 of the Act as regards mens rea apart from the act of selling adulterated articles. 1962 All WR (Sup) 36: 1962 All Cri R 153 (1): 1962 Mad LJ (Cri) 472: (1962) 2 Mad LJ 217: 1962 (2) Cri LJ 701 (701, 702) (Pr 2) (Mad).

——S. 7 — Ingredients of offence — Knowledge — Servant selling milk for master — Liability of.

'Knowledge' is not a necessary ingredient of any offence under S 7. There can be hardly any doubt that a servant who sells milk for his master comes within the mischief of the word 'distribute' contained in S. 6. In other words, he comes specifically within the mischief of the word 'distribute' contained in S. 6. In other words, he comes specifically within the prohibition of the words 'no person shall distribute'. AIR 1957 Mad 631 and AIR 1930 Cal 295 and (1880) 5 AC 857 and (1891) 2 QB 181, Rel. on; AIR 1959 Mad 185, Dissented from. 1960 Cri LJ 494: 37 Mys LJ 948: 1960 Mad LJ (Cri) 324: AIR 1960 Mys 80 (82) (Pt E) (Pr 9) (DB).

7. Sale under a licence.

——S. 7 (iii) — Interpretation of penal statutes—Principles — Wholesale dealer selling under licence — Refusal to sell quantity less than a tin — No offence — Powers of Food Inspector under S. 10 (1) (a) (1) — Under the licence he could not sell less than a tin. See Prevention of Food Adulteration Act (1954), S. 10 (1) (a) (i). 1960 All LJ 100.

——Ss. 7 (v), 16 (1) (a) — (Bihar) Prevention of Food Adulteration Rules (1955), R. 50 — Accused found selling articles of food in shop without necessary licence — Presumption is shop was of accused person unless defence was that accused was not the owner of shop — In any case, accused is liable for contravention of S. 7 (v) read with S. 16 (1) (a) and R. 50. AIR 1961 SC 631, Rel. on. 1965 (1) Cri LJ 580: AIR 1965 Pat 176 (176) (Pt A) (Pr 2).

——S. 7 — Conviction under — Although accused applying for renewal of licence and depositing fees it was found that he had never obtained a licence — Offence does not involve moral turpitude so as to disqualify him under S. 11 (g), Rajasthan Panchayat Act. See Panchayats — Rajasthan Panchayat Act (21 of 1953), S. 11 (g). ILR (1965) 15 Raj 1045: AIR 1966 Raj 42.

8. Sale of mixed milk—Standard of purity applicable.

——Ss. 7, 16 — Mixture of cow's milk and buffalo's milk — No standard fixed for such mixed milk — Standard prescribed for cow's milk and not that for buffalo's milk is to be applied. See Prevention of Food Adulteration Act (1954), S. 16. 1965 (2) Cri LJ 346: AIR 1965 All 463.

——Ss. 7, 16 — Milk sold as mixture of cow's and buffalo's milk — Ascertainment of ratio in which two milks were mixed not possible—Sample must satisfy minimum standard fixed for cow's milk: 1961 All LJ 483, Foll. 1965 All Cri R 250: 1964 All WR (HC) 374.

——Ss. 7, 2 (i) and (xii), 13 (5), 16 (i) (a), 23 (1) (b) (m) — Prevention of Food Adulteration Rules 1955), Rr. 5 and 44 (b) — Sale of mixed milk of cow and buffalo — Test of mean standard for cow and buffalo milk which was the creation of the Analyst and had no statutory support — Not legal — Opinion of Public Analyst can be ignored under certain circumstances—In the instant case it was ignored. See Prevention of Food Adulteration Act (1954), S. 2 (i). 1960 Cri LJ 1056 (2): AIR 1960 All 504.

[Overruled in AIR 1961 All 590 (FB).]

——Ss. 7, 16 (1) — Milk sold as mixture of cow and buffalo's milk — Standard prescribed for buffalo's milk will apply.

If milk was sold without any indication as to whether it was derived from cow, buffalo, goat or sheep, the standard prescribed for buffalo's milk was to be applied. In such a case the milk should contain not less than 5.00 per cent of milk fat and not less than 9.0 per cent of milk solids other than milk fat. Even in cases where the vendor states that he is selling mixture of cow's milk and buffalo's milk, the standard prescribed for buffalo's milk will apply. Cri. Revn. C. No. 1138 of 1961 (Mad), Foll. AIR 1961 Mad 198, Dist. (1963) 2 Mad LJ

255: 1963 Mad LJ (Cri) 419: 1964 (1) Cri LJ 243 (244) (Prs 5, 6) (Mad).

——Ss. 7 (i), 2 (i) (l), 16 (1) (a), 25 (2) — Punjab Prevention of Food Adulteration Rules (1955), App. B, Item A 11.01.01 — Mixed milk of cow and buffalo containing 8.2 per cent of milk solids not fat — Mixture is adulterated — Punjab Pure Food Rules (1930), R. 3 (as amended in 1952). See Prevention of Food Adulteration Act (1954), S. 2 (i) (1). 1964 (2) Cri LJ 202: AIR 1964 Punj 332 (DB).

——Ss. 7 and 16 (1) (a) — Offence relating to mixed milk committed in area comprised in erstwhile Patiala State — Rules for determining standard of milk will be Patiala Pure Food Rules and not Prevention of Food Adulteration Rules. See Prevention of Food Adulteration Act (1954), S. 25 (2). 1964 (2) Cri LJ 114 (Punj).

——S. 7 (i) — Mixed milk of cow and buffalo — Standards in Punjab are those laid down in Punjab Pure Food Rules (1930) — Mixed milk containing 4.9 per cent of milk fat and 7.8 per cent of milk solids other than fat — Conviction not justified. See Prevention of Food Adulteration Act (1954), S. 25 (2). (1962) 64 Pun LR 802.

9. Adulteration or misbranding — Proof of.

——S. 7 — Sample of ghee containing large proportion of vegetable fat — Sample is adulterated — Accused is liable under Act. See Prevention of Food Adulteration Act (1954), S. 2 (1) (i). 1965 All WR (HC) 109: 1965 All Cri R 109: 1966 Cri LJ 113: AIR 1966 All 64.

——Ss. 7, 2 (1) (a) — Applicability — Pepper sold as good pepper, found mixed with 50 per cent of pepper shell — No standard of good pepper — Conviction — Sustainability.

In the absence of any standard prescribing the quality of good pepper, the conviction of the accused for selling pepper mixed with a large percentage of pepper shells, as good pepper cannot be sustained. It cannot be said that it is established in this case beyond doubt that the article sold was not of the nature, substance or quality demanded by the purchaser or was to his prejudice or was not of the nature, substance or quality which it purported or was represented to be. Merely because the pepper had broken grains does not establish that it was not of the quality which was capable of being described as good pepper. ILR (1958) 2 All 618: 1959 All WR (HC) 570: 1959 All Cri R 472: 1959 Cri LJ 930: AIR 1959 All 500 (503) (Pt E) (Pr 15) (DB).

——S. 7 (ii) — Sale of misbranded food—What prosecution has to prove stated. See Prevention of Food Adulteration Act (1954), S. 2 (x) (a). 1958 Cri LJ 1375: AIR 1958 Andh Pra 681.

——S. 7 — Charge under — Proof — Evidence of Food Inspector — Admissibility — Quantity of stuff carried — Not material. See Evidence Act (1872), S. 59. 66 Cal WN 102: ILR (1961) 2 Cal 257.

——Ss. 7 and 16, 10 (7) — Adulteration of milk — Taking signature of two witnesses at the time of seizure of sample, as far as possible — Procedure—Test of adulteration—Freezing point test—Fair and safe method of determining added water.

The expression 'as far as possible' in S. 10 (7) of Act 37 of 1954 is intended to obviate the necessity of the presence of two persons and securing their signatures if circumstances under which he takes the sample were such that there cannot possibly be two persons present at the time. The present case was not one where witnesses had not been requisitioned but where the testifying witnesses have not fully supported the prosecution case and therefore the question was one of appreciation of their evidence in the light of the evidence of the Food Inspector and not a case for the application of the rule relating to securing the signatures of two persons 'as far as possible' laid down in S. 10 (7). In determining the amount of added water in milk the freezing point test is the fair and safe method. Since the test has not been attempted in the present case, the order of acquittal has to be upheld. 1965 Mad LJ (Cri) 824: 78 Mad LW 476: (1965) 2 Mad LJ 381.

——Ss. 7, 16 (1) (a) (ii) and 2 (1) (a) — Adulterated milk — Analysis of fat content — Slight difference in analysis by Public Analyst and Central Food Laboratory — No inference of alteration of sample by natural cause — Proof of adulteration — Reliability of analysis, not affected — Accused, an employee — Not a mitigating factor in awarding sentence for second offence — Practice — Proof of adulteration — Examination of analyst.

The fat content in the adulterated milk, according to the Public Analyst, was 2.6 per cent, while according to the Central Food Laboratory it was 2.4 per cent. The slight difference would not justify any inference that, notwithstanding the addition of formalin as a preservative in prescribed quantities the sample seized might have undergone such alteration by natural causes as to render the analysis unreliable with regard to proof of adulteration. If the prosecution had established its case prima facie, there was no duty cast upon the prosecution to anticipate some line of defence and to exclude it by further expert testimony. It is open to the petitioners to have insisted upon the examination in the witness-box of some officer, actually responsible for making the chemical analysis, and to have cross-examined him upon the points. The fact that the accused was an employee is not a mitigating circumstance which would justify the imposing of less than the minimum sentence prescribed by the statute for a second offence. 1964 Mad WN 166: (1964) 1 Mad LJ 443: 1964 Mad LJ (Cri) 357: 1964 (2) Cri LJ 560: AIR 1964 Mad 490 (490) (Pts B, C) (Prs 4, 5).

——Ss. 7 and 17 (1) — Sample milk taken from Co-operative Milk Society sent to Public Analyst — Analyst's report stating that the sample contained added water — Analyst stating when examined in Court that he found the freezing point of the sample was 0.495 and that was his reason for coming to the conclusion that milk contained added water — Analyst also deposing that no change had taken place in the constitution of the sample because of the addition of the formalin—Held, the prosecution had satisfactorily established that the sample contained added water and the society was guilty under S. 17 (1). 1963

Mad LJ (Cri) 191; AIR 1951 Nag 191: AIR 1961 All 590 (FB), Disting. 77 Mad LW 62: 1964 (2) Cri LJ 39: (1964) 2 Mad LJ 53: 1964 Mad LJ (Cri) 411: ILR (1964) 2 Mad 398: AIR 1964 Mad 301 (304) (Pt C) (Pr 13).

——Ss. 7 and 16 (1) — Considerable delay in analysis of sample of milk — Formalin not added to sample — No presumption that requirement of rules was satisfied — Offence of dilution of milk not committed — Prevention of Food Adulteration Rules, 1955, Rr. 19, 20 and 44-B.

Where there was an intervening period of about eight months between the time when the samples of milk were received in the Institute of Analysis and the time when the report was received and there was no legal evidence to show that the preservative known as formalin was added to the sample:

Held, that as the Act contained penal provisions, there could be no evidentiary presumption that the requirement under Rr. 19 and 20 was satisfied and, therefore, no offence of dilution of milk by adding ten per cent of water could be held to have been committed in such a case. (1962) 2 Cri LJ 579, Rel. on. 1964 Mad LJ (Cri) 660 (Mad).

——Ss. 7, 2 — Stuff sold by accused as butter — Accused never alleging butter to be wholly or partly the product of goat milk — Sample not conforming to requirements prescribed by Item A. 11.05 of Appendix D to the Rules framed under the Act — Article must be deemed to be adulterated and accused is liable for punishment under S. 7. See Prevention of Food Adulteration Act (1954), S. 2. 1965 (1) Cri LJ 77: AIR 1965 Punj 30.

——Ss. 7, 8, 16 — Prevention of Food Adulteration Rules (1955), Appendix B, A.05.10 — Ground chillies sold by accused alleged to be highly adulterated with wheat bran — Report of Public Analyst merely stating that sample was highly adulterated — Percentage of wheat bran not specified — Acquittal of accused held proper AIR 1957 Punj 56 and (1961-63) Punj LR 87, Rel. on. 66 Punj LR 1102: 1964 (2) Cri LJ 578: AIR 1964 Punj 475 (476) (Prs 2, 5) (DB).

——Ss. 7 (1), 13 (1) — Accused prosecuted for selling adulterated curd — Sample analysed by Public Analyst alleged to contain 5.35 added water — Sample obtained on 25th July 1961 and analysed on 31st July 1961—No evidence to show that delay in analysis did not result in deterioration of sample — Conviction based on report of Public Analyst held not warranted — Precautions to be taken to prevent deterioration of sample explained. AIR 1962 Mad 342, Rel. on. (1964) 66 Punj LR 537.

——Ss. 7 (ii), 16 (1) (a), 2 (ix) (g) — Misbranding per se is offence — As far as S. 2 (ix) (g) is concerned, even if mustard oil of one brand is passed off as the mustard oil of another brand in sealed tins, it will amount to misbranding — Accused caught, filling empty tins with embossed marks of different particular brands displayed on them, with mustard oil from a barrel bearing no particular brand — After filling, tins sealed — Accused are guilty of offence of misbranding without proof of adulteration or any intention to mislead or deceive the public — Question is whether the public are likely to be deceived. 1961 (2) Cri LJ 152: AIR 1961 Tripura 18 (21) (Pt C) (Prs 14, 17, 18).

10. Sale of food need not be as article of food.

——S. 7 — That the article was sold as article of food need not be proved. See Prevention of Food Adulteration Act (1954), S. 16 (1) (a). 1965 (1) Cri LJ 420: AIR 1965 Andh Pra 118 (DB).

——S. 7 — Rules under Act, R. 44 (h) — Article of food — Sale of adulterated turmeric powder for external use — Failure of prosecution to prove that the turmeric powder was sold by the accused as an article of food — No offence under R. 44 (h) is committed. See Prevention of Food Adulteration Act (1954), S. 2 (ix) (a). 1958 Cri LJ 1375: AIR 1958 Andh Pra 681.

[Overruled in AIR 1965 Andh Pra 118.]

——Ss. 7 (i), 16 (1) (a), 2 (v) (a) — Sale of adulterated ahar dal—It is an offence under S. 16 — That it was sold as article of food need not be proved. AIR 1965 Andh Pra 118. Rel. on. (1965) 7 OJD 215: 32 Cut LT 83: ILR (1965) Cut 813: 1966 Cri LJ 333 (334 to 336) (Pt B) (Prs 11, 12, 21, 22).

11. No adulteration — No conviction.

——Ss. 7 and 16 — Prevention of Food Adulteration Rules (1955), R. 47—Aerated water is article of food under S. 2 (v) and R. 47 applies—Aerated water sweetened by admixture of saccharin with sugar under declaratory label—No offence under S. 7/16. See Prevention of Food Adulteration Act (1954), S. 2 (v). 1964 (2) Cri LJ 375: AIR 1964 All 455.

——Ss. 7 and 16 — Sale of Butwal Ghee found to be not to standard prescribed for State of Uttar Pradesh — Held, conviction for offence under S. 7/16 was not maintainable as rule prescribing for one standard for whole of Uttar Pradesh was unreasonable and any prohibition to sale of imported unadulterated ghee was also unreasonable. 1961 All LJ 224, Foll. 1964 All Cri R 82: 1964 All WR (HC) 88.

12. Prosecution.

(A) Objection under S. 11 (4) if can be raised.

(B) Non-compliance with S. 242, Cr. P.C.—Effect.

(C) Order under S. 249, Cr. P. C., no bar to fresh complaint.

(D) Absence of complaint for some days.

(E) Simultaneous detection — Conviction in one bars other prosecutions.

12. Prosecution.

——Ss. 7 (i) and 16 (1) (a) — Ghee of S. G. Mark Brand sold from sealed tins — Ghee found to be adulterated — Vendor guilty of offence under S. 7 — That the vendor was ignorant about quality of ghee is no defence under S. 19. See Prevention of Food Adulteration Act (1954), S. 22. 1964 MPLJ (Notes) 81.

——S. 7 — Adulteration not injurious to health—Offence.

It is well settled that under the Prevention of Food Adulteration Act, the adulterated substance need not be poisonous or injurious. Indeed, it may even be conducive to health. The object of the Act is to see that the substance sold is not mixed

with any other thing not permitted by law. Hence, the plea that the adulteration was not prejudicial to health and would not injure anybody, but only added colour to the substance and made it attractive to the buyer cannot be sustained. **1959 Mad WN 161: (1959) 2 Mad LJ 49: 72 Mad LW 117: 1959 Mad LJ (Cri) 491: 1959 Cri LJ 608: ILR (1959) Mad 418: AIR 1959 Mad 185 (185) (Pt A) (Pr 13) (DB).**

[Overruled on another point in AIR 1961 SC 631.]

——**Ss. 7 (i) and 2 (i) and R. 46 — Moisture content of butter in excess of statutory maximum — Practical impossibility of keeping the moisture content at or below the statutory level — Not a justifiable plea in defence. (1958) 2 Mad LJ 408: (1958) Mad LJ (Cri) 836.**

——**Ss. 7 (i), 16 (1) (a) — Object of S. 7 (1) — Adulterated substance need not be poisonous or injurious.**

The adulterated substance need not be poisonous or injurious. Indeed, it may even be conducive to health. It is, however, the object of the Act to see that the substance sold is not mixed with any other thing not permitted by law. Consequently, the plea that the adulteration was only to add colour to the substance so as to attract the buyers and that it was not prejudicial to health or injurious to anybody is unsustainable. AIR 1959 Mad 185, Rel. on. **(1965) 7 OJD 215: 32 Cut LT 83: ILR (1965) Cut 813: 1966 Cri LJ 333 (336) (Pt C) (Pr 23).**

——**Ss. 7, 16 and 19 — Offence under S. 16 by milk vendor — Accused cannot raise the plea that he himself purchased the milk from others and had no knowledge about its quality. 1964 (2) Cri LJ 363: AIR 1964 Tripura 48 (49) (Pt B) (Pr 5).**

12 (A). Objection under S. 11 (4) if can be raised.

——**Ss. 7 (v), 2 (v) (a), 2 (xiii) and 16 (1) — Prevention of Food Adulteration Rules (1955), R. 29 (as amended) — Sale of adulterated asafoetida for analysis — Sale used to be made on understanding that it is not for human consumption — Crux of offence is in sale of food — 'Sale' covers not merely sale for human consumption.**

Sale of adulterated asafoetida (containing coal-tar dye and alcoholic content below prescribed minimum, by a considerable margin), even for purpose of analysis, is punishable under S. 16 (1) (a) of the Act though the article is used to be sold on distinct understanding that it is not to be used for human consumption. As long as the article sold by shopkeeper, or stored by him for sale remains an article which ordinarily enters into the preparation of human food, it is irrelevant to consider whether it was sold to a particular customer on the distinct understanding that he should not use it for preparing food, but should give it only to animals. The crux of the offence is in the sale of food (as defined in the Act). That definition of 'sale' in S. 2 (xiii) of the Act is very wide and covers not merely a sale for human consumption, but a sale for analysis, exposing for sale or having in possession for sale, will all be brought within the scope of the definition of 'sale'. AIR 1958 Andh Pra 681, Disting. **1965 (1) Cri LJ 309: ILR (1964) 2 Mad 972; AIR 1965 Mad 98 (98, 99) (Prs 3, 5).**

12 (B). Non-compliance with S. 242, Cr. P.C.— Effect.

——**S. 7 (i) — Complaint against accused for sale of adulterated milk — Trial of case as summons case — Charge framed without compliance with provisions of S. 242, Criminal P. C. — Further, Magistrate, though required under S. 243, Criminal P. C., to record admission of accused in words used by him, failing to do so and convicting accused on ground that accused had pleaded guilty —Held, conviction could not be maintained. See Criminal P. C. (1898), S. 242. 1965 (1) Cri LJ 599: AIR 1965 Raj 107 (DB).**

12 (C). Order under S. 249, Cr. P.C., no bar to fresh complaint.

——**S. 7 — Complaint under S. 7 of Prevention of Food Adulteration Act — On non-service of the summons, Magistrate ordering further proceedings to be stopped and consigning the case to the records — Effect — Applicability of Ss. 247 and 249 — Order of the Magistrate does not amount to an acquittal under S. 247 — Order passed by the Magistrate in such a case under S. 249, Cr.P.C., is a nullity — Such an order does not determine the proceedings finally — Fresh complaint by the Food Inspector for the same offence, therefore, not barred under S. 403, Cr.P. Code. See Criminal Procedure Code (1898), S. 247. 1964 (2) Cri LJ 459: AIR 1964 Raj 216.**

12 (D). Absence of complaint for some days.

——**S. 7 — Revision against conviction under S. 7 of Prevention of Food Adulteration Act (1954)— Ground that complainant was absent on some days of trial though his presence was not dispensed with — No prejudice to accused — Trial held not vitiated. See Criminal P. C. (1898), S. 247. 1964 All WR (HC) 352.**

12 (E). Simultaneous detection — Conviction in one bars other prosecutions.

——**S. 7 — Three separate prosecutions under S. 7 of Prevention of Food Adulteration Act started against accused in respect of three lots of tins of ghee found in his godown same day at same time by three Food Inspectors — Held offence committed was same and conviction in one case barred other prosecutions. See Criminal P. C. (1898), S. 403. 1962 (2) Cri LJ 747: AIR 1962 Cal 611.**

SECTION 8

——**Ss. 8, 13 (5) — Public Analyst — Report submitted by — Validity — Case from U. P. — English version of Government Gazette showing 3rd August 1959 as date of appointment of 'A' as Public Analyst — Hindi version showing 3rd April 1959 as date of his appointment — Report submitted by 'A' on 30th July 1959 — In case of divergence, English version superseded Hindi version — 'A' held not to be Public Analyst on 30th July 1959 — His report held void—Report could not be validated even under S. 13 (5) — Constitution of India, Arts. 348 (3) and 210 — AIR 1962 All 240 (FB), Foll. 1964 All Cri R 139: 1964 All WR (HC) 204: 1965 (1) Cri LJ 418: AIR 1965 All 170 (172) (Prs 12, 14).**

●——**Ss. 8, 13 — Person appointed Public Analyst under U. P. Pure Food Act, 1950, which is**

repealed cannot be deemed a Public Analyst for the purposes of Prevention of Food Adulteration Act — AIR 1960 All 117; 1960 Cri LJ 198, **Overruled.** Municipal Board, Kanpur v. Behari Lal, 1960 All LJ 376: 1960 All WR (HC) 229: 1960 All Cr R 163: 1960 Cri LJ 1175: ILR (1960) 1 All 644: AIR 1960 All 546 (546) (Prs 7, 8) (FB).

——S. 8 — Public Analyst — Appointment of, by description as holder of particular office — Competency.

The word 'person' in S. 8 does not necessarily mean that the person should be described by name. It is open to the State Government to appoint a person holding a particular office as a Public Analyst provided the other requirements of S. 8 are satisfied. 1960 Cri LJ 1582: (1960) 1 Guj LR 119: (1960) 1 Guj HCR 102: AIR 1960 Guj 34 (36) (Pt B) (Pr 5) (DB).

——S. 8 — Government appointing officer-in-charge of Public Health Laboratory, Surat Borough Municipality, as Public Analyst — Power of appointment not delegated to Municipality — Officer appointed going on leave — Sanitary Committee of Surat Borough Municipality, appointing another person as acting Officer-in-charge of their Public Health Laboratory — Such person cannot be regarded as Public Analyst, and the certificate given by him cannot be admissible in evidence. (1960) 1 Guj LR 119: (1960) 1 Guj HCR 102: 1960 Cri LJ 1582: AIR 1960 Guj 34 (36) (Pt C) (Pr 5) (DB).

——Ss. 8 and 7 — Commission agent was a person having commodity in his possession for sale on behalf of the owner. The petitioner was, though a commission agent and not the owner of the oil, a person who had in his possession for sale the particular oil in question and would be a person contemplated by S. 7. 1962 MPLJ (Notes) 264.

SECTION 9

——Ss. 9 and 10 — Food Inspector under repealed Act — Competency of — S. 6 (b), General Clauses Act — (General Clauses Act (1897), S. 6 (b)).

The appointment of a Food Inspector under the repealed Act is an act duly done under the said Act within S. 6 (b), General Clauses Act and until fresh appointments are made under the present Act, appointments duly made under the previous Act must be considered to be valid and good. Hence, a Food Inspector duly appointed under the previous Act, who takes samples of adulterated milk under the provisions of the present Act must be taken to be a person competent to act as such when the offence takes place. 1960 Cri LJ 198: 1960 All LJ 118: 1960 All WR (HC) 127: 1960 All Cri R 112: ILR (1959) 2 All 121: AIR 1960 All 117 (118) (Pt B) (Pr 6) (DB).
[Overruled in AIR 1960 All 546 (FB).]

——Ss. 9 and 20 — Scope of — Appointment of Sanitary Inspectors as Food Inspectors — Validity of — Complaints filed by them — If proper and valid.

There can be little doubt that the Government Analyst, Deputy Government Analyst and the Sanitary Inspectors possess the required qualifications prescribed by Rules 6 and 8 their appointment under Ss. 8 and 9 of the Prevention of Food Adulteration Act cannot on that ground be challenged.

Taking into consideration the definition in the General Clauses Act and the connotation of the word 'Magistrate' in Chapter II of the Code of Criminal Procedure, a Magistrate or a Court of Magistrate can only be regarded as an office and not an official. Thus, in construing S. 15 of the General Clauses Act, the Sanitary Inspectors would be deemed to be a class of officers generally by their official titles in the sense in which it was also used in S. 39 of the Code of Criminal Procedure. The Sanitary Inspectors could be appointed by virtue of their office under S. 9. There is nothing in S. 20 of the Act, which requires that a person should be appointed by the name before he can be authorised to lodge complaints. The case-law on this aspect which is based on the analogous provision of other Central and Provincial Acts also lend support to this view.

In the instant case, held, that an empowerment of Sanitary Inspectors by virtue of their office would be quite valid having regard to the terms of S. 15 of the General Clauses Act. (1960) 1 Andh WR 117: 1960 Andh LT 55: 1960 Mad LJ (Cri) 159: 1960 Cri LJ 569: ILR (1960) 1 Andh Pra 106: AIR 1960 Andh Pra 282 (285) (Pt A) (Prs 15, 16, 17).

——Ss. 9, 12, 20 — Sanitary Inspector validly appointed Food Inspector is not a 'purchaser' within the meaning of S. 12 and consequently, he is not the person who is in contemplation of S. 12 which specifically excludes him from the category of purchasers. (1960) 1 Andh WR 117: 1960 Andh LT 55: 1960 Mad LJ (Cri) 159: 1960 Cri LJ 569: AIR 1960 Andh Pra 282 (286) (Pt B) (Pr 19).

——S. 9 — Authority to act as Food Inspector — Person must be appointed as Food Inspector by Government notification — He has no authority to act as such only on basis of letter written by Special Officer of Municipality to State Government, recommending such person for appointment as Food Inspector. 1964 (1) Cri LJ 605 (606) (Pt B) (Pr 4) (Pat) (DB).

——S. 9 — Rules under Act, R. 8 — Duly appointed Food Inspector.

Held, that the Food Inspector, on whose report the prosecution was started was one of the duly appointed Food Inspectors, by notification in the Gazette. 1958 Cri LJ 169 (2) (172) (Pt E) (Pr 10) (Cal).

——Ss. 9 and 20 — Appointment of a person as Food Inspector under S. 9 — Written consent under S. 20 — Not dispensed with — Prosecution without such sanction — Invalid. (1962) 40 Mys LJ 564.

SECTION 10

SYNOPSIS

(Prevention of Food Adulteration Act (1954), S. 10.)

1. Food Inspectors appointed under Local Acts — If continue after Act 37 of 1954.
2. 'To take samples' — Sub-sec. (1) (a).

3. Cost shall be paid — Sub-sec. (3).
4. "He may seize" — Sub-sec. (4).
5. Power to break open — Procedure — Sub-sec. (5), Proviso.
6. 'Call two persons' — Sub-sec. (7).
7. Non-compliance with sub-sec. (7) — Effect. See also Prevention of Food Adulteration Act (1954), S. 16.
8. Examination of persons as witnesses in trial, if necessary.
9. Restrictions on powers of Food Inspector — Sub-sec. (9) if contravenes Art. 19 of the Constitution.

1. Food Inspectors appointed under Local Acts — If continue after Act 37 of 1954.

——Ss. 10 and 9 — Appointment of Food Inspector under repealed Act—Appointment is an act duly done within Sec. 6 (b), General Clauses Act and until fresh appointments are made under the present Act, appointments duly made under the previous Act must be considered to be good. See Prevention of Food Adulteration Act (1954), S. 9. **1960 Cri LJ 198: AIR 1960 All 117 (DB).**

[Overruled in AIR 1960 All 546 (FB).]

——S. 10 — Scope — Madras Prevention of Food Adulteration Act (3 of 1918), S. 7 — Person using criminal force and obstructing Executive Officer of a Panchayat from carrying out his powers under S. 7 of Madras Act, after Central Act came into force — Conviction under S. 353, Penal Code is bad in law — Under Central Act Food Inspector alone can exercise these powers. **(1958) 1 Andh WR 158: 1958 Mad LJ (Cr) 172: 1958 An LT 176: 1958 Cri LJ 729: AIR 1958 Andh Pra 348 (348, 349) (Pr 4).**

2. 'To take samples' — Sub-sec. (1) (a).

——S. 10 (1) (a) (i) — Sale includes sale to Food Inspector — No necessity to prove mens rea. See Prevention of Food Adulteration Act (1954), S. 2 (13). **1965 (1) Cri LJ 4: AIR 1965 All 39.**

——Ss. 10 (1) (a) (i), 7 (iii), 16 — Interpretation of penal statutes — Principles — Wholesale dealer selling under licence — Refusal to sell quantity less than a tin — No offence — Powers of Food Inspector under S. 10 (1) (a) (i).

The provisions of Secs. 7 and 16 are penal in their nature and should be interpreted so as to harmonise with the purpose of the Act and not to create conflict or inconsistency between its different provisions.

It is also a well recognised rule that in a penal statute it is the duty of the Court to interpret words of ambiguous meaning in a broad and liberal sense so that they will not become traps for honest, unlearned (in law) and unwary men.

Thus, where a Food Inspector demands by way of purchase six chhataks of mustard oil for sample from a wholesale dealer who is, under the terms of his licence, unable legally to sell less than one tin and the dealer offers to sell one tin of the oil but not six chhataks, he commits no offence. On the other hand, by such a sale, the licensee would have been guilty of an offence of breach of his licence and the food Inspector of the abetment of the offence. Sec. 10 (1) (a) (iii) cannot, therefore, be interpreted as empowering a Food Inspector to take (by purchase) sample of any article of food in such quantity as would result in breach of the conditions of the seller's licence. **1960 All LJ 100.**

——Ss. 10, 2 (xiii) — Sale of article to Food Inspector — Question whether it is voluntary or compulsory is one of fact. See Prevention of Food Adulteration Act (1954), S. 2 (xiii). **(1965) 2 Andh WR 476: 1966 Cri LJ 1122: AIR 1966 Andh Pra 302.**

——S. 10 — Purchase of article for analysis — Entire stock — If to be seized.

It is not obligatory on the part of the Food Inspector to seize the entire stock in the shop at the time of purchasing the article for the purpose of analysis. **1960 Cr LJ 212: AIR 1960 Andh Pra 96 (97) (Pt C) (Pr 6).**

——S. 10 — Sanitary Inspector appointed Food Inspector by State Government — Sanitary Inspector's power to purchase sample, if Health Officer absent on the spot.

Notification issued by the State Government under S. 9 of the Prevention of Food Adulteration Act appointing the 'Health Officer of the Corporation of the City of Nagpur or in his absence Sanitary Inspector' as Food Inspectors for the purposes of the Act.

Held, that both the Health Officer and the Sanitary Inspector were empowered to exercise the powers of Food Inspectors for the purposes of the Act. The only limitation on the powers of the Sanitary Inspector was that if the Health Officer himself was present at any particular occasion then it would not be competent for the Sanitary Inspector to take any action. The expression 'in his absence' did not mean absence of Health Officer from duty altogether on that day but it means his absence at the spot when the Sanitary Inspector exercises the powers under the Act. **1959 Nag LJ (Notes) 31.**

——Ss. 10, 11 (1) (a) — Sample taken from servant — Notice to master not necessary.

Sections 10 and 11 read together clearly indicate that notice need be given only to the persons mentioned in Section 10. Hence notice under Sec. 11 (1) (a) need not be given to the master when the person who sold the sample is the servant. AIR 1960 Kerala 356, Dist. **1961 Ker LT 1077: 1962 Ker LJ 19: (1962) 1 Ker LR 189: 1962 (1) Cr LJ 726: ILR (1962) 1 Ker 719: 1962 All Cri R 238: 1962 All WR (Sup) 60: AIR 1962 Ker 163 (163, 164) (Prs 4, 5, 6) (DB).**

——Ss. 10, 16 (1) (a) (ii) and 2 (xiii) — Sample taken under S. 10 in exercise of Statutory Powers — Transaction is not a sale — Person from whom sample has been taken cannot be convicted of offence under Sec. 16 (1) (a) (ii). 1961 Ker LT 308: 1961 Ker LJ 349: (1961) 1 Ker LR 484: 1962 (1) Cr LJ 152 (153, 154) (Prs 5, 7, 8, 9).

[Overruled in AIR 1966 SC 128.]

——S. 10 — Sale of article of food for purpose of analysis comes within ambit of S. 2 (xiii) — It cannot be presumed in all such cases that it was because of the power given to the Food Inspector under S. 10 and the sanction provided in S. 16 (1) (b) that the article was handed over to the Food Inspector. See Prevention of Food Adulteration Act (1954), S. 2 (xiii). **1962 Ker LT 206.**

——S. 10 (7) — Prosecution under Ss. 7 and 16 of Prevention of Food Adulteration Act — Sending samples of 4 ounces of icecream instead of 8 is an irregularity — Conviction could not be challenged on account of this. See Prevention of Food Adulteration Rules (1955), R. 22. **65 Pun LR 1083: 1964 (1) Cri LJ 606 (Punj).**

3. Cost shall be paid — Sub-sec. (3).

——Ss. 10 and 16 (1) (c) — Powers of Food Inspector — Power and duty — Importance of distinction — Refusal to accept price of sample by vendor — Offence.

Section 10 is headed as 'Powers of Food Inspector'. But all the sub-sections of Sec. 10 do not deal with powers of a Food Inspector, some deal with his power and some with his duties. There is a distinction between 'power' and 'duty'. 'Power' is a thing that may be done or is authorised to be done while 'duty' is a thing which must be done. The distinction between 'power' and 'duty' has this importance that the legislature may punish a vendor for preventing an Inspector from exercising his powers under the Act but has no necessity to punish him for preventing him from performing his duties towards him. If the exercise of the powers is prevented, the public would suffer because the enforcement of the provisions of the Act would be prevented, but if the performance of the duties is prevented, only the vendor will suffer and he need not be punished further.

By refusing to accept the price of the sample the vendors might prevent the Inspector from performing his duty but certainly they do not prevent him from exercising a power. The legislature never intended to punish a vendor for refusing to accept the price. **1959 Cr LJ 1382: 1959 All LJ 874: 1959 All WR (HC) 670: 1960 All Cr R 14: AIR 1959 All 753 (754) (Pt B) (Pr 2).**

4. "He may seize" — Sub-sec. (4).

——Ss. 10 (4) and 10 (7) and R. 9 (c) of the Rules — Respective scope — Seizure of food articles by Food Inspector — Prior suspicion of Food Inspector as to adulteration — Necessity — Requirement as to presence of two witnesses at the time of seizure — Whether mandatory — Non-compliance — Effect.

Under Sec. 10 (4) of the Prevention of Food Adulteration Act and R. 9 (c) of the Rules made thereunder it is not the confirmed suspicion of the Food Inspector that is made a condition precedent while making out samples of the suspected articles of food, but the existence of reasons for entertaining a suspicion would be enough to make the Food Inspector move in the matter. Therefore, to make it appear that the above provisions are in the nature of a condition precedent, whereby the Food Inspector should have a confirmed view in regard to a suspicion as to the adulteration or the misbranding of the food article is unwarranted.

The employment of the word 'shall' in Sec. 10 (7) of the Act prima facie makes it appear that the direction to call not less than two persons to be present and to take their signatures is mandatory. But, the words that follow, viz., 'as far as possible' cannot but be said to qualify the force of that term so as to make it not applicable invariably in all cases. While, therefore, compliance with the provisions of Section 10 (7) of the Act is indispensable, exceptional circumstances must be proved to the hilt for bringing a particular case within the proviso creating the exception by the use of the words 'as far as possible', for making out that the direction contained therein is impossible of compliance. **(1963) 1 Andh WR 296: 1963 Mad LJ (Cri) 213: 1964 (1) Cri LJ 24 (2): AIR 1964 Andh Pra 25 (26) (Pt A) (Pr 4).**

——Ss. 10 (4) and 24 — Prevention of Food Adulteration Rules (Andhra), R. 9 (c) — Seizure — Suspicion in the mind of Inspector about the article being adulterated not essential. **(1963) 1 Andh WR 296: 1963 Mad LJ (Cri) 213: 1964 (1) Cri LJ 24 (2): AIR 1964 Andh Pra 25 (26) (Pt B) (Pr 3).**

5. Power to break open — Procedure — Sub-sec. (5), Proviso.

——S. 10 (5), Second Proviso — 'Two or more respectable inhabitants of the locality' in S. 103, Criminal P. C. (1898) — Emphasis is not upon the word locality, but on two or more respectable inhabitants. See Criminal P. C. (1898), S. 103. **1964 (2) Cr LJ 715: AIR 1964 Pat 565.**

——S. 10 (5), Proviso 2 — Search by Food Inspector — Rule 165 (c), Bihar Police Manual not applicable — Non-compliance with S. 103, Criminal P. C. does not vitiate search.

As the second proviso to Sec. 10 (5) of Prevention of Food Adulteration Act stands, it is not open to the Court to import the rules of the Bihar Police Manual into the provisions of Sec. 10 and to strike down the action taken by the Food Inspector in exercise of his powers under Sec. 10 of the Act as illegal or invalid by reason of non-compliance with the provisions of the Police Manual. Besides, a contravention of the provision of search contained in S. 108 of the Code of Criminal Procedure has not the effect of vitiating the search or the legality of the proceeding. But it undoubtedly casts a duty upon the court to examine the evidence regarding the seizure with greater care. AIR 1956 SC 411 and AIR 1963 SC 822, Foll. **1964 BLJR 754: 1964 (2) Cri LJ 715: AIR 1964 Pat 565 (567) (Pt A) (Pr 10).**

6. 'Call two persons' — Sub-sec. (7).

——S. 10 (7) — Scope — Sec. 10 (7) is only directory. ILR (1964) 1 All 899: 1963 All LJ 1012: 1964 (1) Cr LJ 502: AIR 1964 All 199 (201) (Pt C) (Pr 12) (DB).

——S. 10 (7) — Food Inspector taking sample of food — Presence of two persons not obligatory.

Under Sec. 10 (7), it is not obligatory on the Food Inspector to have at least two persons present whenever he proposes to take sample of food which he considers adulterated. The words 'as far

as possible' used therein completely negative such a construction. 1960 All WR (HC) 296: 1960 All Cr R 201: 1960 All LJ 419.

——S. 10 (7) — Scope — Direction to call at least two witnesses mandatory but requiring obedience only where such witnesses can be secured. (1963) 1 Andh WR 296: (1963) Mad LJ (Cri) 213: 1964 (1) Cri LJ 24 (2): AIR 1964 Andh Pra 25 (26) (Pt A) (Pr 4).

——S. 10 (7) — Provision as to getting witnesses is mandatory. The phrase 'as far as possible' does not give the Food Inspector power to dispense with the witnesses. Where sale takes place in a shop in a busy locality and at a busy time when any number of persons would be available to witness the act, the omission to get witnesses to sign the written intimation can only be due to an ignorance of the rule. The provision is mandatory and in a case where it is not complied with the Court cannot rightly convict the accused. AIR 1959 Mad 118; (1950) Ker LT 395, Rel. on. 1959 Ker LJ 1005: 1959 Mad LJ (Cr) 821: 1959 Ker LR 558: 1959 Ker LT 657.

——Ss. 10 (7) and 7 — The expression 'as far as possible' in Sec. 10 (7) is intended to obviate the necessity of the presence of two persons and securing their signature if the circumstances under which he takes the sample were such that there cannot possibly be two persons present at the time — Present case was not a case of absence of two witneses but appreciation of the evidence of witnesses as they did not support the prosecution — In determining the amount of added water to the milk the freezing point test is the safe and fair method — Test not applied—Acquittal of accused upheld. ('65) 78 Mad LW 476: (1965) 2 Mad LJ 381: 1965 Mad LJ (Cr) 824.

——S. 10 (7) — Duty of food inspector — Procedure for taking sample — Right of inspector to dispense with procedure.

Under sub-section (7) of Section 10 of the Prevention of Food Adulteration Act, the Food Inspector shall as far as possible call not less than two witnesses to be present when he takes a sample and obtain their signatures. This procedure must be complied with in every case by the Inspector. The expression as far as possible is intended to obviate the necessity of the witnesses if the circumstances under which he takes the sample were such that there could not possibly be two persons present at the time; as for example in a solitary place at a late hour. It does not mean that when witnesses are available to the inspector he can dispense with them. (1958) 2 Mad LJ 194: 1958 Mad WN 419: 1959 All Cri R 80: 1959 All WR (Supp) 8: (1958) Mad LJ (Cr) 697: 71 Mad LW 602: 1959 Cri LJ 336: AIR 1959 Mad 118 (118) (Pr 2).

——S. 10 (7) — Applicability — Condition.

Section 10 (7) comes into play only when samples are taken. It is introduced by way of guarantee that the Sanitary Inspector has taken the particular sample from the accused. 71 Mad LW 248: 1958 Mad WN 221: 1958 Mad LJ (Cri) 236: 1958 Cri LJ 915: AIR 1958 Mad 382 (382) (Pt B) (Pr 3).

——S. 10 (7) — Search witnesses not imperative — Witnesses need not be independent persons. What is necessary is that wherever possible, the presence of at least two persons should be secured, and the witnesses need not be independent persons. AIR 1964 Andh Pra 25, Distinguished. 1964 BLJR 754: 1964 (2) Cr LJ 715: AIR 1964 Pat 565 (566) (Pt C) (Pr 8).

——S. 10 (7) — Witnesses to be above board. The evidence relating to the taking of sample must be above board, and the witnesses in whose presence the sample is taken should be independent and disinterested so as to inspire confidence. The persons must not be under the influence of the Food Inspector. ILR (1961) 2 Punj 803: 1962 (2) Cri LJ 779: AIR 1962 Punj 548 (552) (Pt B) (Pr 26) (DB).

7. Non-compliance with sub-sec. (7) — Effect.

See also Prevention of Food Adulteration Act (1954), S. 16.

——S. 10 (7)—Where there was no doubt about the fact of seizure of the milk from the accused and the fact that it was sold by the accused, it must be held that the act of the food inspector in getting only one mediator and failing to get two mediators does not mean that the sale and seizure cannot be acted upon for the purpose of finding the accused quilty. See Prevention of Food Adulteration Act (1954), S. 7 (i). 1965 Mad LJ (Cri) 815: (1965) 2 An WR 359: 1966 Cri LJ 393: AIR 1966 Andh Pra 96.

——S. 10 (7) — Non-compliance with — Effect — Seizure of milk sold by accused — Food Inspector getting only one mediator instead of two — Still accused may be found guilty — Criminal P. C. (1898), S. 103 (1).

Section 103 (1), Cr. P. C., is stricter than S. 10 (7) because it does not contain the words "as far as possible". In the case of an illegality of the seizure in not complying with the provisions in S. 10 (7), the Court will be inclined to examine carefully the evidence regarding the seizure. No further consequence ensues. So, where there was no doubt about the fact of seizure of the milk from the accused and the fact that it was sold by the accused, it must be held that the act of the Food Inspector in getting only one mediator and failing to get two mediators does not mean that the sale and seizure cannot be acted upon for the purpose of finding the accused guilty. AIR 1963 SC 822, Applied, AIR 1959 Mad 118, Disting. (1965) 2 Andh WR 359: 1965 Mad LJ (Cri) 815: 1966 Cri LJ 393: AIR 1966 Andh Pra 96 (99) (Pt A) (Pr 15).

——S. 10 (7) — Taking of sample — Presence of respectable witnesses — When necessary.

One of the meanings which can be assigned to the use of the words "as far as possible" in S. 10 (7) is that the sample should be taken in the presence of two or more respectable witnesses unless they are not available. But where it appears that what the prosecution witnesses are deposing is true and the accused has not in any way been prejudiced by the non-compliance with Sec. 10 (7), the law should take its normal course, namely, that the guilty person should be punished.

In Sec. 10 (7) of the Prevention of Food Adulteration Act the legislature intentionally added the words "as far as possible". Consequently, it will be improper to apply the case law of Sec. 103, Cr. P. C., with the same rigour to cases under that Act. AIR 1959 Mad 118, Dissented from. 1959

All WR (HC) 482: 1959 All Cri R 400: 1959 All LJ 624.

——S. 10 (7) — Taking of samples — Presence of two persons of locality — Provision not mandatory — Words 'as far as possible' in the section clearly indicate that there might be circumstances where it may not be possible for Food Inspector to strictly comply with the provision — Acquitting accused merely on the ground of non-compliance with the provision is therefore not justifiable. **ILR (1963) Andh Pra 739.**

——S. 10 (7) — Scope of — If mandatory.

Sub-section (7) of Sec. 10 of the Prevention of Food Adulteration Act requires a Food Inspector to do no more than call two persons to witness the seizure and the sampling of food suspected to be adulterated. He has no power to compel them to be present. The words 'as far as possible' occurring in sub-sec. (7) of S. 10 indicate that this is a mere directory provision and not a mandatory provision. **1961 Mad LJ (Cri) 495: (1961) 2 Andh WR 90.**

——S. 10 (7) — Scope — Non-compliance — Effect.

The requirements in sub-sec. (7) of Sec. 10 of the Prevention of Food Adulteration Act that a panchanama should be prepared in the presence of the mediators, may be regarded as mandatory. But mere violation or failure to comply with that provision would not, by itself, affect the legality or the validity of the act of the Food Inspector concerned. Non-compliance with the provisions will be curable irregularity and the trial is not vitiated. AIR 1959 Mad 118, Disting. Such carelessness or callousness, however, is unbecoming of the conduct of responsible officers entrusted with the obligation of performing the duties of a public office. **1960 Cri LJ 212: AIR 1960 Andh Pra 96 (97, 98) (Pt B) (Prs 6, 9).**

——S. 10 (7) — Non-compliance with — Effect on legality of conviction.

It cannot be said that in every case where there is a non-compliance with Sec. 10 (7), the conviction would be illegal; it is a curable irregularity. **1958 Andh LT 760.**

——S. 10 (7) — Witnesses not present at the time of seizure of sample as required under Sec. 10 (7) — Defect is only an irregularity — Trial and conviction of accused is not vitiated in the absence of prejudice to accused. See Prevention of Food Adulteration Act (1954), Sec. 16 (1). 1964 (2) Cri LJ 417 (2): AIR 1964 Ker 261.

——S. 10 (7) — Scope and object — Procedure to be followed when taking samples — Non-compliance with — Effect of — Trial not vitiated.

Sub-section (1) of Sec. 10 of Prevention of Food Adulteration Act does not expressly state that a memorandum has to be prepared, when a sample is taken, but when read along with sub-sec. (7) it becomes abundantly clear that the Food Inspector has to draw up a memorandum about the taking of the sample and it is in this memo. that the signature of the witnesses has to be obtained. The non-compliance with the provision of Section 10 (7) of the Act is only an irregularity and the question which would arise on such non-compliance would be whether the accused is prejudiced and whether the evidence adduced is worthy to be acted upon. It is only an irregularity which per se does not vitiate the proceedings relating to the taking of the sample or the subsequent prosecution based thereon. **(1965) Mad LJ (Cri) 335: 1964 Ker LT 198: 1964 (2) Cri LJ 417 (2): ILR (1964) 1 Ker 589: AIR 1964 Ker 261 (262) (Pt A) (Prs 4, 5).**

——S. 10 (7) — Non-compliance of, is a serious 'irregularity' causing prejudice to accused. 1960 Ker LT 515: 1960 Ker LJ 753: 1960 Mad LJ (Cri) 595: 1960 Cri LJ 1467: AIR 1960 Ker 356 (358) (Pt B) (Pr 3) (DB).

——Ss. 10 (7), 23 (1) (h) — Non-compliance — Effect.

Where Food Inspector had not complied with the provisions of Sec. 10 (7), inasmuch as he did not call two persons to be present at the time he took samples of the articles, even though the shop of the accused was situated in the bazaar and that the samples were not taken in clean bottles as required by R. 14 :

Held, that the non-compliance with Sec. 10 amounted to a flagrant violation of the provisions of the Act. Even if this was treated as an irregularity, this had resulted in the prejudice to the accused. AIR 1956 SC 411, Disting. **1959 Ker LR 408: 1959 Ker LT 395: 1959 Ker LJ 367: 1959 Mad LJ (Cr) 267: 1959 Cr LJ 1323: AIR 1959 Ker 351 (352) (Pr 2) (DB).**

——S. 10 (7) — 'As far as' — Effect.

The phrase 'as far as possible' does not give the Food Inspector power to dispense with the witnesess by just stating that he could not find any. It is meant only to obviate the difficult task of getting the witnesses in cases where the action occurs in isolated places, or at times during the day or night when it is not usual to find people walking about. The provision is mandatory and in case it is not complied with the Court cannot rightly convict the accused. **1959 Ker LR 558: 1959 Ker LT 657: (1959) Mad LJ (Cr) 821: 1959 Ker LJ 1005.**

——S. 10 (7) — Non-compliance with — Effect — Trial — If vitiated.

The direction given by Sec. 10 (7) is prefixed by the words 'as far as possible' and consequently, it is not absolute in its terms. It gives a discretion to the food inspector to call at least two witnesses if the circumstances of the case permit it, of which he is made the Judge. Further, no penalty is prescribed for any non-compliance. The language thus shows that the provision for calling two persons as witnesses is directory and not mandatory, and consequently the irregularity in not complying with it in terms would not vitiate the whole trial.

The purpose of the safeguard contained in Section 10 (7) is that the act of the food inspector in taking a sample should be above suspicion and free from any doubt. Consequently, where the precaution provided in the Act, e. g., the calling of two witnesses, is not taken, on the analogy of Sec. 103 of the Code of Criminal Procedure, the taking of the sample has to be scrutinized with greater care and caution. **1960 MPC 88: 1960 MPLJ 273: 1960 Jab LJ 354: 1960 Cr LJ 913: ILR (1959) Madh Pra 617: AIR 1960 Madh Pra 179 (180) (Pr 4).**

——S. 10 (7) — Scope — Non-compliance — If vitiates prosecution.

A contravention of Sec. 10 (7) does not per se vitiate the prosecution. Essential test is one of prejudice to the accused apart from the reliability of the evidence adduced. 37 Mys LJ 948: 1960 Cr LJ 494: 1960 Mad LJ (Cr) 324: AIR 1960 Mys 80 (82) (Pt C) (Pr 8) (DB).

——Ss. 10 (7) and 16 (1) (i) — Mandatory provisions of Sec. 10 (7) not complied with — Accused tried under S. 16 (1) (i), held entitled to acquittal.

Where in a case in which the accused was tried under Sec. 16 (1) (a) (i) of the Act, it was clear from the evidence that there were number of shops in the close proximity of the accused's shop and there were other persons near about the spot at the time when the sample was taken by the Food Inspector at about 3 P. M. But the Food Inspector did not even care to ask any of those persons to witness the transaction, and one of the two persons taken by the Food Inspector as witnesses was his peon who could not be said to be an independent person and the other person stated that he actually reached after the sample had been taken by the Food Inspector:

Held, that the provisions of sub-section (7) of Sec. 10 had not been complied with which were mandatory and therefore the accused was entitled to acquittal. When in a particular case sample was not taken in the presence of two persons it would be for the prosecution to satisfy the Court that it was not on account of any desire to circumvent the provisions of Sec. 10 (7) but due to the non-availability of witnesses or some such cause. AIR 1962 Punj 548, Foll. 1965 Cur LJ 287: 67 Pun LR 425: 1965 (2) Cri LJ 406: AIR 1965 Punj 366 (366) (Prs 3, 4).

——S. 10 (7) — Non-compliance with — Prosecution held not illegal.

Section 10 (7) merely prescribes a procedure of taking samples of the articles suspected to be adulterated and it would be unreasonable to hold that any non-compliance with it however minor it may be, would render the prosecution based upon such taking of samples illegal. 65 Pun LR 1083: 1964 (1) Cri LJ 606 (606, 607) (Pt A) (Pr 3).

——S. 10 (7) — Scope — Provision is mandatory— Memo. to be prepared under Sec. 10 (7) by Food Inspector — Composite memo. under Sec. 10 (7) and Sec. 11 not invalid — Non-compliance with Sec. 10 (7) by itself does not render trial invalid.

The provisions of sub-section (7) of Section 10 are mandatoy, and not merely directory, and it is the duty of the Food Inspector to comply with the same unless it is impossible to secure the attendance of two persons at the time he takes a sample or does any of the acts under sub-secs. (1), (4) and (6) of Sec. 10. Accordingly, when in a particular case sample is not taken in the presence of two persons, it would be for the prosecution to satisfy the Court that it was not on account of any desire to circumvent the provisions of sub-section (7) of Sec. 10 but due to the non-availability of witnesses or some such cause.

Sub-section (1) (a) of Sec. 10 does not expressly state that a memo. has to be prepared when a sample is taken by a Food Inspector, but when it is read along with sub-section (7) the Food Inspector has to draw up a memo. about the taking of sample, and it is on this memo. that the signatures of at least two witnesses have to be obtained. The memo. which only recites that the sample of milk had been divided into three parts and sealed in three separate bottles is not the memo. which is required to be prepared under sub-sec. (7) of S. 10. Since no forms for memos. are prescribed under Section 10 (1) read with sub-section (7) and Section 11, composite memo. relating to the taking of sample, its division into three parts and handing over of one of such parts to the person from whom the sample is taken, would meet the requirements of law, if it is attested by two independent persons.

The failure to comply with Sec. 10 (7) by itself, would not vitiate the proceedings regarding the taking of samples or affect the validity of the prosecution based upon such irregular action of the Food Inspector. AIR 1959 Mad 118, Not foll.; AIR 1960 Mys 80 and AIR 1960 Andh Pra 96 and AIR 1960 Madh Pra 179 and AIR 1960 Ker 356 and AIR 1956 SC 411 and AIR 1946 PC 16, Rel. on. ILR (1961) 2 Punj 803: 1962 (2) Cri LJ 779: AIR 1962 Punj 548 (549 to 552) (Pt A) (Prs 7, 12, 16, 18, 24) (DB).

——S. 10 (7) — Non-compliance — Effect.

Non-compliance with S. 10 (7) of the Prevention of Food Adulteration Act by the Food Inspector would not vitiate the trial of a person for an offence under the Act unless such non-compliance has caused prejudice to the accused. The mere fact that the Inspector has failed to call two witnesses would not be sufficient. ILR (1963) 13 Raj 351: 1963 Raj LW 109.

8. Examination of persons as witnesses in trial, if necessary.

——S. 10 (7) — Scope — Compliance — Examination of search witness in Court — Omission — Effect.

The law does not require that any witness is to be examined in Court though it is desirable that the prosecution should examine all the search witnesses if possible, to dispel all doubts about the manner in which the sample was taken and about the place from where and the person from whom the sample was taken, in other words, to put the entire transaction being above board. This is all the more necessary in view of the severe nature of the penalty prescribed by the Act and also in view of the fact that for a second conviction imprisonment is compulsory. But where out of two witnesses called by the Food Inspector at the time of taking the sample only one was available for examination by the prosecution and his evidence which was accepted by the Magistrate and lower appellate Court was critized in second appeal on the ground that he was not a witness who was at all reliable or trustworthy or independent as he was not a witness of locality and was a person who always accompanied the Food Inspector.

Held, that it could not be said that there was no compliance with Sec. 10 (7) of the Act. 1963 (1) Cri LJ 658 (661, 662) (Pt B) (Pr 9) (Cal).

——S. 10 (7) — Evidence — Duty of prosecution, at trial.

Law does not require that the witnesses called by the Food Inspector while taking action under sub-secs. 1 (a), 2, 4 or 6, or any of them should be examined at the time of trial. In the circumstances of any particular case, the prosecution may choose to examine one or more of these witnesses.

If the Court is unable to place full faith on the evidence of the concerned Food Inspector the non-examination of the attestors may assume importance. 37 Mys LJ 948: 1960 Cr LJ 494: 1960 Mad LJ (Cr) 324: AIR 1960 Mys 80 (82) (Pt B) (Pr 7) (DB).

9. Restrictions on powers of Food Inspector — Sub-sec. (9) if contravenes Art. 19 of the Constitution.

——S. 10 — Constitution of India (1950), Articles 14 and 19 — Powers vested in Food Inspectors — Not arbitrary — Standards of food prescribed by rules — Whether unrelated to conditions of each State and region.

In the face of the safeguards and especially the one contained in Section 10 (9) of the Act, which serves as a deterrent to the Inspectors in that behalf and several rules enacted in regard to the procedure to be followed by the Food Inspectors in the matter of obtaining samples, it is idle to contend that the Food Inspectors are conferred with large powers which are likely to be abused and which will result in the harassment of the petitioners. The Food Inspectors are subject to various restrictions and they could act only in accordance with the Rules framed under the enactment and not arbitrarily.

Even assuming that this amounts to a restriction on trade or business, it is certainly a reasonable restriction within the contemplation of Art. 19 (6) of the Constitution and it is within the domain of the Parliament to impose such restrictions if it is in the public interest and for public good.

The standards for testing the contents of milk are not fixed in the Act but under the Rules. So, it is only the Rules that can be impeached. (1963) 2 An WR 7: (1963) 2 An LT 18: AIR 1964 Andh Pra 501 (503) (Pt B) (Pr 14) (DB).

SECTION 11

SYNOPSIS

(Prevention of Food Adulteration Act (1954), S. 11.)

1. Scope and applicability.
2. Manner of taking sample — Sub-sec. (1).
3. Vendor declining to accept part of the sample — Sub-sec. (2).
4. Evidence and proof.
5. Practice and procedure.

1. Scope and applicability.

●——Ss. 11 and 2 (xiii) — Sale to Food Inspector for analysis — Transaction though not consensual is still a sale under Act.

The Act gives a special definition of 'sale' in Section 2 (xiii) which specifically includes within its ambit a sale for analysis. A sale for analysis must be regarded as sale even if the transaction contains an element of compulsion. A contract comes into existence by the acceptance of a proposal made by one person to another by that other person. The latter is not bound to accept the proposal. It may not, however, necessarily follow that where that other person had no choice but to accept the proposal to the transaction would never amount to a contract. (1962) 1 Cr LJ 152 (Kerala), Overruled; AIR 1942 Mad 609, Impliedly Overruled; AIR 1954 Bom 216 and AIR 1953 Mad 241, Approved. Mangaldas Raghavji Ruparel v. State of Maharashtra, (1965) 2 SCWR 561: (1965) 2 SCA 530: (1965) 2 SCR 894: 1966 Cri LJ 106: AIR 1966 SC 128 (134) (Pt L) (Pr 18).

——S. 11 — Scope — Vendor's refusal to accept notice given by Food Inspector and one part of sample — Offence — S. 16 (1) (c) — Applicability.

Where the Food Inspector offers a notice and one part of the sample to the vendors, he fully performs his duties by doing so. The vendors by refusing to accept the notice and one part of the sample cannot, therefore, be said to have prevented him from performing his duties: in any case they cannot be said to have prevented him from exercising his powers. These two provisions have been enacted in the interests of the vendor and the legislature could not have contemplated to punish him for doing an act to prevent their compliance. 1959 Cri LJ 1382: 1959 All LJ 874: 1959 All WR (HC) 670: 1960 All Cr R 14: AIR 1959 All 753 (754) (Pt C) (Pr 2).

——S. 11 — Report of Public Analyst — Contents — Quantity of extraneous matter should be indicated.

In the case of a firm manufacturing aerated waters in some of which saccharine is used as a sweetening element, while in others only some form of sugar and not sachharine is used, it is better if the report of the analyst contains some indication of the quantity of saccharine because if the quantity of saccharine is only slight, its presence might be due to an accident, it being possible for traces of saccharine to remain in a bottle which had not properly been washed before being filled with liquid sweetened with sugar. AIR 1957 Punj 56, Rel. on. ILR (1962) 2 Punj 312: 1962 (2) Cr LJ 400: AIR 1962 Punj 419 (420) (Pt A) (Pr 5).

2. Manner of taking sample — Sub-sec. (1).

——S. 11 (1) (a)—Prevention of Food Adulteration Rules (1955), Rr. 7 (3) and 12 — Forms under, Forms III and VI — Validity—Actual analysis got done by assistant — Form of report held not ultra vires. See Prevention of Food Adulteration Act (1954), S. 13. 1965 All WR (HC) 506: 1965 All Cri R 319: 1965 All LJ 1004: 1966 Cr LJ 122: AIR 1966 All 91.

●——Ss. 11, 13 — Notice under S. 11 — Object of — Notice is to be served only on person from whom sample is taken — Notice has no bearing on admissibility of public analyst's report, in evidence — Report is admissible in evidence against all accused irrespective of consideration of notice. Mangaldas Raghavji Ruparel v. State of Maharashtra, (1965) 2 SCR 894: (1965) 2 SCWR 561: (1965) 2 SCA 530: 1966 Cri LJ 106: AIR 1966 SC 128 (133) (Pt I) (Pr 12).

—S. 11 (1) (a) — Prevention of Food Adulteration Rules, R. 12 — Notice under, whom to be given — Notice given to person from whom sample is purchased — Name of proprietor mentioned at the top — Valid — Second notice to proprietor also not necessary.

Clause (a) of Sec. 11 (1) does not require the notice under it being addressed to a particular person. It merely requires that notice should be given to the person from whom the Food Inspec-

tor has taken the sample. When the notice is actually handed over to him and even his acknowledgment obtained on the counter-foil thereof, it cannot be said that notice has not been given to the person from whom the sample was taken, merely because the name of the properietor is mentioned at the top of the same. It is substance of the notice which is important. That is also what is required by R. 12.

Clause (a) of Sec. 11 (1) requires notice being given only to the person from whom sample is taken by the Food Inspector. Where this is done, no second notice is required to be given to the proprietor of the shop. 1961 All LJ 186, Rel. on. AIR 1960 Ker 356, Dissent. from. **ILR (1962) 2 All 309: 1962 All LJ 392: 1962 All Cr R 162: 1962 All WR (HC) 260: 1962 (2) Cri LJ 593: AIR 1962 All 517 (519) (Prs 9-a, 13) (DB).**

——**Ss. 11 (1) (a), 11 (1) (c) (i), 11 (2) and 10 (1)** —'Person from whom he has taken the sample'— Interpretation of — Means person present and in charge of shop from whom sample is taken— Notice to be given to such person only — Owner need not be given any notice even though liable. **1961 All LJ 186: 1961 All Cr R 134: 1961 All WR (HC) 273: 1962 (1) Cri LJ 685 (686) (Pr 3).**

——**Ss. 11 (1) (a), 10** — Sample taken from servant —Notice to master not necessary. See Prevention of Food Adulteration Act (1954), S. 10. **1962 (1) Cri LJ 726: AIR 1962 Ker 163 (DB).**

——**S. 11** — Notice in writing of taking sample for analysis should be given to accused from whom sample is taken — Notice addressed to first accused who was owner of shop, served on second accused from whom sample taken — Not sufficient service of notice on second accused — Failure to issue notice to second accused is vital defect vitiating prosecution. **1960 Ker LT 515: 1960 Ker LJ 753: 1960 Mad LJ (Cri) 595: 1960 Cri LJ 1467: AIR 1960 Ker 356 (358) (Pt C) (Pr 4) (DB).**

——**S. 11 (1) (a)** — Omission on the part of Food Inspector to serve a notice under Sec. 11 (1) (a) of the Act to the person from whom sample is purchased, does not vitiate the prosecution if the offence of selling adulterated food is otherwise established. AIR 1942 Mad 609, Foll. AIR 1960 Ker 356, Not foll. **1965 MPLJ (Notes) 45.**

——**S. 11 (1) (c) — Prevention of Food Adulteration Rules (1955), R. 22 — Quantity to be sent for analysis — Quantity less than 8 oz. sent — No prejudice to accused — No illegality.**

The quantity of 8 oz. mentioned in Rule 22 is only an approximate quantity. Where the Public Analyst was able to give his opinion by analysing 4 oz., there could have been no difficulty for the Central Food Laboratory to have analysed 4 oz., of milk. Therefore the fact that the prosecution did not make the entire contents of the bottle retained by the Food Inspector available for being sent for further analysis by the Central Food Laboratory, will not entitle the accused to be acquitted. **(1963) 1 Mad LJ 55: 1963 Mad LJ (Cr) 115: 76 Mad LW 210: 1963 (1) Cr LJ 688 (688, 689) (Pt B) (Prs 4, 9).**

——**S. 11 (1) (a)** — Taking of samples by Food Inspector for analysis — Notice in writing to person from whom sample is taken is imperative — Verbal notice not sufficient. **1964 (1) Cri LJ 605 (605, 606) (Pt A) (Pr 3) (Pat) (DB).**

——**S. 11 (1) — Three bottles of aerated waters purchased as sample — One of them sent to Public Analyst — Manner of obtaining sample held was improper and illegal — Object of provision — Omission in rules pointed out.**

Where the Food Inspector purchased three separate bottles of aerated water each said to contain 12 ozs., and one of these bottles was sent to the public analyst, the other two being dealt with according to the provisions of S. 11 (1):

Held, that this was an improper and illegal manner of obtaining the sample since obviously the contents of three separate and distinct bottles may not be uniform.

The clear intention is that if the sample of food taken is from a bulk supply the quantity taken must be sufficient to be divided into three sufficient portions for the proper quantity to be sent to the Public Analyst in accordance with the provisions of R. 22. The sample to be given to the accused is solely for his own protection. The third sample is kept in reserve for the matter to be decided by the Director of the Central Food Laboratory in case either party in prosecution is not satisfied with the report of the Public Analyst. **ILR (1962) 2 Punj 312: 1962 (2) Cr LJ 400: AIR 1962 Punj 419 (421) (Pt C) (Prs 10, 11, 12).**

——**S. 11** — Prevention of Food Adulteration Rules (1955), R. 20 — Milk sent to Public Analyst as sample — Proportion of formalin added in milk less in strength than prescribed by R. 20 — It should be shown that it was adequate to prevent disintegration. **1962 All Cr R 65: 1962 All WR (Sup) 17: 64 Pun LR 57: 1962 (2) Cri LJ 579 (580) (Pt A) (Pr 2) (Punj).**

[Overruled on another point in AIR 1966 Punj 328.]

3. Vendor declining to accept part of the sample — Sub-sec. (2).

——**Ss. 11 (2), 13 (5)** — Vendor declining to accept sample — Provisions of Sec. 11 (2) not complied with by inspector — Report of Public Analyst not challenged by accused — Proceedings against him not affected by non-compliance with Sec. 11 (2). **1963 All Cri R 468: 1963 All WR (HC) 768: 1964 All LJ 59.**

4. Evidence and proof.

——**S. 11 (3)** — Despatch of sample to Public Analyst — Presumption where there is evidence to the effect that the sample was sent by the Inspector under the Act to the Public Analyst, it is permissible to raise a presumption that the act of despatch was done regularly and properly. See Evidence Act (1872), S. 114. **(1957) All LJ 89: 1957 All WR (HC) 385.**

——**Ss. 11, 7, 16 (1) and 2 (1) (a)** — Prevention of Food Adulteration Rules (1955), R. 44 (b) — Milk purchased from accused and sent to Public Analyst as sample — Less than prescribed quantity of formalin added to milk — Sample analysed after a delay of ten months showing incriminating excess percentage of water — No evidence adduced by prosecution by calling the public analyst to show that omission to add requisite quantity of formalin and the delay in analysing the sample had

not or could not have brought about any difference in the sample — Held, conviction of accused for having sold milk with an incriminating excess percentage of water could not be maintained. AIR 1962 Mad 342, Rel. on. 1964 Mad LJ Cri 592: **(1964) 2 Mad LJ 428: 1964 (2) Crl LJ 97 (97, 98) (Prs 6, 7).**

——Ss. 11, 13 — There is presumption that formaline was in all the bottles in which samples of milk were taken. (1963) Raj LW 434: 1963 (2) Cr LJ 527: ILR (1963) 13 Raj 996: AIR 1963 Raj 233 (234) (Pt B) (Pr 9).

——S. 11 — Sample sealed by Inspector in presence of accused and received by analyst in a sealed condition — There is presumption that seals were not tampered with. 1963 Raj LW 434: 1963 (2) Cr LJ 527: ILR (1963) 13 Raj 996: AIR 1963 Raj 233 (234) (Pt C) (Pr 10).

——S. 11 (3) —Addition of preservative to article before sending sample to public analyst — Proof — Necessity of.

There should be evidence on oath that preservative was in fact added to the article of food sent to the Public Analyst. Simply mentioning it in the forwarding letter is not enough. 1962 Raj LW 279: 1963 (1) Cr LJ 221: ILR (1962) 12 Raj 626: AIR 1963 Raj 17 (18) (Pt B) (Pr 6).

——S. 11 and Rr. 14, 22 — Procedure for taking sample — No opportunity to tamper with sample — Mere sugestion of accused that tampering was possible — Validity of report not affected.

The elaborate procedure and precautions prescribed by Sec. 11 and Rr. 14 to 22 are clearly intended to secure absolute fair-play and eliminate improper and unhealthy practices. The accused has ample means and opportunities of checking up and contradicting the result of the analysis relied upon by the prosecution. In these circumstances, it will be hardly fair to discredit the report of the Public Analyst on a mere suggestion of the accused of theoretical possibility of tampering with the sample. **1961 Raj LW 111.**

5. Practice and procedure.

——Ss. 11 and 13 — Third part of sample retained by Food Inspector must be produced before Court when demanded to send for examination by Director — Failure to produce sample to test veracity of Public Analyst's report would give the accused benefit of doubt — Provisions are mandatory — Word 'shall' used in the section to be construed as 'must'. See Prevention of Food Adulteration Act (1954), S. 13. (1964) 9 Fac LR 150: 1964 All LJ 893: 1964 All Cri R 390: 1964 All WR (HC) 528.

——Ss. 11, 10, 2 (1)—Non-mixing of preservative in milk — Effect — See Prevention of Food Adulteration Act (1954), S. 10. 1964 (1) Cri LJ 834: AIR 1964 Him Pra 10.

——Ss. 11, 19 — Food Inspector taking sample from vendor and putting complaint on printed form — Effective part of complaint saying that Inspector found adulterated article in possession of vendor contained in closed bag with label of a certain company for sale — Complaint held did not disclose any offence against the company — Complaint must state that article of which sample was taken was supplied by the company and that this was done at the place where inspection was done in order to give the Court of that place jurisdiction. **1965 Cur LJ 843: AIR 1966 Punj 421 (422) (Pt B) (Pr 5).**

——Ss. 11, 23 — Rules under S. 23 — Rule 22 requiring 4 oz. of ghee to be sent for analysis— Only 1½ oz. sent — It is mere irregularity and in the absence of prejudice to him, accused cannot escape consequences of his wrongful act. 1960 Raj LW 369: ILR (1960) 10 Raj 984.

——Ss. 11 (1) (c) (ii) and 13 — Delay on part of Food Inspector in sending sample for analysis to Public Analyst, though phials containing samples immediately sealed — Delay held in no way prejudiced accused — Accused not making grievance at trial stage, cannot complain in appeal. 1960 Raj LW 369: ILR (1960) 10 Raj 984.

SECTION 12

——S. 12 — Whether sample sent to Public Analyst was tampered with — Procedure to be followed by accused.

If the accused wanted to challenge the fact that the sample that had been sent to the Public Analyst was not the same that had been taken from them, or that the sample that had been sent had been tampered with during the course of transit or during the period it was stored in the office of the Municipal Board, they could have sent their own sample for analysis as provided under S. 12. ILR (1964) 1 All 899: 1963 All LJ 1012: 1964 (1) Cri LJ 502: AIR 1964 All 199 (201) (Pt D) (Pr 13) (DB).

——S. 12 — Sanitary Inspector validly appointed Food Inspector is not a 'purchaser'. See Prevention of Food Adulteration Act (1954), S. 9. 1960 Cri LJ 569: AIR 1960 Andh Pra 282.

SECTION 13

SYNOPSIS

(Prevention of Food Adulteration Act (1954), S. 13.)

1. Dispatch of sample by Court to Central Food Laboratory for analysis — Sub-s. (2).
2. Certificate of Director of Central Food Laboratory to supersede the report of the Public Analyst — Sub-section (3).
3. Report or certificate to be used as evidence — Sub-s. (5).
4. Certificate to be final and conclusive — Proviso to sub-s. (5).
5. Public Analyst — Who is and whether his signature is sufficient on report.
6. Report of Public Analyst — Requirements and contents of.
7. Evidence and proof.
8. Practice and procedure.

1. Dispatch of sample by Court to Central Food Laboratory for analysis — Sub-s. (2).

——Ss. 13 and 11 — Third part of sample retained by Food Inspector must be produced before Court when demanded, to send for examination by Director — Failure to produce sample to test veracity of Public Analyst's report, would give the accused benefit of doubt — Provisions are mandatory — Word 'shall' used

in section to be construed as 'must' — Interpretation of Statutes — C. P. Code (1908), Preamble.

Held, that since the accused had been denied the right to get the sample tested by the Director, it would not be safe to hold him guilty of the offence and it would be proper to give the accused the benefit of doubt. Section 13 (2) of the Act gives an option both to the accused vendor and the complainant to have either the part of sample in their respective possession or the part of the sample in possession of the other side sent to the Director. **Held,** further that the provisions of Section 11 are mandatory. Section 11 (1) uses the word 'shall' and it is well established that the word 'shall' is normally to be construed as mandatory, that is, as 'must' and not as directory, that is, as 'may'. But the use of the word 'shall' is not conclusive. The relevant provisions of Sections 11 and 13 require that the third part shall be produced and, on application of the accused, the Court shall send it to the Director. Moreover, where an act affects private rights, the prescribed formalities must be strictly performed. Even if it be assumed that the duty to produce the third part of the sample retained by the Food Inspector under Section 11 (1) (c) (iii) is discretionary, the discretion would in law, be complied with a duty to exercise it when the occasion arises, namely, when a demand is made for its production. It is a duty which cannot be shirked or shelved or evaded. (1879-80) 5 AC 214; AIR 1952 SC 16 and AIR 1963 SC 1618, Rel. on. **(1964) 9 Fac LR 150: 1964 All LJ 893: 1964 All Cr R 390: 1964 All WR (HC) 528.**

——Ss. 13 (2) and 11 (1) (c), (i) and (iii) — Scope of S. 13 (2) — Magistrate cannot upon an application by one party call for sample retained with other party.

Section 13 (2) provides for making an application to the Court for sending one or the other sample to the Central Food Laboratory for a certificate. The section does not authorise the Magistrate upon an application of one party to call for the sample retained with the other party. And the true meaning of the sub-section is that the accused vendor can make an application for sending the sample retained with him and he cannot ask the Magistrate to call for the sample retained with the Food Inspector to be utilised upon his application. Similarly the complainant by his application may ask the Magistrate to send the sample retained with him but he cannot ask the Magistrate to call for the sample retained with the accused vendor.

Moreover Section 11 (2) gives key to the whole problem, when it provides that if at the stage of Section 11 the accused vendor has not accepted the sample mentioned in sub-cl. (i) of Section 11 (1) (c) then that sample will be divided into two parts as provided in Section 11 (2) for production in case legal proceedings are taken. This means that if having refused at that stage, later at the stage of Section 13 the accused vendor makes an application under Section 13 (2) then the sample held under S. 11 (2) will be utilised for making direction upon such an application. Otherwise Section 11 (2) would be reduced to an unnecessary appendage. **ILR (1961) 2 Cal 468.**

——S. 13 (2) — Accused vendor feeling that sample bottle forwarded to Food Analyst was tampered with — He should take steps to send the sample which is with him for analysis. ILR (1965) 2 Ker 301: 1966 Cri LJ 416: AIR 1966 Ker 70 (71) (Pt B) (Pr 5).

——Ss. 13 (5), 7 and 17 (1) — Certificate of Public analyst — Contents. **1962 Ker LT 95.**

2. Certificate of Director of Central Food Laboratory to supersede the report of the Public Analyst — Sub-s. (3).

——S. 13 — Certificate by Director of Central Food Laboratory and that of Public Analyst.

Under Section 13 (3) of the Act the certificate issued by the Director of the Central Food Laboratory under sub-section (2) shall supersede the report given by the public analyst under sub-section (1). **(1958) 2 Mad LJ 408: (1958) MLJ (Cr) 836.**

——S. 13 (3), (5) — Public Analyst's report — Supersession of — Certificate by Director of Central Food Laboratory not considered as final and conclusive and considered as defective for determining issue of adulteration — Public Analyst's report not superseded. **ILR (1964) 2 Punj 482: 66 Pun LR 1016: 1964 (2) Cri LJ 723: ILR (1964) 2 Punj 759: AIR 1964 Punj 520 (522) (Pt A) (Pr 8) (DB).**

3. Report or certificate to be used as evidence — Sub-sec. (5).

——S. 13 (5) — Provision permitting use of report of Analyst as evidence — Does not violate any principle of natural justice. **1964 All LJ 291: 1964 (2) Cri LJ 262 :ILR (1964) 1 All 741: 1965 All WR (HC) 14: 1965 All Cri R 48: AIR 1964 All 418 (419) (Pt D) (Pr 13) (DB).**

——Ss. 13 (5), 2 (i) and (xii), 7, 16 (i) (a), 23 (1) (b) (m) — Prevention of Food Adulteration Rules (1955), Rr. 5 and 44 (b) — Sale of mixed milk of cow and buffalo — Test of mean standard for cow and buffalo milk — Legality — Opinion of public Analyst — Value of.

Held, (i) that the conviction of the accused could not be sustained on the basis of the report of the public Analyst since his opinion was based upon the mean standard which was his own creation and had no statutory support (ii) that the report did not state what was the actual percentage of water in the sample and unless that was specified it was not possible for the Courts to test the accuracy of his opinion since standards vary. It is the Court not the public Analyst who is the ultimate judge of the question. The report must therefore be ignored. **1960 All WR (HC) 323: 1960 All LJ 318: 1960 All Cri R 214: 1960 Cri LJ 1056 (2): AIR 1960 All 504 (505) (Prs 5, 7).**

[Overruled by AIR 1961 All 590.]

——S. 13 (5) — Report of Public Analyst must be held to be correct unless superseded by Director of Central Food Laboratory. **1960 All WR (HC) 296: 1960 All Cr R 201: 1960 All LJ 419.**

——S. 13 (5) — Delay in making analysis — Effect.

There is no reason to suppose that as a result of the delay of one month and five days in making analysis of the sample, the proportion of the fat content and of other solids excluding fat would be altered or that the water contents would be increased. **1960 All WR (HC) 296: 1960 All Cr R 201: 1960 All LJ 419.**

——S. 13 (5) — Report of Public Analyst — Evidentiary value — Milk sent for analysis by sanitary Inspector after adding prescribed drops of formalin to each bottle and duly corking and

sealing it — Seals intact and unbroken when samples were received for analysis — Report of Pubic Analyst showing contents of fat and non-fat solids — Contents of non-fat solids all lumped together without giving quantitative break-up of each of the different kinds of non-fat solids — Certificate held satisfied requirements of law and was good — It cannot be stated that analysis was done only on date when report was signed. AIR 1951 Nag 191. Disting. and AIR 1960 Madh Pra 125 and (1897) 1 QB 80, Rel. on. **1961 Ker LT 735: (1961) 2 Ker LR 349: 1962 Mad LJ (Cr) 31: 1962 (1) Cr LJ 154 (155, 156) (Pt B) (Prs 6, 10) (Ker).**

——**Ss. 13 (1) and 7 (1)** — Accused prosecuted for selling adulterated curds — Sample analysed by Public Analyst alleged to contain 35.5 per cent added water — Sample obtained on 25-7-61 and analysed on 31-7-61 — No evidence to show that delay in analysis did not result in deterioration of sample — Conviction based on report of Public Analyst held not warranted — Precaution to be taken to prevent deterioration of sample explained. **(1964) 66 Punj LR 537.**

——**S. 13** — Report of public Analyst — Report is per se evidence — Failure to follow procedure in Section 13 (2) for challenging report — Report cannot be ruled out. **64 Punj LR 949: 1963 (1) Cri LJ 475: 1962 Cur LJ 487: AIR 1963 Punj 175 (177) (Pt C) (Pr 8) (DB).**

4. Certificate to be final and conclusive — Proviso to sub-s. (5).

——**S. 13 (5), Proviso** — Prosecution under Section 16 (1) read with Section 7 for preparation of Dalmot in adulterated Ghee — Certificate of Director of Central Food Laboratory expressing opinion that the ghee used in the sample seized from accused did not conform to prescribed standard — Data contained in certificate of no assistance in recording finding that the ghee used was adulterated — Magistrate acquitting accused disregarding Director's opinion cannot be said to have acted wrongly — Under proviso the certificate of the Director is final and conclusive evidence of facts stated therein but not of any opinion expressed — Court can reject such opinion in suitable circumstances. **1943 All WR (HC) 337: 1963 All Cri R 168: 1964 (2) Cri LJ 125: AIR 1964 All 349 (350) (Pr 4).**

——**S. 13 (5), Proviso** — Finality attaches to the facts found on factual data in respect of article by Director upon analysis of article — Whether article is adulterated has to be decided by Court — It is a question of law — Accused can show that article is not adulterated by showing that the essential ingredients are likely to disappear upon preparation of the article. **(1961) 2 Guj LR 735: 1962 (1) Cri LJ 417: AIR 1962 Guj 44 (45) (Pt A) (Pr 5) (DB).**

——**S. 13 (5), Proviso — Art. 14 of the Constitution is not violated.**

The proviso deprives the accused of his right to challenge the correctness of the facts stated in the certificate. But the object behind this provision is to have finality of a test and an analysis so as to prevent prolonged trials. The certificate of the Director does not conclude the trial. Whether the article of food is adulterated is to be decided by Court. It is a question of law which the Court alone can decide. Therefore the proviso to Section 13 (5) is not in violation of Article 14. **(1961) 2 Guj LR 735: 1962 (1) Cr LJ 417: AIR 1962 Guj 44 (47, 48) (Pt B) (Prs 8, 9) (DB).**

——**S. 13 (5). Proviso — Proviso is not unconstitutional as infringing Art. 19 (1) of the Constitution.**

Since the proviso to Section 13 (5) lays down a rule of evidence, it cannot be said to have the effect of a restriction or a restraint upon the right of an accused person to practice his profession or to carry on his occupation, trade or business. AIR 1957 SC 688. Applied. **(1961) 2 Guj LR 735: 1962 (1) Cr LJ 417: AIR 1962 Guj 44 (49, 50) (Pt C) (Prs 11, 13) (DB).**

——**S. 13 (5). Proviso** — Proviso to S. 13 (5) is not bad because it is contrary to the principles of natural justice and established principles of criminal jurisprudence. AIR 1958 All 865. Distinguished. **(1961) 2 Guj LR 735: 1962 (1) Cr LJ 417: AIR 1962 Guj 44 (50) (Pt D) (Pr 14) (DB).**

——**S. 13 (3) — Report of Central Food Laboratory — Evidentiary value.**

Finality and conclusiveness have been attached only to the facts stated in the report of the Central Food Laboratory. It is not, however, conclusive as to any other matter and it may still have to be ascertained whether adulteration as disclosed in the report of the Central Food Laboratory is due to certain factors for which an accused could not be held responsible. **(1965) 67 Pun LR 941.**

5. Public Analyst — Who is and whether his signature is sufficient on report.

●——**S. 13** — Report of public analyst — Public analyst need not himself undertake analysis, it is quite sufficient if he gets it done under his supervision. Mangaldas Raghavji Ruparel v. State of Maharashtra. **(1965) 2 SCR 894: (1965) 2 SCWR 561: (1965) 2 SCA 530: 1966 Cr LJ 106: AIR 1966 SC 128 (132) (Pt H) (Pr 11).**

——**S. 13 — Report of public analyst — Authenticity of.**

Where the actual analysis of the sample was done by the person whose qualifications were B. Sc., LL. B., had about 25 years' experience in analytical work of food in a laboratory and it was under the personal supervision of the Public Analyst, that the analysis was done.

Held, that there could be no doubt about the accuracy, authority and authenticity of the report. **1965 All WR (HC) 506: 1965 All Cr R 319: 1965 All LJ 1004: 1966 Cr LJ 122: AIR 1966 All 91 (92) (Pt A) (Pr 4).**

——**Ss. 13 and 11 (1) (a) — Prevention of Food Adulteration Rules (1955), Rr. 7 (3) and 12 — Forms under Forms III and VI — Validity — Actual analysis got done by assistant — Form of report held not ultra vires.**

The Form of Report presented under R. 7 (3), namely, Form III, is not in contravention of Form VI prescribed under Rule 12 and is not liable to be declared ultra vires under S. 11 (1) (a). Under Rule 7 (3) there is an option to the Public Analyst either to analyse the sample himself or cause it to be analysed by some other competent person. There is no real inconsistency between Form III as amended in 1960 and Form VI framed under Rule 12 inasmuch as the analysis done by a qualified assistant to the Public Analyst, under the latter's supervision would be deemed to be an analysis by the Public Analyst himself.

Where the Public Analyst caused the analysis of the sample to be done by his fully qualified

and experienced assistant under his own personal supervision.

Held, that there was nothing improper in doing so. **1965 All WR (HC) 506: 1965 All Cr R 319: 1965 All LJ 1004: 1966 Cr LJ 122: AIR 1966 All 91 (92) (Pt B) (Prs 5, 6).**

——**Ss. 13 (5), 8** — Public Analyst — Report submitted by — Validity — Case from U. P. — English version of Government gazette showing 3-8-1959 as date of appointment of 'A' as Public Analyst — Hindi version showing 3-4-1959 as date of his appointment — Report submitted by 'A' on 30-7-1959 — In case of divergence, English version superseded Hindi version — A held not to be public Analyst on 30-7-1959 — His report held void — Report could not be validated even under Section 13 (5) — Constitution of India, Arts. 348 (3) and 210. See Prevention of Food Adulteration Act (1954), S. 8. **1965 (1) Cri LJ 418: AIR 1965 All 170.**

●——**Ss. 13, 8** — Person appointed Public Analyst under U. P. Pure Food Act, 1950 — U. P. Act repealed by Prevention of Food Adulteration Act, 1954 — Person cannot be deemed a Public Analyst for the purposes of Prevention of Food Adulteration Act. See Prevention of Food Adulteration Act (1954), S. 8. **1960 Cri LJ 1175: AIR 1960 All 546 (FB).**

——**S. 13 (5)** — Public Analyst not required to analyse sample himself — His signature on report is sufficient. **ILR (1965) Guj 386: (1965) 6 Guj LR 406: 1966 Cri LJ 411: AIR 1966 Guj 83 (83) (Pt B) (Pr 2).**

——**S. 13 (1), (5) and (2)** — Report of Public Analyst — Analysis need not be made by himself — His signature on report is sufficient — Papers relied on by person analysing substance, may be used for lessening value of report — Nothing shown on papers lessening value of report nor any wrong method shown having been adopted by person analysing substance — Accused not even sending substance to Director of Central Food Laboratory for analysis.

Held, report could not be rejected. It would be wrong to reject the certificate of Public Analyst particularly when the accused has not sent the substance to the Director of the Central Food Laboratory, which he can do as provided in S. 13. **ILR (1965) Guj 391.**

6. Report of Public Analyst — Requirements and contents of.

●——**S. 13 — Report of public analyst — It is admissible in evidence.**

Sub-section (5) of Section 13 clearly makes the report of public analyst admissible in evidence. It is for the Court of fact which has to consider it, to attach to it what value it can. Under sub-section (2) of Section 13 the accused vendor or the complainant on payment of the prescribed fee, can apply to the Court for sending a sample of the allegedly adulterated commodity taken under Section 11 to the Director of Central Food Laboratory for a certificate. This certificate would supersede the report of the Public Analyst. This certificate is made admissible in evidence under sub-section (5) and is given finality of the facts contained therein by the proviso to that sub-section. That the certificate of the Public Analyst is not made conclusive only means that the Court of fact is free to act on certificate or not, as it thinks fit. Mangaldas Raghavji Ruparel v. State of Maharashtra, **(1965) 2 SCR 894: (1965) 2 SCWR 561: (1965) 2 SCA 530: 1966 Cr LJ 106: AIR 1966 SC 128 (131) (Pt E) (Pr 9).**

●——**S. 13** — Report of public analyst — Contents of — Public analyst need not state how calculations were made in arriving at result. (Obiter). ILR (1962) 1 Kerala 430, Criticised. Mangaldas Raghavji Ruparel v. State of Maharashtra, **(1965) 2 SCR 894: (1965) 2 SCWR 561: (1965) 2 SCA 530: 1966 Cr LJ 106: AIR 1966 SC 128 (132) (Pt F) (Pr 10).**

——**S. 13** — Report of Public Analyst — Contents — Result of analysis sufficient — Mode or particulars of analysis or tests applied not required. **1963 All LJ 765: 1964 (1) Cr LJ 626: AIR 1964 All 270 (278) (Pt C) (Prs 33, 34) (DB).**

——**S. 13** — Examination of milk 21 days after taking of sample — No certificate by analyst that constituents of milk had not changed — Report of analyst cannot be relied on for basing conviction upon. AIR 1951 Nag 191, Applied. **1962 (1) Cr LJ 150 (152) (Pt B) (Pr 8) (Him Pra).**

——S. 13 — Report by Public Analyst — Certificate to contain factual data — Evidentiary value of his opinion.

Under the proviso to Section 13 (5), Prevention of Food Adulteration Act any document purporting to be a report signed by a Public Analyst may be used as evidence of the facts stated therein in any proceeding under the Act. But the certificate of the Analyst should contain factual data and not merely his opinion as to what the data indicated about the nature of the article and if the certificate only gives the final opinion of the Analyst, and if such an opinion is treated to be conclusive about the nature of the article the evidence against the accused is really decided by the Public Analyst and not by the Court and it cannot be the position in law. **(1965) MLJ (Crl) 452 (Ker).**

——S. 13 — Report of Public Analyst that milk conformed to the standards fixed in Rules but water had been added to it — Requirements of the certificate — Evidentiary value — Evidence Act (I of 1872), S. 45.

The certificate of the Analyst should contain the factual data which the analysis should reveal and not merely the opinion of the Public Analyst as to what that data indicates about the nature of the article of food. Otherwise if such opinion were to be held to be conclusive evidence about the nature of the article of food the merit of the case against the accused would really be decided by the Public Analyst and not by the Court and the Court just gives its authority to the conclusion of the Public Analyst and this cannot be the position in law. **(1963) MLJ (Cr) 191: ILR (1962) 1 Ker 430: 1962 Ker LT 95: 1963 (1) Cr LJ 124 (125, 126) (Prs 7, 11) (Ker).**

——S. 13 (5) — Analyst's report — Contents of — Information given in should be complete — Prosecution should supplement if incomplete.

In cases under the Prevention of Food Adulteration Act where the main item of evidence to sustain the charge is the Analyst's report, the information given in the report should be as full and complete as could possibly be, so that, in a given case, the Court which is competent to treat the report as evidence may not be confronted with lacunae, which can only be filled in by examining the expert in Court. It is also the duty of the prosecutors where the information contained in the certificate is not full and complete to supplement it by citing the Analyst. **ILR (1962) 2 Ker 243.**

——S. 13 (5) — Report of Analyst — Contents — Data on which conclusion based — Necessity to furnish — Criminal P. C. (1898), S. 510 — Evidence Act (1872), Ss. 45 and 46.

It is not possible to lay down any hard and fast rule as to what particulars should be shown in the Analyst's report as the same may vary in each case. Thus, while it may be necessary to give the data regarding the proportion of the component parts in commodities like milk, ghee, etc. the position may be different where the article sold may be misbranded or entirely different from what it purported to be. In a prosecution under S. 7 (2) read with S. 16 of the Prevention of Food Adulteration Act on the ground that the accused sold the lac dhal as "thuvara parippu" the prosecution relied upon the certificate of the public analyst which stated that the commodity was not thuvara-parippu but lac dhal and this was arrived at as a result of microscopic exmination. The defence of the accused was that it was not possible to ascertain from the certificate as to what the characteristics noticed by the analyst were and it ought not to be relied upon.

Held, that the criticism was not unfounded. In view of the fact that the transaction was more than two years old, permission to examine the analyst was denied and the accused was acquitted. (1894) 1 QB 478; (1896) 1 QB 202; (1901) 2 QB 290; AIR 1956 All 520; AIR 1958 All 34; AIR 1960 All 504 and AIR 1957 Punj 709, Ref. **1962 Ker LT 199: (1962) 1 Ker LR 516.**

——Ss. 13 (5), 7 and 17 (1) — Certificate of Public Analyst — Contents — Evidence Act (1872), Ss. 45 and 46.

The certificate of Public Analyst should contain the factual data which the analysis would reveal and not merely his opinion as to what that data indicates about the nature of the article of food. In the absence of such data, the certificate cannot be accepted as conclusive proof for prosecuting the accused. (1948) 2 All ER 1056, Rel. on.

Where a public analyst in his report on a sample of milk analysed by him stated that the sample of milk conformed to the standard prescribed in Appendix B to R. 5 of Prevention of Food Adulteration rules, but contained not less than 7 per cent, of water without however giving the materials on which he formed his opinion,

Held, that the certificate could not be relied as conclusive proof. **1962 Ker LT 95: ILR (1962) 1 Kerala 430.**

——Ss. 13 (1) and (2), 7 (1), 16 (1) — Prevention of Food Adulteration Rules (1955), R. 20 and R. 22 (b) — Sale of adulterated milk — Charge based on Public Analyst's report — Public Analyst's report not conforming to essential statutory requirements — Acquittal upheld — Effect of — Delay in launching prosecution stated — Duty of Public Anaiyst indicated. See Prevention of Food Adulteration Act (1954), Section 7 (1). **1965 (2) Cri LJ 220: AIR 1965 Madh Pra 180 (DB).**

——Ss. 13, 23 — Law prescribing minimum contents of non-fat solids in milk — Contents of analyst's report — It is not necessary for the Public Analyst to give a quantitative break up of different kinds of non-fat solids in his report. See Prevention of Food Adulteration Act (1954), S. 23. **1960 Cri LJ 487: AIR 1960 Madh Pra 125.**

——S. 13 (5) — Report of public analyst — Admissibility in evidence — Statement in report that sample was kept in refrigerator before analysis — Statement forms part of report — Report admissible in evidence without production of analyst as witness — Court has power to call public analyst to Court. **ILR (1964) 1 Punj 575: 1964 (2) Cr LJ 722: 66 Punj LR 1138: AIR 1964 Punj 520 (523) (Pt B) (Prs 10, 11, 12).**

——S. 13 — Milk sent in sample for testing — Report of Public Analyst should indicate actual percentage of water in milk.

Where the report of the Public Analyst, to whom milk is sent for testing, does not give the actual percentage of water in the sample but simply mentions that the same is adulterated with 10 per cent. added water, the report deserves to be ignored. For, it is the Court, not the Public Analyst who is the ultimate Judge of the question. AIR 1960 All 504, Rel. on. **1962 All Cr R 65: 1962 All WR (Sup) 17: 64 Pun LR 57: 1962 (2) Cri LJ 579 (580) (Pt B) (Pr 3) (Punj).**

[**Overruled** in AIR 1966 Punj 328.]

——S. 13 — Report of Public Analyst — Reports are per se evidence.

Reports of the Public Analyst are per se evidence by reason of S. 13 of the Act. S. 13 (2) prescribes the procedure for challenging the report of the analyst, and if that procedure is not adopted by the accused the report of the Public Analyst becomes evidence and cannot then be ruled out of the case. **(1962) 64 Pun LR 949.**

——S. 13 — Report of public analyst — Time and date of examination of article should be mentioned.

Without the date of examination in the report by the Public Analyst it becomes difficult for the Court to know as to when the articles of food were examined by him, which leaves room for the argument that by the time they were analysed the articles of food had undergone a change. It is, therefore, desirable that the Public Analyst in report should mention the time and date of the examination of the articles of food sent to them for analysis, more so because under Section 13 (5) the report is used as evidence of the facts stated therein without the statement of the Public Analysts in Court. **1962 Raj LW 279: 1963 (1) Cri LJ 221: ILR (1962) 12 Raj 626: AIR 1963 Raj 17 (19) (Pt A) (Pr 5).**

——Ss. 13, 2 and R. 5 — Report of Public analyst — Sample stated to be not of standard purity — Details not given — Amounts to mere formal defect. **1961 Raj LW 111.**

7. Evidence and proof.

●**——Ss. 13, 7 (v), 16 (1) (ii)** — Conviction for sale of adulterated turmeric powder — Conviction based on report of public analyst — Report disclosing that two of three tests performed in public health laboratories revealed adulteration and microscopic examination showed presence of pollen stalks — Data in report cannot be said to be insufficient to found conviction — Prosecution cannot also fail on ground that public analyst was not examined as witness — See Prevention of Food Adulteration Act (1954), Section 7 (v). **(1965) 2 SCWR 561: (1965) 2 SCA 530: (1965) 2 SCR 895: AIR 1966 SC 128.**

●**——Ss. 13, 11** — Notice under Section 11 — Object of — Notice is to be served only on person from whom sample is taken — Notice has no bearing on admissibility of public analyst's report, in evidence — Report is admissible in evidence against all accused irrespective of consideration of notice — See Prevention of Food Adulteration Act. (1954), Section 11. **(1965) 2**

SCWR 561: (1965) 2 SCA 530: (1965) 2 SCR 895: AIR 1966 SC 128.

——**Ss. 13 and 16** — Company charged for sale of adulterated buffalo milk—Defence that it was not buffalo milk sold but toned milk — Company's entire business being at stake in all probability company would have taken steps to challenge public analyst's finding that sample sold was buffalo's mik by resorting to provisions of S. 13, Prevention of Food Aduteration Act, 1954 — Steps not taken — **Held,** it must be presumed that milk sold was buffalo milk and not toned milk. See Evidence Act (1872), S. 114. **1965 (2) Cri LJ 581: AIR 1965 All 525.**

——**S. 13 (1)** — Prevention of Food Adulteration Rules (1955), R. 7 — Analysis of sample by subordinate — Report by Public Analyst — Not inadmissible in evidence. **1964 All LJ 291: 1964 (2) Cri LJ 262: ILR (1964) 1 All 741: 1965 All WR (HC) 14: 1965 All Cri R 48: AIR 1964 All 418 (418) (Pt A) (Prs 4, 7) (DB).**

——**S. 13** — Assistant Analyst who actually examined samples, called as Court witness to give evidence on the prayer of accused — No examination of Public Analyst himself — Conviction held bad. **1966 Cri LJ 135: AIR 1966 Cal 51 (56) (Pt F) (Pr 29).**

——S. 13 — Prosecution under S. 7 — Proof — Oral evidence not inadmissible.

Although a special rule of evidence has been laid down in S. 13 of the Act it cannot abrogate the general rule of evidence, regarding proof of facts. Facts can always be proved by oral evidence and by the evidence of experts. **(1960) 1 Guj LR 119: (1960) 1 Guj HCR 102: 1960 Cri LJ 1582: AIR 1960 Guj 34 (36) (Pt A) (Pr 6) (DB).**

——**S. 13** — Period of three months elapsing between the seizure of milk and its analysis — Formalin in the quantities prescribed by Rules framed under the Act, added to the sample — Public Analyst stating in his report that 'no change had taken place in the constitution of the article that would interfere with the analysis' — It cannot be contended that, because there was a slight difference between the report of the public analyst and the subsequent report of the Central Food Laboratory, regarding the fat contents, the sample seized might have undergone by lapse of time such alteration by natural causes as to render the analysis unreliable with regard to proof of adulteration. **1964 Mad WN 166: (1964) 1 Mad LJ 443: 1964 Mad LJ (Cri) 357: 1964 (2) Cri LJ 560: AIR 1964 Mad 490 (490) (Pt B) (Pr 4).**

——**S. 13** — Analyst's report clearly stating that no change had taken place in the constitution of the milk sample and that the milk had been adulterated — Report clearly establishes the case of the prosecution — Accused, alleging that sample has undergone alteration by natural cause, must take steps for examining officer actually responsible for making the chemical analysis and to cross-examine him. No duty is cast upon prosecution to anticipate the defence and to exclude it by further expert testimony. **1964 Mad WN 166: (1964) 1 Mad LJ 443: 1964 Mad LJ (Cri) 357: 1964 (2) Cri LJ 560: AIR 1964 Mad 490 (490) (Pt C) (Pr 5).**

——**S. 13** — Question whether sample milk contains added water — Freezing point test is a fair and safe method of determining the question and the test by determining the specific gravity or the percentage of solids alone is not an absolutely reliable test—Freezing point test should be conducted when the milk is fresh and before it gets sour — Though addition of preservative such as formalin affects the freezing point, it generally varies between 0·510 to 0·560 with a mean of 0·530. **77 Mad LW 62: (1964) 2 Mad LJ 53: 1964 Mad LJ (Cri) 411: ILR (1964) 2 Mad 398: 1964 (2) Cri LJ 39: AIR 1964 Mad 301 (303) (Pt B) (Pr 9).**

——**S. 13** — Ground red chillies found adulterated with coal-tar dye of prohibited type — Quantity of dye not specified by Public Analyst in report — **Held,** specification was not necessary to sustain conviction, presence of foreign substance being absolutely prohibited. AIR 1962 Punj 524, Rel. on. **1965 (2) Cri LJ 534: AIR 1965 Punj 414 (414) (Pr 3).**

——**Ss. 13, 11** — There is presumption that formaline was in all the bottles in which samples of milk were taken. See Prevention of Food Adulteration Act (1954), S. 11. **1963 (2) Cri LJ 527: AIR 1963 Raj 233.**

——S. 13 (5) and 23 — Prevention of Food Adulteration Rules, Rr. 7 and 20 — Belated analysis of milk — Presumption — Report of public analyst bearing date a month after taking of sample — Inference.

In the case of analysis of milk the Court has to be satisfied that the public analyst has conducted the analysis without any avoidable delay. Further, in view of Rule 7 (3) of the Rules in a case where the date of analysis is not mentioned in the report and the report is dated more than a month after the date of receipt of the sample, the presumption would arise that the analysis was not done immediately on receipt of the sample, but much later. It is for the prosecution, therefore, to rebut that presumption by examining the Public Analyst. Otherwise, the report will not be accepted as showing the contents of fat and non-fat solids at the time of taking the sample. AIR 1951 Nag 191 and 1962 (1) Cri LJ 154 (Ker), Dist. **1964 (2) Cri LJ 363: AIR 1964 Tripura 48 (50, 51) (Pt A) (Prs 13, 15, 17).**

8. Practice and procedure.

——**S. 13** — Accused not challenging accuracy of report of Public Analyst — Objection on ground of his not being produced as witness cannot be raised. **ILR (1964) 1 All 741: 1965 All WR (HC) 14: 1965 All Cri R 48: 1964 All LJ 291: 1964 (2) Cri LJ 262: AIR 1964 All 418 (419) (Pt C) (Pr 10) (DB).**

——**Ss. 13 (5) and 11 (2)**—Vendor declining to accept sample—Provisions of S. 11 (2) not complied with—Report of Public Analyst not challenged by accused — Proceedings not affected by noncompliance. See Prevention of Food Adulteration Act (1954), S. 11 (2). **1964 All LJ 59.**

——S. 13 — Adulteration — Evidence — Report of Public Analyst — Method adopted not indicated — Report cannot be challenged in revision.

Where the Public Analyst has given precise figures regarding the quantity of the fatty acid which he found in the sample of the oil sent to him for analysis, the correctness of the report cannot be challenged in revision on the ground that he had not mentioned the exact method which he utilised to ascertain the results, especially where the report was not challenged in the lower Court under S. 13 (2). (1961) 1 Andh WR 28 (SN), Rel. on. **1963 (1) Cri LJ 109 (110, 111) (Pt A) (Pr 7) (Andh Pra).**

——**S. 13 (1)** — Report of Public Analyst — Requirements of — Form prescribed — Contents of. See Prevention of Food Adulteration Rules (1955), R. 7 (3). **(1960) 62 Bom LR 354.**

——S. 13 — Report of Public Analyst — Sending less quantity than prescribed under R. 22 for analysis — Effect — Rule 22 is recommendatory. See Prevention of Food Adulteration Rules (1955), R. 22. **(1960) 62 Bom LR 354.**

——S. 13 — Criminal P. C. (1898), S. 510 — Report of public analyst giving full factual data and no opinion — Conviction can be based upon it — Public analyst need not be examined — But record must show that Rr. 7 and 18 were duly complied with. AIR 1933 All 837; AIR 1961 Guj 120 and AIR 1944 Bom 321, Disting.; (1905) 92 LT 170, Rel. on. **(1964) 5 Guj LR 578: 1964 (2) Cri LJ 32: AIR 1964 Guj 136 (138, 139) (Prs 2, 3, 5, 7).**

——S. 13 (2) — Application by complainant under S. 13 (2) — Criminal P. C. (1898), S. 423 (1) (a) — Charges under S. 7 read with S. 16, P. F. A. Act — Sample of milk reported to be adulterated but actual percentage of water not stated—Complaint dismissed and accused acquitted — Dismissal held was wrong but retrial need not be ordered — Complainant can make application under S. 13 (2). See Prevention of Food Adulteration Act (1954), S. 2 (i), (1). **67 Punj LR 1250: 1966 Cri LJ 941: AIR 1966 Punj 328 (DB).**

——S. 13 (5) — Accused not asking for opportunity to cross-examine public analyst — Accused cannot complain that opportunity was not given — AIR 1951 Nag 191, Distinguished — Evidence Act (1872), S. 138 — Criminal P. C., Section 510. **1960 Raj LW 369: ILR (1960) 10 Raj 984.**

——S. 13 — Delay on part of Food Inspector in sending sample for analysis to Public Analyst, though phials containing samples immediately sealed — Delay held in no way prejudiced accused — Accused not making grievance at trial stage, cannot complain in appeal. See Prevention of Food Adulteration Act (1954), S. 11 (1) (c) (ii). **1960 Raj LW 369: ILR (1960) 10 Raj 984.**

SECTION 14

——S. 14 (1) (a) — Scope — Prosecution by Municipal Health Officer authorised under Madras Act (3 of 1939) — Validity — (Madras Public Health Act (3 of 1939), S. 16).

Under S. 16 of the Madras Public Health Act, the Health Officer can exercise the functions only under any of the Acts mentioned therein. The Food Adulteration Act, 1954, not being one of the Acts mentioned therein, the authorisation under S. 16 would not avail for the purpose of prosecution for an offence under the Food Adulteration Act, launched by the Health Officer of a Municipality. **1957 Mad WN 486: (1957) Mad LJ (Cr) 513: 1957 Cri LJ 1295 (1): 1957 Ker LT 967: AIR 1957 Mad 741 (741) (Pr 1).**

SECTION 16

SYNOPSIS

(Prevention of Food Adulteration Act (1954), S. 16.)

1. Scope and applicability.
2. Sub-section (1) — General.
3. Storing the article of food in contravention of the Act.
4. Selling the article of food in contravention of the Act.
5. Sale of article of food on behalf of another.
6. Preventing a Food Inspector from taking sample.
7. Possession by manufacturer of food of an adulterant.
8. Giving false warranty.
9. Evidence and proof.
10. Conviction and sentence.
11. Conviction and sentence for subsequent offence of similar nature.
12. Practice and procedure.

1. Scope and applicability.

● ——S. 16 — Person cannot assert any fundamental right under Art. 19 (1) of Constitution to carry on business in adulterated foodstuffs. See Constitution of India, Art. 19 (1). **AIR 1964 SC 1135.**

● ——S. 16 — Offence under — Validity of R. 5 of the Rules under the Act — Rule does not contravene Art. 14 of the Constitution. See Constitution of India, Art. 14. **1964 (2) Cri LJ 229: AIR 1964 SC 1135.**

——Ss. 16 and 17 (2) — Sale of adulterated food by company or by its employee — Vicarious liability of natural persons — It must be established that they had some nexus with crime **1964 All WR (HC) 779: 1965 All Cri R 25: 1965 All LJ 182: 1965 (2) Cri LJ 581: AIR 1965 All 525 (526) (Pt B) (Pr 7).**

——Ss. 16, 7 — Mixture of cow's milk and buffalo's milk — No standard fixed for such mixed milk — Standard prescribed for cow's milk and not that for buffalo's milk is to be applied.

Where no standard has been fixed under the rules for mixed milk of cow and buffalo, whether the sample taken is adulterated or not should be determined on the basis of the standard fixed under the rules for cow's milk. If the fat and non-fatty contents of the sample are less than those as fixed for cow's milk under the rules; then the sample must be held to be adulterated; but if the contents of the sample are above the standard prescribed for cow's milk then it will not be expedient in the interest of justice to convict the milk-vendor under S. 16/7 by holding that the milk was adulterated by applying the standard fixed for buffalo-milk. (1964) 2 Cri LJ 113 (Punj), Rel. on. **1964 All LJ 1147: 1965 (2) Cri LJ 346: AIR 1965 All 463 (464) (Pt A) (Pr 5).**

● ——S. 16 — U. P. Panchayat Raj Act (26 of 1947), S. 5-A (h) — Offence involving moral turpitude — Conviction for selling foodstuff mixed with prohibited colour-matter, under S. 7/16, Prevention of Food Adulteration Act — **Held,** offence did not involve moral turpitude. See Panchayats — U. P. Panchayat Raj Act (26 of 1947), S. 5-A (h). **1965 (2) Cri LJ 306: AIR 1965 All 382 (FB).**

——S. 16 — Sale of Butwal Ghee found to be not to standard prescribed for State of U. P. — **Held** conviction for offence under S. 7/16 was not maintainable as rule prescribing for one standard for whole of U. P. was unreasonable and any prohibition to sale of imported unadulterated ghee was also unreasonable. See Prevention of Food Adulteration Act (1954), S. 7. **1964 All WR (HC) 88.**

——S. 16 — Interpretation of penal statutes — Principles — Wholesale dealer selling under licence — Refusal to sell quantity less than a tin — No offence — Powers of Food Inspector under S. 10 (1) (a) (i). See Prevention of Food Adulteration Act (1954), S. 10 (1) (a) (i). **1960 All LJ 100.**

——S. 16 — Offence committed in 1955 — Prosecution launched by Assistant Medical Officer— Legality — **Held** he could not institute a complaint prior to the enforcement of the rules made by the State Government under the Act, as the

Government had not authorised him by that date to prosecute any person for an offence under the Act. See Prevention of Food Adulteration Act (1954), S. 7. **1957 Cri LJ 615: AIR 1957 All 343 (1) (DB).**

——**Ss. 16, 7, 2 (xiii), 10** — Milk not becoming property of accused at the time when sample was taken by Food Inspector — Food Inspector taking sample in exercise of his statutory powers — Accused held not guilty. See Prevention of Food Adulteration Act (1954), S. 10. **1964 (1) Cri LJ 334: AIR 1964 Him Pra 10.**

——**Ss. 16 (1) and 7 (1) — Water added to curd — Product sold as skimmed buttermilk — Vendor is guilty of offence under Act — Non-specification of standard for buttermilk does not absolve vendor from liability — Interpretation of Statutes — Penal provisions.**

Where water is added to curd so as to reduce the solid-not-fats contents in the product to less than 8.5 per cent, and it is sold as skimmed buttermilk, the seller commits an offence under S. 16 (1) read with S. 7 (1) of the Act.

The non-specification of a standard for buttermilk does not absolve a vendor from conforming to the standard that is necessarily implied in respect of buttermilk. It is true that a strict construction should be adopted regarding a penal statute and that it is only when the thing charged is an offence within the plain meaning of the words used in the statute that Courts should hold that any offence is committed and that whenever there is doubt the construction favourable to the accused should be preferred. But there can also be no doubt that so far as possible, Courts should adopt the interpretation which will promote and further the object and policy of the legislation and suppress the mischief which the statute was enacted to prevent. AIR 1961 SC 1494, Rel. on. **1964 Ker LT 238: ILR (1964) 1 Ker 304.**

——**S. 16** — Person accused of any offence — Meaning of — Purchase of milk by Sanitary Inspector for testing whether it was adulterated — Milkman not accused. See Constitution of India, Art. 20 (3). **1962 (1) Cr LJ 41: AIR 1962 Madh Pra 17.**

——**Ss. 16, 7 and 10** — Adulteration of milk — Taking signature of two witnesses at the time of seizure of sample as far as possible — Procedure — Tests of adulteration — Freezing point test is fair and safe method of determining added water. See Prevention of Food Adulteration Act (1954), S. 7. **78 Mad LW 476: (1965) 2 Mad LJ 381: 1965 Mad LJ (Cri) 824.**

——**Ss. 16, 7** — Applicability — Sections whether apply to servant—Sections will not primarily apply to the servant unless he sold food for his own benefit and the servant selling the food on behalf of his master can only be made liable for aid or abetment on proof of guilty knowledge. AIR 1930 Cal 295, Dissented from. See Prevention of Food Adulteration Act (1954), S. 7. **1959 Cri LJ 608: AIR 1959 Mad 185 (DB).**

[Overruled in AIR 1961 SC 631.]

——**Ss. 16 (1) (a) (i), 10 (7)** — Mandatory provisions of S. 10 (7) not complied with — Accused tried under S. 16 (1) (a) (i), held, entitled to acquittal. See Prevention of Food Adulteration. Act (1954), S. 10 (7). **1965 (2) Cri LJ 406: AIR 1965 Punj 366.**

——**Ss. 16, 2 (v), 7** — Occasional use or Asafoetida (Hing) for agricultural purposes does not take it out of category of food. See Prevention of Food Adulteration Act (1954), S. 2 (v). **1964 (2) Cri LJ 449: AIR 1964 Punj 427.**

——**S. 16 — Applicability — Servant not liable under the provisions unless he sells for his own benefit — Servant selling on behalf of master liable only as abettor.** See Prevention of Food Adulteration Act (1954), S. 7. **1962 (2) Cri LJ 400: AIR 1962 Punj 419.**

——**S. 16** — Conviction under — Although accused applying for renewal of licence and depositing fees it was found that he had never obtained a licence — Offence does not involve moral turpitude so as to disqualify him under S. 11 (g), Rajasthan Panchayat Act. See Panchayats — Rajasthan Panchayat Act (21 of 1953), S. 11 (g). **ILR (1965) 15 Raj 1045: AIR 1966 Raj 42.**

2. Sub-section (1) — General.

——**S. 16** — Evidence Act (1872), Ss. 114 and 3, 'Proved' — Company charged for sale of adulterated buffalo milk — Defence, that it was not buffalo-milk sold but toned milk — Company's entire business being at stake in all probability company would have taken steps to challenge public analyst's finding that sample sold was buffalo's milk by resorting to provisions of Section 13, Prevention of Food Adulteration Act, 1954 — Steps not taken — **Held,** it must be presumed that milk sold was buffalo milk and not toned milk. See Evidence Act (1872), S. 114. **1965 (2) Cri LJ 581: AIR 1965 All 525.**

——**Ss. 16, 7 (1) — Prevention of Food Adulteration Rules (1955), R. 7 — Report of Public Analyst — Analysis caused to be done by Public Analyst — Report signed by Public Analyst — Certificate is in form prescribed as subsequently amended — Acquittal based on overlooking amendment in Form III, set aside.**

Held, that Form No. III as it originally stood was amended by the Government of India's notification published in the U. P. Government Gazette dated June 11, 1962, and the words "I have analysed the aforementioned sample" were substituted by the words "I have caused to be analysed the aforementioned sample". This amendment in the form was overlooked by the learned Sessions Judge when he held that the report of the Public Analyst was not in the form prescribed under the rules. Thus it must be held that the report submitted by the Public Analyst was in accordance with law and the learned Sessions Judge was wrong in holding it otherwise, and acquitting the accused on that ground. AIR 1964 All 418, Rel. on.

The argument that the sample was analysed on the day next it was taken and it could not have remained in a proper condition for analysis could not be accepted in view of the statement of the Food Inspector that a preservative formation was added to the sample. And therefore, the report of the Analyst could not have been doubted on the ground of the sample having undergone a change. The report of the Analyst being thus admissible in evidence, the accused must be held to have committed the offence punishable under S. 16 read with S. 7 (1) of the Food Adulteration Act. AIR 1951 Nag 191, Dist. **(1965) All LJ 1053: 1965 All WR (HC) 816: 1965 All Cri R 545.**

——**Ss. 16 (1) (a) and 23 (1) (b)** — Prevention of Food Adulteration Rules (1955), Appendix B, Clauses A. 11.06, A. 11.01.01 and A. 11.01.03 — Amendment made in Cl. A. 11.06 on 9-12-1958 — Effect of—Stardard of buffalo milk made applicable to Dahi of undeclared source — Amendment is substantive law though garbed as a rule of evidence — Hence not retrospective in operation — Rule does not create new offence and is not ultra vires the Act. See Prevention of

Food Adulteration Act (1954), S. 7. **1964 (2) Cri LJ 281: AIR 1964 Cal 384.**

——Ss. 16 and 2 (i) (1) — No indication whether milk is that of buffalo or cow — Percentage of fats less than that prescribed — Milk is adulterated — Percentage of water contents is no test.

According to paragraph A. 11.01.03 of Appendix B to the Prevention of Food Adulteration Rules, 1955, where milk other than skimmed milk is sold or offered for sale without any indication as to whether it is derived from cow, buffalo, goat or sheep the standard prescribed for buffalo milk shall apply.

The question as to whether milk is adulterated or not does not at all depend on the quantity of water. A sample of milk will be deemed to be adulterated if either the milk fats or the non-fatty solids be less than the prescribed minimum. AIR 1961 All 590 (FB), Relied on. **1961 (1) Cr LJ 150 (HP).**

——Ss. 16 (1) and 7 — Considerable delay in analysis of sample of milk — Formalin not added to sample — No presumption that requirement of rules was satisfied — Offence of dilution of milk not committed. See Prevention of Food Adulteration Act (1954), S. 7. **1965 (1) Cri LJ 176: AIR 1965 Ker 49 (DB).**

——Ss. 16 (1) (a) and 24 — Prevention of Food Adulteration Rules Appendix B — Rules A.01.01 and 47 — Aerated water — Use of only sugar allowed as sweetening agent — Admixture of saccharine — Aerated water must be deemed to be adulterated. See Prevention of Food Adulteration Rules, Appendix B. **ILR (1964) 2 Ker 644.**

——S. 16 (1) (a) — Kerala Prevention of Food Adulteration Rules (1957), Rr. 14, 10 — Period of license under Rule 14 — Calculation of — Date specified in license and not date of issue of license should be taken as starting point — Continuation of trade beyond two years from specified date without license is in contravention of Rule 10. See Kerala Prevention of Food Adulteration Rules (1957), R. 14. **1962 Ker LT 575.**

——S. 16 (1) (a) — Cocoanut oil is food — Cocoanut oil found to be adulterated — Vendor held guilty. See Prevention of Food Adulteration Act (1954), S. 2 (v). **1964 MPLJ (Notes) 91.**

——Ss. 16 (1) (a), 2 (i) (1), 7 (i) and 19 — Ghee of S. G. Mark brand sold from sealed tins — Ghee found to be adulterated — Vendor guilty of offence under Section 7 — That the vendor was ignorant about quality of ghee is no defence under Section 19. See Prevention of Food Adulteration Act (1954), Section 2 (i) (1). **1964 MPLJ (Notes) 81.**

——Ss. 16, 7 and 20, Rr. 44 (c) and 46 of Rules of 1955 — Adulteration of ghee — Reichert value if 22.5 per cent — Analyst's certificate — Adulteration of 13 per cent extraneous fat — Proof of adulteration — Food Inspector authorised to institute prosecutions — General authority — Complaint filed under Sections 7 and 16 and Rr. 44 (c) and 46 or under R. 44 (b) — Want of specific sanction for contravention of items in terms — Prosecution not affected. **(1965) 2 MLJ 403: 1965 Mad LJ (Cri) 796: 1966 Cri LJ 668: AIR 1966 Mad 194 (196, 197) (Pt B) (Prs 7, 9, 10).**

——S. 16 (1) (g) (i) — Scope — Butter obtained from goats' milk — Sale of — Offence.

'Butter' as defined in the rules framed under the Prevention of Food Adulteration Act, 1954, means the product prepared from the milk or cream of cow or buffalo or both. Hence even if there is some admixture of butter prepared from goats' milk with other butter, such stuff will not fall within the definition of butter as defined by the rules and the sale of such stuff would not be a punishable offence under the Act. **(1960) MLJ (Cr) 841: 1961 Mad WN 195 (1): (1961) 1 MLJ 20: 1961 All WR (Sup) 4 (1): 1961 All Cr R 22 (1): 1961 (1) Cr LJ 675: AIR 1961 Mad 198 (199) (Pr 2).**

——S. 16 (1) and R. 49 (2) of the Rules — Keeping chilly-paste in an imperfectly tinned container in a hotel — If an offence.

Rule 49 (2) will apply to any food or ingredient of food which is ultimately intended for sale whether directly as such or as part of some other food prepared with it. Hence, where chilly-paste is kept in an imperfect container (untinned container) in a hotel, the rule will be attracted as the chilly-paste is intended for use in the preparation made in the hotel. **(1960) 1 MLJ 86: (1960) MLJ (Cr) 63.**

——S. 16 — Ground chillies sold by accused alleged to be highly adulterated with wheat bran — Report of Public Analyst merely stating that sample was highly adulterated — Percentage of wheat bran not specified — Acquittal of accused held proper. See Prevention of Food Adulteration Act (1954), S. 7. **1964 (2) Cri LJ 578: AIR 1964 Punj 475 (DB).**

——Ss. 16 (1) (a) and 23 (2) — Punjab Prevention of Food Adulteration Rules (1955), App. B Item A 11, O. 1, O. 1 — Mixed milk of cow and buffalo — Containing 8.2 per cent. of milk solids not fat — Mixture is adulterated. See Prevention of Food Adulteration Act (1954), S. 2 (i) (1). **1964 (2) Cri LJ 202: AIR 1964 Punj 332 (DB).**

——S. 16 (1) (a) — Adulterated — Vinegar found containing sulphuric acid — Presence of sulphuric and specifically prohibited — Public Analyst need not mention exact quantity of sulphuric acid present. See Prevention of Food Adulteration Act (1954), S. 2 (1) (h). **1962 (2) Cri LJ 778: AIR 1962 Punj 524 (DB).**

——S. 16 (1) (a) — Application of its mind by sanctioning authority to facts of a case — Sanction in prescribed form not showing facts — Letter issued to the Magistrate simultaneously giving all the facts — Authority held had applied its mind. See Prevention of Food Adultration Act (1954), S. 20 (1). **(1963) Raj LW 43.**

——S. 16 — Accused running a tea stall — Milk kept for preparing tea — Tea not a milk product — No contravention of R. 50 — Conviction under S. 16 read with R. 50 held not proper. 1961 Raj LW 610.

——S. 16 (1) (a), 7 (ii), 2 (ix) (g) — Misbranding per se is offence — As far as Section 2 (ix) (g) is concerned, even if mustard oil of one brand is passed off as the mustard oil of another brand in sealed tins, it will amount to misbranding. See Prevention of Food Adulteration Act (1954), Section 7 (ii). **1961 (2) Cr LJ 152: AIR 1961 Tripura 18.**

3. Storing the article of food in contravention of the Act.

——Ss. 16, 2 (xiii), 7, 10 — Mere storing of milk of quality below the prescribed standard not offence — Sale of such milk even to Food Inspector for analysis is offence. See Prevention of Food Adulteration Act (1954), S. 2 (xiii). **1964 (1) Cri LJ 502: AIR 1964 All 199 (DB).**

——S. 16 (1) (a) — Adulterated goods stored not for purposes of sale — No offence. See Prevention of Food Adulteration Act (1954), S. 7. **1962 (1) Cr LJ 120: AIR 1962 All 82 (DB).**

——S. 16 — If the definition in Section 2 (v) is read as a whole, it appears that an article which is not ordinarily used as food or drink is not to be treated as food. See Prevention of Food Adulteration Act (1954), Section 2 (v). **1960 All LJ 94.**

——Ss. 16, 7 — "Store" — Meaning of. See Prevention of Food Adulteration Act (1954), Section 7. **1963 (1) Cri LJ 349: AIR 1963 Assam 28.**

● ——Ss. 16 (1) (a), 2 (5), 2 (13) and 23 (1) (f) —Prevention of Food Adulteration Rules (1955), R. 44-A, Cl. (b) — Kesari dal — Possession for purpose of sale not for human consumption or use but as fodder — Possession is punishable under Section 16 (1) (a). Govinda Pillai v. Padmanabha Pillai. **1964 Ker LT 1023: 1965 Ker LJ 18: ILR (1965) 1 Ker 12: 1965 Mad LJ (Cr) 23: (1965) 1 Ker LR 10: 1965 (1) Cr LJ 446: AIR 1965 Ker 123 (125, 127) (Pt A) (Prs 4, 5, 7, 8, 10, 12, 13, 14) (FB).**

——S. 16 (1) (a) and (d) — Storage of tea waste which is not an article of food by person who is not manufacturer of food — No offence even if the storage is for purposes of sale. **1961 Mad LJ (Cr) 51: 1960 Ker LT 743: 1960 Ker LJ 921: ILR (1960) Ker 1426: 1961 (1) Cr LJ 376: AIR 1961 Ker 84 (86) (Pt B) (Pr 7).**

——Ss. 16, 7 — Conviction for storing adulterated food — Storing must be for sale. See Prevention of Food Adulteration Act (1954), Section 7. **1959 Cri LJ 712: AIR 1959 Ker 190 (DB).**

——Ss. 16 (1) (a) (i), 2 (ix) (j), 7 (2) and R. 29 of Rules — Packets exposed in almirah in a shop — Not samples — Implication — Storage for sale of adulterated food — Offence — **Held,** under Section 16 (1) (a) even a storage for sale of any articles of food in contravention of the provisions of the Act is a criminal offence. See Prevention of Food Adulteration Act (1954), S. 2 (ix) (j). **1964 MLJ (Cr) 695 (Mad).**

4. Selling the article of food in contravention of the Act.

——S. 16 (1) (a) and Rr. 44 (g), 5 and Appendix B, Para. A.01.01 — Sale of aerated water sweetened with saccharine — Conflict between provisions of Appendix B, Para. A.01.01, and provisions of Rule 44 (g) — Rule of harmonious construction — Aerated water sweetened with saccharine though deviation from standard prescribed in Para. A.01.01, is protected by Rule 44 and sale of such water is no offence. **1964 All LJ 1040: 1965 (2) Cr LJ 451 (2): AIR 1965 All 486 (487) (Prs 7, 8).**

——Ss. 16, 2 (v), 7 and 2 (xiii) — Sale of Dal Kesari for analysis purpose is not an offence under Act — Sale — Meaning of — Storing of Dal Kesari also not an offence. **1965 (1) Cri LJ 537: AIR 1965 All 231 (232, 233) (Prs 4 to 8).**

——S. 16 (1) — Accused found selling foodstuff coloured with coaltar dye — Accused is guilty under Section 7 (1) read with Section 16 (1). See Prevention of Food Adulteration Act (1954), S. 7 (1). **1964 All WR (HC) 438.**

——S. 16 — Milk sold as mixture of cow and buffalo's milk — Ascertainment of ratio in which two milks were mixed not possible — Sample must satisfy minimum standard fixed for cow's milk. See Prevention of Food Adulteration Act (1954), Section 7. **1964 All WR (HC) 374.**

● ——Ss. 16, 2 (i), 7, 23 — "Adulterated milk" — Sale of mixture of buffalo milk and cow milk — Proportion of mixture not known — On analysis sample found to contain less than prescribed minimum of non-fatty solids for cow milk — Mixture is adulterated milk within meaning of Section 2 (i) (l) — Accused is guilty under Section 16 read with Section 7 — Criminal Appeal No. 1940 of 1960 (All) and 1960 All LJ 318; AIR 1960 All 504; 1960 Cri LJ 1056 (2), **Overruled.** See Prevention of Food Adulteration Act (1954), S. 2 (i). **1961 (2) Cri LJ 737: AIR 1961 All 590 (FB).**

——Ss. 16 (1), 7 and 2 (ix) — Rules under Act, R. 44 (h) — Article of food — Sale of adulterated turmeric powder for external use — Whether offence under Rule 44 (h) is committed — Accused held not guilty. See Prevention of Food Adulteration Act (1954), S. 2 (ix) (a). **AIR 1958 Andh Pra 681.**

[**Overruled** in AIR 1965 Andh Pra 118.]

——Ss. 16, 2 (1) (l), 7 — Prevention of Food Adulteration Rules (1955), Rules 43 and 44 and App. B, Item A.11.05 — Prescribed standard of article — Butter for sale found below standard prescribed — Butter is adulterated — Person selling such butter comes under penal provision of Section 16 read with Section 7 — Rules 43 and 44 are not applicable. See Prevention of Food Adulteration Act (1954), Section 2 (1) (l). **1962 (1) Cri LJ 582: AIR 1962 Bom 104.**

——Ss. 16 (1) and 7 (1) and Appendix B, Clause A.11.03 — Adding water to butter milk and selling product — Whether amounts to an offence. See Prevention of Food Adulteration Act (1954), Section 7 (1). **(1965) MLJ (Cr) 294 (Ker).**

——S. 16 (1) (a) (ii) — Sample taken under Section 10 — Transaction is not a sale — Person from whom sample has been taken cannot be convicted of offence under Section 16 (1) (a) (ii). See Prevention of Food Adulteration Act (1954), S. 2 (xiii). **1962 (1) Cr LJ 152 (Ker).**

[**Overruled** in AIR 1966 SC 128.]

——S. 16 (1) (a), 7 (1), 2 (v), 2 (ix) — Article containing 95.9 per cent Calcium Carbonate and rest sand offered for sale to public as black gram flour — Article offered is "misbranded food' and not food — Offence — Conviction under Section 7 (1) read with Section 16 (1) (a) should follow. See Prevention of Food Adulteration Act (1954), Section 7 (1). **1959 Cri LJ 840: AIR 1959 Ker 217 (DB).**

——S. 16 (1) (a) (ii) — Vendor selling mixture of cow's and buffalow's milk — No standard prescribed — Standard how to be calculated. At all events a person selling what he indicates as a mixture, without showing the proportion of the components, is liable, it the percentage found on analysis, is below the one prescribed for the thinner or the thinnest of the two or three components. AIR 1960 All 504, held **Overruled** by AIR 1961 All 590 and Dissented from. **1962 MPC 67: 1962 MPLJ (Notes) 161: 1962 Jab LJ 1046: 1962 (2) Cri LJ 681 (682) (Pr 5).**

——S. 16 (1) (a) (ii) — Sale of mixture of cow and buffalo's milk — Percentage of fat contents should not be below percentage prescribed for cow's milk — Sale of milk below standard is punishsble. **1962 MPLJ (Notes) 161: 1962 MPC 67: 1962 Jab LJ 1046: 1962 (2) Cri LJ 681.**

——Ss. 16 (1), 2 (v) (a), 2 (xiii), 7 — Prevention of Food Adulteration Rules (1955), R. 29 (as amended) — Sale of adulterated asafoetida for analysis — Sale used to be made on under-

standing that it is not for human consumption — Crux of offence is in sale of food — "Sale" covers not merely sale for human consumption. See Prevention of Food Adulteration Act (1954), S. 2 (v) (a). **1965 (1) Cri LJ 309: AIR 1965 Mad 98.**

——**S. 16 (1) (a)** — Sale of adulterated milk for purpose of analysis — Whether milk was ordinarily intended for sale is not decisive or material in deciding guilt of accused and need not be proved. **(1965) Raj LW 328: ILR (1965) 15 Raj 458.**

5. Sale of article of food on behalf of another.

●——**Ss. 16, 7, 19** — Sale of adulterated article by servant of owner — Servant is liable without proof of mens rea. See Prevention of Food Adulteration Act (1954), S. 7. **1961 (1) Cri LJ 747: AIR 1961 SC 631.**

——**Ss. 16 and 19** — Sale of adulterated article by servant on behalf of master — Conviction of servant — Validity. See Prevention of Food Adulteration Act (37 of 1954), Section 2 (13). **ILR (1961) 2 All 95.**

——**S. 16** — Liability under —Person on whose behalf adulterated food is sold can be punished. See Prevention of Food Adulteration Act (1954), S. 7. **1960 Cr LJ 198: AIR 1960 All 117 (DB).**

[**Overruled** on another point in AIR 1960 All 546 (FB).]

——**S. 16 (1)** — "Sale" — Carrier of milk to be delivered to hotel keeper — Carrier merely an agent having no authority to sell milk — Food Inspector obtaining milk from agent — Milk found adulterated — **Held,** there being no sale, agent could not be convicted. See Prevention of Food Adulteration Act (1954), Section 2 (13). **(1965) 2 Andh LT 282: 1965 Mad LJ (Cri) 882: (1965) 2 Andh WR 476: 1966 Cri LJ 1122: AIR 1966 Andh Pra 302.**

——**Ss. 16 (1), 17 and 19 — Scope of — Prosecution against one of the partners of a firm carrying on groundnut oil business for offence under Section 16 (1) read with S. 7 — Plea that he was selling oil in the condition in which he had bought it and did not know that it was adulterated — Further plea that partner cannot be charged under Act — Sustainability.**

Held: Under Section 17 of the Prevention of Food Adulteration Act not only the company but aso every person who at the time the offence was committed was in charge of and was responsible to the company for the conduct of the business of the company, shall be liable to prosecution. The plea that he was not aware that the oil in question was adulterated cannot be entertained in view of the express provisions of Section 19 of the Act which specify what defences are open and what are not, to a person charged with an offence pertaining to the sale of adulterated food. The acquittal of the accused is bad in law and cannot be allowed to stand. **(1959) 2 Andh WR 479: 1959 Mad LJ (Cr) 858.**

——**S. 16 (1) (a)** — Sale of adulterated article of food by servant — Liability of master under, S. 7. See Prevention of Food Adulteration Act (1954), S. 7. **1959 Cri LJ 1306: AIR 1959 Bom 497.**

——**S. 16** — Liability of servant — Servant is not liable under the provisions. See Prevention of Food Adulteration Act (1954), S. 7. **1960 Cri LJ 69: AIR 1960 Ker 13 (DB).**

——**Ss. 16 and 2** — Servant selling adulterated food on behalf of master — Liability of — The servant cannot be found guilty under Sections 7 and 16. **(1960) 2 Ker LR 161: (1961) MLJ (Cri) 100 (Ker).**

——**Ss. 16 (1) and 7** — Sale of adulterated milk by salesman of co-operative milk supply society — Salesman cannot be convicted. **1961 MLJ (Cr) 100: 1960 Ker LT 773.**

——**Ss. 16 (1), 17 (1)** — Offence by Co-operative Society — Secretary having only supervisory duty — Not a person responsible to society — Separate conviction of society and secretary — A Co-operative Society and its secretary can be separately convicted for an offence under Section 16 (1). See Prevention of Food Adulteration Act (1954), S. 17 (1). **1958 Cri LJ 527: AIR 1958 Mad 183.**

——**S. 16 (1) (a)** — Prevention of Food Adulteration Rules (1955), Rule 50 — Accused found selling sweets etc., in a shop without licence — Trial Court acquitting accused on ground that he was not owner of shop — **Held,** that accused was owner of shop and that, even if he was not owner, he was still guilty of offence with which he was charged — Servant liable without proof of mens rea — Acquittal set aside. AIR 1961 SC 631, Rel. on. **1965 (1) Cri LJ 581: AIR 1965 Pat 177 (177) (Pr 2).**

——**Ss. 16 (1) (a), 7 (v)** — (Bihar) Prevention of Food Adulteration Rules (1955), R. 50 — Accused found selling articles of food in shop without necessary licence — Presumption is shop was of accused person unless defence was that accused was not the owner of shop — In any case, accused is liable for contravention of S. 7 (v) read with S. 16 (1) (a) and R. 50. See Prevention of Food Adulteration Act (1954), S. 7 (v). **1965 (1) Cri LJ 580: AIR 1965 Pat 176.**

——**S. 16 (1) (a)** — Sale of adulterated article of food — Person selling is liable to be punished though he is not owner of article. See Prevention of Food Adulteration Act (1954), S. 7 (1). **1965 Raj LW 382: 1966 Cri LJ 1057: ILR (1965) 15 Raj 820: AIR 1966 Raj 203.**

——**S. 16 (1) (a)** — Sale of adulterated milk belonging to another — Person selling is liable to be punished. **1965 Raj LW 328: ILR (1965) 15 Raj 458.**

——**Ss. 16, 7 — Liability of master and servant — There is no distinction.**

Obiter:— Under Ss. 7 and 16 of the Act, no distinction can be drawn between the master, the principal, the servant and the commission agent.

The legislature is concerned to make the act of selling an act which is imputable both to the person with whose hand it is committed and to any other person, if such there be, on whose behalf it is committed. AIR 1930 Cal 295, Foll; AIR 1959 Mad 185, Not foll. **1960 Raj LW 369: ILR (1960) 10 Raj 984.**

——**Ss. 16, 7 — Commission agent selling on behalf of another is liable — There is no question of mens rea.** The commission agents may sell goods on behalf of owners belonging to other places which may even be outside the State or even outside India; and it will be indeed opening a wide door to the evil to be guarded against, if it is held that a commission agent should be treated differently from the owner and should not be held absolutely liable, but liable only on proof of mens rea. **1960 Raj LW 369: ILR (1960) 10 Raj 984.**

6. Preventing a Food Inspector from taking a sample.

——**S. 16 (b) — Applicability — Disappearance of seller from shop — If prevention.**

If a person selling the article leaves the shop he prevents the Food Inspector from taking sample as authorised by the Act. The fact that the Food Inspector could have taken away the entire stock under S. 10 (4) would not amount to taking of sample. In cases of prevention overt act on the part of the accused is not necessary. AIR 1954 Mad 199, Rel. on; AIR 1957 Punj 99, Diss. from. **ILR (1960) 2 All 755: 1960 All Cr R 310: 1960 All LJ 649: 1960 All WR (HC) 490: 1961 (1) Cri LJ 204: AIR 1961 All 103 (104) (Prs 7, 8) (DB).**

——S. 16 (1) (b) — Refusal of vendor to receive price of sample and notice and to sign receipt and labels — Offence.

The refusal of the vendors to receive the price of the sample and the notice and to sign the receipt and the labels does not amount to their preventing the Inspector from taking a sample and hence, the vendors cannot be said to have committed the offence under S. 16 (1) (b) by such refusal.

There is no provision in the Act which authorises a Food Inspector to require the vendor to sign the labels put on the bottles in which he keeps the three portions of the sample or to sign a receipt for the price of the sample paid to him, therefore, the vendors commit no offence whatsoever by refusing to sign the labels or the receipt for the price. **1959 Cri LJ 1382: 1959 All LJ 874: 1959 All WR (HC) 670: 1960 All Cr R 14: AIR 1959 All 753 (754) (Pt A) (Pr 2).**

——Ss. 16 (1) (c), 10 — Powers of Food Inspector — Distinction between power and duty — Importance of distinction — Refusal to accept price of sample by vendor — Refusal is not punishable. See Prevention of Food Adulteration Act (1954), S. 10. **1959 Cri LJ 1382: AIR 1959 All 753.**

——Ss. 16 (1) (c), 11 — Section 11 does not deal with Food Inspector's powers — Section lays down his duties — Vendor's refusal to accept notice given by Food Inspector and one part of sample — Refusal is not punishable under S. 16 (1) (c). See Prevention of Food Adulteration Act (1954), S. 11. **1959 Cri LJ 1382: AIR 1959 All 753.**

——S. 16 (1) (b) and (c) — Running away when stopped by a Food Inspector — If an offence.

Under S. 10 (8) of the Prevention of Food Adulteration Act a Food Inspector is authorised to exercise the powers of a Police Officer. Hence when a Food Inspector stopped a person carrying milk and the person places the can down and takes to his heels, he is certainly preventing the Food Inspector from discharging his duty and is guilty of an offence under S. 16 (1) (b) of the Act. **(1964) MLJ (Cr) 661: 1965 (1) Cri LJ 389 (390) (Pr 2) (Mad).**

——S. 16 (1) (b) — Applicability — Preventing an Inspector from taking sample — When an offence — Necessity for witnesses — When arises.

In order to make out a case that an offence under S. 16 (1) (b) of the Prevention of Food Adulteration Act has been committed, it should be established that the articles of food, a sample of which was sought to be taken by the Inspector and which was prevented was intended for sale. If the article was in a shop, then there would be a presumption that it was intended for sale. But where it was in a house it should be proved that it was intended for sale. Only then the prevention of an Inspector from taking sample would amount to an offence under S. 16 (1) (b) of the Act. Section 10 (7) of the Act relating to witnesses being taken, will be attracted only when a sample is taken. Where the Inspector is prevented from taking the sample, there is no question of any witnesses being taken under S. 10 (7) of the Act. **1958 Mad WN 221: (1958) MLJ (Cr) 236: 71 Mad LW 248: 1958 Cri LJ 915: AIR 1958 Mad 382 (382) (Pt A) (Pr 2).**

——S. 16 (1) (b) — Refusal to give sample.

Refusal to give the sample even on payment is not the same thing as prevention which need not have an element of physical obstruction but involves some act which hinders an Inspector from taking a sample. (1851) 17 QB 127, Disting. **1957 Cri LJ 656: AIR 1957 Punj 99 (100) (Pr 1).**

7. Possession by manufacturer of food of an adulterant.

——S. 16 (1) (d) — What is punishable is possession by manufacturer of food, of an adulterant in circumstances which lead to inference that he is keeping it for purposes of adulteration. **1961 Mad LJ (Cr) 51: 1960 Ker LT 743: 1960 Ker LJ 921: ILR (1960) Ker 1426: 1961 (1) Cri LJ 376: AIR 1961 Ker 84 (86) (Pt C) (Prs 9, 10).**

——S. 16 (1) (a) — 'Sale' — Confectioner professing to prepare sweets with pure 'Ghee' — Food Inspector purchasing ghee from his premises — Prosecution under S. 16 (1) (a) — Delivery of ghee to the Inspector held did not amount to sale of ghee— Accused could be prosecuted for offence under S. 16 (1) (d) as he had adulterated ghee in his possession for preparing sweets. **1963 Raj LW 413: ILR (1963) 13 Raj 820: 1963 (2) Cri LJ 589 (592) (Pt B) (Prs 13, 14).**

8. Giving false warranty.

——Ss. 16 (1) (g) and 19 (2) — Scope and applicability — Requirements of warranty. Every person who in respect of an article or substance sold by him in respect of which a warranty might be pleaded under the Act gives to the purchaser a false warranty in writing is guilty of the offence under S. 16 (1) (g). A label or cash bill cannot be termed as a warranty unless it falls within the proviso to R. 12-A. The wording in S. 19 (2) (1) shows that the warranty must have been obtained by the vendor at the time of his purchase of the article in question. The undertaking to give a warranty must have been one of the terms of the contract of purchase and it is only then that the warranty obtained subsequently can be availed of as a defence. Warranty under S. 19 must be in writing and in the prescribed form. It makes no difference whether the form was prescribed by the rules only in 1956. Therefore an advertisement circular is not a warranty as contemplated under the Act and the accused cannot be found guilty of the offence of issuing a false warranty. **(1965) MLJ (Cri) 224: 1963 Ker LT 1040: 1963 Ker LJ 1189.**

9. Evidence and proof.

——S. 16 (1) — Conviction for sale of adulterated turmeric powder — Conviction based on report of public analyst — Report disclosing that two of three tests performed in public health laboratories revealed adulteration and microscopic examination showed presence of pollen stalks — Data in report cannot be said to be insufficient to found conviction — Prosecution cannot also fail on ground that public analyst was not examined as witness. Mangaldas Raghavji Rupa-

rel v. State of Maharashtra, (1965) 2 SCR 894: (1965) 2 SCWR 561: (1965) 2 SCA 530: 1966 Cri LJ 106: AIR 1966 SC 128 (132) (Pt G) (Pr 11).

● ——Ss. 16 (1) (a) and 19 — Prosecution under S. 16 (1) (a) — Plea of absence of mens rea — Burden is on accused to show absence of mens rea. AIR 1965 SC 722, Foll.; AIR 1940 All 517, Disting. Mangaldas Raghavji Ruparel v. State of Maharashtra, (1965) 2 SCR 894: (1965) 2 SCWR 561: (1965) 2 SCA 530: 1966 Cri LJ 106: AIR 1966 SC 128 (133) (Pt K) (Pr 14).

——S. 16 — Prevention of Food Adulteration Rules (1955), Rr. 5 and 44 (b) — Sale of mixed milk of cow and buffalo — Test of mean standard for cow and buffalo milk — If justified — Opinion of Public Analyst — Value of.

Held, on facts (i) that the conviction of the accused could not be sustained on the basis of the report of the Public Analyst since his opinion that the sample was adulterated was based upon the mean standard which was his own creation and had no statutory support. There are no statutory standards of quality or statutory limits of componental variability for mixed milk of cow and buffalo. Courts of law would refuse to accord it any sanctity until it has received statutory acknowledgment. (ii) That the report of the Public Analyst did not state what was the actual percentage of water in the sample and unless that was specified it was not possible for the Court to test the accuracy of his opinion since standards vary for various reasons. It is the Court, not the Public Analyst, who is the ultimate Judge of the question. The report must, therefore, be ignored altogether. (1896) 1 QB 202 and (1894) 1 QB 478. Rel. on. 1960 All LJ 318: 1960 Cri LJ 1056 (2): 1960 All WR (HC) 323: 1960 All Cri R 214: AIR 1960 All 504 (505) (Prs 5, 7).

[Overruled in AIR 1961 All 590 (FB).]

——S. 16 (1) (g) (ii), Proviso — Second offence — Proof of previous conviction — Oral evidence — Admissibility.

Section 16 prescribes a minimum sentence in case of second offence. Two special modes for proving previous conviction have been laid down in S. 511, Criminal P. C. Further, a judgment of conviction has to be in writing. This is therefore, a matter required by law to be reduced to the form of a document. According to S. 91, Evidence Act, such matter can be proved either from the document itself or from secondary evidence when such secondary evidence is admissible. Where it has not been suggested that the original judgment of previous conviction has been lost, oral evidence could not be led to prove the previous conviction. The previous conviction could perhaps be proved from an admission of the accused. 1959 All LJ 462: 1959 Cri LJ 1263: ILR (1960) 1 All 13: AIR 1959 All 695 (695, 696) (Pt A) (Prs 5, 9, 10, 11).

——Ss. 16 (1) (a), 7 (i) and 2 (xiii) — That the article was sold as article of food, need not be proved.

Where a person sells edible oil to the Food Inspector for analysis, this act constitutes a 'sale' within the meaning of S. 2 (xiii) of the Act. By its very definition, a sale is not any the less a sale because it is for analysis; it need not necessarily be for human consumption or for human use. AIR 1958 Andh Pra 681, Overruled. (1965) 1 Andh WR 215: (1965) Mad LJ (Cri) 251: (1965) 2 Andh LT 452: 1965 (1) Cri LJ 420: AIR 1965 Andh Pra 118 (122) (Pt B) (Pr 28) (DB).

——Ss. 16 (1) and 7 (1) — Sales of adulterated food — Prosecution for — Proof of mens rea not necessary for conviction. AIR 1961 SC 631, Rel. on. 1963 (1) Cri LJ 109 (111) (Pt D) (Pr 11) (Andh Pra).

——Ss. 16, 7, 17 and 2 (i) — Offence under Section 16 read with Ss. 7 and 2 (i) — Prosecution of managing director of company — Prosecution must prove that accused had knowledge that the food in question was misbranded. See Prevention of Food Adulteration Act (1954), S. 7. 1960 Cri LJ 1417: AIR 1960 Andh Pra 584.

——Ss. 16, 2 (x) (a), 7 (ii) — Sale of misbranded food — The prosecution has to prove that the article seized was an imitation of, or was a substitute for or that it resembled in a manner likely to deceive, another article of food under the name of which it was sold — No evidence to show that the article was an imitation etc.— The report of the analyst which has given only the analysis of the contents would not go to prove that it was an imitation or a substitute to bring the case under S. 7 (ii). (1958) 1 Andh WR 528: 1958 Mad LJ (Cri) 455: 1958 Cri LJ 1375: AIR 1958 Andh Pra 681 (683) (Pt B) (Pr 8).

[Overruled on another point in AIR 1965 Andh Pra 118.]

——S. 16 (1) (a) read with S. 7 (i) — Prosecution under — Intention of seller not relevant — Sale of adulterated coconut oil — Intention to sell as article of food need not be proved. 66 Bom LR 446: 1964 Mah LJ 570: 1965 (1) Cri LJ 145: ILR (1964) Bom 707: AIR 1965 Bom 17 (19) (Pt B) (Prs 9, 10) (DB).

——Ss. 16 (1) (a), 7 (i) and 11 (5) (b) — Prevention of Food Adulteration Rules, R. 14 — Taking of sample — Compliance with rule — Necessity — Absence of evidence of such compliance — Effect.

In cases under the Prevention of Food Adulteration Act where penalties are severe the requirements in the matter of taking samples should be very carefully observed. Prevention of Food Adulteration Rules do not deal in details with the manner or procedure of taking samples except what is provided in R. 14.

A sample of til oil taken by the Food Inspector having been found not to be in conformity with the required standards as laid down in App. B to the Act the owner of the oil mill was prosecuted under Ss. 16 (1) (a) (i) and 7 (i) of the Act and the oil seized was ordered to be destroyed. The Food Inspector in his evidence stated merely that all formalities were observed.

Held, that as the Food Inspector did not describe how or in what manner he took the sample of oil from the tank or the drum it could not be said with certainty that the sample was taken in dry and clear phials and it could not be said with certainty that the analysis had been correct and could be depended upon. The accused were entitled to benefit of doubt. 1963 (2) Cri LJ 448 (450, 451) (Prs 9, 11) (Cal).

——S. 16 (1) (a) — Absence of evidence to connect sample taken with sample analysed and found to be adulterated — Prosecution must fail. (1961) 65 Cal WN 1107: ILR (1961) 2 Cal 398.

——Ss. 16 and 6 — Liability of vendor of food is absolute — Sale by committee member of co-operative society — Nature of liability — Report of the analyst that the seals were found intact — Presumption to be drawn — Held, that it has to be presumed that the analyst compared the seal with specimen seal. He could not certify to that effect without making himself sure that there was no tampering of any sort in the seal. (1965) MLJ (Cri) 401: 1965 Ker LT 402.

——S. 16 (1) — Rules under Act, Rr. 28 and 29 — Tur dal — Adulteration — Certificate of Public analyst stating that dal was found to contain Metanil yellow a prohibited coal-tar dye—Certificate is sufficient proof of adulteration so as to base conviction thereon — Non-mention of quantity of dye or tests conducted is not material.

The fact that the certificate does not reveal what type of tests were conducted by the analyst and it does not specify the quantity of the dye found present in the sample cannot make it invalid. Rule 28 of the Food Adulteration Rules insists that coal-tar dyes except those mentioned therein should not be used in foodstuffs. Where extraneous matter of a type like prohibited varieties of coal-tar dye is used, the analyst's report certifying to its presence in the food without specifying the exact quantity of the adulterant is sufficient to support a conviction. As the certificate shows that Metanil yellow a prohibited coal-tar dye was used, there is no need for the Court to insist that the report should contain the technical processes by which the presence of the dye was identified. The accused could not have escaped liability even if the certificate did not name the type of coal-tar dye used. Rule 29 lays down that even the permitted varieties of coal-tar dyes cannot be used in foodstuffs except those enumerated therein and dal is not to be found among the items mentioned. 1963 (1) Cri LJ 123 (Ker) and 1962 Ker LT 865 and AIR 1962 Punj 419 and 1962 (2) Cri LJ 579 (Punj), Dist.; AIR 1962 Punj 524, Rel. on. **ILR (1963) 2 Ker 192: 1963 Ker LT 698: 1963 Ker LJ 921: 1964 (1) Cri LJ 403: 1964 Mad LJ (Cri) 259: AIR 1964 Ker 107 (108, 109) (Prs 3, 4, 5, 6, 7) (DB).**

——S. 16 — Prevention of Food Adulteration Rules (1955), Rule 20 and Rule 22 (b) — Sale of adulterated milk — Charge based on Public Analyst's report — Public Analyst's report not conforming to essential statutory requirements — Acquittal upheld — Effect of delay in lauching prosecution — Duty of Public Analyst. **1965 Jab LJ 63: 1965 (2) Cri LJ 220: AIR 1965 Madh Pra 180 (181 to 183) (Prs 5 to 9, 11) (DB).**

——S. 16 (1) — Prevention of Food Adulteration Rules (1955), R. 16 — Seizure of groundnut oil — Sample properly packed and sealed — Delay in analysis though not sample exposed to atmosphere — Detection of excess fatty contents —Held, such excess could not be attributed to lapse of time.

The sample of groundnut oil seized by the Food Inspector was sent to the analyst 5 days after it was seized. But the Public Analyst conducted the analysis only after a fortnight. However, the Analyst conducted the test immediately after the bottle containing the sample oil was opened and there was practically no exposure of the oil in the bottle to the atmosphere before it was tested. The analyst found that the free fatty acid in the oil was 6.9 per cent., the prescribed maximum percentage being only 3 per cent. The accused contended that the excess fatty content should be attributed to the lapse of time.

Held, that edible oil could in certain circumstances exist without there being a natural increase in its free fatty acid content. Rule 16 of the Food Adulteration Rules, 1955 provided sufficient safeguard to prevent decomposition of the oil by natural causes. It would however be always open to an accused, in any particular case, to show that the packing was inadequate, or that it was so defective that it could not have prevented air and light affecting the sample oil contained in the bottle. **1964 Mad LJ (Cr) 675: (1964) 2 Mad LJ 539: 1964 Mad WN 506: 1965 (1) Cri LJ 454: ILR (1964) 2 Mad 860: AIR 1965 Mad 168 (169, 170) (Prs 2, 4) (DB).**

——Ss. 16 (1) (a) (i) and Rule 29 of the Rules — Packets exposed in almirah in shop — Not samples — Implication — Storage for sale of adulterated food — Offence.

Where the offending packets of tea were not labelled as samples, and there was no other documentary evidence to show that they were not part of the tea received in the shop for sale to the public and if these packets were kept exposed among other packets for sale in the shop in the glass almirah the implication is that these packets are also for sale. Under Section 16 (1) (a) of the Act even a storage for sale of any articles of food in contravention of the proviso of the Act is a criminal offence. **(1964) MLJ (Cr) 695: (1965) 1 Mad LJ 58.**

——S. 16 — Prosecution for adulteration of milk — Long delay in analysing the milk and failure of prosecution to prove that delay has not caused any change in the sample analysed — Conviction of accused cannot be upheld. 1964 MLJ (Cr) 592: (1964) 2 MLJ 428: 1964 (2) Cr LJ 97 (97, 98) (Prs 6, 7).

——S. 16 (1) — Conviction — Validity — Belated chemical analysis of sample of gingelly oil — Excess percentage of oleic acid found — Excess not appreciable — Burden to prove that delay had no relation to incriminating excess is upon prosecution — Accused entitled to benefit of doubt. **1961 Mad WN 712: 1962 All Cr R 74: 1962 All WR (Sup) 29: 1962 (2) Cr LJ 380: AIR 1962 Mad 342 (343) (Pr 4).**

[**Overruled** in AIR 1965 Mad 168.]

——Ss. 16, 10 — Prosecution — Proof— Where an accused is charged for selling adulterated milk, the first essential requisite to be established is that the milk from which the Inspector gets a small quantity from the vendor as sample is intended for sale. See Prevention of Food Adulteration Act (1954), S. 10. **1959 Cri LJ 997: AIR 1959 Mad 333.**

——S. 16 — Prevention of Food Adulteration Rules (1955), Rr. 7 and 18 — Rules are mandatory — Report of Public Analyst — Non-compliance with Rules — Evidentiary value — Presumption of official act.

Rules 7 and 18 of the Prevention of Food Adulteration Rules are mandatory and hence the non-compliance with them affects the evidentiary value of the report of the Public Analyst and the conviction solely based upon it cannot be sustained. 1957 All LJ 89, Dissented; AIR 1964 Guj 136, Followed. The burden of proving the guilt of the accused is on the prosecution and if the report or the certificate is to be used as evidence without calling the Public Analyst or the Director of the Central Food Laboratory for evidence as the law now permits, then it is imperative that all the rules prescribing the procedure commencing from the stage of purchasing the sample of food leading upto its analysis are strictly observed. To argue that the accused has got the liberty of getting his sample analysed to counteract the effect of the report of the Public Analyst is to require the accused in every case to prove his innocence.

The mere fact that the Report of the Public Analyst contained a statement that the sample sent for analysis had been properly sealed and fastened, and that he found the seal intact and unbroken is not sufficient. The presumption in regard to the regularity of procedure followed

by the Public Analyst may be raised when there is proof that the Food Inspector had discharged his functions according to the rules. To raise a presumption both in favour of the Food Inspector and the Public Analyst is to render the Rules superfluous and meaningless. Mary Lazrado v. State of Mysore. **(1965) 2 Mys LJ 107: (1965) 3 Law Rep 257: (1966) Mad LJ (Cr) 18: 1966 Cr LJ 1036: AIR 1966 Mys 244 (247, 248) (Prs 8, 9, 12, 13).**

——**S. 16 (1)** — Charge against Co-operative milk society — Burden of proof — The liability of its officers is an absolute liability as seen from Section 17 (1). It is unnecessary for the prosecution to prove that the officers knew that the milk offered for sale was adulterated. See Prevention of Food Adulteration Act (1954), Section 17 (1). **1960 Cr LJ 494: AIR 1960 Mys 80 (DB).**

——**S. 16** — Prevention of Food Adulteration Rules (1955), R. 18 — Offence under S. 16, Prevention of Food Adulteration Act — Trial Court finding that the samples of alleged adulterated ghee were taken from stock open for sale in accused's shop and one of the samples was also sent to Public Analyst under special seals given by Food Inspector but acquitting accused as there was no evidence regarding compliance with Rule 18 of the rules made under Act — **Held,** that there was lacuna in prosecution evidence and that it was a fit case to remand for rehearing on evidence on record and such other evidence as may be produced by parties according to law, on question of compliance with R. 18 — Object of Rule 18 is to ensure accuracy of seal on sample sent to Public Analyst. **(1965) 7 OJD 212: 31 Cut LT 1008: ILR (1966) Cut 77: 1966 Cr LJ 1041: AIR 1966 Orissa 188 (189) (Prs 4, 6).**

——S. 16 — Duty of authorities to avoid delay in trial of offences under the Act and examination of samples by Analyst stressed.

Offences under the Prevention of Food Adulteration Act must be tried within a reasonable time and the Analyst must also examine the samples with due promptitude; delays and lapses in this respect are likely to adversely affect the prosecution case. **1965 (2) Cr LJ 571 (574) (Pt D) (Pr 14) (Punj) (DB).**

——**S. 16** — Prevention of Food Adulteration Rules (1955) — Appendix B, A.05.10 — Ground chillies sold by accused alleged to be highly adulterated with wheat bran — Report of Public Analyst merely stating that sample was highly adulterated — Percentage of wheat bran not specified — Acquittal of accused held proper. See Prevention of Food Adulteration Act (1954), S. 7. **1964 (2) Cri LJ 578: AIR 1964 Punj 475 (DB).**

——**S. 16 (1) (a)** — Report of Public Analyst — Failure to mention in report what quantity of foreign substance is present in sample of article sent for analysis — Conviction cannot be based on such report. AIR 1957 Punj 56; AIR 1956 All 520; AIR 1958 All 34; AIR 1944 Bom 321, Rel. on. **(1961) 63 Punj LR 37.**

——**S. 16** — Report of Public Analyst— Sample stated to be not of standard purity— Details not given — Amounts to mere formal defect. See Prevention of Food Adulteration Act (1954), Section 13. **1961 Raj LW 111.**

——**S. 16 (1) (a)** — Sale of adulterated milk for purpose of analysis — Question whether milk was ordinarily intended for sale is not decisive or material in deciding guilt of accused and need not be proved. AIR 1964 Mad 490 and AIR 1965 All 39, Rel. on; AIR 1959 Mad 333, Expl. **1965 Raj LW 328: ILR (1965) 15 Raj 458.**

10. Conviction and sentence.

——S. 16 (1) (ii) — Circumstances to be considered in giving lesser sentence.

Held, that the fact that there was a lacuna in the report of the Public Analyst inasmuch as it was not full in that the columns index and the common name had not been mentioned and the fact that the quantity of Jalebi sent to the Public Analyst was less than 16 ounces, even though it did not affect the result of the analysis by the Public Analyst, were circumstances that would be taken into consideration in awarding a lesser sentence other than the one prescribed in the proviso to S. 16 (1) (ii). **1965 All Cr R 113: 1965 All LJ 348: 1966 Cr LJ 3: AIR 1966 All 32 (33) (Pt C) (Pr 3).**

——S. 16 — Sentence.

Adulteration of articles of food by persons selling them is a serious matter which may endanger the lives of innocent citizens who, far from doing any wrong to the seller, enable the seller of food to make a profit. The desire to make a profit at the expense of the health of other citizens, who purchase articles of food for consumption in all good faith must be checked by awarding adequate sentences whenever that desire takes the form of selling adulterated articles of food. **1964 All WR (HC) 13: 1964 All LJ 169: 1964 All Cr R 54: 1965 (1) Cr LJ 3: AIR 1965 All 39 (40) (Pt B) (Pr 7).**

——Ss. 16 (1) (a), 7 (i) — Sentence.

Offences under the Act are serious ones calling for deterrent punishment, and in most of the cases, imprisonment would be a suitable sentence. However, in the present case, as the offence was committed more than two and a half years ago and the accused was a first offender, he was sentenced to pay a fine of Rs. 500 (Rupees five hundred) and in default, to undergo rigorous imprisonment for three months. **(1965) 1 Andh WR 215: (1965) Mad LJ (Cri) 251: (1965) 2 Andh LT 452: 1965 (1) Cri LJ 420: AIR 1965 Andh Pra 118 (122) (Pt C) (Pr 32) (DB).**

——S. 16 (1) (ii), Proviso — Lenient sentence — Reasons for — Duty of Court to give.

Really adequate reasons should be given for giving sub-minimum sentences under Section 16 (1) (ii) proviso. The mere possibility that the offender may have got the milk from another, and sold it without knowing that it was adulterated is certainly not adequate reason. **1959 Jab LJ 562: 1960 Cr LJ 487: 1960 MPLJ 290: AIR 1960 Madh Pra 125 (126) (Pt A) (Prs 1, 2).**

——S. 16 — No evidence of addition of preservative to the sample milk — No evidence when the sample was analysed — Report of analyst received nine weeks after the taking of the sample — It cannot be said that the milk had not undergone a change in quality and condition — No conclusion can be based on the result of the analysis on the assumption that the sample as sent was analysed by the analyst. See Prevention of Food Adulteration Act (1954), S. 2 (1) (a). **(1965) 2 MLJ 325: 1966 Cri LJ 1023: AIR 1966 Mad 325 (DB).**

——S. 16 — Prevention of Food Adulteration Rules (1961), A-11-05 — Butter sold found adulterated — Acquittal of accused held justified as analysis was done six months after samples

were taken. **1964 Mad LJ (Cr) 644: (1964) 2 Mad LJ 476.**

——**S. 16 (1)** — Sentence for conviction under — Accused first offender — Appeal against acquittal preferred mainly to correct wrong view of law taken by Magistrate — Admonition under Section 3, Madras Probation of Offenders Act held sufficient. **(1963) 1 Mad LJ 55: 1963 Mad LJ (Cri) 115: 76 Mad LW 210: 1963 (1) Cri LJ 688 (690) (Pt C) (Pr 10).**

——**Ss. 16 (1) (ii), Proviso, (iii) — Enhanced sentence — Offence established to be second offence — Court must impose minimum penalty provided by S. 16 (1) (ii) — Accused giving up profession of selling milk is immaterial but may be treated as special reason for purpose of Proviso to S. 16 (1) (ii) — Tendency to take lenient view deprecated.**

Where the prosecution urges that the accused, who is being prosecuted for the offence of selling adulterated milk, be awarded an enhanced sentence under Section 16 (1) (ii) on the ground that it is a third offence committed by the accused but there is no evidence on the record about the prior second offence and the existence of such offence has also not been put to the accused, the offence in respect of which the accused is tried cannot be held to be third offence. Where, however, the offence in respect of which the accused is tried is clearly established to be a second offence, the Court is bound to impose at least the minimum penalty prescribed by S. 16 (1) (ii). The fact that the accused has stated that he has since given up the profession of selling milk is no legal ground for taking out the case out of the provision. That circumstance may, however be treated as a special and adequate reason for taking the case out of the proviso to Section 16 (1) (ii). 1959 All LJ 624, Disting.

For the purpose of deciding the question of previous convictions, the date of the convictions is immaterial for the law envisages offence and not conviction. **(1964) 66 Pun LR 170.**

——**S. 16** — Offences under, call for deterrent sentences. **65 Pun LR 1083: 1964 (1) Cri LJ 606 (607) (Pt D) (Pr 6).**

——**S. 16 — "Adulterated" — Sample of milk not conforming to requirements of prescribed standard — Milk is adulterated — Even if it contains buttermilk fat contents — The fact may be considered while awarding sentence. 1965 Raj LW 178: 1965 (2) Cr LJ 246: ILR (1965) 15 Raj 428: AIR 1965 Raj 152 (155) (Pt B) (Pr 17) (DB).**

——**S. 16 (ii)** — Adulteration of milk — Sentence of rigorous imprisonment for 3 months and fine of Rs. 1,500 held not excessive. **1963 Raj LW 434: 1963 (2) Cr LJ 527: ILR (1963) 13 Raj 996: AIR 1963 Raj 233 (234) (Pt F) (Pr 11).**

——**S. 16 (1) (a)** — Defence — Plea by accused that it was not possible for him to do any chemical examination and that everybody else was dealing in adulterated goods — Not a valid extenuation of the conduct. **1963 Raj LW 43: ILR (1963) 13 Raj 247.**

——**S. 16** — Purpose of sentence under — Leniency not justified. **1961 Raj LW 111.**

11. Conviction and sentence for subsequent offence of similar nature.

——**S. 16 (1)** — 'Second offence' — Meaning of — Second offence contemplated is not only 'offence of the same kind as another' for which accused was convicted and punished on the earlier occasion but it also includes any contravention of the Act committed on the second occasion — Accused convicted under Act on earlier occasion for keeping foodstuff intended for sale in a container not covered as required by Rule 49 (3) — Conviction of accused again for selling foodstuffs coloured with prohibited dye under Rule 28 is for a 'second offence' within the meaning of Section 16 (1) rendering accused liable for enhanced punishment. AIR 1959 All 695 and AIR 1960 All 629 and (1889) 22 QBD 345, Rel. on. Jagdish Prasad v. State of U. P., **1965 Cur LJ 793: 1965 All LJ 933: (1965) All WR (HC) 674: (1965) 2 SCWR 692: (1965) All Cr R 468: 67 Pun LR 1231: 1966 Cr LJ 194: AIR 1966 SC 290 (292) (Pr 10).**

——**S. 16** — Accused, previous convict — Sentence not reduced in revision. **1964 All Cri R 172: 1964 All WR (HC) 246.**

——**S. 16 (1) — Applicability — Second offence — Meaning of.**

Clause (ii) of Section 16 (1) applies for a second offence, i.e., for repeating an offence. For the applicability of Cl. (ii) the previous offence must be one punishable under S. 16. If it was punishable under another law, even if the act was of a similar nature, the subsequent offence cannot be said to be a repetition of it. What is to be considered is the offence, not the act constituting it, the offence must be repeated and not the act. If an act was done when it was not punishable under Section 16 because it was not in force then and is repeated after the enforcement of the Act which punishes it, it is not a repetition of an offence and the offence cannot be said to be a second offence. Clause (ii) would not be applicable unless Cl. (i) had been applied once, i.e., there had been a previous conviction under this very Act. **1960 All LJ 473: 1960 All WR (HC) 339: 1960 All Cr R 217: 1960 Cr LJ 1298: AIR 1960 All 629 (631) (Prs 6, 8, 9, 10).**

——**S. 16 (1) (g) (ii), Proviso** — Second offence — Must be under the same Act. **1959 All LJ 462: 1959 Cri LJ 1263: ILR (1960) 1 All 13: AIR 1959 All 695 (696) (Pt B) (Pr 12) (DB).**

——**S. 16 (1) (a) (ii) — Subsequent offence — If should have been committed after conviction for previous offence. 1959 All WR (HC) 622: 1959 All Cr R 523: 1959 All LJ 751.**

——**S. 16 (1) (a) (ii) — Conviction for second offence — Sentence.**

For a conviction under Section 16 (1) (a) (ii) for an offence under the Act, which is a second offence, the Magistrate must pass a sentence of imprisonment and fine both. Sentence of imprisonment only is illegal. **1959 All WR (HC) 622: 1959 All Cri R 523: 1959 All LJ 751.**

——**S. 16 (1) (a) — Previous convict — Sentence.**

Awarding a previous convict a sentence less than the prescribed one for the reason that the accused was a poor man is not a judicial exercise of discretion. When the legislature decided to lay down a minimum punishment to be awarded to a previous convict, that punishment must be awarded except in exceptional circumstances. Where the sample was found to be adulterated to a nominal extent or the adulteration was not an intentional act on the part of the accused, a lesser sentence could be awarded. **1959 All WR (HC) 482: 1959 All Cri R 400: 1959 All LJ 624.**

——**S. 16 (1) (g) (ii)** — Punishment — Sentence of 3 months' rigorous imprisonment and fine of

Rs. 500 — State not applying for enhancement — Sentence not interfered with in appeal. (1960) **1 Guj LR 119: (1960) 1 Guj HCR 102: 1960 Cri LJ 1582: AIR 1960 Guj 34 (36) (Pt D) (Pr 6) (DB).**

——S. 16 (1) (ii), Proviso — Scope — Second offence — Mere sentence of fine of Rs. 80 is illegal. **1960 Ker LJ 384: (1960) 1 Ker LR 508: 1960 Ker LT 558: 1960 Mad LJ (Cr) 397: 1961 (1) Cri LJ 663 (663) (Pr 1) (Ker).**

——Ss. 16 (1) (ii), Proviso (iii) and 7 — Enhanced sentence — Offence established to be second offence — Court must impose minimum penalty provided by S. 16 (1) (ii) — Accused giving up profession of selling milk is immaterial but may be treated as special reason for purpose of Proviso to S. 16 (1) (ii) — Tendency to take lenient view deprecated. **(1964) 66 Punj LR 170.**

——S. 16 (1) (g) (ii) — Second offence under the Act — Delay in disposal of case — Good ground for awarding minimum sentence.

Though under S. 16 (1) (g) (ii) proviso the minimum sentence prescribed for a second offence is imprisonment for one year and a fine of Rs. 2,000, however in view of the fact that the offence had to be retried and there had been considerable delay in the disposal of the case, it was held that ends of justice would be met by awarding a lesser punishment than that provided for and hence the accused was sentenced to simple imprisonment for six months and a fine of Rs. 1,000. **64 Punj LR 949: 1963 (1) Cri LJ 475: 1962 Cur LJ 487: AIR 1963 Punj 175 (178) (Pt D) (Pr 9) (DB).**

——S. 16 (1) (a) (ii)—Fat found in milk 2 per cent — Extent of adulteration held 95 per cent. — Prosecution under — Sentence — Accused convicted once before of similar offence — Minimum sentence imposed — No special reason to reduce sentence — Sentence maintained. **(1963) 65 Pun LR 939.**

——S. 16 (1) (g) (ii) — Accused having six previous convictions treated as having only one previous conviction and sentenced accordingly — Special and adequate reasons.

The accused at the time of his conviction under the Act in the case had six previous convictions for offences under the Act between 1957 and 1960. He was, however, treated as if this was only his second conviction simply on account of the fact that apparently on his second, third, fourth, fifth and sixth convictions for some reason or other it had not been brought to the notice of the Courts dealing with the cases that he had any previous convictions and, therefore, on each of these convictions he was dealt with as a first offender. He was sentenced under S. 16 (1) (g) (ii) to one year's rigorous imprisonment and a fine of Rs. 2,000.

Held, that it was difficult to make out any case for reducing the sentence which could be covered by the words 'special and adequate reasons to the contrary to be mentioned in the judgment of the Court' in S. 16 (1) (g). **ILR (1962) 1 Punj 723: 1963 (1) Cri LJ 708.**

——S. 16 (1) (ii) — Second offence — Second offence means offence committed after offender has been convicted for first offence. AIR 1965 Raj 152, Foll. **1965 Raj LW 382: ILR (1965) 15 Raj 820: 1966 Cri LJ 1057: AIR 1966 Raj 203 (207) (Pt E) (Pr 5).**

——S. 16 (1) (ii) and (iii) — "Second offence" and "third and subsequent offence" — Meaning of.

The principle underlying S. 16 of awarding enhanced punishment is that if the offender does not reform himself even after his conviction, he is exposed to the enhanced penalties under the law. In interpreting, the law which provides the enhanced penalty the legal meaning of the phrases used therein should prevail over the grammatical construction thereof. The phrase "the second offence" in S. 16 should be construed as that offence which has been committed after the offender had been convicted for the first offence, and similar meaning should be given to "the third and subsequent offences." 1959 All LJ 751, Dissented from; AIR 1960 All 629, Disting.; (1911) 2 KB 1, Rel. on. **1965 Raj LW 178: 1965 (2) Cri LJ 246: ILR (1965) 15 Raj 428: AIR 1965 Raj 152 (155) (Pt A) (Prs 12, 15) (DB).**

12. Practice and procedure.

——S. 16 — Complaint by — Food Inspector under S. 7/16 — Medical Officer endorsing on complaint for purposes of S. 20 — Medical Officer is not a complainant to file appeal against order of acquittal. See Criminal P. C. (1898), S. 417 (3). **1964 (2) Cri LJ 502: AIR 1964 All 497.**

——S. 16 — Revision against conviction under S. 7 of Prevention of Food Adulteration Act (1954) — Ground that complainant was absent on some days of trial though his presence was not dispensed with — No prejudice to accused — Trial held not vitiated. See Criminal P. C. (1898), Section 247. **1964 All WR (HC) 352.**

■ **——S. 16 (1) (ii)** — Offence under being punishable with imprisonment which extends to two years must be tried as a warrant case — Trial as summons case — Irregularity is curable under S. 537, Criminal P. C. when accused is not prejudiced by adoption of such wrong procedure — Criminal P. C. (1898), S. 4 (1) (v) and (w) and S. 537. Prem Das v. State, **1961 All LJ 483: 1961 All WR (HC) 405: 1961 All Cri R 228: 1961 (2) Cri LJ 737: ILR (1961) 2 All 229: AIR 1961 All 590 (594) (Pt C) (Pr 8) (FB).**

——Ss. 16 (1), 17, 7 (i) and 10 (7) — Offence under S. 16 (1) read with S. 7 (1) — Failure to call two persons to be present at the time of seizure — Effect — Servant of a company if liable without proof of mens rea.

Held, that the act of the Food Inspector in getting only one mediator and failing to get two mediators does not mean that the sale and seizure cannot be acted upon for the purpose of finding the accused guilty. The servant is liable to be punished without proof of guilty knowledge. See Prevention of Food Adulteration Act (1954), S. 7 (1). **1965 Mad LJ (Cri) 815: (1965) 2 An WR 359: 1966 Cri LJ 393: AIR 1966 Andh Pra 66.**

——S. 16 — Procedure — Joint trial — Three cases tried together — Evidence same — Prosecution consenting — One judgment — Propriety and legality — Since three offences of the same nature committed in the course of 12 months might be charged and tried together in view of the provisions of the Code of Criminal Procedure, the procedure adopted by the Magistrate was proper. See Criminal Procedure Code (1898), Section 367. **1958 Cri LJ 169 (2) (Cal).**

——Ss. 16 (1), 7 and 10 (7) — Witnesses not present at the time of seizure of sample as required under S. 10 (7) — Defect is only an irregularity — Trial and conviction of accused is not vitiated in the absence of prejudice to accused. **1964 Ker LT 198: 1965 Mad LJ (Cri) 335: ILR (1964) 1 Ker 589: 1964 (2) Cri LJ 417 (2): AIR 1964 Ker 261 (262) (Pt A) (Prs 4, 5).**

——S. 16 (1) — Sale of adulterated food by servant of society is sale by society — Liability of society not affected by S. 17 — Questions of intention, mens rea and knowledge do not arise. See Prevention of Food Adulteration Act (1954), S. 7. **1962 Ker LT 667.**

——S. 16 (1) (b) — Sale of article of food for purpose of analysis comes within ambit of Section 2 (xiii). See Prevention of Food Adulteration Act (1954), S. 2 (xiii). **1962 Ker LT 206.**

——S. 16 (1) (a) (ii) — Charge under should not be mentioned in original charge under sub-s. (1) (a) — Sub-section (1) (a) (ii) refers to second offence of type contemplated by sub-s. (1) (a) — Proper procedure is that the charge of previous conviction should be framed after accused is found guilty and convicted of the main offence charged against him. **ILR 1961-1 Ker 639: 1961 Ker LT 415: (1961) 1 Ker LR 579: 1961 MLJ (Cri) 528: 1962 (1) Cri LJ 647 (649) (Pt B) (Pr 7).**

——S. 16 (1) (g) (ii) — Charge for offence of selling adulterated oil clubbed with charge for enhanced punishment under S. 16 (1) (g) (ii) — Defect in charge prejudicing accused — No interference in appeal with acquittal of accused. **1960 Ker LT 515: 1960 Ker LJ 753: 1960 Mad LJ (Cri) 595: 1960 Cri LJ 1467: AIR 1960 Ker 356 (358) (Pt D) (Pr 5) (DB).**

——S. 16 (1) (ii) — Second offence — Trial — Procedure — Warrant case — Criminal P. C. (1898), Ss. 251, 255-A.

For the accusation of a second offence under S. 16 (1) (g) (ii) the section provides for the enhanced penalty of imprisonment which may extend to two years. The case is, therefore, a warrant case. When the particulars of the first offence are furnished in the complaint the Magistrate should try the case under the provisions of Chapter XXI of the Criminal P. C. and the proper stage for charging the accused, with the previous conviction and of recording evidence, if necessary in respect of that charge would be the stage mentioned in S. 255-A. Trial of the case under Chapter XX of the Code, convicting the accused on his own admission of guilt, and ignoring the prior conviction on the ground that no evidence of that conviction was adduced before him whereas in reality he gave the prosecution no opportunity of adducing such evidence is irregular, if not stringent. **1959 Ker LR 97: 1959 Ker LT 140: 1959 Cri LJ 1330: (1959) MLJ (Cri) 871: AIR 1959 Ker 371 (372) (Pr 1).**

——S. 16 (1) (a) — Storing of goods in shop — — Presumption of sale — Burden of proof — Purchase of samples for cash — **Held** amounted to sale. See Prevention of Food Adulteration Act (1954), S. 2 (xiii). **ILR (1959) Ker 1.**

——S. 16 (1) (a) (iii) — Accused liable to enhanced punishment under S. 16 (1) (a) (iii) — Proper procedure is to frame charge for main offence in the first instance and then charge him as an old offender after he has been found guilty of the main offence — Criminal P. C. (1898), S. 221. AIR 1960 Kerala 356, Rel. on. **(1962) 2 Mad LJ 104: 1962 Mad LJ (Cri) 424: 1962 (1) Cri LJ 166 (168) (Pt C) (Pr 7).**

——S. 16 — Submission of report by Food Inspector for prosecution of accused under sub-section (1) (ii) — Magistrate allowing report to be corrected as one under sub-section (1) (i) on submission by prosecution counsel that there was no previous conviction against accused — Magistrate not verifying correctness of submission by questioning the Food Inspector before allowing correction — Sufficient materials in existence to show that correction made by prosecution counsel was prima facie based on mistaken impression — Conviction and sentence under sub-section (1) (i) set aside and case remanded for trial of accused under sub-section (1) (ii). **(1963) 5 Orissa JD 27.**

——S. 16 — Three different charges under Prevention of Food Adulteration Act — Acquittal in two cases — No bar to conviction under third charge. See Criminal P. C. (1898), S. 403. **1964 BLJR 900.**

——S. 16 (1) (g) (ii) — Second offence under the Act — Delay in disposal of case. **Held,** that ends of justice would be met by awarding a lesser punishment than that provided for and hence the accused was sentenced to simple imprisonment for six months and a fine of Rs. 1000. **64 Pun LR 949: 1962 Cur LJ 487: 1963 (1) Cri LJ 475: AIR 1963 Punj 175 (178) (Pt D) (Pr 9) (DB).**

——S. 16 (1) (a) (ii) — Mixed milk of cow and buffalo — Standards in Punjab are those laid down in Punjab Pure Food Rules (1930) — Mixed milk containing 4.9 per cent. of milk fat and 7.8 per cent. of milk solids other than fats — Conviction held justified. See Prevention of Food Adulteration Act (1954), S. 25 (2). **(1962) 64 Pun LR 802.**

——S. 16 (1) (ii) — Charge must state date of commission of first offence — Merely stating that conviction for first offence was made prior to framing of charge is not enough. See Criminal P. C. (1898), S. 221 (7). **1965 Raj LW 382: 1966 Cri LJ 1057: ILR (1965) 15 Raj 820: AIR 1966 Raj 203.**

——S. 16 (1) (g) (ii) — Criminal P. C. (1898), S. 342 — Examination of accused — Second offence under Food Adulteration Act — Fact that so called first offence was committed prior to commission of offence for which accused is tried must be brought out in examination. See Criminal P. C. (1898), S. 342 (1). **1965 Raj LW 382: 1966 Cri LJ 1057: ILR (1965) 15 Raj 820: AIR 1966 Raj 203.**

——S. 16 (a) — Complaint against accused for sale of adulterated milk — Trial of case as summons case — Charge framed without compliance with provisions of S. 242, Criminal P. C. — Further, Magistrate though required under S. 243, Criminal P. C. to record admission of accused in words used by him, failing to do so and convicting accused on ground that accused had pleaded guilty — Held, conviction could not be maintained. See Criminal P. C. (1898), Section 242. **1965 (1) Cri LJ 599: AIR 1965 Raj 107 (DB).**

——Ss. 16 and 19 — Offence under by milk-vendor — Accused cannot raise the plea that he himself purchased the milk from others and had no knowledge about its quality. See Prevention of Food Adulteration Act (1954), S. 7. **1964 (2) Cri LJ 363: AIR 1964 Tripura 48.**

SECTION 17

——S. 17 (2) — Sale of adulterated food by company or by its employee — Vicarious liability of natural persons — It must be established that they had some nexus with crime. **1964 All WR (HC) 779: 1965 All Cri R 25: 1965 All LJ 182: 1965 (2) Cri LJ 581: AIR 1965 All 525 (526) (Pt B) (Pr 7).**

——S. 17 (1), Proviso — Scope of S. 17 — Vendor of milk on behalf of company — Liability

to be punished for contravention of provisions of Act.

Section 17 deals with cases where an offence has been committed by a company and the liability of the person who at the time the offence was committed was in charge and was responsible to the company for the conduct of its business. It cannot be said that the accused, a vendor of the milk on behalf of the company, is not liable to be punished for contravention of the provisions of the Act unless he is shown to have guilty knowledge. AIR 1961 SC 631, Foll. **(1935) 2 An WR 359: 1965 Mad LJ (Cri) 815: AIR 1966 Andh Pra 86 (99) (Pt B) (Pr 16).**

——**Ss. 17, 7, 16 and 2 (j)** — Offence under Section 16 read with Ss. 7 and 2 (j) — Prosecution of managing director of company — Prosecution must prove that accused had knowledge that the food in question was misbranded. See Prevention of Food Adulteration Act (1954), S. 7. **1960 Cri LJ 1417: AIR 1960 Andh Pra 584.**

——**Ss. 17, 16 (1) and 19** — Scope of — Prosecution against one of the partners of a firm carrying on groundnut oil business for offence under S. 16 (1) read with S. 7 — Plea that he was selling oil in the condition in which he had bought it and did not know that it was adulterated — Further plea that partner cannot be charged under Act — Sustainability — The plea cannot be entertained in view of S. 19. See Prevention of Food Adulteration Act (1954), S. 16 (1). **1959 Mad LJ (Cri) 858: (1959) 2 Andh WR 479.**

——**S. 17 (1). Proviso — Person in charge of and responsible to company for conduct of business — Prosecution of — Burden of proof — Proprietor if can be prosecuted under S. 17 (1).**

Where an offence under the Act was alleged to have been committed by an oil mill and the only evidence led by the prosecution was that the accused was one of the proprietors of the mill and there was no evidence that the accused was in charge of or was responsible to the company for the conduct of the business of the company:

Held, that the accused could not be convicted for the offence under S. 17 (1). **65 Cal WN 1107: ILR (1961) 2 Cal 398.**

——**S. 17, Proviso — Complaint in respect of offence under Act against company represented by accused — Accused has to prove that adulteration was committed without his knowledge if he was personally prosecuted. 1965 Ker LJ 456: 1965 Ker LT 548: ILR (1965) 2 Ker 45: (1965) 1 Ker LR 392: 1965 (2) Cri LJ 775: AIR 1965 Ker 295 (296) (Pt A) (Pr 3).**

——**S. 17** — Sale of adulterated food by servant of society is sale by society — Liability of society not affected by Section 17 — Questions of intention, mens rea and knowledge do not arise. See Prevention of Food Adulteration Act (1954), Section 7. **1962 Ker LT 667.**

——**S. 17 (1)** — Certificate of Public Analyst — Contents. See Prevention of Food Adulteration Act (1954), S. 13 (5). **1962 Ker LT 95.**

——**S. 17** — Charge framed against accused under S. 16 (1) (a) (ii) and not referring to S. 17 — Charge also not disclosing that offence was committed by a firm and accused is prosecuted as a partner — **Held,** that charge could not be treated as one under S. 17 and the accused convicted thereunder. **ILR (1961) 1 Ker 639: 1961 Ker LT 415: (1961) 1 Ker LR 579: 1961 Mad LJ (Cr) 528: 1962 (1) Cri LJ 647 (649) (Pt C) (Pr 7).**

——**S. 17** — If an offence under the Act is committed by a company, both the persons responsible for the conduct of the business of the Company as well as the Company are deemed to be guilty of the offence — But section does not require that the person in charge of the Company should be found guilty before the Company is held liable. **77 Mad LW 62: 1964 (2) Cri LJ 39: (1964) 2 Mad LJ 53: 1964 Mad LJ (Cri) 411: ILR (1964) 2 Mad 398: AIR 1964 Mad 301 (302) (Pt A) (Pr 5).**

——**S. 17 (1)** — Sample milk taken from Co-operative Milk Society sent to Public Analyst — Analyst's report stating that the sample contained added water — Analyst stating when examined in Court that he found the freezing point of the sample was 0.495 and that was his reason for coming to the conclusion that milk contained added water — Analyst also deposing that no change had taken place in the constitution of the sample because of the addition of the formalin — **Held,** the prosecution had satisfactorily established that the sample contained added water and the society was guilty under S. 17 (1). See Prevention of Food Adulteration Act (1954), S. 7. **1964 (2) Cri LJ 39: AIR 1964 Mad 301.**

——**Ss. 17 (1) and 16 (1) — Offence by Co-operative Society — Secretary having only supervisory duty — If person responsible to society — Separate convictions of society and secretary — Legality.**

A co-operative society and its secretary can be separately convicted for an offence under Section 16 (1). Where in a trial of an offence under S. 16 (1) against a co-operative milk society the evidence disclosed that the day-to-day business of selling the milk was done by the clerk of the Society and the secretary, who was only a honorary secretary was not going to the society and the business was left in the hands of the clerk with a check over him by the secretary, it would not make the Secretary a person who at the time of the offence was in charge and was responsible to the Society for the conduct of the business within the meaning of S. 17 (1). In the absence of such evidence the conviction of the secretary under S. 16 (1) cannot be upheld. **1958 Mad WN 49: (1958) 1 Mad LJ 20: 71 Mad LW 78: 1958 All Cr R 72: 1958 All WR (Sup) 27 (2): 1958 Cri LJ 527: AIR 1958 Mad 183 (183, 184) (Prs 2, 4).**

——**Ss. 17 (1), 16 (1) and 7—Co-operative milk society prosecuted — Liability of.**

Where a Co-operative Milk Society is prosecuted for an offence under S. 16 (1) read with S. 7, the liability of the accused is an absolute liability as seen from S. 17 (1). It is unnecessary for the prosecution to prove that the officers of the Society knew that the milk offered for sale was adulterated milk. **1960 Cri LJ 494: 37 Mys LJ 948: 1960 Mad LJ (Cri) 324: AIR 1960 Mys 80 (81) (Pt A) (Pr 6) (DB).**

SECTION 19

●——**S. 19** — 'Vendor' — Meaning of — 'Vendor' means the person who has sold alleged adulterated article of food and not merely one from whom sample was purchased by Food Inspector. Mangaldas Raghavji Ruparel v. State of Maharashtra, **(1965) 2 SCR 894: (1965) 2 SCWR 561: (1965) 2 SCA 530: 1966 Cri LJ 106: AIR 1966 SC 128 (133) (Pt J) (Pr 13).**

●——**S. 19** — Prosecution under S. 16 (1) (a) — Plea of absence of mens rea — Burden is on accused to show absence of mens rea. See Prevention of Food Adulteration Act (1954), S. 16 (1) (a). **(1965) 2 SCWR 561: (1965) 2 SCA 530: 1966 Cri LJ 106: AIR 1966 SC 128.**

●——**Ss. 19, 7, 16** — Sale of adulterated article by servant of owner — Servant is liable without

proof of mens rea. See Prevention of Food Adulteration Act (1954), S. 7. **1961 (1) Cri LJ 747: AIR 1961 SC 631.**

——**Ss. 19, 2 (xiii) and 16** — Sale of adulterated article by servant on behalf of master — Conviction of master — Validity — The section punishes any person who sells an adulterated article and a servant thus can be convicted. See Prevention of Food Adulteration Act (1954), S. 2 (13). **ILR (1961) 2 All 95.**

——Ss. **19, 16 (1) and 17** — Scope of — Prosecution against one of the partners of a firm carrying on groundnut oil business for offences under S. 16 (1) read with S. 7 — Plea that he was selling oil in the condition in which he had bought it and did not know that it was adulterated — Further plea that partner cannot be charged under Act — Sustainability — The plea cannot be entertained in view of S. 19. See Prevention of Food Adulteration Act (1954), Section 16 (1). **1959 Mad LJ (Cri) 858: (1959) 2 Andh WR 479.**

● ——**S. 19 (2)** — Warranty should form part of contract or should accompany the consignment— Warranty given after the seizure of goods and produced in Court is not good. **1961 (2) Cri LJ 456: (1960) 1 Assam LR 200: ILR (1961) 13 Assam 411: AIR 1961 Assam 128 (129) (Pt B) (Pr 5) (SB).**

——**S. 19 (2) — Warranty — Defence by servant — Validity.**

The word 'vendor' ordinarily means 'one who sells' and it is open to the servant who sells, to rely on his master's warranty in defence in the same way in which his master would have been entitled to rely upon if the master had sold; so that a servant selling adulterated food can be liable under the Act. **1963 (1) Cri LJ 658 (662) (Pt D) (Pr 11) (Cal).**

——**Ss. 19 (2) and 16 (1) (g) — Requirements of warranty.**

A label or cash bill cannot be termed as warranty unless it falls within the proviso to R. 12-A. The wording in S. 19(2)(i) shows that the warranty must have been obtained by the vendor at the time of his purchase of the article in question. The undertaking to give warranty must have been one of the terms of the contract of purchase and it is only then that the warranty obtained subsequently can be availed of as defence. Warranty must be in writing and in the prescribed form. Therefore, an advertisement circular is not a warranty. **1963 Ker LT 1040.**

——**S. 19** — Successive warranties — Section 19 does not apply to case of. **1961 Ker LT 980: ILR (1962) 1 Ker 209: 1962 Ker LJ 488: 1962 (2) Cri LJ 433 (435) (Pt B) (Pr 5).**

——S. 19 — Ghee of S. G. Mark brand sold from sealed tins — Ghee found to be adulterated — Vendor guilty of offence under S. 7 — That the vendor was ignorant about quality of ghee is no defence under S. 19. See Prevention of Food Adulteration Act (1954), S. 22 (i) (1). **1964 MP LJ (Notes) 81.**

——**S. 19 (2) — Prosecution of person supplying article of food for sale to dealer, along with that of dealer from whom actually sample was purchased in same trial is not justified.**

There is no justification for the prosecution of a person, firm or company who is alleged to have supplied goods to the dealer from whom the sample is actually purchased by the Food Inspector in the same trial as the dealer from whom the sample was taken. **1965 Cur LJ 843: AIR 1966 Punj 421 (422) (Pt A) (Pr 6).**

——**Ss. 19, 11** — Food Inspector taking sample from vendor and putting complaint on printed form — Effective part of complaint saying that Inspector found adulterated article in possession of vendor contained in closed bag with label of a certain company for sale — Complaint held did not disclose any offence against the company — Complaint must state that article of which sample was taken was supplied by the company and that this was done at place where inspection was done in order to give the Court of that place jurisdiction. See Prevention of Food Adulteration Act (1954), S. 11. **1965 Cur LJ 843: AIR 1966 Punj 421.**

——**S. 19 (2)** — Accused relying on a warranty at the time of trial — No evidence to show that he submitted to the Food Inspector at the time of sale the warranty or a copy of it to the local authority — Accused is not entitled to shelter under the provisions of the section. **1964 Cur LJ 317: 66 Pun LR 566: 1965 (1) Cri LJ 77: AIR 1965 Punj 30 (31) (Pt B) (Pr 9).**

——**Ss. 19, 7, 16** — Offence under S. 16 by milk vendor — Accused cannot raise the plea that he himself purchased the milk from others and had no knowledge about its quality. See Prevention of Food Adulteration Act (1954), S. 7. **1964 (2) Cri LJ 363: AIR 1964 Tripura 48.**

SECTION 20

SYNOPSIS

(Prevention of Food Adulteration Act (1954), Section 20.)

1. Scope.
2. Written consent — General.
(A) State Government or local authority.
(B) "Person authorised".
(C) "In this behalf".
(D) Forms and contents of.
3. Prosecution by purchaser.
4. Cognizance of offence.
5. Evidence and proof.
6. Practice and procedure.

1. Scope.

——**S. 20** — Complaint by Food Inspector under Section 7/16 — Medical Officer endorsing on complaint for purposes of Section 20 — Medical Officer is not a complainant to file appeal against order of acquittal. See Criminal P. C. (1898), Section 417 (3). **1964 (2) Cr LJ 502: AIR 1964 All 497.**

——**Ss. 20, 7, 16 and 25 (2) — Offence committed in 1955 — Prosecution launched by Assistant Medical Officer — Legality — (U. P. Pure Food Act (32 of 1950), Section 34).**

The alleged offence was committed on 21-7-1955 and the prosecution was launched under Section 16 read with Section 7, Prevention of Food Adulteration Act by the Assistant Medical Officer of Health prior to the enforcement of the rules made by the State Government under the Act.

Held, (i) that the State Government had not authorised Assistant Medical Officer by that date to prosecute any person for an offence under the Act. He could not, therefore, institute a complaint in view of Section 20 of the Act. (ii) that the contention that by virtue of Section 25 (2), Prevention of Food Adulteration Act the power which the Assistant Medical Officers exercised under U. P. Pure Food Act and rules thereunder could be exercised by them under the Prevention of Food Adulteration Act was not tenable because Food Inspectors appointed under the U. P. Pure Food Act were conferred the power to prosecute by the Act itself, namely by Section 34. They did not derive this power under any rules.

When Section 34 of the Act was repealed in view of the repeal of the entire Act, this power

of the Food Inspectors came to an end. The notification appointing Health Officers and others to be Food Inspectors might serve the purpose of appointing them Food Inspectors under the Prevention of Food Adulteration Act, but it neither gave them the power to prosecute under the U. P. Pure Food Act nor could it be deemed to confer this power under the Prevention of Food Adulteration Act. Hence, the prosecution was bad in law. **1958 All WR (HC) 281: 1958 All Cr R 229: 1957 Cr LJ 615: AIR 1957 All 343 (1) (343) (Prs 2, 3) (DB).**

——S. 20 — Criminal P. C., Section 197 (1) — Distinction.

Sub-section (1) of Section 197 of Criminal P. C. speaks of any Court not taking cognizance of the offence mentioned therein except with the previous sanction of the Government concerned, while the provisions of Section 20 of the Prevention of Food Adulteration Act, the wording of which is different from that of Section 197, Criminal P. C., speaks of the institution of the prosecution except by, or with the consent, of the authorities or the person mentioned in that section. **60 Bom LR 441: ILR (1958) Bom 906: 1960 Cr LJ 805: AIR 1960 Bom 244 (246) (Pt D) (Pr 11) (DB).**

——Ss. 20 and 2 (vii), (viii) — Offence under Section 20 — Jurisdiction — Corporation of Calcutta has such jurisdiction by virtue of Notification No. P. H. P. 2503/2R-66/54. **ILR (1958) 2 Cal 105.**

——S. 20 — Notification under Section 20, Food Adulteration Act — **Held,** amounted to law and survived in Malabar District after its integration with Kerela. See States Reorganisation Act (1956), Section 119. **1962 (1) Cr LJ 647 (Ker).**

——S. 20 — "Local Authority" — Offence committed within Municipal limits — Municipality is the local authority — Commissioner of Corporation not a local authority within meaning of Section 20. See Prevention of Food Adulteration Act (1954), Section 2 (viii). **(1962) 40 Mys LJ 557.**

——S. 20 — Adulteration of milk — Discretion of Public Analyst — Duty of Court.

The Court has nothing to do with the discretion of the Public Analyst in recommending or not recommending the prosecution of the accused. So far as the Courts are concerned if the milk is adulterated, it is an offence and the offenders have to be punished if they are prosecuted. It is for the Government to choose to prosecute them or not. **37 Mys LJ 948: 1960 Cr LJ 494: 1960 Mad LJ (Cri) 324: AIR 1960 Mys 80 (82) (Pt D) (Pr 8) (DB).**

——Ss. 20 (1) and 2 (viii) (1) (a) — Complaint by Chairman of Municipality authorised to the complaints by a general resolution is not a complaint filed by person authorised 'in this behalf' — Proceedings upon such complaint are vitiated. **1963 (2) Cri LJ 305: AIR 1963 Orissa 158.**

——S. 20 — Scope and applicability — Complaint against specified individual — Prosecution against other persons cannot be initiated on that complaint.

The expression 'prosecution' must have reference to specific individuals and to specific facts against them. A Magistrate while taking cognizance of an offence under the Prevention of Food Adulteration Act on a complaint filed against specified individual or individuals cannot issue process and initiate prosecution against other persons. AIR 1960 Ker 356, Foll; AIR 1944 Pat 210, Dist. **1965 Raj LW 29: 1965 (1) Cri LJ 597: ILR (1965) 15 Raj 186: AIR 1965 Raj 96 (97, 98) (Prs 4, 5).**

——S. 20 — Sanction for prosecution condition precedent for validity of prosecution — Acquittal of accused on ground of want of sanction merely amounts to order of discharge — Fresh prosecution after sanction is not barred. See Criminal P. C. (1898), S. 403 (1). **1963 Raj LW 204.**

2. Written consent — General.
(A) State Government or local authority.
(B) "Person authorised".
(C) "In this behalf".
(D) Forms and contents of.

2. Written consent — General.

——S. 20 — Who can prosecute — Prosecution under Section 16 (1) (a) and (i) read with Section 7 (i) — Prosecution sanctioned by Chairman of Assam Municipality — Assam Municipal Act, 1956 (15 of 1957), Sections 37 and 227 — Chairman, without being so empowered by resolution, is not vested with power to sanction prosecution under Prevention of Food Adulteration Act, 1954.

Under the provisions of Section 20 of the Prevention of Food Adulteration Act it is the Board alone or a person with the written consent of the Board who is empowered to institute a complaint. The written consent of the Chairman cannot be equated with the consent of the Board, unless the Board had by any special resolution, authorised the Chairman to give the written consent as required under Section 20 of the Prevention of Food Adulteration Act. AIR 1960 Andh Pra 27; AIR 1960 Ker 356 and AIR 1923 Cal 561, Rel. on; AIR 1952 All 209 and AIR 1960 All 117, Disting. **1963 (1) Cr LJ 349: ILR (1963) 15 Assam 75: AIR 1963 Assam 28 (30, 31) (Pt B) (Prs 11, 14).**

——S. 20 (1) — Written consent for prosecution. — Who can give — Municipal Borough authorising its Standing Committee to sanction prosecutions under the Act — Latter body giving written consent to Chief Food Officer — Consent not invalid as delegation of delegated power or for non-mention of Officer's name. AIR 1961 SC 1, Foll. **66 Bom LR 446: 1964 Mah LJ 570: 1965 (1) Cr LJ 145: ILR (1964) Bom 707: AIR 1965 Bom 17 (18) (Pt A) (Prs 6, 7) (DB).**

——S. 20 (1) — Consent — Authority to give.

Under Section 20 (1), the prosecution can be instituted with the consent of any of these authorities (1) the State Government, (2) a local authority, (3) a person authorised in that behalf by the State Government, or (4) a person similarly authorised by a local authority. **60 Bom LR 441: ILR (1958) Bom 906: 1960 Cr LJ 805: AIR 1960 Bom 244 (245) (Pt A) (Pr 7) (DB).**

——S. 20 — Chief Officer authorised by Municipality under section — Food Inspector asked to file complaint by Chief Officer — Prosecution being with consent of Chief Officer is valid. **ILR (1965) Guj 386: (1965) 6 Guj LR 406: 1966 Cri LJ 411: AIR 1966 Guj 83 (83) (Pt A) (Pr 1).**

——S. 20 (1) — Sanction under — Complaint signed by Chief Executive Officer who was authorised to sanction prosecution by local authority — **Held,** that sanctioning authority and complaining authority being same, no separate sanction or consent in writing was necessary. **1961 Jab LJ 768: 1961 MPLJ 876: 1962 (1) Cr LJ 41: ILR (1959) Madh Pra 1031: AIR 1962 Madh Pra 17 (18, 19) (Pt B) (Pr 7).**

——S. 20 — Written consent by Commissioner of Corporation — Prosecution by Food Inspector

appointed under Section 9 of the Act — If valid.

A prosecution instituted with the written consent of the Commissioner was a defective prosecution, as the Commissioner had no authority to give sanction. The fact that some one was appointed as a Food Inspector under Section 9 of the Act cannot confer on him power to dispense with the written consent required by Section 20 of the Prevention of Food Adulteration Act. **(1964) MLJ (Cri) 441: 40 Mys LJ 564.**

——S. 20 (1) — Sanction for prosecution — Chairman of Municipal Council, Jaipur can accord sanction — Chairman is not 'a person authorised in this behalf by a local authority' within meaning of Section 20 (1) — In according sanction he acts under statutory power and functions as local authority itself. See Municipalities — Rajasthan Municipalities Act (38 of 1959), Section 67. **1965 Raj LW 382: 1966 Cr LJ 1057: ILR (1965) 15 Raj 820: AIR 1966 Raj 203.**

——S. 20 (1) — Consent for prosecution — Chairman of Municipal Board can give consent under Section 67 (d) of Rajasthan Municipalities Act (1959) — Delegation of power under Section 78 of that Act — Not necessary.

Municipal Board constituted under the Rajasthan Municipalities Act, 1959, can act through its chairman by virtue of Section 67 (d) of that Act in granting written consent for prosecution under Section 20 of the Prevention of Food Adulteration Act. Section 78 does not in any way affect the power conferred upon the chairman under Section 67. This power is there without there being any delegation. 1962 Raj LW 352 and 1959 Raj LW 134, Rel. on. The vice-chairman can grant permission as under Section 69 of the Rajasthan Municipalities Act, 1959, he can exercise the powers and perform the duties of the chairman in the absence of the chairman. **1963 Raj LW 634: ILR (1964) 14 Raj 19: 1964 (1) Cr LJ 702: AIR 1964 Raj 123 (126) (Pt B) (Prs 10, 11) (DB).**

——S. 20 — Sanction of prosecution by Chairman of Municipal Board — Sanction held valid.

Assuming that the accused is not a licensee under Section 23 (d) of the Rajasthan Town Municipalities Act, 1951 as well as under Section 67 (d) of the Rajasthan Municipalities Act, 1959, the Chairman has authority to perform all executive acts on behalf of the Board. The Chairman consequently could grant sanction to prosecute the accused as granting of such sanction was an executive act. The power of the Board to sanction prosecution has not been delegated to any person or authority other than the Chairman in the case of the persons who do not hold a licence. Criminal Revn. No. 198 of 1962, dated 28th February, 1963 (Raj), Disting. **1963 Raj LW 434: 1963 (2) Cr LJ 527: ILR (1963) 13 Raj 996: AIR 1963 Raj 233 (234) (Pt E) (Pr 6).**

——Ss. 20 (1) and 16 (1) (a) — Application of its mind by sanctioning authority to facts of case — Sanction in prescribed form not showing facts — Letter issued to the Magistrate simultaneously giving all the facts — Authority held had applied its mind. 1963 Raj LW 43: ILR (1963) 13 Raj 247.

——S. 20 — Prosecution under — Sanction of prosecution by Chairman of the Municipality — Validity — Rajasthan Town Municipalities Act (23 of 1951), Section 23 (1) (d) — Scope of.

Section 23 (1) (d) of the Rajasthan Town Municipalities Act 1951, is wide in its scope and does not limit the powers of the Chairman to executive functions under that Act alone but covers all executive functions which may be performed by the Municipal Board. Giving of consent for institution of prosecution is an executive function, and the Chairman by virtue of this provision could perform that function on behalf of the Municipal Board under Section 20 of the Prevention of Food Adulteration Act 1954. A prosecution, therefore, which is instituted with the written consent of the Chairman of a Municipal Board is not open to objection and is valid. AIR 1952 All 209, Rel. on. AIR 1923 Cal 561, Disting. **1962 Raj LW 352: ILR (1962) 12 Raj 759.**

——S. 20 — Sanction for prosecution — Administrator of Agartala Municipality — Office vested in District Magistrate — Sanction by Additional District Magistrate directed to be in charge of District Magistrate's post during latter's absence — His sanction is valid. 1964 (2) Cri LJ 363: AIR 1964 Tripura 48 (49) (Pt C) (Pr 6).

2 (A). State Government or local authority.

——Ss. 20 and 2 (vii) and (viii) — 'Local area' and 'local authority' — Interpretation — Prosecution launched by Municipality before Notification — Validity — Authority under U. P. Pure Food Act (32 of 1950), Section 2 (j) and (k) — (General Clauses Act (1897), Section 7) — (Interpretation of Statutes).

Held, that the definitions of 'local area' and 'local authority' supplement each other and these should be read together. When so read it will be clear that when the Prevention of Food Adulteration Act was passed, it did not repeal the definition of 'local authority' as far as it related to the Municipalities, Cantonments and Notified Areas but accepted and confirmed the existence of these local authorities and it also accepted the Municipalities, Cantonments, and Notified Areas as local areas within the meaning of the Central Act. The Uttar Pradesh State merely followed the direction given by the Act and only confirmed what was already enacted.

Hence, the Lucknow Municipality was competent to institute the prosecution. Cri. Revn. No. 164 of 1956 (All), Not approved. Cri. Revn. No. 152 of 1957 (All), Approved. **1960 Cr LJ 199: AIR 1960 All 119 (122) (Pt A) (Prs 15, 16, 17) (DB).**

——Ss. 20 (1), 2 (viii) — Local authority — 'Adiministrator' under Section 554, Bengal Municipal Act, if local authority — (Municipalities — Bengal Municipal Act (15 of 1932) (as amended by West Bengal Act 11 of 1954), S. 554).

A prosecution instituted upon the sanction of the Administrator of the Howrah Municipality was held legally defective, not being a sanction of 'local authority' within the meaning of Section 2 (viii). **1958 Cri LJ 169 (2) (172, 173) (Pt F) (Prs 11, 14, 17, 18) (Cal).**

——S. 20 — Local authority or the State Government can itself launch prosecution under the Act — Prosecution by local authority without consent of the State Government is competent. 1964 MPLJ (Notes) 35.

——S. 20 — Cognizance and trial of offences — Written consent by the Commissioner of Corporation — If prosecution valid.

The power to commence a prosecution under the Prevention of Food Adulteration Act, which resides exclusively in the local authority which is the Corporation in this case. It is not permissible to look into the provisions of the Corporation Act for the purpose of deciding whether the Commissioner is a local authority for the purpose of the Prevention of Food

Adulteration Act. For the purpose of Section 20 of the Prevention of Food Adulteration Act no one but the Corporation is the local authority in this case and as long as the prosecution in the present case was not preceded by the written consent of the local authority, it cannot be considered as one validly commenced. **(1964) MLJ (Cri) 437: 40 Mys LJ 557.**

——Ss. 20 (1), 2 (viii) — Orissa Prevention of Food Adulteration Rules (1959), Rule 12 — District Health Officer is local authority also in mofussil area — 'Person' and 'Local authority' — Distinction.

By virtue of Rule 12 of the Orissa Prevention of Food Adulteration Rules, the District Health Officer must be deemed to be the local authority for the purpose of the Act also in a mofussil area. Hence, where the sanction is given by the local authority the requirements of the mandatory provisions of Section 20 (1) of the Act must be held to have been complied with. The 'person' referred to in Section 20 (1) is one who is different from the 'local authority' as defined in the Act and in the Rules made by the State Government. That local authority is given power to authorise a particular person to sanction the prosecution for offences under the Act. **(1965) 7 OJD 17: 31 Cut LT 100: ILR (1964) Cut 778.**

——S. 20 — Local authority — Meaning of — Municipality superseded — Administrator appointed is local authority — Section 18, General Clauses Act is applicable to such case. See Prevention of Food Adulteration Act (1954), Section 2 (viii). **1963 (2) Cr LJ 589 (Raj).**

——Ss. 20 (1) and 2 (viii) — Administrator appointed after supersession of Municipality — He is 'local authority within meaning of Section 2 (viii) — Sanction given by him under Section 20 (1) for prosecution is valid.

Under Section 293 (kha) of the Tripura Municipal Act, all such powers and duties which might have been exercised by the Chairman of Commissioners if they had been in office on the date when the sanction for prosecution under Section 20 (1) of the Prevention of Food Adulteration Act was given by the Administrator can be exercised by the Administrator after the supersession of the Commissioners. Thus, after the supersession of the Commissioners (which formed the Municipality), the Administrator becomes the local authority within the meaning of Section 2 (viii) who can sanction the prosecution under Section 20 (1) of the said Act. **1961 (2) Cr LJ 807: AIR 1961 Tripura 52 (55) (Pt C) (Prs 17, 18).**

——Ss. 20, 2 (viii) — Sanction of 'local authority' for prosecution — Tripura municipality suspersed-ed under Section 292 of the Tripura Municipal Act — District Magistrate appointed Administrator — Sanction by him is by 'local authority'. **1961 (2) Cri LJ 152: AIR 1961 Tripura 18 (19) (Pt A) (Pr 7).**

2 (B). "Person authorised".

——S. 20 (1) — Medical Officer of Health of Nagar Mahapalika of Kanpur — Is proper authority to make complaints as contemplated by Section 20 — U. P. Nagar Mahapalika Adhiniyam, 1959. **1963 All LJ 765: 1964 (1) Cr LJ 626: AIR 1964 All 270 (272) (Pt A) (Pr 5) (DB).**

——S. 20 — Order by Administrator, Municipal Board, to launch prosecutions — Complaint lodged by Medical Officer is proper complaint. **1960 Cr LJ 198: 1960 All LJ 118: 1960 All WR (HC) 127: 1960 All Cr R 112: ILR (1959) 2 All 121: AIR 1960 All 117 (118) (Pt C) (Pr 8) (DB).**

[**Overruled** on another point in AIR 1960 All 546 (FB).]

——S. 20 — Offence committed in 1955 — Prosecution launched by Assistant Medical Officer — Legality — **Held,** he could not institute a complaint prior to the enforcement of the rules made by the State Government under the Act, as the Government had not authorised him by that date to prosecute any person for an offence under the Act. See Prevention of Food Adulteration Act (1954), Section 7. **1957 Cr LJ 615: AIR 1957 All 343 (1) (DB).**

——Ss. 20, 9 — Appointment of Sanitary Inspectors by their office as Food Inspector is valid and they have the power under Section 20 to file written complaints by virtue of their office. See Prevention of Food Adulteration Act (1954), Section 9. **1960 Cri LJ 569: AIR 1960 Andh Pra 282.**

——S. 20 — Who can file complaint — Complaint by Commissioner of Municipality signed also by Sanitary Sub-Inspector and Municipal Health Officer — Non-compliance of Section 20 — Complaint not valid.

Where a prosecution under Section 16 (1) is instituted on a complaint in writing of the Commissioner of the Municipality the mere fact that the Sanitary Inspector and the Municipal Health Officer had subscribed their signatures to page 2 of the complaint does not in any way alter the fact that the complainant is the Commissioner of the Municipality himself and not any other authority.

The Commissioner of the Municipality does not fall within any of the seven categories of persons or authorities under Sec. 20. Having regard to the plain language of Section 20 as the complaints in these cases have been instituted by an unauthorised person, the Judicial First Class Magistrate had no jurisdiction to take cognizance of these complaints and take action on the footing thereof. **1959 Andh LT 768: 1960 Cr LJ 46: AIR 1960 Andh Pra 27 (28) (Prs 7, 8) (DB).**

——S. 20 — Madras Prevention of Adulteration Act (3 of 1918), Sections 3, 18 — Sanitary Inspector is not competent to launch prosecution under Section 20 — (Constitution of India, Article 245).

A Sanitary Inspector of a town or Panchayat, authorised to launch prosecution under the Madras Prevention of Adulteration Act (3 of 1918), is incompetent to launch a prosecution under Section 20 of the Central Act of 1954. The delegation that is referred to in Section 3 and the rules framed under the Madras Prevention of Adulteration Act will amount to delegation of a delegated authority which is not valid under Section 20 of the Central Act. The prosecution will, therefore, be launched by one who is authorised neither by the Government nor the Municipal Board. **(1956) 2 MLJ 465.**

[**Overruled** in AIR 1961 SC 1.]

——S. 20 (1) — 'Person authorised' — Authorisation by virtue of designation of office — General authorisation of all Food Inspectors in the form of resolution by Municipal Council is valid — General Clauses Act (1897), Section 15. AIR 1961 SC 1 and ILR 22 All 123 (FB) and AIR 1961 Ker 84, Rel. on. **1963 (1) Cr LJ 785: 1963 Mad LJ (Cr) 347: (1963) 1 Mys LJ 312: ILR (1962) Mys 804: AIR 1963 Mys 157 (158, 159) (Prs 4, 6, 7) (DB).**

——Ss. 20 (1) and 2 (viii) (1) (a) — Complaint by Chairman of Municipality authorised to file complaints by a general resolution is not a com-

plaint filed by person authorised 'in this behalf' — Proceedings upon such complaint are vitiated — Orissa Municipal Act (23 of 1950), Section 96 (1). AIR 1962 Assam 28; AIR 1960 Ker 356 and AIR 1960 Andh Pra 27 and AIR 1963 SC 1198, Rel. on. **29 Cut LT 325: ILR (1963) Cut 583: 1963 (2) Cr LJ 305: AIR 1963 Orissa 158 (159) (Prs 4, 6).**

——**S. 20** — Resolution of Municipal Corporation authorising persons to launch prosecutions — Word 'launch' means 'institute' — Resolution does not suffer from infirmity. **(1964) 66 Punj LR 191.**

——**S. 20** — Municipal Commissioner recomending A the Municipal Prosecutor and B the Assistant Prosecutor to be authorised under Section 20 — Resolution referring to Commissioner's letter, authorising Municipal Prosecutor and Assistant Prosecutor to institute complaint under Section 20 — Authorisation held was by name and not by designation — Even the authorisation by designation was valid. **(1964) 66 Punj LR 191.**

——S. 20 (1) — Prosecution by authorised person — Consent of local authority or State Government is not necessary.

Where the prosecution is started by a Food Inspector who was generally and in the case particularly delegated with powers to institute prosecutions, the prosecution is proper. No consent of local authority or of the State Government is necessary. AIR 1960 Ker 356, Dissented from. **ILR (1962) 1 Punj 723: 1963 (1) Cr LJ 708 (709) (Pt A) (Pr 5).**

——S. 20 (1) — Prosecution launched by Food Inspector duly authorised by State Government — Additional written consent not necessary.

The prosecution to be valid under the Act has either to be launched by or with the written consent of the authorities specified in Section 20 (1). If any one of those authorities itself institutes the prosecution, obviously no question of additional written consent of any other authority or person can arise. A contrary interpretation would be reading the word "and" instead of "or" between the words "except by" and "with the written consent of".

Where, therefore, the complaints had been filed by the Food Inspectors who were duly authorised by the State Government to institute prosecutions for offences under the Act, the terms of the statute must be taken to have been fulfilled and additional written consent by the State Government or delegation by the State Government to the Food Inspectors was not necessary. AIR 1960 Ker 356, Not foll. **(1962) 64 Punj LR 1039: ILR (1963) 1 Punj 63.**

2 (C). "In this behalf".

——S. 20 (1) — 'Written consent'.

On the terms of Section 20 (1) a prosecution could be instituted with the written consent not merely of the State Government but 'of a local authority' or 'a person authorised in this behalf by the State Government or a local authority'. On the language of the sub-section no other construction is possible. 1957 Cr LJ 75, **Overruled;** AIR 1960 Bom 244, Approved. State of Bombay v. Parshottam Kanaiyalal, **63 Punj LR 439: 1960 Mad WN 808: (1961) 1 SCJ 226: 63 Bom LR 265: 1961 Mad LJ (Cr) 146: (1961) 1 Mad LJ (SC) 59: (1961) 1 Andh WR (SC) 59: (1961) 1 SCR 458: 1961 Nag LJ 251: 1960 All LJ 946: 1960 BLJR 727: (1960) 2 Ker LR 621: 1960 MPC 765: (1961) 1 Cr LJ 170: 1960 All WR (HC) 682: 1960 All Cr R 429: AIR 1961 SC 1 (3) (Pt A) (Pr 9).**

——S. 20 (1) — Sanction for filing complaint — Person can have authority to file complaint or to give written consent for filing complaint — Authority need not be given separately for each complaint — Provisions of this section and of Cr. P. Code (1898), Section 198-B — Distinction pointed out. ILR (1965) Guj 391.

——S. 20 (1) — "In this behalf" — Authority need not be given for each and every complaint — General authority for taking action under section will meet requirements of section.

Where a general sanction to prosecute is given by a resolution of the General Board of a Municipality authorising the Food Inspector to file cases under the Act, the Food Inspector has authority to institute the prosecution against the accused who has committed an offence under Section 16 of the Act; and the prosecution being instituted on a complaint which fulfils the requirements of Section 20 (1), the Judicial Magistrate, First Class, has the jurisdiction to take cognizance of and try the offence.

The very object of the second part is to enable the State Government and local authorities to appoint some other person to exercise, on their behalf, the discretion vested in them by the first part. Therefore, the words "in this behalf" do not mean that the authority must be given for each and every complaint. The general authority for taking action under Section 20 (1) of the Act will meet the requirement of the section. ILR 22 All 123 (FB) and AIR 1961 Ker 84, Rel. on; AIR 1956 Cal 64 and AIR 1960 Ker 356, Disting. **(1964) 5 Guj LR 696: 1966 Cri LJ 475 (476) (Prs 7, 8, 11) (DB).**

——S. 20 — Sanction to prosecution — Need not be specific as to offence and person — General authority conferred on an officer legal — Prosecution filed by a Food Inspector is legal.

The argument that persons like Food Inspectors could be authorised under Section 20 (1) of the Food Adulteration Act only in relation to a specific or particular case and not in general terms applicable to all prosecutions is not tenable. The expression 'in this behalf' in sub-section (1) of Section 20 means no more than that the authority vested in the State Government or Local Authority is for enabling the person to institute a prosecution. The intention is to provide for a delegation by the State Government or the Local Authority of its power to institute prosecution under the Act. Once under the section, a person is authorised, the authority so vested in the person is of the same quality and virtue as the power of the State Government or a local authority to institute a prosecution. Consequently the prosecution instituted by the Food Inspector appointed under Section 9 of the Act who has been authorised by the State Government under Section 20 (1) to institute prosecutions for offences under the Act, is legal and maintainable. 1961 Mad WN (Cr) 172, Foll. **(1965) 2 Mad LJ 403: 1965 Mad LJ (Cr) 796: 1966 Cr LJ 668: AIR 1966 Mad 194 (196) (Pt A) (Pr 8).**

——S. 20 (1) — General authorisation to Food Inspectors to prosecute for offences under Act is valid.

Section 20 (1) does not contemplate a specific authorisation in respect of a particular prosecution; the words 'in this behalf' means no more than that the authority vested in the State Government or a local authority is for the purpose of enabling the person to institute a prosecution.

The intention is to provide for a delegation by the State Government or a local authority of its power to institute prosecutions under the Act. A general authorisation by the State Government to the Food Inspector appointed under the Act is proper and a prosecution instituted by such authorised Food Inspector is valid. AIR 1961 SC 1, Rel. on. **(1962) 2 Mad LJ 104: 1962 Mad LJ Cri 424: 1962 (1) Cr LJ 166 (167, 168) (Pt A) (Prs 3, 6).**

2 (D). Form and contents of.

——S. 20 (1) — Scope — Non-specification of complaint — If fatal.

Where prosecutions are filed on the basis of written consents granted by the competent person or authority, the specification of the name of the complainant is not a statutory requirement — the consent being to a specified prosecution: AIR 1960 Bom 244, Reversed. State of Bombay v. Parshottam Kanaiyalal. **1960 Mad WN 808: 63 Punj LR 439: (1961) 1 SCJ 226: 63 Bom LR 265: 1961 Mad LJ (Cr) 146: (1961) 1 Mad LJ (SC) 59: (1961) 1 Andh WR (SC) 59: (1961) 1 SCR 458: 1961 Nag LJ 251: 1960 All LJ 946: 1960 BLJR 727: (1960) 2 Ker LR 621: 1960 MPC 765: (1961) 1 Cr LJ 170: 1960 All WR (HC) 68: 1960 All Cr R 429: AIR 1961 SC 1 (3) (Pt B) (Pr 13).**

——S. 20 (1) — Sanction for prosecution — Nature and object of — Sanction must precede actual prosecution though it can be proved subsequently — No particular form is necessary — Recording of reasons for sanction though not necessary, prescribed authority must have sufficiently applied its mind to facts of case — Sanction must be for prosecution of certain offence under the Act by particular offender but need not be for prosecution by specified prosecutor — Interpretation of Statutes — Conditions cannot generally be read into provisions of law if they are not found there at all — Civil P. C. (1908), Preamble — Interpretation of Statutes. **1965 All LJ 612: 1965 All WR (HC) 823: 1966 All Cri R 1: AIR 1966 All 504 (505) (Pt A) (Pr 4).**

——S. 20 (1) — Scope of.

In addition to the prosecution by the authorities mentioned in Section 2 (1), the section also provides for a prosecution to be instituted with the written consent of any of these authorities. This consent should be specifically related to a particular offence with reference to which it is intended to institute a prosecution. **(1962) 2 Mad LJ 104: 1962 Mad LJ (Cri) 424: 1962 (1) Cr LJ 166 (167, 168) (Pt B) (Pr 3).**

——S. 20 (1) — Sanction for prosecution — It should mentioned person to whom consent is given.

A written sanction or a written consent for prosecution, without mentioning the person to whom such consent or sanction is given, would not be a sufficient compliance with the terms of the section. **60 Bom LR 441: ILR (1958) Bom 906: 1960 Cr LJ 805: AIR 1960 Bom 244 (246) (Pt B) (Pr 9) (DB).**

——S. 20 — Scope and object — Written consent must be with reference to particular offence by particular person — Special authorisation for each case — Necessity — Section 16 (1) (a) and (d) — Scope — Storage of waste tea — Offence.

The institution of a prosecution whether it be by the State Government or a local authority under the first clause or by a duly authorised person under the second clause, can only be for a particular offence committed by a particular person. A written consent must be with reference to a particular offence committed by a particular person. There can be no general consent for the prosecution of all offenders. The authorisation under the second clause can be a general authorisation to institute, or give consent to, prosecutions for offences under the Act and it enables a general delegation of the power given to the State Government and local authorities under the first clause. It is obvious that the very object of the second clause is to enable the State Government and the local authorities to appoint some other person to exercise on their behalf the discretion vested in them by the first clause. ILR 22 All 123: (1960) 1 KLR 582: (1960) KLT 515, Relied on.

As tea waste is not an article of food, Cl. (a) of Section 16 (1) becomes inapplicable since that clause relates only to the manufacture, storage, sale or distribution of an article of food. Storage of an adulterant by a person who is not a manufacturer of food is no offence even if the storage be for purposes of sale.

The words 'which may be employed for the purpose of adulteration' in Section 16 (1) (d) are not used in the sense, 'is capable of being employed for the purpose of adulteration'. What is punishable under Section 16 (1) (d) is possession, by a manufacturer of food, of an adulterant in circumstances which lead to the inference that he is keeping it for being used by him for purposes of adulteration. **1960 Ker LT 743: 1960 Ker LJ 921: ILR (1960) Ker 1426: 1961 (1) Cr LJ 376: (1961) MLJ (Cr) 51: AIR 1961 Ker 84 (85) (Pt A) (Pr 3).**

——S. 20 — Sanction for prosecution — Form and contents of — Section 10 (7) — Non-compliance — Serious irregularity — Section 11 — Notice addressed to first accused, owner of shop, on second accused, employee—Legality — Cr. P. Code (5 of 1898), S. 221 — Clubbing together of charge for actual commission of the offence of selling adulterated oil and charge for enhanced punishment under Section 16 (g) (ii) of the Prevention of Food Adulteration Act for previous conviction — Legality.

The sanction required by Section 20 of the Prevention of Food Adulteration Act is not an empty formality. It must show that the authority giving the sanction had applied his mind to the alleged commission of the offence by the accused person and was satisfied that the accused has to be prosecuted for the said offence. Necessarily it follows that the sanction must be for the prosecution of specified individuals and for specific offences. The conferring of an authority or the giving of sanction in vague and general terms is not what is required under Section 20 providing for a proper and valid sanction. In the absence of valid sanction under Section 20, the prosecution launched could not be sustained and it could not confer jurisdiction on the Magistrate to try the case against the accused.

The non-compliance with the requirements of sub-section (7) of Section 10 of the Act is a serious irregularity which causes material prejudice to the accused. The notice required by Sec. 11 should have been given to both the accused. The failure to issue notice as required by Section 11 is also a vital defect which has vitiated the prosecution case. The proper procedure would have been to frame the charge against the accused for the main offence in the first instance and then to charge them as old offenders after they have been found guilty of the commission of the main

offence charged against them. The defect in the charge as framed against the accused has caused prejudice to them in the trial of the case and the order acquitting the accused calls for no interference. **(1960) MLJ (Cri) 595: 1960 Cr LJ 1467: (1960) 1 Ker LR 582: 1960 Ker LT 515: 1960 Ker LJ 753: AIR 1960 Ker 356 (357) (Pt A) (Pr 2) (DB).**

——**S. 20 (1)** — General authorisation to institute prosecution — Validity — A resolution by a Municipal Council which gives a general sanction to a sanitary Inspector to file a prosecution under the Act against certain specified persons but does not refer to any specific offence having been committed by the accused, is a valid sanction under Section 20 (1). AIR 1961 Ker 84; ILR 22 All 123 (FB), Rel. on. **(1960) 2 Ker LR 717.**

——**S. 20** — Sanction, form of — Section of Act need not be specified — Sanctioning authority must apply its mind before granting sanction — There is a presumption from the official act of the Chairman of the Municipal Board granting the sanction that it was regularly performed. AIR 1963 SC 666, Rel. on. **1963 Raj LW 434: 1963 (2) Cr LJ 527: ILR (1963) 13 Raj 996: AIR 1963 Raj 233 (234) (Pt A) (Pr 7).**

——**S. 20** — Consent without the name of persons authorised to prosecute — Prosecution filed on basis of written consent — Consent being to a specified prosecution, specification of name of complainant is not a statutory requirement — Consent held not bad. AIR 1961 SC 1, Relied on. **1962 Raj LW 279: ILR (1962) 12 Raj 626: 1963 (1) Cr LJ 221: AIR 1963 Raj 17 (21) (Pt C) (Pr 8).**

3. Prosecution by purchaser.

——**S. 20** — Sanitary Inspector validly appointed Food Inspector is not a 'purchaser'. See Prevention of Food Adulteration Act (1954), Sec. 9. **1960 Cri LJ 569: AIR 1960 Andh Pra 282.**

4. Cognizance of offence.

——**Ss. 20 and 2 (vii), (viii) — Offence under Section 20 — Jurisdiction — Corporation of Calcutta has such jurisdiction by virtue of Notification No. P. H. p. 2503/2R-66/54 — Municipalities — Calcutta Municipal Act (33 of 1951), Schedule I. ILR (1958) 2 Cal 105.**

5. Evidence and proof.

——**S. 20 (1)** — Cognizance of complaint — Misdescription in designation of Officer authorised to file complaint — Maxim 'falso demonstratio non nocet cum de corpore constat', applicability of — Complaint written on form printed during existence of Municipal Board — Seal of Health Department of Nagar Mahapalika placed on top of form — Construction — Extraneous evidence to prove that complaint was made by duly authorised person, admissibility — Evidence Act (1872), Sections 92 and 96. AIR 1950 All 507, Rel. on; AIR 1948 PC 82 and AI R1954 SC 359 and AIR 1954 SC 637, Rel. on. **1963 All LJ 765: 1964 (1) Cr LJ 626: AIR 1964 All 270 (273, 274) (Pt B) (Prs 7, 8, 9, 15, 16, 17) (DB).**

——**S. 20 (1)** — Authority for prosecution — Resolution by Municipal Council submitted as such authority — Proof of — Order by Municipal Commissioner sanctioning authority in favour of Sanitary Inspector — Statement by Municipal Commissioner in his order or by Sanitary Inspector as prosecution witness — Not admissible as evidence or resolution — No presumption under Section 114, Evidence Act — Evidence Act (1872), Sections 78 (5), 114, Illustration (g). **ILR (1960) Ker 1449.**

——**S. 20 (1) — Authority for prosecution — Absence of proof — Effect — No objection by accused — Authority cannot be presumed.**

The absence of proof of due authority for the prosecution under Section 20 of the Act, goes to the very root of the matter and deprives the Court of jurisdiction. Due authority is a prerequisite for the initiation of the prosecution, and proof thereof, for cognizance.

It is for the prosecution to prove the due authority or sanction required to invest the Court with jurisdiction. The view that where no objection is taken by the accused, the necessary sanction or authority may be presumed is not correct. AIR 1947 Sind 79, Expl. **ILR (1960) Ker 1449.**

6. Practice and procedure.

——**S. 20** — Complaint by Food Inspector under Sections 7/16 — Medical Officer endorsing on complaint for purposes of Section 20 — Medical Officer is not a complainant to file appeal against order of acquittal. See Criminal P. C. (1898), Section 417 (3). **1964 (2) Cri LJ 502: AIR 1964 All 497.**

——**S. 20** — Municipalities — Calcutta Municipal Act (33 of 1951), Section 579 (1) and (2) — Municipal Magistrates — Powers of — Not competent to take cognizance of offence under Prevention of Food Adulteration Act. See Municipalities — Calcutta Municipal Act (33 of 1951), Section 579 (1). **ILR (1958) 2 Cal 105.**

——**S. 20** — Complaint under need not be signed by complainant. See Criminal P. C. (1898), Section 248. **AIR 1967 Guj 15.**

——**S. 20 — Consent may be proved during trial.** Under Section 20, there should be a consent of a particular person, mentioned in the section, for starting a prosecution under the Act but that consent may be proved in the course of the trial. It is not necessary for the complainant to sign the complaint. **ILR (1965) Guj 923: (1965) 6 Guj LR 867: AIR 1967 Guj 15 (16) (Pt A) (Pr 1).**

——**Ss. 20, 9** — Appointment of a person as Food Inspector under Section 9 — Written consent under Section 20 — Not dispensed with — Prosecution without such sanction — Invalid. See Prevention of Food Adulteration Act (1954), Section 9. **(1962) 40 Mys LJ 564.**

——**Ss. 20, 2 (viii)** — "Local Authority" — Offence committed within municipal limits — Municipality is the local authority — Commissioner of Corporation not a local authority within meaning of Section 20. See Prevention of Food Adulteration Act (1954), Section 2 (viii). **(1962) 40 Mys LJ 557.**

——**S. 20** — Question whether Chairman of Municipal Board had no authority to sanction prosecution — Question is mixed question of fact and law — Cannot be raised for the first time in the appellate Court. **1963 Raj LW 434: 1963 (2) Cr LJ 527: ILR (1963) 13 Raj 996: AIR 1963 Raj 233 (234) (Pt D) (Pr 3).**

——**S. 20** — Sanction for prosecution precedent for validity of prosecution — Acquittal of accused on ground of want of sanction merely amounts to order of discharge — Fresh prosecution after sanction is not barred. See Cr. P. Code (1898), Section 403 (1). **1963 Raj LW 204.**

——S. 20 — Written consent filed with complaint — No signature of person authorised to consent or name of person to whom consent was given — Objection not taken during trial — Amounts to mere irregularity — Criminal P. C. (1898), Section 537. AIR 1960 Bom 244, Not foll. **1961 Raj LW 111.**

——S. 20 — Sanction by Administrator of Municipality — Presumption is that it was given on date on which it was shown to have been given — Allegation that it was antedated not made in grounds of appeal nor taken before trial Court — Appellate Court should not deal with allegation and hold that it was antedated — Evidence Act (1872), Section 114, Illustrations (e) and (f) — Cr. P. Code (1898), Section 423. **1961 (2) Cr LJ 152: AIR 1961 Tripura 18 (20) (Pt B) (Pr 8).**

SECTION 21

●——**S. 21 — Scope — Effect on Sections 32 and 347, Cr. P. Code.**

Section 21 of the Act is not a disabling provision. All that it does is to authorise a Magistrate of the first class to award a sentence beyond the limits prescribed for him under Sec. 32 of the Code. It does not affect the provisions of Sections 207 and 347 of the Code nor has it anything to do with the jurisdiction of a Court of Session. The section does not make the commitment by a Magistrate competent to award the full sentence prescribed by the Act, a nullity; nor does the section interfere with the jurisdiction of a Court of Session to deal with a matter committed to it in spite of its provisions. AIR 1959 All 778, **Reversed.** State of Uttar Pradesh v. Khusi Ram, **1960 Cr LJ 1378: 1960 All LJ 633: (1960) 2 Ker LR 179: 1960 All WR (HC) 498: (1960) 2 SCA 212: 1960 All Cr R 312: 1961 Andh LT 74: 1961 MLJ (Cri) 26: (1960) 3 SCR 427: (1961) 1 SCJ 78: AIR 1960 SC 905 (906) (Prs 4, 5).**

——**S. 21 — Scope of — Section 347, Cr. P. Code — Applicability — Order of commitment in Sessions Judge — Legality — (Cr. P. Code (1898), Section 347) — (Interpretation of statutes).**

Where a special Act has made a special provision for punishment to be awarded by a Magistrate irrespective of the limitations placed upon his powers under the Criminal Procedure Code, it amounts to an abrogation of the general law and the provisions of Section 347 of the Criminal Procedure Code cannot be applied to such a case.

Held, that the order of the Magistrate apparently under Section 347, Cr. P. Code committing the case to the Sessions Judge was not legal and the trial of the case by the Sessions Judge was without jurisdiction. **1959 All LJ 139: 1959 All Cr R 207: 1959 All WR (HC) 221: 1959 Cr LJ 1388: AIR 1959 All 778 (778) (Pr 4).**

[Reversed in AIR 1960 SC 905.]

SECTION 23

●——**S. 23** — Prevention of Food Adulteration Rules (1955), Rule 5 — Rule does not contravene Article 14 of the Constitution. See Constitution of India, Article 14. **1964 (2) Cri LJ 229: AIR 1964 SC 1135.**

●——**S. 23** — Person cannot assert any fundamental right under Article 19 (1) of the Constitution to carry on trade in adulterated food stuffs. See Constitution of India, Article 19 (1). **1964 (2) Cri LJ 229: AIR 1964 SC 1135.**

——**S. 23 (1) (e)** — Validity of Rule 7 — Not beyond the authority conferred by Section 23 (1) (e) — Act of causing sample to be analysed is one of the duties of the Public Analyst. See Prevention of Food Adulteration Rules, Rule 7. **1964 (2) Cri LJ 262: AIR 1964 All 418 (DB).**

●——**Ss. 23, 2 (i), 7, 16** — "Adulterated milk" — Sale of mixture of buffalo milk and cow milk — Proportion of mixture not known — On analysis sample found to contain less than prescribed minimum of non-fatty solids for cow milk — Mixture is adulterated milk within the meaning of Section 2 (i) (1) — Accused is guilty under Section 16 read with Section 7 — Criminal Appeal No. 1940 of 1960 (All) and 1960 All LJ 318: AIR 1960 All 504: 1960 Cri LJ 1056 (2), **Overruled.** See Prevention of Food Adulteration Act (1954), Section 2 (i). **1961 (2) Cri LJ 737: AIR 1961 All 590 (FB).**

●——**S. 23 — Rules under, Rule A. 11.01.03 — Scope of presumption under — Sale of mixture of cow and buffalo milk — Presumption not applicable.**

Only one presumption is permissible under the rules and it is that contained in Rule A. 11.01.03 and is to the effect that where milk is sold or offered for sale without any indication as to whether it was derived from cow, buffalo, goat or sheep, the standard prescribed for buffalo milk shall apply. This presumption cannot apply when it is known that the milk sold or offered for sale is a mixture of cow milk and buffalo milk, even if the proportion in which the two kinds of milk are mixed is not known. The presumption applies only when the source is unknown. Prem Das v. State, **1961 (2) Cr LJ 737: 1961 All LJ 483: 1961 All WR (HC) 405: 1961 All Cr R 228: ILR (1961) 2 All 229: AIR 1961 All 590 (594) (Pt B) (Pr 6) (FB).**

——**Ss. 23 (1) (b) and (m), 2 (i) and (xii), 7, 13 (5), 16 (1) (a)** — Prevention of Food Adulteration Rules (1955), Rules 5 and 44 (b) — Sale of mixed milk of cow and buffalo — Test of mean standard for cow and buffalo milk — There are no statutory standards of quality or statutory limits of componental variability for mixed milk of cow and buffalo — Legality — It would be illegitimate to coerce conformity with the standards which are the creation of the Public Analyst by penal sanction — Opinion of Public Analyst — Value of. See Prevention of Food Adulteration Act (1954), Section 2 (i) and (xii). **1960 Cri LJ 1056 (2): AIR 1960 All 504.**

[Overruled by AIR 1961 All 590.]

——**S. 23 — Rules under, Rules 7, 15, 17 and 18 — Scope — If mandatory — Non-compliance — Conviction not illegal — (Prevention of Food Adulteration Rules, Rr. 7, 15, 17 and 18).**

Rules 7, 15, 17 and 18 are directory and not mandatory. There is no direction in the Prevention of Food Adulteration Rules laying down that a report of the Public Analyst shall not be admissible in evidence without due compliance with certain rules. It is possible to take the Public Analyst's report into consideration even in a case where there was non-compliance with some of the rules. Hence even if a particular rule was not followed, that would not be sufficient for interfering with the conviction of the accused under the Act. **1957 All J 89: 1957 All WR (HC) 385.**

——**Ss. 23 and 24** — Rules under — 'Chhana' is a well known form of food which according to the Prevention of Food Adulteration Act is

cooked food within the meaning of Bengal Finance Act, Schedule, Item 7 — Mere fact, that other actions are necessary to extract 'chhana' out of boiled milk does not make the process anything other than cooking. See Sales Tax — Bengal Finance (Sales Tax) Act (6 of 1941), Schedule, Item 7. **(1965) 16 STC 931: AIR 1966 Cal 396.**

——**Ss. 23 (1) (b), 7, 16 (1) (a)** — Prevention of Food Adulteration Rules (1955), Appendix B, Clauses A. 11.06, A. 11.01.01 and A. 11.01-03 — Amendment made in Clause A.11.06 on 9-12-58 — Effect of — Standard of buffalo milk made applicable to Dahi of underclared source — Amendment is substantive law though garbed as rule of evidence — Hence not retrospctive in operation — Rule does not create new offence and is not ultra vires the Act — See Prevention of Food Adulteration Act (1954), S. 7. **1964 (2) Cri LJ 281: AIR 1964 Cal 384.**

——S. 23 — Rules under — Rule 50 (1), Clause (1) and Kerala Government Notification, dated 11-1-1962 issued thereunder specifying articles of food which would be regulated by licence, are ultra vires.

Rule 50 (1), Clause (1) of the Prevention of Food Adulteration Rules and the Kerala Government Notification, dated 11-1-1962 issued thereunder are ultra vires of S. 23 of the Prevention of Food Adulteration Act, 1954. Cls. (f) and (g) of Sec. 23 (1) under which the impugned Rule has been framed to show that the choice of the articles of food the sale of which is to be regulated by the issue of licences, involves the exercise of discretion and judgment and is not a mere ministerial or mechanical act. That involves three things: (1) the choice must be made by the Central Government in exercise of its judgment: (2) that judgment must be exercised in consultation with the expert committee constituted under Section 3 of the Act which would be in a position to advise it as to whether it is necessary or not in the public interest to bring a particular article of food within the regulation; and (3) it can take a final decision only after 'previous publication'. 1962 Ker LT 1012, **Overruled.** Raja Sekharan Nair v. City Corporation Trivandrum, **1965 Ker LJ 123: 1965 Ker LT 61: ILR (1965) 2 Ker 119: 1965 Mad LJ (Cr) 126: 1966 Cr LJ 757: AIR 1966 Ker 184 (185, 187) (Prs 3, 12) (FB).**

——**Ss. 23 (1) (f), 16 (1) (a), 2 (5), 2 (13)** — Prevention of Food Adulteration Rules (1955), Rule 44-A, Clause (b) — Kesari dal — Possession for purpose of sale, not for human consumption or use, but as fodder — Possession is punishable under Section 16 (1) (a) — There can be little doubt that the Rule prohibits the possession of Kesari dal for the purpose of sale, irrespective of whether or not the sale is for human consumption or use — There is nothing in the context in Section 23 (1) (f) requiring the word 'sale' to be read otherwise. See Prevention of Food Adulteration Act (1954), Section 16 (1) (a). **1965 (1) Cri LJ 446: AIR 1965 Ker 123 (FB).**

——**S. 23 (1) (f)** — Prevention of Food Adulteration Rules (1955), R. 44-A, Cl. (b) — Prohibition on trade of Kesari dal is reasonable restriction and is covered by Article 19 (6) — Having regard to the serious consequences that the consumption of Kesari dal by human beings entails, it can scarcely be contended that the prohibition of its sale is not reasonable restriction. See Constitution of India, Article 19 (1) (g). **1965 (1) Cr LJ 446: AIR 1965 Ker 123 (FB).**

——**Ss. 23, 13, 7 and 16 (1)** — Rules under Act, Rules 28 and 29 — Tur dal — Adulteration — Certificate of Public analyst stating that dal was found to contain Metanail yellow a prohibited coal-tar dye — Certificate is sufficient proof of adulteration so as to base conviction thereon — Non-mention of quantity of dye or tests conducted, is not material. See Prevention of Food Adulteration Act (1954), Section 13. **1964 (1) Cri LJ 403: AIR 1964 Ker 107 (DB).**

——**Ss. 23 (1) (g), 24 (2) (b)** — Validity — Rule providing for matter enumerated in Section 24 (2) (b) and not in Section 23 (1) (g) — Rule not beyond rule-making competence of State Government and is valid. See Prevention of Food Adulteration Act (1954), Section 24 (2) (b). **1962 Ker LJ 240.**

——**S. 23 (1) (h)** — Rules under Rule 14 — Non-compliance with Section 10 (7) and Rule 14 — Accused held prejudiced — Non-compliance with Section 10 (7) amounts to flagrant violation of provisions of the Act. See Prevention of Food Adulteration Act (37 of 1954), Section 10 (7). **1959 Cr LJ 1323: AIR 1959 Ker 351 (DB).**

——**S. 23** — Cocoanut oil is food — Cocoanut oil found to be adulterated — Vendor held guilty. See Prevention of Food Adulteration Act (1954), Section 2 (v). **1964 MPLJ (Notes) 91.**

——Ss. 23, 13 — Law prescribing minimum content of non-fat solids in milk — Contents of analyst's report.

Where the law has prescribed in the case of milk the minimum content of non-fat solids all lumped together, it is not necessary for the analyst to give a quantitative break up of each of the different kinds of non-fat solids. **1959 Jab LJ 562: 1960 Cr LJ 487: 1960 MPLJ 290: AIR 1960 Madh Pra 125 (126) (Pt B) (Pr 6).**

——S. 23 — Contents of milk — Variability of — Consideration of.

The contents of the milk, whether of fat or of the non-fats solids do vary. That is exactly why the law has not prescribed a cast iron percentage but has said that to be within the standard these percentages should not fall below a particular percentage. One cannot go beyond it and still assume that in certain circumstances the contents may go lower than the prescribed minimum. See Prevention of Food Adulteration Act (1954), Section 2 (1) (l). **1960 Cr LJ 487: AIR 1960 Madh Pra 125.**

——S. 23 — Prevention of Food Adulteration Rules (1955), Rules 23 and 29 — Banning of colouring matter, other than those permitted — Whether violative of Article 19 (1) (f) of Constitution of India — Sec. 23 (1) (j) — Prevention of Food Adulteration Rules (1955), Rules 23 and 29 — Dhal coloured with non-permitted colouring matter — Legality — Constitution of India (1950), Article 226 — Petition to quash conviction — Statutory remedy of revision availed of and dismissed at the admission stage — Writ petition for same relief, if maintainable.

It was contended for the petitioners that the banning of colouring matter other than those permitted is arbitrary and an unreasonable restriction on a citizen's fundamental right to carry on any occupation, trade or business.

Held, that no citizen has a fundamental right to manufacture or sell poisonous articles of food. This argument of the petitioners has only to be repelled as the right of every citizen to pursue any lawful trade or business must be subject to such reasonable conditions as may be deemed, by the Government authority of the

country essential to the safety, health, peace, order and morals of the country. The contention that so far as dhal was concerned, the dye is applied only externally and so it did not amount to violation of the rule, cannot be sustained. The grounds taken in the original petition were not taken in the criminal revision petition, but that is no ground for interference. In the circumstances, this is not a fit case for interference under Article 226 or Article 227. **(1965) MLJ (Cri) 399 (Ker): ILR (1965) 1 Ker 222.**

——**Ss. 23, 11** — Rules under Section 23 — Rule 22 requiring 4 ozs., of ghee to be sent for analysis — Only 1½ oz. sent — It is mere irregularity and in the absence of prejudice to him accused cannot escape consequences of his wrongful act. See Prevention of Food Adulteration Act (1954), Section 11. **1960 Raj LW 369.**

——**S. 23** — Belated analysis of milk — Presumption — Report of public analyst bearing date a month after taking of sample — Inference — Presumption would arise that the analysis was not done immediately on receipt of sample, but much later — It is for the prosecution to rebut that presumption by examining the Public Analyst — Otherwise his report would not be accepted. See Prevention of Food Adulteration Act (1954), Section 13 (5). **1964 (2) Cri LJ 363: AIR 1964 Tripura 48.**

SECTION 24

——**S. 24** — Prevention of Food Adulteration Rules (Andhra), Rule 9 (c) — Seizure — Suspicion in the mind of Inspector about the article being adulterated not essential under Section 10 (4) — Under Rule 9 (c) also confirmed suspicion of the Inspector is not essential for seizure. See Prevention of Food Adulteration Act (1954), Section 10 (4). **1964 (1) Cri LJ 24 (2): AIR 1964 Andh Pra 25.**

——**S. 24** — 'Chhana' is a cooked food and exempt from taxation which according to the Prevention of Food Adulteration Act 'means' product obtained by boiling of whole milk — Mere fact that other actions are necessary to extract 'Chhana' out of boiled milk does not make the process anything other than cooking. See Sales Tax — Bengal Finance (Sales Tax) Act (6 of 1941), Schedule, Item 7. **(1965) 16 STC 931: AIR 1966 Cal 396.**

——**Ss. 24 (2) (b), 23 (1) (g) — Kerala Prevention of Food Adulteration Rules (1957), R. 4 — Validity — Rule providing for matter enumerated in Section 24 (2) (b) and not in Section 23 (1) (g) — Rule not beyond rule-making competence of State Government and is valid.**

Rule 4 of the Kerala Rules, prohibiting manufacture for sale any food without a valid licence issued under the Rules, relates to a matter expressly enumerated in Section 24 (2) (b) and is, therefore, fully within the rule-making competence of the State Government.

Rule 4 cannot be interpreted as requiring the taking of a licence for sale of any article of food as is mistakenly thought, and, therefore, the subject matter of the rule does not fall within Section 23 (1) (g). **1962 Ker LJ 240: (1962) 1 Ker LR 294: ILR (1962) 1 Ker 436.**

——**S. 24 — Rule under, prescribing same standard of milk in cotton-seed areas — Not unreasonable because a different standard is prescribed in these areas for butter and ghee.**

A rule which prescribes the same standard for milk for areas where cow and buffalo feed consists to a considerable proportion of cotton-seed as well as for those areas where it does not so consist cannot be said to be unreasonable on the ground that a different standard has been fixed for butter or ghee with respect to these two areas. Since the composition of butter and ghee in cotton-seed areas is different from the butter or ghee in other areas, a different standard has been prescribed for these two areas. But the percentage of fat or non-fat solid content in the milk, is usually about the same irrespective of whether or not the animal is fed to a considerable extent on cotton-seed. There will be, of course, local and individual variations, but they have all been eliminated by prescribing a standard of the minimum of the percentages taken in a large number of samples; but these percentages have nothing to do with the place and the proportion of cotton seed in the feed. **1962 MPLJ 972: 1962 Jab LJ 1062.**

——**S. 24** — Previous publication — It is open to Court to take into consideration State Government gazette for holding that the relevant notification under Section 24 (2) (b) of the Act, had received previous publication. **1965 (1) Cri LJ 580: AIR 1965 Pat 176 (176) (Pt B) (Pr 2).**

SECTION 25

——**S. 25 (2)** — Offence committed in 1955 — Prosecution launched by Assistant Medical Officer — **Held,** that the contention that by virtue of Section 25 (2) of the Prevention of Food Adulteration Act the power which the Assistant Medical Officers exercised under the U. P. Pure Food Act and Rules thereunder could be exercised by them under the Prevention of Food Adulteration Act was not tenable as the Food Inspectors appointed under the U. P. Pure Food Act were conferred the power to prosecute by the Act itself that is by Section 34, thereof. They did not derive their powers under any Rules. See Prevention of Food Adulteration Act (1954), Section 7. **1957 Cri LJ 615: AIR 1957 All 343 (1) (DB).**

——**S. 25 (1) and (2)** — Power of inspection exercised by Executive Officer of Panchayat Board — Effect of repeal of Madras Act by Central Act — Saving clause contained in Section 25 (2) had no application to this case — Under the Central Act Food Inspectors alone could exercise the power of inspection — Consequent to repeal of the Madras Act, the Executive Officers ceased to have such powers. See Madras Prevention of Food Adulteration Act (3 of 1918), Section 7. **1958 Cr LJ 729: AIR 1958 Andh Pra 348.**

——**S. 25** — Section 442 of Calcutta Municipal Act (33 of 1951) has got distinct entity untrammelled by provision of Rule 50 of Prevention of Food Adulteration Rules and is not in any way repealed by Section 25 of the Prevention of Food Adulteration Act — No eating house can be run without a licence under Section 442 of the Calcutta Municipal Act although a licence is obtained under Rule 50. See Municipalities — Calcutta Municipal Act (33 of 1951), Section 442. **(1965) Cal WN 517: 1966 Cri LJ 525: AIR 1966 Cal 203.**

——**S. 25** — Scope and effect of — It repeals Section 582, Calcutta Municipal Act (1951) — Even though the Prevention of Food Adulteration Act did not become a workable Code until the State and the Central Rules were framed, still as Section 25 (1) provides for the corresponding State Law upon commencement of the Central Act itself, the corresponding law relating to licens-

ing of premises for the manufacture or sale of mustard oil so far as it may be contained in Section 582 of the Calcutta Municipal Act must be deemed to have been repealed, not on 12-12-1957, the date on which the State Rules made under Section 24 prescribing the forms of licence were published, but on 1-6-1955, when the Central Act came into force. See Municipalities — Calcutta Municipal Act (33 of 1951), Section 442. **1960 Cri LJ 817: AIR 1960 Cal 388.**

——S. 25 (2) — Scope — Rules framed under Section 20 of the Madras Act — If saved and if effective.

Section 25 (2), Prevention of Food Adulteration Act, saves all rules, regulations and bye-laws relating to the prevention of adulteration of food made prior to the coming into force of that Act and which were in force in so far as they are not inconsistent with or repugnant to the provisions of that Act. The prior rules under Section 20 of the Madras Act 3 of 1918 must be considered to be in force under the Act till they are replaced by other rules. **1957 Mad WN 487 (1): 1957 Cr LJ 1294: 1957 Mad LJ (Cr) 648: AIR 1957 Mad 736 (736) (Pr 2).**

——Ss. 25 (2) and 28 — Applicability of — Infraction of Rule 37-E (b), Madras Prevention of Adulteration Rules prior to coming into force of Rules framed under Act of 1954 — Liability to conviction — Accused could not be saved from conviction by reason of the coal-tar derivative used falling within one or more of the five categories mentioned in Rule 28 by virtue of Section 25 (2). See Prevention of Food Adulteration Act (1954), Section 2 (i). **1957 Cri LJ 516: AIR 1957 Mad 268.**

——S. 25 (1), (2) — Scope — Repeal of Bihar Prevention of Food Adulteration Act — Effect.

What is provided is not the local Act but the rules, regulations and bye-laws relating to the prevention of adulteration of food made under such corresponding law and in force immediately before the commencement of the Central Act which shall, except where and so far as they are inconsistent with or repugnant to the provisions of the Central Act, continue in force until altered, amended or repealed by rules made under the Central Act. Hence, the entire Bihar Prevention of Food Adulteration Act was repealed and any complaint filed by the inspector by virtue of Section 21 of the Bihar Act must be deemed to be a complaint filed by a person who was not authorised to do so. AIR 1957 All 343 (1), Rel. on. **1958 BLJR 469: 1959 Cr LJ 508: AIR 1959 Pat 182 (183) (Pr 3).**

——S. 25 (2) — Punjab Prevention of Food Adulteration Rules (1955), App. B, Item A 11.01.01 — Mixed milk of cow and buffalo containing 8.2 per cent of milk solids not fat — Mixture is adulterated as item A 11.01.01 in Appendix B prescribes 8.5 per cent milk solids not fat for cow milk in Punjab — Even under Rule 3 of Punjab Pure Food Rules which becomes applicable by virtue of Section 25 (2) of the Prevention of Food Adulteration Act such mixture is deemed to be deficient when contents of milk solids not fat are less than 8.6 per cent — Punjab Pure Food Rules (1930), Rule 3 (as amended in 1952). See Prevention of Food Adulteration Act (1954), Section 2 (i) (1). **1964 (2) Cri LJ 202: AIR 1964 Punj 332 (DB).**

——Ss. 25 (2), 7 and 16 (1) (a) — Offence relating to mixed milk committed in area comprised in erstwhile Patiala State — Rules for determining standard of milk will be Patiala Pure Food Rules and not Prevention of Food Adulteration Rules — Word 'or' in Entry 4 should be read as 'and' — Prevention of Food Adulteration Rules 1955 — Patiala Pure Food Rules (1998 Bk), R. 3 — Interpretation of Statutes. 66 Pun LR 364: 1964 Cur LJ 100: 1964 (2) Cri LJ 114 (114, 115) (Pr 3) (DB).

——Ss. 25 (2), 7 (1) and 16 (1) (a) (ii) — Mixed milk of cow and buffalo — Standards in Punjab are those laid down in Punjab Pure Food Rules (1930) — Mixed milk containing 49 per cent. of milk fat and 7.8 per cent. of milk solids other than fat — Conviction not justified — Punjab Pure Food Act (8 of 1929), Section 22. **64 Punj LR 802: 1962 Cur LJ 330: 1964 (2) Cri LJ 113 (114) (Pr 4) (Punj) (DB).**

——S. 25 (2) — Marwar Pure Food Rules, 1940 — Inconsistent with Rules under Central Act — Marwar Rules not in force and cannot apply. 1962 Raj LW 279: 1963 (1) Cr LJ 221: ILR (1962) 12 Raj 626: AIR 1963 Raj 17 (22) (Pt D) (Pr 9).

——S. 25 (2) — Sale of mixed milk derived from goat and cow in Jodhpur—Standard of fat contents —Marwar Pure Food Rules 1946, Schedule, Item 5 — Held, applicable. 1961 Raj LW 586.

——S. 25 — Rules under Marwar Pure Food Act are effective in Sirohi and Jaisalmer Districts — Marwar Pure Food Act (16 of 1946 as amended by Act 1 of 1953) — Rules under.

The Marwar Pure Food Act, 1946 had been amended to extend to Sirohi and Jaisalmer — Districts by the Marwar Pure Food (Amendment) Act, 1953 (Act No. 1 of 1953). Thus rules framed under the Marwar Act and continued by Section 25 of the Central Act are effective and there is no inconsistency or repugnancy with the Central Act or Rules subsequently framed under the Central Act. **1960 Raj LW 369: ILR (1960) 10 Raj 984.**

PREVENTION OF FOOD ADULTERATION RULES (1955)

RULE 1

——R. 1 — Sale of Butwal Ghee found to be not to the standard prescribed for State of U. P. — **Held,** conviction for offence under Sections 7/16 was not maintainable as rule prescribing for one standard for whole of U. P. was unreasonable and any prohibition to sale of imported unadulterated ghee was also unreasonable. See Prevention of Food Adulteration Act (1954), Section 7. **1964 All WR (HC) 88.**

——R. 1 (3) — Rules under — Subsequent amendment — Effect — (General Clauses Act (1897), Section 5) — (Interpretation of Statutes).

Where sub-rule (3) of Rule 1, under Prevention of Food Adulteration Act was subsequently amended by notification S. R. O. 1202 of 10th May, 1956 published in Calcutta Gazette of 19th July, 1956, the amended rule must be deemed to have been in existence from the original making and publication of the rules. **1958 Cri LJ 169 (2) (171) (Pt A) (Pr 5) (Cal).**

——R. 1 — Marwar Pure Food Rules, (1946) — Inconsistent with rules under Central Act — Rules not in force and cannot apply. See Prevention of Food Adulteration Act (1954), Section 25 (2). **1963 (1) Cr LJ 221: AIR 1963 Raj 17.**

RULE 5

●**——R. 5 —** Validity — Rule does not contravene Article 14 of the Constitution. See Constitution of India, Article 14. **1964 (2) Cri LJ 229: AIR 1964 SC 1135.**

●——**R. 5** — Person cannot assert fundamental right to carry on business in adulterated food stuffs. See Constitution of India, Article 19 (1). **AIR 1964 SC 1135.**

——**R. 5** — Prevention of Food Adulteration Act (1954), Section 16 (1) (a) and Rules 44 (g), 5 and Appendix B, Para. A.01.01 — Sale of aerated water sweetened with saccharin — Conflict between provisions of Appendix B, Para. A.01.01, and provisions of Rule 44 (g) — Rule of harmonious construction — Aerated water sweetened with saccharin though deviation from standard prescribed in Para. A.01.01 is protected by Rule 44 and sale of such water is no offence. See Prevention of Food Adulteration Act, (1954), Section 16 (1) (a). **1965 (2) Cri LJ 451 (2): AIR 1965 All 486.**

——**R. 5** — Prevention of Food Adulteration Act (1954), Sections 2 (i) and (xii), 7, 13 (5), 16 (i) (a), 23 (1) (b) (m) — Sale of mixed milk of cow and buffalo — Test of mean standard for cow and buffalo milk — Legality — Opinion of public analyst — Value of — **Held,** (i) that the conviction of the accused could not be sustained on the basis of the report of Public Analyst since his opinion was based upon the mean standard which was his own creation and had no statutory support (ii) That the said report did not state what was the actual percentage of water in the sample and hence it was not possible for the court to test the accuracy of his opinion since standards vary for various reasons. See Prevention of Food Adulteration Act (1954), Section 2 (i) (xii). **1960 Cri LJ 1052 (2): AIR 1960 All 504.**

——R. 5 and Appendix B — Certificate of analyst — Legality.

In the case of adulterated mustard oil, even if the test for argemone oil was not applied, once it is found that saponific value and the Bellier's test show that the sample was not in conformity with statutory requirements, the opinion of the analyst that the oil was adulterated must be accepted. **(1965) 7 OJD 17: 31 Cut LT 100: ILR (1964) Cut 778.**

——**R. 5** — Report of Public Analyst — Sample stated to be not of standard purity — Details not given — Amounts to mere formal defect. See Prevention of Food Adulteration Act (1954), Section 13. **1961 Raj LW 111.**

RULE 6

——**R. 6** — Read with Appendix B, Item A 11. 01.01 — Cow's milk — Report of Public Analyst indicating deficiency of 0.5 per cent. in regard to milk solids other than milk fat — Milk held adulterated. **1963 All WR (HC) 768: 1963 All Cri R 468: 1964 All LJ 59.**

RULE 7

——**Rr. 7 (3) and 12** — Forms under, Forms III and VI — Validity — Actual analysis got done by assistant — Form of report held not ultra vires. See Prevention of Food Adulteration Act (1954), Section 13. **1965 All WR (HC) 506: 1965 All Cri R 319: 1965 All LJ 1004: 1966 Cr LJ 122: AIR 1966 All 91.**

——**R. 7** — Report of Public Analyst — Analysis caused to be done by Public Analyst — Report signed by Public Analyst — Certificate is in form prescribed. See Prevention of Food Adulteration Act (1954), Section 16. **1965 All Cri R 545: 1965 All WR (HC) 816: 1965 All LJ 1053.**

——**R. 7** — Prevention of Food Adulteration Act (1954), Section 13 (1) — Analysis of sample by subordinate — Report by Public Analyst — Not inadmissible in evidence. See Prevention of Food Adulteration Act (1954), Section 13 (1). **1964 (2) Cri LJ 262: AIR 1964 All 418 (DB).**

——**R. 7 — Prevention of Food Adulteration Act (1954), Section 23 (1) (e) — Validity of Rule 7 — Not beyond the authority conferred by Section 23 (1) (e). 1964 All LJ 291: 1964 (2) Cri LJ 262: ILR (1964) 1 All 741: 1965 All WR (HC) 14: 1965 All Cri R 48: AIR 1964 All 418 (419) (Pt B) (Pr 9) (DB).**

——**R. 7 — Form of certificate of Public Analyst — Report using words 'the analysis' instead of 'my analysis' — Admissibility of report.**

Held, that there was no difference whether the words 'the analysis' were used or 'my analysis' were used. The report that the analyst had submitted, described in a more accurate manner what he was actually expected to do and what in fact he did though there was a deviation from the form. In any case, even if the report was not on the prescribed form, under Section 13 (5) of the Act it was a document puporting to be a report signed by a Public Analyst and was evidence of facts stated therein. **ILR (1964) 1 All 899: 1963 All LJ 1012: 1964 (1) Cr LJ 502: AIR 1964 All 199 (200) (Pt B) (Prs 10, 11) (DB).**

——**Rr. 7, 15, 17 and 18** — Scope — Rules are directory and not mandatory — Non-compliance — Conviction not illegal. See Prevention of Food Adulteration Act (1954), Section 23. **1957 All LJ 89: 1957 All WR (HC) 385.**

——**R. 7 (3), Art. 14 of Appendix B — Prevention of Food Adulteration Act (1954), Section 13 (1) — Report of Public Analyst — Requirements of — Form prescribed, contents of — Evidence Act (1872), Section 114, Illustration (e).**

What is required of the Public Analyst by the form is a certificate that he has analysed the sample sent to him and on his so certifying it must be presumed that all the steps mentioned in Clauses (a to f) or Article 14 of the Appendix B of the Rules must have been followed by him. Besides even under Section 114, Illustration (e) of the Indian Evidence Act, the Courts may presume that official acts have been regularly performed, in respect of the report. **(1960) 62 Bom LR 354: ILR (1960) Bom 404.**

——**Rr. 7 and 18** — Report of public analyst giving full factual data and no opinion — Conviction can be based upon it — Public analyst need not be examined — But record must show that Rules 7 and 18 were duly complied with. See Prevention of Food Adulteration Act (1954), Section 13. **1964 (2) Cr LJ 32: AIR 1964 Guj 136.**

——**R. 7** — Scope — Official act — Act of sampling, sealing and forwarding of article by Food Inspector and ascertaining seal to be intact by Public Analyst proved — Court may presume that acts themselves were performed in accordance with prescribed form and procedure. See Evidence Act (1872), Section 114 (e). **1966 Cri LJ 416: ILR (1965) 2 Ker 301: AIR 1966 Ker 70.**

——**Rr. 7 and 18 — Whether mandatory or directory — Certificate of Public Analyst without proof of compliance of the Rules 7 and 18 — Conviction based on — If valid.**

Looking to the scheme of the various sections and the Rules made under the Act it is manifest that the Magistrate can accept the report as evidence only if the report is prepared after full and thorough compliance with the Rules. Compliance of the Rules is mandatory to rely upon the report of the Public Analyst. **(1966) MLJ (Cr) 18: (1965) 3 Law Rep 257: (1965) 2 Mys LJ 107: AIR 1966 Mys 244 (247, 248) (Prs 8, 9, 12, 13).**

——**R. 7 (3)** — Report of public analyst — Admissibility in evidence — Statement in report that sample was kept in refrigerator before analysis — Statement forms part of report — Report admissible in evidence without production of analyst as witness — Court has power to call public analyst to Court. See Prevention of Food Adulteration Act (1954), Section 13 (5). **1964 (2) Cr LJ 723: AIR 1964 Punj 520 (DB).**

——**Rr. 7 and 20** — Belated analysis of milk — Presumption — Report of public analyst bearing date a month after taking of sample — Inference — The presumption would arise that the analysis was not done immediately on receipt of the sample but much later. See Prevention of Food Adulteration Act (1954), Section 13 (5). **1964 (2) Cri LJ 363: AIR 1964 Tripura 48.**

RULE 8

——**R. 8** — Rules under — 'Duly appointed Food Inspector' — **Held,** that the Food Inspector on whose report the prosecution was started was one of the duly appointed Food Inspectors by notification in the Gazette. See Prevention of Food Adulteration Act (1954), Section 9. **1958 Cri LJ 169 (2) (Cal).**

RULE 9

——**R. 9 (c)** — Seizure — Suspicion in the mind of Inspector about the article being adulterated not essential. See Prevention of Food Adulteration Act (1954), Section 10 (4). **1964 (1) Cri LJ 24 (2): AIR 1964 Andh Pra 25.**

RULE 12

——**R. 12** — Prevention of Food Adulteration Act (1954), Sections 13 and 11 (1) (a) — Forms under, Forms III and VI — Validity — Actual analysis got done by assistant — Form of report held not ultra vires. See Prevention of Food Adulteration Act (1954), Section 13. **1965 All WR (HC) 506: 1965 All Cri R 319: 1965 All LJ 1004: AIR 1966 All 91.**

——**R. 12** — Notice under, whom to be given — Notice given to person from whom sample is purchased — Name of proprietor mentioned at the top — Valid — Second notice to proprietor also not necessary. See Prevention of Food Adulteration Act (1954), Section 11 (1) (a). **1962 (2) Cri LJ 593: AIR 1962 All 517 (DB).**

RULE 14

——**Rr. 14 and 22** — Procedure for taking sample — No opportunity to tamper with sample — Mere suggestion of accused that tampering was possible — Validity of report not affected. See Prevention of Food Adulteration Act (1954), Section 11. **1962 Raj LW 111.**

RULE 15

——**R. 15 (e) and Appendix, Paragraph A, 11.01.03** — Sale of adulterated milk without indicating whether it was of cow, buffalo or goat — Food Inspector labelling sample as milk only for analysis — Milk judged by standards of buffalo milk — Rule 15 (e) is complied with. **1960 Cr LJ 183: 1960 All LJ 156: 1960 All WR (HC) 143: 1960 All Cr R 120: AIR 1960 All 64 (65) (Pt A) (Pr 7).**

——**Rr. 15, 18, 17 and 7** — Scope — Rules are directory and not mandatory — Non-compliance — Conviction not illegal. See Prevention of Food Adulteration Act (1954), Section 23. **1957 All LJ 89: 1957 All WR (HC) 385.**

RULE 16

——**R. 16 — Conviction and sentence under — Sustainability — Reliance that might be placed on the finding of the Analyst.**

Rule 16 provides sufficient safeguards to prevent decomposition of the oil by natural causes. It will however be always open to an accused, in any particular case, to show that the packing was inadequate or that it was so defective that it could not have prevented air and light affecting the sample oil contained in the bottle. In the instant case, it is not contended that there was any defect in the packing of the sample oil. Therefore, the report of the Public Analyst as showing the condition of the oil exposed for sale by the petitioner on the relevant date, must be accepted. **1964 Mad WN 506: 1965 (1) Cri LJ 454: ILR (1964) 2 Mad 860: (1964) 2 MLJ 539: 1964 MLJ (Cr) 675: AIR 1965 Mad 168 (169, 170) (Prs 2, 4) (DB).**

RULE 17

——**Rr. 17, 18, 15 and 7** — Scope — Rules are directory and not mandatory — Non-compliance — Conviction not illegal. See Prevention of Food Adulteration Act (1954), Section 23. **1957 All LJ 89: 1957 All WR (HC) 385.**

——**R. 17** — Scope — Official act — Act of sampling, sealing and forwarding of article by Food Inspector and ascertaining seal to be intact by Public Analyst proved — That acts themselves were performed in accordance with prescribed form and procedure may be presumed. See Evidence Act (1872), Section 114 (e). **1966 Cri LJ 416: ILR (1965) 2 Ker 301: AIR 1966 Ker 70.**

RULE 18

——**Rr. 18, 17, 15 and 7** — Scope — Rules are directory and not mandatory — Non-compliance — Conviction not illegal. See Prevention of Food Adulteration Act (1954), Section 23. **1957 All LJ 89: 1957 All WR (HC) 385.**

——**R. 18** — Prevention of Food Adulteration Act (1954), Section 13 — Criminal P. C. (1898), Section 510 — Report of public analyst giving full factual data and no opinion — Conviction can be based upon it — Public analyst need not be examined — But record must show that Rr. 7 and 18 were duly complied with. See Prevention of Food Adulteration Act (1954), Section 13. **1964 (2) Cri LJ 32: AIR 1964 Guj 136.**

——**R. 18** — Scope—Official act—Act of sampling and sealing and forwarding of article by Food Inspector and ascertaining seal to be intact by Public Analyst proved — That acts themselves were performed in accordance with prescribed form and procedure may be presumed. See Evidence Act (1872), Section 114 (e). **1966 Cri LJ 416: ILR (1965) 2 Ker 301: AIR 1966 Ker 70.**

——**R. 18** — Rules are mandatory. See Prevention of Food Adulteration Act (1954), Section 7. **(1965) 3 Law Rep 257: (1965) 2 Mys LJ 107: 1966 Cr LJ 1036: AIR 1966 Mys 244.**

——**R. 18** — Offence under Section 16, Food Adulteration Act — Object of Rule 18 is to ensure accuracy of seal on sample sent to Public Analyst. See Prevention of Food Adulteration Act (1954), Section 16. **31 Cut LT 1008: (1965) 7 Ori JD 212: 1966 Cr LJ 1041: AIR 1966 Ori 189.**

RULE 19

——**Rr. 19, 20 and 44-B** — Considerable delay in analysis of sample of milk — Formalin not added to sample — No presumption that requirement of rules was satisfied — Offence of dilution of milk not committed. See Prevention of Food Adulteration Act (1954), Section 7. **1964 Mad LJ (Cr) 660 (Mad).**

——**Rr. 19 and 20 — Delay in analysis of sample — Onus of proof.**

That such a preservative was added and the sample was not deteriorated should be proved like any other fact by evidence. A long delay in analysing the sample will be fatal to prosecution as such a delay might cause deterioration in the sample unless adequate steps are taken for its preservation. **(1964) MLJ (Cr) 660 (Mad).**

RULE 20

——**R. 20 (14)** — Quantity of jalebi sent to Public Analyst 2 ounces — Accused not prejudiced because it was not 16 ounces — **Held,** there was no breach of Act or Rules. See Prevention of Food Adulteration Act (1954), Sec. 7. **1966 Cr LJ 3: 1965 All Cri R 113: 1965 All LJ 348: AIR 1966 All 32 (33) (Pt A) (Pr 2).**

——**R. 20** — Prevention of Food Adulteration Act (1954), Sections 7 (1), 16 (1), 13 (1), 13 (2) — Sale of adulterated milk — Charge based on Public Analyst's report — Public Analyst's report not conforming to essential statutory requirements — Acquittal upheld — Effect of delay in launching prosecution stated — Duty of Public Analyst indicated. See Prevention of Food Adulteration Act (1954), Section 7 (1). **1965 (2) Cri LJ 220: AIR 1965 Madh Pra 180 (DB).**

——**R. 20** — Milk sent to Public Analyst in sample — Proportion of formalin added in milk less in strength than prescribed — It should be shown that it was adequate to prevent disintegration. See Prevention of Food Adulteration Act (1954), Section 11. **1962 (2) Cri LJ 579 (Punj).**

[Overruled in AIR 1966 Punj 328.]

——**R. 20** — Prevention of Food Adulteration Act (1954), Sections 13 (5) and 23 — Belated analysis of milk — Presumption — Report of public analyst bearing date a month after taking of sample — Inference — The presumption would arise that the analysis was not done immediately on receipt of the sample but much later. See Prevention of Food Adulteration Act (1954), Sec. 13 (5). **1964 (2) Cri LJ 363: AIR 1964 Tripura 48.**

RULE 22

——**R. 22** — Scope — Rule is not mandatory — To decide whether a provision is directory or mandatory one has to consider not merely actual words used in statute and hence use of word "shall" in Rule 22 does not necessarily indicate that it is mandatory: AIR 1961 SC 849 and 1951 AWR 385, Rel. on. — Primary object of Rule 22 in prescribing standard quantity of sample of various articles of food is to ensure its despatch in sufficient quantity to Public Analyst to enable him to analyse it in proper manner — Sample though not of requisite quantity, if found sufficient by Analyst for that object and no prejudice is caused to the accused, then such minor laches should not be allowed to override major consideration of bringing anti-social elements to book. (1963) I Mad LJ 55 and (1906) 1 KB 308, Rel on. **1964 All Cri R 305: 1964 All WR (HC) 438.**

——**R. 22 —Prevention of Food Adulteration Act (1954), Section 13 — Report of public analyst sending less quantity than prescribed under R. 22 for analysis — Effect — Rule 22 is recommendatory.**

The use of the words approximate quantity to be supplied in the rule clearly shows that the rule is recommendatory. Consequently the failure of the Food Inspector strictly to comply with the rule would not affect the correctness of the report. **62 Bom LR 354: ILR (1960) Bom 404.**

——**R. 22 (b)** — Sale of adulterated milk — Charge based on Public Analyst's report — Public Analyst's report not conforming to essential statutory requirements — Acquittal upheld—Effect of delay in launching prosecution stated — Duty of Public Analyst indicated. See Prevention of Food Adulteration Act (1954), Section 7 (1). **1965 (2) Cri LJ 220: AIR 1965 Madh Pra 180 (DB).**

——**R. 22 — Sample (milk) sent for analysis less than the quantity prescribed under Rule 22 — If non-compliance and vitiates trial — Preservative not added — Report of Analyst nine weeks after taking of sample — Acquittal if can be interfered with in appeal.**

On Reference to Bench (Ramachandra Iyer, C. J. and Srinivasan J.) **Held,:** Two points were urged in this appear against acquittal of offence under Sections 7 and 16 (1) read with Section 2 (1) (a) of Act 37 of 1954: (1) A sufficient quantity of sample (milk) as required under Rule 22 of the Rules was not sent for analysis. (2) Since no preservative was added the milk would not have retained the quality and condition in which the sample was, when taken, at the time it was analysed. Though Rule 22 employs the word 'shall', the specification of an approximate quantity therein minimises the mandatory force of the expression; the provision is only a means for securing the evidence of an expert witness. If the quantity furnished was adequate enough to render possible all the tests necessary and the expert was in a position to pronounce on the material supplied, the short supply would not detract from the value of that evidence. Whether the quantity was adequate enough for the purpose in question is a matter which might call for investigation in the circumstances of any particular case. It can never be stated as an absolute proposition that upon a lesser quantity than that prescribed in the rule, no proper analysis could at all be done.

Per Kunhamed Kutti, J. (after Reference was answered by the Bench): Where there is no evidence of any addition of a preservative to the sample (milk) sent for analysis and in the absence of any evidence as to when the sample was analysed and in view of the fact that the report of the analyst was received nine weeks after the taking of the sample it is not possible to accept the theory that the milk had not undergone any change in quality and condition; nor can any conclusion be based on the result of the analysis on the assumption that the sample as sent was analysed by the Analyst. **78 Mad WN 685: 1966 Cri LJ 1023: ILR (1965) 2 Mad 369: (1965) 2 MLJ 325: (1965) MLJ (Cr) 723: AIR 1966 Mad 325 (326) (Prs 6, 7) (DB).**

——**R. 22** — Provision is intended to enable analyst to have samples in adequate quantity for the purpose of making his analysis and to provide guidance for authorities who take sample — In absence of any evidence to show that the analyst felt any difficulty in making analysis, it could not be inferred from the mere circumstance that the quantity was less than prescribed in rule, the analysis was inaccurate and, therefore, the accused should be acquitted. 1963 MWN Cr 9, Rel. on. 1958-2 MLJ 194; 1963 MLJ Cr 191 and AIR 1958 All 34, Disting. **ILR (1965) 1 Mad 549.**

——**R. 22** — Prosecution under Sections 7 and 16 of Prevention of Food Adulteration Act — Sending samples of 4 ounces of ice-cream instead of 8 is an irregularity — Conviction could not be challenged on account of this — Prevention of

Food Adulteration Act (1954), Section 10 (7). **65 Punj LR 1083: 1964 (1) Cri LJ 606 (607) (Pt C) (Pr 5).**

——**Rr. 22 and 11** — Procedure for taking samples — No opportunity to tamper with sample — Mere suggestion of accused that tampering was possible — Validity of report not affected. See Prevention of Food Adulteration Act (1954), Section 11. **1962 Raj LW 111.**

RULE 26

——**Rr. 26, 28, 29 and 30** — Rules should be read together — Rule 30 does not permit addition of colour to any article of food not specified in Rule 29. **(1959) 2 Andh WR 509: 1959 Mad LJ (Cri) 899: 1960 Cri LJ 1417: AIR 1960 Andh Pra 584 (586) (Pt A) (Pr 5).**

RULE 28

——**R. 28** — Prevention of Food Adulteration Act (1954), Section 7 Coal-tar dye put in Jalebi prepared by accused — Accused is guilty of violating rule. **1965 All Cr R 113: 1965 All LJ 348: 1966 Cr LJ 3: AIR 1966 All 32 (33) (Pt B) (Pr 3).**

●——**R. 28** — Conviction for selling foodstuff mixed with prohibited colour-matter, under Section 7/16, Prevention of Food Adulteration Act — No disqualification for election as pradhan of gaon sabha under U. P. Panchayat Raj Act. See Panchayats — U. P. Panchayat Raj Act (26 of 1947), Section 5-A (h). **1965 (2) Cri LJ 306: AIR 1965 All 382 (FB).**

——**Rr. 28, 26, 29 and 30** — Rules should be read together — Rule 30 does not permit addition of colour to any article of food not specified in Rule 29. See Prevention of Food Adulteration Rules (1955), Rule 26. **1960 Cri LJ 1417: AIR 1960 Andh Pra 584.**

——**Rr. 28 and 29** — Rules under Act — Rules 28 and 29 — Tur-Dal — Adulteration certificate of Public Analyst stating that dal was found to contain Metanil yellow a prohibited coal-tar dye — Certificate is sufficient proof of adulteration so as to base conviction thereon — Non-mention of quantity of dye or tests conducted is not material. See Prevention of Food Adulteration Act (1954), Section 13. **1964 (1) Cri LJ 403: AIR 1964 Ker 107 (DB).**

——**R. 28** — Applicability — Accused convicted for infraction of Rule 37-E (b), Madras Prevention of Food Adulteration Rules prior to coming into force of Rules framed under Central Act of 1954 — Accused would not be saved from conviction by reason of the coal-tar derivative used falling within one or more of the five categories mentioned in the new Rule 28 by virtue of Section 25 (2). **1956 Mad WN 926: (1957) 1 Mad LJ 25: 1957 Cr LJ 516: AIR 1957 Mad 268 (269) (Pt B) (Pr 4).**

——**R. 28** — Ahar dal coloured with metanil yellow — **Held,** adulterated — Its use even as preservative not permitted. See Prevention of Food Adulteration Act (1954), Section 2 (i) (j). **(1965) 7 Orissa JD 215.**

RULE 29

——**R. 29 (1) — Red gram dhal cannot be placed in category of vegetables.**

No doubt, 'dhal' at some stage i.e., when it is green in the stage of leaves can be held to be vegetable but once it is dried and assumes the shape of 'dhal' it finds its place in 'pulses' group and ceases to be a vegetable. The process of preserved vegetables contemplated in Rule 29 obviously refers to the category of food articles, i.e., vegetables which are kept in that condition by a scientific process or by use of preservatives. Red gram, the subject matter of prosecution in this case, cannot be placed in the category of 'processed and preserved vegetables'. If 'dhals' are deemed to be 'processed vegetables' the distinction between vegetables, pulses and cereals would disappear, which does not seem to be the intendment of the Act where pulses and cereals have been classified separately, vide Rule 22. **ILR (1964) Andh Pra 936.**

——**Rr. 29, 26, 28 and 30** — Rules should be read together — Rule 30 does not permit addition of colour to any article of food not specified in Rule 29. See Prevention of Food Adulteration Rules (1955), Rule 26. **1960 Cri LJ 1417: AIR 1960 Andh Pra 584.**

——**R. 29** — Prevention of Food Adulteration Act (1954), Sections 2 (v) (a), 2 (xiii), 7 (v) and 16 (1) — Sale of adulterated asafoetida for analysis — Sale used to be made on understanding that it is not for human consumption — Crux of offence is in sale of food — "Sale" covers not merely sale for human consumption. See Prevention of Food Adulteration Act (1954), Section 2 (v) (a). **1965 (1) Cri LJ 309: AIR 1965 Mad 98.**

——**R. 29** — Rule prohibiting use of coal-tar dye upon any food other than items specified in rule — Pulses not included in items because colouring matter may indicate real difference in quality of stuff which may tend to deceive and defraud purchasers — Colouring in items listed out for exemption was not likely to mislead customers — Discrimination alleged is in separating some items for grant of exemption from other items — No allegation of discrimination inter se between dealers who sell a particular item not covered by exemption — All of them fall alike under prohibition — **Held,** there are no adequate grounds to hold Rule 29 to be ultra vires of Article 14 of the Constitution. See Constitution of India, Article 14. **ILR (1965) 1 Mad 549.**

——**R. 29** — Prevention of Food Adulteration Act (1954), Sections 2 (ix) (d), 7 (ii) and 16 (1) (a) (i) — Where the offending packets of tea were not labelled as samples and there was no other documentary evidence to show that they were not part of the tea received in the shop for sale to the public and if these packets were kept exposed among other packets for sale in the shop the implication is that these packets are also for sale. Under Section 16 (1) (a) of the Act even a storage for sale of any articles of food in contravention of the provisions of the Act is a criminal offence. **1964 Mad LJ (Cri) 695 (Mad).**

——**R. 29 — Delay in analysis of sample — Onus of proof.**

In cases of prosecution for adulteration of milk Rule 19 and Rule 20 of the Rules specially provide that a preservative has to be added to a sample seized to avoid any deterioration before the same is analysed. But there could be an evidentiary presumption in such a matter in view of the grave consequences to the citizen. That such a preservative was added and the sample has not deteriorated should be proved like any other fact by evidence — A long delay in analysing the sample will be fatal to a prosecution as such a delay might cause deterioration in the sample unless adequate steps are taken for its preservation. **(1964) Mad LJ (Cr) 660.**

RULE 30

——**Rr. 30, 26, 28, 29** — Rules should be read together — Rule 30 does not permit addition of colour to any article of food not specified in Rule 29. See Prevention of Food Adulteration Rules (1955), Rule 26. **1960 Cri LJ 1417: AIR 1960 Andh Pra 584.**

RULE 40

——**R. 40 (2)** — Aerated water — No fruit juice but only synthetic essence used — Use of label leading consumer to believe that it is fruit product — Rule 40 (2) is infringed — Prevention of Food Adulteration Act (1954), Section 2 (ix). **1964 Ker LT 1032: ILR (1964) 2 Ker 644.**

RULE 43

——**R. 43 — Applicability.**

R. 43 does not apply in cases of articles which are pure in themselves and which are required by the Act or the Rules to be sold in pure condition. It applies only in case of an article to which something has been added or with which something has been mixed with a view to either enhence the taste of the article or the nutritive value of that article. Nevertheless, such article must initially conform to the standard prescribed by the Act or the Rules and the addition of any ingredient or admixture contained in that article as also the deficient ingredient, if any, are required to be specified on the label attached to the package containing the article. **63 Bom LR 880: 1961 Nag LJ 735: 1962 (1) Cr LJ 562: ILR (1962) Bom 118: AIR 1962 Bom 104 (105) (Pt B) (Pr 4).**

RULE 44

——**R. 44** — Sample of ghee containing large proportion of vegetable fat — Sample is adulterated — Accused is liable under Act. See Prevention of Food Adulteration Act (1954), Section 2 (1) (i). **1965 All WR (HC) 109: 1965 All Cri R 109: 1966 Cr LJ 113: AIR 1966 All 64.**

——**R. 44 (g)** — Prevention of Food Adulteration Act (1954), Sections 16 (1) (a) and 5 and Appendix B, para A.01.01 — Sale of aerated water sweetened with saccharin — Conflict between provisions of Appendix B, para A.01.01 and provisions of Rule 44 (g) — Rule of harmonious construction — Aerated water sweetened with saccharin though deviation from standard prescribed in Para A.01.01, is protected by Rule 44 and sale of such water is no offence. See Prevention of Food Adulteration Act (1954), Section 16 (1) (a). **1965 (2) Cri LJ 451 (2): AIR 1965 All 486.**

——**R. 44 (b)** — Prevention of Food Adulteration Act (1954), Sections 2 (i) and (xii), 7, 13 (5), 16 (i) (a), 23 (1) (b) (m) — Sale of mixed milk of cow and buffalo — Test of mean standard for cow and buffalo milk — Legality — Opinion of public Analyst — Value of — **Held,** (i) the conviction of the accused could not be sustained on the basis of the report of Public Analyst since his opinion was based upon the mean standard which was his own creation and had no statutory support.

(ii) That the said report did not state what was the actual percentage of water in the sample and hence it was not possible for the Court to test the accuracy of his opinion since standards vary for various reasons. See Prevention of Food Adulteration Act (1954), Section 2 (i) (xii). **1960 Cri LJ 1056 (2): AIR 1960 All 504.**

——**R. 44 (b)** — Milk found to be deficient in milk solids other than milk fat with 31 per cent. of added water — Milk should be held to be adulterated. **1960 Cr LJ 183: 1960 All LJ 156: 1960 All WR (HC) 143: 1960 All Cr R 120: AIR 1960 All 64 (65) (Pt B) (Pr 7).**

——**R. 44 (h) — Sale of turmeric powder containing foreign stuff — No evidence that it was sold as an article of food — Offence — Seller, if guilty under Rule 44 (h) — No evidence that article seized is an imitation or substitute — Section 7 (ii), if attracted.**

Selling of turmeric containing any foreign substance is an offence under Rule 44 (h) of the Prevention of Food Adulteration Rules framed under the Prevention of Food Adulteration Act. 'Sale' in Section 2 (xiii) of the Act should be a sale of any article of food. The argument that since there was no lable to show that the stuff (turmeric) was intended for external use only, it has to be presumed that it was meant for human consumption and is, therefore, an article of food cannot be accepted. No doubt, selling turmeric powder which is an article of food, containing any foreign substance, is an offence punishable under Section 16 (1) read with Section 7 and Rule 44 (h) of the Rules framed under the Prevention of Food Adulteration Act. But according to Section 2 (ix), an article of food shall be deemed to be misbranded if it is an imitation or a substitute for an article of food or if it resembled it in a manner likely to deceive: where there is no evidence on behalf of the prosecution to show that the accused sold turmeric powder as an article of food, and in the face of the positive evidence of the accused that he sold the stuff as turmeric powder, useful for external use only, it is very difficult to hold the accused guilty under Rule 44 (h).

When there is absolutely no evidence to show that the article seized is an imitation or is a substitute for such an article or that it resembles another article of food under the name of which it was sold, the provision of Section 7 (ii) cannot be attracted. The report of the Analyst gives only the analysis of the contents. This would not go to prove that it was an imitation or a substitute. **(1958) 1 Andh WR 528: (1958) MLJ (Cr) 455: 1958 Cr LJ 1375: AIR 1958 Andh Pra 681 (682) (Pt A) (Pr 7).**

[**Overruled** in AIR 1965 Andh Pra 118.]

——**R. 44 — Interpretation of.**

The interpretation of Rule 44 seems to be that even in case of an article of food in which any addition or admixture is present and has been notified on the label affixed to the package containing the article that article cannot be sold if it falls within the list of articles of food given in that rule and the addition or admixture is of the kind specified in that rule in reference to that article. Therefore, just because 'butter' is not mentioned in the list of articles under Rule 44, it does not mean that by complying with the provisions of Rule 43 a person can sell 'adulterated' butter with impunity and thereby contravene the express provisions of Section 7 of the Act. **ILR (1962) Bom 118: 63 Bom LR 880: 1961 Nag LJ 735: 1962 (2) Cr LJ 562: AIR 1962 Bom 104 (106) (Pt C) (Pr 5).**

——**R. 44** — Ghee — Sub-standard by definition — Matters to be considered while according sanction for prosecution for offences under Rules 44, 46. See Prevention of Food Adulteration Act (1954), Section 2. **(1965) 2 MLJ 403: 1966 Cr LJ 668: AIR 1966 Mad 194.**

——**R. 44 (b)** — Offence under — Evidence — Milk purchased from accused and sent to Public Analyst as sample — Less than prescribed quantity of formalin added to milk — Sample analysed

after a delay of ten months showing incriminating excess percentage of water — No evidence adduced by prosecution by calling the public analyst to show that omission to add requisite quantity of formalin and the delay in analysing the sample had not or could not have brought about any difference in the sample — **Held,** conviction of accused for having sold milk with an incriminating excess percentage of water could not be maintained — AIR 1962 Mad 342, Rel. on. See Prevention of Food Adulteration Act (1954), Section 11. **1964 Mad LJ (Cri) 592: (1964) 2 Mad LJ 428: 1964 (2) Cri LJ 97 (Mad).**

RULE 44-A

●——**R. 44-A, Cl. (b)** — Prevention of Food Adulteration Act (1954), Section 23 (1) (f) — Prohibition on trade of Kesari dal is reasonable restriction and is covered by Article 19 (6). See Constitution of India, Article 19 (1) (g). **1965 (1) Cr LJ 446: AIR 1965 Ker 123 (FB).**

——**R. 44-A** — Notification making rule applicable from 1st July, 1961 published in Gazette of 7th July, 1961 — Notification held applicable in respect of acts committed after 7th July, 1961 — Notification as a whole not invalid. See Constitution of India, Article 20 (1). **1965 (1) Cr LJ 446: AIR 1965 Ker 123 (FB).**

RULE 46

——**R. 46** — Prevention of Food Adulteration Act (1954), Section 7 (1) — Mere storing of Adulterated ghee by hotel keeper with intent to serve or use it in preparation of food — No evidence to show that it was actually so used — No offence under Section 7. See Prevention of Food Adulteration Act (1954), Section 7 (1). **1960 Cri LJ 886: AIR 1960 Andh Pra 366.**

——**Rr. 46 and 44** — Ghee — Sub-standard by definition — Prosecution for offence under — Matters to be considered while according sanction to prosecute stated. See Prevention of Food Adulteration Act (1954), Section 7. **(1965) 2 MLJ 403: 1965 Mad LJ (Cri) 796: 1966 Cri LJ 668: AIR 1966 Mad 194.**

——**R. 46** — Prevention of Food Adulteration Act (1954), Sections 7 (1) and 2 (1) — Moisture content of butter in excess of statutory maximum — Practical impossibility of keeping the moisture content at or below the statutory level — It is not legal plea in defence. **(1958) 2 MLJ 408: (1958) MLJ (Cr) 836.**

RULE 47

——**R. 47** — Aerated water is article of food under Section 2 (v) and Rule 47 applies — Aerated water sweetened by admixture of Saccharin with sugar under declaratory label — No offence. See Prevention of Food Adulteration Act (1954), Section 2 (v). **1964 (2) Cri LJ 375: AIR 1964 All 455.**

——R. 47 — Rules under Parts VII and VIII — Rule 47 under Part VIII — If to be read with Part VIII — Commencement of Rule.

Rule 47 relating to labelling occurs in Par VIII. Because Rule 47 relates to labelling and Part VII also relates to labelling, it cannot be argued that Rule 47 must be read with Part VII. The other provisions relating to the labelling of containers came into force on the 1st October, 1956, but this particular provision contained in Rule 47 about Saccharin being declared on the label must be deemed to have come into force on the 24th September, 1955 when Part VIII came into force. **1958 Cri LJ 169 (2) (171) (Pt B) (Pr 6) (Cal).**

RULE 49

——**R. 49 (2)** — Prevention of Food Adulteration Act (1954), Section 16 (1) — Keeping chilly paste in an imperfectly tinned container in a hotel — If an offence — **Held,** the rule will be attracted as the chilly paste is intended for use in the preparations made in the hotel. **(1960) 1 MLJ 86: (1960) MLJ (Cr) 63.**

RULE 50

——**R. 50 (i) (b) — Ice-cream is milk product within meaning of Clause (b).**

Ice-cream is a milk product within the meaning of Clause (b) of sub-rule (i) of Rule 50, and a person desiring to manufacture and sell ice-cream ought to hold a licence as prescribed by Rule 50, Prevention of Food Adulteration Rules. **1961 All Cr R 59: 1961 All WR (HC) 139: 1961 All LJ 105.**

——**R. 50** — Section 442 of Calcutta Municipal Act (33 of 1951), has got distinct entity untrammelled by provision of Rule 50 and is not in any way repealed by Section 25 of Food Adulteration Act. See Municipalities — Calcutta Municipal Act (33 of 1951), Section 442. **(1965) 69 Cal WN 517: 1966 Cri LJ 525: AIR 1966 Cal 203.**

——**R. 50** — Offence under Section 442, Calcutta Municipal Act — Magistrate coming to correct decision that an eating house cannot be run without a licence under Section 442 of the Act even though a licence is obtained under Rule 50 — While convicting accused under Section 442, Magistrate also not overlooking the material evidence — **Held,** order passed by Magistrate is not liable to be interfered with under Section 439 of the Code. See Criminal P. C. (1898), Section 439. **(1965) 69 Cal WN 517: 1966 Cri LJ 525: AIR 1966 Cal 203.**

●——**R. 50 (1), Cl. (e)** — Rule 50 (1), Clause (e) and Kerala Government Notification, Dated 11-1-1962 issued thereunder specifying articles of food which would be regulated by licence are ultra vires: See Prevention of Food Adulteration Act (1954), Section 23. **1965 Ker LJ 123: 1966 Cr LJ 757: AIR 1966 Ker 184 (FB).**

——**R. 50** — Constitutional validity — Legislative sub-delegation — State Government empowered to apply Rule 50 (1) to any other article of food — No legislative sub-delegation — Rule is valid. See Constitution of India, Article 245. **1962 Ker LJ 240: (1962) 1 Ker LR 294: ILR (1962) 1 Kerala 436.**

——R. 50 — Kerala Prevention of Food Adulteration Rules (1957), Rule 4, Schedule I — Failure to take out licence — Prosecution can only be under Rule 50 or notification issued by State Government thereunder — Rule 4 or Schedule I of Kerala Rules not amounting to notification under R. 50.

A person cannot be prosecuted under Rule 4 of the Kerala Rules for running a restaurant without a licence. Prosecution for failure to take out a licence can be only for contravention of the provisions of Rule 50 of the Central Rules and not of Rule 4 of the Kerala Rules. Running a restaurant by itself would not amount to a contravention of Rule 50 of the Central Rules unless there is further proof that the accused was dealing in any of the articles of food which require licence to be taken. It must be proved that he is dealing in articles of food mentioned in Rule 50 of the Central Rules or dealing in articles of food which the State Government may by notification specify.

If the State Government wants that any addition should be made to the list of articles of food

enumerated in R. 50 a notification has to be issued adding particular kinds of food they think necessary to the list given in Rule 50. A general inclusion of all articles of food is not permissible under the powers vested in the State Government under Rule 50 (1). **1962 Ker LJ 240: 1962 1 Ker LR 294: ILR (1962) 1 Ker 436.**

[**Overruled** on another point in AIR 1966 Ker 184.]

——R. 50 — Kerala Prevention of Food Adulteration Rules, Rule 10 — Licence — Period of licence how to be calculated.

The period of the licence under the Prevention of Food Adulteration Rules should be calculated from the date given therein and not from the date of issue of the licence. **(1963) MLJ (Cr) 385: (1962) Ker LT 575: ILR (1962) 2 Ker 351.**

——R. 50 — Servant liable without proof of mens rea. See Prevention of Food Adulteration Act (1954), Section 16 (1) (a). **1965 (1) Cri LJ 581: AIR 1965 Pat 177.**

——R. 50 — Conviction under — Although accused applying for renewal of licence and depositing fees, it was found that he had never obtained a licence — Offence does not involve moral turpitude so as to disqualify him under Section 11 (g), Rajasthan Panchayat Act. See Panchayats — Rajasthan Panchayat Act (21 of 1953), Section 11 (g). **ILR (1965) 15 Raj 1045: AIR 1966 Raj 42.**

APPENDIX B

●——App. B, Rule A. 11.05 — Butter — Meaning of — Butter prepared from curd comes within the definition — If required standard is not maintained the butter is deemed to be adulterated.

Whatever process is adopted, whether butter is taken directly out of milk or taken out of soured milk or cream, it is prepared only from milk. The only difference between the two is that in the case of butter prepared from curd there is an intervening souring process which is not necessary in the case of butter directly prepared from milk or cream. The word "exclusively" in the definition in Rule A. 11.05 refers to the milk or cream of cow or buffalo. The word has no relation to other milk products. Hence butter prepared from curd comes within the definition of 'butter' in Rule A. 11.05 of Appendix B to the Rules. AIR 1960 Bom 243 (FB), Approved. ILR (1958) Bom 637, **Held, overruled.** If the quality or purity of butter falls below the standard prescribed by the said rule or its constituents are in excess of the prescribed limits of variability, it shall be deemed to be adulterated within the meaning of Section 2 of the Prevention of Food Adulteration Act. If the prescribed standard is not attained, the statute treats such butter, by fiction, as an adulterated food, though in fact it is not adulterated. (1916) 2 KB 446, Dist. M. V. Joshi v. M. U. Shimpi, **1962 Nag LJ 378: 1961 SCD 725: 64 Bom LR 158: 1962 MPLJ 762: (1961) 3 SCR 986: 1961 All LJ 656: (1961) 2 Ker LR 289: 1961 BLJR 680: 1961 (2) Cri LJ 696: (1961) 2 SCJ 571: (1961) 2 MLJ (SC) 145: (1960) 2 An WR (SC) 145: 1961 MLJ (Cr) 649: AIR 1961 SC 1494 (1496, 1497, 1498, 1499) (Pt B) (Prs 7, 9, 10, 14, 16).**

——App. B — Prevention of Food Adulteration Act (1954), Sections 2 (i) (l) and (7) — Sample of ghee containing large proportion of vegetable fat — Sample is adulterated — Accused is liable under Act. See Prevention of Food Adulteration Act (1954), Section 2 (i) (l). **1965 All WR (HC) 109: 1966 Cri LJ 113: AIR 1964 All 64.**

——App. B — Prevention of Food Adulteration Act (1954), Section 16 (1) (a) and Rules 44 (g), 5 — Sale of aerated water sweetened with saccharin — Conflict between provisions of Appendix B, Para A. 01.01, and provisions of R. 44 (g) — Rule of harmonious construction — Aerated water sweetened with saccharin though deviation from standard prescribed in Para A. 01.01, is protected by Rule 44 and sale of such water is no offence. See Prevention of Food Adulteration Act (1954), Section 16 (1) (a). **1965 (2) Cri LJ 451 (2): AIR 1965 All 486.**

——App. B, Para. A. 17.11 — Gingelly oil — 'Nuvvula nune' and 'mudi nuvvula nune' are gingelly oil as defined in para. A. 17.11. **1963 (1) Cr LJ 109 (111) (Pt C) (Pr 10) (Andh Pra).**

——App. B, R. A-11-14 — Uttar Pradesh — Ghee from hilly tract — Reichert value found lower than that prescribed by Rule — Ghee not necessarily adulterated — Rule is unreasonable so far as U. P. is concerned. **1961 All LJ 224: 1961 All Cr R 118: 1961 All WR (HC) 241: 1962 (1) Cr LJ 246: AIR 1962 All 156 (157) (Pr 8) (DB).**

[**Overruled** in AIR 1964 SC 1135.]

●——App. B, R. A. 11.05 — 'Butter' — Butter prepared from curd — If included.

The expression 'butter' within the meaning of Rule A. 11.05 in the Rules framed under Section 23 applies also to butter prepared from dahi or curd. ILR (1958) Bom 637, **Overruled.** Sadashiv Tatoba Gatade v. State, **61 Bom LR 1176: ILR (1959) Bom 1800: 1960 Cr LJ 803: AIR 1960 Bom 243 (244) (Pt A) (Pr 6) (FB).**

——App. B of Art. 14 — Report of Public Analyst — Requirements of — Form prescribed, contents of. See Prevention of Food Adulteration Rules (1955), Rule 7 (3). **(1960) 62 Bom LR 354.**

——App. B, A. 11.05; A. 11.01, A. 11.10; A. 11.06 — "Butter" Product obtained from curd.

The limit of variability in respect of butter is prescribed by the Central Government under the Prevention of Food Adulteration Rules, 1955. The prescription is to be found in A. 11.05. The definition of butter is exhaustive and is not inclusive. Reading the definition of the word 'butter' as given in A. 11.05, in conjunction with the definitions of the words 'milk' and 'cream', as given in A. 11.01 and A. 11.10, the result which we obtain is that butter is that product which is obtained from normal, clean and fresh secretion obtained by complete milking of the udder of a healthy cow, buffalo, etc., or that product which is prepared from that portion of milk, rich in milk fat, which has arisen to the surface of milk on standing and has been removed or which has been separated from milk by centrifugal force. The three words 'milk', 'cream' and 'curd' having been defined and the definitions being exhaustive, the definition of the word 'butter' does not include a product which is obtained from curd, and it refers only to a product which is prepared from milk or cream. Butter is that which is exclusively prepared from milk or cream. Curd is not milk, but it is a milk product. It is a produce derived from milk, but it is not milk itself. Milk is a substance which is clean and fresh. Curd is a soured substance. **60 Bom LR 434: ILR (1958) Bom 637.**

[**Overruled** in (1) AIR 1961 SC 1494 (2) AIR 1960 Bom 243 (FB).]

——App. B, Clause A. 11.01.03 — Prevention of Food Adulteration Act (1954), Sections 7, 16 (1) (a) and 23 (1) (b) — Prevention of Food Adulteration Rules (1955), Appendix B, Clauses A. 11.06, A 11.01.01 and A 11.01.03 — Amendment

made in Clause A 11.06 on 9-12-1958 — Effect of — Standard of buffalo milk made applicable to Dahi of undeclared source — Amendment is substantive law though garbed as rule of evidence — Hence not retrospective in operation — Rule does not create new offence and is not ultra vires the Act. See Prevention of Food Adulteration Act (1954), Section 7. **1964 (2) Cri LJ 281: AIR 1964 Cal 384.**

——App. B, Item A. 11.05 — Article sold as butter — Seller to prove that the sample contained admixture of product derived from goat's milk. **(1965) MLJ (Cri) 30: 1965 Ker LJ 6.**

——App. B, Rules A. O. 1, O. 1 and 47 — Aerated water — Use of only sugar allowed as sweetening agent — Admixture of saccharine — Aerated water must be deemed to be adulterated.

Rule A. O.1.O.1 in Appendix B of Prevention of Food Adulteration Rules permits the use of only sugar as a sweetening agent and expressly prohibits the addition of any substance, other than that mentioned in the Rule. Hence, an aerated water containing an admixture of saccharine must be deemed to be adulterated. Rule 47, which permits addition of saccharine to food in certain specified circumstances, is a general provision and does not apply in a case where the specific provision contained in R. A. O.1.O.1 applies. **1964 Ker LT 1032: ILR (1964) 2 Ker 644.**

——App. B, A.11-01 — 'Milk — Mixture of buffalo and cow's milk — Standard required.

Appendix B-A 11-01 to the Prevention of Food Adulteration Act provides that 'milk' means the normal clean fresh secretion obtained by complete milking of the udder of a healthy she-goat, cow, buffalo, sheep. A. 11-01-02 provides that cow's milk shall contain not less than 3.5 per cent. of milk fat and the milk solids other than fat shall not be less than 8.5 per cent. A-11-01-02 provides that buffalo's milk shall contain not less than 5 per cent. of milk fat and that milk solids other than milk fat shall not be less than 9 per cent. Where milk, other than skimmed milk, is sold or offered for sale without any indication as to whether it is derived from cow, buffalo, goat or sheep, the standard prescribed for buffalo milk shall apply.

Where milk was sold as a mixture of buffalo and cow's milk, (i.e., without any indication as to whether it is derived from cow, buffalo, goat or sheep)) it should contain not less than 5 per cent. of milk fat and not less than 9 per cent. of milk solids other than milk fat (i.e., the standard prescribed for buffalo milk shall apply). AIR 1961 Mad 198, Disting. **(1963) 2 MLJ 285: 1963 Mad LJ (Cr) 419.**

——App. B, R. A. 11.05 — 'Butter' — Admixture of goat butter — Product is not butter — Butter as referred to in the Act implies the "product prepared exclusively from the milk or cream of cow or buffalo or both". See Prevention of Food Adulteration Act (1954), Section 16 (1) (g) (i). **1961 (1) Cri LJ 675: AIR 1961 Mad 198.**

——App. B, A 05.10 — Ground chillies sold by accused alleged to be highly adulterated with wheat bran — Report of Public Analyst merely stating that sample was highly adulterated — Percentage of wheat bran not specified — Acquittal of accused held proper. See Prevention of Food Adulteration Act (1954), Section 7. **1964 (2) Cri LJ 578: AIR 1964 Punj 475 (DB).**

PREVENTIVE ACTION

See (1) Constitution of India, Art. 22.
(2) Criminal P. C. (1898), Sections 106-109 and
(3) Enactments under "Public safety".

PREVENTIVE ACTION BY POLICE

See Criminal P. C. (1898), Ss. 149, 151, 153.

PREVENTIVE DETENTION

See (1) Constitution of India, Articles 22 and 226 and 32.
(2) Enactments under "Public safety".

PREVENTIVE DETENTION ACT (4 of 1950)

See under Public Safety.

PREVENTIVE DETENTION (AMENDMENT ACT (4 of 1951)

See under Public Safety.

PREVENTIVE DETENTION (AMENDMENT) ACT (34 of 1952)

See under Public Safety.

PREVENTIVE DETENTION (EXTENSION OF DURATION) ORDER, 1950

See under Public Safety.

PREVENTIVE RELIEF

See Specific Relief Act (1877), Sections 6 and 52.

PREVIOUS ACQUITTAL

See (1) Constitution of India, Article 20 (2).
(2) Criminal P. C. (1898), Section 403.

PREVIOUS CONVICTION

See (1) Constitution of India, Article 20 (2).
(2) Criminal P. C. (1898), Sections 211, 221, 310, 403, 511.
(3) Evidence Act (1872), S. 54.
(4) Penal Code (1860), S. 75.

Proof of.

See Criminal P. C. (1898), S. 511.

Relevancy of, in evidence.

See Evidence Act (1872), S. 14.

Setting out of, in charge.

See Criminal P. C. (1898), S. 221.

Trial of previous convicts.

See Criminal P. C. (1898), S. 348.

PREVIOUS DEPOSITION

See (1) Criminal P. C. (1898), Sections 154, 162, 164, 172, 288.
(2) Evidence Act (1872), Ss. 33, 145.

PREVIOUS SANCTION FOR PROSECUTION

See Statutory Cross-references under "Criminal trial".

PREVIOUS SANCTION TO LEGISLATE

See Constitution of India, Article 225.

PREVIOUS SANCTION TO PROSECUTE

See Statutory Cross-references under "Criminal trial".

PREVIOUS STATEMENT OF WITNESS

Cross-examination as to.

See Evidence Act (1872), S. 145.

PREVIOUS YEAR

Meaning of.

See (1) Excess Profits Tax Act (1940), Section 6.
(2) Income-tax Act (1922), Section 2 (11).

PRICE

Defined.
See Sale of Goods Act (1930), S. 2.

PRICE OF GOODS SOLD AND DELIVERED

Suit for.
—Limitation.
See Limitation Act (1908), Art. 52.

PRICE OF WORK DONE

Suit for.
—Limitation.
See Limitation Act (1908), Art. 56.

PRIEST

See (1) Civil P. C. (1908), S. 9.
(2) Hindu Law—Religious endowment.
(3) Religious and Charitable Endowment.

PRIMARY EVIDENCE

See Evidence Act (1872), Ss. 62, 64.

PRIME MINISTER

See (1) Constitution of India, Arts. 74, 75, 77 and
(2) Statutory cross-references under "Constitution of India".

PRIME MOVER

See Factories Act (1948), S. 21.

PRIMOGENITURE

See (1) Custom.
(2) Hindu Law—Succession.
(3) Evidence Act (1872), S. 13.
(4) Tenancy Laws—Madras Impartible Estates Act (1904).
(5) Tenancy Laws—Oudh Estates Act (1869).

PRINCE OR CHIEF

Recognised agent, of.
See Civil P. C. (1908), S. 85.

PRINCIPAL AND AGENT

See (1) Banker and customer.
(2) Civil P. C. (1908), S. 20.
(3) Contract Act (1872), Ss. 185 to 225.
(4) Evidence Act (1872), S. 115.
(5) Penal Code (1860), S. 352.
(6) Land Acquisition Act (1894), S. 19.
(7) Limitation Act (1908), Arts. 88, 89, 90 and
(8) Statutory cross-references under "Contract —Principal and Agent".

Knowledge of agent, if knowledge of principal.
See Limitation Act (1908). Art. 95.

PRINCIPAL AND SURETY

See (1) Civil P. C. (1908), Ss. 54 and 145.
(2) Contract Act (1872), Ss. 124-128; 133-141; 145, 146.
(3) Criminal P. C. (1898), Ss. 106 to 110; 112 to 123; 123A; 125, 496-502, 513-516 and
(4) Statutory cross-references under "Contract".

PRINCIPAL DEBTOR AND SURETY

See Statutory cross-references under "Contract".

PRINTER

See (1) Contempt of Courts Acts (1926) and (1952).
(2) Penal Code (1860), Ss. 499 and 500.
(3) Press and Registration of Books Act (1867).
(4) Press (Emergency Powers) Act (1931), S. 18 (1).
(5) Tort—Defamation.

PRIOR AND MESNE MORTGAGE

See T. P. Act (1882), Ss. 91 and 92.

PRIORITY

See (1) Civil P. C. (1908), S. 73
(2) Registration Act (1908), S. 50.
(3) T. P. Act (1882), S. 48.

Government debt.
See (1) Bengal Public Demands Recovery Act (1913), S. 8.
(2) Bombay City Land Revenue Act (1878), S. 11.
(3) Civil P. C. (1908), S. 73, O. 21, R. 64; O. 33, R. 10.
(4) Constitution of India, Art. 300.
(5) Income-tax Act (1922), S. 46.
(6) Revenue Recovery Act (1890).

Mortgages.
See T. P. Act (1882), S. 48.

Registered and unregistered documents, priority between.
See Registration Act (1908), S. 50.

Registered document and oral agreement, priority between.
See Registration Act (1908), S. 48.

Rights created by transfer.
See T. P. Act (1882), S. 48.

PRISONERS

See (1) Coroners Act (1871), S. 17 (1).
(2) Identification of Prisoners Act (1920).
(3) Madhya Bharat Identification of Prisoners Act, 2008 (15 of 1951).
(4) Prisons Act (9 of 1894).
(5) Reformatory Schools Act (1897) and
(6) Statutory cross-references under "Jail".

PRISONERS ACT (3 of 1900)

PREAMBLE

——Pre.—Convict in jail — Power of Magistrate to order his detention in police custody for investigation —When once a person is convicted and sent to jail for undergoing sentence, he is to be governed only by the provisions of the two statutes which deal with prisons and with the prisoners. The effect of the provisions of the Prisons Act, and the Prisoners Act is that once a prisoner is inside the jail he will continue to remain in the custody of jail official till the expiry of his sentence. A Magistrate has no power to release him from jail or to change the nature of his custody—(Prisons Act (9 of 1894)). See Criminal P. C. (1898), S. 60. 1956 Cri L J 619 : AIR 1956 Madh-Bha 130.

SECTION 3

——S. 3—Superintendent of Jail—Can detain persons sent by competent authority other than Court of Law — Detention in pursuance of warrant issued by Speaker of Legislative Assembly — Not ultra vires. 1965 All W R (HC) 286 : 1965 All Cri R 213 : 1965 (2) Cri L J 170 : ILR (1965) 2 All 281 : AIR 1965 All 349 (356) (Pt G) (Pr 18) (DB).

PRISON OFFENCES

See Prisons Act (9 of (1894), Ss. 45, 46.

Hunger strike.
See Prisons Act (1894), S. 52.

PRISONS

See (1) Bihar and Orissa Jail Manual.
(2) Pepsu Jail Manual.
(3) Prisons Act (9 of 1894).

(4) Prisons Rules.
(5) Rajasthan Jail Manual.
(6) U. P. Jail Manual.

PRISONS ACT (9 of 1894)

PREAMBLE

——Pre. — Convict in jail — Power of Magistrate to to order his detention in police custody for investigation — When once a person is convicted and sent to jail for undergoing sentence he is to be governed only by the provisions of the two statutes which deal with prisons and prisoners. Once a prisoner is inside the jail he will continue to remain in the custody of the jail official till the expiry of his sentence. A Magistrate has no power to release him from jail or to change the nature of his custody — (Prisoners Act (3 of 1900)). See Criminal P. C. (1898), S. 60. **1956 Cri L J 619 : AIR 1956 Madh Bha 130.**

SECTION 3

——S. 3 (2) — 'On hunger strike' — Person starting hunger strike outside jail continuing it after admission to jail — When liable for prosecution under S. 52 —The act of hunger strike per se does not constitute an offence—If a person is removed to jail merely because he has gone on hunger stike and then after placing him inside the jail, the jail authorities prosecute him under S. 52 such a prosecution would be illegal and a conviction cannot be maintained in such circumstances. In such a case the accused would not be a prisoner within the meaning of S. 3 (2) of the Prisons Act — (U. P. Jail Manual Ch. 28, Para 742). See Prisons Act (9 of 1894), S. 52. **1959 Cri L J 283 : AIR 1959 All 164 (DB).**

——S. 3 (2)—Applicability— 'Prisoner' — Under-trial Prisoner, admitted to jail is a prisoner within the meaning of para. 742 of the Jail Manual. **1959 Cri L J 283 : A I R 1959 All 164 (165) (Pt A) (Prs 3, 4) (DB).**

——S. 3 (1) (a)—Prison does not include police lock-up. **Madh B L R 1955 Cr 360 : Madh B L J 1955 H C R 1975 : 1956 CrLJ 619 : AIR 1956 Madh B 130 (131) (Pt B) (Pr 5).**

——S. 3 (1)—No statutory provision directing imprisonment only in a place described as prison under S. 3 (1) of the Act—Imprisonment in the Court premises till the rising of the Court is imprisonment within the meaning of the Penal Code. **ILR 1945 Mad** 529, Rel. on.

A sentence of imprisonment till the rising of the Court is a sentence which is according to law and a direction that a person shall be confined in the Court premises constitutes imprisonment within the meaning of the Penal Code. As to what amounted to imprisonment. (1945) 7 Q B 742: 115 English Reports 668, Refd. to.

The expression "imprisonment" does not connote the confinement of a person within the four walls of a trial during which the State sets apart for imprisoning persons convicted of offences with which they are charged. There is no statutory provision directing the imprisonment of a person sentenced to imprisonment by a Court of Law only in a place as defined as prison in S. 3 (1) of the Prisons Act 9 of 1894. **ILR (1961) Mys 1053.**

SECTION 12

——Ss. 12, 51 — Interpolation in punishment book— Presumption—Evidence Act (1872), S. 114.

The fact of interpolation in punishment book certainly indicates that the punishment book is not kept properly but from that, it would be an unjustified step to presume that there must have been some punishment inflicted on the prisoner for a certain offence. **(1951) 55 C W N 140 : A I R 1952 Cal 319 (320) (Pt C) (Pr 8) (DB).**

SECTION 45

●——S. 45—Punjab Communist Detenus Rules, 1950, Rules 40 and 41 — Procedure under, not governed by Ss. 45, 46 and 52 of the Prisons Act as the Rules constitute a self-contained Code regulating the place and conditions of detention of the detenus. See Public Safety— Preventive Detention Act (1950), S. 4 (a). **1953 Cri L J 1432 : AIR 1953 S C 325.**

——Ss. 45 (1) and 52, Second Proviso — Prisoners refusing to take food — Warning by Superintendent Trial for same offence — Legality — (Constitution of India, Art. 20):

Refusing to take food when offered by the jail authorities is an offence punishable under S. 45 (1) of the Prisons Act read with para. 806 (17) of the rules framed under S. 50 of that Act. The prisoners cannot, however, be punished twice for the same offence in view of the second proviso to S. 52 of that Act and also under Art. 20 (2) of the Constitution. Formal warning by the Superintendent of Jail is one of the punishments provided by S. 46 (1) of the Act.

The prisoners refused to take food on two consecutive days. The complaint was filed only in respect of the refusal on the first day and there was no mention of any refusal to take food on the next day. It was found that the prisoners were warned personally by the Superintendent on the first day.

Held, that although hunger strike is a continuous offence, in the present circumstances their trial and conviction on the complaint submitted was illegal. **1959 All L J 682 : 1959 All W R (H C) 488 : 1959 All Cr R 406 : 1960 Cr L J 203 : A I R 1960 All 124 (125) (Pt A) (Prs 7, 8) (DB).**

——Ss. 45, 46 and 52—Scope—Offences under Penal Code also falling within definition of prison offence in S. 45 —Ordinary Criminal Courts—Jurisdiction to try—No ouster of jurisdiction by Prisons Act.

The Prisons Act does not contain any provision ousting the jurisdiction of the ordinary criminal Courts to try offences under the Penal Code which are also prison offences mentioned in S. 45 of the Act. Section 52 does not purport to take away the jurisdiction of ordinary Courts of law. Where a regular challan or a complaint is instituted the ordinary Courts of criminal law can proceed with the inquiry and trial of the case notwithstanding the fact that such offences may also fall in the definition of prison offences under S. 45 of the Prisons Act. In order that the jurisdiction of the ordinary criminal Courts may be deemed to have been ousted it is necessary that the provision of such ouster must be either express or at least by necessary implication. **1960 Raj L W 383 : I L R (1960) 10 Raj 1027 : 1960 Cr L J 1661 : A I R 1960 Raj 288 (289) (Pt A) (Pr 4) (DB).**

——S. 45 (2)—Offence under S. 45 (2), Prisons Act, corresponds to offence under S. 353, Penal Code and not under S. 363, Penal Code — Offence by prisoner falling within S. 353, Penal Code is cognizable— Police taking cognizance and submitting challan to sub-divisional Magistrate — Latter does not act without jurisdiction in taking cognizance of case. **1960 Raj L W 383 : ILR (1960) 10 Raj 1027 : 1960 Cr L J 1661 : AIR 1960 Raj 288 (290) (Pt B) (Pr 5) (DB).**

SECTION 46

●——S. 46—Punjab Communist Detenus Rules, 1950 Rules 40 and 41—Procedure under, not governed by Ss. 45, 46 and 52 as the Rules are a self-contained Code as to place and conditions of detention of detenus. See Public Safety — Preventive Detention Act (1950), S. 4 (a). **AIR 1953 S C 325.**

——Ss. 46, 56 — Fetters and confinement to cell—Presumption—Evidence Act (1872), S. 114.

From the mere imposition of fetters and the restriction on a person that he might take exercise in the cell-yard it cannot be presumed that these were by way of punishment. (1951) 55 C W N 140 : A I R 1952 Cal 319 (320) (Pt B) (Pr 9) (DB).

——S. 46—Forfeiture of remission earned by prisoner—Punishment not based on proper evidence — Legality — (Constitution of India, Art. 226)—(Cr. P. Code (1898), S. 491),

Under S. 46 of the Prisons Act, the Superintedent is empowered to examine any person touching any prison offence. This, however, does not mean that he need not examine the necessary witnesses to prove the commission of the offence. Where, apart from the question whether it was necessary to record the evidence of the witnesses, the punishments did not appear to be based on proper evidence, the High Court held that this was tantamount to miscarriage of justice and the punishments were liable to be quashed. 1957 Jab L J 139 : 1957 M P C 54 : 1957 M P L J. 242 : 1957 Cr L J 758 : AIR 1957 Madh Pra 48 (48, 49) (Pt B) (Pr 5) (DB).

——S. 46—Offences under Penal Code also falling within definition of prison offence in S. 45—Ordinary Criminal Courts have jurisdiction to try them — No ouster of jurisdiction by Prisons Act—See Prisons Act (1894), S. 45. 1960 Cri L J 1661 : AIR 1960 Raj 288 (DB).

SECTION 51

——S. 51—Interpolation in punishment book—Presumption—It would be an unjustified step to presume that there must have been some punishment inflicted on the prisoner for certain offence—Evidence Act (1872), S. 114. See Prisons Act (1894), S. 12. AIR 1952 Cal 319 (DB).

SECTION 52

■——S. 52—Punjab Communist Detenus Rules, 1950, Rules 40 and 41 — Procedure under, not governed by Ss. 45, 46 and 52, as the Rules are a self-contained code governing detention of detenus. See Public Safety—Preventive Detention Act (1950), S. 4 (a) 1953 Cri L J 1432 : AIR 1953 S C 325.

——S. 52, Second Proviso—Prisoners refusing to take food—Warning given by Superintendent — Trial for same offence is illegal in view of the second proviso to S. 52 and also under Art. 20 (2) of the Constitution — (Constitution of India, Art. 20). See Prisons Act (9 of 1894), S. 45 (1). 1960 Cri L J 203 : AIR 1960 All 124 (DB).

——S. 52— Validity — Section is not hit by Art. 14—(Constitution of India, Art. 14).

Section 52 of the Prisons Act is not hit by Art. 14 of the Constitution. The power given to the Superintendent under S. 52 to forward the case of an individual prisoner to the District Magistrate is neither unrestricted nor unabridged. The rule for guiding the exercise of discretion is provided by the legislature in the section itself. It cannot, therefore, be said that the discretion is unrestricted. Secondly, the power may be discretionary but not necessarily discriminatory. The discretion conferred by S. 52 of the Prisons Act is vested not in any subordinate official of the jail but in the Superintendent himself and the considerations which are to guide him in the exercise of his discretion have been indicated in the section. The section does not therefore, in any way, infringe the principles of equality before the law vouchsafed by Art. 14 of the Constitution. AIR 1952 S C 75, Disting. AIR 1967 S C 397, Relied on. 1959 All L J 682 : 1959 All W R (H C) 488 : 1959 All Cr R 406 : 1960 Cri L J 203 : AIR 1960 All 124 (126) (Pt B) (Prs 11, 12) (DB).

——S. 52—Applicability—Under-trial Prisoner—Act of going on bunger strike—Offence—S. 3 (2)—(U. P. Jail Manual Chap. XXVIII. Para 742).

The act of going on hunger-strike is an offence within the meaning of para. 742 of the Jail Manual and it is punishable under S. 52 of the Prisons Act. The first fact which should however be proved in such cases is that the accused was a prisoner within the definition given under S. 3 (2) of the Prisons Act. An under-trial prisoner who is admitted to jail is a prisoner within the meaning of para. 742 of the Jail Manual. ILR (1959) 2 All 1 : 1958 All L J 849 : 1959 Cr L J 283 : AIR 1959 All 164 (165) (Pt A) (Prs 3, 4) (DB).

——S. 52—Applicability— Refusal to take food—Offence.

It is only when a prisoner goes on hunger-strike that he can be prosecuted under S. 52 of the Prisons Act, and mere refusal to take food even on repeated occasions will not by itself turn this refusal into a hunger strike. It is only when this refusal is meant to be used as a weapon for seeking redress of grievances that it assumes the character of hunger strike. These grievances need not be related necessarily to the treatment meted out to a prisoner in jail or to a period of time subsequent to his admission in jail. I L R (1959) 2 All 1 : 1959 Cr L J 283 : 1958 All L J 849 : A I R 1959 All 164 (166) (Pt B) (Pr 5) (DB).

——Ss. 52 and 3 (2) — Scope—Person starting ..... hunger strike outside jail continuing it after admission to jail—Offence—'On hunger strike'—(U. P. Jail Manual, Ch. 28, para. 742).

The words 'go on hunger strike' in Para. 742 include 'remaining on hunger strike'. Hunger strike is a continuing act and therefore every fresh act of refusal to take food at the time when food is offered to a prisoner would amount to a fresh act of hunger strike. The words in paragraph 742 do not exclude the operation of its provisions against those who had already started hunger strike outside the jail but who continue it after coming to jail. The act of hunger strike per se does not constitute an offence. If a person is removed to jail merely because he has gone on hunger strike and then after placing him inside the jail the jail authorities prosecute him under S. 52 of the Prisons Act, obviously such a prosecution would be illegal and a conviction cannot be maintained in such circumstances. In such a case the accused would not be a prisoner within the meaning of S. 3 (2) of the Prisons Act. For the purpose of the application of the provisions of the Prisons Act, the prosecution must prove that the detention was legal as it was sanctioned by a competent authority on the basis of an offence charged against the accused and it was not in violation of Art. 20 (2) of the Constitution of India. The executive authority cannot be given the option of punishing a citizen for going on hunger strike by shutting him up in jail and turning him into a prisoner. But where a person goes on hunger strike and he has also committed some offence on the basis of which he was rightly sent on a remand warrant to jail custody then it cannot be pleaded by him that because he had started hunger strike earlier he can ignore the rules of jail discipline. The test is whether the offender was brought to jail because he went on hunger strike or because he committed some offence. If his entry into jail is on the basis of some offence, then this plea is not open to him that as he did not start the hunger strike in Jail, so he can continue to be on hunger strike and thus commit a breach of the jail discipline rules. What is permitted to a citizen is not permitted to a prisoner. 1958 All L J 849 : ILR (1959) 2 All 1 : 1959 Cr L J 283 : AIR 1959 All 164 (166) (Pt C) (Pr 6) (DB).

——S. 52 — Applicability — U. P. Security Prisoners Rules, 1944, Rule 43 (b) — Offence against prison discipline — Release of security prisoner—Rule does not apply and he cannot be punished. **AIR 1955 NUC (All) 1519 (DB).**

——S. 52—Security prisoners going on hunger strike —Prisoners governed by U. P. Security Prisoners Rules, 1944, Rule 43—Offence committed under R. 43 —Previous sanction of Inspector-General of Prisons for prosecution is not necessary—S. 52 of the Prisons Act also does not contain any provision for previous sanction of the Inspector-General of Prisons for prosecution of the prisoners—(U. P. Jail Manual, R. 742). **AIR 1955 NUC (All) 1519 (DB).**

——S. 52—U. P. Security Prisoners Rules, 1944, R. 43 —Offence against prison discipline—Jail Superintendent sending prisoner to Magistrate — Presumption is that he thought he could not adequately punish him —Non-mention of opinion does not affect jurisdiction of Magistrate—A I R 1945 Bom 368, Dissented from. **A I R 1955 N U C (All) 1519 (DB).**

——S. 52—U. P. Security Prisoners Rules, 1944, R. 43 —"Opinion of the Superintendent"—Jail Superintendent not mentioning correct provision under which prisoners committed jail offence or dates when they committed it — It does not mean that he did not apply his mind. **A I R 1955 N U C (All) 1519 (DB).**

——S. 52 — "Prisoner"— Person detained under S. 3 of the Preventive Detention Act.

A person detained in the custody of a superintendent of a jail under an order of the Governor under S. 3 (1) (a) (ii) of the Preventive Detention Act, 1950, is not a prisoner within the meaning of S. 52 of the Prisons Act and therefore is not liable to be punished under that provision. (1953) 2 M L J 113, Ref. **1954 All W R (HC) 313 : 1954 All L J 351 : 1954 Cri L J 1326 : A I R 1954 All 626 (629) (Prs 12, 14) (DB).**

——S. 52 — Offences under Penal Code also falling within definition of prison offence in S. 45—Ordinary Criminal Courts have jurisdiction to try them — No ouster of jurisdiction by Prisons Act — S. 52 does not purport to take away the jurisdiction of ordinary Courts of law. See Prisons Act (9 of 1894), S. 45. **1960 Cri L J 1661 : A I R 1960 Raj 288 (DB).**

SECTION 56

——S. 56—Fetters and confinement to cell—Presumption—It cannot be presumed that these were by way of punishment — Evidence Act (1872), S. 114. See Prisons Act (1894), S. 46. **A I R 1952 Cal 319 (DB).**

SECTION 59

●——S. 59 — Rules under Punjab Jail Manual paragraphs 571 to 575—Separation of prisoners for maintenance of jail discipline — Para. 575 not violative of Art. 14—Power under para. 575, held exercised with mala fides and separate confinement of petitioner held illegal. See Constitution of India, Art. 14. **1962 (1) Cri L J 489 : A I R 1962 S C 510.**

● ——S. 59 — Rules made under S. 59 — Bombay Rules, R. 1419 (c)—Scope of rule.

The Prisons Act does not confer on any authority a power to commute or remit sentences; it provides only for the regulation of prisons and for the treatment of prisoner confined therein. Section 59 of the Prisons Act confers a power on the State Government to make rules, inter alia for rewards for good conduct. Therefore, the rules made under the Act should be construed within the scope of the Act. The rules, inter alia provide for three types of remissions by way of rewards for good conduct, namely, (i) ordinary, (ii) special and (iii) State. For the working out of the said remissions, under R. 1419 (c) of the rules framed by the State of Bombay, transportation for life is ordinarily to be taken as 15 years' actual imprisonment. The rule cannot be construed as a statutory equation of 15 years' actual imprisonment for transportation for life. The equation is only for a particular purpose, namely, for the purpose of 'remission system' and not for all purpose. Gopal Vinayak Godse v. State of Maharashtra, **1961 S C D 255 : 1961 Mad W N 361 : (1962) 1 S C J 423 : 1962 Mad L J (Cri) 269 : (1961) 3 S C R 440 : 39 Mys L J 388 : 63 Bom L R 517 : (1961) 2 S C A 361 : 1961 (1) Cri L J 736 : A I R 1961 S C 600 (603) (Pt D) (Pr 7).**

——S. 59 (5) — Rules under — Bombay Jail Rules, Rr. 1419 (c), 1420, 1447 (2) — Imprisonment for life —Means 15 years actual imprisonment inclusive of remissions under Jail Rules as well as under S. 401, Criminal P. C.—(Criminal P. C. (1898), S. 401).

Reading rules 1419 (c) and 1420 together, it becomes quite clear that although ordinarily a sentence of transportation for life shall be taken as 15 years actual imprisonment, certain remissions should be granted as mentioned in R. 1420, those remissions being subject to the discretion of the Government concerned. This is the effect of the use of the word 'ordinarily' in the said clause. The said word does not imply that although a sentence of transportation for life shall be taken as 15 years actual imprisonment, the Government may detain a person for 20 years. The effect of the said clause is that the maximum period which a person sentenced to transportation for life shall have to undergo is 15 years actual imprisonment. If the Government permits remissions at its discretion allowable under the Jail Rules, then the said period of 15 years will be reduced by the period for which such remission has been so granted. If again the State remissions under S. 401 of the Criminal P. C. have been given to a convict, then the period of 15 years will stand reduced by the said period of State remissions. State remissions, if awarded, must be deducted from the period of sentence and the Government has no discretion in the matter. Rule 1447 (2), also supports this view. In a case where after taking into consideration the period of remissions allowable under the Jail rules, the period of 15 years imprisonment is found to be complete, the Government has power to still detain the convict. But the Government has no power to detain the convict sentenced to transportation for life after he has served full 15 years actual imprisonment. The Government also has no power of detention in a case where 15 years actual imprisonment served by a prisoner sentenced to transportation for life includes the period of State remissions granted under S. 401 of the Criminal P. C. **ILR (1959) Mys 115 : 1959 Mad L J (Cri) 397 : 37 Mys L J 202.**

——S. 59 (5) — Classification of prisoners — Government alone can do—Trial courts are not authorised to do it — Right of prisoner to move High Court for direction. See Criminal P. C. (1898), S. 401. **ILR (1959) 9 Raj 1212.**

PRISONS RULES

RULE 121

——R. 121—Forfeiture.

Under R. 121 of the Prisons Rules, it is only the remission that is earned that can be forfeited by way of punishment. **1957 Jab L J 139 : 1957 M P C 54 : 1957 M P L J 242 : 1957 Cri L J 758 : A I R 1957 Madh-Pra 48 (48) (Pt A) (Pr 4) (DB).**

PRIVACY

See Easements Act (1882), Ss. 8, 13.

PRIVATE AWARD

See Arbitration Act (1940), S. 14.

PRIVATE COMPANY

See Statutory cross-references under "Companies."

PRIVATE DEFENCE, RIGHT OF

See (1) Penal Code (1860), Ss. 96 to 105, 299 and 300, and 304 and
(2) Statutory cross-references under "criminal law."

PRIVATE DETECTIVE

See Evidence Act (1872), S. 3.

PRIVATE INTERNATIONAL LAW

See Constitution of India, Art. 51.

PRIVATE PROPERTY

Compulsory acquisition of

See (1) Constitution of India, Arts. 31, 31A, 31B.
(2) Land Acquisition Act (1 of 1894).

PRIVATE PROSECUTION

See (1) Criminal P. C. (1898), Ss. 417, 423 and 439.
(2) Tort—Defamation.

PRIVIES

See (1) Civil P. C. (1908), Ss. 11, 47.
(2) Contract Act (1872), Ss. 2 (d), 37.
(3) Evidence Act (1872), Ss. 18-21 and 116.
(4) Specific Relief Act (1877), S. 23.

PRIVILEGE

See (1) Penal Code (1860), Ss. 499 and 500.
(2) Tort—Defamation.

PRIVILEGED COMMUNICATION

See (1) Evidence Act (1872), Ss. 122 to and 126 and
(2) Statutory cross-references under "Evidence."

PRIVILEGED DOCUMENT

See (1) Civil P. C. (1908), O. 11 Rr. 12 and 13.
(2) Evidence Act (1872), Ss. 122-126.

Discovery of.

See Civil P. C. (1908), O. 11, Rr. 12, 13.

PRIVILEGED WILL

See Succession Act (1925), Ss. 65, 66.

PRIVILEGES AND IMMUNITIES OF MEMBERS OF PARLIAMENT AND STATE LEGISLATURE

See Constitution of India, Arts. 105 and 194.

PRIVITY OF CONTRACT

See (1) Contract Act (1872), Ss. 2 (d), 19A, 37.
(2) Specific Relief Act (1877), S. 23.
(3) T. P. Act (1882), S. 108 (j).

PRIVY COUNCIL

See (1) Abolition of Privy Council Jurisdiction Act (5 of 1949).
(2) Federal Court (Enlargement of Jurisdiction) Act, 1947 (1 of 1948).
(3) Precedents.

PRIVY COUNCIL RULES (1920)

RULE 9

● ——R. 9 — Civil P. C. (1908), O. 45, R. 7 (as amended by Act 26 of 1920)—Power of Court to extend time—Court has power under O. XII, R. 3 of Supreme Court Rules to extend time limited by O. 45, R. 7, C. P. C.—R. 9 of the Privy Council Rules as well as O. XII, R. 3 of S. C. Rules control the provisions of O. 47, R. 7 (as amended by Act 20 of 1920) — 39 Cal W N 651 and ILR (1941) 1 Cal 299 and AIR 1950 Cal 229 and 54 Cal W N 479 and 62 Cal W N 658, **Overruled.** See Civil P. C. (1908), O. 45, R. 7 (as amended by Act 26 of 1920). **AIR 1961 Cal 483 (FB).**

RULE 12

——R. 12—Certificate under—Power of High Court to cancel or withdraw it — Civil P. C. (1908), Ss. 4, 112, 151, O. 45, R. 7 and O. 47, R. 1—Federal Court Enlargement of Jurisdiction Act (1948), S. 6—Constitution of India, Art. 135.

A certificate issued under R. 12 of the Privy Council Rules, 1920, by the High Court to the effect that an appeal preferred to the Privy Council or the Supreme Court has not been effectually prosecuted by the appellant cannot be cancelled or withdrawn by the High Court either under S. 151 or O. 47, R. 1, Civil P. C.

As the rules made by His Majesty in Council for appeals to the Privy Council must be deemed to be a special law in regard to the procedure which should be applied in the presentation and prosecution of appeals to the Privy Council, the provisions of the Code of Civil Procedure cannot apply to that special law in view of S. 4, Civil P. C.

Indeed S. 112, Civil P. C., read in conjunction with S. 6, Federal Court Enlargement of Jurisdiction Act, 1948 and Art. 135 of the Constitution of India makes it clear that the power of review conferred by Civil P. C. cannot be allowed to interfere with the rules made by the Privy Council, Federal Court or the Supreme Court as the case may be. **ILR (1951) Punj 265 : AIR 1951 Punj 43 (44) (Pt B) (Prs 5, 6) (DB).**

PRIVY PURSE OF RULERS

See Constitution of India, Art. 191.

PRIZE COMPETITIONS ACT (42 of 1955)

SECTION 2

● ——S. 2 (d)—Applicability — Prize competition — Competition in which success depends to a substantial degree or skill.

The definition of 'prize competition' in S. 2 (d) is wide and unqualified in its terms. There is nothing in the wording of it, which limits it to competitions in which success does not depend to any substantial extent on skill but on chance. Hence though on a literal construction of S. 2 (d) the Act applies also to prize competitions in which success depends to a substantial degree on skill, having regard to the history of the legislation, the declared object thereof and the wording of the statute, the competitions which are sought to be controlled and regulated by the Act are only those competitions in which success does not depend to any substantial degree on skill. Having regard to the circumstances under which the resolutions came to be passed, there cannot be any reasonable doubt that the law which the State legislatures moved Parliament to enact under Art. 252 (1) of the Constitution of India was one to control and regulate prize competition of a gambling character. Chamarbaugwalla v. Union of India, 1957 S C R 930 : 35 Mys L J 180 : (1957) 2 Mad L J (SC) 76 : (1957) S C J 593 : (1957) Mad L J (Cri) 547 : (1957) 2 Andh W R 76 : 1957 M P C 630 : 1957 S C A 912 : 59 Bom L R 973 : A I R 1957 S C 628 (631, 632) (Pt E) (Prs 6, 9, 10).

——S. 2 (d)—"Prize competition"—Bombay Lotteries and Prize Competitions Control and Tax Act (54 of 1948), S. 2 (1) (d)—Applicability of sections—Essential Conditions — Result whether depends in substantial degree on exercise of skill—How to be determined—

'Quotes' competitions in Illustrated Weekly of India — Held, a prize competition within S. 2 (d)—A 1 R 1957 S C 628, Rel. on. 1964 (2) Cri L J 384 : 66 Bom L R 147 : ILR (1964) Bom 735 : AIR 1964 Bom 213 (218, 223, 227) (Prs 17, 37, 38, 61, 62) (DB).

SECTION 4

● —Ss. 4 and 5—Repugnancy between Prize Competitions Act (1955) and Mysore Act (27 of 1951)—Effect of Mysore Amending Act (26 of 1957) — The inconsistency between the Central Act, Prize Competitions Act 1955 and Mysore Lotteries and Prize Competitions Control and Tax Act, 1957, would operate on that portion of Mysore Act which became repugnant to Ss. 4 and 5 of the Central Act as to prohibition of prize competitions. Therefore by the omission of the words" for which a licence has been obtained' under S. 8, rest of the clause would be valid—The effect of the Mysore Amending Act 26 of 1957 is that the above mentioned words were deemed to have been omitted as from 1-4-1956, the day when Central Act came into force and the rest of cl. (b) is not repugnant to any of the provisions of Central Act. A I R 1959 S C 648, Rel. on. See Constitution of India, Art. 254 (1). **A I R 1962 S C 594.**

● —S. 4—Scope—Protection of lawful trading activities—Persons carrying gambling competitions whether entitled to protection under Art 19(1)(g) and (6). As gambling is not trade but res extra commercium it does not fall within the purview of Arts. 19 and 301 of the Constitution—Such persons cannot therefore seek the protection of Art. 19 (1) (g) and cannot question whether restrictions enacted in Ss. 4 and 5 are reasonable and in the interests of the public, See Constitution of India, Art. 19 (1) (g). **A I R 1957 S C 628.**

● —S. 4—Prize Competitions involving substantial skill — Restrictions on, whether saved by Art. 19 (6). Even assuming that the Act applies to prize competitions which involve substantial skill, restrictions imposed by Ss. 4 and 5 of the Act and Rr. 11 and 12 framed under S. 20 in respect of such competitions are not reasonable restrictions enacted in the public interest and as such are not saved by Art. 19 (6) (Point conceded) —(Rules under S. 20, Rr. 11, 12). See Constitution of India, Art. 19 (1) (g). **A I R 1957 S C 628.**

● —Ss. 4, 5 — **Rr. 11 and 12 framed under S. 20 — Validity—Whether severable in their applications to competitions not involving skill.**

The impugned provisions, assuming that they apply by virtue of the definition in S 2 (d) to all kinds of competitions, are severable in their application to competitions in which success does not depend to any substantial extent on skill. Chamarbaugwalla v. Union of India, **1957 S C R 930 : 35 Mys L J 180 : (1957) 2 Mad L J (SC) 76 : (1957) S C J 593 : (1957) M L J (Cri) 547 : (1957) 2 Andh W R (SC) 76 : 1957 M P C 630 : 1957 S C A 912 : 59 Bom L R 973 : AIR 1957 S C 628 (637) (Pt H) (Pr 23).**

—S. 4 — Appellate Court enhancing sentence of imprisonment imposed for default as in payment of fine — Sentence in default as awarded amounts to enhancement of sentence and Appellate Court acts without jurisdiction in doing so. See Criminal P. C. (1898), S. 423 (b). **1964 (2) Cri L J 632 : A I R 1964 All 572.**

—S. 4—Prize competitions — Restriction on entries and prizes offered—Restrictions are reasonable and in public interest — Provision saved by Art. 19 (6). See Constitution of India, Art. 19 (1) (g). **1964 (2) Cri L J 632 : A I R 1964 All 572.**

— **Ss. 4 and 11** — Inference of intention — Order placed for printing of prize competitions and results thereof after the Prize Competitions Act, 1955, came into force—Denial that order was placed with intention of conducting a prize competition — Such orders placed and distributed in the past inviting entries — Intention to run a competition after the Act came into force can be inferred from previous conduct. See Evidence Act (1872), S. 14. **1964 (2) Cri L J 632 : A I R 1964 All 572.**

—S. 4 — Illegal prize competition promoted and conducted at place X in India — Prizes meant for people at Y, a place out of India — Important ingredient of offence under S. 4 of Act being promotion and conducting of competition, the offence is committed and is triable at X. See Criminal P. C. (1898), S. 177. **1964 (2) Cri L J 632 : A I R 1964 All 572.**

—S. 4—**Nature of offer to be considered — Not the prizes offered—Contract between parties not essential to constitute offence.**

Section 4 of the Act speaks of prizes to be offered and not prizes offered, so that the offer of prizes as contained in the pamphlet can be made the basis of conviction.

The promoter of the competition shall be guilty of the offence even if no one responds by submitting entries of prize competition. The existence or non-existence of a valid contract or where contract can be enforced are extraneous considerations which cannot influence the decision in the matter. **1964 All L J 581 : 1964 (2) Cri L J 632 : A I R 1964 All 572 (575) (Pt F) (Pr 19).**

—S. 4—**Prize competition organized for residents in States to which Act, not extended—Validity.**

It cannot be contended that the fact that the Act applied to only some of the States and not to all the States of India would absolve the offenders of the offence if they organized the prize competitions for the benefit of persons residing in a State to which the Act was not applied. This factor can be taken into consideration while awarding sentence, but not while laying down whether the accused are guilty or not of the offence charged. **1964 All L J 581 : 1964 (2) Cri L J 632 : A I R 1964 All 572 (575) (Pt G) (Pr 20).**

—Ss. 4 and 6 — Ss. 4 and 6 of Act are severable — Assuming that S. 6 is arbitrary and unconstitutional, validity of S. 4 and the corresponding penal sections is not affected. See Constitution of India, Pre. **1964 (2) Cri L J 632 : A I R 1964 All 572.**

—Ss. 4 and 5 — Scope of — Prize competition if covered by Entry 34 of List II, Sch. VII, Constitution India. Prize Competitions which do not require substantial skill ought to be considered as gambling transactions and therefore they come within the purview of item 34 in List II of the 7th Schedule of the Constitution. See West Bengal Prize Competitions Act (32 of 1957), S. 19 (d). **1959 Cr L J 307 : A I R 1959 Cal 141.**

SECTION 5

● —S. 5 — Scope — Protection of lawful trading activities—Persons carrying gambling competitions are not entitled to protection under Art. 19 (1) (g). See Constitution of India, Art. 19 (1) (g). AIR 1957 S C 628,

● —S. 5 — Scope — Prize Competitions involving substantial skill—Restrictions imposed by Ss. 4 and 5 are not saved by Art. 19 (6). Even assuming that the Act applies to such competitions they are business activities the protection of which is guaranteed by Art. 19 (1) (g). See Constitution of India, Art. 19 (1) (g). **A I R 1957 S C 628.**

● —S. 5 — Rules 11 and 12 framed under S. 20 — Provisions whether severable in their applications to competitions not involving skill. The impugned provisions assuming that they apply by virtue of definition in S. 2 (d) to all kinds of competitions are sever-

able in their application to competitions in which success does not depend to any substantial extent on skill. See Prize Competitions Act (42 of 1955), S. 4. AIR 1957 S C 628.

SECTION 6

——S. 6— Sections 4 and 6 of Act are severable — Assuming that S. 6 is arbitrary and unconstitutional, validity of S. 4 and the corresponding penal sections is not affected. See Constitution of India, Preamble. 1964 (2) Cri L J 632 : AIR 1964 All 572.

SECTION 9

——Ss. 9 and 11—Accused convicted and sentenced under S. 9—Separate sentence under S. 11, which is a lesser offence not necessary. 1964 All L J 581 : 1964 (2) :Cr L J 632 : A I R 1964 All 572 (576) (Pt I) (Pr 25).

SECTION 11

——Ss. 11 and 4 — Inference of intention — Order placed for printing of prize competitions and results thereof after Prize Competitions Act (1955) came into force—Denial that order was placed with intention of conducting a prize competition—Such orders placed and distributed in the past inviting entries — Intention to run a competition after the Act came into force can be inferred from previous conduct. See Evidence Act (1872), S. 14. A I R 1964 All 572.

——S. 11 —Accused convicted and sentenced under S. 9—Separate sentence under S. 11, which is a lesser offence, not necessary. See Prize Competitions Act (42 of 1955), S. 9. 1964 (2) Cri L J 632 : A I R 1964 All 572.

SECTION 14

——S. 14 – Competency of ordinary police officer to investigate crimes under the Act— No special procedure laid down by Act for detention and investigation of offences—Act not self-contained.

A consideration of S. 14 of the Prize Competitions Act makes it clear that it does not lay down any new or special procedure. The Act is not a complete Code for the detection and investigation of offences under it; even the Special Police Officer has to fall back upon and follow the provisions of the Code of Criminal Procedure. What the Act makes provision for is that as Special Police Officers are concerned the offence is cognizable. When the offences under the Act were not declared cognizable, the Courts can hold that, except for Special Police Officers the offences continue to be non-cognizable and other police officers can make investigation in accordance with the Code of Criminal Procedue, after obtaining the permission of the Magistrate concerned. A I R 1962 S C 63, Disting. 1964 All L J 581 : 1954 (2) Cr L J 632 : AIR 1964 All 572 (576) (Pt H) (Pr 24).

SECTION 20

■——S. 20—Prize Competitions involving substantial skill — Even assuming that the Act applies to such competitions they are business activities protection of which is guaranteed by Art. 19 — Restrictions imposed by Ss. 4 and 5 are not saved by Art. 19 (6) as they are reasonable restrictions enacted in the public interests — Rules under S. 20 Rr. 11. 12). See Constitution of India, Art. 19 (1) (g). A I R 1957 S C 628.

●——S. 20—Protection of lawful trading activities— Persons carrying gambling competitions are not entitled to protection under Art. 19 (1) (g) of the Constitution as gambling is not trade but res extra commercium and does not therefore fall within the purview of the said Article — (Rules under S. 20,. Rr. 11, 12). See Constitution of India, Art. 19 (1) (g). AIR 1957 S C 628.

PROBATE

See (1) Administrator General's Act (1913), Ss. 7, 8.
(2) Probate and Administration Act (5 of 1881).
(3) Succession Act (1925), S. 218 et seq.

Conclusiveness of.
See Succession Act (1925), S. 273.

Effect of.
See Succession Act (1925), S. 227.

Grant of.
See Succession Act (1925), Ss. 217 to 302.

Grant of, for special purpose.
See Succession Act (1925), Ss. 254 to 256.

Petition for,
See Succession Act (1925), Ss. 276 to 295.

Revocation of.
See Succession Act (1925), Ss. 263—302.

PROBATE AND ADMINISTRATION ACT (5 of 1881)

SECTION 50

——S. 50 — Revocation of probate — Discretion of Court—Non-citation of necessary party.

Section 50, Probate and Administration Act, confers a discretion on the Court to revoke the grant of a probate on the ground of non-citation of a necessary party. That discretion has to be exercised judicially on well-known principles. It does not follow that because there is a ground, the Court must revoke the probate. 89 Cri L J 41 : AIR 1953 Cal 103 (105, 106) (Pt C) (Prs 18, 19) (DB).

——S. 50—Application for revocation of probate — Laches—Effect of.

A Court may allow a probate to be revoked after a long time. That may be done with cause shown. But it cannot be held that it may be done under any circumstances. It would be contrary to reason and every principle of justice. The doctrine of laches is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where, by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. 89 Cri L J 41 : AIR 1953 Cal 103 (107) (Pt E) (Pr 31).

SECTION 157

——S. 157 (repealed by Act 39 of 1925) — Section 157, Probate and Administration Act applies to a case where the grant is revoked or annulled under S. 50 of the Act and not to a case where the order of issue of grant is vacated on appeal. I L R (1953) 1 Cal 208 : AIR 1952 Cal 473 (476) (Pt B) (Pr 9) (DB).

PROBATE AND LETTERS OF ADMINISTRATION

See Succession Act (1925), Ss. 218 to 302.

Court-fees.
See Court-fees Act (1870), Sch. I, Art. 11.

PROBATION

See (1) Constitution of India, Arts. 310-311.
(2) Criminal P. C. (1898), S. 562.
(3) Madras Probation of Offenders Act (3 of 1937).
(4) Probate and Administration Act (5 of (1881).
(5) Probation of Offenders Act (20 of 1958).
(6) U. P. First Offenders Probation Act (6 of 1938).

PROBATION OF OFFENDERS ACT (20 of 1958)

SECTION 3

●——Ss. 3, 4, 6, 11 — Exercise of power under S. 11 —Appellate Court in appeal or High Court in revision can make an order under S. 6 (1) — Scope of S. 11 (1).

Held, after adopting the rule of beneficial construction that the appellate Court in appeal or the High Court in revision could, in exercise of the power conferred under S. 11 make an order under S. 6 (1) thereof, as the appellate Court and the High Court, agreeing with the Magistrate, found the accused guilty of the offences for which he was charged. (The Supreme Court remanded the matter to High Court to make an order after complying with S. 6 (1) and did not itself exercise powers under S. 11). AIR 1963 S C 1088, Foll. S. 11 (1) ex facie does not circumscribe the jurisdiction of an appellate Court to make an order under the Act only in a case where the trial Court could have made the order. The phraseology used therein is wide enough to enable the appellate Court or the High Court, when the case comes before it, to make such an order. As the Act does not change the quantum of the sentence, but only introduces a provision to reform the offender, there is no reason why the Legislature should have prohibited the exercise of such a power, even if the case was pending against the accused at one stage or other in the hierarchy of tribunals. When S. 11 (1) says that an appellate Court or a revision Court can make an order under the Act, it means that it can make an order also under S. 6 (1) of the Act. If so, 'Court' in S. 6 (1) will include an appellate Court as well as a revisional Court. If an appellate Court or a revisional Court finds a person guilty, under that section it shall not sentence him to imprisonment unless the conditions laid down in that section are satisfied. When a person had been found guilty for the first time of an offence to which the provisions of Ss. 3 and 4 of the Probation of Offenders Act could apply, and such finding, be it of the trial Court or of the appellate Court, was arrived at before the application of the Act, the Court of appeal or revision could not take action under S. 11 (1) of the Act when the case came before it in appeal or revision. Rattan Lal v. State of Punjab, **1964 S C D 914 : (1965) 1 S C J 779 : 1965 Mad L J (Cri) 374 : 1965 Mad W N 170 : (1964) 7 S C R 676 : (1964) 2 S C W R 161 : 1965 (1) Cri L J 360 : AIR 1965 S C 444 (447 to 449, 452) (Pt B) (Prs 7, 8, 10, 26, 27).**

——S. 3 — Petition by Administrator of palace of minor Maharaja under S. 10, Guardians and Wards Act, for being appointed guardian of minor Maharaja —Description of half-brother of minor, as illegitimate in petition held to amount to offence under S. 500, Penal Code — Mere admonition instead of regular sentence held sufficient to meet ends of justice. See Penal Code (1860), S. 500. **1964 (1) Cri L J 408 : AIR 1964 Manipur 20.**

——Ss. 3, 11 (2)—Order under S. 3 improperly passed —Prosecution can also go in appeal. **1964 (1) Cri L J 408 : AIR 1964 Manipur 20 (23) (Pt B) (Pr 13).**

——Ss. 3, 4 — Order under — High Court can pronounce on correctness or otherwise of order passed by Magistrate under S. 3 or 4 of the Act. See Criminal P. C. (1898), S. 439. **1964 (2) Cri L J 176 : AIR 1964 Pat 358 (DB).**

——Ss. 3 and 4—Member of the bar submitting false bill for work done as Asst. Public Prosecutor — Case if fit to be dealt with under the Act. See Penal Code (1860), S. 464. **1963 (2) Cri L J 36 : A I R 1963 Pat 262 (DB).**

——S. 3 — Principles to be followed by Court in dealing with offenders below 21 years of age—Provisions of S. 6 are mandatory—Non-compliance renders sentence of imprisonment void. See Probation of Offenders Act (1958), S. 6. **1964 Raj L W 286 : ILR (1964) 14 Raj 901 : 1966 Cri L J 735.**

SECTION 4

●——S. 4—Exercise of power under S. 11 — Appellate Court in appeal or High Court in revision can make an order under S. 6 (1) — Scope of S. 11 (1). See Probation of Offenders Act (20 of 1958), S. 3. **1965 (1) Cri L J 360 : AIR 1965 S C 444.**

——S. 4 (3) — 'Restraint of Court' — Meaning of — Petitioner, a convict under S. 379, I. P. C. released on probation after execution of bond under Form C of the Act—Petitioner was under restraint with S. 19 (xvii) of Court-fees Act—Revision against order maintaining conviction but releasing accused on probation—No Court-fee is payable on revision against such an order. See Court-fees Act (1870), S. 19 (xvii). **1964 All L J 665 : AIR 1967 All 81.**

——S. 4 — **Offence under S. 326, Penal Code — S. 4 not applicable.**

The provisions of S. 4 are not applicable to a case where a person is found guilty under S. 326, Penal Code, inasmush as the maximum sentence prescribed for the offence is imprisonment for life. **(1963) 2 Mys L J 161 : ILR (1963) Mys 929 : 1964 (1) Cri L J 460 (461) (Pt A) (Pr 4) (Mys).**

—S. 4 (2)—**No authority to release accused on probation in absence of report of Probation Officer.**

In the absence of a report from the Probation Officer under S. 4 (2), the Magistrate has no authority to release the accused on probation. **(1963) 2 Mys L J 161 : ILR (1963) Mys 929 1964 (1) Cri L J 460 (461) (Pt B) (Pr 5) (Mys).**

——Ss. 4 and 6 — **Accused under 21 years of age — Duty of Magistrate.**

It is the duty of the Court to satisfy itself in the case of an accused who is under 21 years of age that it would not be desirable to deal with him under S. 4 before sentencing him to imprisonment. The Magistrate has no jurisdiction even if he found him guilty to punish him straightaway to imprisonment under S. 6. **1961 (2) Cri L J 583 (584) (Pt D) (Pr 11) (Manipur).**

——S 4 — Accused aged about 20 years convicted under S. 376, I. P. Code — Accused appearing to be quite immature — Accused given benefit of S. 4 of Probation of Offenders Act. **1965 M P L J (Notes) 42.**

——Ss. 4 and 6 — Review of order of dismissal of revision petition—Advocate in revision failing to urge that convicts were entitled to benefit of Ss. 4 and 6 of Probation of Offenders Act — Review under inherent power if lies for securing ends of justice. The inherent power can, no doubt, be exercised to reconsider orders of dismissal of an appeal or application passed without jurisdiction, where reconsideration is necessary to secure the ends of justice, but the provisions of Ss. 3 and 4 of the Probation of Offenders Act are not mandatory provisions of law and the order of sentence passed on the petitioners could not be said as one without jurisdiction :

The Court has got no inherent power to reopen a judgment in a case which has been disposed of in accordance with the provisions of law unless any of the provisions in the Criminal Procedure Code expressly empower the Court to review or revise the judgment. See Criminal P. C. (1898), S. 561-A. **1965 (2) Cri L J 372 : AIR 1965 Mys 224.**

——S. 4—Power is discretionary—Accused is to place all necessary material before Court to claim benefit of section. **1964 Mad L J (Cri) 684 : (1964) 2 Mys**

L J 342 : 1965 (2) Cri L J 372 : AIR 1965 Mys 224 (226) (Pt B) (Pr 6).

——S. 4 (1)—Conviction under S. 9 (a), Opium Act—Offence the first offence of accused—Accused respectable businessman whose antecedents were not in any way disreputable—No danger of accused absconding from jurisdiction of Court if released on probation — Case is a fit one in which S. 4 (1) can be applied — Opium Act (1878), S. 9 (a). (1964) 30 Cut L T 282 : AIR 1967 Orissa 54 (55) (Pr 4).

——Ss. 4, 6—Penal Code (1860), S. 394 — Provision for—Imprisonment for life or imprisonment for ten years and fine—Lesser punishment in S. 394 is not alternative sentence — Accused cannot have benefit of provisions of S. 4 or S. 6 of Act.

The provision for punishment in S. 394, Penal Code, for imprisonment for life or imprisonment for ten years and fine cannot be read conjunctively so as to mean that it provides an alternative sentence for the offence concerned. Hence where the accused is convicted under S. 394, Penal Code, the accused cannot be given the benefit of the provisions of S. 4 or S. 6 of the Probation of Offenders Act and released on probation of good conduct on the ground that the offence did not provide for punishment for imprisonment for life. 1965 (2) Cri L J 51 : AIR 1965 Orissa 108 (108) (Prs 14, 15).

——Ss. 4 and 6—Offenders under 21 years of age — Duty of Court to record age — Power to deal with such offenders under S. 4 is discretionary.

After the enforcement of the Probation of Offenders Act (20 of 1958), it is obligatory for the Courts not to impose a sentence of imprisonment when the accused is under 21 years of the age and has committed an offence punishable with imprisonment but not with imprisonment for life. It is therefore one of the essential duties of the Courts to record the age of the accused as estimated by the Courts. It is true that S. 4 of that Act gives wide power to the Courts to deal with such cases irrespective of the age of the accused, but that power is discretionary and has to be exercised in appropriate cases. (1965) 31 Cut L T 617 : 1965 All W R (Supp) 36 (Orissa).

——S. 4 — Conviction under S. 411, Penal Code—Accused being of immature age—Circumstances showing that they had fallen into temptation — Sentences set aside and release ordered on their entering into bonds to appear and receive sentence when called upon and to keep the peace and be of good behaviour for one year. Penal Code (1860), S. 411. Criminal P. C. (1898), S. 562. (1964) 30 Cut L T 544 : (1964) 6 Orissa J D 196.

——S. 4—Scope—Order under—Age of offender—If material—S. 6—Difference.

Section 6 lays down a special provision in respect of offenders under twenty-one years of age. S. 4 is general. It applies to all kinds of offences, whether under or above twenty-one years of age. The only limitation imposed by S. 6 is that in the first instance an offender under twenty-one years of age will not be sentenced to imprisonment. Where therefore the Court deals with the offender under S. 4 of the Act, whether or not he is under twenty-one years of age is of little consequence. 1960 Pat L R 190 : (1961) 1 Cri L J 144 : 1960 B L J R 753 : AIR 1961 Pat 19 (20)(Pt A) (Pr 4).

——S. 4 — 'Punishment' — Meaning of — Power to remit fine.

Section 4 speaks of punishment and not of imprisonment. The word 'punishment' is wide enough to comprehend both the punishment of imprisonment and the punishment of fine. Therefore, S. 4 empowers a Court to remit the fine also. 1960 Pat L R 190 : (1961) 1 Cri L J 144 : 1960 B L J R 753 : AIR 1961 Pat 19 (21) (Pt B) (Pr 5).

——S. 4—Offence under S. 326 read with S. 34, Penal Code — Accused below 18 years of age — Accused cannot be dealt with under the provisions of the Act — Held, however that the accused deserves to be treated leniently considering the facts that he was a junior member of the family and was acting under the influence of the senior member of the family — Penal Code (1860), Ss. 326, 34. 1965 Raj L W 60 : 1965 (1) Cri L J 478 : ILR (1965) 15 Raj 174 : AIR 1965 Raj 74 (78) (Pt E) (Pr 20).

——S. 4 — Principles to be followed by Courts in dealing with offenders below 21 years of age—Provisions of S. 6 are mandatory—Non-compliance renders sentence of imprisonment void. See Probation of Offenders Act (1958), S. 6. 1964 Raj L W 286 : ILR (1964) 14 Raj 901 : 1966 Cri L J 735.

——Ss. 4 and 6 — Applicability — Accused under 21 years of age—Conviction under S. 377, Penal Code altered by appellate Court to one for mere attempt to commit offence and convicted under S. 377/511 and sentence reduced — When appellate decision given, the Act had already come into force in Rajasthan but the Court had not given any reason for not proceeding under S. 6 — Appellate Court held should have complied with S. 6. See Probation of Offenders Act (1958), S. 6. 1962 Raj L W 241.

SECTION 5

——S. 5—Order for compensation and costs—Discretion—Interference in revision.

Section 5 no doubt empowers the Court to grant in appropriate cases compensation and costs but this is purely in the discretion of the Court. The Court will allow compensation and costs only when it thinks fit in any case. When no prayer for compensation and costs is made by the party or when the Court in its discretion does not allow costs and compensation, the High Court sitting in revision, cannot interfere with the discretion of the Court which does not appear to have been exercised capriciously and unreasonably. 1960 Pat L R 190 : (1961) 1 Cri L J 144 : 1960 B L J R 753 : AIR 1961 Pat 19 (21) (Pt C) (Pr 6).

SECTION 6

——S. 6 — Exercise of power under S. 11—Appellate Court in appeal or High Court in revision can make an order under S. 6 (1)—Scope of S. 11 (1). See Probation of Offenders Act (20 of 1958), S. 3. 1965 (1) Cri L J 360 : AIR 1965 S C 444.

——S. 6—Courts exercising appellate or revisional jurisdiction — Can exercise jurisdiction under S. 6 — Beneficial statutes—To be given wider interpretation. See Probation of Offenders Act (1958), S. 11 (1). 1963 (2) Cr L J 173 : AIR 1963 S C 1088.

——S. 6 (1) — Words 'may be made' in S. 11 (1)—Import of—Nature and amount of discretion under S. 11 as regards exercise of jurisdiction under S. 6 (1) —Though the word "may" might connote merely an enabling or permissive power in the sense of the usual phrase "it shall be lawful" it is also capable of being construed as referring to a compellable duty, particularly when it refers to a power conferred on Court or other judicial authority.

The entirety of S. 6 (1) therefore applies to guide or condition the jurisdiction of the High Court under S. 11 (1) and an appellate Court cannot claim any unfettered discretion in dealing with case that comes before it under S. 11 (1). Cr. App. No. 339 of 1961, D/- 10-5-1962 (Patna), Reversed. See Probation of Offenders Act (1958), S. 11 (1). 1963 (2) Cr L J 173 : AIR 1963 S C 1088.

●——S. 6 (1) — Appellate Court modifying trial Court's order — Crucial date for reckoning age of accused for S. 6 (1), is the date upon which the trial Court had to deal with the offender. See Probation of Offenders Act (1958), S. 11 (1). (1963) 2 Cr L J 173 : AIR 1963 S C 1088.

●——S. 6 (1) — Object of — Age relevant under S. 6 (1) is for purpose of punishment and not for offence —Accused not under 21 years when found guilty—Section does not apply.

The object of the Act is to prevent the turning of youthful offenders into criminals by their association with hardened criminals of mature age within the walls of a prison. The method adopted is to attempt their possible reformation instead of inflicting on them the normal punishment for their crime.

The object would make it clear that the question of the age of the person is relevant not for the purpose of determining his guilt but only for the purpose of the punishment which he should suffer for the offence of which he has been found, on the evidence, guilty. Where, therefore, the Court finds that the offender is not a person under the age of 21 on the date when the Court found him guilty. S. 6 (1) has no application to him. Ramji Missar v. State of Bihar. 1963 B L J R 643 : 1963 Mad L J (Cr) 575 : (1963) 2 S C J 571 : 1963 (2) Cr L J 173 : (1963) 1 S C W R 694 : 1963 Mad W N 402 : (1964) 1 S C A 98 : 1 L R 42 Pat 357 : AIR 1963 S C 1088 (1091) (Pt A) (Pr 6).

——S. 6 — Accused under 21 years convicted of an offence—Provisions of S. 6 should be followed. 1962 (1) Cri L J 168 : AIR 1962 Manipur 7 (11) (Pt D) (Pr 24).

——S. 6—Scope—Court passing sentence of imprisonment on offender under 21 years has to record reasons therefor—Omission to record reasons would be an irregularity—(Criminal P. C. (1898), S. 537.)

The section does not prohibit the passing of an order of imprisonment against an accused found guilty of an offence, though under 21 years of age; all that it requires is that Court has got to record its reasons for sentencing such an offender to imprisonment. The omission to record reasons would at the most be an irregularity and will not affect the jurisdiction of the Magistrate. 1964 Mad L J (Cri) 684 : (1964) 2 Mys L J 342 : 1965 (2) Cri L J 372 : AIR 1965 Mys 224 (226) (Pt C) (Pr 6).

——S. 6 — Review of order of dismissal of revision petition — Advocate in revision failing to urge that convicts were entitled to benefit of Ss. 4 and 6 of Probation of Offenders Act — Review under inherent power does not lie — Court has no inherent power to reopen a judgment in a case which has been disposed of according to law — Ss. 3 & 4 of the Probation of Offenders Act are not mandatory provisions of law. See Criminal P. C. (1898), S. 561-A. 1965 (2) Cri L J 372 : AIR 1965 Mys 224.

——S. 6 — Penal Code (1860), S. 394—Provision for punishment under — Imprisonment for life or imprisonment for ten years and fine—Lesser punishment in S. 394 is not alternative sentence — Accused cannot have benefit of provisions of S. 4 or S. 6 of the Probation of Offenders Act on the ground that the offence did not provide for punishment for imprisonment for life. See Probation of Offenders Act (1958), S. 4. 1965 (2) Cri L J 51 : AIR 1965 Orissa 106.

——S. 6—Act extended to district—Fact not brought to High Court's notice before disposing of revision petition—High Court has no inherent power to review its own order passed on criminal revision petition — Portion of sentence in judgment cannot be dissociated from other parts of judgment. See Criminal P. C. (1898), S. 561-A. 1965 (1) Cr L J 56 : AIR 1965 Orissa 7.

——Ss. 6 and 4 — Difference between — Order under S. 4 — Age of offender not material — S. 6 lays down a special provision in respect of offenders under 21 years of age — S. 4 is general and applies to all kinds of offenders whether under or above 21 years of age. See Probation of Offenders Act (20 of 1958), S. 4. 1961 (1) Cri L J 144 : AIR 1961 Pat 19.

——Ss. 6, 3, 4 and 11 — Principles to be followed by Court in dealing with offenders below 21 years of age—Provisions of S. 6 are mandatory—Non-compliance renders sentence of imprisonment void.

Reading Ss. 3, 4 and 11 with S. 6, the correct legal position is that when a Court has found a person under 21 years of age to be guilty of an offence not punishable with imprisonment for life, then the trial Court, before it passes any sentence of imprisonment on the offender, must satisfy itself that it would not be desirable to deal with him under S. 3 or S. 4 of the Act, having regard to the circumstances of the case including the nature of the offence and the character of the offender and where the Court sentences him to imprisonment, it must record its reasons for doing so, and, further, a duty has also been laid upon the High Court or any other Court dealing with such a case on appeal or in revision to satisfy itself likewise. It is also important to point out in this connection that for the purpose of satisfying itself within the meaning of S. 6 whether it would not be desirable to deal with an offender under S. 3 or S. 4, the Court shall call for a report from the probation officer and consider it together with any other relevant information which may be available on the record.

Section 6 is mandatory in its character and a sentence passed by a Court without applying its mind to the principles enunciated above, must be set aside. 1964 Raj L W 286 : I L R (1964) 14 Raj 901 : 1966 Cri L J 735 (736) (Pt A) (Pr 3) (Raj).

——S. 6—Applicability—Age of accused not sufficient by itself to attract provision.

Age alone should not be the guiding factor for the application S. 6 of the Probation of Offenders Act. While giving benefit to the accused of the provision of the section the Court must keep in view the nature and the circumstances of the case.

Where the accused, a young man of about 20 years had assaulted a lonely lady in the jungle with a view to commit rape, and would have succeeded in his designs if at that time the cry of the lady had not attracted some persons to the spot of occurrence.

Held, that the offence was of a serious nature and under the circumstances accused cannot be given the benefit of the provisions of S. 6 of the Probation of Oeffenders Act. I L R (1963) 13 Raj 650 : 1963 Raj L W 288.

——S. 6—Applicability — Accused under 21 years of age—Conviction under S. 377, I. P. C., altered by Apellate Court to one for mere attempt to commit offence and convicted under S. 377/511 and sentence reduced — When appellate decision given, the Act had already come into force in Rajasthan but Court had not given any reason for not proceeding under S. 6— Appellate Court held should have complied with S. 6. See Probation of Offenders Act (1958), S. 4. 1962 Raj L W 241.

SECTION 11

●——S. 11—Scope of—S. 11 (1) ex facie does not circumscribe the jurisdiction of an appellate Court to make an order under the Act only in a case where the trial Court could have made the order. The phraseology used therein is wide enough to enable the appellate court or the High Court, when the case

comes before it, to make such an order. It was purposely made comprehensive, as the Act was made to implement a social reform. As the Act does not change the quantum of the sentence, but only introduces a provision to reform the offender there is no reason why the legislature should have prohibited the exercise of such a power, even if the case was pending before the accused at one stage or other, in the hierarchy of tribunals. See Probation of offenders Act (1958), S. 3. 1965 (1) Cr L J 369 : AIR 1965 S C 444.

● —Ss. 11 (1), 6 — Courts exercising appellate or revisional jurisdiction — Can exercise jurisdiction under S. 6—Beneficial statute — To be given wider interpretation.

The words in S. 11 (1) 'pass an order under the Act' are not to be construed strictly and literally, but to be understood to mean 'to exercise the powers of jurisdiction conferred by the Act.' This wider interpretation might perhaps be justified by the scope and object of this section which is to apply 'notwithstanding anything in the Code or any other law' to all Courts empowered to sentence offenders to imprisonment. To read a beneficial provision of this universal type in a restricted sense, so as to confine the power of these Courts to the exercise of the powers under Ss. 3 and 4 alone would not be in accord with sound principles of statutory interpretation.

It must, therefore, be held that the Courts mentioned in S. 11, are thereby empowered to exercise the jurisdiction conferred on Courts not only under Ss. 3 and 4 and the consequential provisions but also under S. 6. Ramji Missar v. State of Bihar, 1963 BLJR 643 : 1963 Mad L J (Cr) 575 : (1963) 2 S C J 571 : 1963 (2) Cr L J 173 : (1963) 1 S C W R 694 : 1963 Mad W N 402 : (1964) 1 S C A 98 : ILR 42 Pat 357 : AIR 1963 S C 1088 (1092) (Pt B) (Pr 12).

● —Ss. 11 (1), 6 (1)—Words 'may be made'—Import of — Nature and amount of discretion under S. 11 as regards exercise of jurisdiction under S. 6 (1).

Though the word 'may' might connote merely an enabling or permissive power in the sense of the usual phrase 'it shall be lawful', it is also capable of being construed as referring to a compellable duty, particularly when it refers to a power conferred on a Court or other judicial authority.

The fact that the power is conferred on a Court might militate against the literal interpretation of 'may'. This apart, the power conferred by S. 11 (1) is to pass 'an order under the Act' and it would not be a proper construction of S. 11 (1) to hold that the High Court, etc., could pass orders in appeal or revision without reference to the standards, tests or guidance which the statute has prescribed for the primary Courts. The power conferred on appellate or other Courts by S. 11 (1) is thus of the same nature and characteristics and subject to the same criteria and limitation as that conferred on the Courts under Ss. 3, 4 and 6. This view is further confirmed by the terms of S. 11 (3).

The entirety of S. 6 (1) therefore applies to guide or condition the jurisdiction of the High Court under S. 11 (1) and an appellate Court cannot claim any unfettered discretion in dealing with case that comes before it under S. 11 (1). Cr. App. No. 339 of 1961, dated 10th May, 1962 (Patna), Reversed. Ramji Missar v. State of Bihar, 1963 BLJR 643 : 1963 Mad L J (Cr) 575 : (1963) 2 S C J 571 : 1963 (2) Cr L J 173 : (1963) 1 S C W R 694 : 1963 Madh W N 402 : (1964) 1 S C A 98 : ILR 42 Pat 357 : AIR 1963 S C 1088 (1092, 1093) (Pt C) (Prs 16, 17).

● —Ss. 11 (1), 6 (1)—Appellate Court modifying trial Court's order — Crucial date for reckoning age of accused for S. 6 (1).

As regards the crucial date for reckoning the age, where an appellate Court modifies the judgment of the trial Judge and when S. 6 becomes applicable to a person only on the decision of an appellate or a revisional Court, it must be held that it is the date upon which the trial Court had to deal with the offender. Ramji Missar v. State of Bihar, 1963 BLJR 643 : (1963) Mad L J (Cr) 575 : (1963) 2 S C J 571 : 1963 (2) Cr L J 173 : (1963) 1 S C W R 694 : 1963 Mad W N 402 : (1964) 1 S C A 98 : ILR 42 Pat 357 : AIR 1963 S C 1088 (1093) (Pt D) (Pr 19).

—S. 11 (2)—Order under S. 3 improperly passed — Prosecution can also go in appeal. See Probation of Offenders Act (1958), S. 3. 1964 (1) Cri L J 408 : AIR 1964 Manipur 20.

—S. 11 (1)—Relevant date for purpose of applying the Act is the date on which an appeal or revision comes up for consideration : Cr. Revn. No. 31 of 1962, dated 1-12-1962, (Raj). Rel. on. ILR (1964) Cut 221 : 30 Cut L T 370 : (1964) 6 OJD 210 : 1965 (1) Cr L J 56 : AIR 1965 Orissa 7 (8) (Pt A) (Pr 6).

—S. 11 (2)— Right of appeal when resort has been taken to S. 3 or 4— Not confined to convicted person or State—Available to complainant also.

The right view, to adopt with regard to the construction of sub-s. (2) of S. 11 is that the legislature has conferred the power both upon the prosecution and upon the accused person to prefer an appeal even when resort has been taken to S. 3 or 4 of the Act with regard to the merit of the order. Since the language of sub-s. (2) of S. 11 is comprehensive, flexible and unrestricted as to the person who can prefer an appeal, there is no justification for confining a right of appeal only to the convicted person or even to the State when the State is conducting the prosecution, but it must be taken that the privilege of filing an appeal on the narrow question of propriety of an action under S. 3 or 4 of the Act is conferred upon the complainant as well. 1964 (2) Cri L J 176 : 1965 B L J R 387 : I L R 44 Pat 567 : A I R 1964 Pat 358 (359, 360) (Pt A) (Prs 4, 5) (DB).

—S. 11—Principles to be followed by Court in dealing with offenders below 21 years of age — Provisions of S. 6 are mandatory—Non-compliance renders sentence of imprisonment void. See Probation of Offenders Act (1958), S. 6 1964 Raj L W 286 : ILR (1964) 14 Raj 901 : 1966 Cri L J 735.

—S. 11— Offender below 21 years of age — Lower Court not taking into consideration provisions of S. 4 —High Court in appeal can itself make enquiry contemplated by S. 6 or remand case, 1964 Raj L W 286 : ILR (1964) 14 Raj 901 : 1966 Cri L J 735 (736) (Pt B) (Pr 5) (Raj).

PROCEDURAL LAW

See Interpretation of Statutes.

PROCEDURE

See (1) Civil P. C. (1908).
(2) Criminal P. C. (1898) and
(3) Statutory cross references under (i) Criminal trial and (ii) Practice.

PROCEEDINGS

See Statutory cross-references under "Judicial proceedings."

PROCESS

See (1) Civil P. C. (1908), O. 5, O. 16, O. 48, Rr. 1 and 2.
(2) Criminal P. C. (1898), Ss. 68, 99.

Abuse of.

See (1) Civil P. C. (1908), S. 151.
(2) Criminal P. C. (1898), S. 561-A.
(3) Tort—Malicious prosecution.

Expenses of.
See (1) Civil P. C. (1908), O. 16, R. 3; O. 48 R. 1,
(2) Criminal P. C. (1898), Ss. 216, 544.

Fees.
See (1) Court-fees Act (1870), S. 20.
(2) Criminal P. C. (1898), Ss. 204, 544.

Issue of.
See (1) Civil P. C. (1908), O. 5; O. 16; O. 48, R. 2.
(2) Criminal P. C. (1898), Ss. 186, 202, 204, 208, 257 and 291.

Service.
—Service by post.
See Civil P. C. (1908), O. 5, R. 20A.

—Substituted service.
See Civil P. C. (1908), O. 5, R. 20.

PROCESSION

See (1) Constitution of India, Art. 19.
(2) Criminal P. C. (1898), S. 144.
(3) Easements Act (1882), S. 18.
(4) Penal Code (1860), Ss. 145 and 153, 295A, 298.
(5) Police Act (1861), Ss. 30, 31.

PROCLAMATION FOR ABSCONDING ACCUSED

See Criminal P. C. (1898), Ss. 87, 88.

PROCLAMATION OF EMERGENCY

See Constitution of India, Arts. 172, 250, 251, 258, 352, 355 and 366 (18).

PROCLAMATION OF EXECUTION SALE

See (1) Civil P. C. (1908), O. 21, Rr. 66, 67 and 90 and
(2) Statutory cross-references under "Execution Sale—Proclamation of".

PROCURATION OF MINOR GIRL

See Penal Code (1860), S. 366-A.

PROCURING, INDUCING OR TAKING WOMAN OR GIRL FOR SAKE OF PROSTITUTION

See Suppression of Immoral Traffic in Women and Girls Act (1956), S. 5.

PRODUCTION OF DOCUMENTS

See (1) Civil P. C. (1908), O. 7, Rr. 14, 16 to 18; O. 11, Rr. 12-20; O. 13 and O. 16.
(2) Criminal P. C. (1898), Ss. 94, 99.
(3) Evidence Act (1872), Ss. 61, 64, 65, 66, 75, 76, 78 and 163.
(4) Penal Code (1860), S. 175 and
(5) Statutory cross-references under "Documents".

Documentary evidence to be produced at first hearing.
See Civil P. C. (1908), O. 13, R. 1

Non-production at first hearing, effect of.
See Civil P. C. (1908), O. 13, R, 2.

Notice to produce.
See (1) Civil P. C. (1908). O. 11, R. 16; O. 12, R. 8.
(2) Evidence Act (1872), Ss. 163, 164.

Possession or power.
See Civil P. C. (1908), O. 11, R. 14.

PRODUCTION OF EVIDENCE

See Statutory cross-references under "Evidence".

PROFESSIONAL COMMUNICATION

Priviledged.
See Evidence Act (1872), S. 126.

PROFESSIONAL CONDUCT

See (1) Chartered Accountants Act (1949), S. 21.
(2) Legal Practitioners Act (1879), Ss. 13 and 14.

PROFESSIONAL ETIQUETTE

Ethics and misconduct.
See (1) Chartered Accountants Act (1949), S. 21.
(2) Legal Practitioners Act (1879), Ss. 13 and 14.

PROFESSIONAL MISCONDUCT

See (1) Chartered Accountants Act (1949), S. 21.
(2) Legal Practitioners Act (1879), Ss. 13 and 14.

PROFESSION AND VOCATION

See Income-tax Act (1922), S. 10 (1).

PROFESSION TAX

See (1) Constitution of India, Art. 276 (2), Sch. 7, List 2, Entry 60.
(2) Enactments under "Municipalities".

PROFESSIONS TAX LIMITATION ACT (20 of 1941)

SECTION 2

——Ss. 2 and 3-B—Plaintiff assessed to tax under Act — Suit for declaration that District Board was not entitled to charge more than Rs. 50 per annum—Suit decreed — Appeal — Act amended before hearing of appeal. validating imposition of tax upto Rs. 2,000. Held that as the law, as it stood on the date of hearing of appeal, was modified wholly validating a tax which was partially invalid at the date when the judgment was given by trial Court effect must be given to the modification and the judgment of the trial Court must be reversed. See U. P. District Boards Act (10 of 1922), S. 114. A I R 1957 All 527 (DB).

——S. 2—'Any one person' (Government of India Act (1935), S. 142-A) — (U. P. District Boards Act (10 of 1922), Ss. 108, 114).

Sections 108 and 114 of the U. P. District Boards Act contemplate taxing of any person, and therefore, contemplate the taxing of juristic persons. There is no indication either in the provisions of S. 142-A of the Government of India Act, 1935, or in any provision of the Professions Tax Limitation Act which should justify interpreting the expression 'any one person' in the restricted manner as not applying to a juristic person. **A I R 1955 N U C (All) 1694 (DB).**

——S. 2 — Maximum tax to be levied by District Board.

The upper limit of the tax on circumstances and property leviable by a district board cannot exceed Rs. 50. A I R 1948 All 382, Foll. **A I R 1955 N U C (All) 1694 (DB).**

——Ss. 2 and 3—Notification by Municipality imposing enhanced bales and bojas tax in supersession of tax imposing by previous notification, coming into force after 31st March, 1939—Imposition of tax held illegal as infringing s ub-s. (2) of S. 142-A—Cl. 2 of Art. 276 of Constitution held not attracted — Tax could not be justified under Professions Tax Limitation Act. See Government of India Act (1935), S. 142-A, sub-s. (2). A I R 1963 Bom 3 (DB).

SECTION 3-B

——S. 3-B (as inserted by Act 61 of 1949) — Plaintiff assessed to tax under Act — Suit for declaration that

District Board was not entitled to charge more than Rs. 50/- per annum in view of S. 2, Professions Tax Limitation Act—Suit decreed—Appeal—Act amended before hearing of appeal validating imposition of tax up to Rs. 2,000 — Effect if could be given to amendment in appeal — (Interpretation of Statutes)—(Civil P. C. (1908). Preamble). See U. P. District Boards Act (10 of 1952), S. 114. AIR 1957 All 527 (DB).

PROFESSIONS TAX LIMITATION (AMENDMENT AND VALIDATION) ACT (61 of 1949)

SECTION 2

—Ss. 2, 3—Effect of.

The result of the amending Act is that the tax on circumstances and property levied under S. 108 of the U. P. District Boards is not subject to the limitation laid down under the Professions Tax Limitation Act and that, therefore the maximum amount of such tax can be such as can be levied under the U. P. District Boards Act, 1922, which had been in force from before the 31st of March 1939, referred to in S. 142-A of the Government of India Act, 1935. The upper limit laid down under the rules framed by the U. P. Government under S. 114 (d) of the U. P. District Boards Act is Rs. 2,000. By the adaptation of laws Order, 1950, the main Act, namely, the Professions Tax Limitation Act (1941) stood repealed. This means that the Act did not remain in force after the coming into force of the Constitution on the 26th of January 1950. and that therefore no question of its being void in view of Arts. 13 and 31 of the Constitution should arise.

Even if any such question arose it would not affect the validity of the Act prior to the 26th of January, 1950 in view of the amendment carried out in the principal Act and that amendment deemed to exist from the very first day the imposition of the tax for an amount larger than Rs. 50 was valid and its recovery from the assessee was also valid. The repeal of the Act would not revive the right which the assessee had lost in the tax which had been realised from it validly. AIR 1955 N U C (All) 1694 (DB).

SECTION 3

—S. 3—Validity — Section was not ultra vires the provisions of S. 142A of the Government of India Act 1935. See Government of India, Act (1935), S. 142A. AIR 1955 All 508 (DB).

—S. 3—Effect of —Tax on circumstances and property levied under S. 108 U. P. District Boards Act is not subject to limitation laid down under Profession Tax Limitation Act — Maximum amount of tax leviable can be such as can be levied under the U. P. District Boards Act. 1922, which has been in force from before 21st March 1939 referred to in S. 142A of the Government of India Act, 1935:— No question of its being void in view of Arts. 13 and 31 of the Constitution should arise. See Professions Tax Limitation (Amendment and Validation) Act (61 of 1949), S. 2. AIR 1955 N U C (All) 1694 (DB).

PROFESSIONS TAX LIMITATION (AMENDMENT AND VALIDATION) ORDINANCE (17 of 1949)

SECTION 3

—S. 3—Validity — Section was not ultra vires the powers of Central Legislature given to it by S. 142A of the Government of India Act. See Government of India Act (1935), S. 142-A. AIR 1955 All 508 (DB).

PROFESSION, TRADE AND CALLING

Right to carry on.
See Constitution of India, Art. 19.

PROFIT AND LOSS ACCOUNT OF COMPANY

See Companies Act (1956), S. 211. Sch. VI.

PROFIT BONUS

See Industrial Disputes Act (1947), Sch. 3, Item 5.

PROFITS

See (1) Income-tax Act (1922), Ss. 2 (19), 10 (1),
(2) Industrial Disputes Act (1947), Sch. III, Item 5.

PROFITS AND GAINS OF BUSINESS

See Income-tax Act (1922), S. 10.

PROHIBITED DEGREES

See (1) Christian Marriage Act (1872), S. 88.
(2) Hindu Law—Marriage.
(3) Hindu Marriage Act (1955), S. 3.
(4) Mahomedan Law—Marriage.
(5) Special Marriage Act (1954), S. 2.

PROHIBITED LIQUOR

Consumption of.
See Enactments under "Prohibition".

PROHIBITION

Offences against
See Enactments under "Prohibition."

Promotion of, as state policy.
See Constitution of India, Art. 47.

Writ of.
See (1) Constitution of India, Arts, 226 and 32.
(2) Specific Relief Act (1877), S. 45.

PROHIBITION

(Prohibition—List of Headings)

1. Andhra Pradesh Prohibition Act (10 of 1937).
2. Assam Liquor Prohibition Act (1 of 1953).
3. Assam Opium Prohibition Act (23 of 1947).
4. Bombay Prohibition Act (25 of 1949).
5. Bombay Prohibition (Extension and Amendment) Act (12 of 1959).
6. Bombay Prohibition (Medical Examination and Blood Test) Rules (1959).
7. Bombay Spirituous Medical Preparations (Sale) Rules (1954),
8. C. P. and Berar Prohibition Act (7 of 1938).
9. Coorg Prohibition Act (Mysore Act 1 of 1956).
10. Delhi Intoxicating Spirituous Preparations, Import, Transport, Possession and Sales Rules (1952).
11. Kerala Prohibition Act (T. C. Act 13 of 1950),
12. Madhya Bharat Madak Dravya Vidhan. (14 of 2009 Smvt.).
    (Madhya Bharat Excise Act (14 of Smvt. 2009).
13. M. P. Foreign Liquor Rules (1960).
14. Madhya Pradesh Prohibition Act (7 of 1938).
15. Madhya Pradesh Prohibition (Amendment) Act (19 of 1953).
16. Madras Prohibition Act (10 of 1937),
17. Madras Prohibition (Supplementary) Act (11 of 1941).
18. Madras Prohibition (Amendment) Act (8 of 1958).
19. Mysore Prohibition Act (37 of 1948).
20. Mysore Prohibition Act, 1961 (17 of 1962).
21. Punjab Intoxicating Spirituous Preparation, Import, Export, Transport, Possession and Sale Rules (1952).

22. Saurashtra Prohibition Ordinance.
23. Travancore Cochin Prohibition Act (13 of 1950).
24. Travancore Prohibition Act (7 of 1123 M.E.).

—ANDHRA PRADESH PROHIBITION ACT (10 of 1937)

SECTION 4

——S. 4 (1) (a)—Offence of possession of prohiblted liquor — Proof—Duty of prosecution — Examination by Chemical examiner of article, is necessary—Mere oral statement of prohibition officers that article smelt of prohibited article is not sufficient.

When scientific methods are available to prove the fact of alcholic content of an article the prohibition officers should not be allowed to confine proof of such an article hy their mere oral statements because the primary duty of the prosecution is to exclude every possibility of a doubt or suspicion before they ask for the conviction of a person charged under the Act. The smell of liquor is not sufficient to raise a presumption against a person charged for an offence under the Act. The prosecution when they seize the arrack should get it examined by the Chemical Examiner. They cannot be allowed to adopt an easier course examining its own officers to prove the contents of the tins only by smell. If this is to be accepted as a general rule, it would be giving a very large latitude to the prohibition officers to prove alcoholic content of any prohibited article or drug under the Act by mere smell. 1964 Mad L J (Cri) 519 : (1964) 2 Andh L T 164 : 1964 (2) Cri L J 271 : (1964) 2 Andh W R 127 : AIR 1964 Andh Pra 429 (430) (Pr 1).

—ASSAM LIQUOR PROHIBITION ACT (1 of 1953)

SECTION 2

——S. 2 (3)—Validity.

The word 'liquor' in item 8, List II is wide enough to bring within its ambit the substance which may not necessarily include alcohol and, therefore, the Assam Liquor Prohibition Act (1 of 1953). was within the legislative competence of the State Legislature : AIR 1951 S C 318, Foll. See Constitution of India, Sch. 7, List 2, Item 8. AIR 1961 Assam 16 (DB).

——S. 2 (3)—Power of State Government to declare by notification any substance as liquor—When all the provisions of the Act are taken into consideration, it cannot be said to be uncontrolled so as to be hit by the doctrine of excessive delegation. See Constitution of India, Art. 245. AIR 1961 Assam 16 (DB).

——Ss. 2 (3) and 3—Validity—Act is not invalid as it expressly omits substances, restrictions on trade in which would have been considered unreasonable. See Constitution of India, Art. 19 (1) (g). A I R 1961 Assam 16 (DB).

—ASSAM OPIUM PROHIBITION ACT (23 of 1947)

SECTION 5

——S. 5 (a)—Repugnancy of State Law to existing law—S. 5 (a) prevails over S. 9, Opium Act by virtue of S. 107 (2) of Govt. of India Act. See Government of India Act (1935), S. 107 (2). 1960 Cr L J 317 : AIR 1960 Assam 37 (DB).

——S. 5 (a) — Validity — (Constitution of India, Art. 14).

Section 5 (a), Assam Opium Prohibition Act does not violate the provisions of Art. 14, of the Constitution. Under the provisions of the State law it is obvious that the prosecution of the person concerned in this State could only be under the provisions of the Assam Act (XLIII of 1947) when the provisions of the earlier Central Act (1 of 1878) were inconsistent with those of the latter Provincial Act. It is also well known that even under Art. 14 of the Constitution of India, the State Legislature is not prevented from making laws which may be necessary to meet the demands of special classes of cases or special exigencies in any particular territory. For instance, the act of smuggling in any particular territory may be so notorious that it may require a special legislation to meet such offences and to stop the evil. 1952 S C J 168, Rel. on. ILR (1959) 9 Assam 389 : 1960 Cri L J 317 : AIR 1960 Assam 37 (38) (Pt B) (Pr 6) (DB).

——S. 5 (a) — Possession under section is conscious possession—Proof of mens rea essential for offence—Absence of evidence that opium was kept by accused —Element of mens rea not proved beyond doubt — Hence conviction under S. 5 (a) was set aside.

It cannot be doubted that before a person can be convicted under S. 5 (a) of the Act, his possession must be proved. The possession contemplated under S. 5 (a) of the Act is a conscious possession. In order to find a person guilty under S. 5 (a) the element of mens rea has got to be esstablished and that can only be established by proof of the fact that the accused had knowledge of the existence of the contraband article within his compound and that he was in the effective control of the place from where the thing is said to have been recovered. It is true that it may be difficult for the prosecution to prove by positive evidence the fact of the knowledge. It is fact which has to be gathered from the circumstances of each case. AIR 1950 Assam 152 and AIR 1952 Assam 26, Rel. on.

Held on considering circumstances that they did not lead to only one inference that the accused must have had knowledge of opium being at a particular place. There was no evidence that opium was in fact kept by accused there and that was not the inference which could legitimately be drawn. Thus element of mens rea had not been proved beyond doubt against the accused.

Hence conviction under S. 5 (a) was set aside. ILR (1959) 11 Assam 406.

——S. 5 (a)—Burden of proof — Discovery of opium with accused established—She must prove that it was planted on her and that she had no knowledge—(Evidence Act, (1872), Ss. 101, 103 and 105). A I R 1955 N U C (Assam) 4233 (DB).

——S. 5—Possession of contraband opium—Husband and wife living together — Contraband opium recovered from house—No definite evidence against husband—Husband held could not be convicted—Wife being first offender her sentence was reduced — (Opium Act (1878), S. 9). A I R 1955 N U C (Assam) 4217 (DB).

——S. 5 (a)—Possession of opium—Proof of mens rea essential for offence.

Possession of Opium within the meaning of S. 5 (a) of the Assam Opium Prohibition Act must imply knowledge. It must be conscious possession making some kind of control possible, or in other words, there must be mens rea or guilty knowledge before a person could be convicted of an offence under S. 5 (a) for possession of opium.

The accused who were two brothers, were living in the same house which was enclosed by a Court yard inaccessible to persons from outside. On a search a large quantity of opium i.e. 1¼ seer was found hidden in a heap of bricks lying in the court yard of the house. There was, however, no evidence pointing to the conclusion that both or any one of them had guilty knowledge of the existence of the opium. On the other hand the evidence did not exclude the possibility of the opium being kept there by the other inmates of the house.

Held, that it could not be held in the circumstances that the opium was in the possession of the accused merely because they were owners of the house. In the absence of any evidence pointing to their guilty knowledge they could not be convicted under S. 5 (a). AIR 1952 Assam 26 (27) (Pr 6) (DB).

——S. 5 (a)—Sentence.

Where the opium seized from the accused is 15 Seers, it suggests that the importing is on a large scale and hence the sentence of rigorous imprisonment for 5 years and a fine of Rs. 2,000 is not excessive. ILR (1951) 3 Assam 321 : 52 Cri L J 1235 : AIR 1951 Assam 124 (126) (Pt B) (Pr 8) (DB).

——Ss. 5 (a) and 28 — Possession — Meaning—Presumption—Burden of proof—Opium Act (1878), Ss. 9 and 10—Evidence Act (1872), Ss. 101-103.

Possession of opium within the meaning of S. 5 (a) must imply knowledge. It must be conscious possession making some kind of control possible, or, in other words, there must be mens rea or guilty knowledge before a person could be convicted of an offecce under S. 5 (a) for possessing opium.

Thus, a person charged with the possession of opium must be shown to have knowledge of the existence of the opium in his house before he can be said to be in possession of it. Mere recovery of opium from a house in which he lives along with other persons, would not be sufficient to show that he was in possession with knowledge of its existence.

Unless conscious possession on the part of the accused has been proved, no presumption under S. 28 arises in favour of the prosecution.

The burden of proving conscious possession on the part of the accused remains on the prosecution and that burden is not shifted to the accused by anything that is contained in S. 28. 51 Cri L J 973 : I L R (1950) 2 Assam 333 : A I R 1950 Assam 152 (153) (Prs 7, 10, 13) (DB).

SECTION 6

——S. 6 — Reason to suspect or believe—Conviction for.

Before an owner or driver of any vehicle can be convicted under S. 6, he must knowingly permit the vehicle to be used for the commission by any other person of an offence punishable under the Act or the rules made thereunder. Reason to suspect or reason to believe, is not enough for the purposes of a conviction under S. 6; existence of knowledge alone, and not something less than knowledge, can justify a conviction under S. 6. 1952 Cri L J 390 : ILR (1952) 4 Assam 178 : AIR 1952 Assam 47 (48) (Pt B) (Pr 12) (DB).

SECTION 10

——S. 10—Abetment—Proof—Opium recovered from person of wife in presence of husband — At time of recovery and afterwards wife and husband giving joint defence — These facts held not sufficient to convict husband of abetment — From the joint defence it could not be inferred that the husband was an abetter — (Penal Code (1860), S. 107). AIR 1955 NUC (Assam) 3305.

SECTION 11

——Ss. 11, 16, 17 — Evidence of general repute — Proof—Criminal P. C. (1898), S. 117.

General repute or reputation of a man may be proved like any other fact in issue. Witnesses may depose to what the reputation of a particular individual is. A witness giving evidence as to the reputation may depose that a particular individual has the reputation of being a habitual smuggler. Such a witness may be examined and cross-examined as to his means of knowing the reputation of the individual he is talking about. The value of evidence that he gives would no doubt depend to a great extent on whether he is in a position to know of the reputation of the man against whom he is deposing. The evidence of repute is essentially based on hearsay. Where, therefore, reputation is spoken of or described as a fact even though the reputation came to be known by hearsay the evidence is not inadmissible. The weight that should attack to evidence of general repute would vary not only in the circumstances of each case but in the case of each witness. The evidence will have to be weighed in relation to other facts elicited from the statement of the witnesses. General repute has to be distinguished from mere rumour. If a person is suspected of a crime in a particular case by some and there are others who do not share the suspicion, the evidence of those who suspects him cannot be described as evidence of general repute. But, if an individual is suspected in several cases and in course of time people begin to believe and talk about him as a thief or a robber or a smuggler by habit, he may be said to bave acquired the reputation that is attributed to him. The roots of a bad reputation would be ultimately found planted in rumour and it would be difficult to lay down any rule as to how many instances or how long it should take the rumour to ripen into reputation. All that it means and implies is what is thought of a person by others and the general reputation of a person is merely the collective opinion of those in whose midst he lives. It need not necessarily be the opinion of the entire community. Evidence which discloses the existence of collective opinion is evidence of general repute. Case law discussed. 52 Cri L J 966 : ILR (1951) 3 Assam 181 : A I R 1951 Assam 106 (114) (Pt G) (Prs 53, 54) (DB).

SECTION 16

——S. 16—Order under Assam Opium Prohibition Act — Finality of — Like into all other Acts, the General Clauses Act applies for purposes of interpretation of the Constitution, unless the contexf otherwise requires — Art. 227 has no retrospective effect and cannot apply to a proceeding which was pending when the Constitution came into force—When an order under S. 16 of the Assam Opium Prohibition Act passed at appellate stage had become final, when the Constitution came into force. it was not open to challenge under Art. 227 — (General Clauses Act (1897), S. 6). See Constitution of India, Preamble. 1953 Cri LJ 395: AIR 1953 Assam 35 (FB).

——Ss. 16 and 17—Notification No. MEX, 66/48—Empowerment therein is special.

Notification No. MEX, 66/48, dated 5.6.48, empowered all Magistrates of the first class in the State of Assam to exercise powers under S. 17.

Having regard to the definition of the word "Magistrate" in S. 3 (31) of the General Clauses Act and the connotation of the word "Magistrate" in Ch. II of the Code in which manifestly a Magistrate or a Court of Magistrate is regarded as an office and not an official, the notification in question fulfilled the requirements of S. 16 read with S. 39 (1) of the Code. AIR 1915 Mad 1159, Dissent. from. State v. Judhabir Chetri, ILR (1953) 5 Assam 24 : 1953 Cri L J 395 : AIR 1953 Assam 35 (39) (Pt C) (Pr 17) (FB).

——Ss. 16, 17 (2)—Period of duration of externment—Unreasonableness—Constitution of India, Art. 19.

The period of duration of externment under S. 17 is to be determined by a Court of law after giving the fullest opportunity to the person proceeded against of representing his case. The Magistrate has been given the authority to fix the period. His order is subject to appeal to the Court of Sessions and an-

order under S. 17 (3) would be subject to the supervisory jurisdiction of the High Court under Art. 227 of the Constitution. Hence it cannot be said that in leaving the specification of the period of externment to the Magistrate whose decision is subject to judicial review and scrutiny, the Legislature acted unreasonably. Hence, the validity of provisions contained in Ss. 16, and 17 is not assailable on the ground that no maximum duration for externment has been fixed. AIR 1950 S C 211 (Majority view), Foll. AIR 1950 Bom 374, Rel. on; A I R 1950 Bom 363, Dist. **ILR (1951) 3 Assam 181 : 52 Cri L J 966 : AIR 1951 Assam 106 (118, 119) (Pt D) (Prs 74, 75, 79, 82) (DB).**

——Ss. 16, 17 — Evidence of general repute — Admissibility.

(Per Ram Labhaya, J., Thadani, C. J. contra) — Evidence of general repute is admissible in externment proceedings under Chapter VI. **ILR (1951) 3 Assam 181 : 52 Cri L J 966 : AIR 1951 Assam 106 (113) (Pt F) (Pr 43) (DB).**

——S. 16—Habitual smuggler—Specific instances.

Proof of specific instances of smuggling is not necessary in law as the fact that a person is a habitual smuggler may be proved by evidence of general repute or otherwise. **ILR (1951) 3 Assam 181 : 52 Cri L J 966 : AIR 1951 Assam 106 (116) (Pt I) (Pr 62) (DB).**

——Ss. 16, 17 — Unreasonableness on territorial grounds—Constitution of India, Art. 19.

The reasonableness of the provisions of Ss. 16 and 17 cannot be questioned on the ground that they enable the Court to extern a person from the entire State. The reasonableness of the impugned legislation has to be determined on the basis of existing conditions. The Court is not concerned with the situation that might arise if every State were to pass a similar legislation, and to pass a similar order against the person. AIR 1950 Bom 374, Rel. on. **I L R (1951) 3 Assam 181 : 52 Cri L J 966 : AIR 1951 Assam 106 (119) (Pt M) (Prs 85, 87) (DB).**

SECTION 17

——S. 17 (3)—Order under Assam Opium Prohibition Act—Finality of—Article 227 of the Constitution has no retrospective effect—Order passed at appellate stage which had become final when the Constitution was enforced is not open to challenge under Art. 227 —General Clause Act applies to the interpretation of the Constitution as well—(General Clauses Act (1897), S. 6). See Constitution of India, Preamble. **A I R 1953 Assam 35 (FB).**

——S. 17 — Notification No. MEX. 66/48 — Empowerment therein is special—(Criminal P. C. (1898), S. 39 (1) — (General Clauses Act (1897), S. 3 (31)). A I R 1915 Mad 1159, Dissent. from. See Prohibition —Assam Opium Prohibition Act (1947), S. 16. **A I R 1953 Assam 35 (FB).**

——S. 17 (3)—Order under—Interference—Criminal P. C. (1898), Ss 439, 561-A.

The effect of S. 17 (3) is to exclude the revisional jurisdiction of the High Court under S. 439, Criminal P. C. at least by necessary implication, if not expressly. The order of the Sessions Judge, therefore, is not revisable under S. 439 of the Criminal P. C. The attribute of finality which the law attaches to the order under S. 17 (3) will also prevent the High Court from exercising its inherent jurisdiction under S. 561-A, Criminal P. C. Case law relied on. **I L R (1951) 3 Assam 181 : 52 Cri L J 966 : A I R 1951 Assam 106 (109) (Pt A) (Pr 16) (DB).**

——S. 17 (3)—Effect on powers of superintendence —Constitution of India, Art. 227 (1).

No provision contained in any local or special law if it conflicts with an express provision contained in the Constitution can have any force or validity. An Act of the Provincial Legislature cannot have the effect of curtailing the powers conferred on the High Courts by the Constitution of India. Hence S. 17, Cl. (3) has not the effect of limiting the powers conferred on the High Courts by Art. 227 (1) of the Constitution. **52 Cri L J 966 : I L R (1951) 3 Assam 181 : A I R 1951 Assam 106 (110) (Pt C) (Pr 22) (DB).**

——S. 17—Evidence of general repute—Admissibility —Evidence of general repute is admissible in externment proceedings under Ch. VI (Per Ram Labhaya J., Thadam C. J., Contra). See Prohibition — Assam Opium Prohibition Act (1947), S. 16. **52 Cri L J 966 : A I R 1951 Assam 106 (DB).**

——S. 17 — Evidence of general repute — Proof— General repute or reputation of a man may be proved like any other fact in issue — Witnesses may depose to what the reputation of a particular individual is— Criminal P. C. (1898), S. 117. See Prohibition—Assam Opium Prohibitlon Act (1947), S. 11. **52 Cri L J 966 : A I R 1951 Assam 106 (DB).**

——S. 17 — Restrictions on the right of free movement—Justiciability—Validity of such a legislation is justiciable—Court can consider the reasonableness of the restrictions can also examine the procedure to be followed before such restrictions can be imposed. See Constitution of India, Art. 19. **52 Cri L J 966 : A I R 1951 Assam 106 (DB).**

——S. 17 (2) — Period of duration of externment— Unreasonableness — Validity of Ss. 16 and 17 is not assailable on the ground that no maximum duration for externment has been fixed—Constitution of India, Art. 19. See Prohibition — Assam Opium Prohibition Act (1947), S. 16. **52 Cri L J 966 : A I R 1951 Assam 106 (DB).**

——S. 17—Unreasonableness on territorial grounds— Validity of Ss. 16 and 17 cannot be assailed on the ground that no maximum duration of externment has been fixed — Constitution of India, Art. 19. See Prohibition — Assam Opium Prohibition Act (1947), S. 16. **52 Cri L J 966 : A I R 1951 Assam 106 (DB).**

SECTION 28

——S. 28 — Possession — Meaning — Presumption— Burden of proof — Possession of opium within the meaning of S. 5 (a) must imply knowledge. It must be conscious possession making some kind of control possible, or in other words, there must be mens rea or guilty knowledge before a person could be convicted of an offence under S. 5 (a) for possessing opium.

The burden of proving conscious possession on the part of accused remains on the prosecution and that burden is not shifted to the accused by anything that is contained in S. 28. See Prohibition — Assam Opium Prohibition Act (23 of 1947), S. 5 (a). **51 Cri L J 973 : A I R 1950 Assam 152 (DB).**

—BOMBAY PROHIBITION ACT (25 of 1949)

PREAMBLE

——Preamble—Validity of Act—Certain provisions of Act declared invalid—Rest of Act declared valid.

The following provisions of the Bombay Prohibition Act, 1949, are invalid—

(1) Clause (o) of S. 12, so far as it affects the possession of liquid medicinal and toilet preparations containing alcohol.

(2) Clause (d) of S. 12, so far as it affects the selling or buying of such medicinal and toilet preparations containing alcobol.

(3) Clause (b) of S. 13, so far as it affects the consumption or use of such medicinal and toilet preparations containing alcohol.

(4) Clause (a) of S. 23, so far as it prohibits the commendation of any intoxicant or hemp.

(5) Clause (b) of S. 23 in entirety.

(6) Clause (a) of sub-s. (1) of S. 2 so far as it prohibits commendation of any intoxicant or hemp.

(7) Sub-section (1) of S. 136, in entirety.

(8) Clauses (b), (c), (e) and (f) of sub-s. (2) of S. 136, in their entirety.

The rest of the provisions of the Act are valid. The declaration that some of the provisions of the Act are invalid does not affect the validity of the Act as it remains. A I R 1951 Bom 210 (FB), Affirmed.

(Note. — Reversing the decision of the Bombay High Court, the Supreme Court has declared valid the following sections, Rule and Notifications, namely : Ss. 2 (24), 24 (1) (b), 39, 52, 53, 139 (c), Rule 67 of the Bombay Foreign Liquor Rules framed under S. 143, and Notification Nos. 10484/45(c) and 2843/49(a) dated 30-3-1950. To this extent the decision in A I R 1951 Bom 210 (FB), is reversed.) State of Bombay v. F. N. Balsara, 1951 S C J 478 : (1951) 2 Mad L J 141 : 52 Cri L J 1361 : 53 Bom L R 982 : 1951 S C R 682 : A I R 1951 S C 318 (331) (Pt A) (Pr 33).

● ——Preamble—Constitution of India, Arts. 37 and 47 — Bombay Prohibition Act (25 of 1949) has gone beyond scope of directive laid down in Art. 47 inasmuch as it does not prima facie appear to have made adequate provision for allowing the use and consumption of intoxicating drinks for medicinal purposes. See Constitution of India, Art. 37. 52 Cri L J 80 : A I R 1951 Bom 210 (FB).

——Pre—Application of Act to State of Saurashtra by notifications—Notifications not expressed to be made by or by order of Raj Pramukh — Application whether valid.

Rule 11 of the Rules of Business framed in pursuance of S. 6 of the Saurashtra State Regulation of Government Ordinance, 1948, is not mandatory but only directory because it does not lay down that if the provision of the affirmative rule is not complied with, adverse consequences will follow. Hence, where notifications bringing into force in the State of Saurashtra, the Bombay Prohibition Act, 1949, as adapted and applied by the Saurashtra State is signed by a person who is a Secretary to the Government of Saurashtra, the mere fact that the orders contained in the notifications are not expressed to be made by or by order of the Raj Pramukh does not make such orders ipso facto invalid : A I R (34) 1947 F C 38; 50 Bom L R 471, Foll.; A I R (37) 1950 M B 34, Not foll.

(Note :—Affidavit filed on the direction of the High Court ex majore cautela, by the Secretary to the effect that the notifications published in the Saurashtra Government Gazette of the years 1948, 1949 and 1950 under his signature were in fact issued under the orders of the Government was accepted by the High Court which held that it set at rest any doubt about the authority of the Secretary.) 1952 Cri L J 28 : A I R 1951 Sau 79 (81, 83) (Prs 7, 8, 9) (DB).

SECTION 1

● ——S. 1—Certain Provisions of Act held to be void —Whole Act, if void—Constitution of India, Art. 13 (1).

The whole Act cannot be declared to be void. The question of severability of void portion of the Statute from the rest of the Statute can be considered under Art. 13 (1) of the Constitution. Fram Nusserwanji Balsara v. State of Bombay. 52 Bom L R 799 : ILR (1951) Bom 17 : 52 Cri L J 80 : A I R 1951 Bom 210 (224) (Pt O) (Pr 27) (FB).

SECTION 2

● ——Ss. 2 (22) and 66 (b)—Possession of prohibited article.

Where the rectified spirit found in possession of the accused was 94 v/v of ethyl alcohol it fell within the definition of intoxicant as given in S. 2 (22), possession of which, without permit, is prohibited by S. 66 (b). Vijendrajit Ayodhya Prasad Goel v. State of Bombay. 1953 S C J 328 : 1953 Mad W N 552 : 1953 Cri L J 1097 : 1953 All W R (Sup) 70 : 1953 S C A 395: A I R 1953 S C 247 (248) (Pt F) (Pr 6).

——S. 2 (24)—Definition of liquor, if ultra vires. The definition of liquor in S. 2 (24) of the Act is not ultra vires in that it includes all liquids containing alcohol because such a meaning could not have been intended to be excluded from the scope of term "intoxicating liquor" in entry 31 of List II. See Government of India Act (1935), Sch. 7, List II, Entry 31. 52 Cri L J 1361 : A I R 1951 S C 318.

● ——S. 2 (22)—Notifications and orders under dated 16-6-1949 — Provisions if ultra vires as offending against Art. 19 (1) (f) of Constitution.

To the extent to which the Prohibition Act prevents the possession, use and consumption of beverages and medicines and toilet preparations containing alcohol for legitimate purposes the provisions are void as offending against Art. 19 (1) (f) of the Constitution even if they may be within the legislative competence of the Provincial Legislature. Fram Nusserwanji Balsara v. State of Bombay. 52 Bom L R 799 : ILR (1951) Bom 17 : 52 Cri L J 80 : A I R 1951 Bom 210 (223) (Pt L) (Pr 24) (FB).

[Reversed in A I R 1951 S C 318.]

——Ss. 2 (10-a), 59-C, 59-D — Scope — Restrictions, freedom from which is guaranteed by Art. 301 must directly and immediately restrict or impede free flow or movement of trade—Ss. 59-C, 59-D and 2 (10-a) of the Bombay Prohibition Act do not violate Art. 301— Further regulating trade in articles such as French polish and Varnish is not impeding or obstructing trade. See Constitution of India, Art. 301. AIR 1964 Guj 59 (DB).

——Ss. 2 (24) and 66 (1) (b) — Hydrometer test cannot conclusively establish illicitly distilled liquor— Conviction on evidence of smelling alone not justified. 1962 Nag L J (Notes) 26.

——S. 2 (24), S. 66 (b) (as applied to Saurashtra) — Liquid seized according to report of chemical analyser shown to be wine coming within first part of 'liquor' as defined in S. 2 (24) — Held, that the fact that liquid was prohibited liquor was conclusively established. 1956 Cri L J 775 : AIR 1956 Sau 25 (26) (Pt D) (Pr 4).

SECTION 6-A

——Ss. 6-A, 66 (2), 66 (1) (b), 24-A, 85 (2) (as amended by Bombay Act 12 of 1959) — Trial for offence under S. 66 (1) (b)—Burden of proof—Burden when shifts to the accused— Effect of Ss. 6-A and 85 (2) - Quaere—Whether even if the burden of proof in the circumstances under S. 66 (2) shifted to the accused, that burden is discharged by reason of S. 6-A of the Act

Quaere — Whether S. 85 of the Act lays down two conditions, namely that the accused should have been drunk and incapable of taking care of himself and also that he should have taken the drink not for a medicinal purpose, but for the purpose of being intoxicated. See Prohibition — Bombay Prohibition Act (25 of 1949) (as amended by Bombay Act 12 of 1959), S. 66 (2). (1965) 2 S C W R 538 : (1965) 3 S C R 358 : AIR 1966 S C 145.

● ——S. 6-A—Scope—Consultation with Board under S. 6-A (6) is not a condition precedent to launching prosecution under Act.

Section 6-A creates three distinct obligations: (1) upon the State to constitute a Board for the purposes specified in sub-s. (1); (2) upon the Board when consulted, to advise the State Government whether a substance mentioned in sub-s. (1) is unfit for use as intoxicating liquor; and (3) an obligation on the State, when the advice of the Board is received, to determine whether the article is fit or unfit to be used as intoxicating liquor. There is, however no obligation expressly imposed upon the State in any given case to consult the Board of Experts, nor can such a provision be implied. By declining to avail itself of the machinery provided, by sub-s (6) of S. 6-A, in cases which are not sent to the Board the State will not be entitled to rely on the presumption arising under the last sentence of that sub-section. The State may in a prosecution for infringement of the prohibitions contained in Ss. 12 and 13 rely upon the presumption, after resorting to the machinery under S. 6-A (6), but is not obliged to rely upon the presumption. A I R 1959 Bom 199 : 1959 Cri L J 579 : ILR (1958) Bom 1224 : 60 Bom L R 1183, Overruled. State of Bombay v. Narandas Mangilal Agarwal, 64 Bom L R 260 : 1962 Nag L J 333 : 1962 (1) Cri L J 512 : 1962 S C D 305 : 1962 Mad L J (Cri) 649 : (1962) 2 S C J 542 : 1962 Supp (1) S C R 15 : A I R 1962 S C 579 (584, 586) (Pt B) (Prs 11, 14).

——Ss. 6-A (6), 65 (a), 24-A—Fitness or otherwise of medicinal preparation as intoxicating liquor—Machinery provided for purpose—State must refer question to Board of Experts — Court cannot convict person without opinion of Board. See Prohibition—Bombay Prohibition Act (25 of 1949), S. 65 (a). 1959 Cri L J 579 : A I R 1959 Bom 199 (DB).

——S. 6-A (as amended by Act 26 of 1952) — Bombay Spirituous Medicinal Preparations (Sales) Rules, 1954, Rr. 2 and 3 — Restrictions on consumption of spirituous medicinal preparations — Effect of — Determination under S. 6 A—Effect—Act ultra vires due to incompetency of Legislature and invalid due to inconsistency with Part III of Constitution. See Prohibition — Bombay Prohibition Act (25 of 1949) (as amended by Act 26 of 1952), S. 24-A. 1958 Cri L J 607 : A I R 1958 Bom 181 (DB).

——S. 6-A (as amended by Act 26 of 1952) — Reference to Board of Experts and its answer — Validity of.

The quantity required to produce intoxication is not incidental to the determination of the question whether the preparation is or is not unfit for use as intoxicating liquor within the meaning of sub-s. (6) of S. 6-A. And as this part of the reference is outside the scope of S. 6 A, any advice tendered by the Board of Experts to Government in that regard is not advice tendered by a statutory body in the discharge of its function as such a body. A I R 1956 Bom 304 (309) (Pt B) (Pr 10).

——S. 6-A (1) and (6) (as amended by Act 26 of 1952) — Fit or unfit for use as intoxicating liquor — Meaning of.

The words "fit for use as intoxicating liquor and unfit for such use" occurring in S. 6 A (1) and (6) are used in the sense of fit for use for beverage purposes and unfit for such use. The mere presence of alcohol in a preparation does not render it fit for use as intoxicating liquor. Therefore, it is not correct to interpret the section as meaning anything more or less than that a preparation is "fit for use as intoxicating liquor" if it is capable of being used in the way in which drink is normally used and for the same purposes.

Further, it cannot be held that the words 'fit for use as intoxicating beverages' only applied to articles which were medicinal and toilet articles in name and not to articles which were primarily medicinal and toilet preparations but capable of being used as a drink or a beverage. For to hold so, will defeat the intention of the Legislature in preventing the noxious use of innocent articles. A I R 1956 Bom 304 (312, 313) (Pt F) (Pr 15).

——S. 6-A (6) — Determination by Board of Experts raises rebuttable presumption.

The determination by the Board of Experts as to what preparations are fit for use as intoxicating liquor under S. 6-A, only raises a rebuttable presumption. And though the Government is not bound to accept the recommendation of the Board still if the Government does not choose to do so, the value of its determination will of necessity be affected because the fact that the Board has taken a contrary view will in itself be a strong weapon in the hands of the party aggrieved. A I R 1956 Bom 304 (314, 315) (Pt H) (Pr 20).

——S. 6-A—'Fit for use as intoxicating liquor'—'Intoxicate', meaning of—(Words and Phrases).

Assuming the meaning of the words 'fit for use as intoxicating liquor' in S. 6-A is 'calculated to intoxicate', then the word 'intoxicate' in that connection, having regard to the fact that S. 6-A is designed to prevent the abuse of articles innocent in themselves so as to defeat the provisions of the Prohibition Act, would only relate to a state in which a person may be described to be neither sober nor drunk; in other words, when he shows some obvious signs of having had a drink, although such signs may not lead to any objectionable behaviour on his part. AIR 1956 Bom 304 (319) (Pt O) (Pr 26).

SECTION 11

●——Ss. 11, 65 and 66 — Offence of importing and possessing Ayurvedic medicinal preparation 'Mrugmadasava' containing more than prescribed quantity of alcohol—Fact that the preparation was imported under a permit issued by Government of Bhopal on payment of excise duty cannot protect accused from liability to prosecution for infringement of provisions of Act within Bombay State—Accused pleading that importation of article was lawful in view of licence issued under S. 11 — Burden lies on accused to prove his allegation by production of licence—If licence is not produced such defence is not available. State of Bombay v. Narandas Mangilal Agarwal. 64 Bom L R 260 : 1962 Nag L J 333 : 1962 (1) Cri L J 512 : 1962 S C D 305 : 1962 Mad L J (Cri) 649 : (1962) 2 S C J 542 : 1962 Supp (1) S C R 15 : A I R 1962 S C 579 (585) (Pt C) (Pr 12).

——S. 11—'It shall be lawful'—Meaning of.

In the context of the Bombay Prohibition Act, the words 'it shall be lawful' in S. 11 are not capable of having a negative import; they could not possibly have been intended by the Legislature to have any such import, for, the legislature had in terms enacted negative provisions in Ss. 12 to 17 which it would have been quite unnecessary to do if the words of S. 11 by themselves carried a negative import. AIR 1956 Bom 304 (311) (Pt E) (Pr 12).

SECTION 12

●——Ss. 12, 13 and 24-A — Offences under Ss. 65 and 66—Prosecution under — Burden of proof—State has to prove that prohibitions contained in Ss. 12 and 13 were infringed by accused and that medicinal preparation seized from accused is not unfit for use as intoxicating liquor—Scope of S. 24-A. See Prohibition—Bombay Prohibition Act (25 of 1949), S. 65. 1962 (1) Cri L J 512 : AIR 1962 S C 579.

●——Ss. 12 and 13—If and to what extent conflict with Art. 19 (1) (f) of the Constitution—The provisions of S. 12 and S. 13 in so far as they affect the

possession, selling or buying or consumption of all liquids containing alcohol is not a law imposing reasonable restrictions so far as medicinal and toilet preparations containing alcohol are concerned. It is not reasonable that the possession, sale, purchase, consumption or use of medicinal or toilet preparations should be prohibited merely because there is a mere possibility of their being misused by some perverted addicts. To that extent the provisions are in conflict with Art. 19 (1) (f) of the Constitution. See Government of India Act (1935), S. 297, Sch. VII, List I, Entry 19, List II, Entry 31. 52 Cri L J 1361 : A I R 1951 S C 318.

——Ss 12, 13 and 24-A (as amended by Bombay Prohibition (Amendment) Act 26 of 1952) — Validity of S. 24-A.

It is impossible to suggest that the Legislature was not respecting the decision of the Supreme Court in AIR 1951 S C 318 that Ss. 12 and 13 were notionally obliterated from the statute to the extent that they referred to medicinal and toilet preparation. But in the very Act by incorporating S. 24-A in Ch. 3 by the Amending Act of 1952 the Legislature effectively amended Ss. 12 and 13, because whereas at the date when the Supreme Court made its declaration Ss. 12 and 13 applied to all medicinal and toilet preparations, by reason of the amendment Ss. 12 and 13 only applied to a certain limited category of medicinal and toilet preparations. **59 Bom L R 786 : ILR (1958) Bom 128 : 1958 Cri L J 607 : AIR 1958 Bom 181 (186) (Pt A) (Pr 7) (DB).**

——Ss. 12, 24-A, 6A, 59-A, 139 (d), 13 (as amended by Act 26 of 1952) — Bombay Spirituous Medicinal Preparations (Sales) Rules, 1954, Rr. 2, 3—Act if imposes reasonable restrictions on consumption of spirituous medicinal preparations — Determination under S. 6-A—Effect—Tests for reasonableness—Act ultra vires due to incompetence of legislature and invalid due to inconsistency with Part III of Constitution—Effect — Validity of Act on latter ground has to be judged by subsequent amendments, notifications, etc. See Prohibition—Bombay Prohibition Act (25 of 1949 as Amended by Act 26 of 1952), S. 24-A. 1958 Cri L J 607 : AIR 1958 Bom 181 (DB).

●——Ss. 12 to 17 — Provisions relating to export, and import, if ultra vires — Government of India Act (1935), S. 297 (1) and Sch. VII, List II, Items 27 and 29—The provisions relating to export and import contained in the Prohibition Act are intra vires of the Legislature. Fram Nusserwanji Balsara v. State of Bombay. 52 Bom L R 799 : ILR (1951) Bom 17 : 52 Cri L J 80 : AIR 1951 Bom 210 (217) (Pt C) (Pr 17) (FB).

[Reversed in AIR 1951 S C 318.]

SECTION 13

■——S. 13—Offences under Ss. 65 and 66—Prosecution under—Burden of proof—State has to prove that prohibitions contained in Ss. 12 and 13 were infringed by accused and that medicinal preparation seized from accused is not unfit for use as intoxicating liquor — Scope of S. 24-A. See Prohibition — Bombay Prohibition Act (1949), S. 65. (1962) 1 Cri L J 512 : AIR 1962 S C 579.

■——Ss. 13 (b) and 66 (b)—Accused charged under S. 66 (b) — Burden of proof — Statute once declared unconstitutional by Supreme Court was not again to be shown unconstitutional in every case — Balsara's case does not engraft proviso to S. 13 (b) and thus cast onus on the accused — (Constitution of India, Arts. 13 and 141) — (Evidence Act (1872), S. 105)—(Interpretation of Statutes — Statute declared void—Effect).

The effect of the declaration in Balsara's case, AIR 1951 SC 318, that Cl. (b) of S. 13 of the Bombay Prohibition Act is void under Art. 13(1) of the Constitution in so far as it affects the consumption or use of liquid medicinal or toilet preparations containing alcohol, is to render part of S. 13 (b) of the Bombay Prohibition Act inoperative, ineffective and ineffectual and thus unenforceable. The part of the section which has been declared void has no legal force so far as citizens are concerned and it cannot be recognized as valid law for determining the rights of citizens.

In other words, the ambit of the section stands narrowed down so far as its enforceability against citizens is concerned, and no notice can be taken of the part of the section struck down in a prosecution for contravention of the provisions of that section with the consequence that in prosecutions against citizens of India under S. 13 (b), the offence of contravention of the section can only be proved if it is established that they have used or consumed liquor or an intoxicant which is prohibited by that part of the section which has been declared valid and enforceable and without reference to its unenforceable part.

In a criminal case unless the prosecution proves a contravention of a provision that is legally enforceable and valid, it cannot succeed. No onus is cast on the accused to prove that his case falls under that part of the section which has been held unenforceable.

The bare circumstance that a citizen accused of an offence under S. 66(b) is smelling of alcohol is compatible both with his innocence as well as his guilt. It is a neutral circumstance. That being so it is the duty of the prosecution to prove that the alcohol of which he was smelling was such that it came within the category of prohibited alcohols and the onus is not discharged or shifted by merely proving a smell of alcohol.

The onus thus cast on the prosecution may be light or heavy according to the circumstances of each case. The intensity of the smell itself may be such that it may negative its being of a permissible variety. Expert evidence may prove that consumption in small doses of medicinal or other preparations permitted cannot produce the smell or a state of body or mind amounting to drunnkeness. Be that as it may, the question is one of fact, to be decided according to the circumstance of each case. It is open to the accused to prove in defence that what he consumed was not prohibited alcohol, but failure of the defence to prove it cannot lead to his conviction unless it is established to the satisfaction of the Judge by the prosecution that the case comes within the enforceable part of S. 13 (b), contravention of which alone, is made an offence under the provisions of S. 66 of the Bombay Prohibition Act. Criminal Appeal No. 1149 of 1952, dated 5th February, 1953 (Bom), Reversed. AIR 1952 Bom 327, Overruled.

The constitutional invalidity of a part of S. 13(b) of the Bombay Prohibition Act having been declared by the Supreme Court, that part of the section ceased to have any legal effect in judging cases of citizens and had to be regarded as null and void in determining whether a citizen was guilty of an offence. Article 141 of the Constitution declares that the law declared by the Supreme Court shall be binding on all Courts within the territory of India.

Once a statute is declared void under Art. 13(1) or 13(2) by the Supreme Court that declaration has the force of law, and the statute so declared void is no longer law qua persons whose fundamental rights are thus infringed.

In India once a law has been struck down as unconstitutional law by a Court, no notice can be taken of that law by any Court, and in every case an accused person need not start proving that the law is unconstitutional. The Court is not empowered to look

at that part of the law which has been declared as void and therefore there is no onus resting on the accused person to prove that the law that has already been declared unconstitutional is unconstitutional in that particular case as well. The Court has to take notice only of what the law of the land is, and convict the accused only if he contravenes the law of the land.

Balsara's case cannot be given effect to by engrafting an exception or proviso to S. 13(b) of the Bombay Act in the light of that decision and thus casting the onus of proving the exception on the accused person. The Court has no power to engraft an exception or a proviso on S. 13(b) of the Bombay Prohibition Act. The State has no power to make a law abridging fundamental rights and therefore there is no power to engraft an exception by taking something out of a law which cannot be enacted. It is therefore difficult to treat what was declared void in Balsara's case as an exception to S. 13(b) of the Bombay Prohibition Act and apply the rule enunciated in S. 105 of the Evidence Act to the case of the accused. The only correct approach to the subject is to ignore the part of the section declared void in Balsara's case and see if the prosecution has succeeded in bringing the offence home to the accused on the part of the section that remains good law.

The Bombay Act being an existing law, the declaration made by this Court in Balsara's case must be taken to have been made under Art. 13 (1). The Article does not in terms make the existing laws which are inconsistent with fundamental rights void ab initio or for all purposes. The declaration in Balsara's case, is that the prohibition contained in S. 13(b) against the consumption or use of one particular variety of liquid consisting of or containing alcohol, namely, liquid medicinal or toilet preparations containing alcohol imposes an unredsonable restriction on the exercise of a citizen's fundamental right under Art. 19 (1) (f) and is, therefore, unconstitutional and as such void to that extent. The result of it is that the prohibition of that part of S. 13(b) will be ineffective against and inapplicable to a citizen who consumes or uses liquid medicinal or toilet preparations containing alcohol. No part of the section is obliterated or scratched out from the statute book or in any way altered or amended, for that is not the function of the Court.

In short, the judicial declaration serves to provide a defence to a citizen who has consumed or used liquid medicinal or toilet preparations containing alcohol. Test the matter in this way. Suppose after the declaration a person is charged with an offence under S. 66(b) read with S. 13(b) and in such a case the prosecution proves that the accused has taken alcohol in some form or other, what is to happen if nothing further is proved by either party? Surely in such a situation a conviction must follow. If the accused person desires to avail himself of the benefit of the declaration in Balsara's case, surely he must prove first of all that he is a citizen. The onus of this clearly lies on the accused. He has to allege and prove not only that he is a citizen but that he has consumed or used liquid medicinal or toilet preparations containing alcohol and it is only on such proof that he can claim the benefit of the declaration of law made in Balsara's case and establish his defence. The very basis of that declaration is that a citizen has the fundamental right to consume or use liquid medicinal or toilet preparations containing alcohol and S. 13 (b) in so far as it prohibits such consumption or use imposes an unreasonable restriction on his fundamental right under Art. 19 (1)(f).

To say that after the declaration the offence has become limited to the consumption or use of prohibited liquor is to alter or amend the definition of liquor although it has been held to be valid. It is not within the competence of a Court to alter or amend a statute and the effect of the declaration made by the Supreme Court in Balsara's case is not to lift or take away or add anything out of or to the section at all. What it does is to declare, as a matter of law, that in a certain situation, namely, when liquid medicinal or toilet preparation containing alcohol are consumed or used, a certain part of S. 13(b), that is to say, that part of it which prohibits the consumption or use of liquid medicinal or toilet preparations containing alcohol, shall be void qua a particular class of persons, namely, citizens.

In other words the declaration in Balsara's case serves to provide a defence only to a citizen who has consumed or used liquid medicinal or toilet preparations. It is for the accused person, who seeks to ward off the applicability of the section to him by having resort to the declaration made in Balsara's case to establish the situations or circumstances on which that declaration is founded. In short a person who challenges the validity of the section on the ground of its unconstitutionality has the advantage of the declaration as a matter of law but the facts on which that declaration is based have nevertheless to be established in each particular case where the declaration is sought to be availed of.

There is no hardship whatever in this, for the requisite facts are within his special knowledge. To adopt the contrary view will be to ignore the sound principle well established in law that a judicial declaration of invalidity does not repeal, alter or amend a statute.

Since the declaration does not operate as an amendment of the section, it must be held that the declaration cannot be treated as having grafted an exception or proviso to S. 13(b).

It is not unusual in certain classes of cases or in certain circumstances to throw the onus of proof of a defence on the accused person. Section 105 of the Evidence Act is an instance in point. Section 114, Illus. (a) of the same Act is another provision to which reference may be made. Section 103 of this very Bombay Prohibition Act raises a very strong presumption of guilt and throws the burden on the accused to prove his innocence in certain cases, Behram Khurshid v. State of Bombay. **1954 Mad WN 985 : 1955 S C A 1 : 1955 Andh L T (Cri) 1 : 1954 Andh L J (W) S C 90 : 1955 Cri L J 215 : 1955 S C J 73 : (1955) 1 Mad L J (SC) 32 : 57 Bom L R 575 : 1955 Andh W R (SC) 32 : 1955 S C R 613 : AIR 1955 S C 123 (143, 144, 146, 147, 151, 153) (Pt A) (Prs 48, 49, 53, 54, 65 to 67).**

● **——S. 13 (b) — Validity.** See Prohibition—Bombay Prohibition Act (1949), Preamble. **AIR 1951 S C 318.**

——Ss. 13 (b) and 85 (1) (3)—'Found drunk'—Admission of consumption of liquor —Proof of intoxication —If necessary—(Criminal P. C. (1898), S. 255).

The accused came from Balaghat district which is not a prohibition district and got down from the bus at Tumsar. He was examined and the doctor opined that he had consumed liquor. He was prosecuted under Ss. 13 (b) and 85 (1) (3) of the Bombay Prohibition Act. In his examination the accused said 'I admit the offence. I was not creating trouble in the Ganj. I do not have any permit.' The Magistrate purported to convict the accused on a plea of guilty.

Held, that the accused intended to say that he was not intoxicated, that it was not enough to prove that accused had consumed liquor; that there should have been proof that he was intoxicated and that he could

not be convicted under S. 85 (1) (3). AIR 1956 Bom 163, Rel. on. 1961 Nag L J (Notes) 13 (Bom).

——Ss. 13, 12 and 24-A (as amended by Bombay Prohibition (Amendment) Act 26 of 1952)— Validity of S. 24-A—Amendment of Ss. 12 and 13 — Effect of S. C. decision in AIR 1951 S C 318—Interpretation of Statutes—Validity of statute—Duty of Court—Defects in drafting. See Prohibition — Bombay Prohibition Act (25 of 1949), S. 12. 1958 Cri L J 607 : AIR 1958 Bom 181 (DB).

——Ss. 13, 24-A. 6A, 59-A, 139 (d), 12 (as amended by Act 26 of 1952) — Bombay Spirituous Medicinal Preparations (Sales) Rules, 1954, Rr. 2, 3—Act, if imposes reasonable restrictions on consumption of spirituous medicinal preparations — Determination under S. 6-A—Effect—Tests for reasonableness — Act ultra vires due to incompetence of legislature and invalid due to inconsistency with Part III of Constitution—Effect—Validity of Act on latter ground has to be judged by subsequent amendments, notifications, etc. See Prohibition—Bombay Prohibition Act (1949), S. 24-A. 1958 Cri L J 607 : AIR 1958 Bom 181 (DB).

SECTION 17

——S. 17 (a)—Possession—Meaning of.

'Possession' must be conscious possession accompanied by the necessary mens rea or intention to possess and with intent to protect the possessed articles against others. AIR 1953 Sau 155, Foll. (1956) 9 Sau L R 226.

SECTION 21

——S. 21— Scope — Presumption under S. 103 (1)— Applicability to prosecution under S. 67—Special and general provisions—The provisions of S. 103(2) would apply to the prosecutions under S. 67 or 67-1A. See Prohibition — Bombay Prohibition Act (25 of 1949), S. 103 (1). 1958 Cr L J 1009 : AIR 1958 Bom 311 (DB).

——S. 21 (b) — Offence under — Presumption under S. 103 (2) not available — Duty of prosecution. See Prohibition — Bombay Prohibition Act (25 of 1949), S. 103 (2). 1958 Cri L J 1009 : AIR 1958 Bom 311 (DB).

SECTION 23

■ ——Ss. 23 and 24—If curtail right under Art. 19 (1) (a) of the Constitution — The provisions of sections 23 and 24 are invalid only to this extent— (i) Cl. (a) of S. 23, so far as it prohibits the commendation of any intoxicant or hemp. (ii) Cl. (b) of S. 23 in entirety. (iii) Cl. (a) of sub-s. (1) of S. 24, so far as it prohibits commendation of any intoxicant or hemp. See Prohibition—Bombay Prohibition Act (25 of 1949), Preamble. 52 Cr L J 1361 : AIR 1951 S C 318.

■ ——Ss. 23 (a) and (b) and 24 (1) (a)—Sections are ultra vires as offending against Art. 19 (1) (a) of Constitution, Fram Nusserwanji Balsara v. State of Bombay. 52 Bom L R 799 : ILR (1951) Bom 17 : 52 Cri L J 80 : AIR 1951 Bom 210 (221) (Pr 22) (FB).

SECTION 24

■ ——S. 24—If curtails rights under Art. 19 (i) (a) of the Constitution — The provisions of S. 23 (a) and S. 24 (1) (a) of the Act in so far as they refer to "commandation of" any intoxicant conflicts with the fundamental right guranteed by Art. 19 (i) (a) of the Constitution, namely, the right in freedom of speech and expression and the prohibition against "commending" any introxicant is curtailment of the rights guranteed and is not saved by Cl. (2) of Art. 19 of the Constitution. See Prohibition—Bombay Prohibition Act (1949), Preamble. 52 Cr L J 1361 : A I R 1951 S C 318.

SECTION 24-A

● ——Ss. 24-A, 66 (2), 66 (1) (b), 6-A. 85 (2) (as amended by Bombay Act 12 of 1959)—Trial for offence under S. 66 (1) (b)—Burden of proof—Burden when shifts to the accused — Effect of Ss. 6-A and 85 (2) — In a trial for an offence under S. 66 (1) (b), when the prosecution proves that the accused person consumed liquor and that the concentration of alcohol in his blood was more than 0·05 per cent, weight in volume the onus of proving that the liquor consumed was a medicinal preparation containg alcohol, the consumption of which did not contravene the Act or the rules made thereunder, shifts to the accused under S. 66 (2). See Prohibition —Bombay Prohibition Act (25 of 1949), S. 66 (2). (1965) 2 S C W R 538 : (1965) 3 S C R 358 : A I R 1966 S C 145.

● ——Ss. 24-A, 65, 66, 12, 13—Offences under Ss. 65 and 66—Prosecution under — Burden of proof—State has to prove that prohibitions contained in Ss. 12 and 13 were infringed by accused and that medicinal preparation seized from accused is not unfit for use as intoxicating liquor—Scope of S. 24-A indicated. See Prohibition — Bombay Prohibition Act (25 of 1949), S. 65. 1962 (1) Cri L J 512 : AIR 1962 S C 579.

——S. 24-A—"Fit to be used as an intoxicant"—Meaning—Medicinal preparation containing alcohol Tests to determine its intoxicating capacity.

The expression "fit to be used as an introxicant' means that it must be a liquor which is capable of causing intoxication, or liquor which has the property of causing intoxication. It is not the low or high percentage of alcohol contained in the medicinal preparation, or the smaller or larger quantity which is required to be taken in order to produce intoxication, that provides the proper criterion for determining whether the preparation is fit for being used as an intoxicating liquor. The true test is the adaptability or suitability of the preparation for being used as a drink or used in the same manner in which a drink is used. It may contain a high or low percentage of alcohol; it may be taken in smaller or larger quantities but if it is capable of being adapted to be used as a drink or to be a substitute for the drink and capable of being used for purpose of beverage, then it will be a preparation which is fit for use as an intoxicating liquor. 59 BLR 786 (referring to (1943) 1 K B 17) Rel. on., 64 B L R 260, Expl.; 64 BLR 303, Dist. (1964) 66 Bom L R 362 : 1964 Mah L J 401 : ILR (1964) Bom 663 (DB).

——S. 24-A — Nature of—Charge against accused for being in possession of prohibited liquor — Burden of proof — Onus to prove that seized liquid does not fall underS. 24-A is on prosecution and not accused. AIR 1962 S C 579, Foll. 1952 Nag L J 616 : 64 Bom L R 303 : 1962 (2) Cri L J 466 : I L R (1962) Bom 472 : AIR 1962 Bom 229 (231, 233) (Pt A) (Prs 4, 8) (DB).

——Ss. 24-A and 129-B — Prohibition case - Certificate of medical expert as to contents of preparation seized — Value of—The certificate of the Principal of a Medical College giving opinion as to the contents of a liquid seized in a prohibition case under the Bombay Prohibition Act, without more, not being evidence and S. 510 of the Code of Criminal Procedure or S. 129-B of the Act, which contain special rules of evidence being inapplicable to such a certificate, no reliance can be placed by the prosecution thereon—The contents, therefore, of the certificate issued by the Principal of the Medical College cannot form the basis of a finding that the preparation is not a medicinal preparation. See Evidence Act (1872), S. 46. 1962 (2) Cri L J 466 : A I R 1962 Bom 229 (DB).

——Ss. 24-A, 65 (a), 6-A (6)—Fitness or otherwise of medicinal preparation as intoxicating liquor—Macni-

nery provided for purpose—State must refer question to Board of Experts — Court cannot convict person without opinion of Board. See Prohibition—Bombay Prohibition Act (25 of 1949), S. 65 (a). 1959 Cri L J 579 : AIR 1959 Bom 199 (DB).

——Ss. 24-A, 12 and 13 (as amended by Bombay Prohibition (Amendment) Act 26 of 1952) — Validity of S. 24 A —Amendment of Ss. 12 and 13 — Effect of decision in A I R 1951 S C 318 — Interpretation of Statutes — Validity of statute — Duty of Court—Defects in drafting. See Prohibition — Bombay Prohibition Act (25 of 1949), S. 12. 1958 Cri L J 607 : AIR 1958 Bom 181 (DB).

——S. 24-A (as amended by Act 26 of 1952) — Bombay Spirituous Medicinal Preparations (Sales) Rules, 1954, Rr. 2, 3—S. 59-A—Scope and effect and S. 139 (d).

When a Legislature imposes restrictions upon the fundamental rights of a citizen, the Court must not judge these restrictions by any absolute standard. Whether the restrictions are reasonable or not must largely depend upon what is the object the Legislature is seeking to achieve by legislation and what is the mischief it is aiming at. If the restrictions are necessary and essential in order to achieve the object and to remove the mischief, then ordinarily the Court must uphold those restrictions. Personal freedom and rights of the individual must be circumscribed by what the Legislature considers to be in the interests of the general public.

A legislation may be struck down if it violates or contravenes any provision of the Constitution. As regards the fundamental rights it is always open to a person, to challenge even a competent legislation on the ground that it violates his fundamental right.

But a distinction between a law which is bad on the ground that it is ultra vires of the Legislature and a law which is invalid as contravening fundamental rights is vital and fundamental. In the first case the law is a nullity, is bad from its inception, and nothing can be done to cure that law. In the second case, the position is different. Where the law is passed by a competent Legislature but which may contravene fundamental rights, the law may still be good in case of those fundamental rights which are only guaranteed to citizens as regards non-citizens. A petitioner who comes to Court complaining of violation of his fundamental rights must satisfy the Court that at the date of the petition, the law is such as contravenes his fundamental rights.

Thus where Courts are dealing with a pre-Constitution or a post-Constitution Act, if the Act has been passed by a competent Legislature and the constitutional infirmity only arises by reason of the fact that it is inconsistent with Part III of the Constitution, to the extent of that inconsistency the Act is moribund and cannot be given effect to but if the provisions of the Act at any time cease to be inconsistent with the fundamental rights, then it becomes revived or revitalised and can have full force and effect. (1956) 1 Mad L J (SC) 37, Rel. on. (1955) 1 M L J (SC) 732 held impliedly overruled by A I R 1955 S C 781 on this point.

The Amending Bombay Act (26 of 1952), assuming that it was inconsistent with Part III of the Constitution, was not a dead letter, and if subsequently the rules and notifications brought the law into line with the fundamental rights embodied in Part III, then what the Courts have to look at is not the Act as originally passed but the Act with the rules and notifications which were in operation at the date when the petition was filed. Therefore, what the petitioners who challenged the validity have got to establish in order to succeed is not that Act (26 of 1952) violated fundamental rights, but that the Act in conjunction with the rules and notifications violated their fundamental rights at the date when they presented the petition.

The Act even read by itself is not inconsistent with any of the provisions of Part III of the Constitution.

It cannot be seriously urged that the Act and the rules taken together constitute an unreasonable restriction upon the fundamental rights of the petitioners.

Issue of license by the Collector under R. 5 of the Rules, is not left to the subjective determination of the Collector whether he should or should not issue a licence and he must be objectively satisfied that there is some objection which should disentitle the applicant from a licence being granted to him. Inasmuch as a right of appeal is provided against the decision of the Collector the Collector should state his reasons for refusing a licence in writing so that the appellate authority should be in a position to consider his reasons. When a right of appeal is provided against the decision of the Collector, it cannot possibly be urged that his decision is uncontrolled or untrammelled or absolute. Looking to the circumstances of the case and the object to be achieved by this Act, the restrictions imposed by the rules are reasonable.

It is immaterial whether irrelevant circumstances were taken into consideration or even that the decision of the Government was not properly arrived at, because assuming the presumption under S 6-A, does not arise, it is for the Courts on the record to determine whether the particular preparation they are dealing with was or was not fit for use as intoxicating liquor. 59 Bom L R 786 : I L R (1958) Bom 128 : 1958 Cri L J 607 : A I R 1958 Bom 181 (186, 187, 189, 190, 191) (Pt B) (Prs 9, 11, 13, 14, 15, 16, 18) (DB).

——S. 24-A (as amended by Act 26 of 1952)—'Fit for use as intoxicating liquor'—Meaning of.

The proper construction to place upon the expression 'for use as intoxicating liquor' in S. 24-A is that it must be a liquor which is capable of causing intoxication or a liquor which has the property of causing intoxication. 59 Bom L R 786 : I L R (1958) Bom 128 : 1958 Cri L J 607 : A I R 1958 Bom 181 (190, 191) (Pt C) (Prs 17, 18) (DB).

——Ss. 24 A (2) and 25 — Constitution of India, Art. 226—Nature and scope of High Court's power—Order under Bombay Prohibition Act requiring permission for preparation of article — Party claiming exemption must adduce some evidence to lead Court to belief that article is an exempted item under S. 24A (2) of that Act. See Constitution of India, Art. 226. AIR 1955 NUC (Bom) 4477 (DB).

——S. 24-A—Report of Chemical Examiner in prohibition case—Value of—Report stating that contents of sample bottle were alcohol and not recognizable medicinal or toilet preparation — Court can arrive at its conclusion on basis of report. See Criminal P. C. (1898), S. 510 (1). 1963 (1) Cri L J 533 (Guj).

——S. 24-A—Prosecution of accused for being in possion of liquor—No plea by accused that Prohibition Act does not apply to article in his possession — Still the prosecution must prove that the article with the accused is one to which Ss. 12 and 13 apply and that it is not one to which S. 24-A applies—S. 24-A is in substance, not an exception but it only takes out certain preparations from the prohibition contained in Ss. 12 and 13 AIR 1962 S C 579, Rel. on. I L R (1963) Guj 1197.

SECTION 31

——S. 31—Scope of.

Section 31 is procedural only; it cannot be read as embodying any prohibition against the manufacture,

export, import, transport, sale, possession consumption or use of liquor. AIR 1956 Bom 304 (310) (Pt C) (Pr 12).

SECTION 39

● —S. 39 — Whether contravenes Constitution of India, Art. 14.

There is nothing wrong prima facie in the legislature according special treatment to persons of the armed forces who form a class by themselves in many respects and who have been treated as such in various enactments and statutory provisions. Hence, S. 39, in so far as it affects the military and naval messes and canteens, warships and troopships, cannot be held to be invalid on the ground that it contravenes Art. 14 of the Constitution. AIR 1951 Bom 210 (FB), Reversed. State of Bombay v. F. N. Balsara. 1951 S C J 478 : 1951-2 M L J 141 : 52 Cri L J 1361 : 53 Bom L R 982 : 1951 S C R 682 : AIR 1951 S C 318 (327) (Pt H) (Pr 21).

● —S. 39 — Scope—If void as being in contravention of the Constitution.

The classification sought to be made and the special privileges conferred by S. 39 of the Prohibition Act in favour of cargo boats, warships, troopships, military and naval messes and canteens cannot be supported by either logic or reason and the distinction is unjustified. The classification offends against Art. 14 of the Constitution and is void. Fram Nusserwanji Balsara v. State of Bombay. ILR (1951) Bom 17 : 52 Cri L J 80 : 52 Bom L R 799 : AIR 1951 Bom 210 (218) (Pt F) (Pr 19) (FB).

[Reversed in AIR 1951 SC 318.]

SECTION 40

● —S. 40 — Word "Addict" in medical certificate required under rules framed should be replaced by words used in S. 40 (1) (b) or words corresponding to them. State of Bombay v. F. N. Balsara. 1951 S C J 478 : 1951-2 M L J 141 : 52 Cri L J 1361 : 53 Bom L R 982 : 1951 S C R 682 : AIR 1951 S C 318 (331) (Pt J) (Pr 31).

● —S. 40 (c)—Classification of foreigners does not offend against Art. 14 of Constitution. Fram Nusserwanji v. State of Bombay, AIR 1951 Bom 210 (219) (Pt G) (Pr 20) (FB).

● —S. 40 —Medical certificate—Form of.

Insistence upon a medical certificate in the form of a declaration that a person is an addict is not at all warranted by the provisions of the Act. The authority which issues permits has only to be satisfied that the conditions laid down in S. 40 (1) (b) are satisfied. It cannot in any way add to their conditions. Fram Nusserwanji v. State of Bombay, AIR 1951 Bom 210 (224) (Pt N) (Pr 26) (FB).

SECTION 52

● —Ss. 52, 53 and 139 (c) — If constitute delegation of legislative power—Sections 52, 53 and 139 (c) of the Act cannot be attacked on the ground that they constitute "delegation of legislative power" — A Legislature while legislating cannot foresee and provide for all future contingencies and Ss. 52, 53 and 139 (c) do no more than enable the duly authorised officer to meet contingencies and deal with various situations as they arise. See Government of India Act (1935), S. 297, Sch. VII, List I, Entry 19 and List II, Entry 31. 52 Cri L J 1361 : AIR 1951 S C 318.

[AIR 1951 Bom 210 Reversed.]

● —Ss. 52, 53 and 139 (c) — Scope — If void as amounting to delegation of legislative functions to Government.

Sections 52, 53 and 139 (c) of the Bombay Prohibition Act are, to the extent that they empower the Government to vary or substitute any of the conditions provided by the Act for licences, permits, passes or authorisations granted under the Act, void on the ground that they constitute delegation of legislative powers. 52 Bom L R 571, Ref Fram Nusserwanji Balsara v. State of Bombay. ILR (1951) Bom 17 : 52 Cri L J 80 : 52 Bom L R 799 : A I R 1951 Bom 210 (220, 223, 224) (Pt M) (Prs 20, 25) (FB).

[Reversed in AIR 1951 SC 318.]

SECTION 53

● —Ss. 53, 52 and 139 (c) — If constitute delegation of legislative power — A legislature while legislating cannot foresee and provide for all further contingencies and Ss. 52, 53 and 139 (c) do no more than enable the duly authorised officer to meet contingencies and deal with various situations as they arise. See Govt. of India Act (1935), S. 297. 52 Cri L J 1361 : AIR 1951 S C 318.

● —Ss. 53, 52 and 139 (c) — Scope — If void as amounting to delegation of legislative functions to Government—Ss. 52, 53 and 139 (c) of the Act are, to the extent that they empower the Government to vary or substitute any of the conditions provided by the Act for licences, permits, passes or authorisations granted under the Act, void on the ground that they constitute delegation of legislative powers. See Prohibition—Bombay Prohibition Act (1949), S. 52. 52 Cri L J 80 : AIR 1951 Bom 210 (FB).

[Reversed in AIR 1951 SC 318.]

● —S. 53, Proviso—Proviso is ultra vires as offending against Art. 19 (1) (a) of Constitution. Fram Nusserwanji v. State of Bombay, AIR 1951 Bom 210 (221) (Pt I) (Pr 22) (FB).

[Reversed in AIR 1951 SC 318.]

—Ss. 53, 143 — Gujarat Denatutured Spirituous Preparation Rules (1962), R. 37—Validity—R. 37 is invalid under Arts. 301, 304 and 19. See Constitution of India, Art. 301. AIR 1964 Guj 59 (DB).

SECTION 59-A

—Ss. 59A, 24A, 6A, 139 (d), 12, 13 (as amended by Act 26 of 1952)—Scope and effect—Bombay Spirituous Medicinal Preparations (Sales) Rules, 1954, Rr. 2, 3 — Act if imposes reasonable restrictions on consumption of spirituous medicinal preparations—Determination under S. 6-A—Effect—Tests for reasonableness —Act ultra vires due to incompetence of legislature and invalid due to inconsistency with Part III of Constitution—Effect—Validity of Act on latter ground has to be judged by subsequent amendments, notifications etc. See Prohibition—Bombay Prohibition Act (25 of 1949), S. 24-A. 1958 Cri L J 607 : AIR 1958 Bom 181 (DB).

SECTION 59-C

—S. 59-C—Constitution of India, Arts. 301, 304—Scope—Restrictions, freedom from which is guaranteed by Article 301 must directly and immediately restrict or impede free flow or movement of trade—Sections 59C, 59D and 2 (10a) of the Bombay Prohibition Act do not violate Article 301—Further regulating trade in articles such as French polish and Varnish is not impeding or obstructing trade. See Constitution of India, Art. 301. AIR 1964 Guj 59 (DB).

——Ch. IV-B (S. 59-C)—Intoxicating liquors—Meaning of — Must include all preparations made from alochol whether denatured or not—French Polish and Varnish fall within the expression. See Constitution of India, Seventh Amendment, Sch. II, List, Entry 8. AIR 1964 Guj 59 (DB).

——Chap. IV-B, (S. 59C) — Application for wholesaler's licence—Rejection on ground that there were adequate licences—Rejection improper.

After Gujarat Denatured Spirituous Preparations Rules (1962) were brought into force, the petitioner made an applicalion required under the said rules for an import pass and a wholesalers' licence to the Prohibition Excise Sub-Inspector, Surat. The authority alleged that in Surat city and Surat District, there were adequate licences to sell and manufacture French Polish and therefore, it was not necessary to issue licences for sale of wholesale imported French Polish and that for that reason, the petitioner's aforesaid application was rejected.

Held, that the ground given, if at all it could be considered to be a ground, was totally extraneous and not germane to Chapter IV-B of the Bombay Prohibition Act or the aforesaid rules. There was nothing to indicate that the licensing authority had come to even a subjective satisfaction based even on such enquiry as he thought proper to make, that the petitioner was not a person against whom there could be no objection to grant the licence on the basis that he had any reasonable ground to believe or to come to a decision even on the subjective satisfactton, that the petitioner was likely to commit the abuse or the mischief aimed against by Chap. IV-B of the Act or was such as to defeat the purpose and object of the provisions of that chapter. To say that because an adequate number of licences was granted sufficient for reasonable use of the commodities and therefore there was no more any necessity of granting licences to anyone also must entail an unreasonable result, for, it would bar totally anyone entering the trade, prevent competitive business in these commodities and create an exclusive monopoly in favour of those to whom the licensing authority had been pleased to grant the first licences. That being so, the order passed by the licensing authority was not in accordance with the provisions of the Act and was, therefore, ultra vires. The order of rejection passed by the licensing authority must consequently be held to be bad in law. (1963) 4 Guj L R 1033 : ILR (1964) Guj 96 : AIR 1964 Guj 59 (80) (Pt J) (Pr 39) (DB).

SECTION 59-D

——S. 59-D—Constitution of India, Arts. 301, 304—Scope—Restrictions, freedom from which is guaranteed by Article 301 must directly and immediately restrict or impede free flow or movement of trade—Sections 59C, 59D and 2 (10a) of the Bombay Prohibition Act do not violate Article 301—Further regulating trade in articles such as French polish and Varnish is not impeding or obstructing trade. See Constitution of India, Art. 301. AIR 1964 Guj 59 (DB).

SECTION 65

——Ss. 65, 66, 12, 13 and 24-A — Offence under Ss. 65 and 66—Prosecution under—Burden of proof on the State—State has to prove that prohibitions contained in Ss. 12 and 13 were infringed by accused and that medicinal preparation seized from accused is not unfit for use as intoxicating liquor—Scope of S. 24-A indicated. Criminal Revn. Appln. No. 1485 of 1958, dated 9-1-1959 (Bom) Reversed. State of Bombay v. Narandas Mangilal Agarwal, 64 Bom L R 260 : 1962 Nag L J 333 : 1962 (1) Cri L J 512 : 1962 S C D 305 : 1962 Mad L J (Cri) 649 : (1962) 2 S C J 542 : 1962 Supp (1) S C R 15 : AIR 1962 S C 579 (582) (Pt A) (Pr 7).

——Ss. 65, 66 and 11 — Offence of importing and possessing Ayurvedic medicinal preparation 'Mrugmadasava' containing more than prescribed quantity of alcohol—Fact that the preparation was imported under a permit issued by Government of Bhopal on payment of excise duty cannot protect accused from liability to prosecution for infringement of provisions of Act within Bombay State — Accused pleading that importation of article was lawful in view of licence issued under S. 11 — Burden lies on accused to prove his allegation by production of license — If license is not produced such defence is not available. See Prohibition—Bombay Prohibition Act (25 of 1949), S. 11. 1962 (1) Cri L J 512 : AIR 1962 S C 579.

——Ss. 65 (f) and 103—Criminal P. C. (1898), S. 342—Elaborate working still with other contrabands recovered on search from premises of appellant — Presumption under S. 103, use of, for conviction under S. 65 (f) — Failure to put specific questions under S. 342 about still—Appellant whether prejudiced.

Where an elaborate working still with other utensils and implements used in the manufacture of intoxicants was found on search in premises of appellant and the appellant, when examined under S. 342, Cr. P. C., volunteered the statement that he did not know about the various contrabands seized by the police, the Court can rely upon the presumption which arises under S. 103 for convicting appellant under S. 65 (f). The failure of the Magistrate to put to him any specific questions under S. 342 to explain the possession of the still and the various other articles fouud in the premises occupied by him cannot be said to have caused any prejudice to the appellant. Keki Bejonji v. State of Bombay, 1961 (2) Cri L J 37 : AIR 1961 S C 967 (969) (Prs 6, 8, 9).

——Ss. 65 (a), 66 (b)—Scope of—Bottles of foreign liquor found in luggage in exclusive control of servant—No proof of knowledge on part of owner—Conviction on circumstantial evidence—Owner held not guilty. Privisinghji Bhimsinghji v. State of Bombay, (Now Rajasthan). (1960) 1 Ker L R 620 : 1960 Cri L J 672 : AIR 1960 S C 483 (486) (Pr 11).

——S. 65 — Offence under S. 65 tried as summons case — Trial vitiated. See Criminal P. C. (1898), S. 251-A. 1962 (2) Cri L J 597 : AIR 1962 Bom 258 (DB).

——Ss. 65 (c) and (f) — Testimony of witnesses — Panch witnesses not supporting prosecution — Conviction on evidence of Head Constable not illegal—(Criminal trial—Appreciation of evidence).

On information received by the Task Force of the Prohibition Department, the accused was arrested at the spot while running a still. Articles were seized under a Panchanama attested by two Panchas. At the trial for offence under S. 65 (b), (c) and (f) of the Prohibition Act, the Panch witnesses admitted that the Panchanama was made at the spot, but stated that the accused was not caught at the spot. The liquid found was certified to be liquor. It was contended that since the Panch witnesses did not support the prosecution case, the accused could not be convicted on the sole testimony of the Head Constable who was a Police Officer and interested in securing conviction.

Held, that universal proposition of law for appreciation of evidence in a criminal trial that the evidence of a Police Officer can never be the basis of conviction, cannot be laid down. Conviction based on such evidence is not illegal. AIR 1951 Bom 468, Dist. 1962 Nag L J (Notes) 17 (Bom).

——S. 65 (ii) and (iii) — Enhanced punishment — Previous offence must be under the Act itself and not under any other Act.

The offences contemplated under sub-clauses (i), (ii) and (iii) of S. 65 are offences under the Bombay

Prohibition Act, 1949, and not under any other Act or law. The previous convictions of the accused under any other Act cannot, therefore be taken into consideration for the purposes of enhanced penalty under Cls. (ii) and (iii) of S. 65. (1961) 63 Bom L R 749 : 1960 Nag L J 788 : ILR (1961) Bom 231.

——S. 65 (b)—Proof.

Merely sitting near a bhatti burning in a public place without there being any further evidence or circumstance to connect accused with the bhatti can hardly be said to be sufficient evidence to hold that the accused was manufacturing liquor by working that bhatti. 1960 Nag L J (Notes) 112 (Bom).

——Ss. 65 (a), 24A, 6A (6) — Fitness or otherwise of medicinal preparation as intoxicating liquor — Opinion of Board of Experts — Necessity for conviction-

A mere alcoholic content of a substance is not an absolute or unerring criterion of its fitness or unfitness for use as intoxicating liquor. When the Legislature put S. 24-A on the statutes book it became necessary to provide for a machinery for the determination of fitness or otherwise of a medicinal preparation for use as intoxicating liquor, and the Legislature itself provided for that machinery. That provision is made in S. 6-A of the Act.

When the Legislature expressly provides for a machinery for a certain purposes, it cannot be validly contended that the said purpose may be fulfilled in some other way. When a question arises whether a medicinal preparation is fit or unfit for use as intoxicating liquor, it is not left to the option of the State to determine that question in any manner which is considered appropriate by it. It must adopt the method provided by the Act in that behalf in S. 6-A and must refer the matter to the Board of Experts, consider the advice tendered by the Board and then in the light of that advice decide whether the article is fit or unfit for use as intoxicating liquor and this satisfaction under the Act is to be reached only upon a consideration of the advice tendered to the State by the Board of Experts. The prosecution launched without consulting the Board of Experts is, therefore, invalid. 60 Bom L R 1183: ILR (1958) Bom 1224 : 1959 Cr L J 579 : A I R 1959 Bom 199 (200, 201) (Pr 8) (DB).

[Overruled in AIR 1962 S C 759.]

——Ss. 65 (b), (f), 66 (b) — Criminal P. C. (1898), S. 35 — Accused tried at one trial for offences under — Conviction — Separate sentences for each offence if can be passed — Penal Code (1860), S. 71. See Criminal P. C. (1898), S. 35. A I R 1951 Bom 244 (DB).

——S. 65 (b) — General principles as to punishments —Though the Magistrates have a discretion to inflict less than the minimum sentences, under S. 65, Bom. Prohibition Act that discretion has to be exercised in the manner prescribed by that section and for special and adequate reasons only. To inflict less than the minimum sentence on grounds which are transparently untenable may amount to evasion of law. The question as to what are adequate and special reasons, has to be determined with reference to the facts of each case and it is the duty of the Magistrates to consider very carefully the question of sentence in each case and satisfy themselves that there are genuinely adequate and special reasons calling for a lenient treatment of the offender. The fact that the accused is a first offender is no reason for inflicting less than the minimum punishment. Poverty alone is also no ground for imposing less punishment. A I R 1955 N U C (Sau) 526 (DB).

SECTION 66

SYNOPSIS

(Prohibition—Bombay Prohibition Act (1949), S. 66.)

1. Applicability.
2. Prohibited liquor.
3. Possession of article.
4. "Mere drinking liquor"—"Consume".
5. Evidence.
6. Report of Chemical Examiner.
7. Burden of proof.
8. Jurisdiction of Magistrate.
9. Punishment.
10. Interference.

1. Applicability.

——Ss. 66 :(1) (b) and (2), 129-A and 129-B— Scheme of — Trial of offence under S. 66 (1) (b)— Report of Chemical Examiner in cases not covered by S. 129 A—Admiasibility in evidence under S. 510 Criminal P. C.—Ss. 129 A and 120-B how for repugnant to provisions of S. 510, Criminal P. C.— Constitution of India, Article 254 (2), Sch. VII, List III, Entries 2 and 12—Criminal P. C. (1898), S. 510

Per Majority (K. C. Das Gupta J., dissenting):—On an analysis of Ss. 129-A and 129-B, it is clear that the Legislature has provided in the first instance for compelling persons suspected of consuming intoxicants to be produced and to submit themselves for examination and extraction of blood. The Legislature has made the certificate of the examination under S. 129-A, sub-ss. (1) and (2) admissible without formal proof; but by sub-s. (8) of S. 129-A, the adoption of any other method of collection of evidence for proving that a person accused has consumed an intoxicant is not precluded and a report of any registered medical practitioner which tends to establish that fact in respect of matters specified in Cl. (b) of S. 129-B is also made admissible. On that view of Ss. 129-A and 129-B, there is no warrant for assuming that it was intended thereby to exclude in trials for offences under S. 66 (1) (b) of the Act the operation of S. 510 of the Code of Criminal Procedure. It is open to the prosecution to rely in corroboration of a charge of consumption of illicit liquor upon a certificate under Cl. (a) of S. 129-B if it is obtained in the manner prescribed by S. 129-A, and also to rely upon the report of a registered medical practitioner in respect of any person examined by him or upon any matter or thing duly submitted to him for examination or analysis and report. It is also open to the prosecution to rely upon report of the Chemical Examiner in cases not covered by S. 129-A as provided under S. 510, of the Code of Criminal Procedure.

The Code of Criminal Procedure was a law in force immediately before the commencement of the Constitution and by virtue of Art. 254 (2) legislation by a State Legislature with respect to any of the matters enumerated in the Third List repugnant to an earlier law made by Parliament or an existing law with respect to that matter if it has been reserved for the consideration of the President and has received his assent prevails in the State. Bombay Act 12 of 1959 was reserved for the consideration of the President and has received his assent; Ss. 129-A and 129-B will prevail in the State of Bombay to the extent of inconsistency with the Code, but no more.

Report of the Chemical Examiner in respect of blood collected in the course of investigation of an offence under the Bombay Prohibition Act, otherwise than in the manner set out in S. 129-A cannot be used as evidence in the case. To that extent S. 510 of the Code is superseded by S. 129-B. But the report of the Chemical Examiner relating to the examination of

blood of an accused person collected at a time when no investigation was pending or at the instance not of a Police Officer or a Prohibition Officer remains admissible under S. 510 of the Code.

Per Das Gupta J.—On a consideration of S. 66 (2) together with S. 129-A, it is clear that where the procedure laid down in S. 129-A was not followed for testing of the blood, the prosecution cannot get the benefit of S. 66(2) of the Prohibition Act. Ukha Kolhe v. The State of Maharashtra. 1963 (2) Cri L J 418 : (1963) 2 S C W R 46 : 65 Bom L R 793 : (1964) 1 S C A 76 : 1964 Mah L J 246 : (1964) 1 S C R 926 : AIR 1963 S C 1531 (1541, 1546, 1547) (Pt B) (Prs 19, 20, 40, 44, 45).

——Ss. 66 (1) (b) and 66-A — Accused wrongly convicted of offence under S. 66 (1) (b) for possession of opium though opium was excluded from the term "intoxicant" as occurring in the section by Amendment Act, 22 of 1960—Conviction not maintainable in view of amendment by Act 22 of 1960 — Request by State for retrial under S. 66-A (which was the proper section) not granted (Parliament has passed the Indian Opium Laws (Amendment) Act, 1957 raising the punishment for opium offences to three years with or without fine). 1964 Mah L J (Notes) 90.

——S. 66 (1) (b) — Raid and seizure under Bombay Prohibition Act in State of Bombay before bifurcation —Report of Chemical Examiner of Bombay State—Subsequent bifurcation of Bombay State—Offence registered in State of Gujarat—Accused charged in State of Gujarat—Report of Chemical Examiner is admissible even though at the time he was attached to State of Maharashtra – Case in S. 92 (3) of Bombay Reorganisation Act includes proceedings started by raid — Prosecution held commenced when raid took place. See Criminal P. C. (1898), S. 510 (1). 1963 (1) Cri L J 533 (Guj).

——Ss. 66 (1) (b) & 85 (1) (i) and (iii)—Offences under —Distinction—Person found drunk in a public place—Conviction under S. 66 (1) (b) by drawing a presumption under S. 114 Evidence Act—Permissibility.

There is a distinction between offences under Ss. 85 (1) (i) or (iii) and S. 66 (1) (b) of the Bombay Prohibition Act for there is a distinction between the act of consuming and the fact of the man having been found drunk and while under S. 66 (1) (b), the act of consuming has been made an offence under S. 85 (1) the fact of a man having been found drunk and incapable of taking care of himself in any street, thoroughfare or public place, has been made a distinct offence. Consequently where a man has been found to be drunk in a public place in such a condition that he is unable to take care of himself, he cannot be convicted under S. 66 (1) (b) by drawing a presumption under S. 114 of the Evidence Act namely that he must have consumed liquor at the very place where he was found by the police, regard being had to the common course of natural events. This is not permissible because not only the Prohibition Act does not provide for any such presumption but it does not throw the burden upon the accused to prove that he drunk liquor at a place other than the place where he was found intoxicated. Besides, there is nothing like the common course of natural events as contemplated by section 114 of the Evidence Act for a person found intoxicated at one particular place to have of necessty consumed liquor at the very same place. (1962) 3 Guj L R 409.

——S. 66 (b) — Person drinking eau-de-cologne commits offence. 1953 Cri L J 1521 : AIR 1953 Sau 161 (162) (Pt B) (Pr 6) (DB).

——Ss. 66 (b), 84—Alteration of conviction — Criminal P. C. (1898), S. 423.

The offence under S. 66 (b) is more grave than under S. 84 and before altering the conviction from one under S. 84 to one under S. 66 (b) opportunity ought to be given to the accused to meet the charge for it may be that he may have a valid delence to that charge. ('51) 4 Sau L R 67 (68) (DB).

2. Prohibited liquor.

——S. 66 (b)—Onus—Prosecution need not prove that liquor taken was probibited liquor—It is for accused to show that it was medicated liquor.

All that the prosecution has to prove for bringing home a charge under S. 66 (b) to an accused person is that he has drunk liquor in contravention of a permit, pass, license or authorisation. Once that burden is discharged by the prosecution, i. e., once it is proved by the prosecution that a person has drunk or consumed liquor without a permit, it is for that person to show that the liquor drunk by him was not prohibited liquor, but was alcohol or liquor which he is permitted by law to take, e. g, medicated alcohol. The prosecution is not to discharge the burden of the accused, and if in answer to a charge of drinking liquor without a permit the accused suggests that the liquor was drunk by him was not liquor in a prohibited form or was alcohol in a medicated form, he must show it. The prosecution cannot possibly prove that no form of medicated alcohol was taken by the accused. 54 Bom L R 325 : (1951) 21 Bom Cr C 329: ILR (1952) Bom 979 : AIR 1952 Bom 327 (328, 329) (Pt B) (Prs 6, 8) (DB).

[Overruled in AIR 1955 S C 123].

——Ss. 66 (b) and 2 (24) (as applied to Saurashtra) —Liquid seized according to report of chemical analyser shown to be wine coming within first part of 'liquor' as defined in S. 2 (24) — Held, that the fact that liquid was prohibited liquor was conclusively established. See Prohibition — Bombay Prohibition Act (25 of 1949), S. 2 (24). AIR 1956 Sau 25.

——S. 66 (b)—Country liquor — Proof of.

Unless it is proved that the pot found in possession of the accused contained country liquor the conviction cannot be sustained. Where the question of the liquid in dispute being liquor or otherwise is vital to the prosecution, it is the duty of the Medical Officer to examine the liquid by applying the necessary tests and to give a definite opinion one way or the other, instead of giving inconclusive and indefinite opinion. Evidence that the liquor was red coloured and that it emitted a smell like that of liquor is inconclusive and it cannot be taken to mean that the liquid was definitely country liquor. ('51) 4 Sau L R 199 (200) (DB).

3. Possession of article.

● ——Ss. 66 (b) and 81—Possession of article — Evidence Act (1872), S. 3.

Where all that was suggested by the defence was that the articles found in the godowns were planted there by the Police but it was not said that the godown was accessible to all and the police might have kept the spirit there and the suggestion could not bear examination in view of the evidence, the Magistrate was justified in those circumstances in drawing the inference that these articles were in possession of the accused who was in possession of the godown and the Supreme Court would not disturb the decision. Vijendrajit Avodhya Prasad Goel v. State of Bombay. 1953 S C J 328 : 1953 Mad W N 552 : 1953 Cri L J 1097 : 1953 All W R (Sup) 70 : 1953 S C A 395 : AIR 1953 S C 247 (248) (P C) (Pr 4).

● ——Ss. 66 (b) 2 (22)—Possession of prohibited article —Where the rectified spirit found in possession of the accused was 94 A/V of ethyl alcohol it fell within the definition of intoxicant as given in

S. 2 (22), possession of which, without permit, is prohibited by S. 66 (b). See Prohibition—Bombay Prohibition Act (25 of 1949), S. 2 (22). 1952 Cri L J 1097 : AIR 1953 S C 247.

——Ss. 66 (b) and 103 — Presumption under—Extent of—No presumption about possession.

The presumption contained in S. 103 of the Act comes into operation only after a person is found to be in possession of an intoxicant of which he is unable to account satisfactorily. Such presumption cannot be used to infer the fact of possession. See Prohibition—Bombay Prohibition Act (25 of 1949), S. 103. (1960) 62 Bom L R 717.

——S. 66 (b) -Brandy and whisky found in room which was locked.— Accused's possession of key of room is prima facie evidence of his possession of room. 1956 Cri L J 495 : AIR 1956 Bom 225(226) (Pr 2).

——S. 66 (b)—Sentence—Conviction for second time.

Possession of 24 drams of liquor does not show that the accused was keeping in his possession some liquor for his own purpose to drink. It shows trafficking in liquor. It is not, therefore, a case in which there are any good reasons why the minimum sentence should not be imposed, (Sentence enhanced). 1956 Cri L J 488 (1) : AIR 1956 Bom 202 (203) (Prs 5, 6).

——Ss. 66 (1) (b)—Accused convicted for possessing liquor bottles—One of the bottles found with accused sent to Chemical Analyser for analysing of its contents — Report of Chemical Analyser received—No evidence taken to show that the report related to the bottle sent—Conviction held illegal. (1963) 4 Guj LR 1031 : ILR (1963) Guj 1020.

——S. 66 (b)—Possession must be conscious.

The mere fact that some liquid which came in possession of the accused in the natural course of events, underwent fermentation, he cannot be fixed with the knowledge that he had an intoxicant in his possession. (1956) 9 Sau L R 320.

——S. 66 (b) —Possession of senior member of family —He can be convicted only when prosecution proves by evidence that articles were in his possession — (Evidence Act (1872), S. 114). AIR 1955 NUC (Sau) 961 (DB).

——S. 66 (b) — Possession — Necessity of proof — Section 103 does not dispense with the proof of possession the burden of which lies on the prosecution—"Possession" in S. 103 is used in the same sense as "possession" in the offence under S. 66 (b) i. e. being conscious and intelligent. So when the accused is charged with the offence of possession of the article itself if the prosecution has proved the possession, the offence itself is proved and no question of any presumption under S. 103 can arise. AIR 1955 NUC (Sau) 961 (DB).

——S. 66 (b) — Possession, test of indicated — (Evidence Act (1872), Ss. 101 to 103).

In a case under S. 66 (b) it is necessary for the prosecution to show that not only the articles were found in the house of which two accused were in joint occupation but that they were aware of the existence of these articles and had the necessary animus or will to possess them. The prosecution has further to prove that the bottles were brought by both the respondents or that they were brought by one of them with the active consent and concurrence of the other. The question is one of fact depending upon circumstances of each case. AIR 1955 NUC (Sau) 961 (DB).

——S. 66 (b) — Possession — Meaning—Hired coolie carrying tin containing contraband article to station —Offence.

Possession made punishable under S. 66 (b) must be conscious and intelligent possession. It implies knowledge and there can be no possession when there is no knowledge on the part of the accused that he was carrying a contraband article. 5 Sau LR 78 : 1952 Cri L J 1757 : AIR 1953 Sau 6 (7) (Pr 2) (DB).

4. "Mere drinking liquor"—"Consume".

——S. 66 (b)—Mere drinking of liquor is offence.

The consumption of liquor is made punishable under S. 66 (b) and the widest and best known form of consuming liquor is to drink liquor. The "mere drinking of liquor" is also an offence under the Act. There is nothing in the language of S. 66 (b) or in the language of any other section in the Act to suggest that the term "consume" is used in the Act in the sense of use for commercial purposes or use on a large scale, and under S. 66 (b) an individual who consumes liquor on any scale whatsoever, small or large, without a permit, license, pass, etc., is liable to be punished. (1951) 21 Bom Cri C 329 : ILR (1952) Bom 979 : 54 Bom L R 325 : AIR 1952 Bom 327 (328) (Pt A) (Pr 4) (DB).

[Overruled on another point in AIR 1955 S C 123.]

——S. 66 (1) (b) —'Consume'—Meaning.

In the absence of definition of the word 'consume' in the Bombay Prohibition Act, the word must be attributed its literal meaning which is to drink or to otherwise use prohibited liquor. (1923) 2 K B 309, Rel. on. 1963 (2) Cri L J 273 : (1962) 3 Guj L R 409 : AIR 1963 Guj 234 (235, 236) (Pt G) (Pr 7) (DB).

5. Evidence.

● ——S. 66 (1) (b) and (2) (as amended by Bombay Act 12 of 1959)—Offence under S. 66 (1) (b)—Proof by prosecution about requisite alcohol concentration in blood of accused—Onus of proving that consumption of liquor was not in contravention of Act lies on accused — Discharge of onus — Statement of accused under S. 342, Criminal P. C. if sufficient.

In a prosecution under S. 66 (1) (b), Bombay Prohibition Act, it was proved that the accused's breath was smelling of liquor at the time of his arrest and that on examination of his blood it was found to contain 0.148 per cent. ethyl alcohol. The accused in his examination under S. 342, Criminal P. C., gave an explanation that he had not consumed prohibited alcohol but had taken 6 ounces of tincture of neem as he was used to it. The doctor who examined the accused also deposed that the consumption of 6 ounces of that substance would produce that amount of concentration of blood. The Courts below accepted the explanation of the accused and acquitted him holding that no offence was committed by him.

Held, that the explanation given by the accused in his statement under S. 342, Criminal P. C. of the cause of his smelling liquor and of the blood concentration was sufficient to discharge the onus placed on him under S. 66 (2) of the Act. The object of examination under S. 342, Criminal P. C., is to give the accused an opportunity to explain the case made against him. 1960 S C J 160 : 1960 Mad L J (Cr) 91 ; AIR 1960 S C 7, Disting. State of Maharashtra v. Laxman Jairam, 1962 Nag L J 747 : 1962 (2) Cri L J 284 : 1962 S C D 554 : (1963) 1 Andh L T 7 : (1963) 2 S C J 346 : 1963 Mad L J (Cri) 456 : (1962) Supp 3 S C R 230 : AIR 1962 S C 1204 (1205) (Pr 4).

● ——Ss. 66 (b) and 65 (a) — Scope of — Bottles of foreign liquor found in luggage — Luggage in exclusive control of servant — No proof of knowledge of their existence on the part of owner—Conviction on circumstantial evidence—Owner held not guilty. See Prohibition — Bombay Prohibition Act (25 of 1949), S. 65 (a). 1960 Cri L J 672 : AIR 1960 S C 483.

——Ss. 66 (2), 129 B—Court cannot refuse to consider evidence furnished by certificate of Chemical Ana-

lyser merely because it does not contain data or reasons for conclusion.

The Court cannot refuse to consider the evidence furnished by a certificate issued by a Chemical Analyser merely because it does not mention the data, on basis of which Chemical Analyser arrived at the percentage of alcohol mentioned in the certificate, or because he has not given the reasons for his conclusion. Without examining the Chemical Analyser the Court will not be justified in holding that the charge against the accused has not been proved merely because the certificate issued by the Chemical Analyser only mentions the percentage of the alcohol found in the blood of the accused and does not give any other particulars. AIR 1961 Guj 120, Dissented from. 64 Bom L R 451 : 1962 Nag L J 504 : I L R (1962) Bom 493 : 1963 (1) Cr L J 567: AIR 1963 Bom 68 (69) (Pr 3) (DB).

——S. 66 (1) (b) — Hydrometer test cannot conclusively establish illicitly distilled liquor — Conviction on evidence of smelling alone not justified. See Prohibition—Bombay Prohibition Act (1949), S. 2 (24). 1962 Nag L J (Notes) 26.

——Ss. 66 (1) (b) — Bombay Prohibition (Medical Examination and Blood Test) Rules, R. 4 (2)—Blood test—Proof—Legal evidence.

There must be legal evidence to connect the report of the Chemical Analyser tendered in his case with the blood taken out of the body of the accused on that day. From the report of the Chemical Analyser it appeared that the phial containing the blood was sent by Police constable No. 494. The doctor who took the blood out of the body of the accused did not say that he had handed over the phial to the Police constable. Police constable No. 494 was not examined. Held, that there was no clear proof that the report received in Court was the report on analysis of the blood taken out by the doctor on the particular day from the body of the accused. 1961 Nag L J (Notes) 47 (Bom).

——S. 66 (1) (b)—Blood test—Proof.

It is necessary for the prosecution to establish that the report which is received in Court is the report on analysing the blood taken out from the body of the accused on the day of the alleged offence. The evidence of the Doctor was that he took out blood from the body of the accused, collected it in a bottle, sealed the bottle and handed it over to the Police. There was no evidence that the Police after getting the bottle sent it to the chemical analyser.

Held, that it was not possible to sustain conviction of the accused under S. 66 (1) (b) of the Bombay Prohibition Act on the above evidence. 1961 Nag L J (Notes) 44 (Bom).

6. Report of Chemical Examiner.

——S. 66 (1) (b) — Accused has right to summon chemical analyser if prosecution relies on his report —Opportunity to summon him should not be denied. See Prohibition — Bombay Prohibition Act (1949), S. 129B. (1965) Mah L J (Notes) 11 (Bom).

——S. 66(1)—Criminal P.C., S. 510—Evidentiary value —Failure of accused to examine chemical examiner—Effect—Evidentiary value of report of Chemical Examiner is not lost because he is not cross-examined — Position before and after amendment by Act 26 of 1955 — Case under Bombay Prohibition Act — Report of Chemical Examiner as to alcoholic content of blood giving only opinion that it was not less than 0.05 per cent. without factual data and reasons for opinion —Though opinion is admissible in evidence, it has no evidentiary value — Failure of the accused to examine Chemical Examiner under sub-s. (2) of S. 510 of Cr. P. C.. does not make any difference — Evidence Act (1872), S. 45. See Criminal P. C. (1898), S. 510. 1961 (2) Cr L J 78 : AIR 1961 G ; 120.

7. Burden of proof.

——Ss. 66 (2), 66 (1) (b), 24-A, 6-A, 85 (2) (as amended by Bombay Act 12 of 1959) — Trial for offence under S. 66 (1) (b)—Burden of proof—Burden when shifts to the accused — Effect of Ss. 6-A and 85 (2)—Quaere.

In a trial for an offence under S. 66 (1) (b), when the prosecution proves that the accused person consumed liquor and that the concentration of alcohol in his blood was more than 0.05 per cent weight in volume the onus of proving that the liquor consumed was a medicinal preparation containing alcohol, the consumption of which did not contravene the Act or the rules made thereunder, shifts to the accused under S. 66 (2). He can discharge this onus by proving, inter alia, that the medicinal preparation containing alcohol which he had taken was unfit for use as an intoxicating liquor; if so much is established, the accused would not be committing any offence under the Act, since under S. 24-A, the Act itself does not apply to such medicinal preparations. A I R 1962 S C 579, Disting.; I L R (1964) Bom. 357, Affirmed.

Quaere : Whether even if the burden of proof in the circumstances under S. 66 (2) shifted to the accused, that burden is discharged by reason of S. 6 A of the Act?

Quaere : Whether S. 85 of the Act lays down two conditions, namely, that the accused should have been drunk and incapable of taking care of himself and also that he should have taken the drink not for a medicinal purpose, but for the purpose of being intoxicated : Vijay Singh v. State of Maharashtra, (1965) 2 S C W R 538 : 1966 Cri L J 168 : (1965) 3 S C R 358 : A I R 1966 S C 145 (146, 147, 148) (Prs. 7, 10).

——Ss 66, 11, 65—Offence of importing and possessing Ayurvedic medicinal preparation 'Mrugmadasava' containing more than prescribed quantity of alcohol —Fact that the preparation was imported under a permit issued by Government of Bhopal on payment of excise duty cannot protect accused from liability to prosecution for infringement of provisions of Act within Bombay State — Accused pleading that importation of article was lawful in view of licence issued under S. 11 — Burden lies on accused to prove his allegation by production of license — If license is not produced such defence is not available. See Prohibition — Bombay Prohibition Act (25 of 1949), S. 11. 1962 (1) Cri L J 512 : AIR 1962 S C 579.

——Ss. 66, 65, 12, 13 & 24A—Offences under Ss. 65 and 66—Prosecution under—Burden of proof — State has to prove that prohibitions contained in Ss. 12 and 13 were infringed by accused and that medicinal preparation seized from accused is not unfit for use as intoxicating liquor — Scope of S. 24A indicated. See Prohibition — Bombay Prohibition Act (25 of 1949), S. 65. 1962 (1) Cri L J 512 : AIR 1962 S C 579.

——S. 66 (b) — Effect of Balsara's case, 1951 S C R 682, declaring S. 13 (b) invalid so far as it affected consumption of liquid medicinal or toilet preparation containing alcohol—Accused charged under S. 66 (b) —Burden of proof—Balsara's case does not engraft proviso to S. 13 (b) and thus cast onus on the accused. See Prohibition — Bombay Prohibition Act (25 of 1949), S. 13 (b). 1955 Cri L J 215: AIR 1955 S C 123.

——Ss. 66 (1) (b) and 129-A (as amended in 1959).

The certificates under S. 129-A of the Bombay Prohibition Act are endowed with great evidentiary value by virtue of S. 66 (2) and entail the most serious consequences upon the persons against whom they are used. If the artificial rule against burden of proof contrary to known principles of criminal jurisprudence is to be relied upon on behalf of the prosecution,

the certificates which give rise to such rule must be prepared with great care. 1962 Nag L J (Notes) 8.

—S. 66 (b) (as applied to Saurashtra) — Burden of proof.

Where the prosecution case is that the accused was in possession of prohibited liquor, the burden of proof lies on the prosecution to prove that the bottles seized contained prohibited liquor. AIR 1955 S C 123, Foll. 1956 Cri L J 775 : AIR 1956 Sau 25 (26) (Pt A) (Pr 3).

—S. 66 (b)—Person found drunk—Burden of proof—Evidence Act (1872), Ss. 101 to 103 and 106.

Positive facts must always be proved by the prosecution. But the same rule cannot apply to negative facts as regards which the rule about the burden of proof would be governed by Sec. 106, Evidence Act. The case of unauthorised possession of liquor presents points of distinction from the case of unauthorised drinking of liquor and the considerations which determine the burden of proof in the case of unauthorised possession of liquor do not apply to the case of unauthorised drinking. Consequently while the person in possession of liquor need not prove that it is an exempted liquor, a person who is proved to have drunk liquor can only escape conviction if he can show that the liquor consumed by him was exempted liquor.

Cri. A. 1064 of 1951 decided by Bombay High Court, Rel. on; Cri. A. 165 of 1950 and Cri. R. 45 of of 1951, Disting. 1953 Cri L J 105 : AIR 1953 Sau 14 (15) (Pr 3) (DB).

8. Jurisdiction of Magistrate.

—S. 66 (1) (b) — Offence under — Jurisdiction of Magistrate — Proof as to place where offence committed—Onus.

The offence under S. 66 (1) (b) of the Bombay Prohibition Act is complete when a person 'consumes' prohibited intoxicant and the burden to establish that the offence took place within the jurisdiction of the Magistrate who tried the accused, is upon the prosecution.

From the fact that an accused has been found intoxicated at a particular place it cannot be presumed that he must have consumed the liquor at the very place. There is nothing like the common course of natural events as contemplated by S. 114 of the Evidence Act for a person found intoxicated at one particular place to have of necessity consumed liquor at the very same place. Nor can such onus be shifted to the accused on the ground that it being within the special knowledge of the accused as to where he consumed liquor, under S. 106 of the Evidence Act it would be for him to establish that he had consumed liquor at a place where it was not an offence to consume. In the absence of such proof by the prosecution as to the place where the accused 'consumed' liquor the accused cannot be tried and convicted under S. 66 (1) (b) by having resort to Ss. 179, 180 and 182 of the Criminal P. C., (1963) 2 Cri L J 273 : (1962) 3 Guj L R 409 : AIR 1963 Guj 234 (236, 239) (Pt A) (Prs 7, 8, 13, 14) (DB).

—S. 66 (1) (b)—Applicability—It is the relation of one Act with the other that brings S. 180, Criminal P. C into operation and gives the jurisdiction to the Courts in both the local areas where the offence has occurred. AIR 1961 Mad 126, Expl., A I R 1959 Ker 311, Ref.

A Magistrate in whose jurisdiction an offence under S. 85 (1) of the Act has been committed, does not become empowered to try the offence under S. 66 (1) (b) of the Act also by reference to S. 180, Criminal P. C., when it is not proved that the latter offence was also committed in the Magistrate's jurisdiction. See Criminal P. C. (1898), Ss. 180 and 182. 1963 (2) Cri L J 273 : A I R 1963 Guj 234 (DB).

—S. 66 (b)—Proof of accused drinking liquor within Court's territorial jurisdiction is necessary. A I R 1954 Sau 17 (17) (Prs 2, 3) (DB).

—S. 66 (b)—Offence under — Duty of prosecution to prove consumption of liquor within limits of magistrate's jurisdiction — Failure to prove — Presumption under S. 114, Evidence Act, if can be drawn—Evidence Act (1872), S. 114.

In order that a Magistrate may have jurisdiction to convict a person for the offence of drinking an intoxicant without a permit, it is necessary for the prosecution to prove that the intoxicant was consumed within the limits of his jurisdiction.

Where the accused is merely found drunk within the local limits of the jurisdiction of a Magistrate it would be for the prosecution to prove the place where the liquor was consumed in order to give the Magistrate jurisdiction to try the case. If the prosecution fails to prove this, the Court is not justified in drawing a presumption under S 114, Evidence Act that the accused must be considered to have taken liquor at the place where he is found, especially when there is a possibility of the accused reaching that place within a short period of time. 4 Sau L R 264 : 1952 Cri L J 737 : AIR 1952 Sau 35 (36) (Pt A) (Pr 3) (DB).

9. Punishment.

—Ss. 66 (b) and 65 (b) (f) — CriminalP. C., S. 35 — Accused tried at one trial for offences under — Conviction — Separate sentences for each offence if can be passed—Penal Code (1860), S. 71—Although separate sentences can legally be passed at the same trial on a person charged with offences punishable under S. 65 (b), S. 65 (f) and S. 66 (b) of the Act, subject to the limit as regards aggregate punishment imposed by S 71, Penal Code, ordinarily one sentence alone should be passed for the offence of manufacturing liquor under S. 65 (b) and no separate sentences should be passed for offences of possessing materials or apparatus for manufacturing liquor and for possessing liquor punishable under S. 65 (f) and S. 66 (b) of the Act. Of course if the accused is shown to be in possession of liquor not distilled by him, the act of possessing such liquor cannot be said to be covered by his act of manufacturing liquor and it would not only be legal but also proper to pass separate sentences in such cases. See Criminal P. C. (1898), S. 35. A I R 1951 Bom 244 (DB).

10. Interference.

—S. 66 (1) (b)—Appeal against acquittal—Finding of fact based on erroneous rejection of evidence — High Court can interfere. See Criminal P. C. (1898), S. 418. 1963 (2) Cri L J 273 : AIR 1963 Guj 234 (DB).

SECTION 67

—S. 67 — Prosecution under — Presumption under S. 103 (1)—If available—Where there is a special provision made by the legislature in the matter of a presumption to be drawn in particular prosecutions, the drawing of presumption in those prosecutions shall be regulated by the special provisions and not by the general provisions.

The provisions of sub-s. (1) of S. 103 are general and they relate to the presumption to be drawn "in prosecution under any of the provisions" of the Act. It is true that this expression would prima facie include the provisions of S. 67 or S. 67-1A; but there the legislature has specially enacted sub-s. (2) dealing expressly with prosecutions under S. 67 or S. 67-1A and hence the provisions of S. 103 (2) would apply to the prosecutions under S. 67 or S. 67-1A.

It is clear from the language of sub-s. (1) of S. 103 that the presumption contemplated by the legislature in enacting sub-s. (1) relates to an offence in respect of manufacture of an intoxicant and not in respect of an offence arising out of a contravention of S. 21 of the Act. See Prohibition — Bombay Prohibition Act

(25 of 1949), S. 103 (1). 1958 Cri L J 1009 : A I R 1958 Bom 311 (DB).

——Ss. 67, 103 (2), 21 (b)—Offence under S. 21 (b) — Presumption under S. 103 (2) not available — Duty of prosecution — Where the charge is that the accused has in his possession any denatured spirit in contravention of cl. (b) of S. 21 and therefore he has committed an offence under S. 67, the prosecution must prove that charge independently of the presumption under S. 103, sub s. (2). See Prohibition — Bombay Prohibition Act (25 of 1949), S. 103 (2). 1958 Cri L J 1009 : A I R 1958 Bom 311 (DB).

SECTION 81

● ——Ss. 81 and 66 (b) — Possession of articles — Evidence Act (1872), S. 3 — Where all that was suggested by the defence was that the articles found in godowns were planted there by the police but it was not said that the godown was accessible to all and that the police might have kept the spirit there and the suggestion could not bear examination in view of the evidence, the Magistrate was justified in those circumstances in drawing the inference that these articles were in possession of the accused who was in possession of the godown and the Supreme Court would not disturb the decision. See Prohibition—Bombay Prohibition Act (25 of 1949), S. 66 (b). 1953 Cri L J 1097 : A I R 1953 S C 247.

SECTION 83

● **——S. 83—Conspiracy—Inference of.**

Section 83 of the Bombay Prohibition Act provides punishment for conspiracy to commit or cause to commit an offence under the Act. But an inference of conspiracy cannot be made from the facts that five accused were found in a motor car which contained in its luggage compartment a number of foreign liquor bottles and some of the accused were blood relations. Bhagwanbhai Dulabhai Jadhav v. State of Maharashtra, 64 Bom L R 784 : 1963 S C D 17 : 1963 Mad L J 134 : (1963) 3 S C R 386 : (1963) 2 S C J 263 : 1964 Mad L J (Cri) 473 : 1963 (2) Cri L J 694 (SC).

SECTION 84

——S. 84—Alteration of conviction — Criminal P. C (1898), S. 423 — The offence under S. 66 (b) is more grave than under S. 84 and before altering the conviction from one under S. 84 to one under S. 66 (b) opportunity ought to be given to the accused to meet the charge for it may be that he may have a valid defence to that charge. See Prohibition — Bombay Prohibition Act (1949), S. 66 (b). ('51) 4 Sau L R 67 (DB).

SECTION 85

● **——Ss. 85 (2), 66 (2), 66 (1) (b), 24-A, 6-A (as amended by Bombay Act, 12 of 1959) — Trial for offence under S. 66 (1) (b) — Burden of proof — Burden when shifts to the accused—Effect of Ss. 6-A and 85 (2)—Quaere.**

Quaere—Whether even if the burden of proof in the circumstances under S. 66 (2) shifted to the accused, that burden is discharged by reason of S. 6-A of the Act

Quaere—Whether S. 85 of the Act lays down two conditions, namely, that the accused should have been drunk and incapable of taking care of himself and also that he should have taken the drink not for a medicinal purpose, but for the purpose of being intoxicated. See Prohibition — Bombay Prohibition Act (25 of 1949) (as amended by Bombay Act 12 of 1959), S. 66 (2). (1965) 2 S C W R 538 : (1965) 3 S C R 358 : AIR 1966 S C 145.

——S. 85 (1) (3) — "Found drunk" — Admission of Consumption of liquor — Proof of intoxication — If necessary—(Criminal P. C. (1898), S. 255).

The accused came from Balaghat district which is not a prohibition district and got down from the bus at Tumsar. He was examined and the doctor opined that he had consumed liquor. He was prosecuted under Ss. 13 (b) and 85 (1) (3) of the Act. In his examination the accused said "I admit the offence. I was not creating trouble in the Ganj. I do not have any permit." The Magistrate purported to convict the accused on plea of guilty.

Held, that the accused intended to say that he was not intoxicated; that it was not enough to prove that accused had consumed liquor; that there should have been proof that he was intoxicated and that he could not be convicted under S. 85 (1) (3) (b). 1961 Nag L J (Notes) 13 (Bom).

——S. 85 (1)—Ingredients of offence.

The accused was found in a state of intoxication and his mouth was smelling of liquor; his eyes were red and pupils were dilated and his gait was staggering. None of the witnesses stated that the accused was abusive or that he behaved in a disorderly manner or that he was incapable of taking care of himself.

Held, that he could not be convicted under S. 85 (1), Bombay Prohibition Act. 57 Bom L R 541, Foll. 1961 Nag L J (Notes) 7 (Bom).

——S. 85 (1)—Accused found in drunken condition in a car going along a public road — Charge of being found in a drunken condition on a public thoroughfare or road—Essentials of the offence explained.

The fact that a man was going in a vehicle, on a public road in a drunken condition would not exempt him from the mischief of S. 85 (1) of the Prohibition Act.

The test in such a case is, not whether the vehicle was open or closed or the vehicle was accessible to public or the man was visible inside the vehicle, but whether the person who was drunk was travelling in a vehicle which was going along a public road, and as in such a case the only impediment between the person so travelling in the vehicle and the public road, would be the vehicle itself, while considering the question whether such person could be said to be on the public road, the medium which intervenes should be ignored.

For a charge under the section in such a case the prosecution need not show the incriminating condition of the accused at the time he was first seen in the car; it would be enough for a conviction under the section if the medical evidence reveals that the accused was intoxicated and overwhelmed by alcohol and that he exhibited a number of symptoms which clearly pointed to his having been in an intoxicated condition and incapable of taking care of himself even though he was sitting in his own sedan car. Cr R A No. 670 of 1955 decided on 16-8-1955 (Bom), Foll. (1960) 62 Bom L R 853 : 1960 Nag L J 728 : I L R (1960) Bom 951.

——S. 85 (1), Cls. (1) and (2) — Offence under — Proof of drinking of prohibited liquor not necessary —Separate sentences.

The question whether an accused person has taken prohibited liquor or permitted liquor is irrelevant for an offence under S. 85 (1) or S. 85 (1) (2). If it is shown that an accused person was drunk and incapable of taking care of himself and also that he behaved in a disorderly manner under the influence of drink, then the requirements of S. 85 are satisfied. I L R (1955) Bom 924, Foll.

Where the Magistrate finds that the accused was found drunk and was incapable of taking care of himself and also that he behaved in a disorderly manner under the influence of drink, his acquitting the accused on the ground that it was not shown by the prosecution that the accused had taken prohibited liquor is erroneous and must be set aside.

Further, it is not necessary to impose two separate sentences in respect of both these offences. Since the two offences arise out of the same incident it would be proper to impose only one sentence. **1956 Cri L J 584 : A I R 1956 Bom 279 (279, 280) (Prs 2, 4) (DB).**

——S. 85 (1)—Drinking permitted liquor.

A person would commit an offence under S. 85 (1), Bombay Prohibition Act, even if he drinks permitted liquor, if he is found in a public place drunk and incapable of taking care of himself and the word 'drunk' means 'overcome by alcoholic liquor or intoxicated'. ILR (1955) Bom 924, Foll. **1956 Cri L J 505 (1) : AIR 1956 Bom 270 (270) (Pr 2) (DB).**

——Ss. 85 (1), Cls (1) and (3), 2 (12) — 'Drunk' — Meaning of—Proof of drinking prohibited liquor not necessary for conviction.

The expression 'drunk' in S. 85 (1) (3) is not synonymous with the expression 'to drink' defined in S. 2 (12) of the Act. The expression 'drunk' in S. 85 (1) (3) must be given its plain natural meaning which it has in the English language, viz, as overcome by alcoholic liquor or intoxicated. An offence under S. 85 (1) is committed by a person drinking permitted liquor, if he is drunk and incapable of taking care of himself or if he behaves in a disorderly manner or if he is intoxicated. I L R (1955) Bom 924, Rel. on.

Where, therefore, the Magistrate finds that the condition of the accused was such that he was unable to take care of himself, his order acquitting the accused of the offence under S. 85 (1), Cls. (1) and (3) on the ground that the prosecution had failed to prove that the drunkennes of the accused had arisen as a result of his having drunk prohibited liquor cannot be sustained. **1956 Cri L J 384 : A I R 1956 Bom 173 (174) (Prs 2, 3) (DB).**

——S. 85 (1) (3) — "Drunk" — Meaning of, is not synonymous with "to drink" — Definition of requires the person to be intoxicated — Burden of proof is on prosecution when charge is under S. 66 (b)—If under S. 85 no question of discharging any such burden arises. AIR 1955 N U C (Bom) 4498 (DB).

——S. 85 (2) — Criminal P. C. (1898), Ss. 4 (1) (v) and (w), 221 (7), 255. A, 262 — Trial for first offence under—Procedure.

Where in a trial for an offence under S. 85 (2) of the Act, the prosecution do not allege that the accused has a previous conviction for the same offence and the charge does not mention such previous conviction as required by S. 221 (7), Cr. P. C. the offence committed by the accused will be punishable as a first offence with imprisonment for a term extending to three months and the case will be tried as a summons case. If, on the other hand, the accused has been previously convicted for an offence under S. 85 (2), he will be punishable with imprisonment extending to one year and the case will be a warrant case and will have to be tried as such. See Criminal P. C. (1898), S. 4 (1) (v) and (w). **52 Cri L J 693 : AIR 1951 Bom 332 (DB).**

——S. 85 (2) — Procedure for trial of first offence—Warrant case or summons case procedure — Mention of previous conviction in charge—Cr. P. Code, Ss. 221 (7) and 255-A.

Where an accused is charged with an offence under S. 85 (2) of the Bombay Prohibition Act, as a first offence, and no previous conviction is mentioned, though a previous conviction can be mentioned in it, the proper procedure to be applied in the case is the procedure to be applied in summons cases and not that applicable to warrant cases. But if the accused has been previously convicted, he will have to be charged with the previous conviction, and the case will then have to be tried in accordance with the procedure laid down for the trial of warrant case.

Chainani, J.—The effect of Ss. 221 (7), 225-A, Cr. P. Code, read together, is that the accused is to be charged with the previous convictions at the same time when he is charged with the subsequent offence, and if he is found guilty of that offence, he will be tried on the charge of previous convictions, by reason of which he will be liable to enhanced punishment. **52 Cri L J 693 : 53 Bom L R 108 : 21 Bom Cr Cas 61 : ILR (1951) Bom 467 : AIR 1951 Bom 332 (334) (Pr 7) (DB).**

——S. 85 (1) — Applicability—A Magistrate in whose jurisdiction an offence under S. 85 (1) has been committed, does not become empowered to try the offence under S. 66 (1) (b) of the Act also by reference to S. 180, Cr. P. C., when it is not proved that the latter offence was also committed in the Magistrate's jurisdiction. See Criminal P. C. (1898), S. 180. 1963 (2) Cri L J 273 : AIR 1963 Guj 234 (DB).

——S. 85 (1) (3)—'Is found drunk'—Meaning of—The words mean found overcome or intoxicated by liquor.

The expression 'is found drunk' in S. 85 (1), Cl. (3) of the Bombay Prohibition Act (1949), means is found overcome or intoxicated by liquor or any intoxicating drug,

Reading S. 85 as a whole it seems that the object of the Legislature in using the words 'is found drunk' was to describe the condition of a person who was overcome or intoxicated by liquor or an intoxicating drug. When he is so overcome or intoxicated that he is incapable of taking care of himself he would also be committing an offence under Cl. (1). When he is so overcome or intoxicated as to behave in a disorderly manner he would also be committing an offence under Cl. (2). Even if he is capable of taking care of himself and does not behave in a disorderly manner he would be covered by Cl. (3) if he is overcome or intoxicated by liquor or an intoxicating drug. Cl. (3) is wide enough to cover the case of a person who is overcome or intoxicated by liquor or an intoxicating drug whether he is capable of taking care of himself or not and whether he behaves in a disorderly manner or not. State of Gujarat v. Ukaji Devaji, **(1962) 3 Guj L R 1 : 1962 (1) Cri L J 710 : AIR 1962 Guj 84 (86, 88) (Prs 3, 6) (FB).**

——S. 85 (1) (i) and S. 66 (1) (b) — Offence under, distinction — Person found drunk in a public place — Conviction under S. 66 (1) (b) by drawing a presumption under S. 114, Evidence Act—Permissibility. See Prohibition—Bombay Prohibition Act (25 of 1949), S. 66 (1). (1962) 3 Guj L R 409.

——S. 85 (1) (as applied to Saurashtra) — Act prohibited by Cl. (3) of S. 85 (1) whether an offence — Legality of punishment under S. 85 — Legislature intended to prohibit act falling within Cl. (3) — No punishment having been prescribed by S. 85 (1), act is not an offence — Act satisfies both conditions of S. 90. AIR 1955 N U C (Sau) 3458.

——S. 85 (1) and (2)—Offences under — Distinction —Sentence.

The accused under the influence of drink abused and assaulted a woman on a public road and was convicted under S. 85 (1) and (2), Bombay Prohibition Act and sentenced to a fine of Rs. 10.

Held that the conviction ought to be properly under Cl. (2) and not under Cl. (1) of S. 85 of the Act. The offences mentioned in the two clauses are two different offences. Under cl. (1) accused is merely found drunk and incapable of taking care of himself, whereas under Cl. (2) he does a positive act viz., behaves in a disorderly manner under the influence of drink. Hence the conviction under cl. (1) must be set aside.

Held further that the sentence awarded was inadequate and a deterrent sentence is called for. (Sentence enhanced to one month's rigorous imprisonment. ('51) 4 Sau L R 157 (158, 159) (DB).

SECTION 90

——Ss. 90 and 85 (as applied to Saurashtra)—Applicability—Legislature intended to prohibit act falling within cl. (3) of S. 85 (1) also—No punishment having been prescribed by S. 85 (1), act is not an offence—Act satisfies both conditions of S. 90 — (Criminal P. C. (1898), S. 4 (o)) — (General Clauses Act (1897), S. 3 (38)). AIR 1955 N U C (Sau) 3458.

SECTION 92

——S. 92—Scope—If exhaustive — Conviction of offence other than that of consuming liquor — Release of accused on probation—Conviction under Ss. 66 (b) and 85 (2) — Release on probation — If permissible. S. 92, seems to contemplate that only persons, who have been convicted of the offence of consuming liquor, should be released on probation of good conduct. But Ss. 4 and 5 of the Probation of Offenders Act specifically state that the provisions of these sections are to apply, notwithstanding anything contained in any enactment for the time being in force. Action can, therefore, be taken under Ss. 4 and 5 of the Bombay Probation of Offenders Act even in the case of offences, other than that of consuming liquor, punishable under the Bombay Prohibition Act. See Bombay Probation of Offenders Act, Ss. 4 and 5. 52 Cri L J 1408 : AIR 1951 Bom 416 (1) (DB).

——S. 92—Revision.

The question whether the benefit of the section could be given to the accused or not lies within the discretion of the lower Courts, and ordinarily the High Court will not interfere in revision. 6 Sau L R 327 : 1954 Cri L J 415 : AIR 1954 Sau 31 (32) (Pt B) (Pr 5) (DB).

SECTION 98

——S. 98—Things liable to confiscation — Only two out of 1584 bottles proved to contain intoxicants—Order confiscating entire stock of 1584 bottles — Order, except in respect of the two bottles set aside. (1965) 6 Guj L R 227 : ILR (1965) Guj 902 : AIR 1966 Guj 46 (46, 47) (Pr 1).

SECTION 103

——S. 103 — Elaborate working still with other contrabands recovered on search from premises of appellant — Presumption — Use of, for conviction under S. 65 (f) — Failure to put specific question under S. 342, Cr. P C.—Effect.

Where an elaborate working still with other utensils and implements used in the manufacture of intoxicants was found on search in premises of appellant and the appellant, when examined under S. 342, Criminal P. C. volunteered the statement that he did not know about the various contrabands seized by the police, the Court can rely upon the presumption which arises under S. 103 for convicting the appellant under S. 65 (f). The failure of the Magistrate to put to him any specific questions under S. 342 to explain the possession of the still and the various other articles found in the premises occupied by him cannot be said to have caused any prejudice to the appellant. An employee of the appellant in the premises cannot be said to be in possession of things belonging to his master unless they were left in his custody. Keki Bejonji v. State of Bombay, (1961) 1 Ker L R 424 : (1961) 1 S C J 509 : 1961 M L J (Cr) 294 : 1961 (2) Cri L J 37 : (1961) 2 S C R 515 : AIR 1961 S C 967 (969, 970) (Prs 6, 8, 9).

——Ss. 103, 66 (b)—Presumption under—Extent of—No presumption about possession.

The presumption contained in S. 103 of the Act comes into operation only after a person is found to be in possession of an intoxicant of which he is unable to account satisfactorily. Such presumption cannot be used to infer the fact of possession. 62 Bom L R 717 : 1960 Nag L J 627 : ILR (1960) Bom 663.

——S. 103 (1)—Presumption under—Applicability to prosecution under S. 67—Special and general provisions — Application of — S. 21—Scope of.

Where there is a special provision made by the Legislature in the matter of a presumption to be drawn in particular prosecutions, the drawing of presumption in those prosecutions shall be regulated by the special provision and not by the general provision.

The provisions of sub-s. (1) of S. 103 are general and they relate to the presumption to be drawn 'in prosecution under any of the provisions' of the Act. It is true that this expression would prima facie include the provisions of S. 67 or 67-1A: but then the Legislature has especially enacted sub-s. (2) dealing expressly with prosecutions under S. 67 or S. 67-1A and hence the provisions of S. 103 (2) would apply to the prosecutions under S. 67 or 67-1A.

It is clear from the language of sub-s. (1) of S. 103 that the presumption contemplated by the Legislature in enacting sub-s. (1) relates to an offence in respect of the manufacture of an intoxicant and not in respect of an offence arising out of a contravention of S. 21 of the Act. 59 Bom L R 734 : (1958) Cr L J 1009 : ILR (1958) Bom 565 : AIR 1958 Bom 311 (313) (Pt A) (Pr 3) (DB).

——Ss. 103 (2), 67—Offence under S. 21 (b)—Presumption under S. 103 (2) not available—Duty of prosecution.

The language of sub-s. (2) of S. 103 which admits of no ambiguity would show that in enacting the sub-section, the Legislature intended to legislate about the presumption in respect of an offence arising out of altering or attempting to alter any denatured spirit in contravention of clause (a) of S. 21 but not in respect of an offence committed by being found in possession of any denatured spirit in contravention of Clause (b) of S. 21. Accordingly the presumption under sub-s. (2) of S. 103 would not be available to the prosecution in the latter cases.

Where, therefore, the charge is that the accused has in his possession any denatured spirit in contravention of clause (b) of S. 21 and that therefore he has committed an offence under S. 67, the prosecution must prove that charge independently of the presumption under S. 103, sub-s. (2).

Held, on facts that the prosecution had established that the respondents have contravened the provisions of clause (b) of S. 21 and had thereby committed an offence under S. 67. ILR (1958) Bom 565 : 1958 Cr L J 1009 : 59 Bom L R 734 : AIR 1958 Bom 311 (312, 313) (Pt B) (Prs 1, 4, 5) (DB).

——Ss. 103, 66 (b) (as applied to Saurashtra)—Possession — Prosecution must prove—Necessity of proof is not dispensed with—(Evidence Act (1872) Ss. 101 to 103). AIR 1955 N U C (Sau) 961 (DB).

SECTION 116

——S. 116 — Offence under S. 65, tried as summons case—Trial vitiated. See Criminal P. C. (1898), S. 251-A. 1962 (2) Cr L J 597 : AIR 1962 Bom 258 (DB).

——S. 116—Procedure—(Cr. P. Code (1898), Ss. 5 (2), 264 and 362).

The procedure to be ordinarily followed by Presidency Magistrates in regard to the recording of evidence. is mentioned in S. 362 of the Criminal Procedure Code. Section 116 of the Bombay Prohibition Act, however, makes it clear that the procedure mentioned in Chapter XXII of the Cr. P. Code, in so far as it relates to case in which an appeal lies has to be followed even by Presidency Magistrates in the trial of cases under the Prohibition Act irrespective of whether the Magistrate intended initially to impose an appealable sentence or not. The Presidency Magistrate not having recorded 'the substance of the evidence' the case of the accused must be held to have been prejudiced by the irregular procedure, as in the absence of an adequate record of the substance of the evidence, it is not possible for the High Court in appeal to decide whether the conviction of the accused was justified. 61 Bom L R 684 : ILR (1959) Bom 1598 : 1960 Cr L J 324 : AIR 1960 Bom 107 (108, 109) (Pt A) (Prs 5, 9) (DB).

——S. 116—Scope—Procedure applicable.

The procedure which is to be followed in cases under the Bombay Prohibition Act in a trial in the year 1957 is not the procedure laid down in S. 264 of the Criminal Procedure Code as it was when the Bombay Prohibition Act was passed but the procedure of the section as substituted by the amending Parliamentary Act, 26 of 1955. It is clear, from the provisions of S. 116 that the Magistrate who tries a case under the Prohibition Act has merely to apply the same procedure which is applicable at the time of the trial to 'summary cases in which an appeal lies.' 61 Bom L R 684:: ILR (1959) Bom 1598 : 1960 Cr L J 324 : AIR 1960 Bom 107 (109) (Pt D) (Pr 8) (DB).

——S. 116—Magistrates not empowered to try cases summarily, if competent to try offences under Act—Criminal P. C. (1898), Ss. 260 and 261.

Offences punishable under the Bombay Prohibition Act can be tried by any Magistrate who is competent to try them under the second schedule to Criminal P. C. whether he is empowered under S. 260 of the Code to try cases in a summary manner or not.

The power to try a case and the manner in which it is to be tried are two different matters. Section 116 deals only with the second matter, i. e., about the mode of trial and it does not curtail the ordinary powers of Magistrates to take cognisance of and try offences, but, on the other hand, it authorises all Magistrates to follow the summary procedure while trying offences under the Act. 52 Bom L R 321 : 51 Cr L J 1303 : ILR (1950) Bom 428 : 1950 Bom Cri C 172 : AIR 1950 Bom 273 (273, 274) (Pt A) (Prs 2, 4) (DB).

——S. 116 — Offences under Act — Sentence for more than 8 months can be awarded even in cases of summary trials — Criminal P. C. (1898), S. 262 (2) has no application. 52 Bom L R 321 : 51 Cri L J 1303 : I L R (1950) Bom 428 : 1950 Bom Cri C 172 : A I R 1950 Bom 273 (274) (Pt B) (Pr 5) (DB).

——S. 116 (as applied in Saurashtra) — Sentence, in cases tried summarily — Limitation in S. 262 (2), Criminal P. C., does not apply — (Criminal P. C. (1898), S. 262). AIR 1955 NUC (Sau) 1134.

SECTION 117

● ——S. 117—Procedure to be followed in conducting search of motor car — Foreign liquor found in such search — Search carried under provisions of Bombay Prohibition Act—S. 103, Cr. P C. does not apply to such search. See Criminal P. C. (1898). S 103. (1964) 2 S C J 263: 1964 Mad L J (Cr) 473: 1963 (2) Cr L J 694 (SC).

——S. 117 — Criminal P. C. (1898), S. 103—Panchnama made 6 miles away from place of arrest — Evidentiary value. See Criminal P. C. (1898), S. 103. AIR 1956 Sau 25.

SECTION 129-A

● ——Ss. 129-A, 66 (1) (b) and (2), and 129-B—Scheme of — Trial of offence under S. 66 (1) (b) — Report of Chemical Examiner in cases not covered by S. 129-A — Admissibility in evidence under S. 510, Criminal P. C. — Sections 129-A and 129-B how far repugnant to provisions of S. 510, Criminal P. C. — Constitution of India, Art. 254 (2), Sch. 7, List III, Entries 2 and 12—Criminal P. C. (1898), S. 510. See Prohibition — Bombay Prohibition Act (25 of 1949), S. 66. 1963 (2) Cri L J 418 : A I R 1963 S C 1531.

● ——Ss. 129-A and 143 (w)—Criminal P. C., S. 510 — 'Duly submitted' — Meaning of — Blood specimen collected before investigation by a medical practitioner handed over to police and then submitted to Chemical Examiner — Can be regarded as 'duly submitted' — Bombay Prohibition (Medical Examination and Blood Test) Rules (1959), Rr. 3, 4 and 5—Scope and applicability. See Criminal P. C. (1898), S. 510. 1963 (2) Cri L J 418 : A I R 1963 S C 1531.

——S. 129-A — Constitutionality — Section is not ultra vires Art. 31 (2) of Constitution — Acquisition and requisition—Connotation of S. 129-A is not part of law providing acquisition and requisitioning—Pith and substance of Act — Object and scope of the Bombay Prohibition Act — Constitution of India, Arts. 31 (2) and (5), 246.

Section 129-A is not ultra vires Art. 31 (2) of the Constitution on the ground that the collection of blood for the test under that section is acquisition of property without payment of compensation. Looking to the provisions of the Bombay Prohibition Act in general and S. 129-A in particular, it cannot be said that the ownership of the blood is transferred to the State or that the right to possession of that blood is similarly transferred.

Further, looking at the scope and effect of the Bombay Prohibition Act it is not law relating to acquisition but it is law relating to intoxicating liquor. The object of introducing S. 129-A was to provide for the procedure with a view to effectuate the policy of prohibition. The power given by S. 129-A is only in respect of offences under the Act. The presumptions which may arise as a result of the blood test also arise only in respect of the provisions of this Act. They have no operation generally or to offences which fall outside the Act. These provisions are only ancillary to the legislative power of the State Legislature to make a law relating to the matters in Entry 8 in List II (State List) of the Seventh Schedule of the Constitution. The ancillary provisions cannot be considered separately from the enactment and they do not fall under another head of legislation. Therefore, even if it is assumed that the taking of blood is acquisition, it would not be hit by Art. 31 of the Constitution. A I R 1957 S C 297, Applied; (1882) 7 A C 829, Relied on. 66 Bom L R 230 : 1964 Mah L J 360 : 1964 (2) Cri L J 523 : I L R (1964) Bom 404 : A I R 1964 Bom 253 (257, 258) (Pt B) (Prs 4, 5) (DB).

——S. 129-A—Constitution of India, Arts. 19 (1), (f), 20 (3) and 21 — Validity — Deprivation of personal liberty whether in accordance with procedure established by law—Determination of reasonableness of procedure not justiciable — Bombay Prohibition (Medical Examination and Blood Test) Rules (1959), R. 4.

The collection of blood of a person for test under S. 129-A cannot be said to fall within the specific aspects of personal liberty protected under Art. 19 (1) (f) of the Constitution. The validity of the provision of that section has to be examined in the light of the general right to personal liberty as is covered by Art. 21 of the Constitution. Article 21 itself does not give an absolute right to personal liberty. It does not say that no person shall be deprived of his life or personal liberty under any circumstances. On the contrary, the Article presupposes that such deprivation of life or personal liberty as in accordance with procedure established by law is not protected by Art. 21. The function of deciding as to whether a certain procedure established by law which results in the deprivation of life or personal liberty is reasonable or not is not of the Court, since it is an exclusively legislative function. Therefore, even on the assumption that the provision of S. 129-A is unreasonable, it is not for the Court to decide that question.

The Bombay Prohibition Act is brought on the statute book to effectuate the policy of Prohibition. The taking of blood is empowered to be done only by a registered medical practitioner. It is thus under the protective eye of the law. It is intended to help the scientific determination of intoxication and the results of the test may as well prove innocence as the guilt of the person. Since the procedure for such extraction of blood is established by law, any deprivation of liberty on account of a person being compelled to go before a medical officer for that purpose cannot be said to be ultra vires, Article 21 of the Constitution. 63 Bom L R 87 and A I R 1950 S C 27, Relied on. **66 Bom L R 230 : 1964 Mah L J 360 : I L R (1964) Bom 404 : 1964 (2) Cri L J 523 : A I R 1964 Bom 253 (260 to 262) (Pt C) (Prs 8, 9) (DB).**

——Ss. 129-A, 129-B—Scope of S. 129-B—Certificate of Chemical Examiner relating to nature of preparation claimed to be medicinal—Not covered by S. 129-B —Criminal P C (1898), S. 510 — Applicability—Evidence Act (1872), S. 46. See Prohibition — Bombay Prohibition Act (25 of 1949), S. 129-B. **1962 (2) Cri L J 466 : A I R 1962 Bom 229 (DB).**

——S. 129-A (as amended in 1959) — Phial of blood sent for examination not bearing name of accused's father and his caste—Probability of phial containing blood of accused being interchanged in Police station before transmission not ruled out—Burden of proving that accused consumed prohibited liquor lay on prosecution in the circumstances. See Prohibition—Bombay Prohibition Act (1949), S. 66 (1) (b). **1962 Nag L J (Notes) 8 (Bom).**

——S. 129-A (as amended by Act 12 of 1959) — Validity — Consumption of prohibited intoxicant—Medical Examination—S. 129-A applicable to persons 'accused of an offence' — Accused merely required to submit to evidence being collected from him—Compulsion only in case of active resistance — Section held not violating protection against testimonial compulsion guaranteed by Art. 20 (3). See Constitution of India, Art. 20 (3). **I L R (1961) Bom 360.**

SECTION 129-B

●——Ss 129-B, 129-A and 66 (1) (b)—Scheme of—Trial of offence under S. 66 (1) (b)—Report of Chemical Examiner in cases not covered by S. 129-A—Admissibility in evidence under S. 510, Criminal P. C.—Sections 129-A and 129-B how far repugnant to provisions of S. 510, Criminal P. C.—Constitution of India, Art. 254 (2); Sch. 7, List III, Entries 2 and 12—Criminal P. C. (1898), S. 510. See Prohibition — Bombay Prohibition Act (1949), S. 66 (1) (b). **1963 (2) Cri L J 418 : A I R 1963 S C 1531.**

——Ss. 129-B and 66 (1) (b) — Accused has right to summon Chemical Analyser if prosecution relies on his report—Opportunity to summon him should not be denied. **1965 Mah L J (Notes) 11 (Bom).**

——Ss. 129-B and 66 (2) — Court cannot refuse to consider evidence furnished by certificate of Chemical Analyser merely because it does not contain data or reasons for conclusion. See Prohibition—Bombay Prohibition Act (25 of 1949), S. 66 (2). **1963 (1) Cri L J 567 : A I R 1963 Bom 68 (DB).**

——Ss. 129-B and 24-A — Evidence Act (1872), S. 46 —Prohibition case — Certificate of medical expert as to contents of preparation seized —Value of—Criminal P. C. (1898), S. 510 — The certificate of the Principal of a Medical College giving opinion as to the contents of a liquid seized in a prohibition case under the Act, without more, not being evidence and S. 510 of Criminal P. C. or S. 129-B of the Act, which contain special rules of evidence being inapplicable to such a certificate, no reliance can be placed by the prosecution thereon. The contents, therefore, of the certificate issued by the Principal of the Medical College cannot form the basis of a finding that the preparation is not a medicinal preparation. See Evidence Act (1872). S. 46. **1962 (2) Cri L J 466 : A I R 1962 Bom 229 (DB).**

——S. 129-B — Certificate of Chemical Examiner—Probative value—Is no more than opinion evidence—Negative opinion expressed — Failure of accused to summon and examine Chemical Examiner as a witness—Effect — Criminal P. C. (1898), S. 510 — Evidence Act (1872), S. 46.

Section 129-B gives to the accused an unqualified right to have the Chemical Examiner summoned and examined as a witness, but it is elementary that in a criminal trial, the primary duty of the Court is to find out whether on the evidence led by the prosecution, the charge can be said to have been brought home to the accused. If the evidence led by the prosecution is such as could sustain the conviction, the failure of the accused to challenge that evidence may conceivably affect his defence. If, on the other hand, the prosecution evidence falls short of that standard of proof which is required by law, the bridge cannot be gulfed by calling in aid the supposed failure of the accused to challenge that evidence. **1962 Nag L J 616 : 64 Bom L R 303 : 1962 (2) Cri L J 466 : I L R (1962) Bom 472 : A I R 1962 Bom 229 (234) (Pt C) (Pr 13) (DB).**

——Ss. 129-B, 129-A—Scope of S. 129-B—Certificate of Chemical Examiner relating to nature of preparation claimed to be medicinal—Not covered by S. 129-B —Criminal P. C. (1898), S. 510 applies — Evidence Act (1872), S. 46. **1962 Nag L J 616 : 64 Bom L R 303 : 1962 (2) Cri L J 466 : I L R (1962) Bom 472 : A I R 1962 Bom 229 (235) (Pt D) (Pr 14) (DB).**

——S. 129-B — Court cannot refuse to consider evidence furnished by certificate of Chemical Analyser merely because it does not contain data or reasons for conclusion. See Bombay Prohibition Act (25 of 1949), S. 66 (2). **(1962) 64 Bom L R 451.**

SECTION 136

●—— S. 136 (1) — Section, if ultra vires as offending against Art. 22 (2) of Constitution. The prohibition

law does not deal with maintenance of public order, the security of the State, or the maintenance of supplies and services essential to the community and, therefore, the provisions of law to the extent that they make it possible, under S. 136 (1) for a police officer to detain a person without being produced before a Magistrate for a period not exceeding fifteen days is void, apart from the question as to whether the Legislature was competent to enact this provision. Fram Nusserwanji Balsara v. State of Bombay, **52 Bom L R 799 : ILR (1951) Bom 17 : 52 Cri L J 80 : AIR 1951 Bom 210 (222) (Pt J) (Pr 23) (FB).**

[Reversed in AIR 1951 S C 318.]

●——S. 136 (2)—Cls. (b) and (c) of Sub-s. (2) are void as offending against Cls. (d) and (e) of Art. 19 of Constitution—Cl. (2) of S. 136 (2) is void as offending against Art. 19 (1) (g) of Constitution — Cl. (f) is void as offending against Art. 19 (1) (f). Fram Nusserwanji Balsara v. State of Bombay, **52 Bom L R 799 : ILR (1951) Bom 17 : 52 Cri L J 210 : AIR 1951 Bom 210 (222) (Pt K) (Pr 23) (FB).**

SECTION 139

●——Ss. 139 (c), 52 and 53 — If constitute delegation of power.

Sections 52, 53 and 139 (c) cannot be attacked on the ground that they constitute "delegation of legislative power" A Legislature while legislating cannot foresee and provide for all future contingencies and Ss. 52, 53 and 139 (c) do no more than enable the duly authorised officer to meet contingencies and deal with various situations as they arise. See Prohibition—Bombay Prohibition Act (1949), S. 52. **AIR 1951 S C 318.**

——Ss. 139 (d), 24-A, 6-A, 59-A, 12, 13 (as amended by Act 26 of 1952) — Bombay Spirituous Medicinal Preparations (Sales) Rules, 1954, Rr. 2, 3 — Act if imposes reasonable restrictions on consumption of spirituous medicinal preparations — Determination under S. 6.A—Effect—Tests for reasonableness—Act ultra vires due to incompetence of legislature and invalid due to inconsistency with Part III of Constitution—Effect—Validity of Act on latter ground has to be judged by subsequent amendments, notifications, etc.—(Constitution of India, Preamble, Arts. 13, 19, 245 and 246) — Interpretation of Statutes — Vires — Tests). See Prohibition — Bombay Prohibition Act (25 of 1949 as Amended by Act 26 of 1952), S. 24-A. **1958 Cri L J 607 : A I R 1958 Bom 181 (DB).**

● ——S. 139 (c) — Notification, dated 30th March, 1950, exempting foreigners from provisions of proviso (a) (i) and Expl. to (c) of S. 40 (1) —If void and ultra vires.

The Notification No. 1048/45 (c), dated 30th March, 1950, issued by the Government of Bombay in purported exercise of the powers conferred by S. 139 (c) of the Prohibition Act, exempting persons who fall under S. 40 (1) (c) of the Act and who are not citizens of India from the provisions of proviso (a) (i) read with the explanation of Cl. (c) of Sub-s. (1) of S. 40, is ultra vires, it offends against the principle of equality under Art. 14 of the Constitution and is therefore void. The guarantee of equality before the law extends under the Constitution not only to legislation but also to rules and notifications made under statutory authority and even to executive orders. Fram Nusserwanji Balsara v. State of Bombay, **ILR (1951) Bom 17 : 52 Cri L J 80 : 52 Bom L R 799 : A I R 1951 Bom 210 (220, 223, 224) (Pt M) (Prs 20, 25) (FB).**

[Reversed in AIR 1951 S C 318.]

SECTION 143

●——S. 143 (w) — Criminal P. C. (1898), S. 510 — 'Duly submitted' — Meaning of — Blood specimen collected before investigation by a medical practitioner handed over to police and then submitted to Chemical Examiner — Can be regarded as 'duly submitted'—Bombay Prohibition (Medical Examination and Blood Test) Rules (1959), Rr. 3, 4 and 5 — Scope and applicability. See Criminal P. C. (1898), S. 510. **1963 (2) Cri L J 418 : AIR 1963 S C 1531.**

——S. 143 — Constitution of India, Arts. 301, 304—Gujarat Denatured Spirituous Preparations Rules (1962), Rr. 22, 37—Validity — Rules are not violative of Arts. 301 and 304. See Constitution of India, Art. 301. **AIR 1964 Guj 59 (DB).**

——S. 143 — Sanction given for Bill — Sanction for rules framed under Act not necessary — Gujarat Denatured Spirituous Preparations Rules are valid. See Constitution of India, Art. 304, Proviso. **AIR 1964 Guj 59 (DB).**

SECTION 146-A

——S. 146-A—Does not violate Art. 14 of Constitution.

Under the Bombay Prohibition Act certain responsibilities have been thrust upon certain officers and certain corresponding powers have also been conferred for enabling them to carry out those responsibilities. The position of an officer or a person entrusted with the responsibilities of carrying out the duties under the Bombay Prohibition Act is not the same as the position of an ordinary citizen. A person, who is entrusted with the responsibilities of carrying on the provisions of the Bombay Prohibition Act, would not be ordinarily responsible for what he has done in good faith. His powers are statutory and his action would be liable to be impugned only when that action is either in excess of his powers or in abuse of the powers conferred on him. In case of excessive use or abuse of powers, he may make himself liable either for an action in tort or for a criminal prosecution. If however it is established that he has done these acts under colour of the authority or in the discharge of his rights then it is necessary to prescribe a time limit for bringing the erring officer to book so as to protect him from vexatious and frivolous actions and prosecutions. It is this policy which underlies the provisions contained in S. 146-A of the Bombay Prohibition Act. The classification between those entrusted with certain responsibilities under the statute and those who have no such responsibilities but who are ordinary citizens is clear and reasonable in view of the fact that special responsibilities have been thrust upon one class whereas there is no such responsibility upon the other class. The differentia on which this classification is based is quite clear and easily intelligible. That being the case, the classification on which the rule of limitation in S. 146-A of the Bombay Prohibition Act has been based cannot be attacked as being violative of the principle laid down under Art. 14 of the Constitution of India.

Once it is held that it is open to the Legislature to provide a period of limitation during which actions or prosecutions must be started against a group of persons, then it is entirely in the discretion of the Legislature to put down the period of limitation. Merely because, under S. 161 of the Bombay Police Act the period of limitation is mentioned as six months and under S. 146-A of the Bombay Prohibition Act, it has been laid down as four months, the second legislation cannot be considered to be offending against the principle of equality before the law. Further, the reason why the Legislature, in this particular case, must have laid down a smaller period

of limitation than provided in S. 161 of the Bombay Police Act, appears to be apparent in the very nature of the duties entrusted to the persons under the Prohibition Act. In the very nature of things the offences under the Bombay Prohibition Act are bound to be more numerous than the offences under ordinary law. There may be many more cases where raids would be effected and houses searched. Some of these raids may be carried on, on the basis of suspicion engendered by the information given to the police officers. It would not be correct to allow the sword of prosecution or action against such persons hanging for a long time. That seems to be the reason behind putting down the period at four months under S. 146-A of the Bombay Prohibition Act. **66 Bom L R 476 : 1964 Mah L J 561 : I L R (1964) Bom 691.**

SECTION 149

——S. 149 (as applied to Saurashtra) — Saurashtra Ordinance (13 of 1950), S. 2(2) —It is intra vires and valid—(Saurashtra Covenant Art. 9(3)—Government of India Act (1935), S. 107(2) and (3)) — (Revised Instrument of Accession of Saurashtra, Dated 22-5-1948). See Saurashtra Ordinance (13 of 1950), S. 2(2). **AIR 1956 Sau 35 (DB).**

——S. 149 (2) (as adapted and amended by Saurashtra Ordinance, 13 of 1950)—Saurashtra Ordinance (13 of 1950), S. 2(2) — Abatement of suit takes place on passing of Ordinance — Former order of Court is not necessary—(Civil P. C. (1908), O. 22). See Saurashtra Ordinance (13 of 1950), S. 2(2). **A I R 1956 Sau 35 (DB).**

—BOMBAY PROHIBITION (EXTENSION AND AMENDMENT) ACT (12 of 1959)

SECTION 1

—— S. 1—Applicability.

For the applicability of the Bombay Prohibition Act, 1949 to the Vidarbha area it was not necessary to have published the provisions of that Act over again after the Bombay Prohibition (Extension and Amendment) Act came into force. 1951 S C J 735 : A I R 1951 S C 467, Disting. **1961 Nag L J (Notes) 47 (Bom).**

—BOMBAY PROHIBITION (MEDICAL EXAMINATION AND BLOOD TEST) RULES (1959)

RULE 3

——Rs. 3, 4 and 5—Criminal P. C. (1898), S. 510 — Scope and applicability—Duly submitted — Meaning of — Blood specimen collected before investigation by a medical practitioner handed over to police and then submitted to the Chemical Examiner—Can be regarded as duly submitted. See Criminal P. C. (1898), S. 510. **1963 (2) Cri L J 418 : AIR 1963 S C 1531.**

RULE 4

——R. 4—Criminal P. C. (1898), S. 510—"Duly submitted" — Meaning of — Blood specimen collected before investigation by a medical practitioner handed over to police and then submitted to Chemical Examiner — Can be regarded as duly submitted. See Criminal P. C. (1898), S. 510. **AIR 1963 S C 1531.**

——R. 4 — Bombay Prohibition Act (25 of 1949), S. 129-A—Validity — Deprivation of personal liberty whether in accordance with the procedure established by law — Determination of reasonableness of procedure not justiciable. See Prohibition — Bombay Prohibition Act (25 of 1949), S. 129-A. **1964 (2) Cri L J 523 : AIR 1964 Bom 253 (DB).**

——R. 4 (2)—Blood test—Proof—There must be legal evidence to connect the report of the Chemical Analyser tendered in the case with the blood taken out of the body of the accused on that day. From the report of the Chemical Analyser it appeared that the phial containing the blood was sent by police constable No. 494. The doctor who took the blood out of the body of the accused did not say that he had handed over the phial to the Police Constable. Police Constable No. 494 was examined. Held, that there was no clear proof that the report received in Court was the report on the analysis of the blood taken out by the doctor on the particular day from the body of the accused (See Prohibition — Bombay Prohibition Act (25 of 1949), S. 66(1)(b). **1961 Nag L J (Notes) 47 (Bom).**

RULE 5

——R. 5—Criminal P C. (1898), S. 510—"Duly submitted"— Meaning of—Blood specimen collected before investigation by a medical practitioner handed over to police and then submitted to the Chemical Examiner—Can be regarded as "duly submitted". See Criminal P. C. (1898), S. 510. **AIR 1963 S C 1531.**

—BOMBAY SPIRITUOUS MEDICINAL PREPARATIONS (SALE) RULES (1954)

RULE 5

——R. 5—Refusal of licence—Reasons should be given.

While exercising the power under R. 5, the Collector must in fact have reasonable grounds to believe that there is some reasonable objection to granting a licence to the applicant before he can refuse the licence. And as a right of appeal is provided by S. 137(2), Bombay Prohibition Act, 1949, it is incumbent on the Collector to give reasons for such a decision. **AIR 1956 Bom 304 (316) (Pt I) (Pr 21).**

RULE 7

——R. 7—R. 7 is reasonable—(Constitution of India, Art. 19).

The requirement of a medical certificate for obtaining Hall's wine is a reasonable requirement. **AIR 1956 Bom 304 (318) (Pt M) (Pr 24).**

RULE 9

——R. 9—Proper interpretation of R. 9.

The proper interpretation of R. 9 is, where a certificate covers a period of time the person who had obtained the certificate shall be entitled to purchase the quantity prescribed throughout that entire period of time without the necessity of obtaining a fresh certificate. **AIR 1956 Bom 304 (317) (Pt L) (Pr 23).**

—C. P. AND BERAR PROHIBITION ACT (7 of 1938)

See also Madhya Pradesh Prohibition Act (7 of 1938).

SECTION 1

——S. 1—Policy of Act — Duty of Court — Prohibition Acts—Policy held constitutional — See Interpretation of Statutes. **52 Cri L J 1140 : AIR 1951 Nag 58 (FB).**

——S. 1—Validity of the Act—Government of India Act (1935) List II Item 31 & List 1, Items 19, 34—Constitution of India, Art. 372 (1).

In view of the wide meaning which one must attribute to the term 'intoxicating liquors' in Item 31 of the Second list in Sch. 7 to the Government of India Act, 1935, it must be taken that the entire subject of the control, including the prohibition of its use could be legislated upon by the provincial legislature. The provincial legislature must be taken to be possessed of such plenary powers of legislation on this topic as the Imperial Parliament itself. The C. P. & Berar Prohibition Act, 1938, was, therefore, validly enacted by the Legislature. Further it cannot be challenged on the ground of repugnancy to items

19 & 34 of List as a close examination of the provisions shows that the entire subject is related to intoxicating liquors and the effect of items Nos. 19 & 44 of the first list is merely incidental. The Prohibition Act is continued in force unaffected after the Constitution under Art. 372 (1) except in so far as its validity could be brought into question by reason of the non obstante clause in Art. 13 (1). Case law referred, Sheoshankar v. State of Govt. of Madhya Pradesh, 52 Cri L J 1140 : ILR (1951) Nag 646 : AIR 1951 Nag 58 (73) (Pt G) (Prs 105, 110, 111) (FB).

● —S. 1—Validity — Whether infringes Art. 19 (1) (f) — Property — Meaning — Constitution of India, Art. 19 (1) (f).

What the Constitution safeguards is a right to property or to follow a trade. It does not guarantee that what is regarded as property or what is regarded as an object of trade shall for ever be continued to be so regarded. The legislature having come to the conclusion that the consumption of intoxicating liquor is not in the public interest its conclusion is not open to question before a Court of law. From this conclusion, it follows that intoxicating liquor must be regarded as a noxious object. It therefore ceases to be a legitimate object of 'property' or a legitimate object of commerce. What has been rendered contraband cannot be the object of 'property.' The general right to property or to carry on any activity is not unreasonably restricted merely because a particular commodity is excepted from its purview in the public interest. Liquor is not an innocuous article and regulation or prohibition of its consumption by the C. P. & Berar Act, 1938 therefore, does not infringe the provisions of Art. 19 (1) (f) of the Constitution. Sheoshankar v. State Govt. of Madhya Pradesh. 52 Cri L J 1140 : ILR (1951) Nag 646 : AIR 1951 Nag 58 (63, 65, 84) (Pt J) (Prs 17, 41, 175) (FB).

● —Ss. 1 (3) & 1A—Validity — Whether amount to territorial discrimination or constitute delegation of legislative power.

Section 1 (2) of the Prohibition Act makes it clear that it is enacted not for any part of Province but for the whole of it. The provisions contained in subsection (3) of S. 1 and S. 1A cannot therefore be regarded as discriminatory but are only instances of conditional legislation. It is well settled that a legislature may delegate the power to determine the conditions or contingencies under which a statute shall be operative even though such conditions may be determined by the Government.

Moreover, it stands to reason that when a measure of social reform such as the Prohibition Act, 1938 which, on the one hand, denudes the State of a large revenue and on the other, imposes additional duties and expenses for the purposes of preventing and penalising the evasion of the law, it should be applied stage by stage and in the light of the experience gained. For this reason, power must be conferred upon someone to determine the "conditions and circumstances" in which the measure would be applied. The conferral of such power by the legislature upon Govt. is neither delegation of legislative power nor discrimination and so, the impugned provisions are perfectly valid. Sheoshankar v. State Govt. of Madhya Pradesh. 52 Cri L J 1140 : ILB (1951) Nag 646 : AIR 1951 Nag 58 (85) (Pt K) (Pr 182) (FB).

SECTION 1-A

● —Ss. 1-A and 1(3)—Validity—The provisions contained in sub-s. (3) of S. 1 and S. 1-A cannot be regarded as discriminatory but are instances of only conditional legislation. The conferral of power to determine the condition and circumstances in which the measure should be applied does not amount to territorial discrimination or constitute delegation of legislative power — See Prohibition—C. P. and Berar Prohibition Act (1938), S. 1 (3). 52 Cri L J 1140 : AIR 1951 Nag 58 (FB).

SECTION 6

—S. 6 (1) (a) and (g) — Contraband articles found in compound—Offence.

Where contraband articles were found in the compound of the house of the accused and not from the house itself and the accused was convicted under S. 6 (1) (a) and (g) of the Prohibition Act:

Held, that compound is a place which is accessible to other persons than the accused and if any contraband articles were found in the compound it could not be held that those articles were in exclusive use of the accused. 1960 Nag L J (Notes) 91 (Bom).

—S. 6 (1) (j)—For conviction under S. 6 (1) (j) of the Act, it is essential to prove that liquor was consumed in the prohibited area—Mere smelling of person's mouth of liquor is not sufficient for the conviction — Intoxication means impairing physical or mental faculties. 1963 M P L J (Notes) 226.

—S. 6 (1) (j) — Trial under— Prosecution need not prove consumption of liquor within jurisdiction of the Court — Persons roaming aimlessly having staggering gait and talking at random can be presumed to be intoxicated. 1957 M P L J (Notes) 190, Foll. 1962 M P L J (Notes) 202.

—S. 6 (1) (a) — Utensils and articles merely smelling liquor—Presumption—Conviction on mere smell —Legality.

The accused persons were alleged to possess liquor and when the police party entered the house after breaking open the doors, some liquid was found flowing inside the house and there was much smell of liquor.

Held, that merely from the smell of the instruments and utensils, it could not be possible to say that the articles seized contained liquor or that the accused were in possession of the liquor. 1959 M P L J (Notes) 135.

—S. 6 (1)—State of intoxication—Meaning.

The expression "a state of intoxication" denotes that as a result of his consumption of some liquor a man's physical or mental faculties have been appreciably and materially impaired in the conduct of the ordinary affairs or acts of daily life.

When the accused was convicted under S. 6 (1) of the C. P. and Bear Prohibition Act only on the basis that he was found in a state of intoxication only on the evidence of the doctor who had deposed that "his breath smelt of liquor, pupils were moderately dilated, speech was slurring to a little degree but his gait was steady and he was not intoxicated."

Held, that the accused was not guilty. 1957 M P L J (Notes) 190.

—Ss. 6, 28-H, 28-A — Manufacture of medicinal preparation is outside operation of S. 6 — (Constitution of India, Art. 19.) See Prohibition — C. P. and Berar Prohibition Act (7 of 1938), S. 28-H. AIR 1956 Nag 1 (DB).

—S. 6 (1) (a) and (g)—Possession of incriminating articles—Effect.

Charge under S. 6 (1) (a) and (g) for possession of incriminating article—Mere proof that an incriminating article is found in premises occupied by a number of persons does not in itself establish 'prima facie' the guilt of any particular person or all of them jointly. AIR 1935 Pesh 68, Foll. 1953 Nag L J 227 : 1953 Cri L J 1299 : AIR 1953 Nag 253 (254) (Pt A) (Pr 7) (DB).

● —Ss. 6 (1), Proviso, 29 (2) and 32 (a)—Validity—Whether discriminatory within Art. 14 (1) of the Constitution—Constitution of India, Art. 14 (1).

Per Mangalmurti and Mudholkar JJ.: The Court will not pronounce the law itself as discriminatory even though it lends itself to the practice of discrimination unless it is clear that in the guise of conferral of discretion upon an authority arbitrary power is given to it with the sole or dominant intention that it be used for favouring or oppressing a particular class, community, race or other group. 321 U S 1, Rel. on.

There is no reason for saying that Ss. 6 (1), Proviso, 29(2) and 32(a) are made with an ulterior object of favouring or oppressing particular class community or group. Section 29(2) in particular which enables the Provincial Government to exempt any person or class of persons from all or any of the provisions of the Act or of the rules made thereunder recognises the principle that persons differently situated where the difference in situation is real may have to be exempted from the operation of the Act. The mere conferring of power of exemption does not itself create inequality and hence neither the proviso to S. 6(1) nor S. 29 (2) is rendered void by Art. 14(1) of the Constitution. Similarly Cl. (a) of S. 32 is not void because of the power it confers upon certain officers to put in special class those who obtain his consent by way of the permit issued thereunder.

Per Hidayatullah J.:—By reason of the inequality which underlies Rr. 7 and 7-A these rules and S. 29(2), which enables the Provincial Government to enact such rules are void under the present Constitution. Sheoshankar v. State Govt. of Madhya Pradesh, **52 Cri L J 1140 : I L R (1951) Nag 646 : AIR 1951 Nag 58 (71, 87) (Pt M) (Prs 116, 191) (FB).**

SECTION 13

——S. 13 (a)—Applicability—Search — Non-compliance with S. 40 – Police carrying out search assaulted —Offence—S. 332, Penal Code.

Section 13 (a) would apply only when the person who is assaulted or obstructed is exercising powers under the Act. The source of authority of the police officers to make a search is S. 40 of the Act. One of the requirements of S. 40 is that before an officer competent to make a search without a warrant proceeds to make a search, he must record the grounds for his belief that he has reason to believe that an offence in respect of any liquor punishable under Chap. III has been committed and that the delay occasioned by obtaining a search warrant under S. 38 will prevent the execution thereof.

The provision in this regard contained in S. 40 is evidently enacted for protecting persons from vexatious searches. Non-compliance with such a provision would render a search illegal. Since the search made by a Police Officer without complying with S. 40 is illegal, it cannot be said to be one made by him in the exercise of his powers under the Prohibition Act. If he is assaulted or obstructed in carrying out such search the person or persons assaulting him or obstructing him cannot be held guilty under S. 13 (a), C. P. and Berar Prohibition Act or S. 322, Penal Code. **1956 Nag L J 745 : 1956 M P L J 169 : 1957 Cr L J 1298 (2) : AIR 1957 Nag 93 (93, 94) (Prs 5, 6).**

SECTION 24

——S. 24 — Confiscation of property of innocent person—(Justice, equity and good conscience).

The section confers a discretion on the Court concerned to order confiscation of such articles which has to be exercised judicially. From this it would follow that the Court has to consider all the circumstances present in the case and make such order as would accord with justice, equity and good conscience. Surely, confiscation of an article belonging to an innocent person would not accord with justice, equity and good conscience. **1957 Nag L J 120.**

——S. 24 — Scope — Construction of — (Civil P. C. (1908), Pre)—(Interpretation of Statutes).

No doubt, the language of S. 24 is very wide but, it would not be right to give that language a wider meaning than is required for the purposes of giving effect to the provisions of the Act. It would not be in consonance with the well-established principles of construction of statutes to construe that provision in such a way as to affect the proprietary rights of innocent persons. **1957 Nag L J 120.**

——Ss. 24 and 25 (2) Proviso—Confiscation — Right of party to show that he was not connected with the offence — (Justice, equity and good conscience) — Natural justice).

Under the proviso to sub-s. (2) of S. 25 where any article seized appears to be liable to confiscation under S. 24, but the person who committed the offence under the Prohibition Act in connection therewith is not known or cannot be found, it is incumbent on the authority making the order of confiscation to hear the person who claims any right thereto, record evidence adduced on behalf of suoh person and adjudicate on his rights. In principle, there is no reason why even when the perpetrator of an offence is known, the actual owner of a property should not be in a like position to have his claims examined when he has nothing to do with the offence. Indeed, it would be contrary to the principles of natural justice to deprive a person of his rights to property without his being heard and without proper adjudication being made upon his claim. **1957 Nag L J 120.**

SECTION 25

——S. 25 (2) Proviso—Confiscation—Right of party to show that he was not connected with the offence.

Under the proviso to sub-s. (2) of S. 25 where an article seized appears to be liable to confiscation under S. 24, but the person who committed the offence under the Prohibition Act in connection therewith is not known or cannot be found, it is incumbent on the authority making the order of confiscation to hear the person who claims any right thereto, record evidence adduced on behalf of such person and adjudicate upon his rights. **1957 Nag L J 120.**

SECTION 28-A

——Ss. 28-A and 28-B and 28-H — Notifications No. 1323-1095-VIII dated 19th November 1938 and No. 2920-2912-VIII dated 29th October 1954—Medicinal preparations and tinctures falling within purview of S. 28-A—No positive declarations made under S. 28-B and S. 28-H — Notifications of 1938 and 1954 are ineffective — AIR 1956 Nag 1, AIR 1956 S C 318, Rel. on. **(1963) M P L J 409 : 1963 Jab L J 470.**

——Ss. 28-A, 28-H and 6—Manufacture of medicinal preparation is outside operation of S. 6 — (Constitution of India, Art. 19). See Prohibition — C. P. and Berar Prohibition Act (7 of 1938), S. 28-H. AIR 1956 Nag 1 (DB).

SECTION 28-B

——Ss. 28-B, 28-A and 28-H –Notification Nos. 1323-1095-VIII dated 19th November 1938 and No. 2920-2912-VIII dated 29th October 1954 –Medicinal preparations and tinctures falling within purview of S. 28 A—No positive declarations made under S. 28-B and S. 28-H — Notifications of 1938 and 1954 are ineffective. **1963 Jab L J 470 : 1963 M P L J 409.**

SECTION 28-H

——Ss. 28-H, 28-A and 6—Manufacture of medicinal preparation is outside operation of S. 6.

Section 28-H only affects the sale of 'regulated tinctures'. The control in S. 28-H is applied at the stage of sale and not of manufacture and cannot be read to embrace the latter. The only consequences which ensue when a tincture is notified as a 'regulated tincture' are mentioned in that and the next section. Indeed, by S. 28-A the manufacture of medicinal preparations is placed outside the operation of S. 6, and there is thus no prohibition of the manufacture of genuine medicinal preparations, and there cannot be, after 'Balsara's case', AIR 1951 S C 138.

The Prohibition Act does not, therefore, seek to regulate the manufacture of genuine medicinal preparations and does not confer on the State Government the power to do so.

There is no authority or provision of law which enables the executive to ban the manufacture of genuine drugs prepared in conformity with the terms of the licence under the Drugs Act. While the Act desires the control of regulated tinctures at the stage of consumption and sale, the Executive cannot apply the control at a stage prior to sale and consumption by forbidding even the manufacture of genuine medicinal products.

While the two notifications issued under the authority of Ss. 28-H and 28-I of the Prohibition Act are not void because they regulate sale and consumption of medicinal products with a view to preventing their misuse by addicts, the same cannot be said of the three memoranda issued subsequently.

In these three memoranda it was stated that the petitioner who held licence to import rectified spirit, must manufacture only twenty tinctures of which a list was given. Considering that out of 60 tinctures only 20 were to be manufactured, these orders amounted to an interference, without the authority of law, with the rights of pharmaceutical works to manufacture standard drugs under their licence.

Courts are not required to consider whether the prohibition of the manufacture of tinctures is a reasonable restriction or not, because the Legislature has not authorised the Executive to prohibit manufacture. It has only authorised the executive to regulate sales and has prohibited consumption.

The executive control of manufacture in excess of the Drugs Act and the Prohibition Act is tantamount to adding one more Section to Part III-A of the Prohibition Act. This is not to regulate manufacture but to stop it altogether. **ILR (1956) Nag 157 : AIR 1956 Nag 1 (6) (Pt C) (Prs 29, 30, 31, 32) (DB).**

——S. 28-H—Condition of permit—Validity.

Condition 2-A reiterating S. 28-H and the system of permits cannot be said to be illegal. **ILR (1956) Nag 157 : AIR 1956 Nag 1 (8) (Pt H) (Pr 49) (DB).**

SECTION 29

■ **——Ss. 29 (2) and 32 — Validity — Discrimination between persons — Constitution of India, Art. 14 —** The conferring of the power of execution under S. 29 (2) does not itself create inequality and hence neither the Proviso to S. 6 (1) nor S. 29 (2) is rendered void by Art. 14 of the Constitution. See Prohibition—C. P. and Berar Prohibition Act (1938), S. 6 (1), Proviso. **52 Cri L J 1140 : AIR 1951 Nag 58 (FB).**

■ **—Ss. 29 (2), 32 (a)—Validity—Whether amount to delegation of legislative power.**

The power delegated by Ss. 29 (2) and 32 (a) is not a legislative power. It is merely a power to determine the circumstances in which the law shall be applied or to what areas its operation shall be extended or the particular class of persons to whom it shall be applied. The sections are not therefore invalid on the ground that they amount to delegation of legislative power. AIR 1945 P C 48, Rel. on; AIR 1951 S C 69, Ref. Sheoshankar v. State Govt. of Madhya Pradesh, **52 Cri L J 1140 : ILR (1951) Nag 646 : AIR 1951 Nag 58 (89) (Pt O) (Pr 210) (FB).**

SECTION 30

——S. 30—Limiting supply of rectified spirit.

If the right of the petitioner to carry on the business of manufacturing standard and genuine medicines is not taken away, that business cannot be stopped or, in other words, destroyed by the indirect method of limiting unduly the supply of the main ingredient. S. 28-A of the Prohibition Act excepts the preparation of medicinal products from the operation of S. 6 and thereby ensures the right to carry on the business.

Section 33 provides that conditions may be imposed. Rule 5 of the Central Provinces and Berar Rectified Spirit Rules, 1942, says that a bona fide manufacturer of medicinal preparation shall be entitled to India-made rectified spirit and lays down certain conditions. These conditions do not give a power to cut down arbitrarily the quantity to nothing. No doubt, no manufacturer can claim to obtain all the spirit he says he needs. The need must be made out.

The extent to which this can go must depend upon the supply, the need disclosed and the nature and extent of the business. But unless there is a good ground for cutting short the supply, it must normally be allowed. The Legislature has left the discretion to the executive and to its good sense. The Deputy Commissioner while exercising that discretion must have regard to the facts and act reasonably and justly.

That the licensing authorities have discretion in the matter is true enough, but such discretion must be reasonably exercised.

A supply of six bottles of spirit a day held could not be said to be very generous since the manufacture was thereby limited to a dozen pint bottles of medicines per day, where the drugs which the petitioner manufactured. were aquae, essences, extracts, liquors, liniments, spirits, syrups, and tinctures all containing rectified spirit. The order fixing 500 gallons as the quantity when petitioner demanded 25,000 gallons, held must be declared arbitrary and unwarranted. The quantity was ordered to be refixed. **ILR (1956) Nag 157 : AIR 1956 Nag 1 (7, 8) (Pt E) (Prs 37, 38, 41, 42) (DB).**

——S. 30 — Permit for importing rectified spirit — Subsequent reduction of quota—Validity.

Where a condition in a permit granted to import rectified spirit lays down that the maximum quota of rectified spirit fixed for the period of the permit may be reduced at any time, the condition cannot be examined apart from the facts on which it may be exercised in any given case. There may be a hundred reasons for cutting down the quota; but whatever the reason, it must be one permitted by the Prohibition Act and the Rules. It must also be fair and just. **ILR (1956) Nag 157 : AIR 1956 Nag 1 (8) (Pt F) (Pr 43) (DB).**

SECTION 32

■ **——Ss. 32 (a) and 6 (1), Proviso 29 (2)—Validity—Whether discriminatory within Art. 14 (1) of the Constitution — Constitution of India, Art. 14 (1) —** Clause (a) of S. 32 is not void because of the power it confers upon certain officers to put in special class those who obtain his consent by way of the permit issued thereunder. See Prohibition — C. P. and Berar Prohibition Act (1938), S. 6 (1), Proviso. **A I R 1951 Nag 58 (FB).**

■ **——Ss. 32 (a) and 29 (2) — Validity —** The power delegated by S. 29 (2) and S. 32 (a) is not a legislative power. The sections are not therefore invalid

on the ground that they amount to delegation of legislative power. See Prohibition — C. P. and Berar Prohibition Act (1938), S. 29 (2). **52 Cri L J 1140 : AIR 1951 Nag 58 (FB).**

SECTION 40

——S. 40—Scope—Non-compliance—Effect on legality of search. Search is illegal—Assault on such officer —The assulter is not guilty under S. 13 (a), C. P. and Berar Prohibition Act or S. 332, I. P. C. See Prohibition — C. P. and Berar Prohibition Act (7 of 1938), S. 13 (a). 1957 Cri L J 1298 (2) : AIR 1957 Nag 93.

——S. 40 — Madhya Pradesh Prohibition (Amendment) Act (30 of 1953)—C. P. and Berar Rectified Spirit Rules, 1942—Seizure of rectified spirit imported on valid permit—Validity—Constitution of India, Art. 19.

However well-intentioned the move, the Executive ought never to forget that every seizure of private property by Government agency must be justifiable in law. The C. P. and Berar Prohibition Act, 1938 and M. P. Prohibition (Amendment) Act, 1953 and the Rules, etc., thereunder, do not sanction the seizure of rectified spirit, imported on a valid permit after payment of the prescribed fee, unless there is some breach of the Acts or Rules.

Seizure made when there was no breach of licence conditions or provisions of Act or Rules is a flagrant invasion of private property, wholly unjustified either in law or in fact. **ILR (1956) Nag 157 : AIR 1956 Nag 1 (5) (Pt A) (Pr 26) (DB).**

SECTION 68

——S. 68 (2) (m), R. 5 — Application for licence in form MF II rejected by Deputy Commissioner—Appeal dismissed by Director of Excise and Prohibition without giving hearing—Legality.

Rule 5 of the Rules framed by the Madhya Pradesh Government on 31-5-1938 under S. 68 (2) (m) of the C. P. and Berar Prohibition Act in terms provides that the appellate authority may either admit the appeal or after calling for the record and giving the appellant an opportunity to be heard, may summarily reject it provided that the appellate authority shall not be bound to call for the record where the appeal is time-barred or does not lie. R. 5 conferred a right on the person preferring the appeal to be heard before the appeal is disposed of. The order dismissing the appeal not barred by time, without giving a hearing to the dealer-appellant, was therefore liable to be set aside. **1960 Nag L J (Notes) 6.**

——S. 68 (2) (f)—Regulating manufacture of medicinal liquor.

Section 30 of the Prohibition Act requires that a licence must be taken out. If the manufacture of genuine medicines is not banned then under the powers granted by S. 68 (2) (f) the quantity cannot be limited. It is obvious enough that the right to manufacture genuine medicines cannot be taken away indirectly by restricting the quantity.

Section 28-A which has been enacted after the decision in 'Balsara's case', AIR 1951 S C 318 cannot be rendered otiose by action under S. 68 (2) (f). The word 'regulate' in the latter section must be given a meaning consistent with S. 28-A and 'Balsara's case'. When the authorities restrict the quantity for manufacturing purposes the authorities may be called upon to justify their action. **ILR (1956) Nag 157 : AIR 1956 Nag 1 (8) (Pt G) (Prs 46, 47, 48) (DB).**

—COORG PROHIBITION ACT (1 of 1956)

SECTION 3

——S. 3 (1) (j)—Smelling of alcohol—Offence.

The co-existence of all the symptoms which have been spoken to by P. W. 1 together with his opinion to the effect that the accused was under the influence of alcohol was enough to establish that the accused had consumed liquor even if the same may not have been enough to establish that the accused was in a state of intoxication. Observation in AIR 1955 Mad 92, Approved. **(1961) Mad L J (Cr) 169 (Mys) : 1960 Cri L J 1475 : 38 Mys L J 868 : I L R (1960) Mys 987 : AIR 1960 Mys 312 (312, 313) (Prs 2, 3) (DB).**

—— S. 3 (2) (a), (1) (a)—Articles found in house of accused — Accused will be presumed to have committed offence under S. 3 (1) (a).

The possession referred to in S. 3 (2) (a) refers to physical possession as distinguished from legal possession. Where the articles were found in the house of the accused, prima facie he was in possession of those articles. Hence S. 3 (2) (a) raised a presumption that he was guilty of an offence under S. 3 (1) (a) unless he accounted for his possession satisfactorily. AIR 1958 SC 61, Foll. **(1959) 37 Mys L J 911 : 1960 Mad L J (Cri) 307 (Mys).**

—DELHI INTOXICATING SPIRITUOUS PREPARATIONS, IMPORT, EXPORT, TRANSPORT, POSSESSION AND SALE RULES (1952)

●——(As amended upto 13th December, 1961) — Rules not ultra vires of Proviso 1 of S. 18 of Punjab Excise Act (1 of 1914). See Punjab Excise Act (1 of 1914) (as in force in Delhi), S. 18, Proviso 1. **ILR (1965) 1 Punj 775 : 1965 Pun L R (Supp) 183 : AIR 1966 Punj 4 (FB).**

●——(As amended upto 13th December, 1961) — Validity—Rules are saved from operation of Art. 301 of the Constitution. See Constitution of India, Art. 301. **ILR (1965) 1 Punj 775 : 1965 Pun L R (Supp) 183 : AIR 1966 Punj 4 (FB).**

● ——(As amended upto 13th December, 1961) — Validity — Rules are consistent with object of Act and do not impose unreasonable restrictions on trade, medical practitioners or general public. See Punjab Excise Act (1 of 1914) (as in force in Delhi), S. 3 (14). **ILR (1965) 1 Punj 775 : 1965 Pun L R (Supp) 183 : AIR 1966 Punj 4 (FB).**

RULE 3

● ——Rr. 3, 3-A, 12 and 13 (as amended upto 13th December, 1961)—Exercise of power under S. 5 of Punjab Excise Act (1 of 1914) (as in force in Delhi)— Rules under Act leaving limitation on sale to be governed by prescription of registered medical practitioner — Such provision does not militate against provision of S. 5. See Punjab Excise Act (1 of 1914) (as in Force in Delhi), S. 5. **ILR (1965) 1 Punj 775 : 1965 Pun L R (Supp) 183 : AIR 1966 Punj 4 (FB).**

RULE 3-A

● ——R. 3-A (as amended up to 13-12-61) — Punjab Excise Act (1 of 1914) S. 5 (as in force in Delhi) — Exercise of power under S. 5 — Rules under Act leaving limitation on sale to be governed by prescription of registered medical practitioner — Such provision does not militate against provision of S. 5. See Punjab Excise Act (I of 1914) (as in force in Delhi), S. 5. **I L R (1965) 1 Punj 775 : 1965 Pun L R (Supp) 183 : AIR 1966 Punj 4 (FB).**

RULE 12

● ——Rr. 12 and 13 (as amended upto 13-12-61)— Punjab Excise Act (1 of 1914), S. 5 (as in force in Delhi) — Exercise of power under S. 5 — Rules under Act leaving limitation on sale to be governed by prescription of registered medical practitioner — Such provision does not militate against provision of S. 5. See Punjab Excise Act (1 of 1914) (as in force

in Delhi), S. 5. ILR (1965) 1 Punj 775 : 1965 Pun L R (Supp) 183 : AIR 1966 Punj 4 (FB).

– KERALA PROHIBITION ACT (T..C. ACT 13 of 1950)

See also Travancore-Cochin Prohibition Act (13 1950).

SECTION 2

——S. 2 (a) — Where a woman cannnot prevent her husband from keeping the contraband article in the house a Court will not be justified in presuming that everything found in the house is invariably in the joint possession of the house holder and his wife, as it is the mere knowledge of the presence in the house of the offending article is insufficient to raise the presumption against her. See Prohibition — Kerala Prohibition Act (T. C. Act 1950), S. 8 (1) (a). 1964 Mad L J (Cri) 615 (Ker).

SECTION 4

——S. 4(2)(a)—Presumption as to possession of illicit liquor—Presumption normally attaches to head of family — Exception to this normal rule.

The presumption of possession of contraband liquor attaches itself to the head of the family as normally it is his will that prevails in the household. He can wield the authority to see that an article either remains in the house if he so desires or is removed from the house if he does not want it there. If, however, the nominal head of the family is an old man and the effective control over the household is exercised by someone else such as an adult son then there is little justification in holding him responsible for no reason other than that theoretically, he still remains the head of the family. (1963) K L T 661, Foll. 1964 Ker L J 901 : 1964 Ker L T 683:1964 Mad L J (Cri) 615: ILR (1964) 2 Ker 662.

——S. 4 (2) (a) — Possession of husband of illicit liquor — It is not necessarily possession of his wife.

Per Anna Chandy, J. — According to the common course of human conduct, the woman of the house cannot prevent the contraband liquor from being kept in the house, if her husband insists that it should be. If that be so, a Court will not be justified in presuming that everything found in a house is invariably in the joint possession of the householder and his wife. The mere knowledge of the presence in the house of the offending article is insufficient to raise the presumption against the wife.

Per Govinda Menon, J. — The question whether a particular person, be it husband or wife, is in possession of contraband has to be decided on the facts and circumstances of each particular case and no hard and fast rule can be laid down in which case it could be stated that the wife is not in possession of the incriminating article. Circumstances there might be in a particular case from which it could easily be inferred that the wife is also in possession along with her husband and in such a case the presumption under S. 4 (2) (a) of the Act would arise. 1964 Ker L J 901 : 1964 Ker L T 683:1964 Mad L J (Cri) 615 : ILR (1964) 2 Ker 662.

SECTION 8

——S. 8 — Possession of illicit liquor — It need not be exclusive.

Possession of the conraband liquor need not be exclusive for it to amount to an offence under the Prohibition Act. A person can be found guilty of possession even if he is shown to have been in possession of the contraband jointly with others. (1963) Ker L T 661, Foll. 1964 Ker L J 901 : 1964 Ker L T 683 : 1964 Mad L J (Cri) 615 : ILR (1964) 2 Ker 662.

——S. 8 (1) (a) and (2) (a) — Contraband recovered from a house — Women of the house whether guilty of possession of those articles — Presumption to be drawn — Evidence Act (1872), S. 114.

Per Anna Chandy, J. — The presumption that articles in a person's house are in his possession is a presumption under S. 114 of the Evidence Act which permits a Court "to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to facts of the particular case." It has to be presumed that the head of the family is responsible for the contraband found in the house because according to common course of human conduct the head of the family can, if he does not desire its presence in his house, secure its removal irrespective of the wishes of the other members of the household. Would it also be likely, according to the common course of human conduct, that the woman of the house can prevent the contraband from being kept in the house if her husband insists that it should be ? In most cases the answer must be in the negative. If that be so, a Court will not be justified in presuming that everything found in a house is invariably in the joint possession of the householder and his wife. Knowing that the contraband is present in the house is not the same thing as possessing it. If the contraband was recovered from a room under her custody or from a box containing her own things then there might have been some justification in calling upon the wife to explain its presence. As it is, the mere knowledge of the presence in the house of the offending article is insufficient to raise the presumption against her.

Per Govinda Menon, J. — The question whether a particular person, be it husband or wife is in possession of contraband has to be decided on the facts and circumstances of each particular case and no hard and fast rule can be laid down in which case it would be stated that the wife is not in possession of the incriminating article. Circumstances there might be in a particular case from which it could easily be inferred that the wife is also in possession along with her husband and in such a case the presumption under S. 8 (2) (a) of the Act would arise. 1964 Ker L J 901 : 1964 Ker L T 683 : (1964) 2 Ker L R 280 : ILR (1964) 2 Ker 662 : (1964) Mad L J (Cri) 615 (Ker).

——S. 8 (1) (j) — Prosecution must prove that the accused had consumed liquor from a prohibition area.

The burden is always on the prosecution to prove that the consumption of liquor by the accused was from a prohibition area which alone would make it an offence. 1964 Ker L J 719: (1964) M L J (Cri) 605.

—MADHYA BHARAT MADAK DRAVYA VIDHAN (14 of 2009 Smvt.)

(Madhya Bharat Excise Act (14 of 1952).)

SECTION 12

——S. 12 (f) — Offence under — Plea of guilty — Where the particulars of the offence under S. 12 (f) of which the accused can legitimately be charged, viz. that he was in possession of the implements of distilling illicit liquor, are not put to him, the acceptance of his answer to a question which could not be put to him as a plea of guilty cannot be sustained. AIR 1955 N U C (Madh B) 3760.

SECTION 33

——S. 33 — Accused admitting recovery of four bottles of liquor from his house but pleading that

there were five persons and bottles were for consumption — Evidence indicating that four different persons had brought four bottles one each — There is no justification, on this evidence to hold that it was accused who paid for the four bottles — Acquittal cannot be interfered with in appeal. 1956 M B L J 467 : Madh B L R 1956 Cri 53.

——S. 33 (f) — Offence under — Particulars of offence not put to him — Acceptance of his answer to a question which could not be put to him as a plea of guilty cannot be sustained. AIR 1955 N U C (Madh B) 3760.

—(M. P.) FOREIGN LIQUOR RULES (1960)

RULE II

——R. II (iii) and (iv) (as amended in April 1964) —Enhancement of scale of fees— Balance of stock of foreign liquor on 31-3-64 out of stock obtained under licence issued before 1-4-64 — Licensee is not liable to pay difference between enhanced rate and old rate. See M. P. Excise Act (1915), S. 62. AIR 1965 Madh Pra 271 (DB).

RULE IV

——R. IV (as amended in April 1964) — Enhancement of scale of fees — Balance of stock of foreign liquor on 31-3-1964 out of stock obtained under licence issued before 1.4.1964 —Licensee is not liable to pay difference between enhanced rate and old rate. See M. P. Excise Act (2 of 1915), S. 62. AIR 1965 Madh Pra 271 (DB).

—MADHYA PRADESH PROHIBITION ACT (7 of 1938)

See also C. P. and Berar Prohibition Act (7 of 1938).

SECTION 6

——S. 6 (1-a) — Accused suspected of carrying contraband liquor in a kettle — Villagers sensing smell seizing bottle and making police report — Four days later Police Head Constable seizing it from villagers— Such seizure suspicious and liable to be rejected — Inability of accused to establish why he was falsely involved did not mean that the prosecution version was true. 1966 M P L J (Notes) 25.

——S. 6 (j) — Person consuming liquor—His physical or mental faculties not appreciably and materially impaired—He cannot be held to be in state of intoxication. 1965 M P L J (Notes) 17.

—MADHYA PRADESH PROHIBITION (AMENDMENT) ACT (19 of 1953)

——C. P. and Berar Rectified Spirit Rules, 1942 — Seizure of rectified Spirit imported on valid permit — Validity.

However well-intentioned the move, the executive ought never to forget that every seizure of private property by governmental agency must be justifiable in law. The C P. and Berar Prohibition Act, 1938 and M. P. Prohibition (Amendment) Act, 1953 and the Rules thereunder, do not sanction the seizure of rectified spirit imported on a valid permit after payment of the prescribed fee unless there is some breach of the Act or Rules. Seizure made when there was no breach of licence conditions or provisions of Act or Rules is a flagrant invasion of private property, wholly unjustified either in law or in fact. See C. P. and Berar Prohibition Act (7 of 1938), S. 40. AIR 1956 Nag 1 (DB).

—MADRAS PROHIBITION ACT (10 of 1937)

——Applicability — Has no operation beyond the territorial limits of the State of Madras.

The Madras Prohibition Act (10 of 1937) extends only to the State of Madras and it is obvious that any act of omission or commission which constitutes an offence under the Madras Prohibition Act should be committed within the limits of the State of Madras. The Act has no operation beyond the territorial limits of the State of Madras. Prosecution under the Madras Prohibition Act in respect of an offence committed within the boundary limits of the State of Kerala and outside the limits of the State of Madras would be incompetent. The fact that the same act is made an offence under corresponding provision of the Travancore-Cochin Prohibition Act on the same pattern as the Madras Act cannot alter this position. 1965 Mad L J (Cri) 822 : 78 Mad L W 694 : (1965) 2 M L J 379.

SECTION 1

——Ss. 1 and 4 (1) (a) — Validity of Act so far as it pertains to Ganja — Act is not repugnant to any provisions of Constitution — Ganja being narcotic drug State Legislature is competent to make laws on that subject under entry 19 of Concurrent List — Hence Act comes within ambit of Art. 372. See Constitution of India, Art. 372 (1). 1955 Andh L T 205.

SECTION 2

——S. 2 (a) — Possession — Meaning of — Nature of possession required for justifying conviction — Contraband found in joint possession of two persons living in a house — It is not necessary that physical power of dealing with the thing should be retained at every moment of time — Presumption is, both are in possession — Presumption is rebuttable — Nature of proof required for conviction of both — Prosecution to prove that each of the accused had either physical or constructive possession of the property and that the possession was to the knowledge of every accused. See Prohibition — Madras Prohibition Act (1937), S. 4 (1) (a). 1961 Ker L J 1154 : 1961 Ker L T 992.

SECTION 3

——S. 3 (19) and S. 4 (1) (a) — Transporting liquor — What amounts to.

While a person carrying contraband liquor could definitely be said to be in 'possession' of the contraband, such mere possession cannot by itself lead to any inference of the offence of transporting such liquor. Possession of the contraband and transporting it are two distinct offences and the latter attracts a minimum sentence of imprisonment under the Act. A person may be in possession of liquor without transporting it; he may be transporting it without being in possession as in cases where the causes to be moved from place to place without his accompanying it; and finally he may be both in possession of the contraband and may be engaging himself in its transport when of course he may be convicted for both the distinct offences. The purpose of the transport cannot determine the offence. The transport need not be for commercial purpose and even transport for personal consumption will amount to the offence of transporting. Though the quantity of the liquor carried may be relevant it is not decisive. Nor could the distance between one place and another where the accused is apprehended furnish a basis of distinction. Where an accused is taking contraband with knowledge that he is taking it from one place to another, and is physically in possession, the mere fact that he is ultimately going to consume it himself or the fact that the quantity is small, will not afford any principle on which he could be convicted for the offence of possession only and not for transporting. (1965) 1 Mad L J 156 : 1965 Mad L J (Cri) 114 : 1964 Mad W N 345 : ILR (1965) 1 Mad 516.

——Ss. 3 (9), 4, 16 (1), 18, 23 and Forms III-A; III-B and III-C — Validity — Constitution of India, Art. 9 (1) (f).

The provisions of the Madras Prohibition Act, 1937, except S. 23 (2), in so far as they relate to medicinal preparations are regulatory and reasonable in character and do not contravene the provisions of Art. 19 (1) (f) of the Constitution and are valid.

A statute relating to prohibition of intoxicating liquors can validly regulate the manufacture, sale and consumption of allied products like medicinal preparations, not for the purpose of interfering with the rights of citizens to acquire, hold or dispose of them; but for preventing them from being diverted from their true purpose and utilised for defeating the provisions of the law relating to prohibition. Since impugned provisions can be regarded as a proper regulation of medicinal preparations as their object is not to prevent their user as medicine but to prevent intoxicating liquors being passed off under the lable of medicinal preparations, they must be held to be valid as being incidental to the enforcement of prohibition. A I R 1951 S C 318; A I R 1951 Bom 210; A I R 1933 P C 16; (1912) 57 Law Ed. 184; (1919) 64 Law Ed. 260; (1924) 69 Law Ed 1054, Ref. to.

In enacting a prohibition law with reference to intoxicating liquor the legislature intended to take out bona fide medicinal preparations out of the operation of S. 4 and introduced for that purpose a system of licensing and when the Constitution came into force there was both the enactment and the Notifications under the Act all in operation as part of one scheme of prohibition and regulation.

Section 18 of the Act and the licences issued thereunder which are reasonable, cannot be held to be void because of the inclusion of medicinal preparations in the definitions of "liquor" under S. 3 (9).

Section 23 (2) which authorises the Government to cancel or suspend a licence without assigning any reasons therefor, is unconstitutional and void as the exercise of a fundamental right cannot be made to depend on the unfettered discretion of executive authorities. (1953) 2 Mad L J 724 : 1953 Mad W N 909 : A I R 1954 Mad 643 (646, 647, 648, 649, 650) (Pt A) (Prs 11, 16, 22, 23, 27) (DB).

——Ss. 3 (1) and 4 (1) (h) — Licensee reducing bulk from bigger bottles to smaller bottles in course of business — Offence of bottling under S. 4 (1) (h) if committed.

The process of bottling as contemplated by S. 3 (1) obviously is applicable to firms who deal in brandy and also to persons who manufacture large quantities and then divide them into smaller quantities in order to facilitate the distribution and disposal of the quantities manufactured by them. It is too much straining of the language contained in the definition in S. 3 (1) to say that a chemist who is permitted to sell liquor by itself in quantities not exceeding two ounces is bottling or re-bottling. It would be legitimate act on the part of the licensee to keep liquor in smaller bottles to facilitate his trade as a chemist so long as he acts within the directions of his licence. Hence, where he reduces the bulk from bigger bottles to smaller bottles in the course of business and trade he commits no offence under S. 4 (1) (h). 64 Mad L W 663 : 1951 Mad W N 595 : 1951 Mad W N (Cri) 171 : (1951) 2 Mad L J 195 : 1952 Cri L J 48 : A I R 1951 Mad 996 (996) (Pr 1).

——Ss. 3 (a) and 4 (1) (a) — Varnish containing denatured spirit comes within definition of liquor — Its possession by a carpenter for legitimate use is not however an offence — Principle of de minimis non curat lex applies. See Prohibition—Madras Prohibition Act (1937), S. 4(1) (a). 51 Cri L J 452 (1) : A I R 1950 Mad 145.

——S. 3 (9)—'Asavas' and 'Aristas' are 'liquor'—Scope of Notification under S. 16.

The prosecution case itself was that seized articles are 'Aristas' and 'Asavas' manufactured by a reputed firm. The Chemical Examiner who is examined as P. W. 5 in this case, was not sure whether the 'Asavas' and 'Aristas' concerned in this case contain self-generated spirit. In short, the prosecution has not satisfactorily established that the 'Asavas' and 'Aristas' do not fall within the scope of Notification, No. 941. So long as one is not in a position to say that the 'Asavas' and 'Aristas' concerned in this case are not purely 'Asavas' and 'Aristas' containing self-generated spirit, the accused are entitled to the benefit of the exemption found in clause (a) of the aforesaid Notification. (1963) Mad L J (Cri) 73 : 39 Mys L J 848.

SECTION 4

SYNOPSIS

(Madras Prohibition Act (10 of 1937), S. 4).

1. Section 4—Validity of.
2. Sub-section (1).
3. Offence—Proof of.
4. Examination of panchas, if necessary.
5. Proviso to sub-s. (1).
6. Sub-section (2)—Presumption.
7. Sentence.
8. Non-compliance with S. 495, Criminal P. C. — Effect on trial.
9. Charge under S. 4A—Conviction under S. 4 (1), if legal.
10. Conviction under S. 4A—Subsequent prosecution under S. 4 (1) not barred.

1. Section 4—Validity of.

● ——S. 4 (2) — Not ultra vires. See Government of India Act (1935), S. 107. 1957 Cri L J 409 : A I R 1957 S C 297.

● ——S. 4 (2) — Scope — Does not offend against Art. 14, Constitution of India. See Constitution of India, Art. 14. 1957 Cri L J 409 : AIR 1957 S C 297.

——S. 4 (1) (a)—Validity of Act so far as it pertains to Ganja — Act is not repugnant to any provisions of Constitution—Ganja being narcotic drug, State Legislature is competent to make laws on that subject under entry 19 of Concurrent List. Hence Act comes within ambit of Art. 372 (3). See Constitution of India, Art. 372 (1). 1955 Andh L T 205.

——S. 4 (1) (a)—Possession of Ganja — No inconsistency between provisions of Central Act and Madras Act—Assuming that there is inconsistency, Madras Act will prevail over earlier Central Act. See Constitution of India, Art. 254. 1955 Andh L T 205.

——S. 4—Scope—Section is not discriminatory and is not invalid—(Constitution of India, Art. 14).

The fact that certain actions are made offences and are visited with penal consequences, while other actions are not, has never been understood to contravene the rule of equal protection of the laws. It is also obvious that the same procedure cannot be made applicable for every offence. There is no discrimination made against persons accused of offences under the Madras Prohibition Act. There is no difference in procedure, because the procedure as laid down under the Code of Criminal Procedure will apply to the trial of offences under the Prohibition Act. The enactment of a special presumption under S. 4 (2) of the Act in certain circumstances does not offend Article 14 of the Constitution in any manner. Section 4 (2) of the Prohibition Act is neither invalid

nor unconstitutional on any ground. ILR (1955) Mad 887 : 1954 Mad W N 575 : (1954) 2 Mad L J 475 : 1954 Cri L J 1521 : A I R 1954 Mad 993 (998) (Pt D) (Pr 20) (DB).

—S. 4—Validity of — Does not contravene the provisions of Art. 19 (1) (f) and is valid. See Prohibition — Madras Prohibition Act (10 of 1937), S. 3 (9). AIR 1954 Mad 643 (DB).

2. Sub-section (1).

—S. 4 (1) (a) — Transport of liquor and possession of liquor — Distinction — Accused proceeding with small quantity of liquor on his person — Held to be guilty of transporting liquor.

While a person may possess without transporting and one may equally transport without possession, a person may possess and transport, in which case he will be committing both the offences. It cannot be said that the purpose of the transport determines the offence, for a Court is bound by the terms of the enactment, and the legislature has made no such distinction. A person who takes liquor from one place to another, not for sale to some one else but for his own consumption at some ultimate destination, is to be considered, as engaged in 'transport' of the contraband. The legislature has not laid it down that the transport must be for commercial purposes or that it is transport for sale alone which is punishable, and not transport for personal consumption. Again, the quantity of liquor carried may be relevant, but it cannot be decisive. For, here again, the legislature has not laid it down that the offence of transport can be committed only if the contraband is appreciable in quantity, or only if it exceeds a particular quantity. The distance of the ultimate destination, whatever it might be from the place at which the offender is apprehended, again, may not furnish any true basis for distinction. Where it is clear that a person is taking contraband, with the knowledge that he is taking it from one place to another, and he is physically in possession, the mere fact that he is ultimately going to consume it himself, or the fact that the quantity is not considerable, will not afford any principle on which he can be convicted for possession alone, and acquitted as regards the charge of transport. 1958 Mad W N (Cri) (SC) 97, Rel. on; AIR 1938 Bom 43, Not foll.

The accused was apprehended at about 10.30 p. m. on 6.5.1963 on the southern bund of Panchanthangi while he was proceeding along that bund. He was actually carrying a bottle containing 4 drams of arrack, tucked up in the clothes of his waist.

Held, that there was no justification for holding that the accused was not engaged in 'transport' of the contraband. The purpose with which he was so engaged was really immaterial, But the quantity was small, and presumably he was intending to consume the liquor himself, and was not engaged in trafficking in the commodity. Had he been stationary at the time of arrest, or had he consumed the liquor immediately before arrest, he would have been liable for other offences alone, which would involve no minimum punishment. These were special circumstances extenuating the character of the offence, though they did not affect the legal propriety of the conviction for the offence of transport. 1965 Mad L J (Cr) 114 : (1965) 1 Mad L J 156.

—S. 4 (1) (a) — Possession — Possession connotes something more than mere knowledge of presence of contraband article — It has to be inferred from circumstances of case. (1965) 78 Mad L W 226.

—Ss. 4 (1) (a) and 5 — Spirit or preparation containing spirit—Person in possession of — Rendering or attempting to render it fit for human consumption — No knowledge or reason to believe — Conviction for possession of liquor only sustainable.

The petitioner was not detected in rendering or attempting to render fit for humman consumption, the spirit or preparation containing spirit. The latter part of S. 5 of the Madras Prohibition Act requires that the person in possession of the preparation so rendered potable must know or have reason to believe that such an attempt had been made. In the absence of any evidence on this aspect, no inference to that effect can be drawn from mere possession of the preparation. The conviction under S. 5 of the Act cannot be sustained; it can only be under S. 4 (1) (a) of the Act namely possession of liquor or an intoxicating ing drug. 1964 Mad L J (Cri) 210 : (1964) 1 Mad L J 280.

—Ss. 4 (1) and 16 — Tincture ginger beris being a preparation which comes within the exempted categories its consumption under medical prescription is not an offence—Accused need not prove that he purchased the stuff from a source authorized to sell the same—Sale of such stuff without permit by a chemist may be some other offence but the accused commits no offence so long as he takes the exempted tincture under a medical prescription. (1964) Mad L J (Cri) 209 : (1964) 1 Mad L J 292.

—Ss. 4 (1) (j) and 16—Consuming liquor specified among the exempted category—If an offence.

Under S. 16 of the Madras Prohibition Act the Government has the power to exempt certain categories of preparations containing alcohol, even in large proportions, from the operation of the Madras Prohibition Act. Hence it will not be an offence under S. 4 (1) (j) of the Act to consume a stuff in the exempted category. Though it may be that the sale of even such an exempted stuff is licensed, its consumption will not be an offence under S. 4 (1) (j) of the Act and an accused is under no duty to prove that he obtained the stuff from a source authorised to sell the same. 1964 Mad L J (Cri) 209 : (1964) 1 Mad L J 292.

—S. 4 (1) (a) — Intoxicants in possession of wife—Effect of S. 27, Penal Code — [Penal Code (1860), S. 27].

Bottles labelled as 'happy syrup' containing intoxicants found on person of A's wife B—A and B prosecuted under S. 4 (1) (a) — A acquitted but B convicted and sentenced to pay fine — Contention that B's possession was A's possession under S. 27, Penal Code and hence B's conviction after A's acquittal was not justified held wrong—Further the fact that the manufacturer of the syrup held licence to manufacture and to distribute it to authorised druggists did not absolve B from taking out licence under the Prohibition Act. AIR 1955 NUC (Mad) 936.

—S. 4 (1) (a)—Possession of Ganja after enactment of Madras Act 11 of 1941 — If offence—Hemp Drug Rules (1936), R. 23 — Madras Prohibition Supplementary Act (11 of 1941), S. 2.

After the enactment of the Madras Prohibition Supplementary Act (11 of 1941), the Hemp Drug Rules including R. 23 framed under the Indian Abkari Act, are not in force. Hence, the possession of 1/16 tola of Ganja after that enactment, is an offence, under S. 4 (1) (a), Madras Prohibition Act. AIR 1941 Mad 533 (FB), Ref. 1951 Mad W N (Cri) 92 : 1951 Mad W N 300 : (1951) 1 Mad L J 510 : AIR 1952 Mad 504 (1) (504) (Pr 2).

—Ss. 4 (1) (h) and 3 (1) — Licence reducing bulk from bigger bottle to smaller bottle in course of business—Offence of bottling under S. 4 (1) (h) not committed. See Prohibition — Madras Prohibition Act (1937), S. 3 (1). 1952 Cri L J 48 : AIR 1951 Mad 996.

—Ss. 4 (1) (a), 16 — Exemption of certain medicine under S. 16 — Obligation of dealer to examine contents — Some bottles found to contain more spirit — Conviction under S. 4 (1) (a)—Maintainability.

Once a medicine or preparation is exempted from the operation of the Act, it must be taken for granted that any dealer or commission agent trading in such medicine or preparation is free to trade in it without examination of the contents to see whether they contain more spirit or without limitation of the period of keeping where the spirit contents of the medicine or preparation increase with long keeping unless of course, the notification exempting the medicine or preparation prescribes these additional limitations or the dealer adds spirits himself.

Hence where some of the bottles of medicine exempted under the Act are found to contain more spirits the dealer will not be liable to conviction under S. 4 (1) (a). 1951 Mad W N 381 : 1951 Mad W N (Cri) 109 : 64 Mad W N 477 : (1951) 1 Mad L J 698 : 52 Cri L J 1058 : AIR 1951 Mad 883 (2) (884) (Pt B) (Pr 3).

——S. 4 (1) (j), (2)—Evidence of smell of liquor.

A person cannot be convicted under S. 4 (1) (j) for consuming liquor or any intoxicating drug only on the proof that he was found smelling liquor. The presumption under S. 4 (2), in such a case, cannot be raised as proof of possession of the things mentioned is a pre-requisite for raising the presumption. (1951) 1 Mad L J 94 : 1951 Mad W N 197 (2) : 1951 Mad W N (Cri) 49 (2) : 52 Cri L J 703 : AIR 1951 Mad 703 (704) (Pr 3).

——S. 4 (1) — Physical act of transporting liquor to permit holder—If offence.

Where a bottle of liquor was seized from a truck when the same was being transporated to the bungalow of a permit holder, it cannot be said that the owner of the truck (who was not the driver) was in possession of the liquor and hence he cannot be held guilty of an offence under S. 4 (1). (1950) 1 Mad L J 475 : 63 Mad L W 298 : 51 Cri L J 1143 : 1950 Mad W N 343 : 1950 Mad W N (Cri) 99 : A I R 1950 Mad 508 (508) (Pr 3).

——Ss. 4 (1) (a) and 3 (a) — Varnish containing denatured spirit comes within definition of liquor—Its possession by a carpenter for legitimate use is not however an offence — Principle of de minimis non curat lex applies. 51 Cri L J 452 (1) : 62 Mad L W 761 : (1949) 2 Mad L J 558 : 1949 Mad W N 840 (1) : AIR 1950 Mad 145 (145) (Pr 2).

3. Offence—Proof of.

——S. 4 (1) (j)—Consumption of intoxicating drug—Burden of proof—Mere breath smell—If sufficient to base conviction.

In the absence of any other evidence an inference cannot possibly be drawn from the mere breath smell of the accused that he had consumed arrack. The burden is on the prosecution to prove that alcohol of which the accused was smelling is such that it came within the category of prohibited drugs. Where the doctor who examined the accused stated that the accused was smelling of arrack but in cross-examination said that if B. G. Phos was taken there was possibility for the smell to come if that tonic contained sufficient percentage of alcohol and further stated that he did not examine the stomach contents of the accused, or his blood or urine because he was convinced that the smell was of arrack :

Held, that in the absence of examination of stomach contents or the blood or the urine, sufficient doubt was created as to what the doctor deposed was correct and it was not safe to base conviction on mere suspicion. (1957) Mad L J (Cri) 623 : (1957) 2 An W R 413.

——S. 4 (1) (a) — Charge under — Accused asked to show cause against conviction as required under S. 242, Criminal P. C. — Accused answering "it is true" — If amounts to admission within the operation of S. 243, Criminal P. C. — Conviction on basis of admission, can be based. See Criminal P. C. (1898), S. 243. AIR 1955 N U C (Andh Pra) 3627.

——S. 4 (1) (a) and (2) (a)—Possession—Meaning of —Nature of possession required for justifying conviction — Contraband found in joint possession of two persons living in a house — It is not necessary that physical power of dealing with the thing should be retained at every moment of time — Presumption is, both are in possession — Presumption is rebuttable — Nature of proof required for conviction of both — Prosecution to prove that each of the accused had either physical or constructive possession of the property and that the possession was to the knowledge of every accused. (1951) 1 K B 505 : (1896) 2 Q B 44, Rel. on. 1961 Ker L J 1154 : 1961 Ker L T 992.

——Ss. 4 (1) (a) and 34—Conviction solely based on evidence of officer who conducted search—Legality.

The evidence of the prosecutor may or may not be reliable. All the same, it cannot be denied that it will be extremely unsafe and risky to convict an accused on the strength of the evidence of the prosecutor. This is particularly so in respect of offences under the Prohibition Act. The necessity of procuring the attendance of neighbours to the place of search, to witness the search and to attest the search list, cannot be dipensed with. The prosecution cannot disregard this very necessary and wholesome provision and ask the Court to accept the prosecutor's evidence alone as sufficient proof of the truth of the search. (1958) Mad L J (Cri) 867 : 1958 Ker L J 868 : 1958 Ker L T 966 : 1959 Cri L J 463 : AIR 1959 Ker 98 (99) (Pr 3) (DB).

——S. 4 (1) (j) — Offence under — Nature of proof before conviction.

For proper conviction of a person under S. 4 (1) (j), for consumption of illicit liquor, the prosecution has to discharge the burden of proof that the liquor consumed by him was prohibited and it was not of some unprohibited variety. The evidence of the Doctor that he was unable to state categorically whether the offender had consumed prohibited liquor, or otherwise, particularly when he examined an alleged drunkard sometime afterwards, would only prove that the accused had consumed alcohol ; but would not exclude some other mode of proof by the prosecution that the alcohol consumed was of prohibited variety, if the prosecution relies upon the evidence of the constable who smelt the breath of the accused and detected the smell of attack; it must show that it was possible for a trained individual to distinguish that smell from smell of any other alcoholic preparation and that the constable had received such a training. 77 Mad L W 710 : 1965 (2) Cri L J 370 : A I R 1965 Mad 414 (414) (Prs 1, 2, 3).

——S. 4 (1) (b)—Person engaged in illicit distillation apprehended on spot — Mahazar witnesses turning hostile — Evidence of officer who conducted raid—Conviction held not bad—Criminal P.C. (1898), S. 367—Evidence Act (1872), S. 3.

In a case under S. 4 (1) (b), the contention that the officer who conducted the raid was the sole witness to the facts, the alleged Mahazar witnesses having turned hostile to the prosecution, would be a circumstance of some weight in a case where the person engaged in illicit distillation had not been apprehended on the spot. But where the accused was bodily apprehended, and taken to the police station he is unable to deny that he was apprehended, taken to the police station and charge-sheeted, though he would deny that he had been engaged in illicit distillation. In that case the contention raised is not acceptable. 1964 Mad L J (Cr) 664 (Mad).

——S. 4 (1) (j) — **Charge of consumption of prohibited liquor — Onus and proof—Proof of mere symptoms—If sufficient—Admission of accused to Doctor to whom the accused were sent by the Police—Inadmissibility — Evidence Act (1 of 1872), S. 26 — Applicability.**

It is the duty of the prosecution in a charge of an offence under S. 4 (1) (j) of the Madras Prohibition Act to prove that prohibited alcohol had been consumed by the accused persons and that duty does not cease by merely proving that certain symptoms which could be attributed to consumption of alcohol were present in the person of the offenders. 1960 M L J (Cri) 761 and (1960) 2 M L J 449, Foll. Where the accused persons were examined by the Doctor on a requisition from the Police and were actually brought to the Doctor by the Police they must be presumed to have been in 'Police custody' at the time and an alleged admission to the Doctor 'Sapitten' in reply to the Doctor's question "Sarayam suppittaya?" — is inadmissible in evidence to prove consumption of prohibited liquor by the accused persons. The confessional statement is inadmissible in view of the provisions of S. 26 of the Evidence Act. **1964 Mad W N 293 : (1964) 2 Mad L J 204.**

——S. 4 (1) (a) — **Trial for offence under—Accused challenging nature of contents of bottles—Magistrate opening bottles in open Court — Presumption drawn from smell of contents and visual examination of bottles—Validity — Contents ordered to be destroyed immediately—Magistrate held acted in contravention of R. 375 of Criminal Rules of Practice — Evidence Act (1872), S. 114—Criminal Rules of Practice and Orders (Madras), R. 375.**

Held, that it was no doubt permissible to draw an inference, under S. 114 of the Evidence Act, from certain external features and circumstances, like the label and smell, the cork being intact and so forth, that the contents were prohibited liquor. But when a challenge was made by an accused that the contents were not prohibited liquor and that no presumption ought to be drawn from the external features, it might then be necessary, in order to obviate all doubts at all stages of the case, to have the contents analysed. The reasons should be such as would justify that in the particular circumstances the presumption could be safely drawn about the contents being prohibited liquor.

Held, further that in destroying the contents the Magistrate acted not only indiscreetly but took upon himself the role of a prosecution witness, which the Court ought not to do. The Magistrate clearly acted in contravention of R. 375 of the Criminal Rules of Practice in having the contents of the bottles destroyed, even before he delivered his judgment. **1962 Mad L J (Cr) 415 : (1962) 2 Mad L J 95.**

——S. 4 (1) (a) and Notification N. 941 dated 3-12-1952 — **Notification exempting 'Asawas' and Aristas from operation of Act —Contravention of S. 4 (1) (a) —Prosecution must prove that seized articles are not within notification.**

Possession of preparations known purely as asawas and aristas containing self-generating spirit is exempted by Notification No. 941 dated 3.12.1952 from operation of the Act and hence it is not an offence under S. 4 (1) (a).

Unless the prosecution is able to establish that the seized articles do not come within the scope of Notification No. 941, it is not possible to say that there has been any contravention of S. 4 (1) (a) of the Act. **(1961) 39 Mys L J 848: 1963 Mad L J (Cri) 73: I L R (1961) Mys 1202.**

——S. 4 (1) (j) — **Conviction for consumption of liquor—Symptoms held not sufficient to prove guilt.**

The smell and the dilation of pupil might be explained on the basis of taking alcohol of the exempted category. But where, the other two symptoms of incoherent speech and staggering gait were not proved by the prosecution the guilt of the accused for having consumed prohibited alcohol cannot be held to have been established beyond all reasonable doubt. **1960 Mad W N 328 : 1960-2 Mad L J 449 : 1960 Mad L J (Cri) 762.**

——Ss. 4 and 41-A — **Offence of consuming prohibited alcohol—How established—Evidence of doctor not authorised under S. 41-A—Admissibility.**

Section 41-A of the Madras Prohibition Act is intended to compel person taken to a doctor to submit for examination and any resistance to such examination entails the penalties provided for in that regard. The police should take the person suspected of an offence under Prohibition Act to a doctor authorised under S. 41-A of the Act. But the evidence of a doctor, not authorised under S. 41-A of the Act, but who examined the accused does not become inadmissible merely because he is not authorised under S. 41-A of the Act.

In a prosecution under S. 4 (1) of the Act it is the duty of the prosecution to prove that the smell detected was that of a liquor that came within the category of prohibited alcohols as smell, etc, can be explained on the basis of taking alcohol of the exempted category as well. **(1960) 2 Mad L J 449 : 1960 Mad L J (Cri) 762.**

——S. 4 (1) (j) — **Charge of consuming prohibited alcohol—Proof and onus.**

Where the signs found on the medical evidence were : breath smelling of alcohol, congestion of the eyes, dilation and sluggish reaction to light of pupils but speech and gait were normal, the prosecution cannot be said to have discharged the onus of proving that the accused had consumed prohibited alcohol. Those symptoms could very easily have been produced by consumption of medicinal preparations which the accused alleged he had consumed. **(1960) 2 Mad L J 448 : 1960 Mad L J (Cri) 761 : 73 Mad L W 307.**

——S. 4 (1) (j)—**Symptoms of drunkenness—Cumulative effect is important.**

No doubt, each individual symptom might be ascribed to a separate cause. But the significant fact is that all the symptoms co-existed at the same time and their cumulative significance is extremely important. One particular symptom may be evidence of one disease. A second symptom may be evidence of another disease. But the co-existence of a number of symptoms are sufficient to identify the particular disease. **(1954) 2 Mad L J 395 : 1954 Mad W N 563: 67 Mad L W 646 : 56 Cri L J 349 : AIR 1955 Mad 92 (93) (Pt A) (Pr 3).**

——S. 4 (1) (a) — **Search by Prohibition Sub-Inspector —Evidence given by him is sufficient to convict the accused under S. 4 (1) (a) and when there is no reason to disbelive his evidence there is no necessity to examine the witnesses of the search.** See Criminal P. C. (1898), S. 103. **AIR 1955 N U C (Mad) 5363.**

——S. 4 (1) (j)—**Consumption of liquor — Burden of proof—Practicable metbod.**

Where an accused is charged with having consumed liquor and thus having committed an offence under S. 4 (1) (j) of the Madras Prohibition Act it is for the prosecution, affirmatively and satisfactorily; to establish the charge. Cr. App. No. 42 of 1953 (SC), Foll.

The unmistakable alcoholic breath is an indubitable symptom that alcohol has been consumed. In regard to the consumption of liquor the only practicable method in India now open to the prosecuting agency is to find out whether a subject's breath

smells of alcohol and taking into consideration that the smell of alcohol might be stimulated by consumption of other articles like old sugar, the doctor should not only be content with noting that the accused smells of liquor but also note whether the unmistakable characteristic odour is that of arrack or toddy or other distinctive grain alcohol. It will only be fair to the accused if the doctor considers that his breath is smelling of alcohol, to give him an opportunity to explain whether it was due to his having taken any medicated permissible preparation containing alcohol like arishta or asava. The information given by the accused must be considered with an open mind by the doctor and he should make a note of the fact in the certificate whether he considers that explanation plausible or not. AIR 1955 N U C (Mad) 3213.

——S. 4 (1) (a)—Possession of arrack—Proof — (Evidence Act (1872), Ss. 56 and 57).

A Court can take judicial notice of what arrack is. Arrack undoubtedly contains a good percentage of alcohol. It is enough that it is proved that it is arrack. It will certainly fall within the definition of liquor in the Act. Once it is proved that the accused was in possession of arrack he would be guilty under S. 4 (1) (a). No further proof is necessary to show that arrack contains alcohol. AIR 1955 N U C (Mad) 1568.

——S. 4 (1) (a)—Prosecution for consuming liquor—Burden of proof—Inference of guilt — When permissible from proof of smell alone.

In a prosecution for consuming arrack it is the duty of the prosecution to prove that the smell can come only from arrack if the inference is to be drawn about consuming liquor from the smell alone. The other symptoms like red eyes, talking at random, et cetera also must be proved to be due only to the effect of liquor. Where the evidence of the doctor shows that even if old sugar juice was taken, it may smell like arrack and the prosecution has not conclusively proved the smell to be that of arrack, a conviction and sentence will be unsustainable. (1952) 2 M L J 579 : 1952 Mad W N 965 (1) : 1952 Mad W N (Cri) 277 (1) : 55 Cri L J 486 : AIR 1954 Mad 376 (377) (Pr 1).

——S. 4 (e)—Corroboration — The extent and nature of corroboration of confessional statement will depend upon the circumstances of each case. See Evidence Act (1872), S. 114. 1953 Cri L J 1877 : AIR 1953 Mad 1004.

——S. 4 (i) (a)— "Possession" — Meaning and implication — Possession by one of joint family — Presumption as to — (Evidence Act (1872), S. 114; Ill. (a)) — (Words and Phrases).

The word 'possession' implies a physical capacity to deal with the thing as we like to the exclusion of every one and a determination to exercise that physical power on one's own behalf. It implies dominion and consciousness in the mind of the person having dominion over an object that he has it and that he can exercise it. Possession must be conscious and intelligent possession and not merely the physical presence of the accused in proximity or even in close proximity to the object.

In the case of a family living jointly in the same house the head of the family is presumed to be in possession of any illicit article found in the house. The presumption is rebuttable and the weight attached to it must vary according to circumstances. It can be easily rebutted by showing that the room or receptacle in question was in the particular and exclusive possession of one member of the joint family. Similarly, where two or more persons are charged with joint illegal possession it is incumbent on the State to prove (a) that each of the accused had either physical or constructive possession of the property or (b) that one or more of them had possession thereof either physical or constructive on behalf of themselves and the other accused to the knowledge of the latter. Case law Ref. (1953) 1 Mad L J 175 : 1953 Mad W N 300 : 1953 Cri L J 1048 : AIR 1953 Mad 534 (535, 536) (Prs 7, 11, 12).

——S. 4 (1) (a)—'Possession"—Proof — Statement by accused to Prohibition Inspector — Whether admissible in evidence — Brandy bottles in vehicle exclusively in the possession of accused—Whether accused guilty of possession of liquor.

The Prohibition Sub-Inspector is not a police officer within the meaning of Ss. 25 and 26 of the Evidence Act and a statement made to him by the accused is not inadmissible in evidence.

A head of a household or the owner of a vehicle is liable for liquor bottles, etc., found inside the house or vehicle exclusively in his possession unless he proves that he was not responsible for their presence there and that somebody else introduced them there.

The petitioner was the owner of the van, which was exclusively his and brandy bottles were found in a bag kept by his side and close to where he alone sat. He gave a statement to the Prohibition Inspector that he was taking those brandy bottles for being given as medicine to his wife during her expected confinement.

Held, the statement was admissible in evidence and that even apart from the statement the evidence was sufficient to prove the possession by the petitioner of the brandy bottles and he was therefore guilty of an offence under S. 4 (1) (a) of the Madras Prohibition Act. 1952 Mad W N 57 : 1952 Mad W N (Cri) 5 : (1952) 1 Mad L J 69 : 1952 Cri L J 640 : AIR 1952 Mad 299 (299, 300) (Pt B) (Pr 4).

4. Examinaion of panchas, if necessary.

——S. 4 (1) (a) — Offence under — Search mahazar — Attesting witnesses not examined — Evidence of search officer — Whether to be relied on.

In cases like offences under S. 4 (1) (a) where a mahazar has been prepared and attested by witnesses it is desirable, to examine at least one such witness in addition to the police officer who actually seized the materials. It will be but fair from the standpoint of the accused that the prosecution places before the Court the best evidence in respect of the seizure. In the absence of any explanation as to why at least one of the attesting witnesses has not been examined, there is room for doubt whether the evidence of the Sub-Inspector can safely be acted upon. 1962 Mad L J (Cri) 415 : (1962) 2 Mad L J 95.

——S. 4 — Prohibition offence — Evidence as to search — Evidence of Prohibition officer — When sufficient to support a conviction.

There may be cases in which evidence of the Prohibition Officer (as to search) may be such as not to commend itself to Courts. In such cases witnesses of search will have to be examined to prove the search and seizure (of prohibited liquor). But ordinarily the evidence of the Sub-Inspector of Prohibition is sufficient to convict an accused without corroboration by other witnesses. AIR 1955 N U C (Mad) 5363.

——Ss. 4 (1) (a) and 34 — Seizure of articles by search officer — Failure to examine Panchayatdar to corroborate search officer—Conviction—Legality.

It is of the utmost importance that there should be a satisfactory evidence before the Courts regarding the articles seized from accused person. That is why search officers have to take Panchayatdars with them at the time of the search under the law, but the

object of taking such panchayatdars will be frustrated if those panchayatdars or one of them at least, are not examined in Court to corroborate the evidence of the search officer. Failure to do so will only lead to one result, namely, giving the benefit of doubt to the accused. 1951 Mad W N 381 : 1951 Mad W N (Cri.) 109 : 64 Mad L W 477 : (1951) 1 Mad L J 698 : 52 Cri L J 1058 : AIR 1951 Mad 883 (2) (884) (Pt A) (Pr 2).

5. Proviso to sub-s. (1).

——Ss. 4 (1) (a), 11 and 16 — Madras Denatured Spirit and Methyl Alcohol Rules, 1939 — Genuine permit for spirit obtained with help of forged permit — Transportation of spirit on genuine permit — No offence.

Accused No. 1 attempted to get permits for 1,000 and 2,000 gallons of denatured spirit. He was granted a permit for 250 gallons only. Not content with it he forged a permit for 1,000 gallons, and with this forged permit he obtained another permit for 1,000 gallons. While the spirit on this permit was being transported by accused Nos. 2 to 5, it was seized and prosecution was started on various charges including one under S. 4 (1) (a) read with S. 7 (a), Madras Prohibition Act.

Held, (i) that if anyone contravened the rules framed under S. 16 in respect of denatured spirit, he is liable only under S. 11, Madras Prohibition Act, and not under S. 4 (1) (a). (ii). That the fact a genuine permit was got under false pretence would not, however, make the genuine permit a forged one or an invalid one. The only action that could be taken against those who obtained the genuine permit on false pretence was to charge them for offence of cheating or other allied offences. But it was genuine permit, and, therefore, the transport was under a genuine permit, notwithstanding its being issued under a false impression. Accused 2 to 5, therefore, could not be said to have committed any offence by violating any of the rules framed for the transport of denatured spirit. 1957 Mad W N 162 : 1957 Mad L J (Cri.) 209 : 1957 Cri L J 1424 : AIR 1957 Mad 796 (797) (Pt A) (Prs 5, 6).

6. Sub-section (2) — Presumption.

——Ss. 4 (1) (a), 4 (1) (j), 4 (2) (a) — Possession of incriminating articles — Presumption — Fermented wash and liquor found in house in occupation of a lady — Conviction of lady under Ss. 4 (1) (a) and 4 (1) (j), held correct and confirmed — Evidence Act (1872), S. 114.

It is true that possession must be actual and constructive, it must be to the knowledge of the possessor who must have dominion and control over the property. But it is wholly unnecessary to inquire whether it is exclusive or not. Since a person can be in possession jointly with others that person must be held guilty even if he is found to be in joint possession. If from the facts of a particular case it could be stated that incriminating articles were found in a house in the occupation of a particular person who had the power and control then that person can be considered to be in possession : AIR 1953 S C 247, Rel. on.

Where, in prosecution under Ss. 4 (1) (a) and 4 (1) (j) of the Madras Prohibition Act, large quantities of fermented wash and liquor are found in the house admittedly in the occupation of a lady in absence of her husband, knowledge of the incriminating articles can reasonably be attributed to her, her dominion and control cannot be denied, because her husband though having another wife living in another house is the head of the family. The articles can be presumed to be in the possession and control of the lady accused, and if that be so, the presumption under S. 4 (2) (a) of the Prohibition Act, arises and her conviction and sentence are correct. 1964 Mad L J (Cri) 217 : 1963 Ker L T 659 : 1963 Ker L J 577 : ILR (1963) 2 Ker 415.

——S. 4 (2) — Constitutional validity—If repugnant to Evidence Act—(Government of India Act (1935), S. 107) — (Constitution of India, Art. 254).

What facts should be established affirmatively before the Court can be called upon to hold that an accused is guilty of any offence will depend upon the nature of the particular offence. In some cases, the establishment of one fact necessarily leads to the inference of other facts. There is no reason why a statute should not prescribe the ingredients which have to be established by the prosecution before the prosecution can obtain a verdict of guilty of the offence with which an accused is charged. Such a provision would not conflict with the general rules of burden of proof laid down in the Evidence Act. It is not correct to say that S. 4 (2) of the Act completely absolves the prosecution from doing anything more than filing a charge-sheet. It is not as if once a person is accused of an offence under the Prohibition Act it is for the accused to prove that he has not committed the offence. What S. 4 (2) does lay down is that in certain cases, if the prosecution proves possession of liquor or intoxicating drug or other articles or materials, it shall not be necessary for the prosecution to prove anything more. The proof of one fact is taken as proof of the offence. The accused, however, is given every opportunity of showing that a contrary conclusion must be arrived at, that is a conclusion contrary to the conclusion sought to be drawn by the prosecution.

The presumption laid down in S. 4 (2) of the Prohibition Act, is not repugnant to the Evidence Act, because it adds a presumption to the presumptions contained in the Evidence Act. The Evidence Act gives instances where the Court may presume certain things and instances where the Court shall presume certain things. But it has never been understood that the presumptions contained in the Evidence Act are exhaustive and no other statute can lay down other presumptions.

Section 4 (2) of the Prohibition Act, is not repugnant to any provision of the Evidence Act. Case-law Ref. 1954 Mad W N 575 : (1954) 2 M L J 475 : 1954 Cri L J 1521 : ILR (1955) Mad 887 : AIR 1954 Mad 993 (995, 996, 997) (Pt B) (Prs 9, 10, 17) (DB).

——Ss. 4 (2) and 53—In proper case accused can be discharged—S. 4 (2) is not inconsistent with procedure laid down in Cr. P. Code—(Cr. P. Code (1898), Ss 253 (1), 1 (2) and 5 (2))—(Constitution of India, Art. 21).

Section 4 (2) does not prevent a Magistrate in a proper case to discharge the accused if he finds that the prosecution have not established what they have to establish under the provisions relating to the offence with which the accused has been charged.

Even if, for any reason, it is possible to hold that the Prohibition Act prescribes a procedure slightly different from the procedure laid down in the Code of Criminal Procedure such procedure would not be, on that account, invalid. 1954 Mad W N 575 : (1954) 2 M L J 475 : 1954 Cri L J 1521 : ILR (1955) Mad 887 : AIR 1954 Mad 993 (998) (Pt C) (Pr 18) (DB).

7. Sentence.

——S. 4—Prosecution for possession of illicit arrack —Conviction on the evidence of the Police Officer alone as to seizure — When witnesses should have been available and mahazar should have been prepared—Propriety.

Where the only evidence for the prosecution is that of the Sub-Inspector of Police who seized the contra-

band and the time and place where the alleged seizure took place was such that there should have been several persons available to witness the seizure, but no such mahazar for the seizure was prepared. The accused in a prosecution under the Prohibition Act should at least be entitled to the benefit of the doubt regarding the genuineness of the alleged seizure. ILR (1964) 2 Mad 933 : (1965) 1 Mad L J 381.

——S. 4 (1) (a)—Sentence — Duty of Court to award deterrent and severe sentence.

A sentence of two months' rigorous imprisonment and a fine of Rs. 50 cannot be considered excessive in the case of a conviction under S. 4 (1) (a) of the Madras Prohibition Act. for having been found in possession for sale to others of six bottles of arrack at about 8 p. m. in a public road. Having regard to the deep-rooted evils of drink and the length of time in which prohibition has come to be the statute of the State, Courts which have to enforce the Act systematically and fearlessly and even severely cannot treat with leniency the sale of illicit liquor as contradistinguished from the consumption of liquor by addicts. (1959) 2 Mad L J 289 : 1959 Mad L J (Cri) 732.

——S. 4 (e) — Sentence — Offence by toddy tappers thrown out of employment by prohibition—Long sentence of imprisonment held undesirable and reduced to that of 3 weeks and fine of Rs. 30. 1952 Mad W N (Cr) 76 : 1952 Mad W N 364 : (1952) 1 Mad L J 658 : 1953 Cri L J 1877 : AIR 1953 Mad 1004 (1004) (Pt C) (Pr 7).

——S. 4 (1) (a) — Sentence — Travancorean found carrying two small bottles of brandy for wife's confinement — Habit of giving brandy in confinement very common amongst those people in pre-prohibition days — First offence — Sentence of Rs. 500/- fine reduced to Rs. 50. (1952) 1 Mad L J 69 : 1952 Mad W N Cr 5 : 1952 Mad W N 57 : 1952 Cri L J 640 : AIR 1952 Mad 299 (299) (Pt C) (Pr 4).

8. Non-compliance with S. 495, Cr. P. C.— Effect on trial.

——S. 4 (1) (b)—Prosecution under—Non-compliance with S. 495 (4), Criminal P. C. — Effect on trial—Entire trial is null and void. In the instant case as the accused had already undergone a sentence of 55 days the retrial was not ordered. See Criminal P. C. (1898), S. 495 (4). 1959 Cri L J 25 : AIR 1959 Andh Pra 29.

——S. 4 (1) (j) — Prosecution for possession of ganja —Investigating Officer conducting prosecution — Validity.

Disobedience of the mandatory provisions of S. 495 (4) of the Code of Criminal Procedure will render the entire proceedings void. Where in a prosecution under S. 4 (1) (j) of the Madras Prohibition Act the investigating officer conducts the prosecution the procedure being prohibited by the provisions of S. 495 (4) of the Cr. P. Code the proceedings are null and void.

Obiter : However illegal the conduct of a prosecution by the investigating officer may be the case has to be considered by the evidence that has been tendered in Court. The evidence is not in any way vitiated because the prosecution is conducted by the investigating officer. AIR 1955 N U C (Mad) 5675.

9. Charge under S. 4-A—Conviction under S. 4 (1) (j) if legal.

——S. 4 (1) (j) — Charge-sheet and examination of accused revealing offence under S. 4-A — Conviction under S. 4 (1) (j)—Legal. See Madras Prohibition Act (10 of 1937), S. 4-A. (1957) 2 Andh W R 413 : 1957 Mad L J (Cri) 623.

10. Conviction under S. 4-A—Subsequent prosecution under S. 4 (1) not barred.

——S. 4 (1) (a), (g)—Conviction under S. 4-A, Madras Prohibition Act—Subsequent prosecution under S. 4 (1) (a) and (g) not barred—S. 403, Criminal P. C, is no bar, See Criminal P. C. (1898), S. 403 (2). 52 Cri L J 707 (2) : AIR 1951 Mad 716.

SECTION 4-A

——S. 4-A—Sentence—Madras Probation of Offenders Act—Applies to offences under S. 4-A, Madras Prohibition Act—Accused admitting offence under S. 4-A Prohibition Act and acquitted under S. 4 (1) of the Prohibition Act — Held, the Magistrate was not justified without finding out the antecedents or the circumstances in which the offence was committed, in releasing him under S. 4 (1) of the Probation of Offenders Act. See Madras Probation of Offenders Act (3 of 1937), S. 4 (1). 1957 Cri L J 954 : AIR 1957 Andh. Pra 532.

——Ss. 4-A and 4 (1) (j)—Charge-sheet and examination of accused revealing offence under S. 4-A—Conviction under S. 4 (1) (j)—Legality—(Cr. P. Code (1898), S. 238 (2)).

Where the charge-sheet and the examination of the accused revealed an offence under S. 4-A but the accused was convicted under S. 4 (1) (j), that however would not vitiate the trial. Whether the accused is charged under S. 4-A or under S. 4 (1) (j) it does not make any difference. S. 4-A is in a sense a graver offence, viz., that of being in a state of intoxication whereas S. 4 (1) (j) is a lesser offence, viz., the buying of liquor or any intoxicating drug. (1957) Mad L J (Cr) 623 : (1957) 2 Andh W R 413.

——S. 4-A—Madras Probation of Offenders Act, S. 4 (1)—Applicability—Applies to offences under Madras Prohibition Act—(Criminal P. C. (1898), S. 562). See Madras Probation of Offenders Act (3 of 1937), S. 4 (1). AIR 1955 N U C (Andhra) 1156.

—S. 4-A—Intoxication—Meaning of — Smelling of liquor is not intoxication.

Intoxication implies excessive drinking of liquor bringing about drunkenness. Merely smelling of alcohol does not amount to being in a state of intoxication within the meaning of S. 4-A. Something more is necessary and that is the accused must be in a state of drunkenness. 1954 Mad W N 653 : (1954) 2 Mad L J (Andhra) 10 : 1954 Cri L J 1529 : AIR 1954 Andhra 4 (5) (Prs 4, 5).

——S. 4-A—State of intoxication—Question of fact—Private car is not a public place within S. 4-A.

Even after consuming alcohol it would be possible that a man did not reach the stage of intoxication. Stage of intoxication is in itself a question of fact and has to be determined in the light of the particular circumstances and the state of the particular habits and health of the person said to be intoxicated.

Private car, because it was found running on a public road, is not a public place within the meaning of S. 4-A. 1962 Mad L J (Cr) 415 : (1962) 2 Mad L J 93.

——S. 4-A—Intoxication — Meaning — Symptoms — (Words and Phrases—Intoxication).

While the Legislature has made intoxication in a public place a punishable offence, it has not defined what intoxication means. In the absence of any statutory definition, the Court has to adopt its ordinary etymological meaning, namely, a condition produced by excessive use of alcoholic stimulants, as defined in Dorland's American Medical Dictionary.

An accused was found with the following symptoms : (1) smelling of arrack in breath ; (2) redness of the eye and dilation of pupil; (3) tongue clear and dry; (4) speech incoherent; and (5) staggering gait.

Held, that the accused was in a state of intoxication. 1956 Mad W N 657 : (1956) 2 Mad L J 273 : ILR (1957) Mad 66 : 1957 Cri L J 976 : AIR 1957 Mad 546 (547, 548) (Pt A) (Prs 2, 3, 4) (DB).

——S. 4-A—Offence committed not in the course of same transaction—Misjoinder of charges under S. 4-A against accused 1 and 9 and under Ss. 147, 323 etc., under Penal Code—Trial is vitiated — Prejudice has to be so presumed when there is a misjoinder of charges or of persons. See Criminal P. C. (1898), S. 239. AIR 1955 NUC (Mad) 2415.

——S. 4-A—Prosecution must prove that smell came only from I. D. arrack, if inference is to be drawn about consuming liquor from smell alone — Other symptoms also must be proved to be due only to the effect of liquor – Smell and symptoms consistent with other theory and not only with accused being drunk —Accused cannot be convicted. (1952) 2 Mad L J 579 : 1952 Mad W N 965 (1) : 1952 Mad W N (Cri) 277 (1) : 1954 Cri L J 486 : AIR 1954 Mad 376 (377) (Pr 1).

——S. 4-A—Difference between doctors' opinions as to whether accused were really intoxicated — Court entertaining reasonable doubt regarding their guilt — S. 562 (1), Cr P. C. cannot be applied. See Criminal P. C. (1898), S. 562 (1). 1953 Cri L J 1646 : A I R 1953 Mad 877.

——S. 4-A—Applicability — First offence of drunkenness under the Prohibition Act — S. 562 (1), Criminal P. C. should not be applied though there may be exceptional cases. See Criminal P. C. (1898), S. 562(I). AIR 1953 Mad 877.

——S. 4-A—Sentence.

Backward classes should not be treated on a more lenient footing than forward classes regarding offences under the Act in the matter of sentence. 1953 Mad W N 283 : (1953) 1 M L J 492 : 1953 Cri L J 1846 : AIR 1953 Mad 877 (878) (Pt D) (Pr 4).

——S. 4-A—Sentence—(Criminal P. C. (1898), S. 32).

It cannot be said that because the accused belongs to that class of society in which drink was common in pre-prohibition days he deserves a far more deterrent punishment than if he had belonged to non-drinking class in pre-prohibition days. 1953 Mad W N 283 : (1953) 1 Mad L J 492 : 1953 Cri L J 1646 : AIR 1953 Mad 877 (878) (Pt F) (Pr 6).

——S. 4-A—Conviction under S. 4-A, Madras Prohibition Act — Subsequent prosecution under S. 4 (1) (a) and (g) not barred — S. 403, Criminal P. C. is no bar. See Criminal P. C. (1898), S. 403 (2). 52 Cri L J 707 (2) : A I R 1951 Mad 716.

SECTION 5

——Ss. 5 and 29 — Non-compliance with provisions of S. 29—Effect of—Sentence under S. 5—Mitigating factor — Minute quantity of liquor.

Non-compliance with the formalities in S. 29 cannot prevent the discovery of a fact during the search from being used for basing a conviction.

The minute quantity of liquor found with the accused and the absence of any reason to hold that this small quantity came out of a much larger stock are grounds which can be considered in the context of mitigation of the sentence. (1962) 2 Mad L J 100 : 1962 Mad L J (Cri) 420.

——Ss. 5 and 16 (1) — Applicability — Rendering varnish potable and fit for human consumption as illicit liquor — Offence committed in 1959, after amendment of Rules relating to the Manufacture Import, Use and Sale of Varnish (1952) — If punishable under S. 5 or under S. 16 (2) — Amendment of rule in 1959—Effect of.

Held, on facts that the accused was clearly guilty of an offence under S. of the Act and punishable as such, because after the deletion of R. 10 of the Rules relating to varnish in 1959, the rendering or attempting to render any spirit, or preparation containing spirit which has been denatured, fit for human consumption, is not a breach of the Rules under S. 16 of the Act, but is an offence punishable directly under S. 5 of the Act. (1957) Mad L J 209, Distinguished. (1960) 73 Mad L W 572 : (1961) 1 Mad L J 1 : ILR (1961) Mad 186 : (1960) M L J (Cri) 818.

——S. 5—Addition of lime juice and sugar to denatured spirt in exclusive possession of accused — Conviction.

Where sugar and lime juice were found to have been put in the denatured spirit in exclusive possession of the accused.

Held, that accused must be held to have put these articles himself only in an attempt to denature the denatured spirit and make it fit for human consumption. He must, therefore be held guilty under S. 5. 1951 Mad W N 296 (1): 1951 Mad W N (Cri) 88 (1) : (1951) 64 Mad L W 512 : (1951) 1 Mad L J 576.

——S. 5—Applicability — Denatured spirit containing sugar, and lemon juice seized from accused — Sufficiency to convict accused—Attempt to "renature" spirit to render it fit for human consumption.

In a case where the certificate of the analyst showed that the denatured spirit seized from the possession of the accused contained sugar and lemon juice and that an attempt had been made to "renature" it, an offence under S. 5 of the Madras Prohibition Act is proved. To "renature" means to restore to its original nature, that is the nature of spirits fit for human consumption, as against "denature" which means to render spirits fit for human consumption unfit for such consumption. Sugar and lime juice are such well-known articles of human consumption that they must have been put into the denatured spirit by the accused only in an attempt to renature the denatured spirit and make it fit for human consumption. An attempt to render them fit for human consumption will do, however unsuccessful, for a conviction under S. 5 of the Madras Prohibition Act. (1951) 64 Mad L W 512 : 5 A I Cr D 850 : (1951) 1 Mad L J 576.

SECTION 11

——S. 11—Madras Denatured Spirit and Methyl Alcohol Rules, 1939—Genuine permit for spirit obtained with help of forged permit — Transportation of spirit on genuine permit — No offence. See Madras Prohibition Act (10 of 1937), S. 4 (1) (a). 1957 Cri L J 1424 : AIR 1957 Mad 796.

SECTION 13

——Ss. 13, 14 — 'Shall be liable to confiscation'—Meaning of—Vehicles used for committing an affence under the Act — Knowledge of the owner of the vehicle — Necessity of, for confiscation.

Reading Ss. 13 and 14 (1) together, it is clear that it is not obligatory on the part of a Magistrate to confiscate a vehicle used to carry the liquor drug, etc. While S. 13 confers a power upon the Magistrate to confiscate, S. 14 provides for passing of an order of confiscation. The expression "shall be liable to confiscation" in S. 13 only means "is liable to be consfiscated". Under S. 14, the Magistrate has to consider whether confiscation should be ordered or not. Under that section it is only when it is established that the owner of the vehicle had knowledge or had reason to believe that it was going to be used for the purpose of committing an offence, the Magistrate could direct it to be confiscated. If a person committing an offence against the Act is the owner of the vehicle no question of knowledge arises. But if the offender is

not the owner of the vehicle, it would not be proper to pass an order of confiscation without proof that the owner had knowledge or had reason to believe that the vehicle was going to be put to such a use. AIR 1955 NUC (Andhra) 1523.

——Ss. 13, 14, 16—Offence not against Act but against rules — Confiscation of property — Jurisdiction—(Criminal P. C. (1898), S. 517).

In view of the specific provisions in Ss. 13 and 14, Madras Prohibition Act, it is not open to a Magistrate to invoke the powers of confiscation under S. 517, Criminal P. C. Though the general principle is that a valid rule made under an enactment has the same force as a provision in a statute and a breach of the rule might in a sense be considered as a contravention of the enactment itself, this would depend upon the language used in the particular statute. When there has been an infringement of the provision of a rule which specifically provides for a particular punishment, the same cannot be treated also as an offence under the Act so as to enable the Court to impose upon the accused the punishments provided for offences against the Act as distinguished from those provided for the offence against the rules.

On a proper construction of the provisions of the Madras Prohibition Act, the expression 'the offence committed against the Act, in Ss. 13 and 14 cannot comprehend the contravention of a notification issued under S. 16. The Act has drawn a clear distinction between the offences in regard to liquor and intoxicating drugs pure and simple in respect of which a prohibition was being enforced and those preparations containing alcohol used for medicinal and toilet or industrial purposes in regard to which a restriction only was being enacted. Therefore, a breach of the rule is not an offence against the Act :within the meaning of Ss. 13 and 14 of the Prohibition Act. AIR 1955 NUC (Mad) 5946 (DB).

——S. 13—Liable to confiscation—Meaning of.

The term "liable to confiscation" imports not that confiscation is automatic but that Court may impose it as an additional punishment in suitable cases exercising a sound discretion. A I R 1955 N U C (Mad) 3920.

——S. 13 — Power of confiscation is discretionary—Discretion how to be exercised stated. See Criminal P. C. (1898), S. 517. A I R 1955 N·U C.(Mad) 3920.

——S. 13—Property used for commission of offence under Act—Disposal by confiscation of—Bicycle used for selling illicit liquor—Bicycle hired one — Bicycle can be confiscated — Hirer can take appropriate proceedings for reimbursement against accused — (Criminal P. C. (1898), S. 517). AIR 1955 NUC (Mad) 894.

SECTION 14

——S. 14—'Shall be liable to confiscation' only means is liable to be confiscated"—Under S. 14 the Magistrate has to consider whether confiscation should be ordered or not—Meaning of — Vehicles used for committing an offence under the Act — Knowledge of the owner of the vehicle—The question does not arise—Necessity of, for confiscation. The offender not the owner—No knowledge to the owner—Order of confiscation not proper. See Madras Prohibition Act (10 of 1937), S. 13. AIR 1955 NUC (Andhra) 1523.

——S. 14—Offence not against Act but against rules —Cannot be treated also as an offence under the Act —Punishment provided for breach of rules should be inflicted and not punishment provided for offences against the Act. See Madras Prohibition Act (10 of 1937), S. 13. AIR 1955 N U C (Mad) 5946 (DB).

SECTION 15

——S. 15—Procedure—Investigation by Police Officer and by prohibition officer]— Distinction in the procedure required to be followed. See Criminal P. C. (1898), S. 5 (2). 1957 Cri L J 517 : AIR 1957 Mad 292 (DB).

SECTION 16

——S. 16—Sales Tax—Madras General Sales Tax Act (9 of 1939), S. 4—Medical preparations — Excise duty leviable only on spirituous content—Payment of sales tax—Whole preparation not exempted. See Sales Tax —Madras General Sales Tax Act (9 of 1939), S. 4. (1961) 12 S T C 15 (Andh Pra).

——S. 16—Tincture ginger :beris being a preparation which comes within the exempted categories, its consumption under medical prescription is not an offence—Accused need not prove that he purchased the stuff from a source authorised to sell them—Sale of such stuff without permit by a chemist may be some other offence but the accused commits no offence so long as he takes the exempted tincture. under a medical prescription. See Madras Prohibition Act (1937), S. 4 (1). 1964 Mad L J (Cri) 209 (Mad).

——S. 16 (1)—Rendering or attempting to render any spirit or preparation containing spirit which has been denatured, fit for human consumption is an offence punishable directly under S. 5 and not a breach of the rules made under S. 16 after the deletion of Rule 10 of the rules relating to varnish in 1959. See Madras Prohibition Act (1937), S. 5. I L R (1961) Mad 186 : (1960) Mad L J (Cr) 818.

——S. 16—Rules under—Contravention of—Liability for—If any one contravened the rules framed under S. 16 in respect of denatured spirit he is liable only under S. 11 of the Madras Prohibition Act and not under S. 4 (1) (a). See Madras Prohibition Act (10 of 1937), S. 4 (1) (a), 1957 Cri L J 1424 : AIR 1957 Mad 796.

——S. 16 — Rules under, Rr. 6 and 10 — Do not offend Art. 19 (5) of the Constitution and are valid. See Madras Prohibition Act (10 of 1937), S. 4. A I R 1955 NUC (Mad) 5946 (DB).

——S. 16—Offence not against Act but against rules cannot be treated also as an offence under the Act—Punishment provided for breach of rules should be inflicted and not punishment for offences against the Act. See Madras Prohibition Act (10 of 1937), S. 13. AIR 1955 N U C (Mad) 5946 (DB).

——S. 16 (1) — Validity of — The provisions of the Madras Prohibition Act, except S. 23 (2), in so far as they relate to medicinal preparations are regulatory and reasonable in character and do not contravene the provisions of Art. 19 (1) (b) of the Constitution and are valid. See Madras Prohibition Act (10 of 1937), S. 3 (9). AIR 1954 Mad 643 (DB).

——S. 16—Scope—Whether directory or mandatory.

Section 16 of the Act imposes on the Government a duty to exempt medicinal preparations from the operation of the Act. Looking to the intention of the Statute as expressed in the preamble the word 'may' in S. 16 should properly be construced as meaning 'must'. 1953 Mad W N 909 : (1953) 2 Mad L J 724 : AIR 1954 Mad 643 (646, 647) (Pt D) (Prs 13, 14) (DB).

SECTION 18

——S. 18 — Gallonage fee levied under a licence on denatured spirit used in manufacture of French polish — French polish if comes within category of goods on which duty is levied under the Act. See Sales Tax — Madras General Sales Tax Act (9 of 1939), S. 4. 1957 Ker L T 1212.

——S. 18 — Notice of intention to revoke licence — Seizure pending notice — Legality.

The seizure of licensee's goods in respect of which the licence has been granted during the pendency of

a notice of the intention to revoke the licence is illegal. **AIR 1957 Mad 190 (191) (Pt A) (Pr 2).**

——S. 18 — Government's responsibility for tortious acts of its agents — Illegal seizure of licensee's goods by Prohibition Sub-Inspector — Government is not liable to the licensee for the act of the Prohibition Sub-Inspector. See Tort. **AIR 1957 Mad 190.**

——S. 18—Rules under, Rr. 6 and 10—Do not offend Art. 19 (5) of the Constitution and are valid. See Madras Prohibition Act 10 of 1937), S. 4. **AIR 1955 NUC (Mad) 5946 (DB).**

——S. 18 — Validity of — The provisions of the Madras Prohibition Act, except S. 23 (2), in so far as they relate to medicinal preparations are regulatory and reasonable in character and do not contravene the provisions of Art. 19 (1) (b) of the Constitution and are valid. See Prohibition — Madras Prohibition Act (10 of 1937). S. 3 (9). **AIR 1954 Mad 643 (DB).**

——S. 18 — Form III-A are valid and cannot be held to be void because of the inclusion of medicinal preparations in the definition of "liquor" under S. 3 (9). See Prohibition—Madras Prohibition Act (10 of 1937), S. 3 (9). **AIR 1954 Mad 643 (DB).**

——S. 18 — Form III-B are valid and cannot be held to be void because of the inclusion of medicinal preparations in the definition of 'liquor' in S. 3 (9). See Prohibition — Madras Prohibition Act (10 of 1937), S. 3 (9). **AIR 1954 Mad 643 (DB).**

——S. 18 — Form III-C are valid and cannot be held to be void because of the inclusion of medicinal preparations in the definition of "liquor" in S. 3 (9). See Prohibition — Madras Prohibition Act (10 of 1937), S. 3 (9). **AIR 1954 Mad 643 (DB).**

SECTION 18-A

——Ss. 18-A and 21-A — Inter-State sale of foreign liquor — Rate of sales tax would be one chargeable under S. 3 of the Madras General Sates Tax Act — Sections 18A and 21A of the Madras Prohibition Act do not warrant excluding sales of foreign liquor from the operation of S. 3, Madras General Sales Tax Act. See Sales Tax — Madras General Sales Tax Act (1 of 1959), S. 3. **AIR 1965 Mad 115 (DB).**

——S. 18-A — Rules under, Rr. 6 and 10 — Valid — Restrictions not unreasonable. See Prohibition — Madras Prohibition Act (10 of 1937), S. 4. **AIR 1955 NUC (Mad) 5946 (DB).**

——S. 18 A — Scope — Madras Government Notification No. 941, Dated 18th November, 1952, imposing duty on medicinal preparation, is ultra vires and unenforceable to the extent that it imposes a duty on medicinal preparations. See Constitution of India, Art. 162. **AIR 1954 Mad 643 (DB).**

——S. 18-A — Scope — Madras Government Order, dated 29th May, 1952 — Validity.

The Madras Government Order, dated 29th May, 1952, declaring that 'Vitogen' is a medicated wine and not a pure Ayurvedic preparation falling within the proviso to Notification No. 473, dated 7th March, 1949, issued under S. 18-A of the Act and therefore liable for payment of duty at Rs. 35 per gallon on the spirit contents of the medicine is valid and correct.

Notification No. 941 applies only to 'asavas' and 'arishtas' and therefore, it cannot apply to 'vitogen.' The two notifications are mutually exclusive and that is the reason why the proviso to Notification No. 473 was cancelled by Notification No. 921. The petitioner is, therefore, liable to pay a duty in respect of 'Vitogen' only under Notification No. 473 at Rs, 35 per proof gallon of the spirit contents; he is not liable in addition to pay a duty of Rs. 3 per bulk gallon under Notification No. 941, even if that notification were valid. **(1953) 2 Mad L J 724 : 1953 Mad W N 909 : AIR 1954 Mad 643 (649, 650) (Pt F) (Prs 25, 26) (DB).**

SECTION 20

——S. 20 — Scope — Citizens of Portuguese Settlements in India residing in Madras State — Right to issue of liquor permits—Excluding citizens of Portuguese and French Settlements in India from category of foreign nationals — Validity — Constitution of India (1950), Art. 14 — Scope.

Portuguese Settlement in India though geographically situated in India must be treated as part of the territory of Portugal. Foreign nationals would include nationals of every foreign country and it is for the Government of the country concerned to decide who belonged to a particular nationality. It is not open to the Madras State Government to classify citizens of Portuguese Settlements in India resident in Madras State, along with Indian citizens for purposes of issue of liquor permits under the Madras Prohibition Act. The only classification which will not offend Art. 14 of the Constitution would be classification between Indian citizens on the one hand and foreign nationals on the other. Any other classification would be discriminatory. It is not open to the State Government to exclude the citizens of the French and Portuguese Settlements in India from the general category of foreign nationals on the ground that the grant of permits to them might lead to abuse. A Portuguese subject born at Sholapur of parents both of whom were born in Goa and residing at Madras is therefore entitled to the grant of a permit as a foreign national. **65 Mad L W 744 : 1952 Mad W N 619 : (1952) 2 Mad L J 237 : AIR 1952 Mad 734 (735) (Pt B) (Pr 6) (DB).**

SECTION 21

——S. 21 — Rules under, Rr. 6 and 10 — Valid — Restrictions not unreasonable. See Madras Prohibition Act (10 of 1937), S. 4. **AIR 1955 NUC (Mad) 5946 (DB).**

SECTION 21-A

——S. 21-A—Inter-State sales of foreign liquor—Sales not supported by C forms—Rate of sales tax is one under S. 3, Madras General Sales Tax Act — Determination of — Applicability of S. 21-A of Madras Prohibition Act does not apply—General Sales Tax Act (1956), S. 8 (2-A) and (4). See Sales Tax—Madras General Sales Tax Act (1 of 1959), S. 3. **AIR 1965 Mad 115 (DB).**

SECTION 23

——S. 23—Validity of—Section 23 (2) which authorises the Government to cancel or suspend a licence without assigning any reason therefor is unconstitutional and void as the exercise of a fundamental right cannot be made to depend on the unfettered discretion of executive authorities. See Madras Prohibition Act (10 of 1937), S. 3 (9). **AIR 1954 Mad 643 (DB).**

SECTION 25

——Ss. 25 and 53-A—Prohibition officer is not police officer—(Criminal P. C. (1898), S. 162) — (Evidence Act (1872), S. 25). **AIR 1955 NUC (Mad) 686.**

SECTION 28

——Ss. 28 to 31—Are not ultra vires. See Government of India Act (1935), S. 107. **1957 Cri L J 409 : AIR 1957 SC 297.**

——Ss. 28 to 53 (Ch. V) — Investigation of offences under the Act — Powers of police officers —Provisions in Ch. V, are supplementry to those in Criminal P. C.—Report by police officer is under S. 173, Criminal P. C. — Procedure to be followed is that under S. 251-A and not under S. 252 — Latter not more advantgeous—Accused has no vested rignt in procedure. **AIR 1957 Mad 292, Overruled.**

Chapter V of the Madras Prohibition Act is only complementary and supplementary to the provisions of the Criminal Procedure Code in Ch. XIV. Therefore, a police officer investigating into a prohibition offence does so under the provisions of the Criminal Procedure Code, supplemented by the special provisions of the Madras Prohibition Act and the report of Police Officer investigating a prohibition offence will, fall not under S. 48 of the Madras Prohibition Act, but under S. 173, Criminal P. C. Such a report gives jurisdiction to a competent Magistrate to conduct an enquiry under S. 251-A, Criminal P. C. AIR 1957 Mad 292, Overruled.

Further, no material prejudice is caused to the accused by the fact that in such a case the procedure prescribed by S. 251-A, Criminal P. C. and not that under S. 252, Criminal P. C., is followed. The latter procedure is not more advantageous to the accused. On the other hand, the procedure under S. 251-A confers two inestimable advantages on him, viz., his being put in possession of all documents giving him a complete picture of the case against him before he embarks upon the task of meeting it and secondly, his having to be acquitted if the prosecution is unable to prove the case against him and which once again means that unlike a discharge it cannot be comparatively easily interfered with. AIR 1957 SC 927 and AIR 1958 Andh Pra 301, Rel. on.

It is well settled that the accused has no vested right in any course of procedure. Therefore, neither Art. 14 nor Art. 20 of the Constitution can be invoked, if a trial is held under a procedure different from what obtained at the time of the commission of the offence or by a court different from that which had competence at the time. **1960 Mad W N 317 : 1962 Mad L J (Cri) 331 : (1962) 1 Mad L J 434 : ILR (1961) Mad 70.**

——Ss. 28 to 32—Validity — If repugnant to existing law (Govt. of India Act (1935), S. 107) — Criminal P. C. (1898), Ss. 96 and 98)—(Constitution of India, Arts. 246 and 254).

All the provisions of the Prohibition Act deal primarily with Provincial subjects, namely, intoxicating liquors and narcotic drugs. It is true that violations of the provisions of the Act have been made criminal offences. But such offences would certainly be covered by item 37 of List II, and they have been expressly excluded from item 1 of the Concurrent List. The ancillary matters laying down the procedure for trial of such offences and the enactment of certain presumptions which would apply in the course of such trial would be covered completely by item 2 of List II. Consequently, none of the impugned provisions namely Ss. 28 to 32 of the Act including S. 4 (2) of the Prohibition Act, is invalid, on the ground that they are repugnant to the provisions of an existing Indian Law in respect of a subject covered by the concurrent list, e. g., Criminal P. C.

Moreover the Code of Criminal Procedure has not completely occupied the field of criminal procedure in the matter of search warrants. In other words, a provision in the Code of Criminal Procedure to the effect that no such warrants shall be issued by any one except under Ss. 96 and 98 of that Code cannot be implied. Indeed, if there had been such a provision, there might have been room for the contention that in the face of such express prohibition no provincial legislature could provide for the issue of search warrants in a manner other than that provided by the Criminal P. C. **(1954) 2 Mad L J 475 : 1954 Mad W N 575 : 1954 Cri L J 1521 : ILR (1955) Mad 887 : AIR 1954 Mad 993 (1000) (Pt E) (Prs 25, 29) (DB).**

——Ss. 28 to 32 — Scope — Article 19 (1) (f) of Constitution if infringed — Constitution of India, Art. 19 (1) (f).

Search and seizure under the Act would not amount to undue interference with the right to hold property because the warrants are to be issued by persons other than Magistrates. AIR 1954 S C 300, Relied on. **1954 Mad W N 575 : ILR (1955) Mad 887 : (1954) 2 Mad L J 475 : 1954 Cri L J 1521 : AIR 1954 Mad 993 (1001) (Pt F) (Pr 31) (DB).**

——Ss. 28 to 32 — Effect of — Provisions as to search and warrant though not unconstitutional are very drastic in nature — It was held that the High Court would have been happy to have them struck down if there was good ground to do so. 1954 Mad W N 575 : ILR (1955) Mad 887 : (1954) 2 Mad L J 475 : 1954 Cri L J 1521 : AIR 1954 Mad 993 (1001) (Pt G) (Pt G) (Pr 34) (DB).

SECTION 29

——S. 29 — Non-compliance with the formalities of S. 29 cannot prevent the discovery of a fact during the search from being used for basing conviction. (1962) 2 Mad L J 100 : 1962 Mad L J (Cri) 420.

——S. 29 — Applicability and scope — Principle that special provision will apply—Section 29 being special provision will apply — S. 34 being general provision will not apply — Search without warrant — Duty of prohibition officer — No obligation cast on the Prohibition Officer to send the record to the Magistrate. See Criminal P. C. (1898), S. 165. AIR 1955 N U C (Mad) 3146.

——Ss. 29 to 32, 28—Provisions are not repugnant to existing law and are not invalid — (Govt. of India Act (1935), S. 107)—(Criminal P. C. (1898), Ss. 96 and 98)—(Constitution of India, Arts. 246 and 254). See Prohibition — Madras Prohibition Act (10 of 1937), S. 28. AIR 1954 Mad 993 (DB).

——Ss. 29 to 32, 28—Art. 19 (1) (f) of Constitution is not infringed—(Constitution of India, Art. 19 (1) (f)). See Prohibition—Madras Prohibition Act (10 of 1937), S. 28. AIR 1954 Mad 993 (DB).

——Ss. 29 to 32, 28—Provisions though not unconstitutional are very drastic in nature. See Prohibition—Madras Prohibition Act (10 of 1937); S. 28. AIR 1954 Mad 993 (DB).

SECTION 30

——Ss. 30 to 32, 28— Provisions are not repugnant to existing law and are not invalid—(Govt. of India Act (1935), S. 107)—(Criminal P. C. (1898), Ss. 96 and 98) —(Constitution of India, Arts. 246 and 254). See Prohibition—Madras Prohibition Act (10 of 1937), S. 28. AIR 1954 Mad 993 (DB).

——Ss. 30 to 32 and 28—Art. 19 (1) (f) of Constitution is not infringed—(Constitution of India, Art. 19 (1) (f)). See Prohibition — Madras Prohibition Act (10 of 1937), S. 28. AIR 1954 Mad 993 (DB).

——Ss. 30 to 32 and 28—Provisions though not unconstitutional are very drastic in nature. See Prohibition — Madras Prohibition Act (10 of 1937), S. 28. AIR 1954 Mad 993 (DB).

SECTION 31

——Ss. 31, 32 and 28 — Provisions are not repugnant to existing law and are not invalid—(Govt. of India Act (1935), S. 107)—(Criminal P. C. (1898), Ss. 96 and 98) — (Constitution of India, Arts. 246 and 254). See Prohibition — Madras Prohibition Act (10 of 1937), S. 28. AIR 1954 Mad 993 (DB).

——S. 31—Art. 19 (1) (f) of Constitution is not infringed —(Constitution of India, Art. 19 (1) (f)). See Prohibition — Madras Prohibition Act (10 of 1937), S. 28. **AIR 1954 Mad 993 (DB).**

——S. 31— Provisions though not unconstitutional are very drastic in nature. See Prohibition — Madras Prohibition Act (10 of 1937), S. 28. **AIR 1954 Mad 993 (DB).**

SECTION 32

● ——S. 32 — Not ultra vires. See Government of India Act (1935), S. 107. **1957 Cri L J 409 : AIR 1957 S C 297.**

——S. 32—**Non-compliance with—Effect.**

Where there has been substantial compliance with the provisions of S. 32 of the Madras Prohibition Act and a portion of the wash was preserved for analysis any subsidiary omission to comply with the strict terms of S. 32 will not vitiate the trial. **(1964) Mad L J (Cr) 664 (Mad).**

——S. 32 — **Not every omission to comply vitiates trial.**

It is not every subsidiary omission to comply with the strict terms of S. 32 which will vitiate the trial, though that is a statutory safeguard, which the police are bound to comply with, as far as possible. 1959 M W N (Cr) 215 ; (1962) 2 M L J 90, Rel. on. **1964 Mad L J (Cr) 664 (Mad).**

——S. 32—**Compliance with provisions is necessary.**

Section 32 is a safeguard which the statute has provided and it is necessary to enjoin upon the police officers, who make searches and recover fermented wash and the like, that the statutory provision should be complied with. The circumstance that it had been held in a particular case that the omission to comply with this provision did not vitiate the trial, should not be treated as authority for making the statutory provision a dead letter. **1962 Mad L J (Cr) 410 : (1962) 2 Mad L J 90.**

——S. 32 (as amended by Madras Act, 8 of 1958) — **Non-compliance with—Effect.**

Where, in a case under S. 4 (1) (b) and (g), Madras Prohibition Act, the pots and the receptacles were sent to the Magistrate and the Mahazar proved by the Mahazar witness was also forwarded, there was no non-compliance with the substance of S. 32 of that Act as amended by Madras Act 8 of 1958. Even assuming that the report in terms of the amended S. 32 was not sent, that would not by itself vitiate the trial and the conviction of the accused. For, the real question is not whether a matter is expressed positively or is stated in negative terms but whether disregard of a particular provision amounts to substantial denial of a trial as contemplated by the Code and understood by the comprehensive expression 'natural justice.' **1959 Mad W N 469 ; 1959 Cr L J 1189 : AIR 1959 Mad 450 (452) (Pt B) (Prs 10, 11).**

——Ss. 32 and 28 to 31— Provisions are not repugnant to existing law and are not invalid—(Govt. of India Act (1935), S. 107) — (Criminal P. C. (1898), Ss. 96 and 98)— (Constitution of India, Arts. 246 and 254). See Prohibition—Madras Prohibition Act (10 of 1937), S. 28. **AIR 1954 Mad 993 (DB).**

——Ss. 32 and 28 to 31—Art. 19 (1) (f) of Constitution is not infringed—(Constitution of India, Art. 19 (1) (f)). See Prohibition—Madras Prohibition Act (10 of 1937), S. 28. **AIR 1954 Mad 993 (DB).**

——Ss. 32 and 28 to 31—Provisions though not unconstitutional are very drastic in nature. See Prohibition—Madras Prohibition Act (10 of 1937), S. 28. **AIR 1954 Mad 993 (DB).**

SECTION 34

——S. 34—**Search under — Essential formalities — Absence of respectable local witness—Effect.**

It will be extremely unsafe and risky to convict an accused solely on the strength of the evidence of the prosecutor, particularly so in respect of offences under the Prohibition Act. Every search contemplated by S. 34 of the Act should be conducted in the presence of two or more respectable persons of the locality in which the search is to be conducted.

The necessity of procuring the attendance of neighbours to the place of search to witness the search and to attest the search list, cannot be dispensed with. **1958 Ker L J 868 : 1958 Ker L T 966 : 1958 Mad L J (Cr) 867 : 1959 Cr L J 463 : A I R 1959 Ker 98 (99) (Pr 3) (DB).**

——S. 34— Government's responsibility for tortious acts of its agents—Illegal seizure of licensee's goods by Prohibition Sub-Inspector — Government is not liable to the licensee for the acts of the Prohibition Sub-Inspector. See Tort. **AIR 1957 Mad 190.**

——S. 34 — Ratification by Government — Illegal seizure of goods— Sale by District Prohibition Officer of goods illegally seized by Prohibition Sub-Inspector cannot be considered to be the Act of the Government ratifying the seizure but an act done in the ordinary course of the discharge of their particular duties prescribed under the statute. See Contract Act (1872), S. 196. **AIR 1957 Mad 190.**

——S. 34—Applicability and scope — Principle that special provision will apply—Section 29 being the special provision, the general provision in S. 34 will not apply—Search without warrant — Duty of Prohibition officer—No obligation cast on the Prohibition officer to send the records to the Magistrate. See Criminal P. C. (1898), S. 165. **AIR 1955 NUC (Mad) 3146.**

——S. 34—Search and articles recovered—Duty of prosecution to examine panchayatdars—One of them at least must be examined to corroborate the evidence of the search officer — Failure to do so will only lead to one result namely giving benefit of doubt to the accused. See Madras Prohibition Act (10 of 1937), S. 4 (1). **52 Cri L J 1058 : A I R 1951 Mad 883 (2).**

SECTION 38

——S. 38 (3)—**Police thinking no enquiry necessary —Enquiry not made—Proceedings are not vitiated.**

On the mere ground that no enquiry in respect of offence under S. 4 (1) (a) was held when the police officer has a discretion to hold such an enquiry or not if he thinks on facts that no such enquiry was necessary or even possible, the proceedings cannot be said to be vitiated. The spirit of S. 38 (3) should be understood and applied. 17 Mad L W 308, Distinguished. **1952 Cri L J 1198 : 1951 Mad W N 852 : 1951 Mad W N (Cr) 272 (1952) 1 Mad L J 12 : AIR 1952 Mad 604 (605) (Pt A) (Pr 8).**

SECTION 41-A

——S. 41-A—S. 41-A of the Act is intended to compel a person taken to a doctor to submit for examination—The doctor must be authorised under S. 41-A—Person taken to a doctor not authorised under S. 41-A—Examination by him of the accused—His evidence does not become inadmissible merely because he is unauthorised—See Madras Prohibition Act (1937), S. 4. **(1960) 2 Mad L J 449 : 1960 Mad L J (Cr) 762.**

SECTION 48

——S. 48—**Report of Prohibition Officer—Nature of —Position of Prohibition Officer and that of Police Officer—(Evidence Act (1872), S. 125).**

A contention that a case under the Prohibition Act has to be initiated by a Police or Prohibition Officer in the manner indicated in S. 48, Prohibition Act, that the report of a Prohibition Officer was more in the nature of a charge-sheet rather than a complaint, and that, therefore, the position of a Prohibition Officer should be equated to that of a Police Officer for the purpose of S. 48 cannot prevail because a Prohibition Officer shall be deemed to be a Police Officer only for the purpose of S. 125, Evidence Act, which means he will be treated as a Police Officer, only for a limitted purpose. He cannot be regarded as a Police Officer for other purposes. **1957 Cr L J 1388 : 1956 Andh L T 392 : 1956 An W R 642 : AIR 1957 Andh-Pra 977 (977) (Pt B) (Pr 3).**

——Ss. 48, 4 (1) (b), 32 — Offence under S. 4 (1) (b) —Police officer can investigate—Scope of Chapter V explained — Criminal P. C. (1898), Chapter XIV, S. 173.

A Police Officer investigating into a prohibition offence does so under the provisions of the Criminal Procedure Code, supplemented by the special provisions of the Prohibition Act. The Criminal Procedure Code covers all crimes and is not intended to meet special problems arising under the Prohibition Act.

Chapter V of the Prohibition Act is only complementary and supplementary to the provisions of the Criminal Procedure Code in Chapter XIV. Chapter V of the Prohibition Act has been enacted because the investigating agency can consist of two distinct agencies viz., the Police agency or the revenue and excise agency. It is only recently that the separate prohibition agency has been abolished and investigation has been entrusted to the Police. The prohibition agency cannot be made into a Police agency under the provisions of the Criminal Procedure Code. The Code contemplates only investigating Police Officers and Station House Officers. So a non-police prohibition officer can investigate only under the Prohibition Act. But the converse is not true. When a Police Officer investigates, he investigates only under the provisions of the Code.

Hence the report of a Police Officer investigating a prohibition offence will fall not under S. 48 of the Madras Prohibition Act but under S. 173 of the Code —(1956) Mad W N 923, Dissented from. **1960 M W N 317 : ILR (1961) Mad 70 : 1962 Mad L J (Cri) 331 : (1962) 1 Mad L J 434.**

——S. 48 — "Complaint", meaning of — Includes report by Police Officer also—Criminal P. C. (1898) S. 4 (1) (h)—Words and Phrasas—"Complaint".

Normally the word "complaint" includes the allegations made by all persons to Magistrate with a view to his taking action. The word "complaint" in S. 48 of the Madras Prohibition Act is wider and should be construed in a general sense and the restricted definition given in the Criminal Procedure Code should not be made applicable. On this construction the word "complaint" in S. 48 of the Prohibition Act will include a report by a Police Officer also. **1960 Mad W N 317 : ILR (1961) Mad 70 : 1962 Mad L J (Cri) 331 : (1962) 1 Mad L J 434.**

——S. 48—Scope—Report of investigation forwarded by police officer and by prohibition officer—Distinction as regards proper proceedure under Ss. 251-A and 252, Cr. P. Code, See Criminal P. C. (1898), S. 251-A. 1957 Cri L J 517: AIR 1957 Mad 292 (DB).

SECTION 53

——S. 53—Conditions preceding investigation — S. 157 does not prescribe report to Magistrate a condition precedent — Investigation in prohibition case—It starts with seizure of implements or arrest of accused—Police officer taking part in such seizure or arrest—He is disqualified by S. 495 (4) in prosecuting accused so arrested. See Criminal P. C. (1898), S. 157. (1962) 1 Andh W R 104.

——S. 53 — Investigation by Police Officer and by prohibition officer — Distinction in the procedure required to be followed. See Criminal P. C. (1898), S. 5 (2). 1957 Cri L J 517: AIR 1957 Mad 292 (DB).

——S. 53 —In proper case accused can be discharged —Section 4 (2) is not inconsistent with procedure laid down in Cr. P. C. See Madras Prohibition Act (10 of 1937), S. 4 (2). 1954 Cri L J 1521 : AIR 1954 Mad 993 (DB).

SECTION 53-A

——S. 53-A—Prohibition officer is not Police Officer either within the meaning of S. 162, Cr. P. C., or within the meaning of S. 25 of the Evidence Act. See Madras Prohibition Act (10 of 1937, S. 25. AIR 1955 N U C (Mad) 686.

SECTION 54

——Ss. 54 and 4, 16, 18-A, 21—Rules under—Notification G O. Misc. No. 5452 dated 19th December, 1952 Rr 6 and 10—Validity—Restrictions held not unreasonable—(Constitution of India, Art. 19 (5)).

Though the mere fact that preparations used for medicinal, toilet or industrial purposes are liable to be misused is not a sufficient ground for banning them completely, the Legislature or the rule-making authority is entitled to take steps to regulate their manufacture, possession or sale; provided the regulation does not impose any unreasonable restraint or amounts virtually to a prohibition of their possession or use. There is nothing in R. 6 of the Notification G. O. Misc. 5452, which enacts any prohibition or which exceeds the limits of a reasonable restriction which the State may impose under Art. 19 (5) of the Constitution, AIR 1951 S C 318. Expl.; AIR 1954 Mad 643: Rel. on. **AIR 1955 N U C (Mad) 5946 (DB).**

——S. 54 (a)—Arbitrary classification—Exclusion of citizens of French and Portuguese Settlements in India from foreign nationals for purposes of issue of liquor permits held arbitrary and void under Art. 14. See Constitution of India, Art. 14. AIR 1952 Mad 734 (DB).

FORMS III-A, B and C

See Prohibition — Madras Prohibition Act (10 of 1937), S. 18.

—MADRAS PROHIBITION (SUPPLEMENTARY) ACT (11 of 1941)

SECTION 2

——S. 2 — Effect — Hemp Drug Rules including Rule 23 framed under Indian Abakari Act are not in force—Hence possession of 1/16 tola of Ganja after that enactment is an offence under S. 4 (1) (a), Madras Prohibition Act. See Prohibition — Madras Prohibition Act (10 of 1937), S. 4 (1) (a). AIR 1952 Mad 504 (1).

—MADRAS PROHIBITION (AMENDMENT) ACT (8 of 1958)

SECTION 16

——S. 16, Explanation — Wash not sent to Chemical Examiner—No illegality.

Mixture of water and saccharine when in the process of vinous alcoholic fermentation or in which such fermentation has ceased would constitute wash for illicit distillation. Therefore, when the Madras Act 8 of 1958 was enacted to plug as many loopholes as possible in the working of the Prohibition Act, the framers of the Act included this mixture of water

and saccharine material as coming within the term 'wash' provided the stage at which it was, when it was in the process of vinous or alcoholic fermentation or in which such fermentation has ceased. On that conclusion, it follows that there is no necessity to send the sample of every kind of wash seized to the Chemical Examiner in order to find out whether it was only a mixture of water and saccharine materials, etc. The Prohibition Officers can legitimately be considered as experts and their evidence regarding wash may be accepted as expert testimony and it is only when they feel baffled, the aid of the Chemical Examiner need be resorted to. 1959 Mad W N 469 : 1959 Cri L J 1189 : AIR 1959 Mad 450 (453) (Pt C) (Pr 12).

—MYSORE PROHIBITION ACT (37 of 1948)

PREAMBLE

——Preamble—Territorial discrimination—Act is not invalid because it is not put into force in entire State —What is to be seen is whether classification is arbitrary and whether it bears any relation to object sought to be attained by legislature — Classification made in Mysore Prohibition Act is not arbitrary and whether it bears any relation to object of Act it does not offend Art. 14 of Constitution and is valid —Mysore Prohibition Act — Validity. See Constitution of India, Art. 14. 1955 Cri L J 1272 : AIR 1955 Mys 116.

SECTION 4

——S. 4 (1) (a) (b) and (g) — Accused neither tenant not owner of premises—Mere presence during police raid—Not sufficient for conviction.

Where the accused was neither the owner nor the tenant of the premises and there was no evidence that he was residing therein; nor was he a member of the family to whom the house belonged, the presence of the accused at the place when the police raided the house could not be regarded, without anything further, that he had committed the offence. 1961 Mad L J (Cri) 717 : (1962) 40 Mys L J 177.

——S. 4 (1) (a) — Constitution of India, Art. 311 — Departmental enquiry—Offence involving moral turpitude — Meaning of — Offence under S. 4 (1) (a) of Mysore Prohibition Act (37 of 1948) held involved moral turpitude — Omission to specify in notice by disciplinary authority that offence committed by delinquent involved moral turpitude — Conviction established under Standing Orders—Punishment held was competent. See Constitution of India, Art. 311. 1962 Mys L J (Sup) 498 (DB).

——Ss. 4 (1) (a) and 4 (1) (b) — Liquor found in vessel forming part of apparatus for manufacture — Liquor immediate produce of manufacture—Accused cannot be convicted for possession apart from manufacture.

Where the liquor or the intoxicating drug is the direct product of the process of manufacture, the possession of such liquor or drug is an integral part of the process and the accused cannot be held to have committed two independent offences.

Where, therefore, the liquor was found in a vessel kept to receive the liquor when it was being produced and formed part of the apparatus for the manufacture, the liquor found in the possession of the accused was the immediate produce of the manufacture and consequently the accused could not be convicted of the offence of possession of the liquor as something apart from the manufacture of liquor. 1962 Mad L J (Cri) 352 (Mys) : (1961) 39 Mys L J 298 : ILR (1961) Mys 293.

——Ss. 4 (1) (j) and 2 (a) — Presumption under — When can be raised.

Before any presumption could be raised under S. 4 (2) (a) some material mentioned in that section must have been in the possession of the accused for which he is unable to account satisfactorily. Only then the presumption in question could arise. Where nothing was found on the person of the accused, and he was only found smelling of arrack, no presumption can be raised. (1958) Mad L J (Cri) 889 : ILR (1956) Mys 371.

——S. 4—Burden of proof.

The burden of proof is heavily on the prosecution to establish that the articles alleged to have been seized are prohibited articles. 1955 Cri L J 1272 : ILR (1955) Mys 365 : AIR 1955 Mys 116 (117) (Pt A) (Prs 5, 6).

——S. 4 (1) (j)—Burden of proof.

Where the prosecution has proved that the accused was found to have consumed liquor, without being intoxicated, in a 'dry' area, at a place and under circumstances which probabilise that he did so in a dry area it is for the accused to plead and prove that he took the drink in a non-prohibition or "wet" area : A I R 1952 Sau 35, Dissented from. ILR (1953) Mys 298 : 1953 Cri L J 649 : AIR 1953 Mys 31 (32) (Pt A) (Pr 3).

SECTION 14

——S. 14 — Confiscation of conveyance — "Liable to confiscation" meaning of—Criminal P. C. (1898), S. 517—Words and Phrases.

An order confiscating a conveyance under S. 14 should not be passed without giving an opportunity to the alleged owner to prove that he did not know and had no reason to believe that the conveyance was likely to be used for transporting liquor illicitly : AIR 1921 Pat 232, AIR 1942 Mad 724 and (1911) 12 Cri L J 103, Rel. on; (1929) 7 Mys L J 99, Disting. 1952 Cri L J 701 : 31 Mys L J 26 : AIR 1952 Mys 39 (39) (Pr 3).

SECTION 16

——Ss. 16, 51 and 56—Scope—Offence under Act—Power of police to investigate under Chapter XIV, Criminal P. C. is preserved in full—He can also frame a charge-sheet under S. 173 (1)—Once a charge-sheet is filed, S. 251-A, Criminal P. C. is attracted and there is nothing wrong in the Magistrate inquiring into or trying the case under that section—(Criminal P. C. (1898), Ss. 5 (2) and 251-A). See Prohibition — Mysore Prohibition Act (37 of 1948), S. 51. 1959 Cri L J 496 : AIR 1959 Mys 100.

SECTION 31

——Ss. 31 and 32 — Procedure for effecting a search — Irregularity in conducting the search — If vitiates conviction under S. 4 (1), (a), (b), (g) and (k).

Section 31 of the Mysore Prohibition Act lays down the procedure for the issue of a search warrant. Section 32 is an exception to S. 31 and that contemplates that under certain conditions power is given to police officers to search without a warrant. The provisions of Ss. 31 and 32 are made having true regard to the circumstances : (1) apprehension of the articles, etc., from which illicitly distilled liquor is manufactured as well as the persons manufacturing the same; (2) to safeguard the rights and interests of individual citizen. (1961) Mad L J (Cri) 717 : (1962) 40 Mys L J 177 : ILR (1961) Mys 628.

SECTION 32

——S. 32 — Section 31 of the Mysore Prohibition Act lays down the procedure for the issue of a search warrant — S. 32 is an exception to S. 31 and that contemplates that under certain conditions power is given to police officers to search without a warrant.

See Prohibition — Mysore Prohibition Act (1948), S. 31. (1961) Mad L J (Cri) 717 : (1962) 40 Mys L J 177 : ILR (1961) Mys 628.

——S. 32—Search without warrant—Legality.

It is not correct to say that a search should always be preceded by a warrant authorising the search. Powers of entry and search without a warrant are quite valid under certain circumstances under S. 32. 1955 Cri L J 1272 : ILR (1955) Mys 365 : AIR 1955 Mys 116 (117) (Pt B) (Pr 7).

SECTION 41

——Ss. 41, 45 and 51 — Validity — If offend Art. 14 of Constitution.

The procedural differences resulting from Ss. 41, 45 and S. 51, Mysore Prohibition Act are the outcome of changes in law. They are not designed to produce inequality. The two procedures are substantially same. What the legislature wanted was that whenever a responsible police officer had an opportunity to investigate into a case and file a charge-sheet, then it would be sufficient if the Magistrate examines the records prepared by him and questions the accused and hears argument on behalf of the prosecution and the accused before he makes up his mind to frame charge or discharge the accused. But in the case of a private complaint in which the accused generally had not the benefit of an earlier investigation by any responsible officer, then it was thought proper that the Courts should examine the matter with care, right from the beginning. Whether one adopts one procedure or the other it made no difference in the standard of proof required or in the tests to be applied in appreciating the evidence. Article 14 does not take note of trivial differences in procedure incapable of producing any injustice. 1959 Cri L J 496 : 36 Mys L J 124 : I L R (1957) Mys 418 : 1958 Mad L J (Cr) 329 : AIR 1959 Mys 100 (101) (Pt B) (Pr 10).

SECTION 45

——S. 45 — Does not offend Art. 14—(Constitution of India, Art. 14). See Prohibition—Mysore Prohibition Act (1948), S. 41. 1959 Cri L J 496 : A I R 1959 Mys 100.

SECTION 51

——Ss. 51, 16 and 56 — Scope — Offence under Act — Power of police to investigate — Applicability of S. 251-A, Cr. P. Code—(Cr. P. Code (1898), Ss. 5 (2) and 251-A).

On a reading of Ss. 51, 16 and 56 of the Mysore Prohibition Act, it is absolutely clear that the power of the police to investigate under Chapter XIV of the Cr. P. Code is preserved in full. Hence the Police Officer has a right to investigate into the offence under the Mysore Prohibition Act under Chapter XIV of the Cr. P. Code and can also send a final report under S. 173 (1), Cr. P. Code which is better known as charge-sheet. Once he files a charge-sheet under S. 173 (1), Cr. P. Code, provisions of S. 251-A are attracted and there is nothing wrong in the Magistrate inquiring into or trying the case under that section. A I R 1957 Mad 292, Foll. 36 Mys L J 124 : 1958 Mad L J (Cr) 329 : ILR (1957) Mys 418 : 1959 Cri L J 496 : A I R 1959 Mys 100 (101) (Pt A) (Prs 6, 8).

——Ss. 51, 41 and 45 — Do not offend Art. 14—The procedural differences resulting from Ss. 41, 45 and 51 are the outcome of changes in law—They are not designed to produce inequality. See Prohibition — Mysore Prohibition Act (1948), S. 41. 1959 Cri L J 496 : AIR 1959 Mys 100.

SECTION 56

——Ss. 56, 51 and 16 — Scope—Offence under Act— Power of police to investigate under Chapter XIV is preserved in full. He can also send a charge-sheet under S. 173 (1), Cr. P. C. — Once a charge-sheet is filed provision of S. 251-A, Criminal P. C. is attracted —There is nothing wrong in the Magistrate inquiring into or trying the case under that section — (Criminal P. C. (1898), Ss. 5 (2) and 251-A). See Prohibition—Mysore Prohibition Act (1948), S. 51. 1959 Cri L J 496 : AIR 1959 Mys 100.

—MYSORE PROHIBITION ACT, 1961 (17 of 1962)

SECTION 1

——Ss. 1 (3), 129 and Sch. A — Applicability to area which formerly formed part of Madras State — Act applied and not Madras Prohibition Act, 10 of 1937.

Since 12-4-1962, Mysore Prohibition Act (17 of 1962) is the only law of prohibition in force in the entire State of Mysore including the area which formerly formed part of the Madras State. This is in virtue of the repeal of Madras Prohibition Act, 10 of 1937 by S. 129 read with Sch. A of Mysore Act of 1962. The mention of Madras Act 10 of 1938 in Sch. A is a clerical error for Act 10 of 1937. Madras Act 10 of 1938 was an amending Act and was already repealed by the Madras Repealing and Amending Act 14 of 1951. It cannot, therefore, be said that the same Act (Madras Act 10 of 1938) was repealed again in 1962. According to the principles of interpretations of Statutes, the Court has got every power to rectify such an error. (1962) 40 Mys L J 768; A I R 1953 Cal 733; A I R 1962 Punj 337, Disting. (1962) 40 Mys L J 982.

SECTION 12

——S. 12 — Constitution of India, Art. 311—Departmental enquiry — Offence involving moral turpitude —Meaning of — Offence under S. 4 (1) (a) of Mysore Prohibition Act (37 of 1948) held involved moral turpitude — Omission to specify in notice by disciplinary authority that offence committed by delinquent involved moral turpitude—Conviction established under Standing Orders — Punishment held was competent. See Constitution of India, Art. 311. 1962 Mys L J (Sup) 498 (DB).

SECTION 59

——S. 59 (b)—If arrack is liquor—Scope of S. 2 (19).

What section 2 (19) of the Mysore Prohibition Act does is to define liquor, and what the definition does is to give an inclusive definition. It opens with the words 'liquor includes' and not with the words 'liquor means.' So it is obvious that every substance which is liquor according to the natural import or meaning of the word 'liquor' is undoubtedly liquor. Spirits of wine, denatured spirits, wine, beer and toddy are also included in the definition and become liquor for the purpose of the Act not because if there had been no inclusion of those substances in the definition they would not have been liquor but obviously by way of super-abundant caution. Liquor, according to the natural import of that word, according to the Concise Oxford Dictionary means 'liquid' (fermented or distilled, for drinking (malt, ale, beer, porter, etc.) The question is whether arrack is one such liquid. So whether the definition contained in S. 2 (19) included arrack within the definition as it included spirits of wine and other substances or not, if arrack is liquor as ordinarily understood, such non-inclusion would not denude it of its character as liquor if really, it is. Since it is clear that it is liquor as already explained, it was not necessary for the State Government, to make any notification declaring arrack to be liquor for the purpose of the Act notwithstanding arrack being clearly liquor even otherwise. (1965) Mad L J (Cri) 864 : (1965) 2 Law Rep 492 : (1965) 1 Mys L J 310.

——S. 59 (b) — Conviction for an offence under— Burden of proving that alcohol consumed was of prohibited variety.

It is not obligatory to get the blood and urine of the accused examined unless the prosecution wants to rely on the presumption under S. 85 (3) of the Mysore Prohibition Act. Section 16 of the Mysore Prohibition Act cannot be regarded as being in the nature of an exception to the general provisions contained in S. 12 and of other sections in Chapter III of the Act. Section 16 must be regarded as merely declaring that the articles specified in that section are outside the pale of the Prohibition Act. Therefore the burden of proving that the alcohol consumed by the accused was a prohibited liquor, rests on the prosecution. (1965) Mad L J (Cri) 855 : (1965) 2 Law Rep 374 (Mys).

——S. 59 (1)—If sentence of imprisonment compulsory.

It is obvious from the provisions of clause (1) of S. 59 of the Mysore Prohibition Act that for a first offence under that section a sentence of imprisonment is not always obligatory and that each case must depend upon its own facts in regard to the question whether a sentence of imprisonment must needs be awarded or whether a sentence of fine is enough. (1965) Mad L J (Cri) 403 : (1965) 1 Mys L J 104.

SECTION 86

——Ss. 86 and 109—Scope and meaning.

The Registered Medical Practitioner referred to in clause (a) of S. 86 of the Mysore Prohibition Act must be a person who has an authorisation from the Government of the nature referred to in S. 109 (1). Clause (b) of S. 86, however, appears to make a distinction between a Registered Medical Practitioner working in the hospital or dispensary maintained by State Government or a local authority and any other Registered Medical Practitioner, with reference to the latter of whom alone an authorisation by the State Government appears to be necessary. It would appear that the importance of an authorisation by the State Government in favour of a Medical Practitioner lies in the fact that it may be regarded as the foundation of the power or special power of investigation provided in S. 109 of the Act. It should, however, be remembered that any defect in the investigation, in the absence of a specific provision in the statute expressly prohibiting a Court from taking cognisance of an offence in the event of there being such defect in the investigation, will not affect the jurisdiction of a Court. (1964) Mad L J (Cr) 702 : (1964) 2 Mys L J 47 : 1LR (1964) Mys 561.

SECTION 109

——S. 109 — The Registered Medical Practitioner referred to in clause (a) of S. 86 of the Mysore Prohibition Act must be a person who has an authorisation from the Govt. of the nature referred to in S. 109 (1). See Prohibition — Mysore Prohibition Act (1961), (17 of 1962), S. 86. (1964) Mad L J (Cr) 702 : (1964) 2 Mys L J 47 : 1LR (1964) Mys 561.

SECTION 129

——S. 129—Since 12-4-1962 Mysore Prohibition Act 17 of 1962 is the only law of Prohibition in force in the entire State of Mysore including the area which formerly formed part of the Madras State. This is in virtue of the repeal of Madras Prohibition Act 10 of 1937 by S. 129 read with Sch. A of the Mysore Act of 1962 — See Prohibition — Mysore Prohibition Act (17 of 1962), S. 1 (3). (1962) 40 Mys L J 982.

SCHEDULE A

——Since 12-4-62, Mysore Act is only law of prohibition in Mysore including area which formed part of Madras State —

——Sch. A—This is in virtue of the repeal of Madras Prohibition Act 10 of 1937 by S. 129 read with Sch. A of Mysore Act 17 of 1962—See Prohibition—Mysore Prohibition Act (17 of 1962)), S. 1 (3). (1962) 40 Mys L J 982.

SCHEDULE A—ITEM NO. 3

——Schedule A — Item No. 3—Error in mentioning Madras Act (10 of 1938), instead of Act (10 of 1937)— Power of Court to correct — Interpretation of Statues —Repeal, amendment and consolidation.

Following the principle laid down in AIR 1952 S C 324; that when an Act has been amended in such a way as to incorporate itself or a part of itself into the earlier Act, then the rule of construction is that the earlier Act must thereafter be read and construed 'except where that would lead to repugnancy, inconsistency or absurdity' as if the altered words had been written into the earlier Act with pen and ink and the old words scored out so that thereafter there is no need to refer to the amending Act at all. In view of this legal position, there was no need for the Legislature to include Madras Act 10 of 1938 in the Schedule. Even otherwise Madras Act 10 of 1938 was formally repealed by Act 14 of 1951.

Held, Madras Act 10 of 1938 having been repealed in 1951 it would be illogical to hold that the Mysore Legislature repealed it again in 1962, instead of repealing Madras Act 10 of 1937 which it was necessary to repeal for the purpose of promulgating in the entire State as an amended and consolidated uniform enactment on the subject of prohibition. The error in Item No. 3 of the Schedule A is a clerical error and the Court has got every power to rectify such an error. (1964) Mad L J (Cr) 4 : (1962) 40 Mys L J 982.

—PUNJAB INTOXICATING SPIRITUOUS PREPARATION, IMPORT, EXPORT, TRANSPORT, POSSESSION AND SALE RULES (1952)

——Validity of.

In the Punjab Excise Act the rules are issued under the provisions of Ss. 5, 6, 16, 17, 18, 24 and 58 of the Act. These sections enable the State Government to issue the rules and these rules have been issued by the State Government. Tincture Cardamom and Tincture Zingiberis are mentioned in clauses 5 and 17 of notification No. 769 F. & T.—52/1273 issued by the Government under S. 3 (14) of the Punjab Excise Act, on the 22nd of March, 1952. No question of delegated legislation arises in this case. 1951 S C R 682, Foll. 1953 Cr L J 549 : 55 Punj L R 187 : ILR (1953) Punj 618 : AIR 1953 Punj 77 (79) (Pt C) (Pr 5) (DB).

——Scope of.

The Rules were valid. There is a vast distinction between the actual prohibition and regulation. 1951 S C R 682, Disting. (1896) A C 88; 13 A C 446, Rel. on. 1953 Cr L J 549 : 55 Punj L R 187 : ILR (1953) Punj 618 : A I R 1953 Punj 77 (80) (Pt D) (Pr 8) (DB).

—SAURASHTRA PROHIBITION ORDINANCE

SECTION 66

——S. 66 (b)—Retrospective effect.

As Ch. III of the Ordinance, which lays down what the prohibitions were, was made applicable on and from 1-4-1950, there can be no offence for possessing any intoxicant on 12-1-1950. (1950) 3 Sau L R 183.

—TRAVANCORE-COCHIN PROHIBITION ACT (13 of 1950)

See also Kerala Prohibition Act (T. C. Act 13 of 1950).

PREAMBLE

——Pre.—Validity.

The operation of the proviso to Art. 304 (b) is not attracted to the T. C. Prohibition Act, regard being had to the true nature and scope of the Act. The proviso will apply only if the Act imposes restrictions on the freedom of trade, commerce and intercourse as declared in Art. 301 of the Constitution. This Act in its pith and substance prohibits only the use and consumption of intoxicating liquors. It concerns itself only with the enforcement of prohibition and this subject is within the competence of the State Legislature: Vide Entry 8 in list II, schedule VII. The protection afforded by Art. 301 is confined to such activities as may be regarded as lawful trading activities. It does not extend to an activity in respect of anything which is extra commercium. Liquor is not a legitimate article of trade and freedom of trade in liquor is not protected by Art. 301. An Act which restricts or even prohibits trade in liquor, therefore need not satisfy the procedural requirements of Art. 304 for its validity. **(1961) Mad L J (Cr) 58 : 1960 Ker L J 842 : (1960) 2 Ker L R 56 : 1960 Ker L T 753 : I L R (1960) Ker 916 : 1961 (1) Cr L J 70 : AIR 1961 Ker 8 (13) (Pt C) (Pr 33) (FB).**

SECTION 7

——Ss. 7 (8) and 26 (1) — Medicinal and toilet preparations taxable under the Act. See Sales Tax—Kerala General Sales Tax Act (11 of 1125), S. 4. **1965 Ker L T 1225 : 1965 Ker L J 806.**

——Ss. 7 (8) and 8 (1) (a) – **Possession of medicinal preparations containing alcohol is an offence.**

Unless exempted under S. 21 of the Travancore-Cochin Prohibition Act the possession of medicinal preparations (arishtar) containing alcohol would come within the mischief of the provisions of the Act. **(1961) M L J (Cri) 782 : 1961 Ker L T 575 : 1961 Ker L J 782.**

SECTION 8

——S 8 (1) — **Illicit liquor recovered from box the key of which was with wife — Prosecution not proving that possession of wife was on behalf of accused —Conviction of accused is not sustainable.** Penal Code (1860), S. 27, Evidence Act (1872), Ss. 106 and 114. **I L R (1961) 2 Ker 510 : (1961) 2 Ker L R 197 : 1961 Ker L J 693 : 1961 Ker L T 584.**

——S. 8 (1) (a) — **Requirements to constitute the offence — Contraband articles found in possession of wife—Husband having no knowledge of such possession—Possession by wife whether amounts to possession by husband —Conviction of husband — Legality — Illicit liquor found in possession of wife without knowledge of husband—Husband not bound to explain that possession—Evidence Act (1 of 1872), S. 106 — Penal Code (45 of 1860), S. 27.**

The presumption that the head of the family or the husband is responsible for the incriminating articles recovered from the house occupied jointly by him and others is rebuttable. S. 27 of the Indian Penal Code, cannot be applied to a case where the possession is not proved to be "on account" of the accused. The fiction that the husband and wife are one and the same person cannot also be extended. A mental element such as intention or consciousness or knowledge must be established before the possession of illicit liquor can be said to constitute an offence under the Act. As the husband is not proved to have been in conscious possession of the illicit liquor, his conviction must necessarily fail.

In a case under S. 8 (1) of the T. C. Prohibition Act, the onus of proving the guilt of the accused rests on the prosecution. Section 106 of the Evidence Act does not come into play here. It does not affect the onus of proving the guilt of the accused. In this case so long as the prosecution has not succeeded in proving that the illicit liquor kept inside the box of which the key was with his wife was with his knowledge certainly the husband cannot be called upon to explain that possession. **(1962) Mad L J (Cr) 29 : 1961 Ker L J 696 : (1961) 2 Ker L R 197 : 1961 Ker L T 584 : I L R (1961) 2 Ker 510.**

——Ss. 8 (1) (a), 7 (8) and 21 — **Medicinal preparation containing alcohol — Possession of—When is an offence.**

Unless exempted under S. 21 the possession of medicinal preparations containing alcohol would come within the mischief of the provisions of the Act and would amount to an offence under S. 8 (1) (a). **1961 Ker L T 575 : 1961 Ker L J 782.**

——Ss. 8 (1) (a) and 8(1) (g)—Possession of 'wash' fit for distillation—Offence comes not under S. 8 (1) (a) but under S. 8 (1) (g) and is triable as a warrant case. (Criminal P. C. (1898), S. 4 (l) (v) and (w)). **(1961) 1 Ker L R 190.**

——S. 8 (1) (a), (b) and (g) — **Illicit manufacture of liquor — Attestors of search mahazer won over by accused—Effect on prosecution evidence.**

The accused persons were found illicitly manufacturing arrack when a search was made of their house. The evidence of the excise officers who conducted the search was sought to be corroborated by the testimony of two independent witnesses who had attested the search mahazar. The attestors had been won over by the accused at the trial stage. In view of their admission that they had attested the mahazar no great weight could be attached to their statement that they attested the mahazar at a different place and on the next day.

Held, that such a change of attitude on the part of the independent attestors could not by itself destroy the effect of the prosecution evidence. The conviction of the accused persons under S. 8 (1) (a), (b) and (g) was justified. **(1960) 1 Ker L R 580 : 1960 Ker L T 704.**

——S. 8 (1) (g) — **Possession of fermented wash for illicit distillation —Offence — Triable as a warrant case—Warrant case tried as summons case –Acquittal —Legality — (Criminal Procedure Code (5 of 1898), Ss. 244 and 245 — Summons case—Accused pleading not guilty—Witnesses present — Acquittal without examining witnesses, unsustainable.**

The offence with which the respondent was charged was for being in possession of 8 edangazhis of fermented wash fit for illicit distillation. The offence would, therefore, be one under S. 8 (1) (g) of the Travancore-Cochin Prohibition Act (1950) and not under S. 8 (1) (a) which applies only to possession of liquor. An offence under S. 8 (1) (g) is punishable with imprisonment which may extend to two years and is therefore triable only as a warrant case. Where a warrant case is tried as a summons case and the accused is acquitted the order cannot be sustained. The order of acquittal in such case is not in accordance with law. In a summons case when the accused pleads not guilty, the Magistrate shall proceed under S. 244 by examining the witnesses. The proper course

would be to examine the witnesses and then proceed with the case under S. 245. The acquittal under S. 245 without examining the witnesses, who are actually present is, in any view unsustainable. (1960) Mad L J (Cr) 378 : (1960) 1 Ker L R 372 : 1960 Ker L J 375 : 1960 Ker L T 479.

——S. 8 (1)—Conviction under—Prosecution relying solely on evidence of officers conducting search—Witnesses attesting search mahazar turning hostile—Cunviction cannot be sustained.

Though the contention that the rejection of the evidence of the Excise Officers who conduct searches on the ground that they are interested in the case would lead to miscarriage of justice, specially in a case where the officers had conducted the search in the presence of neighbours, the fact that due to the intervention of the accused the witness subsequently turned hostile is not without force. However, any possible prejudice to the prosecution would not justify the non-enforcement of the salutary provisions of the Act introduced with a view to safeguarding the liberty of the citizens of the land.

Moreover, unless shown to be biassed, persons who give evidence before Court that they have not witnessed the search but simply signed the search list at the instance of the officers, cannot be presumed to be speaking falsehood. In such cases conviction cannot be sustained. AIR 1959 Ker 98, Followed. (1960) 1 Ker L R 169 : 1960 Ker L T 271 : 1960 Ker L J 228: I L R (1960) Ker 427.

——Ss. 8 (1) (a) and 8 (1) (b) — Accused charge-sheeted under S. 8 (1) (a) and S. 8 (1) (b), Travancore Cochin Prohibition Act — Offence under S. 8 (1) (a) triable as a summons case and that under S. 8 (1) (b) triable as warrant case—Procedure to be adopted is that applicable to warrant cases as prescribed by Chapter 21. See Criminal P. C. (1898), S. 251. 1960 Ker L T 99.

——S. 8 (1) (a)—Offence under—Evidence given by Officers of department — Independent corroboration —Necessity.

It is incorrect to say that, in every case under the Prohibition Act, there should be independent evidence to corroborate the officers of the Department. Where the seizure of arrack was made on the road without search of any premises, it is not essential that there should be independent evidence to corroborate the Officers. Each case has to be decided on the evidence in the case. AIR 1959 Ker 98 and 1959 Ker L R 665, Dist. 1959 Ker L J 1045.

——S. 8 (1) — Attestation of search mahazar by fish monger and person not neighbour—Evidence of these witness—Value of—Acquittal—No interference.

Attestation of the search mahazar upon the search of the premises by a fish monger and another person who is not a neighbour was held not to satisfy the requirements of law. AIR 1959 Ker 98, Rel. on.

Where these witnesses deposed to, that the arrack was found not inside the room but in the corner of the compound, while the prosecution case was that it was found inside the room, and the witnesses were not declared hostile and in view of this evidence the accused were acquitted:

Held, that there was no warrant to interfere with the acquittal. 1959 Ker L R 665 : 1959 Mad L J (Cr) 634 : 1959 Ker L T 768.

——S. 8—Examination of principle witness—Witness not served — Disposal of case without examining such witness is not justified. 1959 Ker L T 496,

SECTION 9

——S. 9—Examination of principle witness—Witness not served—Disposal of case without examining such witness is not justified. 1959 Ker L T 496.

SECTION 21

——S. 21 — Unless exempted under S. 21 of T. C. Prohibition Act the possession of medicinal preparations (arishtas) containing alcohal would come within the mischief of the Act. See Prohibition Travancore-Cochin Prohibition Act (1950), S. 8 (1) (a). 1961 Ker L J 782 : 1961 Ker L T 575.

SECTION 37

——S. 37 — Scope — Searching house of accused by officer competent to act under S. 37 but not authorised by Government to act under S. 38 — Legality — Failure to record reasons—Effect.

The failure to record the reasons will not indicate that the search was not one made under S. 37 of T. C. Prohibition Act. When the officer was competent to act under S. 37, there is no justification for presuming that the search was under S. 38 and then invalidating his action on the ground that he was not authorised by the Government to act under that section. Moreover S. 38 deals with entry and inspection and does not appear to contemplate the seizure of contraband and as such the officer's action in entering the house and seizing the articles can only have been under S. 37. So far as the alleged illegality of the search is concerned, namely the failure to record reasons, it is sufficient to say that even assuming that the search was illegal the seizure of the articles is not vitiated. It may be that where the provisions of S. 37 are contravened the search could be resisted by the person whose premises are sought to be searched. It may also be that because of the illegality of the search the Court may be inclined to examine carefully the evidence regarding the seizure. But, beyond these two consequences, no further consequence ensues. (1965) Mad L J (Cr) 341 : 1964 Ker L J 193 : 1964 Ker L T 177 : (1964) 2 Ker L R 455 : ILR (1964) 1 Ker 330.

——S. 37 and S. R. O. 222 of 1962—Search and recovery by Preventive Officer holding charge of the duties of the Excise Inspector — Legality — General Clauses Act, S. 18.

Section 18 of the General Clauses Act can be attracted only if the subordinate is lawfully performing the duties of the Excise Inspector at the time and as the Excise Inspector cannot delegate his powers and appoint his subordinate to exercise his functions the subordinate cannot be said to be lawfuly performing his duty. The effect of the Excise Inspector putting the Preventive Officer-in-charge of the duties is only to put him in charge of administrative matters. The Preventive Officer who was only put in temporary charge of the functions of the Excise Inspector was not competent to effect the search. (1965) M L J (Cr) 297 : 1963 Ker L T 1144: (1963) 2 Ker L R 336.

SECTION 61-A

——S. 61-A—Scope and ambit—Accused found in an intoxicated condition and behaving riotously in a public place—Conviction under S. 8 (1) (j) of Prohibition Act and and S. 51 of the Police Act—Order of Magistrate to pay an amount out of the fine to the Officer who 'detected' the offence—Legality.

The case against the accused was that he was found in an intoxicated condition and behaving riotously in a public place. The offence comes squarely within the purview of S. 51 of the Police Act and since it happened in a prohibition area S. 9 of the Prohibition Act can also be included, but S. 8 (1) (j) does not come into the picture as there was no case that he consumed or brought the liquor in a prohibition area. Section 61-A of the Act contemplates the payment of a portion of the fine levied under Ss. 8, 10, 12 or 17 of the Act only and not under S. 9. When a man is found in a state of intoxication in public place, the

offence is made out and no question of detection arises at all. In such a case an order for payment of the amount forthwith to the officer is passed without jurisdiction. Sction 61-A only enables the Magistrate who tries the case to make a direction that any portion not exceeding one half of the fine which may be levied be paid to the Police and Prohibition Officers who may have assisted in the detection of the offence and he is bound to send the amount to be paid to the District Collector who is the authority to distribute it among such of the Officers aforesaid as may be chosen by him and in such proportion as he thinks fit. (1965) Mad L J (Cr) 45 : 1964 Ker L J 803 : (1964) 1 Ker L R 411 : 1964 Ker L T 526.

—TRAVANCORE PROHIBITION ACT (7 of 1123 M E)

——Offence under—Punishment.

Uuless deterrent sentences are awarded for those found guilty of contravening the provisions of the Prohibition Act, the successful working of the Act will be seriously hampered. The High Court expects the Magistracy to take note of this and act accordingly. I L R (1951) Trav.Co 122 : 1953 Cri L J 69 : AIR 1952 Tra.Co 550 (550) (Pr 1).

SECTION 9

——S. 9—State of intoxication—Meaning.

The word "intoxication" applies only to the excessive use of intoxicating liquors or drugs. And the state of intoxication may be taken to be practically equivalent to a state of drunkenness, so that the person intoxicated was incapable of knowing the consequences of his action.

Where the certificate of the Medical Officer stated that the accused was in a state of drunkenness for the following reasons, viz. smell of brandy from nose, redness of the eyes, very rapid pulse, and tremors of his hands.

Held that these findings were absolutely insufficient to hold that the accused was in a state of intoxication. :1952 Ker L T 159 : 1952 Cri L J 1905 : ILR (1951) Tra-Co 755 : AIR 1952 Trav-Co 239 (242) (Pt A) (Prs 2, 3).

——S. 9 — Person found in state of intoxication in public road—Arrest—Refusal to give address.

Where a person is found in a state of intoxication in the public road, he cannot be arrested unless he refused to give his address to the police when demanded. 1952 Ker L T 159 : 1952 Cri L J 1095 : ILR (1951) Trav-Co 755 : AIR 1952 Trav-Co 239 (243) (Pt B) (Pr 6).

PROHIBITION LAW

See (1) Constitution of India, Arts. 14 and 47.
(2) Enactments under "Prohibition".

PROHIBITION OF IMPORT OR EXPORT

See Sea Customs Act (1878), S. 19.

PROJECTION

See (1) Easements Act (1882), Ss. 15, 23.
(2) Enactments under "Municipalities".

PROMISE

See Contract Act (1872), S. 2 (d).

Breach of.
See Contract Act (1872), S. 73.

PROMISOR AND PROMISEE

See Contract Act (1872), S. 2 (c).

PROMISSORY NOTE

See (1) Evidence Act (1872), S. 91.
(2) Negotiable Instruments Act (1881), S. 4.
(3) Stamp Act (1899), Ss. 2 (22), 35, Sch. I, Art. 49.
(4) Statutory cross-references under "Negotiable Instruments".

Defined.
See (1) Limitation Act (1908), S. 2 (9).
(2) Negotiable Instruments Act (1881), S. 4.
(3) Stamp Act (1899), S. 2 (22).

Maker, liability of.
See Negotiable Instruments Act (1881), S. 32.

Nature of.
See Negotiable Instruments Act (1881), S. 4.

Stamp duty.
See Stamp Act (1899), Sch. 1, Art. 49.

Suit on.
—Limitation.
See Limitation Act (1908), Arts. 72, 73, 74, 75.

PROMOTERS OF COMPANY

Public examination of.
See Companies Act (1956), S. 478.

PROMOTING ENMITY BETWEEN CLASSES DURING ELECTION

See Representation of the People Act (1951), S. 125.

PROMOTING ENMITY OR HATRED BETWEEN GROUPS,

See Penal Code (1860), S. 153A.

PROOF

See (1) Evidence Act (1872), Ss. 3, 56 to 99 and
(2) Statutory cross-references under "Evidence".

Burden of.
See Evidence Act (1872), Ss. 101 to 112, 114.

PROPER AND IMPROPER QUESTIONS TO WITNESS

See Evidence Act (1872), S 148.

PROPER PARTY

See Civil P. C. (1908), O. 1, R. 10; O. 34, R. 1.

PROPERTY

Acquisition, compulsory.
See (1) Assam Land (Requisition and Acquisition) Act (25 of 1948).
(2) Constitution of India, Arst. 19, 31, 31A, 31B.
(3) Land Acquisition Act (1 of 1894).
(4) Requisitioning and Acquisition of Immovable Property Act (30 of 1952).
(5) Tenancy Laws — West Bengal Estates Acquisition Act 1953 (1 of 1954).

Acquisition, self.
See (1) Custom—Punjab — Ancestral property.
(2) Hindu Law—Joint family.

Ancestral.
See (1) Custom—Punjab.
(2) Hindu Law—Joint family.

Attachment of.
See Civil P. C. (1908), Ss. 60-64 and 136.

Defined.
See (1) Gift-tax Act (1958), S. 2.
(2) Sale of Goods Act (1930), S. 2.

Dispute as to.
See Criminal P. C. (1898), S. 145.

Immovable.
See (1) General Clauses Act (1897), S. 3 (26).
(2) T. P. Act (1882), S. 3.

Joint family property.
See Hindu Law—Joint family.

Jus in rem Jus in personam.
See (1) Evidence Act (1872), S. 41.
(2) T. P. Act (1882), S. 3.

Legal incidents of.
See T. P. (1882), S. 5.

Mark.
See (1) Penal Code (1860), Ss. 482, 484, 486.
(2) Trade Marks Act (1940).
(3) Statutory cross-references under "Criminal law".

Movable.
See T. P. (1882), S. 6.

Of State.
—Exemption from tax.
See Constitution of India, Art. 289.

Right to hold.
See Constitution of India, Art. 19.

Transfer of.
See T. P. Act (1882), S. 5.

Union, property of, exemption from State taxation.
See Constitution of India, Art. 285.

PROPORTIONAL REPRESENTATION.

See Statutory cross-references under "Elections".

PROPOSAL.

See Contract Act (1872), Ss. 2, 3 and 4.

Express and Implied.
See Contract Act (1872), S. 9.

PROSECUTION

See Criminal P. C. (1898), Ss. 208, 252, 286, 289, 292, 367.

Adultery and enticing married woman, offence of.
See Criminal P. C. (1898), S. 199.

Company officers, prosecution of.
See Companies Act (1956), Ss. 242, 545.

Contempt of lawful authority.
See Criminal P. C. (1898), S. 195.

Duty of.
See (1) Criminal P. C. (1898), Ss. 208, 286 and 367.
(2) Constitution of India, Art. 20.
(3) Evidence Act (1872), Ss. 101-104, 114 and
(4) Statutory cross-references under "Criminal trial".

Malicious.
—Suit for damages.
See Tort—Malicious prosecution.

Offences against public justice.
See Criminal P. C. (1898), S. 195.

Offences against State.
See Criminal P. C. (1898), S. 196.

Offences of breach of contract, defamation and against marriage.
See Criminal P. C. (1898), S. 198.

Offences of criminal conspiracy.
See Criminal P. C. (1898), S. 196-A.

Offences of defamation against public servant.
See Criminal P. C. (1898), S. 198-B.

Offences of marital misbehaviour.
See Criminal P. C. (1898), S. 198-A.

Offences relating to documents given in evidence.
See Criminal P. C. (1898), S. 195.

Permission to conduct.
See Criminal P. C. (1898), Ss. 197-A, 198-B, 495.

Rulers of former Indian States, prosecution of.
See Criminal P. C. (1898), S. 197-A.

PROSPECTING LICENSE

Defined.
See Mines and Minerals (Regulation and Development) Act (1957), S. 3.

PROSTITUTION.

See (1) Bengal Suppression of Immoral Traffic Act (6 of 1933).
(2) Bombay Prevention of Prostitution Act (11 of 1923).
(3) Hyderabad Suppression of Immoral Traffic Act (49 of 1952).
(4) Madras Devadasis (Prevention of Dedication) Act (31 of 1947).
(5) Madras Hindu (Bigamy, Prevention and Divorce) Act (6 of 1949).
(6) Penal Code (1860), Ss. 366, 366A and 366B.
(7) Suppression of Immoral Traffic in Women and Girls Act (104 of 1956) and
(8) Statutory cross-references under "Criminal law".

Defined.
See Suppression of Immoral Traffic in Women and Girls Act (1956), S. 2.

Living on earnings of.
See Suppression of Immoral Traffic in Women and Girls Act (1956), S. 4.

Public place, in the vicinity of.
See Suppression of Immoral Traffic in Women and Girls Act (1956), S. 7.

Seducing or soliciting for purpose of.
See Suppression of Immoral Traffic in Women and Girls Act (1956), S. 8.

Selling minor for.
See Penal Code (1860), S. 372.

PROTECTED FOREST

See Forest Act (1927), Ss. 29, 33.

"PROVED"

Defined.
See Evidence Act (1872), S. 3.

PROVIDENT FUND

See (1) Civil P. C. (1908), S. 60.
(2) Coal Mines Provident Fund and Bonus Scheme Act (1948).
(3) Companies Act (1956), Ss. 417, 419, 420.
(4) Employees' Provident Funds Act (1952).
(5) Income-tax Act (1922), S. 7.
(6) Industrial Disputes Act (1947), Sch. 3, Item 5.
(7) Provident Funds Act (1925).]

Attachment.
See Civil P. C (1908), S. 60.

PROVIDENT FUND OF COMPANY EMPLOYEES

See Companies Act (1956), Ss. 417, 420.

PROVIDENT FUNDS ACT (19 of 1925)

PREAMBLE

——Preamble — The Act has been enacted with the object of amending and consolidating the law relating to Government and other Provident Funds. **(1965) 2 Lab L J 50 : AIR 1964 Mad 108 (109) (Pt C) (Pr 5) (DB).**

SECTION 1

——S. 1 — Working Journalists (Conditions of Service) Etc., Act (1955), does not amend Provident Funds Act. See Working Journalists (Conditions of Service) Etc. Act (1955), S. 15. **1965 (1) Cri L J 555 : AIR 1965 Ker 130 (DB).**

——S. 1 — Provident Fund account maintained by District Board of Ganjam is governed by the Act. **ILR (1963) Cut 272 : AIR 1963 Orissa 181 (182) (Pt B) (Pr 3) (DB).**

SECTION 2

● ——S. 2 (a) — Compulsory deposit—Fund at credit of retired servant is also compulsory deposit — Not

liable to attachment nor can it be assigned or charged — No receiver can be appointed. See Civil P. C., Ss. 51 and 63 (k) and (i). AIR 1952 S C 227.

● —Ss. 2 (a), 3 (1)—Compulsory deposit—Fund at credit of retired servant — Not liable to attachment — No receiver can be appointed—Civil P. C. (1908), S. 60 (k).

The definition in S. 2 (a), Provident Funds Act, makes it clear that the provident fund amount not paid to the subscriber after the date of his retirement is also a compulsory deposit. Such a deposit cannot be assigned or charged and is not liable to attachment under S. 3(1) of the Provident Funds Act. It is exempt from attachment and sale also under S. 60 (k), Civil P. C. Normally no execution can lie against such a sum nor can a receiver be appointed for collecting the money.

The prohibition against the assignment or the attachment of such compulsory deposits is based on grounds of public policy. Where the interdiction is absolute, to allow a judgment creditor to get at the fund indirectly by means of the appointment of a receiver would be to circumvent the statute and frustrate the very object of the legislation. (1887) 18 Q B D 127, Rel. on; AIR 1951 Cal 25, Reversed; 52 I A 262; AIR 1925 P C 176, Disting. Case law referred. 1952 S C R 765: 65 Mad L W 628 : 1952 Mad W N 511 : 1952 S C J 326: 90 Cal L J 95: (1952) 2 Mad L J 265 : AIR 1952 S C 227 (228 to 230) (Pt A) (Prs 9, 10, 15).

——S. 2 — "Vesting of money after subscriber's death — Money standing to the credit of a subscriber or depositor at the time of his death is only subject to any deduction authorised by the Act or to the rights of assignee under an assignment made before the commencement of the Act — Money so vested in the dependent of the deceased subscriber is in every case free from any debt or liability incurred by the deceased subscriber. See Provident Funds Act (19 of 1925), S. 3. AIR 1956 Ajmer 7.

——S. 2 — Money in deposit in provident fund — Subscriber retiring from service — Effect — Money is provident fund within the section, although the subscriber has retired from service. AIR 1953 All 1 (3) (Pt A) (Pr 16) (DB).

——S. 2 (e) — Insurance amount — (Rules framed by Government for working of Provident Funds maintained by District Boards — Rules 3, 5, 6, 7, 10, 12, 13).

Before it can be held that the insured amount is an increment accruing on the subscriptions or contributions forming part of the Provident Fund, it must be established that the said sums are invested as forming part of the Provident Fund. Though the rules are made to help a subscriber to insure his life and to facilitate payment of premiums they treat the premiums paid only as advances to the subscriber. The insured amount minus the amount necessary to cover the advances made towards the premiums is not part of it. In this view the entire amount standing to the credit of a subscriber in the Provident Fund account and that part of the insured amount sufficient to recoup the advances made from and out of the Provident Fund towards the premiums would be the absolute property of the nominee and in regard to the balance of the Provident Fund, the nominee would succeed to such right as he would be entitled under personal law. 1955 Andhra W R 710: 1955 Andh L T (Cri) 658 : ILR (1956) Andh Pra 360 : AIR 1957 Andh Pra 887 (889) (Prs 7, 8) (DB).

——S. 2 (a) — Transfer of Provident Fund account upon retirement of railway employee to Miscellaneous account 'E' — Character of Provident Fund money is not altered — Mere perambulation from one account to the other did not change its character of Provident Fund money — It is "compulsory deposit" as defined in S. 2, Provident Funds Act — Amount could not be attached — Section 60 (k), Civil P. C., does not stipulate that the sum has to remain in particular account — (Indian Railway Code of Accounts Department, Part I, R. 1023 (3)). See Civil P. C. (1908), O. 21, R. 46. AIR 1955 Cal 509.

● ——S. 2 (a) — Money when can be said to be in deposit — (Limitation Act (1908), Art. 60) — (Words and Phrases).

Money belonging to one can be said to be in deposit only with another person or authority. It can never be 'a deposit' in the hands of the very person to whom the money belongs. 1956 Mad W N 109 : 69 Mad L W 105 : ILR (1956) Mad 491 : (1956) 1 Mad L J 166 : AIR 1956 Mad 283 (284) (Pt B) (Pr 2) (FB).

——S. 2 (e) — Scope — Insurance policy re-assigned to widow, the nominee for the Provident Fund under Proviso (d) of R. 11 (2) of Provident Fund Rules framed under Madras Local Boards Act — Fact that premium was paid from the fund cannot make at an increment accruing on such subscriptions and so Provident Fund within the meaning of S. 2 (e) of the Provident Funds Act. See Hindu Law — Widow Succeeding to Husband's Estate. AIR 1953 Mad 508.

——S. 2 (a) — Compulsory deposit — Railway Provident Fund standing to credit of subscriber — Decree against his wife prior to his death for joint debts of herself and deceased subscriber — Fund is immune from liability to attachment. See Provident Funds Act (1925), S. 3 (2). AIR 1965 Mys 303.

SECTION 3

● ——S. 3 — Provident Fund — Rules providing that on adjudication of subscriber as insolvent, amount standing to his credit shall be liable to be forfeited to the Fund — Validity of — (Contract Act (1872), Ss. 17 and 23).

Where a rule of Provident Fund Rules provides that on the adjudication of the subscriber as an insolvent, the amount standing to his credit in the Fund shall be liable to be forfeited to the Fund, such condition or agreement is invalid. A man may give (in India only by will) property or its income to a donee with a condition that the donee's interest will cease on bankruptcy and the property will in that event go to another; if insolvency supervenes, the property will not vest in the Official Receiver. If there is no gift over on the cesser of the donee's interest, the property will revert to the donee and will vest in the Official Receiver on the donee's insolvency. But a person cannot enter into any arrangement or agreement by which his own title will cease in the event of bankruptcy for it would then be a fraud perpetrated on the Insolvency law. Muktilal Agarwala v. The Trustees of the Provident Fund, of the Tin Plate Co. of India, Ltd., 1956 Pat L R (SC) 95 : 1956 B L J R 366 : ILR 35 Pat 359 : 69 Mad L W 930 : 1956 S C R 100 : (1956) 2 Lab L J 215 : 1956 S C A 675 : (1956-57) 10 F J R 350 : (1956) 1 M L J (SC) 183 : 1956 S C J 406 : 1956 All L J 383 : 1956 Cri L J 366 : AIR 1956 S C 336 (339) (Pt B) (Pr 16).

● ——S. 3 (1)—Compulsory deposit—Fund at credit of retired servant—Not liable to attachment—No receiver can be appointed—(Civil P. C. (1908), S. 60(k)): AIR 1951 Cal 25, Reversed.

The prohibition against the assignment or the attachment of compulsory deposit is based on grounds of public policy. Where the interdiction is absolute, to allow a judgment debtor to get at the fund indirectly by means of the appointment of a receiver would be to circumbent the statute a nd to frustrate the very object of the legislation. (1887) 18 Q B D 127, Rel. on. AIR 1951 Cal 25, Reversed; AIR 1925

P C 176, Dist. Case law referred. See Provident Funds Act (19 of 1925), S. 2 (a). AIR 1952 S C 227.

——Ss. 3 and 2—Vesting of money after subscriber's death—No liability to pay debt of subscriber.

The position of all compulsory deposits mentioned in S. 3 (1) and defined in S. 2 (a) is that the sum standing to the credit of the subscriber or depositor at the time of his decease shall vest in the dependant subject to any deduction authorized by the Act and subject to the right of an assignee under an assignment made before the commencement of this Act. The second condition as to the vesting being subject to the rights of the assignee under an assignment made before the commencement of the Act, is not to apply in case the dependant is the widow or child of the subscriber or depositor.

But whether the vesting is to be subject to the rights of an assignee under the assignment made before the commencement of the Act or not, the money so vested is in every case free from any debt or liability incurred by the deceased or incurred by the dependant before the death of the subscriber or depositor. 1955 A M L J 81 : AIR 1956 Ajmer 7 (7) (Pr 3).

——S. 3 (1)—Direction in decree to send amount to subscriber's wife amounts to assignment.

The direction in the decree of a Court to the Railway Administration to send a portion of the amount from the provident fund due to subscriber amounts to an assignment of that portion. Such a direction is not binding on the Railway Administration because it contravenes the provisions of S. 3 (1) of the Provident Funds Act. AIR 1952 S C 227, Rel. on; AIR 1938 Oudh 48, Held no longer good law. AIR 1953 All 1 (3, 4) (Pt B) (Prs 16, 18) (DB).

——S. 3 (2) and 4 (1) (a) — Railway Provident Fund —Fund vesting in dependant on death of subscriber —Right of Administrator General to receive fund—Constitution of India, Art. 226.

An Administrator General who is administering the estate of the deceased subscriber to a Railway Provident Fund has no right to receive the provident fund from the Railway authorities as it vests in the dependants under S. 3 (2) and does not form part of the estate of the deceased. Even a letter of authority from the guardian of the minor dependant of the subscriber would not constitute the Administrator General into a person 'authorised by law' to receive the payment on behalf of the minor as required by S. 4 (1) (a). Letters of Administration can govern the payment of the Provident Fund money only when the Provident Fund does not vest in a dependant under S. 3 (2) and is not payable to a dependant or a person authorised by law to receive payment under S. 4 (1) (a) of the Act. Even a nomination made, while the dependent is alive, would be against the provisions of sub-section (2) of S. 3 and would be invalid, AIR 1924 Sind 57 Dist. The remedy of the Administrator General, if any, is not by a writ of mandamus but in a regular court. 1951 All W R (HC) 559 : 1951 All L J 672 : ILR (1953) 2 All 323 : AIR 1951 All 815 (815, 816) (Prs 1 to 3) (DB).

——S. 3 — Railway Provident Fund — Payment of amount in manner suggested by subscriber — Effect —Civil P. C. (1908), S. 60 (1) (k) O. 21, Rr. 52 and 58—Contract Act (1872), S. 50.

It is well settled that as soon as the compulsory deposit is paid on to the subscriber, the amount so paid out ceases to be a compulsory deposit in a Provident Fund. It is also well settled that under S. 50 of the Contract Act payment of a debt may be made not only in cash but also in any other manner sanctioned or prescribed by the creditor.

Where a subscriber to the Railway Provident Fund desired payment of his deposit in the Provident Fund, in Sterling and also desired that remittance be made to him by a Bank draft in a named Bank in England and under the law, the only legal method of such remittance was to send the amount to the Reserve Bank of India for payment to the Bank in England. Illustration (d) to S. 50, Contract Act, read with the section itself justified the conclusion that by sending the cheques for the amount to the Reserve Bank of India, in performance of the manner of payment prescribed by the subscriber, the debt was discharged and the money must be deemed to have been paid out to the subscriber and such a sum of money looses all immunity from attachment.

Further, as the sum was deemed to have been paid to the subscriber and as such ceased to be the part of the compulsory deposit, the Union Government had no locus standi to object to the attachment of the sum in execution of a decree against the subscriber. ('61) 65 Cal W N 848 : AIR 1962 Cal 169 (172) (Pt B) (Prs 28, 31 to 33) (DB).

——S. 3 (2) — Judgment-debtor dying — Receiver, if can be appointed of Provident Fund amount — Civil P. C. (1908), S. 51 and O. 40, R. 1.

A receiver in execution of a decree cannot be appointed of a Provident Fund amount which stood at the credit of the deceased judgment debtor at the time of his death; such amount vests in the dependents and ceases to be part of the assets of deceased judgment-debtor. AIR 1952 Cal 349 (350) (Pr 12).

——S. 3 (1) — Section speaks only of attachment—Receiver can be appointed in execution for realising provident fund of a railway employee. AIR 1951 Cal 285 (285) (Pt A) (Pr 3).

[Must be deemed to have been Overruled by AIR 1952 S C 227.]

——S. 3 (1)—Equitable execution by appointment of Receiver in respect of money standing to the credit of a subscriber to Provident Fund is not barred—Bar imposed under S. 3 is to attachment of compulsory deposit under a decree or order and not to any other form of execution. AIR 1950 Cal 212, Overruled. AIR 1951 Cal 25 (27) (Pt B) (Prs 14, 15) (DB).

[Reversed in AIR 1952 S C 227.]

——S. 3 (1) — Receiver in execution proceedings—Judgment-debtor in service — Providend fund money —Court should refuse to appoint a receiver as the only object of such appointment is to avoid bar created by S. 60 (k), Civil P. C —Civil P. C. (1908), Ss. 51 and 60 (k). See Civil P. C. (1908), O. 40, R. 1. AIR 1950 Cal 212.

[Overruled in AIR 1951 Cal 25.]

——S. 3—Extension of the Act to non-governmental or quasi-governmental institution can be made only in the manner laid down in S. 8—Even the principles underlying the provisions cannot be extended in any other manner —:Suit by wife of a deceased bank-employee for provident fund of the husband — Act not extended by notification to bank — Wife can claim the amount only as 'heir' to her husband and not as his dependent —Succession certificate necessary for obtaining the decree. See Provident Funds Act (1925), S. 8. AIR 1964 Mad 108 (DB).

● ——S. 3 (1)—Immunity from attachment — Extent of — Compulsory deposit paid over to the subscriber or depositor — If loses its character as such — Subscriber or depositor becoming insolvent — If the amount vests in the Official Assignee of Receiver in insolvency.

Section 3 (1) of the Provident Funds Act is intended to protect compulsory deposits only so long as they remained deposited in the fund. The immunity from

attachment under S. 3 (1) of the Act does not attach to moneys paid over to the subscriber or depositor from his Provident Fund. When it is paid over to the person entitled to receive it, it ceases to retain its character as Provident Fund and becomes part of the person's ordinary money. Money belonging to one can be said to be in deposit only with another person or authority and not in the hands of the very person to whom it belongs. (1919) ILR 44 Bom 673, Diss.; (1930) 61 M L J 354, Foll. Joseph Benjamin Bonjour v. O. A. of Madras. **1956 Mad W N 109 : 69 Mad L W 105 : ILR (1956) Mad 491 : (1956) 1 M L J 166 : AIR 1956 Mad 283 (285) (Pt A) (Pr 7) (FB).**

——S. 3 (2) and S. 2 (a) — Railway Provident Fund standing to credit of subscriber — Decree against his wife prior to his death for joint debts of herself and deceased subscriber — Fund is immune from liability of attachment.

The railway provident fund, so long as it stands to the credit of the subscriber, is immune from the liability of attachment for the decree-debt incurred by him and his wife, the dependent of the subscriber, prior to his death. The addition of the words 'until the happening of some specified contingency' to the definition of the term 'compulsory deposit' in S. 2 (a) does not affect the protection extended to the provident fund after it becomes payable on the happening of the specified contingency, while it still stands to the credit of the subscriber. AIR 1929 All 417 and AIR 1937 Pat 22 and AIR 1947 Mad 317 and AIR 1950 Mad 402 and AIR 1949 Cal 144, Rel. on; AIR 1952 S C 227, Foll. **(1965) 1 Mys L J 35 : (1965) 1 Lab L J 361 : AIR 1965 Mys 303 (305) (Pt A) (Prs 16, 19).**

——S. 3 (2) — Provident Fund — Dependent cannot waive his right as the benefit is conferred by a statute which has public policy for its object — Dependent cannot therefore agree to have the amount brought in court for payment to decree-holder in satisfaction of his decree. See Evidence Act (1872), S. 115. AIR 1965 Mys 303.

——Ss. 3 and 4 — Provident fund deposited in Court for payment to dependant — If attachable in execution of decree against deceased subscriber.

Where provident fund standing to the credit of a deceased subscriber is deposited by the authorities concerned in Court for payment to his dependant, the amount so deposited is no part of the assets of the deceased subscriber and cannot be attached in execution of a decree which is executable against his assets. AIR 1934 Mad 173; AIR 1928 Rang 312; 59 B 475 and ILR (1944) Nag 444, Rel. on. AIR 1935 Bom 396, Dist. **ILR (1951) Nag 540: 1951 N L J 128: AIR 1952 Nag 266 (267) (Prs 8, 10).**

——S. 3—Death of nominee of subscriber to fund — Heirs of nominee whether can obtain succession certificate — Succession Act (1925), S. 372.

The nominee of a subscriber to a provident fund has nothing more than a right to receive the amount; he does not get an absolute title to it. Under S. 3, Provident Funds Act, the amount standing to the credit of a subscriber at the time of his death can vest only in his dependent and not in the nominee. It follows, therefore, that upon the death of the nominee, whether before or after the death of the subscriber, the right of the nominee to recieve the amount cannot pass to his personal heirs. Hence if the nominee dies before the subscriber the nomination in his favour actually becomes null and void. In such circumstances, the personal heirs of the nominee have no locus standi in obtaining a succession certificate: AIR 1949 Sind 38, Rel. on; AIR 1929 Sind 158; AIR 1940 Cal 395 and AIR 1949 Nag 85, Ref. **1950 Nag L J 401 : ILR (1951) Nag 407 : AIR 1950 Nag 244 (246) (Pt C) (Pr 6).**

——S. 3—Attachment of Provident Fund money — Prohibition — If absolute — Criminal Law Amendment Ordinance (1944), Ss. 3, 4, 5.

Under S. 3 of the Provident Funds Act there is an absolute interdiction to the attachment of a compulsory deposit in any Government or Railway Provident Fund account. The power of attachment of property under Ss. 3, 4, 5 of the Criminal Law Amendment Ordinance (1944) must be construed subject to the provisions of S. 3 of Provident Funds Act. Attachment creates no charge or lien upon the attached property but prevents and avoids private alienations and that is the meaning and effect of an attachment both under S. 3 (1) of the Provident Funds Act and Ss. 3, 4 and 5 of Ordinance No. 38 of 1944. AIR 1952 S C 227 and (1884) 10 A C 59, Rel. on. **(1961) 3 Fac L R 377 : 1961 (2) Cri L J 522 : 1961 Pat L R 18 : 1961 B L J R 261 : AIR 1961 Pat 384 (386) (Prs 4, 5) (DB).**

SECTION 4

——Ss. 4 (1) (b) and (c), (i), 5 (2) — Provident Fund money — Succession certificate — Can be granted — Succession Act (1925), Ss. 370, 372.

In order to establish the right of persons claiming the Provident Fund money of any subscriber after his death to receive the money, the Provident Funds Act itself envisages that a succession certificate may be issued by the Court in respect of provident fund **(1964) 9 Fac L R 391 : 1964 All L J 916 : (1965) 1 Lab L J 20 : AIR 1965 All 267 (268) (Pr 4).**

——S. 4 (1) (d) — Railway provident fund — Fund vesting in dependent on death of subscriber — Administrator General has no right to receive the provident fund as it vests in the dependents under S. 3 (2) and does not form part of estate of deceased — Constitution of India, Art. 226. See Provident Funds Act (19 of 1925), S. 3 (2). AIR 1951 All 815 (DB).

——S. 4—Provident Fund Rules applicable to Railway servants framed by Governor-General in Council are conditions of service — They are intra vires — Rule prescribing the manner in which contributions by subscriber to the fund are to be disposed of on cessation of service or on his death — Provisions in R. 1336 in this regard are not contrary to provisions of S. 4 because these provisions restrict payment to minor sons only. See Government of India Act (1935), S. 241. AIR 1955 Cal 245 (DB).

——S. 4 (1) — Order directing payment of provident fund to person other than depositor—Validity.

An order directing Accounts Officer of a Railway Company to hand over the provident fund money of a member to a Receiver in execution against the member is in direct contravention of statutory liability of Accounts Officer under S. 4 (1) and, therefore, is without jurisdiction. **AIR 1951 Cal 285 (285) (Pt B) (Pr 3).**

——S. 4 —Dismissal of employee for misconduct — Employee is entitled to recover amounts contributed by him towards provident fund with interest thereon — Employees' Provident Funds Act (1952), S. 6. (1964) 1 Lab L J 500.

——S. 4—Provident fund amounted due to deceased subscriber—Rival claimants not producing succession certificate as directed—Amount transferred to lapsed deposit account—Creditor of subscriber applying for attachment of fund under O. 21, R. 52, Civil P. C. — Attachment without production of letters of administration by creditor is not legal. See Succession Act (1925), S. 214 (1) (b). AIR 1961 Mad 288.

SECTION 5

——S. 5—Rights of nominee.

A nomination confers an absolute right on the nominee to appropriate to himself the amount of the Provident Fund money. AIR 1936 Ondh 32 (FB), AIR 1939 Mad 489, AIR 1946 Bom 304, Rel. on. **1952 Cri L J 1384 : AIR 1952 Ajmer 42 (1) (42) (Pr 5).**

——S. 5 — Declaration form appointing nominee of provident fund—Document being a formal document duly attested and deposited with railway authorities held combined nomination and will. See Succession Act (1925), S. 2 (h). **AIR 1951 Ajmer 42.**

——S. 5 — **Rights of a nominee under a nomination which was also a will.**

Though a nominee under S. 5 of the Provident Funds Act merely acquires a right to receive the money and does not become the owner of it, where the nomination also amounts to a will under which the nominee is the legatee, the nominee would become entitled to the money on the death of the subscriber. **AIR 1951 Ajmer 42 (44) (Pt B) (Prs 11, 12).**

——S. 5 (2) — Provident Fund money — Succession certificate — Can be granted — Provident Funds Act envisages that a succession certificate may be issued by the Court in respect of fund money. Succession Act (1925), Ss. 370, 372. See Provident Funds Act (1925), S. 4 (1) (b). **AIR 1965 All 267.**

——S. 5—Provident Fund—Nomination under rules governing fund — Held the provident fund amount did not vest as absolute property in the nominee on the death of the subscriber.

Under Rule 23 of the Employees' Provident Fund Rules of the Central Bank of India an employee who was a subscriber of the fund nominated his wife. The Rule in question provided that each member may nominate in writing any person to whom the amount standing to the credit of such member shall be paid, in the event of his death while in the service of the Bank or before his claim on the Fund shall have been discharged and may from time to time change such nomination in writing.

Held, that the provident fund amount in the hands of the wife after the death of the subscriber, was liable for attachment for a debt due by him. The nominee under the Rules did not become the owner of the amount payable to her on the death of the subscriber. The nomination by itself conferred no right on the nominee, during the life time of the subscriber and only gave a bare right to collect the amount on the subscriber's death. A receiver of moneys was not the owner of the moneys. Hence the provident fund amount was not the absolute property of the nominee on the death of the subscriber. AIR 1961 Kerala 126 (FB), Rel. on. **ILR (1963) 1 Ker 493: AIR 1964 Ker 197 (198) (Prs 2, 3).**

——S. 5 — Scope — Nature of interest taken by nominee — Death of nominee during lifetime of subscriber—Effect.

Section 5 merely wipes out all the personal and other law for the time being in force and also sets at naught any other disposition by the subscriber, whether testamentary or otherwise, creating a right in the nominee to receive the money from the Government or the other holder of the provident fund. The nomination confers this right on the nominee absolutely. This does not make the nominee the owner of the fund. So long as the nomination stands, the nominee is required only to prove that he is the person nominated by the subscriber and he can then receive the amount without any conditions being imposed on him.

The nomination is in its nature testamentary and being ambulatory the death of the nominee in the lifetime of the subscriber defeats the nomination, so that on the death of the member his legal personal representative is entitled to the property and not the legal representative of the nominee. (1940) 1 Ch 267, Foll.; AIR 1950 Nag 244, Affirmed; AIR 1949 Nag 85, Distinguished. **1957 M P L J 233: 1957 M P C 309 : 1957 Jab L J 408 : ILR (1957) Madh Pra 133 : AIR 1957 M P 79 (83) (Prs 17, 19) (DB).**

——S. 5 —Nomination —Alteration of, by will —Not allowed — It does not form part of undisposed estate of deceased. **AIR 1955 NUC (Mad) 1832.**

——S. 5 (before amendment of 1946) — Subscriber to fund nominating his wife — Wife predeceasing him — Money deposited in Fund passes to wife's heir.

Where a subscriber to the General Provident Fund nominated his wife but the wife predeceased him :

Held, that as the nomination was not revoked at any time, under S. 5, notwithstanding the death of the wife, she became absolutely entitled to the money deposited in the Fund and the money passed to her heir. It could not be held that on the death of the nominee the nomination must be deemed to be revoked : AIR 1936 Mad 477 and AIR 1944 Mad 370, Rel. on. **62 Mad L W 793 : (1949) 2 Mad L J 635 : AIR 1950 Mad 210 (210) (Prs 2, 4) (DB).**

SECTION 6

——S. 6—Municipal Committee not adopting provisions of Provident Funds Act—Act not applicable.

Section 6, Provident Funds Act, only applies to Government and Railway Provident Funds and does not apply to Municipal Provident Fund unless the Municipal Committee has, by rules or bye-laws adopted the provision of the Act to Municipal Provident Fund. **1959 Nag L J (Notes) 97.**

——Ss. 6, 7 — Local Boards Provident Fund Rules made under Madras Local Boards Act, 1928, R. 22—Retired employee of District Board — His Provident Fund amount cannot be withheld or transferred to deposit account for deduction of amount found due under liability incurred by subscriber.— Suit for recovery of amount is not barred. **ILR (1963) Cut 272 : AIR 1963 Orissa 181 (182, 183) (Pt A) (Prs 5, 7, 8) (DB).**

SECTION 7

——S. 7—Scope and applicability.

Section 7, Provident Funds Act, affords protection to the officers acting bona fide under that Act. No suit or action lies against any officer for any action taken by him bona fide under any provision of Provident Funds Act. Where the suit is not directed against any officer for any action taken by him under any of

the provisions of that Act but is a claim against the Government for a sum which the plaintiff considers is due to him under the rules which govern his conditions of service such a suit is not within the ambit of S. 7, Provident Funds Act. ILR (1954) 6 Assam 383 : AIR 1955 Assam 17 (20) (Pt B) (Pr 11) (DB).

—S. 7—Local Boards Provident Fund Rules made under Madras Local Boards Act, 1928, R. 22—Retired employee of District Board— His provident fund amount cannot be witheld or transferred to deposit account for deduction of amount found due under liability incurred by subscriber — Suit for recovery of amount is not barred. See Provident Funds Act (19 of 1925), S. 6. AIR 1963 Orissa 181 (DB).

SECTION 8

—Ss. 8 and 2 (e)—(Rules framed by Government for working of Provident Funds maintained by District Boards, Rr. 3, 5, 6, 7, 10, 12, 13)—Insurance amount — The rules are made to help a subscriber to insure his life and to facilitate payment of premium and they treat the premium paid only as advances to the subscriber. The insured amount minus the amount necessary to cover the advances made towards the premium is not part of it. See Provident Funds Act (1925), S. 2 (e). AIR 1957 Andh Pra 887 (DB).

—Ss. 8, 3 and 2 (c)—Extension of the Act to non-Governmental or quasi-Governmental institution can be made only in the manner laid down in S. 8—Even the principles underlying the provisions cannot be extended in any other manner—Suit by wife of a deceased bank employee for provident fund of her husband—Act not extended by notification to bank—Wife can claim the amount only as 'heir' to her husband and not as his dependent—Succession certificate necessary for obtaining the decree.

Provisions of Provident Funds Act can be extended to quasi-Governmental or other institutions which are not Governmental, only in the manner indicated in S. 8 of the Act. The manner of extension of the provisions being indicated, extension of the principles of the provisions as distinguished from the provisions themselves, will not be consistent with the special mode of extension provided by the section.

In a suit by the wife of a deceased bank employee for recovery of the amount at the credit of the employee the trial Court, assuming that though the Act was not made applicable to the bank by a notification of the Government, the statutory principles underlying the provisions were, nonetheless applicable, rejected the prayer by the Bank that plaintiff ought to produce Succession Certificate on the ground that the plaintiff was not suing as a mere heir but also as a dependent. The Bank appealed :

Held, that in the absence of a notification extending the provisions of the Act to the bank, the statutory principles could not be extended to the fund. The plaintiff could not therefore claim the amount in her capacity as a dependent as defined in the Act. As an heir of her husband she was obliged to produce a succession certificate in order to obtain a decree in her favour. (1965) 2 Lab L J 50 : AIR 1964 Mad 108 (109, 110) (Pt A) (Prs 5, 7) (DB).

PROVIDENT FUNDS RULES

—Construction—Rule providing that, in case of dismissal, contributor shall be paid his own contribution—Meaning of "dismissal".

A Provident Fund Rule of a Co-operative Bank provided: 'In case the contributor is dismissed from his service and in the bank he shall be paid his own contribution up to the date of his dismissal together with interest calculated thereon for the whole number of years preceding his dismissal, but shall forfeit all other benefits from the fund'.

Held, that the meaning of the expression 'dismissal' in the rule has to be read in the light of the employee's service conditions as determined by the relevant bye-laws and if under the bye-laws the bank were not bound to assign reasons for effecting a dismissal, a termination of service so brought about would also be 'dismissal' within the Provident Fund Rules, and the employee would therefore be entitled to his own contribution and interest thereon. (1955) 1 M L J 293 : 1955 Mad W N 81 : (1955) 1 Lab L J 21 : AIR 1956 Mad 150 (154) (Pt D) (Pr 19).

PROVIDENT FUNDS SCHEME (1952)

PARA 50

—Paras. 50, 53, 57, 59, 61 and 70—Provident Fund built up in respect of persons expiring or leaving employment.

The Provident Fund built up in respect of persons who expired between the date of notification applying the provisions of the scheme and the date of issue of notice goes to their nominees or their heirs. A person who left his employment in one concern and took up service in another concern or did not seek employment anywhere else thereafter, is not debarred from availing himself of the benefits of the Fund that has accumulated up to the particular point of time. He is as much entitled to make use of the Fund in the manner indicated in the several provisions of the scheme as any other workman who continues to serve in the same establishment and there is no particular reason why he should be deprived of the advantages flowing from the scheme. (1965) 2 Andh W R 326 : (1965-66) 29 F J R 277 : AIR 1965 Andh Pra 200 (211) (Pt E) (Prs 58, 60) (DB).

PARA. 53

—Para. 53 — Provident Fund built up in respect of persons expiring or leaving employment—Goes to the nominees or heirs of persons who expired between the date of notification applying the provisions of the scheme and the date of issue of notice. See Provident Funds Scheme (1952). Para. 50. AIR 1965 Andh Pra 200 (DB).

PARA. 57

—Para. 57 — Provident Fund built up in respect of persons expiring or leaving employment—Goes to the nominee or heirs of persons who expired between the date of notification applying the provisions of the scheme and the date of issue of notice—Person leaving employment and joining another employment or not seeking another employment not debarred from availing himself of the benefit. See Provident Funds Scheme (1952), Para. 50. A I R 1965 Andh Pra 200 (DB).

PARA. 59

—Para. 59—Provident Fund built up in respect of persons expiring or leaving employment—Fund standing to the credit of persons who expired between the date of notification applying the provisions of the scheme and date of issue of notice goes to their nominees or heirs — Person leaving service and joining another or not seeking other employment can also avail of the benefit of the Fund. See Provident Funds Scheme (1952), Para. 50. AIR 1965 Andh Pra 200 (DB).

PARA. 61

—Para. 61 — Provident Fund built up in respect of persons expiring or leaving employment—Fund standing to the credit of persons who expired between the date of notification applying the provisions of the scheme and date of issue of notice, goes to their heirs or nominees — Person leaving service and joining another service or not seeking other employment can also avail of the benefit of the Fund. See Provident

Funds Scheme (1952), Para. 50. A I R 1965 Andh Pra 200 (DB).

PARA. 70

——Para. 70—Provident Fund built up in respect of persons expiring or leaving employment—Devolution and benefit of—Who can claim. See Provident Funds Scheme (1952), Para. 50. A I R 1965 Andh Pra 200 (DB).

PARA. 76

——Para. 76 – Penal provisions — S. 14, Employees Provident Funds Act or Para. 76 does not exhaust the remedies for enforcement of Act—It is only an additional remedy provided by the Act. See Employees' Provident Funds Act (1952), S. 14. A I R 1965 Andh Pra 200 (DB).

PROVIDENT SOCIETIES

See Insurance Act (1938), S. 88.

PROVINCES AND STATES (ABSORPTION OF ENCLAVES) ORDER (1950)

CLAUSE 3

——Cls. 3, 5 and 8—Scope and effect — Surrender of area from Madras to Mysore after commission of offence and institution of case but before charge-sheet — Jurisdiction of Mysore Magistrate to try charge.

An offence was committed on 21st May 1949, in Kote Shirur, which then formed part of the Madras State, and the case was originally instituted in the Magistrate of Coondapur in South Canara District, Madras. At the time of the charge-sheet, the place became part of the Mysore State by reason of the surrender of the area by the Madras State to Mysore State under the Provinces and States (Absorption of Enclaves) Order, 1950. The accused objected to the Magistrate of Coondapur proceeding with the case, which was upheld. The police then placed a charge-sheet before the Magistrate of Sagar in Mysore within whose jurisdiction the area surrendered fell and was absorbed, but the Magistrate declined to entertain it on the ground that the proper Court was Court in Coondapur and not the Court in Mysore.

Held : (on a reference by the District Magistrate), that the combined effect of Cls. 3, 5 and 8 of the Absorption of Enclaves Order, 1950, was to vest the Magistrate of Sagar in Mysore with jurisdiction to deal with the cases relating to offences alleged to have been committed in the surrendered area even prior to the Order, and therefore the Magistrate of Sagar in Mysore was competent to proceed with the case and acted erroneously in declining to entertain the case. The question whether the act complained of was punishable according to the law of Mysore, if the law in Madras, on the date of the commission of the offence was different was not a factor in determining the forum for trial the only point being one of jurisdiction. ILR (1951) Mys 452 : 52 Cr L J 1490: AIR 1951 Mys 115 (115, 116) (Pr 2) (DB).

CLAUSE 5

——Cl. 5 — Effect — Offence in Kote Shirur prior to Order — Charge-sheet after Kote Shirur became part of Mysore — Jurisdiction of Mysore Court to proceed with case—The combined effect of Cls, 3, 5 and 8 is to vest the Magistrate in Mysore with jurisdiction to deal with cases relating to offences alleged to have been committed even prior to the Order — Criminal P. C. (1898), S. 179 — See Provinces and States (Absorption and Enclaves) Order (1950), Cl. 3. 52 Cri L J 1490 : AIR 1951 Mys 115 (DB).

CLAUSE 8

——Cl. 8 — Scope and effect of — Village outside Mysore becoming part of Mysore by absorption under order,— Laws of Mysore — Application of — Special notification—Necessity—Mysore Agricultural Relief Act—Operation of, in absorbed area.

Under Cl. 8 of the Provinces and States Absorption of Enclaves) Order, 1950 all laws in force in the absorbing unit at the time are automatically extended to the absorbed territory or enclave from the time of the absorption and becomes the law in force in that area. It is not necessary that a specific notification extending a specific law or specific laws should be issued or published. Where an enclave outside Mysore is absorbed and made part of Mysore under the order, the Mysore Agriculturists Relief Act becomes extended to the absorbed enclave which becomes part of Mysore thenceforward and the Act can be applied to residents of that locality as if the Act has been in force there; it cannot be objected that the Act has not been specifically extended to the area or village by notification specially issued. 31 Mys LJ 135 : AIR 1952 Mys 2 (2, 3) (Prs 3, 4, 5).

——Cl. 8—Offence in Kote Shirur prior to Order — Charge-sheet after Kote Shirur became part of Mysore —Effect —Jurisdiction of Mysore Court to proceed with case — Combined effect of Cls. 3, 5 and 8 is to vest the jurisdiction in relation to such offence even in the Magistrate in Mysore— Criminal P. C, (1898), S. 179 — See Provinces and States (Absorption of Enclaves) Order (1950), Cl. 3. 52 Cri L J 1490 : AIR 1951 Mys 115 (DB).

——Cl. 8, Proviso—Suit properly filed at L in Punjab —Subsequent transfer of village to Pepsu — Jurisdiction of District Judge in Pepsu to entertain appeal from decree.

Held, that once the suit had been so instituted in a Court of competent jurisdiction at L, that Court had jurisdiction to continue the proceedings in the suit and to dispose of it. Subsequent transfer of the territory to Pepsu could not divest that Court of jurisdiction in that suit. An appeal from that Court did not lie to the Court of a District Judge in Pepsu so the appeal in the case was not competent in the Court of District Judge at B. S. 16, Civil P. C. had no application in the circumstances.

(2) that even consideration of the proviso to Cl. 8 of the Enclaves Order did not help the party because it did not confer jurisdiction upon the Courts in Pepsu to hear appeals from the Courts in the neighbouring State of Punjab. See Civil P. C. (1908), S. 16. AIR 1955 N U C (Pepsu) 3997.

——Cl. 8, Proviso — Accused resident of place in Punjab, committing acts of misappropriation in 1948 —Place transferred to Pepsu under Enclaves Order— Act not in force in Pepsu — Accused tried and convicted under S. 5 (2) — Conviction held not legal — S. 6 (e), General Clauses Act does not apply—(General Clauses Act (1897), S. 6 (e)). See Prevention of Corruption Act (1947), S. 5 (2). A I R 1955 N U C (Pepsu) 2509.

● ——Cl. 8 — Suit for pre-emption in respect of land situate in M which was part of erstwhile Kalsia State —Suit decreed—Appeal to District Judge Kalsia — Subsequently Kalsia becoming part of Pepsu—Appeal transferred to District Judge, Patiala and dismissed on 14-5-51—Second appeal preferred in High Court at Patiala—In the meanwhile, because of exchange of enclaves between :Pepsu and Punjab M taken away from Pepsu and added to Punjab—Contention that second appeal lay to Punjab High Court — First Appeal having been properly heard and decided by District Judge, Patiala second appeal held could lie only to High Court at Patiala. A I R 1943 F C 24, Rel. on.; 34 Cal 853, Disting. I L R (1953) Patiala 33 : A I R 1953 Pepsu 65 (65, 66), (Prs 4, 6) (FB).

——Cl. 8 — Appeal filed in proper Court — Transfer of territory—Right to hear appeal.

The High Court has jurisdiction to continue to hear an appeal which is properly instituted in it, even though the area after such filing is transferred to the jurisdiction of another High Court. AIR 1943 F C 24 ; 82 R R 436; A I R 1952 Punj 186, Rel. on. **55 Punj L R 28 : AIR 1953 Punj 94 (96) (Pt A) (Pr 8)**

——Cl. 8 — 'Ordinarily' in S. 177, Criminal P. C. — Meaning of.

The word 'ordinarily' in S. 177, Criminal P. C., means 'except in cases provided to the contrary'. The rule in S. 177 should be read subject to any special provision of law which may modify it. Where an appeal against conviction is filed in the Punjab High Court before the date with effect from which the place where the incident took place ceased to form part of Punjab State and was included in the Patiala and East Punjab States Union, the Punjab High Court would have jurisdiction to decide the appeal. There is no indication in Cl. 8 of the Provinces and States (Absorption of Enclaves) Order, 1950, or in any other provision of the Order to take away the right to continue the appeal in the Punjab High Court. **5 A I Cr D 773 : ILR (1951) Punj 231: 53 Cri L J 775 : AIR 1952 Punj 186 (188) (Pt A) (Prs 25, 27, 28) (DB).**

PROVINCIAL AND SUBORDINATE SERVICES GENERAL RULES (MADRAS)

RULE 22

——R. 22—Removal from service.

Though where the appointing authority under special Rules is the High Court and it is the High Court at Madras that can terminate or discharge a person from service in compliance with the provisions of R. 22 of the General Rules, still under Art. 310 of the Constitution, the Governor can certainly remove the person but he can do so after complying with the provisions of Art. 311 of the Constitution. See Constitution of India, Art. 309. **AIR 1954 Mad 1043.**

PROVINCIAL DEBT LAWS (TEMPORARY VALIDATION) ORDINANCE (11 of 1945)

See under Debt Laws.

PROVINCIAL INSOLVENCY ACT (5 of 1920)

SECTION 1

——S. 1—Object of Act.

The preference to be shown to the diligent creditor cannot be carried further than the advantages provided for under the Provincial Insolvency Act. The insolvency law has a twofold purpose to serve. One is to give relief to the debtor from the harassment of his creditors whose claims he is unable to meet and the other is to prevent a scramble among the creditors to get at the assets of the debtor promoting fraud and collusion between the creditor and debtor and facilitating the vicious principle of each one for himself and provide a machinery by which all creditors are equitably satisfied. **AIR 1956 Mad 157 (159) (Pt B) (Pr 9).**

——S. 1 — Sale of insolvent's property by Official Receiver — Notice to petitioning creditor not given — Effect — Setting aside sale—Offer of higher price by petitioning creditor—If valid ground.

A sale made by the Official Receiver without notice of the same to the petitioning creditor resulting in a low price has to be set aside especially where the petitioning creditor comes forward with an offer of nearly 50 per cent. more than the price for which the sale had been made and the sale has not been fair or just.

It cannot be held that because there was no fraud or illegality or irregularity in the conduct of the sale by the Official Receiver the sale was not liable to be set aside.

Difference between a sale in execution of a decree and a sale by an Official Receiver discussed. **(1953) 2 M L J 411 : AIR 1954 Mad 79 (80) (Pr 4).**

——S. 1 — Annulment of insolvency on ground of adjudication being result of collusion between petitioning creditor and debtor — Effect on declaration obtained by Official Receiver that sale deed and mortgage-deed by insolvent were not binding—Death of debtor — Heirs — Suit by for recovery of lands covered by sale deed and mortgage deed — Competency.

Where the insolvency was annulled on the ground that there was collusion between the alleged petitioning creditor and the insolvent, the fraud vitiates all transactions and when once the fraudulent decree has been set aside, it is as if there has been no decree at all. In the collusive proceedings that culminated in the adjudication of the debtor, there is no real controversy between the parties and there was nothing which the Court decided. The proceedings before the Court were a make-believe and a sham fight. Such being the case the annulment of the adjudication would result in this, namely, that all transactions that have taken place and all proceedings that would have been gone through during the pendency of the insolvency would be completly wiped off. If that is so, then the decision by which the sale and the mortgage deeds executed by the debtor were declared invalid also became null and void, with the result that the documents remain in the same position as they had been but for the insolvency.

By the circumstance that the insolvency proceedings have been annulled all actions done and all proceedings taken during such period also get annulled and the proceedings by which the deeds have been declared void have also got annulled.

In any event the heirs of the debtor cannot take advantage of a decision obtained by the Official Receiver declaring the sale and mortgage deeds not valid and binding. They have not succeeded to the rights of the Official Receiver, because the Official Receiver represents not only the insolvent but also the creditors.

Accordingly the heirs of the debtor (after his death) have no subsisting cause of action against persons in possession of lands under the sale-deed and usufructuary mortgage deed executed by the insolvent though the deeds have been declared to be not binding in proceedings during the pendency of the insolvency. Such a suit is not maintainable. **1952 Mad W N 836 : 65 Mad L W 1107 : (1952) 2 M L J 823 : AIR 1953 Mad 620 (621, 622) (Pr 7) (DB).**

SECTION 2

——Ss. 2 (1) (d) and 28 (2) — Money standing to the credit of insolvent in provident fund vests in in Official Receiver — (Civil P. C. (1908), S. 60).

It cannot be said that the 'property' mentioned in the Insolvency Act must be such that the insolvent has an absolute and unconditional present disposing power over the same. The word 'property' includes even property which may belong to or is vested in another but over which the insolvent has a disposing power which he may exercise for his own benefit. This part of the definition of 'property' has reference obviously to powers of appointment and the power of a Hindu father who is the managing member of a joint family. The fact that on the date of the adjudication the insolvent could not transfer the property does not militate against the view that he has a vested interest in the same.

According to the Provident Fund Rules of a company every member was allowed to contribute any sum not exceeding one twelfth of his earnings and such amounts were credited in the name of each member in an account called 'A' account. An equal amount was paid by the company and was called 'B' account. An increased contribution was payable by the company in certain events and this was called 'C' account. The management of the fund vested in the trustees. The membership was voluntary and there was no transfer of the ownership of the Fund. The monies of the Fund might be invested by the trustees but the subscriber did not divest himself of control over the Fund. A subscriber became insolvent.

Held, that a subscriber had a present interest in the Fund though the moneys might become payable to him, or his nominee or heirs only in the future. Even where there was a declaration about the nominee who was to receive payment after the subscriber's death, the fund would still be the property of the subscriber in the hands of the nominee for the satisfaction of his debts, as there was no present gift to take effect immediately. The subscribers had an interest in the moneys which could vest in the Official Receiver on their adjudication. Hence the right, title and interest of the insolvent in the moneys standing to his credit in A and C Accounts respectively would vest in the Official Receiver. AIR 1951 Pat 488, **Reversed**. Muktilal Agarwala v. Trustees of the Provident Fund of the Tin Plate Co. of India, Ltd., ILR 35 Pat 359 : 69 Mad L W 930 : 1956 S C R 100 : (1956) 2 Lab L J 215 : 1956 Pat L R (SC) 95 : 1959 B L J R 366 : 1956 S C A 675 : (1956-57) 10 F J R 350 : (1956) 1 M L J (SC) 183 : 1956 S C J 406 : 1956 All L J 383 : 1956 Cri L J 366 : AIR 1956 S C 336 (339, 341) (Pt A) (Prs 14, 15, 20, 21, 25).

——S. 2 (2)—Exemptions under Civil P.C.—If apply to attachment and sale by Official Receiver.

In view of Ss. 2 (2) and 5 (1) in the matter of attachment and sale of insolvent's properties, the provisions applicable under the Act must be regarded as materially the same as those of the Civil Procedure Code.

The exemptions contained in S. 60, Civil P. C., are based on reasonable and equitable grounds and considarations and they are applicable to the proceedings by way of attachment and sale taken out by the Official Receiver in the exercise of powers vested in him under the Provincial Insolvency Act. See Civil P. C. (1908), S. 60 (1), Proviso. **AIR 1960 Andh Pra 458.**

——S. 2 (1) (d)—'Property' — Test — Leasehold interest in land—If property—Definition of the word in the Act is not exhaustive—Test to determine what is property is whether the insolvent has a disposing interest in the property or not — If he has absolute disposing interest in the leasehold, it would fall under S. 2 (1) (d). See Provincial Insolvency Act (1920), S. 69 (a). **1958 Cri L J 159 : AIR 1958 Andh Pra 120.**

——S. 2 (1) (a) 'Creditor'—Endorsee of pronote for collections.

The holder of a negotiable instrument in respect of which he obtained a decree is a creditor within the meaning of S. 2 (1) (a) though the promissory note is endorsed in his favour for collection. **1956 Andh Pra W R 339 : AIR 1957 Andh Pra 535 (536) (Pt A) (Pr 3).**

——S. 2 (1) (d)—Scope—Insolvency of Hindu father —Joint family property—Right of insolvent to dispose of—If vests in Receiver—A Hindu father has power or capacity to dispose of for his own benefit the interest of his son in the joint family property and therefore such capacity may be exercised by the Receiver. See Provincial Insolvency Act (1920), S. 28 (2). **AIR 1959 Bom 229 (DB).**

——S. 2 (1) (d) — "Property" — Present disposing power.

The definition of "property" in S. 2 (1) (d) appears to be modelled on S. 60 (1), Civil P. C. Unless the insolvent has got a present disposing power, which he may exercise for his own benefit, over a property, it will not be considered to be one coming within this definition. **AIR 1950 Cal 487 (488) (Pt A) (Pr 8).**

——S. 2 (2) — Expression "Court or Courts" in S. 80, meaning of—Whether the expression bears the meaning assigned to it by S. 2 (2) of Hyderabad Insolvency Act—(Quaere). See Hyderabad Insolvency Act (8 of 1351F), S. 80. **AIR 1952 Hyd 80 (FB).**

——S. 2 (e)—'Secured creditor'—Compromise instalment decree in mortgage suit—Mortgaged property to remain under attachment till payment of decree — Decree-holder is secured creditor. See Provincial Insolvency Act (1920), S. 52. **AIR 1959 Madh Pra 420.**

——Ss. 2 (1) (d) and 53—Transfer—Malabar Tarwad — Karnavan—Deed surrendering right of insolvent karnavan in property for certain liquidated sum per month and accumulated arrears—This is transfer of property within meaning of S. 2 (d) and not merely right to future maintenance—(T. P. Act (1882), S. 6 (dd). AIR 1955 NUC (Mad) 3144.

——S. 2 (1) (f)—"Any transfer"—What amounts to "transfer"—Held, that the surrender deed executed by the insolvent though clothed as a relinquishment amounted to transfer of property within the meaning of S. 2 (1) (f). See Provincial Insolvency Act (1920), S. 53. **AIR 1955 NUC (Mad) 3144.**

——Ss. 2 (d), 28 (2), 56 (3), Proviso — Property — Meaning of—Provident Fund.

Whatever the nature of the property may be the insolvent should have an interest in present to dispose of the same, and not such an interest which may depend upon the fulfilment of certain conditions or contingencies. The definition of the term "property" as used in the Act contemplates that the power of disposition must be an unconditional power. It is only such a property that is divisible amongst the creditors of the insolvent.

Rules 17 and 18 of the Rules of the Provident Fund created by the Tinplate Company of India Ltd., for the benefit of their employees show that the members of the fund have no disposing power over the fund. They are bound by the rules and it is only on the conditions mentioned in the rules that the fund under certain circumstances becomes payable to the members concerned. That being so, the said funds are not the property of the insolvent members within the meaning of S. 2 (d) and are not divisible amongst the creditors as contemplated by S. 28 (2). By the mere act of insolvency the insolvent members cannot compel the trustees to make payment of the funds standing in the various accounts, and if the insolvents cannot do so, the receiver of the Court cannot remove the trustees from the custody of the same as enjoined by the proviso to sub-s. (3) of S. 56. **AIR 1946 Pat 430**

and AIR 1949 Pat 337, Dissented from. ('50) ILR 29 Pat 713 : AIR 1951 Pat 488 (489, 490) (Pt A) (Prs 6, 8) (DB).

[Reversed in AIR 1956 SC 336.]

——S. 2 (1) (a)—Adjudication— Joint Hindu trading family —All the members of the family when could be declared insolvents—'Debtor,' meaning of —Act of insolvency by Karta of family business cannot be imputed to other coparceners—Difference between a partnership firm and joint Hindu trading family pointed out. See Provincial Insolvency Act (5 of 1920), S. 7. AIR 1964 Raj 218 (DB).

——Ss. 2 (e), 9 (2) and 28 (2) and (6) —"Secured creditor"—Petition by.

The definition of the term "secured creditor" is to be understood as confined to his capacity qua the secured debt and not comprehending his capacity as regards debts for which there is no security.

A creditor to whom the insolvent debtor owes secured as well unsecured debts cannot be held to be a secured creditor qua the unsecured debts and is entitled to file a petition for insolvency without valuation of the security or its abandonment as contemplated by S. 9 (2). If this were not so the equity of redemption would operate as security for the unsecured debts due to the secured creditor, i. e., a situation which is the very opposite of what is envisaged by the Insolvency Act. The object of proceedings in insolvency is to render the assets of the insolvent as at their inception available undiminished if not augmented, for liquidation of his liabilities: (1882) 19 Ch D 105 : AIR 1940 Nag 252 : (1924) 2 Ch 199, Ref. to. ILR (1954) Trav-Co 93 : AIR 1954 Trav-Co 419 (421, 422) (Pt C) (Prs 8, 9, 10) (DB).

SECTION 3

——Ss. 3 (1), 75—Order by subordinate Court invested with powers under S. 3—Appeal against—Whether lies to High Court.

It is the subordinate Court that is invested with jurisdiction by a notification under S. 3 and when so invested with jurisdiction, it has got the same powers as the District Court but there is no provision in S. 3 (1) which makes the Civil Judge the Court of principal civil jurisdiction when there is a District Judge for that area. No appeal therefore lies to the High Court against the orders of the Court so invested with jurisdiction. ('51) 1951 A L J 280 : 1951 All W R (H C) 471 : AIR 1952 All 423 (423) (Pr 2) (DB).

——S. 3 (1)—Notification under S. 3 investing subordinate Court with insolvency jurisdiction — Effect —Order of Assistant Judge in insolvency proceeding —Appeal—Forum—Notwithstanding the notification, the Assistant Judge will still be a Court subordinate to the District Court and therefore appeal against order passed by him in insolvency jurisdiction would lie to the District Court and not the High Court—(Saurashtra District and Subordinate Civil Court Ordinance (11 of 1948), S. 5)—(Words and Phrases — 'Concurrent jurisdiction'). See Provincial Insolvency Act (5 of 1920), S. 75 (1). AIR 1959 Bom 47 (DB).

——S. 3 (1), Proviso—Notification by limiting jurisdiction of Court to debts upto Rs. 2,000—Effect and validity.

It is permissible to the State Government under the Proviso to S. 3 (1) to restrict the jurisdiction of a Court Subordinate to the District Court by specifying the class of cases in which it will have jurisdiction. No doubt, after such investiture that Court will have jurisdiction concurrently with the District Court but this concurrent jurisdiction will only be limited to the class of cases which the notification authorised it to entertain. This is the plain meaning of the provision and, therefore, the notification, No. 1596 1212-XIX dated 16th May, 1938 limiting the jurisdiction of certain subordinate Courts to entertain petitions in which the value of the debts alleged does not exceed Rs. 2,000 cannot be regarded as ultra vires. 1958-Nag L J 83 : 60 Bom L R 505 : ILR (1959) Bom 194.

——S. 3—Creditor bank impleaded as supplementary respondent in application for adjudication of debtor —Bank wound up during pendency of insolvency application—Winding up does not oust jurisdiction of insolvency Court to adjudicate debtor an insolvent. See Banking Companies Act (1949), S. 49-B. 1961 Ker L J 658.

——S. 3—Debtor of banking company under liquidation — Application for adjudication as insolvent—Jurisdiction of Insolvency Court to entertain application is not taken away by Ss. 45A and 45B of the Banking Companies Act, 1949. A question relating to the debtor of a Banking Company in liquidation does not relate to the winding up of that company as contemplated by S. 45-B. See Banking Companies Act (1949), S. 45-A. AIR 1962 Mad 75 (DB).

——S. 3—Scope—If inconsistent with S 25, Manipur (Courts) Act—Subordinate Judge—Jurisdiction to try insolvency cases — (Manipur (Courts) Act (1955) S. 25).

Both the Provincial Insolvency Act and Manipur (Courts) Act are Central Acts and one cannot prevail over the other. Under S. 3 of the Provincial Insolvency Act, the State Government may invest the Subordinate Judge with concurrent jurisdiction in insolvency matters. There is thus no conflict between the provisions of the two Acts and the Subordinate Judge is quite competent to dispose of a case transferred to him by the District Judge. AIR 1960 Manipur 53 (53) (Pr 4) (DB).

SECTION 4

SYNOPSIS

(Provincial Insolvency Act (5 of 1920), S. 4.)

1. Scope and applicability.
2. Power and duty of insolvency Court.
3. Jurisdiction of insolvency Court.
4. Applicability of provisions of Civil P. C.
5. Gift to wife.
6. Insolvency of Hindu father or manager.
7. Transfer from transferee.
8. Applicability of Limitation Act.

1. Scope and applicability.

——S. 4—Sale of insolvent's property by Official Receiver—Insolvent can maintain application to set aside sale.

Even though the property is vested in the Official Receiver or in a trustee, the insolvent has a subsisting interest in the property. Therefore, if the properties of a debtor which are vested in a trustee by an order of insolvency Court are sold out at an undervaluation the debtor is unquestionably aggrieved by such an act. He is entitled to apply under S. 4 of the Provincial Insolvency Act to set aside the sale, on the ground of fraud. But though the debtor has interest in the properties, his interest does not permit him to meddle with the administration of the same. But the debtor can certainly complain if in selling the properties or in collecting the assets the Official Receiver or trustee acts fraudulently or illegally or in excess of the authority given to the trustee by the insolvency Court. Subject to this limitation the trustee's discretion is unfettered and the debtor has no right either to interfere or to complain against the costs of the Trustee. 44 Cal W N 665, Expl. and applied.

The application can be made even after the annulment order. Upon an annulment of the order of adjudication, the insolvency proceedings are not automatically terminated. Therefore, whenever there is a vesting order following an order of annulment insolvency proceedings do in fact continue. AIR 1943 Cal 133 and AIR 1936 Cal 573, Rel. on. **AIR 1963 Cal 587** (587, 588) **(Pt A) (Prs 3, 6, 7) (DB).**

——S. 4 (1)—Scope—Distinction between this section and S. 45B of Banking Companies Act, 1949—While S. 4 is limited to question which may arise in any case of insolvency, S. 45B is wider and refers to questions which may relate to or arise in the course of winding up proceedings. See Banking Companies Act (1949) S. 45-B (1). **AIR 1954 Orissa 139.**

——S. 4 (3) — Applicability — Order for sale of property alleged to be of insolvent — Enquiry into title.

Where the insolvent opposes an order for sale of properties alleged to be belonging to him, on the ground that the properties were sold or belong to his co-sharers but does not specify the date of sale nor the names of purchasers, his opposition is frivolous and the order for sale must be deemed to be one under S. 4 (3) in which no enquiry was expedient or necessary. AIR 1928 Lah 556; AIR 1919 Cal 507; AIR 1925 Cal 932, Distinguished. **1955 B L J R 517 : AIR 1955 Pat 503** (504) **(Pt B) (Pr 4) (DB).**

——S. 4—Scope—Order under S. 24.

The summary enquiry under S. 24 as to whether a debtor is entitled to present a petition has nothing to do with S. 4 which ordinarily comes into play after adjudication in disputes between the debtor's estate represented by a receiver and the claims of one or all of his creditors. A I R 1938 Lah 490, Rel, on. **A I R AIR 1955 Pat 413** (417) **(Pt E) (Pr 14) (DB).**

——S. 4—Claim application under S. 4 on attachment of property by Receiver—Application made more than 21 days after attachment—It is barred under Proviso to S. 68.

It is not obligatory on a stranger to apply to the Insolvency Court at all to establish his title to property, possession of which is taken by the Receiver; he can go to the ordinary Court to establish his title within the ordidary period of limitation. If, however, he does want a relief to be given to him against what he considers to be an improper act of the Receiver, he must comply with the provisions of S. 68 and take the consequences that follow with regard to the finality of the orders, as provided under Ss. 4 and 75 of the Act. See Provincial Insolvency Act (5 of 1920), S. 68, Proviso. **AIR 1963 Punj 243 (DB).**

——Ss. 4 and 14—Scope and applicability —Withdrawal of insolvency petition before adjudication as a result of compromise among creditors — Order granting leave does not constitute res judicata so far as question whether compromise is beneficial to minors and binding on them — (Travancore Insolvency Act (8 of 1108), Ss. 4 and 14) — (Civil P. C. (1908), S. 11 and O. 32, R. 7).

Section 4 applies only to decisions of questions arising in cases of insolvency and no case of insolvency can be said to have arisen when the fact of insolvency and the right to maintain the insolvency petition is disputed and no order of adjudication has been passed. An insolvency petition can be withdrawn under S. 14 only before the order of adjudication is passed. After the order of adjudication an insolvency petition cannot be withdrawn even with the leave of the Court, for the debtor has become an insolvent by the order of adjudication. Therefore, it is only an annulment of the order of adjudication and not a withdrawal of the insolvency petition that can be made after the order of adjudication. Section 14 applies only to withdrawals before adjudication. Matters which have to be considered under S. 14 cannot therefore be said to be matters arising in a case of insolvency; so S. 4 can have no application to them at all. The effect of the withdrawal of a petition is that the position of the parties would be as if no insolvency petition had been filed, and the creditors would be free to enforce their claim against the debtor subject to any discharge effected or lawful agreement made between them after the institution of the insolvency petition. A compromise in pursuance of which leave for withdrawing the insolvency petition is granted is entirely different from a composition scheme sanctioned and accepted by the Court after the order of adjudication. The composition scheme sanctioned and accepted by the Court after the order of adjudication bears the authority of the Court and is a complete answer to all the claims made against the insolvent. The compromise before the order of adjudication in pursuance of which leave is applied for and granted to withdraw the insolvency petition does not bear the authority of the Court.

An insolvency petition was withdrawn by leave of Court prior to adjudication as a result of compromise among the creditors. Neither the guardian for the minor creditors nor any counsel had certified to the Court that the compromise was beneficial to the minors. Nor had the insolvency Court considered the question whether the compromise was beneficial to minors. The minors subsequently sued for full recovery of their dues on ground that the compromise was not binding on them.

Held, that the order granting leave to withdraw the insolvency petitions did not constitute res judicata so far as the question whether the compromise was beneficial to the minors and was binding on them was concerned. Held, further, on the facts and circumstances of the case that the compromise to accept half the dues in discharge of the full debt entered into by the guardian on behalf of the minors was highly prejudicial to their interest and the guardian had not acted with reasonable care and prudence which the guardian of a minor should normally exercise in such matters. Hence, the compromise was not binding on them and they were entitled to recover the whole amount due. M. K. Muhammed Pillai v. Pariyathu Pillai Abdulkadir. **I L R (1955) Trav-Co 909 : 1955 Ker L T 641 : A I R 1956 Trav-Co 27** (28, 29) **(Prs 4, 5, 6) (FB).**

2. Power and duty of insolvency Court.

——S. 4 (1) and (3)—Powers of Court—Sale of debtor's interest in property should be directed only when Court does not deem it expedient or necessary to decide the question of the nature referred to in S. 4 (1) — Stay of sale of debtor's interest in property held proper. **AIR 1955 N U C (Ajmer) 336.**

——S. 4 — Scope — Powers of Insolvency Court — Application by Receiver to set aside decree — Insolvency proceedings engineered by debtor — Provision cannot be called in aid to benefit insolvent.

Under the scheme of the Insolvency law, on adjudication, the Receiver is to take possession of the assets of the debtor, ascertain the liabilities and then make an equitable distribution of the assets among the creditors. The express language of S. 4 of the Provincial Insolvency Act brings out the object of the Insolvency law. The powers of the Insolvency Court under the section are wide and necessarily exercisable to achieve the said object.

In the instant case, there are good reasons to believe that the entire insolvency proceedings were engineered by the debtor himself seeking to benefit by these proceedings. There are clinching circumstances to show that the Official Receiver's applica-

tion to set aside the decree, if successful, would yield benefits to the insolvent, That is not the object to be achieved by S. 4 of the Act. 1965 2 Andh W R 125 : (1965) 2 Andh L T 83 : A I R 1966 Andh Pra 114 (115) (Pr 11) (DB).

——S. 4—Scope—Duty of insolvency Court.

Section 4 gives wide powers to the Court to decide all questions arising in insolvency. The Court has jurisdiction to intervene whenever the Court thinks it necessary 'for the purpose of doing complete justice.' Where there are allegations of fraud on the part of the Official Receiver in conducting sale of the insolvent's property the Court has ample powers unders S. 4 to look into the allegations, as the debtor has locus standi to bring a question before the Court for decision. A I R 1963 Cal 587 (588) (Pt B) (Pr 5) (DB).

——Ss. 4 and 37—Application for payment of money against stranger—Order on — Annulment of adjudication — Quondam insolvent's right to execute order as a decree — Failure to execute — Effect — Limitation.

When money is due to a person who has been adjudicated an insolvent and the Official Receiver in whom the estate of that person has become vested files a suit to realise that sum of money, it cannot be said that he is representing any of the creditors of the insolvent in realising that sum of money. After an adjudication has been annulled, it is open to the quondam insolvent to take such steps regarding his property which he could ordinarily have done unless there had been an order under S. 37 (1), clause (2), of the Provincial Insolvency Act, vesting the property in a trustee or in the Official Receiver.

An order for payment of money on an application under S. 4 of the Provincial Insolvency Act is tantamount to a decree and if after annulment of adjudication the insolvent failed to apply for execution and three years had elapsed, the Official Receiver cannot on the setting aside of the annulment seek to execute such decree. 1951 Mad W N 412 : 64 Mad L W 661 : (1951) 1 M L J 551 : A I R 1951 Mad 879 (2) (880) (Pr 3) (DB).

——S. 4 — Power of Court—Agreement between insolvent and transferee to gift part to insolvent's minor son—Transferee selling to insolvent's nephew — Receiver applying for payment of the purchase money — Proceeding cannot be treated as suit for damages which was proper remedy.

There was an agreement between the insolvent and his transferee, the mortgagee, that the latter should gift a portion of the property to the minor son of the insolvent but the transferee collusively sold a portion to the insolvent's nephew. The receiver alleged that the transaction was benami being really in favour of the son and applied for a direction that the amount of the purchase money be paid to him.

Held, that the breach of agreement by the transferee might have been the foundation of a suit for damages but that the proceedings could not be converted by the insolvency Court into a suit for damages and the Court could not treat the money as payable to the insolvent without due process of law. 1951 N L J (Notes) 196.

——S. 4—Scope—Power to direct ad interim receiver to take possession of joint family property — Resort cannot be had to S. 4 for giving the interim receiver possession of such property as that would be to override express provisions of S. 20 which permits the Court to appoint a receiver for the property of the debtor only — S. 4 cannot override express provisions of S. 20. See Provincial Insolvency Act (1920), S. 20. AIR 1954 Pat 459 (DB).

——S. 4— Power of Insolvency Court to set aside auction—Sale of insolvent's property—Grounds for.

In cases arising under the Provincial Insolvency Act the provisions of Order 21, Civil P. C. have to be applied subject to what is contained inter alia in S. 4 of the Act which provides that the Court may deem it expedient or necessary to decide for the purpose of doing complete justice. That being so, it cannot be maintained that an Insolvency Court has no power to set aside an auction-sale on grounds not falling within Order 21 of the Code. Section 4 of the Act empowers the Court to set aside an auction sale if the Court deems it expedient or necessary for the purpose of doing complete justice. AIR 1931 Lah 733, Rel. on.

Where the sale of insolvent's property held by the Collector contravenes the provisions of S. 60 of the Act as amended by Punjab Act 3 of 1939, it is open to the Insolvency Judge to consider the objections that may arise under S. 60 and consider on the facts and circumstances of the case the question of the legality of the sale before confirming it. 54 Punj L R 121 : AIR 1952 Punj 222 (224) (Pt B) (Prs 16, 17) (DB).

——Ss. 4, 51 (3) and 56 (3)—Sale of insolvent's property after adjudication — Relief of possession by Official Receiver — Power of Court to grant relief—A Court sale of an insolvent's properties at the instance of an unsecured creditor is void. if the sale has been conducted after the order of adjudication. In such a case it is open to the Official Receiver to request the Court for an order directing the auction purchaser to put the official Receiver in possession of the property sold under S. 4 and it is open to the Court to grant such relief under S. 56 (3). AIR 1951 Trav-Co 193 (195) (Pt A) (Pr 6) (DB).

3. Jurisdiction of insolvency Court.

● ——Ss. 4, 24 and 33 — Jurisdiction and power of Insolvency Court—In view of the provisions of S. 11 of the Patiala Recovery of State Dues Act no civil Court can have jurisdiction to determine these two matters viz. determining the amount of State dues recoverable and the liability of the alleged defaulter to pay the amount—The insolvency Court, however, is not precluded by S. 11 of that Act from inquiring into the question whether the alleged debtor was really a debtor and liable to pay sums said to be payable by him. It is well settled that the Insolvency Court can, both at the time of hearing the petition for adjudication of a person as insolvent and subsequently at the stage of proof of debts, reopen the transaction on the basis of which the creditor had secured the judgment of a Court against the debtor. See Debt Laws—Patiala Recovery of State Dues Act (4 of 2002 B K.), S. 4. AIR 1964 S C 1223.

——S. 4—Property sold by official receiver — Petitioner claiming title to share and asking for sale to be set aside where claminant wants that his share should be left untouched by the sale, it is a case where he approaches the Court to determine his title and that he is competent to do under S. 4 only—Petition falls under S. 4 and is not an appeal under S. 68 —Hence no question of bar of limitation prescribed by proviso to S. 68 can arise in regard to it. See Provincial Insolvency Act (5 of 1920), S. 68, Proviso. AIR 1963 Andh-Pra 296.

——S. 4—Jurisdiction of Insolvency Court if exclusive—Separate suit if barred — (C. P. Code (1908), S. 9).

What S. 4 purports to do is to confer power on the Insolvency Court to decide certain questions, and where a question is decided by it then under sub-s. (2) of S. 4 its decision shall be final and binding and can no longer be challenged in any other proceeding. It does not confer exclusive jurisdiction on the Court

to deal with such questions. Hence a suit by the creditors for a declaration that the property purchased by them in execution of a decree against the insolvent is not liable to attachment and sale in insolvency proceedings pending against him will not be barred if the question raised in the suit has not been decided by the Insolvency Court. **1958 Nag L J 367 : 60 Bom L R 1017 : ILR (1959) Bom 249 : AIR 1959 Bom 10 (11) (Pt A) (Pr 6).**

——Ss. 4 and 54-A—Property vesting in Official Receiver on the adjustment of a person as insolvent — Receiver alone can invoke jurisdiction of Court under S. 4—Petition by individual creditor for annulment of a transfer made by the insolvent is not maintainable.

When a person has been adjudged insolvent and his entire property vests in the Official Receiver, the Receiver alone can invoke the jurisdiction of the Court under S. 4. Hence a petition by a creditor, in his own name, for a declaration that certain properties formed part of the estate of the insolvent and that the Official Receiver should be directed to take possession of the same, is incompetent : A I R 1927 P C 108 and AIR 1924 Cal 827 and AIR 1941 Cal 298 and AIR 1942 Cal 584 and A I R 1935 Mad 809 and AIR 1935 Mad 46 and AIR 1924 Mad 345 and A I R 1922 Mad 246 and AIR 1942 P C 39, Rel. on.

It is true that under S. 54-A, any creditor who has proved his debt in insolvency, can take judicial proceeding with the leave of the Court, for the annulment of transfer under S. 53 or S. 54 but it is subject to the provision that he satisfies the Court that the Receiver had been requested and he had refused to take such proceeding. Under S. 4 it is true, very wide jurisdiction has been conferred on the insolvency Court to decide questions of title, or priority of any nature whatsoever arising in the course of insolvency. But the legal position of individual creditor remains unaltered because of the basic principle that, on the adjudication, the entire property of the insolvent vested in the Official Receiver, and he alone would be competent to represent the estate and transact business in regard thereto. If the creditor initiates any such proceeding, any decision rendered therein would not bind or affect the rights of the Official Receiver in any manner. Such a decision would not operate as res judicata, as the Official Receiver, in whom the properties have vested, had not been made a party, thereto. It is because of this utter futility of any proceeding prosecuted by the individual creditor that the law enjoins that the Official Receiver alone can prosecute such proceedings. **77 Mad L W 379 : 1964 Mad W N 311 : ILR (1964) 2 Mad 592 : (1965) 1 Mad L J 128 : AIR 1964 Mad 501 (501, 502) (Prs 4, 5, 8).**

——Ss. 4, 5, 28 (6) and 53—Jurisdiction of insolvency Court to issue injunction.

Though an insolvency Court will not restrain a mortgagee or other secured creditor in the exercise of his legal remedies under S. 28 of the Act, it has jurisdiction in proper cases to restrain him under O. 39, R. 1, Civil P. C., if there are substantial grounds for impeaching his title, with a view to safeguard the interests of the general body of creditors.

Observations to the contrary in A I R 1925 Mad 1051 held to be too widely stated.

Held, that the insolvency Court was justified in issuing an injunction restraining a Co-operative Bank from proceeding with the sale of insolvent's immovable properties in a proceeding under S. 57-A, Madras Co-operative Societies Act, pending an application by the Official receiver under S. 53, Provincial Insolvency Act, challenging the security bond in favour of the Bank which covered all the immovable properties of the insolvent. **1953 Mad W N 527 : I L R (1954) Mad 360 : (1953) 2 Mad L J 359 : AIR 1954 Mad 12 (14, 15) (Prs 11, 14, 15) (DB).**

——S. 4—Powers of insolvency Court — Application by third party—Maintainability.

Section 4 ordinarily comes into play after the debtor has been adjudicated an insolvent; under S. 4 the Court can then decide any question of title or priority arising between the debtor and one or more of his creditors if it considers this to be just and necessary as well as expedient. It is, however, open to the Court not to go into all these questions, as is shown by sub-s. (3) of S. 4.

Under that sub-section the Court can sell the interest of the debtor, leaving the parties to fight out the extent of their interest in a regular suit before the ordinary Courts. But it may be that in an appropriate case the question of title may arise at a stage earlier than the order of adjudication, but such cases can only be very rare. A third party is not forced to make an application under S. 4, but there are decisions in which the claim of a third party has been considered under S. 4. **AIR 1955 Pat 413 (417) (Pt B) (Pr 13) (DB).**

——Ss. 4, 20 and 21 — Jurisdiction of Court to enquire into validity of claim of third party prior to adjudication.

It is incorrect to say that prior to adjudication the Court has no jurisdiction at all to get at the properties of the insolvent and to preserve them. Special provisions in that direction are contained in Ss. 20 and 21. These powers are conferred on the Court to see that the property of the insolvent is not wasted or taken out of the reach of the Court during the pendency of the insolvency petition.

(Procedure to be followed by insolvency Court pointed out).

Where an interim Receiver appointed under S. 20 takes possession of the property of which the insolvent is in possession in pursuance of the direction of the Court but a claim of title is preferred by a third party to such property, the insolvency Court has jurisdiction to conduct a summary inquiry as to the sustainability of the claim even prior to the passing of adjudication order. The order passed at such inquiry is not however final and conclusive as between the parties to it.

Such a final and conclusive order may still be passed under S. 4 when the receiver seeks to annul the document in favour of the third party concerned and for inclusion of the property covered by that document also among the assets of the insolvent. **AIR 1953 Trav-Co 266 (266, 267) (Pr 2) (DB).**

——S. 4 — Travancore Insolvency Act (8 of 1106), S. 4 (1), Proviso — Claim by Receiver—Jurisdiction of Insolvency Court.

A claim by an official receiver that the properties covered by a sale-deed in favour of A, the insolvent's wife really belong to the insolvent and that B is only a benamidar for the insolvent cannot be said to arise out of the insolvency and if B expressly refuses to submit to the jurisdiction of the insolvency Court to adjudicate upon her title to the properties, the Insolvency Court cannot adjudicate upon it and the proper course would be to file a regular suit. **1951 K L T 103 : A I R 1951 Trav-Co 139 (139, 140) (Prs 2, 4) (DB).**

4. Applicability of provisions of Civil P. C.

——S. 4 — General principle of res judicata is applicable to proceedings under the Provincial Insolvency Act — Insolvency Court exercises all the powers of a civil Court — Consequently if a question cannot be reagitated before a Civil Court, it cannot be allowed

to be reagitated before the Insolvency Court—See Civil P. C (1908), S. 11. AIR 1965 All 248.

—S. 4 (3)—Order for sale of property—Applicability of O. 1. R. 10, Civil P. C.

By reason of the provision of S. 5, it is manifest that unless there is any express provision in the Act to the contrary, the procedure followed in the exercise of the original jurisdiction applies to the proceedings under the Insolvency Act. It cannot be contended that O. 1, R 10, Civil P. C. is not a rule governing the procedure of the Courts in exercise of original civil jurisdiction. As there is no express provision in the Act prescribing a procedure different from that laid down in the Civil Procedure Code, or expressly excluding the application of that procedure to proceedings under S 68 of the Act, S. 5 attracts the provisions of the Civil Procedure Code. A new party may be added to an application under section 68 of the Act if the conditions laid down in O. 1, R. 10 are complied with. (1951) 1 M L J 87, Distinguished. AIR 1955 N U C (Andhra) 4816.

—Ss. 4 and 5 — Insolvency proceedings— Application falling under S. 4, Provincial Insolvency Act, made to Court — Application dismissed for default of appearance of applicant not aware of date of hearing —Neither O. 9, R. 9, C. P. Code nor Art. 163, Limitation Act, is attracted — Application can be restored under S. 151, C. P. Code — See Civil P. C. (1908), S. 151. AIR 1964 Bom 40.

—Ss. 4 and 21 — Attachment of debtor's property before adjudication—Objection to attachment of property under S. 21 (2) — Court determining validity of transfer in favour of objector — Appeal against order competent and resort to S. 75 (3) is not necessary—See Provincial Insolvency Act (1920), S. 75 (2). AIR 1962 Madh Pra 354.

—Ss. 4 and 75 (2) — Objection to attachment of property under S. 21 (2)—Court determining validity of transfer in favour of objector—Appeal lies.

Ordinarily the Insolvency Court should not inquire prior to the making of an order of adjudication whether the transfer made by the insolvent in favour of a third person is genuine or not but where the Court has determined the validity of transfer in favour of the objector, an appeal under S. 75 (2) of the Provincial Insolvency Act is competent and resort to S 75 (3) is not necessary. 1964 Jab L J 131 : 1962 M P L J (Notes) 285 : 1962 M P C 457 : AIR 1962 Madh Pra 354 (356) (Pt B) (Pr 10).

—Ss. 4 and 21 (2) — Attachment of property under S. 21 (2) — Objection to—Objector claiming title on alleged transfer — Decision as to validity of transfer —Proper stage.

Where an objection to attachment was made by a third party claiming interest in the property attached under S. 21 (2) of the Act and the Insolvency Court did not merely determine the question whether the certificates sought to be attached were in the possession or under the control of the insolvent at the time of their attachment but went further and held that the transfer of the same in favour of the objector was good and for valid consideration and that too without giving full opportunity to the parties to lead evidence.

Held, that the stage for determining the question of title or validity of transfer had not arrived and the decision was illegal. 1964 Jab L J 131 : 1962 M P L J (Notes) 285 : 1962 M P C 457 : AIR 1962 Madh Pra 354 (356) (Pt C) (Pr 11).

—Ss. 4 and 5 — Application under O. 21, R. 100 to Insolvency Court for re-delivery dismissed — Subsequent suit under O 21, R. 103 to set aside summary order and in the alternative for partition — Held, suit was maintainable and summary order did not operate as res judicata — See Civil P. C. (1908), S. 11. A I R 1965 Mad 331 (DB).

—Ss. 4 and 5 — Insolvency Court can invoke, in appropriate cases, provisions of O. 21, Rr. 95 to 102 —Civil P. C. (1908), O. 21, Rr. 100, 103.

The procedure prescribed by O. 21, Rr. 95 to 102, C. P.Code, can be invoked, in appropriate cases, by the insolvency Court. Consequently if an order is made under any one of these provisions it should be competent to the aggrieved party to file a suit under O. 21, R. 103, because the very terms of the provisions relating to passing summary order prescribe that such orders will be subject to the result of the suit. It is true that S. 4 clothes the insolvency Court with a power to investigate questions of title and the adjudication in those proceedings would, subject to the provisions as to appeals, etc., contained in the Act, be final between the parties. But that cannot mean that every order passed by the Insolvency Court would attract the provisions of S. 4 of the Act. Where the Insolvency Court does not purport to decide a matter under S. 4, but proceeds only under S. 5, the rules prescribed by the Civil Procedure Code would apply to its decision. 45 Mad 434, Rel, on.; 43 Mad 434, 51 Mad 567, AIR 1945 Mad 10 (F B) ; (1953) 2 M L J 359, Ref. to; A I R 1938 Nag 320, A I R 1932 All 408, ILR (1941) Nag 757, Distinguished. 77 Mad L W 636 : ILR (1965) 1 Mad 34 : AIR 1965 Mad 331 (333) (Pt A) (Prs 5, 7) (DB).

—S. 4—Insolvency of co-parcener of Hindu family — Partition claimed as between branches of the family—Heads of branches alone need be made parties—Official Receiver suing for partition for share of insolvent who represents one branch of the joint family — His sons are not necessary parties though they are proper parties — Hence suit of Official Receiver cannot be dismissed for non-joinder of parties —See Civil P. C. (1908), O. 1, R. 10. A I R 1953 Nag 351.

5. Gift to wife.

—Ss. 4, 53—Gift of property by husband in favour of his wife—Wife taking no steps for mutation in her name — Husband declared insolvent subsequently— No inference about benami character of gift transaction could be drawn merely from such non-mutation or from payment of municipal taxes and rent of the property through her husband—Transfer of Property Act (1882) S. 122 — Benami. AIR 1963 Orissa 37, Dist. AIR 1937 P C 13, Rel. on. ILR (1964) Cut 274.

—S. 4—Transfer in favour of wife—Statement made by insolvent in his cross-examination — Its admissibility against wife — Non-production of documents in party's possession—Effect—See Provincial Insolvency Act (1920), S. 53. (1959) 1 Orissa J D 339.

6. Insolvency of Hindu father or manager.

—Ss. 4, 5 and 28-A — Civil Procedure Code (5 of 1908), S. 64 — Decree obtained against father and sons after insolvency petition but before adjudication — Attachment of property effected before filing of petition — Adjudication of father — Sale of son's shares — Right of decree-holder to proceeds of sale to the exclusion of other creditors — Application by Receiver claiming sale proceeds on behalf of general body of creditors—Sustainability.

An attachment, whether before or after judgment, does not create any charge on the attached property. An attaching creditor is not a secured creditor. Hence, if an order of adjudication is made after attachment but before sale, the property vests in the Official Receiver for the benefit of the general body of creditors, and the attaching creditor is not entitled to obtain satisfaction of his decree by sale of the attached property. The order of adjudication divests

the rights of the attaching creditor, and remits him to the position of an ordinary creditor. The effect of an attachment of the son's share is not to create a charge or lien in favour of the attaching creditors. But it only puts an end to the power of disposal of the father and of the Official Receiver and under S. 28-A of the Provincial Insolvency Act to dispose of son's shares. It does not preclude the Official Receiver from obtaining a declaration from the Insolvency Court that the son's shares are liable for the discharge of the debts due to the several creditors which are not illegal or immoral, and have the property sold through Court. A I R 1928 Mad 735 (FB); A I R 1931 Mad 317; A I R 1927 Mad 471 (FB) and (1943) 1 Mad L J 24, Rel. on. It is open to the Official Receiver to file an application under S. 4 of the Provincial Insolvency Act for a declaration that the shares of the sons of the insolvents are liable to discharge the debts of the creditors enumerated in his petition. A sale by Court is equally subject to the doctrine of lis pendens like a private sale, and consequently the sale of the shares during the pendency of the application of the Official Receiver cannot affect the right of the creditors on whose behalf the petition was filed by the Official Receiver. **(1964) 2 An W R 435: AIR 1965 Andh Pra 52 (57, 59, 60) (Pt B) (Prs 19, 38, 39, 41).**

——S. 4—Scope—Insolvency of Hindu father — Official Receiver purporting to exercise power vested in father to sell son's shares — Enquiry under S. 4 — If obligatory.

It is not obligatory on the Court in every case where, on the insolvency of a Hindu Mitakshara father, the Official Receiver purports to exercise the power vested in the father to sell the son's shares for satisfying his debts, to hold an enquiry under S. 4 of the Act. If in a proceeding under S. 4 of the Act intiated by the sons or by the creditors, the sons dispute the right of the Official Receiver to sell their shares in the family properties and the matter is decided one way or the other, the adjudication would be binding on the parties and the Official Receiver should, in administering and selling the property of the insolvant give effect to that decision. If no proceeding under S. 4 had been taken, all that the sons could claim is an opportunity to show that the sale by the Official Receiver was not binding on their interest in the property by reason of the debts of the father not being binding upon them under the rule of pious obligation. **1956 Andh W R 586 : A I R 1957 Andh Pra 609 (610) (Pt B) (Pr 4) (DB).**

——Ss. 4, 53 and 75 — Power of Insolvency Court — Insolvent partitioning property allotting insignificant share to himself — Receiver applying for annulment — Wife and sons pleading debts to be Avyavaharik—Insolvency Court ordering annulment —District Judge upholding annulment but leaving question about binding nature of debts open — Propriety—Appeal—Competency.

The insolvent effected a partition of his property between himself and his wife and sons by which he retained an insignificant share to himself. The receiver applied for annulment under S. 53. The sons and wife of the insolvent objected on the ground that not only was the partition good but that several of the insolvent's debts were Avyavaharik and not for legal necessity. The insolvency Court decided in favour of the Receiver. In appeal the District Judge upheld the annulment but held that the question as to binding nature of debts was irrelevant and set aside the finding leaving the question for a fresh decision under S. 4. The Receiver appealed.

Held, that the question fell under S. 4, that District Judge should have decided it and that the appeal by the Receiver was competent. **1957 Nag L J (Notes) 156.**

7. Transfer from transferee.

——Ss. 4 and 53—Transfer from insolvent's transferee —Right to challenge.

An alienation in favour of a transferee from the transferee of an insolvent cannot be challenged by the Official Receiver under S. 63 of the Act. It can be challenged, if at all, only under S. 4 of the Provincial Insolvency Act and in order to make the decision binding, the transferee from the transferee must be made a party to those proceedings. In such proceedings, it is open to the transferee from the transferee to plead and establish that he is a bona fide purchaser for value without notice of the insolvency proceedings. If he is able to establish that, the transaction in his favour will have to be upheld. **1959 Ker LJ 78: 1959 Ker L T 93: ILR (1959) Ker 803.**

——S. 4—Scope—Jurisdiction — Transfer from insolvent's transferee — If such a transfer is declared invalid and not binding on the Receiver and if such a transfer is held to form only a link in the chain of a fraudulent scheme to defraud the other creditors, the insolvency Court has clearly the power to annul such transfer as not binding on the official Receiver not only under S. 53 but also if necessary by exercise of its powers under S. 4. See Provincial Insolvency Act (1920), S. 53. AIR 1958 Mys 35 (DB).

8. Applicability of Limitation Act.

——S. 4—Application for mesne profits by receiver—Limitation Act does not apply—But defence of limitation is open to opponent — Limitation Act (1908), Art. 109.

Section 4 merely empowers the Insolvency Court to try matters referred to in that section. It does not in any way oust the jurisdiction of the ordinary Court, and the Insolvency Court has always the discretion instead of trying a matter under S. 4 to refer the receiver to a suit. Thus, S. 4 is merely declaratory of the jurisdiction of the Insolvency Court and does not in any way alter or amend the law nor deprives the party of its rights. Therefore, an application made under S. 4 by the receiver to recover mesne profits cannot be looked upon as a suit. It may be in the nature of a suit, the same procedure might be applied to it by virtue of S. 5 as might be applied if the receiver had filed a suit, but strictly the Limitation Act would not apply to such an application. However, by reason of the receiver adopting one procedure rather than the other, that is making an application under S. 4 rather than filing a suit, the party against whom the application is made cannot be deprived of his right to plead the statute of limitation. Hence, when an application is made under S. 4, by the receiver, the Court is bound to consider all the defences that are open to the party against whom the application is made. Any defence that could be put forward by the party in a suit would be equally available to him in an application made by the receiver: **A I R 1936 Mad 778 (FB), Expl. and Foll. 52 Bom L R 606: I L R (1950) Bom 678: A I R 1950 Bom 399 (399) (Pt A) (Pr 2) (DB).**

SECTION 5

SYNOPSIS

(Provincial Insolvency Act (5 of 1920), S. 5.)

1. Scope and applicability.
2. Joinder of parties.
3. Applicability of O. 9, Civil P. C.
4. Abatement.
5. Injunction.
6. Appeal.
7. Revision.
8. Review.

1. Scope and applicability.

—S. 5 — Decree obtained against Hindu debtors and their sons — Joint properties attached before judgment-debtors adjudicated insolvents — Sons' shares sold in execution of decree and sale proceeds deposited in Court — Application by Official Receiver under Ss. 4 and 5 to make available sale proceeds for benefit of all insolvent's creditors and not only for benefit of attaching creditor — Application is maintainable and the sale proceeds in deposit in execution of A's decree be made available for distribution among all the creditors. See Provincial Insolvency Act (5 of 1920), S. 4. AIR 1965 Andh-Pra 52.

—Ss. 5, 10 (2) and 43 (1) — Order of annulment under S. 43 — Debtor should follow specific remedy under S. 10 (2) — He cannot apply under S. 5 for setting aside order and for extension of time for discharge.

Where an order of annulment passed under S. 43, Provincial Insolvency Act is sought to be set aside, the aggrieved party has a specific remedy provided under S. 10 (2) and therefore he cannot invoke to his aid the provisions of S. 5 of the Insolvency Act, which make the provisions of the Civil P. C. applicable. Hence, an application under S. 5 for setting aside the order of annulment and for extension of the time for discharge is not maintainable. AIR 1926 Mad 942, held not overruled by AIR 1930 Mad 389 (FB), and is still good law. (1962) 1 Andh W R 102 : (1962) 2 Andh L T 1 : ILR (1962) Andh Pra 1098 : AIR 1962 Andh Pra 262 (263) (Prs 6, 8) (DB).

—S. 5 (1) — Exemptions under S. 60 (1) Civil P. C., apply to attachment and sale by Official Receiver under Provincial Insolvency Act in view of Ss. 2 (2) and 5 (1) of the Provincial Insolvency Act. See Civil P. C. (1908), S. 60 (1), Proviso. AIR 1960 Andh-Pra 458.

—S. 5 — Addition of party — Provincial Insolvency Act making adequate provision as to procedure — Civil P. C. will not apply — (Civil Procedure Code (1908), O. 1, R. 10). See Provincial Insolvency Act (5 of 1920), S. 24. AIR 1957 Andh-Pra 603.

—Ss. 4, 5 — Application under O. 21, R. 100, Civil P. C. to Insolvency Court for redelivery, dismissed — Subsequent proceedings under O. 21, R. 103, Civil P. C. to set aside summary order and in the alternative for partition — Held, suit was maintainable and summary order did not operate as res judicata. AIR 1946 Mad 141, Dist., ILR 21 All 505 (P C), Rel. on. See Civil Procedure Code (1908), S. 11. AIR 1965 Mad 331.

—S. 5 — Scope — Insolvency Court can invoke provisions of O. 21, Rr. 95 to 103, Civil P. C. in appropriate cases.

It is true that S. 4 clothes the Insolvency Court with a power to investigate questions of title. Once the Court is held to have jurisdiction to adjudicate upon title, it must be conceded that there should be a further power in it to give effect to such adjudication. It is for that purpose that S. 5 arms the Court with all the powers of a Civil Court.

The jurisdiction conferred by Ss. 4 and 5 is distinct; the former provision will apply where the Court purports to adjudicate finally the title of a person and the latter provision arms the Court with certain powers. When, therefore, the Court merely assumes the power conferred on it under S. 5 it cannot be said that it has proceeded to decide the dispute finally under S. 4. In every case it has to be seen whether there was an adjudication within the provisions of S. 4 or whether there was merely a summary order passed under any of the powers vested in the Insolvency Court under S. 5. See Provincial Insolvency Act (1920), S. 4. AIR 1965 Mad 331.

—S. 5 — Scope — Insolvency proceedings — Substitution of parties.

Under S. 5 of the Act the Court in exercising insolvency jurisdiction can follow the procedure prescribed in Civil P. C. only when there is no procedure prescribed in the Act with regard to a particular matter but not when it is provided for in the Act. Since under S. 16, Insolvency Act, a creditor who is agrieved by the conduct of the petitioning creditor can come by way of an application for being substituted and not for being added as an additional party, resort cannot be had by him to the provisions of O. 1, R. 10, Civil P. C. See Civil P. C. (1908), O. 1, R. 10 (2). AIR 1951 Mad 665.

2. Joinder of parties.

—Ss. 5, 68 — Proceedings under S. 68 — Applicability of O. 1, R. 10, Civil P. C. — New party may be added to application under S. 68, if conditions of O. 1, R. 10 are complied with — It is manifest that in view of the provisions of S. 5, unless there is express provision in the Act to the contrary, procedure followed in exercise of original civil jurisdiction applies to proceedings under the Insolvency Act — (Civil P. C. (1908), O. 1, R. 10). AIR 1955 N U C (Andhra) 4816.

—Ss. 5 and 16 — Creditor's petition — Application by another creditor to be added as a party — Maintainability.

A creditor filed an application for adjudging the petitioner an insolvent. Pending disposal of this petition the respondent herein came by way of an application under O. 1, R. 10, Civil P. C. to be added as an additional party to the petition. On the question whether the petition could be ordered :

Held, that under S. 5 of the Provincial Insolvency Act the Court exercising insolvency jurisdiction can follow the procedure prescribed in the Code only when there is no procedure prescribed in the Act with regard to a particular matter but not when it is provided for in the Act. While a definite provision for substitution of a party has been made under S. 16 of the Provincial Insolvency Act a creditor aggrieved by the conduct of the petitioning creditor can come only by way of the substitution petition under S. 16 of the Act and not under O. 1, R. 10 of the Civil P. C. to be added as a party.

Held further, that in the absence of any allegation or proof that the presence of the party is necessary for any effective and complete adjudication of the matters in dispute, the petition could not be allowed. (1951) 1 Mad L J 87 : 1951 Mad W N 48 : ILR (1951) Mad 463 : AIR 1951 Mad 665 (666, 667) (Prs 4, 7).

3. Applicability of O. 9, Civil P. C.

—Ss. 5 and 7 — Ex parte order of adjudication — Setting aside of — Who can apply — Civil P. C. (1908), S. 141 and O. 9, R. 13) — (Madras Provincial Insolvency Rules (1922), R. 21).

An application for setting aside an ex parte order passed by an Insolvency Court is permissible in view of O. 9, R. 13, Civil P. C. read with S. 141, Civil P. C. and S. 5 of the Provincial Insolvency Act. Under Cl. 3 of R. 21 of the rules framed under the Madras Provincial Insolvency Rules the alienees, the transfers to whom were alleged to be the acts of insolvency, are entitled to notice. The language of this rule is in a mandatory form and therefore it is obligatory on a Court to issue notice to the transferees. Disobedience of this rule does not render the order of adjudication void as it is only an irregularity which can sustain an application to set aside the ex parte order. The alienees, therefore, have a right to maintain the application under O. 9, R. 13, Civil P. C. to set aside the

ex parte order of adjudication passed against their transferor. 1958 Andh L T 925 : (1958) 2 Andh W R 316.

4. Abatement.

●——S. 5 — Death of debtor during pendency of insolvency proceedings — Proceedings can continue for realisation and distribution of property — Provisions of Insolvency Act are to be preferred to those under O. 22, Civil P. C.—(Hyderabad Insolvency Act (8 of 1351 F.), Ss. 17 and 5)—(Civil P. C. (1908), O. 22). See Provincial Insolvency Act (1920), S. 17. **A I R 1952 Hyd 80 (FB).**

5. Injunction.

——S. 5 — Jurisdiction of insolvency Court to issue injunction — Though Insolvency Court will not restrain a mortgagee or other secured creditor in exercise of his legal remedies under S. 28, it has jurisdiction in proper cases to restrain him under O. 39, R. 1, if there are substantial grounds to impeach his title to safeguard interests of general body of creditors—(Civil P. C. (1908), O. 39, R. 1). See Provincial Insolvency Act (5 of 1920), S. 4. **A I R 1954 Mad 12 (DB).**

——S. 5—Scope—Power of Court to grant injunction against secured creditor from enforcing his remedy.

It is open to the Insolvency Court to see that the interests of the general body of creditors are not jeopardised by a secured creditor prosecuting his remedy in other proceedings. There is a discretion vested in the Court in the manner of granting injunctions. Under S. 5 of the Provincial Insolvency Act the Insolvency Court, since it has the same powers as a civil Court, could, under justifiable circumstances, grant an injunction preventing a creditor from selling the insolvent's property which right is disputed by the other creditors in Insolvency Court.

The observations in Official Receiver, Coimbatore v. Palaniswami Chetti, (1925) 49 Mad L J 203 ; I L R 48 Mad 750, held to be too wide and Mulla's "Insolvency", paragraph 74, held to state the principle correctly. **(1953) 2 Mad L J 359 : 1953 Mad W N 527 : I L R (1954) Mad 360 : A I R 1954 Mad 12 (14, 15) (Prs 11, 14, 15) (DB).**

6. Appeal.

——S. 5 — Scope of — Order passed on application made under Ss. 53 and 54—Appeal — Maintainability of. See Debt Laws—Madras Agriculturists Relief Act (4 of 1938) (as amended by Madras Act 23 of 1948), S. 25-A (1) (B). **1958 Andh L T 896.**

——Ss. 5 (1) and 75 — Order refusing review — Appeal.

Under the Insolvency Act an appeal is entertainable even against an order rejecting an application for review. The provisions of the Civil P. C. are made applicable to insolvency proceedings subject to the provisions of the Insolvency Act. Consequently when the right of appeal is expressly regulated by the Insolvency Act it should not be taken to be governed by the provisions of O. 47, R. 7, Civil P. C. A I R 1935 Pat 177, Not foll. **I L R (1954) Trav-Co 1042 : 1954 Ker L T 525 : A I R 1955 Trav Co 49 (51) (Pt E) (Pr 10) (DB).**

7. Revision.

——S. 5—Power of revision — Power of revision can be exercised by High Court only in respect of appellate order—Order of adjudication—Revision does not lie directly—Section 5 will not apply. See Provincial Insolvency Act (1920), S. 75 (1). **1964 Ker L J 29.**

——Ss. 5, 23, 31 and 75 — Interim protection from arrest in execution of decree against debtor pending his application for adjudication—Inherent power—Refusal to grant protection — Not revisable either under S. 115, Civil P. C. or Art. 227 of the Constitution — Civil P. C. (1908), S. 151 — Constitution of India, Art. 227.

Where the insolvency Court has declined to grant a debtor interim protection from arrest in execution of a decree against him pending his application for adjudication, the proper remedy of the debtor is to appeal under S. 75, Provincial Insolvency Act and not to file a petition for revision under S. 115, Civil P. C. or under Art. 227 of the Constitution.

Even assuming that the Court has inherent power under S. 5 of the Act read with S. 151, Civil P. C. to grant such protection, the refusal by the Court to exercise its inherent power would not be revisable either under S. 115 or Art. 227 of the Constitution. Further as the Act makes complete provision for the protection of insolvent in the shape of S. 23 pending adjudication and under S. 31 after adjudication, the Court has no inherent power under S. 5 of the Act read with S. 151, Civil P. C. to order interim protection apart from the above provisions. A I R 1925 Mad 170, Not foll. **1961 Ker L J 1272.**

8. Review.

——S. 5 and 10 (2) — Civil Procedure Code (5 of 1908), O. 47, R. 1 — Order passed by Insolvency Court—Power of review.

The Provincial Insolvency Act is a Special Law, and where the Act provides a specific remedy, it is not open to a party to resort to the general provisions of the Code of Civil Procedure. But, where there is no specific provision in the Act, orders passed under the Provincial Insolvency Act are reviewable under O. 47, R. 1, Civil Procedure Code. Section 10 (2) of the Provincial Insolvency Act provides a specific remedy for the debtor in respect of whom an order of adjudication has been annulled and it gives him permission to present another petition on the same facts, provided that he satisfies the Court that he was prevented by any reasonable cause from presenting or prosecuting his application. But, in the instant case, the relief sought is to set aside the unconditional order of annulment passed by the Court on an earlier occasion without providing for the vesting of the properties of the insolvent in the Official Receiver. In such a situation, the special remedy provided by S. 10 (2) cannot be availed of by the debtor, and therefore the remedy sought by the debtor is outside the scope of S. 10 (2). Therefore, the Court was right in allowing the review application and rectifying the defect contained in the earlier order by passing a supplementary order vesting the property of the insolvent in the Official Receiver to be administered by him in accordance with the provisions of the Insolvency Act. (1947) 2 Mad L J 425 : A I R 1948 Mad 233 : 51 Mad L J 60 ; A I R 1927 Mad 175 : 61 Mad L J 719 : A I R 1932 Mad 63, Rel. on. **(1962) 1 Andh W R 253 : I L R (1965) Andh Pra 61 : A I R 1963 Andh Pra 52 (53) (Prs 5, 7) (DB).**

——S. 5—Powers of review — Insolvency Court can review its order.

Even though there is no specific provision in the Act conferring powers of review, the insolvency Court can review its order under S. 5 of the Act. Therefore, the petition for extending time for discharge, and for setting aside order for annulment of adjudication can be regarded as a petition to review the order under S. 5 of the Act. A I R 1948 Mad 233, Foll. **(1965) 2 Mad L J 11 : 78 Mad L W 442 : A I R 1966 Mad 29 (30) (Pt B) (Pr 4).**

——S. 5 — Insolvency Court — Powers of review—Insolvency Court recording compromise between petitioner-creditor and debtor and dismissing petition — Court can review its order at instance of

another creditor — Any other view would mean that the interests of the general body of creditors might be irreparably jeopardised by collusion between petitioning creditor and the debtor. See Civil P. C. (1908), S. 151. A I R 1963 Mad 367.

——S. 5 (1)—Review—Powers of.

The Act does not contain a provision for the Court to review an order made by it in its insolvency jurisdiction. That does not, however, mean that the Court cannot review its order passed in insolvency matters. The result of the absence of a provision for review in the Act is only that before the Court can review its own order, the power so exercised should have been conferred on it by some provision of the Civil P. C. In other words, unless the case falls under O. 47, R. 1, the Court will have no power of review. **I L R (1954) Trav-Co 1042 : 1954 Ker L T 525 : A I R 1955 Trav-Co 49 (50) (Pt B) (Pr 5) (DB).**

——Ss. 5 (1) and 14 — Review — Error apparent on face of record.

Where the Insolvency Court strikes off the insolvency petition without adverting to S. 14, this is an error apparent on the face of the record and attracts the application of O. 47, R. 1. **I L R (1954) Trav-Co 1042 : 1954 Ker L T 525 : A I R 1955 Trav-Co 49 (50) (Pt C) (Pr 6) (DB).**

SECTION 6

SYNOPSIS

(Provincial Insolvency Act (5 of 1920), S. 6.)

1. Scope and applicability.
2. Sub-section (a) — Transfer to third person for benefit of creditors.
3. Sub-section (b) — Transfer with intent to defeat or delay creditors.
4. Sub-section (c) — Transfer void as fraudulent preference.
5. Sub-section (e)—Sale of property in execution.
6. Sub-section (f)—Petition for adjudication.
7. Sub-section (g)—Notice to creditors about suspension of business.

1. Scope and applicability.

——Ss. 6 and 9 — Minor admitted to benefits of partnership becoming major after its dissolution—He cannot be adjudicated insolvent for acts of insolvency committed by major partners. See Partnership Act (1932), S. 30 (5). AIR 1965 S C 212.

——Ss. 6, 9, 28, 24, 33, 50, 53—Debtor adjudged insolvent — Petitioning creditor applying under S. 53 for annulment of certain transfers by insolvent — Transferee cannot challenge order of adjudication on ground that petitioning creditor was not creditor of the insolvent.

So far as the effect of the order of adjudication is concerned, no one is entitled to challenge the order of adjudication except by way of an appeal under the Insolvency Act. Once an order of adjudication has come to stay beyond challenge, then in subsequent proceedings in the insolvency, it is not open to any other person to challenge the order of adjudication. When an application is made by a petitioning creditor, the creditor has to show that the debtor owes a debt to him and that he is unable to pay that debt. Such an enquiry is contemplated under S. 24 of the Provincial Insolvency Act. But once an enquiry is made and the Insolvency Court comes to a finding that the debtor has committed an act of insolvency and is liable to be adjudged an insolvent, the status of the debtor comes to be determined as an insolvent. If at any subsequent stage an occasion arises in insolvency proceedings either under S. 33 or under S. 50 that an enquiry ought to be made into the genuineness of the claim of the petitioning creditor, the fact that the adjudication order was passed on the application of the petitioning creditor, will not preclude such an enquiry. But that enquiry could not be made in an application under S. 53 of the Insolvency Act at the instance of the transferee who wanted such an enquiry to be made in order to support his contention that the adjudication order itself is bad to the limited extent to which the transferee was precluded from making such a challenge to the adjudication order. AIR 1940 Nag 393, Dissented from; 1957 Nag L J 523 (Bom) and A I R 1947 Nag 161 (FB) and AIR 1935 Bom 80, Distinguished; A I R 1943 P C 130 and A I R 1931 Mad 441 (SB), Rel. on. **1963 Mah L J 89 : 65 Bom L R 39 : I L R (1963) Bom 173 : A I R 1963 Bom 212 (216 to 218) (Pt B) (Prs 18, 19, 21, 24).**

——Ss. 6 and 53 — Effect of adjudication order — Conclusive only as regards status and not as regards grounds.

Under S. 41, Evidence Act, a judgment in rem is conclusive only as regards status and not as regards the ground on which the order is passed. An order of adjudication in insolvency is admissible to prove the legal character of the debtor as an insolvent but is inadmissible as against third parties to prove that the act on which the order was passed was an act of insolvency. Order of adjudication is not binding in proceedings under S. 53 and the Court could come to a conclusion on facts that the transfer was for consideration and not mala fide. **1959 Nag L J (Notes) 46.**

——Ss. 6, 6 (i) (Bombay) and S. 6 (a) (Bombay) — Scope of — R. III-A, Cls. 9 (c) and 10 of Bombay High Court Rules—Scope and validity of—Ss. 9 (1) and 79.

Section 6 sets out the conduct or acts of a debtor which may be regarded as acts of insolvency. But the section does not purport to state at what point of time an act of insolvency shall be deemed to be committed. In each case, at what point of time an act of insolvency shall be deemed to be committed is a question to be decided on evidence.

Similarly S. 6(1) which has been added by the Bombay Act, 15 of 1939, does not purport to set out the point of time at which the act of insolvency may be committed by reason of non-compliance with the insolvency notice. It only provides that an act of insolvency may be committed by failure to comply with the insolvency notice. The Bombay High Court was competent to frame rules under S. 79 to prescribe a point of time, at which an act of insolvency may be deemed to be committed by failure to comply with the notice. By Cl. (10) of R. III-A framed by the High Court that point of time is the disposal of the application where an application for setting aside the insolvency notice has been made.

In framing Cls. 9(c) and 10 of R. III-A, therefore, the Bombay High Court did not purport to extend the time prescribed by S. 9(1)(c) of the Provincial Insolvency Act. The Court in exercise of its rule-making authority enacted a provision for ascertaining the point of time from which the period for the fulfilment of the condition prescribed in the section is to be calculated and in this view no provision of the Act is violated by framing Cls. 9(c) and 10 of R. III-A. Both the clauses are thus intra vires the High Court. **59 Bom L R 96 : I L R (1957) Bom 295 : A I R 1958 Bom 164 (166) (Prs 5, 6) (DB).**

——Ss. 6 and 7—Person heavily indebted executing partition with brothers and sisters—Major portion of properties allotted to wives of debtor and his brothers in lieu of streedhanam alleged to have been brought by them — Property allotted to debtor not shown to be sufficient to pay off his debts—His failure to make attempt to pay any of several debts also indicating his incapacity to pay — Contention of debtor that he had not committed any act of insolvency is not sus-

tainable—Order adjudicating him insolvent is correct. 1961 Ker L T 648 : (1962) 32 Com Cas 438 : 1961 Ker L J 658.

——Ss. 6, 9—Scope of inquiry — Petition by creditor for adjudging debtor insolvent—Court is not required to finally adjudge amount due by debtor to him but only to see whether debt owed by debtor exceeds Rs. 500. 1961 Jab L J 193 : 1961 M P L J 708 : 1960 M P C 682 : A I R 1961 Madh Pra 15 (18) (Pt D) (Pr 16) (DB).

——Ss. 6, 27 and 53 — Transfer by insolvent challenged—Burden of proof.

Per Shiv Dayal, J.: The burden of proof in insolvency proceedings is not upon the transferee but is on the official receiver or the creditor who challenges the transfer, but it is competent for the Court to draw the inference of intention from the totality of circumstances. The burden on the petitioning creditor is discharged as soon as it is shown that the property stood in the name of the debtor. It is then for the transferee to show that he was the real owner and the debtor was only a benamidar. (1956) 2 All E R 537 and 1949 F L J 90 : (1949) 1 Mad L J 568 : A I R 1949 F C 88, Rel. on. 1961 Jab L J 193: 1961 M P L J 708 : 1960 M P C 682 : A I R 1961 Madh Pra 15 (20, 21) (Pt G) (Prs 24, 25) (DB).

——Ss. 6, 9, 54 — Transfer executed with a view to defeat claims of creditors—It is an act of insolvency affording cause of action to file a petition under S. 9. 1963 Mys L J (Supp) 266 : AIR 1963 Mys 257 (261) (Pt C) (Pr 16).

——Ss. 6, 53 and 54 — Distinction between—Scope of inquiries under.

Even if the Court has to go into question of the genuineness or otherwise of the transfers made by the debtor firm, it has to go into the question only for the purpose of finding out whether prima facie the creditor had the right to present an application under S. 9. It is clear that the scope of an enquiry into the acts of insolvency as contemplated by S. 6 is wholly different from the scope of an enquiry for the purpose of an annulment or avoidance of certain transfers under Ss. 53 and 54.

The annulment proceedings under Ss. 53 and 54 are in the nature of suits in the matter of pleadings, framing of issues, taking of evidence and the giving of judgment and decree, whereas the decision that a transfer is an act of insolvancy must in the nature of the case and at the stage at which it has to be given be based only on inconclusive material ; the incidental determination of the question that the debtor firm has committed an act of insolvency for the purpose of deciding whether adjudication should be ordered or not cannot be regarded as a final determination with regard to the transfers for purposes of annulment proceedings under Ss. 53 and 54. AIR 1955 Pat 413 (416) (Pt A) (Pr 9) (DB).

——Ss. 6 and 9 — Act of insolvency within three months.

Even if a debtor has enough property by the sale of which his debts could be liquidated, that circumstance would not render the petition for his insolvency unsustainable or make it liable to be dismissed. The cause of action of a creditor, to whom is owing an unsecured debt or a balance in a secured debt with insufficient security on its being valued or given up, of Rs. 500 or more is complete on the commission of an act of insolvency by the debtor. The debtor may avoid his adjudication if under S. 25 he is able to pay the debts and pays them within a reasonable time. Except for this purpose the existence or extent of other assets has no relevance. Insolvency need not be and most often is not pauperism. If a person is not able to meet his liabilities as and when they become due, out of his funds, he is not solvent though he may have enough assets by converting which into cash he may be able to liquidate his liabilities. If a debt of the requisite description and quantum exists and there is an act of insolvency, the jurisdiction of the Insolvency Court can be invoked. But adjudication is not inevitable and can be averted as aforesaid because no creditor can as of right claim that the debtor must necessarily be adjudged insolvent. An act of insolvency is not an offence or crime on proof of which a sentence in the shape of adjudication must follow. ILR (1954) T C 93 : AIR 1954 Trav-Co 419 (423) (Pt E) (Pr 13) (DB).

——S. 6 — Adjudication on basis of debt for which debtor was not liable to petitioning creditor — Validity.

An insolvency proceeding is essentially a proceeding 'in personam' and only personal debts due by the insolvent can be proved therein. When the debtor was not personally liable for the debt due to the petitioning creditor and when there is no evidence of any other debt being in existence when the sale deed (alleged to be an act of insolvency) in favour of the vendee was executed, it can on no account be treated as an act of insolvency — See Provincial Insolvency Act (5 of 1920), S. 35. AIR 1952 Trav-Co 234 (DB).

2. Sub-section (a) — Transfer to third person for benefit of creditors.

——S. 6 (a)—Scope—Petition under S. 16, Travancore Debt Relief Act — If act of insolvency — See Debt Laws — Travancore Debt Relief Act (2 and 3 of 1116), S. 16. 1957 Ker L J 620.

3. Sub-section (b) — Transfer with intent to defeat or delay creditors.

——S. 6 (b) — "To defeat or delay his creditors" — Transfer substantially for benefit of some of creditors — Transfer is not made with intent to defeat or delay creditors as a whole. AIR 1955 N U C (Ajmer) 774.

——Ss. 6 (b), 9 (1) (c) and 53—Application by creditor for insolvency under S. 6 (b) — Debtor declared insolvent — Application by Official Receiver under S. 53 to annul alienation in favour of purchaser — Purchaser can show his bona fides — Decision under S. 6 does not act as res judicata—Court is not, under S. 6, to consider good faith or consideration paid by purchaser — Any finding recorded at that stage cannot, therefore, debar purchaser from pleading these facts when the transfer in his favour is sought to be annuled : AIR 1956 All 68, Overruled. 1963 All L J 623 : AIR 1965 All 80 (82) (Prs 7, 8) (DB).

——S. 6 (b) and (c)—Transfer with intent to defeat or delay creditors — Determination — Possession of assets far more than liabilities — Only a portion of property mortgaged — No fraudulent preference made — Debtor commits no act of insolvency.

A transfer by the debtor of his property may be act of insolvency upon either of two grounds (1) where the necessary consequence of the transfer is to produce insolvency or (2) where the debtor transfers a portion only of his property but is shown to have done so with the intention of defeating or delaying his creditors. Intention to delay or defeat the creditors or the intention to give preference to the creditors are mental acts which can only be determined from surrounding circumstances. Another test is whether the alleged insolvent is in a position to pay his debt and whether the property which has been transferred bears such a proportion to the whole property that the remaining or the residue of the property is still sufficient from the point of view of an ordinary businessman to meet the debts of the creditors who remain unsatisfied.

Where a creditor filed a petition for declaration of the debtor as insolvent alleging that he had dishonoured three hundis executed in petitioner's favour and had mortgaged some of his property in favour of another person and it was found that the assets possessed by the debtor were far more than the liabilities and there was no fraudulent preference in executing the mortgages.

Held, that the debtor had committed no act of insolvency. 1963 All L J 28.

——Ss. 6 (b) and 27 — Firm possessing no property — No allegation against one partner of a fraudulent transfer or any other act of insolvency — Allegation of fraudulent transfer only against the other partner — The transfer as an act of insolvency is sufficient only to declare that partner as also the firm as insolvents — The first partner against whom there is no allegation cannot be adjudged an insolvent as a partner of the firm. 1962 All L J 1101 : 1963 All W R (H C) 30.

——Ss. 6 (b) and 9 (1) (c) — Gift — Deed registered within three months before petition though executed beyond that period — Can be treated as act of insolvency — Transfer of Property Act (1882), S. 123 — Registration Act (1908), Ss. 47 and 60 — See Provincial Insolvency Act (1920), S. 9 (1) (c). 1962 All L J 1101.

——S. 6 (b) — Transfer in favour of one creditor — Registration after three weeks — Date of transfer — Date of registration is the date of transfer as transfer does not become effective till the document was registered — It cannot be antedated by operation of S. 47 of the Registration Act, for the purposes of S. 54 of the Insolvency Act. See Provincial Insolvency Act (5 of 1920), S. 54. AIR 1957 Andh-Pra 535.

——Ss. 6 (b), 53 and 54 — Jurisdiction of Insolvency Court.

The debtor was adjudged an insolvent on the ground that he had mortgaged his property to D and thereby committed an act of insolvency under S. 6 (b), Provincial Insolvency Act. Court found that the transfer in favour of D amounted to a fraudulent preference. One of the other creditors applied for annulment of the transfer in favour of D, under Ss. 53 and 54. It was contended that the finding in the adjudication order was binding and could not be reagitated under the garb of application under Ss. 53 and 54 and that the Insolvency Court had no jurisdiction to go into the matter.

Held, that it was within the competence of the Insolvency Court to find whether the transaction was without consideration and not in good faith and whether it was a fraudulent preference. AIR 1947 Nag 161, Foll.; AIR 1943 P C 190; (1943) 2 Mad L J 160; (1878) 10 Ch D 3 and AIR 1956 All 68, Dist. 1959 Nag L J (Notes) 74.

——S. 6 (b)—Applicability—'Creditors'.

In order that a creditor may file an insolvency petition against a debtor on the ground that he has committed an act of insolvency by transferring his property it must be shown that the transfer was made with intent to defeat or delay the creditors of the debtor generally and not some particular creditor or creditors. AIR 1934 Rang 242 and AIR 1937 Lah 495, Rel. on.

Held, on facts that the transfers were made with intent to defeat or delay not only the petitioning creditors but the entire body of the creditors of the debtor and hence an act of insolvency was committed by him. AIR 1958 Cal 319 (320) (Prs 9, 10) (DB).

——S. 6 (b) and (c)—Certificate of fitness of case for appeal to Supreme Court — Question only of academic importance at particular stage—Case not fit for appeal to Supreme Court.

At the stage of adjudication of a person as insolvent neither the Insolvency Court nor the Appellate Court is required to say what the effect of adjudication order would be on the annulment proceedings and it is unnecessary for the transferees to take an appeal to the Supreme Court from the decision of the High Court in appeal on such a point at that stage. High Court will not grant a certificate of fitness under Art. 133 (1) (c) of the Constitution in such a case. AIR 1961 Madh-Pra 172 (DB).

——Ss. 6 (b), 53 — Transfer with intent to delay or defeat creditors alleged as act of insolvency — Court is competent to determine nature of transfer in the order of adjudication.

Per Shiv Dayal, J. — If a transfer of property with intent to defeat or delay the creditors is alleged as constituting an act of insolvency the Court is competent to determine the alleged nature of the transfer in the order of adjudication and cannot postpone its decision to the stage when the same is sought to be annulled under S. 53. The scope of inquiry under S. 6 (b) is quite different from that under S. 53. It is the intention and conduct of the debtor, in making the transfer, which determines whether it constitutes or not an act of insolvency. But on an application for avoidance of a transfer under S. 53 what is to be established is want of good faith of the transferee. How far the order of adjudication would be binding on the transferee in annulment proceedings is to be seen at the proper stage. 1961 Jab L J 193 : 1961 M P L J 708 : 1960 MP C 682 : AIR 1961 Madh Pra 15 (19, 20) (Pt F) (Prs 18, 19, 23) (DB).

——S. 6 (b)—Fraudulent transfer—Transferor in embarrassed circumstances—Transferee close relation—Transfer of all properties—Sole object to defraud creditors can be inferred — Inadequacy of consideration indicates fraud. AIR 1955 N U C (Mad) 3169.

——S. 6 (b) and 53—Fraudulent transfer—Fraudulent transfer coming under S 6 (b) is one voidable under S. 53, T. P. Act independently of insolvency of transferor and one that is voidable under S. 53, Provincial Insolvency Act — (Transfer of Property Act (1882), S. 53). AIR 1955 N U C (Mad) 3169.

——Ss. 6 (b), 53 and 54—Act of Insolvency.

When a transaction is impeached as fraudulent under S. 53 or S. 54 of the Insolvency Act, one way of escape is to plead and prove that the alienations were effected on account of pressure exerted upon the alienor by the creditors. If the debtor was not a free agent, but was forced to enter into a transaction, then that cannot be impeached on the ground of the debtor's intention to prefer some, or defeat other creditors. It is not impossible to peep into the mind of man and ascertain his intention. The subjective state of mind of the transferor is what is material and that has to be inferred from the attendant circumstances. Where the circumstances of a case leave no room for doubt that the transactions were resorted to by the debtor with a view to defeat his creditors that would be an act of insolvency.

Held, on a consideration of the documents in the case that they constituted an act of insolvency. ILR (1954) T C 93 : AIR 1954 Trav-Co 419 (422) (Pt D) (Pr 11) (DB).

4. Sub-section (c)—Transfer void as fraudulent preference.

—— S. 6 (c) and (b)—Transfer with intent to defeat or delay creditors — Determination — Possession of assets for more than liabilities—Only a portion of property mortgaged—No fraudulent preference made

—Debtor commits no act of insolvency. See Provincial Insolvency Act (1920), S. 6 (b). 1963 All L J 28.

——Ss. 6 (c), 54 — Fraudulent preference alleged as act of insolvency—Court if competent to determine.

Per A H. Khan, J. — If fraudulent preference is alleged as an act of insolvency, the Court is competent to determine the question under S. 6. The determination of the question cannot be postponed till the proceedings have reached the stage under S. 54. At the time of determining whether any transfer amounts to a fraudulent preference under S. 6 (c), the Court does not declare the transfer as void nor does it annul the transfer. The stage of annulment comes later on when a receiver is appointed. AIR 1958 S C 1, Dist. 1961 Jab L J 193 : 1961 M P L J 708 : 1960 M P C 682 : AIR 1961 Madh Pra 15 (17) (Pt B) (Pr 7) (DB).

——S. 6 (c)—Transfer—What constitutes—Release—Release is a sort of surrender of rights in favour of another person and for all intents and purposes it is a transfer of the rights. 1961 Jab L J 193 : 1961 M P L J 708 : 1960 M P C 682 : AIR 1961 Madh Pra 15 (17) (Pt C) (Pr 11) (DB).

——Ss. 6 (c), 54—Fraudulent preference—What constitute—Impugned transfer itself creating a debt — Cannot constitute fraudulent preference.

Per Shiv Dayal, J. — The very word 'preference' envisages at least two creditors and a preference to one of them. If the very act of the impugned transfer such as a mortgage creates a debt, the transferee no doubt becomes a creditor by virtue thereof but it cannot be said to be a fraudulent preference for the transferee (as a creditor) to others. 1961 Jab L J 193 : 1961 M P L J 708 : 1960 M P C 682 : AIR 1961 Madh Pra 15(19) (Pt E) (Pr 17) (DB).

5. Sub-section (e)—Sale of property in execution.

——S. 6 (e) — 'Court immediately below' — Single Judge of High Court sitting in appeal — Not a Court immediately below Letters Patent Appeal Bench of same High Court—Order of adjudication as insolvent by District Judge—Reversal by single judge—Letters Patent Appeal Bench restoring order of District Judge —Judgment one of affirmance—No substantial question of law involved. See Constitution of India, Art. 133 (1). AIR 1962 Andh Pra 346 (DB).

[Overruled in AIR 1963 S C 1279]

——S. 6 (e)—Applicability—Confirmation of sale not necessary for applicability of S. 6 (e).

In order to attract S. 6 (e) it is sufficient if there is a sale in execution of a decree and it is not necessary that the sale should be confirmed. The fact that subsequently such a sale is set aside is immaterial. (1942) 1 M L J 38 : AIR 1942 Mad 306 and AIR 1959 Bom 289 and AIR 1954 Nag 286 and AIR 1933 Cal 564, Rel. on. 1960 Andh L T 859 : (1961) 1 Andh W R 191 : ILR (1961) 1 Andh-Pra 610 : AIR 1961 Andh-Pra 97 (98) (Pr 14) (DB).

——S. 6 (e) — 'Sold in execution' as contemplated by S. 9 (1) (e) of Presidency Towns Insolvency Act — Sale becoming confirmed or becoming absolute under O. 21, R. 92. Civil P. C See Presidency Towns Insolvency Act (1909), S. 9 (1) (e). AIR 1959 Bom 289 DB).

——S. 6 (e) — Scope —Validity — Presidency Towns Insolvency Act, S. 9 (e).

Fact that under S 6 (e) attached property of the debtor has to be sold in execution of a decree for payment of money before the act can be considered an act of insolvency while under S. 9 (e) of the Presidency-Towns Insolvency Act mere continuation of attachment for 21 days is sufficient to constitute an act of insolvency it does not amount to discrimination and a denial of equality before the law and benefit of equal laws to persons in or carrying on business within the Presidency Towns. See Constitution of India, Art. 14. AIR 1957 Mad 403 (DB).

——S. 6 (e) — Sale subsequently set aside — If act of insolvency.

The sale of the debtor's property, even though it was subsequently set aside. is an act of insolvency within the meaning of Cl. (e) of S. 6. AIR 1942 Mad 366; (1942) 1 M L J 38, Rel. on. ILR (1954) Nag 720 : 1954 Nag L J 521: AIR 1954 Nag 286 (287 to 289) (Prs 2, 6, 7, 8, 10, 13) (DB).

——S. 6 (e) — Decree for payment of money — Property sold under personal decree passed under O. 34, R. 6 — It is not necessary to examine nature of previous liability.

The debt in execution of which the property of the debtor was sold was under a decree passed under O. 34, R. 6, Civil P. C. in which it was expressly mentioned that the debtor was personally liable for the amount.

Held, that it was not necessary to examine the nature of the previous liability under the original debt; that it was not open to controversy that the debtor was personally liable to pay and that the provisions of S. 6(e). Provincial Insolvency Act applied. AIR 1927 Mad 922 and ILR 1938 (1) Cal 132, Dist. 1952 Nag L J (Notes) 134 (DB).

——S 6 (e)—Petition — Unequal partition between father and sons — Father getting small share and more liabilities —Transaction is transfer.

Ordinarily a partition is only a change in the mode of enjoyment of property. Hence it property has been allotted as a result of a fair partition the transaction may not be characterised as a transfer. But if the partition is unequal as where it has the effect of depriving the father of his due share by giving him a small share and saddling him with greater burden of the family debts the transaction is in effect a transfer pro tanto by the father of his own interest in the joint family and the transaction must come within the purview of S. 6 (b), Provincial Insolvency Act. 6 Lah 1, Dist.; AIR 1930 Nag 215, Ref. 1952 Nag L J (Notes) 121 (DB).

6. Sub-section (f)—Petition for adjudication.

——Ss. 6 (f), 9 and 10 — Scope — Petition for adjudication by debtor — Provisions of S. 10 should be complied with — Advantage of S. 6 (f) not available to a debtor.

The question whether the debtor is entitled to present the petition for adjudicating him as insolvent should be decided by taking into consideration the conditions laid down in S. 10 and not by referring to S. 6. The advantage of S. 6 (f) may be taken only by a creditor if he presents an application under S. 9 of the Act. A debtor cannot urge that he has committed an act of insolvency by presenting an application for insolvency and therefore he is entitled to present the application. 1960 Raj L W 623.

7. Sub-section (g) — Notice to creditors about suspension of business.

——S. 6 (g) — Notice of suspension of payment of debts may be given to any one of the creditors. AIR 1935 Mad 589 (2), Foll. AIR 1955 NUC (Ajmer) 774.

——S. 6 (g) — Allegation that debtor had suspended payment of debts — It is not act of insolvency — Act of insolvency under S. 6 (g) cannot be established by evidence when it was not pleaded in petition — Civil P. C. (1908), O. 6, Rr. 2, 17.

Where the act of insolvency committed by the debtor alleged was not the act of insolvency specified

in S. 6 (g) no inquiry can be held into the question whether such act of insolvency was committed by the debtor. Where the allegation made by the petitioning creditor was that the debtor had suspended payment of his debts and was not paying them as they became due, this allegation even if established, cannot constitute an act of insolvency so as to render the debtor liable to be adjudicated as insolvent. Mere suspension of payment of debts does not constitute an act of insolvency. It is necessary in order to constitute an act of insolvency within S. 6 (g) that the debtor should give notice to any of his creditors that he has suspended payment of his debts. Notice by the debtor to any of his creditors is a necessary constituent of an act of insolvency under this head. Where that has not been alleged, the petition does not disclose any cause of action in respect of this particular act of insolvency and in the absence of such cause of action no inquiry can be held whether the debtor had committed this particular act of insolvency.

Moreover, an act of insolvency in order to found a petition must have been committed within three months of the filing of the petition. If a petition is filed more than three months after the commission of the act of insolvency it would fail since the act of insolvency would not be available to the petitioning creditor after the expiration of three months from its commission. It would, therefore, follow that if a particular act of insolvency is not mentioned in the petition, the petition cannot even be amended except on strong and exceptional grounds so as to found it upon the particular act of insolvency if more than three months have already elapsed from the date of commission of such act of insolvency.

It is not sufficient to make vague allegations in the petition of acts which are not acts of insolvency and then endeavour by means of evidence to prove that as a matter of fact an act of insolvency under S. 6 (g) has been committed.

If an amendment cannot be permitted after the expiration of a period of three months from the date of commission of the act of insolvency, mere leading of evidence in regard to the act of insolvency after the expiration of such period of three months cannot entitle the petitioning creditor to make out a case for adjudication based on such act of insolvency. AIR 1926 Bom 405, Rel. on. **(1963) 4 Guj L R 439.**

——S. 6 (g) — Partnership Act (1932), Ss. 30 (5), Proviso, 45 — Minor admitted to benefits of partnership — Subsequent dissolution of partnership — Minor attaining majority long after — Question of his election under S. 30 does not arise—Act of insolvency by major partners after dissolution—Minor who attained majority before act of insolvency but after dissolution is not personally liable and cannot be adjudicated insolvent. See Partnership Act (1932), S. 30 (5). (1963) 1 Mys L J 332.

——S. 6 (g) — Act of insolvency — Notice of suspension of payment of debts—What constitutes.

Whether the acts of the debtor relied upon by the creditors in support of their petition constitute an act of insolvency within the meaning of S. 6 of the Insolvency Act or not, is to be decided in the light of the following principles: 1. That a mere statement of the debtors that they are unable to pay their debts however insolvent they may be, is not necessarily a notice within the meaning of the Act, that they are suspending or about to suspend payment. 2. Whether the effect of the words used by the debtors would reasonably and ordinarily mean to the creditors that the former intend suspending payment or about to suspend payment as they are unable to discharge their liabilities immediately. 3. Construing the statement of the debtors it has to be seen whether they intend to deal with their creditors collectively.

A joint Hindu family firm sent a registered notice signed by one of its members to several of their creditors that they are unable to meet their liabilities immediately and that they would like to make arrangements for the purpose of realising all their assets and discharge their liabilities. At a meeting called for the purpose an agreement was arrived at between the firm and some of the creditors present. The relevant clause in the agreement ran as follows: —'As the debtors were in financial difficulties they cannot pay in full to the creditors owing to loss in business. So they have proposed to pay annas six in the rupee as full and final settlement towards their dues to the creditors'. The creditors agreed to take six annas in a rupee in full and final settlement and it was provided that if the payment was not made within the prescribed time the agreement will automatically be cancelled. The payment not having been made the creditors filed a petition for adjudication of the firm as insolvent.

Held, that the registered notice as well as the agreement read as a whole amounted to notices of suspension of debts of the firm. Each of them constituted an act of insolvency. 1891 A C 318 and (1894) 1 Q B 433 and AIR 1935 Mad 589 (2): 69 Mad L J 184 and A I R 1937 All 435 and A I R 1955 Punj 193, Rel. on; A I R 1932 Lah 643 (2) and A I R 1933 Pat 461, Dist. **38 Mys L J 909 : ILR (1960) Mys 900 : A I R 1960 Mys 267 (269, 270, 271) (Pt A) (Prs 7, 8, 17) (DB).**

——S. 6 (g) — Requirements — Notice and not mere suspension is necessary — Evidence of intention to suspend payment and not mere declaration is necessary.

What the S. 6 (g), Provincial Insolvency Act requires is notice of suspension of payment. Therefore, mere suspension of payment will not suffice. There must be a notice of suspension, that is, a statement which is intended to give the creditor to understand that the debtor has in fact suspended payment. 12 Rang 150 and Mulla's Insolvency Act, p. 96, para 129, Foll.

Suspension of payment is something different from and over and above inability to pay. A statement by debtor to creditor that he is unable to pay does not by itself and without reference to context or circumstances amount to notice of suspension within the meaning of the section. Beyond a simple declaration there must be some evidence of intention to suspend payment that is to say, to abstain from paying his debts as they fall due. 39 Mad 250 and Mulla's Insolvency Act, p. 96, para 129, Foll. **1952 Nag L J (Notes) 19.**

——S. 6 (g)—"Suspended payment" — Suspension of whole indebtedness and payment to every creditor is meant—Refusal to pay disputed debt is not suspension.

The expression "suspension of payment" means the entire suspension of his whole indebtedness by a debtor and a general intention to stop payment to every creditor. A refusal to pay creditors whose debts are disputed is not a suspension of payment. 49 All 321, Foll. **1952 Nag L J (Notes) 19.**

——S. 6 (g) — Requirements — Proof of act must be strict — Notice of suspension alleged — Time, place and particulars must be specified.

The proof of commission of an act of insolvency must be strict and precise and where it is alleged that a debtor has given notice that he has suspended or is about to suspend payment of his debt the time, place and particulars of the notice must be specified. 11 Rang 96 (98) and 12 Rang 150, Foll. **1952 Nag L J (Notes) 19.**

——S. 6 (g)—Debtor's inability to pay debt — Communication to creditor—Act of insolvency—Test.

A communication of his inability to pay his debts made by a debtor to his creditor may be oral or in writing In order to decide the question whether such a communication amounts to an act of insolvency, the test is what effect would the statement of the debtor produce on the mind of the creditor receiving it as to the intention of the debtor with regard to the creditor taking into account the circumstances disclosed at the time. If the effect is that the debtor has suspended or is about to suspend payment it will amount to an act of insolvency. (1891) A C 316; (1934) 2 K B 769; (1905) A C 442, Rel. on; A I R 1937 Mad 13; 71 M L J 730, Rel. on.

A joint family firm consisted of father, sons and grandsons. When the creditors of the firm demanded payments of their debts at the firm Shop, one of the sons in the presence of the father stated that they had no money and the creditors could do what they liked.

Held, that the statement made by the son fell within S. 6 (g) and was an act of insolvency binding on the whole family. A I R 1937 All 435; AIR 1933 Pat 461; A I R 1934 Pat 526, Ref. **A I R 1955 Punj 193 (195 to 197) (Pt A) (Prs 18, 22, 26).**

[Reversed in A I R 1958 S C 999.]

——S. 6 (g)—Notice of suspension of payment.

A statement by the debtor in a prior insolvency proceeding that he had issued a notice to the creditors suspending payments of debts does not itself amount to any notice to the creditors that on the date of the statement the debtor has suspended or is about to suspend payment of his debts. 31 P L T 1095, Rel. on. **A I R 1953 Trav-Co 356 (357) (Pr 4) (DB).**

SECTION 6-A

——S. 6-A (Bom) — R. III-A, Cls. 9 (c) and 10 of Bombay High Court Rules — Scope and validity of— Do not extend time prescribed by S. 9 (1) (c)—Rules held intra vires.

Section 6 sets out the conduct or acts of a debtor which may be regarded as acts of insolvency. But the section does not purport to state at what point of time an act of insolvency shall be deemed to be committed. Section 6 (1) which has been added by the Bombay amending Act does not purport to set out the point of time at which the act of insolvency may be committed by reason of non compliance with insolvency notice. The High Court was therefore was competent to frame rules under S. 79 of the Act to prescribe a point of time at which an act of insolvency may be deemed to be committed by failure to comply with notice as contemplated by S. 6A (2). It is evident from the terms of S. 6 (1) and S. 6A (2) that the Legislature has not provided that on the expiry of the period specified in the notice an act of insolvency shall be deemed to be committed. See Provincial Insolvency Act (5 of 1920), S. 6. **A I R 1958 Bom 164 (DB).**

SECTION 7

——S. 7 — Ex parte order of adjudication — Setting aside of—Who can apply—(C. P. Code (1908), S. 141 and O. 9. R. 13)—(Madras Provincial Insolvency Rules (1922), R. 21). See Provincial Insolvency Act (1920), S. 5. **1958 Andh L T 925 : (1958) 2 Andh W R 316.**

——S. 7 — Ex parte order of adjudication — Setting aside of—Limitation—(Limitation Act (1908), Arts. 164 and 181).

To attract Art. 164 of the Limitation Act, the application must be to set aside a decree. Mere fact that O. 9, R. 13, read with S. 141, Civil P. C., is invoked would not necessarily bring that Article into operation. An order of adjudication as an insolvent does not amount to a decree. Nor does a combined reading of Ss. 12 and 18, Provincial Insolvency Act results in converting an order of adjudication into a decree. An application to set aside such order does not therefore attract Art. 164 of the Limitation Act.

But since the petition to set aside the order of adjudication is one taken out under the Code and since no other Article is applicable to it, Art. 181, Limitation Act will govern it. AIR 1932 Lah 522, Dissented from; AIR 1920 Lah 410, Rel. on. **(1958) 2 Andh W R 316 : 1958 Andh L T 925.**

——Ss. 7 and 11 — Insolvency petition by debtor — Banking company which is being wound up, one of the creditors—S. 45-B is not attracted — Proceedings under Ss. 15 to 18 of Kerala Act 31 of 1958 are akin to insolvency proceedings — Petition under S 15 should not be heard by High Court. See Banking Companies Act (1949), S. 45-B. **ILR (1961) 1 Ker 619.**

——Ss. 7, 9—Partnership Act (1932), S. 49—'Partner' when can petition for co-partner's adjudication.

There is nothing in law to preclude a partner from presenting a petition for adjudicating a co-partner insolvent in respect of a distinct debt for which an action might have been brought notwithstanding the partnership. It is only in cases where it would depend upon taking partnership account whether the sum was due or not or where a partner treats a debt due to him by his co-partner as mixed with the partnership accounts, that he cannot present a petition in respect of such debts.

Where a partner who had advanced moneys to his co-partner and took documents from him at every advance as though he (co-partner) were a debtor in respect of those amounts, a sum found due under those documents on account having been made up cannot be said to be an unliquidated sum. As the advances made were by agreement treated not as capital invested in the partnership business but as advance made as creditor, it is not open to the co-partner debtor to contend that the advances were unliquidated sums in respect of which no action can be taken by the creditor partner under the Insolvency Act. AIR 1943 Mad 766 and AIR 1955 All 352, Distinguished. **1963 Mad W N 609 : (1964) 1 Mad L J 99 : AIR 1964 Mad 106 (107, 108) (Pt A) (Prs 4, 5, 7).**

——S. 7 — Person heavily indebted executing partitions with brothers and sisters — Major portion of properties allotted to wives of debtor and his brothers in lieu of stridhanam alleged to have been brought by them—Property allotted to the debtor not shown to be sufficient to pay off his debts — His failure to make attempt to pay any of his several debts also indicating his incapacity to pay — Contention of debtor that he had not committed any act of insolvency is not sustainable — Order adjudicating him insolvent is correct. See Provincial Insolvency Act, (1920), S. 6. **(1962) 32 Com Cas 438 : 1961 Ker L J 658.**

——S. 7 — Joint Hindu family firm — Order of adjudication—Competency and effect of.

An order adjudicating a joint Hindu family firm as insolvent, is in effect an order adjudicating as insolvents those adult members of the family who had participated in the business of the firm. There is no legal impediment to the adjudication of a joint family firm, provided that no minor member is adjudged an insolvent and the other members as are alleged to have participated in the business of the firm had an opportunity to put forward their objections : 9 Mys L J 1; AIR 1941 Pat 596 and AIR 1937 Pat 455 and A I R 1931 Sind 179, Rel. on. **38 Mys L J 909 : ILR (1960) Mys 900 : AIR 1960 Mys 267 (271) (Pt B) (Pr 18) (DB).**

——S. 7—Joint Hindu family firm—Creditor's petition for adjudicating insolvent—Parties.

In a creditor's petition for adjudicating a joint Hindu family firm as insolvent which involves the adjudication of persons as insolvents, it is proper that the creditor should specifically name as respondents all those members of the ioint family who have participated in the business of the firm and are connected with the act of insolvency.

Ordinarily, it would be more appropriate that the Court before making an order of adjudication against the joint family firm should be in a position to know as to who are all the members of the family that have participated in the business of the firm and are connected with the act of insolvency. It is also proper that such members should have opportunity to put forward their objections, before the adjudication order is made.

Where the petition named only the Manager of the firm in the cause title as respondent and no notices were issued to the other members :

Held, that the order of adjudication so far as it affected the other members should be set aside. **38 Mys L J 909 : ILR (1960) Mys 900 : AIR 1960 Mys 267 (272) (Pt C) (Pr 20) (DB).**

——Ss. 7 and 2 (1) (a) — 'Creditor' and 'Debtor' — Adjudication — Joint Hindu Trading Family — All the members of the family when could be declared insolvent—'Debtor', meaning of—Act of insolvency by Karta of family business cannot be imputed to other coparceners — Difference between a partnership firm and joint Hindu trading family.

For the purposes of the Insolvency Act, nobody is a debtor unless he is personally liable for the debt; or, in other words, whether his separate or self-acquired property can be sold out to satisfy the debt; for, if that cannot be done, then, the necessary foundation for adjudication is lacking.

A joint Hindu family as such, as contradistinguished from a partnership firm, cannot be adjudicated insolvent and it is the individual members thereof alone who could be so declared. In order that members of a joint Hindu trading family other than the managing member may be lawfully adjudicated as insolvents, it must be proved not merely that the debts are owned by the family but that such other members have actively participated in the business of the family by actual conduct or otherwise, so that they may be held liable to personally satisfy the debts. Where, these conditions are not satisfied, it cannot but follow that the order adjudicating the members of such a family other than the managing member cannot be sustained in law for an act of insolvency of the manager of such business cannot be imputed to the other coparceners. AIR 1927 Mad 922 and AIR 1919 Mad 690 and AIR 1936 Mad 64 and AIR 1940 Mad 241, Followed.

There is an inherent difference between a partnership firm and a joint Hindu trading family. Where as a partnership firm arises from contract, a joint Hindu family business arises from status and hence while the interest of a partner in a firm is determined by contract, the rights and obligations of the coparceners, in a joint Hindu family business, are not governed by any contract but by the personal law by which they are governed. While the death of a partner would dissolve the partnership firm, joint Hindu family business cannot be dissolved by the death of a member of such a family. Consequently a joint Hindu family business cannot be called a partnership or a firm as regards the relations inter se of its members and unlike the partners of a firm, members of a joint Hindu trading family are not bound by the acts of the manager of the family. AIR 1936 Rang 160, Rel. on. **1964 Raj L W 161 : ILR (1964) 14 Raj 348 : AIR 1964 Raj 218 (219, 220) (Prs 6, 7, 8, 9, 10) (DB).**

——S. 7—Petition for adjudication—Debt as foundation — Requirements of Bankruptcy is essentially a proceeding 'in personam' and only a personal debt due by the insolvent can form the foundation of a petition for adjudication—Person appointed as administrator—Failure to pay amount—Nature of liability —Liability, if any, is in the nature of damages for breach of trust — It cannot be a debt for liquidated sum — And even if he is a debtor, his son cannot become a debtor—Therefore, adjudication cannot be founded on such a claim—(Civil P. C. (1908), S. 52). See Provincial Insolvency Act (5 of 1920), S. 9. AIR 1956 Trav-Co 88 (DB).

SECTION 8

——S. 8 — Adjudication of Partnership Firm—Court can pass an order under R. 28 of the Rules framed by the High Court under S. 79 (2) (c) of the Act, even though there is no specific provision in the Provincial Insolvency Act corresponding to Ss. 11 (d) and 99 of the P. T. Insolvency Act — Ss. 79 (2) (c) provides for rules being made by High Court as to procedure to be followed where the debtor is a firm. See Provincial Insolvency Act (5 of 1920), S. 79 (2). AIR 1964 Andh Pra 498.

SECTION 9

SYNOPSIS

(Provincial Insolvency Act (1920), S. 9.)

1. Scope and applicability.
2. Condition precedent for petition.
3. Act of insolvency.
4. Debt owing—Meaning of.
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10. Applicability of Limitation Act.
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12. Hindu joint family—Competency of petition against.
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1. Scope and applicability.

——S. 9 (1) (c) — Application by creditor for insolvency under S. 6 (b) — Debtor declared insolvent — Application by Official Receiver under S. 53 to annul alienation in favour of purchaser — Purchaser can show his bona fides — At the stage of declaring a person insolvent no notice is required by the Act to be served on the transferee or on creditors who have not applied—Nor is it necessary for the Court to go into question of bona fides of or consideration for the tranfer at the stage of adjudication—Decision under S. 6 does not act as res judicata : AIR 1956 All 68, Overruled. See Provincial Insolvency Act (5 of 1920), S. 6 (b). AIR 1965 All 80 (DB).

——S. 9—Petition by creditor for adjudging debtor insolvent —Court is not required to finally adjudge amount due by debtor to him but only to see whether debt owed by debtor exceeds Rs. 500. See Provincial Insolvency Act (5 of 1920), S. 6. AIR 1961 Madh-Pra 15 (DB).

——S. 9—Scope — S. 9 of the Provincial Insolvency Act and S. 235 of the Companies Act, 1913, are not in pari materia. See Companies Act (1913), S. 235. AIR 1955 NUC (Mad) 1824 (DB).

——S. 9—Debt alleged denied by debtor — Duty of Court—The Insolvency Court is to examine into the

existence of the debt and it cannot refer the debtor to another civil suit. See Provincial Insolvency Act (1920), S. 24. AIR 1954 Nag 33 (DB).

——S. 9—Scope—Petition for adjudication by debtor — Provisions of S. 10 should be complied with — Advantage of S. 6 (f) not available to a debtor. See Provincial Insolvency Act (1920), S 6 (f). 1960 Raj L W 623.

2. Condition precedent for petition.

——S. 9—Applicability—Condition precedent.

To enable the creditor to maintain a petition for insolvency of the debtor, the debt alleged to be owing to the creditor must have come into existence prior to the act of insolvency on which the petition is founded. The fact that while under the Presidency Towns Insolvency Act, adjudication relates back to the date of the act of insolvency, under the Provincial Insolvency Act, it relates back to the date of presentation of the petition, makes no difference in the application of the rule, that the debt should have been in existence on the date of the act of insolvency. 1957 Mad W N 722 : 70 Mad L W 986 : (1957) 2 Mad L J 582 : ILR (1958) Mad 405 : AIR 1958 Mad 379 (381) (Pt B) (Pr 10).

——Ss. 9 (1) (c) and 13 (2)—Requirements—Creditor applying must allege specific acts of insolvency — Petition not so alleging is incompetent.

The provision in S. 13 (2), Provincial Insolvency Act and S. 9 (1) (c) make it clear that a creditor's petition must allege the specific act of insolvency on which it is founded and the facts which constitute the act. It is not sufficient to make vague allegations and then endeavour by means of evidence to prove that some hitherto unspecified act of insolvency had been committed. If an act of insolvency is not set out in the petition the petition is incomplete. 50 Bom 624, 28 Bom L R 680, 119 I C 46 and 55 I C 186, Foll. 1952 Nag L J (Notes) 19.

——S. 9—Scope—Limitation—Provision as to limitation in the section is a condition precedent to the exercise of jurisdiction by the Court. See Land Acquisition Act (1894), S. 18. AIR 1958 Punj 490 (DB).

3. Act of insolvency.

— S 9 (g)—"Act of insolvency"—Mere declaration by debtor of inability to pay — Sufficiency — Test whether such declaration constitutes an "act of insolvency"—Proof required of creditor.

A mere declaration of inability to pay by the debtor does not of itself constitute an act of insolvency. S. 9 (g) contemplates that the debtor should not only not pay the debt but must convey the information to the creditor of his intention not to pay. The test whether a communication by debtor constitutes an act of insolvency being whether its effect is that the debtor has suspended his business or is about to suspend payment in which case it may amount to an act of insolvency. Further a creditor has to prove that the debtor was not merely refusing to pay any particular creditor but had declined to pay every one of the creditor or the creditors in a body. AIR 1936 Cal 269; AIR 1932 Lah 643; AIR 1934 Pat 526 and AIR 1955 Punj 193, Rel. on. 1963 All L J 28.

——S. 9—Debtor willing to pay particular creditor who insists on payment—No ground for not adjudicating him insolvent. When a person is adjudicated as insolvent it is not a particular debtor alone whose interests are to be protected by the Court but the entire body of his creditors, secured and unsecured. See Presidency-Towns Insolvency Act (1909), S. 12. AIR 1957 Mad 403 (DB).

—S. 9 (1) (c), Proviso (inserted by Insolvency Law Amendment Act (1950)).

An alleged act of insolvency committed before the coming into operation of the amendment on 21st February, 1950, but with reference to which a petition was not filed within three months, as the last day of the three months' period happened to be a holiday and so the petition was presented on the next working day, will not be an 'act of insolvency' for the purpose of that petition, which is pending after 21st February, 1950, and cannot be relied on for adjudicating a person an insolvent. AIR 1935 Mad 857; 69 M L J 283 (FB), Foll 1956 Mad W N 6 : (1956) 1 Mad L J 380 : AIR 1956 Mad 257 (258) (Pr 1).

——S. 9 — Transfer executed with a view to defeat claims of creditors—It is an act of insolvency affording cause of action to file a petition under S. 9. See Provincial Insolvency Act (5 of 1920), S. 6. AIR 1963 Mys 257.

——Ss. 9 (1) (c) and 13 (2) — Admissibility of evidence—Transfer not set out as act of insolvency—It can be used as evidence of payment as fraudulent preference alleged.

Where a transfer is not set out as an act of insolvency it cannot be received in evidence to show an act of insolvency but it can be used as evidence of payment to the transferee as fraudulent preference set out in the creditor's petition. 55 I C 185, Foll. 1952 Nag L J (Notes) 19.

4 Debt owing — Meaning of.

——S. 9 — Petition under — Amounts claimed as 'debts' exceeding pecuniary jurisdiction—Effect.

Where a petition under S. 9 is presented by a creditor setting out certain sums to be due from the debtor the petition need not be rejected on the ground that on the face of it, the debts alleged to be due exceeded the jurisdiction of the Court. The Court has the jurisdiction to enquire into the question as to whether what is claimed to be due by the petitioning creditor is or is not a debt as contemplated by S. 9. 1958 Nag L J 83 : 60 Bom L R 505 : ILR (1959) Bom 194.

——S. 9—'Debts' — Meaning of—Claim for refund of earnest money — Character of.

The essence of a debt is that it must be a sum certain which was due from one person to another and would, therefore, exclude a claim for money which arises solely upon the allegation of the breach of a contract. No doubt, the right to refund earnest money is a legal right and does not depend on any equitable consideration, but before being entitled to the refund of earnest money the buyer has to establish that a breach of a contract has been committed by the seller. Where a claim for the return of money is dependent upon the determination of the question as to who is in breach of the contract, it cannot be regarded as a debt within the meaning of the word in S. 9 until it has matured into a decree. 1958 Nag L J 83 : 60 Bom L R 505 : ILR (1959) Bom 194.

——S. 9 (1) (b) — 'Debt' — Meaning of — Claim for damages for breach of contracts relating to forward business — Not a debt.

A claim for damages for breach of contracts relating to forward business is not a debt within the meaning of S. 9 (1) (b) because a claim for damages does not amount to a debt unless the damages are ascertained by a Court. An application to adjudicate opponents as insolvents does not lie in such a case. AIR 1962 Guj 295 (296) (Pr 1).

——S. 9 — Promissory note or letter evidencing deposit — Letter by debtor to creditor — Letter held to be evidencing deposit and not pronote — (Stamp Act (1899), S. 2 (22)).

Held that the document was only a letter evidencing a deposit and was not a promissory note and that

the petitioning creditor was entitled to file an application for adjudicating V as an insolvent. The claim was not barred and the respondent was a creditor within the meaning of the Provincial Insolvency Act. See Negotiable Instruments Act (1881), S. 4. AIR 1955 NUC (Mad) 3942.

—Ss. 9, 7 — Petition for adjudication — Debt as foundation — Requirements of — Person appointed as administrator — Failure to pay amount — Nature of liability—Liability of legal representatives—(Civil P. C. (1908), S. 52).

Bankruptcy is essentially a proceeding 'in personam' and only a personal debt due by the insolvent form the foundation of a petition for adjudication. Such a debt must have come into existence before the act of insolvency. A debt on which the insolvency petition can be based must be one provable in insolvency or in other words it must be a subsisting debt due from the debtor on the date of the presentation of the petition. It must also be a liquidated sum payable either immediately or at some future time. Where a person appointed to administer the fund fails to pay it to the beneficiary, the liability, if any is one in the nature of damages for breach of trust. It cannot be a debt for liquidated sum. And even if he is a debtor, his son cannot become a debtor; for, a legal representative will become personally liable only in the circumstances provided for in S. 52, Civil P. C. Therefore adjudication cannot be founded on such a claim. AIR 1928 Mad 133 (1), Not approved; AIR 1927 Mad 922, Foll. ILR (1955) Trav-Co 1239: 1955 Ker L T 669: AIR 1956 Trav-Co 88 (88) (Pr 2) (DB).

—S. 9 — Travancore Insolvency Act (8 of 1108) — "Debt owing by debtor to creditor."

Where the secretary of co-operative Bank retained a certain amount with him without depositing it in the Bank and became liable under the by-laws of the Bank to make good that amount together with interest at a particular rate, the liability of the secretary arising under the bye law cannot be characterised as amounting to an embezzlement. Such an obligation can be enforced as a debt and can form the foundation of an application to adjudge the secretary as insolvent. Where the secretary has, by a document executed by him, owned and accepted the liability, the case is still stronger by the novation of the original liability. ILR (1954) T C 93: AIR 1954 Trav-Co 419 (421) (Pt B) (Pr 7) (DB).

5. "Liquidated sum."

—S. 9 (1) (b) — "Liquidated sum" — Mutual open and current account — No liquidated sum or ascertained sum, can be said to be due under such account — Words and Phrases — Mutual open and current account.

One of the conditions for the maintainability of an insolvency petition by the creditor is that the debt must be a liquidated sum. A sum can be said to be liquidated only if it is ascertained sum or one that can be immediately computed with certainty. In commission agency account which is admitted to be 'mutual open and current account,' it cannot be said that any ascertained sum or liquidated sum is due under that account. AIR 1935 All 53; AIR 1931 Cal 359; AIR 1960 Cal 285; AIR 1935 All 352; 1907 C R L 158: (1882) 28 E R 210, Rel. on. 1964 All L J 38.

—S. 9 (1) (b) — 'Liquidated sum' — Amount found due if accounts are taken.

A and B were carrying on joint business, one contributing the capital and the other labour. A applied under S. 9 (1) of the Provincial Insolvency Act. The amount which was alleged by A to be due by B was on account of profits earned by the business. It was alleged that a certain sum would be found due if the accounts prepared by B were examined and that as B had not paid up that sum he should be adjudged an insolvent.

Held, that the relationship between the two partners in business could not be said to be that of a creditor and a debtor and that the amount which may be found due on accounting cannot be said to be a liquidated sum within the meaning of S. 9 (1) (b). Case law referred 1955 All L J 52: 1955 All W R (HC) 174: AIR 1955 All 352 (353) (Prs 6, 8) (DB).

—S. 9 — 'Liquidated sum' — Claim for damages for non-performance of contract.

An essential condition for a creditor's petition is that the debt due to him must be a liquidated sum (i.e.), there must be a certain sum admittedly due and payable to the petitioning creditor. A claim for damages for non-performance of a contract of sale cannot ordinarily be within the meaning of a "liquidated sum" and such a claim cannot support a creditor's petition. AIR 1951 Madh B 115 (115) (Prs 5, 6).

—S. 9 (1) (b) — 'Liquidated sum' — Claim for refund of advance on breach of contract.

The fact that the cause of action which enabled the creditor to recover the debt was the same as the cause of action on which he could claim damages for breach of contract does not disentitle him from maintaining the petition under S. 9 (1) (b). The debt on the basis of which the creditor seeks the adjudication of the debtor is a liquidated sum within the meaning of that expression in S. 9 (1) (b). 70 Mad L W 986: 1957 Mad W N 722: (1957) 2 Mad L J 582: ILR (1958) Mad 405: AIR 1958 Mad 379 (380) (Pt A) (Pr 6).

6. Secured creditor — Who is.

—S. 9 (2) — Secured creditor, who is—Petition by secured creditor.

The definition of the term secured creditor has to be understood as confined to his capacity qua the secured debt and not comprehending his capacity as regards debts for which there is no security.

A creditor to whom the insolvent debtor owes secured as well as unsecured debts cannot be held to be a secured debtor qua the unsecured debts and is entitled to file a petition for insolvency without valuation of the security or its abandonment as contemplated by S. 9 (2). See Provincial Insolvency Act (1920), S. 2 (e). AIR 1954 Trav-Co 419.

7. Amendment of petition.

—S. 9—Amendment of petition.

If within three months from the act of insolvency a debt has been made ground of the petition, and it afterwards becomes desirable to add another party to the petition in respect of that debt, leave may be given to join that other party as a petitioner where it will not lead to any injustice.

Where on an application having been filed by A to adjudicate B as insolvent it was contended by the latter that the debt was due not to A in his individual capacity but it was really a partnership debt due to a firm of which A was only one of the partners and, thereupon an amendment was sought for more than three months after the act of insolvency to the effect that the petitioner may be described as the firm of which A was the managing partner.

Held, that the amendment should be allowed. ('50) 1950-2 Mad L J 761: A I R 1951 Mad 436 (437) (Pr 2).

—Ss. 9 (1) (c) and 13 (2) — Amendment — Act not set out as act of insolvency in creditor's petition — Amendment to include it cannot be allowed after more than 3 months from act of insolvency.

Where an amendment goes to the root of the petition and alters the substance of the act of insolvency alleged, the Court ought not to permit the amendment to be made if the effect would be that the amended petition would be represented more than three months after the date of act of insolvency alleged. Where the amendment seeks to add another act of insolvency not set out and seeks to do so long after three months from date of act of insolvency the amendment cannot be allowed. 22 Rang 150 (156), Foll. **1952 Nag L J (Notes) 19.**

8. Abatement of petition.

——S. 9—Abatement of application under.

Application under S. 9, Provincial Insolvency Act, was filed against, D by A, B and C, brothers, as proprietors of a joint Hindu family concern carrying on cloth business. B died and the application to bring his sons on record was rejected as made beyond time. The application under S. 9 was also held to have been abated as a whole. In appeal against the order by A and C.

Held, that the presumption of law was that the persons who are own brothers are members of a joint Hindu family. The mere fact that they are living and messing separately does not establish that they were separate in status. Separation in status comes about by proof of separate enjoyment of the income of the property. There was no evidence on record that the brothers were separate and the application was filed by A as manager of the joint family.

Further that even if the brothers were assumed to have been separate, A and C satisfied the requirements of S. 9 and could apply under it in their own rights. The application therefore did not abate by the death of B. AIR 1928 Pat 250 and AIR 1945 Oudh 50, Distinguished. **AIR 1954 All 449 (450) (Prs 3, 5, 6) (DB).**

9. Within three months.

——Ss. 9 (1) (c) and 6 (b) — Gift — Deed registered within three months before petition though executed beyond that period— Can be treated as act of insolvency — Transfer of Property Act (1882), S. 123— Registration Act (1908), Ss. 47 and 60.

A gift can be treated as an act of insolvency within three months of the presentation of the petition where the deed had been registered within that period although its execution itself took place beyond that period of time.

Reading together the provisions of S. 123 of the Transfer of Property Act with S. 6 (b) of the Provincial Insolvency Act and S. 47 of the Registration Act the only conclusion which can be drawn is that the material date cannot be the date of execution of the deed for acts of insolvency but would be the date of registration. 1947 A L J 408, Rel. on; AIR 1937 Rang 446, Not followed.

For the purposes of the act of insolvency under S. 6 (b) what is required is that the debtor makes a transfer of his property or any part thereof with intent to defeat the claims of the creditor. Section 123, T. P. Act requires that for the purpose of making a gift the transfer must be effected by a registered instrument. Hence it cannot be held that there is a distinction between a gift and a sale as an act of insolvency and that as a gift is irrevocable after its acceptance by the donee it must be deemed to operate as a transfer for the purposes of the Insolvency Act from the date of its execution or transfer of possession.

The date of execution cannot also be deemed to be date of registration by a reference to the fiction of law in S. 47, Registration Act. The reason of the fiction of law under S. 47 is that the document when it is registered would operate from the date of its execution as if no registration had been required by law and not that the date of registration would date back to the date of execution.

Similarly the date of presentation of the document for registration and its admission therefor cannot also be taken as the date of registration. When an act is completed by a series of acts the date of the performance of the act would be the date when the final act is performed and not the first act. A reference to S. 60 of the Registration Act shows that though a series of acts may have to be performed for registering a document yet the act of registration would mean the date when the certificate is actually made containing the word "registered" in the document. The admission of the document for the purposes of registration, which is the first act in the series, cannot therefore be taken as the date of registration. **1962 All L J 1101 : 1963 All W R (HC) 30.**

——Ss. 9 (1) (c), 53 and 54— Date of transfer is date of registration and not date of execution of transfer deed — Fiction of relation back does not apply— (Registration Act (1908), Ss. 47 and 75).

A creditor may present a petition to adjudicate a debtor as an insolvent under S. 9 of the Provincial Insolvency Act on the ground that the debtor made a fraudulent transter of his property within the meaning of S. 6 (c) of the Act. Similarly, an Official Receiver can present a petition for avoiding a transfer under S. 53 or for annulling a transfer under S. 54 of the Act. The fiction of relation back which is provided for under Ss. 47 and 75 of the Registration Act does not find a place in the Provincial Insolvency Act. Therefore the date of the transfer of property for purposes of Ss. 9 (1) (c), 53 and 54, is date on which the document of transfer is registered and not the date on which it was executed or the date when it was first presented for registration. AIR 1953 Mad 682, Dissented from; AIR 1933 Mad 185; 64 M L J 382, AIR 1934 Mad 637 (2) : 67 M L J 380; AIR 1938 Mad 801: (1938) 2 M L J 362; AIR 1935 Lah 565 (FB); AIR 1937 Nag 197; A I R 1938 Nag 454; AIR 1947 All 383; AIR 1944 Cal 370; AIR 1934 Rang 216; AIR 1937 Rang 446 (FB). Relied on. **(1961) 2 Andh W R 271 : 1961 Andh L T 974 : ILR (1962) Andh Pra 413 : AIR 1962 Andh Pra 226 (230, 231) (Pt B) (Prs 17, 18 (DB).**

—— S. 9 (1) (c)—Transfer in favour of one creditor — Registration after three weeks — Date of transfer — Transfer cannot be antedated by operation of S. 47 Registration Act for purposes of S. 54 of the Provincial Insolvency Act—Date of registration should be regarded as the date of transfer — Registration Act (1908), S. 47). See Provincial Insolvency Act (5 of 1920), S. 54. AIR 1957 Andh Pra 535.

——S. 9 (1) (c), Proviso — Cochin Insolvency Act (7 of 1098), S. 9 (1) (c) — Period of three months, for presenting insolvency petition, expiring during vacation — Presentation of petition on reopening day is in time—General Clauses Act (1897), S. 10.

Where the period of three months from the occurrence of an act of insolvency expired during a vacation, the presentation of an insolvency petition on the reopening day of Court was in time. A I R 1935 Mad 857, Dissented from; A I R 1942 All 429; A I R 1955 Trav.Co 2, Rel. on. Section 10 of the General Clauses Act provides the principle of construction of statutory computation of time, which has to be read into every statute to which it applies and according to to this provision the presentation of the petition on reopening day of Court is in time the period has expired during vacation. A I R 1961 SC 838, Rel. on. Moreover, the proviso to S. 9 (1) (c) of the Provincial Insolvency Act which section is identical in expression with S. 9 (1) (c) of the Cochin Insolvency Act, has clarified that such petition may be presented on

the day on which the Court re-opens. 1964 Ker L J 650 : 1964 Ker L T 443: ILR (1964) 2 Ker 386.

——S. 9 (1) (c) — Period of three months — Date of commencement—Act of insolvency based on transfer requiring registration—Period of three months to be reckoned from date of registration and not from date of execution.

The condition that a petition for adjudging a person insolvent should be filed within three months from the date when the act of insolvency on which the petition is grounded has occurred as a condition precedent. For purposes of S. 9, sub-s. (1), cl. (c) time is to be reckoned from the date of the registration of the transfer deed in a case where the Transfer of Property Act requires a registered instrument for the transfer which is alleged to constitute the act of insolvency and not from the date of its execution. R. A. No. 34 of 1939-40 decided by former Mysore High Court. AIR 1938 Cal 417. Dissented from; AIR 1947 All 383 and A I R 1944 Cal 370 and A I R 1954 Mys 189 and A I R 1933 Mad 185 and AIR 1934 Mad 637 (2) and (1938) 2 M L J 362 : A I R 1938 Mad 801 and A I R 1935 Lah 565 (FB) and A I R 1933 Lah 821 and A I R 1937 Nag 197 and A I R 1938 Nag 454 and (1961) 2 An W R 271 : A I R 1962 Andh Pra 226, Rel. on. 1963 Mys L J (Supp) 266 : A I R 1963 Mys 257 (258, (259) (Pt A) (Prs 4, 5).

——S. 9 (1) (c)—'Within three months'—Meaning of.

For an application by a creditor under S. 9, where the act of insolvency alleged against the debtor is the execution of a sale deed or other alienation which requires registration, the period of three months for presenting the petition for adjudication should be computed from the date of registration of the sale deed and not from the date of its execution If it is held that the period of three months provided under S. 9 begins to run from the date of execution and not from the date of registration of a sale deed that section can be easily rendered nugatory by the insolvent or the alienee merely deferring presentation of the document for registratson till the last day of the four months within which the document may normally be registered or to the eight months available under some special circumstances referred to in S. 24 of the Registration Act. Case law discussed. 34 Mys L J 107 : I L R (1955) Mys 98 : A I R 1954 Mys 189 (190, 191) (Pt A) (Prs 3, 5).

● ——S. 9 (1) (c), Proviso—Period prescribed in—Applicability of S. 4, Limitation Act, and S. 10, General Clauses Act—(Limitation Act (1908), S. 4)—(General Clauses Act (1897), S. 10).

The period prescribed in S. 9 (1) (c) is a period of limitation to which S. 4 of the Limitation Act as well as S. 10 of the General Clauses Act should be made to apply. K. Gopala Pillai v. S. P. Sankara Iyer, 1954 Ker L T 535 : AIR 1955 Trav-Co 2(2, 3) (Pr 1) (FB).

——S. 9—Act of insolvency within three months.

Even if a debtor has enough property by the sale of which his debts could be liquidated, that circumstance would not render the petition for his insolvency unsustainable or make it liable to be dismissed. The cause of action of a creditor, to whom he is owing an unsecured debt or a balance in a secured debt with insufficient security on its being valued or given up, of Rs. 500 or more, is complete on the commission of an act of insolvency by the debtor. See Provincial Insolvency Act (1920), S. 6. A I R 1954 Trav-Co 419 (DB).

10. Applicability of Limitation Act.

——S. 9 (1) (c) — Scope — Time prescribed by the section—Not extended by R. III-A, Cls. 9 (c) and 10 of Bombay High Court Rules. See Provincial Insolvency Act (1920), S. 6. AIR 1958 Bom 164 (DB).

——S. 9 (1) (c) — Application of S. 14 of Limitation Act—(Limitation Act (1908), S. 14).

Section 9 (1) (c) does not prescribe a period of limitation for presentation of a petition by a creditor for adjudication but sets out a condition precedent, and by applying the rule contained in S. 14 of the Limitation Act a petition filed after the expiry of three months cannot be made to conform to the strict requirement ot S. 9 (1) (c) of the Provincial Insolvency Act.

Held, that where the petition for adjudicating the respondent an insolvent was lodged in the Insolvency Court at Broach on 23rd April, 1951 which had no jurisdiction to entertain the petition the proceeding taken in the Insolvency Court at Borivli on 15th November, 1951 could not be regarded as an extension of the proceedings filed in the former Court, and the petition must be regarded as presented on 15th November 1951. The petition having been presented more than three months after the date on which the act of insolvency occurred it must be regarded as not complying with the requirement of S. 9 of the Provincial Insolvency Act. I L R (1956) Bom 748: 58 Bom L R 568 : AIR 1956 Bom 650 (652) (Prs 5, 6).

——S. 9 — Limitation — Court closed on last day — Application on re-opening day. See Companies Act, (1913), S. 235. AIR 1955 NUC (Mad) 1824 (DB).

——S. 9 —Mysore Insolvency Act (11 of 1925), Ss. 13 and 9 (1) (c)—Last date of three months' period from date of act of Insolvency falling during period of Court's vacation—Application under S. 13 filed on reopening date—Filing of an application under S. 13 is an "act" or at any rate a "proceeding" contemplated by S. 10 of Mysore General Clauses Act; that act or proceeding is allowed to be done in any Court within the period fixed under S. 9 (1) (c) — S. 10 of Mysore General Clauses Act applies in term to an application under S. 13 — Held, application was filed within period fixed by S. 9 (1) (c) — Limitation Act (1908), S. 4. See Mysore General Clauses Act (3 of 1899), S. 10. AIR 1962 Mys 197 (DB).

11. Petition for readjudication—Requirements.

——Ss. 9 and 40 — Petition for re-adjudication — Requirements.

When the statute is thoroughly silent as to the kind of requirements under S. 9 which are to be fulfilled in the case of original adjudication where the statute deals with re-adjudication, it is not for the Court by a process of judicial construction to indulge in anything like a legislative enlargement of the Act, on an application for re-adjudication after the annulment of the original adjudication on account of the failure of a composition scheme which intervened, it is not incumbent upon the petitioning creditors to satisfy the requirements of S. 9. (1947) 1 M L J 4, Disting. (1952) 2 Mad L J 681: 1952 Mad W N 839 : 65 Mad L W 1122: AIR 1953 Mad 375 (375) (Pr 2).

12. Hindu joint family—Competency of petition against.

——Ss. 9, 34—Joint family debt.

A person liable for debts merely on the ground that he is a member of a joint family and that the debts are payable by the joint family cannot be adjudicated insolvent for those debts, and those debts cannot be proved in his insolvency and will have only to be allowed for primarily in a partition suit brought by the purchasers of the other share or shares. But there are also undoubtedly circumstances which will make such a person personally liable for the debt, such as his being a member of a trading firm and holding himself out as a partner and the debts being contracted for that trade. There is no

need to wait then for a partition suit for allowing such debts which can be proved in the insolvency of the person who had made himself personally liable for the debts in addition to being liable for them from out of his share in the joint family properties. 17 Lah 644: A I R 1936 P C 277: 34 L W 781, A I R 1931 Mad 788, Ref. ('51) 64 MLW 438: (1951) 2 Mad L J 32: A I R 1952 Mad 504 (2) (508) (Pt D) (Pr 14) (DB).

—S. 9 — Hindu joint family — Debts incurred by Manager — Insolvency petition against whole family —Competency—Proof of liability of coparceners.

In the case of a joint Hindu family of which the father or manager is the head, the sons or other members are not personally liable for debts contracted by the father or manager and hence in order to support a single petition against the entire members constituting the joint family it must be shown that the debt on which the petition is founded is a joint debt for which all members are personally liable and that they have committed a joint act of insolvency. 1959 Nag L J (Notes) 128.

13. Partnership firm — Adjudication of partner of.

—S. 9 — Minor admitted to benefits of partnership becoming major after its dissolution—He cannot be adjudicated insolvent for acts of insolvency committed by major partners. See Partnership Act (1932), S. 30 (5). AIR 1965 S C 212.

——S. 9—Partner, when can petition for co-partner's adjudication.

There is nothing in law to preclude a partner from presenting a petition for adjudicating a co-partner insolvent in respect of a distinct debt for which an action might have been brought notwithstanding the partnership. It is only in cases where it would depend upon taking partnership account. whether the sum was due or not or where a partner treats a debt due to him by his co-partner as mixed with the partnership account that he cannot present a petition in respect of such debt See Provincial Insolvency Act (1920), S. 7. AIR 1964 Mad 106.

——S. 9—Petition for adjudication of a partner made by partner—Mortgage debt — Claim for a liquidated sum — Transaction impugned as an act of insolvency — Creditor receiving monies due to him under that transaction — When would be precluded from maintaining petition

There is nothing in law to preclude a partner from presenting a petition in his insolvency against a co-partner in respect of a distinct debt for which an action might have been brought notwithstanding the partnership. It is only in cases where it would depend upon taking partnership accounts to ascertain whether the sum was due or not or where a partner treats debts due to him by his co partner as mixed with the partnership accounts, he cannot present a petition in respect of such debt. Where for the advances made by one partner to another partner the parties used to take documents from the borrower as though he was a debtor in respect of those amounts, a debt evidenced by a mortgage would be liquidated sum under S. 9 of the Provincial Insolvency Act.

Where the creditor protested against the sale effected by the insolvent, the fact that the creditor received payments that were due to him under the mortgage from the vendee under the transaction which was impugned as an act of insolvency, would not preclude him from maintaining the petition for adjudication. It is only where a creditor assents to or is a party to the transaction or privy to or where he acquiesces in the conveyance that he cannot rely on the conveyance as an act of bankruptcy. (1964) 1 M L J 99 : 1963 Mad W N 609 : A I R 1964 Mad 106 (107, 108) (Pt A) (Prs 4, 5, 7).

—S. 9 (1) — Sale of property mortgaged by a co-partner as security for advances made to him independent of partnership business by his partner — Partner creditor not a consenting party to sale — Receipt of the amount due by partner creditor from out of sale proceeds does not estop him from relying upon the sale as an act of insolvency.

A partner in a firm made advances to his co-partner and every time took a document from him. Pursuant to this practice the co partner executed a mortgage of his property to the partner creditor. When accounts were taken of the advances it was found that the co-partner owed a large sum to his partner-creditor which sum was acknowledged by him by signing the pass book. While the partnership continued, the co partner debtor sold to third parties all his properties which he had mortgaged to the partner creditor. Alleging that though the properties were really worth merely Rs. 80,000, they were sold by the co-partner for Rs. 47,000 only with a view to defeat and delay his creditors, the partner creditor relying upon the sale as an act of insolvency filed a petition to adjudicate the co-partner an insolvent. The petition was opposed by the co-partner debtor on the ground that as the partner creditor had received and accepted whole amount due to him under the mortgage from out of the sale proceeds he was estopped from relying upon the sale as an act of insolvency.

Held, that it was only where a creditor assented in or was a party or privy to or where he acquiesced in the conveyance or assignment by his debtor that he was estopped from relying upon the conveyance or assignment as an act of insolvency and from filing a petition for adjudicating the debtor as insolvent and not otherwise. A I R 1924 Mad 839, Distinguished. (1964) 1 Mad L J 99 : 1963 Mad W N 609 : A I R 1964 Mad 106 (107) (Pt B) (Pr 6).

14. Adjudication order—Who can challenge.

——S. 9 — Debtor adjudged insolvent — Petitioning creditor applying under S. 53 for annulment of certain transfers by insolvent — Transferree cannot challenge order of adjudication on ground that petitioning creditor was not creditor of the insolvent — Once an order of adjudication has come to stay in the insolvency it is not open to any other person to challenge the order of adjudication. See Provincial Insolvency Act (5 of 1920), S. 6. AIR 1963 Bom 212.

15. Appeal.

——S. 9 — Right of appeal — 'Person aggrieved' — Who is.

The right of appeal under S. 75 of the Act is given not only to creditors but also to any person aggrieved by a decision come to or an order made in the exercise of insolvency jurisdiction See Provincial Insolvency Act (1920), S. 75. A I R 1958 Raj 223 (DB).

SECTION 10

——S. 10 —Condition precedent for filing insolvency petition by debtor -Prima facie proof of inability to pay debts essential — Omission to disclose full assets in petition—Petition not maintainable.

A substantial change was made in the law by the enactment of Provincial Insolvency Act of 1920, which for the first time made it a condition precedent, for a debtor to entitle him to present an application for being declared an insolvent, to prove, prima facie, that he is unable to pay his debts. It is only when the conditions prescribed under S. 10 of the Act have been fulfilled that a Court has no option but to admit him to the protection of the insolvency Court.

This condition was absent in the Act of 1907. A I R 1924 Pat 166, Rel. on. Unless the assets of the petitioner along with his liabilities, are fairly presented before the Court, for which a duty is cast on the petitioner under the law, it cannot be held that the Court is in a position to come to a finding on the question about his inability to pay his debts 1964 All L J 82 : AIR 1964 All 322 (323) (Prs 8, 9) (DB).

—S. 10 (2) — Applicability — Defective order of annualment —Review—Maintainability—Order without vesting properties of insolvent in Official Receiver — Review at instance of debtor to rectify defect lies.

Section 10 (2) of the Act which provides a specific remedy to a debtor in respect of whom an order of adjudication has been annulled and gives him permission to present other petition on the same facts, provided he has satisfied the Court that he was prevented, by any reasonable cause, from presenting or prosecuting his application cannot be applied to set aside an unconditional order of annulment passed earlier without providing for vesting of properties of the insolvent in Official Receiver. In such a case therefore the earlier order of annulment can be reviewed on debtor's application in order to rectify the defect therein. See Provincial Insolvency Act (1920), S. 5. AIR 1963 Andh Pra 52 (DB).

—S. 10 (2) — Order of annulment under S. 43 — Debtor should follow specific remedy under S 10 (2) — He cannot apply under S. 5 for setting aside the order of annulment and for extension of time for discharge — The intention of the Legislature is that in class of cases coming under S. 43, the special procedure referred to in S. 10 (2) should be followed and not the provisions of C P. C made applicable by S. 5. See Provincial Insolvency Act (5 of 1920), S. 5. AIR 1962 Andh Pra 262 (DB).

—S. 10 –Order of adjudication—Conditions for — Debtor satisfying requirement of S. 10 — Application cannot be dismissed on ground that it was not bona fide—Petition cannot be dismissed because salary was not disclosed — That the petitioner was harrassed by the creditors may by itself not warrant his being adjudicated an insolvent. See Provincial Insolvency Act (1920), S. 27. AIR 1957 Andh Pra 375.

—Ss. 10 and 24 — Preliminary inquiry—Scope—Power of Court.

During a preliminary enquiry the Insolvency Court has no power to enquire into the correctness of the particulars of the claim furnished under S. 13 (1) (d) and has no power to direct deletion of any of the items included in such particulars. Before making the order of adjudication, the Court has no power to enquire what debts are provable in insolvency. Such inquiry is made in the course of framing of the schedule of creditors under Ss. 33 and 34 after the order of adjudication is made. ILR (1957) 3 Cal 481 : AIR 1957 Cal 16 (16) (Prs 5, 6).

—S. 10 — Inability to pay debt—Proof—No elaborate enquiry contemplated — Applicant to make out prima facie case

Unless the debtor satisfies the court of his inability to pay his debts, his petition for insolvency must be dismissed under section 25 (a) of the Act. It is no doubt true that under section 10 read with the proviso to section 24 (1) (a) of the Act, for the purpose of proving his inability to pay his debts, the debtor is required to furnish only such proof as will satisfy the Court that there are prima facie grounds for believing the same, and the Court if and when so satisfied is not bound to hear any further evidence thereon. It is thus clear that at this stage an elaborate inquiry into the alleged inability of the applicant to pay his debts is not contemplated. At the same time it is necessary that the debtor must make out a prima facie case to the satisfaction of the Court as to his inability to pay his debts. The fact that the only property to which the petitioning debtor is entitled to is his share in the joint family property of which he cannot, under the Hindu law enforce partition during the life time of his father, is no ground for holding that the debtor has no property available for payment of his creditors. His interest in the property is alienable notwithstanding the restriction, and its value must be taken into consideration in determining whether he is unable to pay his debts. 1956 Madh B L J 923.

—S. 10—Debtor's petition for insolvency — Conditions satisfied—Court cannot refuse adjudication—Abuse of process, if any can be visited with consequences at time of application for discharge.

For adjudicating a debtor an insolvent, the court must see whether there is compliance with the provisions of S. 10 and whether the debtor has committed an act of insolvency. A debtor commits an act of insolvency even if the petitioner to be adjudged an insolvent under the provisions of the Act. Under S. 10 his debt must amount to Rs. 500 or he must be under arrest or imprisonment in execution of the decree of any court for the payment of money. When all the conditions specified under the Act are satisfied a debtor is entitled to an order of adjudication. The matter does not depend on the discretion of the court, but it is a statutory right of which he cannot be deprived by the court on the ground of abuse of process. There is a stage at which the court can visit on the petitioner its due consequences of misconduct, that is when the application for discharge comes before the court. At the time of the initiation of the proceedings, the court has only to be satisfied that the essential conditions for adjudication as provided under the Act are present. 44 Cal 535, Relied on.

The petitioner's petition for insolvency was rejected on the ground that the debt was fictitious. Subsequently the same creditor obtained a decree on that debt and in execution thereof arrested the petitioner. The petitioner came up with another application for adjudication but the court dismissed it on the ground that it was abuse of the process of the court

Held, that the petitioner was entitled to be adjudicated. (1966) 1 Mad L J 210 : 78 Mad L W 648.

—Ss 10 and 24—Petition by debtor under S. 10—Scope of inquiry—Evidence that may be adduced in such inquiry — Evidence regarding concealment of property by debtor—When can be adduced.

When a petition is made by a debtor under S. 10 for being adjudged insolvent, the debtor has, under proviso to S 24 (1), only to furnish such proof as to satisfy the Court that there are prima facie grounds for believing that he is unable to pay his debts and the Court, if and when so satisfied, is not bound to hear any further evidence. The creditors who have a right under S. 24 (2) to question the debtor as regards his conduct, dealings and property have no right to produce substantive evidence as regards the concealment of property by the debtor; it is only at the stage of making the order of discharge that the question as regards the concealment of property or the question of the debtor being guilty of any fraud or fraudulent breach of trust can be raised and it is only at that stage that the creditors are entitled to adduce evidence on these points AIR 1928 Pat 477, Foll. AIR 1961 Orissa 91 (91) (Pr 4).

—S. 10—Unable to pay his debts—Meaning.

The existence of assets may not be the criterion to determine whether one is able to pay the debts or unable to pay the debts. Even though a man may

own several assets, still he can be said to be unable to pay his debts if he cannot raise money by sale of those properties. The fact that the assets exceed the liabilities is colourless and will not disentitle the debtor to an order of adjudication.

Held, that the petition could not be dismissed merely because the petitioner failed to show that he was unable to pay his debts, especially when the only objection of the respondent was that the petitioner owned one-fifth share in the joint family property, without stating the value of that one-fifth share. AIR 1933 All 841, Not foll.; AIR 1928 Lah 202, Rel. on. **I L R (1958) Cut 126 : 24 Cut L T 167 : AIR 1958 Orissa 117 (118) (Pr 5).**

——S. 10 (1) (a) Proviso — Second application presented by debtor with leave — Court must without another inquiry order the debtor to be treated as insolvent on strength of previous order of adjudication itself—See Provincial Insolvency Act (5 of 1920), S. 24 (2). AIR 1964 Pat 521 (DB).

——Ss. 10 (1) (a), 13 (1) (d), 24—Petition by debtor —Procedure.

Under S. 10 (1) (a), the two conditions which must co-exist are: first, that the debtor is unable to pay his debts, and, secondly his debts amount to Rs. 500. These two conditions which are pre-requisite for presentation of an application for insolvency must be established in every case. On the failure of either, the debtor's application for insolvency must fail if his case is governed by S. 10 (1) (a). Mentioning only of the names of the creditors and amount of loan is not sufficient compliance with S. 13 (1) (d) of the Act. In order to determine whether the loans taken on the basis of the two handnotes were subsisting or not, or, when they would be barred by limitation, it was necessary to mention further the dates of the handnotes in order to enable the Court to find out whether the two handnotes really existed either in fact or in law. AIR 1933 Pat 43, Rel. on. **1958 B L J R 522 : AIR 1958 Pat 528 (528, 529, 530) (Prs 6, 7, 8, 10, 18).**

——S. 10—Insolvency petition by debtors pending in Insolvency Court — Creditor filing application under S. 6 in Debt Relief Court — Abatement of insolvency petition is legal—See Debt Laws—Rajasthan Relief of Agricultural Indebtedness Act (28 of 1957), S. 5. 1966 Raj LW 80 : ILR (1965) 15 Raj 1084.

——S. 10—'Unable to pay his debts'—Debtor owning share in property—Value of share though in excess of his liability not immediately realisable—Effect.

Although a debtor may have assets which, if liquidated would provide sufficient money to discharge his debts, yet if he has no liquidated assets with which to pay his debts at present he must be held not to be able to pay his debts and therefore liable to adjudication as an insolvent. AIR 1934 Lah 63 (1), Rel. on. Thus where the debtor owned one fourth share in a house along with three others and the value of his share was sufficient to liquidate his debts but the debtor could not alone sell away that property and it could not be said what exact amount that property will fetch on being sold that would not be sufficient to prove his ability to pay his debts. **A I R 1960 Raj 242 (243) (Pr 6).**

——S. 10 — Scope — Petition for adjudication by debtor— Provisions of S. 10 should be complied with —Advantage of S. 6 (f) is not available to a debtor. See Provincial Insolvency Act (1920), S. 6 (f). 1960 Raj L W 623.

——S. 10—Inability to pay debts— Test of — Liquid assets should be considered — Value of the property need not be considered.

In deciding a question whether a debtor is unable to pay his debts within the meaning of S. 10 the Court has primarily to consider the matter from the point of liquid assets. If the conditions are such thet he cannot realise his assets when he is called upon to pay his debts a debtor would be insolvent although the total value of the properties which may subsequently be found to be his as a result of a long and tedious litigation would be sufficient to discharge those debts. **AIR 1955 N U C (Trav-Co) 6006.**

SECTION 11

——S. 11—Scope—Have overriding effect—Winding up of Banking company —Execution proceedings by Liquidator against certified debtor — Pending such proceedings another creditor of such debtor initiating insolvency proceedings in another Court — Order of adjudication passed by such Court is null and void. See Banking Companies Act (1949), S. 45-A. AIR 1962 Andh Pra 17.

——S. 11—Insolvency petition by debtor — Banking Company which may be wound up, one of the creditors of the debtor — S. 45B of Banking Companies Act is not attracted — Proceedings under Ss. 15 to 18 of Kerala Act 31 of 1958 are akin to insolvency proceedings — Petition under S. 15 should not be heard by the High Court—See Banking Companies Act (1949),, S. 45-B. ILR (1961) 1 Ker 619.

——Ss. 11, 36—Two Courts having concurrent jurisdictton to entertain insolvency proceedings in respect of same debtor — Proceedings already taken up in one Court — Other Court also has jurisdiction to entertain proceedings initiated subsequently.

Where a debtor carried on business at two places in the event of proceedings having been already taken in the Insovency Court at one place proceedings for insolvency can be subsequently initiated at the other place as well. Both according to English and Indian Law, the proceedings for insolvency can concurrently go on in two Courts which may have jurisdiction to entertain them ; but it is always open to a party to apply to the Court either to annul its adjudication or stay all proceedings and the Court having regard to the fact as to where the property of the debtor can be more conveniently dealt with can pass such order as the exigency of the case may require. **1963 M P L J 884 : 1963 Jab L J 144 : A I R 1963 Madh Pra 228 (230) (Pt B) (Pr 15) (DB).**

— S. 11 — 'Carrying on business'.— Person doing leather business outside Madras coming to Madras often to sell and purchase leather and staying in Madras — Effect — He must be deemed to be carrying on business in Madras even though he had closed his business earlier and could be adjudicated as insolvent in Madras and also at V. under Provincial Insolvency Act for act of insolvency committed there. See Presidency-Towns Insolvency Act (1909), S. 11 (d). AIR 1957 Mad 403 (DB).

SECTION 13

——S. 13 (2)—Scope —Provisions mandatory—Word "shall" not used in the sense of "may"—Omission to furnish particulars in a creditor's petition renders it unmaintainable.

Provisions of S. 13 (2) of the Provincial Insolvency Act are mandatory. The word "shall" used in the section cannot be taken to have been used in the sense of 'may' and the non-compliance with the provisions of S. 13 would make the petition incompetent.

The Legislature while enacting S. 13 (2) of the Act could not have intended that any vagueness in the petition, which does not give sufficient particulars regarding the matters required to be given could be condoned. The mere fact that no penalty was provided for not giving particuiars is

only one of the criteria for judging the intention of the legislature. ILR 50 Bom 624 Rel. on.; A I R 1961 S C 751, AIR 1954 S C 210. A I R 1958 Orissa 260, A I R 1958 M P 168, A I R 1960 S C 444, Dist. 1963 All L J 28.

——S. 13 (1) (e) 22, 69 (a) (c) (ii)—Fraud— Party to fraud—Right to relief from Court — When denied — Insolvency proceedings —Fraud on creditors — Property saved from insolvency Court—Suit for possession against trespasser — Insolvent not disentitled to relief by reason of the fraud committed by him on his creditors in the insolvency proceedings — Forfeiture or extinction of insolvent's title is not one of the penalties mentioned in the Provincial Insolvency Act for an offence under S. 69 of that Act. (1961) 1 Andh W R 92 : 1961 Andh L T 483 : A I R 1961 Andh Pra 219 (222) (Pt A) (Prs 14, 15, 16) (DB).

—S. 13—Scope of inquiry — Prima facie evidence of inability to pay debts—Sufficiency. See Provincial Insolvency Act (1920), S. 24 (2), 1959 M P L J (Notes) 221.

—S. 13—Petition wrongly presented as one under S. 13, Provincial Insolvency Act — Petition should not be dismissed but got corrected. See Mysore Insolvency Act (XI of 1925), S. 13. A I R 1962 Mys 197 (DB).

——S 13—Mysore Insolvency Act (11 of 1925), Ss. 13 and 9 (1) (c)—Last date of three months' period from date of act of insolvency falling during period of Court's vacation —Application under S. 13, Mysore Act filed on reopening date — Held, application was filed within period fixed by S. 9 (1) (c) Mysore Act —Limitation Act (1908), S. 4. See Mysore General Clauses Act (3 of 1899), S. 10. A I R 1962 Mys 197 (DB).

——S. 13 — Amendment — Act not set out as act of insolvency in creditor's petition — Amendment to include it cannot be allowed after more than 3 months from act of insolvency. See Provincial Insolvency Act (1920), S. 9 (1). 1952 Nag L J (Notes) 19.

—S. 13 (1) (d) — Petition by debtor — Procedure to be followed — Mere mention by the debtor that he was unable to pay his debts and that his debts amounted to five hundred rupees was not legally sufficient for obtaining an order of adjudication— Mentioning only the names of creditors and amount of loan is not sufficient compliance with S. 13 (1) (d). See Provincial Insolvency Act (5 of 1920), S. 10 (1) (a). AIR 1958 Pat 528.

SECTION 14

——S. 14 — Scope and applicability — Withdrawal of insolvency petition before adjudication as a result of compromise among creditors — Order granting leave does not constitute res judicata so far as question whether compromise is beneficial to minors and binding on them — (Travancore Insolvency Act (8 of 1108), Ss. 4 and 14) — (Civil P. C. (1908), S. 11 and O. 32, R. 7). See Provincial Insolvency Act (5 of 1920), S. 4. AIR 1956 Trav-Co 27 (FB).

——S. 14 — Review — Error apparent on face of record—Court striking off petition without referring to S. 14—This is error apparent on the face of record and attracts application of O. 47, R. 1 — (Civil P. C. (1908), O 47, R. 1). See Provincial Insolvency Act (5 1920), S 5 (1). AIR 1955 Trav-Co 49 (DB).

SECTION 15

——Ss. 15, 28 (2) — Consolidation of insolvency petitions.

Under S. 15, Provincial Insolvency Act, the Court has power to consolidate separate petitions against the same debtor. The only limitation is that the section does not empower the Court to pass an order of consolidation on a petition in insolvency before it is admitted and before an opportunity had been afforded to the other parties concerned of showing that the petition is not competent. Prima facie, this section refers to consolidation of insolvency petitions after they are admitted and pre-supposes that such petitions are otherwise competent. This section also does not require that a formal order of consolidation should be passed because the language used is 'The Court may consolidate the proceedings or any of them on such terms as the Court thinks fit.' Express order is not necessary and can be inferred from the conduct of the proceedings. AIR 1933 Cal 651 and AIR 1930 Rang 265 (1), Distinguished. AIR 1956 Mad 157 (159) (Pt A) (Pr 7).

——Ss. 15, 18 —Consolidation of creditors' petitions.

Section 15 permits the Court to consolidate the creditors' petitions, before the order of adjudication under S 27 is passed. There is no impediment in the way of the debtor being heard on the point whether creditors are competent to file the applications, even after the applications are consolidated. AIR 1931 Sind 65, Dissented from. 1961 Raj L W 33 : ILR (1960) 10 Raj 1612.

SECTION 16

——S. 16 — Scope and object of — Debtor admitting inability to pay debts—Proof of insolvency — Necessity — Negotiable Instruments Act (26 of 1881), S. 118 (1) — Nature of presumption.

The object of S. 16 of the Provincial Insolvency Act is to serve as a check on the fraud of a creditor who has presented the application for insolvency and to prevent other creditors from being injured by the action of the former, who by reason of collusion or otherwise, may not diligently prosecute the petition and to give the other creditors the benefit of the date of the original petition, no matter how much later be the date of their own introduction into the case. This act of the petitioning creditor colluding with the proposed insolvent may happen at any time after the filing of the petition and if the petition happens to come for enquiry more than three months after the act of insolvency, it cannot be said that no new creditor can be substituted for the petitioning creditor and the purpose of the Act cannot be defeated by objecting to any new creditor coming on record. AIR 1934 Rang 87, Disting.; AIR 1932 All 147; AIR 1929 Rang 291; AIR 1928 Mad 608, Foll. Where the insolvent himself has pleaded that he is unable to pay his debts there is no purpose in closely scrutinising the acts of insolvency. AIR 1925 Mad 483, Rel. on. The presumption under S. 118 (1) of the Negotiable Instruments Act is only with regard to the passing of consideration. 1960 Andh L T 482 : (1960) 2 Andh W R 493 : AIR 1960 Andh Pra 600 (601) (Pt A) (Pr 7).

—S. 16 — Insolvency Court — Powers of review— Insolvency Court recording compromise between petitioner-creditor and debtor and dismissing petition — Court can review its order at instance of another creditor under its inherent powers as the earlier settlement between petitioning creditor and the debtor was substantially as abuse of the process of the Court. See Civil P. C. (1908), S. 151. AIR 1963 Mad 367.

——S. 16—Petitioning creditor not proceeding with insolvency petition with diligence—Another creditor — If can be allowed to proceed with the petition.

The requirements of S 16 of the Provincial Insolvency Act are satisfied when the first petitioning creditor withdraws the amount deposited by the insolvent towards the debt and does not proceed with the insolvency petition and where the consequent annulment of the adjudication would result in defeating all the other creditors. The petition presented by the first petitioning creditor must be held to enure for the benefit of all the creditors of the insolvent on

that date. Any other creditor whose debt exists on the date of the filing of the insolvency petition can be allowed to proceed with the insolvency petition as petitioning creditor. 1958 Mad W N 597 : (1958) 2 Mad L J 530.

——S. 16 — A applying for adjudication of B as insolvent — B depositing in Court amount claimed by A as due to him — Application dismissed — As per agreement between A and B amount deposited kept earmarked to meet debt of A if any — Money to be paid to A on his establishing his claim in suit and obtaining decree — Dismissal of application held was not due to any want of due diligence on A's part but was on merits. ILR (1945) Bom 734, Ref to. ('52) 1952 Mad W N 351 : 1952-2 Mad L J 148 : AIR 1953 Mad 993 (994) (Pt A) (Pr 4).

——Ss. 16 and 19 — Application for adiudicating debtor as insolvent—Application dismissed on basis of compromise — Proper procedure—Restoration of apolication under inherent power — (Civil P. C. (1908), S. 151).

Where, on the basis of a compromise between the petitioning creditor and the debtor, the petition adjudicating the debtor as insolvent was dismissed and it was further ordered that the sum of money which was deposited by the debtor in Court should be paid over to the petitioning creditor in case to be obtained a decree against the debtor and thereafter another creditor applied under S. 16 of the Act and S. 151 of the Civil P. C. to re-open the original petition and substitute him as the second petitioning creditor and allow him to continue the application for adjudication.

Held that the proper thing for the Court would have been to withhold the payment of the amount for a period in order to allow other creditors to come up and then adjudge their rights against the debtor. Such a procedure would alone have satisfied the principle or the policy and scheme underlying the Provincial Insolvency Act that the petitioning creditor acts not merely for himself but also on behalf of other creditors when once he files a petition to adjudicate debtors as insolvents.

Held further that this was a fit case where the ends of justice required that in the exercise of the powers vested in Court under S 151 of the Code, the original application should be ordered to be restored to file in order that the claims of the other creditors against the respondents could be considered and disposed of. ('52) 1952 Mad W N 351 : 1952-2 Mad L J 148 : AIR 1953 Mad 993 (994) (Pt C) (Pr 6).

——S. 16 — Scope — Right of creditor apply under O. 1, R. 10, Civil P. C., to be added as a party.

Since under S. 16, a creditor who is aggrieved by the conduct of the petitioning creditor can come by way of an application for being substituted and not for being added as an additional party resort cannot be had by him to the provisions of O. 1, R. 10, Civil P. C. See Provincial Insolvency Act (5 of 1920), S. 5. AIR 1951 Mad 665.

——S. 16—Substitution under—Conditions.

The substitution under S. 16 contemplates a petition that is alive and is not dead, a petition that is pending and has not been dismissed I L R (1954) Trav-Co 1042 : 1954 Ker L T 525: AIR 1955 Trav-Co 49 (50) (Pt A) (Pr 3) (DB).

——S. 16 — Applicability.

Where a petitioning creditor, who is a representative of the whole body of creditors, comes to an arrangement with the debtor and seeks not to prosecute his application any further, his action amounts to a failure to proceed with due diligence in the highest degree and S. 16 which permits substitution has to be invoked. ILR (1954) Trav-Co 1042 : 1954 Ker L T 525: AIR 1955 Trav-Co 49 (50) (Pt D) Pr 8) (DB).

SECTION 17

——Ss. 17 and 5 — Death of debtor during pendency of insolvency proceedings — Proceedings can continne for realisation and distribution of property — Provisions of Insolvengy Act are to be preferred to those under O. 22. Civil P. C — (Hyderabad Insolvency Act (8 of 1351F), Ss. 17 & 5).

Under S. 17 if a debtor by or against whom an insolvency petition has been presented dies the proceedings in the matter are to be, unless the Court otherwise orders, continued so far as may be necessary for the realiasation and distribution of the property of the debtor. In view of S. 5 of the Act the provisions of S 17 should be given preference over the provisions of O. 22, Civil P. C in the case of death of a debtor. The same rule applies if death of the debtor takes place after adjudication and the Court can continue all necessary proceedings subsequent to adjudication. Criterion for applicability of S. 17, Hyderabad Insolvency Act and O. 22 of Civil P. C stated. ILR (1952) Hyd 196 : AIR 1952 Hyd 80 (83, 87) (Pt A) (Prs 6, 20) (FB).

——S. 17 — Adjudication order after death of debtor.

Section 17 authorizes the Court by necessary implication to pass an adjudication order even after the death of the debtor. AIR 1944 Cal 370, Rel. on. 34 Mys L J 107 : ILR (1955) Mys 98 : AIR 1954 Mys 189 (192) (Pt B) (Pr 8).

——Ss. 17 and 37 — Death of insolvent — Court not passing any order for realization of property — Properties revert to debtor. ILR (1954) Mys 95 : AIR 1954 Mys 52 (53, 54) (Pt B) (Pr 3) (DB).

SECTION 18

——S 18 — Provincial Insolvency Act making adequate provision as to procedure — Civil P. C. will not apply — Civil P. C. (1908), O. 1, R. 10. See Provincial Insolvency Act (5 of 1920), S. 24. AIR 1957 Andh Pra 603.

——S. 18—Consolidation of creditors' petitions.

Section 15 permits the Court to consolidate the creditors' petitions before the order of adjudication under S. 27 is passed. There is no impediment in the way of the debtor being heard on the point whether creditors are competent to file the applications even after the applications are consolidated. AIR 1931 Sind 65, Dissented from. See Provincial Insolvency Act (1920), S. 15. 1961 Raj L W 33 : ILR (1960) 10 Raj 1612.

SECTION 19

——S. 19 — Provincial Insolvency Act making adequate provision as to procedure— Civil Procedure Code would not apply — Right of creditors to whom notice under S. 19 (2) is given to appear at and oppose the petition — (Civil Procedure Code (1908), O. 1, R. 10) — See Provincial Insolvency Act (5 of 1920), S 24. AIR 1957 Andh Pra 603.

——Ss. 19 and 24 — R. 21 (3) of Rules under Act — Notice to alienee — Absence of — Effect of validity of adjudiction.

There is no doubt that R. 21, sub-r. (3) framed under the Act is mandatory in its nature and the Court is bound to follow it. It does not however follow that the failure to issue the notice to the transferee necessarily vitiates the proceedings and renders it void The debtor on whom notice was served cannot be heard to urge the failure to serve the transferee as a ground in revision for invalidating the order of adjudication particularly so where the point regarding the failure to comply with the rule

was never urged by the debtor before the Insolvency Court or in appeal. 1956 Mad W N 939 (2) : 70 Mad L W 207 (2): AIR 1957 Mad 299 (299, 300) (Prs 3, 4).

—S. 19 (2)—Application for adjudicating debtor as insolvent — Court calling upon petitioning creditor to deposit charges and ordering notice to debtor — Publication of notification in Gazette also ordered — Notification appearing in Gazette — Debtor served — On date fixed for hearing Court giving time to creditors to appear and be heard — Requirements of S. 19 (2) held were complied with AIR 1915 Mad 589 and AIR 1917 Mad 203 and AIR 1950 Mad 386, Disting. ('52) 1952 Mad W N 351 : 1952-2 Mad L J 148: AIR 1953 Mad 993 (994) (Pt B) (Pr 5).

—S. 19 — Application for adjudicating debtor as insolvent — Application dismissed on basis of compromise—Proper procedure is to restore application under inherent power on petition of another creditor —(Civil P. C. (1908), S. 151). See Provincial Insolvency Act (1920), S. 16. AIR 1953 Mad 993.

—Ss. 19, 27, 79—(Madras) Civil Rules of Practice, R. 21, Cl. (3) — Adjudication without notice of petition on transferee of property—Validity.

An order of adjudication passed on a petition under S. 19 (1) without notice to the transferee of the properties of the insolvent, as required under R. 21, Cl. (3), (Madras) Civil Rules of Practice, is unsustainable. 1950 Mad W N 82 : (1950) 1 Mad L J 113 : AIR 1950 Mad 386 (386) (Pr 2).

—S. 19 (2)—Petition by creditor — Notice - Necessity — (High Court Rules and Orders — (Rajasthan) General Rules (Civil), R. 423).

Section 19 (2) applies to petitions both by creditors and by debtors and the notice has to be made in the manner prescribed in R. 423 of the General Rules (Civil) framed by the High Court of Rajasthan. This means that whether the petition is by a creditor or by a debtor, general notice as prescribed by that rule must always be given. Specific notice to individual creditors will only be given where the names and addresses of the individual creditors are known from any part of the petition. ILR (1958) 8 Raj 221 : AIR 1958 Raj 223 (225) (Pt B) (Pr 10) (DB).

SECTION 20

—Ss. 20, 28, 56 — Powers of interim receiver — Property, when vests in receiver.

Whatever may be the powers conferred on an interim Receiver the property of the debtor does not vest in him as it does in a Receiver appointed after adjudication under S 56 of the Act; in other words his appointment has not the same effect as the effect of the appointment of an Official Receiver after adjudication.

It is only after the adjudication that an insolvent can be said to have been divested of his property and it is only then and not otherwise that the property would vest in the receiver. But before adjudication, debtor continues to be the legal owner of the property. AIR 1964 Andh Pra 299 (302) (Pt B) (Pr 22) (DB).

—S. 20—Interim receiver appointed under S. 20 — Expenses incurred by him are not expenses of administration within S. 61 (3) — Priority cannot be claimed in respect thereof. See Provincial Insolvency Act (5 of 1920), S. 61 (3). AIR 1960 Andh Pra 53 (DB).

—S. 20—Interim Receiver — Vesting of property.

It is not correct to assume that by the appointment of an interim Receiver the property of the insolvent vests in the Receiver. Under S. 20, Provincial Insolvency Act, an interim Receiver has powers conferable on a Receiver appointed under the Code of Civil Procedure. The property of the debtor against whom an application for adjudication is made is not vested in the interim Receiver. Till the debtor is adjudicated an insolvent, the property continues to remain vested in the debtor. It is only when an order of adjudication is passed that the title of the Receiver in Insolvency relates back to the date of the application for adjudication. 56 Bom L R 1028 : ILR (1955) Bom 236 : AIR 1955 Bom 170 (171) (Pt A) (Pr 2).

●—S. 20—Interim Receiver — Powers of—Sale in execution of decree against insolvent — Interim Receiver directed by Court to take possession of insolvent debtor's property — He can apply under O. 21, R. 90, C. P. Code to set aside sale.

In a case where on an application made by a creditor to adjudicate his debtor an insolvent against whom a decree already obtained by another creditor is being executed by sale of his property, an interim Receiver is appointed under S. 20 of the Provincial Insolvency Act, subsequent to the date of the execution sale, as well as in a case where he has been appointed before, it is competent to the insolvency Court to clothe the Receiver with the authority to take proceedings under O. 21, R. 90, Civil P. C., to set aside the sale. Such authority can be given expressly or even impliedly and if such Court directs the interim Receiver to take charge of the property which had been sold (the sale not having been confirmed), he would have authority to institute all necessary proceedings to retain the property and thereby make the title of the debtor more perfect. ILR 34 Cal 305 and (1951) 2 M L J 506 ; AIR 1952 Mad 51, Rel. on ; AIR 1928 Mad 454, Foll ; (1942) 2 M L J 563 ; AIR 1943 Mad 199, Overruled. T. S. Sailappan v. Subbiah Pillai, 75 Mad L W 713 : (1962) 2 Mad L J 493 : ILR (1963) Mad 1 : 1962 Mad W N 716 : AIR 1963 Mad 156 (160) (Pt A) (Pr 15) (FB).

● —S. 20—Interim Receiver—Purpose in appointment of.

The appointment of the interim Receiver does not have the effect of vesting or transferring title in the property to him. The real purpose of such appointment is to preserve the assets of the debtor for the benefit of the general body of creditors, in case the main petition were to result in an adjudication of the debtor. After an adjudication, however, the property of the debtor will vest in the Official Receiver (under the provisions of the Provincial Insolvency Act) as and from the date of the presentation of the petition. T. S. Sailappan v. Subbiah Pillai, 75 Mad L W 713 : 1962 Mad W N 716 : (1962) 2 Mad L J 493 : ILR (1963) Mad 1 : AIR 1963 Mad 156 (157) (Pt B) (Pr 6) (FB).

—S. 20—Effect of appointment.

On the appointment of the interim receiver in the insolvency proceedings not only the general property of the insolvent but also contracts made by him which were outstanding vest in the receiver. ILR (1953) Nag 201 : AIR 1953 Nag 345 (348, 349) (Pt C) (Pr 23) (DB).

—S. 20—Insolvency of purchaser—Effect—Conduct of interim receiver and the plaintiff entitled defendants to treat the contract as abandoned by the plaintiff—Held that the insolvency was equivalent to a notice by the insolvent that he did not intend to perform his obligation — (Sale of Goods Act (1930), S. 32). See Contract Act (1872), S. 39. AIR 1953 Nag 345 (DB).

—S. 20 — Receiver's power to take possession of property not of the debtor.

Under the provisions of S. 20 the interim receiver has no authority to take possession of properties which were not admitted to be the properties of the

debtor firm. AIR 1955 Pat 413 (417) (Pt C) (Pr 14) (DB).

——Ss. 20, 28-A and 4 — Power to direct ad interim receiver to take possession of joint family property—(Hindu law — Joint family—Insolvency of Karta)—Presidency-Towns Insolvency Act (1909), Ss. 52 and 16.

In an undivided Hindu family governed by the Mitakshara law, the property of the family being joint, no member of the family can predicate which portion of it belongs to him. It is only on partition that a member of such a family is in a position to say as to which part of the joint family property belongs to him. Therefore, on the insolvency of a member of such a family the joint family property does not vest in the Court or the receiver, whatever power the receiver may exercise by virtue of the provisions of S. 28-A of the Act and S. 52 of the Presidency-Towns Insolvency Act to have the joint family properties sold to meet debts binding on the family. 52 I A 22 and AIR 1942 Mad 682 : (1942) 2 Mad L J 457, Followed.

Such being the position after adjudication of insolvency, the ad interim receiver appointed before adjudication cannot be given possession of the joint family property. By virtue of the provisions of S. 28A of the Act and S. 52 of the Presidency-Towns Insolvency Act certain power vests in the receiver by operation of law, but in the case of an ad interim receiver nothing vests in him by operation of law and he can take possession of only such properties as belong to the debtor. It would, therefore, be misapplication of the law to apply to the provisions of S. 20 the provisions of S. 28-A of the Act. An ad interim receiver cannot take physical possession of the disposing power of the karta or the manager of a joint family although such disposing power may vest in him by operation of law after adjudication of insolvency.

Nor can resort be had to S. 4 to give possession of the joint family property to the ad interim receiver because that would be to override the express provisions contained in S. 20 which permit the Court to appoint such receiver for the property of the debtor only and S. 4 cannot override the express provisions of S. 20. **1954 B L J R 260 : ILR 33 Pat 185 : AIR 1954 Pat 459 (462, 463) (Pt B) (Prs 5, 6, 7) (DB).**

——S. 20 — Parties to suit or their representatives—Executing Court passing order under S. 52 of Provincial Insolvency Act directing attached property to be delivered to interim receiver — Receiver appointed under S. 20 of Provincial Insolvency Act cannot be termed as representative of party within meaning of S. 47 — Order cannot be said to have determined question arising between parties to suit or their representatives — Appeal under S. 96 of Civil P. C. against such order not competent. See Civil P. C. (1908), S. 47. **ILR (1965) 2 Punj 212 : AIR 1966 Punj 479 (DB).**

——S. 20—Court appointing interim receiver to take steps to recover compensation money payable to judgment-debtor—Property does not vest in interim receiver — Neither the decree-holders are precluded from taking out attachment against that compensation nor executing Court is precluded from proceeding against the same.

An interim receiver appointed by the Court under S. 20 does not stand on the same footing as a receiver appointed at the time, or, after the order of adjudication under S. 28. Furthermore, such a receiver can have only such powers as the Court may confer upon him and which are conferrable on a receiver appointed under O. 40, R. 1, of the Civil P. C. that is to say, the property of the insolvent does not vest in such a receiver. It is only after his adjudication that an insolvent can be said to have been divested of his property and it is only then that his property would vest in the receiver but before that stage has reached, the debtor does and must continue to be the legal owner of the property : AIR 1926 Mad 432 and AIR 1931 Pat 70 and AIR 1964 Andh Pra 299, Foll. Therefore where an interim receiver was appointed by the Insolvency Court, under S. 20, for taking steps to recover the compensation money payable to the judgment-debtors, neither the decree-holders were precluded from taking out attachment against the compensation money of the judgment-debtor, nor the executing Court was in any manner precluded from proceeding in execution against the same. **1965 Raj L W 160 : ILR (1965) 15 Raj 488 : AIR 1965 Raj 188 (190) (Pt A) (Prs 9, 14, 15) (DB).**

——S. 20 — Jurisdiction to enquire into validity of claim of third party prior to adjudication—Interim receiver taking possession of insolvent's property as per direction of Court—Claim of title to it preferred by third party — Insolvency Court has jurisdiction to conduct a summary inquiry as to the sustainability of the claim even prior to passing of adjudication order —Order passed however is not final and conclusive as between parties to it. See Provincial Insolvency Act (5 of 1920), S. 4. **AIR 1953 Trav-Co 266 (DB).**

SECTION 21

——S. 21 (2)—Power of attachment—Nature of—Objector can question attachment even prior to adjudication.

The powers of attachment under S. 21 (2) are somewhat analogous to powers of ordinary Civil Courts with reference to suits under O. 38, R. 5. The power of attachment under S. 21 (2) is confined to the property of the insolvent which is either in his possession or under his control. When, therefore, the objector third party claims exclusive possession and not through the insolvent, the question concerns the jurisdiction of the Court to attach and has to be determined summarily apart from the question as to insolvent's title. The latter question can be examined under S. 4 after adjudication. It is competent therefore for an objector to question the attachment even at a stage prior to adjudication by contending that the property when attached was not in the possession or under the control of the insolvent but had properly passed on him and was under his control. AIR 1938 Cal 182 and AIR 1939 Nag 10, Rel. on. **1964 Jab L J 131 : 1962 M P L J (Notes) 285 : 1962 M P C 457 : AIR 1962 Madh Pra 354 (356) (Pt A) (Prs 7, 8).**

——S. 21 (2)—Attachment of property under S. 21 (2) —Objection to — Objector claiming title on alleged transfer—Decision as to validity of transfer — Proper stage. See Provincial Insolvency Act (1920), S. 4. **AIR 1962 Madh Pra 354.**

——S. 21 — Jurisdiction to enquire into validity of claim of third party prior to adjudication—Insolvency Court has jurisdiction to conduct summary inquiry into the matter prior to passing of adjudication order —Order passed at such inquiry however, is not final and conclusive between parties to it. See Provincial Insolvency Act (5 of 1920), S. 4. **AIR 1953 Trav-Co 266 (DB).**

SECTION 22

——S. 22—Party to fraud—Right to relief from Court —When denied—Insolvency proceedings—Fraud on creditors — Property saved from insolvency Court — Suit for possession against trespasser — Insolvent not disentitled to relief—Forfeiture or extinction of title of the insolvent is not one of the penalties mentioned in the Act for an offence under S. 69. **A I R 1961 Andh Pra 219 (DB).**

—S. 22—Production of debtor's account books.

Where the creditor's petitions are admitted the Court may ask the debtor to produce his books of account. But where the debtor strenuously contests the right of the creditors to present the applications and alleges that he has not committed any act of insolvency, it is not proper to ask him to produce his books without first deciding the contentions of the debtor.

If while deciding the matter under S. 27 of the Act the Judge thinks it necessary to examine the debtor's books of account, he is free to make such a direction giving his reasons for the same. 1961 Raj L W 33 : ILR (1960) 10 Raj 1612.

SECTION 23

—S. 23 — Interim protection from arrest in execution of decree against debtor pending his application for adjudication — Inherent power—Refusal to grant protection — Not revisable either under S. 115, Civil P. C. or Art. 227 of the Constitution. See Provincial Insolvency Act (1920), S. 5. 1961 Ker L J 1272.

—S. 23 (1)—Default by husband to pay maintenance — Magistrate's power to order imprisonment not barred by order of protection by Insolvency Court where the husband has failed without sufficient cause to pay his wife the maintenance ordered by the Court. See Criminal P. C. (1898), S. 488 (3). 1965 (1) Cri L J 186 : A I R 1965 Mad 77.

—S. 23 — Applicability — Maintenance order in favour of wife of insolvent under S. 488, Criminal P. C. —Enforcement of, by imprisonment of husband—Insolvency petition by him—Release of husband—Jurisdiction and power of Insolvency Court.

Section 44 of the Act indicates that the Legislature has maintained a clear distinction as between a liability under and order of maintenance made under S. 488, Criminal P. C. and other classes of debts in respect of which protection is afforded under the provisions of the Act. The order under S. 488, Criminal P. C., cannot be deemed to be a decree of Court. Clause (1) of S. 23 cannot therefore, be invoked by the husband when the order is enforced by imprisonment.

The Insolvency Court has no jurisdiction to pass a protection order against such imprisonment and direct release of the prisoner even though the Court is competent to entertain his insolvency petition and to pass an order adjudicating him insolvent. See Criminal P. C. (1898), S. 488 (3). 1957 Cri L J 392 : AIR 1957 Trav-Co 49 (DB).

SECTION 24

SYNOPSIS

(Provincial Insolvency Act (1920), S. 24.)

1. Scope of inquiry under.
2. Powers of Insolvency Court.
3. Inability to pay debts—Proviso to sub-sec. (1) (a).
4. Examination of debtor—Sub-sec. (2).
5. Sufficient cause—Sub-section (3).
6. Miscellaneous.

1. Scope of inquiry under.

—Ss. 24, 4 and 33—Powers of head of department under S. 4 of Patiala Recovery of State Dues Act — Scope — He can determine not only amount of debt due but also whether alleged defaulter is defaulter or not — Insolvency Court not precluded by S. 11 of Patiala Recovery of State Dues Act from going into question whether alleged debtor was really debtor and liable to pay — Jurisdiction and power of Insolvency Court — Insolvency Court can reopen the transaction on the basis of which the creditor has secured the judgment both at the time of hearing adjudication petition and at the stage of proof of debts. 61 Pun L R 753, Reversed. See Patiala Recovery of State Dues Act (4 of 2002 B K), S. 4. A I R 1964 S C 1223.

—Ss. 24 and 5 and 18 — Civil P. C. (1908), O. 1, R. 10 — Provincial Insolvency Act making adequate provision as to procedure - Civil P. C., will not apply.

Under S. 24, the creditors to whom notice is given as provided under S. 19 (2) are entitled to appear at the hearing of the petition and oppose the maintainability of the insolvency petition by creditor, or a debtor. They are entitled to adduce evidence and satisfy the Court that the provisions of S. 9 or 10 of the Act are not complied with and that the insolvency petition should be dismissed under S. 25. As under the provisions of the Provincial Insolvency Act it is open to the creditor to whom notice has been issued to prove that the applicant creditor is not a creditor of the debtor and that the insolvency petition is engineered by the debtor only with a view to defeat and delay his rights, it is not necessary to add him as a party under the terms of O. 1, R. 10, Civil P. C., when the Provincial Insolvency Act itself has made adequate provision, the provisions of the Code of Civil Procedure will not apply. A I R 1936 Lah 499, Foll. 1956 Andh L T 125 : 1956 Andh W R 30 : A I R 1957 Andh Pra 603 (604) (Prs 2, 3).

—S. 24—Preliminary inquiry—Scope of - No power to enquire into the correctness of the particulars of the claims furnished under S. 13 (1) (d) and has no power to direct deletion of any of the items included in such particulars. See Provincial Insolvency Act (1920), S. 10. A I R 1957 Cal 16.

—S. 24 (1) (a), Proviso—Scope—Petition by debtor for adjudication on ground of inability to pay debts —Scope of enquiry — Court is bound to inquire into genuineness of all debts enumerated in the petition —Prima facie case—If sufficient.

When a debtor applies to get himself adjudicated an insolvent alleging that he is unable to pay his debts mentioning the names of creditors to whom he owes debts and also deposes in the witness box that he is unable to pay the debts mentioned in his application, all that the Court has to do is to see whether he has made out a prima facie case. His petition stating that he is unable to pay his debts can itself be treated as an act of insolvency and it is not necessary for him to prove each and every debt mentioned by him. Where further a creditor who has obtained a decree is taking execution by way of arrest and the petition for adjudication is filed at that stage and there is no evidence to prove that he possessed any property sufficient to discharge the debts a prima facie case must be held to be made out and he should be adjudicated. A I R 1926 Mad 494, Followed. (1964) 1 Mad L J 261.

—S. 24—Petition by debtor under S. 10—Scope of inquiry — Evidence that may be adduced at such inquiry — Evidence regarding concealment of property by debtor—When can be adduced — It is only at the time of order of discharge that such question can be raised and it is only at that stage that the creditors are entitled to adduce evidence on the point. See Provincial Insolvency Act (1920), S. 10. A I R 1961 Orissa 91.

—S. 24 (1), Proviso—Application by debtor—Court cannot hold elaborate enquiry into question of debtor's inability to pay debt — Dismissal of application on the ground that debtor had made fraudulent transfers and purchased property benami is erroneous. AIR 1937 Pat 134, Rel. on. A I R 1964 Pat 521 (522) (Pt B) (Pr 4) (DB).

—S. 24—Scope of inquiry—Question of benami.

Ordinarily, the question of benami cannot be and should not be gone into a proceeding for adjudi-

cating the debtor as insolvent; nonetheless it does not debar a Court from looking into the conduct of the debtor and to see as to whether really he is in a position not to pay the debts as alleged by him. While coming to this satisfaction on prima facie evidence, the Court can look into the attending circumstances and the conduct of the debtor. It is not a case of going into the question of benami nature of the transaction if from the answers given by the debtor in cross-examination the Court comes to the conclusion that the debtor purported to bring into existence a sale deed transferring his half share in the ancestral house in favour of his younger brother in order to defraud the creditors. **1960 B L J R 442 : A I R 1960 Pat 522 (522) (Pr 3).**

——S. 24 — Scope — Summary enquiry under S. 24, has nothing to do with S. 4 which ordinarily comes into play after adjudication in disputes between receiver representing debtor's estate and creditors. See Provincial Insolvency Act (1920), S. 4. **A I R 1955 Pat 413 (DB).**

2. Powers of Insolvency Court.

——**Ss. 24, 25 and 9—Duty of Court.**

Where a debt is alleged and it is denied by a debtor the duty of the insolvency Court is to examine into the existence of the debt. It cannot refer the creditor to another civil suit.

Under the Insolvency Act the Court has power to enquire into the genuineness of the debts denied by the debtor, and that power extends to judgment debts also. The enquiry may be made at the instance of the Official Receiver or the debtor himself. This does not, however, mean that the Court is bound to enquire into the allegations of the debtor in every case. There may be a case in which the debt was contested in a regular suit and upheld. The debtor in such a case cannot ask the insolvency Court to re-investigate the matter on the same allegations. **1953 Nag L J 480 : ILR (1953) Nag 625 : AIR 1954 Nag 33 (34, 35) (Prs 10, 16) (DB).**

——S. 24—Second appeal—Maintainability—Creditor's application — Insolvency Court, finding question to be complicated, referring parties to civil Court and keeping petition pending in the meanwhile — First appeal against order not successful — No second appeal lies to High Court. See Provincial Insolvency Act (1920), S. 75. **AIR 1953 Nag 189 (DB).**

——**Ss. 24 and 25 — Power of insolvency Court to refer complicated questions to Civil Court.**

Having regard to the entire scheme of the Act and the fact that all matters are open for determination by the Insolvency Court and there is no provision for trial of any issue by a regular suit (as there is in the Presidency Towns Insolvency Act or the English Bankruptcy Act) the insolvency Court has no option but to try all the matters. Further, the insolvency Court has to determine whether the creditor's application is proper or not and to dismiss it if it is not; and for this purpose the inquiry, though summary, has to be made. Insolvency Court cannot leave the matter suspended for years and refer the applicant to a regular suit if it finds that complicated pleas of law and facts are involved. Such is not the intention to be gathered from the Act as a whole. AIR 1935 Bom 80, Dissented from, A I R 1941 Mad 895, Foll. Case law referred. **1953 Nag L J 246 : I L R (1953) Nag 608 : A I R 1953 Nag 189 (191) (Pt B) (Pr 15) (DB).**

——**S. 24 (1) (a) — Insolvency petition by debtor — Petition contested by creditor—Duty of Court.**

In a case where a debtor's application for being adjudged an insolvent is not contested by the creditors and the Judge is satisfied that the debtor is unable to pay his debts, he need not hear further evidence. But where the debtor's application is contested by the creditors then it is not proper for the Judge to ride roughshod over the rights of the creditors and say that he is satisfied from the debtor's statement alone about his inability to pay his debts and that he is not going to hear the creditors or entertain their evidence on that point. It is true that he need not make an elaborate or searching enquiry at this stage, but he must give hearing and equal opportunity to both the parties. AIR 1933 Pat 43 and AIR 1936 Rang. 108, Rel. on. **ILR (1957) 7 Raj 287 : 1958 Raj L W 111 : AIR 1957 Raj 354 (335) (Pr 4).**

3. Inability to pay debts — Proviso to sub-sec. (1) (a).

——S. 24 (1) (a), Proviso—Application by debtor for being declared insolvent — Mere filing of the application will not preclude Court from examining whether application is bona fide or it has been filed with the ulterior purpose of running away from liability for payment of the debts. AIR 1936 Pat 18 (FB) and AIR 1921 Pat 315, Rel. on. **AIR 1964 Pat 521 (522) (Pt A) (Pr 4) (DB).**

——S. 24—Petition by debtor — Procedure to be followed—Where the Court below has simply relied on the evidence of the debtor who repeated in his evidence what he had said in the petition that was not sufficient to discharge his obligation envisaged by the proviso to S. 24 (1) (a) and S. 24 (1) (a) of the Act to satisfy that the conditions precedent for presenting insolvency application as required by S. 10 (1) (a) had been complied with. See Provincial Insolvency Act (5 of 1920), S. 10 (1) (a). **AIR 1958 Pat 528.**

——**S. 24—Application for adjudication by debtor—His inability to pay off debts disputed by creditors—Court should afford opportunity to parties to produce evidence.**

Where the creditors contested the debtor's right to present the application for adjudication and also alleged that he was in possession of sufficient property to liquidate his debts, it is incumbent upon the Court not only to examine the debtor but also to afford an opportunity to the creditors to question the debtor on the matters regarding his conduct, dealings and property. The Court should also give fair time to the parties to produce their evidence. **1960 Raj L W 623.**

4. Examination of debtor—Sub-sec. (2).

——**Ss. 24 (2), 13—Scope—Prima facie evidence of inability—Sufficiency — Enquiry about concealment of property—Propriety.**

The insolvency Court dismissed the debtor's application under S. 13 of the Provincial Insolvency Act for being adjudged as insolvent, holding that he had suppressed a house and ornaments from the list of his properties, which were sufficient to discharge the debts due by him. The order was approved by single Judge in appeal.

Held, that a debtor is not entitled to present an insolvency petition unless he is unable to pay his debts and the Court under S. 24 (2) is required to examine him, if he is present as to his conduct, dealings and property. However, he has to tender only prima facie evidence as regards his inability to pay the debts: AIR 1928 Nag 226, Foll. The enquiry that is contemplated under S. 24 (2) of the Act is only to obtain information at as early a stage as possible of the property and the conduct of the debtor in relation to the insolvency proceedings but such an enquiry is not essential for deciding whether a debtor should be adjudged as insolvent. AIR 1937 Nag 226, Rel. on. At that stage, therefore, it is not for

the Insolvency Court to decide whether the petitioner has not concealed any property from his list of assets from which he can pay his debts. (ILR 36 Mad 402, Rel. on). 1959 M P L J (Notes) 221.

——Ss. 24 (2) and 10 (2) — Second application presented by debtor with leave — Court has to treat debtor as insolvent on strength of previous order.

Where the debtor with the permission of Court presents a second application for adjudication after the annulment of the previous order of adjudication the Court must without another enquiry order the debtor to be treated as an insolvent on the strength of the previous order of adjudication itself. AIR 1937 Pesh 85 (1), Rel. on. Section 10 (2) lays down that the permission to present another application for adjudication as insolvent will be entertainable when the Court is satisfied that the petitioner by any reasonable cause was not able to prosecute his application for discharge which resulted in the annulment of the adjudication or when he has presented fresh facts substantially different from those contained in the petition on which the order of adjudication was made. The effect of this provision is to put such proceedings on the same footing as O. 9, Rr. 9 and 13 of the Code of Civil Procedure. If it were to be held otherwise and if an enquiry were permitted to be made by the Court on the second occasion which might go against the conclusion recorded in the proceeding resulting in the order of adjudication, the entire object of clause (2) of S. 10 would be defeated. Where the petition is founded on facts substantially different from those in the previous petition, it will be proper for the Court to embark upon fresh enquiry. AIR 1964 Pat 521 (524) (Pt C) (Pr 6) (DB).

——S. 24 (2)—Provision as to—Examination of debtor under—Is mandatory in nature—Examination cannot be dispensed with — Non-compliance with it will vitiate the order of adjudication. AIR 1955 N U C (Sau) 4688.

5. Sufficient cause—Sub-section (3).

——S. 24 (3)—"Sufficient cause"—Lower Court holding no sufficient cause as required by S. 24 (3)—Finding is one of fact and binding. A I R 1955 N U C (Ajmer) 774.

6. Miscellaneous.

——S. 24 — Debtor adjudged insolvent — Petitioning creditor applying under S. 53 for annulment of certain transfers by insolvent — Transferee cannot challenge order of adjudication on ground that petitioning creditor was not creditor of the insolvent. See Provincial Insolvency Act (5 of 1920), S. 6. AIR 1963 Bom 212.

——S. 24—R. 21 (3) of Rules framed under Act — Notice to alienee—Absence of — Effect on validity of adjudication. Failure to conform to the Rule would merely render the resultant order of adjudication irregularly passed which could be set aside at the instance of party aggrieved by want of notice. See Provincial Insolvency Act (1920), S. 19. A I R 1957 Mad 299.

——S. 24—Decision of District Judge that transfer is fraudulent and allowing insolvency petition — Decision is not binding on a vendee who was not a party to the proceedings. See Provincial Insolvency Act (1920), S. 53. AIR 1960 Punj 24.

SECTION 25

——S. 25—Ability to pay debts.

Held, that the finding of the Courts below that the debtor might have had slightly more assets than liabilities was not only not correct but was not even a very relevant circumstance to be taken into account while deciding whether the debtor was able to pay his debts. 34 Mys L J 107 : I L R (1955) Mys 98 : AIR 1954 Mys 189 (192) (Pt C) (Pr 7).

——Ss. 25 and 75 — Second appeal and revision — (Mysore Insolvency Act (14 of 1925), Ss. 25 and 75).

No second appeal lies against an order passed under S. 25. The High Court may, however, in certain circumstances treat the second appeal as revision and examine the order of the District Judge and determine about its legality and correctness. AIR 1936 Rang 26; A I R 1931 Mad 745 and A I R 1934 Lah 807 (1), Foll. I L R (1953) Mys 566 : 32 Mys L J 95 : AIR 1954 Mys 133 (134) (Pr 3).

——S. 25—'Sufficient cause' — Registered agreement under S. 12(2), C. P. and Berar Debt Conciliation Act subsisting — Creditor subsequently obtaining decree against debtor—Decree cannot be executed till instalments on debts due to other creditors are paid—Petition by creditor under S. 9—Debtors adjudged insolvents—Held, that was not data to adjudge them insolvents—There was held sufficient cause for dismissing petition under S. 25 — C. P. and Berar Debt Conciliation Act (2 of 1933), S. 12(2). A I R 1955 N U C (Nag) 98.

——S. 25—Duty of Court.

Where a debt is alleged and it is denied by a debtor the duty of the insolvency Court is to examine into the existence of the debt. It cannot refer the creditor to another civil suit. See Provincial Insolvency Act (1920), S. 24. AIR 1954 Nag 33 (DB).

——Ss. 25, 24 — Power of Insolvency Court to refer complicated questions to Civil Court—Insolvency Court cannot leave the matter suspended for years and refer the applicant to a regular suit if it finds that complicated pleas of law and facts are involved. A I R 1935 Bom 80, Dissented from. See Provincial Insolvency Act (1920), S. 24. AIR 1953 Nag 189 (DB).

SECTION 27

——Ss. 27 and 28—Provisions of S. 7 (1) or S. 8 not inconsistent with provisions of Ss. 27, 28, Provincial Insolvency Act. See Administration of Evacuee Property Act (1950), S. 7 (1). AIR 1965 S C 951.

——Ss. 27, 19—Order of adjudication under S. 27 — Notices under S. 19 must be given to creditors. 1964 All L J 812 : I L R (1964) 2 All 867.

——Ss. 27 and 6 (b)—Firm possessing no property—No allegation against one partner of a fraudulent transfer or any other act of insolvency — Allegation of fraudulent transfer only against the other partner —The transfer as an act of insolvency is sufficient only to declare that partner is also the firm as insolvents — The first partner against whom there is no allegation cannot be adjudged an insolvent as a partner of the firm. See Provincial Insolvency Act (1920), S. 6(b). 1962 All L J 1101.

——Ss. 27, 10 and 74—Order of adjudication—Conditions for.

Where the facts disclosed that the debtor-petitioner satisfied the requirements of S. 10 by being unable to pay his debts amounting to more than Rs. 500:

Held (i) that the application could not be dismissed on the ground that it was not a bona fide one. AIR 1916 P C 64, Rel. on; A I R 1928 Mad 1193, Distinguished.

(ii) that as there was no provision in the Act that the petitioner should disclose his salary or possession of any assets; the petition could not be dismissed on the ground that the petitioner did not mention the salary he was earning. (1931) 62 Mad L J 234, Rel. on.

(iii) that though S. 74 provided for the summary administration of the debtor's estate when his property was not likely to exceed Rs. 500 there was no

provision in the Act which disentitled him from presenting a petition if he did not possess assets of a particular or substantial value.

(iv) that the reason that the petitioner was being harassed by the creditors may not by itself warrant his being adjudicated an insolvent but the Court was bound to adjudicate him so when he satisfied the provisions of S. 10. (1913) 25 Mad L J 545, Distinguished. **1955 Andh W R 78 : 1955 Andh L T (Civil) 14 : AIR 1957 Andh Pra 375 (376) (Prs 3, 4, 5).**

——Ss. 27, 10 and 74—Order of adjudication—Debtor satisfying requirement of S. 10 — Application cannot be dismissed on ground that it was not bona fide—Petition cannot be dismissed because salary was not disclosed — That petition was harassed by debtors is no reason for adjudication. **AIR 1955 N U C (Andhra) 3611.**

——Ss. 27, 6, 53—Transfer by insolvent challenged—Burden of proof.

Per Shiv Dayal J.:—The burden of proof in insolvency proceedings is not upon the transferee but is on the official receiver or the creditor who challenges the transfer, but it is competent for the Court to draw the inference of intention from the totality of circumstances. The burden on the petitioning creditor is discharged as soon as it is shown that the property stood in the name of the debtor. It is then for the transferee to show that he was the real owner and the debtor was only a benamidar. See Provincial Insolvency Act (5 of 1920), S. 6. **AIR 1961 Madh Pra 15 (DB).**

——Ss. 27, 19, 79—Madras Civil Rules of Practice, R. 21, Cl. (3) — Adjudication without notice of petition on transferee of property — Vadidity — An order of adjudication passed on a petition under S. 19(1) without notice to the transferee of the properties of the insolvent, as required under R. 21, Cl. (3), Madras Civil Rules of Practice, is unsustainable. See Provincial Insolvency Act (1920), S. 19. **AIR 1950 Mad 386.**

——Ss. 27, 28 (2)—Adjudication order — Effects of—Subsequent declaration of property being evacuee property—Validity—Property held vested in Official Receiver—He could not be divested.

An order of adjudication passed under S. 27 denudes the insolvent of all right, title and interest to and in the property of the insolvent and this continues during the whole period of the insolvency. It is as if the law has effected a transfer of title from the insolvent to the Official Receiver. Under Ss. 7 and 8 of the Administration of Evacuee Property Act the Custodian gets dominion over the property only after the declaration is made that the property is evacuee property. That declaration follows upon the enquiry under S. 7, but until the proceeding is taken under S. 7 of the Administration of Evacuee Property Act there is no vesting of the property and consequently no right in the Custodian to take possession of it. Therefore, where the order of adjudication is passed the property of the insolvent vested in the Official Receiver and it is not open to the Custodian to issue any notice under S. 7(1) of the Administration of Evacuee Property Act and declare the property to be evacuee property. Section 8(1) of the Administration of Evacuee Property Act would not have any effect in the circumstances. Nor would S. 17 read with S. 4 of that Act render the effect of the adjudication order and vesting of the property in the Official Receiver, inoperative and ineffectual. AIR 1939 Lah 346 and AIR 1919 Cal 781 and AIR 1936 Cal 434 and AIR 1951 Nag 241 and 1953 S C J 411 : AIR 1953 S C 298, Rel. on. **I L R (1960) 2 Punj 494 : 63 Punj L R 844 : AIR 1962 Punj 78 (80, 81) (Prs 5, 6, 7) (DB).**

[Reversed in AIR 1965 S C 951 only with regard to the construction of S. 7(1) of the Administration of Evacuee Property Act (1950).]

SECTION 28

SYNOPSIS

(Provincial Insolvency Act (1920), S. 28.)

1. Scope and object.
2. Scope and object of sub-section (2).
3. Property.
4. "Shall vest . . . . hereinafter provided."
5. Insolvency of Hindu father.

   See Provincial Insolvency Act (1920), S. 28-A.
6. Vesting of property situated in foreign territory.
7. Effect of adjudication in a foreign country.
8. "Shall become divisible."
9. Bar of remedy.
10. "Commence any suit or other legal proceeding."
11. Leave of Court—When necessary.
12. Leave of Court—When not necessary.
13. Effect of not obtaining leave.
14. Rights and disabilities of insolvent.
15. Position of receiver.
16. Vesting of property held on trust.
17. After acquired property—Sub-section (4).
18. Property exempted under Civil P. C.—Sub-section (5).
19. Property exempted under other enactments — Sub-section (5).
20. Secured creditor—Sub-section (6).
21. Relation back—Sub-section (7).

1. Scope and object.

——S. 28—Scope—Transfer of property — Transfer stands valid till annulled — Exercise of rights by transferee is in accordance with law. See Provincial Insolvency Act (1920), S. 54. **AIR 1960 S C 70.**

——Ss. 28 (2), 33, 44, 49 and 62 — 'Debts provable'—Affidavit in support of application for permission does not amount to proof of debt. See Provincial Insolvency Act (1920), S. 78 (2). **A I R 1960 Andh Pra 257 (DB).**

——Ss. 28, 6, 9, 24, 33, 50, 53—Debtor adjudged insolvent — Petitioning creditor applying under S. 53 for annulment of certain transfers by insolvent — Transferee cannot challenge order of adjudication on ground that petitioning creditor was not creditor of the insolvent. See Provincial Insolvency Act (5 of 1920), S. 6. **AIR 1963 Bom 212.**

——Ss. 28 (2), 15— Consolidation of insolvency petitions. See Provincial Insolvency Act (5 of 1920), S. 15. **AIR 1956 Mad 157.**

——S. 28 (2) — Absolute occupancy land of insolvent vesting and in possession of receiver on 31-3-1951 — Insolvent cannot invoke S. 43 of M. P. Act 1 of 1951 —Such land cannot be said to have been held by the insolvent on the date when the M. P. Abolition of Proprietary Rights Act, 1951 came into force. See Tenancy Laws—M. P. Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act (1 of 1951), S. 43. **A I R 1956 Nag 57 (DB).**

——S. 28—Adjudication order—Effect on third person's claim.

If under impresssion that her claim would be decided after the order of adjudication the third person did not appear at the time of the hearing of the adjudication matter, it can hardly be said that her claim has been finally determined by that adjudication order. **AIR 1955 Pat 413 (417) (Pt D) (Pr 14) (DB).**

——S. 28—Scope and effect—Property of insolvent in his possession at time of filing of insolvency petition —Custody of insolvency Court—Power of Court to

hear and determine conflicting claims in respect of title and possession. 58 Punj L R 448 : 1957 All W R (Sup) 6 : 1957 Cri L J 92 (95) (Pt C) (Pr 16) (Punj).

2. Scope and object of sub-section (2).

——S. 28 (2)—Constitutional validity — Deprivation of property of insolvent under S. 28 (2) — Not hit by Art. 31, Constitution of India—Constitution of India, Art. 31.

Section 28 (2) of the Provincial Insolvency Act, which provides for the vesting of the property of the insolvent in the Insolvency Court or the receiver and thereby in effect divests the insolvent of his ownership rights in property, does not contravene Art. 31 of the Constitution and is not unconstitutional on that ground. Section 28 (2) of the Act does not contravene Art. 31, Cl. (1) inasmuch as the vesting of the property is due to a duly enacted piece of legislation, viz. Provincial Insolvency Act, and as such supported by authority of law. Clause (2) of Art. 31 is not applicable as the property is neither requisitioned nor acquired for a public purpose. ILR (1962) 1 All 200 : AIR 1962 All 256 (260) (Pt C) (Prs 26, 26a) (DB).

——S. 28 (2)—Vesting of Insolvent's property in the Court or the Receiver—Amounts to reasonable restriction as contemplated in Cl. (5) of Art. 19 of the Constitution. See Constitution of India, Art. 19 (5). AIR 1962 All 256 (DB).

——S. 28 (2)—Sub-section places no inherent bar on rights which creditor has at common law but places only a restriction on the rights—Sale in auction of insolvent's property without leave of Court—Property purchased by creditor decree-holder himself — Court has power to validate sale by subsequent order—Receiver reporting to Court to accept sale—Court ordering that sale may be confirmed if purchaser paid a certain sum—Amount paid by auction-purchaser utilised by receiver for payment to creditors of insolvent—Effect of the order of Court was to validate the sale by ratification—Subsequent acceptance of the sale by the receiver by his act amounted to feeding the estoppel—Hence person having obligation to pay the profits of the property cannot defeat the right of the purchaser to such profits by pleading the absence of saleable interest in the judgment-debtor when the sale was made : AIR 1933 Cal 627, Rel. on—(T. P. Act (1882), S. 43). 1962 All W R (H C) 55 : 1962 All LJ 53.

——Ss. 28, 67—Insolvent mortgagors—Right to apply for amendment of decree—See Debt Laws—U. P. Debt Redemption Act (13 of 1940), S. 8. A I R 1952 All 328 (DB).

——S. 28—Contract by insolvent — After initiation of insolvency proceeding, but before adjudication is not per se void. See Contract Act (1872), S. 39. AIR 1964 Andh Pra 299 (DB).

——Ss. 28 (2), 78 (2)—'Provable' — Mortgage suit—Mortgagee, if entitle to deduction of period under S. 78 (2). See Provincial Insolvency Act (5 of 1920), S. 78 (2). AIR 1957 Andh Pra 437.

——S. 28 (2)—Scope—Mandatory character.

It is clear from the terms of S. 28 (2) that as on the making of an order of adjudication the estate vests in the Receiver no suit shall be commenced except with the leave of the Court. The terms of the section are mandatory and there can be no question of any waiver of objection as to the maintainability of the suit on the part of the parties so as to nullify the effect of the section. The suit is not maintainable unless leave of the Insolvency Court is obtained prior to its institution. AIR 1937 Mad 667, Rel. on; AIR 1929 Mad 323; AIR 1933 Mad 917, Dissented from. 1955 Andh L T (civil) 27 : 1955 Andhra W R 69 : AIR 1955 Andhra 115 (115) (Prs 2, 3).

——S. 28 (2) — Suit filed before adjudication — Appeal filed after adjudication — Section 28 (2) not contravened—Appeal is continuation of suit — (Civil P. C. (1908), S. 96).

An appeal is a continuation of the suit and not a commencement of a new proceeding. Where a suit has been filed before the adjudication of the debtors as insolvents, there can be no question of seeking leave from the insolvency Court under S. 28 (2) of the Provincial Insolvency Act and of making the Receiver-in-insolvency a party to the suit and consequently to the appeal filed. 64 Cal W N 88 : ILR (1960) 2 Cal 466 : AIR 1960 Cal 469 (473) (Pt B) (Pr 19) (DB).

——S. 28 (2) — "Debt" — Meaning of.

An execution of a decree for specific performance compelling the judgment-debtor and a person claiming as his representative to execute a mortgage in favour of the decree-holder is not a legal proceeding in respect of a debt within the meaning of S. 28 (2) and previous leave of the Court is not necessary. ('51) 1951 M W N 137 : 64 M L W 181: (1951) 1 Mad L J 200 : AIR 1951 Mad 687 (688) (Pt A) (Pr 4) (DB).

——S. 28 (2) & S. 58 — Order of adjudication passed — Decree obtained by secure creditor against insolvent before appointment of receiver — Insolvency Court not impleaded — Validity of decree.

A decree obtained by a secured creditor against an adjudged insolvent without impleading insolvency Court as a defendant after an order of adjudication has been passed under S. 27 but before a receiver is appointed to take charge of the insolvent's estate, is ineffective and does not bind the receiver. AIR 1927 P C 108 : 54 Cal 595 (P C). Rel. on. The mere fact that the creditor had obtained permission of the insovency Court to file the suit is not sufficient to validate the decree. ILR (1952) Nag 662 : AIR 1953 Nag 268 (269, 270) (Prs 15, 16) (DB).

——Ss. 28 (7), 30 and 54 — Order of adjudication — Transfer held to be act of insolvency — Finding, if can be challenged in annulment proceedings.

An order of adjudication is not conclusive as to the legal character of a transfer which it has held to be an act of insolvency. The transferee who was not a party to the adjudication proceedings can, therefore, challenge that finding in the annulment proceedings. 1950 Ker L T 573 : 1950 T C L R 707 : AIR 1951 Tra-Co 55 (60) (Pt A) (Pr 13) (DB).

3. Property.

——S. 28 — Right to claim damages is not property — Plaintiff dying during pendency of claim for the damages — Receiver in insolvency not entitled to be substituted in his place — 28 N L R 340 and AIR 1935 Nag 135, Foll. 1963 M P L J (Notes) 190.

——S. 28 — 'Property' — Right to receive compensation under statute relating to displaced persons — If vests in Official Receiver.

Under the Displaced Persons (Compensation and Rehabilitation) Act, a displaced person has to be paid the compensation for his verified claim, out of the compensation pool. Once the amount of compensation is determined, only the manner how that has to be paid is left to the discretion of the authority concerned. The department cannot withhold it. Hence the right to receive such compensation is property just as the creditor's right to recover a debt is property. AIR 1957 S C 599 : 1957 S C J 574, Distinguished. Where, after the compensation is determined, the displaced person is adjudicated insolvent, the

right to receive compensation will, by operation of law (namely, S. 28 of the Provincial Insolvency Act), vest in the Official Receiver. Section 15 of the Displaced Persons (Compensation and Rehabilitation) Act will not bar such vesting. **(1960) 62 Punj L R 348 : AIR 1960 Punj 474 (475) (Prs 3, 4).**

4. "Shall vest . . . . . hereinafter provided".

● —Ss. 28 (2) and 26 — Effect of adjudication — Adjudication made by two Courts of same insolvent under Presidency Towns and Provincial Insolvency Acts — Doctrine of relating back — Its applicability — Vesting of insolvent's property — Precedence in —Property vested cannot be divested. See Presidency Towns Insolvency Act (1909), S. 17. **AIR 1963 S C 754.**

● —Ss. 28 (2) and 2 (d) — Money standing to the credit of insolvent in Provident Fund vests in Official Receiver — (Civil P. C. (1908), S. 60) — 1951 Pat 488 (AIR V 38), Reversed. See Provincial Insolvency Act (5 of 1920), S. 2 (d). **AIR 1956 S C 336.**

——S. 28 (2)—Property 'vesting' in Court or receiver — Meaning of.

Vesting of a property in the Court or the receiver not only gives the Court or the receiver the right to take possession of the property and deal with it in a certain manner but amounts to a legal transfer of the right, title and interest of the insolvent in the Court or the receiver as the case may be and as a result of the vesting, the property for the purposes of the Insolvency Court becomes the property of the Court or the receiver and ceases to be the property of the insolvent. After the order of adjudication either the Court or the receiver as the case may be, becomes owner and the insolvent is divested of his rights with respect to the property under adjudication. AIR 1939 Lah 346 and AIR 1941 Mad 753 and (1894) 9 Ch D 557 and AIR 1932 Oudh 244, Rel. on. **ILR (1962) 1 All 200 : AIR 1962 All 256 (260) (Pt B) (Pr 20) (DB).**

——Ss. 28, 20, 56 — Powers of interim receiver — Property, when vests in receiver stated. See Provincial Insolvency Act (1920), S. 20. **AIR 1964 Andh Pra 299 (DB).**

● —S. 28 (2) — Bona fide purchaser in execution sale after adjudication — His rights held are saved — Vesting of property in receiver under S. 74 (ii) held makes no difference. See Provincial Insolvency Act (1920), S. 51 (3). **AIR 1956 Andhra 243 (FB).**

——Ss. 28 (2), (7), 51 (3), 52 — Effect of—Purchase of insolvent's property at execution sale after admission of insolvency petition but before order of adjudication — Title of purchaser.

Considering the provisions of sub-ss. (2) and (7) of S. 28 along with the provisions of Ss. 51 and 52, the title of the receiver to the property of the insolvent would relate back from the date of adjudication to the date of the petition and the auction-purchaser at the sale held in execution of the decree against the insolvent would only get a title defeasible by the receiver unless he was a purchaser in good faith. The provisions of sub-s. (3) of S. 51 would apply whether notice of the insolvency proceedings is given to the executing Court or not because no reference to notice of the insolvency proceedings to the executing Court is at all made in sub s. (3) of S. 51. The matters dealt with by these provisions are quite different from those dealt with by S. 52. These provisions can be availed of only where sale has been held whether before or after adjudication while the provisions of S. 52 are available only where notice of the admission of the insolvency petition is given to the executing Court and while it is still in possession of the property of the insolvent, that is, where sale has not been held at all. The nature of the title that he will get will depend on whether he fulfils the condition laid down in sub-s. (3) of S. 51 or does not fulfil it. Knowledge of insolvency proceedings by the purchaser is sufficient to disprove his contention that he was a bona fide purchaser. **60 Bom L R 1017 : 1958 Nag L J 367 : ILR (1959) Bom 249 : AIR 1959 Bom 10 (12, 13) (Pt B) (Prs 16, 17, 18).**

——S. 28—Bona fide purchaser at execution sale held after application for the adjudication is admitted—Protection of purchase — Decree-holder himself purchasing property — He has no right to set off of the price realised at the sale against his own decretal dues — Receiver in insolvency is entitled to receive the price at which the property was sold to the decree-holder auction-purchaser for the benefit of the general body of creditors. See Provincial Insolvency Act (1920), S. 51 (3). **A I R 1955 N U C (Cal) 834 (DB).**

——S. 28—Civil P. C. (1908), O. 22, R. 10 — Devolution of interest of revision adjudged insolvent during pendency of suit — Official Receiver brought on record—Acquiescence in continuance of insolvent as party even after adjudication — Right to conduct to suit not lost See Civil P. C. (1908), O. 22, R. 10. **(1962) 3 Guj L R 52.**

——S. 28 — Person declared insolvent — Transfer by insolvent set aside at instance of Official Receiver — Official Receiver must be held to be in possession of property transferred through insolvent. See Limitation Act (1908), Art. 136. **A I R 1963 Ker 176.**

——S. 28—Partnership Act (1932), Ss. 34, 47, 48 and 49—Partner declared insolvent subsequent to dissolution of partnership—Only separate property of insolvent partner and net amount of his share in partnership and not partnership property itself vest in the receiver—No relation back of determination of partner's interest to date of insolvency petition—Sale of partnership property subsequent to its dissolution pursuant to a decree, not affected. **1963 Jab L J 476 : I L R (1963) Madh Pra 263 : A I R 1964 Madh Pra 55 (56, 57) (Prs 4, 5, 7) (DB).**

——Ss. 28 (2) and 47—Effect of S. 28 (2).

The effect of S. 28 (2) is that so far as properties are concerned the insolvent completely goes out of the picture ; his ownership in the properties at least temporarily ceases and becomes fully vested in the Court or the Official Receiver. In other words the Court or the Official Receiver stands in the shoes of the insolvent and he has all the rights, privileges and commitments which the insolvent may have. Section 47 cannot in any way derogate or reduce the nature of the Official Receiver's right in the property that is vested in him. **1956 Mad W N 765 : I L R (1957) Mad 344 : 69 Mad L W 734 : (1956) 2 Mad L J 421 : A I R 1957 Mad 1 (2) (Pt A) (Prs 5, 6) (DB).**

——Ss. 28 (2), 59 (g)—Effect of — Official Receiver can acknowledge binding debt of insolvent —(Limitation Act (1908), S. 19).

A combined reading of Ss. 28 (2) and 59 (g) makes it clear that when the property of the insolvent is vested in the Official Receiver he can mortgage or sell the property or renew the existing mortgage for a further term. Under Cl. (g) of S. 59 of the Act the Official Receiver has power to acknowledge a binding debt of an insolvent. **1956 Mad W N 765 : I L R (1957) Mad 344 : 69 Mad L W 734 : (1956) 2 Mad L J 421 : A I R 1957 Mad 1 (2) (Pt B) (Pr 6) (DB).**

● **——Ss. 28 and 37—Scope.**

Sections 28 (2) (7) and 37—Mortgagor during pendency of suit on mortgage adjudicated insolvent—Decree in suit without making official assignee party to suit—Decree-holder purchasing property in execu-

tion—Decree and execution being void, are ineffective to bind equity of redemption which is vested in receiver—Mortgagee auction-purchaser does not get title — Not only his insolvency, the mortgagor is necessary party to suit on mortgage under S. 91, T. P. Act—Effect of annulment is to vest property retrospectively in the insolvent — Transfers are validated with effect from date on which insolvency petition was filed. A I R 1929 Mad 480, Overruled ; A I R 1951 Nag 241, Dissented from ; A I R 1931 Mad 63 (FB), Approved — Insolvent who was party to suit and execution proceeding cannot take advantage of non-joinder of Receiver in the proceedings. Subbaiah Goundan v. Ramasami Goundan, 1953 Mad W N 857 : (1953) 2 Mad L J 766 : 67 Mad L J 106 : I L R (1954) Mad 80 : A I R 1954 Mad 604 (611) (Pt A) (Prs 23, 34) (FB).

——S. 28 — Purchaser in insolvency — If represents interest of insolvent.

The purchaser in insolvency represents the interest of the insolvent, because it is the right and title of the insolvent which are vested in the Insolvency Court or the receiver. When the sale takes place it is of the property, right, title and interest of the insolvent, and the purchaser obtains it subject to any advantage or disadvantage which the insolvent himself enjoyed. A I R 1927 P C 113 : 52 Mad L J 658 and (1881) 16 Ch D 522 and A I R 1932 All 78, Rel. on. I L R (1956) Nag 256 : A I R 1956 Nag 241 (243) (Pt B) (Pr 13) (DB).

——S. 28 —Effect of vesting.

On the making of an order of adjudication the whole of the property of the insolvent which is not exempted under S. 28 (5) vests in the receiver and becomes divisible amongst his creditors. The effect of the vesting is that the ownership of the property is transferred by operation of law to the receiver who becomes its legal owner. The insolvent loses all right, title or interest in the property on the passing of the vesting order. Though the insolvent is entitled to surplus of the sale proceeds of the property that may remain after all the creditors are paid off, it is not a legal right, but it is a mere hope or expectation. 37 Cal 418 : 20 Mad L J 432 (P C); A I R 1951 Nag 281, Rel. on. I L R (1955) Nag 939 : 1955 Nag L J 682 : A I R 1956 Nag 57 (58) (Pt A) (Pr 2) (DB).

——Ss. 28 (2), 35 and 37 — Alienation during pendency of insolvency—If validated by order of annulment—Application by insolvent to Debt Conciliation Board—Etfect of—C. P. Debt Conciliation Act, S. 21.

It follows from S. 28 (2) of the Provincial Insolvency Act that an order of adjudication divests the insolvent of all right, title and interest to and in his property and this continues during the whole period of the insolvency. It is as if the law had effected a transfer of title from the insolvent to the receiver. Even if the insolvent applies to the Debt Conciliation Board for settlement of his debts S. 21 of the C. P. Debt Conciliation Act, cannot do more than "suspend" the insolvency proceedings. It cannot abrogate them, nor can it restore the status quo. Therefore, once the insolvent is divested of his property by the insolvency proceedings S. 21 does not have the effect of re-vesting it in him ; all it does is to "suspend" the possibility of re-vestment. It follows from this that the insolvent has no authority or power to alienate his property after his adjudication and before its annulment by order of the Insolvency Court.

It is true that the property reverts to the insolvent under S. 37 of the Provincial Insolvency Act after the annulment of his adjudication, but that does not wipe out all the effects of the insolvency. The insolvent gets his original title back and it is possible that one can place him as far as may be in the same position as he was on the date of the adjudication, but that does not mean that acts done by the insolvent while under an incompetency can be validated or can be regarded as if there had never been a disability. An order of annulment, therefore, does not have the effect of validating an alienation made by the insolvent during the pendency of the insolvency. A I R 1943 Mad 453 and A I R 1938 Nag 312, Dist.; 52 Mad 648 ; 42 Cal 72 ; 54 Cal 595 and 28 Nag L R 317, Ref. to. I L R (1951) Nag 12 : 1952 Nag L J 106 : A I R 1951 Nag 241 (245) (Pt E) (Pr 28).

——Ss. 28, 75—Who may appeal—Person aggrieved— Insolvent is not person aggrieved by order directing sale of property which he alleges to belong to him. See Provincial Insolvency Act (5 of 1920), S. 75. A I R 1955 Pat 503 (DB).

——S. 28 (2) — "Whole property of insolvent" — What vests in the Court or Receiver — Provident Fund money of insolvent is not property and does not vest in Court or receiver and is not divisible amongst creditors : AIR 1946 Pat 430 ; AIR 1949 Pat 337, Dissented from. — See Provincial Insolvency Act (1920), S. 2 (d). AIR 1951 Pat 488 (DB).

[Reversed in AIR 1956 S C 336.]

——Ss. 28 (2) and 27 — Adjudication order—Effects of — Subsequent declaration of property being evacuee property — Validity — Property held vested in Official Receiver — He could not be divested — See Provincial Insolvency Act (5 of 1920), S. 27. AIR 1962 Punj 78 (DB).

——Ss. 28, 37 and 43 — Execution of decree against insolvent without sanction and without receiver on record — Auction sale — Validity — Annulment of adjudication — No order of vesting — Effect —(Travancore Insolvency Act (8 of 1108), Ss. 28, 37 and 43).

The auction sale of the property in execution of the decree against the insolvent without the leave of the insolvency Court and without impleading the receiver to represent the estate is valid even when the order of adjudication which then existed has been annulled afterwards without ordering the vesting of the property in any person. Therefore, when an assignee of the rights of such an auction-purchaser seeks redemption of the mortgage with respect to the property sold he is entitled to a decree : AIR 1951 Mad 63 : (1951) 1 M L J 35 (FB) ; AIR 1954 Mad 604 : (1953) 2 M L J 788 (FB), Foll. 1955 Ker L T 702 : I L R (1955) T C 68 : A I R 1955 Trav-Co 241 (242) (Pt A) (Prs 3, 5) (DB).

5. Insolvency of Hindu father.

See Provincial Insolvency Act (1920), S. 28-A.

6. Vesting of property situated in foreign territory.

——S. 28 (1) — Debtor adjudicated insolvent—Vesting of property situated in foreign State.

Legislature in one State cannot legislate in respect of land situate in a foreign State. Even if the land in a foreign State (e. g. Baroda State before its merger) be regarded as vested on adjudication (by a former British Indian Court) in the Receiver in Insolvency in an ideal sense, unless the law of the foreign State recognises the vesting as a transfer of the property to the Receiver, the vesting cannot operate to confer title upon the Receiver in Insolvency and the property situate in the foreign State will continue to be liable for satisfaction of the claims against the debtor according to the law of that State and unaffected by the insolvency.

Section 28 (1) imposes a purely personal obligation upon the insolvent which may be enforced by process of the Insolvency Court to compel compliance of all acts necessary for completing the title of the Receiver to property situate in a foreign territory.

But the personal obligation cannot affect the jurisdiction of the Courts in the foreign State to deal with property situate in that State ; nor can it compel the creditors, who are not amenable to the jurisdiction of the Insolvency Court which has adjudicated the debtor an insolvent, to allow other creditors to participate in the satisfaction obtained by them by taking proceedings in a foreign State. By the rules of private international law immoveable property can only be transferred in accordance with what is called 'lex rei sitae' : 2 Moo Ind App 353 (PC) and AIR 1926 Cal 898, Rel. on ; A I R 1926 Bom 271, Disting. **56 Bom L R 1028 : ILR (1955) Bom 236 : AIR 1955 Bom 170 (173) (Pt B) (Pr 5).**

7. Effect of adjudication in a foreign country.

——S. 28 — Adjudication of insolvency in foreign Court — Immovable property of insolvent situated in India is not affected—See Constitution of India, Art. 51. **AIR 1962 Punj 228.**

8. "Shall become divisible."

——**S. 28 (5)** — Companies Act (1913), S. 229 — Property held by company for itself and another — Company becoming insolvent—Proportion in which such property is divisible among creditors — (Presidency Towns Insolvency Act (1909), S. 52 (1) (a)) — See Companies Act (1913), S. 229. **AIR 1956 Cal 188 (DB).**

9. Bar of remedy.

——**S. 28 (2)** — Contract obtained by fraud — Rights of defrauded party—Rescission of contract — Notice to agent of defrauding party—Scope of S. 19, Contract Act, and S. 30, Sale of Goods Act — Applicability of S. 86, Trusts Act — Insolvency of defrauding party pending suit by defrauded party—Suit is not barred — Scope of S. 28 (2), Provincial Insolvency Act — See Contract Act (1872), S. 19. **AIR 1963 All 459 (FB).**

10. "Commence any suit or other legal proceeding."

——**S. 28 (2) — Suit or legal proceeding —Meaning of — Section not applicable to personal action.**

The words 'suit or other legal proceeding' in S. 28 (2) mean suit or other legal proceeding against the property of the insolvent, which vests in the Receiver and the remedy against which is controlled by that sub-section. Section 28 (2) has no application in respect of any suit or appeal which is merely a personal action against the insolvent, for example, a suit for bare claim of money against the insolvent. This view finds additional support from the provisions of S. 59 (d) under which the receiver's right to defend has been limited only to suits or other legal proceeding relating to the property of the insolvent : 18 Cal 43 ; 12 Mad L J 282 ; AIR 1939 Mad 572 ; (1939) 1 M L J 889 and AIR 1932 All 382, Rel. on ; AIR 1931 Pat 357, Dissented from. **64 Cal W N 88 : ILR (1960) 2 466 : AIR 1960 Cal 469 (473, 474, 475) (Pt C) (Prs 21, 29, 30 34) (DB).**

——**S. 28—Person declared insolvent—Locus standi to continue appeal — (Civil P. C. (1908), S. 96).**

When a person is declared insolvent, he becomes civilly dead and on such death, all his rights and liabilities devolve on the Receiver. It being so, the necessary corollary of this is that he has no locus standi to maintain the appeal. **1960 Jab L J 256 (2) : 1960 M P L J 418.**

——**Ss. 28, 59 — Scope — Insolvent continuing legal proceedings against his debtors — Decree passed in favour of undischarged insolvent without Official Receiver being brought on record—Validity—C. P. Code (1908), O. 22, R. 8).**

The prohibition contained in sub-s. (2) of S. 28 is only in respect of independent legal proceedings being taken by the ordinary creditors of the insolvent against his property after it has become vested in the Court or in the Official Receiver as a result of the order of adjudication. There is no provision barring the insolvent from commencing or continuing any legal proceeding against his debtors. On the other hand sub-s. (4) of S. 28 clearly indicates that no such prohibition is contemplated by the Legislature. The acquisition of property by the insolvent after the death of the adjudication order could very well be by instituting or continuing the necessary legal proceedings in that direction. His liberty to commence or continue such legal proceedings cannot cause any prejudice to the insolvency proceedings against him, because any property acquired by him as a result of the proceedings commenced or continued by him will forthwith vest in the Insolvency Court or the Official Receiver.

It is also clear from the provisions of R. 8 of O. 22, Civil P. C. that unless the suit by the insolvent plaintiff is caused to be dismissed in the manner prescribed by the rule, it will not abate and come to an end; in other words, the suit will proceed on the basis that the insolvent plaintiff is competent to continue the suit. If it ends in a decree in his favour, it will be a valid decree capable of enforcement and cannot be ignored as a void decree. The provisions of Ss. 28 and 59 of the Provincial Insolvency Act also lead to the same inference. Even though the insolvent plaintiff may be the decree-holder, the property covered by the decree will vest in the Official Receiver by virtue of the provisions contained in sub-s. (4) of S. 28 of the Provincial Insolvency Act unless such property happens to fall under the category exempted by sub-s. (5) of the same section. A I R 1935 All 675 (FB), Rel. on. **ILR (1956) Trav-Co 575 : AIR 1957 Trav-Co 241 (243) (Pt A) (Prs 4, 5) (DB).**

11. Leave of Court—When necessary.

——**S. 28 (2) — Joint decree — One of judgment-debtors adjudicated insolvent—Decree-holder instituting execution proceedings without leave of Court —Execution petition is not in accordance with law —Dismissal of execution petition for non-payment of batta — Second petition filed more than 3 years from date of decree—Held, second petition was not in continuation of first one and hence was barred by limitation—Limitation Act (1908), Art. 182 (5)—Limitation Act (1963), Art. 136.**

A holder of a joint decree transferred the decree after one of the judgment-debtors was adjudicated insolvent. The transferee filed an execution petition without obtaining the permission of the Official Receiver or Insolvency Court and proceeded to levy attachment and sale of property which had vested in the Official Receiver. However, the sale was stopped on an application of the judgment-debtor that he could not be proceeded against as the property had vested in the Official Receiver. The execution petition which was posted for hearing later was dismissed as no batta was paid. After annulment of adjudication and more than 3 years from date of decree the transferee filed a second petition.

Held, that the second petition was barred by time as it was not in continuation or in revival of the first one. The first execution petition without the leave of the insolvency Court was not in accordance with law. The question therefore that the second petition was in continuation or in revival of the previous one did not arise : ILR 12 All 64, Rel. on. Further, the first petition was dismissed for non-payment of batta. It was a final order and hence there could be no question of treating the second

one as being in continuation or in revival of the first petition. (1964) 2 Andh L T 204.

12. Leave of Court—When not necessary.

——Ss. 28 (2), 37, 78 (2) — Execution petition dismissed—Adjudication of one of judgment-debtors—Subsequent unconditional annulment of adjudication—No leave of Insolvency Court is required for filing subsequent execution petition — Joint decree against several judgment-debtors—Execution against one — Effect of saving limitation against all—Limitation Act (1908), Art. 182 (5).

The decree was passed on 31st August 1951 and it became final as no appeal had been preferred. On 2nd May 1952 the decree-holder put his decree into execution but that petition was dismissed on 18th June 1952, as the batta was not paid. This was followed by another E. P. on 25th June 1952 which again was dismissed on 29th August 1952 as no property liable to be attached could be found. On 29th August 1952 the 1st defendant on the petition of the decree-holder had been adjudged insolvent. Without taking out permission of the Insolvency Court for taking execution proceedings against the insolvent, the decree-holder filed his E. P. on 18th November 1954. Of course the petition was against all the judgment-debtors including the insolvent. This petition was, however, dismissed on 20th April 1955 on the ground that no batta was paid. The next petition was filed on 18th November 1957 again without the leave of the Insolvency Court and it met the same fate on 9th December 1957 on the same ground that batta was not paid. Sometime thereafter on 11th August 1958 the adjudication of insolvency was annulled unconditionally. Thereafter the E. P. was brought on 1st December 1958. This time statute of limitation was set up against the tenability of E. P. The Subordinate Judge having regard to the provisions of S. 78 (2) held that the E. P. was barred by limitation.

Held, that the effect of annulling the adjudication unconditionally was that the insolvent was automatically reverted to his original position. The execution petition, therefore, filed without the leave of the Court would be taken as valid applications and it would constitute a step-in-aid of the execution, in view of Ss. 37 and 43. (1962) 2 Andh W R 266, Foll. Even though the provisions of S. 78 (2) did not avail the decree-holder, it was open to him to take advantage of the effect of S. 37 and S. 43 of the Act. When there were more than one defendant and the decree had been passed against them jointly, the E. P. against any one of them would take effect and save limitation against all of them. This position was in no way affected by S. 78 (2) of the Provincial Insolvency Act, which only conferred some concession on the creditors who might satisfy the requisite conditions. (1962) 2 Andh W R 266, Foll. Plea taken under Art. 182 (5) by the decree-holder must also prevail. (1965) 1 Andh L T 73 : AIR 1966 Andh Pra 25 (25, 26) (Prs 2, 4, 5).

——S. 28 (2) — Applicability — Suit by creditor against sons for pre-partition debt — Leave of Court —Necessity.

Creditors who sue the divided sons for realisation of the pre-partition debts of the father who was adjudged insolvent cannot be said to be seeking a remedy against the property of the insolvency in respect of the debt within the meaning of S. 28 (2) of the Act. Therefore leave of the Insolvency Court is not necessary for a creditor's suit against the divided sons of the insolvent debtor. (1957) 1 Andh W R 216 : AIR 1957 Andh Pra 692 (700) (Pt F) (Pr 19) (DB).

——S. 28 (2) — Joint Hindu family — Debt incurred by father for family purposes — Severance of status — Father's subsequent insolvency — Right of creditor to file suit against son not barred — Liability of son to pay family debt—Hindu Law—Debts — Pious obligation of son.

There is no objection in law against the creditor filing a suit against the sons in regard to a debt incurred by the father as manager of the joint family for family purposes, even though subsequently they become divided and the father becomes an insolvent.

Section 28 (2) of the Provincial Insolvency Act does not prohibit a creditor from filing a suit against a divided son against whom and against whose assets the insolvency Court has no control. Even if the father is alive, it is not necessary that such creditor should have taken necessary steps to enforce the relief against the father in proceedings in insolvency. (1942) 1 M L J 173, Rel. on; (1942) 1 M L J 177, Dist. (1961) 74 Mad L W 693 : (1962) 1 Mad L J 6 : ILR (1962) Mad 221.

——S. 28 (2) — Scope of — Collusive and fraudulent decree and execution — Possession delivered to auction-purchaser — Suit by other creditors for declaration that decree and all other proceedings are null and void is maintainable — Specific Relief Act, S. 42. See T. P. Act (1882), S. 53. AIR 1959 Mad 141 (DB).

13. Effect of not obtaining leave.

——S. 28 (2) (7) — Scope—Leave of insolvency Court — Absence of — Effect — Objection as to want of, in collateral proceedings.

Leave of the Insolvency Court under S. 28 (2) of the Act is essential to the institution of a suit or other legal proceeding of the nature described in the sub-section. Want of leave before the institution of the suit or proceeding entails its dismissal and cannot be cured by the grant of leave subsequently. But the fact that the leave of the insolvency Court was not obtained for the institution of a suit by a creditor under S. 28 (2) does not render the decree passed therein a nullity.

Obiter :— There may be same ambiguity in the word 'thereafter' as used in S. 28 (2) but it must be held that the doctrine of relation back in S. 28 (7) applies to the first part of S. 28 (2) and not to the second part and that a suit instituted after the filing of an insolvency petition and before adjudication does not become incompetent or unsustainable by reason of want of leave of the insolvency Court. Section 29 of the Act refers to such a suit and the Court in which it is instituted has to act under the provisions of that section, if and when an order of adjudication is made by the insolvency Court. (1957) 1 Andh W R 216 : AIR 1957 Andh Pra 692 (697, 699) (Pt E) (Prs 13, 17, 17A) (DB).

14. Rights and disabilities of insolvent.

——Ss. 28 (2), 37 and 43—Decree against A and B — Dismissal of execution application filed during pendency of Insolvency application by B and without leave of Court—Insolvency annulled unconditionally — As effect of annulment is to revert B to his original status by operation of law the execution application becomes one in accordance with law even as against him in spite of the omission to obtain leave — Second execution application filed within the period of limitation from the date of dismissal of the first is not barred by time though from the date of decree it may be so—Apart from that the application in the case is saved also by reason of the explanation to Art. 182, Limitation Act (1908). See Limitation Act (1908), Art. 182 (5). AIR 1963 Andh Pra 228 (DB).

——S. 28 — Civil P. C. (1908), S. 47 — Objection by undischarged insolvent who is not claiming any pro-

prietary right in property which is under control of Insolvency Court, by reason of vesting of that property, but is only simply pointing out that the property which is sought to be attached is no longer his and is not liable to attachment, is entertainable. See Civil P. C. (1908), S. 47. **AIR 1959 Cal 160 (DB).**

——Ss. 28 and 34 — Rights and disabilities of insolvent — (Presidency Towns Insolvency Act (1909), Ss. 17 and 46).

There is nothing in the provisions of the Presidency Towns Insolvency Act or the Provincial Insolvency Act which prohibits an insolvent from borrowing or entering into contracts, giving rise to financial liability. All that the insolvency effects is to vest all the properties belonging to the insolvent in the Official Receiver and since S. 28 (7) of the Act governs S. 34, the date of adjudication will have relation back to the date of the presentation. When there is no prohibition under the Insolvency Act from an insolvent borrowing or entering into contracts giving rise to a liability, it necessarily follows that a promissory note debt incurred by him after presentation of his petition but before adjudication is a post-insolvency debt and is not provable in insolvency. Consequently the promissory note debt and the subsequent decree and execution proceedings cannot be said to be absolutely without any effect on the insolvent's estate on the ground that the decree on the foot of that promissory note was obtained without the leave of the insolvency Court and without the leave of the Official Receiver being made a party. AIR 1937 Mad 577, AIR 1939 Lah 384 (FB) and AIR 1951 Mad 1045, Foll. **1953 Mad W N 692 : (1953) 2 M L J 504: ILR (1954) Mad 484 : AIR 1954 Mad 508 (510) (Pt A) (Pr 6) (DB).**

——S. 28 (2) — Power of undischarged insolvent to contract debt — He is not legally incapacited in incurring any debt and a creditor is not prevented from recovering on the basis of a debt so incurred by way of a suit or otherwise. See Presidency Towns Insolvency Act (1909), S. 17. **AIR 1951 Mad 1045 (DB).**

——Ss. 28, 20— Contract Act, Ss. 39 and 51—Insolvency of purchaser before taking delivery of goods—Interim receiver not adopting the contract within reasonable time—Plaintiff (purchaser) found at no time ready and willing to fulfil contract — Insolvency held amounted to notice that plaintiff did not intend to perform his obligation — His conduct and that of Insolvent entitled defendant to treat the contract as abandoned — Abandonment of contract — (Sale of Goods Act (1930), S. 32). See Contract Act (1872), S. 39. **AIR 1953 Nag 345 (DB).**

——Ss. 28 and 37 — Object and scope — Annulment — Vesting order — Necessity.

The provision under S. 28 is for purposes of administration of the estate for discharging the debts of the insolvent. If that purpose is accomplished by discharge of all liabilities in full or becomes impossible on account of annulment of adjudication without a vesting order under S. 37, the insolvent gets back the property in his original right. No transfer from the receiver to the insolvent is needed. Nor would there be an interregnum when the insolvent had no right. The term 'revert' instead of 'revest' in the section renders the position clear. **1955 Ker L T 702 : ILR (1955) T C 68 : AIR 1955 Trav-Co 241 (242) (Pt B) (Pr 5) (DB).**

——Ss. 28 and 37 — Rights of insolvent during pendency of insolvency — Effect of annulment.

During the subsistence of the receivership or of the order of adjudication, the rights of the insolvent are in a state of suspense or abeyance. They are not extinct. Whatever the insolvent may do and whatever proceedings may be taken against him will no doubt not bind the receiver or the insolvency Court. But by his acts and by the proceedings to which he is a party the insolvent is bound and on the disappearance of the obstacle by the accomplishment of the purpose or its becoming impossible by an unconditional order of annulment the acts and proceedings will bind his property that reverts to him **AIR 1951 Mad 63; AIR 1954 Mad 604, Foll. 1955 Ker L T 702 : ILR (1955) T C 68 : AIR 1955 Trav-Co 241 (242) (Pt C) (Pr 5) (DB).**

15. Position of receiver.

——S. 28—Suit for enforcement of mortgage—Necessary parties — Insolvency of mortgagor—Receiver in insolvency—Joinder beyond limitation—Effect stated —S. 10, Limitation Act, whether attracted. See C. P. Code (1908), O. 34, R. 1. **AIR 1962 All 256 (DB).**

——S. 28—Representative—Judgment-debtor becoming insolvent—Official Receiver represents him thereafter. See Civil P. C. (1908), S. 47. **AIR 1960 Andh Pra 131.**

——Ss. 28, 59 — Limitation Act (1908), S. 20—Person liable to pay—Includes official receiver— A I R 1933 Bom 91, Diss. from. See Limitation Act (1908), S. 20. **AIR 1959 Andh Pra 518 (DB).**

——S. 28—Expression 'Person liable to pay the debt' in S. 20, Limitation Act—Payment by Receiver. See Limitation Act (1908), S. 20. **AIR 1957 Andh Pra 437.**

——Ss. 28, 38, 59 — Vendee obtaining goods under fraud — Vendee declared insolvent subsequently — Receiver or Trustees in Composition Scheme not entitled to the goods — Equity is in favour of vendor —Specific Relief Act (1877), S. 11 (d).

A purchased goods from B and paid for them by a cheque, which was subsequently dishonoured. B instituted a suit for the recovery of the price of goods and applied for attachment of the said goods which were removed to its godown by a Bank which had accommodated A. The goods were attached and sold by B and the money realised by sale was brought to the Court. In the meantime proceedings in insolvency were started against A and a receiver of his property was appointed. The insolvency proceedings, however, were compromised and under the scheme of composition, certain creditors were appointed as trustees. The receiver and the trustees were therefore made parties to the suit by B. It was contended that the suit brought under S. 11 (d) of the Specific Relief Act was not maintainable, that A was not entitled to the moneys realised from the sale of goods, property in which had already passed to the insolvent. The plaintiffs argued in reply that though the suit might not be maintainable, the trustees were not entitled to the moneys realised as the goods were obtained by fraud by the insolvent.

Held, that the insolvent played a fraud on the plaintiff and cheated him by taking delivery of the goods by passing cheques, which he knew full well would not be honoured by the Bank. In these circumstances, even if the plaintiff had no legal right to get back the goods, the trustees in insolvency must be directed to return the goods to the plaintiff, because the equity was all in their favour. Allowing the trustees to retain the moneys for distribution would produce an unjust and dishonest result which the Court in point of moral justice and honest dealing could not allow to perpetuate. 16 Q B D 308; 32 Ch D 597; (1919) 2 K B 735; L R 9 Ch 722; (1907) 1 K B 865, Applied. **(1963) 1 Ker L R 443 : 1963 Ker L J 387.**

——Ss. 28 and 55—Position of receiver — Valid contracts of insolvent, entered into before insolvency — Official Receiver —If bound by.

It is an elementary principle of insolvency law that subject to the special provisions enacted by the insolvency statute—Ss. 51 to 54—the official receiver merely steps into the shoes of the insolvent and can claim no higher rights than the insolvent. Where under a contract of lease entered into by the insolvent he was bound to make adjustment towards rent a certain amount received by him at the time of entering into the lease the official receiver as the representative of the insolvent, is equally bound to give effect to the contract. He can have no real legal basis for disputing the adjustment or to claim that the adjustment would not be binding upon him. 1958 Mad W N 388 : 71 Mad L W 367 : (1948) 1 Mad L J 424 : AIR 1958 Mad 486 (488) (Pt B) (Pr 7).

——S. 28 (2)—Relationship between official receiver and insolvent—Is not one of agency. AIR 1933 Bom 91, Dissented from. See Contract Act (1872), S. 182. AIR 1957 Mad 1 (DB).

——S. 28 (2)—Acknowledgment of liability of official assignee — It will furnish fresh starting point for limitation. See Limitation Act (1908), S. 19. AIR 1957 Mad 1 (DB).

——S. 28—Position of receiver—Insolvency of defendant pending arbitration in suit—Receiver is necessary party to proceedings. See Arbitration Act (1940), S. 30. AIR 1955 NUC (Mad) 1825.

16. Vesting of property held on trust.

——S. 28—Vesting of property in trust—Chit fund—Promissory note executed by member for arrears in respect of chits drawn as collateral security—Manager adjudged insolvent—Power of Official Receiver to sue member on promissory note. See Hyderabad Insolvency Act (8 of 1351), S. 2 (1) (d). AIR 1952 Andh Pra 406.

——S. 28 (5) — Companies Act (1913), S. 229 -Property held in trust is not asset of company -(Presidency Towns Insolvency Act (1909), S. 52 (1) (a)). See Companies Act (1913), S. 229. AIR 1956 Cal 188 (DB).

——S. 28 (5) — Companies Act (1913), S. 229—Property held by company for specific purpose—Insolvency of company—Such property is outside divisible property assets of company — (Presidency Towns Insolvency Act (1909), S. 52 (1) (a)). See Companies Act (1913), S. 229. AIR 1956 Cal 188 (DB).

17. After-acquired property—Sub-section (4).

——S. 28 (4) — Property acquired before discharge lost after adjudication — Right to sue trespasser — Insolvent has right to possession against all world except official assignee — His suit held maintainable. AIR 1955 NUC (Assam) 2809.

——Ss. 28 and 28-A—Equitable assignment—Transfer by shareholder of his right to receive moneys in respect of shares of company in liquidation — Shareholder adjudged insolvent -Effect—Official Assignee if entitled to claim moneys in respect of those shares —Right of assignee.

Where future debts are assigned and the assignor becomes an insolvent after the assignment, the Official Assignee's rights may or may not be subject to the assignment. His rights are subject to the assignment if the debts are due at the date of the bankruptcy but are not payable until a future time. The assignee loses his rights upon insolvency if the debt is one that will only become due if certain conditions are fulfilled in future on behalf of the insolvent.

S and R, the two partners of a firm, were the holders of four shares in a company against which an order for winding up had been made in 1948. S who owed two sums of money to the petitioners executed a document in their favour by which S agreed to give due information to the petitioners whenever any money would be payable by the company in respect of his two shares so that the petitioners shall receive the sum or sums which shall be payable in respect of those shares thereby pledged till their respective debts together with interest were discharged. In 1955, S was adjudicated insolvent. The petitioners made a claim against the official liquidator of the company in respect of the dividend declared by him in respect of the two shares of S.

Held, that S had created an equitable assignment of his rights to receive moneys payable in respect of his shares in favour of the petitioners. Since the moneys that were payable on the shares were not payable until future time and no act or effort on the part of the assignor was required or necessary in order that they become payable, the assignor would have been entitled to these moneys by virtue of his being only one of the holders of the share. Therefore, the Official Assignee had no claim on these moneys at all. Hence the official liquidator of the company should be directed to pay to the petitioners the sums of moneys as prayed for. AIR 1963 Cal 122 (123, 124) (Prs 9, 11).

——S. 28 (2), (4)—Creditor after date of adjudication —Rights.

By reason of the vesting under S. 28 (4) the judgment-debtor becomes completely divested of any interest or title in the property which consists of his salary. By operation of law, the title of the Court or the receiver in insolvency is absolute and the judgment-debtor is no longer the owner of his own salary. In these circumstances, although the Insolvency Court has chosen to realise only a small portion of the salary of the judgment-debtor, it is not open to the decree-holder to attach the remaining portion of the attachable part, though his debt came into existence after the date of the order of adjudication. The vesting which is mentioned in sub-s. (2) of S. 28 of the Provincial Insolvency Act is necessarily a vesting against the whole world and in the second part of that sub-section a limited right is given to creditors whose debts are provable under the Act to pursue their remedy in the ordinary Court with the leave of the Insolvency Court. No such exception has been made in favour of creditors whose debts are not provable before the Insolvency Court. AIR 1925 Oudh 668, Dissented from. I L R (1959) 1 Cal 287 : AIR 1959 Cal 160 (161) (Pt A) (Prs 4, 5) (DB).

——S. 28 (4) — After-acquired property.

Once it is established that the suit relates to after-acquired property it must be held that the suit by the insolvent cannot be maintained irrespective of the question whether the Receiver intervenes or not. AIR 1953 Nag 227, Followed. Case-law Considered. 1954 Nag L J 593 : ILR (1955) Nag 970 : 1954 NLJ 593 : AIR 1955 Nag 47 (49) (Pt A) (Pr 11).

——Ss. 28 (4) and (1)—After-acquired property—Pronote devolved on insolvent on his wife's death—Suit brought by insolvent—Receiver not impleaded—Suit is not maintainable — Permission to implead receiver beyond limitation cannot be granted — Rule of English law that insolvent can take action himself before intervention of Receiver not applied in India. AIR 1937 Mad 165, Foll. AIR 1924 Mad 223, Dissented from. Case-law Referred. 1953 Nag L J 157 : AIR 1953 Nag 227 (227, 228) (Prs 4, 5, 8).

——S. 28 (2)—Tenant adjudicated insolvent during tenancy — Liability for payment of rent accrued due after insolvency. See Houses and Rents — Saurashtra Rent Control Act (1951), S. 12. AIR 1956 Sau 71.

18. Property exempted under Civil P. C.—Sub-section (5).

——S. 28 (2) and (5) — Property exempted from attachment under Civil P. C.—Only small portion of

residential house used as shop — Entire house is exempted — Civil P. C. (1908), S. 60 (1) (ccc) (as amended in Punjab).

Besides other properties of the insolvents, the building in dispute consisting of a residential portion and a shop were attached. The upper portion of the storey was a residential house and even a part of the ground floor was used as residence. It was only a portion of the ground floor which had been used for shops. The insolvents objected to this attachment under S. 28 (5) of Provincial Insolvency Act. The question was whether the building was exempt from attachment under S. 60 (1) (ccc) of Civil P. C. as amended in Punjab.

Held, that there was no room for the contention that the exemption could not be claimed in respect of the suit property on the ground that it was available only for the benefit of the creditors.

Held, further, that the entire building was exempt from attachment. (1963) 65 Punj L R 641.

[Overruled in AIR 1967 Punj 53.]

——S. 28 (5)—Suit by company and one another allowed to be dismissed—Costs imposed on both plaintiffs — Co-plaintiff making full payment of costs and claiming from official liquidator—He could not be allowed preferential treatment. See Companies Act (1956), S. 530. AIR 1962 Punj 530.

19. Property exempted under other enactments—Sub-section (5).

——S. 28 (5) — Property granted to maintenance holder in lieu of maintenance — Relinquishment in favour of grantor in lieu of payment of maintenance —If vests in Official Receiver.

The property which is granted to a maintenance holder merely in lieu of maintenance with control over the power of disposition thereon, and which property is relinquished in favour of the grantor or his heirs or successors in lieu of payment of maintenance is not subject to attachment and cannot vest in the Official Receiver having regard to the provision in S. 28 (5), Provincial Insolvency Act read with S. 60 (1) (n). Civil P. C. The mere fact that future maintenance accrues by lapse of time, and becomes as it were, maintenance due, would not make it liable for attachment, as what is exempted under the Civil Procedure Code, is property or right. The principle on which exemption is granted in regard to the rights of future maintenance is that a person who is depending on that right for her maintenance should not be deprived of that maintenance. The general policy underlying exemption in S. 60 clearly indicates the anxiety on the part of the Legislature to ensure a certain minimum income or property to the person concerned, so as not to interfere with what is needed for his existence in this world. AIR 1954 Mad 946, Dissented from. (1959) 2 Andh W R 524 : 1959 Andh L T 931 : AIR 1960 Andh Pra 353 (354) (Pr 3).

——Ss. 28 (2) (5) and 53 — Annulment of transfer—Gift deed by insolvent of sir land in favour of his son prior to adjudication — Land not liable to attachment and sale in view of S. 155, M. P. Land Revenue Code—Bar under S. 155 does not apply to usufruct or income of land — Receiver can be appointed — Inquiry under S. 53 not barred. See Provincial Insolvency Act (5 of 1920), S. 53. AIR 1960 Bom 477.

20. Secured creditor — Sub-section (6).

——S. 28 (6) — Scope and effect — Secured creditor —Rights of — Civil P. C. (1908), O. 34, R. 1.

Sub-s. (6) of S. 28 of the Act only saves the power of the secured creditor to realise his security or to otherwise deal with it and authorises him to do so in the same manner as he would have done had the section not been passed. On the basis of S. 28 (6) a secured creditor cannot shut his eyes to the fact of passing of the order of adjudication and the vesting of property in the insolvency Court. He can file a suit for realising his mortgage debt and get the property sold in execution; but while doing so he must implead either the Court or the official receiver as the case may require, as the equity of redemption vests in them. In their absence, the security cannot be realised. AIR 1927 P C 108, Foll. ILR (1962) 1 All 200 : AIR 1962 All 256 (259, 260) (Pt A) (Prs 17, 19) (DB).

——Ss. 28 (6) and 52, 2 (e) — Secured creditors — Compromise instalment decree in mortgage suit — Mortgaged property to remain under attachment till payment of decree—Decree-holder is secured creditor —Interim receiver in subsequent insolvency of mortgagor cannot claim possession of mortgaged property from receiver in execution. See Provincial Insolvency Act (5 of 1920), S. 52. AIR 1959 Madh Pra 420.

——Ss. 28 (6) and 4 — Jurisdiction of Insolvency Court to issue injunction — Though Insolvency Court will not restrain a mortgagee or other secured creditor in the exercise of his legal remedies under S. 28, it has jurisdiction in proper cases to restrain him under O. 39, R. 1, Civil P. C., if there are substantial grounds for impeaching his title, with a view to safeguard the interest of the general body of creditors. (1953) 2 Mad L J 359 : ILR (1954) Mad 360 : AIR 1954 Mad 12 (DB).

——Ss. 28 (6) and 47 — Secured creditor — Right to execute decree against personal property of insolvent after his discharge.

Where a secured creditor has during the insolvency proceedings realised his security and there is a deficiency, the balance of the debt constitutes a debt provable in insolvency. If the creditor omits to make an application to the Official Receiver for being included in the list of creditors he cannot, after the discharge of the insolvent, recover the balance by executing his decree in execution proceeding under O. 21 of Civil P. C. AIR 1938 Lah 217; AIR 1942 Mad 273, Foll; AIR 1939 All 401; AIR 1940 Nag 251, Not foll. (1954) 24 Com Cas 232 : 56 Punj L R 113: ILR (1954) Punj 831 : AIR 1954 Punj 180 (181) (Pt B) (Prs 5, 6).

——S. 28 (2) and (6) — Secured creditor, who is— A creditor to whom the insolvent debtor owes secured as well as unsecurred debts cannot be held to be secured creditor. See Provincial Insolvency Act (1920), S. 2 (e). AIR 1954 Trav Co 419 (DB).

21. Relation back—Sub-section (7).

——S. 28—Relation back.

The principle underlying the law of insolvency is that interest ceases to run when adjudication takes place. An order of adjudication relates back to and takes effect from, the date of the presentation of the petition on which it is made. Therefore interest should run up to the date of the presentation of the petition in an insolvency case and upto the date of presentation of winding up petition in the case of an insolvent company. Case law Referred. 1953 All W R (H C) 566 : 1953 All L J 725 : (1954) 24 Com Cas 450 : AIR 1954 All 129 (131) (Pt B) (Prs 4, 5).

——Ss. 28 (2) and (7), 29 and 78 (2) — Defendant executing pronote on 7-1-1953 — Insolvency petition filed by him on 17-7-54—Adjudication on 10-8-59— Suit held did not fall within concept of S. 28 (2) — S. 29 does not govern suits instituted before order of adjudication

The defendant executed a promissory note on 7-1-53. He presented a petition under S. 10 of the Act on 17-7-1954 and was adjudicated an insolvent on 10-8-1959. A money suit having been instituted against the defendant:

Held, that the suit did not fall within the concept of S. 28 (2). It could not be argued that since S. 28 (2) was a bar to the filing of suits, the suit must be deemed to have been in time as the insolvency petition was presented within three years of the execution of the promissory note. AIR 1935 Mad 817, Disting.; AIR 1938 Mad 19 and AIR 1928 Mad 977 and AIR 1957 Andh Pra 692 and (1963) 2 Andh W R 249, Foll. Moreover the expression "on the making of the order of adjudication" in S. 28 (7) cannot be interpreted to mean "on the date of the presentation of the petition." Section 78 (2) also contemplates exclusion of the time between the date of the order of adjudication and the date of the order of annulment. This does not permit the exclusion of the period between the date of the presentation and the date of adjudication. AIR 1954 Bom 436, Rel. on. Further S. 29 did not help the defendant as it envisages stay of proceedings only on proof of an order of adjudication being made and a suit cannot be stayed when the order of adjudication has not been made. On the other hand, this section supports the view that S. 28 (2) comes into operation only when an order of adjudication is made and not otherwise. It does govern suits or proceedings instituted before the order of adjudication. **(1965) 2 Andh W R 26 : AIR 1965 Andh Pra 260 (261, 262) (Prs 5, 9, 15, 16)) (DB).**

—Ss. 28 (7), 33 (1), 34 and 61 (3) — Sum due from Official Receiver in respect of rent—If expenses of administration.

The words 'expenses of administration' have not been defined anywhere in the Provincial Insolvency Act but the question of expenses of administration only arises when the property vests in the Official Receiver and is bound up for purposes of paying the insolvent's creditors. The debt to be provable must accrue before adjudication but if it accrues after adjudication and before discharge, it is provable only if the obligation giving rise to the debt was incurred before adjudication. Even though on the theory of relation back the order of adjudication may take effect from the date of the presentation of petition still the question arises whether the expenses incurred by the Interim Receiver can be treated as expenses of administration under the Insolvency Act. Such expenses having been covered by O. 40, R. 1, C. P. Code are not meant to be covered by S. 61 (3) of the Insolvency Act, for the authorisation to incur is not conferred on the Official Receiver under the Bankruptcy Act. The property had not vested in the Receiver though he had taken possession of the property. The Receiver was in possession of the property, but that alone cannot confer any priority. His powers were limited and were covered under O. 40, R. 1, C. P. Code, and they would be governed by the said provision. **(1959) 2 Andh W R 313 : ILR (1959) Andh Pra 1162 : A I R 1960 Andh Pra 53 (53, 54) (Prs 2, 4, 6, 7) (DB).**

—Ss. 28 (7) and 78 (2) — "The date of the order of adjudication."

In considering the question of the exclusion of time under S. 78 (2) it would not be reasonable to give effect to the legal fiction which has been introduced by S. 28 (7) in dealing with the effect of the order of adjudication. It would be necessary to look at the date of the order of adjudication and count the period from that ascertained date to the subsequent date on which the order of annulment is passed. Case law discussed. **56 Bom L R 414 : ILR (1954) Bom 840 : A I R 1954 Bom 436 (438) (Pt A) (Pr 8) (DB).**

—S. 28 (7) — Companies Act (1913), Ss. 229, 168—Scope—Insolvent Company—Interest on debts due to creditors — Interest up to the date of petition for winding up only admissible — Travancore-Cochin Indian Company Rules (1952), R. 159 — See Companies Act (1913), S. 229. 1963 Ker L T 288.

——S. 28 (7)—Company in liquidation—Claim against —Limitation — Starting point — Time will run from date of application for winding up and not of adjudication—See Companies Act (1913), S. 228. AIR 1962 Mad 506 (DB).

——Ss. 28 (7), 34 — Debt in time at time of presentation of insolvency petition but barred by the time of adjudication can be proved.— For purposes of S. 34 (2), adjudication makes effect from date of presentation of the petition — See Provincial Insolvency Act (5 of 1920), S. 34. AIR 1959 Mad 394.

——S. 28 (7)—Relation back—Court executing mortgage for debtor in execution of decree for specific performance pending insolvency petition against judgment-debtor—Adjudication of debtor—Mortgage — If binding on insolvent's estate and on Official Receiver.

An ex parte decree was passed on 30th June, 1952 against A for specific performance of an oral agreement to execute a mortgage deed in favour of B. On 14th July, 1952, C, another creditor of A filed an insolvency petition and A was adjudged insolvent on 16th December, 1952. Meanwhile on 22nd October, 1952, B, in execution of his decree got the mortgage executed by the Court, as A defaulted to comply with the terms of the decree. D, the prior mortgagee of A filed a petition for declaration that the mortgage executed in favour of B was not binding on the estate of A.

Held, that the mortgage executed in favour of B was therefore not binding on the estate of A or on the Official Receiver. **1957 Mad W N 472 : 70 Mad L W 636 : (1957) 2 Mad L J 398 : A I R 1958 Mad 126 (127) (Pr 7).**

● ——Ss. 28 (2), 28 (7) and 37 —'Official Receiver not made party to mortgage suit — Effect—Title to property on annulment — Execution sale—If can be challenged by judgment-debtor or his representatives.

Where during the pendency of a suit on mortgage the mortgagor is adjudicated but the decree is passed without making the Official Assignee a party to the suit and the decree-holder purchases the property in execution of the decree, the decree and the proceedings are not null and void in the sense that they have no legal effect at all. The proceedings are only ineffective to bind the equity of redemption which is vested in the receiver.

Notwithstanding his insolvency, the mortgagor under the law as it now exists is a necessary and proper party to a suit on mortgage as under S. 91 of the Transfer of Property Act, he is a person entitled to redeem the property and under O. 34, Rule 1, C. P. Code, all persons having an interest either in the mortgage security or in the right of redemption have to be joined as parties in any suit relating to mortgage. (1821) 56 E R 903, Distinguished. 25 Mad 406; AIR 1949 Mad 886; AIR 1927 P C 108, Rel. on.

The effect of annulment is to vest the property retrospectively in the insolvent, in other words the consequence of annulling an order of adjudication is to wipe out altogether the insolvency and its effect except to the limited extent reserved under the section. The Legislature introduced the fiction of vesting the title retrospectively in the insolvent. In view of this, the alienations made of property, movable or immov-

able, by the insolvent after adjudication or the decree and execution proceedings suffered by him during such insolvency, notwithstanding the property is taken away and transferred from him are all restored and validated with effect from the date on which the insolvency petition was filed. A I R 1951 Mad 63 (FB), Approved; AIR 1929 Mad 480; 113 Ind Cas 556, Overruled and AIR 1951 Nag 241, Dissented from.

Further, the insolvent who was a party to the suit and the execution proceedings or the party claiming through him, cannot take advantage of the defect of non-joinder of the Official Receiver in the proceedings. 25 Mad 406 and AIR 1931 All 159, Referred.

Per Subba Rao, J. — Insolvency does not operate as civil death. The insolvent's property vests in the Official Receiver for the purpose of administering the estate and for meeting the claims of the creditors. The Act does not affect the capacity of the insolvent to enter into contracts and otherwise deal with the property. He is in the position of a person who has alienated all his property or otherwise lost it. But his position cannot be equal to that of a minor or a lunatic. He can be sued with or without the leave of the Court, as the case may be, and in that suit he can properly represent himself. But any decree that might be obtained against him would not bind the Official Receiver in whom his entire properties vest. If the properties vested in the Official Receiver are sold as if they were the properties of the insolvent, the sale would be valid and the judgment-debtor cannot question the validity of the sale. Subbiah Goundan v. Ramaswami Goundan, **1953 Mad W N 857 : (1953) 2 M L J 766 : 67 Mad L W 106 : ILR (1954) Mad 80 : A I R 1954 Mad 604 (610, 613, 615, 618) (Pt A) (Prs 23, 28, 33, 34, 40) (FB).**

——Ss. 28 (7) and 54 —Date of registration is date of transfer—(Registration Act (1908), S. 47).

For the purpose of S. 54 of the Provincial Insolvency Act, the date of the transfer is the date of the registration of the document and not the date of its execution, and the transfer cannot be ante-dated by the operation of S. 47 of the Registration Act. A transfer effected after the insolvency petition has been filed, if the transferor is ultimately adjudged insolvent is void as against the Official Receiver in view of sub-ss. (2) and (7) of S. 28 of the Provincial Insolvency Act. It is the registration of a sale deed that is material for it not only completes the sale and makes it valid, but also gives notice of the fact of the alienation. (1933) 2 Mad L J 62, 58 Mad 166, Foll.; (1953) 1 Mad L J 465, Dissent. from; A I R 1937 Rang 446, Not foll. **(1953) 2 M L J 308 : AIR 1954 Mad 93 (93) (Pt B) (Pr 5).**

——S. 28 (2) and (7) — Sale deed executed before filing of creditor's petition but registered a few days after filing—Is void as against the Official Receiver —Registration Act (16 of 1908), S. 47 — Scope and effect.

The date of the transfer is the date of the registration of the document and not the date of its execution and the transfer cannot be ante-dated by the operation of S. 47 of the Registration Act which lays down that a registered document shall operate from the time which it would have commenced to operate if no registration thereof had been required or made and not from the time of registration. A sale deed by a debtor which though executed before the filing of insolvency petition is registered after the filing of the petition is void as against the Official Receiver as the order of adjudication relates back to the date on which the insolvency petition was presented. **(1953) 2 Mad L J 305.**

——S. 28 (2), (7)—Decree against insolvent pending insolvency in a suit filed before insolvency petition —Official receiver if bound — Transfer of Property Act (1882), S. 52.

By the operation of S. 28 (7) the insolvency of the insolvent relates back to the date of the filing of the application for insolvency and a decree in a suit for specific performance of an agreement to execute a mortgage filed against him before the application for insolvency passed during the pendency of the application is not binding on the official receiver if he is not made a party to such suit even though the official receiver is bound by the equities of the insolvent and cannot be executed against him. The official receiver is not a legal representative of the insolvent. The devolution in favour of the official receiver under S. 28 (2) being a devolution by law. S. 52, T. P. Act has no application. The official receiver cannot be impleaded in execution of the decree and no relief can be claimed against him. **('50) (1951) 1 Mad L J 200 : 1951 Mad W N 137 : 64 Mad L W 181 : A I R 1951 Mad 687 (690 to 692) (Pt B) (Prs 10, 15 to 17) (DB).**

——Ss. 28 (2) and 34 (2)— Debt contracted by insolvent after his adjudication — Decree obtained in respect of the debt can be executed by attachment of a portion of the salary of insolvent which had been excluded from distribution among the creditors— Debt or the obligation to pay it having been incurred by insolvent after his adjudication and not before it is not provable under the Act — Hence creditor is at liberty to commence proceeding for recovery of the debt notwithstanding S. 28(2): AIR 1925 Oudh 688; 34 Cal W N 751 Rel. on. — Civil P. C. (1908), S. 60. See Provincial Insolvency Act (1920), S. 34 (2). **('62) 40 Mys L J 673.**

——S. 28 (7)—Effect of—Relating back of receiver's title.

The effect of sub-s. (7) of S. 28 is that the adjudication is deemed to have taken place on the date of the presentation of the petition for adjudication and from that date the property vests in the Receiver. Therefore, transactions entered into by the insolvent at any time between the commencement of the insolvency and the date of the adjudication order will not prevail against the Receiver whose title by relation back dates from the commencement of the insolvency. **AIR 1957 Pepsu 22 (23) (Pt A) (Prs 3, 4).**

——Ss. 28 (7), 34 (2)—Companies Act (1913), Ss. 229, 168—Winding of company—Debt due from company not barred on date of petition for winding up but barred before winding up order is debt provable—AIR 1958 Punj 341, **Reversed.** See Companies Act (1913), S. 299. **AIR 1961 Punj 84 (DB).**

——Ss. 28 (7), 51 (1)—A purchasing property of B in execution of his decree against B — Sale confirmed after filing of insolvency petition by B—Receiver selling same property to C—Effect — Sale in favour of A being earlier prevails over C's sale. A I R 1915 Mad 400 and AIR 1916 Oudh 274, Rel. on—(Civil P. C. (1908), S. 65). **1961 Raj L W 652 : I L R (1962) 12 Raj 523.**

SECTION 28-A

● **——S. 28-A, Proviso I (as amended in 1948) — 'Final decision' — Meaning of — Preliminary decree for partition is 'final decision' — Civil P. C. (1908), Ss. 2 (2), 97, O. 20, R. 18.**

A decision is said to be final when, so far as the Court rendering it is concerned it is unalterable except by resort to such provisions of the Civil P. C., as permit its reversal, modification or amendment. Similarly, a final decision would mean a decision which would operate as res judicata between the parties if it is not sought to be modified or reversed by preferring an appeal or a revision or a review application as is permitted by the Code. A preliminary decree passed

whether it is in a mortgage suit or a partition suit, must be regarded as conclusive. No doubt in suits which contemplate the making of two decrees—a preliminary decree and a final decree—the decree which would be executable would be the final decree. Section 97, Civil P. C. clearly indicates that as to the matters covered by it, a preliminary decree is regarded as embodying the final decision of the Court passing that decree.

After a father of a joint Hindu family became insolvent, the joint family properties consisting of his and his two sons' shares were sold by the Official Receiver. The transferee sold the entire property to the respondent. The sons thereafter filed a suit for partition of the joint family property to which suit they made the respondent a party. A preliminary decree for partition was passed in favour of sons. The decree was eventually affirmed by the High Court in 1946. In the meanwhile there was an application by the sons for a final decree, which was granted ex parte. That decree was set aside at the instance of the respondent in 1950. By that time the new S. 28-A had come into force. On the question in appeal by the sons by Special Leave before the Supreme Court, whether the first proviso to S. 28-A would save the preliminary decree from being re-opened :

Held, that in this case the sale made by the Official Receiver during the insolvency of the appellants' father was the subject of a final decision by a competent Court inasmuch as the Court decided that the sale was of no avail to the purchaser as the Official Receiver had no power to that sale. Nothing more was required to be established by the appellants before being entitled to the protection of the first proviso to S. 28-A. A I R 1956 Mad 413. Reversed. Venkata Reddy v. Petthi Reddy, (1963) 1 S C W R 420 : (1963) 2 S C J 577 : (1963) Supp 2 S C R 616 : (1963) 2 Mad L J (S C) 126 : (1963) 2 Andh W R (SC) 126 : AIR 1963 S C 992 (994, 996) (Prs 6, 10).

●——S. 28-A—Retrospective effect—Father's power to alienate son's share if vests in Receiver.

Under the new S. 28-A the powers of a father under the Mitakshara law to alienate the joint family property including the interest of his sons in the same for discharge of an antecedent debt not contracted for illegal or immoral purposes vests in the Receiver on the adjudication of the father as an insolvent. Section 28-A has retrospective operation. A I R 1946 Mad 434, Reversed. Nageswaraswami v. Viswasundara, (1953) S C J 539 : (1953) 2 Mad L J 252 : 1953 S C R 894 : A I R 1953 S C 370 (372) (Pt A) (Pr 10).

——Ss. 28-A and 28 — Hindu Joint family — Insolvency of father — What vests in official receiver — Father's power to sell son's share for his personal debts comes to end when son files suit for partition or his share is attached by creditor — Power of receiver being co-extensive also comes to end—Decree-holder can execute decree against son's share without leave of insolvency Court. A I R 1965 Andh Pra 451 (453) (Pt A) (Prs 6, 7) (DB).

——S. 28-A — Effects of attachment of property on rights of alienation — Right which attaching creditor obtains by attaching property—Transfer by operation of law is not affected. See Civil P. C. (1908), S. 64. A I R 1965 Andh Pra 52.

——S. 28-A—Decree obtained against Hindu debtors and their sons—Joint properties attached before judgment-debtors adjudicated insolvents — Sons' shares sold in execution of decree and sale proceeds deposited in Court—Application by Official Receiver under Ss. 4 and 5 to make available sale proceeds for benefit of all insolvent's creditors and not only for benefit of attaching creditor—Application is maintainable. See Provincial Insolvency Act, 1920, S. 4. A I R 1965 Andh Pra 52.

——S. 28-A — Hindu father becoming insolvent — Power to alienate interest of sons — If passes to official receiver.

The power of the father to alienate the interests of his sons for the satisfaction of his antecedent debts passes to the receiver as 'property' within the meaning of the Provincial Insolvency Act. Once it has so passed by virtue of S. 28-A, S. 28 (2) of the Act debars any creditor from having any remedy over the property of the insolvent which property includes the property defined under S. 28-A. A I R 1953 S C 370, Foll.; A I R 1951 Mad 713 and A I R 1951 Mad 1010, Diss. from. AIR 1960 Andh Pra 131 (133) (Pt C) (Prs 10, 11).

——S. 28-A — Father — Insolvency of — Powers of official receiver—Partition — Effect. See Hindu Law —Debts. A I R 1957 Andh Pra 692 (DB).

——S. 28-A—Scope—If ultra vires.

Section 28-A is ultra vires the Dominion Legislature and the power to sell the entire joint family property including the shares of the sons vested in the Official Receiver on the insolvency of the father of a Mitakshara joint family. A I R 1952 Mad 27, Rel. on. 1956 Andh W R 586 : A I R 1957 Andh Pra 609 (610) (Pt A) (Pr 3) (DB).

——S. 28-A—Scope — Exercise by Official Receiver of father's power to sell sons' share—Interest of sons —When passes—Question of fact.

The question whether in a particular case the Official Receiver has exercised the power of father to sell sons' share and conveyed the entire interest in the property including the sons' share must be decided on the facts of that case. It is true that the mere fact that the order of adjudication vests in the Official Receiver not only the share of the father but also the power of disposition possessed by the father over the sons's shares would not by itself convey to the purchaser the shares of the sons unless there is indication in the deed of sale or in the sale proceedings which preceded the sale that the Official Receiver purported to exercise that power of sale and did in fact sell the sons' shares also. It is sufficient if the Official Receiver in fact exercises the right of the father to sell the share of the sons and convey the entire interest in the property to the purchaser. The Official Receiver need not purport 'to exercise the right to sell the right of the father to sell the son's share as well, whatever this might mean.' It is sufficient if he sells the absolute interest in the property. There is no doubt a difference between the existence of a power and its actual exercise and the mere existence of power may not be sufficient to show that in any particular case that it was exercised. At the same time the deed of sale executed by the Official Receiver need not specifically recite that he was exercising the power of sale vested in him under Ss. 28 and 28-A of the Act. It will be sufficient if he purports to convey the entire interest in the property and not merely the share of the insolvent father. 1956 Andh W R 586 : AIR 1957 Andh Pra 609 (611) (Pt C) (Pr 5) (DB).

——Ss. 28-A, 28 (2)—Joint family property—Right of insolvent to dispose of—Vesting of right in Receiver.

Although on first impression, in view of the definition of the word 'property' it appears that the receiver in insolvency is invested with not only the property belonging to the insolvent but also property over which the insolvent had a disposing power which he may exercise for his own benefit, it has been held that the capacity of an insolvent to dispose of joint family property for his own benefit, having regard to the fact that what vests in the receiver is property which is to become divisible among the

creditors, is not property within the meaning of S. 28 (2). In view of such judicial pronouncements the legislature amended the Act by adding S. 28-A and since that amendment the property of the insolvent comprises and always has been deemed to comprise also the capacity to exercise and to take proceedings for exercising all such powers in relation to property as might have been exercised by the insolvent for his own benefit. A Hindu father has the power or capacity to dispose of for his own benefit the interest of his sons in joint family property and therefore by the operation of S. 28-A such capacity may be exercised by the receiver. But when the manager of a joint Hindu family, who is not the father, exercises his power of disposing of property for the benefit of the joint family for purposes of legal necessity, he does not exercise the power for his own benefit. Therefore such a capacity is not comprised in the expression 'property' in S. 28-A and hence it does not vest in the receiver'. **59 Bom L R 1243 : ILR (1959) Bom 13 : A I R 1959 Bom 229 (230, 231, 232) (Prs 5, 8, 9, 10, 11) (DB).**

——Ss. 28A and 28—Equitable assignment—Transfer by share-holder of his right to receive moneys in respect of shares of company in liquidation — Shareholder adjudged insolvent—Effect—Official Assignee if entitled to claim moneys in respect of those shares — Right of assignee indicated. See Provincial Insolvency Act (5 of 1920), S. 28. AIR 1963 Cal 122.

——S. 28A (inserted by Act 25 of 1948) — Effect of section — Adjudication of father — His power under Mitakshara law to alienate joint family property including the interest of his sons for discharge of antecedent debt not contracted for illegal or immoral purposes vests in Receiver — S. 28-A has retrospective effect. **AIR 1951 Cal 210 (211) (Pt A) (Pr 5) (DB).**

——S. 28-A (inserted by 25 of 1948) — Retrospective operation — Section is retrospective and applies to all transfers which may have been effected by the receiver on an adjudication of the father or the managing member of a joint Mitakshara Hindu family under the Act. The fact that the decree of the trial Court had been passed already and the amendment was made during the pendency of an appeal does not affect the applicability of S. 28A. **A I R 1951 Cal 210 (211) (Pt B) (Pr 5) (DB).**

——S. 28-A—Father's power to dispose of son's property — Vesting in official receiver—Attachment by creditor before insolvency — Effect — (Civil P. C. (1908), S. 64).

The result of the enactment of S. 28-A, which is expressly made retrospective, is that the powers of a father under the Mitakshara Law, to alienate the joint family property including the interest of his sons in the same for discharge of an antecedent debt not contracted for illegal or immoral purposes vests in the Receiver on the adjudication of the father as an insolvent, as 'property' within the meaning of the Insolvency Act: AIR 1953 S C 370, Rel. on.

That as regards the attachment before insolvency it was not correct to read S. 64, Civil P. C. as putting an end to the power of sale because as between the transferor and the transferee the alienation would undoubtedly be operative and if the attaching creditor was paid off or for any reason the attachment ceased to subsist the alienee's right would be unassailable. So long as there was no dispute raised by the attaching creditor regarding the sale, neither the son nor anybody else would have a right to challenge the sales by the Official Receiver on the ground of an attachment by another creditor: A I R 1939 Mad 702, Rel. on. **I L R (1958) Ker 1039: 1958 Ker L T 995 : 1959 Ker LJ 569: AIR 1959 Ker 141 (144, 146) (Prs 20, 21, 36, 37, 40) (DB).**

——S. 28-A — Insolvency of Hindu father — Sale by Official Receiver — Extent of right acquired by auction purchaser — Son's shares — If pass — (T. C. Insolvency Act (2 of 1956), S. 29).

The mere fact that the order of adjudication vested in the Official Receiver not only the share of the insolvent father but also his power of disposition of the son's share would not by itself convey to the auction-purchaser the share of the son, unless there is indication in the document or in the sale proceedings that the Official Receiver in fact purported to exercise that power of sale and did in fact sell the son's share as well. Where the sale-deed executed in favour of the auction-purchaser shows that what was conveyed by the sale was the interest notified to be sold and it is seen from the notice that what was notified to be sold was the right, title and interest of the insolvent in the properties described in the schedule and there is no indication in the notice or the sale-deed that the insolvent's son's share was intended to be or was sold by the receiver it is not possible to hold that the insolvent's son's share was also conveyed. The interest obtained by the purchaser must be limited to the insolvent's share in the property sold. AIR 1952 Mad 776, Rel. on; AIR 1957 Andh Pra 609; 1956 A W R 586, Explained and Distinguished. **1957 Ker L J 533: 1957 Ker LT 532 : I L R (1957) Ker 806 : A I R 1957 Ker 144 (146) (Pt B) (Pr 3) (DB).**

——S. 28-A, First Proviso—'Final decision by competent Court'—Preliminary decree—If final decision —(Civil P. C. (1908), S. 2 (2)).

A preliminary decree passed on 2nd February, 1943 by which the plaintiff's share has been declared as two-third in the entire property belonging jointly to him and his insolvent father and which preliminary decree has received confirmation by the appellate Court and finally by the High Court on 1st August, 1946 is not a final decision by a competent Court within the meaning of the first proviso to S. 28-A holding that the word 'decision' is synonymous with decree. For the mere declaration of the rights of the plaintiff by the preliminary decree would not amount to a final decision. **69 Mad L W 273: 1956 Mad W N 248 : ILR (1956) Mad 1133 : (1956) 1 Mad L J 576 : AIR 1956 Mad 413 (414) (Pr 6) (DB).**

[Reversed in AIR 1963 SC 992.]

——S. 28-A—Fraudulent transfer — Father adjudged insolvent — Alienation by father — Effect of setting aside of transfer on son's share. See Provincial Insolvency Act (1920), S. 53. **AIR 1955 Mad 51 (DB).**

——S. 28-A—Insolvency of Hindu father — Power of Official Receiver to sell son's interest.

On adjudication of the father as an insolvent not only the share of the father but also the power of the father to dispose of the share of the son would vest in the Official Receiver under S. 28. But the mere fact that the order of the adjudication vested in the Official Receiver not only the share of the father but also the power of disposition possessed by the father for the son's share would not by itself convey to the auction purchaser the share of the son unless there is indication in the document or in the sale proceedings that the Official Receiver in fact purported to exercise that power of sale and did in fact sell the son's share as well. Where in the sale list it is said in the preamble that what is purported to be sold is the entire right possessed by the insolvent in the immoveable properties described in the schedule, so also if in the sale deed, it is definitely stated that what is being conveyed is the property belonging to the insolvent under Muli mula geni and janmi right of which the creditor became the auction purchaser the sale will be confined to the right of the insolvent in the property and will not extend to the

share of the son. Further, the power of sale of the father is dependent upon the existence of coparcenary and if that coparcenary is terminated by division in status, the power ceases to exist. When prior to the date of sale the son issued a notice to the father demanding partition of the property, this would bring about division in status and prevent the Official Receiver from exercising the power of sale. ('52) 65 Mad L W 634 : 1952 Mad W N 592: 1952-1 Mad L J 681: AIR 1952 Mad 776 (777, 778) (Prs 3, 4).

——S. 28-A—Powers under S. 28-A, whether vest in receiver.

The power of the manager or the father, as the case may be, under S. 28-A can vest in the Official Receiver. As the whole of the property of the insolvent can vest in the Court or in the receiver at the commencement of the insolvency, along with the entire property his powers mentioned in S. 28-A also vest in the receiver. Pending the insolvency the insolvent might get some properties or powers by devolution or otherwise. Such properties or powers also would vest in the receiver. 64 Mad L W 906 : 1951-2 Mad L J 438 : AIR 1952 Mad 27 (31) (Pt C) (Pr 9) (DB).

——S. 28-A, Proviso — "Final decision by a competent Court."

"Final decision by a competent Court" can only mean the decision of the Court which ultimately disposes of the suit. If an appeal has been filed against the judgment of the subordinate Judge, it is impossible to treat his judgment as final within the meaning of the proviso. 64 Mad L W 906 : 1951-2 Mad L J 438 : AIR 1952 Mad 27 (32) (Pt D) (Pr 10) (DB).

——S. 28-A — Scope and effect — Decree against Hindu insolvent father and his son — Executability against son.

The insolvency of the father of a joint Hindu family under the law as it now stands, after the introduction of S. 28-A of the Provincial Insolvency Act in April, 1948, which has retrospective effect, vests not only the share of the father but also the power of the father to dispose of the properties of the sons in the Official Receiver. But where actually the Official Receiver has sold only the father's interest in the property and has not exercised the power of the father by bringing to sale the share of the son also, S. 28 does not prevent the decree-holder from proceeding in execution of the decree against the son's share notwithstanding the vesting of the power to dispose of the property in the Official Receiver. That vesting does not take away the power of the son to sell the property in his own right and much less prevent the execution creditor from proceeding with the sale of the son's share. As under the law there is no bar preventing the decree-holder from executing the decree against the son, there will be nothing to prevent running of limitation for execution of the decree against the son. It is wrong to think that S. 28-A by recognising retrospectively the power of the Official Receiver in the case of insolvency of the father to dispose of the son's share in the right of the father saves the bar of limitation against the son. 1951 Mad W N 557 : (1951) 2 M L J 299 : AIR 1951 Mad 1010 (1010, 1011) (Pt A) (Prs 2, 3, 4).

——S. 28-A — Hindu joint family — Adjudication of father—Creditor proceeding against sons — Official Receiver, whether necessary party.

When a father of a Hindu joint family is adjudicated insolvent, a creditor of the family can proceed against the shares of the sons so long as they have not been disposed of by the Official Receiver in the exercise of the right of the father himself to sell the shares of the sons under certain circumstances. In such a case the sons cannot compel the creditor who has obtained a decree to implead the Official Receiver in the execution proceedings. (1951) 2 M L J 48 : 1951 Mad W N 414 (1) : AIR 1951 Mad 713 (713, 714) (Pr 1).

——S. 28-A—Insolvency of Hindu father.

When the insolvent is a Hindu father the property that would vest in the receiver would consist of the share of the father in the joint family property and the right, capacity or power of the father to sell the shares of the sons to pay antecedent debts which are not illegal or immoral in character. The effect of the vesting would be to take out or abstract from the joint family the properties that so vest in the official receiver and the funds realised by him by the sale of the properties must also be deemed to have been abstracted or taken out from the joint family. Those funds would be at the disposal of the official receiver for payment to the creditors of the insolvent father, subject always, of course, to the reverter of any surplus. The creditors of the sons would be entitled to proceed only against the surplus, if any. ('51) 1951 M W N 76 : 1951-1 M L J 145 : AIR 1951 Mad 656 (2) (657) (Prs 2, 4).

——S. 28-A—"For his own benefit" — Meaning of— Presidency — Towns Insolvency Act (1909), S. 52 (2) (b).

The words "for his own benefit" can have reference only to a father manager of Hindu joint family and not to a manager other than father as the power of the latter is exercisable for the benefit of the family and not for his own. Hence S. 28-A has no application to the insolvency of a manager other than father of a Hindu joint family. 1950 Mad W N 471 : (1950) 2 Mad L J 173 : 63 Mad L W 766 : ILR (1951) Mad 449 : AIR 1950 Mad 770 (771) (Pt A) (Pr 3).

——S. 28-A (inserted by Act 25 of 1948), and S. 28— Insolvency of Hindu father — Sale of property—Interest of sons if passes.

A person acquires, at the sale by the Official Receiver in the insolvency proceedings not merely the interest of the insolvent in the joint family estate, but also the interests of his sons as well. (1950) 2 Mad L J 817 : AIR 1950 Mad 691 (691) (Pt A) (Pr 1) (DB).

——S. 28-A—Applicability—Ad interim receiver has no power to take possession of joint family properties which were not admitted to be properties of the debtor. See Provincial Insolvency Act (1920), S. 20. AIR 1954 Pat 459 (DB).

SECTION 29

——S. 29—General principle of res judicata is applicable to proceedings under the Provincial Insolvency Act. See C. P. Code (1908), S. 11. AIR 1965 All 248.

——Ss. 29, 28 (2) and (7) and 78 (2) — Defendant executing pronote on 7-1-53 — Insolvency petition filed by him on 17-7-54 — Adjudication on 10-8-59 — Money suit filed against him on 14-2-59 — Suit held did not fall within concept of S. 28 (2) — Section 29 does not govern suits instituted before order of adjudication. See Provincial Insolvency Act (5 of 1920), S. 28 (2). AIR 1965 Andh Pra 260 (DB).

——S. 29—Scope.

There is nothing in S. 29 to indicate that in cases where a person has been declared an insolvent, the official receiver has to be impleaded in his place. (1958) 2 Andh W R 30 : 1958 Andh L T 706 : AIR 1958 Andh Pra 438 (439) (Pt A) (Pr 4) (DB).

——S. 29 — Duty of Court — Special circumstance justifying continuance of suit—Failure to consider— Effect.

In order to exercise discretionary power under S. 29, it is incumbent upon the Court to consider whether there are special circumstances to justify the continuance of the suit. Where the insolvent is the only defendant and the claim relates to a debt there is greater reason than not to stay the suit since the debt

is provable in the insolvency. But where besides him another person is also sued and the claim is laid in the alternative, the continuance of the suit is more desirable than its stay because if the suit is totally stayed the plaintiff's chance to obtain a decree against a defendant who is not adjudicated an insolvent is also withheld. The Court may permit the continuance of the suit subject to the condition that the insolvent or his estate would not be liable for any further costs incurred by the plaintiff. Where the trial Court stayed the suit merely by observing that the stay was necessary for avoiding further complications, and did not even mention what were the likely further complications, the order involved material irregularity in the exercise of jurisdiction. 1960 M P L J 1368 : 1960 Jab L J 1186 : AIR 1961 Madh·Pra 199 (200) (Prs 2, 3).

——S. 29—Stay under—When once there is an order of the Court which absolutely on its terms prohibits a party from executing the decree, the mere fact that the Court has power to modify such an order does not make it any the less an order staying the execution of a decree. Hence, it cannot be held that as it was open to the decree-holder to have applied to have the order of stay under S. 29, modified or vacated it is not such an order of absolute stay as is contemplated by S. 15. See Limitation Act (1908), S. 15. AIR 1955 Mad 547.

SECTION 30

——Ss. 30, 28 (7) and 54 — Order of adjudication — Transfer held to be act of insolvency — Finding, if can be challenged in annulment proceedings.

An order of adjudication is not conclusive as to the legal character of a transfer which it has held to be an act of insolvency. The transferee who was not a party to the adjudication proceedings can, therefore, challenge that finding in the annulment proceedings. See Provincial Insolvency Act (5 of 1920), S. 28 (7). **AIR 1951 Trav.Co 55 (DB).**

SECTION 31

——S. 31—Section applies to State debts.

A protection order under S. 31, Provincial Insolvency Act, may apply either to all the insolvents' debts or to some of them. It draws no distinction between classes of debts, that is debts due to the State or to Corporation or Municipalities or private persons. Section 31 does not impose any obligation whatsoever on the State. Certain creditors are by law given a right in certain circumstances to have an unfortunate debtor imprisoned for failure to pay his debt. It is a form of execution recognised by the Code of Civil Procedure. The State can take advantage of these provisions and the fact that a protection order might be made is not an obligation imposed on the State. All that the section provides is that the rights of creditors to imprison a debtor may be curtailed if the debtor has been adjudicated insolvent. That being so, S. 31 must be held to apply to State debts. **AIR 1952 Cal 251 (252) (Pt A) (Prs 5, 6) (DB).**

——S. 31 — Discretion of Court—Wrong exercise of discretion resulting in injustice to insolvent — High Court should interfere under Art. 227, Constitution of India—Civil P. C. (1908), S. 115—Constitution of India, Art. 227.

A protection order under S. 31, Provincial Insolvency Act should not ordinarily be refused to an adjudged insolvent who has been stripped of all his property which has by law vested in the official Receiver whose duty is to discharge the insolvent's debt to the best of his ability, unless there is proof that the debtor has concealed some of his assets or there is some special reason for refusing him the protection. The mere fact that the insolvent after his discharge would still be liable for the State debt in respect of the income tax is no reason for refusing him the protection from arrest.

Where the Court wrongly refuses to pass a protection order in favour of the insolvent in the exercise of its discretion under S. 31, Provincial Insolvency Act, it would be difficult for the High Court to exercise its powers of revision under S. 115, Civil P. C. unless it can be said that the jurisdiction has not been exercised judicially. But the High Court can and should interfere under Art. 227 of the Constitution of India when the refusal to pass the order would result in real injustice to the insolvent. Interference under Art. 227 should only be resorted to in rare cases where real injustice would be done if the Court could not interfere under S. 115, Civil P. C. **AIR 1952 Cal 251 (252) (Pt B) (Prs 7, 8, 9) (DB).**

——Ss. 31, 5, 23 and 75 — Interim protection from arrest in execution of decree against debtor pending his application for adjudication — Inherent power — Refusal to grant protection — Not revisable either under S. 115, Civil P. C or Art. 227 of the Constitution — Civil P. C. (1908), S. 151 — Constitution of India, Art. 227. See Provincial Insolvency Act (1920), S. 5. 1961 Ker L J 1272.

SECTION 33

——Ss. 33, 80, 49 — Proceedings under S. 33—Presumption under S. 118 (a), Negotiable Instruments Act does not arise — Nature of proceedings under S. 33—Jurisdiction and duties of Insolvency Court — Negotiable Instruments Act (1881), S. 118.

No statutory presumption of consideration under S. 118 (a), Negotiable Instruments Act arises in favour of creditors in a proceeding under S. 33, Provincial Insolvency Act for settlement of schedule of creditors and the Receiver exercising power under S. 80 is not bound to admit the debts in the schedule if the insolvent or the other creditors failed to displace that presumption. A I R 1958 All 54, Reversed. A proceeding under S. 33 of the Provincial Insolvency Act is not a proceeding between the insolvent and the proving creditor. The proceeding is between the creditors represented by the Official Receiver and the insolvent. When a creditor, seeking to prove a debt relying upon a negotiable instument, or other evidence makes a claim for inclusion of the debt due to him, the Court, or, where he is authorised the Receiver of the estate of the insolvent, has to be satisfied about the existence of the debt, the amount due, its particulars and that it is provable in insolvency. Section 33 does not indicate the quantum of proof which may be regarded as sufficient to prove a debt. A Court may accept in proof of a debt a registered letter to the Court and an affidavit verifying the debt. That, however, is a matter of procedure, and does not lay down as to what is sufficient to prove the debt. In each case it is for the Court or the Receiver (subject to review in the manner provided by the Act) to consider whether the debt of which the creditor claims inclusion is proved. The decision of the question must of necessity depend upon the circumstances and the evidence led to prove the debt.

The presumption under S. 118 of the Negotiable Instruments Act is a presumption of consideration; it does not in all cases prove the quantum of debt due by the insolvent at the date of insolvency. The Insolvency Court has to ascertain whether a debt is due by the insolvent, whether the debt is provable in insolvency, and the quantum of the debt due at the material date. In making this enquiry in its three aspects even the judgment of a Court against the debtor may not be regarded as binding upon the Court.

A debt to be entered in the schedule must be a real debt. The Court in each case has jurisdiction to investigate whether there is a real debt; whether production of a judgment or a negotiable instrument or other evidence may be regarded as sufficient to regard the debt as proved is a matter for the Insolvency Court to decide. The question is not to be adjudged in the light of any estoppel which may operate against the insolvent or of any presumption. The Court has power to insist upon proof of the debt apart from the judgment or the negotiable or other instrument. Whether the power should be exercised in the case of a judgment debt in a given case depends upon the discretion of the Court which has to be exercised on sound judicial principles. It is true that the Court ordinarily does not go behind a judgment against the debtor, on a bare suggestion by the debtor that the debt which is merged in the judgment did not exist or was bad. There must undoubtedly be circumstances prima facie justifying an enquiry. There must appear something that the judgment was procured by fraud or collusion, or that there has been miscarriage of justice. But a mere, irregularity or error in form will not be a sufficient reason for going behind the judgment.

When a debt secured by a promissory note is sought to be proved, the Insolvency Court must enquire into the reality, and the quantum of consideration. What shape this enquiry may take will depend upon the circumstances of the case. In all cases of proof of debts under S. 33, the burden is upon the creditor. That burden may be discharged by the affidavit of the creditor viewed in the light of a presumption which the Court may raise under S. 114 of the Evidence Act, that a bill of exchange accepted or endorsed, was for good consideration. Hence the presumption under S. 118 of the Negotiable Instrumen s Act that every negotiable instrument was made or drawn for consideration cannot avail against the Receiver of the estate of the insolvent. Official Receiver, Kanpur v. Abdul Shakoor, 1965 All L J 482 : (1965) 1 S C A 714 : (1965) 1 S C W R 1029 : (1965) 2 S C J 691 : (1965) 2 Andh W R (SC) 152 : (1965) 2 Mad L J (SC) 152 : (1965) 1 S C R 254 : ILR (1965) 2 All 359 : A I R 1965 S C 920 (923, 924, 925, 926) (Pt A) (Prs 10, 12, 13, 14, 15, 17).

——Ss. 33, 24 and 4 — Patiala Recovery of State Dues Act (4 of 2002 BK), Ss. 4 and 11 — Powers of head of department under S. 4 — Scope — He can determine not only amount of debt due but also whether alleged defaulter is defaulter or not—Insolvency Court not precluded by S. 11 from going into question whether alleged debtor was really debtor and liable to pay — Jurisdiction and power of Insolvency Court. 61 Pun L R 753, Reversed. See Patiala Recovery of State Dues Act (4 of 2002 BK), S. 4. AIR 1964 SC 1223.

——Ss. 33 (3), 37, 43 and 73 — Respective scope and applicability — Annulment of adjudication — Order vesting property in Official Receiver under S. 37 — Effect — Debts included in schedule but not proved before annulment and closing of administration — Administration re-opened on creditor's application— — Power of Official Receiver to entertain proof of the debts.

A was adjudicated insolvent on 27th March, 1944. Two years later, the Insolvency Court, in annulling the adjudication, passed an order under S. 37 of the Insolvency Act that the properties would continue to vest in the Official Receiver. The administration was closed in 1947, as there were no assets to be realised. A suit filed in 1949 by B, a creditor, was decreed in 1950, holding the properties mentioned therein as those of the insolvent. The administration was reopened in 1952. In June and July, 1955 two more creditors, whose debts were shown in the Schedule but had not been proved, filed proofs of debt before the Official Receiver. On the question whether the Official Receiver was competent to receive the proofs of debt and the creditors were entitled to proceed against the properties of the insolvent subsequent to the order of annulment:

Held, it is open to the creditors to approach the Official Receiver in whom the property vested by an order of the Court under S. 37 of the Insolvency Act, to prove their debts before the Official Receiver. A debt not barred at the commencement of the insolvency does not in and for the purpose of the insolvency become barred by lapse of time. The annulment of adjudication under S. 43 is merely a continuation of the insolvency and the vesting order in the Official Receiver is for the benefit of the general body of creditors. AIR 1924 Mad 163, Rel. on. **(1964) 1 Andh W R 284.**

——Ss. 33, 78 (2), 28 (2), 34. 49, 62 and 79—'Debts provable,' meaning of—Affidavit in support of application for permission under S. 28 (2) does not amount to proof of debt—Benefit of S 78 (2) cannot be taken —(Words and Phrases). See Provincial Insolvency Act (5 of 1920), S. 78 (2). AIR 1960 Andh Pra 257 (DB).

——Ss. 33, 6, 9, 28, 24, 50, 53 —Debtor adjudged insolvent — Petitioning creditor applying under S. 53 for annulment of certain transfers by insolvent — Transferee cannot challenge order of adjudication on ground that petitioning creditor was not creditor of the insolvent. See Provincial Insolvency Act (5 of 1920), S. 6. AIR 1963 Bom 212.

——Ss. 33, 50 —Proof of debts — Revision — Interference in — Civil P. C. (1908), S. 115.

In an insolvency matter the Schedule of Creditors was prepared by the Receiver and was submitted to the Court, for necessary orders along with the dividend proposed to be distributed amongst the said creditors and an application for fixing his remuneration. The Schedule and the proposal along with the application of the receiver for fixing his remuneration was at Court's order shown to the creditors or their advocates for having their say on the same. The advocate of two of the creditors, A and B made an endorsement that he had no objection if reasonable remuneration was paid to the receiver. The Court thereupon passed an order that as the parties had no objection to the proposal and approved the proposal of the receiver, the receiver should distribute the dividend as proposed and also to receive the amount of his remuneration. After this order creditors A and B filed an application that as the debts of creditors C and D had not been accepted as such by the Insolvency Court as required by S. 33, they were not entitled to share in the proposed distribution of the assets. The Insolvency Court held that the Court had done what was necessary for C and D to be entitled to a share in the distribution of the assets and that nothing further was required to be done by the Court in that respect. The appellate Court, however, held that as the Court

had not determined the correctness of the claims made by C and D, which the Court ought to have done, C and D were not entitled to a share in the distribution of the assets. In the revision petition by C and D against the order:

Held, that the question about the proof of debt by a creditor and the question about the acceptance or admission of his debt by the Insolvency Court are two distinct steps. One step is to be taken by the creditor and the other by the Court. It is only when the Court either accepts or rejects the creditor's claim and, in case of acceptance, enters his name and claim in a schedule that it can be said that the question has been finally determined by the Court. The effect of the preparation of the schedule by the Insolvency Court and the affixation of the signature by the Civil Judge thereon was a question which is primarily within the jurisdiction of the appellate Judge to determine. It might be that another Judge might have inferred from the fact that a schedule was prepared that the Court had also determined the question about tho creditor and his claim. But, the fact that appellate Court has drawn a different inference on the facts did not mean that the interference of the High Court was necessary in the interests of justice. **Held**, further, that even assuming that the failure to pass a specific order in terms of S. 33 was a mere irregularity and that the mention of the names of C and D in the Schedule suggested that the Court had accepted or admitted their claims, if in the absence of such specific order a competent Court took the view that specific order in terms of S. 33 had not been passed then it did not necessarily establish, except in certain exceptional cases, a case for interference of the Court of revision. **(1964) 5 Guj L R 130.**

——Ss. 33, 49, 50 — Insolvency Rules (by Bombay High Court), R. 8 — Proof of debts — Admission of a claim by creditor — Requirements of — Specific order under S. 33 necessary — Mere inclusion of his name in schedule of creditors does not amount to compliance with S. 33.

Mere acceptance of evidence tendered by the creditor in support of his claim against the insolvent does not amount to admission of his claim by the Court. The question about the proof of debt by a creditor should not be confused with the question about acceptance or admission of his debt by the Insolvency Court. For acceptance of a debt, specific order in terms of S. 33 by the Court is necessary.

For determining who are the creditors of the insolvent and what is the amount due to them, three steps are required to be taken. The first of these three steps is to be taken by the creditor himself and that step is described as proof of his debt in S. 49 read with R. 8 of the Insolvency Rules (Bombay High Court) which prescribe the normal mode of proving a claim. The other two steps in the process are to be taken by the Court itself. The second step consists of the determination of the persons proving their debts as creditors and the amounts of their debts proved by them by passing a written order in that behalf as specifically stated in S. 33. The third and the last step consists of framing the Schedule of creditors and the debts due to them. Mere inclusion of a creditor's name in the Schedule of creditors without prior determination of his claim in the manner prescribed in S. 33, however, does not entitle him to a share in the distribution of the assets of the insolvent. AIR 1943 P C 98; AIR 1934 Mad 465; AIR 1947 Pat 161, Dist. A I R 1946 Mad 500, Dissented from. **(1964) 5 Guj L R 130.**

——Ss. 33 (3) and 41 — Limitation for tender of proof — Effect of order of discharge.

Fixing of some time for proof of debts at the time of passing an order of adjudication is only for the convenience of parties. Hence delay in applying for proof of debts is not per se fatal to acceding to the prayer for the inclusion of debt in the schedule. No period of limitation is preseribed in the Insolvency Act during which a creditor should apply for proof of his debt. But this right of creditor to prove his debt is subject to the condition that he (creditor) should apply for proof of debts before the insolvent is granted an unconditional order of discharge and his assets are realised and distributed and the surplus, if any, is paid to the insolvent. The granting of an unconditional order of discharge is the last act in bringing about a final termination of the insolvency proceedings. AIR 1936 Cal 807 and 54 Mys H C R 261. Foll. **ILR (1956) Mys 209 : AIR 1957 Mys 3 (4) (Pt A) (Prs 9, 10) (DB).**

——Ss. 33 (3) and 41 — Death of insolvent before filing application for discharge — Effect—Automatic discharge — Meaning of — Unconditional order of discharge, when can be passed.

The order of discharge contemplated under S. 33 (3) is one made on the application of the debtor. It does not contemplate a case where the insolvent dies without filing an application for discharge. 'Automatic discharge' does not mean 'immediate discharge'. Those words can only mean a discharge brought about without any direct or immediate stimulus from without. Death of an insolvent is no bar to the Court suo motu granting an order of discharge to a deceased insolvent when the other conditions required under the Act, i. e., the realisation of his assets and the distribution of the same among his creditors are completed and when there is nothing else to be done.

There is no reason to doubt the jurisdiction of the Court to grant an unconditional order of discharge in favour of a deceased insolvent when the proceedings otherwise terminate. Even otherwise, an automatic discharge can occur when the insolvency proceedings finally terminate. Hence the death of the insolvent does bring about automatic discharge of the insolvent and the insolvency proceedings do not terminate thereby. The creditors are, therefore, entitled to prove their debts even after the death of the insolvent till the unconditional order of discharge is passed. **ILR (1956) Mys 209 : AIR 1957 Mys 3 (5) (Pt B) (Prs 12, 13) (DB).**

——S. 33—Right of purchaser of mortgaged property — Mortgagee obtaining decree against mortgagor and purchaser — Mortgagor declared insolvent and sale annulled — Purchaser paying decretal amount is entitled to be shown as scheduled creditor. See T. P. Act (1882), S. 92. ('52) 1952 Nag L J (Notes) 143.

——Ss. 33, 75 — Order under—No second appeal. 62 Pun L R 597: AIR 1960 Punj 604 (604) (Pt A) (Pr 2).

——S. 33 — T. P. Act (1882), S. 53-A — Schedule of creditors — Proof of debt — Unregistered mortgage — Possession delivered to mortgagee — Insolvency of mortgagor — In proving debt, benefit conferred by S. 53-A, T. P. Act, is available to mortgagee as against Receiver in whom interests of mortgagor vest — AIR 1947 Lah 1 (F B). Rel. on. 62 Pun L R 597 : AIR 1960 Punj 604 (604) (Pt D) (Pr 3).

SECTION 34

——S. 34 — Civil Procedure Code (5 of 1908), S. 11 and O. 9, Rr. 8 and 9 — Suit for recovery of money dismissed for default — Subsequent petition for proof of the debt in insolvency — Maintainability.

The plea of res judicata cannot be raised unless the matter directly and substantially in issue in the latter

suit has been heard and decided in the former suit. Therefore, where a suit was not heard and decided but was only dismissed for default, it cannot be said that there was anything decided in the former suit, which can operate as res judicata in a petition for proof of that debt in insolvency. Further, even where O. 9, R. 9, Civil P. C. applies, it could only be a bar for a second suit based upon the same cause of action. Therefore, the further condition that has to be proved is that, the cause of action is the same in the suit previously instituted as well as in the application for proving the debt.

It is well settled that the scope of an inquiry by the Insolvency Court under S. 34 of the Provincial Insolvency Act is very wide. Even in a case where the liability of the insolvent is embodied in a decree, it is open to the Insolvency Court to inquire and go behind it and get to the real character of the transaction. A fortiori in a case where the suit had been dismissed for default, it cannot be said that the creditor is debarred under S. 34 of the Act from proving his claim or for the Insolvency Court to entertain and inquire it, especially when the Civil Court had not decided the claim on its merits.

The proceedings before the Official Receiver and the Insolvency Court in regard to proof of debt are not suits within the meaning of the Code of Civil Procedure. That being so, O. 9, R. 9, Civil P. C is no bar and does not apply to the case. AIR 1927 Mad 579 : AIR 1933 Cal 673 : AIR 1947 Lah 4, Rel. on., 57 I C 223 : AIR 1950 Mad 184, Disting. **(1964) 1 A L T 129 : (1964) 2 Andh W R 75.**

——Ss. 34, 78 (2), 28 (2), 33, 49, 62 and 79 — 'Debts provable', meaning of — Affidavit in support of application for permission under S. 28 (2) does not amount to proof of debt — Benefit of S. 78 (2) cannot be taken — (Words and Phrases). See Provincial Insolvency Act (5 of 1920), S. 78 (2). AIR 1960 Andh Pra 257 (DB).

——Ss. 34 (2) and 44 (2) — Insolvency of monthly tenant — Rent due subsequent to adjudication but before discharge is debt 'provable'—Monthly tenancy, nature of, indicated — (T. P. Act (1882), Ss. 105, 106). AIR 1955 N U C (Cal) 756.

——Ss. 34, 28 (7) — Debt in time at time of presentation of insolvency petition but barred by the time of adjudication, if can be proved.

A debt, which is in time under the Limitation Act on the date of the presentation of the petition, could be proved in the insolvency of the debtor, notwithstanding that a suit to recover the debt was barred on the date of the order of adjudication. For the purpose of S. 34 (2) adjudication takes effect from the date of the presentation of the petition. **AIR 1959 Mad 394 (394) (Pr 2).**

——S. 34 — Promissory note debt incurred by insolvent after presentation of his petition and before adjudication is a post-insolvency debt and is not provable in insolvency. See Provincial Insolvency Act (1920), S. 28. AIR 1954 Mad 508 (DB).

——Ss. 34, 53, 54 — Fraudulent preference not carried out — Proof of debt as unsecured creditor.

Where in spite of a mortgage, which is set aside under Ss. 53 and 54 and a suit and a decree therein for the first instalment due under the mortgage, there has been no substantial part performance of the fraudulent intention to prefer some of the creditors to others under the mortgage and no harm has been actually done and the parties have virtually been put back to their original position by the cancellation of the deed, the intended fraudulent transaction will not prevent the mortgagee from proving in insolvency the debts covered by the mortgage as an unsecured creditor. 59 Mad 998 : AIR 1936 Mad 717 (F B), Rel. on. **('51) 64 M L W 438 : (1951) 2 Mad L J 32 : AIR 1952 Mad 504 (2) (506) (Pt B) (Pr 11) (DB).**

——Ss. 34, 53, 54 — Mortgage declared void—Effect on debt.

The mere fact that a mortgage is declared void under Ss. 53 and 54 does not make the debt included in it void. Though the mortgage deed is annulled under Ss. 53 and 54, the mortgagee thereunder can rely on the debt included in the mortgage deed and prove the debt in insolvency as an unsecured creditor. The mortgagee need not plead any fraud for proving these debts as for proving the mortgage. Further this view does not take away the effect of cancelling the mortgage deed. The mortgagee, who was a secured creditor and could recover his dues in full under the mortgage set aside, is, owing to the cancellation of the mortgage, relegated to the position of a mere unsecured creditor, entitled only to the dividend (a mere fraction) of his dues, like the remaining unsecured creditors. 59 Cal 377 : AIR 1931 P C 245, Foll. **('51) 64 M L W 438 : (1951) 2 Mad L J 32 : AIR 1952 Mad 504 (2) (507) (Pt C) (Pr 12) (DB).**

——S. 34 — Joint family debt.

A person liable for debts merely on the ground that he is a member of a joint family and that the debts are payable by the joint family cannot be adjudicated insolvent for those debts, and those debts cannot be proved in his insolvency and will have only to be allowed for preliminarily in a partition suit brought by the purchaser of the other share or shares. But there are also undoubtedly circumstances which will make such a person "personally liable" for the debt. Such as his being a member of a trading firm and holding himself out as a partner, and the debts being contracted for the trade. There is no need to wait then for a partition suit for allowing such debts which can be proved in insolvency of the person who had made himself personally liable for the debts in addition to being liable for them from out of his share in the joint family properties. **AIR 1952 Mad 504 (2) (DB).**

——Ss. 34 (2) and 28 (2)—Debt contracted by insolvent after his adjudication — Decree obtained in respect of the debt can be executed by attachment of a portion of the salary of insolvent which had been excluded from distribution among the creditors— Debt or the obligation to pay it having been incurred by insolvent after his adjudication and not before, it is not provable under the Act — Hence creditor is at liberty to commence proceeding for recovery of the debt notwithstanding S. 28 (2). A I R 1925 Oudh 668 and 34 Cal W N 751, Rel. on.—Civil P. C. (1908), S. 60. **(1962) 40 Mys L J 673.**

——Ss. 34 (2), 28 (7)—Companies Act (1913), Ss. 229, 168—Winding of company—Debt due from company not barred on date of petition for winding up but barred before winding up order is debt provable— A I R 1958 Punj 341, **Reversed. See Companies Act (1913), S. 229. A I R 1961 Punj 84 (DB).**

——S. 34 — Cochin Insolvency Act (7 of 1098 M E.), S. 34 (2) — Surety's right against principal debtor— Nature of — Suit by surety for contribution — Debt not proved in insolvency—Suit not maintainable.

It is clear from the S. 34 (2) that future, certain or contingent liabilities of the insolvent are also deemed to be debts provable in insolvency. The surety's right against the principal debtor comes under the category of the principal debtor's contingent liability as contemplated by the section which could be proved in insolvency. The surety who has not proved his debt in the insolvency proceedings cannot, therefore, sue the principal debtor for contribution if the loan is recovered from him. 50 All 606 ; 40 Mad 783 and 39 Cal W N 863, Rel. on.

Held, also that the contingent liability came into existence on the date of the first promissory note executed by the principal debtor and not on the date of renewal of the note. **('50) 1950 Trav-Co L R 493 (DB).**

SECTION 35

——Ss. 35 and 53 — Sham and nominal transactions not covered by S. 53 — Annulment of adjudication under S. 35, if controlled by S. 53.

After A was adjudicated as an insolvent, on a creditor's petition, the Court ordered annulment of a gift-deed executed by A in favour of B on a petition under S. 53 of the Provincial Insolvency Act filed by the Official Receiver. Pending appeal against that order, the lower appellate Court annulled the insolvency of A on application by B under S. 35 of the Act without considering the plea of the petitioning creditors that the gift-deed executed by A in favour of B was a fictitious, sham and nominal transaction. In revision against the order :

Held, a transaction assailed on the ground of its being fictitious, sham and nominal is not covered by S. 53 of the Provincial Insolvency Act. The order annulling the adjudication is bad without considering the plea of the petitioning creditors. **(1963) 2 Andh L T 325 : (1963) 2 Andh W R 437.**

——Ss. 35, 37 — Annulment of adjudication — No vesting order—Effect of—Insolvent can claim benefit of Madras Act 4 of 1938—(Debt Laws—Madras Agriculturists' Relief Act (4 of 1938), S. 14).

Where an adjudication is annulled under S. 35 and no vesting order is made under S. 37 of the Provincial Insolvency Act (5 of 1920), the property does not merely revest in the insolvent but it reverts to him. The effect of the annulment relates back to the date of adjudication and therefore the insolvent must be deemed to have had a saleable interest in that property for the purpose of being treated as an agriculturist entitled to the benefits of the Madras Agriculturists' Relief Act. A I R 1951 Mad 63 (FB), and A I R 1954 Mad 604 (FB), Foll. **1955 Andh L T (Civil) 150 : (1955) Andh W R 199 : A I R 1955 Andhra 152 (154) (Pt A) (Pr 3) (DB).**

——S. 35—Scope—Fraud between petitioning creditor and insolvent resulting in adjudication of latter as insolvent — Adjudication liable to be annulled under S. 35—Burden of proof.

One G filed insolvency petition, dated 18-11-1965, to adjudicate one D, his wife K and his son S as insolvents on the ground that a sum of about Rs. 4,000 was due to G under three promissory notes of the year 1948 executed in his favour by S as well as a separate sum of Rs. 350 due under a promissory note executed in his favour by S and his parents aforesaid in June 1951. The case of the petitioning creditor was that D and K, had guaranteed the liability of Rs. 4,000 of S under the three promissory notes aforesaid ; that D had executed a mortgage in favour of A on 25 7.1951 for Rs. 300 that he and his wife K had also executed a sale of all his properties to one R for a sum of Rs. 3,000 and that these alienations constituted acts of insolvency. At the same time the petitioning creditor filed a suit against D and his two wives and their children for recovery of a sum of Rs. 4,780 due under the three promissory notes executed by S which were guaranteed by his parents under separate letters of guarantee passed by them in favour of the petitioning creditor. The suit and the insolvency petition were dismissed as the petitioning creditor had not proved that D or K was indebted to him in the sum of Rs. 500. The petitioning-creditor thereupon filed appeals against the order dismissing insolvency petition and the suit. While the aforesaid appeals were pending, both the parties entered into a compromise and under that compromise, the members of the family agreed to be adjudged insolvents and the suit was decreed against them for the entire amount claimed with full costs. This compromise was entered into even without reference to their counsel.

Held, that under S. 35 an adjudication is liable to be annulled if the proceedings resulting in the adjudication are vitiated by fraud or collusion, or if it is proved that really no debt existed and the adjudication was suffered by the debtor fraudulently admitting the existence of a debt. The Insolvency Court had undoubted jurisdiction to enquire into the factum of the debt and also to determine whether any judgment obtained against an insolvent as evidence of the debt was vitiated by fraud and collusion when an application is filed under S. 35 for the annulment of the adjudication. In a majority of cases, direct evidence of fraud and collusion may not be available and the decision of the Court may have to rest upon circumstantial evidence. The circumstances under which the compromise was entered into between the parties, led to the clear and irresistible inference that the compromise was brought about as a result of fraud and collusion. The question of burden of proof had no significance on the facts in the present case. All the members of the family were undoubtedly making common cause with the petitioning creditor. In view of the changed attitude of the members of the family, the duty to examine them was clearly upon the petitioning creditor and the Official Receiver and an adverse inferenee had necessarily to be drawn against them for the non-examination of the members of the family. It may be that the decree passed upon consent may be binding between the parties. But so far as the adjudication was concerned, it should be annulled once for all. I L R (1948) 1 Cal 131 and A I R 1948 Nag 385 and A I R 1940 Mad 375 (FB), Rel. on. **78 Mad L W 715: I L R (1966) 1 Mad 449 : A I R 1966 Mad 240 (241, 243) (Prs 5, 8, 9, 10).**

——S. 35—Proceedings in insolvency — Termination of—Modes.

Proceedings in insolvency can be terminated by any one of the following modes, namely, (i) by discharging the receiver ; (ii) by the insolvent applying for discharge and (iii) by annulment of adjudication. Where none of these things happened and, on the other hand, the proceedings were kept pending, it could not be said that the Official Receiver had not locus standi to maintain the application questioning the sale deed executed by the insolvent. **(1963) 76 Mad L W 757 : 1964 Mad W N 91.**

——Ss. 35, 28 and 55—Position of receiver—Obligations under valid contracts of insolvent, entered into before insolvency.

It is an elementary principle of insolvency law that subject to the special provisions enacted by the insolvency statute — Sections 51 to 54 — the Official Receiver merely steps into the shoes of the insolvent and can claim no higher rights than the insolvent. Where under a contract of lease entered into by the insolvent he was bound to make adjustment towards rent a certain amount received by him at the time of entering into the lease the Official Receiver as the representative of the insolvent is equally bound to give effect to the contract. He can have no real legal basis for disputing the adjustment or to claim that the adjustment would not be binding upon him. **A I R 1958 Mad 486.**

——Ss. 35, 37—Annulment of insolvency under S. 35—Liability of debtor for outstanding debts remains unaffected — Words 'paid in full' in S. 35 — Meaning of.

The liability of the debtor for the balance of the debt remaining unpaid at the date of the annulment

of adjudication of insolvency under S. 35 remains unaffected and can be enforced by the creditor as if there had been no proceeding in insolvency against the debtor.

By virtue of the provisions of S. 37 of the Act, the consequence of annulling an order of adjudication is to wipe out altogether the insolvency and its effect, except to the limited extent reserved under that section. The legislature has introduced the fiction of vesting the title to his property retrospectively in the insolvent without invalidating the sales and dispositions of property and payments duly made by the Court or the Official Receiver. The effect of annulment relates back to the date of adjudication and the property does not merely revest in the insolvent.

There is no scope for contending that no liability subsists against the debtor where the debts of the insolvent have been paid in full. The words 'paid in full' occurring in S. 35 of the Act mean payment of the full amount as the creditor would be entitled to, as if no order of adjudication had been passed against the debtor. Hence, a person who seeks to set aside an adjudication altogether must show that, independently of the insolvency, he had cleared off his debts and satisfied the creditors in full. Case law Discussed. **(1964) 2 Mys LJ 417: A I R 1965 Mys 117 (118, 119) (Pt A) (Prs 4, 7).**

——Ss. 35 and 37 — Alienation during pendency of insolvency—If validated by order of annulment.

An order of annulment does not have the effect of validating an alienation made by the insolvent during the pendency of the insolvency. See Provincial Insolvency Act (1920), S. 28 (2). **AIR 1951 Nag 241.**

——Ss. 35 and 37—Debt Laws—C. P. and Berar Debt Conciliation Act (2 of 1933), S. 21 — Proceedings relating to same debt pending before Insolvency Court and Debt Conciliation Board—Power of insolvent to deal with property.

Where, pending proceedings before the Insolvency Court, the debtor applies to the Debt Conciliation Board, even if it be assumed that the Debt Conciliation Board obtains precedence that does not abrogate the proceedings in the Insolvency Court. It merely "suspends" them. Whatever the position may be vis a vis the two Courts the insolvent has no power to deal with the property qua insolvent. **ILR (1951) Nag 12 : 1952 Nag L J 106 : A I R 1951 Nag 241 (244) (Pt A) (Pr 21).**

——S. 35—Practice and procedure—Burden of proof.

Where an application for annulment challenges the debt, whole stock and barrel and when the creditor's eligibility to lay the application in insolvency is founded upon that debt, it is for him to show that the debt was not only genuine, but also one for the non-payment of which the debtor could have been personally proceeded against. **1951 Ker L T 553 : A I R 1952 Trav-Co 234 (235) (Pt A) (Pr 4) (DB).**

——Ss. 35, 6—Adjudication on basis of debt for which debtor was not personally liable to petitioning creditor—Validity.

It is a common place of the insolvency law that an act of insolvency to serve as the basis of adjudication upon a creditor's petition must be an act committed by his debtor and unless there is a personal liability in respect of the debt there is no such relation of the debtor as will serve to support an adjudication order. 32 Cochin L R 263, Rel. on.

An insolvency proceeding is essentially a proceeding in personam and only the personal debts due by the insolvent can be proved therein.

When the debtor was not personally liable for the debt due to the petitioning creditor and when there is no evidence of any other debt being in existence when the sale deed (alleged to be an act of insolvency) in favour of the vendee was executed, it can on no account be treated as an act of insolvency. **1951 Ker L T 553 : A I R 1952 Trav-Co 234 (236) (Pt B) (Pr 7) (DB).**

SECTION 36

——Ss. 36 and 77 — Successive orders of adjudication by two Courts A and B—Effect of prior Order—Proper procedure — Application by official assignee of B Court for transfer of assets from A Court to B Court made to A Court — Maintainability—Absence of letter of request from B Court — Effect — (Presidency-Towns Insolvency Act (1909), Ss. 22 and 126).

Where there are successive adjudications in insolvency by two Courts, all the property of the insolvent vests in the Official Assignee appointed by the Court in which the prior adjudication was made and it will not be divested from him by the subsequent adjudication by the other Court. In such cases it would not be just or equitable to allow the proceedings in both Courts to go on concurrently leading to a most undesirable conflict of jurisdiction. The proper procedure in such a case would be for one of the Courts either to annul the adjudication or to stay all proceedings thereof as provided by S. 22 of the Presidency-Towns Insolvency Act or S. 36 of the Provincial Insolvency Act. Hence where there is a prior order of adjudication by A Court and a subsequent order by B Court, any assets in the hands of A Court can only be transferred to B Court in pursuance of a letter of request under S. 77 made by B Court to A Court. An application for transfer of such assets by the Official Assignee of B Court made directly to A Court is not sustainable under S. 36. **1956 Andh W R 207 : AIR 1957 Andh Pra 649 (650) (Pr 3) (DB).**

[Reversed on another point in AIR 1963 S C 754.]

——Ss. 36, 11—Two Courts having concurrent jurisdiction to entertain insolvency proceedings in respect of same debtor—Proceedings already taken up in one Court—Other Court also has jurisdiction to entertain proceedings initiated subsequently. See Provincial Insolvency Act (5 of 1920), S. 11. **A I R 1963 Madh Pra 228 (DB).**

SECTION 37

SYNOPSIS

(Provincial Insolvency Act (5 of 1920), S. 37.)

1. Applicability.
2. Section 37 and Section 39.
3. Section 37 and Section 43.
4. Sale in execution.
5. Vesting order.
6. Powers and duties of an appointee.
7. Effect of annulment.
8. Powers and duties of Court.

1. Applicability.

——Ss. 37, 28 (2), 78 (2)—Execution petition dismissed — Adjudication of one of judgment-debtors — Subsequent unconditional annulment of adjudication—No leave of Insolvency Court is required for filing subsequent execution petition—Joint decree against several judgment-debtors—Execution against one—Effect of saving limitation against all — Limitation Act (1908), Art. 182(5). See Provincial Insolvency Act (1920), S. 28(2). (1965) 1 Andh L T 73 : A I R 1966 Andh Pra 25.

——Ss. 37, 28 (2) and 43 — Limitation Act (1908), Art. 182(5) — Decree against A and B — Dismissal of execution application filed during pendency of insolvency application by B and without leave of Court—Insolvency annulled unconditionally — As effect of annulment is to revert B to his original status by operation of law the execution application becomes

one in accordance with law even as against him in spite of the omission to obtain leave—Second execution application filed within the period of limitation from the date of dismissal of the first is not barred by time though from the date of decree it may be so—Apart from that, the application in the case is saved also by reason of the explanation to Art. 182. See Limitation Act (1908), Art. 182(5). **A I R 1963 Andh Pra 228 (DB).**

●——S. 37—Official Receiver not made party to mortgage suit — Effect — Title to property on annulment. See Provincial Insolvency Act (1920), S. 28(2). **A I R 1954 Mad 604 (FB).**

——Ss. 37 and 35— Annulment of insolvency under S. 35 — Liability of debtor for outstanding debts remains unaffected — Words "paid in full" in S. 35 — Meaning of. See Provincial Insolvency Act (1920), S. 35. **AIR 1965 Mys 117.**

—— S. 37—Death of insolvent—Court not passing any order for realization of property—Properties revert to debtor. See Provincial Insolvency Act (1920), S. 17. **AIR 1954 Mys 52 (DB).**

——Ss. 37 and 35—Debt Laws—C. P. and Berar Debt Conciliation Act (2 of 1933), S. 21 — Proceedings relating to same debt pending before Insolvency Court and Debt Conciliation Board—Power of insolvent to deal with property.

Where pending proceedings before the Insolvency Court, the debtor applies to the Debt Conciliation Board, even if it be assumed that the Debt Conciliation Board obtains precedence that does not abrogate the proceedings in the Insolvency Court. It merely "suspends" them. Whatever the position may be vis-a-vis the two Courts, the insolvent has no power to deal with the property qua insolvent. **ILR (1951) Nag 12: 1952 Nag L J 106: AIR 1951 Nag 241. (244) (PtA) (Pr 21).**

——S. 37—Annulment of adjudication order does not have effect of validating an alienation made by insolvent during pendency of insolvency. See Provincial Insolvency Act (1920), Ss. 28 (2), 35 and 37. **AIR 1951 Nag 241.**

——S. 37—Order vesting only realised assets in the Court—Unrealised assets — If available for distribution.

Where at the time of annulment of an adjudication, the Court has passed an order under S. 37 vesting only the realised assets in the Court and has not passed an order vesting certain property (unrealised assets) of the insolvent in the Court for distribution amongst the creditors, that property cannot be available to that Court for such distribution. The unrealised assets revert to the insolvent from before the date of annulment unconditionaliy, in the absence of any condition prescribed by the Court, as if he had never been adjudged insolvent. **1959 B L J R 706 : AIR 1960 Pat 176 (178, 179) (Pt C) (Prs 12, 15) (DB).**

—— Ss. 37 and 75 (2)—Appeal under S. 75 (2) — Receiver becoming divested of property — Receiver is not necessary party to appeal — (Civil P. C. (1908), O. 1, R. 10 (2)).

A plain reading of S. 37 shows that the receiver washes his hands off, where an order of adjudication is annulled. Where, therefore, the order of discharge has the effect of vesting the amount realised with the creditors in certain proportions and what is left to be done by the receiver is the doing of the ministerial act of distribution in the proportion ordered by the Court, the receiver, according to the order of the Court, becomes divested of the property and in that view, it is not necessary to make him a party in an appeal under S. 75 (2) against an order rejecting the application of the insolvent for discharge and annulling the order of adjudication. **1960 Raj L W 18 : ILR (1959) 9 Raj 923.**

——Ss. 37 and 28—Object and scope— Annulment — Insolvent gets back property in his original right — Vesting order is not necessary. See Provincial Insolvency Act (5 of 1920), S. 28. **AIR 1955 Trav-Co 241 (DB).**

——S. 37 — Travancore Insolvency Act (8 of 1108), Ss. 28, 37, 43 — Execution of decree against insolvent without sanction and without receiver on record — Auction sale is valid — Annulment of adjudication — No order of vesting property in any person—Assignee of rights of auction purchaser seeking redemption with respect to property sold — He is entitled to decree. See Provincial Insolvency Act (5 of 1920), S. 28. **AIR 1955 Trav-Co 241 (DB).**

2. Section 37 and Section 39.

——Ss. 37, 39—Absence of order annulling adjudication.

Section 39 expressly provides that the Court has to make an order annulling the order of adjudication and that provision is mandatory. Where, therefore, although the Court gave sanction to the composition, there was admittedly no order made by the Court annulling the order of adjudication, S. 37 will not apply. And if S. 37 does not apply, it is obvious that the insolvency continues. **A I R 1956 Bom 262 (262) (Pr 7).**

3. Section 37 and Section 43.

——Ss. 37, 33 (3) and 43 — Decree debt, not barred by time, shown in the schedule, though creditor did not prove it under S. 33 (3)—Annulment of adjudication.

Right of creditor to prove the debt before Official Receiver in whom property vests by order of Court under S. 37 is not affected as annulment of adjudication under S. 43 is merely a continuation of the insolvency and the vesting order in the Official Receiver is for the benefit of the general body of creditors — No question of the proof of the debt being barred on the ground that the debt was barred by time on the date of the petition for proof can arise as the debt was in time of the commencement of insolvency. AIR 1924 Mad 164, Rel. on. AIR 1949 Mad 683, Doubted. **1964-1 Andh W R 284.**

——Ss. 37, 43—Effect of order of discharge — Does not operate to divest official receiver of property — Receiver closing or abandoning administration—Property may be deemed to have reverted to insolvent. **AIR 1961 Andh-Pra 219 (222, 223) (Pt B) (Prs 19, 22, 24) (DB).**

——S. 37—Annulment of adjudication under S. 43— Effect of. See Elections—Madras Village Panchayats Act (10 of 1950), S. 16 (2). **ILR (1958) Ker 215.**

——Ss. 37 and 43 (1) — Annulment of adjudication under S. 43 (1) — After annulment debtor loses protection available under Act — Annulment without vesting of property in Official Receiver under S. 37— Notice to petitioning creditor necessary before annulment. See Provincial Insolvency Act (5 of 1920), S. 43 (1). **(1965) 2 Mad L J 11 : 78 Mad L W 442 : AIR 1966 Mad 29.**

——S. 37 — Annulment — Effect on vesting — If no vesting order is made at the time of annulling an adjudication under S. 43 any property of the insolvent which may have vested in the Receiver reverts to the debtor automatically and the Court cannot thereafter divest the debtor of the property and revest it in another person. See Provincial Insolvency Act (1920), S. 43. **AIR 1954 Mys 52 (DB).**

——Ss. 37 and 43 — 'Assets vested in Court' and 'assets realised'—Distinction.

There is a difference between the 'assets realised' and 'assets vested in the Court'. Though all the properties of the insolvents vest in the insolvency Court, they cannot be said to be assets realised unless the same had been actually realised. 1959 B L J R 706 : AIR 1960 Pat 176 (178) (Pt A) (Pr 9) (DB).

4. Sale in execution.

● —Ss. 37 and 28 — Annulment of insolvency — Decree and execution sale in suit on mortgage without impleading Official Receiver—Validity—Effect of reverting of property to debtor on annulment — Sale in execution — If can be challenged by judgment-debtor or his representatives. See Provincial Insolvency Act, S. 28 (2). AIR 1954 Mad 604 (FB).

5. Vesting order.

—S. 37—Annulment of adjudication — No vesting order — Effect of — Insolvent can claim benefit of Madras Act (4 of 1938). See Provincial Insolvency Act (1920), S. 35. AIR 1955 Andhra 152 (DB).

—S. 37—Annulment—Vesting order.

It is clear from S. 37 that in all cases of annulment of adjudication the court is not bound to pass an order for vesting the debtor's property in some person and that it has got a discretion either to pass a vesting order or not to pass the same. If no vesting order is passed, the properties revert to the debtor whose adjudication has been annulled. Imposition of conditions on the insolvent in cases in which his properties are to revert to him is also not obligatory and is a matter of discretion. An order of annulment making provision for the protection of the creditors would defeat the ends of justice and lead to an abuse of the process of the Court. But if the case is one where there is no creditor to be protected, an order under S. 37 of the Provincial Insolvency Act vesting the debtor's properties in some other person or imposing conditions on the debtor if the properties are to revert to him should not be passed at the time of the annulment. 1957 Ker L T 877 : (1957) Ker L J 801.

—S. 37 — Absence of vesting order on annulment —Property reverts to debtor — Execution against insolvent judgment-debtor — Official Receiver is not a party — (C. P. Code (1908), O. 21, Rr. 66, 90) — Parties. AIR 1955 N U C (Mad) 2435.

—S. 37 — Adjudication annulled — Vesting order not passed — Effect — Possession of Official Receiver does not become adverse — (Limitation Act (1908), Arts. 142 and 144).

Where the adjudication order is annulled but the Insolvency Court does not make any order under S. 37 vesting property in the Official Receiver, the position is that the situation becomes as before the adjudication and the quondam insolvent gets back his property saddled with all the debts. But if he does not take back the possession which still remains with the Official Receiver, the possession of the latter does not become adverse to the quondam insolvent. He holds the property on behalf of the rightful owner. If the Receiver sells the property the possession of the purchaser however becomes adverse to the quondam insolvent from the date of the sale but his suit for possession filed within 12 years is not barred AIR 1919 Mad 8 Rel. on, 1951-2 Mad L J 585 : 64 Mad L W 1097 : AIR 1952 Mad 179 (179) (Pr 3) (DB).

6. Powers and duties of an appointee.

—S. 37 — Powers and duties of appointee. See Arbitration Act (1940), S. 30. AIR 1955 N U C (Mad) 1825.

7. Effect of annulment.

—Ss. 37, 43, 53, 54 — Annulment of adjudication — Official Receiver cannot initiate proceedings under Ss. 53, 54. AIR 1964 Andh Pra 299 (303) (Pt C) (Pr 24) (DB).

—Ss. 37, 54 — Sale by Hindu father before adjudication on his behalf and on behalf of minor sons annulled — Property not sold by Official Receiver — Annulment of adjudication — Effect.

Where a sale of the properties in question executed by a Hindu insolvent on his behalf and on behalf of his minor sons prior to adjudication, for valuable consideration to discharge antecedent debts is set aside at the instance of the Official Receiver as offending the provisions of the Act and the properties were not effectively sold by the Official Receiver, the effect of the annulment of adjudication is to restore the sale in favour of the alienee. The object of setting aside the alienation as offending the provisions of the Insolvency law is for the benefit of the insolvent's creditors and where no provision is required to be made from and out of the property so far as the insolvent's creditors are concerned, by reason of the adjudication having become annulled, the limited purpose for which the benefit of such an order of setting aside disappears and the alienation in question must be deemed to have been left untouched. AIR 1943 Mad 453 : (1943) 1 M L J 166, Foll.

What are saved under S. 37 are 'sales and dispositions of property and payments duly made' and the 'acts' done by the Court or Receiver could not be any act done at any time by the Court or Receiver but must be acts done by the Court or Receiver which will have a relation to the sales and dispositions of property and payments duly made. AIR 1930 Mad 278 : 57 M L J 116, Dissent. from. In this view, the 'acts' in S. 37 (1) could not include the act of ordering the setting aside of the sale in question, the effect of annulment being to restore the prior state of things. It must, therefore, be taken that the order setting aside the sale has ceased to have any effect with the annulment of the adjudication. Further, so far as the minor son is concerned, his interest in the present case having already been parted with by the father who was competent to represent him and sell the property for purposes binding on him, it is not open to the minor son to question the alienation even on the assumption that the order setting aside the sale at the instance of the Official Receiver continues after the annulment. In so far as the minor son is concerned, his interests had already passed to the alienee, and his interest did not vest in the Official Receiver that it required revert consequent on the annulment. the reason being that on the setting aside of the alienation it was only the insolvent's interest that vested in the Official Receiver and that that interest alone could revert to the debtor on annulment. AIR 1955 Mad 51, Rel. on. 1956 Mad W N 105 : (1956) 1 Mad L J 519: 69 Mad L W 93 : AIR 1956 Mad 341 (342, 343) (Prs 3, 4, 5).

—S. 37 — Effect of annulment—Alienations before insolvency declared not binding on Official Receiver — Subsequent annulment of adjudication — Suit for recovery of possession by heirs of insolvent —Annulment of adjudication resulted in annulling decision by which deeds were declared not binding on Official Receiver — Plaintiffs who claimed under insolvent could not take advantage of decision obtained by Official Receiver — Plaintiffs had no cause of action. Case-law Discussed. 1952 Mad W N 836 : (1952) 2 Mad L J 828 : 65 Mad L W 1107 : AIR 1953 Mad 620 (621, 622) (Pr 7) (DB).

—S. 37 — Limitation Act (1908), Art. 182 (5) — Decree in favour of Official Receiver for debt due

to insolvent — Annulment of adjudication and then setting aside of annulment – Limitation for execution by Official Receiver.

When money is due to a person who has been adjudicated an insolvent and the official receiver in whom the estate of that person has become vested files a suit to realise that sum of money, it cannot be said, that he is representing any of the creditors of the insolvent in realising that sum of money. After an adjudication has been annulled, it is open to the quondam insolvent to take such steps regarding his property which he could ordinarily have done unless there has been an order under S 37 (1), Provincial Insolvency Act, vesting the property in a trustee or an Official Receiver. When there is no such vesting, since the decree obtained by the Official Receiver is capable of being executed after the adjudication has been annuled and till that order is set aside, failure by the insolvent to apply for execution during that period would disentitle the Official Receiver from seeking to execute the decree after the annulment order is set aside after three years from the date of the order on the previous application for execution. **(1951) 1 Mad L J 551 : 1951 Mad W N 412 : 64 Mad L W 661 : AIR 1951 Mad 879 (2) (880) (Pr 3) (DB).**

——**S. 37**—Debt Laws—Madras Agriculturists' Relief Act (4 of 1938), S. 10 — Applicant insolvent and property in hands of Receiver on relevant date — Subsequent annulment of adjudication—Applicant should be deemed to have had property on relevant date — Presidency-Towns Insolvency Act (1909), S 23. See Debt Laws—Madras Agriculturists' Relief Act (4 of 1938), S. 10. **AIR 1951 Mad 581 (DB).**

——**S. 37—Effect of annulment—Whether debtor has saleable interest in property in interval — Debt laws—Madras Agriculturists' Relief Act (4 of 1938).**

Per Full Bench — A debtor who was an insolvent on 1-10-1937 and 22-3-1938 (crucial dates for determining the applicability of the Madras Agriculturists' Relief Act, 1938), but whose adjudication is subsequently annulled has saleable interest in the property on those dates even though his property had remained vested in the Official Receiver on those particular dates. The reason is that the effect of the annulment of the adjudication relates back to the date of the adjudication and is as if no adjudication had taken place, except as regards the acts of the Court and the Official Receiver which are validated by S. 37. AIR (29) 1942 Mad 523, Explained.

Hence if the property is agricultural property he would be entitled to relief under the Madras Agriculturists' Relief Act, 1938. Arunachalam Chettiar v. Narayanaswami Gounder, **1951 M W N 1 : 1951 1 Mad L J 35 : A I R 1951 Mad 63 (66, 67) (Pt A) (Prs 9, 11) (FB).**

——**S. 37—Annulment—Retrospective operation.**

Where the order of adjudication is annulled unconditionally, the property reverts to the insolvent retrospectively. Therefore where an insolvent brings a suit for recovery of money and the order of adjudication is annulled pendente lite, but before the hearing of the appeal, the suit cannot be dismissed by the appellate Court on the ground that the insolvent's property vested in the receiver. **1954 Nag L J 593 : ILR (1955) Nag 970 : A I R 1955 Nag 47 (49) (Pt B) (Prs 12, 13).**

——**Ss. 37, 28 (2) — Annulment of adjudication order—Effect on alienation pending insolvency.**

An order of annulment does not have the effect f validating an alienation made by the insolvent uring the pendency of the insolvency. 20 Mad 452: 7 Mad 7 and AIR 1937 Mad 717, Not approved; AIR 930 Mad 278 and AIR 1937 Mad 131, Approved. **1952 Nag L J 106 : ILR (1951) Nag 12 : AIR 1951 Nag 241 (245) (Pt E) (Pr 28).**

——**S. 37—Order of annulment becoming final.**

The contention that the orders passed by Insolvency Court while passing an order of annulment directing only the assets realised to remain vested in the Court for payment to the creditors are against the provisions of S. 37 itself and are bad in law, and that the appropriate order should have been that the properties of the insolvent remained vested in the Court for the purpose referred to above, cannot be raised after the orders have become final and binding, no appeal having been preferred against it. **1959 B L J R 706 : AIR 1960 Pat 176 (178) (Pt B) (Pr 10) (DB).**

——**Ss. 37 and 28** — Rights of insolvent during pendency of insolvency — Effect of annulment stated. See Provincial Insolvency Act (5 of 1920), S. 28. **AIR 1955 Trav-Co 241 (DB).**

8. Powers and duties of Court.

——**Ss. 37, 78 (2) — Unconditional order of adjudication—Powers of Court.**

Under S. 37, in the absence of any conditions imposed by the Court, the properties would automatically revert to the insolvent as soon as the order of annulment is passed. But the Court does not become functus officio so as to be incapable of passing a subsequent order in order to make the properties formerly vested in the Insolvency Court available for distribution among the creditors on their applications.

Section 78 (2) has no application to the exercise of such power by the Court. **ILR (1950) Cut 117 : AIR 1950 Orissa 233 (233, 234) (Pr 2) (DB).**

SECTION 38

——**S. 38**—Applicability—Order of insolvency under S. 47 (1), Bombay Agricultural Debtors' Relief Act — Debtor if entitled to further relief similar to one under S. 38, Provincial Insolvency Act. See Debt Laws—Bombay Agricultural Debtors' Relief Act (28 of 1947), S. 47. **AIR 1955 NUC (Bom) 1174.**

——**Ss. 38, 28 and 59**—Vendee obtaining goods under fraud — Vendee declared insolvent subsequently — Receiver or trustee in Composition Scheme not entitled to the goods—Equity is in favour of vendor—Specific Relief Act (1877), S. 11 (d). See Provincial Insolvency Act (1920), S. 28. **(1963) 1 Ker L R 443.**

SECTION 39

——**Ss. 39 and 40**—Hindu Law—Joint family—Debts —Pre-partition debt of father — Decree by creditor against father — Liability of sons to pay — Principle of pious obligation applies — Insolvency of father — Sons' liability not affected — Creditor can sue for recovery of the debt — Limitation — Limitation Act (1908), Art. 120. See Hindu Law — Joint family — Debts. **AIR 1965 Andh Pra 285.**

——**Ss 39 and 37 — Absence of order annulling adjudication.**

Section 39 expressly provides that the Court has to make an order annulling the order of adjudication and that provision is mandatory. Where, therefore, although the Court gave sanction to the composition, there was admittedly no order made by the Court annulling the order of adjudication, S. 37 will not apply. And if S. 37 does not apply, it is obvious that the insolvency continues. See Provincial Insolvency Act (5 of 1920), S. 37. **AIR 1956 Bom 262.**

SECTION 40

—Ss. 40 and 39 — Hindu Law — Joint family — Debts — Pre-partition debt of father — Decree by creditor against father — Liability of sons to pay — Principle of pious obligation applies — Insolvency of father—Sons' liability not affected—Creditor can sue for recovery of the debt—Limitation—Limitation Act (1908), Art. 120. See Hindu Law — Joint family — Debts. AIR 1965 Andh Pra 285.

—S. 40 — Petition fot re-adjudication — Requirements.

When the statute is thoroughly silent as to the kind of requirements under S. 9 which are to be fulfilled in the case of the original adjudication where the statute deals with re-adjudication, it is not for the Court by a process of judicial construction to indulge in anything like a legislative enlargement of the Act. Hence on an application for re-adjudication after the annulment of the original adjudication on account of the failure of a composition scheme which intervened, it is not incumbent upon the petitioning creditors to satisfy the requirements of S. 9. See Provincial Insolvency Act (5 of 1920), S. 9. **AIR 1953 Mad 375.**

SECTION 41

—Ss. 41 (2) (c), 67 — Scope — Sale of property in contravention of S. 60 — Conditional discharge of insolvents under S. 41 (2) (c) — Effect — Right of insolvents to recover possession of property.

The effect of the order of conditional discharge under S. 41 (2) (c) is that, subject to the conditions laid down in the order, the insolvents are free men after the order of discharge. They are not bound by the debts incurred by them or proved against them up to the date of discharge. But they do not get back the property which has vested in the official receiver. Even though the receiver had been discharged the creditors are entitled in case the property reverts to the receiver for some reason or other to apply to the insolvency Court for the re-appointment of the receiver, and the sale of the property and distribution of the proceeds amongst them. AIR 1943 Mad 26, Disting. 1957 All W R (HC) 111 : AIR 1957 All 262 (263) (Pr 8) (DB).

—Ss. 41 and 75 — Conditional order of dischage—Dismissal of application for review—Appeal.

An order dismissing an application for review of an earlier conditional order allowing the insolvent's prayer for an order of discharge is not appealable. 1959 Ker L T 993 : 1959 Ker L J 1141 : AIR 1960 Ker 146 (147) (Pr 1) (DB).

—S. 41 — Condititional order of discharge — Grounds for.

The debtor executed a release of share in Tavazhi properties to his sister before applying for adjudication. The Tavazhi was undivided at that time and the transfer was absolutely inoperative. The property belonged to the Tavazhi and the debtor's mother was alive on the date of the transfer so that he could not ask for partition.

Held, even if the debtor had no transferable share in Tavazhi properties on the date of his adjudication he would have obtained a share after the lifetime of his mother. In such a case it was open to the Court to make the discharge conditional and to direct that such share when acquired should vest in the Official Receiver. Further, the Madras Marumakkattayam (Amendment) Act (26 of 1958, Kerala) had conferred a right to enforce partition even during the mother's lifetime. It was therefore clear that the debtor's share in his Tavazhi properties should vest in the Official Receiver for the benefit of his creditors. 1958 Ker L T 445 : 1958 Ker L J 583 : ILR (1959) Ker 27 : AIR 1959 Ker 376 (377) (Pt A) (Prs 2, 3).

—Ss. 41 and 75—Concurrent orders—Revision.

The fact that the Courts below have passed concurrent orders of discharge is no bar to interference in revision in proper cases. 1958 Ker L T 445 : 1958 Ker L J 583 : ILR (1959) Ker 27 : AIR 1959 Ker 376 (377) (Pt B) (Pr 5).

—Ss. 41 and 42—Power of Court to refuse absolute discharge—Grounds.

The Court has got the power under S. 41 (2), cl. (a) to refuse absolute discharge in appropriate cases. S. 42 of the Act mentions circumstances on proof of which the Court shall refuse absolute discharge. This may mean that the Court might grant discharge subject to conditions or suspend the order of discharge in appropriate cases. But from this it does not follow that the Court has no power at all to refuse absolute discharge so as to leave the insolvent an undischarged insolvent for life. Where the conduct of the petitioner insolvent is not bona fide in that he had sold all his assets before filing the insolvency petition and had failed to produce account books and there is nothing to show that conditions if imposed will be complied with, the Court is justified in refusing to grant an absolute discharge. Where the Court cannot grant absolute discharge without any condition nor does it find room or justification for imposing conditions with an expectation that the same will be complied with, there is no other course but to refuse absolute discharge. 1956 Madh B L J 340 : Madh B L R 1956 : (Civ) 53 : AIR 1956 Madh B 254 (254, 255) (Prs 6, 7, 9, 11) (DB).

—S. 41 (2) (b) and (c) — Refusal to discharge absolutely—Appropriate order.

Although it is competent in extreme cases for the Court to refuse discharge absolutely when the insolvent is guilty of some misconduct or dishonesty either before filing the petition for insolvency or during the proceedings of insolvency, in the rest of the cases the Court ought to consider as to whether it would be appropriate to pass an order of the nature indicated in Cls. (b) and (c) of S. 41 (2).

As regards the grant of conditional discharge in favour of an insolvent where he has given up all his property for the benefit of the creditors and nothing is left with him, it is futile to impose such a condition where what the insolvent earns is barely sufficient for the maintenance of his family and practically nothing is left for payment to the creditors and there are no reasonable prospects of his coming by any property from any other source.

Where in the case all that is alleged is rash and hazardous business and there is no allegation or proof of any dishonest conduct, and bearing in mind the object of Bankruptcy Laws that the debtor on giving up whole of his property should be a free man again able to earn his livelihood, then it is pre-eminently a case where the Court should direct suspension of the order of discharge. 1960 Jab L J 546 : 1960 M P C 331 : 1960 M P L J 662 : AIR 1960 Madh Pra 204 (205) (Pt B) (Prs 10, 11, 13) (DB).

—Ss. 41 and 44 — Absence of notice — Effect on, order of discharge.

The absence of notice under S. 41 to a creditor would not invalidate the order of discharge especially when the creditor has filed a review petition against the order of discharge on the ground of absence of notice to him and that petition has been dismissed and the discharge order has become final. (1956) 1 Mad L J 527.

—S. 41—Limitation for tender of proof—Effect of order of discharge.

Fixing of some time for proof of debts at the time of passing an order of adjudication is only for the convenience of the parties. No period of limitation is prescribed in the Act during which a creditor should apply for proof of his debt. But this right of creditor to prove his debt is subject to condition that he should apply for proof of debts before the insolvent is granted an uncondional order of discharge and his assets are realised and distributed and the surplus, if any, is paid to the insolvent. I L R (1956) Mys 209 : AIR 1957 Mys 3 (4, 5) (Pt A) (Prs 9, 10) (DB).

——S. 41—Death of insolvent before filing application for discharge — Effect—Automatic discharge — Unconditional order of discharge, when can be passed.

Death of insolvent is no bar to the Court suo motu granting an order of discharge of the deceased insolvent when other conditions required by the Act are fulfilled. Even otherwise, automatic discharge can occur when the insolvency proceedings finally terminate. But mere death does not bring about automatic discharge and the insolvency proceedings do not terminate. Creditors can prove their debts even after the death of the insolvent till unconditional discharge order is passed. ILR (1956) Mys 209 : AIR 1957 Mys 3 (5) (Pt B) (Prs 12, 13) (DB).

——S. 41 (2) (a) — Absolute discharge — Debtors held entitled to absolute discharge in circumstances of case.

The debts were incurred long before 1932. The application for adjudging the petitioners as insolvents was filed on 15th May, 1946 and according to the report of the receiver, every property in the hands of the debtors had been accounted for and realised. According to the receiver, the debtors were eking out existence with difficulty. This report was dated 21st July, 1952 and although more than six years had elapased since then, no property was found in the hands of the debtors on which the creditors could lay their hands.

Held, that it would be a mockery of law if the debtors were to continue to remain undischarged and that they were entitled to an absolute discharge. 1960 Raj L W 18 : ILR (1959) 9 Raj 923.

SECTION 42

——Ss. 42, 41—Power of Court to refuse absolute or conditional discharge—Grounds for, stated. See Provincial Insolvency Act (5 of 1920), S. 41. AIR 1956 Madh-Bha 254 (DB).

——S. 42 (1) (b) — Insolvent not keeping accounts—No discharge.

Where the insolvents who were allowed to carry on trade and keep accounts were either reckless in carrying on business or they had kept accounts but did not produce them, the Court should not be too ready to help them in the matter of getting their adjudication annulled. In such a case the Court would refuse to grant discharge. (1886) 15 Q B D 213, Ref.

Conditional discharge was also refused because of the behaviour of the insolvent, who was allowed to continue trade on condition that he kept accounts, in not helping the Official Receiver and not keeping the whole property at the disposal of creditors for distribution in insolvency proceedings. Madh B L R 1954 (Civ) 69 : Madh B L J 1954 H C R 609 and 934 : A I R 1955 M B 79 (79, 80) (Prs 3, 4) (DB).

——S. 42 (1) (f) — Rash and hazardous transaction—Refusal to grant absolute order of discharge.

Where the insolvents, dealing in a speculative business, know that they are not in a position to bear the burden of the losses and yet go on with the transaction hoping that by some miracle there would be a windfall and being fully aware of their position of financial embarrassment continue the trade, the Court is right in refusing to grant an absolute order of discharge because a mentality such as this denotes rashness as well as great hazard. 1960 Jab L J 546 : 1960 M P C 381 : 1960 M P L J 662 : AIR 1960 Madh Pra 204 (205) (Pt A) (Pr 5) (DB).

——S. 42 (1) — Debtor agreeing to refer case of mother's time-barred debt to arbitration — Conduct does not amount to fraud.

Where, although the debtor's mother's debt had been barred by time he became a party to an agreement to refer the case to arbitration and by so doing the mother was able to obtain a decree in terms of the award :

Held, that it might be the misconduct of the arbitrator if he gave an award in favour of the mother, but the conduct of the debtor in agreeing to refer the dispute to arbitration did not amount to a fraud which would disentitle him to an order of discharge. 1960 Raj L W 18 : ILR (1959) 9 Raj 923.

——S. 42 (c) — Debtor making some attempts to earn honestly by service or small trade — Case does not come under clause. 1960 Raj L W 18 : ILR (1959) 9 Raj 923.

——S. 42 (a)—Circumstances under which bar under sub-section would arise.

The bar under sub-section (a) of S. 42 would arise if the debtors have in their possession cash and jewellery of large valuation or, are carrying on business and earning a good amount or have secretly with them reserves which prompted them to spend large amount of money in marriages or in living affluent life. 1960 Raj L W 18 : ILR (1959) 9 Raj 923.

SECTION 43

——Ss. 43, 37, 53, 54 — Annulment of adjudication—Official Receiver cannot initiate proceedings under Ss. 53, 54. See Provincial Insolvency Act (1920), S. 37. A I R 1964 Andh-Pra 299 (DB).

——Ss. 43, 33, 37 and 73 — Respective scope and applicability—Annulment of adjudication—Order vesting property in Official Receiver under S. 37—Effect—Debts included in schedule but not proved before aunulment and closing of administration — Administration reopened on creditor's application—Power of Official Receiver to entertain proof of the debts.

Held, it is open to the creditors to approach the Official Receiver in whom the property vested by an order of the Court under S. 37, to prove their debts before Official Receiver. A debt not barred at the commencement of the insolvency does not in and for the purpose of the insolvency become barred by lapse of time. The annulment of adjudication under S. 43 is merely a continuation of the insolvency and the vesting order in the Official Receiver is for the benefit of the general body of creditors. 1964-1 Andh W R 284.

——Ss. 43, 28 (2), 37 — Limitation Act (1908), Art. 182 (5) — Decree against A and B — Dismissal of execution application filed during pendency of insolvency application by B and without leave of Court — Insolvency annulled unconditionally — As effect of annulment is to revert B to his original status by operation of law the execution application becomes one in accordance with law even as against him in spite of the omission to obtain leave — Second execution application filed within the period of limitation from the date of dismissal of the first is not barred by time though from the date of decree it may be so — Apart from that, the application in the case is saved also by reason of the

explanation to Art. 182. See Limitation Act (1908), Art. 182 (5). A I R 1963 Andh Pra 228 (DB).

——S. 43—Applicability — Defective order of annulment — Review — Maintainability — Order without vesting properties of insolvent in Official Receiver — Review at instance of debtor to rectify defect lies. See Provincial Insolvency Act (1920), S. 5 AIR 1963 Andh Pra 52 (DB).

——S. 43 (1) — Order of annulment under S. 43 — Debtor should follow specific remedy under S. 10 (2) — He cannot apply under S. 5 for setting aside order and for extension of time for discharge. See Provincial Insolvency Act (1920), S 5. AIR 1962 Andh Pra 262 (DB).

——Ss. 43, 37 — Effect of order of discharge — Does not operate to divest official receiver of property— Receiver closing or abandoning administration—Property may be deemed to have reverted to insolvent. See Provincial Insolvency Act (1920), S. 37. A I R 1961 Andh Pra 219 (DB).

——S. 43—Insolvency — Annulment of adjudication under — Effect of.

When the adjudication is annulled the insolvency is wiped out so far as the property right of the insolvent is concerned and it also restores back to the creditors the right to proceed against the person of the insolvent but it does not restore back to him his civic rights. He cannot therefore stand for an election to any office of any local authority. The disability is not removed by annulment of insolvency. ILR (1958) Ker 215.

——S. 43 — Gwalior Insolvency Act (1980 Samwat), S. 26 (2) — Extension of time — Application made after expiry of period originally fixed — Power of Court—Civil P. C., S. 148—Applicability.

Under S. 26 (2), Gwalior Insolvency Act the Court is empowered to extend the time within which the debtor has to apply for his discharge, if sufficient cause is shown. Section 148, Civil P. C., would apply to insolvency proceedings and the time may be extended on an application made after the expiry of the period fixed provided it is made before the order of adjudication is annulled under S 42 (1). It must be noted that S. 42 (1), Gwalior Insolvency Act only says that if the debtor does not apply for an order of discharge within the period specified by the Court, the order of adjudication shall be annulled. The annulment under this section is thus not automatic on the failure of the debtor to apply; it requires an order of the Court. So long as the order is not passed by the Court annulling the order of adjudication an application to extend the time under S. 26 (2) is competent. Madh B L J 1955 H C R 2231 : A I R 1956 Madh B 256 (256) (Prs 2, 3) (DB).

——Ss. 43 (1) and 37 — Annulment of adjudication under S. 43 (1) — After annulment debtor loses protection available under Act — Annulment without vesting of property in Official Receiver under S. 37 — Notice to petitioning creditor necessary before annulment. (1965) 2 Mad L J 11 : 78 Mad L W 442 : A I R 1966 Mad 29 (30) (Pt A) (Pr 3).

——Ss. 43 and 37—Annulment—Effect on vesting.

If no vesting order is made at the time of annulling an adjudication under S. 43, any property of the insolvent which may have vested in the Receiver reverts to the debtor automatically and the Court cannot thereafter divest the debtor of the property and revest it in another person. 47 Mys 242 (FB), Rel. on. ILR (1954) Mys 95 : A I R 1954 Mys 52 (52) (Pt A) (Pr 2) (DB).

——Ss. 43, 37 — "Assets vested in Court" and "assets realised"—Distinction.

There is a difference between the two terms. Though all the properties of the insolvent vest in the Insolvency Court they cannot be said to be assets realised unless the same had been actually realised. See Provincial Insolvency Act (1920), S. 37. A I R 1960 Pat 176 (DB).

——Ss. 43, 28, 37—Execution of decree against insolvent without sanction and without receiver on record —Auction sale is valid—Annulment of adjudication — No order of vesting property in any person—Assignee of rights of auction purchaser seeking redemption with respect to property sold — He is entitled to decree — (Travancore Insolvency Act (8 of 1108), Ss. 28, 37, 43). See Provincial Insolvency Act (5 of 1920), S. 28. A I R 1955 Trav-Co 241 (DB).

SECTION 44

——S. 44 (2) and (3)—Suit against father and son and property attached before judgment—Insolvency petition by another creditor — Decree against father and son—Father alone declared insolvent—Son's share is saved from release on account of attachment before judgment.

Section 44 (3) applies and operates so as to save from release the shares of non-insolvent sons under a decree passed against them and the father after the date of presentation of the insolvency petition. On the adjudication of the father in a joint Hindu family, the shares of the sons do not vest in the Official Receiver but only the father's power of disposal vests in him. Where the entire joint family property belonging to the father and the sons had been attached by the creditor before the petition for adjudication, the father's power to sell was destroyed by attachment and was no longer available to the Official Receiver and he had no power to deal with the son's shares. A I R 1926 Mad 1106 and A I R 1943 Mad 94 and AIR 1952 Mad 108 and AIR 1944 Mad 333, Rel. on. AIR 1962 Andh Pra 129 (132) (Pt B) (Prs 10, 11).

—S. 44 (2)—Insolvency of monthly tenant — Rent due subsequent to adjudication but before discharge is debt provable - Monthly tenancy nature of. See Provincial Insolvency Act (1920), S. 34 (2). AIR 1955 NUC (Cal) 756.

——S. 44 (2)—Effect of discharge under — Receiver if becomes functus officio after discharge of insolvent.

A reading of the provisions of the Provincial Insolvency Act shows that on the adjudication of insolvency of a debtor all the properties which came under the definition of S. 2 (1) (d) of that Act come into the hands of the Court and are subject to any order that the said assets be administered and such of the creditors whose debts can be proved in the insolvency proceedings may get payments pro rata from those assets. The Court takes charge of those properties, and the insolvent after fulfilling certain conditions is allowed an absolute discharge. He is given an opportunity to begin his career without any handicap or impediment. The order of discharge is made without any direction being given about the divesting of the properties which had, under S. 28, vested in the Court or the Receiver for distribution amongst the creditors. Even, therefore, after an order for discharge under sub-s. (2) of S. 44 the Receiver in Insolvency does not become functus officio : Case law referred. AIR 1950 Cal 487 (489, 490) (Pt B) (Prs 12, 18).

——S. 44 (2)—Order of discharge—Its effect on debt.

The effect of an order of discharge under S. 44 (2) is not to extinguish the debts of the insolvent. The only limitation imposed is that the creditors who have got debts provable under the Act can, after the order of discharge, look only to those particular assets which the insolvent was possessed of and had accord-

ingly vested in the Court or the Receiver on the date of the filing of the application for adjudication. The claims of the creditors cannot be directed against any other property which may be acquired by the insolvent after an order of discharge is made ; (1922) 1 Ch 22: (1878) 4 Ex D 26, Rel. on. AIR 1950 Cal 487 (489) (Pt C) (Pr 14).

——S. 44 (2)—Order of discharge—Effect—Insolvency proceedings in two Courts—Creditor receiving final dividend in one Court—Balance of debt cannot be realised in other Court.

Where an order of discharge has been passed by an insolvency Court, the creditor who has received the final dividend in respect of a debt proved by him, cannot be allowed to realise the balance of the proved debt in another Court where insolvency proceedings are started subsequently against the same debtor. Release from a proved debt means that not only the remedy (further proceedings for the realisation of the balance of the proved debt in another Court) is barred but the debt itself is also extinguished: (1872) 7 Q B 527 and AIR 1941 Mad 620, Rel. on. 1963 Jab L J 144 : 1963 M P L J 884 : AIR 1963 Madh Pra 228 (229) (Pt A) (Pr 8) (DB).

——S. 44 (2)—Sale of property by insolvent after he was granted an absolute order of discharge — Such property however not revested in insolvent after his disharge by any order of Court—Sale not questioned by Official Receiver—Purchaser if gets a valid title.

It is clear from Mulla's Insolvency (2nd Edn, page 389) that there is no provision that a property which is vested in the Insolvency Court should revest in the insolvent on the passing of an absolute order of discharge and it was never contemplated that an insolvent should get an absolute order of discharge and yet retain part of his property. Section 44 (2) of the Provincial Insolvency Act (5 of 1920) means that the order of discharge frees the insolvent from liability for all debts provable under the Act but does not free his property from such liability. But there is no authority for the proposition that once a person was adjudged an insolvent. he was completely deprived of his property and that his property can be owned by the Official Receiver and that if and when he is granted an order of discharge his property does not revest in him unless there was a speciffc order to that effect by the Insolvency Court. Hence, when an insolvent sells property after his discharge the title of the purchaser cannot be questioned on the ground that there was no order of Court revesting such property in the insolvent after his discharge. The fact that the sale could be affected by the Official Receiver taking suitable steps cannot take away the title of the purchaser so long as such steps are not taken. The Official Receiver could take any steps only if there are creditors to be paid and the administration is not over, and the purchaser gets a valid title as long as the sale has not been questioned by the Official Receiver in any independent proceedings. (1966) 1 M L J 69 : ILR (1965) 1 Mad 556.

——S. 44—Order of discharge passed by foreign State—Binding nature—(Conflict of laws)—(International law) (Private).

The general rule is that a discharge granted under the Indian Insolvency law is binding on all the Courts of India without regard to the place where the contract was to be performed. A discharge granted in the Travancore State would certainly be an answer to a claim made subsequently in Madras State. In fact even in the case of foreign States, orders of discharge granted under the Insolvency Act by any foreign country have always been recognised by the comity of nations in accordance with the principles regulating faith and credit being given to such order. Hence an order of discharge passed in Travancore State when its insolvency law was identical with the insolvency law in British India, whether it is looked upon as an order passed by a foreign State or by any part of the Republic in India, would be binding in Madras State. (1868) L R 2 P C 157; (1870) L R 2 C P 228 and (1890) 25 Q B D 399 and AIR 1921 Bom 128, Rel. on. (1956) 1 Mad L J 527.

——S. 44 — Effect of Order of discharge.

An order of discharge no doubt released the insolvent from his liabilily to pav debts provable in the insolvency but it did not extinguish the decretal debt of the respondent creditor in the sense that after the discharge the creditor could look to the assets which the insolvent was possessed of and which had vested in the Court of Receiver on filing of the application for adjudication. The claim of the creditor would be satisfied also from any other property which may be acquired by the insolvent after the date of order of discharge in view of the condition attached to the order of discharge that 'his after-acquired assets, if any, will vest in the Official Receiver till his creditors are paid 8 annas in a rupee'. (1956) 1 M L J 527.

—S. 44—Absence of notice — Effect on order of discharge.

The absence of notice under S. 41 to a creditor would not invalidate the order of discharge especially when the creditor has filed a review petition against the order of discharge on the ground of absence of notice to him and that petition has been dismissed and the discharge order has become final. AIR 1955 NUC (Mad) 3927.

——S. 44 (2) and (3)—Father's debt—Decree passed against father and son—Father declared insolvent — Release of father under S. 44 (2) whether extinguishes liability of son under decree—Hindu Law—Debt.

The fact that sub-s. (3) of S. 44 provides for the continuance of the liability of persons jointly liable along with the insolvent indicates that the debt as such is not extinguished but it only releases the insolvent from all liability keeping alive the liability of the other debtors jointly liable with him. It, therefore, follows that liability of a person jointly bound with the insolvent is not extinguished despite the discharge of the insolvent.

The effect of decree against the son against whom a decree has been passed along with his father is to make the son jointly liable along with his father to discharge the debt. Whatever might be the position prior to the decree, when the obligation of a Hindu son to pay his father's debts fructifies into a decree it imposes a joint liability on the son along with the father and the former is jointly bound along with the latter within the meaning of sub-s. (3) of S. 44.

Hence, the release of an insolvent father under S. 44 (2) from all debts does not extinguish the liability of the son who is liable under a decree along with the father in respect of his father's debts. (1941) 1 Mad L Jour 270 : AIR (13) 1926 Mad 1106, Rel. on. (1949) 2 Mad L Jour 217 (FB), Expl. (1950) 2 Mad L J 674, Not Applied; 40 Mad 581 and (1938) 2 Mad L J 287. Disting. 1951 Mad W N 588 : 64 Mad L W 786 : AIR 1952 Mad 108 (108 to 112) (Prs 1, 8, 15, 16) (DB).

——S. 44—Scope—Discharge of insolvent — Decree in respect of debt provable in insolvency, in spite of objection that debt ceased to exist because of discharge order—Objection cannot be raised in executing Court, decree though wrong not being void —

Civil P. C. (1908), Ss. 38 and 47 — Evidence Act (1872), S. 44

The provisions of S. 44 of the Provincial Insolvency Act are mandatory and when a discharge order is made all debts provable under the insolvency proceedings in a way cease to exist but this does not make the decree for a debt provable against the insolvent, altogether void. It is well recognised that when the Court has jurisdiction to decide a matter it has jurisdiction to decide it wrongly or rightly. Where, therefore, in a suit the petitioner had pleaded that he had been discharged and accordingly no decree against him could be passed in respect of the debt in suit the debt being provable in insolvency but the trial Judge did not accept his contention and passed the decree notwithstanding the discharge order, though conceding that the decision was contrary to the provisions of S. 44 and was erroneous, the remedy for the petitioner was to have it set aside by way of appeal and he could not ask the executing Court to treat the decree as if it did not exist at all. It was the decree that was to be executed and even though the Court was wrong in passing it and it might be urged that it should not have been passed, since the petitioner did not get it set aside by a higher Court or even by the same Court on review, it existed and the executing Court was bound to execute it. A I R 1941 Lah 314, Dissented from. 2 Pepsu L R 602 : AIR 1951 Pepsu 46 (47) (Prs 2, 3).

——S. 44—Scope—Validity—Sovereign prerogative—Priority of taxes in bankruptcy—Nature and scope of.

In S. 44 the Legislature has classified debt for the purpose of priority and has accorded a favoured position to debts due to State. The section is designed to carry out a public purpose, it operates uniformly on all persons in the State, it does not subject individuals to an arbitrary power and it does not discriminate against some and the favour of others. It is thus not violative of constitutional provision regarding equal protection of the laws. See Constitution of India, Art. 14. AIR 1957 Punj 150 (DB).

——Ss. 44—Civil P. C. (1908), Ss. 38, 47—Power of executing Court to go behind decree.

There is nothing in S. 44 of Provincial Insolvency Act which bars the jurisdiction of a Civil Court to entertain a suit and decide it provided it has the necessary relevent jurisdiction. S. 44 could only be urged as a defence by defendant. Such a defence if raised will be decided by the Court where the suit is pending. If the decision is wrong the remedy is to file an appeal or revision. But it cannot be said that the decree is a nullity in execution proceedings for, there is no question involved of the inherent jurisdiction of the Court to pass a decree. 1957 Raj L W 319 : AIR 1957 Raj 131 (132, 133) (Prs 8, 16) (DB).

——S. 44—Maintenance order under S. 488, Criminal P. C.—Enforcement of, by imprisonment of insolvent — Release order — Jurisdiction and power of insolvency Court.

The Insolvency Court has no jurisdiction to pass a protection order against such imprisonment and to direct a release of the prisoner even though that Court is competent to entertain his insolvency petition and to pass an order of adjudicating him an insolvent. See Criminal P. C. (1898), S. 488 (3). 1957 Cri L J 392: AIR 1957 Trav-Co 49 (DB).

SECTION 45

——Ss. 45, 46—English Case—Insolvency—Proof — Money advanced to bankrupt for setting up riding academy—Money not intended to constitute loan — Creditor interested in business—Creditor if entitled to claim repayment with other creditors.

The appellant (Mrs. M) advanced certain sums of money to the bankrupt for setting up a riding academy. There was no agreement for the repayment of the said moneys or the payment of interest thereon or of the giving of any security in respect of the said moneys. In other words, the money was not intended to constitute a loan at all. The enterprise into which the money went was intended to provide both of them with a home and a living. The appellant, although not married to the bankrupt, had been living with him for some time prior to the bankruptcy and both were described as the principals of the academy in the brochure.

Held, that the moneys advanced by the appellant represented her contribution to the capital of the business enterprise in which she had an interest herself and she was no more entitled as against the ordinary creditors of the business to prove in respect of her contribution than the proprietor, was entitled to prove in respect of his. The result was that she was not entitled to claim repayment in competition with the creditors of the bankrupt. ('51) 1951-2 All E R 168.

SECTION 46

——S. 46—Companies Act (1956), Ss. 529 and 460 (6) — Company—Winding up — Claim by creditor in respect of amount due to him from company—Set off —Duty of creditor to deduct from his claim any sum due by him to company which is legally recoverable —Relevant date for determining whether claim for set off is barred by limitation—Creditor's claim allowed by official liquidator without any deduction—Application by auction purchaser of Company's assets under S. 460 (6)—Plea of set off can be allowed. See Companies Act (1956), S. 529. AIR 1964 Andh Pra 88 (DB).

——S. 46—Set-off of debt jointly due.

A debt repayable under a contract with A and B to either or survivor cannot at one and the same point of time be a debt jointly payable to A and B and also a debt severally payable to A. During the joint lives of A and B at least until due demand for repayment of money to A specifically is made, the debt continues to be a debt jointly due to A and B and X cannot set off a debt due from A alone against such debt nor can A set off his debt against a separate debt due from him to X. 93 Cal L J 84 : 58 Cal W N 395: (1954) 24 Com Cas 306 : I L R (1956) 1 Cal 102 : AIR 1954 Cal 303 (304, 305) (Prs 7, 8, 14, 15, 20).

● ——S. 46—Scope—Fixed deposit with Bank—Subsequent loan from Bank on promissory note—Handing over of fixed deposit receipt with endorsement of discharge and letters of delivery and instructions — Insolvency of Bank before maturity of fixed deposit —Depositor's claim for set off of fixed deposit against liability on promissory note held was valid. See Kerala Insolvency Act (2 of 1956), S. 47. AIR 1964 Ker 1 (FB).

——S. 46 — Banking Company — Winding up of — Claim by depositor in bank preferred under S. 45-D, Banking Companies Act (1949) — Depositor claiming right of set off under S. 529, Companies Act, 1956 read with S 46, Provincial Insolvency Act, 1920 in respect of loan obtained by him from bank against deposit — Transaction evidenced by documents by which deposit receipt was passed as security for loan —Transaction held not to amount to transfer of deposit under Ss. 130 and 134, Transfer of Property Act, 1882 — 'Security', meaning of — Transaction amounted to security culminating in something more than mere set-off — As loan remained undischarged on day the banking company was ordered to be wound up, the depositor was not entitled to claim

set-off. See Companies Act (1956), S. 528. AIR 1963 Ker 128.

——S. 46 — Court-fees Act (1870), Sch. 1, Art. 1— Travancore-Cochin Court-fees Act (2 of 1125), Sch. I, Item 1—Liquidation proceedings of banking company —Debtor filing affidavit claiming dues from company — Set-off — Court fee on claim under S. 529, Companies Act read with S. 47 of Kerala Insolvency Act, in the case of mutual dealings an account has to be taken and only the balance of the account can be claimed by the one party or the other as the case may be—It is only this balance if it is in favour of the company that the liquidator is entitled to claim. (Companies Act (1956), S. 529) — (Civil P. C. (1908), O. 8, R. 6). See Court-fees Act (1870), Sch. I, Art. 1. AIR 1959 Ker 11.

——S. 46—Companies Act (1913), S. 229 — Set-off — Amount becoming due from fund to mortgagor — Fund claiming an amount due to it under mortgage— Two amounts can be set off. AIR 1953 Mad 610.

——S. 46—Scope — Insolvency of proprietor of chit fund — Assignment of pronote — Suit by assignee— Dealings in respect of separate chit — Set off by subscriber — Permissibility.

Section 46, Provincial Insolvency Act, is more or less a copy of S. 39 of the English Bankruptcy Act. Hence it is proper to presume that the Indian Legislature intended to give S. 46 the same import. The rule embodied in S. 46 is a rule of equity and there are no legitimate grounds to limit its benefits solely to actions in Insolvency Courts.

Where on the insolvency of the proprietor of a chit fund, the Official Receiver assigned a pronote executed by one of the subscribers in favour of the proprietor as security for future instalments, in the suit brought by the assignee on that pronote the subscriber can claim set off of a sum due to him in respect of instalments paid by him to the proprietor under a separate chit. 36 Mys L J 57 : ILR (1957) Mys 333 : AIR 1958 Mys 126 (127) (Pt A) (Pr 6).

——S. 46 —"Mutual dealings" — Meaning — Set off when allowable—Material date.

Mutual credit or mutual dealings under S. 46, Provincial Insolvency Act, mean reciprocal demands which must be naturally terminated in a debt. In a case where there are reciprocal demands available by one party against the other in the same capacity it is a clear case of mutual dealings in which a set-off is a matter of course. The date of insolvency would be material for the purpose of set-off. Fixed deposits maturing on a future date may be a future debt but it is a debt nevertheless at the date of the bankruptcy, available for set-off as a debt. (1953) 23 Comp Cas 369 : ILR (1952) Cut 309 : AIR 1954 Orissa 7 (9, 10) (Pt A) (Prs 15, 16).

SECTION 47

——S. 47—Insolvent company in liquidation—Rights of secured creditors under S. 47 — Debenture-holder coming in liquidation after valuing his security — Court having no desire to redeem security — Creditor desiring to purchase property put to auction — Whether can demand set-off of value of security. See Companies Act (1913), S. 229. AIR 1963 All 12 (DB).

——S. 47—Valuation of security under—Effect of — If bar to claim in excess of that valuation — (Civil P. C. (1908), O. 2, R. 2).

The right of a secured creditor to realise the security in accordance with the terms of the bond in his favour is not affected in any manner whatsoever by the valuation which he puts on his security under S. 47 of the Provincial Insolvency Act. A secured creditor is clearly entitled to make a claim in respect of the whole of the amount due under the security despite the valuation made by him of his security at a lesser figure. And if he limits his claim in a subsequent suit to the amount of the original valuation he is precluded under O. 2, R. 2, Civil P. C. from recovering any amount in excess of that valuation thereafter. AIR 1938 Lah 217 and AIR 1940 Nag 252, Disting. 1955 Andh L T (Civil) 150 : 1955 Andh W R 199 : AIR 1955 Andhra 152 (156) (Pt B) (Prs 5, 7) (DB).

——Ss. 47, 28 (2) — Effect of.

Section 47 does not in any way derogate or reduce the nature of the Official Receiver's right in the property that is vested in him under S. 28 (2). 69 Mad L W 734 : ILR (1957) Mad 344 : (1956) 2 Mad L J 421 : AIR 1957 Mad 1 (2, 3) (Pt A) (Prs 5, 6) (DB).

——S. 47—Secured creditor—Right to execute decree against personal property of insolvent after his discharge.

The right of a secured creditor in insolvency proceedings is a contingent one and until the contingency happens he is outside the Act — His debt is not provable until he has realised his security or has abandoned it or valued it as per S. 47. In such a case he is entitled to a personal decree against the insolvent under O. 34, R. 6, Civil P. C. after the insolvent's unconditional discharge, if the security has not been realised before the discharge of insolvent. ILR (1954) Punj 831 : 56 Pun L R 113: AIR 1954 Punj 180 (181) (Pt B) (Prs 5, 6).

SECTION 48

——S. 48—Companies Act (1913), Ss. 229 and 230 — Interest —Trusts Act (1882), S. 23.

Where the sum constituted a trust money in the Company's hands and therefore the claimant is entitled to priority not under S. 230 of the Companies Act but independently of it, such a claim is subject to the same rule about interest as any other debt provable in the liquidation proceedings and the mere fact that the debt was trust money will not entitle the claimant to claim any special treatment in the matter of payment of interest.

Thus where the official liquidators had not received interest for the sum from any other person, nor was it a case where they ought or might be fairly presumed to have received interest nor had any unreasonable delay been made in paying the trust money, the case was not governed by S. 23 of the Trusts Act and the company being not a solvent company the payment was governed by the rules applicable to insolvency cases. 1953 All W R (H C) 586 : 1953 All L J 725 : (1954) 24 Com Cas 450 : AIR 1954 All 129 (130) (Pt A) (Pr 3).

——S. 48—Companies Act (1913), Ss. 229, 168—Scope — Insolvent Company — Interest on debts due to creditors — Interest up to the date of petition for winding up only admissible — Travancore-Cochin Indian Company Rules (1952), R. 159—See Companies Act (1913), S. 229. 1963 Ker L T 268.

SECTION 49

——Ss. 49, 33, 80 — Proceedings under S. 33 — Presumption under S. 118 (a), Negotiable Instruments Act does not arise—Nature of proceedings under S. 33 — Jurisdiction and duties of Insolvency Court stated —Negotiable Instruments Act (1881), S. 118. AIR 1958 All 54, Reversed. See Provincial Insolvency Act (5 of 1920), S. 33. AIR 1965 S C 920.

——S. 49 (1) — 'Provable' and 'proof' — Meaning — Contested claim—Mode of proof.

'Provable' and 'proof' are words of technical import in the language of the law of insolvency. And it is only that a certain debt may conform to that description for certain purposes of the Act that the

convenient mode of proof prescribed by S. 49 has been laid down.

Where a claim for recovery of a debt is not contested, the mode of proof prescribed by S. 49 should be sufficient. But to say that that mode of proof will do even where a claim is contested would be to run counter to the recognised rules of pleading and proof. Where a debt is contested in the insolvency proceedings it should be proved in the ordinary way, and it would be no answer to the contest that a prima facie proof of it according to the mode prescribed by S. 49 had already been given. AIR 1958 All 54 (59) (Pt D) (Pr 15) (DB).

[Reversed on another point in AIR 1965 S C 920.]

——S. 49—Scope—Debts under pronote — Presumption under S. 119, Negotiable Instruments Act—Applicability—Proof of passing of consideration — Necessity — (Negotiable Instruments Act (1881), S. 118 (a)).

Where the circumstances on which the preliminary inference as to the weakening of the presumption as regards certain pronote under S. 118 (a) of the Negotiable Instruments Act was based are found to be illusory and unfounded, the creditors are not deprived of the benefit of that presumption and there is no necessity of proving by evidence that consideration did actually pass.

Held, on facts that it was clearly a case where not only had the insolvent failed to displace, or even to weaken, the presumption in favour of the creditors under S. 118 of the Negotiable Instruments Act, but the passing of consideration stood fully established, even if there were no initial presumption in favour of the creditors, by the evidence adduced by them and by the insolvent's own admission. There was therefore no need for the creditors to prove the actual passing of the consideration in respect of their pronotes. AIR 1958 All 54 (63, 66) (Pt J) (Prs 30, 40) (DB).

[Reversed in AIR 1965 S C 920.]

——Ss. 49, 72 (2)—Execution petition relating to debt provable under Act — Decree-holder not proving the debt—Sub-s. (2) of S. 78 cannot apply and he cannot claim the benefit under the provision in regard to his second execution application. See Provincial Insolvency Act (1920), S. 72 (2). A I R 1963 Andh Pra 228 (DB).

——S. 49, 78 (2), 28 (2), 33, 34, 62 and 79 — 'Debts provable,' meaning of — Affidavit in support of application for permission under S. 28 (2) does not amount to proof of debt—Benefit of S. 78 (2) cannot be taken —(Words and Phrases). See Provincial Insolvency Act (5 of 1920), S. 78 (2). AIR 1960 Andh Pra 257 (DB).

——S. 49 (2)—Proof of debt—Failure to submit vouchers with claim — Order dismissing claim — Held to be opposed to elementary notions of justice and fairness. AIR 1955 NUC (Bom) 6015 (DB).

——Ss. 49, 33 and 50—Insolvency Rules (By Bombay H. C.), R. 8—Proof of debts—Admission of a claim by creditor—Requirement of—Specific order under S. 33 necessary—Mere inclusion of his name in schedule of creditors does not amount to compliance with S. 33. (1964) 5 Guj L R 180.

——S. 49 — Non-registration of a charge against a company's property in respect of company's debts—Effect — Charge invalid against liquidator only—Surety guarantor who could have got the charge registered under S. 134 of the Companies Act (1956) cannot take advantage of his failure to do so and claim relief under Ss 139, 141 of the Contract Act. See Contract Act (1872), S. 139. A I R 1964 Mad 134.

——S. 49—Winding up of insolvent company—Claims by creditors—Proof of debts — Application of insolvency rules—Affidavit not the only way of proof. See Companies Act (1956), S. 528. AIR 1963 Punj 22.

SECTION 50

——Ss. 50, 6, 9, 28, 24, 33, 53 — Debtor adjudged insolvent — Petitioning creditor applying under S. 53 for annulment of certain transfers by insolvent—Transferee cannot challenge order of adjudication on ground that petitioning creditor was not creditor of the insolvent. See Provincial Insolvency Act (5 of 1920), S. 6. AIR 1963 Bom 212.

——S. 50—Petition under, by creditors—Propriety of—Objection as to in second appeal —Maintainability—Civil P. C. (1908), S. 100.

A creditor although authorised and directed by the Official Receiver cannot file a petition under S. 50 in the Insolvency Court, to have debts incorrectly or improperly admitted expunged from the schedule and get a valid order. Where, however, such a petition is made by the creditor and no objection is raised to it in the Courts below, objection cannot be raised for the first time in second appeal as it does not go to the root of the matter vitiating the proceedings. ('51) 64 M L W 296 : (1951) 1 Mad L J 468 : 1951 Mad W N 318 (2): AIR 1951 Mad 814 (815) (Pt A) (Pr 5).

[Overruled on another point in AIR 1957 Mad 1.]

——S. 50—Payment of dividend into Court.

The insolvency Court has got not only the right, but also the duty, to order dividends paid on settled and non-existent time-barred debts expunged by it from the schedule to be put back into Court. ('51) 64 M L W 296 : (1951) 1 Mad L J 468 : 1951 Mad W N 318 (2) : AIR 1951 Mad 814 (815) (Pt B) (Pr 6).

[Overruled on another point in AIR 1957 Mad 1.]

——S. 50 (2) — Debtor cannot apply in absence of approved composition or scheme. (1950) 2 Mad L J 162 : 63 Mad L W 764 : 1950 Mad W N 485 : I L R (1951) Mad 237 : AIR 1950 Mad 800 (801) (Pr 3) (DB).

● ——Ss. 50, 68, 75—"Aggrieved person"—Insolvent's right to apply under S. 68 and appeal under S. 75—S. 50, if bars application under S. 68—Remedies under Ss. 50 and 68. In view of the explicit and all embracing language of Ss. 68 and 75 if cannot be maintained that the insolvent can ever apply to the Court under S. 68 questioning the act of the Official Receiver or appeal under S. 75 from an adverse order of the Court passed on suit application. The remedies under Ss. 50 and 68 are different in their scope and S. 50 does not exclude the applicability of S. 68 or disable the insolvent from objecting under that section to a debt admitted by the Official Receiver. AIR 1926 Mad 556 (FB), Overruled. Chalavadi Narasimham v. Chalvadi Ramayya, 68 Mad L W 333 : 1950 Mad W N 287 : (1950) 1 Mad L J 484 : I L R (1950) Mad 77 : A I R 1950 Mad 492 (501, 502) (Prs 25, 27, 29) (FB).

SECTION 51

● ——Ss. 51 (3), 28 (2), (7) and 74 (ii) — Applicability—Bona fide purchaser in execution sale after adjudication—If protected — Vesting of property in receiver under S. 74 (ii)—Effect of.

Section 51 (3) applies to purchaser in good faith of the debtor's property at an execution sale held after an order of adjudication had been made against the debtor. The title of such a purchaser as against the receiver in insolvency is protected by S. 51 (3).

Section 51 (3) applies also to a sale in execution of a decree held after the property of the judgment-debtor vested in a Receiver under S. 74 (ii). On the date of the insolvency petition in a summary administration, the property of the debtor vests in the Court as a Receiver on the date of the admission of the insolvency petition under S. 74 (ii) in the same

manner as property vests in a Court or Receiver under S. 28 (2) on an adjudication. If the property so vested is sold in execution of a decree by another Court a purchaser in good faith is entitled to retain the property and the creditors of the insolvent are entitled only to the sale proceeds of the property for distribution among them. AIR 1938 Mad 449 and AIR 1942 Mad 415 (1), Dissented from; ILR (1948) All 508 and ILR (1942) Nag 377 and ILR 62 Cal 457, Foll.; ILR (1952) Mad 948, held obiter. Lokanatham Srirangamma v. Gangala Narayanamma, 1956 Andh L T 755 : 1956 Andh W R 815 : ILR (1956) Andh Pra 230 : AIR 1956 Andhra 243 (246) (Pt A) (Prs 15, 16) (FB).

——Ss. 51 (3), 28 (2), (7), 52 — Effect of — Purchase of insolvent's property at execution sale after admission of insolvency petition but before order of adjudication — Purchaser if gets good title — The nature of title that he will get will depend upon whether he fulfils the condition laid down in S. 51 (3) or does not fulfil it. Knowledge of insolvency proceedings is sufficient to disprove that he was a bona fide purchaser. See Provincial Insolvency Act (5 of 1920), S. 28 (2). AIR 1959 Bom 10.

——Ss. 51 (3) and 28 — Bona fide purchaser at execution sale held after application for adjudication is admitted — Purchaser is protected — But Receiver has superior claim over sale proceeds — Decree-holder himself purchasing property — He is not entitled to sale proceeds in satisfaction of his decree—He cannot claim set-off of price realised at sale against his own decretal dues. AIR 1955 NUC (Cal) 834 (DB).

——S. 51 (3) — Good faith — Knowledge alone is not conclusive. AIR 1955 NUC (Cal) 834 (DB).

——S. 51 (3) — Property sold in execution proceedings during pendency of insolvency proceedings against judgment-debtor — Mere knowledge on part of purchaser in execution sale of admission of petition to adjudicate judgment-debtor insolvent does not mean absence of good faith on part of purchaser — But onus of proving good faith is on purchaser — Tests to be applied in deciding question of good faith stated. See Presidency-Towns Insolvency Act (1909), S. 53 (3). AIR 1964 Mad 549 (FB).

——S. 51 (1) and (3) — Applicability — Civil P. C. (5 of 1908), O. 21, R. 72 — Leave to bid and set-off obtained by decree-holder — Judgment-debtor adjudicated insolvent on his own petition presented before the date of execution sale — Decree-holder — If should put sale-proceeds into Court.

A decree-holder auction-purchaser who has obtained leave to bid and set-off the sale-proceeds against his dues under the decree cannot get the benefit of the execution sale and cannot set-off but must put the sale proceeds into Court, if the judgment-debtor was adjudicated insolvent on his petition presented before the date of the sale.

The combined effect of S. 51 (1) and (3) of the Provincial Insolvency Act is that while a purchaser in good faith gets good title for the properties sold in Court auction after the presentation of the insolvency petition, the decree-holder cannot get any right to the proceeds which would vest in the Receiver. (1942) 1 M L J 306, Foll. (1958) 2 Mad L J 532 : 71 Mad L W 748 : 1958 Mad W N 663 : AIR 1959 Mad 431 (432) (Prs 3, 4).

——S. 51 (1) — Realised — Meaning — Money sent for is not realised.

There is nothing intelligible in legal principle or in the ordinary meaning of the words "realised" such as would render the mere order sending for the moneys of the judgment-debtor tantamount to an order realising the assets within the meaning of sub-s. (1) of S. 51. AIR 1944 Mad 389, AIR 1941 Mad 575 and AIR 1931 Sind 164, Disting. 64 Mad L W 764 (2): 1951 Mad W N 729 (1) : 1951-2 Mad L J 271 : AIR 1952 Mad 256 (256, 257) (Pr 5).

——Ss. 51 (1) and 28 — A purchasing property of B in execution of his decree against B — Sale confirmed after filing of insolvency petition by B — Receiver selling same property to C — Effect — Sale in favour A being earlier prevails over C's sale. See Provincial Insolvency Act (1920), S. 28 (7). 1961 Raj L W 652 : ILR (1962) 12 Raj 523.

——Ss. 51 (3), 4 and 56 (3) — Sale of insolvent's property after adjudication — Relief of possession by Official Receiver — Power of Court to grant relief — It is open to the Court to grant such relief. See Provincial Insolvency Act (5 of 1920), S. 4. AIR 1951 Trav-Co 193 (DB).

——S. 51 (3) — Court sale of insolvent's property — Purchase by insolvent's benamidar—Official Receiver can claim consideration. AIR 1951 Trav-Co 193 (195) (Pt B) (Pr 7) (DB).

SECTION 52

——S. 52 — Civil P. C. (1908), S. 47 and O. 21, R. 58 — Money decree against insolvent and his sons — Property attached before judgment sought to be sold in execution by decree-holder — Application by receiver who was party to decree for delivery of property to him for administration — Question of title whether property is self-acquired or joint family property — Power of executing Court to decide stated. AIR 1965 Andh-Pra 451 (454) (Pt B) (Pr 10) (DB).

——Ss. 52, 28 (2), (7), 51 (3) — Effect of — Purchase of insolvent's property at execution sale after admission of insolvency petition but before order of adjudication — Purchaser if gets good title.

The nature of title that the purchaser will get will depend upon whether he fulfils the condition laid down in sub-s. (3) of S. 51 or does not fulfil it. Knowledge of insolvency proceedings by the purchaser is sufficient to disprove that he was a bona fide purchaser. See Provincial Insolvency Act (5 of 1920), S. 28 (2). AIR 1959 Bom 10.

——Ss. 52, 2 (e) and 28 (6) —Applicability and scope — Secured creditors—Compromise instalment decree in mortgage suit — Mortgaged property to remain under attachment till payment of decree — Interim receiver in subsequent insolvency of mortgagor — Claim to possession of mortgaged property from receiver in execution — Sustainability.

Under S. 28 (6), Provincial Insolvency Act, the right of a secured creditor, to realise or otherwise deal with his security is in no way affected by the order of adjudication and the mortgagee can sue on and realise, his security. Under S. 20 of the Insolvency Act, the property of the debtor does not vest in the interim receiver as it does in a receiver appointed after adjudication under S. 56 of the Act. If, therefore, after the adjudication of insolvency, the right of a secured creditor to realise or otherwise deal with his security is unaffected, though the other property of the insolvent has vested in the official receiver then, a fortiori, the interim receiver appointed before adjudication to whom the property of the debtor does not vest cannot claim the right to take possession of any mortgaged property that is with the secured creditor of the insolvent, such being the rights of a secured creditor and of the receiver appointed before or after the adjudication. Section 52 of the Insolvency Act cannot, in its very nature, apply to mortgage decreee-holders or to decree-holders holding a charge or lien on the property of the debtor as security for the paymet of the debt due from him. Money decree-holders holding a charge or lien on the debtor's property being secured creditors within the meaning of S. 2 (e) are exempted from the operation of S. 52.

Held on facts, that the compromise decree passed in favour of the mortgagee was not a simple money decree but was in the nature of a mortgage decree. Even if the decree could not be regarded as a mortgage decree, it had beyond doubt the character of a decree giving to the decree-holder a charge or a lien on the properties of the debtor specified in the decree as security for the payment of the decretal amount and S. 52 could not be invoked by the interim receiver for delivery to him of the property mortgaged. The mere fact that in execution proceedings a receiver was appointed at the instance of the mortgagee for the collection of rents and profits of the mortgaged property did not attract S. 52, when it is in its nature inapplicable. 1959 M P C 726 : 1960 M P L J 135 : 1960 Jab L J 317 : ILR (1959) Madh-Pra 780 : AIR 1959 Madh-Pra 420 (421, 422) (Pt A) (Prs 4, 5).

——S. 52 — Jurisdiction — Application for delivery of property to interim receiver — Forum.

An application under S. 52 has to be made to the Court which is executing the decree and it is that Court which has to decide whether in regard to an application under S. 52 the conditions laid down by that section are fulfilled and whether the provisions of the section are applicable. The Insolvency Court has no jurisdiction to make an order under S. 52 : AIR 1935 Cal 150, Rel. on.; 68 Mad L J 681 : AIR 1935 Mad 651, Disting. 1959 M P C 726 : 1960 M P L J 135 : 1960 Jab L J 317 : ILR (1959) Madh-Pra 780 : AIR 1959 Madh-Pra 420 (422) (Pt B) (Pr 6).

——S. 52 — Parties to suit or their representative—Executing Court passing order under S. 52 of Provincial Insolvency Act directing attached property to be delivered to interim receiver—Receiver appointed under S. 20 of Provincial Insolvency Act cannot be termed as representative of party within the meaning of S. 47 of C. P. Code — Order cannot be said to have determined question arising between parties to suit or their representative — Appeal under S. 96 of C. P. Code against such order not competent—See C. P. Code (1908), S. 47. I L R (1965) 2 Punj 212 : A I R 1966 Punj 479 (DB).

——Ss. 52 and 75—Order under S. 52—Appeal against —Order not appealable under S. 75 as it is not order made in exercise of insolvency jurisdiction nor is it appealable under Order 43, Rule 1 of Civil P. C. ILR (1965) 2 Punj 212 : AIR 1966 Punj 479 (480) (Pt B) (Prs 4, 5) (DB).

—— S. 52 — Property saleable in execution—Debt is chose-in-action and therefore, attachable and saleable property — Movable is attached by actual seizure whereas debt is attached by prohibitory order—Order under Section 52 can be made where money belonging to judgment-debtor is attached. ILR (1965) 2 Punj 212 : A I R 1966 Punj 479 (481) (Pt C) (Pr 6) (DB).

SECTION 53

SYNOPSIS

(Provincial Insolvency Act (1920), S. 53.)

1. Scope and applicability.
2. "Any transfer."
3. Good faith.
4. "For valuable consideration."
5. Transfer in favour of wife.
6. Transfer from insolvent's transferee.
7. "Purchaser."
8. Conditions of avoiding transfer under S. 53.
9. "Voidable as against the receiver."
10. Transfer annulled—Rights of transferee.
11. Defence to an application under this section.
12. This section and S. 53, T. P. Act.
13. Jurisdiction.
14. Evidence and burden of proof.
15. Procedure.
16. Res judicata.
17. Appeal.
18. Limitation for application under S. 53.
19. Scope of enquiry—Duty of Court.
20. Illustrative cases.

1. Scope and applicability.

——Ss. 53 and 35 — Sham and nominal transactions not covered by S. 53 — Annulment of adjudication under S. 35 if controlled by S. 53.

Held, the order annuling the adjudication is bad without considering the plea of the petitioning creditors — See Provincial Insolvency Act (1920), S. 35. (1963) 2 Andh W R 437.

——Ss. 53 and 54—Fraudulent preference—What is.

If a man who is in serious pecuniary difficulties, his debts surpassing his assets, makes a transfer of a considerable portion of his properties to one creditor without making any provision for the payment of the debts of other creditors, the Court may presume that the transfer was with a view to give fraudulent preference. 1959 M P L J (Notes) 177.

——S. 53—Applicability—Fraudulent transfer.

Fraudulent transfer coming under S. 6 (b) is one voidable under S. 53 T. P. Act independently of insolvency of transferor and one that is voidable under S. 53, Provincial Insolvency Act— See Provincial Insolvency Act (1920), S. 6 (b). AIR 1955 N U C (Mad) 3169.

——Ss. 53, 6 (b), and 54—Act of Insolvency.

Where the circumstances of a case leave no room for doubt that the transactions were resorted to by the debtor with a view to defeat his creditors that would be an act of insolvency — See Provincial Insolvency Act (5 of 1920), S. 6 (b). A I R 1954 Trav.Co 419 (DB).

——Ss. 53 and 54—Applicability.

Once the consideration is found to be real and not illusory. the transfer goes outside the scope of S. 53, whether or not it will come within that of S. 54. AIR 1954 Vind Pra 11 (12) (Pt A) (Pr 8).

2. "Any transfer."

——Ss. 53, 9 (1) (c) and 54 — Date of transfer is date of registration and not date of execution of transfer deed—Fiction of relation back does not apply—Registration Act (1908), Ss. 47 and 75 — See Provincial Insolvency Act (1920), S. 9 (1) (c). A I R 1962 Andh Pra 226 (DB).

——Ss. 53, 54 and 28.A — Scope — Father adjudged insolvent — Alienation by father — Effect of setting aside on sons' shares.

The jurisdiction of an Insolvency Court when setting aside a transfer under S. 53 or 54, where the transaction is not sham and nominal, is, confined to doing so in respect of the insolvent's share. In so far as the insolvent's share of property is involved in the alienation the Official Receiver will get it back when the alienation is set aside, but if under the powers vested in the insolvent father under the general law (such as, the Hindu Law) he has alienated the interests of his sons who are not insolvents, no order of the Insolvency Court under S. 54 can get back from the alienee and vest in the Official Receiver the interests of persons, who have not been adjudicated.

The question as to the father's powers to alienate family property for the discharge of antecedent debts and the provisions enacted in S. 28-A vesting such a

power in the Official Receiver is wholly irrelevant for the consideration of the question. AIR 1935 Mad 246, Approved; A I R 1937 Mad 791, AIR 1943 Mad 303 held not good law. **1954 Mad W N 880 : I L R (1955) Mad 1039 : (1954) 2 M L J 755 : 67 Mad L W 1064 : AIR 1955 Mad 51 (52, 53) (Prs 6, 10) (DB).**

——Ss. 53 and 2 (1) (f) — 'Any transfer' means transfer recognised by general law—Court must look to substance and not to form. **A I R 1955 N U C (Mad) 3144.**

——S. 53—Scope — Malabar tarwad—Right of member to maintenance — Surrender deed surrendering right — Transfer of property — Insolvent Karnavan giving up right in property for liquidated sum of Rs. 75/- per month and residence and Devaswam perquisites — Not only accruing allowance but also accumulated arrears given up — What is transferred by surrender deed is the property of the insolvent within the meaning of S. 2 (d) and not merely right to future maintenance. **AIR 1955 N U C (Mad) 3144.**

——S. 53 — **Scope — Father adjudged insolvent — Share of son — If affected.**

The question whether a Hindu father as the manager of the family has the right to alienate the son's share for a binding debt is not quite relevant in considering whether he alone was a transferor within the meaning of S. 53 of the Act. The mere fact that the father has got such a power does not imply that he is purporting to exercise that power in any given case.

Where a document of transfer is executed not only by the Hindu father but by the son as well and the fact that the son is a minor and is represented by the father does not make the transfer effected by the father as the managing member of the family, the circumstance that the son also is a party to the document shows that the father alone is not the transferor so as to render the whole document voidable as against the receiver. In such a case it is only the transfer effected by the father who is adjudged an insolvent, that can be annulled and the share of the minor son will be unaffected : AIR 1935 Mad 246 ; AIR 1944 Mad 233 ; AIR 1945 Mad 253 and AIR 1937 Mad 791, Dissented from. **1953 Mad W N 948 : AIR 1954 Mad 431 (432) (Prs 9, 12, 13).**

——**Ss. 53 and 54 — Annulment of transfers under these sections not identical.**

The approach to a solution of the problem presented when a transfer is annulled under S. 53 as distinguished from annulment under S. 54 is not identical. **1962 Nag L J (Notes) 32.**

3. Good faith.

——S. 53 — **Travancore (Insolvency) Regulation (8 of 1090), S. 35—'Good faith'—Factors to be considered.**

It is settled law that it is not necessary in annulment proceedings under S. 53 to prove that the transferor who has been subsequently adjudged an insolvent should have been honest and straightforward in the matter of the transaction impeached. Even if the transferor was wanting in bona fides the crucial question still remains to be answered. Unless it is found that the transferee was wanting in bona fide in respect of the transaction in question, he cannot be affected by the dishonest course of conduct of the transferor. Subramania Iyer v. Official Receiver. **1958 Mad W N (SC) 1 : 1958 Ker L J 17 : 1958 S C J 172 : 1958 S C R 257 : 1958 Ker L T 1195 : AIR 1958 S C 1 (9) (Pt D) (Pr 10).**

——S. 53 — **Travancore (Insolvency) Regulation (8 of 1090), S. 35 — Good faith—Test—Travancore General Clauses Act—Indian General Clauses Act — (Travancore (Insolvency) Regulation (8 of 1108), S. 53) — (General Clauses Act (1897), S. 3 (22)) — (United State of Travancore and Cochin Interpretation and General Clauses Act (7 of 1925), S. 2 (6)).**

The Travancore General Clauses Act (2 of 1072) (1897), in Cl. (6) of S. 2 provides that 'Nothing is said to be done or believed in good faith which is done or believed without due care and attention'. The definition of 'good faith' in the Indian General Clauses Act (10 of 1897) is in these terms : 'A thing shall be deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not'. The test of good faith as laid down in the law (viz , the General Clauses Act, 1897) generally applicable to Indian Statutes is more appropriate to proceedings under the insolvency law and not the test of good faith as laid down in the Travancore General Clauses Act, 1125, which is the same as found in the Act of 1072. For, it cannot be said that the definition of 'good faith' as contained in the Travancore General Clauses Act of 1125 must apply in the same sense to every piece of legislation to which it may apply irrespective of the subject or the contest. The Travancore Insolvency Regulation is on the same lines as the Provincial Insolvency Act and therefore must be understood in the same sense. If that is the correct approach to the law of insolvency, a secured creditor who has advanced money to a debtor honestly, even though he may not have taken all due precautions, would not come within the mischief of S. 35. Subramania Iyer v. Official Receiver, **1958 Mad W N (S C) 1 : 1958 Ker L J 17 : 1958 S C J 172 : 1958 S C R 257 : 1958 Ker L T 1195 : AIR 1958 S C 1 (9) (Pt F) (Pr 10).**

——S. 53 — **Annulment of transfer — Test — Intention of transferee.**

The test to determine whether the transaction is liable to be annulled under S. 53 would be the intention of the transferee. Once a finding is reached that the transfer was for no consideration or without consideration an inference of want of bona fides would normally follow and the transfer ought to be annulled. **1962 Nag L J (Notes) 32.**

——S. 53 — **'Good faith' — What is.**

If it was within the knowledge of the transferees that the transferor was in insolvent circumstances at the time of the sale and there was pressure from his creditors for the payment of the moneys due to them and transferees purchased from him his entire stock-in-trade and assets without making any substantial contemporaneous payment and without undertaking to make any such payment in future in order that he might be able to continue his business so that he would be in a position to pay off his creditors, it would be very difficult to hold that the transfer was one entered into in good faith : ILR 19 Cal 223 (P C), Foll. **35 Mys L J 274 : 1957 Knt L J 86 : ILR (1957) Mys 147 : (1958) 2 Lab L J 613 : AIR 1958 Mys 35 (38) (Pt B) (Pr 9) (DB).**

——S. 53 — **Good faith — Test to decide.**

The true test with respect to good faith of a transferee is not as to the honesty on the part of the transferee to discharge the obligations standing against the transferor. The true test is as to whether the transferee at the time of taking the transfer did or did not honestly know that the transferor was so heavily burdened with debts that there was no property left for him, more than what was needed, to discharge his obligations towards his creditors ; if the transferee honestly knew that the properties were more than the obligations standing against the transferor, he may possibly prove that there was no bad faith on the part of the transferee.

If, however, there are indications sufficient to prove that the transferee had the knowledge that the debts standing against the transferor were more than the

property owned by the transferor, then in those circumstances it cannot be said that the transferee, when taking the transfer, was acting in good faith. The transfer in that case may be proved to have been entered into by the transferee in collusion with the transferor to screen the properties from the reach of the creditors. ILR 34 Pat 440 : AIR 1955 Pat 458 (467) (Pt G) (Pr 24) (DB).

——Ss. 53 and 54 — Applicability — Tests — S. 54, if controls S. 53 — Transfer in consideration of pre-existing debt.

The true test whether S. 53 applies to a transaction or not is not whether the transferee is not the creditor of the insolvent but whether the transferee creditor is proved not to have acted in good faith. The creditor's good faith will afford a complete answer to an application under S. 53 and the burden is on the Receiver to establish the absence of good faith on the part of the creditor. There is nothing either in S. 53 or S. 54 to justify the construction that the provisions of S. 54 which are meant to meet the specific case of the debtor's fraudulent act controls in any way the general provisions of S. 53 or that the latter section makes any exception in favour of the creditors. Transfer in favour of a creditor in consideration of a pre-existing debt is as much subject to the provisions of S. 53 as any other transfer provided that the conditions laid down in that section have been fulfilled. AIR 1952 Sau 47 (48) (Pt A) (Pr 4) (DB).

——S. 53 — Good faith — Transferee's good faith alone if sufficient.

The expression "in good faith" does not contemplate that both parties to the transaction should act in good faith. Good faith on the part of the transferee is alone required. 1950 Ker L T 573 : 1950 T C L R 707 : AIR 1951 Tra-Co 55 (61) (Pt B) (Prs 15, 20) (DB).

——S. 53 — Good faith — Mortgagee advancing Rs. 75,000 on mortgage — Mortgagor in embarrassed circumstances at time of mortgage — No proper enquiry regarding general financial condition of mortgagor made by mortgagee though there were materials to put mortgagee on enquiry — Mortgage held was not one made in good faith. 1950 Ker L T 573 : 1950 T C L R 707 : AIR 1951 Trav-Co 55 (63) (Pt F) (Pr 25) (DB).

——S. 53—Fraudulent transfer—Threat of legal proceeding.

A threat of legal proceeding to a person in hopelessly involved condition is no genuine pressure at all so as to make a transfer, which otherwise appears fraudulent, a bona fide transfer. 1950 Ker L T 573 : 1950 T C L R 707 : AIR 1951 Trav-Co 55 (70) (Pt J) (Pr 43) (DB).

4. "For valuable consideration".

——S. 53 — "Valuable consideration", meaning of — Gift for 'obedience and submission' to donor is not transfer for valuable consideration — Contract Act, S. 2 (d).

A valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility, given, suffered, or undertaken by the other. The obedience and submission to donor referred to in the deed of gift might be a motive or ground for the gift in favour of the donee; but the obedience and submission cannot be said to have been suffered by her as a consideration for the gift. (1875) 10 Exch 153, Rel. on.

It is well settled that a transfer in consideration of natural love and affection is not a transfer for consideration within the meaning of S. 2, Contract Act. In law a consideration in a contract for sale, as in all other contracts under the Contract Act, must be a good and valuable consideration. Therefore, a meritorious or a gratuitous consideration such as natural love and affection or obedience and submission by way of respect or love may at best be a meritorious or a gratuitous consideration and in no case can be a good consideration or valuable consideration. AIR 1929 Pat 591; (1758) 28 E R 647, Rel. on. ILR 34 Pat 440 : AIR 1955 Pat 458 (461) (Pt A) (Pr 10) (DB).

——S. 53—"Valuable consideration"—Acceptance of liability by donee.

The mere acceptance of the liability on the part of the donee to discharge the debts of the donor and to maintain him till his lifetime out of the income and profits of the properties transferred to her does not amount in any way in law to a valuable consideration and satisfies the condition of 'quid pro quo'. (1888) 20 Q B D 732; (1908) 2 K B 169, Disting; AIR 1925 Oudh 28; AIR 1917 Mad 102, Doubted

Anything done or to be done by a universal donee under a transfer in the form of the mere management of the properties transferred so as to save them from the liabilities standing against the transferor at the time of transfer cannot in law amount to a valuable consideration as contemplated by the expression 'quid pro quo' or within the meaning of S. 53, Provincial Insolvency Act.

The obligation, therefore, in law arising under S. 128, T. P. Act against a universal donee is not a valuable consideration at all for the transfer made to the donee. ILR 34 Pat 440 : AIR 1955 Pat 458 (464 to 466) (Pt E) (Prs 18, 21, 22) (DB).

5. Transfer in favour of wife.

——Ss. 53, 4—Insolvent gifting away properties to his wife—Properties gifted given by way of security by the husband insolvent in an execution case against him—No inference that the gift deed was not genuine could be drawn from the fact unless it was proved that the properties were given in security within the knowledge of the wife and that she took no objection to it despite her knowledge. ILR (1964) Cut 274.

——Ss. 53 and 4 — Gift of property by husband in favour of his wife—Wife taking no steps for mutation in her name — Husband declared insolvent subsequently — No inference about benami character of gift transaction could be drawn merely from such non-mutation or from payment of municipal taxes and rent of the property through her husband. ILR (1964) Cut 274.

6. Transfer from insolvent's transferee.

——S. 53 — Transfer from insolvent's transferee—Right to challenge.

An alienation in favour of a transferee from the transferee of an insolvent cannot be challenged by the Official Receiver under S. 53. It can be challenged if at all only under S. 4 and in order to make the decision binding, the transferee from the transferee must be made a party to these proceedings. If the transferee from the transferee establishes that he is a bona fide purchaser for value without notice of the Insolvency proceedings, the transaction in his favour will have to be upheld. 1959 Ker L T 93 : 1959 Ker L J 78 : ILR (1959) Ker 803.

——S. 53—Scope—Transfer set aside — Effect of, on rights of transferee from insolvent's transferee.

If a transfer is set aside under S. 53 of the Provincial Insolvency Act, it becomes ineffective only from the date of application for setting it aside, and it cannot affect the rights of transferees from the transferee prior to that date who were not made parties to the application. ILR (1955) Mad 744 : (1955) 1 M L J 322 : AIR 1956 Mad 19 (25) (Pt C) (Pr 10) (DB).

——Ss. 53, 4—Scope—Transfer from insolvent's transferee.

It cannot be said that S. 53 of the Insolvency Act does not apply to a transfer by a transferee from the insolvent. If the transfer to a transferee from the insolvent is declared invalid and not binding on the Official Receiver and if the later transfer by the transferee from the insolvent is held to form only a link in the chain of a fraudulent scheme to defraud the other creditors of the insolvent, the insolvency Court has clearly the power to annul the second transfer as not binding on the Official Receiver not only under S. 53 of the Act, but also if necessary by the exercise of its powers under S. 4. AIR 1936 Bom 176 and AIR 1938 Mad 370 and AIR 1935 All 671, Rel. on. **1957 Knt L J 86 : 35 Mys L J 274 : I L R (1957) Mys 147 : (1958) 2 Lab L J 613 : AIR 1958 Mys 35 (39) (Pt C) (Pr 12) (DB).**

——S. 53—Applicability—Sale in favour of purchaser from transferee of insolvent—Validity of.

Where the transfer in favour of A is itself hit by S. 53 because of the absence of valuable consideration for it, then the transfer in favour of B, transferee of A, is equally hit by that section. However, this does not mean that in no case a purchaser from a transferee under a transfer made by the insolvent can in law sustain his title for the simple reason that the original transfer made by the insolvent is itself hit by S. 53, Provincial Insolvency Act. He may in certain circumstances defend his title on the equitable principle of being a purchaser for value without notice. **ILR 34 Pat 440 : AIR 1955 Pat 458 (467) (Pt H) (Pr 26) (DB).**

——Ss. 53 and 55 (c) — Transfer from insolvent's transferee.

If the original transfer is found to be sham or fictitious the subsequent transfer must also fall with it. In a proper case it may, however, be possible to protect a subsequent transfer if it falls within the purview of S. 55 (c). With respect to transfers falling within the scope of S. 53, there is, however, no express protection clause. Even if the subsequent transfers were annulled, if it afterwards turns out the sale-proceeds of the other properties were sufficient to pay off the creditors, the transferees will have to be reinstated to their former position. If the sale did not bring in the amounts needed, subsequent transferees can at that stage step in and make good the deficit with a view to retain unhampered the transfers in their favour. **ILR (1955) T C 764 : AIR 1956 Trav-Co 61 (62) (Prs 4, 5) (DB).**

7. "Purchaser."

——S. 53 — 'Purchaser'— (T. P. Act (1882), S. 54)—(Sale of Goods Act (1930), S. 4).

The expression 'valuable consideration' as used in S. 53, Provincial Insolvency Act, has to be read in a manner consistent with the implication of the words 'purchaser' and 'incumbrancer' used therein along with it.

The word 'purchaser' means a 'buyer' in the ordinary commercial sense and a purchaser in the legal sense of the word. The consideration for the transfer need not be necessarily something equivalent to what is transferred under the contract, but it must be valuable consideration in the sense that there must be 'quid pro quo'. In other words, something should be paid for something. Looked at from these considerations a donee, in whose favour a gift is made for 'obedience and submission', cannot be called in law a purchaser as there is no 'quid pro quo' at all, which means that nothing passed from the side of the donee for what is given to her under the gift deed. (1879) 10 Ch D 622 ; (1888) 20 Q B D 732 ; (1908) 2 K B 169; (1871) 6 Ch A 228, Rel. on. **I L R 34 Pat 440 : A I R 1955 Pat 458 (462, 463) (Pt B) (Prs 11, 14) (DB).**

8. Conditions of avoiding transfer under S. 53.

——Ss. 53, 54 and 55 — Scope and effect of—Kuri security bond — Payment by paid-up subscribers to non-prized subscribers under direction of foreman—Effect of his default—(Travancore Insolvency (Amendment) Act (1108)).

Under Travancore Insolvency Act after amendment in 1108 protection was given only to payments made prior to the presentation of the petition which when applied to an administration suit would be the date of the institution of the suit. Prior to it the law protected moneys realised before the actual adjudication. The rule of relation back does not under the Travancore or Cochin Acts or under the Provincial Insolvency Act, 1920, relate to a period anterior to the presentation of the petition. Transactions which do not come under that rule are prima facie valid unless they can be voided under some express statutory provision, e g. Ss. 53 and 54, Insolvency Act (these sections are the same under Travancore Cochin and the Provincial Insolvency Acts) or S. 53, Transfer of Property Act, 1882. The avoidance of a voluntary transfer under S. 53, Insolvency Act, is confined to cases where the transferor is adjudged insolvent within two years after the date of the transfer and S. 54 covers only cases where the presentation of the petition in insolvency is within three months of the transfer.

In 1104 three plaintiffs instituted administrative suit against the foreman of a Kuri. One of the plaintiffs was appointed receiver. The receiver instituted suits against paid-up subscribers to enforce Kuri security bond. The defendants pleaded discharge effected by payment made to certain non-prized subscribers as per foreman's directions and after his death by directions of his legal heirs. The Munsif accepted the defendants' plea. The findings were confirmed by the District Court in appeal. In second appeal the concurrent findings were challenged and the validity of payments made to certain subscribers in preference to others after the default by the foreman was questioned.

Held that the Court in second appeal would not go behind the concurrent findings on the plea of discharge which was supported by registered documents and which was corroborated by formal evidence.

Held further that the relevant clause of the Kuri Vaimpu that the Kuri assets shall in the first instance be applied to discharge the liabilities of the Kuri transaction. It did not create any property interests over the said assets in favour of the non-prized subscribers or even create a charge or a trust in their favour. There was no evidence that the Kuri Vaimpu was registered. The proposition that the moment that foreman commits default to conduct the Kuri he ceases to have any authority to deal with the assets of the Kuri was unwarranted by the terms of the vaimpu. To uphold it would be to create an impossible position with respect to conduct of Kuries and to extend the rule of 'relation back' even beyond its scope and amplitude under the bankruptcy law in England or under the Presidency-Towns Insolvency Act. No doubt if the Kuri assets were alienated in such a way as to defeat or delay the non-prized or unpaid prized subscribers such alienations would be voidable at the instance of such subscribers. The law does not go beyond that. AIR 1951 Trav Co 97, Foll ; 25 Trav L J 1288, Dist. **I L R (1953) Trav Co 326 : 1953 Ker L T 682 : AIR 1953 Trav-Co 321 (322) (Prs 5, 6) (DB).**

9. "Voidable as against the receiver".

——S. 53 -'Voidable against the receiver'—Meaning and effect of.

A transfer of property made by an insolvent two years prior to the filing of the petition to be adjudged insolvent is only voidable. The property so transferred does not vest in the Official Receiver; but within two years the Official Receiver may apply for setting aside that sale. It is incumbent on him to establish that the sale was not in good faith and for valuable consideration. If so much is proved, it is in the discretion of the Court to annul the sale in which case it is not binding on the receiver. It follows that the sale is valid till set aside. A I R 1941 Mad 903 (FB); AIR 1946 Nag 163 and A I R 1935 All 671, Ref. to. **ILR (1955) Mad 744 : (1955) 1 Mad L J 322 : A I R 1956 Mad 19 (24) (Pt B) (Pr 8) (DB).**

10. Transfer annulled—Rights of transferee.

——S. 53—Rights of transferee.

Once it has been found by the insolvency Court at the time of adjudication that the transfer was an act of insolvency then the alleged transferee can no longer contend that the transfer was not void on that ground. This principle applies not only to cases where the transfer is declared automatically void by the insolvency Court at the time of adjudication but also to a case where the Official Receiver subsequent to a debtor's adjudication makes an application under S. 53 for having a document adjudged void. The order of adjudiction is conclusive and the aggrieved third party's remedy is to prefer an appeal against the order of adjudiction. A I R 1943 P C 130, Expl. and Foll. **AIR 1956 All 68 (68) (Pr 5).**

[Overruled in AIR 1965 All 80.]

——S. 53—Transfer annulled—Rights of transferee.

Where the consideration for the transfer annulled under S. 53 consisted of two debts one on the prior mortgage and the other on the promissory note and both the debts were discharged by the transferee, the transferee is entitled to have a charge for the mortgage amount and to rank as a secured creditor to the extent of the amount paid. But he can rank only as an ordinary creditor in respect of the amount covered by the promissory note A I R 1926 Mad 672, Foll. **1959 Ker L J 302: 1959 Ker L R 248 : AIR 1959 Ker 380 (381) (Pt C) (Pr 5) (DB).**

——S. 53—Transfer annulled—Rights of transferee.

Cash items of consideration in transfers set aside by the Insolvency Court advanced at the time of the execution of a fraudulent transfer cannot be allowed to be proved as a debt as the same are advanced for the purpose of carrying out the fraud. But when a transfer is annulled the alienee may prove just antecedent debts which existed before the fraudulent transfer but were included in the consideration therefor. Whether the alienee could rank as a secured creditor would depend upon whether the antecedent debt was itself secured or not. **1950 Ker L T 573 : 1950 T C L R 707 : A I R 1951 Trav. Co 55 (63) (Pt G) (Pr 26) (DB).**

11. Defence to an application under this section.

——S. 53—Defence.

It would not be open to transferees to urge a contention that out of the consideration paid to the insolvent by transferees large number of creditors were paid, as a result of a composition between the creditors and the insolvent, by way of an answer to an application under S. 53 of the Act when they had not opposed the application for the adjudication of the insolvent on that ground. **35 Mys L J 274 : 1957 Knt L J 86 : I L R (1957) Mys 147 : (1958) 2 Lab L J 613 : A I R 1958 Mys 35 (38) (Pt E) (Pr 10) (DB).**

12. This section and S. 53, T. P. Act.

——Ss. 53 and 54 — Applicability — Dissolution of partnership — 'Transfer' — Dissolution to give preference to one creditor—Effect.

A suit under S. 53, T. P. Act has to be instituted on behalf of or for the benefit of all the creditors and it does not hit a transaction by which one creditor is given preference over others for which contingency proceedings will have to be had under some other law. See T. P. Act (1882), S. 53. **1960 Cr L J 1134 : AIR 1960 Punj 417.**

——S. 53 — Good faith — Mortgage for pre-existing debt — Creditor aware of precarious financial position of debtor at time of mortgage — Plea of good faith, if can stand—T. P. Act (1882), S. 53.

The fact that a transfer by way of a mortgage of the only property of the debtor was made to one of the creditors, who was a relative of the debtor in consideration of pre-existing debts, (almost equal to the value of the property) even though the debtor had notice of the debtor's precarious financial circumstances may be a complete answer to a suit against the creditor under S. 53, T. P. Act. But when the creditor's good faith is questioned under S. 53, Provincial Insolvency Act that the fact that he had notice of the financial position of the debtor and that he made no contemporaneous advance would be sufficient to destroy his plea of good faith even though the creditor in fact acted honestly and attempted to secure what was due to him. Such a mortgage in favour of the creditor is voidable against the receiver. 50 Mad 943, Rel. on. AIR 1939 Cal 503, Commented and not Followed. **A I R 1952 Sau 47 (48, 49) (Pt B) (Prs 5, 8) (DB).**

13. Jurisdiction.

——Ss. 53, 4, 5, 28 (6) — Jurisdiction of insolvency Court to issue injunction—(Civil P. C. (1908), O. 39, R. 1).

Though an insolvency Court will not restrain mortgagee or other secured creditor in the exercise of his legal remedies under S. 28 of the Act it has jurisdiction in proper cases to restrain him under O 39, R. 1, Civil P. C., from proceeding with the sale of the insolvent's property, pending application by Official Receiver under S. 53, if there are substantial grounds for impeaching his title with a view to safegaurd the interests of the general body of creditors **1953 Mad W N 527 : (1953) 2 Mad L J 359 : I L R (1954) Mad 360: AIR 1954 Mad 12 (14, 15) (Prs 11, 14, 15) (DB).**

——S. 53—Application for adjudicating person insolvent — Debts amounting to Rs. 14, 700 — Jurisdiction of Sub-Judge, Second Class — Notification No. 1596-1212-XIV of 16th May, 1938, investing Subordinate Judge of Second Class to deal with insolvency petitions not exceeding Rs. 2,000—Effect of — Proceedings null and void. 1958 Nag L J 135.

14. Evidence and burden of proof.

● **——S. 53—Travancore (Insolvency) Regulation (8 of 1090), S. 35 — Burden of proof — (Presidency-Towns Insolvency Act (1909), S. 55) — (Travancore (Insolvency) Regulation (8 of 1108), S. 53).**

Upon a true construction of S. 35 of the Travancore (Insolvency) Regulation, 1090, the onus is upon the Official Receiver to prove that a conveyance which he is seeking to set aside is not made in good faith and for valuable consideration: A I R 1930 P C 265 and A I R 1931 P C 75 and AIR 1934 P C 8, Foll. Subramania Iyer v. Official Receiver, **1958 Mad W N (S C) 1: 1958 Ker L J 17: 1958 S C J 178 : 1958 SCR 257 : 1958 Ker LT 1195: AIR 1958 SC 1 (4) (Pt A) (Pr 4).**

● **——S. 53 — Travancore (Insolvency) Regulation (8 of 1090), S. 35 — Avoidance of transfer — Burden of proof—Duty of Official Receiver—(Travancore (Insolvency) Regulation (8 of 1108), S. 53).**

An application by the Official Receiver under S. 53 for annulment of transfer can be allowed on proof either that there was no consideration for the transaction or that the consideration was so inadequate as to

raise the presumption of want of good faith. Alternatively, the Receiver may also succeed on showing that though there was valuable consideration for the transaction impeached, there was want of good faith in the sense that the transferee knowing all the circumstances of the transferor who had since been adjudged an insolvent entered into the transaction with a view to screening the assets of the insolvent from the Receiver in whom the insolvent's property vests for the benefit of the creditors. Where the intention clearly is to shield the assets against the claims of creditors, though the transfer may have been for consideration, either adequate or otherwise, having been entered into with a view to defraud or delay the creditors, the transferor and the transferee sharing the common intention, the transaction must be annulled and the assets must be brought into the common hotchpot for the benefit of the insolvent's creditors. Subramania Iyer v. Official Receiver, 1958 Mad W N (S C) 1 : 1958 Ker L J 17 : 1958 SCJ 172 : 1958 SCR 257: 1958 Ker L T 1195 : A I R 1958 SC 1 (6) (Pt C) (Pr 7).

——Ss. 53, 54 — Avoidance of transfers as fraudulent —Burden of proof — Reliance on circumstantial evidence — Duty of Court — Inference of fraudulent nature—When made — Evidence Act (1872), Ss. 101-104.

In a proceeding to set aside fraudulent transfer under the Insolvency Act, the burden of proof is on the Official Receiver, but, such burden can only be discharged by showing circumstances from which strong inference can be drawn that the transfer impugned was made either mala fide or in the absence of valuable consideration. When the Official Receiver discharges the prima facie burden which lay upon him, it is for the transferee to explain the case which gives so many and so obvious grounds for suspicion, and to show that there was in fact an explanation for the transfer which the Court could deem to be satisfactory.

The fraudulent nature of the transaction in insolvency cases can scarcely ever be proved by direct evidence. The petitioning creditor or the Receiver has to rely on circumstantial evidence in most cases, and usually that is to be found only in the conduct of the parties. It is therefore more than ever the duty of the Court carefully to examine all the surrounding circumstances; and in any case if a Judge considers that the burden of proof lies on a particular party, it is incumbent on him at least to examine the facts on which that party's case is based. A I R 1938 Nag 216, Rel. on. Where a transfer challenged as fraudulent is shown to have taken place immediately after the insolvent had been served with summonses in some suits and after one or two decrees had also been passed against him, and the transfer is one of four or five transfers by which he got rid of all his immovable properties, and which had been practically admitted to be fraudulent ones, the circumstances certainly require a very full explanation by the transferee to avoid the inference of fraudulent transfer. AIR 1936 Rang 506, Rel. on. AIR 1965 Ker 156 (158, 159) (Pt A) (Prs 10, 12).

——S. 53—Good faith—Absence of—Proof—Onus.

Section 53 requires only proof of absence of good faith on the part of the transferee and not the absence of good faith on the part of the transferor. 1959 Ker L J 302 : 1959 Ker L R 248 : AIR 1959 Ker 380 (381) (Pt A) (Pr 4) (DB).

——S. 53—Good faith—Proof.

Question of determining good faith with respect to a transfer under S. 53 depends not alone on the recitals and covenants contained in it; the circumstances surrounding the transaction and the conduct of the parties at the time of and after the execution of the deed should be taken into account. The facts should be considered in relation to each other and weighed as a whole. 1959 Ker L J 302 : 1959 Ker L R 248 : A I R 1959 Ker 380 (381) (Pt B) (Pr 4) (DB).

——Ss. 53, 6, 27 — Transfer by insolvent challenged —Burden of proof.

The burden of proof in insolvency proceeding is not upon the transferee but is on the official receiver or the creditor who challenges the transfer. The burden is discharged as soon as it is shown that the property stood in the name of the debtor. It is then for the transferee to show that he was the real owner and the debtor was only a benamidar. 1961 Jab L J 193 : 1960 M P C 682 : 1961 M P L J 708 : AIR 1961 Madh Pra 15 (20, 21) (Pt G) (Prs 24, 25) (DB).

——S. 53—Good faith and consideration—Onus.

In proceedings under S. 53 of the Insolvency Act the onus of proving that the impugned transactions were not entered into in good faith and for valuable consideration is on the Official Receiver. 35 Mys L J 274 : 1957 Knt L J 86 : ILR (1957) Mys 147 : (1958) 2 Lab L J 613 : A I R 1958 Mys 35 (36) (Pt A) (Pr 4) (DB).

——Ss. 53, 4 — Gift by insolvent to his wife, challenged — Onus of proof is on receiver or assignee — Evidence Act (1872), Ss. 101-104.

In insolvency proceedings the burden of proof lies on the assignee or receiver who challenges a transaction by the insolvent as a fictitious and a nominal one. AIR 1958 S C 1, Followed.

The insolvent had obtained certain properties in a partition on 28-7-48 and purchased another property on 14-10-48. All these properties were transferred by him by a deed of gift dated 16-11-48 in favour of his wife who alleged that she had accepted the gift and obtained possession of the same. The transaction was challenged by the receiver as a colourable one entered into to save the properties from the creditors, but there was no affidavit filed by the receiver, in that regard.

Held, that the onus to prove that the transaction was merely a colourable one was on the receiver and since there was no evidence laid to show that the insolvent was over head and ears in debt at the time of the transaction, no inference adverse to the insolvent could be drawn from the mere fact that the transaction in favour of the wife was entered into immediately after the properties under gift were obtained by the insolvent. ILR (1964) Cut 274.

——Ss. 53 and 4—Transfer in favour of wife — Statement made by insolvent in his cross-examination — Its admissibility against wife — Non-production of documents in party's possession—Effect — Evidence Act (1872), S. 114.

An application for enquiry under S. 4, Provincial Insolvency Act, was made by the Receiver with a view to set aside the transfer of his property made by the insolvent in favour of his wife intended to defraud his other creditor which in this case was the Income-tax Department. The Department, a party to this enquiry, alleged that the insolvent was in heavy arrears of payment of income-tax. For this purpose, it wanted to rely on the statements made by the insolvent in his cross-examination by the counsel for the Department that there were proceedings for reassessment of his income in the states in 1940 and there was a demand against him of heavy amount of income-tax.

Held that this statement of the insolvent could not be relied upon in the absence of more direct evidence not being produced by the Department itself which had been in custody of the relevant documents. The Department could not, under these circumstances, ask

the Court to accept the replies made in cross-examination of the insolvent so as to bind the wife. It was incumbent upon the Income-tax Officers to produce documentary evidence in their possession to show that there was actually a demand at or about the time when these transfers were made and that the transfers were made benami to avoid payment of tax, and in the absence of filing of these documents an adverse inference should be drawn against them and their contention should not be accepted. (1959) 1 Orissa J D 339.

——S. 53—Good faith—Onus of proof.

Good faith, that is required under S. 53 is one on the part of the transferee, and the onus to prove either lack of good faith or absence of valuable consideration is on the Receiver. AIR 1931 P C 75; AIR 1930 P C 290; A I R 1934 P C 3; (1895) 1 Ch D 505, Rel. on. **I L R 34 Pat 440 : A I R 1955 Pat 458 (466) (Pr F) (Pr 23) (DB).**

——S. 53—Burden of proof.

The burden to make out circumstances which invalidate a transfer made by an insolvent on the eve of his insolvency is on the official receiver or other persons seeking to avoid it and not on the alienee. **1950 Ker L T 573 : 1950 T C L R 707 : A I R 1951 Tra-Co 55 (62) (Pt D) (Pr 23) (DB).**

15. Procedure.

——Ss. 53, 37, 43, 54—Annulment of adjudication — Official Receiver cannot initiate proceedings under Ss. 53, 54. See Provincial Insolvency Act (1920), S. 37. AIR 1964 Andh Pra 299 (DB).

——Ss. 53 and 54 — Order passed on application made under—Appeal—Maintainability of.

An order passed on an application made to the Insolvency Court under Ss. 53 and 54 of the Act does not come within the definition of 'decree'. This is so in spite of the provisions of S. 5 of the Act. For merely because certain powers are confined on the Insolvency Court and it can adopt the procedure followed by civil Court it does not mean that every order of that Court becomes decree. See Debt Laws — Madras Agriculturists' Relief Act (4 of 1938) (as amended by Madras Act 23 of 1948), S. 25-A (1) (B). **1958 Andh L T 896.**

——S. 53 — Fictitious and fraudulent transaction — Distinction—Plaint held alleged fictitious transaction — Suit need not be a representative suit. See T. P. Act (1882), S. 53. 1957 M P L J 107.

——S. 53—Nature of order to be made.

If the transferees took possession of the assets of the insolvent and handed them over to their transferee and later in his turn dealt with those assets and stock-in-trade in the course of his business the proper direction to be given in those circumstances would be a direction that the transferees and each of them shall deliver to the Official Receiver all the assets and stock in-trade purchased by them and that they should also render an account to the Official Receiver and to the Court of all their dealings with the insolvent in respect of the impugned transfers and also of all their dealings in respect of the assets, and stock-in-trade which they purchased and also in respect of the proceeds of those assets and stock-in-trade. Any amounts found due by transferees after such an accounting shall be paid by them to the Official Receiver for distribution by him among the creditors of the insolvent. A I R 1925 Cal 640, Rel. on. **35 Mys L J 274 : 1957 Knt L J 86 : ILR (1957) Mys 147 : (1958) 2 Lab L J 613 : A I R 1958 Mys 35 (40) (Pt D) (Pr 13) (DB).**

——S. 53—Procedure.

In an enquiry held with respect to an Official Receiver's application to annul transfers made by insolvent the Receiver and the parties are expected to disclose their respective cases in their pleadings and the Court should hold the trial in the same manner as regular original suit is tried. **1950 Ker L T 573 : 1950 T C L R 707 : AIR 1951 Tra-Co 55 (71) (Pt K) (Pr 47) (DB).**

——Ss. 53 and 54 — Procedure—Joint application in respect of more than one transfer.

Except when the alienations are the outcome of a scheme of fraud and conspiracy between the insolvent on the one hand and the alienee on the other a joint application or joint trial is not the proper procedure to be adopted. **1950 Ker L T 573 : 1950 T C L R 707 : A I R 1950 Tra-Co 55 (71) (Pt L) (Pr 48) (DB).**

16. Res judicata.

● **——S. 53 — Res judicata — Matter not decided in adjudication proceeding — Is not res judicata in proceedings for avoiding transfer. See Civil P. C (1908), S. 11. A I R 1958 S C 1.**

——Ss. 53, 6 (b), 9 (1) (c) — Application by creditor for insolvency under S. 6 (b)—Debtor declared insolvent - Application by Official Receiver under S. 53 to annul alienation in favour of purchaser — Purchaser can show his bona fides — Decision under S. 6 does not act as res judicata : A I R 1956 All 68, Overruled. See Provincial Insolvency Act (5 of 1920), S. 6 (b). A I R 1965 All 80 (DB).

——S. 53 — Annulment proceedings—Finding in adjudication proceedings not res judicata — Burden of proof lying on Receiver continues — Burden when discharged.

A finding arrived at by the Insolvency Court while adjudging a person as an insolvent is not res judicata in a subsequent annulled proceeding. The burden still lies on the Receiver in the first instance, who seeks to annul the alienations, to show that the necessary ingredients of S. 53 of the Act were present. That is to say he must show that the alienations in favour of the purchaser were not made in good faith and for valuable consideration. A I R 1958 S C 1, Rel. on.

Held, on facts that the Receiver had discharged the initial burden that lay on him to show that the alienations were not made in good faith and for valuable consideration. The very fact that all the properties of the insolvents were alienated by six sale deeds executed on two successive dates, though possession was not delivered to the alienees, leads to the reasonable conclusion that the main object was to screen the property from the clutches of the creditors by transferring them in the name of friends, relatives and co-villagers of the insolvents. Moreover the alienees in respect of the transactions were fully aware that the genuineness of the transactions was objected to by the creditors and they never took the precaution of paying the consideration money to the creditors, instead of to the insolvent, though it was recited in the sale deeds that the alienations were made for the purpose of discharging debts. **I L R (1962) Cut 484 : 28 Cut L T 343 : A I R 1963 Orissa 37 (38, 39) (Prs 4, 8).**

——Ss. 53, 24 — Decision of District Judge that transfer is fraudulent and allowing insolvency petition — Decision if binding on vendee who was not a party — (Presidency-Towns Insolvency Act (1909), S. 55).

The decision of the District Judge in the insolvency application declaring the sale to be fraudulent and amounting to an act of insolvency is not binding on the vendees, who were not parties to proceedings and can be challenged by them, when the Receive-

applies under S. 53 of the Provincial Insolvency Act for the annulment of the sale.

The Privy Council decision in A I R 1943 P C 130 which follows (1878) 10 Ch. D 3, applies to orders of adjudication under the Presidency-Towns Insolvency Act alone and cannot be applied to orders of adjudication under the Provincial Insolvency Act, for the relevant provisions of the two Acts are different: A I R 1947 Nag 161, Foll.; A I R 1945 Mad 66 (FB), Rel. on.; A I R 1956 All 68, Dissented from. **A I R 1960 Punj 24 (25, 26) (Prs 3, 4, 5, 7).**

17. Appeal.

——S. 53 — Constitution of India, Art. 133 (1) (c) — Certificate of fitness — Question only of academic importance — Case not fit for appeal to Supreme Court. See Constitution of India, Art. 133 (1) (c). **A I R 1961 Madh Pra 172 (DB).**

——Ss. 53, 75, 9 and 54 — Who may appeal—Person aggrieved—Who is.

Held that as a result of the order of adjudication other creditors would be able to make an application under S. 53 or 54 of the Act and that would very prejudicially affect the right of the person who was said to be the creditor to whom fraudulent preference was given. He was therefore a person aggrieved by the order of adjudication and had a right to appeal. **ILR (1958) 8 Raj 221 : AIR 1958 Raj 223 (224) (Pt A) (Pr 3) (DB).**

18. Limitation for application under S. 53.

——S. 53 — Limitation Act (1908), Arts. 136, 144 — Person declared insolvent—Transfer by insolvent set aside at instance of official receiver—Official receiver must be held to be in possession of property transferred through insolvent. See Limitation Act (1908), Art. 136. **A I R 1963 Ker 176.**

19. Scope of enquiry—Duty of Court.

——Ss. 53, 28 (2) and (5) — Scope — Gift deed by insolvent of sir land in favour of son prior to adjudication — Land not liable to attachment and sale in view of S. 155, M. P. Land Revenue Code — Annulment of transfer — Inquiry—If barred under S. 53.

An insolvent had executed a deed of gift in favour of his son of certain sir land prior to his adjudication in 1955. There was an orange garden on the land yielding a substantial income. A creditor applied under S. 53, Provincial Insolvency Act for annulment of transfer. The application was dismissed on the ground that the property was not liable to attachment and sale by virtue of the bar under S. 155, M. P. Land Revenue Code :

Held, that the bar of attachment and sale created by S. 155, M. P. Land Revenue Code is a bar which is in derogation of the normal right of a creditor to realise his debts out of the properties of his debtor, and therefore that bar must be strictly construed. When S. 155 refers to any land, it cannot possibly apply to the income or usufruct of that land, and therefore to the extent that the orange garden yields an income from its crop, a receiver could be appointed.

To that extent, therefore, that part of the property of the insolvent would under the provisions of S. 28 (2) read with S. 28 (5) of the Provincial Insolvency Act vest in the Insolvency Court and an inquiry under S. 53, so far as the gift deed is concerned is not barred. 49 M L J 244; A I R 1925 P C 176, Applied. **1960 Nag L J 341 : A I R 1960 Bom 477 (478) (Prs 3, 4).**

——Ss. 53, 6 (b) — Transfer with intent to delay or defeat creditors alleged as act of insolvency — Court is competent to determine nature of transfer in the order of adjudication. See Provincial Insolvency Act (5 of 1920), S. 6 (b). **A I R 1961 Madh Pra 15 (DB).**

——S. 53—Fraudulent sale—Evidence—Non-payment of consideration—Intention of parties — Inadequacy of consideration—Doctrine of 'lucky purchase'—(T. P. Act (1882), Ss. 53 and 54).

Specific evidence of a convincing nature must be adduced to show that a sale deed reciting the payment of consideration was really executed for no consideration and that no consideration was intended to be paid. No doubt, a piece of evidence tending to show that will be the recital of the receipt of the consideration when no consideration has, as a matter of fact, been paid as recited. But such a recital will not be conclusive. A Court has to go into the whole evidence and come to its own conclusion. It will be inadvisable for Courts to apply the doctrine of inadequate consideration proving fraud by shocking the conscience of the Court where there is no evidence as to the real worth of property. It is better to apply in such cases the doctrine of 'lucky purchaser' adumbrated in some cases. Often the 'lucky purchaser' gets a property for less than 1/4th its value. That, by itself, will not prove any fraud. Only, a careful scrutiny should be made of the circumstances to see whether the purchaser is a 'lucky purchaser' or a 'fraudulent purchaser'. **1957 Mad W N 483 : (1957) 2 Mad L J 414 : A I R 1957 Mad 630 (630) (Pt B) (Pr 3).**

——Ss. 53, 6, 54 — Distinction between and scope of inquiries under indicated—See Provincial Insolvency Act (5 of 1920), S. 6. **AIR 1955 Pat 413 (DB).**

20. Illustrative cases.

——Ss. 53, 6, 9, 28, 24, 33, 50 — Debtor adjudged insolvent—Petitioning creditor applying under S. 53 for annulment of certain transfers by insolvent—Transferee cannot challenge order of adjudication on ground that petitioning creditor was not creditor of the insolvent — See Provincial Insolvency Act (5 of 1920), S. 6. **AIR 1963 Bom 212.**

——Ss. 53, 55 —Amendment of assignment — Transferee of assignee not made party — His title will not be affected.

A had assigned the plaint property to his brother B. On A's adjudication as insolvent the Official Receiver applied under S. 53 for annulment of the assignment, and on such annulment sold the property to C. Even before the motion of annulment B had transferred that property to D and though D had come into possession thereof he was not made a party to the annulment proceedings. In the suit filed by C for recovery of property from D, the transfer to D by B was found to be bona fide for value and without notice of the insolvency proceedings against A.

Held, that the assignment in favour of B was valid till it was annulled and B was therefore competent to transfer the property till annulment. The transfer made by him to D was therefore valid in law and D's title could not be affected by the motion of the Official Receiver to annul the title of B to which proceedings D was made no party. A I R 1960 S C 70 and A I R 1935 All 671 and AIR 1958 S C 1, Rel. on. **1963 Ker L J 738 : AIR 1964 Ker 183 (184) (Pr 4) (DB).**

——S. 53—Transfer of property by A to B—In insolvency proceedings against A, Official Receiver impugning such transfer — Transfer set aside by order of Court — At private auction held by Official Receiver for realisation of insolvent's assets C becoming purchaser of the property—Suit by C—Concurrent findings by lower Courts that though the order of Court setting aside the transfer did not bind transferee from B being no party to the order, the transfer was nominal or fictitious transaction — Held it could not be contended on behalf of transferee from B that under the insolvency law, the Official Receiver alone could impeach a transfer by the insolvent and that the

plaintiff who was but an assignee from him, was not competent to do so, as the plaintiff could allege grounds and seek a declaration that defendant transferee had obtained no title, because his predecessor-in-interest himself had derived none under the transfer and could not convey any—This was the effect of the concurrent findings that the transfer was sham and inoperative. 1962 Ker L J 3 : (1962) 1 Ker L R 139 : AIR 1963 Ker 176 (177) (Pt A) (Pr 2).

——Ss. 53 and 54—Scope and effect of—Mortgage by debtor set aside as partially void and fraudulent preference — Mortgagees if can prove for debt as unsecured creditors—Member of joint Hindu family — Liability of — If can be enforced in insolvency proceedings.

Though a mortgage deed is annulled under Ss. 53 and 54 of the Provincial Insolvency Act as not fully supported by consideration and as intended to be a fraudulent preference of some creditors over others, the mortgagee thereunder could rely on the debts included in the mortgage deed and prove those debts in insolvency as an unsecured creditor.

In order to prevent a person who has been a party to a fraudulent transaction from pleading his own fraud, the intended fraud must have been effected or there must have been a substantial part-performance of the intention to defraud and a mere fraudulent intention evidenced by the transaction is not sufficient. The mortgagee need not plead any fraud for proving the debts as for proving the mortgage. The debts included in the mortgage deed can be dissociated from the security.

The law undoubtedly is that a person liable for debts merely on the ground that he is a member of a joint family and that the debts are payable by the joint family cannot be adjudicated an insolvent for those debts, and those debts cannot be proved in his insolvency and will have only to be allowed for in a partition suit brought by the purchasers of the other share or shares (for example by the proving creditors who have purchased the minor coparceners' shares). But there are undoubtedly circumstances which will make such persons personally liable for the debt, such as his being a member of a trading firm and holding himself as a partner, and the debts being contracted for that trade. There is no need to wait then for a partition suit for allowing such debts which can be proved in the insolvency of the person who had made himself personally liable for the debts in addition to being liable for them from out of his share in the joint family properties. 64 Mad L W 438 : (1951) 2 M L J 32 : AIR 1952 Mad 504 (2) (507) (Pt C) (Pr 12) (DB).

SECTION 54

SYNOPSIS

(Provincial Insolvency Act (1920), S. 54.)

1. Scope and applicability.
2. Evidence and burden of proof.
3. Fraudulent preference.
4. Intention to prefer.
5. "Within three months."
6. "Void."
7. Effect of annulment of transfer.
8. Effect of annulment of adjudication.
9. Procedure.
10. Appeal.

1. Scope and applicability.

——S. 54 — Sale proceeds of sale earmarked for payment of debits for which pressure was the greatest — Transfer can be impugned under Insolvency Law and not under S. 53. See Transfer of Property Act (1882), S. 53. AIR 1963 S C 1150.

——S. 54—Applicability.

In order to be governed by S. 25A (1), Cl. (b) of the Madras Act an order imposing liability and sought to be amended should be a decree. An order passed on an application made to the Insolvency Court under Ss. 53 and 54 of the Provincial Insolvency Act does not come within the definition of 'decree.'

The decision can only be an order and since it is only decrees that can be amended under S. 19, Madras Agriculturists' Relief Act, an order falling outside it cannot come under S. 25A (1) (b) of the said Madras Act. See Debt Laws — Madras Agriculturists' Relief Act (4 of 1938), S. 25-A (1) (b). (1958) Andh L T 896.

——Ss. 54 and 53 — Annulment of transfers under these sections are not identical.

The approach to a solution of the problem presented when a transfer is annulled under S. 53 as distinguished from annulment under S. 54 is not identical. 1962 Nag L J (Notes) 32.

——S 54—Applicability — Transfer under S. 231, Companies Act.

It is payments which fall within the mischief of S. 54 that are referred to as a fraudulent preference in S. 231 of the Companies Act (1913). Where transfers were not within three months preceding the date of winding of application, there is no scope for the operation of the provisions of S. 231, Companies Act. 58 Cal W N 545 : AIR 1955 Cal 338 (340) (Pt A) (Pt A) (Pr 6) (DB).

——Ss. 54, 6 (c) — Fraudulent preference alleged as act of insolvency — Court is competent to determine it under S. 6. See Provincial Insolvency Act (5 of 1920), S. 6 (c). AIR 1961 Madh Pra 15 (DB).

——S. 54—Interpretation — Value of English decisions — (Presidency Towns Insolvency Act (1909), S. 56).

The insolvency law is one borrowed from England, and, the language of the Indian enactment being in terms of the corresponding English statute, English decisions on the interpretation of the terms of the enactment can be safely applied to cases arising in India under S. 54 of the Provincial Insolvency Act and S. 56 of the Presidency Towns Insolvency Act. 68 Mad L W 720 : (1955) 2 M L J 441 : ILR (1956) Mad 505 : AIR 1956 Mad 33 (37) (Pt A) (Pr 13A) (DB).

——S. 54 — Scope—Sale by Hindu father on his own behalf and on behalf of two minor sons — Adjudication of father as insolvent — Setting aside of sale — Effect of — What passes to alienee.

On the adjudication of an insolvent what vests in the Official Receiver is the interest of the insolvent and when a transaction entered into by the father of a joint Hindu family not merely in his own behalf but on behalf of others (here two minor sons) who are not adjudicated and whose property does not vest in the Official Receiver is set aside, what vests in the Official Receiver as the result of such setting aside is merely the interest of the insolvent father and not that of the non-insolvents. In so far as the insolvent's share of the property is involved in the alienation, the Official Receiver would get it back when the alienation is set aside, but if under the power vested in the insolvent father under the general law he alienated the interests of his sons who were not insolvents and were minors, no order of the Insolvency Court under S. 54, Provincial Insolvency Act, could get back from the alienee and vest in the Official Receiver the interest of persons who had not

been adjudicated. The power vested in the Official Receiver for discharging antecedent debts of fathers enacted in S. 28-A is irrelevant for consideration of a question like the one here where the father instead of the Official Receiver had sold the properties on his own and his sons' behalf.

The view of Sundaram Chetty, J., in 1934 M W N 881. Held good law. (1937) 2 M L J 427 and (1943) 1 M L J 24, Diss. (1954) 2 M L J 755:1954 Mad W N 880 : 67 Mad L W 1064 : ILR (1955) Mad 1089: AIR 1955 Mad 51 (52, 53) (Prs 6, 10) (DB).

——S. 54 — Transfer executed with a view to defeat claims of creditors—It is an act of insolvency affording cause of action to file a petition under S. 9. See Provincial Insolvency Act (1920), S. 6. AIR 1963 Mys 257.

——Ss. 54, 6, 53 — Distinction between and scope of inquiries under indicated. See Provincial Insolvency Act (5 of 1920), S. 6. AIR 1955 Pat 413 (DB).

——Ss. 54, 53 — Applicability — Tests — S. 54, if controls S. 53 — Transfer in consideration of pre-existing debt.

There is nothing either in S. 53 or S. 54 to justify the construction that the provisions of S. 54 which are meant to meet the specific case of the debtor's fraudulent act controls in any way the general provisions of S. 53 or that the latter section makes any exception in favour of the creditor's transfer in favour of a creditor in consideration of a pre-existing debt is as much subject to S. 53 as any other transfer provided that the conditions laid down in that section are fulfilled. AIR 1952 Sau 47 (48) (Pt A) (Pr 4) (DB).

——Ss. 54, 6 (b), 53—Act of insolvency.

Where the circumstances of a case leave no room for doubt that the transactions were resorted to by the debtor with a view to defeat his creditors that would be an act of insolvency. See Provincial Insolvency Act (5 of 1920), S. 6 (b). AIR 1954 Trav-Co 419 (DB).

——Ss. 54, 53 and 55 — Protection order — Position before and after Travancore Insolvency Amendment Act (1108) — Rule of relation back — Avoidance of transactions under Ss. 53 and 54 and T. P. Act, S. 53 — Kuri security bond — Payment by paid-up subscribers to non-prized subscribers under direction of foreman after his default — Under Travancore Insolvency Act after amendment in 1108 protection was given only to payments made prior to the presentation of the petition which when applied to an administration suit would be the date of the institution of suit. Prior to it the law protected moneys realised before the actual adjudication. The rule of relation back does not under the Travancore or Cochin Acts or under the Provincial Insolvency Act, 1920, relate to a period anterior to the presentation of the petition. Transactions which do not come under that rule are prima facie valid unless they can be avoided under some express statutory provision. AIR 1953 Trav-Co 321 (DB).

——S. 54—Applicabllity.

Once the consideration is found to be real and not illusory the transfer goes outside the scope of S. 53 whether or not it will come under S. 54. See Provincial Insolvency Act (1920), S. 53. AIR 1954 Vind Pra 11.

2. Evidence and burden of proof.

——Ss. 54, 53—Avoidance of transfers as fraudulent—Burden of proof—Reliance on circumstantial evidence—Duty of Court—Inference of fraudulent nature — When made — Burden is on the Official Receiver — After he discharges this burden it is for the transferee to explain the case—Fraudulent nature of transaction can be shown by circumstantial evidence —Court should examine carefully all the surrendering circumstances—Evidence Act (1872), Ss. 101-104— See Provincial Insolvency Act (5 of 1920), S. 53. AIR 1965 Ker 156.

——S. 54—Burden of proof—Fraudulent intention—Onus.

The burden of proving fraudulent motive on the part of the debtor naturally falls on the receiver who tries to annul the transfer. AIR 1954 Vind Pra 11 (12) (Pt C) (Pr 10).

3. Fraudulent preference.

——S. 54 (1)—Creditor if includes secured creditor —Transfer of hypothecated and unhypothecated items to secured creditor—Fraudulent preference—Sale if can be split up.

A secured creditor, no doubt, is not a creditor within the meaning of S. 54.

But where the property transferred to the secured creditor under a single transaction consists of hypothecated and unhypothecated items, the deed of transfer cannot be separated into two transactions one dealing with items in respect of which the vendees held the position of secured creditors and the other dealing with items which were not hypothecated to them from before. The entire sale deed must stand or fall as a fraudulent preference. 1950 All W R 315 : AIR 1950 All 479 (480) (Pr 7).

——S. 54—Ex parte decree for maintenance obtained by aged and blind mother against son—Charge on family properties—Son adjudicated insolvent—Application to set aside decree—Maintainability.

One G was adjudicated as insolvent in 1953. His mother, who was an old and blind woman aged about seventy years filed a suit in 1952 against G for her maintenance which she was entitled to obtain from out of the family properties. The suit was decreed ex parte and a charge was created on the family properties in respect of the decree amount. The Official Receiver having filed an application under S. 54, Pro. Ins. Act to set aside the decree on the ground that it was collusive and intended to defraud the general body of creditors :

Held (1) that it being common knowledge that a mother is entitled to be maintained out of the family properties enjoyed by her son and that the family properties could be charged for ensuring the payment of that maintenance the burden was heavily on the Official Receiver to establish that S. 54 applied to the case and that the maintenance decree could be struck down as a fraudulent preference; (2) that the passing of the decree for maintenance itself could not be claimed to be collusive; (3) that the creation of a charge on entire family properties for the payment of maintenance being recognised by the law it could not be said that the maintenance-holder had been unduly preferred and the mere fact that G was ex parte did not by itself indicate that it was fraudulent or collusive. AIR 1960 Andh Pra 144 (145) (Pr 4).

——Ss. 54, 6 (e) — Fraudulent preference— What constitutes—Impugned transfer itself creating debt —Cannot constitute fraudulent preference — See Provincial Insolvency Act (5 of 1920), S. 6 (c). AIR 1961 Madh-Pra 15 (DB).

——S. 54—Interpretation—"With a view of giving that creditor a preference over the other creditors"—Meaning—Transfer by insolvent in favour of one creditor to save himself from imminent criminal prosecution—Transfer not fraudulent preference.

In order to determine whether a transfer is a fraudulent preference the test is to find what is it that

eventually and effectually operated in the mind of the insolvent or what is the compelling force that induced him, or what is the immediate cause for the insolvent to enter into a transaction of this nature. There is only one test for understanding the meaning of "with a view", that is, if no other consideration prevailed but the only object was to prefer one creditor, then it could be said it was done voluntarily nothing else influencing his decision to make the preference. If the sole view or the only view was to prefer the creditor, then undoubtedly the transaction could not be supported. Equally the bona fides or otherwise of the preferred creditor are immaterial.

Considerations such as whether the transfer results in stifling criminal prosecution and as such against public policy under S. 23 of the Contract Act are all extraneous to the only point to be decided, viz. whether the transfer has been made with a view of giving that creditor a preference over other creditors under S. 54.

The Court must, therefore, in each case consider as a question of fact what was the real and dominant motive of the insolvent in making the payment or transfer, and, if the Court comes to the conclusion that the bankrupt's real motive was, e. g., to save himself from exposure or from a criminal prosecution, the payment or transfer is not a fraudulent preference. 68 Mad L W 720 : (1955) 2 M L J 441: ILR (1956) Mad 505 : AIR 1956 Mad 33 (37, 40, 41) (Pt B) (Prs 14, 29, 30, 32) (DB).

—S. 54—Applicability—Fraudulent preference—What is.

Where a decree-holder for Rs. 30,000 who has expended a great deal of money in obtaining decrees is rather blatantly disregarded and preference given to the simple creditors to pay whom a transfer of property is effected by the insolvents, the transfer is fraudulent preference within the scope of S. 54. (1953) 2 M L J 303 : AIR 1954 Mad 93 (93) (Pt A) (Pr 4).

——S. 54—Transfers pursuant to prior agreement—Validity.

Transfers pursuant to prior agreements are held valid where the agreements are made contemporaneously with the advance of the loan or with the debtor incurring obligation in any other manner and not where the debtor transfers the whole or a substantial portion of his properties to a creditor for the purpose of securing payment of a past debt which act itself might or would constitute an act of insolvency.

Further, it is only transfers given in performance of a prior valid agreement that would take the transfer beyond the purview or the mischief of the Insolvency law. 1950 Ker L T 573 : 1950 T C LR 707 : AIR 1951 Tra-Co 55 (66, 67) (Pt I) (Prs 34, 37) (DB).

4. Intention to prefer.

——S. 54—Fraudulent preference—Dominant motive to prefer.

In order that a transfer may be avoided as a fraudulent preference the law requires that the dominant motive with which the transfer is effected was to prefer the creditor in whose favour the transfer is made. 1950 Ker L T 573 : 1950 T C L R 707 : AIR 1951 Tra-Co 55 (68) (Pt H) (Pr 33) (DB).

——S. 54—Intention to prefer—Proof of—Test.

For the applicability of S. 54 the most important test is the state of mind of the debtor-transferor. Obviously every creditor of an embarrassed debtor will be anxious to get a preference; to penalise that would be futile. On the other hand, the motive of the debtor is to be examined to ascertain whether he is actuated by the substantial and dominant motive of preferring this creditor and depriving others of the benefit of rateable distribution of the assets thus transferred.

Another form of the same test is whether the circumstances show that there was a real pressure brought to bear on the debtor by the creditor and whether he was acting under that pressure.

Thus where the mortgage in question was created on pressure by the creditor to replace a security given under an agreement made at the very inception of their business dealings and the dominant intention of the debtor was not to give any undue advantage to creditor nor was he voluntarily making a transfer.

Held, that the mortgage was not fraudulent preference as defined under S. 54. AIR 1954 Vind Pra 11 (12, 13) (Pt B) (Prs 9, 18).

5. "Within three months."

——Ss. 54, 9 (1) (c), 53 — Date of transfer is date of registration and not date of execution of transfer deed — Fiction of relation back does not apply — Registration Act (1908), Ss. 47 and 75. See Provincial Insolvency Act (1920), S. 9 (1) (c). AIR 1962 Andh Pra 226 (DB).

——Ss. 54, 9 (1) (c), 6 (b)— Transfer in favour of one creditor — Registration after three weeks — Date of transfer—(Registration Act (1908), S. 47).

As a transfer does not become effective till the document was registered, the date of registration should be regarded as the date of transfer. The transfer cannot be anti-dated by operation of S. 47 of the Registration Act for the purposes of S. 54 of the Provincial Insolvency Act. AIR 1938 Mad 801, Foll. Further, having regard to the terms of Ss. 60 and 61, Regn. Act, the registration is complete only after the certificate of registration is signed, sealed and dated by the Registrar and the registration cannot date back to the date of the presentation of the document. 1956 Andh W R 339 : AIR 1957 Andh Pra 535 (536) (Pt B) (Prs 4, 6).

——S. 54 — 'Date of transfer' — Date of registration is date of transfer and not the date of execution. See Provincial Insolvency Act (1920), S. 28 (7). AIR 1954 Mad 93.

——S. 54—"Date of transfer"—Meaning of.

In the expression 'the date thereof' in S. 54 the word 'thereof' relates to 'transfer' so that time must be computed not from the date which the instrument bears, but from the date when the instrument becomes effective as a transfer. Where the law enjoins that before a transfer can be effective, the document in question must be registered, the transfer would become complete in the eye of law only on the date the document is registered. Hence, if the date of the execution or the document is different from the date on which it is registered then the date on which it is registered shall constitute the starting point for the computation of time.

In the case of compulsorily registered documents S. 75, Registration Act, provides that registration shall take effect from the time when the document was first duly presented for registration. It follows that in such cases the time must be computed from the date of the presentation of the document for registration. 58 Mad 166 and (1938) 2 M L J 362, Rel. on. (1953) 1 M L J 465: 66 Mad L W 497 : AIR 1953 Mad 682 (682, 683) (Pt A) (Prs 2, 5).

6. "Void."

● ——Ss. 54, 28 — Scope — Transfer of property — Transfer stands valid till annulled — Exercise of rights by transferee is in accordance with law —

(Limitation Act (1908), Art. 182 (5)— 'In accordance with law').

Assuming that when an order is made under S. 54 of the Provincial Insolvency Act annulling a transfer (transfer of a decree in this case), the transfer stands annulled as from the date it was made, even so, the transfer stands till it is annulled and therefore, till then, the transferee has all the rights in the property transferred. So long as the transferee has such rights he is competent to exercise then and such exercise would be legal and fully in accordance with law. Sub-ss. (2) and (7) of S. 28 cannot have the effect of vesting the property in the receiver till its transfer has been annulled. Even where the order of adjudication is based on an act of insolvency constituted by a transfer of property found to be a fraudulent preference, the transfer stands till it is set aside. A separate order annulling the transfer would be necessary even in such a case. **1960 S C J 128 : (1960) 1 M L J (S C) 41 : (1960) 1 Andh W R (S C) 41 : (1960) 1 S C R 616 : AIR 1960 S C 70 (72, 73) (Pt A) (Prs 11, 13, 18).**

——Ss. 54, 34, 53—Mortgage declared void — Effect on debt.

The mere fact that a mortgage is declared void under Ss. 53 and 54 does not make the debt included in it void. Though the mortgage deed is annulled under Ss. 53 and 54 the mortgagee thereunder can rely on the debt included in the mortgage deed and prove the debts in insolvency as an unsecured creditor— The mortgagee deed not plead any fraud for proving these debts as for proving the mortgage. **64 Mad L W 438 : (1951) 2 Mad L J 32 : AIR 1952 Mad 504 (2) (507) (Pt C) (Pr 12) (DB).**

7. Effect of annulment of transfer.

——S. 54—Sale by father of his own interest and that of his minor sons and brothers — Sale found to be purely nominal and sham transaction with intention to defeat or dely creditors — Court has power to set aside the entire sale and not with respect to interest of insolvent only. A I R 1955 Mad 51, Dist. **1961 Mad W N 676 : AIR 1962 Mad 189 (192) (Pt B) (Pr 14).**

——Ss. 54, 34, 53—Fraudulent preference not carried out—Proof of defendant as unsecured creditor — Execution of mortgage by debtor a fraudulent preference — Mortgage set aside under Ss. 53, 54 — Fraudulent preference not carried out— Mortgagee is not prevented from proving in insolvency the debts covered by mortgage as unsecured creditor. See Provincial Insolvency Act (5 of 1920), S. 34. **AIR 1952 Mad 504 (2) (DB).**

8. Effect of annulment of adjudication.

——Ss. 54, 37, 43, 53— Annulment of adjudication — Official Receiver cannot intiate proceedings under Ss. 53, 54. See Provincial Insolvency Act (1920), S. 37. **AIR 1964 Andh Pra 299 (DB).**

——S. 54, 37—Sale of property prior to adjudication by Hindu father on his behalf and on behalf of minor sons annulled — Property not sold by Official Receiver — Annulment of adjudication—Effect—Sale in favour of alienee is restored. AIR 1930 Mad 278, Dissented from. See Provincial Insolvency Act (5 of 1920), S. 37. **AIR 1956 Mad 341.**

9. Procedure.

——S. 54 — Representative suit by creditor of insolvent under S. 53, T. P. Act — No notice to Official Receiver — Decision in suit not binding on Official Receiver — Subsequent petition under S. 54, Provincial Insolvency Act not barred by res judicata. See C. P. Code (1908), S. 11, Explanation VI. **AIR 1962 Mad 189.**

——Ss. 54, 28 (7), 30—Order of adjudication—Transfer held to be act of insolvency — Finding can be challenged in annulment proceedings. See Provincial Insolvency Act (5 of 1920), S. 28 (7). **AIR 1951 Trav-Co 55 (DB).**

10. Appeal.

——S. 54 — Constitution of India, Art. 133 (1) (c) — Certificate of fitness — Question only of academic importance — Case not fit for appeal to Supreme Court. See Constitution of India, Art. 133 (1) (c). **AIR 1961 Madh Pra 172 (DB).**

——Ss. 54, 75, 9 and 53 — Who may appeal —Person aggrieved—Who is.

As a result of order of adjudication other creditors would be able to make an application under S. 53 or S. 54 and that would very prejudicially affect the right of the person who was said to be the creditor to whom fraudulent preference was given. He was therefore a person aggrieved by the order of adjudication and had a right to appeal. **ILR (1958) 8 Raj 221 : AIR 1958 Raj 223 (224) (Pt A) (Pr 3) (DB).**

SECTION 54-A

——S. 54-A—Property vesting in Official Receiver on the adjudication of a person as insolvent — Receiver alone can invoke jurisdiction of Court under S. 4— Petition by individual creditor for annulment of a transfer made by the insolvent, is not maintainable. See Provincial Insolvency Act (1920), S. 4. **AIR 1964 Mad 501.**

——S. 54-A — Right to apply — Receiver not appointed — Non-scheduled creditor if can apply for annulment.

The restrictions imposed by S. 54-A apply only where a Receiver has been appointed in the case. If there is no receiver, any creditor can make an application for annulment of a transfer. **AIR 1951 Nag 268 (269) (Pt B) (Pr 4).**

——S. 54-A—Civil P. C. (1908), O. 22, Rr. 3, 4 and 9 —Proceedings for annulment of fraudulent transfer —Death of petitioner pending proceedings — Question of abatement, if arises—Subsequent application of legal representative—Competency.

The right of the creditor to move the Court under the section does not fall within the purview of O. 22, Rr. 3 and 4, Civil P. C. so as to make the applications of persons claiming through creditor untenable by reason of his death pending an application for annulment as in these cases no question of abatement arises. **1950 Nag L J 105 : ILR (1950) Nag 331 : AIR 1951 Nag 268 (269) (Pt C) (Pr 5).**

SECTION 55

——Ss. 55, 53 — Annulment of assignment — Transferee of assignee not made party — His title will not be affected. See Provincial Insolvency Act (1920), S. 53. **AIR 1964 Ker 183 (DB).**

——S. 55—Protection to bona fide payments.

Section 55 is concerned with the validity of payments made by or to insolvents by persons who do so bona fide. The proviso makes provision for taking out of the protection of the substantive part of the section payments and transactions which would not be bona fide, the test of bona fides being knowledge of the presentation of a petition. The knowledge which the section postulates would necessarily be actual knowledge. The constructive notice which S. 19 (2) postulates would be wholly an insufficient basis depriving a person of the protection afforded by S. 55. **1958 Mad W N 388 : 71 Mad L W 367 : (1958) 1 Mad L J 424 : AIR 1958 Mad 486 (487) (Pt A) (Pr 6).**

——S. 55—Proviso—Burden of proof.

The person claiming the benefit of the proviso to S. 55 has to prove (i) that the transfer in his favour was for valuable consideration, and (ii) that he had no notice of the presentation of the insolvency petition. AIR 1957 Pepsu 22 (23) (Pt B) (Pr 4).

——Ss. 55 (c) and 53 — Transfer from insolvent's transferee.

If the original transfer is found to be sham or fictitious the subsequent transfer must also fall with it. In a proper case it may however be possible to protect a subsequent transfer if it falls within the purview of S. 55 (c). ILR (1955) T.C 764 : AIR 1956 Trav-Co 61 (62) (Prs 4, 5) (DB).

——Ss. 55, 53 and 54 — Protection order — Position before and after Travancore Insolvency Amendment Act (1108) — Rule of relation back — Avoidance of transactions under Ss. 53 and 54 and T. P. Act, S. 53 — Kuri security bond — Payment by paid-up subscribers to non-prized subscribers under direction of foreman after his default—(Travancore Insolvency (Amendment) Act (1108) — T. P. Act (1882), S. 53)—Civil P. C. (1908), S. 100).

Under Travancore Insolvency Act after amendment in 1108 protection was given only to payments made prior to the presentation of the petition which when applied to an administrative suit would be the date of the institution of suit. Prior to it law protected moneys realised before the actual adjudication. The rule of relation back does not under the Travancore or Cochin Acts or under the Provincial Insolvency Act, 1920, relate to a period anterior to the presentation of the petition. Transactions which do not come under that rule are prima facie valid unless they can be avoided under some express statutory provision. ILR (1953) T-C 326 : 1953 Ker L T 682 : AIR 1953 Trav-Co 321 (322) (Prs 5, 6) (DB).

SECTION 56

——S. 56—'Vest', meaning of.

The property vests in the receiver for the purposes of administering the estate of the insolvent for the payment of his debts after realising his assets. The property does not so vest for all purposes but for the purposes of Insolvency Act and the receiver has no interest of his own in the property. See Words and Phrases. AIR 1957 S C 344.

——Ss. 56, 20, 28 — Powers of interim receiver — Property, when vests in receiver. See Provincial Insolvency Act (1920), S. 20. AIR 1964 Andh Pra 299 (DB).

——S. 56 (4) — Scope of — Claim against legal representative of official receiver — Proper course to enforce liability is by regular suit and summary order is wrong. 1959 K L R 222.

——S. 56 (1)—Receiver in insolvency is not officer of Government — Nor is he occupant and, therefore, land-holder — Lease granted by receiver in insolvency would not therefore make a lessee protected lessee. See Tenancy Laws—Berar Regulation of Agricultural Leases Act (24 of 1951), S. 2 (d). 1962 Nag L J 508.

——Ss. 56 (3), 2 (d), 28 (2)—Property—Meaning of—Provident Fund.

In order that the property of insolvent should vest in the receiver it is essential that the the insolvent should have an interest in praesenti to dispose of the same. The power of disposition must be unconditional. Where according to the provident fund rules of the company, the member has no disposing power over his fund except under certain conditions and the members cannot compel the trustees to make payments of the fund upon the insolvency of the member the Court or receiver cannot remove the trustees from the custody of the same as enjoined by the proviso to S. 56 (3). ILR 29 Pat 713 : AIR 1951 Pat 488 (489, 491) (Pt A) (Prs 6, 8) (DB).

——Ss. 56 (3), 4, 51 (3)—Sale of insolvent's property after adjudication — Relief of possession by Official Receiver — Power of Court to grant relief.

A Court sale of insolvent's property at the instance of an unsecured creditor is void if the sale has been conducted after the order of adjudication. In such a case it is open to the official receiver to request the Court for an order directing the auction purchaser to put the official receiver in possession of property sold under S. 4 and it is open to the Court to grant such relief under S. 56 (3). 1950 T C L R 125 : AIR 1951 Trav-Co 193 (195) (Pt A) (Pr 6) (DB).

SECTION 57

——S. 57 (2)—Removal of official receiver—Grounds—[Hyderabad Insolvency Act, S. 58 (2)].

It is of general importance that all insolvencies should be kept within the control of the Official Receiver, unless very exceptional reasons such as reasons connected with the personality of the Official Receiver are put forward to deprive him of the control. Where no application or affidavit has been submitted to remove the official receiver assigning any special reasons, the mere statement of the Court that the creditors have complained against him that he is not acting with diligence is not enough to justify removal. AIR 1923 Mad 355; 44 M L J 251, Rel. on. I L R (1954) Hyd 218 : AIR 1954 Hyd 160 (160) (Pr 3) (DB).

——S. 57 — Official Receiver made party to suit — Notice under S. 80, C. P. Code—When necessary.

Notice is necessary only in those cases where the suit is in respect of any act purporting to be done by public officer in his official capacity. AIR 1955 NUC (Raj) 4062 (DB).

SECTION 58

——Ss. 58, 28 (2) — Order of adjudication passed — Decree obtained by secured creditor against insolvent before appointment of receiver — Insolvency Court not impleaded—Validity of decree.

It is ineffective and does not bind the receiver. The fact that creditor had attained permission of the Insolvency Court to file the suit is not sufficient to validate the decree. ILR (1952) Nag 662 : AIR 1953 Nag 268 (269, 270) (Prs 15, 16) (DB).

SECTION 59

——S. 59—Civil P. C. (1908), S. 51—Decree against receiver — Discharge of insolvent pending appeal — Property ordered to continue to vest in receiver — Executability of decree against property.

Held, that decree was executable against property which remained vested with Official Receiver who was a party to the suit throughout acting in his duty as official receiver with sanction of Court—The fact that insolvent was impleaded at execution stage did not alter position. 1950 All W R (HC) 289 : AIR 1952 399 (401) (Pt A) (Pr 7) (DB).

——S. 59 — Costs in suit defended by receiver — Personal liability.

The receiver in insolvency is not personally liable of a liability for costs incurred in connection with a contract made with the sanction of the Court. AIR 1952 All 399 (401) (Pt B) (Prs 9, 10) (DB).

——Ss. 59, 28, 29 — Limitation Act (1908), S. 20 — Person liable to pay — Includes official receiver — A I R 1933 Bom 91. Diss. from. See Limitation

Act (1908), S. 20. AIR 1959 Andh-Pra 518 (DB).

——S. 59 — Limitation Act (1908), S. 20 — 'Person liable to pay the debt'—Payment by Receiver.

Official Receiver in whom the estate of the insolvent mortgagor vests, comes within the description of "a person liable to pay" the mortgage debt within the meaning of S. 20 (1) of the Limitation Act and the payment made by him towards the mortgage debt and ordered by him with his signature gives a fresh start of limitation for the suit on the mortgage. See Limitation Act (1908), S. 20. AIR 1957 Andh-Pra 437.

——Ss. 59, 28 and 38—Vendee obtaining goods under fraud — Vendee declared insolvent subsequently — Receiver or trustees in composition scheme not entitled to the goods — Equity is in favour of the vendor. See Provincial Insolvency Act (1920), S. 28. (1963) 1 Ker L R 443.

——S. 59—Sale by receiver—Sale to secured creditor —Validity.

If a secured creditor agreed to have the sale conducted free of his encumbrance so that he could realise his debt from the amount realised by sale and the receiver conducted the sale accordingly such a procedure cannot be said to be not warranted by law. If at such a sale the secured creditor offered the highest bidding and that was accepted and a sale-deed executed in his favour without any objection either from the insolvent or the other creditors, such a sale cannot be assailed on the ground that the receiver had no jurisdiction to sell the property to a secured creditor. The mere fact that the amount realised was sufficient only to satisfy the claim of the secured creditor and there was nothing available to satisfy the claims of the simple creditors cannot render the sale invalid. 1957 Ker L J 533 : 1957 Ker L T 532 : ILR (1957) Kerala 808 : AIR 1957 Ker 144 (145) (Pt A) (Pr 2) (DB).

——S. 59 — Sale of immovable property by insolvent —Official receiver could take any steps to affect only if creditors are remained to be paid and administration is not over—Purchaser gets valid title so long as such sale has not been questioned by Official Receiver in any independent proceedings. (1966) 1 Mad L J 69 : ILR (1963) 1 Mad 556.

——S. 59 (g) — Official Receiver can acknowledge binding debt of insolvent. See Provincial Insolvency Act (1920), S. 28 (2). AIR 1957 Mad 1 (DB).

——S. 59 (g) — Acknowledgment of liability by Official Assignee — It will furnish fresh starting point for limitation. See Limitation Act (1908), S. 19. AIR 1957 Mad 1 (DB).

——Ss. 59 (a) and 68—Sale — Setting aside of — Inadequacy of price—Irregularity.

Where the sale by the receiver is irregular, having been held without notice to the petitioning creditor and is not fair and just and the petitioning creditor offers to pay merely 50 per cent. more than the price offered by the auction purchaser the sale is liable to be set aside and a fresh sale ordered. Case-law referred. (1953) 2 M L J 411 : AIR 1954 Mad 79 (80) (Pr 4).

——S. 59—Power of receiver to act as owner.

The official Receiver is a trustee in respect of the entire body of creditors and has no power at all, like ordinary full owners, to spend the money on himself, or to make a gift of it to others, however deserving or to acknowledge or pay time-barred debts, or settled debts, or other debts not binding on the insolvent's estate under the law, including the law of limitation. ('51) 64 M L W 296 : (1951) 1 Mad L J 468 : 1951 Mad W N 318 (2) : AIR 1951 Mad 814 (816) (Pt C) (Pr 7).

[Overruled in AIR 1957 Mad 1.]

——S. 59 — Sale by receiver.

The sale by the receiver is not a Court sale but a private sale. There is no provision requiring a receiver to conduct such a sale in accordance with the provisions of O. 21, Civil P. C. 1951 Nag L J 207 : ILR (1951) Nag 511 : AIR 1951 Nag 388 (389) (Pt A) (Pr 4).

——S. 59 — Sale by receiver — Civil P. C. (1908), S. 115.

In the absence of fraud or collusion the sale by receiver cannot be set aside on the ground that he had stopped in the house of the purchaser when he had gone to the village to effect the sale. The order of the lower Court setting aside the sale can be interfered with in revision. 1951 Nag L J 207 : I L R (1951) Nag 511 : A I R 1951 Nag 388 (389) (Pt B) (Prs 5, 8).

——S. 59 (d) — Civil P. C. (1908), O. 22, R. 8 (1) — "Might maintain" — Meaning of — Appeal against money decree passed against insolvent — Right of insolvent appellant to continue appeal.

A suit or appeal which the receiver is required to continue is one relating to the property of the insolvent and therefore an appeal which relates to a money decree passed against the insolvent does not a amount to a legal proceeding relating to the property of the insolvent. If therefore the receiver declines to continue the appeal the insolvent is entitled to continue it. AIR 1953 Sau 82 (82) (Pr 2) (DB).

——Ss. 59, 28 — No prohibition against insolvent continuing legal proceedings against his debtors— Decree passed in favour of undischarged insolvent without Official Receiver being brought on record — Not void—(Civil P. C. (1908), O. 22, R. 8). See Provincial Insolvency Act (5 of 1920), S. 28. AIR 1957 Trav-Co 241 (DB).

SECTION 60

——S. 60 — Sale of property in contravention of — Conditional discharge of insolvents under S. 41 (2) (c) —Effect—Right of insolvent to recover possession of property.

Insolvent after discharge cannot be said to have become the owner of the property and he is not entitled to recover the possession. See Provincial Insolvency Act (1920), S. 41 (2) (c). AIR 1957 All 262 (DB).

SECTION 61

——S. 61 (6)—Applicability to all debts entered in schedule.

Section 61 (6) is intended to provide that if there is a surplus after payment of all the debts entered in the schedule then all the creditors are to be treated equally and for the deprivation during the pendency of the Court proceedings they are to be compensated at a fixed rate. The section therefore applies to all debts entered in the schedule whether there was or was no stipulation between the creditors and the debtors as regards some of the debts about payment of interest.

The words 'all debts entered in the schedule' can be interpreted only to mean that the legislature had intended that all debts so entered must carry interest at 6 per centum per annum and as the proceedings after the date of adjudication affect all the creditors in the same way there is no reason why a difference should be made between one set of creditors and another set of creditors. (1891) 2 Q B 574, Rel. on. 1954 A W R (H C) 292 : 1954 A L J 421 : A I R 1954 All 742 (744, 745) (Pt B) (Prs 9, 10, 16) (DB).

—S 61 (6)—Rate of interest—If excessive.

Interest at 6 per cent. provided in S. 61 (6), according to the rates now prevailing, is excessive. The Civil Courts do not now award interest at a rate higher than 3 to 3 1/2 per cent. per annum as pendente lite and future interest. 1954 A W R (H C) 292; 1954 A L J 421 : AIR 1954 All 742 (745) (Pt C) (Pr 18) (DB).

—S. 61 (3) and S. 20 — Interim receiver appointed under S. 20—Expenses incurred by him are not expenses of administration within S. 61 (3) — Priority cannot be claimed in respect thereof. A I R 1960 Andh.Pra 53 (53, 54) (Prs 2, 4, 6, 8) (DB).

—S. 61—Insolvency—Moneys of registered society deposited with a firm which happened also to be a member of the society — Firm becoming insolvent—Deposit of the society, if in the nature of a trust — Society if can claim priority in insolvency.

Where a society registered under the Societies Registration Act, 21 of 1860, invested certain moneys belonging to it, with a firm, which was also a member of the society and the firm later on became insolvent, on the question whether the society can claim priority of payment as the moneys invested by the society with the firm were in the nature of a trust.

Held, as the insolvent firm was neither a member of the governing body nor was it one of the trustees under the Societies Registration Act, it cannot be said that the insolvent firm which at best was an ordinary member was by reason of such membership in the position of a trustee in respect of moneys belonging to the society as such. 64 Mad L W 654: 1951 Mad W N 353 : (1951) 1 M L J 548 : AIR 1951 Mad 875 (875) (Pr 2) (DB).

—S. 61 (6) — Rate of six per cent per annum mentioned in sub-section applies when insolvency is not annulled—Higher rate is admissible where adjudication of insolvency is annulled under S. 35.

After the annulment of insolvency under S. 35 of the Provincial Insolvency Act, the debtor is liable to pay interest at the contract rate, and where the contract rate is usurious, at such rate as the Court thinks reasonable. Sub-s. (6) of S. 61 of the Act is applicable to cases where the order of adjudication is not annulled and the assets of the insolvent in the hands of the Receiver are found to be surplus. Section 43(2) of the Act which deals with proof of interest expressly provides that the creditor may prove for interest 'at a rate not exceeding six per cent, per annum without prejudice to the right of a creditor to receive out of the debtor's estate any higher rate of interest to which he may be entitled after all the debts proved have been paid in full.' Therefore, a creditor, where an order of annulment of insolvency is passed, is entitled to a rate of interest from the debtor in excess of six per cent per annum. (1964) 2 Mys L J 417 : AIR 1965 Mys 117 (120) (Pt B) (Pr 9).

—S. 61 (3)—Applicability—Interim receiver taking charge of debtor's movables kept in house belonging to stranger—Rent of premises—Priority.

In the course of the insolvency proceedings the Official Receiver was appointed an interim Receiver on 26-3-1949. He was directed to take charge of the properties of the debtor. Accordingly the Receiver took possession of some machinery belonging to the debtor kept in a rented house belonging to the appellant, locked it and sealed the premises on 29-3-1949. He was thus in possession of the premises from that date till the articles were sold. The order of adjudication was passed on 24-2-1951 :

Held, that the rent due from the date on which the interim receiver took possession of the movables and locked and sealed the premises, up to the date of the movables had to be treated as 'expenses of administration or otherwise' within the meaning of S. 61, sub-cl. (3) of the Insolvency Act.

Held further that the rent and other incidental expenses had to be deducted out of the gross proceeds of the sale in order to arrive at the net proceeds. The rent due to the appellant should, therefore, be paid out of the amount realised by the sale. 34 Mys L J 2 : ILR (1954) Mys 327 : A I R 1955 Mys 29 (30) (Prs 3, 4).

—S. 61—Civil P. Code (1908), O. 3, R. 4 — Lien for fees — Where the Advocate had notice of the prior charge in favour of the Bank earlier to the insolvency proceedings in which he earned his costs, his lien, if any, has to be postponed to the prior charge—(Solicitor and Client). See Civil P. C. (1908), O. 3, R 4. AIR 1952 Mys 141.

—S. 61—Priority.

Where advances were made to a company whose agency consisted in soliciting orders for the Hudson cars whose direct importers were Rayala Corporation, Madras and where the petitioners handed over advances to the agent company for the supply of those cars which were misappropriated by the company and where the company was subsequently ordered to be wound up on the application of a creditor, it is not open to the petitioner to claim any priority or preferential treatment with reference to the advances they had made. The respective legal position of the petitioners and the company is one of the promisee and promisor and not that of a beneficiary and a trustee since there is no fiduciary relationship. The petitioners were entitled to rank only as ordinary creditors. 1955 Ker L T 251 : ILR (1954) T C 1342 : AIR 1955 Trav-Co 139 (141) (Prs 8 to 11) (DB).

SECTION 62

—Ss. 62, 78 (2), 28 (2), 33, 34, 49 and 79 — 'Debts provable,' meaning of — Affidavit in support of application for permission under S. 28 (2) does not amount to proof of debt — Benefit of S. 78 (2) cannot be taken — (Words and Phrases). See Provincial Insolvency Act (5 of 1920), S. 78 (2). AIR 1960 Andh Pra 257 (DB).

SECTION 64

—S. 64—Dividend declared by Receiver under S. 64 —Attachment of under O 21, R. 52 before sanction for distribution under R. 19—Attachment not ineffective. See Civil P. C. (1908), O. 21, R. 52. ILR (1962) Andh Pra 477.

SECTION 67

—S. 67—Devolution of property on undischarged insolvent — Insolvent obtaining absolute discharge —Suit for recovery of property thereafter—Suit held maintainable subject to conditions laid down by S. 67.

On consideration of the scheme of the Act, it is clear that an insolvent is entitled to get back any undisposed of property as surplus when an absolute order of discharge is made in his favour, subject always to the condition that if any of the debts provable under the Act have not been discharged before the order of discharge, the property would remain liable to discharge those debts and also meet the expenses of all proceedings taken under the Act till they are fully met.

There is nothing in the Act which takes away the right of the insolvent to sue in Courts after he has been granted a discharge, for he then becomes a free man. In such a situation he would certainly be entitled to sue in Court for recovery of his undisposed of property, if it is in the possession of a third party, after his discharge and such property cannot for ever remain vested in the Court or receiver. All that justice requires is that in case the conditions of S. 67 have not been fulfilled such property should be subject to those conditions.

Therefore, an insolvent on whom property devolves when he is an undischarged insolvent can maintain a suit for the recovery of the property after his absolute discharge. F. A. Nos. 897 of 1951 and 66 of 1952, dated 7-3-1957 (Bom.). Reversed. Raghunath Keshava Kharkar v. Ganesh, (1964) 3 SCR 520 : 1964 Mah L J 105 : 1964 B L J R 105 : 66 Bom L R 382 : 1964 M P L J 105 : AIR 1964 SC 234 (238, 242) (Pt A) (Prs 17, 27).

——S. 67—Sale of property in contravention of S. 60—Conditional discharge of insolvents under S. 41 (2) (c)—Effect—Right of insolvent to recover possession of property.

Insolvent after the discharge cannot be said to have become owner of property and he is not entitled to recover possession over the same. See Provincial Insolvency Act (1920), S. 41 (2) (c). AIR 1957 All 262 (DB).

——S. 67—U. P. Debt Redemption Act (13 of 1940), Ss. 8 and 2 (2)—Insolvent mortgagors—Right to apply for amendment of decree.

An undischarged insolvent or a discharged insolvent whose property continues to vest in the receiver cannot apply under the Debt Redemption Act for the amendment of a mortgage decree because the effect of such vesting is that he is not the owner of the property. See Debt Laws — U. P. Debt Redemption Act (13 of 1940), S. 8. AIR 1952 All 328 (DB).

SECTION 68

——Ss. 68 and 75—Sale by receiver—Power of Court to set it aside — Nature and extent of — Grounds on which the sale can be set aside — Power of High Court in revision — Question to be considered in revision.

The fact that the act of the receiver in selling properties under S. 59 (a) is subject to the control of the Court under S. 68 does not mean that the Court can arbitrarily set aside a sale decided upon by the official receiver. It is true that the Court has to look in insolvency proceedings to the interest in the first place of the general body of creditors; in the second place, to the interest of the insolvent, and lastly, where a sale has been decided upon by the official receiver to the interest of the intending purchaser in that order. Unless there are good and judicial grounds for interfering with the discretion exercised by the official receiver, a sale should not be set aside.

The jurisdiction of the High Court to interfere in revision under the proviso to S. 75 arises only if it is of opinion that the District Judge's order was not according to law.

Held on facts, that as the High Court did not consider the question whether the order of the District Judge was according to law or not the High Court had no jurisdiction to interfere with that order. The decision of the Madras High Court in C. R. P. No. 90 of 1955, dated 27-7-1956 (Mad.), Reversed. P. Srinivasa Naicker v. Engammal. 1962 S C D 518 : 1962 Supp (1) S C R 690 : (1962) 2 Andh L T 506 : (1962) 1 Ker L R 551 : AIR 1962 SC 1141 (1143, 1144) (Prs 8, 9, 10).

——Ss. 68, Provisos, 75 (4) and 78 (1)—Delay in presenting petition under S. 68 — Application for condoning delay under S 5, Limitation Act, can be entertained — Proviso to S. 68, compared with Ss. 75 (4) and 78 (1) and with S. 48, Civil P. C. — Limitation Act (1908), S. 5.

The delay in filing an application under S. 68 for setting aside a sale held by an Official Receiver can be condoned under S. 78 (1), on an application under S. 5, Limitation Act, provided sufficient cause is shown therefor. Under the proviso to S. 68 there is no absolute prohibition against the entertainment of an application after the lapse of twenty-one days. The concept of the proviso is similar to the one underlying S. 48, Civil P. C., which embodies a rule of limitation. It follows that what is enshrined in the proviso is a period of limitation. Consequently, an application under S. 68 comes within the sweep and range of S. 78 (1) and no exception can be taken to the entertainment of the petition for the purpose of dealing with the question whether the delay can be condoned or not. Delay can be excused under S. 5, Limitation Act. ILR (1957) A P 538, Differed from. AIR 1958 Andh Pra 426; AIR 1935 Lah 60; AIR 1924 Oudh 294, Disting. ILR (1965) Andh Pra 458 : (1963) 2 Andh W R 304 : AIR 1964 Andh Pra 50 (52) (Pt A) (Prs 9, 10, 12, 15) (DB).

——S. 68, Proviso—Limitation Act (1908), S. 5—Petition for setting aside auction sale held by Official Receiver under Provincial Insolvency Act filed beyond 21 days — Application for condoning delay under S. 5, Limitation Act — Court without even ordering notice to the Official Receiver or the auction purchaser, condoning delay and entertaining application for setting aside sale—Held that there was violation of the principle of natural justice contained in maxim audi alteram partem. See Limitation Act (1908), S. 5. AIR 1964 Andh Pra 50 (DB).

——Ss. 68, Proviso and 4 — Properties of insolvent sold by Official Receiver—Application by third party to set aside sale and claiming share in such properties—Nature of — Application not an appeal under S. 68—No question of limitation.

The petitioner, who was the mother of two insolvents, filed an application before the Insolvency Court, under Ss. 4 and 68 of the Insolvency Act, claiming a one-third share in the properties which were sold by the Official Receiver as belonging to the insolvents and for setting aside the sale. She also filed another application for condoning the delay in filing the above application. On the question whether the application purporting to be filed under Ss. 4 and 68 of the Act is exclusively an appeal under S. 68 and as such cannot be filed beyond the period of 21 days from the sale by the Official Receiver :

Held, — The petitioner has not made any claim before the Official Receiver; and even if she chose to make any such claim in respect of her interest or right to the properties sold by the Official Receiver, the Official Receiver has no right whatsoever to decide upon such claim petitions. So, the present application cannot be taken in any sense to be an appeal against the act of the Official Receiver as such. It is a case where the petitioner approached the Court to determine the question of her title, which it is competent to do only under S. 4 of the Act. As the application is not an appeal under S. 68, no question of bar of limitation will therefore arise. (1963) 1 Andh W R 70 : AIR 1963 Andh Pra 296 (297) (Prs 3, 6, 7).

[Overruled in AIR 1967 S C 1780].

——S. 68—Limitation—Limitation Act (1908), S. 5).

The section contains a mandatory provision which requires the acts of the receiver to be questioned within 21 days. Such being the case, there is no inherent power in a Court to receive a petition filed after the lapse of 21 days. AIR 1935 Lah 60, Rel. on. S. 5 of the Limitation Act cannot be extended to such application as it is not applicable to those applications. ILR 35 All 410, Rel. on. ILR (1957) Andh Pra 538 : AIR 1958 Andh Pra 426 (426, 427) (Prs 3, 4).

——S. 68—Proceedings under—Applicability of O. 1, R. 10, C. P. Code.

As there is no express provision in the Act prescribing a procedure different from that laid down in the Civil P. C. or excluding the application of that procedure to proceedings under S. 68, S. 5 attracts the

provision of C. P. Code. Therefore a new party may be added to an application under S. 68 if conditions laid down in O. 1, R. 10, C. P. Code are complied with. AIR 1955 N U C (Andhra) 4816.

——Ss. 68, 59 (a)—Sale—Setting aside of.

Sale by receiver without notice to petitioning creditor—Sale is irregular—Petitioning creditor offering to pay nearly fifty per cent. more than the price offered by auction-purchaser — Sale should be set aside and fresh sale ordered. See Provincial Insolvency Act (5 of 1920), S. 59 (a). AIR 1954 Mad 79.

■ ——Ss. 68, 75 and 50—"Aggrieved person"—Insolvent's right to apply under S. 68 and appeal under S. 75—S. 50, if bars application under S. 68 — Remedies under Ss. 50 and 68, 49 Mad 461; AIR 1926 Mad 558: 94 I C 642 (FB), Overruled.

In view of the explicit and all-embracing language of Ss. 68 and 75, it cannot be maintained that the insolvent can never apply to the Court under S. 68 questioning the acts of the Official Receiver or appeal under S. 75 from an adverse order of the Court passed on such application. If there is a flagrant case of a sale by the receiver for a gross undervalue, if a sale or lease is granted secretly and without public notice for a wholly inadequate price or rental, or if a sale or lease is granted in favour of a benamidar or a person in whom the receiver is personally interested without disclosing that fact to the Court, if property on which there is no subsisting encumbrance is sold for an undervalue as if it were subject to prior encumbrances, if there is a concealment of material facts or a misrepresentation of such facts so as to prevent purchasers from having a fair idea of the real value of the property sold, if the property sold is so incorrectly described as to mislead purchasers into thinking that its value is negligible when in fact it is valuable, in cases like these, the insolvent is an "aggrieved person" and would have a remedy by way of an application to the Court under S. 68 and an appeal under S. 75, Provincial Insolvency Act: AIR 1926 Mad 558 (FB), Overruled.

The remedies under Ss. 50 and 68 are different in their scope and S. 50 does not exclude the applicability of S. 68 or disable the insolvent from objecting under that section to a debt admitted by the Official Receiver. The only limitation is that the application under S. 68 must be made within 21 days of the act or decision of the receiver unlike an application under S. 50 which can be made at any time during the pendency of the insolvency proceedings.

When the application by the debtor to the District Court purported to be made with reference to a scheme of composition and for the expunging of the debt of the respondent from the schedule of creditors:

Held, that under S. 75 (2) of the Act an appeal would lie to the High Court from the order of the District Court rejecting the debtor's application. Chalavadi Narasimham v. Chalvadi Ramayya, 63 Mad L W 333: 1950 Mad W N 267: (1950) 1 Mad L J 484: ILR (1951) Mad 77: AIR 1950 Mad 492 (501 to 503) (Prs 25, 27, 29) (FB).

——S. 68—Sale of property — Mistake as to encumbrance in proclamation due to error committed by Official Receiver—Property fetching low price—Sale can be set aside by Insolvency Court at instance of Official Receiver under Court's inherent powers.

An Official Receiver cannot invoke the provisions of S. 68, to have his acts or decisions reversed, or modified, by the Insolvency Court. But an Insolvency Court has inherent powers vested in it outside the provisions of S. 68, to rectify the defects, mistakes, or errors committed by an Official Receiver. It cannot be said that the Court is powerless to prevent an injury being done to the general body of creditors and the insolvent in consequence of a mistake committed by the Official Receiver in the conduct of an auction sale held by him, merely because the person who applies to the Court to have the mistake rectified is the Receiver himself and not a creditor or the insolvent.

Consequently, Official Receiver who discovers that a property has been sold under an erroneous proclamation of sale, due to an error committed by him, mentioning therein that the property was subject to an encumbrance of Rs. 7,000 while in fact the encumbrance was only up to Rs. 3,500, is entitled to have the sale set aside by an order of the Insolvency Court on the ground that owing to the said mistake the property fetched a very low price (in this case a sum of Rs. 255 only). It cannot be disputed that if the insolvent, or any of the creditors, had applied to the Court to have the sale avoided by reason of the obvious mistake committed by the Official Receiver in notifying the encumbrance to which the properties of the insolvent were subject, the Court could have set aside the sale. It does not make any difference in this case that the person that sought to have the sale set aside on the ground of an error committed is the Official Receiver himself who was responsible for the mistake and not an insolvent or a creditor or any other person aggrieved by it: AIR 1946 Mad 89; AIR 1920 Lah 361; AIR 1914 Cal 885 and 9 I C 344 (Bom), Rel. on. (1950) 1 Mad L J 15: 1950 Mad W N 47 (2): 64 Mad L W 1057: AIR 1950 Mad 311 (312, 313) (Prs 6, 9).

——S. 68 — Insolvency Court under S. 68 confirming act of receiver—Appeal to District Court under S. 75 — Revision to High Court against order of District Judge — High Court setting aside order as being unsupported by facts and as being based on misconception of powers of Insolvency Court — No appeal lies under S. 109, Civil P. Code to Supreme Court against orders of High Court passed in revision. 1953 Nag L J 31: I L R (1953) Nag 243: A I R 1953 Nag 145 (146) (Prs 2, 5) (DB).

——Ss. 68, Proviso and 4 — Claim-application under S. 4 on attachment of property by Receiver:— Application made more than 21 days after attachment—It is barred under Proviso to S. 68.

It is not obligatory on a stranger to apply to the Insolvency Court at all to establish his title to property, possession of which is taken by the Receiver; he can go to the ordinary Court to establish his title within the ordinary period of limitation. If, however, he does want a relief to be given to him against what he considers to be an improper act of the Receiver, he must comply with the provisions of S. 68 and take the consequences that follow with regard to the finality of the orders, as provided under Ss. 4 and 75 of the Act. A I R 1935 Lah 60 and AIR 1919 All 274, Rel. on.

Where as an effect of an order of adjudication the natural consequence indicated in S. 28 (2) flows and there is no specific order of the Court to the Receiver to take possession of the particular property in respect of which a claim application is filed under S. 4 in the Insolvency Court, the application, if made more than 21 days after the attachment by the Receiver of the property, is barred by time under the Proviso to S. 68. 65 Pun L R 184: I L R (1963) 1 Punj 557: AIR 1963 Punj 243 (245) (Pt. A) (Pr 6) (DB).

SECTION 69

——Ss. 69 (a) and (c) (ii) — Party to fraud—Right to relief from Court — When denied—Insolvency proceedings—Fraud on creditors — Property saved from insolvency court — Suit for possession against trespasser—Insolvent not disentitled to relief. AIR 1961 Andh Pra 219 (DB).

——Ss. 69 (a) and (c) (ii), S. 2 (d)—'Property'—Test to determine—Lease-hold interest in land — Transfer after insolvency petition—Offence.

The term 'property' is a generic term for all that a person has dominion over. In order to determine what is 'property', the test is; whether the insolvent has a disposing power over the interest in the property or not. Where an insolvent has a lease-hold interest in a certain land, which he possessed, he having an absolute disposing power, it falls within the definition of the word 'property' under S. 2 (d) of the Act. Therefore, if he transfers this right after the filing of the insolvency application and before he is adjudged an insolvent with a view to keep it away from the list of assets which has to be placed at the disposal of the Receiver, he commits an offence as provided in S. 69 (a) and (c) (ii). A I R 1918 Lah 247 (2). Disting **1958 Cr L J 159 : A I R 1958 Andh Pra 120 (122) (Pr 6).**

——S. 69 — Offence committed prior to adjudication —Complaint under S. 70 can be made only after adjudication as insolvent. **1959 Cr L J 41 : A I R 1959 Cal 74 (75) (Pr 5) (DB).**

SECTION 70

——Ss. 70, 69 — Offence under S. 69 committed prior to adjudication — Complaint under S. 70 not to be made until order of adjudication. **1959 Cri L J 41 : A I R 1959 Cal 74 (75) (Pr 5) (DB).**

——S. 70 — Ground for inquiry—Recording of finding—What is.

Held, that in the context in which it was made, the direction of the Subordinate Judge to send a complaint to the First Class Magistrate was tantamount to the requisite finding though the Subordinate Judge had not in so many words stated that there was ground for inquiring into the offence which the insolvent appeared to have committed. A I R 1955 N U C (Mad) 3223.

——S. 70—'May record a finding'—Meaning of.

(Obiter) — The words actually used are "The Court may record a finding to that effect and make a complaint.' The word 'may' applies both to 'record' and to 'make.' On the words of the statute, it would certainly be legitimate to say that the recording of a finding is optional and it is not obligatory on the Court to record such a finding. **A I R 1955 N U C (Mad) 3223.**

——Ss. 70, 75 — Appeal — Decision of Insolvency Court not to prosecute debtor—Receiver—If "person aggrieved"—by decision and entitled to appeal.

Neither a creditor nor the Official Receiver is a "person aggrieved" by a decision of the Insolvency Court declining to make a complaint against a debtor under S. 70 of the Provincial Insolvency Act and has no right of appeal under S. 75 (1) of the Act. The case of a debtor against whom a complaint is made uuder S. 70 of the Act might stand on a different footing. (Case-law discussed). (1923) 45 M L J 804; AIR 1924 Mad 185; (1914) ILR 40 Mad 630; AIR 1915 Mad 1066; (1919) 38 M L J 338; AIR 1920 Mad 400, Appr. Official Receiver of Ramanathapuram v. Chellappa Chettiar. **1951 Mad W N 552 (2 : 64 Mad L W 616 : (1951) 2 M L J 87 : ILR (1952) Mad 82 : AIR 1951 Mad 935 (936, 937) (Pt A) (Prs 2, 5) (FB).**

——S. 70 — Complaint under — Offences under S. 69 need not be established. **(1950) 2 Mad L J 630 : 1951 Mad W N 154 (1) : 1951 Mad W N (Cri) 38 (1) : AIR 1951 Mad 686 (1) (686) (Pr 1).**

SECTION 73

——Ss. 73, 33, 37 and 43 — Respective scope and applicability — Annulment of adjudication — Order vesting property in Official Receiver under S. 37—Effect — Debts included in schedule but not proved before annulment and closing of administration—Administration reopened on creditor's application—Power of Official Receiver to entertain proof of debt. See Provincial Insolvency Act (1920), S. 33 (3). **1964-1 Andh W R 284.**

SECTION 74

——S. 74—Order of adjudication.

The Act nowhere prohibits a debtor who is not possessed of substantial assets from applying to be adjudged an insolvent. Section 74 provides that where the debtor's property is not likely to exceed the value of Rs. 500/. summary administration of the debtor's estate may be ordered by the Insolvency Court—See Provincial Insolvency Act (1920), S. 27. **A I R 1957 Andh Pra 375.**

——S. 74 (ii)—Bona fide purchaser in execution sale after adjudication — His rights held are saved—Vesting of property in receiver under S. 74 (ii) held makes no difference—See Provincial Insolvency Act (1920), S. 51 (3). **AIR 1956 Andhra 243 (FB).**

——Ss. 74, 27, 10 — Order of adjudication — Debtor satisfying requirement of S. 10 — Application cannot be dismissed on ground that it was not bona fide — Petition cannot be dismissed because salary was not disclosed — That petitioner was harassed by debtors is no reason for adjudication. See Provincial Insolvency Act (5 of 1920), S. 27. **AIR 1955 N U C (Andhra) 3611.**

——Ss. 74 and 78 (2) — Summary proceedings — decree-holder not proving debt — Execution not barred.

In summary proceedings creditors do not prove their debts and it is the Court which has to go into the claims of creditors and frame a schedule of creditors and distribute whatever assets are available. Therefore, S. 78 (2) could not be a bar to an execution petition because the decree-holder has not proved his debt in insolvency. **69 Mad L W 299 : 1956 Mad W N 355 : AIR 1956 Mad 580 (581) (Pt B) (Pr 5).**

——S. 74 — Civil P. C. (1908), O. 40, R. 1—Summary jurisdiction of Court.

Where the receiver in insolvency proceedings leases out the land of the insolvant and an express undertaking is given by the lessee in the lease deed to unconditionally surrender possession of the land on the termination of the period of the lease, the insolvency Court can summarily enforce that undertaking and evict the lessee. **1953 Ker L T 110 : ILR (1953) Trav-Co 30 : AIR 1953 Trav-Co 205 (208) (Pt C) (Pr 7) (DB).**

SECTION 75

SYNOPSIS

(Provincial Insolvency Act (1920), S. 75.)

1. Applicability and scope.
2. Who may appeal — Person aggrieved.
3. "Order of Court subordinate to District Court".
4. "Order of District Court upon such appeal shall be final".
5. Revision.
6. Appeal.

7. Order appealable with leave of Court.
8. Parties.
9. Procedure.
10. Limitation.

1. Applicability and scope.

—S. 75 (1) — Applicability and scope — Order appointing interim receiver — Appeal — Maintainability.

An order appointing an interim receiver affects the rights of the parties inasmuch as the receiver would be under the order entitled to take over possession of certain properties and to realise rent therefrom. Such an order can hardly be said to relate to the procedure of the court and therefore is appealable. AIR 1942 Mad 305 : (1942) 1 M L J 113, Disting ; AIR 1952 Pun 49, Foll. AIR 1955 Ajmer 26 (26) (Pt A) (Pr 2).

—S. 75 — Powers of District Judge under — Civil P. C. (1908), O. 47, R. 7 — Applicability.

A District Judge sitting as an appellate Court in insolvency proceeding has the same powers as an appellate Court under the Code of Civil Procedure. If he reviews the judgment in appeal, an appeal from that order will only lie if the provisions of O. 47, R. 7, Civil P. C., are applicable. There is no difficulty in applying the provision of S. 75, Provincial Insolvency Act as well as the provisions of O. 47, R. 7, Civil P. C., to appeals of this nature. Although S. 75, Provincial Insolvency Act provides for appeals of this kind, disposal of such appeals will be governed by O. 47, R. 7, Civil P. C. AIR 1922 All 206, Foll. 1964 All L J 812 : ILR (1964) 2 All 867.

—S. 75 — Cross-objections — Competency — (Civil P. C. (1908). O. 41, R. 22).

There is no provision in the Provincial Insolvency Act for a cross-objection to be filed within 30 days after service of notice as under O. 41, R. 22 and there is nothing in the Provincial Insolvency Act making the provisions of O. 41, R. 22 applicable to an appeal under S. 75. 1954 All L J 90 : 1954 A W R (HC) 101 (1) : AIR 1954 All 419 (419 420) (Pr 5) (DB).

—S. 75 — Applicability — Application to bring respondent on record — Rejection — Appeal — Mysore Insolvency Act, S. 75.

Section 75 of the Act enables "any person aggrieved by a decision come to or an order made in the exercise of the insolvency jurisdiction" to prefer an appeal. The right of appeal is substantive and when by the Act it is allowed with respect to "any" decision or order, the right cannot be taken away or curtailed by the restrictive provisions of the Code of Civil Procedure. The words in S. 75 are wide enough to make an appeal possible though the Civil P. C., denies it in some cases. Hence an order rejecting an application filed under O. 22, R. 3, Civil P. C., for the respondents 1 and 2 being brought on record in place of a deceased petitioner in an insolvency case is appealable. AIR 1948 Mad 520; AIR 1946 Nag 42; AIR 1937 Lah 568, Rel. on. ILR (1954) Mys 330 : 34 Mys L J 23 : AIR 1955 Mys 97 (97) (Prs 1, 3).

—S. 75 — Second appeal and revision against order under S. 25, Provincial Insolvency Act.

No second appeal lies against an order passed under S. 25. The High Court may however in certain circumstances treat the second appeal as revision and examine the order of the District Judge and determine its legality and correctness. See Provincial Insolvency Act (1920), S. 25. AIR 1954 Mys 133.

—S. 75 — Applicability — Order refusing review — Appeal.

The result of the provisions for review in the Act is only that before the Court can review its own order, the power so exercised should have been conferred on it by some provisions of Civil P. C. In other words unless the case falls under O. 47, R. 1, the Court will have no power of review. 1954 Ker L T 525 : ILR (1954) T C 1042 : AIR 1955 Trav-Co 49 (51) (Pt E) (Pr 10) (DB).

—S. 75 (3) — Scope of — Travancore Insolvency Act (8 of 1105), S. 77 — Distinction.

Section 77, Travancore Insolvency Act, imposes no limitations whatever as to appeals against orders passed in the exercise of insolvency jurisdiction. Unlike the Provincial Insolvency Act no leave of the Insolvency Court or the High Court is required to entertain an appeal against any order in insolvency. ILR (1954) Trav-Co 1042 : 1954 Ker L T 525 : AIR 1955 Trav-Co 49 (51) (Pt F) (Pr 10) (DB).

2. Who may appeal — Person aggrieved.

—S. 75 — "Person aggrieved" — Insolvent, if.

Where an insolvent is impleaded in his individual capacity as a party to proceedings initiated by the opposite party, the insolvent's estate being represented by the Official Receiver and an order is passed against the insolvent personally and not against his estate, he will be deemed to be a person aggrieved within the meaning of S. 75 of the Provincial Insolvency Act. AIR 1952 All 356 (357) (Pr 10) (DB).

—S. 75—Petition by creditor invoking jurisdiction of lower Court dismissed — Appeal lies — (Hyderabad Insolvency Act (8 of 1351-F), S. 78).

Section 78 of the Hyderabad Insolvency Act provides that a debtor or a creditor or a receiver or any person feeling aggrieved by the order of insolvency Court can prefer an appeal against such an order. The words of the section are very wide. An appeal lies on dismissal of a petition in the lower Court filed by the creditor for invoking the insolvency jurisdiction of that Court. Ramdayal v. Shankarlal, I L R (1952) Hyd 196 : AIR 1952 Hyd 80 (84) (Pt C) (Pr 8) (FB).

—S. 75 (2)—'Person aggrieved'.

Where the Court passes an adjudication order and holds that the transfer by the insolvent amounts to a fraudulent preference, the order affects the rights of the transferee. It declares the nature of the transaction and to that extent determines absolutely the rights and liabilities of the insolvent, receiver and the transferee. The order operates in rem and as such binds the transferee also, not only as regards the fact of insolvency but also as regards the transfer on which it is based. Hence tha transferee being a person aggrieved can appeal against such order. View of Bose, J. in A I R 1947 Nag 161 (FB), Foll.; View of Sen, J., Diss. from. 1960 M P C 682 : 1961 Jab L J 193 : 1961 M P L J 708 : AIR 1961 Madh Pra 15 (17) (Pt A) (Pr 5) (DB).

—S. 75 (1)—Insolvency Court declining to make complaint against debtor under S. 70 — Appeal by Receiver—Receiver whether is "person aggrieved".

A debtor, creditor or Receiver has not an unqualified right of appeal from any decision or order of an insolvency Court, but a right of appeal only if he is aggrieved by that decision or order. Thus, under S. 75 (1) the only person entitled to appeal is "a person aggrieved" by the decision or order of the Court. However, the Receiver is not a "person aggrieved" by the decision of the Insolvency Court declining to make a complaint for an offence under S. 69 against a debtor under S. 70 of the Act. 1951-1 Mad L Jour 484 (FB), Foll.; I L R 1942 Bom 67: I L R 1941 Lah 779 : AIR 1941 Lah 248, Appr. (1902) 1 K B 107, Expl.; 45 Mad L J 804, Disting : 40 Mad 630, Ref. Palaniappa Chettiar v. P. L. S. L. Chellappa Chettiar, 64 Mad L W 616 : 1951 Mad W N 552 (2) : 1951-1

Mad L J 87 : I L R (1952) Mad 82 : A I R 1951 Mad 935 (936, 937) (Pt A) (Prs 2, 5) (FB).

● ——S. 75 (1)—"Person aggrieved"—Who is.

A person against whom a decision has been pronounced which has wrongfully refused him something which he had a right to demand, would be an "aggrieved person". The grievance may not be personal or pecuniary and may yet be a legal grievance. A creditor or receiver who is under the provisions of the Act empowered to make and who makes an application to the Insolvency Court for a relief or who is brought before the Court to submit to its decision is, if the decision goes against him, thereby an 'aggrieved person'. However, not every person who has suffered some disappointment or whose expectations have not been realised as a result of the decision or order of an Insolvency Court can claim to be an aggrieved person. (1880) 14 Ch D 458; (1887) 19 Q B D 174 : (1894) 2 Q B D 805, Ref. Palaniappa Chettiar v. P. L. S. L. Chellappa Chettiar, 64 Mad L W 616 : 1951 Mad W N 552 (2) : 1951-1 Mad L J 87 : I L R (1952) Mad 82 : A I R 1951 Mad 935 (936, 937) (Pt B) (Pr 3) (FB).

● ——Ss. 75, 68 and 50—"Aggrieved person"—Insolvent's right to apply under S. 68 and appeal under S. 75—S. 50, if bars application under S. 68 – Remedies under Ss. 50 and 68. The insolvent can in certain circumstances apply to the Court under S. 68 questioning the acts of the Official Receiver or appeal under S. 75 from an adverse order of the Court passed on such application. 49 Mad 461 : A I R 1926 Mad 556 : 94 Ind Cas 642 (FB), Overruled. 63 Mad L W 333 : 1950 Mad W N 267 : (1950) 1 Mad L J 484 : I L R (1951) Mad 77 : AIR 1950 Mad 492 (FB).

——S. 75—Right of appeal—Order including creditor in list of scheduled creditors—Insolvent has no right of appeal. A I R 1951 Nag 281 (281, 283) (Prs 1, 5, 10, 12) (DB).

——Ss. 75, 28 — "Person aggrieved" — Insolvent — Right of.

Under S. 75 read with S. 28, an insolvent cannot be said to be a person aggrieved by an order directing sale of property alleging it to belong to him and hence he has no right of appeal. A I R 1926 Mad 556 (FB); A I R 1919 All 284, Rel. on. 1955 B L J R 517 : AIR 1955 Pat 503 (504) (Pt A) (Pr 3) (DB).

——S. 75 (1) — Person aggrieved — Meaning of — Receiver – Appeal by receiver.

The word 'aggrieved' in S. 75(1) means something more than merely 'disappointed'. It must mean being deprived of something which the person who wishes to file an appeal was entitled to claim. AIR 1951 Mad 935 (FB), Rel. on.

Where, therefore, an Official Receiver moves the Court under S. 70 for proceeding against the insolvent for any of the offences under S. 69 and the Court declines to make a complaint, the Receiver cannot be said to be a person who is aggrieved by the order and no appeal lies under S. 75(1) at his instance. AIR 1941 Lah 243, Approved. 61 Punj L R 570 : 1960 Cri L J 509 : I L R (1959) Punj 647 : A I R 1960 Punj 202 (204) (Pr 9) (DB).

——Ss. 75, 9, 53 and 54—Appeal—Right of—'Person aggrieved'.

The right of appeal under S. 75, Insolvency Act, is given not only to creditors but also to any person aggrieved by a decision come to or an order made in the exercise of insolvency jurisdiction.

One of the acts of insolvency was that the insolvents had given fraudulent preference to the Banks who were also creditors. After the order of adjudication and the appointment of a receiver the Banks made an application that no notice under S. 19 (2) was issued by the Court and therefore the Banks could not appear and contest the petition and show to the Court that it was not a case of fraudulent preference to the Banks. That application was dismissed on the ground that no notice under S. 19(2) was necessary when the application was by a creditor. On objection to the appeal preferred by the Banks against that order:

Held, that as a result of the order of adjudication the creditors would be able to make an application under S. 53 or 54, Insolvency Act, and that would very prejudicially affect the rights of the Banks who were said to be creditors to whom fraudulent preference was given. They were therefore persons aggrieved by the order of adjudication and had right to appeal. I L R (1958) 8 Raj 221 : A I R 1958 Raj 223 (224) (Pt A) (Pr 3) (DB).

3. "Order of Court subordinate to District Court".

——S. 75—No appeal lies to the High Court against an order of a Civil Judge (Subordinate Court invested with jurisdiction under S. 3 with powers of District Court; granting an application to set aside an abatement. 1951 All L J 280 : A I R 1952 All 423 (423) (Pr 2) (DB).

——Ss. 75, 3 (1) and 4—Order of Assistant Judge—Appeal—Forum—Notification under S. 3 investing subordinate Court with insolvency jurisdiction —Effect —Distinction between appellate and revisional jurisdiction of High Court.

It is clear from S. 75(1), Provincial Insolvency Act, that, if any order is passed by a Court subordinate to a District Court, in the exercise of its insolvency jurisdiction, then an appeal does not lie to the High Court, but it lies to the District Court. The expression 'concurrent jurisdiction' in S. 3 (1) of the Act only means that even though a Court subordinate to a District Court may be invested with jurisdiction under the Act, the District Court would still continue to possess jurisdiction under the Act. Therefore, notwithstanding the fact that the Assistant Judge may have been invested with jurisdiction under the Act by a notification issued under S. 3, sub-s. (1) of the Act, he would still be a Court subordinate to the District Court. Nor can such Court be a 'District Court' within the meaning of S. 5 of Saurashtra District and Subordinate Civil Court Ordinance, 1948 because there can be only one District Court in a District. He does not, therefore, cease to be subordinate to the District Court.

Further, the proviso to S. 75 (1) is clear that the jurisdiction of the High Court to call for a case and pass such order as it thinks fit, is a revisional jurisdiction of the High Court quite distinct from an appellate jurisdiction. An appeal contemplated by the further proviso to S 75(1) is an appeal from a decision of a District Court which decision itself must have been arrived at from a decision of a Subordinate Court, and it must be a decision under S. 4 of the Act. Where, therefore, a decision is of a Court subordinate to the District Court and that too, is not under S 4 of the Act, the provisions of the further proviso to S. 75 (1) cannot be invoked. 60 Bom L R 1197 : ILR (1959) Bom 1115 : AIR 1959 Bom 47 (48, 49) (Prs 2, 3, 4) (DB).

——S. 75 (1) (3)—Order of Court subordinate to District Court — Conferment of concurrent jurisdiction on subordinate Court—Effect — Maintainability of appeal and revision to High Court.

Where a subordinate Judge's Court which is vested with insolvency jurisdiction concurrent with the District Court passes an order under S. 68, Provincial Insolvency Act, confirming the decision of the Official Receiver rejecting a claim of the creditor, the order is

appealable to the District Court under S. 75 (1) and not to the High Court under S. 75 (3). The mere vesting of concurrent jurisdiction in the subordinate Court does not make the Court cease to be subordinate to the District Court. AIR 1919 Cal 900, Distinguished.

In such a case a revision to High Court against the order of the subordinate Court would be incompetent inasmuch as an appeal lies to the District Court. AIR 1948 Mad 520 : (1948) 1 M L J 310; A I R 1948 Mad 320, Rel. on. 1955 Mad W N 45: 68 Mad L W 55 : (1955) 1 M L J 245 : AIR 1955 Mad 554 (555) (Pr 3).

● —S. 75—Applicability—Decision in proceeding under S. 16, Travancore Debt Relief Act, is not appealable.

Per Sankaran J —Insolvency Act applies to proceedings under Travancore Debt Relief Act for limited purposes only. The general right of appeal conferred by S. 75 (S. 77 of Trav. Ins. Act) cannot be invoked in respect of orders passed in proceedings under S. 16 of the Debt Relief Act. See Debt Laws — Travancore Debt Relief Act (2 of 1116), S. 16. AIR 1954 Trav-Co 259 (FB).

4 "Order of District Court upon such appeal shall be final."

——S. 75—Civil P. C. (1908), O. 41, R. 23 — Duty of Court to which case is remanded to act according to directions contained in order of remand pointed out. See Civil P. C. (1908), O. 41, R 23. AIR 1955 NUC (Trav-Co) 5106 (DB).

5. Revision.

● —Ss. 75, 68—Sale by receiver — Power of Court to set it aside—Nature and extent of — Grounds on which the sale can be set aside—Power of High Court in revision—Question to be considered in revision.

The jurisdiction of the High Court to interfere in revision under the proviso to S. 75 arises only if it is of opinion that the District Judge's order was not according to law. If the High Court comes to that conclusion, it can then pass such order as it may think fit. AIR 1962 S C 1141.

——S. 75—Civil P. C. (1908), S. 115—Claim in insolvency proceedings — Prayer for stay of sale during inquiry into claimant's title refused—Revision against order filed under S. 115, Civil P. C.—Revision may be treated as one under S. 75, Provincial Insolvency Act. See Civil P. C. (1908), S. 115. AIR 1955 NUC (Ajmer) 4137.

——S. 75 (1), Proviso 1—Scope — Correction of decision—If can be canvassed.

It is not the correctness of the the decision but illegality or the material irregularity in procedure that can be pointed out in a revision application. The contention that the District Judge in an appeal under S. 75 adopted an incorrect procedure cannot therefore be accepted in revision. AIR 1953 S C 23, Rel. on.

Similarly, where the District Judge has given reasons for the order interfering with the exercise of the discretion by the first Court the order being within his jurisdiction cannot be challenged in a revision petition. AIR 1955 Ajmer 26 (27) (Pt B) (Prs 3, 4).

——S. 75 (1), First Proviso—Final order in appeal in favour of party—Party cannot go in second appeal against adverse finding against him—He can file revision under First proviso to S. 75 (1) against such adverse finding.

The petitioning creditor filed an application under S. 53 for annulment of certain transfers made by the insolvent. The trial Court held that the transferee could challenge the order of adjudication on the ground that petitioner was not a creditor of the insolvent. In the final order the Court found that the transfers were liable to be annulled under S. 53 of the Provincial Insolvency Act. Against these orders the transferee preferred appeal before the District Judge under S. 75 of the Provincial Insolvency Act. The District Judge affirmed the finding of the Insolvency Court that the transfers were liable to be annulled under S 53. The District Judge also held that the transferee proved that the insolvent did not owe any debt to the creditor. In spite of these adverse findings against the creditor, however, the appeal was dismissed by the District Judge. The transferee did not challenge the order of the District Judge. It was the creditor, however, who had come up to the High Court in revision purporting to invoke the jurisdiction of the High Court under the first proviso to S. 75 (1) of the Provincial Insolvency Act.

Held, that as the District Judge finally rejected the appeal and confirmed the operative part of the order, namely annulment of transfers passed by the Insolvency Court the applicant could not have a further right of appeal for challenging the adverse findings of the District Court. There being no right of second appeal even against an unsuccessful appellant, the only mode in which the order could be challenged was by way of revision application. Such jurisdiction vested only in the High Court and could be invoked under the first proviso to S 75 of the Provincial Insolvency Act. If the revisional jurisdiction of the High Court could be invoked in a given case, then, it could be validly invoked by a person in the position of the present applicant against whom two adverse findings had been recorded in the proceedings under S. 53 of the Provincial Insolvency Act for annulment of transfers. 1933 Mah L J 89 : 65 Bom L R 39 : ILR (1963) Bom 173 : AIR 1963 Bom 212 (213, 214) (Pr A) (Pts 2, 10).

——Ss. 75 (1), 5—Power of revision—Power of revision can be exercised by High Court only in respect of appellate orders—Order of adjudication — Revision does not lie directly — S. 5 will not apply.

Section 75 is a special provision which provides for revision by High Court only from the appellate order passed by the District Court and not from the orders passed by the Court of original jurisdiction and as such the remedy for setting aside the adjudication order passed by the Subordinate Court lies in appeal to the District Court and not to the High Court in revision : AIR 1948 Mad 520, Rel. on. The order of adjudication falls directly under S. 75 (1) and excludes applicability of S. 5 of the Act : AIR 1948 Mad 520, Rel. on. (1964) 1 Ker L R 235 : 1964 Ker L J 29 : 1964 Ker L T 244.

——Ss. 75, 5, 23 and 31 — Interim protection from arrest in execution of decree against debtor pending his application for adjudication — Inherent power—Refusal to grant protection — Not revisable either under S. 115, Civil P. C. or Art. 227 of the Constitution. See Provincial Insolvency Act (1920), S. 5. 1961 Ker L J 1272.

——S. 75—Revision—Order under S. 41.

The fact that the Courts below have passed concurrent orders of discharge is no bar to interference in revision in proper cases. 1958 Ker L T 445 : 1958 Kea L J 583 : I L R (1959) Ker 27 : A I R 1959 Ker 376 (377) (Pt B) (Pr 5).

——S. 75 (1), Proviso 1—Revision — Powers of High Court—S. 115, Civil P. C.—Distinction.

Scope of proviso to S. 75 (1) is much wider than S. 115 of the Code of Civil Procedure. The High Court can go into the question whether the decision

of the District Judge is in accordance with law. 62 Punj L R 597 : A I R 1960 Punj 604 (604) (Pt B) (Pr 2).

——S. 75—Question of fact.

It is not open to High Court in revision to upset the conclusion of fact arrived at by District Judge based on evidence even though as a Court of first instance, it may be inclined to take a different view. ('59) 61 Punj L R 753.

6. Appeal.

——S. 75 (1) — Question whether statutory presumption is rebutted is a question of fact — High Court cannot interfere.

Where a creditor made a claim based on a promissory note and the District Judge considering the evidence produced, inferred from the facts found that the statutory presumption under S. 118, Negotiable Instruments Act, had been weakened and the burden which lay upon the insolvent was discharged, it is not open to the High Court exercising jurisdiction under S. 75 (1), Proviso 1, nor even under Proviso 2, to set aside the judgment of the Court as the question whether a statutory presumption is rebutted is a question of fact. A I R 1930 P C 91, Foll. Official Receiver, Kanpur v. Abdul Shakoor, 1965 All L J 482 : (1965) 1 S C A 714 : (1965) 1 S C W R 1029 : (1965) 2 S C J 691 : (1965) 2 Andh W R (S C) 152 : (1965) 2 Mad L J (S C) 152 : (1965) 1 S C R 254 : I L R (1965) 2 All 359 : A I R 1965 S C 920 (923) (Pt D) (Pr 7).

——S. 75 (1)—Insolvency Court deciding that it has jurisdiction to entertain application — 'Decision come to or order made' — Maintainability of appeal to District Judge.

The provisions of S. 75 (1) make a distinction between a decision and an order made by the insolvency Court, suggesting that not merely an order but a decision which does not require compliance is contemplated within the meaning of S. 75 (1). The section does not speak of a final decision but merely a decision. Having regard to these considerations the contention that an appeal against the decision of an Insolvency Court must be against a final determination cannot be accepted. A decision come to, in the exercise of insolvency jurisdiction includes a finding upon an issue material to determination of the entire case. An appeal lies against the finding of an Insolvency Court that the petition is maintainable. A I R 1946 Nag 42 ; A I R 1952 Punj 49, Relied on ; A I R 1936 All 80 ; A I R 1934 Lah 194 (1) ; A I R 1942 Mad 305, Distinguished. 1964 All L J 38.

——Ss. 75, 41 — Conditional order of discharge — Review—Appeal.

An order dismissing an application for review of an earlier conditional order allowing the insolvent's prayer for an order of discharge is not appealable. See Provincial Insolvency Act (5 of 1920), S. 41. A I R 1960 Ker 146 (DB).

——S. 75 (2) — Objection to attachment of property under S. 21 (2)—Court determining validity of transfer in favour of objector — Appeal lies. See Provincial Insolvency Act (1920), S. 4. A I R 1962 Madh Pra 354.

——Ss. 75 (2), 4 and 21 — Attachment of debtor's property before adjudication — Objection — Court determining not merely question of possession of debtor but also question of title — Appeal against order competent.

National Planning certificates in possession of the debtor were attached under S. 2 (2) before adjudication at the instance of the petitioner-creditor. An objector claimed release of the certificates on the ground of their transfer to him before attachment. The Insolvency Court determined not merely the question of possession of the certificates but also held that the transfer in favour of the objector was valid and ordered their release. The petitioner-creditor preferred an appeal under S. 75 (2) and made an application for permission to appeal in case the order was not treated as one under S. 4 of the Act.

Held, that the Insolvency Court ought not to have enquired, prior to the passing of the order of adjudication, whether the transfer in favour of the objector was valid, but since it had determined the validity of the transfer in favour of the objector, an appeal under S. 75 (2) of the Provincial Insolvency Act was competent. A I R 1935 Cal 558, Rel. on. 1964 Jab L J 131 : 1962 M P L J (Notes) 285 : 1962 M P C 457 : A I R 1962 Madh Pra 354 (356) (Pt C) (Pr 11).

——S. 75—Right of appeal—District Judge ordering shareholder who has overdrawn company's amount to pay 6 per cent. interest — Another shareholder, if competent to appeal.

Where in the winding-up proceedings the District Judge allows 6 per cent. per annum interest to the shareholder who has overdrawn the company's money, it is only the Official Liquidator who is competent to appeal. An appeal by another shareholder is not competent. His appeal cannot also be treated as revision, inasmuch as the Official Liquidator has not appealed and it will not be proper to interfere in revision at the request of a shareholer. 70 Mad L W 910 : (1957) 2 Mad L J 506 : 1957 Mad W N 698 : (1958) 28 Comp Cas 168 : A I R 1958 Mad 260 (260, 261) (Prs 1, 2).

——S. 75—Appeal—Insolvent partitioning property—Receiver applying for annulment — Wife and sons objecting and stating that debts were Avyavaharika —Insolvency Court ordering annulment and holding debts binding—District Judge upholding annulment but leaving question about binding nature of debts open for fresh decision — Appeal lies. See Provincial Insolvency Act (1920), S. 4. 1957 Nag L J (Notes) 156.

——Ss. 75, 24 — Creditor's application — Insolvency Court finding questions to be complicated referring parties to Civil Court and keeping petition pending in the meanwhile — First appeal against order not successful — No second appeal lies to High Court. A I R 1938 Lah 490 ; AIR 1938 All 28 and AIR 1935 Bom 80, Ref. 1953 Nag L J 246 : I L R (1953) Nag 608 : A I R 1953 Nag 189 (190) (Pt A) (Pr 4) (DB).

——S. 75—Civil P. C. (1908), S. 109 — Order of High Court passed in revisional jurisdiction — Appeal to Supreme Court cannot lie. See Civil P. C. (1908), S. 109. A I R 1953 Nag 145 (DB).

——S. 75 (4)—Tenability — Order declaring debtor insolvent — Appellate Court upholding decision—Appeal to High Court is not competent.

An appeal against the appellate order of the District Court upholding the order of the Insolvency Court declaring the debtor insolvent is not competent. ('52) 1952 Nag L J (Notes) 121 (DB).

——S. 75 (1), Proviso 2 — Second appeal—Transfers by insolvent annulled as fraudulent — Order under S. 4 though relief sought under S. 53 — Matter for purposes of appeal is under S. 4—Whatever the view of the lower appellate Court, second appeal is competent. A I R 1951 Nag 268 (269) (Pt A) (Pr 3).

——S. 75 — Order under S. 52 — Appeal against—Order not appealable under S. 75 as it is not order made in exercise of insolvency jurisdiction. See Provincial Insolvency Act (1920), S. 52. I L R (1965) 2 Punj 212 : A I R 1966 Punj 479 (DB).

——S. 75 (1), Proviso 2 — Second appeal—Its scope.

A second appeal in an insolvency proceeding lies only on a point of law. In such an appeal, the appellate Court cannot interfere with a finding of fact arrived at by the lower appellate Court after consideration of the evidence on the record even if such a finding be grossly erroneous. 65 Pun L R 184 : I L R (1963) 1 Punj 557 : AIR 1963 Punj 243 (245) (Pt B) (Pr 7) (DB).

——S. 75—Order under S. 33—No second appeal. See Provincial Insolvency Act (1920), S. 33. A I R 1960 Punj 604.

——S. 75 (1), Proviso 2—Second appeal—Decision in first appeal falling under S. 4—Second appeal lies—Letters Patent (Punj.) Cl. 10.

Where an insolvent files an application for restoration of his property by challenging the sale of his property made by the Collector under S. 68. Civil P. C. the Insolvency Judge has ample power to decide the question under S. 4 of the Provincial Insolvency Act for the purpose of doing complete justice between the parties. Any order passed on appeal from the decision of the Insolvency Judge would fall within the second proviso to S. 75 (1) of the Act and therefore a second appeal to the High Court would be competent. A further appeal under cl. 10 of the Letters Patent would also be competent if the case is certified to be a fit one for appeal. 54 Pun L R 121 : AIR 1952 Punj 222 (224) (Pt A) (Pr 14) (DB).

——S. 75 (1)—Decision made in insolvency jurisdiction—"Decision" meaning of.

A second appeal is competent if the order passed by the insolvency Judge is 'a decision come to or an order made in the exercise of insolvency jurisdiction'.

The expression 'decision' occurring in S. 75 (1) means a decision whether it is final or otherwise.

An order was made by the Insolvency Judge in the course of an insolvency application. That order did not merely deal with the jurisdiction of the Insolvency Judge to entertain the application under S. 4. In making that order, the Insolvency Judge had found against A on various other pleas touching the question of restitution of an amount to be made by him.

Held, that the order passed by the Insolvency Judge was not merely an order regulating procedure but decided questions arising on the merits of the application; that order must, therefore, be deemed to have been passed in the exercise of insolvency jurisdiction and thus came within S. 75 (1). AIR 1946 Nag 42, Rel. on; AIR 1942 Mad 305, Dist. 54 Pun L R 154 : ILR (1951) Punj 313 : A I R 1952 Punj 49 (50, 51) (Prs 7, 9).

7. Order appealable with leave of Court.

——S. 75 (3)—Leave of High Court — Admission of appeal in office.

The leave referred to in S. 75 (3) is leave granted by a Judge of the High Court and not by any of its administrative officers. Hence, an admission of appeal as a matter of routine in the office cannot be treated as tantamount to the grant of leave. 63 Mad L W 75: (1950) 1 Mad L J 89 : 1950 Mad W N 100 : AIR 1950 Mad 630 (630) (Pt A) (Pr 2) (DB).

——S. 75 (3)—Oral application for leave.

It is the duty of the counsel before he files an appeal to investigate and make certain whether leave is or is not necessary. Where the appeal has been coming up in the list for considerable time and the error has not been rectified, the Court will not allow an oral application for leave made at the time of hearing. 63 Mad L W 75 : (1950) 1 Mad L J 89 : 1950 Mad W N 100 : AIR 1950 Mad 630 (630) (Pt B) (Pr 4) (DB).

——S. 75—Leave to appeal.

Appeal against order of District Judge unaccompanied by any application for leave admitted by Registrar of High Court—The High Court, if the circumstances justify can grant leave to appeal at the hearing of the appeal itself. AIB 1937 Pat 665; AIR 1942 Cal 241 and ILR 50 Mad 815, Rel on; AIR 1927 Lah 424 (2) Distinguished; AIR 1950 Mad 630, Explained. 1954 B L J R 260 : I L R 33 Pat 185 : AIR 1954 Pat 459 (460) (Pt A) (Pr 2) (DB).

8. Parties.

——S. 75 (2)—Appeal under S. 75 (2) — Receiver becoming divested of property — Receiver is not necessary party to appeal. See Provincial Insolvency Act (1920), S. 37, ILR (1959) 9 Raj 923.

9. Procedure.

——S. 75—Finding of fact — Interference in second appeal—Principles.

Where in arriving at finding of fact lower appellate Court did not consider oral evidence, or did not apply its mind to the question or based the finding partly on admissible and partly on irrelvant and inadmissible evidence, the finding can be interfered with in second appeal, for this would raise a question of law. See Civil P. C. (1908), S. 100 (1) (a). A I R 1958 All 54 (DB).

[Reversed in AIR 1965 SC 920.]

10. Limitation.

——Ss. 75 (4), 68, Proviso and 78 (1)—Delay in presenting petition under S. 68—Application for condoning delay under S. 5, Limitation Act can be entertained—Proviso to S. 68 compared with Ss. 75 (4) and 78 (1) and with S. 48 Civil P. C. See Provincial Insolvency Act (5 of 1920), S. 68, Proviso. AIR 1964 Andh Pra 50 (DB).

——S. 75 (4)—Period of 30 days—Starting point.

A person can become aggrieved only when the act by reason of which the grievance arises comes to his knowledge. Hence in the case of parties to the proceeding the 30 days would be from the date of the order of adjudication because they would have known of its pronouncement but in the case of third parties the starting point would be the date of Gazette notification which would fix him with knowledge of the order passed by the Court. 53 Mad 491, Rel. on. ('52) 65 Mad L W 448 : 1952-1 Mad L J 765 : A I R 1953 Mad 465 (466) (Pt A) (Pr 11).

——S. 75—Limitation Act (1908), S. 5 — Third party aggrieved by order of adjudication — Court should consider whether case had been made out for application of S. 5, Limitation Act. See Limitation Act (1908), S. 5. AIR 1953 Mad 465.

——S. 75—In counting the 30 days, the time taken for obtaining a copy of the order of adjudication must be excluded under S. 12 of the Limitation Act. See Limitation Act (1908), S. 12. AIR 1953 Mad 465.

SECTION 77

●——S. 77—Adjudication by Bombay High Court—Property of insolvent vesting in Official Assignee — Deposit of amounts and other assets of insolvent held by District Court, Bellary — Application made by Official Assignee to District Court, Bellary to transfer deposit and assets to Bombay—This does not meet requirement of S. 77—It is necessary for Bombay High Court to make an order and follow it up by letter of request addressed to the District Court at Bellary. 1956 Andh WR 207: AIR 1957 Andh Pra 649, Approved. Held, on facts that S. 77, did not apply. Official Assignee, High Court, Bombay v. Haradagiri Basavanna Gowd. (1963) 1 S C W R 211: (1964) 1 S C J 322: (1964) 1 Mad

L J (SC) 99:(1964) 1 Andh W R (SC) 99 : (1963) Supp (1) S C R 809: AIR 1963 S C 754 (758) (Pt B) (Pr 14).

——Ss. 77, 36—Successive orders of adjudication by two Courts A and B—Effect of prior order — Proper procedure — Application By Official Assignee of B Court for transfer of assets from A Court to B Court made to A Court—Maintainability — Absence of letter of request from B Court — Effect—It is not just and equitable to all proceedings to go on in both Courts concurrently leading to conflict of jurisdiction—One of the Courts should either annul the adjudication or stay all proceedings—Assets in hands of A Court can only be transferred to B Court and in pursuance of a letter of request under S. 77 made by B Court to A Court — Application for transfer of assets by Official Assignee of B Court made directly to A Court is not sustainable under S. 36 — (Presidency-Towns Insolvency Act (1909), Ss. 22 and 126). AIR 1957 Andh Pra 649 (650, 651) (Pr 3) (DB).

[Reversed on another point in A I R 1963 S C 754.]

——S 77 — Civil P. Code (1908), S. 13 — After integration of State with Indian Union, all Courts in State are Indian Courts—Insolvency Court in Akola adjudicating debtor insolvent — Receiver taking possession of property in Berar and applying to Aurangabad Court for its aid to enable him to take seisin of property in Hyderabad—Aurangabad Court must give aid — (Constitution of India. Art. 261) — (Hyderabad Insolvency Act (8 of 1351 F., S. 80). See Civil P. C (1908), S. 13. AIR 1952 Hyd 80 (FB).

—S. 77 — Hyderabad Insolvency Act (8 of 1351 F), Ss. 80 2 (2) — Expression 'Court or Courts' in S. 80, meaning of.

Quaere.—Per Qamar Hasan J: Whether the expression 'the Court or Courts' occuring in S. 80, Hyderabad Act bears the meaning assigned to it by sub-s. (2) of S. 2 of the Act or there is any repugnancy in the subject or context to give to that expression an inclusive or extended meaning. Ramdayal v. Shankarlal. I L R (1952) Hyd 196: AIR 1952 Hyd 80 (91) (Pt G) (Pr 37) (FB).

——S. 77 — Debtor adjudicated insolvent on 16-12-1947 by Karachi Court in Pakistan—Official Receiver at Karachi making application to Delhi Court for taking possession of insolvent's property within its jurisdiction—Court at Delhi has no power to grant it after 26-1-50 from which date Pakistan became a foreign territory — British Bankruptcy Act, 1914, S. 122. ('50) 52 P L R 468 : AIR 1951 Punj 356 (356) (Pt B) (Pr 4).

SECTION 78

——Ss. 78 (2), 28 (2), 37 — Execution petition dismissed — Adjudication of one of judgment-debtors—Subsequent unconditional annulment of adjudication —No leave of Insolvency Court is required for filing subsequent execution petition — Joint decree against several judgment debtors — Execution against one — Effect of saving limitation against all — Limitation Act (1908), Art. 182 (5). See Provincial Insolvency Act (5 of 1920), S. 28 (2). (1965) 1 Andh L T 73: AIR 1966 Andh-Pra 25.

——S. 78 (2) — Section does not permit of exclusion of period between date of order of adjudication and date of order of annulment See Provincial Insolvency Act (1920), S. 28 (2). AIR 1965 Andh Pra 260 (DB).

—Ss. 78 (1), 68, Proviso, 75 (4) — Delay in presenting petition under S. 68—Application for condoning delay under S. 5, Limitation Act can be entertained—Proviso to S. 68 compared with Ss. 75 (4) and 78 (1) and with S. 48, Civil P. C. See Provincial Insolvency Act (5 of 1920), S. 68, Proviso. AIR 1964 Andh Pra 50 (DB).

——S. 78 (1)—Limitation Act (1908), S. 5 — Petition for setting aside auction sale held by Official Receiver under Provincial Insolvency Act filed beyond 21 days — Application for condoning delay under S. 5, Limitation Act—Court without even ordering notice to the Official Receiver or the auction purchaser, condoning delay and entertaining application for setting aside sale—Held that there, was violation of the principle of natural justice contained in maxim audi alteram partem. See Limitation Act (1908), S. 5. AIR 1964 Andh Pra 50 (DB).

——S. 78 (2) — Benefit under section — Available to creditor only whose debt is duly proved. A creditor whose debt is not proved before the insolvency Court cannot take advantage of the provisions of S. 78 (2). The mere fact that one of judgment-debtors had paid a part of his share in the decretal amount would not establish that the debt of the creditor in respect of the other judgment-debtors has been duly proved. (1960) 1 Andh W R 46, Rel. on. (1964) 2 Andh L T 204.

——Ss. 78 (2) and 49—Execution petition relating to debt provable under Act—Decree-holder not proving the debt — Sub-s. (2) of S. 78 cannot apply and he cannot claim the benefit under the provision in regard to his second execution application. (1962) 2 Andh L T 120 : (1962) 2 Andh W R 266 : AIR 1963 Andh Pra 228 (230) (Pt A) (Pr 11) (DB).

——S. 78 (2) — Limitation Act (9 of 1908), Art. 182 (5)—Execution petition filed within three years from date of annulment—Exclusion of period of insolvency —Starting point of — Not date of insolvency petition but date of adjudication — Steps-in aid taken before Insolvency Court—Relevancy.

The period that can be excluded under S. 78 (2) of the Insolvency Act is only the period from the date of the order of adjudication to the date of the order of annulment. The section can be invoked only if the suit or the execution petition is not barred by limitation on the date of the order of adjudication.

On the question whether the filing of an insolvency petition by a creditor should be deemed to be a step-in-aid of execution of the decree:

Held, the phrase "made in accordance with law to the proper Court" in Art. 182 (5) of the Limitation Act is to be read also along with the concluding words "to take some step-in-aid of execution". The Insolvency Court is not the proper Court for execution and therefore any so-called steps-in-aid taken in that Court cannot extend the period (1963) 2 Andh W R 249.

——S. 78 (2)—Applicability — Period to be excluded is from the date of adjudication order to its annulment and not from filing of insolvency application.

Before S. 78 (2) of the Provincial Insolvency Act can be invoked, the following conditions must be satisfied: —(1) An order of adjudication must have been passed and annulled; (2) the period of limitation can be excluded in respect of suits or applications for execution of the decree, which might have been brought or made but for the making of an order of adjudication; (3) the period to be excluded is from the date of the order of adjudication to the date of the order of annulment; (4) even if the conditions mentioned in S. 78 (2) are satisfied, it shall not apply to a suit or application in respect of a debt which is provable but which has not been proved under this Act.

The period that could be excluded under S. 78 (2) is not from the date of filing of insolvency petition but only from the date of adjudication order to its annulment. AIR 1954 Bom 436. Foll.; AIR 1939 Mad 19, Rel. on. (1963) 2 Andh W R 249.

——S. 78 (2), Proviso — Applicability—'Debts provable — Meaning of—Affidavit in support of application for permission under S. 28 (2)—If proof of debt

—Benefit of S. 78 (2) — If available — Ss. 33, 34, 49; 62 and 79.

The expression 'debts provable' in the Act means the debts whose proof is offered with a view to entitle the creditors to be included in the Schedule with a view to their participating in the assets of the insolvent and not the proof for any other purpose. The use of the same expression in S. 28 (2) and the proviso to S. 78 (2) should not carry a different meaning. The definition of proved debts under R. 3 of the Rules framed by the Madras High Court under S. 79 (1) is not ultra vires the Act. The word 'proved' in the proviso to S. 78 (2) is used in the technical sense of proof or debt for the purposes of claiming distribution in the assets of the insolvent before the Insolvency Court, and would include admission in the Court and also affidavit of debt under S. 49. S 78 (2) can only be taken advantage of where creditor's purpose for furnishing proof of his debts is that of claiming a share in the dividend. An affidavit for purposes of permission under S. 28 (2) would not amount to a debt being proved within the meaning of S. 78 (2). AIR 1947 Mad 331 : AIR 1940 Mad 716, Rel. on; AIR 1934 Mad 465. (1960) 1 Andh W R 46: I L R (1959) Andh Pra 1379 : AIR 1960 Andh Pra 257 (258, 259) (Pt A) (Prs 3, 4, 5) (DB).

——S. 78 (2)—'Provable'—Mortgage suit — Mortgage if entitled to deduction of period under S. 78 (2) — (Civil P. C. (1908), O. 34, R. 6).

Secured creditors are not affected by proceedings in insolvency and unless they realise the security or surrender or value it under S. 47 of the Provincial Insolvency Act, it cannot be said that their debts are provable in insolvency. Thus if the mortgagee has no debt provable in insolvency, then the ban on the institution of suits or proceedings for the realisation of debts imposed by S. 28 (2) does not operate and the mortgagee cannot avail himself of the provisions of S. 78 (2) of the Act and claim to deduct the time between the date of the adjudication and the date of the order of annulment in computing the period of limitation for a suit to enforce the mortgage

The application by the mortgagee under O 34, R. 6, Civil P. C., is an application in the mortgage suit itself and the personal remedy would be available only if the suit had been filed within six years of the date due for the payment of the mortgage money, subject to any acknowledgment or part payment extending the period of limitation. Hence the contention that though in so far as the relief for the sale of the hypotheca was concerned, the mortgagee was not entitled to the benefit of S 78 (2) of the Provincial Insolvency Act he was entitled to invoke the aid of that provision in respect of his claiming a personal decree against the mortgagor cannot be accepted. A I R 1949 Mad 273 : (1948) 2 M L J 256, Dist. 1955 Andh W R 626 : 1955 Andh L T (Civil) 593 : AIR 1957 Andh Pra 437 (439, 440) (Pt C) (Prs 7, 8, 9, 10).

——S. 78 (2) — "The date of the order of adjudication."

In considering the question of exclusion of time it would be necessary to look at the date of the order of adjudication and count the period from that ascertained date to the subsequent date on which the order of annulment is passed. 56 Bom LR 414 : I L R (1954) Bom 840 : A I R 1954 Bom 436 (439) (Pt A) (Pr 8) (DB).

——Ss. 78 (2), 74 — Summary proceedings — Decree holder not proving his debt — Execution not barred. See Provincial Insolvency Act (5 of 1920), S. 74 AIR 1956 Mad 580.

——S. 78—Limitation Act (1908), S. 5 — Third party aggrieved by order of adjudication — Court should consider whether case had been made out for application of S. 5. See Limitation Act (1908), S. 5. AIR 1953 Mad 465.

——S. 78 — Limitation Act (1908), S. 12 — Appeal under S. 75 of Provincial Insolvency Act — S. 12, Limitation Act applies — See Limitation Act (1908), S. 12. AIR 1953 Mad 465.

——S. 78 (2), Proviso—Proof of debt.

The debtor's statement in the application for being adjudged insolvent that the amount is due to the creditor under a decree by itself does not constitute proof of the debt and the creditor is not entitled to claim the benefit of the section on the basis of such statement. In the absence of a copy of the decree it cannot be assumed from the bare reference to the decree in the debtor's petition that there is subsisting decree or that the amount said to be due is correct. Case Law discussed. ('51) 55 Mys HCR 152 (DB).

——Ss. 78 (2), 37—Unconditional order of adjudication—Powers of Court.

Properties automatically revert to insolvent—Court however is not functus officio — It can subsequently pass orders to make properties formerly vested in Court available to distributors amongst creditors upon their application — S. 78 (2) does not apply to exercise of such powers by the Court. See Provincial Insolvency Act (1920), S. 37. AIR 1950 Orissa 233 (DB).

——S. 78 (2), Proviso—Applicability.

For the purpose of claiming the exclusion of time under S. 78 (2) there must be proof of the debt in the insolvency proceedings after the order of adjudication and before the order of annulment. The admission by the judgment-debtor of the debt in his application to declare him an insolvent does not amount to proof of the debt within the meaning of the section.

Thus where the decree-holder did not give the proof of his claim, he could not claim exclusion of time under this section in order to take out the case out of the bar under S. 48 Civil P. C. Krishna Panicker v. Kunchu, I L R (1953) Trav-Co 858: 1953 Ker L T 670 : A I R 1954 Trav-Co 1(4) (Pt C) (Prs 14, 15) (FB).

SECTION 79

——S. 79—Insolvency Rules, R. 28 — Scope — Whether partnership firm can be adjudicated insolvent.

A partnership firm can be adjudicated an insolvent and on the ground that individual partners have committed acts of insolvency they can be adjudicated insolvents and on the ground of joint act of insolvency of the partnership in relationship in relation to the partnership property the firm also can be adjudicated insolvent. (1963) 2 An W R 491: AIR 1964 Andh Pra 498 (499, 500) (Prs 3, 4, 5).

——Ss. 79, 78 (2), 28 (2), 33, 34, 49, 62 — 'Debts provable,' meaning of — Affidavit in support of application for permission under S. 28 (2) does not amount to proof of debt—Benefit of S. 78 (2) cannot be taken —(Words and Phrases). See Provincial Insolvency Act (5 of 1920), S. 78 (2). AIR 1960 Andh Pra 257 (DB).

——S. 79 — Scope — R. 111-A, Cls. 9 (c) and 10 of Bombay High Court Rules — Scope and validity of — If ultra vires.

Rules do not extend time prescribed by S. 9 (1) (c) Rules are enacted by the Court under its rule making power and contain a provision for ascertaining the point of time from which the fulfilment of the condition prescribed in the section is calculated and in this view no provision of the Act is violated by framing cls. 9 (c) and 10 of R. 111-A. Both clauses are intra vires. 59 Bom LR 96; ILR (1957) Bom 295; AIR 1958 Bom 164 (166, 167) (Prs 5, 6) (DB).

——S. 79 (2) (c)—Applicability—Joint Hindu family firm—If can be adjudicated.

Acts of insolvency are acts which when committed create personal liablility. The reason why a joint Hindu family as such cannot be adjudged insolvent is that although the manager of a joint Hindu family can act on behalf of the family but the liability which he can create is restricted to the extent of joint family property. He cannot impose any personal liability on any other member of the family. In this view of the matter any act of insolvency committed by the Manager is to be considered as an act of insolvency committed by him alone and not by other members of the family. Nor can a joint Hindu family firm be adjudged insolvent. 1958 M P C 388 : 1958 Jab L J 776 : 1958 MPLJ 493 : AIR 1958 Madh Pra 233 (233) (Prs 3, 4) (DB).

——Ss. 79, 19, 27 — Madras Civil Rules of Practice, R. 21, cl. (3) — Adjudication without notice of petition on transferee of property—Application by transferee to set aside adjudication—Order set aside. 1950 Mad W N 82: (1950) 1 Mad L J 113 : AIR 1950 Mad 386 (386).(Pr 2).

SECTION 80

——Ss. 80, 33, 49—Proceedings under S. 33 — Presumption under S. 118 (a), Negotiable Instruments Act does not arise — Nature of proceedings under S. 33 — Jurisdiction and duties of Insolvency Court stated — Negotiable Instruments Act (1881), S. 118. AIR 1958 All 54, Reversed. See Provincial Insolvency Act (5 of 1920), S. 33. AIR 1965 SC 920.

PROVINCIAL INSOLVENCY (AMENDMENT) ACT (25 of 1948)

PREAMBLE

——Preamble—Validity — Government of India Act (1935), Sch. VII, List, Item 12, List III, Item 21.

The "pith and substance" of the Amending Act is clearly within the scope of item 12 of List 3. "Bankruptcy and insolvency". The true nature and character of the legislation, the scope and the ambit of it obviously relate to legislation in regard to bankruptcy and insolvency. The fact that it incidentally infringes on some other items such as item 21 in the Provincial List does not affect its validity. Further it will be seen that whenever the Legislature intended to exclude agricultural lands it said so in definite terms. The non-exclusion of agricultural lands from Item 12 is an indication that the iegislation used the words "bankruptcy and insolvency' in a comprehensive sense so as to empower it to enact laws in regard to bankruptcy and insolvency in respect of agricultural lands also. Hence the Amending Act of 1948 is intra vires of the Dominion Legislature. Case law discussed. 64 Mad L W 906 : 1951-2 Mad L J 438 : A I R 1952 Mad 27 (30, 31) (Pt B) (Prs 7, 8) (DB).

PROVINCIAL SMALL CAUSE COURT

See (1) Civil P. C. (1908), S. 8, O. 50, R. 1 and
(2) Provincial Small Cause Courts Act (1887).

PROVINCIAL SMALL CAUSE COURTS ACT (9 of 1887)

SECTION 3

——S. 3 (c) — Section 25 of the Act affords grounds for interference within an ambit wider than that provided by Para. 35 of Himachal Pradesh (Courts) Order. Hence S. 25 of the Act cannot be said to affect the special law contained in Para. 35 of the order within intendment of S. 3 (c) of the Act. AIR 1953 Him Pra 68 (69) (Pt A) (Pr 4).

——S. 3 (c) — Scope — Madras Civil Courts Act — Power of local Government to raise pecuniary jurisdiction above Rs. 1,000.

In view of the rule of construction contained in S. 3 (c), what is contained in the Act does not affect the power that is given to the local Government under the Madras Civil Courts Act to raise the jurisdiction. (1957) 1 Mad L J 186 : AIR 1957 Mad 673 (674) (Pt B) (Pr 3).

SECTION 5

——S. 5 — Madras Civil and Village Courts (Amendment) Act (1951), S. 1 — Constitutionality of Act — (Madras Civil Courts Act (3 of 1873), S. 28) — (Constitution of India, Art. 254 (2), Sch. VII, List II, Entry 3) — Section 28 of Madras Civil Courts Act does not owe its origin to S. 5 of the Small Cause Courts Act. The former section only envisages ordinary Civil Courts invested with Small Cause jurisdiction by virtue of the powers given by other enactments. The Small Cause Courts contemplated by S. 5 are distinct and different from those envisaged in S. 28 of the Madras Civil Courts Act. (1959) 1 Andh W R 161 : ILR (1958) Andh. Pra 740 : AIR 1959 Andh Pra 3 (5) (Pt A) (Prs 7, 10) (DB).

SECTION 15

SYNOPSIS

(Provincial Small Cause Courts Act (1887), S. 15.)

1. Nature of suit.
2. Jurisdiction.
   See also Provincial Small Cause Courts Act (1887), S. 16.
3. Suits of small cause nature.
4. Suits excepted from small cause jurisdiction.

1. Nature of suit.

——S. 15 — Money suit cognizable by Small Cause Court — Second Appeal—(Civil P. C. (1908), S. 102).

Held, that regard being had to the nature of the dispute in the instant case, the defence raised and the change of law effected by the operation of the West Bengal Non-agricultural Tenancy Act, 1949, the Money suit was cognizable by a Small Cause Court and was not excepted therefrom on account of the provisions of Art. 35 (ii) of the Second Schedule of the Provincial Small Cause Courts Act. The fact that Money Suit was tried by the Munsif in his ordinary jurisdiction did not take away the prohibition as to appeal contained in the Provincial Small Cause Courts Act. ILR (1910) 33 Mad 323 (FB), Dissented from. (1960) 64 Cal W N 172.

——S. 15 — Jurisdiction has to be determined on allegations in plaint and not on defence. Even though no objection is raised, the Court is to see whether it has got inherent jurisdiction. Where there is a lack of jurisdiction, there cannot be waiver of it nor can it be confined by consent. (1965) 7 Orissa J D 192 : 32 Cut L T 94 : ILR (1965) Cut 597 : AIR 1966 Orissa 84 (85) (Pr 5).

——Ss. 15 and 27 — Nature of suit is determined by relief claimed — Suit for recovery of Rs. 20 — Suit is small cause suit — No second appeal lies — (Civil P. C. (1908), S. 102). AIR 1955 NUC (Punj) 5722.

——S. 15 and Sch. II, Art. 31 — Suit for recovery of specific sum on basis of Karta for price of goods supplied — Defendants denying any transaction and pleading bar of suit under S. 11 and O. 2, R. 2, Civil P. C. — Return of plaint on ground that suit was one for accounts held premature. 1963 Raj L W 208 : ILR (1963) 13 Raj 441.

——S. 15 — Nature of suit is primarily determined by relief claimed in suit as originally instituted—Suit for recovery of arrears of rent of shop with costs and interest is not covered by Art. 7. AIR 1955 NUC (Raj) 306.

2. Jurisdiction.

See also Provincial Small Cause Courts Act (1887), S. 16.

——S. 15 — Scope — Madras Civil and Village Courts (Amendment) Act (16 of 1951) — Effect of — Pecuniary jurisdiction prescribed by S. 15 is subject to provision of any enactment — Section does not stand in the way of local or special enactments taking effect. The section does not affect S. 28 of the Madras Civil Courts Act and the right of legislature to amend it cannot be denied. There being no repugnancy between the material sections of Provincial Small Cause Courts Act and S. 28 of the Madras Civil Courts Act, there is nothing unconstitutional in the amendment of S. 28 — Even if there is any repugnancy, Art. 254 of the Constitution does not stand in the way of its operation. See Madras Civil and Village Courts (Amendment) Act (16 of 1951), S. 1. **AIR 1959 Andh-Pra 3 (DB).**

——S. 15 — Suit filed as original suit — Increase of Small Causes jurisdiction of Court — Effect — If changes character of suit — Transfer of suit to Small Cause Court — Order for attachment before judgment — Validity. See Civil P. C. (1908), S. 7. **1958 Andh L T 557.**

——Ss. 15, 25, Sch. II, Art. 15 — Question of jurisdiction — Issue as to — Duty of Court — Nature of suit — Determining factor — (Civil P. C (1908), S. 115, O. 14, R. 2).

After giving notice to the vendor that the house which was the subject-matter of the contract was likely to be acquired by the Municipality and having received no reply to it the vendee filed a suit in the Court of Small Causes to recover back the earnest money paid by him. The vendor in his written statement stated that in form and in substance it was a suit for specific performance of the contract and for its rescission and so the Court of Small Causes had no jurisdiction to entertain the suit. The Judge however passed the decree without framing the issue as to jurisdiction. On revision:

Held (i) that the issue of jurisdiction did obviously arise on the written statement and it was the duty of the Judge to have raised that issue; (ii) that the question of jurisdiction must be decided solely by reference to the plaint. The plaint described the circumstances under which the contract became void, or, in the alternative voidable. The plaintiff did not come to Court with a clear and unambiguous allegation that the contract became void. Alternatively he alleged that the contract became voidable. Thus he wanted the Court to decide that the contract had become void and on that basis he wanted a decree for the refund of the earnest money in terms of the contract itself. Such a claim would inevitably attract the provisions of Art. 15. Being a suit for specific performance and for rescission of the contract it was outside the jurisdiction of the Court of Small Causes; (iii) that the decree was therefore liable to be set aside. **AIR 1956 Bom 254 (255) (Pr 3).**

——S. 15 — Suit for rent — Court in deciding whether there was contractural relationship of landlord and tenant can decide question of title.

A Court of Small Causes is entitled to decide even questions of title relating to immovable property provided the suit in form does not ask for a relief relating to title to immovable property, but for payment of a sum of money. Hence in a suit for rent, the Court in deciding whether there was contractual relationship of landlord and tenant between the parties, can embark upon an enquiry as to title. AIR 1939 Bom 353, Disting. I L R (1913) 37 Bom 675 (FB), Rel. on. **AIR 1956 Bom 236 (237) (Pt B) (Pr 6).**

——S. 15 (1) — Small Cause Court deciding suit although allegation in plaint clearly excluded it from its jurisdiction — Plaintiff not estopped from challenging Court's jurisdiction subsequently when decision goes against him — Doctrine of blowing hot and cold — Not applicable. See Evidence Act (1872), S. 115. **AIR 1965 Cal 59.**

——S. 15 (1) — Small Cause Court trying suit excluded from its jurisdiction and delivering judgment — Proper course for High Court in revision under S. 25, Provincial Small Cause Courts Act, is to dismiss suit and not to return plaint to proper Court. See Civil P. C. (1908), O. 7, R. 10. **AIR 1965 Cal 59.**

——S. 15 (3) — Claim tried in suit on regular side — No objection to jurisdiction on regular side raised — Judgment appealable — Revision against judgment not competent. **1964 M P L J (Notes) 77.**

——Ss. 15 (3), 3 (c) — Power of local Government to raise pecuniary jurisdiction above Rs. 1,000—S. 3 (c) —(Madras Civil Court Act (III of 1873), S. 28).

The Provincial Small Cause Courts Act is an Act of 1887, whereas the Madras Civil Court Act is one of 1873. S. 15 (3) of the Provincial Small Cause Court Act does not affect, in view of the rule of construction contained in S. 3 (c), the power that is given to the local Government under the Madras Act to raise the jurisdiction. **1957 Mad W N 171 : 70 Mad L W 288: (1957) 1 Mad L J 186: AIR 1957 Mad 673 (674) (Pt B) (Pr 3).**

——Ss. 15, 16 and 27 — Small Cause suit tried as ordinary suit by Court having small cause jurisdiction—Nature of decree—Appealability.

Where suit is clearly of a civil nature of which the value does not exceed Rs. 500 it is cognizable by a Court of Small Causes and by no other Court. The jurisdiction to try it as a regular civil suit has been expressly barred by the provisions of Ss. 15 and 16, Small Cause Courts Act, and it is not within the competence either of the parties or the High Court to confer jurisdiction on a tribunal on which jurisdiction has not been conferred by the Legislature.

Hence where a judicial officer invested with Small Cause Court jurisdiction tries a suit filed as a regular civil suit, which he might have tried under the summary procedure, in the ordinary manner, the character of the suit is not altered. The decision arrived at in the suit should be deemed to be a decision given by a Court of Small Causes and should be treated as such. The decree passed is not appealable even though the plaintiff may have raised no objection to jurisdiction in the lower appellate Court and may have been agreed to amend the plaint. I L R 40 Cal 537 and I L R 33 Mad 323 : 20 Mad L J 718 and AIR 1928 Pat 451 (1) and 36 Punj Re. 1902 (FB), Foll. 58 Punj L R 307 : **AIR 1956 Punj 233 (233, 234) (Prs 6, 7, 8).**

——S. 15 — Suit for arrears of rent filed as a small cause suit — Tenant praying for fixation of fair rent on ground that rent was excessive — Jurisdiction of Civil Judge to try it as small cause suit not ousted. See Houses and Rents — Saurashtra Rent Control Act (22 of 1951), S. 27 (2). **(1956) 9 Sau L R 24.**

—S. 15 — Jurisdiction—[C. P. Code (1908), O. 26, R. 15].

Suit by Commissioners for recovery of remuneration ordered to be paid to them in partition suit — Small Cause Court is bound by the decision given in the partition and has no jurisdiction to go into the question of the quantum of remuneration and hold that the amount of remuneration was exorbitant in relation to the nature of work done by the Commissioners: Chitale & Rao's Commentary on Civil Procedure Code, (1951) Edn. p. 2844, Relied on. **(1953) 6 Sau L R 255 : AIR 1954 Sau 49 (49) (Pt B) (Pr 2).**

3. Suits of small cause nature.

——S. 15 and Sch. II, Art 41—Lease of certain lands —Lessees sub-dividing the lands and holding distinct shares — No joint ownership — Rent due to lessor paid by plaintiff alone — His suit for contribution is cognizable by the Small Cause Courts.

The plaintiff and defendants were lessees of certain lands under a single patta. They sub-divided the lands into distinct shares and the sharers were liable to pay rent to the lessor in proportion to their shares. The plaintiff paid the entire rent due to the lessor and filed a suit for contribution in a Small Cause Court.

Held, that the suit was cognizable by the Small Cause Court as the plaintiff and defendants were not joint owners of the lease-hold interest at any time, much less on the date of the suit and hence Art. 41, Sch. II of the Act did not apply to the case.

As a rule suits for contribution are cognizable by the Small Cause Courts, except where a case falls under Art. 41, Sch. II of the Act which applies only to claims for contribution by sharers in a joint property. Where the respective shares are in the exclusive enjoyment of the sharers the mere fact that the sharers are jointly and severally liable by reason of the patta of the lands being single, would not exclude the jurisdiction of the Small Cause Court. If in such a case, the rent is paid by one of the sharers he is entitled to sue the other sharers in the Small Cause Court for contribution. I L R 12 Mad 349; 14 Mad L J 480; AIR 1935 Mad 88; 1 Mad L J 175; 65 Mad L W 914; I L R 28 All 292 and AIR 1941 Pat 49, Rel. on. **(1964) 1 Andh W R 66 : (1964) 1 An L T 272.**

——S. 15 and Sch. II, Cl. 15 — Compromise decree declaring rights of parties—Plaintiff getting right to recover amount of money from defendant—Suit to recover such amount—If Small Causes.

Where a compromise decree is only a declaratory decree declaring the rights of the parties to the suit not only to the property but also to the income thereof, and if, any income is received by the defendant from the property then the plaintiff cannot seek to recover that amount by executing the decree but must necessarily file a suit for the purpose of recovering that amount. Such a suit cannot be called a suit for specific performance of any agreement. And if the claim in such suit is less than Rs. 500 in value, the suit is exclusively triable by the Court of Small Causes. Such a suit being thus exclusively cognizable by the Small Causes Court cannot be regarded as having changed its nature by reason of its having been registered and tried as a regular suit, even though it it is so registered and tried with the consent of the parties to the suit. 11 Bom L R 817, Rel. on. And against the decree passed in such a suit if an appeal is filed in the lower appellate Court the appeal is incompetent 63 Bom L R 58 : 1961 Nag L J 79 : ILR (1961) Bom 214 : AIR 1961 Bom 221 (222, 223) (Pt A) (Prs 3, 4).

——S. 15, Civil Procedure Code, O. 2, R. 2 — and Limitation Act, Arts. 57 and 120 — Suit for return of pledged articles — Jurisdiction — Bar of suit — Limitation.

S purchased cloth from R's shop in 1950 and pledged certain articles for the price. In 1951 R sued S on a pro-note and for the price of cloth purchased. S pleaded pledge of the articles but R denied the pledge. The Court decreed R's suit though it held that the articles were kept by S as 'Amanat'. On 25-3-57, S paid up the decretal amount and then sued R for return of the pledged articles.

Held, that the suit was triable by the Court of Small causes; that the suit was not barred by O. 2, R. 2. Civil Procedure Code and that the limitation started on 25th March 1957 and not in 1951. 1960 Nag L J (Notes) 24 (Bom).

——S. 15 — Suit for mesne profits — Jurisdiction of Small Cause Court.

The plaintiff and the defendants were the shebaits of a certain deity. The suit lands formed a tenancy under the deity landlord and the shebaits used to collect their share of the rent separately. The defendants shebaits sued the tenants for their share of the rent and in execution of the decree purchased the tenancy as shebaits, that is to say, on behalf of the deity. The plaintiffs claimed their proportionate share of the produce of the suit lands.

Held, that the suit was in essence a suit for mesne profits and was maintainable in the Small Cause Court 23 Cal 884, Ref. to. **(1951) 55 Cal W N 51.**

——S. 15 and Sch II, Art. 13 — Suit for recovery of municipal taxes — Jurisdiction of Small Cause Court —Municipalities—Bengal Municipal Act (15 of 1932) S. 167.

A suit by a Municipality to recover arrears of taxes which are due to the Municipality by force of a statute and not by reason of any interest in immovable property is not a suit coming within Sch. II Art. 13 when the plaintiff merely claims a money decree without claiming any charge given to it under S. 167, Bengal Municipal Act, and the Small Cause Court will have jurisdiction to entertain and decide the suit by virtue of S. 15.

Though by virtue of S. 167, Bengal Municipal Act, the Municipality has charge on the holding in respect of which the taxes are claimed the Municipality is entitled to recover them as a simple money-decree and is not bound to enforce its rights as a charge holder. **54 Cal W N 416 : A I R 1950 Cal 415 (416, 417) (Pt A) (Prs 8 to 10) (DB).**

——S. 15 — Jurisdiction — Suit under S 65, Contract Act — Small Cause Court has jurisdiction to entertain it. See Hyderabad Small Cause Courts Act, S. 6. AIR 1955 Hyd 69 (FB).

——S. 15—Jurisdiction—Obstruction or diversion of water course—Suit for damages from defendant for injury caused to plaintiff's well on account of percolation of water under the foundation of the well—Damages alleged by plaintiff to be the result of defendant's negligent construction of drains — No question of obstruction or diversion of a water course arises in the suit and hence the suit is not one which is not cognizable by Small Cause Court. See Madhya Bharat Small Cause Courts Act (Smvt. 2006), Art. 35 (i). AIR 1955 N U C (Madh-B) 1311.

——S. 15 — Jurisdiction — Suit for specific performance—Plaintiff not claiming performance of a specific act or delivery of particular articles or of particular coins but is merely claiming money payable to him under a contract—Suit can in no sense be headed as a suit for specific performance of a contract. See Madhya Bharat Small Causes Courts Act (Smvt. 2006). AIR 1955 N U C (Madh B) 1311.

——S. 15—Jurisdiction—Small Cause Court—Suit of small cause nature — Madhya Bharat Notification No. 1567 (3rd March 1948) — Notification does not bar jurisdiction of Court of Small Causes in cases within its pecuniary jurisdiction—Civil P. C. (1908), Ss. 6 and 15.

The jurisdiction of the Court depends upon the nature of the suit as originally brought and not upon the character which it ultimately assumes. What the defence of the defendant in his written statement will be is irrelevant consideration in the determination of this question.

Madhya Bharat Notification No. 1567 (3rd March 1948) does not bar the jurisdiction of the Court of

Small Causes in cases which are within its pecuniary jurisdiction.

Hence, a simple suit for damages for less than Rs. 500 against a railway company for shortage of goods so far as the city of Indore is concerned, is cognizable by the Small Cause Court Indore. A I R 1950 Madh B 14 (14) (Prs 6, 7).

—S. 15 and Sch. II, Art. 31 — Civil P. C. (1908), S 2(12) and O. 20, R. 12—Suit for liquidated amount of mesne profits—Suit is not suit for accounts and is not excluded from cognizance by Court of Small Causes—Suit for accounts—Test.

In Art. 31 to Sch. II of the Provincial Small Cause Courts Act the words used are 'a suit for profits on immovable property' and not 'a suit for mesne profits'; nor is the full definition of mesne profits in S. 2 (12) of Civil P. C inserted. The exclusion is not of every suit for mesne profits per se but of a suit 'for account for the profits on immovable property belonging to the plaintiff which have been wrongfully received by the defendant.' If one clearly bears in mind the basic concept of mesne profits on the one hand and an account suit on the other, it will become clear that a suit for mesne profits as such is not excluded; if any suit or as for that matter a large proportion of suits for mesne profits have been excluded it is on the ground that they involve the taking of accounts.

The test to determine whether a suit is for accounts is not whether in course of the trial the Court is going to examine accounts in evidence but whether the plaintiff's own claim is indeterminate and implies that further proceedings have to be gone through before the ascertainment of what is payable. If that is the position the Small Cause Court has no competency to start independent proceedings for the ascertainment of accounts and it cannot exercise jurisdiction over account suits for that claim. It however the plaintiff is able to claim a liquidated amount without invoking any proceedings in account it is difficult to see how the jurisdiction of the Small Cause Court is excluded. AIR 1933 Nag 87 and A I R 1936 Nag 42, Rel. on. 1965 Jab L J 1012 : A I R 1966 Madh Pra 186 (187) (Pt A) (Prs 4, 5).

—S. 15 and Sch. II, Art. 8 — Suit for damages for use and occupation relating to house within municipal limits —Small cause nature. AIR 1928 Nag 118 and A I R 1933 Nag 382, Rel. on. 1961 Jab L J 90 : 1961 M P L J 20.

—S. 15, Sch. II, Arts. 7 and 31 — Applicability — Suit for damages for breach of contract.

The defendant took a lease of pasture lands from the Government subject to certain conditions. The defendant cultivated the land in breach of the condition imposed and penalty was imposed on him by the Collector according to the terms of engagement. On failure of the defendant to pay the same a suit for its recovery was brought on the small cause side.

Held, that the suit was one for damages for breach of contract pure and simple and was cognizable by the Small Cause Court. Neither Art. 7 nor 31 of Sch. II was applicable. (1951) 1 Mad L J 164 : 64 Mad L W 261 : A I R 1951 Mad 710 (710) (Prs 4, 6).

—S. 15 and Sch. II, Arts. 7, 8 — Case involving question of realisation of rent of immovable property —Small Cause Court has no jurisdiction.

In view of S. 15 read with Arts. 7 and 8 of Sch. II of the Provincial Small Cause Courts Act, the Small Cause Court has no jurisdiction to try a case which involves the question of the realisation of rent of the immovable property. The decree if passed amounts to nullity and is without jurisdiction. A I R 1965 Manipur 52 (53) (Pt B) (Pr 6).

—S. 15, Sch. II, Art. 35 (ii)—Offences against property — Averments showing defendant's action to be illegal but not penal — Jurisdiction of Court not barred.

Where upon the facts stated in the plaint the case against the defendant is that his act was wrongful or illegal but not necessarily penal, the jurisdiction of the Small Cause Court to entertain a suit is not barred. 1958 Mys L J 836, Rel. on.

Where it was alleged in the plaint that the defendant had wrongfully removed certain crop belonging to plaintiff and did not pay its price inspite of notice but it was not asserted by plaintiff that the defendant had taken the crops with any dishonest intention and the defendant's statement showed that he bona fide believed the crop to be his:

Held, that the action could not be considered as theft and the Small Cause Court had jurisdiction to entertain the suit. 1963 Mys L J 325.

—S. 15, Sch. II, Arts 4; 11 and 35 (ii) — Applicability — Suit by landlord against tenant for damages for unauthorisedly cutting some trees on lease-hold.

A suit filed by the respondent against the petitioners who were her tenants for damages resulting from their unauthorisedly cutting some trees standing on the leasehold, is a small cause suit. Articles 4 and 11 of Sch. II are clearly inapplicable. Nor does the suit come under Art. 35 (ii). In order to constitute an offence of theft, mischief or misappropriation, criminal intention is a necessary ingredient. A wrongful or illegal act is not necessarily motivated by criminal intention. 36 Mys L J 836 : ILR (1958) Mys 826 : A I R 1959 Mys 162 (163, 164) (Prs 7, 8, 9).

—Ss. 15 and 25—Suit for fruit of trees or damages —Question of title incidental.

Where the plaintiff has a prima facie right of recovering the value of half the fruit of trees, a suit for half the fruit or for damages in lieu thereof, is not a suit which is barred from the cognizance of a Small Cause Court, even though the defendant raises the question of title by denying the plaintiff's title. In such a case the question of title is only incidental and when such is the case it is in the discretion of the Court of Small Causes whether to try the suit itself or to return the plaint for presentation to the proper Court. It cannot be said that in exercising its discretion to try the suit itself, the Court commits any error. 1953 Nag L J 529 : A I R 1954 Nag 128 (128) (Prs 3, 4).

—S. 15 and Sch. II, Art. 8—Suit to recover grazing fee—Jurisdiction of Small Cause Court.

Where the same land is used by a large number of persons for grazing their cattle and the only charge made is a fee per head of cattle, there cannot be said to be a tenancy nor a lease of the land. The charge made must be treated as a bare fee and would not strictly fall within the conception of 'rent'. The license to graze cattle would not in these circumstances amount to a lease since no right to the land is created, and the persons grazing their cattle are not tenants. A suit for recovery of grazing fee is, therefore, not a suit for rent which is barred under Art. 8 of the Provincial Small Cause Courts Act. Such a suit is within the competence of the Court of Small Causes. 1951 Nag L J 237 : ILR (1952) Nag 115 : A I R 1951 Nag 50 (51) (Pr 15).

—Ss. 15 (3), 16, 23 and Second Schedule, Arts. 8 and 44—Suit to recover arrears of rent—Question of fixation of standard rent raised by tenant—Jurisdiction of Small Cause Courts is not ousted — (Houses and Rents — Delhi and Ajmer Rent Control Act (38 of 1952), S. 33)—(Interpretation of Statutes) — (Civil P. C. (1908), Pre. and S. 9),

In view of Ss. 15 (3) and 16 of the Provincial Small Cause Courts Act and Arts. 8 and 44 of the Second Schedule to it, a suit to recover rent falls exclusively within the jurisdiction of Small Cause Courts, and the jurisdiction is not ousted by the defendant raising the question of the fixation of the standard rent. Where such a defence is raised, the Court of Small Causes has the power to determine it for the purpose of the suit which it has jurisdiction to try, unless, of course, the jurisdiction is barred by any other enactment.

The effect of S. 33 of the Delhi and Ajmer Rent Control Act is that the Court of Small Causes shall not be competent to hear and decide any plea raised or an application made under the Act. It does not amount to saying that the Court of Small Causes ceases to be competent to try the suit, which was within its exclusive jurisdiction, merely because of the plea raised or application made by the defendant. There being nothing in that Act to oust the Court of Small Causes of its exclusive jurisdiction to hear and decide a suit for the recovery of house rent, the plain terms of law must be adhered to even at the risk of possible injustice in special causes or to particular litigants. In such cases the plaint cannot be returned for presentation to the proper Court. 76 Punj Re 1909 (FB), Foll.; A I R 1951 Bom 294 and A I R 1958 S C 677 and A I R 1949 E P 44, Disting. **61 Punj L R 932 : A I R 1960 Punj 11 (13, 14) (Prs 8, 9, 12) (DB).**

——S. 15 — Civil P. C. (1908), O. 8, R. 6 — Adjustment and set-off — Difference between — Held on facts that what was claimed by defendants was adjustment and could be tried by Small Cause Court.

The difference between an adjustment and a set-off or counter-claim is that the former takes place before the suit, whereas when a defendant claims a set-off he claims an adjustment in the suit itself. A plea of adjustment is tantamount to a plea of payment and no Court-fee is payable.

The plaintiffs supplied Til worth Rs. 6,665 to the defendants who paid Rs. 6,350 towards the price of it leaving a balance of Rs. 315. The plaintiffs filed a suit against the defendants for its recovery. The defendants pleaded an adjustment of this amount. They alleged that there was another contract for the supply of Til between the parties which the plaintiffs failed to fulfil and that there was an agreement between them before the institution of the suit, under which the plaintiffs agreed to pay Rs. 605 to the defendant as damages for breach of that contract, and that out of this amount a sum of Rs. 315 would be adjustable towards the price of Til already supplied, leaving a balance of Rs. 289 which the plaintiffs had promised to pay to the defendants. The trial Court held that what the defendants had in fact pleaded was a counter-claim to the extent of Rs. 605 and as its pecuniary jurisdiction extended upto Rs. 500 it refused to try the counter-claim.

Held, that what was claimed by the defendant was not a counter-claim but an adjustment which could be tried by the Small Cause Court. A I R 1925 Rang 22, Disting **1965 Raj L W 465 : A I R 1966 Raj 177 (178) (Prs 5, 6).**

——S. 15 — Suit of small cause nature—Suit for recovery of advance paid for carrying out certain contract.

A suit for recovery of money paid to the defendant for carrying out a certain contract which the defendant had failed to carry out is of a small cause nature and therefore cognizable by a Small Cause Court. AIR 1924 Mad 903, Rel. on; A I R 1953 Mad 553, Ref. to. **1957 Raj L W 135 : ILR (1956) 6 Raj 1025.**

——S. 15 and Sch. II, Art. 7 — Jurisdiction — Nature of suit is primarily determined by relief claimed in suit as originally instituted — Suit for recovery of arrears of rent of shop with costs and interest — Suit is not covered by Art. 7. A I R 1955 N U C (Raj) 306.

4. suits excepted from Small cause jurisdiction.

——S. 15 and Sch II, Cl. 35 (ii)—Suit for compensation for dishonest removal of tree belonging to plaintiff valued at Rs. 200 — Plaint disclosing offence under Chap. 17, Penal Code — Civil Court has jurisdiction — Finding of Criminal Court that defendant had committed no offence is irrelevant in determining question of its own jurisdiction — Allegations in plaint should only be looked to.

The verdict of a Criminal Court cannot operate as res judicata when the Civil Court has to decide the question of its own jurisdiction.

The Court can determine the question of its jurisdiction only by examining the plaint and deciding whether the relief claimed by the plaintiff falls within the prohibited categories of Cl. (35) of Sch. II, Provincial Small Cause Courts Act.

A suit for compensation of Rs. 200 for the removal of a tree belonging to the plaintiff on the allegation that the defendant had dishonestly removed it and stole the timber falls within Cl. 35 (ii) of Sch. II, Provincial Small Cause Courts Act as the allegations disclose an offence under Ch. 17, Penal Code. The fact that a criminal Court had acquitted the defendant on the ground that the tree belonged to him cannot be considered in determining whether the plaint discloses a cause of action triable by the Court. The civil Court is not bound by the verdict of the criminal Court and to accept its finding irrespective of its own opinion on the question whether the plaint disclose an offence punishable under the Penal Code. A I R 1926 All 760, Applied. **A I R 1962 All 480 (481, 482) (Prs 3, 6, 7).**

——S. 15 (1) and Sch. II, Arts. 30 and 31 — Suit by one co-owner against other co-owner for recovery of rent realised from tenant in excess of his share —Suit is one for account within Art. 31.

Article 31 is concerned with a suit which is a suit for an account and not merely a suit for the recovery of profits of immoveable property which have been wrongfully received. Whether a suit is one for accounts within the meaning of Art. 31 must depend upon the relation in which the parties stand to each other, and the nature of the investigation required to afford relief to the plaintiff. ILR 23 Cal 884 (FB); 24 Cal L J 187, Foll.

The plaintiff, a co-owner, brought a suit for recovery of a certain sum of money as his share of the rent due from the defendant tenant impleading the other co-owner as defendant with an alternative prayer for passing a decree against him for the amount if it be found that he had realised the whole rent from the tenant.

Held that the suit as against the defendant co-owner was a suit for an account and was accordingly excepted under Art. 31 from the cognizance of the Court of Small Causes. A I R 1928 Cal 424, Rel. on; AIR 1917 Cal 317, Explained. **('52) 56 Cal W N 12 : AIR 1952 Cal 736 (737) (Pr 7) (DB).**

——S. 15, Sch. II, Arts. 4 and 8 — Suit for rent of non-agricultural property — Suit is triable by Small Cause Court.

A suit for damages for use and occupation in respect of non-agricultural properties would be triable by a Small Cause Court. Therefore, a suit relating to rent against a tenant of such property would be

triable by a Small Cause Court. A I R 1928 Nag 118 and A I R 1933 Nag 382, Foll. 1962 M P L J (Notes) 6.

——S. 15 and Sch. II, Art. 11 — Suit for interest due on mortgage of house in form of rent suit — Not maintainable in Small Cause Court.

A suit for recovery of interest due on a mortgage of a house brought in the guise of a suit for arrears of rent as owner of the house, is not maintainable in a Small Cause Court in view of Sch. II, Art. 11 of the Provincial Small Cause Courts Act. 1961 Jab L J 570 : 1961 M P L J 175 : A I R 1961 Madh Pra 152 (153) (Pt A) (Prs 6, 7).

——S. 15 (1) and Sch. II, Art. 35 (ii)—Jurisdiction of Small Cause Court—To be determined on allegations in plaint and not on defence — Suit for damages on allegation of acts constituting offence under S. 379, I. P. C.—Jurisdiction is barred—Proper procedure is to return plaint for presentation to proper Court and not to dismiss suit.

For the purpose of determining the question of jurisdiction, the averments in the plaint alone should be the guide. It does not depend upon the defence. Even though no objection is raised, the Court is to see whether it has got inherent jurisdiction. Where there is lack of jurisdiction, there cannot be waiver of it nor can it be conferred by consent. 13 Ind App 134 (PC) and 14 Ind App 160 (PC), Rel. on.

A suit for damages were filed in the Small Cause Court on the allegation that the defendants dishonestly and forcibly, without the consent of the plaintiff, cut away 32 palm leaves from the palm trees belonging to and in the possession of the plaintiff. In the written statement the defendants alleged that the palm leaves belonged to them and that they did not remove the palm leaves on the date of occurrence (22nd April, 1963). The suit was dismissed on merits as well as for want of jurisdiction.

Held, that on the allegations in the plaint, the acts alleged against the defendants made out an offence under S. 379, I. P. C. The suit therefore was excluded from the cognizance of Small Cause Court under Sch. II, Art. 35 (ii) read with S. 15 (1). Even though the defendants did not raise any objection in the written statement, that the Court had no jurisdiction, and the plaintiff by filling the plaint, submitted to the jurisdiction of the Small Cause Court the said Court lacked inherent jurisdiction on the allegations made in the plaint and the S. C. C. Judge should have returned the plaint to be filed in proper Court. (1965) 7 O J D 192 : ILR (1965) Cut 597 : 32 Cut L T 94 : AIR 1966 Orissa 84 (85, 86) (Prs 5, 7, 8, 9).

——S. 15 and Sch. II, Art. 34 — Suit for amount incurred in repairs to damaged car on account of accident on the strength of the policy of insurance — Is a suit on policy of insurance within Art. 34 of Sch. II of the Act — Such a suit is not cognisable by the Small Cause Court. A I R 1926 Cal 100, Distinguished. AIR 1965 Pat 55 (57) (Pt A) (Pr 6).

——S. 15 — Nature of suit to be determined on allegations in plaint — Suit for arrears of rent and eviction — Withdrawal of latter claim — Decree for arrears of rent only — Not a small cause decree—Appeal and second appeal lies — Civil P. C. (1908), Ss. 96, 100, 102.

The question as to whether a suit is cognizable by a Small Cause Court has got to be decided on the plaint as instituted, that is to say, upon the nature of the claim as initially filed; it does not depend upon the defence set up by the defendant, or giving up of a portion of the claim by the plaintiff, or the findings arrived at by the Court. A suit for ejectment of tenant and arrears of rent is not cognizable by a Small Cause Court and the fact that a decree for arrears of rent on withdrawal of claim for eviction has been passed would not make the decree of the trial Court a decree of the Court of Small Causes. An appeal against such a decree would be competent. Even if the appeal is dismissed as incompetent a second appeal and not a revision would be competent against the dismissal of the appeal. 1963 B L J R 175.

SECTION 16

See also Small Cause Courts Act (1887), S. 15, Note 2.

——S. 16—U. P. (Temporary) Control of Rent and Eviction Act (1947), S. 7—Overrides S. 16, Provincial Small Cause Courts Act — (Government of India Act (1935), S. 107 (2)). See Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 7. AIR 1953 All 346.

——S. 16—U. P. (Temporary) Control of Rent and Eviction Act (1947), S. 5 (4) and (5) — Suit for fixation of enhanced rate of rent and arrears of rent at that rate—Civil Judge has jurisdiction to entertain it even if valuation is less than Rs. 5,000 — Jurisdiction — (Civil P. C. (1908), S 15) — (Bengal, Agra and Assam Civil Courts Act (12 of 1887), S. 18 — See Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 5 (4). AIR 1953 All 158.

——S. 16—Jurisdiction of Small Cause Court—Suit on pronote executed for purchase of produce of Phulwari and Kondar.

Though the income derived by the sale of the produce of Phulwari and Kondar is sayar income, where a pronote is executed for their purchase and a suit is brought to recover the amount on the basis of the pronote, it could be filed in the Court of Small Cause and not in the Revenue Court. 1951 All W R (H C) 634 : 1951 All L J 632.

——S. 16—Scope — Ordinary Court, if can try small cause suit.

Where a suit of a small cause nature is filed as an original suit in the District Munsiff's Court, as at that time the Court of the Subordinate Judge did not have small cause jurisdiction, but, subsequently, the Subordinate Judge is invested with small cause jurisdiction over the local limits of the District Munsiff, the District Munsiff continues to have jurisdiction to dispose of the suit as original suit and it should not be transferred to the Subordinate Judge's Court to be decided by it in exercise of its small cause jurisdiction, O. 7, R. 10, Civil P. C. saves the jurisdiction of the District Munsiff's Court and preserves it notwithstanding the subsequent conferment of small cause powers on the Subordinate Judge. 1956 Andh W R 280, Overruled; AIR 1934 Pat 504; ILR 26 Mad 212 and 15 Mad L J 491, Rel. on. (1957) 1 Andh W R 340 : 1957 Andh L T 346 : ILR (1957) Andh Pra 270 : AIR 1957 Andh Pra 133 (134, 135) (Pt A) (Prs 2, 5, 11) (DB).

——S. 16 — Scope — Decree by ordinary Court in small cause suit — No objection raised by parties — Validity of decree — Powers of High Court in revision—Interference held not necessary. See Civil P. C. (1908), S. 115. (1957) 1 Andh W R 261.

——S. 16— Scope — Suit for recovery of Rs. 1,033 instituted in Court of District Munsiff — After written statements were filed, High Court issuing Notification under S. 28, Madras Civil Court Act, conferring on all Subordinate Judges in Andhra jurisdiction to try Small Cause suits up to Rs. 2,000. Defendant's objection to jurisdiction of Munsiff overruled on ground

that it should have been taken in written statement—**Held**, on revision that S. 16 was of imperative nature and plaint should have been returned for presentation to Subordinate Judge as the District Munsiff had no further jurisdiction to proceed with suit though it was rightly instituted before him—(Madras Civil Courts Act (3 of 1873), S. 28). AIR 1928 All 38, Foll. **1956 Andh L T 683 : 1956 Andh W R 280.**

[Overruled in AIR 1957 Andh Pra 133.]

—Ss. 16 and 33—Interference in revision — Discretion of High Court — Cross suits — Small Cause suit and original suit jointly tried by Court having both jurisdictions on its original side at instance of one party and in spite of objection by other— Revision — Party inviting joint trial cannot raise objection as to Court's jurisdiction — No interference if decree is found to be correct. See Civil P. C. (1908), S. 115. **AIR 1963 Ker 51.**

—Ss. 16 and 25 — Suit excepted from cognizance by Small Cause Court tried by it — Decree is nullity — Small cause suit tried on regular side — Decree not a nullity — Objection raised in trial Court — Jurisdiction referable to proper one — Civil P. C. (1908), S. 102.

If the Small Cause Court were to try a suit excepted from its jurisdiction, its decree will clearly be without jurisdiction. On the other hand, if a suit triable by a Small Cause Court being of Small Cause nature were to be tried by the same Judge sitting on the regular side, it would at the most amount to an irregularity. Section 16 of the Provincial Small Cause Courts Act provides that suits triable by a Small Cause Court shall not be tried by any other Court. But non-compliance with the provision of S. 16 would not render the decree a nullity. AIR 1930 Bom 80; 30 Nag LR 252 and AIR 1936 Rang 35, Foll. If an objection be raised by any party in the trial Court, the jurisdiction exercised by the trial Court, will be referable to the proper jurisdiction under which the trial Court should have tried the suit. In such event when the trial Court should be deemed to have exercised jurisdiction as a Small Cause Court, an appeal may not lie and the party may be compelled to file a revision under S. 25 of the Provincial Small Cause Courts Act. Even if a Small Cause suit were to be tried by a regular Court and no objection is raised an appeal would lie subject to the provisions of S. 102, Civil P. C. 1959 M P L J (Notes) 50, Foll. **(1961) M P L J (Notes) 254.**

—S. 16—Ordinary Court, if can try small cause suit.

If a suit of a small cause nature is brought before and tried by an ordinary Court, or vice versa, the trial is without jurisdiction even though no objection is raised by the defendant as to the competency of the Court to entertain the suit. **AIR 1956 Mad 610 (612) (Pt B) (Pr 5).**

—Ss. 16 and 27—Court having small cause jurisdiction trying suit on its original side — Decree is not void—No appeal but revision lies. AIR 1930 Bom 80 and AIR 1938 Rang 35, Foll. **AIR 1962 Manipur 1 (2) (Pt B) (Prs 5, 7).**

—S. 16—Suit to recover arrears of rent — Question of fixation of standard rent raised by tenant — Jurisdiction of Small Cause Court is not ousted. See Provincial Small Cause Courts Act (1887), S. 15 (3). **AIR 1960 Punj 11 (DB).**

—Ss. 16, 15 and 27 — Suit of small cause nature filed as money suit — Small cause suit tried as ordinary suit by Court having small cause jurisdiction—Nature of decree—Appealability—(Civil P. C. (1908), Ss. 24 and 102). See Provincial Small Cause Courts Act (9 of 1887), S. 15. **AIR 1956 Punj 233.**

—Ss. 16, 33 and 27 — Decision in suit of nature of small cause suit—Finality—Appeal.

According to S. 16 read with S. 33, a Court which has small cause jurisdiction cannot try a suit of small cause nature otherwise than as a small cause suit and a small cause suit instituted as a small cause suit does not lose its character of a small cause suit by reason of its being mistakenly transferred to the original side of the Court and tried as a regular suit and S. 27 bars any right of appeal from a decree in such a suit. AIR 1937 Mad 227, Relied on. **AIR 1954 Vin Pra 49 (49) (Pt A) (Pr 2).**

SECTION 17

SYNOPSIS

(Provincial Small Cause Courts Act (1887), S. 17).

1. Scope and applicability.
2. Proviso—General.
3. Application to be made with deposit of or security for decree amount.
4. Direction of Court.
5. Liability of surety.

1. Scope and applicability.

—S. 17 (1), Proviso — Security bond presented beyond 30 days of ex parte decree—Validity.

If the security is furnished within 30 days of the ex parte decree, the application for setting aside the decree though in fact presented earlier may also be deemed to have been presented on that day and both may be deemed to be within time. But if the security bond is presented after the expiry of 30 days the application it must be rejected for non-compliance with the proviso. **1953 All L J 413 : 1953 All W R (HC) 419 : AIR 1953 All 758 (758, 759) (Prs 3, 4).**

—S. 17 — Framing of issues in suits under the Small Cause Courts Act (1887) — Adducing full and further particulars — (C. P. Code (1908), O. 50, R. 1 and O. 10, R. 2 and O. 14, R. 1).

It is provided in S. 17 of the Provincial Small Cause Courts Act that as far as possible the provisions of the Code of Civil Procedure will apply to the trial of cases under that Act. And it is nowhere laid down in the Civil Procedure Code that in Small Cause Court suits issues need not be framed nor the framing of issues is prohibited in the Provincial Small Cause Courts Act. Hence, the Judge of Small Cause Courts should frame issues before recording evidence of parties so that they may know which matters are in dispute and on which points they have to adduce evidence. Framing of issues is also necessary to narrow down the points in dispute. Similarly, in cases where the facts are somewhat complicated the Small Cause Court can direct the parties to adduce further and full particulars and can also examine them under O 10, C. P. Code. **AIR 1956 Bhopal 9 (9) (Pt B) (Pr 3).**

—S. 17 — S. 47, Civil P. C. is not inapplicable to Provincial Small Cause Courts. See Civil P. C. (1908), S. 47. **ILR (1960) 1 Cal 895.**

—S. 17 (1)—Ex parte decree by Small Cause Court —Revision against withdrawn with permission of High Court—No decision of High Court that it was unable to entertain revision—Application for review of judgment of Small Cause Court — Defendant held not entitled to the benefit of S. 14, Limitation Act for purposes of review application. **ILR (1955) 1 Cal 88.**

—S. 17—O. 7, R. 10, Civil P. C. — Read with S. 17, Provincial Small Cause Courts Act (1887)—Mandatory—Suit entertained on allegation of plaint—Court found to have no jurisdiction on defence allegation—Court can dismiss suit and is not bound to return plaint under O. 7, R. 10. See Civil P. C. (1908), O. 7, R. 10. AIR 1961 Madh Pra 152.

—Ss. 17 and 25—Ex parte decree—Setting aside—'Sufficient cause' — Finding as to — Interference — Matter cannot be agitated in revision. 1960 Jab L J 610: 1960 M P L J 1109 : ILR (1960) Madh Pra 516 : AIR 1961 Madh Pra 2 (3) (Pt A) (Pr 2).

—S. 17—Scope — Compliance with O. 18, R. 13, Civil P. C. is mandatory—Separate memorandum of evidence by each witness necessary and mere reference to evidence in judgment is not enough. AIR 1965 Manipur 34 (35) (Pr 4).

—S. 17—Scope—Procedure laid down in C. P. Code made applicable to small cause suits—Objection as to jurisdiction — Code of Civil Procedure does not lay down that such an objection cannot be taken before filling his written statement by the defendant. AIR 1965 Pat 55 (57) (Pt B) (Pr 6).

—Ss. 17 (1), 25—Judgment, meaning of — Reasons for decision in brief to be given.

The word 'Judgment' as used in R. 4 of O. 20 of C. P. Code means judgment as defined in S. 2 (9) of the Code and must always contain a statement, by the Judge of the Court of Small Causes, of the grounds on which the decree or order is passed by him. Rule 4 of Order 20 does not authorise the Court merely to give a final pronouncement on the points of determination involved in a case in its judgment without anything more.

In order to enable the High Court to exercise jurisdiction vested in it under S. 25 of the Act, it has to be presumed that every decree or order which can be revised by the High Court, must be supported by some reasons, however brief they may be.

Where questions of law or mixed questions of law and fact are involved, Judge of the Court of Small Causes should always set out at least so much of his reasoning on which his findings are based as would throw at least some light on the path by which he had reached his conclusions. Interference in revision under S. 25 of the Act being possible even on a question of fact, it is desirable that a Court of Small Causes should at least briefly indicate the reasons for its decision and the process by which it has reached the conclusions recorded in its judgment. 1965 Cur L J 884 : AIR 1966 Punj 227 (228) (Prs 7, 8, 9).

2. Proviso — General.

—S. 17, Proviso and S. 35—Ex parte decree passed by Small Cause Court — Afterwards said Court abolished — Application to set aside ex parte decree —Application made to ordinary Court under S. 35—S. 17, applies.

Where a Munsif deals with a Small Cause Court decree under S. 35 of the Provincial Small Cause Courts Act under his ordinary jurisdiction, the decree does not become a decree of the regular Court. It remains a decree of the Small Cause Court and consequently the proviso to S. 17 of the Act would apply. Where, therefore, an ex parte decree is obtained from the Court of Small Causes and the Court is subsequently abolished and the application for restoration becomes entertainable by the Munsif, provisions of S. 17 of the Provincial Small Cause Courts Act apply. An application to set aside the ex parte decree should, therefore, conform to the procedure laid down in S. 17 of the Provincial Small Cause Courts Act. That means along with the application the applicant has to deposit in Court the amount due under the decree or he has to furnish a security for the performance of the decree as required. (1956) 69 Mad L J 443; AIR 1935 Mad 919, Foll. 1962 All L J 285 : 1962 All W R (H C) 213 : A I R 1962 All 514 (515) (Prs 5, 6).

—S. 17, Proviso—"Security"—Acceptance of mere personal bond of debtor—Propriety.

In cases in which a personal liability to pay a certain amount has been created by a decree, Courts should not ordinarily accept a personal bond of the debtor himself because such a bond gives no security worth the name to the decree-holder. The bond merely creates a personal liability which has already been created by the decree. 1950 All L J 685 : 1950 All W R 642 : AIR 1951 All 424 (425) (Pt B) (Pr 7) (DB).

—Ss. 17 and 25 — Ex parte decree set aside on payment of costs — Party accepting costs — Cannot challenge order by revision. See Provincial Small Cause Courts Act (9 of 1887), S. 25. AIR 1958 Andh Pra 483 (DB).

—S. 17, Proviso — Compliance when sufficient — (Civil P. C. (1908), O. 9, R. 13).

The provisions of the proviso to S. 17 are mandatory. But it is sufficient compliance if, when the application under O 9, R. 13, Civil P. C. is taken notice of, the applicant has furnished the requisite security or deposited the requisite amount within the period of limitation of 30 days although it did not accompany such application. AIR 1948 Oudh 41, Disting. AIR 1956 Bhopal 10 (11) (Pr 3).

—Ss. 17 and 25 — Ex parte decree in small cause suit — No application for setting aside under S. 17, Provincial Small Cause Courts Act read with O. 9, R. 13 — Revision against ex parte decree filed — No allegation as to sufficient cause for non-appearance of defendant—Decree cannot be set aside in revision as question of sufficient cause for non-appearance of defendant is a pure question of fact. See Civil P. C. (1908), O. 9, R. 13. AIR 1964 Bom 38.

—S. 17 (1) — Court-fees Act (1870), Sch. II, Art. 6 (Bengal) — Security bond given under S. 17 (1), Provincial Small Cause Courts Act is not one under Civil P. C. — In this view, the law does not require this security bond to be affixed with court-fee stamp—Security bond written on stamp paper in accordance with Stamp Act—Bond is proper and sufficient in so far as the matter of stamps was concerned—AIR 1935 Mad 380 (FB), Dissent. from. 60 Cal W N 224 : AIR 1956 Cal 375 (376, 377) (Pt A) (Pr 7) (DB).

—S. 17 — Scope and effect of — Security bond in favour of Court — Registration whether necessary — (Registration Act (1908), S. 17).

A security bond required no order of the Court to make it effective and the Court's order of acceptance of the bond only indicates that the Court considers the security sufficient and does not give validity to the bond. It necessarily follows that execution of a bond in such circumstances is not a step of judicial procedure or a part of judicial proceedings. Hence, where a security bond given under S. 17, Provincial Small Cause Courts Act, on the face of it, purports to create right, title and interest in properties valued over one hundred rupees, the bond requires registration and where it is not registered, it is not a valid and effective bond. AIR 1928 Bom 42 and AIR 1934 Lah 138 (FB), Dissented from; ILR 31 Mad 330 and AIR 1935 Rang 168, Rel. on. 60 Cal W N 224 : ILR (1956) 2 Cal 50 : AIR 1956 Cal 375 (378) (Pt B) (Pr 16) (DB).

——S. 17 (1), Proviso — Counter-claim by defendant —Suit dismissed for default but counter-claim decreed ex parte — Restoration of suit without setting aside ex parte decree, on plaintiff's making out good case — Restoration cannot be refused on ground that provisions of S. 17 (i), Proviso had not been complied with—Restoration would result in re-opening plaintiff's claim only and will leave untouched ex parte decree. See Civil P. C. (1908), O. 8, R. 6. **AIR 1960 Madh Pra 393.**

——S. 17 (1), Proviso—Rajasthan Small Cause Courts Ordinance (8 of 1950), Cl. 15 (1), Proviso — Scope — Proviso is mandatory. See Rajasthan Small Cause Courts Ordinance (8 of 1950), Cl. 15 (1), Proviso. **AIR 1963 Raj 240.**

3. Application to be made with deposit of or security for decree amount.

——S. 17 (1), Proviso — Application to set aside ex parte decree — Application made before obtaining Court's direction or furnishing security.

Where the direction of the Court as to the security to be furnished is taken and the security is furnished within the period of limitation and the application for the setting aside of an ex parte decree is also made within time, the application for the setting aside of an ex parte decree, though made before the direction of the Court is obtained or the security is actually furnished, can be treated as having been made when the security bond is filed or the cash is deposited; and in such cases the provisions of S. 17 shall be deemed to have been substantially complied with. Where any of the two necessary conditions required by S. 17 are done after the expiry of the period of limitation, the application for the setting aside of an ex parte decree cannot be considered to be a proper application. AIR 1939 All 77 and AIR 1939 All 46, Not approved. **1951 All L J 156 : AIR 1951 All 420 (423) (Pr 21) (DB).**

——S. 17 (1) — Proviso — Scope — Security to set aside ex parte decree given in time but accepted by Court after scrutiny beyond time—Sufficiency.

An unregistered security bond is sufficient compliance with the law, provided the delay in getting it registered is not due to any fault of the applicant himself. Where security is tendered within the time and proved, even though tested after the time, applicant must be deemed to have complied with the requirements of the proviso. The words 'give such security' may be construed to mean 'tender such security'. AIR 1956 Mad 422; AIR 1933 Pat 279, Rel. on. Satyanarayana v. Ramabrahman, **(1960) 1 Andh W R 24 : 1960 Andh L T 13 : ILR (1960) 1 Andh Pra 1 : AIR 1960 Andh Pra 230 (233) (Prs 17, 18) (FB).**

——S. 17 (1), Proviso — Scope — Directory and not mandatory—Application to set aside ex parte decree of Small Cause Court under S 151, O. 9, R. 13, C. P. Code—S. 17 (1), Proviso of Small Cause Courts Act applicable— Failure to furnish security for the decretal amount — Application need not be dismissed— Time can be extended — (Limitation Act (1908), S. 5)—(C. P. Code (1908), O. 9, R. 13 as amended in M. P.) A I R 1943 Mad 520, Diss, **1961 Nag L J (Notes) 12 (Bom).**

——S. 17—Proviso — Effect of amendment in 1935—Application to set aside ex parte decree—Subsequent deposit of security — Validity, Civil P. C. (1908), O. 9, R. 13.

Even after the amendment of the Proviso to S. 17 in 1935 it is competent for the Small Cause Court to accept security for the performance of the decree filed, not along with the application to set aside an ex parte decree, but subsequent to it, though within 30 days of the date of the knowledge of the decree. The date of the presentation of the application in such a case is the date of the deposit of security. **ILR (1951) 1 Cal 213 : AIR 1951 Cal 455 (455) (Prs 6, 7) (DB).**

——S. 17 (1), Proviso (before amendment of 1935)—Scope — Directory and not mandatory — Court can extend time for making deposit or furnishing security — See Jammu and Kashmir Small Cause Courts Act (1968), S. 16, Proviso. **AIR 1957 J & K 20.**

——S. 17 — Application for setting aside ex parte small cause Court decree not accompanied by deposit —Subsequent deposit within period of limitation validates application—See Kerala Small Cause Courts Act (8 of 1957), S. 14. **1963 Ker L T 352.**

——S. 17 (1)—Proviso—Application not accompanied by deposit—Effect.

If the application for setting aside the decree was not accompanied by the security deposit and the security was filed subsequently and yet within the period of limitation when separate application could have been legally preferred, the provisions of S. 17(1) are substantially complied with. **Madh B L R 1954 Civ.47 : Madh B L J 1954 H C R 564 : AIR 1954 Madh B 147 (148) (Pt C) (Pr 7).**

——S. 17 (1), Proviso — Defective application—Deficiency made good subsequently — (Limitation Act (1908), Art. 164).

An application which is not in conformity with the provision of S. 17 is defective and could be rejected by the Court. But if the Court keeps it pending and allows the deficiency to be made good and the defects are actually removed on a day on which fresh application was competent, the original application could be deemed to have been presented on the date on which the defects are made good. A I R 1944 Oudh 104, A I R 1943 All 288; AIR 1946 All 425 and Sm. C. Revn. No. 39 of 1950 (Madh B) Not followed, AIR 1951 All 420 and AIR 1951 Cal 455, Foll. **Madh B L R 1954 Civ 47 : Madh B L J 1954 H C R 564 : AIR 1954 Madh B 147 (149) (Pt D) (Pr 10).**

——S. 17—Application for setting aside ex parte decree together with application to furnish security filed within 30 days — Order passed beyond limitation —Security accepted—Validity.

Ex parte decree was passed on 29-10-1958. Judgment-debtor applied for setting it aside on 27-11-1958 together with an application seeking direction of the Court to permit him to furnish security. As the Judge was not in the station, the hearing was fixed for 1-12-1958 when the Judge was to return. On that day security was furnished and accepted by the Court. Decree-holder contended that neither the security was furnished nor the decretal amount deposited within 30 days and as such, provisions of S. 17 of the Act were not complied with.

Held, that if a party took the necessary steps as were permitted by law, then he cannot be punished if the Judge happened to be absent and his application could not be disposed of before expiry of the period of 30 days. **1960 M P L J (Notes) 59.**

——S. 17—Judgment-debtor giving security without applying to be allowed to furnish security — Court referring to Nazir to verify surety and staying execution of decree, amounts to permitting defendant to give security instead of depositing cash for setting aside ex parte decree. **1959 M P L J (Notes) 208.**

——S. 17 — Defendant applying for setting aside ex parte decree — Neither amount deposited nor surety given with application — Application not maintainable. **1959 M P L J (Notes) 63.**

——S. 17—Scope of— Requirement—Security bond—Compliance with — What amounts to—Draft bond is not sufficient.

What section 17 of the Provincial Small Cause Courts Act requires is that within the period of 30 days security should be placed in the hands of the Court by the applicant in such manner that if ultimately accepted it should be sufficient to enforce the obligation upon him and make the money assured readily recoverable. The bond which should be filed into Court within the time should be a duly executed one. A draft bond executed by the judgment-debtor cannot satisfy the purpose. Security bond can be held to be duly tendered, if without any further voluntary act on the part of the judgment-debtor the security bond could be legally enforced. While filing of a draft security bond may not be sufficient compliance with the requirements of the section, where the fair bond is filed within the time, though accepted or registered later, the applicant must be deemed to have complied with the section. The words 'give such security' in the section may be construed to mean 'tender the security.' **(1965) 2 Mad L J 556.**

——Ss. 17 (1), Proviso and 25 — Finding of fact—Finding that summons was not duly served and that defendant knew of ex parte decree only on service of notice of execution — Interference — Application to set aside ex parte decree — Security furnished and fair bond executed within one month—Bond accepted within time but registered only after — Effect — S. 17 (1), proviso, if complied with.

A finding by the trial Court, that the defendant in a suit had not been duly served with summons as the building to the outer door of which the summons was affixed was not the place where the defendant was ordinarily residing at the time of the alleged affixtures, is one of fact and cannot be interfered with in revision under S. 25 of the Provincial Small Cause Courts Act, when the trial Court has not failed or omitted to take into account anything material on the point. Likewise a finding that the defendant did not know of the ex parte decree until service of the notice ot execution is a finding of fact and should not be disturbed.

Where at the time of filing an application for setting aside an ex parte decree, the defendant files a draft security bond giving a list of immovable properties offered as security, and after the security is tested and found sufficient, the defendant executes a fair bond and files it in Court in accordance with the direction of the Court within the time limited by the proviso to S. 17 (1) of the Provincial Small Cause Courts Act, and it is accepted by the Court, it must be held that the security has been given in time and that the requirements of S. 17 (1) proviso have been satisfied. The circumstance that the bond is registered only subsequently after the period of 30 days from the date of knowledge of the decree does not affect the matter, as the bond when registered would take effect and date back to the date of execution. **(1958) 2 Mad L J 594 : 72 Mad L W 127.**

——S. 17 (1) — Limitation Act (1908), Ss. 5, 14 and Art. 164 — Application for setting aside ex parte decree — Applicability of Ss. 5 and 14, Limitation Act — In Madras S. 5 has been made applicable — Application made within time — Deposit or security furnished beyond time — S. 5 does not apply—S. 14, however, applies — (Civil P. C. (1908), O. 9, R. 13)—See Limitation Act (1908), S. 5. AIR 1956 Mad 422 (DB).

——S. 17 (1), Proviso — Unregistered security bond filed within time — Bond registered after limitation through no fault of applicant — Sufficiency.

What S. 17, Provincial Small Cause Courts Act, requires is that within the period of 30 days security should be placed in the hands of the Court by the applicant of such a nature that it ultimately accepted it should be sufficient to enforce the obligation upon him and make the money assured in its payment or more readily recoverable. Judged by this test, a duly executed unregistered security bond would be sufficient compliance with the law, though not registered but subsequently registered, the delay in getting it registered being not due to any fault of the applicant. AIR 1933 Pat 279, Foll. **1956 Mad W N 283 : (1956) 2 Mad L J 25 : 69 Mad L W 329 : AIR 1956 Mad 422 (424) (Pt A) (Pr 12) (DB).**

——S. 17—Limitation Act (1908), S. 5—Applicability — Proceedings under S. 17, Provincial Small Cause Courts Act — S. 5 is applicable to such proceedings — See Limitation Act (1908), S. 5. AIR 1951 Mad 472.

——S. 17, Proviso — Compliance — Application on date of decree — Security tendered next day and Court accepting same — Application then registered — There is compliance.

On the 3rd January 1949 an ex parte decree was passed. On the same date an application for setting aside the ex parte decree was made. Along with it was filed an affidavit of one S that he was offering security for the decretal amount. The clerk of Court made endorsement that security should be furnished first. On the 4th January 1949 security of one L was tendered in Court. The Court asked the nazir to verify his solvency and this was certified. On the 6th January 1949 the application was registered. The Court thereafter set aside the ex parte decree.

Held, that there was compliance with the proviso to S. 17, Provincial Small Cause Courts Act, as the security was accepted before the application was registered : AIR 1949 Mad 419 ; ILR 18 Lah 728 ; AIR 1945 All 282 and ILR (1946) All 615, Disting. **1952 Nag LJ (Notes) 89.**

——S. 17 (1), Proviso — Civil P. C.—Time for filing security — Power to extend.

An applicant applying for a review of judgment or for an order to set aside an ex parte decree of a Small Cause Court must at the time of presenting his application do one of the two things, namely, either deposit in Court the amount due under the decree or give such security for performance of the decree as the Court may have directed on a previous application made by him in this behalf. When a valid security bond on which the Court could act was not filed within a period of thirty days from the date of the ex parte decree, the subsequent filing of the security bond with the permission of the Court or having it accepted by the Court would not enable the petitioner to comply with the provisions of S. 17. In such a case the provisions contained in the proviso to S. 17 cannot be said to have been complied with. Civil Revn. No. 255 of 1958, Dated 10-9-1959 (Orissa), Rel. on. **ILR (1960) Cut 481 : AIR 1961 Orissa 37 (38, 39) (Prs 2, 5).**

——S. 17 — Application to set aside ex parte decree — Conditions to be fulfilled — Court cannot extend time — (Civil P. C. (1908), O. 9, R. 13).

Under the proviso to S. 17 of the Provincial Small Cause Courts Act, a person applying for a review of judgment for an order to set aside an ex parte decree must at the time of presenting his application do one of the two things, namely, either deposit in Court the amount due under the decree or give such security for performance of the decree or give such security for performance of the decree as the Court may have directed on a previous application made by him in

this behalf. If he does not make the previous application, he must put in the decretal amount in full. If he has made the previous application and succeeded in getting an order for security, he can, instead of depositing the decretal amount in cash furnish the security directed by the Court. It is no longer open to the Court to extend the time within which the deposit is to be made or the security furnished : AIR 1953 All 758, Foll. ; AIR 1956 Mad 422, Disting. (1959) 1 Orissa J D 604.

——S. 17—Defective application filed with deposit of chalan — Chalan passed and amount deposited after period of limitation — Application for setting aside ex parte decree cannot be allowed.

The petitioner filed an application under O. 9, R. 13, Civil P. C., for setting aside the ex parte decree on the last day of the prescribed period of limitation. On the same day he filed another insufficiently stamped application along with a chalan to deposit the decretal amount as required by the proviso to S. 17, Provincial Small Cause Courts Act. The chalan was, however, passed and the money was actually deposited in the treasury only after the expiry of limitation.

Held, the petitioner had not complied with the requirements of the mandatory provisions of the proviso to S. 17 of the Act. When there was no compliance with the requirement of that provision either in substance or in law the application for setting aside an ex parte decree could not be allowed : AIR 1932 Pat 342 and AIR 1960 Pat 31, Disting. The mere filing of the chalan was not a valid tender of the money in Court. It was true that the procedure prescribed in R. 10 onwards and specially in R. 11 of Chapter I of Part X at page 193 of the General Rules and Circular Order (Civil) of the Patna High Court Vol. I did indicate that in ordinary course some time was bound to elapse between the filing of the chalan and the passing of it by the Court. But if the petitioner chose to file a chalan with a defective application on the last day of the limitation, it could not be held that by merely filing the chalan he tendered the money for deposit in Court according to law and that it should be held to be tantamount to a deposit of money in Court. If the petitioner had taken steps to get the chalan passed on the very date on which it was filed and if the chalan had been actually passed on that day, the fact that the money was physically put in the hands of the cashier of the Court or the treasury a day later, might not have mattered. 1964 B L J R 399 : AIR 1964 Pat 502 (503, 504) (Prs 3, 4, 5).

——S. 17 (1), Proviso—Requirement as to deposit — Substantial compliance sufficient — Setting aside ex parte decree — Application filed before preparation of decree sheet — Deposit of estimated amount less than actual decretal amount — Held, there was substantial compliance.

Section 17 requires a deposit to be made along with an application for setting aside an ex parte decree, as a guarantee of the judgment-debtor's bona fides. It is not intended that there should be a literal compliance with the provisions of this section where such literal compliance will have the result of defeating the ends of justice. Substantial compliance with provisions of the section is sufficient : AIR 1916 Cal 464 (2) and AIR 1922 All 29, Not followed.

A judgment-debtor who applies for setting aside an ex parte decree before the decree sheet has been prepared cannot possibly know at the time of making the application what is the exact decretal amount and, therefore, it the deposit of an amount calculated by him, on the basis of estimated costs, is found to be less than the actual decretal amount, it must be held that the judgment-debtor complied substantially with the requirements of S. 17, for otherwise it would entail undue hardship and injustice upon him. ILR (1961) 2 Punj 507 : AIR 1963 Punj 206 (207, 208) (Pt B) (Pr 4).

——S. 17 (1)— Proviso—Deposit, if should be made at time of making application.

In order to comply with the first part of the proviso, it is not essential that the deposit should be made at the time of making the application to set aside the decree ; it is sufficient if the deposit is made within the time allowed by law for setting aside the decree. AIR 1951 Simla 230 (231) (Pr 10).

4. Direction of Court.

——S. 17 (1), Proviso — Application for permission to furnish security—When to be made—Actual direction of Court — If to be previous to such application —Failure of Court to give direction at proper time—Exercise of inherent powers.

Held, tentatively, Under the proviso to S. 17 (1), Provincial Small Cause Courts Act, an application for being permitted to give security should be previous to the application for setting aside an ex parte decree but the actual direction of the Court to furnish security need not necessarily be previous to the application for setting aside the ex parte decree. This interpretation in addition to being possible on the language of the proviso would be in line with the principle that a statute should be so interpreted as not to defeat the rights of any party for no fault of his own.

The applicant, due to intervening vacation moved an application on the last day of limitation for a direction from the Court permitting him to furnish security and also applied on the same day for setting aside the ex parte decree. The Court, however, did not pass any order on that day but after three days allowed the application for furnishing security and finally accepted the security. On objection by the decree-holder the Court ultimately dismissed the application under O. 9, R. 13, C. P. Code, for not obtaining a direction as required by proviso to S. 17 (1), Provincial Small Cause Courts Act.

Held, that the applicant had done all he could do within the period of limitation and his right to be heard on the application for setting aside the ex parte decree was defeated by the lower Court simply because that Court itself delayed the making of the direction which was sought by an application made within time. In such a case, instead of dismissing the application for restoration, the Court should have exercised its powers under S 151 C. P. Code so as to mitigate the hardship being caused to the applicant as a result of the fault of the Court itself. AIR 1931 All 727 (FB), Rel. on. 1960 All L J 678 : 1960 All W R (HC) 494 : AIR 1960 All 612 (612 to 614) (Prs 3, 4) (DB).

——S. 17, Proviso – Compliance with—Order to file personal security bond—Personal security bond filed containing also a hypothecation clause but not registered—Validity.

Where an ex parte judgment debtor applicant was "permitted" by the Court to file a personal security bond, and he in fact files a proper personal security bond, the fact that it also contained a hypothecation clause and it was not registered would not affect the validity of the bond required to be filed. It satisfies the order of the Court. 1950 All L J 685 : 1950 All W R 642 : AIR 1951 All 424 (425) (Pt A) (Pr 6) (DB).

——S. 17—Proviso — Furnishing security in lieu of depositing amount in Court — Filing of written ap-

plication for Court's direction prior to filing application for setting aside ex parte decree—Necessity.

The filing of a draft bond along with an application for setting aside the ex parte decree made in a Small Cause suit is sufficient compliance with the Proviso to S. 17 of the Provincial Small Cause Courts Act. The Act does not contemplate filing of a written application for furnishing security in lieu of the deposit of the amount in the Court. The application may be oral.

In the instant case, from the fact that the draft bond was filed on the same day along with the application to set aside the the decree and an order to test the draft bond was made, it must be held that the Court had virtually allowed the petitioner to furnish security in lieu of depositing the amount in cash. **(1964) 2 An W R 275 : AIR 1964 Andh Pra 544 (545) (Pr 4).**

——S. 17 (1)—Proviso — Security — Filing of draft bond without obtaining order—Sufficiency.

A mere filing of a draft bond without obtaining an order from the Court regarding its acceptance would not satisfy the requirements of the proviso. **I L R (1955) 1 Cal 88.**

——S. 17—Judgment-debtor giving security without obtaining prior permission—Petition held proper — (C. P. Code (1908), O. 9, R. 13).

The defendant moved a petition under O. 9, R. 13, C. P. Code, for setting aside an ex parte decree, along with a security bond as required bv S. 17 of the Provincial Small Cause Courts Act. The plaintiff contended that the security bond was without the prior permission of the Court. The trial Court accepting the plaintiff's contention, dismissed the petition.

Held, that the trial Court took a very highly technical view of the matter. Although S. 17 requires that furnishing of the security bond should be with prior permission of the Court, yet that permission can be oral and so long as the bond is filed within the period of limitation, the requirements of law would be deemed to have been complied with. **1960 M P L J (Notes) 4.**

——S. 17 (1), Proviso — Security bond under — Essentials.

The word 'security' has not been defined either in the Civil Procedure Code or in the Provincial Small Cause Courts Act or in the General Clauses Act. It means and includes the filing into Court of an enforceable document for the purpose of giving assurance to the decree-holder about the payment of the money due to him under the decree. Such a purpose can be achieved only if the bond put into Court by the obligor could be converted into a legally enforceable security without any further act to be performed by him.

The filing of a mere draft bond written on unstamped paper cannot therefore be deemed a sufficient compliance with the order of a Court directing security of immovable property to be furnished by a particular date. **71 Mad L W 257 : (1958) 1 Mad L J 330 : ILR (1958) Mad 590.**

5. Liability of surety.

——S. 17 (1), proviso—Security under—Object of — Liability of surety for decree in suit.

The surety under the proviso to S. 17 (1), Provincial Small Cause Courts Act, cannot be proceeded against in execution of the decree passed on merits after the ex parte decree, for which the surety has been furnished, had been vacated. The surety is only for the purpose of the application and not for the benefit of the decree that may be passed in the case.

The object with which provisos are put in legislation is to except from the operation of the main section something which would otherwise be subject to it. It would be straining the language used in the proviso to hold that the legislature intended the security to endure for the decree which may be ultimately passed in creditor's favour. **I L R (1957) Andh Pra 162.**

——S. 17—Civil P. C. (1908), S. 145 and O. 38, R. 2 —Security for the performance of any decree.

Money suit in Small Cause Court — Attachment before judgment—A executing surety bond undertaking to pay decretal amount, if suit was decreed—Ex parte decree passed — Defendant ordered in his application for setting aside ex parte decree, to furnish security—B executing surety bond—Ex parte decree subsequently set aside and suit decreed—Held as security given under S. 17, Provincial Small Cause Court Act ended with ex parte proceeding, B could not be held liable after these proceedings and that A who stood surety for paying the amount that might be decreed continued to be liable till the suit was decided and became liable for the amount decreed under the terms of the bond — Case law relied on. **AIR 1954 Hyd 24 (25) (Prs 2, 3).**

——S. 17—Application to set aside ex parte decree made and security given—Application dismissed — Surety liable to pay decretal amount in the ex parte decree.

Held, that under the proviso to S. 17, the defendant had to take one of the two steps contemplated in the proviso, when he made an application for setting aside an ex parte decree. Security was the substitute for the deposit. In the expression 'deposit in the Court the amount due from him under the decree' spoken of was the ex parte decree and it could not be read as the decree which might eventually be passed after the ex parte decree was set aside. It was the same decree which was referred to in the alternative steps, 'such security for the performance of the decree . . . '. It was, therefore, quite clear that the decree referred to in the proviso to S.17 of the Act meant the ex parte decree which was sought to be set aside and not the decree which might eventually be passed, if the ex parte decree was set aside. In fact, where an ex parte decree was set aside, the surety's liability came to an end and he could proceed against under S. 145, Civil P. C., when a new decree was passed against the defendant. AIR 1938 Nag 75 and AIR 1944 Nag 103, Foll. **1964 MPLJ (Notes) 86.**

——S. 17. Proviso—Surety bond need not be registered. AIR 1947 Nag 26, Relied on. Second Appeal No. 102 of 1958, dated 21-9-1959 (MP), Dist. 1960 Jab L J 610 : 1960 MPLJ 1109 : ILR (1960) Madh Pra 516 : AIR 1961 Madh Pra 2 (3) (Pt B) (Pr 4).

SECTION 23

——S. 23—'Plaint'—Meaning of—Transfer of small cause suit to ordinary Civil Court under S. 23 — Effect—Civil Court to try suit as framed — Plaintiff cannot be required to amend plaint by basing his suit on title also.

'Plaint' in S. 23 means the plaint as filed in Court of Small Causes.

An order under S. 23 does not have the effect of converting the suit from one of small cause nature to a title suit. As soon as the Small Cause Court Judge exercises his discretion under S. 23 of the Act and returns the plaint to be presented to a Court having jurisdiction to determine the issue relating to title the

bar of S. 16 is removed and the Civil Court is authorised to entertain the plaint as such and to try the suit as framed. The Civil Court cannot require the plaintiff to amend his plaint so as to raise a question of title also. It has to receive the plaint and try it as such. AIR 1926 Cal 83, and ILR 24 Cal 557 and ILR 23 Cal 425 and ILR 29 Mad 329 and 1931 All L J 967. Rel. on. **1963 All L J 564 : 1963 All W R (HC) 495: AIR 1963 All 258 (259, 260) (Prs 9,10, 13).**

——S. 23 - Complicated question of title involved — Case not fit to be tried by Small Cause Court. **AIR 1955 NUC (All) 2744.**

——S. 23—Revision—Small Cause suit—Question of title involved—Plaint not returned—Court has juisdiction to try suit. See Provincial Small Cause Courts Act (1887), S. 25. **AIR 1962 Him Pra 17.**

——S. 23—Where a contract of sale of immovable property falls through, suit to recover the part price is triable by Small Cause Court.

When a contract of sale of immovable property falls through and the vendee sues to recover back the purchase money from the vendor, such a suit is small cause. The question whether a suit is of a small cause nature is to be determined by the relief which the plaintiffs claim and not by the nature of the defence. It is not in the power of the defendant to oust the jurisdiction of the Small Cause Court merely by raising a plea involving a dispute about title to immovable property. It is for this reason that where such a dispute is raised, S. 23 of the Act vests in the Small Cause Court a discretion either to determine that question of title or to return the plaint for presentation to the Court having jurisdiction to determine the question of title. **AIR 1926 Nag 65, Foll. 1963 MPLJ (Notes) 138.**

——Ss. 23 and 25—Question of title involved—Small Cause Court can return plaint for presentaiion on regular side—Order of Small Cause Court not arbitrary or capricious—High Court will not interfere.

Held, on facts, that if in the opinion of a Small Cause Court the case involved a question relating to proof or disproof of a title to immovable property or other title, the Court was empowered to return the plaint. In the case, the only obstacle in the way of non-applicant was the decree passed in the earlier suit, which was passed on admission and on account of which the non-applicant would be estopped from challenging the petitioner's title on account of the fact that he acknowledged the petitioner as landlord in that suit. The decision of the question of title would be unnecessary in the present case. But the non-applicant had filed civil suit for setting aside the decree in that earlier suit on the ground that it was obtained by fraud. It was this aspect which persuaded the High Court not to interfere with the order of the Small Cause Court. 1956 Nag L J (Notes) 25, Foll. **1962 M P L J (Notes) 59.**

——Ss' 23 and 25 — Suit dismissed as not cognizable by Small Cause Court — S. 23 does not apply — Revision — Suppression of material fact by applicant—High Court would not remit case to regular Court in exercise of its discretion.

Seetion 23 would be attracted where the suit be cognisable by a Small Cause Court, but at the same time, the Court is required to decide a question of title relating to immovable property. The section would not apply to a suit not triable by a Small Cause Court.

The powers under the section are discretionary and the applicant, by suppressing a material fact, has disentitled himself to indulgence at the revisional stage. **1961 Jab L J 570: 1961 MPLJ 175 : AIR 1961 Madh Pra 152 (153) (Pt B) (Pr 8).**

——S. 23 — Applicability — No question of title between parties inter se — Effect.

Merely because the question of title was raised by the defence, not between themselves and the plaintiff but betwen themselves and a third person who was not a party to the suit, Section 23 cannot be invoked by them. Had it been between the defendant and the plaintiff, S. 23 could be invoked. **1958 MPLJ (Notes) 123.**

——S. 23—Suit involving question of title—Jurisdiction.

A suit for refund of consideration on the failure of the consideration is not exempted from the jurisdiction of a Small Cause Court. It is however a different matter if the Court thinks that a question as to the title to immovable property being involved, the suit should be tried by a regular Court. In that case it has power under S. 23 of the Act to return the plaint and the regular Court would then get jurisdiction and will be bound to try the suit by the regular procedure. But that is not the same thing as saying that the Small Cause Court has no jurisdiction to try the suit. **AIR 1959 Manipur 14 (14) (Pt A) (Pr 5).**

——S. 23—Breach of covenant for title — Suits for damages—Jurisdiction.

A suit for damages for breach of covenant for title is not excluded from the jurisdiction of a Court of Small Causes. It is not the rule that the vendee cannot bring an action for breach of covenant of title until actual eviction. **'AIR 1922 Mad 300 and AIR 1928 Bom 427, Foll.' ILR (1956) Nag 74 : 1955 Nag L J 731 : AIR 1956 Nag 124 (124, 125) (Pt A) (Prs 3, 4).**

——S. 23—Jurisdiction — Suit cognizable by Small Cause Court—Plaint returned for presenting before another Court—It amounts to refusal to exercise jurisdiction that was vested in Small Cause Court Judge under the law—Revision is competent. 1956 BLJR 204 : AIR 1958 Pat 22 (24) (Pt B) (Pr 6) (DB).

——S. 23 (1)—Suits involving proof of title to immovable property—Jurisdiction of Small Cause Court.

The controversy between 2 sets of defendants (landlord and tenants) inter se as to whether the latrine tax was payable by the owner or occupier does not amount to any dispute of title to the premises concerned. Similarly, the validity or otherwise of the latrine tax imposed by the special officer of a Municipality does not amount to a proof or disproof of title to immovable property within the meaning of S. 23 (1). Simply because a complicated question regarding the jurisdiction of the Special Officer to assess the latrine tax had to be decided in a suit of Small Cause nature would not entitle a Small Cause Court Judge to return the plaint for presentaion to proper Court. 62 Cal L J 530, Rel. on. **1956 BLJR 204 : AIR 1958 Pat 22 (23, 24) (Pt C) (Pr 6) (DB).**

——S. 23—Suit to recover arrears of rent—Question of fixation of standard rent raised by tenant—Jurisdiction of Small Cause Courts is not ousted. AIR 1960 Punj 11 (DB).

SECTION 24

——Ss. 24 and 25 — Powers of revision under section 25 are independent of a right of appeal under section 24—High Court can entertain revision even though appeal against the order be competent.

Powers of revision under S. 25 of the Act are not curtailed on account of the fact that a separate remedy by way of appeal is available under S. 24 thereof. Though an appeal against the order imposing compensatory costs lies to the District Judge under S. 24 of the Act, the High Court may entertain a revi-

sion application under S. 25 of the Small Cause Courts Act. AIR 1926 All 554; AIR 1933 Oudh 477 and AIR 1947 Nag 247, Foll. 1965 M P LJ (Notes) 57.

SECTION 25

SYNOPSIS

(Provincial Small Cause Courts Act (1887), S 25.)

1. Scope.
2. Revision only in small cause suits.
3. "Decided", meaning of—Interlocutory order.
4. "According to law."
5. Substantial justice.
6. Discretionary orders—Revision.
7. Ex parte decree.
8. Error of procedure.
9. Interference on questions of fact.
10. Error of law.
11. Question of limitation.
See also Note 13,
12. Question of jurisdiction.
See also Note 13.
13. New pleas.
14. Powers of High Court.
15. Limitation for revision.
16. Forum of revision.
See also Note 1.

1. Scope.

——S. 25 (substituted by U. P. Amending Act 17 of 1957) — Bengal, Agra and Assam Civil Courts Act (1887), Ss. 40 (2) and 8 — Scope of S. 40 (2)—Additional District Judge appointed under S. 8 can decide revision under S. 25.

Section 40 (2), Bengal, Agra and Assam Civil Courts Act means that Ss. 15, 32, 35, 38 and 39 which have been applied to the Provincial Small Couse Courts by sub-section (1) are the only sections which are applicable to cases when being tried by Courts of Small Causes. This section has nothing to do with the decision of cases by Courts other than the Courts of Small Causes and on the basis of this section, therefore, it cannot be contended that the Additional District Judge has no power to hear revisions which the District Judge may transfer for decision to him. Under section 8 of the Bengal, Agra and Assam Civil Courts Act, whenever business pending before the District Judge requires aid of Additional District Judges, such Additional Judges can be appointed and they are empowered to discharge any of the functions of the District Judge which the District Judge may assign to them. Therefore the Additional District Judge can decide a revision under S. 25 of the Act, if transferred for decision to him by the District Judge. **1965 All W R (H C) 645 : 1965 All L J 989.**

——S. 25 — Decision of Judge, Small Cause Court not according to law — District Judge declining to exercise revisional jurisdiction under S. 15—Non-exercise of jurisdiction vested in District Judge would empower the High Court to entertain revision. See Civil P. C. (1908), S. 115. 1965 All W R (HC) 596.

——S. 25 (as applicable to U. P.) — Additional District Judge can also exercise power of revision — General Clauses Act (1897), S. 3 (17).

It is for the purpose of clearing the arrears that Additional District Judges can be appointed under S. 8 (1) of the Bengal, Agra and Assam Civil Courts Act, and such Additional District Judges can exercise the same powers as the District Judge with regard to cases transferred to them, or the work which is assigned to them. When S. 8 (2) of the Bengal, Agra and Assam Civil Courts Act permits cases triable by the District Judge to be heard by the Additional District Judges, there is no reason why a case under S. 25 of the Provincial Small Cause Courts Act be also not heard by the Additional District Judge.

The definition of the word 'District Judge' as given in S. 3 (17) of the General Clauses Act can be made applicable to the Small Cause Courts Act only if there is nothing repugnant in the subject or context. Subject includes a question like the hearing of a case after its presentation or even the presentation of Memo of Appeal or Grounds of Revision. When cases within the jurisdiction of the District Judge can, on transfer, be heard by the Additional District Judge, there exists something repugnant in the subject and a literal meaning as contained in S. 3 (17) of the General Clauses Act cannot be given to that word. ILR 43 All 409 and ILR 34 All 205, Ref. **1964 All L J 998 : ILR (1965) 1 All 229.**

——S. 25 (as amended by U. P. Act 17 of 1957) — Revisional jurisdiction of High Court under S. 115, Civil P. C. against orders of District Court passed under S. 25 of Provincial Small Cause Courts Act — Distinction between revisional jurisdiction under S. 115, Civil P. C. and S. 25, Provincial Small Cause Courts Act pointed out. See Civil P. C. (1908), S. 115. (1965) 2 ITJ 740 (All).

——S. 25 — Revision admitted and listed for hearing —Cannot be subsequently held to be not properly presented. See Civil P. C. (1908), S. 115. AIR 1962 All 485.

——S. 25 (as amended by U. P. Act (17 of 1957) — Additional District Judge appointed under S. 8 (1) of Bengal, Agra, Assam Civil Courts Act — Power of, to dispose of revisions transferred to him by District Judge — Bengal, Agra, Assam Civil Courts Act (12 of 1887), S. 8 (1).

Whenever an Additional District Judge has been appointed under S. 8 (1) of the Bengal, Agra and Assam Civil Courts Act for the speedy disposal of cases and the cases have been transferred to him, the very order of appointment coupled with the order of transfer of cases entitles such Additional District Judge to dispose of cases transferred to him. A separate order of assignment of the functions of disposing of the cases is not necessary to be passed. An Additional District Judge, so appointed, is therefore competent to hear and dispose of revisions under S. 25 of the Small Cause Courts Act transferred to him by the District Judge. AIR 1956 Pat 108; AIR 1954 Assam 161; ILR 34 All 205; ILR 43 All 409, Ref. **1962 All L J 850:1962 All W R (H C) 666.**

● **——S. 25 (as substituted by U. P. Act 17 of 1957) — Revision application filed in High Court before 4-6-1957—Jurisdiction of High Court to entertain.**

Where applications in revision are filed in the High Court under S. 25 of the Provincial Small Cause Courts Act prior to 4th June, 1957, then in spite of the substitution of S. 25 by the U. P. Act 17 of 1957 whereby the jurisdiction conferred on the High Court is transferred to the District Courts, the High Court retains its jurisdiction to hear applications in revision filed in the High Court under S. 25 of the Provincial Small Cause Courts Act prior to 4th June, 1957, in all cases in which prior to that date the High Court had directed the record to be called for. Civil Revn. No. 789 of 1950, dated 18-11-1957 (All), Overruled. Om Prakesh v. Moti Lal, **ILR (1958) 1 All 70 : 1958 All L J 210 : 1958 All W R (H C) 239 : AIR 1958 All 409 (411, 412) (Pt A) (Prs 7, 9) (FB).**

● **——S. 25 (as substituted by U. P. Act 17 of 1957) — Application in revision — If vested right — (Civil P. C. (1908), S. 115).**

There is no authority for the proposition that an application in revision stands on exactly the same footing as an appeal, and that both are vested rights which can be taken away only by express enactment or necessary intendment. Om Prakash Moti Lal, 1958 All L J 210 : 1958 All W R (HC) 239 : ILR (1958) 1 All 70 : AIR 1958 All 409 (411) (Pt B) (Pr 3) (FB).

● —S. 25 — Scope — If confers right or privilege — (U. P. General Clauses Act (1 of 1904), S. 6 (c) and (e) — (General Clauses Act (1897), S. 6 (c) and (e)).

Section 25 of the Provincial Small Cause Courts Act as it was before its substitution by U. P. Act, 17 of 1957 did not confer any right or privilege on any person. In this respect neither Cl. (c) nor Cl. (e) of S. 6 of the U. P. General Clauses Act is attracted. AIR 1958 All 404, Approved. Om Prakash v. Moti Lal, ILR (1958) 1 All 70 : 1958 All L J 210 : 1958 All W R (HC) 239 : AIR 1958 All 409 (411) (Pt C) (Pr 4) (FB).

● —S. 25 — Application for revision — High Court calling for record — Effect of — 'Thing duly done' — (U. P. General Clauses Act (1 of 1904), S. 6 (b)) — (General Clauses Act (1897), S. 6 (b)).

Per Mootham, C. J. : Where the High Court has called for the records of the cases filed under the old S. 25 for the sole purpose of enabling it to determine whether it shall exercise its revisional powers then with respect to such cases there is considerable force in the argument that if the High Court is now no longer able to exercise such powers in respect of these cases, a 'thing duly done', namely the calling for the records, is affected within the meaning of Cl. (b) of S. 6, U. P. General Clauses Act, because the purpose of the action is wholly frustrated.

Per V. Bhargava and M. L. Chaturvedi, JJ. : Clause (b) of S. 6, U. P. General Clauses Act, should be interpreted as covering anything duly done not only by parties litigating or claiming the right but also anything duly done by the Court before which the remedy or legal proceeding is commenced. The consequence of the applicability of the provisions of S. 6 (b), U. P. General Clauses Act, therefore, is that the High Court having validly called for the record and its order not being affected by the subsequent amending Act, it continues to have jurisdiction to pass further orders in pursuance of that valid Act and, consquently, to pass such order with respect to the case as it may think fit. Om Prakash v. Motilal, ILR (1958) 1 All 70 : 1958 All L J 210 : 1958 All W R (HC) 239 : AIR 1958 All 409 (412, 413) (Pt D) (Prs 8, 9, 10) (FB).

—S. 25 (as amended by U. P. Act 17 of 1957) — Applicability to pending actions — (Interpretation of Statutes—Retrospective effect).

A suitor has no right to apply in revision; as a matter of fact, there is nothing like a right to apply in revision. The Amendment Act does not say anything about its effect or enforcement except that it was to come into force at once. The obvious meaning of the Act coming into force on 4-6-1957 the date of its publication, was that on and after the date the District Judge had the power of calling for a case decided by a Court of Small Clauses and revising a decree or order made by it. There was nothing in the Amendment Act to suggest that it would not apply to a case instituted or decided before it came into force and it would not be open to the Court to read any such qualification in it. AIR 1947 Oudh 232, Dissented from. ILR (1958) 1 All 635 : AIR 1958 All 404 (405 to 409) (Pt A) (Prs 1, 4, 11) (DB).

—S. 25 — Revision against decree, under S. 25 — Article 11 (u) of Sch. 2 of Andhra Court-fees and Suits Valuation Act, applies. (1965) 2 Andh W R 149.

—S. 25 — Revision — Interference in — When made.

The plaintiff, who as a common carrier was entrusted with certain goods by their owner for carriage from place A to place B employed another common carrier for carrying them to place B. The latter common carrier in his turn handed over the goods to his driver for being carried to B. The goods never reached their destination. The plaintiff therefore sued the driver and his employer defendant No. 1 for recovering damages from them for loss of the goods. Decree against the latter common-carrier (defendant No. 2 was sought on the basis of his statutory liability under the Carriers Act. Suit having been allowed defendant No. 1 filed a revision petition against the decree under S. 25 of the Provincial Small Cause Courts Act. The essential requirement for making a person liable under the Carriers Act being that the plaintiff must be the owner of the goods. The plaintiff could not have sustained the action for damages for loss of the consignment. Consequently passing of the decree against defendant No. 1 had occasioned manifest injustice, justifying interference under the section. AIR 1960 Andh Pra 89, Distinguished. (1963) 2 Andh W R 190 : (1963) 2 Andh L T 285 : AIR 1964 Andh Pra 71 (74) (Pt B) (Pr 25).

—S. 25 — Himachal Pradesh Courts Order (1948), Para. 35—Relative scope — Provisions of the order override provisions of S. 25 of the Provincial Small Cause Courts Act. AIR 1964 Him Pra 12 (14) (Pt B) (Pr 6).

—S. 25 — Himachal Pradesh Courts Order (1948), Para. 35 (1) (b) — Relative scope — (Obiter).

Section 25 of Provincial Small Cause Courts Act is wider in some respects but narrower in others than Para 35, H. P. Courts Order, 1948. It is narrower as while para. 35 permits interference by the High Court if there has been unwarranted usurpation of jurisdiction or failure to exercise jurisdiction or material irregularity in the exercise of jurisdiction there is no such provision in S. 25. The aforesaid section is wider to this extent that while clause (b) to para. 35 (1) of the Order 1948 provides for the filing of an application in revision if an important question of law or custom is involved the section permits interference if the Court has not acted according to law and secondly that while the section provides for interence in a case irrespective of its value, an application in revision cannot be entertained under para. 35 if the value of the suit is below Rs. 1,000. AIR 1964 Him Pra 12 (14) (Pt C) (Pr 8).

—Ss. 25 and 3 (c) — Section 2 and (Himachal Pradesh (Courts) Order (1948), Para. 35) — Special law.

Section 25, Provincial Small Cause Courts Act, affords ground for interference within an ambit wider than that provided by para. 35 of the Himachal Pradesh (Courts) Order. Hence, S. 25 of the Act cannot be said to affect the special law contained in Para. 35 of the Order within the intendment of S. 3 (c) of the Act. AIR 1953 Him Pra 68 (69) (Pt A) (Pr 4).

—S. 25—High Court's power of revision — Refusal of—Amendment—Revision.

The power of revision under S. 12 of the Hyderabad Small Cause Courts Act is wider than that under S. 115, C. P. Code. Under S. 115, C. P. Code the High Court cannot interfere when the lower Court having jurisdiction has arrived at a wrong decision on a question of fact or even on a point of law. But the powers conferred under S. 12, Hyderabad Small Cause Courts Act, are wide enough to justify an in-

terference in some cases on a question of fact and law also.

Thus, where the lower Court has wrongly refused to allow amendment of the plaint the High Court has power to interfere in revision under S. 12. I L R (1953) Hyd 366 : A I R 1953 Hyd 212 (215) (Pt E) (Pr 17).

—S. 25—J. and K. Small Cause Courts Act, 1968 Smt. (1911 A. D.) S. 24.

Trial Court rejecting document of defendant on ground that it was not registered — Application in revision against order, under S. 24, J. and K. Small Cause Courts Act — Defendant wishing to use document only to prove admission of executant to have received money which was clear defence to plaintiff's suit — Held, the High Court should entertain revision—Scope of S. 24 is wider than that of S. 115, Civil P. C.—Registration Act (1908), S. 49. AIR 1964 S C 497, Ref. to; 66 Punj Re 1885 and ILR 11 Cal 6 (P C) and ILR 21 Bom 250, Rel. on. 1964 Kash L J 302 : AIR 1965 J & K 48 (48, 49) (Pt A) (Prs 2, 4).

—S. 25—Powers under—Extension.

The powers of revision under S. 25 are wider than those under S. 115 of the Code of Civil Procedure, 1908. However, the Act does not provide for any appeal either on facts or on law and the powers under S. 25 should not be so construed as to give the parties a right of appeal. 4 Punj L R 1903 p. 390 and AIR 1915 Mad 635 and A I R 1938 Bom 223 and A I R 1943 Nag 117, Rel. on. 1960 Ker L J 309 : (1960) 1 Ker L R 513 : I L R (1960) Ker 539 : A I R 1960 Ker 306 (307) (Pt A) (Pr 5) (DB).

—S. 25—Power of High Court to act suo motu — —Application of party—Necessity.

In order to invoke the revisional jurisdiction of the High Court it is not necessary that a party should apply to the Court. The High Court can suo motu consider whether the order of the trial Court requires any interference. 1957 Ker L J 804 : 1957 Ker L T 1022 : ILR (1957) Ker 920 : AIR 1959 Ker 329 (331) (Pt A) (Pr 16).

—S. 25—Jurisdiction—Power of District Court.

Section 25 gives power only to the High Court to entertain a revision against a decree in a small cause suit and the District Court has no powers at all of either entertaining an appeal or a revision.

Held that if the High Court thought that the C. R. petition in the High Court and the appeal pending in the District Court required to be jointly heard, the proper order would have been to withdraw the appeal from the District Court to the file of the High Court to be heard and disposed of along with the C. R. petition and not to return the C. R. petition to the petitioner for presentation to the District Court to be heard along with the appeal. 1957 Ker L J 804 : 1957 Ker L T 1022 : ILR (1957) Ker 920 : AIR 1959 Ker 329 (330) (Pt B) (Pr 9).

—S. 25 — Revision— Proper presentation — (M. B. Small Cause Courts Act (46 of 1949), S. 25). See High Courts Rules and Orders — Rules for Judicial Business in Madhya Bharat High Court, R. 12. AIR 1954 Madh-Bha 18.

—S. 25 — Restriction of grounds of revision on admission—Revision against decree of Small Cause Court —Petitioner can urge all grounds of attack on merits and is not restricted to ground on which revision was admitted. 1965 M P L J 102 : 1965 Jab L J 94 : ILR (1965) Madh-Pra 335 : AIR 1965 Madh-Pra 24 (25) (Pt A) (Prs 6, 13).

—S. 25 — Powers of revision under S. 25 are independent of a right of appeal under S. 24—High Court can entertain revision even though appeal against the order is competent. 1965 M P L J (Notes) 57.

—S. 25—Powers under S. 25, Small Cause Courts Act are wider than those under S. 115, C. P. Code— Simply because another view of the facts was possible interference would not be justified. 1965 M P L J (Notes) 15.

—S. 25—Powers of revision under.

It is no doubt true that the powers of revision conferred under S. 25 of the Provincial Small Cause Courts Act, 1887, are wider than the powers under S. 115 of the Code of Civil Procedure. But it certainly is not equivalent to an appellate power and even if the High Court is of the view that a particular conclusion upon facts could well have been different it would not be ground for the exercise of the revisional jurisdiction. (1960) 2 Mad L J 323 : 73 Mad L W 537 : AIR 1961 Mad 152 (153) (Pr 3).

—S. 25—Scope—Section must not be construed in a sense which would virtually give a right of appeal on law and on facts in every small cause case and which would be inconsistent with the finality which the legislature intended to attach to the judgment of Small Cause Court. AIR 1955 NUC (Mad) 3211.

—S. 25 — Civil P. C. (1908), O. 41, R. 27 whether applies to revision petitions under Provincial Small Cause Courts Act (Quaere). See Civil P. C. (1908), O. 41, R. 27. AIR 1950 Mad 438.

—S. 25 — Requirement of notice under O. 47, R. 4 is mandatory and O. 47, R. 4 is applicable to Court of Small Causes. See Civil P. C. (1908), O. 47, R. 4, Cl. 2 (a). AIR 1965 Pat 219.

—S. 25—Scope—Powers of High Court.

The High Court under S. 25 has wider powers of interference than under S. 115 of the Code of Civil Procedure — Of course, the High Court cannot reverse the decision of the trial Court on a question of fact unless the judgment is perverse, or, has overlooked essential evidence, but it can interfere where the trial Court has taken an erroneous view of law. In revisions under S. 25 questions of law can certainly be raised as they are raised in second appeals under S. 100, C. P. Code, even if such a question of law was not raised in the first Court, provided it does not involve an investigation of facts. 1956 B L J R 636 : 1956 Pat L R 393 : ILR 35 Pat 986 : AIR 1957 Pat 168 (172) (Pt B) (Pr 31) (DB).

[Overruled on another point in AIR 1959 Pat 133 (FB)].

—S. 25 — Revision under — O. 22, Civil P. C. not applicable—Civil P. C. (1908), O. 22 (Gen).

Order 22 does not govern the cases of revision application though it applies to appeals. An appeal is always a continuation of the suit but a revision petition cannot be said to be so. AIR 1953 Raj 169 (FB) and AIR 1949 Lah 186 (FB), Rel. on. ILR (1961) 2 Punj 507 : AIR 1963 Punj 206 (207) (Pt A) (Pr 3) (DB).

—S. 25—Scope of — Section compared with S. 115, C. P. Code — (C. P. Code (1908), S. 115). AIR 1955 NUC (Sau) 5416.

—S. 25—Revision—Grounds.

Although the powers of a Court of revision under S. 25, Provincial Small Causes Courts Act, are limited, though more extensive than under S. 115, C. P. Code, and it is not the practice of the High Court to lightly interfere with findings of fact yet, where there is an obvious injustice to the plaintiff and perversity in the decision by the lower Court, the High Court can set aside the decision of the lower Court. 6 Sau L R 270 : AIR 1954 Sau 26 (27) (Pt B) (Prs 2, 3).

2. Revision only in small cause suits.

——S. 25 — Question of limitation — Decision on — Interference.

Interference with the decisions of Courts under S. 25 is wholly discretionary, and should not be resorted to except in cases where justice has failed. Where the Court has misapplied the law of limitation, interference under S. 25 is not called for where justice has been done. AIR 1946 Cal 526, Foll. **AIR 1960 Andh-Pra 89 (92) (Pt C) (Pr 12).**

——S. 25 — Small Cause Court trying suit excluded from its jurisdiction and delivering judgment—Proper course for High Court in revision under S. 25, Provincial Small Cause Courts Act, is to dismiss suit and not to return plaint to proper Court. See Civil P. C. (1908), O. 7, R. 10. **AIR 1965 Cal 59.**

——S. 25 — Order in execution passed by Small Cause Court in its small cause side — Order is not appealable but revisable. **ILR (1960) 1 Cal 895.**

——Ss. 25 and 23 — Revision — Small cause suit — Question of title involved — Plaint not returned — Jurisdiction of Court to try suit.

Where a question of title is involved in the case it is open to the Judge to return the plaint to be presented to a Court having jurisdiction to determine that question as provided by S. 23 of the Act but if it does not do so and entertains the suit it cannot be said to have exercised a jurisdiction not vested in it. **AIR 1962 Him Pra 17 (22) (Pt B) (Pr 17).**

——S. 25 — Revision—Suit for arrears of rent brought on small cause side of lower Court — Tenant raising claim for abatement from contract rent on ground that there was silting — Suit decided on merits — Plaintiff in revision questioning jurisdiction of Small Cause Court to apportion rent — **Held** that he should have moved for transfer of suit to original side — High Court in revision was not bound to upset the decision merely because the lower Court had no jurisdiction to try the suit if the decision was otherwise right. See Kerala Small Cause Courts Act (8 of 1957), S. 22. **AIR 1962 Ker 239.**

——S. 25 — Suit excepted from cognizance by Small Cause Court tried by it — Decree is a nullity—Small Cause suit tried on regular side — Decree not a nullity—Objection raised in trial Court—Jurisdiction exercised by the trial Court will be referable to proper jurisdiction under which trial Court should have tried the suit — In such a case when the trial Court should be deemed to have exercised jurisdiction as Small Cause Court, an appeal may not lie and the party may be compelled to file revision under S. 25. Even if small cause suit were tried on regular side and no objection is raised an appeal would lie subject to the provisions of S. 102, Civil P. C. **1961 M P L J (Notes) 254.**

——S. 25 — Suit triable on regular side tried on Small Cause side by Judge having Small Cause and regular powers — Appeal—(Civil P. C. (1908), S, 96).

A suit was wroungly tried on the Small Cause side though triable on the regular side by the same Judge.

Held, that the trial must be held to be on the regular side and an appeal against the Court's decree was competent. AIR 1926 Lah 150, Foll. **1958 M P L J (Notes) 123.**

——S. 25 — Applicability—Small cause decree transferred for execution to Court of original jurisdiction — Latter Court passing order for arrest under S. 51, Civil P. C. — Remedy of judgment-debtor — Appeal or revision. See Civil P. C. (1908), S. 42. **AIR 1957 Mad 761.**

——S. 25 — Scope.

Small Cause suit transferred by High Court under S. 24, Civil P. C. Transferee Court's decision, inspite of it having original jurisdiction only, is a small Cause decision and revision under S. 25 of the Act and not an appeal under S. 96, Civil P. C. lies. 38 Mad 25, Rel. on. **(1953) 1 Mad L J 250 : 1953 Mad W N 58 : 66 Mad L W 111 : AIR 1953 Mad 582 (582) (Pt A) (Pr 5).**

——S. 25 — Three small cause suits against different defendants withdrawn to original side and tried along with original suit — Upon withdrawal the suits lose their character of small cause suits— Common judgment and joint decree — Revision filed — Duty of Court is to return revision petition to be re-presented as appeals. **(1950) 2 Mad L J 495 : AIR 1951 Mad 275 (275) (Pt A) (Pr 2).**

[Overruled in (1955) 2 Mad L J 254 (FB)].

——S. 25 — Order for ejectment passed by Civil Judge Junior Division under S. 28, Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947) — Revision — Competency. See Houses and Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (1957), Ss. 28 and 29. **AIR 1959 Mys 145.**

——S. 25 — Suit cognizable by Small Cause Court — Plaint returned for presenting before another Court— Revision—Interference. See Civil P. C. (1908), S. 115. **AIR 1958 Pat 22 (DB).**

3. "Decided," meaning of — Interlocutory order.

——S. 25 — Case decided — Order under O. 11, R. 18, Civil P. C.—(Civil P. C. (1908), S. 115, O. 11, R 18).

An order for inspection of accounts passed under O. 11, R. 18, Civil P. C., does not dispose of the whole case or any part of it. It does not even indirectly amount to an order which will have material effect on the final disposal or decision of the case. Simply because the plaintiff may not carry out the orders passed by the Court and may thus invite rejection of his plaint, the order does not amount to a case decided within S. 25, Provincial Small Cause Courts Act. **1954 A M L J 112 : AIR 1956 Ajmer 32 (32) (Pr 5).**

——S. 25 — Revision against interlocutory order — Suit finally decided — Maintainability—(Civil P. C. (1908), S. 115).

If a remedy is provided against an interlocutory order and if a party has the right to challenge that interlocutory order within the period allowed by the statute of limitation, it would not be correct to deprive him of that right merely because before he could secure the remedy in the superior Court, a final order is passed by the trial Court. For, the aggrieved person cannot be deprived of his legal right merely because he was unable to persuade the trial Court to stay its hands or the superior Court to issue an order staying the proceedings in the trial Court. If the law grants a right that right must not be negatived merely because the trial Court has proceeded further and has heard or even finally decided the suit in which the interlocutory order was passed. AIR 1937 Oudh 364, Dissented from. **1956 A M L J 76 : AIR 1956 Ajmer 9 (9) (Pt A) (Pr 2).**

——S. 25 — 'Case decided' meaning of — Interlocutory order — (Civil P. C. (1908), S. 115) — (Words and Phrases) — 'Case decided.'

The words 'case decided' in S. 25 must be liberally construed and must be taken to include decision on all questions materially affecting the rights of the parties, though, not all interlocutory orders would amount to a 'case decided.' It will be a question of fact in each case whether the question decided

amounts to a 'case decided' or not. Where the Court assumes jurisdiction which it does not legally possess, the order will amount to a 'case decided' and a revision lies against it. 1956 A M L J 76: AIR 1956 Ajmer 9 (10) (Pt B) (Pr 5).

——S. 25 — 'Any case decided' — Order directing plaintiff to implead certain parties—No revision lies.

Under S. 25 a High Court has revisional powers when any case is decided by a Court of Small Causes. Unless a case is decided, this section would have no application.

An order directing the plaintiff to join certain parties cannot be said to be a decision of the case. It gives the plaintiff an opportunity to join additional parties. If he does so, the suit would proceed. If he does not do so, the Court would have to consider what the effect of the non-joinder of the parties would be. The Court may even dismiss a suit if it feels that it cannot properly decide the matter in the absence of certain necessary parties; but at the time when the Court directs a plaintiff to join certain parties, it cannot be said that the Court has decided a case. Such an order is not therefore open to revisional jurisdiction under S. 25 of the Act. AIR 1955 Kutch 23 (23) (Prs 3, 5).

——S. 25—Refusal to amend—Interference—Discretion—C. P. Code (1908), O. 6, R. 17.

Where the plaintiff, who had brought a suit in his own name for recovery of money due to a partnership firm of which he was a partner without joining the other partner, applied for amendment of the plaint by addition of the other partners as co-plaintiffs after the claim had become barred by limitation:

Held, that it was quite competent for a Court in exercise of its jurisdiction under O. 6, R. 17, Civil Procedure Code to refuse the amendment of plaint by addition of co-plaintiffs after the claim against the defendant has become barred by limitation. 1959 M P L J (Notes) 220.

——S. 25—Case decided—Return of plaint by Small Cause Court for presenting the same before another Court—It is case decided. 1956 B L J R 204 : AIR 1958 Pat 22 (Pt A) (DB).

4. "According to law."

——S. 25—Scope—'According to law'—Meaning of—Finding of fact—Interference by High Court.

A decree or order of the Court of Small Causes cannot be said to be according to law: (1) Where the decision of the Small Cause Court is not based on any evidence. (2) Where the decision is based on an erroneous and improper appreciation of the evidence on record, amounting to a gross misappreciation of the evidence. (3) Where the decision is based on evidence on which no reasonable man would come to the conclusion reached by the Small Cause Court Judge. (4) Where the decision is based on an erroneous view of the law. (5) Where the decision is based, ignoring the rules as to burden of proof. As regards the restraint on the powers of the High Court, exercising jurisdiction under this Section, it is to be noted that it may not be open to the High Court to interfere with the finding of fact reached by the Court of Small Causes, merely because it takes a different view. Such a right is, of course, open to the High Court in a first appeal, but not in a revision under S. 25. 1961 Andh L T 404 : AIR 1961 Andh Pra 461 (465) (Pt D) (Prs 11, 12).

——S. 25—Interference in revision.

Small cause suit — Plaintiff alleging of having supplied ghee to defendant—Defendant not admitting plaintiff's claim — Judge putting plaintiff to proof — Held that relevant issue was framed and that the Judge did consider the issue raised by the pleadings —No interference in revision. AIR 1953 Him Pra 68 (69) (Pt C) (Pr 8).

——S. 25—Revision under—When allowed—Decision not in accordauce with law — High Court will interfere — Finding not perverse or against weight of evidence —No interference. AIR 1955 N U C (Madh-Bha) 3371.

——S. 25 — 'According to law' — High Court when would interfere in revision — Small Cause Court misdirecting itself and casting burden of proof wrongly by not drawing correct inferences from documents by basing its findings not on evidence but on conjectures or assumptions for which there was nothing in facts to support and by overlooking important principles of the law of evidence—This resulting in miscarriage of justice — High Court will interfere in revision. AIR 1953 Madh-Bha 32 (34) (Pt C) (Pr 20).

——S. 25—Small Cause Court is duty bound to make its judgment self-sufficient and reasonably intelligible so as to enable the High Court to see that the decree or order is in accordance with law. 1963 M P L J (Notes) 260.

——S. 25 — Judgment, meaning of — Reasons for decision in brief to be given. See Provincial Small Cause Courts Act (1887), S. 17 (1). 1965 Cur L J 884: AIR 1966 Punj 227.

——S. 25—Decision based on insufficient evidence. See Civil P. C. (1908), S. 115. AIR 1955 N U C (Punj) 5722.

——S. 25—'According to law'.

The phrase 'according to law' implies according to the forms of law prescribed for ensuring a fair trial. Where the trial has taken place in a manner not contemplated by the Code, and is nothing more than a travesty of the trial, a judgment based on such a trial could in no manner be accepted as being according to law within the meaning of S. 25, Provincial Small Cause Courts Act. I L R (1955) 5 Raj 869 : 1956 Raj L W 555 : AIR 1956 Raj 9 (11) (Pt C) (Pr 6).

——S. 25—Judgments of Small Cause Courts—O. 20, R. 4 (1) must be read along with S. 25, Provincial Small Cause Courts Act. See Civil P. C. (1908), O. 20, R. 4 (1). AIR 1955 N U C (Sau) 4604.

5. Substantial justice.

——S. 25 — Applicablity — Technical objection to trial of suit — (Houses and Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (LXV of 1947), S. 49—Rules under.

A technical contention cannot be permitted to be raised in revision unless it is shown that substantial injustice has resulted by reason of infringement of the rules as to the trial of suits. AIR 1936 Bom 102 (104) (Pt E) (Pr 8).

——S. 25 — Substantial injustice — Tests indicated. AIR 1955 N U C (Madh Bha) 197.

——S. 25—Revision lies on ground of error of law or fact when there is injustice—Application for restoration dismissed without calling upon plaintiff to corroborate allegations—There is injustice to plaintiff. (C. P. Code (1908), S. 115). AIR 1955 N U C (Raj) 5749.

6. Discretionary orders—Revision.

——S. 25—Interference with discretionary order.

Where in a small cause suit for recovery of arrears of rent, the trial Court after considering the evidence,

allows payment of decretal amount by instalments, the High Court will not in revision, interfere with the order as it cannot be said that that discretion has been exercised in so perverse a manner as to invite the interference of the High Court. AIR 1949 Cal 427, Disting. AIR 1956 Ajmer 69 (70) (Pt C) (Pr 4).

——S. 25 — Exercise of discretion of Small Cause Court, not to stay suit under S. 34, Arbitration Act — Revision shall not be entertained. 1952 All L J 715 : AIR 1953 All 149 (150) (Pt B) (Pr 7).

——S. 25 — Question of title involved — Small Cause Court can return plaint for presentation on regular side — Order of Small Cause Court not arbitrary — High Court will not interfere. 1962 M P L J (Notes) 59.

7. Ex parte decree.

——Ss. 25, 17 — Right to apply — Bar of — Ex parte decree set aside on payment of costs — Party accepting costs—Right to challenge order by revision.

Where an ex parte decree is set aside on the term of payment of costs, the party accepting the costs cannot afterwards object to the order by way of revision under S. 25 of the Act. The principle underlying the rule is that when an order shows plainly that it is intended to take effect in its entirety and that several parts of it depend upon each other, a person cannot adopt one part and repudiate another. A I R 1930 Mad 268 and A I R 1956 S C 593, Rel. on. 1958 Andh L T 472 : (1958) 1 Andh W R 542 : AIR 1958 Andh Pra 483 (484) (Pr 9) (DB).

——Ss. 25 and 17—Ex parte decree—Setting aside of, for sufficient cause — Whether cause for non-appearance was sufficient is a factual matter—Court accepting cause as sufficient — Matter cannot be agitated in revision. 1960 Jab L J 610 : 1960 M P L J 1109 : A I R 1961 Madh Pra 2.

——S. 25 — Case proceeded ex parte — Court should warn if no prima facie case made out—Court acting erroneously with regard to its practice to the prejudice of a party—High Court can interfere in revision—(Civil P. C. (1908), O. 20, R. 4)—(Practice and Procedure).

Plaintiffs filed a suit for recovery of money on a bond. The defence was that the loan had been repaid by giving a buffalo and some land on lease to the plaintiffs. The defendant remained absent after filing written statement. The plaintiff No. 1 alone entered the witness-box and admitted the receipt of buffalo and land but stated that it was in satisfaction of another loan. The Judge however dismissed the claim.

Held, that when the defendant did not appear and the Court required the plaintiff to adduce prima facie evidence, the Court ought to warn the plaintiff that such evidence as he had adduced was not in the opinion of the Court sufficient to establish a prima facie case. High Court would have power to interfere with a decree of Small Cause Court on a question of practice which went to the root of the trial when prejudice was caused to one of the parties on account of the mistake of the Court on a question of practice.

The admission of the plaintiff could be taken into consideration either in its entirety or not at all. The Small Cause Judge acted erroneously in dissecting the so-called admission of the plaintiff in his deposition. (1961) M P L J (Notes) 262. :

——S. 25—Ex part decree — No application filed for setting it aside—Revision—Competency—Interference. 1959 Raj L W 296 : ILR (1958) 8 Raj 837 : AIR 1958 Raj 286 (286) (Pt A) (Pr 2).

8. Error of procedure.

——S. 25—Error of procedure—Court taking up case on date of original hearing even though adjournment was granted on application by plaintiff — Judgment and decree set aside and retrial ordered — (Civil P. C. (1908), O. 17, R. 1). A I R 1955 N U C (Ajmer) 4789.

——S. 25 —Error of procedure.

Where the point as to jurisdiction of the trial Court is raised after all the evidence in the case is recorded and the Court holds that it has no jurisdiction to entertain the suit, nevertheless it is entitled to record findings on all the other points for determination arising in the case. It the trial Court has found that the claim of the plaintiff is not proved which is a finding of fact, the High Court in revision would not interfere with the decree even if it holds that the question of jurisdiction was wrongly decided. A I R 1955 Kutch 8 (8) (Pt C) (Prs 4, 5).

——S. 25 — Scope — Point for determination not set out in judgment — Trial Court, however, applying its mind to the question—No interference will be made. A I R 1955 N U C (Madh B) 3332.

——S. 25—Error of procedure and of law—Suit instituted in Small Cause Court — On date of first hearing defendant applying for adjournment without any affidavit to support application—Defendant unwilling to pay adjournment costs also — Court holding that defendant should have obtained leave under O. 37, to appear and defend suit — Application for adjournment rejected and plaintiff's claim decreed — Provisions of O. 37, Civil P. C., held were inapplicable and it was not incumbent on the defendant to obtain previous leave to appear and defend suit—Nor was it necessary for him to agree to pay adjournment costs—If he did not pay costs he would not have been allowed to file written statement—Order refusing adjournment held erroneous and liable to be set aside—(Civil P. C. (1908), O. 17, R. 1 and O. 37, R. 1). A I R 1959 Manipur 14 (14) (Pt B) (Pr 6).

9. Interference on questions of fact.

——S. 25 — Excessive interest — Question of fact — Nothing to show that 12 per cent interest was excessive — No interference by High Court. See Debt Laws—Usurious Loans Act (1918), S. 3. A I R 1956 Ajmer 79.

——S. 25—Interference on questions of fact—Appreciation of evidentiary value of entries in document not of title—It is question of fact—No interference—Civil P. C. (1908), S. 115. A I R 1955 N U C (Ajmer) 4800.

——S. 25 — No interference on question of fact supported by evidence. A I R 1955 N U C (Ajmer) 4750.

——S. 25—Powers of High Court — Nature of — No interference on pure question of fact.

It is true that revisional powers are reserved to the High Court under S. 25 but in exercising those powers the High Court will not, and is not intended to, perform the function of a Court of appeal and will not therefore ordinarily interfere on questions of pure fact. Not only is the trial Court in a better position to appreciate the evidence of witnesses whom it has actually seen and heard, but for the High Court to interfere on such grounds would be to stultify the whole object and intention of the Act which is designed to procure a speedy and final settlement of claims within the jurisdiction of Small Cause Courts. A I R 1952 Ajmer 45 (2) (45) (Pr 3).

——S. 25 (substituted by U. P. Amending Act 17 of 1957) — District Judge not empowered to decide question of fact — Whether particular endorsement was made on certain date is question of fact.

Under S. 25 of the Act as substituted by U. P. Amending Act No. 17 of 1957, the District Judge has

power to satisfy himself that a decree or order made in any case decided by a Court of Small Causes was according to law. He is not empowered to look into the evidence of the case and to decide whether the finding of fact arrived at by the Court below is justified by the evidence on record or not. Only questions of law can be gone into and the fact that a particular endorsement was made on a certain date is a pure question of fact and cannot be looked into by exercising revisional powers under S. 25. 1965 All W R (HC) 645 : 1965 All L J 989.

——S. 25—Revision under—High Court has no jurisdiction to investigate into questions of fact.

Under the provisions of S. 25, the High Court can only correct legal errors committed by the Small Cause Court. It has no jurisdiction to investigate into questions of fact and record different findings of fact from those recorded by the Judge of the Small Cause Court. AIR 1963 All 574 (578) (Pt E) (Pr 15).

——S. 25—Interference on questions of fact—Findings of Small Cause Court Judge found perverse—Re-assessment of evidence in revision permissible.

It may be ordinarily correct that a Judge sitting in revision cannot act like an appellate Court and cannot reassess the evidence once assessed by the Small Cause Court; but if the assessment of the evidence is wrong or the approach is wrong or the finding is perverse, the Judge sitting in revision has every right to give a judgment after correctly assessing the evidence. 1963 All W R (HC) 195 : A I R 1963 All 109 (110) (Pr 2).

——S. 25—Question of fact — Interference — Trial Court having advantage of seeing demeanour of witnesses and believing particular set of evidence—High Court under S. 25 cannot regard conclusions of trial Court as being perverse or liable to amendment. 1961 All W R (HC) 193 : 1961 All L J 333 : ILR (1961) 1 All 834 : AIR 1961 All 347 (352) (Pt C) (Pr 15) (DB).

[Overruled in AIR 1964 All 1 (FB).]

——S. 25—Question of fact—Interference.

Finding of fact arrived at after due consideration of evidence must be accepted and cannot be challenged in revision. 1957 All L J 507 : AIR 1958 All 32 (33) (Pt B) (Pr 6).

——S. 25—Trial Court taking particular view on evidence—Interference by High Court.

When the Small Cause Court has taken a particular view on the evidence adduced, that view is not open to interference in exercise of revisionary jurisdiction of the High Court unless it is shown that the trial Court has gone wrong on principle. (1963) 2 Andh W R 245 : (1963) 2 Andh L T 115 : AIR 1963 Andh Pra 438 (439) (Pt A) (Pr 4).

——S. 25—Scope of revisional jurisdiction of High Court—Question of damages—Interference. (1962) 2 Andh W R 323 : (1962) 2 Andh L T 495 : AIR 1963 Andh-Pra 250 (251) (Pt B) (Pr 5).

——S. 25—Questions of fact—Interference.

In exercise of its jurisdiction under S. 28, Provincial Small Cause Courts Act, High Court cannot interfere with the conclusion of the trial Judge on a pure question of fact. AIR 1956 Bom 236 (236) (Pt A) (Pr 2).

——S. 25—Question of fact—Question as to quantum of profits—Question cannot be considered in petition under S. 25. 65 Cal W N 1067 : AIR 1962 Cal 111 (112) (Pt C) (Pr 5).

——S. 25—Finding of fact based on misappreciation of evidence—High Court would interfere. ILR (1951) 1 Cal 279 : AIR 1950 Cal 201 (202) (Pt B) (Pr 8).

——S. 25—Interference on question of fact.

Normally the finding of fact recorded by the trial Court is not interfered with in revision but when the trial Court has brushed aside the documentary and oral evidence without giving any good reason for doing so and has returned a finding contrary to the evidence on record, the finding arrived at by the trial Court can be overset in revision. 10 J & K L R 183 : AIR 1952 J & K 27 (27) (Pr 4).

——S. 25—Interference on questions of fact—Perverse conclusion on question of fact leading to inference that it was not deduced from evidence — Decision is not according to law—Liability for claim arising on admission or proof—Party under liability not alleging or proving discharge — Conclusion that party claiming cannot be believed is perverse finding. AIR 1955 N U C (Kutch) 4308.

——S. 25—Interference on question of fact—Finding based on no evidence will be interfered with. A I R 1955 N U C (Kutch) 4307.

——S. 25—Interference on question of fact—Finding that cash consideration was not paid is one of fact—No interference. AIR 1955 N U C (Kutch) 1812.

——S. 25—No interference on question of fact. AIR 1955 N U C (Madh-B) 3369.

——S. 25—Question of fact.

Small cause suit for arrears of rent brought by heir to property of J—Judge holding that plaintiff was not heir of J—Question whether plaintiff was heir of J or not held was question of fact — Finding of Judge not being perverse or obviously wrong, High Court held could not interfere on revision side. AIR 1944 Mad 181; AIR 1925 All 172, Ref. AIR 1953 Madh-B 242 (242) (Pr 3).

——S. 25—Finding of fact.

Section 25 gives power to the High Court to interfere if the decision is not according to law. If a finding of fact is perverse the High Court can interfere. Interference in regard to appreciation of evidence should, in general, only be exercised when there is a very clear case of misappreciation which has resulted in injustice and makes the decree one that cannot be regarded by a revisional Court as 'according to law'. AIR 1921 Bom 407; AIR 1933 All 373, Relied on. AIR 1953 Madh-B 158 (159) (Pt B) (Pr 4).

——S. 25 — Interference on question of fact—Small Cause Judge reaching conclusion reasonably possible from state of evidence on record—High Court would decline to interfere : AIR 1943 Nag 117 (FB), Foll. 1965 M P L J 102 : 1965 Jab L J 94 : ILR (1965) Madh Pra 335 : AIR 1965 Madh-Pra 24 (26) (Pt C) (Pr 21).

——S. 25 — Question whether amount decreed was correct or not is one of fact — Cannot be raised in revision. 1959 Jab L J 473 : 1959 M P L J 1203 : 1960 M P C 12 : AIR 1960 Madh-Pra 30 (31) (Pt C) (Pr 7).

——S. 25—Finding that summons was not duly served and that defendant knew of ex parte decree only on service of notice of execution is one of fact and cannot be interfered with in revision. (1958) 2 Mad L J 594 : 72 Mad L W 127.

——S. 25 — Question of fact — (C. P. Code (1908), S. 115).

The High Court has wider jurisdiction under S. 25 in entertaining revision application than under the provisions of S. 115, C. P. Code. But where the evidence makes it clear that a question of fact was gone into by the Judge and this decision is apparently in accordance with the evidence, the High Court will not usually interfere in revision merely because it is

possible to take a different view of the evidence to that of the Court below. The decision of the Small Cause Court should not be interfered with in revision though it may appear even to be erroneous unless the conclusion is one which no Judge acting judicially could reasonably reach. Case law relied on. 1954 Mad W N 279 : AIR 1955 Mad 271 (272) (Pt A) (Pr 5).

——S. 25—Erroneous finding of fact—Interference is not justified on the ground that finding of fact is inadequate or incorrect. AIR 1955 N U C (Mad) 4544.

——S. 25—Revision lies when trial Court has misappreciated evidence and reached perverse conclusion causing miscarriage of justice. AIR 1955 N U C (Mad) 4331.

——S. 25—Finding of fact—Interference. ILR (1958) 8 Raj 837 : AIR 1958 Raj 286 (287) (Pt C) (Pr 5).

——S. 25—Question of fact—Interference.

A trial Court is in a far better position to judge the credibility of the oral evidence having an opportunity to hear and see the witnesses, which opportunity is denied to the High Court. The latter will not therefore interfere with the conclusion of the trial Court on a question of fact. 1957 Raj L W 411 : I L R (1957) 7 Raj 898 : A I R 1957 Raj 279 (281) (Pt B) (Pr 9).

——S. 25—Finding of fact.

A revisional Court does not ordinarily interfere with a finding of fact recorded by the Small Cause Court Judge. When, however, a finding is based upon a misinterpretation or brushing aside of a very valuable piece of evidence, e. g., not taking into consideration important admissions of the plaintiff, it is not only permissible but necessary for the High Court to vacate that finding in the interest of justice. A I R 1927 Nag 77 ; A I R 1933 Pat 145, Relied on. A I R 1955 N U C (Raj) 361.

——S. 25—High Court's power of revision — Question of fact—No interference.

Though the powers of the Court of Revision under S. 25 of the Provincial Small Cause Courts Act are wider than those under S. 115, Civil P. C, yet the section ought not to be construed as giving the aggrieved party a right of appeal on points of law much less than on points of fact.

Where the question involved in revision is one of pure fact depending upon appreciation of evidence (viz., that the plaintiff's suit was false and ought not to nave been decreed) the High Court would refuse to interfere with the decision of the trial Court in the exercise of its discretionary powers under S. 25. 21 Bom 250 ; A I R 1938 Bom 223 ; A I R 1941 Bom 67. Foll. 7 Sau L R 58 : A I R 1953 Sau 108 (108, 109) (Prs 2, 3).

10. Error of law.

——S. 25 — Scope—In revision under S. 25, question of law may be raised—In addition obvious perversity in deciding facts may also be corrected—This is also the scope of S. 35 of Delhi and Ajmer Rent Control Act, 1952, which is very similar to S. 25 of the Provincial Small Cause Courts Act. A I R 1955 N N C (Ajmer) 4405.

——S. 25 — Interference by High Court — Obvious misapprehension of legal position resulting in miscarriage of justice—Interference justified.

Normally, in a revision filed under S. 25, the Courts are reluctant to inferfere, except in cases of grave injustice. Where there is an obvious misapprehension of the legal position resulting in miscarriage of justice, it is right to interfere with the order of the lower Court. (1962) 2 Andh L T 206 : (1962) 2 Andh W R 182 : A I R 1963 Andh Pra 24 (25) (Pt C) (Pr 10) (DB).

——S. 25—Finding that clerical mistake in document was corrected—There is no question of law involved. A I R 1955 N U C (Assam) 5528.

——S. 25 — Order wrong in law — Interference by High Court.

The use of the word 'may' in S. 25 suggests that even if the decree or order made in a case is not according to law, the High Court can refuse to interfere with the decree or order, especially when no injustice had been done to any party. When it appears to the High Court that interference under S. 25 will not be beneficial to any of the parties and will simply put them to extra expenses and inconvenience and will also cause delay in the disposal of the suit, it is but proper that the High Court should refuse to interfere with the order. Thus, where the Court wrongly orders the restoration of a suit dismissed by it on merits the order though without jurisdiction will not be interfered with by the High Court in the exercise of its discretion under S. 25 when the effect of setting aside the wrong order would be to put the parties to additional expenses and inconvenience. A I R 1956 Bhopal 54 (55) (Pt C) (Prs 6, 7).

——S. 25—Interference—Suit for loan cannot be dismissed because receipt does not disclose date of re-payment—Terminus a quo was the date of making the loan under Art. 57, Limitation Act. 1961 M P L J (Notes) 44.

——S. 25—Error of law—Suit time-barred — Decree in—Illegality — Interference in revision. A I R 1939 All 260 and 25 Nag L R 187, Rel. 1958 M P L J (Notes) 16.

11. Question of limitation.

See also Note 13.

——S. 25—Question of law — Interference on question of limitation.

In revisions under S. 25, questions of law may certainly be raised as they are raised in second appeals under S. 100, Civil P. C. In addition though the Court will not ordinarily interfere with decisions on fact it will interfere with a question of fact when it is obviously perverse. The High Court will therefore interfere in revision under S. 25 on a question of limitation : 1925 A M L J Sup 6 and 1946 A M L J 42 (1), Not foll.; AIR 1952 Ajmer 51 (2); 1936 A M L J 68 and S C C Revn. No. 112 of 1953 (Ajmer), Foll. AIR 1955 Ajmer 46 (47) (Pt C) (Prs 6, 7, 8).

——S. 25—Revision under—Wrong decision on question of limitation.

The Court certainly can revise a decision of a Small Cause Court on a question of limitation, where such decision is wrong and has resulted in an injustice to a party. 1952 A M L J 9 : A I R 1952 Ajmer 51 (52) (Pr 3).

——S. 25—Revision under — Powers of High Court —Extent of — Order contravening S. 3, Limitation Act—Must be set aside—Limitation Act (1908), S. 3.

The powers of the High Court under S. 25 are not limited to the question of jurisdiction but extend to the power to see whether the judgment has been rendered according to law. Section 3 of the Limitation Act being mandatory, it is indisputable that it has to be obeyed in full. Any decision contrary to that section must be open to interference in exercise of the powers of revision. A I R 1963 S C 698, Foll. (1964) 2 Andh W R 114 : A I R 1964 Andh Pra 462 (465) (Pt B) (Pr 5).

—S. 25 — Wrong decision on point of limitation—Interference in revision.

The power of revision under S. 25 is discretionary and the High Court will refuse to interfere with the trial Court's decision when no injustice has resulted therefrom to the applicant, even though there has been a misapplication of the law of limitation by the Court below and especially when injustice will result to the opposite party by such interference. Where the Small Cause Court negatives the plea of limitation raised by the defendant and decrees the suit and there is no doubt that the claim of the plaintiff is true and just, the High Court would not interfere with the decree in revision simply because the law of limitation has been erroneously applied by the Court below. A I R 1946 Cal 526 and I L R 15 All 139, Rel. on. **65 Cal W N 905 : 1961 All W R (Supp) 47 : 1961 All Cri R 279 : 1962 (1) Cri L J 139 : A I R 1962 Cal 97 (98) (Pt B) (Prs 5, 6).**

—S. 25—Error of law or fact — Question of limitation—Revision.

The revisional powers under S. 25 of the Act are discretionary and there should be no interference on a question of fact or of law even though the decision may appeal to be erroneous, unless the conclusion of the Small Cause Court is one which no judge acting judicially could reasonably reach. **1958 Ker L T 573 : 1958 Ker L J 704 : I L R (1958) Ker 1151 : A I R 1959 Ker 356 (358) (Pt C) (Pr 6).**

12. Question of jurisdiction.

See also Note 13.

—S. 25—Laches in making application — Point of jurisdiction incorrectly decided by trial Court — Interference in revision.

Though the power under S. 25, Small Cause Courts Act is discretionary, and if a long time has elapsed since the decree was passed the High Court should not exercise its discretion in favour of the defendants, when the point of jurisdiction was raised in the trial Court and was incorrectly decided there is no reason why the incorrect decision should be maintained. **1958 All W R (H C) 351 : 1958 All L J 876.**

—Ss. 25, 15, Sch. II, Art. 15 — Question of jurisdiction — Issue as to — Duty of Court — Nature of suit — Determining factor — See Provincial Small Cause Courts Act (9 of 1887), S. 15. **AIR 1956 Bom 254.**

—S. 25—Jurisdiction—Absence of—Revision.

A suit which was barred by S. 47, Civil P. C., was erroneously held to be maintainable by Small Cause Court. **Held**, that the question being one of jurisdiction, High Court should not refuse to interfere under S. 25, Provincial Small Cause Courts Act. **1959 M P L J (Notes) 172.**

—S. 25 — Decree passed by Small Cause Court without jurisdiction — Question of jurisdiction not raised in trial Court — It can be raised in revision — Civil P. C. (1908), Ss. 115, 9.

Where the question of jurisdiction of the Small Cause Court was not raised in the trial Court, it can still be raised before the High Court in revision. AIR 1965 Guj 131, Rel. on.

It is a fundamental principle that a decree passed by a Court without jurisdiction is a nullity. Its invalidity can be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction whether pecuniary or territorial, or in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree, such a defect cannot be cured even by consent of parties. **AIR 1965 Manipur 52 (53) (Pt A) (Prs 4, 5).**

—S. 25—Trial by Small Cause Court of suit for fruit of trees or damages — Question of title incidental — Suit not barred from cognizance of Small Cause Court even though defendant raises question of title — It is in discretion of Small Cause Court either to try the case or return it for presentation to proper Court — Court deciding to try suit —No error is committed. See Provincial Small Cause Courts Act (1887), S. 15. **AIR 1954 Nag 128.**

13. New pleas.

—S. 25—Revision under—Objection that execution application filed by one of the joint decree-holders is defective if it does not state explicitly that it has been filed on behalf of all the creditors, should be raised in the trial Court and the judgment-debtor cannot be allowed to raise it for first time in High Court in revision application. **AIR 1951 Ajmer 73 (1) (74) (Pt A) (Pr 2).**

—S. 25—New plea — Question of jurisdiction.

When the question of jurisdiction was not raised before the Small Cause Court and that question is linked with a question of fact it will not be proper for the High Court to entertain the plea in revision. ILR 25 All 135; AIR 1925 All 51 and AIR 1918 All 355 (2), Rel. on. **1957 All L J 507 : AIR 1958 All 32 (33) (Pt A) (Pr 5).**

—S. 25—New plea — Suit to recover difference of interest paid at rate higher than statutory rate — Plea that difference should in law be regarded as moneys had and received by the creditor to the use of debtor —Such allegations not made in plaint—Debtor cannot be allowed to raise such point at the stage of revision. **(1962) 2 Andh L T 206; (1962) Andh W R 182 : AIR 1963 Andh Pra 24 (25) (Pt B) (Pr 9) (DB).**

—S. 25—Revisional jurisdiction of High Court — Objection to jurisdiction raised for first time before High Court — Not allowed to be raised. **1961 Andh L T 628 : (1961) 2 Andh W R 140 : AIR 1962 Andh Pra 162 (163 to 165) (Pr 3).**

—S. 25—Succession Act (1925), S. 332 — Objection to suit on ground of want of executor's assent cannot be raised in revision for first time. **AIR 1956 Bom 102.**

—S. 25—New plea in revision— Failure of lessee to pay property tax which he was bound to pay — Landlord paying same — Suit by him for reimbursement — Allegation in plaint bringing case within Ss. 69 and 70, Contract Act — Allegations neither denied nor controverted—It amounts to admission by lessee of his liability — No issue on question framed —Revision against decree — Plea that landlord had not made out case under Ss. 69 and 70, Contract Act, cannot be raised for first time. **1955 Mad W N 298 : (1955) 1 Mad L J 531 : AIR 1955 Mad 555 (556) (Pt A) (Pr 5).**

—S. 25—New plea.

Point about which there is no hint either in the pleadings or the issues framed will not be allowed to be raised in revision. **1953 Mad W N 58 : (1953) 1 Mad L J 250 : 66 Mad L W 111 : AIR 1953 Mad 582 (583) (Pt B) (Pr 7).**

—S. 25—New point.

The question whether korfa (under raiyati) right is heritable by custom is a mixed question of law and fact and cannot be allowed to be raised for the first time in revison in absence of any evidence on record on the point. **1953 B L J R 888 : AIR 1954 Pat 32 (32) (Pt A) (Pr 4).**

14. Powers of High Court.

—S. 25 — Giving of reasons is not necessary for order on revision. **AIR 1955 N U C (Ajmer) 1328.**

—S. 25—Remand — Admission by plaintiff in trial Court on particular point — Remand will not be

ordered to enable plaintiff to adduce evidence contrary to admission — Civil P. C. (1908), O. 41, R. 25. AIR 1955 N U C (Ajmer) 1263.

—— Ss. 25 and 23 — Suit dismissed as not cognizable by Small Cause Court — S. 23 does not apply — Revision — Suppression of material fact by applicant — High Court would not remit case to regular Court in exercise of its discretion. 1961 Jab L J 570 : 1961 M P L J 175 : AIR 1961 Madh Pra 152 (153) (Pt B) (Pr 8).

15. Limitation for revision.

——S. 25—Limitation for revision against rejection of application for substitution of legal representative — Remedy of revision not followed — Second infructuous application — Application for revision — Limitation of 45 days expiring— Relaxation of limitation cannot be permitted. AIR 1955 N U C (Madh B) 3762.

16. Forum of revision.

See Note 1.

SECTION 27

——S. 27—Order in execution passed by Small Cause Court in its small cause side—Order is not appealable but revisable. ILR (1960) 1 Cal 895.

—— S. 27 — Munsif having jurisdiction to try suit of Small Cause nature trying such suit in ordinary jurisdiction—That fact does not take away the prohibition of appeal against his decision in such suit. AIR 1950 Cal 109 (110) (Pt B) (Pr 6).

——S. 27—Order scaling down decree under Madras Agriculturists' Relief Act 1938 passed by Small Cause Court is not appealable. AIR 1953 Mad 908 (Pr 1).

——Ss. 27 and 16—Court having small cause jurisdiction trying suit on its original side — Decree is not void—No appeal but revision lies. AIR 1962 Manipur 1 (Pt B).

——S. 27—Setting aside decree on ground of fraud.

Where a decree passed by a Small Cause Court is sought to be set aside on the ground of fraudulent suppression of summons and fraud is not proved, the decree cannot be set aside merely on the finding that the summonses were not properly served. A I R 1950 Pat 284 (285) (Pt A) (Pr 5) (DB).

——Ss. 27, 15, 16—Suit of small cause nature filed as money suit — Small Cause suit tried as ordinary suit by Court having small cause jurisdiction — Decree is not appealable. 58 Punj L R 307 : A I R 1956 Punj 233 (233, 234) (Prs 6 to 8).

——Ss. 27 and 15 — Nature of suit is determined by relief claimed —Suit for recovery of Rs. 20 — Suit is small cause suit — Suit instituted in Court having small cause Court power but tried not summarily but as regular: suit — Decree is not appealable. A I R 1955 N U C (Punj) 5722.

——Ss. 27, 16, 33—Cause against defendant that his action was wrongful and illegal but not necessarily penal—Held, that suit was of small cause nature — Valuation of suit within pecuniary jurisdiction of Court exercising small cause powers — To that extent its decision is final. A I R 1954 Vind-Pra 49.

—— S. 27—Scope - Suit raising question of bona fide claim of defendants—Decision in—Finality—Art. 35 (ii)—Applicability.

If upon the plaint a question of bona fide claim on behalf of the defendant is obvious, then Art. 35 (ii) will have no application.

Where upon the facts stated in the plaint the cause against the defendant was that his action was wrongful or illegal but was not necessarily penal :

Held, that the suit was of small cause nature and when the valuation of such a suit was within the pecuniary jurisdiction of the Court exercising small cause powers, to that extent, his decision was final and not open to appeal. A I R 1936 Pat 428, Rel. on. AIR 1954 Vin Pra 49 (49) (Pt B) (Pr 3).

SECTION 29

——S. 29 — Cognisability — Plaintiff alleging joint cultivation and suing for share of produce removed by defendant — If cognisable by Small Cause Court.

According to plaintiff he and defendant had taken a joint lease of a field but defendant removed entire crop without giving plaintiff's half share. Plaintiffs, therefore, sued for the value of his share. No partnership was alleged.

Held, that the suit could not be said to be one for account; that there were no allegations in the plaint which would amount to an offence and that the suit was cognisable by Small Cause Court. 1960 Nag L J (Notes) 30.

SECTION 32

——S. 32 — Plaint properly filed as original suit in District Munsif's Court—Subsequent enhancement of Small Cause jurisdiction of Subordinate Court — Return of plaint for presentation to proper Court— Plaint represented on small cause side of subordinate Court — Trial proceeding without any objection — Decree passed — Decree held not a nullity merely by reason of order of return of plaint being invalid. See Civil P. C. (1908), O. 7, R. 10. AIR 1962 Andh Pra 442 (DB).

——S. 32 — It is manifest from S. 32 that Chapter 3 in which S. 15 occurs is applicable only in regard to the nature of suits cognizable by Court of Small Causes and has no reference to the value of suit contemplated by S. 15. (1959) 1 Andh W R 161 : I L R (1958) Andh Pra 740 : A I R 1959 Andh Pra 3 (Pt A) (DB).

——S. 32 (2) — Scope.

Section 32 (2) in terms is not comprehensive enough to take in a case where a suit was instituted in one Court and the jurisdiction of a Court of Small Causes was conferred on a different Court. ILR (1957) Andh Pra 270 : (1957) 1 Andh W R 340 : 1957 Andh L T 346 : A I R 1957 Andh Pra 133 (134) (Pt B) (Pr 4) (DB).

SECTION 33

——S. 33 — Civil P. C., S. 73 — Same Court — Two Small Cause decrees passed by same Court against same judgment-debtor — One decree transferred for execution to original side of same Court and assets realised — Other decree not transferred to original side prior to receipt of assets — Other decree-holder not entitled to claim rateable distribution under S. 73. AIR 1961 Andh Pra 422 (DB).

——S. 33—Chapter III in which S. 15 occurs is applicable only in regard to nature of suit cognizable by Court of Small Causes and has no reference to the value of suits contemplated by S. 15. (1959) 1 Andh W R 161 : I L R (1958) Andh Pra 740 : A I R 1959 Andh Pra 3 (DB).

——S. 33—Civil P. C., S. 115—Interference in revision —Discretion of High Court — Cross-suits — Small cause suit and original suit jointly tried by Court having both jurisdictions on its original side at instance of one party and in spite of objection by other —Revision — Party inviting joint trial cannot raise objection as to Court's jurisdiction—No interference if decree is found to be correct. 1962 Ker L J 452 : 1962 Ker L T 319 : AIR 1963 Ker 51 (51, 52) (Prs 3 and 4).

——S. 33—Trial as regular suit—Change of procedure—Rajasthan Small Cause Court Ordinance (8 of 1950), S. 30.

If a suit is instituted or proceedings have commenced in any suit as a regular civil suit, it cannot afterwards be tried as a Small Cause Court suit: AIR 1937 Nag 200; AIR 1922 All 112, Rel. on. 1951 Raj L W 145 : ILR (1951) 1 Raj 176 : AIR 1951 Raj 149 (149) (Pr 1).

——S. 33—Scope—Decision in suit of nature of small cause by Court of original jurisdiction is final and not open to appeal. AIR 1954 Vin Pra 49.

SECTION 35

——S. 35—Small cause suit—Munsif having jurisdiction succeeded by Munsif without Small Cause Court powers—Direction of District Judge to try it as regular suit — Not an order under S. 24, Civil P. C. —Decree in such suit — Maintainability and appealability — Civil P. C. (1908), Ss. 24, 96.

A Munsif without Small Cause Court powers who succeeds Munsif having Small Cause Court jurisdiction, has no jurisdiction to try a Small Cause suit as a regular suit if it has been instituted in the Court of the previous Munsif as Small Cause Court suit, when at the time of the transfer of the previous Munsif there is at that place as Subordinate Judge who exercises Small Cause Court powers, even though there is direction of the District Judge to try the suit of small cause nature as a regular Civil Suit. Such direction of the District Judge is not an order under S. 24, Civil P. C. When such a case has been tried as a regular suit by a Munsif without jurisdiction, an appeal against the decree and judgment therefrom does lie. AIR 1931 All 574 (FB) and AIR 1925 Oudh 101, Rel. on. AIR 1964 All 420 (421) (Pt A) (Prs 7, 8, 9, 10).

——Ss. 35 and 17, Proviso—Ex parte decree passed by Small Cause Court—Afterwards said Court abolished —Application to set aside ex parte decree — Application made to ordinary Court under S. 35—Section 17 applies. See Provincial Small Cause Courts Act (1887), S. 17, Proviso. AIR 1962 All 514.

——S. 35 (2)—Himachal Pradesh (Courts) Order 1948 Paras. 35 (1) (b) Proviso 2, 24, 2 (v) — Proviso 2 to Para. 35 (1) (b) not in conflict with S. 35 (2) of Act or Para. 24 of Courts Order. AIR 1963 Him Pra 53 (53, 54) (Prs 5, 6).

——S. 35—Small cause suit pending in Court with no small cause powers — Case transferred—Appeal —Civil P. C. (1908), S. 24 (4).

Held, that on the date of transfer of the suit, it was not transferred from the Small Cause Court because on that date the Judge presiding on that Court had no powers of a Small Cause Judge. It was also clear that the transfer was under S. 35 of the Small Cause Courts Act. In this situation the fiction created by S. 24 (4) of the Civil P. C. could not be applied to hold that the Court trying the transferred suit was to be deemed to be a Court of Small Causes. An appeal, therefore, lay to the District Judge against the decree of the trial Court. C. R. No. 1059, dated 2-2-60, Foll. 1961 M P L J (Notes) 124.

SCHEDULE II, ARTICLE 1

——Sch. 2, Art. 1—Suit for refund of fees on export of cotton seed levied and collected by State — Levy challenged as illegal — If cognizable by Small Cause Court.

In a suit filed for refund of the amount recovered by the State on account of permit fees levied by the State Government on cotton seed meant for export outside the State, it was contended by the plaintiff that the levy of the fees was illegal and without jurisdiction. The suit was filed in the Court of Small Causes.

Held, that Art. (1) of the Second Schedule of the Provincial Small Cause Courts Act was broadly worded and excludes from the cognizance of a Small Cause Court a suit concerning any act done by or by order of the Government. The plaintiff claimed a right to get back his money which was recovered from him in the form of illegal levy. The Court had to investigate if the act of the State Government of levying permit fees and appropriating that amount was authorised by law. Such a suit was excluded from the cognizance of the Court of Small Causes. 1959 Nag L J (Notes) 130.

——Sch. 2, Art. 1 — Civil Procedure Code, S. 102 —Consignment booked on Railway — Consignment not delivered — Suit for damages for non-delivery of consignment — Suit not excepted from cognizance of Small Cause Court.

Plaintiff's claim for damages of Rs. 600 on account of non-delivery of consignment was decreed. On behalf of the appellant it was contended that the suit was excepted from cognizance of the Court of Small Causes by the provision contained in Art. 1 of the II Schedule of the Act.

Held, that the act of refusing to deliver the consignment was not an act which could be said to have been done by or by the order of the Central Government. Orders passed by the officers of the departments of Government which were commercial in their nature were not acts done or orders passed by an officer of the Government in official capacity. 37 Mad 533 and 17 Cal 290, Foll. A Small Cause Court had jurisdiction to entertain such a suit, it being a suit based on contract and not on tort. 28 Mad 213, Foll. The act of the Railway authorities of Katni refusing to deliver the goods (wheat in this case) might have been in pursuance of an order (Inter-Zonal Wheat Control Movement Order, 1957) in this case promulgated by the Central Government, but the refusal itself by no stretch of imagination be held to be that of the Central Government. Thus the present suit could not be said to have been excepted from the cognizance of the Court of Small Causes and, therefore, under S. 102, Civil P. C. second appeal was not competent. (Appeal dismissed). 1965 M P L J (Notes) 66.

SCHEDULE II, ARTICLE 2

——Sch. 2, Art. 2—Scope — Art. 2 applies to suits in respect of ministerial acts of officer.

Schedule 2, Art. 2 applies to a case where the suit is instituted against a ministerial act of an officer alleging that he has done something which was not lawful and the act purported to have been done by the officer in the execution of his duty. AIR 1950 Mad 33, Rel. on. 1959 Jab L J 473 : 1959 M P L J 1203 : 1960 M P C 12 : AIR 1960 Madh Pra 30 (31) (Pt A) (Pr 3).

——Sch. 2, Art. 2—Claim to recover amount paid to Government under decree later superseded — Suit does not fall under Art. 2.

Article 2 refers to acts done by persons not acting as suitors in pursuance of a judgment or order which gives permission so to act, but as ministerial officer or otherwise obeying the order of the Court. Where the essence of the action relates to the payment by the plaintiff himself as a mere suitor, i.e. as the defendant in the former suit of a certain sum of money to Government under a decree later superseded, the suit is not outside the jurisdiction of a Court of Small Causes as the suit does not fall under Sch. 2 Art. 2 : 1 Cal W N 140, Rel. on. AIR 1927 Mad 253, Disting. (1949) 2 Mad L J 400 : 62 Mad L W 663 : 1949 Mad W N 657 : AIR 1950 Mad 33 (33) (Pr 3).

——Sch. 2, Art. 2 — Rajasthan Small Cause Courts (Ordinance) (8 of 1950), Schedule, Art. 2—The suits which concern acts purporting to be done by any person who is not a party to the suit in pursuance of a judgment or order of a Court are excepted from the cognizance of Small Cause Court. 1952 Raj L W 258 : ILR (1952) 2 Raj 348 : AIR 1952 Raj 188.

SCHEDULE II, ARTICLE 3

——Sch. 2, Art. 3—Government Officer appointed as Officer-in-charge of Municipal Committee, but contract on which suit is based was made with Secretary acting for Municipal Committee—Suit not excluded from Small Cause Court's jurisdiction. 1962 Nag L J (Notes) 23.

SCHEDULE II, ARTICLE 4

——Sch. 2, Art. 4—Suit for rent of non-agricultural property is triable by Small Cause Court. See Provincial Small Cause Courts Act (1887), S. 15. 1962 M P L J (Notes) 6.

——Sch. 2, Arts. 4, 11 and 35—Scope — Suit by landlord against tenant for damages for unauthorisedly cutting some trees on leasehold is a small cause suit — Arts. 4 and 11 of Sch. 2 are clearly applicable —Suit does not come under Art. 35 (ii). See Provincial Small Cause Courts Act (1887), S. 15. AIR 1959 Mys 162.

——Sch. 2, Art. 4 (as amended in Bombay) —Saurashtra Rent Control Act, Ss. 27 (1), 28 (1) — Suit for eviction—Trial by Small Cause Court — Right of appeal given by S. 28 (1) is not affected by adopting procedure of a Small Cause Court. See Houses and Rents — Saurashtra Rent Control Act (20 of 1951), S. 27 (1). AIR 1955 NUC (Sau) 4109 (DB).

SCHEDULE II, ARTICLE 7

——Sch. II, Arts. 7 and 8 — Suit for rent other than house rent.

A suit for arrears of rent in respect of a wooden cabin which cannot at all be used for residential purposes and in which a question of apportionment of rent arises is not cognizable by a Small Cause Court in view of Sch. II, Arts. 7 and 8 of the Provincial Small Cause Courts Act. AIR 1927 All 194; A I R 1936 Pesh 55, Dist. 1952 A M L J 2: AIR 1952 Ajmer 47 (2) (47) (Pr 3).

——Sch. II, Arts. 7 and 31—Applicability.

Defendant took a lease of pasture lands from the Government subject to certain conditions. The defendant cultivated the land in breach of the conditions and the Collector imposed penalty upon him in accordance with the terms of the agreement. On failure of the defendant to pay the same, a suit for its recovery was brought on small cause side:

Held that the suit was one for damages for breach of contract pure and simple and was cognizable by Small Cause Courts, although in fixing the quantum of damages, the Collector had regard to the income or profits which the defendant might be expected to have received from the unauthorised use of the land. Neither Art. 7 nor Art. 31 was applicable. (1951) 1 Mad L J 164 : 64 Mad L W 261: A I R 1951 Mad 710 (710) (Prs 4 and 6).

——Sch. II, Arts. 7, 8, Ss. 15 and 25—Case involving question of realisation of rent of immovable property — Small Cause Court has no jurisdiction. See Provincial Small Cause Courts Act (1887), S. 15. A I R 1965 Manipur 52.

——Sch. II, Art. 7 — Suit for recovery of arrears of rent of shop with costs and interest — Suit is not covered by Art. 7. See Provincial Small Cause Courts Act (1887), S. 15. AIR 1955 NUC (Raj) 306.

SCHEDULE II, ARTICLE 8

SYNOPSIS

(Provincial Small Cause Courts Act (1887), Sch. 2, Art. 8.)

1. Rent—Meaning of.
2. Suit for rent—Illustrative cases.
3. Suit not for rent—Illustrative cases.
4. Damages for use and occupation.
5. House rent.
6. "Court expressly invested with power."

1. Rent—Meaning of.

——Sch. II, Art. 8—Rent—Meaning of.

The word 'rent' is used in respect of immovable property like land, house and shops. The word 'rent' therefore, has distinct meaning from the word 'hire' and unless suits for hire are specifically excluded from the cognizance of Court of Small Causes it cannot be held that the suit for hire would not lie in the Court of the Small Causes. Thus the suit for the recovery of hire for boats is not excepted under Art 8. 7 Ind Cas 553, Rel. on. 10 J & K L R 82 : AIR 1952 J & K 15 (15) (Pr 2).

——Sch. II, Art. 8 — 'Rent' what is — Suit to recover hire charges.

The word 'rent' as occurring in Art. 8 of Sch. II has a reference to rent in respect of immovable property and it does not mean hire charges in respect of a movable property such as a loud speaker. Hence Art. 8 does not exclude from the jurisdiction of Small Cause Court, a suit for hire charges in respect of such a property. AIR 1927 Rang 94 and AIR 1957 Raj 279 and A I R 1952 J & K 15, Rel. on; 1950 Madh B L R 496, held not correct. 1957 M P C 717 : 1957 Jab L J 1045 : 1958 M P L J 56; AIR 1958 Madh Pra 52 (53) (Prs 5, 7, 8).

——Sch. II, Arts 7, 8 and S. 15—Case involving question of realisation of rent of immovable property — Small Cause Court has no jurisdiction. See Provincial Small Cause Courts Act (1887), S. 15. A I R 1965 Manipur 52.

——Sch. II, Art. 8—Rent, what is.

Where the same land is used by larger number of persons for grazing their cattle and the only charge made is a fee per head of cattle there cannot be said to be tenancy nor a lease of the land. The licence to graze cattle would not in these circumstances amount to a lease since no right to the land is created, and the persons grazing their cattle are not tenants. A suit for recovery of grazing fee is not a suit for rent. 1951 Nag L J 237; I L R (1952) Nag 115; A I R 1951 Nag 50 (51) (Pr 15).

——Sch. II, Art. 8—Transfer of Property Act (1882), S. 105—Rent—Share of fruit on mango trees.

Ancestors of A planted certain mango trees in the gairmazrua land of the landlord B, merely as trespassers, but there was agreement between B and the ancestors of A by which half the share in the trees and the fruit thereof was to be taken by B and the other half by the ancestors. B settled the land with C recognizing C as his tenant. C, by a registered sale deed transferred his rights to D who, by a suit in the Small Cause Court claimed half the share in the fruit trees on the land from A. The question was whether the share in fruit amounted to 'rent' within Art. 8 of Sch. II, Provincial Small Cause Courts Act and whether D could claim the share:

Held, (i) that the word 'rent' was not defined by the Provincial Small Cause Courts Act but the share in fruit was not a payment for the use and occupation of any land and hence was not rent within the

meaning of the Bihar Tenancy Act; nor was it rent within the meaning of S. 105, T. P. Act as the share was payable under an agreement between the parties which did not amount to lease. The suit for the share was therefore not a suit for rent within Art. 8 and hence was cognizable by the Small Cause Court: Case law discussed.

(ii) that on settlement of the land with C, the rights of the landlord B in the trees passed to C who had validly transferred them to D. D was, therefore, entitled to the half share of fruit of the trees: 24 W. R. 330 and AIR 1930 Pat 382, Rel. on. **A I R 1950 Pat 284 (285 to 288) (Pt B) (Prs 6, 7, 8) (DB).**

——Sch. II, Art. 8 — 'Rent' — Meaning of — Hire for movables — Jurisdiction of Small Cause Court — (Rajasthan Small Cause Courts Ordinance (8 of 1950), Sch. II, Art. 8).

Although the use of the word 'rent' in modern times is not confined to payment received for the use of immovable property only and it is used in connection with movables also, the primary meaning of the term is properly referable to a paymgnt for the enjoyment of immovable property only. It is in this latter sense that the term has been used in Art. 8 in the Provincial Small Cause Courts Act or its counterpart in Rajasthan namely, the Rajasthan Small Cause Courts Ordinance. The word 'rent' has not been used in the Article to cover suits relating to hire for movables and therefore a Small Cause Court has jurisdiction to try such suits. **I L R (1957) 7 Raj 898: 1957 Raj L W 411: AIR 1957 Raj 279 (280) (Pt A) (Prs 5, 8).**

2. Suit for rent—Illustrative cases.

——Sch. II, Art. 8—Suit for rent.

The plaintiff gave certain land to the defendant for a period of three years at a certain annual rent for the purpose of making bricks by excavating the earth therefrom and allowed the defendant to remain in possession. The plaintiff brought a suit for arrears of rent.

Held that the case was not one of mere licence of profit a prendre or even the sale of the earth. It was a case of demise of land and therefore the suit for rent was barred from the cognizance of Small Cause Court under Sch. II, Art. 8. 12 All L J 36; 22 All L J 339, Rel. on; I L R 31 All 342, Dist. **1952 All W R (H C) 326: 1952 All L J 664: AIR 1952 All 874 (874, 875) (Prs 3, 5).**

——Sch. II, Art. 8 — Jurisdiction of Small Cause Court — Suit for recovery of rent other than house rent—(Civil P. C. (1908), S. 102).

Article 8, Sch. II of the Provincial Small Cause Courts Act excepts from the cognizance of a Court of Small Causes suits for recovery of rent other than house rent unless the Judge of the Court of Small Causes has been expressly invested by the State Government with authority to exercise jurisdiction with respect thereto under Notification No. 3009 J, dated June 6, 1951. In the absence of such investiture, the bar under S. 102 of the Code of Civil Procedure does not apply. **(1960) 64 Cal W N 172.**

——Sch. II, Art. 8 — Suit for rent described as for damages.

Where the tenant agrees to give the landlord a fixed share of the produce as rent and not to appropriate the produce without first paying this share and the landlord sues the tenant for damages for loss suffered by misappropriation of the crop by the tenant the suit is really for rent and, as such, not cognisable by a Small Cause Court. **AIR 1950 Kutch 61 (61) (Pt A) (Pr 3).**

——Sch. II, Art. 8 — Suit for rent of cinema house is not triable by Small Cause Court. 1959 M P L J (Notes) 70.

3. Suit not for rent—Illustrative cases.

——Sch. II, Arts. 8 and 13—Suit for licence fee is not one for rent — (Transfer of Property Act (1882), S. 105). AIR 1955 N U C (All) 5810.

——Sch. II, Art. 8 — Suit for arrears of amount due from the defendant in respect of Bazaar dues — Suit does not relate to interest in immovable property — Not excluded from Small Cause Court's jurisdiction —Municipalities—C. P. and Berar Municipalities Act, S. 76-A — C. P. Code (1908), S. 9. 1962 Nag L J (Notes) 23.

——Sch. II, Art. 8—Suit for rent.

A suit for recovery of the money value of the half share of produce of bhag cultivation from the defendant who is allowed to cultivate the land on the stipulation that he would be paid half the produce by way of wages is not a suit for rent and therefore is not excluded from cognizance of the Small Cause Court. **1953 B L J R 388: A I R 1954 Pat 32 (33) (Pt B) (Pr 5).**

4. Damages for use and occupation.

——Sch. II, Arts. 8 and 31 — Tenancy terminated — Suit for damages for use and occupation is triable by Small Cause Court. 1959 Nag L J (Notes) 54.

——Sch. II, Art. 8 — Suit for damages for use and occupation in respect of non-agricultural properties would be triable by a Small Cause Court. Therefore a suit relating to rent against a tenant of such property would be triable by Small Cause Court. 1962 M P L J (Notes) 6.

——Sch. II, Art. 8 — Suits for damages for use and occupation relating to house within municipal limits — Small cause nature. See Provincial Small Cause Courts Act (1887), S. 15. 1961 Jab L J 90: 1961 M P L J 20.

5. House rent.

——Sch. II, Art. 8—Suit for arrears of rent in respect of wooden claim which could not at all be used for residential purposes and in which question of apportionment of rent arose, is not cognizable by a Small Cause Court in view of Arts. 7 and 8. A I R 1952 Ajmer 47 (2).

——Sch. II, Art. 8 — Suit for arrears of house rent is not a suit relating to immovable property and can always be filed in Small Cause Court though suit for immovable property cannot be filed there. AIR 1956 All 131.

——Sch. II, Art. 8 — Application under S. 7-B, U. P. Temporary Control of Rent and Eviction Act treated as plaint in suit for arrears of rent — Jurisdiction. See Houses and Rents — U. P. Temporary Control of Rent and Eviction Act (3 of 1947), S. 7-B (7). AIR 1955 N U C (All) 1150.

——Sch. II, Art. 8—Suit for arrears of rent of a shop in cabin on municipal land is cognizable by Small Cause Court.

Held, on facts that having regard to the scheme of the Act and the meaning of Art. 8, Schedule II of the Small Cause Courts Act, there was no doubt that the Legislature did not exclude the rent of a shop from the jurisdiction of a Small Cause Court. Therefore, a suit for arrears of rent of a shop was within the jurisdiction of the Small Cause Court. (Revision allowed). **1959 M P L J (Notes) 68, Foll. 1964 M P L J (Notes) 186.**

——Sch. II, Art. 8—Suit for rent of open plot—Land assessed to land revenue—Jurisdiction.

Claim in suit in the Small Cause Court was for recovery of rent of an open plot, for diversion tax and premium in respect thereof. The land was assessed to land revenue. The claim was decreed.

Held, that claim for only house rent was within the cognizance of the Small Cause Court. The suit for rent of a site was different from the one for house rent and was not cognizable by a Small Cause Court unless it was expressly invested with jurisdiction in that behalf. (Decree of Small Cause Court was set aside). (Revision allowed). **1964 M P L J (Notes) 71.**

——Sch. II, Art. 8 — Property (house) mortgaged under usufructuary mortgage without interest—Mortgagor taking it on lease from mortgagee — Suit for recovery of rent was maintainable by Small Cause Court— S. A. 47/59, dated 26-10-62 (Gwalior Bench), Foll. **1964 M P L J (Notes) 55.**

—— Sch. II, Art. 8—Suit for rent of shop is triable by Small Cause Court. **1959 M P L J (Notes) 68.**

——Sch. II, Art. 8 — Suit to recover arrears of rent—Question of fixation of standard rent raised by tenant — Jurisdiction of Small Cause Courts is not ousted. See Provincial Small Cause Courts Act (1887), S. 15 (3). **AIR 1960 Punj 11 (DB).**

——Sch. II, Art. 8 —Suit for arrears of rent filed as a small cause suit — Tenant praying for fixation of fair rent on ground that the rent was excessive—Jurisdiction of Civil Judge to try it as small cause suit not ousted. See Houses and Rents—Saurashtra Rent Control Act, S. 27 (2). **(1956) 9 Sau L R 24.**

6. "Court expressly invested with power".

——Sch. 2, Art. 8 — **Judge not expressly invested to try suit—Effect.**

Where the Judge of the Small Cause Court was not specially authorised under Art. 8, a decree passed by him for rent of a vacant land leased to defendant held was without jurisdiction. **AIR 1951 Punj 389 (2) (390) (Pr 3).**

SCHEDULE II, ARTICLE 11

——Sch. II, Art. 11 — Extent of tenancy — Suit in Small Cause Court for, but in respect of plot of land governed by T. P. Act—Defendant not disputing the amount of rent payable but disputing the extent of tenancy — Question being outside the scope of the suit, the Court should leave the same open for adjudication in future proceedings. **AIR 1951 Cal 302 (302) (Pr 2).**

——Sch. II, Art. 11 — **Applicability — Test—Determining factor.**

The question whether a suit does or does not fall within the jurisdiction of a Court of Small Causes has to be decided prima facie upon the language of the plaint. Where the plaintiff's suit is in essence and in substance a suit for payment of a sum of money as arrears of rent, the fact that incidentally the question of plaintiff's title to the property may have to be gone into does not take away the jurisdiction of the Small Cause Court. **ILR (1954) Madh B 172 : AIR 1954 Madh B 34 (34, 35) (Pr 3).**

——Sch. II, Art. 11 and S. 15—Suit for interest due on mortgage of house in form of rent suit—Not maintainable in Small Cause Court. See Provincial Small Cause Courts Act (1887), S. 15. **AIR 1961 Madh Pra 152.**

——Sch. II, Arts. 11 and 31 — **Suit for refund of earnest money as also for damages of breach of contract—Small Cause Court's jurisdiction.**

A suit for refund of earnest money as also for damages on account of the breach committed by the defendant of a contract of lease, is not a suit falling within the purview of either Art. 11 or Art. 31 of Sch. II of the Provincial Small Cause Courts Act. Such a suit is not excluded from the jurisdiction of the Small Cause Court under any of the said Articles. 50 I C 629, Foll. **1961 M P L J (Notes) 3.**

——Sch. II, Art. 11 — **Suit for compensation for breach of covenant for title — Jurisdiction of Small Cause Court.**

The plaintiff who had purchased 3 Khasra Nos. from the defendant and who was dispossessed from two of them by persons who claimed rights in the lands filed a suit for refund of Rs. 880 as compensation.

Held, that in this case the issue would be one of title, viz., whether the defendant had title in him to sell the two fields and in view of Art. 11 of the Provincial Small Cause Courts Act, the suit could not be considered to be one of a small cause nature. **1958 M P L J (Notes) 151.**

——Sch. II, Arts. 11 and 35 — **Suit for recovery of price paid for immovable property on being dispossessed by rightful owner—Jurisdiction.**

A suit for recovery of the price paid to the defendant for the purchase of property on the ground that the plaintiff has been dispossessed by a claimant, whose claim had been recognised by a decree of Court is a plain and simple suit for damages when there is no prayer in that suit to determine the right or enforce the right or interest in any immovable property. It is not outside the jurisdiction of the Small Cause Court under Art. 11. (1897) ILR 20 Mad 155, Distinguished. Nor does the suit fall under Art. 35 and therefore the Small Cause Court has jurisdiction to entertain the suit. AIR 1926 Bom 362, Doubted and Distinguished. **1957 Mad W N 171 : (1957) 1 Mad L J 186 : 70 Mad L W 288 : AIR 1957 Mad 673 (673) (Pt A) (Pr 2).**

SCHEDULE II, ARTICLE 13

——Sch. II, Art. 13—Applicability—Suit for licence fee is not a suit for rent. **AIR 1955 NUC (All) 5810.**

——Sch. II, Art. 13, S. 15 — Suit by municipality for recovery of arrears of municipal taxes by force of statute and not by reason of any interest in immovable property does not come within Art. 13, when plaintiff merely claims a money decree without claiming any charge given to it under S. 167, Bengal Municipal Act — Small Cause Court has jurisdiction to try and decide the suit. **AIR 1950 Cal 415 (DB).**

——Sch. II, Art. 13 — Applicability — Article does not apply to suit for share by one person against another who has realised entire amount. **AIR 1955 NUC (Raj) 4042.**

SCHEDULE II, ARTICLE 15

——Sch. II, Art. 15 — **Suit for redemption of goods pledged—If small cause.**

Where the pawner sues for redemption of the goods pledged, whether after a valid tender of the loan or on ascertainment of the amount due, he cannot be deemed to be seeking a relief of specific performance of the contract. He is, in the one case, suing for his goods simpliciter, and in the other, suing for them coupled with an offer of the amount due on the loan. In either case, the suit is for delivery of specific goods, and as such is maintainable on the small cause side. AIR 1959 M P 97, Followed; AIR 1919 Oudh 73 and AIR 1921 Oudh 124, Differed from. **1961 Andh L T 145 : (1961) 1 Andh W R 74 : AIR 1961 Andh Pra 312 (312, 313) (Pr 5).**

——Sch. II, Art. 15 and S. 15 — Compromise decree declaring rights of parties — Plaintiff getting right to recover amount of money from defendant — Suit to recover such amount lies in Small Cause Court and is not one for specific performance — Suit tried as regular suit does not change its nature — No appeal. See Provincial Small Cause Courts Act (9 of 1887), S. 15. **AIR 1961 Bom 221.**

——Sch. II, Art. 15 and Ss. 15, 25 — Question of jurisdiction — Issue as to — Duty of Court — Nature of suit — Determining factor indicated. AIR 1956 Bom 254.

——Sch. II, Art. 15—Suit for "specific performance", what is, indicated — Plaintiff merely claiming money payable to him under a contract, the suit is in no sense to be treated as a suit for specific performance of a contract. AIR 1955 NUC (Madh B) 1311.

——Sch. II, Art. 15 — Suit for refund of money paid in a contract to sell property is cognizable by a Small Cause Court.

Held, on facts that what the plaintiff desired to obtain from the Court was not rescission of the contract but the recovery of the money advanced. Art. 15 which applies only to a suit for the specific performance or rescission of the contract would not exclude the suit from the cognizance of the Small Cause Court. AIR 1936 Pat 429, Foll. 1962 M P L J (Notes) 335.

——Sch. II, Art. 15—Suit for redemption of pledged articles is not a suit for specific performance of contract and as such is not excepted from the jurisdiction of the Small Cause Court under Art. 15, Schedule II, of the Provincial Small Cause Courts Act. 1959 M P L J 57 : 1959 Jab L J 130 : 1959 M P C 54 : AIR 1959 Madh Pra 97 (99) (Prs 11, 16) (DB).

——Sch. II, Art. 15 — Applicability — Suit for 'specific performance' — Meaning of.

Defendant, a member of an aboriginal tribe, governed by the C. P. Land Alienation Act, agreed to sell property to the plaintiff but the Deputy Commissioner did not sanction the transfer. Plaintiff sued in the Small Cause Court to recover the amount paid towards consideration.

Held, that the claim was not one for specific performance of the contract and it was triable by the Small Cause Court. 1959 M P L J (Notes) 15.

——Sch. II, Art. 15 — Applicability—Suit by vendor to recover balance of purchase money.

Generally speaking, a suit by a vendor to recover the purchase money or any balance alleged to be due on a sale of immovable property falls within the category of a suit for specific performance. Where therefore a suit is not even one to recover a specific unpaid amount but raises generally the question of how a specific contract of sale has been performed it is one which is not of a small cause nature and the decree passed by the Small Cause Court is accordingly without jurisdiction. AIR 1943 Mad 761 (FB), Rel. on. 19 Mad L J 220, Dist. (1953) 1 Mad L J 321 : 1953 Mad W N 338 : 66 Mad L W 230 : AIR 1953 Mad 559 (560) (Pr 2).

——Sch. II, Art. 15 — Suit for redemption of pledge for value of Rs. 70 — Nature of — Jurisdiction of Small Cause Court not excluded.

A suit for redemption of a pledge of the value of Rs. 70 is a suit cognizable by a Small Cause Court and does not come within the exception provided in Art. 15 of Sch. II of the Provincial Small Cause Courts Act. The reason is that where the pawner sues for redemption of the goods pledged, whether after a valid tender of the loan or on ascertainment of the amount due, he cannot be deemed to be seeking a relief of specific performance of the contract. The suit by the pawner is one for delivery of specific goods which is not excluded from the cognizance of the Small Cause Court. AIR 1921 Oudh 124 (1), Not followed; AIR 1928 Lah 535, Followed. AIR 1962 Manipur 1 (2) (Pt A) (Pr 4).

——Sch. 2, Art. 15 — Suit to enforce award is not one for specific performance.

A suit to enforce an award, namely, for recovery of money payable under an award is not a suit for specific performance of a contract and hence is cognizable by a Small Cause Court. I L R 28 Pat 569 : AIR 1950 Pat 48 (49) (Pt A) (Pr 2) (DB).

——Sch. II, Art. 15 — Dispossession of usufructuary mortgagee — Suit to recover mortgage money — Suit not based on covenant in deed — Held, could be entertained by Small Cause Court — Limitation — Suit governed by Art. 97 and not by Art. 116 or 120, Limitation Act. See Transfer of Property Act (1882), S. 68 (1). I L R (1960) 10 Raj 1608.

SCHEDULE II, ARTICLE 19

——Sch. II, Art. 19 — Specific Relief Act (1877), S. 42 — Suit for recovery of money illegally collected — Need for finding as to illegality of levy while claiming refund does not make suit a suit for declaration — Held, suit was cognizable by Court of Small Causes—Specific Relief Act (1963), S. 34 — Specfic Relief Act (1877), S. 42. (1965) 2 Mad L J 510.

——Sch. II, Arts. 19 and 43 — Suit for recovery of money wrongly realized by Customs and Excise Department as licence fee — Jurisdiction of Small Cause Court.

A suit claiming refund of licence fee for sale of liquor, wrongly realized under a demand by Customs and Excise Department, does not fall under Art. 43. The powers of the officers of the Customs and Excise Department do not include, according to the Rajasthan Excise Act, issue of process for recovery of any excise revenue. Article 19 also is not per se applicable as the plaintiff has not asked for any declaratory relief. The main relief is the recovery of the money wrongly realised, and in such cases the addition of the prayer for declaration even if made does not prevent the suit from being a nature cognizable by a Small Cause Court. 1958 Raj L W 107 : I L R (1957) 7 Raj 139 : AIR 1957 Raj 396 (397) (Pt A) (Pr 7).

SCHEDULE II, ARTICLE 24

——Sch. II, Art. 24 — Applicability—Suit for refund of money paid under arbitration agreement.

The plaintiff and defendant 3 entered into an arbitration agreement in pursuance of which they deposited each a sum of Rs. 100 with defendant 2 and appointed defendant 1 as arbitrator to decide certain land dispute. The arbitrator was to give his award within one month and defendant 3 was to produce K for her deposition before the arbitrator. In default, plaintiff was to get the disputed land. Defendant 3 did not perform his part of the contract to enable the arbitrator to decide the dispute. The plaintiff then sued the defendants for return of Rs. 100 deposited with defendant 2 and also for compensation. The defence version that the arbitrator had delivered the award but it was lost and that defendant 2 had paid a part of the amount of Rs. 100 to defendant 3 was found to be false and the suit was decreed against all the defendants.

Held that (i) the suit was not one to contest an award within Sch. II, Art. 24 and therefore was not excepted from the cognizance of a Small Cause Court.

(ii) The liability to refund the amount of Rs. 100 to the plaintiff solely rested with defendant 2 as no part of it was paid to defendant 3. Hence no decree could be passed as against defendant 3 for refund of the amount. AIR 1952 Assam 158 (158) (Pr 4).

SCHEDULE II, ARTICLE 29

——Sch. II, Art. 29 — Agricultural partnership — Art. 29 applies.

Article 29, Provincial Small Cause Courts Act would apply even to a case of agricultural partnership. 92 Pun Re 1889, Foll. 1952 Nag L J (Notes) 90.

——Sch. 2, Art. 29 — Batai agreement — Plaintiff alleging agreement to pay half cost of cultivation of Rs. 100 and receive half produce and suing for Rs. 450 on giving account — No allegation that balance was struck—Article 29 applies.

Plaintiff in his plaint alleged that the parties entered into a batai agreement under which plaintiff was to pay half the amount of expenses of cultivation of Rs. 100 of his land which he paid and that defendant was to give him half the produce and pay half the jama out of Rs. 291. Plaintiff sued for an amount of Rs. 450 giving his own account in the plaint as to how the figure was arrived at. There was no allegation that the balance was struck.

Held, that the suit fell under Article 29 (c), Provincial Small Cause Courts Act as there was agricultural partnership. 28 Nag L R 198 and 10 C P L R 29, Rel. on, AIR 1917 Nag 176 (2), Dist. 1952 Nag L J (Notes) 90.

SCHEDULE II, ARTICLE 30

——Sch. II, Arts. 30 and 31, S. 15—Suit by one co-owner against other co-owner for recovery of rent realised from tenant in excess ot his share—Suit is one for accounts within Art. 31, Provincial Small Cause Court Act (1887), Ss. 15 (1). 56 Cal W N 12: AIR 1952 Cal 736 (DB).

SCHEDULE II, ARTICLE 31

——Sch. II, Art. 31—Suit for specific amount — (Accounts).

Article 31 refers to suits for accounts. A suit for a specific amount which has wrongly been credited in the defendant's account with the firm of the plaintiffs, where it is not at all necessary to investi. gate the various items in the accounts is not barred by Art. 31. Nor does such a suit amount to a rectification of account by re-opening it. AIR 1944 Nag 124, Disting. AIR 1953 Ajmer 9 (10) (Prs 5, 6).

——Sch. II, Art. 31—Suit for mesne profits—Cognizance by Small Cause Court—If barred.

'Profits' within the meaning of Art. 31 does not include mesne profits. Hence, a suit for mesne profits is not excepted from the cognizance of Small Cause Court by Art. 31 of Schedule II.

The expression "mesne profits" refers to wrongful possession and not dispossession. 65 Cal W N 1067 : AIR 1962 Cal 111 (112) (Pt A) (Pr 2).

——Sch. II, Art. 31—"Suit for accounts."

There is a clear distinction between suits for accounts and suits in which decrees are passed after taking some accounts. A suit for money where the amount is to be determined on accounting is not a suit for accounts. 65 Cal W N 1067 : AIR 1962 Cal 111 (11½) (Pt B) (Pr 4).

——Sch. II, Art. 31—Applicability—"Account"—Co-sharers—Suit by one against another for share of profits of joint property.

A suit simpliciter for recovery of profits of immovable property wrongfully received by a co-sharer defendant does not fall under Art. 31 of the 2nd Schedule to the Provincial Small Cause Courts Act. This article is concerned with a suit which is a suit for an account. Whether a suit is one for account within the meaning of this article must depend upon the relation in which the parties stand to each other, and the nature of the investigation required to afford relief to the plaintiff. 23 C. 884, Foll. 56 C W N 12 : AIR 1952 Cal 736 (737) (Pr 7) (DB).

—— Sch. II, Art. 31 and S. 15—Civil P. C. (1908), S. 2 (12) and O. 20, R. 12—Suit for liquidated amount of mesne profits—Suit is not suit for accounts and is not excluded from cognizance by Court of Small Causes—Suit for accounts—Test indicated. — See Provincial Small Cause Courts Act (9 of 1887), S. 15. 1965 Jab L J 1012 : AIR 1966 Madh-Pra 186.

—Sch. II, Arts. 31 and 35 (ii) — Applicability—Damage for, 'tendu leave' gathered — Suit for damages cognizable by Small Cause Court—Question of title incidentally referred—Jurisdiction of Small Cause Court not ousted.

Held, on facts that before Art. 35 (ii) could be deemed to apply it must be shown and alleged not merely that there was a cutting or damage done to trees or other objects but that it was done with some criminal intent or act. Where there was no allegation of criminal act or intent the suit was cognizable by the Court of Small Causes. AIR 1936 Nag 276; AIR 1936 Pat 428 and AIR 1927 All 288, Foll. The dispute in the case was with regard to leaves after they were already severed or gathered from the trees. Tendu leaves would be included within the expression 'growing crop' as used in the T. P. Act and, therefore, did not constitute immovable property. AIR 1959 S C 735, Rel. on, AIR 1933 Nag 87 : AIR 1936 Nag 42, Dist. Further, the jurisdiction of a Small Cause Court would not be barred if merely incidentally the question of title was required to be gone into. AIR 1954 Nag 128, Foll. 1962 M P L J (Notes) 19.

——Sch. II, Art. 31 — Suit for refund of earnest money as also for damages of breach of contract of lease— Suit not falling within purview of either Art. II or Art. 31—Such suit is not excluded from jurisdiction of Small Cause Court. 1961 M P L J (Notes) 3.

——Sch. II, Art. 31, S. 15, Art. 7 — Defendant took a lease of pasture lands from the Government subject to certain conditions. The defendant cultivated the land in breach of the conditions and the Collector imposed penalty upon him in accordance with the terms of the agreement. On failure of the defendant to pay the same a suit for its recovery was brought on Small Cause side.

Held that the suit was one for damages for breach of contract pure and simple and was cognizable by Small Cause Court, although in fixing the quantum of damages, the Collector had regard to the income on profits which the defendant might be expected to have received from the unauthorised use of the land. Neither Art. 7 nor Art. 31 was applicable. (1951) 1 Mad L J 164 : 64 Mad L W 261 : AIR 1951 Mad 710 (710) (Prs 4. 6).

——Sch. II. Art. 31—Conditions for applicability stated—Suit against agent by principal for money had and received—Suit for balance due after deducting expenses and commission—Suit is not for money received by defendant for plaintiff's use—Limitation Act (1908), Art. 62 — See Mysore Small Cause Courts Act (8 of 1911), Sch. I, Art. 8. (1951) 29 Mys L J 41.

——Sch. II, Art. 31—Suit against agent for value of goods received by him and sold by him is cognizable by Small Cause Court. AIR 1955 N U C (Orissa) 711.

——Sch. II, Art. 31 — Applicability—Suit for fixed amount as mesne profits.

A simple suit for mesne profits is not excluded from the jurisdiction of the Small Cause Court unless a decree for accounts is expressly asked for.

Article 31 relates to suits for account as also suits in which the Court can pass a decree only upon taking some accounts. Therefore, all suits in which the mortgagor prays for recovery of surplus collections and in which a decree is asked for profits of immovable property wrongfully received by the defendant, are excepted from the cognisance of Small Cause Courts. In effect, it is a suit in which decrees in terms of O. 20, R. 16, C. P. Code can be

passed. Thus where the relief sought is that "the plaintiff be given a decree for Rs. 400 against the defendants for mesne profits" and other ancillary relief in the shape of cost and there is no prayer for accounts, the amount being fixed, it is a suit triable by a Court of Small Causes. 1957 Pat L R 152 : 1952 B L J R 382 : I L R 36 Pat 624 : AIR 1957 Pat 713 (714, 715) (Prs 16 to 19, 21) (DB).

—Sch. II, Art. 31—Suit for recovery of specific sum on basis of khata, for price of goods supplied—Defendants denying any transaction and pleading bar of suit under S. 11 and O. 2, R. 2 of Civil P. C.—Return of plaint on ground that suit was one for accounts, held premature. 1963 Raj L W 208.

—Sch, II, Art. 31—Applicability—Suit for accounts—What is.

Where the plaintiff prays in the plaint that the defendant be asked to render accounts and brings a suit for an indeterminate amount then the suit is clearly one falling under Art. 31 of the Schedule. If on the other hand, the plaintiff sues for a specific sum of money and it is the defendant who alleges that the suit falls under Art. 31 then before the Court can hold that it does so, the defendant must prove to its satisfaction firstly that other transactions besides those in suit have taken place between the parties, secondly that the plaintiff is liable to render account to the defendant and thirdly that the suit cannot be disposed of satisfactorily without taking accounts. 1959 Raj L W 296 : ILR (1958) 8 Raj 837 : AIR 1958 Raj 286 (287) (Pt B) (Pr 4).

SCHEDULE II, ARTICLE 34

—Sch. 2, Art. 34 and S. 15 — Suit for amount incurred in repairs to damaged car on account of accident on the strength of the policy of insurance—Is a suit on policy of insurance within Art. 34 of Sch. 2 of the Act — Such a suit is not cognisable by the Small Cause Court. See Provincial Small Cause Courts Act (1887), S. 15. AIR 1965 Pat 55.

SCHEDULE II, ARTICLE 35

—Sch. 2, Art. 35 — Scope — Suit for recovery of price of immovable property paid on being dispossessed by rightful owner does not fall under the Article. See Provincial Small Cause Courts Act (1887), Art. 11. AIR 1957 Mad 673.

SCHEDULE II, ART. 35 (i)

—Sch. 2, Art. 35 (i)—Obstruction to water channel by defendant — Accumulation of rain water on defendant's land — Injury caused to plaintiff's wall — Suit for compensation for injury — Art. 35, if applies — Easements Act (1882), S. 33.

Where damages are claimed for the injury caused to the plaintiff's wall on account of the accumulation of rain water on the defendants' land, the suit does not fall within the purview of Art. 35 (i) although this was the result of the defendants' obstructing the channel through which water used to flow out. 1950 All L J 60 : AIR 1950 All 519 (520) (Pt A) (Pr 4).

—Sch. 2, Art. 35 (i) — Obstruction or diversion of water course. AIR 1955 NUC (Madh Bha) 1311.

SCHEDULE II, ART. 35 (ii)

—Sch. 2, Art. 35 (ii) — Suit for refund of purchase money — No fraud or dishonesty alleged—Case held not for compensation of act punishable under S. 415, Penal Code. AIR 1955 NUC (Ajmer) 1328.

—Sch. 2, Art. 35 (ii) — Suit for compensation for dishonest removal of tree belonging to plaintiff valued at Rs. 200—Plaint disclosing offence under Ch. 17, Penal Code—Civil Court has jurisdiction—Finding of Criminal Court that defendant had committed no offence is irrelevant in determining question of its own jurisdiction—Allegations in plaint should only be looked to. See Provincial Small Cause Courts Act (1887), S. 15. AIR 1962 All 480.

—Sch. 2, Art. 35 (ii) — Scope — Defendant unlawfully removing moonj from plaintiff's property—Suit for damages — Plaint alleging criminal offence — Jurisdiction. 1957 All L J 944 : AIR 1958 All 168 (169) (Pt A) (Pr 6).

—Sch. 2, Art. 35 (ii) — Suit for recovery of money — Plaintiff alleging that defendants removed trees with intent to cause wrongful loss to plaintiff — Suit held not cognizable by Small Cause Court. AIR 1955 NUC (All) 2744.

—Sch. 2, Art. 35 (ii)—Applicability—Suit for compensation for wrongful detention of goods — Suit not cognisable by Small Cause Court. AIR 1942 Bom 316, Disting. 1961 N L J (Notes) 52 (Bom).

—Sch. 2, Art. 35 (ii) — Scope — Suits when can be said to fall under Cl. (ii) — Duty of Court — Alleged act of defendant need not have been actually found by a Court to be a crime — Defendant need not raise the objection as to jurisdiction. 69 Cal W N 545 : AIR 1965 Cal 59 (65) (Pt A) (Pr 22).

—Sch. 2, Art. 35 (ii) — Objects and Reasons for introducing Cl. (ii) in 1914.

Clause (ii) in Art. 35, Sch. 2 was added by Act 6 of 1914. The justification for introducing this provision as stated in the Object and Reasons was that under the then existing law, complicated suits which practically involved a criminal charge punishable under Chap. 17 of the Penal Code, against the defendants if their value was within the pecuniary jurisdiction of Provincial Small Cause Courts were triable by a summary procedure which allowed no right of appeal upon the facts and required no full record of the evidence, thus depriving the defendant of the possibility of clearing his character by an appeal from an adverse decree. The position was unsatisfactory and the legislature wanted to exclude such cases from the jurisdiction of such tribunals. 69 Cal W N 545 : AIR 1965 Cal 59 (62, 65) (Pt E) (Prs 14, 22).

—Sch. 2, Art. 35 (ii) — Tenant cutting and appropriating trees planted by his predecessor — Suit by landlord for compensation alleging tenant entitled only to fruits of trees — Tenant claiming right to cut trees under law — Suit held cognizable by Small Cause Court.

The right of a landlord and a tenant in respect of trees is very often a disputed right depending in some cases upon statutory provisions and in others upon custom or otherwise. A criminal case for theft or mischief or misappropriation can easily be defeated by defendant urging that he had a right to cut the trees or that he bona fide believed that he was entitled to cut the trees. In such a case a suit for compensation would not be excluded from the cognizance of the Small Cause Court under Sch. 2, Art. 35 (ii) : AIR 1923 Cal 568; AIR 1928 Cal 153; AIR 1930 Pat 575 and AIR 1928 Cal 946, Ref.

A suit was brought by landlord against tenant for compensation for cutting and appropriating trees on the ground that the tenant was a non-permanent theka tenant who had only the right to enjoy the fruits of trees. The trees were found to have been planted by the tenant's predecessor. The tenant claimed that he had a right to cut the trees under the law :

Held, that the suit was not excepted from the cognizance of the Small Cause Court under Sch. 2, Art. 35 (ii). AIR 1950 Cal 109 (110, 111) (Pt A) (Prs 6, 7).

—Sch. 2, Art. 35 (ii) — Applicability — Allegations made in plaint must contain the ingredients of an offence under Chapter 17 of the Penal Code.

The question as to whether Art. 35 (ii) of the Provincial Small Cause Courts Act applies or not has to be decided on the allegations made in the plaint. The plaint should disclose the commission by the defendant of an offence under the Chap. 17 of Penal Code.

Where allegations made in the plaint are merely that the plaintiffs were the owners of the disputed ghala and the defendants had cut 160 beds of grass out of the aforesaid ghala and thereby caused damage to the tune of Rs. 30:

Held, that suit was not covered by Art. 35 (ii) of Sch. 2 and that it was cognizable by the Court of Small Causes. **AIR 1962 Him Pra 17 (22) (Pt A) (Pr 18).**

——Sch. 2, Art 35 (ii) — Grazing of cattle in assertion of right — Suit to recover damages — Suit is not covered by Art. 35 (ii).

Where the defendants are within their rights, as burtandars, in cutting grass or allowing their cattle to graze on the ghasni, prima facie, the mens rea to constitute a criminal offence under Chap. 17, Penal Code is absent. Hence, a suit for recovery of a sum claimed as damages caused by the grazing of the defendant's cattle is not covered by Art. 35 (ii) of Sch. 2. **AIR 1938 Lah 759, Rel. on. AIR 1955 Him Pra 56 (56) (Pt B) (Pr 3).**

——Sch. 2, Art. 35 (ii) — Scope—Suit for recovery of price of thela on hire to defendant and alleged to have been stolen from his custody—Suit is cognizable by Small Cause Court. AIR 1955 NUC (Madh Bha) 2994.

——Sch. 2, Art. 35 (ii) — Claim for compensation for obtaining chilli bags from plaintiff's mother fraudulently — Claim excluded from Small Cause Court jurisdiction. 1962 M P L J (Notes) 250.

——Sch. 2, Art. 35 (ii) — Claim for return of movable articles — Cognizable by Small Cause Court — Civil P. C., O. 46, R. 7.

Plaintiff filed a suit alleging that the defendant had effected an outright sale of his Ghana and Kadhai (articles used for preparation of sugarcane jaggery) for a consideration of Rs. 400 and that it was agreed between the parties that the plaintiff would lend the said articles to the defendant without charging any rent, whenever so required. The defendant took the articles on loan, but refused to return the same. The plaint was returned to be presented on Small Cause side and later it was again returned for presentation to the regular side. Hence the plaintiff moved the District Judge for a reference to the High Court under O. 46, R. 7, Civil P. C.

Held, that the claim which was for return of movable articles, was triable by a Small Cause Court: ILR 46 All 683, Foll. **Held** further, that it was open to the High Court to set aside the order of the Small Cause Court even though the same was not challenged by way of revision: AIR 1934 Nag 257, Foll. **1962 M P L J (Notes) 54.**

——Sch. 2, Art. 35 (ii) — Suit for — Damages for tendu leaves gathered is cognizable by Small Cause Court—Question of title incidentally referred—Jurisdiction is not ousted — See Provincial Small Cause Courts Act (1887), Art. 31. 1962 M P L J (Notes) 19.

——Sch. 2, Art. 35 (ii)—Suit for recovery of entrusted article or its price is cognisable by Small Cause Court. 1959 M P L J (Notes) 17.

——Sch. II, Art. 35 (ii) — Suit under — Offence against property — Test.

Where in a suit for recovery of advance paid, it was alleged in the plaint that under an agreement of sale of the suit property defendant had induced plaintiff to pay an advance to him on false representations of absolute title and had been thus cheated the plaintiff and had committed an offence under **S. 415**, Penal Code.

Held, that the facts of this case clearly take the suit out of the category of suits of Small Cause nature, and the exemption under Art. 35 of Sch. II, Provincial Small Cause Courts Act, is clearly applicable : AIR 1924 All 430, Rel. on. AIR 1956 Mad 610 (612) (Pt C) (Pr 6).

——Sch. 2, Art. 35 (ii) and S. 15—Offences against property — Averments showing defendants's action to be illegal but not penal — Jurisdiction of Court not barred. 1963 Mys L J 325.

——Sch. 2, Arts. 35 (ii), 4 and 11 and S. 15 — Suits of small cause nature — Suit by landlord against tenant for damages for unauthorisedly cutting some trees on leasehold is a small cause suit — Arts. 4 and 11 apply — Suit does not come under Art. 35. AIR 1959 Mys 162.

——Sch. 2, Art. 35 (ii)—Jurisdiction — Plaint alleging mischief — Suit is excepted.

Plaintiff, suing for price of crop damaged, alleged in his plaint that the defendant having mischievous motive to cause damage to plaintiff's crop and thus to harass him continued to let loose his cattle knowing that they were damaging plaintiff's crop and in spite of plaintiff's request not to do so.

Held, that the acts attributed constituted an offence under S. 426, Indian Penal Code, (Chapter XVII) and the suit was therefore not triable by a Small Cause Court. **1951 Nag L J (Notes) 217.**

——Sch. 2, Art. 35 (ii) and S. 15 (1)—Jurisdiction of Small Cause Court — To be determined on allegations in plaint and not on defence—Suit for damages on allegations of acts constituting offence under S. 379, Indian Penal Code—Jurisdiction is barred — Proper procedure is to return plaint for presentation to proper Court and not to dismiss suit—See Provincial Small Cause Courts Act (1887), S. 15 (1). (1965) 7 O J D 192 : ILR (1965) Cut 597 : 32 Cut L T 94 : AIR 1966 Orissa 84.

——Sch. 2, Art. 35 (ii) — Suit for compensation for unlawful cutting of bamboos from plaintiff's land — Jurisdiction of Small Cause Court — Matters.

In order to find out whether a suit for compensation falls within the purview of Sch. II, Art. 35 (ii) and as such barred from the cognizance of a Small Cause Court the Court has to look to the pleadings of the parties with special reference to the pleading of the plaintiff. It has then to see whether the admitted facts or the facts stated in the plaint constitute an offence under Chapter XVII, Penal Code. If it finds that the language of the pleadings, especially that of the plaint, is such as would disclose the commission of an offence against property under Chapter XVII, Penal Code, it will return the plaint for presentation before a proper forum.

In order to oust the jurisdiction of the Small Cause Court the plaint must present facts of which a criminal Court could take cognizance. If it is stated in a petition of complaint that certain trees had been wrongfully cut, a Criminal Court is hardly expected to find the accused guilty in absence of any dishonest intention or knowledge on the part of the accused. Therefore, if a plaint merely states that the defendants had removed crop or timber wrongfully or illegally, that fact alone would not constitute an offence either of theft or of mischief : AIR 1936 Pat 428, Foll. Consequently, where the plaint in a suit for compensation merely alleges that the defendant had unlawfully cut certain bamboos from the plaintiff's land but there are no allegations in the plaint which would constitute an offence of theft or mischief, the suit is cognizable by the Small Cause Court;

AIR 1926 Bom 362, Dissented from. 1956 B L J R 178 : AIR 1956 Pat 196 (198, 199) (Prs 5, 6).

——Sch. 2, Arts. 35 (h) (ii) and 43-A — Suit to recover loan simpliciter—Liability not relating to act amounting to offence under Chapter XVII, Penal Code — None of Arts. 35 (h) (ii) and 43-A held applied—Provisions of these two articles compared.

A filed a suit in the Court of Small Causes against B and C on averments that B, who was A's Munim and used to maintain account books and handle cash of A's shop advanced certain sum to C and made entry to that effect in the account books but that they failed to return the said sum. The plaint was subsequently amended by dropping B and by confining the claim against C for the specific sum lent to him by B as his agent.

Held, that in view of the fact that A had not asked for accounts from his agent, the question of accounts did not arise at all. Similarly, Art. 35 (h) (ii) could not come into play because it was not a liability on account of an act which save for the provisions of Chapter IV of the Indian Penal Code, will be an offence punishable under Chapter XVII of the Penal Code. The suit was filed for the recovery of loan simpliciter and it was wrong on the part of the Judge, Small Cause Court to refer to Arts. 35 (h) (ii) and 43-A to support the return of the plaint.

A comparison of Arts. 35 (h) (ii) and 43-A would show that both contemplate the same kind of act on behalf of the defendant and the only difference between the two is that while Art. 35 (h) (ii) is meant for recovering compensation for the act, Art. 43-A is for recovering the property itself of which the plaintiff might have been deprived on account of such an act. 1963 Raj L W 175 : ILR (1963) 13 Raj 444 : AIR 1964 Raj 38 (39) (Pr 3) (DB).

——Sch. 2, Art. 35 (ii) — Applicability — Act done by defendant in bona fide claim of right — Suit in respect of — Cognizability by Small Cause Court — See Provincial Small Cause Courts Act (1887), S. 27. AIR 1954 Vin Pra 49.

SCHEDULE II, ARTICLE 36

——Sch. 2, Art. 36 (ii) — Notice cannot be considered in judging allegations in plaint. AIR 1955 N U C (Ajmer) 1328.

SCHEDULE II, ARTICLE 38

——Sch. 2, Art. 38 (as amended by U. P. Act 24 of 1954) — Suit for arrears of maintenance based on agreement—Small Cause Court has Jurisdiction. AIR 1960 All 446 (448) (Pt A) (Pr 5).

——Sch. II, Art. 38—'Maintenance'—Meaning.

The term 'maintenance' is not defined in the Small Cause Courts Act. According to the Oxford Dictionary, it means to provide with means of subsistence or necessaries of life, to pay or furnish the means for keeping up of, to support. In this sense, when the testator provided in his will that the monthly allowance was to be paid to his mother for the purpose of her maintaining herself, his intention was to provide maintenance for her. That he was a separate member of his family that the property was a self-acquired property and that there was no legal obligation for him for providing maintenance for his mother were entirely immaterial considerations. It was certainly an allowance but it was maintenance allowance and a suit to recover the arrears of allowance was not cognizable by a Small Cause Court. I L R 15 Cal 164; AIR 1918 All 398, Relied on; 1890 All W N 201; 2 All L J 697; AIR 1914 Mad 16; 13 Mad L J 471, Disting. 1958 All W R (H C) 351 : 1958 All L J 876.

——Sch. 2, Art. 38 — Maintenance due under agreement—Suit for arrears—Small Cause Court's jurisdiction.

The sons divided the property between themselves without giving a share to the mother but agreed to give her Rs. 10 p. m. each for maintenance. The mother sued for arrears of maintenance.

Held, that the suit fell under Art. 38, Sch. 2, Provincial Small Cause Courts Act and was not triable by a Small Cause Court. AIR 1931 Bom 286, Foll. 1958 Nag L J (Notes) 103 (Bom).

——Sch. 2, Art. 38 — Suit on basis of agreement to pay rent—Not a suit relating to maintenance—Maintenance, meaning of—Words and phrases.

"Maintenance" is a wide word and covers every thing which a person may require e. g., means of subsistence, support, livelihood, supplies of necessities and convenience. In other words, it means much more than food, lodging. clothes and other forms of necessary expenditure. It may include lodging or residence, but a suit on the basis of an agreement to pay rent will, in itself, not amount to a suit relating to maintenance, within the meaning of Sch. 2, Art. 38. 1956 M B L J 1218 : Madh B L R 1956 (Civ) 495.

——Sch. 2. Art. 38 — Proceedings for maintenance under S. 488, Cr. P. Code—Compromise in — By the compromise defendant agreeing to construct a house for the plaintiff and her child and to give utensils and cooking materials to enforce suit agreement—Jurisdiction — Stipulations held related to maintenance—Such a suit could not be taken cognizance of by a Court of Small Causes — Hindu Law—Maintenance: 112 Ind Cas 256 (Lah) and AIR 1935 Oudh 289, Rel. on. (1961) 3 Orissa J D 7 : 27 Cut L T 203 : AIR 1962 Orissa 23 (24) (Prs 3, 4).

SCHEDULE II, ARTICLE 41

——Sch. 2, Art. 41—Lease of certain lands—Lessees sub-dividing the lands and holding distinct shares — No joint ownership — Rent due to lessor paid by plaintiff alone — His suit for contribution is cognizable by the Small Cause Court. (1964) 1 Andh W R 66.

——Sch. II, Art. 41—Civil P. C. (1908), S. 102 — Suit for contribution — Suit of small cause nature — No second appeal lies. AIR 1955 N U C (Madh-Bha) 5629.

——Sch. II, Art. 41—Applicability—Decree for costs—Joint and several liability—Claim for contribution by one paying off costs—Jurisdiction of Small Cause Court.

Where plaintiffs and defendants were made jointly and severally liable for a decree for costs and the plaintiff paid the whole amount and claimed contribution from some of the defendants:

Held, that Art. 41 did not apply to such a case, where there had been a decree already passed making both the plaintiffs and defendants jointly liable. (1904) 14 Mad L J 480 and I L R 28 All 292, Foll. 65 Mad L W 914 : 1952 Mad W N 822 : (1952) 2 Mad L J 452 : AIR 1953 Mad 164 (165) (Pr 1).

——Sch. II, Art. 41 — Decree for arrears of rent against original tenant and his transferees—Satisfaction of decrees by transferees — Transferees' suit against original tenant for recovery of amount is not hit by Art. 41:

Held on facts, that the suit was not affected by Art. 41 of the Act and it was maintainable in the Small Cause Court. AIR 1920 Pat 506, Disting: AIR 1937 Pat 382; AIR 1914 Oudh 385; AIR 1918 Oudh 435, Rel. on.

The plaintiff's suit was not one for contribution by a sharer in joint property in respect of payment made by him of money due from other co-sharers which alone has been kept out from cognizance of Small Cause Courts by Art. 41. No doubt the Jama in respect of the different plots was joint, but the fact that, the landlord instituted the rent suit against all the transferees of the recorded tenant showed that the landlord recognised such transfers and also the transferee-tenants, which amounted to splitting up of the rent for the purpose of individual liability of the different tenants. Hence it was not a case where there was any joint property held by the plaintiffs and the defendant in the sense that their respective liabilities were not determinable as far as the landlord was concerned. **1964 B L J R 319 : AIR 1965 Pat 72 (73) (Pr 1).**

——**Sch. 2, Art. 41**—Suit for contribution—Payment made by partner in respect of partnership business—Partnership dissolved—Suit for contribution by partner who is made to pay—Suit is not cognizable by Small Cause Court even when brought after partnership is dissolved. 15 Ind Cas 218 (Mad) and 17 Ind Cas 90 (Cal) and AIR 1915 Cal 310, Rel. on; AIR 1935 Mad 88, Dissent from. **AIR 1961 Punj 552 (553) (Pr 5).**

SCHEDULE II, ARTICLE 43

——**Sch. 2, Art. 43** — Suit for refund of money wrongly realized by Customs and Excise Department as licence fee. Art. 19 is not per se applicable as the plaintiff has not asked for any declaratory relief—Main relief being for recovery of money, addition of a prayer for declaration even if made, will not prevent the suit from being of a nature cognizable by a Small Cause Court. See Provincial Small Cause Courts Act (1887), Sch. 2, Art 19. **AIR 1957 Raj 396.**

SCHEDULE II, ARTICLE 43-A

——**Sch. II, Arts. 43-A and 35 (b) (ii)** — Suit to recover loan simpliciter — Liability not relating to act amounting to offence under Chap. XVII, Penal Code —None of Arts. 33 (h) (ii) and 43-A held applied—Provisions of these two articles compared. **1963 Raj L W 175 : I L R (1963) 13 Raj 444 : AIR 1964 Raj 38 (39) (Pr 3) (DB).**

SCHEDULE II, ARTICLE 44

——**Sch. 2, Art. 44 and S. 15 (3)** — Suit to recover arrears of rent—Question of fixation of standard rent raised by tenant — Jurisdiction of Small Cause Courts is not ousted. **61 Punj L R 932 : AIR 1960 Punj 11 (DB).**

PROVINCIAL TRANSPORT AUTHORITY

See Motor Vehicles Act (1939), S. 44.

PROVISIONAL ASSESSMENT

See (1) Excess Profits Tax Act (1940), S. 14-A.
(2) Income-tax Act (1922), S. 22 (4).

PROVISIONAL COLLECTION OF TAXES ACT (16 of 1931)

SECTION 4

——**S. 4 (1)** — Declaration under regarding rates of excise duty—Change of rates by Finance Act—Finance Act given retrospective operation — The rates of excise duty given in Finance Act will prevail over those given in the declaration. See Finance Act (1951), S. 7. **AIR 1957 All 84 (DB).**

——**S. 4 — Finance Bill (10 of 1961), Cl. 13 (k) — Finance Act (14 of 1961), Ss. 11, 13 — Tariff Act (1934), Sch. I, Item No. 59 (7) — Central Excises and Salt Act (1944), Sch. I, Items Nos. 23-A, 23-B — Declared provision in Finance Bill — Provision appearing in amended form in the Finance Act — Liability to pay excise duty for period taken in by the Bill ought to be determined on the basis of declared provision — Demand of excise duty in terms of the provisions of the Act for period anterior to the Act, not legal.**

Under S. 4 (2) of the Provisional Collection of Taxes Act (1931) a declared provision in a Finance Bill ceases to have the force of law, when the Bill comes into operation as an enactment with or without amendment. When, however, the declared provision comes into operation in the Act with an amendment, the liability to pay excise duty on articles covered by the provision for the period taken in by the Bill and anterior to the Act, has to be determined on the basis of provision in the Finance Bill and not in accordance with the relevant amended provision in the Act.

The expression used in the Finance Bill, 1961 levying excise dnty on Chinaware and Porcelainware did not contain an explanation which found a place against the relevant items in the Finance Act. The explanation sought to cover all glazed clayware by the levy of duty of excise. After the bill became an Act a notice demanding duty on stoneware jars removed and sold from a factory manufacturing stoneware articles like pickle jars, etc., during the period taken in by the Finance Bill 10 of 1961 was served on the petitioner. The petitioner challenged the same in a writ petition :

Held, that as the explanation found in item 23-B in the Finance Act 14 of 1961 did not find a place as against item 23-B dealing with excise duty on china and porcelainware in the Finance Bill, 10 of 1961, and since the expression chinaware occurring in item 23-B as found in the Finance Bill must be understood to have been used in its technical sense in which it is understood in ceramic science, it did not include stoneware articles manufactured by the petitioner, the demand for excise duty on stoneware articles manufactured during the period taken in by the Finance Bill was not legal and ought to be quashed. **(1963) 1 Ker L R 312 : AIR 1964 Ker 18 (23) (Prs 38, 39).**

PROVISIONAL DECREE

See Civil P. C. (1908), S. 2.

PROVISIONAL LIQUIDATOR

Company in liquidation
See Companies Act (1956), S. 449.

PROVOCATION

See Penal Code (1860), Ss. 299, 300, 301, 302, 304.

PUBLIC ANALYST

Report of.
See (1) Prevention of Food Adulteration Act (1954), Ss. 8, 13.
(2) Punjab Pure Food Act (8 of 1929), S. 13.

PUBLICATION

See (1) Contempt of Courts Acts (1926) and (1952).
(2) Copyright Act (1957).
(3) Drugs and Magic Remedies (Objectionable Advertisement) Act (1954).
(4) Penal Code (1860), Ss. 292, 499, 500.
(5) Press and Registration of Books Act (1867).
(6) Tort—Defamation.

PUBLICATION OF BOOK

Publication without name of printer and publisher.
See Press and Registration of Books Act (1867), Sections 3, 12.

PUBLICATION OF OBJECTIONBLE MATTER

See (1) Penal Code (1860), S. 292.
(2) Press (Objectionable Matter) Act (1951).

PUBLIC AUCTION

See Civil P. C. (1908), O. 21, R. 66.

PUBLIC AUTHORITY

See Enactments under "Municipalities".

PUBLIC BODY

See Enactments under "Municipalities".

PUBLIC CARRIER

See Statutory cross-references under (1) "Carrier" and (2) "Motor Vehicles".

PUBLIC CHARITABLE PURPOSE

What is.

See (1) Estate Duty Act (1953), S. 2.
(2) Income-tax Act (1922), S. 4.

PUBLIC CHARITY

See (1) Civil P. C. (1908), S. 92.
(2) Hindu Law—Religious endowments.
(3) Madras Hindu Religious and Charitable Endowments Act (19 of 1951).
(4) Madras Hindu Religious Endowments Act (2 of 1927).
(5) Mahomedan Law—Wakf.
(6) Religious and Charitable Endowments.
(7) Trusts Act (1882).

Suit relating to.

See Civil P. C. (1908), Ss. 92, 93.

PUBLIC COMPANY

Defined.

See Companies Act (1956), S. 3.

PUBLIC DEBT ACT (18 of 1944)

SECTION 2:

—S. 2 (2) — Acquisition of Zamindari rights by State Government — Compensation paid in bonds—Amount of interest paid to zamindar — Not part of compensation money—Amounts to interest on security or income from other source — Liable to pay income-tax. See Income-tax Act (1922), S. 6. AIR 1961 All 574 (FB).

SECTION 11

—Ss. 11 (2) and 19 — Order of renewal by Reserve Bank under S. 11 (2)—It cannot be called in question before the civil Court by any person claiming an interest in the security on the ground of forged endorsement on the cancelled note—(Civil P. C. (1908), S. 9)—See Public Debt Act (18 of 1944), S. 19. A I R 1953 Bom 209.

—Ss. 11 and 19 — Renewal of security negotiated under forged endorsement—Remedy of real owner is against the person who has a title to the security as a result of the order of the renewal by the Bank. The real owner can enforce the personal liability for money had and received on his account against the endorsee in whose favour the security is renewed by the Reserve Bank. Such a right however must exist outside the Act (18 of 1944). See Public Debt Act (18 of 1944), S. 19. AIR 1953 Bom 209.

—S. 11 (3)—Renewal of security negotiated under forged endorsement—Delivery to real owner—(Negotiable Instruments Act (1881), S. 58).

Though where a Government promissory note is negotiated under a forged endorsement no title passes to the subsequent endorsees, if such a note is renewed by the Reserve Bank, in favour of any of such endorsees, such a renewal constitutes a new contract between the Central Government and the endorsee under S. 11 (3) and the original real owner is not entitled to obtain the delivery of the renewed note. AIR 1932 P C 22, Rel. on. 54 Bom L R 765 : A I R 1953 Bom 209 (211) (Pt A) (Pr 7).

SECTION 19

—S. 19 — Negotiable Instruments Act, S. 58 — Negotiation through forged endorsement — Plea of negligence — Held, on facts that the negligence of the real owner in allowing a Government promissory note to remain with his broker or sub-broker for almost a year did not contribute to the forgery of endorsement and therefore the subsequent endorsee Bank who obtained its renewal from the Reserve Bank was not saved from the liability to pay its value to the real owner by reason of such negligence — See Negotiable Instruments Act (1881), S. 58. A I R 1953 Bom 209.

—S. 19 — Order of renewal under S. 11 (2)—Jurisdiction of Civil Court to question.

An order by the Reserve Bank under S. 11 (2) cancelling an old security note and issuing a new one being an order made under the Act, it cannot be called in question before the Civil Court by any person claiming an interest in the security on the ground of forged endorsement on the cancelled note. 54 Bom L R 765 : A I R 1953 Bom 209 (211) (Pt B) (Pr 8).

—Ss. 19 and 11 — Renewal of security negotiated under forged endorsement—Remedy of real owner.

Whatever may have been the position before the Act, 18 of 1944, there is no remedy available under this Act to the real owner of a Government security which has been renewed in favour of an endorsee after forged endorsement, against the Government or against the Reserve Bank. The only remedy that has been saved by S. 19 is a remedy against the person who has a title to the security as a result of the order of the renewal by the Bank. The real owner can enforce the personal liability for money had and received on his account against the endorsee in whose favour the security is renewed by the Reserve Bank. Such a right however must exist outside the Act 18 of 1944.

The endorsee has obtained the new note by using the note belonging to the real owner and to which he had acquired no title whatever as it had passed under a forged endorsement. He, therefore, becomes liable to pay to the real owner the value of the Government security belonging to him which is effectively lost to the real owner, provided the real owner is not guilty of negligence in respect of it. A I R 1937 Bom 145, Rel. on. 54 Bom L R 765 : AIR 1953 Bom 209 (211, 212) (Pt C) (Prs 8, 9).

—S. 19 — Criminal breach of trust by holder of Government security — (Negotiable Instruments Act (1881), S 13)—(Securities Act (1920), S. 5)—(Penal Code (1860), S. 405).

Reserve Bank of India vesting and recognizing securities in petitioner—It operates to confer on him title to securities subject to personal liability to rightful owner — Petitioner negotiating securities as negotiable instruments — Rightful owner (a trust in this case) has only a civil claim enforceable against petitioner, as for money had and received on account of rightful owner by the holder of security — No prosecution for criminal breach of trust is maintainable. (1953) 2 Mad L J 42 : 1953 Mad W N 285 : 1953 Cri

L J 1441 : A I R 1953 Mad 787 (790) (Pt B) (Pr 13) (DB).

PUBLIC DEBTS

See (1) Constitution of India, Arts. 292, 293, Sch. 7, List 2, Entry 43.
(2) Public Debt Act (18 of 1944).

PUBLIC DEMANDS RECOVERY

See (1) Bengal Public Demands Recovery Act (3 of 1913).
(2) Bengal Public Demands Recovery (Validation of Certificates and Notices) Act (11 of 1961).
(3) Bihar and Orissa Public Demands Recovery Act (4 of 1914).
(4) Madras Revenue Recovery Act (2 of 1864).
(5) Rajasthan Public Demands Recovery Act (3 of 1952).
(6) Revenue Recovery Act (1890).

PUBLIC DEMANDS RECOVERY ACT (7 of 1880)

SECTION 43

——**Ss. 43, 44** — Cancellation of certificate by civil Court—Question whether amount under certificate is due by the debtor within exclusive jurisdiction of special tribunal — No suit lies in civil Court — Civil P. C. (1908), S. 9. **AIR 1953 Orissa 300 (304) (Pt D) (Pr 9) (DB).**

SECTION 44

——**S. 44**—Cancellation of certificate by civil Court—Question whether amount under certificate is due by the debtor within exclusive jurisdiction of special Tribunal — No suit lies in civil Court. See Public Demands Recovery Act (1880), S. 43. **AIR 1953 Orissa 300 (DB).**

PUBLIC DOCUMENT

See (1) Civil P. C. (1908), O. 11, Rr. 12, 13, 18, O. 13, R. 5.
(2) Evidence Act (1872), Ss. 35, 65, 74-78.

Proof of.
See Evidence Act (1872), Ss. 74-78.

PUBLIC EXAMINATION OF PROMOTERS OF COMPANY

See Companies Act (1956), S. 478.

PUBLIC GAMBLING ACT (3 OF 1867)

SECTION 1

——**S. 1 U. P. Amendment)** — Satta papers containing words or figures indicating bets are instruments of gaming. U. P. Act 21 of 1961. **1965 All WR (HC) 761: 1965 All Cr R 513: 1966 All LJ 170.**

——**S. 1 (U. P. Amendment Act (1 of 1917)) and S. 13** — Slips used for recording bets — If instruments of gaming.

The evidence of the eye-witnesses was that they saw satta gambling being indulged in by the applicant with B, that B wrote something on a slip of paper at the dictation of the applicant and that three slips of paper were recovered from the possession of B. The slips contained nothing but figures; some figures were mere numbers and others were of amount of money; no name was written anywhere.

Held, that the slips could not be said to be the instruments of gaming even if they were proved to have been used in connection with betting, i.e., to record the bets or for any other purpose. **1959 Cr LJ 1397: 1960 All LJ 160: 1960 All WR (HC) 1292: 1960 All Cr R 114: AIR 1959 All 799 (799) (Pt B) (Pr 2).**

——S. 1 — Making out profit — That profit was made out of gaming need not be proved as fact — Mere hope of making profit is enough. See Bombay Prevention of Gambling Act (4 of 1887), S. 3. **AIR 1955 NUC (Kutch) 3689.**

——S. 1 — Instruments of gaming — Money and cards used or intended to be used for gaming can be instruments of gaming. **AIR 1955 NUC (Madh B) 3005.**

——S. 1 — Common gaming house — No access to the public — Place cannot be called 'public place'. See Hyderabad Gambling Act (2 of 1305), S. 13 (1). **1964 (1) Cri LJ 414: AIR 1964 Mys 53.**

——**Ss. 1 and 13 (as amended by Punjab Acts 1 of 1929 and 9 of 1960) — 'Gaming' and 'instruments' of gaming — Gaming includes betting on numbers called Dara-Satta — Evidence.**

Definition of 'gaming' in Sec. 1 as amended by Punjab Acts of 1929 and 1960, now includes betting on numbers called 'dara' or 'dara-satta' and the person indulging therein is guilty of an offence under Sec. 13. Manner and method of dara or dara-satta and the nature and type of evidence of such gambling available indicated. AIR 1940 All 412 and 1961 (2) Cr LJ 399 (Punj) and AIR 1933 All 554, Rel. on.

Held, on facts that the accused had committed the offence under Sec. 13. The slip given to the decoy gambler after accepting the bets was an instrument of gaming and inferential of the conclusion that the person had been gaming in dara or dara-satta. The piece of paper on which appeared a number of entries giving numbers on which various bets had been laid with the accused including the two bets laid by decoy gambler and giving the amount staked with each number was a strong corroboration of the prosecution case against the accused. ILR (1962) 1 Punj 323, and Cri. Appeal No. 1195 of 1961, dated 25-10-1962 (Punj) and Cri. Revn. No. 649 of 1961, dated 16-10-1961 (Punj) and Cri Revn. No. 57 of 1962, dated 30-7-1962 (Punj), Rel. on; Cri. Revn. No. 651 of 1957, dated 17-1-1958 (Punj) and Cri. Revn. No. 1032 of 1958, dated 5-12-1958 (Punj), Ref.; AIR 1960 Punj 72 and Cr. Appeal No. 1222 of 1961, dated 12-11-62 (Punj), Dist. **ILR (1963) 2 Punj 868: 1964 Cur LJ 182: 1964 (1) Cri LJ 607 (609, 611) (Prs 6, 8) (DB).**

——**Ss. 1, 13 and 13-A (as amended by Punjab Act 9 of 1960) — 'Gambling' — Scope — Includes Satta gambling — Person accepting stakes on figures or numbers to be subsequently disclosed is liable to be punished under S. 13-A (Punjab) read with Sec. 1 (Punjab).** AIR 1960 Punj 72, Dist. **ILR (1962) 1 Punj 323.**

——**Ss. 1 and 3 (as amended by the Punjab Act, 1 of 1929) — Common gaming house and 'Instruments of gaming' — Meaning of — Necessity.**

Whether the slips recovered from the house of the accused refer to sums of money in connection with numbers of either two or one digit and one of the documents, appears to be a summarised account of the various sums laid by different people on the numbers from 19 to 29 there can be no doubt that they refer to satta wagers and under the amended definition the amount to 'Instruments of gaming' and also the premises used for collecting them are a 'Common Gaming House' whether

or not the prosecution establishes that their collection is for the purpose of making a profit. The owner of the premises is therefore rightly convicted of the offence under Sec. 3. 63 Pun LR 316: 1961 (2) Cr LJ 399 (400) (Prs 7 and 8) (Punj) (DB).

SECTION 2

——Ss. 2, 3, 4, 5, 6 and 9 — Constitutional validity — Application of stringent provisions of Act to certain areas — State Government having better knowledge of local conditions given legislative guidance to choose areas — Sections not contravening Art. 14 of Constitution and are valid — Interpretation of Statutes — Statement of Objects and Reasons and Preamble as guides to construction.

The provisions of Ss. 2, 3, 4, 5, 6 and 9 of the Act do not infringe Article 14 of the Constitution and are not ultra vires. In fact all the provisions in the Act are intra vires.

It is no doubt true that there are contained in the Act certain provisions like Sections 3, 4, 5, 6 and 9 which are definitely harsher than their counter parts in other Acts. But the State Government has not been left without there being any legislative guidance to choose the areas to which the stringent provisions of the Act would apply, leaving other areas to be dealt with under the more generous provisions of Criminal P. C.

The State Governments have no doubt been given a certain discretion in the matter but it is well settled that discretionary powers are not necessarily discriminatory powers and where conditions for the exercise of the powers are laid down in the Act or the Rules made thereunder the powers cannot be said to be discriminatory. It is only in cases where it is found that either there is no standard or guide at all or that the guidance is vague or uncertain that the Court has power to strike down the law at the altar of Article 14 of the Constitution. AIR 1956 SC 676 and AIR 1962 SC 75, Foll.

Having laid down the policy of law and legal principles into a binding rule of conduct, the legislature left it to the State Governments concerned to decide to which area they would extend the remaining provisions of the Act. AIR 1954 SC 92 and AIR 1955 SC 604, Foll.

A preamble of the Act can be construed as laying down sufficiently clear a policy or principles for the guidance of the executive. The preamble and also the long title of the Act lay down a clear guiding policy, the same being that wherever it is considered necessary to punish public gambling and the keeping of common gaming houses the remaining provisions of the Act should be extended. AIR 1952 SC 123, Foll. 1963 All LJ 360: 1963 All WR (HC) 274: 1963 All Cri R 144: ILR (1963) 1 All 946: 1964 (1) Cri LJ 319: AIR 1964 All 95 (97, 98, 99, 100, 101) (Prs 6, 8, 11, 12, 13, 18, 19) (DB).

SECTION 3

——Ss. 3 and 4 — Instrument of gaming recovered from shop or house of accused during search accused can be rightly convicted under section. 1965 All WR (HC) 761: 1965 All LJ 176: 1965 All Cr R 513.

——Ss. 3 and 4 (U. P.) — Offences are not cognizable: AIR 1961 All 377, Foll. — Criminal P. C. (1898), S. 4 (1) (f). 1965 All WR (HC) 115: 1965 All Cr R 119: 1965 All LJ 68.

——S. 3 — Constitutional validity — Application of stringent provisions of Act to certain areas — State Government having better knowledge of local conditions given legislative guidance to choose areas — Sections not contravening Article 14 of Constitution and are valid — Interpretation of Statutes — Statement of Objects and Reasons and Preamble as guides to construction. See Public Gambling Act (3 of 1867), S. 2. 1964 (1) Cri LJ 319: AIR 1964 All 95 (DB).

——S. 3—Presumption under S. 6—Nature of—Not irrebuttable—The presumption to be drawn under S. 6 merely relieves the prosecution of the duty of adducing complete evidence as to the gaming but even then the evidence has to be considered as a whole in determining whether the offences under Secs. 3 and 4 of the Act were made out. See Public Gambling Act (1867), S. 6. 1964 All WR (HC) 435.

——Ss. 3 and 4 — Offences under are not cognisable. 1961 All LJ 118: 1961 All Cr R 62: 1962 All WR (HC) 149: 1961 (2) Cr LJ 53: AIR 1961 377 (Pt B).

——Ss. 3, 4 and 13 — Instruments of gaming — Recovery of — When relevant.

The recovery of instruments of gaming is relevant only if the offences under Ss. 3 and 4 are to be proved by presumption; public gambling punishable under Section 13 is to be proved by evidence and no question of presumption arises. The recovery of instruments of gambling may be circumstantial evidence to prove public gambling but is not conclusive and may not be considered enough in certain circumstances. 1959 Cr LJ 1397: 1960 All LJ 160: 1960 All WR (HC) 129: 1960 All Cr R 114: AIR 1959 All 799 (800) (Pt C) (Pr 3).

——S. 3 — Applicability — Absence of evidence of commodity of Satta — Effect.

Where the accused is charged for an offence under S. 3 of the Gambling Act, it is incumbent on the prosecution under the law to prove by definite evidence the commodity in respect of which the alleged Satta gambling was going on, and where it has not been proved, the accused is entitled to acquittal. AIR 1939 All 734, Rel. on. 1957 All LJ 95: 1957 All WR (HC) 220.

——S. 3 — Search Warrant under Sec. 5 issued in name of Station Officer — Latter endorsing it to second Officer not authorised to make search — Presumption under Sec. 6 does not apply — Conviction based solely on such presumption — Cannot be sustained. See Public Gambling Act (1867), S. 5. 1956 All LJ 862: 1956 All WR (HC) 689.

——S. 3 — Evidence — Sufficiency of — Statement of Police Officer — Credibility — Where a police officer is not bound to give out his source of information regarding any offence, his statement followed subsequent conduct consistent with the same is enough to hold that he had credible information upon which he could take search of the accused person. AIR 1955 NUC (Madh B) 1551.

——Ss. 3 and 4 — Burden of proof.

In a prosecution of the accused for an offence of gambling in American futures it is for prosecution to prove that the 'Muddemal slips' contain a record of betting transactions or were in any other manner connected with betting in American futures. It is therefore for the prosecution to explain how the bets in American futures are recorded and to satisfy the Court that the slips seized were a part of this record. **1954 Cr LJ 1347: Madh B LR (1954) Cr 17: Madh B LJ 1954 HCR 574: AIR 1954 Madh B 145 (146) (Pt C) (Pr 8).**

——Ss. 3, 4 and 6 — Gambler's testimony — To be treated as that of accomplice — Corroboration necessary by independent witnesses — Corroboration need not be by direct evidence — Sufficient if it is merely circumstantial. **1961 MPLJ (Notes) 74.**

——S. 3 — Conviction — Essentials for — House must be common gaming house for profit of the owner or occupier.

The mere fact that a person owns a house in which gambling was going on is not sufficient for his conviction under Sec. 3 of the Act. It must further be proved that the house was used as a common gaming house for the profit or gain of the owner or the occupier. **1960 MPLJ (Notes) 178.**

——Ss. 3 and 5 — Likelihood of gambling at a place — Search warrant — If to be issued — Proof of place being public gaming house.

A search warrant was obtained on information that there was likelihood of gambling taking place in the house of non-applicant which was subsequently confirmed.

Held, that a search warrant obtained on the basis of such information is not legal. What is required under Sec. 5 of the Public Gambling Act is that the Magistrate should be satisfied upon credible information that he has reason to believe that any house, walled enclosure, room or place was used as a common gaming house.

A house used for gaming with cards is not a 'common gaming house' unless it is shown that the owner or occupier keeps or uses it for profit or gain to himself. **1959 MPLJ (Notes) 181.**

——S. 3 — Elements required for conviction under — To convict a person as the patron of a common gaming house there must be proof that there is sufficient record to make out an element of profit or gain to that person as the owner, occupier, user or keeper of the premises — Madras Gambling Act (3 of 1930), S. 8. **1959 Mad WN 456: 1960 Mad LJ (Cri) 382.**

——S. 3 — Gambling in private house — Gambling itself how far an offence — Not an offence under the Act not being within the ambit of Section 8 or Sec. 12. It becomes an offence only when the gaming takes place in a common gaming house or in a public place — Madras City Police Act (3 of 1888), S. 8. **1960 MLJ (Cri) 16 (Mad): 1959 Mad WN 171.**

——S. 3 — Conviction for keeping common gaming house — Evidence for — It must be established that he owned the house or was the occupier of it and that the instruments of gambling were kept or used for the profit or gain of that person. Madras City Police Act (3 of 1888), S. 45. **1960 Mad LJ (Cri) 16: 1959 Mad WN 171.**

——Ss. 3 and 4 — Common gaming house — Presence of implements of gaming or fact that monies were found in a glass near knee of occupier is hardly evidence that house was common gaming house. **AIR 1955 NUC (Punj) 3442.**

——Ss. 3, 4 and 6 — Rajasthan Public Gambling Ordinance (1949), Ss. 3, 4 and 6 — Search-warrant illegal — Presumption under Sec. 6 cannot be drawn — Conviction for gambling can still be supported if there is evidence of actual gaming and realisation of commission. **AIR 1955 NUC (Raj) 4644.**

——S. 3 — Burden of proof — Onus to prove ingredients is on prosecution. **AIR 1955 NUC (Raj) 3442.**

SECTION 4

SYNOPSIS

(Public Gambling Act (1867), S. 4.)

1. Scope.
2. "Found in any such house".
3. Illegal search — Effect on convictions.
4. Nature of offence.
5. Burden of proof.
6. Evidence.
7. Presumption under the section.
8. Validity of section.

1. Scope.

——S. 4—Hyderabad Gambling Act (2 of 1305-F), Sec. 5 — Essential condition for framing charge — Accused must be found playing in a common gaming house. See Hyderabad Gambling Act (2 of 1305-F), S. 5. **AIR 1953 Hyd 60 (DB).**

——S. 4— Madras Gaming Act, S. 9 — Conditions essential for conviction — The game of chance becomes punishable only if it is played in any common gaming house under Sec. 9 or in a public place under Sec. 12 — It is not punishable if it is played elsewhere and not coming within either of these two sections. **1960 Mad LJ (Cri) 382: 1959 Mad WN 456.**

——S. 4 — Essentials of S. 9 — Gaming on Sankaranti day — Absence of evidence that house was common gaming house — No offence. **1953 Mad WN 14: 1953 Mad WN (Cri) 6: 65 Mad LW 949: (1952) 2 Mad LJ 686: 1953 Cri LJ 492: AIR 1953 Mad 243 (244) (Pt A) (Prs 4, 5).**

——Ss. 4, 13 — House held to be not common gaming house — Person found gaming cannot be held guilty.

The Public Gambling Act makes punishable gaming in a common gaming house by Sec. 4 and gaming in public places, public street, or thoroughfare by Sec. 13. Gaming in any other place including a private house will not be an offence under the Act. Thus, when the Magistrate finds that the house was not a common gaming house, it is his duty to acquit the persons who are said to have been found gaming in that place. **1962 (1) Cri LJ 615: AIR 1962 Manipur 20 (21, 22) (Pt A) (Pr 5).**

——S. 4 — Scope — Gambling not per se an offence under the Gambling Act. It is only an offence to gamble in a common gaming house as defined in S. 1. Where, therefore, the accused merely met on a Diwali night for a friendly game of cards in the house of one of them, no offence is committed. 52 Cri LJ 365: AIR 1951 Pat 405 (405) (Pt C) (Pr 3).

2. "Found in any such house".

——S. 4 — Found in house — Person need not be actually caught in the house. 1949 All WR (HC) 438: 1949 All LJ 462: 1949 All Cri R 102: 1952 Cri LJ 852: AIR 1952 All 469 (470) (Pr 5).

——S. 4 — "Found gaming" — Meaning of — The Act deliberately use the word 'Found gaming' which is wider than 'seen gaming'. The word found is more akin to "discovered". See Madras City Police Act (3 of 1888), S. 46. 1960 Mad LJ (Cri) 16: 1959 Mad WN 171.

3. Illegal search — Effect on conviction.

——S. 4 — Search Warrant under Sec. 5 issued in name of Station Officer — Latter endorsing it to second Officer not authorised to make search — Presumption under Sec. 6 does not apply — Conviction based solely on such presumption — Cannot be sustained. See Public Gambling Act (1867), S. 5. 1956 All LJ 862: 1956 All WR (HC) 689.

——S. 4 — Rajasthan Public Gambling Ordinance (1949), Ss. 3, 4 and 6 — Search warrant illegal — Presumption under Sec. 6 cannot be drawn — Conviction for gambling cannot be interfered in revision if the judgment of the trial Court can be supported on the actual gaming and realisation of commission produced in the case. AIR 1955 NUC (Raj) 4644.

4. Nature of offence.

——S. 4 (U. P.) — Offence is not cognizable. See Public Gambling Act (1867), S. 3. 1965 All WR (HC) 115: 1965 All LJ 119: 1965 All LJ 68.

——S. 4 (U. P.) — Offences under, are not cognizable. See Public Gambling Act (3 of 1867), S. 3. 1961 (2) Cri LJ 53: AIR 1961 All 377 (DB).

5. Burden of proof.

——S. 4 — Burden of proof — In a prosecution of the accused for an offence of gambling in American futures it is for prosecution to prove that the "Muddemal Slip" contain a record of betting transactions or were in any other manner connected with betting in American futures. It is therefore for the prosecution to explain how the bets in American futures are recorded and to satisfy the Court that the slips seized were a part of this record. See Public Gambling Act (1867), S. 3. AIR 1954 Madh B 145.

6. Evidence.

——S. 4 — Presumption under Sec. 6 — Nature of — Presumption under S. 6 of the Act can be drawn if on search of the house, cards etc. are found therein. The presumption so drawn is not irrefutable. The presumption may be drawn and used against the accused in one set of circumstances and in another Courts may not convict the accused on presumption alone. The presumption merely relieves the prosecution of the duty of adducing complete evidence as to the gambling, but even then the evidence has to be considered as a whole in determining whether the offences under the Secs. 3 and 4 of the Act were made out. 1964 All WR (HC) 435.

——Ss. 4, 3 and 13 — Instruments of gaming — Recovery of, is relevant only if offences under Ss. 3 and 4 are to be proved by presumption — Offence under S. 13 — No question of presumption arises. See Public Gambling Act (3 of 1867), S. 3. 1959 Cri LJ 1397: AIR 1959 All 799.

——S. 4 — Conviction under — Requirements. It is in respect of convictions under Ss. 3 and 4 that proof of 'Nal' is needed. See Public Gambling Act (1867), S. 3. AIR 1955 NUC (All) 2702.

——S. 4 — Being found in gaming house — Evidence — Solitary word of Police Sub-Inspector is not sufficient — Formal complaint recorded by him, is not independent corroboration. See Bombay Prevention of Gambling Act (4 of 1887), S. 5. AIR 1955 NUC (Kutch) 3689.

——S. 4 — Evidence — Sufficiency of — Statement of Police-Officer — Credibility. — Where a police officer is not bound to give out the source of his information regarding any offence his statement followed by subsequent conduct consistent with the same is enough to hold that he had credible information upon which he could take search of accused person. See M. B. Gambling Act, Section 3 AIR 1955 NUC (Madh B) 1551.

——S. 4 — Gambler's testimony — To be treated as that of accomplice—Corroboration — Necessary by independent witnesses — Corroboration need not be by direct evidence—Sufficient if it is merely circumstantial. See Public Gambling Act (1867), S. 3. 1961 MPLJ (Notes) 74.

——S. 4 — Offence under Section 4, Public Gambling Act — Solitary statement of investigating officer not sufficient for conviction. See Criminal Trial — Evidence. 1962 Cur LJ 417 (Punj).

——S. 4 — Common gaming house — Mere presence of implements of gaming or the facts that some moneys were found in a glass placed near the knee of the occupier or that some money was lying in front of the other accused hardly serve as evidence that the house was a common gaming house and the people present there were engaged in gaming for the sake of gain or profit. See Punjab Prevention of Gambling Act (3 of 1867), S. 3. AIR 1955 NUC (Punj) 3442.

7. Presumption under the section.

——S. 4 — Bombay Prevention of Gambling Act (4 of 1887), Ss. 5, 6 — Scope —Duty of Court — Issue of proper warrant under S. 6 — Presumption under S. 7 — Rebuttal.

Where in a prosecution under Ss. 4 and 5, Bombay Act 4 of 1887 the prosecution proves that the police entered the house in question under a proper warrant issued under Sec. 6 and seized the instruments of gaming there, it is the duty of the Court to hold that the owner of the house was keeping a common gaming house and that every

person was present there for the purpose of gaming unless the accused are able to prove the contrary. In such a case the prosecution need not prove by positive evidence that the owner was keeping a common gaming house and that the persons found there were assembled for the purpose of gaming: 36 Cr LJ 902, Dist.

The accused persons, who were all Muhammadans, were found playing on Idd holiday, a day sacred to the Muhammadans, in a house in broad day light with its doors kept open when the police raid took place. The raid had taken place in pursuance of a proper warrant issued under S. 6:

Held, that the presumption arising under S. 7 may well be rebutted by the above circumstances and, therefore, the accused could not be held guilty under Ss. 4 and 5. **(1952) 5 Sau LR 79.**

8. Validity of section.

——**Ss. 4, 2, 3, 5, 6 and 9** — Constitutional validity — Application of stringent provisions of Act to certain areas — State Government having better knowledge of local conditions given legislative guidance to choose areas — Sections not contravening Art. 14 of Constitution and are valid—Interpretation of Statutes — Statement of Objects and Reasons and Preamble as guides to construction See Public Gambling Act (3 of 1867), S. 2. **1964 (1) Cri LJ 319: AIR 1964 All 95 (DB).**

SECTION 5

SYNOPSIS

(Public Gambling Act (1867), S. 5.)

1. Scope.
2. "Credible information".
3. Procedure relating to search.
4. Search witnesses.
5. Delegation of authority to search.
6. Search warrant.
7. Warrant must state identity of place to be searched.
8. Seizure of money found on person.
9. Custom — Whether a defence.
10. Instruments of gaming.
See Public Gambling Act (1867), S. 1.
11. Validity of section.

1. Scope.

——**Ss. 5 and 6** — Applicability and scope.

The rules contained in Ss. 5 and 6 of the Public Gambling Act appear in a penal Statute which must be strictly interpreted, and they would not be applicable to cases in which all the essential conditions provided by the law have not been duly observed. 1884 All WN 285 and 4 Cal 710, Rel. on. **(1956) All WR (HC) 509: (1956) All LJ 935.**

——**S. 5** — Applicability — Order unwarranted by law — Order directing stoppage of Game House being members' registered Social Club — Order must be quashed. See Constitution of India, Article 226. **AIR 1955 Assam 84 (DB).**

2. "Credible information".

——**S. 5** — Where Magistrate acts in good faith in issuing warrant under Sec. 5, Courts will not judge whether information received by him was sufficient to issue warrant — Correctness of such information can be judged with result of search. **1964 All Cri R 303: 1964 All WR (HC) 435.**

—**S. 5** — Warrant when to be issued—Evidently a warrant can be issued on a complaint made before the Magistrate on oath and after making such enquiry as the Magistrate thinks necessary and after satisfying himself that there are good grounds to suspect that the house, room or place is used as a common gaming house. See Bombay Prevention of Gambling Act (4 of 1887), Sec. 6. **1957 Cri LJ 362: AIR 1957 Bom 66 (DB).**

——**S. 5**—Hyderabad Gambling Act (2 of 1305-F), S. 6 — Credible information — Report of police officer that a person has allowed gambling in his house is insufficient. See Hyderabad Gambling Act (2 of 1305-F), S. 6. **AIR 1953 Hyd 60 (DB).**

——**S. 5** — Indore Prevention of Gambling Act, S. 6 — Reasonable suspicion — Sufficiency of. See Indore Prevention of Gambling Act (1 of 1909), S. 6. **AIR 1951 Madh Bha 33.**

3. Procedure relating to search.

——**S. 5 — Authority to search warrant—Delegation of power to search — Applicability of S. 79, Criminal P. C.**

Where there is no inconsistency between the provisions of the Criminal P. C. and the U. P. Gambling Act, or where the Gambling Act is silent the provisions of the Code of Criminal Procedure will be applicable to the proceedings under the Gambling Act. Thus, the provisions of S. 79, Criminal P. C., are applicable to a search under the Gambling Act. And according to this provision the officer who has been nominated to make a search can delegate his powers to another Sub-Inspector for that purpose. AIR 1920 All 150, Foll. AIR 1948 Lah 81, Dissent. from. **1954 All LJ 609: 1954 All WR (HC) 592: 1955 Cri LJ 656: AIR 1955 All 231 (232) (Pr 2).**

——**S. 5** — Search — Procedure not given in S. 5 — Hence provisions of Cr. P. C. will apply by virtue of Sec. 5 (2) Cr. P. C. and search will have to be conducted in accordance with S. 165 and S. 103 of Cr. P. C. See J and K Gambling Act (18 of 1977), S. 5. **1954 Cri LJ 488: AIR 1954 J and K 28 (DB).**

4. Search witnesses.

——**S. 5** — Search under Act is not covered by S. 103, Criminal P. C. — Witnesses not from vicinity and one of them not examined will not by itself vitiate the search—(Cr. P. C. (1898), S. 103). **1953 Mad WN (Cri) 6: 1953 Mad WN 14: 65 Mad LW 949: (1952) 2 Mad LJ 686: 1953 Cri LJ 492: AIR 1953 Mad 243 (245) (Pt E) (Pr 9).**

5. Delegation of authority to search.

——**Ss. 5 and 6 — Construction and Scope — Presumption under S. 6 — Authority to make search — Delegation of — Legality — (Cr. P. C. (1898), S. 79) — (Interpretation of Statutes).**

The presumption under Sec. 6, encroaches upon the liberty of a person and has got to be strictly

construed. There is nothing in Sec. 5 which empowers a person, authorised by the Magistrate to make a search, to further delegate that power to another officer. There is no provision by which the provisions of Sec. 79, Criminal P. C., have been made applicable to a warrant issued under S. 5, Public Gambling Act. Therefore, if a warrant issued under Sec. 5 in favour of a particular officer by a Magistrate has been endorsed in favour of another officer and the search has been made by such an officer, such a search cannot be regarded as one in accordance with Sec. 5, Public Gambling Act, and the presumption under Sec. 6 will not be available to the prosecution in such circumstances. 30 All 60 and AIR 1920 All 150 and AIR 1945 Nag 216, Not approved. AIR 1948 Lah 31 and AIR 1929 Bom 157 and AIR 1940 Cal 586 and AIR 1929 All 937, Approved. **1957 All LJ 214: 1956 All WR (HC) 219: 1956 Cr LJ 952: AIR 1956 All 449 (450) (Pr 4) (DB).**

——S. 5 — Notification of local Government — Delegation of power to search — Second officer executing search warrant in contravention of notification — Irregularity — Effect — Applicability of S. 6.

The terms of the Sec. 5 of the Public Gambling Act clearly show that the Legislature has attached importance to the rank of the officer who is competent to execute the warrant, and no warrant can be issued to any officer of police not below such rank as the State Government shall appoint in that behalf. Hence where the notification issued by the U. P. Government clearly laid down that the State Government under Sec. 5 of the Public Gambling Act should appoint Inspectors of police and officers in-charge of police stations not below the rank of Sub-Inspector as the officers who may be authorised to exercise the power described in that section and under that notification a second officer who is not in-charge of a police station was not authorised to exercise the power described in Sec. 5, but the search warrant given in the name of the station officer of the police station was endorsed by him in favour of this second officer who executed it.

Held, that the warrant was wrongly endorsed and the execution of the search warrant by the second officer amounted to an irregularity, which rendered Sec. 6 of the Act inapplicable. AIR 1920 All 150 and 30 All 60 and AIR 1955 All 231, Disting. **(1956) All WR (HC) 509: 1956 All LJ 935.**

——Ss. 5, 6, 3 and 4 — Search warrant under S. 5 issued in name of Station Officer — Latter endorsing it to second officer not authorised to make search — Presumption under S. 6 does not apply — Conviction based solely on such presumption— validity — (Criminal P. C. (1898), Ss. 4 (1) (p) and 79).

Notification No. 2195/VI-349-1909 dated 14th of June 1910 published in the U. P. Gazette, Part 1, p. 9598 dated 25th of June 1910 says that Inspectors of Police and all officers in charge of police stations not below the rank of Sub-Inspector, may be authorised to take action under S. 5 of the Public Gambling Act. It will thus appear that though the police officer originally authorised under the warrant might endorse it to another police officer, yet it is necessary that the endorsement must be in favour of a person who has been appointed in that behalf by the State Government; and if it is endorsed in favour of a person who is not such a person then the mere endorsement will not make him an authorised police officer and the execution of the warrant by him would not fulfil the requirements of Section 5 or Section 6 of the Act.

The presumption under Section 6 encroaches upon the liberty of a person and has got to be strictly construed.

There is nothing in Section 5 which empowers a person authorised by Magistrate to make a search, to further delegate that power to another officer. The provisions of Section 79, Cr.P.C., have not been made applicable to a warrant issued under Section 5 of the Public Gambling Act. Therefore, if the warrant issued under Section 5 in favour of an officer in charge of a police station K has been endorsed in favour of another officer, viz., the second officer who cannot be said to be in charge of the police station K within S. 4 (p), Criminal P. C., and the search has been made by such an officer, the search cannot be regarded as one in accordance with Section 5, and the presumption under Section 6 will not be available to the prosecution in such circumstances. AIR 1956 All 449, Foll.

Where in such a case the convictions of the accused under Ss. 3 and 4 are based solely on such presumption and not upon independent evidence, they cannot be sustained. **(1956) All WR (HC) 689: (1956) All LJ 862.**

——S. 5 — When a class of officials are empowered, they are generally empowered. But when specified officials are empowered, they are specially empowered. It is not necessary that an official be empowered by name. He can be empowered by virtue of his office — Delegation of power of search by Chief Commissioner to all police officers not below the rank of Deputy Superintendent of Police — Delegation was general empowerment — Warrant unauthorised—Presumption under S. 7 of the Bombay Prevention of Gambling Act cannot be made. Bombay Prevention of Gambling Act (4 of 1887), S. 6. **AIR 1955 NUC (Kutch) 3689.**

——S. 5 — Search warrant, who can issue — Deputy Superintendent of Police has no power to issue or to endorse such a search warrant — Entire proceedings quashed under S. 561-A, Criminal P. C. **1962 (1) Cri LJ 615: AIR 1962 Manipur 20 (22) (Pt D) (Pr 13).**

——S. 5 — Superintendent of Police invested with powers of District Superintendent — Warrant issued by — Legality — (Police Act (1861), Ss. 1 and 23).

In S. 1, Police Act, the District Superintendent of Police appointed by a State Government is to perform all or any of the duties of a District Superintendent of Police under the Police Act in any district and S. 23 gives the police the power to detect and bring offenders to justice and it cannot be said that the power to detect and bring offenders to justice should be circumscribed to offences which come only under the Penal Code. This will be too narrow an interpretation and is not justified by the wording of the section. There is, therefore, nothing wrong or illegal in investing

a Superintendent of Police with powers of District Superintendent of Police to issue warrants under S. 5, Public Gambling Act. **ILR (1955) Punj 24: 1956 Cri LJ 1348: AIR 1956 Punj 226 (227) (Pr 6) (DB).**

——S. 5 — Execution of warrant — Authority for — Punjab Government Notification, dated 1-9-52 — Construction of — Both Sub-Inspectors and Assist. Sub-Inspectors present — Superintendent of Police can issue warrant to either of these officers. **AIR 1955 NUC (Punj) 4919 (DB).**

——Ss. 5 and 6 — 'District Superintendent of Police' — Does not mean Additional Superintendent of Police — Warrant signed by latter — Presumption under S. 6 cannot be drawn. See Rajasthan Public Gambling Ordinance (1949), S. 5. **1965 (1) Cri LJ 80: AIR 1965 Raj 5 (DB).**

6. Search warrant.

——S. 5 — Scope of — All powers under S. 6 of the Bombay Prevention of Gambling Act not conferred but in substance the officer authorised to enter and search a house suspected to be common gaming-house — The exclusion of one or more powers granted under the warrant from powers conferrable under S. 6 does not make the warrant defective — Presumption under S. 7 of the Act must arise. See Bombay Prevention of Gambling Act (4 of 1887), S. 6. **1957 Cri LJ 362: AIR 1957 Bom 66 (DB).**

——S. 5 — Officer asked in the warrant to produce articles seized before Magistrate — The obligation does not vitiate the warrant so as to disable the prosecution from availing itself of the presumption arising under S. 7 of the Bombay Prevention of Gambling Act. See Bombay Prevention of Gambling Act (4 of 1887), S. 6. **1957 Cri LJ 362: AIR 1957 Bom 66 (DB).**

——S. 5 — Form of warrant — Warrant not in the prescribed form — Warrant not invalid—The raid effected in pursuance thereof not affected. See Bombay Prevention of Gambling Act (4 of 1887), S. 6. **1957 Cri LJ 362: AIR 1957 Bom 66 (DB).**

——S. 5 — Search warrant — Defects in — Wrong procedure — Effect.

Where the warrant was issued in the name of an officer who was not correctly designated in it, and the said officer did not follow the direction given in the warrant and also exceeded the authority that was given to him and the house which was searched was not the one mentioned in the warrant:

Held, that the conviction of the accused could not be sustained. AIR 1937 Cal 54 and AIR 1936 All 109, Rel. on. **10 J and K LR 77: 1952 Cri LJ 298: AIR 1952 J and K 14 (14, 15) (Prs 6, 7).**

——S. 5 — Credible information — It is not necessary that officer issuing warrant must state in warrant that he is satisfied from credible information — (Madhya Bharat Gambling Act (51 of 1949), S. 5). **AIR 1955 NUC (Madh B.) 3005.**

——S. 5 — Defect in warrant — Effect on legality of search — Warrant sufficient to fix identity of place—Mere minor misdescription does not render search illegal — (Madhya Bharat Gambling Act (51 of 1949), S. 5). **AIR 1955 NUC (Madh B) 3005.**

——S. 5 — Search warrant — No prescribed form — He need not even record his reasons of belief — (Madras Gaming Act (3 of 1930), S. 5). **1953 Mad WN (Cri) 6: 1953 Mad WN 14: 65 Mad LW 949: (1952) 2 Mad LJ 686: 1953 Cri LJ 492: AIR 1953 Mad 243 (245) (Pt B) (Pr 6).**

——S. 5 — Search warrant — Misdescription is immaterial and does not vitiate the warrant. **AIR 1953 Mad 243 (245) (Pt D) (Pr 8).**

——S. 5 — Warrant signed by Assistant Superintendent of Police is valid for the purposes of Ss. 38 and 63, Mysore Police Act. See Mysore Police Act (5 of 1908), S. 4 (b). **1953 Cri LJ 238: AIR 1953 Mys 14.**

——Ss. 5, 6 — Blank warrant signed by Superintendent of Police to be filled in as and when necessity arose — Such warrant is not legal — Presumption under S. 6 cannot be raised. **AIR 1955 NUC (Raj) 5007.**

——S. 5 — Bombay Prevention of Gambling Act, Ss. 6, 7 — Special warrant — Requirements—Non-compliance — Effect. See Bombay Prevention of Gambling Act (1887), S. 6. **52 Cri LJ 812: AIR 1951 Sau 55 (DB).**

7. Warrant must state identity of place to be searched.

——S. 5 — Search warrant — Requirements of—House to be searched must be described and it must also be stated that the house was used as common gaming-house.

The Public Gambling Act does not make gambling in a private house illegal. Before issuing a search warrant under S. 5, the officer must have had reliable information that the public servant concerned was using or keeping instruments of gaming in the Government quarters in his occupation for his profit or gain. In the warrant the house should have been described and it ought to have been stated that the house was used as a common gaming-house. **1962 (1) Cri LJ 615: AIR 1962 Manipur 20 (22) (Pt E) (Pr 8).**

8. Seizure of money found on person.

——Ss. 5, 8 — Court has no jurisdiction to order forfeiture of moneys found upon person of accused: 7 All LJ 404: 11 Cri LJ 373, Overruled.

Under S. 5, the only articles authorised to be seized, when a search is made of the persons of those who are taken into custody, are those that may be described as "instruments of gaming". The officer is not authorised to seize moneys or other articles recovered from the person or the persons taken into custody upon such search. Sec. 8 does not authorise the forfeiture of moneys recovered from the persons of the accused. Thus, the Court has no jurisdiction under S. 8 to order the forfeiture of moneys found upon the persons of the accused. 7 All LJ 404: 11 Cri LJ 373, Overruled; Case-law, Ref. **1950 All LJ 58: 51 Cri LJ 640: 1950 All WR 141: 1950 All Cri Cas 53: ILR (1950) All 1299: AIR 1950 All 199 (199) (Prs 6, 7) (DB).**

9. Custom — Whether a defence.

——S. 5 — Diwali gambling — Offence — Custom — Plea in defence.

An offence of gambling cannot be condoned on the ground of custom prevailing amongst Hindus to gamble on the Diwali day. (1956) All WR (HC) 509: (1956) All LJ 935.

10. Instruments of gaming.

See Public Gambling Act (1867), S. 1.

11. Validity of section.

——Ss. 5, 2, 3, 4, 6 and 9 — Constitutional validity — Application of stringent provisions of Act to certain areas — State Government having better knowledge of local conditions given legislative guidance to choose areas — Sections not contravening Art. 14 of Constitution and are valid — Interpretation of Statutes — Statement of Objects and Reasons and Preamble as guides to construction. See Public Gambling Act (3 of 1867), S. 2. 1964 (1) Cri LJ 319: AIR 1964 All 95 (DB).

SECTION 6

SYNOPSIS

(Public Gambling Act (1867), S. 6.)

1. Presumption under section mandatory.
2. Presumption when can be raised.
3. Presumption is rebuttable.
4. Gaming.
5. Validity of section.
6. Conviction based on independent evidence.
7. Appeal and revision.
8. Cases under other similar Acts.

1. Presumption under section mandatory.

——S. 6 — Scope of presumption under — Special rule of evidence — (Evidence Act (1872), S. 114).

The provision of S. 6 of the Public Gambling Act constitute a special rule of evidence as to the onus probandi in such cases; and, although with reference to the general terms of S. 114 of the Evidence Act, Section 6 of the Public Gambling Act has not seriously altered the ordinary rules of evidence as to presumptions or burden of proof, the provisions of the section must not be held strictly applicable to cases in which search is not made by a duly authorised officer under the provisions of S. 5. That things like cards, money and a tin containing nal when found in a house suspected of being a common gaming-house would be 'evidence' is obvious and scarcely needs special legislation, but the context of S. 6 clearly shows that the word is used in the sense of 'proof' and not in the sense of evidence which falls short of proof. The rule contained in Section 6 renders imperative a presumption which has always been regarded as permissible by the rules of evidence. 1884 All WN 39 and 1884 All WN 285, Followed. (1956) All WR (HC) 509: (1956) All LJ 935.

2. Presumption when can be raised.

——S. 6 — Presumption under S. 6 encroaches upon the liberty of a person — Has got to be strictly construed — Construction of — Authority to make search — Delegation of — Further delegation of that power by that officer not legal — (Criminal P. C (1898), S. 79) — (Interpretation of Statutes) — (Civil P. C. (1908), Pre.) — 30 All 60 and AIR 1920 All 150 and AIR 1945 Nag 216, Not Approved. See Public Gambling Act (1867), S. 5. 1956 Cri LJ 952: AIR 1956 All 449 (DB).

——S. 6 — Applicability — Delegation of power to search — Second officer executing search warrant in contravention of notification under S. 5— Presumption under S. 6 cannot be raised. See Public Gambling Act (1867), S. 5. 1956 All LJ 935.

——S. 6 — Search warrant under S. 5 issued in name of Station Officer — Latter endorsing it to Second Officer not authorised to make search — Search cannot be in accordance with S. 5 — Presumption under S. 6 does not apply — Conviction based solely on such presumption cannot be sustained. See Public Gambling Act (1867), S. 5. 1956 All LJ 862.

——S. 6 — Officer asked in the warrant to produce article seized before Magistrate — Warrant not vitiated — Presumption under S. 7 can be availed of. See Bombay Prevention of Gambling Act (4 of 1887), S. 6. 1957 Cri LJ 362: AIR 1957 Bom 66 (DB).

——S. 6 — Scope — Search not made in accordance with provisions of Cr. P. Code — Presumption under S. 6 will not arise. See J and K. Gambling Act (18 of 1977), S. 5. 1954 Cri LJ 488: AIR 1954 J and K 28 (DB).

——S. 6 — Applicability — Power can be delegated generally or specifically and by name or in virtue of office — Power to issue warrants delegated by Chief Commissioner of Kutch to police officers not below the rank of Deputy Superintendent of Police — Delegation is general empowerment — Warrant unauthorised — Presumption under S. 7 of Bombay Prevention of Gambling Act cannot be drawn. See Bombay Prevention of Gambling Act (4 of 1887), S. 6. AIR 1955 NUC (Kutch) 3689.

——S. 6 — Applicability — Conditions requisite for raising presumption under S. 6 indicated — (Madhya Bharat Gambling Act (51 of 1949), S. 6). AIR 1955 NUC (Madh B.) 3005.

——S. 6 — Presumption under — Mere assertion that articles seized are records of gaming, does not raise presumption under S. 6 — (Madhya Bharat Gambling Act (51 of 1949), S. 6). AIR 1955 NUC (Madh. B) 31.

——S. 6 — Presumption under — Duty of Court — If contrary be made to appear, the presumption referred to in the section ought not to be raised. See Madhya Bharat Gambling Act (1949), S. 6. 1953 Cri LJ 1121: AIR 1953 Madh B 173.

——S. 6 — Presumption under, arises when entry is effected and search made upon receipt of credible information mentioned in S. 5 — There must be something on record to show the belief of the officer. AIR 1955 NUC (Punj) 3442.

——S. 6 — "District Superintendent of Police" — Does not mean Additional Superintendent of Police — Warrant signed by latter — Presumption under S. 6 cannot be drawn. See Rajasthan Public Gambling Ordinance (1949), S. 5. 1965 (1) Cri LJ 80: AIR 1965 Raj 5 (DB).

——S. 6 — Warrant under S. 5 not legal—Presumption under S. 6 does not arise. See Public Gambling Act (1867), S. 5. **AIR 1955 NUC (Raj) 5007.**

——S. 6 — Scope — Person found in house at time of search can be presumed to be gambling only when cards, dice and other instruments of gaming are found in the house — Only paper and a rupee note found — Contents of paper not proved — Guilt held not brought home to accused. **AIR 1955 NUC (Raj) 5007.**

——S. 6 — Scope — Rajasthan Public Gambling Ordinance (1949), Ss. 3, 4 and 6 — Search warrant illegal — Presumption under S. 6 cannot be drawn — Conviction for gambling can still be supported if there is evidence of actual gaming and realisation of commission. See Public Gambling Act (1867), S. 3. **AIR 1955 NUC (Raj) 4644.**

——S. 6 — Bombay Prevention of Gambling Act, Ss. 6, 7 — Special warrant — Requirements — Non-compliance with requirements — Effect. See Bombay Prevention of Gambling Act (1887), S. 6. **52 Cri LJ 812: AIR 1951 Sau 55 (DB).**

3. Presumption is rebuttable.

——Ss. 6, 3 and 4 — Presumption under S. 6——Nature of.

Presumption under S. 6 of the Act can be drawn if on search of the house cards, etc., are found therein. The presumption so drawn is not rebuttable. The presumption may be drawn and used against the accused in one set of circumstances and in another Courts of law may not convict the accused on presumption alone. The presumption to be drawn under Section 6 merely relieves the prosecution of the duty of adducing complete evidence as to the gambling, but even then the evidence has to be considered as a whole in determining whether the offences under Ss. 3 and 4 of the Act were made out. **1964 All Cr R 303: 1964 All WR (HC) 435.**

——S. 6 — Presumption under, is a weak one — Reasonable explanation of accused should be accepted. **AIR 1955 NUC (Madh Bha) 3005.**

——S. 6 —Scope and weight of — Presumption — The section gives lead only to the presumption — Presumption is only a rebuttable presumption. See Madras Gambling Act (3 of 1930), S. 6. **1960 Mad LJ (Cri) 382: 1959 Mad WN 456.**

——S. 6 — Gambling on Diwali occasion — Presumption under Act is not so strong. **AIR 1955 NUC (Punj) 3442.**

——S. 6 — Presumption — Rebuttal.

A house must be habitually used as a gaming house and the person who owns or occupies it must have the intention or knowledge that it is being so used. Similarly the accused person must derive some benefit or profit from the game, otherwise he cannot be held guilty under Sec. 3. Under Sec. 6 if a house is raided on the authority of a warrant under Sec. 5 and cards, dice or instruments of gaming are found in the house, then it may be presumed that the house is a common gaming house and the persons present in the house at the time of the search had gone there for the purpose of gaming. Under Sec. 6 the presence of certain articles is evidence until the contrary is made to appear that the house is a common gaming house. The presumption arising under Sec. 6, however is not conclusive and may in certain circumstances be extremely weak. Even in a case where no defence evidence is led the presumption may be rebutted by bringing out circumstances which go to show that some or all the ingredients which constitute the offence under Sec. 3 or the offence under Sec. 4 are lacking and in such a case the accused persons will not be held guilty.

Where the occasion was two days before the Diwali day when Hindus indulge in a great deal of gambling because it is considered auspicious, the accused was a Municipal employee and it had not been shown that he had derived any profit or gain from gambling either on this occasion or on any other occasion, the presence of a pot containing some money near his knee was scarcely evidence of the fact that he was taking a share of the winnings of other persons. Nor had it been shown that in this house gambling took place on any previous occasion, and these circumstances were quite sufficient to rebut the presumption arising under Sec. 6. **1954 Cr LJ 1209: 56 Punj LR 78: ILR (1954) Punj 783: AIR 1954 Punj 164 (164) (Pr 3).**

4. Gaming.

——S. 6 — 'Gaming' — Game involving skill and chance played with stakes — It is still gaming — Game purely one of skill is not gaming. AIR 1955 NUC (Madh Bha) 3005.

5. Validity of section.

——Ss. 6, 2, 3, 4, 5 and 9 — Constitutional validity — Application of stringent provisions of Act to certain areas — State Government having better knowledge of local conditions given legislative guidance to choose areas — Sections not contravening Article 14 of Constitution and are valid — Interpretation of Statutes — Statement of Objects and Reasons and Preamble as guides to construction. See Public Gambling Act (3 of 1867), S. 2. 1964 (1) Cri LJ 319: AIR 1964 All 95 (DB).

6. Conviction based on independent evidence.

——S. 6 — Irregularity in search warrant — Effect — (Criminal P. C. (1898), S. 537).

There is nothing in Sec. 6 to render the results of a search conducted under an irregularly issued warrant inadmissible in evidence. If there is sufficient evidence to sustain the conviction irrespective of the special rule contained in S. 6, the conviction is proper. Mere irregularity in issuing the search warrant does not prejudice the accused or occasion any failure of justice within the meaning of Sec. 537 of the Code of Criminal Procedure: **1884 All WN 285 and 28 Bom LR 272, Followed (1956) All WR (HC) 509: (1956) All LJ 935.**

7. Appeal and revision.

——S. 6 — Presumption under — Conviction on plea of guilty — Appeal competent — Interference in revision is not called for — (Criminal P. C. (1898), Ss. 412 and 439). AIR 1955 NUC (Madh Bha) 3058.

8. Cases under other similar Acts.

——S. 6 — Scope — All powers under Sec. 6 of the Bombay Prevention of Gambling Act not con-

ferred — Presumption under Sec. 7 of the Act must arise. See Bombay Prevention of Gambling Act (4 of 1887), S. 6. 1957 Cri LJ 362: AIR 1957 Bom 66 (DB).

——S. 6 — — Presumption under S. 91, Hyderabad Evidence Act — Reliance upon, to support presumption under Sec. 7 of Act permissible. See Hyderabad Gambling Act (2 of 1305-F), S. 7. AIR 1953 Hyd 60 (DB).

——S. 6—Hyderabad Gambling Act (2 of 1305-F), Sec. 7 — Proof of due search is necessary to invoke presumption. AIR 1953 Hyd 60 (DB).

——S. 6—Hyderabad Gambling Act (2 of 1305-F), S. 7 — Scope — Strict interpretation is necessary. AIR 1953 Hyd 60 (DB).

——S. 6 — Conviction on mere presumption raised under Sec. 6, Madras Gaming Act is not prohibited — Still it has been the practice of Madras High Court not to convict on mere presumption alone unless there is something more in addition to the presumption raised under that section. See Madras Gaming Act (3 of 1930), S. 6. AIR 1955 NUC (Mad) 3190.

——S. 6 — Effect of defective warrant on presumption to be drawn under Explanation to S. 63 and conviction — Presumption may not arise but conviction need not necessarily be set aside if there is evidence that the accused are guilty of the offences with which they are charged and also on the basis of natural presumption. See Mysore Police Act (5 of 1908), Ss. 38 and 63. 1956 Cri LJ 631: AIR 1956 Mys 42.

——S. 6 — Large number of persons found playing cards late at night in a house with all its doors closed — Search taking place in pursuance of a warrant issued, under Sec. 38 — Playing cards and a large sum of money lying on 'Akhada' recovered by police — **Held**, that in the circumstances a natural presumption arose that the accused were engaged in playing a game of chance irrespective of whether the warrant was in accordance with law or not. See Mysore Police Act (5 of 1908), Ss. 38 and 63. AIR 1953 Mys 14.

——S. 6 — Warrant signed by Assistant Superintendent of Police is valid for the purposes of Secs. 38 and 63 of Mysore Police Act. See Mysore Police Act (5 of 1908), Ss. 4 (b) and 63. AIR 1953 Mys 14.

——S. 6 — Mysore Police Act, Sec. 63, Expl. 3 — 'Gaming and Playing' — Distinction — Accused found in common gaming house during playing — Presumption is, until the contrary is proved that they were there for the purpose of gaming. See Mysore Police Act (5 of 1908), S. 63, Expl. 3. AIR 1953 Mys 14.

——S. 6 — (Saurashtra) Gambling Act, Sec. 7 — Presumption under — Instruments of gaming.

Where the accused are found in possession of cards and counters with different colours which are generally used in place of coins, the presumption under Sec. 7 arises that the place where such instruments of gaming are found is a common gaming house and it is for the accused to displace that presumption. (1950) 3 Sau LR 169 (DB).

SECTION 8

——S. 8 — Accused acquitted — No order of forfeiture.

Before the Court can exercise its jurisdiction to pass order of forfeiture of money or destruction of property under Sec. 8 it is necessary that the accused must be convicted of the offence with which he is charged. This being a penal enactment must be construed strictly. In the case of an acquittal therefore the Court has no power to pass an order of forfeiture or destruction under this section. 1952 All LJ 169: 1952 RD (HC) 199 (1): 1952 All Cr R 51: 1952 All WR (HC) 128: 1953 Cri LJ 1017: AIR 1953 All 463 (463) (Pr 2).

——S. 8 — Court has no jurisdiction to order forfeiture of moneys found upon person of accused. 7 All LJ 404, 11 Cr LJ 373, Overruled. See Public Gambling Act (1867), S. 5. 51 Cri LJ 640: AIR 1950 All 199 (DB).

——S. 8 — Indore Prevention of Gambling Act (1 of 1909), Ss. 6, 8 — Money when can be forfeited — Suspicion of use or intention to use necessary. See Indore Prevention of Gambling Act (1 of 1909), S. 6. AIR 1951 Madh Bha 33.

——S. 8 — Confiscation of money. See Madras Gaming Act (3 of 1930) (as amended by Act 16 of 1955), S. 10. 1960 Mad LJ (Cri) 16 (Mad): 1959 Mad WN 171.

——S. 8 — Conviction for gambling and for keeping a common gaming house under Ss. 8 and 9 of the Gaming Act — Confiscation of money found on person — Court is not competent to pass such an order. See Madras Gaming Act (3 of 1930) (as amended by Madras Act 16 of 1955), S. 8. 1960 Mad LJ (Cri) 16 (Mad): 1959 Mad WN 171.

SECTION 9

——Ss. 9 and 2, 3, 4, 5, 6 — Constitutional validity — Application of stringent provisions of Act to certain areas — State Government having better knowledge of local conditions given legislative guidance to choose areas — Sections not contravening Art. 14 of Constitution and are valid — Interpretation of Statutes — Statement of Objects and Reasons and Preamble as guides to construction. See Public Gambling Act (3 of 1867), S. 2. 1964 (1) Cri LJ 319: AIR 1964 All 95 (DB).

SECTION 10

——S. 10 — Evidence of punter — Evidence of person, deliberately sent by investingating officer, to offer bet, should be received with caution, unless corroborated — (Evidence Act (1872), Ss. 114, Illus. (b) and 133). AIR 1955 NUC (Madh Bha) 31.

——S. 10 — Evidence.

Must be strictly construed — Person found in house during search or raid which is non-compliance with Act — Such person cannot be examined as witness — Search in accordance with Act — He can be examined on oath — That he would be accused of offence is immaterial — He is entitled to benefit of Art. 20 (3) of the Constitution — His pleading not guilty is immaterial — It will only affect the value of his evidence — His pleading guilty will make S. 30, Evidence Act, applicable and co-accused would have right to cross-examine him — Such a person can be examined even at subsequent stage and not necessarily immediately when he is brought before the Magistrate — (Constitution of India, Art. 20 (3)) — (Evidence

Act (1872), S. 30). AIR 1944 Nag 328, Rel. on. 1953 Cr LJ 985: AIR 1953 Vind Pra 18 (19) (Prs 3, 4, 5).

SECTION 12

——S. 12 — Game of chance and game of mere skill — The word 'mere' used in the phrase "games of mere skill" stands for "pure". Games of mere skill are not penalised. See Madras Gaming Act (3 of 1930) (as amended by Madras Act 16 of 1955), S. 4 (1) (a) (vi). 1960 Mad LJ (Cri) 16 (Mad): 1959 Mad WN 171.

SECTION 13

——S. 13—Mere recovery of instruments of gaming without allegation that the accused was found gaming in a public place is not sufficient for a conviction under section. AIR 1959 All 799, Foll. 1965 All WR (HC) 761: 1965 All Cr R 513: 1966 All LJ 176.

——S. 13 — "Public place" — Meaning place open to public or used by public — Private place though open to public is not a public place — Gaming in such a place does not entail conviction. AIR 1954 All 356; AIR 1927 All 560, Foll. 1965 All Cri R 300: 1965 All WR (HC) 454.

——S. 13 — Evidence and proof — No amount of money recovered from possession of accused or from place where satta was going on — Witnesses produced by prosecution were not men of locality —Complaint appeared to be out of grudge entertained by Sub-Inspector against accused who had earlier asked for his transfer — Held, charge was not proved and accused could not be convicted as assessment of evidence by Courts below was wholly unreasonable. Evidence Act (1872), Ss. 3 and 5. Criminal P. C. (1898), S. 367. 1964 All WR (HC) 730: 1965 All Cri R 5.

——S. 13 — Slips used for recording bets are not instruments of gaming. See Public Gambling Act (1867), S. 1 (U. P. Amendment). 1959 Cr LJ 1397: AIR 1959 All 799.

——S. 13 — Scope — Instruments of gaming — Recovery of — Relevancy — Is relevant only if offences under Secs. 3 and 4 are to be proved by presumption — Offence under Sec. 13 is to be proved by evidence and no question of presumption arises. The recovery of instruments of gaming may be circumstantial evidence to prove public gambling but is not conclusive and may not be considered enough in certain circumstances. See Public Gambling Act (1867), S. 3. 1959 Cr LJ 1397: AIR 1959 All 799.

——S. 13 — Proof — Admissible evidence.

Where the eye-witnesses stated that they saw Satta gambling being indulged in by the applicant with one B, but they did not depose about the words used by B and the applicant, and what they stated was the effect produced on their minds by the words used by B and the applicant.

Held, that the words "uttered by the applicant and B" would be the real evidence and it would be for the Court to interpret them and determine whether they amount to betting or wagering. The effect produced by them on the minds of the witnesses was wholly irrelevant and inadmissible in evidence; it was not for them to judge whether the applicant was betting or not. 1959 Cr LJ 1397: 1959 All LJ 160: 1960 All WR (HC) 129: 1960 All Cr R 114: AIR 1959 All 799 (799) (Pt A) (Pr 1).

——S. 13 — Recovery of betting slips — Effect — Applicant said to have indulged in satta gambling with B — Slips recording bets recovered from possession of B — Applicant could not be convicted in absence of any connection arising out of gaming between him and slips. 1959 Cr LJ 1397: 1960 All LJ 160: 1960 All WR (HC) 129: 1960 All Cr R 114: AIR 1959 All 799 (800) (Pt D) (Pr 4).

——S. 13 — 'Public place' — Arhar field separated from public street — Effect of — Explanation added by — (U. P. Public Gambling (Amendment) Act (34 of 1952)).

Under Sec. 13 of the Act gaming has been prohibited in a public street, place or thoroughfare. On the face of it, an arhar field would not be a public place since the public would have no access thereto. It is private property into which if any unconnected person were to enter he would be committing trespass.

Where the arhar field on which gaming was found to be going on, although it was an open space, was not adjacent to and abutting a public street but was separated therefrom by another field the field is not a public place, not only per se, but even under the extended definition of that term under the explanation added to the section by S. 4 of the U. P. Public Gambling (Amendment) Act 34 of 1952. 1957 All LJ 282: 1957 All WR (HC) 412.

——S. 13 — Conviction under — Requirements — S. 13 which makes it an offence to gamble in a public street, place or thoroughfare does not lay down as a necessary ingredient of the offence the condition that "Nal" should be taken out. Therefore if a person is found gambling in a public street, place or thoroughfare he commits an offence punishable under S. 13 even without proof of 'Nal' being taken out. See Public Gambling Act (1867), S. 3. AIR 1955 NUC (All) 2702.

——S. 13 (before amendment) — Public place, what is — Open Chabutara abutting on public street having unrestricted access, is a public place.

Under Sec. 13, it must be proved that, inter alia the place where the accused was found gambling was a 'public street' place or thoroughfare'.

According to 1952 amendment of the section, for the purposes of this section "public place" includes any open space situate adjacent to or abutting on a public street and not separated therefrom by a boundary wall. But the amendment will not govern the case in which the offence was committed before the amendment. In such a case the term 'public place' has to be interpreted without reference to the amendment.

In order to determine whether a place is a 'public place' within the meaning of the term as used in Sec. 13 (before amendment) the test is whether members of the public have, as a matter of fact, a free access to it. If they do reach the place without let or hindrance it is a 'public place' but if the entry is regulated by permission or is otherwise restricted it is not a 'public place'. In the former case it is immaterial that members of the public have no legal right to claim access to

that place. If a member of the public, even in the absence of a legal right, can actually find access to the said place the place becomes 'public place'. It is also immaterial for this purpose whether the place is owned by a private individual or is vested in a public body like Municipal Board or District Board or State. It is equally immaterial whether it is visible from a public place or road or is screened from view from a thoroughfare. The gambling may be going on in the verandah of a house abutting on a public road but there may be a person on duty in the verandah to prevent persons from entering the verandah. If such is the case the verandah will not become a 'public place' notwithstanding the fact that it is visible to the passers by. On the contrary there may be a case where gambling may be going on in the innermost room of a house but the members of the public may be finding free access to the said room. In such a case the room in which the gambling is going on will become a 'public place'.

Where there was no restriction on the public against finding access to the chabutara abutting on a public way in a village on which gambling was going on, the chabutra was held a 'public place' within the meaning of Sec. 13, as it stood before its amendment. **AIR 1955 NUC (All) 2288.**

——S. 13 — Public place — Meaning of.

No doubt, a public street, place or thoroughfare is not necessarily a street, place or thoroughfare where the public has a right to go or which the public has a right to use. If a street, place or thoroughfare is in fact used by the public, it will be a public street place or thoroughfare within the meaning of S. 13.

A public place must be a place which is either open to the public or is used by the public and the publicity of its situation is not a necessary element of the offence any more than public ownership.

An arhar field on the road side in which crop is standing cannot be said to be a public place within the meaning of Sec. 13. **1954 All WR (HC) 32: 1953 All LJ 714: 1954 Cr LJ 765: AIR 1954 All 356 (357, 358) (Pt B) (Prs 4, 7).**

——S. 13 (as amended by U. P. Act 1 of 1917) —Gaming — Proof of.

Gaming, wagering or betting have all one common feature, that the game is a game of chance and played with stakes. In order, therefore, that gaming be established, the prosecution must establish, (1) that the game being played was a game of chance, and (2) that it was being played with stakes. The mere proof that some game of cards was being played and that some money was found in possession of the accused is not enough to establish that they were gaming. **1952 RD (HC) 125: 1952 All LJ 153: 1952 Cri LJ 1471: AIR 1952 All 817 (817) (Pr 1).**

——S. 13 — Teji Mandi transaction — Instruments of gaming — Hyderabad Public Gambling Act (2 of 1305-F), S. 13.

Where the contention of the prosecution is that the offence of gaming consisted in the Teji Mandi transactions (which were entered in the account books kept with accused where these transactions took place) the Teji Mandi transactions cannot be regarded as wagers, or cannot constitute gaming and the books cannot be called instruments of gaming. This apart, books of accounts in which bets are recorded by their very nature are not instruments of gaming under Sec. 13. **53 IA 241, Rel. on. ILR (1952) Hyd 445: 1952 Cri LJ 1307: AIR 1952 Hyd 147 (148) (Pt A) (Pr 6) (DB).**

——S. 13 — Public place.

Public place is one where the public can have free access. It should be a place of public resort. As to whether a particular place is a 'public place' within the meaning of the Gambling Act would depend on the character of the place and the use to which it is put. If the place is not open to the public such as a private house, or a private garden it cannot be called a public place. It would not cease to be a private house or a private garden simply because the passers by could stop and witness the gambling. Gambling in a vacant private land which could be easily reached from the public road by outsiders going on the road can never be regarded as public place for that place is not open to the public nor could they use it. The mere visibility of the land or house to the public would not make it a public place. In each case whether the place is a public place or not must depend on the facts proved. **ILR (1952) Hyd 445: 1952 Cri LJ 1307: AIR 1952 Hyd 147 (148) (Pt B) (Pr 7) (DB).**

——S. 13 — Money found in possession of accused cannot be forfeited. See Madhya Bharat Gambling Act (51 of 1949), S. 12 (2). **1957 Cri LJ 284 (Madh Bha).**

——S. 13 — Applicability — Essentials to be proved.

If a Police Party finds people playing with certain instruments used for gaming, they have no right to arrest any of the persons under Sec. 13 unless the persons are found playing for money or other valuable thing. It is the most important ingredient for the offence that the person or persons must have been seen playing for money or other valuable thing.

The fact that the accused were playing for money or other valuable thing cannot be inferred from the conduct of the persons in running away at the sight of the Police. It is necessary for the Police Officer to state in so many words that he found the persons playing for money or other valuable thing. **1961 (2) Cr LJ 504 (505, 506) (Pt A) (Prs 4, 5) (Manipur).**

——S. 13 — Instrument of gaming — Bet entered in notebook along with figures on which bet is laid—Notebook is not an instrument of gaming — What is prohibited is playing for money with instrument of gaming. AIR 1955 NUC (Nag) 956.

——S. 13 — Applicability — Satta gambling — Mere entering stakes on chit — Offence.

Where the petitioner alleged to be indulging in Satta gambling accepted one rupee currency note from a decoy punter for staking on certain numbers and after he made an entry regarding the stake on a slip of a paper, the raiding party arrived and took into possession from the petitioner, one rupee currency note, a pencil, the slip and some cash,

Held, that these facts did not constitute the offence under Sec. 13 of the Act. At best it was merely a preparation which was not culpable. That

apart, merely entering on a chit the alleged stakes could not constitute gambling as envisaged under S. 13. **61 Pun LR 439: 1960 Cr LJ 275 (1): AIR 1960 Punj 72 (72, 73) (Pt A) (Pr 3).**

——S. 13 — "Place to which public have access' is a place which is used by the public generally. See Bombay Prevention of Gambling Act (4 of 1887), S. 12. **AIR 1955 NUC (Sau) 980 (DB).**

SECTION 13-A

——**S. 13-A (as amended by Punjab Act 9 of 1960)** ——Gambling includes satta gambling — Person accepting stakes on figures or numbers to be subsequently disclosed is liable to be punished under S. 13-A (Punjab), read with S. 1 (Punjab). See Public Gambling Act (1867), S. 1. **ILR (1962) 1 Punj 323.**

SECTION 16

——**S. 16 — Scope — Magistrate has no power to reward a police officer under the section.**

Under S. 16 it is only an informer who can be rewarded by directing a portion of the fine levied under Ss. 3 and 4 to be paid to him. Section 16 will not authorise Magistrate to reward to a Police officer for good and careful handling of a case before him. **1962 (1) Cri LJ 615: AIR 1962 Manipur 20 (22) (Pt C) (Pr 7).**

PUBLIC HEALTH

See (1) Criminal P. C. (1898), S. 133.
(2) Epidemic Diseases Act (1897).
(3) Dangerous Drugs Act (1930).
(4) Penal Code (1860), Ss. 268, 269, 273, 277 and 278 and
(5) Enactments under "Municipalities".

Offences relating to.
See (1) Penal Code (1860), Ss. 268, 269, 273. 277, 278 and 290.
(2) Statutory cross-references under "Criminal Law".

PUBLIC HIGHWAY

See (1) Civil P. C. (1908), S. 91.
(2) Easements Act (1882), S. 2 (b).
(3) Enactments under "Municipalities".

Procession, right to take.
See (1) Constitution of India, Art. 19.
(2) Easements Act (1882), Ss. 2 (b), 18.

PUBLIC HOLIDAY

See Negotiable Instruments Act (1881), S. 25.

PUBLIC INTEREST

See (1) Civil P. C. (1908), Ss. 91, 92.
(2) Constitution of India, Art. 19.
(3) Criminal P. C. (1898), S. 195.

PUBLIC INTERNATIONAL LAW

See Constitution of India, Art. 51.

PUBLIC NOTIFICATION

See (1) Constitution of India, Art. 366 (17).
(2) Evidence Act (1872), S. 81.

PUBLIC NUISANCE

See (1) Criminal P. C. (1898), Ss. 91, 133 to 137, 139, 141 to 143.
(2) Penal Code (1860), Ss. 268, 290 and 291.
(3) Tort — Nuisance.

PUBLIC OFFICE

Suit relating to.
See Civil P. C. (1908), S. 9.

Transfer of.
See (1) Contract Act (1872), S. 23.
(2) Transfer of Property Act (1882), S. 6 (f).

PUBLIC OFFICER

See (1) Civil P. C. (1908), Ss. 2 (17), 80, 81, 82, O. 27.
(2) Criminal P. C. (1898), S. 197.
(3) Judicial Officers' Protection Act (1850).
(4) Penal Code (1860), Ss. 21, 161, 162, 165-A, 166, 170 and 171.
(5) Prevention of Corruption Act (1950).

Decree against, execution of.
See Civil P. C. (1908), S. 82.

Defined.
See Civil P. C. (1908), S. 2 (17).

Suit against.
See Civil P. C. (1908), S. 80, O. 27.

PUBLIC PEACE

See Criminal P. C. (1898), Ss. 107, 108, 145.

PUBLIC PLACE

See (1) Madras Gaming Act (1930), S. 12.
(2) Penal Code (1860), Ss. 159, 160.
(3) Public Gambling Act (1867), S. 13.

Prostitution in vicinity of.
See Suppression of Immoral Traffic in Women and Girls Act (1956), S. 7.

What is.
See (1) Criminal P. C. (1898), S. 133.
(2) Motor Vehicles Act (1939), S. 2 (24).

PUBLIC POLICY

See Contract Act (1872), S. 23.

Contract against.
See Contract Act (1872), S. 23.

PUBLIC PREMISES

See (1) Public Gambling Act (1867), S. 13.
(2) Public Premises (Eviction of Unauthorised Occupants) Act (1958).

PUBLIC PREMISES (EVICTION OF UNAUTHORISED OCCUPANTS) ACT (1958), S. 2 PREAMBLE

——**Pre.** — Whether the Public Premises (Eviction of Unauthorised Occupants) Act, is ultra vires offending Arts. 14 and 19 of the Constitution. See Constitution of India, Art. 14. **(1965) 69 Cal WN 1035 (DB).**

SECTION 1

——**Ss. 1 and 2 (c) — Provisions of Act are intra vires — Act is within legislative competence of Parliament even with regard to its application to agricultural lands — Constitution of India, Sch. VII, List I, Entry 32, List II, Entry 18.**

Provisions of the Public Premises (Eviction of Unauthorised Occupants) Act are intra vires: **AIR 1963 Punj 290, Rel. on.**

The applicability of the Act to agricultural lands cannot be challenged by contending that Parliament is not competent to legislate in respect of agricultural lands, the State Legislature having the

exclusive jurisdiction under Item 18 of List II, to legislate in respect of agricultural lands. In view of Item 32 of List I, where the land belongs to the Union, the Parliament is authorised to legislate about the same, and if there is a legislation of the Parliament dealing with the matter, the property would not be subject even to legislation of the State. **65 Pun LR 615: ILR (1963) 2 Punj 229: AIR 1964 Punj 304 (305) (Pt A) (Pr 2).**

SECTION 2

——Ss. 2(c) and 1 — Provisions of Act are intra vires — Act is within legislative competence of Parliament even with regard to its application to agricultural lands — Constitution of India, Sch. VII, List I, Entry 32; List II, Entry 18. See Public Premises (Eviction of Unauthorised Occupants) Act (32 of 1958), S. 1. **AIR 1964 Punj 304.**

——S. 2(c) — Term "Premises" includes agricultural lands — Words and Phrases — 'Premises'.

In the absence of any qualifying words restricting the meaning of "land" in the definition of "premises", the word should be given its natural meaning as land used for any purpose including an agricultural land. **65 Pun LR 615: ILR (1963) 2 Punj 229: AIR 1964 Punj 304 (305) (Pt B) (Pr 2).**

SECTION 3

——S. 3 (a) — Appointment of Estate Officers by virtue of their office — Appointment is valid by reason of S. 15, General Clauses Act, 1897.

Section 3(a) of the Public Premises (Eviction of Unauthorised Occupants) Act, 1958, provides that the Central Government may, by notification in the official Gazette, appoint such persons, being gazetted officers of the Government, as it thinks fit to be Estate Officers for the purposes of the Act. The argument that the name of the officer occupying the gazetted post must be seen in the notifications cannot be accepted in the face of S. 15 of the General Clauses Act, 1897, which is a statutory authorisation to appoint persons by virtue of office as Estate Officers. They could be appointed, no doubt, by name also as provided under S. 15. But, if they are appointed by virtue of office, it cannot be questioned. AIR 1961 Tripura 52, Rel. on. **AIR 1964 Tripura 9 (11) (Pt B) (Pr 9).**

——S. 3 — Notification appointing Additional District Magistrate as Estate Officer — More than one such Magistrate in the same district — They are all appointed as Estate Officers.

The purpose of the appointment under S. 3 of the Act is only to clothe a person by virtue of the office he holds with the authority to act as Estate Officer. Thus, if there are more officers at the time of the issue of a notification than one holding the office of Additional District Magistrate of a district, then the notification appointing the Additional District Magistrate as Estate Officer will only mean that both of them are appointed as Estate Officers. **AIR 1964 Tripura 9 (11) (Pt C) (Pr 10).**

SECTION 4

——Ss. 4 and 5 — Notice under S. 4 stating only one ground that the person is in unauthorised occupation, is an invalid notice — Notice under S. 5 without stating reasons for evicting occupant but stating only decision that he is in unauthorised occupation is an irregular notice — Failure to follow obligatory or mandatory requirement of S. 4 makes the order null and void and without jurisdiction and likewise the omission to state reasons in notice under S. 5 makes order null and void as being a material irregularity in exercise of the vested jurisdiction. Hence High Court can suo motu take notice of illegal assumption under Art. 227 of the Constitution — Constitution of India, Art. 227: Case-law Discussed. **(1965) 69 Cal WN 1035 (DB).**

——Ss. 4 and 9 — Validity of Act.

The provisions of the Act do not offend the provisions of Art. 19 (1) (f) of the Constitution and the Act is valid.

Section 4 provides for the issue of a show-cause notice which gives the person affected a right to appear and state his ease before the Estate Officer who has been substituted for the "competent officer". Further, if necessary, a full-dress inquiry is contemplated. S. 9 deals with appeals and S. 9 (4) clearly envisages a regular hearing of an appeal by an experienced judicial officer. It is thus clear that even if a question of disputed title arises out of the issue of a notice under S. 4 by an Estate Officer, the affected person has every opportunity to present his case and the dispute can be properly adjudicated on, before any final action is taken under S. 5 of the Act. **ILR (1961) 1 Punj 354: 62 Punj LR 871: AIR 1961 Punj 98 (100) (Prs 7, 8) (DB).**

——S. 4 (1) — Notice issued under S. 4 (1) — Its contents — Necessity of its being correct at the time it is issued — It cannot be corrected in later stage of proceedings — No obligation on receiver occupant to get it clarified — Premises not described correctly in notice — Proceedings started against occupant are illegal. **AIR 1964 Tripura 9 (12) (Pt D) (Prs 14, 15).**

SECTION 5

——S. 5 — Notice under S. 5 without stating reasons for evicting occupant but stating only decision that he is in unauthorised occupation is an irregular notice. See Public Premises (Eviction of Unauthorised Occupants) Act (1958), S. 4. **(1965) 69 Cal WN 1035 (DB).**

SECTION 9

——Ss. 9(1) and 10 — Order passed by District Judge in appeal against order under S. 5 — District Judge acts as persona designata — Revision is excluded by S. 10 — Civil Procedure Code (1908), S. 115.

An appeal lies to the District Judge as persona designata and not to be a Court of the District Judge. This is clear from the language of the provisions of Ss. 9 (1) and 10. The decision of the District Judge does not give rise to a revision application under S. 115 of the Code of Civil Procedure. By enacting that the order of the appellate officer shall not be called in question in any original suit, application or execution proceeding, Section 10 of the Act provides a very wide prohibition. The word 'application' is wide

enough to cover an application made under S. 115 of the Code of Civil Procedure. AIR 1938 Cal 465 and AIR 1965 Madh Pra 237, Rel. on; AIR 1963 Madh Pra 218, Disting. **1965 Jab LJ 364: 1965 MPLJ 415: ILR (1965) Madh Pra 998: AIR 1966 Madh Pra 7 (8) (Pr 5).**

——S. 9 — Act does not offend the provisions of Art. 19 (1) (f) of the Constitution — It is valid. See Public Premises (Eviction of Unauthorised Occupants) Act (32 of 1958), S. 4. **AIR 1961 Punj 98 (DB).**

SECTION 10

——Ss. 10 and 9 (1) — Order passed by District Judge in appeal against order under S. 5 — District Judge acts as persona designata — Revision is excluded by S. 10 — Civil Procedure Code (1908), S. 115. See Public Premises (Eviction of Unauthorised Occupants) Act (32 of 1958), S. 9 (1). **1965 Jab LJ 364: 1965 MPLJ 415: ILR (1965) MP 998: AIR 1966 Madh Pra 7.**

PUBLIC PROSECUTOR

See Criminal P. C. (1898), Ss. 492, 494, 495.

Appointment of.
See Criminal P. C. (1898), S. 492.

Conduct of prosecution.
See Criminal P. C. (1898), S. 493.

Who is.
See Criminal P. C. (1898), S. 4 (1) (c).

Withdrawal from prosecution.
See Criminal P. C. (1898), S. 494.

PUBLIC PURPOSE

See (1) Constitution of India, Arts. 31, 31-A, 31-B.
(2) Land Acquisition Act (1894), Ss. 3, 4, 6.

PUBLIC RECORDS

See (1) Constitution of India, Art. 261.
(2) Evidence Act (1872), Ss. 35, 65, 74.

Entry in, relevancy of, in evidence.
See Evidence Act (1872), S. 35.

PUBLIC RELIGIOUS TRUST

See (1) Charitable and Religious Trusts Act (14 of 1920).
(2) Civil P. C. (1908), S. 92.
(3) Hindu Law — Religious Endowment.
(4) Madras Hindu Religious and Charitable Endowments Act (1951).
(5) Madras Hindu Religious Endowments Act (2 of 1927).
(6) Muhammadan Law — Wakf.
(7) Religious and Charitable Endowments.
(8) Religious Endowments Act (1863).

PUBLIC RIGHT

See Civil P. C. (1908), S. 92.

PUBLIC RIGHT, CUSTOM OR MATTERS OF GENERAL INTEREST, STATEMENT AS TO, ADMISSIBILITY OF

See Evidence Act (1872), S. 32.

PUBLIC SAFETY

See also (1) Constitution of India, Art. 22.
(2) Defence of India Rules (1939), Rr. 30, 30-A.
(3) J. and K. Defence Rules (1996 Samvat), R. 24.
(4) Enactments under "Public Safety".

(Public Safety — List of Headings)

1. Assam Maintenance of Public Order Act (5 of 1947).
2. Assam Maintenance of Public Order (Autonomous Districts) Act (16 of 1953).
3. Bengal Criminal Law Amendment Act (6 of 1930).
See also W. B. Criminal Law Amendment Act (6 of 1930).
4. Bengal Criminal Law Amendment Ordinance (2 of 1947).
5. Bengal Criminal Law (Industrial Area) (Amendment) Act (4 of 1942).
6. Bengal State Prisoners Regulation (3 of 1818).
7. Bengal State Prisoners Regulation (Adaptation) Order (1947).
8. Bihar Maintenance of Public Order Act (3 of 1950).
9. Bihar Maintenance of Public Order (No. 2) Ordinance (4 of 1949).
10. Bihar Maintenance of Public Order (No. 2) (Amendment) Ordinance (5 of 1949).
11. Bihar Preventive Detention Ordinance (2 of 1950).
12. Bombay Conditions of Detention Order (1951).
13. Bombay Public Security Measures Act (6 of 1947).
14. C. P. and Berar Goondas Act (10 of 1946).
15. C. P. and Berar Maintenance and Restoration of Order and Collection of Fines (Indemnity) Act (2 of 1945).
16. C. P. and Berar Public Safety Act (62 of 1948).
17. Cochin Criminal Law Amendment Act (27 of 1124 M. E.).
18. Criminal Law Amendment Act (14 of 1908).
19. Criminal Law Amendment Act (23 of 1932).
20. Criminal Law Amendment Act (46 of 1952).
21. Criminal Law Amendment Ordinance (29 of 1943).
22. Criminal Law Amendment Ordinance (38 of 1948).
23. East Punjab Public Safety Act (5 of 1949).
24. Hyderabad Public Safety and Public Interest Regulation (8 of 1358F).
25. Hyderabad Public Safety and Interest Regulation (12 of 1358F).
26. Hyderabad Public Security Act (12 of 1348F).
27. Hyderabad Special Tribunals Regulation (5 of 1358F).
28. Hyderabad Special Tribunals (Termination) and Special Judges (Appointment) Regulation (10 of 1350F).
29. Hyderabad Special Tribunals Validation of Proceedings Regulation (1 of 1359F).
30. Indore Public Safety Order (1947).
31. Jammu and Kashmir Preventive Detention Act (4 of 2011 Samvat).
32. Jammu and Kashmir Public Security Act (15 of 2003 Samvat).
33. Madhya Bharat Maintenance of Public Order Act (7 of 1949).
34. Madhya Bharat Maintenance of Public Order Ordinance (5 of 1948).
35. Madhya Bharat Public Security Act (19 of 1953).
36. Madhya Pradesh Public Security Act (25 of 1959).
37. Madhya Pradesh Public Security Measures Act (23 of 1950).
38. Madras Maintenance of Public Order Act (1 of 1947).

39. Madras Maintenance of Public Order Act (23 of 1949).
40. Madras Maintenance of Public Order Ordinance (4 of 1949).
41. Madras Maintenance of Public Order (Removal of Doubts and Amendment) Ordinance (1 of 1949).
42. Mysore Public Security Act (12 of 1940).
43. Orissa Maintenance of Public Order Act (4 of 1948).
44. Orissa Maintenance of Public Order Act (10 of 1950).
45. Orissa Security Prisoners (Conditions of Detention) Order (1950).
46. Patiala State Public Safety Ordinance (11 of 2003 Samvat).
47. Pepsu Public Safety Ordinance (7 of 2006 Samvat).
48. Preventive Detention Act (4 of 1950).
49. Preventive Detention (Amendment) Act (4 of 1951).
50. Preventive Detention (Amendment) Act (34 of 1952).
51. Preventive Detention (Extension of Duration) Order (1950).
52. Punjab Communist Detenus Rules (1950).
53. Punjab Criminal Law (Amendment) Act (30 of 1960).
54. Punjab Criminal Law (Amendment) Ordinance (2 of 1960).
55. Punjab Detenus Rules (1950).
56. Punjab Disturbed Areas Act (1 of 1947).
57. Punjab Public Safety Act (2 of 1947).
58. Punjab Security of the State Act (12 of 1953).
59. Rajasthan Public Safety Ordinance (9 of 1948).
60. Rajasthan Public Security Ordinance (26 of 1949).
61. Saurashtra State Public Safety Measures Ordinance (9 of 1948).
62. Saurashtra State Public Safety Measures (Third Amendment) Ordinance (66 of 1949).
63. Travancore Cochin Public Safety Measures Act (5 of 1950).
64. Travancore Cochin Public Safety Measures Ordinance (5 of 1125 ME).
65. Travancore Emergency Powers Act (1 of 1122 ME).
66. U. P. Goondas Act (1 of 1932).
67. U. P. Maintenance of Public Order (Amendment) and (Proceedings Validating) Act (11 of 1949).
68. U. P. Maintenance of Public Order (Proceeding Validation) Ordinance (2 of 1949).
69. U. P. Maintenance of Public Order (Temporary) Act (4 of 1947).
70. U. P. Prevention of Crimes (Special Powers) (Temporary) Act 1948 (5 of 1949).
71. Vindhya Pradesh Criminal Law Amendment (Special Courts) Ordinance (5 of 1949).
72. West Bengal Criminal Law Amendment Act (6 of 1930).

See also Bengal Criminal Law Amendment Act (6 of 1930).

73. West Bengal Criminal Law Amendment (Special Courts) Act (21 of 1949).
74. West Bengal Criminal Law Amendment (Special Court) Amending Act (12 of 1952).
75. West Bengal Criminal Law Amendment (Special Courts) (Amending) Act (24 of 1960).
76. West Bengal Security Act (3 of 1943).
77. West Bengal Security Act (19 of 1950).
78. West Bengal Security Ordinance (2 of 1949).
79. West Bengal Security (Second Amendment) Ordinance (14 of 1950).
80. West Bengal Special Courts Act (10 of 1950).
81. West Bengal Tribunal of Criminal Jurisdiction Act (14 of 1952).

—ASSAM MAINTENANCE OF PUBLIC ORDER ACT (5 of 1947)

SECTION 2

——S. 2 (1) —Contravention of order under — Prosecution for — Scope of inquiry — Validity of order — If can be gone into — Evidence.

In a prosecution where the contravention of an order constitutes the offence, the validity of the order does become an ingredient of the offence which the prosecution has to prove. The validity can be established by examining the officer who made the order. It is only then that the accused can have an opportunity of showing that the order was on extraneous consideration, was made mala fide or was outside the ambit of provisions of the Act. AIR 1949 Bom 387, Foll. **ILR (1953) 5 Assam 229: 1954 Cr LJ 381: AIR 1954 Assam 62 (63) (Pr 7) (DB).**

——Ss. 2 (1), 3 and 4-B (3) — Reasonable restrictions — Test — (Constitution of India, Article 19).

Whether the restrictions imposed by an impugned legislation on the exercise of the fundamental rights are reasonable or not is a matter for the Court to consider, and in doing so, the Court is entitled to take into account the reasonableness of both the substantive as well as the procedural part of the law in all its bearings; in regard to territory, in regard to the nature of the restrictions, and the circumstances and the manner of their enforcement, etc. The test of reasonableness is bound to be conditioned by the understanding and prudence of the individual who applies it to the facts and circumstances of each case; but there can be no doubt that it is well recognised objective standard by which Courts can be guided.

In view of the above, the provisions of Sections 2 (1), 3 and 4-B of Assam Maintenance of Public Order Act are saved by Cl. (5) of Art. 19 and are not void. AIR 1950 SC 211, Ref. **1953 Cr LJ 1740: AIR 1953 Assam 209 (210) (Pt A) (Pr 8) (DB).**

——S. 2 (1) — If ultra vires as imposing restriction on citizen.

Section 2 (1) has provided for serving the grounds on which the order is made upon the person affected and for enabling him to make a representation to the Advisory Council against that order. But if the petitioner has made no grievance on these points, the mere fact that the order depends upon the satisfaction of the officer does not necessarily impose any reasonable restrictions on the exercise of the citizen's right, and the section is not ultra vires on that ground. AIR 1950 Pat 322; AIR 1950 Bom 363, Disting; AIR 1950 SC 211, Ref. **1953 Cri LJ 1740: AIR 1953 Assam 209 (211) (Pt B) (Pr 9) (DB).**

——S. 2 (1) and S. 3, Proviso — Validity.

The contention that under the proviso to Section 3 the State Govt. can at its will indefinitely continue the order of detention and there is no provision in the Act that the report of the Advisory Council will be binding on the State Government and therefore, the proviso is unreasonable and it makes Section 2 (1) void is not tenable because the proviso to Section 3 is severable from the first part of Section 3, and therefore even if it is held to be unreasonable, it will not affect the validity of the remaining portion of Section 3 or that of the other sections of the Act on the ground of unreasonable-

ness. **1953 Cr LJ 1740: AIR 1953 Assam 209 (212) (Pt C) (Pr 10) (DB).**

——S. 2 (1) — Fixation of period — If makes detention order invalid.

The contention that there should be no period fixed in the order itself as the fixation of such a period is likely to prejudice the case of the detenue before the Advisory Council, cannot stand because under Section 2 (1) the order continues for a period of one year from the date on which it is confirmed or modified under sub-section (3) of Section 4-B of the Act, unless earlier revoked. Moreover, the Advisory Council is not concerned with the duration of the order but it has to consider on the materials placed before it as to whether there is sufficient ground for the making of the order and then on the report of the Advisory Council the State Government can confirm, modify or even cancel the order made under sub-section (1) of Section 2. Thus the Act purports to be a permanent statute and the fixation of time in the detention order itself is not prejudicial but to the advantage of the detenue. AIR 1952 SC 27, Disting. **1953 Cr LJ 1740: AIR 1953 Assam 209 (212) (Pt D) (Pr 11) (DB).**

——S. 2 (as amended by Assam Act 21 of 1950) — Validity.

The Preamble to Act 5 of 1947 has been amended by Act (21 of 1950) whereby the words "restrictions on movement" have been substituted for the words "preventive detention"; in other words, Act of 1947, as amended by Act 21 of 1950, is no longer law dealing with preventive detention, but law imposing restrictions on movement. There is nothing in the Constitution of India which imposes an obligation on a State Government, when enacting a law restricting the movement of a citizen, to provide a safeguard similar to the one providing for a reference to an Advisory Board under the Preventive Detention Act 1950 (4 of 1950), as amended. In the absence of such a constitutional obligation, the question of reasonableness or otherwise of restrictions imposed on a citizen's movement, must be determined without any reference to what are characterised as safeguards. Hence, Section 2 of the Assam Act 5 of 1947 which imposes restrictions on movement without providing a safeguard, namely, reference to an Advisory Board, not ultra vires the Legislature and the restrictions imposed cannot be regarded as unreasonable from the point of view of procedural and substantive law. AIR 1950 SC 211, Rel. on; AIR 1951 Cal 322 and AIR 1951 Orissa 86, Dist. **ILR (1952) 4 Assam 126: 1953 Cr LJ 657: AIR 1953 Assam 77 (78) (Pr 4).**

——S. 2 (6) (a) — Report in writing of the Provincial Government.

Under sub-section (6) of Section 3, if it is intended to take action under Cl. (a) of sub-section (6) of Section 2, it is the Provincial Government who is to make a report in writing of the fact, namely, that the person against whom an order of detention is made has absconded or is concealing himself, to a Magistrate of the First Class having jurisdiction. Without such report the Magistrate cannot take action. **ILR (1953) 5 Assam 194: 1953 Cri LJ 476: AIR 1953 Assam 54 (54) (Pt A) (Pr 2) (DB).**

——S. 2 (6) — Action under, after lapse of detention order.

Once the duration of the order of detention has expired, the authorities competent to act, under the Act, are debarred from making any order under the provisions of the Act, the effect of which is to revive a lapsed order. Hence an action under Section 2 (6) after the lapse of detention order by efflux of time is without jurisdiction. **ILR (1953) 5 Assam 194: 1953 Cri LJ 476: AIR 1953 Assam 54 (55) (Pt B) (Pr 5) (DB).**

——S. 2 (6) — Order of detention for two months — Conviction under Section 2 (6) — Sentence of 12 months R. I. held unduly severe (Obiter). **ILR (1953) 5 Assam 194: 1953 Cri LJ 476: AIR 1953 Assam 54 (55) (Pt C) (Pr 6) (DB).**

——S. 2 (7) — Offence under, is bailable — Bail refused — Proper procedure is to move appropriate Court by application under Criminal P. C. and not by application under Art. 226, Constitution of India — (Constitution of India, Art. 226)—(Criminal P. C. (1898), S. 498). **1952 Cri LJ 1710: AIR 1952 Assam 192 (192) (Prs 4, 5).**

——S. 2 (1) (a) (as amended) — Meaning of 'satisfied' — Powers of Court to question reasonableness of the grounds of detention — Section 491, Cr. P. Code.

The satisfaction contemplated by the section is satisfaction in point of fact, that detention is necessary in order that no act prejudicial to public safety and maintenance of public order is committed. It is the detaining authority that must be 'honestly satisfied'. The reasonableness or otherwise of the satisfaction which forms the basis of detention is not open to question in any Court.

The detention is preventive; the authority may be satisfied from the past conduct or behaviour of an individual and in that case no question will arise. But if the authority acts on being satisfied about his future intentions the difficulty may arise as to whether it was honestly satisfied or not. Where the past conduct is relied on and it is referred to and described in the grounds of detention it is not open to objection as unreasonable.

Mere preaching of communism as a creed to be adopted by the students is not a reasonable ground; but if such propagation is sought to be made by methods unconstitutional or unlawful it could be subversive of law and order.

Per Ram Labhaya, J.:— The validity of the order of detention depends solely on the satisfaction of the detaining authority as to the necessity of its doing so. The grounds stated in the order of detention are not strictly part of the order; if the Provincial Government is satisfied that it is necessary to detain him under the provisions of the Act the validity of the order cannot be questioned simply because in the ground it stated a fact which may not be prejudicial to public safety or the maintenance of public order.

The powers of a High Court under S. 491, Cr. P. Code are circumscribed by the language of the section. The Court must content itself, where the order of detention is free from mala fides to regard the statement of the authority ordering detention that it is satisfied as to the necessity for doing so, as a fact, and not to question it merely because in its opinion the grounds stated are inadequate or defective. **ILR (1950) Assam 147: 52 Cr LJ 68: AIR 1951 Assam 14 (15 to 17) (Prs 2, 6, 7, 10, 11) (DB).**

SECTION 3

——S. 3 — Reasonable restrictions — Test — Whether the restrictions imposed by an impugned legislation on the exercise of the funda-

mental rights are reasonable or not is matter for the Court to consider, and in doing so, the Court is entitled to take into account the reasonableness of both the substantive as well as the procedural part of the law in all its bearings; in regard to the territory, the nature of restrictions and the circumstances and the manner of their enforcement etc. The test of reasonableness is bound to be conditioned by the understanding and prudence of the individual who applies it to the facts and circumstances of each case; but there can be no doubt that it is well-recognised objective standard by which Court can be guided. In view of the above, the provisions of Sections 2 (1), 3 and 4-B of Assam Maintenance of Public Order Act are saved by Cl. (5) of Art. 19 and are not void. See Public Safety — Assam Maintenance of Public Order Act (5 of 1947), S. 2 (1). **1953 Cri LJ 1740: AIR 1953 Assam 209 (DB).**

——**S. 3, Proviso** — Validity — The contention that under the proviso to Section 3, the State Government can at its will indefinitely continue the order of detention and there is no provision in the Act that the report of the Advisory Council will be binding on the State Government and therefore, the proviso is unreasonable and it makes S. 2 (1) void is not tenable because the proviso to Section 3 is severable from the first part of Section 3, and therefore, even if it is held to be unreasonable, it will not affect the validity of the remaining portion of S. 3 or that of the other Sections of the Act on the ground of unreasonableness. See Public Safety — Assam Maintenance of Public Order Act (5 of 1947), S. 2 (1). **1953 Cri LJ 1740: AIR 1953 Assam 209 (DB).**

SECTION 4-B

——**S. 4-B (3)** — Reasonable restrictions— Test — Whether the restrictions imposed by an impugned legislation on the exercise of the fundamental rights are reasonable or not is matter for the Court to consider, and in doing so, the Court is entitled to take into account the reasonableness of both the substantive as well as procedural part of the law in all its bearings; in regard to territory, in regard to the nature of restrictions and the circumstance and the manner of their enforcement, etc. The test of reasonableness is bound to be conditioned by the understanding and prudence of the individual who applies it to the facts and circumstances of each case; but there can be no doubt that it is well recognised objective standard by which Courts can be guided.

In view of the above provisions of Ss. 2 (1), 3 and 4-B of Assam Maintenance of Public Order Act are saved by Cl. (5) of Article 19 and are not void. See Public Safety — Assam Maintenance of Public Order Act (5 of 1947), S. 2 (1). **1953 Cri LJ 1740: AIR 1953 Assam 209 (DB).**

SECTION 8-B

——**S. 8-B (b) — Scope — Effect of — Assam Maintenance of Public Order (Autonomous Districts) Act (16 of 1953), S. 11.**

The provisions as to any restriction of printing, publication or distribution of any news sheet or book or document as contained in the Assam Maintenance of Public Order Act, 5 of 1947, stood repealed by virtue of Section 37 of the Press (Objectionable Matter) Act, 1951. The Assam Act (Act 5 of 1947) was brought in line with the Press Act, and by an amendment, Cl. (b) of Section 8-B thereof was deleted. That being so, the charge against the petitioners cannot be sustained under Section 11 of the Assam Maintenance of Public Order (Autonomous Districts) Act, 1953 (16 of 1953). The words 'do any prejudicial act' in Section 8-B of the Assam Act, 1947 have no specific reference now, in view of the change in the law, to matters of this nature which affect the press and the proper procedure for the authorities would be to take appropriate action under the Press (Objectionable Matter) Act, 1951, which has also got application to the Autonomous Districts of Assam. **ILR (1957) 9 Assam 501: 1960 Cr LJ 319: AIR 1960 Assam 43 (44) (Pr 5) (DB).**

—ASSAM MAINTENANCE OF PUBLIC ORDER (AUTONOMOUS DISTRICTS) ACT (16 of 1953)

SECTION 11

——**S. 11** — Charge under the section against the petitioners cannot be sustained in view of amendment of Cl. (b) of S. 8-B of Assam Act (5 of 1947). See Public Safety — Assam Maintenance of Public Order Act (5 of 1947), Section 8-B (b). **1960 Cri LJ 319: AIR 1960 Assam 43 (DB).**

—BENGAL CRIMINAL LAW AMENDMENT ACT (6 of 1930)

See also West Bengal Criminal Law Amendment Act (6 of 1930).

PREAMBLE

● ——**Pre. and S. 2 (1) —Act, if valid after the passing of the Constitution of India — Constitution of India, Arts. 13 (1), 19 (1) (d), 19 (5) and 22 (4).**

The Bengal Criminal Law Amendment Act, 1930, even if it is an Act providing for preventive detention, is void under Article 13 (1) of the Constitution of India because it is inconsistent with the provisions of Part. III of the Constitution.

The detention which may be imposed upon a citizen by the Bengal Act amounts to restriction on the right of free movement guaranteed as one of the fundamental rights by Article 19 (1) (d) of the Constitution of India, and the restriction is neither reasonable nor in the interests of the general public considering the fact that the Act is not an emergency measure. (For summary of the grounds why restrictions are not reasonable and in the interests of the public, see Para. 14).

The Act is also in direct conflict with Article 22 (4) of the Constitution of India.

The illegalities are fundamental and they taint the whole of the Act. The doctrine of severability cannot be applied. The entire Act is, therefore, void. Sunil Kumar Bose v. The Chief Secretary to the Government of West Bengal, **54 Cal WN 394: 51 Cri LJ 1110: AIR 1950 Cal 274 (277, 280, 281) (Pt C) (Prs 6, 13, 14, 15, 16, 17) (SB).**

● ——**Pre. and S. 2 — Act if provides for preventive detention — Detenu not produced before Magistrate within 24 hours as required under Art. 22 (2), Constitution of India — Effect — Constitution of India, Art. 22 (2).**

The Bengal Criminal Law Amendment Act does not deal with preventive detention. The law regarding preventive detention is directed towards preventing a person from doing something which the Legislature thinks should not be done. The Act nowhere says that a person

may be detained or otherwise dealt with in order to prevent him from doing anything.

There can be no doubt that if a person is detained, the detenu is deprived of his personal liberty. In such a case, if the detenu is not produced before any Magistrate within 24 hours of his arrest as required under Article 22 (2) of the Constitution, the detenu is deprived of his personal liberty without complying with one of the most important items of procedure laid down in the Constitution regarding such deprivation. In these circumstances the order of detention cannot be upheld. **54 Cal WN 394: 51 Cri LJ 1110: AIR 1950 Cal 274 (282, 283) (Pt E) (Prs 19, 20) (SB).**

●——**Pre.** — The Preventive Detention (Extension of Duration) Order, 1950, made by the President of Indian Republic, can have no effect so far as the Bengal Criminal Law Amendment Act, 1930 and West Bengal Security Ordinance, 1949 are concerned: The Act and the Ordinance became void as soon as the Constitution came into force (i.e., at midnight on 25th January, 1950) by reason of the provisions of Art. 13 (1) of the Constitution. They cannot be revived by the subsequent Order of the President passed in the exercise of the powers conferred by Article 22 (7) (a) and (b) read with Art. 373 of the Constitution. See Public Safety — Preventive Detention (Extension of Duration) Order (1950). **51 Cri LJ 1110: AIR 1950 Cal 274 (SB).**

SECTION 2

■——**S. 2 (1) (l)** — Honest belief of Provincial Government that detained person was member of association is enough — Court cannot go into question whether association was in fact association as contemplated by section — Where the Provincial Government honestly believes that a person is a member of an association which the Government believes has certain objects and certain methods, then an order for detention can be made. Again, if the Provincial Government honestly thinks that a man has done or is doing any act to assist the operations of any such association an order for detention can be made. A Court is not entitled to go into the question whether the association is in fact such an association as is contemplated in this section. Bhupendra De v. Chief Secretary, Government of West Bengal. **51 Cr LJ 169: 53 Cal WN 798: AIR 1949 Cal 633 (636) (Pt B) (Pr 21) (FB).**

●——**S. 2 (1)** — Act, if valid after the passing of the Constitution of India — Constitution of India, Arts. 13 (1), 19 (1) (d), 19 (5) and 22 (4) — The Bengal Criminal Law Amendment Act 1930, even if it is an Act providing for preventive detention, is void under Arts. 13 (1), 19 (1) (d) 19 (5) and 22 (4). See Public Safety — Bengal Criminal Law Amendment Act (6 of 1930), Preamble. **51 Cri LJ 1110: AIR 1950 Cal 274 (SB).**

●——**S. 2 (1) (l)** — Detention without forming opinion whether detenu was at any time member or is member of certain kind of association — Detention is illegal under Act (assuming that the Act is not void). Sunil Kumar Bose v. West Bengal Government, **54 Cal WN 394: 51 Cri LJ 1110: AIR 1950 Cal 274 (281) (Pt D) (Pr 18) (SB).**

■——**S. 2 and Preamble** — Act if provides for preventive detention — Detenu not produced before Magistrate within 24 hours as required under Art. 22 (2), Constitution of India — Effect — Constitution of India, Art. 22 (2). See Public Safety — Bengal Criminal Law Amendment Act (6 of 1930), Preamble. **51 Cri LJ 1110: AIR 1950 Cal 274 (SB).**

—BENGAL CRIMINAL LAW AMENDMENT ORDINANCE (1 of 1947)

SECTION 8

——**Ss. 8 and 11** — Previous statement of witness not available before Special Bench — Section 8 makes much wider provision than S. 33, Evidence Act — Applicability of both provisions considered — Cognizance before ordinance — Witnesses examined in sessions before certificate under S. 5 — Section 11 would apply — Evidence Act (1872), S. 33. **AIR 1955 NUC (Cal) 573 (DB).**

SECTION 11

——**S. 11** — Previous statement of witness not available before Special Bench — Admissibility — Where the cognizance had been taken before the Ordinance came into force. If the witnesses had been examined in the Court of Session before the certificate of the Commissioner of police under S. 5 was given, then S. 11 of the ordinance would apply to the evidence of those witnesses. See Public Safety — Bengal Criminal Law Amendment Ordinance (1 of 1947), S. 8. **AIR 1955 NUC (Cal) 573 (DB).**

—BENGAL CRIMINAL LAW (INDUSTRIAL AREAS) (AMENDMENT) ACT (4 of 1942)

SECTION 4

——**S. 4** — Case under—Onus on accused when shifts — To say that the Bengal Criminal Law Amendment Act shifts the onus on the accused person is not correct. The onus is not upon the accused person, but upon the prosecution. What the Act does is that after the prosecution has discharged this onus, it is for the accused to explain his possession of goods, and that onus certainly is upon him—(Evidence Act (1872), Sections 101 to 103). **AIR 1955 NUC (Cal) 5593.**

——**S. 4** — Applicability—(Criminal P. C. (1898), S. 244) — "Goods seized from accused's shop on ground that he was removing them suspiciously — Case put up under S. 4 — No allegation that goods were smuggled — Magistrate acquitting accused without allowing prosecution opportunity to lead evidence in support of complaint — Order held illegal. **AIR 1955 NUC (Cal) 2926 (DB).**

——**S. 4 — Possession of goods suspected to be stolen — Immediate explanation by accused — Value of — Extent of burden of proof on accused.**

The proof required of the accused is not of the same standard as required of the prosecution in proving guilty, and lawful possession is proved if he satisfies the Court of a reasonable probability that the articles came into his possession lawfully.

Thus when a driver of a lorry is charged under S. 4 of the Bengal Act 4 of 1942 for being in possession of certain quantity of paper and paper board either stolen or fraudulently obtained and his immediate explanation is that he carried them in his lorry for some persons who preceded him in a taxi, which was admitted by the police to have passed by him some time before.

Held, that the explanation was quite a probable one and that he must therefore, be considered to have discharged the duty that lay on him under S. 4 for accounting for his possession of the goods found in his lorry. 49 CWN 229, Rel. on. **AIR 1952 Cal 122 (123) (Pr 3) (DB).**

—BENGAL STATE PRISONERS REGULATION (3 of 1818)

●——**(as adapted by Bengal State Prisoners Regulation (Adaptation) Order 1947), is perfectly valid** — See Public Safety — Bengal State Prisoners Regulation (Adaptation) Order, 1947, Preamble. **51 Cri LJ 269: AIR 1950 All 11 (FB).**

●——(as adapted by Bengal State Prisoners Regulation (Adaptation) Order, 1947) — Scope — Provides for preventive detention and not arbitrary detention.

Wali Ullah Ag. C. J.:— The nature of detention provided for in the Regulation cannot be said to be different from "preventive detention." In substance, in regard to Indian States, what the Regulation provides is that a person who acts in a manner which may embitter relations between the Dominion of India and an acceding State may be placed under personal restraint; such a detention is not different from "preventive detention" and cannot be called arbitrary detention. It may be that the powers given to the executive to issue orders of personal restraint against individuals are very wide and it may be said that the Regulation as it stands may enable the executive to make serious inroads on the liberty of a citizen, but it should not be forgotten that the Regulation has remained on the statute book for more than a century without any attempt on the part of the Legislaure to circumscribe limits within which the power of detention is to be exercised. It has also been preserved on the statute book as an existing Indian Law, both by the Government of India Act, 1935, and the Indian Independence Act, 1947.

Adaptation of the Regulation of 1818 falls within Entry I, List I of Sch. 7, Government of India Act, 1935.

Sapru J.:— The scope of preventive detention is different in nature from both punitive detention and arbitrary detention; that preventive detention means detention, the aim of which is to prevent person from doing something which is likely to endanger the public peace, cause public disorder or lead to a situation which might become critical from a defence, external affairs or law and other point of view; and that therefore, it is not to be confounded with punitive detention which is meant to punish a person for what he has done or arbitrary detention which empowers the executive to arrest at will without any reason whatever. There is little doubt that Regn. 3 of 1818 is not in accordance with the notion of preventive detention as used in the Government of India Act, 1935. It would thus seem to have provided not only for preventive but also arbitrary or punitive detention. It is however, a regulation which was preserved as an existing British Indian Law on the statute book both by the Government of India Act, 1935, and the Indian Independence Act, 1947. For this reason no relief can be given on the ground that the Regulation in question is not altogether in harmony with the notion of preventive detention.

Bind Basni Prasad J.:— The Regulation lays down the reasons for which a person may be detained under it. It is true that the existence of those reasons cannot be adjudicated upon by the Courts of Law. Nevertheless it casts upon the Executive a duty to determine the existence of those reasons and only when it is satisfied of their existence then can it issue an order of commitment. The forms of commitment given at the end of the Regulation point to this fact. The presumption is that the Regulation will be administered in good faith by those who are armed with powers under it. Moreover the Regulation has been in existence for one hundred and thirty-one years. Its legality has been questioned in the past, but it has been upheld as valid. It provides for preventive detention for reasons mentioned there. An arbitrary detention is a detention without any reason. The Regulation as adapted does not contemplate detention without any reason. Various considerations may render it desirable that such cases may not go to Court e.g., undesirability of giving publicity to the facts, the necessity of prompt and quick action, the fact that strict legal proof may not be available although there may be a moral certainty of the facts. The motive behind the law is irrelevant for the Courts. Courts have only to see whether a valid law was made or not. With the change in 1947 in the Government of India Act, 1935, the insertion of the impugned words in the Regulation did not trespass the ambits of adaptation. Gulab Singh v. Dist. Magistrate Dehra Dun, **1949 All LJ 587: 51 Cri LJ 269: ILR (1950) All 845: AIR 1950 All 11 (17, 35, 40, 41) (Pt G) (Prs 12, 69, 70, 97, 98) (FB).**

—BENGAL STATE PRISONERS REGULATION (ADAPTATION) ORDER (1947)

PREAMBLE

●——Preamble — Order is not ultra vires — Detention under Bengal State Prisoners Regulation (3 of 1818 as adapted by Adaptation Order, 1947, cannot be questioned under Criminal P. C., S. 491, by virtue of sub-section (3) thereof — Criminal P. C. (1898), S. 491 (3) — Bengal State Prisoners Regulation (3 of 1818 as adapted by Bengal State Prisoners Regulation (Adaptation) Order, 1947).

The Bengal State Prisoners Regulation (Adaptation) Order, 1947, dated 26th August 1947, is not ultra vires of the powers of the Governor-General. It follows, therefore, that the Bengal State Prisoners Regulation, 1818, as adapted by the aforementioned Order is perfectly valid. By reason of sub-section (3) of S. 491, Criminal P. C., the detention of the applicant under the Regulation cannot be questioned in proceedings under S. 491, Criminal P. C. Gulab Singh v. District Magistrate Dehra Dun, **51 Cri LJ 269: 1949 All LJ 587: ILR (1950) All 845: AIR 1950 All 11 (15, 35, 41) (Pt A) (Prs 7, 72, 100, 101) (FB).**

●——Pre. — Order is made in virtue of S. 19 (5), Indian Independence Act, 1947, and varies India (Adaptation of Existing Indian Laws) Order, 1947.

Wali Ullah Ag. C. J.:— The Governor-General has power under Section 19 (5), Independence Act to make any Order and includes the power to revoke or vary an Order previously made in the exercise of that power. The Bengal State Prisoners Regulation (Adaptation) Order made on 26th August 1947, must be considered to have been made in virtue of the provisions of sub-s. (5) of Section 19. The said Adaptation Order may be considered to have revoked to some extent or at any rate, varied, the India (Adaptation of Existing Indian Laws) Order, 1947 dated 14th August 1947. Furthermore, Article 3, Prisoners Regulation (Adaptation) Order of 26th August 1947, has expressly provided that the provisions of this Order shall have effect notwithstanding anything to the contrary contained in the India (Adaptation of Existing Indian Laws) Order, 1947.

Sapru J.:— By virtue of India (Adaptation of Existing Indian Laws) Order, 1947, on the appointed day, i. e., 15th August 1947, the Bengal Regn. 3 of 1818 did not have the words "connected with the discharge of the functions of the Crown in its relation with Indian States," but it did have them immediately before that date. The fact, however, that the words "connected with the discharge of the function of the Crown in its relation with Indian States" had ceased to be part of Regn. 3 of 1818 was completely overlooked by those responsible for drafting S. 2, Bengal State Prisoners Regulation (Adaptation) Order, 1947. It does not seem to have occurred to

Governor-General that he was directing words "relations with Acceding State" to be substituted for words which had disappeared from the Regulation which he was adapting on the date on which his second Adaptation Order was passed. It is commonsense that you cannot substitute something for what had ceased to be an immediately existing British Indian Law without first reviving that law. It is only thereafter that you can substitute the adaptation that you consider necessary for it. But the position is that S. 3 of the Adaptation Order, referred to above, lays down that "the provisions of this Order shall have effect notwithstanding anything to the contrary contained in the India (Adaption of Existing Indian Laws) Order, 1947". The difficulty, in this view, with the manner in which the Bengal State Prisoners Regulation (Adaptation) Order, 1947, was made is thus one of form. Gulab Singh v. District Magistrate Dehra-Dun, 51 **Cri LJ 269: 1949 All LJ 587: ILR (1950) All 845: AIR 1950 All 11 (16, 28) (Pt D) (Prs 9, 50) (FB).**

—BIHAR MAINTENANCE OF PUBLIC ORDER ACT, 1949 (3 of 1950)

PREAMBLE

——Pre. — Validity of Act — Constitution of India, Arts. 13 and 22.

The detention provisions in the Bihar Act 3 of 1950 are completely inconsistent with the fundamental rights prescribed in Art. 22 (4) and (5) of the Constitution of India and consequently, directly the Constitution came into force on the mid-night of 25th January 1950, these provisions became void under Art. 13 (1) of the Constitution and they could not be revived or rendered valid by any Act of the President purporting to do so under Art. 22 (7) read with Art. 373 of the Constitution; nor could the President do so by any adaptations contemplated by Art. 372 of the Constitution.

The provisions of the impugned Act relating to duration of detention being inextricably mixed up with the provisions of safeguards laid down therein the doctrine of severability cannot apply and therefore, the entire Act becomes void. **51 Cri LJ 1081: ILR 29 Pat 335: AIR 1950 Pat 265 (269, 271, 277, 278, 279) (Pt A) (Prs 19, 20, 28, 57, 60, 62) (DB).**

SECTION 2

——S. 2 — Order on externee — Test of reasonableness — 'Public order' — Scope of.

In the Bihar Maintenance of Public Order Act, there are provisions for communicating the grounds of the order to the externee. The externee has a right to make a representation, and the representation has to be considered by an Advisory Board. These are all safeguards which fulfil the test of reasonableness.

The existence of a provision which prevents externment of a person from his usual place of residence is not an essential criterion for fulfilling the test of reasonableness.

The expression "in the interests of the general public" is wide enough to cover serious and aggravated forms of public disorder which are calculated to endanger the security of the State as also other breaches of the peace of a purely local significance which endanger the public order. Public Order is not excluded from the purview of Cl. (5) of Art. 19. **1952 Cri LJ 1361: AIR 1952 Pat 376 (377, 378) (Prs 5, 6) (DB).**

——S. 2 (1) (b) — Constitution of India, Articles 13 (1), 19 (1) (d) and (3) — Validity of S. 2 (1) (b) of Bihar Act (3 of 1950).

(Per Majority, Shearer, J. Contra)— Section 2 (1) (b), Bihar Maintenance of Public Order Act, 1949 (Bihar Act 3 of 1950), in so far as it operates to restrict freedom of movement of a free citizen, has become void by reason of Article 13 (1), read with Art. 19 of the Constitution of India, which came into force on 26th January 1950, Brajnandan v. State of Bihar, **52 Cri LJ 610: ILR 29 Pat 461: AIR 1950 Pat 322 (324, 326) (Pt B) (Prs 4, 12) (FB).**

——S. 2 (1) (b) — Constitution of India, Article 19 (5) — Reasonable restrictions — Courts excluded from applying objective test of reasonableness — Section 2 (1) (b) is not reasonable.

A law to satisfy the criterion imposed by Article 19 (5) must be so framed as to leave it open to the Courts to apply the objective test of reasonableness to its operation.

The power of restriction contained in S. 2 (1) (b) of the Bihar Act 3 of 1950, is based, not on any reasonable grounds, but upon the satisfaction of some individual and the provision is in such terms that it is not open to the Court to examine the reasonableness or otherwise of orders passed. There can be no presumption that an executive official will always act reasonably. There may be a presumption that he will act bona fide; but that is a different thing. The test is not what is actually done under the law, but what the law enables to be done. If the law enables orders to be passed which are unreasonable, and yet are consistent with its terms, then that cannot be called a law operating to impose only reasonable restrictions. **52 Cri LJ 610: ILR 29 Pat 461: AIR 1950 Pat 322 (325) (Pt F) (Pr 9) (FB).**

——S. 2 (1) (a) — Detention under — Validity — Constitution of India, Arts. 21 and 226 — Criminal P. C. (1898), S. 491.

The provisions of the Bihar Act having become void on the coming into force of the Constitution the detention of a person under S. 2 (1) (a) of that Act cannot legally continue after 26th January 1950 by virtue of Art. 21 of the Constitution and the detenu is entitled to be released. **51 Cri LJ 1081: ILR 29 Pat 335: AIR 1950 Pat 265 (271) (Pt B) (Pr 30) (DB).**

SECTION 5

——S. 5 (1), Proviso — Proviso being repugnant to Art. 22 (5) of the Constitution has become void from 26th January 1950 — Proviso being severable from rest of the section it can be eliminated from consideration in examining legality of detention (Obiter). **51 Cri LJ 1025: ILR 29 Pat 293: AIR 1950 Pat 265 (272, 281) (Pt G) (Prs 33, 64) (DB).**

——S. 5 (6) — Sub-section (6) is designed to prevent Court from ascertaining if detention beyond three months is in accordance with report of Advisory Council — It is repugnant to Art. 22 (4) and as such void — It is however severable from rest of Act (Obiter). **51 Cri LJ 1081: ILR 29 Pat 335: AIR 1950 Pat 265 (273) (Pt H) (Pr 38) (DB).**

——Ss. 5, 26 — Reference to advisory Council constituted under Bihar Maintenance of Public Order (No. 2) Ordinance of 1949.

If a member of the Advisory Council constituted under the Ordinance of 1949 was not qualified to be a member under the Act, the Advisory Council on the operation of the Act, ipso facto stood dissolved; nevertheless the reference made to the then existing Council under the law as it was and the steps taken by the Advisory Council would be deemed to have been

made under the Act. **51 Cri LJ 1025: ILR 29 Pat 293: AIR 1950 Pat 259 (264) (Pt C) (Pr 21) (DB).**

SECTION 8

——S. 8 (1) — Constitution of India, Art. 19 (1) (f) and (5) — Section 8 (1) is indefinite, vague and unreasonable both from aspects of substantive and procedural law. See Constitution of India, Art. 19 (1) (f) and (5). **1956 Cri LJ 640: AIR 1956 Pat 137 (DB).**

——S. 8 (2) — Constitution of India, Art. 19 (1) (f)—S. 8 (2) of the Act violates guarantee under Art. 19 (1) (f) of the Constitution. See Constitution of India, Art. 19 (1) (f). **1956 Cri LJ 640: AIR 1956 Pat 137 (DB).**

——S. 8 (1) — Section 8 (1) is not preventive in character.

The matters dealt with in S. 8 (1) are all matters that more or less correspond to substantive offences under the Penal Code. There is, therefore no scope for the argument that S. 8 (1) is preventive in character and not punitive. **1956 BLJR 210: 1956 Cri LJ 640: ILR 35 Pat 102: AIR 1956 Pat 137 (141) (Pt D) (Pr 18) (DB).**

——S. 8 — Constitution of India, Art. 31 (2) — Bihar Act 3 of 1950 infringes Art. 31 (2) of the Constitution. See Constitution of India, Art. 31 (2). **1956 Cri LJ 640: AIR 1956 Pat 137 (DB).**

SECTION 9

——S. 9 (2) — Validity — If imposes unreasonable restriction — (Constitution of India, Article 19).

Per Misra, J.:— The restriction imposed by the Act, in so far as it relates to public processions, etc., is not unreasonable. The restrictions do not constitute a violation of fundamental right guaranteed under Art. 19 of the Constitution. **ILR 38 Pat 544: 1959 Pat LR 111: 1959 Cri LJ 1100: AIR 1959 Pat 425 (426) (Pt A) (Pr 2) (DB).**

——S. 9 (2) — Validity — Act — If permanent measure imposing restrictions — (Constitution of India, Art. 19 (1) (b) and (d)).

Per Misra, J.:— The Act cannot be said to be ultra vires the Bihar Legislature as constituting a violation of Art. 19 (1), for the reason that it originated in the promulgation of the Bihar Maintenance of Public Order Ordinance No. 4 of 1946.

The Legislature has not placed this Act on the statute book as a permanent legislative measure but the situation is reviewed every two years to find out whether the extension of the Act for a further period would be justified in the circumstances. If the Legislature which is in the best position to know the conditions of law and order prevailing in the State is satisfied that a further extension of the Act is warranted, it is not for the law Court to say that it should not have been extended. The Legislative judgment of the Legislature must be held to be supreme, and on this ground the provision cannot be struck down as invalid and ultra vires as violating Art. 19 (1) (b) (d) of the Constitution of India. **ILR 38 Pat 544: 1959 Pat LR 111: 1959 Cri LJ 1100: AIR 1959 Pat 425 (428) (Pt B) (Pr 3) (DB).**

——S. 9 (2) — Validity — Provision for appeal or review — Absence of — Effect — (Constitution of India, Art. 14).

There being a distinct provision in S. 9 (2) that the authority entrusted with the exercise of the power to grant or refuse licence for taking out a public procession can refuse the prayer for grant of licence only after recording reasons therefor, this is an adequate safeguard against the misuse of power. Although there is no provision for an appeal to the State Government, the refusal being an administrative act, there is no reason why, in case of arbitrary refusal of licence, the matter cannot be agitated and taken up with the higher executive authorities in the Government. Consequently the absence of provision for appeal or review by State Government against the order passed by the District Magistrate would not make the Act invalid. **ILR 38 Pat 544: 1959 Pat LR 111: 1959 Cri LJ 1100: AIR 1959 Pat 425 (428) (Pt C) (Pr 4) (DB).**

——S. 9 (2) — Scope — Notification — Prohibiting procession without licence — If ultra vires.

Section 9 (2) imposes restriction on public procession. Notification issued by Government in pursuance of Section 9 (2), being notification No. A/A/201/51/O—8006, dated 29-6-1951 puts restriction on any procession, inasmuch as it prohibits any procession without licence. The notification is ultra vires and no offence would be committed for violation of the prohibition contained therein. AIR 1951 Pat 418, Relied on. **ILR 38 Pat 544: 1959 Pat LR 111: 1959 Cr LJ 1100: AIR 1959 Pat 425 (429) (Pt D) (Pr 5) (DB).**

——S. 9 — "Procession" — Ingredients of.

Some element of an organised march according to a system is necessary in order to constitute a procession. Where therefore a meeting was permitted to be held in the village, and it was being lawfully held, if a number of villagers came to the meeting, though shouting slogans and carrying musical instruments, that will not be a circumstance leading to the inference that they came in a procession. (1950) 1 All ER 1091 and AIR 1943 Bom 209. Ref. **ILR 31 Pat 845: 1953 BLJR 165: 1953 Cri LJ 1191: AIR 1953 Pat 195 (196) (Prs 5, 6) (DB).**

——S. 9 — Constitution of India, Art. 19 (1) (b), (3) — Unreasonable restrictions — Public Safety — The restrictions imposed by the Bihar Maintenance of Public Order Act, so far as it relates to public processions, etc., was not unreasonable. See Constitution of India, Art. 19 (1) (b), (3). **AIR 1951 Pat 242 (DB).**

——S. 9 — Bihar Maintenance of Public Order (No. 2) Ordinance (4 of 1949), S. 6 — Whether ultra vires — The words "public safety" and 'public order" are interchangeable terms in the context in which they have been used and Section 6 of the Ordinance or Section 9 of the Act was not ultra vires the State Legislature. See Public Safety — Bihar Maintenance of Public Order (No. 2) Ordinance (4 of 1949), S. 6. **AIR 1951 Pat 242 (DB).**

SECTION 12

——S. 12 (3) (ii) — Scope — Failure of statutory duty — Mandamus — Issue of. See Constitution of India, Art. 226. **1958 Pat LR 82.**

SECTION 26

——Ss. 20, 4 — Failure to submit report by Advisory Council — Where there was a proper reference to the Advisory Council on 24th September 1949 but no further information was called for by the Council and no report was

submitted by the Advisory Council to the Provincial Government at all there are no proceedings pending which could be saved and continued under Section 26. There being failure to comply with the mandatory provisions of sub-ss. (4) and (5) of Section 4 of the Ordinance the detention of the detenu is illegal. See Public Safety — Bihar Maintenance of Public Order (No. 2) Ordinance (4 of 1949), S. 4. **51 Cri LJ 1025: AIR 1950 Pat 259 (DB).**

——**Ss. 26, 5** — Reference to Advisory Council constituted under Bihar Maintenance of Public Order (No. 2) Ordinance of 1949 — If a member of the Advisory Council constituted under the Ordinance of 1949 was not qualified to be a member under the Act, the Advisory Council on the operation of the Act, ipso facto stood dissolved; nevertheless the reference made to the then existing Council under the law as it was and the steps taken by the Advisory Council would be deemed to have been made under the Act. See Public Safety — Bihar Maintenance of Public Order Act (3 of 1950), S. 5. **51 Cri LJ 1025: AIR 1950 Pat 259 (DB).**

—BIHAR MAINTENANCE OF PUBLIC ORDER (No. 2) ORDINANCE (4 of 1949)

●——Validity of Ordinance — Applicability of particular list — Test to determine — Ordinance entirely covered by Items (1) and (2) of List II — Question of repugnancy under Section 107 does not arise. See Government of India Act (1935), S. 107. **51 Cri LJ 921: AIR 1950 FC 59.**

——**Subject-matter of Ordinance falls within Sch. 7, List II, Items 1 and 2 — Ordinance cannot be held to be ultra vires for absence of instructions from Governor-General — Government of India Act (1935), S. 107, Sch. 7, List 2, Items 1 and 2.**

The subject-matter of the impugned Ordinance (4 of 1949) falls clearly within Items 1 and 2 of the Provincial Legislative List and therefore there was no necessity for the Governor to invoke any powers from the Concurrent Legislative List. It follows that the Ordinance cannot be held to be ultra vires for absence of instructions from the Governor-General. **51 Cri LJ 300: 30 Pat LT 419: ILR 28 Pat 782: AIR 1950 Pat 35 (38) (Pt C) (Pr 15) (DB).**

——**Pith and substance falls under Sch. 7, List 2, Item 1 — Ordinance is intra vires — Sections 23, 24 and S. 4 proviso whether ultra vires (Quaere).**

The Ordinance deals in 'pith and substance' with Item 1, Sch. 7, List 2, namely, public order and preventive detention for reasons connected with maintenance of public order, and is intra vires the Governor of Bihar.

(Quaere) — Whether Sections 23, 24 or the proviso to Section 4 of the Ordinance are ultra vires.

Even assuming that they are invalid they are separable from the rest of the Ordinance which would still retain its original character and therefore would be valid. **51 Cri LJ 300: 30 Pat LT 419: ILR 28 Pat 782: AIR 1950 Pat 35 (37, 39, 40) (Pt E) (Prs 10, 23, 27) (DB).**

——**This Ordinance is ultra vires and invalid.**

Bihar Maintenance of Public Order Ordinance, 1949 (No. 2 of 1949) was promulgated on 3rd June 1949 when the Bihar Provincial Legislatures were in session. As the Governor in thus promulgating the Ordinance acted beyond the authority conferred upon him by Section 88, Government of India Act, 1935, the said Ordinance is ultra vires and invalid. **51 Cri LJ 256: ILR 28 Pat 775: AIR 1950 Pat 19 (20, 21) (Pt A) (Prs 5, 10) (DB).**

SECTION 2

——**S. 2 (1) — Detention under — Court is not entitled to examine adequacy of grounds on which Provincial Government ordered detention.**

Section 2 (1) uses the words "the Provincial Government if satisfied". There is a vital distinction between the word "satisfied" and the words "reasonable cause". In the former case unlimited discretion is given to the Provincial Government but in the latter the discretion is subject to an objective condition to the Government's power to detain, the existence of which would be cognizable in the Court of law. Thus, where the Government is merely "to be satisfied" its certificate is enough; and where it has "reasonable cause to believe" then the test is subjective and not objective. Therefore, in the case of detention of a detenu under Section 2 (1) the Court is not entitled to apply the objective standard and to examine the adequacy of the grounds on which the Provincial Government have ordered detention of the detenu: Liversidge v. Anderson, (1941) 3 All ER 338, Rel. on; AIR 1945 PC 156; AIR 1944 Pat 354 and AIR 1945 Pat 44, Ref. **51 Cri LJ 327: ILR 28 Pat 800: AIR 1950 Pat 41 (43) (Prs 9, 10) (DB).**

SECTION 4

●——**S. 4 (1) — Government of India Act, 1935, Sch. 7, List II, Item (1) — Preventive and arbitrary detention — Distinction — Legislation coming within preventive detention — Policy or reasonableness of it cannot be criticised by Courts.**

Preventive detention can properly be contrasted with punitive detention, one having reference to the apprehension of wrong doing and the other coming after the illegal act is actually committed. The word "arbitrary" connotes want of reasonable or proper justification. If a particular piece of legislation is entirely within the ambit of the Legislature's authority, there could be nothing arbitrary in it so far as a Court of law is concerned. The Courts have nothing to do with the policy of the Legislature or the reasonableness or unreasonableness of the legislation.

The contention that as one of the safeguards available to a detenu under Section 4 (1) of the Ordinance is whittled down and rendered illusory by the proviso, the detention is no longer a "preventive detention" which Item (1) of the Provincial List contemplates but it degenerates into "arbitrary detention" and in respect of such a matter no power of legislation has been given to the province by the Government of India Act is not sound as "preventive detention for reasons connected with the maintenance of public order" is one of the subjects upon which the provinces have been given the authority to legislate under the Government of India Act. The Court has got to decide on a consideration of the true nature and character of legislation whether it is really on the subject of preventive detention or not. Once that point is decided in favour of the legislative authority, and it is held that it has not trespassed beyond the limits of its assigned powers, it is not for the Court to criticise the wisdom and policy of the Legislature. 53 CWN 545, Ref.

AIR 1948 Pat 135. Disting. Lakhi Narayan Das v. The Province of Bihar. **1950 Mad WN (Crl) 46 (2): 1950 Mad WN 222 (2): ILR 29 Pat 185: 1950 SCJ 32: 51 Cri LJ 921: 1949 FCR 693: 85 Cal LJ 305: (1950) 1 Mad LJ 760: AIR 1950 FC 59 (66, 67) (Pt D) (Prs 23, 24, 25).**

——S. 4 — Failure to submit report by Advisory Council — Bihar Maintenance of Public Order Act (3 of 1950), S. 26.

Where there was a proper reference to the Advisory Council on 24th September 1949 but no further information was called for by the Council and no report was submitted by the Advisory Council to the Provincial Government at all there are no proceedings pending which could be saved and continued under Section 26, Bihar Maintenance of Public Order Act (3 of 1950). There being a failure to comply with the mandatory provisions of sub-sections (4) and (5) of Section 4 of the Ordinance the detention of the detenu is illegal. **51 Cri LJ 1025: ILR 29 Pat 293: AIR 1950 Pat 259 (263, 264) (Pt A) (Prs 19, 20) (DB).**

——S. 4 (1), Proviso — Proviso is valid. **51 Cri LJ 1025: ILR 29 Pat 293: AIR 1950 Pat 259 (260) (Pt B) (Pr 3) (DB).**

——S. 4 (1), Proviso — Propriety of detention can be enquired into — It is within competence of legislature to curtail liberty of individual by valid legislation — Ordinance is intra vires — Proviso to S. 4 (1) before its amendment is valid and does not make sub-section (1) ultra vires — Amendment of proviso by Bihar Ordinance 5 of 1949 does not render Ordinance 4 of 1949 ultra vires.

It is always open to a Court of law to enquire into the propriety of a detention made under a particular legislation in order to see whether the order of detention was a valid one or not. The Courts of law, however, at the same time have to administer the law as it exists, and if the particular legislation is validly enacted, it is not within the scope of the authority of a Court of law to ignore that legislation because it interferes with the liberty of the subject. The liberty of the subject is not an abstract or an absolute freedom. It is capable of being regulated by legislation when the safety of the State is involved. The safety of the State may be involved in various ways. In all these circumstances and others, where the established Government finds it necessary to maintain law and order in the State, it is compelled to legislate and in so legislating may have to curtail the liberty of the subject. It may also have to curtail the powers of the Courts of law. So long as the legislation is within the legislative field of the legislating authority, such legislation would be valid legislation. 1942 AC 206 and other case law relied on.

The Bihar Ordinance 4 of 1949 was declared to be intra vires by Federal Court in Lakhi Narayan Das's case, AIR 1950 FC 59, by its judgment dated 28th November 1949. It is quite clear that its provisions cannot be declared to be invalid merely on the ground that it confers powers on the executive to interfere with the liberty of the subject. The decision of the Federal Court was not obiter and the proviso to Section 4 (1) of the Ordinance before its amendment was within the competency of the legislative authority to enact, and, consequently the proviso was a valid provision, and, it did not render the entire provisions of the Ordinance ultra vires, nor the powers exercised under it ultra vires. Provisions of sub-section (1) of Section 4 are mandatory and must be complied with by the authority making the order in respect of any person, under Cl. (a) of sub-s. (1) of Section 2. The proviso does not nullify any of these provisions. It is a saving clause to the effect that neither the order nor the detention of the person thereunder shall be invalid or unlawful or improper on the ground of any defect, vagueness or insufficiency of the communication made to such person under this section. What has been saved by the proviso, however, is not that the detaining authority shall not comply with the mandatory provisions of the sub-section — on the contrary, it shall comply with these provisions — but that if there was any defect, vagueness or insufficiency in the communications made to the detenu, that by itself would not make the detention invalid or unlawful or improper.

The proviso to sub-section (1) of S. 4 of the Ordinance no doubt makes ineffective the decision in Nek Mohammad's case, AIR 1949 Pat 1 (FB) in this respect. That, however, was within the competence of the Legislative authority to do. In construing the wording of sub-s. (1) with its proviso, the decision in Nek Mohammad's case, AIR 1949 Pat 1 (FB) or in Murat Patwa's case, AIR 1948 Pat 135 regarding the vagueness or insufficiency of the particulars supplied to a detenue cannot be taken into consideration.

The amendment of the proviso to sub-s. (1) of Section 4 by the Bihar Ordinance No. 5 of 1949 which directed that the words "where the Provincial Government is of opinion that it would be against the public interest to disclose all the grounds of the order" shall be omitted, does not render the Ordinance No. 4 of 1949 ultra vires. **51 Cri LJ 936: AIR 1950 Pat 228 (230, 232, 233, 234) (Pt A) (Prs 4, 7, 8, 9,10) (DB).**

——S. 4 (1) — "As soon as may be" does not mean that in all cases grounds of detention should be served within 15 days from the date of order of detention — Delay of 58 days held not such delay as to render detention illegal. **51 Cri LJ 936: AIR 1950 Pat 228 (235, 236) (Pt E) (Prs 14, 17) (DB).**

——S. 4 — Detention mala fide — Detention can be declared illegal — But it does not make Ordinance ultra vires. **51 Cri LJ 936: AIR 1950 Pat 228 (236) (Pt F) (Pr 15) (DB).**

——S. 4 (1)— Interpretation — Non-compliance with mandatory provisions of S. 4 (1) — Effect.

The material portion of Section 4 (1) of the Ordinance is phrased exactly in the same manner as Section 4 (1), Bihar Maintenance of Public Order Act, 1947.

The ratio of the two Full Bench decisions, 28 Pat 773 (FB) and 26 Pat 628 (FB), are applicable for construing Section 4 of the new Ordinance.

Under Section 4 (1) of the Ordinance, the authority making the order was given a discretion to give such particulars as were in the opinion of that authority sufficient to enable the detenu to make representation against the order of detention. The discretion, however, is not to be exercised in an arbitrary or capricious manner. If no particulars are given or particulars are given in such a way as to make it impossible for the detenu to make representation against the order, then there is a failure to comply with the mandatory provisions of the section since the detenu is deprived of his right of making an effective representation and the detention is invalid and illegal.

Merely because the new Ordinance provides for an Advisory Council to review the orders of

detention it cannot be said that the High Court is precluded from scrutinising the validity of the order of detention or that the Provincial Government is excused from strict compliance with the mandatory provisions of Section 4 of the Ordinance. **('49) 28 Pat 806 (DB).**

SECTION 6

——S. 6 (1) — Notification prohibiting any meeting or procession without sanction is ultra vires. **30 Pat LT 411: 28 Pat 854: 52 Cri LJ 182: AIR 1951 Pat 418 (419) (Pr 6) (DB).**

——S. 6 (2) — Public procession — What constitutes.

Where a procession is taken out at a public place, it is going along a public thoroughfare to a meeting which is admittedly public, the purpose of procession is public i.e. a purpose of a party as opposed to a private purpose, and it is open to the public or a class of the public to join the procession, the reasonable inference from the proved facts is that the procession is public. **AIR 1951 Pat 242 (243) (Pt A) (Pr 6) (DB).**

——S. 6 — Holding of procession — What amounts.

Where certain persons, who were members of Communist Party led a procession arranged by the Communist Party, carried communist flags and were most vociferous in the slogans which the processionists shouted it must be held that such persons held the procession. **AIR 1951 Pat 242 (244) (Pt B) (Pr 7) (DB).**

——S. 6 — Bihar Maintenance of Public Order Act (3 of 1950), S. 9 — Whether ultra vires.

The words "public safety" and "public order" are interchangeable terms in the context in which they have been used and Section 6 of the Ordinance or Section 9 of the Act was not ultra vires the State Legislature. **AIR 1951 Pat 242 (245) (Pt D) (Pr 9) (DB).**

SECTION 21

●——S. 21 — Applicability of S. 107 of Government of India Act (1935) — Necessary conditions — Section 21 of the Ordinance — Validity — No repugnancy with S. 54, Criminal P. C. — Section 107 does not apply. See Government of India Act (1935), S. 107. **51 Cri LJ 921: AIR 1950 FC 59.**

SECTION 23

——Ss. 23 and 24 — Scope — If render Ordinance invalid.

Sections 23 and 24 of Bihar Ordinance 4 of 1949 cannot be held to have the effect of rendering the Ordinance ultra vires. AIR 1950 FC 59, Foll. **51 Cr LJ 936: AIR 1950 Pat 228 (235) (Pt D) (Pr 13) (DB).**

SECTION 24

——Ss. 24, 23 — Sections are not ultra vires. See Public Safety — Bihar Maintenance of Public Order (No. 2) Ordinance (4 of 1949), S. 23. **51 Cri LJ 936: AIR 1950 Pat 228 (DB).**

—BIHAR MAINTENANCE OF PUBLIC ORDER (No. 2) (AMENDMENT) ORDINANCE (5 of 1949)

PREAMBLE

——Pre. — Ordinance if ultra vires — Power of Governor to amend Ordinance duly promulgated by another Ordinance — Government of India Act (1935), S. 88 (2) (e).

There is no warrant for the contention that the Governor of Bihar had no power to amend Ordinance 4 of 1949, by enacting Ordinance 5 of 1949, in view of Section 88 (2) (e) of the Government of India Act, 1935. The power to enact laws in a legislative authority contains within it the inherent power to repeal or amend an enacted law. Section 88 (2) (e) of the Government of India Act is merely an enabling clause by which the Governor could by some order withdraw an Ordinance duly promulgated by him without having to promulgate a fresh repealing Ordinance, and does not mean that the Governor has no power to amend an Ordinance already promulgated by him by duly promulgating an Ordinance under Section 88 of the Government of India Act. 1940 Dacca 33, Dist.; 33 CWN 27, Foll. **51 Cr LJ 936: AIR 1950 Pat 228 (234) (Pt B) (Pr 11) (DB).**

——Pre. — Ordinance has retrospective operation — Interpretation of Statutes — Retrospective operation — Declaratory and amending statute.

No statute shall be construed so as to have retrospective operation, unless its language is such as plainly to require such a construction, and a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary. (1892) 3 Ch 402, Rel. on.

Where an Act is in its nature declaratory the presumption against construing it retrospectively is inapplicable. Where a statute is passed for the purpose of supplying an obvious omission in a former statute, or "to explain" a former statute, the subsequent statute has relation back to the time when the prior Act was passed.

The amending Bihar Ordinance 5 of 1949 should be read as one to which the presumption against construing it retrospectively is inapplicable. The amending Ordinance has a retrospective effect, that is to say, applies to cases where orders of detention had been passed before the date of the amending Ordinance. **51 Cri LJ: 936: AIR 1950 Pat 228 (235) (Pt C) (Pr 12) (DB).**

—BIHAR PREVENTIVE DETENTION ORDINANCE (2 of 1950)

——Pre. — Validity of Ordinance — Constitution of India, Art. 213 (1) — Criminal P. C. (1898), Section 5.

Per Sinha and Sarjoo Prasad JJ. —(Meredith C. J. contra). In promulgating the Bihar Preventive Detention Ordinance (Bihar Ordinance 2 of 1950), the Governor has complied with the terms of Cl. (1) of Art. 213 of the Constitution of India and therefore the Ordinance is not void on that ground.

In the first place, the Article does not require that the Ordinance to be promulgated by the Governor has to state in so many words that the Governor was satisfied as to a certain state of affairs. In the second place, all the paragraphs of the Preamble read together would show that the Governor was satisfied in terms of Article 213 (1) of the Constitution of India.

Per Meredith C. J. — The Ordinance is void as not satisfying the conditions laid down in Article 213 of the Constitution for its promulgation.

For a valid Ordinance, two conditions are necessary under Article 213; (1) that the Governor is satisfied that circumstances exist which require immediate action, and (2) that in his opinion the circumstances require such an Ordinance as he promulgates. The preamble makes it clear that the first of these conditions is satisfied. It is stated that the Governor is satisfied

of the necessity of immediate action. But the second condition is not satisfied. The Governor has not stated, as he should have done, that in his opinion the circumstances required an Ordinance in these terms.

Per Meredith C. J. and Surjoo Prasad J. — There is no other illegality in the Ordinance.

The Government is right in framing the Ordinance in accordance with Art. 22 (4) and not in accordance with the Preventive Detention (Extension of Duration) Order, 1950, made by the President under Art. 22 (7).

The Ordinance is not void on the ground of unreasonableness, so far as it puts restrictions on the personal liberty of the subject.

The provisions of the Ordinance are not repugnant to the provisions of the Criminal P. C. Repugnancy can arise only when one law says "shall" and the other says "shall not". It does not arise when one law says "may in certain circumstances" and the other says "may also in certain circumstances". The latter is the true position as between the Criminal Procedure Code and the Ordinance.

Just as the Penal Code does not prevent the creation of additional offences, so also the Criminal Procedure Code does not prevent the creation of additional procedures. As the Penal Code is not exhaustive of offences, so also Chap. 8, Criminal P. C., is not exhaustive of preventive detention, and, therefore, no question of repugnancy arises.

The State Legislature and, consequently, the Governor by Ordinance has power to create offences, and, in any event, the portions of the Ordinance creating offences are severable from the portions providing for detention. The Ordinance, therefore, cannot be attacked on this ground.

Although under Article 213 (2), an Ordinance framed by the Governor ceases to operate on the expiration of six weeks from the re-assembly of the Legislature, the provision in the Ordinance in question for detention for 3 months and in certain circumstances for a longer period, is merely a case of ex abundanti cautela. If for any reason the Legislature did not meet, the Ordinance would not expire at the end of six weeks, but would continue and it was, therefore, only right and proper to frame it in such a way as to be suitable for its continuance in such circumstances. Even if there was in fact no justification for making provisions of this kind, that would not make the Ordinance invalid or void so long as the Governor was satisfied, however mistakenly, that the circumstances required such provisions, and said so.

Nor is the Ordinance void on the ground of mala fides or as a colourable device to evade constitutional provisions.

In considering the question of bona fides or mala fides the Court is only concerned with the motive and not the results. **51 Cri LJ 1251: ILR 29 Pat 410: AIR 1950 Pat 332 (335, 336, 338, 339, 340, 341, 345, 346) (Pt A) (Prs 7, 10, 20, 22, 23, 26, 31, 37, 38, 39, 52, 55, 58) (DB).**

—BOMBAY CONDITIONS OF DETENTION ORDER (1951)

RULE 12

——Rr. 12, 16 (ii) — Requirement of R. 12 has nothing to do with restriction on number of books. 66 Bom LR 185: 1964 Mah LJ 297: ILR (1964) Bom 300 (DB).

RULE 16

——R. 16 (ii) — Discretion to decide suitability of book — Field within which discretion is to be operated.

The only ground on which book may be withheld from a detenu is on the decision of the Superintendent that it is unsuitable. It is true that the discretion to decide the suitability of the book or publication is vested in the Superintendent. But that discretion will have to operate within a well-defined field. The book may be unsuitable considering the material or the contents of the book which may be objectionable because it preaches violence, it may be vulgar or obscene, it may be pornographic or it may have been proscribed, but beyond the compass of this discretion the Superintendent has no power to withhold a book from the detenu on any other ground. **ILR (1964) Bom 300: 66 Bom LR 185: 1964 Mah LJ 297 (DB).**

——R. 16 — Violation of rule — Detenu can ask for relief under Article 226, Constitution of India. **66 Bom LR 185: 1964 Mah LJ 297: ILR (1964) Bom 300 (DB).**

——Rr. 16, 15, 13 — Contention that what was being given to detenu under provisions of Order is concession and not a matter of right — Contention cannot be accepted if it means that privilege can be withdrawn except in accordance with manner provided in conditions themselves. **1964 Mah LJ 297: 66 Bom LR 185: ILR (1964) Bom 300 (DB).**

——Rr. 16, 13 — Prison official has no general power of regulation of privileges in sense of withdrawal, curtailment, etc., except by way of punishment for breach of duty imposed on detenu by Rules.

The right to withdraw a privilege or any of the privileges is not an arbitary right, nor has the Superintendent an unrestricted power to curtail any of the privileges on the ground that thereby the Superintendent is regulating the privilege. There is no such general power of regulation of privileges in the sense of withdrawal, curtailment or abridgment of the privileges being given to the Superintendent except by way of punishment for a breach of duty imposed on detenu by Rules. Therefore, where a complaint is made by a detenu whose conditions of detention are regulated by the Bombay Conditions of Detention Order, 1951, that complaint will have to be decided with reference to the provisions of the several clauses of the Order of 1951, and not by reference to any other implied power in the Superintendent which has not been shown to exist anywhere outside the provisions of the Order of 1951. **66 Bom LR 185: 1964 Mah LJ 297: ILR (1964) Bom 300 (DB).**

—BOMBAY PUBLIC SECURITY MEASURES ACT (6 of 1947)

SECTION 2

●——S. 2 (1) (b) — Externment order under — Validity — Constitution of India, Arts. 13 and 19 (1) (d) and (e) and (5).

Per Chagla C. J. and Bavdekar J.; (Shah J., contra) — Bombay Act 6 of 1947, to the extent that it empowers the Government to issue an externment order under Section 2 (1) (b), is void under Article 13 (1) of the Constitution, inasmuch as it imposes a restriction on the fundamental rights of the citizen under Art. 19 (1), sub-cls. (d) and (e), such a restriction being an unreasonable restriction.

Per Shah J. (contra). — The provisions of Section 2 (1) (b), Public Security Measures Act, are not inconsistent with the provisions of Part III of the Constitution of India, and therefore not void. The restriction involved in an order of externment passed under Section 2 (1) (b) cannot be said to be an unreasonable restriction on the fundamental right of a citizen under Article 19 (1) (d) and (e).

Per Chagla C. J. — No period for the duration of the externment order is laid down in the statute.

The person against whom an order of externment is to be made has no right whatever to be heard in his defence before he is asked to leave his home and hearth and go and reside in some other place. There is no obligation upon the authority to tell him what he is charged with or what are the grounds against him which make it incumbent upon the Government to ask him to leave his home town. Nor is there any obligation upon the authority to hear the person against whom the order is intended to be made in his defence before the order is made. The restriction imposed on the fundamental rights is not a reasonable restriction.

The Constitution has made the Courts the custodians of the fundamental rights of the citizens, and it is in that spirit and in that capacity that the Court must look upon the nature of the restriction, and even though the absence of a particular safeguard may not be the violation of a fundamental right as such, even so the absence of such a safeguard may result in the restriction not being a reasonable restriction.

Per Bavdekar J. — In case the existing laws which restrict the freedom referred to in Cl. (1) of Article 19 must be reasonable it is obvious that they must provide that any person whose right, for example, of freedom of movement, is restricted must be given an opportunity, may be after an interim order restricting his rights is passed ex parte, of showing cause why an order under a Security Act restricting his movements should not be passed. The right of hearing before condemnation is admittedly a component of the rights which taken together constitute rights of natural justice, and, in case legislation which restricts the fundamental rights has not to be pronounced to be reasonable, it must give the person whose freedom is restricted, an opportunity to be heard. The manner in which he is to be heard is, of course, a different matter.

Per Shah J. (contra) — There is nothing in the Constitution of India which enables the Court to declare a piece of legislation as void merely because the Legislature thought it expedient to provide that the satisfaction of an executive officer instead of a Court should be a condition precedent to the issue of an order intended to protect either the security of the State or the interest of the general public.

In terms the order passed under Section 2 (1) (b) may be unlimited in duration, but it is not necessary that the executive officer who passes the order must necessarily pass an order of an unlimited duration, nor can the order be really said to be of unlimited duration in view of the fact that the parent Act under which the orders are passed is necessarily of a temporary character passed in order to meet an emergency, and the effectiveness of the order would remain so long as the statute under which the orders are passed would remain operative.

The sole ground of absence of a provision for being heard either before or after the passing of the order of externment, which is less drastic than an order of detention, cannot render the provision of Section 2 (1) (b) void or inoperative as from 26th January 1950. The Constitution has not provided for a right of being heard before any restriction on any fundamental right is placed, and in the absence of such a provision made expressly or by necessary implication, a provision which enables an externment order to be passed cannot be deemed to be void merely on the ground that it may be regarded as contrary to rules of natural justice. Jeshingbhai v. Emperor, **52 Bom LR 544: (1950) 20 Bom Cri Cas 188: 52 Cri LJ 120: ILR (1950) Bom 539: AIR 1950 Bom 363 (368, 369, 370, 373) (Pt D) (Prs 9, 10, 11, 13, 14, 16, 23) (FB).**

——S. 2 (6) and (1) — Offence under S. 2 (6) — Satisfaction of detaining authority — Burden and nature of proof.

In the case of prosecution under Section 2 (6) for contravention of order under Section 2 (1) the burden is upon the prosecution to establish every ingredient which goes to constitute the offence and one of the most important ingredients is that the detaining authority was satisfied as to the matters set out in S. 2 (1) before the order was made. It is not sufficient to tender the order which states that the detaining authority is satisfied. The detaining authority must step into the witness box and make that statement on oath in order to enable the accused to challenge that statement, if he is so advised, in cross-examination. **52 Bom LR 223: 1949-50 Bom Cri Cas 149: 52 Cri LJ 1184: AIR 1950 Bom 330 (330) (Pt A) (Pr 2) (DB).**

——S. 2 (6) — Order under Section 2 (1) to furnish security — Failure to comply does not amount to contravention of the order within the meaning of S. 2 (6). 52 Bom LR 226: 1949 Bom Cri Cas 152: 51 Cri LJ 972: ILR (1950) Bom 321: AIR 1950 Bom 257 (258) (Pr 2) (DB).

——S. 2 (A-1) — Detention for collateral purpose — Cri. Appln. No. 18 of 1948, D/- 4-2-1948 (Unrep.) (Bom.), Overruled.

When the detaining authority makes up his mind to detain a person who is alleged to have committed an offence, then, the detaining authority has made his choice and it would not be permissible to him to investigate the offence while still keeping the person under detention and not complying with the provisions of the law with regard to investigation. If the purpose of detaining a person is a collateral purpose i. e., to deprive him of his rights and safeguards under the Criminal Procedure Code and to carry on an investigation without the supervision of the Court then the detention is mala fide and cannot be justified: Crim. Appln. No. 18 of 1948, D/- 4-2-1948 (Unrep.) (Bom) **Overruled.** Maledath Bharathan v. Commissioner of Police, **ILR (1950) Bom 438: 52 Bom LR 268: 1949 Bom Cri Cas 157: AIR 1950 Bom 202 (204) (Pt A) (Prs 5, 6) (FB).**

——S. 2 (1) (a) — Grounds of detention — Detaining authority not properly applying its mind to question of detention — High Court can interfere — Some grounds of detention good and some bad — Whole order is not vitiated — Inciting ignorant people to resort to criminal activities held to be bad ground for want of precision.

The powers of the High Court to interfere with detention orders made under the Act are limited and are confined to cases where it appears that the detaining authority has not properly applied its mind to the question as to whether the detention of the person is or is not

justified under the Act. Under the Act, as it now is, it is not compulsory for the detaining authority to furnish to the detenu a statement of the ground or grounds upon which the order of detention has been made. When, however, grounds have been furnished, it is permissible for the High Court to consider the statement of those grounds together with the order made; and, if the statement of grounds does show that the detaining authority has not properly applied its mind to the question of detention then it has jurisdiction to interfere and direct that the detenu be released.

When there are several grounds given, some of which are good and some bad the whole order is not vitiated; there is a sharp distinction between a ground which is outside the purview of the statute and a ground which is bad because it lacks precision and accuracy. In the latter case the ground has to be completely ignored as if no ground was furnished at all, and if the grounds which are no grounds at all, inasmuch as no precise information was furnished to the detenu, are eliminated, and there still remain a ground or grounds which are precise and accurate and which can justify the order, then the order made by detaining authority must stand. AIR 1948 Bom 334 (FB), Foll.

Where the ground of detention stated that the detenu was likely to act in a prejudicial manner by inciting ignorant people to resort to criminal activities:

Held, that the ground was bad for want of precision. **51 Bom LR 1038: 51 Cri LJ 665: 1949 Bom Cri Cas 121: ILR (1950) Bom 177: AIR 1950 Bom 126 (126, 127) (Prs 3, 4) (DB).**

SECTION 9-A

——S. 9-A — Order under — Writ of Certiorari — Issue of — Certiorari.

The Legislature has in Section 9-A left it to the satifaction of the Provincial Government as to the nature and necessity of the action to be taken, but as far as the purpose for which action has to be taken it has not chosen to leave it to the subjective determination of the Government, but has provided that the purpose must be objectively established and must be a condition precedent before Government could take the action contemplated by the section. An order issued by the Government under Section 9-A is, therefore, not an executive order but a judicial or quasi-judicial order against which a writ of certiorari can be issued. **52 Bom LR 62: 1949 Bom Cri Cas 139: 51 Cri LJ 1184: ILR (1950) Bom 762: AIR 1950 Bom 213 (214, 217) (Pt A) (Prs 2, 4, 10) (DB).**

SECTION 12

●——S. 12 — Validity — Section is unconstitutional as contravening Art. 14 of the Constitution — (Constitution of India, Art. 14).

Majority view, Patanjali Sastri, C. J. dissenting — Article 14 condemns discrimination not only by a substantive law but also by a law of procedure.

The Bombay Act, besides providing for enhanced punishment and whipping, eliminates the committal proceedings permits the Special Judge to record only a memorandum of the evidence, confers on him a larger power to refuse to summon a defence witness, than what is conferred on a Court by Section 257 (1), Cr. P. C. and also deprives the accused of his right to apply for a transfer or for revision. These departures from the ordinary law cause prejudice to persons subjected to the procedure prescribed by the Act and constitute a discrimination against the persons tried by the Special Judge. In view of these departures from the ordinary law brought about by the Bombay Act, Section 12 of the Act in so far as it authorises the Government to direct specific and particular 'cases' to be tried by the Special Judge is unconstitutional and void. 1952 SCR 284 and 1952 SCR 435, Rel. on.

Per Patanjali Sastri, C. J. — The procedural variations brought about by the Bombay Act in the recording of evidence and the summoning of witnesses are not so serious as to amount to a denial of the equal protection of the laws within the meaning of Article 14. Even if the accused were to be tried under the normal procedure of the Criminal Procedure Code after 26th January, 1950, the omission to record the evidence in full and the refusal to summon a witness in the circumstances mentioned in Section 13 of the Bombay Act may well be regarded as mere irregularities curable under S. 537 of the Code. As regards transfer, it does not fit in with the scheme of trial before Special Judge, and, unless any system of trials by Special Court is to be condemned as violative of Article 14, a prohibition of transfer cannot be regarded as falling within the inhibition of Art. 14. Lachmandas Kewalram v. State of Bombay, **1952 Cri LJ 1167: 1952 SCJ 339: 1952 Mad WN 752: 1952 Mad WN (Cri) 200: 54 Bom LR 854: (1952) SCA 352: 1952 SCR 339: AIR 1952 SC 235 (239, 242) (Pt A) (Prs 10, 22).**

●——S. 12 — Constitution of India, Art. 14 — Classification — When permissible — Classification under Section 12 of Bombay Act (6 of 1947) — **Held,** arbitrary and void after Constitution. See Constitution of India, Art. 14. **1952 Cri LJ 1167: AIR 1952 SC 235.**

●——S. 12 — Cases referred to Special Judge before Constitution — Validity of special procedure after coming into force of Constitution — (Constitution of India, Arts. 14, 13 (1)).

(Majority view, Patanjali Sastry, C. J., Contra):

If in the absence of any special provision to the contrary, no person has a vested right in procedure, it must follow as a corollary that nobody has a vested liability in matters of procedure in the absence of any special provision to the contrary. If this is the position when the law of procedure is altered by statute, the position would not be different when the Act prescribing the discriminatory procedure becomes void by reason of its repugnancy to the equal protection clause of the Constitution. Although the substantive rights and liabilities acquired or accrued before the date of the Constitution remain enforceable, nobody can claim after that date, that those rights or liabilities must be enforced under that particular procedure although it has, since that date, come into conflict with the fundamental right of equal protection of laws guaranteed by Article 14. 1951 SCR 228, Referred.

The Special Procedure prescribed by the Bombay Act constitutes a departure from the ordinary law of procedure and is, in some important respects, detrimental to the interest of the persons subjected to it and as such is discriminatory. As the Act was valid in its entirety before the date of the Constitution, that part of the proceedings before the Special Judge, which, upto that date had been regulated by this special procedure, cannot be questioned, however discriminatory it may have been, but the continua-

tion of the application of the discriminatory procedure to their cases after the date of the Constitution constitutes a breach of their fundamental right guaranteed by Article 14 and being inconsistent with the provisions of that Article the special procedure becomes void under Art. 13 and as there is no vested right or liability in matters of procedure the accused are entitled to be tried according to the ordinary procedure after the date of the Constitution.

Held, that the conviction of the accused on trial after the date of the Constitution according to the special procedure and the sentences passed on them could not be supported and were set aside. 54 Cal 508, Disting.

Patanjali Sastri, C. J. — Equal protection of the laws under Art. 14 postulates persons in the same situation and in the same circumstances claiming that the same law should be applied to them. In this case it could not be said that the accused whose trial by the Special Judge had been lawfully commenced and was pending at the commencement of the Constitution, were in the same situation with persons who committed the same offences after the Constitution came into force, and no complaint of discriminatory treatment by reason only of the trial having been continued under the special procedure can be sustained, even assuming that the ordinary procedure under the Criminal Procedure Code became applicable to the accused on and after 26th January 1950.

In view of Section 1 (2) Cr. P. C., however, it could not be said that on the 26th January 1950 the accused were in a position to claim that they were entitled to be tried under the ordinary procedure like those who committed the same offences after that date or who, having committed them before such date, had not been directed to be tried by the Special Judge.

Further the jurisdiction of the Special Judge which was validly created and exercised over the case did not cease to continue on and after 26-1-1950 as he was merely working out the application of the Bombay Act and there was nothing which affected the competency of the Special Judge to try the case after 26-1-1950. 54 IA 152, Disting. Lachmandas Kewalram v. State of Bombay, **1952 Mad WN 752: 1952 Mad WN (Cri) 200: 1952 SCR 710: 54 Bom LR 854: (1952) SCA 352: 1952 Cri LJ 1167: 1952 SCJ 339: AIR 1952 SC 235 (238, 243, 245) (Pt C) (Prs 6, 7, 8, 25, 26, 28).**

SECTION 13

●——S. 13 (2) (a) (as extended to province of Delhi) — Pardon — Special judge can tender pardon to accused in a trial under Act — Powers are not limited to offences under the Act.

Per Achhruram J.:— The words "under the Act" in S. 13 (2) (a) have not been used to qualify the immediately preceding word 'offence' but have been used as qualifying the word "trying". It cannot, therefore, be said that the Special judge has power to tender pardon only in respect of offence committed under the Act. Nathu Ram V. Godse v. Rex, **ILR (1956) Punj 499 (FB).**

—C. P. AND BERAR GOONDAS ACT (10 of 1946)

SECTION 2

——S. 2 — Penal Code, S. 499 — Publication of photograph with false caption depicting persons therein as soldiers of Goonda war — Publication per se defamatory — Knowledge by publisher that it affects complaint immaterial — Every person photographed can file complaint — 'Goonda' — Meaning — Definition in C. P. Act (10 of 1946), Rel. on. See Penal Code (1860), S. 499. **1962 (2) Cri LJ 142 (Ker).**

SECTION 4

●——S. 4 (as amended by Act 49 of 1950) — Constitutional validity — Sections 4 and 4-A contravene Art. 19 (1) (d) and (e) and the whole Act is invalid. See Constitution of India, Article 19 (1) (d). **1961 (1) Cri LJ 442: AIR 1961 SC 293.**

SECTION 4-A

●——S. 4-A (as amended by Act 49 of 1950) — Constitutional validity — Sections 4 and 4-A contravene Art. 19 (1) (d) and (e) and whole Act is invalid. See Constitution of India, Art. 19 (1) (d). **1961 (1) Cri LJ 442: AIR 1961 SC 293.**

—C. P. AND BERAR MAINTENANCE AND RESTORATION OF ORDER AND COLLECTION OF FINES (INDEMNITY) ACT (2 of 1945)

SECTION 4

——S. 4 — Plaint alleging that defendants 1 and 2, servants of Provincial Government, defendant 6 committed acts of assault and danger to property in league with defendant 3, also a servant of Provincial Government and defendants 4 and 5 not servants of Provincial Government — Defendants 4 and 5 alleged to have acted for their own ends — Question of good faith against defendants 1 to 3 held did not arise but to be considered against defendants 4 and 5 — Suit to be discharged against defendants 1 to 3 and 6 but not against defendants 4 and 5. **AIR 1951 Nag 419 (420 to 422) (Pt A) (Prs 6, 13, 15, 16, 22) (DB).**

——S. 4 — Suit instituted before passing of Act and pending — No question of previous sanction arises — Act discharges suit — Section 4 in such case leaves no discretion to Court. **AIR 1951 Nag 419 (422) (Pt B) (Prs 25 to 27) (DB).**

——S. 4 — Section is intra vires the Provincial Legislature. **AIR 1951 Nag 419 (423, 424) (Pt C) (Prs 31, 35) (DB).**

——S. 4 — Civil P. C. (1908), S. 35 — Suit discharged under C. P. and Berar Maintenance and Restoration of Order and Collection of Fines (Indemnity) Act (2 of 1945), S. 4 — Court not to direct one party to pay costs of other. See Civil P. C. (1908), S. 35. **AIR 1951 Nag 419 (DB).**

—C. P. AND BERAR PUBLIC SAFETY ACT (62 of 1948)

SECTION 2

●——S. 2 (1) (a) — Government of India Act (1935), Sch. 7, List 2, Entry 1 — Words "for reasons connected with the maintenance of public order' explained — Detention order under C. P. and Berar Public Safety Act— Court, if can substitute its judgment for satisfaction of executive authority.

The language of S. 2 (1) (a), of the Act clearly shows that the responsiiblity for making a detention order rests on the provincial executive, as they alone are entrusted with the duty of maintaining public peace, and it would be a serious derogation from that responsibility if the Court were to substitute its judgment for the satisfaction of the executive authority and, to that end, undertake an investigation of the sufficiency of the materials on which such satisfaction was grounded. Machindar Shivaji v. The King, **1949 FCR 827: 51 Cri LJ 1480: AIR 1950 FC 129 (130) (Pt A) (Pr 5).**

●——**S. 2 (1) (a) — Provincial Government, if obliged to hold enquiry before issuing detention order — Court, if can examine grounds disclosed by Government.**

It is true that the Act departs from the usual pattern of public safety legislation in eliminating an important safeguard, namely, a review of grounds of detention by an independent body, like an Advisory Council, against the misuse of the power of detention. But such elimination cannot by itself import an obligation on the Provincial Government to hold an enquiry before issuing a detention order, which is a purely executive act when the Act nowhere imposes such an obligation on the Government. The Court can, however, examine the grounds disclosed by the Government to see if they are relevant to the object which the legislation has in view, namely, the prevention of acts prejudicial to public safety and tranquillity, for "satisfaction" in this connection must be grounded on material which is of rationally probative value. Machindar Shivaji v. The King. **1949 FCR 827: 51 Cri LJ 1480: AIR 1950 FC 129 (130) (Pt B) (Pr 6).**

●——**S. 2 (1) (a) — Party spreading doctrine of violence — Party not outlawed — Affiliation to such party, if ground for detention.**

While mere belief in or acceptance of any political ideology may not be a ground for detention under the Act, affiliation to a party which is alleged to be spreading its "doctrine of violence rendering life and property insecure and trying to seize power by violence" may, in certain circumstances, lead to an inference that the person concerned is likely to act in a manner prejudicial to the public safety, order or tranquillity. The fact that the party had not been outlawed is immaterial, that being a matter of expediency. Machindar Shivaji v. The King. **1949 FCR 827: 51 Cri LJ 1480: AIR 1950 FC 129 (130) (Pt C) (Pr 7).**

●——**S. 2 (1) — Detention under — Validity of, after coming into force of Constitution —Constitution Order No. 8 — Effect — Validity of — Subsequent order of detention under Preventive Detention Act, 1950, S. 3 (1) — Preventive Detention Act (1950), S. 3 (1).**

Per Mudholkar J.:— Since the provisions of S. 2 (1), C. P. and Berar Public Safety Act, 1948, in so far as they permitted the detention of a person for more than three months without reference to an Advisory Board had become void on coming into force of the Constitution of India, the order of detention under S. 2 (1) passed against certain person lapsed after the inauguration of the Constitution as more than three months had expired since his detention. Constitution Order No. 8 could not and did not revive or keep in force the order but only permitted the continuance of his detention. The State Government could, therefore, act under S. 3 (1) (a), (Preventive Detention Act, and pass the new order against him under the Acts. B. N. Mukherjee v. State Government Madhya Pradesh. **1951 All WR (Supp) 21: 1951 Nag LJ 71: ILR (1951) Nag 1: AIR 1951 Nag 2 (2, 3) (Pt D) (Pr 11) (FB).**

——**S. 2 (1) (a) — Constitution of India, Articles 22 (7), 373 — Validity of S. 2 (1) (a) — Order of President C. O. 8 dated 26th January 1950 — Effect on order of detention under Section 2 (1) (a).**

Article 22 of the Constitution contemplates and permits the preventive detention of a person, though subject to certain conditions. Therefore, S. 2 (1) (a), in so far as it provides for the detention of certain classes of persons, is not rendered void, by the Constitution. What is rendered void, however, is the implied provision conferring a power to detain a person for an indefinite period because sub-clause (b) of Cl. (7) of Art. 22 requires a maximum period to be fixed by the law governing preventive detention.

The power to detain a person and the power to detain a person for an indefinite period are distinct and therefore, the provision conferring the former is not rendered void merely because the provision conferring the latter is void. As a consequence of the coming into force of the Constitution, what has happened is that the powers to detain a person will be thenceforth automatically subjected to the restrictions and limitations imposed by the Constitution. But the powers to order the detention of a person still remains.

Section 2 (1) (a), being thus still extant, is "any law" within the meaning of the expression used in sub-clause (a) of Cl. (7) of Art. 22 and hence the President can by virtue of the powers conferred on him, by order, prescribe the circumstances under which the period of detention may extend beyond three months without obtaining the opinion of the Advisory Board. The President's Order published with Notification No. C. O. 8 dated 26th January 1950 is such an Order and has the effect of validly extending the period of detention of the persons already detained under S. 2 (1) (a), C. P. and Berar Act, to three months from 26th January. **1951 Nag LJ 1: 51 Cri LJ 1372: AIR 1950 Nag 203 (207, 208) (Pt D) (Prs 24 to 26, 28) (DB).**

SECTION 14

——**S. 14** — The Provincial Government (now the State Government) is not a person within meaning of Article 14 of the Constitution when it exercises its powers under Section 14 of the C. P. and Berar Public Safety Act, 1948, or the corresponding provision, namely Section 11 of M. P. Public Security Measures Act, 1950, which has superseded the C. P. and Berar Public Safety Act, 1948. For, while exercising those powers the State Government performs one of its essential functions, the functions of maintaining the Security of the State or public order. When the State performs such a function it is different from other persons whether natural or artificial. See Constitution of India, Art. 14. **1953 Nag LJ 161: ILR (1952) Nag 830: AIR 1953 Nag 35 (DB).**

——**S. 14 (1) — "Supplies or services".**

The words "supplies or services" are not inapt to include the supply of housing. The requisitioning of the premises for housing the refugees is covered by Section 14 (1). **1951 Nag LJ 212: ILR (1951) Nag 395: AIR 1951 Nag 386 (386) (Pt A) (Pr 5) (DB).**

——**Ss. 14 (1) and 29 — Power of requisition delegated to Deputy Commissioner — Order of Additional Deputy Commissioner requisitioning premises — Validity — C. P. Land Revenue Act, S. 9-A.**

The C. P. and Berar Public Safety Act confers no power of requisition upon the Deputy Commissioner. The power is conferred by Section 14 (1) on the Provincial Government. The Deputy Commissioner exercises the power of requisition by virtue of the delegation made by the Provincial Government under S. 29. Such a delegation of power cannot by any means be regarded as a power conferred by the Act. Section 9-A of the C. P. Land Revenue Act cannot be of any avail to the Additional Deputy Commissioner in exercising a power conferred upon the Deputy Commissioner not by any enactment

but by virtue of a notification under an Act. An order of the Additional Deputy Commissioner requisitioning premises under Section 14 (1) of the C. P. and Berar Public Safety Act is, therefore, invalid. **ILR (1951) Nag 395: 1951 NLJ 212: AIR 1951 Nag 386 (387) (Pt B) (Pr 6) (DB).**

——S. 14 (1) — Satisfaction of requisitioning authority.

Where there is no recital in the order that it is necessary or expedient to requisition the property in question, nor is there any affidavit filed to establish that the authority requisitioning the property has in fact applied its mind to the question and formed an opinion as required by the Statute, no presumption can be made in favour of the order. In the absence of proof that the order has been passed in conformity with the requirements of the statute, the order is liable to be quashed. **1951 Nag LJ 212: ILR (1951) Nag 395: AIR 1951 Nag 386 (387) (Pt C) (Pr 9) (DB).**

SECTION 16

——Ss. 16 and 17 — Offence under S. 307, Penal Code made punishable with death by Section 16 — Notification excluding trial by jury in such offences— Sessions Judge trying offence under S. 307, Penal Code, with jury — Trial is invalid — Provisions of Section 17 do not apply to Sessions Court.

Section 16, Central Provinces and Berar Public Safety Act, 1948, prescribes inter alia that whoever commits an offence under Section 307, Penal Code, may be punished with death, and the notification issued by the Provincial Government under Section 269, Criminal P. C., excluded from trial by jury offences punishable with death. It is true that Section 17 of the Act provides that any offence under Sections 307, 324, 325 or 326, Penal Code shall not, except in cases in respect of which a direction under Section 21 has been issued, cease to be triable by any Court which might have tried the offence had it not been made punishable with the enhanced penalty specified in Section 16, but this provision cannot apply to Courts of Session for the obvious reason that those Courts are empowered to try offences which are punishable with death. The provision must apply to the Courts of Section 30 — Magistrates who are empowered to try in certain areas all offences not punishable with death. This view is reinforced by the proviso to Section 17, Central Provinces and Berar Public Safety Act, 1948, which inhibits a Court not constituted under it from inflicting a punishment in excess of the punishment which it is authorised to inflict under Sections 32, 33 or 34, Criminal P. C. A trial by Jury of an offence under Section 307, Penal Code by a Sessions Judge, is therefore, not valid. **51 Cri LJ 474: ILR (1950) Nag 925: AIR 1950 Nag 49 (51) (Pt A) (Pr 7).**

SECTION 17

——Ss. 17 and 16 — Offence under Section 307, Penal Code made punishable with death by Section 16 — Notification excluding trial by jury in such offences— Sessions Judge trying offence under Section 307, Penal Code, with jury — Trial is invalid — Provisions of Section 17 do not apply to Sessions Court. See C. P. and Berar Public Safety Act (62 of 1948), S. 16. **51 Cri LJ 474: AIR 1950 Nag 49.**

SECTION 29

——S. 29 — Exercise of power under S. 14 (1) by Additional Deputy Commissioner — C. P. and Revenue Act (2 of 1947), S. 9-A.

Section 9-A of the Land Revenue Act cannot be of any avail to the Additional Deputy Commissioner in exercising of power conferred upon the Deputy Commissioner not by any enactment but by virtue of a notification under an Act. The Deputy Commissioner exercises the power of requisition by virtue of the delegation made by the Provincial Government under Section 29. Such a delegation of power cannot by any means be regarded as a power conferred by the Act itself within the meaning of Section 9-A of the C. P. Land Revenue Act. **1951 Nag LJ 212: ILR (1951) Nag 395: AIR 1951 Nag 386 (387) (Pt B) (Pr 6) (DB).**

—COCHIN CRIMINAL LAW AMENDMENT ACT (27 of 1124 ME)

SECTION 3

●——S. 3 — Notification under — Prosecution after repeal of Act.

(Koshi and Govinda Pillai, JJ., in the order of reference):— The omission of the word 'notification' in Section 73 (2) of the Travancore-Cochin Public Safety Measures Act (5 of 1950) is of no moment in view of Section 23 of the Travancore-Cochin Interpretation and General Clauses Act (1125). Hence where the notification declaring the communist party unlawful under Section 3 of the Cochin Criminal Law Amending Act (27 of 1124) was in force when the meeting of the Communist party was held but the Act was repealed by Act 5 of 1950 when the action was taken under S. 4 against the accused it cannot be said that the prosecution was started under a defunct notification. By transgressing the law as enacted in Section 4 (1) and (2) of the Cochin Criminal Law Amendment Act (27 of 1124) the accused persons had incurred a liability in the sense of Section 73 (3) of the Public Safety Measures Act and Clause (c) expressly authorises an institution of an investigation or a legal proceeding in respect thereof notwithstanding the repeal of the law under which the liability was incurred. George Chandayammury v. State. **1952 Ker LT 178: 1952 Cri LJ 1066: ILR (1952) Tra-Co 1: AIR 1952 Trav-Co 217 (219) (Pt A) (Prs 2, 3) (FB).**

●——Ss. 3, 31, 33 and 40 — Declaration under S. 3 — Finality.

Subject to the Order of the High Court on application, if any, made under Section 31 a declaration under Section 3 is final and conclusive for all purposes and a person prosecuted under Section 4 for being a member of an association declared to be unlawful or for other activities in connection therewith could not question its validity. To make an order under Section 3 is an executive act and it cannot be canvassed directly or indirectly in Court except as the law makes provision in that behalf. Apart from the language of Section 3, sub-sections (2) and (3) of Section 33 also make that point clear. To hold otherwise would be to hold that even when the High Court refuses to set aside the order, a subordinate Criminal Court can examine its validity if and when a prosecution happens to be launched under Section 4. S. 40 does not justify an inference to the contrary. George Chandayammury v. State. **1952 Ker LT 178: 1952 Cri LJ 1066: ILR (1952) Trav-Co 1: AIR 1952 Trav-Co 217 (222, 223) (Pt B) (Prs 10, 11) (DB).**

●——S. 3 — Scope — If void as contravening Art. 19 (1) (c) and (4) of the Constitution — Notification dated 2-1-1950 — Validity of — Prosecution for contravention of — Sustainability.

Section 3 of the Cochin Criminal Law Amendment Act (27 of 1124 ME) oversteps the bounds of permissible legislation and it therefore has to be declared to have become void on the coming into force of the Constitution. Likewise the notifications issued under that section would also become void. The safeguard of a judicial review which is provided in the Act is really illusory. The absence of a provision for proper notice or sufficient publicity and the imposition of a time limit for seeking a review of the Government order or Notification by the High Court make that law overstep the bounds of permissible legislation in such a way that Art. 19 (4) of the Constitution cannot save it. It is an unreasonable restriction on the exercise of the right conferred by Article 19 (1) (c), and therefore on the coming into force of the Constitution not only Section 3 of the Act, but also the Notifications issued under it became void. The prosecution launched for transgression of the Notification, dated 2-1-1950, is therefore clearly unsustainable, and the charge and proceedings must therefore be quashed. AIR 1950 SC 27; AIR 1950 SC 124; AIR 1950 SC 129; AIR 1950 SC 211; AIR 1950 Bom 363 (FB); AIR 1950 Cal 274; AIR 1950 Pat 166; AIR 1951 SC 128; AIR 1951 SC 467; AIR 1951 Bom 188; AIR 1951 Mad 147, Rel. on. Antony v. State of Travancore Cochin, **1952 Ker LT 178: 1952 Cr LJ 1066: ILR (1952) Trav-Co 1: AIR 1952 Trav-Co 217 (223, 224) (Pt D) (Prs 13, 17, 18, 19) (FB).**

SECTION 31

●——S. 31 — Declaration under S. 3 — Finality. See Public Safety — Cochin Criminal Law Amendment Act (1124 ME), S. 3. **1952 Cri LJ 1066: AIR 1952 Trav-Co 217 (FB).**

SECTION 33

●——S. 33 — Declaration under S. 3 — Finality. See Public Safety — Cochin Criminal Law Amendment Act (1124), S. 3. **1952 Cri LJ 1066: AIR 1952 Trav-Co 217 (FB).**

SECTION 40

●——S. 40 — Declaration under S. 3 — Finality. See Public Safety — Cochin Criminal Law Amendment Act (1124), S. 3. **1952 Cri LJ 1066: AIR 1952 Trav-Co 217 (FB).**

—CRIMINAL LAW AMENDMENT ACT (14 of 1908)

See Criminal Law Amendment Act (14 of 1908).

—CRIMINAL LAW AMENDMENT ACT (23 of 1932)

See Criminal Law Amendment Act (23 of 1932).

—CRIMINAL LAW AMENDMENT ACT (46 of 1952)

See Criminal Law Amendment Act (46 of 1952).

—CRIMINAL LAW AMENDMENT ORDINANCE (29 of 1943)

See Criminal Law Amendment Ordinance (29 of 1943).

—CRIMINAL LAW AMENDMENT ORDINANCE (38 of 1944)

See Criminal Law Amendment Ordinance (38 of 1944).

—EAST PUNJAB PUBLIC SAFETY ACT (5 of 1949)

SECTION 3

●——Ss. 3 (4), 4 (6) — Representation to advisory board — No provision as to powers of board — Act not invalid on that ground.

A reference to the advisory board constituted under Section 3 (4) necessarily implies a consideration of the case by such board. The absence of an express statement to that effect in the impugned Act does not invalidate the Act. N. B. Khare v. State of Delhi, **86 Cal LJ 83: 1950 Mad WN 440: 1950 Mad WN (Cri) 120: 1950 All LJ 506: 1950 SCJ 328: 1950 All WR 514: 1950 SCR 519: 51 Cri LJ 550: 1950 Raj LW 398: AIR 1950 SC 211 (215) (Pt E) (Pr 8).**

——S. 3 (5), Proviso — Scope — Vagueness of grounds supplied — Effect.

Vagueness of grounds supplied does not connote non-compliance with the provisions of Section 3 (5), E. P. Public Safety Act, **1952 Cr LJ 1529: AIR 1952 Punj 359 (360) (Pt A) (Pr 4) (DB).**

——S. 3 (5) — Scope — Non-compliance — Grounds not supplied within reasonable time — Legality of detention.

The provisions of Section 3 (5), E. P. Public Safety Act, are mandatory and non-compliance with their terms makes the detention illegal. Further the grounds must be supplied within a reasonable time and if they are not so supplied the delay amounts to a breach of the provisions of Section 3 (5) and renders the detention illegal. **1952 Cr LJ 1529: AIR 1952 Punjab 359 (360, 361) (Pt B) (Prs 7, 8, 9) (DB).**

——S. 3 (4) — Order extending period of detention under old Act is not invalid especially where the detenu is detained under the subsequent order further extending his detention under correct provision of law. **AIR 1951 Punj 216 (221) (Pt D) (Pr 12) (DB).**

——S. 3 (5) — Detention under Punjab Public Safety Act extended under new Act — It is not necessary to comply with provisions of S. 3 (5) of the old Act. **AIR 1951 Punj 216 (222) (Pt E) (Pr 14) (DB).**

——S. 3 (5) — Non-compliance with — Effect.

Though the executive orders of the Government in force at time when the order of detention was passed did not require the District Magistrate to communicate to the detenu the grounds of his detention and to inform him of his right to make representation to the Provincial Government, it is his duty to comply with the statutory formalities in Section 3 (5) as soon as the Act of 1949 is published in the Gazette. Hence though the order of detention is valid at its inception the subsequent detention becomes wholly void and inoperative in the eye of the law. **52 Pun LR 141: 51 Cri LJ 1335: AIR 1950 East Punj 271 (272) (Pt A) (Prs 6, 10).**

——S. 3 (5), Proviso — Scope of.

The proviso to Section 3 (5) does not contemplate that the order of detention will not be invalid even if no communication whatsoever is made to the detenu or that it is open to the Provincial Government to comply or not to comply with the direction given by the Legislature. **52 Pun LR 141: 51 Cri LJ 1335: AIR 1950 East Punj 271 (272) (Pt B) (Pr 7).**

——S. 3 — Grounds — Sufficiency.

Where the grounds supplied to the detenu merely state that he took part in subversive activities and committed breach of the public tranquillity the information given is not merely vague, insufficient or indefinite but amounts to

no information at all and there is no compliance with all the provisions of law as contained in Section 3 and the continued detention of the detenu becomes illegal. **51 Cri LJ 1237: AIR 1950 East Punj 222 (225) (Pt A) (Prs 13, 14).**

——S. 3 — Reasons not within scope of Act — Effect.

If a reason is given for detention of the person which is not within the scope and ambit of the Act conferring the power upon the detaining authority then the whole order is vitiated notwithstanding the fact that other reasons given are good. **51 Cri LJ 1237: AIR 1950 East Punj 222 (224) (Pt B) (Pr 10).**

——S. 3 (5), Proviso — Interpretation.

If the proviso nullifies the effect of sub-section (5), the two have to be read and construed together. The proviso cannot be read in a manner to say that if the sub-section requires some information to be given no information is to be given merely because indefiniteness, vagueness and insufficiency are envisaged by the statute. **51 Cri LJ 1237: AIR 1950 East Punj 222 (224) (Pt C) (Pr 11).**

——S. 3 — Detenu detained for something already done — Detention is not preventive but punitive and is illegal.

The executive must not detain a subject in order to punish him for what he has already done but in order to prevent him from doing something which in the opinion of the executive is likely to affect the public safety, etc. The Act can only be used for prevention and not for punishing of persons. If the District Magistrate is of the opinion that the detenu had started malicious propaganda and had issued posters, which, according to him, were objectionable from communal point of view, then it is open to him to take action against the detenu under Section 153-A, Penal Code, or under Section 108, Criminal P. C. The Act is not intended to suspend the ordinary criminal tribunals of the land or prevent them from exercising their ordinary jurisdiction. In such a case the action of the executive certainly is dehors the object of Section 3 and the detention of the detenu is illegal. AIR 1946 Bom 32, Rel. on. **51 Cri LJ 888: AIR 1950 East Punj 172 (174) (Pt A) (Prs 9, 10).**

——S. 3 — Whether detenu is doing propaganda objectionable from communal point of view — District Magistrate is sole judge — High Court cannot adjudicate on such fact. **51 Cri LJ 888: AIR 1950 East Punj 172 (174) (Pt B) (Pr 9).**

——S. 3 — Bona fides — Arrest under specific charge — Charge not made out — Detention under Act on same facts — Bona fides of detention become doubtful.

In a case where a man is arrested and ordered to be detained under Section 3 of the Act after having been originally arrested on a specific charge which has either collapsed or been withdrawn, there must always remain a strong suspicion that his detention has been ordered on the very facts which formed the basis of the specific charge against him, and which could not be substantiated in a Court of law, since after the date of his first arrest his conduct could not have furnished any fresh material against him. To this extent the bona fides of the order of detention become doubtful, but it cannot be held that in every such case the detention becomes illegal. **52 Pun LR 17: 51 Cri LJ 599: AIR 1950 East Punj 162 (164) (Pt A) (Pr 2).**

——S. 3 (4) — Advisory Committee under old Punjab Public Safety Act, 1947, automatically treated as Advisory Tribunal under S. 3 (4) — It is not properly constituted Tribunal under Act.

It does not appear that Section 3, Punjab Public Safety Act of 1947 made any provision for the review of cases of persons detained under the section by any form of Advisory Committee or Tribunal and so the setting up of such an Advisory Committee by the Provincial Government to review such cases appears to have been an act of grace, performed perhaps in response to the pressure of public opinion. A body thus gratuitously constituted to deal with cases under the old Act cannot automatically and without any further order or notification become the Advisory Tribunal required by sub-section (4) of Section 3, of the new East Punjab Public Safety Act 1949, and in such a case, there is no validly constituted Advisory Tribunal under sub-section (4). **52 Pun LR 17: 51 Cri LJ 599: AIR 1950 East Punj 162 (164) (Pt B) (Pr 4).**

——S. 3 (4) — Order under, in question — Affidavit should be by Secretary to Government and not by Superintendent of Police C. I. D.

Generally when any action of the Provincial Government is in question the Secretary to the Government in the Department concerned is the officer through whom any order is conveyed or any information supplied and an affidavit on the point should be that of the Home Secretary, Since sub-section (4) of Section 3 itself requires that the Provincial Government shall as soon as may be and ordinarily not more than two months after the date on which the detenu has been taken into custody refer his case to the Advisory Tribunal, when it is alleged that the provision of the sub-section (4) were not complied with the officer filing an affidavit should be the Secretary to the Government and not the Superintendent of Police, C. I. D. **52 Pun LR 17: 51 Cri LJ 599: AIR 1950 East Punj 162 (164) (Pt C) (Pr 5).**

——S. 3 (4) — Provisions are mandatory — In case of delay in making reference, there must exist special reasons.

The provisions of sub-section (4) of Section 3 regarding the reference of cases of detenus to the Tribunal are mandatory and although the word "ordinarily" leaves a loophole in the case of delay in such a reference, the word must be taken in this context to mean in the absence of special reasons for not making a reference within two months. When no special reasons are given for the delay, and the case was referred only when the detenu had made a petition under Section 491, Criminal P. C., the detention would be illegal. **52 Pun LR 17: 51 Cri LJ 599: AIR 1950 East Punj 162 (164) (Pt D) (Pr 5).**

——S. 3 (5) — Provisions are mandatory.

The provisions of Section 3 (5) are mandatory and must be complied with. Where no communication was made to the detenu as was required by sub-section (5) of Section 3 nor was he informed of his right to make a representation to the Provincial Government or afforded the earliest opportunity of doing so the detention is illegal. The fact that the detenu previous to his detention, when arrested under different charge, had made a represetnation in his bail application against his arrest, will not cure the illegality.

(The word "may" interpreted.) **52 Pun LR 17: 51 Cri LJ 599: AIR 1950 East Punj 162 (165, 166, 167) (Pt E) (Prs 6, 7, 8).**

SECTION 4

●——**S. 4 (3)** — Order of externment for three months — Period not unreasonable — Possibility of abuse of power — No ground for impugning an Act. See Constitution of India, Art. 19 (5). **51 Cri LJ 550: AIR 1950 SC 211.**

●——**S. 4 (1) (c)** — Right of free movement throughout India — Extent of — Right means absence of inter State restrictions — Act restricting the right not valid as it represents an interference with fundamental right guaranteed by Art. 19 (1) (d) of the Constitution. See Constitution of India, Art. 19 (1) (d) and (5). **51 Cri LJ 550: AIR 1950 SC 211.**

●——**S. 4 (6) — Grounds of externment —Communication to externee — Right whether given by S. 4 (6) — Validity of S. 4 (6).**

(Majority view; Mukherjea and Mahajan JJ., dissenting.) — While the word "may" ordinarily conveys idea of a discretion and not compulsion, reading it with the last part of the clause it seems that when an externment order has to be enforced for more than three months an absolute right is given to the externee to make a representation. He cannot make a representation unless he has been furnished grounds for the order. In no other part of the Act a right to obtain the grounds for the order in such a case is given to him. Therefore that right has to be read as given under the first part of Section 4 (6).

Per B. K. Mukherjea J. — First part of sub-section (6) of Section 4 makes it entirely optional with authorities to communicate the grounds, upon which the order is made, to the person affected by it. The grounds need not be communicated at all if the authorities so desire. As regards the right of representation the latter part of the sub-section seems to imply that when the order is to remain in force for more than 3 months, the right of representation should be given to the aggrieved person and the representation shall be referred for consideration to the Advisory Tribunal constituted under Section 3, sub-section (4) of the Act. The right, however, is purely illusory as would appear from the fact that even in cases where the order is to be operative for more than three months, there is no obligation on the part of the authorities to communicate to the person the grounds upon which the order was made. This sub-section, therefore, cannot be said to have imposed restrictions which are reasonable in the interest of the general public and under Article 13 (1) of the Indian Constitution has become void and inoperative after the Constitution came into force. N. B. Khare v. State of Delhi, **1950 Mad WN 440: 1950 All LJ 506: 1950 SCJ 328: 1950 All WR 514: 1950 SCR 519: 1950 Raj LW 398: 1950 Mad WN (Cri) 120: 51 Cri LJ 550: AIR 1950 SC 211 (214, 218) (Pt D) (Prs 7, 28).**

——**S. 4 (as applied to Ajmer) — Power of District Magistrate to cancel his previous order issued under S. 4 — General Clauses Act (1897), S. 21.**

There is no specific provision in Section 4 to enable a District Magistrate to cancel an order passed by him under that section. Section 21, General Clauses Act, also does not apply to such a case as the East Punjab Public Safety Act is not a Central Act or Regulation. But the principle laid down in Section 21, General Clauses Act, is of general application and there is no reason why an executive officer should not withdraw an order passed by him earlier particularly when the second order is in favour of the liberty of the subject. The District Magistrate who acts as an executive officer under Section 4, has power to cancel or withdraw an earlier order passed by him under S. 4. **1950 AMLJ 39: AIR 1950 Ajmer 57 (58) (Pt A) (Prs 5, 6).**

——**S. 4** — A District Magistrate acting under Section 4, is not a Court. He acts purely as an executive officer. **1950 AMLJ 39: AIR 1950 Ajmer 57 (57) (Pt B) (Pr 4).**

SECTION 7

●——**S. 7 (i) (c) — Validity of — Constitution of India, Arts. 19 (1) (a) and (2) and 32.**

The Chief Commissioner of Delhi issued an order under Section 7 (i) (a), East Punjab Public Safety Act, against the printer, publisher and editor of the English weekly of Delhi called the Organizer directing them "to submit for scrutiny in duplicate, before publication, till further orders, all communal matter and news and views about Pakistan including photographs and cartoons other than those derived from official sources or supplied by the news agencies . . . The applicants, the printer, publisher and editor, applied under Article 32 of the Constitution for issue of a writ of certiorari and prohibition against the Chief Commissioner:

Held (Per majority, Fazl Ali J. Contra) — That the imposition of pre-censorship on the journal was undoubtedly a restriction on the liberty of the press which is an essential part of the right to freedom of speech and expression declared by Art. 19 (1) (a) and for the reasons indicated in the Supreme Court judgment in Petn. No. 16 of 1950: (AIR 1950 SC 124). Section 7 (i) (c) which authorised the imposition of such restriction fell outside the reservation of Art. 19 (2) and as such was void. The impugned order of the Chief Commissioner should therefore be quashed. Brij Bhushan v. State of Delhi, **1950 Mad WN 429: 1950 Raj LW 382: 1950 SCR 605: 1950 Mad WN (Cri) 109 (2): 1950 All LJ 491: 1950 SCJ 425: (1950) 2 Mad LJ 431: 63 Mad LW 934: 51 Cri LJ 1525: AIR 1950 SC 129 (133, 134) (Prs 19, 20, 25, 26).**

——**S. 7 (1) (c) — Pre-censorship order issued under — Validity — Constitution of India, Article 19 (1) (a).**

The imposition of pre-censorship on a journal is undoubtedly a restriction on the liberty of the press, which is an essential part of the right to freedom of speech and expression declared by Art. 19 (1) (a) of the Constitution of India and, as such an order issued by the District Magistrate under Section 7 (1) (c) of the East Punjab Act 5 of 1949 is altogether without jurisdiction. AIR 1950 SC 124 and AIR 1950 SC 129, Rel. on. **52 Cri LJ 1530: AIR 1951 Ajmer 100 (101) (Pt B) (Pr 5).**

SECTION 20

●——**Ss. 20, 36 (1)** — Expiry of Act — Continuance of trial started as summons proceedings, — Not valid — Notification declaring territory as disturbed area in respect of certain offences only is outside the authority conferred by Section 20 or Second Part of Section 36 (1) — Notification is invalid — Notification under Part 2 of S. 36 (1) — (General Clauses Act (1897), Ss. 6, 21) — Expiry of temporary statute

— (Punjab General Clauses Act (1 of 1898), S. 19 — Power to cancel notification) — 51 Pun LR 317; AIR 1950 EP 25; 51 Cri LJ 459 (FB), **Overruled.** See Public Safety — East Punjab Public Safety Act (5 of 1949), S. 36 (1). **1959 Cri LJ 782: AIR 1959 SC 609.**

SECTION 24

——S. 24 — Lodging a false report with police — S. 24 if applies.

'Lodging a false report' with the Police by itself can, in no way, be held to be 'publishing a report or spreading a rumour' within the meaning of Section 24 of the Act, and as such the person lodging the report cannot be convicted under Section 24. **1951 AMLJ 91: 1952 Cri LJ 166: AIR 1952 Ajmer 7 (7) (Pr 2).**

——S. 24 — Validity — Constitution of India, Art. 19.

Section 24 (a) is void. 1950 Supreme Law Journal 425, Foll. **('51) 53 PLR 22: 52 Cri LJ 449: ILR (1951) Punj 193: AIR 1951 Punj 27 (28, 30) (Pt E) (Prs 5, 17) (DB).**

SECTION 36

——S. 36 (1) — Validity — Classfication of territory into dangerously disturbed area and other area — (Constitution of India, Art. 14).

It was contended that Section 36 (1) of the East Punjab Safety Act is ultra vires. It was alleged that it violated the fundamental right of equality before law guaranteed by Article 14 of the Constitution. The argument was that since offences charged against the accused (Ss. 408, 409 and 120-B, I. P. Code) were triable under the warrant procedure under the Code, the adoption of summons procedure which S. 36 (1) authorised amounted to discrimination and thereby violated Article 14. It was the first part of sub-s. (1) of Section 36 which was impugned.

Held, that the classification had obviously been made on a territorial or geographical basis. Considering the background of the Act, it could not be said that this classification was not rational or that it was not based on an intelligible differentia. Then again, the object of the Act was obviously to ensure public safety and maintenance of public order; and there could be no doubt that the speedy trial of the specified offences had an intimate rational relation or nexus with the achievement of the said object. The Legislature was justified in enacting the first part of Section 36 so that the cases against persons charged with the commission of the specified offences could be speedily tried and disposed of. The challenge to the vires of the first part of sub-section (1) of Section 36 could not therefore be sustained, and that the impugned provision contained in the first part of Section 36 (1) was constitutional and valid. The validity of the two tests that have to be applied in determining the vires of the impugned statute under Art. 14 of the Constitution cannot be doubted. AIR 1958 SC 538; 1959 SCJ 147; (1959) 1 Mad LJ (SC) 67, Rel. on. Gopi Chand v. Delhi Administration. **ILR (1959) Punj 1040: (1959) Supp 2 SCR 87: (1959) 2 SCA 94: 1959 Mad LJ (Cr) 557: 1959 Cr LJ 782: 1959 SCJ 831: AIR 1959 SC 609 (614, 615) (Pt A) (Prs 9, 10, 11, 13).**

——Ss. 36 (1) and 20 — Expiry of Act — Continuance of trial started as summons proceedings — Validity — Notification declaring territory as disturbed area in respect of offences — Validity of — Notification under Part II of S. 36 (1).

The general rule in regard to a temporary statute is that, in the absence of special provision to the contrary, proceedings which are being taken against a person under it will ipso facto terminate as soon as the statute expires. It is true that the Legislature can and often enough does avoid such an anomalous consequence by enacting in the temporary statute a saving provision, and the effect of such a saving provision is in some respects similar to the effect of the provisions of Section 6 of the General Clauses Act which deals with effect of repeal of a permanent statute. AIR 1951 SC 301; 1951 SCJ 453, Rel. on.

Section 16 of the Punjab State Legislature (Delegation of Powers) Act (46 of 1951) which repealed the East Punjab Public Safety Act (1949), and the East Punjab Safety (Amendment) Ordinance 5 of 1951 cannot be invoked for the purposes of validating the continuation of the proceedings taken against the accused under the summons procedure authorised by Punjab Act 5 of 1949, after the expiry of the Act on August 16, 1951. Besides, Section 36 (1) of the Act prescribed the application of the summons procedure in the trial of specified offences only in dangerously disturbed areas; and so, unless it is shown that the relevant area could be treated as a dangerously disturbed area at the material time, S. 36 (1) would be inapplicable.

The notification which declared that the whole of Province of Delhi had ceased to be a dangerously disturbed area 'except as respects things done or omitted to be done before the date of this notification' goes outside the authority conferred by Section 20 and is clearly invalid. If that be so, it must be held that the whole of the Province of Delhi ceased to be a dangerously disturbed area, as from October 1, 1950. Subsequent issue of a Certificate in the form of a notification under the second part of Section 36 (1) seeking to achieve the same result by declaring that though the State of Delhi was not a dangerously disturbed area, the offences specified in the notification would nevertheless continue to be tried according to the summons procedure, is also not authorised by the powers conferred by the second part of Section 36, sub-section (1). Since it is clear that the notification in question covers only pending cases and has no reference to offences or class of offences under the Indian Penal Code, it is outside the authority conferred by the second part of Section 36 (1). If through inadvertence or otherwise the Act did not contain an appropriate saving section, the defect could not be cured by the notifications issued either under Section 20 or under Section 36 (1) of the Act.

Held, that so long as the State of Delhi was validly notified to be a dangerously disturbed area the adoption of the summons procedure was no doubt justified and its validity could not be impeached; but with the cancellation of the relevant notification Section 36 (1) of the Act ceased to apply and it was necessary that as from the stage at which the cases against the accused then stood the warrant procedure should have been adopted. The continuation of the trial according to the summons procedure subsequent to October 1, 1950, vitiated the trial and rendered the final orders of conviction and sentence invalid. 51 Punj LR 317; AIR 1950 EP 25; 51 Cr LJ 459, **Overruled.** Considering the seriousness of the charges the fact that the ac-

cused had to undergo the ordeal of a trial and had suffered rigorous imprisonment for some time would not justify, his prayer that his retrial should not be ordered. Ends of justice required that he should be tried for the said offences de novo according to law. Gopi Chand v. Delhi Administration, **ILR (1959) Punj 1040: (1959) Supp (2) SCR 87: (1959) 2 SCA 94: 1959 Mad LJ (Cr) 557: 1959 Cr LJ 782: 1959 SCJ 831: AIR 1959 SC 609 (615 to 617, 619) (Pt B) (Prs 14 to 20, 28, 29).**

SECTION 38

——S. 38 — Transfer of cases triable by Magistrates under S. 30 Criminal P. C.

Section 30, Criminal P. C., in no way stands repealed by the East Punjab Public Safety Act. Only such cases are to be sent by the Magistrates in the State of Ajmer under S. 38 of the East Punjab Public Safety Act to the Court of Session that could not be tried and adequate punishment meted out by Magistrates invested with powers under S. 30, Criminal P. C. **52 Cri LJ 591: AIR 1951 Ajmer 59 (2) (60) (Pr 3).**

——S. 38 (1) (i) — Case triable by Magistrate with powers under S. 30, Criminal P. C., if can be sent to Sessions Court — Criminal P. C. (1898), S. 30.

No doubt, S. 38 (1) (i), East Punjab Public Safety Act, 1949, lays down that a Magistrate shall send a case to the Court of Session when it appears that the offence is one triable exclusively by a Court of Session or when it appears that it ought to be tried by such Court. This, however, does not mean that a case that could be tried by a Magistrate invested with power under S. 30, Criminal P. C., must necessarily be sent for disposal to the Court of Session. Section 30, Criminal P. C., in no way stands repealed by the East Punjab Public Safety Act, 1949. **51 Cri LJ 1240: 1950 AMLJ 1: AIR 1950 Ajmer 37 (1) (37) (Pr 1).**

SECTION 43

——S. 43 — 'Person' — If includes State.

The word 'person' in S. 43 does not include the word 'Crown' or 'State'. Hence, S. 43 is no bar to a suit against the State. **55 Punj LR 481: ILR (1954) Punj 617: AIR 1954 Punj 49 (49) (Pt A) (Pr 3) (DB).**

——S. 43 (1) — Detention order not in accordance with authority conferred is not protected — Criminal P. C. (1898), S. 491.

If the order of detention was not in conformity with the power conferred upon the detaining authority, the order is not protected by the section from being called into question in any Court. **52 Punj LR 17: 51 Cri LJ 599: AIR 1950 East Punj 162 (167) (Pt F) (Pr 9).**

—HYDERABAD PUBLIC SAFETY AND PUBLIC INTEREST REGULATION (8 of 1358-F)

SECTION 2

● **——S. 2 — Preventive detention order based on — Validity after 26th January 1950 — Order, if saved by Preventive Detention (Extension of Duration) Order (1950), General Clauses Act (1897), S. 6, and Adaptation of Laws Order (1950), R. 28.**

Per Full Bench— Section 2 is inconsistent with Art. 22 of the Constitution and is, therefore, void under Art. 13 (1) of the Constitution.

That section or the preventive detention order based on it is not saved after 26th January 1950 when the Constitution came into force by the Preventive Detention (Extension of Duration) Order, 1950.

Nor is the Preventive Detention Order served before 26th January 1950 saved by the operation of S. 6, General Clauses Act.

Per S. Ali Khan J.:— The section or the order is also not saved by R. 28, Adaptation of Laws Order, 1950. Showkat-Un-nissa Begum v. State of Hyderabad, **ILR (1951) Hyd 237: AIR 1950 Hyd 20 (21, 24, 27, 30, 36) (Pt A) (Prs 4, 19, 37, 49, 60) (FB).**

—HYDERABAD PUBLIC SAFETY AND PUBLIC INTEREST REGULATION (12 of 1358 Fasli)

SECTION 5

——S. 5 — Section is void being inconsistent with Art. 21 of the Constitution of India.

Article 21 of the Constitution lays down that no person shall be deprived of his life or personal liberty except according to procedure established by law. No procedure has been laid down in the Hyderabad Public Safety and Public Interest Regulation which must be followed before depriving a citizen of his personal liberty. It gives very wide and unlimited powers to the Security Officer for calling upon a citizen to execute a bond. Such powers are clearly against the spirit of Art. 21 of the Constitution and the general spirit of Part III of the Constitution regarding fundamental rights. Section 5 of the Security Regulation is inconsistent with the provisions of Article 21 and is, therefore, void under the provision of Article 13 of the Constitution. **ILR (1951) Hyd 818: AIR 1951 Hyd 64 (65) (Pr 2) (DB).**

—HYDERABAD PUBLIC SECURITY ACT (12 of 1348 Fasli)

SECTION 13

● **——S. 13 (2)**—Question regarding validity of S. 13 — Reference to High Court under S. 432, Criminal P. C. can be made only when the trial Court is satisfied that in a case pending before it the determination of any constitutional point with regard to the validity of any Act, Ordinance or Regulation is necessary for the disposal of the case. See Hyderabad Criminal P. C., S. 432. **1953 Cri LJ 1638: AIR 1953 Hyd 267 (FB).**

—HYDERABAD SPECIAL TRIBUNALS REGULATION (5 of 1358 Fasli)

● ——Constitution of India, Arts. 13, 14 — Trial under Hyderabad Special Tribunals Regulation (5 of 1358-F) before coming into force of the Constitution — Proceedings before commencement of Constitution cannot be challeged on ground of discrimination—Validity of subsequent proceedings depends on questions as to whether the accused had been deprived of equal protection in matters of procedure — **Held**, that although there was certain deviation in certain particulars the accused had substantially the benefit of a normal trial in this case. See Constitution of India, Art. 13. **1953 Cri LJ 862: AIR 1953 SC 156.**

——Validity — Regulation is not unconstitutional — Constitution of India, Arts. 14, 21, 245.

The Hyderabad Special Tribunals Regulation is not unconstitutional and is valid law.

The Regulation does not infringe Art. 14 of the Constitution. All Constitutions have recognised the power of the legislature to make classification of Courts resting upon reasonable grounds

of distinction. It does not offend against the guarantee of equal protection of the laws envisaged by Art. 14 of the Constitution of India. Equal protection of the laws is ensured when the laws operate alike on all subjects without any discrimination. As regards Procedural Laws, it is open to the Legislature to abolish Courts, create new ones and it may prescribe different modes of procedure in its discretion. This power is subject only to one limitation and that is that in so doing legislature shall not dispence with any substantive rights. AIR 1951 Hyd 13 (FB), Foll.

The trial of an accused by a Special Tribunal under the Regulation does ont infringe Art. 21 of the Constitution. The expression 'procedure established by law' in Art. 21 must mean procedure prescribed by the law of the State. AIR 1948 PC 48 and AIR 1950 SC 27, Rel. on.

The provision in the Special Tribunals Regulation whereby the Tribunal would get jurisdiction only when the case was transferred by the Military Governor is not unconstitutional and does not amount to abrogating the extant law, namely the Criminal Procedure Code, because a provision in an Act that the operation of the Act is to be determined by some officer does not amount to delegation of any legislative power. It can only amount to an authorisation to enforce the Act on the fulfilment of the conditions specified therein. **('51) ILR (1951) Hyd 895: 1953 Cri LJ 785: AIR 1953 Hyd 145 (149) (Pt A) (Prs 13, 14).**

——Consent of Nizam — The Special Tribunal's Regulation under which the Tribunal was constituted was promulgated by the Military Governor with the assent of H. E. H. the Nizam. H. E. H. the Nizam vested all authority of the Government in the then Military Governor Major General J. N. Chaudhury, who enacted the regulation. Under these circumstances the necessity of assent as to regulation of this kind cannot be imported merely because prior to Police Action Local legislature needed the assent. Judgment in cases Nos. 1346/6, 1404/6 and 1403/6 of 1950, Rel. on. **52 Cri LJ 1123: AIR 1951 Hyd 97 (98, 99) (Pt A) (Pr 3) (DB).**

SECTION 1

●——Ss. 1, 4 and 7 — Regulation if ultra vires the Constitution — Constitution of India, Article 14.

Per Full Bench:— The Special Tribunals Regulation is intra vires the Constitution with the exception of the whole of S. 4 (2) and (4) and S. 7 (2-A) and (3), and certain portions of Section 4 (2-A), (7) and S. 7 (2) indicated below, which offend Art. 14 of the Constitution.

Section 4 (2-A), after deleting the words "nothing in sub-section (2) ..... is under" will stand.

Section 4 (7) in so far as it enjoins the Special Tribunal to follow the procedure prescribed for summary trial, cannot stand. The only procedure left is the one prescribed for the trial of warrant cases by Magistrates. The latter procedure remains in force.

Section 4, sub-section (7) is severable and the portion of the sub-section which will remain .....after separating it from the void portion will read thus: "A Special Tribunal, shall, in all matters in respect to which no procedure has been prescribed by this Regulation, follow the procedure prescribed for the trial of warrant cases by Magistrates".

Section 7 (2) has to be deleted because it puts restriction on the right of appeal and the power of revision from any order or sentence passed by the Special Tribunal and also it does away with the necessity of the submission of the case for confirmation to any authority. This portion with sub-section (2-A) has to go because the valuable rights of appeal and powers of revision and confirmation are denied to the accused.

But the portion of S. 7 (2) beginning from .....there shall be Court of Session "can stand and is valid".

After deleting the above portion from S. 7, sub-section (2) the portion which validly remains in force would read as follows: "There shall be an appeal to the High Court from any sentence passed by a Special Tribunal which would have been appealable to the High Court under the Hyderabad Criminal P. C."

After the deletion of the provisions mentioned above, the trial by a tribunal under the Regulation is substantially the same as that under the ordinary Criminal P. C. and the regulation as it stands after the deletion mentioned above, is neither void nor unworkable.

The omission of committal proceedings by Section 4 (1) does not amount to a denial of equality within the meaning of Art. 14 of the Constitution.

(The Regulation after deleting the excepted portion is given in extenso in para. 81). Abdul Rahim v. Joseph A. Pinto. **ILR (1951) Hyd 1: 52 Cri LJ 1333: AIR 1951 Hyd 11 (13, 14, 21, 22, 24 to 26, 27) (Pt C) (Prs 11, 17, 19, 22, 50, 58, 64, 69, 72, 74, 81) (FB).**

[Overruled in AIR 1953 Hyd 33.]

SECTION 2

●——s. 2 — Creation of Special Tribunal — (Constitution of India, Art. 14).

(Per Majority)— It cannot be urged that the creation of a Special Court by itself was an inequality in the eye of law. Syed Qasim Razvi v. State of Hyderabad, **1953 SCA 742: (1953) SCJ 151: 1953 SCR 589: 1953 Cri LJ 862: ILR (1953) Hyd 211: AIR 1953 SC 156 (162) (Pt H) (Pr 21).**

SECTION 2-B

●——S. 2-B (1) (as amended by Regulation of 30-10-49) — Retrospective effect — Sentence of death before amending Regulation — Execution of sentence by hanging — Legality.

The provisions of S. 2-B applied to all sentences which had remained unexecuted or were to be executed at the date of the amending Regulation. They must be taken to have restrospective effect because the mode of the execution of a sentence can hardly be regarded as a matter of substantive law or something which would affect any substantive rights. Where the High Court which upheld the conviction and sentence of death passed by the Special Tribunal had power to inflict the sentence of death by hanging under the amended Regulation the fact that at the time of passing the sentence of death by hanging by the tribunal it could be executed by decapitation only is of no avail, (Fazl Ali, Mahajan, B. K. Mukherjea, S. R. Das and Chandrasekhar Aiyar JJ.) Janardhan Reddy v. State of Hyderabad. **64 MLW 406: 1951 Mad WN (Cri) 189 (2): 1951 SCJ 320: 52 Cri LJ 736: 1951 SCR 344: 1951 All LJ (SC) 94: 1951 Mad WN 613 (2): AIR 1951 SC 217 (220) (Pt B) (Pr 7).**

SECTION 3

●——Ss. 3, 4 — Cognizance by Special Tribunal — (Constitution of India, Arts. 13, 14).

(Per Majority):— No exception could be taken to the Special Tribunal's taking cognizance of the case under an order of the Military Governor when this happened long before the advent of the Constitution. Syed Qasim Razvi v. State of Hyderabad, **(1953) SCJ 151: 1953 SCA 742: 1953 SCR 589: 1953 Cri LJ 862: ILR (1953) Hyd 211: AIR 1953 SC 156 (162) (Pt G) (Pr 21).**

● **——S. 3 — Trial of individual case — (Constitution of India, Art. 14).**

(Per Majority):— Section 3 empowers the Military Governor to direct a Special Tribunal to try an offence committed by a particular person, in other words, to try an individual case. Syed Qasim Razvi v. State of Hyderabad, **1953 SCA 742: (1953) SCJ 151: 1953 SCR 589: 1953 Cri LJ 862: ILR (1953) Hyd 211: AIR 1953 SC 156 (163) (Pt K) (Pr 24).**

——S. 3 — Validity of — Jurisdiction of Courts — The Constitution of the Special Tribunal and the discretion under S. 3 of the Regulation was not proscribed either on the ground of repugnancy or of that of adversely affecting fundamental rights and both these provisions were legitimately operative — (Constitution of India, Arts. 14, 245). **AIR 1955 NUC (Hyd) 5624 (DB).**

——S. 3 — Scope and nature of S. 3 of the Regulation was imperative — Tribunal not competent to hear cases without an order contemplated by S. 3 — Delay or irregularity in compliance with that section has been cured by the Special Tribunal Validating Act — (Hyderabad Special Tribunals (Validation of Proceedings) Regulation (1 of 1359-F., S. 3). **AIR 1955 NUC (Hyd) 5624 (DB).**

——S. 3 — Proceedings under — Validity of — Contravention of Art. 21 of the Constitution — H. E. H. the Nizam had delegated full power to the Military Governor and the validating Regulation passed on 6-10-49 cured the earlier defect in the proceedings: so there can be no question of offending Art. 21 of the Constitution. The validating Regulation was as much the law of the State as the Regulation appointing the Tribunal — (Constitution of India, Art. 21) — (Hyderabad Special Tribunals (Validation of Proceedings) Regulation (1 of 1359-F.), S. 3). **AIR 1955 NUC (Hyd) 5624 (DB).**

——S. 3 — Compliance with — Criminal P. C. (1898), S. 197.

The principles underlying sanction of the Court contemplated under S. 197, Criminal P. C. have no bearing on the cases of want of direction under S. 3 of the Regulation and the want of any direction whatever under that section in a case will result in similar consequences where a case is tried by a Court of Sessions without commitment. No Court of Sessions is empowered to take cognizance of a case without proper committal. In the absence of a clear inference being possible under the terms of the order the fact that a major offence has been mentioned in the direction of a kind provided for under S. 3 the minor offences cannot be taken to have been included by necessary implication because the direction required under the section could have been with regard to a particular offence or offences and was so secured under a special order. The Tribunal, therefore, cannot hear and convict the accused for S. 146, Penal Code, as S. 148 is already there. But mention of S. 326 in the order does actually include S. 324 as there is no reason whatever to include S. 326 and exclude the other section: 75 IA 41; 75 IA 30 and AIR 1945 Pat 98, Ref. **52 Cri LJ 1123: AIR 1951 Hyd 97 (99, 100) (Pt B) (Prs 4, 6) (DB).**

SECTION 4

● **——Ss. 4, 3** — Cognizance by special tribunal — No exception could be taken to the Special Tribunals taking cognizance of the case under an order of Military Governor when this happened long before the advent of the Constitution. — (Constitution of India, Arts. 13, 14). See Public Safety — Hyderabad Special Tribunals Regulation (5 of 1358-F.), S. 3. **1953 Cri LJ 862. AIR 1953 SC 156.**

● **——S. 4 (1) — Validity — (Constitution of India, Art. 14).**

(Per Majority: Bose and Ghulam Hasan, JJ., Contra):— The elimination of the committal proceeding is not by itself a substantial departure from the normal procedure. Syed Qasim Razvi v. State of Hyderabad, **1953 SCA 742: (1953) SCJ 151: 1953 SCR 589: 1953 Cri LJ 862: ILR (1953) Hyd 211: AIR 1953 SC 156 (158) (Pt B) (Pr 8).**

● **——S. 4 — Proceedings in English — (Constitution of India, Art. 14).**

(Per Majority: Bose and Ghulam Hasan, JJ., Contra)— The provision in the Regulation relating to proceeding being conducted in English if the tribunal so desires, per se, does not violate the equal protection clause in the Constitution. Syed Qasim Razvi v. State of Hyderabad, **1953 SCA 742: (1953) SCJ 151: 1953 SCR 589: 1953 Cri LJ 862: ILR (1953) Hyd 211: AIR 1953 SC 156 (159) (Pt C) (Pr 9).**

● **——S. 4 — Summary trial — (Constitution of India, Art. 14).**

The provision relating to summary trial irrespective of the nature of the offence and also that relating to recording of evidence in a summary manner may be considered prejudicial to the accused and may normally deprive him of benefits which are enjoyed by other persons similarly situated who are tried under the ordinary law. Syed Qasim Razvi v. State of Hyderabad, **(1953) SCJ 151: 1953 SCA 742: 1953 SCR 589: 1953 Cri LJ 862: ILR (1953) Hyd 211: AIR 1953 SC 156 (159) (Pt D) (Pr 11).**

● **——S. 4 (7) — Warrant procedure — (Constitution of India, Art. 14).**

(Per Majority: Bose and Ghulam Hasan, JJ., Contra)— The substitution of warrant procedure for sessions procedure did not constitute a substantial difference. Syed Qasim Razvi v. State of Hyderabad. **1953 SCJ 151: 1953 SCA 742: 1953 SCR 589: 1953 Cri LJ 862: ILR (1953) Hyd 211: AIR 1953 SC 156 (160) (Pt E) (Pr 12).**

● **——Ss. 4, 1, 7** — Regulation is intra vires the Constitution with the exception of the whole of S. 4 (2) and (4) and S. 7 (2-A) and (3) and certain portions of S. 4 (2-A) (7) and S. 7 (2) which offend Art. 14 of the Constitution — Constitution of India, Art. 14. See Public Safety — Hyderabad Special Tribunals Regulation (5 of 1358-F), S. 1. **52 Cri LJ 1333: AIR 1951 Hyd 11 (FB).**

[Overruled in AIR 1953 Hyd 33.]

SECTION 6

——S. 6 — Powers of Tribunal.

It cannot be said that there is a difference between a Court constituted under the Criminal Procedure Code and a Court constituted under the Special Tribunals Regulation and such a Tribunal does not have the power given to the ordinary Court of law under S. 14, Hyderabad Criminal P. C. According to S. 6 of the Regulation, the Tribunal is like any other Court of Sessions with original jurisdiction. The Regulation merely creates a Court and does not inter-

fere with the ordinary procedure. **AIR 1951 Hyd 97 (107) (Pt D) (Pr 34) (DB).**

SECTION 7

——S. 7 — Right of second appeal — (Constitution of India, Art. 14).

(Per Majority)— It could not be held that the provision for appeal contained in the Regulation deprived the accused of the right of second appeal which is allowed under the Hyderabad Code. Syed Qasim Razvi v. State of Hyderabad, **1953 SCA 742: (1953) SCJ 151: 1953 SCR 589: 1953 Cri LJ 862: ILR (1953) Hyd 211: AIR 1953 SC 156 (160) (Pt F) (Pr 13).**

——S. 7 — Absence of provision for revision and transfer — (Constitution of India, Art. 14).

(Per Majority: Bose and Ghulam Hasan, JJ. Contra)— Regarding omission of the provisions relating to revision and transfer in the Regulation the grievance of the accused was more imaginary than real. Syed Qasim Razvi v. State of Hyderabad. **(1953) SCJ 151: 1953 SCA 742: 1953 SCR 589: 1953 Cri LJ 862: ILR (1953) Hyd 211: AIR 1953 SC 156 (163) (Pt I) (Pr 22).**

——S. 7 — Confirmation of sentence — (Constitution of India, Art. 14).

(Per Majority: Bose and Ghulam Hasan, JJ., Contra)— The question of confirmation of sentence was not at all relevant when the sentences passed upon the accused did not require any confirmation under the Hyderabad Criminal P. C. Syed Qasim Razvi v. State of Hyderabad, **1953 SCA 742: 1953 SCJ 151: 1953 SCR 589: 1953 Cri LJ 862: ILR (1953) Hyd 211: AIR 1953 SC 156 (163) (Pt J) (Pr 22).**

——S. 7 (2) — Sentence of death by Special Tribunal — Want of assent of H. E. H. the Nizam for execution — Legality — Hyderabad Criminal P. C., Ss. 20, 307 and 308.

The provisions of S. 7 (2) cover all those cases where Manzuri and tashih were contemplated under the Hyderabad Criminal P. C., S. 20 shows that the word manzuri has not been used with reference only to H. E. H. the Nizam, but it has also been used with reference to the High Court and the Government. In the context in which it is used, it has no other meaning than the act of confirmation, and the new word, tausiq, which has been used in the Regulation, and which literally means confirmation, appears to convey the same sense as the word manzuri. It is quite plain that one of the objects of the Regulations was to simplify procedure and expedite trials. Hence the contention that a sentence of death passed by the Special Tribunal cannot be executed without the assent or approval of H. E. H. the Nizam, cannot be satisfied. Janardhan Reddy v. State of Hyderabad, **1951 Mad WN (Cri) 189 (2): 64 Mad LW 406: 1951 SCJ 320: 52 Cri LJ 736: 1951 SCR 344: 1951 All LJ (SC) 94: 1951 Mad WN 613 (2): AIR 1951 SC 217 (221) (Pt C) (Pr 9).**

——Ss. 7, 1, 4—Regulation is intra vires the Constitution with the exception of the whole of S. 4 (2) and (4) and S. 7 (2-A) and (3) and certain portions of S. 4 (2-A) (7) and Sec. 7 (2) which offended Art. 14 of the Constitution — Constitution of India, Art. 14. See Public Safety — Hyderabad Special Tribunals Regulation (5 of 1358-F), S. 1. **52 Cri LJ 1333: AIR 1951 Hyd 11 (FB).**

[Overruled in AIR 1953 Hyd 33.]

—HYDERABAD SPECIAL TRIBUNALS (TERMINATION) AND SPECIAL JUDGES (APPOINTMENT) REGULATION (10 of 1359 Fasli)

——Discriminatory procedure — Regulation is ultra vires of Constitution of India, Art. 14.

Per Majority (Srinivasachari, J., Contra) — Article 14 of the Constitution condemns discrimination not only by substantive law but also by law of procedure. The Hyderabad Special Tribunals (Termination) and Special Judges (Appointment) Regulation No. 10 of 1359 Fasli, provides certain special procedure different from that laid down in the ordinary law of criminal procedure. There is no object specified. There is no understandable basis as to why certain persons should be tried under the Regulation by Special Judges and why persons charged under similar offences should be tried in the ordinary Courts. There is, no basis of any territorial classification in it. Moreover, the Regulation lays down a procedure which is, in some respects, less advantageous to the accused. The procedure, therefore, being discriminatory is hit by Art. 14 of the Constitution. Hence, the said Regulation is invalid and ultra vires. AIR 1951 Hyd 11, **Overruled.** Mohammad Hyder v. State of Hyderabad, **ILR (1952) Hyd 877: 1953 Cri LJ 454: AIR 1953 Hyd 33 (34, 42, 51) (Prs 7, 28, 56) (FB).**

SECTION 3

——S. 3 — General Order of transfer of cases pending before Special Tribunal on the abolition of the Special Tribunal, to a special Judge appointed under the said Regulation was held sufficient to confer jurisdiction on the special Judge to try those cases. See Public Safety—Hyderabad Special Tribunals (Termination) and Special Judges (Appointment) Regulation (10 of 1359-F), S. 5. **AIR 1955 NUC (Hyd) 1808-1809 (DB).**

SECTION 4

——S. 4 — Validity — (Constitution of India, Art. 14).

It is not possible to say that the appointment of a Special Judge was in itself an inequality in the eye of the law. Habeeb Mohammad v. State of Hyderabad, **(1953) SCJ 361: 1953 Cri LJ 1158: 1953 SCA 789: 1953 SCR 661: ILR (1953) Hyd 345: AIR 1953 SC 287 (289) (Pt C) (Pr 5).**

SECTION 5

——S. 5 — Validity — (Constitution of India, Art. 14).

Under the Hyderabad Criminal P. C. the committal proceeding is not an indispensable preliminary to a sessions trial, and its absence does not operate to take away the jurisdiction of the Special Judge to take cognizance of the case before the Constitution. The difference between a warrant procedure prescribed by the Regulation and the sessions procedure at that stage applicable, under the general law is not at all substantial, and the minor difference would not bring the case within the mischief of Art. 14 of the Constitution. AIR 1953 SC 156, Foll. Habeeb Mohamed v. State of Hyderabad, **1953 SCA 789: 1953 SCR 661: (1953) SCJ 361: 1953 Cri LJ 1158: ILR (1953) Hyd 345: AIR 1953 SC 287 (289) (Pt D) (Pr 6).**

——S. 5 (b) — Validity — (Constitution of India, Art. 14).

The delegatee can certainly be described by reference to his official designation and the authority may be vested in the holder of a particular office for the time being. Habeeb Mohamed v. State of Hyderabad, **1953 SCA 789: 1953 SCR 661: 1953 SCJ 361: 1953 Cri LJ 1158: ILR (1953) Hyd 345: AIR 1953 SC 287 (291) (Pt G) (Pr 13).**

——Ss. 5 and 3 — General order of transfer of cases pending before Special Tribunal which was

abolished, on 14th January, 1950, issued under S. 5 held sufficient to confer jurisdiction on Special Judge. **AIR 1955 NUC (Hyd) 1808-1809 (DB).**

——S. 5 (1) (b) and (2) — Special Judge can take cognisance of case only when it is transferred to him by chief minister — Case validly transferred — Subsequent transfer by Chief Minister to Sessions Judge without order of committal — Sessions Judge has no jurisdiction — (Criminal P. C. (1898), S. 193) — (Hyderabad Criminal P. C., S. 198).

The accused was charged before the Special Tribunal with offences of murder under various sections of the Hyderabad Penal Code, and was convicted and sentenced to death. On appeal the conviction was quashed on ground that he was not afforded an opportunity to engage a lawyer and the case was remanded "to the trial Court for fresh trial". When the order of remand was made, special Tribunals were abolished and Special Judges were appointed under the Hyderabad Special Tribunals (Termination) and Special Judges (Appointment) Regulation 10 of 1359-F and although there was no specific direction in the order of the High Court to remand the case to a Special Judge appointed under the aforesaid Regulation, the file was sent by the office of the High Court to the Special Judge for Medak and Nalgonda holding his Court in the city of Hyderabad. While the case was pending on the file of the Special Judge, Medak and Nalgonda the Chief Minister purporting to act under sub-section (2) of Section 5 of the said Regulation transferred it to the Sessions Judge, Medak for "trial in accordance with Law" who in turn transferred the case for disposal to the Additional Sessions Judge, Medak. After the case was transferred to the Additional Sessions Judge, Medak the accused put in a petition challenging the jurisdiction of that Court on the ground inter alia that being a Sessions Court it could not take cognizance of the case without an order of commitment by a Magistrate duly empowerd in that behalf. The Additional Sessions Judge rejected the petition for the reason that once cognizance was taken by a competent court there was no question of further taking cognizance of the same offence. After the application of the Indian Penal Code and Indian Criminal Procedure Code to all Part B States and the re-allocation of territorial jurisdiction, the file was transferred to the Sessions Judge, Nalgonda who incidentally happened to be the same Additional Sessions Judge of Medak, a similar petition challening the jurisdiction of the Session Court to take cognizance of the case was presented. This petition was also dismissed. The accused was convicted. In appeal the same objections as to jurisdiction of the Sessions Judge without an order of committal was taken:

Held, that before cognizance of the case could be taken by any Special Judge, it was essential that the Chief Minister or a person authorised by the Chief Minister in this behalf should have directed its trial by the Special Judge as required by Cl. (b) of sub-section (1) of S. 5 of the said Regulation. Since no such order was passed the transfer of such a case by the Chief Minister to the Sessions Judge of Medak was ineffective if not otiose.

Even on the assumption that there was a valid order of the Chief Minister directing the trial of this case by the Special Judge under Cl. (b) of sub-section (1) of S. 5, the subsequent transfer by the Chief Minister of the case to the Sessions Judge of Medak would involve the determination of the very same question, viz., whether the Sessions Judge of Medak could take cognizance of a case transferred to his Court without a valid order of committal, and that there being no committal order by any Magistrate to the Sessions Court of Medak, that Court could not take cognizance of this case. As such the proceedings and the trial by the Sessions Court of Nalgonda to which the case was subsequently transferred were vitiated. **ILR (1952) Hyd 581: 1953 Cri LJ 115: AIR 1953 Hyd 9 (10, 12) (Prs 6, 10) (DB).**

——S. 5 (2) — Scope and effect of — Transfer of case pending before special tribunal or Special Judge — High Court's power to order — Transfer not excluded by State legislation such as special Judge's Regulation. See Constitution of India, Art. 227. **52 Cri LJ 708: AIR 1951 Hyd 82 (DB).**

SECTION 8

——S. 8 — Validity — (Constitution of India, Art. 14).

Not only the right of an accused to apply for transfer of his case has not been taken away by S. 8 but the right of revision also has been left unaffected except to a small extent. Habeeb Mohammad v. State of Hyderabad, **1953 SCA 789: 1953 SCR 661: (1953) SCJ 361: 1953 Cri LJ 1158: ILR (1953) Hyd 345: AIR 1953 SC 287 (290) (Pt E) (Prs 7, 8).**

——S. 8 — Validity — (Constitution of India, Art. 14).

Section 8 must be held to be invalid to the extent that it takes away the provision relating to confirmation of sentences as in the Hyderabad Criminal Procedure Code. This, however, is a severable part of the Section and being invalid, the provisions of the Hyderabad Criminal Procedure Code with regard to the confirmation of sentences must be followed. Those provisions however, do not affect in any way the procedure for trial laid down in the Regulation. The proper stage when Section 20 of the Hyderabad Cr. P. Code comes into operation is the stage of the execution of the sentence. Habeeb Mohammad v. State of Hyderabad. **1953 SCA 789: 1953 SCR 661: (1953) SCJ 361: 1953 Cri LJ 1158: ILR (1953) Hyd 345: AIR 1953 SC 287 (290) (Pt F) (Pr 10).**

—HYDERABAD SPECIAL TRIBUNALS (VALIDATION OF PROCEEDINGS) REGULATION (1 of 1359 Fasli)

SECTION 3

——S. 3 — Proceedings under S. 3 of the Hyderabad Regulation (5 of 1358-F.) — Validity of — Contravention of Article 21 — H. E. H. the Nizam had delegated full power to the Military Governor and the validating Regulation passed on 6-10-49 cured the earlier defects in the proceedings. So there cannot be any question of offending Art. 21 of the Constitution. The validating Regulation was as much the law of the State as the regulation appointing the Tribunal. See Public Safety—Hyderabad Special Tribunals Regulation (5 of 1358-F.), S. 3. **AIR 1955 NUC (Hyd) 5624 (DB).**

——S. 3 — Effect of non-compliance and subsequent validation of S. 3 of Hyderabad Regulation (5 of 1358-F.) — Section 3 of the Regulation 5 of 1358-F was imperative and there was no jurisdiction and competence in the Tribunal without an order contemplated by that section. But any irregularity or delay in compliance with that section has been cured by the Special Tribunal Validating Act which was enacted by the Military Governer under the authority delegated to him. See Public Safety— Hyderabad Special Tribunals

Regulation (5 of 1358-F.), S. 3. **AIR 1955 NUC (Hyd) 5624 (DB).**

——S. 3 — Validity.

Section 3 of the Regulation validates restrospectively all proceedings that took place before the Special Tribunal in the absence of a specific order by the Military Governor transferring the case to the Tribunal. The Regulation did not affect the jurisdiction of the Tribunal because it had jurisdiction already. The proceedings held by it could not be regarded as void because there was no express prohibition to try the case, and statutes which merely purport to cure defects in legal proceedings, which are in their nature irregularities, are always permissible under law. **('51) ILR (1951) Hyd 895: 1953 Cri LJ 785: AIR 1953 Hyd 145 (149) (Pt B) (Pr 14-D).**

—INDORE PUBLIC SAFETY ORDER (1947)

——Validity — Order not ultra vires of State Cabinet.

The validity of the Public Safety Order (Indore) 1947, rest neither upon proof of urgency of the matter nor upon the proof of His Highness' order not being obtainable in time but upon the judgment of the Cabinet that immediate action of this character is necessary. Where, therefore, the fact of the absence of His Highness from the State is not challenged, there is no basis for the contention that the Public Safety Order is not valid and effective and is ultra vires the Holkar State Cabinet. Krishnaji Shankar v. Madh. Bha. State, **AIR 1950 Madh Bha 107 (111) (Pt A) (Pr 12) (SB).**

—JAMMU AND KASHMIR PREVENTIVE DETENTION ACT (4 of 2011 SAMVAT (1954))

SECTION 3

——S. 3 (1) — Scope — Detention on several grounds — Some grounds non-existent or irrelevant — Effect on validity of order — (Public Safety — Preventive Detention Act (1950), S. 3).

Where power is vested in a statutory authority to deprive the liberty of a subject on its subjective satisfaction is stated to be based on a number of grounds or for a variety of reasons, all taken together, and if some out of them are found to be non-existent or irrelevant, the very exercise of that power is bad. To uphold the validity of such an order in spite of the invilidity of some of the reasons or grounds would be to substitute the objective standards of the Court for the subjective satisfaction of the statutory authority. In applying these principles, however, the Court must be satisfied that the vague or irrelevant grounds are such as, if excluded, might reasonably have affected the subjective satisfaction of the appropriate authority. The Court while anxious to safeguard the personal liberty of the individual will not lightly interfere with such orders. Dwarka Das Bhotia v. The State of J. and K. **1957 SCJ 133: 1957 SCA 273: 1956 SCR 948: 1957 SCC 18: 1957 Cr LJ 316: (1957) Mad LJ (Cr) 58: AIR 1957 SC 164 (168) (Prs 4, 5, 6).**

——S. 3 — No necessity of signature of Prime Minister of Jammu and Kashmir on detention order served on detenu or on order sent to the officer in charge of jail. Lakhanpal, P. L. v. State of Jammu and Kashmir, **1956 Cr LJ 421 (2): 1956 SCA 706: (1955) 2 SCR 1101: (1956) SCJ 236: AIR 1956 SC 197 (201) (Pt B) (Pr 9).**

——S. 3 (1) (a) — Detention under, challenged in writ petition for habeas corpus on grounds of mala fide — Mere allegation of mala fide in affidavit without details is not enough. **1962 Kash LJ 212: 1963 (1) Cri LJ 765: AIR 1963 J & K 23 (27) (Pt D) (Pr 8).**

——S. 3 — Government — Meaning of — Order of detention issued over signature of Chief Secretary — Is duly authenticated in accordance with Rule 13. **1959 Cr LJ 709: AIR 1959 J & K 56 (57) (Pt A) (Prs 6, 8, 11) (DB).**

——S. 3 — Grounds of detention — Subjective satisfaction.

The grounds on which the order of detention is made is a matter of subjective satisfaction of the Government. **1959 Cri LJ 709: AIR 1959 J & K 56 (58) (Pt D) (Pr 23) (DB).**

——S. 3 — Detention whether mala fide.

Even if a detenu had some political differences with the Prime Minister some time in the past that would not make his detention mala fide unless the petitioner shows that there are patent facts on which the detention is based and which have absolutely no connection with the object which the legislature has in view, namely the prevention of acts prejudicial to the security of the State. AIR 1954 SC 276, Foll. **1959 Cr LJ 709: AIR 1959 J & K 56 (58) (Pt E) (Pr 26) (DB).**

——S. 3 — Constitution of India, (as applied to Jammu and Kashmir), Arts. 35 (c) and 13 — Fundamental rights—Jammu & Kashmir Preventive Detention Act is excepted from the operation of fundamental Rights by virtue of Article 35 (c) — Curtailment of, with respect to preventive detention in Jammu and Kashmir is valid — See Constitution of India, Article 35 (c). **1956 Cri LJ 48: AIR 1956 J and K 1 (FB).**

——S. 3 — Jammu and Kashmir Constitution Act (1996), Section 6 — Jammu and Kashmir Preventive Detention Act (2011), Section 3 — Order of detention issued not on behalf of Sadar-i-Riyasat but on behalf of Government is not bad. See Jammu and Kashminr Constitution Act (1996), Section 6. **1956 Cri LJ 48: AIR 1956 J & K 1 (FB).**

SECTION 4

——S. 4 — Order of detention is not warrant of arrest within meaning of Section 80, Criminal P. C. — Section 4 does not attract Section 80 of Code.

Section 4 of the Jammu and Kashmir Preventive Detention Act speaks only of the manner of execution of a detention order and does not render the detention order a warrant of arrest under the Criminal P. C. so as to require compliance with Section 80 of that Code. The manner of execution of a warrant of arrest is provided for in Section 46 of the Code and not in Section 80.

The obligation laid under Section 80 of the Code of Criminal Procedure on the person arresting cannot under the circumstance be extended to the case of a detention order which is entirely different from a warrant of arrest. AIR 1961 All 542, Rel. on. **1962 Kash LJ 212: 1963 (1) Cri LJ 765: AIR 1963 J & K 23 (24, 25) (Pt A) (Prs 3, 4).**

——S. 4 — Superintendent of Police appointed as Principal of Training School — Has competency to execute order of detention. **1959 Cri LJ 709: AIR 1959 J & K 56 (58) (Pt C) (Prs 21, 22) (DB).**

● ——S. 4 — **Detention of detenu — Procedure laid down in Section 4 not strictly observed — Detention is invalid.**

Per Kilam and Shahmiri, JJ. (Wazir, C. J., contra): Where the detention orders are not served on the detenus in accordance with the procedure established by Section 4, Jammu and Kashmir Preventive Detention Act, 2011, the arrest and detention of the detenus are both improper and invalid. The procedure laid down by law has to be strictly observed and where deviation from legal procedure is established the detenu is entitled to be set free. AIR 1952 SC 106; 1952 SCJ 111; (1952) 1 MLJ 733 (SC) and AIR 1954 J and K 59, Disting.; AIR 1955 J and K 7 (FB), Rel. on. Mohd. Subhan v. State. **1956 Cr LJ 48: AIR 1956 J & K 1 (11, 16) (Pt H) (Prs 35, 57) (FB).**

● ——S. 4 — **Directions as to execution of order given in order of detention — Failure to follow — Effect — (Preventive Detention Act (1950), Section 3).**

Preventive detention is a serious inroad on civil liberties and as such any law which in any way curtails civil liberties has to be very strictly construed. The Court has to see if the law as it is, has or has not been meticulously followed, and if it finds even a hair-breadth deviation made from the express provisions of law or a slight disregard of any direction given according to law it shall have no hesitation in declaring a detention under such circumstances quite illegal. This shall apply with greater force in Kashmir as the law there is somewhat different and even a bit harsh when compared to the law in force in the other Indian States. When directions as to the execution of an order of detention are given in the order of detention itself, those directions have to be meticulously followed. Hence, where the order of detention has provided that a notice of the said Order shall be given to the detenu by delivering a copy of this order to him, and no such copy is delivered to him, the order of detention is bad. Hissam-Ud-Din v. State. **1955 Cr LJ 1071: AIR 1955 J & K 7 (8) (Pt B) (Prs 6, 7) (FB).**

[Overruled on another point in AIR 1957 SC 281.]

SECTION 8

● ——S. 8 (1) — **'As soon as may be' — Meaning of.**

The period of time predicated by the phrase "as soon as may be" begins to run from the time the detention in pursuance of the detention order begins. And to communicate the grounds 'as soon as may be' may well be said to mean to do so within a reasonable time with an understanding to do it within the shortest possible time. Whenever the question of reasonableness arises in computing the period of time the Court has perforce to have regard to the particular circumstances of the case in which the question arises for decision. It may not be possible in many cases to affirmatively say or to precisely quantify the period of time by reference to hours days, or months, nevertheless, it is possible, having regard to the circumstances of the case, to say whether the thing done was or was not done 'as soon as may be' within the time which was reasonably convenient or requisite. Abdul Jabar Butt v. The State of Jammu and Kashmir, **1957 Cr LJ 404: 1957 SCJ 184: (1957) MLJ (Cri) 83: 1957 SCR 51: 1957 SCA 423: 1957 SCC 149: AIR 1957 SC 281 (283) (Pt A) (Pr 6).**

● ——S. 8 (1), Proviso — **Construction — Time for making declaration under — (Interpretation of Statutes).**

Proviso to Section 8 (1) has to be construed harmoniously with the provisions of sub-section (1) to which it is a proviso. The proviso implies that the time for making the declaration should be conterminous with the time fixed for communicating the grounds under sub-section (1). When the detaining authority makes the order of detention, it specifies in the preamble to the order why the order is made, namely, whether it is made with a view to preventing the detenu from acting in any manner prejudicial to one or other of the four objects enumerated in Section 3 (1) (a). If the Government can make up its mind that the detention order is made against a particular person on account of his activities being prejudicial to the security of the State, there is no reason why the Government should not at the same time or 'as soon as may be' thereafter make up its mind as to whether or not it would be against the public interest to communicate to such person the grounds on which the detention order is made. AIR 1955 J and K 7, 1955 Cr LJ 1071 (FB), **Overruled.** Abdul Jabar v. The State of Jammu and Kashmir, **1957 Cr LJ 404: 1957 SCJ 184: (1957) MLJ (Cri) 83: 1957 SCR 51: 1957 SCA 423: 1957 SCC 149: AIR 1957 SC 281 (285) (Pt B) (Pr 12).**

● ——S. 8 (1), Proviso — **Validity — Constitutionality questioned on the ground of its inconsistency with Arts. 21 and 22 of the Constitution — (Constitution of India, Arts. 21, 22, 35 (c), 370 (1) (c) and (d)).**

Section 8 of the Act is not in excess of or inconsistent with the provisions of Cl. (c) added to Article 35 of the Constitution by the Constitution (Application to Jammu and Kashmir) Order, 1954. The effect of the modification in Article 35 of the Constitution by the addition of Cl. (c) in it by the Constitution (Application to Jammu and Kashmir) Order, 1954, is that such of the provisions of the Jammu and Kashmir Preventive Detention Act (4 of 2011) as are inconsistent with Part III of the Constitution shall be valid until the expiration of five years from the commencement of the Order. This is an exception which has been engrafted on the Constitution in respect of fundamental rights relating to personal liberty for the limited period of five years. The Act itself has a limited life of five years. Thus the exception aforesaid is co-extensive with the life of the Act itself. Hence, so long as the Act continues in force in its present form, the aid of the provisions of Articles 21 and 22 cannot be invoked to attack the constitutionality of Section 8 (1), of the Act by a person detained under Section 3 (1) (a) (i). Hence, the petitioner, who has been detained under Section 3 (1) (a) (i) of the Act, is not entitled to know the grounds upon which he had been detained beyond what is disclosed in the order itself, where the Government by order has declared that it would be against the public interest to communicate to him the grounds on which the detention order has been made. Lakhanpal, P. L. v. State of Jammu and Kashmir, **(1956) SCJ 236: 1956 Cr LJ 421 (2): 1956 SCA 706: (1955) 2 SCR 1101: AIR 1956 SC 197 (200, 201) (Pt A) (Prs 6, 8).**

——S. 8 (1) — Though Article 22 (5) of the Constitution is violated, the provisions are not ultra vires in view of Article 35 (c) as applied to Jammu and Kashmir State. **1963 (1) Cri LJ 765: 1962 Kash LJ 212: AIR 1963 J & K 23 (25) (Pt B) (Pr 5).**

——S. 8 (1), Proviso — Declaration under, need not be communicated to detenu in language

known to him. 1957 SCJ 137; (1957) 1 MLJ (Cri) 62; AIR 1957 SC 173, Rel. on. AIR 1962 SC 911, Dist. **1963 (1) Cri LJ 765: 1962 Kash LJ 212: AIR 1963 J & K 23 (26) (Pt C) (Pr 6).**

●——**S. 8 (1)** — Constitution of India (as applied to Jammu and Kashmir), Articles 35 (c) and 370 (1) (d), (as applied to Jammu and Kashmir) — Constitution (Application to Jammu and Kashmir) Order (1954), Para 4 (1) (iii) — Jammu and Kashmir Preventive Detention Act (2011), Section 8 (1) — Article 35 (c) is not ultra vires — Section 8 (1), Jammu and Kashmir Preventive Detention Act competently enacted. See Constitution of India, (as applied to Jammu and Kashmir), Article 35 (c). **1956 Cri LJ 48: AIR 1956 J & K 1 (FB).**

●——**S. 8 — Detention for reasons of security of State — Declaration as to non-supply of grounds — Time limit.**

Though it is highly undesirable that a detenu should remain in suspense, if the making of a declaration with regard to the supply or non-supply of the grounds is delayed, yet a reference to proviso to Section 8, Preventive Detention Act, would show that no time-limit for making a declaration with regard to the non-supply of grounds is provided by this Section or any other Section of the Preventive Detention Act. Such being the case, the Government cannot be forced to act in a manner which may be more desirable, but which law does not make upon it obligatory. Hence, where the detention is for reasons of security of State, the mere fact that the declaration as regards non-supply of grounds is made after the application for habeas corpus is submitted to the High Court does not vitiate the detention. Hissam-Ud-Din v. State, **1955 Cr LJ 1071: AIR 1955 J & K 7 (7, 8) (Pt A) (Prs 4, 5) (FB).**

[**Overruled** in AIR 1957 SC 281.]

SECTION 14

●——**S. 14 — Scope of — Decision of Government if to be communicated to detenu — (Public Safety — Preventive Detention Act (1950), Section 11).**

Decision of the Government under Section 14 need not be communicated to the detenu. The omission to convey the order made under Section 11 of the Indian Preventive Detention Act does not make the detention illegal or result in infringement of the petitioner's fundamental right. The position is the same under Section 14 of the Jammu and Kashmir Preventive Detention Act which does not in terms require any formal order to be made. Mohammad Afzal Khan v. State of Jammu and Kashmir, **1957 SCJ 137: 1957 SCA 131: 1957 Cr LJ 320: (1957) Mad LJ (Cri) 62: 1957 SCR 63: 1957 SCC 1: AIR 1957 SC 173 (175) (Pr 7).**

SECTION 19

●——**S. 19** — Constitutionality of Act — Tests of— Opposed to the policy of the Constitution is no test — Section 19 of the Preventive Detention Act is not ultra vires of the Constitution on the ground that it is not in accordance with the spirit of the Constitution. See Constitution of India, Article 245. **1954 Cri LJ 1811: AIR 1954 J & K 59 (FB).**

●——**S. 19 — Scope — If contravenes Art. 20, Constitution of India.**

It is true that Article 20, Constitution of India, forbids the trial and conviction of a person according to a law which was not in force at the time when the offence was committed; but proceedings under the Preventive Detention Act are not judicial proceedings and preventive detention by itself is not a conviction or sentence of imprisonment. Section 19 which is of the nature of an ex post facto law which has been framed to govern the cases of those detenus who were arrested under earlier laws now repealed and whose remedies available to them then have now been taken away from them, does not, therefore, contravene the provisions of Article 20. Ghulam Ahmad v. State, **1954 Cr LJ 1811: AIR 1954 J & K 59 (62) (Pt D) (Pr 11) (FB).**

●——**S. 19— Effect of, on High Court's powers — (Constitution of India, Article 32) — (Criminal P. C. (1898), Section 491).**

Section 19 appears to limit the powers of the High Court in respect of those detentions to whom Section 19 applies but it has to be kept in view that the powers of issuing writs of habeas corpus are guaranteed to the High Court by the Constitution and also similar orders can be issued under Section 491, Criminal P. C. No doubt the scope of Section 19 is wide enough yet it does not affect the power of the High Court to scrutinize the orders under which detentions are made.

The Court has to see whether the detention order which is challenged is made or appears to have been made under a valid law. If detention order appears to have been made under a valid law the Courts cannot interfere with that order and cannot release the detenu but if the circumstances show that the order has no semblance of having been made under any valid law in respect of detention the Courts can release the detenu. Ghulam Ahmad v. State, **1954 Cr LJ 1811: AIR 1954 J & K 59 (63) (Pt F) (Pr 12) (FB).**

—JAMMU AND KASHMIR PUBLIC SECURITY ACT (15 of 2003 SAMVAT)

SECTION 3

●——**S. 3 — Order under — Form and content of.**

It is true that no form is prescribed in Section 3 in which an order of detention is to be drawn but that does not mean that a free licence has been given to detaining authorities to draw their orders in a haphazard manner. The order must not only show that the detaining authority was satisfied about the necessity of making a detention order, but it must also show, and the detenu has a right to know, that the detaining authority was in fact authorised by the Government to take action under the relevant section. Ghulam Ahamad v. State, **1954 Cr LJ 1811: AIR 1954 J & K 59 (60) (Pt A) (Pr 3) (FB).**

●——**S. 3 — Validity of order — Order not signed by proper authority — Effect.**

The order under Section 3, is not an executive order, but is an order under a Statute. When a statutory duty is cast upon an authority to do a certain act, it is that authority which must do that act and sign all orders passed under the said statute. Without express powers granted by the statute itself, the said authority cannot delegate its powers to any authority whatsoever.

Held, that the signing of the order by Deputy Secretary in place of the Minister was improper. Ghulam Ahmad v. State, **1954 Cr LJ 1811: AIR 1954 J & K 59 (61) (Pt B) (Pr 5) (FB).**

●——**S. 3 (as amended by Act 13 of 2010) — Power of Government to revoke defective order and pass fresh order — Criminal P. C. (1898), Section 491).**

The Government has the right to pass a fresh order of detention, if it comes to the conclusion that the previous order of detention was defective on any grounds whatsoever and once such a valid order of detention is passed, any irregularities or illegalities of the period prior to the making of the fresh valid order would in no way affect the merits or the result of the case.

Further, if at any time before the Court directs the release of the detenu, a valid order directing his detention is produced, the Court cannot direct his release merely on the ground that at some prior stage there was no valid order for detention. AIR 1945 FC 18 and AIR 1952 SC 106; 1952 SCJ 111; (1952) 1 MLJ 732, Rel. on. Ghulam Ahmad v. State, **1954 Cr LJ 1811: AIR 1954 J & K 59 (61, 62) (Pt C) (Pr 7) (FB).**

——S. 3 —Annexure to Council Order No. 356-C of 1947 — Detention outside jurisdiction — (Criminal P. C. (1898), Section 491) — (Constitution of India, Article 226).

An order of detention directing that the detenu be detained at a place beyond the jurisdiction of the detaining authority is illegal as the annexure to Council Order No. 356-C of 1947 shows that the power of arrest and detention has to be exercised by a police officer within his own jurisdiction. AIR 1949 Bom 37, Rel. on. **12 J and K LR 73: 1953 Cr LJ 1885: AIR 1954 J & K 7 (8) (Pt A) (Pr 3) (DB).**

——Ss. 3 (2) and 38-A — Annexure to cabinet order No. 928-C of 1948, dated 27-11-48—Validity.

According to Section 38-A, Public Security Act, the Government can delegate only those powers to an officer of authority which it possesses. Neither Section 3 (2) nor any other section of the Act confers any power on the Government to transfer a detenu from one place of custody to another. The committal to custody, has in all cases to be made by the officer who has effected or directed the arrest of the detenus, and, therefore, the Notification (Annexure to Cabinet Order No. 928-C of 1949, dated 27-11-48) by which powes of transfer are deemed to have been delegated to the Hon'ble Home and Dy. Prime Minister is ultra vires of Section 3 (2) and Section 38-A of the Act. **12 J and K LR 73: 1953 Cr LJ 1885: AIR 1954 J & K 7 (9) (Pt B) (Prs 5, 6) (DB).**

——S. 3 — Power of High Court — Criminal P. C. (1898), Sec. 491.

Under Section 3 of the Public Security Act, the sufficiency or insufficiency of material which might have satisfied the detaining authority effecting the detention of a person is a matter for the decision of that authority alone which passed the order of detention. The High Court has, however, power to examine the correctness of the recital about satisfaction of the detaining authority contained in any such order and if it comes to the conclusion that the recital is incorrect, it may declare the order to be invalid and the detention of the individual concerned to be illegal. **10 J and K LR 70: AIR 1952 J and K 4 (5) (Pt A) (Pr 3).**

——S. 3 —Detention under— Grounds for, need not be supplied to detenu — Preventive Detention Act (1950), Section 7 — Applicability.

For purposes other than defence, foreign affairs and security of India, the Public Security Act is in force so far as the State of Jammu and Kashmir is concerned and detention can be ordered under its provisions.

Consequently, an order passed under Section 3 of the Public Security Act cannot be said to be invalid merely because the detenu is not supplied with the grounds of detention. The provisions of S. 7, Preventive Detention Act, cannot apply to such a case and the provisions of Public Security Act do not provide for supplying such grounds to the detenu. **10 J and K 70: AIR 1952 J and K 4 (5) (Pt B) (Pr 4).**

——S. 3 — Prior order of externment — Subsequent immediate order of detention — Validity — Criminal P. C. (1898), S. 491.

A wavering mind can never be treated as "a mind satisfied" which is pre-requisite for passing an order under Section 3 of the Public Security Act.

Where on the oral report of a police officer an order for externment was passed against the detenu but the Magistrate shortly after passed an order of detention against the detenu.

Held, that the order of detention was not valid inasmuch as the prior order of externment showed that the Magistrate was not satisfied as to the necessity of the action taken later on. **10 J & K LR 70: AIR 1952 J and K 4 (6) (Pt C) (Pr 7).**

——S. 3 — Order of detention under, passed and signed by a sub-divisional Magistrate at a time when that sub-division had been converted into a district and when he had ceased to exist as sub-divisional Magistrate — Order is invalid — Criminal P. C. (1898), Section 491. **10 J and K LR 70: AIR 1952 J and K 4 (7) (Pt D) (Prs 8, 10).**

SECTION 38-A

——S. 38-A — Notification (Annexure to Cabinet Order No. 928-C of 1949) by which powers of transfer are deemed to have been delegated to the Hon'able Home and Deputy Prime Minister is ultra vires of Section 3 (2) and Section 38-A of the Act. See Public Safety — Jammu and Kashmir Public Security Act (15 of 2003 Sm.), Section 3 (2). **1953 Cri LJ 1885: AIR 1954 J and K 7 (DB).**

—MADHYA BHARAT MAINTENANCE OF PUBLIC ORDER ACT (7 of 1949)

SECTION 3

——S. 3 — Preventive Detention Act (1950), Section 3 — Detention under local Act — Fresh order under Preventive Detention Act—It is not extension of previous order. **AIR 1955 NUC (Madh Bha) 1469.**

——Ss. 3 (1), 4 — Order of detention under Section 3 (1) — Omission to mention period — Order is not bad — Presumption as to non-satisfaction cannot be drawn. See Madhya Bharat Maintenance of Public Order Act (7 of 1949), Section 4. **1952 Cri LJ 1058: AIR 1952 Madh B 114 (DB).**

——Ss. 3, 5 and 11 — Validity — Constitution of India, Article 19 (1) (d) and (e) and (5).

The powers conferred upon the Government under Section 3 are as wide as conceivable. It authorises the Government not only to interfere with the personal liberty of an individual but makes legal an interference by the Government with practically every sphere of activity of the citizen as a preventive measure if it is satisfied that he is likely to do any act prejudicial to public safety or maintenance of public order.

The unreasonableness of the restrictions imposed by the statute does not result merely from the unusually wide character of the restrictions that may be imposed upon the rights of the citizens but also flows from the manner in which the power conferred may be exercised. Under

Section 11 the Government is empowered to delegate the powers or duty which is conferred or imposed on the Government, to any officer or authority without any safeguards. The unreasonableness of restrictions becomes evident from the fact that except in the case of an order of detention (See Section 5) the person against whom any other of the various orders which it is permissible to make under Section 3 (1) is passed, the person affected thereby is not given any right of representation. The authority making the order may have acted on wrong information or under a mistaken belief as to the existence of a set of circumstances which really do not exist, yet the person against whom an order is made, if it is an order other than one for his detention, is without a remedy.

The cumulative effect, therefore, of Sections 3, 5 and 11 is to impose restrictions on the Fundamental Rights conferred by Article 19 (1) (d) and (e) of the Constitution which cannot be called reasonable. The restrictions which it is permissible to impose under those sections must, therefore, be held to be ultra vires of the powers of the State Legislature. **1952 Cri LJ 1058: ILR (1952) Madh Bha 364: AIR 1952 Madh B 114 (117, 118, 119) (Pt B) (Prs 14, 18, 19) (DB.**

——S. 3 (1) — Accused prohibited from entering district — Contravention — Accused sentenced — Appeal — He cannot be ordered to be removed to place outside district. **52 Cri LJ 670: AIR 1951 Madh Bha 108 (109) (Pt A) (Pr 3).**

——S. 3 (4) and (7) — Powers of police.

Powers of the Police in sub-sections (4) and (7) of Section 3 are co-extensive. The police is authorised to remove any person from a prohibited area or place. At the same time he can be prosecuted under sub-clause (7) and he shall be punishable with imprisonment to a term which may extend to one year or with fine or with both, etc. **52 Cri LJ 670: AIR 1951 Madh Bha 108 (109) (Pt B) (Pr 4) (DB).**

——S. 3 (1) — Order under — Who can pass.

It is primarily the M. B. Government that is empowered to make an order under Section 3 (1) (d) of the M. B. Maintenance of Public Order Act. Any other officer or authority exercising power under that rule has to derive his power from M. B. Government's order made under Section 11 of the Act and that is the sole channel provided by that Act for the delegation of the M. B. Government's power to any officer or authority subordinate to it. **52 Cr LJ 670: AIR 1951 MB 108 (109) (Pt C) (Prs 5, 8).**

——S. 3 (2) — Detention by District Magistrate — Period exceeding one month — Legality of order.

Even though by virtue of Section 3 (1) read with Section 11 a District Magistrate acting as Subha can exercise the powers of the Government, yet where he expressly records in the order that he is making it under S. 3 (2), the detention of the detenu if for a period of more than one month, is illegal. **AIR 1951 Madh Bha 43 (43, 44) (Pt A) (Pr 2).**

——S. 3 (2) — Detention for more than own month — Legality.

Where an order of detention statedly is passed under Section 3 (2) of the Madhya Bharat Maintenance of Public Order Act by the District Magistrate it would be illegal if the detention extends beyond one month. **AIR 1951 MB 43 (43, 44) (Pt B) (Pr 2).**

——S. 3 — Detention order — Necessity of furnishing copy to detenu.

Justice requires that the detenu should, immediately he is taken in custody, be furnished a copy of the detention order, though there is no express provision made in these respects in the Act. **51 Cri LJ 797: AIR 1950 Madh B 26 (26) (Pt A) (Pr 2).**

——Ss. 3 and 5 — Order of detention and communication of grounds — Magistrate should not merely repeat verbatim definition of 'prejudicial act' — He should scrutinise acts and conduct of person in question and then make order of detention — In communicating grounds of order he should state acts of detenu which in his opinion constitute danger to public safety or order.

When making an order of detention under Section 3 of the Act or when communicating the grounds for making the order of detention the Magistrate should not repeat verbatim the definition of 'act prejudicial to the public safety or maintenance of public order' as given in Section 2 of the Act. This is far from what the law requires. The Magistrate should scrutinise the acts and the conduct of the person in question and judge whether his acts and conduct as brought to his notice would have any of the effects stated in the definition of 'prejudicial act' and if he comes to the conclusion that public safety or public order would thereby be endangered he should proceed to make the order, and when communicating the grounds of the order of detention he should state the acts of the detenu which in his opinion constitute a danger to the public safety or maintenance of public order. **51 Cri LJ 655: AIR 1950 Madh B 9 (10) (Pt A) (Pr 4) (DB).**

——S. 3 (2) — Certain statement proscribed by Government of India but not prohibited in Madhya Bharat — Statement may be highly objectionable one none the less — Possession and distribution of copies of such statement may furnish ground for detention. **51 Cri LJ 655: AIR 1950 Madh B 9 (10) (Pt C) (Pr 4) (DB).**

SECTION 4

——Ss. 4 and 3 (1) — Order of detention under Section 3 (1) — Omission to mention period — Effect — Presumption as to non-satisfaction.

An order made under Section 3 is not bad because it does not state the period for which it is to remain in force. From the language of Section 4 it is clear that in the absence of mention by the authority making the order of the period for which the order is to remain in force, it must remain in force for three months unless revoked earlier. The only effect of expressing the duration of the order in the particular form chosen by the Legislature in the Statute is to give the authority concerned a discretion to make an order which may remain in force for less than three months.

Section 4 compared with various sections of the Penal Code (1860) providing punishments and Section 144, Criminal P. C. (1898).

In this view of the matter, the omission by the authority making the order to mention the period for which it is to be in force does not lead to an inference that the authority did not properly apply his mind to all the relevant points which he ought to have considered at the time of making the order and so the order is bad in law. Want of bona fides cannot be presumed and if an order, which on the face of it is a good and valid order, is passed, the burden of proving that it was not made bona fide must rest on the party challenging the same. **1952**

Cri LJ 1058: ILR (1952) Madh Bha 364: AIR 1952 Madh B 114 (115, 116) (Pt A) (Prs 4, 8).

SECTION 5

——S. 5 — Section 5 is ultra vires the State legislature as it imposes restrictions which are not reasonable and offend against Art. 19 (1) of the Constitution. See Madhya Bharat Maintenance of Public Order Act (7 of 1949), Section 3. 1952 Cri LJ 1058: AIR 1952 Madh B 114 (DB).

——S. 5 — Duty imposed by Section 5 — Failure to perform — Effect.

The grounds of detention may be contained in the order itself. But if the order fails to state that the detenu has the right to make a representation against the order of detention to the authority making the order, the continued detention becomes illegal. **AIR 1951 Madh Bha 43 (44) (Pt B) (Pr 3).**

——S. 5 — Grounds supplied to detenue should be specific and not vague.

The grounds of detention supplied to the detenu should be intelligible and specific, that is they must refer to specific acts of the detenu. The object is to enable the detenu to make a representation against his detention. Mere allegation in the grounds that the detenu held a meeting wherein labourers were exicted by false propaganda, that dissatisfaction was created among the labourers and that he was an active member of the communist party are vague and do not achieve this object. **AIR 1950 Madh Bha 118 (118) (Pr 3).**

——S. 5 — Undisclosed grounds of detention.

There is no reason why the detaining authority should not tell the detenu that none or some of the grounds on which the order of detention was made cannot in the public interest be communicated to him. Also there is no reason why the detaining authority should not on affidavit say, when the case comes to Court, that there were grounds of detention which could not be disclosed. **51 Cri LJ 797: AIR 1950 Madh B 26 (26) (Pt B) (Pr 3).**

——S. 5 — Discretion as to particulars to be communicated to detenu.

The discretion is vested by the law in the detaining authority as to what particulars out of the many shall be communicated to the detenu and he may not ask for all that he thinks he requires. But under the guise of exercising this discretion, it cannot take away the advantage of making representation against his detention.

Where the communication states that the detenu was a member of bodies which have been declared illegal and had been secretly participating in their activities, without more, this statement is not sufficient to enable the detenu to make the representation. Particulars of participation and of the activities are required.

But where it is stated that the detenu made a spirited speech in a labour meeting promoting feelings of class-hatred and exhorting labourers to go on strike and use violence, the communication stating the day and the place of the meeting, it would suffice to enable him to make the representation. Some words used in the speech are not required to be reproduced. **51 Cri LJ 797: AIR 1950 Madh B 26 (27) (Pt C) (Prs 6, 7).**

——S. 5 — Grounds supplied being absolutely vague and no specific grounds alleged — Detention is improper — Unwarranted delay in supplying grounds would not show bona fides of detaining authority — Grounds not to be furnished in instalments.

Where in the order of the District Magistrate supplying the grounds beyond making a general and vague statement that the detenus are found to influence the conduct or attitude of the public in a manner likely to be prejudicial to public safety or order and prejudicing the maintenance of public order and safety no specific grounds have been alleged, there is no sufficient compliance with the provisions of Section 5; the grounds being absolutely vague the detenus are not in a position to make any effective representation and the detention being not in compliance with Section 5 it is improper. An unwarranted delay in supplying the grounds would not show the bona fides of the detaining authority with regard to the detention of the detenus. The grounds of detention and additional particulars required to be furnished under Section 5 must not be furnished in instalments but at one time soon after the order under Section 5 (1) has been made. The detaining authorities cannot go on shifting and changing the grounds under Section 5 as it suits to their convenience. That would show mala fide on their part: AIR 1949 All 148 (FB); AIR 1948 Pat 135 and AIR 1949 Oudh 20, Rel. on. **51 Cri LJ 660: AIR 1950 Madh B 11 (11, 12) (Prs 1, 3) (DB).**

——Ss. 5, 3 — Order of detention and communication of grounds — Magistrate should not merely repeat verbatim definition of 'prejudicial act' — He should scrutinise acts and conduct of person in question and then make order of detention — In communicating grounds of order he should state acts of detenu which in his opinion constitute danger to public safety or order. See Public Safety — Madhya Bharat Maintenance of Public Order Act (7 of 1949), S. 3. 51 Cri LJ 635: AIR 1950 Madh Bha 9 (DB).

——S. 5 — Grounds may be furnished in instalments — All that section requires is that grounds should be communicated as soon as possible after order of detention — Order of detention on 20th March — First communication of grounds on 24th March — Second and amended communication of grounds on 2nd April — Second communication held not so late as to impute malicious motive to detaining authority.

It cannot be said that the grounds for detention cannot be furnished in instalments. All that is required by the section is that the grounds on which the order of detention has been made shall be communicated as soon as may be after the order has been made.

Where the order of detention was made on 20th March and what were supposed to be the grounds of detention were communicated to the detenu on 24th March and the second and amended communication of grounds was made on 2nd April, the second communication of grounds held could not be said to be too late, so late as to impute a malicious motive to the detaining authority, the intention to evade the law by not communicating the grounds in time or communicating them in a slovenly manner to gain time. **51 Cri LJ 655: AIR 1950 Madh B 9 (10) (Pt B) (Pr 4) (DB).**

SECTION 7

——S. 7 (1) — 'A' factually invested with powers to issue order — Order issued by 'A' under wrong official designation — Order is not invalid.

The essential thing in the matter of exercise of executive function by a public authority is the

factual existence of power in him to act and not the official designation in which he expresses himself to be acting. The mere erroneous mention of the official designation cannot render the order invalid when in fact the same person was factually invested with powers to issue the order. AIR 1952 SC 181: 1952 SCJ 235: (1952) 2 MLJ 119, Foll. **1957 MPC 220: 1957 Jab LJ 74: ILR (1957) Madh Pra 179: AIR 1957 MP 54 (56) (Pt A) (Pr 13) (DB).**

——S. 7 (1) — Cr. P. Code (1898), Section 144 — Difference between scopes.

It is clear from the wordings of Section 7 (1), M. B. Maintenance of Public Order Act, 1949, that it is essentially different from S. 144 of the Cr. P. Code, in its language and scope. There is moreover an essential difference in the two statutes and the meaning and scope of one cannot be interpreted on the basis of the other provision. **1957 MPC 220: 1957 Jab LJ 74: ILR (1957) Madh Pra 179: AIR 1957 MP 54 (56) (Pt B) (Pr 16) (DB).**

——Ss. 7, 11 — Constitution of India, Article 19 (1) (b) and (d) — Delegation of power under Section 11 is contrary to fundamental rights under Art. 19 — Contravention of order under Section 7 is not illegal. See Constitution of India, Article 19 (1) (b). **AIR 1957 Madh Pra 54 (DB).**

——Ss. 7 and 11 — Notification in Gazette — Delegation of powers under Section 7 to Subas for their respective districts — No specific order to individual Suba is necessary — Contravention of order under Section 7, promulgated by District Magistrate under powers delegated by Gazette Notification No. 18, D/- 22-4-1949 published in M. B. Gazette D/- 30-4-1949, is offence under Act.

All that is required by Section 11 is that the Government should by order direct that the powers conferred upon it by the Act shall be exercised or discharged by any officer or authority specifically mentioned in that direction. The expressions 'order' and 'direction' are not terms of art and have no technical meaning. They are used in Section 11, in the same sense in which they are used in common parlance. The order contemplated by Section 11 need not be specifically directed to the person who was to exercise the powers mentioned in the section. It will be sufficient to meet the requirements of the section if the Government indicate with sufficient clearness, so as to leave no room for doubt on the subject, that the powers conferred upon it by the Act shall be exercised by some authority specified by it in the said direction.

Notification No. 18, Dated 22-4-1949 published in the Madhya Bharat Government Gazette dated 30-4-1949 whereby the Government had directed that all the powers and duties conferred or imposed on it under the Maintenance of Public Order Act except the power of imposing collective fines under Section 6 and the powers under Section 10 of the Act shall be exercised by the Subas in their respective Districts, held was sufficient in law to clothe the District Magistrate, Gird Gwalior with powers under S. 7 (1) and therefore, the contravention of an order promulgated by the District Magistrate, Gird Gwalior, under these powers, prohibiting processions, meeting etc., would be an offence, under the Act. Cri. Rev. No. 43 of 1950, (MB) **Held,** not correctly decided. **('52) ILR (1952) Madh B 109: 53 Cri LJ 41: AIR 1952 Madh Bha 199 (201, 203) (Prs 12, 29) (DB).**

SECTION 11

——Ss. 11, 7 — Constitution of India, Art. 19 (1) (b) and (d) — Delegation of power under Section 11 is contrary to fundamental rights under Article 19 — Contravention of order under Section 7 is not illegal. See Constitution of India, Article 19 (1) (b). **AIR 1957 Madh Pra 54 (DB).**

——Ss. 11, 7 — Notification in Gazette — Delegation of powers under Section 7 to Subas for their respective districts — No specific order to individual Subas is necessary — Contravention of order under Section 7, promulgated by District Magistrate under powers delegated by Gazette Notification No. 18, D/- 22-4-1949 published in M. B. Gazette, D/- 30-4-1949, is offence under Act. See Public Safety — United State of Gwalior, Indore and Malwa (Madhya Bharat) Maintenance of Public Order Act 2005, (7 of 1949), Section 7. **AIR 1952 Madh Bha 199 (DB).**

——S. 11 — Ultra vires of the State legislature as the restrictions imposed by those sections are not reasonable and offend Article 19 (1) (d) and (e) — Constitution of India, Article 19 (1) (d) and (e) and (5). See Public Safety — Madhya Bharat Maintenance of Public Order Act (7 of 1949), S. 3. **1952 Cri LJ 1058: AIR 1952 Madh Bha 114 (DB).**

——S. 11 — Mere information to public that powers have been delegated to Subhas is not enough — Order authorising Subha to exercise power under Act is essential. **52 Cri LJ 670: AIR 1951 Madh Bha 108 (109) (Pt E) (Pr 10).**

—MADHYA BHARAT MAINTENANCE OF PUBLIC ORDER ORDINANCE (5 of 1948)

SECTION 3

——S. 3 (1) — Detention under — Order of detention must be expressed to be in name of Rajpramukh — Order signed by Chief Secretary to Government — Detention held illegal — Criminal P. C. (1898), Section 491.

If an order purporting to be made under subsection (1) of Section 3, Maintenance of Public Order Ordinance, is not made out in the name of the Rajpramukh it cannot be deemed to be made by the Government of the State. The reason is that under the constitution of the United State persons can only be authorised by the Rajpramukh by rules made to take executive action in his name. When the act is done in the name of the Rajpramukh it becomes an act of the Government but not otherwise. An order made in the name of the Rajpramukh is an order made by the Rajpramukh. The Rajpramukh is, so far as the exercise of executive authority is concerned, the Government of the United State of Madhya Bharat.

Where on an application under Section 491, Criminal P.C. by certain persons who were arrested and detained on 24th December 1948 under Section 3 (1) of the Ordinance the Government produced only an order Dated 8th January 1949 signed by the Chief Secretary to the Government certifying that an order of detention in respect of these persons had been made by the Government :

Held, that the order dated 8th January 1949, not being in the name of the Rajpramukh, was not a valid order and in the absence of any valid order the detention must be held to be illegal. **51 Cri LJ 902: AIR 1950 Madh Bha 34 (36, 37) (Prs 5, 7) (DB).**

—MADHYA BHARAT PUBLIC SECURITY ACT (19 of 1953)

CHAPTER 6

——Chap. VI (Ss. 12 to 21) — Provisions of Chapter VI, do not offend against Article 14. See Constitution of India, Article 14. **AIR 1955 NUC (Madh Bha) 800.**

SECTION 12

——S. 12 — Special Court — Position and status of — "Any other Court" stated in Section 28 (c) Criminal P. C. and Section 29 (2) Criminal P. C. means a Court referred to in Section 6 of the Code — It means a Magisterial Court constituted under the Code and not a special Court constituted under the M. B. Public Security Act. See Criminal P. C. (1898), Section 28 (c). **1957 Cri LJ 452: AIR 1957 Madh Bha 134.**

——S. 12 — Special Judge — Power to try offences under Sections 148 and 149, Penal Code.

The Special Judge is not empowered to try offences under Sections 148 and 149 of the Penal Code. Cri. Revn. No. 104 of 1956 (MB); AIR 1955 SC 274; 1955 SCJ 241; (1955) 1 Mad LJ (SC) 141 and AIR 1955 SC 216; 1955 SCJ 106, Rel. on. **1957 Jab LJ 126: 1957 MPC 74.**

——Ss. 12, 13 — Notification under Section 13 — Retrospective operation — No words excluding offences committed before its issue — Accused cannot have vested right at the moment when he commits offence — Special Judge has jurisdiction to try offences committed prior to Notification. **AIR 1955 NUC (Madh Bha) 2104.**

SECTION 13

——S. 13 — Notification under — Special Judge has jurisdiction to try offence committed prior to Notification. See Public Safety — M. B. Public Security Act (19 of 1953), Section 12. **AIR 1955 NUC (Madh Bha) 2104.**

SECTION 14

——S. 14 — Special Courts — Jurisdiction to try offence under Section 398, Penal Code.

Where the notification, empowering the Special Courts to try notified offences, mentions Section 395, but not Section 398, Penal Code, there is no illegality in the special Court trying an offence under Section 398, as Section 398 does not create a new substantive offence but only provides a principle for the sentence for the offence created by any of the Sections 392 to 395, Penal Code: AIR 1928 Bom 52 (1), Rel. on. **1959 Cr LJ 47: 1958 MPC 537: 1959 Jab LJ 166: 1959 MPLJ 949: AIR 1959 Madh Pra 6 (6) (Pt A) (Prs 1a, 2).**

——S. 14 — Notification specifying offences triable by special Court — Section 149, Penal Code, not included — Power — (Penal Code (1860), Section 149).

A plain reading of Section 14 of the M. B. Public Security Act and the notification issued thereunder specifying the offences which the special Court can try, there can be no doubt that if the notification does not empower the Special Judge specifically to try an offence under Section 149, then the Special Judge is not competent to try any person charged with any of the enumerated substantive offences read with Section 149, Penal Code. **1957 Jab LJ (MB) 1: 1957 Cr LJ 452: AIR 1957 Madh Bha 134 (135) (Pt A) (Pr 2).**

——S. 14 — Jurisdiction of Special Judge — Power to try offence under Penal Code, Section 149 — (Penal Code (1860), Section 149).

A Special Judge constituted under the Madhya Bharat Public Security Act of 1953 is not competent to try a case under Section 149, Penal Code. AIR 1957 Madh Bha 134, Foll. **Madh BLR (1956) Cr 455: 1957 Cr LJ 641: 1957 Jab LJ 685: AIR 1957 Madh Pra 47 (48) (Pr 2).**

SECTION 15

——S. 15 (4) — Special Judge — Power to discharge.

The provisions of Section 15 (4) of the Act show that the legislature intends the trial before a special Judge to commence as provided under Section 271, Criminal P. C. The special Judge must frame a charge which he has to read out and explain to the accused, if he thinks that the case is fit to be tried. As a necessary consequence a special Judge has also the power to refuse to frame a charge if he considers that no case has been made out against the accused. **1960 Jab LJ 761: 1960 MPLJ 1102: 1960 MPC 596: 1961 (2) Cr LJ 122 (124) (Pt B) (Pr 6).**

SECTION 19

——Ss. 19 (2) and 21 — Order of discharge by special Judge — High Court — Jurisdiction to set aside — Section 439, Criminal P. C.

The High Court in exercise of its revisional jurisdiction under Section 439, Criminal P. C., has jurisdiction to set aside an order of discharge passed by a special Judge appointed under S. 13, Madhya Bharat Public Security Act, by virtue of the provisions of Sections 19 (2) and 21 of that Act. The language of Section 21 of the Act is wide enough to include the powers under Section 439 of the Code to set aside an order of discharge passed by a special Judge which is a criminal Court inferior to the High Court. **1960 Jab LJ 761: 1960 MPLJ 1102: 1960 MPC 596: 1961 (2) Cri LJ 122 (123) (Pt A) (Prs 2, 3).**

——Ss. 19 and 21 — Trial by Special Judge (constituted under Section 12 M. B. Public Security Act) — Acquittal — Appeal lies to the High Court under Section 417 of Criminal P. C. as intended by implication by reference to Sections 423, 427 and 428 of Criminal P. C. in Clause (2) of Section 19 though not expressed in so many words — 'Any Court' — Meaning of. See Criminal P. C. (1898), Section 417. **1960 Cr LJ 917: AIR 1960 Madh Pra 188 (DB).**

SECTION 21

——S. 21 — Criminal P. C., Section 417 — Trial by Special Judge — Acquittal — Appeal against is competent to the High Court under Section 417 Criminal P. C. — This view is supported by Section 21 of the M. B. Public Security Act also — "Any Court" — Meaning of. See Criminal P. C. (1898), Section 417. **1960 Cri LJ 917: AIR 1960 Madh Pra 188.**

—MADHYA PRADESH PUBLIC SECURITY ACT (25 of 1959)

SECTION 3

——S. 3 (1) (a) — Validity — Order restricting person not to remain in any area or place in the

State — Not unreasonable on ground that it is not in the interest of general public and for maintenance of public order — Expression "in the interests of general public" — Meaning and scope of — Constitution of India, Article 19 (1) (d) and (5).

An order under Section 3 (1) (a) directing a person not to remain in any area or place in the State cannot be said to be unreasonable on the ground that such a restriction has no connection whatever with the maintenance of public order or the security of the State. If because of his associations, contacts, influence and the facilities available in an area a person is in a position to act in a manner prejudicial to the security of the State or to the maintenance of public order, and if he is so acting or is likely to act in such manner, then clearly in order to prevent him from so acting it becomes necessary to prohibit him from remaining in that area. Such a prohibition, if imposed is clearly in the interests of the general public and for the maintenance of public order. "In the interests of the general public" is a very wide expression and embraces public security, public order, and public morality. It is not something different from security of the State, public order or public morality. It cannot, therefore, be said that the restriction which the order made under Clause (a) of Section 3 (1) has only far-fetched, hypothetical or problematical and not proximate connection with the security of the State or the maintenance of public order. AIR 1952 SC 221 and AIR 1960 SC 633, Rel. on. **1964 MPLJ 209: 1964 Jab LJ 303: 1964 (2) Cri LJ 160: ILR (1965) Madh Pra 778: AIR 1964 Madh Pra 175 (178) (Pt A) (Prs 5, 6) (DB).**

——S. 3 (1) (a) — Restriction under, is reasonable both from substantive and procedural aspects.

The question whether the restriction imposed by certain provision of law is a reasonable restriction, must be determined on the nature of the right claimed, the object to be achieved, the means employed and the limitations imposed, and for this purpose both the substantive and procedural aspects or the impugned restrictive provision must be examined. Judged by both the substantive and the procedural aspects, Section 3 (1) (a) of the M. P. Public Security Act (25 of 1959) falls within the limits of authorised restrictions on the right conferred by Art. 19 (1) (d). AIR 1952 SC 196, Rel. on. **1964 MPLJ 209: 1964 Jab LJ 303: 1964 (2) Cri LJ 160: ILR (1965) Madh Pra 778: AIR 1964 Madh Pra 175 (178) (Pt B) (Pr 7) (DB).**

——S. 3 (1) (a) — Validity — Imposing of restriction without notice or hearing — Unreasonability of procedure does not affect validity of Section 3 (1) — Doctrine of natural justice — Applicability — Order not quasi-judicial — Action under, is preventive in nature — Therefore, exception to rule of natural justice.

Validity of Section 3 (1) is not affected by the unreasonableness of procedure based on the ground that the restriction under that provision can be imposed without notice or without hearing the person affected by the order. Giving of a notice or a hearing to a person against whom a restriction order was intended to be made before the making of that order cannot be sine qua non of the constitutionality of such a legislation. It is true that according to rules of natural justice a person whose right is sought to be affected by an action or order should be heard before any action is taken or order passed against him. But the doctrine of natural justice is attracted only where the function is quasi judicial. When the State Government or a District Magistrate makes an order under Section 3 (1) of the Act, it or he does not exercise any quasi judicial function. That apart, there is an exception to the rule of natural justice and that is that the hearing requirement may be excluded in emergency or under extraordinary exceptional circumstances. Action under Section 3 (1) is of a preventive nature, and the object of making an order under that provision would be altogether defeated if the order is not made promptly but deferred until after the person intended to be affected by the order is heard. AIR 1952 SC 196, Observations of Mukherjee J., in AIR 1950 SC 211, Rel. on; AIR 1952 SC 221 and AIR 1956 SC 559 and AIR 1956 SC 585 and AIR 1954 SC 229 and AIR 1961 SC 293, Disting. **1964 MPLJ 209: 1964 Jab LJ 303: 1964 (2) Cri LJ 160: ILR (1965) Madh Pra 778: AIR 1964 Madh Pra 175 (179) (Pt C) (Pr 8) (DB).**

——S. 3 (1) (a) — Order under, based on satisfaction of the State Government or the District Magistrate with regard to prejudicial activities of a person — High Court will not enter into the truth or adequacy of grounds communicated to person if they have a rational probative value and are not extraneous to the scope of Section 3 (1) — The past activities of the person are relevant in giving rise to the subjective mental satisfaction of the State that the person was likely to indulge in objectionable activities. AIR 1951 SC 481 and AIR 1952 SC 350, Rel. on. **1964 MPLJ 209: 1964 Jab LJ 303: 1964 (2) Cri LJ 160: ILR (1965) Madh Pra 778: AIR 1964 Madh Pra 175 (181) (Pt D) (Pr 12) (DB).**

——S. 3 (1), (a) — Scope — Order of externment for acts constituting penal offences — Order held not invalid on ground that such acts could be enquired into and tried by Courts of law under Criminal P. C. 1964 MPLJ 209: 1964 Jab LJ 303: 1964 (2) Cri LJ 160: ILR (1965) Madh Pra 778: AIR 1964 Madh Pra 175 (181) (Pt E) (Pr 12) (DB).

——S. 3 (1) (b) — Validity — Asking a person to remain at particular place — Restriction is unreasonable — Constitution of India, Art. 19 (1) (d) and (5).

The power of the State Government or the District Magistrate as provided by Clause (b) of Section 3 (1) of the M. P. Public Security Act, cannot be held to be in the nature of reasonable restriction of fundamental right under Article 19 (1) (d). The restriction under it has no reasonable relation to the subject in view but is so drastic in scope that it goes much in excess of the object stated in Section 3 (1). It is a very serious matter to ask a person to leave his home and hearth and go and reside in some other place in the State where he is an utter stranger, where the climate may be uncongenial to him and where he has to experience difficulties in the matter of accommodation and maintaining himself. It is difficult to see how the object stated in Section 3 (1) is advanced by immobilising a person in a certain place. If the activities of a person in a certain area fall within the mischief of Section 3 (1) and it is desirable that he should be asked to remove himself as far away as possible from that area, then the obvious course to adopt is to extend the area within which he cannot remain by making an appropriate order under Clause (a). By asking a person to remain in a particular place, his freedom of movement in other parts of the State and the whole country is unreasonably restricted (Clause (b) of Section 3 (1) held invalid). **1964 MPLJ 209: 1964**

Jab LJ 303: 1964 (2) Cri LJ 160: ILR (1965) Madh Pra 778: AIR 1964 Madh Pra 175 (181, 182) (Pt F) (Pr 14) (DB).

——**S. 3 (1) (c)** — Scope — Clause (c) is independent of other clauses — Restriction requiring person to notify his movements — **Held,** permissible and, therefore, not unconstitutional — Constitution of India, Article 19 (1) (d). **1964 MPLJ 209: 1964 Jab LJ 303: 1964 (2) Cri LJ 160: ILR (1965) Madh Pra 778: AIR 1964 Madh Pra 175 (182) (Pt G) (Pr 15) (DB).**

——**S. 3 (1) (b)** — Order under passed after declaration of emergency — Clause (b) held to be invalid as offending Article 19 (1) (d) of the Constitution — Order passed held not immune from attack — Order cannot be supported under Article 358 — Constitution of India, Articles 19 (1) (d) and 358 — AIR 1955 SC 549, Disting. **1964 MPLJ 209: 1964 Jab LJ 303: 1964 (2) Cri LJ 160: AIR 1964 Madh Pra 175 (182) (Pt H) (Pr 17) (DB).**

SECTION 12

——S. 12 (1) — An order under Section 12 (1) — Satisfaction of State Government — Justiciability — Basis of satisfaction — Action under S. 12 (1) when can be taken.

An order under Section 12 (1) can be made by the State Government only after satisfying itself as to the matter mentioned in Sub-section (1). But this satisfaction is open to review by the High Court when the person aggrieved by an order made under Sub-section (1) moves the High Court for setting aside the order. When therefore, a person applies to this Court under Sub-section (5), what this Court has to see is whether on the material that was before the State Government at the time of the making of the impugned order, the satisfaction of the Government with regard to the objectionable character of the publication was real or illusory and whether that material affords any justification for confirming, varying or reversing the order of the State Govenment.

The requiste satisfaction under Section 12 (1) must, therefore, be as to whether the reasonable and natural effect of the sale, distribution or circulation of the publication in question would be to undermine the security of the State or to prejudice the maintenance of public order or to offend against decency or morality. The publication said to be of the mischievous character mentioned in Section 12 (1) must be read as a whole, in a fair, free and liberal spirit. For purposes of Section 12 (1) a distinction must necessarily be drawn between a historical or literary work, on the one hand, and writing such as newspapers articles, pamphlets and other publications meant for the common and ordinary man on the other.

The truth or falsity of the objectionable matter in the publication is immaterial for determination of the question under Section 12 (1). If the impugned matter is of the character falling under Section 12 (1), then its quality in that respect is not made better by examining other books and publications or by the fact that no action has been taken by the Government in regard to these other publications. The question whether any newspaper, book or publication is of the nature described in Section 12 (1) must be decided on the nature, object and purpose of the publication, the time of the publication, the class of people for whom it is meant and the effect it would produce on the minds of the people into whose hands the publication is likely to fall.

The power conferred by that provision must be exercised with great caution and regulated by a full observance of the limitations imposed by the provision.

Applying these principles, it was held that the lesson in question was not of the nature described in Section 12 (1). **1963 (2) Cri LJ 521: 1963 MPLJ 489: 1963 Jab LJ 499: ILR (1964) Madh Pra 694: AIR 1963 Madh Pra 301 (303, 304, 306) (Pt A) (Prs 7 to 10, 17) (DB).**

——**S. 12** — Order under — Petition for setting aside order taking aid of Section 12 (5) of the Act — It is not open to petitioner to challenge the validity of Section 12. See Evidence Act (1872), Section 115. **1963 (2) Cri LJ 521: AIR 1963 Madh Pra 301 (DB).**

——**S. 12 (1) and (5)** — Whether a periodical will undermine public security is to be subjectively determined by State Government — The Government is not bound to hear person before passing order — Order of the State Government is not assailable on the ground that the applicant was not previously given an opportunity of being heard nor for the reason that the grounds for the satisfaction of the State Government were not disclosed in the order — AIR 1950 SC 222; 1950 SCR 621; 1959 MPLJ 185; AIR 1959 SC 107; 1959 SCR 1440 and AIR 1958 SC 398; 1958 SCR 1240, Rel. on. **1963 MPLJ (Notes) 200.**

SECTION 20

——S. 20 (1) and (2) — 'Regulate the entry of persons' — Meaning of — Government order prohibiting persons working in protected area from holding meetings, processions or demonstrations in the area — Order is intra vires.

The power under Section 20 (1) of the Act can be exercised by the Government whenever the Government considers it necessary or expedient in the interest of general public to regulate the entry of persons into any area. The words 'regulate the entry of persons' also imply restrictions being placed upon the persons who are allowed to enter into the said area. Therefore, an order made by the Government, whereby the persons working in the said area are made subject to the condition that they shall not hold meetings, processions or demonstrations in the said area, is intra vires of power of the Government as laid down in sub-sections (1) and (2) of Section 20 of the Act. On the making of such an order, the provisions of the order shall be deemed to have become a part of the Statute itself. **1965 Jab LJ 296: 1965 MPLJ 345: 1965 (1) Cr LJ 711: AIR 1965 Madh Pra 137 (138, 139) (Pt B) (Pr 9) (DB).**

—MADHYA PRADESH PUBLIC SECURITY MEASURES ACT (23 of 1950)

SECTION 11

——S. 11 — Government exercising the powers under Section 11 of the M. P. Security Measures Act (23 of 1950) is not acting as a person within the meaning of Article 14 of the Constitution and hence the provisions in Section 11 are not unconstitutional. See Constitution of India, Article 14. **AIR 1953 Nag 35 (DB).**

——S. 11 — Arbitrator — Power to determine compensation respecting movable property.

Under Section 11 the arbitrator has power to determine the amount of compensation in respect of movable property as well as immovable property. **1953 Nag LJ 161: ILR (1952) Nag 830: AIR 1953 Nag 35 (37) (Pt B) (Pr 7) (DB).**

SECTION 12

——Ss. 12, 15 — Act does not contravene Article 21, Constitution of India — Constitution of India, Article 21.

The Act does not contravene Article 21 of the Constitution of India.

Law in Article 21 means State-made or enacted law and not the general principles of natural justice. Procedure established by law thus means procedure prescribed by the legislature.

The accused has no absolute right to be tried under the Code. No person has a vested right in any course of procedure. Section 1 (2) of the Code recognises the special jurisdiction or power conferred or any special form of procedure prescribed by any other law. The Legislature is left free to lay down any procedure within the ambit of the legislative powers conferred by Entry 2 of List III (Criminal Procedure) subject of course to the limitation that there is no invasion of fundamental rights.

Article 21 is not intended to be a constitutional limitation upon the powers of the Legislature otherwise conferred by the Constitution.

The Act is not open to challenge on the ground that the Legislature was not competent to undertake legislation in respect of special criminal Courts. **1952 Cri LJ 646: 1952 Nag LJ 300: AIR 1952 Nag 118 (122) (Pt A) (Prs 19, 21, 22) (DB).**

SECTION 14

——S. 14 — Validity — Discrimination in criminal trials — Provision contravenes Article 14, Constitution of India, in so far as it empowers State to direct trial of any case by Special Judge and is ultra vires — Constitution of India, Articles 14 and 13.

The power given to the State Government under Section 14 to direct that any particular case be tried under the Act in a different way from that in which it would ordinarily have been tried involves discrimination and infringement of Article 14 of the Constitution. It enables the State Government to discriminate between man and man in the same locality—it may be even in respect of the same or a similar crime and to send one of them for trial by a Special Court, with all the risks and disadvantages which the special procedure involves, while leaving the other to be tried in the normal course by the regular Courts. It is an uncontrolled and unguided power left in the hands of the Government.

There is no discrimination if certain offences or classes of offences are directed to be tried by a Special Judge. Persons accused of such offences would be treated alike. They will be all subject to the procedure governing the trial of cases under the Act by a Special Judge. The power to direct certain classes of cases to be tried by a Special Judge may not also be regarded as discriminatory if there are good reasons for classification of such cases and treating the cases and the persons charged in such cases differently from other cases and the persons charged therein. Civil Revision Nos. 942 and 1113 of 1951 (Cal); AIR 1952 Cal 150 (FB), Rel. on; 72 IA 57, Disting; Case law discussed.

(Editorial Note: In State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75, which was an appeal from AIR 1952 Cal 150 (FB), the Supreme Court has held that the whole of Section 5 (1), West Bengal Special Courts Act (10 of 1950) (corresponding to Section 14 of the Madhya Pradesh Security Measures Act (23 of 1950), is ultra vires as it contravences Article 14, Constitution of India. In view of the Supreme Court decision, this decision, which agrees with the view of the Calcutta Full Bench Case and holds Section 14 only partly ultra vires, requires to be reconsidered. **1952 Cri LJ 646: 1952 Nag LJ 300: AIR 1952 Nag 118 (123) (Pt B) (Prs 26, 27) (DB).**

SECTION 15

——Ss. 15, 12 — Act does not contravene Article 21, Constitution of India — Constitution of India, Article 21. See Public Safety — Madhya Pradesh Security Measures Act (23 of 1950), Section 12. **1952 Cri LJ 646: AIR 1952 Nag 118 (DB).**

—MADRAS MAINTENANCE OF PUBLIC ORDER ACT (1 of 1947)

SECTION 1

——S. 1 — Date of commencement — 12th March 1947 should be taken as date of commencement of the Act — Madras General Clauses Act (1 of 1891), Section 5.

Madras Maintenance of Public Order Act has not fixed any date or time for its commencement. Under sub-clause (3) of Section 1 it comes into force at once. The assent of the Governor-General was received on 11th March 1947, but the assent was published in the Fort. St. George Gazette only on 12th March 1947. In view of Section 5, Madras General Clauses Act (1 of 1891), 12th March 1947 should be taken as the date of the commencement of the Act: (1879) 4 QBD 230 and AIR 1948 Mad 288, Ref. **(1949) 2 Mad LJ 663: 1949 Mad WN 733: 51 Cri LJ 615: AIR 1950 Mad 243 (246) (Pt A) (Pr 5) (DB).**

——S. 1 (4) — Power conferred upon Provincial Government to extend duration of Act by Section 1 (4) is delegation of legislative power and is not valid.

The power of extending the life of an Act is really a power to bring the Act itself into existence for a further period and if not so brought would cease to be law. A bare power to extend an Act is not in the nature of conditional legislation. Such a power cannot be delegated. The power of extending the life of an Act is clearly legislative power. The power conferred upon the Provincial Government to extend the duration of the Act by Section 1 (4), Madras Maintenance of Public Order Act, 1947, falls under the category of delegation of legislative power and is not valid. The Madras Maintenance of Public Order Act, 1947, ceased to have operation and died a natural death on 11th March 1948: AIR 1949 FC 175, Foll. Case law discussed. **(1949) 2 Mad LJ 663: 1949 Mad WN 733: 51 Cri LJ 615: AIR 1950 Mad 243 (251, 254) (Pt B) (Prs 12, 17) (DB).**

SECTION 2

——S. 2 (7) — Breach of rules — Offence — (Penal Code (1860), Sections 40, 42).

The Madras Maintenance of Public Order Act is a local law within the meaning of Section 42, Penal Code, applicable to the State of Madras. A local law does not necessarily include all the rules made under the provisions of a local law. Where a local law declares a breach of the rules made under its authority to be punishable, then a breach of such rules constitutes an offence within the meaning of Section 40, Penal Code. Therefore, when the act in respect of which apprehension or detention is made is in respect of an offence falling within a local law, it will be

a detention in respect of an offence falling within the meaning of Section 40, Penal Code, and a rescue by others and the escape by the detainee attracts the application of Section 225-B, Penal Code, provided the detention is lawful. **1953 Mad WN 362: (1953) 1 MLJ 653: 55 Cr LJ 396: AIR 1954 Mad 321 (322, 323) (Pt A) (Pr 11).**

——S. 2 (6) — No action taken under Section 2 (6) — Invocation of Police Act (1861), Section 23 — Permissibility.

Where beyond passing the detention order there is no evidence that action had been taken under Clause (6) of Section 2 the defect cannot be got over by invoking Section 23 of the Police Act, 1861. **(1953) 1 MLJ 653: 1953 Mad WN 362: 1954 Cri LJ 396: AIR 1954 Mad 321 (323) (Pt B) (Pr 13).**

——S. 2 (1) and (2) — Order of detention by District Magistrate — Wrong section inserted therein — It cannot be said that District Magistrate did not bestow attention on action he took. **1949 Mad WN 518: 62 Mad LW 573: (1949) 2 Mad LJ 337: 1952 Cri LJ 1206: AIR 1952 Mad 606 (607) (Pt C) (Pr 4) (DB).**

——S. 2 (1) — Satisfaction of detaining authority — Antecedents, including activity outside Province, can be considered.

Since the object of the Act is essentially preventive, if the detaining authority is satisfied from the antecedents (including activities outside the Province) of the person sought to be detained that he is likely to act in the same manner hereafter as he had been doing in the past, then it is perfectly open to the detaining authority to pass an order of detention. It is not necessary to wait until mischief is done before preventive sections are invoked. **(1950) 1 Mad LJ 69: 63 Mad LW 63: 1950 Mad WN 150: 1950 Mad WN (Cri) 34: 51 Cri LJ 710: AIR 1950 Mad 405 (406) (Prs 3, 4) (DB).**

——Ss. 2 and 3 — Detenu arrested, for offence under Explosive Substances Act — Subsequent order of detention under Madras Act 1 of 1947 — Grounds stating merely that detenu was smuggling explosives into Communist camps in Hyderabad State — Lack of good faith on part of Government — Ground being outside purview of Act detention is illegal — Criminal P. C. (1898), Section 491, (Per Horwill and Satyanarayana Rao JJ.; Balakrishna Iyer J., dissenting).

The detenu was arrested for having committed an offence punishable under the Explosive Substances Act, 1908, by transporting certain explosive substances from Bezwada to Jeggayyapet, but instead of being brought to trial for this offence an order of detention under Madras Act 1 of 1947 was served on him a month after. The grounds of detention supplied to the detenu merely stated that the detenu was clandestinely transporting certain explosive substances to Communist camps in Hyderabad State but they did not show how the supply of the explosives to Communists in Hyderabad State would endanger the transquillity of the Madras Province. The detenu applied under Section 491, Criminal P. C.

Held, (Per Horwill and Satyanarayana Rao JJ.; Balakrishna Ayyar J. dissenting) that as the ground mentioned was entirely outside the purview of the Act the order of detention was not justified. It should have been specifically and definitely stated in the grounds the activity of the detenu which was calculated to endanger the public peace of Madras Presidency so as to justify an order of detention under the Act. It was not permissible for the Court to enlarge the scope of the grounds by inference or implication or to interpret the grounds in the light of knowledge acquired by it through other channels: AIR 1950 Mad 162, Rel. on.

Held, further that the conduct of the Government in not prosecuting the detenu for an offence under the Explosive Substances Act which was punishable with a longer term of imprisonment afforded a basis for inferring lack of good faith on its part. The Act is not intended to enable the Government to deprive the liberty of a subject by first putting forward a case which they know fully well could not be substantiated in a Court of law and then take advantage of the provisions of the Act and detain the person in Jail. **(1949) 2 Mad LJ 711: (1949) Mad WN 831: 51 Cri LJ 670: AIR 1950 Mad 266 (267, 269) (Prs 2, 3, 11, 12) (DB).**

——S. 2 (1) — It is satisfaction of detaining authority that gives jurisdiction to it to act — Court not to examine conscience of detaining authority whether reasons for detention were sufficient — Detaining authority not exercising its mind at all or acting upon irrelevant considerations — High Court can interfere under Section 491, Criminal P. C. — Criminal P. C. (1898), Section 491.

Before at all exercising the power of detention and passing an initial order, therefor, the Provincial Government or its duly empowered delegate, must be satisfied that a person is acting or about to act or likely to act in a manner prejudicial to public safety or the maintenance of public order. This is a fundamental requisite essential to give jurisdiction to the detaining authority to act. It is the satisfaction of the detaining authority that matters. It is a personal or "subjective" and not an impersonal or "objective" standard of satisfaction. The Court cannot examine the conscience of the detaining authority to find out whether its reasons for satisfaction were sufficient. No outside decision is involved in this matter of satisfaction which rests solely with the detaining authority. The detaining authority can act on hearsay evidence and is not bound to derive its satisfaction from legal evidence. The information on which it acts is likely to be of a confidential character which need not be communicated to the detenu or disclosed in Court. If the detaining authority has acted in good faith and has come to a decision on relevant materials placed before it that detention is necessary, the Court cannot enquire into the sufficiency of the materials or reasonableness of its satisfaction in regard to the matters of which it is required to be satisfied.

It is open, however, to the detenu if he can, to establish that the detaining authority has not exercised its mind on the materials placed before it and has not satisfied itself about the necessity for the detention and therefore, the order for detention, though purporting to be passed under Section 2 (1) (a), must be deemed not to be an order under the section. If there is sufficient material before the Court for holding that the recital in the order is inaccurate and that the order is merely a routine order mechanically passed or the mere outcome of police recommendation and not of a decision on the part of the detaining authority under Section 2 (1) then the High Court would interfere under Section 491, Criminal P. C. Section 3 (1) requires the Provincial Government to communicate to the detenu the grounds on which an order for his detention has been made against him together with such particulars as it considers necessary to enable him to make a representation against the order for detention. If the grounds and particulars

furnished disclose that the detaining authority had not exercised its mind at all or had applied its mind to and acted upon considerations wholly irrelevant to and outside the ambit and scope of Section 2 of Act 1 of 1947, then it is open to the High Court to hold that the detaining authority had not the requisite satisfaction regarding the necessity for detention and that the detention is bad for that reason. It is not permissible for the High Court to go into the correctness of the facts alleged by the detaining authority but it is equally clear that accepting the facts at their face value, the Court can say that the satisfaction of the detaining authority is not a real satisfaction or a satisfaction in accordance with law: Case law referred. **1949 Mad WN 549: (1949) 2 Mad LJ 310: 51 Cri LJ 525: AIR 1950 Mad 162 (173, 174) (Pt B) (Prs 28, 29, 30) (DB).**

——S. 2 (1) — Acts done in approximate past to be relied upon to obtain satisfaction.

Acts done in the approximate and immediate past and not in the remote past, should alone be relied upon to obtain the satisfaction that is required under Section 2 (1). **1949 Mad WN 549: (1949) 2 Mad LJ 310: 51 Cri LJ 525: AIR 1950 Mad 162 (174) (Pt C) (Pr 30) (DB).**

——S. 2 — Some of grounds disclosed being within ambit of the Act and some outside — Order of detention bad — If however some grounds are good and some are vague and indefinite, order of detention can be justified on grounds that are definite.

If the grounds disclosed contain grounds, some within the ambit of the Act and some outside it, the order of detention would be vitiated wholly as in that event it would be impossible to say which of the grounds and to what extent the detaining authority was influenced by acts outside the Act in making the order of detention. If, however, some of the grounds are good and some are vague and indefinite and uncertain, the grounds which are uncertain and vague may be ignored and may be treated as non-existing, and the order of detention can be justified on the grounds which are definite and certain. AIR 1943 FC 1 and AIR 1948 Bom 334 (FB), Rel. on. **1949 Mad WN 549: (1949) 2 Mad LJ 310: 51 Cri LJ 525: AIR 1950 Mad 162 (165, 174) (Pt D) (Prs 6, 32) (DB).**

——S. 2 — Detenu not to litigate facts — High Court can however scrutinise grounds disclosed to find out conditions of mind of detaining authority.

The detenu cannot litigate facts and must accept the facts disclosed by the executive authority. But if the reasons which influenced detaining authority in making the order of detention are disclosed and put on the record by the Government, High Court can scrutinise them to find out the condition of the mind of the detaining authority when it made the order. In view however, of the presumption of regularity and validity attaching to an official order, regular on the face of it, in view of the rule that it is only the satisfaction or state of mind of the detaining authority without reference to any external standard that matters and in view of the power vested in the Provincial Government under Section 3 (1) of refusing to disclose facts which it considers would be against the public interest to disclose, it will be difficult for the person challenging an order of detention on the ground above stated to substantiate his plea. **1949 Mad WN 549: (1949) 2 Mad LJ 310: 51 Cri LJ 525: AIR 1950 Mad 162 (175) (Pt E) (Pr 33) (DB).**

——S. 2 — Order of detention not disclosing satisfaction of detaining authority is bad on face of it.

An order of detention may be bad on the face of it if it does not dislose the satisfaction of the detaining authority that the person ordered to be detained has acted or is about to act or is likely to act in a manner prejudicial to public safety or the maintenance of public order: AIR 1949 Mad 596, Rel. on. **1949 Mad WN 549: (1949) 2 Mad LJ 310: 51 Cri LJ 525: AIR 1950 Mad 162 (175) (Pt F) (Pr 34) (DB).**

——S. 2 — Person already arrested under Section 151, Criminal P. C. — Order of detention not mala fide for that reason.

Merely because the order for detention is made where the person concerned has already been arrested under S. 151, Criminal P. C. the order cannot be said to be mala fide. **1949 Mad WN 549: (1949) 2 Mad LJ 310: 51 Cri LJ 525: AIR 1950 Mad 162 (176) (Pt H) (Pr 37) (DB).**

——S. 2 — Association with party declared illegal — No inference that person was acting in prejudicial manner.

Even if a party is declared illegal, the mere association with that party would not justify the inference that the person was acting in a manner prejudicial to public safety. **1949 Mad WN 549: (1949) 2 Mad LJ 310: 51 Cri LJ 525: AIR 1950 Mad 162 (171) (Pt L) (Pr 17) (DB).**

——S. 2 — Person taking part in elections or criticising proposal of Government to award compensation to Zamindars — Activity of person not to be considered as endangering public safety.

A political party is entitled to take part in the municipal or other elections and for that reason alone it cannot be said that the activity of a person concerned is such as to endanger public safety, nor his criticism of the proposals of the Government to award compensation to the Zamindars and inamdars under legislation pending sanction before the Governor-General for the abolition of the Zamindaries. **1949 Mad WN 549: (1949) 2 Mad LJ 310: 51 Cri LJ 525: AIR 1950 Mad 162 (171) (Pt M) (Pr 17) (DB).**

——Ss. 2 (1), 15 — Authority of detaining authority need not be disclosed in order of detention.

It is not necessary to disclose the authority of the District Magistrate passing an order under Secion 2 (1) in the order of detention. **1949 Mad WN 549: (1949) 2 Mad LJ 310: 51 Cri LJ 525: AIR 1950 Mad 162 (172) (Pt N) (Pr 21) (DB).**

——Ss. 2 (1) and 15 — Delegation of power — Meaning of — Delegation does not mean parting with all power by delegating authority — Notification No. G. O. No. Ms. 907, dated 21st March, 1947 — Effect of — Provincial Government can still exercise power under Section 2 (1) (a).

Delegation, as the word is generally used, does not imply a parting with powers by the person who grants the delegation, but points rather to the conferring of an authority to do things which otherwise that person would have to do himself. The notion, therefore, that the use of the word 'delegate' implies that the delegating authority parted with their own authority is misconceived.

Even if the language of the Notification No. G. O. No. Ms. 907, dated 21st March 1947, were otherwise, it is clear that merely because the Commissioner of Police is authorised by the Provincial Government by virtue of Section 15, Madras Act 1 of 1947, to exercise the power under Section 2 (1) of the Act, the Provincial Government is not deprived of their power under Section 2 (1): (1890) 25 QBD 391, Rel. on. (1948) 1 KB 349 and AIR 1945 PC 156, Disting.

The Government order in G. O. No. Ms. 907, dated 21st March 1947, however, makes it clear that the District Magistrates and the Commissioner of Police, Madras, were also empowered to exercise powers under Section 2 (1) in addition to the Provincial Government. It is not an absolute transfer by the Provincial Government of the power to pass an order of detention under Section 2 (1) of the Act, but a partial delegation or transfer of its power which is not prohibited by Section 15 of the Act. In view of the language of the Section, it would be perfectly open to the Provincial Government to say that they would not part with the power under Section 2 (1) entirely and would reserve to themselves a part of it. Of course in the case of the same person the Provincial Government and the Commissioner of Police at Madras cannot exercise the power of detention under Section 2 (1) of the Act. But there is nothing in the provisions of the Act to limit or restrict the authority of the Provincial Governmen to delegate its powers in the manner in which it was effected in the G. O. above referred to. **(1949) 2 Mad LJ 61: 62 Mad LW 473: 1949 Mad WN 509: 51 Cri LJ 424: ILR (1950) Mad 167: AIR 1950 Mad 100 (101, 102) (Pt A) (Prs 4, 5) (DB).**

——S. 2 (1) — Satisfaction under — Detention of person in province — His activities outside province can be considered in arriving at satisfaction.

The Act applies to the whole of the Province, and the danger contemplated by the Act is the danger to the public safety and maintenance of public order of the province. The antecedent history of the person—whether he lived in Malava or elsewhere it does not matter — so long as it was proximate enough in date, if it is such as to produce the satisfaction in the mind of the detaining authority that the person concerned was likely to act in a manner prejudicial to public safety and the maintenance of public order, will be perfectly relevant material under the section. There is no objection for taking into consideration under Section 2 (1) of the Act the activities of the person outside the province to justify action under Section 2 (1) of the Act when at the time of action the person is in the province. **(1949) 2 Mad LJ 61: 62 Mad LW 473: 1949 Mad WN 509: 51 Cri LJ 424: ILR (1950) Mad 167: AIR 1950 Mad 100 (102) (Pt B) (Pr 7) (DB).**

SECTION 2-A

——S. 2-A (as amended by Act 17 of 1948) — For conviction under Section 2-A prosecution must prove that accused had knowledge or had reason to believe that an order of detention had been passed in respect of person harboured by him — Original order of detention not produced by prosecution — Proof of order by newspaper evidence is not sufficient when case does not fall under Section 65, Evidence Act — Conviction cannot be sustained — AIR 1944 PC 54, Foll. — Evidence Act (1872), Sections 64, 65. **1951 MWN Cri 71: 1951 Mad WN 243: (1951) 2 Mad LJ 52: AIR 1953 Mad 780 (781) (Pr 2).**

——S. 2-A (1) (as amended by Madras Act 17 of 1948) — Person wanted for detention under S. 2 (1) (a) found concealed in accused's house — Accused knowingly not disclosing this fact in spite of previous intimation — Offence under Section 2-A (1) is committed. **1951 Mad WN 203 (2): 1951 Mad WN (Cr) 55 (2): (1951) 2 Mad LJ 29.**

——S. 2-A (1) (as amended by Madras Act 17 of 1948) — Person against whom order of detention passed seen running away from accused's tea shop — No evidence that accused supplied either food or drink to him — No offence under Section 2-A (1). **1951 Mad WN 203 (2): 1951 Mad WN (Cri) 55 (2): (1951) 2 Mad LJ 29.**

SECTION 3

——S. 3 — Detenu arrested for offence under Explosive Substances Act — Subsequent order of detention under Madras Act. 1 of 1947 — Grounds stating merely that detenu was smuggling explosives into Communists Camp in Hyderabad State — Lack of good faith on part of Government —Ground being outside purview of Act, detention is illegal. See Public Safety — Madras Maintenance of Public Order Act (1 of 1947), Section 2. **51 Cri LJ 670: AIR 1950 Mad 266 (DB).**

——S. 3 — Unreasonable delay in complying with provisions of Section 3 (1), (2) or (5) — Continuance of detention becomes illegal.

Where the delay in communicating the grounds under Section 3 (1) or in submitting the case to the Advisory Council under Section 3 (2) or in passing final orders under Section 3 (5) is unreasonable and unexplained to the satisfaction of the Court, it must be held that the continuance of the detention becomes illegal on that ground: Case law discussed. **1949 Mad WN 549: (1949) 2 Mad LJ 310: 51 Cri LJ 525: AIR 1950 Mad 162 (181) (Pt I) (Pr 48) (DB).**

——S. 3 (1) — Grounds supplied to detenu being vague and uncertain — His further detention becomes illegal or improper.

The provision of Section 3 (1) is mandatory and imposes on the Provincial Government a duty of communicating to the detenu the grounds on which the order was made. So far as the grounds are concerned, there is no power under the Act to withhold any of the grounds. So far as the facts are concerned, the Provincial Government are not bound to disclose all the facts if they consider that such a disclosure would be against public interest. The Act makes a distinction between facts, grounds and particulars. While all the grounds have to be communicated and such facts as would not endanger public interest alone could be disclosed, so far as the particulars are concerned, the Government are to communicate to the detenu so much of the particulars as would be sufficient in their opinion to enable the detenu to make a representation against the order. The Provincial Government, therefore, has to decide whether the particulars given and disclosed would be sufficient to enable the detenu to make a representation against the order. If the grounds are vague and uncertain, it would be open to the Government to supplement them by giving particulars to enable the person concerned to make a proper representation. If the grounds communicated are vague and uncertain, and no particulars are given the non-observance of the rule makes the further detention of detenu illegal or improper: Case law referred. **1949 Mad WN 549: (1949) 2 Mad LJ 310: 51 Cri LJ 525: AIR 1950 Mad 162 (168, 182) (Pt J) (Prs 11, 50) (DB).**

——S. 3 — Detenu making representation on basis of vague and uncertain grounds — Detenu not precluded from agitating question before High Court.

In cases where on the basis of vague, indefinite and uncertain grounds a representation is made by the detenu to the best of his ability and after the matter is considered by the Advisory Council, the Provincial Government passes a final

order of detention, there is no further means of remedying the defect. In such a case it cannot be said that when a Provincial Government failed to discharge its duty the fact that the detenu did not complain at the time of making the representation of want of particulars, he is precluded from agitating the question before the High Court. **1949 Mad WN 549: (1949) 2 Mad LJ 310: 51 Cri LJ 525: AIR 1950 Mad 162 (170) (Pt K) (Pr 15) (DB).**

SECTION 15

——**Ss. 15, 2 (1) —** Authority of detaining authority need not be disclosed in order of detention. See Public Safety — Madras Maintenance of Public Order Act (1 of 1947), Section 2 (1). **1949 Mad WN 549: (1949) 2 Mad LJ 310: 51 Cri LJ 525: AIR 1950 Mad 162 (DB).**

——**S. 15 —** Delegation of power — Meaning of — Delegation does not mean parting with all power by delegating authority — Notification No. G. O. No. Ms. 907 dated 21st March 1947 — Effect of — Privincial Government can still exercise power under Section 2 (1) (a). See Public Safety — Madras Maintenance of Public Order Act (1 of 1947), Section 2 (1). **51 Cr LJ 424: AIR 1950 Mad 100 (DB).**

SECTION 16

——**S. 16 — Order of detention can be challenged in application under Section 491.**

In spite of the enactment of Section 16, it is now well settled that an order of detention made under the Act is open to challenge in an application under Section 491 on the ground that it was not made in conformity with the powers conferred by that Act: Case law referred. **1949 Mad WN 549: (1949) 2 Mad LJ 310: 51 Cri LJ 525: AIR 1950 Mad 162 (173) (Pt A) (Pr 26) (DB).**

—MADRAS MAINTENANCE OF PUBLIC ORDER ACT (23 of 1949)

PREAMBLE

——**Pre. — Scope and effect of Act—If special law — Special and local laws — Distinction — Escape from police custody — When an offence — Arrest without authority or under improper or invalid authority — Resistance to — If offence.**

The word 'offence' means a thing punishable under the Penal Code or any special or local law. The special laws contemplated are laws such as those that create fresh offences, i. e., laws making punishable certain things which are not already punishable under the Penal Code. But other Acts are those that create no fresh offences but merely provide a supplementary or alternative punishment of offences already primarily punishable under the Penal Code or which can be dealt with under preventive or reformative provisions of the Code of Criminal Procedure.

The Madras Act 1 of 1947 (now Act 23 of 1949), is not a special law. It can be considered a local law applicable to the State of Madras. A local law does not necessarily include all the rules made under the provisions of a local law. Where a local law declares a breach of the rules made under its authority to be punishable, then a breach of such rules might constitute an offence within the meaning of Section 40 of the Penal Code.

A person cannot be convicted of escape unless the custody in which he was detained was lawful. A person about to be arrested is entitled to know under what power the constable is arresting him and if he specifies certain power which the person knows the constable has not got, he is entitled to object to such arrest and escape from custody, such custody not being lawful one.

A detention and a rescue by others and the escape by the detenu will attract the application of Section 225-B, Penal Code, provided the detention was lawful. **1953 Mad WN 362: 55 Cr LJ 396: (1953) 1 MLJ 653: AIR 1954 Mad 321 (322, 323) (Pts A, B) (Prs 11, 13).**

SECTION 2

——**S. 2 — Provisions relating to preventive detention are ultra vires as being inconsistent with Constitution of India, Arts. 21, 22 — Detention whether is validated by Preventive Detention (Extension of Duration) Order, 1950.**

The provisions of the Madras Maintenance of Public Order Act, 23 of 1949, relating to preventive detention, viz., Sections 2 (1) (a), 3, 4, 4-A and 15 are totally repugnant to the provisions of Articles 21 and 22 of the Constitution of India and are, therefore, ultra vires and void. It, therefore, follows that the detention of a person made under that Act cannot be held to be legal, in any event after 26-1-1950, which is the date of the commencement of the Constitution of India.

Further, the Preventive Detention (Extension of Duration) Order, 1950, promulgated by the President on 26-1-1950 with the object of continuing the detention of all persons detained under the Maintenance of Public Safety Orders and Acts of the several States prior to the commencement to the Constitution has failed to achieve its purpose. The order has proceeded on a clear misconception and totally erroneous view of the powers of the President under the Constitution in regard to preventive detention and the order is therefore, void. The detention, of a person which is otherwise illegal for the above reasons is not validated by the President's Order of 26-1-1950.

(Editorial Note.— The Preventive Detention (Extension of Duration) Order 1950, had already been repealed at the date of this decision by Section 16 of the Preventive Detention Act, 1950 (4 of 1950). **1952 Cri LJ 170: AIR 1951 Mad 1015 (1030, 1031, 1041) (Pt A) (Prs 34, 63, 67) (DB).**

——**Ss. 2, 19 — Ex post facto legislation creating crime — Validity of — Constitution of India, Article 20.**

Per Govinda Menon, J.— Prior to Constitution of India, an ex post facto legislation creating a crime for the first time could be validly made. Thus, by the operation of Section 19, Madras Act, 23 of 1949, all acts done in pursuance of Madras Act, 1 of 1947, on or after 12-3-1948 were rendered valid. Hence, if a person had been arrested for example, on 17-8-1948 and detained and subsequently a provision like Madras Act 23 of 1949 was passed by the Provincial Legislature which took effect retrospectively from a date anterior to 17-8-1948, such an arrest and detention would be valid.

But the Constitution of India, in its Article 20 gives protection in respect of conviction for offences. This means that ex post facto legislation regarding crimes is made illegal. That is, it is not competent either to the Parliament or the Legislature of a State to enact a law creating a crime for the first time and make the same

retrospective. **1952 Cri LJ 170: AIR 1951 Mad 1015 (1018, 1020) (Pt B) (Prs 3, 7) (DB).**

——**Ss. 2, 3, 4 and 4 (a)** — These sections are repugnant to and inconsistent with the Fundamental Rights provision in Part III of the Constitution. **(1950) 2 Mad LJ 207: 63 Mad WN 718: 1950 Mad WN (Cri) 242: ILR (1951) Mad 135: AIR 1951 Mad 269 (273) (Pt D) (Pr 16) (DB).**

SECTION 3

——**Ss. 3, 2, 4 and 4 (a)** — These sections are repugnant to and inconsistent with the Fundamental Rights provision in Part III of the Constitution. See Public Safety — Madras Maintenance of Public Order Act (23 of 1949), Section 2. **AIR 1951 Mad 269 (DB).**

SECTION 4

——**Ss. 4, 2, 3** — These sections are repugnant to and inconsistent with the Fundamental Rights provision in Part III of the Constitution. See Public Safety — Madras Maintenance of Public Order Act (23 of 1949), Section 2. **AIR 1951 Mad 269 (DB).**

SECTION 9

●——**S. 9 (1-A)** — Danger to public security — Restriction on freedom of speech and expression permissible only in cases where danger to public safety is involved — Restrictions imposed by Section 9 (1-A) are of wider scope and hence unconstitutional offending Article 19 (2) of the Constitution. See Constitution of India, Article 19 (2). **51 Cri LJ 1514: AIR 1950 SC 124.**

SECTION 19

——**Ss. 19, 2** — 'Ex post facto' legislation creating crime is not valid after the constitution of the Act — This could be valid before the constitution by virtue of Section 19 of Act 23 of 1949 in respect of acts done in pursuance of Madras Act 1 of 1947 — Constitution of India, Article 20. See Public Safety — Madras Maintenance of Public Order Act (23 of 1949), Section 2. **1952 Cri LJ 170: AIR 1951 Mad 1015 (DB).**

——**S. 19** — Section validates all previous actions or acts or any other thing done in pursuance of Madras Maintenance of Public Order (Amendment) Act (17 of 1948). **1951 Mad WN 203 (2): 1951 Mad WN (Cri) 55 (2): (1951) 2 Mad LJ 29.**

—MADRAS MAINTENANCE OF PUBLIC ORDER ORDINANCE (4 of 1949)

SECTION 1

——**S. 1 (3) — Powers of Governor-General and Governor to promulgate Ordinances compared — Latter's powers to make law by Ordinances is co-extensive with power of Legislature to legislate — Sections 1 (3), 4-A and 19 of Ordinance are not ultra vires — Government of India Act (1935), Sections 42 and 88 — Public Safety — Madras Maintenance of Public Order Ordinance (4 of 1949), Sections 4-A and 19.**

The Governor-General's power to promulgate an Ordinance is not affected in any way by the Legislature being in session, whereas the Governor's is, and the Governor-General's power is circumscribed to those of emergency whereas the Governor's power can be exercised when he is satisfied that there are circumstances which render it necessary to take immediate action. Therefore, though similar in some respects, there is no complete analogy between the Governor's powers and the Governor-General's powers. But there can be no doubt that the Governor's power of making law by Ordinances is co-extensive with the power of the Legislature to legislate subject to the restrictions contained in Section 88, Government of India Act.

The power of a Governor to make Ordinances being as wide as the powers of the Legislature, there is no reason why a Governor should not be at liberty to promulgate retrospective Ordinances having the effect even of re-opening transactions which had been adjudicated upon by Courts of law. The Provincial Legislature can pass a law creating a crime for the first time and giving it retrospective effect, and a Governor exercising the power of promulgating an Ordinance, if he conforms to the provisions of Section 88 of the Act, can also do likewise and such an Ordinance will have the same force and effect as an Act of the Provincial Legislature. Case law discussed.

In Ordinance 4 of 1949 it cannot be said that there is no express provision that the Ordinance is to apply to a time anterior in date to its promulgation, because Section 1 (3) clearly says so In spite of the fact that the preamble does not in so many terms refer to the retrospective aspect, that portion of it mentioning that it was necessary for the Governor to take immediate action for the maintenance of public safety and to prevent and to put down disorders involving menace to the peace and tranquillity of the province is sufficiently wide to include cases of detentions under a previous invalid statute or Ordinance Section 1 (3) of the Ordinance is not, therefore, ultra vires.

The High Court having held that Section 4-A of the Ordinance 1 of 1949 was invalid because it was only an amending Act and not a re-enactment, it cannot be said that the Governor by re-enacting it in Sections 4-A and 19 in Ordinance 4 of 1949 acted in any manner in derogation of the decision of the High Court, Sections 4-A and 19 of the Ordinance cannot, therefore, be held to be ultra vires the powers of the Governor. (1940) 2 All ER 220 and 1907 AC 8, Disting. **51 Cri LJ 754: 1950 Mad WN 24: (1950) 1 Mad LJ 508: 1950 Mad WN (Cri) 4: AIR 1950 Mad 324 (327, 328, 331) (Pt B) (Prs 4, 5, 10, 11) (DB).**

SECTION 4-A

——**Ss. 4-A, 1 (3)** — Powers of Governor-General and Governor to promulgate Ordinances compared — Latter's powers to make law by Ordinances is co-extensive with power of Legislature to legislate — Sections 1 (3), 4-A and 19 of Ordinance are not ultra vires — Government of India Act (1935), Section 42 and 88. See Public Safety — Madras Maintenance of Public Order Ordinance (4 of 1949), Section 1 (3). **51 Cri LJ 754: AIR 1950 Mad 324 (DB).**

SECTION 19

——**Ss. 19, 1 (3)** — Powers of Governor-General and Governor to promulgate Ordinances compared — Latter's powers to make law by Ordinances is co-extensive with power of Legislature to legislate — Secs. 1 (3), 4-A and 19 of Ordinance are not ultra vires — Government of India Act (1935), Sections 42 and 88. See Public Safety — Madras Maintenance of Public Order Ordinance (4 of 1949), Section 1 (3). **51 Cri LJ 754: AIR 1950 Mad 324 (DB).**

—MADRAS MAINTENANCE OF PUBLIC ORDER (REMOVAL OF DOUBTS AND AMENDMENT) ORDINANCE (1 of 1949)

SECTION 2

——Ss. 2, 3 (a), (b), 4 — To remove doubts by declaratory Act and to amend an Act, original Act must be in force — Sections 2, 3 (a) and Section 4 are of no effect — Section 3 (b) is enacting provision and is valid.

To remove doubts by a declaratory Act, there should be in existence an Act, the doubts in which have to be removed. If the Act had already ceased to be in force, a declaratory Act would have no operation. An amending Act also presumes the existence of an orinigal Act. If the original Act, which was a temporary Act, terminated after the lapse of time, the amending Act would be inoperative. The amending provisions of the Ordinance are of no effect as the main Act came to an end when the first year expired. Unless there is a re-enacting provision in the Ordinance which amounts to a new Act, the declaratory and amending provisions of the Ordinance are not valid. Hence, Sections 2, 3 (a) and 4 which purport to insert a new Section 4-A of the Ordinance are of no effect, as they do not purport to enact or revive a new law but only seek to amend or clear doubts in the old Act. Section 3 (b) however, is an enacting provision though the opening words of the section state "For the removal of doubts it is hereby declared" and it retrospectively validates action, proceedings, notifications and orders made under the Act, and it is valid and operative: AIR 1949 FC 175, Foll. **(1949) 2 Mad LJ 663: 1949 Mad WN 733: 51 Cri LJ 615: AIR 1950 Mad 243 (257, 258) (Pt D) (Prs 24, 25, 27) (DB).**

SECTION 3

——S. 3 (b) — Section 3 (b) is valid — Arrest and detention after 12th March 1948 are legal.

Section 3 (b) of the Ordinance is valid and operative; and hence it cannot be said that the arrest and detention under the Madras Maintenance of Public Order Act of 1947 subsequent to 12th March 1948 is without any legal foundation. AIR 1950 Mad 243, Foll. **51 Cri LJ 754: 1950 Mad WN 24: (1950) 1 Mad LJ 508: 1950 Mad WN (Cri) 4: AIR 1950 Mad 324 (326) (Pt A) (Pr 2) (DB).**

——S. 3 (a) — To remove doubts by declaratory Act and to amend an Act original Act must be in force — Sections 2, 3 (a) and 4 are of no effect — Section 3 (b) is enacting provision and is valid. See Public Safety — Madras Maintenance of Public Order (Removal of Doubts and Amendment) Ordinance (1 of 1949), Section 2. **51 Cri LJ 615: AIR 1950 Mad 243 (DB).**

SECTION 4

——S. 4 — To remove doubts by declaratory Act and to amend on Act original Act must be in force — Sections 2, 3 (a) and 4 are of no effect — Section 3 (b) is enacting provision and is valid. See Public Safety — Madras Maintenance of Public Order (Removal of Doubts and Amendment) Ordinance (1 of 1949), Section 2. **51 Cri LJ 615: AIR 1950 Mad 243 (DB).**

—MYSORE PUBLIC SECURITY ACT (12 of 1940)

SECTION 3

——S. 3 — Standard of proof required for reasonable satisfaction — Burden of proof.

Where the technicalities prescribed under Section 3 have been scrupulously followed, a presumption is raised that the order is properly made and the burden of rebutting the presumption is shifted on to the person that alleges a misuse. The standard of evidence required for conviction is different from that required for a reasonable satisfaction of the necessity for detention in the interest of public safety or maintenance of public order. For conviction the Court has to be convinced of the guilt of the accused and the benefit of a reasonable doubt goes to the accused. But for the purpose of detention it is enough if the Government or any officer duly empowered is reasonably satisfied of the necessity of his detention, and there can be no benefit of doubt, since the public safety and maintenance of public order are the paramount concern of Government, during the times of emergency. AIR 1945 Bom 533, Foll. **('51) 29 Mys LJ 28.**

——S. 3 — Arrest under Section 3 under warrant — It is desirable to serve copy of warrant on detenu.

It is true that the rules do not compel the authorities to serve a copy of the warrant on the detenue. Indeed there need be no warrant at all. Section 2 clearly lays down that the officer may "himself arrest without warrant": but where a warrant as a matter of fact has been issued, it may be desirable that such copies are served to facilitate the defence and avoid confusion that may arise from merely inferring reasons or basing arguments upon such inferences. **('51) 29 Mys LJ 28.**

——S. 3 — Detention order by authorised person, fixing period — Validity.

An officer authorised under Section 3 is competent to detain for a specific period not exceeding 15 days and the initial order for the mere reason of fixing a period does not render itself ultra vires the powers under Section 3. **('51) 29 Mys LJ 28.**

——S. 3 — Satisfaction required under Section 3 is personal to officer — Power of the Court to go behind satisfaction of officer.

The "satisfaction required under Section 3 is personal to the detaining officer and not an impersonal requirement and if there is sufficient indication that the officer has brought his mind to bear upon the material and comes to the conclusion, it satisfies the conditions prescribed therein. The satisfaction is that of the officer and he is not required to satisfy the person arrested. It is not open to the Court to inquire into the material or dissect the opinion of the officer to find out whether the reasons that satisfied the officer are sufficient to satisfy the Court as well. AIR 1945 Bom 533, Rel. on. **('51) 29 Mys LJ 28.**

——Ss. 3, 4 — Sections are not mutually exclusive.

The executive has taken power to itself under Section 3 to detain suspected persons and under Section 4 to control the movements of suspected persons. As to what is the appropriate section it is for the executive to decide. Obviously it depends upon general atmosphere in the country at the time, the intensiveness of the activity of the person, his status in the public life of the country and other factors. Taking these circumstances into consideration, it is left to the executive to decide whether the conrol of the movement of the person is sufficient or whether detention is necessary. Unless the nature of the acts done in Section 4 is expressly excluded from the purview of Section 3 which is general in character, it cannot be said that Section 3 does not apply.

The function of the Court is merely to examine whether the particular provision under which the detention is made is applicable to the circumstances of the case. It is not the function of the Court to interfere with the discretion of the Government or dictate the choice of any particular provision of law to act upon. **('51) 29 Mys LJ 28.**

——Ss. 3, 37 —Order of detention under Section 3 — Validity — Jurisdiction of High Court to entertain petition under Section 491, Criminal P. C. — Criminal P. C. (1898), S. 491.

Where an order of detention is passed under Section 3 of the Act, it must be established on behalf of the Government that the detaining authority strictly complied with all the rules of procedure laid down in that section and observed all the safeguards referred to therein, and it is not enough if the provision in that section are substantially complied with Section 3. ('48) 53 Mys HCR 265, Rel. on.

According to the wording of Sec. 3, Clause (1), the District Magistrate before making the arrest, or directing the arrest, should be satisfied that there are reasonable grounds for believing that the person mentioned in the order has acted, is acting or is about to act in a manner prejudicial to the public safety or peace.

Hence where the order of detention except reproducing the wording of Section 3 does not mention anything to indicate the existence of any material justifying the arrest and detention under Section 3 and there is no material before the Court to show that the detaining authoriy had applied its mind with a view to satisfy himself of the existence of circumstances justifying the order, the order cannot be held to be in strict compliance with law and must be held to have been made without jurisdiction and therefore the jurisdiction of the High Court to entertain a petition for the issue of a writ of habeas corpus is not taken away by virtue of Section 37 of the Act read with Section 491 (3), Criminal P. C. The detention of the accused in such circumstances must be held to be illegal and the detenu is entitled to be released. **('50) 28 Mys LJ 303 (DB).**

——S. 3 — Detention under — There is no provision in the Act requiring the detaining authority to furnish the detenu with reasons for his detention. **('50) 28 Mys LJ 303 (DB).**

——S. 3 (2) — Composite Order of arrest and detention is illegal.

Under Section 3 (2) of the Public Security Act an order of detention should be passed only after the arrest is effected and not before. A composite order for arrest and detention passed by a Distict Magistrate cannot be said to be in strict compliance with Section 3 and therefore renders the detention invalid and illegal. **('50) 28 Mys LJ 231 (DB).**

——S. 3 — Order of detention under — Strict compliance with provisions of Section 3 is essential — Order not stating satisfaction of magistrate — No material on record to show such satisfaction — Detention is invalid — Criminal P. C. (1898), S. 491.

In order to hold that an order alleged to have been made under Section 3 of the Public Security Act, is one made under that section, it must be established on behalf of the Government that the detaining authority strictly complied with all the rules of procedure laid down in that section and observed all the safeguards referred to therein, and it is not enough if the provisions in that section are substantially complied with.

Where the order of detention passed under Section 3 of the Act does not mention that the District Magistrate was satisfied that there were reasonable grounds for believing that the person named in the order had acted, was acting or was about to act in a manner prejudicial to public safety or peace and there is no evidence before the Court about such satisfaction on the part of the District Magistrate, the order of detention must be held to be illegal as the satisfaction of the District Magistrate required by the section is a condition precedent to the exercise of jurisdiction under Section 3. **('50) 28 Mys LJ 231 (DB).**

——S. 3 — Original Order of detention passed under Section 3 illegal — Subsequent order of Government extending the term of detention must also be held to be illegal — AIR 1946 Bom 32, Rel. on. **('50) 28 Mys LJ 231 (DB).**

——S. 3 — Detention under — Validity — Jurisdiction of High Court to determine — Bar under Section 491 (3) Mysore Criminal P. C. when operates — Mysore Criminal P. C., Sec. 491.

The bar to jurisdiction contained in Section 491 (3) Mysore Criminal P. C. can be invoked only if the Government establishes that the detention of the petitioners is a valid detention under the Mysor Public Security Act, 1940, or, in other words, that it is an order made in strict conformity with the provisions of Section 3 of the Public Security Act and within the scope of the powers conferred by that section. The High Court has jurisdiction to see whether that is done. If the High Court finds that the requirements of S. 3 of the Public Security Act are not complied with, it has jurisdiction to hold that the order of detention is illegal and it cannot be regarded as an order made under Section 3 of the Public Security Act. If, on the other hand, the High Court is satisfied that the requirements of Section 3 are complied with and the order is within the scope of the powers conferred by Section 3, the bar of jurisdiction contained in Section 491 (3), Mysore Criminal P. C. comes into play, and it is not competent for it to go further and enquire into the sufficiency of the materials and the reasonableness of the grounds upon which the detaining authority was satisfied that it was necessary to make the order. AIR 1943 FC 75; AIR 1944 FC 86, Rel. on. Case law Ref **('50) 28 Mys LJ 231 (DB).**

SECTION 4

——Ss. 4 and 3 — The executive has taken power to itself under Section 3 to detain suspected persons and under Section 4 to control the movements of suspected persons. Unless the nature of the acts done in Section 4 is expressly excluded from the purview of Section 3 which is general in character it cannot be said that Section 3 does not apply. **('51) 29 Mys LJ 28.**

SECTION 37

——Ss. 37, 3 — Order of detention under Section 3 not in strict compliance with law — Order must be held to have been made without jurisdiction — The jurisdiction of the High Court to entertain a petition for the issue of a writ of Habeas Corpus is not taken away by virtue of Section 37 of the Act read with Section 491, Cr. P. C. **('50) 28 Mys LJ 303 (DB).**

——S. 37 — Application under Section 491, Criminal P. C. — Jurisdiction of High Court how far affected stated — Criminal P. C. (1898), Section 491.

Section 491 was introduced into the Mysore Criminal Procedure Code by Amending Act VII of 1948 which is later than the Mysore Public Security Act of 1940. The omission of the words "purporting to be taken or made or deemed to have been so taken or made under the Public Security Act" in sub-section (3) of Section 491, Mysore Criminal P. C. of Criminal Procedure would indicate that, to that extent, the provisions contained in Section 37 of the Public Security Act were modified and the bar of jurisdiction was confined in the case of petitions filed in the High Court under Section 491, Code of Criminal Procedure only as regards orders made under the Public Security Act. Moreover, the words "purporting to be taken or made or deemed to have been so taken or made under this Act" used in Section 37 of the Public Security Act cannot cover cases where the orders were made by the District Magistrate without jurisdiction and are entirely ultra vires. The protection afforded under Section 37 of the Public Security Act in respect of proceedings or orders purporting to be taken or made or deemed to have been taken or made under the Act can only apply to cases where there is an irregular exercise of jurisdiction as distinct form a complete absence of jurisdiction. **('50) 28 Mys LJ 231 (DB).**

—ORISSA MAINTENANCE OF PUBLIC ORDER ACT (4 of 1948)

PREAMBLE

• ——Pre.—Validity of Act—Preventive Detention (Extension of Duration) Order (1950) — Interval between midnight of 25th-26th January and signing of Order by President—Whether material for validity — Constitution of India, Article 373 — General Clauses Act (1897), Sections 5 (3) and 3 (12).

The Preventive Detention (Extension of Duration) Order, 1950, being an Order made by the President under Article 373 of the Constitution, is to be deemed an Act of Parliament and as such a Central Act. The order came into force about 10-50 A. M. on 26th January 1950. But by virtue of Section 5 (3) read with Section 3 (12), General Clauses Act, it should be deemed to have come into force for legal purposes from the midnight of 25th-26th January 1950, even though it might have been actually signed by the President only after 10-50 A. M. on 26th.

Hence, in considering the validity of the Orissa Maintenance of Public Order Act, 1948, the short interval of time between the midnight of 25th-26th January and the exact time of the signing of the Order by the President, becomes immaterial. **51 Cri LJ 1189: ILR (1950) Cut 222: AIR 1950 Orissa 157 (158) (Pt A) (Pr 2) (FB).**

● ——Pre. — Act was validly extended to Orissa States which have by agreement of 15th and 30th December 1947 have transferred their administrative Control to Dominion of India — Delegation of Contral by Dominion Government to Orissa Government, by virtue of Extra-Provincial Jurisdiction Act (1947) is valid — Act of 1947 is not ultra vires — Extra Provincial Jurisdiction Act (1947) — International law — Extra-Territorial Legislation.

By Instruments of Accession executed by Orissa States on 16th August 1947, the Orissa State gave the Dominion Legislature power to make laws on defence, external affairs and ancillary matters, regarding the States. By subsequent agreements of 15th and 30th December 1947, the Rulers ceded to the Dominion Government full and exclusive authority and jurisdiction by transferring administration of the States (which included legislative powers) for the governance of the States.

[Per Ray C. J. — Validity of Instruments of Accession and subsequent agreements, being acts of two Sovereign States cannot be questioned in municipal Courts — Conception of Sovereign State, Government and legislation discussed.]

The powers thus transferred to the Dominion Government were validly delegated to the Government of Orissa by virtue of the Extra Provincial Jurisdiction Act 1947. The Act is not ultra vires. The Executive authority of a Sovereign State can exercise extra-territorial powers over a foreign territory and can promulgate laws in that behalf, subject only to limitations of International law.

Notification of Government of India delegating its authority to Orissa Government and Orissa Government's Administration of Orissa States Order, 1948 are intra vires.

Consequently, extension by the Orissa Government of the Orissa Maintenance of Public Order Act, 1948, which was originally applicable only to Province of Orissa, to all Orissa States, including Bamra and Kalahandi States, is intra vires : Case law and Texts reviewed. **51 Cri LJ 683: ILR (1949) 1 Cut 1: AIR 1950 Orissa 67 (69, 70, 72, 73, 76, 79) (Prs 17, 19, 20, 21, 23, 25, 26, 44, 59, 60) (SB).**

SECTION 2

——S. 2 (4) — Order of detention — Expiry of term — Subsequent order on same grounds under Preventive Detention Act (1950) — Legal — Two Acts — Not fundamentally divergent or different in respect of grounds of detention — Past acts of detenu — Relevancy as guide to future behaviour or propensities — Satisfication of detaining authority — Power of Court to go into. See Public Safety — Preventive Detention Act, Section 3 (1). **52 Cr LJ 110: AIR 1951 Orissa 27 (DB).**

● ——Ss. 2, 3 and 4 (as amended in 1949) — Validity — Public Safety — Preventive Detention (Extension of Duration) Order (1950) — Constitution of India, Articles 13 and 22.

The provisions of the Orissa Act dealing with preventive detention are void under Article 13 (1) of the Constitution on account of their inconsistency with Article 22 of the Constitution.

Sections 3 and 4 of the Orissa Act are void being inconsistent with the Constitution. Section 2 by itself is unworkable because no law merely authorizing the detention of a person under some circumstances, without any provision for fixing the duration, can be said to be workable. The entire law contained in Sections 2, 3 and 4 must be held to be invalid on the application of the doctrine of severability.

Nor can the Preventive Detention (Extension of Duration) Order, 1950 be of any avail to the State in justification of the continuance of detention after the Constitution came into force. Prahalad Jena v. State, **51 Cri LJ 1189: ILR (1950) Cut 222: AIR 1950 Orissa 157 (160, 162, 168) (Pt B) (Prs 5, 10, 31) (FB).**

● ——Ss. 2, 3 — Successive orders of detention.

The Government have the power to pass any number of successive orders against the same person as the occasion may require. But if it appears that the fresh order is nothing more in substance than an extension of the previous order that would amount to an evasion of the imperative provisions of Section 3. Hence an order of

detention under Section 2 passed against a person who has been already in detention by virtue of a prior order and without any fresh material disclosed for passing of the fresh order is illegal. Brajakishor Pattanik v. Indian Union. **51 Cri LJ 826: ILR (1949) 1 Cut 723: AIR 1950 Orissa 146 (148) (Pt C) (Pr 15) (FB).**

● **——S. 2 (1) (a) and (2) — Prior invalid order under Section 2 (2) — Subsequent order under Section 2 (1) (a) — Validity.**

Where a detenu is arrested under an invalid order of detention of a District Magistrate under Section 2 (2), a subsequent order of detention under Section 2 (1) (a) passed by the Provincial Government on substantially different grounds is not an extension of the previous order and cannot be pronounced invalid for that reason. Prahalad Panda v. Province of Orissa, **51 Cri LJ 891: 15 Cut LT 73: ILR (1949) 1 Cut 821: AIR 1950 Orissa 107 (109) (Pt B) (Pr 5) (FB).**

● **——Ss. 2 and 3 (as amended by Act (6 of 1949)) — Prior invalid order of detention — Detenu released — Subsequent camouflaged order on substantially same grounds — Validity — Contempt of Court.**

Where a detenu was released by the High Court on the ground of invalidity of order of detention and was immediately re-arrested under a camouflaged order of detention containing substantially the same grounds of detention for the earlier illegal order without existence of any fresh material giving rise to fresh occasion for passing the order:

Held, that the second order of detention must be held to be illegal especially when it is not attempted to be justified by invoking the provisions of the Amending Act (6 of 1949).

Held, further that even if the order of the District Magistrate might have been passed with the best of motives in view of the apprehension that the detenu, after release, might go underground, it would nonetheless be contempt of Court prima facie. (Rule nisi for contempt issued). Prahalad Panda v. Province of Orissa, **51 Cri LJ 801: 15 Cut LT 73: ILR (1949) 1 Cut 821: AIR 1950 Orissa 107 (111, 113) (Pt D) (Prs 12, 15) (FB).**

● **——S. 2 — Want of bona fides on part of Government — Onus.**

The commission of illegalities by subordinate officers is not by itself any reason for imputing bad faith to the Provincial Government. Before the order of the Government can be pronounced to be a fraudulent exercise of its power, the same must be proved like any other fact.

The burden of substantiating the plea of want of bona fides is on the detenu. It may be that the burden on the detenu to make out the want of bona fides on the part of the Government is not so heavy as the burden would be on the Government to prove its bona fides, in case there is sufficient material on the side of the detenu to shift the onus on to the Government. But mere suspicion and conjecture cannot take place of tangible material required for shifting the onus. Prahalad Panda v. Province of Orissa, **51 Cri LJ 891: 15 Cut LT 73: ILR (1949) 1 Cut 821: AIR 1950 Orissa 107 (112) (Pt E) (Pr 14) (FB).**

SECTION 3

● **——Ss. 3, 2 and 4 (as amended in 1949) —** Sections 3 and 4 of the Orissa Act are void being inconsistent with the Constitution of India, Article 22 — Preventive Detention (Extension of Duration) Order (1950) can be of no avail to the State in justification of the continuance of detention after the Constitution came into force — Constitution of India, Arts. 13 and 22. See Public Safety — Orissa Maintenance of Public Order Act (4 of 1948), Section 2. **51 Cri LJ 1189: AIR 1950 Orissa 157 (FB).**

● **——Ss. 3, 2 —** Successive orders of detention can be passed by Government — Fresh order of detention nothing more than an extension of previous order without any fresh material disclosed for passing of the fresh order — Amounts to an evasion of provision of Section 3. See Public Safety — Orissa Maintenance of Public Order Act (4 of 1948), Section 2. **51 Cri LJ 826: AIR 1950 Orissa 146 (FB).**

● **——Ss. 3, 2 (as amended by Act 6 of 1949) —** Prior invalid order of detention — Detenu released — Subsequent camouflaged order on substantially same grounds — Invalid — It would also amount to Contempt of Court. See Publice Safety — Orissa Maintenance of Public Order Act (4 of 1948), Section 2. **51 Cri LJ 891: AIR 1950 Orissa 107 (FB).**

SECTION 4

● **——Ss. 4, 2 and 3 (as amended in 1949) —** Sections 3 and 4 of the Orissa Act are void being inconsistent with the Constitution of India, Art. 22—Public Safety—Preventive Detenion (Extension of Duration) Order (1950) can be of no avail to the State in justification of the continuance of detention after the Constitution came into force — Constitution of India, Articles 13 and 22. **51 Cri LJ 1189: AIR 1950 Orissa 157 (FB).**

SECTION 13

——S. 13 (1) — Order of requisition of house under for accommodating named officer — Officer transferred — Duty of Government. See Orissa Requisitioning and Acquisition of Immovable Property Act (19 of 1952), Section 23 (1). **(1958) 24 Cut LT 426.**

——S. 13 — Opinion of Provincial Government — No power to civil Court to question except on ground of mala fides. See Public Safety — Orissa Maintenance of Public Order Act (10 of 1950) (As Amended by Act, 21 of 1951), Section 22. **AIR 1953 Orissa 229 (DB).**

—ORISSA MAINTENANCE OF PUBLIC ORDER ACT (10 of 1950)

SECTION 2

——Ss. 2 (1) (b) and 3 — Scope — Are void as offending Art. 19 (1) (d) and (e) of the Constitution. See Constitution of India, Articles 13 (2), 19 and 21. **AIR 1951 Orissa 86 (DB).**

SECTION 3

——Ss. 3, 2 (1) (b) — Provisions are void under Articles 13 (2) and 21 of Constitution. See Public Safety — Orissa Maintenance of Public Order Act (10 of 1950), Section 2 (1) (b). **AIR 1951 Orissa 86 (DB).**

SECTION 22

——S. 22 (as amended by Act 21 of 1951) — Opinion of Provincial Government — No power to Civil Court to question except on ground of mala fides — (Public Safety — Orissa Maintenance of Public Order Act (4 of 1948), Section 13). AIR 1950 SC 222, Foll; AIR 1951 Bom 404, Disting;

AIR 1952 Cal 65. Rel. on. **18 Cut LT 350: AIR 1953 Orissa 229 (231, 232) (Prs 5, 7) (DB).**

—ORISSA SECURITY PRISONERS (CONDITION OF DETENTION) ORDER (1950)

CLAUSE 39

——Cl. 39 (2) — Conviction for contravention of Clause 39 (2) cannot be sustained if the provisions of the order are not communicated to person when the orders were not published in the Gazette.

Presumption that every person knows about an Order does not arise in the case of an order not published in Gazette in the manner required by law — Section 4, Preventive Detention Act, which gives power to Government and in exercise of which Orissa Security Prisoners (Condition of Detention) Order was passed has not laid down any mode of publication — Order also not published in Gazette — No question of prosecuting a person affected by order, for contravention of its provisions can arise until he has been communicated of its provisions. **ILR (1953) Cut 514: 19 Cut LT 351: 1953 Cri LJ 1840: AIR 1953 Orissa 336 (336) (Pr 3) (DB).**

—PATIALA STATE PUBLIC SAFETY ORDINANCE (11 of 2003 Samvat.)

SECTION 3

● **——S. 3 — Consolidated order of arrest and detention — Legality.**

The Patiala State Public Safety Ordinance contemplates that the order of arrest should be separate from the order of detention and one consolidated order is therefore irregular. Sadhu Ram v. Crown **51 Cr LJ 1585: 2 Pepsu LR 71: AIR 1951 Pepsu 6 (10) (Pt B) (Pr 11) (FB).**

● **——S. 3 — Failure to report arrest—Legality of arrest and detention.**

The failure of the authority effecting or ordering arrest under Section 3, Patiala State Public Safety Ordinance as amended by subsequent ordinances, to report forthwith the arrest to the prescribed authority under sub-section (2) of the said section does not affect that arrest of the person concerned, but it makes his detention illegal and void. Sadhu Ram v. Crown, **51 Cr LJ 1585: 2 Pepsu LR 71: AIR 1951 Pepsu 6 (11, 12) (Pt C) (Pr 13) (FB).**

● **——S. 3 — Order of arrest not mentioning amending ordinance — Legality of arrest and detention.**

The failure of the authority making or directing an arrest under Section 3 of the Patiala State Public Safety Ordinance (11 of 2003) after the expiry of that Ordinance, to make any mention of the second amending Ordinance 3 of 2004, not only does not make the arrest or detention void ab initio but does not affect them in any way. The mention of the original ordinance in the order when if the second amending ordinance had not been promulgated the original ordinance would have been no longer in existence, implies that the order is being made under the original ordinance as amended up to date. Sadhu Ram v. Crown, **51 Cr LJ 1585: 2 Pepsu LR 71: AIR 1951 Pepsu 6 (13) (Pt D) (Pr 14) (FB).**

—PEPSU PUBLIC SAFETY ORDINANCE (7 of 2006 Samvat.)

SECTION 48

● **——S. 48, Proviso — Retrospective effect of Ordinance — Legality of arrest and detention under repealed Ordinance.**

The proviso to Section 48 of the Union Public Safety Ordinance cannot be interpreted to give retrospective effect to that ordinance so far as the legality of an order of arrest and detention of the detenu under the repealed ordinance is concerned. The legality of the order must be determined according to the provisions of the law that existed at the time the order was made. Sadhu Ram v. Crown, **51 Cr LJ 1585: 2 Pepsu LR 71: AIR 1951 Pepsu 6 (8, 9) (Pt A) (Pr 10) (FB).**

—PREVENTIVE DETENTION ACT (4 of 1950)

PREAMBLE

● **——Preamble** — Act not colourable legislation because of existence of Preventive Detention Act (3 of 1950). See Defence of India Act (1962), Section 3 (2), (15) (i). **1964 (1) Cri LJ 269: AIR 1964 SC 381.**

● **——Preamble** — Act is valid except S. 14. **AIR 1953 SC 451 (451, 452 (Pt A) (Prs 1, 7).**

● **——Preamble — Validity of Act.**

The Preventive Detention Act is not ultra vires the Constitution with the exception of S. 14 which being severable from the rest of the Act, does not affect the validity of the latter in any way. AIR 1950 SC 27, Foll. Ashutosh Lahiri v. State of Delhi. **(1950) 2 MLJ 555: 63 MLW 1142: 53 PLR 33: 1950 SCJ 433 (SC).**

● **——Preamble — Validity of Act.**

The Preventive Detention Act of 1950 is intra vires of the Constitution with the exception of S. 14, which is illegal and ultra vires, but this invalidity does not affect the rest of the provisions in the Act. AIR 1950 SC 27, Foll. **1951 ALJ 203: 1952 Cri LJ 3: AIR 1951 All 838 (842) (Pt A) (Pr 17) (DB).**

● **——Preamble — Scope of Act—If void as in conflict with Art. 22 (5) of the Constitution — Section 14 of Act IV of 1950 — If void and renders whole Act illegal — Person undergoing trial for substantive offence or convicted therefor — Order of detention in respect of — If illegal.**

The Courts must interpret the various provisions of the Constitution in such a manner as to make them consistent as far as possible; and the various provisions can be read consistently if one regards Arts. 21 and 22 as setting out, qualifying and safeguarding the right of personal liberty of every person and Art. 19 as dealing only, and independently, with certain special rights of such citizens as are already at liberty.

Such deprivation of personal liberty as is involved in a detention order under Act IV of 1950 is dealt with by Arts. 21 and 22 and not by Article 19 of the Constitution. If the Act therefore is in conformity with the provisions of Arts. 21 and 22 of the Constitution, it is good law and is not hit by Art. 13 (2) and therefore, not void.

Meredith, C. J. and Das, J., (Shearer, J. contra): The provisions of S. 14 are however, very drastic and void being in conflict with Art. 22 (5) of the Constitution and perhaps with Art. 32 as well. But S. 14 is not an integral and inseverable part of the Act and does not render the whole Act void.

The fact that the detenu is undergoing trial for a substantive offence or has been convicted for an offence does not operate as a bar to the passing of a detention order under S. 3 of the Act AIR 1946 Nag 99; 23 Pat 252; 27 Pat 773 (FB); 29 Pat 410, Ref. L. K. Burman v. State, **('50) 29 Pat 502 (FB).**

● **——Preamble — Act whether ultra vires.**

The Preventive Detention Act except S. 14 thereof is not outside the Constitutional powers

of the Parliament and is, therefore, a valid law of the country. AIR 1950 SC 27. Foll. Hari Singh v. State. **('50) 2 Pepsu LR 370: 52 Cri LJ 1076: AIR 1951 Pepsu 123 (124) (Pt A) (Pr 3) (FB).**

SECTION 1

●——Ss. 1, 12 and 14 — Act whether ultra vires the Constitution of India — Constitution of India, Art. 22 (7) (a).

The Preventive Detention Act 1950, is intra vires the Constitution with the exception of Section 14 which is illegal and ultra vires. The invalidity of S. 14 does not affect the rest of the provisions in the Act.

Per Fazl Ali J. and Mahajan J.:— Section 12 of the Act also does not conform to the provisions of the Constitution of India and is therefore ultra vires.

(Editorial Note— By S. 3, Preventive Detention (Amendment) Ordinance, 1950 (No. 19 of 1950), S. 14, Preventive Detention Act, 1950 (4 of 1950) is omitted. This Ordinance is promulgated by the President on 23rd June 1950 and is printed in the Gazette of India, Extraordinary of that date, Part. II, S. 1, P. 207). A. K. Gopalan v. State of Madras. **(1950) 2 Mad LJ 42: 1950 Mad WN 495: 1950 Mad WN (Cri) 127: 63 Mad LW 638: 1950 SCJ 174: 51 Cri LJ 1383: 1950 SCR 88: AIR 1950 SC 27 (67, 88) (Pt A) (Prs 93, 149).**

——S. 1 — Construction of Act — Strict construction.

The Preventive Detention Act constitutes a serious infringement upon Civil liberty and to the extent that it constitutes that infringement it must be strictly construed, and the Court must always be vigilant to see that every safeguard provided in that Act has been complied with. **1956 Cri LJ 875: ILR (1956) Bom 792: 58 Bom LR 473: AIR 1956 Bom 490 (491) (Pt A) (Pr 1) (DB).**

——S. 1—Scope and object of Act—Duty of Court — Principles to be applied in construing grounds of detention — (Constitution of India, Art. 22).

Preventive Detention Act confers very wide powers upon the executive and it undoubtedly constitutes an inroad upon the personal freedom of a citizen which is guaranteed to him under the Constitution. It is true that Parliament in its wisdom enacted this piece of legislation for the security of the State and, there is always the conflict between the security of the State on the one hand and the personal freedom of the citizen on the other. But as far as the Court is concerned, it should be unaffected by questions of policy which lead the executive to detain a particular citizen. The function and the duty of the Court is to see that every constitutional safeguard which the Act provides has been satisfactorily assured to the person detained. If the Court comes to the conclusion that any constitutional safeguard has not been carried out, then even though the detention might be bona fide, even though it may be the result of high policy, the Court must set the detenu free. In considering the grounds, the Court must examine each ground and satisfy itself as to its validity. The Court must also consider whether proper particulars are furnished in order to enable the detenu to make a proper representation to the advisory board. But if the Court is satisfied that the order has been made bona fide, the care and caution has been given to the making of the order, that proper grounds have been furnished and every attempt has been made to give such particulars as are possible, then it is open to the Court to say that it should take a reasonable view of the order made by Government. It would then not be proper to dissect the order so as to find out whether there are mistakes in punctuation, whether the language used is proper, and whether there has been lapses of grammer or of English. **58 Bom LR 602: ILR (1956) Bom 715.**

——Ss. 1 (5) and 11 (A) (as amended by Preventive Detention (Second Amendment) Act (1952)) and Preventive Detention (Amendment) Act (1954) — "Things done and omitted to be done" — Detention for period beyond life of Act — Validity — (Constitution of India, Art. 22 (4)) — (Words and Phrases).

Per Mitter, J.:— The words "things done or omitted to be done" in S. 1 (3) mean acts or omissions and all that the expression saves is the liability or the immunity as the case may be in respect of such acts or omissions.

An order of detention can be successfully impugned before the life of the temporary Act is extended by subsequent legislation. Once, however, a fresh life is added to the temporary Act by a subsequent legislation, the original order of detention on the score that it was for a period beyond the life of the temporary Act under which it was made, cannot be challenged, for, then the order as well as the consequent detention must be deemed to have been under the original Act.

The entire order of detention, the duration of which is fixed for a period going beyond the expiry of the Act cannot be held to be void ab initio but only that part of the order which goes beyond the expiry of the Act, becomes illegal on the actual expiry of the Act, but as the Act did not in fact expire, no part of the detention becomes illegal. **1955 Cri LJ 1055: ILR (1957) 2 Cal 149: AIR 1955 Cal 374 (376) (Pt A) (Prs 6, 7) (DB).**

——S. 1 (3) — Detention under — Application for writ of habeas corpus — Scope of proceedings in High Court — (Practice).

In an application for writ of habeas corpus in the cases of detention under the Preventive Detention Act, 1950 the High Court cannot treat the cases as though they were cases under trial before them so as to entitle them to consider the evidence and substitute their judgment for that of the State Government. It would be wrong on principle to do so as it is for the State Government to examine the materials and come to a judgment on the question. **1952 Cri LJ 1101: AIR 1952 Pat 298 (303) (Pt C) (Pr 13) (DB).**

●——S. 1 — Interpretation — Act if emergency legislation — Interpretation of Statutes — Emergency legislation.

Per Meredith C. J.:— The Act nowhere specifies the existence of an emergency or that it is emergency legislation. The principles of interpretation laid down for emergency legislation have no application at all, and the Courts must follow the ordinary principle of construction that legislation dealing with the liberty of the subject must be construed, if possible, in favour of the subject and against the Crown, or in India, against the Government. L. K. Burman v. State, **('50) 20 Pat 502 (FB).**

——S. 1 — Interpretation — Act must be strictly construed. **AIR 1951 Punj 157 (164) (Pt H) (Pr 12) (DB).**

SECTION 2

——Ss. 2 and 3 (1) (a) (ii) — Validity of order of detention — (Constitution of India, Art. 226). See Public Safety — Preventive Detention Act (4 of 1950), S. 3 (1) (a) (ii). **AIR 1953 Assam 97.**

——S. 2 (1) (a) — Party spreading doctrine of violence — Membership of — When good ground for detention.

While mere belief in or acceptance of any political ideology may not be a ground for detention under the Act, affiliation to a party which is alleged to be spreading its "doctrine of violence rendering life and property insecure and trying to seize power by violence" may, in certain circumstances lead to an inference that the person concerned is likely to act in a manner prejudicial to public safety, order or tranquillity. **('51) 64 MLW 116: 1951 MWN 88: 1951 MWN (Cri) 28: 1951-1 MLJ 169: 52 Cri LJ 396: AIR 1951 Mad 115 (116) (Pt A) (Prs 4, 5) (DB).**

SECTION 3

SYNOPSIS

(Preventive Detention Act (4 of 1950), S. 3)

1. Scope and applicability.
2. Constitutional validity.
3. Preventive detention.
4. Satisfaction of detaining authority.
5. Scope of enquiry.
6. Detention order.
7. Legality of order.
8. Past acts.
9. Prosecution or detention.
10. Order of detention against person already in jail.
11. Contents of order.
12. Correctness of order.
13. Mala fides — General.
    (A) Mala fides — Proof of.
    (B) Mala fides — Burden of proof.
    (C) Mala fides — Inference.
14. Defence of India — Relation with foreign powers.
15. Security of State.
16. Public order.
    (A) Public order — Illustrations.
17. Maintenance of supplies and services essential to community.
18. Arrangements for expulsion.
19. Foriguers Act.
20. Jurisdiction to pass orders.
21. "Forthwith".
22. Report to State.
23. "Approval".
24. Grounds for order — General.
    (A) Grounds for order — Vagueness of.
    (B) Grounds for order — Relevancy of.
    (C) Grounds for order — Whether order is on one or more extraneous grounds.
25. Power of Court.
    (A) Power of Court — Satisfaction of detaining authority if justiciable.
    (B) Power of Court — Grounds of detention if justiciable.
26. Miscellaneous.

1. Scope and applicability.

●——S. 3 — Right of detenu — Limitations — Satisfaction of appropriate authority — Grounds of — Rights under Art. 22 (5) of Constitution — (Public Safety — Constitution of India, Art. 22 (5) and (6)).

The right of the detenu to be furnished with facts or particulars is subject to the limitation mentioned in Cl. (6) and even if the grounds communicated are not as precise and specific as might be desired, the appropriate authority has the right to withold such facts or particulars, the disclosure of which it considers to be against the public interest. AIR 1956 SC 531; 1956 SCJ 559, Foll. Under Section 3 of the Preventive Detention Act, it is the satisfaction of the appropriate authority which is necessary for an order of detention and if the grounds, on which the appropriate authority has said that it is so satisfied, have a rational connection with the objects which are to be prevented from being attained, the question of satisfaction cannot be challenged in a Court of law except on the ground of mala fides. Clause (5) of Art. 22, confers two rights on the detenu, namely, first, a right to be informed of the grounds on which the order of detention has been made, and secondly, to be afforded the earliest opportunity to make a representation against the order. If grounds which have a rational connection with the objects mentioned in Section 3 are supplied, the first condition is complied with. But the right to make a representation implies that the detenu should have such information as will enable him to make a representation and if the grounds supplied are not sufficient to enable the detenu to make a representation, he can rely on the second right. The second right, however, is again subject to the right of privilege given by Cl. (6) and the obligation to furnish grounds and the duty to consider whether the disclosure of any facts involved therein is against public interest, are both vested in the detaining authority and not in any other. AIR 1951 SC 157; 1951 SCJ 208; (1951) 1 MLJ 389 and AIR 1956 SC 531; 1956 SCJ 559, Foll. Puranlal Lakhanpal v. Union of India, **1958 Cr LJ 283: 1958 SCA 355: 1958 SCR 460: 1958 SCJ 510: 1958 Mad LJ (Cr) 427: ILR (1958) Punj 46: AIR 1958 SC 163 (170) (Pt B) (Pr 14).**

——S. 3 — Act is not enacted to deal with habitual criminal.

The law of Preventive Detention is not meant for punishing persons who cannot be brought to book under the ordinary criminal law of the land. The authorities cannot be permitted to take recourse to the law of Preventive Detention because they have failed to secure a conviction under the ordinary criminal law. If a different view is taken, it would create a situation which would be extremely dangerous to individual liberty. If the police are displeased with a particular individual all that they have to do is to start a number of cases against him, and if they fail for want of evidence he can be locked up under the Preventive Detention Act and those very facts which formed the subject-matter of his prosecution could be called in aid for detaining him. The law of Preventive Detention was not enacted to deal with the habitual criminal. There may be circumstances such as communal disturbances and riots in which the detention of a notorious goonda may be justified. The justification, however, would not be the fact of his being a notorious goonda but the existence of circumstances making his detention imperative in the interest of public order. AIR 1960 Punj 332 and AIR 1949 Pat 299, Rel. on. **1965 All WR (HC) 266: 1966 All Cr R 196: ILR (1965) 2 All 261.**

——Ss. 3, 7 and 13 — Power of State Government to revoke or modify under S. 13 order of detention — Does not include power to modify grounds under S. 7 — Constitution of India, Art. 25 (5).

The grounds mentioned in Section 3 of the Act are quite different from the grounds mentioned in Section 7 of the Act. The grounds referred to in Section 3 of the Act are the grounds of the order, which, along with other particulars,

the District Magistrate is required to report to the Government. On the other hand, the grounds mentioned in Section 7 of the Act are the grounds which the authority responsible for making the order is required to communicate to the detenu.

The meaning of the words "detention order" in Section 13 of the Act cannot be stretched to cover within its ambit the grounds mentioned in Section 7 of the Act. In this view of the matter, the power given to the State to revoke or modify a detention order cannot empower the State to modify the grounds under Section 7 of the Act in a case where the order itself was passed by a different authority, namely the District Magistrate.

According to Article 22 (5) of the Constitution, the District Magistrate alone would be the authority competent to communicate the grounds. If, therefore, Section 13 is construed to entitle the Government to modify the said grounds in such a way as to supersede them with grounds of its own and to communicate the same to the detenu, S. 13 would come into conflict with the aforesaid constitutional provision, and itself become void to that extent.

Section 13 of the Act cannot be invoked by the State for the purpose of modifying the grounds already issued by the District Magistrate under Section 7 of the Act and to communicate the same to the detenu. Even assuming that Section 13 can be invoked for such purpose the modified grounds cannot be served after the expiry of prescribed period of 5 days from the detention order. **ILR (1961) 1 All 427.**

——S. 3 (1) and (2) — Two separate procedures provided for preventive detention — One is under Section 3 (1) by State Government — Another is under Section 3 (2) by executive officers — Concurrent exercise of powers in respect of common detention order not contemplated — Indiscriminate mixing of the two procedures held vitiated entire proceedings. **ILR (1961) 1 All 427.**

——S. 3 — Scope — Person detained under — If prisoner — A person detained in the custody of a Superintendent of Jail under an order of the Governor under Section 3 (1) (a) (ii) of the P. D. Act is not a prisoner within the meaning of Section 52 of the Prisons Act and therefore is not liable to be punished under that provision. **1954 All LJ 351: 1954 Cri LJ 1326: AIR 1954 All 626 (629) (Prs 12, 14) (DB).**

——S. 3 — Constitution of India, Art. 21 — Procedure prescribed by law — Preventive Detention Act, if fully prescribes procedure by which liberty may be taken away — Since Article 21 permits deprivation of liberty by procedure established by law, it is obvious that the discretion of deciding what the procedure should be and to what extent it need to be prescribed has been given entirely to the legislature. Obviously it cannot be necessary that every detailed step of the procedure need be mentioned. In the case of Preventive Detention Act the legislature empowered the authorities to make an order of detention on being satisfied that one of the conditions laid down in Section 3 exists and it is not necessary that the legislature should also have gone on to say by what process that satisfaction should have been arrived at. **1950 All LJ 526 (2): AIR 1951 All 456 (457, 458) (Pt A) (Pr 2).**

——S. 3 — Constitution of India, Art. 22 — Preventive detention — Scope of — Right of detenu indicated. See Constitution of India, Article 22. **1959 Cri LJ 160: AIR 1959 Andh Pra 73 (DB).**

——S. 3 (1) (a) and (b) — Applicability and relative scope of.

Section 3 (1) (a), provides for the detention of any person if the conditions laid down therein are satisfied, whereas Cl. (b) prescribes for the detention of any person who is a foreigner within the meaning of the Foreigners Act for the purposes mentioned therein namely, with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India. Clause (a) applies to any person and the word 'person' is comprehensive enough to take in citizens as well as foreigners. The mischief sought to be averted by Clause (a) applies equally to a citizen as well as to a non-citizen. While Clause (a) is concerned with the internal and external security of the State, Cl. (b) deals with the preliminary steps necessary to take action under the Foreigners Act, 1940. The scope of the two sub-sections is different and they were intended to meet different contingencies and, therefore, they cannot be so read as to exclude a foreigner from the operation of the word 'person' in Cl. (a). **(1957) Mad LJ (Cr) 34: 1957 An LT 223: 1957 Cr LJ 703: ILR (1957) Andh Pra 167: (1957) 1 An WR 79: AIR 1957 Andh Pra 143 (145) (Pt A) (Pr 7) (DB).**

——S. 3 — Object of Act — No offence need be proved — Satisfaction of detaining authority is subjective — Grounds of detention, if they have rational connection with object sought to be prevented, question of satisfaction is not justiciable — But order under S. 3 can be challenged on ground of want of bona fides.

The object of the Act is not to punish a person for having done something but to intercept him before he does a prejudicial act and to prevent him from doing it. In the case of such detention, no offence is proved nor any charge formulated, and the justification is suspicion or a reasonable probability and not a conviction warranted by legal evidence. AIR 1950 SC 27; 1917 AC 260, Rel. on.

Since the action under Section 3 is taken on suspicion or anticipation, its test is a subjective test based on the cumulative effect of different acts, even spread over a considerable period. For such preventive detention, it is obvious that it would be difficult, almost impossible, to lay down objective rules of conduct, the failure to conform to which should lead to preventive detention. As the very expression "preventive detention" implies, it is enacted with the object of preventing the person concerned from acting prejudicially to any one of the objects set out in the section. Therefore, under Section 3, it is the satisfaction of the appropriate authority which is necessary, and if the grounds of detention on which that authority has stated that it is so satisfied have a rational connection with the objects, which are to be prevented from being attained, the question of satisfaction is not justiciable. AIR 1958 SC 163, Rel. on.

Since the satisfaction is that of the appropriate authority and not of the Court, it must follow that the question as to sufficiency of materials, on which the satisfaction is arrived at, is also not an issue in which the Court can go into, nor also into the question whether the materials placed before the authority, upon which its suspicion is founded, are true or false. Therefore, the satisfaction of the appropriate authority as to matters specified in Section 3 is the only condition for the exercise of

the power and the Court cannot substitute its own satisfaction for that of the authority.

Though the satisfaction of the appropriate authority is the only condition for the exercise of the power under Section 3 and the question of that satisfaction is not justiciable, an order of preventive detention, can be challenged on the ground that it was made in mala fide exercise of power. AIR 1953 SC 451; AIR 1958 SC 163, Rel. on.

Where the detention of the petitioner was ordered on the ground that he was acting prejudicially to the maintenance of public order in a certain village and its neighbouring villages in a certain district, the question that has to be considered is whether the grounds, which were communicated to the petitioner and which presumably were the grounds upon which the satisfaction of the District Magistrate was based, had a rational connection with the object for which the order was passed, namely, to prevent the petitioner from acting prejudicially to the maintenance of public order in these places. **(1965) 6 Guj LR 632: ILR (1965) Guj 644.**

——**S. 3** — Applicability — Detention under local Act—Fresh order under Preventive Detention Act — It is not extension of previous order — (Public Safety — M. B. Maintenance of Public Order Act (7 of 1949), S. 3). **AIR 1955 NUC (Madh B) 1469.**

——S. 3 (1) — Power of detention under — Object of.

The powers under such an Act as the Preventive Detention Act are for the purpose of preventive detention and they are not punitive in their nature. A person cannot be detained under the Act for what he has already done but in order to prevent him from acting in any manner prejudicial to the matters mentioned in Section 3 (1) of the Act. AIR 1946 Bom 32. Ref. **AIR 1951 Madh Bha 56 (59) (Pt C) (Pr 8) (DB).**

——**S. 3** — Constitution of India, Art. 215 — Consideration of validity of detention order pending — Revocation of order — Contempt of Court — Passing of fresh order on advice of Central Government, when would amount to contempt — If the fresh order was passed not during the actual pendency of an application questioning the prior detention, but in anticipation of such an application being made by the detenu, it would amount to contempt. See Constitution of India, Art. 215. **AIR 1953 Orissa 33 (DB).**

●——**S. 3 (1)** — C. P. and Berar Public Safety Act (62 of 1948), S. 2 (1) — Detention under — Validity of, after coming into force of Constitution — Constitution Order No. 8 — Effect — The order of detention under Section 2 (1) C. P. and Berar Act lapsed after the inauguration of the Constitution. Constitution Order No. 8 could not and did not revise the order but only permitted the continuance of his detention. The State Government could, therefore, act under Section 3 (1) (a) P. D. Act and pass the new order. See Public Safety — C. P. and Berar Public Safety Act (62 of 1948), S. 2 (1). **AIR 1951 Nag 1 (FB).**

2. Constitutional validity.

●——**S. 3 (1) (b)** — Constitution of India, Sch. 7, List 1, Entries 9, 10 — Interpretation of — Language of entries must be given widest scope — Entry 9 brings Union into relation with foreign country — Legislative competence in this respect is clear and covers not only S. 3 (1) (b) of Preventive Detention Act but also Foreigners Act — Foreigners Act, 1946 and Section 3 (1) (b), Preventive Detention Act are valid. See Constitution of India, Sch. 7, List I, Entry 9. **1955 Cri LJ 876: AIR 1955 SC 367.**

●——**S. 3 (1) (b) — If ultra vires —Foreigners Act (1946), Ss. 2 (a) and 3 (2) (c) — Validity of — Classification is reasonable — (Constitution of India, Art. 14).**

The classification of foreigners into those who are British subjects of the kind set out in the definition of 'a foreigner' in Section 2 (a) of the Foreigners Act, 1946, and others, so as to make the former not foreigners for the purposes of the Foreigners Act and the Preventive Detention Act, is a reasonable and rational classification and so does not offend Article 14. There is no individual discrimination and it is easily understandable that reasons of State may make it desirable to classify foreigners into different groups. Section 3 (1) (b) of the Preventive Detention Act or S. 3 (2) (c) of the Foreigners Act is not, therefore ultra vires as offending Article 14 of the Constitution. Hans Muller of Nurenburg v. Supdt., Presidency Jail, Calcutta, **1955 Mad WN 478: 1955 SCA 487: (1955) 1 MLJ (SC) 188: 1955 Cr LJ 876: (1955) 1 SCR 1284: 1955 An WR (SC) 188: 1955 SCJ 324: AIR 1955 SC 367 (373) (Pt D) (Prs 25, 27).**

——**S. 3** — Constitution of India, Arts. 19 (1) (a), 14, 21 and 22 — Scope and applicability — Validity — A law which deprives a person of his personal liberty falls exclusively under Arts. 21 and 22 and the reasonableness of such a law cannot be questioned with reference to Art. 19. **Held,** that the Act is not invalid. See Constitution of India, Art. 19 (1) (a). **1956 Cri LJ 1152: AIR 1956 All 589 (DB).**

——**S. 3** — Validity of — The provision in Section 3 of the P. D. Act is not bad as being an instance of unwarranted delegation of legislative power. See Constitution of India, Art. 245. **55 Cri LJ 1722: AIR 1954 Cal 591 (DB).**

——**Ss. 3 and 5** — Illegality of arrest — Detention not per se invalid. **56 Cal WN 427: 1953 Cri LJ 310: AIR 1953 Cal 81 (DB).**

●——**Ss. 3, 14 — Validity — Constitution of India, Arts. 13 (2), 19, 21 and 22.**

Per Full Bench:— The various provisions of the Constitution can be read consistently if Articles 21 and 22 are regarded as setting out, qualifying and safeguarding the right of personal liberty of every person and Article 19 as dealing only, and independently, with certain special rights of such citizens as are already at liberty.

Such deprivation of personal liberty as is involved in a detention order under the Preventive Detention Act, 1950, is dealt with in Articles 21 and 22 of the Constitution, and not Article 19. The Detention Act being in conformity with the provisions of Articles 21 and 22 of the Constitution, is good law, and is not hit by Article 13 (2).

Contras — Section 14 of the Detention Act however is void, inasmuch as it is in conflict with Clause (5) of Art. 22 of the Constitution. Probably, it is also in conflict with Art. 32 of the Constitution.

But Section 14 not being an integral inseverable part of the Detention Act, the Detention Act under Art. 13 (2) of the Constitution is void only to the extent of the contravention; in

other words, Section 14 of the Detention Act must go, and the Court can then see the grounds not for the purpose of judging the sufficiency or otherwise of the grounds given, but for the purpose of seeing whether the person detained has had a real opportunity of making an effective representation against the order of detention. L. K. Burman v. State, **('50) 29 Pat 502 (543) (FB).**

3. Preventive detention.

●——**S. 3 — Objective standard of conduct — Failure to make provision of, whether affects section.**

Per Kania C. J. and Patanjali Sastri J.:— Section 3 cannot be impugned on the ground that it does not provide an objective standard which the Court can utilize for determining whether the requirements of law have been complied with. The reason is that no such objective standard of conduct can be prescribed, except as laying down conduct tending to achieve or to avoid a particular object. For preventive detention, action must be taken on good suspicion. It is a subjective test based on the cumulative effect of different actions, perhaps spread over a considerable period. For the purposes of preventive detention, it would be difficult, if not impossible to lay down objective rules of conduct failure to conform to which should lead to such detention. As the very term implies, the detention in such cases is effected with a view to prevent the person concerned from acting prejudicially to certain objects which the legislation providing for such detention has in view. A. K. Gopalan v. State of Madras, **(1950) 2 Mad LJ 42: 63 Mad LW 638: 1950 SCJ 174: 51 Cri LJ 1383: 1950 SCR 88: 1950 Mad WN 495: 1950 Mad WN (Cri) 127: AIR 1950 SC 27 (42, 77) (Pt B) (Prs 27, 123).**

——**S. 3** — If detention is lawful, detenu cannot be released even if his prior detention and custody was unlawful. AIR 1945 FC 18. Rel. on. **ILR (1952) Hyd 122: 1952 Cri LJ 1076: AIR 1952 Hyd 112 (116, 119) (Pt C) (Prs 6, 20) (DB).**

——**S. 3 — Detention under, for investigation of crime — Legality — Constitution of India, Article 22.**

If the main ground of detention be investigation of a crime detention of a person under the Preventive Detention Act would be colourable, improper and amount to circumventing important provisions of the Constitution, and as such it cannot be allowed. **ILR (1951) Hyd 183: AIR 1950 Hyd 68 (69) (Pt B) (Pr 3) (DB).**

——**S. 3** — Preventive and punitive detention — Distinction — Constitution of India, Art. 22 — The distinction between punitive and preventive detention is fundamental and should not be allowed to be obliterated. Its disregard leads to his constitutional right and other safeguards given to the accused under the Criminal P. C. being rendered nugatory and does not serve the object for which this detention is allowed. The two forms of detention cannot be concurrent and a choice must be made between the two. **ILR (1951) Hyd 196: AIR 1950 Hyd 66 (67, 68) (Prs 6, 11, 12, 13) (DB).**

——**S. 3** — Applicability — Mala fide order — Substantive criminal case pending against petitioner — Detention is not illegal. **AIR 1955 NUC (Madh Bha) 3867 (DB).**

——**S. 3** — Scope — Person bound over under provisions of Part IV of Criminal P. C. — District Magistrate is not barred from having recourse to Preventive Detention Act — Construction to be put on Act must be determnied by the language — (Interpretation of Statutes — General and Special provisions). **AIR 1955 NUC (Madh Bha) 3864.**

——**S. 3 (2)** — Government having grounds to believe that detenue was associating himself actively with named leader of gang of dacoits — Dacoits concerned in certain named dacoities — Detention held was preventive and not of punitive character. **1952 Cri LJ 1526: ILR (1951) Mys 455: AIR 1952 Mys 85 (88) (Pt F) (Pr 10) (DB).**

●——**S. 3 — Petitioner holder of license to sell rationed cloth — Shop closed and license withdrawn — Whether can he be detained on ground that he is likely to indulge in black-marketing.**

Preventive detention depends on suspicion — Suspicion inferred from circumstances, and it is for the detaining authority to be satisfied about the inference to be drawn. The mere closure of the shop of the petitioner who was a holder of a licence to sell cloth or even the temporary seizure of his goods is no ground for holding that the order of detention on the ground that the petitioner is likely to indulge in black-marketing prejudicial to the maintenance of supply of essential commodities and services, is mala fide. Jagarnath Prasad v. State of Bihar. **ILR 31 Pat 97: 1952 Cri LJ 493: AIR 1952 Pat 185 (193) (Pt F) (Pr 26) (FB).**

——**S. 3 (1) — Alleged facts or ground non-existing — Detention order falls.**

Where the facts alleged by the State Government exist but two inferences are possible it is for the State Government to make up its mind as to the inference to be drawn. The Court cannot say that a particular inference should have been drawn from the facts. But if the affidavit on behalf of the detenu discloses such specific circumstances as to show that the alleged facts or grounds are non est, then the order has no legs to stand upon. **52 Cri LJ 406: ILR 30 Pat 630: AIR 1951 Pat 47 (56) (Pt 1) (Pr 22) (DB).**

——**S. 3 — Being Communist or attending meeting held by Communists.**

Since the Communist Party has not so far been declared illegal, one cannot be detained merely because of being a member of that party or for attending a meeting held by that party. **3 Pepsu LR 77: 1952 Cri LJ 1485: AIR 1952 Pepsu 126 (127) (Pt A) (Pr 5) (DB).**

——**Ss. 3 and 10** — Detention under — Advisory Board examining case of detenu and deciding not to order release — Petition by detenu under Article 226 not barred. See Constitution of India, Art. 226. **1960 Cri LJ 981: AIR 1960 Punj 332.**

——**S. 3** — Detention under Preventive Detention Act—Case examined by Advisory Board and report submitted — Petition under Art. 226 is not maintainable. See Constitution of India, Article 226. **1957 Cri LJ 480: AIR 1957 Tripura 25.**

4. Satisfaction of detaining authority.

●——**S. 3 — Proof of 'satisfaction' of Minister — Affidavit by his Secretary — Sufficiency — Evidence Act (1872), S. 14.**

As a matter of abstract law, the state of man's mind can be proved by evidence other than that of the man himself, and if the Home Secretary has the requisite means of knowledge, for example, if the Minister had told him that he was satisfied or he had indicated satisfaction by his conduct and acts, and the Home Secretary's affidavit was regarded as sufficient in the particular case, then that would constitute legally sufficient proof of the satisfaction of the Home Minister. But whether that would be enough in

any given case, or whether the "best evidence rule" should be applied in strictness in that particular case, must necessarily depend upon its facts. State of Bombay v. Purshottam Jog, **(1952) 2 Mad LJ 338: 1952 SCR 674: 54 Bom LR 869: 1953 SCA 893: 1952 SCJ 503: 1952 Cri LJ 1269: AIR 1952 SC 317 (319) (Pt D) (Pr 17).**

——S. 3 (1) — Satisfaction — Material given in grounds not existing in fact — Effect.

When admittedly a most important material is placed before the detaining authority, but the material turns out to be a material which did not exist, it cannot be said that the detaining authority applied its mind to all the relevant and proper circumstances which he must do before he makes the order contemplated by the Act, and that there was a proper satisfaction which would justify the making of the order. **1956 Cri LJ 875: ILR (1956) Bom 792: 58 Bom LR 473: AIR 1956 Bom 490 (492) (Pt D) (Pr 7) (DB).**

——S. 3 (1) (a) — Satisfaction of detaining authority — Question of maintenance of public order — Grounds must be germane to that question — Grounds germane to other emergencies — Validity of order — (Constitution of India, Art. 22).

The power to detain is conferred upon the State in order to meet various emergencies and the detaining authority must be satisfied that there is a prejudicial activity on the part of the person sought to be detained which has a bearing on that particular emergency. If the detaining authority seeks to detain a person in the interest of the maintenance of public order, then the grounds on which the order is made and which are communicated to the detenu must be germane to the question of the maintenance of public order. Even though the grounds may be germane to the other emergencies contemplated by Section 3 (1) (a), inasmuch as the power is not exercised for the purpose of meeting that particular emergency, the order would be bad if every one of the grounds does not fall within the ambit of the exercise of the particular power under S. 3 (1).

The activity relied upon by the detaining authority must be such as being reasonably capable of being considered as a prejudical activity or it must be possible to infer from the specific activity referred to in the ground that what the detenue was doing was something which is prejudicial to the maintenance of public order. In other words, the ground relied upon must have a rational probative value and the probative value must be from the point of view of the prejudicial activity alone which can come within the ambit of the Act. 1954 SCR 418, Disting. **58 Bom LR 60: ILR (1956) Bom 715.**

——S. 3 (1) (a) — Nature of satisfaction required.

The satisfaction required is that there must be at least a reasonable probability of the person against whom an order is sought to be made acting in a prejudicial manner. It is not necessary that the detaining authority must feel absolute certainty that if the person concerned was not detained he would act in a prejudicial manner. **AIR 1951 Bom 161 (164) (Pt B) (Pr 11) (DB).**

——S. 3 — Satisfaction of detaining authority — Person given benefit of doubt in criminal case — If can be detained.

Where the petitioner was acquitted in a criminal case not because there was no basis for the charge against him but because the Court which tried him found that the case against him was not proved beyond reasonable doubt, and, therefore, the benefit of that reasonable doubt had to be conferred upon him, these facts can nevertheless form sufficient data before the detaining authority upon which the satisfaction required under S. 3 can be founded. **(1960) 1 Guj LR 140: (1960) 1 Guj HCR 114: 1960 Cri LJ 1588: AIR 1960 Guj 43 (46) (Pt B) (Pr 9) (DB).**

——S. 3 — Power of detention — Condition precedent for exercise.

It is the satisfaction of the detaining authority that matters under S. 3 and it is a condition precedent to the exercise of the power of detention under the section. **AIR 1951 Madh Bha 51 (53) (Pt A) (Pr 7) (DB).**

——S. 3 — Satisfaction under — Nature of — Burden of proof — How discharged.

The word 'satisfied' does not import an arbitrary or irrational state of being satisfied. It means 'reasonable' satisfaction. But this condition about 'reasonable satisfaction' is not an objective condition precedent of fact capable of determination by a Court of law like any other positive fact. It is a subjective condition incapable of being determined by a party other than the one who has taken action in the matter.

As S. 3 of the Act gives plenary power to the detaining authority, it is for him to arrive at the reasonable satisfaction and decide whether it is necessary to detain the person. Where, therefore, an order of detention ex facie shows that the authority making the order of detention was satisfied, a presumption arises in favour of the detaining authority and the burden lies on the petitioner who challenges the bona fides of the detaining authority to show, not that there was no 'reasonable satisfaction', but to show that as a matter of fact the order of detention was passed wihout such satisfaction as is required and that the detaining authority did not hold the opinion which he professed to hold that, therefore, although the forms of law have been observed, there has been a fraud on the Act or an abuse of the powers given by the Legislature: (1941) 3 All ER 338 and 388; AIR 1945 PC 156 and AIR 1950 FC 129, Rel. on.

The heavy burden which lies on the petitioner is not discharged by a mere denial or by asserting that he is not aware of any reasons or that he does not know why he has been detained or that he has not done anything wrong: Case law referred. **AIR 1951 Madh Bha 51 (53, 54) (Pt B) (Prs 7, 11) (DB).**

——S. 3 — Constitution of India, Art. 132 — Substantial question of law — If the applicant was a member of a communist party which itself was indulging in unlawful subversive activities that by itself would be sufficient for the Government to come to the conclusion that his being at large would be prejudicial to the maintenance of public order in the State. There is no substantial question of law involved in such a case. See Constitution of India, Article 132. **52 Cri LJ 252: AIR 1951 Mad 61 (DB).**

——S. 3 — Satisfaction contemplated by section is that of detaining authority. **1952 Cri LJ 1526: ILR (1951) Mys 455: AIR 1952 Mys 85 (87) (Pt D) (Pr 7) (DB).**

● **——S. 3 (1) — Satisfaction — Fresh order against person in detention — Material must be examined afresh.**

Per Full Bench — The State Government can be said to be reasonably satisfied even where the materials for satisfaction are activities in which the detenu indulged a long time ago and when during the interval the detenu has been continually in detention provided that the State Govern-

ment examines the material afresh before passing the new order.

Per Hemeon Ag. C. J.:— That the detaining authority must apply its mind afresh to the materials in its possession before the new order is passed is implicit in the terms of S. 3, Preventive Detention Act, 1950. There must, therefore be a de novo scrutiny of the case of each detenu before the satisfaction which the law requires is reached; and it follows that it is not open to the detaining authority to pass an order of detention under the Act of 1950 on the mere ground that it had passed an order under an earlier enactment. **1951 All WR (Supp) 21: 1951 Nag LJ 71: ILR (1951) Nag 1: AIR 1951 Nag 1 (4, 5) (Pt A) (Prs 20, 30) (FB).**

——S. 3 — Constitution of India, Art. 166 (3) —Rules of business of Orissa Government, R. 14 — Subsidiary Rules of Business, R. 2 — Order of detention passed by Home Secretary — Validity — Presumption as to implied authority — (Evidence Act (1872), S. 114, Illustration (e)).

The presumption that all official acts are to be taken to have been regularly performed is one that 'may' be drawn by a Court. In a matter regarding the liberty of a subject the High Court will not be prepared to uphold the validity of an order by reliance on any such presumption.

Thus R. 2 of the Subsidiary Rules of Business cannot validate an order of detention passed by Home Secretary, as the authority of the Minister in charge who could have passed the order to Home Secretary to deal with the case cannot be presumed. **18 Cut LT 307: ILR (1952) (Cut) 353: 1952 Cri LJ 1051: AIR 1952 Orissa 200 (201) (Pt B) (Pr 4) (DB).**

——S. 3 — Constitution of India, Art. 166 (3) — Rules of Business of Orissa Government, R. 14 — Subsidiary Rules of Business, Rr. 2 and 8 (b) (iii) — Secretary dealing with cases of detention — No submission to Chief Minister or Government — Validity of orders passed.

If orders of preventive detention fall under Cl. (iii) of sub-rule (b) of R. 8 of the Subsidiary Rules it would follow that even though the secretary deals with such cases they have to be submitted to the Chief Minister and Governor and if there is no proof of the same, the orders are invalid. **18 Cut LT 307: ILR (1952) Cut 353: 1952 Cri LJ 1051: AIR 1952 Orissa 200 (202) (Pt C) (Pr 5) (DB).**

——S. 3 — Satisfaction of Provincial Government — Delegation of responsibility from Minister to Home Secretary — Validity — (Constitution of India, Art. 166 (3) — Rules of business of Orissa Government, R. 8 — Subsidiary Rules of Business, R. 2).

Having regard to Art. 166 (3) of the Constitution and R. 8 of the main Rules of Business made by the Governor, the satisfaction of the concerned Minister must be taken to be the satisfaction of the Provincial Government, but there is no legal provision at all for the delegation of that responsibility from the Minister to the Home Secretary. Rule 2 of the Subsidiary Rules cannot be treated as authorising or validating any such delegation of responsibility. **ILR (1951) Cut 624: 18 Cut LT 58: 1952 Cr LJ 1113: AIR 1952 Orissa 200 (202) (Pt D) (Pr 6) (DB).**

——S. 3 — Satisfaction of the detaining authority — Proof.

The question whether or not the Deputy Commissioner at the time he passed order under Section 3, Preventive Detention Act, was satisfied that it was necessary to arrest the petitioner with a view to preventing him from acting in any manner prejudicial to the public peace and order is a question of fact and if the petitioner's position was that such a satisfaction did not exist he should definitely assert the fact in the petition.

Further where a Deputy Commissioner revoked his first order and passed a second order, the very fact that there was some variation in the grounds of detention and in one respect even the order in which the facts were alleged to have taken place was also changed goes to show that the Deputy Commissioner did go into the matter afresh and he passed the new order after he was satisfied of the necessity of it. **ILR (1952) Patiala 445: 1953 Cri LJ 1519: AIR 1953 Pepsu 145 (146) (Pt D) (Pr 5).**

——S. 3 — Satisfaction of detaining authority— Onus — Evidence Act (1872), Ss. 101 to 103 — Constitution of India, Arts. 154, 166.

When an order expressed to be made by the Rajpramukh and authenticated by a person authorised in this behalf by the rules is produced, it shall be accepted as an order made by his Highness the Rajpramukh and if the order contains a recital of a fact, under Clause (2) of Article 166 the presumption in so far as it relates to its execution, does not extend to the correctness of that recital, that is to say, the Court can go into the matter and decide whether or not the recital was correct or not. This means that it is open to the Court to decide whether the Chief Secretary who made the order of detention on behalf of his Highness the Rajpramukh satisfied himself about the necessity of detention before he made the order. In a case of this kind the onus is initially upon the State to prove that the authority who made the order of detention was satisfied in respect of its necessity. But if an order expressed to be made in the name of the Rajpramukh and duly authenticated by a person authorised in this behalf has been produced the onus shifts to the other side. AIR 1945 PC 156, Foll. **1950-2 Pepsu LR 402: 52 Cri LJ 1081: AIR 1951 Pepsu 126 (129) (Prs 15, 16).**

——S. 3 — Satisfaction of detaining authority — Commission of offence.

It is not open to a detaining authority to make an order of detention on the ground that the person sought to be detained has committed an offence. Evidence of offences committed previously by the detenu or of his antecedent conduct can be used by the detaining authority as an indication of the manner in which the person intended to be detained would conduct himself in the future. AIR 1950 All 69; AIR 1949 Mad 605, Rel. on. Hari Singh v. State, **('50) 2 Pepsu LR 370: 52 Cri LJ 1076: AIR 1951 Pepsu 123 (126) (Pt B) (Pr 11) (FB).**

——S. 3 (1) (a) (i) — Satisfaction of detaining authority — Satisfaction is presumed unless rebutted by detenu — Government of India (Allocation of Business) Rules, 1961. 1965 (2) Cr LJ 119: 1965 Pun LR (Supp) 286: AIR 1965 Punj 270 (279) (Pt G) (Pr 14) (DB).

——S. 3 — Satisfaction of detaining authority — Nature of.

The information obtained by the Magistrate and which is relied on by him need not satisfy the strict rules regarding admissibility of evidence before a judicial tribunal. The rule that the accused person is entitled to the benefit of the doubt which applies in the case of persons tried in criminal Courts will not apply in the case of persons proceeded against and detained

under the Preventive Detention Act. Nor is it open to a Court of law which is approached for relief to go into the question as to whether the information acted upon by the District Magistrate was sufficient to entitle him to take steps. **('50) 1950 KLT 723: 52 Cri LJ 1089: ILR (1951) Trav-Co 1: AIR 1951 Trav-Co 217 (219) (Pt B) (Pr 8) (DB).**

5. Scope of enquiry.

——**S. 3** — Detenu alleging illegal detention and torture prior to his being served with detention order — Police officers filing affidavits denying allegations of torture but admitting questioning detenu regarding activities and addresses of his alleged associates — Detenu cannot be allowed to cross examine police officers submitting affidavits since allegations of illegal detention and alleged torture prior to lawful detention are outside the scope of the enquiry into legality of detention. **ILR (1952) Hyd 122: 1952 Cri LJ 1076: AIR 1952 Hyd 112 (116) (Pt D) (Pr 6) (DB).**

6. Detention order.

●——**S. 3** — Order under — Order is not equivalent to conviction by criminal Court. See Dock Workers (Regulation of Employment) Act (IX of 1948), S. 4 (1). **(1965) 3 SCR 453: 1966 Cr LJ 189: AIR 1966 SC 282.**

●——**Ss. 3, 7 — Order of detention — Nature and contents — (Constitution of India, Art. 22).**

The detenu has to be served with a copy of the order passed by the authority contemplated by sub-section (2) of Section 3, containing, firstly, recitals in terms of one or more of the sub-clauses of Clauses (a) and (b) of Section 3 (1), which may be called the 'preamble', and secondly, the grounds contemplated by Section 7, namely, the conclusions of fact which have led to the passing of the order of detention, informing the detenu as to why he was being detained. If the grounds do not contain all the particulars necessary for enabling the detenu to make his representation against the order of his detention, he may ask for further particulars of the facts, and the authority which passed the order of detention is expected to furnish all that information subject, of course, to the provisions of sub-section (2) of Section 7; that is to say, the person detained shall not be entitled to the disclosure of such facts as the authority making the order, considers against public interest to disclose. Thus, the order of detention to be served upon the person detained would usually consist of the first two parts, namely, the preamble and the grounds, but it may also consist of the third part, namely, the particulars, if and when they are required or found to be necessary. But the particulars referred to in sub-sections (3) and (4) of Section 3, would not be identical with the third part of the order. The preamble cannot be treated as the ground of detention contemplated by Section 7. 1951 SCJ 208: (1951) 1 Mad LJ 389: AIR 1951 SC 157, Rel. on. Naresh Chandra Ganguli v. State of W. B., **1959 Cr LJ 1501: 1960 SCJ 303: 1960 Mad LJ (Cr) 200: (1960) 1 SCR 411: AIR 1959 SC 1335 (1340, 1341) (Pt A) (Prs 11, 12).**

●——**Ss. 3 and 13 — Former defective order — Subsequent fresh order free from defect — Constitution of India, Art. 22.**

Before a person is deprived of his personal liberty the procedure established by law must be strictly followed and must not be departed from to the disadvantage of the person affected. This proposition, however, applied with equal force to cases of preventive detention before the commencement of the Constitution. The Constitution does not make any difference in regard to the position. The position is now made more clear by the express provisions of Section 13 of the Preventive Detention Act which provides that a detention order may at any time be revoked or modified and that such revocation shall not bar the making of a fresh detention order under Section 3 against the same person. As in habeas corpus proceedings the Court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the date of the institution of the proceeding, in the absence of proof of bad faith, the detaining authority can supersede an earlier order of detention challenged as illegal and make a fresh order wherever possible which is free from defects and duly complies with the requirements of the law in that behalf. The question of bad faith, if raised, would certainly have to be decided with reference to the circumstances of each case but the observations in one case cannot be regarded as a precedent in dealing with other cases. AIR 1952 SC 27; AIR 1945 FC 18, Rel. on. Petn. No. 334 of 1951 (SC) Disting. Naranjan Singh v. State of Punjab, **(1952) SCA 230: 1952 SCJ 111: 1952 Cri LJ 656: 1952 SCR 395: 1952-1 Mad LJ 733: AIR 1952 SC 106 (108) (Prs 9, 10).**

——**S. 3 (3)** — Order of detention passed by District Magistrate stating two-fold objects necessitating the order — State Government while approving order under Section 3 (3) has no jurisdiction to modify objects stated by eliminating one of them — Such an order of approval if passed is only partial one and cannot be considered an approval order as contemplated by Section 3 (3) and is ultra vires. **ILR (1961) 1 All 427.**

——**Ss. 3 (1) (a) (iii), 9, 10 and 13 — Scope of S. 13 — Government revoking Magistrates' order and itself passing order of detention — Non-compliance with Ss. 9 and 10 in respect of Magistrate's order — Effect.**

The power of revocation conferred on the State Government by Section 13 is untrammelled by any restrictions. There is nothing in the Act to suggest that this power of revocation cannot be exercised unless the procedure prescribed by Sections 9 and 10 has been followed. The State Government can revoke the District Magistrate's order at any time and at any stage of the proceedings.

Where, therefore, the Government revokes an order of detention passed by the District Magistrate and itself passes an order of detention, the orders of the Government are not ultra vires on the ground that requirements of Sections 9 and 10 of the Act had not been complied with in respect of the District Magistrate's order. **1951 All WR (HC) 502: 1951 All Cri Cas 123: 1952 Cri LJ 372: AIR 1952 All 180 (180, 181) (Pt B) (Prs 6, 7, 9).**

——**S. 3** — Grounds on which detention can be ordered — Preaching of violence is not sine qua non for order for detention. **AIR 1959 Andh Pra 73 (77) (Pt D) (Pr 9) (DB).**

——**S. 3** — Applicability — Order of detention on grounds on which person was arrested under Section 109, Cr. P. Code can be passed. **AIR 1955 NUC (Assam) 2841.**

——**S. 3 (2) — Order of detention — Delay in arrest.**

An order of detention was passed by A, a District Magistrate on 29-3-50. In pursuance of this order the detenu was arrested on 14-6-1950. But at the time when the order of detention was actually served on the detenu, A had left charge and another District Magistrate B was in charge of the District. The grounds of detention were furnished to the detenu on 19-6-1950:

Held, (1) that an order passed by a District Magistrate, who is subsequently transferred and relieved of his duties, does not lose its value and cease to be an order of a District Magistrate. (2) that the delay of two and a half months which occurred in this case between the date of the order of detention and the date of arrest was not an unreasonable length of time which required the passing of a fresh detention order by B. **53 Bom LR 127: 21 Bom Cri Cas 80: 52 Cri LJ 418: ILR (1951) Bom 546: AIR 1951 Bom 33 (35, 36, 42) (Pt A) (Prs 3, 17) (DB).**

——Ss. 3 and 7 — Validity of detention — Detention order under S. 3 (2) but grounds described as being under S. 3 (1) (a) (iii).

Order of detention passed by District Magistrate under Section 3 (2) — Grounds of detention served on same day but described as grounds of detention under Section 3 (1) (a) (iii) — **Held,** that if in addition to setting forth the grounds which he did correctly enough the District Magistrate made a 'slip' in a superfluous portion of the relevant communication, it could not be said that he did not observe the 'forms and rules of the law' so as to vitiate his order — The detention was clearly under Section 3 (2). **58 Cal WN 659: 1954 Cr LJ 1722: AIR 1954 Cal 591 (594) (Pt B) (Pr 9) (DB).**

——S. 3 — Successive orders passed on same grounds — Legality.

Raghava Rao J. — An order of detention can be passed against a person who is already under detention and there is nothing inherently illegal about successive orders passed on the same grounds where the sufficiency of the grounds is not examinable by Courts. AIR 1945 FC 18, Rel. on. **65 Mad LW 876: (1952) 2 Mad LJ 690: 1953 Cri LJ 224: AIR 1953 Mad 41 (50) (Pt F) (Pr 17) (DB).**

——S. 3 (1) — Detention order — Necessity to mention period of detention.

The detaining authority is not required under the Act, to mention the period for which the detaining authority intends the detenu to be detained. If there is no provision for mentioning the period, the detaining authority is not bound or obliged to mention the period. AIR 1951 All 357, Dissent. from.

Hence a detention order under Section 3 is not invalid by reason of a failure to mention therein the period of detention.

(Distinction between preventive and punitive detentions pointed out). **52 Cri LJ 282: ('50) ILR 29 Pat 992: AIR 1951 Pat 389 (391, 398) (Pt A) (Prs 3, 26) (DB).**

——S. 3 (1)— Detention under— Mere fact that copy of order of detention is not supplied to detenu does not make arrest or detention illegal — Cr. P. C. (1898), S. 491. **52 Cri LJ 1215: AIR 1951 Pepsu 147 (149) (Pt B) (Pr 3).**

——Ss. 3 (2), 12 and 13 —Detention order under S. 3 (2) — Non-specification of detention period — Legality — Defect if can be cured under Section 13 — Constitution of India, Art. 22.

The specification of the period of detention is one of the indispensable essentials that would go to make the order of detention legal and valid in the eye of law. It is, therefore, imperative for the detaining authority to prescribe the term of detention, and failure to do so and leaving it to the maximum period permissible under the law if intended would make the order of detention doubtlessly vague.

The defect caused by the non-specification of the period of detention cannot be cured by the fact that the Government in the exercise of powers conferred upon it by Section 13 can revoke or modify the order of detention.

The existence of another remedy that may possibly be used by the Government for affording relief cannot validate the order of detention which was unsustainable in law when it was made. **2 Pepsu LR 421: 52 Cri LJ 33: AIR 1951 Pepsu 1 (2, 3) (Prs 3, 4).**

——Ss. 3 and 7 — Order of detention passed under Section 3 without giving grounds — Grounds of detention communicated subsequently as required under Section 7 — Order passed under Section 3 need not itself contain grounds of detention and order is not invalid. **1965 (2) Cr LJ 119: 1965 Pun LR (Supp) 286: AIR 1965 Punj 270 (272) (Pt A) (Pr 4) (DB).**

——S. 3 (1) — Order though not passed in name of President but in name of Central Government is still an order of authority under the section — General Clauses Act (1897), S. 3 (8) (b). **1965 (2) Cr LJ 119: 1965 Pun LR (Supp) 286: AIR 1965 Punj 270 (277) (Pt E) (Pr 11) (DB).**

——S. 3 (1) (a) (i) — Order issued in name of Central Government and validly authenticated by Joint Secretary for and on behalf of President of India — Order could be said to have been made or executed by President — Constitution of India, Art. 77 (2) — Authentication (Orders and other Instruments) Rules (1958), R. 2 — General Clauses Act (1897), S. 3 (8) (b). **1965 Pun LR (Supp) 286: 1965 (2) Cr LJ 119: AIR 1965 Punj 270 (278) (Pt F) (Pr 12) (DB).**

——Ss. 3 and 13 — Grounds — Modification of — Power of Government.

The Government cannot modify the grounds on which the District Magistrate bases his satisfaction. In other words the Government cannot substitute its own satisfaction for the satisfaction of the District Magistrate.

Where the District Magistrate considered it essential to detain a person to prevent him from acting in a manner prejudicial to the maintenance of "public order and tranquillity" but the Government considered that to prevent the person from acting in a manner prejudicial to the maintenance of 'public order' was sufficient and modified the District Magistrate's order accordingly:

Held, that such modification was not contemplated by S. 13. **1955 Cr LJ 95: 1955 Raj LW 75: ILR (1954) 4 Raj 51: AIR 1955 Raj 6 (9, 10) (Pt B) (Prs 9, 15) (DB).**

——Ss. 3 and 11-A (2) — Fixation of period of detention by District Magistrate, is not permitted — Such order will prejudice fair consideration of detenu's case by Advisory Board — Order contemplated by Section 11-A (2) is order by Government after receipt of report from advisory Board. **AIR 1955 Raj 6 (10, 11) (Pt F) (Prs 19, 20) (DB).**

——S. 3 (1) (a) — Question if ill-treatment of detenu prior to detention order whether relevant — Criminal P. C. (1898), S. 491.

The detention of which the detenu complains by his application is the detention in the jail on the date when he makes the application and it

is immaterial for the determination of the question in issue as to whether his prior alleged ill-treatment cannot affect the merits of the detention order, the validity of which is to be determined independently of any such considerations. AIR 1949 Bom 319 (FB), Rel. on. **AIR 1952 Sau 12 (14) (Pt C) (Pr 6) (DB).**

7. Legality of order.

——**S. 3** — Detention based on several grounds — Some grounds non-existent or irrelevant — Effect on validity of order — **Held,** that the order was bad and must be quashed. See Public Safety — Jammu and Kashmir Preventive Detention Act (4 of 2011), S. 3 (1). **1957 Cri LJ 316: AIR 1957 SC 164.**

● ——**S. 3 — Validity of detention — Failure of one of the grounds for detention — Effect.**

The power to issue a detention order under Section 3 of the Preventive Detention Act depends entirely upon the satisfaction of the appropriate authority specified in that section. The sufficiency of the grounds upon which such satisfaction purports to be based, provided they have a rational probative value and are not extraneous to the scope or purpose of the legislative provision cannot be challenged in a Court of law, except on the ground of mala fides. A Court of law, is not even competent to enquire into the truth or otherwise of the facts which are mentioned as grounds of detention in the communication to the detenu under S. 7 of the Act. AIR 1951 SC 157, Rel. on.

Where however the Government itself while confirming the detention in exercise of its power under Section 11 admits that one of the two grounds mentioned in the original order is substantial or non-existent, to say that the other ground which still remains, is quite sufficient to sustain the order would be to substitute an objective judicial test for the subjective decision of the executive authority which is against the legislative policy underlying the statute. In such cases, the position would be the same as if one of these two grounds was irrelevant for the purpose of the Act or was wholly illusory and this would vitiate the detention order as a whole. AIR 1943 FC 72, Rel. on. Shibban Lal Saksena v. State of Uttar Pradesh, **(1954) 1 Mad LJ 143: 1954 SCJ 73: 1954 Cr LJ 456: 1954 BLJR 113: 1954 SCA 53: 1954 SCR 418: 1954 All LJ 48: AIR 1954 SC 179 (180) (Pt B) (Pr 8).**

● ——**Ss. 3 and 7 — Order purporting to be made by Governor and signed by Home Secretary — Communication of grounds — By whom to be made — (Constitution of India, Art. 166 (1)).**

Where orders of detention expressly state that the Governor of Punjab was satisfied of their necessity and that they were made by his order, the mere fact that they are signed by the Home Secretary would not make them defective. The communication of the grounds need not be made directly by the authority making the order. Section 7 does not require this. The communication may be through recognized channels prescribed by the administrative rules of business. Ujagar Singh v. State of Punjab. **(1952) SCA 648: 1952 SCJ 521: (1952) 2 MLJ 641: 1952 SCR 756: 1953 Cr LJ 146: AIR 1952 SC 350 (352) (Pt B) (Pr 7).**

● ——**Ss. 3 (1), 9 and 11 (as amended by Act 4 of 1951) — Fixing of period of detention in initial order itself — Order cannot be supported.**

It is clear that the Preventive Detention Act (1950) as amended requires that every case of detention should be placed before an Advisory Board constituted under the Act (Section 9) and provides that if the Board reports that there is sufficient cause for the detention "the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit" (S. 11). It is, therefore, plain that it is only after the Advisory Board, to which the case has been referred, reports that the detention is justified, the Government should determine what the period of detention should be and not before. The fixing of the period of detention in the initial order itself is therefore, contrary to the scheme of the Act and cannot be supported. Makhan Singh v. The State of Punjab (I), **1952 Cri LJ 321: 1952 SCA 91: 1952 All LJ 97: 1952 Mad WN 155: 1952 Mad WN Cr 31: 1952 SCR 368: 1951 SCJ 835: AIR 1952 SC 27 (28) (Pr 4).**

● ——**Ss. 3, 12 — Order of detention not specifying period — Validity.**

Even if the order of detention passed under Section 3 does not specify the period during which the detenus are to be under detention, the order is not invalid as Section 12 prescribes a maximum period of one year and hence such orders cannot be said to be of indefinite period or unlawful on that ground. Petns. Nos. 149 and 167 of 1950, Rel. on. Ram Singh v. State, **1951 SCJ 374: 52 Cri LJ 904: 1951 Mad WN 765: 1951 Mad WN (Cri) 233: 1951 SCR 451: AIR 1951 SC 270 (274) (Pt C) (Pr 11).**

——**S. 3 (1) (a) (iii) — Order of detention — Omission to mention period — Effect.**

The law does not require the detaining authority to specify the period of detention. Hence an order of detention cannot be declared to be void on the ground that it failed to specify the period of detention. **1951 All WR (HC) 502: 1952 Cri LJ 372: AIR 1952 All 180 (180) (Pt A) (Pr 4).**

——**S. 3** — Detention under — Period of, not fixed — Validity of — Criminal P. C. (1898), S. 491 — It is not capable of being properly carried out by the authority to whom the order is directed and therefore the detention is not in accordance with law. **AIR 1951 All 357 (357) (Pt A) (Pr 1).**

——**S. 3 — Order of detention — Period of detention not specified — Validity of order.**

An order of detention which does not specify the period of detention cannot be regarded as illegal, or invalid. **1952 Cri LJ 422: AIR 1951 All 18 (18, 19) (Pt A) (Pr 1) (DB).**

——**S. 3 — Detention under — Legality of order — Burden of proof.**

No person shall be deprived of his life or personal liberty except according to the procedure established by law, as prescribed under Article 21 of the Constitution of India. It is, therefore, for the Government to show that the orders of detention in particular cases are perfectly valid and in strict adherence to the law as laid down. AIR 1951 Assam 169, Rel. on. **1952 Cri LJ 1706: ILR (1952) 4 Assam 134: AIR 1952 Assam 187 (188) (Pt B) (Pr 7).**

——**Ss. 3 and 7 — Scope — Order of detention by Chief Commissioner — Grounds supplied by successor-in-office — If invalidates detention.**

The mere fact that the order of detention under Section 3 (1) of the Preventive Detention Act was passed by one Chief Commissioner, but the grounds were supplied by his successor-in-office, does not warrant the inference that these grounds were those which satisfied the then Commissioner who made the order of detention in the matter of the requisite satisfaction before

passing the order. It is not the satisfaction of the individual but of the authority that is required. It is the authority and not the person who has to be satisfied and who has to furnish the grounds on which the order was passed. **1952 Cr LJ 683: AIR 1952 Bhopal 6 (9, 10) (Pt A) (Prs 12, 13).**

——Ss. 3, 11 — Detention order under S. 3 — Necessity to state period of detention — Case referred to Advisory Committee and detention order confirmed — Period of detention not mentioned — Detention order if valid.

Where an original order of detention is passed under Section 3 as it stood before its amendment in 1951 it is not necessary to state therein the period for which the detenu is to be detained. (1951) Cri Appl. No. 235 of 1951 (Bom) D/. 17-4-51, Rel. on.

Merely because there could not be detention of a longer duration than one year from the date of the order, it cannot be held that the detention order had to mention the period for which the detenu was to be detained by the jailor. The detaining authority could very well say 'until further orders', and even if he did not use the words but merely said that the detenu should be detained, the jailor knowing that the detention could only be for one year would naturally understand that before the expiry of one year orders would be received as to when the detenu was to be released. (1942) AC 206, Rel. on.

Nor is it necessary when subsequently the case of the detenu is referred to the Advisory Committee and the State Government confirms the order of detention that they must mention the period during which the detenu would be detained further. **53 Bom LR 717: 21 Bom Cr C 210: 1952 Cri LJ 81: ILR (1952) Bom 134: AIR 1952 Bom 1 (6, 8) (Pt C) (Prs 13, 14) (DB).**

——S. 3 (1) — Acts attributed, as grounds of detention, relating to security of State — Legality of detention for maintenance of public order.

It does not make any difference to the legality of the order. The detaining authority has power to detain a person in either circumstances. **AIR 1952 Hyd 186 (187) (Pt C) (Pr 5) (DB).**

——S. 3 — Validity of detention — Directions as to execution of order of detention given in order of detention — Failure to follow — Effect — The order of detention is bad. See Public Safety — Jammu and Kashmir Preventive Detention Act (4 of 2011), S. 4. **1955 Cri LJ 1071: AIR 1955 J and K 7 (FB).**

[Overruled on another point in AIR 1957 SC 281.]

——S. 3 — Constitution of India, Art. 166 (2) — Order not based on satisfaction of appropriate authority — Challenge to validity of order —What Article 166 (2) prevents is the challenge to the validity of properly authenticated order on the ground that it is not an order or instrument made or executed by the Governor but that does not prevent a challenge to the validity of the said order on the ground that such an order was not based on the satisfaction of the appropriate authority who under the law, can legally act for Provincial Government. See Constitution of India, Art. 166 (2). **1952 Cri LJ 1051: AIR 1952 Orissa 200 (DB).**

——S. 3 — Legality of order — Burden of proof.

Onus to prove that the authority who makes the order of detention is satisfied about the necessity of detention in the words of S. 3 lies upon the State. But when an order duly authenticated by a competent authority is produced and it is mentioned in that order that the order is made after the authority is satisfied the onus shifts to the detenu. AIR 1951 Pepsu 126, Ref. **ILR (1953) Patiala 1: 1953 Cr LJ 1710: AIR 1953 Pepsu 190 (192) (Pt D) (Pr 7).**

——S. 3 — Validity of detention — (Constitution of India, Art. 226).

Action under S. 3 is preventive and not punitive and can be taken only with a view to preventing person from doing something prejudicial to public order.

Petitioner was all along detained in jail as an undertrial prisoner in three cases for about six months. In one of them he was acquitted and in another he was discharged. Immediately after his acquittal and while the third case was pending against him he was served with an order of preventive detention under Section 3 mentioning his past activities prior to his detention extending for a period of two years as the grounds of detention. **Held,** that the order of detention was made for a collateral purpose as there was likelihood that the object was either to punish him for his past acts or to prejudice his defence in the case pending against him. The order of detention was, therefore, illegal. **1953 Cr LJ 1210: ILR (1952) Patiala 620: AIR 1953 Pepsu 111 (112) (Pt B) (Pr 5).**

——S. 3 — Satisfaction of detaining authority — Whether material before authority had connection with matters referred to in S. 3 (1) (a) — Power of Court to consider.

With a view to determining whether the order of detention is legal the Court has to consider whether the detaining authority was satisfied as a matter of fact or he could be satisfied on that material or information that was before him. If the nature of the material be such that when believed it could afford a ground for satisfaction the order of detention cannot be characterised as illegal merely on the ground that the material was not sufficient but when it has no connection whatsoever with any of the three matters referred in Cl. (a) of Section 3 (1) the inference is clear that the ground upon which the order of detention is made is outside the scope of the Act and accordingly the order is illegal and ultra vires and is made without any authority. **3 Pepsu LR 77: 1952 Cri LJ 1485: AIR 1952 Pepsu 126 (127) (Pt C) (Pr 6) (DB).**

——S. 3 — Production of copy of order of arrest — Presumption — Evidence Act (1872), S. 114.

The production of a copy of the order of arrest purporting to have been made by the Rajpramukh and signed by the Deputy Secretary of the Government is only prima facie evidence in support of the legality of the arrest and detention but the evidence is liable to be rebutted and if in order to rebut this evidence the detenu wants to examine the Deputy Secretary in respect of the allegations made in the affidavit by him the Court cannot refuse the request of the detenu. AIR 1949 Nag 50 and AIR 1948 Lah 87, Ref.; 5 DLR (Bom) 55, Rel. on. **('50) 2 Pepsu LR 299: 52 Cri LJ 1068: AIR 1951 Pepsu 121 (122) (Pr 2).**

——Ss. 3, 4 and 7 — Detention under S. 3 by District Magistrate — Detention period extended by State Government without supplying fresh grounds — Validity of detention — Constitution of India, Art. 22 (5).

A person who is ordered to be detained by a District Magistrate but whose period of deten-

tion is extended by an order of the State Government is entitled to claim that fresh grounds of detention should be supplied to him.

Hence where the detenu was not supplied with grounds on which the order of the State Government was based the detention is invalid as being repugnant to Article 22 (5) of the Constitution of India. Article 22 (5) does not draw any distinction between one authority and another or between an original order or an order made at a later date **52 Cri LJ 1451: AIR 1951 Punj 119 (119) (Pt A) (Pr 5) (DB).**

——**Ss. 3 and 7** — Scope and effect — Detenu not served with order nor granted copy thereof even after request — Grounds alone served three days after arrest — Legality of detention — Absence of proof of legal order of detention by proper authority — Effect — Writ of Habeas Corpus — Right to — **Held,** that the detention is not legal. See Constitution of India, Art., 22 (5). **52 Cr LJ 845: AIR 1951 TC 130 (DB).**

8. Past acts.

●——**Ss. 3 and 7** — Past activities can be ground for detention. **AIR 1957 SC 28 (34) (Pt B) (Pr 14).**

●——**S. 3 — Instances of past activities if relevant.**

Instances of past activities are relevant to be considered in giving rise to the subjective mental conviction of the detaining authority that the persons to be detained are likely to indulge in objectionable activities. Bhim Sen v. State of Punjab, **1952 Cri LJ 75: (1951) 2 Mad LJ 641: 1951 Mad WN 865: 1951 SCJ 747: 1951 Mad WN (Cri) 285: 1952 SCR 18: ILR (1952) Punj 1: AIR 1951 SC 481 (483) (Pt A) (Pr 7).**

——**S. 3 — Past activities.**

The nature of the action under the Preventive Detention Act is one intended to prevent a person from acting in any manner prejudicial to the maintenance of the supplies and services essential to the community in future. It is absolutely necessary that his future must be judged by his past. It is not until the past activities of an individual spreading over a period of time, not distant or remote, have been watched and scrutinised, will it be possible to come to any reasonable conclusion as to his conduct in future. Once the objectionable nature of his activities for a period prior to his arrest is brought to light, the authorities on being satisfied as to his future behaviour would inevitably take action of a preventive character. The grounds of an order referring to the detenu's activities in the recent past, therefore, constitute a valid basis of action for his detention. **52 Cri LJ 3: 1951 ALJ 203: AIR 1951 All 838 (844) (Pt C) (Pr 24) (DB).**

——**S. 3 — Constitution of India, Art. 22 — Preventive detention — Satisfaction of detaining authority — Past acts or conduct of detenu — Relevancy of.**

Held, the distance of time is immaterial unless there is practically no connection between the past and present activities. There is no force in the argument that since the historical background too weighed with the detaining authority in judging the implications and tendencies of the present acts of the detenu and in obtaining satisfaction warranted by S. 3 the order is bad in law. **(1958) 2 Andh WR 589: 1958 Mad LJ (Cri) 913: 1958 Andh LT 1136: 1959 Cri LJ 166: AIR 1959 Andh Pra 73 (76, 77) (Pt C) (Pr 8) (DB).**

——**S. 3 (1) — Satisfaction of detaining authority — Proximate and past activities of detenu.**

It is no doubt true that the detaining authority could take into the consideration the proximate and immediate past of the detenu while passing an order of detention, but it is only the immediate past, the antecedents and the history of the detenu, that alone could be taken into consideration if there be nothing between immediate past and the order of detention.

It is impossible to gauge the mental attitude of the detenu as it existed about the time the detention order was passed by its comparison with that obtained six months before. **1952 Cri LJ 683: AIR 1952 Bhopal 6 (10, 12) (Pt D) (Pra 15, 23, 24).**

——**S. 3 — Past acts.**

Where past acts form a chain with the connected acts which might imperil the security of the State or the maintenance of public order, and all the acts show the mental make-up of the would-be detenu at the relevant dates and are useful aids in finding out the potential activities of the would-be detenu, such past acts form the basis of the subjective satisfaction of the detaining authority. The degree of relevancy is not a matter which is justiciable AIR 1951 SC 174 and AIR 1951 SC 481, Foll. **('52) 56 Cal WN 427: 1953 Cri LJ 310: AIR 1953 Cal 81 (82) (Pt A) (Pr 10) (DB).**

——**S. 3 — Past acts.**

Where after the past act the would-be detenu was enrolled as a member of the Volunteer corps and given military training this does not necessarily show that there was a radical change in the mental tendencies of the would-be detenu. **56 Cal WN 427: 1953 Cri LJ 310: AIR 1953 Cal 81 (82) (Pt B) (Pr 11).**

——**S. 3 — Previous penal acts.**

It is no doubt true that the object of a preventive detention Statute is mainly preventive but it does not follow that previous penal acts of the would-be detenu are irrelevant. The normal process of a criminal trial may be inappropriate or ineffective. Past acts even if they have gone beyond the stage of preparation or of attempts to commit penal offences and have even resulted in the commission of penal offences, are relevant for sustaining an oder of detention. **('52) 56 Cal WN 427: 1953 Cri LJ 310: AIR 1953 Cal 81 (82) (Pt B) (Pr 12) (DB).**

●——**Ss. 3 and 7 — Statements relating to past conduct in grounds of detention — Whether justiciable — Constitution of India, Art. 22 (6).**

The correctness of statement relating to the past activities of a detenu contained in the grounds of detention is not justiciable. The satisfaction under S. 3 being a subjective one, no Court can substitute its opinion of the material for that of the authority directing detention, and thereby hold the satisfaction to be wrongly reached. There is however a difference between irrelevant ground and incorrect ground. To hold it incorrect, an adjudication of relevant facts is necessary, which means jurisdiction to order production of the relevant data and this jurisdiction cannot be exercised in view of Art 22, Cl. (6) of the Constitution of India Bompalli Sathia v. Government of Hyderabad, **52 Cri LJ 1527: AIR 1951 Hyd 162 (162) (Pt A) (Pr 5) (FB).**

●——**S. 3 — Statement as to past conduct of detenu if justiciable.**

The correctness of the statement of facts relating to the past activities of the detenu in the grounds of detention cannot be challenged by the detenu in a Court of law. He must accept them

as disclosed by the authorities. AIR 1950 Mad 162, Rel. on; Case law discussed.

By use of the words 'must be satisfied' in Section 3 of the Preventive Detention Act, the Parliament has shown the intention of the satisfaction to be subjective and the Court cannot hold the satisfaction to be wrong as based on evidence which it considers to be false. Santhamma B. v. State of Hyderabad. **52 Cri LJ 1402: ILR (1951) Hyd 654: AIR 1951 Hyd 128 (131) (Pt B) (Prs 11, 12) (FB).**

—Ss. 3 and 7 — Grounds for order — Past penal activities.

The object of the Preventive Detention Act was no doubt preventive and not punitive detention; but from this it is erroneous to infer that past penal acts of the would-be detenu cannot be taken into account in finding out his likely course of action in the future. As a matter of fact it is largely from the past activities of a person that his behaviour in the future can be inferred. The normal process of investigation and trial according to the Code of Criminal Procedure may be found to be ineffective and inadequate to meet a real situation of lawlessness. AIR 1951 SC 481; AIR 1952 SC 350 and AIR 1954 Madh B 125, Rel. on. **Madh BLJ 1954 HCR 1442: Madh MLR 1955 Cri 268: 1955 Cri LJ 476: ILR (1955) Madh B 98: AIR 1955 Madh Bha 36 (39) (Pt F) (Pr 8) (DB).**

—S. 3 — Past activities — Instances of, are relevant. **AIR 1955 NUC (Madh Bha) 3807 (DB).**

—S. 3 — Relevancy of grounds — Determination of — Past punitive acts, consideration of.

The object of the Preventive Detention Act is no doubt preventive and not punitive detention. But from this object of the Act, it is erroneous to infer that past penal acts of the would be detenu cannot be taken into account in finding out his likely course of action in the future. Moreover, when a number of notorious dacoits operate in co-ordination over extensive areas aided and abetted by their agents who give them shelter, arms, information as regards police posting and who intimidate witnesses from giving evidence against the dacoits, the normal process of investigation and trial according to the Code of Criminal Procedure may be found to be ineffective and inadequate to meet a real situation of lawlessness. The question whether in such a situation a person should or should not be detained in order to prevent him from acting in a manner prejudicial to the maintenance of public order is not for the decision of the Court. **Madh BLR (1954) Cr 108: 1954 Cri LJ 1062: Madh BLJ 1954 HCR 582: ILR (1954) Madh B 445: AIR 1954 Madh Bha 125 (127, 128) (Pt C) (Pr 9) (DB).**

—S. 3 — Past activities — Consideration of.

The detaining authority can fall back upon the grounds existing prior to the original detention of the detenu under the Madras Maintenance of Public Order Act in 1948 for his fresh detention under the Preventive Detention Act in 1950. The past acts would furnish safe criteria of the likely future activities of the detenu. **64 Mad LW 311: 1951 Mad WN 248: 1951 Mad WN (Cri) 76: 52 Cri LJ 688: AIR 1951 Mad 182 (185, 186) (Pt B) (Prs 14, 18) (DB).**

—S. 3 — Antecedents of detenue — Consideration of.

In judging whether a person is likely to indulge in activities prejudicial to a State or to the maintenance of public order, his antecedents can also be considered. **1952 Cri LJ 1526: ILR (1951) Mys 455: AIR 1952 Mys 85 (87) (Pt E) (Pr 7) (DB).**

—S. 3 (1) — Grounds of detention under — Validity of — Criminal P. C. (1898).

The mere fact that a person has committed an offence or that he has been convicted for an offence would not by itself afford a ground for detaining him under S. 3 of the Preventive Detention Act, but his antecedent conduct in committing the offence may be taken into consideration by the detaining authority in arriving at the conclusion that he was likely to act in a manner prejudicial to the maintenance of the public order. Hence where the detenu was complained of being in the habit of harbouring dacoits and affording them protection and supplying information to them of movements of the police, and particular instances of when and where he had harboured certain dacoits were mentioned in support of the belief that he was likely to do so in future also, with a view to avoid which the detention was considered necessary the order cannot be held to be illegal on the ground that harbouring of dacoits is not a matter for consideration for the maintenance of public order. AIR 1949 Pat 299, Disting. **52 Cri LJ 1215: AIR 1951 Pepsu 147 (151) (Pt E) (Pr 12).**

9. Prosecution or detention.

—S. 3 — Arrest unaccompanied by prosecution — Subsequent detention.

It is true that the distinction between the two forms of action, namely, punitive action such as a criminal charge and preventive detention is clear cut and it is not open to the detaining authority to punish a man for some act which could only have constituted the basis of prosecution. But the mere fact that the arrest was originally ordered for a specific offence but it was not followed by prosecution for that offence cannot affect the power of the detaining authority to take preventive action after the interim or final release of the person detained. It cannot be held that where an arrest unaccompanied by prosecution is followed by an order of detention, the Court must hold that the detention was mala fide. The burden of proving that the order was mala fide lies upon the detenu Case law discussed. **52 Cri LJ 3: AIR 1951 All 838 (842, 843) (Pt B) (Prs 17, 20) (DB).**

—S. 3 — Detention based on matter being subject of pending prosecution.

(Per Ram Labhaya J.):— Preventive action which the Preventive Detention Act seeks to legalise may not be based on a matter which is the subject matter of a pending prosecution. The order of detention in such circumstances may result in serious prejudice to the person detained. **('51) 55 CWN 13 (Assam): 52 Cri LJ 434: ILR (1950) 2 Assam 470: AIR 1951 Assam 43 (44) (Pt B) (Pr 11) (DB).**

—S. 3 — Subject-matter of ground of detention being sub judice.

(Per Ram Labhaya J.):— When what is alleged against the accused in the ground of detention is the subject of a pending prosecution the order of detention is improper as the matter is still to be proved by the prosecution in the pending case and the decision of the Court cannot be anticipated. **('51) 55 CWN 13: 52 Cri LJ 434: ILR (1950) 2 Assam 470: AIR 1951 Assam 43 (44) (Pt C) (Pr 10) (DB).**

—S. 3 (1) — Inciting illegal strike — Power to detain person so inciting — Prior decision under Bombay Industrial Relations Act, 1946 (11 of 1947), S. 97, whether necessary.

Section 97, Bombay Industrial Relations Act, 1946, speaks of certain conditions which would

make a strike illegal and if a detaining authority acting under the Preventive Detention Act, 1950, thinks that one or the other of those conditions exists and the strike which is incited to be resorted to by the person to be detained is illegal on that score, it is open to the detaining authority to take action under the Preventive Detention Act against the person concerned. In this connection it is not correct to argue that no action for detaining a person can be taken under the Preventive Detention Act unless there is a prior determination by a Labour Court or the Industrial Court that the strike is an illegal one. **53 Bom LR 127: 21 Bom Cri Cas 80: 52 Cri LJ 418: ILR (1951) Bom 546: AIR 1951 Bom 33 (40, 44, 45) (Pt E) (Prs 12, 23) (DB).**

——S. 3 — Prosecution and detention — Parallel proceedings at same time — Does not vitiate detention order.

The fact that there are parallel proceedings in existence one in Court and the other by way of detention, does not by itself vitiate the order of detention. (1955) 2 MLJ (SC) 165; 1955 SCJ 669; AIR 1955 SC 631, Rel. on. **1963 (2) Cri LJ 499: AIR 1963 Cal 589 (590) (Pt A) (Pr 5) (DB).**

——S. 3 (as amended by Act 51 of 1954) — Scope — Detention in respect of matter as to which criminal prosecution can be launched — Legality.

There is no law which precludes the State from invoking the provisions of the Preventive Detention Act in respect of a matter as to which a criminal prosecution has been launched or can be launched. The detention however must not be mala fide. **60 Cal WN 464: 1957 Cr LJ 172: ILR (1957) 2 Cal 463: AIR 1957 Cal 74 (75) (Pt B) (Pr 7) (DB).**

——S. 3 (as amended in 1951) — Incidents punishable under ordinary Criminal law — Detention order on grounds relating to such incidents — Competency — Autre fois acquit — Principle of — Protection against double jeopardy under Article 20 (2), Constitution of India — Applicability — Criminal P. C. (1898), S. 403 — Constitution of India, Art. 20 (2).

The basis of the Preventive Detention Act of 1950 as amended by Act 4 of 1951 is that the Central Government or the State Government is given the power to make orders of detention against certain persons provided such Government is satisfied on the grounds mentioned in Section 3 of the Act. The satisfaction is of the appropriate Government and not of the Courts. Such satisfaction as is laid down in S. 3 of the Preventive Detention Act is not limited to be based on the existing laws of the lands. Fundamentally, therefore, the operation of the existing laws of the land of the determination of the offences by Courts under such laws and the result arising therefrom whether of acquittal or discharge or even of conviction (for instance only a sentence of fine and not of imprisonment) cannot be allowed to operate as a restriction on the powers of the Government to detain under Section 3 of the Preventive Detention Act. To allow it to do so would be to completely eliminate the very justification of the Preventive Detention Act. For if the ordinary laws of the land and their application to any particular person by the Courts were enough to meet the situation which the Preventive Detention Act was intended to meet, then it is difficult to imagine either the purpose or the object of such an Act.

The central purpose of the Preventive Detention Act is preventive detention justified by national security and maintenance of public order and essential supplies and services and its purpose is not criminal conviction justified by legal evidence and by existing laws relating to crimes and offences. The consideration of the Court and the consideration of the Government are in this context disparate and do not belong to the same realms of scrutiny. The principle of autrefois acquit under Section 403 of the Code of Criminal Procedure has no application because the satisfaction of the Government under the Preventive Detention Act is not a "trial". The constitutional protection against double jeopardy under Art. 20 (2) of the Constitution is also inapplicable because satisfaction under the Preventive Detention Act is not a "Prosecution". There is and can be no identity of offence or of prosecution between detention under the Preventive Detention Act and trial conviction by a Court of law.

Hence, an order of detention under the Preventive Detention Act is not illegal merely because it nullifies a previous order of discharge or acquittal by a Court in a Criminal or a quasi-criminal case.

There is no reason why acquittal must necessarily mean that the acquitted person nevertheless cannot be acting in a manner prejudicial to national security or maintenance of essential supplies and services as mentioned in S. 3 of the Preventive Detention Act and why if the Government is satisfied on that account it cannot in such a case come to the conclusion that it is necessary to detain him. A person can be detained under the Preventive Detention Act even if he has not committed an offence proved under the Penal Code or under any other Act. It is entirely erroneous to think that the ordinary criminal laws of the country and the Preventive Detention Act are substitutes for each other. If anything, they are complementary. **56 Cal WN 42: 1952 Cri LJ 204: ILR (1953) 1 Cal 89: AIR 1952 Cal 26 (29, 30) (Pt B) (Prs 12, 15, 16, 18) (DB).**

——S. 3— Contravention of S. 3, Essential Supplies (Temporary Powers) Act, 1946 — Two remedies open to authorities — They must choose one.

Where the facts alleged against a person are that he has contravened the provision of S. 3, Essential Supplies (Temporary Powers) Act, 1946, he can either be detained under the preventive measures or prosecuted in a Court of Law. The authorities concerned cannot have resort to both the forms, i.e., of preventively detaining and seeking conviction in a Court of Law. For it is a well settled principle that the detaining authority must make a choice either to preventively detain the offender under the provisions of the Preventive Detention Act or to challan him in a Court of Law for the alleged offences which he is stated to have committed. AIR 1950 Bom 202, Rel. on. **52 Cri LJ 916: ILR (1952) Hyd 71: AIR 1951 Hyd 94 (94, 95) (Pr 1) (DB).**

——S. 3 (1) — Two courses, prosecution and detention, open to Government — Power of Government to choose one.

It is not a rule of law that when a person is accused of an offence the only alternative is to prosecute him, and there is no legal authority to detain him. Public safety and the maintenance of public order are paramount concern of the Government, and the power of the State Government to order the detention of a man is not lost if the Government are not in possession of sufficient evidence to secure his conviction. It is not necessary for the executive authority to make a choice between prosecution and detention at the earliest stage and it is not the law that

unless such a choice is made the order of detention should be regarded as invalid. What is required is that the executive authority should act according to law, reasonably and in good faith. In all cases it is a question of fact whether the order of detention is mala fide or not. AIR 1951 Pat 68, Foll.; 23 Pat 252, Expl. **52 Cri LJ 1231: ILR 30 Pat 653: AIR 1951 Pat 153 (154) (Pt B) (Pr 3) (DB).**

——S. 3 (2) — Detention of person accused of offence — Legality — Mala fide order — Test.

It cannot be stated as a rule of law that when a person is accused of an offence, the only alternative is to prosecute him, and there is no legal authority to detain him. It is a fallacy to say that the right to prosecute a person under the ordinary criminal law and the right to detain him are mutually exclusive. AIR 1945 Bom 533, Rel. on.

There is no rule of law that unless a choice of one of two alternatives, prosecution or detention, is made at the earliest moment, the order of detention must be held to be invalid. The proper approach is to consider the facts of each case and then consider whether the order of detention is mala fide or not.

No doubt there may be cases in which there will be a clash between the different rights, if and when both detention and prosecution are made and pursued at the same time. In such cases, if the State Government wish to pursue the prosecution it must be prepared to comply with the safeguards of the Code of Criminal Procedure, and must give to the undertrial prisoner such rights as he may have under the law. It would not be open to the State Government to fall back on Cl. (3) of Art. 22 and hold an investigation or trial in disregard of the provisions of the Code of Criminal Procedure. Apart, however, from this difficulty which may arise in some cases, the test whether a detention order is or is not mala fide depends on whether the order is for the purpose mentioned in the order itself namely, the maintenance of public order, or whether it is for any ulterior or collateral purpose. **52 Cri LJ 603: AIR 1951 Pat 68 (74, 75) (Pt E) (Prs 11, 13) (DB).**

——S. 3 (1) — Detention and prosecution whether can be simultaneously made — Test to be applied.

Whether detention of a person and prosecution started against him can be simultaneously made does not depend on any rule of law; the question has to be approached, and answered in each case on the footing whether the order of detention in view of the pending prosecution, is bona fide or not. For answering the question the uncontroverted facts may have to be considered, and the test will be whether the order of detention is for the purpose it purports to be or really for any ulterior or collateral purpose. **52 Cri LJ 406: ILR 30 Pat 630: AIR 1951 Pat 47 (52) (Pt E) (Pr 15) (DB).**

——S. 3 — Mala fides — Inference.

It cannot be stated as a rule of law that when a person is accused of an offence, the only alternative is to prosecute him, and there is no legal authority to detain him. The right to prosecute a person under the ordinary criminal law and the right to detain him are not mutually exclusive. The question whether an order is made for a collateral purpose has to be decided on the facts of each particular case. AIR 1953 Pepsu 111, Rel. on. **ILR (1953) Patiala 1: 1953 Cri LJ 1710: AIR 1953 Pepsu 190 (192) (Pt E) (Prs 9, 10).**

——S. 3 — Scope — Simultaneous prosecution and preventive detention — Legality.

Whether detention of a person and prosecution started against him can be simultaneously made, does not depend on any rule of law and the question is to be approached and answered in each case on the footing whether the order of detention in view of the pending prosecution is bona fide or not. **1953 Cri LJ 1210: ILR (1952) Patiala 620: AIR 1953 Pepsu 111 (112) (Pt A) (Pr 3).**

——S. 3 (1) (a) — Prosecution or detention — Choice if of Government.

Whether the person should be prosecuted under the ordinary law, or the Government should exercise their powers under the Preventive Detention Act is a matter for the authorities to decide. 52 Bom LR 268 (FB), Rel. on; 2 Sau LR 41, Dissent. **AIR 1952 Sau 12 (16) (Pt E) (Pr 11) (DB).**

10. Order of detention against person already in jail.

■ **——S. 3 (1) (a)** — Order of detention cannot be served on person who is in jail custody. See Defence of India Rules (1962), R. 30 (1) (b). **1964 (2) Cri LJ 217: AIR 1964 SC 1120.**

■ **——S. 3 (1) (a) — Order of detention of person already in jail custody is beyond the powers of the District Magistrate — Such person cannot act in prejudicial manner — Subjective satisfaction of detaining authority — Justiciability — Past conduct of person, relevancy of.**

Before an order of detention can be validly made by the detaining authorities specified by S. 3 (2), the authority must be satisfied that the detention of the person is necessary in order to prevent him from acting in any prejudicial manner as indicated in Cls. (i) to (iii) of S. 3 (1) (a). Since the Act authorises the preventive detention of citizens without a trial, the material provisions of the Act must be strictly construed and safe-guards which the Act has deliberately provided for the protection of citizens must be liberally interpreted. The satisfaction of the detaining authority to which S. 3 (1) (a) refers is his subjective satisfaction, and so is not justiciable. Therefore it would not be open to the detenue to ask the Court to consider the question as to whether the said saisfaction of the detaining authority can be justified by the application of objective tests.

If any of the grounds furnished to the detenue are found to be irrelevant while considering the application of Cls. (i) to (iii) of S. 3 (1) (a) and in that sense are foreign to the Act, the satisfaction of the detaining authority on which the order of detention is based is open to challenge and the detention order liable to be quashed. Similarly, if some of the grounds supplied to that detenue are so vague that they would virtually deprive the detenu of his statutory right of making a representation, that again may introduce a serious infirmity in the order of his detention. If, however, the grounds on which the order of detention proceeds are relevant and germane to the matters which fall to be considered under S. 3 (1) (a), it would not be open to the detenue to challenge the order of detention by arguing that the satisfaction of the detaining authority is not reasonably based on any of the said grounds.

Though the satisfaction of the detaining authority contemplated by S. 3 (1) (a) is subjective of the said authority, cases may arise where the detenue may challenge the validity of his detention on the ground of mala fides and in support of the said plea urge that along with

other facts which show mala fides, the Court may also consider his grievance that the grounds served on him cannot possibly or rationally support the conclusion drawn against him by the detaining authority. It is only in this incidental manner and in support of the plea of mala fides that this question can become justiciable; otherwise the reasonableness or propriety of the said satisfaction contemplated by S. 3 (1) (a) cannot be questioned before the Courts.

In deciding the question as to whether it is necessary to detain a person, the authority has to be satisfied that if the said person is not detained, he may act in a prejudicial manner, and this conclusion can be reasonably reached by the authority generally in the light of the evidence about the past prejudicial activities of the said person. But the past conduct or antecedent history of the person on which the authority purports to act, should ordinarily be proximate in point of time and should have a rational connection with the conclusion that the detention of the person is necessary.

The question about the validity of the satisfaction of the authority will have to be considered on the facts of each case. The detention of a person without a trial is a very serious encroachment on his personal freedom and so, at every stage, all questions in relation to the said detention must be carefully and solemnly considered.

Where a person is undergoing imprisonment for a very short time and it is known that he would soon be released from jail, it may be possible for the authority to consider the antecedent history of the said person and decide whether his detention would be necessary after he is released from jail and if the authority is bona fide satisfied that such detention is necessary he can make a valid order of detention a few days before the person is actually released. On the other hand, if a person is sentenced to a long term of imprisonment, the authority cannot pass an order soon after the sentence is pronounced, directing the detention of the person after he is released from jail at the end of the long period of sentence imposed on him. Therefore, the question as to whether an order of detention can be passed against a person who is in detention or in jail, will always have to be determined in the circumstances of each case.

If a person is already in jail custody as a result of a remand order passed by a competent authority, it cannot rationally be postulated that if he is not detained, he would act in a prejudicial manner. At the point of time when an order of detention is going to be served on a person, it must be patent that the said person would act prejudicially if he is not detained and that is a consideration which would be absent when the authority is dealing with a person already in detention. The satisfaction that it is necessary to detain a person for the purpose of preventing him from acting in a prejudicial manner is thus the basis of the order under S. 3 (1) (a), and this basis is clearly absent in the case of a person already in jail custody. Therefore, the detention of the person in the circumstances of this case, is not justified by S. 3 (1) (a) and is outside its purview. The District Magistrate who orders the detention of the detenue acts outside his powers conferred on him by S. 3 (a) when he holds that it was necessary to detain the person in order to prevent him from acting in a prejudicial manner. AIR 1951 Assam 43 and AIR 1952 Assam 175, Approved. Rameshwar Shaw v. District Magistrate, Burdwan, **(1964) 4 SCR 921: (1964) 2 SCA 724: 1964 (1) Cri LJ 257: 1964 BLJR 128: 1964 All LJ 211: 1964 SCD 368: AIR 1964 SC 334 (336 to 339) (Prs 5 to 10, 12, 13).**

——S. 3 — Detenu under detention under U. P. Maintenance of Public Order (Temporary) Act (4 of 1947) — Order under S. 3 served while under such detention — Period of detention enhanced —Validity of detention order and enhancement of period.

While the detenu was under detention under the U. P. Maintenance of Public Order (Temporary) Act, 1947, a detention order under S. 3 of the Preventive Detention Act, 1950, was served upon him converting his detention under the U P. Act into one under the Preventive Detention Act. The grounds of detention communicated to him under S. 7 of the Act were presumably the same as the grounds which had been communicated to him previously in connection with his detention under the U. P. Act. The matter went up in due course before the Advisory Board under S. 9 of the Act and on the report of the Advisory Board the Government confirmed his detention order and directed that he be detained for a period of eleven months more.

Held, that the order of detention was valid though it was not passed on fresh materials.

Held, further, that the order enhancing the period of detention being strictly in accordance with the provisions of the Act, it could not be said to be illegal or invalid. **52 Cri LJ 422: AIR 1951 All 18 (20, 21) (Pt C) (Prs 4 to 6) (DB).**

——S. 3 (2) — Applicability — Order of detention against detenu already in custody — "Validity".

When a person is in custody and is, therefore, already prevented from acting in a manner prejudicial to the security of the State, it cannot be said that the satisfaction of the State as required by S. 3 of the Preventive Detention Act is real. Thus where the petitioner was arrested on 17th March, 1951, in connection with an offence under the Official Secrets Act and was in custody from that date as under-trial prisoner till 18th April, 1952, the order of detention passed on 10th February, 1952, lacks the reality of satisfaction required by S. 3 of the Act and is not valid. **ILR (1953) 5 Assam 109: 55 Cri LJ 747: AIR 1954 Assam 93 (94) (Pr 3).**

——S. 3 — Applicability — Order of detention against person already in jail custody — Legality.

When a person is not free to act at all, as when he is in jail custody, the question of satisfaction in terms of S. 3 of the Preventive Detention Act does not arise by reason of his confinement as an under-trial prisoner in jail custody, as he is already prevented from acting in any manner prejudicial to the purposes mentioned in S. 3 of the Act. Where a person is already prevented from so acting by reason of his detention in jail custody, it is futile to say that the detaining authority is satisfied with respect to him that it is necessary to pass an order of detention against him. The element of satisfaction must necessarily relate to a point of time when a person has freedom of action. **1952 Cri LJ 1670: ILR (1952) 4 Assam 381: AIR 1952 Assam 175 (176) (Prs 2, 3).**

——S. 3 — Person already in detention — Subsequent order under S. 3 — Validity.

(Per Ram Labhaya J., and Thadani C. J.):— When a person is already in detention in pursuance of his being accused of a non-bailable offence another order of detention under S. 3 is not necessary. He is not in a position to act in a manner prejudicial to the maintenance of public order. The detaining authority, in these circum-

stances, cannot feel satisfied that an order of detention is necessary for any of the purposes mentioned in S. 3 for, by serving the order of detention on him, the situation does not improve at all, the person on whom the order is served being already in confinement. The satisfaction, therefore, of the detaining authority cannot be regarded as real.

(Per Ram Labhaya J.):— The order effectively prevents the detenu from asking for bail in order to defend himself and thus easily exposes itself to the attack that it is beyond the scope of S. 3. **('51) 55 CWN 13 (Assam): 52 Cri LJ 434: ILR (1950) 2 Assam 470: AIR 1951 Assam 43 (44) (Pt A) (Prs 7, 9, 12) (DB).**

——S. 3 — Scope — Person already arrested under S. 151, Criminal P. C. — Order of detention can be passed — (Criminal P. C. (1898), S. 151. AIR 1955 NUC (Madh Bha) 3864.

——S. 3 — Detention under of person undergoing trial for substantive offence — Legality — Order if mala fide.

Detention order under S. 3 is not mala fide merely because it is passed in respect of a person who is undergoing trial for substantive offence, or has been convicted for such offence. L. K. Burman v. State, **('50) 29 Pat 502 (544, 545) (FB).**

——S. 3 — Constitution of India, Art. 226 — Habeas Corpus — Provision of S. 491, Criminal P. C., has to be kept in view — Order of preventive detention against under-trial prisoner is not invalid — But matter depends on facts— Under-trial prisoner held "improperly detained" under S. 3 of Preventive Detention Act — (Criminal P. C. (1898), S. 491). See Constitution of India Art. 226. AIR 1955 NUC (Raj) 1480 (DB).

——S. 3 — Person already under detention under S. 4 of Rajasthan Public Security Ordinance (1949) — Fresh order under S. 3 — General Clauses Act (1897), S. 6— Constitution of India, Art. 22.

Section 4 of the Rajasthan Public Security Ordinance (1949) became void on 26-1-1950 and so detention under the Ordinance of a person for a period longer than three months after the Constitution of India came into operation also became illegal. In such a case fresh order of detention can be passed against the person under S. 3 of the Preventive Detention Act even if the acts were committed previous to the first order of detention. Section 6 of the General Clauses Act would not apply in such a case. **1950 Raj LW 204: 52 Cri LJ 425: AIR 1951 Raj 69 (72) (Pt F) (Pr 11) (DB).**

11. Contents of order.

——S. 3 (1) — Requisite satisfaction of detaining authority — Omission to mention details of Section 3 (1) in detention order — If indicates carelessness on part of detaining authority — Detention order by Chief Commissioner, Bhopal — Omission to state place of activity — Effect.

Where the preamble of the detention order clearly states the purpose with which the order is passed viz. to prevent the detenu from acting in a manner prejudicial to the maintenance of the public order and the security of the State, nothing more is required to be stated in the order. The mere fact that the order omitted to state that the order was passed under sub-cl. (ii) of Cl. (a) of sub-secion (1) of S. 3 of the Act does not indicate any carelessness on the part of the detaining authority. If at all it indicates anything it may be said to be a typing or clerical omission. AIR 1945 Bom 212, Disting.

Where the detention order is passed by the Chief Commissioner, Bhopal, the presumption that the authority acted within its jurisdiction and powers clearly arises and implies and indicates the place of the activities unless it is otherwise shown. AIR 1948 Bom 360, Disting.

It is the authority and not the person who has to be satisfied and who has to furnish the grounds on which the detention order was passed. **1952 Cri LJ 683: AIR 1952 Bhopal 6 (9, 10) (Pt C) (Prs 12, 13).**

——Ss. 3 and 4 (as amended by amending Act of 1951) — Detention order not mentioning place of detention — Failure to detain detenu in place determined in accordance with S. 4 — If renders detention order invalid or vague.

Section 4 whether of the original Act or the amending Act does not empower the detention of the petitioner as distinguished from his detention in a particular place. The order of detention actually is passed under the provisions of S. 3, and S. 12 of the amending Act makes it quite clear that what is continued after the coming into operation of the amending Act is the detention order. Consequently the failure to detain a detenu in a place determined in accordance with the provisions of S. 4 of the original Act or the Act as amended would not render the detention order, that is the order passed under S. 3, an invalid order.

Failure to mention in the detention order the place where he is going to be detained does not render the order vague or invalid.

Where there is a valid order for detaining the detenu, the absence of a valid order directing his detention in a particular place would not compel the Court to release the detenu if a valid order directing that he be detained in a particular place is passed by a proper authority before his release. 47 Bom LR 396 (FC), Rel. on. **53 Bom LR 717: 21 Bom Cr C 210: 1952 Cri LJ 81: ILR (1952) Bom 134: AIR 1952 Bom 1 (4, 5) (Pt B) (Prs 6, 7, 11) (DB).**

——S. 3 — Satisfaction of detaining authority — (Constitution of India, Art. 22).

Detention order by District Magistrate under S. 3 (2) — Grounds of detention described as grounds of detention under S. 3 (1) (a) (iii) — **Held,** that even if the District Magistrate made a mistake in this regard, this did not show that he did not apply his mind to the facts before passing the detention order. **58 Cal WN 659: 1954 Cri LJ 1722: AIR 1954 Cal 591 (600) (Pt L) (Pr 31) (DB).**

——S. 3 — Non-mention of period of detention.

The non-mention of the period of detention in the order of detention does not make the detention illegal or ultra vires. AIR 1951 All 18, Rel. on; AIR 1951 All 357, Dissent. **1953 Cri LJ 1875: ILR (1951) Hyd 821: AIR 1953 Hyd 288 (288) (Pr 2) (DB).**

——Ss. 3, 7 — Satisfaction of detaining authority —Discrepancy between detention order and grounds supplied.

Where it is mentioned in the order of detention, that the detaining authority was satisfied within the meaning of Section 3, that it was necessary to make the order with a view to prevent the detenu from acting in a manner prejudicial to the security of the State and maintenance of public order, the mere fact that the grounds supplied make no reference to the security of the State, does not justify the inference that the satisfaction of the detaining authority required under Section 3 was wanting. **3 Pepsu LR 288.**

——Ss. 3, 7, 11 — Contents of order — If should specify period of detention.

An order passed under Section 3 of the Preventive Detention Act should not specify the period for which the person is to be detained, as this period is to be determined by the appropriate Government under the provisions of Section 11 of the Act. **54 Punj LR 342: ILR (1952) Punj 481: 54 Cri LJ 26: AIR 1952 Punj 406 (407) (Pr 8) (DB).**

——Ss. 3, 12 — Period of detention how to be specified.

It is not necessary that the period of detention must be specified in the order of detention itself. It can be specified by a separate order passed subsequently. **1950 Raj LW 204: 1952 Cri LJ 425: AIR 1951 Raj 69 (72) (Pt D) (Pr 9) (DB).**

——S. 3 — Warrant of arrest — Mistake in father's name of person not material — Identity of person not doubtful.

Where the first name of the person, against whom a warrant was issued by the District Magistrate is substantially correct, a mere mistake in the name of his father is not material and does not indicate that a different person was intended to be proceeded against by the District Magistrate. AIR 1952 Sau 12; AIR 1948 All 440, Rel. on. **(1956) 9 Sau LR 246.**

——S. 3 (1) (a) — Mistake in describing detenu by name — Validity of order.

Where the mistake as to the surname and the slip in the spelling of the father's name of the detenu had been sufficiently accounted for and these mistakes did not affect his identity as the person meant to be detained was the detenu and none other:

Held, that the contention that the District Magistrate had not applied his mind with due diligence before issuing the order of detention was altogether unsustainable. AIR 1948 All 440, Rel. on; 2 Sau LR 113; AIR 1945 Bom 212 (FB); AIR 1949 Bom 75, Disting. **AIR 1952 Sau 12 (14, 15) (Pt D) (Prs 7, 10) (DB).**

12. Correctness of order.

——S. 3 — Correctness of order — Presumption as to.

In respect of detention orders under Preventive Detention Act there is always a presumption of the correctness of an order of a Court. The maxim 'omnia acta rite esse praesumuntur' would apply and unless it is proved that what purports to be the order was not actually passed by the authority the Court will presume the document to be a genuine one. **ILR (1952) Hyd 122: 1952 Cr LJ 1076: AIR 1952 Hyd 112 (119) (Pt J) (Pr 18) (DB).**

13. Mala fides — General.
(A) Mala fides — Proof of.
(B) Mala fides — Burden of Proof.
(C) Mala fides — Inference.

13. Mala fides — General.

●**——S. 3 — Mala fides — Relevant consideration.**

On the question of mala fides of an order of detention, it is not a relevant consideration whether the activities of the appellant were liked or disliked by the authorities concerned. The only relevant consideration is if the order of detention was made for ulterior purposes or purposes other than those mentioned in the detention order. Puranlal Lakhanpal v. Union of India, **1958 Cr LJ 283: 1958 SCA 355: 1958 SCJ 510: 1958 SCR 460: 1958 Mad LJ (Cr) 427: ILR (1958) Punj 46: AIR 1958 SC 163 (172) (Pt D) (Pr 17).**

●**——S. 3 — Mala fides — Test.**

Where the grounds of detention are not wholly the same as the facts in respect of which the prosecution was launched and the proceeding under Section 107 of the Criminal P. C., was initiated, the contention that the detention is in respect of the very same matter for which the prosecution was launched and that the detention order is in the nature of interference with the course of justice and therefore mala fide is not sustainable. Thakur Prasad Bania v. State of Bihar, **1955 All WR (Supp) 115: 1955 All LJ 802: (1955) 2 MLJ (SC) 165: 1955 SCJ 669: 1955 BLJR 659: 1955 Andhra WR (SC) 419: 1955 SCA 1079: 1955 Cr LJ 1408: AIR 1955 SC 631 (631) (Pt A) (Pr 2).**

●**——S. 3 — Question of mala fide — Question of fact (Obiter).**

Obiter — It may be that where the grounds on which a detention order is based are also the subject-matter of a criminal prosecution the order of detention may amount to abuse of the statutory powers. But this does not mean that such an order is necessarily mala fide. Such a circumstance calls for scrutiny as to bona fides of the detention order but the question of mala fides has got to be decided as one of fact with reference to all the circumstances of an individual case. Thakur Prasad Bania v. State of Bihar, **1955 All WR (Supp) 115: 1955 All LJ 802: (1955) 2 MLJ (SC) 165: 1955 SCJ 669: 1955 BLJR 659: 1955 Andhra WR (SC) 419: 1955 SCA 1079: 1955 Cr LJ 1408: AIR 1955 SC 631 (631) (Pt C) (Pr 2).**

●**——S. 3 — Mala fide order, instance of.**

There can be no better proof of 'mala fides' on the part of the executive authorities than a use of extraordinary provisions contained in the Act for purposes for which ordinary law is quite sufficient. **AIR 1953 SC 451 (453) (Pt C) (Pr 11).**

●**——S. 3 — 'Mala fides' — Subsequent order of detention mentioning same grounds as prior order — Detenu all the while in jail in intervening period — Subsequent order cannot be said to be mala fide.**

If while the detenu is in jail under a prior order of detention under a provincial Act, a subsequent order of detention under the Preventive Detention Act is passed against him after several months mentioning the same grounds as in the prior order it cannot be said that the subsequent order is mala fide or passed mechanically without proper satisfaction. The past conduct or antecedent history of a person can be taken into account when making a detention order, and, as a matter of fact, it is largerly from prior events showing the tendencies or inclinations of the man that an inference could be drawn whether he is likely even in the future to act in a manner prejudicial to the maintenance of public order. If the authority satisfied himself that the original ground was still available and that there was need for detention on its basis, no mala fides can be attributed to the authority from this fact alone. Ujagar Singh v. State of Punjab, **(1952) SCA 648: 1952 SCJ 521: (1952) 2 MLJ 641: 1952 SCR 756: 1953 Cr LJ 146: AIR 1952 SC 350 (352) (Pt C) (Pr 8).**

●**——S. 3 — Satisfaction — Large number of detention orders passed overnight.**

(Per Das J.) — Where the authorities had already applied their minds to the suspected activities of each of the several detenus and

were satisfied as to the necessity of detaining them but there being doubts as to the validity of the local Acts and the Preventive Detention Act having been passed in the meantime the question was to make fresh orders under the new Act.

Held, that under the circumstances it could not be said that the fact that a large number of fresh orders of detention were made "overnight" indicated bad faith on the part of authorities. Tarapada De v. State of W. B., **52 Cri LJ 400: 1951 SCJ 233: (1951) 1 Mad LJ 431: 1951 SCR 212: 1951 Mad WN 549: 1951 Mad WN (Cri) 165: AIR 1951 SC 174 (177) (Pt D) (Pr 11).**

——S. 3 (1) — Bona fides of order — Order passed during detention for trial under ordinary criminal law.

The order is, to say the least 'undesirable' even though it may not be wanting in good faith on the part of the detaining authorities. **1957 Cri LJ 1361: AIR 1957 All 782 (796) (Pt G) (Pr 30) (DB).**

——Ss. 3 (1) and 7 — Order of detention — Mala fides — Test of.

An order of detention passed against a person by the authority exercising powers under Section 3 (1) of the Preventive Detention Act can be said to be lacking in bona fides when it is found that the basic facts on which the order of detention is founded were not before the detaining authority on the date the order has been made or if the grounds are not such as a rational human being would consider connected in some manner with the objects which were to be prevented from being attained or where the authority has not applied its mind in the manner the Act required it. A detenu against whom an order of detention has been passed can challenge the order on mala fides and if so challenged, it is open to the High Court to examine the question. **1961 Nag LJ (Notes) 34.**

——S. 3 — Mala fide — Failure of prosecution under ordinary criminal law — Detention order thereafter if mala fide.

Failure of prosecution under the ordinary criminal law cannot by itself be said to make the subsequent application of the Preventive Detention Act mala fide. Where the Government chose to bring the offender to book under the ordinary criminal laws of the country and the Government was told by the courts that he was outside the reach of such laws, then, it is not mala fides but bona fides of the Government when it applies the Preventive Detention Act only as a means of last resort where the ordinary laws of the land had failed. It only shows that the Government acted with good faith and was reluctant to apply its summary powers of preventive detention in the first instance.

A prior unsuccessful application of the ordinary criminal laws of the country to a citizen does not make a subsequent application of the Preventive Detention Act to that citizen ipso facto mala fide. **56 Cal WN 42: 1952 Cri LJ 204: AIR 1952 Cal 26 (30, 31) (Pt C) (Prs 19, 21) (DB).**

——S. 3 — Mala fides — Test.

Although the matter as to whether the Government would have recourse to preventive detention or a criminal prosecution is a matter left to the discretion of the Government, the law enjoins that the Government should elect to take one step or the other. If there is a pending prosecution then the question might arise as to whether the order of detention is bona fide or not. The test would be whether the order of detention is for an ulterior purpose. This would have to be decided on the particular facts and circumstances of the case. No hard and fast rule can be laid as to when and in what cases a criminal case ought to be continued and the detention proceedings not resorted to. (1943) 2 All ER 546, Rel. on. **ILR (1953) Hyd 459: 1953 Cr LJ 1845: AIR 1953 Hyd 277 (279) (Pt B) (Pr 5) (DB).**

——Ss. 3, 7, 11 — Bona fides of detention — Relevant factors — Petition held not mala fide — (Constitution of India, Arts. 226 and 22). **AIR 1958 Mad 425 (427, 428) (Pt B) (Prs 8, 9, 10) (DB).**

——Ss. 3, 7, 11 — Detenu charge-sheeted in criminal prosecution against him — Ground of detention not same as offence set out in charge — No question of mala fide arises — (Constitution of India, Arts. 226 and 22). **AIR 1958 Mad 425 (429) (Pt C) (Pr 12) (DB).**

——Ss. 3 and 12 — Right of detenu to challenge order on ground of mala fide —Burden of proof — Duty of Government — Malice and 'mala fide' explained — Validity of prior order in question — Fresh order for detention passed before pronouncement of judgment — Omission by Government to inform court of order reflects on their bona fide — (Criminal P. C. (1898), S. 491) — (Constitution of India (1950), Article 226).

Satyanarayana J. — An order of detention passed under the law of preventive detention can be challenged on the ground that there is lack of bona fide on the part of the authority exercising the power. ILR (1949) Mad 377, Rel. on.

A statutory authority must always be exercised honestly and without malice. There should be no fraudulent exercise of the power conferred or colourable exercise of it to gain an ulterior object. The question when that power has been exercised mala fide will depend upon the circumstances of the case. 1942 AC 206; 1917 AC 260; 1942 AC 284; 1945-2 MLJ 325 (PC) and 1949-2 MLJ 310, Ref. to.

When the question of the validity of an order of detention is being decided by the Court in an application for a writ of Habeas Corpus, the Government passes a fresh order to arrest the detenu if he is set at liberty, and alleges as its reason for passing the order the difficulty of arresting the detenu, a dangerous communist whose subversive activities would be a threat to the security of the State, as he would go underground immediately, the reason is unconvincing. Further the Government which apprehending an adverse judgment acts with alacrity and passes the fresh order after full consultations with all its legal advisers and even communicates it, before Judgment is delivered to the police officer present in court for execution if the detenu is set at liberty but fails to inform the court of the fresh order and the reasons for passing it, the omission to do so is a serious circumstance reflecting upon the bona fide of the Government in passing the order.

Raghava Rao J. — It is open to a detenu to show that the order of detention was a fraudulent exercise of the power vested in the Government. The burden of showing that is on him and he can sustain the burden only if he successfully rebuts the presumption of bona fide on the part of Government. AIR 1945 FC 18, Rel. on.

'Malice' and 'mala fide' in connection with an order of detention are cognate terms expressive of the same legal idea. 'Malice' in law can mean nothing more than intention to injure another by doing an act in disregard of the latter's

right, wifully and wrongfully, without reasonable and probable cause. It does not mean personal ill feeling or spite. These terms in relation to an order of detention express the legal idea of an intention on the part of the Government to misuse or abuse the power vested in it and not necessarily connotative of moral turpitude on the part of the Government or anybody connected with it.

A detention order issued for the purpose of flouting the decision of Court, holding the previous order of detention invalid on merits, would be a mala fide order. But if the decision had proceeded on the ground that the law under which the prior order was made was invalid or that the order itself was in an irregular form a fresh order passed under a fresh legislation or in a valid form would not be necessarily mala fide. Where, however, the Government, passes an order even before the judgment is delivered and allege that they passed the order because they anticipated the judgment to declare the prior order invalid on the technical ground that it did not mention the period of detention, when they had no justification for such belief, and even the fresh order omits to rectify the defect the circumstances leave no doubt that the intention of the Government was to flout the decision of the court. ILR (1949) Mad 377, Ref. to.

Further when having passed such an order they refrain from mentioning it to the court, so as to enable the court to take the reasons therefor into consideration before it pronounces judgment against it is a circumstance which goes to show the indirect motive and improper conduct of the Government. **65 Mad LW 876: (1952) 2 Mad LJ 690: 1953 Cri LJ 224: AIR 1953 Mad 41 (45, 49, 50, 51) (Pt A) (Prs 7, 9, 14, 17, 18) (DB).**

● **——S. 3 (1) — Mala fides — Test — Preventive detention and punitive action — Distinction.**

There is no rule of law that unless a choice of one of two alternatives, prosecution or detention, is made at the earliest moment, the Order of detention must be held to be invalid as mala fide. The proper approach to the matter is to consider the facts of each particular case and then consider whether the order of detention was mala fide or not. Where on the basis of the grounds of detention stated against a detenu, the Court is unable to hold that the order of detention was for an ulterior purpose or collateral purpose and not for the purpose of preventing him from acting in a manner prejudicial to the maintenance of supplies and services essential to the community, the order of detention cannot be held to be mala fide. The distinction between "preventive detention" and "punitive action" must always be kept in mind; the first has reference to a likelihood of some prejudicial activity in future, while the second has reference to some past action for which punishment is needed. Where the State Government has unequivocally stated that it is satisfied that it is necessary to pass on order of detention to prevent him from acting in a manner prejudicial to the maintenance of supplies and services essential to the community and has also withdrawn the prosecution against him, it cannot be held that it was for any purpose other than that stated by the Government. 23 Pat 352; 6 DLR (Pat) 69, Ref. **ILR 31 Pat 97: 1952 Cr LJ 493: AIR 1952 Pat 185 (FB).**

——S. 3 (1) — Bona fide order — Court's power to test — Mala fide order, meaning of — Constitution of India, Art. 22 (5).

The Court can examine the grounds in order to see if the order of detention is bona fide or whether the grounds on which the order of detention is founded are based on materials of rationally probative value. If the alleged grounds or the facts on which they are stated to be based, do not exist at all, then the order of detention cannot be said to be bona fide order. When it is stated that the order is mala fide, no dishonest motive is necessarily imputed. It merely means that the order is bad for want of necessary care and caution, or is for some purpose other than what is stated in the order of detention. If an order of detention is stated to be based on certain grounds but on uncontroverted facts it appears that those grounds do not really exist, then it follows that the order of detention is made for reasons other than those disclosed in the grounds; in that sense the order will be a mala fide order and will also contravene Art. 22 (5) of the Constitution. **52 Cri LJ 406: ILR 30 Pat 630: AIR 1951 Pat 47 (54) (Pt G) (Pr 20) (DB).**

13 (A). Mala fides — Proof of.

● **——S. 3 — Mala fides of detaining authority — (Constitution of India, Arts. 22, 226).**

Where an order of detention is challenged on the ground of mala fides, what has got to be made out is not the want of bona fides on the part of the police but want of bona fides, as well as the non-application of mind, on the part of the detaining authority, viz., the Government, which for this purpose must be taken to be different from the police. Lawrence Joachin Joseph D'Souza v. State of Bombay, **1956 SCA 766: 1956 Cr LJ 935 :1956 SCJ 559: 1956 All WR (Sup) 121: 58 Bom LR 989: 1956 SCR 382: AIR 1956 SC 531 (533) (Pt A) (Pr 3).**

● **——S. 3 — Mala fide order.**

There can be no better proof of mala fides on the part of the executive authorities than a use of the extraordinary provisions contained in the Act for purposes for which ordinary law is quite sufficient. **('50) 1950-2 MLJ 555: 63 MLW 1142: 53 PLR 33: 1950 SCJ 433 (SC).**

——S. 3 — Bad faith on part of detaining authority — Proof — Prior unsuccessful criminal cases instituted against detenue — Effect.

A mere averment of bad faith on the part of the detaining authority is not enough to prove and it cannot be inferred from the only circumstances that some of the grounds of detention related to facts of cases against the detenue before the Court which had failed. Even assuming that all the cases against the detenue had ended favourably to the detenue, that would merely mean that the allegations against him were not proved. But prior unsuccessful applications of the ordinary law would not make a subsequent application of Preventive Detention Act ipso facto mala fide. **1962 (1) Cr LJ 311: ILR (1961) 1 Cal 276: AIR 1962 Cal 162 (164) (Pt C) (Pr 7) (DB).**

——S. 3 — Judgment declaring detention order invalid — Government's failure to appeal — Bona fide of fresh order of detention.

Raghava Rao J. — The failure of the Government to take steps to appeal against the order of the High Court declaring the detention order under which the detenu is detained invalid is not proof of the mala fide of the fresh order passed by it. If the Government felt satisfied about the emergency of the situation so far as to resort to the speedier course of a fresh order instead of the normal remedy of an appeal which might involve delay in making sure of the detenu if he once gets off, they may do so

provided their action is well founded otherwise their failure to appeal cannot render the order invalid or illegal. **65 Mad LW 876: (1952) 2 Mad LJ 690: 1953 Cri LJ 224: AIR 1953 Mad 41 (51) (Pt G) (Pr 20) (DB).**

13 (B). Mala fides — Burden of proof.

●—**S. 3 — Satisfaction of detaining authority — Mala fides — Evidence Act (1872), Sections 101 and 103.**

The satisfaction of the authority making the order as to the matters specified in the Act is the only condition for the exercise of his powers and the Court cannot substitute its own satisfaction for that of the authority. It is, however, open to the detenu to establish, if he can, that the order was made mala fide and in abuse of powers and the order of detention may be declared invalid if it could be proved to have been made by the authorities concerned in mala fide exercise of their power. The burden of proving the absence of good faith is upon the detenu and it is certainly a heavy burden to discharge. Mere suspicion is, however, not proof. Ashutosh Lahiri v. State of Delhi, **('50) 1950-2 MLJ 555: 63 MLW 1142: 53 PLR 33: 1950 SCJ 433: AIR 1953 SC 451 (452, 453) (Pt B) (Prs 4, 8).**

●—**S. 3** — Order of detention — Mala fides of detaining authority — Onus of proof — Burden is on detenu. Ram Singh v. State, **1951 SCJ 374: 52 Cri LJ 904: 1951 Mad WN 765: 1951 Mad WN (Cri) 233: 1951 SCR 451: AIR 1951 SC 270 (274) (Pt D) (Pr 12).**

—**Ss. 3 (1) (a) (ii) and 4 — Mala fides — Proof — Onus — Detention — (Constitution of India, Art. 226).**

It cannot be laid down as a matter of law that an order of detention under the Preventive Detention Act can, in no circumstances, be passed when a person is already in custody. Whenever a detention order is passed for the detention of a person who is already in detention, the question that would arise would be whether the detaining authority could feel satisfied that the order was necessary for the purposes of the Act. This essentially is a question the determination of which must depend on the circumstances of each case.

The necessity of the order may be questioned and it may be argued in a given case that the order is not made bona fide. An order may be challenged as having been made mala fide without imputing any improper motive to the detaining authority. An order can be said to have been made mala fide when there is malice in law though there may be no malice in fact and the malice in law may be deemed to exist when an order is made contrary to the objects and purposes of the Preventive Detention Act or when the detaining authority permits itself to be influenced by consideration which are outside the scope of the Act. In all cases where this question arises, it will have to be decided with reference to the circumstances of each case.

Petitioner was arrested and detained and a case under Section 8-B, Assam Maintenance of Public Order (Amendment) Act, 1951, was registered against him. He was, however, released on basis of a final report by police under S. 173, Cr. P. Code, which stated that though investigation had not been completed, Government had decided to drop the case as the available evidence was of such a nature that its disclosure in Court was not in the interest of State. On his release he was again arrested under an order of detention under Sections 3 (1) (a) (ii) and 4, Preventive Detention Act, which had already been passed in anticipation of his release.

Held, that in the circumstances the subsequent order of detention could not be regarded as having been made mala fide or wrong in law merely because he was not prosecuted for the specific offence for which he was arrested and the order of detention was passed while he was already in detention. The burden of proving mala fides on part of Government lay on detenu and having failed to discharge it the order could not be declared invalid. AIR 1951 All 838, Foll.; AIR 1949 Mad 712; AIR 1952 Cal 26 and AIR 1951 SC 270, Rel. on. **1953 Cr LJ 770: ILR (1953) 5 Assam 66: AIR 1953 Assam 97 (99, 100) (Pt A) (Prs 13, 14, 16, 17, 19).**

—**S. 3 — Mala fides — Test — (Constitution of India, Art. 22).**

The detention orders are not mala fide simply because the District Magistrate passed them shortly after the previous detention orders were set aside by the High Court; nor can they be held to be mala fide or bad on the ground that only the past activities of the detenus were relied upon. AIR 1952 SC 106; 1952 SCJ 111; (1952) 1 MLJ 733; AIR 1951 SC 481; (1951) 2 MLJ 641; 1951 SCJ 747 and AIR 1951 SC 174; 1951 SCJ 233; (1951) 1 MLJ 431, Foll. **58 Cal WN 659: 1954 Cr LJ 1722: AIR 1954 Cal 591 (600) (Pt K) (Pr 31) (DB).**

—**S. 3 — Mala fides of detaining authority.**

The onus of proving mala fides of detaining authority rests on the petitioner. The facts proved by the petitioner must be such as to amount to proof of mala fides. The Court cannot base its decision on suspicion. **('52) 56 Cal WN 427: 1953 Cri LJ 310: AIR 1953 Cal 81 (83) (Pt E) (Pr 15) (DB).**

—**S. 3 — Mala fides — Burden of proof.**

The burden of substantiating the plea that the order is mala fide is primarily upon the detenu.

The mere fact that the detenu challenges the factum or bona fides of the order or the fact that in such cases the Government is in possession of information on the subject does not shift the onus on the Government. (1942) AC 284 and AIR 1945 FC 18, Rel. on.

The sole fact that the petitioner was arrested under some provision of the ordinary law and subsequently detained under the Preventive Detention Act would not by itself make the act of the Government 'mala fide' AIR 1948 All 281 and AIR 1949 Mad 712, Rel. on. **ILR (1953) Hyd 459: 1953 Cr LJ 1845: AIR 1953 Hyd 277 (279) (Pt C) (Prs 6, 6a) (DB).**

—**S. 3 (1) (a) (ii) — Order of detention under — Mala fide nature — Proof of — Onus — Prior detention under ordinary law.**

The arrest of a person under Section 151, Criminal P. C., or under some other provisions of ordinary law does not preclude the exercise of the powers under the Preventive Detention Act, 1950. Nor is the mere fact that the person was first arrested under the ordinary law and later ordered to be detained in itself, sufficient to prove that the order of detention was mala fide. There must be other circumstances or evidence to show that the detaining authority acted mala fide. AIR 1948 All 281; AIR 1949 Mad 712 and AIR 1950 Mad 162, Ref.

Mere suspicion is not enough to discharge the heavy burden which lies on the detenu to show that the order of detention was passed mala fide. **AIR 1951 Madh Bha 56 (57) (Pt A) (Pr 4) (DB).**

——S. 3 (2) — Mala fides of District Magistrate — Burden of proof.

The burden is on the petitioner to prove that the District Magistrate acted mala fide in issuing the order of detention. AIR 1950 SC 270, Foll. **1952 Cri LJ 1526: ILR (1951) Mys 455: AIR 1952 Mys 85 (88) (Pt G) (Pr 11) (DB).**

——S. 3 — Detention under — Validity — Mala fides — Detention order pending prosecution — Burden of proof.

The detention order under Section 3 in cases where the prosecution is pending or imminent, is a serious step for the executive authorities to take. It must be made with full appreciation of the fact that the order in such cases has grave consequences on the judicial trial and must bear scrutiny of the Courts on the footing that such an order was called for notwithstanding such appreciation. A detention order passed without such appreciation may well be held to be lacking in bona fides on the facts of an individual case.

It is true that the satisfaction of the detaining authority under Section 3 of the Preventive Detention Act which has been held to be "reasonable satisfaction" is not liable to be controlled by the Courts. The issue of reasonable satisfaction is not justiciable, but the case of bona fides of the exercise of the power or the abuse of the power when raised on proper material is justiciable. A case of want of bona fides may be made out, not merely by proof that the order of detention was in fact made for ulterior purposes, that is, for purposes outside the needs of prevention, but also when the order is made without taking into consideration any important circumstances which notionally and legitimately arise for consideration, when making an order of detention in a particular case. The standing of bona fides under the penal law is defined in Section 22 of the I. P. C. as being "due care and attention". It cannot be anything less where the exercise of drastic statutory power interfering with the liberty of the citizen is concerned.

The burden of making out want of bona fides of the detention order is on the detenu though such burden of proof is not so onerous as that on the prosecution in a criminal case.

Per Das J. — I would hesitate to accept as correct the broad proposition that the power of detention cannot be exercised as against a person who is being prosecuted on the same facts which constitute the grounds of the detention and that an order of detention in such cases without making a choice between the two courses is ipso facto and without more abuse of the power of detention". Case law ref. **1952 Cri LJ 1039: ILR (1951) Cut 441: AIR 1952 Orissa 52 (56, 57, 58) (Pt A) (Prs 10, 12, 13) (DB).**

——Ss. 3, 13 — Detention order — Validity — Mala fides — Burden of proof.

The burden of proving bad faith is on the detenus, and the burden is a fairly heavy burden.

When the law gives the State Government the power to issue a fresh order of detention after the revocation of the Order of the District Magistrate, the exercise of that power cannot be held to be mala fide merely because the State Government passed the orders of detention at a time when a habeas corpus application was pending in the High Court. **52 Cri LJ 603: AIR AIR 1951 Pat 68 (71) (Pt B) (Pr 5) (DB).**

——S. 3 (1) — Mala fide order — Onus.

The onus of showing that the order is mala fide rests on the detenu; and the onus is a heavy onus which may be very difficult to discharge. One of the ways by which a detenu can show that the order is not bona fide is by stating facts by means of an affidavit, and if those facts are uncontroverted they may be taken into consideration by the Court for the purpose of seeing if the order is bona fide or if the order is based on materials of a rationally probative value, or if the order contravenes the fundamental right guaranteed by Article 22 (5) of the Constitution. A mere denial by the detenu would not be enough to discharge the onus which rests on him; but the detenu may be in a position to state definite facts which would show that the order of detention was bad either for want of good faith, or on the ground that it was based on materials which did not at all exist in fact. **52 Cri LJ 406: ILR 30 Pat 630: AIR 1951 Pat 47 (54) (Pt H) (Pr 20) (DB).**

——S. 3 — Mala fides — Onus.

The detenu can always establish that the order was made in abuse of the powers and thus mala fide, and that he was entited to his liberty and release. The onus of proof in this respect, however, is on the detenu. Mere allegations, even suspicion that the grounds are mala fide is not enough to impair the order of detention. **1961 (2) Cr LJ 547: 63 Punj LR 242.**

——S. 3 (2) — Bona fides — Burden of proof.

The burden of proof is on the detenu to challenge the bona fides of the order of detention. **('51) 4 Sau LR 45 (DB).**

13 (C). Mala fides — Inference.

——Ss. 3 and 9 — Mala fides — Inference of.

Where the grounds of detention are supplied to the detenu along with the order of detention in order to enable the detenu to make a representation without delay, the Government can place the case before the Advisory Board at any time within the period allowed under Section 9. The mere fact that the Government had made an undue haste in obtaining the decision of the Advisory Board for purposes of confirming the order of detention cannot lead to inference of mala fide on part of Government especially when there is no allegation of any violation of any provision of the Act. **1953 Cr LJ 770: ILR (1953) 5 Assam 66: AIR 1953 Assam 97 (100) (Pt C) (Pr 22).**

——S. 3 — Detention order — Allegation of bad faith of authority — Prior unsuccessful criminal proceeding not sufficient basis.

Allegation of bad faith is quite easy to make but very difficult to substantiate. The mere circumstance that some of the particulars in this case related to facts which formed the basis of prior unsuccessful criminal proceedings will not necessarily lead to the inference that there was bad faith on the part of the detaining authority. To hold that bad faith was established the Court would require very much more than that. AIR 1952 Cal 26, Rel. on. **1963 (2) Cri LJ 499: AIR 1963 Cal 589 (591) (Pt D) (Pr 12) (DB).**

——S. 3 (2) — Mala fide orders — Order of detention after release in Criminal case.

Where persons are detained in prison upon criminal charges it would be unnecessary to make any orders of detention, because whilst they were in prison they would be safe and would be unable to commit any acts of a subversive nature. Once an order for their release was passed whether by way of a discharge or by granting bail, different considerations would arise. Such person would be at large, and if they were dangerous, the fact that they were

discharged in some criminal case or the fact that they had been granted bail would in no way prevent them from carrying dangerous activities. The very circumstances would by themselves justify the making of the order for detention which up to then would have been unnecessary if it was honestly believed that the person detained under the order was dangerous. It cannot be inferred that the orders were mala fide merely because they were made when it became clear that the detained person would be released from custody. To hold that the orders were mala fide, something more than these mere circumstances would have to be established. **1953 Cri LJ 361: AIR 1953 Cal 129 (134) (Pt D) (Prs 34, 35) (DB).**

——S. 3 — Person arrested and detained in police custody with intention of being prosecuted for certain crime — Government changing its mind and preventively detaining him — Detention is not mala fide.

The Government have the choice either to prosecute the person arrested or to preventively detain him. Where a person is arrested and kept in police custody under lawful orders of remand in connection with a certain incident, for the purposes of investigation and ultimately prosecuting him, but subsequently the Government decides to preventively detain him and drop further criminal proceeding against him, the fact that he was interrogated while in police custody prior to the serving of the detention order on him does not show that the detention was for some collateral purpose and mala fide. AIR 1940 Lah 49; AIR 1946 Lah 36; AIR 1945 Nag 8, Distinguished. **ILR (1952) Hyd 122: 1952 Cri LJ 1076: AIR 1952 Hyd 112 (117) (Pt F) (Pr 7) (DB).**

——S. 3 — Mala fides — Inference of — Acquittal of detenu in criminal trial—Action under Act — If mala fide.

Even after the acquittal of the detenu in a regular criminal trial Government can proceed to take action under the Preventive Detention Act. The action under the Act after the acquittal does not necessarily lead to the conclusion that the action of the Government is mala fide. **MBLR 1955 Cr 265: Madh BLJ 1955 HCR 30: AIR 1955 MB 65 (66) (Pt B) (Pr 4) (DB).**

——S. 3 — Mala fides — Inference — Detention order against candidate for election passed by Home Secretary without approval of Minister-in-charge due to urgency, minister-in-charge being outside station — Subsequent approval by minister — Procedure in accordance with pre-existing practice — Order though illegal having been passed without legal authority, could not be challenged on grounds of mala fides. **1953 Cr LJ 349: 19 Cut LT 58: AIR 1953 Orissa 33 (36) (Pt B) (Pr 8) (DB).**

——S. 3 — Mala fides.

Preventive justice in all cases must proceed to a ceratin extent upon suspicion or anticipation as distinct from proof. For passing an order for detention it is really the satisfaction of the Magistrate which is necessary. If the police have sufficient material to satisfy him he can act under the Act, even though there is no detailed evidence of the type on which a Court of law can convict an accused. Hence the fact that the police were unable to furnish a detailed report till a date very near the one on which the order was passed cannot lead to the inference that the order was passed mala fides in the absence of materials. **1952 Cri LJ 543: AIR 1951 Pat 439 (2) (442) (Pt D) (Pr 6) (DB).**

14. Defence of India — Relations with foreign powers.

——S. 3 — 'Foreign power' — Meaning of — Pakistan — Effect of order passed by Governor-General under Art. 392 (3) of the Constitution.

On a correct interpretation of the meaning of the words 'the relations of India with foreign powers' in Section 3, Pakistan must be regarded as a foreign power, although that country may be a part of the Commonwealth as India is. Apart from its membership of the Commonwealth, the independent sovereign status of Pakistan is the same as the sovereign status of any country outside the Commonwealth. The Constitution (Declaration as to Foreign States) Order, 1950, made under Article 392 (3) read with Article 367 (3) does not take Pakistan outside the category of a foreign power. The Order only declared that a country within the Commonwealth would not be a Foreign State for the purposes of the Constitution. It cannot be brought into aid for the purposes of construing the expression 'foreign affairs' appearing in Item 9 of List I of the Seventh Schedule and the expression 'foreign powers' in Section 3 of the Act. These expressions must be construed in the ordinary way giving the words their ordinary meaning. There is, therefore, no doubt that Pakistan is a foreign power. Jagan Nath Sathu v. Union of India, **1960 Cr LJ 764: 1960 SCJ 975: 1960 Mad LJ (Cr) 671: (1960) 2 SCR 784: AIR 1960 SC 625 (627) (Pt A) (Pr 11).**

——S. 3 (1) (a) — Ground in case held to be covered by section.

Where the gravamen of the charge against the petitioner was that he aimed at setting up a parallel Government in the Uran Peta area and that in order to achieve that end he did various acts such as intimidating the workers in the salt pans with threats of murder and his own workers with threats of death, unless they carried out his orders; and among the lesser instances given to illustrate the exercise of parallel governmental authority were the ones set out in the first ground, namely the infliction of fines with the sanction of ex-communication and boycott to ensure their payment and due obedience to his orders:

Held, that the ground was covered by S. 3 (1) (a). Shamrao v. Dist. Magistrate, Thana, **1952 SCJ 476: 1952 SCR 683: 54 Bom LR 877: (1952) SCA 635: 1952 Cri LJ 1503: AIR 1952 SC 324 (328) (Pt H) (Pr 27).**

15. Security of State.

——S. 3 — Security of India — Bringing of the Government of India and the Government of the State of Jammu and Kashmir into hatred and contempt does involve the security of India. Jagan Nath Sathu v. Union of India, **1960 Cr LJ 764: 1960 SCJ 975: 1960 Mad LJ (Cr) 671: (1960) 2 SCR 784: AIR 1960 SC 625 (628) (Pt B) (Pr 12).**

——S. 3 — Constitution of India, Art. 22 (5) — Ground of detention — Whether punitive — Rational connection with objects of detention.

The objects of the appellant's detention were to prevent him from acting in a manner prejudicial to (1) the security of India and (2) her relations with foreign powers. One of the grounds communicated to the appellant was in these terms.

"That you addressed a Press Conference at New Delhi on 18th day of February, 1956, which

was attended by a large body of Press Correspondents of foreign countries and that you made a speech (copy of contents of which is hereto annexed) containing various false statements about the conditions of the people of Kashmir. The combined effect of these statements is prejudicial to the security of India and to the relations of India with foreign powers."

Held, that though ground related to what happend on 18th February, 1956, that did not mean that the detention of the appellant was punitive in character. **Held,** further that the ground had a rational connection with the object which the appellant had to be prevented from attaining. Puranlal Lakhanpal v. Union of India, **1958 SCJ 510: 1958 Cri LJ 283: 1958 SCA 355: 1958 SCR 460: (1958) Mad LJ (Cri) 427: ILR (1958) Punj 46: AIR 1958 SC 163 (171, 172) (Pt C) (Pr 16).**

● **——S. 3 (1) (a) (ii) and (2) — Scope — Detention on ground of speeches prejudicial to the security of the State or the maintenance of public order — Failure to indicate passages in speeches considered objectionable — If renders detention illegal — Constitution of India (1950), Articles 19 and 22 (5).**

An order of detention made under sub-s. (2) read with Cl. (a), sub-clause (ii) of sub-s. (1) of S. 3 of the Preventive Detention Act was attacked on the ground that it was illegal as it was based on the ground of making speeches prejudicial to the security of the State or the maintenance of public order and that the grounds of detention failed to indicate the objectionable passages and thereby failed to comply with the requirements of Cl. (5) of Art. 22 of the Constitution.

Held: (By the Full Court) It cannot be said that the detention would be illegal and ultra vires because it was based on the ground of making speeches prejudicial to the security of the State or the maintenance of public order. The validity of the detention is governed by the decision in A. K. Gopalan's Case, AIR 1950 SC 27 notwithstanding that the detenus' right under Art. 19 (1) (e) of the Constitution is abridged as a result of their detention under the Act.

(2) Per Kania, C. J., Patanjali Sastri and Das, JJ. (Mehrchand and Vivian Bose, JJ., contra):— To hold that Art. 22 (5) requires that, wherever detention is grounded on alleged prejudicial speeches the detaining authority should indicate to the person detained the passages which it regards as objectionable, would rob the provisions of the Act of much of their usefulness in the very class of cases where those provisions were primarily intended to be used and where their use would be most legitimate. It is difficult to see how the communication of particular passages or their substance is necessary in addition to the particulars already given to enable the detenus to make their representations. The requirements of Art. 22 (5) must be held to be sufficiently complied with where the time and place at which the speeches were alleged to have been made were specified and their general nature and effect was also stated even though the objectionable passages had not been indicated in the grounds of detention.

Mehrchand Mahajan, J.:— In the absence of any indication in the grounds as to the nature of the words used by the detenus in their speeches from which an inference has been drawn against them they would not be able to furnish a proper defence to the charge made against them. The detention order is therefore, illegal. Ram Singh v. The State of Delhi, **1951 Mad WN 765: 1951 Mad WN (Cri) 233: (1951) SCJ 374: 52 Cri LJ 904: 1951 ALJ (SC) 111: 1951 SCR 451: AIR 1951 SC 270 (272) (Pt A) (Prs 5, 6).**

——S. 3 — Grounds for detention — Criticism of Government — (Constitution of India, Art. 19).

Criticism of the Government however, strong it may be or deprecating the action of the Government is not to be regarded as a justifying ground of taking action under the Preventive Detention Act, unless it is such as to undermine security or would tend to overthrow the Government. Freedom of speech and of the press lies at the foundation of all democracy. Disapprobation and criticism of any policy or administrative action of the Government with a view to obtaining redress by lawful means cannot be regarded as an act which is likely to create disaffection in the minds of the people so as to result in disturbance of public safety and the maintenance of public order. **ILR (1953) Hyd 568: 1954 Cri LJ 52: AIR 1953 Hyd 295 (296) (Pr 7) (DB).**

——S. 3 — Affiliation to Communist party.

Affiliation to the Communist party which is not banned but whose avowed objects are said to be the overthrowing of Government by subversive and terroristic activities would have a relation to the security of the State and the maintenance of public order and would afford ground for detention of the person. **64 Mad LW 311: 1951 Mad WN 248: 1951 Mad WN (Cri) 76: 52 Cri LJ 688: AIR 1951 Mad 182 (187) (Pt C) (Pr 23) (DB).**

● **——S. 3 (1) (a) (ii) — Political party attempting to raise army — Matter affects security of State.**

Per Mudholkar J.:— An attempt by a political party to raise a people's army is nothing short of setting the stage for a Civil War. It is one thing for the Government established by law to raise any force, be it the regular army or the territorial army or the Home Guards, but it is indubitably a different matter if the various political parties started having armies of their own and it is the primary duty of every Government to prevent it. Moreover, such an activity on the part of a member of the party contravenes the Arms Act. There can, therefore, be no question of the matter falling under S. 3 (1) (a) (ii) of the Preventive Detention Act. B. N. Mukerjee v. State Government M. P., **1951 All WR (Supp) 21: 1951 Nag LJ 71: ILR (1951) Nag 1: AIR 1951 Nag 1 (2) (Pt C) (Pr 9) (FB).**

——S. 3 (1) (a) (ii) — 'Security of State — Meaning of.

Where the detenu is detained as his remaining at large constituted a great danger to the security of the State the further fact mentioned in ground of detention that he was also a danger to the maintenance of communal harmony serves only to show how he was a danger to the security of the State. **1950 Raj LW 204: 52 Cri LJ 425: AIR 1951 Raj 69 (72) (Pt E) (Pr 10) (DB).**

16. Public Order.

(A) Public order — Illustrations.

16. Public order.

● **——S. 3 (1)** — Detention under — Validity — **Held** on facts that the order is illegal as the publication or distribution of the pamphlets, attacking the character of the Chief Minister, could not have any rational connection with the maintenance of law and order of prevention of acts leading to disorder or disturbance of public tranquillity. See Constitution of India, Art. 32. **1954 Cri LJ 735: AIR 1954 SC 276.**

——Ss. 3 and 7 — Detenu detained for maintenance of public order — Grounds supplied —

Connection between them and order — Nature of.

Where "maintenance of public order" is the reason mentioned in the order of detention of a detenu, the Court is entitled to examine the grounds to see whether there is any direct and causal connection between them and the maintenance of public order. If there is no direct and causal connection between them and the maintenance of public order, then the position that will follow is that it cannot be assumed, as a matter of course, that the detaining authority exercised its mind in an intelligent manner in regard to the case against the detenu and inasmuch as it did not do so it cannot be said to have acted in law honestly. **52 Cri LJ 732: ILR (1951) 2 All 493: AIR 1950 All 709 (711) (Pt B) (Pr 7).**

——S. 3 — Detention for preserving public order — Threat or force in exercise of civil right — May be sufficient ground.

When exercise of civil right involves use of force or threat of force having a tendency to jeopardise public order, there can be no objection to the exercise of such right being considered relevant to an order of detention for preservation of public order. **1963 (2) Cri LJ 499: AIR 1963 Cal 589 (591) (Pt E) (Pr 14) (DB).**

——S. 3 — Public disorder of less serious character — Is covered by S. 3.

There is a dividing line between serious and aggravated forms of public disorder which are calculated to endanger the security of the State and the relatively minor breaches of the peace of purely local significance. Public order is certainly vulnerable to individual acts of lawessness some of which may be of a less serious character others of an aggravated nature. 1950 SCJ 418; (1950) 2 Mad LJ 390; AIR 1950 SC 124, Rel. on. **1962 (1) Cri LJ 311: ILR (1961) 1 Cal 276: AIR 1962 Cal 162 (164) (Pt D) (Pr 8) (DB).**

——S. 3 — Maintenance of public order — Relevancy of grounds — Use of abusive and filthy language and creation of hullah in the vicinity of a tea-stall—Attack on persons preventing detenu and his associates from removing wooden sleepers from railway lines—Attempt to extort money towards price of liquor from a person—Publicly making indecent remarks towards ladies. Each one of those grounds has direct relation to public order and no exception can be taken to any of these grounds as being irrelevant. AIR 1949 Pat 229, Dist. **1962 (1) Cri LJ 311: ILR (1961) 1 Cal 276: AIR 1962 Cal 162 (165) (Pt E) (Pr 9) (DB).**

——S. 3 (1) (a) (ii) — Disturbance of public order — What constitutes — Public order may be disturbed even by ordinary case of breach of peace.

Maintenance of public order has been distinguished from security of the State or public safety. Security of the State may be endangered only by widespread public disorder, but public order may be disturbed even by an ordinary case of breach of public tranquillity or an ordinary case of the breach of the peace. Where the grounds taken collectively are certainly relevant to the question, the High Court is not concerned with the question whether the conduct of the petitioner constitutes a threat to the maintenance of the public order. The High Court is only concerned with the question whether the grounds are relevant to the object of the detention. The question whether the grounds are sufficient is not for the High Court to consider. AIR 1962 Cal 162, Rel. on. **1962 (1) Cri LJ 279: AIR 1962 Cal 119 (122) (Pt F) (Pr 10) (DB).**

——S. 3 (a) (ii) — Construction — "Maintenance of public order" — Principle of ejusdem generis does not apply because section does not enumerate specific acts before such general clause. AIR 1955 NUC (Cal) 4507 (DB).

——S. 3 — "Public order" — Connotation of the term, indicated — Grounds of detention held outside scope of S. 3 — Detention held bad.

Condition that must exist before the power is exercised under S. 3 is that the District Magistrate must be satisfied that to prevent the person concerned from acting in a manner prejudicial inter alia to the maintenance of public order, it is necessary to detain that person.

The term "public order" is synonymous with public safety and tranquillity; it is the absence of disorder involving breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife, war affecting the security of the state. AIR 1950 SC 124; AIR 1950 SC 128; AIR 1960 SC 633, Rel. on.

There must be a proximate or reasonable nexus between the activities alleged against the person concerned and the objective of S. 3 of the Preventive Detention Act, 1950, namely the maintenance of public order, in other words, the absence of disorder involving breaches of peace of local significance, as contradistinguished from national upheavals affecting the security of the nation. AIR 1946 Bom 32, Rel. on; AIR 1949 Pat 209; AIR 1950 Mad 266; AIR 1950 East Punj 172 and AIR 1960 Punjab 332, Ref.

Statutes, such as the Preventive Detention Act, conferring extra-ordinary powers of arrest and detention on mere suspicion or anticipation and not on legal evidence are obviously intended not as substitutes for ordinary trials or ordinary Courts, but are intended to deal with emergencies stated in the Act, one of which is the maintenance of public order. Ordinarily, a single offence or several offences dealt with by Penal Code or other penal statutes cannot be held to affect prejudicially the maintenance of public order to an extent which would call for the exercise of this extraordinary power. In a given situation, however, even a single act or series of acts might put in jeopardy the maintenance of public order and call for the exercise of this extraordinary power. When the authorities find that the maintenance of order and tranquillity are in danger and the normal administrative machinery is not sufficient or in a position to cope with such a situation such power can certainly and justifiably within the extent and scope of the Act, be exercised.

Held, that the grounds stated in the order were not within the scope of S. 3 and were in fact de hors it and therefore, the detention was illegal. **(1965) 6 Guj LR 632: ILR (1965) Guj 644.**

——S. 3 — Construction — Public order and public peace and tranquillity" — No distinction between 'public tranquillity' and 'public order'—Use of expression "public tranquillity" in grounds supplied to detenu — Grounds are not invalid. **AIR 1955 NUC (Madh Bha) 3864.**

——S. 3 — Construction — 'Prejudicial to Maintenance of public order' — What amounts to.

It is true that meeting a dacoit or making efforts, to get a person arrested for the offence of dacoity released on bail is not per se an act prejudicial to the maintenance of public order. But if a person associates himself actively with named, notorious and proclaimed dacoits and gangs of dacoits, aids, abets and harbours them in various ways, extracts money from the relations of person held to ransom by the dacoits and terrorises witnesses from giving evidence against

persons accused of serious offences, then his activities are prejudicial to the maintenance of public order. A ground of detention containing a statement of fact showing the association of the detenu with such dacoits would, therefore, be a relevant ground. **Madh BLR (1954) Cr 108: 1954 Cri LJ 1062: Madh BLJ 1954 HCR 582: ILR (1954) Madh Bha 445: AIR 1954 MB 125 (127) (Pt A) (Pr 4) (DB).**

——S. 3 (1) — Public Order — Meaning — Words and Phrases.

'Public order' must be taken in a comprehensive sense so as to include public safety in its relation to the maintenance of public order and that maintenance of public order undoubtedly involves consideration of public safety. **52 Cri LJ 282: ILR 20 Pat 992: AIR 1951 Pat 389 (391) (Pt B) (Pr 4) (DB).**

——S. 3 (1) (a) (ii) — 'Maintenance of public order' — Detention of Goonda to prevent him from indulging in anti-social and criminal activities — Legality.

Merely because a person is of a dangerous character or is breaking the law in one manner or the other it does not mean that the maintenance of public order is being threatened unless the activities are of such a nature and the situation prevailing in a particular part of the country is such that if he is not detained, the maintenance of public order cannot be maintained or it would be endangered. If the local police is helpless in securing conviction successfully with regard to a person who is committing thefts and is indulging in gambling, drinking, assaults, etc., it does not mean that resort can be had to the provisions of the Preventive Detention Act in normal conditions unless some special circumstances exist which would show that the maintenance of tranquillity in the community would be prejudiced or endangered unless that person is detained. AIR 1949 Pat 299 and AIR 1955 Raj 6, Rel. on. The inclusion of those grounds which were wholly irrelevant or otherwise invalid and which could not be said to be of a comparatively unessential nature, must be held to vitiate the grounds as a whole. Criminal Writ No. 145-D of 1955, dated 24-1-1956 (Punj), Rel. on. **62 Punj LR 339: 1960 Cri LJ 981: AIR 1960 Punj 332 (333, 334) (Pt A) (Prs 4, 5).**

——S. 3 (1) — Public order and public tranquillity — Distinction. See Constitution of India, Schedule VII, List I, Item No. 9. **1955 Cri LJ 95: AIR 1955 Raj 6 (DB).**

——S. 3 — Order mentioning words Suvyavastha.

There is no real difference between the word suvyavastha and vyavastha. Suvyavastha does mean "public order" and an order of detention mentioning the word 'suvyavastha' does come within the purview of the section. **('51) 4 Sau LR 45 (46) (DB).**

16 (A). Public order — Illustrations.

● **——S. 3 — Statement prejudicial to maintenance of public order — Denouncing Nehru-Noon pact — Instigation against personal safety of Prime Minister — (Constitution of India, Article 22).**

The statements calling upon persons to 'build up strong movement against the implementation of 'Nehru-Noon Pact', and to 'rouse passions by alleging that the Indian Prime Minister had no sympathy for West Bengal' cannot be said to be wholly unconnected with the maintenance of public order. Similarly, denouncing the agreement between the two Prime Ministers and stressing the need of forming a militia with youths of the country, cannot be said to have no repercussions on the maintenance of public order. And any instigation against the personal safety of the Prime Minister of India cannot but have a deleterious effect on the maintenance of public order. Naresh Chandra Ganguli v. State of W. B., **1959 Cri LJ 1501: 1960 SCJ 303: 1960 Mad LJ (Cr) 200: (1960) 1 SCR 411: AIR 1959 SC 1335 (1341) (Pt C) (Pr 14).**

——Ss. 3, 7 — Grounds of detention — Spreading af disaffection against party Government cannot be said to be a ground for inferring that the public order would not be maintained. See Public Safety — Preventive Detention Act (4 of 1950), S. 7. **AIR 1956 All 589 (DB).**

——S. 3 — Grounds of detention — Spread of disaffection against party Government cannot be said to be a ground for inferring that the public order woud not be maintained. **1950 All LJ 521: 1950 All WR 531: AIR 1951 All 459 (459) (Pr 4). (Pr 4).**

——S. 3 (1) (ii) — Maintenance of public order — Sporadic and casual acts committed by a person may cause public disorder.

While it is true that the High Court has always to keep in view the object of detention in order to assess its relation or relevance to the particulars upon which the order is based, acts apparently sporadic and casual committed by a person in a particular locality, time and again are bound to have repercussions on public order. It would be an extreme proposition to hold that in no case can a person be preventively detained when acts of lawlessness are alleged against him which acts take place within months of each other and which have a certain family likeness demonstrating a tendency on the part of the person concerned to behave in a particular manner which is calculated to affect the peace of the locality. When there has been allegation of more than one act or offence against women such repetition is bound to produce a consequence which has a direct relation to public order. AIR 1950 FC 67 and AIR 1954 SC 276 and AIR 1949 Pat 299, Distinguished. **1964 (1) Cri LJ 515: AIR 1964 Cal 231 (233) (Pt A) (Pr 9) (DB).**

——S. 3 — Where there are other activities attributed to the detenu different and independent of the alleged charge of dacoity (wherein he was discharged) the detaining authority is at liberty to continue the detention in spite of the fact that he had been discharged from the offence of dacoity, if he finds that such detention is still necessary for the maintenance of public peace. **AIR 1952 Hyd 186 (186) (Pt B) (Pr 4) (DB).**

——S. 3 — Association with dacoits — Offence.

Association with dacoits is an act affecting public order. **1960 Jab LJ 522: 1961 MPLJ 1136.**

——S. 3 — Activities prejudicial to maintenance of public order — Harbouring of notorious murderers and dacoits.

The term "public order" is very wide and is incapable of exhaustive definition. Where the detenus were alleged to be harbouring and helping in different ways a number of persons who were notorious dacoits and murderers whose activities must necessarily affect a large section of the people and each one of whom could rightly be regarded as a menace to public peace and order, **Held,** that there was ample justification for the detaining authority to come to the conclusion that the cases fell within the purview of S. 3. **3 Pepsu LR 238.**

——S. 3 (1) — Public order — Trying to organise meetings — (Constitution of India, Art. 19 (1) (b), (c) and (d)).

Trying to organise meetings, processions and hartals is covered by Cls. (b), (c) and (d) of Art. 19 (1) and so long as there is no allegation of violence the disturbance of public order or tranquillity does not come in. **1955 Cri LJ 95: 1955 Raj LW 75: ILR (1954) 4 Raj 51: AIR 1955 Raj 6 (10) (Pt E) (Pr 13) (DB).**

——S. 3 (1) — Grounds — Maintenance of public tranquillity cannot furnish valid ground for detention. 1955 Cri LJ 95: 1955 Raj LW 75: ILR (1954) 4 Raj 51: AIR 1955 Raj 6 (9) (Pt A) (Pr 9) (DB).

——S. 3 (1) — "Prejudicial to public tranquillity" — Pleading of cause by lawful means — (Constitution of India, Art. 19 (1) (a)).

The pleading of any cause which an individual may think it beneficial is permitted by Article 19 and if some person pleads his cause by lawful means, it cannot be said that he was acting in any manner prejudicial to public tranquillity. **1955 Cri LJ 95: 1955 Raj LW 75: ILR (1954) 4 Raj 51: AIR 1955 Raj 6 (9) (Pt D) (Pr 12) (DB).**

——S. 3 — Application of Act to prevent commission of dacoities by gang — When permissible — Preventive detention solely on ground of relationship with dacoit — If legal.

The Preventive Detention Act is for several emergencies, among which one is prejudice to the maintenance of public order. Normally, a single dacoity or a number of dacoities cannot be held to affect prejudicially the maintenance of public order to an extent calling for the application of the Act. Such happenings are dealt with, either under the penal provisions against the formation of gangs, preparations to commit a dacoity or dacoity itself or under the preventive sections of the Criminal P. C. It is, however, possible, that with a single, or a number of gangs, acting in co-ordination, over extensive areas, maintenance of public order is so prejudiced as to call for application of this extraordinary law. When the executive authorities find that activities of the gang are so widespread as to have virtually annihilated or completely disarmed the normal administrative machinery, they may invoke the Preventive Detention Act.

At the same time, the detaining authority should act bona fide, in other words, after a fair and unprejudiced consideration of the allegation. This is particularly so, when one of the grounds is that the detenu is related to a proclaimed offender, against whom there are several cases of dacoity. It is possible that by exercising pressure on a relation a really dangerous man can be controlled, especially in a primitive society where family and clan-ties are very strong; but to punish or impose disabilities on a person solely on the ground of relationship, is against all the principles of modern jurisprudence. There should be something more definite. The allegation that he is co-operating with a dacoit is much too general.

Preventive detention is not a device to evade the scrutiny of the ordinary criminal Courts into allegations that the detaining authority itself does not seem to believe. **AIR 1952 Vindh Pra 36 (37, 38) (Pt A) (Prs 8, 9, 10, 16).**

17. Maintenance of supplies and services essential to community.

——S. 3 (1) (a) (iii) — Activities of detenu interfering with Scheme of Act (24 of 1946).

The object of the Government in passing the Essential Supplies (Temporary Powers) Act (1946) and regulating the control of production and distribution of certain essential commodities, including iron and steel, was to ensure a fair and equitable distribution among the public. Where the activities carried on by the detenu were such as to interfere with the scheme underlying the Act and the Government orders they can rightly be regarded as prejudicial to the maintenance of supplies of essential commodities to the community. **1951 ALJ 203: 52 Cri LJ 3: AIR 1951 All 838 (845) (Pt E) (Pr 30) (DB).**

——S. 3 (1) (a) (iii) — Detention under — Validity — Smuggling and blackmarketing in rice if prejudicial to maintenance of supplies and services essential to the community.

The petitioner was arrested and detained under S. 3 (1) (a) (iii), Preventive Detention Act for action prejudicial to the maintenance of supplies and services essential to the community. The grounds of detention served on him alleged that the petitioner was smuggling rice into his mill and was carrying on black-marketing activities in rice on a large scale in the course of which he was estimated to have made illegal profits amounting to about five lakhs of rupees.

Held, that the grounds alleged against the petitioner came within the scope of S. 3 (1) (a) (iii) Preventive Detention Act and as such the detention was not illegal. **('52) 1952 Cri LJ 306: AIR 1952 Mad 157 (158) (Pr 5) (DB).**

——S. 3 (1) (a) (iii) — Applicability — Hoarding and selling in black-market foodgrains — Order of detention — If justified.

There can be no doubt that both hoarding and selling in the black-market foodgrains, are prejudicial to the maintenance of supplies essential to the community. From the emphasis laid on the words essential to the community, it can be safely predicated that selling in the black-market amounts to interfering with the normal supply to the community at large. Nor can it be said that preventive detention as a measure of social control with a view to safeguard the maintenance of supplies and services essential to the community is beyond the range of reasonable restrictions on the citizen's right to personal liberty and freedom; the principle of reasonable restriction or reasonableness of law imposing restriction upon the liberty of citizens has no application to the laws prescribing preventive detention. (1950) 12 SCJ 174, Ref. **ILR (1951) Cut 387: 52 Cri LJ 679: 17 Cut LT 109: AIR 1951 Orissa 251 (253 to 255) (Pt A) (Prs 7, 9 to 11, 17, 18) DB).**

——S. 3 (1) (a) (iii) — "Maintenance of supplies and services essential to community" — Supply of cloth and commodities are included in the clause.

The word 'supplies' carries with it the meaning "to fill the needs of or to supply provisions to the community": in other words, the meaning of the words "maintenance of supplies and services essential to the community" in Cl. (iii) of S. 3 (1) (a) must "be the upkeep of the needs and the provisions essential to the community". This is the only proper meaning, which follows not only from grammatical construction, but also from the context in which the words have been used. The supply of cloth fills an essential need of the community and is a service to it. Any interference with such supply and service will be prejudicial to the maintenance of supplies and services essential to the community. Where with regard to an essential commodity there is a system of controls, on which the maintenance of

supplies and services depends, evasion of the control orders will prejudicially affect the maintenance or upkeep of the supplies and services essential to the community. The view point that the action of a petty shop-keeper will not prejudicially affect the maintenance of supplies and services, fails to take note of the control system; and further, if a number of petty shop-keepers indulge in similar activities, there will, undoubtedly be an artificial scarcity in cloth.

It is not open to the Court to consider the difference in degree, and treat some prejudicial activities as coming within the expression and some as not coming within it, though in the ordinary grammatical sense they all come within the expression. 30 Patna 630; 30 Pat 716, Approved.

Observations of Shearer, J. in Cri. Misc. Case No. 258 of 1951, D/- 20 August 1951 (Pat.) Dissented from; 1950 SCR 594, Distinguished. Jagannath Prasad v. State of Bihar, **1952 Cri LJ 493: ILR 31 Pat 97: AIR 1952 Pat 185 (189) (Pt A) (Pr 11) (FB).**

——S. 3 (1) (a) (iii) — Blackmarketing and hoarding whether affect maintenance of essential supplies and service.

In S. 3 (1) (a) (iii) not only the word "supplies" but also the word "services" has been used. A supply of food or cloth which is essential to the community has a service aspect as well. The use of the word "maintenance" has also to be appreciated. Hence, the acts of black-marketing or hoarding must affect the maintenance of supply and service essential to the community. AIR 1951 Pat 47, Foll.

The words 'hoarding' and 'black-marketing' have a definite meaning in the context of a system of controls, such as will be found in the Foodgrains Control Order, the Cloth and Yarn Control Order and other Control Orders of a similar nature. The maintenance of supplies of food and cloth depends on this system of controls, and anybody who evades the Control Orders by hoarding (e. g. secreting part of the stock by making false entries in the stock register, or showing fictitious sales, etc.) or blackmarketing (e.g., selling at rate higher than the controlled rate) clearly acts in a manner which directly jeopardises the maintenance of supplies and services essential to the community. **52 Cri LJ 1231: ILR 30 Pat 653: AIR 1951 Pat 153 (154, 156) (Pt A) (Prs 2, 7) (DB).**

● **——S. 3 (1) (a) (iii) — "Maintenance of supplies and services essential to the community" — Adulteration of food stuffs.**

The plain duty of the Court is to consider the words in the Act as they stand and give to them their ordinary meaning. The words "maintenance of supplies and services essential to the community" themselves have to be construed independently of what is stated in items 3 and 18 in the Concurrent List of the Seventh Schedule of the Constitution and what is contained in R. 81 of the Defence of India Rules. The words cannot reasonably carry the meaning that any one who adulterated foodstuffs would be acting in a manner prejudicial to the maintenance of supplies or the continuity of supplies.

Where the facts stated in the orders of detention were that one R manufactured flour in a Mill B stored stone powder and mixing was done at the house of one M and that these persons entered into a conspiracy to profiteer by sale of flour at the expense of the health of the community.

Held, that the conduct of the persons did not come within the meaning of the words in Section 3 (1) (a) (iii), and the detention must be held to be illegal. **52 Cri LJ 1175: ILR 30 Pat 716: AIR 1951 Pat 134 (135, 136) (Pt A) (Prs 7, 9, 10) (FB).**

——S. 3 (1) (a) (iii) — Interpretation of.

The word "and" between the words "supplies" and "services" is not used in any restrictive sense, but in a comprehensive sense. The manifest intention of Parliament, therefore in the use of the expression "maintenance of supplies and services essential to the community" in Section 3 (1) (a) (iii) is to provide for preventive detention for reasons connected with the maintenance of supplies essential to the community or the maintenance of services essential to the community or both.

Hence any activity which directly interferes with or threatens the maintenance of the supply of such primary necessities of life as food or cloth attracts the operation of S. 3 (1) (a) (iii). The supply of an essential commodity cannot be contemplated as entirely divorced from service; because an essential supply is a service to the community. Thus any apprehended act of black-marketing or hoarding will directly affect maintenance of supply and service essential to the community. **52 Cri LJ 406: ILR 30 Pat 630: AIR 1951 Pat 47 (50, 51) (Pt A) (Prs 9, 10, 11) (DB).**

——S. 3 (1) (a), Cls. (ii) and (iii) — Clauses whether to be construed on principle of ejusdem generis.

Section 3 (1) (a) (iii) need not be construed on the principle of ejusdem generis as being related to Cl. (ii) which precedes Cl. (iii) and which relates to the security of the State or the maintenance of public order. The ejusdem generis rule is one to be appiled with great caution and not pushed too far. Where the words are clearly wide in their meaning, they ought not to be qualified on the ground of their association with other words. Hence the contention that the maintenance of supplies and services essential to the community referred to in Cl. (iii) must have some relation to the maintenance of public order or the security of State mentioned in the preceding Cl. (ii) cannot be accepted as it leads to a narrow construction of Cl. (iii). **52 Cri LJ 406: ILR 30 Pat 630: AIR 1951 Pat 47 (52) (Pt C) (Pr 13) (DB).**

——S. 3 (1) (a) (iii) — Constitution of India, Sch. VII, List II, Entries 26, 27 and List III Entry 3 — Entries whether mutually exclusive — "For reasons connected with" — This expression is important, it means that the detention is for reasons connected with the maintenance of supplies and services essential to the community. Such detention may affect the supply of goods, but that does not mean that the detention is for an object other than what is contemplated by Entry 3 of the list. See Constitution of India, Sch. 7, List II, Entry 26. 52 Cri LJ 406: AIR 1951 Pat 47 (DB).

——S. 3 (1) (a) (iii) — "Maintenance of supplies and Services' — Meaning — Words and Phrases — 'And' 'Services'.

Though in order to give effect to the real intention of the legislature it may sometimes be necessary to hold that the conjunction "and" means "or" or vice versa it is clear by reading the whole of Cl. (a) and by comparing the words of sub-clauses, that the word "and' used in the expression 'maintenance of supplies and services' is used in the ordinary sense. Where, therefore, a person is detained under sub-clause (iii) of

Cl. (a) of S. 3 the detaining authority must be satisfied that the detention is essential with a view to preventing the person concerned from acting in any manner prejudicial to the maintenance of suppiles as well as services essential to the community.

It is true that one of the meanings of the word "service" is occupation or status of a servant, and when used in plural it can mean persons holding a particular occupation or members of a particular department but since supplies and services are bracketed together and the object of the legislature appears to be to keep intact their maintenance the word "services" as used in sub-clause (iii) merely means the means and methods necessary for regulating and maintaining supplies of some general demand. **52 Cri LJ 1438: AIR 1951 Pepsu 164 (168) (Pt C) (Prs 12. 13) (DB).**

——S. 3 (1) (a) (iii) — Applicability — Order detaining person selling soda ash at more than controlled price — If ultra vires — Soda ash — If essential commodity — View of executive — If subject to review by Court.

An order of the District Magistrate directing the detention of a person engaged in activities relating to the sale of soda ash at a price higher than its controlled price falls within the purview of S. 3 (1) (a) (iii), Preventive Detention Act and is not ultra vires. Because of the use the soda ash is put to, it is difficult to say that the District Magistrate is wrong in holding that it is an essential commodity.

As essential commodities have not been defined, what is regarded by the executive as an essential commodity must be subject to review by the Courts, though no doubt proper weight would be attached to the views of the Executive if supported by proper materials. **54 PLR 88: 1952 Cri LJ 416: AIR 1952 Punj 124 (128) (Pt A) (Pr 12) (DB).**

——S. 3 (1) (a) (iii) — Smuggling of unessential articles — Order of detention for — Validity — Smuggling of certain articles of luxury such as gold thread, art silk etc., does not endanger the supply of essential commodities in the country and does not justify an order of detention on this ground. **AIR 1951 Punj 157 (161, 162) (Pt E) (Prs 6, 8) (DB).**

——Ss. 3, 7 — Order under S. 3 — Whether arbitrary — Grounds — Vagueness.

Where the information obtained by the District Magistrate is that acting in his capacity as licensed wholesale dealer in food grains, the detenu sold such grains in the black market which implies that he parted with grain in favour of persons who did not have permits for purchasing such grains from him or who did not have ration cards for purchasing such stock or to persons possessing such permits or ration cards in excess of the quantity lawfully allotted to them, such conduct will certainly be prejudicial to the maintenance of supplies essential to the community. The order of detention made by the District Magistrate in those circumstances cannot be characterised as arbitrary and is warranted by the provisions of the Act. The information supplied to the detenu under S. 7 in such a case cannot be said to be too vague to be acted upon or to be answered effectively by the detenu. **('50) 1950 KLT 723: 52 Cri LJ 1089: ILR (1951) Trav-Co 1: AIR 1951 Trav-Co 217 (219, 220) (Pt A) (Prs 7, 10) (DB).**

18. Arrangements for expulsion.

●——S. 3 (1) (b) — Applicability — Detention of foreigner to enforce order of expulsion — Nature and validity of (Foreigners Act (1946), Ss. 3 (2) (c) and 11 (1)).

The right to make arrangements for an expulsion includes the right to make arrangements for preventing any evasion or breach of the order, and the Preventive Detention Act confers the power to use the means of preventive detention as one of the methods of achieving this end. How far it is necessary to take this step in a given case is a matter that must be left to the discretion of the Government concerned, but in any event, when criminal charges for offences said to have been committed in his country and abroad are levelled against a person, an apprehension that he is likely to disappear and evade an order of expulsion cannot be called either unfounded or unreasonable. Detention in such circumstances can be rightly termed preventive and falls within the ambit of the Preventive Detention Act and is reasonably related to the purpose of the Act. Hans Muller of Nurenburg v. Superintendent, Presidency Jail, Calcutta, **1955 SCA 487: (1955) 1 MLJ (SC) 188: 1955 Cr LJ 876: (1955) 1 SCR 1284: 1955 An WR (SC) 188: 1955 Mad WN 478: 1955 SCJ 324: AIR 1955 SC 367 (371) (Pt B) (Pr 20).**

●——S. 3 (1) (b) — Detention by State Government before order of expulsion — Validity of.

The right to satisfy itself that the drastic method of preventive detention is necessary to enable suitable arrangements for expulsion to be made is expressly conferred on the State Government by Section 3 (1) (b) and as a State Government cannot expel, the conferral of the right can only mean that the State Government is given the power to decide and to satisfy itself whether expulsion is desirable or necessary, and if it thinks it is, then to detain until proper arrangements for the expulsion are made, one of them, and an essential one, being reference to the Central Government for final orders. Unless a State Government has authority to act in anticipation of orders from the Centre, it might be too late to act at all. It cannot, therefore, be argued that the arrangements contemplated by Section 3 (1) must follow and not precede the order, especially as they involve curtailment of a man's personal liberty. Hans Muller of Nurenburg v. Superintendent, Presidency Jail, Calcutta, **1955 SCA 487: 1955 Mad WN 478: 1955 SCR 1284: 1955 Cri LJ 876: (1955) 1 MLJ (SC) 188: 1955 SCJ 324: AIR 1955 SC 367 (372) (Pt C) (Pr 23).**

19. Foreigners Act.

●——S. 3 (1) (b) — Scope — Powers of Government — Good faith of Government— Powers under Foreigners Act, 1946 and Extradition Act — Distinction — (Foreigners Act (1946), S. 3 (2) (c)) — (Extradition Act (1903), S. 3 (1)).

The Foreigners Act is not governed by the provisions of the Extradition Act. The two are distinct and neither impinges on the other. Even if there is a requisition and good case for extradition, Government is not bound to accede to the request. It is given an unfettered right to refuse under Section 3 (1) of the Extradition Act. Therefore, if it chooses not to comply with the request for extradition, the person against whom the request is made cannot insist that it should. The right is not his; and the fact that a request has been made does not fetter the discretion of Government to choose the less cumbrous procedure of the Foreigners Act when a foreigner is concerned provided always, that in that event the person concerned leaves India a free man. If no choice had been left to the Gov-

ernment, the position would have been different but as Government is given the right to choose, no question of want of good faith can arise merely because it exercises the right of choice which the law confers in ordering detention of the person under Section 3 (1) (b) of the Preventive Detention Act. (Distinction between the Foreigners Act and the Extradition Act and powers thereunder pointed out). Hans Muller of Nurenburg v. Supdt., Presidency Jail, Calcutta, **1955 Mad WN 478: 1955 SCA 487: (1955) 1 MLJ (SC) 188: 1955 Cr LJ 876: (1955) 1 SCR 1284: 1955 Andhra WR (SC) 188: 1955 SCJ 324: AIR 1955 SC 367 (375, 376) (Pt F) (Pr 43).**

——S. 3 (1) (b) — 'Foreigner' — Who is — (Foreigners Act (1946), S. 2).

Neither the proclamation issued by the President under Article 367 of the Constitution nor the provisions of the Citizenship Act, 1955, confer rights of citizenship of India on a citizen of Pakistan. Being a citizen of Pakistan and not a citizen of India he is a foreigner within the meaning of the Foreigners Act, and therefore, is liable to be proceeded against under Section 3 (1) (b) of the Preventive Detention Act. **ILR (1957) Andh Pra 167: (1957) Mad LJ (Cr) 34: 1957 Andh LT 223: 1957 Cr LJ 703: (1957) 1 An WR 79: AIR 1957 Andh Pra 143 (146) (Pt B) (Pr 8) (DB).**

20. Jurisdiction to pass orders.

——S. 3 — General order by State Government directing that detenus were liable to be detained in specified jails — Power of detaining authority to direct detention of person in one of them.

The detaining authority can direct the detention of a person in its own jurisdiction where the local Government has, by a general order, specified that the detenu can be detained in a jail which is within the jurisdiction of the detaining authority. Just as when a person is convicted, no order is required from anybody and the Court which convicts an accused person can send him to the prison within its jurisdiction for undergoing the sentence, similarly the detaining authority is empowered to send him in a jail where by a general order the State Government has directed the detenus were liable to be detained. **53 Bom LR 717: 21 Bom Cr C 210: 1952 Cri LJ 81: ILR (1952) Bom 134: AIR 1952 Bom 1 (11) (Pt H) (Pr 22) (DB).**

——S. 3 (2) — Commissioner of Police cannot pass order against person not within his territorial jurisdiction. **AIR 1951 Bom 161 (161, 163) (Pt A) (Prs 3, 9) (DB).**

——S. 3 (2) (d) (as amended by Act 51 of 1954) — 'As provided in sub-cls. (ii) and (iii) of Cl. (a) of sub-s. (1)' — Meaning of.

The expression "as provided in sub-cls. (ii) and (iii) of Cl. (a) of sub-section (1)" appearing in sub-section (2) of Section 3 attracts Items (ii) and (iii) of Cl. (a) of sub-section (1) of S. 3. Anyone of the officers mentioned in sub-s. (2) is empowered to act if the satisfaction relates to one or other of the matters mentioned in Items (ii) and (iii) above. **60 Cal WN 464: 1957 Cr LJ 172: ILR (1957) 2 Cal 463: AIR 1957 Cal 74 (75) (Pt A) (Pr 5) (DB).**

——S. 3 (2) — Order of detention passed by Deputy Commissioner — Legality — Presumption of regularity — (Evidence Act (1872), Section 114).

As Section 3 (2) only authorises particular officers to make the order of detention, an order would not be a good order if made by some other officer. Under the said sub-section not only the satisfaction must be the satisfaction of one of the officers named therein but the order directing a person to be detained must be an order made by one of such officers. An order, therefore, made by a Deputy Commissioner as such and not as a District Magistrate is without jurisdiction, even if the order states that it was being made under Section 3 (1) (a) (iii) of the Act and the doctrine of presumption of regularity cannot be invoked for presuming that the Deputy Commissioner acted in his capacity as a District Magistrate. **58 CWN 363: 1954 Cr LJ 1496: AIR 1954 Cal 518 (519) (Pr 5) (DB).**

——Ss. 3 and 5 — Illegality of arrest — Detention not per se invalid.

The illegality of the arrest does not per se make the order of detention invalid.

Where it is the propriety and legality of the detention within the jurisdiction of the State Government which is in controversy there is no reason why the State Government cannot detain the detenu at a jail, which is within its jurisdiction on valid grounds. The fact that at the time the order was made, the would-be detenu was residing outside the territorial jurisdiction of the State of West Bengal, the Government whereof made the order is not material. (1829) 9 B and C 446; 71 IA 75; 24 IA 137, Rel. on. **('52) 56 Cal WN 427: 1953 Cri LJ 310: AIR 1953 Cal 81 (83, 84) (Pt F) (Prs 19, 30) (DB).**

——Ss. 3 and 5 — Relative scope of — Detenu arrested in French territory — Detention by Government within jurisdiction — Validity.

There is no reason why the State Government cannot detain a detenu within its jurisdiction on grounds which are neither vague nor irrelevant and which in the opinion of the State Government imperil the security of the State or the maintenance of public order, although the would-be detenu was arrested in French territory by virtue of an order passed by the State Government. The illegality of the arrest does not make the order of detention illegal. In a petition for a writ of habeas corpus, it is the propriety and legality of the detention within the jurisdiction of the State Government which is in controversy.

Section 5 of the Preventive Detention Act, 1950, as amended by Act 4 of 1951, plainly provides for passing an order of detention of the would-be detenu even though he is outside the territorial limits of the jurisdiction of the Government, which may mean either the Central or the State Government. This connotes the exercise of the power of detention of a "person to be detained", i.e., the would-be detenu even when he is in a foreign territory. The section does not draw any distinction between deliberate and unintentional exercise of extra-territorial powers. The use of the word "merely" was not intended to restrict the exercise of extra-territorial powers. The word "merely" was used for an entirely different purpose, viz., that a detention order, otherwise valid, cannot be challenged solely on the grounds specified in S. 5 (a) and (b). Sections 3-A, 4 (a) and (b) cannot be read as limiting the scope of Section 5. **56 CWN 427: 54 Cr LJ 310: AIR 1953 Cal 81 (84, 85) (Pt H) (Prs 36, 41, 42, 43, 47, 52, 54, 55) (DB).**

——S. 3 — Arrest for activities in another State — Constitution of India, Arts. 162, 245 — Transfer of Detained Persons Act (1949), S. 2.

The State of Bombay cannot, for the purpose of Preventive Detention Act, pass orders for detaining a person found within its territory for

his activities in the State of Madras or direct that such a person be interned in the State of Madras. Therefore, when the Commissioner of Police, Bombay arrested and detained a person as he was wanted by the Madras Police for detention, the arrest and detention are illegal. Where such a person is transferred to the State of Madras under Section 2 of the Transfer of Detained Persons Act and after such transfer the Commissioner of Police, Bombay cancels the order of detention he would be entitled to be released and the order of detention cannot be validated by the Madras Government by serving a fresh order of detention without first releasing him. **64 Mad LW 142: 1951 Mad WN 81: 52 Cri LJ 94: (1950) 1 Mad LJ 174: 1951 Mad WN (Cri) 21: AIR 1951 Mad 583 (585, 588, 589) (Prs 6, 13, 14, 15) (DB).**

——S. 3 — Jurisdiction to pass order — Satisfaction is of the minister-in-charge of Home Department as regards detention cases — Secretary cannot substitute his own satisfaction under Rules of Business, in cases of urgency — Order of detention on such satisfaction is illegal — Scope of Rr. 4, 8, 9 and 13 of the Rules of Business indicated. AIR 1952 Orissa 200, Approved. 1953 Cr LJ 349: 19 Cut LT 58: AIR 1953 Orissa 33 (37, 38) (Pt C) (Prs 11, 12, 14) (DB).

——S. 3 — Jurisdiction.

The mere fact that the detenu's activities extended over places within the area of adjoining district over which he has no jurisdiction does not deprive the District Magistrate of his authority to order his detention when at the time of making the order the detenu was admittedly within his district. **52 Cri LJ 543: AIR 1951 Pat 439 (2) (440, 441) (Pt A) (Prs 3, 11) (DB).**

——S. 3 (1) — Order of detention under, passed by the minister and authenticated by Deputy Secretary and purported to be issued on behalf of his Highness the Rajpuramukh cannot be held to be illegal merely because the matter did not go to the Rajpramukh for consideration — Power to pass an order under the Act can be delegated by the Rajpramukh to any of his ministers under the Rules of business and it is not necessary that Rajpramukh should be personally satisfied as to necessity for passing order of detention — 1 Pepsu LR 402 and AIR 1945 PC 156, Foll. — Constitution of India, Arts. 154 (1), 166, 238, 372 (1) — Pepsu Ordinance (No. 16 of 2005) as amended by Ord. No. 18 of 2005) S. 10 (3), Rules of business under Rr. 5, 7, and 8. **52 Cri LJ 1215: AIR 1951 Pepsu 147 (150) (Pt C) (Prs 7, 8, 9).**

——S. 3 (2) — Legality of detention — Some grounds relating to relations of India with foreign powers — Validity of order.

The defence of India, the relations of India with foreign powers or the security of India is a matter regarding which a District Magistrate under Section 3 (2) of the Preventive Detention Act cannot make an order of detention. If there are a number of grounds for detention by the District Magistrate some intra vires and some extra vires the District Magistrate, and it cannot be said that the grounds extra vires did not prevail on him when he made the order, the order of detention cannot be regarded as intra vires the District Magistrate and is bad. **52 PLR 429: 52 Cr LJ 17: AIR 1951 Simla 157 (159, 160) (Pt D) (Pr 5) (DB).**

21. "Forthwith."

●——Ss. 3 (2), (3) and 7 — Past activities — If could be ground for future detention —Duty to report 'forthwith' to the State Government the fact of passing orders for detention — Scope.

"Forthwith" in Section 3 (3) of the Preventive Detention Act cannot mean the same thing as "as soon as may be" in Section 7, and the former is more peremptory than the latter. The difference between the two expressions lies in this that while under Section 7 the time that is allowed to the authority to send the communication to the detenu is what is reasonably convenient, under Section 3 (3), what is allowed is only the period during which he could not, without any fault of his own send the report. Under Section 7 the question is whether the time taken for communicating the grounds is reasonably requisite. Under Section 3 (3) it is whether the report has been sent at the earliest point of time possible, and when there is an interval of time between the date of the order and the date of the report, what has to be considered is whether the delay in sending the report could have been avoided. On the facts it was found that the delay between 13th January, 1956 when orders were passed and the 21st January, 1956 when the reports to the State Government were made could not have been avoided by the Commissioner of Police, Bombay as the Commissioner and his staff were busy in spotting and rounding up the miscreants during the unusual and tense situation in Bombay caused by disturbances. In the circumstances it was held that the reports were sent 'forthwith' within the meaning of S. 3 (3) of the Preventive Detention Act.

What a person is likely to do in future can only be a matter of inference from various circumstances and his past record will be valuable, and often the only record on which it could be made. Accordingly, it cannot be contended that past activities could not constitute grounds for detention in future. Keshav Nilkanth Joglekar v. The Commissioner of Police, Greater Bombay, **1957 MPC 49: 1956 SCJ 715: 1956 SCA 1123: 1957 Cr LJ 10: 1957 All LJ 132: 1956 SCR 653: 1957 BLJR 260: 59 Bom LR 87: 1957 All WR (HC) 144: AIR 1957 SC 28 (30 to 33) (Pt A) (Prs 7, 8, 10, 11, 13).**

●——S. 3 (3) — Non-compliance with —Effect — "Forthwith" — Meaning — Words and Phrases.

Where the order of detention is made by a subordinate authority, it is essential that the reports of the fact together with the grounds on which the order has been made, should be furnished to the State Government as soon as possible. The Legislature has used the expression "forthwith", but "forthwith" cannot in the context mean "instanter". It means "in a reasonable time", as soon as the party who is to perform the act can reasonably perform it. "Forthwith" has practically the same significance as the other expression used in Section 7, "as soon as may be", and again it is a question of fact as to whether in a particular case the subordinate authority has complied with this mandatory provision of the statute. A non-compliance with this provision would result in the detention being invalid.

The grounds and particulars by the subordinate authority should be furnished to the State Government before the grounds are furnished to the detenu.

Although the furnishing of the grounds to the detenu may take some time, no time need

be taken as far as the furnishing of the grounds and particulars under Section 3 (3) is concerned, because whereas in the case of the former the grounds would have to be formulated and the detaining authority would have to consider what materials should be held back in public interest, no such question would arise in the case of the latter. In re Pandurang Kashinath, **('51) 53 Bom LR 65: 21 Bom Cri Cas 54: 52 Cri LJ 366: ILR (1951) Bom 190: AIR 1951 Bom 30 (32, 33) (Pt B) (Prs 7, 8) (FB).**

22. Report to State.

——Ss. 3 (3) and 7 (1)—Grounds of detention communicated to detenu under S. 7 — If to be sent to the State Government along with the report under S. 3 (3).

Section 3 (3) of the Preventive Detention Act requires the authority to communicate the grounds of its order to the State Government, so that the latter might satisfy itself whether detention should be approved. Section 7 requires the statement of grounds to be sent to the detenu so that he might make a representation against the order. The purpose of the two sections is so different that it cannot be presumed that the expression "the grounds on which the order has been made" is used in Section 3 (3) in the same sense which it bears in Section 7. The communication that has to be served on the detenu under Section 7 of the Act is a formal document setting out the grounds for that order and the particulars in support therefor, subject of course, to Section 7 (2); whereas the reports to the State under Section 3 (3) is a less formal document in the nature of a confidential inter-departmental communication, which is to contain the particulars on which the order was made. It could not have been intended that the contents of the two communications which are so dissimilar in their scope and intendment should be identical. The grounds are conclusions of facts and not a complete detailed recital of all the facts.

Accordingly the failure on the part of the Authority to send along with his report under Section 3 (3) the very grounds which he subsequently communicated to the detenu under Section 7 is not a breach of the requirements of that sub-section and it was sufficiently complied with when he reported the materials on which he made the order. Shamrao Vishnu Parulekar v. The Dt. Magistrate, Thana, **(1956) SCJ 710: 1957 All LJ 33: 1956 SCC 504: 1957 MLJ (Cr) 23: 1957 MPC 84: 59 Bom LR 83: 1956 SCA 1132: 1957 Cr LJ 5: 1957 BLJR 1: 1956 SCR 644: AIR 1957 SC 23 (26 to 28) (Pt B) (Prs 5 to 8, 10).**

23. "Approval".

——S. 3 (3) — Essentials — Approval based on incorrect considerations — Validity.

The approval that the Parliament required from the State Government under Section 3 (3) is an approval arrived at after considerations of all relevant and material circumstances. It is not a mechanical approval; it is an approval which requires a certain mental process and that mental process can only be possible provided not only relevant and proper materials are placed before the Government, but also correct facts are placed before the Government. If the Court is satisfied that the State Government gave its approval on incorrect facts placed before it, then the approval is vitiated by extraneous factors and it cannot be an approval required by law.

Held, on facts, that the order of detention made by the Police Commissioner was bad by reason of the fact that an important ground mentioned was not a correct ground also by reason of the fact that the detaining authority did not and could not apply its mind to the relevant circumstances which were required by law and finally for the reason that the approval given by the State Government was not a proper approval. **1956 Cr LJ 875: ILR (1956) Bom 792: 58 Bom LR 473: AIR 1956 Bom 490 (493) (Pt E) (Pr 8) (DB).**

——S. 3 (3) — Place of detention — Approval by Government not necessary.

Section 3 (3) does not require the approval by Government of the place of detention. **ILR (1956) Bom 715: 58 Bom LR 602.**

——S. 3 (3) —Habeas corpus — District Magistrate passing order of preventive detention — Grounds of detention drawn more than three weeks thereafter — Legality — **Held,** that in the circumstances either the District Magistrate or the State Government had not before them proper material on the basis of which the detention of the petitioner could be ordered or approved. See Constitution of India, Art. 22. **1957 Cri LJ 100: AIR 1957 Raj 5 (DB).**

24. Grounds for order — General.
(A) Grounds for orders — Vagueness of.
(B) Grounds for orders — Relevancy of.
(C) Grounds for orders — Whether order is vitiated by one or more extraneous grounds.

24. Grounds for order — General.

——Ss. 3 and 7 — Grounds for detention — Instigation of hartal — Instigation of hartal bringing about a complete stoppage of work, business and transport with a view to promote lawlessness and disorder, is a ground on which an order can be made under Section 3 (2). **AIR 1957 SC 28 (34) (Pt C) (Pr 14).**

——Ss. 3, 7 and 12 — Grounds supplied to detenu must be connected with preventive order — Failure to establish such connection — Right of detenu — Constitution of India, Art. 22.

The grounds supplied to a detenu must be connected with the order of preventive detention. If it is found that they are not so connected, it cannot be said that the requirements of Art. 22 (1), (3), (5) of the Constitution of India had been complied with. Failure to establish a connection between them and the order of detention would make the order invalid. Thus, it is open to a detained person to contend before the Court that the grounds on which the order has been made have no connection at all with the maintenance of public order or have no connection with the circumstances or class of cases under which a preventive detention order could be supported under Section 12, Preventive Detention Act, 1950. **52 Cri LJ 732: ILR (1951) 2 All 493: AIR 1950 All 709 (713) (Pt D) (Pr 14).**

——Ss. 3 and 7 — Validity of detention — Reference to pending case in grounds.

A person was detained for doing smuggling businesss in rice. The District Magistrate, in the grounds supplied to the person, referred to the case, as one of the grounds alleged to have been sub judice in May 1951, to bring out that, the

person was an incorrigible smuggler, as his smuggling activities continued even in June and July, 1951.

Held that the order did not rest on this ground alone and the detention was not illegal. AIR 1951 Assam 43, Disting. **1953 Cr LJ 507: AIR 1953 Assam 63 (64) (Pt B) (Pr 4).**

——Ss. 3, 7 (1) — Grounds disclosed under — Essentials of — Grounds as evidence of satisfaction under Section 3 — It may be that the detaining authority may have more materials than the grounds, but the grounds must be essential basis upon which the detaining authority arrives at its satisfaction and makes the order of detention — (Constitution of India, Art. 22). See Public Safety — Preventive Detention Act (4 of 1950), S. 7 (1). **1956 Cri LJ 875: AIR 1956 Bom 490 (DB).**

——Ss. 3 and 7 — Grounds — Sufficiency — Extent of facts or particulars to be disclosed — Right of detenu — Constitution of India, Art. 22 (6).

The grounds which have to be furnished to a detenu must be not only the words of the Section under which action has been taken, but must disclose to him the facts upon which action has been taken, though it is not necessary for the detaining authority to disclose such facts as in his opinion, would be against the public interest to disclose, in view of Art. 22 (6) of the Constitution. What must be disclosed are the conclusions of facts of the detaining authority. Every fact ought to be disclosed which is not protected by Art. 22(6) of the Constitution. There is no justification to limit the "grounds" to only just those facts which would be sufficient in the opinion of the Court to enable the detenu to make a defence. The scheme of the Preventive Detention Act is not merely to import mechanically the language of Cls. (a) and (b) of S. 3 (1) of the Act into the grounds given under Section 7 but to give all facts, particulars and details on which the detention is based. All those must be given in the grounds which are to be furnished to the detenu as soon as may be after his detention.

Where the ground stated is that the detenu is an active worker of the "communist party and in furtherance of the aims of the organisation he has been secretly and actively engaged in organising dangerous and violent agitation so as to cause widespread disturbance of peace and disorder in the city and other parts of the District," without telling the detenu what were the activities in which he ever indulged, it must be held that it is vague and insufficient. But if all the necessary particulars are given in the other grounds and they would enable the detenu to make a representation to the State and also disclose to him sufficient particulars upon which action has been taken against him, the order of the detention cannot be held to be illegal. It is, the satisfaction of the detaining authority which has to result in the detention of the detenu, provided, of course, it is not mala fide and it is not based upon anything which is arbitrary or capricious, it would not be open to the detenu to call in effect upon the detaining authority to produce before the Court evidence upon which action is taken. 51 Bom LR 653 (FB), Expl.; 52 Bom LR 794, Foll. **21 Bom Cri Cas 80: ILR (1951) Bom 546: 52 Cr LJ 418: 53 Bom LR 127: AIR 1951 Bom 33 (43) (Pt I) (Pr 21) (DB).**

——S. 3 — Threat to burn house and to assault person deposing against detenu — Held, sufficient to form basis of order of detention. 1964 (1) Cri LJ 515: AIR 1964 Cal 231 (235) (Pt E) (Pr 17) (DB).

——S. 3 — Detention — Grounds.

It is not a relevant consideration whether the activities of the detenu were liked or disliked by authorities concerned. AIR 1958 SC 163; 1958 Mad LJ (Cri) 427; 1958 SCJ 510, Foll. **1960 Jab LJ 522: 1961 MPLJ 1136.**

——S. 3 — Constitution of India, Art. 22 (5) — Objection that grounds supplied are vague — Sufficient particulars immediately supplied — Infringement of fundamental right — There can be no infringement of any fundamental right of a person detained or the contravention of any constitutional provision if he has been supplied with sufficient particulars as soon as he raised the objection that the grounds supplied are vague. **1952 Cri LJ 1526: AIR 1952 Mys 85.**

——S. 3 — Constitution of India, Art. 22 (5) — Grounds of detention — Detention under S. 3, Preventive Detention Act, 1950.

The expression "the maintenance of public order" is comprehensive enough to include "the security of state". Therefore, when the grounds supplied to the detenu do not suggest that there were other grounds besides those mentioned it cannot be said that they do not disclose all the grounds merely because they were described as concerning maintenance of public order while the order stated that the detention was for the security of State as well. See Constitution of India, Art. 22 (5). **52 Cri LJ 543: AIR 1951 Pat 439 (2) (DB).**

——S. 3 — There must be material for satisfaction of authorities — Single instance of obstruction to police held was not sufficient.

It is true that in a case of detention under Preventive Detention Act it is the satisfaction of the detaining authority that must be looked to, but unless there is any material on the strength of which the said authority can be satisfied that it is necessary to order the detention of the person concerned with a view to preventing him from acting in a manner prejudicial to the maintenance of the public order, etc. the mere fact that it is mentioned in the order that he was so satisfied is not sufficient.

Where the only allegation against the detenu was that he obstructed a Police Sub-Inspector in recovering an abducted muslim woman from his house, for which offence a case under Section 353 I. P. C. was registered against him:

Held, that this solitary incident could not form the basis for thinking that the detenu was likely to engage in future in activities prejudicial to maintenance of public order, specially when the State had not even cared to place on record an affidavit of the officer who made an order of detention on behalf of his Highness that he had any material before him at the time of the order on which his satisfaction was based. It was observed that it was a case of high-handedness and misuse of the drastic powers that Preventive Detention Act has vested in the Executive Authorities, and that the detenu was ordered to be detained not with a view to preventing him from indulging in any kind of illegal activities but to teach him a lesson for offending a police officer. **1953 Cri LJ 120: ('52) ILR (1952) Patiala 107: AIR 1953 Pepsu 16 (16) (Prs 2a, 2b).**

——S. 3 — Preventive detention — Grounds.

The admittedly settled legal propositions that pertain to detention under the Preventive Detention Act are:

(i) The propriety of the detention order is the subjective satisfaction of the detaining authority

and cannot be questioned in Court of law. Satisfaction of the detaining authority is to be based on the grounds supplied, supported by instances and particulars; (ii) What is justiciable is whether said grounds and particulars probatively had a proximate casual connection with the object of the detention; (iii) to sustain order of detention, the grounds and each of them have not only to be relevant, but they must not also be vague; (iv) if the said satisfaction is well-based as alleged then the order can only be challenged on grounds of mala fides. 1942 AC 206, Rel. on. **1961 (2) Cr LJ 547: 63 Punj LR 242.**

——**S. 3 (1) (a),** — Criminal P. C. (1898), Section 491 — Application by detenu under Section 491 — Affidavit by District Magistrate — Causing of misunderstanding between two Dominions alleged as additional ground of detention — Ground disallowed. See Criminal P. C. (1898), S. 491. **52 Cri LJ 17: AIR 1951 Punj 157 (DB).**

——**S. 3 (3)** — Preventive Detention — Grounds of detention — Rational relation between the two necessary — Legality of detention. See Constitution of India, Art. 22. **1957 Cri LJ 100; AIR 1957 Raj 5 (DB).**

——**S. 3 (1) — 'New grounds' — What are.**

If the later communication contains facts leading to a conclusion which is outside the grounds first supplied the same cannot be looked into as supporting the order of detention and therefore those grounds are new grounds. AIR 1951 SC 157; 1951 SCJ 208; (1951) 1 MLJ 389, Foll. **1955 Cr LJ 95: 1955 Raj LW 75: ILR (1954) 4 Raj 51: AIR 1955 Raj 6 (11) (Pt I) (Pr 22) (DB).**

——**S. 3 (1) (a) — Detention for investigation of crime — Validity — Criminal P. C. (1898), S. 491.**

If the main ground of detention be investigation of a crime, detention of a person under the Preventive Detention Act would be colourable, and improper. But where the grounds have been definitely mentioned with sufficient precision and details there is little scope for the allegation that the detention is for a collateral purpose. AIR 1945 Nag 8; AIR 1949 Lah 36; 52 Bom LR 268 (FB); AIR 1950 Hyd 68, Disting. **AIR 1952 Sau 12 (13, 14) (Pt B) (Prs 5, 6) (DB).**

24 (A). Grounds for order — Vagueness of.

——**Ss. 3, 7 — Grounds of detention vague — Order of detention is bad.**

If the grounds are so vague that no reply to the grounds is possible, the order of detention must be considered bad and cannot be sustained. **Held,** that each of the grounds contained definite allegations of fact and it could not be said that any of the grounds was so vague that no reply was possible. **1962 (1) Cr LJ 279: AIR 1962 Cal 119 (120) (Pt A) (Pr 2) (DB).**

——**Ss. 3, 7 — Constitution of India, Art. 22 — Grounds supplied to detenu vague — Non-disclosure of grounds in public interest — Rights of detenu — Detention Order held invalid.**

The detenu has to be served with a copy of the order passed by the authority contemplated by sub-section (2) of Section 3 containing, firstly ,the recitals in the terms of one or more of the sub-clauses (a) and (b) of Section 3 (1) which may be called the preamble, and secondly, the grounds contemplated by Section 7, i.e. the conclusions of fact which led to the passing of the order of detention informing the detenu as to why he was being detained. If the grounds do not contain all the particulars necessary for enabling the detenu to make his representation, the detenu may ask for further particulars of the facts and the authority which passed the order of detention is expected to furnish all the information, subject of course to the provisions of sub-section (2) of Section 7, that is to say, the person detained is not entitled to the disclosure of such facts if the authority making the order considers it against public interest to disclose. Therefore, the order of detention to be served on the person detained would usually consist of the first two parts, namely, the preamble and the grounds, but it may also consist of the second part, namely, particulars, if and when they are required or found to be necessary.

The obligation to furnish grounds and the duty to consider whether disclosure of any facts involved therein is against public interest are both vested in the detaining authority. If such privilege is exercised, the detenu cannot be heard to say, apart from the question of mala fides, that the grounds did not disclose the necessary particulars or that in the absence of such particulars he was not in a position to make an effective representation.

Held, that a ground having been kept vague and indefinite and no particulars thereof having been given in spite of the demand made therefor, coupled with the fact that the privilege exercised was to a limited extent, the impugned order must be held to be invalid on this ground **(1965) 6 Guj LR 632: ILR (1965) Guj 644.**

● ——**Ss. 3 and 5 — Grounds — Sufficiency of — Vagueness.**

Where the ground alleged for the detention is capable of being, and has in fact been, intelligently understood by the detenu, it cannot be said that the material furnished to him was not sufficient to enable him to make a representation. It cannot in such a case be held that the grounds are vague. Santhamma v. State of Hyderabad, **52 Cr LJ 1402: ILR (1951) Hyd 654: AIR 1951 Hyd 128 (131, 132) (Pt C) (Pr 13) (FB).**

——**S. 3 (1) — Order of detention under— Validity — Powers of Court to determine — Vagueness of grounds — Effect.**

Though it is not competent to the Court to enquire into the sufficiency of the materials and the reasonableness of the grounds on which the detaining authority was satisfied that it was necessary to make the order under Section 3 (1) the grounds can be scrutinised to see whether the detaining authority had the state of satisfaction necessary to make an order under the section. Unreported decision in Cri. Misc. No. 57 of 1950, Rel. on.

Where a careful scrutiny of the grounds show that they are indefinite and vague on which it is clearly not possible for the applicant to make any representation and they also show that the District Magistrate had not the state of satisfaction which he professed to have when he made the order of detention, statutory requirement of satisfaction has not been fulfilled and the detention of the applicant is not justified. **AIR 1951 Madh Bha 56 (58, 59) (Pt B) (Prs 6, 12) (DB).**

——**S. 3 — Ground sufficient to satisfy authorities — Vague ground.**

Merely because a ground is vague it cannot be considered that it is no ground at all and therefore not sufficient to satisfy the authorities, and a vague ground does not stand on the same footing as an irrelevant ground, which

can have no connection at all with the satisfaction of the Government. 1951 SCR Vol. II, P. 212, Foll. **1952 Cri LJ 1526: ILR (1951) Mys 455: AIR 1952 Mys 85 (87) (Pr B) (Pr 6) (DB).**

——S. 3 (1) — Legality of detention — Original arrest and proceedings under Section 107, Cr. P. Code — Subsequent dropping of same and recourse to S. 3 (1) of Act 4 of 1950 — Inference — Right to be released.

If a person is arrested on a charge of offence or misbehaviour likely to prejudice the public peace under Section 107, Cr. P. Code, and then those proceedings are dropped and recourse is had to Section 3 (1) of the Preventive Detention Act, for his detention, and then after a long time, he is supplied with very vague grounds, he is entitled to have it adjudged that the grounds are not true and that he is detained illegally of improperly, so as to entitle him to be released under Section 491, Cr. P. Code. **ILR (1950) Cut 540: 52 Cr LJ 104: AIR 1951 Orissa 20 (21) (Prs 4, 5) (DB).**

——S. 3 — Constitution of India, Art. 22 (5) — Grounds of detention — Vagueness of — The grounds on which the officer passes order for detention within the meaning of Section 3, should not necessarily mean the detailed facts on which a prosecution in Criminal Court may be launched it is not necessary to mention in the grounds the particulars in the same way as they are mentioned in charge of a criminal offence. It is not safe to judge the vagueness of grounds in a particular case with reference to the grounds in other cases. **1952 Cri LJ 543: AIR 1951 Pat 439 (2) (441) (Pt C) (Pr 5) (DB).**

——S. 3 — Validity of detention — Vague grounds of — Effect — All the grounds supplied to the petitioner must be clear and specific and even if one of them does not satisfy this condition the right of representation guaranteed to the detenu under Art. 22 (5) of the Constitution is affected and consequently the order is illegal. See Constitution of India Art. 22(5). **1953 Cr LJ 1838: AIR 1953 Pepsu 207.**

——Ss. 3 (1) (a) and 7 — Facts and particulars of detenu's acts — Disclosure of — Duty of Government.

The Government is not bound to supply the facts and particulars of the detenu's acts, on the basis of which it forms the satisfaction that it is necessary to make a detention order with a view to preventing the detenu from acting in any manner prejudicial to public peace, etc. But where the ground of detention supplied to the detenu merely states that the detenu is constantly engaged in doing something without telling him anything further it falls short of the requirements of law, because it does not give any information to the detenu which he can controvert and show that there exist no grounds for his detention. Such a ground, therefore, is vague. AIR 1950 SC 211, Disting. **ILR (1953) Patiala 1: 54 Cr LJ 1710: AIR 1953 Pepsu 190 (191) (Pt A) (Pr 4).**

——Ss. 3 and 7 — Ground furnished to detenu stating that he was a believer in the cult of violence — No facts quoted in support of the allegation — Ground is vague and detention illegal. **3 Pepsu LR 77: 1952 Cri LJ 1485: AIR 1952 Pepsu 126 (127) (Pt B) (Pr 5) (DB).**

——Ss. 3, 7 — Grounds — Vagueness.

The question as to what information would be sufficient to enable the detenu to make a proper representation has to be decided with reference to the facts of each case and it cannot be held as a general rule that without specification of time of the activities the ground of detention would always be considered to be vague and indefinite. It is not always necessary that the time of a particular activity must also be given in order to make a ground explicit, if otherwise it is clear enough to make the detenu understand what is being complained against him. (In view of the particulars supplied, ground held not to be vague for want of specification of time of activity). Case law Discussed. **52 Cr LJ 1100: AIR 1951 Pepsu 134 (134) (Pr 4).**

——S. 3 — Detention under — Grounds for — Consideration by Court — (Constitution of India, Art. 22).

The cases decided by the Supreme Court show (i) that whether the grounds given are sufficient or not is not within the ambit of the decision of the Court and it is the subjective decision of the Government which is implied. (ii) There must be a rational connection between the grounds stated by the Government and the objects which are to be prevented under the statute; (iii) that the grounds must not be vague and this applies to each one of the grounds communicated to the detained persons, but this is subject to the claim of privilege under Cl. (6) of Article 22 of the Constitution; (iv) that even if one of the grounds is vague and the others are not, the detention is not in accordance with the procedure established by law and is therefore illegal; and (v) that a detenu can challenge his detention in a court of law on the ground of mala fides.

Held, on a consideration of the grounds supplied to the detenu that they were neither vague nor insufficient to enable him to make a proper representation. The second ground no doubt did not give the facts although it did indicate what was the nature of the activities objected to, but withholding facts is not contravention of the constitutional rights of the petitioner. **ILR (1956) Punj 374: 1957 Cr LJ 1168: AIR 1957 Punj 235 (237, 238) (Prs 14, 16, 19).**

——S. 3 — Constitution of India, Art. 22 (5) — Vagueness of grounds — Where the grounds are so vague that the detenu cannot make an effective representation he has a right to approach the Court and complain that there has been an infringement of his fundamental right and even if the infringement of the second part of the right under Art. 22 (5) is established he is bound to be released by the Court. See Constitution of India, Art. 22 (5). **AIR 1953 Raj 177 (DB).**

——S. 3 — Detention grounds — Dates of activities not mentioned — If sufficient to make grounds vague and insufficient.

Merely because the dates relating to the various activities mentioned in the grounds supplied to the petitioner are missing, the grounds cannot be held to be vague and indefinite. Whether reference to the dates of these activities is necessary in order that the grounds may cease to be vague and indefinite would always depend upon the facts of each case and the nature of the grounds supplied to the detenu. AIR 1949 All 148, Rel. on; 1950 RLW 37, Disting. **1951 Raj LW 263: 1952 Cri LJ 370: ILR (1951) 1 Raj 193: AIR 1952 Raj 33 (34) (Pt B) (Pr 5) (DB).**

24 (B). Grounds for order — Relevancy of.

——Ss. 3 and 7 — Ground for detention — Relevancy — Test of.

In determining whether a ground of detention is or is not relevant to the detention, the grounds

of detention must be regarded as a whole. A ground of detention containing a statement of facts showing the association of the detenu with notorious and proclaimed dacoits is a relevant ground: AIR 1952 SC 324; 1952 SCJ 476 and AIR 1954 Madh B 125, Ref. **Madh BLJ 1954 HCR 1442: Madh BLR 1955 Cri 268: 1955 Cri LJ 476: ILR (1955) Madh B 98: AIR 1955 Madh Bha 36 (40) (Pt G) (Pr 9) (DB).**

——S. 3 — Relevancy of grounds — Determination of.

In determining whether a ground of detention is or is not relevant to the detention, the grounds of detention must be regarded as a whole. The relevancy of the ground in question cannot be determined from the ground standing by itself.

The gravamen of the indictment against the detenu was that he actively associated with notorious dacoits, aided, abetted and harboured them, concealed and confined, abducted or kidnapped women and intimidated witnesses from giving evidence against accused persons. Grounds Nos. 7, 8 and 9 only narrated instances of the petitioner's close association with dacoits.

Held, that the acts mentioned in items Nos. 7, 8 and 9 under the other items formed a chain of acts of the petitioner which might prejudice the maintenance of public order. AIR 1952 SC 324 Foll.; AIR 1954 SC 179, Distinguished and explained. **Madh BLR (1954) Cr 108: 1954 Cri LJ 1062: Madh BLJ 1954 HCR 582: ILR (1954) Madh B 445: AIR 1954 Madh Bha 125 (127) (Pt B) (Pr 4) (DB).**

——Ss. 3, 7 — Relevancy of grounds — Test.

In order to find out whether any particular ground is or is not relevant, regard must be had to all the grounds as a whole. AIR 1952 SC 324, Foll. **1960 Jab LJ 522: 1961 MPLJ 1136.**

——S. 3 — Grounds — Relevance.

For determining relevance of any one ground the grounds of detention must be regarded and read as a whole. 1952 SCJ 476: AIR 1952 SC 324; AIR 1959 SC 1335, Relied on.

Held, that the plain reading of the grounds and particulars supplied clearly showed that none of the grounds was irrelevant. In any event, if they were read as a whole, the statements calling upon persons to build up strong movement for Punjabi Suba demand and rousing communal passions that it must be attained at all costs and not refraining from even preaching violence, could not be said to be wholly unconnected with the maintenance of public order. **1961 (2) Cri LJ 547: 63 Punj LR 242.**

24 (C). Grounds for order — Whether the order is vitiated by one or more extraneous grounds.

——S. 3 (1) (a) (ii) — Grounds for order — Order based on various grounds—Some of them too vague — Some others were decided in favour of detenu at his previous trial before competent Court — Order held vitiated on both grounds — Constitution of India, Arts. 21 and 22 (5) — Vagueness of grounds for detention — Estoppel —Grounds decided in favour of detenu at previous trial cannot be made basis for his subsequent detention. **1965 All WR (HC) 266: 1965 All Cr R 196: ILR (1965) 2 All 261.**

——S. 3 (1) (ii) — Detention order made on totality of facts — Particulars of grounds of detention should not be considered in isolation.

Where the detention order was made on the totality of the facts contained in the particulars attached to the ground it would not be right to take a particular ground and study it in isolation from the rest. It would be only necessary to take the particulars together and in order to see whether they could have reasonably produced the personal satisfaction of the authority making the order and whether all of them were such as to have enabled the detenu to make an effective representation against the order. AIR 1962 Cal 119, Rel. on. **1964 (1) Cri LJ 515: AIR 1964 Cal 231 (233) (Pt C) (Pr 10) (DB).**

——S. 3 — Several grounds of detention — One of them subject-matter of prosecution — Detention is not illegal.

Where there are several grounds of detention and one of them is the subject-matter of a criminal prosecution that does not make the order of detention illegal. If it be proved that the detention was resorted to for a collateral purpose, then it would be a different matter. The question has to be approached and answered in each case on the footing whether the order of detention in view of the pending prosecution is bona fide or not. For answering the question the uncontroverted fact may have to be considered and the test will be whether the order of of detention is for the purpose it purports to be or really for any ulterior or collateral purpose. **MBLR 1955 Cr 265: Madh BLJ 1955 HCR 36: AIR 1955 MB 65 (65) (Pt A) (Pr 3) (DB).**

——Ss. 3 and 7— Several grounds of detention— One or more beyond scope of Act — Entire order of detention is vitiated.

When out of the several grounds of detention one or more are beyond the scope of the Act under which an order of detention is made, even if some of the grounds are legal, the entire order of detention is vitiated thereby and in the application of this principle the reason why a particular ground is held to be beyond the scope of the Act is not material at all. AIR 1943 FC 1; AIR 1950 Punj 222 and AIR 1949 All 158 & AIR 1948 Bom 334 (FB) and AIR 1950 Mad 162, Rel. on; AIR 1949 All 248, Dissent. **3 Pepsu LR 77: 1952 Cri LJ 1485: AIR 1952 Pepsu 126 (128) (Pt D) (Pr 8) (DB).**

25. Power of Court.

(A) Power of Court — Satisfaction of detaining authority if justiciable.

(B) Power of Court — Grounds of detention if justiciable.

25. Power of Court.

——S. 3 — Vagueness of grounds — Satisfaction of authority — Constitution of India, Article 22 (5).

Vague grounds do not stand on the same footing as irrelevant grounds. An irrelevant ground has no connection at all with the satisfaction of the State Government making the order of detention. Further it cannot be said that if the grounds are vague and no representation is possible there can be no satisfaction of the authority as required by Section 3. The sufficiency of the grounds, which gives rise to the satisfaction of the State Government is not a matter for examination by the Court. The sufficiency of the grounds to give the detained person the earliest opportunity to make a representation can be examined by the Court, but only from that point of view. The quality and characteristic of the grounds need not be the same for both tests. One person may be but another may not be satisfied on the same grounds. That aspect however is not for the determination of the Court. The second part of the inquiry is clearly open to the Court under Art. 22 (5). Even if the grounds are not suffi-

cient or adequate for making the representation the grounds may still be sufficient for the subjective satisfaction of the authority. Tarapada De v. State of West Bengal, **52 Cri LJ 400: 1951 SCJ 233: (1951) 1 Mad LJ 431: 1951 SCR 212: 1951 Mad WN 549: 1951 Mad WN (Cri) 165: AIR 1951 SC 174 (176, 177) (Pt C) (Pr 8).**

——S. 3 (1), (a), (ii) — Detention under and also under ordinary law — Effect — Habeas Corpus Petition — Proper order — (Constitution of India, Art. 226) — (Cri. P. Code (1898), Section 491).

In proceedings under habeas corpus petition what the Courts have to see is whether the particular detention complained of is lawful or not. If not lawful, the Courts would order the release of the petitioner from detention under such a detention order. If the petitioner is also being held in detention under some other valid and lawful order, the order that the Court would pass would naturally have to be a conditional one. Otherwise the petitioner who is detained both under the ordinary law — where he could apply for and possibly get bail — and the Preventive Detention Act which he attacks as being unlawful, would be in the impossible position of not being able to secure his release from detention under any circumstances. If the order is passed in the conditional form, the petitioner having secured to get the main impediment removed from his way could try for his release on bail for offences under the ordinary law. AIR 1951 Assam 43 and AIR 1955 NUC (Raj) 1480, Rel. on. **ILR (1957) 2 All 42: 1957 Cri LJ 1361: AIR 1957 All 782 (789, 790) (Pt A) (Prs 7, 8) (DB).**

——S. 3 — Duty of Court — Considerations of security of State — How far material — (Constitution of India, Art. 22).

It is very essential that a Court of Law should, as far as possible, keep away from the heat and dust of political battle and make an objective and detached appraisal of the record before it. That does not mean that the Court should not be anxious to see that the security of the State is maintained. Nor does it mean that the Court should not see to it that the Preventive Detention Act which is intended for security of the State, is not an effective instrument in the hands of the State.

It is however, equally necessary especially in critical times, that the Court should be vigilant to safeguard the liberty of the subject. The conflict between the security of the State and the liberty of the subject is always a conflict difficult to resolve but the Constitution and the Preventive Detention Act have sought to resolve it by arming the State with wide powers and at the same time providing important safeguards for the liberty of the subject. **1956 Cr LJ 875: ILR (1956) Bom 792: 58 Bom LR 473: AIR 1956 Bom 490 (491) (Pt B) (Pr 1) (DB).**

——S. 3 — Constitution of India, Art. 226 — Habeas Corpus — Mala fide detention alleged — Duty of Court. See Constitution of India, Article 226. **1952 Cri LJ 1076: AIR 1952 Hyd 112 (DB).**

——S. 3 — Satisfaction of authority — Power to issue detention order depends upon satisfaction of appropriate authority — Sufficiency of grounds cannot be challenged except on ground of mala fides. **AIR 1955 NUC (Madh B) 3867 (DB).**

——S. 3 — Mala fides of authorities.

The High Court is not at all concerned with the mala fides or otherwise of any one except the detaining authority. AIR 1961 SC 531; 1956 SCJ 559, Foll. **1960 Jab LJ 522: 1961 MPLJ 1136.**

——Ss. 3 (1) (a) (ii), 6 (1) (b) — Distinction between orders under —Grounds of order under S. 6 (1) (b) — Satisfaction of District Magistrate cannot be challenged.

Where the District Magistrate was already satisfied under Section 3 that the petitioner's detention was necessary and that satisfaction of the District Magistrate has not been challenged, the subsequent order issued under Section 6 (1) (b), calling upon the petitioner to appear before the Superintendent of Police within 10 days from the date of the order, cannot be challenged.

When the District Magistrate has stated in his order under Section 6 (1) (b) that he had reason to believe that the petitioner had absconded or was concealing himself, the High Court, in revision against the order, cannot substitute its own satisfaction for that of the District Magistrate. It is the subjective satisfaction of the District Magistrate which is material. 1950 SCJ 433; (1950) 2 Mad LJ 555; AIR 1950 SC 451, Rel. on. **1962 (1) Cr LJ 173: AIR 1962 Manipur 12 (13) (Pt A) (Prs 5, 7).**

——S. 3 (1) — Validity of detention — Jurisdiction of High Court to grant bail.

Preventive Detention Act, Section 3 (1) requires that the authority directing the detention has to be satisfied after applying his mind, that such detention is necessary in the interests of the State and for the maintenance of public order. If a challenge is made about the accuracy or the prima facie correctness and regularity of the order, it is upon the State Government to satisfy the Court that the order complained against does not suffer from any obvious infirmity or irregularity. Where all that appears from the order is that it has been properly authenticated, that by itself does not show that the order of detention was validly made. If, as is clear from the evidence, the materials upon which the order of detention in question is based are not placed before the proper authority who has to decide such matters and it appears that that authority did not apply his mind with a view to satisfy himself about the necessity for such detention, then the condition precedent to the making of the order of detention is lacking and the order can consequently be successfully challenged as a nullity.

Ordinarily bail should not be granted in cases under the Preventive Detention Act but in an extraordinary case where the extreme urgency arising out of the commencement of the elections wherein the detenu is a candidate and the repeated dilatory tactics adopted by the Government not being ready for the final hearing of the petitions, granting of bail is justified, to enable the detenu to contest the elections in his constituency subject to certain necessary restrictions consistent with the security of the State. **ILR (1951) Cut 624.**

——S. 3 (1) — Satisfaction of executive authority — High Court cannot question.

Where two inferences including the one that was drawn by the State Government are possible on the facts mentioned in the grounds supplied to the detenu, it is not open to the High Court to say that that particular inference should not have been drawn by the State Government. The High Court cannot undertake an investigation as to the truth or otherwise of the materials on which the satisfaction of the executive authority is grounded. The facts alleged have to be taken to be correct and it will

not be a ground for interference if the detenu merely puts forward a counter-version. Putting a counter-version is not the same thing as placing circumstances which can go to establish that the alleged facts or grounds are non est. 11 FCR 827, Ref. **52 Cri LJ 1231: ILR 30 Pat 653: AIR 1951 Pat 153 (155) (Pt C) (Pr 5) (DB).**

——S. 3 (1) — More courses than one open to State Government — It may take any effective course.

In starting proceedings against a person where more courses than one are open to the State Government, to cancellation of the licence issued in his favour under one of the Control Orders, prosecution under the Essential Supplies (Temporary Powers) Act, 1946, or detention under the Preventive Detention Act, 1950, it is for the State Government to decide which alternative it should adopt or which is most effective in the circumstances of the case. It is not for the Court to decide the matter even to express any opinion as to which alternative should be the most effective. **52 Cri LJ 406: ILR 30 Pat 630: AIR 1951 Pat 47 (52) (Pr D) (Pr 15) (DB).**

——S. 3 (1) — High Court when will interfere.

Affidavits filed on behalf of the detenus may generally be divided into three Classes (i) those that consist of a mere denial of the grounds or facts alleged (ii) those that consist of an attempted explanation of the fact alleged, the truth of the explanation depending on credibility of evidence; and (iii) those that disclose circumstances which render the grounds or the facts on which the grounds are founded completely non-existent, that is, inaccurate on the face of them, without the necessity, and independent of the question, of any evidence. It is in the last class of cases the High Court can interfere on the ground that the order is not bona fide. The first two classes of cases are those in which the Advisory Board is the proper authority to consider the denial or the explanation. **52 Cri LJ 1231: ILR 30 Pat 653: AIR 1951 Pat 153 (156) (Pt E) (Pr 9) (DB).**

——S. 3 — Essential commodity — Views of executive — If subject to review by Courts.

As essential commodities have not been defined by Section 3 what is regarded by the Executive as an essential commodity must be subject to review by the Courts, though no doubt proper weight would be attached to the views of the Executive if supported by proper materials. **54 Pun LR 88: 1952 Cri LJ 416: AIR 1952 Punj 124 (127) (Pt C) (Pr 11) (DB).**

——S. 3 (1) (a) (i) (ii) — Constitution of India. Art. 226 — Habeas corpus — Preventive detention — Legality — A writ Habeas Corpus is intended for the protection of personal liberty which is a fundamental right under the Constitution and considering the object for which the power has been conferred it is conceived that whenever the case of unlawful deprivation of personal liberty is brought to the notice of the Court the Court will not hesitate to issue the writ. But the writ can be refused on appropriate grounds. See Constitution of India, Article 226. **1956 Cri LJ 118: AIR 1956 Tripura 1.**

——S. 3 — Bona fides of detaining authority — Power of Cour to ascertain.

Although it is not open to the Court to scrutinize the correctness or the incorrectness of the allegations made by the detaining authority, yet it is entitled to know that the order is bona fide. **AIR 1952 Vindh Pra 36 (38) (Pt B) (Pr 16).**

25 (A). Power of Court — Satisfaction of detaining authority if justiciable.

●**——S. 3 — Power of Court — Propriety or reasonableness of satisfaction of detaining authority if can be questioned.**

The propriety or reasonableness of the satisfaction of the Central or the State Government upon which an order for detention under S. 3 of the Preventive Detention Act is based, cannot be raised and the Supreme Court cannot be invited to undertake an investigation into sufficiency of the matters upon which such satisfaction purports to be grounded. The Supreme Court can, however, examine the grounds disclosed by the Government to see if they are relevant to the object which the legislation has in view, namely, the prevention of objects prejudicial to the defence of India or to the security of State and maintenance of law and order therein. Sodhi Shamsher Singh v. State of Pepsu, **1954 Cr LJ 735: AIR 1954 SC 276 (277) (Pt A) (Pr 4).**

●**——S. 3 (as amended by Act 4 of 1951) — Subjective satisfaction of detaining authority — Effect of amending Act of 1951.**

Where the grounds given for the detention are relevant the question whether they are sufficient or not is not for the decision of the Court. The Legislature has made only the subjective satisfaction of the authority making the order essential for passing the order. The satisfaction for making the initial order is and has always been under the Preventive Detention Act, that of the authority making the order. Because the Amending Act of 1951 establishes a supervisory authority, that discretion and subjective test is not taken away and by the establishment of the Advisory Board, the Court is not given the jurisdiction to decide whether the subjective decision of the authority making the order was right or not. Bhim Sen v. State, **52 Cri LJ 75: (1951) 2 Mad LJ 641: 1951 Mad WN 865: 1951 SCJ 747: 1951 Mad WN (Cri) 285: 1952 SCR 18: ILR (1952) Punj 1: AIR 1951 SC 481 (483) (Pt B) (Pr 7).**

●**——S. 3 — Satisfaction of Government — If can be challenged — Constitution of India, Article 22 (5).**

Before the Government can pass an order of preventive detention under Section 3 it must be satisfied with respect to the individual person that his activities are directed against one or other of the three objects mentioned in the section, and that the detaining authority was satisfied that it was necessary to prevent him from acting in such a manner. It is the satisfaction of the Central Government or the State Government on the point which alone is necessary to be established.

The satisfaction of the Government must be based on some grounds. There can be no satisfaction if there are no grounds for the same. If the grounds on which it is stated that the Central Government or the State Government was satisfied are such as a rational human being can consider connected in some manner with the objects which were to be prevented from being attained, the question of satisfaction except on the ground of mala fides cannot be challenged in a Court. State of Bombay v. Atmaram, **52 Cri LJ 373: 1951 SCJ 208: (1951) 1 Mad LJ 389: 53 Bom LR 437: 1951 SCR 167: 1951 Mad WN 532: 1951 Mad WN (Cri) 148: 21 Bom Cri Cas 134: AIR 1951 SC 157 (160) (Pt A) (Pr 5).**

——S. 3 (1) (a) (iii) — Satisfaction of detaining authority — Power of Court to go into evidence and question satisfaction.

If the detaining authority on the evidence placed before it is satisfied that the applicants are, unless detained, likely to act in a manner prejudicial to the maintenance of supplies and services essential to the community, the Court cannot go into the evidence and cannot question the satisfaction of the detaining authority. The satisfaction must, however, be honest satisfaction. Where wrong facts were placed by subordinate official before the detaining authority, but that authority acted on the belief that these facts were true, it cannot be said that its satisfaction was not an honest satisfaction. **1951 All WR (HC) 502: 1951 All Cri Cas 123: 1952 Cri LJ 372: AIR 1952 All 180 (182) (Pt C) (Prs 14, 17).**

——S. 3 — Satisfaction of detaining authority.

The satisfaction contemplated in Section 3 is the satisfaction of the District Magistrate and it is not open to the Court to examine minutely into the reasonableness or otherwise of the order. **1951 ALJ 203: 52 Cri LJ 3: AIR 1951 All 838 (844) (Pt D) (Pr 25) (DB).**

——S. 3 (1) (a) — Jurisdiction of Court — Merits of order — Power of Court to go into — Function of Court.

Under the scheme of the Preventive Detention Act, it is a matter entirely for the detaining authority as a representative of the executive Government to decide whether the activities of a particular person are prejudicial to the security of the State, the maintenance of public order, etc. It is that authority alone, and not the Court, who is in the best position to take a decision whether the detention of a particular person is called for on any of the reasons mentioned in Section 3 (1) (a) of the Act. The High Court is no doubt competent to decide whether a detaining authority had jurisdiction to pass an order of detention, or had applied its mind properly to the question of detention or whether the detention order was passed mala fide or whether any of the grounds fell outside the scope of the Act or whether the order is invalid for any other reason. But it is not open to the Court to go into the question whether on merits the detaining authority had jurisdiction to pass the order of detention or to continue the detention. That under the Act is a sphere exclusively of the detaining authority and upon this sphere the Court cannot encroach. It is the detaining authority alone whose satisfaction as to whether a person should be detained is material and relevant under the scheme of the Act, and it is that authority which has got to see whether the activities of the particular person are prejudicial to the maintenance of public order, the activities of the particular person are pre- **54 Bom LR 620: ILR (1953) Bom 182: 1953 Cr LJ 322: AIR 1953 Bom 59 (61) (Pt C) (Pr 7) (DB).**

——S. 3 — Satisfaction of detaining authority — Sufficiency of materials — Powers of High Court.

The question of sufficiency of materials to induce the subjective satisfaction of the detaining authority, does not fall to be considered by the High Court since that is not justiciable. The High Court cannot even examine whether the grounds were true or false. All that the High Court is concerned with is to see whether the grounds which were communicated to the detenue were such as enabled him to exercise his constitutional right to make an effective representation against the order of detention. **1962 (1) Cr LJ 311: ILR (1961) 1 Cal 276: AIR 1962 Cal 162 (166) (Pt G) (Pr 13) (DB).**

——S. 3 — Satisfaction of detaining authorities — High Court cannot enquire into truth or otherwise of facts mentioned in grounds.

It is for the Government to be satisfied as to the truth or otherwise of the facts contained in the grounds; and thereafter it is for the detenue to make his representation before the Advisory Board, and then it is for the Advisory Board to consider the representation and the evidence produced by the State Government in support of the allegations and the evidence if any to the contrary, and then come to its decision. The satisfaction being a subjective satisfaction of the Government and of the Advisory Board, it is not open to the High Court to inquire into the truth or otherwise of the facts mentioned in any of the grounds. **1962 (1) Cr LJ 279: AIR 1962 Cal 119 (120) (Pt B) (Pr 4) (DB).**

——Ss. 3 and 7 — Sufficiency of material to arrive at conclusion that detenu is likely to indulge in prejudicial activities is solely question for detaining authorities — Correctness of statements of past activities of detenu is not justiciable — Prejudicial activities alleged to continue till time of arrest — That activities in remote past were considered, is immaterial.

Whether there is sufficient material for arriving at the conclusion that the detenu is likely to indulge in prejudicial activities is a question solely to be decided by the Detaining Authority. It is not necessary that such a conclusion should be arrived at on legal proof. It is well settled that the question whether the Detaining authority was right in view of the material before it in issuing the order of detention is not justiciable.

The scope of judicial enquiry in the proceedings challenging the order under the Preventive Detention Act is a limited one. The correctness of the statements relating to the past activities of the detenu is not justiciable. Thus, the Court cannot examine the past activities of the detenu as alleged by the detaining authority. The reason for the exclusion from judicial scrutiny is that the satisfaction under Section 3 of the Preventive Detention Act is subjective and no Court can substitute its opinion of the material for that of the authority and thereby hold the satisfaction to be wrongly reached. Thus, if a detenu states that the grounds alleged are false, the Court cannot adjudicate on the question of the correctness of the grounds. ILR (1951) Hyd 654; AIR 1951 SC 157, Rel. on.

That the detaining authorities had taken notice of activities in remote past, is immaterial when prejudicial activities were alleged to continue till time of arrest.

Per Srinivasa Chari J.:— The state of mind of a person who makes an order is pre-eminently a fact within his knowledge and if on the material before him he comes to the conclusion that he is satisfied that if the detenu were allowed to be at large there was every likelihood of his inciting innocent people to resort to violence, he would be justified in restraining the activities of the man by an order of detention. It is a matter for subjective decision and can never be subjected to an objective test. The satisfaction that is expected is of the executive as it is the executive which is entrusted with the duty of maintaining peace and order. **ILR (1952) Hyd 122: 1952 Cri LJ 1076: AIR 1952 Hyd 112 (114, 119) (Pt A) (Prs 3, 16) (DB).**

——S. 3 — Satisfaction of detaining authority — Power of Court.

Where the Government of a State being satisfied that any person is acting in a manner pre-

judicial to public safety and maintenance of public order makes an order detaining him, it is not open to the detenu to invite the Court to go into the question as to whether the satisfaction of the detaining authority was on proper or reasonable grounds. **52 Cri LJ 710 (2); ILR (1951) Hyd 168: AIR 1951 Hyd 83 (85) (Pt B) (Pr 8) (DB).**

——**S. 3** — Power of High Court — Satisfaction of District Magistrate is required — High Court cannot examine material on which satisfaction is based — High Court can only determine whether on grounds supplied order of detention could not be passed — (Constitution of India, Art. 226) — (Criminal P. C. (1898), S. 491). **AIR 1955 NUC (Madh B) 3864.**

——**S. 3 — Satisfaction under — Powers of Court, to determine.**

A detenu is not entitled to urge that High should enquire into the sufficiency of the material which was before the District Magistrate or reasonableness of his satisfaction with regard to the detention of the petitioner. All that he can urge is that the satisfaction of the detaining authority is not a real satisfaction. **AIR 1951 Madh Bha 51 (54, 55) (Pt C) (Pr 13) (DB).**

●——**S. 3 (1) — Satisfaction— Powers of High Court.**

Per Mudholkar J. — As the satisfaction of the Government is based on material which is proper for the consideration of the Government, the High Court cannot go behind it. B. N. Mukherjee v. State Government, Madhya Pradesh, **1951 All WR (Supp) 21: 1951 Nag LJ 71: ILR (1951) Nag 1: AIR 1951 Nag 1 (2) (Pt B) (Pr 4) (FB).**

——**S. 3 — Powers of High Court.**

Where it is amply clear that the State Govt. were in possession of facts on which they felt satisfied that it was absolutely necessary to prevent the petitioners from acting in a manner prejudicial to the maintenance of supplies and services essential to the community, the High Court cannot go into facts to find out whether the facts were sufficient for the satisfaction of the State Government or not. **1953 BLJR 371: 1953 Cr LJ 1734: AIR 1953 Pat 351 (352) (Pt A) (Pr 3) (DB).**

——**S. 3 — Detaining authority must be satisfied that it is necessary to detain person to prevent him from carrying on prejudicial activities —Grounds supplied not irrelevant — Court cannot enter into their sufficiency.**

Before the Government can pass an order of preventive detention under the Act it must be satisfied with respect to the individual person that his activities are directed against one or other of the objects mentioned in the Act and that it was necessary to prevent him from acting in such a manner. If the ground by itself is not so convincingly irrelevant and incapable of bringing about satisfaction to any rational person the question whether such ground can give rise to the satisfaction required for making the order is outside the scope of the inquiry of the Court. 1951 SCR 167, Rel. on. **1952 Cri LJ 1382: AIR 1952 Pat 374 (376) (Pt B) (Pr 6) (DB).**

●——**S. 3 — Power of Court to question facts.**

It is not open to the High Court to question the facts stated in the grounds of detention, or whether those facts were sufficient to satisfy the detaining authority to order the detention of the detenu. Misrilal Tailor v. State, **52 Cri LJ 1175: ILR 30 Pat 716: AIR 1951 Pat 134 (135) (Pt B) (Pr 4) (FB).**

——**S. 3 — Satisfaction — Nature of— Satisfaction based on wrong or false material — Effect — Jurisdiction of Court.**

It is settled law that satisfaction contemplated by S. 3 is the satisfaction of the detaining authority and not that of the Court. From this it follows that the question that the material placed before the detaining authority upon which his satisfaction, was based was false or true or that he was misled in forming the satisfaction is irrelevant. So long as there is material before the authority on which the said authority bases his satisfaction and proceeds to act thereon, the Court has no jurisdiction to scrutinise that material. 1 Pepsu LR 447, Rel. on. **52 Cri LJ 1438: AIR 1951 Pepsu 164 (167) (Pt B) (Pr 11) (DB).**

——**Ss. 3, 7 — Detention grounds — Allegation against detenu — Power of Court to enquire.**

It is beyond the scope of a habeas corpus petition to go into the question whether the allegations on which the grounds of detention were based, were without foundation for the simple reason that it is the subjective satisfaction of the authority that makes the order of detention which is required and not that of the Court. **(1950) 3 Pepsu LR 238.**

——**S. 3 (1) (a) — Satisfaction — Duty of Court.**

When an application is made challenging the existence of the satisfaction, what the Courts have got to see is whether there was the subjective satisfaction of the authority which made the order and not whether there were grounds upon which a reasonable person could be satisfied that it was necessary to make the order, the latter being at times called an objective test of the satisfaction. **('51) 4 Sau LR 45 (47) (DB).**

25 (B). Power of Court — Grounds of detention if justiciable.

——**S. 3** — Criminal P. C. (1898), S. 491 — Detention under Preventive Detention Act — Application under S. 491 — Extent of High Court's power—All that can be seen in the proceedings is whether the grounds communicated are connected with the order of detention and whether the order made was bona fide or mala fide. The question of correctness of the grounds of detention cannot be enquired into by the High Court. See Criminal P. C. (1898), S. 491. **AIR 1951 All 456.**

——**S. 3** — Constitution of India, Art. 22 — Grounds of detention — Consideration by Court — The Courts can examine the grounds disclosed by the Government to see if they are relevant to the object which the legislature has in view. But if the relevancy is placed beyond doubts the sufficiency of the grounds which gives rise to the satisfaction of the detaining authority is not a matter for examination by Court. **(1958) 2 Andh WR 589: 1958 Mad LJ (Cri) 913: 1958 Andh LT 1136: 1959 Cri LJ 160: AIR 1959 Andh Pra 73 (76, 77) (Pt B) (Pr 8) (DB).**

——**S. 3 — Satisfaction of authority — Powers of High Court — (Constitution of India, Art. 226).**

The satisfaction in S. 3 is that of the detaining authority and the High Court can only scrutinise the grounds furnished to see whether they are in fact relevant to the object sought to be achieved. **(1957) 1 An WR 97: (1957) Mad LJ (Cr) 34: 1957 An LT 223: 1957 Cri LJ 703: ILR (1957) Andh Pra 167: AIR 1957 Andh Pra 143 (146) (Pt C) (Pr 11) (DB).**

——**Ss. 3 and 7 — Power of Court to question truth or falsity of grounds.**

The Court cannot go into the question of truth or falsity of the statement of facts contained in the grounds of detention. If the facts stated in the grounds of detention are disputed, the remedy that the law allows to the petitioner is by a representation to the Government. **1953 Cri LJ 770: ILR (1953) 5 Assam 66: AIR 1953 Assam 97 (100) (Pt B) (Pr 21).**

——Ss. 3 (1) (a) (ii) and 7 — Detention under — Grounds for — Power of Court to determine sufficiency of — Grounds should not be vague or indefinite — Particulars of activities of detenu need not be supplied.

In determining the validity of an order of detention under S. 3, the Preventive Detention Act, it is not open for the Court to determine the sufficiency of the reasons which induce the detaining authority to issue the order of detention nor to investigate into the evidence upon which the authority was satisfied that it was necessary to detain the person concerned against whom such an order is made. The satisfaction required under the section must be the satisfaction of the authority issuing the order but such authority must be reasonably satisfied that the detention of the person is necessary for the security of the State or the maintenance of public order or communal harmony and the Court in the exercise of its powers will be competent to determine whether such an order could have been made by a person acting reasonably and if it is found that the authority did apply its mind in passing the order, it will set it aside. AIR 1949 Oudh 20, Applied.

The omission of the word "particulars" in the Preventive Detention Act is not accidental but deliberate and decidedly it has widened the scope of the detaining authority's discretion. He is not now required to supply the detenu with the particulars of his activities. But the elimination of the necessity of mentioning particulars does not take away from the detaining authority the responsibility of not leaving the grounds vague and indefinite. They must also be such as to enable the detenu to make an effective representation to him. If the aforesaid conditions are not fulfilled, the grounds of detention cannot be called good and the detenus are entitled to be released.

Held, on a consideration of the grounds supplied to the detenus that they were not good grounds and therefore, the detenus were entitled to be released. **1952 Cri LJ 660: AIR 1952 Bhopal 1 (5, 6) (Pt D) (Prs 21, 29).**

——Ss. 3 (1) and 7 — Order of detention — Grounds — High Court's powers to go into matter.

An order of detention made by the authority exercising jurisdiction under S. 3 (1) of the Preventive Detention Act has to be founded on certain basic facts which rationally lead to the conclusion to which the detaining authority has arrived. Although it is not open to the High Court either to question the sufficiency of grounds on which the order has been made or to embark upon an enquiry into the questions of fact but the High Court can find out whether the order of detention has been made on rational grounds. AIR 1951 SC 157 and AIR 1959 SC 1335, Rel. on. **1961 Nag LJ (Notes) 34.**

——S. 3 — Criminal P. C. (1898), S. 491 — Order of detention under Preventive Detention Act (1950) — Powers of High Court to interfere — High Court cannot investigate truth or falsity of particulars — It can only consider whether detenu could make effective representation or mala fide on part of detaining authority. See Criminal P. C. (1898), S. 491. **1964 (1) Cri LJ 515: AIR 1964 Cal 231 (DB).**

——S. 3 — Grounds of detention — Truth of — Powers of High Court — The Court has no power to investigate the truth or otherwise of the grounds of detention. 1962 (1) Cri LJ 311: ILR (1961) 1 Cal 276: AIR 1962 Cal 162 (164) (Pt B) (Pr 7) (DB).

——Ss. 3 and 7 — Power of Court to question vagueness of grounds.

The Court can only go into the question whether the grounds supplied to the detenu are irrelevant or vague and can afford a basis for the subjective satisfaction of the detaining authority. **56 Cal WN 427: 1953 Cri LJ 310: AIR 1953 Cal 81 (82) (Pt C) (Pr 12) (DB).**

——S. 3 — Grounds of detention if justiciable.

Whether there is sufficient material for arriving at the conclusion that a detenu is likely to indulge in prejudicial activities is a question solely to be decided by the detaining authority. It is not necessary that such a conclusion should be arrived at on legal proof. It is well settled that the question whether the detaining authority was right in view of the material before it in issuing the order of detention is not justiciable. **ILR (1952) Hyd 122: 1952 Cri LJ 1076: AIR 1952 Hyd 112 (114, 119) (Pt A) (Prs 3, 16) (DB).**

——S. 3 — Detention under — Grounds — Sufficiency of — If and when can be challenged in Court of law — Court not to inquire into truth or otherwise of facts stated therein.

The power to issue a detention order under Section 3 of the Preventive Detention Act depends entirely upon the satisfaction of the appropriate authority specified in that section and the sufficiency of the grounds upon which satisfaction purports to be based, provided they have a rational probative value and are not extraneous to the scope or purpose of the legislative provision cannot be challenged in a Court of law, except on the ground of mala fides. The truth or otherwise of the facts which are mentioned as grounds of detention in the communication to the detenue cannot also be inquired into by a Court of law. AIR 1954 SC 179 and AIR 1954 MB 125, Foll. **1956 MBLJ 1270.**

——Ss. 3 and 7 — Sufficiency of grounds — Power of Court to go into.

The power to issue a detention order under S. 3 depends entirely upon the satisfaction of the appropriate authority specified in that section. The sufficiency of the grounds upon which such satisfaction purports to be based, provided they have a rational probative value and are not extraneous to the scope or purpose of the legislative provision, cannot be challenged in a Court of law except on the ground of mala fides. A Court of law is not competent to enquire into the truth or otherwise of the facts which are mentioned as grounds of detention communicated to the detenue: AIR 1951 SC 157; AIR 1951 SC 174 and AIR 1954 SC 179, Ref. **Madh BLJ 1954 HCR 1442: Madh BLR 1955 Cr 268: 1955 Cri LJ 476: ILR (1955) Madh Bha 98: AIR 1955 Madh Bha 36 (39) (Pt E) (Pr 8) (DB).**

——S. 3 — High Court precluded from going into the truth or adequacy of the grounds of detention communicated to the detenu: AIR 1954 MB 125, Foll. — (Constitution of India, Art. 22). AIR 1955 NUC (Madh Bha) 3100 (DB).

——S. 3 — Sufficiency of grounds — When can be examined by Court.

Sufficiency of the grounds for the purpose of satisfaction of the Government is not a matter

for examination by the Court; their sufficiency to give the detained person the earliest opportunity to make a representation can be examined by the Court but only from the point of view of seeing if it is relevant, i.e., it can have some connection with the satisfaction of the Government. **1952 Cri LJ 1526: ILR (1951) Mys 455: AIR 1952 Mys 85 (87) (Pt C) (Pr 7) (DB).**

——S. 3 (1) — Applicability — Detention under after expiry of period of detention under Orissa Act (4 of 1948) — Legality — Reasonableness of satisfaction of detaining authority — Power of Court to investigate — Past acts of detenu — Relevancy of.

It cannot be ruled as an absolute proposition of law that once a man is detained under a preventive detention measure (Orissa Maintenance of Public Order Act) on the basis of his prejudicial activities, he cannot, on the expiry of the term, again be detained on the selfsame grounds under the Preventive Detention Act. A man is to be adjudged by his association with politically dangerous individuals, or his advocacy of a cause which, if pursued, involves manifestation of violence, sabotage, chaos and confusion in the present day political and economic set up of things, and is, otherwise, subversive of the estabished Government. Nor can it be said that the past acts of a man are not safe criteria of his propensities. If the members of of a particular group of agitators are known to be, as a matter of habit, exploiting the situation prevailing in the country, and if their political aims, as judged from their past acts, are not offset by any change in their creed and if there be no reasonable ground to believe that the views of the particular member concerned have undergone fundamental change, these circumstances would constitute reasonable grounds to the satisfaction of the detaining authorities. The Court cannot investigate into the authenticity of the allegations on which orders of detention are passed. Grounds which would be insufficient in one state of things would be overwhelmingly sufficient in another state. So long and so far as the conditions justifying necessity for prevention exists, a detention order made within the reasonable limits laid down by the Legislature would be quite justifiable. It would be beyond the Court's power of interference even if it does not fit within judicial strait-jacket.

There is no fundamental or great divergence between the Preventive Detention Act (4 of 1950) and the Orissa Public Security Measures Act which was formerly in force. The relevant sections in both Acts are almost identical.

It may be assumed or acknowledged to be correct that for a certain period the past acts of a citizen will be a sufficient guide for the authorities to control his movements, so as to prevent him from acting in a manner prejudicial to the public safety. What would be the particular period is not for the Court of justice to decide or define, but for the detaining authority to decide nor can any hard and fast rule be laid down as to that. The detaining authority is in a more advantageous position of having all the materials before it, a large part of which is not available to the Court. **52 Cr LJ 110: 17 Cut LT 313: AIR 1951 Orissa 27 (27 to 29) (Pts A, B, C) (Prs 3 to 7) (DB).**

——Ss. 3 and 4 — Power of Court — Power to substitute its judgment for that of Government.

In an application by a detenu ordered to be detained by an order under Sections 3 and 4 of the Preventive Detention Act filed under Section 491, Cr. P. Code, or Article 226 of the Constitution, the High Court cannot treat detention cases as though they were cases under trial before it and to substitute its own judgment for that of the State Government. When the grounds communicated to the detenu are sufficiently precise and definite and cannot be said to be imaginary, it is not for the Court to scrutinise the evidence and seek to draw a different interence from the facts stated from what has been drawn by the State. **1952 Cr LJ 1101: AIR 1952 Pat 298 (303) (Pt C) (Pr 13) (DB).**

——S. 3 — Grounds of detention — Jurisdiction of Court to determine correctness.

It is not open to the Court to go into an attempted explanation of the facts alleged, in order to determine the correctness or otherwise of the grounds of detention. 30 Pat 653, Rel. on. Jagarnath Prasad v. State of Bihar, **1952 Cri LJ 493: ILR 31 Pat 97: AIR 1952 Pat 185 (192) (Pt D) (Pr 21) (FB).**

——S. 3 (1) — Extent of power of High Court to examine grounds supplied to detenu.

The grounds supplied to the detenu can be examined by the High Court to see if the mandatory provisions of Clause (5) of Art. 22 of the Constitution have been complied with, viz. (1) that they have been communicated as soon as may be; and (2) they give definite and enough information so as to afford an opportunity of making a representation to the detenu. Secondly, the grounds or facts (materials on which the detaining authority says it has acted) can be examined to see if they are relevant to the object of detention and have a rationally probative value. They can also be examined, if the question of mala fides is raised, the onus on that question being heavy on the detenu. The detenu may, possibly in rare cases, show that the order of detention was made not on the grounds given, but for some other purpose.

The statement that the High Court cannot question the correctness of the grounds means that an investigation into the correctness or otherwise of the grounds, depending as it does on the believability of evidence, cannot be undertaken by the High Court because it is not the satisfaction of the High Court which is a condition precedent to the validity of the order but the satisfaction of the State Government. In such cases, whether there is an affidavit in reply or not the High Court is powerless to interfere. **52 Cri LJ 1231: ILR 30 Pat 653: AIR 1951 Pat 153 (156) (Pt D) (Prs 8, 9) (DB).**

——S. 3 (1) — Satisfaction of State Government — Function of Court — Contravention of Constitution of India, Art. 22 (5).

The satisfaction, which Section 3 (1) speaks of, is the satisfaction of the State Government It is not open to the Court to substitute its own judgment for that of the State Government. Thus, the sufficiency or adequacy of the facts on which the grounds of an order of detention are based is not a question which can be agitated in the Court, though if the grounds are vague and indefinite and afford no real opportunity to make a representation, the Court may hold that there has been a contravention of the mandatory provisions of Article 22 (5) of the Constitution. **52 Cri LJ 406: ILR 30 Pat 630: AIR 1951 Pat 47 (54) (Pt F) (Pr 20) (DB).**

——S. 3 (1) (a) — Merits of grounds — Power of High Court to enquire into.

Where the Government is prima facie satisfied about the activities of the detenu, then it is not open to the High Court to go into the

merits, and enquire about the reasons of such detention. AIR 1949 All 748, Foll. **AIR 1952 Sau 12 (12) (Pt A) (Pr 3) (DB).**

26. Miscellaneous.

●——**Ss. 3 (1) (a) (ii) and 7** — 'Communicate the grounds' — Communication, meaning of— Communication means bringing home to detenu effective knowledge of facts — Detenu not knowing enough English to understand grounds served upon him — In such case, grounds should be in language which he can understand. See Constitution of India, Art. 22 (5). **1962 (1) Cr LJ 797: AIR 1962 SC 911.**

——**S. 3 (3) — 'Day' meaning of — Twelve days — Mode of computation — Day on which order of detention is passed to be included — Order of approval passed by State Government after expiry of 12 days is of no avail — Words and phrases — 'Day' meaning of — Interpretation of statutes.**

Where the order of detention was passed by the District Magistrate on 29th April, 1960, the order would lapse on the midnight between 10th and 11th May, 1960, and the order of approval passed by State Government on the 11th May, 1960, would be of no avail and remain in vacuo. It cannot resuscitate the initial order, dated 29th April, 1960. AIR 1957 SC 23; AIR 1958 SC 163, Rel. on. **ILR (1961) 1 All 427.**

——**Ss. 3, 11, 12 — Period of detention, who can fix — Advisory Board has no such power.**

There is nothing in the Act to indicate that it is for the Advisory Board to fix the period of detention; the Advisory Board will simply report whether or not in its opinion there is sufficient material to justify an order of detention of the person concerned. **1962 (1) Cr LJ 279: AIR 1962 Cal 119 (121) (Pt E) (Pr 9) (DB).**

——**S. 3 (1)** — Detention under — Application under Section 491, Cr. P. C. — Government should produce and place on record original order of detention or a copy thereof permissible under law — Unauthorised copy of order placed on record without objection — Subsequent production of original order of detention — Arrest and detention cannot be held to be illegal — Cr. P. C. (1898), S. 491. **52 Cri LJ 1215: AIR 1951 Pepsu 147 (148) (Pt A) (Pr 2).**

——**S. 3** — Prejudicial activities — It may be, that in some of the publications there are hardly any offending portions but what has to be seen is the cumulative effect of all the publications. **(1960) 62 Pun LR 257.**

SECTION 3-A

——**S. 3-A** — Detention order not a warrant of arrest — Provisions of S. 80, Cr. P. Code cannot be extended to detention order by virtue of Section 3-A — Not necessary to notify to the person the substance of the detention order at the time of custody. **1961 All LJ 270: 1961 All WR (HC) 313: 1961 All Cr R 167: 1961 (2) Cr LJ 595: ILR (1961) 1 All 315: AIR 1961 All 542 (543, 544) (Prs 6, 7, 8) (DB).**

——**Ss. 3-A, 5 and 4 (a) and (b) (as amended by Act 4 of 1951)** — Construction of Section 5 —Ss. 3-A, 4 (a) and 4 (b) cannot be read as limiting the scope of S. 5 — Constitution of India, Art. 245. See Public Safety — Preventive Detention Act (1950), S. 5. **1953 Cri LJ 310: AIR 1953 Cal 81 (DB).**

——**S. 3-A** — Order of detention is not warrant of arrest within meaning of Section 80 of Criminal P. C. — Section 4 does not attract Section 80 of Code. See Public Safety — J. and K. Preventive Detention Act, S. 4. **1963 (1) Cri LJ 765: AIR 1963 J and K 23.**

——**S. 3-A — Arrest and service of order not simultaneous — Effect.**

Non-service of detention order simultaneously with the arrest does not necessarily render the arrest illegal. It is all a question of substance whether subsequent service is or is not a sufficient compliance with law. **65 Mad LW 876: (1952) 2 Mad LJ 690: 1953 Cri LJ 224: AIR 1953 Mad 41 (49) (Pt E) (Pr 14) (DB).**

SECTION 4

——**Ss. 4 and 3 (as amended by Amending Act of 1951)** — Detention order not mentioning place of detention— Failure to detain detenu in place determined in accordance with Section 4 — The detention order is not rendered invalid. **ILR (1952) Bom 134: 1952 Cri LJ 81: AIR 1952 Bom 1 (4, 5, 6) (Pt B) (Prs 6, 7, 11) (DB).**

——**S. 4 — Invalid order under — Place bad — If renders order of detention itself invalid — Proper order passed later — Effect — Detenu if to be released.**

Merely because an order under Section 4 of the Preventive Detention Act, is invalid and would vitiate the detention in a particular place which is referred to in that order, the order of detention itself, which has been properly passed, will not be invalidated. It will remain a good order. An order of detention is quite a different thing from an order directing the detenu to be detained in a particular place. The latter may be bad in some cases for certain reasons but the former may be a perfectly valid and good order. If the factum of detention in a particular place becomes illegal by reason of an order under Section 4 being bad, it can be subsequently validated by a proper order made under Section 4. In such a case the absence of a valid order directing that the detenu be detained in a particular place would not compel the Court to release the detenu if a valid order directing his detention in a particular place is passed by a proper authority before his release. AIR 1950 Cal 274, Dist. 47 Bom LR 396 (FC), Foll. **21 Bom Cri Cas 210: 53 Bom LR 717: ILR (1952) Bom 134: 53 Cr LJ 81: AIR 1952 Bom 1 (6 to 8) (Pt C) (Prs 13, 14) (DB).**

SECTION 5

——**S. 5 — Jurisdiction of State Government to detain person outside jurisdiction — Constitutionality — Constitution of India, Article 245 (1).**

Within the ambit of entry 3 in the concurrent list Parliament is supreme and sovereign and it can legislate with regard to all aspects of preventive detention. It can therefore legislate conferring upon the State a power to detain a person beyond its territorial jurisdiction. **58 Bom LR 602: ILR (1956) Bom 715.**

——**Ss. 5, 3-A and 4 (a) and (b) (as amended by Act 4 of 1951)** — Construction of Section 5 — Constitution of India, Art. 245.

Section 5 plainly provides for passing an order of detention of the would-be detenu even though he is outside the territorial limits of the jurisdiction of the Government, which may mean either the Central or the State Government. This connotes the exercise of the power of detention of a "person to be detained", i.e., the would-be detenu even when he is in a foreign country. The section does not draw any distinction between deliberate and unintentional exercise of extra territorial

powers. The use of the words 'merely' is not intended to restrict the exercise of extra-territorial powers. Sections 3-A, 4 (a) and 4 (b) cannot be read as limiting the scope of Section 5. The context does not therefore narrow down to plain meaning of Section 5. The fundamental principles that: (1) "All legislation is prima facie territorial and should be so construed", that (2) in a federation of States no State has, under normal circumstances, extra-territorial powers", and that (3) No detaining authority is normally entitled to order detention outside its own territorial jurisdiction are not conclusive of the matter. These principles admit the legislative competence to confer extra-territorial powers but lay down that to warrant an intention on the part of the legislature to enact legislation having extra-territorial effect, it is necessary that the intention must be clearly expressed. The unambiguous meaning of Section 5 cannot be whittled down for these reasons. Thus Section 5 is not limited to cases of unintentional exercise, by the detaining authority, of extra-territorial powers. 52 Bom LR 711; 50 Cal WN 532, Disting. (1946) All ER 79; (1946) 2 All ER 372, Rel. on. **56 Cal WN 427: 1953 Cri LJ 310: AIR 1953 Cal 81 (84, 85) (Pt H) (Prs 36, 41, 42, 43, 47, 52, 54, 55) (DB).**

SECTION 6

——**Ss. 6 (1) (b), 3 (1) (a) (2)** — Distinction between orders under — Grounds of order under Section 6 (1) (b) — Satisfaction of District Magistrate cannot be challenged. See Public Safety — Preventive Detention Act (1950), Section 3 (1) (a) (2). **1962 (1) Cri LJ 173: AIR 1962 Manipur 12.**

——**S. 6 (1) (b) — Sentence.**

Where certain public agitation was going on in the State and the order of detention of the petitioner was passed to prevent his participation in the agitation in the interests of maintenance of public order, and the petitioner, without challenging the validity of the detention order, disobeys the order under Section 6 (1) (b) coupled with the attempt on his part to take part in a public meeting later, clearly shows that the stiff sentence was necessary and it cannot be said that the sentence of six months S. I. was a harsh sentence at all in these circumstances. **1962 (1) Cr LJ 173: AIR 1962 Manipur 12 (14) (Pt B) (Pr 11).**

SECTION 7
SYNOPSIS

(Preventive Detention Act (1950), S. 7.)

1. Scope and applicability.
2. Communication of grounds.
3. "Authority making the order".
4. "As soon as may be".
5. "Grounds on which an order has been made".
6. Vagueness of grounds — General.
7. Vagueness of grounds — Illustrations.
8. No vagueness of grounds — Illustrations.
9. Particulars whether should be given.
10. Sufficiency of grounds.
11. Supplementary grounds — When permissible.
12. Some grounds vague and some clear — Effect.
13. Some grounds beyond the scope of the Act — Effect.
14. Past activities whether can be considered.
15. Representation by detenue.
16. Disclosure of facts — Sub-section (2).
17. Powers of High Court.
18. Burden of proof.
19. Pleas permissible in the Court.
20. Non-compliance of the section — Effect.
21. Grounds under Section 7 — Power of Government to modify.

See Public Safety — Preventive Detention Act (1950), S. 13.

1. Scope and applicability.

——**Ss. 7 and 3** — Ground for detention — Instigation of hartal with a view to promote lawlessness and disorder is a ground on which an order can be made under Section 3 (2). See Public Safety — Preventive Detention Act (4 of 1950), Section 3. **1957 Cri LJ 10: AIR 1957 SC 28.**

——**S. 7 — Notice — Satisfaction based on two circumstances — One of them irrelevant — Effect on vlidity of order — (Constitution of India, Article 22).**

Where in a notice under Section 7 the reasons or the grounds for the detention order are stated to be: (1) that the petitioner had created disaffection and discontent among the Muslims towards the Government and (2) that he persisted in activities calculated to disturb public peace and tranquillity.

Held, that the spreading of disaffection against a party Government has been repeatedly held to be the right of every citizen in a democratic Government subject to the condition that there should be no advocacy to violence or incitement to use violence or to resort to other illegitimate means. The petitioner could not therefore be said to have done anything illegal and his detention, inter alia, on the ground of spreading disaffection against the Government in the absence of anything to show that the said ground was of an 'inconsequential nature' could not be upheld. AIR 1956 All 589 and AIR 1951 All 459, Rel. on. (2) that one of the grounds given in the Notice thus suffered from irrelevancy and as it was not possible to say to what extent the satisfaction of the detaining authority was based upon his consideration, the notice was bad as a whole and the detention order based on it must be quashed. AIR 1957 SC 164: (1957) Mad LJ (Cri) 58, Rel. on. **ILR (1957) 2 All 42: 1957 Cri LJ 1361: AIR 1957 All 782 (794) (Pt F) (Pr 23) (DB).**

——**Ss. 7 and 3 — Grounds of detention — Spreading of disaffection against party Government.**

Spreading of disaffection against a party Government cannot be said to be a ground for inferring that the public order would not be maintained. It is the right of every citizen in a democratic Government to spread disaffection against a particular party Government. That right is, of course subject to the condition that the disaffection should not be so spread as to result in violence and there should be really no incitement to use violence. AIR 1951 All 459, Foll. **1956 Cr LJ 1152: AIR 1956 All 589 (593) (Pt C) (Pr 7) (DB).**

——**S. 7** — Jammu and Kashmir Public Security Act, Section 3 — Detention under — Grounds for, need not be supplied to detenu does not apply. See Public Safety — Jammu and Kashmir Public Security Act, Section 3. **AIR 1952 Jammu and Kash 4.**

——**S. 7** — That the detenu had eloped with a girl and married her would not endanger public peace — Ground is outside scope of Act. **AIR 1953 Madh Bha 153 (153) (Pt A) (Pr 2).**

——**S. 7 — To** take part in procession taken out by socialist to protest against cut in rations, is not such prejudicial or subversive activity as would endanger peace of city. **AIR 1953 Madh Bha 153 (154) (Pt D) (Pr 4).**

——S. 7 — Detention by one State in respect of activities in another State — Legality — Transfer of detenu from jail in former State to jail in latter — Cancellation of order of detention by former State — Effect.

The State of Bombay cannot for the purpose of the Preventive Detention Act, 1950, pass orders for detaining a person found within its territory for activities in Madras, that is outside that State, or direct that such a person be interned outside the Bombay State, that is, in Madras. When such detention has been ordered but subsequently cancelled after the detenu had been transferred to a jail in the Madras State under Section 2 (2) of the Transfer of Detained Persons Act, 1949, it cannot be validated by the Madras Government serving a fresh order of detention. When once the Bombay Government has cancelled the order of detention, the proper procedure to be followed, would be for the Madras Government to release him and if they considered that he should be detained in the State of Madras a fresh order of detention should be served on him. In the absence of such a procedure, his detention in jail would be illegal and he would have to be released. **1951 Mad WN 81: 1951 Mad WN (Cri) 21: 64 Mad LW 142: 52 Cr LJ 294: (1951) 1 MLJ 174: AIR 1951 Mad 583 (585, 588, 589) (Prs 6, 13, 14, 15) (DB).**

——S. 7 — After expiry of detention under Orissa Act, detenu can be detained under Central Act on same grounds.

Once a man is detained under a Provincial Preventive detention measure on the basis of his prejudicial activities he can on the expiry of the term, again be detained under the Central Act on the self-same grounds, particularly when there has happened nothing to show that his approach, from the standpoint of his political creed, to the political, social and economical problems of the society has undergone any change. **17 Cut LT 313: 52 Cri LJ 110: AIR 1951 Orissa 27 (27) (Pt A) (Pr 3) (DB).**

——S. 7 — Grounds under, for detention have no wide divergence from those under Orissa Act which was in force — Satisfaction of detaining authority under Orissa Act on previous occasion can be relied on for satisfaction of detaining authority under Central Act — It is not for Court to decide what will be particular period of detention. **17 Cut LT 313: 52 Cri LJ 110: AIR 1951 Orissa 27 (28) (Pt B) (Pr 4) (DB).**

——S. 7 — Insufficient ground — Member or Organisation not declared illegal.

As the organisations known as Bharatiya Jan Sangh R. S. S. S. and Gohatya Nirodh Samiti are not illegal organisations, mere membership of these organisations cannot bring to detenu within the mischief of the Preventive Detention Act. **1956 Cri LJ 86: AIR 1956 Pat 1 (2) (Pt A) (Pr 4) (DB).**

——Ss. 7 and 11 — Detention order continued and extended — Fresh grounds not supplied — Legality of detention.

Section 11 does not govern the order made by Government to confirm the original order of detention or to confirm the period of detention originally fixed.

No doubt Section 7 gives a very valuable right to the detenu and should the Government fail to conform with the provisions of that section the detenu can claim to be released, but this fact does not extend its provisions to the orders to which it does not relate. It merely comes into play when an order of detention is made and it has no applicability whatsoever to the order confirming the order of detention or extending the period fixed by that order. Consequently the fact that no fresh grounds of detention were supplied to the detenu after the order of detention has been confirmed and extended by the Government does not make his detention illegal. AIR 1951 Punj 119, Dissent. from. AIR 1952 Bom 1, Rel. on. **1952 Cri LJ 1093: ILR (1952) Pepsu 192: AIR 1952 Pepsu 100 (101, 102) (Pt B) (Prs 2, 4).**

——Ss. 7, 3, 11 — Order under Section 3 — Non-specification of period — Confirmation by Government — Fresh grounds not necessary. See Public Safety — Preventive Detention Act (4 of 1950), Section 3. **AIR 1952 Punj 406.**

2. Communication of grounds.

● **——S. 7** — Constitution of India, Article 22 (5) — "Communicate the grounds" — Communication, meaning of — Communication means bringing home to detenu effective knowledge of facts — Detenu not knowing enough English to understand grounds served upon him — In such case grounds should be in language which he can understand. See Constitution of India, Article 22 (5). **1962 (1) Cri LJ 797: AIR 1962 SC 911.**

● **——Ss. 7 and 3** — Order of detention — Nature of, stated — (Constitution of India, Article 22) — Consists of two parts, first part containing recitals in terms of one or more of sub-clauses (a) and (b) of Section 3 which may be called preamble and other part containing grounds contemplated by Section 7. It may also consist of third part namely the particulars if and when they are required or found to be necessary. See Public Safety — Preventive Detention Act (4 of 1950), Section 3. **1959 Cri LJ 1501: AIR 1959 SC 1335.**

● **——S. 7** — Constitution of India, Article 22 (5) —Vagueness of grounds— Detenu, a layman inexperienced in interpreting documents without legal aid — Legal aid not available — Detaining authority should express grounds in language clear beyond doubt otherwise the grounds would be regarded as vague to enable the representation to be made. See Constitution of India, Article 22 (5). **1953 Cri LJ 1241: AIR 1953 SC 318.**

● **——S. 7** — Constitution of India, Article 22 (5) — Information conveyed to detenu must be sufficient to make a representation against the order of detention — Nature of. See Constitution of India, Article 22 (5). **52 Cri LJ 373: AIR 1951 SC 157.**

——S. 7 (1) — Grounds of detention — Should be communicated by authority making the order —Requirement is mandatory — Order of detention by District Magistrate — Communication of grounds by Governor on behalf of State — Section 7 is not complied with. **ILR (1961) 1 All 427.**

——S. 7 — Sufficiency of grounds — Test (Constitution of India, Article 22 (5)).

The fact that the petitioner would suffer no hardship or prejudice by reason of sufficient particulars not having been already furnished to him is immaterial. The question is not whether the petitioner will in fact be prejudicially affected in the matter of securing his release by his representation but whether his constitutional safeguard has been infringed. AIR 1953 SC 318, Foll. **1954 All LJ 6: 1954 All WR (HC) 34: 1954 Cr LJ 685: ILR (1954) 2 All 230: AIR 1954 All 315 (317) (Pt C) (Pr 15) (DB).**

——S. 7 — Constitution of India, Article 22 (5) — Communication of grounds to detenu — Grounds must be sufficient to enable the detenu

to make his representation against the order at the earliest opportunity. See Constitution of India, Article 22 (5). **1959 Cri LJ 160: AIR 1959 Andh Pra 73 (DB).**

——**S. 7** — Nature of activities to enable detenu to make effective representation should be given. **AIR 1953 Madh Bha 153 (153) (Pt C) (Pr 3).**

——**Ss. 7 and 3** — Order of detention passed under Section 3 without giving grounds — Grounds of detention communicated subsequently as required under Section 7 — Order passed under Section 3 need not itself contain grounds of detention and is not invalid. See Public Safety — Preventive Detention Act (4 of 1950), Section 3. **1965 (2) Cri LJ 119: AIR 1965 Punj 270 (DB).**

——**Ss. 7, 3, 4** — Detention under Section 3 by District Magistrate — Detention period extended by State Government without supplying fresh grounds — Detention is invalid as being repugnant to Article 22 (5) of the Constitution — Constitution of India, Article 22 (5). See Public Safety — Preventive Detention Act (1950), Sec. 3. **52 Cri LJ 1451: AIR 1951 Punj 119 (DB).**

——**S. 7 — Furnishing copy of grounds to detenu — Necessity of.**

It is not at all imperative under Section 7 to furnish a copy of the grounds to the detenu. Though it is desirable to supply such copy to the detenu as it would greatly facilitate the making of a representation this would be unnecessary where the detenu had the grounds before him when he made the representation and was not handicapped by a copy not having been supplied to him. **52 Cri LJ 1300: AIR 1951 Raj 69 (71) (Pt B) (Pr 6) (DB).**

——**S. 7 — Duty of detaining authority.**

Section 5 has cast a duty on the detaining authority to supply the grounds of detention to the detenu and if it has not done its duty and has thereby incurred a liability there is no reason why the detenu should make complaint to it and not come to the Court and ask for his release on the ground that a mandatory provision of the statute not having been fulfilled his further detention has become illegal. Even if a detenu does make a representation in ignorance of his rights, it cannot be said that the High Court should not consider what the duties of the detaining authority were. **(1950) 3 Sau LR 232: AIR 1951 Sau 13 (14) (Pt B) (Pr 5) (DB).**

3. "Authority making the order".

●——**Ss. 7 and 3** — Detention order purporting to be made by Governor and signed by Home Secretary is not bad — Communication of grounds need not be made directly by the authority making the order — It may be made through recognised channel prescribed by the administrative rules of business — (Constitution of India, Article 166 (1)). See Public Safety — Prevention Detention Act (4 of 1950), S. 3. **AIR 1952 SC 350.**

——**S. 7 — "Authority making the order" — Meaning of — Grounds communicated by another District Magistrate — Legality — Constitution of India, Art. 22 (5).**

Article 22 (5), Constituion of India, contemplates that the grounds are to be furnished after the detention; therefore the words "the authority making the order do not mean the individual who made it. What is meant by the words "the authority making the order" is; if the order is made by the District Magistrate, the District Magistrate; if the order is made by the Government of a State, the State Government; if the order is made by the Central Government, then, necessarily the Central Government. Thus there is nothing wrong if an order of detention is passed by one District Magistrate and after his transfer the grounds are supplied by another District Magistate. **53 Bom LR 127: 21 Bom Cri Cas 80: 52 Cri LJ 418: ILR (1951) Bom 546: AIR 1951 Bom 33 (41) (Pt B) (Pr 16) (DB).**

4. "As soon as may be".

●——**Ss. 7 and 3 (3)** — "Forthwith", meaning of — "Forthwith" and "as soon as may be" — Difference between stated—(Words and Phrases). See Public Safety — Preventive Detention Act (4 of 1950), Section 3 (3). **1957 Cri LJ 10: AIR 1957 SC 28.**

●——**S. 7 — Communication of grounds — When to be made — Delay in furnishing grounds — Effect.**

The Act does not fix the time within which the grounds should be furnished to the person detained. It merely states that the communication must be as soon as may be. This means reasonable despatch and what is reasonable must depend on the facts of each case. No arbitrary time-limit can be set down.

When the long delay in furnishing the grounds has been adequately explained, the detention cannot be held unlawful on that ground. Ujagar Singh v. State of Punjab, **1952 SCJ 521: (1952) SCA 648: (1952) 2 Mad LJ 641: 1952 SCR 756: 1953 Cr LJ 146: AIR 1952 SC 350 (352) (Pt D) (Pr 9).**

●——**S. 7 — Communication of vague grounds— Delay in supplying particulars — Detenu's right to be released.**

Mere vagueness of grounds standing by itself and without leading to inference of mala fides or lack of good faith is not justiciable issue in a Court of law. AIR 1951 SC 157, Rel. on.

Where the petitioners were given only vague grounds which were not particularised or made specific so as to afford them the earliest opportunity of making representations against their detention orders, and there having been inexcusable delay in acquainting them with particulars of what was alleged, the petitioners were held entitled to be released. Ujagar Singh v. State of Punjab, **(1953) SCJ 521: (1952) 2 MLJ 641: 1952 SCR 756: 1953 Cr LJ 146: AIR 1952 SC 350 (353) (Pt E) (Prs 11, 14).**

——**S. 7 (1) — Supplying grounds of detention to detenu within five days — Not merely directory but mandatory — Breach of, cannot be condoned.**

The use of the word "shall" and further, the combined use of the positive as well as the negative injunctions conveyed in the expression "as soon as may be but not later than five days" indicates that the Legislature wanted to make it quite clear that the provision of law in this regard is obligatory and not merely directory. Its breach cannot, therefore, be condoned. **ILR (1961) 1 All 427.**

●——**S. 7** — Delay in furnishing detention grounds — Effect — Constitution of India, Articles 21 and 22 (5). Under Section 7 of the Preventive Detention Act, 1950 and Article 22 (5) of the Constitution, the grounds of detention have to be communicated to the detenu as soon as may be. There is no limit of time laid down in

Section 7 of the Act. In a certain measure and degree it is left to the executive, but the time taken for the furnishing of the grounds must be a reasonable time reasonable in the circumstances of each case. It is impossible to lay down a definite, and unchangeable yardstick by which the Court must judge as to whether the time taken in a particular case was reasonable or not.

In order that the detention should be valid and should be upheld by the Court not only must the order of detention be valid, but there must be a substantial compliance with all the provisions of the statute. Therefore even though when the detenu was deprived of his personal liberty that deprivation was according to procedure established by law, if the Court finds that that deprivation was continued contrary to the procedure established by law, the Court must hold that Article 21 has been contravened. Hence if after a person has been detained grounds are not furnished within a reasonable time, his detention becomes invalid as he is being deprived of his liberty contrary to the procedure established by law.

(Desirability of furnishing grounds within a week or 10 days of the detention, pointed out). In re Pandurang Kashinath. **53 Bom LR 65: 21 Bom Cri Cas 54: 52 Cri LJ 366: ILR (1951) Bom 190: AIR 1951 Bom 30 (30, 31) (Pt A) (Prs 2, 3, 5) (FB).**

——S. 7 — Detention in February 1950 — Grounds served in March by the middle of the month — Supplementary grounds or particulars of grounds which were not new grounds but particulars of grounds already given earlier served by the end of July 1950 — **Held** the detenu had been given the grounds of detention "as soon as may be" and had been given the earliest opportunity of making representations. See Constitution of India, Article 22 (5). **1953 Cri LJ 361: AIR 1953 Cal 129 (DB).**

——S. 7 — 'As soon as may be' — Meaning of.

The words 'as soon as may be' appearing in Section 7 of the Preventive Detention Act have to be interpreted as meaning as soon as circumstances permit the authority to furnish the grounds. No unreasonable or unjustifiable delay can be allowed. (1953-54) 8 Moo PC 203, Ref.

Delay of three weeks in furnishing the grounds was held not unreasonable. **ILR (1953) Hyd 459: 1953 Cr LJ 1845: AIR 1953 Hyd 277 (279) (Pt A) (Pr 4) (DB).**

——S. 7 — Delay in furnishing grounds — Delay of 14 days held not unreasonable — Constitution of India, Article 22 (5).

Considering that the grounds for detention covered about thirteen paragraphs, from the large volume of information available to the detaining authority, the time of 14 days which elapsed between the order of detention and the furnishing of grounds held was not unreasonable in view of the provisions of Article 22, Clause (5) of the Constitution. AIR 1951 Hyd 128: AIR 1951 Bom 30, Rel. on. **ILR (1952) Hyd 122: 1952 Cri LJ 1076: AIR 1952 Hyd 112 (115, 116) (Pt B) (Pr 4) (DB).**

——S. 7 — Scope — Non-compliance — Failure to furnish grounds — Effect on continuance of detention.

Under Section 7 of the Preventive Detention Act, the grounds of detention must be communicated to the detenu as soon as may be so that he may have an opportunity of representing against the order at the earliest moment. Non-compliance with this requirement makes the detention improper and the detention cannot be permitted to continue further. **AIR 1952 Hyd 24 (24) (Pr 1) (DB).**

——S. 7 — Detention grounds — Delay in communication — It is a question of fact in each case whether there has been delay or not. Bompalli Sathia v. Government of Hyderabad. **52 Cri LJ 1527: AIR 1951 Hyd 162 (163) (Pt C) (Pr 7) (FB).**

——S. 7 — Duty of detaining authority — Time for furnishing grounds — Delay in furnishing — What amounts to — Test — Question of facts — The phrase "as soon as may be" in Article 22 (5) does not exclude reasonable time for formulating the grounds on the material in possession of the authority — The time must necessarily vary with the activities of the person and other circumstances of the case — It is therefore a question of fact in each case whether there has been delay. See Constitution of India, Article 22 (5). **52 Cr LJ 1402: AIR 1951 Hyd 128 (FB).**

——S. 7 — Unreasonable delay.

If there be unreasonable delay in communicating grounds of detention the words "as soon as may be" used in Section 7 are not complied with and the detention becomes illegal. **AIR 1951 Hyd 43(43) (Pr 2) (DB).**

——S. 7 — Detention grounds — Communication of — Delay in — Delay of 18 days between the date of the order of detention and the actual service of the grounds of detention is not an unreasonable delay — Constitution of India, Article 22 (5). **52 Cri LJ 282: ILR (1950) 29 Pat 992: AIR 1951 Pat 389 (392) (Pt D) (Pr 8) (DB).**

——S. 7 — 'As soon as may be' meaning of — Grounds not communicated within reasonable time — Validity of detention — Criminal P. C. (1898), Section 491.

The words 'as soon as may be' in Section 7 of the Act mean that the grounds of detention should be communicated to the detenu within a reasonable time and if this is not done the detention must be regarded as illegal. The reason is that the law gives a detenu a valuable right to make a representation to the Central Government or the State Government, as the case may be, against his detention and unless the grounds of detention are communicated to him within a reasonable time his right to make the representation is really affected thereby. AIR 1948 All 225, Rel. on.

(Delay of one month and eleven days held was not reasonable and therefore detention held illegal). **(1950) 2 Pepsu LR 471: AIR 1952 Pepsu 61 (62) (Pt A) (Pr 5).**

——S. 7 — Inordinate delay in supplying grounds — Supplementary grounds supplied pending application of detenu to Court — Legality of detention.

Communication of the grounds to the detenu has to be made as early as possible regard being had to all attendant or likely exigencies. Inordinate delay in communicating the grounds of detention vitiates the order and renders the detention improper and illegal. Further the defect that is engendered by supplying belated and vague grounds is not cured by supplementary and more specific grounds supplied pending an application by the detenu to the High Court for his release. **('50) 2 Pepsu LR 394: AIR 1951 Pepsu 84 (85) (Prs 3, 4).**

——S. 7 — "As soon as may be" — Meaning of —Criminal P. C. (1898), S. 491.

Where a contention is based on the question of delay, it is for the Government to explain why the grounds were not furnished sooner than they were. Thus, this is a question of fact on which light can be thrown by the Government alone. It is, therefore, necessary that the allegation must

find a place in the petition under Section 491, Criminal P. C. **52 Cri LJ 1300: AIR 1951 Raj 69 (71) (Pt A) (Pr 6) (DB).**

5. "Grounds on which an order has been made".

●——**Ss. 7 (1) and 3 (3)** — "Grounds on which an order has been made" — Meaning of — Expression does not bear same meaning in Section 3 (3) and Section 7 (1) — Report under Section 3 (3) not accompanied with the very grounds communicated to detenu under Section 7 — Sufficient compliance. See Public Safety — Preventive Detention Act (4 of 1950), Section 3 (3). **1957 Cri LJ 5: AIR 1957 SC 23.**

——**Ss. 7 and 3** — Reference of case pending as one of the grounds — As the detention did not rest on this ground alone the detention could not be held to be illegal even if there was any case pending against the person arising out of any one transaction. See Public Safety — Preventive Detention Act (4 of 1950), Section 3. **AIR 1953 Assam 63.**

——**S. 7 — 'Grounds on which order has been made" — Interpretation of — Constitution of India, Article 22 (5) and (6).**

The words "grounds on which the order has been made" are to be considered in context of the Constitution and the Preventive Detention Act. Article 22 (6) contemplates that the detaining authority, while furnishing grounds of detention, is required to state facts on account of which he is satisfied that the detention is necessary in the interest of the security of the State, maintenance of public order, etc. The only privilege a detaining authority can claim against disclosure of facts is on grounds of public interest. If no facts at all leading to the detention of a detenu are to be mentioned in the grounds which are to be furnished to him, then obviously the intention underlying the enactment of Article 22 (6) is frustrated. **53 Bom LR 127: 21 Bom Cri Cas 80: 52 Cri LJ 418: ILR (1951) Bom 546: AIR 1951 Bom 33 (37, 42, 43) (Pt C) (Prs 5, 19) (DB).**

——S. 7 — **Communication of grounds — Purpose of — Constitution of India, Article 22 (5).**

The purpose of Article 22 (5) of the Constitution and Section 7 of the Preventive Detention Act clearly is that the grounds which are to be furnished to the detenu should be sufficient to enable him to make an effective representation to Government in the matter of his detention. If a statute is to be construed in such a way that a representation provided for by it can never be effective, the provision itself becomes meaningless in practice. Unless the facts and particulars on the basis of which the detention is ordered are furnished to the detenu in the grounds which are given to him so soon as may be after detention, he cannot possibly make an effective representation to Government against his detention. Thus the scheme of the Act is not merely to import mechanically the language of Clauses (a) and (b) of sub-section (1) of Section 3 of the Preventive Detention Act into the grounds given under Section 7, but to give all facts, particulars and details on which the detention is based. **53 Bom LR 127: 21 Bom Cri Cas 80: 52 Cri LJ 418: ILR (1951) Bom 546: AIR 1951 Bom 33 (43) (Pt D) (Pr 20) (DB).**

——S. 7 — Grounds — Membership of Communist party which was declared an unlawful body under Section 16 which was declared as void — Declaration also is void — Being member of Communist Party, one of grounds of detention — Detention is not rendered invalid — (Criminal Law Amendment Act (1908), Section 16) — (Constitution of India, Articles 19 (1) (c), 19 (4) and 22). **AIR 1955 NUC (Cal) 1009 (DB).**

——**S. 7 — Grounds of detention — Detenu being member of Communist Party.**

The orders of detention are not invalid because of the statement in the grounds that the organisation to which the detenu belongs has been declared an illegal organisation and therefore is an illegal organisation. It has never been held by the Supreme Court that an order declaring the Communist Party to be an illegal organisation is illegal. This particular ground has been before the Supreme Court on a number of occasions and no suggestion has ever been made that it is an improper and a bad ground. Further the gravamen of the allegation made in this ground is that the detenu belongs to an organisation which is committed to violent and subversive acts and which has as its main objects the overthrow of the State by violence. Such being the case it is of little importance whether such an organisation has or has not been declared to be illegal. On a fair reading of the ground it would appear that the detenu is regarded as dangerous not because he is a member of an illegal organisation but because he is a member and assists in the activities of an organisation whose objects are said to be a danger and a menace to the maintenance of public order and the security of the State. **1953 Cri LJ 361: AIR 1953 Cal 129 (133, 134) (Pt B) (Prs 30, 31, 32) (DB).**

——**Ss. 7 and 3** — Ground for detention — To consider its relevancy, grounds must be regarded as whole— Ground showing association of detenue with proclaimed dacoit is a relevant ground. See Public Safety — Preventive Detention Act (4 of 1950), Section 3. **1955 Cri LJ 476: AIR 1955 Madh Bha 36 (DB).**

——**S. 7 — Detention grounds — Necessity to disclose all grounds — Constitution of India, Article 22 (5) and (6).**

The grounds on which the order of detention has been made must be communicated to the person detained and the right to get the grounds on which the order of detention has been made is one of the fundamental rights. The Preventive Detention Act (4 of 1950) has quite properly given due consideration to that fundamental right embodied in Article 22 (5) of the Constitution and detaining authority, under Section 7. Preventive Detention Act, is bound to furnish the grounds on which the order of detention has been made. He is not at liberty to disclose some and withhold other grounds on which the order is made. If some of the grounds on which the order has been made are not communicated to the detenu, then he is not in a position to make an effective representation which he has the right to do under Article 22 (5) of the Constitution.

There may be a number of grounds in support of the order, but the authority making the order must be held entitled to base the order of detention only upon some out of the many grounds in his possession. It is only those grounds on which the order has been made that have to be communicated to the detenu.

The safeguard provided by Clause (5) of Article 22 of the Constitution of India is a safeguard in favour of the detenu, and the detenu is entitled, as a matter of right, to know the grounds on which the order of detention has been made against him. No question of waiver can arise in such circumstances. **52 Cri LJ 282: AIR 1951 Pat 389 (293, 394, 400) (Pt E) (Prs 10, 12, 36) (DB).**

——S. 7 — Detention grounds — Form of — Conclusion from facts — Necessity to reproduce words of S. 3.

It is true that the grounds to be supplied to the detenu under Section 7 must give some particulars of the acts ascribed to him as well as the conclusions drawn from those acts but it is not necessary that they should meticulously reproduce the relevant words of Section 3 itself. AIR 1951 SC 157, Ref.

Section 7 merely mentions "the grounds on which the order has been made" and does not prescribe any form of the grounds. From this it is legitimate to infer that all that is necessary is that the grounds should be such that should enable the detenu to make a representation to the proper authority and this condition should be regarded as amply satisfied when the grounds contain the particulars of the detenu's activities, on account of which the detaining authority formed his satisfaction that it was necessary to order his detention and it is also stated therein what the nature of the conclusion arrived at by the detaining authority was.

Where after giving the particulars of the detenu's acts, it was stated in the grounds supplied that the detention had been ordered to ensure the maintenance of public order, evidently what was meant was that the activities of the detenu were prejudicial to the maintenance of public order and he was being detained with a view to preventing him from indulging in those activities.

The words used for the conclusion are no doubt capable of improvement and probably the better way of saying was that the detaining authority had come to the conclusion or had formed the opinion that his activities were prejudicial to the maintenance of public order, but the defect is not material. **(1951) 3 Pepsu LR 238.**

6. Vagueness of grounds — General.

●——S. 7 — Vagueness of grounds — Particulars of events in offing — If to be definitely stated — (Constitution of India, Article 22).

Vagueness is a relative term. Its meaning must vary with the facts and circumstances of each case. If the statement of facts is capable of being clearly understood and is sufficiently definite to enable the detained person to make his representation, it cannot be said that it is vague. Further particulars of what has taken place, can be more definitely stated than those of events which are yet in the offing. In the very nature of things, the main object of the Act is to prevent persons from doing something which comes within the purview of any one of the sub-clauses of Clause (a) of Section 3 (1) of the Act. AIR 1957 SC 164, Rel. on. Naresh Chandra Ganguli v. State of W. B., **1959 Cr LJ 1501: 1960 SCJ 303: 1960 Mad LJ (Cr) 200: (1960) 1 SCR 411: AIR 1959 SC 1335 (1341) (Pt B) (Pr 13).**

——Ss. 7 and 3 — Grounds of detention vague — Order of detention is bad. See Public Safety — Preventive Detention Act (4 of 1950), Section 3. **1962 (1) Cri LJ 279: AIR 1962 Cal 119 (DB).**

——S. 7 — Constitution of India, Article 22 (5) — Vagueness of grounds — Grounds capable of being intelligently understood and sufficiently definite to furnish materials to enable the detained person to make representation against the respective orders of detention — Grounds are not vague. See Constitution of India, Article 22 (5). **AIR 1954 Cal 591 (DB).**

——S. 7 — Vague grounds — What are.

Grounds of detention can be regarded as being vague only if they are couched in such language which makes it impossible for the detenu to make an effective representation to the Advisory Board. If they are understandable by the detenu to enable him to make his representation to the Advisory Board, the grounds would be certainly regarded as clear and unambiguous. This is especially so when the detenu has actually made a representation. **ILR (1953) Hyd 459: (1953) Cr LJ 1845: AIR 1953 Hyd 277 (279) (Pt D) (Pr 6-b) (DB).**

●——S. 7 — Detention grounds — Statements in — Vagueness — Test.

The test as to when the grounds of detention can be held vague is that if on reading the ground furnished it is capable of being intelligently understood and is sufficiently defined to furnish materials to enable the detained persons to make representation against the order of detention, it cannot be called vague: AIR 1951 SC 270, Foll. Bompalli Sathia v. Government of Hyderabad. **52 Cri LJ 1527: AIR 1951 Hyd 162 (162, 163) (Pt B) (Pr 6) (FB).**

●——S. 7 — Grounds supplied to detenu when can be called vague — Test.

Vague can be considered as the antonym of 'definite'. If the ground which is supplied is incapable of being understood or defined with sufficient certainty it can be called vague. It must vary according to the circumstances of the case. It is however, improper to contend that a ground is necessarily vague if the only answer of the detained person can be to deny it. If, on reading the ground furnished it is capable of being intelligently understood and is sufficiently definite to furnish materials to enable the detained person to make a representation against the order of detention, it cannot be called vague.

Where the detenu after intelligently understanding the ground, has procured the certificates to contradict its statements, the ground cannot be said to be vague: AIR 1951 SC 157, Applied. Santhamma B. v. State of Hyderabad. **52 Cri LJ 1402: ILR (1951) Hyd 654: AIR 1951 Hyd 128 (131, 132) (Pt C) (Pr 13) (FB).**

——S. 7 — Grounds to be supplied — Nature of — Non-compliance with section — Effect — Test to determine vagueness or precision of grounds.

It is to be noted that the grounds are not given to justify the detention but to afford the detenu a chance to make a representation. The grounds furnished must be clear, precise and must disclose facts except those which the detaining authority considers to be against the public interest to disclose; otherwise, the grounds would fail to serve the purpose for which they were intended by the Parliament. The discretion given to the detaining authority under Section 7 (2)is not to be exercised capriciously, and if no facts are given or if they are given in such a way as to make it impossible for the detenu to make a representation against the order then there is a failure to comply with the mandatory provision of the section and the order of detention under Section 3 cannot be held to be good. It is, however, impossible to lay down an inflexible rule for determining whether the grounds furnished to the detenu are vague or clear and precise. The question is to be determined in each case with reference to its facts and circumstances remembering that a certain amount of vagueness is bound to occur when the facts are inter-woven with the grounds and the detaining authority may consider the disclosure of those facts to be against

the public interest. **AIR 1951 Madh Bha 51 (55, 56) (Pt D) (Prs 14, 15) (DB).**

——S. 7 — Constitution of India, Article 22 (5), (6) — Basis of grounds — Disclosing of — The detaining authority is under no obligation to disclose the basis of the allegation i. e., the particulars of the allegation on which the detention is made — Grounds of detention cannot be said to be vague and indefinite for the reason that they do not contain the basis of those grounds. See Constitution of India, Article 22 (5), (6). **52 Cri LJ 688: AIR 1951 Mad 182 (DB).**

——S. 7 — Grounds — Particulars — Duty of detaining authority — Vagueness of grounds — Effect of.

It is well settled that whenever the grounds of detention are found vague, the detenu is entitled to an order of release from the Court. What constitutes vagueness has to be determined by keeping in view the purpose for which the grounds are supplied. They are supplied in order to enable the detenu to make a representation to the detaining authority refuting the correctness of the involved facts and inferences founding the grounds. They can be held to be vague if the minimum of information which will enable the detenu to present a case in his expected representation is not available on the face of it. Vagueness also consists in that the reasons of apprehension of the detaining authority are too remote, being mere possibility upon possibility or contingency upon contingency. If under the cause-and-effect rule circumstances reveal no proximity between the apprehension and the possibility of his future activities and the reasons given for the preventive orders, they can be considered vague. That a detenu is of a desperate character and his political creed is communism are too vague and are not sufficient to enable the detenu to make a representation to the authorities concerned. **52 Cr LJ 110: 17 Cut LT 313: AIR 1951 Orissa 27 (28) (Pt B) (Pr 4) (DB).**

——S. 7 — Constitution of India, Article 22 (5) — Insufficient and vague grounds — Violation of safeguards under Article 22 (5) — The detenue deserves to be released. See Constitution of India, Article 22 (5). **1956 Cri LJ 86: AIR 1956 Pat 1 (DB).**

——S. 7 — Grounds — Vagueness — Non-mention of time of activities of detenu.

It is not always necessary that the time of a particular activity of the detenu must also be given in order to make a ground explicit, if otherwise it is clear enough to make the detenu understand what is being complained against him. The question what information would be sufficient to enable the detenu to make a proper representation has to be decided with reference to the facts of each case and it cannot be held as a general rule that without specification of time of the activities the ground would always be considered to be vague and indefinite. **52 Cr LJ 1100: AIR 1951 Pepsu 134 (134) (Pr 4).**

——S. 7 — Grounds supplied vague — It is breach of Article 22 (5) of the Constitution — Order of detention becomes illegal. See Constitution of India, Article 22 (5). **AIR 1955 NUC (Punj) 5712 (DB).**

——S. 7 (1) — Grounds supplied vague and indefinite — Detention not justified by grounds — Order of detention is bad. **AIR 1951 Punj 157 (159) (Pt A) (Prs 4, 5) (DB).**

——S. 7 — Grounds of detention vague and indefinite to enable the detenu to make a representation — Detention is illegal and the detenu should be released. **AIR 1951 Punj 8 (9) (Pt A) (Pr 2).**

7. Vagueness of grounds — Illustrations.

——S. 7 — "Vague grounds" — What are.

In none of the grounds had any date or time been mentioned. In one of the grounds in which it was alleged that the petitioner orgainsed two illegal strikes not only was there no mention of the date but no particulars were given as to the place or places where the alleged strikes were said to have occurred nor of the persons against whom they were alleged to have been directed.

Held, that these grounds were in terms which were too vague to enable the petitioner to make an adequate representation. AIR 1953 SC 318, Foll. **1954 All LJ 6: 1954 All WR (HC) 34: 1954 Cr LJ 685: ILR (1954) 2 All 230: AIR 1954 All 315 (316, 317) (Pt B) (Prs 6, 13, 15) (DB).**

——S. 7 — Detention for maintenance of public order — Ground supplied mentioning breach of public peace and helping another to go underground — Sufficiency of.

The ground supplied to the detenu that he with another person tried to chalk out a programme for the breach of the peace is not enough to detain him in order to prevent him from acting in any manner prejudicial to the maintenance of public order. Such disclosure of ground conveys nothing. A breach of peace may affect only a limited number of persons but breach of public order conveys the idea of actions on the part of individuals acting as a community calculated to disturb the peace. Thus the ground has no causal or direct connection with the maintenance of public order and is far too vague and indefinite. So also to help a person go "underground" cannot be a ground for detaining a person unless such rendering of help is connected with the maintenance of public order. **52 Cri LJ 732: ILR (1951) 2 All 493: AIR 1950 All 709 (711) (Pt C) (Pr 8).**

——S. 7 — Grounds of detention — Particulars — Sufficiency.

It is absolutely necessary that the grounds of detention supplied to a detenu must be quite definite as well as precise.

A ground of detention stating that the detenu used to meet certain dacoit whenever he came to the detenu's village is absolutely vague and indefinite. So also a ground, which states that the detenu had given shelter to the gang of that dacoit in his village at some period before the date when the detenu was taken under detention, and that in this way and also other ways, the detenu had directly or indirectly helped the dacoits in their activities. **(1950) 3 Sau LR 232: AIR 1951 Sau 13 (14) (Pt A) (Prs 3, 4) (DB).**

——S. 7 — Detention grounds — Vagueness — Statement in grounds that detenu was responsible for strike — Fact that strike was illegal not mentioned — Ground if vague.

Merely stating in the grounds for detention that the detenu was responsible for strikes amongst the labourers without mentioning whether they were legal or illegal is not a ground of such precision or adequacy as to enable the detenu to make a representation against the order of detention. AIR 1949 Pat 236, Foll. **1952 Cri LJ 683: AIR 1952 Bhopal 6 (12) (Pt E) (Pr 21).**

——S. 7 — Grounds of detention — Insufficiency — Grounds and facts — Distinction — Constitution of India, Article 22 (6).

Insufficiency of the ground supplied to a detenu would not render the detention order invalid ab initio.

Unreasonable delay however in communication of the grounds or communication of inadequate or vague and indefinite grounds would make further

detention of the detenu illegal. Distinction between 'facts' and 'grounds' pointed out.

Where the grounds stated that the detenu (a wholesale licensed dealer in foodgrains) was engagaing himself in the activity of hoarding considerable quantity of food-grains from out of their normal circulation so vitally necessary for the life of the community and thereby offended against the provisions of Section 3 (1) (a) (iii) and also disclosed that the object of such hoarding was to profiteer by selling the hoarded stock in the blackmarket.

Held, that the grounds disclosed were not insufficient for enabling the detenu to make a representation, although all the sources of information which led the authorities to the conclusion that detention was essential to prevent the detenu from selling in black-market, were not disclosed.

Selling in the black-market amounts to interfering with the normal supply to the community at large.

The act complained of was not done by him as a licensed dealer but stood completely outside it. Hence, it could not be argued that the self-same act of the detenu, as a licensee, could be dealt with in a punitive measure rather than preventive. **17 Cut LT 109: 52 Cri LJ 679: ILR (1951) Cut 387: AIR 1951 Orissa 251 (253 to 255) (Pt A) (Prs 7, 9 to 11, 17, 18) (DB).**

——S. 7 — Vagueness of grounds — Tests of vagueness.

Whenever the grounds are found vague, the detenu is entitled to an order of release from the Court. They can be held to be vague if the minimum of information that will entitle the detenu to present a case in his expected representation is not available on the face of it. Besides, the vagueness consists in that the reasons of apprehension of the detaining authority are too remote being mere possibility upon possibility or contingency upon contingency. Merely saying that detenu is a dangerous character and his creed is communism, is not sufficient.

It is not for the Court to consider the falsity or otherwise of the allegations. It is the function of the Advisory Board. **17 Cut LT 313: 52 Cri LJ 110: AIR 1951 Orissa 27 (28, 29) (Pt C) (Prs 5, 6, 7) (DB).**

——S. 7 — Duty of detaining authority — Grounds to be specific and precise.

Section 7 of the Preventive Detention Act which compels the detaining authority to supply persons deprived of their liberty without a trial and to afford them an opportunity of making a representation for the purpose of clarifying their position and repudiating the grounds urged against them, are meant to be considered as substituted for trial. This minimum of liberty should not be further whittled down. The grounds should not be indefinite or vague, but should be specific and precise, though they need not disclose facts which are against the public interest to disclose. Where the grounds communicated to a detenu are that he is an avowed member of the communist Party who are out to follow the avowed policy of the party and are describing the agitation of that party as civil war, and are making every attempt to collect weapons and foment disorder, etc., and that the detenu is likely to go underground to further the plans of the Communist Party, namely, commission of sabotage and violence, but there is no mention as to when, where and with whom he was planning, it must be held that the grounds are too vague to be availed of for the purpose of making a representation. Such grounds when the party as such has not been declared unlawful are not valid grounds for taking action under S. 8 of the Act, and the Court will order the detenu to be released forthwith, because in the circumstances the State cannot be considered to have made out a case of any clear, immediate danger happening to the maintenance of public order by allowing the detenu to remain at large. **ILR (1950) Cut 540: 52 Cr LJ 104: AIR 1951 Orissa 20 (21) (Prs 4, 5) (DB).**

——S. 7 — Insufficient ground — Personal opinion about Prime Minster of India.

One of the grounds supplied to the petitioner for his detention was that he associated himself with the fast undertaken by A and that the petitioner criticised the Congress Government and accused the Indian Prime Minister in his speeches saying that the Prime Minister was solely responsible for the partition of India and cow-slaughter. It was also alleged that he incited the public against cow-slaughter and threatened the Government with bad consequences if A expired.

Held, that the statement about the Prime Minister of India indicated only the personal approach to those problems of the petitioner but that statement in itself could not be taken in any way to have any connection with the maintenance of public order, inasmuch as these statements could not have any rational probative force to serve as a ground for the detention of the petitioner. **Held,** further that both the expressions 'incited the public against cow-slaughter" and "threatened the Government with bad consequences" were so vague as not to lead to the conclusion that any kind of violence was to be practised by the people in case A expired. **1956 Cr LJ 86: AIR 1956 Pat 1 : (2) (Pt B) (Pr 5) (DB).**

——Ss. 7 and 3 (1) (a) — Facts and particulars of detenu's acts — Disclosure of — Government is not bound to disclose — But where ground merely states that the detenue is constantly engaged in doing something without telling him anything further it falls short of the requirements of law — It does not give any information to the detenue which he can controvert — Ground is therefore, vague — See Public Safety — Preventive Detention Act (4 of 1950), Section 3 (1) (a). **AIR 1953 Pepsu 190.**

——Ss. 7 and 3 — Ground furnished to detenu stating that he was a believer in the cult of violence — No facts quoted in support of the allegation — Ground is vague and detention illegal. See Public Safety — Preventive Detention Act (1950), Section 3. **1952 Cri LJ 1485: AIR 1952 Pepsu 126 (DB).**

——S. 7 — Sufficiency of grounds of detention — Test — Precision.

It is necessary that the grounds of detention supplied to detenu under S. 7 of the Preventive Detention Act must be quite definite as well as precise. So merely stating that the detenu had given shelter to the gang of dacoits some time prior to his being taken into detention is not enough as it is vague and a proper representation cannot be made on such grounds. **3 Sau LR 232: AIR 1951 Sau 13 (14) (Pt A) (Prs 3, 4) (DB).**

8. No vagueness of grounds — Illustrations.

——S. 7 — Grounds of detention — Vagueness. — The grounds communicated in the following words "During monsoon in 1955 you held secret meetings of adivasis at ———— etc., in Thana District in which you incited and instigated them to have recourse to intimidation, violence and arson in order to prevent the labourers from outside villages hired by landlords from working for landlords" — Then detailed statement of cases of intimidation with their dates given — It further stated that it was not in the public interest

to disclose further facts—**Held,** that the communication as a whole was not vague and was sufficiently clear to make a representation. Shamrao Vishnu Parulekar v. District Magistrate. Thana, **1957 BLJR 1: 1956 SCJ 710: 1957 All LJ 33: (1957) 1 Mad LJ (Cri) 23: 1956 SCA 1132: 1956 SCR 644: 1956 SCC 504: 59 Bom LR 83: 1957 MPC 34: 1957 Cri LJ 5: AIR 1957 SC 23 (25) (Pt A) (Pr 3).**

● **——S. 7 — Grounds of detention — Vagueness — Test — (Constitution of India, Article 22 (5)).**

The question as to whether the grounds furnished are vague or not, is ultimately a question that has to be determined on a consideration of the circumstances of each case. AIR 1951 SC 15, Foll.: The grounds of detention furnished to the detenu were as follows: "With the financial help given by the Portuguese authorities you are carrying on espionage on behalf of the Portuguese Government with the help of underground workers. You are also collecting intelligence about the security arrangements on the border area and you make such intelligence available to the Portuguese authorities. These activities which are being carried on by you with the object of causing further deterioration in the relations between the Portuguese Government and the Indian Government over the question of Goan National Movement, are prejudicial to the security of India and to the relations of India with Portugal". The detenu did not apply to the Government to be supplied with the particulars of the grounds furnished to him.

Held, that it was true that the allegations were not as precise and specific as might have been desired. But having regard to the nature of the alleged activities of the appellant, it was not unlikely that no more could be gathered or furnished. The fact that the detenu made no application for particulars was a circumstance which might well be taken into consideration in deciding whether the grounds can be considered to be vague. In the circumstances and having regard to the fact that what was alleged was espionage activity at a time when relations between the two Governments on the affairs of Goa were somewhat delicate, the grounds could not be considered to be vague. Lawrence Joachem Joseph D'Souza v. State of Bombay, **1956 SCA 766: 1956 Cr LJ 935: 1956 SCJ 559: 1956 All WR (Sup) 121: 58 Bom LR 989: 1956 SCR 382: AIR 1956 SC 531 (534) (Pt B) (Pr 4).**

——S. 7 — Grounds of detention vague — No prejudice to detenu — Section, if complied with.

Although grounds and particulars communicated to the detenu must not be vague, indefinite or incomplete and must convey sufficient information to the detenu to enable him to make a representation that the detaining authority was wrong in its belief that his detention was necessary in the interest of public safety etc., if the detenu knew what incidents were being referred to and was, therefore, not prejudiced by any defect in the grounds themselves. There is a substantial compliance with the provisions of Section 7. **1952 Cri LJ 422: AIR 1951 All 18 (19) (Pt B) (Pr 2) (DB).**

——S. 7 — Scope — Compliance — Detention order under Section 3 (2) but grounds described as being under Section 3 (1) (a) (iii) — **Held,** this was a slip in the superfluous portion of the communication — There was sufficient compliance with the forms and rules of law — Order of detention was valid. See Public Safety — Preventive Detention Act (1950). Section 3. **1954 Cri LJ 1722: AIR 1954 Cal 591 (DB).**

——S. 7 — Vagueness of grounds — Detenu member of party not declared illegal — Activities of party may afford background for appreciation of acts attributed to detenu, which acts may by themselves be innocent — Grounds supplied held not vague.

The grounds suppiied to the detenu must be such as would assist the detenu to know exactly what he has been charged with and to make a proper representation to which he is entitled both under the Act and under the Constitution. If they are not, there is violation of fundamental right and a contravention of the statutory provisions, which will make the order a void order. What is a ground contemplated under the Act to be given to a detenu for the purpose of his representation has been explained in the case of the State of Bombay v. Atma Ram Shridhar Vaidya (1951 SCR 167) by Kania C. J. The activities of a party, in general, which has not been declared illegal may not by itself be a ground for holding that any particular programme of that party. The activities of the party only afford background for an intelligent appreciation and weighing of the acts attributed to the particular member. In the light of this back ground many of the acts of the particular member, which are innocent and legal on the face of it, may be found to have a different implication behind them. Therefore, the ground that a particular act on the face of it is legal or innocent by itself is not sufficent to exonerate the individual for the purpose of preventive detention. His activities have to be weighed in the light of all surrounding circumstances wherein he has voluntarily placed himself. The responsibility is his for placing himself in those surroundings, and he does it not without risk of being even sometimes truly misunderstood. The remedy of having been so misunderstood is in the right of explaining his acts in his representation and not a plea in Court for setting aside the order. 1951 SCR 167, Relied on.

Held, on facts that the grounds supplied did afford sufficient facts to disclose the charge framed against the detenu and enable him to make a representation. **1952 Cri LJ 1382: AIR 1952 Pat 374 (375) (Pt A) (Pr 5) (DB).**

——S. 7 — Grounds — Held on facts that they were not vague and that the detention was legal.

The statement of the grounds supplied to the detenu mentioned that he was an important member of the Communist Party of India, that though there was change of leadership in the middle of 1950 this brought about "little change in the highly subversive programme of the party", all the members of the reconstituted Central Committee and "practical experience of leading armed agrarian agitation in the rural areas", that, this Committee in the early part of 1951 circularised all party units that "while exploiting the legal possibilities" the revolutionary trade unions should orientate towards illegal trade unionism as the principal form of organisation, and that "the perspective of the fight to be initiated was armed guerilla struggle in rural areas leading to the gradual establishment of 'liberated bases' setting up of 'liberation armies' for the purpose of a final overthrow of the Government". The present programme of the party was set out in paragraph 6 and the following paragraphs of the grounds which were: "Although Sri Chandra Rajeshwar Rao has resigned from the General Secretaryship of the party and the Polit Bureau, which is now functioning as the Secretariat of Central Committee, has issued a draft programme of the party which gives an impression that the party has decided to abjure violence and armed struggle and has taken to only legal methods, Government have dependable information that

the party is still definitely of the view that without violence no revolution can take place and consequently it is taking steps not only to continue its underground "Tech" organisation but to strengthen it and tighten it. In actual practice also it is continuing its orgy of loot, arson and murder in Hyderabad, Andhra, Tripura, Manipur and other places. It is, therefore, abundantly clear that the C. P. I. has now divided the activities on two fronts, an open front where the party still exploits all legal possibilities and an illegal front for carrying on armed guerialla struggle in rural areas for the formation of liberation bases and liberation armies, that the State Government is satisfied that the members of the Communist Party of Bihar who continue to be working for the party's cause have accepted the party's aforesaid programme, and that members who do not accept the programme or show any hesitation are promptly suspended, expelled or 'purged' from the party".

Held, per Reuben and Narayan JJ.— There was nothing in the grounds, to justify the inference therefrom that the party was divided into two groups, one consisting of those partaking in the legal activities and the other consisting of those indulging in activities of the opposite kind. The grounds were quite consistent with a member of the party taking part openly in one set of activities and at the same time being an active participator in underground activities of the other set. It was also consistent with a member of the party whose participation in the illegal activities at an opportune moment was important, attempting to evade detention or arrest in the meantime by apparently confining himself to legal activities. What had been pointed was this that though the draft programme showed that the party had now decided to abjure violence, it had really not done like that and that the draft programme was nothing but a camouflage meant to deceive the public and the State. The question of mentioning to which group the detenu belonged did not, therefore, arise and the grounds were not vague on that ground.

Per Imam J.— (Contra) — That the grounds definitely mentioned that the Communist had formed into two groups and the grounds should have mentioned to which group detenu belonged. Without this it was impossible for him to make effective representation. The grounds were vague and the detention illegal. **ILR 31 Pat 1: 1952 Cri LJ 484: AIR 1952 Pat 177 (179, 182, 183, 184) (Pt B) (Prs 5a, 12g, 16a, 18c) (DB).**

——S. 7 (1) — Vagueness of grounds — Constitution of India, Art. 22 (5).

Where it is apparent from Annexure containing the grounds and the facts or particulars that the petitioner had been clearly told that he had come into possession of certain official secrets connected with the security of India and having a bearing on relations of India with foreign powers while he was serving under the Government of India as an officer in the Air Headquarters in the Ministry of Defence and that during the period March to October, '63 he had established and maintained secret contacts with an agent of a foreign power and had been in unauthorised and clandestine communication with him with a view to disclosing vital secret information connected with the security of India and further that he continued to be in possession of that secret information which justified a belief that he would communicate the same to the agents of foreign powers, it could not be said that the grounds did not disclose the necessary facts or particulars or that in the absence of such facts or particulars he was not in a position to make an effective representation. Though the petitioner could have been tried under Section 34 (d) or 35 (b) of the Air Force Act (1950) or under Section 5 (1) of the Official Secrets Act (1923), that does not suggest that there was any lack of good faith on the part of the respondents in detaining him under Preventive Detention Act. **1965 Pun LR (Supp) 286: 1965 (2) Cr LJ 119: AIR 1965 Punj 270 (275, 276) (Pt C) (Prs 7, 9) (DB).**

——S. 7 — Sufficiency of grounds.

Where the first sentence in the grounds supplied to the detenu only alleged his association with a gang headed by a certain named person wanted by the police in 15 cases of murder and dacoity, but in the same paragraph the grounds continued with the words 'amongst the many acts of your association and assistance, a few specific acts are mentioned below' which were followed by details of three recent occasions on which the detenu had been seen in the company of that leader of the gang the ground cannot be said to be vague, though the first sentence taken by itself may possibly be regarded as somewhat vague. **56 Punj LR 291: 1954 Cr LJ 1068: AIR 1954 Punj 154 (155, 156) (Pt A) (Prs 4, 5).**

——S. 7 — Grounds of detention — Vagueness.

Where the grounds furnished to the detenu contain fairly detailed references to his activities and the detenu had absolutely no doubt or misgiving in his mind regarding them they cannot be held to be vague or indefinite merely because the dates of the activities imputed to the detenu at various places were not mentioned. **52 Cri LJ 1300: AIR 1951 Raj 69 (72) (Pt C) (Pr 8) (DB).**

——Ss. 7, 3 — Grounds—When bad for vagueness — The ground that the detenu as a licensed wholesale dealer in food grains sold such grain in the black market — The information cannot be said to be too vague to be acted upon or to be answered effectively by the detenu. See Public Safety — Preventive Detention Act, Section 3. **52 Cri LJ 1098: AIR 1951 Trav-Co 217 (DB).**

9. Particulars whether should be given.

——S. 7 — Contents of grounds.

The obligation of the Government to furnish grounds which are not vague cannot be taken to mean that they must furnish every meticulous detail. Thakur Prasad Bania v. State of Bihar, **1955 All WR (Supp) 115: 1955 All LJ 802: (1955) 2 MLJ (SC) 165: 1955 SCJ 669: 1955 BLJR 659: 1955 An WR 419: 1955 SCA 1079: 1955 Cr LJ 1408: AIR 1955 SC 631 (632) (Pt B) (Pr 4).**

——Ss. 7 and 3 (1) (a) (ii) — Detention under — Grounds for — Power of Court to determine sufficiency of — Particulars of activities of detenu need not be supplied. See Public Safety — Preventive Detention Act (1950), Section 3 (1) (a) (ii). **1952 Cri LJ 1243: AIR 1952 Bhopal 1 (DB).**

10. Sufficiency of grounds.

——S. 7 — Notice containing grounds and other facts — Vagueness in facts — Effect on validity — (Constitution of India, Article 22 (5)).

When on perusal of the notice under Section 7 it is clear that the grounds and reasons for the detention are contained in the first paragraph of the said Notice and that other paragraphs are only compendium of the facts and particulars on whch the subjective satisfaction of the statutory authority was based for coming to the conclusions mentioned in the first paragraph, any vagueness, irrelevancy or the like in the facts and particulars supplied in the other paragraphs would not affect the validity of the detention

order so long as the grounds furnished do not suffer from any of those defects. AIR 1951 SC 157 and AIR 1954 SC 276, Rel. on. **ILR (1957) 2 All 42: 1957 Cri LJ 1361: AIR 1957 All 782 (792) (Pt E) (Pr 17) (DB).**

——S. 7 — Ground of detention — Ground held not vague and indefinite — Detenue was holding secret meetings and inciting students and villagers of a place to resort to unconstitutional activities in order to bring about a disruption of the present order by violent means—This ground is by itself not insufficient to warrant an order of detention. **AIR 1951 Assam 29 (31, 34) (Prs 9, 24) (DB).**

——S. 7 — Grounds making wide and sweeping allegations against detenu without disclosing bases of those allegations are not sufficient. **AIR 1951 Cal 194 (196) (Pt C) (Pr 13) (DB).**

——S. 7 — Scope — Membership of communist party is not enough for action under Act.

When nothing else is known a mere membership of the Communist Party, if it has not been declared an unlawful body, would not attract the provisions of the Preventive Detention Act. In all democratic States it is essential that the citizens should be made conversant with the pros and cons of every political system and every politial ideology, and so long as a party organisation merely tries to place its own views before the people it does not matter, and a Court cannot in such a case interfere with the activities of that party as long as they are confined to the limits mentioned above. The broadcasting and the preaching of the philosophy and the ideology of a party like the Communist Party would not justify an interference by the Government with the activities of that organisation but once such an organisation in attempting to achieve its object has recourse to activities of a violent nature resulting in danger to public safety, the Government would step in to stop the organisation from carrying on its activities. Where, therefore, members forming part of an organisation are known to indulge in acts of violence and brutality and a person is a member of such an organisation, it is sufficient to raise a suspicion in the mind of the Government that if such person were allowed to be at large he is likely to act in a manner prejudicial to the safety of the public. In order to warrant action being taken under the Preventive Detention Act, it is necessary that there should be sufficient material to satisfy the Government that the person was actively fomenting and inciting violence and instigating people to resort to subversive activities. AIR 1950 FC 129, Rel. on. **ILR (1952) Hyd 122: 1952 Cri LJ 1076: AIR 1952 Hyd 112 (118) (Pt I) (Pr 14) (DB).**

——S. 7 — Grounds of detention — Sufficiency of.

The petitioner was originally detained in 1948 under the Madras Maintenance of Public Order Act, and when that Act was considered to be inconsistent with the Constitution, was directed to be detained by the State under the Preventive Detention Act, 1950, passed by Parliament. The grounds of detention which were served on the petitioner were attacked on three grounds, viz., (i) that the grounds were vague and indefinite as no particulars were given; (ii) there was no present connection between the order of detention and past activities of the petitioner; and (iii) they had no relation either to the security of the State or the maintenance of public safety.

Held: (i) The satisfaction contemplated in Section 3 of the Act is that of the detaining authority and since the section only provided for a subjective standard and not an objective standard of satisfaction, the particulars of the reasons for detention need not be furnished, though if the grounds of detention are very vague and indefinite so as to render the object of furnishing the grounds nugatory the order may be set aside.

(ii) No doubt a person cannot be deprived of his liberty merely because he belongs to a political organisation whose ideologies differ from the party in power but when the aims and objects of the party are to create confusion and to threaten injury to society which the Government has a right to protect and they are sought to be achieved by resorting to violence and terror, the Government would well be justified in detaining a peson who is instrumental in carrying out such a programme and who is likely to resort to activities calculated to prejudice the security of the State and the maintenance of the public order in pursuance of the aims of such a party.

(iii) In judging likelihood of a person of his propensities to indulge in activities prejudicial to the security of the State or maintenance of public order, regard can be had to the antecedents of the person. **1951 Mad WN 248: 1951 Mad WN (Cri) 76: 64 Mad LW 311: 52 Cr LJ 688: (1951) 1 MLJ 274: AIR 1951 Mad 182 (184, 185) (Pt A) (Prs 8, 13) (DB).**

——S. 7 — Detention grounds — Inaccuracy in — Effect — Constitution of India, Article 22 (5).

Any slight inaccuracy in details of the grounds stated cannot be held to invalidate an order of detention. The inaccuracy has to be considered in the light of, and against the background of, all the grounds which have been communicated to the detenu. It would be pushing technicality to an unreasonable extent. If it were to be held that a slight inaccuracy in the name of the village or regarding a date amounts to a contravention of Clause (5) of Article 22 of the Constitution, or shows that the order is mala fide or that the detaining authoriy did not apply its mind before passing the orders of detention. The inaccuracies complained of are not inaccuracies which affect either the form or substance of the orders of detention. **52 Cri LJ 603: AIR 1951 Pat 68 (72) (Pt C) (Prs 7, 8) (DB).**

11. Supplementary grounds — When permissible.

● **——S. 7 — Communication of supplementary grounds.**

A description of the contents of the second communication of the grounds for detention as "supplementary grounds" does not necessarily make them additional or new grounds. One has to look at the contents to find out whether they are new grounds. When they only furnish details of the grounds furnished to the detenu previously, they can be treated as new grounds. Further the fact that the details were communicated later does not necessarily show that they were not within the knowledge of the authorities when they sent the first communication of grounds. Tarapada De v. The State of West Bengal, **52 Cri LJ 400: 1951 SCJ 233: (1951) 1 Mad LJ 431: 1951 SCR 212: 1951 Mad WN 549: 1951 Mad WN (Cri) 165: AIR 1951 SC 174 (176) (Pt B) (Pr 7).**

● **——S. 7** — Constitution of India, Article 22 (5) — Supplementary grounds means additional new grounds or giving particulars of grounds already mentioned — When do they infringe right given by Article 22 (5) — If by supplementary grounds is meant additional grounds i.e., conclusions of fact required to bring about the satisfaction of the Government the furnishing of any such additional

grounds at a later stage will amount to an infringement of the first mentioned right in Article 22 (5) — AIR 1951 Bom 266, **Reversed.** See Constitution of India, Article 22 (5). **52 Cri LJ 373: AIR 1951 SC 157.**

——S. 7 — Scope — Non-compliance — Particulars not such as to enable detenu to make representation — Effect — Subsequent furnishing of better and further particulars — If validates order — Constitution of India, Article 22 (5).

The grounds of detention which have to be furnished under Section 7 of the Preventive Detention Act, as well as under Article 22 (5) of the Constitution, constitutes a very important and vital safeguard for the subject. If the grounds furnished are not such as to give him the opportunity, which the Constitution makes it incumbent, of making a representation against the order of detention, then there is a clear contravention of the fundamental rights given to the subject and of the safeguard given to him under Article 22 (5) of the Constitution, and the detention becomes bad and illegal for non-compliance with Article 22 (5) and of S. 7 of the Preventive Detention Act. That defect and illegality cannot be set right by the detaining authority by amplifying or improving the grounds already given, by subsequently furnishing further and better particulars. It is not open to the detaining authority to furnish grounds in several instalments. The grounds to be furnished are grounds in existence at the time of the order and on the basis of which the detention order is made. **21 Bom Cri Cas 43: ILR (1951) Bom 155: 52 Bom LR 856: AIR 1951 Bom 266 (267) (Pt B) (Prs 3, 5) (DB).**

[Reversed in AIR 1951 SC 157.]

——S. 7 (1) — Grounds first supplied vague — Supply of full particulars in High Court is no compliance with Section 7 — The detention is invalid and cannot be validated by supply of further particulars in the High Court. **AIR 1951 Punj 157 (159, 166) (Pt D) (Prs 5, 22) (DB).**

12. Some grounds vague and some clear — Effect.

●**——S. 7 —** Constitution of India, Articles 22 (5), 21 — One of several grounds vague — Effect — The detention cannot be held to be in accordance with the procedure established by law within the meaning of Article 21 and he is therefore entitled to be released. See Constitution of India, Article 22 (5). **AIR 1953 SC 318.**

——S. 7 — Good grounds mixed up with bad grounds — Effect — Constitutional requirements with respect to each of the grounds communicated to the detenu subject to a claim of a privilege under Clause (6) of Article 22 not satisfied — Order of detention is not in accordance with the procedure established by law within the meaning of Article 21 of the Constitution. See Constitution of India, Article 21. **1954 Cri LJ 685: AIR 1954 All 315 (DB).**

——S. 7 — Grounds of detention — Vagueness — Test.

Sub-clause (5) of Article 22 of the Constitution enjoins upon the detaining authority the duty to communicate to the detenu as soon as may be the grounds on which the order has been made and the detaining authority should afford him the earliest opportunity of making a representation against the order. In that context the supply of the grounds and the opportunity of making a representation are to be read together so that if the grounds are too vague that they make representation ineffective or impossible in any real sense of the term, then such vagueness will be defeating the constitutional right of representation. When that is so, then the order of detention can be set aside.

The object of this constitutional safeguard is that the grounds must be such as to enable the detenu to make what has been called an 'effective representation". Vagueness of grounds therefore is not an abstract notion but is always to be examined by the test whether the grounds permit the detenu to make an effective representation or not. 55 CWN 27, Rel. on.

Each case has to be decided on its own merits and with special reference to individual facts. The confusion that is to be avoided on this branch of constitutional law is that while the sufficiency of the grounds in the sense whether the same could give satisfaction to the Government is not a matter for examination by the Courts, the sufficiency of the grounds in the sense of enabling a detenu to make an effective representation can be examined by the Courts. Case No. 24 of 1950 (SC), Rel. on.

In considering the grounds they must be taken and read as a whole and in context in which they are stated. While a ground taken in isolation might appear to be too vague for representation may nevertheless in the context of other grounds stated, give sufficient materials for effective representation. It is not correct to say that when one out of many grounds is too vague the order of detention itself is bad even though such order is based not only on that ground alone but also on other grounds which do not suffer from vagueness. The order of detention is the result of the cumulative effect of the different grounds stated and the vagueness of one ground cannot therefore be said to vitiate the order of detention. **56 Cal WN 42: ILR (1953) 1 Cal 59: 1952 Cri LJ 204: AIR 1952 Cal 26 (28, 29) (Pt A) (Prs 7, 8, 9) (DB).**

●**——S. 7 —** Grounds of detention — Vagueness — One of the grounds vague — Detention held illegal. See Constitution of India, Article 21. **1955 Cri LJ 1958: AIR 1955 J and K 38 (FB).**

●**——S. 7 — Grounds — Contents — Introduction of irrelevant matter — Effect.**

The grounds supplied to the person detained should show relevancy to the object which the Legislature has in view, namely, the prevention of objects prejudicial to the maintenance of law and order. For introduction, of irrelevant matters vitiates the detention order as a whole, though there may be only a few grounds that are irrelevant or illusory. AIR 1954 SC 179, Foll. Ghulam Qadir Hawaraz v. State, **1955 Cr LJ 1597: AIR 1955 J and K 35 (36) (Pt B) (Pr 7) (FB).**

——S. 7 — Grounds — Even one vague ground affects the legality of detention — All the grounds supplied must be precise, definite, clear and specific — (Constitution of India, Article 226) — AIR 1953 SC 318 and Cri. Misc. P. No. 66 of 1953, Dated 10th August, 1953 (Pepsu), Followed. **AIR 1955 NUC (Pepsu) 2157.**

——S. 7 — One of several grounds vague — Effect.

Where one out of the several grounds supplied to the detenu is vague but the others are in order the legality of the detention order is not affected thereby. **AIR 1952 Pepsu 126,** Rel. on.

ILR (1953) Patiala 1: 1953 Cri LJ 1710: AIR 1953 Pepsu 190 (192) (Pt C) (Pr 6).

——S. 7 — Grounds under — Validity — Some grounds vague and incorrect — Effect.

The question whether the grounds supplied in the particular case can be regarded as vague and incomplete is a question of fact to be decided with respect to facts of each case.

If some of the grounds given are not outside the scope and ambit of the Act but are merely vague and indefinite, it cannot be said that the whole order is vitiated because some extraneous consideration might have weighed with the detaining authority in making the order. A ground which is bad because it lacks precision and accuracy has to be completely ignored as if no ground was furnished at all. If after eliminating such grounds there still remain a ground or grounds which are precise and accurate and which can justify the order, then there is no reason why the order made by the detaining authority should not stand. AIR 1948 Bom 334 (FB) and AIR 1950 Mad 162, Rel. on.

Held, that though some of the grounds supplied to the detenu were vague and indefinite, there were others which could justify the order of detention. **52 Cri LJ 1100: AIR 1951 Pepsu 164 (165 to 167) (Pt A) (Prs 5, 8, 10) (DB).**

13. Some grounds beyond the scope of the Act — Effect.

——Ss. 7, 9, 11 — Some of grounds irrelevant and outside scope of Act — Detention is illegal — Grounds of detention and particulars thereof — Distinction pointed out — (Constitution of India, Article 22). **AIR 1955 NUC (Cal) 1009 (DB).**

——S. 7 — Some of grounds for detention outside scope of Act — Whole order is bad. **AIR 1953 Madh Bha 153 (153) (Pt B) (Pr 2).**

——Ss. 7 and 3 — Several grounds of detention — One or more beyond scope of Act — Entire order of detention is vitiated. See Public Safety — Preventive Detention Act (4 of 1950), Section 3. **AIR 1952 Pepsu 126 (DB).**

14. Past activities whether can be considered.

——Ss. 7 and 3 — Past activities can be ground for detention. See Public Safety — Preventive Detention Act (4 of 1950), S. 3. **1957 Cri LJ 10: AIR 1957 SC 28.**

——S. 7 — Sufficiency of grounds.

The mere past mental attitude of the detenu, which showed that at some past period he indulged in prejudicial activities cannot form a ground for any reasonable satisfaction of the detaining authority so as to justify his detention, when there is no statement of his activities in the proximate or immediate past in the grounds. **1952 Cri LJ 683: AIR 1952 Bhopal 6 (10, 12) (Pt D) (Prs 15, 24).**

——S. 7 — Past activities of detenu can be considered.

The past conduct or the antecedents of the person detained would always afford sufficient data in order to judge about the propensities and the criminal proclivities of the detenu. They cannot necessarily be ignored. They may be safe criteria for determining about his propensities and likely future activities. 1950 SCR 88, Ref. **ILR (1952) Hyd 122: 1952 Cri LJ 1076: AIR 1952 Hyd 112 (120) (Pt L) (Pr 21) (DB).**

——Ss. 7 and 3 — Past penal activities can be taken into account to find out likely future course of conduct. See Public Safety — Preventive Detention Act (4 of 1950), Section 3. **1955 Cri LJ 476: AIR 1955 Madh Bha 36 (DB).**

——S. 7 — Insufficient ground — Reference to previous detention.

Previous detention of the petitioner can have no relevant bearing upon his present activities which must be judged on merits apart from the petitioner's past, when no reference is made to the nature of his past activities. **1956 Cr LJ 86: AIR 1956 Pat 1 (4) (Pt D) (Pr 11) (DB).**

——S. 7 — Grounds of detention — Past activities of detenu can be taken into consideration by detaining authority — Membership of a party spreading doctrine of violence to acquire power though the party is not declared unlawful, may under certain circumstances lead to inference that person concerned is likely to act in manner prejudicial to public safety. (1940-50) FCR 827, Relied on. **31 Pat 1: 1952 Cri LJ 484: AIR 1952 Pat 177 (178) (Pt A) (Pr 4) (DB).**

——S. 7 — Detention grounds — Inference from past activity.

It is open to the detaining authority to apply its mind afresh to the past activities of the detenus to draw the inference from the past activity that if the detenus be allowed to remain at large, they will indulge in activities to the prejudice of public safety and the maintenance of public order. **52 Cri LJ 603: AIR 1951 Pat 68 (72) (Pt D) (Pr 9) (DB).**

15. Representation by detenu.

——S. 7 — 'Earliest opportunity of making representation' — Meaning of — Provision mandatory — Effect of non-compliance — Supplying two sets of grounds resulting in prejudice to detenu — Proceedings vitiated.

The third requirement of Section 7 is that the grounds shall afford the detenu "the earliest opportunity of making a representation against the order". Bearing in mind the object of the section and its entire context, the word "opportunity" used therein should be construed to mean "adequate opportunity" and the word "representation" should be construed to mean "effective representation".

Where the detenu was supplied with two sets of grounds, one by the District Magistrate making the order and the other by the State Government after the expiry of 5 days allowed by law, the second set of grounds should be ignored as not being in accordance with law. If the detenu is misled into thinking that the first set of grounds is superseded and makes a representation againt the second set, a serious and irreparable prejudice is caused to the detenu so as to vitiate the proceedings. Moreover where such a mandatory provision of law is contravened in a case of this nature, the proceedings are vitiated irrespective of the question of prejudice. Prejudice in such a case should be presumed. **ILR (1961) 1 All 427.**

——Ss. 7 and 9 — Sections show that detenu should have a minimum period of 25 days to submit his representation — Curtailing such period is a serious irregularity which cannot be condoned. **ILR (1961) 1 All 427.**

——S. 7 — Right of detenu to ask for further particulars.

If the detenu feels embarrassed by reason of want of necessary details he has the right to ask

for further necessary particulars since that right follows from his other right to make an effective representation before the authority concerned. **1964 (1) Cri LJ 515: AIR 1964 Cal 231 (234) (Pt D) (Pr 12) (DB).**

——S. 7 — Constitution of India, Article 22 (5) — Grounds of detention — Insufficiency of particulars — Detenu has right to obtain further details.

Sufficiency of the grounds for the purpose of inducing satisfaction of the authority concerned is entirely different from sufficiency in relation to the detenu's right to make an effective representation. If the detenu even felt that sufficient details had not been supplied with respect to them or any of them, it was quite open to him to apply for further particulars. He had that right flowing from his constitutional right of making an effective representation against the order of detention. **1963 (2) Cri LJ 499: AIR 1963 Cal 589 (590) (Pt C) (Prs 8, 9) (DB).**

——S. 7 — Representation made by detenu should be forwarded to Government with utmost promptitude. **52 Cri LJ 1451: AIR 1951 Punj 119 (120) (Pt C) (Pr 6) (DB).**

16. Disclosure of facts — Sub-sec. (2).

——S. 7 — Affidavit filed by detaining authority — Recourse to Constitution of India, Article 22 (6).

"I must point out that we have noticed a general, but definite, tendency amongst the detaining authorities to say in their affidavits in a vague way that whatever is stated in the grounds of detention is the only material which could be furnished to the detenu and that any further disclosure is against public interest. I must express disapproval of the omnibus manner in which recourse is taken to Article 22 (6) of the Constitution for claiming privilege. In my opinion, such general, indefinite and omnibus expression as is employed in the detaining authority's affidavit is open to a real danger that it may be used sometimes to shut out some possible contentions which a detenu may take in order to challenge his detention. That surely could never have been the intention of the Constituent Assembly in enacting Article 22 (6)". **53 Bom LR 127: 21 Bom Cri Cas 80: 52 Cri LJ 418: ILR (1951) Bom 546: AIR 1951 Bom 33 (43) (Pt I) (Pr 21) (DB).**

——S. 7 (2) — Disclosure of facts — Withholding of facts in public interest — Right vests only in detaining authority — Constitution of India, Article 22 (6). **1965 Pun LR (Supp) 286: 1965 (2) Cr LJ 119: AIR 1965 Punj 270 (275) (Pt B) (Pr 7) (DB).**

17. Powers of High Court.

——S. 7 — Constitution of India, Article 22 (5) — Grounds supplied to detenu — Jurisdiction of Court to test if they are sufficient arises when the question whether the vagueness or indefiniteness of the statement furnished to the detained person is such as to give him the earliest opportunity to make a representation to the authority arises. See Constitution of India, Article 22 (5). **52 Cri LJ 373: AIR 1951 SC 157.**

——S. 7 — Constitution of India, Articles 226, 21 and 22 — Habeas Corpus — Detention under Preventive Detention Act — Allegation as to non-existence of grounds would be basis for the Board to hold that there is no sufficient cause for detention — Opportunity to be heard can be had before the Advisory Board — Reagitation of matter before High Court is not allowed — Absence of provision for reagitation in High Court — Remedy is to get the law changed and not to approach the Court. See Constitution of India, Article 226. **1956 Cri LJ 1152: AIR 1956 All 589 (DB).**

——Ss. 7 and 3 — Grounds of detention — Sufficiency of — Power of Court to go into — Preventive and punitive detention — Distinction — (Constitution of India, Articles 22 and 226).

The subjective satisfaction as regards the sufficiency of the grounds for passing a detention order is the satisfaction exclusively of the authority which has to pass such an order, and it is not for the High Court to enter into the merits of that order. That being so, it follows necessarily that it is not open to the High Court to examine the said materials with a view to determining whether the aforesaid subjective satisfaction of the executive authority concerned had been arrived at correctly or not.

The only purpose for which the grounds, and therefore the materials for those grounds, could be judicially examined would be to see whether they were sufficient to enable the detenu to make an effective representation contemplated by Article 22 (5) of the Constitution, or whether they were relevant to the circumstances under which the detention could be supported or whether the order had been made mala fide. It follows therefore that it is not open to the detenu to urge before the High Court that the District Magistrate had no jurisdiction or authority to take into account the speeches delivered by him in the district outside his jurisdiction.

Further, preventive detention is by its very nature different from what may be called punitive detention. The latter results, on a trial of the person concerned for committing a crime after his guilt has been established in a competent Court of justice, whereas the former is not a punitive but a precautionary measure the object of which is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. That being so, justification for action under the Act is suspicion or reasonable probability and not criminal conviction. Such a suspicion may well be based on any past actions of the person concerned, and they may even be actions committed outside the jurisdiction of the authority passing the order of detention. AIR 1950 SC 27, Foll. **1956 Cr LJ 1152: AIR 1956 All 589 (593) (Pt D) (Prs 8, 9) (DB).**

——S. 7 — Grounds of detention supplied to detenu — Court if can look into these and to what purpose.

It is open to the Court to look into the grounds supplied to the detenu, in order to determine whether the detention is proper or improper. It can look into the grounds to see whether they are precise and definite. Thus, although it is not open to the Court to question the reasonableness or otherwise of the satisfaction of the detaining authority yet it is certainly competent to the Court to satisfy itself that, on the materials supplied to the detenu, the detaining authority could be honestly satisfied as to the correctness of the order passed by it. **52 Cri LJ 732: ILR 1951-2 All 493: AIR 1950 All 709 (710) (Pt A) (Pr 6).**

——Ss. 7 and 3 — Power of Court to question truth or falsity of grounds — The Court cannot go into the question of truth or falsity of the statement of facts contained in the grounds of detention. If the facts stated in the grounds of detention are disputed, the remedy that the law

allows to the petitioner is by a representation to the Government. See Preventive Detention Act (4 of 1950), Section 3. **1953 Cri LJ 770: AIR 1953 Assam 97.**

——S. 7 — Power of High Court.

High Court cannot enter into the question whether the statement of fact made in the grounds supplied to the petitioner are true or not. It is a matter for the consideration of the Advisory Board. **1953 Cr LJ 507: AIR 1953 Assam 63 (64) (Pt A) (Pr 4).**

——S. 7 — Detention grounds — Vagueness of mind of detaining authority.

The detention grounds are liable to be examined not with a view to ascertain their existence as a fact, but with a view to examine the state of mind of the detaining authority. If the state of the mind of the detaining authority discloses that he has been casual in his approach and that he has not applied his mind with that diligence which is necessary when the question is of taking away the liberty of a subject, the Court will interfere and will set at liberty the detenu arrested by the order of the detaining authority. AIR 1949 Bom 75, Foll, AIR 1950 Bom 126 and AIR 1949 All 748, Rel. on. **1952 Cri LJ 683: AIR 1952 Bhopal 6 (13) (Pt F) (Pr 26).**

——S. 7 — Order of detention — Grounds — High Court's power to go into the matter.

Although it is not open to the High Court to question the sufficiency of grounds on which the order has been made or to embark upon an enquiry into the questions of fact, the High Court can find out whether the order of detention has been made on rational grounds. **1961 Nag LJ (Notes) 34 (Bom).**

——Ss. 7 (1), 3 — Satisfaction — Essentials of — Grounds as evidence of satisfaction — (Constitution of India, Article 22).

The Courts must look at the grounds disclosed to the detenu under Section 7 (1) from two points of view: In the first place to consider whether they came within the ambit of the Act and the second, which is equally important, is whether they furnish an opportunity, and a reasonable opportunity, to the detenu of making a representation which he has a right to make under the section.

Further, the grounds that are to be furnished to the detenu being grounds on which the order has been made, they may also be looked at by the Courts for the purpose of satisfying themselves whether the Government or the officer concerned arrived at the satisfaction which is necessary under Section 3 before a valid order could be made. It may be that the detaining authority may have more materials than the grounds; but the grounds must be the essential basis upon which the detaining authority arrives at its satisfaction and makes the order of detention. **1956 Cr LJ 875: ILR (1956) Bom 792: 58 Bom LR 473: AIR 1956 Bom 490 (491) (Pt C) (Pr 3) (DB).**

——S. 7 — Nature of order of detention and duty of High Court — High Court can only see whether the order challenged is sufficiently full and clear so as to give the detenu an opportunity to make an effective representation against the order — It cannot decide whether the material in possession of the Government was sufficient to justify the order or the reasonableness of the satisfaction of Government as to the necessity of passing the order against the detenu. See Constitution of India, Article 22 (5). **AIR 1955 NUC (Bom) 5556 (DB).**

——S. 7 — Grounds for detention — Sufficiency, vagueness or imprecision of — Powers of High Court to determine.

The High Court has only the power to see whether the detenu has been enabled to exercise his constitutional right of making an effective representation against the order he complains of. This really resolves itself to the question of vagueness or imprecision, of the grounds. Whether the grounds were sufficient in the opinion of the detaining authority for the purpose of inducing its subjective satisfaction in making the order of detention, is a matter which is entirely outside the purview of the Court's consideration. Further, it is not right to equate want of particulars or vagueness with irrelevance. An irrelevant ground has no connection at all with the satisfaction of the authority making the order of detention.

While the Court should not uphold an order of detention in spite of invalidity of some of the reasons or grounds, it is its duty to be satisfied as to whether the allegedly vague or irrelevant ground is such as, if excluded, might reasonably have affected the subjective satisfaction of the authority concerned. If some ground or reason appears to the Court to be of comparatively unessential nature, the order of detention cannot be held bad, merely because there are one or two such particulars amongst a number of others upon which an order of detention has been made. AIR 1957 SC 164, Rel. on. **1963 (2) Cri LJ 499: AIR 1963 Cal 589 (590) (Pt B) (Prs 6, 8, 9, 10) (DB).**

——S. 7 — Facts in grounds of detention — High Court's power to question them.

The High Court is not entitled to go into the question whether the statements made in the grounds and in the particulars served later were untrue.

The High Court cannot sit as a Court of appeal and hold that the facts alleged are not true or have not been established. **1953 Cri LJ 361: AIR 1953 Cal 129 (134) (Pt C) (Pr 33) (DB).**

——Ss. 7 and 3 — Power of Court to question vagueness of grounds — The Court can only go into the question whether the grounds supplied to the detenu are irrelevant or vague and can afford a basis for the subjective satisfaction of the detaining authority. See Public Safety — Preventive Detention Act (1950), Section 3. **1953 Cri LJ 310: AIR 1953 Cal 81 (DB).**

——S. 7 — Grounds — Sufficiency of — Court has power to look into the grounds to consider whether they afford sufficient particulars to enable a detenu to make an effective representation — Constitution of India, Article 22 (5). **AIR 1951 Cal 194 (196) (Pt A) (Pr 11) (DB).**

——S. 7 — Grounds, sufficiency of.

Adequacy or sufficiency of grounds justifying an order of detention is not justiciable. Inference drawn by Government on facts supplied to it cannot also be gone into. AIR 1951 SC 157 and 1950 SCJ 433, Rel. on. **ILR (1953) Hyd 459: (1953) Cr LJ 1845: AIR 1953 Hyd 277 (280) (Pt E) (Pr 8) (DB).**

——Ss. 7 and 3 — Correctness of statements relating to past conduct in grounds of detention — Not justiciable — Constitution of India, Article 22 (6). See Public Safety — Preventive Detention Act (1950), Section 3. **AIR 1951 Hyd 162 (FB).**

——S. 7 — Grounds of detention — Power of High Court to look into, to determine whether order of detention is mala fide.

In cases of preventive detention the executive must act within the limits of the powers conferred by law; it must act bona fide and it must act according to the provisions of the Law and the Court has a power to scrutinise the action of the executive from the point of view of ascertaining whether the action taken was bona fide or not. Hence, where a person arrested in respect of certain offence is released from jail on a writ of habeas corpus but is immediately arrested under Section 7, Preventive Detention Act on ground which had been held to be illegal that very day, the Court can look into the grounds of detention with a view to see whether the order of detention is male fide or bona fide. Such an action on the part of the executive is bound to shake the confidence of the public in Courts and suitable action for committal for contempt should invariably be taken. **1956 Cr LJ 1411: AIR 1956 Manipur 44 (47, 48) (Pt B) (Prs 8, 10, 11).**

——S. 7 — Grounds of detention — Satisfaction of detaining authority — Interference by Court.

Before the Government can pass an order of preventive detention under the Act it must be satisfied with respect to the individual person that his activities are directed against one or other of the objects mentioned in the Act and that it was necessary to prevent him from acting in such a manner. If the ground by itself is not so convincingly irrelevant and incapable of bringing about satisfaction in any rational person the question whether such ground can give rise to the satisfaction required for making the order is outside the scope of the inquiry of the Court. **1952 Cr LJ 1382: AIR 1952 Pat 374 (375, 376) (Pt A) (Pr 5).**

——S. 7 — Detenu's petition for release to the High Court — It is not within the scope of such a petition to enquire into the truth or falsehood of the grounds supplied to the detenu — (Constitution of India, Article 226). See Criminal P. C. (1898), Section 491. **1953 Cri LJ 1710: AIR 1953 Pepsu 190.**

——S. 7 — Grounds not true — Interference by High Court — Constitution of India, Article 226.

The mere fact that the grounds on which the detaining authority made an order of detention were not true is not a matter for the High Court to go into in a petition under Article 226 of the Constitution. **ILR (1952) Patiala 445: 1953 Cr LJ 1519: AIR 1953 Pepsu 145 (145) (Pt B) (Pr 3).**

——S. 7 — Grounds of detention vague — High Court should not direct Government to supply fresh grounds containing fuller particulars. **AIR 1951 Punj 8 (10) (Pt B) (Pr 3).**

——S. 7 — Particulars of grounds of detention need not be furnished — Grounds supplied should not be irrelevant — Detenu can however ask for further particulars — Courts cannot enquire into truth of grounds, unless it is found that action of detaining authority is mala fide — Burden to establish mala fide is on detenu — Court cannot also enquire into sufficiency of grounds for satisfaction of detaining authority — It can only see whether grounds are relevant and whether the authority was reasonably satisfied — Since grounds had no bearing on objects order of detention held bad — Constitution of India, Article 22.

Neither in Article 22 nor in Preventive Detention Act is there any express provision that particulars of the grounds of detention should be given to the person detained. Looking to the wordings of Article 22 of the Constitution of India and Section 7 of the Act, it is not necessary that any particulars should have been given by the detaining authority in the grounds furnished to the detenu. Grounds which form the basis of satisfaction when formulated are bound to contain certain facts but mostly they are themselves deductions of facts from facts. Simply because the grounds are such that no answer can be given to them excepting a simple denial, it cannot be said that the grounds are vague. Of course, it is desirable that the detaining authority should give the information with reasonable details to the detenu, but when it is not so given and only the grounds for the order are given, it cannot be said that the provisions of either Article 22 of the Constitution of India or of Section 7 of the Act are not complied with. An order of detention cannot therefore, be vacated simply on that gounds so long as the grounds furnished are not irrelevant to the objects mentioned in Section 3 of the Act. It is open to a detenu to ask the detaining authority for further particulars if he thinks that he is not in a position to make an effective representation on the grounds supplied to him, or the Government itself might at a later date furnish such particulars but it is not incumbent upon the detaining authority to furnish all sorts of particulars in its possession, besides the grounds having a bearing on the objects which satisfied the detaining authority that the detenu should be detained.

As regards the truth of the grounds, it is not open to the Court to go into them, unless it records a finding that the action of the detaining authority was mala fide. The burden of proving the mala fides lies heavily on the detenu and under circumstances by their mere affidavit which have been answered by the counter affidavit of the District Magistrate, it cannot be said that they have established a case of mala fide.

It is also not permissible for the Court to see whether the grounds were sufficient for the satisfaction of the District Magistrate that the detention of the detenu was necessary in the interest of the objects mentioned in the order of detention. All that it is authorised to see is whether the grounds bear any relevancy to the objects mentioned in the detention orders. Unless mala fides are proved, a Court cannot go into such questions.

The only thing, therefore, that the Court has to consider is whether the District Magistrate can be said from the grounds furnished to the detenu to have had mental satisfaction that it was necessary to detain him with a view to preventing him from acting in any manner prejudicial to the security of the State and the maintenance of the public order (which objects were mentioned in the detention order). The term "satisfied" in this context means "reasonably satisfied".

Though it is not permissible for the Court to see whether the grounds given are true or sufficient, it is certainly (permissible for it to be satisfied) whether detaining authority was reasonably satisfied that the material supplied showed that an intended detenu was acting in any manner prejudicial to one or more of the objects, given in section 3. It is not permissble to a detaining authority to issue an order of detention mechanically incorporating the words of Section 3. It is necessary for it to issue such order after mental satisfaction. In grave cases of detention without trial, it would not do to pass routine orders, but the detaining authority should carefully consider the materials before it, and then

form its opinion whether it warrants order of detention for fulfilment of any of the objects given in Section 3. When orders of detention are made for several reasons without distinguishing between them, there is a reasonable doubt as to whether the detaining authority was reasonably satisfied that the materials placed before it were sufficient for making a detention order because it cannot be said which of the reasons principally influenced the detaining authority in making the detention order. It is necessary for the detaining authority to examine the materials before it and then to form a clear opinion as to whether it was necessary to make an order of detention in the interest of one or the other object given in Section 3 of the Act. It is not permissible to recite all, or more than one object given in Section 3 in the order of detention, and when it is shown by the grounds that they have no bearing upon some of those objects, to fall back upon the argument that they have at least bearing upon one or more of those objects. This argument does not take note of the fact that it is necessary for the detaining authority to apply its mind before making an order of detention to the question as to which of the acts alleged against the intended detenu have bearing on a particular object for which he is going to be detained. **1953 Cri LJ 34: 1953 Raj LW 232: ILR (1952) 2 Raj 569: AIR 1952 Raj 171 (174 to 177) (Prs 10, 11, 13) (DB).**

——S. 7 — Failure of detaining authority to do his duty properly — Right of detenu to apply to Court.

A duty has been cast upon the detaining authority by Section 5 of the Preventive Detention Act to supply to the detenu the grounds of his detention. If he fails in that duty, the detenu can come up to the Court direct and ask for his release on the ground that a mandatory provision of the Act has not been complied with. He is not bound to complain to the authority. Even if he complains to the authority in ignorance of his rights, the Court can take cognizance of it and consider whether the duty has been discharged properly. **3 Sau LR 232: AIR 1951 Sau 13 (14) (Pt B) (Pr 5) (DB).**

18. Burden of proof.

——S. 7 — Grounds for detention — Burden of proof.

The burden to prove that the reasons for detention supplied to the detenu were of such a nature that it was possible for the detenu to base thereon his representation to the Government lies upon the State.

Where the Government verbally communicates the reasons for detention and there is no evidence to show what those reasons were the order of detention must be held to be illegal. **(1950) 2 Pepsu LR 471: 1952 Cri LJ 591: AIR 1952 Pepsu 61 (62) (Pt B) (Pr 6).**

19. Pleas permissible in the Court.

——Ss. 7, 3 and 12 — Grounds supplied to detenu must be connected with preventive order — Failure to establish such connection — No compliance with Article 22 (1) (3) (5) of the Constitution — Order of detention would be invalid — Right of detenu — The detenu can raise this contention before the Court. See Public Safety—Preventive Detention Act (1950), S. 3. **52 Cri LJ 732: ILR (1951) 2 All 493: AIR 1950 All 709.**

——S. 7—Facts on which order of detention is based not before the detaining authority on the date of the order or the grounds not connected with the acts to be prevented — Order under Section 3 (1) is not bona fide — Detenu can challenge it on grounds of mala fides and High Court has power to examine the question. **1961 Nag LJ (Notes) 34 (Bom).**

——S. 7 — Addition of ground of mala fides in petition — Order challenged in High Court — Plea of mala fides of the order not taken in the petition — It cannot be allowed to be taken at the stage of arguments in the High Court. See Constitution of India, Article 226. **AIR 1955 NUC (Bom) 5556 (DB).**

——S. 7 — Detention grounds — Further facts not disclosed on grounds of public interest — Decision can be challenged only on grounds of mala fides.

When giving the grounds for detention, the authority may and indeed usually should embody in the grounds the conclusions which are reached by him. But under the Constitution itself he is not required to disclose such facts as it is not in the public interest to disclose. It is obvious, therefore, that, in the first instance, at any rate, the authority which detains has to determine whether it is in the public interest to disclose a particular fact or not. Its decision can be challenged consequently only on the ground that it is a mala fide decision. **53 Bom LR 717: 21 Bom Cr C 210: 1952 Cri LJ 81: ILR (1952) Bom 134: AIR 1952 Bom 1 (10) (Pt G) (Pr 21) (DB).**

——S. 7 (1) and (2) — Power of Court — Discretion and duty of detaining authority is to disclose all facts which would enable the detenu to make a representation against the order and also to decide whether a certain fact is or is not against public interest in order to be withheld from the detenu — Grounds on which exercise of discretion can be challenged that the discretion to withhold facts was exercised arbitrarily, capriciously or mala fide — Constitution of India, Article 22. **52 Cri LJ 34: AIR 1951 Bom 252 (253 to 255) (Prs 3, 4, 5) (DB).**

——S. 7 — Order of detention under Section 3 of Preventive Detention Act (1950) — Satisfaction of detaining authority is the basis of the order and it cannot be challenged in a Court of law — Order can however be challenged on the ground of mala fide — Truth of facts cannot be enquired by the High Court — Vagueness of grounds — The question whether the vagueness or indefiniteness of the statement furnished is such as to deprive or preclude the detenu of the earliest opportunity to make a representation to the authority is however within the jurisdiction of High Court. See Criminal P. C. (1898), Sec. 491. **1960 Cri LJ 1588: AIR 1960 Guj 43 (DB).**

——S. 7 — Sufficiency of grounds — Detenu having made detailed representation cannot contend grounds supplied were vague — (Constitution of India (1950), Article 22 (5)). **AIR 1952 Hyd 186 (186) (Pt A) (Pr 3) (DB).**

——S. 7 — Sufficiency of grounds upon which the satisfaction of the detaining authority is based cannot be challenged in a Court of law except on the ground of mala fides — A Court of law is not competent to enquire into the truth or otherwise of the facts which are mentioned as grounds of detention communicated to the detenu. See Public Safety — Preventive Detention Act (1950), Section 3. **1955 Cri LJ 476: AIR 1955 Madh B 36 (DB).**

—S. 7 — In order to find out whether any ground is or is not relevant regard must be had to all the grounds as a whole. See Public Safety — Preventive Detention Act (1950), Section 3. **1960 Jab LJ 522: 1961 MPLJ 1136.**

—S. 7 — **Vagueness of grounds — (Constitution of India, Article 22).**

The fact that the detenu did not apply to the detaining authority to be supplied with particulars of the grounds furnished to him is a circumstance against the allegation of vagueness of grounds. **1960 Jab LJ 522: 1961 MPLJ 1136.**

—Ss. 7, 3, 11 — Bona fides of detention — Relevant factors — Petition held not mala fide — (Constitution of India, Articles 226 and 22). See Public Safety — Preventive Detention Act (4 of 1950), Section 3. **1958 Cri LJ 1047: AIR 1958 Mad 425 (DB).**

—Ss. 7, 3, 11 — Detenu charge-sheeted in criminal prosecution against him — Ground of detention not same as offence set out in charge — No question of mala fide arises — (Constitution of India, Articles 226 and 22). See Public Safety — Preventive Detention Act (4 of 1950), Section 3. **1958 Cri LJ 1047: AIR 1958 Mad 425 (DB).**

—S. 7 — **Mere vagueness — Effect of.**

Mere vagueness of grounds standing by itself and without leading to an inference of mala fides or lack of good faith is not a justiciable issue in a Court of law for the necessity of quashing the order of detention, inasmuch as the ground or grounds on which the order of detention was made is a matter for the subjective satisfaction of the Government or of the detaining authority. When entries are referable to the account books the omission to mention the year cannot be referable to a lack of bona fide on the part of the State Government. AIR 1952 SC 350; AIR 1951 SC 157, Ref. **1953 BLJR 371: 1953 Cri LJ 1734: AIR 1953 Pat 351 (353) (Pt C) (Pr 8) (DB).**

—S. 7 — **Grounds of detention — Objection on ground that certain grounds were withheld from detenus — When not allowed.**

Where in petitions under Article 226, Constitution of India, the position taken up by the detenus is that there did not exist any ground whatsoever for thinking that the activities of the detenus where prejudicial either to the security of State or to the maintenance of public order and when it is mentioned in the grounds that the detenus had been ordered to be detained with a view to preventing them from acting prejudicially to the maintenance of public order, it does not lie in the petitioners' mouth to say that there existed any other grounds which justified the belief that the detenus had been acting prejudicially to the security of the State as well and that the said grounds had been withheld from them. **(1951) 3 Pepsu LR 238.**

20. Non-compliance of the section — Effect.

—S. 7 — Arrest under — Grounds of — Non-compliance with constitutional and statutory provisions — Detention is not valid — Constitution of India (1950), Article 22 (5). **AIR 1951 Bom 266 (266, 267) (Pt A) (Prs 1, 3) (DB).**

—S. 7 — Scope — Failure to communicate particulars to enable the detained person to make a representation is an infringement of the right of the detenu to make a representation. See Constitution of India, Article 22 (5). **AIR 1955 NUC (Cal) 1009 (DB).**

—S. 7 — Scope — Grounds of detention not furnished to detenu — Effect on legality of detention — Detention is not lawful. See Constitution of India, Article 22. **52 Cri LJ 502: AIR 1951 Hyd 79 (1) (DB).**

—S. 7 — Scope — Non-compliance — Effect on legality of detention — Detention becomes illegal. See Constitution of India, Article 22 (5). **AIR 1950 Hyd 68 (DB).**

—S. 7 — **Grounds for detention — Failure to communicate to detenu — Effect — Constitution of India, Art. 22.**

The Indian Constitution attaches special importance to the communication to the detenu of ground for his liberty being curtailed, and failure or non-fulfilment of the condition makes the detention illegal.

Curtailment of personal liberty being subjected to certain conditions under the Constitution and the Preventive Detention Act those conditions must be complied with in order to continue the curtailment. **ILR (1951) Hyd 183: AIR 1950 Hyd 68 (69) (Pt A) (Pr 2) (DB).**

—S. 7 — **Provisions are mandatory.**

The provisions of Section 7 are mandatory and if no grounds of detention are supplied to the detenu or they are not supplied within a reasonable time, the detention becomes illegal. **1952 Cri LJ 1093: ILR (1952) Pepsu 192: AIR 1952 Pepsu 100 (101) (Pt A) (Pr 2).**

21. Grounds under S. 7 — Power of the Government to modify.

See Public Safety — Preventive Detention Act (1950), S. 13.

SECTION 8

—S. 8 — Power of High Court to grant writ of habeas Corpus — On the ground that the initial arrest and detention were illegal or improper is not taken away by Section 8 which provides for the Constitution of Advisory Board — It is not a judicial body but only an advisory body. See Constitution of India, Article 22 (4). **1954 Cri LJ 685: AIR 1954 All 315 (DB).**

—S. 8 (as amended by Act 4 of 1951) — **Notification constituting Advisory Board issued after the amendment — Omission to state that notification was issued under Section 8 as amended — Effect.**

Where the Notification constituting an Advisory Board under S. 8 was issued after the Act had been amended, and the notification took cognizance of the amendment, it must be assumed the Board was constituted under the Act of 1950 as amended. The omission to state that the notification was being issued under Section 8 of the Act of 1950 as amended does not detract from the validity of the Notification. **1953 Cri LJ 220: ILR (1952) 4 Assam 295: AIR 1953 Assam 22 (23) (Pt A) (Pr 3).**

● —Ss. 8, 10 (as amended in 1951) — **Constitution of India, Article 21 — Reference of detenu not considered by three members — Effect.**

Having regard to the proviso added to sub-section (2) of Section 8 and to sub-section 2-A, inserted after sub-section (2) of Section 10 of Act

4 of 1950 by the amending Act of 1951 there is no doubt that references made in respect of orders of detention passed on or after 22-2-51 must be considered by all the three members of the Advisory Board.

Article 21 of the Constitution applies to orders passed under a Preventive Detention Act. A State can justify continuance of detenion of a person if it has followed the procedure established by law, namely procedure as laid down in the Preventive Detention Act 1950 (4 of 1950) as amended by Act 4 of 1951. Where, therefore, a detenu's case is considered only by two members and not by all the three members of the Advisory Board, it follows that the fundamental right of the detenu as guaranteed by Article 21 has been infringed, and that he is entitled to be released forthwith. AIR 1931 PC 248; AIR 1948 Pat 135; AIR 1950 Mad 162; AIR 1950 EP 222 and (1881) 6 QBD 376, Ref. Kishorilal Bahati v. State, **52 Cri LJ 1453: ILR (1951) 3 Assam 494: AIR 1951 Assam 169 (170) (Pt A) (Prs 4, 6) (SB).**

——**Ss. 8 to 11**—Application under S. 491, Cr. P. C. or Art. 226 of the Constitution to Court challenging order of detention — Detenu's case not considered by Advisory Board, before he has made any representation is maintainable — The disposal of a petition under S. 491, Cr. P. C. or Article 226 does not at all affect the applicant's cause before the Advisory Board. See Criminal P. C. (1898), Section 491. **1952 Cri LJ 204: AIR 1952 Cal 26.**

——**Ss. 8 (3) and 9 (as amended) — Scope — Non-compliance — Effect.**

Chairman of Advisory Board not duly appointed — Reference made beyond 30 days of date of detention — Provisions of Sections 8 (3) and 9 held violated — Effect of amendment of Section 8 considered — Provisions of Ss. 8 and 9 held are in nature of statutory safeguards — Detention held illegal. Case law Ref. **ILR 32 Pat 55 : 1954 Cri LJ 91: AIR 1954 Pat 57 (57, 58) (Pt A) (Prs 1, 2) (DB).**

SECTION 9

——**S. 9** — Sections show that detenu should have a minimum period of 25 days to submit his representation — Curtailing such period is a serious irregularity which cannot be condoned. See Public Safety — Preventive Detention Act (1950), Section 7. **ILR (1961) 1 All 427.**

——**Ss. 9 and 10** — Grounds of detention must be forwarded to the Advisory Board within 30 days of detention order — Forwarding of wrong grounds — Vitiates entire proceedings before Board under Section 10. **ILR (1961) 1 All 427.**

——**Ss. 9, 3 (1) (a) (iii), 10 and 13**—Scope of Section 13 — Government revoking Magistrate's order and itself passing order of detention — Non-compliance with Ss. 9 and 10 in respect of Magistrate's order — Government's order of detention does not become bad. See Public Safety — Preventive Detention Act (4 of 1950), S. 3 (1) (a) (iii). **1952 Cri LJ 372: AIR 1952 All 180.**

——**Ss. 9, 3**—Mala fides of authority—The mere fact that the Government had made an undue haste in obtaining the decision of the Advisory Board for purpose of confirming the order of detention cannot lead to inference of mala fide on part of the Government especially when there is no allegation of any violation of any provisions of the Act — See Public Safety — Preventive Detention Act (1950), Section 3. **1953 Cri LJ 770: AIR 1953 Assam 97.**

●——**Ss. 9, 14 (as amended in 1951) — Detenu released on parole — Effect on reference under Section 9.**

It is plain from the language of Section 9 that the necessity for a reference to an Advisory Board is the subsistence of an order of detention and that it matters not that the detenu has been temporarily released in pursuance of Section 14 of the Act. Kishorilal Bahati v. State, **ILR (1951) 3 Assam 494: 52 Cri LJ 1453: AIR 1951 Assam 169 (170) (Pt B) (Pr 10) (SB).**

——**Ss. 9 and 10 — Validity — Section 10 does not offend against principles of natural justice or test of proper judicial inquiry — (Natural Justice) — (Constitution of India, Art. 22).**

There is no limitation placed by the Constitution upon Parliament in deciding what procedure should be laid down for the holding of the inquiry by the advisory board. Further, the advisory board has been given the power to call for such further information as it may deem necessary from the Government. Further, the right has been given to the detenu to be heard by the advisory board. Even assuming that the Constitution contemplated a judicial or quasi-judicial inquiry by the advisory board, the procedure laid down in Section 10 does not offend against either the principles of natural justice or the test of a proper judicial inquiry. **58 Bom LR 602: ILR (1956) Bom 715.**

——**S. 9** — Criminal P. C., Section 491 — Order of detention under Preventive Detention Act (1950) — Powers of High Court to interfere — High Court cannot investigate truth or falsity of particulars — It can only consider whether detenu could make effective representation or mala fide on the part of detaining authority. See Criminal P. C. (1898), S. 491. **1964 (1) Cri LJ 515: AIR 1964 Cal 231 (DB).**

——**S. 9** — Mala fides — Detention orders passed within very short time of each other — Orders not mala fide — (Constitution of India, Art. 22). **AIR 1955 NUC (Cal) 1009 (DB).**

——**S. 9** — Mala fides — Detention order during pendency of case against person or immediately after his discharge — Not mala fide — (Constitution of India, Art. 22). **AIR 1955 NUC (Cal) 1009 (DB).**

——**S. 9 — Late representation.**

Though Government is technically correct in not accepting the representation sent by the detenu after the period prescribed under S. 9, yet it would be far better if the technicalities are waived and the representation is placed before the Advisory Board. **1953 Cri LJ 361: AIR 1953 Cal 129 (135) (Pt G) (Pr 43) (DB).**

——**Ss. 9, 10, 11 — Right of detenu to apply under Section 491, Criminal P. C. or Article 226 — Reference to Advisory Board.**

A detenu has the legal and constitutional right to approach the High Court, under S. 491, Criminal P. C. or Art. 226, Constitution of India, before he has made any representation or before there is any reference to the Advisory Board and

before the time for such reference or report by the Board has expired.

The disposal of a petition under Section 491 of the Code of Criminal Procedure or even Article 226 of the Constitution cannot at all affect the applicant's cause before the Advisory Board.

There is no competition or conflict between the Advisory Board and the Courts under the scheme of Constitution as well as under the Preventive Detention Act. The Court's order of dismissal is not an adverse adjudication on the merits of the "cause for detention" in this context. The merits or demerits of the cause for detention are not within the purview of the Courts but of the Advisory Board. **56 Cal WN 42: 1952 Cri LJ 204: ILR (1953) 1 Cal 89: AIR 1952 Cal 26 (31, 32) (Pt D) (Prs 24, 26).**

——S. 9 — 'Within thirty days from the date of detention' — (General Clauses Act (1897), Section 10).

The thirty days period prescribed by Section 9 is governed by Section 10, General Clauses Act, so that if the period expires on a holiday, the material can be placed before the Board on next day on which the office of the Board is open. The placing of the requisite material before the Board is an act or proceeding within the meaning of Section 10, General Clauses Act. **Madh BLR 1955 Cr 268: Madh BLJ 1954 HCR 1442: 1955 Cr LJ 476: ILR (1955) Madh Bha 98: AIR 1955 Madh Bha 36 (38) (Pt A) (Pr 5) (DB).**

——S. 9 — 'Place before the Advisory Board' — Meaning of.

The plain meaning of the expression 'place the material before the Advisory Board' is simply this, that the material should be made available to the Board or placed in their hands. It cannot be said that the material can be said to be placed before the Board only if the Board at a formal meeting is made aware of the material and the Board at that meeting applies its mind to the detenu's case. Section 9 is sufficiently complied with if the material referred to therein is handed over in the office of the Board within thirty days from the date of detention. **Madh BLJ 1954 HCR 1442: Madh BLR 1955 (Cri) 268: 1955 Cr LJ 476: ILR (1955) Madh Bha 98: AIR 1955 Madh B 36 (38) (Pt B) (Pr 5) (DB).**

——S. 9 — Constitution of India, Articles 226, 22 — Habeas Corpus — Detention under Preventive Detention Act — Factual correctness of ground for detention verified by Advisory Board after hearing petitioner — Matter cannot be investigated by High Court under Article 226. See Constitution of India, Article 226. **AIR 1958 Mad 425 (DB).**

——Ss. 9 (2) (a) and 12 (a) as amended by Act 4 of 1951 — Scope of Section 9 (2) (a).

Though Section 9 (2) (a) in terms applies to all classes of detentions under the Act which continued to be in force from the date of the commencement of the amending Act by virtue of Section 12 (a), the scope of that clause should however be limited to those classes of detentions where orders did not expire within six weeks from 22-2-51. **ILR (1951) Cal 529: 18 Cut LT 58: 1952 Cri LJ 1113: AIR 952 Orissa 208 (209) (Pt A) (Pr 6) (DB).**

——Ss. 9 (1) and (2) (a), 10 (1) and 12 (a) (as amended by Act 4 of 1951)—Procedure prescribed by section not followed — Detention, if in accordance with procedure established by law — Constitution of India, Article 21.

Where the petitioners were detained under the Act before its amendment and after the amendment the Government passed fresh orders of detention wherein previous orders were expressly referred to and it was stated that "in partial modification" of those orders the Government were pleased to detain the petitioners and the grounds for detention communicated to the petitioners were identical with those for the detention under the unamended Act and the reference to Advisory Board was made after the expiry of the period of six weeks from 22-2-51 and similarly the report of the Board was submitted to the Government after the expiry of ten weeks from that date.

Held, that the detention had been all along continuous and consequently the right of the petitioners to have their case referred to the Advisory Board within six weeks from 22-2-51 would not be taken away and similarly the duty cast on the Board to submit their report to the Government within ten weeks from that day must be strictly obeyed.

Held, further that since the time-limits fixed in Sections 9 (1) and 10 (1) were not complied with it could not be held that the detention was in accordance with the procedure established by law. There was a clear violation of the fundamental right guaranteed under Article 21 which invalidated the subsequent detention even if it be held that the detention orders were valid in their inception. **ILR (1951) Cut 529: 1952 Cri LJ 1113: 18 Cut LT 529: AIR 1952 Orissa 208 (210, 211) (Pt B) (Prs 9, 10) (DB).**

——S. 9 — Reference made beyond 30 days of detention — Provisions of Sections 8 and 9 are in nature of statutory safeguards — Detention held illegal. See Public Safety — Preventive Detention Act (1950), Section 8 (3). **1954 Cri LJ 91: AIR 1954 Pat 57 (DB).**

SECTION 10

SYNOPSIS

(Public Safety — Preventive Detention Act, 1950, Section 10).

1. **Scope and object.**
2. **Desires to be heard.**
3. **Report by Advisory Board.**
4. **Non-submission of report within ten weeks — Effect.**
5. **Detenu whether entitled to a copy of the report.**
6. **Writ petitions — Maintainability.**

1. Scope and object.

——Ss. 10, 3 (1) (a) (iii), 9, 13 — Scope of Section 13 — Government revoking Magistrate's order and itself passing order of detention — Non-compliance with Sections 9 and 10 in respect of Magistrate's order — The orders of the Government are not ultra vires on the ground that requirements of Sections 9 and 10 of the Act had not been complied with in respect of District Magistrate's order. See Public Safety — Preventive Detention Act (1950), Section 3 (1) (a) (iii). **1952 Cri LJ 372: AIR 1952 All 180.**

——S. 10 — Validity — The procedure laid down in Section 10 does not offend against principles of natural justice or test of proper judicial in-

quiry. See Public Safety — Preventive Detention Act (1950), Section 9. **ILR (1956) Bom 715: 58 Bom LR 602.**

——**Ss. 10 (1), 9 (1) and 12**—Detention continued under Section 12 cannot be regarded as a new detention — Fresh opportunity to detenu to make representation need not be given. See Public Safety — Preventive Detention (Amendment) Act (4 of 1951), Section 9 (1). **1952 Cri LJ 81: AIR 1952 Bom 1 (DB).**

——**S. 10** — Constitution of India, Articles 22 (4) (a) and 22 (7) (c) — Advisory Board does not exercise functions of Courts — Its duty is to report about sufficiency of cause for detention — Section not invalid on ground of violation of rule of natural justice or for not providing for elaborate procedure before the Advisory Board. **1965 Pun LR (Supp) 286: 1965 (2) Cr LJ 119: AIR 1965 Punj 270 (275) (Pt D) (Pr 8) (DB).**

——**Ss. 10 and 11 — Report of Advisory Board — Order of detention not confirmed within reasonable period — Continued detention — Legality.**

Section 10, Preventive Detention Act, imposes a statutory obligation on the Advisory Board to submit a report to Government within a period of 10 weeks from the date of the detention under Section 11 (1). The Government may confirm the order of detention if the Advisory Board is of the opinion that there is sufficient cause for the detention of the detenu. Section 11 (1) does not specify the period during which the order of detention should be confirmed by the appropriate Government, but there can be little doubt that it should be confirmed within a reasonable period, i.e., within a period which a man of ordinary prudence would consider reasonable in the circumstances of the case. If the Government does not confirm the order of detention within a reasonable period, the detention of the detenu becomes illegal and improper, and he is entitled to be released from custody. **1952 Cr LJ 1493: 54 PLR 47: ILR (1952) Punj 129: AIR 1952 Punj 349 (349) (Pt B) (Pr 6) (DB).**

2. Desires to be heard.

——**S. 10 (as amended by Act 61 of 1952)** — Opportunity not given to detenu of being personally heard — Effect of, is to render recommendation of advisory board of no avail — If more than 3 months pass, detenu is entitled to release — (Constitution of India, Article 22 (4)). **AIR 1955 NUC (Raj) 4639 (DB).**

——**S. 10 (1) and (3) — 'If the person concerned desires to be heard" — Meaning of.**

Reading sub-sections (1) and (3) of Section 10 together there is no doubt that the intention behind the use of the words "if the person concerned desires to be heard" appearing in sub-sec. (1) was that the detenu, if so desired to be heard personally, would be entitled to be heard by the Board. To say that these words mean a desire to be heard either in person or through counsel would be to overlook sub-sec. (3) on account of which a detenu can never claim to be heard through counsel. **1955 Raj LW 480: 1955 Cr LJ 1517: ILR (1955) 5 Raj 761: AIR 1955 Raj 185 (185) (Pr 3) (DB).**

3. Report by Advisory Board.

●——**S. 10 (1)** — Nature of enquiry by Advisory Board — Enquiry is not judicial or quasi-judicial. See Dock Workers (Regulation of Employment) Act (9 of 1948), Section 4 (1). **(1965) 11 Fac LR 72: (1965) 2 SCWR 1142: (1965) 3 SCR 453: 1966 Cr LJ 189: AIR 1966 SC 282.**

●——**S. 10 (1) — Validity — Procedure under — If opposed to principles of natural justice.**

It is clear from Section 10 (1) that the Advisory Board, after considering the materials placed before it under Section 9, can call for further information from the appropriate Government and that thereafter if in any particular case it considers it essential so to do or if the detenu desires to be heard, after hearing him, submit its report to the appropriate Government. In such a situation the Advisory Board must of necessity obtain further information from the appropriate Government before it hears the detenu. There is nothing in this procedure which offends against the principles of natural justice. Jagan Nath Sathu v. Union of India, **1960 Cr LJ 764: 1960 SCJ 975: 1960 Mad LJ (Cr) 671: (1960) 2 SCR 784: AIR 1960 SC 625 (629) (Pt C) (Pr 14).**

●——**S. 10 — Jurisdiction of Advisory Board.**

Where a statement of fact contained in the affidavit filed in Court by the detaining authority is disputed, the matter has to be considered by the Advisory Board. The question of the truth of that statement is not within the jurisdiction of the Court to decide. Bhimsen v. State of Punjab, **1952 Cri LJ 75: (1951) 2 Mad LJ 641: 1951 Mad WN 865: 1951 SCJ 747: 1951 Mad WN (Cri) 285: 1952 SCR 18: ILR (1952) Punj 1: AIR 1951 SC 481 (484) (Pt C) (Pr 9).**

——**S. 10** — Grounds of detention must be forwarded to the Advisory Board within 30 days of detention order — Forwarding of wrong grounds — Vitiates entire proceedings before Board under Section 10. See Public Safety — Preventive Detention Act (1950), Section 9. **ILR (1961) 1 All 427.**

●——**Ss. 10, 8 (as amended in 1951)** — Constitution of India, Article 21 — Reference of detenu not considered by all the three members — Effect — The fundamental right of the detenu as guaranteed by Article 21 has been infringed and the detenu is entitled to be released forthwith. See Public Safety — Preventive Detention Act (1950) (as amended in 1951), Section 8. **52 Cri LJ 1453: ILR (1951) 3 Assam 494: AIR 1951 Assam 169 (SB).**

——**S. 10** — Scope — Refusal of the Advisory Board to call records of cases required by detenu — There is no infringement either of Article 22 (5) or of Section 10 of the Preventive Detention Act (1950). See Constitution of India, Article 22 (5). **1962 (1) Cri LJ 311: AIR 1962 Cal 162 (DB).**

——**Ss. 10 and 11 — Order of Government under Section 11 — Validity — Report of Advisory Board — Nature of — Reasons — If should be given in the report — Proceedings under Article 226 of the Constitution of India, (1950) — Factual correctness of grounds — If can be gone into.**

In an application under Article 226 of the Constitution questioning the validity of an order of detention of a person under the Preventive Detention Act, 1950, it is not open to the petitioner to canvass the factual correctness of the grounds of detention even for the limited purpose of deciding whether the order of detention is mala fide. The report of the Advisory Board under Section 10 of the Act is not equivalent to a judgment or order of a judicial or quasi-judicial tribunal. It is no doubt true that Section 10 (2) draws a distinction between the report of an

Advisory Board and its opinion. But the question does not prescribe as to what the report should contain. Having regard to the provisions of Section 10 (3) which make the report of the Advisory Committee confidential what is really required is the unambiguous opinion of the Advisory Board and the factual existence of a report setting out the reasons for the opinion is not a condition precedent for the exercise of power by the Government under Section 11 of the Act. The non-existence of a report setting out the reasons of the Advisory Board for its opinion will not affect the validity of the order of Government under Section 11 of the Act. **(1958) MLJ (Cr) 607: 1958 Mad WN 369: (1958) 2 MLJ 169: ILR (1958) Mad 692: 71 Mad LW 228: 1958 Cr LJ 1047: AIR 1958 Mad 425 (429, 430) (Pt D) (Prs 17, 21).**

4. Non-submission of report within ten weeks — Effect.

●——**S. 10 — Advisory Board not making report within 10 weeks — Effect on — Detention — (Constitution of India, Article 226).**

The making of the report by the Advisory Board under Section 10 within the time prescribed by law (10 weeks) is of the utmost importance to the detenu and the failure to make the report in time may quite conceivably have the effect of unlawfully prolonging the detention and, therefore after the expiry of the ten weeks the detenu may well complain that he has been deprived of his personal liberty otherwise than in accordance with procedure established by law. Where the ten weeks' time within which the report of the Advisory Board was to be filed expired on October 27, 1957 and the habeas corpus petition was filed on November 8, 1957, the detenu may well complain that on and from October 28, 1957, his detention has become illegal and bad.

Under Section 10 of the Act the Board has no power to make any order to continue or discontinue the detention, but is only under a duty to submit its report to the State Government. When the petitioner says in his petition for habeas corpus, that the Board has not passed any order, in the context, he means that the Board has not submitted its report. Dharam Singh v. State of Punjab, **36 Mys LJ 341: 1958 Cr LJ 282: 1958 SCJ 425: 1958 All WR (HC) 396: 1958 Mad LJ (Cri) 409: 1958 All Cri R 289: 1958 SCR 96: AIR 1958 SC 152 (153) (Prs 3, 4).**

——**S. 10** — Constitution of India, Articles 226, 22—Habeas Corpus — Detention under Preventive Detention Act — Factual correctness of ground for detention verified by Advisory Board after hearing petitioner — Matter cannot be investigated by High Court under Article 226. See Constitution of India, Article 226. **1958 Cri LJ 1047: AIR 1958 Mad 425 (DB).**

——**Ss. 10 (1), 9 (1) and (2) (a), 12 (a) (as amended by Act, 4 of 1951)** — Procedure prescribed by Sections 9 (1) and 10 (1) not followed — Detention, not in accordance with procedure established by law — There was a clear violation of the fundamental right guaranteed under Article 21 which invalidated the subsequent detention even if it be held that the detention orders were valid in their inception. See Public Safety — Preventive Detention Act (4 of 1950), Section 9 (1). **1952 Cri LJ 1113: AIR 1952 Orissa 208 (DB).**

——**S. 10 — Non-compliance — Effect — Constitution of India, Art. 22.**

The provisions of Section 10 of the Preventive Detention Act appear to be mandatory. If the Advisory Board fails to submit its report within the period prescribed by Section 10 and consequently the Government does not pass orders under Section 11 the detention of the detenu after the expiry of the period provided will in any case become illegal, and the accused is entitled to be set at liberty. AIR 1951 Assam 169, Rel. on. **1953 Cri LJ 586: AIR 1953 Sau 63 (64) (Prs 4, 5) (DB).**

——**S. 10 (1) — Failure to report within ten weeks — Constitution of India, Art. 21.**

It is clear from the language of Section 10 (1) of the Act that the provision as to the submission of the Advisory Board's report within ten weeks is imperative and that the Advisory Board has to conform to the time limit there prescribed. If the report of the Advisory Board was not submitted to the Government within ten weeks from the date of the order of detention further detention becomes illegal — Case law discussed. **1953 Cri LJ 503: AIR 1953 Sau 51 (51, 52) (Pt B) (Prs 3, 5) (DB).**

5. Detenu whether entitled to a copy of the report.

——**Ss. 10 and 7 — Object of Advisory Board's report — Communication of Board's report to detenu more than three months after his arrest — If renders detention illegal.**

The Act does not provide anywhere for the communication of the Advisory Board's report to the detenu. Under Section 10 the report has to be submitted by the Board only to the appropriate Government within 10 weeks from the date of detention. In other words, the Board's report only serves the purpose of enabling the appropriate Government either to confirm the detention order and continue the detention of the person concerned or to revoke that order and cause the person to be released forthwith. That being so, no question of supplying the detenu with a copy of the Advisory Board's report arises, for it would be of no use to the detenu. Hence, the fact that the decision of the Board was communicated to the detenu more than three months after his arrest will not make the detention illegal. **1956 Cr LJ 1152: AIR 1956 All 589 (592) (Pt B) (Pr 6) (DB).**

6. Writ petitions — Maintainability.

——**S. 10** — Constitution of India, Articles 226, 21 and 22 — Habeas Corpus — Detention under Preventive Detention Act — Allegation as to non-existence of grounds — Complaint that under Preventive Detention Act no opportunity to be heard and to prove the grounds of detention to be incorrect is untenable — Reagitation of matter before High Court in writ of Habeas Corpus not possible — Absence of provision — Remedy to get the law changed instead of approaching the Court. See Constitution of India, Article 226. **1956 Cri LJ 1152: AIR 1956 All 589 (DB).**

——**Ss. 10, 11, 9 (as amended in 1951)** — A detenu has legal right to apply under Sec. 491, Criminal P. C. or Article 226 before he has made any representation or before there is any reference to the Advisory Board — The disposal of a petition under Section 491, Cr. P. C. or Article 226 of the Constitution cannot at all affect the applicant's cause before the Advisory Board — Reference to Advisory Board. See Public Safety — Preventive Detention Act (1950), Section 9. **1952 Cri LJ 204: AIR 1952 Cal 26 (DB).**

——**S. 10** — Constitution of India, Article 226 — Writ of habeas corpus—Detention under Preven-

tive Detention Act, 1950 — Advisory Board examining case of detenu and deciding not to order release — Petition by detenu under Article 226 not barred. See Constitution of India, Article 226. **1960 Cri LJ 981: AIR 1960 Punj 332.**

——**S. 10** — Constitution of India, Article 226 — Habeas Corpus — Detention under Preventive Detention Act — Case examined by Advisory Board and report submitted — Petition under Article 226 is not maintainable. See Constitution of India, Article 226. **1957 Cri LJ 480: AIR 1957 Tripura 25.**

SECTION 11

SYNOPSIS

(Public Safety — Preventive Detention Act (1950), S. 11.)

1. Scope and object.
2. Report to Government.
3. 'May confirm the detention order and continue the detention'.
4. Fixing the period of detention.
5. Order if to be communicated to the detenu.
6. Validity of the section.
7. Writ petition — Maintainability.

1. Scope and object.

——**S. 11** — Grounds — Being habitual offender — Sufficiency — Preventive Detention Act is not meant for the purpose of detaining habitual criminals, as in that case it would really take the place of the Criminal Procedure Code. See Constitution of India, Article 22 (5). **1959 Cr LJ 63: AIR 1959 Mys 7 (DB).**

——**Ss. 11 and 7** — Detention order confirmed and extended — Fresh grounds not supplied — Detention is not rendered illegal — Section 7 has no application to such an order of confirmation. See Public Safety — Preventive Detention Act (1950), Section 7. **1952 Cri LJ 1093: AIR 1952 Pepsu 100.**

——**S. 11 — Scope.**

Section 11 merely empowers the appropriate Government to "confirm" the order of detention and to extend the period of detention; it does not empower the Government expressly or by implication to override the provisions of Section 7. **52 Cri LJ 1451: AIR 1951 Punj 119 (119) (Pt B) (Pr 5) (DB).**

2. Report to Government.

——**Ss. 11, 10** — Report of Advisory Board cannot be equated to a judgment — Opinion of Board — Need not be backed by report containing reasons for its opinion — (Constitution of India, Article 22). See Public Safety — Preventive Detention Act (4 of 1950), Section 10. **1958 Cri LJ 1047: AIR 1958 Mad 425 (DB).**

——**S. 11 — Government's discretion under — Opinion and report of Advisory Board — Nature and relevancy of.**

Before exercising the statutory power under Section 11 (1) of the Act at its discretion, the Government is not bound to take into account both the report and the opinion of the Advisory Board. Both sub-sections (1) and (2) of Section 11 require of the Government that it should consider the opinion of the Advisory Board reported to it by that Board. It is the opinion of the Advisory Board that is relevant both under sub-sections (1) and (2) of Section 11, the opinion of the Advisory Board reported by that board to the Government. The language of Section 11 (1) gives no indication of what the "report" referred to in Sections 10 (2) and 10 (3) of the Act should contain.

The report is confidential even from the Court. The Court is not entitled to examine the report even to verify whether it satisfies what Section 10 requires. There is certainly nothing in Section 10 or in Section 11 that required the Advisory Board to submit to the Government the reasons for the opinion, which Section 10 (2) requires the Board to report to the Government. Whether or not the Court can ascertain whether there was factually a report apart from the opinion of the Advisory Board, the Court is not entitled to examine the contents of the report for any purpose. **1958 Mad WN 369: (1958) 2 Mad LJ 169: 71 Mad LW 328: 1958 Mad LJ (Cri) 607: 1958 Cr LJ 1047: ILR (1958) Mad 692: AIR 1959 Mad 425 (429, 430) (Pt E) (Prs 18, 19) (DB).**

3. 'May confirm the detention order and continue the detention'.

●——**S. 11 — Duty of Government.**

Where the original order for detention was under sub-clauses (ii) and (iii) of Section 3 (1) (a) and the Government in exercise of its power under Section 11 confirmed the detention under sub-clause (ii) but revoked the detention under sub-clause (iii) on the ground that the Advisory Board did not uphold the detention under that sub-clause:

Held, that the order was not in conformity with Section 11 under which Government could either confirm the order of detention made under Section 3 or revoke it completely and that there was nothing in law which prevented the Government from making a fresh order of detention if it so chose. Shibban Lal Saksena v. State of Uttar Pradesh, **(1954) 1 Mad LJ 143: 1954 SCJ 73: 1954 Cr LJ 456: 1954 BLJR 113: 1954 SCA 53: 1954 SCR 418: 1954 All LJ 48: AIR 1954 SC 179 (181) (Pt C) (Pr 9).**

●——**S. 11 (i) — Decision confirming detention order — Inclusion of direction for continuation of detention — Necessity.**

Per Das, J.— Patanjali Sastri, C. J., concurring :— Grammatically Section 11 (1) confers two powers, namely (1) the appropriate Government may confirm the detention order and (2) the appropriate Government may continue the detention for such period as it thinks fit. The confirmation of the detention order certainly contemplates the taking of an executive decision, but the detenu being already in custody and the detention order being confirmed his detention continues automatically and, therefore, no further executive decision is called for to continue the detention. It follows that it is not necessary to include a direction for the confirmation of the detention in the decision confirming the detention order. Dattatraya Moreshwar v. State of Bombay, **1952 SCR 612: 21 Bom Cri Cas 350: (1952) SCA 526: 1952 SCJ 235: 1952 Cri LJ 955: 54 Bom LR 525: (1952) 2 Mad LJ 119: AIR 1952 SC 181 (183) (Pt A) (Pr 4).**

●——**S. 11 (1) — Confirmation order — Non-compliance with Article 166 of Constitution — (Constitution of India, Article 166 (1)).**

It is well settled that generally speaking the provisions of a statute creating public duties are directory and those conferring private rights are imperative. When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts

done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and at the same time would not promote the main object of the legislature, it has been the practice of the Courts to hold such provisions to be directory only, the neglect of them not affecting the validity of the acts done.

While the Preventive Detention Act requires an executive decision, call it an order or an executive action, for the confirmation of an order of detention under Section 11 (1) that Act does not itself prescribe any particular form of expression of that executive decision. Article 166 directs all executive action to be expressed and authenticated in the manner therein laid down but an omission to comply with those provisions does not render the executive action a nullity. Therefore, all that the procedure established by law requires is that the appropriate Government must take a decision as to whether the detention order should be confirmed or not under Section 11 (1). Where such decision has been in fact taken by the appropriate Government, there is no breach of the procedure established by law and the detention cannot be called in question. Dattatraya Moreshwar v. State of Bombay, **1952 SCR 612: 21 Bom Cri Cas 350: (1952) SCA 526: 1952 Cri LJ 955: 54 Bom LR 525: 1952-2 Mad LJ 119: 1952 SCJ 235: AIR 1952 SC 181 (185, 188) (Pt C) (Prs 7, 19).**

● **——Ss. 11 (1) and 13 — Order under Section 11 (1) — Power to extend period of detention.**

Per Mukherjea, J.:— Chandrasekhara Aiyar. J. Concurring:— Once the appropriate Government in making the order under Section 11 (1) specifies the period during which the detention of the person concerned is to continue, it does not become functus officio and is not incapable of extending the detention for a further period at a subsequent time if it considers necessary. Section 13 of the Act gives very wide powers to the detaining authority in this respect and it can revoke or modify any detention order at any time it chooses and the power of modification would certainly include a power of extension of the period of detention, provided such power is exercised before the period originally fixed has expired and provided the extended period does not exceed the over-all limit which is co-extensive with the life or duration of the Act itself. Dattatraya Moreshwar v. State of Bombay, **1952 SCR 612: 21 Bom Cri Cas 350: (1952) SCA 526: 1952 Cri LJ 955: 54 Bom LR 525: (1952) 2 Mad LJ 119: 1952 SCJ 235: AIR 1952 SC 181 (186) (Pt D) (Pr 13).**

——S. 11 — Detention order confirmed after receipt of report of Advisory Committee — Necessity to communicate decision to detenu.

Where after receiving the report of the Advisory Committee the State Government confirms the order of detention, there is nothing in Section 11 which would compel the State Government to communicate its decision to the detenu. **21 Bom Cri Cas 210: 1952 Cri LJ 81: ILR (1952) Bom 134: AIR 1952 Bom 1 (10) (Pt F) (Pr 18) (DB).**

——S. 11 — Public interest — Proof of — Vagueness of grounds — Although the Government may not in the public interest disclose the full particulars of the grounds supplied, the Government is bound to disclose all the grounds on which the order of detention is based. See Constitution of India, Article 22 (5). **1959 Cr LJ 63: AIR 1959 Mys 7 (DB).**

——Ss. 11 (1) and 3 (1) (a) — Scope — Government, if bound to disclose all the grounds on which order of detention is made.

Having regard to the different provisions of the Preventive Detention Act the order of confirmation which the Government is required to make under Section 11 of the Act has to be made within a period of three months from the date of detention. Sub-section (1) of Section 11 makes it clear that confirmation order in question has to be made if the Government after the receipt of the report from the Advisory Board decides to continue the detention and in view of the provisions of Clause (4) of Article 22 of the Constitution such confirmation has to be made within three months from the date of detention. Clause (5) and Clause (6) of Article 22 of the Constitution read together make it obligatory on the part of the Government to disclose all the grounds on which the order has been made though not all the facts constituting such grounds. In other words although the Government may not in the public interest disclose the full particulars of the grounds supplied, the Government is bound to disclose all the grounds on which the order of detention is based. **36 Mys LJ 580: ILR (1957) Mys 374: (1958) Mad LJ (Cr) 670: 1959 Cr LJ 63: AIR 1959 Mys 7 (9, 10) (Pt A) (Prs 13, 14, 15) (DB).**

——Ss. 11, 9, 10 (as amended by Act 4 of 1951) — Scope — Order of detention under Section 3 — Report of Advisory Board under Section 9 that detention was justified received by Government — Failure of Government to pass order under Section 11 within three months of initial order — Further detention is illegal. See Public Safety — Preventive Detention Act (1950), Section 9. **1952 Cri LJ 1452: AIR 1952 Pepsu 134.**

——S. 11 — Government confirming order — If should supply grounds.

It is not necessary for Government, when it proceeds to confirm an order of detention and to continue the detention of the person concerned to supply the grounds on which the detention is being continued. **54 PLR 342: ILR (1952) Punj 481: 1953 Cr LJ 26: AIR 1952 Punj 406 (407) (Pr 8) (DB).**

——S. 11 — Detention should be confirmed within reasonable time.

Section 11 does not specify the period during which the order of detention should be confirmed by the appropriate Government, but there can be little doubt that it should be confirmed within a reasonable period, i.e., within a period which a man of ordinary prudence would consider reasonable in the circumstances of the case.

Where the report of the Advisory Board was received on the 4th August and the order of confirmation was not communicated till the 24th September it was passed after the lapse of a period which could not be regarded as reasonable.

When order of confirmation was passed one month after the petitioner detenu had presented an application for writ of habeas corpus, after the counsel of the State had been repeatedly asked to produce it, the detention is an infringement of fundamental rights of the petitioner. **('52) 54 Pun LR 47: 1952 Cri LJ 1493: ILR (1952) Punj 129: AIR 1952 Punj 349 (349, 350) (Pt A) (Prs 3, 7, 8) (DB).**

——S. 11 — It is obligatory on State to confirm order of detention and satisfy court that order has in fact been confirmed.

Section 11 imposes a statutory obligation on the appropriate Government to confirm the order of

detention, and it is incumbent on the State to satisfy the Courts that the order had in fact been confirmed by the Chief Commissioner. When no evidence of this confirmation is placed before the Court excepting only the letter of the Home Secretary to the Chief Commissioner informing the Supdt. of jail in which the detenu was confined that his representation to the Advisory Board has been rejected, in the absence of evidence to the effect that the Chief Commissioner had in fact passed the order of confirmation, the Court will only hold that no such order was passed. **54 Pun LR 47: 1952 Cri LJ 1493: ILR (1952) Punj 129: AIR 1952 Punj 349 (349) (Pt B) (Pr 6) (DB).**

——**S. 11 (1)** — Report of Advisory Board received within ten weeks — Order of confirmation passed beyond ten weeks, but within three months of order of detention — Further detention is valid — (Constitution of India, Article 226). See Public Safety — Preventive Detention Act (4 of 1950), Section 10 (1). **AIR 1953 Sau 138 (DB).**

4. Fixing the period of detention.

● ——**S. 11 (1) — Constitution of India, Article 22 (4) and (7) — 'Such detention' — Meaning of — Section 11 (1), Preventive Detention Act, whether contravenes Article 22.**

Per Majority, A. K. Sarkar, J., (Dissenting). — Clause (4) of Article 22 does not state that the Advisory Board has to determine whether the person detained should be detained for more than three months. What it has to determine is whether the detention is at all justified. The matter before the Advisory Board is the subject of detention of the person concerned and not for how long he should be detained. Clause (7) of Article 22 is an exception to Clause (4) of that Article. The expression 'such detention' in Article 22 (4) (a) refers to preventive detention and not to how long the person is to be detained. The decision as to the period of detention must be of the detaining authority. The reference to the Board is only a safeguard against Executive vagaries and high-handed action and is a machinery devised by the Constitution to review the decision of the Executive on the basis of a representation made by the detenu, the grounds of detention, and where the order is by an officer. the report of such officer.

Under the Preventive Detention Act as amended in 1951, the Government must determine what the period of detention should be only after the Advisory Board to which the case is referred reports that the detention is justified. AIR 1952 SC 27 and AIR 1952 SC 181, Rel. on. Sub-section (1) of Section 11 of the Preventive Detention Act does not, therefore, contravene any of the provisions of Article 22 of the Constitution and is accordingly valid.

Per A. K. Sarkar, J.: — The words 'such detention' in Article 22 (4) (a) of the Constitution must necessarily refer to detention for a period longer than three years and not to preventive detention simpliciter; and hence Section 11 (1) of the Preventive Detention Act must be held to be ultra vires. Puranlal Lakhanpal v. Union of India, **1958 Cr LJ 283: ILR (1958) Punj 46: 1958 SCA 355: 1958 SCR 460: 1958 MLJ (Cr) 427: 1958 SCJ 510: AIR 1958 SC 163 (168, 169, 170, 173, 174, 176) (Pt A) (Prs 10, 11, 12, 13, 23, 24, 25, 34).**

● ——**S. 11 (1) — "Such period as it thinks fit" — Non-specification of period — Validity of detention.**

Per Majority of the Court (Mahajan, J. dissenting) :— On a proper construction of Section 11 (1), a specification of the period of continuation of the detention is not necessary, however desirable one may consider it to be. Non-specification of such period at the time of confirming the detention order will not, therefore, make detention a nullity.

The non-determination by Government of the period of the continuance of the detention operates prejudicially against the detenus and makes the detention illegal. Dattatraya Moreshwar v. State of Bombay, **1952 Cri LJ 955: 54 Bom LR 525: 1952 SCR 612: 21 Bom Cri Cas 350: (1952) SCA 526: (1952) 2 Mad LJ 119: 1952 SCJ 235: AIR 1952 SC 181 (183, 186, 191) (Pt B) (Prs 6, 14, 35).**

● ——**Ss. 11 and 3 (1), 9 (as amended by Act 4 of 1951)** — Fixing of period of detention in initial order itself — Order cannot be supported. See Public Safety — Preventive Detention Act (1950), Section 3. **1952 Cri LJ 321: AIR 1952 SC 27.**

——**S. 11 (as amended in 1951)** — An order of detention for an indeterminate period at the time of confirmation is not what is contemplated under Section 11. Criminal Misc. Case No. 71 of 1951, Cri. Misc. Case No. 72 of 1951 and AIR 1952 SC 27, Rel. on; AIR 1952 Bom 1, Dissent. from. **1953 Cri LJ 654: AIR 1953 Assam 73 (74) (Pr 5).**

——**S. 11 (1) — Confirmation order of detention under Section 11 — No obligation to fix detention period.**

The language employed in Clause (1) does not impose any obligation on the appropriate Government to determine the period of detention when confirming an order of detention.

It may be very desirable that the Provincial Government should be under an obligation to fix a period at the confirmation stage. But if the Legislature has not made it obligatory for the appropriate Government to do so, the requirement may not be read in Section 11, Clause (1) by the process of interpretation. Principles of natural justice also must not be invoked for the purpose.

The Government no doubt has got the power to determine for what period a person is to be detained if the Advisory Board has reported that there is sufficient cause for his detention. If it wants to fix it, it would be after the receipt of the report. But it is a very different thing to say that it is obligatory on it to fix the period and that if it does not, there is necessarily a non-compliance with the requirement of Section 11 (1). AIR 1952 Bom 1, Rel. on; AIR 1952 SC 27, Expl. Cri. Misc. No. 5 of 1952 (Assam), Dissented from. **1953 Cri LJ 220: ILR (1952) 4 Assam 295: AIR 1953 Assam 22 (23, 24) (Pt B) (Prs 5, 7).**

——**S. 11 (1) — Order of detention not specifying period — Validity.**

An order of detention for an indefinite period or without specifying the period at the time of confirmation as provided in Section 11 (1) of the Preventive Detention Act is bad in law and has to be set aside in keeping not only with the provisions of law but also according to the principle of natural justice. **ILR (1952) Assam 134: 1952 Cr LJ 1706: AIR 1952 Assam 187 (189) (Pt A) (Pr 16).**

——**S. 11 (1) — Non-specification of period of detention in confirmation order — Detention — Is not illegal.**

The non-specification of the period, for which the detention was to continue, in the order of confirmation made under Section 11 (1) of the Act, after the Advisory Board had considered the

cases of the detenus, would not make the detention illegal. AIR 1952 SC 181, Relied on. **('52) 54 Bom LR 620: 1953 Cri LJ 322: 22 Bom Cri Cas 1: ILR (1953) Bom 182: AIR 1953 Bom 59 (60) (Pt B) (Pr 5) (DB).**

——**Ss. 11 and 3** — Detention order under Section 3 as it stood before amendment in 1951 — No necessity to mention period of detention — Case referred to Advisory Committee and detention order confirmed — Period of detention not mentioned — Order of detention or confirmation not bad. See Public Safety — Preventive Detention Act (1950), Section 3. **1952 Cri LJ 81: AIR 1952 Bom 1 (DB).**

——**Ss. 11 and 12** — Period of detention who can fix — Advisory Board has no such power. See Public Safety — Preventive Detention Act (1950), Section 3. **1962 (1) Cr LJ 279: AIR 1962 Cal 119 (DB).**

5. Order if to be communicated to the detenu.

● ——**S. 11** — Decision of Government under Section 14 of the Jammu and Kashmir Preventive Detention Act — No duty to communicate to detenu — The omission to convey the order made under Section 11 of the Indian Preventive Detention Act does not make the detention illegal or result in infringement of the petitioner's fundamental right. See Public Safety — Jammu and Kashmir Preventive Detention Act (4 of 2011), Section 14. **1957 Cri LJ 320: AIR 1957 SC 173.**

● ——**S. 11 — Scope.**

Under Section 11 it is not an essential pre-requisite to the validity of the detention order that it should be communicated to the petitioner. AIR 1952 SC 27, Expl. **1953 Cri LJ 507: AIR 1953 Assam 63 (64) (Pt C) (Pr 6).**

6. Validity of the section.

● ——**S. 11 (1)** — Scope — Dose not contravene Article 22. See Public Safety — Constitution of India, Article 22 (4). **1958 Cr LJ 283: AIR 1958 SC 163.**

● ——**S. 11 (1) (as amended by Act 4 of 1951) — Validity.**

Majority view, (Bose, J., dissenting) :— As the Amending Act of 1951 is to be in force only up to 1-4-1952 and no detention under the Act can continue thereafter, the discretionary power given to the appropriate Government could be exercised only subject to that over-all limit and therefore, the validity of Section 11 (1) of the Act cannot be questioned on the ground that it authorises preventive detention for an indefinite period which is contrary to Art. 22 (4) of the Constitution. **1951 SCJ 453: (1951) 2 Mad LJ 105: 52 Cri LJ 1103: 64 Mad LW 945: 1951 SCR 621: AIR 1951 SC 301 (304) (Pt D) (Pr 11).**

——**S. 11 (as amended in 1951)** — Scope — Not void as contravening Article 20 of the Constitution — Sub-Article (1) of Article 20 has reference to a penalty to be imposed in respect of an offence and where the question is of preventive detention, the Art. has no application. See Constitution, of India, Article 20. **1952 Cri LJ 81: AIR 1952 Bom 1 (DB).**

——**S. 11 — Preventive Detention (Amendment) Act (1951), Section 12 — Validity — Provisions if contravene Article 20 Constitution of India — Constitution of India, Art. 20.**

It cannot be contended that in so far as Section 11 of the Act as it stands after its amendment permits further detention after receiving the report of the Advisory Committee, there has been any contravention of Article 20 of the Constitution.

What sub-article (1) of Article 20 prevents is the infliction of a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the same offence. The sub-article has, therefore, reference to a penalty to be imposed in respect of an offence, and where the question is one of preventive detention, the article has no application. **21 Bom Cri Cas 210: 1952 Cri LJ 81: ILR (1952) Bom 134: AIR 1952 Bom 1 (9) (Pt D) (Pr 15) (DB).**

——**Ss. 11 (1) and 11-A** — Validity — Opinion of Advisory Board obtained and final order passed — Question of validity of sections does not arise. See Constitution of India, Article 22 (7) (a). **1962 (1) Cr LJ 279: AIR 1962 Cal 119 (DB).**

7. Writ petition — Maintainability.

——**S. 11** — Opinion of Advisory Board under Section 11 of Preventive Detention Act (1950) — Not subject to revision under Article 227. See Constitution of India, Article 227. **1962 (1) Cr LJ 279: AIR 1962 Cal 119 (DB).**

——**S. 11, 9, 10 (as amended in 1951)** — A detenu has legal right to apply under Section 491, Criminal P. C. or Article 226 before he has made any representation or before there is any reference to the Advisory Board — The disposal of a petition under Section 491, Cr. P. C. or even Article 226 of the Constitution cannot at all affect the applicant's cause before the Advisory Board. See Public Safety — Preventive Detention Act (1950), Section 9. **1952 Cri LJ 204: AIR 1952 Cal 26.**

——**Ss. 11, 9, 10** — Constitution of India, Articles 226, 22 — Habeas Corpus — Detention under Preventive Detention Act — Factual correctness of ground for detention verified by Advisory Board after hearing petitioner — Matter cannot be investigated by High Court under Article 226. See Constitution of India, Article 226. **1958 Cri LJ 1047: AIR 1958 Mad 425 (DB).**

——**Ss. 11, 3, 7** — Bona fides of detention — Relevant factors — Petition held not mala fide — (Constitution of India, Articles 226 and 22). See Public Safety — Preventive Detention Act (4 of 1950), Section 3. **1958 Cri LJ 1047: AIR 1958 Mad 425 (DB).**

——**Ss. 11, 3, 7** — Detenu charge-sheeted in criminal prosecution against him — Ground of detention not same as offence set out in charge — —No question of mala fide arises — (Constitution of India, Articles 226 and 22). See Public Safety — Preventive Detention Act (4 of 1950), Section 3. **1958 Cri LJ 1047: AIR 1958 Mad 425 (DB).**

SECTION 11-A

● ——**S. 11-A (2) as amended by Second Amendment Act 61 of 1952 — Applicability — Order of detention confirmed — Period not specified in order — Section 11-A (2) applies — Dates of expiry of earlier Acts (Amendment Act 4 of 1951 and Amendment Act 34 of 1952) cannot be read into order.**

Section 11-A is clear and unless a shorter period is specified in the order of detention, Section 11-A (2) applies. The Court cannot add the words "or must be deemed to have been specified by reason of the expiry of the earlier Act" into the section. Section 11-A (2) validly extended the period of detention till the 1st April, 1953, and the contention that although no shorter period was specified in the order of petitioner's detention, since the

detention under the previous Acts (Amendment Act 4 of 1951 and Amendment Act 34 of 1952) would have expired either on 31st March, 1952 or 30th September, 1952, one of those dates must be read into the order, is not tenable. Godavari Parulekar v. State of Bombay, **1953 SCJ 28: 1953 SCA 287: (1953) 1 MLJ 203: 1953 Cri LJ 508: 1953 SCR 210: AIR 1953 SC 52 (52) (Pt A) (Prs 4, 5).**

● **——S. 11-A — Validity.**

Preventive Detention (Second Amendment) Act (61 of 1952) extended the life of the Principal Act 4 of 1950, till 31-12-1954. Therefore in the absence of Section 11-A all the old detentions would have been extended till that date. But Section 11-A modified that period and put 1-4-1953 as the latest date for them. Section 11-A therefore conferred a benefit and is not unreasonable. But it is inevitable that the length of detention will vary in each individual case, for, it is the discretion of the Government to fix the period of detention. Classification of detentions into those before and after 30-9-1952 is therefore not discriminatory within the meaning of Articles 22 (7) (b) and 14 of the Constitution and Section 11-A is not ultra vires. Godavari Parulekar v. State of Bombay, **1953 SCA 287: 1953 SCJ 28: (1953) 1 MLJ 203: 1953 Cri LJ 508: 1953 SCR 210: AIR 1953 SC 52 (53) (Pt B) (Prs 9, 10, 12).**

● **——S. 11-A — Construction order made on 29th March, 1952, extending detention till 30th September, 1952 — Subsequent order on 22nd September, 1952, extending detention till 31st December, 1952 — Latter order held illegal could not be justified by the provisions of Section 22, General Clauses Act (1897).**

Section 11-A (2) held, the detention did not extend automatically since the words "the order" in Section 11-A (2) refer, not to the initial order of detention, but to the order of detention as eventually confirmed under Section 11 (1). Detention, held, could not continue after 30-9-1952 by force of Section 11-A (2) merely because that date happens to be identical with the date on which the Preventive Detention (Amendment) Act (34 of 1952) was to expire. Venkateswarlu v. Supdt., Central Jail, Hyderabad State, **1953 SCJ 1: 1953 SCA 263: (1953) 1 MLJ 185: 1953 Cri LJ 501: 1953 All WR (Supp) 15: 1953 SCR 905: AIR 1953 SC 49 (51) (Pt B) (Pr 8).**

● **——S. 11-A (as amended by Act 61 of 1952) —** Order extending detention till 30-9-1952 — The detention cannot continue after that date by force of the provisions of sub-section (2) of Section 11-A merely because that date by accident coincides with the date on which the Preventive Detention Amendment Act 34 of 1952 also expires. Venkateswarlu v. Supdt., Central Jail, Hyderabad State, **(1953) 1 Mad LJ 185: 1953 SCJ 1: 1953 All WR (Supp) 15: 1953 SCR 905: 1953 Cri LJ 501: AIR 1953 SC 49 (51) (Pt C) (Pr 9).**

● **——S. 11-A (2) (as amended by Act 61 of 1952) —** "Unless shorter period is specified in the order" — Words have reference to the periods mentioned immediately thereafter and not the date of expiry of the Act 34 of 1952. Venkateswarlu v. Supdt., Central Jail, Hyderabad State, **(1953) 1 Mad LJ 185: 1953 All WR (Supp) 15: 1953 SCJ 1: 1953 SCR 905: 1953 Cri LJ 501: AIR 1953 SC 49 (51) (Pt D) (Pr 10).**

——S. 11-A — Detention for period of more than one year.

What is rendered invalid by Section 11-A is continued detention for more than one year. Where the order of detention was passed on 29-7-1953 but the detenu was detained on 19-8-1955 in pursuance of this order, although detention commenced from 19-8-1955, the order passed on 29-7-1953 was still a good and valid order under which action could be taken by the State of Bombay.

But the Preventive Detention Act is not a Penal Statute. Therefore it was right for the State of Bombay to think that because an order was passed on 29-7-1953 therefore necessarily the detenu must be detained for a period of one year. What the Court has to consider is whether in detaining the detenu on 19-8-1955, the State of Bombay was acting bona fide. As there was no suggestion that there were any materials before any authority that between the period of 29-7-1953 and 19-8-1955 the detenu had indulged in any prejudicial activities or that his being at large on 19-8-1955 would be prejudicial to public order the detention was not bona fide. **1956 Cr LJ 379: AIR 1956 Bom 127 (127, 128) (Prs 3, 4, 5, 6) (DB).**

——Ss. 11-A, 11 (1) — Validity — Opinion of Advisory Board obtained and final order of detention passed within 3 months of original order — Question of validity of sections does not arise. See Constitution of India, Article 22 (7) (a). **1962 (1) Cri LJ 279: AIR 1962 Cal 119 (DB).**

——S. 11-A (as amended by Preventive Detention (Second Amendment) Act (1952) and Preventive Detention (Amendment) Act (1954)) — "Things done and omitted to be done" — Detention for period beyond life of Act cannot be ordered in anticipation of the life of the Act being extended by an Amending Act — Such order can be successfully impugned before the life of the Act is extended. See Public Safety — Preventive Detention Act (1950) (as amended by Preventive Detention (Second Amendment) Act (1952) and Preventive Detention (Amendment) Act (1954), Section 1 (5). **1953 Cr LJ 1055: AIR 1955 Cal 374 (DB).**

——S. 11-A (2) — Fixation of period by District Magistrate is not permitted by any of the provisions of Act and such a direction would tend to prejudice a fair consideration of the Detenu's case by the Advisory Board — The Order referred to in Section 11-A (2) is the order to be passed by the Government under Section 11 after the receipt of the report of the Advisory Board. See Public Safety — Preventive Detention Act, (1950), Section 3. **1955 Cri LJ 95: AIR 1955 Raj 6 (DB).**

SECTION 12

● **——S. 12 — Omission to specify definite period of detention — If renders order invalid.**

Section 12 of the Preventive Detention Act does not require that the period of detention should be specified in the order itself where the detention is with a view to preventing any person from acting in any manner prejudicial to the maintenance of public order. The section itself provides that he can be detained without obtaining the opinion of an Advisory Board for a period longer than three months but not exceeding one year from the date of detention. Under Art. 22 (4) (a) read with Art. 22 (7) (a) of the Constitution detention for more than three months can be justified either on the ground of an opinion of the Advisory Board sanctioning of warranting longer detention or on the ground that the detention is to secure the due maintenance of public order, in which case it cannot exceed one year in any event as stated in Section 12 of the Preventive Detention Act. It is thus clear that the period is not to exceed three

months generally, but may go up to one year in certain special cases. In view of these provisions, the non-specification of any definite period in the detention order is not a material omission rendering the order itself invalid. Ujagar Singh v. State of Punjab, **1952 SCJ 521: 1952 SCA 648: (1953) 2 MLJ 6441: 1952 SCR 756: 53 Cri LJ 146: AIR 1952 SC 350 (352) (Pt A) (Pr 6).**

●——**Ss. 12 (1) and 9 (2) (as amended in 1951)** — Validity — Sections substantially satisfy requirements of Article 22 (4) (b) and are valid. See Public Safety — Preventive Detention Act (1950), Section 9 (2). **52 Cri LJ 1103: AIR 1951 SC 301.**

●——**S. 12** — Constitution of India, Article 21 — "Procedure established by law" means procedure prescribed by law — Parliament can change the procedure prescribed by Section 12 of Act 4 of 1950 and that procedure becomes procedure established by law within the meaning of Article 21 of the Constitution — Procedure under Section 12 of Act 1951 invalid. **52 Cri LJ 1103: AIR 1951 SC 301.**

●——**Ss. 12 and 3** — Order of detention under Section 3 not specifying period of detention is not invalid as S. 12 prescribes a maximum period of one year and hence such orders cannot be said to be of indefinite period or unlawful on that ground. See Public Safety — Preventive Detention Act (1950), Section 3. **52 Cri LJ 904: AIR 1951 SC 270.**

●——**S. 12 (1)(as it stood before the insertion of the present section by Preventive Detention (Amendment) Act (4 of 1951))** — Parliament may prescribe either the circumstances or the classes of cases or both in enacting Preventive Detention Act, Section 12 (1) — Parliament evidently regarded the matters in Clauses (a) and (b) of Section 1 (1) as sufficiently indicative both of the circumstances under which and the classes in which a person could be detained for the longer period. See Constitution of India, Article 22 (7) (a). **51 Cri LJ 1383: AIR 1950 SC 27.**

●——**S. 12 (as it stood before the insertion of present section by Preventive Detention (Amendment) Act (4 of 1951))** — Section 12 ultra vires the Constitution of India. See Public Safety — Preventive Detention Act (4 of 1950), Section 1. **51 Cri LJ 1383: AIR 1950 SC 27.**

●——**S. 12** — Scope — Section 12 of the Act merely lays down the maximum period for which a person can be detained but it does not lay down that in case the detaining authority prescribes no period, the detention will continue for the whole of this maximum period. M. M. Bashir v. State, **ILR (1951) All 269: AIR 1951 All 357 (357) (Pt B) (Pr 1) (FB).**

——**Ss. 12, 3 and 7** — Grounds supplied to detenu must be connected with preventive order — Failure to establish such connection makes the order of detention invalid — Right of detenu — Detenu can contend before the Court that the grounds have no connection with the maintenance of public order or have no connection with the circumstances or class of cases under which a preventive detention order could be supported under Section 12, Preventive Detention Act 1950 — Constitution of India, Article 22. See Public Safety — Preventive Detention Act (1950), Section 3. **52 Cri LJ 732: ILR (1951) 2 All 493: AIR 1950 All 709.**

——**S. 12 — Scope.**

Section 12 does not provide that detention under any law providing for preventive detention could be for a period up to one year. This provision is made just for the purposes of that Act only and the detention referred to therein is detention ordered under that particular Act. It cannot, therefore, be taken to be an enactment under Article 22 (7), Clauses (a) and (b) of the Constitution. **52 Cri LJ 1282: ILR (1952) 1 All 8: AIR 1950 All 562 (576) (Pt M) (Pr 56) (DB).**

——**S. 12 (as amended in 1951) — Legislation continuing detention of persons already detained — If ultra vires on ground of encroachment by Legislature upon powers of executive.**

Section 12 as amended in 1951 is not ultra vires inasmuch as it continues detention by an Act passed by the Legislature.

It is true that the Legislature has continued for a further period, which was to be regulated by certain procedure mentioned in the amending Act, the detention of the persons who had already been detained by a valid order of detention in force at the date of the coming into force of the amending Act but that does not render the Act invalid. It is true that it may often be found that orders of detention are passed by executive officers whom the Legislature empowered by suitable legislation; but that does not come in the way of the Legislature legislating that, if there was in respect of any person a valid order of detention in force, the person shall be continued to be detained for a period to be stated or for a period to be regulated. It is not the question of an encroachment by Legislature upon the powers of the executive.

Where a nexecutive officer is empowered to do an act by a legislation enacted by Parliament, it cannot be said that Parliament encroaches upon th powers of the executive if subsequently it passes legislation continuing the orders of detention already in force. Even if there is any interference with the powers of executive given by Parliament, Parliament gave them and consequently was in a position to interfere with them. **53 Bom LR 717: 21 Bom Cr C 210: 1952 Cri LJ 81: ILR (1952) Bom 134: AIR 1952 Bom 1 (3) (Pt A) (Pr 4) (DB).**

——**Ss. 12 and 9 (1), 10 (1)** — Detention continued under Section 12 — Fresh opportunity to detenu to make representation need not be given. See Public Safety — Preventive Detention Act (1950), Section 9 (1). **1952 Cri LJ 81: AIR 1952 Bom 1 (DB).**

——**S. 12 (as amended in 1951) — Validity — Provisions if contravene Article 20, Constitution of India — Constitution of India, Art. 20.**

It cannot be contended that in so far as Section 11 (effecting amendment in Section 12) of the Act as it stands after its amendment permits further detention after receiving the report of the Advisory Committee, there has been any contravention of Article 20 of the Constitution.

What sub-article (1) of Article 20 prevents is the infliction of a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the same offence. The sub-article has, therefore, reference to a penalty to be imposed in respect of an offence, and where the question is one of preventive detention, the article has no application. **53 Bom LR 717: 21 Bom Cr C 210: 1952 Cri LJ 81: ILR (1952) Bom 134: AIR 1952 Bom 1 (9) (Pt D) (Pr 15) (DB).**

——**S. 12 — Applicability — 'Such order' — Meaning of.**

Per Guha Ray, J.:— Section 12 has no application to any order of detention which was not in force at the commencement of the Preventive Detention (Amendment) Act, 1951, i.e., on 22nd

February, 1951. The words "such order" in sub-section (b) clearly mean an order referred to in sub-section (a) i. e., an order in force on 22nd February, 1951. **1955 Cr LJ 1055: ILR (1957) 2 Cal 149: AIR 1955 Cal 374 (381) (Pt C) (Pr 30) (DB).**

——S. 12 (2) — Mere initiation of review proceedings within six months.

Under Section 12 (2) it is necessary for the review to be completed within six months, and it is not a sufficient compliance with the statutory obligation if the proceedings be initiated within that period. The legislature by using words "shall within a period of six months from the date of his detention be reviewed" intended that the authorities concerned must complete their review within that period. The non-compliance with Section 12 (2) renders the further detention illegal. 1881 QBD 376, Rel. on. AIR 1950 Mad 162, AIR 1950 EP 222, AIR 1950 Hyd 69, Ref. **52 Cri LJ 918: ILR (1951) Hyd 651: AIR 1951 Hyd 92 (93) (Prs 3, 4) (DB).**

——Ss. 12 and 3 — Right of detenu to challenge order on ground of mala fide — Burden of proof — Duty of Government — Malice and 'mala fide' explained — Validity of prior order in question — Fresh order for detention passed before pronouncement of judgment — Omission by Government to inform Court of order reflects on their bona fides — (Criminal P. C. (1898), Section 491) — (Constitution of India (1950), Article 226). See Public Safety — Preventive Detention Act (4 of 1950), Section 3. **AIR 1953 Mad 41 (DB).**

——Ss. 12 (a), 9 (1) and (2) (a), 10 (1) (as amended by Act 4 of 1951) — Procedure prescribed by Section 9 (1) as it stood before insertion of present section in 1952 and Section 10 (1) not followed — Detention could not be held to be in accordance with procedure established by law — Constitution of India, Article 21. See Public Safety — Preventive Detention Act (1950), Section 9 (2) (a). **1952 Cri LJ 1113: AIR 1952 Orissa 208 (DB).**

——Ss. 12 (a), 9 (2) (a) (as amended by Act 4 of 1951) — Scope of Section 9 (2) (a).

Though Section 9 (2) (a) (as it stood before insertion of present section in 1952) in terms applies to all classes of detentions under the Act which continued to be in force from the date of commencement of the amending Act by virtue of Section 12 (a) the scope of that clause should however be limited to those classes of detentions where the orders of detention did not expire within six weeks from 22-2-51. **18 Cut LT 58: ILR (1951) Cut 529: 1952 Cri LJ 1113: AIR 1952 Orissa 208 (210) (Pt A) (Pr 6) (DB).**

——S. 12 — Previous detention under other law — If can be considered for one year, under Section 12.

The expression 'from the date of his detention' in Section 12 must refer to the detention under the Act under which the person is to be detained, that is to say, the Preventive Detention Act (4 of 1950) if Parliament has enacted that a person should be detained without his case having been referred to an Advisory Board for a period not exceeding one year from the date of his detention, it must have reference to the detention under the Preventive Detention Act and it would be ridiculous to hold that this maximum period of one year could be made up by taking into consideration, the previous detention under some previous enactment. **ILR 29 Pat 992: 52 Cri LJ 282: AIR 1951 Pat 389 (392) (Pt C) (Pr 7) (DB).**

——Ss. 12, 3 (2) and 13 — Detention under Section 3 (2) —Non-specification of detention period and leaving it to the maximum period permissible under the law if intended would make the order vague — Defect cannot be cured under Section 13 — Constitution of India, Art. 22. See Public Safety — Preventive Detention Act (4 of 1950), Section 3 (2). **52 Cri LJ 33: AIR 1951 Pepsu 1.**

——Ss. 12, 3 — Period of detention how to be specified — It is not necessary that it must be specified in the order of detention itself — It can be specified by a separate order passed subsequently. See Public Safety — Preventive Detention Act (4 of 1950), Section 3. **52 Cri LJ 425: AIR 1951 Raj 69 (DB).**

——Ss. 12, 13 (as amended in 1951) — Period of detention.

The question as to whether the detenu should be detained for the full period mentioned in the order passed by the detaining authority or whether before the termination of that period he may be released is a matter that is to be considered by the Government of the State. **52 Cri LJ 1089: ILR (1951) Trav-Co 1: 1950 KLT 723: AIR 1951 Trav-Co 217 (221) (Pt C) (Pr 11) (DB).**

SECTION 13

●**——Ss. 13 and 11 (1)** — Order under Sec. 11 (1) — Power to extend period of detention — Appropriate Government confirming detention order under Section 11 (1) not specifying the period during which the detention is to continue — The order does not become functus officio — Section 13 gives very wide powers to the detaining authority in respect of extension or modification of detention and the power of modification would certainly include the power of extension of the period of detention provided such power is exercised before the period originally fixed has expired. See Public Safety — Preventive Detention Act (1950), Section 11 (1). **1952 Cri LJ 955: AIR 1952 SC 181.**

●**——Ss. 13 and 3** — Former defective order — Subsequent fresh order free from defect is not barred as is made clear by Section 13 — Constitution of India. Article 22. See Public Safety — Preventive Detention Act (1950), Section 3. **1952 Cri LJ 656: AIR 1952 SC 106.**

——S. 13 — Power of State Government to revoke or modify under Section 13 order of detention — Does not include power to modify grounds under Section 7. See Public Safety — Preventive Detention Act (1950), Section 3. **ILR (1961) 1 All 427.**

——S. 13 — Scope of power of revocation.

The power of revocation conferred on the State Government by Section 13 of the Preventive Detention Act is untrammelled by any restrictions. There is nothing in the Act to suggest that this power of revocation cannot be exercised unless the procedure prescribed by Sections 9 and 10 of the Act has been followed. It follows, that when the State Government passes its own order of detention after revoking the order of detention passed by the District Magistrate, it cannot be attacked as ultra vires because the procedure prescribed by Sections 9 and 10 was not followed. **1951 All Cri Cas 123: 1951 AWR (HC) 502: 1952 Cr LJ 372: AIR 1952 180 (180, 181) (Pt B) (Prs 6, 7, 9).**

——S. 13 (2) — Satisfaction based on past and present facts — Propriety.

When the detaining authority is in possession of some facts, both past and present, it is on

the aggregate effect of all the facts taken together that the detaining authority has got to make up its mind, and it cannot be said with any reasonableness that the past activities of a man cannot be taken into account on which the satisfaction of the State Government should be based as to whether or not a particular person should be prevented from acting in a particular manner within the meaning of the Preventive Detention Act. It is open to the detaining authority to take into consideration and apply its mind afresh to the past activities as also to the activities which came to light after the revocation of the previous order of detention. When fresh grounds based on fresh facts have been incorporated in the same it is not at all necessary, under the provisions of Section 13 (2) of the Act, for the detaining authority to say expressly that its satisfaction about the necessity of passing a fresh order of detention was based on fresh facts. **1953 BLJR 371: 1953 Cri LJ 1734: AIR 1953 Pat 351 (352) (Pt B) (Pr 6) (DB).**

——S. 13 (2) — 'Expiry" — Order of detention held illegal and invalid — It does not amount to "expiry" of order.

The word 'expiry' must necessarily have reference to time. If an order or an Act is held illegal, it becomes invalid as if it never existed. If an order or an Act is said to expire, it must convey the idea that the order or the Act has run out its full course with reference to time. Accordingly a declaration by the High Court that the detention of the detenu was illegal does not amount to expiry of the order of detention.

Where therefore the earlier order of detention is held invalid on more or less formal grounds, there is nothing in law, to prevent a proper order of detention being passed on the same grounds, and the mere fact that the subsequent detention order has been passed on the grounds as were mentioned in the previous order cannot lead the Court to hold that the detaining authorities acted mala fide. **1953 BLJR 354: ILR 32 Pat 480: 1953 Cri LJ 1690: AIR 1953 Pat 334 (335, 336) (Pt A) (Prs 6, 9) (DB).**

——S. 13 — Mala fides — Onus is on detenu to prove that detention order is mala fide — Onus held not discharged. **1953 BLJR 354: ILR 32 Pat 480: 1953 Cri LJ 1690: AIR 1953 Pat 334 (336) (Pt B) (Pr 8) (DB).**

——Ss. 13 and 3 — Detention order — Validity — Habeas Corpus application pending in High Court — State Government revoking the order of the District Magistrate and passing fresh order of detention — Government's order of detention after exercise of power of revocation cannot be held to be mala fide merely because the Government passed those orders when the Habeas Corpus application was pending — Mala fides — Burden of proof is on the detenu. See Public Safety — Preventive Detention Act (4 of 1950), Section 3. **52 Cri LJ 603: AIR 1951 Pat 68 (DB).**

——S. 13 — Revocation of detention order — Fresh order of detention.

Where an order of detention passed by the District Magistrate was revoked it is open to the State Government to issue a fresh order of detention against the same person. **52 Cri LJ 603: AIR 1951 Pat 68 (70) (Pt A) (Pr 4) (DB).**

——S. 13 — Power to revoke previous order.

When an authority has a power to make an order he has also inherent power to revoke the order once made, unless there is an express provision of law to the contrary.

Thus when a Deputy Commissioner passes an order under Section 3, Preventive Detention Act, he is competent to revoke the same. Moreover, in view of the fact the grounds of detention had not been supplied to the detenu in respect of the first order, that order was inoperative and illegal and for practical purposes it did not exist at all. The only order that would be effective is the later order. **ILR (1952) Patiala 445: 1953 Cri LJ 1519: AIR 1953 Pepsu 145 (146) (Pt C) (Pr 4).**

——Ss. 13, 3 (2), 12 — Detention under Section 3 (2) — Non-specification of detention period — The order is vague — Defect cannot be cured under Section 13 —Constitution of India, Article 22. See Public Safety — Preventive Detention Act (4 of 1950), Section 3 (2). **52 Cri LJ 33: AIR 1951 Pepsu 1.**

——Ss. 13, 3 — Modification of order — Government cannot modify grounds on which District Magistrate bases his satisfaction. See Public Safety — Preventive Detention Act (4 of 1950), Section 3. **1955 Cri LJ 95: AIR 1955 Raj 6 (DB).**

——S. 13 — Modification — Meaning of.

Modification means maintenance of the order with slight change. This would not include an attempt at validation of the order which was illegal at its inception. **1955 Cr LJ 95: 1955 Raj LW 75: ILR (1954) 4 Raj 51: AIR 1955 Raj 6 (11) (Pt H) (Pr 20) (DB).**

——S. 13 — Period of detention — Question of release of detenu after the full period or before the expiry of the period is to be considered by the Government of the State. See Public Safety — Preventive Detention Act (1950), Section 12. **52 Cri LJ 1089: AIR 1951 Trav-Co 217 (DB).**

SECTION 14

●——S. 14 — Act whether ultra vires the Constitution of India — Act is intra vires with exception of Section 14 which is illegal and ultra vires — The invalidity of Section 14 does not affect the rest of the Act. [Note:— Section 14 which was declared ulra vires was omitted by Preventive Detention Amendment Act (50 of 1950), Section 3 and present section was inserted by Preventive Detention Amendment Act (4 of 1951), Section 12.] See Public Safety — Preventive Detention Act (1950), Section 1. **51 Cri LJ 1383: AIR 1950 SC 27.**

●——Ss. 14 and 9 (as amended in 1951) — Detenu released on parol — Effect on reference under Section 9 — From Section 9 it is clear that the necessity for a reference to an Advisory Board is the substance of the order of detention and that it matters not that the detenu has been temporarily released in pursuance of Section 14 of the Act. See Public Safety — Preventive Detention Act (4 of 1950), Section 9. **52 Cri LJ 1453: AIR 1951 Assam 169 (SB).**

●——S. 14 (as it stood before the insertion of present Section by Act 4 of 1951) — If void — Whole Act illegal.

Per Meredith, C. J. and Das, J., Shearer, J., contra. :— The provisions of Section 14 of the Act are very drastic, and void as they are in conflict with Article 22 (5) of the Constitution and perhaps with Article 32 as well. But Section 14 is not an integral and inseverable part of the Act and does not render the whole Act void. L. K. Burman v. State, **ILR (1950) 29 Pat 502 (FB).**

—PREVENTIVE DETENTION (AMENDMENT) ACT (4 of 1951)

SECTION 9

●——Ss. 9 (2) and 12 (1) (as amended in 1951) — Validity — Sections substantially satisfy requirements of Article 22 (4) (b) and are valid.

The combined effect of Sections 9 (2) (a) and 12 (1) of the Act as amended by Act 4 of 1951 is to provide, in a certain class of cases, namely, where detention orders were in force at the commencement of the new Act, that the persons concerned could be detained for a period longer than three months if an Advisory Board reports that there are sufficient grounds for detention within ten weeks from the commencement of the new Act, that is to say, without obtaining the opinion of an Advisory Board before the expiration of the three months from the commencement of the detention as provided in sub-clause (a) of Cl. (4). And, although the new Act does not in express terms prescribe in a separate provision any maximum period as such for which any person may in any class or classes be detained, it fixes, by extending the duration of the old Act till 1-4-1952, an over-all time-limit beyond which preventive detention under the Act cannot be continued. These sections, therefore, substantially satisfy the requirements of sub-clause (b) of Clause (4) of Article 22, and cannot be declared unconstitutional and void.

Per Mahajan, J.:— Technically speaking, an amended statute remains the same statute as originally enacted but from that proposition it does not follow that the law contained in the amended statute is the same law as was contained in the original one. The law declared by Sections 9 and 12 of the amended statute is not the same law as was declared by the original statute and to that extent the amended statute is in the nature of a new and independent statute. The new law admittedly standing by itself does not authorise detention of any person beyond a period of three months except in the manner provided by Article 22 (4) of the Constitution. No question whatever arises of tacking of the period of detention under one law to the period of detention under another law inasmuch as the detention under the earlier law automatically terminates with the repeal of Section 12 of Act 4 of 1950. These sections, therefore, do not contravene Article 22 (4) of the Constitution. **1951 SCJ 453: (1951) 2 Mad LJ 105: 52 Cri LJ 1103: 64 Mad LW 945: 1951 SCR 621: AIR 1951 SC 301 (303, 304, 306) (Pt A) (Prs 10, 22.)**

——Ss. 9 (1), 10 (1) and 12 — Detention continued under Section 12 — Fresh opportunity to detenu to make representation it must be given.

It appears from the amending Act that where an order for detention is continued under the provisions of Section 12 of the Act the case of the detenu must be referred to an Advisory Board. But there is nothing whatever which requires the appropriate Government to give an opportunity to the detenu to make a representation to the Advisory Committee.

The detention is continued by the new Act pending the examination of the question by an Advisory Committee; but it cannot be regarded as a new detention in the sense that the detenu is to be given another opportunity to make a representation. **53 Bom LR 717: 21 Bom Cr C 210: 1952 Cri LJ 81: ILR (1952) Bom 134: AIR 1952 Bom 1 (9) (Pt E) (Prs 16, 17) (DB).**

——Ss. 9, 10 and 11 — Scope — Order of detention under Section 3 — Report of Advisory Board under Section 9 that detention was justified received by Government — Failure of Government to pass order under Section 11 within three months of initial order — Further detention is illegal.

The intention of the Legislature in enacting Sections 9, 10, 11, Preventive Detention Act is that no detention is to be regarded as lawful beyond three months unless within that period the Government, on a report from the Advisory Board justifying detention, decides to confirm the detention order that in its view may appear to be necessary. It is mandatory that within three months of the detention, the initial detention order be reviewed in the light of the recommendation of the Advisory Board by the Government and that appropriate order be passed within that period. The remaining period of two weeks after the report of the Advisory Board is provided by the statute for that purpose. The law does not confer any authority or option on the Government to make a validating order after the expiry of the statutory three months beyond which the detention, although valid originally, must become invalid unless the Government exercises its discretionary powers under Section 11 to confirm the order and continue the detention.

The absence of an order terminating the detention, would not by itself, mean that the Government had decided to continue the detention for the period originally fixed by the District Magistrate, unless the Government makes a clear order to that effect, it cannot be taken to have considered the advisability of confirming the detention order and continuing the detention of the person concerned.

What Section 11 provides is that Government "may confirm and continue the detention" of the person concerned. The words "may confirm" and "and continue detention" have their own significance and they obviously mean that if the Government decides to continue the detention it must confirm the order of detention, and that the non-confirmation of the order would result in its revocation and termination of the detention. The verb "may" only indicates that it is not obligatory on the Government to confirm the detention order even though the Advisory Board has reported in favour of the necessity of continuing the detention. The phrase, read in its context, undoubtedly signifies that the Government, if it decides to continue the detention, must confirm the detention order. **3 Pepsu LR 595: 1952 Cri LJ 1452: AIR 1952 Pepsu 134 (135, 136) (Prs 3, 4, 5) (DB).**

—PREVENTIVE DETENTION (AMENDMENT) ACT (34 of 1952)

SECTION 3

●——S. 3 — Section is intra vires. Shamarao v. District Magistrate, Thana, 1952 SCJ 476: 1952 SCR 683: 54 Bom LR 877: (1952) SCA 635: 1952 Cri LJ 1503: AIR 1952 SC 324 (328) (Pt A) (Pr 24).

●——S. 3 — Classification made by section is reasonable and fair — Classification is not hit by equality clause in Article 14 of Constitution — (Constitution of India, Article 14). Shamarao v. District Magistrate, Thana, 1952 SCJ 476: 1952 SCR 683: 54 Bom LR 877: (1952) SCA 635: 1952 Cri LJ 1503: AIR 1952 SC 324 (327) (Pt D) (Prs 14, 15, 17).

●——S. 3 — Section does not offend Article 22 (4) and (7) of Constitution — (Constitution of India, Article 22 (4) and (7)).

It cannot be contended that Section 3 offends the Constitution because Article 22 (4) and (7) do no envisage the direct intervention of Parliament in a whole batch of cases. Parliament can prescribe the minimum period for a class taken

as a whole as it has done in Section 3. Shamarao v. Dist. Magistrate, Thana, **1952 SCJ 476: 1952 SCR 683: 54 Bom LR 877: (1952) SCA 635: 1952 Cr LJ 1503: AIR 1952 SC 324 (327, 328) (Pt E) (Prs 19, 21).**

●——**S. 3 — Indefinite detention — Repugnancy to Constitution — (Constitution of India, Article 22 (7) (a)).**

It cannot be said that Section 3 is repugnant to the Constitution, and in any event a fraud upon it, as it fixes no time limit, because the section specifies the exact period of the detention, namely till the expiry of the Preventive Detention Act, 1950, that is to say, till the 1st of October 1952. Nor is it repugnant to the Constitution on the ground that Parliament is enabled to continue detentions indefinitely by the expedient of periodic amendments in the Act of 1950, because Parliament has the power. Shamarao v. District Magistrate, Thana, **1952 SCJ 476: 1952 SCR 683: 54 Bom LR 877: (1952) SCA 635: 1952 Cri LJ 1503: AIR 1952 SC 324 (328) (Pt G) (Pr 23).**

—PREVENTIVE DETENTION (EXTENSION OF DURATION) ORDER (1950)

CLAUSE 1

——**Cl. 1 — Commencement of operation of Order — General Clauses Act (1897), Section 5 (3).**

The Preventive Detention (Extension of Duration) Order, passed by the President under Article 22 (7) read with Article 373 of the Constitution does not amount to an Act of Parliament and does not come within the definition of Central Act or Regulation and as such Section 5 (3), General Clauses Act can have no application in determining the time from which the Order has to come into effect. Moreover the Order expressly states that it shall come into force 'at once' which refers to the time when it came into existence after the President assumed his office at 10.15 A. M. on 26th January 1950. Hence it cannot be held that the Order came into operation on the midnight of 25th January 1950. **52 Cri LJ 1282: ILR (1952) 1 All 8: AIR 1950 All 562 (573, 574, 580) (Pt I) (Prs 46, 47, 76) (DB).**

●——**Cl. 1 — Validity of Order — Constitution of India, Articles 373 and 392.**

The power to make adaptations in the Constitution itself could be exercised under Article 392 (3) by the Governor-General of the Dominion of India only before the commencement of the Constitution and not after it. Therefore, the Preventive Detention (Extension of Duration) Order dated 26th January 1950 and purported to be signed by the Governor-General is of no value at all for purposes of adaptation of the Constitution Act; nor can it be of any value for purpose of Article 373 because, under that Article, it is only the President who can act after the commencement of the Constitution. **51 Cri LJ 1081: ILR 29 Pat 335: AIR 1950 Pat 265 (280) (Pt J) (Pr 63) (FB).**

CLAUSE 2

——**Cl. 2** — Criminal P. C. (1898), S. 123-A (U. P.) does not give the person right to consult or to be defended by a legal practitioner of his choice as contemplated by Art. 22 (1) of the Constitution — Detention under — Illegal — The Preventive Detention (Extension of Duration) Order 1950 passed by the President under Art. 22 (7) read with Art. 373 after assumption of office at 10.15 A. M. on 26th January 1950 could not validate those provisions of S. 123-A (U. P.) as they became void on the midnight of 25/26 January 1950 when the Constitution came into force — Constitution of India, Arts. 13 (1), 21 and 22 (1), (2) and (4) — Criminal P. C. (1898), S. 491 — See Criminal P. C. (1898), S. 123-A (U. P.). **52 Cri LJ 1282: AIR 1950 All 562 (DB).**

——**Cls. 2 and 3** — Clause 2 of the Order is in conformity with provisions of Art. 22 (7) (a) but Cl. 3 is not in accordance with Art. 22 (7) (b) of the Constitution of India. **52 Cri LJ 1282: ILR (1952) 1 All 8: AIR 1950 All 562 (574 to 576) (Pt J) (Prs 50, 53) (DB).**

●——**Cl. 2 — Applicability of Order to Bengal Criminal Law Amendment Act (1930) and West Bengal Security Ordinance (1949) — Constitution of India, Article 22 (7) and 373 — Public Safety — Bengal Criminal Law Amendment Act (1930) — Public Safety — West Bengal Security Ordinance (1949).**

The Preventive Detention (Extension of Duration) Order, 1950, made by the President of the Indian Republic, can have no effect so far as the Bengal Criminal Law Amendment Act, 1930 and the West Bengal Security Ordinance, 1949 are concerned.

The Act and the Ordinance became void as soon as the Constitution came into force (i. e., at midnight on 25th January 1950) by reason of the provisions of Art. 13 (1) of the Constitution. They cannot be revived by the subsequent Order of the President passed in the exercise of the powers conferred by Art. 22 (7) (a) and (b) read with Art. 373 of the Constitution. Sunil Kumar Bose v. The Chief Secretary to the Government of West Bengal. **54 Cal WN 394: 51 Cri LJ 1110: AIR 1950 Cal 274 (283) (Pt H) (Pr 23) (SB).**

●——**Cl. 2 — Validity of Order — Constitution of India, Articles 13 (1) and 22 (7) (a) and (b).**

The Preventive Detention Order of 1950 is of no effect.

The Order does not comply with the provisions of Article 22 (7) (a) and (b), Constitution of India.

The Order is also void because the Bengal Criminal Law Amendment Act, 1930, is not an Act providing for preventive detention. — The Act and the Ordinance having become void could not be revived by the Preventive Detention (Extension of Duration) Order 1950. Sunil Kumar Bose v. The Chief Secretary to the Government of West Bengal, **54 Cal WN 394: 51 Cri LJ 1110: AIR 1950 Cal 274 (284) (Pt I) (Prs 25, 26) (SB).**

●——**Cl. 2** — Hyderabad Public Safety and Public Interest Regulation (8 of 1358-F), S. 2 is inconsistent with Art. 22 of the Constitution and is therefore void — Section 2 or the Detention Order based upon it not saved by the Preventive Detention (Extension of Duration) Order. Showkat-un-nissa Begum v. State of Hyderabad **ILR (1951) Hyd 237: AIR 1950 Hyd 20 (21 to 24, 27, 30, 36) (Pt A) (Prs 4, 16, 19, 37, 49, 60) (FB).**

●——**Cl. 2 — Validity of Order — General Clauses Act (1897), Sections 5 (3) and 3 (12).**

Per Full Bench — The order is ultra vires of the Constitution and cannot be invoked to validate an invalid detention.

Per Naik C. J.— Though by virtue of S. 5, sub-s. (3) read with S. 3, sub-s. (12), General Clauses Act, the President's Order should be deemed to have come into force from the midnight of 25th and 26th January 1950, it cannot be said that under the General Clauses Act, the author of the Act also is considered to have the power to make the law. The fiction applies to the law or the signature but not to the author. The exact time of signing of the Order by the

President may be immaterial but the exact time of the President having the power to make an enforceable law becomes material. The oath-taking ceremony may be a mere ceremony for ceremonial and administrative purposes, but for promulgating a law the oath has an importance of its own and without oath, the President has no power to make an order which will be recognised by a Court of law: AIR 1950 Orissa 157, Dissent. Showkat-un-nissa Begum v. State of Hyderabad, **ILR (1951) Hyd 237: AIR 1950 Hyd 20 (24, 25) (Pt C) (Prs 19, 22) (FB).**

——**Cl. 2** — Clause 2 is ultra vires being repugnant to the provisions of Articles 21 and 22 of the Constitution — The Preventive Detention (Extension of Duration) Order 1950 promulgated by the President with the object of continuing the detention of all persons detained under the maintenance of Public Safety Order and Acts of the several States prior to the commencement of the Constitution has failed to achieve its purpose. See Public Safety — Madras Maintenance of Public Order Act (23 of 1949), Section 2. **52 Cri LJ 170: AIR 1951 Mad 1015 (DB).**

●——**Cl. 2** — Commencement, scope and effect of — Does not validate Orissa Preventive Detention Act which became void before the Constitution came into force. See Public Safety — Orissa Maintenance of Public Order Act, 4 of 1948 (as amended in 1949). **51 Cri LJ 1189: AIR 1950 Orissa 157 (FB).**

—PUNJAB COMMUNIST DETENUS RULES (1950)

RULE 40

●——**Rr. 40 and 41 — Procedure under, not governed by Prisons Act (1894), Sections 45, 46 and 52.**

The Punjab Communist Detenus Rules, 1950, constitute a self-contained code regulating the place and conditions of detention of the detenus. Hence Sections 45, 46 and 52 of the Prisons Act do not apply to their case. Maqbool Hussain v. State of Bombay, **1953 Mad WN 648: (1953) 2 MLJ 113: 1953 Cr LJ 1432: 1953 All WR (Sup) 84: (1953) SCR 730: 1953 SCJ 456: 56 Bom LR 13: AIR 1953 SC 325 (332) (Pt E) (Pr 23).**

RULE 41

●——**R. 41** — Constitution of India, Articles 20 (2) and 21 — Action of Jail Superintendent under Rule 41 — He cannot then send the case after his action to the Magistrate — If he sends the case to the Magistrate after he had taken actions the prosecution before the Magistrate would be illegal and not in accordance with the procedure established by law — Procedure established by law. See Constitution of India, Article 20 (2). **1953 Cri LJ 1432: AIR 1953 SC 325.**

—PUNJAB CRIMINAL LAW (AMENDMENT) ACT (30 of 1960)

SECTION 6

——**S. 6 (2) — Bail — Granting of — Matters to be considered.**

In deciding the question of bail in prosecutions under the Punjab Criminal Law (Amendment) Act, among the matters that are to be considered are (1) the charge made, (2) the attendant facts including such police reports as the Courts may think proper to consider, (3) the facts as stated by the petitioner in the petition for bail and (4) the presumption of innocence in favour of the accused. Though the stage for raising the presumption of innocence in favour of the accused does not arise till the conclusion of the trial and the appreciation of the entire evidence on the record, yet the matter of granting bail has to be considered in the background of the fact that in the Criminal Jurisprudence, which guides the Courts, there is a presumption of innocence in favour of the accused.

At this stage the question is only of a reasonable belief and not of a conclusion and a reasonable belief at this stage has nothing to do with the final conclusion which may be arrived at by the trial Court on the material on record as it would come after the evidence is recorded. Cri. Misc. No. 1631 of 1960, dated 25-10-1960 (Punj.), Foll.; Cri. Misc. No. 1229 of 1960 (Punj) and 63 Pun LR 531, Dist. **64 Punj LR 396: 1962 (2) Cri LJ 633: AIR 1962 Punj 487 (488, 489) (Pt A) (Prs 5, 6).**

——**S. 6 (1) and (2) — Sub-section (1) applies only to instigation or incitement for disobedience of order under Section 144, Criminal P. C.**

Sub-section (1) of Section 6 does not punish instigation and incitement for commission of any offence, but only instigation or incitement "to act in disobedience of any order made under Section 144 of the Criminal P. C."

If, on the facts disclosed at the hearing, there is no reasonable ground for believing that the alleged offender, who is being prosecuted under Section 6 (1), has instigated or incited disobedience of an order under Section 144 of the Criminal P. C. or had not done anything to encourage disobedience of such an order, the Court will be at liberty to admit him to bail. **64 Pun LR 396: 1962 (2) Cr LJ 633: AIR 1962 Punj 487 (489) (Pt B) (Prs 9, 10).**

—PUNJAB CRIMINAL LAW (AMENDMENT) ORDINANCE (2 of 1960)

SECTION 6

——**S. 6 (2) — Grant of bail under — Relevant considerations — Grant of bail to member of Legislative Assembly — Desire to attend current Assembly Session not a relevant consideration.**

The rule which has been laid down in the matter of bail by Section 6 of the Criminal Law (Amendment) Ordinance does not affect the presumption of innocence of the accused which is a cardinal principle of criminal jurisprudence. All that the Court in granting bail in such cases has to do is to examine the available material to come to a conclusion whether or not there is a reasonable belief to hold that the accused is guilty of the offence charged with.

The desire of a member of the Legislative Assembly who is accused of an offence of inciting others to disobey an order passed under Section 144, Cr. P. C., to participate in the current Assembly Session is not a relevant consideration in coming to a conclusion about the guilt or innocence of the member for the offence charged. **(1961) 63 Pun LR 531.**

—PUNJAB DETENUS RULES (1950)

——**Rules are valid — Defence of India Rules (1962), Rule 30 (4) — Preventive Detention Act (1950), S. 4.**

The Punjab Detenus Rules have been framed by the Government for the purpose of determining the conditions of detention of persons detained in any prison in the State of Punjab. The effect of these rules is to avoid differential treatment and arbitrariness in the matter of treat-

ment of the detenus and the jail authorities, in whose custody the detenus are kept, are bound to abide by those rules. The Government under sub-rule (4) of Rule 30 of the Defence of India Rules had the power to lay down the conditions as to maintenance, discipline and the punishment of offences and breaches of discipline for the detenu while in detention. These rules were within the rule making power of the Government and as they are not shown to be violative of any law, they cannot be struck down. The mere fact that the rules framed by the Kerala Government in the matter are comparatively more liberal, there is no ground for striking down the Punjab Rules. **67 Pun LR 1165: ILR (1965) 1 Punj 273: 1966 Cr LJ 690: AIR 1966 Punj 248 (253) (Pt B) (Pr 12).**

——It is for Government to determine conditions of maintenance and discipline under which person is detained — Court cannot substitute its own opinion. See Defence of India Rules (1962), Rule 30 (4). **(1965) 67 Pun LR 1165: AIR 1966 Punj 248.**

——Punjab Detenus Rules are valid. See Punjab Detenus Rules (1950). **(1965) 65 Pun LR 1165: AIR 1966 Punj 248.**

—PUNJAB DISTURBED AREAS ACT (1 of 1947)

PREAMBLE

——Pre. — Act if still in force in Ajmer.

The provisions of the Punjab Act 1 of 1947 do not continue to remain in force in the State of Ajmer after the extension of the East Punjab Act 5 of 1949 to the State. Moreover, there is nothing in the notification extending the Punjab Act 1 of 1947 to show that that Act was to continue to remain in force even after its natural death in the State of Ajmer. **1951 AMLJ 38: AIR 1951 Ajmer 49 (49, 50) (Pr 1).**

—PUNJAB PUBLIC SAFETY ACT (2 of 1947)

PREAMBLE

——Pre. — Notification under authorising District Magistrate to issue precensorship order — Validity after repeal of Act — General Clauses Act (1897), Sec. 24.

The Notification dated 24-2-1948 issued by the Chief Commissioner, Ajmer under the East Punjab Act 2 of 1947 as extended to the State of Ajmer, authorising District Magistrate to issue pre-censorship orders on the publishers of journals continues to be in force by virtue of Section 24 of the General Clauses Act, 1897 in spite of the repeal of that Act by the East Punjab Act 5 of 1949 and the District Magistrate can validly pass such an order even before a notification under Section 7 (1) (c) of the East Punjab Act 5 of 1949 is issued. **52 Cri LJ 1530: AIR 1951 Ajmer 100 (100) (Pt A) (Pr 4).**

——Pre. — Scope and operation of — If lapses on passing of Indian Independence Act.

As according to the provisions of Section 18 (3) of the Indian Independence Act laws enacted under Section 93 of the Government of India Act remain in force for the time for which they were originally passed unless repealed, the Punjab Public Safety Act which was passed in 1947 under Section 93 of the Government of India Act to last for two years cannot lapse on the passing of the Indian Independence Act. **(1948) AMLJ 46: 52 Cr LJ 763: AIR 1951 Ajmer 61 (61, 62) (Pt A) (Pr 4).**

SECTION 3

——S. 3 (as applied to Ajmer Merwara) — Satisfaction of authority — Order must show that satisfaction was arrived at after deliberate consideration of available material. 1948 AMLJ 7: 52 Cri LJ 1485: AIR 1951 Ajmer 92 (92) (Pt A) (Pr 2).

——S. 3 (4) (as applied to Ajmer-Merwara) — Detention beyond one month — Separate special order under Section 3 (4) is required — Mere signature of Chief Commissioner against recommendation of Deputy Commissioner is not sufficient. 1948 AMLJ 7: 52 Cri LJ 1485: AIR 1951 Ajmer 92 (92) (Pt B) (Pr 3).

——S. 3 (1) — Detenu arrested by police under Section 151, Criminal P. C. — On vague police report District Magistrate ordering further detention for one month under Section 3 (1) without making further enquiry and accepting recommendation of police — No formal order of arrest under Section 3 (1) passed — Detention held illegal as District Magistrate acted in a routine mechanical way without applying his mind to case — Criminal P. C. (1898), Section 491. **1948 AMLJ 11: 52 Cri LJ 1475: AIR 1951 Ajmer 87 (87) (Pr 4).**

——S. 3 — Detention under — Power of High Court in hearing habeas corpus application.

When the High Court hears an application under Section 491, Cr. P. Code in respect of a detention under the Punjab Public Safety Act, prima facie it is not the function of the High Court to sit in appeal or judgment over the conclusion reached by the District Magistrate on the materials placed before him for making the order of detention, for Section 491, Cr. P. Code cannot be stretched to imply that the High Court can substitute its own judgment for the judgment arrived at by the District Magistrate. All that the High Court can do is to see whether the District Magistrate did in fact act on the basis of material that was placed before him, however scanty that may be or whether he acted arbitrarily on no material whatever. **1948 AMLJ 46: 52 Cr LJ 763: AIR 1951 Ajmer 61 (62) (Pt B) (Pr 5).**

——S. 3 — Satisfaction of authority — Power of Court to question — Criminal P. C. (1898), Section 491.

It is not open to High Court in a habeas corpus application to go behind detention orders under Section 3 in order to give finding whether the authorities were rightly satisfied as to the necessity of passing the orders and substitute its own judgment for the judgment of the authorities concerned. **51 Cri LJ 1069: AIR 1950 Ajmer 25 (1) (25) (Pt B) (Pr 4).**

SECTION 4

——S. 4 — Powers of Additional District Magistrate — Criminal P. C. (1898), Section 10 (2).

By virtue of Section 10 (2), Criminal P. C., an Additional District Magistrate has powers to pass orders under Section 4 of the Punjab Act: AIR 1937 Mad 637, Rel. on; AIR 1944 Nag 84 and AIR 1948 All 281, Disting. **51 Cri LJ 771: AIR 1950 Ajmer 12 (12) (Pr 4).**

SECTION 10

——S. 10 (2) (c) — Acquisition of moveable property — Compensation — (Acquisition of property — Compensation).

The exercise of the right by the State of taking possession of the moveable property of a subject in invitum for the exigency of public service does not connote that the subject is left without any right of compensation and that when he can claim compensation he is doing so because of

the tortuous acts of the State or its servant. Case-law, Rel. on.

Hence where a movable property was acquired under Section 10 (2) (c) of the Punjab Public Safety Act, 1947, and the restitution of it was not possible, a suit for compensation against the Government is not barred although the Act contained no provision for compensation. **55 Punj LR 481: ILR (1954) Punj 617: AIR 1954 Punj 49 (51) (Pt B) (Prs 11, 12) (DB).**

SECTION 19

——S. 19 — Prosecution under — If can be continued after date of expiry of Act — (Interpretation of Statutes).

The general rule in regard to a temporary statute is that in the absence of special provision to the contrary proceedings which are being taken against a person under it will terminate as soon as the statute expires. AIR 1951 SC 301 and AIR 1951 All 703, Rel. on.

Hence a prosecution for an offence under Section 19, Punjab Public Safety Act, 1947 started after 31-12-1947 when the Act was extended to the Province of Ajmer-Merwara, cannot be continued after 19-9-1949 the date of the expiry of the Act in the absence of any special provision to the contrary. **1952 Cri LJ 232: AIR 1952 Ajmer 14 (1) (14) (Prs 3, 4).**

——S. 19 — Offence under — Contravention of notice under Section 4.

A person was prohibited by a notice under Section 4 of the Act from attending labour meetings or participating in processions subversive of law and order. He was charged under both heads of the notice for contravention :

Held, that the prosecution having failed to prove that labour problems were discussed at the meeting he was to get the benefit of doubt under that head :

Held, however, that he was rightly convicted under Section 19 for having joined a procession where slogans intended to create public disturbance and incite labour to action were shouted. **51 Cri LJ 877: AIR 1950 Ajmer 18 (18) (Prs 3, 4).**

SECTION 21

——S. 21 (b) — Publishes — Meaning of — Penal Code (1860), Section 499.

Where a person sends an anonymous letter containing slanderous remarks maliciously made against a Government servant, to his superior with the object of prejudicing his chances of promotion the person cannot be convicted under Section 21 as there is no publication within the meaning of Clause (b) and the case is one which can be dealt with under Section 500, Penal Code. **52 Cri LJ 643: AIR 1951 Punj 381 (382) (Pt B) (Pr 4).**

SECTION 37

●——S. 37 (1) — Case sent for trial under Section 37 (1) to Sessions Judge when District was declared to be a dangerously disturbed area — Sessions Judge though seized of case, not commencing trial — Before commencement of trial, District ceasing to be dangerously disturbed area by virtue of subsequent notification — Sessions Judge has to follow procedure under Section 37 (1) and not under ordinary provisions of Criminal P. C. —Interpretation of statutes — Retrospective effect — Procedural law — General Clauses Act (1897), Section 6.

When a case is sent to the Court of Session under the provisions of Section 37 (1), Punjab Public Safety Act, at a time when the district is declared to be a dangerously disturbed area, and before the trial in the Court of Session actually commences the district ceases to be a dangerously disturbed area, the Sessions Judge should continue with the trial under the provisions of Section 37 (1) of the Act and not under the ordinary provisions of the Code of Criminal Procedure regarding Sessions trials. The Sessions Judge has to follow the procedure prescribed for trial of summons cases. Ram Singh v. The Crown. **51 Punj LR 317: 51 Cri LJ 459: AIR 1950 East Punj 25 (32 to 35) (Prs 18, 19, 23, 26, 27) (FB).**

—PUNJAB SECURITY OF THE STATE ACT (12 of 1953)

SECTION 9

●——S. 9 — Charge — Matters to be proved.

Admitting that the accused are not justified in hurling vulgar abuses against the Ministers of the State howsoever prejudicial to the interest of the accused the policy of nationalised motor transport sponsored by them might have been, yet when the charge which is levelled against the accused is one under Section 9, of the Act, before the prosecution can succeed it has not only to prove that what the accused did is against decency and is defamatory of these individuals, but also is such that it undermines public order, decency or morality or is tantamount to an incitement to an offence prejudicial to the maintenance of public order.

(Note :— It was held that indecent and vulgar though the slogans uttered by the accused were directed against the Ministers of the Punjab Government, the utterance thereof by the accused who were the members of the procession protesting against the scheme of nationalised motor transport was hardly calculated to undermine decency or morality, the strata of society from which they came being habituated to indulge freely in such vulgar abuses without any the slightest effect on the persons hearing the same). Kartar Singh v. State of Punjab, **1956 Pat LR (SC) 164: 1956 SCR 476: 1956 All WR (Sup) 109: 1956 Nag LJ 628: 1956 Cr LJ 945: 1956 SCA 775: ILR (1956) Punj 1190: 1956 SCJ 539: AIR 1956 SC 541 (543) (Pt A) (Prs 9, 11).**

——S. 9 (applied to Ajmer under S. R. O. 379, dated 31st January, 1954) — Restrictions — Validity of — (Constitution of India, Art. 19 (2)).

Admitting that the restrictions imposed must be clearly specified, still the phrases 'security of the State', 'friendly relations with foreign States' and 'public order' in S. 9 are, however phrases, which are well understood and whose connotation and meaning are not in doubt. There can hardly be two opinions as to the 'reasonableness' of restrictions imposed on speech, statement, rumour or report which tends to undermine the security of the State, to imperil friendly relations with foreign States, or to disturb public order. But the words 'decency' or 'morality' are not equally well understood. There may be wide difference of opinion as to the precise meaning of these words 'decency or 'morality'. If the Legislature intended to impose any restrictions on the freedom of speech and expression in the interest of decency and morality those prohibited acts and restrictions should be clearly specified so that it could be decided whether the restrictions were reasonable or not. Hence, the restriction imposed with regard to decency or morality is both vague and unreasonable and to the extent Section 9

is invalid. **1956 AMLJ 4: 1956 Cr LJ 658: AIR 1956 Ajmer 52 (52) (Pt A) (Pr 4).**

——S. 9 (as applied to Ajmer under S. R. O. 379, dated 31st January, 1954) — 'Speech', statement, etc., amounts to contempt of Court, etc., — Interpretation and reasonableness of — (Constitution of India, Preamble and Article 19 (2)).

Since there is a presumption as to the validity of the laws, the Legislature should be taken to have intended in Section 9 only to make such speeches, statements, rumours or reports as amount to contempt of Court prejudicial to the security of the State, etc., defamation prejudicial to the security, of the State, etc., or incitement to an offence prejudicial to the security of the State, etc., punishable. In that view the restrictions will not be unreasonable or even vague. **1956 AMLJ 4: 1956 Cr LJ 658: AIR 1956 Ajmer 52 (53) (Pt B) (Pr 5).**

——S. 9 — Applicability — Conditions.

Even if the words amount to a contempt of Court, that alone is not sufficient for bringing the case within the mischief of Section 9. The law requires that the words amounting to contempt of Court should further be prejudicial to the security of the State or to the maintenance of public order. **60 Pun LR 266: ILR (1958) Punj 1319: 1959 Cr LJ 1022: AIR 1959 Punj 379 (380) (P A) (Pr 6).**

——S. 9 — Undermining of decency or morality.

In its general sense, decency means propriety or seemliness of action, speech, etc., conforming to the standards in vogue among civilized people. But the words 'decency or morality' used in the context of S. 9 do not refer to vague or general standards of appropriateness in conformity with what is becoming or considered to be in good taste. The use of the words 'decency or morality', suggest that the language that the law penalizes must be obscene signifying lewd or lustful ideas offensive to modesty and forbidden by delicacy, purity or chastity. A language which is otherwise scurrilous, insulting or abusive need not be obscene, suggestive of depravity and such as is calculated to corrupt minds open to moral influences. **60 Pun LR 266: ILR (1958) Punj 1319: 1959 Cr LJ 1022: AIR 1959 Punj 379 (380) (Pt B) (Pr 11).**

——S. 9 — Applicability.

The objectionable speech by the accused was as follows:

'This despicable and mean Magistrate does not know that he is drawing his pay from our treasury. Does the despicable person not know that if his mother, sister, father or brother were to remain hungry for two days, then he would feel the pain? The Magistrate is most contemptible and mean. If Socialist Party were in power, then such a contemptible and mean Magistrate would be stripped and flogged. This bastard does not know that he is drawing his salary from our treasury'. While the case under Section 9 of the Punjab Security of State Act, 1953, for the speech was pending in the Court the accused raised objectionable slogans within the hearing of the Magistrate 'Goonda, Magistrate ki goonda gardi nahin chalegi. Ise jail ki kotheri men band kar do'.

Held, that the words used in this case with respect to the Magistrate deserved severe censure but the accused could not be convicted as his utterances did not transgress the statutory inhibitions. **60 Pun LR 266: ILR (1958) Punj 1319: 1959 Cr LJ 1022: AIR 1959 Punj 379 (381) (Pt D) (Pr 19).**

——S. 9 — Constitution of India, Articles 246, 254, Sch. 7, List II, Item 1 and List III, Item 14 — Section 9, Punjab Security of the State Act is valid — No conflict between Punjab Security of the State Act (12 of 1953), Section 9 and Contempt of Courts Act (1952), Sections 3, 4. See Constitution of India, Article 246. 1956 Cri LJ 1015: AIR 1956 Punj 169 (DB).

—RAJASTHAN PUBLIC SAFETY ORDINANCE (9 of 1948)

SECTION 3

——S. 3 (1) — "Good faith' in Section 44 — Meaning — Order of detention merely reproducing grounds mentioned in Section 3 (1) — Order held not passed in good faith within Section 44. See Public Safety — Rajasthan Public Safety Ordinance (9 of 1948), Section 44. AIR 1961 Raj 64 (DB).

——S. 3 (1) — Suit against Government for compensation for act of Commissioner in ordering wrongful detention under delegated powers — Not maintainable — Maxim 'Respondeat Superior' — Law of Principal and Agent — Applicability. See Constitution of India, Article 300. AIR 1961 Raj 64 (DB).

SECTION 43

——S. 43 — Suit against Government for compensation for act of Commissioner in ordering wrongful detention under delegated powers — Not maintainable — Maxim "Respondeat Superior" — Law of Principal and Agent — Applicability. See Constitution of India, Article 300. AIR 1961 Raj 64 (DB).

SECTION 44

——S. 44 — 'Person' — Meaning — Includes Government — Suit against Rajasthan State Government for tortious act of Commissioner — Right of Government to claim protection under Sec. 44 — Kotah General Clauses Act (11 of 1945), Section 3 (34) — Rajasthan Administration Ordinance (1 of 1948), S. 3.

The Government is included in the term 'person' in Section 44 of the Public Safety Ordinance. The General Clauses Act of Kotah is applicable to the interpretation of the Public Safety Ordinance by virtue of Section 3 of Ordinance No. 1 of 1948. The definition of 'person' as per Kotah General Clauses Act is wide enough to include Government also. AIR 1956 All 383, Rel. on.

Where, therefore, a suit is brought against the Rajasthan Government for compensation for wrongful detention under the Public Safety Ordinance under an order passed by the Commissioner, the Government is entitled to claim protection under Section 44 of the Public Safety Ordinance if the other conditions laid down in Section 44 are satisfied.

Moreover, if the Commissioner is protected under S. 44, the vicarious liability of the State would also not arise for the simple reason that such liability is co-extensive with the liability incurred by the servant. **1960 Raj LW 225: ILR (1960) 10 Raj 784: AIR 1961 Raj 64 (69) (Pt C) (Pr 17) (DB).**

——Ss. 44, 3 (1) — "Good faith" in Section 44 — Meaning — Order of detention merely reproducing grounds mentioned in Section 3 (1) — Order held not passed in good faith within S. 44.

Though the Central General Clauses Act and the definition given in the Indian Penal Code do not directly apply in the matter of interpretation of

the term "good faith" appearing in Section 44 of the Rajasthan Public Safety Ordinance, the meaning of the term can be gathered with reference to those definitions. Any thing done honestly notwithstanding some negligence is deemed to be done in good faith.

Held, on facts that in order that Section 3 of the Ordinance may be attracted, the Commissioner had to be satisfied that the detenu was likely to commit an act prejudicial to the public safety, the maintenance of public order and Government's relations with the Government of India. **1960 Raj LW 225: ILR (1960) 10 Raj 784: AIR 1961 Raj 64 (70) (Pt D) (Pr 18) (DB).**

—RAJASTHAN PUBLIC SECURITY ORDINANCE (26 of 1949)

PREAMBLE

——Pre. — Scope of Ordinance — Relation to other laws.

The provisions of the Rajasthan Public Safety Ordinance are in addition to and not in derogation of any other law for the time being in force in the whole or any part of Rajasthan. **1950 RLW 37: 51 Cr LJ 1160: AIR 1950 Raj 40 (43) (Pt B) (Pr 6) (DB).**

SECTION 1

——Ss. 1, 69 — Force and operation of Ordinance.

The Ordinance came into force on 9th September, 1949, when it was made and promulgated by the Rajpramukh. Under Section 69 (1) it remained in force for a period of two years and expired on the 9th September, 1951.

[Note :— His Lordship referred to S. 5-A, General Clauses Act, in this judgment but it was subsequently held by his Lordship in a subsequent case, Atmaram v. Madanlal, D. B. Misc. Writ No. 90 of 1951, dated 27-10-1952, that reference to Section 5-A, General Clauses Act, in this was due to mistake. His Lordship observed in the subsequent case : "We now find that Section 5-A had been repealed by the India (Adaptation of Existing Indian Laws Order, 1947). This mistake took place because the copy of the General Clauses Act, 1897, then before us did not mention the repeal. However, we are of opinion that this makes no difference, because the material words of Section 5-A of the General Clauses Act are exactly the same in Section 5 (1)]. **ILR (1952) 2 Raj 951: 1953 Raj LW 144: AIR 1953 Raj 78 (80) (Pt A) (Pr 8) (DB).**

SECTION 3

——Ss. 3, 64 — Satisfaction — Powers of Court to question.

The Court cannot consider the adequacy of the reasons of information available to the Government which led to its satisfaction before the order of detention was passed. But the detenu can be allowed to show that the order was not made bona fide or was made without sufficient application of the mind of the detaining authority to the facts or requirements of the law.

Where as soon as the previous period of six months' detention expired, the Government rearrested and detained the detenu for another period of six months the order of detention is mala fide. **1950 Raj LW 37: 51 Cri LJ 1160: AIR 1950 Raj 40 (41, 45) (Pt A) (Prs 3, 11) (DB).**

SECTION 5

——S. 5 — Non-compliance — Effect.

Non-compliance with the provisions of Sec. 5 only makes further detention improper and does not make the initial order of detention void ab initio. **1950 Raj LW 37: 51 Cri LJ 1160: AIR 1950 Raj 40 (44, 45) (Pt C) (Pr 9).**

——S. 5 — Grounds — Sufficiency of.

The grounds communicated to the detenu must not be vague, indefinite or incomplete and must convey sufficient information to him to enable him to make the representation. If in the opinion of the Court the grounds are vague, indefinite and insufficient, further detention is illegal or improper. The ground that the detenu was an active Communist and as an agitator had been fomenting and organizing industrial strikes is vague. **1950 Raj LW 37: 51 Cri LJ 1160: AIR 1950 Raj 40 (44 to 46) (Pt D) (Prs 9, 12) (DB).**

SECTION 33

——S. 33 (1) (a) and (b) — Order under Section 33 (1) (a) before expiry of Ordinance — Disobedience after expiry — Action under Section 33 (1) (d) cannot be taken after expiry as it amounts to deprivation of property of the owner against whom the order is passed, within the meaning of Article 31 (1) of the Constitution. (State was ordered to restore the property). **ILR (1952) 2 Raj 951: 1953 Raj LW 144: AIR 1953 Raj 78 (80, 83) (Pt B) (Prs 10, 18) (DB).**

SECTION 62

——S. 62 — Scope of Ordinance — Criminal P. C. (1898), Section 491.

The provisions of Rajasthan Public Security Ordinance are in addition to and not in derogation of any other law for the time being in force in the whole or in part of Rajasthan such as the provisions of Section 491, Criminal P. C. **1950 Raj LW 37: 51 Cri LJ 1160: AIR 1950 Raj 40 (43) (Pt B) (Pr 6) (DB).**

SECTION 64

——S. 64 — Satisfaction of detaining authority — Province of Court.

The sufficiency of the material on which the satisfaction of the detaining authority was based cannot be the subject of scrutiny by the Courts. But the detenu can be allowed to show that the order was not bona fide or was made without sufficient application of the mind of the detaining authority to the fact or requirements of law. **1950 RLW 37: 51 Cr LJ 1160: AIR 1950 Raj 40 (41, 45) (Pt A) (Prs 3, 11) (DB).**

SECTION 69

——Ss. 69, 1 — Ordinance came into force when it was made and promulgated by the Rajpramukh, i.e., on 9th September 1949 — Under Section 69 (1), it remained in force for period of two years and expired on 9th September 1951. See Rajasthan Public Security Ordinance (1949), Section 1. **AIR 1953 Raj 78 (DB).**

—SAURASHTRA STATE PUBLIC SAFETY MEASURES ORDINANCE (9 of 1948)

PREAMBLE

——Pre. — Satisfaction of Magistrate.

Unless there is any internal evidence to show that the District Magistrate has not applied his mind to the question, the High Court would have no power to interfere with an order of detention made by the District Magistrate. **3 Sau LR 48: AIR 1950 Sau 12 (13) (Pt A) (Pr 1) (DB).**

——Pre. — Grounds for detention — Supply of, to detenu without delay.

Even if the District Magistrate is in correspondence with the Government for considering the release of the detenu that is no reason at all why, once he receives an application from the detenu for furnishing grounds he should not send those grounds to him even through the Home Department as expeditiously as possible. **3 Sau LR 48: AIR 1950 Sau 12 (13) (Pt B) (Pr 2) (DB).**

SECTION 6-A

——S. 6-A (as modified by Ordinance 38 of 1948 and by Act 7 of 1950) — Section 6-A if ultra vires — Constitution of India, Art. 19 (2).

Unless the security of the State is endangered there can be no restriction on the freedom of expression under Article 19 of the Constitution of India. Section 6-A, Ordinance 9 of 1948 would be ultra vires because the words 'Security of State' are not there. Hence, a precensorship order passed under Section 6-A would be bad as well as ultra vires. **('50) 3 Sau LR 267: AIR 1951 Sau 9 (10) (Prs 4, 5) (DB).**

—SAURASHTRA STATE PUBLIC SAFETY MEASURES (THIRD AMENDMENT) ORDINANCE (66 of 1949)

SECTION 9

——Ss. 9, 10 and 11 — If offend against principle of delegatus non potest delegare.

The legislation contained in Sections 9, 10 and 11 of the Saurashtra State Public Safety Measures (Third Amendment) Ordinance is valid and is not obnoxious to the principle of delegatus non potest delegare. **52 Cr LJ 1300: AIR 1951 Sau 69 (70) (Pt A) (Pr 4) (DB).**

SECTION 10

——S. 10 — Validity — Constitution of India, Article 14.

The Legislative Authority in promulgating the Ordinance has not made any distinction between any person or any class of persons or denied equal protection of laws. What has been done is to constitute Special Courts for the trial of certain cases. So far as the procedure is concerned, it is bound to vary from place to place as exigencies and peculiar circumstances of society vary. This does not mean that the State is denying equality before the law. No person has any vested right in any particular procedure. It is for the State to legislate about the forum and procedure of seeking remedies for infringement of substantial rights and such forum and procedure are bound to vary. Hence the Constitution of the Special Court under Section 10 of the Ordinance is not in contravention of Article 14. AIR 1951 Hyderabad 11, Rel. on. **52 Cri LJ 1300: AIR 1951 Sau 69 (70) (Pt A) (Pr 4) (DB).**

——S. 10 — Valid and not obnoxious to the principle of delegatus non potest delegare. **52 Cri LJ 1300: AIR 1951 Sau 69 (73) (Pt B) (Pr 7) (DB).**

SECTION 11

●——S. 11 — Ordinance is intra vires and constitutional — Constitution of India, Article 14.

Per Patanjali Sastri C. J. and Fazl Ali, B. K. Mukherjea and Das JJ,; (Mahajan,, Chandrasekhara Aiyar and Vivian Bose JJ. Contra) — The Saurashtra State Public Safety Measures (Third Amendment) Ordinance, 1949, is not unconstitutional. Section 11 of the Saurashtra Ordinance in so far as it authorises the State Government to direct offences or classes of offences or classes of cases to be tried by the Special Court does not offend against the equal protection clause of the Constitution of India, and the notification No. II 35-5 C. D/- 9-2-1950 which has been issued by the Saurashtra Government under that part of the Section cannot be held to be invalid or ultra vires. AIR 1952 SC 75, Disting.

Per Patanjali Sastri C. J.: — The impugned Ordinance having been passed to combat the increasing tempo of certain types of regional crime, the twofold classification on the lines of type and territory adopted in the impugned Ordinance, read with the notification issued thereunder, is reasonable and valid, and the degree of disparity of treatment involved is in no way in excess of what the situation demanded.

Per Fazl Ali J.:— The clear recital of a definite objective furnishes a tangible and rational basis of classification to the State Government for the purpose of applying the provisions of the Ordinance and for choosing only such offences or cases as affect public safety, maintenance of public order and preservation of peace and tranquillity. Thus, under Section 11, the State Government is expected to select only such offences or class of offences or class of cases for being tried by the Special Court in accordance with the special procedure, as are calculated to affect public safety, maintenance of public order etc., and under Section 9, the use of the special procedure must necessarily be confined to only disturbed areas or those areas where adoption of public safety measures is necessary. This is in plain language the rational of the Ordinance, and it will be going too far to say that in no case and under no circumstances can a legislature lay down a special procedure for the trial of a particular class of offences, and that recourse to a simplified and less combrous procedure for the trial of those offences, even when abnormal conditions prevail, will amount to a violation of Article 14 of the Constitution.

Per Das J.— Section 11 of the Saurashtra Ordinance, like Section 5 (1) of the West Bengal Special Courts Act, refers to four distinct categories, namely, "offences" "classes of offences", "cases", and "classes of cases" and empowers the State Government to direct any one or more of these categories to be tried by the Special Court constituted under the Act. The expressions "offences", "classes of offences" and "classes of cases" clearly indicate and obviously imply a process of classification of offences or cases. Prima facie those words do not contemplate any particular offender or any particular accused in any particular case. The emphasis is on "offences", "Classes of offences" or "classes of cases". The classification of offence by itself is not calculated to touch any individual as such, although it may, after the classification is made, affect all individuals who may commit the particular offence. In short, the classification implied in this part of the sub-section has no reference, to and is not directed towards the singling out of any particular person as an object of hostile State action but is concerned only with grouping of "offences", "classes of offences" and "classes of cases" for the purpose of the particular legislation as recited in its preamble. Section 11 of the Ordinance properly construed and understood, does not confer an uncontrolled and unguided power on the State Government. On the contrary, this power is controlled by the necessity for making a proper classification which is to

be guided by the preamble in the sense that the classification must have a rational relation to the object of the Act as recited in the preamble. It is, therefore, not an arbitrary power. The Legislature has left it to the State Government to classify offences or classes of offences or classes of cases for the purpose of the Ordinance, for the State Government is in better position to judge the needs and exigencies of the State and the Court will not lightly interfere with the decision of the State Government. If at any time, however, the State Government classifies offences arbitrarily and not on any reasonable basis having a relation to the object of the Act, its action will be either an abuse of its power if it is purposeful or in excess of its powers even if it is done in good faith and in either case the resulting discrimination will encounter the challenge of the Constitution and the Court will strike down, not the law which is good but, the abuse or misuse or the unconstitutional administration of the law creating or resulting in unconstitutional discrimination.

Per Mahajan J. (Dissenting) — Section 11 of the Ordinance, like Section 5 (1) of the West Bengal Act (10 of 1950), suggests no reasonable basis or classification either in respect of offences or in respect of cases. It has laid down no measure for the grouping either of persons or of cases or of offences by which measure these groups could be distinguished from those outside the purview of the Special Act. The State Government can choose a case of a person similarly situate and hand it over to the special tribunal and leave the case of another person in the same circumstances to be tried by the procedure laid down in the Criminal Procedure Code. It can direct that the offences of simple hurt be tried by the special tribunal, while a more serious offence be tried in the ordinary way. Section 11 of the Ordinance offends against Article 14 of the Constitution and is, therefore, unconstitutional. Raning Rawat v. State of Saurashtra, **1952 Mad WN 762: 1952 Mad WN (Crl) 210: (1952) SCA 245: 1952 SCJ 168: 1952 SCR 435: 1952 Cri LJ 805: AIR 1952 SC 123 (126, 128, 129, 133, 136, 137, 138) (Pt A) (Prs 8, 20, 22, 23, 36, 47, 48, 54, 57).**

●——S. 11 — Validity — Delegated legislation— **Constitution of India, Article 245.**

Per Mukherjea and Das JJ.:— Section 11 of the Saurashtra Ordinance is not a case of a delegated legislation at all but is an instance of conditional legislation coming within the rule of Queen v. Burah (AIR 1945 PC 48) and is not illegal on that ground.

Per Patanjali Sastri C. J.— Legislature in India have plenary authority to delegate their power to make laws to subordinate agencies of their choice and such delegation, however inexpedient or undesirable politically, is constitutionally competent. AIR 1951 SC 332, Ref. Raning Rawat v. State of Saurashtra, **1952 Mad WN 762: 1952 Mad WN (Crl) 210: (1952) SCA 245: 1952 SCJ 168: 1952 Cri LJ 805: 1952 SCR 435: AIR 1952 SC 123 (126) (Pt C) (Pr 9).**

——S. 11 — Sch. 11 is valid and not obnoxious to the principle of delegatus non potest delegare. **52 Cri LJ 1300: AIR 1951 Sau 69 (73) (Pt B) (Pr 7) (DB).**

—TRAVANCORE-COCHIN PUBLIC SAFETY MEASURES ACT (5 OF 1950)

PREAMBLE

——Pre. — Validity of Act — State Legislature's competency to pass Act — State Legislature was competent to pass the Act. See Constitution of India (1950), Art. 246 (3). **1953 Cri LJ 1786: AIR 1953 Trav-Co. 540.**

——Pre. — Repeal of Act — Effect of — Paddy (Acquisition and Movement) Control Order, 1950 kept alive after 17th August 1950. See Essential Supplies (Temporary Powers) Act, 1946, as amended in 1950, S. 17 (4), Proviso. **AIR 1952 Trav-Co 455 (DB).**

——Pre. — Act if invalid as not having been assented to by the President.

Quaere.—Whether the Travancore-Cochin Public Safety Measures Act is not validly passed by the State Government because the President has not given his assent to it or whether it is authorised under Art. 246 (2) of the Constitution of India? **ILR (1951) Trav-Co 655: AIR 1952 Trav-Co 455 (458) (Pr 13) (DB).**

——Pre. — Act if ultra vires—The Act and Paddy (Acquisition and Movement) Control Order (1950) promulgated thereunder are not ultra vires. **1951 Ker LT 268: ILR (1951) Trav-Co 691: AIR 1951 Trav-Co 241 (244) (Pt D) (Pr 7) (DB).**

SECTION 3

——S. 3 — Constitution of India, Arts. 304 (b), Proviso, 246, Seventh Schedule, List I, Entry 48; List II, Entries 26, 27 — Validity — Section is ultra vires for lack of sanction of President under Article 304 (b), Proviso — Art. 304 controls Art. 246 — Art. 304 (b), Proviso does not affect validity of repeal under S. 73 of the Act of 1950 — Repeal under S. 73 of Act 5 of 1950 is valid — As S. 3 of the Act is void, notifications issued under it are also invalid and cannot continue under S. 73 (2) — Suit contracts entered into in February 1952 not affected by notification under Essential Supplies (Temporary Powers) Act (1946) also. See Constitution of India, Art. 304 (b), Proviso. **AIR 1964 Ker 92 (DB).**

●——S. 3 — 'Not bill or amendment shall be introduced or moved' — Meaning of — S. 3, Travancore-Cochin Public Safety Measures Act, 1950, is ultra vires of the Constitution for lack of Presidential sanction prescribed by Art. 304. See Constitution of India, Art. 304, Proviso. **1955 Cri LJ 844: AIR 1955 Trav-Co 82 (FB).**

——S. 3 — Validity — (Constitution of India, Art. 304 (b).

Section 3 of the Travancore-Cochin Public Security Measures Act, 1950, is void and inoperative for lack of Presidential sanction insisted upon by the proviso to Art. 304 (b) of the Constitution. Since the invalid portion of S. 3 is not separable from rest of the portions of S. 3 which deals only with transport and manufacture, the whole of S. 3 must be declared ultra vires and invalid. **1953 Ker LT 863: 1954 Cri LJ 669: ILR (1954) Trav-Co 139: AIR 1954 Trav-Co 257 (257, 258) (Pt B) (Prs 3, 8) (DB).**

——S. 3—Is ultra vires being without the previous sanction of the President and therefore illegal. See Constitution of India, Art. 246 (3). **1954 Cri LJ 63: AIR 1954 Trav-Co 34 (DB).** —

——S. 3 — Scope — Travancore-Cochin Paddy (Acquisition and Movement) Control Order, 1950—

Scope — If ultra vires — Locus standi to impeach Act and Order.

It cannot be said that the Travancore-Cochin Public Safety Measures Act, 1950, and the Paddy (Acquisition and Movement) Control Order, 1950, made under the former Act are ultra vires. Where a party himself applies for reliefs under that Act and the order made thereunder, it is not open to him on failing to obtain the reliefs provided therein to turn round and raise the contention that the Act and the Order are ultra vires. **ILR (1951) Trav-Co 691: 1951 Ker LT 268: AIR 1951 Trav-Co. 241 (244) (Pt D) (Pr 7) (DB).**

SECTION 4

——Ss. 4 and 11 — Construction — 'On account of water used for purposes of irrigation' — Meaning of — Demand notices relating to dewatering charges for Kole cultivation—Provisions of Revenue Recovery Act cannot be invoked exercising powers under Ss. 4 and 7 of the Public Measures Act under R. 12. See Travancore-Cochin Revenue Recovery Act (7 of 1951), S. 2 (a). 1957 Ker LJ 386: 1957 Ker LT 431.

——Ss. 4, 5, 6, 14 (part relating to S. 4) and 15— Part of the Act relating to requisitioning of property — Validity — (Constitution of India, Arts. 31 (3), 200).

Sections 4, 5, 6, 14 (part relating to S. 4) and 15 are the parts of Act 5 of 1950 having reference to the subject of requisitioning of property and they would have no effect as a law for purposes of Clause 2 of Article 31.

Act 5 of 1950 not having been reserved for the consideration of the President and not having received his assent, has no effect and would not constitute "law" within the meaning of Clause 2 of Article 31. Act 5 of 1950 is an Act providing for requisitioning of property and several other matters unconnected with and separable from requisitioning. Article 31 prescribes the necessity for reservation of a law regarding requisitioning or acquisition of property for the consideration of the President and that part of Act 5 of 1950 pertaining to the requisitioning of property cannot have effect as the requirements of Clause 3 of Article 31 have not been complied with. That part is severable from other parts of that Act and the defect attaching to the part relating to the requisitioning of property will not affect the other parts of that Act.

The contention that the expression having been reserved for the consideration of the President, has received his assent "should be construed as meaning". If it has been reserved for the consideration of the President, has received his assent "based on Article 200, is clearly and obviously untenable. The reservation that has to be made under Cl. 3, of Art. 31, for the consideration of the President is of a Law". A Bill passed by the Legislative Assembly or in a case where there is a Legislative Council also, by both the Houses, would continue to be a Bill even after its passage by the House or Houses. It becomes law on assent being accorded to it by the Governor. Article 200 refers only to Bills which have not become law by assent thereto declared by the Governor. That article cannot, therefore, be relied upon as giving any guidance to the construction of Clause 3 of Article 31 which relates to the reservation of a 'Law' for the consideration of the President. The language of Clause 3 is clear. The words used are "having been reserved for the consideration of the President has received his assent" clearly indicating that there should have been a reservation for the consideration of the President and there must have been his assent. **1952 Ker LT 372: 1954 Cri LJ 274: ILR (1952) Trav-Co 519: AIR 1954 Trav-Co 145 (148, 150) (Pt A) (Prs 10, 12).**

——S. 4 — Scope of.

Section 4 gives the Government wide powers. The use of the discretion by the Government is absolute and no further question can arise upon it unless it is shown that the requisitioning was actuated by mala fides or manifest fraud upon the statute or the power conferred by the statute was utilised for some indirect purpose not connected with the object of the Act.

The High Court will not, therefore, interfere in such matters in the absence of any invalidating circumstances. **1950 Ker LT 689: AIR 1951 Trav-Co 221 (224) (Pt B) (Pr 8) (DB).**

SECTION 5

——S. 5 — Sections 4, 5, 6, 14 (part relating to S. 4) and 15 are the parts of Act (5 of 1950) having reference to the subject of requisitioning of property and they would have no effect as a law for the purposes of Clause 2 of Art. 31, the Act not having been reserved for the consideration of the President and not having received his assent. See Public Safety — Travancore-Cochin Public Safety Measures Act (5 of 1950), S. 4. **1954 Cri LJ 274: AIR 1954 Trav-Co 145.**

SECTION 6

——S. 6 — Sections 4, 5, 6, 14 (part relating to S. 4) and 15 are the parts of Act 5 of 1950 having reference to the subject of requisitioning of property and they would have no effect as a law for the purpose of Cl. 2 of Art. 31; the Act not having been reserved for the consideration of the President and not having received his assent. See Public Safety — Travancore-Cochin Public Saftey Measures Act (5 of 1950), S. 4. **1954 Cri LJ 274: AIR 1954 Trav-Co 145.**

SECTION 7

——S. 7 — Scope and effect of — Neither S. 4 nor S. 7 empowers Kole Cultivation Authority to invoke provisions of Revenue Recovery Act. 1957 Ker LJ 386: 1957 Ker LT 431.

SECTION 13

——Ss. 13 and 22 — Scope and object of.

Obiter—Although the wording of S. 22 of the Public Safety Measures Act is wide enough to take in a power conferred on an officer by an order made under S. 13, the real purpose of S. 22 is to provide for an appeal from the decision of an officer in exercise of powers conferred by the Act itself, (for example by S. 8) as also from the decision of an officer in exercise of powers delegated to him by the Government under S. 15, in

other words, of powers conferred under the Act. **1957 Ker LJ 380: 1957 Ker LT 411: AIR 1957 Ker 109 (111) (Pt D) (Pr 5).**

——S. 13 — Scope — Refund of rent recovered in excess of fair rent — The Executive Government have not overstepped the limits of their authority under S. 13 of the Act in enacting the provisions for refund or adjustment under S. 6, Cl. (c) of Cochin Buildings (Lease and Rent Control) Proclamation 4 of 1922. See Houses and Rents — Travancore-Cochin Buildings (Lease and Rent Control) Order (1950), S. 6(c). **AIR 1957 Ker 59.**

——S. 13 — Travancore-Cochin Buildings (Lease and Rent Control) Order (1950), R. 16 — Rule 16 is ultra vires — The Act 5 of 1950 contemplates only two tribunals whereas the rules provide for three tribunals and, therefore, the provision in R. 16 constituting the Government a revisional Court is ultra vires. See Houses and Rents—Travancore-Cochin Buildings (Lease and Rent) Control Order (1950), R. 16. **AIR 1954 Trav-Co 465.**

SECTION 14

——S. 14 — Sections 4, 5, 6, 14 (part relating to S. 4) and 15 are parts of Act 5 of 1950 having reference to the subject of requisitioning of property and they would have no effect as a law for the purposes of Clause 2 of Article 31, the Act not having been reserved for the consideration of the President and not having received his assent. See Public Safety — Travancore-Cochin Public Safety Measures Act (5 of 1950), S. 4. **1954 Cri LJ 274: AIR 1954 Trav-Co. 145.**

SECTION 15

——Ss. 15 and 22 — Non-mention of Sections in Preamble to Rent Control Order — Effect — (Houses and Rents — Travancore-Cochin (Lease and Rent Control) Order (1950), Cls. 15 and 16)— (Interpretation of Statutes).

The intention to provide for an appeal and a revision is clear from the provisions made in the Rent Control Order in that behalf, and if the Government had the power to make provisions for these matters under Ss. 15 and 22 of the Publice Safety Measures Act, they must be presumed to have exercised that power notwithstanding that these sections are not expressly mentioned in the preamble to the Order. Whatever a preamble to a statutory order or notification might say, the presumption is that it is made in exercise of all the powers conferred by the statute in question. **1957 Ker LJ 380: 1957 Ker LT 411: AIR 1957 Ker 109 (111) (Pt E) (Pr 6).**

——S. 15 — Travancore-Cochin Buildings (Lease) and Rent Control) Order (1950), Cl. 15 — Appointment of District Magistrate as appellate authority is valid as is clear from Ss. 22 and 15 of the Travancore-Cochin Public Safety Measures Act 5 of 1950. **AIR 1955 NUC (Trav-Co) 1162 (DB).**

——S. 15 — Travancore-Cochin Buildings (Lease and Rent Control) Order (1950), Cl. 16 — Clause is intra vires as S. 15 of the Act confers on the Government the power to impose the conditions mentioned in the clause. **AIR 1955 NUC (Trav-Co) 1162 (DB).**

——S. 15 — Travancore-Cochin Buildings (Lease and Rent Control) Order (1950), R. 16 — Rule 16 is ultra vires — From the language of S. 15 empowering the Government to delegate its right to hear appeals 'under such conditions', it cannot be held that the delegation of power to hear appeals to the District Magistrate would imply the power of Government to revise the orders passed by the District Magistrate in appeal. Rule 16 passed under S. 13 of Act 5 of 1950 is, therefore, ultra vires. See Houses and Rents — Travancore-Cochin Buildings (Lease and Rent Control) Order (1950), R. 16. **AIR 1954 Trav-Co 465.**

——S. 15 — Part of the Act relating to requisitioning of property and they would have no effect as a law for the purposes of Clause 2, Art. 31, the Act not having been reserved for the consideration of the president and not having received his assent. See Public Safety — Travancore-Cochin Public Safety Measures Act (5 of 1950), S. 4. **AIR 1954 Trav-Co. 145.**

SECTION 21

——S. 21 — 'Order' — Includes 'notified order' such as the T. C. Buildings (Lease and Rent Control) Order, 1950. **AIR 1955 NUC (Trav-Co.) 1162 (DB).**

SECTION 22

——S. 22 — Object of — Obiter — Although the wording of Sec. 22 of the Act 5 of 1950 is wide enough to take in a power conferred on an officer by an order made under Sec. 13 the real purpose of Sec. 22 is to provide for an appeal from the decision of an officer in exercise of powers conferred by the Act itself as also from the decision of an officer in exercise of the powers delegated to him by the Government under S. 15, in other words, of powers conferred under the Act. See Public Safety — Travancore-Cochin Public Safety Measures Act (5 of 1950), S. 13. **AIR 1957 Ker 109.**

——S. 22 — Non-mention of Sections in Preamble to Rent Control Order — Effect — Presumption from the provisions of appeal and revision made in Rent Control order in that behalf and as the power to make provision is under Ss. 15 and 22 of the Act the presumption is that the powers were exercised under Ss. 15 and 22 though they were not mentioned in the preamble. See Public Safety — Travancore-Cochin Public Safety Measures Act (5 of 1950), S. 15. **AIR 1957 Ker 109.**

——S. 22 — T. C. Buildings (Lease and Rent Control) Order (1950), Cl. 15 — Appointment of District Magistrate as appellate authority is valid as is clear from S. 22 and S. 15 of the T. C. Public Safety Measures Act (5 of 1950). **AIR 1955 NUC (Trav-Co.) 1162 (DB).**

SECTION 23

——S. 23 — Validity — (Constitution of India (1950), Art. 19 (4)).

The Travancore-Cochin Safety Measures Act contains no privision for a judicial review of the declaration nor does it provide for a reference to any advisory board. Section 23 of the Act which is nothing but a reproduction of Sec. 16, Indian Criminal Law Amendment Act with words added to widen its scope and amplitude and contains restrictions which are not in any sense reasonable

within the meaning of Art. 19 (4) of the Constitution. Therefore the section and the notification issued under the same declaring the Cochin Communist Party unlawful are ultra vires the Constitution. AIR 1952 SC 196, Rel. on. 1953 Cr LJ 915: 1952 Ker LT 530: AIR 1953 Trav-Co 174 (174, 175) (Prs 2, 3) (DB).

SECTION 31

——S. 31 (5) — Not ultra vires Art. 19 (1) (a) of Constitution. See Constitution of India, Art. 19 (1) (a). 1964 (1) Cri LJ 400: AIR 1964 Ker 104 (DB).

——S. 31 — Validity — (Constitution of India (1950), Art. 19 (2)).

The restriction imposed by the section is of the nature permitted by Art. 19 (2) of the Constitution and is not ultra vires of the Constitution. 1953 Cr LJ 1786: 1953 Ker LT 482: AIR 1953 Trav-Co 540 (541) (Pt C) (Pr 5).

SECTION 71

——S. 71 — Procedure to be followed by police.

Observations by Court: "Since investigation under Chapter XIV of the Criminal P. C. is the normal procedure to be followed in the case of cognizable offences and when the new Ss. 173 (4) and 251-A are introduced in the Criminal P. C., it is desirable that the police would follow that normal procedure when dealing with offences made cognizable by Sec. 71 of the Public Safety Measures Act." 1960 Ker LT 217: 1960 Ker LJ 271: (1960) 1 Ker LR 357: (1960) Mad LJ (Cr) 313: ILR (1960) Ker 708: 1960 Cri LJ 1334: AIR 1960 Ker 315 (317) (Pt B) (Pr 6) (DB).

SECTION 73

——Ss. 73, 3 — Validity — Section is ultra vires for lack of sanction of President under Art. 304 (b), Proviso — Art. 304, controls Article 246 — Art. 304 (b), Proviso does not affect validity of repeal under Sec. 73 of the Act — Repeal under Sec. 73 is valid — As Sec. 3 of the Act is void notification issued under it are also invalid and cannot continue under Sec. 73 (2) — Suit contracts entered into February, 52 not affected by Notification under Essential Supplies (Temporary Powers) Act (1946) also. See Constitution of India, Art. 304 (b), Proviso. AIR 1964 Ker 92 (DB).

—TRAVANCORE-COCHIN PUBLIC SAFETY MEASURES ORDINANCE (5 OF 1125 M. E.)

SECTION 19

●——S. 19 — Order under for requisition of land — Quashing of — Constitution of India, Art. 226.

An order for requisition of land passed under Sec. 19 of the Ordinance being an executive order in the absolute discretion of the Government cannot be challenged on the ground that the opinion of the Government that the land is required for purposes specified in Sec. 19 was not based on proper grounds. Where the order specifically states that the requisition is made in furtherance of a housing scheme for the homeless and destitute there can be no objection to the opinion of the Government on the merits as there is no purpose so essential for the life of the community and as such it cannot be quashed by a writ of certiorari. LR 1942 AC 206, Rel. on; AIR 1949 Bom 277, Disting. Aiyam Perumal v. Chief Secretary to Government U.S.T.C., 1950 Ker LT 675 (FB).

—TRAVANCORE EMERGENCY POWERS ACT (1 OF 1122 M. E.)

SECTION 29

——Ss. 29 (1) and 34 — Order of detention under S. 29 (1) — Court's power to examine propriety of order — Extent of — Travancore Criminal P. C. Sec. 402 — Criminal P. C.(1898), S. 491.

Section 34 (1), Travancore Emergency Powers Act does not operate as a complete ouster of the High Court's jurisdiction to entertain an application under Sec. 402, Travancore Criminal P. C. in respect of a person purporting to have been detained under Sec. 29 of the Act. At the same time the Court's jurisdiction to examine propriety of an order passed under S. 29 of the Emergency Powers Act has been very much restricted and limited in its scope by Sec. 34 (1).

Under Sec. 34 (1), Emergency Powers Act, the Court is debarred from examining the validity of an order made or deemed to be made in exercise of the powers conferred by the Emergency Powers Act. But there is nothing in the clause to suggest that the Court has no jurisdiction even to consider the question whether an order purporting to have been passed under the Act has really been passed in strict conformity with the provisions of the Act. 1949 TCLR 156: 1950 Ker LT 544 (DB).

——S. 29 — Antecedent conduct of detenu if relevant.

The power given under Cl. (1) of Sec. 29 is to prevent the commission of acts prejudicial to public safety and that object would be defeated if the officer concerned is to wait until the actual commission of any such act. The language of Cl. (1) of Sec. 29 certainly warrants the entertainment of a reasonable suspicion on the strength of the antecedents of a person just prior to his arrest that on his release he would continue to act as before in a manner prejudicial to public safety. The expression "about to act" must necessarily refer to the possible contingency of acting within a reasonably short space of time. 1949 TCLR 156: 1950 Ker LT 544 (DB).

——S. 29 — Satisfaction of Government — Omission to mention in order if fatal.

Section 29 (1) of the Act does not require the arresting officer to be satisfied that the person sought to be arrested has acted or is acting, or is about to act in a manner prejudicial to the public safety. It is enough if the officer reasonably suspects the person of having acted, or of acting, or of being about to act in a manner prejudicial to the public safety.

Clause (2) of Sec. 29 does not insist that the detention order should be passed only after the Government have come to a final and independent conclusion that justifiable grounds as stated in the report of the arresting officer do really exist. Hence the non-mention of such satisfaction in the order of detention cannot be said to be a fatal defect.

Where the order passed by Government shows that Government's attention was directed to the

several grounds mentioned in the arresting officer's report and on which he came to the conclusion that the person concerned was acting in a manner prejudicial to the public safety and that his detention was necessary to prevent his subversive activities the detention order must be held to be in strict compliance with the requirements of the Act. **1949 TCLR 156: 1950 Ker LT 544 (DB).**

——S. 29 (2) — Order of detention under by Government — Minor defects or irregularities in procedure adopted at earlier stage cannot affect validity or legality of order passed by Government. AIR 1945 FC 18, Rel. on. **1949 Trav-Co LR 156: 1950 Ker LT 544 (DB).**

——S. 29 — Order under — Validity — Test to determine — Bona fides of Government — Burden of proof.

In determining the validity of an order of detention one of the tests to be considered is whether the detention order is lacking in bona fides or, in other words, whether it amounts to an abuse of the powers given to the executive by the Legislature. When a duly authenticated order of detention is produced, it carries with it a presumption that the order was properly and validly made. No doubt it is a rebuttable presumption and the burden is on the party challenging the order to make out that the order is unwarranted, defective or otherwise invalid. It will undoubtedly be a difficult job to attempt to prove that the detention order is lacking in good faith. The informations and materials on the basis of which the detention of the individual concerned was thought necessary, will have an important bearing in determining the question of the bona fides of the action taken. In most instances such informations and materials may be of a highly confidential nature and the disclosing of the same may be against public interest. The detaining authority cannot also be compelled to disclose such informations and materials. Hence the petitioner will have to rely mainly on the circumstances which he may be in a position to allege and prove by way of discharging this onus to make out that the detention order is lacking in bona fides and is an abuse of the power conferred on the detaining authority. **1949 Trav-Co LR 156: 1950 Ker LT 544 (DB).**

——S. 29 — Prejudicial act — Vulgar abuse of Government. Vulgar abuse against the Government need not necessarily always amount to sedition or to the commission of a prejudicial act. Many an objectionable word or phrase have come to lose their real meanings as one of them have long become the stock-in-trade of the damagogue: AIR 1942 FC 22, Rel. on. **1949 Trav-Co LR 23 (DB).**

SECTION 34

——Ss. 34, 29 (1) — Section 34 (1), Travancore Emergency Powers Act does not operate as a complete ouster of the High Court's jurisdiction to entertain an application under S. 402, Criminal P. C. in respect of a person purporting to have been detained under Sec. 29 of the Act. At the same time the Court's jurisdiction is to examine propriety of an order passed under Sec. 29 of the Emergency Powers Act has been very much restricted and limited in its scope by S. 34 (1). **1950 Ker LT 544 (DB).**

—U. P. GOONDAS ACT (1 OF 1932)

SECTION 5

——S. 5 (as modified and extended to the State of Delhi) — Section 5 and consequently the whole Act is ultra vires being in violation of the fundamental rights set out in Arts. 19 (1) (d) ond (e) and (5) and 22 (1) and (3) of Constitution of India). **54 Pun LR 312: ILR (1952) Punj 362: 1953 Cri LJ 421: AIR 1953 Punj 52 (54, 55) (Pt C) (Prs 5, 7, 9) (DB).**

SECTION 6

——S. 6 (1) — S. 6 (1) is not a law providing for preventive Detention — [Preventive detention and externment or banishment — Distinction]. See Constitution of India, Art. 22 (3). **AIR 1953 Punj 52 (DB).**

—U. P. MAINTENANCE OF PUBLIC ORDER (AMENDMENT AND PROCEEDINGS VALIDATION) ACT (11 OF 1940)

SECTION 8

——S. 8 — Section not only validates proceedings after 1st March 1948 under U. P. Maintenance of Public Order (Temporary) Act 1947 but also other orders and proceedings. See Public Safety — U. P Maintenance of Public Order (Temporary) Act (4 of 1947), S. 5, Proviso. **51 Cri LJ 432: AIR 1950 All 132.**

——S. 8 — Scope and object of — Section not only validates proceedings after 1st March 1948 but also other orders and proceedings.

The purpose of Sec. 8 is no doubt to validate all proceedings that may have taken place under the U. P. Maintenance of Public Order (Temporary) Act, 1947, after it had expired on 1st March 1948 and before the U. P. Maintenance of Public Order (Proceedings Validation) Ordinance, 1949 was promulgated. But a perusal of the whole of the Amendment Act shows that the purpose of S. 8 is also to validate other orders and proceedings as well. The section itself is very comprehensive and it is not possible to put any limitation upon its scope or interpretation. **51 Cri LJ 432: 1949 All LJ 518: 1950 All WR 20: 1950 All Cri Cas 2: AIR 1950 All 132 (134) (Pt B) (Pr 8).**

—U. P. MAINTENANCE OF PUBLIC ORDER (PROCEEDINGS VALIDATION) ORDINANCE (2 OF 1949)

PREAMBLE

——Pre. — The Ordinance 2 of 1949 is intra vires. **1951 All LJ 9.**

SECTION 3

——S. 3 — Effect of.

The effect of the provisions of S. 3 of the U. P Maintenance of Public Order (Proceedings Validation) Ordinance, 1949, is to keep alive the U. P. Maintenance of Public Order (Temporary) Act, 1947, after the 29th February, 1948. In view of S. 3, the Courts are precluded from holding that the Act had expired in February, 1948 and consequently from holding that the Ordinance tries to amend something which was non-existent and was already dead. **1951 All LJ 9.**

—U. P. MAINTENANCE OF PUBLIC ORDER (TEMPORARY) ACT (4 OF 1947)

PREAMBLE

——Pre. — U. P. Ordinance 2 of 1949 validated the continued enforcement of U. P. Act 4 of 1947 which originally expired on 29-2-1948. 52 Cri LJ 1282: ILR (1952) 1 All 8: AIR 1950 All 562 (565) (Pt A) (Pr 8) (DB).

SECTION 1

——S. 1 (4), Proviso — If ultra vires.

Per Malik, J. :— I am inclined to hold that the proviso to sub-sec. (4) of Sec. 1 of the U. P. Maintenance of Public Order Act was ultra vires, though I do not want to express any definite opinion as it does not appear to be necessary in this case.

Per Wanchoo, J. :— Proviso to sub-sec. (4) of Sec. 1 of the U. P. Maintenance of Public Order (Temporary) Act, 1947, is ultra vires the powers of the Provinicial Legislature. 1951 All LJ 9.

SECTION 3

——S. 3 — Contingent or prospective order is not contemplated by Sec. 3 — District Magistrate cannot direct that period of fifteen days of detention is to commence from date of arrest. AIR 1955 NUC (All) 2782.

——S. 3 — Duration of order — Order must terminate after 15 days of order — It cannot stay longer because person in respect of whose detention order has been made is not apprehended. AIR 1955 NUC (All) 2782.

——S. 3 — Order against person outside jurisdiction — Detention under Sec. 123-A (U. P.), Criminal P. C. — Criminal P. C. (1898), S. 123-A (U. P.)

An order under Sec. 3 (3) cannot be passed by a District Magistrate against a person who is not within his jurisdiction. When the order under Sec. 3 (3) is illegal having been passed against a person outside the jurisdiction, order under Section 123-A, Criminal P. C., ordering detention in jail for failure of furnishing the required security is also illegal. 1950 All LJ 350: 51 Cri LJ 1342: 1950 All WR 412: 1950 All Cri Cas 126: ILR (1952) 1 All 1: AIR 1950 All 500 (500) (Pr 3) (DB).

——S. 3 (1) — Detention or restriction for period longer than six months.

The Provincial Government after passing an order under Sec. 3 (1) (a) detaining a person for a period of six months can direct his release earlier and pass an order restraining or regulating his movements under one of the Cls. (c) to (f) of Sec. 3 (1) but this must be for the remaining part of the period of six months only and not beyond that. 1950 All WR 123: 1950 All LJ 176: 1950 All Cri Cas 65: 51 Cri LJ 1020: AIR 1950 All 370 (377) (Pr 3) (DB).

——S. 3 (7) — Failure to furnish security ordered — Applicability of S. 3 (7) — Criminal P. C. (1898) (as amended by U. P. Act 46 of 1948), S. 123-A.

Sub-sec. (7) to S. 3 provides for penalty in case the orders passed under the various clauses of S. 3, Sub-sec. (1), are contravened. Failure to furnish security cannot be said to be a contravention of the order demanding it. It is simply a non-compliance of the order. To such a case, S. 123-A, Criminal P. C. (U. P. Amendment) would apply. 1950 All LJ 126: 1950 All WR 127: 1950 All Cri Cas 67: 51 Cri LJ 605: ILR (1951) 1 All 626: AIR 1950 All 307 (307) (Pr 2) (DB).

——S. 3 — Order under, issued under instructions of Police Minister and authenticated by Home Secretary — Order stating that 'Governor' was 'satisfied' — Order is perfectly valid — Validity of order cannot be challenged on ground that it was not made by Governor — Whether authority concerned was satisfied or not may however be enquired into.

An order of detention under Sec. 3 of the Act issued under instructions from the Hon'ble Police Minister, and authenticated by the Home secretary to the U. P. Government who was empowered to authenticate under Rules framed under Sec. 59 (3), Government of India Act, stating that the Governor was satisfied of the necessity of the action contemplated by Sec. 3 is perfectly valid and in view of Sec. 59 (2), Government of India Act, it is not permissible to call into question the validity of the order on the ground that it was not made by the Governor. So also it is not permissible to enquire into the question whether it was the person holding the office of Governor that was satisfied or not though an enquiry may be made to determine whether the authority concerned was 'satisfied' or not: AIR 1945 PC 156 and AIR 1949 Pat 1 (FB), Rel. on. 1949 All LJ 501: 51 Cri LJ 337: AIR 1950 All 69 (71, 72) (Pt A) (Prs 10, 11, 14).

——S. 3 — Detention under — Court will interfere only when there is absence of honest satisfaction.

Where an order of detention of is passed under Section 3 of the Act, it is only if the material at the disposal of the Government is such that no reasonable person could be satisfied that the detenu would act in a manner prejudicial to public safety, public order or communal harmony that the Court will interfere and will hold the detention to be illegal: AIR 1949 All 148 (FB) and Cr. Misc. Appln. No. 47 of 1948 (Mad), Foll. 1949 All LJ 501: 51 Cri LJ 337: AIR 1950 All 69 (74) (Pt C) (Pr 25).

——S. 3 — Detention under — Actions of detenu though affecting only private property in past may indicate that he will act in a manner prejudicial to public safety in future — Satisfaction of Government — Court will not enter into question whether actions of detenu will have a prejudicial effect on public safety.

Section 3 does not authorise the detention of any person who has acted in a manner prejudicial to public safety etc., but only of a person who is to be prevented from acting in a prejudicial manner. The enactment is not penal but preventive and the past conduct of a person is only to be considered in so far as it provides a clue to what is expected of him in the future. If the authority to be satisfied is convinced that the actions of the detenu, though they relate to private property in the past, give an indication that he will so conduct himself in the future as to cause prejudice to public safety or public order, it is not for the

Court to sit in judgment over this. The satisfcation may depend upon materials available to the detaining authority which may not be legal evi dence at all. Thus it might well be that the Gov ernment has in its archives materials for showing what the repercussions of actions such as those complained of will be upon the economic stability of the State and might form its opinion upon material, upon which Courts of law are not expected to act: AIR 1949 All 148 (FB) and (1942) 1 All ER 373, Rel. on; AIR 1942 Mad 735, Disting. **1949 All LJ 501: 51 Cri LJ 337: AIR 1950 All 69 (74) (Pt D) (Prs 26, 27).**

——S. 3 (1) and (7) — Failure of Government to take action under Sec. 3 (7) does not preclude it from taking action under Sec. 3 (1).

The mere fact that action could be taken under Sec. 3 (7) of the Act against the detenu for a substantive offence committed by him but has not been taken—either because the evidence is of such a nature as to exclude its consideration by a Court of law or for any other reason does not take away the power of taking action under S. 3 (1) of the Act. **1949 All LJ 501: 51 Cri LJ 337: AIR 1950 All 69 (76) (Pt F) (Pr 33).**

SECTION 4

——S. 4, Proviso (as amended by U. P. Act 11 of 1949) — Proviso as amended applies to all orders passed under Sec. 3 (1) and not merely to orders under Sec. 3 (1) (a) — Sec. 4 as amended has enlarged the powers of Provincial Government which it could exercise previously. 52 Cri LJ 1282: ILR (1952) 1 All 8: AIR 1950 All 562 (565) (Pt B) (Pr 12) (DB).

——S. 4 (as amended by U. P. Act 11 of 1949) — Scope.

The words "an order under Sec. 3" in Sec. 4 mean in effect all the orders which are passed against a person imposing restrictions on him, and all such orders would be valid for a period of six months of the date of service of the first order under that section. In view of the proviso to Sec. 4, this period can be enlarged upto another 12 months. **52 Cri LJ 1282: ILR (1952) 1 All 8: AIR 1950 All 562 (566) (Pt C) (Pr 13) (DB).**

——Ss. 4, 11 — Delegation of powers by Provincial Government under Sec. 11 to District Magistrate—Fresh delegation not necessary after amendment of Sec. 4 by U. P. Act 11 of 1949. See U. P. Maintenance of Public Order (Temporary) Act (1947), S. 11. **52 Cri LJ 1282: AIR 1950 All 562 (DB).**

——S. 4, Second Proviso — First order of detention revoked — Subsequent order of detention — Proviso does not apply — Order cannot be held illegal merely because total period of detention exceeds 6 months.

The second proviso to Sec. 4 does not take away the effect of the first proviso which enables the Government to issue a fresh order after revoking a previous order. In such a case the Government must serve a fresh notice under Sec. 5 and must furnish fresh materials for detention in order not to render illusory the detenu's right of making a representation. Further, the time limit imposed is only on an extension and does not relate to a fresh order passed after a revocation of a previous order. If the order challenged is merely an extension of the previous order, then of course the proviso will forbid the detention of the petitioner beyond the period of six months. If, however, the order is a fresh order altogether then the proviso cannot apply. **1949 All LJ 501: 51 Cri LJ 337: AIR 1950 All 69 (76) (Pt G) (Pr 36).**

SECTION 5

——S. 5, Proviso (as amended by U. P. Act 11 of 1949) — Court cannot hold detention illegal on ground of any defect, vagueness or insufficiency of communication made to detenu under Sec. 5 — U. P. Maintenance of Public Order (Amendment and Proceedings Validation) Act (11 of 1949), S. 8.

By virtue of the provisions of Sec. 8 of Amending Act of 1949, the grounds of detention supplied to the detenu under Sec. 5 of the principal Act will be deemed to be 'as good and valid in law as if such action had been duly taken under the Act as amended by the Amending Act' and under the proviso to Sec. 5 of the principal Act as amended it will not be open to the High Court to hold that the detention is 'invalid or unlawful or improper' on the ground of any defect, vagueness or insufficiency of the communication made under Sec. 5 of the principal Act. **51 Cri LJ 432: 1949 All LJ 518: 1950 All WR 20: 1950 All Cri Cas 2: AIR 1950 All 132 (134) (Pt A) (Prs 6, 7).**

——S. 5 — Grounds of detention communicated to detenu need not contain all materials available — If they contain sufficient particulars to enable detenu to make representation that is sufficient.

The fact that the date, time and place of all the particulars are not given would not make the order defective provided that sufficient particulars were given in order to enable the petitioner to make an adequate representation against his detention. Even if one or two grounds are vague, that would not affect the validity of the order if some of the grounds are clear, definite and precise. There is nothing in law which compels the Government to give all the materials available if the grounds are such as to enable the detenu to make his representation. Even a charge-sheet in a criminal case does not narrate all the materials on the record of the Court: AIR 1949 All 148 and AIR 1949 All 406, Rel. on; AIR 1949 All 37, Ref. **1949 All LJ 501: 51 Cri LJ 337: AIR 1950 All 69 (75) (Pt E) (Pr 31).**

SECTION 11

——Ss. 11 and 4 — Delegation of powers by Provincial Government under Sec. 11 to District Magistrate — Fresh delegation not necessary after amendment of Sec. 4 by U. P. Act 11 of 1949.

The Provincial Government by an order dated 13th April 1948 passed under Sec. 11 delegated its powers exercisable under the Act to all District Magistrate within their respective jurisdictions. Subsequently the powers of the Provincial Government were enlarged by amendment of Sec. 4 by U. P. Act 11 of 1949. Subsequent to the amendment the District Magistrate passed an order under Sec. 3 (1) (d) and (f):

Held, that the order of delegation dated 13th April 1948 would continue in force in spite of the amendments made in the Act and no fresh notifica-

tion or delegation of powers by the Provincial Government was necessary. A change of order and a fresh notification should be necessary only when the delegating authority does not want to delegate to the other person the additional powers it gets under the amended provision. If it does not want to curtail the power delegated, it should not be incumbent on the authority to pass a second order delegating its powers: AIR 1944 Bom 259, Disting. **52 Cri LJ 1282: ILR (1952) 1 All 8: AIR 1950 All 562 (567, 568) (Pt D) (Prs 17, 18) (DB).**

—U. P. PREVENTION OF CRIMES (SPECIAL POWERS) (TEMPORARY) ACT (1948) (5 OF 1949)

PREAMBLE

——Pre. — Act is not ultra vires of Legislature — Government of India Act (1935), Sch. 7, List II, Item 1, List III, Part I, Item 2.

The whole of the U. P. Prevention of Crimes (Special Powers) (Temporary) Act (5 of 1949) is intra vires of the Provincial Legislature (as regards subject-matter).

The Act was passed when the Government of India Act, 1935 was in force. The matters dealt with by it do not fall under any item of Federal Legislative List (1); on the other hand, they fall under item 1 of the Provincial Legislative List II and under Item 2 of the Concurrent Legislative List III, Part 1, or either of them.

Taking measures to check the activities of bad characters comes under "public order", (Item 1 in Provincial List) which is a most comprehensive term. An order of imprisonment for failure to give security does not cease to be an order of detention merely because an option is given to the person to escape it by offering security. As the detention is for preventive and not punitive purposes, it is preventive detention.

The pith and substance of the Act is prevention of offences, a matter expressly included in the Code of Criminal Procedure on 2nd August 1935; its enactment is therefore justified under Item 2 of List III. Taking security from a likely offender is not the only way of preventing the commission of an offence by him; detaining him in a prison, expelling him and ordering him to make reports about his movements are other ways. It does not matter if expulsion and the ordering to make reports of movements are not dealt with in the Code; they are intimately connected with the prevention of offences, a matter included in the Code. Similarly the provision regarding the keepers of gambling dens and habitual manufacturers and smugglers of illicit liquor would be covered by Item 2 of List III.

Even if it be conceded that provision in Sec. 3 (2) of the Act is not covered by Item 2 of List III, the only effect of it would be that sub-sec. (2) of Sec. 3 which is severable from sub-sec. (1) would be ultra vires. The validity of sub-sec. (1) and of an order passed under it would not be affected. **52 Cri LJ 1251: ILR (1951) 2 All 745: AIR 1951 All 718 (724 to 726) (Pt A) (Prs 14, 15, 17) (DB).**

SECTION 3

——S. 3 (1) (a) (i), (b) and (c) and S. 3 (2) — Provisions if contravene Article 14 of the Constitution — Constitution of India, Art. 14.

It was open to the Legislature of Uttar Pradesh to make a special law regarding habitual criminals or offenders. Making one law for habitual criminals and another law for other criminals would not, by itself, contravene Art. 14. But the law regarding habitual criminals must apply to all habitual criminals alike and should not discriminate between some and others. The impugned Act, however, discriminates between habitual criminals who have acquired a bad reputation and others who have not and the difference in the treatments meted out to them has no intelligible connection with the acquisition or non-acquisition, of a reputation as bad character. Even within the class of habitual criminals who have acquired a bad reputation, the Act makes an unconstitutional discrimination between some and others. The discrimination lies in the fact that some are left to be prosecuted under Sec. 110 of the Criminal P. C. while others are prosecuted under the Act. The Act has laid down no standard to guide the Magistrate's choice of one of the two procedures and no standard can even be imagined by the Court. The discretion (if it at all is a discretion) that is conferred upon the Magistrate is naked and arbitrary; there is absolutely nothing to guide him. It is Sec. 3 (1) (a) (i), (b) and (c) which makes this irrational and arbitrary discrimination and it must be held to be a piece of legislative despotism. Sec. 3 (1) (a) (i), (b) and (c) is unconstitutional. The provision in Sec. 3 (1) (a) (iii) is, on the other hand, not unconstitutional; it applies equally to all keepers of gambling dens who are by repute bad characters. They are all liable to be proceeded against under the Act and under no other provision. When S. 3 (1) (a) (i), (b) and (c) is found to be unconstitutional, S. 3 (2) also must be held to be unconstitutional along with it. An order under Sec. 3 (2) is to be passed in addition to the order under Sec. 3 (1); if no order under sub-section (1) is passed, no order under sub-section (2) can be passed. The order under sub-section (2) is in addition to that under sub-section (1) and not in addition to it or in lieu of it according to the discretion of the Judge.

Hence orders passed after the coming into force of the Constitution would be void. **52 Cri LJ 1251: ILR (1951) 2 All 745: AIR 1951 All 718 (731, 732) (Pt C) (Prs 28, 29) (DB).**

——S. 3 (2) — Provision if imposes unreasonable restriction — Constitution of India, Art. 19.

The restrictions imposed under the Act on free movement and the right to reside and settle anywhere in India are not unreasonable. There is nothing unreasonable either in the procedural law or in the substantive law. Externment in the interests of the State and public order is resorted to by all Governments. The order of expulsion may be irrevocable but the period of expulsion is limited to one year, Vide S. 15. Hence the Act is not obnoxious to Art. 19 of the Constitution. Even if it is obnoxious, only that part of Section 3 (2) that is obnoxious would be invalid because it is admittedly severable from the rest of the Act.

(Meaning and test of reasonable restriction considered). **52 Cri LJ 1251: ILR (1951) 2 All 745: AIR 1951 All 718 (733) (Pt I) (Pr 33) (DB).**

——S. 3 (1) — Notice fixing period longer than two years instead of two — Effect.

The provision that the notice should mention the period is directory and not mandatory. The notice would not become invalid because it fixes a period longer than two years. Even though a longer period is mentioned the Judge is not bound by it and it is open to him to bind down the applicants for any period less than that given in the notice. It would not be sufficient for the applicants simply to say in reply to the notice that they can not legally be bound down for a longer period. If they do not show cause why they should not be bound down at all, they would render themselves liable to be bound down for a period that would be legal. **52 Cri 1251: ILR (1951) 2 All 745: AIR 1951 All 718 (735) (Pt K) (Pr 37) (DB).**

——**Ss. 3 (1) and 14, Proviso** — Order passed by the Judge for a period longer than that mentioned in the notice issued by Magistrate — Order is illegal and should be set aside. **52 Cri LJ 1251: ILR (1951) 2 All 745: AIR 1951 All 718 (735) (Pt L) (Pr 39) (DB).**

——**Ss. 3 (1), 5 (1)** — Column of particulars in the notice left blank — Defect is fatal as applicant would not be in a position to make representation to the Magistrate — Proceedings before the Magistrate and Judge held null and void. **52 Cri LJ 1251: ILR (1951) 2 All 745: AIR 1951 All 718 (735, 736) (Pt M) (Pr 41) (DB).**

SECTION 4

——**S. 4** — Warrant to the police directing them to take security from the applicants and to take them in custody only on their default — Police taking them into custody first and then releasing them on security, thinking that it was warrant for arrest and that the security to be taken from the applicants was for their appearance before the Magistrate and not for being of good behaviour and keeping the peace — Arrest could not be said to be under the Act which was held to be one for preventive detention — Hence Art. 22 (3) did not apply to rob them of the right of defence by a legal practitioner. See Constitution of India, Art. 22 (1). **52 Cri LJ 1251: AIR 1951 All 718 (DB).**

——**S. 4** — Omission by the Magistrate to record reasons for his satisfaction that immediate action is necessary is only an irregularity not vitiating the proceedings and the orders. **52 Cri LJ 1251: ILR (1951) 2 All 745: AIR 1951 All 718 (735) (Pt N) (Pr 40) (DB).**

SECTION 5

——**Ss. 5 (1), 3 (1)** — Column of particulars in the notice left blank — Defect is fatal as applicant would not be in a position to make representation to the Magistrate — Proceedings before the Magistrate and Judge held null and void. See Public Safety — U. P. Prevention of Crimes (Special Powers) (Temporary) Act (1949), S. 3 (1). **52 Cri LJ 1251: AIR 1951 All 718 (DB).**

SECTION 12-A

——**S. 12-A — Judge under the Act if inferior criminal Court and his orders if revisable — Criminal P. C. (1898), Ss. 435 and 439.**

Per Desai J.; Dayal J. Contra:— Judge under the Act is an inferior criminal Court and his orders are, therefore, liable to be revised by the High Court in the exercise of revisional powers under Ss. 435 and 439, Criminal P. C. AIR 1943 Pat 18 (FB), Commented. **52 Cri LJ 1251: ILR (1951) 2 All 745: AIR 1951 All 718 (734, 741) (Pt J) (Prs 36, 45) (DB).**

SECTION 14

——**Ss. 14, Proviso, 3 (1)** — Order passed by the Judge for a period longer than that mentioned in the notice issued by Magistrate—Order is illegal and should be set aside. See Public Safety — U. P. Prevention of Crimes (Special Powers) (Temporary) Act (1949), S. 3 (1). **52 Cri LJ 1251: AIR 1951 All 718 (DB).**

—VINDHYA PRADESH CRIMINAL LAW AMENDMENT (SPECIAL COURTS) ORDINANCE (5 OF 1949)

SECTION 5

●——**S. 5 (2) — Right of appeal from decision of Special Judge — (Criminal P. C. (1898), Ss. 410, 417).**

Sub-section (2) of Sec. 5 of the Vindhya Pradesh Ordinance is an express provision conferring a right of appeal to the aggrieved party, whether an accused or the State, against the judgment of the Special Judge. The only limitation in Sec. 5 (a) on the application of the provisions of the Criminal Procedure Code to the proceedings of the special Court is the one arising from the existence of any inconsistent provisions in the Ordinance and not with reference to the conduct of the proceedings before that very Court. Once the special Court is to be deemed a Court of Session the normal right of appeal provided by Sec. 410 or Sec. 417, Criminal P. C., as the case may be, must be taken to have been expressly provided by reference and not as arising by mere implication. Shiv Bahadur Singh v. State of V. P., **1953 SCR 1188: 1953 SCJ 563: 1953 Cri LJ 1480: AIR 1953 SC 394 (396, 397) (Pt A) (Pr 4).**

—WEST BENGAL CRIMINAL LAW AMENDMENT ACT (6 OF 1930)

See also Public Safety — Bengal Criminal Law Amendment Act (6 of 1930).

PREAMBLE

●——**Preamble** — West Bengal Criminal Law Amendment Act (6 of 1930) and West Bengal Security Ordinance (1949) are inconsistent with the provisions of Constitution and hence became void from the midnight of 25th January 1950 when the Constitution came into force — They cannot be continued by the President by the Adaptation of Laws Order — Courts cannot give effect to the Adaptation of Laws Order (1950). See Adaptation of Laws Order (1950), R. 28. **51 Cri LJ 1110: AIR 1950 Cal 274 (SB).**

—WEST BENGAL CRIMINAL LAW AMENDMENT (SPECIAL COURTS) ACT (21 OF 1949)

SECTION 2

——**Ss. 2 and 9 (1) (as amended by Act 12 of 1952) — Appointment of Additional District and Sessions Judge by name as Special Court — Quali-**

fication under Sec. 2 (2) (b) wanting — As the officer was appointed by name and as he was otherwise qualified to be appointed as a special Judge and he became qualified under S. 2 (2) (b) also afterwards, he was under the circumstances held competent to try the case —Competency to try case. **1958 Cr LJ 1178: AIR 1958 Cal 517 (519) (Pt A) (Pr 3) (DB).**

——Ss. 2 (2) and (3) and 4 (2) (as amended by Act 12 of 1952) — Effect of amendment — Cases triable by special Courts only — Power of State Government to distribute cases includes power to cancel distribution — No question of transfer arises — (Bengal General Clauses Act (I of 1899), S. 22). **1957 Cr LJ 54: AIR 1957 Cal 25 (32, 33) (Pt C) (Prs 34, 36, 39, 40).**

——S. 2 — Applicability — Criminal breach of trust by company appointed as carrier for whole year by Government Department—Nature of offence —S. 409 and not S. 407, Penal Code applies—Special Court set up under S. 2 of W.B.C. Law Amendment Act has sole jurisdiction to try — Penal Code, Ss. 407 and 409 — Applicability. See Penal Code (1860). S. 407. **1957 Cr LJ 124 (Cal).**

SECTION 4

●——S. 4 (2) (as amended by W. B. Act 12 of 1952) — Scope and object — Trial in respect of certain offence pending before Magistrate on 9th April, 1952 — Trial has to continue and no fresh allotment in respect of same offence can be made to Special Judge under Sec. 4 (2). See West Bengal Criminal Law Amendment (Special Courts) Act (21 of 1949), S. 12. **1966 Cri LJ 805: 1963 Mad LJ (Cri) 613: (1963) Supp (2) SCR 542: (1963) 2 SCJ 680: AIR 1966 SC 1061.**

●——Ss. 4 and 12 — Jurisdiction of Special Court — Cognizance of offence duly taken by Chief Presidency Magistrate on a charge-sheet filed by police — Subsequent allotment of case to Special Court by Notification under Sec. 4 — Order of allotment quashed by High Court on 4th December, 1952 — Effect of—Magistrate issuing process against accused — Order set aside by High Court — Fresh allotment of same case to Special Court — Jurisdiction of Special Court to try.

A charge-sheet was filed by the police before the Chief Presidency Magistrate who had jurisdiction to entertain the complaint and proceed with the enquiry and trial. He took cognizance of the offence and thus became seized of the proceedings. It was at that stage that the Government issued the notification under Sec. 4 of the West Bengal Criminal Law Amendment (Special Courts) Act, 1949 allotting the case to the Special Judge at Alipore and directed a trial by him. In pursuance of this Notification the Chief Presidency Magistrate by his order, dated 16th February, 1951 sent the records of this case to the Special Judge. But before any proceedings could be commenced S. 4 (1) of the Act and the order of allotment thereunder to the Special Judge was struck down as unconstitutional by the High Court on 4th April, 1952. After the promulgation of West Bengal Ordinance VIII of 1952 on 9th April, 1952 a charge-sheet was refiled before the Special Judge but the allotment was set aside by the High Court on 24th March, 1953 on the ground that on its strength the proceeding could not be continued after the lapse of the Ordinance thus leaving the position as before the allotment. Thereafter the Government again allotted the case to the Special Judge and a fresh charge-sheet was submitted to the Court on 18th June, 1953. The legality of this allotment was upheld by the High Court by its order, dated 12th January, 1956 and a special leave petition against that order was also dismissed by the Supreme Court. When the matter went back before the Special Judge an objection to his jurisdiction based on Sec. 12 of Act was made and the Judge upheld it and directed the discharge of the accused by its order, dated 22nd February, 1956. This order was not challenged by the State in revision and thus it became final superseding the High Court's order, dated 12th January, 1956. Therefore, the proceedings against the accused before the Chief Presidency Magistrate were revived by the issue of a process to the accused. The accused again filed a revision before the High Court objecting to the jurisdiction of the Magistrate and the High Court quashed the proceedings before the Magistrate by its order, dated 19th December, 1956. On a fresh allotment to the Special Judge being made under Sec. 4, the accused objected to the jurisdiction of the Special Judge. The objection being overruled the matter was again taken to the High Court by a revision petition. The revision was accepted and the proceedings before the Special Judge were quashed. On appeal to the Supreme Court:

Held, (1) that when the order under Sec. 4 of the Act was quashed by the High Court on 4th April, 1952 its effect in law was to restore the position as it was before the allotment, namely, the revival of the jurisdiction of the Chief Presidency Magistrate over the case of which he had in compliance with law taken cognizance. Therefore, on the terms of S. 12, the proceeding against the respondent was pending in the Court of the Chief Presidency Magistrate on 9th April, 1952 the date of the commencement of the Ordinance, (2) that though the effect of the order of the High Court, dated 4th April, 1952, was to leave the proceedings against the accused pending before the Chief Presidency Magistrate, so as to attract the ban enacted by S. 12 of the Act, still by the decision of the High Court, dated 19th December, 1956 which is binding as between the parties, the special Court had been held to have jurisdiction over the case, Sec. 12 being held not to be in the way. There was thus no escape from the position that effect had to be given to this state of affairs and that the accused could derive no advantage by canvassing the correct result of the order of the High Court, dated 4th April, 1952 unhampered by the subsequent decisions which were binding on him. Therefore, the Special Court must be deemed to have jurisdiction over the case and that the High Court was in error in reversing the order of the Special Judge. State of West Bengal v. Hemant Kumar, **(1963) 2 SCJ 680: 1963 Mad LJ (Cri) 613: (1963) Supp 2 SCR 542: 1966 Cri LJ 805: AIR 1966 SC 1061 (1066, 1067) (Pt B) (Prs 17, 20).**

●——S. 4 (2) and Schedule — Offence under S. 420, I. P. C. by public servant — When committed while purporting to act as such — Presentation and encashment of false bill as clerk of certain office — Offence covered by Schedule.

Presentation of a false bill for encashment may not be in the discharge of official duty of a public servant, but the question under the Schedule to the W. B. Act is different and is as to whether the presentation of a false bill was made by the public servant purporting to do so in the discharge of his duties. Thus where the accused presents a false bill purporting to present it in the discharge of his duties as a clerk of the Office of the Sub-Divisional Health Officer who was duly authorised to present bills and cash them, and the bank pays him the cash as a messenger of that office duly authorised to receive payment in cash, it follows that the offence under Sec. 420, I. P. C. committed by the accused would be committed by him as a public servant purporting to act as such within the meaning of the expression in the schedule. Sunil Kumar Paul v. State of W. B., **1964 Mad WN 581: (1965) 1 SCJ 414: 1965 Mad LJ (Cri) 217: (1964) 7 SCR 70: 1964 All LR (Cri) 107: 1964 SCD 701: 1965 (1) Cri LJ 630: AIR 1965 SC 706 (109) (Pt A) (Prs 11, 13).**

●——**S. 4 (1) proviso — Criminal P. C. (1898), Ss. 236, 237, 537 — Public servant charged under Sec. 409, I. P. C. — Facts in charge sheet also supporting charge under Sec. 420, I. P. C. — Special Judge or appellate Court can convict accused under Sec. 420, I. P. C. instead of Sec. 409, I. P. C. — Scope of Ss. 236, 237, Criminal P. C. — Accused not prejudiced by not framing charge under Sec. 420, I. P. C. — Conviction not invalid.**

The framing of a charge under Sec. 236, Criminal P. C. is, in the nature of things, earlier than the stage when it can be said what facts have been proved, a stage which is reached when the Court delivers its judgment. The power of the Court to frame various charges contemplated by Sec. 236 therefore arises when it cannot be said with any definiteness, either by the prosecutor or by the Court, that such and such facts would be proved. The Court had at the time of framing the charges, therfore to consider what different offences could be made out on the basis of the allegations made by the prosecution in the complaint or in the charge submitted by the investigating agency or by the allegations made by the various prosecution witnesses examined prior to the framing of the charge. All such possible offences could be charged in view of the provisions of Sec. 236, Criminal P. C.

Where a public servant was charged and tried by the special Court for an offence under S. 409, I. P. C. but a charge under Sec. 420, I. P. C. could have been framed by the Special Court under Sec. 236, Criminal P. C. on the basis of the allegations in the charge-sheet, the trial Court or the appellate Court can, in law convict the accused of that offence instead of an offence under S. 409, I. P. C. if it be of the view that the offence of cheating had been established. This would be in accordance with the provisions of Sec. 237, Criminal P. C. AIR 1925 PC 130 and AIR 1958 SC 56 and AIR 1961 SC 1241, Rel. on; AIR 1955 SC 274, Distinguished. Further held, on facts, that accused could not be said to be prejudiced in his conviction under Sec. 420, I. P. C. on account of the non-framing of the charge, and consequent non-trial, under Sec. 420, I. P. C. In fact, in the circumstances of the case, question of irregularity in the trial did not arise. The framing of the charge under Sec. 420, I. P. C. was not essential and Section 237, Criminal P. C. itself validates his conviction of the offence under Sec. 420 if that be proved on the findings on the record. Sunil Kumar Paul v. State of W. B., **1964 All LR (Cri) 107: 1964 Mad WN 581: (1965) 1 SCJ 414: 1965 Mad LJ (Cri) 217: (1964) 7 SCR 70: 1964 SCD 701: 1965 (1) Cri LJ 630: AIR 1965 SC 706 (709, 710, 711, 712) (Pt B) (Prs 15, 16, 20, 27).**

●——**S. 4 (1) proviso — Powers of Special Court — Accused charged with one offence — Proviso does not prohibit trial and conviction of accused for different offences if permitted by Criminal P. C. and other provisions of the Act — Criminal P. C. (1898), Ss. 236, 237.**

The contention that under the proviso to S. 4 of the Act, the Special Court can try any other offence only when the accused is specifically charged with that offence is not correct. The language of the proviso does not lead to such a conclusion. It provides for the trial of the accused for any other offence provided the accused could be charged with that offence at the same trial under the provisions of the Criminal P. C. The proviso does not say that the charge must be framed, though of course, if the trial Court itself tries the accused for a certain offence, it will ordinarily frame a charge. The proviso has nothing to do with the power of the Trial Court or of the appellate Court to record a conviction for any other offence when an accused is being tried with respect to an offence mentioned in Schedule. That power depends on other provisions of the Criminal P. C. and of the Act. Sunil Kumar Paul v. State of W. B., **1964 Mad WN 581: (1965) 1 SCJ 414: 1965 Mad LJ (Cri) 217: (1964) 7 SCR 70: 1964 All LR (Cri) 107: 1964 SCD 701: 1965 (1) Cri LJ 630: AIR 1965 SC 706 (711) (Pt C) (Pr 21).**

●——**S. 4 and Schedule (as amended by W. B. Act 12 of 1952 and W. B. Act 15 of 1953) — Scope of — Case under S. 161/116, Penal Code, distributed to Special Judge — Charge and conviction under Sec. 165-A — Legality — Special Judge whether Court of competent jurisdiction — S. 529, Criminal P. C. — If can cure defect. — (Criminal Law, Amendment Act (1952), S. 3 — Criminal P. C. (1898), S. 529 (e)) — (Penal Code (1860), Ss. 161, 116 and 165-A).**

Held, (1) that Sec. 165-A is not merely a restatement of the offence of abetment under Sec. 116 of the Penal Code and therefore it could not be said that merely because the abetment of an offence under Sec. 161 was specified in the Schedule of the West Bengal Act of 1949, Sec. 165-A which did not then exist in the Penal Code, must be deemed to have been specified therein. (2) That Sec. 529 applies to Magistrates and would not apply to a Special Judge whose jurisdiction arises not on his taking cognizance under Sec. 190 of the Code of Criminal Procedure but on the case for an offence specified in the Schedule being distributed to him by the State Government by notification. The defect of jurisdiction therefore could not be cured by Sec. 529 (e) of the Code of Criminal Procedure. AIR 1956 Cal 385, **Reversed.** Bhajahari Mondal v. State of W. B., **1959 All Cri R 192: 1959 Cr LJ 98: 1959 All WR 192: 1959 SCJ 191: 1959 Mad LJ (Cr) 59: 1959 All WR (Sup) 47: 1959 SCR 1276: AIR 1959 SC 8 (12) (Pr 12).**

●——Ss. 4 and 9 (1) — S. 4 does not violate Art. 14 of the Constitution and is constitutional— Sentence under S. 9 (1) being in violation of Art. 20 of the Constitution set aside — Constitution of India, Arts. 14 and 20. AIR 1952 Cal 644 (FB), Overruled.

The equal protection of the laws guaranteed by Art. 14 of the Constitution does not mean that all laws must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons or things for the purposes of legislation. To put it simply, all that is required in class or special legislation is that the legislative classification must not be arbitrary but should be based on an intelligible principle having a reasonable relation to the object which the Legislature seeks to attain. If the classification on which the legislation is founded fulfils this requirement, then the differentiation which the legislation makes between, the class of persons or things to which it applies and other persons or things left outside the purview of the legislation cannot be regarded as a denial of the equal protection of the law, for, if the legislation were all-embracing in its scope, no question could arise of classification being based on intelligible differentia having a reasonable relation to the legislative purpose.

Article 14 does not insist that legislative classification should be scientifically perfect or logically complete.

There are cases where the Legislature itself makes a complete classification of persons or things and applies to them the law which it enacts, and others where the Legislature merely lays down the law to be applied to persons or things answering to a given description or exhibiting certain common characteristics, but being unable to make a precise and complete classification, leaves it to an administrative authority to make a selective application of the law to persons or things within the defined group, while laying down the standards or at least indicating in clear terms the underlying policy and purpose, in accordance with, and in fulfilment of, which the administrative authority is expected to select the persons or things to be brought under the operation of the law.

Whether an enactment providing for special procedure for the trial of certain offences is or is not discriminatory, and violative of Art. 14, must be determined in each case as it arises, for, no general rule applicable to all cases can safely be laid down.

In order to see whether S. 4 of the West Bengal Criminal Law Amendment (Special Courts) Act, 1949 violates Art. 14, the real issue to be considered is whether having regard to the underlying purpose and policy of the Act as disclosed by its title, preamble and provisions, the classification of the offences, for the trial of which the Special Court is set up and a special procedure is laid down, can be said to be unreasonable or arbitrary and, therefore, violative of the equal protection clause.

(Held, after considering the background of the legislation and its preamble, purpose and the provisions that the system of Special Courts to deal with the special types of offences under a shortened and simplified procedure was devised, to meet the situation and that the legislation in question was based on a perfectly intelligible principle of classification having a clear and reasonable relation to the object sought to be attained.)

Section 4 of the Act, therefore, is constitutionally valid and the Special Court had jurisdiction to try and convict the accused. AIR 1952 SC 75, Discussed and Distinguished. AIR 1952 SC 123; 1952 SCR 435, Discussed and Applied.

Sentence of compensatory fine under S. 9 (1) was set aside being in violation of Art. 20 of the Constitution.

Per Bose, J.: (Dissentient).

In so far as the Act makes provision for the setting up of Special Courts and of Special Judges, and in so far as it selects classes of offences which can be tried by them, it is good. Where, it is bad is, in Sec. 4 (1), where it empowers the Provincial Government to pick out cases from among the specified classes and to send them to Special Courts and thus discriminate between man and man in the same class.

On the question of punishment also there is discrimination but that is severable and would in any event be covered by Article 20. Kedar Nath Bajoria v. State of West Bengal, (1954) SCR 30: 1953 SCA 835: 1953 SCJ 580: 1953 Cri LJ 1621: AIR 1953 SC 404 (406, 407, 408, 409, 410) (Prs 6, 7, 9, 10, 16, 17, 23, 25).

——Ss. 4 (2) and 7 — Power of Government to transfer cases — Case already referred to Special Court under S. 4 (2) — Special Court acquires jurisdiction — Government has no power of transferring or redistributing case from one Special Court to another.

Under sub-section (2) of Section 4 of the West Bengal Criminal Law Amendment (Special Courts) Act (21 of 1949), the State Government can distribute cases amongst the Special Courts which have been constituted under S. 2. Once, however, there has been such an allotment, the Special Court gets jurisdiction and there is no provision in the said Act for transfer of the cases or redistribution thereof from one Special Court to another. There is a special provision in Section 7 that no Court shall have jurisdiction to transfer any case from a Special Court and the High Court's power to do so has been taken away or not conferred by the said Act. Therefore, the framers of the Act did not contemplate transfer of a case, once it is referred to a particular Special Court. AIR 1958 SC 1018, Rel. on. (1965) 69 Cal WN 119,

●——Ss. 4 (2), 5 (1) and (2) — Special Court — taking cognizance — Mode of — Petition of complaint — Necessity — Criminal P. C. (1898), Ss. 190, 193 — Applicability — West Bengal Criminal Law Amendment (Special Courts) (Amending) Act (24 of 1960), Ss. 2 and 3 — Effect of.

Per majority (Das Gupta, J., contra): The Special Court under the West Bengal Criminal Law Amendment (Special Courts) Act, 1949, can take cognizance, on receiving the Government order of distribution under S. 4 (2) of the Act and on the record of the case from the Court of the Magistrate, by applying his mind to the facts of the case for the purpose of trying the offence under the Act. The Special Court must look at whatever records it has or can get before it and apply its mind to proceed under the Act in order to

take cognizance. AIR 1951 SC 207 and AIR 1959 SC 8, Rel. on; Criminal Revision Cases Nos. 1545 to 1548 of 1959, dated 22-12-1959 (Cal), **Overruled.** The Special Court is not confined to the statutory methods recognised and prescribed under S. 190 (1), Criminal P. C. and by reason of S. 5 (1) of the special statute, is not dependent on an order of commitment as prescribed under S. 193, Criminal P. C.

The amendment introduced to the Act of 1949 by West Bengal Act (24 of 1960) does not alter the legal position where the Special Court has already taken cognizance.

Per Das Gupta, J., contra: The Special Court under the West Bengal Criminal Law Amendment (Special Courts) Act, 1949, does not take cognizance of an offence on the order of distribution made by the State Government under S. 4 (2) of the Act, but needs either a petition of complaint or a report in writing of facts constituting the offence made by a police officer, for taking cognizance. If there be distribution of a case by Government involving an offence under S. 417, Penal Code, where there has been no investigation by the police, the Special Court would require a complaint to take cognizance. Ajit Kumar Palit v. The State, **1961 (2) Cri LJ 617: 65 Cal WN 977: ILR (1962) 1 Cal 357: AIR 1961 Cal 560 (565, 567, 576, 578) (Pt A) (Prs 13, 14, 15, 23, 76, 79) (FB).**

——S. 4 (1), Proviso and (2) — Applicability — Case not specifically allotted for trial to Special Court — Trial with other cases specifically allotted for trial to Special Court — Legality.

The jurisdiction of the Judge of the Special Court to try the case only arises on an allotment of the case by the State Government. Where, after framing of charges under S. 420, Penal Code, in the two cases which were specifically allotted for trial by the Special Court, a case of a third offence of a similar nature committed within the course of a year and which was not allotted for trial was included in the charge of the other two cases, the trial of the third case is without jurisdiction. The Proviso to S. 4 (1) does not justify the framing of a charge in respect of a scheduled offence committed on a different occasion, that is, an offence which was not a part of the same transaction as the offences specifically allotted for trial to the Special Court. **ILR (1961) 2 Cal 764: 1961 (2) Cr LJ 218 (221, 222) (Pt C) (Prs 10, 11) (DB) (Cal).**

——Ss. 4 (2), 2 (2) and (3) (as amended by Act 12 of 1951) — Effect of amendment — Cases triable by Special Courts only — Power of State Government to distribute cases between Special Courts includes power to cancel such distribution — No question of transfer arises — (Bengal General Clauses Act (1 of 1899), S. 22). See Public Safety — West Bengal Criminal Law Amendment (Special Courts) Act (21 of 1949), S. 2 (2). 1957 Cri LJ 54: AIR 1957 Cal 25.

——Ss. 4 and 5—Meaning of word "cases" occurring in S. 4, indicated — Prosecution which it is proposed to launch — Allotment of such prosecution to Special Judge — Complaint can be filed in Court of Special Judge who can take cognizance and proceed with cases. AIR 1955 NUC (Cal) 832 (DB).

——S. 4 (as amended by West Bengal Act 12 of 1952) — Special Judge — (Criminal P. C. (1898), S. 268).

Where a public servant is charged with an offence which is triable by a Special Judge along with an offence which is ordinarily triable by a Court of Session, both the charges can be tried by a Special Court under the provisions of Sec. 4 of West Bengal Act 21 of 1949, as amended by West Bengal Act 12 of 1952. **57 Cal WN 678: 1953 Cri LJ 1523: AIR 1953 Cal 681 (682) (Pt B) (Pr 4) (DB).**

●——S. 4 (1) — Section gives discretionary power to Government and is, therefore, ultra vires — Constitution of India, Art. 14.

A discretionary power is given to the State to allot cases to the Special Judge or not as the State Government feel inclined. The State Government do not regard S. 4 as compelling them to allot all cases of crimes set out in the schedule to the Act to Special Judges. If S. 4 (1) was mandatory, then the Government would be bound to allot each and every one of these cases to a Special Judge and this they do not do and never have done since the Act came into force. The Government have a discretion in the matter and that being so, even assuming that the Act creates a valid class or classes of offence, there is discrimination between persons charged with any offence falling within such class or classes. For these reasons S. 4 (1) is ultra vires. Art. 14 of the Constitution. Misc. Case No. 288 of 1951 (Cal), Followed. Gupta, J. K. v. State, **(1952) 56 Cal WN 701: 1952 Cri LJ 1447: AIR 1952 Cal 644 (645) (Pr 17) (FB).**

[Overruled in AIR 1953 SC 404.]

SECTION 5

●——S. 5 — Prior to its amendment by West Bengal Act (24 of 1960) — Cognizance of offences by Special Court — Mode of — Cognizance — When taken — Criminal P. C. (1898), Ss. 190 (1) and 193 (1) — Applicability.

As soon as a Special Judge appointed under S. 2 of the West Bengal Criminal Law Amendment (Special Courts) Act, 1949, receives the orders of allotment of the case passed by the State Government under S. 4, he becomes vested with jurisdiction to try the case and, when he receives the record from the Government he can apply his mind and issue notice to the accused and thus start trial of the proceedings assigned to him by the State Government. AIR 1961 Cal 560 (FB), Affirmed.

The provisions of Ss. 190, 191, 192 and 194 show that there is no statutory requirement under the Criminal Procedure Code as to the class or character of material that must be before a Special Judge before he can assume and exercise jurisdiction over a case. The same is not a requirement of the Special Courts Act either. The Judge of the Special Court appointed under S. 2 of the Act is not within the class of Magistrates designated by S. 190 (1) and hence there can be no question of such a Judge having to comply with its requirements before he can "take cognizance of an offence".

The word "cognizance merely means become aware of and when used with reference to a

Court or Judge, to take notice of judicially. Taking cognizance does not involve any formal action; or indeed action of any kind, but occurs as soon as a Magistrate, as such, applies his mind to the suspected commission of an offence. Where the statute prescribes the materials on which alone the judicial mind shall operate before any step is taken, obviously the statutory requirement must be fulfilled. But statutory provision apart, there is no set material which must exist before the judicial mind can operate.

(Editorial Note: The Calcutta Full Bench overruled the following decisions: Criminal Appeals Nos. 377 of 1958 and 393 of 1959 (Cal.) and Cri. Revn. Cases Nos. 1545 to 1548 of 1959 (Cal.). The Supreme Court by affirming the Calcutta Full Bench decision must be deemed to have impliedly overruled the above decisions). Ajit Kumar Palit v. State of West Bengal, 1964 Mad LJ (Cri) 12: (1963) Supp 1 SCR 953: 1963 (1) Cri LJ 797: (1964) 1 SCJ 75: AIR 1963 SC 765 (768, 769, 770) (Pt A) (Prs 13, 14, 19).

●——**S. 5 (1) — Effect of amendment by West Bengal Act (26 of 1956).**

The insertion of the words 'otherwise than on a police report' in S. 5 (1) by the Amending Act was merely to ensure the inapplicability of S. 251-A, Criminal P. C., to the procedure to be followed by the Special Courts and has no further significance. Ajit Kumar Palit v. State of West Bengal, 1964 Mad LJ (Cri) 12: (1963) Supp 1 SCR 953: (1963) (1) Cri LJ 797: (1964) 1 SCJ 75: AIR 1963 SC 765 (768) (Pt B) (Pr 10).

●——**S. 5 (1) (as amended by West Bengal Act 24 of 1960) — Effect of — Whether retrospective and applies to pending proceedings.**

The amending Act does not purport to be declaratory but seeks in terms to carry out an amendment, in other words, to effect a change. The mere fact that the change effected conforms to a particular interpretation which the word which previously existed might bear and which found acceptance at the hands of the Courts in a few cases, is a wholly insufficient foundation to base an argument that it is declaratory and further that it must be taken to have declared the law from the commencement of the parent Act so as to invalidate all proceedings validly taken on a proper construction of the law as it then stood. Ajit Kumar Palit v. State of West Bengal, 1964 Mad LJ (Cri) 12: 1963 Supp 1 SCR 953: 1963 (1) Cri LJ 797: (1964) 1 SCJ 75: AIR 1963 SC 765 (771) (Pt C) (Pr 22).

●——**S. 5 (1) and (2) (as it stood prior to its amendment by the Amending Act of 1960) — Special Court — Taking cognizance — Mode of — Petition of complaint not necessary — Criminal P. C. (1898), Ss. 190, 193 — Not applicable but can take cognizance on a complaint under S. 190, Criminal P. C. — Material on which Special Court will take cognizance — West Bengal Criminal Law Amendment (Special Courts) (Amending) Act (24 of 1960), Ss. 2 and 3 — Effect of amendment — Does not vitiate the cognizance already taken. See Public Safety — West Bengal Criminal Law Amendment (Special Courts) Act (21 of 1949), S. 4 (2). 1961 (2) Cri LJ 617: AIR 1961 Cal 560 (FB).**

——**S. 5 (1)—Taking cognizance — What amounts to — Criminal P. C. (1898), S. 190 (1) (a).**

The Public Prosecutor filed a petition of complaint against the accused after the case had been allotted to the Special Court under the Act by a notification of the Government. The first information report and the charge-sheet were filed as annexures to the petition of complaint, and the details appeared in them. On taking cognizance the Judge ordered that copies of the statements under S. 161, Criminal P. C., and other relevant papers should be supplied to the accused.

Held, that the cognizance was taken on the petition of complaint filed by the Public Prosecutor and not on the police report or charge-sheet. There was no illegality in taking cognizance. **ILR (1961) 2 Cal 764: 1961 (2) Cri LJ 218 (Cal).**

——**S. 5 (as amended by Act 26 of 1956) —** Amendment is retrospective — Special Courts should follow the altered procedure laid down by the amending Act (W. B. Act 26 of 1956) — The amendment to S. 5 has retrospective effect — (Criminal P. C. (1898), Ss. 251 and 251-A). **ILR (1960) 2 Cal 268 (DB).**

——**S. 5 —** Meaning of word 'cases' occurring in S. 4 is wide and includes prosecution which it is proposed to launch — Allotment of such prosecution to Special Judge is an allotment of a case and complaint can be filed in the Court of the Special Judge. See Public Safety — West Bengal Criminal Law Amendment (Special Courts) Act (21 of 1949), S. 4. **AIR 1955 NUC (Cal) 832 (DB).**

SECTION 9

●——**S. 9 — Section 4 does not violate Art. 14 of the Constitution and is constitutional — Sentence under S. 9 (1) being in violation of Art. 20 of the Constitution, set aside. See Public Safety —West Bengal Criminal Law Amendment (Special Courts) Act (21 of 1949), S. 4. 1953 Cri LJ 1621: AIR 1953 SC 404.**

——**S. 9 (1) (as amended by Act 12 of 1952) —** Appointment of Additional District and Sessions Judge by name as Special Court — Qualification under S. 2 (2) (b) wanting — As the Judge was appointed by name and as he was otherwise qualified under S. 2 (2) (b) within a year—Under the circumstances he was held competent to try the case. See Public Safety — West Bengal Criminal Law Amendment (Special Courts) Act (21 of 1949), S. 2. **1958 Cri LJ 1178: AIR 1958 Cal 517 (DB).**

SECTION 12

●——**S. 12 —** Jurisdiction of Special Court — Cognizance of offence duly taken by Chief Presidency Magistrate on a charge-sheet filed by police —Subsequent allotment of case to Special Court by notification under S. 4 — Order of allotment quashed by High Court on 4-12-1952—Effect was revival of jurisdiction of Chief Presidency Magistrate — Magistrate issuing process against accused — Order set aside by High Court—Fresh allotment of same cases to Special Court—High Court upholding this order. The order was binding as between the parties — The accused could not derive any advantage by canvassing the correctness of the High Court's order of 4-12-52 unhampered by subsequent decisions which were binding on him — Jurisdiction of Special Court

to try is upheld. See Public Safety — West Bengal Criminal Law Amendment (Special Courts) Act (21 of 1949), S. 4. (1963) 2 SCJ 680: 1966 Cri LJ 805: AIR 1966 SC 1061.

●——Ss. 12 and 4 (2) (as amended by W. B. Act 12 of 1952) — Scope and object — Trial in respect of certain offence pending before Magistrate on 9th April, 1952 — Trial has to continue and no fresh allotment in respect of same offence can be made to Special Judge under S. 4 (2).

The manifest object of S. 12 appears to be that where a proceeding is pending in the ordinary Courts on 9th April, 1952, the power of the Government to allot the trial for that offence to a Special Court constituted under S. 2 of the Amending Act and the allotment to the Judge of that Court under S. 4 shall not be affected, but that those proceedings shall continue and be concluded before the ordinary Courts. To hold that notwithstanding the prohibition enacted in S. 12, the State Government could still allot a case which deals with the same offence, arising out of identical facts against the same accused to a Special Judge would be a patent infringement of the term of S. 12 and in derogation of the protection which that provision was meant to confer. State of West Bengal v. Hemant Kumar, (1963) 2 SCJ 680: 1963 Mad LJ (Cri) 613: (1963) Supp 2 SCR 542: 1966 Cri LJ 805: AIR 1966 SC 1061 (1068) (Pt C) (Pr 24).

——S. 12 (as amended by W. B. Act 12 of 1952) —Applicability of Act — Trial by Special Judge of Special Court and conviction — Appeal to High Court — Pending appeal — W. B. Criminal Law Amendment (Special Courts) Amending Ordinance, 1952, coming into force — Retrial ordered —Special Courts Act held did not apply—Proceeding held could not be tried by Special Court — Position could not be changed by fresh complaint. AIR 1955 NUC (Cal) 1196 (DB).

——S. 12 (as amended in 1952) — "Proceedings pending before a Court".

The words "proceedings pending before a Court" in S. 12 mean judicial proceedings which started with the submission of a charge-sheet or a complaint or taking cognizance thereon. It cannot be argued that since the accused is produced before the ordinary Magistrate and the question of bail is considered, there is a proceeding before the Court and, therefore, S. 12 bars the jurisdiction of the Special Court. 1953 Cri LJ 1540: 57 Cal WN 581: AIR 1953 Cal 661 (663) (Pt B) (Pr 5) (DB).

SCHEDULE

●——Schedule and S. 4 (as amended by W. B. Act (12 of 1952) and W. B. Act 15 of 1953)— S. 165-A, Penal Code, not a mere restatement of S. 116 of Code — Case under Ss. 161, 116, Penal Code, included in the schedule distributed to Special Judge — S. 165-A not included in schedule at time Judge took cognizance of case — Charge and conviction under S. 165-A — Special Judge was not a Court of competent jurisdiction—Defect of jurisdiction could not be cured by S. 529, Criminal P. C., as it did not apply to Special Judge— (Criminal Law Amendment Act (1952), S. 3) — (Criminal P. C. (1898), S. 529 (e)) — Penal Code (1860), Ss. 161, 116 and 165-A — AIR 1956 Cal 385, Reversed. See Public Safety — West Bengal Criminal Law Amendment (Special Courts) Act (21 of 1949), S. 4. 1959 Cri LJ 98: AIR 1959 SC 8.

SCHEDULE, ITEM 3

——Schedule, Item 3 — Applicability — Offence by public servant while purporting to act as public servant.

Where the accused, a laboratory technician of a T. B. Hospital, was officially permitted to go to Calcutta to obtain blood from the Blood Bank, Calcutta Medical College, both for paying and non-paying patients, and used to draw travelling allowance for such visits, the fact that the paying patients paid tip to him does not indicate that the job fell outside the public duty of the accused. If he committed an offence under S. 420, Penal Code, in connection with the supply of blood to the paying patients, the offence would be triable by the Special Court under the Act. ILR (1961) 2 Cal 764: 1961 (2) Cri LJ 218 (Cal).

——Schedule, Item 3 (as amended by Act 12 of 1952) — Offence committed by person as agent of Government — (Penal Code (1860), S. 420).

The prosecution case was that the accused who supplied dhenki rice to the Government procurement godown submitted bills claiming the procurement price as well as appropriate bonus in respect of stocks so delivered. It was alleged that the accused in fact supplied this quantity of rice from old stocks purchased prior to the date with effect from which bonus was payable, and had thus to pay no bonus money to any one. The real allegation on which the accused was said to have committed an offence under S. 420, Penal Code, was that by making a false representation that he had obtained this quantity of rice between the 3rd and 7th October, 1951, the accused induced Government to pay to him certain amounts on account of bonus.

Held, that the accused, when procuring rice and delivering rice to Government, was not dealing with property belonging to Government. It was only after the procurement agent delivered the property to Government that the paddy or rice became Government property. Prior to that it was not Government property. Consequently, when he was dealing with rice, he was not dealing with property belonging to Government as an agent of Government.

It should, however, be held that in accepting from Government the money paid by way of bonus and in keeping it with him or in paying it to any person, the accused must be held to be dealing with a property belonging to Government as agent of Government. It was equally clear, however, that the offence under S. 420, Penal Code, if committed by the accused, could not be said to have been committed by him while purporting to act as agent of Government dealing with Government property. If, as a result of deception, Government was dishonestly induced to pay certain amount of money to the accused, the offence under S. 420, Penal Code, was complete before any dealing by the accused with that Government money was started. The offence under S. 420, Penal Code, could not, therefore, be said to have been committed by the accused while pur-

porting to act as agent of Government. It was not, therefore, triable by a Special Court. 93 Cal LJ 289: 1954 Cri LJ 1435: ILR (1956) 1 Cal 130: AIR 1954 Cal 505 (505, 506) (Prs 4, 5, 6) (DB).

——Sch., Items 3 and 8 — Private person conspiring with public servants to cheat — (Penal Code (1860), S. 420).

It is true that if there is a charge against a person who is neither a public servant nor a person dealing with property belonging to Government as an agent of Government, under S. 420, I.P.C., and no other section, the Special Court has, under Item 3 of the Schedule, no jurisdiction to try the case. But if the offence under S. 420 is committed by the public servants, then the offence is cognizable by the Special Court and if the petitioner though not a public servant is concerned in the offence of conspiracy to cheat with such public servants, he is triable by the Special Court in view of item 8 of the Schedule. 57 Cal WN 581: 1953 Cri LJ 1540: AIR 1953 Cal 661 (663) (Pt C) (Pr 6) (DB).

SCHEDULE, ITEM 8

——Sch., Item 8 — Private person conspiring with public servants to cheat — Offence under S. 420, I.P.C — The case is triable by the Special Court in view of item 8 of the Schedule—(Penal Code (1860), S. 420). See Public Safety — West Bengal Criminal Law Amendment (Special Courts) Act (21 of 1949), Sch., Item 3. 1953 Cri LJ 1540: AIR 1953 Cal 661 (DB).

——Sch., Item 8 — Jurisdiction to try offence of cheating — (Penal Code (1860), S. 420).

The Special Court has jurisdiction to try an offence under S. 420, I.P.C., if committed by a public servant. It is not necessary that he should be taking Government money by the offence of cheating. 57 Cal WN 581: 1953 Cri LJ 1540: AIR 1953 Cal 661 (663) (Pt D) (Pr 7) (DB).

——Sch., Item 8 — Cheating with respect to Government money.

Where there is cheating in respect of the sum included in an award given by the Land Acquisition Officer, it is an offence committed in respect of the Government money. 57 Cal WN 581: 1953 Cri LJ 1540: AIR 1953 Cal 661 (663) (Pt E) (Pr 7) (DB).

—WEST BENGAL CRIMINAL LAW AMENDMENT (SPECIAL COURTS) AMENDING ACT (12 OF 1952)

SECTION 11

——S. 11 — Proceeding pending in Court — Proceeding begins with submission of charge-sheet — Submission of charge-sheet after coming into force of Act — It is not proceeding pending in Court. AIR 1955 NUC (Cal) 1208.

SECTION 12

●——S. 12 — Section has no application to pending appeals — Appeal against judgment of First Special Tribunal, Calcutta, under Central Ordinance (29 of 1943) — Judgment set aside — Constitution of Tribunal being held void under Art. 14, Constitution of India — Case remanded for retrial by competent Court — Only Court having jurisdiction to try held was special Court under West Bengal Act (12 of 1952) — Jurisdiction held was not ousted by S. 12.

The object of the Legislature in enacting S. 12 of West Bengal Act 12 of 1952 was that cases pending before an ordinary or a non-special Court at the date when the West Bengal Ordinance 8 of 1952 came into existence and which were being tried in the ordinary way, should not be brought on to or tried by the Special Courts in spite of the provision of the new S. 4 (1) introduced by the Ordinance into the Act. This reason manifestly could have no application to appellate proceedings, for there could be no question of cases pending in appeals being allotted to special Courts for trial.

To attract the operation of S. 12, it is necessary to show that the proceedings were pending before a Court other than a Special Court on the 9th April, 1952. The expression "proceedings in a Court other than a Special Court" occurring in S. 12 means and refers to proceedings relating to trial of a case in the original Court and not to proceedings in appeal.

How the case pending in the appellate Court is to proceed further if the appellate Court directs a rehearing would depend entirely on the order which the appellate Court passes and is competent in law to pass. If the appeal Court directs retrial by an ordinary Court, as the Court competent to try the case or that is the implication of the order, the jurisdiction of the Special Court would be barred not by reason of S. 12 of the Special Act but by reason of the order made by the appeal Court. The pendency of the appeal before the High Court on the relevant date (9th April, 1952) could not attract the operation of S. 12, but where the appeals were taken to the High Court from the decision of a Court other than a Special Court as contemplated by Act 12 of 1952, whether the retrial directed by the High Court could be held by a Court under Act 12 of 1952, would depend on the nature and effect of the order which the High Court has made.

The High Court in an appeal against the judgment of the First Special Tribunal, Calcutta, constituted under the Central Ordinance 29 of 1943 did not acquit the accused, nor make any order of discharge in their favour but set aside the conviction and sentence and directed the retrial of the accused by a competent Court in accordance with law if the Government chose to proceed against them. The High Court set aside the proceedings of the Special Court on the ground that the trial held by it became void on and from the 26th January, 1950, as S. 5 (1) of the Ordinance under which the allotment of the case was made and the Tribunal acquired jurisdiction to try it became void and inoperative as soon as the Constitution came into force, by reason of its being in conflict with Art. 14 of the Constitution.

Held, that the Special Tribunal, from which the appeals came to the High Court must be held according to the decision of the High Court itself to have lost seisin of these cases after the 26th January, 1950, and they had no jurisdiction to proceed with the trial. As the High Court directed these cases to be tried by a competent Court, they could not possibly be sent back for trial to

the Special Tribunal assuming that any such Tribunal existed or could be constituted by the Central Government. The only Court which was competent to try these cases would be the Special Court under Act 12 of 1952 and its jurisdiction could not be ousted as the order of the High Court itself proceeded on the footing that no trial could be held by the Tribunal constituted under the Central Ordinance 29 of 1943. The jurisdiction of the Special Court not being ousted by S. 12 of the Act or by the order of the High Court, the proceedings before it could not be quashed. Edward Ezra v. State of West Bengal, **1955 Cri LJ 342: 1955 SCA 215: 1955 SCJ 228: (1955) 1 SCR 1025: AIR 1955 SC 155 (159) (Prs 10, 11).**

——S. 12 — Scope and applicability — Appropriation of funds of Union Board by President of Union Board — He is liable to be tried by Special Court. **AIR 1955 NUC (Cal) 1208.**

—WEST BENGAL CRIMINAL LAW AMENDMENT (SPECIAL COURTS) (AMENDING) ACT (24 OF 1960)

SECTION 2

●——**Ss. 2, 3 (as it stood prior to its amendment by the Amending Act of 1960) — Special Court — Taking cognizance — Mode of — Petition of complaint not necessary — Criminal P. C. (1898), Ss. 190, 193 — Not applicable but can take cognizance on a complaint under Sec. 190, Criminal P. C. — Material on which Special Court will take cognizance — Effect of amendment — Does not vitiate the cognizance already taken — Where cognizance has not been taken Ss. 2 and 3 of the Amending Act is to be applied and the proper mode of taking cognizance would be as indicated in S. 190, Criminal P. C. See Public Safety — West Bengal Criminal Law Amendment (Special Courts) Act (21 of 1949), S. 4 (2). AIR 1961 Cal 560 (FB).**

—WEST BENGAL SECURITY ACT (3 OF 1948)

PREAMBLE

——**Preamble** — Interpretation of Act. **AIR 1955 NUC (Cal) 577 (DB).**

——**Preamble** — Validity of Act — Effect of Full Bench decision in 53 CWN 27 — Division Bench cannot entertain plea of invalidity of Act. **AIR 1955 NUC (Cal) 577 (DB).**

SECTION 6

——**Ss. 6 (3), 38** — Scope — S. 38 is ultra vires — Delegation under S. 38 is invalid — Orders by delegate under S. 6 (3) — Contravention of — Conviction for, is illegal. **AIR 1955 NUC (Cal) 2056.**

SECTION 16

——S. 16 — Rule under S. 491, Criminal P. C. pending — Another valid order under S. 16 — Relief under S. 491, in respect of pending rule cannot be granted — (Criminal P. C. (1898), S. 491). **AIR 1955 NUC (Cal) 577 (DB).**

SECTION 18

——S. 18 — Grounds — High Court cannot examine grounds with meticulous care. **AIR 1955 NUC (Cal) 577 (DB).**

SECTION 30

——S. 30 — Satisfaction of Court regarding grounds is essential. **AIR 1955 NUC (Cal) 577 (DB).**

—WEST BENGAL SECURITY ACT (19 OF 1950)

PREAMBLE

——**Preamble — Act if ultra vires.**

The W. B. Security Act, 1950, cannot be held ultra vires merely because there is no section expressly allowing the person externed to make a representation to the Government. Nor can it be held ultra vires on the ground that it gives power to extern persons from the districts in which they are ordinarily resident. **55 CWN 53: AIR 1951 Cal 3 (5) (Pt B) (Prs 18, 19, 20) (DB).**

SECTION 2

●——**Ss. 2 (9) (e) and 11 — Applicability — Conciliation proceedings between a public utility concern and one union — Settlement binds all its workers—Strike by some of its workers belonging to other union illegal — Strikers are guilty of offence punishable under S. 11, West Bengal Security Act as the illegal strike amounts to a subversive act within the meaning of S. 2 (9) (e) of the W. B. Security Act. See Industrial Disputes Act (1947), S. 18 (3) (d). 1960 Cr LJ 1384: AIR 1960 SC 1012.**

——**Ss. 2 (3), 20 and 38** — Essential commodity — Notification of, in Gazette is essential — No publication in Gazette — Contravention of District Magistrate's order under S. 20 (1) read with S. 38 — Conviction under S. 20 (3) held bad. **AIR 1955 NUC (Cal) 5562 (DB).**

——**S. 2 (9) (a) (i) — Endangering "communal harmony" — Constitution of India, Arts. 19, 132.**

A person who speaks in favour of the interest of the inhabitants of one particular province or State as against the interest of the inhabitants of another province or State, cannot be regarded as endangering "communal harmony" irrespective of the question whether such an act is proper or desirable. The order of externment passed against the person under Sec. 21 in such a case is therefore illegal. **55 Cal WN 101: AIR 1951 Cal 424 (426) (Prs 14, 19) (DB).**

——**S. 2 (9) — Instigating Muslims to boycott the Hindus — If subversive act.**

Instigating local Muslims to boycott the Hindus is a subversive act and cannot be deemed to be either indefinite or vague or outside the scope of the provisions of the Act. **55 Cal WN 94: 52 Cri LJ 327: AIR 1951 Cal 322 (326) (Pt C) (Pr 38) (DB).**

SECTION 6

——**S. 6 (6) — Loitering in vicinity — If punishable.**

Although sub-sec. (2) of Sec. 6 forbids loitering in the vicinity, yet the provisions of sub-sec. (6) of that section are not sufficiently comprehensive to punish such loitering. To be in a protected place is indeed very much different from being merely in the vicinity of it. Sub-sec. (6) cannot, therefore, be held to be sufficiently wide to cover

all cases of infraction contemplated in sub-sec. (2); the former is not co-extensive with the latter which presumably covers a much wider field. 59 Cal WN 999: 1955 Cr LJ 1336: ILR (1957) 2 Cal 351: AIR 1955 Cal 513 (514) (Pt B) (Pr 16) (DB).

——Ss. 6 (3) and 38 — Delegation under S. 38— Orders by delegate under S. 6 (3) — Contravention of — Conviction for — Not sustainable. See Public Safety — W. B. Security Act (19 of 1950), S. 38. AIR 1955 NUC (Cal) 2056.

SECTION 11

——Ss. 11, 18 (3) (d), 22 (1) (d) — Conciliation proceedings between a public utility concern and one union — Settlement binds all its workers — Strike by some of its workers belonging to other union is illegal — Strikers are guilty of offence under S. 11 of W. B. Security Act. See Industrial Disputes Act (1947), S. 18 (3) (d). 1960 Cri LJ 1384: AIR 1960 SC 1012.

——Ss. 11, 40 — Prejudicial speech made on 26th June, 1949 — Prosecution started under S. 11 (3), W. B. Security Ordinance — Conviction under S. 11, W. B. Security Act—Conviction held offended Art. 20 of the Constitution — (Constitution of India, Art. 20) — (Public Safety — W. B. Security Ordinance (2 of 1949), S. 11). AIR 1955 NUC (Cal) 5590 (DB).

——Ss. 11 (3), 40 — Conviction for offence alleged to have been committed after expiry of West Bengal Security Act, 1948 and promulgation of West Bengal Security Ordinance, 1949 — Legality.

Section 1 (3) of the West Bengal Security Ordinance of 1949 cannot in law support the conviction for an alleged offence or act said to have been committed between the date on which the W. B. Security Act, 1948, expired and the date on which the Ordinance in question was enacted, by reason of Art. 20 (1) of the Constitution. Consequently, the conviction for such an offence under S. 11 (3), W. B. S. Act, 1950 is illegal notwithstanding S. 40 of the said Act.

The W. B. Security Ordinance of 1949 and the W. B. Security Act of 1950, so far as they purport to make acts done in the intervening period, namely, the period between 12-3-1949, and 8-7-1949, offences under the law, are ultra vires by reason of Art. 13 (1), Constitution of India. 52 Cri LJ 1087: AIR 1951 Cal 505 (506) (Pt A) (Prs 5, 7) (DB).

SECTION 20

——S. 20 — Essential commodity — Notification of, in Gazette is essential — No publication in Gazette — Contravention of District Magistrate's order under S. 20 (1) read with S. 38 — Conviction under S. 20 (3) held bad. AIR 1955 NUC (Cal) 5562 (DB).

SECTION 21

——S. 21 (1) — Order under — Validity.

Before an order can come within S. 21 (1) (a) the authority's satisfaction that the person against whom the order is made is doing or is about to do or is likely to do an act must be stated. Without a recital of that satisfaction the order is not in accordance with the Act. ('51) 55 Cal WN 45: 1952 Cri LJ 1662: AIR 1952 Cal 798 (799) (Pt B) (Pr 6).

——S. 21 — Subversive act — Specification of.

The order under S. 21 should contain a statement as to what the subversive act was, and a mere recital that a man was doing a subversive act is not enough. ('51) 87 Cal LJ 1: 55 Cal WN 104: AIR 1951 Cal 404 (404) (Pt B) (Pr 4).

——S. 21 — Nature of order to be passed.

Where under an order passed under S. 21 a person is prohibited from associating or corresponding with any person "who is known or believed to be a member of unlawful association" such an order cannot be complied with and is not one contemplated by the Act. ('51) 87 C LJ 1: 55 Cal WN 104: AIR 1951 Cal 404 (404) (Pt C) (Pr 5).

——Ss. 21 and 22 — Sections, if ultra vires Constitution — Constitution of India, Art. 19 (1) (d) and (a).

Sections 21 and 22 of the West Bengal Security Act, 1950, impose unreasonable restrictions on the exercise of the fundamental rights of a citizen of India secured by Art. 19 (1) (d) and (e) of the Constitution of India. Those two sections of the said Act are therefore ultra vires the Constitution of India. 55 Cal WN 94: 52 Cri LJ 327: AIR 1951 Cal 322 (326) (Pt B) (Pr 34) (DB).

——S. 21 (1) — Externment order under — Contents regarding subversive act.

Section 21 clearly contemplated that in the externment order under that section it should be stated what the subversive act was, because in Sec. 2 (9) of the Act a very comprehensive definition of the term "subversive act" is given. It is essential that an externment order under Sec. 21 should correctly state upon what matter the person making the order is satisfied. An externment order merely stating that the person served was committing a subversive act does not contain such a statement and therefore, is not an order made under the Act and hence not binding upon the person served. 55 Cal WN 53: AIR 1951 Cal 3 (5, 7) (Pt A) (Prs 15, 16, 17, 32) (DB).

——S. 21 — Want of provision in Act for stating grounds for making order and making representation — Act if ultra vires on that ground.

The Act cannot be held to be ultra vires merely on the ground that there is nothing in the Act requiring the grounds for making the order to be stated. Nor can the Act be held to be ultra vires merely because there is no section expressly allowing representation to be made. 55 Cal WN 53: AIR 1951 Cal 3 (5) (Pt B) (Prs 18, 19, 20) (DB).

——S. 21 (1) and (4) — Order under S. 21 (1) — Satisfaction of authority — Nature.

No order can be made under S. 21 (1) unless there is satisfaction of authority that the person is actually doing or is about to do or is likely to do an act falling within S. 2 (9). It is not enough to say that the authority was satisfied that an order of externment is necessary with a view to preventing a person from doing a subversive act. Unless there is first a satisfaction upon the point that the person is doing or is about to do or is likely to do a subversive act an order made with a view to

preventing a person from doing a subversive act is not one made under S. 21 (1), and there can be no conviction under Sec. 21 (4) for disobeying that order. **54 Cal WN 823: AIR 1950 Cal 543 (544) (Prs 8, 9) (DB).**

SECTION 22

——Ss. 22, 21 — Ss. 21 and 22 of the West Bengal Security Act 1950 impose unreasonable restrictions on the exercise of the fundamental rights of a citizen of India secured by Art. 19 (1) (d) and (e) of the Constitution of India. These two sections of the said Act are therefore ultra vires the Constitution of India. See Public Safety — West Bengal Security Act (19 of 1950), S. 21. **52 Cri LJ 327: AIR 1951 Cal 322 (DB).**

SECTION 38

——S. 38 — Essential commodity — Notification of, in Gazette is essential — No publication in Gazette — Contravention of District Magistrate's order under S. 20 (1) read with S. 38 — Conviction under S. 20 (3) held bad. **AIR 1955 NUC (Cal) 5562 (DB).**

——S. 38 — Delegation under — Orders by delegate under S. 6 (3) — Contravention of — Conviction for — Not sustainable as S. 38 is declared ultra vires — Delegation under it is invalid and the notice issued by the delegate under S. 6 (3) has no force in law. **AIR 1955 NUC (Cal) 2056.**

——S. 38 — Ultra vires.

The power of delegation contained in S. 38 of the Act is 'ultra vires' inasmuch as the power may be delegated to an officer of the lowest rank who may be wholly unfitted to exercise the power so delegated. **87 C LJ 1: 55 Cal WN 104: AIR 1951 Cal 404 (404) (Pt A) (Pr 4).**

——S. 38 — Power to delegate to any authority — Section if ultra vires on that ground — Constitution of India, Art. 19 (5).

Section 38 which entitles Government to delegate its powers under the Act to any officer subordinate to it irrespective of whether that officer is fit to make such orders is a procedure which is wholly unreasonable and that being so, S. 38 must be held to be ultra vires as being beyond the powers given to the State by Cl. (5) of Art. 19 of the Constitution.

Quaere—If Sec. 38 is ultra vires, whether S. 35 (1) and (3) would also have to be held to be ultra vires.

Once Sec. 38 is held ultra vires, there is no longer any power in the Act to delegate and externment order unless made by the State Government itself would be invalid. **55 Cal WN 53: AIR 1951 Cal 3 (6, 7) (Pt C) (Prs 26, 28, 30) (DB).**

SECTION 40

——S. 40 — Prejudicial speech made on 26th June 1949 — Prosecution started under S. 11 (3) — W. B. Security Ordinance — Ordinance coming to an end on 26-1-1950 — Speech of 26-6-1949 could never be regarded as offence under the Act of 1950 it being not retrospective — Conviction under S. 11, W. B. Security Act (1950) — Conviction offended against Art. 20 — Section 40 of the Act cannot be availed of which applied only to proceedings under Act of 1950 — **AIR 1955 NUC (Cal) 5590 (DB).**

——S. 40 — S. 11 (3) of the W. B. Security Ordinance of 1949 cannot in law support the conviction for an alleged offence or act said to have been committed between the date on which the W. B. Security Act 1948 expired and the date on which the W. B. Security Ordinance was enacted by reason of Art. 20 (1) of the Constitution. Consequently the conviction for such an offence under Sec. 11 of W. B. S. Act 1950 is illegal notwithstanding Sec. 40 of the said Act. W. B. S. Ordinance 1949 and W. B. S. Act 1950 so far as they purport to make acts done in intervening period between 12-3-1949 and 8-7-1949 offences under the law are ultra vires by reason of Art. 13 (1) of the Constitution. See Public Safety — West Bengal Security Act (1950), S. 11 (3). **52 Cri LJ 1087: AIR 1951 Cal 505 (DB).**

—WEST BENGAL SECURITY ORDINANCE (2 OF 1949)

●——Bengal Criminal Law Amendment Act (1930) and West Bengal Security Ordinance (1949) became void as soon as the Constitution came into force by reason of Art. 13 of the Constitution — Constitution of India, Arts. 22 (7) and 373—Public Safety — Bengal Criminal Law Amendment Act (1930) and West Bengal Security Ordinance (1949) cannot be revived by subsequent order of the President passed in exercise of the powers conferred by Art. 22 (7) (a) read with Art. 373 See Public Safety — Preventive Detention (Extension of Duration) Order (1950). **51 Cri LJ 1110: AIR 1950 Cal 274 (SB).**

●——Adaptation of Laws Order (1950), R. 28 — Validity — Constitution of India, Art. 372 — West Bengal Criminal Law Amendment Act (6 of 1930) and West Bengal Security Ordinance (1949) became void when the Constitution came into force and the President cannot revive them by Adaptation of Laws Order, 1950 — Apart from this R. 28 of the order itself directing a Court to interpret to construe the law in a particular manner cannot be given effect to — The W. B. S. Ordinance is also void being inconsistent with the provisions of the Constitution. Sunil Kumar Bose v. The Chief Secretary to the Government of W. B., **54 Cal WN 394: 51 Cri LJ 1110: AIR 1950 Cal 274 (285, 286) (Pt J) (Prs 29, 30) (SB).**

SECTION 11

——S. 11 — Prejudicial speech made on 26-6-1949 — Prosecution started under S. 11 (3), W. B. Security Ordinance — Conviction under S. 11, W. B. Security Act — Conviction held offended Art. 20 of the Constitution. See Public Safety — W. B. Security Act (19 of 1950), S. 11. **AIR 1955 NUC (Cal) 5590 (DB).**

——S. 11 (3) — Validity of Ordinance — AIR 1950 Cal 274 held did not express any opinion on validity of of S. 11 or any other section of ordinance. **AIR 1955 NUC (Cal) 826 (DB).**

SECTION 22

●——S. 22 — Validity of Ordinance — Constitution of India, Arts. 13 and 22 (4).

The Ordinance is clearly an Ordinance providing for preventive detention, but the Ordinance is void because it is inconsistent with the provisions of the Constitution Act.

The West Bengal Security Ordinance, 1949, does not provide for any Advisory Board of the nature contemplated by Art. 22 (4), Constitution Act.

Further, the Ordinance does not impose restrictions which are reasonable and are in the interests of the general public. Sunil Kumar Bose v. The Chief Secretary to the Government of W. B., 54 Cal WN 394: 51 Cri LJ 1110: AIR 1950 Cal 274 (283) (Pt G) (Prs 21, 22) (SB).

SECTION 31

——S. 31 — Scope — Requisition order to rehabilitate refugee from Pakistan — Validity.

The Governor when he enacted Ordinance 2 of 1949 merely had in mind persons in the State of West Bengal who had lost their residence by reason of the serious communal disturbances which occurred in that State since the year 1946. The clause must be confined to such persons and that being so, an order of requisition which on the face of it was made to rehabilitate a refugee from East Bengal driven out of Pakistan by political disturbances is not contemplated by cl. 31 of the Ordinance of 1949 though the disturbances were tinged with communalism, and is not an order made under the Ordinance at all and therefore must be regarded as invalid. 55 Cal WN 297: ILR (1952) 1 Cal 168: AIR 1951 Cal 346 (349) (Pt B) (Pr 19) (DB).

—WEST BENGAL SECURITY (SECOND AMENDMENT) ORDINANCE (14 OF 1950)

PREAMBLE

——Pre. — Validity of Ordinance — Previous instructions of President not obtained — Effect — Constitution of India, Art. 213 (1), Proviso (c).

State Legislation on an item included in List III, Sch. 7 of the Constitution without the President's assent is only invalid in so far as it is repugnant to Central Legislation or existing law. A State may legislate on an item in List III and such legislation will be perfectly valid if it does not conflict with a piece of legislation of Parliament or with existing law as defined by the Constitution.

There is no piece of existing law which can be said to be repugnant to the provisions of Ordinance 14 of 1950. Therefore that Ordinance is valid, though the previous instructions of the President were not obtained. The fact that a subsequent Act (W. B. Security Act (61 of 1950)) required and obtained the assent of the President is by no means conclusive because the subsequent Act deals with many matters which were not covered by the Ordinance and some of those matters undoubtedly required the assent of the President to make the legislation valid. 55 Cal WN 297: ILR (1952) 1 Cal 168: AIR 1951 Cal 346 (348) (Pt A) (Prs 12, 13) (DB).

—WEST BENGAL SPECIAL COURTS ACT (10 OF 1950)

SECTION 5

●——S. 5 (1) — Validity — Discrimination in criminal trials — Classification based on speedier trial of offences — Applicability of Art. 14, Constitution of India, to rule of procedure — Provision offends Art. 14 of the Constitution and is ultra vires — Constitution of India, Arts. 14 and 13.

Per Fazl Ali, Mahajan, Mukherjea, Chandrasekhara Aiyar and Bose, JJ., Sastri, C. J. Contra.— The provisions of Sec. 5 (1) are ultra vires the Constitution by reason of their being in conflict with Art. 14 of the Constitution.

Per Das J. :— The provision of S. 5 (1) is ultra vires the Constitution only so far as it allows the State Government to direct any case to be tried by the Special Court. The rest of Sec. 5 (1) is valid.

Per Sastri, C. J. :— It is difficult to hold that S. 5 (1) in whole or in part is discriminatory. AIR 1952 Cal 150 (FB), Affirmed; Case-law discussed. State of West Bengal v. Anwar Ali, 1952 Mad WN 460: 1952 SCJ 55: 1952 SCR 284: 1952 Mad WN (Cr) 124: 1952 Cr LJ 510: AIR 1952 SC 75 (81, 84, 86, 89, 91, 92, 93, 96, 97, 101) (Prs 15, 24, 27, 37, 38, 45, 46, 50, 51, 52, 63, 64, 76).

●——S. 5 (1) — Provision is discriminatory between persons and offends against Art. 14 of the Constitution in so far as they empower State to direct trial of any case by Special Judge and therefore is ultra vires — (Constitution of India, Articles 14 and 13 (2)).

[Editorial Note—This decision has been confirmed on 11-1-1952 by the Supreme Court (See AIR 1952 SC 52), which held that the whole Act was ultra vires]. Anwar Ali Sarkar v. State of W. B., 1952 Cri LJ 450: AIR 1952 Cal 150 (157 to 170) (Pt B) (Prs 51, 62, 63, 73, 74, 78, 88, 92, 103 to 104, 109, 117, 122) (FB).

●——S. 5 (1) — Word "cases" does not mean "cases requiring speedier trials" — Preamble cannot be looked into. See Interpretation of Statutes Preamble. 1952 Cri LJ 450: AIR 1952 Cal 150 (FB).

—WEST BENGAL TRIBUNALS OF CRIMINAL JURISDICTION ACT (14 OF 1952)

PREAMBLE

——Pre. and Sch., Items 1 to 3 — Act applies to offences under item 3 committed before the Act came into force. AIR 1955 NUC (Cal) 2876 (DB).

SECTION 2

●——S. 2 (b), S. 4 (1), Proviso — Validity of— — If contravene Art. 14 of Constitution.

The Court should apply the dual test in examining the validity of the impugned statute. Is the classification rational and based on intelligible differentia; and, has the basis of differentiation any rational nexus with its avowed policy and object? If both these tests are satisfied, the statute must be held to be valid. If either of the two tests is not satisfied, the statute must be struck down as violative of Art. 14. If any state of facts can reasonably be conceived to sustain a classifi-

cation, the existence of that state of facts must be assumed. AIR 1951 SC 41 and AIR 1953 SC 404, Foll.

The West Bengal Tribunals of Criminal Jurisdiction Act (14 of 1952) was passed because the Legislature thought it expedient, in the interest of the security of the State, the maintenance of public peace and tranquillity and the due safeguarding of industry and business, to provide for the speedy trial of the offences specified in the schedule.

Held, by the majority (Sinha, C. J., Gajendragadkar and Shah, JJ.; Sarkar and Subba Rao, JJ., contra), that the impugned provisions contained in S. 2 (b) and the proviso in S. 4 (1) could not be said to contravene Art. 14. But if in issuing the notification authorised by S. 2 (b) the State Government acted mala fide or exercised its power in colourable way that could always be effectively challenged.

Per Sarkar and Subba Rao, JJ., Dissenting: S. 2 (b) of the Act in so far as it permits an area which was a disturbed area in the past to be declared a disturbed area for the purposes of the Act, offends Art. 14 of the Constitution and is, therefore, unconstitutional and void. Kangshari Haldar v. State of West Bengal, **(1960) 2 SCR 646: 1960 Mad LJ (Cri) 448: 1960 SCJ 629: 1960 Cri LJ 654: AIR 1960 SC 457 (459, 461, 464, 467) (Pt A) (Prs 4, 9, 19, 40).**

SECTION 4

●——**Ss. 4 (1), Proviso and 2 (b) — Special** Courts and special procedure — S. 2 (b) and S. 4 (1), Proviso, held did not contravene Art. 14 of Constitution — Tests for application of Art. 14. See Public Safety — West Bengal Tribunal of Crl. Jurisdiction Act (14 of 1952), S. 2 (b). **AIR 1960 SC 457.**

——**S. 4 and Schedule — 'Scheduled offences' — Offences punishable under S. 397, Penal Code — (Penal Code (1860), S. 397).**

It may be reasonably said that a proper description of an offence punishable under S. 397, I. P. Code, would be given by the words "an offence of robbery or dacoity for which the offender is liable to punishment under S. 397, I. P. Code". The omission to use these words cannot, however, take away the fact that something definite is understood when the schedule speaks of an offence 'punishable under S. 397, I. P. Code'. One understands by these words an offence or robbery or dacoity in which the offender uses any deadly weapon or causes grievous hurt to any person or attempts to cause death or grievous hurt to any person. The Legislature did not think it right to include every offence of robbery in the schedule for the special procedure of trial laid down in the Act, but thought proper to include only certain kinds of robbery, the robbery for which the offender is liable to the minimum punishment under S. 397, I. P. Code. There is, therefore, no substance in the contention that the words used in S. 397, I. P. Code, do not indicate an offence and that, therefore, when the schedule mentions an "offence punishable under S. 397, I. P. Code", it means nothing at all and there is no scheduled offence. **1955 Cri LJ 657: 59 Cal WN 312: AIR 1955 Cal 177 (179) (Pt A) (Pr 7) (DB).**

——**Ss. 4, 5 and 10 — Offence under S. 397, Penal Code, taken cognizance of — Legality of trial for offence under S. 394, Penal Code — (Penal Code (1860), Ss. 397 and 394) — (Criminal P. C. (1898), Ss. 236 and 238).**

There can be no doubt that a person accused of an offence under S. 397, Penal Code, which is a scheduled offence, can at the same trial be, by reason of S. 236. Criminal P. C., tried for an offence under S. 394, Penal Code. Where the Acts are obviously of such a nature that if certain facts could be proved, the offence would be punishable under S. 397, Penal Code, whereas if certain lesser facts could be proved, the offence would be punishable under S. 394, Penal Code, the Tribunal acts rightly as regards the accused persons against whom it had already taken cognizance of an offence under S. 397, Penal Code, on the charge-sheet submitted by the Police, in trying them also for the non-scheduled offence under S. 394, Penal Code.

The argument that as S. 5 of the Act provides for cognizance being taken by the Tribunal only of scheduled offences and the Act contains no provision for cognizance being taken by the Tribunal of non-scheduled offences, the Tribunal has no power in law to take cognizance of non-scheduled offences and could not try an offence under S. 394, Penal Code, and so it could not be said that the accused could under the Criminal Procedure Code, be charged at the same trial for an offence of which it has taken cognizance is not well founded in law. Section 10 of the Act has made all the provisions of the Code of Criminal Procedure so far as they are not inconsistent with the provisions of the Act applicable to all matters, upon a trial by a Tribunal as if the Tribunal were a Court of Sessions exercising original jurisdiction. Therefore, the contention that the accused could not be charged under S. 394, Penal Code, at the same trial for an offence under S. 397, Penal Code, must be rejected.

For the same reasons the objection to the trial of the accused for offences under the Explosive Substances Act based on the assumption that as cognizance could not be taken by the Tribunal of those offences they could not try the accused for these offences must also fail. **1955 Cri LJ 657: 59 Cal WN 312: AIR 1955 Cal 177 (179, 180) (Pt B) (Prs 10 to 12, 14 to 16) (DB).**

——**S. 4 — Joint trial — Some accused charged with scheduled offence and others not — Effect— (Criminal P. C. (1898), Ss. 530 and 239).**

The Tribunal has no jurisdiction to try persons in the absence of allegation in the charge-sheet that they had committed any scheduled offence. But the fact that the Tribunal had acted without jurisdiction in respect of some of the accused because there was no charge of scheduled offences against them has no effect on the legality of the trial of the other accused to try whom the Tribunal had jurisdiction. **1955 Cri LJ 657: 59 Cal WN 312: AIR 1955 Cal 177 (180) (Pt C) (Pr 18) (DB).**

——**S. 4 (1), Proviso — Not void as offending** Art. 14 — Special Courts and special procedure. See Constitution of India, Art. 14. **AIR 1955 NUC (Cal) 2876 (DB).**

——S. 4 (1), Proviso — Taking cognizance of scheduled as well as non-scheduled offences at same time — Trial in respect of scheduled offences does not become illegal. AIR 1955 NUC (Cal) 2876 (DB).

——Ss. 4 (2) and 5 — Conditions for assumption of jurisdiction by Special Tribunal — Special Tribunal can assume jurisdiction to try scheduled offences only when case in respect of it is distributed to the Tribunal by State Government and Tribunal has taken cognizance either on petition of complaint or police report. AIR 1955 NUC (Cal) 2876 (DB).

SECTION 5

——Ss. 5, 8 — **Tribunal constituted under Act— Competency to try offence committed prior to enactment of the statute.**

The Tribunals of Criminal Jurisdiction Act, 1952, did not create any new offences nor did it provide for enhanced punishment for any old offence. Apart from S. 8, which provides for an appeal to the High Court by a person convicted by the Tribunal, the provisions of this Act relate to the procedure for trial of offences and consequently must be held to be retrospective in their operation. Section 8 giving a right of appeal is no doubt a provision of substantive law, but as it gives the right of appeal to any person convicted on a trial held by a Tribunal, it applies whenever The trial itself is held after the Act was passed. Hence, the provisions relating to a trial by a Special Tribunal constituted under the Act are applicable to offences committed before the Act was passed. 1955 Cri LJ 1348: AIR 1955 Cal 535 (538) (Pt A) (Pr 11) (DB).

——S. 5 — Offence under S. 397, Penal Code, taken cognizance of — Legality of trial for offence under S. 394, Penal Code. See Public Safety — West Bengal Tribunals of Criminal Jurisdiction Act (14 of 1952), S. 4. AIR 1955 Cal 177 (DB).

——S. 5 — Conditions for assumption of jurisdiction by Special Tribunal. See Public Safety — West Bengal Tribunals of Criminal Jurisdiction Act (14 of 1952), S. 4 (2). AIR 1955 NUC (Cal) 2876 (DB).

SECTION 8

——Ss. 8 and 5 — Tribunal constituted under Act is competent to try offences committed prior to enactment of the statute. See Public Safety — West Bengal Tribunals of Criminal Jurisdiction Act (14 of 1952), S. 5. 1955 Cri LJ 1348: AIR 1955 Cal 535 (DB).

SECTION 10

——Ss. 10, 12 — Ppwer and jurisdiction of Special Tribunals of tendering pardon — (Criminal P. C. (1898), Ss. 193, 338).

The Tribunals of Criminal Jurisdiction Act, 1952, was enacted in place of the West Bengal Special Courts Act, 1950, which is repealed by S. 12 of the present Act. In enacting this new Act, the Legislature in its wisdom has omitted any provision similar to what had been enacted in the third sub-section of S. 6. In this view it is impossible to escape any conclusion that the Legislature decided to take away the power and jurisdiction of tendering pardon from the Special Tribunals.

The conclusion that necessarily follows from this is that the Special Judge presiding over the Special Tribunal acts without jurisdiction in tendering pardon to one of the accused and that consequently the evidence as recorded by him of such accused cannot be taken into consideration for the purpose of the trial. 1955 Cri LJ 1348: AIR 1955 Cal 535 (538) (Pt B) (Pr 13) (DB).

——S. 10 — Offence under S. 397, Penal Code, taken cognizance of — Legality of trial for offence under S. 394, Penal Code. See Public Safety — West Bengal Tribunals of Criminal Jurisdiction Act (14 of 1952), S. 4. AIR 1955 Cal 177 (DB).

SECTION 12

——Ss. 12 and 10 — Special Tribunal has no power of tendering pardon. See Public Safety — West Bengal Tribunals of Criminal Jurisdiction Act (14 of 1952), S. 10. 1955 Cri LJ 1348: AIR 1955 Cal 535 (DB).

SCHEDULE

——Sch. — Offence punishable under S. 397, I. P. Code — Meaning. See Public Safety — West Bengal Tribunals of Criminal Jurisdiction Act (14 of 1952), S. 4. AIR 1955 Cal 177 (DB).

——Sch., Items 1 to 3 — Applicability of Act to offences committed before Act came into force. See Public Safety — West Bengal Tribunals of Criminal Jurisdiction Act (14 of 1952), Preamble. AIR 1955 NUC (Cal) 2876 (DB).

PUBLIC SERVANT

See (1) Civil P. C. (1908), Ss. 2 (17), 80 and O. 27.
(2) Constitution of India, Arts. 284, 309, 311.
(3) Criminal P. C. (1898), Ss. 195, 197, 476.
(4) Judicial Officers' Protection Act (1850).
(5) Penal Code (1860), Ss. 21 and 161-171.
(6) Prevention of Corruption Act (1947).
(7) Public Servants (Inquiries) Act (1850).
(9) Statutory cross-references under "Criminal law".

Allowing prisoner to escape
See Penal Code (1860), S. 129.

Defined.
See Penal Code (1860), S. 21.

Defamation of
—Prosecution for.
See Criminal P. C. (1898), S. 198-B

Disobedience of order promulgated by
See Penal Code (1860), S. 188.

Escape from custody, negligently allowing.
See Penal Code (1860), S. 223.

Furnishing false information to
See Penal Code (1860), Ss. 177, 182.

High Court employees.
See Allahabad High Court (Conditions of Service Staff) Rules (1946), R. 12.

Incorrect record, framing of
See Penal Code (1860), S. 218.

Obstruction in discharge of public duties
See Penal Code (1860), S. 186.
Omission to give notice or information to
See Penal Code (1860), S. 176.
Taking illegal gratification by.
See (1) Penal Code (1860), Ss. 161, 162, 165, 165-A.
(2) Prevention of Corruption Act (1947).

PUBLIC SERVANTS (INQUIRIES) ACT (37 OF 1850)

PREAMBLE

●——Pre. — 'Removable from his appointment' — Interpretation — I. C. S. Officer serving with State Government — State Government is competent to initiate inquiry against such officer under S. 2 — The preamble of the Act shows that the intention was that there should be a uniform law regulating inquiries into the behaviour of public servants not removable without sanction of Government and the inquiry was to be made by either the Central Government or the State Government — (Words and Phrases) — Remove — See Public Servants (Inquiries) Act (37 of 1950), S. 2. AIR 1964 SC 295.

——Pre. — Right to claim salary from Crown — Contractual right — There is no contract, within the meaning of Contract Act, by the Crown to pay any salary to a public servant — U. P. Rules are meant as guidance only and do not form the terms of the contract between the Crown and the Civil Servant — U. P. Civil Service (Executive Branch) Rules, 1941, R. 25. **AIR 1951 All 205 (209, 218, 223) (Pt B) (Prs 13, 29, 56) (DB).**

[Reversed on another point in AIR 1955 SC 600].

——Pre. — Non-selection posts — Promotion — Position as to — Position in Eastern Railway is that promotion is to be by order of seniority and not in order of merit — This does not, however, mean that the seniormost man must be promoted to higher post even if unsuitable—(Master and Servant). See Railway Establishment Code, Vol. 1 (1951), Appendix 2-A. **AIR 1956 Cal 465.**

——Pre. — The Public Servants (Inquiries) Act 1977 Smt., is an optional measure and it is not possible to treat the provisions of that Act as constituting any restriction upon the power of dismissal which his Highness or his Government may possess independently of that Act. See Kashmir Regulation 1 of 1991. **AIR 1951 J and K 1 (DB).**

——Pre. — Nature of Act — Not repealed pro tanto by the Prevention of Corruption Act, 1947.

The Public Servants (Inquiries) Act, 1850 is not a penal Act and its object is not to provide punishment for an officer guilty of misconduct. The Act merely provides for an inquiry into the conduct of a Government servant and the only thing that can be done as a consequence of the inquiry is the dismissal or removal of the Government servant. The Act and the Prevention of Corruption Act lie in entirely different fields and there is no question of either Act being repealed pro tanto by the other. AIR 1954 SC 375, Rel. on. **ILR (1956) Punj 236: AIR 1956 Punj 58 (70) (Pt I) (Prs 36, 37) (DB).**

SECTION 2

SYNOPSIS

(Public Servants (Inquiries) Act (1850), S. 2.)

1. Applicability.
2. Enquiry — Nature, purpose and object of.
3. Validity.
4. Applicability of Criminal P. C.
5. Appointment — Meaning of.
6. Misbehaviour — Meaning of.
7. Jurisdiction of Civil Court.
8. Suspension.

1. Applicability.

●——Ss. 2, 23 — Applicability — I. C. S. Officer employed under State — State Government's power to direct inquiry against him.

Where an I. C. S. Officer is employed under the State Government, there is nothing in the Constitution which abrogates the authority of the State Government to direct an enquiry against him under S. 2 of the Act. AIR 1956 Punj 58, Affirmed.

The special method of recruitment of the officer to the service does not warrant the view that the officer is not employed under the Government of the State, in connection with the affairs of which he was serving. S. Kapur Singh v. Union of India, **1960 SCJ 487: (1960) 1 Mad LJ (SC) 116: (1960) 1 Andh WR (SC) 116: (1960) 1 SCA 680: 1960 Mad LJ (Cr) 406: ILR (1960) 1 Punj 824: (1960) 2 SCR 569: AIR 1960 SC 493 (496) (Pt A) (Pr 7).**

●——S. 2 — Applicability — Disciplinary proceedings against members of I. C. S. — Enquiry — Obligation to hold enquiry under R. 55, Civil Services (Classification, Control and Appeal) Rules.

Members of the Indian Civil Service are not liable to be dismissed from their appointment without the sanction of the Government under which they are serving and are not excluded from the purview of the Public Servants (Inquiries) Act, 1850.

Rule 55 of the Civil Services (Classification, Control and Appeal) Rules means that an order of dismissal, removal or reduction in rank shall not be passed without an enquiry either according to the procedure prescribed by the Public Servants (Inquiries) Act, 1850, or the procedure prescribed by the Rule. The Rule does not mean that even if an enquiry be held under the Public Servants (Inquiries) Act, 1850, before an order of dismissal of removal or reduction is passed against a member of the civil service, another enquiry expressly directed under R. 55 shall be made. AIR 1954 SC 375, Rel. on.

By Art. 314, to civil servants appointed by the Secretary of State the same rights in disciplinary matters as were available before the Constitution (including a right to enquiry under R. 55 of the Civil Services (Classification, Control and Appeal) Rules) are guaranteed. But the guarantee being one of an enquiry directed under one of two alternative powers conferred either under the Public Servants (Inquiries) Act or under R. 55 of the Civil Services (Classification, Control and Appeal) Rules, the exercise of authority under one of the two alternatives is not prima facie illegal.

The procedure prescribed by Act 37 of 1850 and the procedure to be followed under R. 55 are in substance not materially different. No discrimination is practised merely because resort is had to one of two alternative sources of authority, unless it is shown that the procedure adopted operated to the prejudice of the public servant concerned. On a plea of inequality before the law, the enquiry held by the Enquiry Commissioner is not liable to be declared void because it was held in a manner though permissible in law, not in the manner, the public servant says it might have been held. S. Kapur

Singh v. Union of India, 1960 SCJ 487: (1960) 1 MLJ (SC) 116: (1960) 1 An WR (SC) 116: (1960) 1 SCA 680: 1960 Mad LJ (Cr) 406: ILR (1960) 1 Punj 824: (1960) 2 SCR 569: AIR 1960 SC 493 (497 to 500) (Pt C) (Prs 8, 10, 13, 14, 16).

●——S. 2 — Applicability.

The Public Servants (Inquiries) Act (Kashmir) is applicable in cases of suspension or removal from service. It does not apply in the case of demotion. Gulam Rasul v. State of Jammu and Kashmir, AIR 1956 J and K 17 (22) (Pt E) (Pr 27) (FB).

(Reversed on another point in AIR 1961 SC 1301].

——S. 2 — Applicability — Satisfaction of Government is foundation of enquiry. See Travancore Public Servants (Inquiries) Act (10 of 1122), S. 2. AIR 1958 Ker 374 (DB).

——Ss. 2, 23 — Member of I. C. S. employed under Punjab Government — Punjab State Government is competent to direct inquiry under the Act against him — Appointment of a Judge of Punjab High Court as Commission of Inquiry by Governor with approval of Government of India is valid — Constitution of India, Art. 217. AIR 1960 SC 493, Foll. (1961) 63 Pun LR 780.

——Ss. 2, 23 — Civil Servant employed under State Government — Power of State Government to order public enquiry — Irregularity in ordering inquiry — Effect — (Civil Services (Classification, Control and Appeal) Rules, Rr. 52, 55).

S. 2 read with S. 23 makes it quite clear that a public enquiry into the conduct of an officer holding a particular post can be ordered only by the Government, Central or Provincial, which is clothed with the power of ordering his removal from the said post.

Thus in the case of a civil servant employed under a State Government, the State Government which has power to appoint him to the post of Deputy Commissioner has power also to order his removal from the said post. It follows as a consequence that, in view of the provisions of S. 2, the State Government has full power to order an inquiry into charges brought against such civil servant although its power to award a punishment to him is strictly limited by the provisions of R. 52 of the Civil Services (Classification, Control and Appeal) Rules.

Even assuming that the State Government had no power to order such an inquiry against a civil servant under the Act, such an irregularity entitles the public servant to claim that the entire proceedings should be quashed and that the order which is based on those proceedings should be set aside. The provisions of the Public Servants (Inquiries) Act, 1850, or of R. 55, of the Civil Services (Classification, Control and Appeal) Rules are fully satisfied if the officer conducting the removal proceedings observes the fundamental rules of a fair and impartial trial even though he does not comply with the technical rules of evidence and procedure. Proceedings of this kind cannot be rendered void when they are conducted in accordance with the rules of natural justice and they cannot be set aside for non-compliance with the legal formalities unless the failure to observe the said formalities has brought about a miscarriage of justice. ILR (1956) Punj 236: AIR 1956 Punj 58 (62) (Pt B) (Pr 7) (DB).

2. Enquiry — Nature, purpose and object of.

●——S. 2 — Enquiry under Act is neither prosecution nor punishment — In an enquiry under the Act there is neither any question of investigating an offence in the sense of an act or omission punishable by the law for the time being in force, nor is there any question of imposing punishment prescribed by law which makes that act or omission an offence. See Constitution of India, Art. 20 (2). 1954 Cri LJ 993: AIR 1954 SC 375.

●——S. 2 — Scope — Civil servant — Dismissal of — Purpose of enquiry under Public Servants (Inquiries) Act — The purpose of inquiry under the Public Servants (Inquiries) Act, 1850, is to help Government to come to a definite conclusion regarding the misbehaviour of a public servant and thus enable it to determine provisionally the punishment which should be imposed upon him, prior to giving him reasonable opportunity of showing cause as is required by Art. 311 (2) of the Constitution. See Constitution of India, Art. 311 (2). 1954 Cri LJ 993: AIR 1954 SC 375.

——S. 2 — Object of inquiry.

As the law stands at present, the only purpose for which an enquiry under Act 37 of 1850 could be made is to help the Government to come to a definite conclusion regarding the misbehaviour of a public servant and thus enable it to determine provisionally the punishment which should be imposed upon him, prior to giving him a reasonable opportunity of showing cause, as is required under Art. 311 (2) of the Constitution. An enquiry under the Act is not at all compulsory and it is quite open to the Government to adopt any other method if it so chooses. It is a matter of convenience merely and nothing else. AIR 1956 Pat 384 (395) (Pt F) (Pr 29) (DB).

●——S. 2 — Proceedings under the Act — Dismissal order — Writ Petition — Appeal under Article 133, Constitution of India — Proceedings, if civil — Any proceeding in a Court of law brought to vindicate or enforce a civil right would fall within the word 'sue' and if a writ of certiorari to quash an order of Government requisitioning a flat can fall within the word "sue", it would be difficult to contest that a writ directed against proceedings under Act 37 of 1850, or to challenge the order made as a consequence of those proceedings is not within the words "civil proceedings". See Constitution of India, Art. 133. AIR 1957 Punj 173 (FB).

3. Validity.

●——S. 2 — Procedure and provisions of Public Servants (Inquiries) Act are not more drastic and less advantageous than those of the 1955 rules — Public Servants (Inquiries) Act (1850), does not violate Art. 14. See Constitution of India, Art. 14. 1963 Cur LJ (SC) 105: 1964 SCD 1: (1964) 1 SCA 313: (1964) 4 SCR 204: 1964 (1) Cri LJ 224 (SC).

——Ss. 2, 3 and 4 — Procedure — Civil Services Rules are mere administrative rules and they have no statutory force — Compliance with the said Rules is not essential for enquiry against a public servant — Procedure under Public Servants (Inquiries) Act followed — Constitutional guarantee is satisfied. See Civil Services (Classification, Control and Appeal) Rules, Rule 55. AIR 1960 Pat 116 (DB).

——Ss. 2, 11, 15 and 19 — Public servant subject to All India Services (Discipline and Appeal) Rules, 1955 — Member of Indian Civil Service — Enquiry against him under Act — No violation of Art. 14. See Constitution of India, Art. 14. (1961) 63 Pun LR 780.

——S. 2 — Validity of Act — Does not contravene Art. 14 of Constitution — (Constitution of India, Art. 14).

The Public Servants Inquiries Act, 1850 is an empowering Act and it vests the Government with power to proceed against a Government servant who has been guilty of misconduct. The fact that it is not obligatory on the Government to proceed against every Government servant against whom an imputation may be made is scarcely a violation of the provisions of Art. 14. There is no question of any classification. To give such discretion to Government is not only lawful but essential. There is therefore nothing in this Act which offends against the provisions of Art. 14. **ILR (1956) Punj 236: AIR 1956 Punj 58 (70) (Pt H) (Pr 35) (DB).**

——S. 2 — Inquiry under by High Court Judge — No request by President — Validity of inquiry — (Constitution of India, Sch. II, Pt. D, Para 11 (b) (i)).

Paragraph 11 (b) (i) of Part D of the Second Schedule of the Constitution deals merely with the remuneration of Judges. There is nothing to preclude a Judge from undertaking an inquiry of a public servant under the Public Servants (Inquiries) Act, 1850, at the request of a State Government and the inquiry does not become invalid merely because it was not undertaken at the request of the President. **ILR (1956) Punj 236: AIR 1956 Punj 58 (70) (Pt J) (Pr 38) (DB).**

——S. 2 — Reasonable classification — Enquiry of public servants — Power of Government to appoint anyone for enquiry — Cannot come under Article 14, Constitution of India — The Central Act and the Punjab Rules are made for different class of persons and there is reasonable classification between them — See Constitution of India, Art. 14. AIR 1955 Punj 3.

——S. 2 — Procedure — Public servant proceeded against under Appendix 24 of Punjab Civil Services Rules and not under Public Servants (Inquiries) Act — There is no contravention of Art. 14 of the Constitution. See Punjab Civil Services Rules, Appendix XXIV. AIR 1955 Punj 1.

4. Applicability of Criminal P. C.

●——S. 2 — Government servant — Information under S. 154, Criminal P. C. lodged against — Investigation by police pending — No legal bar to Government ordering departmental enquiry.

Where a first information report under Section 154, Criminal P. C. has been recorded against a Government servant that he has committed a cognizable offence, the truth of the same should be ascertained only in an inquiry or trial by the criminal Court when a prima facie case is found by the investigation and a chargesheet is submitted. If the police on investigation finds that no case is made out for submission of a chargesheet the allegations should be held to be untrue, or doubtful and in such a case there is no need for any further inquiry in the same matter. In most cases it would be proper and reasonable for Government to await the result of the police investigation and where the investigation is followed by an inquiry or trial, the result of such inquiry or trial, before deciding to take any disciplinary action against any of its servants. It would be proper and reasonable also, generally, for Government not to take action against a Government servant when on investigation by the police, it is found that no prima facie case has been made out. Even though this appears to be a reasonable course which is and will ordinarily be followed by Government there is no legal bar to the Government ordering a departmental enquiry even in a case where a first information report under Section 154 having been lodged an investigation will follow. R. P. Kapur v. S. Pratap Singh Kairon. **1963 Cur LJ (SC) 105: 1964 SCD 1: (1964) 1 SCA 313: 1964 (1) Cri LJ 224 (228) (Pt B) (Pr 13) (SC).**

——S. 2 — Inquiry under — Joinder of charges — Applicability of provision of Cr. P. Code — (Cr. P. Code (1898), S. 233).

The provisions of the Criminal Procedure Code relating to the misjoinder of charges do not apply to the Public Servants (Inquiries) Act and the inquiry cannot be held to be bad merely on the ground that more than three charges were made the subject-matter of one inquiry. **ILR (1956) Punj 236: AIR 1956 Punj 58 (71) (Pt L) (Pr 41) (DB).**

5. Appointment — Meaning of

●——Ss. 2 and 23, Preamble — 'Removable from his appointment' — Interpretation — I. C. S. Officer serving with State Government — State Government is competent to initiate inquiry against such officer under S. 2 — Words and Phrases — Remove.

Per Majority (Wanchoo, Das Gupta and Ayyangar, JJ., contra) — One of the conditions which has to be satisfied, before an enquiry under Section 2 can be directed to be made into the truth of the imputations of misbehaviour by a person in the service of the Government, is that the person should not be 'removable from his appointment' without the sanction of that Government. The words 'removable from his appointment' do not indicate 'removable from service' but merely 'removable from the appointment in the sense of office or post held by the officer'. In this sense, an I. C. S. or other such officer, serving with the State Government, satisfies the condition of 'removability', although he is not capable of being dismissed or removed from service by that Government, and so falls within those public servants against whom the State Government can initiate proceedings under Section 2.

It will be seen from the Preamble to the Act that ever since 1850, the intention was that there should be a uniform law for regulating inquiries into the behaviour of public servants not removable without the sanction of Government and the inquiry was to be made either by the Central Government or by the Governments of the Presidencies (later, of the Provinces and now of the States) and the provisions of Sections 2 and 23 between them pointed out which Government it was to be. At every stage of the Inquiries Act, 1850, right from the beginning till to-day, there has always been a key furnished by S. 23 to the solution of the question which Government should take action and it has not been necessary to go to other statutes.

The original Inquiries Act as also the amendments made in it from time to time was designed to bifurcate the power of inquiry between the Central Government and the local Government and the word 'remove' simpliciter which might have had the restricted meaning was never so used. It was first qualified by the words 'from office' and is now qualified by the words from his 'appointment. The word 'remove' cannot therefore be defined without the qualifying words.

Construing the phrase 'removable from appointment' occurring in S. 2 with the help of the key furnished by S. 23 which is merely a definition of the words 'the Government' wherever used in the Act, the words 'in the service of' in the expression 'in the service of the Government' mean 'while serving with' and do not convey the sense of 'employment by'. The word 'appointment' can thus

only mean a 'post', 'station' or 'office' and does not refer to the whole service as such. Removal, therefore, cannot be the equivalent of loss of service but the loss of 'post', 'station' or 'office'. S. 2 is intended to apply only to an officer whose 'post', 'station or 'office' can only be lost under orders of appropriate Government and not any lesser authority. In this sense, the action of the State Government is clearly exercisable in the case of an I. C. S. Officer serving with the State Government. To be able to say that the inquiry could be made by the other Government, one would have to discard altogether S. 23 as a key and the interpretation placed on the section by the Supreme Court in Sardar Kapur Singh's case, AIR 1960 SC 493.

Per Wanchoo, Das Gupta and Ayyangar, JJ., contra:— The word 'removable' in the words 'not removable from his appointment' without the sanction of the Government occurring in S. 2, means removable from his appointment in the sense of terminating his appointment and signifies the penalty numbered 6 in R. 3 of All India Services (Discipline and Appeal) Rules, 1955, where the expression is expanded to mean 'removal from the service which shall not disqualify for future employment'. The State Government therefore is not the appropriate Government to direct an inquiry under S. 2 of the Act against an I. C. S. Officer in the service of that State Government. The condition that the officer against whom proceedings are taken must be one who is amenable to the disciplinary control of the Government which initiates the inquiry and is competent to inflict upon him the punishment of removal has been the basic ratio and purpose of the Act of 1850 ever since it was enacted. The change effected by the amendment brought in 1897 retained this characteristic, though it gave an overriding power to the Governor-General to initiate proceedings in all cases whether or not the officer was serving a local Government or the Central Government. It could not, therefore, be that by reason of an adaptation which was effected in 1937, in order to bring the Act into line with the Constitution, the Government of India Act, 1935, a vital change was made which upset this basic feature and conferred a power upon a Provincial Government to institute an inquiry even when such a Government had not the power to punish him by way of removal. The definition of 'the Government' in S. 23 of the Act as it now stands would not in terms apply to that word in the preamble. The result would be that the word 'Government' as used in the preamble would continue to retain the same meaning as it had when the Act was originally enacted in 1850 when the word which S. 23 defined was 'Government' and not 'the Government' as it has done since 1897. If the preamble and the operative provisions have to be reasonably and harmoniously construed, one must posit as a condition for the availability of the power to institute the enquiry under S. 2, that the officer must be one over whom the Government that initiates the proceedings has disciplinary powers extending to his removal from service.

There is practically a parallel provision for conducting an inquiry into the misconduct of an officer under the All India Services (Discipline and Appeal) Rules, 1955 — a proceeding which could be initiated by the State Government where the officer were in the employ of the State Government. Nor is this the only remedy because an officer in the All India Services could be called over to the Union Government and then proceedings even under this Act could be launched against him. In the circumstances the supposed anomaly which is brought in by reason of a definition in S. 23 which does not entirely fit into the provisions of S. 2 of the Act, is no ground at all for adopting a forced construction of S. 2 by reading the word 'removal' in an unusual, if not an unnatural sense. R. P. Kapur v. S. Pratap Singh Kairon, **(1964) 4 SCR 224: AIR 1964 SC 295 (300, 301, 302, 312) (Pt A) (Prs 13, 17, 18, 22, 51).**

——S. 2 — Appointment — Meaning of — Not synonymous with service — (Words and Phrases).

The expression "appointment" appearing in S. 2 has been used not in the sense of designation of a person to discharge the duties of a particular office but meaning only the office or post to which one is appointed. It is not synonymous with the expression "service". A person may be appointed to a service by the Central Government but if he is employed under a State Government he may be appointed to a post by the State Government. **ILR (1956) Punj 236: AIR 1956 Punj 58 (61) (Pt A) (Pr 5) (DB).**

6. Misbehaviour — Meaning of.

——S. 2 — 'Misbehaviour' — Meaning of.

The word 'misbehaviour' by a Government servant in S. 2 of the Public Servants (Inquiries) Act, 1850, means a lapse by him from the proper standard of conduct in the discharge of his functions as a Government servant. That word is not vague. Even in the absence of any detailed instructions or directions as to how a Government servant should act and conduct himself there cannot be any manner of doubt that Government servant is expected and required to act honestly and not to use his position as a Government servant for enriching himself or others. Every dishonest act of a Government servant, including acts by which he uses his position for enriching himself or others would clearly amount to 'misbehaviour'.

The argument that at the date of the Public Servants (Inquiries) Act in 1850 no ascertainable standard of conduct for Government servants had been laid is not available to one against whose conduct an order is made in 1961 and who is governed by the All India Services Conduct Rules, 1954. R. P. Kapur v. S. Pratap Singh Kairon, **1963 Cur LJ (SC) 105: 1964 SCD 1: (1964) 1 SCA 313: 1964 (1) Cri LJ 224 (229) (Pt C) (Prs 14, 15) (SC).**

——S. 2 — Applicability — Enquiry cannot be ordered in case of 'irregularities' — "Misconduct" of a servant comprises positive acts and not mere neglects or failures — See Travancore Public Servants (Inquiries) Act (11 of 1122), S. 2. AIR 1958 Ker 374 (DB).

——S. 2 — 'Misbehaviour' — Meaning — Constitution of India, Arts. 124, 148, 217, 317 and 324.

The word 'misbehaviour' when employed in respect of holders of high offices has a well understood and well-defined meaning according to the tradition and standards maintained by the members of a particular service or office. **(1961) 63 Pun LR 780.**

7. Jurisdiction of Civil Court.

——S. 2 — Enquiry officer following correct procedure — Jurisdiction of Civil Court — Civil Court cannot question findings on appraisal of evidence — All that the court has to see in such cases is whether the constitutional requirements have been satisfied. See Civil Services (Classification Control and Appeal) Rules, R. 55. AIR 1960 Pat 116 (DB).

S. Suspension.

——S. 2 — Suspension during pendency of enquiry into conduct — R. 12 (1) (a) of Kerala Civil Services (Classification, Control and Appeal) Rules empowers the Government to suspend a public servant pending enquiry into his conduct. See Kerala Civil Services (Classification, Control and Appeal) Rules (1957), R. 12 (1) (a). **AIR 1958 Ker 374 (DB).**

SECTION 3

●——Ss. 3, 8, 21 and 22 — 'Court', meaning of — Tests to determine — Commissioner appointed under Act 37 of 1850 is not a Court within the meaning of the term as used in the Contempt of Courts Act — (Evidence Act (1872), S. 3) — (Penal Code (1860), Ss. 19 and 20) — (Words and Phrases — 'Court') — AIR 1954 Pat 289, **Reversed** — AIR 1951 Punj 49, **Overruled** — See Contempt of Courts Act (1952), S. 3. **1956 Cri LJ 156: AIR 1956 SC 66.**

——S. 3 — Scope — Purpose of inquiry under the Act — Procedure — The only purpose for which an inquiry under the Public Servants (Inquiries) Act could be made, is to help Government to come to a definite conclusion regarding the misbehaviour of a public servant and thus enable it to determine provisionally the punishment which should be imposed on him prior to giving him a reasonable opportunity of showing cause as is required by Art. 311 (2) of the Constitution — See Constitution of India, Art. 227. **AIR 1959 Andh Pra 497 (DB).**

——Ss. 3, 21 — Scope — Fundamental Rules and Assam Subsidiary Rules, R. 6.

The fundamental rules have been framed by the State of Assam in the exercise of the powers vesting in it under the Government of India Act. It has provided for the delegation of its powers for administrative efficiency and needs. The Public Servants (Enquiries) Act does not provide for any such delegation. But as the Government acting under the provisions of the Government of India Act could delegate its authority there is no essential conflict between R. 6 of the Fundamental Rules and the provisions of the Public Servants (Inquiries) Act, 1850.

It is true that the Act merely provides for an inquiry and report and not for final decision. But the Fundamental Rules which are complementary complete the picture in this respect by providing that the final decision may be given by any authority exercising delegated powers. The Government when framing the rules has given this power of delegation to itself and in doing so it has not exceeded its rule making power.

Held, that the authority of the Government having been validly delegated, the Deputy Commissioner was virtually exercising powers of the State Government when suspending and directing the compulsory retirement of the petitioner. **ILR (1955) 7 Assam 410: AIR 1956 Assam 12 (14) (Pt A) (Pr 8) (DB).**

SECTION 8

●——Ss. 8, 3, 21, 22 — 'Court', meaning of — Tests to determine—Commissioner appointed under Act 37 of 1850 is not a Court within the meaning of the term as used in Section 3 of Contempt of Courts Act — (Evidence Act (1872), Section 3) — (Penal Code (1860), Sections 19 and 20) — (Words and Phrases — 'Court') — AIR 1954 Pat 289, **Reversed** — AIR 1951 Punj 49, **Overruled.** See Contempt of Courts Act (1952), Section 3. **1956 Cri LJ 156: AIR 1956 SC 66.**

——S. 8 — Commissioner under Act is 'Court' subordinate to High Court within the meaning of Section 3 of the Contempt of Courts Act, 1952. See Contempt of Courts Act (1952), Section 3 **1954 Cri LJ 942: AIR 1954 Pat 289 (DB).**

[Reversed in AIR 1956 SC 66.]

——S. 8 — Contempt of Courts Act (1926), Section 2 — Commissioner acting under Public Servants Inquiries Act is a Court — Evidence Act (1872), Section 3. See Contempt of Courts Act (1926), Section 2. **52 Cri LJ 950 : AIR 1951 Punj 49 (DB).**

[Overruled in AIR 1956 SC 66.]

——S. 8 — 'Protection', meaning of.

The word 'protection' as used in Section 8 of the Act cannot be construed in the wider sense of protection by the H. C. from contempts. In using that word the legislature had in mind the meaning of that word as used in the Judicial Officers Protection Act passed previously in the same year. **53 Pun LR 178: 52 Cri LJ 950: ILR (1951) Punj 362: AIR 1951 Punj 49 (50) (Pt B) (Pr 4) (DB).**

[Overruled on another point in AIR 1956 SC 66.]

SECTION 11

——S. 11 — Public servant subject to All India Services (Discipline and Appeal) Rules, 1955 — Member of Indian Civil Service — Enquiry against him under the Act — No violation of Art. 14 of the Constitution. See Constitution of India, Article 14. **(1961) 63 Pun LR 780.**

——Ss. 11, 15, 16, and 19 — Inquiry under Act against public servant accused of offence — No violation of Article 20 (3). See Constitution of India, Article 20 (3). **(1961) 63 Pun LR 780.**

SECTION 13

——S. 13 — Scope — Compliance — Documents admitted without objection by accused — (Evidence Act (1872), Section 167).

If a formal proof was waived and some of the documents were taken in evidence when their proper custody was proved, there was no such violation of the rules of evidence as would justify the Court to hold that the enquiry was not in conformity with the provisions of the Public Servants (Inquiries) Act, 1850. **AIR 1956 Pat 384 (396) (Pt H) (Pr 31) (DB).**

SECTION 15

●——S. 15 — Section 15 does not contravene Article 20 (3). See Constitution of India, Art. 20 (3). **1963 Cur LJ (SC) 105: 1964 SCD 1: (1964) 1 SCA 313: (1964) 4 SCR 204: 1964 (1) Cri LJ 224 (SC).**

——S. 15 — Public Servant subject to All India Services (Discipline and Appeal) Rules, 1955 — Member of Indian Civil Service — Enquiry against him under the Act — No violation of Article 14 of the Constitution. See Constitution of India, Article 14. **(1961) 63 Pun LR 780.**

——S. 15 — Inquiry under Act against public servant accused of offence — No violation of Article 20 (3) of the Constitution. See Constitution of India, Article 20 (3). **(1961) 63 Pun LR 780.**

SECTION 16

——S. 16 — Accused examining himself as witness — If illegal — (Oaths Act (1873), Sec. 5.)

Per Das, C. J.—None of the provisions of the Public Servants (Inquiries) Act, 1850, say anything as to whether the accused person can exa-

mine himself as a witness or not. There was no violation of the provisions of the Public Servants (Inquiries) Act, 1850 when the accused came and was examined as defence witness nor were the provisions of Section 5, of the Oaths Act violated in such a case. **AIR 1956 Pat 384 (395) (Pt C) (Pr 30) (DB).**

——**S. 16 — Inquiry under the Act against public servant accused of offence — No violation of Article 20 (3) of the Constitution.** See Constitution of India, Article 20 (3). **(1961) 63 Pun LR 780.**

——**S. 16 — Scope of — No objection to examine every item of evidence.**

There is nothing in the wording of Section 16, to warrant such an assumption, that the enquiry Commissioner is obliged to examine every item of evidence which the defence wishes to call. Every Court, tribunal or enquiry officer has the discretion of disallowing irrelevant or unnecessary evidence. **ILR (1956) Punj 236: AIR 1956 Punj 58 (70) (Pt K) (Pr 40) (DB).**

SECTION 17

——**Ss. 17 (1) (b), 49 — Document merely evidencing severance of status and fixing shares of coparceners in joint property — No partition of property by metes and bounds effected thereunder — Document is no compulsorily registrable and would not come within the mischief of Section 49.** AIR 1958 SC 706, Followed. **(1964) 30 Cut LT 168 (Orissa).**

SECTION 19

——**S. 19 — Public servant subject to All India Services (Discipline and Appeal) Rules, 1955 — Member of Indian Civil Service — Enquiry against him under the Act — No violation of Art. 14 of the Constitution.** See Constitution of India, Article 14. **(1961) 63 Pun LR 780.**

SECTION 21

●——**Ss. 21, 3, 8, 22 — 'Court', meaning of — Tests to determine — Commissioner appointed under Act 37 of 1850 is not a Court within the meaning of the term in Section 3 of Contempt of Courts Act, 1952 —** (Evidence Act (1872), S. 3) — (Penal Code (1860), Sections 19 and 20) — (Words and Phrases — 'Court') — AIR 1954 Pat 289, **Reversed** — AIR 1951 Punj 49, **Overruled.** See Contempt of Courts Act (1952), Section 3. **1956 Cri LJ 156: AIR 1956 SC 66.**

——**Ss. 21 and 3 — Scope — Fundamental Rules and Assam Subsidiary Rules, R. 6.**

The Fundamental Rules (Assam) have been framed by the State of Assam in the exercise of powers vesting in it under the Government of India Act. It has provided for the delegation of its powers for administrative efficiency and needs. The Public Servants (Inquiries) Act does not provide for any such delegation. But as the Government acting under the provisions of the Government of India Act could delegate its authority there is no essential conflict between Rule 6 of the Fundamental Rules and the provisions of the Public Servants (Inquiries) Act, 1850). See Public Servants (Inquiries) Act (37 of 1850), Section 3. **AIR 1956 Assam 12 (DB).**

——**S. 21 — Bias — Personal interest of Judge — Proof of bias — Bias alleged against Commissioner appointed under Public Servants (Inquiries) Act — No one is allowed to be a judge in his own cause.** The rule applies and has been asserted not only in the case of Courts of justice in the proper sense but also in the case of administrative tribunals who are required to act judicially.

But there is a sharp distinction between a case of pecuniary interest and a case of non-pecuniary interest.

A mere possibility of bias is not enough to disqualify a judge however. See Constitution of India, Article 226. **AIR 1955 Pat 131 (DB).**

SECTION 22

●——**Ss. 22, 3, 8 and 21 — 'Court meaning of — Tests to determine — Commissioner appointed under Act 37 of 1850 is not a Court within the meaning of Section 3 of Contempt of Courts Act, 1952 —** (Evidence Act (1872), Section 3) — (Penal Code (1860), Sections 19 and 20) — (Words and Phrases — 'Court') — AIR 1954 Pat 289, **Reversed** — AIR 1951 Punj 49, **Overruled.** See Contempt of Courts Act (1952), Section 3. **1956 Cri LJ 156: AIR 1956 SC 66.**

——**S. 22 — Commission — Nature of.**

It is apparent from Section 22 of Act (37 of 1850), that the Commission is in the nature of an advisory body and not a Court or Tribunal in the strict sense of the term and his report is not binding on the parties or even on the Government. It is open to the Government to direct the Commission to take further evidence or to ask for further explanation. **ILR (1958) 8 Assam 91: AIR 1957 Assam 77 (82) (Pt H) (Pr 15) (DB).**

SECTION 23

●——**Ss. 23, 2 and Preamble — 'Removable from his appointment' — Interpretation — I. C. S. Officer serving with State Government — State Government is competent to initiate inquiry against such officer under Section 2 read with Sec. 23 —** There has always been a key furnished by Section 23, to the solution of the question which government should take action and it has not been necessary to go to other statutes. — (Words and Phrases — Remove). See Public Servants (Inquiries) Act (37 of 1850), Section 2. **AIR 1964 SC 295.**

●——**Ss. 23 and 2 — I. C. S. Officer employed under State — State Government can direct enquiry against him under Section 2.**

Where an I. C. S. officer is employed under the State Government there is nothing in the Constitution which abrogates the authority of the State Government to direct an inquiry against him under S. 2. The special method of recruitment of the Officer to the service does not warrant the view that the officer is not employed under the State Government, in connection with the affairs of which he was serving. See Public Servants (Inquiries) Act (37 of 1850), Section 2. **AIR 1960 SC 493.**

——**S. 23 — Member of I. C. S. employed under Punjab Government — Punjab State Government is competent to direct inquiry under the Act against him — Appointment of a Judge of Punjab High Court as Commission of Inquiry by Governor with approval of Government of India is**

valid. See Public Servants (Inquiries) Act (1850), Section 2. (1961) 63 Pun LR 780.

——S. 23 — Dismissal of public servant — Petition under Article 226 — Scope of enquiry — (Civil Services (Classification, Control and Appeal) Rules, Rule 55). See Constitution of India, Article 226. **AIR 1956 Punj 58 (DB).**

——Ss. 23 and 2 — Civil servant employed under State Government — Power of State Government to order public enquiry — Irregularity in ordering inquiry — Effect — Such an irregularity entitles the public servant to claim that the entire proceedings should be quashed and that the order which is based on those proceedings should be quashed — (Civil Services (Classification, Control and Appeal) Rules, Rules 52, 55). See Public Servants (Inquiries) Act (37 of 1850), Section 2. **AIR 1956 Punj 58 (DB).**

PUBLIC SERVICE COMMISSION

See (1) Bengal Public Service Commission Regulation (1937).
(2) Constitution of India, Articles 316, 323 and 378.
(3) Pepsu Public Service Commission (Limitation of Functions) Regulation (1951).
(4) Pepsu Public Services Commission Ordinance (6 of 2006 Smvt.), and
(5) Statutory cross-references under "Constitutional Law — Services."

PUBLIC SERVICE COMMISSION CONSULTATION REGULATION (1952)

——Case arising after promulgation of the Regulation — Consultation — Necessity.

There is no force in the contention that because these Regulations had not come into force at the time of commencement of the inquiry against the petitioner, consultation with the Commission was necessary, for it is only when the Government is satisfied that disciplinary action is necessary that such consultation has to be made. In this case the stage was reached long after the Regulation were promulgated. These Regulations must therefore govern the case. See Constitution of India, Art. 320 (3). **AIR 1956 Trav-Co 158 (159) (Pt B).**

REGULATION 7

——Regn. 7 and Annexure III, Cl. 6 — Validity Powers of Rajpramukh to make regulations — 'Other services and posts' — Construction of — (Words and Phrases — 'Other services and posts') See Constitution of India, Article 320 (3) (e), Proviso. **AIR 1956 Trav-Co 158.**

ANNEXURE III, CLAUSE 6

——Annexure III, Cl. 6 and Regn. 7 — Validity — Powers of Rajpramukh to make regulations — 'Other services and posts' — Construction of — The expression 'other services and posts' cannot mean services and posts other than civil services. See Constitution of India, Article 320 (3) (e), Proviso. **AIR 1956 Trav-Co 158.**

PUBLIC SERVICE VEHICLES

Defined
See Motor Vehicles Act (1939), S. 2 (25).

PUBLIC TEMPLE

See (1) Bombay Harijan Temple Entry Act (1947)
(2) C. P. and Berar Temple Entry (Authorisation) Act (41 of 1947).
(3) Civil P. C. (1908), S. 92.
(4) Hindu Law — Religious Endowment.
(5) Madras Hindu Religious and Charitable Endowments Act (1951).
(6) Madras Hindu Religious Endowments Act (2 of 1927).
(7) Madras Temple Entry Authorisation Act (5 of 1947).
(8) (Orissa) Puri Jagannath Temple Administration Act (14 of 1952).
(9) (Orissa) Shri Jagannath Temple Act (11 of 1955).
(10) Religious and Charitable Endowments.
(11) Religious Endowments Act (1863).
(12) Untouchability (Offences) Act (1955), S. 3.

PUBLIC THOROUGHFARE

See Civil P. C. (1908), S. 91.

PUBLIC TRUST

See (1) Civil P. C. (1908), S. 92.
(2) Hindu Law — Religious Endowments.
(3) Income-tax Act (1922), S. 4.
(4) Madhya Pradesh Public Trusts Act (30 of 1951).
(5) Madras Hindu Religious and Charitable Endowments Act (1951).
(6) Madras Hindu Religious Endowments Act (1927).
(7) Mahomedan Law — Wakf.
(8) Religious and Charitable Endowments.
(9) Religious Endowments Act (1863).
(10) Trusts Act (1882).

PUBLIC UTILITY SERVICE

Defined.
See Industrial Disputes Act (1947), S. 2 (n).

PUBLIC WAKFS (EXTENSION OF LIMITATION) ACT (29 of 1959)

SECTION 3

——S. 3 — Hyderabad Limitation Act (2 of 1322 F), Section 29 (c) — Part B. State Laws Act (1951), Section 30 — Pre-existing rights relating to wakfs — Scope — Applicability and effect of Public Wakfs (Extension of Limitation) Act — Recovery of wakf property — Limitation applicable. See Hyderabad Limitation Act (2 of 1322 F), Section 29 (c). **(1963) 1 Andh LT 465.**

PUBLIC WAY

See (1) Civil P. C. (1908), S. 91.
(2) Tort.

Danger or obstruction to
See (1) Criminal P. C. (1898), S. 133.
(2) Penal Code (1860), S. 283.

Procession, right to take out.
See Statutory cross-references under "Procession".

Rash driving on
See (1) Motor Vehicles Act (1939), Ss. 116 and 117.
(2) Penal Code (1860), Ss. 279, 304-A.

PUBLIC WORSHIP

See (1) Civil P. C. (1908), Ss. 9, 92 and
(2) Statutory cross-references under "Public temple".

PUCCA ADITHIYA OR ARHATIA

See Contract Act (1872), Ss. 30, 182, 211, 219.

PUDUKOTTAI VILLAGE PANCHAYAT REGULATION (3 of 1925)

See under Panchayats.

PUERPERAL INSANITY

See Penal Code (1860), S. 84.

PUNISHMENT

See (1) Constitution of India, Arts. 30, 310-311.
(2) Criminal P. C. (1898), Ss. 31-35, 562.
(3) Penal Code (1860), Ss. 53, 55, 57, 59, 60, 64, 65, 67, 70, 71, 74 and 75 and
(4) Statutory cross-references under "Criminal Trial — Sentence".

PUNITIVE POLICE

See Police Act (1861), S. 15.

PUNJAB AGRICULTURAL PRODUCE MARKETS ACT (5 of 1939)

SECTION 2

——Ss. 2 and 4 — 'Market' — Meaning of — Notified market area — Distinction.

The expression "market" as defined in Sec. 2 means a building, block of buildings, enclosure or other area which may be so notified in accordance with the rules made under this Act. A market is clearly distinguishable from a "Notified market area," that is an area notified under the provisions of Section 4. (1957) 59 Pun LR 628: ILR (1958) Punj 286.

SECTION 4

——S. 4 — 'Market' — Meaning of — Notified market area — Distinction.

Market is clearly distinguishable from a "notified market area" that is an area notified under the provisions of S. 4. (1957) 59 Pun LR 628.

SECTION 9

——S. 9 — Object of Act — Power of market committee to restrict place of sale.

The Act was enacted to provide for the better regulation of the purchase and sale of agricultural produce in the Punjab and for that purpose to establish markets and to make rules and bye-laws for their proper administration. It would be defeating the object of the Act if Courts were to hold that market committees have no power to restrict the place in which transactions of sales and purchases should be entered into. (1957) 59 Pun LR 628: ILR (1958) Punj 286.

SECTION 19

——Ss. 19, 23, 27 and 31 — Suit for injunction against Market Committee restraining it from recovering market fees on ground that levy was illegal and ultra vires — Jurisdiction of Civil Court not barred — Rule 51 is ultra vires of Section 31. See Civil P. C. (1908), S. 9. AIR 1962 Punj 426 (DB).

SECTION 23

——Ss. 23, 19, 27, 31 — Civil P. C. S. 9 — 'Expressly or impliedly barred' — Punjab Agricultural Produce Markets Rules (1940), Rr. 19A (4) and 51 — Suit for injunction against Market Committee restraining it from recovering market fees on ground that levy was illegal and ultra vires — Jurisdiction of Civil Court not barred — Rule 51 is ultra vires of Section 31. See Civil P. C. (1908), Section 9. AIR 1962 Punj 426.

SECTION 27

——Ss. 27, 19, 23 and 31 — Civil P. C., S. 9 — 'Expressly or impliedly barred' — Punjab Agricultural Produce Markets Rules (1940), Rr. 19A (4) and 51 — Suit for injunction against Market Committee restraining it from recovering market fees on ground that levy was illegal and ultra vires — Jurisdiction of civil Court not barred — Rule 51 is ultra vires of Section 31. See Civil P. C. (1908), Section 9. AIR 1962 Punj 426.

——Ss. 27, 28 — Construction as to scope — Bye-law 9-A, framed by Tarn Taran Market Committee — Validity — (Punjab Agricultural Produce Markets Rules (1940), R. 31) — (Interpretation of Statutes).

The principle of interpretation that the express mention of one thing implies the exclusion of another is not a rule of law but a rule of construction. If the rejection of the maxim will serve the purpose for which the statute was enacted or will accomplish beneficial results, the maxim must be rejected. Thus the State Government may have empowered, under Rule 31 of the Punjab Agricultural Produce Markets Rules, 1940, market committees to prescribe the places at which tobacco may be sold and declared that other agricultural produce may be weighed and measured anywhere in the notified market area, but they have imposed no restriction on the power of market committee to make bye-laws under S. 27, or to make any bye-laws concerning the regulation of business or the conditions of trading under Section 28. The expressions 'regulation of business' and 'conditions of trading' are wide enough to embrace a bye-law of the nature of the bye-law No. 9-A, which the market committee of Tarn Taran had framed, restricting the sales of cotton to markets alone and not allowing sales in the premises of the ginning factories as, in its view it was necessary for the protection of the interests of the traders that the sales of cotton should be made only within the limits of the market. The bye-law therefore could not be said to be inconsistent with the Act or with the rules framed thereunder. (1957) 59 Pun LR 628: ILR (1958) Punj 286.

SECTION 28

——S. 28 — The State Govt. have not imposed restrictions on the powers of the market committee to make bye-laws under S. 27 or to make a bye-law concerning the regulation of business or the conditions of trading under Section 28. See Punjab Agricultural Produce Markets Act (5 of 1939), Section 27. (1957) 59 Punj LR 628: ILR (1958) Punj 286.

SECTION 31

——Ss. 31, 19, 23 and 27 — Civil P. C., S. 9 — — 'Expressly or impliedly barred' — Punjab Agricultural Produce Markets Rules (1940), Rr. 19A (4) and 51 — Suit for injunction against Market Committee restraining it from recovering market fees on ground that levy was illegal and ultra vires — Jurisdiction of civil Court not barred — Rule 51 is ultra vires of Section 31. See Civil P. C. (1908), Section 9. AIR 1962 Punj 426.

PUNJAB AGRICULTURAL PRODUCE MARKETS ACT (23 of 1961)

PREAMBLE

——Preamble, S. 43 — Exclusion of use of hand-scales as provided by Section 43 (2) (x) is not inconsistent with object of Act as disclosed in preamble. 66 Punj LR 836: ILR (1964) 2 Punj 523: AIR 1965 Punj 33 (36) (Pt A) (Pr 4) (DB).

SECTION 3

——Ss. 3 (5), 15 and 47 — Removal of member for misconduct under Section 11 of the repealed

Punjab Act 5 of 1939 — Removal is deemed to be one under Section 15 of the present Act so as to amount to a disqualification under S. 3 (5) See Punjab Agricultural Produce Markets Act (23 of 1961), Section 15. **(1965) 67 Pun LR 914: AIR 1966 Punj 139 (DB).**

SECTION 10

——S. 10 (2) — Notice under Section 10 (2) — Punjab Agricultural Produce Markets Act 1961 by Chairman — Market Committee suspending licence of petitioner for period of fifteen days — Writ petition against order — Expiry of period of suspension — Writ petition becomes infructuous. See Constitution of India, Article 226. **(1965) 67 Pun LR 66.**

——S. 10 (2) — Mere show cause notice why license of petitioner should not be suspended — No final orders passed — Writ petition is premature. See Constitution of India, Article 226. **(1965) 67 Pun LR 66.**

——S. 10 — Petition for setting aside election to Market Committee under Punjab Agricultural Produce Markets Act (23 of 1961) — Grounds vague — Election will not be set aside. See Constitution of India, Article 226. **(1964) 66 Pun LR 1000.**

——S. 10 — Quo warranto — Delay — Rejection of nomination paper of one of candidates to election — Other candidates acquiescing in order and taking part in election — Declaration of result of election — Defeated candidate applying for writ of quo warranto — Discretion to issue writ refused. See Constitution of India, Article 226. **(1964) 66 Pun LR 1000.**

SECTION 13

——Ss. 13, 37, 40 — Writ in election dispute — Exercise of jurisdiction by High Court — Punjab Agricultural Produce Markets (General) Rules (1962), Rule 21 — Rule is directory and not mandatory — Renewal of licence after prescribed period does not invalidate licence — Writ petition against acceptance of nomination paper of a candidate on ground that he was not a valid licence holder — Interference by High Court. See Constitution of India, Article 226. **67 Pun LR 665: 1965 Cur LJ 488: ILR (1965) 2 Punj 65.**

SECTION 15

——S. 15 — Constitution of India, Article 14 — Election of Members — Disqualification on ground of misconduct — Provision disqualifying member permanently though severe is not unconstitutional — Interpretation of Statutes — Section being plain, cannot be construed to limit disqualification to particular period. See Constitution of India, Article 14. **(1965) 67 Pun LR 914: AIR 1966 Punj 139 (DB).**

——S. 15 — Constitution of India, Art. 14 — Discrimination — Discrimination alleged on ground that only members of Market Committees under the Act incur permanent disqalification for misconduct unlike members of other local bodies like Municipal Committees — **Held** that offices of members under two Acts cannot be equated and no discrimination can be alleged. See Constitution of India, Art. 14. **(1965) 67 Pun LR 914: AIR 1966 Punj 139 (DB).**

——Ss. 15 and 47 and 3 (5) — Removal of member for misconduct under Section 11 of the repealed Punjab Act V of 1939 — Removal is deemed to be one under Section 15 so as to amount to a disqualification under Section 3 (5). Decision in Civil Writ No. 1563 of 1963, dated 5th January, 1965 (Punj), Affirmed. **67 Pun LR 914: AIR 1966 Punj 139 (140) (Pt C) (Pr 2) (DB).**

SECTION 43

——S. 43 and Preamble —Exclusion of use of handscales not inconsistent with object of Act as disclosed in Preamble. See Punjab Agricultural Produce Markets Act (1961), Preamble. **AIR 1965 Punj 33 (DB).**

SECTION 44

——S. 44 — Bye-laws under — Validity — Bye-laws to be valid must be made strictly in accordance with Section 44.

In the sphere of delegation of legislative power, the manner prescribed for exercising the delegated power can be presumed to be directory, and indeed, such delegated power must be exercised strictly as directed or not at all. There is close connection between delegated legislation and Rule of law. Bye-laws having been made under the delegated power of legislation under Section 44, in order to be valid and to have the force of law, must be made strictly in accordance with the said section and in pursuance of the authority delegated thereby. Where the Chairman of the Board merely complied with the provisions of S. 44 (3) (a) and sub-sections (b), (c), (d) and (e) were clearly ignored by him, the bye-laws must be held not to have been made in accordance with law delegating the power so as to be of binding effect. **66 Pun LR 836: ILR (1964) 2 Punj 523: AIR 1965 Punj 33 (38, 39) (Pt C) (Prs 12, 13, 14, 15) (DB).**

SECTION 47

——S. 47 — Removal of member for misconduct under Section 11 of repealed Punjab Act 5 of 1939 — Removal is deemed to be one under Section 15 of the new Act by virtue of Section 47 of the new Act. See Punjab Agricultural Produce Markets Act (23 of 1961), Section 15. **(1965) 67 Pun LR 914: AIR 1966 Punj 139 (DB).**

PUNJAB AGRICULTURAL PRODUCE MARKETS (ELECTION TO MARKET COMMITTEES) RULES (1961)

RULE 8

——R. 8 — Requirement of attaching deposit receipt to nomination papers — Requirement is only directory — Actual deposit of security is substantial compliance with rule — AIR 1956 SC 140, Rel. on. **1965 Cur LJ 398: ILR (1965) 2 Punj 270: AIR 1965 Punj 505 (506) (Pr 3).**

RULE 9

——R. 9 — Quo warranto — Delay — Rejection of nomination paper of one of candidates to election — Other candidate acquiescing in order and taking part in election — Declaration of result of election — Defeated candidate applying for writ of quo warranto — Discretion to issue writ refused. See Constitution of India, Art. 226. **(1964) 66 Pun LR 1000.**

PUNJAB AGRICULTURAL PRODUCE MARKETS (CENTRAL) RULES (1962)

RULE 21

——R. 21 — Rule is directory and not mandatory — Renewal of licence after prescribed period does

not invalidate licence. See Constitution of India, Art. 226. 1965 Cur LJ 488: (1965) 67 Punj LR 665.

RULE 24

——R. 24 (12) and (14) — Bye-laws of Market Committee (Kurali), Bye-law 13 (1) — Rule and the bye-law forcing dealer who was a kutcha Arhatiya to charge commission from the buyer rather than the seller — Rule cannot be considered as restriction on arhatia's right to carry on his trade — Even if it be held that sub-rules (12) and (14) impose any restrictions on fundamental right to carry on his trade, these restrictions are reasonable and are therefore protected under Cl. (6) of Art. 19 of the Constitution — Restrictions imposed by the sub-rules moreover advance the objects of the legislation under which they are framed and as such must be regarded as reasonable in the circumstances — (Constitution of India, Art. 19 (6)). AIR 1959 SC 300 and AIR 1962 SC 97, Foll. 65 Punj LR 887: ILR (1963) 2 Punj 765 (DB).

RULE 25

——Rr. 25 and 26 — Validity — Does not contravene Art. 19 (1) (f) of Constitution. See Constitution of India, Art. 19 (1) (g). AIR 1965 Punj 33 (DB).

RULE 26

——R. 26 — Constitution of India, Art. 19 (1) (g), (6) — Validity — Does not contravene Art. 19 (1) (g) — See Constitution of India, Art. 19 (1)(g). AIR 1965 Punj 33 (DB).

PUNJAB AGRICULTURAL PRODUCE MARKETS RULES (1940)

RULE 19-A

——Rr. 19-A (4) and 51 — Suit for injunction against Market Committee restraining it from recovering market-fees on ground that levy was illegal and ultra vires — Jurisdiction of civil Court not barred — Rule 51 is ultra vires of S. 31. See Civil P. C. (1908), S. 9. AIR 1962 Punj 426 (DB).

RULE 31

——R. 31 — Has not imposed restrictions on the power of Market Committee to make bye-laws under S. 27 and S. 28 — Constitution and scope of — Bye-law 9-A framed by Tarn Taran Market Committee restricting the sales of cotton to market alone — Validity — Not ultra vires. See Punjab Agricultural Produce Markets Act (5 of 1939), S. 27. (1957) 59 Punj LR 638.

RULE 51

——Rr. 51 and 19-A (4) — Civil P. C., S. 9 — 'Expressly or impliedly barred' — Punjab Agricultural Produce Markets Act (5 of 1939), Ss. 19, 23, 27 and 31 — Suit for injunction against Market Committee, restraining it from recovering market fees on ground that levy was illegal and ultra vires — Jurisdiction of civil Court not barred — Rule 51 is ultra vires of S. 31 — See Civil P. C. (1908), S. 9. AIR 1962 Punj 426.

PUNJAB AGRICULTURAL UNIVERSITY ACT, (32 of 1961)

SECTION 6

——Ss. 6 (13), 30 (1), 29, Cl. (1)—Statutes framed in exercise of powers conferred by S. 30 (1) read with S. 29, Cl. (1) — R. 2 — 'Requirements of discipline' means 'maintenance of discipline' — Not necessary to prescribe certain acts amounting to indiscipline. (1965) 67 Pun LR 830.

PUNJAB ALIENATION OF LAND ACT (CENTRAL ACT 13 of 1900)

SECTION 2

●——Ss. 2 (5), 14 and 6 (1) (a) — Sale by agriculturist to non-agriculturist when Act was in force — Sanction under S. 14 not obtained — Sale not liable to be treated as mortgage after repeal of the Act — Risaldar Major Amar Singh v. R. L. Aggarwal, 62 Punj LR 115: ILR (1960) 1 Punj 791: AIR 1960 Punj 312 (315) (Pt A) (Pr 7) (FB).

——S. 2 (3) — Agricultural land diverted to non-agricultural purposes prior to sale for a period exceeding one and a half year — Cannot be treated as land defined in sub-sec. (3) of S. 2, Punjab Land Alienation Act — Right of pre-emption — Material date to determine nature of land. See Punjab Pre-emption Act (1 of 1913), S. 3. (1959) 61 Punj LR 716.

SECTION 3-A

——S. 3-A — Jurisdiction of Deputy Commissioner — Deputy Commissioner held had no jurisdiction to decide the case. AIR 1953 NUC (Punj) 1379.

——S. 3-A — Jurisdiction of Deputy Commissioner and Civil Court — (Constitution of India, Art. 226).

Under S. 3-A three things seem to be necessary to give to the Deputy Commissioner the jurisdiction. There should be a (1) a debtor, (2) a creditor and (3) that the effect of the transaction should be to pass the beneficial interest to such creditor. Before the Deputy Commissioner can give a decision it has to be determined whether the above three conditions have been fulfilled and if they are not fulfilled the jurisdiction of the Deputy Commissioner does not arise and, in any case, it is for the courts of general jurisdiction to decide as to whether the conditions for giving jurisdiction to the Deputy Commissioner have arisen or not.

In any case, the High Court has jurisdiction under Art. 226 of the Constitution to quash orders passed by judicial or quasi-judicial bodies which are contrary to law and even if the Deputy Commissioner were to decide the matter would be subject to the jurisdiction of the High Court and no amount of taking away the jurisdiction of Civil Courts can deprive the High Court of its jurisdiction under the Constitution which was framed by the Constituent Assembly representing the people of this country.

The Punjab Alienation of Land Act has now been repealed by Presidential order. There is no Deputy Commissioner within the Act at the present moment and therefore there is no officer who can decide within the provisions of the Act and it cannot therefore be argued that if it is held that an order is not a decision of the Deputy Commissioner the High Court should not decide the matter and should leave it to the Deputy Commissioner to adjudicate upon the point. ILR (1953) Punj 446: AIR 1954 Punj 139 (140) (Prs 6 to 10) (DB).

●——Ss. 3-A and 21 — Order under S. 3-A — Civil Court, if can challenge.

A Civil Court is competent to challenge an order passed by a Deputy Commissioner under S. 3-A on the ground that the alinee was not a creditor. AIR 1951 Simla 213 (214) (Pt B) (Pr 3).

SECTION 4

——S. 4 — Jurisdiction of civil Court — Question whether vendees belong to agricultural tribe

arising in case under S. 14, Punjab Pre-emption Act — Jurisdiction not barred by provisions in Punjab Alienation of Land Act — Punjab Pre-emption Act (1 of 1913), S. 14 — See Civil P. C. (1908), S. 9. **AIR 1950 East Punj 246**

SECTION 5

——S. 5 — Notification under S. 5 — Notification has no retrospective operation — Mortgage by person before notification notifying him as agriculturist — Mortgaged property can be sold in execution of mortgage decree obtained subsequent to notification — See Punjab Alienation of Land Act (13 of 1900), S. 16. **AIR 1950 East Punj 282 (DB).**

SECTION 6

●——Ss. 6 (1) (a) and 14, 2 (5) — Sale by agriculturist to non-agriculturist effected when Act was in force — Sanction under Section 14 not obtained — Sale not liable to be treated as mortgage after repeal — See Punjab Alienation of Land Act (13 of 1900), S. 2 (5). **AIR 1960 Punj 312 (FB).**

SECTION 14

●——Ss. 14, 2 (5) and 6 (1) (a) — Sale by agriculturist to non-agriculturist effected when Act was in force — Sanction under Section 14 not obtained — Sale not liable to be treated as mortgage after repeal — See Punjab Alienation of Land Act (13 of 1900), Section 2 (5). **AIR 1960 Punj 312 (FB).**

SECTION 16

——S. 16 (as amended by Punjab Act 1 of 1931) — Applicability — Material date.

The date which is material and relevant for the purpose of deciding whether the amending Act 1 of 1931 could apply or not is the date of the order of the executing Court and not of any subsequent mutation made by the revenue authorities pursuant to that order. AIR 1933 Lah 924, Followed. **(1959) 61 Punj LR 443.**

——S. 16 — Scope — Alienation in contravention of the Act is not void but can be avoided by authorities mentioned in the Act. **AIR 1955 NUC (Punj) 4974.**

●——S. 16 — Repeal of by the Adaptations of Laws (Third Amendment) Order, 1951 — Effect— Only Ss. 3 (4), 14, 13, 24, 29 and the concluding Clause of S. 9 are rendered void — These provisions are severable—Hence the constitutionality of the Act is not affected — See Punjab Pre-emption Act (I of 1913), Preamble. **AIR 1954 Punj 55 (FB).**

[Overruled in AIR 1962 SC 1476].

——S. 16 — Notification under S. 5 — Notification has no retrospective operation — Mortgage by person before notification notifying him as agriculturist — Mortgaged property can be sold in execution of mortgage decree obtained subsequent to notification — Punjab Alienation of Land Act (13 of 1900), S. 5.

It is a well-known rule of construction of statutes that statutes are not be held to act retrospectively unless a clear intention to that effect is manifested. 1905 AC 369, Foll.; Case law Referred.

The notification issued under S. 5 of the Act has no retrospective operation and cannot be given a retrospective effect. Therefore, the notification notifying a person or a tribe as members of a notified agricultural tribe will not confer rights which would prevent mortgages entered into by such persons to be enforced in Courts of law and mortgaged properties sold in execution of decrees so obtained, if the mortgages are of a date prior to the notification: First Appeal No. 195 of 1942 (Lah), Rel. on. **AIR 1950 East Punj 282: (283, 284) (Pt A) (Prs 4, 7) (DB).**

SECTION 21

——Ss. 21 and 3-A — Order passed by a Deputy Commissioner under S. 3-A — Civil Court, can challenge on the ground that the alienee was not a creditor — See Punjab Alienation of Land Act (13 of 1900), S. 3-A. **AIR 1951 Punj 213.**

PUNJAB CAPITAL (DEVELOPMENT AND REGULATION) BUILDING RULES (1952)

RULE 2

——Rr. 2 (10), 2 (16), 2 (38) — Petrol pump installed in public or open space — Neither a public building nor an amenity as a public utility service. See Capital of Punjab (Development and Regulation) Act (27 of 1952), S. 2 (b). **AIR 1964 Punj 533 (DB).**

RULE 7

——Rr. 7 and 117 — Administrative agencies created by statutes — Powers of — Have no arbitrary and uncontrolled powers — Powers of Chief Administrator under Building Rules — Not absolute or uncontrolled or immune from judicial scrutiny. See Constitution of India, Art. 226. **AIR 1964 Punj 533 (DB).**

RULE 117

——Rr. 117 and 7 — Constitution of India, Art. 226 — Administrative agencies created by statutes — Powers of — Have no arbitrary and uncontrolled powers — Powers of Chief Administrator under Building Rules — Not absolute or uncontrolled or immune from judicial scrutiny — See Constitution of India, Art. 226. **AIR 1964 Punj 533 (DB).**

PUNJAB CINEMAS (REGULATION) ACT (11 of 1952)

SECTION 5

——S. 5 — Application for licence under — Licensing authority has power to grant or refuse — Power cannot be withdrawn and assumed by Government — Approval granted by licensing authority — Government rejecting application — Order held void — Words and Phrases — 'Control'. **63 Pun LR 580: ILR (1961) 2 Punj 831.**

PUNJAB CIVIL SERVICE (EXECUTIVE BRANCH) RULES (1930)

PREAMBLE

——Pre. — Applicability of Rules—Essential conditions — Officer on probation — Reversion to substantive rank — It is merely a transfer and not a demotion — Failure to consult Public Service Commission — Consultation not necessary — The exercise of the discretion of the transferring authority cannot be controlled by Courts of law. See Constitution of India, Art. 311. **AIR 1957 Punj 191 (DB).**

[Overruled on another point in AIR 1958 SC 36; **Reversed** in AIR 1962 SC 1711].

RULE 5

——Rr. 5, 17 and 22 — Scope — Probation compulsory — Governor has no power to dispense with probation — Failure to designate appointment as on probation — Probationary condition must be implied as a matter of law — Com-

pletion of probationary period itself cannot confer permanent status in the absence of positive or affirmative act on the part of the competent authority. See Constitution of India, Art. 309. AIR 1957 Punj 191 (DB).

[Overruled on another point in AIR 1958 SC 36; Reversed on another point in AIR 1962 SC 1711].

RULE 17

——Rule 17 — Scope — Probation — Compulsory — Governor has no power to dispense with probation — Failure to designate appointment as on probation — Probationary condition must be implied as a matter of law — Completion of probationary period by itself cannot confer permanent status in the absence of positive or affirmative act on the part of the competent authority — Effect — See Constitution of India, Art. 309. AIR 1957 Punj 191.

[Overruled on another point in AIR 1958 SC 36; Reversed on another point in AIR 1962 SC 1711].

RULE 22

——Rule 22 — Scope — Probation — Compulsory — Governor has no power to dispense with probation — Failure to designate appointment as on probation — Probationary condition must be implied as a matter of law — Completion of probationary period by itself cannot confer permanent status in the absence of positive or affirmative act on the part of the competent authority — Effect — See Constitution of India, Art. 309. AIR 1957 Punj 191.

[Overruled on another point in AIR 1958 SC 36; Reversed on another point in AIR 1962 SC 1711].

RULE 23

●——Rr. 23 ad 24 — Probationer — Does not automatically acquire status of permanent member after expiry of probationary period — He merely qualifies for substantive permanent appointment. See Constitution of India, Art. 309. AIR 1962 SC 1711.

——R. 23 read with Rules 21, 22 and 24 — Termination of services of a probationer within the meaning of R. 9 of Punjab Civil Services (Punishment and Appeal) Rules and not merely of person on probation — Probationer must be given an opportunity to show cause against the termination of his services — R. 23 does not apply to the case of a probationer and he cannot be removed under that Rule read with Rr. 21. 22 and 24 — See Constitution of India, Art. 310. 1965 Pun LR (Sup) 586.

PUNJAB CIVIL MEDICAL SERVICES CLASS 1 (RECRUITMENT AND CONDITIONS OF SERVICE) RULES (1950)

RULE 13

●——Rr. 13 and 17—Applicability—Government servant joining Class I, Medical Service in 1947. Rule 13 not applicable — Rule 17 applied:- By virtue of R. 17 the latest general rule R. 3.26 (d) applied to the Government servant in matters of retirement. See Punjab Civil Services Rules (1959), R. 3.26 (d). AIR 1964 SC 72.

RULE 17

●——R. 17 — Applicability — Government servant joining Class I Medical Service in 1947 — From rule 17 it was clear that in the matter of retirement the Government servant would be governed by such general rules as might have been made by the Government at the time the Medical rules were made or as would be made by the Government subsequently — Latest general rule governing retirement of Government servant is R. 3.26 (d) — That rule would therefore apply to this case. See Punjab Civil Services Rules (1959), R. 3.26 (d). AIR 1964 SC 72.

——R. 17 — Effect — Under this rule a member entered service accepting that rules in his case could be altered and when altered he would be governed by the altered or new rules — AIR 1958 Cal 407; (1898) 1 QB 71 and (1927) 43 TLR 375 and (1927) 43 TLR 712 and (1960) 1 All ER 631, Rel. on. ILR (1962) 2 Punj 642: AIR 1963 Punj 298 (307) (Pt E) (Pr 15) (DB).

[Reversed on another point in AIR 1964 SC 72].

PUNJAB CIVIL SERVICES (PUNISHMENT AND APPEAL) RULES (1952)

●——Government servant on leave preparatory to retirement — Leave revoked by Government, Government servant suspended and departmental enquiry ordered against him — Held, no breach of service rules — Petition under Art. 226 by such Government servant alleging mala fides on part of Minister in charge — No counter affidavit by Minister concerned but affidavit filed by Secretary in the Department having no personal knowledge regarding allegations against Minister — Mala fides held proved — Orders set aside. See Constitution of India, Art. 226. AIR 1964 SC 72.

RULE 4

——R. 4 (v) — In the case of suspension, explanation of the Government servant is not required. ILR (1962) 2 Punj 642: AIR 1963 Punj 298 (310) (Pt P) (Pr 21) (DB).

[Reversed on another point in AIR 1964 SC 72].

——Rr. 4 (vi) and (vii) — Removal and dismissal — Distinction. See Municipalities — Punjab Municipal Act (3 of 1911), S. 39. (1961) 63 Punj LR 870.

RULE 7

●——R. 7 — 'Charge' — Meaning of — Does not necessarily mean formal charge framed and communicated to the Government servant. See Punjab Civil Services Rules (1959), R. 3.26 (d). AIR 1964 SC 72.

●——R. 7 — Order suspending Government servant on charge of misconduct is partly administrative — Government servant's explanation to charge before suspending him pending enquiry not necessary. See Punjab Civil Services Rules (1959), R. 3.26 (d). AIR 1964 SC 72.

——R. 7 (5) — Personal hearing not necessary — Permission to be represented by counsel is discretionary. See Constitution of India, Art. 311. ILR (1965) Punj 651: (1965) 67 Pun LR 404: AIR 1966 Punj 175.

——R. 7 (2) — Departmental enquiry under — Plaintiff afforded opportunity to challenge evidence adduced by Department — Plaintiff not availing of it cannot find fault with Enquiry Officer's report on ground that it was not based on evidence but on affidavits. See Constitution of India, Art. 311. (1963) 65 Pun LR 945.

[Overruled on another point in AIR 1965 SC 1153].

——R. 7 (2) — Omission to strictly follow rule — Art. 311 of Constitution not affected — Denial of

reasonable opportunity — Constitution of India, Art. 311.

The mere omission to strictly follow R. 7 (2) cannot be deemed as enough to offend Art. 311 of the Constitution where it has not brought about a miscarriage of justice. AIR 1956 SC 58, Rel. on. Where the charge itself proves to be a detailed document which furnished all the particulars that the plaintiff could have required to submit her explanation and she had in fact furnished her reply thereto without feeling any impediment it cannot be said that the failure of a Government Department to furnish the plaintiff, who has been dismissed from Government service, with the statement of allegations contemplated by R. 7 (2) amounts to a denial of reasonable opportunity of showing cause against the action proposed to be taken against the plaintiff. (1963) 65 Pun LR 945.

RULE 9

——R. 9 and R. 2.49 — Probationer and person on probation distinguished — Protection of R. 9 not available to the latter. 67 Punj LR 111: (1965) 2 Lab LJ 392: AIR 1965 Punj 94 (97) (Pt B) (Pr 11).

——R. 9 — Termination of service of a probationer within the meaning of R. 9 of Punjab Civil Services (Punishment and Appeal) Rules and not merely of person on probation — Probationer must be given an opportunity to show cause against the termination of his services — Rule 23 does not apply to the case of a probationer and he cannot be removed under that Rule read with Rr. 21, 22 and 24. See Constitution of India, Art. 310. 1965 Pun LR (Supp) 586.

RULE 14

——R. 14 — Penalty inflicted upon public servant by subordinate authority — Government or Head of Department has power to enhance it, after giving public servant opportunity to be heard against it.

Where, in a departmental enquiry against a public servant penalty is imposed by competent authority, the Government or the Head of Department, under Rule 14 of the Punjab Civil Services (Punishment and Appeal) Rules, is competent to increase the penalty and pass an order of dismissal without holding a de novo enquiry and giving a fresh charge-sheet to the persons concerned. No penalty can, however be increased, unless opportunity is given to him to show cause against such increase. Where notice to show cause against increase of penalty was given and moreover the petitioner did not claim in de novo enquiry in the explanation that he submitted in reply to the notice, the order enhancing the penalty was not bad. (1965) 67 Pun LR 404: ILR (1965) 1 Punj 651: AIR 1966 Punj 175 (178) (Pt A) (Pr 4).

——R. 14 — Validity.

Rule 14 is not in any way in conflict with Article 311 of the Constitution. (1965) 67 Pun LR 404: ILR (1965) 1 Punj 651: AIR 1966 Punj 175 (178) (Pt E) (Pr 8).

——R. 14 — Departmental enquiry and punishment against Government servant — Power of Government to hold fresh enquiry — Principle of double jeopardy not applicable — (Constitution of India, Art. 20 (2) — (Cr. P. Code (1898), S. 403).

Where a punishment has been given to a Government servant after holding a departmental inquiry, it is open to the Government under R. 14 Punjab Civil Services (Punishment and Appeal) Rules, to call for the records of the case and if in its opinion the punishment is inadequate it can order a fresh enquiry and impose adequate punishment. To such a case neither Article 20 (2) of the Constitution nor the doctrine of double jeopardy underlying it can have application. AIR 1953 SC 325 and AIR 1954 SC 375 Rel. on. Rule 14 as amended in 1954, has only cleared up what was meant by the old rule. ILR (1956) Punj 94: 57 Punj LR 502: AIR 1956 Punj 81 (82) (Pt A) (Pr 11).

——R. 14 — Departmental enquiry — Re-opening of — Principle of staleness does not apply.

Where the Government in exercise of its powers under Rule 14 re-opened a departmental enquiry against a Government servant nearly one year after the previous enquiry:

Held, that although the Government may have taken more time than it might have, the action of the Government is not barred on the principle of staleness which does not apply to public or departmental enquiry. ILR (1956) Punj 94: 57 Punj LR 502: AIR 1956 Punj 81 (82, 83) (Pt B) (Prs 12, 15).

PUNJAB CIVIL SERVICES RULES (1941)

——Adaptation of Laws Order (1950), Para 27 — 'Existing law' — Civil Services Rules (Punjab) (1941) are not covered by the expression — See Adaptation of Laws Order (1950), Para 27. AIR 1963 Punj 298 (DB).

——Constitution of India Arts. 309, 313, 372 (1) — Not legislature alone, but until Legislature acts in this behalf the Governor also has the power of making 'other provision' within the scope of Article 313 and of alteration or repeal or amendment under Article 372 (1) and thus can change the rules — Rules of 1941 could only continue till Punjab Civil Services Rules (1959) were made. See Constitution of India, Art. 309. AIR 1963 Punj 298 (DB).

——Rules are justiciable only so long as they remain in force. ILR (1962) 2 Punj 642: AIR 1963 Punj 298 (307) (Pt H) (Pr 16) (DB).

——Punjab Municipal Act, S. 40, does not apply where a Municipal empolyee is only reduced in rank not for misconduct or incompetence. Punjab Civil Service Rules as applicable to reduction to a lower post were also not made applicable to Municipal employees. See Municipalities — Punjab Municipal Act (3 of 1911), Section 240. AIR 1956 Punj 220.

RULE 1.4

——R. 1.4 and R. 2.14 — Dismissal of Tahsildar from service — Order passed by Financial Commissioner in 1953 — Order held valid. See Punjab Land Revenue Act (17 of 1887), S. 9. AIR 1962 SC 219.

RULE 1.6

——Rr. 1.6 (d), 3.26 — Vested right to retire at the age of 55 years — Rules of 1941 were subject to alteration — Government servant taking service subject to express condition that rules relating to his conditions of service were liable to change and alteration — Rules of 1941 abrogated by Rules of 1959 — No vested right in the age of superannuation was created in the Government servant by the Rules of 1941 — Section 6 of General Clauses Act (1897) does not extend to such rules. ILR (1962) 2 Punj 642: AIR 1963 Punj 298 (307) (Pt G) (Pr 16) (DB).

RULE 1.8

——R. 1.8 Vol. 1, Part 1, Note 2 — Persons on the staff of High Court — Power to interpret

change or relax the rule vests in the Chief Justice and not in the Finance Department of Punjab Government — High Court Establishment (Appointment and Condition of Service) Rules (Punjab) 1952, R. 29. See Constitution of India, Article 229 (2). AIR 1964 Punj 285 (DB).

RULE 2.2

●——R. 2.2 (b) — Scope — Action under rule can be taken only in case of grave misconduct and not simple misconduct.

Per Raghubar Dayal and Mudholkar, JJ.—The mere fact that the Government took action under Rule 7 of the Punjab Civil Services (Punishment and Appeal) Rules (1952) and under Rule 3.26 (d) of the Punjab Civil Services Rules (1959), which was open to them and not under Rule 2.2 (b) of 1941 Rules is no ground to hold the Government's action mala fide. Further, resort to Rule 2.2 (b) could have been taken only if the Government servant was found guilty of grave misconduct and it would have been always a debatable point whether the charges made out against him established grave misconduct or simple misconduct. Action under that rule can be taken only in limited circumstances. S. Pratap Singh v. State of Punjab, (1964) 4 SCR 733: (1965) 1 SCA 259: AIR 1964 SC 72 (107) (Pt I) (Pr 103).

RULE 2.14

●——R. 2.14 — Punjab Land Revenue Act, Sections 9 and 28 — Rules under — Punjab Tehsildari Rules (1932) — Rules continued to remain in force even after Act was amended by Government of India (Adaptation of Indian Laws) Order, 1937 — Dismissal of Tehsildar from service — Order passed by Financial Commissioner in 1953 — Order held valid. See Punjab Land Revenue Act (17 of 1887), Section 9. AIR 1962 SC 219.

RULE 3.26

——Rr. 3.26 and 1.6 (d) — Vested right to retire at the age of 55 years — Rules of 1941 were subject to alteration — Government servant taking service subject to express condition that rules relating to his conditions of service were liable to change and alteration — Rules of 1941 abrogated by Rules of 1959 — No vested right in the age of superannuation was created in the Government servant by the Rules of 1941 — S. 6 of General Clauses Act (1897) does not extend to such rules. See Punjab Civil Services Rules (1941), Rule 1.6 (d). AIR 1963 Punj 298 (DB).

RULE 5

——Vol. II, Rr. 5 and 32 — Right of civil servant to continue in service — Power to retire compulsorily — Proof of Power by State not necessary. See Constitution of India, Art. 310. (1962) 64 Punj LR 469.

——Vol. II, Rr. 5 and 32, Appendix II — New pension rules in Appendix II are whole body of rules connected with subject of pension.

The new pension rules contained in Appendix II at page 245 of Vol. II of Punjab Court Service Rules are the whole body of rules connected with the subject of pension as contained in Vol. II. That this is so finds support from the fact that the Appendix II has to be read in conjunction with R. 12 (b) and so read, these new pension rules apply to Government servants who entered Government service from 10-6-1951. (1962) 64 Punj LR 469.

RULE 5.28

●——R. 5.28 — Right to retire under the rule, if any, is subject to R. 3.26 (d) of 1959 rules.

Per Raghubar Dayal and Mudholkar, JJ. — There is nothing corresponding to R. 5.28 of Vol. II of the 1941 rules in Vol. II of the 1959 rules. When the retirement of the Government servant is governed by the 1959 rules and not by the 1941 rules, the right, if any, given by the 1941 rules to the Government servant to opt for retirement could not be said to be a right which comes within Rule 1.6 of the 1959 rules as R. 1.6 preserves such right to which the Government servant be entitled by or under any law or by the terms of his agreement. It contemplates such rights which the law in force gives to the Government servant at the time the 1959 rules are in force. When the 1941 rules do not govern him, it cannot be said that he has a right to opt for retirement on attaining the age of 55. Rule 5.28 is in Vol. II of the 1941 rules which embodies the rules relating to pensions and provident fund and therefore the proper interpretation of that rule would be that it provides for and permits the grant of superannuation to a Government servant who has opted to retire after attaining the age of 55 years on being required by the Government, in the exercise of its powers under R. 3.26 of Vol. I, to continue in service. Assuming however that the Government servant had a right to retire on attaining the age of 55 years in view of this rule or R. 3.26 (a), that right is subject to Rule 3.26 (d) in so far as this rule provides that no Government servant would be permitted to retire on his reaching the date of compulsory retirement if he be under suspension on a charge of misconduct. S. Pratap Singh v. State of Punjab. (1964) 4 SCR 733: (1965) 1 SCA 259: AIR 1964 SC 72 (99) (Pt P) (Prs 62, 63, 64).

RULE 5.32

——Vol. II, R. 5.32 — Right of civil servant to continue in service — Power to retire compulsorily — Proof of power by State not necessary. See Constitution of India, Arts. 309 and 310. (1962) 64 Pun LR 469.

——Vol. II R. 5.32 — New pension rules in Appendix II are whole body of Rules connected with subject of pension.

The new pension rules contained in Appendix II at page 245 of Vol. II of Punjab Civil Services Rules are the whole body of rules connected with the subject of pension as contained in Vol. II. That this is so finds support from the fact that the Appendix II has to be read in conjunction with R. 12 (b) and so read, these new pension rules apply to Government servants who entered Government service from 10-6-1951. (1962) 64 Punj LR 469.

——R. 5.32 — Scope — Amendment of — Absence of publication cannot bind the public servants. See Constitution of India, Art. 309. AIR 1957 Punj 140.

RULE 7.5

●——R. 7.5 — Punjab Civil Service Rules 1959, Rr. 7.5, 7.6 — Scope — Rules do not invest Government with power of suspension. AIR 1964 SC 72.

RULE 10

——Vol. I, Part I, Rules 10, 13 and 14 — Constitution of India, Article 226 — Writ of Mandamus — Permanent Municipal servant — Bye-law 62 of Simla Municipality and rules 1 to 4 framed under Section 240 (n), Punjab Municipal Act — Discharge from service for alleged mis-

conduct — Procedure prescribed by rules framed under Act not followed — Writ held should be issued — (Municipalities — Punjab Municipal Act (3 of 1911), Sections 31 (1) and 240 (n)). See Constitution of India, Art. 226. **AIR 1953 Punj 88 (DB).**

RULE 14

——Rr. 14 and 10 — Discharge —Meaning of.

The word "discharge" does not occur either in Article 311 of the Constitution or in the Civil Services Rules (Punjab) in regard to penalties, but the definition of this word given in the Punjab Rules shows that it only applies to those cases where a person's service is terminated for reasons given in (a), (b) and (c) of the Explanation under Rules 14, 10 of the Civil Services Rules (Punjab). 8 LT 278, Relied on. **54 Punj LR 100: ILR (1954) Punj 528: AIR 1953 Punj 88 (93) (Pt B) (Pr 35) (DB).**

APPENDIX 24

——Appendix 24 — Classification of Government servants into (1) liable to be dismissed with the sanction of the Government and (2) subordinate services, is a reasonable classification — Enquiry of public servants — Power of Government to appoint anyone for enquiry is also not hit by Art. 14 of the Constitution. See Constitution of India, Art. 14. **AIR 1955 Punj 3.**

——Appendix 24 — Rules in Appendix are in consonance with concept of natural justice. **AIR 1955 Punj 1 (2, 3) (Pt A) (Pr 9).**

——Appendix 24 — Public servant proceeded against under Appendix 24 and not under Public Servants (Inquiries) Act —There is no contravention of Art. 14 of Constitution — (Constitution of India, Art. 14) — (Public Servants (Inquiries) Act (1850), S. 2). **AIR 1955 Punj 1 (2, 3) (Pt B) (Pr 9).**

——Vol. I, Part II, Appendix 24 — Civil servant — Punishment of withholding an increment is not reduction in rank. See Constitution of India, Art. 311. **AIR 1955 NUC (Punj) 4999.**

PUNJAB CIVIL SERVICES RULES (1959)

——Both in Rules of 1941 and 1959 the expressions 'compulsory retirement' and 'superannuation' are used as synonyms. **ILR (1962) 2 Punj 642: AIR 1963 Punj 298 (308) (Pt J) (Pr 18) (DB).**

[Reversed on another point in AIR 1964 SC 72.]

●——Vol. 1 — Notes to Rules — Effect — Have force of law.

The position of the notes to rules in 1959 Rules is somewhat different than notes subsequently added to the rules as instances of decision taken by the executive authorities under the rules. In the case of 1959 Rules notes have appeared as part of the rules as illustrations as much as illustrations appearing sometimes as of a statutory provision. It cannot be said in such a case that notes to rules as decisions of the Government interpreting the rules have no force in law. **ILR (1962) 2 Punj 642: AIR 1963 Punj 298 (313) (Pt W) (Pr 25) (DB).**

[Reversed on another point in AIR 1964 SC 72.]

RULE 1.6

●——R. 1.6 and R. 3.2 (d) — Punjab Civil Services Rules (1941), Rule 5.28 — Right to retire under the rule is subject to Rule 3.26 (d) of 1959 rules. See Punjab Civil Services Rules (1941), Rule 5.28. **AIR 1964 SC 72.**

RULE 2.2

●——Rr. 2.2 (b), 3.26 (d) (Vol. II) — Order suspending Government servant on charge of misconduct is partly administrative — Government servant's explanation to charges before suspending him pending enquiry not necessary. See Punjab Civil Services Rules (1959), Rules 3.26 (d). **AIR 1964 SC 72.**

RULE 3.13

●——R. 3.13 — Government servant on leave preparatory to retirement — Can be suspended.

Per Raghubar Dayal and Mudholkar, JJ. — A Government servant is in service till his service terminates and the service can terminate only by dismissal, removal or retirement. The date from which a Government servant is on leave preparatory to retirement cannot be treated as the date of his retirement from service. When a Government servant proceeds on leave preparatory to retirement, he does not cease to hold office and to be in the employment of Government. Suspension of a Government servant, during the course of his service, simply means that no work is to be taken from him during the period of suspension. If he is actually discharging the duty of a certain office prior to suspension the order of suspension would mean that he would cease to work on and discharge the duties of that post. If at that time he is not working on any post but is on leave, no question of his actually ceasing to work or giving up the discharge of duty arises, but that does not mean that the order of suspension would be ineffective. The Government servant, during suspension or on leave, holds a lien on his permanent post in view of Rule 3.13 unless his lien is suspended or is transferred under the appropriate rule and so has a title to hold that post when under suspension or on leave. A Government servant on leave preparatory to retirement can therefore be suspended. AIR 1963 SC 687, Rel. on. S Pratap Singh v. State of Punjab, **(1964) 4 SCR 733: (1965) 1 SCA 259: AIR 1964 SC 72 (95) (Pt B) (Prs 44, 45).**

——R. 3.13 (e) Vol. 1 — Rule applies to leave Preparatory to retirement. See Punjab Civil Services Rules (1959), Vol. 1, Rule 3.26 (d). **AIR 1963 Punj 298 (DB).**

[Reversed on another point in AIR 1964 SC 72.]

RULE 3.26 (d)

●——R. 3.26 (d) — Validity — Does not contravene Article 14 or Article 23 of Constitution. See Constitution of India, Article 19. **AIR 1964 SC 72.**

●——R. 3. 26 (d) — Applicability — Government servant joining Class I Medical Service in 1947.

Per Raghubar Dayal and Mudholkar, JJ.— The Government servant joined the Punjab Civil Medical Service, Class I, in 1947. At that time the Punjab Civil Medical Services, Class I (Recruitment and Conditions of Service) Rules 1940 were in force. The Punjab Civil Services Rules (1941) were also in force when he joined service. Rule 3.26 (d) of the 1959 Rules did not find place in 1940 rules:

Held, that the question of retirement of a Government servant on superannuation or otherwise is not matter cognate to pensions. Pension follows retirement and may be said to be incidental to it. Rule 13 of the Medical Rules therefore did not govern the terms of retirement of the Government servant. It was Rule 17 of the Medical Rules which would govern the matter of his retirement. It was clear from this rule that in the matter of retirement the Government servant would be governed by such general rules as might have been made by the Government at the time the Medical rules were made or as would be made by the Government subsequently. The

latest general rules governing the retirement of Government servants would govern the retirement of the Government servant even if it be assumed that the Medical rules still governed his conditions of service. Rule 3.26 (d) was therefore applicable to the Government servant. S. Pratap Singh v. State of Punjab, (1964) 4 SCR 733: (1965) 1 SCA 259: AIR 1964 SC 72 (97) (Pt L) (Prs 51, 52).

●——R. 3.26 (d) — 'Charge' — Meaning of —Does not necessarily mean formal charge framed and communicated to the Government servant.

Per Raghubar Dayal and Mudholkar, JJ.— Rule 7 of the Punjab Civil Services (Punishment and Appeal) Rules (1962) comes into play only after a prima facie case is made out against a Government servant and not at the stage of a preliminary investigation into accusation made against a Government servant. But it does not follow that suspension is not permissible till this stage of making a formal charge arrives. Rule 3.26 (d) of the Punjab Civil Services Rules is of general application and therefore the expression 'charge of misconduct' in this rule is not to be interpreted narrowly as meaning 'the charges formally framed and communicated to the Government servant concerned' with the intimation that a formal departmental enquiry had been initiated against him on those charges. Of course the enquiry would be into the charges of misconduct on account of which the Government servant has been suspended and the suspension will continue till a final order is passed on those charges. The requirements of the last portion of this rule do not in any way lead to the conclusion that the enquiry into the charges refers to a formal departmental enquiry into the charges framed and communicated to the Government servant in accordance with Rule 7 of the Punishment and Appeal Rules. Whenever any charge of misconduct is under enquiry by the Government, be it informally or formally, the Government is competent to suspend the Government servant and, if the requirements of the case require, to take action under R. 3.26 (d). S. Pratap Singh v. State of Punjab, (1965) 1 SCA 259: (1964) 4 SCR 733: AIR 1964 SC 72 (98) (Pt M) (Pr 54).

●——Rr. 3.26 (d), 2.2 (b), (Vol. II) — Order suspending Government servant on charge of misconduct is partly administrative — Government servant's explanation to charges before suspending him pending enquiry not necessary. AIR 1963 SC 395, Disting. S. Pratap Singh v. State of Punjab, (1964) 4 SCR 733: (1965) 1 SCA 259: AIR 1964 SC 72 (98) (Pt N) (Prs 55, 56).

●——R. 3.26 (d) — Date of compulsory retirement — Meaning — Does not mean date on which Government servant can be retired or permitted to retire before actual date of superannuation.

Per Raghubar Dayal and Mudholkar, JJ.— The expression 'date of compulsory retirement' in Rule 3.26 (d) must really refer to the dates mentioned in the earlier clauses of Rule 3.26 (d) and they are those on which the Government servant attains the age of 55 years or any of the ages mentioned in Clauses (b) and (c) of that rule. The expression 'required to retire' would certainly refer to those officers whose cases come within the previous clauses of Rule 3.26 and may also be applicable to Government servants who may be required to retire under any other rule in particular circumstances. The expression 'permitted to retire', again would refer to cases where the Government servant opts to retire in view of certain rules providing for his exercising such an option. AIR 1957 SC 892, Distinguished. S. Pratap Singh v. State of Punjab, (1964) 4 SCR 733: (1965) 1 SCA 259: AIR 1964 SC 72 (99) (Pt Q) (Prs 65, 66).

——Vol. 1, Rule 3.26 (d) — Validity — Government servant has no absolute right to retire at a particular date and the Government has the power to continue him in service in the circumstances as given in R. 3.26 (d) — Petitioner entering into service with express condition that he was to be governed by rules of service made from time to time — It cannot be held that on attaining the age of 55 years he was to become a free man on retirement with restoration of full freedom to exercise all his fundamental rights under Art. 19 and by retention of him in service beyond that date under R. 3.26 (d), all such rights are curtailed so that the rule is bad as conflicting with fundamental rights and thus void under Art. 13. See Constitution of India, Art. 13. AIR 1963 Punj 298 (DB).

[Reversed on another point in AIR 1964 SC 72].

——Vol. 1, R. 3.26 (d) — Validity — Rule does not offend Art. 14. See Constitution of India, Art. 14. AIR 1963 Punj 298 (DB).

[Reversed on another point in AIR 1964 SC 72].

——Vol. 1, R. 3.26 (d) — Validity — Rule does not contravene Art. 23. See Constitution of India, Art. 23. AIR 1963 Punj 298 (DB).

[Reversed on another point in AIR 1964 SC 72].

——Vol. 1, R. 3.26 (d) — Applicability — Rule can be applied even after the Government servant went on leave preparatory to retirement. ILR (1962) 2 Punj 642: AIR 1963 Punj 298 (308) (Pt I) (Pr 18) (DB).

[Reversed on another point in AIR 1964 SC 72].

——Vol. 1, R. 3.26 (d) — Scope — Rule does not require that charge of misconduct should be communicated to the Government servant with the order of suspension — All that it means is that at the time the suspension is made there is to exist 'a charge of misconduct' against the Government servant, and if this condition is fulfilled, the requirements of the rule are satisfied. ILR (1962) 2 Punj 642: AIR 1963 Punj 298 (308) (Pt K) (Pr 18) (DB).

[Reversed on another point in AIR 1964 SC 72].

——Vol. 1, R. 3.26 (d) — 'Permitted to retire' — Meaning of — The words mean that a Government servant against whom there is a charge of misconduct shall not be allowed to retire on the date of reaching the normal age of compulsory retirement or superannuation — The words are not used with limited meaning given in R. 5.32(a) (Vol. 2) which deals with retiring pension to a Government servant permitted to retire after completing qualifying superior service for 25 years. ILR (1962) 2 Punj 642: AIR 1963 Punj 298 (308) (Pt L) (Pr 18) (DB).

[Reversed on another point in AIR 1964 SC 72].

——Vol. 1, R. 3.26 (d) — Petitioner in medical service due to retire on 15th June, 1961 — Letter from Secretary to Director of Health Service to the petitioner under Rule 3.26 (d) stating that he was to retire on 16th June, 1961 — Gazetted Notification published on 10th June, 1961, however stating that he was to be retained in service on his reaching date of compulsory retirement till the result of the enquiry against him — It cannot

be said in such a case that he had retired before the order under R. 3.26 (d) was made operative. ILR (1962) 2 Punj 642: AIR 1963 Punj 298 (310) (Pt M) (Pr 20) (DB).

[Reversed on another point in AIR 1964 SC 72].

——Vol. 1, R. 3.26 (d) — Scope — Order of suspension and retention in service need not be made on public grounds. AIR 1961 Cal 1. Disting. ILR (1962) 2 Punj 642: AIR 1963 Punj 298 (311) (Pt T) (Pr 23) (DB).

[Reversed on another point in AIR 1964 SC 72].

——Vol. 1, R. 3.26 (d) — Suspension under — Suspension does not mean suspension of the Government servant from contract of service but merely suspension from office — His connection with the Government as employer has not ceased and further he holds the office under the direction that he is not to attend to his duty until order is made in accordance with R. 3.26 (d). ILR 10 All 459 and AIR 1961 All 580, Disting. AIR 1958 Cal 239 and AIR 1957 Punj 130 and (1888) 39 Ch. D 339, Rel. on. ILR (1962) 2 Punj 642: AIR 1963 Punj 298 (312) (Pt U) (Pr 24) (DB).

[Reversed on another point in AIR 1964 SC 72].

——Vol. 1, Rr. 3.26 (d), 3.13 (e), 8.21, 8.15, 8.44-A, 8.42 — Leave preparatory to retirement — Effect — There can be recall from such leave and suspension for enquiry.

While leave preparatory to retirement has to be on different basis in some respects, it does not cease to be leave. And if it is leave which is subject to the general provisions relating to leave such as the provision of R. 8.15, Vol. 1, of 1959 Rules, that leave cannot be claimed as of right and when the exigencies of public service so require, discretion to refuse or revoke leave of any description is reserved to the authority empowered to grant it. All leave including leave preparatory to retirement is apparently subject to this rule. Although R. 8.44-A deals with recall of a Government servant who has proceeded on leave preparatory to retirement to duty with his consent, the power of recall in regard to all leave is to be found in R. 8.42 and leave preparatory to retirement is not excepted from this rule. It is clear from note 10 to R. 8.21 that there can be compulsory recall from leave preparatory to retirement in which case the balance of the unenjoyed leave is treated as leave refused under that rule.

There is nothing exceptional in the order cancelling the leave preparatory to retirement of the Government servant and recalling him for the purposes of enquiry while suspending him at the same time when he was recalled. If the Government servant has retained lien on the post from which he proceeded on leave, he cannot say that he cannot be suspended from that post and his leave preparatory to retirement cannot be cancelled so as to recall him to duty while simultaneously suspending him. AIR 1954 SC 584, Disting. ILR (1962) 2 Punj 642: AIR 1963 Punj 298 (313) (Pt V) (Pr 25) (DB).

[Reversed on another point in AIR 1964 SC 72].

——R. 3.26 (d) — Applicability and effect — Public servant on leave prior to retirement — Order of suspension passed, reaching him subsequent to his retirement — Effect.

An order passed under Rr. 3.26 (d) of Punjab Civil Services Rules takes effect from the date when it is served on the Government servant concerned or when it comes to his knowledge. If by the time it comes to his knowledge he has retired from service, such an order will not have any effect qua him. AIR 1963 Punj 298, Followed.

The services of the respondent, a Punjab Co-operative Department servant were lent to the Himachal Pradesh Government on 1st May, 1954. The duration of his deputation was extended with the concurrence of the Government of India to 4th August, 1958 on which date he was to retire. The H. P. Government on his request granted him leave prior to retirement by a notification. The Punjab Government asked the H. P. Government to cancel the leave and issue reversion orders to the respondent. In compliance with this direction of Punjab Government the H. P. Government cancelled the leave prior to retirement and granted the respondent earned leave from 17th July, 1958 to 2nd August, 1958, instead. The Punjab Government by a telegram addressed to the respondent suspended him with effect from 2nd August, 1958. The respondent was asked to report himself to the Registrar, Co-operative Societies, Punjab, on 4th August, 1958, positively. In his letter the respondent specifically contended that as he had already proceeded on leave prior to retirement on 17th July, 1958, till 4th August, 1958, when he attained the age of superannuation and as no orders regarding his suspension were received by the respondent till then, the orders made by the relevant Department of the Punjab Government were invalid and ineffective as against him. The contention of the respondent was accepted by the Single Judge in writ petition filed by him challenging his subsesquent dismissal from service after an inquiry in which he had participated under protest. In appeal against the grant of writ:

Held, that the finding that neither any order had been served on the respondent before 4th August, 1958, intimating that he had been reverted to the parent State nor had he been informed that he had been placed under suspension on charges of misconduct, based as it was on documents which had been placed on the record, coupled with the well-known fact that there was no telegraphic office near village Batahar where the respondent resided left little room for doubt that the conclusion of the learned Single Judge was unassailable, with the result that the decision of the learned Single Judge must be upheld. (1963) 65 Pun LR 975: 1963 Cur LJ 466: (1964) 1 Lab LJ 655.

RULE 7.2

——Vol. 1, R. 7.2 — Scope — Language of rule is imperative — Subsistence allowance admissible under the Rule can be enforced as a right. ILR (1962) 2 Punj 642: AIR 1963 Punj 298 (316) (Pt Z2) (Pr 27) (DB).

[Reversed on another point in AIR 1964 SC 72].

RULE 7.5

——Rr. 7.5, 7.6 — Scope — Rules do not invest Government with power of suspension.

Per Raghubar Dayal and Mudholkar, JJ. — R. 7.5 of the 1941 Rules, or Rr. 7.5 and 7.6 of the 1959 rules do not invest the Government with the power of suspension, but only provide either for certain periods during a Government servant's service to be deemed to be periods during which he was under suspension or during which he be placed under suspension in view of the various exigencies mentioned in those rules. No such formal rule is to be found in any of these rules. The power of suspending a Government servant

is vested in the authority which appoints the Government servant in view of S. 16 of the General Clauses Act, 1897. S. Pratap Singh v. State of Punjab, (1964) 4 SCR 733: (1965) 1 SCA 259: AIR 1964 SC 72 (98) (Pt O) (Pr 58).

RULE 8

●——R. 8 — Government Servant on leave preparatory to retirement — Leave revoked by Gov ernment, Government servant suspended and departmental enquiry ordered against him — Held, no breach of service rules — Petition under Art. 226 by such Government servant alleging mala fides on part of Minister in charge — No counter affidavit by Minister concerned but affidavit filed by Secretary in the Department having no personal knowledge regarding allegations against Minister — Mala fides held proved — Order set aside. See Constitution of India, Art. 226. AIR 1964 SC 72.

RULE 8.15

●——Rr. 8.15, 8.3, 8.42 — Scope — Leave can be revoked even after officer has proceeded on leave. S. Pratap Singh v. State of Punjab (1965) 1 SCA 259: (1964) 4 SCR 733: AIR 1964 SC 72 (95) (Pt F) (Pr 43).

●——R. 8.15 — Government servant on leave preparatory to retirement — Orders of suspension and revocation of leave passed on same date — Order of suspension bearing an earlier number than order of revocation of leave — Held, the order in which the two orders were issued did not affect in substance the validity of the two orders so long as the Governor had the power to suspend the Government servant and revoke his leave — Orders may be issued in any sequence. S. Pratap Singh v. State of Punjab, (1964) 4 SCR 733: (1965) 1 SCA 259: AIR 1964 SC 72 (95) (Pt J) (Pr 47).

●——R. 8.15 — Government servant on leave preparatory to retirement and to retire on 16th June, 1961 — Orders of revocation of his leave and suspension passed on 3rd June, 1961 but actually communicated to the Government servant on 19th June, 1961 owing to his wrong address — Government not having received acknowledgment of receipt of orders from Government servant publishing in the Gazette, Extraordinary, dated 10th June, 1961 — Held, the orders of the Government ordinarily take effect from the moment they are issued except when they cannot be effective due to their nature — An order of suspension of the Government servant when he was on leave could be effective from the moment it was issued — The Government servant was on leave and was not discharging any official functions — If he had been actually on duty, the order of suspension would have taken effect from the moment it reached him and from which moment alone he could have complied with that order by ceasing to work any further in the discharge of his duties — It was therefore immaterial whether the publication of the orders in the Gazette, Extraordinary amounted to sufficient notice to the Government servant of the various orders and whether the letters communicating to him the order reached him after the due date of retirement — In the present cases the orders were effective from 3rd June, 1961 and their validity and effect did not depend on the date of communication to the Government servant — They were final orders — Of course, the Governor could, at any time, pass further orders superseding those orders — The possibility of a change in the order was not the main basis for considering whether a certain order was effective or not. AIR 1963 SC 395 and AIR 1961 SC 493, Distinguished. S. Pratap Singh v. State of Punjab, (1964) 4 SCR 733: (1965) 1 SCA 259: AIR 1964 SC 72 (95, 96) (Pt K) (Prs 48, 49, 50).

——Vol. 1, Rr. 8.15, 8.21, 8.41-A and 8.42 — Leave preparatory to retirement — Effect — There can be recall from such leave and suspension for enquiry. See Punjab Civil Services Rules (1959), Vol. 1, R. 3.26 (d). AIR 1963 Punj 298 (DB).

[Reversed on another point in AIR 1964 SC 72].

RULE 8.19

●——R. 8.19 — Applicability — Government not in a position to form any opinion about dismissal, etc. of Government servant — Leave not to be refused by resort to R. 8.19. S. Pratap Singh v. State of Punjab, (1965) 1 SCA 259: (1964) 4 SCR 733: AIR 1964 SC 72 (107) (Pt H) (Pr 101).

PUNJAB COAL CONTROL ORDER (1955)

CLAUSE 2

——Cls. 2 (i), 9 and 10 — Instruction that a certain person should be accepted as partner by a depot-holder is not justified.

The word 'instructions' as employed in Cl. 9 (c) surely has reference to such instructions as can be issued under the Order and not to any other kind of direction, however whimsical or arbitrary it may be which the District Magistrate may choose to issue. There is nothing in the Order which authorises or justifies the issuing of an instruction that a particular person should be accepted as partner by a depot-holder who has already been appointed by the District Magistrate within the meaning of Cl. 2 (i). ILR (1961) 2 Punj 595: 63 Pun LR 593: AIR 1962 Punj 32 (37) (Pt D) (Pr 9) (DB).

CLAUSE 9

——Cls. 9, 2 (i) and 10 — Instruction that certain person should be accepted as partner by a depot-holder is not justisfied. See Punjab Coal Control Order (1955), Clause 2 (i). AIR 1962 Punj 32 (DB).

——Cls. 9, 10 — Order cancelling coal depot on ground of failure of depot-holder to disclose source from which he obtained copies of certain office notes — Order held illegal. ILR (1961) 2 Punj 595: 63 Punj LR 593: AIR 1962 Punj 32 (37) (Pt E) (Pr 10) (DB).

CLAUSE 10

——Cl. 10 — Order issued under Clause 10 of Punjab Coal Control Order (1955) being illegal and ultra vires and affecting fundamental right of a person to carry on his trade or business under Article 19 (1) (g) — Held writ under Article 226 should issue. See Constitution of India, Art. 226. AIR 1962 Punj 32 (DB).

——Cls. 10, 9 and 2 (i) — Instruction that a certain person should be accepted as partner by a depot-holder is not justified. See Punjab Coal Control Order (1955), Cl. 2 (i). AIR 1962 Punj 32 (DB).

——Cls. 10, 9 — Order cancelling coal depot on ground of failure of depot-holder to disclose source from which he obtained copies of certain office notes — Order held illegal. See Punjab Coal Control Order (1955), Cl. 9. AIR 1962 Punj 32 (DB).

——Cl. 10 — **Order of cancellation on various grounds some of which are ultra vires — Order becomes void in its entirety.**

When an order under Cl. 10 is made in which various grounds are given for cancellation of the depot and only one of them is sustainable and the others are ultra vires and outside the provisions of the order, the order becomes void in its entirety. In such circumstances it cannot be said which ground or reason affected the mind of the authorities and what punishment would have been inflicted if the other grounds or reasons had not existed. **ILR (1961) 2 Punj 595: 63 Pun LR 593: AIR 1962 Punj 32 (37) (Pt F) (Pr 11) (DB).**

——Cls. 10 and 11 — Scope — Government failing to perform duty imposed on it by law — Mandamus — Issue of remedy — Petitioner has a right to the enforcement of the said duty by the issue of a writ of mandamus. See Constitution of India, Art. 226. **59 Punj LR 647: ILR (1958) Punj 547.**

——Cls. 10 and 11 — **Scope — If exhaustive — Cancellation of depots on grounds not mentioned in cls. 10 and 11 — Legality.**

Where a coal depot was cancelled on the ground that Government had decided to revoke the policy concerning allotment of depots which was being followed in the past and had adopted a policy of giving out depots on merit;

Held, that the express words mentioned in Clauses 10 and 11 of the Coal Control Order of the fact that a coal depot may be cancelled only under certain circumstances implies that it may not be cancelled under any other circumstances. It was therefore, not within the competence of the State Government to cancel the depot on any ground other than a ground mentioned in Clause 10 or Clause 11 of the Order. **59 Punj LR 647: ILR (1958) Punj 547.**

PUNJAB COLONIZATION OF GOVERNMENT LANDS ACT (5 of 1912)

SECTION 15

——Ss. 15, 19 — Scope of S. 19 — Tenant of colony land acquiring proprietary rights in that land — Subsequent transfer of that land without Commissioner's consent is valid — Restrictions on alienation under S. 19 are against transfer of tenancy rights and not against transfer of proprietary rights — See Punjab Colonization of Government Lands Act (1912), S. 19. **AIR 1965 Punj 225 (DB).**

SECTION 19

——Ss. 19, 15 — **Scope of S. 19 — Tenant of colony land acquiring proprietary rights in that land — Subsequent transfer of that land without Commissioner's consent is valid — Restrictions on alienation under S. 19 are against transfer of tenancy rights and not against transfer of proprietary rights.**

There is no restriction on the power of alienation once proprietary rights have been acquired by a tenant of colony land. The restrictions under S. 19 are apparently meant against the transfer of tenancy rights because of the Government's interest in realizing the lease-money and also in making the scheme of colonization successful. Therefore, the restriction under S. 19 of prior written consent of the Commissioner, has no application where a tenant of colony land transfers the colony land after acquiring its proprietorship: AIR 1926 Lah 14, Disting.

Where according to the recital in the registered sale-deed itself, the whole purchase money has been received by the vendors (original tenants) and the zar-i-malkana asserted by them to have been deposited and possession also given to the vendees with an undertaking that the necessary mutation would also be got entered by the vendors, no basic principle of public policy would be violated if the deed is given full effect, even though there is no direct affirmative proof in the form of receipt of actual deposit of the price and of the requisite consent of the Commissioner or other duly empowered officer. **67 Pun LR 178: AIR 1965 Punj 225 (229) (Pt B) (Pr 13) (DB).**

PUNJAB COMMODITIES PRICE MARKING AND DISPLAY ORDER (1962).

CLAUSE 3

——Cl. 3 (a) — Power of superintendence — Comparison with powers under Art. 226 — No interference under Art. 227 merely on technical ground. See Constitution of India, Art. 227. **(1964) Cur LJ 324 (Punj).**

CLAUSE 4

——Cl. 4 — Violation of — Conviction cannot be challenged on ground that 'essential commodity' has not been defined by Defence of India Rules or Order itself. See Defence of India Rules (1962), R. 125 (2). **1965 (1) Cr LJ 205: AIR 1965 Punj 86.**

CLAUSE 6

——Cl. 6 — Order published in official gazette — Accused cannot contend ignorance of its provisions — It is open to the prosecution to prove that the accused was aware of the order in question — Omission on part of prosecution to prove that issuing authority had decided to so publish the Order, not material. See Defence of India Rules (1962), R. 141. **1965 (1) Cr LJ 205: AIR 1965 Punj 86.**

PUNJAB COMMUNIST DETENUS RULES (1950)

See under Public Safety.

PUNJAB CONSOLIDATION OF LAND PROCEEDINGS (VALIDATION) ACT (6 of 1957)

See under Tenancy laws.

PUNJAB CONTROL OF BRICKS SUPPLIES ORDER (1956)

CLAUSE 4

——Cl. 4 (iii) — Refusal of licence on ground that applicant indulges in anti-national activities which tend to cause disharmony likely to result in breach of peace between different communities — Held refusal of licence on this ground was illegal. **ILR (1962) 2 Punj 546.**

PUNJAB CO-OPERATIVE SOCIETIES ACT (14 of 1955)

See under Co-operative Societies.

PUNJAB CO-OPERATIVE SOCIETIES ACT (25 of 1961)

See under Co-operative Societies.

PUNJAB COURT OF WARDS ACT (2 of 1903)

SECTION 5

——S. 5 (2) (d) — Scope — Not invalid as being an unreasonable restriction. See Constitution of India, Art. 19. **AIR 1954 Punj 247 (DB).**

[Overruled on another point in AIR 1963 Punj 9].

——S. 5 (2) (d) — Scope and effect of — Property taken under superintendence of Court of

Wards — Property is not 'acquired'. See Constitution of India, Art. 31. AIR 1954 Punj 247 (DB).

[Overruled on another point in AIR 1963 Punj 9].

——S. 5 (2) (d) — Constitution of India, Art. 13 — Retrospective effect — Order passed by Government under S. 5 (2) (d) of the Punjab Court of Wards Act passed before the Constitution cannot be interfered with by the High Court merely on the ground that by subsequent enactment or by Constitution some rights have been conferred on the petitioner, which according to him have made the Act ultra vires. See Constitution of India, Art. 13. AIR 1953 Punj 30 (DB).

[Overruled on another point in AIR 1963 Punj 9].

——S. 5 — Constitution of India, Art. 14 — Reasonable classification — Validity — It cannot be said that the classification for purposes of protections of land revenue is not a reasonable classification — See Constitution of India, Art. 14. AIR 1953 Punj 30 (DB).

[Overruled on another point in AIR 1963 Punj 9].

——S. 5 (2) (d) — Constitution of India, Art. 226 — Order under S. 5 (2) (d) is not a judicial or quasi-judicial order — No writ of certiorari or mandamus can be issued — See Constitution of India, Art. 226. AIR 1953 Punj 30 (DB).

[Overruled on another point in AIR 1963 Punj 9].

——S. 5 — Validity.

Howsoever undesirable it may be to pass a law like Punjab Court of Wards Act, S. 5, it is not hit by Art. 15 of the Constitution. 55 Pun LR 279: ILR (1953) Punjab 279: AIR 1953 Punjab 30 (35) (Pt D) (Pr 35) (DB).

[Overruled on another point in AIR 1963 Punj 9].

SECTION 12

——S. 12 — Power of High Court — Superintendence of property assumed under S. 5 (2) (d) — Evidence — Sufficiency of — (Constitution of India, Art. 226).

It is not within the competence of the High Court under Art. 226 of the Constitution to examine the evidence on the basis of which the State Government came to the conclusion that the conditions set out in S. 5 (2) have been complied with. The High Court cannot constitute itself into a Court of appeal in cases of this kind and it is not within the province of the High Court to express an opinion on the adequacy or otherwise of the material on which the conclusion of a Deputy Commissioner is based. 56 Punj LR 403: ILR (1955) Punj 331: AIR 1954 Punj 247 (250) (Pt E) (Pr 15) (DB).

[Overruled on another point in AIR 1963 Punj 9].

SECTION 13

——S. 13 — Reasonable restrictions.

It is for the purposes of protection of the revenues of the State and for seeing that there is no discontent amongst the tenants, laws of the kind such as Punjab Court of Wards Act are passed by the Government. It cannot be said that they are unreasonable interference with the fundamental rights of persons — See Constitution of India, Art. 19 (1) (f). AIR 1953 Punj 30.

[Overruled on another point in AIR 1963 Punj 9].

SECTION 15

——S. 15 — Reasonable restrictions.

It is for the purpose of protection of the revenue of the State and for seeing that there is no discontent amongst the tenants, laws of the kind such as Punjab Courts of Wards Act are passed by Government. It cannot be said that they are unreasonable interference with the fundamental rights of persons — See Constitution of India, Art. 19 (1) (f). AIR 1953 Punj 30.

[Overruled on another point in AIR 1963 Punj 9].

SECTION 17

——S. 17 — Reasonable restrictions.

It is for the purpose of protection of the revenues of the State and for seeing that there is no discontent amongst the tenants, laws of the kind such as Punjab Courts of Wards Act are passed by the Government. It cannot be said that they are unreasonable interference with the fundamental rights of persons. See Constitution of India, Art. 19 (1) (f). AIR 1953 Punj 30.

[Overruled on another point in AIR 1963 Punj 9].

SECTION 25

——S. 25 — Reasonable restrictions.

It is for the purposes of protection of the revenues of the State and for seeing that there is no discontent amongst the tenants, laws of the kind such as Punjab Courts of Wards Act are passed by the Government. It cannot therefore be said that they are unreasonable interference with the fundamental rights of persons — See Constitution of India, Art. 19 (1) (f). AIR 1953 Punj 30.

[Overruled on another point in AIR 1963 Punj 9].

SECTION 48

——S. 48 — S. 48 of the Punjab Act 2 of 1903 does not define interpleader suit or gives procedure governing interpleader suit. But in view of the definition of the expression 'interpleader suit and the procedure governing such suits given in S. 88 of C. P. C., the Court of Wards can institute interpleader suit against several claimants when on the death of any person of whose property the Court of Wards has assumed jurisdiction the succession to his property is disputed. Such a suit falls within S. 88, C. P. C. and is not barred by S. 48 of the Punjab Act II of 1903. See Civil P. C. (1908), Order 35, Rule 5. AIR 1954 Punj 103 (DB).

——S. 48 — Scope — C. P. Code (1908), S. 88.

Section 48 of the Punjab Act 2 of 1903 does not define an interpleader suit or gives the procedure governing interpleader suits. But in view of the definition of the expression 'interpleader suit' and the procedure governing such suits given in S. 88, C. P. Code, the Court of Wards can institute an interpleader suit against several claimants, when on the death of any person of whose property the Court of Wards has assumed jurisdiction, the succession to his property is disputed. Such a suit falls prima facie within S. 88, C. P. Code, and is not barred by S. 48 of the Punjab Act II of 1903. AIR 1931 Oudh 177, Relied on. 56 Punj LR 63: ILR (1954) Punj 769: AIR 1954 Punj 103 (104) (Pt B) (Prs 12, 18) (DB).

APPENDIX, CLAUSE 3

——Appendix C, Cl. (3) — Power of attorney — Authorisation by Deputy Commissioner.

Under Cl. (3) it is the Deputy Commissioner who must sign the power of attorney of the ad-

vocate who acts on behalf of the Court of Wards. Where there is no such authorisation the appeal is not effective. **55 Pun LR 375: AIR 1953 Punj 273 (274) (Pr 6) (DB).**

PUNJAB COURTS ACT (6 of 1918)

SECTION 3

●——S. 3 (4) and S. 39 (1) (a) — Suit for pre-emption of agricultural land — Value for jurisdiction in appeal — Direction to deposit market value — No effect on valuation for jurisdiction See Suits Valuation Act (1887), S. 3. **AIR 1960 Punj 467 (FB).**

SECTION 18

●——Ss. 18, 22, 26, 27, 33, 34 and 39 (3) — **High Court Notification No. 4 dated, 3rd January, 1923 — Court of Senior Subordinate Judge — If same as Court of subordinate Judge, First Class — (High Court Rules and Orders — Punjab High Court Rules, Vol. I, Chap. 20-B — Notification, dated 16th May, 1935, as amended on 23rd February, 1940).**

Held, on a consideration of the relevant provisions of the Punjab Courts Act and the High Court notification No. 4, dated 3rd January, 1923 that the Court of the Senior Subordinate Judge is not the same Court as the Court of the Subordinate Judge of the first class. The senior Subordinate Judge does not appear to be vested with either administrative or judicial control over any other Subordinate Judge except in so far as he is a Court of appeal in certain specified classes of cases.

The Punjab High Court Notification, dated 16th May, 1935, as amended on 23rd February, 1940, reproduced in Vol. 1, Ch. 20-B of the High Court Rules and Orders also appears to regard each Senior Subordinate Judge as a Court in itself and not merely as the presiding officer of the Court of the Subordinate Judge.

S. 39 (3) permits an appeal from one Subordinate Judge to another and the words the "Court of such other Subordinate Judge" indicate that the Subordinate Judge to whom the appeal is preferred is a separate and distinct Court. Kuldip Singh v. State of Punjab, **1956 Mad WN 465 (2): 1956 SCR 125: 1956 SCA 809: 1956 All LJ 434: 1956 Cr LJ 781: 1956 SCJ 387: 1956 SCC 455: 58 Punj LR 595: ILR (1956) Punj 1075: AIR 1956 SC 391 (396, 397, 398) (Pt B) (Prs 23, 30, 32, 33).**

●——Ss. 18, 21 — **Court of Additional Judge — If a division Court of the Court of District Judge.**

Under Section 18, the Court of the Additional Judge is constituted a distinct class of Court; the Act speaks of the Court of the Additional Judge and not of the Additional District Judge as is the case with certain other Acts in other parts of India. The Punjab Courts Act nowhere speaks of an Additional District Judge or of an Additional Judge to the District Court; also, the Additional Judge is not a Judge of co-ordinate judicial authority with the District Judge. But these Judges cannot discharge all the judicial functions of the District Judge. Their jurisdiction is a limited one and is limited to the discharge of such functions as may be entrusted to them by the District Judge under Section 21 (2). Thus, if his functions are confined to the hearing of appeals he cannot exercise original jurisdiction and vice versa. But if he is invested with the functions of an appellate tribunal at the District Court level, then he can exercise all the powers of the District Judge in dealing with appeals which the District Judge is competent to entertain. This is a very different thing from the administrative distribution of work among the Judges of a single Court entitled to divide itself into sections and sit as division Courts. As the Punjab Courts Act does not contemplate the appointment of Additional Judges to the District Court, none can be appointed. The Court contemplated is the Court of the Additional Judge which is in the nature of a special tribunal set up for a special purpose and invested with the powers of a District Judge when dealing with the matters specially entrusted to its jurisdiction. Therefore the Court of the Additional Judge is not a division Court of the Court of the District Judge but a separate and distinct Court of its own. Kuldip Singh v. State of Punjab. **1956 Mad WN 465 (2): 1956 SCR 125: 1956 SCA 809: 1956 All LJ 434: 1956 Cr LJ 781: 1956 SCC 455: 58 Punj LR 595: ILR (1956) Punj 1075: 1956 SCJ 387: AIR 1956 SC 391 (398, 399) (Pt C) (Prs 36, 37).**

——Ss. 18 and 21 — Additional District Judge is not principal Civil Court of original Civil jurisdiction — District judge cannot transfer the petition under Hindu Marriage Act to him. See Hindu Marriage Act (1955), S. 19. **AIR 1959 Punj 50 (DB).**

[Overruled in AIR 1965 Punj 472.]

SECTION 20

——S. 20 (as it stood in 1957) — District Judge, meaning of — The Court of Additional District Judge was not recognied under the provisions of the Punjab Courts Act as it stood in 1957 and there could be only one District Judge in the District who could be nominated under proviso to Section 9 of the Displaced Persons (Compensation and Rehabilitation) Act. Subsequent amendment of the Act was not retrospective. See Displaced Persons (Compensation and Rehabilitation) Act (1954), Section 9 Proviso. **1965 Pun LR (Supp) 371.**

SECTION 21

●——Ss. 21 and 18 — Court of Additional Judge is not a Division Court of the Court of District Judge — It is a separate and distinct court of its own — (Special Tribunal). See Punjab Courts Act (6 of 1918), Section 18. **1956 Cri LJ 781: AIR 1956 SC 391.**

●——S. 21 — Principal Civil Court of original civil jurisdiction — Suit under Section 92 instituted in Court of District Judge — District judge transferring it to Additional District Judge — Latter has jurisdiction to dispose it. See Civil P. C. (1908), Section 24. **AIR 1965 Punj 472 (FB).**

——S. 21 — Principal Civil Court of original civil jurisdiction — Additional District Judges in the Punjab is not — Jurisdiction to hear petitions under Hindu Marriage Act — Power of District Judge to transfer petition to Additional District Judge — District Judge has no power. See Hindu Marriage Act (1955), Section 19. **AIR 1959 Punj 50 (DB).**

[Overruled in AIR 1965 Punj 472 (FB).]

——S. 21 (2) — Houses and Rents — E. P. Urban Rent Restriction Act (1949), Section 15 — District Judge acting as appellate auothority not a Court — He has no power to assign appeal to Additional District Judge under Section 21 (2) of the Act. See Houses and Rents — E. P. Urban Rent Restriction Act (3 of 1949), Section 15. **AIR 1951 Punj 415.**

——S. 21 (2) — East Punjab Urban Rent Restriction Act, Section 15 (1) and (4) — Appellate authority whether can assign appeal to another under — Appellate authority hearing appeal from an order of the Rent Controller does so as a 'persona designata' and not as a Court — District Judge hearing such appeal has no jurisdiction under Section 21 (2), Punjab Courts Act 1918 to assign the appeal to the Additional District Judge. See Houses and Rents — East Punjab Urban Rent Restriction Act (3 of 1949), Section 15 (1). **AIR 1951 Punj 355.**

SECTION 22

●——Ss. 22, 18, 26, 27, 33, 34 and 39 (3) — Punjab High Court Notification No. 4 D/- 3-1-1923 — Court of Senior Subordinate Judge is not same court as Court of subordinate Judge First Class — (High Court Rules and Orders — Punjab High Court Rules, Vol. 1, Ch. 20B — Notification dated 16-5-1935 as amended on 23-2-1940) See Punjab Courts Act (6 of 1918), Section 18. **1956 Cri LJ 781: AIR 1956 SC 391.**

SECTION 24

——S. 24 — Plaint filed in Court of principal Civil jurisdiction with application for transfer to subordinate court — Plaint transferred to subordinate court and registered there — Date of filing suit held to be date when plaint was filed before court of principal civil jurisdiction. See Limitation Act (1908), Section 3. **AIR 1963 Punj 208 (DB).**

SECTION 26

●——Ss. 26, 18, 22, 27, 33, 34 and 39 (3) — Punjab High Court Notification No. 4 D/- 3-1-1923 — Court of Senior Subordinate Judge is not same court as Court of subordinate Judge First Class — (High Court Rules and Orders — Punjab High Court Rules, Vol. 1, Ch. 20-B — Notification dated 16-5-1935 as amended on 23-2-1940). See Punjab Courts Act (6 of 1918), S. 18. **1956 Cri LJ 781: AIR 1956 SC 391.**

SECTION 30

——S. 30 (1) — Notification — Jurisdiction — Revocation of probate — Senior Subordinate Judge in Punjab is competent. See Succession Act (1925), Section 263. **AIR 1964 Punj 485.**

SECTION 31

——S. 31 (1) (a) — Suit for pre-emption of agricultural land — Value for jurisdiction in appeal is 30 times the land revenue. See Suits Valuation Act (1887), Section 8. **1965 Cur LJ 450 (Punj).**

SECTION 33

●——Ss. 33, 18, 22, 26, 27, 34 and 39 (3) — Punjab High Court Notification No. 4 D/- 3-1-1923 — Court of Senior Subordinate Judge is not same court as Court of subordinate Judge First Class — (High Court Rules and Orders — Punjab High Court Rules, Vol. 1, Ch. 20-B — Notification dated 16-5-1935 as amended on 23-2-1940). See Punjab Courts Act (6 of 1918), Section 18. **1956 Cri LJ 781: AIR 1956 SC 391.**

SECTION 34

——Ss. 34 and 37 — Civil P. C., Ss. 15, 26, Order 4, Rules 1 and 2 — Presentation of plaints —Law as to — Date of institution of suits — At the headquarters the date of institution is the date when it is presented to the senior subordinate judge of the district. At other places the date of institution is the date when it is presented to the proper court — (High Court Rules and Orders — Punjab High Court Rules, Vol. 1, Chap. 1-B, Rules 2 and 3). See Civil P. C. (1908), Sec 15. **AIR 1956 Punj. 30.**

SECTION 37

——S. 37 — Section 37 permits the District Judge to delegate powers of transfer of appeals to the subordinate Judge. **ILR (1959) Punj 1237: 61 Pun LR 730: AIR 1959 Punj 586 (589) (Pt C) (Pr 12) (DB)**

——Ss. 37 and 34 — Civil P. C., Sections 15, 26, Order 4, Rules 1 and 2 — Presentation of plaints — Law as to — Date of institution of suits — At the headquarters the date of institution is the date when it is presented to the senior subordinate Judge of the district. In other places the date of institution is the date when it is presented to the proper Court—(High Court Rules and Orders — Punjab High Court Rules, Vol. I, Chap. 1-B, Rr. 2 and 3). See Civil P. C. (1908), Section 15. **AIR 1956 Punj 30.**

SECTION 38

——Ss. 38 and 39 — Appeal from order upon an application under Section 10 passed by Subordinate Judge, Ist class lies to the High Court and not District Court. See Hindu Marriage Act (1955), Section 28. **AIR 1961 Punj 480 (DB).**

SECTION 39

●——S. 39 — Criminal P. C., Ss. 195 (3), 476A and 476B — Subordination of Courts — "Court to which appeals ordinarily lie' — Guiding principles — Court of Subordinate Judge is not subordinate to Senior Subordinate Judge but to District Court for purposes of Section 195 (3) — (Words and Phrases — 'Court to which appeals ordinarily lie') — AIR 1931 Sind 163, Not approved. See Criminal P. C. (1898), Section 195(3). **1956 Cri LJ 781: AIR 1956 SC 391.**

●——Ss. 39 (3) and 18, 22, 26. 27, 33, 34 — Punjab High Court Notification No. 4 D/- 3-1-1923 — Court of Senior Subordinate Judge is not same court as Court of subordinate Judge First Class — (High Court Rules and Orders — Punjab High Court Rules, Vol. 1, Ch. 20B — Notification dated 16-5-1935 as amended on 23-2-1940). See Punjab Courts Act (6 of 1918), S. 18. **1956 Cri LJ 781: AIR 1956 SC 391.**

——S. 39 — Leave to sue in forma pauperis — 'Sufficient means' — Property subject-matter of suit — Cannot be taken into consideration in deciding pauperism — Interference with order refusing leave — Revision — Maintainable under Section 39 of Punjab Courts Act. See Civil Procedure Code (1908), Order 33, Rule 1. **AIR 1966 Punj 86.**

●——S. 39 (1) (a) — Rules under, Rule 2 — Suit for pre-emption of agricultural land — Value for jurisdiction in appeal — Direction to deposit market value — No effect on valuation for jurisdiction — 16 Pun Re 1908: 146 Pun LR 1908 (FB), Overruled. See Suits Valuation Act (1887), Section 3. **AIR 1960 Punj 467 (FB).**

——S. 39 (1) — Suit for redemption — Valuation for jurisdiction is to be determined under R. 9 framed under Suits Valuation Act — Forum of appeal — Value of the original suit not exceeding Rs. 5,000 — Appeal from the decree would lie to the District Judge under Section 39 (1) of the Punjab Courts Act even if the decretal amount exceeds Rs. 5,000. See Suits Valuation Act (1887), Section 3. **AIR 1960 Punj 357 (DB)**

——S. 39 — Jurisdiction — Appeal in redemption suit — Forum is determined not by original jurisdictional value of the suit but by the amount which is found by the Court to be due. See

Suits Valuation Act (1887), Section 8, **AIR 1954 Punj 36 (DB).**

——S. 39 — **Punjab Pre-emption Act (I of 1913), Section 22 — Failure of plaintiff to deposit one-fifth amount — Trial Court rejecting plaint — Appeal — Discretion of trial Court — Power of appellate Court.**

Where it can be shown that the trial Court has acted under a misapprehension of fact in that it either gave weight to irrelevant or unproved matters or omitted to take into account matters that are relevant, the exercise of discretion by the trial Court may be impeached in such a case as it has been exercised on wrong or inadequate materials: 1937 AC 473 and 1943 AC 517, Rel. on.

Thus, where in a suit for pre-emption under the Punjab Pre-emption Act, 1913, an order to deposit one fifth of the probable value of land in suit is passed in the absence of the plaintiff or his counsel, and it is not communicated to them and on failure of the plaintiff to deposit the amount on the date, the trial Court rejects the plaint under Section 22 (4), relying on certain practice of the Court, of which there is no evidence and taking into consideration certain documents which were not proved or exhibited, the appellate Court is empowered to set aside the order of rejection of plaint. **ILR (1950) Punj 243: AIR 1950 East Punj 264 (265) (Prs 12, 13) (DB).**

SECTION 41

——S. 41 — Civil P. C., Sections 100-101 — Finding about ancestral character of land is one of fact and is not open to challenge in second appeal — Where the finding is based upon the perusal, construction, and piercing together of a large number of revenue records that finding cannot be regarded as a finding of fact. See Civil P. C. (1908), Sections 100-101. **AIR 1951 Punj 358.**

——S. 41 — Finding of fact — Finding that land is not ancestral land based on perusal and construction of revenue records is no finding of fact. — Civil P. C. (1908), Section 100. AIR 1949 PC 87, Rel. on. **AIR 1950 East Punj 179 (180) (Pt A) (Pr 6) (DB)**

SECTION 44

——S. 44 — Petition under Section 115, Civil P. C. and Article 227 of Constitution challenging order of Authority under Payment of Wages Act — Authority not being subordinate to High Court, Section 115 Civil P. C. or Section 44 Punjab Courts Act not applicable. See Civil P. C. (1908). Section 115. **AIR 1964 Punj 242 (DB).**

——S 44 — Nature of — Proper Court-fee payable is in accordance with Schedule II, Article 1. See Court-fees Act (1870), Schedule II, Art. 1. **AIR 1962 Punj 378 (DB).**

——S. 44 — Authority under Payment of Wages Act, is not Court subordinate to High Court — Decision of Authority — When can be interfered with under Article 227. See Civil P. C. (1908), Section 115. **AIR 1961 Punj 154.**

SECTION 46-A

●——S. 46-A — Punjab High Court Rules and Orders, Vol. 1, Chap. 17-B, Rules 5 (ii) 6, 37 — Petitioner granted petition-writer's licence under Rule 5 (ii) on personal ground under order of Chief Justice — Grant is contrary to Rule 5 — Resolution by Full Court at its administrative meeting held subsequently not to renew licence — Resolution not open to question under Article 226 of the Constitution, as resolution only rectified an obvious case of mistake — Constitution of India, Article 226, Debi Ram Sharma v. High Court of Judicature, Punjab. **64 Punj LR 1136: AIR 1963 Punj 46 (47, 48) (Prs 6, 7) (FB).**

SECTION 70

——S. 70 (1) (b) — **Remand in appeal to Dist. Judge — Revision.**

Where the Dist. Judge on an appeal from the decision of the custodian of evacuee property passed an order for remand:

Held, that there was no occasion for the High Court to interfere with the order of remand at that stage; there would be time enough for the petitioner to come to the High Court again if and when the Dist. Judge decided the case against him after the Custodian dealt with the case in accordance with the order of remand. **AIR 1951 Punj 423 (424) (Pr 6).**

PUNJAB CRIMINAL LAW (AMENDMENT) ACT (30 of 1960)

See under Public Safety.

PUNJAB CRIMINAL LAW (AMENDMENT) ORDINANCE (2 of 1960)

See under Public Safety.

PUNJAB CUSTOM (POWER TO CONTEST) ACT (2 of 1920)

SECTION 3

——Ss. 3 and 6 — 'Alienation' — Testamentary disposition is alienation. **AIR 1955 NUC (Punj) 4974.**

SECTION 6

●——S. 6 — **Defendant must specifically allege ancestral nature of property and his relationship — Mere framing of issues or leading evidence not sufficient — Civil P. C. (1908), O. 8, R. 2.**

Under Section 6 it is necessary that a person objecting to the validity of the appointment of an heir to the property on the ground of custom must plead and prove that the land in suit is ancestral and that he comes within five degrees of the common ancestor The mere fact that the defendants contended in the written statement that the plaintiff could not be adopted according to the custom does not tantamount to making the requisite pleas.

Similarly the mere fact that the issues as framed did involve the consideration of the validity of the adoption and the ancestral nature of the land in suit will not clothe the vague allegation in the written statement with the definiteness of the requisite pleadings.

Where a claim has been never made in the defence presented, no amount of evidence can be looked into upon a plea which was never put forward.: AIR 1930 PC 57, Rel. on; ILR 39 Bom 399, Disting., Bhagat Singh v. Jaswant Singh, (1962) 1 SCJ 162: (1961) 1 Ker LR 539: 1961 SCD 709: AIR 1966 SC 1861 (1862, 1863) (Prs 6, 7, 9).

——S. 6 — Alienation by widow of A's brother after commencement of Act — Gift by A of his property challenged by appellants, his collaterals — Property found to be ancestral, though not in hands of common ancestors of A and the appellants — Widow of A's brother claiming property on A's death as his natural heir — Unchallenged continued possession even after the Act — Widow

becomes absolute owner — Alienation valid — Provisions of Punjab Limitation (Custom) Acts I and II of 1920 not attracted. See Hindu Succession Act (1956), Section 14. AIR 1962 Punj 481.

●——S. 6 — Right to contest alienation — Transferee from competent person — Right to continue contest after his death.

When an alienation of ancestral immovable property is in fact contested by the person competent to contest it, the transferees from him can continue the contest after his death. By the transfer the person is not merely transferring his personal right to challenge the alienation but the property itself with all its rights appertaining to it, which property at that time had vested in him. When treating the alienation as nullity and having obtained an order in his favour from the revenue authorities he obtained possession of the property and remained in possession of it till he transferred it, he must be held to have contested it. AIR 1929 Lah 295 and 16 Ind Cas 634 (Cal), Rel. on; 66 Punj Re 1897 (FB), Dist.; 67 Punj Re 1909, Diss. from. Harcharan Singh v. Isher Singh, ILR (1960) 2 Punj 999: 62 Punj LR 875: AIR 1961 Punj 55 (56, 57) (Prs 3, 4, 5) (FB).

PUNJAB DAMAGED AREAS ACT (11 of 1947)

SECTION 3

●——S. 3 — Scheme in respect of area declared to be "damaged area" under 1947 Act but not so declared under 1951 or 1949 Act is without jurisdiction — Conclusiveness of scheme under S. 5 (4) of 1951 Act does not apply where there is total lack of jurisdiction — Punjab General Clauses Act (1 of 1898), S. 22 — Implied repeal — 1947 Act not repealed but lapsing and re-enacted by 1949 Act — Notification under 1947 Act cannot be deemed to be one under 1949 Act — Interpretation of Statutes — Implied repeal — There must be inconsistency between two Acts. See Punjab Development and Damaged Areas Act (10 of 1951), S. 2 (d). AIR 1963 SC 976.

PUNJAB DEBTORS' PROTECTION ACT (2 OF 1936)

See under Debt Laws.

PUNJAB DEVELOPMENT OF DAMAGED AREAS ACT (10 OF 1951)

SECTION 1

—S. 1 — Validity of Act — Contravention of Art. 14 — (Constitution of India, Art. 14).

There is nothing in the Act which involves the denial of equality or equal protection of laws to any individual. The Constitution contemplates compulsory acquisition of property and, therefore, the mere compulsory acquisition of property provided for by the Act cannot be held to connote unequal treatment and thus offend the provisions of Art. 14. 55 Punj LR 488: AIR 1954 Punj 110 (111) (Pt A) (Pr 4) (DB).

——Ss. 7, 13 (1) — Validity — Absence of time-limit for award — Effect.

The fact that no time-limit for giving an award is mentioned does not make the Act ultra vires. The time within which an award may be made will depend on particular facts of the case and the Act contemplates the award being made within a reasonable time. If the Collector or the authority concerned delays the making of the award, the aggrieved person has a remedy by way of applying for a writ of mandamus. 55 Punj LR 488: AIR 1954 Punj 110 (112) (Pt C) (Pr 7) (DB).

——Ss. 1, 11 and 12 — Validity of Act — Constitution of India, Arts. 31, 14.

There is nothing in S. 12 (1) to say that the execution of the scheme must come before the award or computation of compensation. In fact, under S. 11, the compensation has to be computed by the Collector before the demolition of the buildings takes place and before the scheme is put into effect. There is, therefore, nothing in the Act which contravenes Art. 31 or Art. 14 of the Constitution. 55 Punj LR 488: AIR 1954 Punj 110 (112) (Pt D) (Prs 8, 9) (DB).

SECTION 2

●——Ss. 2 (d), 5 (4) — East Punjab Damaged Areas Act (10 of 1949), S. 1 (2) — Punjab Damaged Areas Act (11 of 1947), S. 3 — Scheme in respect of areas declared to be 'damaged area' under 1947 Act but not so declared under 1951 or 1949 Act is without jurisdiction — Conclusiveness of scheme under S. 5 (4) of 1951 Act does not apply where there is total lack of jurisdiction — Punjab General Clauses Act (1 of 1898), S. 22 — Implied repeal — 1947 Act not repealed but lapsing and re-enacted by 1949 Act — Notification under 1947 Act cannot be deemed to be one under 1949 Act — Interpretation of Statutes — Implied repeal — There must be inconsistency between two Acts — Civil Writ No. 460 of 1961, dated 20th April, 1961 (Punj.), **Reversed.** Trust Mai Lachhmi Sialkoti Bradari v. Chairman, Amritsar Improvement Trust, (1963) 1 SCR 242: 1962 SCD 1016: AIR 1963 SC 976 (978, 979, 980) (Prs 6, 7, 8, 9, 10).

SECTION 4

——S. 4 — Certain schemes prepared under Punjab Development of Damaged Areas Act (10 of 1951) struck down as invalid on technical grounds — Subsequent legislation to validate the schemes — Right of filing objections in respect of validated schemes not given afresh — Such right available to other persons in respect of schemes framed after Validating Act was passed — No discrimination as regards right of filing objections against earlier and new schemes. See Constitution of India, Art 14. AIR 1965 Punj 212 (DB).

SECTION 5

●——Ss. 5 (4) and 2 (d)—East Punjab Damaged Areas Act (10 of 1949), S. 1 (3)—Punjab Damaged Areas Act (11 of 1947), S. 3 — Scheme in respect of areas declared to be "damaged area" under 1947 Act but not so declared under 1951 or 1949 Act is without jurisdiction — Conclusiveness of scheme under S. 5 (4) of 1951 Act does not apply where there is total lack of jurisdiction — Punjab General Clauses Act (1 of 1898), S. 22 — Implied repeal — 1947 Act not repealed but lapsing and re-enacted by 1949 Act — Notification under 1947 Act cannot be deemed to be one under 1949 Act—Interpretation of Statutes — Implied repeal—There must be inconsistency between two Acts. See

Punjab Development of Damaged Areas Act (10 of 1951), S. 2 (d). AIR 1963 SC 976.

——S. 5 — Objector not heard in person — Effect.

That the petitioners were not heard in person in support of their objections is scarcely a matter which makes the notification of the scheme in any way illegal as the subject does not possess the right to be personally heard on every occasion.

The important point is that objections were invited. They were submitted by the petitioners and they were considered before the final scheme was sanctioned. 55 Punj LR 488: AIR 1954 Punj 110 (112) (Pt E) (Pr 10) (DB).

SECTION 11

——Ss. 11, 1 and 12 — Validity of — There is nothing in S. 12 (1) to say that the execution of the scheme must come before the award or computation of compensation. In fact, under S. 11, the compensation has to be computed by the Collector before the demolition of the buildings takes place and before the scheme is put into effect. Therefore, there is nothing in the Act which contravenes Art. 31 or 14 — (Constitution of India, Arts. 31, 14). AIR 1954 Punj 110 (Pt D) (DB).

SECTION 12

——Ss. 12, 13 — Validity — Just compensation for damaged property — (Constitution of India, Art. 31).

All that is required under Art. 31 is that compensation should not be illusory. It should be just and proper and it should represent an equivalent of the market value. But the equivalent does not mean the exact figure of the market value.

To say that in assessing the compensation which must be paid in compulsorily acquiring property damaged in riots, no deduction should be made for removing the material would be saying that the owners should be paid more than the market value. For a case of this type, the market value is the price of the land plus the price of the material minus the cost of removing it.

Where, therefore, the Punjab Act lays down in S. 13, that the cost of demolition and removal may be deducted from the market value as determined under S. 12, the provisions of Art. 31 of the Constitution are in no way contravened. 55 Punj LR 488: AIR 1954 Punj 110 (111) (Pt B) (Pr 5) (DB).

——Ss. 12, 1, 11 — Validity of — There is nothing in S. 12 (1) to say that the execution of the scheme must come before the award or computation of compensation. In fact, under S. 11, the compensation has to be computed by the Collector before the demolition of the buildings takes place and before the scheme is put into effect. Therefore, there is nothing in the Act which contravenes Art. 14 or 31 of the Constitution — (Constitution of India, Arts. 31, 14). 55 Punj LR 488: AIR 1954 Punj 110 (DB).

SECTION 13

——Ss. 13 and 12 — Validity — Just compensation for damaged property — All that is required under Art. 31 is that compensation should not be illusory. It should be just and proper and it should represent an equivalent of the market value. But the equivalent does not mean the market value.

Where, therefore, the Punjab Act lays down in S. 13 that the cost of demolition and removal may be deducted from the market value as determined under S. 12, the provisions of Art. 31 are not contravened — (Constitution of India, Art. 31). 55 Punj LR 488: AIR 1954 Punj 110 (DB).

——Ss. 13 (1) and 1 — Validity — Absence of time-limit for award — The fact that time-limit for giving an award is mentioned does not make the Act ultra vires. If the Collector or the authority concerned delays the making of an award, the aggrieved person has a remedy by way of applying for a writ of mandamus. 55 Punj LR 488: AIR 1954 Punj 110 (DB).

PUNJAB DEVELOPMENT OF DAMAGED AREAS (VALIDATION) ACT (8 OF 1963)

SECTION 2

——S. 2 — Schemes prepared under Punjab Development of Damaged Areas Act (10 of 1951) struck down as invalid on technical grounds — Subsequent legislation to validate the schemes — Right of filing objections in respect of validated schemes not given afresh — Such right available to other persons in respect of schemes framed after validating Act was passed — No discrimination as regards right of filing objections against earlier and new schemes. See Constitution of India, Art. 14. AIR 1965 Punj 212 (DB).

——S. 2 — Certain schemes struck down by Supreme Court as illegal and invalid — Defect found not fundamental or against constitutional provisions — State Legislature can pass appropriate legislation to remedy defect. See Constitution of India, Art. 141. AIR 1965 Punj 212 (DB).

——S. 2 — Validated provisions made effective retrospectively — Validating enactment cannot be held to be void on this account. See Constitution of India, Art. 245. AIR 1965 Punj 212 (DB).

PUNJAB DISTILLERY RULES (1932)

RULE 9.36

——R. 9.36 — Punjab Excise Act (1 of 1914), Ss. 80 (2), 36 and 21—Validity of S. 80 (2) and last part of R. 9.36 — Both provisions are not ultra vires. See Punjab Excise Act (1 of 1914), S. 80 (2). ILR (1965) 1 Punj 189.

RULE 37

——R. 37 — Powers under — Commissioner of Excise and Taxation has power to direct distillery to cover its uncovered storage tank and impose penalty for disobedience thereof — But penalty imposed cannot be recovered as arrears of land revenue. See Punjab Excise Act (1 of 1914), S. 36 (c). 1964 Cur LJ 519 (Punj).

PUNJAB DISTRICT BOARDS ACT (CENTRAL ACT 20 OF 1883)

SECTION 5

——S. 5 — Tax on profession whether in respect of any property within S. 30 (b) — A tax on profession levied under notification in respect of profits made by a person by taking on lease a large

area of land and sub-letting the same to various tenants cannot be regarded to be a tax in respect of any property within the meaning of S. 30 (b). See Punjab District Boards Act (20 of 1883), S. 30 (b). (1959) 61 Punj LR 309.

SECTION 10

——Ss. 10 (3) and 30 — Legislation dealing with revenue in Social Welfare State — Subject cannot be taxed unless language clearly applies to him— Employees ordered by employer to check buses within jurisdiction of District Board — Employees residing in different district — Distrct Board cannot make them liable to pay profession tax—(Interpretation of Statutes).

Legislation dealing with revenue in a social welfare State should not be too rigidly construed against the State. At the same time, a subject cannot be taxed unless the language of the statute clearly and indubitably applies to him. A construction which would have the effect of making a person liable to pay the same tax twice in respect of the same subject-matter would not be adopted unless the words were very clear and precise to that effect. In a case of reasonable doubt the construction most beneficial to the subject is to be adopted. Still less is the language of a section to be strained in order to tax a transaction which, had the Legislature thought of it, would have been covered by appropriate words.

A profession tax was payable by every person carrying on a trade, profession, calling or employment in the area subject to the authority of the District Board, Kangra. The plaintiffs who were employees of a company were ordered to check or supervise buses on a road the major portion of which was in the Kangra district. The plaintiffs resided at Pathankot and the head office of the company was also at that place.

Held, that merely because the plaintiffs were ordered by their employer to check or supervise the various buses plying on the road within the jurisdiction of the District Board would not make them liable to be taxed by the Board.

Held further, that tax being payable on the basis of income, the place of its accrual can also be legitimately taken into account for the purpose of determining the place of assessment, unless of course the statute suggests a contrary legislative intent; and that place was obviously Pathankot. ILR (1959) Punj 2041.

SECTION 30

——S. 30 — Punjab Government Notification No. 11992/LD-58/13577-A, dated 23-4-1959 — Permission to District Board to levy tax on sleepers — 'Imported into the area' — Sleepers brought into the area in course of transportation, not liable to tax — 'Imported into the area' — Meaning of — Interpretation of Statutes — Notification — Reference to previous background. AIR 1958 SC 578, Rel. on. AIR 1965 Punj 97 (99, 100) (Pt A) (Prs 2, 3).

●——S. 30 — District Board imposing tax under S. 30 of the Punjab District Boards Act on timber carried on two specified roads — Classification of roads if rational and was supported by sound reason. See Constitution of India, Art. 14. AIR 1962 Punj 350 (FB).

●——S. 30 — Validity — Section is not invalid on ground of abdication by State Legislature of its essential legislative function. See Constitution of India, Art. 246. AIR 1962 Punj 350 (FB).

●——S. 30 — Colourable legislation — Tax on goods carried over certain roads — Tax is valid under Seventh Sch., List II, Item 56 — Fact that part of tax is expended on improvement of roads does not make tax illegal. See Constitution of India, Art. 246. AIR 1962 Punj 350 (FB).

●——S. 30 — Previous sanction of State Government — All that S. 30 says is that the District Board may with the previous sanction of the State Government impose any tax and meaning obviously is that previous to the imposition of the tax there must be the State Government's sanction in existence — It cannot be said that sanction has to be obtained at two stages, first before the District Board considers the proposal and secondly, after the proposal is adopted by the District Board. Mangat Ram Roshan Lal v. Punjab State, ILR (1962) 2 Punj 118: 64 Punj LR 342: AIR 1962 Punj 350 (353) (Pt D) (Pr 7) (FB).

●——S. 30 — Powers of District Board — The District Board was fully competent to drop the proposal for a tax at one time and equally competent to reconsider the matter and impose the same or a similar tax on a subsequent occasion. Mangat Ram Roshan Lal v. Punjab State, ILR (1962) 2 Punj 118: 64 Punj LR 342: AIR 1962 Punj 350 (354) (Pt E) (Pr 8) (FB).

——S. 30 — Legislation dealing with revenue in social welfare State — Subject cannot be taxed unless language clearly applies to him — Employees ordered by employer to check buses within jurisdiction of Dist. Board—Employees residing in different district—Dist. Board cannot make them liable to pay profession tax. See Punjab District Boards Act (20 of 1883), S. 10 (3). ILR (1959) Punj 2041.

——S. 30 — Notification under, D/-16-2-1947 — Appellant taking on lease large area of land — Land sub-let to various tenants — Appellant, whether carrying on trade, profession or business.

Where the appellant took on lease a large area of land consisting of about 4,000 bighas and as he could not carry on the cultivation himself, created sub-leases in favour of various tenants and the District Board sought to levy professional tax on the appellant under notification dated 16-12-1947:

Held, that the acivitiy which the appellant was carrying on would certainly fall within the purview of the notification whether it was treated as a trade, which would include business, or a calling, which would include avocation or vocation. It might even be brought within the meaning of the word "profession" as the appellant did carry on the profession of a thekedar by systematically taking large areas of land on lease and subletting the same to various tenants or cultivators and thus reaping profits. (1959) 61 Punj LR 309.

——Ss. 30 (b) and 5—Tax on profession whether in respect of any property within S. 30 (b)—(Constitution of India, Sch. VII, List II, Entries 49 and 60).

Section 30 (b) obviously has reference to taxation on the property itself as such, and does not debar the imposition of tax on profession, trade, calling or employment which fall under a separate item. The item in List II (State List) under which taxes can be imposed on lands and buildings is 49; whereas taxes on profession, trade, calling and employment fall within Item 60. Therefore, a tax on profession levied under Notification dated 16-12-1947 in respect of profits made by a person by taking on lease a large area of land and subletting the same to various tenants cannot be regarded to be a tax in respect of any property within the meaning of S. 30 (b). **(1959) 61 Punj LR 309.**

SECTION 31

●——Ss. 31 and 56 — Levy imposed under S. 31 (6) of the Punjab District Boards Act by notification, dated 17th September, 1954 — Validity — Levy is tax and not fee and is invalid. See Constitution of India, Art. 265. **AIR 1962 Punj 267 (FB).**

——S. 31 (6) — Government of India Act (1935), S. 142-A — Profession tax — The objection that profession tax imposed by East Punjab Government by Notification No. 458-LG-49/20921, dated 9-4-1949, in pursuance of S. 31 (6), Punjab District Boards Act, was tax on income, has no validity under S. 142-A. See Government of India Act (1935), S. 142-A. **AIR 1955 NUC (Punj) 4995.**

——S. 31 (6) — Notification by Government No. 458-L.G.-49/20921, dated 9th April, 1949 imposing tax on every person carrying on a trade, profession, calling or employment in the area subject to the authority of the Rohtak District Board — List of persons given in the Schedule is merely illustrative of the rule given in the notification itself that a tax at the rates given in the schedule will be levied on every person carrying on trade, profession or calling in the area subject to the authority of the Board — Person is said to carry on business or profession at a place where he actually carries on business or profession and not where he lives. **AIR 1955 NUC (Punj) 4995.**

SECTION 56

●——S. 56 — Constitution of India, Art. 265 — Levy imposed under S. 31 (6) of Punjab District Boards Act by notification dated 17-9-1954 — Validity — Levy is tax and not fee and is invalid — AIR 1957 Punj 45, **Overruled.** See Constitution of India, Art. 265. **AIR 1962 Punj 267 (FB).**

PUNJAB DISTRICT BOARDS (TAX VALIDATING) ACT (27 OF 1955)

SECTION 2

——S. 2 —Validity — S. 2 of the Punjab Act purports to validate three notifications mentioned in the schedule the first of which is issued by the District Board of Karnal. Even assuming that the validating of the other two notifications in the schedule would offend the rule against ex post facto legislation contained in Art. 20 (1), the validity of the first notification cannot be impugned on that ground because the notification contains no penal provisions. The first and other two notifications are not so inextricably bound up that, if the other two are declared to continue to be invalid and not to have been validated retrospectively, the first one cannot independently survive. The impugned Act minus the other two notifications can remain unaffected and the omission of the other two notifications would not change the nature or the structure of the legislation. See Constitution of India, Art. 13. **AIR 1959 Punj 318.**

PUNJAB DISTURBED AREAS ACT (1 OF 1947)

See under Public Safety.

PUNJAB EDUCATIONAL SERVICE (CLASS I) RULES (1931)

RULE 7

●——R. 7 — Application of — Must be consistent with Art. 16 of the Constitution.

Rule 7 of the Punjab Educational Service (Class I) Rules, 1931, which provides for promotion by strict selection and rules out claim as of right to such promotion, has to be harmonized with Art. 16 of the Constitution and is not to be construed in such a way as to make it inconsistent or violative of that Article because the inevitable effect of that would be to strike down that rule. Brijlal v. State of Punjab, **1965 Cur LJ 232: ILR (1965) 1 Punj 423: AIR 1965 Punj 401 (405) (Pt C) (Pr 22) (FB).**

PUNJAB EDUCATIONAL SERVICE (PROVINCIALISED CADRE) CLASS III RULES (1961)

RULE 2

●——Rr. 2 (d) and 2 (e) — Public servants — Equality of opportunity in matters of promotion— Validity—District Board and Municipal Board teachers taken over by Punjab Government and given same scales and grades of pay as were applicable to teachers in Government employment — Service Rules discriminating them in matters of promotion — Not violative of Art. 14 or 16. See Constitution of India, Art. 14. **AIR 1963 SC 913.**

RULE 3

●——R. 3 — If violates Art. 14 or 16 of the Constitution — Held it is not violative of Art. 14 or 16. See Constitution of India, Art. 14. **AIR 1963 SC 913.**

RULE 6

——R. 6 — Service of a teacher, taken over by State and he continued to hold post beyond maximum period of probation prescribed under Rules — Services terminated after giving one month's notice and stating that it was in accordance with terms of his employment — **Held,** order was illegal as it amounted to punishment and removal from service which was not permissible without proper enquiry — After period of probation teacher must be taken to have confirmed. See Constitution of India, Art. 311. **(1965) 67 Punj LR 312: 1965 Cur LJ 149: AIR 1966 Punj 468 (DB).**

PUNJAB EDUCATION CODE

——Constitution of India, Art. 226 — Writ against educational institution — Expulsion of school-boy for alleged misconduct and refusal to allow him

to appear at annual examination — Principles of natural justice — Applicability — Order of expulsion passed without giving opportunity of hearing — Order quashed. See Constitution of India, Arts. 226 and 32. AIR 1965 Punj 507 (DB).

PUNJAB EMPLOYEES' STATE INSURANCE COURT RULES (1949)

RULE 17

——R. 17 — Rule is intra vires — Limitation for recovery of employees' contribution.

Rule 17 of the Punjab Employees' Insurance Courts Rules, 1949, is intra vires. AIR 1963 Punj 422. Foll.

The period of limitation for recovery of employees' contribution starts from the date the claim became due. Section 39 (3) lays down that a week shall be the unit in respect of which all contributions shall be payable under the Act. Where under Reg. 31 of the Employees' State Insurance (General) Regulations, 1950, the Corporation's claim became due within 21 days of the last day of the wage period in which contribution fell due, such a claim for a period of one year and 28 days only is within limitation. When the petition was instituted on 16th May, 1961, and the employee contribution has been claimed on the amount of wages paid for the period from 1st October, 1958 to 30th June, 1960, the claim is in time for the period from 18th April, 1960 to 30th June, 1960 only. (1963-64) 25 FJR 203: (1964) 1 Lab LJ 669: AIR 1963 Punj 426 (427) (Pt B) (Pr 6).

——R. 17 (1), Proviso — Permanent partial disablement of employee — Right of State Insurance Corporation to recover damages from employer in respect of — Cause of action and starting point — Premature application by Corporation dismissed — Second application — Delay in filing same — Condonation of — 'Sufficient reasons for not making the application — Interpretation of — Held that there were no sufficient reasons shown for condoning delay. See Employees' State Insurance Act (1948), S. 66. AIR 1962 Punj 308 (DB).

PUNJAB EMPLOYEES' STATE INSURANCE RULES (1951)

RULE 17

——R. 17 — Employees State Insurance Act (1948), Ss. 75, 80, 82 and 96 — Vires — Rule 17 is not inconsistent with the Act, and is intra vires. See Employees' State Insurance Act (1948), S. 75. AIR 1963 Punj 422 (DB).

PUNJAB ENTERTAINMENTS DUTY ACT (16 OF 1955)

SECTION 3

——Ss. 3 (1), 13, 15 and 17 — Validity of — Object of Act — Provisions under R. 17 carry out the object — Rule 17 is intra vires S. 20 (1) — Power to make best judgment assessment under R. 17 on evasion of duty — Power is inherent in general power of assessment and no separate provision therefor is necessary — Alternative remedy of prosecution for evasion of duty, under S. 15 — Remedy no bar for proceeding under R. 17. See Punjab Entertainments Duty Act (16 of 1955), S. 20 (1). ILR (1965) 1 Punj 567.

SECTION 12

——S. 12 — Punjab Entertainments Duty Rules (1956), Rules 17, 36 and 38 — Revision under S. 12 against best judgment assessment order under Rule 17 — Revision decided by Joint Commissioner and not by Commissioner — Joint Commissioner empowered by State Government by notification under Sec. 12, to decide revision — Rr. 36 and 38 though refer to Commissioner as authority competent to decide revision, rules cannot undo effect of enacted provision. ILR (1965) 1 Punj 567.

——Ss. 12 and 20 (1) — Punjab Entertainments Duty Rules (1956), R. 36 (3) (a) — Validity — Rule ultra vires being beyond the statutory power granted under S. 20(1)—Not warranted by provisions of S. 12. See Punjab Entertainments Duty Rules (1956), R. 36 (3) (a). AIR 1963 Punj 116.

SECTION 13

——Ss. 13, 15, 17, 3 and 20 — Punjab Entertainments Duty Rules (1956), R. 17 — Validity of — Object of Act — Provisions under R. 17 carry out the object —R. 17 is intra vires S. 20 (1) — Power to make best judgment assessment under R. 17 on evasion of duty — Power is inherent in general power of assessment and no separate provision therefor is necessary — Alternative remedy of prosecution for evasion of duty, under S. 15 — Remedy no bar for proceeding under R. 17. ILR (1965) 1 Punj 567.

SECTION 15

——Ss. 15, 3, 13, 17 and 20 — Punjab Entertainments Duty Rules (1956), R. 17 — Validity of — Object of Act — Provisions under R. 17 carry out the object — R. 17 is intra vires S. 20 (1)—Power to make best judgment assessment under R. 17 on evasion of duty — Power is inherent in general power of assessment and no separate provision therefor is necessary — Alternative remedy of prosecution for evasion of duty, under S. 15 — Remedy no bar for proceeding under R. 17. ILR (1965) 1 Punj 567.

SECTION 17

——Ss. 17, 3, 15, 13, 17 and 20—Punjab Entertainments Duty Rules (1956), R. 17 — Validity of — Object of Act — Provisions under R. 17 carry out the object — R. 17 is intra vires S. 20 (1)—Power to make best judgment assessment under R. 17 on evasion of duty — Power is inherent in general power of assessment and no separate provision therefor is necessary — Alternative remedy of prosecution for evasion of duty, under S. 15 — Remedy no bar for proceeding under R. 17. ILR (1965) 1 Punj 567.

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SECTION 20

——Ss. 20 (1), 15, 3 (1), 13, 17—Punjab Entertainments Duty Rules (1956), R. 17 — Validity of — Object of Act — Provisions under R. 17 carry out the object — R. 17 is intra vires S. 20 (1)—Power to make best judgment assessment under R. 17 on evasion of duty — Power is inherent in general power of assessment and no separate provision therefor is necessary — Alternative remedy of

prosecution for evasion of duty, under S. 15 — Remedy no bar for proceeding under R. 17. ILR (1965) 1 Punj 567.

——S. 20 (1) — Punjab Entertainments Duty Act (1956), Rule 36 (3) (a) — Validity — Rule ultra vires being beyond the statutory power granted under S. 20 (1) — Not warranted by provisions of S. 12. See Punjab Entertainments Duty Act (1956), Rule 36 (3) (a). AIR 1963 Punj 116.

PUNJAB ENTERTAINMENTS DUTY RULES (1956)

RULE 17

——R. 17 — Provisions under R. 17 carry out the object — R. 17 is intra vires S. 20 (1) — Power to make best judgment assessment under R. 17 on evasion of duty — Power is inherent in general power of assessment and no separate provision therefor is necessary — Alternative remedy of prosecution for evasion of duty, under S. 15 — Remedy no bar for proceeding under R. 17. See Punjab Entertainments Duty Act (16 of 1955), S. 20 (1). ILR (1965) 1 Punj 567.

——Rr. 17, 36 and 38 — Revision under S. 12 against best judgment assessment order under R. 17 — Revision decided by Joint Commissioner and not by Commissioner — Joint Commissioner empowered by State Government by notification under S. 12 to decide revision — Rr. 36 and 38 though refer to Commissioner as authority competent to decide revision, rules cannot undo effect of enacted provision. See Punjab Entertainments Duty Act (16 of 1955), S. 12. ILR (1965) 1 Punj 567.

RULE 36

——R. 36 (3) (a) — Validity — Rule ultra vires being beyond the statutory power granted under S. 20 (1) — Nor warranted by provisions of S. 12 — Punjab Entertainments Duty Act (16 of 1955), S. 20 (1) and S. 12.

No rules can be made, under the rule-making power granted by a statute, by which a right conferred by the statute itself can be abridged or restricted. Rule 36 (3) (a), in that it requires the deposit of entire amount of duty levied to be made before a revision petition is entertained, is ultra vires the provisions respecting rule-making contained in Sec. 20 (1) of the Act. Sec. 12 or the Act which provides the only remedy against either assessment or imposition of duty, does not contain any provision under which such a rule could be sustained. The rule restricts and makes burdensome the right to revision conferred on a party by S. 12 of the Statute. AIR 1954 SC 403 & (1958) 60 Punj LR 205, Rel. on; (1898) 2 QB 340 and (1937) AC 139, Applied. 64 Punj LR 596: ILR (1962) 2 Punj 495: AIR 1963 Punj 116 (117, 118) (Prs 5, 6, 7).

PUNJAB ENTERTAINMENTS TAX (CINEMATOGRAPH SHOWS) ACT (8 OF 1954)

SECTION 6

——S. 6 — Power to grant exemption — Its effect on power to levy tax.

The power to grant exemption does not affect the power to levy a tax and there is nothing in Sec. 6 (2) which invalidates the rest of the Act nor the notification whereby the petitioners have been held liable to pay tax. 58 Punj LR 226: AIR 1956 Punj 203 (204) (Pt B) (Pr 6) (DB).

PUNJAB EXCISE ACT (1 OF 1914)

SECTION 1

——S. 1 — Constitution of India, Art. 19 (1) (g) — Excise Act is valid. See Constitution of India, Art. 19 (1) (g). AIR 1956 Punj 97 (DB).

[Reversed on facts in AIR 1959 SC 65.]

SECTION 3

●——Ss. 3 (14) and 58 — Notification under — Notification and Rules are saved from operation of Art. 301 of the Constitution. See Constitution of India, Art. 301. 1965 Pun LR (Supp) 183: ILR (1965) 1 Punj 775: AIR 1966 Punj 4 (FB).

●——S. 3 (14) (as in force in Delhi) — Notification under, not specifying date of enforcement — Second notification specifying date of enforcement the first notification — Mistake in publication of second notification — Effect.

A notification declaring all spirituous preparations with content of more than 20 per cent. proof alcohol to be liquor for the purposes of the Act was issued under Sec. 3 (14) on 7th December, 1961. Apparently it came into force, as nothing else was said in it, on the date of its own publication. A second notification of 13th December, 1961, was issued saying that the notification of 7th December, 1961, shall come into force with effect from 13th December, 1961. This second notification was published in Gazette, dated 9th December, 1961. But the Gazette came to be dated 9th Dec., 1961 instead of 13th Dec., 1961, due to genuine printing mistake. The Delhi Intoxicating Spirituous Preparations, Import, Export, Transport, Possession and Sale Rules (1952) (as amended upto 13th December, 1961) framed under S. 58 of the Act were promulgated on 13th December, 1961.

Held, the printing mistake did not invalidate either the second notification or the first notification and, in any case, not the first notification. Pritpal Singh v. Chief Commr. of Delhi, 1965 Pun LR (Supp) 183: ILR (1965) 1 Punj 775: AIR 1966 Punj 4 (8) (Pt A) (Pr 9) (FB).

●——S. 3 (14) — 'Liquor' — Definition of — Last part of definition is positive enactment conferring power.

Interpretation clauses are not to be construed as positive enactments; there is, however, nothing to prevent the declaration of particular meaning to a word in an interpretation clause also containing in its positive enactment. A definition may be in part declaratory of specific and stated meaning and in the remaining part may be a positive enactment conferring power.

Held, that the last part of S. 3 (14) of the Punjab Excise Act is a positive enactment conferring power on the Chief Commissioner to declare any substance to be liquor for the purposes of the Act. Pritpal Singh v. Chief Commr. of Delhi, 1965 Pun LR (Supp) 183: ILR (1965) 1 Punj 775: AIR 1966 Punj 4 (9) (Pt B) (Pr 10) (FB).

●——S. 3 (14) — Notification under — Notification declaring spirituous preparations with 20 per

cent proof alcoholic content to be liquor — Medicinal preparations that are fatal to health cannot be considered as intoxicants — Validity of notification challenged on ground that it included even such non-intoxicants — Held, that listing preparations which are or are not capable of being consumed as ordinary alcoholic beverages being impractical, notification was neither vague nor ultra vires S. 3 (14). Pritpal Singh v. Chief Commr. of Delhi, 1965 Pun LR (Supp) 183: ILR (1965) 1 Punj 775: AIR 1966 Punj 4 (10) (Pt C) (Pr 11) (FB).

●——Ss. 3 (14) and 58 — Notification under S. 3 (14) — Validity — Delhi Intoxicating Spirituous Preparations, Import, Export, Transport, Possession and Sale Rules (1952) (as amended upto 13-12-1961) — Validity — Notification and Rules are consistent with object of Act and do not impose unreasonable restrictions on trade, medical practitioners or general public — Constitution of India, Art. 19 (1) (f) and (g). Pritpal Singh v. Chief Commr. of Delhi, 1965 Pun LR (Supp) 183: ILR (1965) 1 Punj 775: AIR 1966 Punj 4 (13) (Pt I) (Pr 15) (FB).

——Ss. 3 (9), 58 and 60 — Deficiency in price on re-sale of excise shop is excise revenue — It can be recovered under S. 60.

Under R. 21 of Order 34, Rules framed under S. 58 of the Punjab Excise Act a defaulting auction purchaser of a liquor shop is liable for the deficiency in price resulting from the re-sale of a shop. This liability to pay for the short fall comes within the definition of 'excise revenue' in Sec. 3 (9) of the Act and its recovery can be made by means of distress and sale under Sec. 60 of the Act. (1952) 53 Pun LR 424: AIR 1953 Punj 274 (278) (Pt C) (Pr 21).

——S. 3 (14) — Validity — (Constitution of India, Art. 13).

The definition of liquor in Sec. 3 (14) does not contravene the provisions of Art. 13 of the Constitution. 1951 SCR 682, Foll. 1953 Cr LJ 549: 55 Punj LR 187: ILR (1953) Punj 618: AIR 1953 Punj 77 (78) (Pt B) (Pr 3) (DB).

——S. 3 (14) — Validity — Constitution of India, Art. 245.

In the Punjab Excise Act the rules are issued under the provisions of Ss. 5, 6, 16, 17, 18, 24 and 58. These sections enable the Government to issue the rules and these rules have been issued by the State Government. No question of delegated legislation arises in this case. 1953 Cri LJ 549: 55 Pun LR 187: ILR (1953) Punj 618: AIR 1953 Punj 77 (DB).

SECTION 5

●——S. 5 — Delhi Intoxicating Spirituous Preparations, Import, Export, Transport, Possession and Sale Rules (1952) (as amended upto 13-12-1961), Rr. 3, 3-A, 12 and 13 — Exercise of power under S. 5—Rules under Act leaving limitation on sale to be governed by prescription of registered medical practitioner — Such provision does not militate against provision of S. 5. Pritpal Singh v. Chief Commr. of Delhi, 1965 Pun LR (Supp) 183: ILR (1965) 1 Punj 775: AIR 1966 Punj 4 (12) (Pt F) (Pr 13) (FB).

——S. 5 — Notifications issued under Sec. 5 permitting to keep one bottle of Punjab distilled liquor or of foreign liquor imported or made in India. Accused found in possession of one bottle of liquor — Liquor proved different from Punjab distillery spirits — Burden to establish that liquor was illicit does not shift to accused on that count —Burden lies entirely on prosecution. 1965 Cur LJ 577: (1965) 67 Punj LR 1044.

——Ss. 5, 6, 16, 17, 18 and 24 — Validity — Constitution of India, Article 245 — In the Punjab Excise Act the rules are issued under the provisions of Ss. 5, 6, 16, 17, 18, 24 and 58. These sections enable the State Government to issue the rules and these rules have been issued by the State Government. No question of delegated legislation arises in this case. 1953 Cri LJ 549: AIR 1953 Punj 77 (DB).

SECTION 6

——S. 6 — Validity of Punjab Intoxicating Spirituous Preparations, Import, Export, Transport, Possession and Sale Rules (1952) — Constitution of India, Article 245 — In the Punjab Excise Act the rules are issued under the provisions of Sections 5, 6, 16, 17, 18, 24 and 58 of the Act. These sections enable the State Government to issue the rules and these rules have been issued by the State Government. No question of delegated legislation arises in this case. AIR 1953 Punj 77 (DB).

SECTION 8

——Ss. 8 (2), 21 (b) — Scope of State Government's superintendence power — Notice of determination of licence by excise authority—Abeyance or revival of notice when matters of policy fall within scope of superintendence — Independent judgment of authorities is not required. 1965 Cus LJ 3: 67 Punj LR 144: ILR (1965) 1 Punj 358: AIR 1965 Punj 217 (219) (Pt D) (Pr 14) (DB).

——Ss. 8, 9, 14, 15-A, 36, 40, 41, 44, 58 — Punjab Liquor Licence Rules (1956), R. 36 — Auction sale of excise licence — Highest bid accepted by Collector and approved by Excise and Taxation Commissioner — Deposit of one-sixth license fee as required by rules — Highest bidder acquires legal status of licensee even though no formal licence is granted — Re-auction by Government without notice to such licensee and without giving any reasons — Legality — Action of State Government if can be justified under Ss. 8, 36 or 41.

Held, on facts, (i) that having regard to the provisions of the Act and the Rules thereunder the Respondent had acquired the legal status of grantee of a licence even though no formal instrument of licence was prepared and granted to him and he could invoke his rights and was subject to the obligations under the Act and was within the protection of the statute. After the proposal had been accepted by the Financial Commissioner and the requisite fee deposited by the licensee, he was entitled to receive the licence as a matter of routine. It cannot be contended on the basis of explanation to S. 44 that the holder of a licence must necessarily be understood as the possessor of the certificate or licence and not the person in whose favour the licence had been ordered to be granted by the highest authority though the document had not been issued so far. (ii) that the impugned act of re-auctioning could not be justified

with reference to Sec. 41 the provisions of which neither applied nor were relied upon. Before an action for 'withdrawal' of licence is taken under S. 41, the Collector has to weigh the appropriateness of, the reason or the motive, justifying the withdrawal, and such a ground for action has to be de hors the matters specified under Sec. 36. No material had been placed upon the record indicating the circumstances of the so-called withdrawal, if there had been one, on the part of the authority granting the licences. 1960 MPLJ 323, Dist. (iii) that the action of the State Government in re-auctioning the licences could not be supported on the basis of Sec. 8 of the Act as the State Government did not purport to exercise any power under S. 8. Having regard to the commonly accepted meaning of the word 'control', and also in the background of the context, it cannot connote a command or a direction justifying interference by the State Government. Sec. 8, however liberally construed, cannot lend itself to the construction that the State Government is given an absolute and unfettered discretion. AIR 1954 SC 592 and AIR 1954 SC 224 and 63 Pun LR 580 and 62 Pun LR 520, Rel. on; AIR 1956 All 99, Dissented from. **ILR (1963) 1 Punj 148: AIR 1963 Punj 76 (80, 81, 82, 83, 84, 85) (Pt B) (Prs 10, 11, 13, 16, 17, 22, 23, 27) (DB).**

——S. 8 — **Cancellation of licence validly sold — Jurisdiction of State Government.**

Section 8 does not confer any jurisdiction on the State Government, after the licence has been validly sold, to cancel the same. It is only that power of the Financial Commissioner which is subject to the control of the State Government which the Financial Commissioner possesses under the Act. The Financial Commissioner has no power of revision qua the confirmation of the sale of licences under the Act except in the case of a sale by an officer subordinate to the Collector where that sale is required to be confirmed by the Collector, or, in other words, where the sale is under Cl. (18) of Rule 36. Where the sale is by the Collector, the confirmation or approval has to be by the Financial Commissioner, but there is no provision for revision in such a case. **(1962) 64 Punj LR 719.**

——S. 8 — **Auction of liquor shops — Condition that bids are subject to Chief Commissioner's sanction — Contract, when complete.**

Where one of the conditions of auction sale of liquor shops is that all bids are subject to the sanction of the Chief Commissioner, the auction sale is not complete until the bid is finally approved by the Chief Commissioner. If, therefore, the bid is withdrawn before the Chief Commissioner gives his assent, there is no completed contract between the parties. **53 PLR 424: AIR 1953 Punj 274 (277, 278) (Pt B) (Prs 14, 18).**

SECTION 9

——S. 9 — Licence granted by Financial Commissioner — Notification delegating all powers of Financial Commissioner to Excise and Taxation Commissioner — Notice cancelling licence by latter held valid. See Punjab Excise Act (1 of 1914), S. 39. AIR 1965 Punj 217 (DB).

——Ss. 9, 8, 14, 15-A, 36, 40, 41, 44, 58 — Punjab Liquor Licence Rules (1956), Rule 36 — Auction sale of excise licence — Highest bid accepted by Collector and approved by Excise and Taxation Commissioner — Deposit of one sixth licence fee as required by rules — Highest bidder acquires legal status of licensee even though no formal licence is granted — Reauction by Government without notice to such licensee and without giving any reasons — Legality — Action of State Government is not justified under Ss. 8, 36 or 41. See Punjab Excise Act (1 of 1914), S. 8. **AIR 1963 Punj 76 (DB).**

SECTION 14

——Ss. 14, 8, 9, 15-A, 36, 40, 41, 44, 58 — Punjab Liquor Licence Rules (1956), R. 36 — Auction sale of excise licence — Highest bid accepted by Collector and approved by Excise and Taxation Commissioner — Deposit of one-sixth licence fee as required by rules — Highest bidder acquires legal status of licensee even though no formal licence is granted — Reauction by Government without notice to such licensee and without giving any reasons — Legality — Action of State Government is not justified under Ss. 8, 36 or 41. See Punjab Excise Act (1 of 1914), S. 8. **AIR 1963 Punj 76 (DB).**

SECTION 15-A

——Ss. 15-A, 8, 9, 14, 36, 40, 41, 44, 58 — Punjab Liquor Licence Rules (1956), R. 36—Auction sale of excise licence — Highest bid accepted by Collector and approved by Excise and Taxation Commissioner — Deposit of one-sixth licence fee as required by rules — Highest bidder acquires legal status of licensee even though no formal licence is granted — Reauction by Government without notice to such licensee and without giving any reasons — Legality — Action of State Government is not justified under Ss. 8, 36 or 41. See Punjab Excise Act (1 of 1914), S. 8. **AIR 1963 Punj 76 (DB).**

SECTION 16

——S. 16 — Validity of Punjab Intoxicating Spirituous Preparations Import, Export, Transport, Possession and Sale Rules (1952) — Constitution of India, Art. 245 — In the Punjab Excise Act the rules are issued under the provisions of Ss. 5, 6, 16, 17, 18, 24 and 58. These sections enable the State Government to issue the rules and these rules have been issued by the State Government. No question of delegated legislation arises in this case. **AIR 1953 Punj 77 (DB).**

SECTION 17

——S. 17 — Validity of Punjab Intoxicating Spirituous Preparations Import, Export, Transport, Possession and Sale Rules (1952) — Constitution of India, Art. 245 — In the Punjab Excise Act the rules are issued under the provisions of Ss. 5, 6, 16, 17, 18, 24 and 58. These sections enable the State Government to issue the rules and these rules have been issued by the State Government. No question of delegated legislation arises in this case. **AIR 1953 Punj 77 (DB).**

SECTION 18

——S. 18, Proviso I — Delhi Intoxicating Spirituous Preparations, Import, Export, Transport, Possession and Sale Rules (1952) (as amended upto

13-12-1961) — Notification under Proviso I not issued — Issuance of notification is discretionary and non-issuance does not render Rules ultra vires of the section. Pritpal Singh v. Chief Commr. of Delhi, 1965 Pun LR (Supp) 183: ILR (1965) 1 Punj 775: AIR 1966 Punj 4 (12) (Pt G) (Pr 13) (FB).

——S. 18 — Validity of Punjab Intoxicating Spirituous Preparations Import, Export, Transport, Possession and Sale Rules (1952) — Constitution of India, Art. 245 — In the Punjab Excise Act the rules are issued under the provisions of Ss. 5, 6, 16, 17, 18, 24 and 58. These sections enable the State Government to issue the rules and these rules have been issued by the State Government. No question of delegated legislation arises in this case. (1953) Cr LJ 549: AIR 1953 Punj 77 (DB).

[Reversed on facts in AIR 1959 SC 65.]

SECTION 21

——S. 21 (b) —Notice of determination of licence by excise authority — Abeyance or revival of notice when matters of policy fall within scope of superintendence — Independent judgment of authorities is not required. See Punjab Excise Act (1 of 1914), S. 8 (2). AIR 1965 Punj 217 (DB).

——S. 21 (b) — Distillery licence containing condition for determining licence by Excise authorities on notice — Notice issued under S. 21 (b) and under licence condition — Notice kept in abeyance for some years — Its subsequent revival with shorter notice period is illegal — Principle of Ss. 111 (h) and 113 of T. P. Act is applicable. 1965 Cur LJ 3: 67 Punj LR 144: ILR (1965) 1 Punj 358: AIR 1965 Punj 217 (218) (Pt A) (Prs 9, 10) (DB).

——Ss. 21, 80 (2), 36 — Punjab Distillery Rules (1932), R. 9.36 — Validity of S. 80 (2) and last part of R. 9.36 — Both provisions are not ultra vires. See Punjab Excise Act (1 of 1914), S. 80 (2) ILR (1965) 1 Punj 189.

SECTION 24

——S. 24 — Possession of intoxicant in transit by person on behalf of another, for purposes of transit, whether illegal.

It is a matter of common occurrence that intoxicants are in possession of various persons in the course of transit from one place to another, e. g., cartmen, ship-owners, coolies and so forth. Such persons cannot, of course, be said to be persons in possession within Sec. 24 of the Act. It is therefore reasonable to hold that the person in possession contemplated by that provision is one who is in possession of the intoxicant on his own behalf, and not one who is in temporary custody or charge of the same on behalf of another in the course, and for purposes of transit. What is such temporary custody or charge depends upon the facts and circumstances of each case, so that what is temporary custody or charge on behalf of another person initially may be converted into illegal possession at a subsequent stage. This may, for instance, take place where a person initially in change of the intoxicant on behalf of another person in course, and for the purpose, of transit detains the consignment longer than necessary for transmission or for a purpose uncomnected with the transmission. 9 Cal 223, Relied on.

Possession of intoxicant in transit by a person not on his behalf but for the purposes of transit to its destination for ten days was held not unreasonable, considering the tardy nature of communication and the long distance to be covered. The possession did not therefore become illegal merely because of the long period. 1952 Cri LJ 1350: AIR 1952 Him Pra 61 (62) (Prs 5, 6).

——S. 24 (4) — Notification introducing prohibition in social clubs — Validity. It does not constitute a direct interference with the liberty of the subject or violate the fundamental rights guaranteed by Art. 19. See Constitution of India, Art. 19 (1) (f) (g) and (6). AIR 1957 Punj 20 (DB).

——S. 24 — Validity of Punjab Intoxicating Spirituous Preparations Import, Export, Transport, Possession and Sale Rules (1952) — Constitution of India, Art. 245 — In the Punjab Excise Act the rules are issued under the provisions of Ss. 5, 6, 16, 17, 18, 24 and 58. These sections enable the State Government to issue the rules and these rules have been issued by the State Government. No question of delegated legislation arises in this case. 1963 Cr LJ 549: AIR 1953 Punj 77 (79) (Pt C) (Pr 5) (DB).

SECTION 25

——S. 25 — Guilty knowledge — Necessity for conviction under S. 61 (1) (a) — The offence punishable under Sec. 61 (1) (a) clearly relates back to the provisions of S. 25 and therefore for anybody to be convicted under S. 61 (1) (a) there must be two ingredients, namely the possession of illicit liquor and the knowledge that for one of the reasons mentioned in S. 25 the liquor is illicit. See Criminal P. C. (1898), S. 342. AIR 1957 Punj 75 (DB).

SECTION 26

——Ss. 26 and 2 (18) — 'Sale' — Supply of liquor by club to its members.

The supply of intoxicating liquor by a club to its members, as a mere incident of the general purposes of the club, constitutes a sale within the meaning of S. 26. This is clear from the fact that the expression "sale" as defined in Sec. 2 (18) includes any transfer otherwise than by way of gift. 58 Punj LR 426: ILR (1957) Punj 166: AIR 1957 Punj 20 (22) (Pt A) (Pr 4) (DB).

——S. 26 — Constitution of India, Art. 47 — Right to sell liquor and Government control — None has a legal right to sell liquor. From the earliest times it has been found expedient to control the use and traffic in liquor and this control embraces both regulatory and prohibitory measures. This doctrine has been recognised by the Directive principles of State policy in Art. 47. (Excise Law — Liqour). AIR 1956 Punj 97 (DB).

[Reversed on facts in AIR 1959 SC 65.]

——S. 26 — Excise Law — Liquor — Issue of licence to sell liquor is a matter of grace — (Constitution of India, Art. 19 (1) (g)).

A licence to vend liquor is a merely personal and a temporary permit or privilege to be enjoyed as long as its terms are complied with. It follows therefore, that the issue of a licence is a matter of

grace granted by the Government and is not a matter of right. Hence, no person can demand such a license as of right and cannot carry on the trade under the law of the land without first obtaining the required approval of the licensing authority. **ILR (1956) Punj 390: AIR 1956 Punj 97 (98, 99) (Pt B) (Pr 5) (DB).**

[Reversed on facts in AIR 1959 SC 65.]

——S. 26 — Delhi Excise Rules, R. 5 (17) — Words 'proved respectability' in R. 5 (17) do not contemplate any enquiry — (Words and Phrases).

The Word 'proved' in R. 5 (17) is not used to show that it raises a justiciable issue, but in the sense that the licensing authority is satisfied of the applicant's respectability and that satisfaction need not necessarily be the result of any enquiry or evidence produced by the parties. Thus the word 'proved' in this Rule does not contemplate any kind of enquiry. **ILR (1956) Punj 390: AIR 1956 Punj 97 (100) (Pt H) (Pr 10) (DB).**

[Reversed on facts in AIR 1959 SC 65.]

——S. 26 — Delhi Excise Rules, R. 5 (1) — Licence to vend liquor — No enquiry by authority granting licence is required.

Taking into consideration the nature of trade involved and the Delhi Excise Rules framed under the Punjab Excise Act, the enquiry by the authority granting a licence is not required. The matters involved do not reveal a justiciable issue. No judicial or quasi-judicial duty is imposed on the Chief Commissioner by the Excise Act or by the rules framed under it. The rules do not prescribe any steps which must be taken to decide the matters. The object of the rules is to get information with a view to decide whether a licence should be issued or not and, if so, to whom. The object of the collection of information is not to decide any issues. 1948 AC 87, Rel. on. AIR 1955 Pat 345, Disting. **ILR (1956) Punj 390: AIR 1956 Punj 97 (100) (Pt I) (Pr 10).**

[Reversed on facts in AIR 1959 SC 65.]

SECTION 32

——Ss. 32, 34, 58 and 59 — Rules under S. 58 cannot be varied by those framed under Ss. 32 and 34 — Conditions of sale announced at auction inconsistent with those framed under S. 58—Validity — Auction purchaser is not estopped from challenging their validity — Evidence Act (1872), S. 115.

Rules made by the Chief Commissioner under Sections 32 and 34 of Punjab Excise Act cannot vary those made by the Provincial Government under Section 58 of the Act.

The rule-making power for purposes of carrying out the auction of Excise shops is contained in S. 58 of the Punjab Excise Act and this power is exercisable by the Provincial Governments. Sections 34 and 59 deal with the power of the Financial Commissioner in the Punjab and Chief Commissioner in Delhi but these sections do not concern the power of making rules for auction. The two powers are exercised by two different authorities though it may be that in Delhi it is the Chief Commissioner who may have combined in him the powers of the Provincial Government and the Financial Commissioner. Besides the rules made have to be notified in the official Gazette.

Where the modified conditions of sale announced at the time of sale are inconsistent with the rules contained in 5.34, Rules framed under S. 58 of the Act and were not notified in the official Gazette, they cannot have the force of statutory rules and will not be binding on the auction-purchaser and he would not be estopped from challenging the legality of those conditions in spite of his making a bid knowing that they were different from those contained in R. 34 of the Rules. The reason is that there cannot be an estoppel against statute. If rules made under a statute or byelaws framed under the rules are in excess of the provisions of the statute or are inconsistent with such provisions, then these rules or bye-laws must be regarded as ultra vires of the statute and they cannot be given effect to. AIR 1934 Cal 537, ILR 1947 Mad 366, Rel. on. ('52) 53 **Pun LR 424: AIR 1953 Punj 274 (277, 279) (Pt A) (Prs 10, 12, 22).**

SECTION 34

——Ss. 34, 32, 58 and 59 — Rules under S. 58 cannot be varied by those framed under Ss. 32 and 34 — Conditions of sale announced at auction inconsistent with those framed under S. 58 — Validity — Auction-purchaser is not estopped from challenging their validity — (Evidence Act (1872), S. 115). See Punjab Excise Act (1914), S. 32. AIR 1953 Punj 274.

SECTION 35

——S. 35 — Punjab Liquor Licence Rules (1956), Rr. 36-B, 36-A — R. 36-G taking away in fact and in substance power of grant vested in Collector under S. 35 — Rr. 36-A and 36-B being integral, both are ultra vires.

S. 35 indicates that the grant of country liquor vend licence has to be made by the Collector subject to rules made by the Financial Commissioner. Therefore, any rule made by the Financial Commissioner cannot derogate in any manner the statutory power vested in the Collector in the matter to grant of licences. The power to grant licences vests in the Collector and he alone can exercise it. The rules can only regulate the manner in which and the circumstances under which it can be exercised.

Sending of the applications for licences to the Deputy Commissioner of the district concerned their scrutiny by him and their transmission to Government by him with his recommendations under Rule 36-B virtually put at naught the discretion vested in the Collector by the Act in the matter of grant of country liquor vend licences. The matter of grant, though technically left with the Collector, is, in fact and in substance, taken away from him. Rule 36-B, therefore, is ultra vires S. 35. Rule 36-A will also go along with it because both the rules are an integral part of each other. **ILR (1965) 1 Punj 57: AIR 1965 Punj 284 (288) (Pt A) (Pr 13) (DB).**

——S. 35 — Allotments of country liquor vends — District Excise and Taxation Officer vested with authority to grant allotments — Officer not acting independently but on directions of higher authorities in making allotments — Allotments are not in accordance with law.

If any authority has been vested with the power to grant a licence, it is that authority which must

exercise that power, and if power is exercised by some other authority, the exercise of that power will be wholly void: AIR 1952 SC 16, Foll.

Where the allotments of country liquor vends could only be made by the District Excise and Taxation Officer who was the competent authority under the Act and that authority had not exercised its independent mind in the matter but had made the allotments in accordance with the directions issued to it by the higher authorities, the grant of country liquor vend licences was not in accordance with law. **ILR (1964) 1 Punj 57: AIR 1965 Punj 284 (290) (Pt B) (Pr 15) (DB).**

——S. 35 — Restriction on sale of liquor — Discretion of executive authority to grant or refuse licence — How to be exercised stated — Discrimination in issuing licences — Held on facts that there was no warrant for unjust discrimination between these two sets of associations and the order refusing to grant a licence to petitioner contravened Art. 14 and must, therefore, be deemed to be void and of no effect. See Constitution of India, Art. 19 (6). **AIR 1957 Punj 20 (DB).**

SECTION 36

——Ss. 36, 21 and 80 (2)—Punjab Distillery Rules (1932), R. 9.36 — Validity of S. 80 (2) and last part of R. 9.36 — Both provisions are not ultra vires. See Punjab Excise Act (1914), S. 80 (2). ILR (1965) 1 Punj 189.

——Ss. 36 (c) and 80 (2) — Notice by Excise authorities to petitioner (distillery company) to carry out certain directions — Date fixed for giving company personal hearing — Company praying for change of date twice which was granted — Company failing to present case on those dates — It cannot be said that no sufficient opportunity to be heard was given to company—Order against company cannot be quashed on that ground. 1964 Cur LJ 519 (Punj).

——Ss. 36 (c), 80 (2) — Punjab Distillery Rules (1922), R. 37 — Powers under — Commissioner of Excise and Taxation has power to direct Distillery to cover its uncovered storage tank and impose penalty for disobedience thereof — But Penalty imposed cannot be recovered as arrears of land revenue.

Rule 37 clearly contemplates that the gur, molasses or mahua store, which has to be maintained by the distillery, has to be approved by the Financial Commissioner. In view of the above rule the Excise and Taxation Commissioner, who was vested with the power of Financial Commissioner, could issue a direction for covering the uncovered molasses storage tank. As there was non-compliance with such a direction, the Commissioner could cancel or suspend the licence of the petitioner by virtue of the powers vested in him under Cl. (c) of S. 36 of the Act. Instead of cancelling or suspending the licence, the Commissioner was entitled to impose the penalty by virtue of powers under S. 80 (2). Therefore, the order of the Commissioner, imposing the penalty upon the petitioner company under S. 36 (c) read with S. 80 (2) should be deemed to be in accordance with law.

But proceedings taken to recover the amount of penalty as arrears of land revenue is contrary to provisions of Ss. 36 (c) and 80 (2) and contrary to operative part of the order. The fact that the licence of the petitioner has since been cancelled for another default cannot alter the legal position contemplated by S. 80 (2) of the Act and entitle authorities to recover the penalty as arrears of land revenue. **1964 Cur LJ 519 (Punj).**

——S. 36 — Licence — When revocable — Excise licence and bare licence — Distinction between — Licence granted under statutory provision — Right of revocation or cancellation by Government to be confined within statutory limits and not de hors statute. See Easements Act (1882), S. 60. **AIR 1963 Punj 76 (DB).**

——Ss. 36, 8, 9, 14, 15-A, 40, 41, 44, 58 — Punjab Liquor Licence Rules (1956), R. 36—Auction sale of excise licence — Highest bid accepted by Collector and approved by Excise and Taxation Commissioner — Deposit of one-sixth licence fee as required by rules — Highest bidder acquires legal status of licensee even though no formal licence is granted—Reauction by Government without notice to such licensee and without giving any reasons — Legality — Action of State Government cannot be justified under Ss. 8, 36 or 41. See Punjab Excise Act (1 of 1914), S. 8. **AIR 1963 Punj 76 (DB).**

SECTION 39

——Ss. 39, 9 — Licence granted by Financial Commissioner — Notification delegating all powers of Financial Commissioner to Excise and Taxation Commissioner — Notice cancelling licence by latter held valid. AIR 1963 SC 1503, Rel. on. **1965 Cur LJ 3: 67 Punj LR 144: ILR (1965) 1 Punj 358: AIR 1965 Punj 217 (219) (Pt B) (Pr 12) (DB).**

SECTION 40

——S. 40 — Notice to Government — Construction of — Notice to be construed reasonably and not to be interpreted pedantically — Substantial information of claim against Government should be conveyed — **Held** part of claim was barred under S. 40 of the Punjab Excise Act and whole suit was barred by S. 80, Civil P. C., as there was non-compliance with requisites of S. 80. See Civil P. C. (1908), S. 80. **AIR 1963 SC 424.**

——Ss. 40, 41, 8, 9, 14, 15-A, 36, 44, 58 — Punjab Liquor Licence Rules (1956), R. 36—Auction sale of excise licence — Highest bid accepted by Collector and approved by Excise and Taxation Commissioner — Deposit of one-sixth licence fee as required by rules — Highest bidder acquires legal status of licensee even though no formal licence is granted — Reauction by Government without notice to such licensee and without giving any reasons — Legality — Action of State Government cannot be justified under Ss. 8, 36 or 41. See Punjab Excise Act (1 of 1914), S. 8. AIR 1963 Punj 76 (DB).

SECTION 44

——Ss. 44, 8, 9, 14, 15-A, 36, 40, 41, 58 — Punjab Liquor Licence Rules (1956), R. 36 — Auction sale of excise licence — Highest bid accepted by Collector and approved by Excise and

Taxation Commissioner — Deposit of one-sixth licence fee as required by rules — Highest bidder acquires legal status of licensee even though no formal licence is granted — Reauction by Government without notice to such licensee and without giving any reasons — Legality — Action of State Govt. cannot be justified under Ss. 8, 36 or 41. See Punjab Excise Act (1 of 1914), S. 8. **AIR 1963 Punj 76 (DB).**

SECTION 50

——S. 50 — Search witness — Excise case — A.S.I. raiding house of accused with witnesses two of whom were brought from town 25 miles away — Both those witnesses also appearing as witnesses for prosecution in other cases — One of remaining witnesses found on inimical terms with accused not relied on by trying Magistrate — — Head constable not mentioned as witness in case present at the time of recovery of impugned article — Evidence on record that relations between his father and accused were not very happy — Recovery of article held could not be said to have been satisfactorily proved. See Criminal P. C. (1898), S. 103. **(1963) 65 Punj LR 823.**

SECTION 54

——S. 54 — Notification introducing prohibition in social clubs — Validity — It does not constitute a direct interference with the liberty of the subject or violate the fundamental rights guaranteed by Art. 19. See Constitution of India, Art. 19 (1) (g), (5) and (6). **AIR 1957 Punj 20 (DB).**

SECTION 58

●——**Ss. 58, 59 — Rule-making power of Chief Commissioner under S. 58 — Power not controlled by that of Excise Commissioner under S. 59.**

Section 58, after empowering the Chief Commissioner to make rules for the purpose of carrying out the provisions of the Act, proceeds to give him further power to make rules for the purpose of any other law for the time being in force relating to excise revenue. This general power is not restricted or controlled by the rule-making power conferred on the Excise Commissioner by S. 59. The rule-making power of the Excise Commissioner is subject to action taken by the Chief Commissioner in making rules under S. 58 and the other sections of the Act. Pritpal Singh v. Chief Commr. of Delhi, **1965 Pun LR (Supp) 183: ILR (1965) 1 Punj 775: AIR 1966 Punj 4 (13) (Pt D) (Pr 14) (FB).**

——**Ss. 58, 8, 9, 14, 15-A, 36, 40, 41, 44**— Punjab Liquor Licence Rules (1956), R. 36—Auction sale of excise licence — Highest bid accepted by Collector and approved by Excise and Taxation Commissioner — Deposit of one-sixth licence fee as required by rules — Highest bidder acquires legal status of licensee even though no formal licence is granted — Reauction by Government without notice to such licensee and without giving any reasons — Legality — Action of State Government cannot be justified under Ss. 8, 36 or 41. See Punjab Excise Act (1 of 1914), S. 8. **AIR 1963 Punj 76 (DB).**

——**S. 58 (2) (f) (as extended to Delhi) — Rules under — Delhi Liquor Licence Rules, R. 5.34 (21), —Sale of licence—Confirmation by Chief Commissioner not necessary — Failure of purchaser to deposit one-sixth of purchase price — Effect.**

The question of confirmation by the Chief Commissioner of the sale of any licence is against the plain language of sub-rule (21) of Rule 5.34. If the purchaser fails to deposit one-sixth of the price within the specified period or if he refuses to take up the licence, the authorities are entitled to enforce the provision of sub-rule (21) of R. 5.34, which permits the resale of the licence and the loss, if any, can be recovered from the defaulting purchaser. AIR 1953 Punj 274, Not foll. **(1960) 62 Punj LR 717.**

——**Ss. 58 and 3 (9), 60** — Deficiency in price on resale of excise shop in excise revenue — It can be recovered under S. 60. See Punjab Excise Act (1914), S. 3 (9). **AIR 1953 Punj 274.**

——**Ss. 58, 32, 34 and 59** — Rules under S. 58 cannot be varied by those framed under Ss. 32 and 34 — Conditions of sale announced at auction inconsistent with those framed under S. 58— Validity — Auction-purchaser is not estopped from challenging their validity — (Evidence Act (1872), S. 115). See Punjab Excise Act (1914), S. 32. **AIR 1953 Punj 274.**

——**S. 58 — Rules under — Conditions of auction — Power of Chief Commissioner to vary.**

The Chief Commissioner cannot vary the conditions of auction of liquor shops laid down by the rules framed by the Provincial Government under S. 58 of the Punjab Excise Act.

Rules made by the Chief Commissioner under Ss. 32 and 34 of the Act cannot vary those made by the Provincial Government under S. 58 of the Act. **53 Punj LR 424: AIR 1953 Punj 274 (278) (Pt C) (Pr 21).**

——S. 58 — Validity of Punjab Intoxicating Spirituous Preparations Import, Export, Transport, Possession and Sale Rules (1952) — Constitution of India, Art. 245 — In the Punjab Excise Act the rules are issued under the provisions of Ss. 5, 6, 16, 17, 18, 24 and 58. These sections enable the State Government to issue the rules and these rules have been issued by the State Government. No question of delegated legislation arises in this case. **1953 Cri LJ 549: AIR 1953 Punj 77 (79) (Pt C) (Pr 5) (DB).**

[Reversed on facts in AIR 1959 SC 65.]

SECTION 59

●——**S. 59** — Rules under — Delhi Liquor Licence Rules, 1935, Chap. 5, R. 1 — Chief Commissioner of Delhi is competent authority to grant licence in Delhi. Ghaio Mal & Sons v. State of Delhi, **1959 SCJ 105: ILR (1959) Punj 277: 1959 SCR 424: AIR 1959 SC 65 (70) (Pt B) (Pr 9).**

——S. 59 — Government of Part C States Act (1951), S. 38 — Delhi Excise Rules, Rule 5.1 — Scope of S. 38 of the Act of 1951 — Powers of Chief Commissioner under Excise Act — Powers conferred under the statutory rules framed under the Punjab Excise Act on the Chief Commissioner cannot be said to be powers which the Chief Commissioner exercises by virtue of S. 38, Government of Part C States Act. See Government of Part C States Act (1951), S. 38. **AIR 1956 Punj 97 (DB).**

[Reversed on facts in AIR 1959 SC 65.]

——**Ss. 59, 32, 34 and 58** — Rules under S. 58 cannot be varied by those framed under Ss. 32

and 34 — Conditions of sale announced at auction inconsistent with those framed under S. 58— Validity — Auction-purchaser is not estopped from challenging their validity — (Evidence Act (1872), S. 115). See Punjab Excise Act (1914), S. 32. **AIR 1953 Punj 274.**

SECTION 60

——Ss. 60, 3 (9) and 58 — Deficiency in price on resale of excise shop is excise revenue — It can be recovered under S. 60. See Punjab Excise Act (1914), S. 3 (9). **AIR 1953 Punj 274.**

SECTION 61

——S. 61 — Penal Code (1860), S. 53 — Proper sentence — Held that the facts that the accused was a refugee and that he had confessed his guilt were not, by themselves, extenuating circumstances and his sentence was enhanced. See Penal Code (1860), S. 53. **1953 Cri LJ 1261: AIR 1953 Pepsu 118.**

——Ss. 61 and 5 — Notifications issued under S. 5 permitting to keep one bottle of Punjab-distilled liquor or of foreign liquor imported or made in India — Accused found in possession of one bottle of liquor — Liquor proved different from Punjab distillery spirits — Burden to establish that liquor was illicit does not shift to accused on that account — Burden to prove that liquor was of illicit origin lies entirely on prosecution. **1965 Cur LJ 577: (1965) 67 Punj LR 1044.**

——Ss. 61 (1) (a), 68-A (added by Punjab Excise Amendment Act (35 of 1956) — Recovery of charas from accused after raid by police officers — Value of associating independent persons as witnesses — Witnesses of Police department — Effect—Material discrepancies in evidence led by prosecution — Recovery of charas not proved beyond doubt— Accused is entitled to benefit of doubt — Criminal trial — Raid by police officers — Importance of associating non-officials as witnesses. **1965 Cur LJ 71: (1965) 67 Punj LR 128.**

——S. 61 (1) (a) — Possession of illicit liquor — Proof — Accused living jointly with four brothers —Mere knowledge of existence of illicit liquor is not sufficient.

Where the 'haveli' from where the illicit liquor was recovered was owned and possessed by the accused and his four brothers, the fact that the accused knew that the illicit liquor was there in the haveli alone was not enough to say that he was in possession thereof. **(1962) 64 Punj LR 91.**

——S. 61 (1) (a) — Essentials for conviction — Guilty knowledge — The offence punishable under S. 61 (1) (a) clearly relates back to the provisions of S. 25 and, therefore, for anybody to be convicted under S. 61 (1) (a), there must be two ingredients, namely the possession of illicit liquor and the knowledge that for one of the reasons mentioned in S. 25, the liquor is illicit. See Criminal P. C. (1898), S. 342. **1957 Cri LJ 473: AIR 1957 Punj 75 (DB).**

——S. 61 (1) (c) — 'Possession of liquor'—Proof.

B was found drinking with a bottle of liquor and a glass lying near him in the house of S. The inmates of the house were S, his daughter G and his wife T. B was a stranger from another village. S stated that the liquor was in his possession and that nobody else in the house or B had any connection with it. B's defence was that he had been to S to get his shoes repaired. Accused S, G and T were acquitted and B was convicted under S. 61.

Held, that on the evidence B could not be convicted as the possession of liquor by B had not been proved. **1957 Cri LJ 476 (1) (476) (Pr 3) (Punj).**

——S. 61 (1) (a) — 'Lahan' — Offence.

If all the ingredients of Lahan were present mixed in the vessels recovered from the accused, or in other words, the mixture was ready for the fermentation which would inevitably follow, it is immaterial whether the ingredients had been mixed sufficiently long for the process of fermentation to have advanced very far or not, at the time of the recovery. Where the mixture consisted of water, gur and some fermenting agent, it does not matter how recently the mixture had been made before it was recovered and the substance is lahan and so amounts to liquor within the meaning of the definition contained in paras 1, 2, Chap. I of the Punjab Excise Liquor Definitions in Vol. II of the Excise Manual. The accused is, therefore, guilty under S. 61 (1) (a). **ILR (1956) Punj 1187: 58 Punj LR 359: 1957 Cri LJ 291 (Punj).**

——S. 61 (1) (a) — Lahan, possession of — Offence.

Lahan is the substance out of which alcohol is distilled and if the person who possesses any quantity of this substance, has no licence for distilling alcohol, its possession is a criminal offence under the Excise Act, although lahan may not in itself be an intoxicating substance, particularly if it is recovered before the process of fermentation has had time to take effect. It is quite open to the Government to include lahan as such as falling within the term 'liquor' and thereby to make its possession without a licence an offence under the Excise Act. "Lahan" is lahan once the ingredients have been mixed whatever stage the process of fermentation may have reached. **ILR (1957) Punj 238.**

——S. 61 (1) (a) — Proof essential for conviction — No proof that bottles found in godown of accused contained Tincture Zingiberis — Conviction held could not be sustained. **AIR 1955 NUC (Punj) 4957.**

——S. 61 — Sentence — Sentence of fine should be imposed — (Criminal P. C. (1898), S. 32). **AIR 1955 NUC (Punj) 2520.**

——S. 61 (1) (a) — Possession of illicit liquor— Accused stating that they themselves had buried the pitchers of lahan under trees in their family fields — Pitchers discovered in consequence of these statements — This was held sufficient to establish their conscious possession of the incriminating article to justify conviction under S. 61 (1) (a). **55 Punj LR 474: 1954 Cri LJ 554: AIR 1954 Punj 83 (83) (Pr 3) (DB).**

——S. 61 (1) (a) — Evidence not satisfactory — Not safe to convict.

Where in a prosecution under S. 61 (1) (a) there was no satisfactory evidence produced by the prosecution regarding the discovery of pitchers containing the offensive matter from the premises

ot the accused and the testimony in favour of the accused given by two lambardars of the village was discarded by the lower Court on the ground that being the co-villagers of the accused they gave evidence to oblige him:

Held, taking into consideration the provisions of Ss. 52 and 68 and the fact that there was no evidence on the record showing any connection whatsoever between the accused on the one side and the two lambardars on the other, the lower Court was not justified in discarding the evidence given by them and that it was not safe to act on the evidence given by witnesses for prosecution. **55 Punj LR 345: 1953 Cri LJ 1825: AIR 1953 Punj 266 (267) (Pr 12).**

——S. 61 (1) — Illicit liquor — Possession — Meaning.

In order to decide whether a quantity of illicit liquor or illicit arm is or is not in possession of the accused person, the Courts have to consider not merely whether the article is lying at the house of the accused person or at a place accessible to others, but a number of other circumstances, the proof of which will persuade the Court to come to the conclusion that the article was in fact under the control and absolute dominion of the person concerned.

Recovery of illicit liquor from field of another on information supplied by the accused. Several persons distilling liquor in that village and this fact known to almost all villagers — **Held** that it was probable that accused gave information relating to liquor belonging to someone else and, therefore, accused could not be said to be in possession of that discovered liquor.

The fact that a man buries an article in his own kotha shows that he retained control over it and. therefore, the article must be said to have continued in his possession. **52 Cri LJ 108: AIR 1951 Simla 185 (185, 186) (Prs 3, 4, 6) (DB).**

SECTION 68-A

——Ss. 68-A (added by Punjab Excise Amendment Act (35 of 1956) and 61 (1) — Recovery of charas from accused after raid by Police officers—Value of associating independent persons as witnesses—Witnesses of Police department — Effect—Material discrepancies in evidence led by prosecution—Recovery of charas not proved beyond doubt — Accused is entitled to benefit of doubt — Criminal trial — Raid by Police officers — Importance of associating non-officials. 1965 Cur LJ 71: (1965) 67 Punj LR 128.

SECTION 69-A

——S. 69-A (added by E. P. Act (9 of 1948)— Applicability.

S. 69-A does not apply to Patiala or Pepsu State as the amendment inserting that section in the Punjab Excise Act after 1925 was not enforced in these States. **1953 Cri LJ 1261: ILR (1953) Patiala 139: AIR 1953 Pepsu 118 (118) (Pt B) (Pr 2).**

——S. 69-A — Procedure — Order to furnish security — Standard practice — The standard sentence for working an illicit still has been one year's imprisonment, and since the introduction of S. 69-A it has also been almost a standard practice to require convicted persons to furnish security covering a period after their release from prison. See Criminal P. C. (1898), S. 32. **AIR 1955 NUC (Punj) 4973.**

SECTION 80

——Ss. 80 (2), 36 and 21 — Punjab Distillery Rules (1932), R. 9.36 — Validity of S. 80 (2) and last part of R. 9.36—Both provisions are not ultra vires. **ILR (1965) 1 Punj 189.**

——Ss. 80 (2) and 36 (c)—Notice by Excise authorities to petitioner (distillery company) to carry out certain directions — Date fixed for giving company personal hearing — Company praying for change of date twice which was granted — Company failing to present case on those dates—It cannot be said that no sufficient opportunity to be heard was given to the company — Order against company cannot be quashed on that ground. **1964 Cur LJ 519 (Punj).**

PUNJAB FINANCIAL RULES

●——Responsibility of head of office for pay drawn on bill signed by him.

Under the Punjab Financial Rules the head of an office is personally responsible for every pay drawn on a bill signed by him or on his behalf until he has paid it to the person entitled to receive it and obtained his receipt, duly stamped where necessary on the office copy of the pay-bill. This responsibility is a serious one and a disclaimer thereof is not lightly to be accepted. Bhagat Ram v. State of Punjab, **1954 Cri LJ 1645: AIR 1954 SC 621 (624) (Pt B) (Pr 5).**

PUNJAB FORWARD CONTRACTS TAX ACT (7 OF 1951)

SECTION 2

●——S. 2 — Validity of Act. See Constitution of India, Sch. 7, List II, Entry 62. **AIR 1961 SC 268.**

PUNJAB GENERAL CLAUSES ACT (1 OF 1898)

SECTION 2

——S. 2 (40) — Profession tax — Tax to be borne by partnership as such and not individually by every partner. See Municipalities — Punjab Municipal Act (3 of 1911), Section 61 (1) (b). **AIR 1965 Punj 168.**

——S. 2 (40) — Own occupation — Meaning of — Occupation may be by a human being or a juristic person like Trust. See Houses and Rents — East Punjab Urban Rent Restriction Act (3 of 1949), Section 13 (3) (a) (i). **(1962) 64 Pun LR 1141.**

——S. 2 (36) — Notification — Publication in Gazette — Necessity of.

Clause (36) does not say that the notification shall have effect only from the date when it is published in the Official Gazette. All that it requires is such publication, and according to the routine in Government Offices the notification takes effect from the date it is issued which must usually be some time before it can be actually printed in the Gazette: AIR 1954 Pat 393, Doubted. **ILR (1958) Punj 1884: AIR 1958 Punj 402 (405) (Pt C) (Pr 5) (DB).**

SECTION 3

——Ss. 3, 27 — Ordinance stated to come into operation "at once" — Ordinance whether comes into operation on particular day.

An ordinance published in Delhi under the authority of the President on a particular day comes into force on that day as the words "at once" used in the Ordinance read with the date which appears above the title of the Ordinance as published in the Gazette of India can only mean that the Ordinance was expressed to come into force on the day it was published. The provisions of the Punjab General Clauses Act are applicable to an Ordinance published under Article 213 of the Constitution, for in Section 27 of the Act as now adapted express provision for such application is made. 54 Pun LR 11: ILR (1951) Punj 480: AIR 1952 Punj 55 (57) (Pt B) (Pr 5) (DB).

SECTION 4

——S. 4 — Scope of — Repeal and fresh legislation — Duty of Court.

Whenever there is repeal of an enactment, the consequences laid down in Section 4 will follow unless, as the section itself says, a different intention appears. In the case of a simple repeal there is scarcely any room for expression of a contrary opinion. But when the repeal is followed by a fresh legislation on the same subject, the Court would undoubtedly have to look to the provisions of the new Act: but only for the purpose of determining whether they indicate a different intention. The line of enquiry in such cases would be not whether the new Act expressly keeps alive old rights and liabilities, but whether it manifests an intention to destroy them. 60 Punj LR 332: ILR (1958) Punj 1553.

SECTION 6

——S. 6 — 'Instrument' — Meaning — Order of detention under Public Safety Act — The order of Chief Commissioner extending the period of detention of a person detained under S. 3 (1) of the Punjab Public Safety Act or of the East Punjab Public Safety Act is not an instrument within the meaning of Section 6. 52 PLR 60: 52 Cri LJ 3: AIR 1951 Punj 216 (219) (Pt B) (Pr 10) (DB).

——S. 6 — Enactments and instruments coming into existence after repealing Act — Section 6 was not intended to apply to enactments and instruments coming into existence after the passing of the repealing and modifying Act. Even if an order extending a period of detention under the Public Safety Act were to be deemed to be an instrument a mistaken reference to the repealed Punjab Public Safety Act after the enactment of East Punjab Public Safety Act would not be saved by Section 6. AIR 1951 Punj 216 (219) (Pt C) (Pr 10) (DB).

SECTION 11

——Ss. 11 and 12 — East Punjab Utilization of Lands Act (38 of 1949), Ss. 3, 5, proviso and 7 (1) — Lease of lands under S. 5 for 7 years —Renewal of lease for balance of 20 years — Renewal is within scope of provisions. See East Punjab Utilization of Lands Act (38 of 1949), Section 3. 1964 Cur LJ 495: ILR (1965) 1 Punj 1:

SECTION 12

——S. 12 — Lease of land under Section 5 for 7 years — Renewal of lease for balance of 20 years — Renewal is within scope of provisions. See East Punjab Utilization of Lands Act (38 of 1949), Section 3. 1964 Cur LJ 495: ILR (1965) 1 Punj 1.

——S. 12 — Government creating Improvement Trust for municipal area during suspension of Municipal Committee — Fresh election of committee of July 1961 — Government dissolving trust on 30th August, 1961 and later on informing its reconstitution on 9th November, 1962 — Municipality at its meeting on 9th November, 1962 unanimously deciding and requesting Government not to reconstitute trust — Government persisting with its intention and appointing a chairman of trust — Act of Government held invalid — Section 12 of the Act held inapplicable, since even when power is exercised on a second or subsequent occasion it is to be exercised in accordance with provisions of law granting power. See Punjab Town Improvement Act (4 of 1922), Section 1 (3). 1965 Cur LJ 669: (1965) 67 Pun LR 1050.

SECTION 14

——S. 14 — Scope — Government has power to suspend a Government servant appointed by it See General Clauses Act (1897), Section 16. AIR 1963 Punj 298 (DB).

[Reversed in AIR 1964 SC 72].

SECTION 19

●——S. 19 — Power to cancel notification — S. 19 of the P. G. Clauses Act embodies a rule of construction, the nature and extent of the application of which must inevitably be governed by the relevant provisions of the statute. The power to cancel the notification can be easily conceded to the competent authority and so also to modify or vary it be likewise conceded but the said power must inevitably be exercised within the limits prescribed by the provision conferring the said power. See Public Safety — East Punjab Public Safety Act (5 of 1959), Section 36 (1) 1959 Cri LJ 782: AIR 1959 SC 609.

SECTION 22

●——S. 22 — Punjab Development and Damaged Areas Act (10 of 1951), Sections 2 (d), 5 (4) — East Punjab Damaged Areas Act (10 of 1949), Punjab Damaged Areas Act (XI of 1947), S. 3 — Scheme in respect of area declared to be 'damaged area' under 1947 Act but not so declared under 1951 or 1949 Act is without jurisdiction — Conclusiveness of scheme under Section 5 (4) of 1951 Act does not apply where there is total lack of jurisdiction — Punjab General Clauses Act (I of 1898), Section 22 — Implied repeal — 1947 Act not repealed but lapsing and re-enacted by 1949 Act — Notification under 1947 Act cannot be deemed to be one under 1949 Act — Interpretation of Statutes — Implied repeal — There must be inconsistency between two Acts. See Punjab Development and Damaged Areas Act (10 of 1951), Section 2 (d). AIR 1963 SC 976.

——S. 22 read with Section 27 — Punjab Gram (Regulation of Distribution) Order (1964), Cl. 3 — Permit granted under old clause on 21st September 1964—Petitioner loading wagons on 21st and 22nd September 1964—Old Clause 3 replaced by new clause 3 on 21st September 1964 — District Magistrate acting under new clause not allowing wagons to proceed to destination — Held, action of District Magistrate was unjustified — Permit not being revoked was good under new Cl. 3 — ILR (1965) 1 Punj 610.

●——S. 22 — Acquisition of land — Passing of Punjab Act of 1955 during pendency of proceedings — Effect in determination of compensation. There is nothing in the Act of 1953 or in S. 22 which can be construed to imply that it was to affect any suits or other legal proceedings which were actually pending when it came into force and consequently in the facts and circumstances of the present case the compensation payable to the appellant must be paid in accordance with provisions of the Act of 1948 and in accordance with the provisions of the Act of 1953. See East Punjab Requisitioning of Immovable Property (Temporary Powers) Act (XLVIII of 1948), S. 5. **AIR 1957 Punj 209 (FB).**

——S. 22 — East Punjab Urban Rent Restriction Act (3 of 1949), Section 17 — Order passed under Act of 1947 — Execution after Act of 1949 — General Clauses Act (1897), Section 8. See Houses and Rents — East Punjab Urban Rent Restriction Act (3 of 1949), Section 17. **AIR 1951 Punj 329.**

SECTION 27

——Ss. 27 and 3 — Ordinance stated to come into operation "at once" — Ordinance whether comes into operation on particular day.

An ordinance published in Delhi under the authority of the President on a particular day comes into force on that day as the words 'at once' used in the ordinance read with the date which appears above the title of ordinance as published in the Gazette can only mean that the ordinance was expressed to come into force on the day it was published. See Punjab General Clauses Act (1898), Section 3. **AIR 1952 Punj 55 (DB).**

PUNJAB GENERAL SALES TAX ACT (46 of 1948)

See under Sales Tax.

PUNJAB GRAM PANCHAYAT ACT, 1952 (4 of 1953)

See under Panchayats.

PUNJAB GRAM PANCHAYATS (AMENDMENT) ACT (26 of 1960)

See under Panchayats.

PUNJAB GRAM PANCHAYAT ELECTION RULES (1953)

See under Panchayats.

PUNJAB GRAM PANCHAYAT ELECTION RULES (1960)

See under Panchayats.

PUNJAB GRAM (REGULATION OF DISTRIBUTION) ORDER (1964)

CLAUSE 3

——Cl. 3 (old and new) — Permit granted under old clause on 21st September 1964 — Petitioner loading wagons on 21st and 22nd September 1964 — Old Clause 3 replaced by new Clause 3 on 21st September, 1964 — District Magistrate acting under new clause not allowing wagons to proceed to destination — Held, action of District Magistrate was unjustified — Permit not being revoked was good under new Clause 3 — Punjab General Clauses Act (1 of 1898), S. 22 read with Section 27. **ILR (1965) 1 Punj 610.**

PUNJAB HIGH COURT RULES AND ORDERS

See under High Court Rules and Orders.

PUNJAB HOLDINGS (CONSOLIDATION AND PREVENTION OF FRAGMENTATION) ACT (50 of 1948)

See under Tenancy Laws — East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act (50 of 1948).

PUNJAB INTOXICATING SPIRITUOUS PREPARATION, IMPORT, EXPORT, TRANSPORT, POSSESSION AND SALE RULES (1952)

See under Prohibition.

PUNJAB INSTRUMENTS (CONTROL OF NOISES) ACT (36 of 1956)

SECTION 3

——S. 3 —'Premises' — Open piece of land. Held, after considering the context and the object of the Act, that the word 'premises' occurring in Section 3 covers an open piece of land. Criminal Revn. No. 1084 of 1959, dated 5th November, 1959 (Punj) and ILR 34 Bom 593 and AIR 1950 Mad 38 and ILR 4 Bom 168 (FB), Disting. **1960 Cri LJ 1371: ILR (1960) 2 Punj 814: AIR 1960 Punj 538 (542) (Pt C) (Pr 14) (DB).**

PUNJAB JAIL MANUAL

PARA 571

●——Paras 571 to 575 — Constitution of India, Article 14 — Prisons Act (1894), Section 59 — Rules under Punjab Jail Manual Paras 571 to 575 — Separation of prisoners for maintenance of jail discipline — Para 575 not violative of Article 14 — Power under Para 575 held exercised with mala fides and separate confinement of petitioner held illegal. See Constitution of India, Article 14. **AIR 1962 SC 510.**

——Paras 571 to 575 — Constitution of India, Articles 14, 20 — Provisions for separation of prisoners for jail management — Not unconstitutional. See Constitution of India, Article 14. **1961 (2) Cri LJ 687 (2): AIR 1961 Punj 524.**

PARA 572

——Paras 572 to 575 and 571 — Constitution of India, Articles 14, 20 — Provisions for separation of prisoners for jail management — Not unconstitutional. See Constitution of India, Article 14. **1961 (2) Cri LJ 687 (2): AIR 1961 Punj 524.**

PARA 573

——Paras 573 to 575 and 571, 572 — Constitution of India, Articles 14, 20 — Provisions for separation of prisoners for jail management — Not unconstitutional. See Constitution of India, Article 14. **1961 (2) Cri LJ 687 (2): AIR 1961 Punj 524.**

PARA 574

— Paras. 574, 571 to 573 and 575 — Constitution of India, Artciles 14, 20 — Provisions for separation of prisoners for jail management — Not unconstitutional. See Constitution of India, Article 14. **1961 (2) Cri LJ 687 (2): AIR 1961 Punj 524.**

PARA 575

——Paras 575 and 571 to 574 — Constitution of India, Articles 14, 20 — Provisions for separation

of prisoners for jail management — Not unconstitutional. See Constitution of India, Article 14 1961 (2) Cri LJ 687 (2): AIR 1961 Punj 524.

PUNJAB KHANDSARI AND GUR DEALERS LICENSING ORDER (1963)

——Rights under Art. 19 of Constitution are suspended during emergency — Order cannot be challenged as being violative of Art. 19. See Constitution of India, Art. 358. AIR 1965 Punj 74 (DB).

——Validity of Order can be challenged on score of being outside scope of under Art. 19 of Constitution — Order is within scope of S. 3 of Essential Commodities Act. See Essential Commodities Act (1955), S. 3. AIR 1965 Punj 74 (DB).

PUNJAB LAND REVENUE ACT (CENTRAL ACT 17 of 1887)

SECTION 3

●——S. 3 (2) — Ejectment of tenant at will by lessee landlord — Latter admittedly not an allottee or lessee under Cls. (b) and (c) of S. 2 of East Punjab Displaced Persons (Land Re-settlement) Act 30 of 1949 or a mortgagee with possession — Lessee holding land subject to liability to pay to owner of land rent equal to lease money — He is only a tenant within S. 4 (5) of Punjab Tenancy Act (16 of 1887) and not a landowner within the definition in the Act — Hence he is not entitled to benefit under S. 14-A (1) and his application for ejecting his tenant at will has to be dismissed. See Tenancy Laws — Punjab Security of Land Tenures Act (10 of 1953), S. 14-A (1). 1962 Supp (3) SCR 386.

●——S. 3 — Constitution of India, Art. 31-A (1) (a) — "Any estate or of any rights therein" — Meaning — Portions of estate whether included — Punjab Security of Land Tenures Act (10 of 1953 as amended by Act 11 of 1955) — If comes within purview of Art. 31-A — Act whether extinguishes or modifies any rights in any estate within Art. 31-A (1) (a) — (Tenancy Laws — Punjab Security of Land Tenures Act (10 of 1953 as amended by Act 11 of 1955) — Constitutional validity) — AIR 1959 Punj 8 (FB), Overruled — See Constitution of India, Art. 31-A (1) (a). AIR 1959 SC 519.

——S. 3 (1) — Right of pre-emption — Requisites of — Pre-emptor must be co-sharer — Right must subsist up to date of decree — Burden of proof is on plaintiff — Each and every land-owner in estate is not co-sharer. See Punjab Pre-emption Act (1 of 1913), S. 15 (b), Fourthly. (1964) 66 Punj LR 1063.

——Ss. 3 (1), 158 (2), 4, 48 and 141 — Jurisdiction of Civil Court — The Act does not exclude the jurisdiction of civil Courts in regard to lands on which houses, shops and factories have been built — (Civil P. C. (1908), S. 9). AIR 1953 Punj 250. (251, 252) (Pt C) (Prs 10, 15).

SECTION 4

——Ss. 4, 158 (2), 3 (1), 48 and 141 — Jurisdiction of Civil Court — The Act does not exclude the jurisdiction of civil courts in regard to lands on which houses, shops and factories have been built — (Civil P. C. (1908), S. 9). AIR 1953 Punj 250 (251, 252) (Pt C) (Prs 10, 15).

SECTION 9

●——Ss. 9 and 28 — Rules under — Punjab Tahsildari Rules (1932) — Rules continued to remain in force even after Act was amended by Government of India (Adaptation of Indian Laws) Order, 1937 — Dismissal of Tahsildar from service — Order passed by Financial Commissioner in 1953 — Order held valid — AIR 1960 Punj 168, Affirmed. Gian Singh v. State of Punjab, (1962) 3 SCR 515: (1962) 1 SCJ 641: AIR 1962 SC 219 (222 to 223; 226, 227, 231, 232) (Pt A) (Prs 6, 7, 9, 10, 27, 29, 31, 47, 48, 49).

——S. 9 — Adaptation Order, 1937 — Effect on validity of Tahsildari Rules, 1932 — Powers of Financial Commissioner not affected.

The Punjab Tahsildari Rules, 1932 have either been made in exercise of the powers conferred by the Government of India Act, 1919, or in exercise of the powers conferred by S. 9 of the Punjab Land Revenue Act, 1887. If they have been made in exercise of the powers conferred by the Government of India Act, 1919, they continue in force under S. 276 of the Government of India Act, 1935 and Art. 313 of the Constitution of India. These rules purport to have been framed under the provisions of S. 9 of the Punjab Land Revenue Act, 1887 and although this section was amended by the Government of India (Adaptation of Indian Laws) Order, 1937, the rules continue in force by virtue of paragraphs 9 and 10 of the said Order and the Financial Commissioner who had power to appoint and to dismiss the Tahsildars, continues to exercise these powers. These powers have not been abrogated or withdrawn 61 Pun LR 370: ILR (1959) Punj 96: AIR 1960 Punj 168 (169) (Prs 8 to 10) (DB).

SECTION 16

——S. 16 — Constitution of India, Art. 226 — Exercise of discretion — Art. 226 makes the issue of directions, orders or writs discretionary and it cannot be urged that any party has a right to any form of an order as a matter of course. See Constitution of India, Art. 226. AIR 1953 Him Pra 74.

SECTION 28

●——Ss. 28 and 9 — Rules under — Punjab Tehsildari Rules (1932) — Rules continued to remain in force even after Act was amended by Government of India (Adaptation of Indian Laws) Order, 1937 — Dismissal of Tehsildar from service — Order passed by Financial Commissioner in 1953 — Order held valid — See Punjab Land Revenue Act (17 of 1887), S. 9. AIR 1962 SC 219.

——Ss. 28 and 158 — Remuneration of Patwaris — Suit for recovery.

No statutory rule gives to the Patwari, who is a village servant under the S. 28, an exceptional right of recovering arrears of pay by bringing a suit. Para 14 of the Standing Orders makes no such provision. 54 Punj LR 472: AIR 1953 Punj 174 (174) (Pt A) (Pr 5) (DB).

SECTION 31

●——Ss. 31, 44 — Entries in Wajib-ul-arz — Effect and value of—(Evidence Act (1872), Ss. 35, 114, 101 to 104).

Whether the statutory presumption attaching to an entry in the Wajib-ul-arz has been properly displaced or not must depend on the facts of each case. Under S. 31 of the Punjab Land Revenue Act, 1887, Wajib-ul-arz is a part of the record of rights, and entries made therein in accordance with law and the provisions of Ch. IV of the Act and the rules thereunder, shall be presumed to be true. The Wajib-ul-arz or village administration paper is a record of existing customs regarding rights and liabilities in the estate; it is not to be

used for the creation of new rights or liabilities. ILR 2 Mad 128 (PC) and AIR 1918 PC 4 and AIR 1922 Lah 234, Rel. on. Raja Rajinder Chand v. Mst. Sukhi. **1957 SCJ 119: 1957 SCA 251: 1956 SCR 889: ILR (1957) Punj 819: AIR 1957 SC 286 (294 to 296) (Pt E) (Prs 19, 20, 22).**

●——Ss. 31, 44 — **Jamabandi entries — Authenticity.**

The entries in Jamabandies fall within the purview of the record of rights under S. 31 and are to be presumed to be true under S. 44 until the contrary is proved. Chhote Khan v. Mal Khan **1955 SCR 60: 1954 SCJ 577: AIR 1954 SC 575 (578) (Pt D) (Pr 20).**

——Ss. 31 (2) (d) and 44 — Evidence Act (1872), Ss. 35, 90 and 114 — Settlement pedigree-tables — Presumption of truth of relationship — Burden to prove that entry in such tables is wrong. See Evidence Act (1872), S. 35. **AIR 1961 Punj 251.**

SECTION 32

——S. 32 — Jurisdiction of civil Courts. The correctness of a record of rights can be challenged in civil Courts. The jurisdiction of Civil Courts is not either expressly or impliedly framed — See East Punjab Holding (Consolidation and Prevention of Fragmentation) Act (50 of 1948), S. 22. **AIR 1955 NUC (Punj) 3439.**

SECTION 34

——S. 34 — **Mutation — Cancellation—Power of Tahsildar.**

A Tahsildar has no jurisdiction or authority to cancel a mutation that had been properly sanctioned by another revenue officer. **ILR (1954) Pepsu 433: AIR 1953 Pepsu 161 (177) (Pt J) (Pr 46) (DB).**

[Overruled on another point in AIR 1963 SC 222].

——S. 34 — **Mutation — Mutation proceedings — Inferences from, as to conduct of party.**

Inferences as to conduct of a party to the mutation proceedings can legally be drawn in spite of the fact that mutation proceedings are concerned only with fiscal purposes. **62 Pun LR 29: ILR (1959) Punj 1269.**

——Ss. 34 and 44 — Mutation does not create new title or determine existing title — (Mutation — Effect) — (Evidence Act (1872), S. 35). **AIR 1955 NUC (Punj) 5725 (DB).**

SECTION 37

●——S. 37 — Vendor's admission as to correctness of new entry or agreement to have old entry corrected after parting with his interest in property cannot bind purchaser — But where Revenue Officer makes the entry on the facts proved before him and not on the basis of the admission alone the provisions of S. 37 (a) are satisfied and hence there is a presumption of the correctness of the entry. See Punjab Land Revenue Act (17 of 1887), S. 44. **AIR 1963 SC 1917.**

SECTION 42

●——Ss. 42 (1) (2) (4), 155 — **Presumption under S. 42 (2) when can be raised — Presumption can be raised when record of rights is produced in court — Document not produced — Presumption neither under S. 42 (1) nor under S. 42 (2) can be raised — Application for permit under Delhi Minor Mineral Rules (1938) would constitute admission that person applying is not owner of minerals.**

Sub-s. (4) of S. 42 is not applicable to the presumption raised in favour of the land owner by sub-s. (2) S. 42. S. 42 (2) raises a presumption against the Government when in any record-of-rights completed after November, 18, 1871 it is not expressly provided that any quarry belongs to the Government, but this presumption arises only when the record-of-rights is before the Court and flows from the contents of the produced document. The sub-section is no authority whatsoever for raising a presumption as to the contents of a record-of-rights which is not produced and is not before the Court. No presumption against the Government can be drawn from the non-production of the record-of-rights in court by the Government because the record-of-rights is a public document and therefore, available to the land owner or a person claiming through him as well who can obtain a cretified copy and file it if it supports his case. A jamabandi account however is not a document on the basis of which the presumption in S. 42 (2) can be invoked. But though the relevant record-of-rights not being before the court the presumption raised either by S. 42 (1) or by S. 42 (2) cannot be invoked in favour of the Government or the owner, the application for grant of permit under Delhi Minor Mineral Rules (1938) framed under S. 155 (1) of the Punjab Land Revenue Act (1887) by a person would constitute an admission and would prima facie show that the person was not the owner of the minerals. Possession of the minerals under the permit would negative the ownership of the person in the minerals having regard to the scheme of the Minor Mineral Rules. Amar Iyoti Stone Crushing Co. v. Union of India, **1962 (3) SCR 62: AIR 1967 SC 46 (47, 48) (Pt A) (Prs 4, 5).**

——S. 42 — **Auction of bushes and trees on Government land — Auction price is revenue payable to Government and recoverable as arrears of land revenue — Dispute as to area — Remedy open in ordinary court — Petition under Art. 226 of Constitution held not maintainable as requiring hearing of evidence — Constitution of India, Art. 226.**

Held, on facts that the auction price of thorny bushes and trees was revenue due to Government on account of rights described in S. 42 of the Land Revenue Act and was, therefore, recoverable as arrears of land revenue. **Held,** further that the real dispute whether the sale was only of trees and bushes in Ss. 7 and 7-E, or whether the sale covered such bushes and trees standing in the whole of the capital area was a dispute which could be settled properly in an ordinary court and A must seek his remedy in such Court. Petition under Art. 226 was not maintainable. **64 Punj LR 602: ILR (1962) 2 Punj 508.**

——S. 42 — **Trees — Ownership — Kangra District — Spontaneous growth on waste land — Waste land assessed — Rule.**

In the District of Kangra, ownership of trees of spontaneous growth, on the waste land which was assessed to land revenue and was in possession of the proprietors, is in the Government **ILR (1957) Punj 479.**

SECTION 44

●——Ss. 44 and 37 — Vendor's admission as to correctness of new entry or agreement to have old entry corrected after parting with his interest in property cannot bind purchaser — But where Revenue Officer makes the entry on the facts proved before him and not on the basis of the admission alone the provisions of S. 37 (a) are

satisfied and hence there is a presumption of the correctness of the entry. Gurbaksh Singh v Nikka Singh, 1963 SCD 403: (1963) 2 SCJ 285: (1963) Supp I SCR 55: AIR 1963 SC 1917 (1920) (Pt C) (Pr 9).

●——Ss. 44 and 31 — Entries in wajib-ul-arz — Under S. 31 of the Punjab Act wajib-ul-arz is a part of the record of rights and entries made therein in acordance with law and the provisions of chapter IV of the Act and the Rules thereunder shall be presumed to be true. The Wajib-ul-arz is a record of existing customs regarding rights and liabilities in the estate: it is not to be used for the creation of new rights or liabilities — (Evidence Act (1872), Ss. 35, 114, 101 to 104) — See Punjab Land Revenue Act (17 of 1887), S. 31. AIR 1957 SC 286.

●——Ss. 44, 31—Jamabandi entries—Authentictiy — The entries in Jamabandi fall within the purview of the record of rights under S. 31 and are to be presumped to be true under S. 44 until the contrary is proved. AIR 1954 SC 575 (575) (Pt D) (Pr 20).

——S. 44 — Jamabandi entries — Presumption — Onus of proof.

Ghair-maorosi means tenant-at-will, and when a defendant is so recorded along with the original tenants-at-will the entry in his favour can only be interpreted as a sub-tenancy, and it is incorrect not to give the entries their natural meaning on the ground that it was never the plaintiff's case that the defendant held the land as his/her sub-tenant. The entries being presumed under section 44 to be true, it is for the defendant to prove that they were erroneous. AIR 1939 PC 114, Ref. AIR 1951 Him Pra 65 (66) (Pt A) (Prs 8, 9).

——Ss. 44 and 31 (2) (d) — Evidence Act (1872), Ss. 35, 90 and 114 — Settlement pedigree-tables — Presumption of truth of relationship — Burden to prove that entry in such tables is wrong — See Evidence Act (1872), S. 35. AIR 1961 Punj 251.

——S. 44 — Mutation — Effect of — Mutation does not create new title or determine existing title. AIR 1955 NUC (Punj) 5725 (DB).

——S. 44 — Jurisdiction of civil Courts — The correctness of record-of-rights can be challenged in Civil Courts. The jurisdiction of Civil Courts is not barred. See Tenancy Laws — East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act (50 of 1948), S. 22. AIR 1955 NUC (Punj) 3439.

——S. 44 — Presumption under—Rebuttal — Evidence Act (1872), Ss. 101 to 103.

Section 44 raises a rebuttable presumption of law. Where the Jamabandi shows that the plaintiffs entered on the land in suit as tenants-at-will on payment of the land revenue and cesses to the defendants-occupancy tenants and the proprietors the onus is on the plaintiff to show that they were not tenants-at-will under the defendants. That onus is not discharged by proof of the fact that the amount which the plaintiffs paid to the defendants did not exceed the amount of revenue and cesses. The fact that the plaintiffs have come to Court pleading that they are in adverse possession of the land in suit does not affect the initial presumption. L. P. A. No. 5 of 1949, Disting. AIR 1952 Punj 114 (115) (Prs 10, 12).

SECTION 45

——Ss. 45, 158 (2) (vi) — Suit not under S. 158 (2) (vi) but under S. 45 is cognizable by civil Court — (Civil P. C. (1908), S. 9). — See Punjab Land Revenue Act (1887), S. 158 (2) (vi). AIR 1952 Him Pra and Bilaspur 51 (52) (Pt A) (Pr 7).

——S. 45 — Jurisdiction of Civil Courts — The correctness of a record-of-rights can be challenged in a civil Court. The jurisdiction of civil Courts is not barred — See Tenancy Laws — East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act (50 of 1948), S. 22. AIR 1955 NUC (Punj) 3439.

SECTION 48

——Ss. 48, 158 (2), 3 (1), 4 and 141 — Jurisdiction of Civil Court—The Act does not exclude jurisdiction of Civil Courts in regard to lands on which Shops, houses and factories have been built — (Civil P. C. (1908), S. 9). 55 Pun LR 326: ILR (1954) Punj 372: AIR 1953 Punj 250 (251, 252) (Pt C) (Prs 10, 15).

SECTION 66

——Ss. 66, 67, 98 (e) — Loan advanced by State to principal debtor recoverable from him as arrears of land revenue — It can also be so recovered from surety. See Contract Act (1872), S. 128. (1962) 64 Punj LR 416.

SECTION 67

——Ss. 67, 70 and 158 (2) (14) and (15) — Collection of land revenue — Property ex facie belonging not to defaulter but to some body else — Bar of suit — (Civil P. C. (1908), S. 9).

There is no doubt that the Land Revenue Act would expressly and impliedly bar matters concerning the collection of land revenue where the property from which the land revenue is to be had ex facie belongs to the defaulter, but there is no express or implied bar of such a nature regarding property which ex facie belongs to some body else.

Where, therefore, in pursuance of a certificate under S. 46 (2), Income-tax Act, forwarded to him the Collector attached the properties of a firm which thereupon brought a suit contesting the liability of the properties for attachment and sale on the ground that the assessee in respect of whom the certificate was issued was not a partner of the firm.

Held that the civil court had jurisdiction to entertain the suit. 54 Pun LR 429: AIR 1952 Punj 340 (342, 343) (Pt B) (Prs 5, 7).

SECTION 69

——S. 69 — Default in payment of loan — Death of borrower — His son cannot be proceeded against personally — Such action not justified even under S. 69 of Punjab Land Revenue Act See Land Improvement Loans Act (19 of 1883), S. 7. 1964 (1) Cri LJ 71: AIR 1964 Punj 31.

●——S. 69 — Displaced Persons (Compensation and Rehabilitation) Act (1954), Ss. 30, 2 (d), 10, 21, 40 — Rules under S. 40, Rr. 72 and 73 — Land Improvement Loans Act (19 of 1883), S. 7 — Agriculturists' Loans Act (12 of 1884), S. 5 — Rural loans advanced to displaced persons who were granted agricultural lands out of compensation pool, under 1883 and 1884 Acts — Default in payment — Loans if can be recovered as arrears of land revenue by arrest of debtors — "Sums due under this act" in S. 30 (1) of 1954 Act — Interpretation — Loans, if "Sums due under this Act" within the meaning of S. 30 (1)

— C. W. 216/D of 1955 (Punj), Overruled — See Displaced Persons (Compensation and Rehabilitation) Act (1954), S. 30. AIR 1961 Punj 34 (FB).

——S. 69 — Applicability — Joint Hindu family — Arrest — (Income-tax Act (1922), Ss. 2 (9), 46 (2)).

The scheme of S. 69 shows that it is meant to apply only to natural persons and not to artificial persons. A Hindu undivided family cannot be arrested and brought before the Revenue Officer as laid down in S. 69 (1). Moreover under S. 69 (4) of the Punjab Act, a minor or a female, a lunatic or idiot, cannot be arrested and detained. If a Hindu undivided family consists of minors also, then the family as a whole cannot be arrested and detained, or confined in jail. Obviously some of the members of the Hindu undivided family cannot be picked out and chosen for arrest and detention as a defaulter under S. 69, as the entire family is one entity and cannot be split up for the purposes of arrest and detention. Under S. 2, sub-cl. (9) of the Income-tax Act, a person includes a Hindu undivided family. Accordingly a Hindu undivided family is an entity for assessment. The amount mentioned in a certificate sent under S. 46 (2) of the Indian Income-tax Act for recovery of the amount due from the joint Hindu family as arrears of land revenue cannot be recovered from the individual coparceners by arrest and detention. (1958) 34 ITR 164: ILR (1958) Punj 1540: AIR 1958 Punj 244 (245, 246) (Prs 2, 3, 6) (DB).

SECTION 70

——S. 70 — Constitution of India, Art. 226 — Mandamus — Writ of, against ministerial officers cannot be granted — Forest Act (1927), S. 82 — See Constitution of India, Art. 226. AIR 1952 Him Pra 16.

——Ss. 70, 67 and 158 (2) (xiv) and (xv) — Collection of land revenue — Property 'ex facie' belonging not to defaulter but to some body else —Bar of suit—Where in pursuance of a certificate under S. 46 (2), Income-tax Act, forwarded to him the collector attached the properties of a firm which thereupon brought a suit contesting the liability of the properties for attachment and sale on the ground that the assessee in respect of whom the certificate was issued was not a partner of the firm — Held that the Civil Court had jurisdiction to entertain the suit — (Civil P. C. (1908), S. 9) — See Punjab Land Revenue Act (1887), S. 67. AIR 1952 Punj 340 (Pt B).

SECTION 97

——Ss. 97, 98 and 70 — Constitution of India, Art. 226 — Mandamus — Writ of, against ministerial officers cannot be granted — Forest Act (1927), S. 82 — See Constitution of India, Art. 226. AIR 1952 Him Pra 16.

SECTION 98

——Ss. 98, 97 and 70 — Constitution of India, Art. 226 — Mandamus — Writ of, against ministerial officers cannot be granted — Forest Act (1927), S. 82 — See Constitution of India, Art. 226. AIR 1952 Him Pra 16.

SECTION 111

——Ss. 111 and 158 — Applicability — Jurisdiction of Civil Court.

The right to partition of lands is governed by S. 111 of the Act and the Civil Court's jurisdiction to entertain a partition suit in respect of lands is ousted by S. 158. 55 Punj LR 237: ILR (1953) Punj 659: AIR 1953 Punj 264 (265, 266) (Pt C) (Prs 11, 13) (DB).

SECTION 116

——S. 116 (b) — Qestion relating to mode of making partition — Jurisdiction of Civil Court — Ownership of land on which trees are planted.

When in the course of partition proceedings a question arises whether the land on which the trees are standing should be allotted to one co-sharer or another the question falls within the ambit of the expression 'the mode of making the partition' and must be decided by a revenue officer and not by a Civil Court. 57 Punj LR 6: AIR 1955 Punj 63 (64, 65) (Pt C) (Prs 14, 15) (DB).

SECTION 117

——S. 117 — Consolidation proceedings — Question of title, can be determined only by the civil Court as contemplated by S. 117. See Tenancy Laws — East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act (50 of 1948), S. 16-A. (1965) 67 Punj LR 1102: ILR (1966) 1 Punj 627.

——Ss. 117, 158 (2) — Partition Suit — Question of title — Direction by Revenue Officer to institute suit in his Court — Suit instituted in Civil Court — Civil Court has jurisdiction under S. 158 (2) — S. 10, C. P. Code not applicable — Civil P. C. (1908), Ss. 10, 9.

A suit for partition would lie in the Civil Court in spite of a direction by the revenue officer to file it in his Court to enable him to determine the question of title: AIR 1936 Lah 589, AIR 1931 Lah 664, Followed; 1902 PLR 633, Distinguished.

Sub-s. (2) of S. 158 was an independent sub-section and was in no way controlled by sub-s. (1). By virtue of the aforesaid clause the civil Courts would have jurisdiction to try the question of title to the property of which partition was sought in spite of a determination by a revenue officer to decide the question himself. AIR 1936 Lah 589, Followed.

Similarly S. 10, of the Civil P. C. would have no application where the proceedings relating to partition had been ordered to be consigned to the record-room and it could not be said that any suit or proceedings were pending before the revenue officer. 1902 PLR 633, Disting. 63 Punj LR 777: ILR (1962) 1 Punj 279.

SECTION 141

——Ss. 141, 158 (2), 3 (1), 4 and 48 — Jurisdiction of Civil Court — The Act does not exclude the jurisdiction of Civil Courts in regard to lands on which Shops, Houses and Factories have been built — (Civil P. C. (1908), S. 9). AIR 1953 Punj 250 (251, 252) (Pt C) (Prs 10, 15).

SECTION 155

——S. 155 — Presumption under S. 42 (2) when can be raised — Presumption can be raised when record-of-rights is produced in court — Document not produced — Presumption neither under S. 42 (1) nor under S. 42 (2) can be raised — Application for permit under Delhi Minor Mineral Rules (1938) would constitute admission that person applying is not owner of minerals. See Punjab Land Revenue Act (17 of 1887), S. 42 (1). 1962 (3) SCR 62: AIR 1967 SC 46.

——S. 155 (1) (c) and (g) — Rules under — Delhi Minor Minerals Rules (1938), Rr. 3, 7, 8, 9, 18 (iv) — Plaintiff carrying on quarrying operations under yearly permits issued to him from time to time — Refusal by Government to issue further permit — Suit for declaration and injunction — Ad interim injunction restraining Government from interfering with plaintiff's right to quarry — Suit dismissed — Effect of — Quarrying operations during interim period are unauthorised under Rules — Plaintiff held liable for penalty under R. 18 (iv).

Held, on facts (i) that as under the Rules a fresh permit had to be obtained in the prescribed form on every occasion and the permit was to be issued for a period not exceeding one year, the injunction order could not have the effect in law of fresh permits having been issued to the petitioner. Technically, therefore, the petitioner was quarrying stone without a permit which would render him liable to action under R 18 (iv); (ii) that though it was not open to the respondent Government to take any action under R. 18 (iv) so long as the interim injunction stood, once that hurdle was removed and the suit was dismissed, the plaintiff could not avoid the liability to pay five times the royalty by way of penalty; (iii) that though the previous order of the Chief Commissioner under S. 13, Punjab Land Revenue Act, holding that the quarry operation was not illegal during the existence of injunction, had finality and could not be now re-opened so far as the penalty which was sought to be levied at that stage was concerned, it could have no finality in respect of the penalty which is now sought to be levied by the impugned order and it was certainly open to the Chief Commissioner to decide afresh whether it should be imposed or not, particularly for the period which was not covered by the first order 65 Pun LR 33: AIR 1963 Punj 158 (161, 162) (Pt A) (Prs 8, 11, 12, 13).

SECTION 158

——Ss. 158 (2) (vi), 45 — Suit not under S. 158 (2) (vi) but under S. 45 is cognizable by civil Court — (Civil P. C. (1908), S. 9).

Where the suit was not a suit for mere correction of any entry in a record of rights annual record or register of mutations, as provided by Section 158 (2) (vi), but a suit under Section 45, by a person considering himself aggrieved as to a right, of which he professed to be in possession, by an entry in a record of rights, for a declaration of his right under Chapter VI of the Specific Relief Act, 1877, the suit was cognizable by a civil Court. AIR 1952 Him Pra and Bilaspur 51 (52) (Pt A) (Pr 7).

——Ss. 158 (2) and 117 — Partition suit — Question of title — Direction by Revenue Officer to institute suit in his Court — Suit instituted in Civil Court — Civil Court has jurisdiction under S. 158 (2) — S. 10 C. P. Code not applicable. 63 Punj LR 777: ILR (1962) 1 Punj 279.

——S. 158 (2) (xiv) — Recovery of income-tax — Attachment of property by Collector — Suit by owner for declaration that properties attached belonged to him and not to defendant and were not attachable is not barred — (Income-tax Act (1922), S. 46 (2)).

Section 158 (2) (xiv) was intended to oust the jurisdiction of Civil Courts with respect to matters dealt with in Chapters VI and VII of the Act dealing with 'collection' of land-revenue or the enforcement of any 'process' for the recovery of land-revenue.

The claims referred to in S. 158 (2) (xiv) of the Act are claims which are connected with or arise out of proceedings for the enforcement of any process for the recovery of land-revenue or any sum recoverable as an arrear of land-revenue.

It was not the intention of the Legislature that the prohibition contained in S. 158 (2) (xiv) of the Act should apply to the claims of persons other than the defaulter. In the Act there is no provision corresponding to Rr. 58, 89 and 81 of O. 21, C. P. Code. The Act does not give the person other than a defaulter 'a right' to object to the attachment and sale for the recovery of arrears of land revenue.

Powers conferred on the Collector by the proviso to S. 46 (2), Income-tax Act, are to be used by the Collector in proceedings which are permitted under Chapters VI and VII of the Land Revenue Act for the recovery of arrears of land revenue.

Ss. 78 and 158 (2) (xiv) of the Act apply to that person alone against whom the 'writs' of demand for the arrears of land revenue realizable as such are issued. S. 158 (2) (xiv) of the Act does not refer to claims which may have a connection with the collection of revenue but are made by persons other than the defaulter. S. 158 (2) (xiv) cannot be interpreted to bar a suit instituted by a person other than the defaulter to establish that the property proceeded against was not the property of the defaulter from whom land revenue was due.

Consequently a suit by the owner of the property attached by the Collector under S. 46 (2), Income-tax Act, for arrears of income-tax for a declaration that the property attached did not belong to the defaulter and was not attachable is not barred. (1954) 26 ITR 602: 56 Punj LR 488: ILR (1954) Punj 440: AIR 1954 Punj 271 (273, 274) (Pt A) (Prs 20, 23, 29 to 32, 34, 35) (DB).

——Ss. 158 and 111 — Scope — Partition suits in respect of land — The right to partition of the lands is governed by S. 111 of the Act and the Civil Court's jurisdiction to entertain a partition suit in respect of lands is ousted by S. 158. AIR 1953 Punj 264 (DB).

——Ss. 158 (2), 3 (1), 4, 48 and 141 — Jurisdiction of Civil Court.

The Punjab Land Revenue Act does not exclude the jurisdiction of Civil Courts in regard to lands on which houses, shops and factories have been built. 55 Punj LR 326: ILR (1954) Punj 372: AIR 1953 Punj 250 (251) (Pt C) (Prs 10, 15).

——Ss. 158 and 28 — Remuneration of Patwaris — Suit for recovery — No statutory rule gives to the Patwaris, who is a village Servant under S. 28, an exceptional right of recovering arrears of pay by bringing the suit—Para 14 of the Standing Orders makes no such provision. 54 Pun LR 472: AIR 1953 Punj 174 (174) (Pt A) (Pr 5) (DB).

——Ss. 158 (2) (xiv) and (xv), 67, 70 — Collection of land revenue — Property 'ex facie' belonging not to defaulter but to some body else — Bar of suit—Where, in pursuance of a certificate under S. 46 (2) Income-tax Act forwarded to him the Collector attached the properties of a firm which thereupon brought a suit contesting the liability of the properties for attachment and sale on ground that the assessee in respect of whom the certificate was issued was not a partner of the firm.

Held, that the Civil Court had jurisdiction to entertain the suit — (Civil P. C. (1908), S. 9). See Punjab Land Revenue Act (1887), S. 67. AIR 1952 Punj 340.

PUNJAB LAND REVENUE (SPECIAL ASSESSMENTS) ACT (6 of 1956)

SECTION 10

——S. 10 — Jurisdiction of civil Court — Question of title as to whether tenants are entitled to get possession of any area of land and if so how much — Civil Court alone has jurisdiction to decide. See Tenancy Laws — East Punjab Holdings (Consolidation and Prevention of Fragmentations) Act (50 of 1948), S. 44. **AIR 1965 Punj 372.**

PUNJAB LAND REVENUE (SPECIAL CHARGES) ACT (6 of 1958)

SECTION 3

——S. 3 — Validity of — Expression customary rent in S. 12 (1) of Punjab Security of Land Tenures Act — Meaning of — Rent fixed in 1908 could not become customary rent — Remedies for enhancement of rent and for recovery thereof available — Provisions held valid. See Tenancy Laws — Punjab Security of Land Tenures Act (10 of 1953), S. 12. **ILR (1962) 2 Punj 903.**

PUNJAB LAWS ACT (CENTRAL ACT 4 of 1872)

SECTION 2

——S. 2 — Adoption — Customary law of Punjab — Applicability to Himachal Pradesh — Effect of enforcement of the Act. The enforcement of the Punjab Laws Act has not the effect of introducing Punjab Customary laws into Himachal Pradesh. Hence adoption cannot be interpreted as a means of transferring property, according to customary law prevalent, amongst Punjab Agricultural tribes. And this principle is applicable to the areas comprised in the District of Mohasu in Himachal Pradesh. **AIR 1955 NUC (Him Pra) 4304.**

SECTION 5

●——S. 5 — Custom — Customary law at variance with Hindu law — Proof — When pleaded must be proved. See Hindu Law — Succession. **AIR 1961 SC 1374.**

●——S. 5 (b) — Applicability — Claim to property on basis of special custom — Failure to prove — Plaintiff can fall back on personal law — (Hindu Law). Ujagar Singh v. Mt. Jeo. **ILR (1959) Punj 1735: (1959) Supp (2) SCR 781: 1960 SCJ 16: AIR 1959 SC 1041 (1048) (Pt F) (Pr 38).**

——S. 5 — Applicability — Both parties must belong to Punjab.

In the Punjab, the basis of application of customary law is S. 5 of the Punjab Laws Act of 1872, under which in questions relating to succession, adoption or any religious usage, the rule of decision shall be the custom applicable to the parties concerned, and the Hindu Law in cases where the parties are Hindus. However, this Punjab Law can only be applied if both parties are men of the Punjab. In cases where the parties belong to two different States that law does not apply. **AIR 1960 Cal 597 (601, 602) (Pt C) (Prs 14, 16) (DB).**

●——S. 5 — Succession Act (1925), S. 29 (2) — 'Any other law for the time being in force' — Expression covers Punjab Laws Act — (Words and Phrases — "Any other law for the time being in force") — See Succession Act (1925), S. 29 (2). **AIR 1956 Him Pra 17 (FB).**

SECTION 6

——S. 6 — Transfer of Property Act (1882), Ss. 111 (g), 117 — Agricultural land — Tenant repudiating tenancy by claiming title in himself — Forfeiture of tenancy — Rule of equity — In the absence of any law, usage or custom to the contrary, the principles of chapter V of the Transfer of Property Act are applicable to leases for agricultural purposes as rule of justice, equity and good conscience. Therefore tenancy of agricultural land is forfeited by repudiation by the tenant the tenancy by claiming in himself the title to the land. See T. P. Act (1882), S. 111 (g). **AIR 1952 Punj 52.**

PUNJAB LAWS (EXTENSION NO. 2) ACT (7 of 1957)

SECTION 4

——S. 4 — Punjab Act 17 of 1940 — Extension of to former Pepsu areas by Section 4 of Punjab Act (VII of 1957), is according to law. See Punjab Urban Immovable Property Tax Act (17 of 1940), S. 1. **AIR 1963 Punj 354 (DB).**

PUNJAB LAWS (EXTENSION NO. 4) ACT (18 of 1958)

SECTION 6

——S. 6 — Res judicata — Principle of — Applicability to proceedings for fixation of fair rent under Rent Acts — Fixation of fair rent in transferred territories prior to merger — No change in circumstances of tenancy — Proceeding for refixation in merged State barred. See Civil P. C. (1908), S. 11. **AIR 1963 Punj 163.**

——S. 6 — Fair rent fixed under Pepsu Urban Rent Restriction Ordinance — Fresh application for fixation of fair rent after extension of East Punjab Rent Restriction Act to Pepsu territory — Not competent. See Houses and Rents — East Punjab Urban Rent Restriction Act (3 of 1949), S. 4. **(1962) 64 Punj LR 1034.**

PUNJAB LIMITATION (CUSTOM) ACT (1 of 1920)

PREAMBLE

——Pre. — Applicability of Act.

Act has no application to cases not governed by the customary law of the Punjab. **ILR (1953) Patiala 368: AIR 1954 Pepsu 62 (64) (Pt C) (Pr 3) (DB).**

——Pre. — Applicability of Act to Nabha State — Date of application—Notification of Nabha Government making Act applicable — Interpretation of.

As the notification of the Nabha Government making the Punjab Limitation (Custom) Act (No. 1 of 1920) applicable to the State and published in the Nabha Government Gazette of 27th March, 1946 recognises the fact that the Act in question as also the other Acts mentioned in the notification, had been followed in Nabha State even though they were not expressly made applicable and says that the Acts should be deemed to have been in force, then although it is not stated from when they should be deemed to have been in force, reading the entire notification it must be held that what was meant was that they should be deemed to have been in force from the respective dates on which they were first enacted by the Punjab

Government. ILR (1952) Patiala 142: AIR 1952 Pepsu 85 (86) (Pt A) (Pr 2) (DB).

——Pre. — Limitation Act (1908), Art. 141 — Gift by Hindu widow of non-ancestral land — Death of widow — Suit by reversioners for possession against donees — Art. 141 is applicable and not Punjab Limitation (Custom) Act. See Limitation Act (1908), Art. 141. AIR 1955 NUC (Punj) 5723.

SECTION 6

——S. 6 — Suit filed within one year of the date of Gazette enumerating enactments which were already in force — Fact that name of Punjab Limitation (Custom) Act also appears in such list does not mean that the Act came into force for the first time on the date of Gazette — Benefit of S. 6 cannot be claimed by plaintiff and as such suit cannot be deemed to be filed within prescribed period of limitation. AIR 1952 Bilaspur 12 (12, 13) (Pt D) (Prs 4, 6).

SECTION 7

——Ss. 7, 8 and Art. 2 of Schedule — Rules of customary law — Alienation of ancestral immovable property — Descendants and reversioners not consenting can impeach such alienation — Two brothers jointly selling ancestral property — Reversioners obtaining declaratory decree — Right to sue for possession — Accrues only after death of both brothers.

Ancestral immovable property is ordinarily inalienable except for necessity or with the consent of male descendants or, in the case of a sonless proprietor, with the consent of his male collaterals.

If, one or some only out of the descendants of the alienor have consented to the alienation, then it cannot have the effect of making the alienation indefeasible or absolutely unassailable; the other or remoter descendants being fully competent to sue to set it aside. Unless, the consent or concurrence of the descendants and reversioners, who have not sued, has the effect of validating the alienation or making it unassailable and completely immune from challenge, the right of the other descendants or remoter collaterals to attack the alienation cannot be defeated. It is not necessary that consent should be given before or at the time of the alienation. This rule provides the substantive provision of customary law as prevailing in the Punjab.

The proper person to object to an alienation is the next reversionary heir. The mere assent of the next reversioner or of one of several reversioners will not by itself debar other reversioners from suing to set aside the alienation.

Held, on facts that participation of one of the two brothers in the sale could not validate the transaction or make it indefeasible as against the reversioners who had successfully impugned the sale and obtained a declaratory decree. The declaratory decree gave the right of possession to the reversioners only after the death of both the brothers. Possession of the estate could only be claimed by those who happened to be the actual heirs, according to the law of succession governing them, on death of the brothers, the alienors. 63 Punj LR 308: ILR (1960) 2 Punj 468.

——S. 7 and Arts. 1 and 2 — Suit by after-born son for possession of property given in will — Limitation — (Limitation Act (1908), S. 6).

So far as the after-born reversioners are concerned, they are not altogether unfettered by the law of limitation, and cannot exercise their rights at any time they choose. In their case, limitation would be judged from the point of view of the rightful claimant, whose existence at the material time enables them to raise the suit. The existence of a reversioner with a subsisting right does therefore affect the question of limitation and the limitation for an after-born son suing under the Punjab Customary Law on his own account and not in conjunction with any existing reversioner, to challenge an alienation made by his father or a previous maleholder, is the same as laid down in Art. 1 or Art. 2, Punjab Limitation (Custom) Act, as the case may be, for the reversioner in existence at the time of the alienation. AIR 1943 Lah 281, Foll. (1958) 60 Punj LR 492.

——S. 7, First Sch., Arts. 3, 4 — Applicability.

Suit for possession of property alleged to be ancestral immovable property on the ground that defendant was never in fact appointed an heir when no declaratory decree of the nature referred to in Art. 3 had been obtained would obviously be governed by the six years' period of limitation and the terminus a quo for the said period will be the date on which the alleged appointment of defendant became known to the plaintiff. It is for the plaintiff to allege and prove as to when the appointment became known to him. (1958) 60 Punj LR 132.

SECTION 8

——S. 8 — Alienation by widow after commencement of Act — Gift by A of his property challenged by appellants, his collaterals — Property found to be ancestral, though not in hands of common ancestors of A and the appellants — Widow of A's brother claiming property on A's death as his natural heir — Unchallenged continued possession even after the Act — Widow becomes absolute owner — Alienation valid — Provisions of Punjab Acts I and II of 1920 not attracted. See Hindu Succession Act (1956), S. 14. AIR 1962 Punj 481.

——Ss. 8 and 7 — Rules of customary law — Alienation of ancestral immovable property — Descendants and reversioners not consenting can impeach such alienations — Two brothers jointly selling ancestral property — Reversioners obtaining declaratory decree — Right to sue for possession — Accrues only after death of both brothers. 63 Punj LR 308: ILR (1960) 2 Punj 468.

——S. 8 — 'Entitled to impeach the alienation' — Meaning of.

S. 8 cannot be held to take in its scope those persons who have their own conduct, e. g., by joining in the alienation itself or by expressly consenting to the alienation itself, precluded themselves from challenging the particular alienation. Those persons must be deemed to have lost all their rights, title and interest in the property and if they are the only persons in existence at the time of the alienor's death the alienation will become indefeasible. 'Entitled to impeach the alienation' in S. 8 was intended to include those persons only who possessed in presenti any right to challenge the alienation and to exclude those who either possessed no such title or having possessed it had lost it by their own act or by the operation of law before the passing of the declaratory decree. 60 Pun LR 605: ILR (1958) Punj 1688.

ARTICLE 1

——Art. 1 — Suit by after-born son for possession of property given in will — Limitation. The limitation would be judged from the point of view of the rightful claimant where existence of the material time enables them to raise the suit. The existence of reversioner with a subsisting right does therefore affect the question of limitation and the limitation for an after-born son suing under the Punjab Customary law on his own account and not in conjunction with any existing reversioner to challenge an alienation made by his father or a previous maleholder, is the same as laid down in Art. 1 or Art. 2 of the Act, as the case may be, for the reversioner in existence at the time of the alienation. **(1958) 60 Punj LR 492.**

——**Arts. 1 and 2** — Applicability — Articles apply to cases where reversioner seeks to avoid alienation binding on alienor — Plaintiff's case that last maleholder never executed will — Act does not apply. **AIR 1955 NUC (Punj) 4020.**

ARTICLE 2

——Art. 2 — Suit by reversioner challenging alienation of ancestral land by a female owner having limited interest on allegation that she was not entitled under law and custom to sell the property — Suit is governed by Art. 2, Punjab Limitation (Custom) Act — Mere fact that law was also alleged cannot take away from the fact that sale was challenged on ground of custom as well. 133 IC 880, Ref.; AIR 1933 Lah 369, Disting. **AIR 1952 Bilaspur 12 (13) (Pt C) (Prs 5, 7).**

——Art. 2 of Schedule and Ss. 7 and 8 — Rules of customary law — Alienation of ancestral immovable property — Descendants and reversioners not consenting can impeach such alienation — Two brothers jointly selling ancestral property — Reversioners obtaining declaratory decree — Right to sue for possession — Accures only after death of both brothers — See Punjab Limitation (Custom) Act (1920), S. 7. **63 Punj LR 308: ILR (1960) 2 Punj 468.**

——**Art. 2, Sch. — Ancestral property — Alienation by last male holder with consent of next presumptive reversioner — Decree for declaration — Consenting reversioner outliving donor assailing alienation obtained by remote reversioners — Suit for possession by remoter reversioners on death of consenting reversioner — Starting point of limitation.**

N, the last male holder of the suit land, made a gift of it in favour of his daughter on 25-10-29 D, the next nearest presumptive reversioner consented to the gift. The plaintiffs as remoter reversioners, thereupon instituted the usual declaratory suit impeaching the gift so far as their reversionray right was concerned. This suit was decreed on 3rd of April 1930, the declaration granted being that the alienation would not affect the plaintiffs' reversionary rights after the death of N. In 1941 N, the donor, died. The plaintiffs filed a suit for possession of the gifted land but the same was dismissed in default on 8-10-42 under Order IX, Rule 8, Code of Civil Procedure. On 8-2-50 D also died. Thereafter, the instant suit was instituted by the plaintiffs for possession of the suit land. **Held** that the suit was barred by time.

The right to sue accrued to the plaintiffs on the death of N. As D the next presumptive reversioner was not entitled to take advantage of the declaratory decree, having consented to the gift in question and thus disentitled himself from challenging the alienation, the plaintiff had a right to institute a suit for possession even during the life-time of D. AIR 1946 Lah 180 (FB); AIR 1938 Lah 571, Ref.

There was also another way of considering the matter. The declaratory decree passed would mean that as soon as N died the reversioners would be entitled to exercise their right as N's heirs as if no gift had been made to their detriment or prejudice. If D had, by giving his consent to the gift, waived, given up or signed away his rights in the gifted property by being disentitled to challenge the gift, then, obviously right to claim possession of this property would immediately accrue to the present plaintiffs. N having thus died in 1941 the present suit for possession would clearly be barred under article 2 (b) of schedule 1 of Punjab Act, I of 1920.

Even assuming, for the sake of argument, that D had a right to succeed to the property in question on N's death because of the declaratory decree secured by the other reversioners in 1930, then that decree would become wholly infructuous, inoperative and useless so far as the present plaintiffs were concerned, because immediately on N's death the property in suit would vest in D, who being in fact the next heir would be the male holder of the property in suit. This decree would thus have become wholly ineffective on the vesting of N's estate in D. On D's death the question would have to be determined as to who is his next heir, and succession to D's estate could not possibly be determined by a reference to the declaratory decree obtained by the other reversioners in 1930 with respect to the gift made by N as the last male holder in favour of his daughter, **ILR (1959) Punj 2242.**

——**Art. 2 — Suit by after-born son for possession of property given in will.**

The limitation would be judged from the point of view of the rightful claimant whose existence on the material time enables them to raise the suit. The existence of a reversioner with a subsisting right does therefore affect the question of limitation and the limitation for an after-born son suing under the Punjab Customary law on his own account and not in conjunction with any existing reversioner to challenge an alienation made by his father or a previous male holder is the same as laid down in Art. 1 or Art. 2 of the Act as the case may be, for the reversioner in existence at the time of alienation. **(1958) 60 Punj LR 492.**

——**Arts. 2 and 1** — Applicability — Articles apply to cases where reversioner seeks to avoid alienation binding on alienor — Plaintiff's case that last male holder never executed will — Act does not apply — See Punjab Limitation (Custom) Act (1 of 1920), Art. 1. **AIR 1955 NUC (Punj) 4020.**

ARTICLE 3

——Art. 3 and First Sch. — Suit for possession of property alleged to be ancestral on the ground that defendant was never in fact appointed an heir when the declaratory decree of the nature referred to in Art. 3 had been obtained would obviously be governed by the six years' period of limitation and the terminus a quo for the said period will be the date on which the alleged appointment of defendant became known to the plaintiff — See Punjab Limitation (Custom) Act (1920), S. 7. **(1958) 60 Punj LR 132.**

ARTICLE 4

——Art. 4, First Sch. — Suit for possession of property alleged to be ancestral on the ground that defendant was never in fact appointed an heir when no declaratory decree of the nature referred to in Art. 3 had been obtained would obviously be governed by six years' period of limitation and the terminus a quo for the said period will be the date on which the alleged appointment of defendant became known to the plaintiff. See Punjab Limitation (Custom) Act (1920), S. 7. (1958) 60 Punj LR 132.

PUNJAB LIQUOR LICENCE RULES (1956)

RULE 36

——R. 36 — Auction sale of excise licence — Highest bid accepted by Collector and approved by Excise and Taxation Commissioner — Deposit of one-sixth licence fee as required by rules — Highest bidder acquires legal status of licensee even though no formal licence is granted — Re-auction by Government without notice to such licensee and without giving any reasons — Legality — Action of State Government, if can be justified under Ss. 8, 36 or 41. See Punjab Excise Act (1 of 1914), S. 8. **AIR 1963 Punj 76 (DB).**

RULE 36-A

——R. 36-A and S. 35 — R. 36-B taking away in fact and in substance power of grant vested in Collector under S. 35 — Rr. 36-A and 36-B being integral both are ultra vires — See Punjab Excise Act (1 of 1914), S. 35. **AIR 1965 Punj 284 (DB).**

RULE 36-B

——R. 36-B and S. 35 — R. 36-B taking away in fact and in substance power of grant vested in Collector under S. 35 — Rr. 36-A and 36-B being integral both are ultra vires. See Punjab Excise Act (1 of 1914), S. 35. AIR 1965 Punj 284 (DB).

PUNJAB LOCAL BODIES (VALIDATION OF CONTRACTS) ORDINANCE (1 of 1951)
See under Municipalities.

PUNJAB MAIZE AND MAIZE PRODUCTS PRICE CONTROL ORDER (1948)

——Contravention of — Trial after order was cancelled — Court's right to punish. A court has power to punish an offence under the provisions of S. 7 of the Act as long as the offence was committed where the order was in force in spite of the fact that the order had been cancelled before the case was brought to trial. **55 Cr LJ 1836: AIR 1954 Punj 285 (DB).**

PUNJAB MANUFACTURED DRUGS RULES (1932)

RULE 27

——Rr. 27 and 30 — Scope — Validity — Renewal of licence — Discretion of authority — Authority not bound to state or give reasons for refusal — Power is arbitrary — Reasonableness — Rule violates fundamental right guaranteed by Art. 19 (1) (g) and Art. 19 (6). See Dangerous Drugs Act (1930), S. 8 (2). **AIR 1959 Punj 526.**

RULE 30

——Rr. 30 and 27 — Dangerous Drugs Act (2 of 1930), S. 8 (2) — Renewal of licence at discretion of authority — Authority not bound to state or give reasons for refusal — Power is arbitrary — Reasonableness — Rule violates fundamental right guaranteed by Art. 19 (1) (g) and Art. 19 (6) of Constitution — (Constitution of India, Arts. 19 (1) (g) and 19 (6)) — See Dangerous Drugs Act (2 of 1930), S. 8 (2). **AIR 1959 Punj 526.**

PUNJAB MINIMUM WAGES RULES (1950)

RULE 9

——R. 9 — Non-compliance — Effect.
Rules under S. 30 have been framed to regulate the meeting of the Committee. These rules provide for quorum and method of voting and enable decision to be taken by majority. It follows that the Committee may give its report even when all the members of the Committee have not attended all its meetings. It is also unnecessary that all the members of the Committee should sign the report. In any case these irregularities do not vitiate the fixation of minimum wages by the Government after taking into consideration the advice given by the Advisory Committee. AIR 1955 SC 25, Foll. **AIR 1958 Punj 425 (427) (Pt C) (Pr 9).**

RULE 24

——R. 24 (1) — Appointed authority allowing overtime charges to employees of Municipal Committee on basis of calculating normal working hours at 8 hours instead of 9 hours in a day — **Held** there is an error of law apparent on face of record and hence order must be set aside — Normal working day is of 9 hours under R. 24 (1) and not of 8 hours as the case is covered under R. 25 (2) — R. 25 (1) has no application as the Committee is not governed by provisions of Factories Act though its employees are in a scheduled employment. See Constitution of India, Art. 226. **(1965-66) 28 FJR 472: ILR (1965) 2 Punj 837 (DB).**

RULE 25

——R. 25 — Appointed authority allowing overtime charges to employees of Municipal Committee on basis of calculating normal working hours at 8 hours instead of 9 hours in a day — Held there is an error of law apparent on face of record and hence order must be set aside — Normal working day is of 9 hours under R. 24 (1) and not of 8 hours as the case is covered under R. 25 (2) — R. 25 (1) has no application as the Committee is not governed by provisions of Factories Act though its employees are in a scheduled employment. See Constitution of India, Art. 226. **(1965-66) 28 FJR 472: ILR (1965) 2 Punj 837 (DB).**

RULE 26-A

——R. 26-A — Not ultra vires of Sec. 30 of the Minimum Wages Act. **63 Punj LR 132: ILR (1961) 1 Punj 266: 1961 (2) Cr LJ 398 (Punj).**

PUNJAB MOTOR VEHICLES RULES (1940)
See under Motor Vehicles Rules (1940), (Punjab).

PUNJAB MOTOR VEHICLES TAXATION ACT (4 of 1924)

SECTION 3

——Ss. 3 and 8—A selling truck and giving permit to transferee but license remaining in his name —

Till transfer of licence in accordance with law, tax liability remains on A — Proper declaration and correct particulars submitted by transferor — No duty cast on transferor to notify transfer to registering authority — No penalty can be imposed under S. 8 — 1957 M. W N. 429, Disting. **1965 Cur LJ 117: ILR (1965) 1 Punj 584.**

SECTION 8

——Ss. 8 and 3 — A selling truck and giving permit to transferee but licence remaining in his name — Till the transfer of licence in accordance with law, tax liability remains on A—Proper declaration and correct particulars submitted by transferor — No duty cast on transferor to notify transfer to registering authority — No penalty can be impeached under S. 8. **1965 Cur LJ 117: ILR (1965) 1 Punj 584.**

PUNJAB MUNICIPAL ACCOUNT CODE

See under Municipalities.

PUNJAB MUNICIPAL ACT (3 of 1911).

See under Municipalities.

PUNJAB MUNICIPAL ELECTION RULES, (1952)

See under Municipalities.

PUNJAB MUNICIPAL (EXECUTIVE OFFICER) ACT (2 OF 1931)

See under Municipalities.

PUNJAB NEW CAPITAL (PERIPHERY) CONTROL ACT (1 OF 1953)

SECTION 12

——S. 12 (1) and (2) — Scope — Notice under sub-sec. (2) when could be served — Sub-sections (1) and (2) not independent of each other. AIR 1958 Andh Pra 371, Disting. **1963 Cur LJ 550: 65 Pun LR 1080: ILR (1964) 1 Punj 431.**

PUNJAB OCCUPANCY TENANTS (VESTING OF PROPRIETARY RIGHTS) ACT, 1952 (8 OF 1953)

See under Tenancy Laws.

PUNJAB OCCUPANCY TENANTS (VESTING OF PROPRIETARY RIGHTS) (AMENDMENT) ORDINANCE (4 OF 1958)

See under Tenancy Laws.

PUNJAB OFFICIAL LANGUAGES ACT (28 OF 1960)

SECTION 3

——Ss. 3, 4 — Punjab Gram Panchayat Act (4 of 1953) as amended in 1962, Sec. 8 — Election Petition — Prescribed Authority under, is a Court within Sec. 4 of Act 28 of 1960 — Illaqa Magistrate entertaining petition in English language does not act in excess of jurisdiction. **67 Punj LR 387: ILR(1965) 1 Punj 452.**

SECTION 4

——S. 4 — Punjab Gram Panchayat Act 1953 (as amended in 1962) Sec. 8 — Election petition — Prescribed authority under, is a Court within S. 4 of Act 28 of 1960 — Illaqa Magistrate entertaining petition in English language does not act in excess of jurisdiction. See Punjab Official Languages Act (1960), S. 3. **(1965) 67 Pun LR 378: ILR (1965) 1 Punj 452.**

PUNJAB OPIUM ORDERS (1956)

ORDER 1

——O. 1 (d) and O. 5 — Possession of opium — Prohibition as to — Applies to possession of crushed poppy seeds. See Opium Act (1878), S. 9 (a). **1962 (1) Cr LJ 840 (Punj).**

ORDER 59

——O. 59 (1) (a) — Contract Act, S. 23 — Excise contracts — Partnership agreement by licensee under Opium Act with third person in consideration of money contributed by latter, to share profits and losses of his business — Agreement does not contravene O. 59, Punjab Opium Orders or S. 23, Contract Act — Partnership is valid under Partnership Act — Opium Act (1878), S. 5 — Punjab Opium Orders (1956), O. 59 (1) (a), Rules under — Partnership Act (1932), S. 4. See Contract Act (1872), S. 23. **AIR 1961 Punj 405 (DB).**

PUNJAB OPIUM ORDERS (1957)

ORDER 21

——O. 21.5 — Opium extracted poppy-heads can be possessed in any quantity. **ILR (1959) 1870: 1959 Cr LJ 1207: AIR 1959 Punj 497 (498) (Pt A) (Pr 4) (DB).**

——O. 21.5 — Order capable of two constructions — Court will adopt construction which is in favour of accused. **ILR (1959) Punj 1870: 1959 Cr LJ 1207: AIR 1959 Punj 497 (498) (Pt D) (Pr 4) (DB).**

PUNJAB OPIUM (RESTRICTION ON ORAL CONSUMPTION) RULES (1957)

——Validity — **If inconsistent with S. 5, Opium Act, 1878 — Regulation — Meaning — Total prohibition.**

The Rules, which in effect introduced rationing leading to complete prohibition of opium, are not inconsistent, with the provisions of the Opium Act, 1878, under which they were promulgated, nor are their provisions beyond the scope of the Act. Whether or not "Regulation" of an activity includes its total prohibition, depends upon the nature of activity sought to be regulated and also on the facts and circumstances of each case. 1950 AC 235 and (1888) 13 AC 446, Ref.

In the context the term 'regulation' in S. 5 includes restriction and also prohibition, of the opium trade. The Legislature in Sec. 4 of the Act has declared its decision of prohibiting sale and possession of opium. Art. 47 of the Constitution also lays down that the Government shall endeavour to bring about prohibition of consumption of intoxicating things and drugs which are injurious to health. Obviously opium is a drug which is injurious to health. It must, therefore, be held that in the context of the present case "regulations" and "conditions" include prohibition of the opium trade. **ILR (1958) Punj 1332: AIR 1958 Punj 400 (401) (Pt A) (Pr 6).**

——Constitutional validity — Unreasonable restrictions on trade — (Constitution of India, Art. 19 (1) (g) — Opium trade — Restrictions on) — (Opium Act (1878), S. 5).

The regulations and restrictions on the noxious trade of opium imposed by the Rules cannot be considered to be unreasonable. There is nothing improper or illegal in these rules, once it is held that the limitation of supply to addicits is legal. It is true arbitrary discretion has been given to the Excise and Taxation Officer to decide whether a particular person should be allowed to consume opium or not. But such a provision does not contravene Art. 19 of the Constitution, howsoever the trader may be affected by the decision of the officer. AIR 1957 Punj 20 and AIR 1956 Punj 97, Ref. ILR (1958) Punj 1332: AIR 1958 Punj 400 (402) (Pt B) (Prs 7, 8).

PUNJAB PANCHAYAT SAMITIS AND ZILLA PARISHADS ACT (3 OF 1961)

See under Panchayats.

PUNJAB PANCHAYAT SAMITIS AND ZILLA PARISHADS CHAIRMAN AND VICE-CHAIRMAN (ELECTIONS) RULES (1961)

See under Panchayats.

PUNJAB PANCHAYAT SAMITIS AND ZILLA PARISHADS (ELECTION) RULES (1961)

See under Panchayats.

PUNJAB PANCHAYAT SAMITIS (PRIMARY MEMBERS) ELECTION RULES (1961)

See under Panchayats.

PUNJAB PARTITION (CONTRACTS) ORDER (1947)

ARTICLE 6

——Art. 6 — Land acquired before partition of Punjab — Costs awarded — Liability to pay costs is determined not by Art. 9, Indian Independence (Rights, Property and Liabilities) Order (1947) but by Punjab Partition (Contracts) Order (1947). See Indian Independence (Rights, Property and Liabilities) Order (1947), Art. 9. AIR 1955 NUC (Punj) 4978 (DB).

PUNJAB PASSENGERS AND GOODS TAXATION ACT (16 OF 1952)

PREAMBLE

——Pre. — Validity — Act does not contravene Art. 19 (1) (g) of Constitution of India. See Constitution of India, Art. 19 (1) (g). AIR 1955 NUC (Punj) 1887 (DB).

——Pre. — Validity — Act does not place restriction on inter-State trade. See Constitution of India, Art. 301. AIR 1955 NUC (Punj) 1887 (DB).

——Pre. — Validity — Delegation of authority. There is no delegation of legislative powers — It is really no delegation if the choice of the prescribed authority is left entirely to the State Government. See Constitution of India, Art. 245. AIR 1955 NUC (Punj) 1887 (DB).

SECTION 3

——S. 3 — Purchase of taxation stamps by company — Deduction in.

It was contended on behalf of the assessee that once it had been proved that the stamps worth Rs. 27,393 had been purchased during the relevant period, it should have been presumed that they had been utilised by affixation on the tickets. The assessee company, however, failed to produce the necessary evidence in this behalf.

Held, that in the circumstances of the case, the Assessing Authority had justification to find that deduction of only Rs. 10,000 should be allowed with regard to these stamps. (1965) 67 Pun LR 651.

——S. 3 (3) — Start of journey, for carrying goods in one State, termination in another and part of journey lying over road in Punjab State — Case is not covered by sub-section (3).

Where the trucks are used for the carriage of goods from places in the State of Rajasthan to Delhi, and for the purpose of travelling between Rajasthan and Delhi it is necessary to pass for some distance through the territory of the State of Punjab, such cases are not covered by sub-section (3) of Section 3. (1965) 67 Pun LR 208: ILR (1965) 1 Punj 540.

——S. 3 (3), Proviso — Person transporting goods from place outside Punjab to place also outside Punjab — Such person passing through Punjab is liable to tax under S. 3 (3).

A person who carries on goods from a place outside the territory of Punjab State to a place again outside the territory of Punjab State, but passes through the territory of the State of Punjab incurs the liability to tax under the provisions of Sec. 3 (3). He is liable to tax because in the very nature of things he first transports the goods from a place outside the Punjab to a place inside the Punjab and then transports them from a place inside the Punjab to a place outside the Punjab. There is no escape from this conclusion. Both ends are covered by the provisions of sub-sec. (3) of Sec. 3 of the Act. Further, the Proviso to Sec. 3 (3) is meant to cover a different contingency and does not in any manner restrict the provisions of Sec. 3 (3) which fastens the liability on the person the moment he enters the territory of the State of Punjab and transports the goods within that territory. (1964) 66 Pun LR 477.

——Ss. 3, 4, 8, 9 and 10 (as amended by Punjab Act II of 1952) — Act is not 'ultra vires' — Ss. 3, 4, 8 and 9 are valid — S. 10 is invalid. See Constitution of India, Art. 19 (1) (g). AIR 1955 NUC (Punj) 1887 (DB).

——S. 3 (3) — Locus standi to challenge validity of the Act. The persons plying their vehicles cannot challenge the validity of the Act because they are not the persons who pay the tax. The tax is paid by the passengers who are carried or the owners of goods which are transported. See Constitution of India, Art. 226. AIR 1954 Punj 264 (DB).

——S. 3 (3), Proviso — Validity — (Constitution of India, Arts. 245, 246 (3), Sch. VII, Entry 56).

Prima facie the jurisdiction of a State is territorial for States can legislate effectively only for their own territories. AIR 1933 PC 16, Relied on

But a tax can also be levied by a State if the real object intended to be taxed (whether the

object is a person, some species of property or some business) is within or associated with the State. The relation may consist in presence within the territory, residence, domicil, carrying on business there, or even remoter connection. If a connection exists, it is for the Legislature to decide how far it should go in the exercise of its powers. 56 CLR 337; AIR 1953 SC 252; 1953-1 MLJ 743; 1953 SCJ 373; AIR 1953 SC 274; 1953 SCJ 369; (1953) 1 MLJ 739, Relied on.

If the tax is otherwise valid, the mere fact that the State has decided to charge a heavy tax when it could as easily have charged a lighter one would not detract from the validity of the tax. A Court should endeavour to uphold the validity of a measure unless it finds clearly that the Legislature has exceeded the authority conferred upon it by the Constitution.

Held, that it was within the legislative and territorial competence of the State to enact the Punjab Act 16 of 1952. The mere fact that the Act has imposed a tax on the full amount of the fare or freight payable in respect of the entire journey of 56 miles, only five miles of which passed through the State of Punjab and the remaining 51 miles through the territories of other States shows only that the State Legislature has adopted a particular method for the assessment of the tax **(1955) 6 STC (Supp) 1: ILR (1955) Punj 58: AIR 1954 Punj 264 (266) (Pt B) (Pr 7) (DB).**

SECTION 4

——S. 4 (as amended by Punjab 21 of 1952) — S. 4 is neither illegal nor 'ultra vires'. **AIR 1955 NUC (Punj) 1887 (DB).**

——Ss. 4, 3, 8, 9 and 10 (as amended by Punjab Act 21 of 1952) — Act is not 'ultra vires' — Sections 3, 4, 8 and 9 are valid — S. 10 is invalid. See Constitution of India, Art. 19 (1) (g). **AIR 1955 NUC (Punj) 1887 (DB).**

——S. 4 — Locus standi to challenge validity of the Act. The persons plying their vehicles cannot challenge the validity of the Act because they are not the persons who pay the tax. The tax is paid by the passengers who are carried or the owners of goods transported. They can challenge the validity of the Act. See Constitution of India, Art. 226. **AIR 1954 Punj 264 (DB).**

SECTION 6

——S. 6 — Evasion by assessee of payment of tax —Power of Assessing Authority to add amount in estimated income of company.

Where the Assessing Authority thinks that a transport company must have evaded payment of tax due to the Government or that tickets have been issued without affixation of Transport Tax Stamps in large numbers, assessing authority has no power under the Act to include, for these reasons, any additional amounts in the estimate of income of the company once he has determined the highest possible income which could have accrued. The only course open to the Assessing Authority is to start criminal prosecution against the transport company as provided in Sec. 17. **(1965) 67 Pun LR 651.**

——S. 6 (4) — Constitutionality — Section not ultra vires on ground that it confers uncontrolled or unregulated power to reopen past assessment. **66 Pun LR 683: ILR (1964) 2 Punj 181: AIR 1964 Punj 438 (441, 442) (Pt B) (Prs 11, 12) (DB).**

SECTION 8

——Ss. 8 and 17 (1) (e) — Word 'ply' in S. 8 in regard to transport vehicle — It means to load and unload goods for carriage for reward — Decision in Civil Writ No. 22 of 1964, D/-27-7-1964 (Punj), **Reversed.** See Punjab Passengers and Goods Taxation Act (16 of 1952), S. 17 (1) (e). **AIR 1966 Punj 261 (DB).**

——Ss. 8 and 9 (as amended by Punjab Act 21 of 1952) — Ss. 8 and 9 are valid — S. 10 is invalid. See Constitution of India, Art. 19 (1) (g). **AIR 1955 NUC (Punj) 1887 (DB).**

SECTION 10

——S. 10 (as amended by Punjab Act 21 of 1952) — S. 10 is invalid. See Constitution of India, Art. 19 (1) (g). **AIR 1955 NUC (Punj) 1887 (DB).**

SECTION 15

——S. 15 — Revision under S. 16 — Cannot be dismissed on ground that petitioner has not paid assessed tax. See Punjab Passengers and Goods Taxation Act (1952), S. 16. **(1964) 66 Pun LR 1177.**

SECTION 16

——Ss. 16, 15 and 22 (2) (g) — Revision under S. 16 — Cannot be dismissed on ground that petitioner has not paid assessed tax. **(1964) 66 Punj LR 1177: 1964 Cur LJ 526: ILR (1965) 1 Punj 44.**

SECTION 17

——Ss. 17 (1) (e) and 8 — Word 'ply' in S. 8 in regard to transport vehicle — It means to load and unload goods for carriage for reward—Decision in Civil Writ No. 22 of 1964, dated 27-7-1964 (Punj), Reversed.

The appellant was a truck owner firm in Rajasthan State. It had a permit for its vehicle in Rajasthan State and was countersigned by the R. T., as of Delhi and Punjab States. The appellant was passing through the areas of Punjab State while transporting goods without loading and unloading in areas of Punjab State.

Held, that the appellant firm could not be prosecuted for the offence under Sec. 17 (1) (e). Decision in Civil Writ No. 22 of 1964, dated 27-7-1964 (Punjab), **Reversed.** (1965) 67 Punj LR 208, Foll. **1965 Cur LJ 831: 68 Pun LR 100: ILR (1966) 1 Punj 757: AIR 1966 Punj 261 (262) (Prs 3, 4) (DB).**

SECTION 22

——S. 22 (2) (g) — Revision under S. 16 — Cannot be dismissed on ground that petitioner has not paid assessed tax. See Punjab Passengers and Goods Taxation Act (1952), S. 16. **(1964) 66 Pun LR 1177.**

PUNJAB PASSENGERS AND GOODS TAXATION RULES (1952)

RULE 21

——Rr. 21 and 29 — Applicability and Scope— Rule 29 covers all cases of under-assessment or escaped assessment while R. 21 deals with assessment and is meant for a purpose entirely different from the one for which R. 29 has been framed — Rule 29 would apply to a case where passenger tax has been paid in advance by way of adhesive stamps and there is an order imposing additional tax. 66 Pun LR 683: ILR (1964) 2 Punj 181: AIR 1964 Punj 438 (442) (Pt C) (Pr 13) (DB).

RULE 29

——R. 29 — Validity — Best judgment assessment provided under Rule — Provision is not unconstitutional.

Without assessment of tax the prescribed authority cannot carry out the duty with which it is charged under Sec. 6 (4) and, therefore, not only that Rule 29 would be directly connected with the aforesaid provision but it could also validly be promulgated under the general and wide powers conferred by Sec. 22 (1) and it is not possible to understand how any omission in sub-sec. (2) of Sec. 22 of a particular head under which R. 29 could be brought would render that rule void. Rule 29 is essentially meant for securing the payment of tax and for carrying into effect the provisions of the Act.

Per Dua, J. :— A statutory provision conferring, in general terms, power and imposing duty to make assessment includes by implication, in the absence of limitation, the incidental and necessary power and duty of making an assessment on best judgment basis, if circumstances so warrant, for, it means no more than power to construct procedural machinery to make assessment; of course it must not violate rules of natural justice. When a valid statute, otherwise complete in itself, enacts the general outline of a legislative scheme, policy or purpose, and confers upon the executive wing, charged with the duty of assisting in administering the law, authority within defined intelligible limits to make rules, such conferment of authority may not be unconstitutional delegation or abdication of legislative power.

Rule 29 is intended to include within its purview making an assessment to the best of the assessing Authority judgment when the owner declines assistance by producing all the relevant material with him; in other words, when he obstructs the assessment by, what may be described as, non-co-operation. AIR 1964 Punj 438, Distinguished. ILR (1965) 1 Punj 487.

——Rr. 29 and 21 — Rule 29 covers all cases of under-assessment or escaped assessment while R. 21 deals with assessment and is meant for a purpose entirely different from the one for which R. 29 has been framed — Rule 29 would apply to a case where passenger tax has been paid in advance by way of adhesive stamps and there is an order imposing additional tax. See Punjab Passengers and Goods Taxation Rules (1952), R. 21. AIR 1964 Punj 438 (DB).

PUNJAB POLICE RULES (1934)

RULE 10.70 (2)

——Vol. I, R. 10.70 (2) and Vol. II, Rr. 16.17 and 16.19 — Suspension of Police Officer — Honourable acquittal by Court — Reinstatement — Rule 10.70 (2) applies — Period of suspension to be treated as duty — Full salary during such period payable. AIR 1959 SC 1342, Discussed and Rel. on; AIR 1938 Cal 759 and AIR 1954 Punj 298, Dist. ILR (1962) 1 Punj 171: AIR 1961 Punj 558 (559) (Pr 5) (DB).

RULE 13.18

——Rr. 13.18, 16.4 (as applied to Himachal Pradesh) — Reduction in rank — When amounts to punishment — Police Sub-Inspector promoted to selection grade — Misconduct in investigation — Reversion with retrospective effect, during period of probation — Order amounts to punishment only so far as it was retrospective — Order quashed only to that extent. See Constitution of India, Art. 311 (2). 1962 (1) Cri LJ 721: AIR 1962 Him Pra 35.

——R. 13.18 — Constitution of India, Art. 311— — Respondent's name placed on List E under polic Rules — Promotion to officiate on higher post — Reversion and name removed from list — Held, in the cricumstances, it was by way of punishment and it was in contravention of Art. 311. See Constitution of India, Art. 311. ILR (1964) 1 Punj 84.

RULE 16.3

——Vol. II, R. 16.3 (1) (c) — Departmental inquiry upon evidence cited in criminal case — Suspicion of guilt — Judgment of criminal Court held, did not suggest acquittal on technical ground or suspicion resting upon Police Officer — Departmental proceedings, held not sustainable under Cl. 1 (c). 1965 Cur LJ 509 (Punj).

——R. 16.3 (1) (d) — Departmental inquiry upon evidence cited in criminal case — Charge different from one in criminal case — Facts forming basis of departmental inquiry found not unconnected with charge in criminal case — Same facts held, could not be subject-matter of departmental inquiry — Provisions of sub-cl. (d) held, negative effect of Cl. (1). 1965 Cur LJ 509 (Punj).

RULE 16.4

——Rr. 16.4, 13.18 (as applied to Himachal Pradesh) — Reduction in rank — When amounts to punishment — Police Sub-Inspector promoted to selection grade — Misconduct in investigation — Reversion with retrospective effect, during period of probation — Order amounts to punishment only so far as it was retrospective — Order quashed only to that extent. See Constitution of India,

Art. 311 (2). 1962 (1) Cri LJ 721: AIR 1962 Him Pra 35.

RULE 16.17

——Vol. 2, Rr. 16.17 and 16.19 and Vol. 1, R. 10.70 (2) — Suspension of Police Officer — Honourable acquittal by Court — Reinstatement — Rule 10.70 (2) applies — Period of suspension to be treated as duty — Full salary during such period payable. See Punjab Police Rules (1934), Vol. 1, R. 10.70 (2). AIR 1961 Punj 558 (DB).

RULE 16.19

——Vol. 2, Rr. 16.19 and 16.17 and Vol. 1, Rule 10.70 (2) — Suspension of Police Officer — Honourable acquittal by Court — Reinstatement — R. 10.70 (2) applies — Period of suspension to be treated as duty — Full salary during such period payable. See Punjab Police Rules (1934), Vol. 1, R. 10.70 (2). AIR 1961 Punj 558 (DB).

RULE 16.23

——R. 16.23 — Vigilance Department conducting investigation of complaint against Police Officer —District Magistrate according necessary permission as recommended by Superintendent of Police — No reasons recorded for same — Rule 16.38 held contravened — Case held not covered by R. 16.23. See Punjab Police Rules (1934), R. 16.38. 1964 Cur LJ 150 (Punj).

RULE 16.24

——R. 16.24, Ch. 16 — Contravention — No right of action. See Police Act (1861), S. 7. AIR 1955 Punj 118.

RULE 16.38

——R. 16.38 (1) and (2) — Provisions are mandatory — Non-compliance — Departmental enquiry is illegal.

Sub-rules (1) and (2) of Rule 16.38 must be held to be mandatory in so far as whenever any complaint is made against a police officer of a criminal offence in connection with his official relations with the public they enjoin that the Superintendent of Police must forward the complaint to the District Magistrate who will decide whether the investigation should be conducted by a police officer or made over to a Magistrate and then after examining the result of such investigation the District Magistrate has to decide and has to give reasons in his decision for proceeding against the police officer departmentally and not prosecuting him judicially if the investigation establishes a prima facie case.

Held, on facts that as the mandatory provisions of the police R. 16.38 were not followed, it must be held that the departmental enquiry which was being conducted against the petitioner was altogether illegal and invalid. AIR 1961 SC 751, Rel. on. 63 Pun LR 860: AIR 1962 Punj 38 (39, 40) (Prs 4, 5).

——Rr. 16.38 (1) and (2) and 16.23 — Vigilance Department conducting investigation of complaint against Police Officer — District Magistrate according necessary permission as recommended by Superintendent of Police — No reasons recorded for same — Rule 16.38 held contravened — Case held not covered by R. 16.23 — Criminal P. C. (1898), S. 4 (1) (h) and (1). AIR 1962 SC 195 and 65 Punj LR 802, Disting. 1964 Cur LJ 150 (Punj).

——R. 16.38 — Submission of complaint papers to District Magistrate — Superintendent of Police is required to submit papers only when complaint is received directly by him.

The Superintendent of Police is enjoined under Cl. (1) of Rule 16.38 of the Police Rules to submit the papers to the District Magistrate only when the complaint is received directly by him. This is obviously because the head of the police force in a district is subordinate to the District Magistrate who has to give directions on such matters. (1965) 67 Punj LR 763.

——Vol. II, Rr. 16.38 and 16.23 — Police Act (1861), S. 7 — Constitution of India, Arts. 310, 311 and 226 — Held, on facts that there had been full and substantial compliance with the statutory rules and the constitutional requirements — There had been no denial of the principles of natural justice in the enquiry which had been conducted by the appropriate authority. (1963) 65 Pun LR 802: 1963 Cur LJ 473.

RULE 17.1

——Chap. 17, R. 17.1 — Foot-constable performing duties of drill instructor in accordance with R. 17 (1) — Disobedience to lawful order of superior authority to perform guard duty—Offence under S. 29, Police Act, is committed. See Police Act (1861), S. 29. 1955 Cri LJ 944: AIR 1955 Him Pra 29.

RULE 26.2

——Vol. 3, Chap. 26, R. 26.2 — Punjab Police Act, S. 4 — Scope — The rules made under the Police Act do not override the Criminal Procedure Code. See Police Act (1861), S. 4. AIR 1953 Punj 149.

PUNJAB POLICE RULES (1959)

RULE 16.25

——R. 16.25 (2) — Charge of failing to reach and maintain reasonable standard of efficiency — Held, not vague — Efficiency includes honesty so far as Police officer is concerned. AIR 1960 All 543 and AIR 1953 Nag 138, Dist. 64 Pun LR 1157: 1962 Cur LJ 577: AIR 1963 Punj 503 (505) (Pt A) (Pr 6) (DB).

RULE 16.38

——Vol. II, R. 16.38 — District Magistrate sanctioning initiation of departmental enquiry into conduct of Police officer, at suggestion of Superintendent of Police—No reasons given for sanction —

Rule 16.38 is contravened — Dismissal of Police officer as result of inquiry set aside — 1964 Cur LJ 146 (Punj) and 1964 Cur LJ 150 (Punj), Foll. Government servant — Dismissal, discharge and suspension — Departmental inquiry in contravention of Rules. 1965 Cur LJ 1: 67 Pun LR 523.

——R. 16.38 — Scope and interpretation — Rule is confined only to departmental inquiries and Court cannot interpret it so as to apply it to trials in Courts — Prior sanction of District Magistrate for trials in Court not required — Interpretation of Statutes — Interpretation of rules under Act— Court cannot interpret rules so as to make, modify or amend them — Civil P. C. (1908), Preamble— Interpretation of Statutes.

The court cannot make law, it can merely interpret or construe it, and not modify or amend it under the cloak or guise of interpretation, though in this process of construction it may give the law shape, but this is permissible only within the strict limits of discernible legislative scheme or intent.

The Police Act enacted for the regulation of police is designed to reorganise the police and to make it a more efficient instrument for the prevention and detection of crime. There is no provision in the Act which deals with the subject of trial of the Police officers in the ordinary Criminal Courts for the offences of corruption alleged to have been committed by them.

After considering the purpose and object of rules in the opening part of Chapter 16 headed 'Punishments' as also of parent Act (Act No. 5 of 1861) empowering the framing of these rules, it is somewhat difficult to construe them in a manner which would add to the provisions of the Code of Criminal Procedure or the Prevention of Corruption Act or any other statute dealing with or regulating the prosecution of offences in the ordinary Courts of law so as to make the sanction or order by the District Magistrate under Rule 16.38, Punjab Police Rules (1959) to be a mandatory condition precedent for such a prosecution.

Therefore, the language of R. 16.38 of the rules has to be confined only to departmental enquiries. The investigation for establishing a prima facie case is merely meant to guide the District Magistrate, uncontrolled by the opinion of the Superintendent of Police, whether or not a departmental proceeding should be initiated against the guilty party, and it is the procedure and the punishment controlling the departmental proceedings alone, which have been prescribed by this rule. (1965) 67 Pun LR 438: ILR (1964) 2 Punj 605.

——R. 16.38 — Scope.

Rule 16.38 relates to a criminal offence committed by a Police officer in connection with the official business of the public. An enquiry against Police officer involving a charge of misconduct, impertinence and refusal to answer questions of the superior officer is not covered by the rule. ILR (1956) Punj 361: AIR 1956 Punj 102 (104) (Pt C) (Pr 9).

RULE 23.4

——R. 23.4 — Surveillance Register No. 10 — Keeping of — If unconstitutional — (Police Act (1861), Ss. 12 and 23) — (Constitution of India, Arts. 14 and 19 (1) (d)).

Surveillance Register kept under Police Rules is no more than a confidential Police record which enables the Police to perform its duties more efficiently. Maintaining such register is not unconstitutional. There is no doubt that to apprehend a person who is not alleged to have committed a crime or to restrict his liberty in any way would be illegal but to keep watch over a bad character cannot be said to infringe any right given to him under the Constitution or by any law. The rules quite clearly lay down that the Surveillance Register is a confidential document and an entry made in it does not affect the personal liberty of the individual in any way. Therefore, it is not necessary that any notice should be given to the person concerned before his name is entered in this register. If his personal liberty is at any time interfered with, then the aggrieved person has a clear remedy under law. ILR (1959) Punj 1369: 61 Pun LR 441: 1959 Cri LJ 900: AIR 1959 Punj 323 (323) (Pr 3) (DB).

RULE 24.4

——R. 24.4 — Surveillance Register No. 10 — Maintenance of, is not unconstitutional — The register, however, cannot be publicly displayed. AIR 1959 Punj 323, Foll. 67 Pun LR 528: AIR 1966 Punj 268 (269) (Pr 1).

RULE 24.5

——Vol. 3, R. 24.5 — Object — Should be complied with promptly — Offence of murder — Rule cannot be circumvented by registering it under S. 304, Penal Code.

In murder cases, because of the enormity of the stakes involved, certain additional safeguards are provided to ensure that the version of the occurrence is disclosed as soon as possible thereafter. One of those safeguards is the provision in R. 24.5 which requires a copy of the first information report to be sent to the Illaqa Magistrate immediately after the report is made. If the facts given in the first information report disclose the commission of an offence of murder, it is not open to the officer recording the first information report to circumvent the requirements of the R. 24.5 by registering a case under S. 304, I. P. Code, instead of S. 302, I. P. Code. (1963) 65 Punj LR 409.

PUNJAB PRE-EMPTION ACT (1 OF 1913)

PREAMBLE

——Pre. — Act is intra vires the Constitution — (Constitution of India, Arts. 19 (1) (f) and 19 (5)). AIR 1955 NUC (Him Pra) 3680.

——Pre. — Constitutional validity — If offends Art. 31 of the Constitution — (Constitution of India, Art. 31 (2) (5) and (6)).

Clause (5) of Art. 31 is very wide in its scope and nothing in Cl. (2) provided expressly or impliedly can affect the provisions of any existing law. The Punjab Pre-emption Act does not fall under Cl. (6) and as such is an existing law within the meaning of Cl. (5) and therefore, does not offend the provisions of Cl. (2). AIR 1952 SC 252; 1952 SCJ 354, 427, 446, Distinguished. ILR 1954 Pepsu 545: AIR 1954 Pepsu 180 (184) (Pt D) (Pr 10) (DB).

——Pre. — Constitutionality of Act — (Constitution of India, Art. 14).

Article 14 forbids class legislation; but it does not shut out classification for the purpose of legislation.

From the provisions of the Punjab Pre-emption Act it is obvious that the statute operates equally on all persons including the group of pre-emptors and the classification is not arbitrary, but it bears a reasonable relation to the objective which the Legislature had in view. The tests laid down in AIR 1953 SC 404 are, therefore, complied with and the Act does not offend the provisions of Art. 14. **ILR (1954) Pepsu 545: AIR 1954 Pepsu 180 (184) (Pt F) (Pr 11) (DB).**

●——Pre.—Scope—Repeal of Punjab Alienation of Land Act — Effect — (Punjab Alienation of Land Act (13 of 1900)).

The repeal of the Punjab Alienation of Land Act by the Adaptation of Laws (Third Amendment) Order, 1951, does not render the provisions of Sections other than Ss. 2 (4), 14, 13, 24, 29 and the concluding clause of S. 9 of the Act to be void. The restrictions imposed by those sections are severable and the deletion of those provisions does not affect the constitutionality of the Act. Uttam Singh v. Kartar Singh, **ILR (1954) Punj 232: 55 Punj LR 500: AIR 1954 Punj 55 (56) (Pt C) (Pr 10) (FB).**

[Overruled on another point in AIR 1962 SC 1476.]

SECTION 3

——S. 3 (5) (b) — Document whether sale of proprietary rights or merely creates occupancy rights in transferee — (Deed — Construction).

A deed executed by S specifically mentioned therein that occupancy rights were being created in favour of B under S. 8 of the Punjab Tenancy Act, 1887, and that the right of succession in favour of the heirs of B would be governed by the provisions of S. 59 of the said Act. It was further provided that neither S nor any successor of her would be entitled to eject B otherwise than in accordance with the law. The right to cut trees was conferred on the transferee, but only in accordance with the terms of the Wajib-ul-arz. The consideration for the alienation was stated to be Rs. 1,000 though its market value was Rs. 1,200. S reserved to himself only a malikana of 2 annas in the rupee:

Held, that the document did not amount to a sale of proprietary rights and the only effect of the document was the creation of occupancy rights in favour of B. Hence, the transaction was not a sale liable to pre-emption. The fact that the consideration was high or that the terms were favourable to the transferee was of no importance in determining the question. 1911 PLR 187, Dist. **AIR 1953 Bilaspur 1 (2) (Pt B) (Prs 6, 7).**

——S. 3 (5) — Suit for specific performance decreed — Vendor ordered to execute sale-deed—Failure — Court appointing Commissioner to execute sale deed — Held sale as per sale deed was pre-emptible — Civil P. C. (1908), O. 21, R. 34 (5)—AIR 1951 Cal 551; AIR 1919 Lah 118, Rel. on. AIR 1949 Lah 72, Not considered; AIR 1949 Lah 22, Disting. **67 Punj LR 74: 1965 Cur LJ 86: AIR 1965 Punj 346 (347, 348) (Prs 8, 12, 15).**

——S. 3 — Small bits of land situated in factory area and sold for purpose of constructing factory—Not 'agricultural land' for the purpose of the operation of the law of pre-emption though described as banjar qadim and though baira karaba grown on it occasionally — Also do not form "village immovable property" — Pre-emption — Law of—Construction in light of nation's progress and economy. **ILR (1963) 2 Punj 52.**

——Ss. 3 (5) and 4 — Compromise to avoid alienation — If 'sale' — Right of pre-emption.

The suit in which the compromise was arrived at was a suit to avoid an alienation and not a suit based on contract for the transfer of property. The compromise was that the suit for possession would be decreed if a certain sum was paid within two months, failing which the suit shall stand dismissed. The sons of the defendant treating this compromise as a sale by their mother filed a suit for pre-emption:

Held, that the amount paid was a little more than the price of the land could not by itself make the decree a sale. The right claimed by the plaintiffs in the suit which was recognized by the compromise was not a right of reconveyance but a right to avoid an unauthorised transfer. The nature of the compromise was such that it could not be held to be a sale and, therefore, there was no right of pre-emption. **(1961) 63 Punj LR 345.**

——S. 3 — Applicability — Agricultural land diverted to non-agricultural purposes prior to sale — Right of pre-emption — 'Land' — (Punjab Alienation of Land Act (13 of 1900), S. 2 (3)).

For purposes of pre-emption under the Punjab Pre-emption Act, the nature of land sought to be pre-empted is to be seen as on the date of sale. Where on the date of the sale, the property had been entirely diverted from its original agricultural use to the use of a 'bhatta' and the only finding possible was that on the date of the sale the land had ceased to be agricultural land and was being put to use, for a period exceeding one and a half years, to purposes other than agricultural, the property in dispute cannot be treated as 'land' as defined in sub-sec. (3) of Sec. 2 of the Punjab Land Alienation Act which is the definition of land for the purposes of S. 3 of the Punjab Pre-emption Act. The mere fact that the land is assessed to land revenue will not necessarily prove that it is 'land' as defined in S. 2 (3) of the Punjab Land Alienation Act. **(1959) 61 Punj LR 716.**

——S. 3 — Sale — Property taken under indemnity clause.

The property taken under an indemnity clause does not amount to a sale within the meaning of S. 3 of the Pre-emption Act and there is no right of pre-emption in such a case. 48 PLR 301, Foll. **AIR 1952 Punj 297 (298) (Pr 3).**

SECTION 4

——S. 4 — Right of pre-emption — Is an aggressive right — No equity in favour of pre-emptor—Right must be strictly construed — Constitution of India, Art. 19.

It is now well settled that the right of pre-emption is an aggressive right. It operates as a clog on the right of the owner to sell his property

to a person of his choice and must, therefore, be strictly construed. AIR 1959 Punj 117, Foll.

There is no question of any hardship on any occasion for equitable considerations in favour of the pre-emptor in construing the law of pre-emption. Prima facie any restriction on a citizen's right to dispose of his property is unconstitutional and can be upheld only on the ground of reasonable restrictions as contemplated by Art. 19 of the Constitution. Therefore, such restrictions must not be interpreted more widely than the circumstances and object of the Legislature justify: AIR 1960 SC 1368, Foll. ILR (1962) 2 Punj 614.

——S. 4 — Patiala and East Punjab States Union Holdings (Consolidation and Prevention of Fragmentation) Act (5 of 2007 B.K.), Ss. 24, 25— Interpretation of — Land allotted to vendees in consolidation operations — Is subject to right of pre-emption within ambit of S. 24 — It is not an encumbrance within meaning of S. 25 — Right of pre-emption, nature of — It can be exercised when allotted land is not inextricably mixed up with ancestral land — Words and Phrases — Encumbrance.

A right of pre-emption is not a charge upon or a claim against land as it does not arise out of any private grant or contract. Therefore, S. 25 of the Act is of no avail in enforcing right of pre-emption against land allotted in pursuance of a scheme of consolidation.

Section 24 of the Act is not confined to relationship between landlord or tenant-at-will inter se and further that rights of the third party in the land, other than those rights specifically mentioned in Section 25 of the Act, can be enforced against the land-owner in respect of the land allotted to him in consolidation in lieu of his original holdings.

The right of pre-emption imposes a corresponding burden which can be enforced against the owner of the land the sale of which is sought to be pre-empted, and to that extent there is an infirmity in the title of the owner. Section 24 of the Act provides that the land-owner shall have the same right in the land allotted to him in pursuance of the scheme of consolidation as he had in his original holdings; therefore, it follows that if there was any infirmity in his title to the original holdings, the same infirmity will attach to his title in the land allotted. It is true that the holder of the land, subject to right of pre-emption, is its full owner but there is a clog to his power of alienation. By virtue of Section 24, the same clog which is attached to the original holding will attach to the land allotted to the land-owner in pursuance of the scheme of consolidation: (1946) 48 PLR 536; AIR 1948 EP 22; (1949) 51 PLR 394; AIR 1949 PC 87; AIR 1954 SC 417, Foll.

There is no difficulty in the exercise of the right of pre-emption where the land allotted is not inextricably mixed up with the ancestral land. ILR (1961) 2 Punj 882.

——S. 4 — Suit to set aside alienation — Compromise that the suit for possession would be decreed if a certain sum was paid within two months failing which the suit shall stand dismissed — Held, the nature of the compromise was such that it could not be held to be a sale and therefore, there was no right of pre-emption — The suit for pre-emption brought by the plaintiff was therefore, dismissed. See Punjab Pre-emption Act (10 of 1913), S. 3 (5). (1961) 63 Punj LR 345.

——S. 4 — Sale or gift — (Transfer of Property Act (1882), Ss. 54, 122).

The vendors were a Christian Mission. They wanted to help Christians who had been serving them. Property worth Rs. 8,000 was alleged to be sold for Rs. 190. No money was paid before the Registrar. There was evidence that no money was received from the alleged transferee as price but he had only to pay some subscription.

Held, that the transaction was a gift and not a sale. AIR 1954 Punj 116 (117) (Pt B) (Pr 7).

●——S. 4 — Nature of pre-emptive right.

The pre-emptive right is primary and secondary in nature. It is a primary right which exists before the sale and a secondary one which arises when a sale has been effected. Uttam Singh v. Kartar Singh, ILR (1954) Punj 232: 55 PLR 500: AIR 1954 Punj 55 (60) (Pt E) (Pr 48) (FB).

[Overruled on another point in AIR 1962 SC 1476.]

——Ss. 4 and 15 (b), 'fourthly' — Plaintiff must show that the rights existed on date of sale — He cannot be allowed to improve his position after the date of sale. AIR 1953 Punj 97 (97, 98) (Prs 14, 15) (DB).

SECTION 5

●——S. 5 — 'Katra' — Expression not defined in the Act — Primary meaning is 'enclosure' — Secondary meaning is 'market' — Generally katra would be a business locality though there might be purely residential katras. See Words and Phrases — 'Katra'. AIR 1962 SC 1476.

——S. 5 (b) (as amended by Punjab Act 10 of 1960) — Scope of — Land reclaimed up to date of suit and not beyond — Saved from pre-emption suit.

It is the sale of waste land reclaimed by the vendee which is protected from the hands of the pre-emptor and obviously the relevant date is the one when the pre-emption suit is filed. The vendee is given protection by the Legislature only in respect of land which he may have reclaimed since it was sold to him. The vendee is not given a carte blanche to reclaim as much of the land as he can even after the pre-emption suit is filed. R.S.A. No. 51 of 1961, dated 20-7-1961 (Punj.), Approved. Thus, the land which is saved from the pre-emption suit is only the land which has been reclaimed up to the date of the suit and not beyond. ILR (1963) 1 Punj 193.

——S. 5 — Transaction held amounted to lease— Suit for pre-emption could not lie — Transfer of Property Act (1882), Ss. 105, 111 (g).

In a deed of permanent lease the annual rent was fixed at Rs. 40. The premium money was to be Rs. 9,000 out of which a sum of Rs. 8,500 was to be paid before the Sub-Registrar at the time of the registration of the deed and the balance of Rs. 500 was to be paid by the lessees for payment to the mortgagees who could get the land redeemed by making that payment. The lessees were given the right to cultivate the land or bring it into any use. If the land was acquired by the Government, then the lessees were entitled to re-

ceive out of the compensation money the amount of the premium as also the amount spent by them on improvements. If at any time the lessees had to make payment of land revenue, they were entitled to deduct the same from the annual rent. If at any time the lessees were deprived of the possession over the land, they were entitled to be indemnified to the extent of the premium money and the improvements from the property of the lessor.

Held, that the transaction was one of lease according to its apparent tenor and not of sale, and a suit for pre-emption could not lie. AIR 1924 All 60, Rel. on. **(1962) 64 Punj LR 165.**

SECTION 7

——S. 7 — Custom of pre-emption — Custom did not exist in Mohalla Nim Tala. **AIR 1955 NUC (Punj) 4006.**

——S. 7 — Civil P. C., S. 100 — Question of fact ——Question whether town comprises recognised sub-divisions is one of fact. See Civil P. C. (1908), S. 100. **AIR 1955 NUC (Punj) 4006.**

——S. 7 — Mohalla Nim Tala of Palwal town is separate sub-division of Palwal town. **AIR 1955 NUC (Punj) 4006.**

——S. 7 — Custom of pre-emption — Proof of— Judicial instances in contested cases — Custom held did not prevail in Mohalla Sanicharan of town Rae Kot of Ludhiana District — Custom (Punjab). **AIR 1951 Punj 392 (392, 393) (Prs 3, 6).**

SECTION 8

——Ss. 8 (2), 21 — Sale of agricultural land in 1959 in favour of Harijan — Suit by brother of vendor for pre-emption on 30-9-1960 — Decree passed in favour of plaintiff confirmed in appeal on 21-12-1961 — Right of pre-emption in cases of sales of land in favour of Harijan taken away by notification under S. 8 (2) on 2-12-1962 pending second appeal — Subsequent amendment of notification on 21-12-1962 taking away right of pre-emption only in cases of sale effected after 31-3-61 — Pre-emptor is entitled to the passing of decree in second appeal — Pre-emption — Right of. **1965 Cur LJ 519 (Punj).**

SECTION 9

——S. 9 (as applied to Himachal Pradesh) — After accession Chief Commissioner selling lands to defendants — Plaintiff filing suit claiming that as collateral he had preferential right to purchase lands — Government held were at liberty to dispose of lands in any manner they chose — Sale held could not confer upon plaintiff right of pre-emption. See Escheat — Lands escheated to State before accession. **AIR 1957 Him Pra 61.**

SECTION 10

——S. 10 — Hindu joint family — Sale by karta —Right of pre-emption by members.

If property is joint family property of a joint Hindu family, every coparcener is a joint owner of the same and when a karta or a manager sells the property, he sells not only his own share but by the provisions of the Hindu Law he has the power of selling and does sell the interest of every member of the family. It may be that other members have the right to have the sale set aside on the grounds which are peculiar to Hindu Law, i.e., the sale is not for consideration and necessity. But that does not mean that the interest of every member of the family is not sold away, and if right, title and interest of every member are sold for pre-emption such a member will be a party to the sale, and, therefore, under S. 10 of the Punjab Pre-emption Act he has not the power to sue for pre-emption. 67 IC 76 (Lah) and AIR 1935 Lah 560, Foll.; AIR 1929 Oudh 265 (FB), Diss.; AIR 1920 All 131, Ref. **AIR 1952 Punj 195 (196) (Pt B) (Pr 5).**

SECTION 11

●——S. 11 — Deposit by pre-emptor in pre-emption suit — Suit dismissed — Deposit can be attached by creditor-decree-holder in money suit against pre-emptor — Protection of S. 11 can be waived by agreement. See Punjab Pre-emption Act (1 of 1913), S. 22. **AIR 1964 Punj 171 (FB).**

——S. 11 — Validity — Abolition of rights founded on custom — Effect on rights of pre-emption does not result in discrimination. See Hindu Succession Act (1956), S. 4. **AIR 1958 Punj 44 (DB).**

[Overruled on another point in AIR 1960 Punj 196.]

SECTION 12

——S. 12 — Applicability.

The Punjab Pre-emption Act is not applicable to the sale taking place before the coming into force of the Act. **AIR 1954 Him Pra 20 (20) (Pt C) (Pr 3).**

SECTION 13

●——Ss. 13 and 15 — Provision similar to S. 21, Agra Pre-emptions Act (U. P. Act 11 of 1922) not introduced — Implication. **1965 Cur LJ 598: 67 Punj LR 849: ILR (1965) 2 Punj 706: AIR 1966 Punj 36 (FB).**

SECTION 14

●——Ss. 14, 15, 23 (before its amendment in 1960) — Punjab Alienation of Land Act, 1900 — Repeal of — Consequential removal of the fetters imposed by Sections 14 and 23 of Punjab Pre-emption Act — Substantial provision in S. 15 is not affected.

Neither the repeal of the Punjab Alienation of Land Act, 1900, by the Adaptation of Laws (Third Amendment) Order, 1951, nor the consequential removal of the fetters imposed by Ss. 14 and 23 of the Punjab Pre-emption Act, 1913, have the effect of rendering the substantive provision contained in S. 15, not available to those who satisfy its terms. Ram Sarup v. Munshi, (1963) 3 SCR 858: 65 Punj LR 531: 1963 SCD 728: AIR 1963 SC 553 (559) (Pt C) (Pr 13).

——S. 14 — Civil P. C. (1908), S. 9 — Jurisdiction of Civil Court — Question whether vendees belong to agricultural tribe arising in case under S. 14, Punjab Pre-emption Act — Jurisdiction whether barred by provisions in Punjab Alienation of Land Act — Punjab Alienation of Land Act (13 of 1900), S. 4. **AIR 1950 East Punj 246.**

——Ss. 14 and 15 — Scope — Repeal of Punjab Alienation of Land Act — Effect.

The Punjab Alienation of Land Act having been repealed, there is no distinction between "agriculturist" and "non-agriculturist" in Punjab State and therefore the provisions of S. 14, Punjab Pre-emption Act, are of no effect, but this circumstance does not in any way affect the provisions of S. 15, as S. 15 is in no way dependent upon S. 14. If S. 14 is treated as non-existent, S. 15 can still stand by itself. The repeal of the Punjab Alienation of Land Act does not in any way affect the provisions of S. 15 or render them null and void. 54 Pun LR 395: ILR (1953) Punj 227: AIR 1953 Punj 20 (20) (Pt A) (Pr 3) (DB).

SECTION 15

SYNOPSIS

(Punjab Pre-emption Act (1 of 1913), S. 15.)

1. Scope and applicability.
2. Validity of the section.
3. Law before Amending Act (10 of 1960).
4. Amending Act of 1960 — Effect on pending proceedings.
5. Sale by a co-sharer — Pre-emption — Sub-sec. (1) (b).
6. Sale by a female — Pre-emption — Sub-sec. (2) (b).
7. Right of pre-emption, when to subsist.
8. Consent to sale by minor's guardian — Effect of.
9. Parties to the suit.

1. Scope and applicability.

——S. 15 (as amended by Punjab Act 10 of 1961). Sale of land not hit by S. 17-A of Punjab Security of Land Tenures Act — Purchase of land by tenants pending suit for pre-emption — Bar against pre-emption did not apply. See Tenancy Laws—Punjab Security of Land Tenures Act (1953), S. 17-A. (1965) 67 Pun LR 1034: 1965 Cur LJ 517: AIR 1966 Punj 179 (DB).

——S. 15 — Village immovable property — Right of pre-emption.

As respects village immovable property, right of pre-emption has no nexus to the quantum of share heritable from the vendor or vendors. The right of challenge is given to a class or group of persons connected together by the tie of relationship with the vendor. Before the Punjab Pre-emption Act was amended, large number of persons in respect of their relative preferential proximity to the vendor had been selected. The amendment, however, cut down that group to closer relationship by blood. Any one or more of that class or group can impugn the sale successfully and obtain possession on payment of the total sale price. L.P.A. No. 339 of 1961, dated 10-4-1963 (Punj.), Distinguished. 1965 Cur LJ 632: 67 Punj LR 919.

——S. 15 (1) and (2) — Sale under S. 15 (2) — No right of pre-emption — Interpretation of Statutes — Construction.

The scheme of Section 15 (1) of the Punjab Pre-emption Act is that it vests a right of pre-emption with regard to agricultural land and village immovable property on certain specified persons and that too with reference to the sale by a particular type of person. The first type of person is a sole owner. The second type of person is a co-sharer and the sale is of share by him out of the joint holding. The third type is the co-sharers and the sale is of land jointly held by them. As far as the applicability of S. 15 (2) is concerned, the opening words of Section 15 (2) are "notwithstanding anything contained in sub-section (1)". Then there are two categories of sales dealt with in Clauses (a) and (b). The first category of sale dealt with is by a female of land or property to which she succeeds through her father or brother. The second type of sale is by a female where she succeeds through her husband or through her son. If the sale is a sale under sub-sec. (2) of Sec. 15, the plaintiff pre-emptor has no right to pre-empt. The plaintiff pre-emptor will have only a right of pre-emption if the sale is of second type under S. 15 (1). 1965 Cur LJ 44: 67 Punj LR 132.

●——Ss. 15 and 16 — Object of.

The objects underlying Ss. 15 and 16 are: (1) to preserve the integrity of the village and the village community; (2) to avoid fragmentation of holdings; (3) to implement the agnatic theory of the law of succession; (4) to reduce the chances of litigation and friction and to promote public order and domestic comfort; and (5) to promote private and public decency and convenience. Uttam Singh v. Kartar Singh, ILR (1954) Punj 232: 55 Punj LR 500: AIR 1954 Punj 55 (58) (Pt D) (Pr 28) (FB).

[Overruled on another point in AIR 1962 SC 1476.]

——Ss. 15, 14 — Repeal of Punjab Alienation of Land Act — The provisions of S. 14, Punjab Pre-emption Act, are of no effect — There is no distinction between 'agriculturists' and 'non-agriculturists' in the Punjab State — The repeal does not in any way affect the provisions of S. 15 or render them null and void. See Punjab Pre-emption Act (10 of 1913), S. 14. AIR 1953 Punj 20 (DB).

2. Validity of the section.

●——S. 15 (a) (before its amendment by Punjab Act 10 of 1960), S. 15 (1) (a) (and after amendment) — Pre-emption restricts right given by Art. 19 (1) (f) of Constitution — However, provisions in S. 15 (a), whether before or after amendment, do not transgress limits of reasonableness required by Art. 19 (1) (f) — Punjab Pre-emption Act is valid. See Constitution of India, Art. 19 (1) (f). AIR 1963 SC 553.

●——S. 15 (1) (c), Thirdly (before its amendment in 1960)—Restriction placed on right of vendor in regard to disposal of his agricultural land—Restriction is reasonable — S. 15 (c) Thirdly is valid See Constitution of India, Art. 19 (1) (f). AIR 1963 SC 553.

——Ss. 15 and 16 — Scope — If ultra vires — Sections are not ultra vires. AIR 1954 Punjab 55 (FB), Foll. — (Constitution of India, Art. 19 (1) (f)). ILR (1954) Pepsu 545: AIR 1954 Pepsu 180 (181) (Pt B) (Pr 6) (DB).

——Ss. 15, 16 — Classification under — Basis of —Validity — If contravenes Art. 14 — (Constitution of India, Art. 14).

The Punjab Pre-emption Act has made classification on the basis of agricultural land and village immovable property as a separate subject-matter falling with the scope of Sec. 15 and urban immovable property falling within the scope of S. 16. The classification is based on an intelligible differentia which distinguishes one type of property from other types of property and the differentia has a rational relation to the objects behind the right of pre-emption with regard to each type of property inasmuch as the right is secured to a set of persons in each case having regard to the object underlying the right to acquire, hold and dispose of property being ultra vires Article 14 of the Constitution. AIR 1953 Punjab 20 and AIR 1954 Punj 55 (FB) and ILR 7 All 775, Rel. on. **60 Punj LR 151: AIR 1958 Punj 44 (45) (Pt A) (Pr 4) (DB).**

[Overruled on another point in AIR 1960 Punj 196.]

●——**Ss. 15 and 16 — Validity — (Constitution of India, Art. 19 (1) (f) and (5)).**

The restrictions imposed by Ss. 15 and 16 upon the right guaranteed by Art. 19 (1) (f) are in the interests of the general public of the State. It cannot also be sustained that the restrictions have no reasonable relation to the object which the legislation seeks to achieve or go in excess of that object. The sections are, therefore, not ultra vires. Uttam Singh v. Kartar Singh, **ILR (1954) Punj 232: 55 Punj LR 500: AIR 1954 Punj 55 (58) (Pt A) (Prs 32, 33, 35, 36) (FB).**

[Overruled in AIR 1962 SC 1476 (in so far as this holds that the sixth ground in Section 16 is constitutional).]

——**S. 15 — Scope — If ultra vires — (Constitution of India, Arts. 19 (1) (f) and 19 (5)).**

There can be very little doubt that the law of pre-emption is a clog or fetter upon the freedom of sale. It disqualifies certain types of persons from purchasing land freely. But the sole object of this legislation is to preserve the homogeneity of the village community and to prevent fragmentation of holdings. The terms of S. 15 do not go beyond the objects aimed at and the restrictions imposed are just sufficient to achieve the interest of general public. Section 15 of the Punjab Pre-emption Act is not ultra vires the Constitution. Case-law Rel. on. **54 Punj LR 395: ILR (1953) Punj 227: AIR 1953 Punj 20 (20, 21) (Pt B) (Prs 4, 6, 7) (DB).**

3. Law before Amending Act (10 of 1960).

——**S. 15 (c), Secondly — Admission.**

In the absence of a clear and specific averment in the plaint that the Thulla in which the land was situate was a separate sub-division and, therefore, the plaintiff had a superior right of pre-emption, the allegations in the written statement held cannot be regarded as admissions of that fact. See Civil P. C. (1908), O. 8, R. 5. **AIR 1955 NUC (Pepsu) 256 (DB).**

——**S. 15 (c), Secondly — Sub-division of a village — Plaintiff claiming preferential right of pre-emption on ground that they were also owners of Thulla Jogian where defendants owned no land— Plaintiff must prove sub-divisions of Patti were well marked and were authenticated by Settlement Records and history of the village. AIR 1955 NUC (Pepsu) 256 (DB).**

——**S. 15 (b), Fourthly — Right of pre-emption— Requisites of — Pre-emptor must be co-sharer— Right must subsist up to date of decree — Burden of proof is on plaintiff — Each and every land owner in estate is not co-sharer — Evidence Act (1872), Ss. 101-104 — Punjab Land Revenue Act (17 of 1887), S. 3 (1). 1964 Cur LJ 480: 66 Punj LR 1063.**

——**S. 15 (c), Secondly — Sub-division — Sub-division of village into separate panas — Homogeneity of descent is quite sufficient to show separation of village into distinct areas for purposes of Act. AIR 1955 NUC (Punj) 4949.**

——**S. 15 (b), Thirdly — Custom — Succession— Collaterals — Property of non-proprietor.**

A collateral more distant than the third degree, has no right of succession to the property of a non-proprietor, under the Punjab Customary Law. Therefore, a collateral of the fifth degree has no right to pre-empt a sale of a house of a non-proprietor under S. 15 (b) (thirdly) of the Punjab Pre-emption Act. **AIR 1952 Punj 295 (296) (Pr 8).**

——**S. 15 — Punjab Tenancy Act, S. 59 — Heir— Meaning of — Landlord — Death of an occupancy tenant without leaving any heir — His rights merge in rights of ownership of the landlord — Landlord does not take as an heir of the tenant — He has, therefore, no right to pre empt the sale of occupancy rights under the provisions of S. 15 of the Punjab Pre-emption Act. See Tenancy Laws — Punjab Tenancy Act (16 of 1887), S. 59. AIR 1952 Punj 156 (DB).**

——**S. 15 — Right of pre-emption — Landlord, if heir of deceased occupancy tenant — Punjab Tenancy Act, S. 59.**

A landlord cannot be regarded as an heir to a deceased occupancy tenant under S. 59 of the Punjab Tenancy Act and consequently he has no right to pre-empt the sale of occupancy rights under the provisions of S.15 of the Punjab Pre-emption Act. It may be that when an occupancy tenant dies without leaving any heirs his occupancy rights merge in the rights of ownership of the landlord and for all practical purposes devolve on the landlord but this devolution takes place not because the landlord is an heir but because the rights themselves have ceased to exist. **ILR (1952) Punj 162: AIR 1952 Punj 156 (157) (Pr 14) (DB).**

——**S. 15 (c) — The question whether a particular village comprises recognised sub-divisions is a question of fact and is not open to challenge in second appeal — Civil P. C. (1908), S. 100: 1887 PR 64, Appl. ILR (1951) Punj 149: AIR 1951 Simla 182 (182) (Pt A) (Pr 8).**

——**S. 15 (c) — Sub-divisions — Tarafs when sub-divisions.**

Tarafs to be distinct sub-divisions must be distinct entities having nothing common between them each having homogeneity of the area and descent.

(On facts established held that the taraf in question was distinct sub-division.) **ILR (1951) Punj 149: AIR 1951 Simla 182 (183) (Pt B) (Pr 12).**

4. Amending Act of 1960 — Effect on pending proceedings.

●——**Ss. 15 and 31 (as amended by Punjab Act 10 of 1960) — Right of pre-emption — Right ac-**

crued in favour of owner of estate under old S. 15 (c), Thirdly — Newly substituted S. 15 abrogating this right — Retrospective effect of S. 31 — Decree passed in favour of pre-emptor owner of estate — Appeal preferred by unsuccessful vendee — Effect to provision in S. 31 has to be given by appellate Court and decree vacated.

By Section 4 of the Punjab Amending Act 10 of 1960, S. 15 of the Punjab Pre-emption Act, 1913, is repealed and in its place it substituted a new provision which omits to confer a right of pre-emption in the case of persons 'owning land in the estate' as the original S. 15 (c), Thirdly, had done. The new S. 31, inserted in the principal Act, which is retrospective, affects rights to pre-emption which had accrued before the coming into force of the Amending Act, 1960. Even agreeing with the view that there is a presumption against the retrospective operation of a statute, still in the present case the language used in S. 31 is plain and comprehensive so as to require an appellate Court to give effect to the substantive provisions of the Amending Act whether the appeal before it is one against a decree granting pre-emption or one refusing that relief. Where, therefore, an appeal is preferred by an unsuccessful vendee against a decree passed by both the trial and appellate Courts in favour of the pre-emptor and pending the appeal, the new Ss. 15 and 31 come into force, the decree passed in favour of the pre-emptor has to be set aside and the suit for pre-emption dismissed, as required by S. 31. AIR 1941 FC 5 and 62 Pun LR 291, Rel. on. Ram Sarup v. Munshi, (1963) 3 SCR 858: 65 Pun LR 531: 1963 SCD 728: AIR 1963 SC 553 (562, 563) (Pt F) (Prs 26, 27, 28, 29).

●——S. 15 (1) (c) (as amended by Act 10 of 1960) — Retrospective operation of S. 31 — Applies both to rights extinguished by amendment as well as to rights newly created — Hence, appellate Court must recognise in pending pre-emption matter, rights newly created by amending Act. See Punjab Pre-emption Act (1 of 1913) (as amended by Act 10 of 1960), S. 31. (1963) 2 SCJ 659.

5. Sale by a co-sharer — Pre-emption — Sub-sec. (1) (b).

——S. 15 — Applicability — Sister of female vendor is competent to pre-empt sale.

Section 15 (1) does not make any distinction between a sale made by a female or a male and talks only of sales made by a sole owner, co-sharer or joint owner of agricultural property. This provision does not exclude the sale executed by a female sole owner of the property, co-sharer or joint owner, and the pre-emption claim of the sister of such owner falls within this sub-section being a co-sharer.

Where the property in the hands of the vendor, female owner, had come to her not through her father, brother, son or husband but through her mother, and that too not as a result of inheritance or succession but under a gift deed executed in her favour jointly with her sister who was claiming pre-emption of sale by former, S. 15 (2) was not applicable. Under S. 15 (1), the sister of female vendor being co-sharer, was competent to pre-empt the sale. 65 PLR 500, Dist. 1966 Cur LJ 10.

——S. 15 (1) and (2) (as amended in 1960) — Applicability — Although special provisions override the general, such overriding is only to the extent of inconsistency between the two — No doubt, S. 15 (2) overrides S. 15 (1) — However, it does not altogether exclude the applicability of S. 15 (1) — As such, S. 15 (1) (a) will apply to sales by a female of properties other than those dealt with in S. 15 (2) — Property acquired by wife as gift from her husband — Such acquisition cannot be equated to inheritance by her from her husband and hence S. 15 (2) will not apply — Since S. 15 (1) (a) will apply, her son is entitled to claim superior right of pre-emption. 1963 PLR 500 and 1965 PLR 132, Dist.—(Civil P. C. (1908), Preamble — Interpretation of Statutes — (Interpretation of Statutes — General and Special provisions). (1965) 67 Pun LR 1108: ILR (1966) 1 Punj 257.

——S. 15 (1) (b), Fourthly (as amended by Punjab Pre-emption (Amendment) Act 10 of 1960) — Punjab Occupancy Tenancy (Vesting of Proprietary Rights) Act (8 of 1953), S. 3 — Occupancy rights enjoyed by widow ripening into full ownership under Punjab Act 8 of 1953 — Widow can alienate land as she likes — Pre-emption by co-sharer under S. 15 (1) (b), Fourthly, cannot be challenged by vendee — Tenancy Laws — Punjab Occupancy Tenants (Vesting of Proprietary Rights) Act (8 of 1953), S. 3. (1963) 65 Pun LR 821.

——S. 15 (1) (b), Fourthly and S. 15 (2) (b) — Widow succeeding to occupancy rights of husband — Conversion of those rights into full ownership rights under Pepsu Occupancy Tenants (Vesting of Proprietary Rights) Act, 1953 — Widow becomes absolute owner — Co-sharer in widow's land entitled to pre-empt.

Where a widow enters into enjoyment of the occupancy rights in succession to her deceased husband, she only enjoys a widow's estate but the effect of her own conversion of these occupancy rights into a full ownership in accordance with the provisions of the Pepsu Occupancy Tenants (Vesting of Proprietary Rights) Act, 1953, is that she becomes an absolute owner of the land and is entitled to alienate it in any manner she likes. The widow acquires the occupancy rights for herself and not as representative of her deceased husband. This absolute estate is separate and S. 15 (2) (b) of the Act is not applicable to such property and a co-sharer in the holding of such widow is entitled to pre-empt in pursuance of S. 15 (1) (b) (4th clause) of the Act. ILR (1960) Punj 47 and AIR 1925 Lah 305, Rel. on. 1962 Cur LJ 136: (1962) 64 Pun LR 349.

6. Sale by a female — Pre-emption — Sub-sec. (2) (b).

——S. 15 (1) and (2) — Scope — Co-sharer's right of pre-emption under sub-sec. (1) is subject to what is provided in sub-sec. (2) — (Words and Phrases—"Notwithstanding anything contained in") — (Interpretation of statutes — "Notwithstanding anything contained in").

The clear effect of the words 'notwithstanding anything contained in sub-section (1)' in sub-sec. (2) of S. 15 of the Punjab Pre-emption Act is that the provisions of sub-section (1) giving right of pre-emption to a co-sharer under sub-clause (Fourthly) of Cl. (b) must give way to what is

provided for in sub-section (2). Therefore, in the case of property to which females have succeeded through their father, brother or husband, the right of pre-emption is given only to very close relations and certainly not to co-sharers: AIR 1955 SC 191. Rel. on. (1963) 65 Pun LR 500: ILR (1963) 2 Punj 233.

——S. 15 (2) (b), First clause (as amended in 1960) — Son and daughter — Must be those of the female vendor and her husband whose property is sold — Illegitimate son and illegitimate daughter of female vendor — Not entitled to pre-empt the sale.

It is clear from the legislative scheme in enacting sub-sec. (2) of S. 15 that it is only the sale by a female of the property which has come to her by succession from her father, brother or husband, that is made pre-emptible. The husband's property might come to her direct or through her son and here the reference to the son means her son from her husband whose property has come to her by succession. The son and daughter mentioned in First clause of S. 15 (2) (b) are, therefore, the son and daughter of both the female vendor and her husband whose property is the subject-matter of sale, which is sought to be pre-empted. Therefore, an illegitimate son or an illegitimate daughter of the female vendor was not held entitled to pre-empt: AIR 1954 Mad 136 and AIR 1957 All 215, Not foll. ILR (1961) 2 Punj 614.

●——S. 15 (2) (b) (as amended by Act 10 of 1960) — "Son or daughter of such female" — Means only legitimate son or daughter of female vendor. Gulraj Singh v. Mota Singh, (1964) 7 SCR 205: 1964 CIS (IJ) 13: (1964) 1 SCWR 486: 1964 Cur LJ (SC) 181: 66 Punj LR 746: (1965) 1 SCJ 254: AIR 1965 SC 608 (609, 610) (Prs 3, 4).

7. Right of pre-emption, when to subsist.

——S. 15 (b) (iii) — Applicability and scope — Applies to person not included in first and second parts of S. 15 (b) and who would have been entitled to inherit property on death of vendor. AIR 1955 NUC (Him Pra) 3680.

——Ss. 15, 17, 21-A (as amended by Punjab Act 10 of 1960) — Tenant's right of pre-emption — Punjab Security of Land Tenures Act (10 of 1953), Sec. 17-A — Applicability — Transfer of Property Act (1882), Sec. 52 — Sale held hit by doctrine of pendente lite — Vendees becoming co-sharers subsequent to institution of suit — Plaintiff's right of pre-emption, if could be defeated — 62 PLR 247, Disting. — Punjab Security of Land Tenures Act (10 of 1953), Sec. 17-A —Transfer of Property Act (1882), Sec. 52 — Pre-emption. 1964 Cur LJ 200: 66 Pun LR 507.

——S. 15 (b) fourthly and S. 4 — Plaintiff must show that the rights existed on date of sale — He cannot be allowed to improve his position after the date of sale. See Punjab Pre-emption Act (1 of 1913), S. 4. AIR 1953 Punj 97 (DB).

8. Consent to sale by minor's guardian — Effect of.

——S. 15 — Right of son — Consent by son — Consent to sale by natural guardian of minor son — No bar to minor's suit for pre-emption. 89 Punj LR 1912, Foll. (1960) 62 Punj LR 691.

9. Parties to the suit.

●——S. 15 — Suit for—Person having no right of pre-emption made co-plaintiff by pre-emptor — Right of pre-emptor is not forfeited — Right lawfully created must be respected — Precedents — Ratio and reasoning of previous decision not shown erroneous — Decision would not be overruled though another view is equally possible view — Agra Pre-emption Act (U. P. Act 11 of 1922), S. 21 — Provision similar to, not introduced in Punjab Pre-emption Act (1 of 1913) — Implication. Bachan Singh v. Bhupal Singh, 1965 Cur LJ 398: 67 Pun LR 849: ILR (1965) 2 Punj 706: AIR 1966 Punj 36 (38, 39) (Pt A) (Prs 8 to 11) (FB).

SECTION 16

●——S. 16—Validity—The sixth ground (vicinage) for vesting the right of pre-emption in respect of urban immovable property is unconstitutional. Bhan Ram v. Baji Nath, 1962 Jab LJ 676: AIR 1962 SC 1476 (1479 to 1485) (Pt A) (Prs 3 to 8, 10, 11, 13, 16).

——Ss. 16, 15 — Sections are not ultra vires: AIR 1954 Punj 55 (FB), Foll. (Constitution of India, Art. 19 (1) (f)). See Punjab Pre-emption Act (1 of 1913), S. 15. AIR 1954 Pepsu 180 (DB).

●——S. 16, sixthly — Validity—The provisions are not ultra vires the provisions of Art. 19 of the Constitution — Restrictions imposed by law of pre-emption are not unreasonable. See Constitution of India, Art. 19 (1) (f). AIR 1960 Punj 196 (FB).
[Overruled in AIR 1962 SC 1476.]

——Ss. 16, 15 — Classification under — Basis of — Validity — Do not contravene Art. 14 — (Constitution of India, Art. 14). See Punjab Pre-emption Act (1 of 1913), S. 15. AIR 1958 Punj 44 (DB).

——S. 16 — Validity — (Constitution of India, Arts. 19 (1) (f), 19 (5)).

It is obvious that the right of pre-emption restricts the rights of the owner to dispose of his property as he pleases and the rights of the vendee to acquire the property. Article 19 of the Constitution is immediately attracted, but according to Cl. (5) of Art. 19 what is to be seen is whether those restrictions are reasonable restrictions on the exercise of the right to acquire, hold and dispose of property specified in Art. 19 (1) (f). A restriction placed to secure objects is on the face of it a restriction in the interests of the general public and consequently within the scope of Art. 19 (5).

The provisions of Sec. 16 with regard to first five classes of persons, who are entitled to enforce a right of pre-emption in regard to urban immovable property on the ground of joint use of part or whole of the property provide a reasonable restriction on the right to acquire, hold and dispose of property and that is in the interest of general public. The same consideration cannot apply to the sixth class of persons referred to in S. 16 for their right is based not on any common use of the property but merely on the ground of contiguity. The right of pre-emption in their favour cannot be said to secure public order and to be in the interest of

general public. Consequently the restriction imposed by the right of pre-emption in their favour cannot be described reasonable restriction within the scope of Art. 19 (5). The right of pre-emption claimed by the plaintiff, under clause 'sixthly' of Sec. 16 of the Act is thus a right which is not consistent with the provisions of Art. 19 (1) (f) of the Constitution and as such cannot be enforced. **60 Punj LR 151: AIR 1958 Punj 44 (46, 47) (Pt C) (Prs 5, 6) (DB).**

[Overruled in AIR 1960 Punj 196 which is itself overruled in AIR 1962 SC 1476 affirming AIR 1958 Punj 44.]

——**S. 16** — Right of easement—Proof—To prove the right of easement claimed by the plaintiff and to make him dominant owner it was necessary to prove that the plaintiff was in peaceful, uninterrupted and open enjoyment of that right for a period of 20 years lasting within two years of the suit. See Easements Act (1882), S. 4. **AIR 1957 Punj 238 (DB).**

●——**S. 16** — Validity — Ss. 15 and 16 are not ultra vires. See Punjab Pre-emption Act (1 of 1913), S. 15. **AIR 1954 Punj 55 (FB).**

[Overruled in AIR 1962 SC 1476 in so far as this holds that the sixth ground in S. 16 is constitutional.]

●——**S. 16** — Object of Sections 15 and 16 enumerated. See Punjab Pre-emption Act (1 of 1913), S. 15. **AIR 1954 Punj 55 (FB).**

[Overruled on another point in AIR 1962 SC 1476.]

SECTION 17

●——**S. 17** — 'B' got a decree for pre-emption — Before he deposited the decretal amount another pre-emptor 'C' also filed a suit for pre-emption — B deposited the amount and got possession — **Held,** as B was substituted in the place of vendee before C's suit was disposed of C was not entitled to a decree for share of the land under Section 17 Punjab Pre-emption Act though he had an equal right of pre-emption. See Transfer of Property Act (1882), S. 52. **1958 SCJ 1234: AIR 1958 SC 838.**

——**Ss. 17 and 21-A (as amended by Punjab Act 10 of 1960)** — Tenant's right of pre-emption — Punjab Security of Land Tenures Act (10 of 1953), Section 17-A — Applicability — Transfer of Property Act (1882), S. 52 — Sale held hit by doctrine of pendente lite — Vendees becoming co-sharers subsequent to institution of suit — Plaintiff's right of pre-emption if could be defeated. See Punjab Pre-Emption Act (1 of 1913), S. 15. **1964 Cur LJ 200 (Punj).**

——**S. 17 — Scope.**

Section 17 applies to those persons who are proposing to exercise the right of pre-emption and have not yet exercised it and cannot apply to a person who has already exercised the right. Hence where A only obtains a decree for pre-emption by consent, B who had an equal right of pre-emption with A, cannot subsequently claim a share in the land pre-empted under Section 17 of the Act. ILR 11 Lah 258 (FB), Foll.; AIR 1927 All 664, Ref. **('51) 53 PLR 92: AIR 1952 Punj 206 (207) (Pr 7).**

SECTION 19

●——**Ss. 19, 20 and 28 — Scope and effect of on right of pre-emption.**

The right of pre-emption is not a right to the thing sold but a right to the offer of a thing about to be sold. This right is called the primary or inherent right. The pre-emptor has a secondary right or a remedial right to follow the thing sold. It is a right of substitution but not of re-purchase i.e., the pre-emptor takes the entire bargain and steps into the shoes of the original vendee. It is a right to acquire the whole of the property sold and not a share of the property sold. Preference being the essence of the right, the plaintiff must have a superior right to that of the vendee or the person substituted in his place. It can be defeated by all legitimate methods, such as the vendee allowing the claimant of a superior or equal right being substituted in his place. Sections 19, 20 and 28, Pre-emption Act do not materially affect the characteristics of the right of pre-emption as existed before the Act. The provisions do not in any way enable the pre-emptor to exercise his right without establishing his superior right over the vendee or the person substituted in his place or to prevent the vendor or the vendee by legitimate means to defeat his right by getting substituted in place of the vendee a pre-emptor with a superior right to or an equal right with that of the plaintiff. Nor does Section 28 preclude the Court from giving a decree for pre-emption in a case where the two suits were not joined together but one of the suits was decreed separately. The section enacts a convenient procedure, but does not affect the substantive rights of the parties. Bishan Singh v. Khazan Singh, **ILR (1958) Punj 2225: 1959 SCR 878: 1958 SCJ 1234: AIR 1958 SC 838 (841, 842) (Pt A) (Prs 11, 13, 14, 15).**

——**Ss. 19, 20 — Sale of property of insolvent by special official receiver after proclamation — Refusal to purchase by B having right of pre-emption — Refusal made to the clerk of the Official Receiver — Intending purchasers must be presumed to have known of the refusal — B is estopped from subsequently claiming right of pre-emption — (Evidence Act (1872), S. 115).**

An occupancy tenant of land situated in a village became insolvent and his property vested in Spsecial Official Receiver. The occupancy right in the land was sold to the vendee after issuing proclamation in the village and the adjoining villages. Neither B. who had a right of pre-emption nor anybody else had come forward to purchase the occupancy rights. B was specially asked by the clerk of the Special Official Receiver to purchase but he declined to do so in unequivocal language. Thereupon the Special Official Receiver searched for another purchaser and ultimately sold the rights to the vendee Upon this sale B claimed his right of pre-emption:

Held, that B was estopped from claiming the right of pre-emption. The refusal was made directly to the clerk of the Special Official Receiver whose agent he was and it could be presumed having regard to human conduct and to ordinary course of business (both public and private) that the intending purchasers would have come to know from the Special Official Receiver and his clerk that B had refused to purchase. In these circumstances B intentionally permitted even if he did not intentionally cause the intending purchaser, the vendee included, to believe that he was not buying the property. B having generated this belief could not now be allowed to say that he still mentally reserved to himself any pre-emptive right. Case law Ref. **AIR 1952 Punj 255 (256, 258) (Prs 8, 13) (DB).**

SECTION 20

●——Ss. 20, 19 and 28—Right of pre-emption—Effect of Act on the right — They do not materially affect the characteristics of the right of pre-emption as it existed before the Act. They provide a convenient and effective procedure for disposing of together different suits, arising out of the same transaction etc. and to regulate the distribution of the pre-empted land between rival pre-emptors — (Pre-emption). See Punjab Pre-Emption Act (1 of 1913), S. 19. **AIR 1958 SC 838.**

——Ss. 20, 19 — Sale of property of insolvent by Special Official Receiver after proclamation — Refusal to purchase by B having right of pre-emption -- Refusal made to the clerk of the Official Receiver — Intending purchasers must be presumed to have known of the refusal — B is estopped from subsequently claiming right of pre-emption — (Evidence Act (1872), S. 115). See Punjab Pre-emption Act (1913), Section 19. **AIR 1952 Punj 255 (DB).**

SECTION 21

——S. 21 — Suit for pre-emption of sale — Defence that decreeing of suit would be violative of Section 19-A of Punjab Act, 10 of 1953 —**Held,** question of violation could arise only at the time of execution of decree and not at the time of granting it. See Tenancy Laws — Punjab Security of Land Tenures Act (10 of 1953), S. 19-A. **67 Pun LR 735: ILR (1965) 2 Punj 513: AIR 1966 Punj 310 (DB).**

●——S. 21 — Suit for — Person having no right of pre-emption made co-plaintiff by pre-emptor — Right of pre-emption is not forfeited — Right lawfully created must be respected — Precedents — Ratio and reasoning of previous decision not shown erroneous — Decision would not be overruled though another view is equally posssible view — Agra Pre-emption Act (U. P. Act (11 of 1922), S. 21 — Provision similar to, not introduced in Punjab Pre-emption Act (1 of 1913) — Implication — 83 Pun Re 1893, Foll. Bachan Singh v. Bhupal Singh, **1965 Cur LJ 598: 67 Pun LR 849: ILR (1965) 2 Punj 706: AIR 1966 Punj 36 (38, 39) (Pt A) (Prs 8, 9, 10, 11) (FB).**

SECTION 21-A

——S. 21-A — Tenant's right of pre-emption — Punjab Security of Land Tenures Act 10 of 1953, Section 17-A — Applicability — Transfer of Property Act, Section 52 — Sale held hit by doctrine of pendente lite — Vendee becoming co-sharer subsequent to institution of suit — Plaintiff's right of pre-emption if could be defeated. See Punjab Pre-emption Act (1913), Section 15. **1964 Cur LJ 200.**

——S. 21-A —Vendee selling house before institution of pre-emption suit — Sale-deed registered after suit — Substitution of vendee's vendee takes place when the deed was executed — Doctrine of lis pndens not applicable — The plaintiff could not succeed as he had no superior right of pre-emption as against the defendent— (Registration Act (1908), S. 47) — (Transfer of Property Act (1882), S. 52). **59 Punj LR 310: AIR 1957 Punj 238 (243) (Pt F) (Pr 22) (DB).**

——S. 21-A — Improvement in status of vendee — Effect.

Sale of land to defendants 2 to 7 — Share purchased by defendant 7 who was stranger on date specified in sale deed but not the share of purchase price paid by him — Suit by plaintiff for pre-emption — Plaintiff and defendants 2 to 6 collaterals in equal degree of vendor — Defendant 7 selling his share to defendants 2 to 6 after institution of pre-emption suit — Defendants 2 to 6 having associated with defendant 7 who was stranger sank to level of a stranger — Plaintiff held had a superior right of pre-emption — Improvement in status of defendants 2 to 6 after institution of suit by purchase of share of defendant 7 cannot affect right of pre-emptor plaintiff — Sale is indivisible for purposes of pre-emption. AIR 1945 Lah 184 and AIR 1928 Lah 784, Rel. on; 19 All 148, Not Foll. **ILR (1953) Punj 631: 55 Punj LR 175: AIR 1953 Punj 128 (128) (Prs 8, 10, 14).**

SECTION 22

——S. 22 — Failure of plaintiff to deposit one-fifth amounts — Trial Court rejecting plaint on misapprehension of facts — Appeal — Discretion of trial Court — Power of appellate Court — The appellate Court is empowered to set aside the order of rejection of the plaint. See Punjab Courts Act (6 of 1918), S. 39. **AIR 1950 East Punj 264 (DB).**

——S. 22 — Section 22 as applied to Himachal Pradesh — Deposit under — Demand after settlement of issues — Plaint rejected on failure to deposit — Order held not disposal on preliminary point — Remand — Second appeal held not maintainable — Matter held could be dealt with under revisional powers— Successor Judge held could not demand deposit under S. 22 (1) after settlement of issues — Previous proceedings should be got quashed — Maintainability— (Civil P. C. (1908), O. 41, R. 23; O. 43, R. 1 (u); S. 115). **AIR 1955 NUC (Hlm Pra) 2344.**

——S. 22 — Duty of Court— Court must specify probable value of property 1/5 of which is required to be deposited as security — Plaintiff is not to be left to his own assumption on estimate — Probable value does not invariably mean price entered in sale deed — Failure to mention probable value — Order is imperfect **ILR (1952) Patiala 342: AIR 1953 Pepsu 23 (23) (Pr 1).**

●——Ss. 22, 11 — Deposit by pre-emptor in pre-emption suit — Suit dismissed — Deposit cannot be attached by creditor-decree-holder in money suit against pre-emptor — Protection of Section 11 can be waived by agreement. Maharaj Kishan Mulkh Raj v. Tara Singh, **66 Pun LR 127: ILR (1964) 1 Punj 255: AIR 1964 Punj 171 (174, 176, 177, 178) (Prs 15, 23, 27, 28, 29, 30, 31) (FB).**

——S. 22 — Court has discretion to grant extension of time for making deposit but discretion must be exercised judicially— Order passed in presence of plaintiff's counsel on date of institution of suit that deposit should be made on or before 1-5-62 — Application for extension of time made on 10-10-62 — Affidavit by counsel that order for deposit was never conveyed to him by Court and that it was not passed in his presence — **Held,** statement in affidavit that counsel was not present could not be believed — If counsel had been inattentive when order was made that was no ground to exercise leniency in matter of extension of time in making deposit which was made peremptory in pre-emption suit. Blunt v. Blunt, 1943 AC 517 and 1920 (55) IC 621, Ref. **(1963) Cur LJ 315 (Punj).**

SECTION 23

●——S. 23 (before its amendment in 1960) — Punjab Alienation of Land Act, 1900 — Re-

peal of — Consequential removal of Ss. 14 and 23 of Punjab Pre-emption Act — Substantial provision in Section 15 is not affected. See Punjab Pre-emption Act (1 of 1913) (Before its amendment in 1960), S. 15. **AIR 1963 SC 553.**

SECTION 27

——S. 27 — Decree for possession by pre-emption in respect of part of property sold — Liability of pre-emptor, for sale-price — Extent of — Pre-emptor is liable to pay market value for only that property contained in the decree — Pre-emption — Partial pre-emption. R. S. A. No. 312 of 1959 dated 21-12-1961 Reversed.

The right of pre-emption is a right of substitution, and if a plaintiff is found to have a superior right of pre-emption only in respect of a part of the property sold and gets a decree for possession in respect of that part, it would be only to the extent of the part of the property sold that there would be substitution of the plaintiff in place of the vendee. As substitution would be confined only to a part of the property sold, it seems but fair that the plaintiff should be made to pay the price which represents that part of the property in respect of which he is substituted. In such a case it is the real market, value of that portion that is to be determined and it is not a fair way of dealing with the matter to work out the value according to the total price paid as the area pre-empted may be more valuable than the rest of the land or there may be special consideration for accepting a comparatively low price. AIR 1929 Lahore 140, Foll.; 2 IC 65 and AIR 1936 All 732, Rel. on; 103 Punjab Record 1919 and AIR 1945 Lahore 11, Disting, R. S. A. No. 312 of 1959 dated 21-12-1961 Reversed.

Observation — A pre-emptor must take the sale as a whole and in case he is entitled to pre-empt the whole of the property sold he cannot be allowed to pick and choose and pre-empt only a part of the property sold which he finds to be profitable or convenient and to leave the other property, because this would militate against the rule which forbids the partial exercise of the right of pre-emption. **(1966) 68 Punj LR 128.**

SECTION 28

●——Ss. 28, 19 and 20 — Right of pre-emption — Effect of Act on the right — Section 28 enacts a convenient procedure but does not affect the substantive rights of the parties — (Pre-emption). See Punjab Pre-emption Act (1 of 1913), S. 19. AIR 1958 SC 838.

——S. 28 — More than one suit for pre-emption in respect of same sale — Each plaintiff in each suit should be joined as defendant in other suit — Non-compliance does not render decree a nullity — Objection should be raised in trial Court.

Under Section 28 when more suits than one arising out of the same sale or foreclosure are pending, the plaintiff in each suit shall be joined as defendant in each of the other suits, and in deciding the suits the Court shall in each decree state the order in which each claimant is entitled to exercise his right. This section only deals with a matter of procedure and therfore, non-compliance with it would hardly render the decree a nullity. It is only if the plaintiff in a pre-emption suit is aware of the pendency of another pre-emption suit that he is enjoined to implead the rival pre-emptor plaintiff, Mis-joinder or non-joinder of parties or causes of action (unless of course the parties are admittedly essential) is merely an error, defect or irregularity in proceedings and therefore do not by themselves affect the merits of the case or the jurisdiction of the Court. **(1959) 61 Punj LR 774.**

SECTION 30

——S. 30 — Limitation Act, S. 29. Arts. 10, 120 — Applicability — Pre-emption suits in Pepsu—Cases in Pepsu which do not fall under Art. 10 of the Limitation Act all governed by Section 30 Punjab Pre-emption Act — Cases not falling under Art. 10 or Section 30 of Punjab Pre-emption Act will be governed by Art. 120 of the Limitation Act. See Limitation Act (1908), S. 29. AIR 1956 Pepsu 17.

——S. 30 — Suit for pre-emption — Limitation —Starting point of—Suit for pre-emption of property capable of physical possession — Period starts from the date of possession. See Limitation Act (1908), Art. 10. 1965 Cur LJ 507: AIR 1966 Punj 181 (DB).

——S. 30 — Limitation Act, Art. 10 — Land sold capable of physical possession — Suit for pre-emption — Starting point of limitation — Oral sale of agricultural land — Delivery of physical possession to vendee on date of sale reported to Patwari — Patwari's report cannot be considered as evidence of the date on which delivery of physical possession took place. See Limitation Act (1908), Art. 10. AIR 1964 Punj 323.

——S. 30 — Limitation — Starting point — Sale of agricultural land — Knowledge of sale on part of pre-emptor does not cause limitation to run — Suit for pre-emption within time if filed within 1 year of date of attestation of mutation or from date when transfer of possession took place. (1964) 66 Punj LR 91.

●——S. 30 (3) — Limitation Act (1908), Articles 10, 120 — Principle underlying S. 30 and Art. 10 — Sale of property — Physical possession not possible — Art. 120 — Applicability of.

Section 30 of the Punjab Pre-emption Act, 1913, is a residuary provision excluding so far as possible Article 120 of the Limitation Act, 1908. But if the taking of physical possession of any part of the property in consequence of the sale is not possible or is not effected, S. 30 (3) can have no application. The principle underlying both Article 10, Limitation Act, and Section 30, Punjab Pre-emption Act is that of the notice afforded to the pre-emptor by the transfer of physical possession or by the registration of the sale-deed. If the transaction of sale is affected in such manner that such notice has not occurred, resort to the residuary Art. 120 is unavoidable. Kherati Ram v. Ram Lal, **53 Pun LR 147: ILR (1951) Punj 207: AIR 1951 Punj 45 (46) (Pt A) (Pr 6) (FB).**

●——S. 30 (3) — Applicability — Mortgagee in possession — Sale to him of right of redemption.

A mortgagor selling the right of redemption to the mortgagee in possession does not sell any property which is capable of physical possession within the meaning and intention of Section 30 (3) of the Punjab Pre-emption Act, 1913. In such a case the property sold is the right of redemption though the sale by the mortgagor to the mortgagee of such right to redeem has the effect of extinguishing such right and by merger of the two estates in the mortgagee the mortgagee becomes the proprietor of the property mortgaged. Hence, Section 30 (3) does not apply to a suit to enforce a right of pre-emption under the provisions of the Act in the case of

a sale of a right of redemption of urban immovable property. 9 All 234, Rel. on. Kherati Ram v. Ram Lal, **53 Pun LR 147: ILR (1951) Punj 207: AIR 1951 Punj 45 (48) (Pt B) (Pr 17) (FB).**

● **——S. 30 (3) — Applicability — Composite suit for pre-emption and redemption.**

Per Harnam Singh J. — Taking into consideration the provisions of Order 2, Rule 4, Civil P. C., it is doubtful whether a composite suit for pre-emption and redemption is competent. Assuming such a suit is competent, even then the suit brought by the pre-emptor treating the sale of the right of redemption to the mortgagee in possession as being the sale of the property itself will not be governed by Section 30 (3). For, such a suit proceeds upon two causes of action and for purposes of limitation each part of the suit is governed by different provisions of law. In deciding the application of S. 30 (3) the sole test is the nature of the property sold and the fact that the pre-emptor sues to enforce right of pre-emption treating the sale of the right of redemption of urban immovable property to the mortgagee in possession as being a sale of property itself does not bring the suit within that section. Kherati Ram v. Ram Lal, **53 Pun LR 147: ILR (1951) Punj 207: AIR 1951 Punj 45 (48) (Pt C) (Pr 21) (FB).**

SECTION 31

● **——S. 31 (as amended by Punjab Act 10 of 1960) — Right of pre-emption — Right accrued in favour of owner of estate under old Section 15 (c), Thirdly Newly substituted S. 15 abrogating this right — Retrospective effect of Section 31 — Decree passed in favour of pre-emptor owner of estate — Appeal preferred by unsuccessful vendee — Effect to provision in Section 31 has to be given by appellate Court and decree vacated.** See Punjab Pre-emption Act (Punjab 1 of 1913) (As Amended by Punjab Act 10 of 1960), S. 15. **AIR 1963 SC 553.**

● **——Ss. 31 and 15 (1) (as amended by Act 10 of 1960) — Retrospective operation of Section 31 — Applies both to rights extinguished by amendment as well as to rights newly created — Hence appellate Court must recognise in pending pre-emption matter rights newly created by amending Act.** Amir Singh v. Ram Singh, **(1963) 2 SCJ 659: (1963) 3 SCR 884.**

——S. 31 — Civil P. C., O. 41, Rr. 22, 33 — Withdrawal of appeal — Effect on cross-objections — Pre-emption decree — Appeal by decree-holder challenging amount to be paid — Cross-objection by vendee respondent praying that decree be set aside and pre-emption suit be dismissed — Amendment in pre-emption law non-suiting plaintiff, during pendency of appeal — Withdrawal of appeal — Cross-objections held not affected and survived withdrawal — Respondent held entitled to claim benefit of change in law. See Civil P. C. (1908), O. 41, R. 22. **AIR 1961 Punj 287 (DB).**

——S. 31 (as amended by Act 10 of 1960) — Applicability to pending proceedings.

The Punjab Pre-emption (Amendment) Act (10 of 1960) is applicable not only in fresh suits filed or suits pending but also in those cases in which appeals or cross-objections are pending and have not been decided. 62 Punj LR 291, Foll. **ILR (1961) 1 Punj 520: 63 Punj LR 104: AIR 1961 Punj 287 (288) (Pt A) (Prs 9, 9a, 10) (DB).**

——S. 31 — Applicability to pending proceedings — Change in law — Appellate Courts — Duty of.

An appeal is a continuation of the original proceedings and a re-hearing of the matter and is governed by a change in law.

Quite apart from the fact that a change in law after the decision of the trial Court must be given effect to by the appellate Court, with regard to pre-emption cases the law has always been that the right of pre-emption must subsist not only on the date of the sale but also on the date when the suit is brought and finally on the date when the decree is passed.

The amending Act, therefore, must be given effect to not only in fresh suits filed or suits pending but also in those cases in which appeals are pending and have not been decided.

Where, therefore, a decree on the ground of contiguity was passed by the District Judge it was held that under the Amending Act the ground of contiguity was no longer available to the pre-emptor and in view of Section 31 of the amending Act a decree in favour of the pre-emptor could no longer be passed or affirmed by an appellate Court. (1949) 1 MLJ (Sup) 49; AIR 1941 FC 5, Foll.; AIR 1955 Punj 5; ILR 36 Mad 439, Rel. on; AIR 1922 Lah 344, Dissented. **(1960) 62 Punj LR 291: ILR (1960) 2 Punj 232.**

PUNJAB PREVENTION OF FOOD ADULTERATION RULES (1955)

APPENDIX B

——App. B, Item A-11.01.01 — Mixed milk of cow and buffalo — Containing 8.2 per cent. of milk solids not fat — Mixture is adulterated. See Prevention of Food Adulteration Act (1954), S. 2 (i) (1). **1964 (2) Cri LJ 202: AIR 1964 Punj 332 (DB).**

PUNJAB PROFESSIONS, TRADES, CALLINGS AND EMPLOYMENTS TAXATION ACT (7 of 1956)

SECTION 2

——S. 2 (d) — Although a firm is not a person it is the collective name for all the partners who individually are persons and are liable to be assessed as such under Section 3 of the Punjab Act. See Punjab Professions, Trades, Callings and Employments Taxation Act (1956), S. 3. **1964 Cur LJ 543 (DB).**

——S. 2 — 'Total gross income' — Meaning of.

The expression 'total gross income' as defined in Section 2 means the aggregate of income derived from various professions, trades, callings and employments. The expression 'income' appearing in this definition is synonymous with the expressions gain, profit, revenue. Income as a subject of taxation imports an actual gain and means an increase of wealth out of which money may be taken to satisfy the pecuniary imposition made by the taxing statute. For purpose of taxation 'income' means net income and not gross income. Proposition that the expression income means all that which comes in cannot possibly be supported. (1881) 6 AC 373; AIR 1928 Mad 346 and AIR 1931 Mad 45, Foll. **(1959) 61 Punj LR 835: ILR (1960) Punj 128.**

SECTION 3

——Ss. 3 and 2 (d) — 'Person' — Partner of a firm — Position of — Liability to tax under Act — Partnership Act (1932), S. 4.

Although a firm is not a person, it is the collective name for all the partners who individually are persons and are liable to be assessed as such under Section 3 of the Punjab Act. A partner can be regarded as carrying on trade or following a profession or calling, if he does

so by entering into an agreement with other persons to share the profits of a business. Indeed, as is provided by Section 4 of the Partnership Act, it is not necessary that the business should be carried on by all of them. Even one of the partners can carry on the business acting for all. It is well known that a firm is not recognised as distinct from the members composing it. The firm as such has no legal recognition. The law looks to the partners composing it, what is called the property of the firm is their property, and what are called the debts and liabilities of the firm are their debts and their liabilities. Moreover, a member of an ordinary partnership fills a double character, he is both a principal and an agent. As a principal he is bound by what he does himself and by what his co-partners do on behalf of the firm, provided they keep within the limits of their authority; as an agent he binds them by what he does for the firm, provided he keeps within the limits of his authority. The name under which the firm carries on any business in point of law is only a conventional name applicable to the persons who on each particular occasion when the name is used are members of the firm. **1964 Cur LJ 543: ILR (1965) 1 Punj 48.**

——**S. 3** — Fiscal statute — Rule of construction — Company having no place of business or resident representatives in Punjab supplying goods to State Departments F. O. R. destination — Company cannot be held to carry on part of trade in the State — No liability to tax under Section 3 — Provisions of Sale of Goods Act not relevant. AIR 1957 SC 657, Rel. on. **1964 Cur LJ 385: 66 Punj LR 923: ILR (1964) 2 Punj 759: AIR 1964 Punj 530 (531, 532) (Prs 6, 7, 11, 12) (DB).**

——**Ss. 3 and 5 — Computation of tax — 'Gross income'.**

In computing the 'gross income' for purposes of taxation under the Act, income derived from trades or callings etc., carried on within the State of Punjab can only be taken into account. The Act does not authorise the assessing authority to take into account gross income of an assessee from a trade, calling, profession or employment carried on outside the State of Punjab. The view, therefore, that assessment of profession tax is to be made on the basis of total gross income whether earned in Punjab or outside the State of Punjab is not sustainable **(1960) 62 Pun LR 846: ILR (1961) 1 Punj 136.**

SECTION 5

——**S. 5 — 'Trade', meaning of — Cinema concerns — Are trading concerns within meaning of explanation Cl. (b) of S. 5.**

The word 'trade' is associated with the activity which an individual pursues to earn his livelihood on living. The words 'trading concern' in explanation Cl. (b) to Section 5 which have been used in contradistinction to the words 'manufacturing concern' in explanation (a), would include the business or activity of exhibiting cinematograph films in a cinema house which essentially is meant for earning profits or making a livelihood or living. Therefore cinema concerns would be covered by Explanation (b) in Section 5 and not Explanation (c) for the purpose of working out their gross profits. 61 Punj LR 309, Rel. on; AIR 1955 Sau 90 Dist. **1964 Cur LJ 543: ILR (1965) 1 Punj 48.**

——**S. 5, Explanation — As amended by Punjab Act (8 of 1960)** —Total gross income —Computation of — Partner in various firms — Gross income — Deductions allowable are only those specified in explanation. **1964 Cur LJ 543: ILR (1965) 1 Punj 48.**

——**S. 5** — Gross income for the purpose of Taxation under this Act means income derived from trade callings etc. carried on within the State — Income derived from trade callings etc. carried on outside the State is not to be taken into account. See Punjab Professions, Trades Callings and Employments Taxation Act (1956), S. 3. **(1960) 62 Pun LR 846.**

PUNJAB PUBLIC PREMISES AND LAND (EVICTION AND RENT RECOVERY) ACT (31 of 1959)

See Under Houses and Rents.

PUNJAB PUBLIC SAFETY ACT (2 of 1947)

See under Public Safety.

PUNJAB PURE FOOD ACT (8 of 1929)

SECTION 4

——**S. 4 (I) and (iii) — Applicability — Conviction under S. 13 — Essentials — Specific rules for analysis not necessary — Duty of analyst.**

For conviction under the Act all that is required is that there should be diminution of nutritive or beneficial properties of food, or there must be mixture with a substance of Lower Commercial Value than such food in a pure and normal state. Where a sample of turmeric sent to an analyst is reported to contain ash 31.45 per cent. and other inorganic and vegetable matter, it falls both under parts (i) and (iii) of Section 4 of the Act.

In all the cases where pure food is analysed, the Analyst should indicate what is the extent of impurity and what the impurity is. Merely stating that it is highly adulterated with extraneous vegetable matter is not sufficient for the purpose of determining the question of guilt or otherwise of the accused person. **59 Punj LR 17: 1957 Cri LJ 390: AIR 1957 Punj 56 (57) (Prs 4, 6) (DB).**

——**S. 4** — "Adulteration" — Tea when can be deemed to be adulterated — Either of two items mentioned in Column 4 of the Schedule to Rules established — Conviction not sustainable. See Punjab Pure Food Rules (1930) (As Amended in 1953), R. 3. **AIR 1955 NUC (Punj) 6088.**

——**Ss. 4, 13 — Adulteration — Meaning — Selling one kind of oil for other — No offence under S. 13.**

To offer linseed oil as Sarson oil is not adulteration of food within one or other of the Clauses (i), (ii) and (iii) of Section 4 as it cannot be said to fall within any one of these three clauses. There is no question of mixture or dilution extraction of substance or ingredient. It may be a clear case of cheating or at least of attempted cheating but the conviction under the Punjab Pure Food Act cannot be supported. **53 Pun LR 445: 1952 Cri LJ 492: AIR 1952 Punj 140 (141) (Pt A) (Pr 4).**

——**Ss. 4 and 13 — Sale of separated milk — If offence.**

Separated milk may be good milk, may be milk without butter and fat, or may not contain other ingredients, but the sale of separated milk does not seem to be an offence within the provisions of the Punjab Pure Food Act, 1929. **53 PLR 53: AIR 1951 Simla 13 (14) (Pr 4).**

SECTION 11

——**S. 11 (1) — Samples sent to Public Analyst and Director of Central Food Laboratory — Ad-**

missibility in evidence of latter's report — (Criminal P. C. (1898), S. 510).

According to the law in the Punjab, the report of the Public Analyst on the sample sent to him as required by S. 11 of the Punjab Pure Food Act is prima facie evidence on the facts stated therein and the report of the Director of Central Food Laboratory on a sample sent to him at the request of the accused is neither admissible nor is it allowable under the law. **59 Punj LR 89: 1957 Cri LJ 658: AIR 1957 Punj 109 (110) (Pt A) (Pr 3).**

SECTION 13

——S. 13 — Prosecution for exposure of adulterated milk for sale — Admission of adulteration — Conviction — Sustainability — Criminal P. C. (1898), Ss. 255 (2), 271 (2).

Where the prosecution is for alleged exposure of adulterated milk for sale an admission by accused that milk was adulterated does not amount to an admission that the milk had been exposed for sale, and therefore, conviction on such admission is not sustainable. The term 'sale' as defined by the Punjab Pure Food Act is very wide. Still mere possession of an adulterated article will not amount to sale. **1952 Cri LJ 141: AIR 1952 Ajmer 4 (4) (Pt B) (Pr 2).**

——S. 13 — Mere exposing adulterated milk for sale is not by itself an offence — It must be proved that such milk was sold. **1950 All LJ 28: 51 Cri LJ 1296: AIR 1950 Ajmer 47 (48) (Prs 3, 7).**

——S. 13 — Conviction based on report of Public Analyst — Report not giving exact degree of deterioration — Conviction bad.

In giving analysis of articles sent to the Public Analyst he must give exact degree of deterioration or adulteration: approximations cannot be allowed in cases of this kind. And if the only evidence on which the accused can be convicted is that of the Public Analyst then it is not sufficient to sustain the conviction when there is no exactitude in the report of the Public Analyst. **59 Punj LR 89: 1957 Cri LJ 658: AIR 1957 Punj 109 (110) (Pt B) (Pr 3).**

——S. 13 (1) — Conviction under — Essentials — Specific rules for analysis not necessary — Duty of analyst stated. See Punjab Pure Food Act (8 of 1929), S. 4 (i) and (iii). **1957 Cri LJ 390: AIR 1957 Punj 56 (DB).**

——S. 13 — Criminal P. C., Ss. 263, 264 — Trial under Section 13, Punjab Pure Food Act — Section 264 applies AIR 1942 Sind 52, Dissented from. See Criminal P. C. (1898), S. 263. **1956 Cri LJ 918: AIR 1956 Punj 160 (DB).**

——S. 13 (1) (d) — Prosecution under — Rules under the Act not in accordance with provisions of law — Prosecution, held could not stand. **54 Punj LR 493: 1953 Cri LJ 373: ILR (1953) Punj 384: AIR 1953 Punj 40 (43) (Pt C) (Pr 13) (DB).**

——Ss. 13, 4 — Adulteration — Meaning — Selling one kind of oil for other — No offence under S. 13. See Punjab Pure Food Act (1929), S. 4. **1952 Cri LJ 492: AIR 1952 Punj 140.**

——S. 13 — Criminal P. C. (1898), S. 237 — Summary trial for offence under S. 13 (1) (a), Punjab Pure Food Act, 1929 — Revision against conviction — Conviction cannot be altered into one for offence under S. 420, I. P. C. as latter offence is not triable summarily. See Criminal P. C. (1898), S. 237. **AIR 1952 Punj 140.**

SECTION 19

——S. 19 (as amended by Act of 1949) — Scope and object — Complaint against A — On his statement B proceeded against — Prosecution of B — If without jurisdiction — Section 190 (1) (c), Criminal P. C. held could not be availed of — (Criminal P. C. (1898), S. 190).

On a proper interpretation of S. 19 no Court can proceed in regard to an offence under the Pure Food Act unless there is a complaint particularising the person who has committed the offence and the nature of the article which has been sold.

Where the name is not mentioned in the complaint, S. 190 (1) (c), Criminal P. C. cannot be availed of because it is wholly a different provision and is meant to give jurisdiction to Magistrate for taking cognizance of offences. If that had been a sufficient provision or the Magistrates to take cognizance of an offence under the Pure Food Act, then there was no necessity for enacting Section 19.

Where the Food Inspector filed a complaint under the Punjab Pure Food Act against A who pleaded guilty stating that he had purchased the article from B and on that statement B was ordered to be proceeded against and ultimately on his plea of guilty was convicted:

Held, that the prosecution of B was without jurisdiction and must, therefore, be quashed. AIR 1945 FC 16; AIR 1953 Punj 120, Rel. on. **(1957) 59 Pun LR 86: ILR (1957) Punj 720.**

SECTION 22

——Ss. 22 (2) (f) and (5) — Rule under Section 22 (2) (f) regulating saccharine in ice candies held not valid, since S. 22 (5) was not complied with — Constitution of India, Art. 369 — President's Proclamation, dated 20-6-1951—Effect of, stated — Punjab State Legislature (Delegation of Powers) Act (Central Act 46 of 1951) — Effect of — Section 22 was not impliedly repealed — State Government could not frame any rule under Act. **AIR 1955 NUC (Punj) 4965 (DB).**

——S. 22 (5) — "Meeting" — Meaning of — Draft rules published within less than 30 days before commencement of session and more than 30 days before last sitting — Validity of rules made.

The expression "meeting" appearing in S. 22 (5) of the Punjab Pure Act, is wide enough to embrace not only one sitting but all the sittings within a particular session of the East Punjab Legislative Assembly. The expression has been used in its collective sense as meaning a "session". A draft of the proposed rules should, therefore, be published at least 30 days before the commencement of the session. Where the draft rules were published within less than 30 days of the commencement of the session but more than 30 days before the last sitting in the session, the rules cannot be deemed to have been validly made. **54 PLR 493: 1953 Cri LJ 373: ILR (1953) Punj 384: AIR 1953 Punj 40 (42, 43) (Pt B) (Prs 8, 9, 11, 12) (DB).**

PUNJAB PURE FOOD RULES (1930)
RULE 3

——R. 3 (as amended in 1952) — Punjab Prevention of Food Adulteration Rules (1955) App. B. Item A-11.01.01 — Mixed Milk of cow and buffalo — Containing 8.2 per cent. of milk solids not fat — Mixture is adulterated. See Prevention of Food Adulteration Act (1954), Sec-

tion 2 (i) (1). **1964 (2) Cri LJ 202: AIR 1964 Punj 332 (DB).**

——R. 3, Sch. (as amended in 1952) — Construction — Words not to be read conjunctively.

The addition of the words 'and more than 20 per cent. of stalks' by notification No. 13747-3 H. B. 52/35720, dated the 29th December, 1952, must be read disjunctively and not conjunctively. **58 Pun LR 288: ILR (1956) Punj 1160: 1956 Cri LJ 918: AIR 1956 Punj 160 (160) (Pt B) (Pr 4) (DB).**

——R. 3 and Schedule Serial No. 10 (as amended in 1953) — Tea when can be deemed to be adulterated — Either of two items mentioned in Column 4 established — Conviction cannot be sustained unless the existence of both the items is established — (Punjab Pure Food Act (8 of 1929), S. 4). **AIR 1955 NUC (Punj) 6088.**

SCH., ITEM 3

——Sch., Item 3 — Mixed milk of cow and baffalo — Standards in Punjab are those as laid down in Punjab Pure Food Rules (1930)—Mixed milk containing 4.9 per cent. of milk fat and 7.8 per cent. of milk solids other than fat — Conviction not justified. See Prevention of Food Adulteration Act (1954), S. 25 (2). **(1962) 64 Pun LR 802.**

PUNJAB REDEMPTION OF MORTGAGES ACT (2 of 1913)

SECTION 1

——S. 1 — Redemption petitions are wholly governed by Act — Civil P. C. does not apply. **('52) ILR (1952) Patiala 197: AIR 1953 Pepsu 129 (131) (Pt C) (Pr 12a) (DB).**

SECTION 4

——Ss. 4, 7 and 12 — Proceedings for redemption of land — Joint mortgagees — Service on some only — Order redeeming land is void — Suit by mortgagees for possession of land is maintainable — Section 7 not attracted—Transfer of Property Act (1882), S. 60.

In the proceedings started by the Collector for redemption of land vested in the State by escheat upon the mortgagor dying childless, the service on two out of five joint mortgagees is no service on the mortgagees to enable the Collector to pass a valid order of redemption. The order, if passed, is void and has no existence in law. It can always be ignored and no question of limitation can arise. It is also not necessary to file a suit to set aside the order and if a suit is filed by the mortgagees to recover possession of land on the ground that there was no order of redemption, they are entitled to a decree. 1959 PLR 926 and AIR 1917 Lah 443 and ILR 1903 Bom 292, Rel. on.

Where there was no application under S. 4 and no service on the mortgagees, there can be no question of an order under S. 7 being passed or of a suit being filed to challenge the order of redemption passed by the Collector. **(1963) 65 Pun LR 804.**

SECTION 12

——S. 12 — Review — Power of Collector.

A Collector when he is hearing an application for the redemption of land in a summary manner provided by the Act has no power to review his orders, and the only way in which these orders can be avoided is by having recourse to the provisions of S. 12. **ILR (1954) Punj 326: 55 Punj LR 331: AIR 1953 Punj 252 (254) (Pt D) (Pr 6) (DB).**

SECTION 13

——S. 13 — Petition ordered to be filed in record room — Petition is not "dismissed" within meaning of S. 13 — Fresh petition is not barred. **ILR (1952) Patiala 197: AIR 1953 Pepsu 129 (131) (Pt B) (Pr 12a) (DB).**

——S. 13 — Neither petitioner nor mortgagee appearing — There is no provision for dismissal of petition in such case — Petition consigned to record room — Dismissal is not under Ss. 6 to 11, which are the only provisions under which petition can be dismissed — Dismissal is not "under the Act" — Section 13 does not, therefore, apply — Fresh petition is not barred — Words "under the Act' 'qualify dismissal and not "Petition". AIR 1943 Lah 176, Rel. on. **ILR (1952) Patiala 197: AIR 1953 Pepsu 129 (131, 132) (Pt D) (Prs 12a, 13, 18) (DB).**

PUNJAB REGIONAL COMMITTEES ORDER (1957)

SCH. 3, RULE 171-A

——Sch. 3, R. 171-A — Scope — Speaker — Duty of, to submit bill to Governor — Conditions.

The contention that the Sikh Gurdwaras (Amendment) Bill as passed by the State Assembly was different from the Bill as reported by the Regional Committee and that the State Assembly was not competent to do so cannot be accepted as correct.

Under R. 171-A the Speaker is required to submit the Bill to the Governor only if he is of opinion that the Bill is passed by the Assembly in a form substantially different from that reported by the Regional Committee. The Speaker never formed such an opinion and quite naturally, therefore, he never submitted the Bill to the Governor. In a matter of this kind the Court cannot substitute its judgment for the opinion of the Speaker, but, apart from that it does not even appear that there was any difference of substance between the Bill as reported by the Regional Committee and as passed by the Assembly. **61 Punj LR 620: ILR (1959) Punj 1373: AIR 1959 Punj 623 (625) (Pt B) (Pr 7) (DB).**

PUNJAB REGISTRATION OF MONEY LENDERS ACT (3 of 1938)

See under Debts Laws.

PUNJAB RELIEF OF INDEBTEDNESS ACT (7 of 1954)

See under Debt Laws.

PUNJAB RESTAURANT (CONSUMPTION OF LIQUOR) RULES (1955)

RULE 3

——Rr. 3 and 2 (a) — Before a person can be convicted for violation of R. 3 prohibiting possession of liquor, prosecution has to prove that place from which recovery of liquor is made is 'restaurant' as defined in R. 2 (a) — Halwai's or confectioner's shop used merely for preparation or sale of food or drinks without there being any arrangement for serving customers with drink or food inside shop, is not 'restaurant'. **(1963) 65 Pun LR 1013 (DB).**

PUNJAB RESTITUTION OF MORTGAGED LANDS ACT (4 of 1938)

See under Debt Laws.

PUNJAB REQUISITIONING AND ACQUISITION OF IMMOVABLE PROPERTY ACT (11 of 1953)

SECTION 3

——Ss. 3, 8 — Requisition of premises — Criterion for determining compensation — Houses and Rents — East Punjab Urban Rent Restriction Act (3 of 1949), S. 4.

When the premises are requisitioned under the Punjab Requisitioning and Acquisition of Immovable Property Act, 1953, the compensation has to be determined on a consideration of the evidence of what the requisitioned property had been fetching by way of rent fixed by the Rent Controller under the provisions of East Punjab Urban Rent Restriction Act, 1949 prior to its requisition. This is of course a relevant piece of evidence and has to be considered along with any other material which is brought before the Arbitrator: 1960 PLR 812 (FB) and AIR 1950 East Punjab 296 (DB), Rel. on. **(1964) 66 Pun LR 187.**

——Ss. 3 (1) and 8 — Requisition and acquisition of land for public purpose — Award determining compensation — Appeal — Remand — question that Government has no jurisdiction to acquire land as it is not needed for purpose of State cannot be raised before Arbitrator after remand of case for limited purpose of re-assessing award: ILR 8 Bom 535 and AIR 1916 All 213 Rel. on. Civil P. C. (1908) O. 41 R. 23. **(1963) 65 Pun L. R. 555**

——S. 3 (1) — Acquisition of land for construction of aerodrome though strictly falling in Item 29 of Unon List, might likewise become State purpose: 1955 (2) SCR 867, Foll. — Constitution of India, Sch. 7, List 1, Entry 29. **(1963) 65 Pun LR 555.**

——S. 3 — Scope — Notice of requisition — Personal service on owner — Necessity.

Where the authority decides to requisition anybody's property it is a serious matter for the owner of the property. It is the owner of the property that should be served with a notice. An employee cannot be considered to be an officer of the person whose property is being requisitioned. Hence a notice served on such an employee of the owner, in the absence of any allegation that notice could not be served on the owner personally, is not sufficient. And in the absence of service of notice on him he cannot show cause against the proposed requisition and therefore, the requisition under S. 3 (2) of the Act must be held to be invalid. **AIR 1957 Punj 34 (35) (Prs 2, 3).**

——S. 3 — Requisition of property in actual use and occupation of owner in 1952 — Act of 1953 coming into force — Effect — Proper procedure — (East Punjab Requisitioning of Property (Temporary Powers) Act (48 of 1948), S. 3).

The property belonging to a person could be requisitioned in the year 1952 even though it was in the actual use and occupation of the owner, for neither the Act of 1948 nor the Act of 1951 imposed any limitation on the power of the Competent Authority to requisition such property so long as it was required for a public purpose. The Act of 1953, however, enacted that a house which is bona fide used by the owner thereof as the residence of himself or his family should not be requisitioned, and Section 3 prescribes the procedure which should be followed by the Competent Authority before deciding whether an order of requisition should or should not be passed. It provides that the Competent Authority shall call upon the owner of the property to show cause within a specified period of the service of notice as to why the property should not be requisitioned. If after considering the cause, if any, shown by the person interested in the property the Competent Authority is satisfied that the property ought to be requisitioned, it is open to the Competent Authority to requisition the property provided of course that the property is not in the bona fide use of the owner thereof and is not being used as the residence of himself or members of his family. The enquiry which the statute contemplates is to be undertaken by the Competent Authority constituted under the Act of 1953 and not by or under the supervision of a Court. It is not within the competence of the High Court to appropriate to itself the functions of the Competent Authority or to embark on an enquiry which the legislature says shall be made by executive officers alone. **(1957) 59 Pun LR 21: ILR (1957) Punj 409.**

——S. 3 (2) and S. 25 (2) — Applicability — Order under former Act — Former Act repealed pending proceeding — Validity of order.

In spite of representation by the petitioner stating that the house was not lying vacant and it was bona fide used as residence by himself, the District Magistrate issued the order of requisition under the East Punjab Requisitioning of Immovable Property (Temporary Powers) Act, 1948, as amended by the Act of 1951. The petitioner obtained a rule from the High Court against the order. In the meanwhile the previous Act had been repealed and a new Act, namely, Punjab Act (11 of 1953) was passed.

Held, that the order of requisitioning at the time when it was passed even though it might have been good at the time, had now to be read along with the proviso to sub-section (2) of Section 25, and as it was inconsistent with Section 3 (2) of the new Act, it could not be taken to be an order passed under the new Act and that the order could not be held to be a good order. **56 Punj LR 62: AIR 1954 Punj 144 (145) (Pr 4).**

SECTION 8

●——**S. 8 (3)**—Punjab Act (48 of 1948) replaced by Punjab Requisitioning and Acquisition of Immovable Property Act (11 of 1953) — Property acquired under 1948 Act — Compensation has to be paid in accordance with provisions of that Act. See East Punjab Requisition of Immovable Property (Temporary Powers) Act (48 of 1948), S. 5. **AIR 1961 SC 908.**

——S. 8 (2) (a) — Recurring payment for use and occupation — Determination of — Arbitrator is not bound to determine as compensation rent payable under Punjab Urban Rent Restriction Act — He is entitled to take into account the other circumstances in arriving at the figure —Any other view would render the words 'which appears to him to be just' and 'he shall have regard to the circumstances of each case' in Cl. (e) of sub-section (1) nugatory. 62 Punj LR 812, Rel. on. F. A. O. 90 of 1956, dated 8-11-1957, (Punj), Explained. **(1964) 66 Punj LR 919.**

——S. 8 (2) (b) (i) — Requisitioning of agricultural land — No evidence to show that owner had framed scheme for converting land into residential colony or had sought sanction from authorities — Rejection of claim for compensation for loss of profits which would have resulted if land had been sold as plots for building is justified — Potential value of property cannot be taken into account in awarding compensation. **(1964) 66 Punj LR 919.**

——S. 8 (1) (b) — Land Acquisition Act (1894), S. 23 (1) — Compensation for property acquired

under Punjab Act 48 of 1948—Proceeding held under Punjab Act 11 of 1953 — Compensation to be determined on principles laid down in 1948 Act — Market value of property to be determined with reference to date of acqusition and not that of requisition. See E. P. Requisitioning of Immovable Property (Temporary Powers) Act (48 of 1948), S 3. **1963 Cur LJ 272 (Punj).**

——**S. 8** — Arbitrator cannot investigate whether object of acquisition was in fact for purposes of State or not: AIR 1958 Punj 490, Rel. on. **(1963) 65 Pun LR 555.**

——**S. 8 (2) (b) (i) — Scope of — Public Officer throwing away claimant's goods in requisitioned shop — If covered.**

Section 8 (2) (b) (i) envisages a loss which is directly due to the act of requisitioning and not a loss which may be due to the tortious act of a a public officer in throwing away the goods lying in the shop requisitioned and not taking care of the same. The remedy of the claimant, if any, with regard to the loss under such head is a civil suit for damages on account of torts. **(1959) 61 Pun LR 322: ILR (1959) Punj 233.**

——**S. 8 (2) (a) — Compensation — Period for which compensation is allowable.**

The claimant is entitled to rent from the date on which actual possession was taken by the Government and up to the date on which the property was released. He is not entitled to the rent from the date on which the premises were requisitioned to the date on which possession was taken. Nor is he entitled to claim any rent on the ground that he should have been given one month's notice regarding derequisitioning. There is no such provision in the Act. **(1959) 61 Pun LR 322: ILR (1959) Punj 233.**

●——**Ss. 8, 23 and 25** — Acquisition of land — Passing of Punjab Act of 1953 during pendency of proceedings — Vested rights not affected — Compensation must be determined under Act of 1948. See East Punjab Requisition of Immovable Property (Temporary Powers) Act (48 of 1948), S. 5. **AIR 1957 Punj 209 (FB).**

——**S. 8** — Compensation — Property register produced in Court — It is relevant under S. 4 (2), East Punjab Urban Rent Restriction Act, 1949. **AIR 1955 NUC (Punj) 5393.**

SECTION 11

——**S. 11** — Proceeding for requisitioning of premises — Determination of compensation — New Act coming in force during proceeding — Determination held to be under new Act — Limitation for appeal — It must be taken to be thirty days, under new Act and not three months under repealed Act. **AIR 1955 NUC (Punj) 5393.**

——**S. 11** — Award of compensation by arbitrator — Appeal to High Court — Court-fee is payable under Sch. II, Art. 11 and not under Sch. 1, Art. 1 of Court-fees Act. See Court-fees Act (1870), S. 4. **AIR 1957 Punj 32 (DB).**

——**S. 11** — Appeal by Government in acquisition proceedings — Appeal is not an appeal against a decree as defined in Section 2 (2) of C. P. C. — Cross-objection by respondent, the owner of property acquired is not maintainable — He may apply for modifications under Section 5 (f) of E. P. Act 43 of 1948. See Civil P. C. (1908), O. 41, R. 22. **1963 Cur LJ 272 (Punj).**

SECTION 23

●——**Ss. 23, 8, 25** — East Punjab Requisitioning of Immovable Property (Temporary Powers) Act (1948), S. 5 — Acquisition of land under — Passing of Punjab Act of 1953 during pendency of proceedings — Compensation must be determined under Act of 1948 — (Punjab General Clauses Act (1898), S. 22) — (Interpretation of Statutes). See East Punjab Requisitioning of Immovable Property (Temporary Powers) Act (48 of 1948), S. 5. **AIR 1957 Punj 209 (FB).**

SECTION 25

——**S. 25 (2), Proviso (b) — Interpretation of.**

Although it is possible to argue with a certain amount of justification that the enacting part of sub-section (2) is capable of bearing the construction that any property requisitioned under the earlier Acts should be deemed to be property requisitioned under the Act of 1953 even though the order of requisition was not consistent with the Act of 1953, there are at least two factors which appear to militate against this argument. In the first place the statute declares such property shall be deemed to be property "requisitioned" under the Act of 1953 and not "duly requisitioned" under the provisions of the said Act. If the Legislature intended that all properties which were requisitioned under the provisions of the earlier Acts should, notwithstanding the repeal of those acts, be deemed to be validly requisitioned under the later Act, there was nothing to prevent it from making its intention plain by using the expression "duly requisitioned" as has been used in Section 23 instead of contenting itself by using the word "requisitioned" without a qualifying word which would have put the matter beyond the pale of controversy. Secondly, it must be remembered that sub-section (2) of Section 25 has been subjected to the proviso that any order passed under an earlier Act shall be deemed to have been passed only in so far as it is not inconsistent with the Act of 1953. The proviso is intended to restrain the previous provisions and it must therefore be assumed that the matter contained in the proviso would have been within the language of the main provisions had the proviso not been included. **(1957) 59 Pun LR 21: ILR (1957) Punj 400.**

●——**Ss. 25, 8, 23** — Acquisition of land under — Passing of Punjab Act of 1953 during pendency of proceedings — Compensation must be determined under Act of 1948 — (Punjab General Clauses Act (1898), S. 22—(Interpretation of Statutes). See East Punjab Requisitioning of Immovable Property (Temporary Powers) Act (48 of 1948), S. 5. **AIR 1957 Punj 209 (FB).**

——**S. 25 (2)** — Order made under former Act — Former Act repealed pending proceeding — Order held not to be valid. See Punjab Requisitioning and Acquisition of Immovable Property Act (9 of 1953), S. 3 (2). **AIR 1954 Punj 144.**

PUNJAB REQUISITIONING OF IMMOVABLE PROPERTY (AMENDMENT AND VALIDATION) ACT (PRESIDENT'S ACT 2 of 1951)

SECTION 3

——**S. 3** — Punjab Requisitioning of Immovable Property (Amendment and Validation) Act (2 of 1951), is not ultra vires—(Constitution of India, Art. 31 (2) and Sch. 7, List II, Item 36). See East Punjab Requisitioning of Immovable Property (Temporary Powers) Act (48 of 1948). **AIR 1953 Him Pra 5.**

SECTION 6

——**S. 6** — Punjab Requisitioning of Immovable Property (Amendment and Validation) Act (1

not ultra vires — (Constitution of India, Article 31 (2) and Sch. 7, List II, Item 36). See East Punjab Requisitioning of Immovable Property (Temporary Powers) Act (48 of 1948 as amended in 1951). **AIR 1953 Him Pra 5.**

PUNJAB REQUISITIONING OF IMMOVABLE PROPERTY (AMENDMENT AND VALIDATION) ORDINANCE (CENTRAL ORDINANCE) (4 of 1951)

——If ultra vires.

The Punjab Requisitioning of Immovable Property (Amendment and Validation) Ordinance, 1951, made under Article 213 (1) of the Constitution, is not ultra vires the powers of the President. There can be no objection to the ordinance on the ground that it validates the Punjab Requisitioning of Immovable Property Act, 1948, which has been declared ultra vires of the Governor by a judgment of the High Court. That judgment is not a judgment of the nature of those judgments set out in S. 41 of the Evidence Act. The effect of that judgment is not that the impugned Act never existed or has ceased to exist, but only that so long as the judgment is not overruled the Courts in the Punjab will decline to recognise the impugned Act. By Cl. 1 (3) of the ordinance it is provided that the ordinance shall come into force at once. The ordinance was published in Delhi under the authority of the President on the 3rd August, 1951. The ordinance must therefore be taken to have been promulgated on that date, when admittedly Parliament was not in session. **54 PLR 11: ILR (1951) Punj 480: AIR 1952 Punj 55 (57) (Pt C) (Pr 6) (DB).**

PUNJAB REQUISITIONING OF IMMOVABLE PROPERTY (TEMPORARY POWERS) ACT (17 of 1947)

SECTION 1

——S. 1 — East Punjab Requisitioning of Immovable Property (Temporary Powers), Act (48 of 1948) — Validity — Constitution of India, Art. 31 — Government of India Act (1935), Section 299.

Acquisition in case of immovable property means the permanent acquisition of the property and the passing of all title in the property acquired from the previous owner to the acquiring authority, while requisitioning means only the temporary taking possession of the property and the temporary use and enjoyment of the owner's rights by the requisitioning authority. In Article 31 (2) the words ". . . . shall be taken possession of . . . . . ." coming before the words ". . . . . or acquired . . . . . " must be intended to cover requisitioning as distinct from acquisition. Even before the Defence of India Act came into force requisitioning of land had for many years been in existence though under a different name. Hence, neither the Punjab Act of 1947 nor the Act of 1948 was ultra vires or unconstitutional on the ground that the legislature was not empowered to pass laws relating to the requisitioning of property. AIR 1946 Bom 216, Diss. from. **53 Pun LR 391: ILR (1951) Punj 438: AIR 1952 Punj 70 (76, 77) (Pt D) (Prs 7, 8, 9) (DB).**

——S. 1 — East Punjab Requisitioning of Immovable Property (Temporary Powers), Act (48 of 1948) — Validity — Constitution of India, Art. 31 — Government of India Act (1935), Section 299.

The Government of India Act of 1935 and Art. 31 of the Constitution, as well as the Lists in the Seventh Schedule, only contemplate acquisition or requisitioning for public purposes. The choice of the words "necessary or expedient" in the Acts of 1947 and 1948 was deliberate, and the Government intended to take to itself, and to delegate to its officers under Section 8 of the Acts, powers of requisitioning property wider than might be covered by the phrase "for a public purpose'. The words used in Section 3 of both the Acts are defective as they stand, and after the words "necessary or expedient" it should be necessary to insert either "for a public purpose" or "in the public interest", or some such phrase, before either the Act of 1947 could be held to be intra vires under the Government of India Act of 1935, or the Act of 1948 could be held to be intra vires under Art. 31 of Constitution. As the Acts were ultra vires the requisitioning orders passed under them are void and of no force. AIR 1951 Bom 86, Rel on. **53 Pun LR 391: ILR (1951) Punj 438: AIR 1952 Punj 70 (76, 77) (Pt E) (Prs 10, 11) (DB).**

——S. 1 — Requisition order passed under Act of 1947 — Amendment by Act of 1948 — Virtually converting former order of requisition to one under Act of 1948 — Order can be challenged under Art. 226. See Constitution of India, Art. 226. ('51) 53 Punj LR 391: AIR 1952 Punj 70 (DB).

SECTION 5

——S. 5 — East Punjab Requisitioning of Immovable Property (Temporary Powers) Act (48 of 1948), Section 5 — Validity — Constitution of India, Art 31.

There is nothing in the provision of Section 5 which excludes the payment of compensation to a tenant in a case where a tenant who is evicted in consequence of an order of requisition can make out a case that he is entitled to such compensation. This section is not ultra vires on this account. AIR 1951 Nag 33, Referred. **53 Pun LR 391: ILR (1951) Punj 438: AIR 1952 Punj 70 (74) (Pt C) (Pr 6a) (DB).**

SECTION 8

——S. 8 — East Punjab Requisitioning of Immovable Property (Temporary Powers) Act (48 of 1948), Section 8 — Validity — Constitution of India, Art 19 (5).

The High Court will not interfere under Article 19 (5) of the Constitution and hold Section 8, ultra vires on the ground that the powers of delegation were so wide as to be unreasonable, since the powers could be delegated by the Government to any officer however subordinate, unless it could be shown that the Punjab Government had obviously been using its power of delegation under these Acts in an unreasonable manner by delegating its functions under the Act to manifestly and wholly unsuitable officers, which is not the case. AIR 1951 Cal 3 Dist. **53 Pun LR 391: ILR (1951) Punj 438: AIR 1952 Punj 70 (73) (Pt B) (Pr 6) (DB).**

PUNJAB RESUMPTION OF JAGIRS ACT (39 of 1957)

See Under Tenancy Laws.

PUNJAB RULES OF BUSINESS

RULE 8

——Rr. 8 and 28 (1) — Removal or reduction in rank of an official on grave charges — Chief

Minister can call for records and pass order — Action taken under Rule 8 would be action of Government. See Constitution of India, Art. 166 (3). **AIR 1963 SC 395.**

RULE 28

●——**Rr. 28 (1), 8** — Removal or reduction in rank of official on grave charges—Chief Minister has right to call for record and pass orders. See Constitution of India, Art. 166 (3). **AIR 1963 SC 395.**

PUNJAB SECURITY OF LAND TENURES ACT (10 of 1953)

See under Tenancy Laws.

PUNJAB SECURITY OF LAND TENURES SUPPLEMENTARY RULES (1956)

See under Tenancy Laws.

PUNJAB SERVICES INTEGRATION RULES (1957)

RULE 16

●——**R. 16** — Punjab Government — Notification dated 29-9-1961 — Notification bifurcating P. E. S. Class II service into two cadres — Bifurcation affecting prevalent practice of promotion according to seniority and promoting juniors over seniors in same class — Notification held offended Rule 16 and also violated Art. 16 (1) of Constitution. See Constitution of India, Art. 16 (1). **AIR 1965 Punj 401 (FB).**

PUNJAB SHOPS AND COMMERCIAL ESTABLISHMENTS ACT (15 of 1958)

SECTION 2

●——**S. 2 (iv)** — Commercial establishment — Tea stored in depot — Salesman doing no sale of tea at depot — Depot is not commercial establishment — Salesman cannot be convicted under Section 9 read with Section 26— Question of claim of salesman's exemption under S. 3 (g) does not arise. See Punjab Shops and Commercial Establishments Act (15 of 1958), S. 26. **1963 (1) Cr LJ 459: AIR 1963 Punj 148 (FB).**

●——**S. 2 (iv) and (xxv) — Commercial establishment and shop — Common and not common features of.**

One element is common to both the expressions 'shop' and commercial establishment, namely that there have to be premises wherein, the case of a commercial establishment any business, trade or profession is carried on for profit and in the case of a shop where any trade or business is carried on or where services are rendered to customers. The carrying on of trade or business or profession necessarily has to have a close and intimate connection with the premises. The other requirement is that what should be carried on in those premises is trade or business or rendering of services to customers in the case of a shop and in the case of a commercial establishment a trade or business or profession has to be carried on for profit. If the element of rendering service is eliminated, the remaining two elements, that is carrying on of trade or business are common both to a shop as well as to a commercial establishment. But a shop according to the definition does not include a commercial establishment. Therefore, the same premises cannot be at the same time a shop as well as a commercial establishment. Ram Chander Baru Ram v. State, **65 Punj LR 1: 1963 All Cr R 39: 1963 All WR (Sup) 25: ILR (1963) 1 Punj 259: (1963) 1 Lab LJ 620: 1963 (1) Cr LJ 459: AIR 1963 Punj 148 (153) (Pt B) (Pr 11) (FB).**

●——**S. 2 (xxv) — 'Shop' — Essential feature of.**

The word 'shop' is to be taken to mean a premises where trade or business is carried on in the shape of buying and selling of goods at the spot. It is rather axiomatic that in all trades it is the buying or selling which is going on in one form or the other in presenti or in futuro or even on speculative basis. But in a shop the buying and selling is at the premises or in other words on the spot for cash consideration or may be barter, or on credit. The significant factor is the availability of the goods, there and then and so also of services. The crux of the definition of the word 'shop' in S. 2 (xxv) is that the business or trade vis-a-vis the shop is the actual buying and selling of goods and that must take place in the premises. Ram Chander Baru Ram v. State, **65 Punj LR 1: 1963 All Cr R 39: 1963 All WR (Supp) 25: ILR (1963) 1 Punj 259: 1963 (1) Cr LJ 459: (1963) 1 Lab LJ 620: AIR 1963 Punj 148 (153) (Pt C) (Prs 12, 13) (FB).**

●——**S. 2 (iv) — 'Commecial establishment' — Integrated trade or business activity must take place.**

It will be seen from the definition of the phrase commercial establishment in Section 2 (iv) that an integrated trade or business activity must take place at the given premises for profit. Activities though connected with trade or business in premises in an isolated form like the activity of a business traveller would not make the same a commercial establishment. Similarly, the residence of a business man will not become a commercial establishment merely because he is thinking out schemes and making plans to either evolve new business or to enlarge the existing one. No one can deny that it is business activity. To put it shortly, only those premises can be said to be a commercial establishment where two minds meet to strike a business deal for profit. Ram Chander Baru Ram v. State, **65 Punj LR 1: 1963 All Cr R 39: 1963 All WR (Sup) 25: ILR (1963) 1 Punj 259: 1963 (1) Cr LJ 459: (1963) 1 Lab LJ 620: AIR 1963 Punj 148 (154) (Pt D) (Pr 17) (FB).**

——**Ss. 2 (1) (iv) and 4 (d) — Commercial establishment — Includes establishments of medical practitioners — Medical profession is a profession carried on for profit — Words and phrases — 'Profit' and 'profession' — Meaning of.**

Neither the word 'profit' nor the word 'profession' has any fixed meaning and it has to be interpreted in the context in which it is used in any particular enactment.

Section 4 (d) of the Act shows that the framers of the Act in the definition of the term 'commercial establishment' used the words 'profit' and 'profession' in their wider sense. This definition included the establishment of medical practitioners and that is why a specific exemption was granted to these establishments under Section 4. Thus keeping in view the purpose of the Act and the definition of the 'commercial establishment', it cannot but be held that for the purpose of the impugned Act the medical profession is a profession carried on for profit and therefore the establishment of a medical practitioner is a commercial establishment. **64 Pun LR 113: (1962) 1 Lab LJ 592: AIR 1962 Punj 280 (284, 285) (Pt A) (Prs 17, 18) (DB).**

SECTION 3

——Ss. 3 (g), 26, 9, 2 (vi) — Commercial establishment — Tea stored in depot — Salesman doing no sale of tea at depot — Depot is not commercial establishment — Salesman cannot be convicted under Section 9 read with S. 26 — Question of claim of salesman's exemption under Section 3 (g) does not arise—ILR (1960) Punj 639, **Overruled.** See Punjab Shops and Commercial Establishments Act (15 of 1958), S. 26. **1963 (1) Cri LJ 459: AIR 1963 Punj 148 (FB).**

——S. 3 (g) — Exemption under is in respect of medical practitioners whose work is inherently intermittent and not their establishments.

The argument that as the medical practitioners are exempted from the operation of the Act, therefore, their establishments are also exempted is not tenable for Section 3 (g) only exempts persons and not the establishments. The persons employed in these institutions are not necessarily working intermittently. It is open for normal work during the normal working hours and is really open for emergent cases for practically all the 24 hours. **64 Pun LR 113: (1962) 1 Lab LJ 592: AIR 1962 Punj 280 (285) (Pt B) (Pr 20) (DB).**

SECTION 4

——Ss. 4 (d) and 2 (1) (iv) — Commercial establishment — Includes establishments of medical practitioners — Medical profession is a profession carried on for profit — Words and Phrases — "Profit" and "profession" — Meaning of, indicated. See Punjab Shops and Commercial Establishments Act (15 of 1958), S. 2 (1) (iv). **AIR 1962 Punj 280 (DB).**

SECTION 7

——S. 7 — Section is constitutionally valid. See Constitution of India, Art. 19 (1) (g). **AIR 1961 SC 1559.**

——S. 7 — Section merely covers employees and has nothing to do with employers.

Section 7 only confers benefit on the employees and in that sense it would naturally entail necessary obligations on the employers but it does not, in any way, affect the employers if they want to exceed the hours of work prescribed by this section. **(1962) 1 Lab LJ 592: 64 Punj LR 113: AIR 1962 Punj 280 (287) (Pt C) (Pr 27) (DB).**

——Ss. 7, 8, 11, 12, 13, 14, 20, 21, 30, 32 and Form B prescribed under S. 20 (1) — Validity — Provisions not ultra vires as violating fundamental right under Art. 19 (1) (g) of Constitution — Restrictions imposed are reasonable and in the interest of general public — Constitution of India, Article 19 (1) (g) and (6).

The Punjab Shops and Commercial Establishments Act is not ultra vires Article 19 of the Constitution as violating the fundamental rights of the petitioners under Article 19 (1) (g) of the Constitution.

The correct test as to the reasonableness of the restrictions imposed by the impugned Act would be whether the benefit conferred on the general public by the restriction is in proportion to the detriment resulting therefrom. If the detriment outweighs the benefit there can be no doubt that the restrictions will be unreasonable. The yard stick to judge the validity of an enactment which curtails the fundamental right to carry on one's profession freely is whether abridgment of that right is reasonably necessary in the interest of the general public.

All laws have to be administered in a reasonable manner and merely because a law can be abused is no ground to hold that the law should be struck down. Thus if the provisions of the Act are viewed with reference to the various exemptions granted by the Act itself and the notifications issued and to be issued thereunder there can be no manner of doubt that the restriction imposed on the medical practitioners under the Act cannot be said to be unreasonable. The mere fact that double the wages have to be paid under Section 12 would not amount to an unreasonable restriction on the carrying on of the work of the institution, particularly when these institutions are not charitable institutions and are really profit making institutions. **64 Pun LR 113: (1962) 1 Lab LJ 592: AIR 1962 Punj 280 (286, 288, 289) (Pt D) (Prs 24, 29, 32, 34, 35) (DB).**

SECTION 9

——S. 9 — Section is constitutionally valid. See Constitution of India, Art. 19 (1) (g). **AIR 1961 SC 1559.**

——Ss. 9, 26, 2 (iv) and 3 (g) — Commercial establishment— Tea stored in depot— Salesman doing no sale of tea at depot — Depot is not commercial establishment — Salesman cannot be convicted under Section 9 read with S. 26 — Question of claim of salesman's exemption under Section 3 (g) does not arise—ILR (1960) Punj 639, **Overruled.** See Punjab Shops and Commercial Establishments Act (15 of 1958), S. 26. **1963 (1) Cri LJ 459: AIR 1963 Punj 148 (FB).**

SECTION 11

——Ss. 11, 7, 8 12, 13, 14, 20, 21, 30, 32 and Form B prescribed under S. 20 (1) — Validity — Provisions not ultra vires as violating fundamental right under Art. 19 (1) (g) — Restrictions imposed are reasonable and in the interest of general public— Constitution of India, Article 19 (1) (g) and (6). See Punjab Shops and Commercial Establishments Act (15 of 1958), S. 7. **AIR 1962 Punj 280 (DB).**

SECTION 16

——Ss. 16 (4), 18 (1), 26— Court granting wages in lieu of unavailed leave and also compensation under Section 18 (1) to employee — Further imposition of fine under Section 26 for violating Section 16 (4) — Conviction is proper. See Punjab Shops and Commercial Establishments Act (1958), S. 26. **(1965) 67 Pun LR 210: ILR (1965) 1 Punj 615.**

SECTION 18

——S. 18 (1) — Court granting wages in lieu of unavailed leave and also compensation under Section 18 (1) to employee — Further imposition of fine under Section 26 for violating Section 16 (4) — Conviction is proper. See Punjab Shops and Commercial Establishments Act (1958), S. 26. **(1965) 67 Pun LR 210: ILR (1965) 1 Punj 615.**

SECTION 20

——Ss. 20, 7, 8, 11, 12, 13, 14, 21, 30, 32 and Form B prescribed under S. 20 (1) — Validity — Provisions not ultra vires as violating fundamental right under Art. 19 (1) (g) of Constitution — Restrictions imposed are reasonable and in the interest of general public — Constitution of India, Art. 19 (1) (g) and (6). See Punjab Shops

and Commercial Establishments Act (15 of 1958), S. 7. **AIR 1962 Punj 280 (DB).**

——S. 20 (1) and Form B prescribed thereunder — How far applicable to medical practitioners.

Most of the provisions prescribed in Form B do not apply to the medical practitioners for they have either been exempted from their application by the Act itself or by notifications issued and to be issued by the Government. Therefore, any matter in the form relating to exempted provisions need not be filled by the medical practitioners. Only those particulars have to be supplied which flow from those provisions of the Act which remain operative qua the medical practitioners. **64 Punj LR 113: (1962) 1 Lab LJ 592: AIR 1962 Punj 280 (288) (Pt E) (Pr 32) (DB).**

SECTION 26

——Ss. 26, 16 (4) and 18 (1) — Court granting wages in lieu of unavailed leave and also compensation under S. 18 (1) to employee — Further imposition of fine under S. 26 for violating provisions of Section 16 (4) — Held, conviction was proper. (1965) 67 Pun LR 210: ILR (1965) 1 Punj 615.

——Ss. 26, 9, 2 (iv) and 3 (g) — Commercial establishment — Tea stored in depot — Salesman doing no sale of tea at depot — Depot is not commercial establishment — Salesman cannot be convicted under Section 9 read with S. 26 — Question of claim of salesman's exemption under S. 3 (g) does not arise.

Held, by the Full Bench — (i) that the depot in question could not be said to be a shop within the meaning of the definition in S. 2 (xxv) in the Act; (ii) that taking into consideration the provision contained in Section 25 the storing of the goods and writing of accounts by an individual where nothing besides this was done did not make such premises a commercial establishment within the meaning of the definition in Section 2 (iv) of the Act; AIR 1955 SC 62, Rel. on. ILR (1960) Punj 639, **Overruled.** (iii) that the claim as to exemption under S. 3 (g) need be examined if it could be held that the petitioner was an employee either in a shop or a commercial establishment; but as the depot was a commercial establishment or a shop it would be futile to examine this matter any further; (iv) that the order of conviction deserved to be set aside. Ram Chander Baru Ram v. State, **65 Punj LR 1: 1963 All Cri R 39: 1963 All WR (Sup) 25: ILR (1963) 1 Punj 259: 1963 (1) Cri LJ 459: (1963) 1 Lab LJ 620: AIR 1963 Punj 148 (151, 154, 155) (Pt A) (Prs 8, 15, 18, 24) (FB).**

SECTION 30

——Ss. 30, 7, 8, 11, 12, 13, 14, 20, 21, 32 and Form B prescribed under S. 20 (1) — Validity — Provisions not ultra vires as violating fundamental right under Art. 19 (1) (g) of Constitution — Restrictions imposed are reasonable and in the interest of general public — Constitution of India, Art. 19 (1) (g) and (6). See Punjab Shops and Commercial Establishments Act (15 of 1958), S. 7. AIR 1962 Punj 280 (DB).

SECTION 32

——Ss. 32, 7, 8, 11, 12, 13, 14, 20, 21 30 and Form B prescribed under S. 20 (1) — Validity — Provisions not ultra vires as violating fundamental right under Art. 19 (1) (g) of Constitution — Restrictions imposed are reasonable and in the interest of general public — Constitution of India, Art. 19 (1) (g) and (6). See Punjab Shops and Commercial Establishments Act (15 of 1958), S. 7. AIR 1962 Punj 280 (DB).

FORM B

——From B prescribed under Section 20 (1) and Ss. 7, 8, 11, 12, 13, 14, 20, 21, 30, 32 — Validity — Provisions not ultra vires as violating fundamental right under Art. 19 (1) (g) — Restrictions imposed are reasonable and in the interest of general public — Constitution of India, Article 19 (1) (g) and (6). See Punjab Shops and Commercial Establishments Act (15 of 1958), S. 7. AIR 1962 Punj 280 (DB).

——From B prescribed under Section 20 (1) — Most of the provisions prescribed in form do not apply to medical practitioners—They have been exempted from their application either by Act itself or by notifications of Government. See Punjab Shops and Commercial Establishments Act (15 of 1958), S. 20 (1). **AIR 1962 Punj 280 (DB).**

PUNJAB SIKH GURDWARAS ACT (8 of 1925)

SECTION 3

——S. 3 — Claim as owner and cultivator. See Tenancy Laws — Punjab Tenancy Act (16 of 1887), S. 5 (1) (d). AIR 1951 Punj 336 (DB).

SECTION 5

——Ss. 5, 7, 8 and 10 — Scheduled and non-scheduled Gurdwaras — Claim to properties — Procedure.

In the case of scheduled Gurdwaras after a consolidated list is published a person can make a claim in regard to these properties under Section 5 and that has to be adjudicated upon. In regard to Gurdwaras which are not in the schedule a claim by 50 or more Sikhs has to be made under S. 7 (1) for the Gurdwara to be declared a Sikh Gurdwara and under S. 7 (2) a claim has to be made to the property claimed to be attached to such Gurdwara. If it is sought to be claimed that the Gurdwara is not a Sikh Gurdwara then a hereditary office-holder or any twenty worshippers can make the claim under S. 8 and that will be adjudicated upon. Claimants under S. 8 are those who have religious affinity with the institution and not any one else. But when the claim is to the property notified in the list then any person can put in a petition under S. 10, claiming his right, title or interest in the property and that will be adjudicated upon in accordance with the provisions of this Act which are given in Chapter III. **AIR 1951 Simla 257 (265) (Pt D) (Pr 33) (DB).**

SECTION 7

——Ss. 7 (3) and 37 — Section 7 (3), when becomes bar — Declaration by Gurdwaras Tribunal that certain Bunga is private property — Jurisdiction of Court to reagitate question — Act, if applicable.

The object of the Act is to provide a machinery for the determination of the question whether a particular Gurdwara is or is not a Sikh Gurdwara, and if the institution is not a Gurdwara at all, then the Act has no application and a notification under S. 7 (3) becomes a bar only if it is within regard to a Gurdwara. Consequently, where a declaration has been given by the Gurdwaras Tribunal that a certain Bunga is

a private property and not a Sikh Gurdwara or even a Gurdwara, a notification under S. 7 in respect of the Bunga is de hors the Act and such declaration bars not only the jurisdiction of the Courts to reagitate the question but it makes the Act inapplicable. **AIR 1950 East Punj 338 (343, 344) (Pt B) (Prs 18, 23) (DB).**

——**Ss. 7, 5, 8 and 10**—Schedule and non-scheduled Gurdwaras — Claim to properties — Procedure indicated. See Punjab Sikh Gurdwaras Act (8 of 1925), Section 5. **AIR 1951 Simla 257 (DB).**

——**Ss. 7, 17 and 18 — Applicability of S. 18 — Properties claimed under S. 7 — Notification under S. 17, if refers to such claim.**

Section 18 does not apply to a person other than an office-holder. This section comes into operation after a Gurdwara is notified under Section 17 which necessarily must imply that the notification under this section has no reference to claims which may be made by other persons in regard to properties which under S. 7 (2) were claimed by signatories to S. 7 (1) petition to belong to the Gurdwara. **AIR 1951 Simla 257 (266) (Pt E) (Pr 35) (DB).**

——**Ss. 7 (3), (5) and 36 — Notification under S. 7 (3) — Court's jurisdiction to question legality.**

There is one fundamental fact throughout the Act and that is that there has to be a Gurdwara before the Act or the machinery of the Act can be set into motion. If there has been a determination binding on both parties that a building is not a Gurdwara but a 'Bunga' or a hostel for pilgrims, the State Government cannot under the Act issue a notification that the Gurdwara is claimed to be a Sikh Gurdwara. Sections 7 (5) and 36 are no bar to the jurisdiction of the Courts in questioning the legality of a notification under Section 7 of the Act. The State Government cannot oust the jurisdiction of the Courts by merely purporting to act under a statute which has no application or exercising a jurisdiction which without the existence of a Gurdwara it did not possess. **AIR 1951 Simla 257 (268, 269) (Pt G) (Prs 50, 51, 60) (DB).**

SECTION 8

——**Ss. 8, 5, 7 and 10** — Scheduled and non-scheduled Gurdwaras — Claim to properties — Procedure indicated. See Punjab Sikh Gurdwaras Act (8 of 1925), S. 5. **AIR 1951 Punj 257 (DB).**

SECTION 10

——**Ss. 10, 5, 7 and 8** — Scheduled and non-scheduled Gurdwaras — Claim to properties — Procedure indicated. See Punjab Sikh Gurdwaras Act (8 of 1925), S. 5. **AIR 1951 Punj 257 (DB).**

SECTION 17

——**Ss. 17, 7 and 18** — Applicability of S. 18 — Properties claimed under S. 7 — Notification under S. 17, has no reference to such claim. See Punjab Sikh Gurdwaras Act (8 of 1925), S. 7. **AIR 1951 Punj 257 (DB).**

SECTION 18

——**Ss. 18, 7 and 17** — Applicability of S. 18 — Properties claimed under S. 7 — Notification under S. 17, has no reference to such claim. See Punjab Sikh Gurdwaras Act (8 of 1925), S. 7. **AIR 1951 Punj 257 (DB).**

SECTION 25-A

● ——**S. 25-A — 'Date of the constitution of the Committee'.**

Sub-section (2) of section 88, Sikh Gurdwaras Act provides with reference to committees under section 85 that as soon as all the members described therein have been elected or co-opted, the fact should be duly notified, and also declares in clear and categorical terms that the date of the publication of the notification shall be deemed to be the date of the constitution of the committee. In the face of the deeming provision relating to those committees it is not permissible to impute to such a committee any other date as the date of its constitution for any of the purposes of the Act and to imply an exception and an addendum to the specific deeming provision. This would be legislating.

The committee for all the Gurdwaras situated within the Municipal limits of Amritsar was constituted prior to the year 1930 and this committee also became the committee concerned with the Gurdwara Bunga Sarkar which is located within the Municipal limits to Amritsar. It cannot be said that this committee became concerned with the Gurdwara Bunga Sarkar only from the date when the notification under S. 17 was issued, i.e., from the 3rd March, 1937. The date of the notification under S. 17 could not in respect of such Gurdwara be deemed to be the date of the constitution of the committee concerned for the purposes of S. 25-A. Shiromani Gurdwara Parbandhak Committee v. Sardar Raghubir Singh, **57 Punj LR 264: 1955 SCJ 466: (1955) 2 SCR 67: AIR 1955 SC 455 (458) (Pr 3).**

——**S. 25-A — Condition precedent to suit under section.**

A decision that a right, title or interest in immovable property belongs to a Sikh Gurdwara is a condition precedent to a suit under S. 25-A and if there is no such decision in favour of the plaintiffs the suit is incompetent. **AIR 1951 Simla 257 (268) (Pt F) (Pr 46) (DB).**

——**S. 25-A — Terminus a quo under section.**

The terminus a quo under S. 25-A is the date of the decision or the date of the constitution of the committee. Where the suit is brought more than one year after the date of the decision and the date of the constitution of the committee was before that date, the terminus a quo cannot be taken to be the date when the committee formed under S. 85 (2) took charge of the Gurdwara in dispute and began to function under S. 41. **AIR 1951 Simla 257 (274) (Pt M) (Pr 80) (DB).**

SECTION 29

● ——**S. 29 (2) — Applicability — Bar of jurisdiction of Civil Court.**

The exclusion of jurisdiction of the Civil Court in respect of a suit or an issue which is normally within its competence can be brought about only by clear and unambiguous language or by the necessary implication thereof.

In S. 29 (2) of the Punjab Sikh Gurdwaras Act the clause "unless and until it has been decided under the provisions of S. 16 that such Gurdwara should not be declared a Sikh Gurdwara" applies to a situation where proceedings involving the determination of the issue of "Gurdwara or Sikh Gurdwara" come up before the Tribunal by virtue of S. 14 or S. 32.

The effect of S. 29 (2) being, not to exclude jurisdiction, but to operate only as a limited stay until a specific issue is determined by the Tribunal, it does not apply to a case where there is no scope for the determination of such an

issue by the Tribunal under prescribed machinery of the Act. Shiromani Gurdwara Parbandhak Committee, Amritsar v. Raja Shiv Rattan Dev Singh, **(1955) 2 SCR 67: ILR (1955) Punj 1108: AIR 1965 SC 576 (580) (Pt B) (Pr 8).**

——S. 29 (2) — Question whether Gurdwara is Sikh Gurdwara — Determination of question by Civil Court is not barred by section — Civil P. C. (1908), S. 9. AIR 1950 East Punj 338 (344, 345) (Pt C) (Prs 25, 31) (DB).

SECTION 31

——S. 31 (2) — Question whether Gurdwara is Sikh Gurdwara — Civil Court's jurisdiction to determine question — Civil P. C. (1908), S. 9.

The Act contemplates the determination by a Civil Court of the question whether a Gurdwara is or is not a Sikh Gurdwara, whether the property claimed under S. 10 does or does not belong to the claimants, and whether compensation can or cannot be given to a claimant. **AIR 1950 East Punj 338 (345) (Pt D) (Pr 28) (DB).**

SECTION 36

——Ss. 36, 37 — Scope and effect of — Property claimed by Gurdwara under S. 3 — Rival claims by B and K — Consolidation — Finding of Tribunal that property was wakf property under management of B as descendant of one S — Subsequent suit by B against K for possession — K if can plead that B was not descendant of S and as such not entitled to maintain suit.

The bunga in dispute was notified under Section 3 of the Punjab Sikh Gurdwaras Act as property claimed by the Golden Temple. This led to four claims by J. D. K. and B, all of which were consolidated and dealt with under S. 15 as one proceeding. B's case was that the bunga was built by his ancestor Shersingh for spiritual and worldly benefit of their offspring and was in his possession and that of his ancestors and should be declared to be the property of his family. The Tribunal held that the bunga was not the property of the Golden Temple and that the bunga was wakf property under the management of the descendants of the Maharaja Shersingh. B's claim as descendant of Maharaja Shersingh was never disputed either before the Tribunal or before the High Court, in an appeal under S. 34 of the Act which was dismissed and thus the finding that B was the descendant of Shersingh became final. B then filed a suit for possession and ejectment of K. The question for determination in this suit was whether K was debarred from denying B's title as the descendant of Shersingh in the bunga in view of the decision of the tribunal and that of the High Court.

Held, that in view of Ss. 36 and 37 it would not be open to any Court now to give a decision which will go against the decision of the tribunal and, therefore, K was debarred under Sections 36, 37 of the Act from raising the question whether B was the descendant of Shersingh and as such entitled to maintain the suit. Kesar Singh v. Balwant Singh, **(1962) Supp (1) SCR 325: AIR 1967 SC 487 (493) (Pt A) (Pr 15) (SC).**

——Ss. 36 and 7 (3) (5) — Existence of Gurdwara, if necessary for notification under S. 7 (3) — Sections 7 (5) and 36 are no bar to Court's jurisdiction to question legality of notification. See Punjab Sikh Gurdwaras Act (8 of 1925), Section 7 (3) (5). AIR 1951 Punj 257 (DB).

SECTION 37

——Ss. 37, 36 — Scope and effect of — Property claimed by Gurdwara under S. 3 — Rival claims by B ank K — Consolidation — Finding of tribunal that property was wakf property under management of B as descendant of one S —Subsequent suit by B against K for possession — K cannot plead that B was not descendant of S and as such not entitled to maintain suit — See Punjab Sikh Gurdwaras Act (8 of 1925), Section 36. AIR 1967 SC 487.

——Ss. 37, 7 (3) — Section 7 (3) when becomes bar — Declaration by Gurdwaras Tribunal that certain Bunga is private property — Jurisdiction of Court to reagitate question is barred — Act is also not applicable. See Punjab Sikh Gurdwars Act (1925), S. 7 (3). AIR 1950 East Punj 338 (DB).

——S. 37 — Tribunal, if Court.

The Tribunal under the Act is a Court within the meaning of that word as used in S. 37 of the Act, which has all the attributes of a Court and exercises judicial powers but is only a Court of a limited and special jurisdiction. **AIR 1951 Simla 257 (270) (Pt H) (Pr 64) (DB).**

——S. 37 — Proceedings under S. 5 — Compromise decree — Subsequent suit under S. 25-A — Bar of suit — Civil P. C. (1908), S. 11.

A compromise and a decree passed thereon in a proceeding under S. 5 of the Act will bar a subsequent suit under S. 25-A of the Act between the same parties under S. 37. Even if S. 11, Civil P. C., does not in terms apply the principles of res judicata will apply. **AIR 1951 Simla 257 (275) (Pt I) (Pr 83) (DB).**

SECTION 41

——S. 41 — Section 41 is merely directory and is not imperative. AIR 1951 Simla 257 (272) (Pt J) (Pr 74) (DB).

——S. 41 — Proceedings under S. 5 of Act — Compromise — Decision on question of ownership if militates against S. 41 — Estoppel — Evidence Act (1872), S. 115.

Where under compromise in a proceeding under S. 5 of the Act between the owners of a Banga and the Committee of Management the Banga instead of being the private property of the owners became trust property, the legal title to which, but not the beneficial interest, vested in them as trustees and they were to exercise certain rights, in a suit by the Committee under S. 25-A of the Act:

Held, that neither the decision on the question of ownership nor the question of management in any way militated against S. 41 and the Committee was estopped from challenging the compromise and could not ask for possession of the property on the ground of its belonging to a Sikh Gurdwara as it induced the owners to give up their rights of ownership and gave them an assurance that their possession would not be disturbed. **AIR 1951 Simla 257 (278) (Pt K) (Pr 77) (DB).**

SECTION 52

——Ss. 52, 148-B (as amended in 1959) — Act does not offend against Art. 26 of the Constitution — Constitution of interim Board under Section 148-B — Does not amount to interference in religious matter by non-Sikhs — (Constitution of India, Art. 26). See Punjab Sikh Gurdwaras Act (8 of 1925) (as amended in 1959), S. 148-B. AIR 1959 Punj 623 (DB).

SECTION 64

——S. 64 — Member of board getting scholarship for his son — **Held** there was no dereliction of duty within S. 142. See Punjab Sikh Gurdwaras Act (8 of 1925), S. 142. **(1957) 59 Pun LR 410.**

SECTION 85

——S. 85 (2) — Member of board getting scholarship for his son — **Held** there was no dereliction of duty within S. 142. See Punjab Sikh Gurdwaras Act (8 of 1925), S. 142. **(1957) 59 Pun LR 410.**

SECTION 89

——Ss. 89, 96 (1) and 146 — **By-election — Power of State Government to interfere retrospectively with process of election after changing limit of constituency — (Sikh Gurdwaras Committee Election Rules (1954), R. 4).**

The proviso to S. 89 (1) of the Act certainly grants powers to the Government to alter the local limits of the constituency but this alteration cannot be held to operate retrospectively so as by itself to reopen the proceedings which have already been taken in pursuance of the notice calling upon the constituency to elect members of the Committee. Such an alteration can only operate prospectively. There is no provision of the Act or of the Rules under which the Elections Commissioner or the State Government is empowered after various steps in the process of election have been duly and properly taken, to ignore or cancel them and to order a fresh election to be held on the basis of the altered constituency. In the absence of an express provision of law or of binding authority or of some other compelling reason of the provisions of the proviso to section 89 (1) and of subrule (3) of R. 4 cannot be construed in such a way as to confer by implication such extraordinary and uncontrolled power on the Government to interfere retrospectively with the process of election. **60 Pun LR 148: ILR (1959) Punj 67: AIR 1959 Punj 24 (26, 27) (Prs 10, 11, 12) (DB).**

SECTION 96

——S. 96 (1) — Rules under S. 146, R. 4 — By-election under S. 96 (1) — State Government has power to interfere retrospectively with process of election after changing limits of constituency — (Sikh Gurdwaras Committee Election Rules (1954), Rule 4). See Punjab Sikh Gurdwaras Act (8 of 1925), S. 89. **AIR 1959 Punj 24 (DB).**

SECTION 142

——S. 142 — Applicability — Petition by clerk on ground that his transfer was abuse of powers of Secretary — Held, Gurdwara Judicial Commissioner had no jurisdiction to entertain it. (1962) 64 Pun LR 446: ILR (1962) 2 Punj 111.

——S. 142 — Scope — **Abuse of position by President or Vice-President — Amounts to abuse as member of committee.**

Section 142 includes malfeasance, misfeasance or misconduct of a member not merely in his capacity as a member but also in his capacity as president or vice-president of the committee of management. The view that when a member in his capacity as a member is elected as president to or vice-president and he abuses his position as such, it would not amount to an abuse of position as a member of the committee is wrong. A member only gets some added powers when he is elected as president or vice-president and when he abuses those powers, it would amount to abuse of powers as a member. (1960) 62 Pun LR 906.

——Ss. 142, 64 and 85 (2) — Member of board getting scholarship for his son —Held there was no dereliction of duty within S. 142.

The petitioner made an application against one R to the Judicial Commission under S. 142, Sikh Gurdwaras Act for recovery of money and for other reliefs on the allegation that he had by abusing his powers as a member of the Board received monetary advantage of Rs. 610 which was paid to his son by way of cash grants from the funds of the S. G. P. C. and he had thereby incurred disability given under Section 142 of the Sikh Gurdwaras Act.

The whole of the evidence led by the parties disclosed that the scholarships were given by the Executive Committee of which H was neither a member nor was it shown that he had in any way influenced the exercise of the discretion.

Held, that though it may be said that it is not right for sons of members to get scholarships from the S.G.P.C. but an impropriety of this kind will hardly come within dereliction of duty imposed by Sec. 142, Sikh Gurdwaras Act. Merely because some payments were made before the annual General Meeting cannot necessarily lead to the conclusion that H got the scholarship for his son as a price for voting for a certain person or a set of persons for which there is neither proof nor does anything on the record lead to that inference.

According to Section 64 the Executive Committee of the Board of which the appellant was not a member has all the powers conferred on the Board itself, and the words in the section are, shall exercise, and therefore it cannot be said that any power exercised by the Committee of the Board was power exercised by the Board itself for the purposes of taking action under Section 142. (1957) 59 Pun LR 410: ILR (1957) Punj 605.

SECTION 146

——S. 146 — Rules under R. 4 — By-election — State Government has power to interfere retrospectively with process of election after changing limits of constituency. See Punjab Sikh Gurdwaras Act (8 of 1925), S. 89. AIR 1959 Punj 24 (DB).

SECTION 148-B

——S. 148-B — Validity — Principle of direct election on universal denominational suffrage — If matter of religion — (Constitution of India, Art. 26 (b)).

Section 148-B of the Punjab Sikh Gurdwaras Act, 1925, which was added to the principal Act by the Sikh Gurdwaras (Amendment) Act, 1959, does not contravene the fundamental right granted to the Sikhs under Art. 26 (b) of the Constitution.

Section 148-B has not in any way affected whatever powers the Board or Committee has under Ss. 133 and 134 of the principal Act. In order to hold, that Sec. 148-B introduces even though as a temporary measure, some more designated Sikh

members into the Board by Cl. (a) of sub-sec. (1) thereof and further introduces the election of thirty-five Sikhs (from the Pepsu area) into the Board by means of an indirect method, that is, by a limited Sikh electorate, the members of which electorate are in their turn elected by Sikhs as well as non-Sikhs, it must be proved not merely that some provisions of the principal Act refer to matters of religion but that the introduction of new members into the Board in respect of the extended territories of the Pepsu area, in the manner envisaged by Sec. 148-B, violates by itself the right of the Sikhs in a matter of religion.

The principle of direct election on universal denominational suffrage cannot be raised to the pedestal of religion within the meaning of Art. 26 (b) of the Constitution. So also any restrictions which the principal Act or the rules made thereunder may impose in the matter of election or the exercise of the vote, such as, restrictions with regard to the age of the voter, etc. Obviously, these are not matters of religion and to treat these as matters of religion is tantamount to confusing religion with current politics.

The principal Act contained a provision before 1953 for nomination of 12 members by the Rajpramukh of Pepsu and after 1953, the co-opted members included twelve residents of Pepsu. By an order of the Maharaja of Patiala the Interim Gurdwara Board, Patiala, was constituted to look after certain Gurdwaras of the Pepsu area, and after merger the appointment was made by the Governor of the Punjab. Under Sec. 148-A which was also added to the principal Act by the amending Act of 1959 the Interim Gurdwara Board, Patiala, has ceased to function, and under S. 148-B (1) (a) the memebers of the Interim Board, Patiala, have become members of the Board constituted under Sec. 43. The designation of such members, as an interim measure, to represent those Gurdwaras in the Pepsu area which they were actually managing is not violative of any fundamental right; nor does the non-application of the disqualifications stated in Ss. 45 and 46 of the Act to these members advance the case of the petitioners any further. The circumstance that some members of the electorate detailed in Sec. 148-B (2) are in their turn elected by constituencies of Sikhs and non-Sikhs is far too remote and indirect to constitute an infringement of freedom of religion. The members of the electorate itself are all Sikhs and they have to elect thirty-five Sikhs. Unless one proceeds mechanically on mere abstract considerations, there is no real basis for the contention that non-Sikhs can in any way influence the Board. It cannot be said that Sikh Sarpanches and Naya Pradhans are in the service of Government or that their inclusion as members of the electorate violates the right of the Sikhs under Art. 26 (b) of the Constitution. Sarup Singh v. State of Punjab, (1959) SCJ 1115: (1960) 1 SCA 163: (1959) Supp (2) SCR 499: AIR 1959 SC 860 (866, 867) (Pt C) (Prs 9, 10, 11, 12).

——Ss. 148-B and 52 (as amended in 1959) — Validity — If offends against Art. 26 of the Constitution — If amounts to interference in religious matter by non-Sikhs — (Constitution of India, Art. 26).

The contention that the Sikh Gurdwaras Act, 1925, as amended by the Amending Act of 1959, offends against Art. 26 of the Constitution as it interferes with the right of a religious denomination to manage its own affairs and to administer its property cannot be accepted. The election of 35 new members of the interim Board under Sec. 148-B (2) does not amount to interference in Sikh religious affairs by non-Sikhs it being perfectly clear that none of the electors and none of the members of the Board can ever be a non-Sikh. The introduction of the nominees of the Governor in the interim Board does not offend against the right of Sikhs to manage their own religous affairs: AIR 1954 SC 282 and AIR 1954 SC 388, Distinguished.

The Act does not contemplate that anybody suffering from any of the disabilities mentioned in Sec. 45 or S. 46 can remain a member of the Board and no question of any discrimination therefore arises. Regarding the members to be now elected the rules framed by the Governor have further clarified this matter, and R. 5 provides for the nomination of a candidate for election only of a person 'not ineligible for membership of the Board under the provisions of sub-secs. (1), (2-A) and (3) of Sec. 45 of the Act so that nobody suffering from any disability contained in the Act can stand for election. **61 Punj LR 620: ILR (1959) Punj 1373: AIR 1959 Punj 623 (624, 625) (Pt A) (Prs 4, 5, 6) (DB).**

PUNJAB SMALL TOWNS ACT (2 OF 1921)

See under Municipalities.

PUNJAB SMALL TOWNS APPOINTMENT, SUSPENSION AND DISMISSAL RULES (1925)

See under Municipalities.

PUNJAB SMALL TOWNS BUSINESS RULES (1924)

See under Municipalities.

PUNJAB SPECIAL POWERS (PRESS) ACT (38 OF 1956)

SECTION 2

●——S. 2 — Validity of — Section held, had not imposed total prohibition upon exercise of fundamental rights. See Constitution of India, Art. 19 (1) (a). AIR 1957 SC 896.

●——Ss. 2, 3 (1) — Constitution of India, Arts. 19 (1) (a), 19 (1) (g), 19 (2), 19 (6) — Reasonableness of restrictions — Test of — S. 2 must be held to have imposed reasonable restrictions on exercise of rights under Arts. 19 (1) (a) and 19 (1) (g). See Constitution of India, Art. 19 (1) (a). AIR 1957 SC 896.

●——S. 2—Delegation of discretion to State Government or its executives — Section not invalid as conferring wide powers. See Constitution of India, Art. 245. AIR 1957 SC 896.

SECTION 3

●——S. 3 — Section held had not imposed total prohibition upon exercise of fundamental rights. See Constitution of India, Art. 19 (1) (a). AIR 1957 SC 896.

●——Ss. 3 (1), 2 — Constitution of India, Arts. 19 (1) (a), 19 (1) (g), 19 (2), 19 (6) — Reasonableness

of restrictions — Test of — S. 3 held ultra vires State Legislature. See Constitution of India, Art. 19 (1) (a). AIR 1957 SC 896.

●——S. 3 — Delegation of discretion to State Government or its executives — Section not invalid as conferring wide powers. See Constitution of India, Art. 245. AIR 1957 SC 896.

PUNJAB STATE AID TO INDUSTRIES ACT (5 OF 1935)

SECTION 20

——S. 20—Priority of State Debt—Debt secured by mortgage deed but not registered under S. 125 — State not entitled to preferential treatment — Cannot recover as arrears of land revenue. See Companies Act (1956), S. 530. AIR 1962 Punj 519.

SECTION 35

●——S. 35 — Section is not repugnant to Art. 14 of the Constitution. See Constitution of India, Art. 14. AIR 1959 Punj 19 (FB).

PUNJAB STATE LEGISLATURE (DELEGATION OF POWERS) ACT (CENTRAL ACT 46 OF 1951)

SECTION 1

——S. 1 — President's Proclamation dated 20-6-1951 and passing of Punjab Act 46 of 1951 — Subject to certain conditions, powers and functions of Punjab Legislature held transferred to President. See Punjab Pure Food Act (8 of 1929), S. 22 (2) (f). AIR 1955 NUC (Punj) 4965 (DB).

PUNJAB SUPPRESSION OF IMMORAL TRAFFIC ACT (4 OF 1935)

SECTION 5

——S. 5 — Evidence of only one visit to woman — Conviction held not proper.

Where, in a case under Sec. 5, all that the prosecution evidence showed was that on one occasion the witness went to the house of the woman, paid Rs. 10 to her husband and had sexual intercourse with her. Held, that it was not proved that the accused knowingly lived wholly or in part on the earnings of prostitution of his wife and he was entitled to acquittal. (The practice of getting persons to go and commit sexual intercourse with wives of poor persons in order to prove offences under Suppression of Immoral Traffic Act deprecated). ILR (1956) Punj 1371.

PUNJAB TAHSILDARI RULES (1932)

RULE 1

●——R. 1 — Punjab Land Revenue Act (17 of 1887), Ss. 9 and 28 — Rules under — Rules continued to remain in force even after Act was amended by Government of India (Adaptation of Indian Laws) Order, 1937—Dismissal of Tahsildar from service — Order passed by Financial Commissioner in 1953 — Order held valid. See Punjab Land Revenue Act (17 of 1887), S. 9. AIR 1962 SC 219.

——R. 1 — Scope — Amendment of, by Adaptation Order, 1937 — Rules held, continued to be in force — Powers of Financial Commissioner not affected. See Punjab Land Revenue Act (17 of 1887), S. 9. AIR 1960 Punj 168 (DB).

RULE 7

●——R. 7 (as applied to former State of Pepsu) — Reduction in rank — Punjab Tahsildari Rules (as applied to former State of Pepsu), R. 7—Officiating Tahsildars in State of Pepsu confirmed as Tahsildars although no posts were available for confirmation — Supernumerary posts of Tahsildars created subsequently by Rajpramukh of Pepsu to provide liens for confirmed Tahsildars — Merger of Pepsu with Punjab under States Reorganization Act — Subsequent order of successor (Punjab) Government, cancelling previous order of confirmation —Validity — Art. 311 (2) not attracted—Successor Government competent under Sec. 116 (2) of the States Reorganization Act to deprive respondents of status of permanent Tahsildars. See Constitution of India, Art. 311 (2). AIR 1964 SC 521.

PUNJAB TENANCY ACT (16 OF 1887)

See under Tenancy Laws.

PUNJAB TEXTILES AND SUGAR (EXISTING STOCKS) PURCHASE TAX AND MISCELLANEOUS PROVISIONS ACT (8 OF 1958)

SECTION 6

——Ss. 6 and 8 — Assessee filing return of existing stock within contemplation of Punjab Ordinance No. 9 of 1957 on 28-1-58 and depositing certain sum on 28-3-58 on basis of return—Assessing authority issuing statutory notice to assessee on 6-6-1958 requiring his appearance on 19-6-58 — Legal representative of assessee appearing and praying for adjournment — Subsequent assessment on 29-11-1961 — Assessing authority contending that assessment was under S. 6 — Held, assessment was not vitiated by any patent error of law. (1963) 65 Pun LR 831.

SECTION 8

——S. 8 — If refusal to disallow composition is not contrary to law, then it cannot be described to be manifestly unjust. Constitution of India, Art. 226. (1963) 65 Pun LR 831.

SECTION 14

——S. 14 (2) — Sec. 14 (2) does not in terms prohibit disposal of appeal without payment of tax assessed, if dealer satisfies appellate authority his inability to pay same. (1963) 65 Pun LR 831.

PUNJAB TOBACCO VEND FEES ACT (12 OF 1954)

SECTION 1

●——S. 1 — Two taxes on same commodity by earlier and later Acts — Repeal of earlier Act by later Act not to be implied. See Interpretation of Statutes — Tax Laws. AIR 1962 SC 745.

——S. 1 — Act is valid. See Constitution of India, Art. 19 (1) (g). AIR 1967 Punj 45 (DB).
[Overruled in AIR 1962 Punj 267 (FB).]

SECTION 4

——S. 4 — Imposition of fees — Imposition not in excess of — Purpose — Act and rules not invalid. See Constitution of India, Art. 19 (6). AIR 1957 Punj 45 (DB).
[Overuled in AIR 1962 Punj 267 (FB).]

——S. 4 — Imposition of fees — Fees received in treasury and not earmarked — Imposition does not cease to be of nature of fees. See Constitution of India, Art. 19 (6). AIR 1957 Punj 45 (DB).
[Overruled in AIR 1962 Punj 267 (FB).]

——S. 4 — Section is valid. See Constitution of India, Art. 14. AIR 1957 Punj 45 (DB).
[Overruled on another point in AIR 1962 Punj 267 (FB).]

PUNJAB TOBACCO VEND FEES RULES (1955)

RULE 4

——R. 4 — Imposition of fees — Imposition not in excess — Rule not invalid. See Constitution of India, Art. 19 (6). AIR 1957 Punj 45 (DB).
[Overruled in AIR 1962 Punj 267 (FB).]

——R. 4 — Tax or fees — Income from licence fees under Punjab Act of 1954 — Income not earmarked — Imposition does not cease to be of nature of fees. See Constitution of India, Art. 19 (6). AIR 1957 Punj 45 (DB).
[Overruled in AIR 1962 Punj 267 (FB).]

——R. 4 — Classification of and discrimination between dealers — Rule held to be valid. See Constitution of India, Art. 14. AIR 1957 Punj 45 (DB).
[Overruled on another point in AIR 1962 Punj 267 (FB).]

PUNJAB TOWN IMPROVEMENT ACT (4 OF 1922)

See under Municipalities.

PUNJAB TRADE EMPLOYEES ACT (10 OF 1940)

SECTION 2

——S. 2 (d) — Applicability — Petitioner not working either in shop or clerical establishment — Rights to benefit of Act.

Where the petitioner is an artisan working in a hosiery mill but he is working neither in a shop attached to the said mills nor in the clerical department thereof, the portion of the factory to which he is attached is not a commercial establishment within the meaning of S. 2 (d). It follows as a consequence that the petitioner is not entitled to the privileges admissible under the Punjab Trade Employees Act. (1957) 12 FLR 49 (Punj).

——S. 2 (1) (d) and (p) — Scope — Expression "shop", "Commercial establishment" and "Trade or business" — Meaning — Premises used as godown-cum-office wherein goods meant for sale in market stored and account thereof kept and correspondence with branch office also carried on — Premises are "Commercial establishment".

The definition of the word "shop" in S. 2 (1) (p) of the Punjab Trade Employees Act and the expression "Trade or business" as used in the definition of "shop" and of "commercial establishment" in Sec. 2 (1) (d) are broad and comprehensive. The object of the Act is to limit the hours of work of shop assistants and commercial employees and to make certain regulations concerning their holidays, wages and terms of service and being a welfare legislation the definitions of "shop" and "commercial establishment" have deliberately been couched in wide language, so that the human and beneficial purposes and the long-range social objective of the measure may be effectively accomplished. Being an enactment responsive to the social and economic needs of the society, the word "shop" and the expression "commercial establishment" have to be given a liberal meaning. AIR 1955 SC 62, Dist.; (1938) 1 KB 715, (1954) 1 QB 77, (1922) 1 KB 693, AIR 1924 Lah 213, AIR 1927 Lah 328, AIR 1936 Cal 477, (1944) 1 KB 106 and AIR 1954 Mad 892, Ref.

Certain premises occupied by a tea company were used as godown-cum-office. Goods meant for sale in the market were received and stored there and the account thereof was kept there. Correspondence with the branch office of the company also used to be carried on in the premises.

Held, that the premises fell within the definition of "commercial establishment" in S. 2 (1) (d). ILR (1960) 1 Punj 639.
[Overruled in AIR 1963 Punj 148 (FB).]

SECTION 2-A

●——S. 2-A (as amended in 1943) — S. 2-A (1) does not control S. 7 (1). See Punjab Trade Employees Act (1940), S. 7 (1). 52 Cri LJ 1237: AIR 1951 SC 315.

——S. 2-A —Scope of S. 2-A — S. 7 (1), Punjab Trade Employees Act does not contravene Art. 14 of Constitution. See Constitution of India, Art. 14. (1956) 58 Pun LR 528.

SECTION 2-B

——S. 2-B — Scope of S. 2-B — S. 7 (1), Punjab Trade Employees Act does not contravene Art. 14 of Constitution. See Constitution of India, Art. 14. (1956) 58 Pun LR 528.

SECTION 2-C

——S. 2-C — Scope of S. 2-C — S. 7 (1), Punjab Trade Employees Act does not contravene Art. 14 of Constitution. See Constitution of India, Art. 14. (1956) 58 Pun LR 528.

SECTION 7

●——S. 7 (1) — Validity — Constitution of India, Art. 19 (6).

The legislation is in effect the exercise of social control over the manner in which business should be carried on regulated in the interests of the health and welfare not merely of those employed in it but of all those engaged in it. The restriction imposed by the terms of S. 7 (1) is with a view to secure this purpose and would, therefore, be clearly saved by Art. 19 (6) of the Constitution even in its application to the shops entirely conducted by the owner and his family.

Restrictions in regard to acts though innocent in themselves would be reasonable, if the same were necessary to secure the efficient enforcement of valid provisions. The inclusion of a reasonable margin to ensure effective enforcement will not stamp a law with the character of unconstitutionality as being unreasonable. The provisions of Sec. 7 (1) could, therefore, be justified as for securing administrative convenience and for the proper enforcement of it without evasion. AIR 1951 SC 315, Rel. on; ILR (1957) Punj 155, Affirmed. Manohar Lal v. State of Punjab, **(1961) 2 SCJ 17: (1961) 2 Fac LR 107: (1961) 2 SCR 343: (1962) 1 SCR 265: (1961) 2 Ker LR 109: 1961 Mad LJ (Cr) 385: (1961) 2 Andh WR (SC) 13: (1961) 2 Mad LJ (SC) 13: (1961) 2 Lab LJ 67: 63 Punj LR 660: (1960-61) 19 FJR 221: 1961 (1) Cr LJ 570: AIR 1961 SC 418 (419, 420) (Prs 4, 5, 6).**

●——**Ss. 7 (1) and 2-A (as amended in 1943) — S. 7 (1) is intra vires — Government of India Act (1935), Sch. VII, List II, Item 27 and List III, Item 27 — Constitution of India, Sch. VII, List II, Item 26 and List III, Items 24 and 33.**

The subject-matter of S. 7 (1) of the Punjab Trade Employees Act is covered by Sch. 7, List II, Item 27 and List III, Item 27 of the Government of India Act and as such is intra vires.

The impugned section is a general one and applies to all kinds of shops; that is to say, to those in which labour is employed as well as to those which are run by the owners and their families. The Act in which the section occurs is directed at regulating the hours of employment of persons who are employed in the business of shops or commercial establishments. Therefore, in so far as S. 7 covers establishments where labour is employed, it is undoubtedly intra vires.

Where a shop is run only by the owner and his son without employment of any labour, the mere fact that Cls. (i) and (j) of S. 2-A exempts persons employed in managerial capacity and the members of the family of the employer from the purview of the Act cannot give the owner or the son the right to keep the shop open on a close day. Even where the owner of the shop and the manager are the same, the two capacities will have to be separated for purposes of S. 7 (1) under which the owner is obliged to close his shop one day in a week. S. 2-A (i) does not control S. 7 (1).

Consequently, where the son sells an article to a customer on a close day, the owner would be guilty under S. 16 read with S. 7 (1). **1951 SCJ 475: (1951-52) 3 FJR 149: (1951) 2 Mad LJ 139: 1951 All LJ 605: 1951 SCR 671: 52 Cri LJ 1237: 1951 Mad WN 763: 1951 Mad WN (Cri) 1248: AIR 1951 SC 315 (316) (Prs 8, 9).**

——**S. 7** — S. 7 (1) does not violate Art. 19 (1) (g) of Constitution. See Constitution of India, Art. 19 (1) (g). **(1956) 58 Pun LR 528.**

PUNJAB UNIVERSITY ACT (EAST PUNJAB ACT 7 OF 1947)

SECTION 1

——**S. 1** — Provincial Legislature held had authority to pass Act — Government of India Act (1935), List II, Entry 17. **AIR 1952 Punj 395 (398) (Pt C) (Pr 17) (DB).**

SECTION 15

——**S. 15 (2)** — Scope — Directions of Chancellor would apply to both bye-elections and general elections. **AIR 1955 NUC (Him Pra) 4517.**

——**S. 15 (2)** — Power of Chancellor to give directions is a statutory power — Court cannot go behind it and hold that it should not have been given — (Constitution of India, Art. 226). **AIR 1955 NUC (Him Pra) 4517.**

——**S. 15 (2)** — Notification under, by Chancellor, dated 30th August, 1949, giving directions in connection with 'forthcoming elections' — Construction — **Held** it did not apply to elections held three years after its issue. **AIR 1955 NUC (Him Pra) 4517.**

SECTION 20

——**S. 20 (5), Regulation 6 — Procedure under, followed — Examinee not allowed to appear personally — Validity of proceedings.**

The Senate has framed rules for dealing with a candidate who is found guilty of misconduct in the course of an examination and the procedure is laid down in Regulation 6 made under S. 20 (5), East Punjab University Act. Where in a case this procedure was followed and the examinee was given an opportunity of being heard, the fact that he was not allowed to appear personally does not render the proceedings in any way invalid. The Act does not give the right of personal appearance to an examinee and such a right cannot be claimed on the ground that it is sanctioned by the principles of natural justice. **54 PLR 485: ILR (1953) Punj 56: AIR 1952 Punj 395 (398 to 400) (Pt B) (Prs 26, 27) (DB).**

——**S. 20 (5), Regulation 6 — If ultra vires.**

Section 20 (5), East Punjab University Act, empowers the Syndicate to delegate any of its executive functions to the Vice-Chancellor or to the Sub-Committees appointed from among the members of the Syndicate, or to Committees appointed by it which may include persons who are not members of the Syndicate or to any other authority or body constituted by the Act or Regulations. Regulation 6 framed under S. 20 (5) of the Act is, therefore, intra vires the authority that made the Regulation. **54 PLR 485: ILR (1953) Punj 56: AIR 1952 Punj 395 (400) (Pt E) (Pr 28) (DB).**

——**Ss. 20, 31 and 33, Regn. 6 of Chap. III of Part II and Reg. 13 of Part IV — Decision of University against delinquent student — Interference — Jurisdiction of Civil Court.**

By the combined effect of Ss. 20, 31 and 33 of the East Punjab University Act and the Regulations made thereunder, i.e., Regulation 6 of Chapter III of Part II and Regulation 13 of Part IV, the jurisdiction to decide whether a student is guilty of any delinquency is a matter exclusively for the committee appointed by the Vice-Chancellor or by the Syndicate of the University, and merely because the University comes to a wrong conclusion or even if the conclusion is against the weight of the evidence, the decision is final. No suit, therefore, lies to challenge the decision of the University to take action against an erring student. **(1952) 54 Pun LR 369.**

——Ss. 20 and 31, Regn. 6 of Chap. III of Part II and Regns. 12 and 13 of Part IV — If ultra vires.

Regulation 6 contained in Chapter III of Part II which purports to have been made under Ss. 20 (1) (c) and 31 (b), (c) of the East Punjab University Act, and Regns. 12 and 13 contained in Part IV which have been made under S. 31 of that Act, are intra vires of that Act. (1952) 54 Punj LR 369.

——Ss. 20 and 31, Regn. 6 of Chap. III of Part II and Regns. 12 and 13 of Part IV — Right of erring candidate to personal hearing.

There is no provisions in the East Punjab University Act or in the Regulations made thereunder enjoining upon the University to give a personal hearing to any erring candidate before any action could be taken. That being so, the non-appearance of the candidate before the committee, the Vice-Chancellor or the Syndicate, will not invalidate a decision of the University which is otherwise valid. (1952) 54 Pun LR 369.

SECTION 24

——S. 24 — Regulation I (iii) of 1962 — Petitioner passing B.A. examination — After lapse of seven years petitioner's result quashed on ground that he was ineligible to appear for B.A. examination and allegation that certificate relied by him was false — Opportunity to prove innocence not given to him — Held, principles of natural justice were not observed and hence order should be cancelled. 1964 Cur LJ 373: 66 Punj LR 873.

SECTION 31

——S. 31 — Regulations under Part D (vii), Regn. 3-B — Misconduct by college student—Disciplinary proceedings — Principles of natural justice — Principal recording student's statement, admitting allegations — Tutor, who witnessed incident, identifying student — Student not demanding cross-examination of witnesses or permission to produce witnesses — University ordering cancellation of result on basis of Principal's report — Student alleging violation of principles of natural justice — Held there was no violation. See Constitution of India, Art. 226. AIR 1964 Punj 456 (DB).

——S. 31 — Misconduct by University students—Enquiries into — Desirability of framing precise and definite rules of procedure to conduct such enquiries.

Though mere absence of precise rules for enquiries into misconduct by college students may not by itself attract the challenge of failure of natural justice, nevertheless, for the guidance of its officers entrusted with such enquiries, if for no other reason, the University might well consider the desirability of framing some more precise and definite rules of procedure for the purpose. Decision in such matters must be given in the spirit and with a sense of responsibility of a Tribunal with a duty to mete out justice, undeflected by prejudice, interest or caprice. For this purpose, it is necessary to preserve a judicial temper and treat the matter in a judicial spirit. Judicial process can more easily find expression in administrative sphere by prescribing some rules of procedure or guidance. 66 Punj LR 992: AIR 1964 Punj 456 (461) (Pt C) (Pr 10) (DB).

——S. 31 — Constitution of India, Arts. 226 and 227 — Natural justice — Use of unfair means at examination — Inquiry proceedings — Proceedings are of quasi-judicial nature — Regulations of University not prescribing any procedure — Principles of natural justice should be followed. See Constitution of India, Art. 226. AIR 1964 Punj 327 (DB).

——S. 31 (2) (a) — Constitution of India, Art. 226 — Other remedy open — Election disputes—Election to Punjab University — Improper rejection of nomination paper — Remedy under University Regulations — No bar to writ proceedings, before election is held. See Constitution of India, Art. 226. AIR 1961 Punj 194.

——S. 31 (2) (a) — Regulations framed under, Regn. 24 (ii) — Scope — If mandatory.

The provision in Regulation 24 about sending the nomination paper on the prescribed form under registered cover to the Returning Officer by name is merely of a directory nature and is not mandatory. Its non-compliance is not a defect of such a substantial nature as can justify the rejection of the nomination papers which satisfy all the other conditions which have been laid down by the regulation.

If the Registrar is the Returning Officer and the cover is addressed to him and it is received by him, there has been substantial compliance though technically and literally it may be said that the requirement had not been satisfied, and the nomination paper cannot be rejected on a ground of such inconsequential nature. 63 Pun LR 142: AIR 1961 Punj 194 (199, 200) (Pt B) (Prs 9, 10).

—S. 31, Regns. 6, 12, 13 — Regulations are intra vires.

The Regulation 6 contained in Chap. III of Part II and Regulations 12 and 13 contained in Part IV are intra vires and are not beyond the powers of the University under Ss. 20 and 31 of the East Punjab University Act, 1947. ILR (1953) Punj 140: AIR 1953 Punj 3 (7) (Pt A) (Pr 13) (DB).

——Ss. 31, 33 and Regns. 6, 13 — Student guilty of delinquency in respect of examination—Decision rests entirely with University — Jurisdiction of Civil Courts is excluded — Principles of natural justice — Applicability.

By the combined effect of Ss. 20, 31 and 33 of the East Punjab University Act and the Regulations made thereunder, i.e., the Regulation 6 of Chap. III of Part II and Regulation 13 of Part IV the jurisdiction to decide whether a student is guilty of any delinquency is a matter exclusively for the Committee appointed or by the Vice-Chancellor or by the Syndicate of the University. The decision arrived at by them under the powers conferred by the Act or the regulations made thereunder is final and it excludes the jurisdiction of Civil Courts to entertain the suit. The discretion is of the Committee and the Vice-Chancellor and if they decide the question in accordance with the requirements of the statute, no Court can sit in appeal against their decision. No suit lies to challenge the decision of the University to take action against an erring student.

It is not necessary to give a personal hearing to a student against whom action is intended to be taken and in the very nature of things the Committee cannot hold a trial as it is understood by lawyers nor can they take evidence which lawyers consider to be evidence. All they can do is to get statements of various persons for and against a complaint; and after considering them it is for them to give their honest and bona fide opinion. Once they do that, it is not challengeable in a Court of law, and there is no offending of the concept of natural justice in the case. Case-law discussed. **ILR (1953) Punj 140: AIR 1953 Punj 3 (12, 13, 15) (Pt C) (Prs 36, 48, 49) (DB).**

——S. 31, Regulation 12 — If ultra vires.

Regulation 12 was framed with proper authority and, falling as it does within the scope of S. 31 (1), East Punjab University Act, is in every respect valid. It cannot be said that it was framed without proper authority merely because it purports to relate to S. 31 (2) (f). **54 PLR 485: ILR (1953) Punj 56: AIR 1952 Punj 395 (396, 397, 398, 399) (Pt A) (Prs 4, 24, 25) (DB).**

——Ss. 31 and 20 — Reg. 6 of Chap. III of Part II and Regulations 12 and 13 of Part IV — **Held** not ultra vires of that Act. See East Punjab University Act (1947), S. 20. **(1952) 54 Pun LR 369.**

SECTION 33

——Ss. 33, 31 and Regns. 6, 13 — Student guilty of delinquency in respect of examination — Decision rests entirely with University — Jurisdiction of Civil Courts is excluded — Principles of natural justice should be followed — (Civil P. C. (1908), S. 9). See Punjab University Act (7 of 1947), S. 31. **AIR 1953 Punj 3 (DB).**

——Ss. 33, 20 and 31 — Reg. 6 of Chap. III of Part II and Reg. 13 of Part IV — Decision of University against delinquent student — Interference — Jurisdiction of Civil Court is barred. See East Punjab University Act (1947), S. 20. **(1952) 54 Punj LR 369.**

PUNJAB UNIVERSITY ACT (35 OF 1961)

REGULATION 7

——Regn. 7, Cl. (1) — Petitioner refusing to comply with directions of respondent University — University passing order in writing disqualifying petitioner from examinership for three years — Petitioner not given opportunity to defend his case — **Held**, that action of University involved exercise of quasi-judicial functions and opportunity of being heard should have been given to petitioner — (Constitution of India, Art. 226) — Natural justice—Education. **1965 Cur LJ 197: ILR (1965) 1 Punj 704.**

PUNJAB UNIVERSITY CALENDAR (1961), PART I, RULE 10

——Part I (1961), Rr. 10 and 11 — Using unfair means in examination — Suspected candidate not given opportunity to show cause against action to be taken against him on basis of report submitted by Superintendent in charge of Examination — Controversy about facts reported by Superintendent — Action disqualifying candidate held not valid. See Constitution of India, Art. 226. **AIR 1963 Punj 480.**

PUNJAB UNIVERSITY CALENDAR (1962) VOL. I (1962), REGULATION 12

——(Vol. 1, 1962 Edn., pp. 89 and 97), Regulations 12 (c) (iii) and 21 (viii), 1 (i) — Power of Syndicate to quash result — Result of 'person' who has not taken examination at which unfair means are used but who is guilty only of rendering help from outside to candidate taking examination, cannot be quashed. **(1965) 1 Cur LJ 243.**

——(Vol. 1, 1962 Edn., p. 89), Regulation 12 (c) (iii) — Punishment under — Adverse finding without sufficient evidence — Order quashed — Institute — Educational — Punishment for use of unfair means at examination — Domestic Tribunal.

The domestic tribunals are as much governed by the rule of fair play and have to act on established principles and cannot possibly come to an adverse finding against a person, which is bound to result in ruining his career, without there being sufficient material in support of it. 1963 CLJ (SC) 153 and 1964 Punj LR 852, Ref.

Where the University authorities holding the petitioner guilty of having rendered help from outside the examination hall, to a candidate taking the examination, by sending a chit alleged to have been written by the petitioner and containing an answer to a certain question set at the examination, passed an order disqualifying the petitioner for three years:

Held, that the order was liable to be quashed. Even if it were taken that the chit did contain a part of the solution of the particular question the part contained in it, which might have been of help, was of a general nature and not specifically meant as a solution to the question actually set and the authorities could not overlook the fact that the major portion of the chit contained irrelevant matter, particularly in view of the fact that there was no evidence whatever indicating that the petitioner was outside the hall at or about the time of the examination or he sent the chit through the agency of any supervisor or otherwise. **(1965) 1 Cur LJ 243.**

VOL. I (1962), REGN. 19

——Vol. I, Regulation 19 — Vice-Chancellor when may give decision.

Regulation 19 contemplates a decision by the Standing Committee alone and it is only when there arises any difference between the members of the Committee that the Vice-Chancellor can give a decision. **1965 Cur LJ 182 (Punj).**

VOL. I (1962), REGN. 21

——(Vol. 1, 1962 Edn., pp. 89 and 97), Regulations 21 (viii), 1 (i) — Power of Syndicate to quash result — Result of person who has not taken examination at which unfair means are used but who is guilty only of rendering help from outside to candidate taking examination, cannot be quashed. See Punjab University Calendar (Vol. 1, 1962 Edn., pp. 89 and 97, Regulation 12 (c) (iii). **(1965) 1 Cur LJ 243.**

PUNJAB UNIVERSITY REGULATIONS

REGN. 6

——Regns. 6, 12, 13—Regulations are intra vires. See Punjab University Act (E. P. Act 7 of 1947), S. 31. AIR 1953 Punj 3 (DB).

——Regns. 6, 13 and Ss. 31, 33 — Student guilty of delinquency in respect of examination — Decision rests entirely with University — Jurisdiction of Civil Courts is excluded — Principles of natural justice should be followed—(Civil P. C. (1908), S. 9. See Punjab University Act (E. P. Act 7 of 1947), S. 31. AIR 1953 Punj 3 (DB).

REGN. 11

——Regn. 11 (c) — Malpractice by examinee—Enquiry into — Procedure to be followed by University authorities — Right of examinee to be heard — Statement of examinee obtained first — Statements of Superintendent and Supervisor at examination centre obtained subsequently — No opportunity to rebut subsequent prejudicial statements of Superintendent and Supervisor given to examinee — Decision prejudicial to examinee taken on basis of Supervisor's and Superintendent's statements — Rules of natural justice violated. See Constitution of India, Art. 226. AIR 1965 Punj 120 (FB).

REGN. 12

——Regns. 12, 6, 13 are intra vires. See Punjab University Act (E. P. Act 7 of 1947), S. 31. AIR 1953 Punj 3 (DB).

REGN. 13

——Regn. 13 (a) — Smuggling of answer-paper from outside by candidate at examination — Subsequent amendment of Regulation in 1964 — Candidate's case has to be determined according to old Regulations. (1965) 67 Punj LR 544.

——Regns. 13, 6, 12 are intra vires. See Punjab University Act (E. P. Act 7 of 1947), S. 31. AIR 1953 Punj 3 (DB).

——Regns. 13, 6 and Ss. 31, 33 — Student guilty of delinquency in respect of examination — Decision rests entirely with University — Jurisdiction of Civil Court is excluded — Principles of natural justice should be followed—(Civil P. C. (1908), S. 9). See Punjab University Act (E. P. Act 7 of 1947), S. 31. AIR 1953 Punj 3 (DB).

REGN. 18

——Regns. 18 and 18-A — Powers of Superintendent.

Under Regulation 18 the only power vested in the Superintendent is to expel a candidate under the circumstances enumerated therein. If any other action has to be taken against the candidate, then the matter has, obviously, to go to the Syndicate, as is obvious from the perusal of Regulation 18-A. AIR 1957 Him Pra 31 (32) (Pt A) (Pr 7).

——Regn. 18 — University taking action against certain candidates without affording opportunity of showing cause—Principles of natural justice — If violated — (Constitution of India, Art. 226).

The University cannot be said to have acted against the principles of natural justice in not offering the candidates an opportunity of showing cause before action is taken against them under Regulation 18 of the Punjab University. The regulations of the Punjab University do not provide for the issue of any show-cause notice to a candidate before taking action against him in accordance with the regulations of the University. When a candidate offers himself for an examination by the University, he is deemed to have submitted himself to the jurisdiction of the University and to have agreed to be bound by the regulations of that University. It is not possible for the High Court to read into the regulations something which is not there on the basis of what is referred to as 'principles of natural justice'. AIR 1957 Him Pra 31 (32) (Pt C) (Pr 8).

REGN. 18-A

——Regn. 18-A — Superintendent can expel a candidate — See Punjab University Regulations, Regulation 18. AIR 1957 Him Pra 31.

REGN. 23

——Regn. 23 — Decision of Vice-Chancellor to be final — Court has no power to sit in judgment over it — Constitution of India, Arts. 226 and 227. AIR 1955 NUC (Him Pra) 4517.

REGN. 24

——Regn. 24 — Decision of Election Tribunal under University Regulations is not open to interference. See Constitution of India, Art. 226. AIR 1955 NUC (Him Pra) 4517.

PUNJAB URBAN IMMOVABLE PROPERTY TAX ACT (17 OF 1940)

SECTION 1

——S. 1 — Extension to former Pepsu area by S. 4 of Punjab Act (7 of 1957) is according to law. 65 Punj LR 197: ILR (1963) 1 Punj 477: AIR 1963 Punj 354 (358) (Pt F) (Prs 19, 20) (DB).

——Ss. 1 and 3 (2) — Act was not enacted as a temporary war measure and has not met a natural death.

The heading and the preamble of the Punjab Act 17 of 1940 do not show that it was a case of a temporary statute made for a defined period and as a war measure. Section 3 (2) of the Act rather clearly indicates the intention of the Legislature that the Act was not a war measure but an ordinary piece of legislation to collect revenue. The statement of the object of the enactment of the Act merely says that the Bill is fiscal, to raise additional revenue. AIR 1952 SC 1781 Rel. on. 65 Pun LR 197: ILR (1963) 1 Punj 477: AIR 1963 Punj 354 (358) (Pt G) (Pr 21) (DB).

——Ss. 1 and 3 — Not ultra vires the Constitution — Constitution of India, Arts. 13, 246, 254, 265 and Sch. VII, List II, Item 49. 65 Pun LR 297: ILR (1963) 1 Punj 477: AIR 1963 Punj 354 (359) (Pt I) (Pr 23) (DB).

——Ss. 1 (2), 2 (c), 3 (3) and 4 (2) — Not violative of Art. 14 of the Constitution as being discriminatory — Ss. 1 (2), 3 (3) and 4 (2) are in the

nature of conditional legislation which is not an abdication of legislative powers.

Sections 1 (2), 2 (e), 3 (3) and 4 (2) of the Act are not discriminatory. The Act applies to urban immovable property and in itself creates no discrimination and the State Legislature is justified in legislating separately for a defined and known class of property, so that there is no discrimination between urbanities and ruralities so far as provisions of this Act are concerned. The power in most of these provisions is in the nature of conditional legislation which is not abdication of legislative powers, and on this ground these provisions are not ultra vires. AIR 1962 Punj 204, Rel. on. **65 Pun LR 197: ILR (1963) 1 Punj 477: AIR 1963 Punj 354 (359) (Pt J) (Pr 24) (DB).**

——**S. 1** — Property already taxed under Act 17 of 1940 — Same can be validly taxed again under Section 61 (1) (a) of Punjab Municipal Act. See Constitution of India, Art. 265. **AIR 1955 NUC (Punj) 3446.**

——**S. 1 (2)** — Necessity for extension of Act to levy tax in included area. See Punjab Urban Immovable Property Tax Act (17 of 1940), S. 3. **AIR 1954 Punj 18 (DB).**

SECTION 2

——**Ss. 2 (e), 1 (2), 3 (3) and 4 (2)** — Not violative of Art. 14 of the Constitution as being discriminatory — Sections 1 (2), 3 (3) and 4 (2) are in the nature of conditional legislation which is not an abdication of legislative powers. See Punjab Urban Immovable Property Tax Act (17 of 1940), S. 1 (2). **AIR 1963 Punj 354 (DB).**

——**S. 2 (c)** — Owner — Mortgagee in possession included in definition of owner. **65 Pun LR 197: ILR (1963) 1 Punj 477: AIR 1963 Punj 354 (357) (Pt A) (Pr 9) (DB).**

SECTION 3

——**Ss. 3 (3), 1 (2), 2 (e) and 4 (2)** — Not violative of Art. 14 of the Constitution as being discriminatory — Sections 1 (2), 3 (3) and 4 (2) are in the nature of conditional legislation which is not an abdication of legislative powers. See Punjab Urban Immovable Property Tax Act (17 of 1940), S. 1 (2). **AIR 1963 Punj 354 (DB).**

——**Ss. 3 and 1** — Not ultra vires the Constitution — Constitution of India, Arts. 13, 246, 254, 265 and Sch. 7, List II, Item 49. See Punjab Urban Immovable Property Tax Act (17 of 1940), S. 1. **AIR 1963 Punj 354 (DB).**

——**Ss. 3, 5 and 7 (1) — Levy of property tax — Basis of.**

The basis of levy and charge of property tax is "the annual value" of property and 'not gains and profits' derived from property — Nor is contractual rent basis of such charge — Fact that valuation list has to remain in force for a period of five years under S. 7 (1) does not affect this position — It cannot be contended that property tax should be levied on buildings and lands from which owners derive gains and profits only. **65 Pun LR 197: ILR (1963) 1 Punj 477: AIR 1963 Punj 354 (357) (Pt C) (Pr 15) (DB).**

——**S. 3** — Double taxation — Charge and levy of property tax by State Government under S. 3, Punjab Act (17 of 1940), and by Municipality under S. 61 (1) (a) of Punjab Act (3 of 1911) — Not unconstitutional as offending Art. 265. See Constitution of India, Art. 265. **AIR 1963 Punj 354 (DB).**

——**S. 3 (2)** — Act was not enacted as a temporary war measure and has not met a natural death. See Punjab Urban Immovable Property Tax Act (17 of 1940), Preamble. **AIR 1963 Punj 354 (DB).**

——**S. 3 — Punjab Urban Immovable Property Tax Rules (1941), Rr. 4 (e), 4 (f) — Scope of — Property subject to Urban Rent Restriction Act — Assessment of tax — Annual rental value is to be determined — Houses and Rents — East Punjab Urban Rent Restriction Act (3 of 1949), S. 4.**

Under Rr. 4 (e) and 4 (f) it is the actual gross annual rent earned or which could reasonably be earned in respect of the property which will become the annual renting value. If the property is subject to the provisions of the East Punjab Urban Rent Restriction Act, it cannot earn or cannot be reasonably expected to earn more rent than what that Act permits. Therefore, fixing the annual rent in disregard of the restrictions on enhancement of rent by the East Punjab Urban Rent Restriction Act would be a violation of Cls. (e) and (f) of R. 4. Thus, it was incumbent on the assessing authority to determine the annual rental value for purposes of the assessment of the tax, with reference to the provisions of the East Punjab Urban Rent Restriction Act. **ILR (1962) 2 Punj 884.**

——**Ss. 3 (1) and 73** — Scope and applicability — Debt due to State on account of property tax under Punjab Urban Immovable Property Tax Act, 1940 — Section 73 does not apply. See Civil P. C. (1908), S. 73. **AIR 1961 Punj 292.**

——**Ss. 3 and 1 (2) — Necessity for extension of Act to levy tax in included area.**

When by notification, dated the 24th of January, 1950, the built-up area of Sanjauli was included within the area administered by the Simla Municipality for purposes of administration with effect from the 25th January, 1950, the Act came into force in Sanjauli. Therefore, the promulgation of notification under S. 1 (2) of the Act was not necessary for levying tax in Sanjauli under S. 3. **ILR (1953) Punj 50: AIR 1954 Punj 18 (19) (Pt A) (Pr 4) (DB).**

SECTION 4

●——**S. 4 (1) (g) — Punjab Urban Immovable Property Tax Rules (1941), R. 18 — Exemption from property tax — Buildings used for purpose of a factory — Conditions to be satisfied for getting benefit of exemption.**

Section 4 of the Punjab Urban Immovable Property Tax Act, 1940, provides that the tax shall not be levied in respect of the properties mentioned in Cls. (a) to (g) of sub-sec. (1) thereof. Clause (g) mentions "such buildings and lands used for the purpose of a factory as may be prescribed". "Prescribed" has been defined as 'prescribed by the rules made under the Act'. Rule 18 of the Punjab Urban Immovable Property Tax Rules, that were framed by the Punjab Government in 1941, prescribes buildings and lands for the purpose of Cl. (g) of S. 4 (1).

The effect of R. 18 of the Punjab Urban Immovable Property Tax Rules, 1941, is that buildings belonging to the proprietors of the factory will get the benefit of exemption from taxation under S. 4 of the Act, provided three conditions are satisfied, namely, (i) the building must be used for the purpose of a factory; (ii) the factory must be one where a manufacturing process involving the use of power is being and has been carried on for a continuous period of six months; and (iii) (a) no rent is being charged for the building; (b) it is not a godown outside the factory compound; or (c) it is not a bungalow or house intended for or occupied by the managerial or superior staff. State of Punjab v. British India Corporation Ltd., (1964) 1 SCA 522: (1964) 1 SCJ 571: (1964) 2 SCR 114: (1963) 2 SCWR 114: 65 Pun LR 727: 1963 Cur LJ (SC) 40: AIR 1963 SC 1459 (1461) (Pt A) (Prs 1, 4).

●——S. 4 (1) (g) — Punjab Urban Immovable Property Tax Rules (1941), R. 18 (1) and (4) — Buildings used for the purpose of a factory — Two principles that determine use of building for purpose of factory — Building fulfilling requirements of factory law and building used towards securing welfare of workmen employed in factory — All such buildings are used for purpose of a factory.

In this case the factory was one in which manufacturing process involving the use of power was being and had been carried on for a continuous period of six months. Further, the building was not a godown outside the factory compound nor was it a bungalow or house intended for or occupied by the managerial or superior staff. Such buildings consisted of the following units: (1) a set of rooms used for indoor games by the mill employees; (2) one big hall used as the Gurkha Guards Club; (3) a set of rooms used as Officers' Club; (4) a set of rooms used as residential quarters by workers of the mills; and (5) a unit consisting of 200 quarters which had been allotted to workers of the factory for their occupation.

Held, that the allotment of these buildings for the use of the workmen was made for a purpose which was necessary to the efficiency of the workmen, and thus the buildings were being used for the purpose of a factory. (1942) 1 KB 53 Rel. on. State of Punjab v. British India Corporation Ltd., (1964) 1 SCA 522: (1964) 1 SCJ 571: (1964) 2 SCR 114: (1963) 2 SCWR 114: 65 Pun LR 727: 1963 Cur LJ (SC) 40: AIR 1963 SC 1459 (1462, 1463) (Pt B) (Prs 6, 7, 8, 9, 13, 14).

●——S. 4 (1) (g) — Punjab Urban Immovable Property Tax Rules (1941), R. 18 (4) (ii)—"Rent" — Meaning of — Word "rent" used in R. 18 (4) (ii) is in narrower sense of payment to landlord by a tenant and not in wider sense of money received for user of building on leave and licence— Where payment received is not rent in its narrower sense, property is exempt from assessment to tax under Act. State of Punjab v. British India Corporation Ltd., (1964) 1 SCA 522: (1964) 1 SCJ 571: (1964) 2 SCR 114: (1963) 2 SCWR 114: 65 Pun LR 727: 1963 Cur LJ (SC) 40: AIR 1963 SC 1459 (1463, 1464) (Pt C) (Prs 15, 16, 17, 19, 20).

——Ss. 4 (2), 1 (2), 2 (e), 3 (3) — Not violative of Art. 14 of the Constitution as being discriminatory — Sections 1 (2), 3 (3) and 4 (2) are in the nature of conditional legislation which is not an abdication of legislative powers. See Punjab Urban Immovable Property Tax Act (17 of 1940), S. 1 (2). AIR 1963 Punj 354 (DB).

——S. 4 (1) (j) — Buildings used for purposes of factory — Rent-free accommodation of workmen and club premises — Scope of R. 18 of Rules framed under Act (Words and Phrases — Rent) — (Transfer of Property Act (1882), S. 105).

There is very little doubt that living quarters intended for the use of workmen are buildings which are being used for the purpose of the factory. But a further question arises when, although the accommodation has been expressly made rent-free would become liable to tax because a small sum on account of conservancy and repairs is collected from the occupiers and that question must depend on whether the amount is rent.

The expression 'rent' has not been defined in the Act. The word 'rent' must be taken to mean only as a payment made by a tenant to his landlord. Therefore, there must exist a relationship of landlord and tenant between the parties before the payment received by one and made by the other can fall within the definition of rent. A person occupying a workman's quarter is not a tenant and becomes a trespasser if he continues to occupy the premises after he ceases to be a workman. The amount paid by him on account of the conservancy and repairs was of the nature of a payment by a licensee for use and occupation and not rent because rent is consideration of the demise of the premises occupied. Therefore, the premises were not liable to be taxed. Cri. Revn. No. 245 of 1955 (Punj.), Rel. on; AIR 1957 SC 309 and AIR 1951 Cal 126, Distinguished.

As regards the club premises for which also no rent is charged, it must be held that it is a building used for the purpose of the factory because the club contributes to the contentment of the workers and a contented workman produces more. The purpose of the factory must not be interpreted in the narrow sense of restricting it to the production and sale of the commodities produced by the factory. It must be given a slightly extended meaning so as to take within its compass whatever is not an unnecessary luxury but amenities and a certain amount of amusement which makes the workmen more contented and consequently better workers. ILR (1957) Punj 1840.

——Ss. 4 (1) (f), Provisos (i) and (ii), 24 (2) (k) — Rule 17 framed under S. 24 (2) (k) — No conflict with S. 4 (1) (f), Provisos (i) and (ii). AIR 1955 NUC (Punj) 4009.

SECTION 5

——Ss. 5 and 7 (1) — Levy of property tax — Basis of, indicated. See Punjab Urban Immovable Property Tax Act (17 of 1940), S. 3. AIR 1963 Punj 354 (DB).

SECTION 7

——Ss. 7 (1), 3, 5 — Levy of property tax — Basis of, indicated. See Punjab Urban Immovable Property Tax Act (17 of 1940), S. 3. AIR 1963 Punj 354 (DB).

——Ss. 7 and 9 — Amendment of valuation list. Assessing authority has power to make amendments in the valuation list prepared for a rating

area, so as to bring that list into accord with the circumstances arising out of the inclusion of a built-up area in that rating area. A separate valuation list is not required by law for the case comes within S. 9 of the Act. **ILR (1953) Punj 50: AIR 1954 Punj 18 (19) (Pt B) (Pr 5) (DB).**

SECTION 9

——S. 9 — Scope.

Power to make amendments in order to bring the valuation list in accord with the existing circumstances given by the provisions of law contained in the opening part of S. 9 of the Act is not restricted by Cls. (a), (b) and (c) which mention cases that are merely illustrative. **ILR (1953) Punj 50: AIR 1954 Punj 18 (19) (Pt C) (Pr 6) (DB).**

SECTION 10

——Ss. 10, 24, Rr. 7, 20 — Order rejecting objection — Appeal — Record not traceable — Failure to give proper notice — Effect — Issue of writ— (Constitution of India, Art. 226).

Where a citizen is to be taxed it is highly desirable that his liability is fixed after affordng him an adequate opportunity of representing his case. To deprive him of such an opportunity, which has been expressly provided by statutory rules, cannot but result in failure of justice. The case must be heard in a judicial spirit and in accordance with the principles of substantial justice.

Where an appeal against an order rejecting objections to the assessment of tax on property was not being heard on account of non-supply of copy of order which was not supplied because the record was not traceable in the office, and in spite of it, the appeal was disposed of ex parte without proper service of notice on the appellant as required by R. 20:

Held, that the disposal of appeal in these circumstances was not in accordance with the rules of natural justice and the order must be quashed under Art. 226 of the Constitution. (2) Further, in case the original record was not traceable, then it was for the department to consider as to what steps should be taken to see that the assessee did not suffer on account of the loss of the record by the department, and no injustice was done to him on that account. Department directed to reconstruct the record and to grant copy of the order and failing that, to hold the entire assessment proceedings de novo. **61 Punj LR 905: AIR 1960 Punj 278 (279, 280) (Pt A) (Prs 2, 3).**

SECTION 14

——S. 14—Relates to recovery of tax from tenants — Does not apply to mortgagee of property — Notice to him under form C not necessary. 64 Pun LR 197: ILR (1963) 1 Punj 477: AIR 1963 Punj 354 (357) (Pt B) (Pr 13) (DB).

SECTION 16

——S. 16 — Recovery of property tax as arrears of land revenue under Punjab Land Revenue Act — Not repugnant to provisions of Constitution — Constitution of India, Art. 265. 65 Pun LR 197: ILR (1963) 1 Punj 477: AIR 1963 Punj 354 (358) (Pt E) (Pr 18) (DB).

——S. 16 — State's right of priority — If restricted.

Section 16 merely provides a machinery and does not suggest that no other mode of realisation of the tax is permitted to the State. That section cannot have any bearing on the existence or abridgment of the State's right of priority in respect of the debts due to it. AIR 1956 Cal 26, Rel. on; AIR 1958 All 636, Disting. **ILR (1960) 1 Punj 809: AIR 1961 Punj 292 (295) (Pt D) (Pr 16).**

SECTION 18

——S. 18 (1) — Notice before amending current valuation list.

Notice under Sec. 18 (1) the Act as amended by East Punjab Act 33 of 1948, is not necessary to be given to the owner, occupier or lessee of buildings or lands in the rating area in the case of an amendment in the current valuation list. **ILR (1953) Punj 50: AIR 1954 Punj 18 (20) (Pt D) (Pr 7) (DB).**

SECTION 24

——Ss. 24, 20 and Rr. 7, 20—Order rejecting objection—Appeal—Record not traceable—Failure to give proper notice — Effect — Principles of natural justice not followed — Writ must be issued — (Constitution of India, Art. 226). See Punjab Urban Immovable Property Tax Act (17 of 1940), S. 10. AIR 1960 Punj 278.

——S. 24 (2) (k) — Rule 17 framed under —No conflict with Sec. 4 (1) (f), Provisos (i) and (ii). See Punjab Urban Immovable Property Tax Act (17 of 1940), S. 4 (1) (f), Provisos (i) and (ii). AIR 1955 NUC (Punj) 4009.

——S. 24 (2) (k) — Rules framed under, R. 17 — Object of — Rule is meant to prevent lengthy proceedings. AIR 1955 NUC (Punj) 4009.

PUNJAB URBAN IMMOVABLE PROPERTY TAX RULES (1941)

RULE 4

——Rr. 4 (e) and 4 (f) — Scope of — Property subject to Urban Rent Restriction Act — Assessment of tax—Annual rental value is to be determined. See Punjab Urban Immovable Property Tax Act (17 of 1940), S. 3. ILR (1962) 2 Punj 884.

RULE 7

——Rr. 7, 20, Ss. 10, 24 — Order rejecting objection — Appeal — Record not traceable — Failure to give proper notice — Effect — Principles of natural justice not followed — Writ must be issued — (Constitution of India, Art. 226). See Punjab Urban Immovable Property Tax Act (17 of 1940), S. 10. AIR 1960 Punj 278.

RULE 18

——R. 18 — Exemption from property tax — Buildings used for purpose of factory — Condition in R. 18 has to be satisfied for getting benefit of exemption. See Punjab Urban Immovable Property Tax Act (17 of 1940), S. 4 (1) (g). AIR 1963 SC 1459.

●——Rr. 18 (1) and 18 (4) — Buildings used for the purpose of a factory — Two principles that determine use of building for purpose of factory — Building fulfilling requirements of factory law and buildings used towards securing welfare of workmen employed in factory — All such buildings are used for purpose of a factory. See Punjab Urban Immovable Property Tax Act, (17 of 1940), S. 4 (1) (g). **AIR 1963 SC 1459.**

●——R. 18 (4) (ii) — Rent — Meaning of Word 'rent' used in R. 18 (4) (ii) is in narrower sense of payment to landlord by a tenant and not in wider sense of money received for user of building on leave and license — Where payment received is not 'rent' in its narrower sense, property is exempt from assessment to tax under Act. See Punjab Urban Immovable Property Tax Act (17 of 1940), S. 4 (1) (g). **AIR 1963 SC 1459.**

RULE 20

——Rr. 20, 7 and Ss. 10, 24 — Order rejecting objection — Appeal — Record not traceable — Failure to give proper notice — Effect — Principles of natural justice not followed — Writ must be issued — (Constitution of India, Art. 226). See Punjab Urban Immovable Property Tax Act (17 of 1940), S. 10. **AIR 1960 Punj 278.**

PUNJAB URBAN RENT RESTRICTION ACT (6 OF 1947)

See under Houses and Rents.

PUNJAB VILLAGE COMMON LANDS (REGULATION) ACT (1 OF 1954)

See under Tenancy Laws.

PUNJAB VILLAGE COMMON LANDS (REGULATION) ACT (18 OF 1961)

See under Tenancy Laws.

PUNJAB VILLAGE PANCHAYAT RULES

See under Panchayats.

PUNJAB WEIGHTS AND MEASURES ACT (12 OF 1941)

SECTION 18

——S. 18 — Bribe offered to Head Constable — Head Constable unable to act under Ss. 18 and 37 of Weights and Measures Act — Conviction under S. 165-A is not affected. See Penal Code (1860), S. 161. **56 PLR 298: 1954 Cr LJ 1503: AIR 1954 Punj 228.**

SECTION 28

——S. 28 — Applicability — Secretary — Liability to conviction — Weights and measures belonging to municipality not authorised. **1957 Cr LJ 476 (2) (Punj).**

SECTION 37

——S. 37 — Bribe offered to Head Constable — Head Constable unable to act under Ss. 18 and 37, Weights and Measures Act — Conviction under Sec. 165-A not affected. See Penal Code (1860), S. 161. **1954 Cr LJ 1503: AIR 1954 Punj 228.**

PUNJAB WELFARE OFFICERS RECRUITMENT AND CONDITIONS OF SERVICE RULES (1952)

RULE 6

●——R. 6 (5) and (6) — Tribunal — Meaning of — Tests to determine — State Government exercising appellate jurisdiction under R. 6 (5) and (6) of Punjab Welfare Officers Recruitment and Conditions of Service Rules (1952) is a tribunal. See Constitution of India, Art. 136 (1). **AIR 1965 SC 1595.**

●——R. 6 — Validity — R. 6 (3) which requires concurrence of Labour Commissioner before Management can dismiss or terminate services of Welfare Officer is not ultra vires of rule-making power of State Government under S. 49 (2). See Factories Act (63 of 1948), S. 49 (2). **AIR 1965 SC 1595.**

●——R. 6 — Termination of service of Welfare Officer by giving him one month's pay in lieu of notice — Termination in accordance with terms of appointment — Not a punishment contemplated by R. 6 (3) (v) and is outside R. 6 (6) — Appeal by Welfare Officer to State Government against such order is incompetent. Associated Cement Co., Ltd. v. Sharma, (1965) **11 Fac LR 77: (1965) 2 SCR 366: (1964-65) 27 FJR 204: (1965) 1 SCA 723: (1965) 1 Lab LJ 433: AIR 1965 SC 1595** (1599, 1607, 1608, 1610) (Pt C) (Prs 7, 38, 39, 48).

PUNNYA RULES ALWAR (1931)

CLAUSE 11

——Cl. 11 — Appointment of Pujari — Person holding honorary post under Government is not disqualified. See Municipalities — Rajasthan Municipalities Act (1959), S. 26 (viii). **1965 Raj LW 461.**

PURCHASER

See (1) Civil P. C. (1908), O. 21, Rr. 93 and 94.
(2) Contract Act (1872), Ss. 69, 70.
(3) Sale of Goods Act (1930).
(4) T. P. Act (1882), Ss. 54 and 55.

PURDHA WOMAN

Complaint.
See Criminal P. C. (1898), S. 198.

PURI SHRI JAGANNATH TEMPLE (ADMINISTRATION) ACT (14 OF 1952)

See under (Orissa) Puri Shri Jagannath Temple (Administration) Act (14 of 1952).

PUROHIT OFFICE

See (1) Civil P. C. (1908), S. 9.
(2) Hindu Law — Religious Office.
(3) T. P. Act (1882), S. 6.

PUTRA PUTRADE

See (1) Succession Act (1925), S. 97.
(2) Words and Phrases.

PUTRAVAKASAM GIFT

See Marumakkattayam Law.

QUALIFICATION FOR BEING ELECTOR

See Representation of the People Act (1950), S. 19.

QUALIFICATION FOR BEING LEGAL PRACTITIONER

See (1) Advocates Act (1901), S. 30.
(2) Legal Practitioners Act (1879), Ss. 2, 4, 5, 41.

QUALIFICATION FOR ELECTION AS PRESIDENT

See Constitution of India, Art. 58.

QUALIFICATION FOR MEMBERSHIP OF PARLIAMENT

See Constitution of India, Art. 84.

QUALIFICATION FOR MEMBERSHIP OF STATE LEGISLATURE

See (1) Constitution of India, Art. 173.
(2) Representation of the People Act (1951), S. 5.

QUALIFIED MEDICAL PRACTITIONER

Defined.

See Mines Act (1952), S. 2.

QUALITY OF GOODS

Defined.

See Sale of Goods Act (1930), S. 2.

QUANOON HAQ SHAFA, GWALIOR

SECTION 3

——S. 3 — Sale when complete — Intention of the parties should be looked to — (Transfer of Property Act (1882), S. 54). **AIR 1955 NUC (Madh Bha) 3031.**

QUANOON MAL GWALIOR (SMT. 1983)

See under Tenancy Laws.

QUANOON MAL OF MEWAR (5 OF 1947)

See under Tenancy Laws.

QUANTUM MERUIT

See Contract Act (1872), Ss. 69, 70, 73.

QUANUN-I-DIWANI OF PATIALA STATE (1874)

CHAPTER 3

——**Chap. 3, Ss. 1, 2 — Interpretation.**

Sections 1 and 2 do not mean that mere denial of a party would deprive the other of the right to prove that he was governed by custom and not by personal law. All what they mean is that the first rule would be the personal law of the parties concerned; in case where custom is set up and proved the custom so proved would be given effect to; and where the parties agree to a particular custom then the decision would be according to that custom. **AIR 1950 Pepsu 37 (40) (Pt D) (Pr 11) (DB).**

QUARRIES

See (1) Mineral Concession Rules (1952).
(2) Mines Act (1952).

QUASHING PROCEEDINGS

See (1) Constitution of India, Arts. 226 and 32.
(2) Criminal P. C. (1898), S. 439.

QUASI-CONTRACTS

See Contract Act (1872), Ss. 68 to 72.

QUASI-CRIMINAL PROCEEDINGS

See (1) Contempt of Courts Acts (1926) and (1952).
(2) Legal Practitioners Act (1879), Ss. 13 and 14.
(3) Representation of the People Act (1951), S. 123.

QUASI-EXECUTOR

See Succession Act (1925), S. 303.

QUASI-JUDICIAL AUTHORITY

See Constitution of India, Arts. 226 and 32.

QUASI-JUDICIAL ORDERS

See (1) Constitution of India, Arts. 226 and 32.
(2) Specific Relief Act (1877), S. 45.
(3) Stamp Act (1899), S. 57.

QUASI-JUDICIAL PROCEEDINGS

See Constitution of India, Arts. 226 and 32.

QUESTIONING BY PARTY HIS OWN WITNESS

See Evidence Act (1872), S. 154.

QUESTION OF FACT AND LAW

See (1) Civil P. C. (1908), Ss. 100-101, 110, 115.
(2) Constitution of India, Arts. 132-136 and 226 and 32.
(3) Income-tax Act (1922), S. 66.

QUESTION OF LAW

See (1) Civil P. C. (1908), Ss. 100-101, 110, 115.
(2) Constitution of India, Arts. 132-136 and 226 and 32.
(3) Income-tax Act (1922), S. 66.

Substantial.

See (1) Civil P. C. (1908), S. 110.
(2) Constitution of India, Arts. 132, 133.

QUESTION OF TITLE

See (1) Civil P. C. (1908), S. 9.
(2) Criminal P. C. (1898), S. 145.
(3) Limitation Act (1908), Arts. 142 to 144
(4) Provincial Small Cause Courts Act (1920), S. 23.
(5) Specific Relief Act (1877), S. 9.

QUESTIONS, INDECENT AND SCANDALOUS, TO WITNESS, FORBIDDEN

See Evidence Act (1872), S. 151.

QUESTIONS INTENDED TO INSULT OR ANNOY WITNESS, FORBIDDEN

See Evidence Act (1872), S. 152.

QUESTIONS LAWFUL IN CROSS-EXAMINATION

See Evidence Act (1872), S. 146.

QUESTIONS, LEADING

When may not and may be asked of witness.

See Evidence Act (1872), Ss. 142, 143.

QUESTIONS TENDING TO CORROBORATE EVIDENCE OF RELEVANT FACT

See Evidence Act (1872), S. 156.

QUESTIONS TESTING VERACITY OF WITNESS, ANSWER TO

—Evidence to contradict, admissibility.

See Evidence Act (1872), S. 153.

QUESTIONS TO BE ASKED OF WITNESSES

See Evidence Act (1872), Ss. 145, 149, 150.

QUESTIONS TO BE DETERMINED BY EXECUTING COURT

See Civil P. C. (1908), S. 47.

QUESTIONS TO JURY BY JUDGE

See Criminal P. C. (1898), S. 303.

QUESTIONS TO WITNESS

Power of Judge to put.

See Evidence Act (1872), S. 165.

Power of Jury or assessors to put.

See (1) Criminal P. C. (1898), S. 299.
(2) Evidence Act (1872), S. 165.

QUESTIONS TO WITNESS TENDING TO CORROBORATE EVIDENCE OF RELEVANT FACT

Admissibility of.

See Evidence Act (1872), S. 156.

QUESTIONS WHICH WITNESS IS COMPELLED TO ANSWER

See Evidence Act (1872), S. 147.

QUORUM FOR COMPANY MEETING

See Companies Act (1956), S. 174.

QUO WARRANTO

Writ of.

See Constitution of India, Arts. 226 and 32.

RACES AND RACING

See (1) Civil P. C. (1908), S. 9 — Note 9 (D) — Suit expressly barred — Domestic tribunal.
(2) Clubs and Associations.

RACING CLUB

See Clubs and Associations.

RAIGARH STATE WAZIB-UL-ARZ

See under "Tenancy Laws".

RAILWAY

See (1) Carriers Act (1865).
(2) Civil P. C. (1908), S. 80 (Notice of Suit)
(3) Commercial Documents Evidence Act (1939), S. 3.
(4) Constitution of India, Arts. 269, 299.
(5) Contract Act (1872), Ss. 151, 152 and 161.
(6) Criminal P. C. (1898), S. 184 (Jurisdiction to try offences against railway).
(7) Electricity Act (1910), S. 12.
(8) Industrial Employment (Standing Orders) Act (1946), Ss. 1 and 2.
(9) Land Acquisition Act (1894), S. 4.
(10) Railway Boards Act (1905).
(11) Railway Establishment Code.
(12) Railway Protection Force Act (1957).
(13) Railways Act (1890).
(14) Railways (Local Authorities) Taxation Act (25 of 1941).
(15) Railway Stores (Unlawful Possession Act (1955).
(16) Tort — Negligence.

Claim against.

—Notice of.

See Railways Act (1890), S. 77 (Old).

Risk-note.

See Railways Act (1890), Ss. 72-A, 74-A, 74-B, 74-C, 75 (Old).

Suit against.

—Notice of.

See Civil P. C. (1908), S. 80.

RAILWAY ACCIDENTS (COMPENSATION) RULES (1950)

——Railways Act (1890), Sections 82-A and 82-J — Rules under Section 82-J — Rules are not inconsistent with Section 82-A, Railways Act. See Railways Act (1890), Section 82-A. **AIR 1952 Pat 466 (DB).**

RULE 2

——**R. 2 (e)** — Scope — Total or partial disablement of temporary nature — Compensation — Basis, indicated. See Railway Accidents (Compensation) Rules (1950), Rule 6. **AIR 1954 Pat 507 (DB).**

RULE 6

——**Rr. 6 and 2 (e) — Scope — Total or partial disablement of temporary nature — Compensation — Basis — (Railways Act (1890), Section 82-A).**

By adopting the definitions of partial and total disablements as given in the Workmen's Compensation Act, the framers of the Railway Accidents (Compensation) Rules (1950), have indicated that the injuries for which compensation will be payable will be total or partial disablement of either permanent or temporary nature. All that they have omitted to do is to provide for the rates at which compensation will be payable in respect of total or partial disablement of temporary nature. This is a lacuna in the rules.

But even though the rules have not provided for compensation in respect of temporary disablements, the person who suffers from such disablement is entitled to some compensation under the provisions of Section 82-A, Railways Act. The basis on which the compensation is to be fixed is not the same on which damages are allowed under the common law of torts, because the compensation payable under Section 82-A is irrespective of any wrongful act, neglect or default on the part of the railway administration. The only safe criterion for fixing the amount of compensation payable will be on the basis of loss of earning capacity. Neither Section 82-A nor any of the rules indicate that medical expenses reasonably incurred by the injured person have to be taken into consideration. **AIR 1954 Pat 507 (509, 510) (Prs 17, 18, 20) (DB).**

——**R. 6 (2) and Sch. Part II** — Person injured in railway accident — Injuries causing permanent partial disablement affecting his earning capacity — Injuries sustained not those specified in Part II of Schedule — Rule 6 (2) held applied to case. **AIR 1952 Pat 466 (468) (Pt B) (Pr 5) (DB).**

RULE 11

——**R. 11 (1) (l)** — Rule is not ultra vires. See Railways Act (1890), Section 82-J. **AIR 1962 Pat 109.**

SCHEDULE, PART 2

——**Sch., Part. 2 and R. 6 (2)** — Person injured in railway accident — Injuries causing permanent partial disablement affecting his earning capacity — Injuries sustained not those specified in Part 2 of Schedule — Rule 6 (2) held applied to case See Railway Accidents (Compensation) Rules (1950), Rule 6 (2). **AIR 1952 Pat 466 (DB).**

RAILWAY ADMINISTRATIVE RULES

RULE 39

——R. 39 (b) — Failure to mention age and to sign season ticket by holder as required by R. 39 (b) — Conviction under Section 113, Railways Act held, justified. See Railways Act (1890), Section 47. **1952 Cri LJ 1462: AIR 1952 Bom 421.**

RULE 45

——R. 45 — Liability of railway as bailee — Duty to compare railway receipt with junction or through Invoice before effecting delivery, pointed out — Traffic Mannual of B. B. and C., Rly Ch. XI, Booking of Goods Traffic Rules 32, 45. See Contract Act (1872), Section 151. **AIR 1963 Raj 162 (DB).**

RAILWAY BOARDS ACT (4 of 1905)

SECTION 2

——S. 2 — Notification under Section 47, Railways Act by Railway Board — Railway Board invested with powers of Central Government — Absence of sanction of Central Government for Notification does not render it illegal. See Railways Act (1890), Section 47 (3). **AIR 1960 All 438.**

——S. 2 (b) — Scope — Government of India Act (1935), Sec. 175 — Contracts on behalf of railway administration not exempted — Provisions of Section 47, Railways Act and Railway Board Act do not imply that provisions of Section 175, Government of India Act, did not apply to railways — Reference to Section 47, and Railways Act and Section 2 (b) of Railway Board Act is irrelevant in this connection. See Government of India Act (1935), Section 175. **AIR 1957 Pat 586 (DB).**

[Reversed on another point in AIR 1962 SC 113.]

RAILWAY BOARDS CIRCULARS

●——Promotion to selection posts — If within scope of Article 16 (4) of the Constitution — Reservation of selection posts in Railway Service in favour of members of Scheduled Castes and Scheduled Tribes — Not ultra vires Article 16 (4) — Circulars issued by Railway Board, dated 27-4-59 and 12-6-59 — Do not fall outside Article 16 (4) and are not ultra vires on that ground — Validity — AIR 1961 Mad 35, **Reversed.** See Constitution of India, Article 16 (4). **AIR 1962 SC 36.**

RAILWAY CODE OF ACCOUNTS DEPARTMENT

PART 1, RULE 1023

——Part. 1, Rule 1023 (3) — Transfer of Provident Fund account upon retirement of railway employee to Miscellaneous account 'E' — Character of Provident Fund money is not altered — It is "compulsory deposit" as defined in Section 2, Provident Funds Act — Amount could not be attached — (Provident Funds Act (1925), Section 2 (a)). See Civil P. C. (1908), Order 21. Rule 46. **AIR 1955 Cal 509.**

RAILWAY COMPANY

Place of residence.

See Civil P. C. (1908), Order 29, Rule 2.

Tariff Rules.

See (1) Railways Act (1890), S. 47.
(2) Tariff Act (1934).

RAILWAY ESTABLISHMENT CODE

——**Railway Administration — Powers of General Manager and Deputy General Manager.**

In all administrative matters the General Manager and the Deputy General Manager have concurrent powers. **ILR (1957) 1 All 278.**

——**Non-selection post — Promotion — Rule of seniority — Departmental test — Effect of.**

Promotion of a holder of a 'non-selection post' under the Railway Establishment Code is by seniority, but he can, in accordance with the letter of the Railway Board, No. E-56 P. M. 1/12/3 of 22nd March, 1956, now be asked to sit in a departmental test, which may include a general examination just to see whether he is qualified to hold the post to which he claims promotion. The rule as to seniority in such a case is not abrogated, but still prevails. What is aimed at is to determine whether candidate has attained a particular standard of efficiency. If a person passes, then in his service record the word 'passed' is inserted. Thereafter, a passed candidate is entitled to promotion according to seniority There is no question of a junior superseding a senior. **61 Cal WN 260: (1957) 2 Lab LJ 666: AIR 1957 Cal 459 (459) (Pr 3).**

——Disciplinary and Appeal Rules for non-gazetted staff, Rule 1725 — Railway Servant — Enquiry for misconduct closed and punishment inflicted acted upon — Fresh enquiry on same charges is illegal — Power to revise or review to be exercised only if some fresh facts come to light — AIR 1958 Madh Pra 413; AIR 1954 Pepsu 129; AIR 1960 All 164, Rel. on.; AIR 1959 AP 618, Disting. **1961 MPLJ (Notes) 222.**

——Railway Servant — Departmental Enquiry — Not Quasi-judicial but administrative. See Constitution of India, Article 226. **AIR 1963 Pat 38 (DB).**

——Suit for recovery of gratuity by retired railway servant — Gratuity is a matter in discretion of Government — Such a suit is incompetent. See Constitution of India, Article 310. **AIR 1961 Punj 3.**

——Procedure for conducting enquiries under Disciplinary Action Rules, Rule 21 — Reasonable opportunity of showing cause — Charges against railway servant being very vague — **Held,** he was deprived of reasonable opportunity of his defence. See Constitution of India, Article 311 (2). **AIR 1962 Raj 265 (DB).**

——Procedure for conducting enquiries under Disciplinary Action Rules, Rule 21 — Reasonable opportunity of showing cause — Inquiry officer refusing to summon witnesses for defence — **Held,** there was violation of principle of reasonable opportunity of defence. See Constitution of India, Article 311 (2). **AIR 1962 Raj 265 (DB).**

——**Jodhpur Railway Rules — Rule regarding declaration of date of birth by employee — Retrospective operation.**

The rules framed by the Jodhpur Railway regarding declaration of date of birth by employees are not retrospective in operation. The mere fact that the Railway authorities took declaraion as to age from each and every employee whether employed prior to the coming into force of the rules or not cannot make the rules retrospective as a matter of law. **1951 Raj LW 343.**

CHAPTER 17

——Ch. 17 — Temporary railway servant — Suspension from service on account of bad con-

duct and absenting from duty — Subsequent termination of service held by way of punishment — No opportunity to show cause given according to railway rules — Termination is illegal and void. See Government of India Act (1935), Section 240 (3). **(1962) 64 Pun LR 807.**

RULE 1

——R. 1 — Applicability — Applicant B. N. Railway servant agreeing to serve with State Railway — No Specific agreement about termination of service — Agreement to abide by rules on matters not specified — Rules apply for termination of service.

The applicant who was serving with the B. N. Railway entered into an agreement to serve under the State Railway when the State took over the B. N. Railway. The agreement provided for applicability of specific provision on specific matters and for other matters it was agreed that the State Railway Rules would apply. There was no specific agreement referred in the matter of termination of service.

Held, that termination of service was governed by the State Service Rules. **('52) 1952 Nag LJ (Notes) 60 (DB).**

RULE 5

——Rr. 5, 11 — Applicability — Employee found medically unfit for job — Another job offered and employee put on leave pending acceptance of same — Is not punishment — It is in the discretion of the head of department to grant leave. **(1959) 1 Lab LJ 360 (Andh Pra).**

——R. 5 — Scope — Under Rule 5, Clause (4), it is obligatory on Railway administration not to allow a person to discharge such duties, competence for which is not certified by medical officer — Railway servant declared unfit for his duty on account of bad vision — Railway administration had no option but to post him on a post where a less standard of vision was required — Therefore there was no point in asking him to show cause against proposed transfer. See Constitution of India, Article 311. **AIR 1954 Raj 189 (DB).**

RULE 101-A

——R. 101-A; Vol. 2, R. 2202 and Appendices 37 and 38 — Letter No. E-48, C. P. C./288, dated 11th May, 1949 issued by Ministry of Railway (Railway Board) — Interpretation of — Deputy General Manager has not been authorised to hold tests for crossing efficiency bar.

The definition of the word "department" as given in Rule 101-A (5), P. 1, Volume 1 (Indian Railway Establishment Code) does not lead to the conclusion that the expression "Head of the Department" as used in clause (ii) of the Letter No. E-48, C. P. C./288 dated 11th May, 1949, issued by the Ministry of Railways (Railway Board) on the subject of "Efficiency bars in the prescribed scales applicable to Class II Officers" must mean the Deputy General Manager (Personnel).

The Deputy General Manager is not the head of any department under the Indian Railway Establishment Code. Hence under the letter of the Railway Board referred to above the Deputy General Manager (Personnel) has not in any way been authorised to hold the tests for permitting officers in Railway Services, Class II to cross the efficiency bar. **59 Cal WN 812: ILR (1957) 1 Cal 447: AIR 1955 Cal 385 (388, 389) (Pt D) (Prs 7, 8) (DB).**

RULE 105

——Rr. 105 and 106 and Appendix 20, Table 16 — Circular No. A. E. 721, dated 31-10-1951 issued by General Manager, Clause 8 and Sch. A, Item 12 — Applicability.

When an officer of Class II is appointed in the junior scale of pay as in the case of an Assistant Personnel Officer according to Table 16, the right of permitting him to cross the efficiency bar, vests in the General Manager under item No. 12 of Schedule A and it requires the personal sanction of the General Manager. Where the case comes under item 12, Clause 8 of the Schedule has no application. **59 Cal WN 812: ILR (1957) 1 Cal 447: AIR 1955 Cal 385 (389) (Pt E) (Pr 10) (DB).**

RULE 106

——R. 106 — Circular No. A. E. 721, dated 31-10-51, issued by General Manager, Clause 8, Schedule A, Item 12 — Applicability — If case comes under Item 12, Clause 8 of schedule has no application. See Railway Establishment Code, Rule 105. **AIR 1955 Cal 385 (DB).**

RULE 134

——R. 134 (3) (a) — 'Appointing authority' — Power to promote Railway Employee to Gazetted post vested in General Manager of railway—Power implies power to revert — Officer so promoted cannot be reverted to substantive post by Chief Engineer. See Constitution of India, Article 311. **(1957) 61 Cal WN 849.**

——R. 134 — Discipline and Appeal Rules for Non-gazetted Railway-Servant, Rule 19, Note (c) — Authority competent to remove — Determination of — Article 311 (1) of the Constitution has to be taken into consideration — Servant of former Bikaner State Railway absorbed in Northern Railway — Authority competent to remove is General Manager, Northern Railway — Sanction granted by Divisional Engineer is invalid. See Prevention of Corruption Act (1947), Section 6. **1963 (2) Cri LJ 44: AIR 1963 Raj 126.**

——R. 134 — Prevention of Corruption Act (1947), Section 6 — Sanction for prosecution — Validity — Authority competent to remove determination of — Article 311 (1) of the Constitution has to be taken into consideration — Servant of former Bikaner State Railway absorbed in Northern Railway — Authority competent to remove is General Manager, Northern Railway — Sanction granted by Divisional Engineer is invalid — Discipline and appeal rules for non-gazetted Railway Servant, Rule 19, Note (c). See Prevention of Corruption Act (1947), Section 6. **1962 Raj LW 657.**

RULE 135

——R. 135 — Constitution of India, Articles 311 (1), 299, 309, 310 — "Appointing authority" in respect of Railway servant in non-gazetted post — Railway Establishment Code and contract of service — Question as to who is appointing authority to be determined by Rules and not by service contract — President of India is not appointing authority in such cases. See Constitution of India, Article 311 (1). **(1961) 21 Fac LR 344 (Cal).**

——R. 135, Proviso (2) — Appointing authority.

The power of delegation given to the General Manager is not in any way based on the provision made in proviso (2) of Rule 135 but is

based exclusively on the proviso made in Cl. (d) of Rule 135 itself. If proviso (2) and Cl. (d) are read consistently the limitation placed on the power of delegation in proviso (2) cannot be applied to the power of delegation given to the General Manager under Clause (d). **ILR (1955) Pat 625: AIR 1955 Pat 305 (311) (Pt B) (Pr 13) (DB).**

RULE 143

——**R. 143** — Constitution of India, Articles 311 (1), 299, 309, 310 — "Appointing authority" in respect of Railway servant in non-gazetted post — Railway Establishment Code and contract of service — Question as to who is appointing authority to be determined by rules and not by service contract —President of India is not appointing authority in such cases. See Constitution of India, Article 311 (1). **(1961) 2 Fac LR 344 (Cal).**

——**S. 143 — Contract Act (1872), Section 23 — Applicability.**

Before Section 23 can apply there must be an agreement. The section has no application to rules such as Rule 143, containing a provision for service agreement. **AIR 1959 All 643 (648 to 650) (Pt D) (Pr 5).**

——**Rr. 143 and 148 — Termination of services — Validity — (Constitution of India, Article 311).**

Ordinarily when a railway servant enters into a service agreement at the time of entering the railway service Rule 148 of the Railway Establishment Code either the whole if it, or in modified form is incorporated, as one of the terms of the agreement. In a case where a railway servant has entered into such a contract his services are liable to be terminated not only under Rule 148 but also under the terms of the agreement. **AIR 1959 All 643 (648) (Pt E) (Pr 5).**

——**Rr. 143, 148** — Agreement under Rule 148, Railway Establishment Code — Conflict with Section 23 of the Contract Act and Article 311 of the Constitution — (Constituion of India, Article 311). See Contract Act (1872), Section 23. **AIR 1959 All 643.**

——**Rr. 143 and 148** — Not discriminatory and are valid. See Constitution of India, Article 14. **AIR 1959 All 643.**

——**Rr. 143, 148** — Applicability of Rule 148 does not depend upon there being an agreement under Rule 143. See Railway Establishment Code, Rule 148. **AIR 1959 All 643.**

——**R. 143 and Appendix 24, Form No. 1 — Implied compliance — Appointment by letter — Form not signed — Agreement held effected — Article 311 of the Constitution or Disciplinary and Appeal Rules held not applicable — (Constitution of India, Article 311) — (Contract Act (1872), Section 1).**

Where, by joining the service in pursuance of the offer made to him by the letter of appointment a person impliedly accepted all the terms of the offer including the terms that he shall conform to all the rules and regulations applicable to Government Railway Servants, which included Rule 143 and the obligation that arose under that rule to sign an agreement in Form No. 1 in Appendix 24, the fact that no such form was signed was immaterial. The Court must consider that as done which ought to have been done, and although there was no written agreement executed, it could be held that there was an agreement effected by him accepting by his conduct the terms of the offer; and such agreement must be deemed to contain all the conditions on which alone he could be in the service of the Railway including the term that his service was terminable by one month's notice by the Administration. If the services are terminated under the terms of such agreement or contract then Article 311 of the Constitution or the Disciplinary and Appeal Rules have no application. **(1957) 59 Bom LR 1210: (1958) 1 Lab LJ 456 (Bom).**

RULE 148

●——**Rr. 148 (3) and 149 (3)** — Validity — Termination of service of Railway servants by notice — No rational basis for distinction between them and other public servants — Rules held invalid. See Constitution of India, Article 14. **AIR 1964 SC 600.**

●——**R. 148 (3)** — Permanent Railway servant — Rights of — Termination of his service on notice — Amounts to removal within Article 311 (2) — No provision of enquiry and notice — Rules contravene Article 311 (2) and are invalid — (Majority view). See Constitution of India, Article 311 (2). **AIR 1964 SC 600.**

●——**Rr. 148, 1702 and 1712** — Permanent railway servant — Charge of misconduct — Termination of service — Opportunity against proposed punishment not given — Order held not valid. See Constitution of India, Article 311(2). **AIR 1958 SC 905.**

●——**R. 148 (3)** — Constitution of India, Article 226 — Action against appellants under Railway Security Rules — Writ petition on ground that Rules were ultra vires — High Court holding that orders could be sustained under Rule 148 — But no such ground was raised by railway authorities — Court cannot base its judgment on ground that order fell under Rule 148 — (Railway Services (Safeguarding of National Security) Rules (1949), Rule 3). See Constitution of India, Article 226. **AIR 1958 SC 232.**

●——**R. 148** — Whether Security Rules have independent operation of their own, quite apart from Rule 148 of Railway Establishment Code — Quaere. See Railway Service (Safeguarding of National Security) Rules (1949), Rule 3. **AIR 1958 SC 232.**

●——**R. 148** — Order terminating services under Rule 3, Railway Services (Safeguarding of National Security) Rules — Order stands on same footing as an order of discharge under Rule 148 — It is neither one of dismissal nor of removal — (Railway Services (Safeguarding of National Security) Rules (1949), Rules 3 and 7). See Constitution of India, Article 311. **AIR 1958 SC 232.**

——**Rr. 148 (3), 1707 and 1708** — Permanent railway servant holding non-pensionable post — Absence from duty without leave — Order of removal from service on payment of one month's pay in lieu of notice not based on terms of agreement — Rule 148 (3) not applicable — Procedure prescribed by Paragraph 1707 not followed — Order of removal is by way of punishment and is illegal. See Government of India Act (1935), Section 240 (3). **AIR 1963 All 441.**

——**R. 148 (3) and (4)** — Constitution of India, Article 311 — Termination of service under Rule 148 (3) and (4) — Not amounting to removal under garb of termination, motive is immaterial. See Constitution of India, Article 311. **AIR 1959 All 643.**

——**Rr. 148, 143** — Railway servant entering into service contract — Services are liable to be terminated not only under Rule 148 but also

under terms of agreement — (Constitution of India, Article 311.) See Railway Establishment Code, Rule 143. **AIR 1959 All 643.**

——Rr. 148, 143 — Agreement under Rule 148, Railway Establishment Code — Conflict with Section 23 of Contract Act and Article 311 of the Constitution — (Constitution of India, Art. 311). See Contract Act (1872), Section 23. **AIR 1959 All 643.**

——Rr. 148, 143 — Rules 143 and 148 of Railway Esablishment Code are not discriminatory. See Constitution of India, Article 14. **AIR 1959 All 643.**

——R. 148 — Applicability — Agreement under Rule 143 — If essential.

Applicability of Rule 148 does not depend upon there being a service agreement under Rule 143. Termination of services of a railway employee under Rule 148 (3), is not bad, on the ground that he has not entered into a service agreement under Rule 143. **AIR 1959 All 643 (654) (Pt 1) (Pr 13).**

——R. 148 — Government servants — Termination according to conditions of service — Validity — (Constitution of India, Article 311).

A civil servant does not hold office during good behaviour but during the pleasure of the President or of the Governor according as to whether he holds a civil post under the Union or under a State, and there is nothing to prevent the President or the Governor, as the case may be, regulating the conditions of service of persons appointed to such posts subject to the provisions of Article 311 (2).

There is no clear distinction between the termination of the services of a person under the terms of a contract governing him and the termination of his service in accordance with the terms of his conditions of service. AIR 1957 SC 886; (1958) 1 Mad LJ (SC) 71; 1958 SCJ 148; 1958 Mad LJ (Cr) 127, Rel. on. **ILR (1959) 1 All 68: 1959 All LJ 113: AIR 1959 All 439 (440) (Prs 6, 7) (DB).**

[**Overruled** in AIR 1964 SC 600.]

——R. 148 (3) — (State Railway Rules) — Termination of service under — It is not removal from service — Rule 1709. See Constitution of India, Article 311. **ILR (1957) 2 All 486.**

——R. 148 (3) — Service of non-pensionable servant liable to termination on one month's notice — Rule applies to persons who are re-employed.

Rule 148 (3) of the Indian Railway Establishment Code, Volume I, which provides "that the service of a non-pensionable railway servant shall be liable to termination on notice on either side for the period specified in that sub-rule", applies to a person who is re-employed on 8-7-1947, on the basis of a circular which contained the terms of re-employment does not contain the rule "the State Railway Rules applicable to persons appointed on or after 1st January 1946, will apply". The fact that the circular embodying the terms of re-employment does not contain the rule similar to one embodied in Rule 148 (3) or in the service agreement under Rule 143, executed by persons who are re-employed, is immaterial. **(1960) 2 Lab LJ 384 (Andh Pra).**

——Rr. 148, 1708 — Charges framed — Termination of services not under disciplinary Rules but under contract without holding inquiry, is not illegal.

The mere fact that the employee was served with a charge-sheet and his explanation called for does not indicate that action was taken in the exercise of disciplinary jurisdiction under Rule 1708. It is quite consistent with the intention of the Department to dispense with his services in the exercise of contractual rights under Rule 148, without holding an inquiry. **(1960) 2 Lab LJ 384 (AP).**

——R. 148 — Proceeding against petitioner under Railway Security Rules — Proceedings dropped and services terminated under Rule 148 — Termination, is not a punishment to attract Article 311 (2) of Constitution. See Constitution of India, Article 311 (2). **AIR 1959 Assam 120 (DB).**

——Rr. 148 (3) and 1709 — Contractual right intended to be enforced against employee — Chance of explaining conduct should be given — (Constitution of India, Article 311 (2)). See Government of India Act (1935), Section 240 (3). **AIR 1960 Cal 264 (DB).**

——Rr. 148 (3), 1707 and 1709 — Contract of service — Right of railway authorities to take disciplinary action instead of terminating service in terms of contract — Employee's right to protection of — Section 240, Government of India Act — (Government of India Act (1935), Section 240 (3)) — (Constitution of India, Article 311 (2)).

Where there is a special contract it is open to the railway to terminate the services of an employee in pursuance of that contract, and where this is done, they would not be considered to have acted unconstitutionally, merely because the special requirements of Section 240 of the Government of India Act were not complied with. But even when there is such a contract, it is open to the railway authorities to decide not to enforce the special term entitling them to terminate employment by a month's notice but to follow the special procedure laid down in Chapter 17 of the Indian Railways Establishment Code, specially in its Rules 1707 and 1709 for taking disciplinary action. Where the railway authorities decide to take action in their exercise of disciplinary powers as distinct from their contractual powers, the railway servants would also be entitled to the protection of Section 240 of the Government of India Act. Whether in a particular case the railway has acted by way of enforcing the contractual right of terminating the employment by service of a month's notice or whether it has proceeded by exercise of the disciplinary powers is a question of fact which is to be decided on the facts and circumstances in each case. **64 Cal WN 272: ILR (1960) 1 Cal 19: (1960) 2 Lab LJ 326: AIR 1960 Cal 264 (267) (Pt C) (Pr 13) (DB).**

[**Overruled** in AIR 1964 SC 600.]

——Rr. 148 (3), 1707 and 1709 — Charge-sheet served on employee —Order of removal giving one month's notice — Effect — Government of India Act (1935), Section 240.

The appellant was a permanent employee of a railway. A report having been made against his conduct a charge-sheet was served on him by the Divisional Superintendent of the Railway. On receiving explanation of the appellant in which he pleaded not guilty, the Divisional Superintendent ordered removal of the appellant from service giving him one month's notice.

Held, (1) the mere fact that a charge-sheet was submitted did not show that the action was taken in exercise of the disciplinary powers as the action was consistent with its being taken in enforcement of the contractual right as well. (2) that since none of the other steps contemplated in Rule 1709 was taken the railway authorities could not be said to have acted in exercise of the disciplinary powers in ordering removal of the appellant. The use of the word 'removed' was intended to have such effect. (3) that it

could not be argued that giving of one month's notice might merely be a compassionate order even when exercise of disciplinary powers was being intended. 61 Cal WN 1, Distinguished. (4) that, therefore, the railway authorities did proceed in this case under R. 148 (3) and not under R. 1709 and the order of removal having thus been made in exercise of the contractual right of the railway to terminate the employment, the provisions of section 240 of the Government of India Act did not come into operation. **64 Cal WN 272: (1960) 2 Lab LJ 326: ILR (1960) 1 Cal 19: AIR 1960 Cal 264 (268, 269) (Pt E) (Prs 18, 19, 20, 22) (DB).**

[**Overruled** in AIR 1964 SC 600.]

——**R. 148 (3)** — Railway employee — Disciplinary action for serious misconduct of employee — Removal from service — Copies of proceedings before enquiry committe not furnished — Order of removal, held, could not be upheld. See Constitution of India, Article 226. **AIR 1957 Cal 4 (DB).**

——**R. 148 (3) — Scope — Permanent non-gazetted officer — Termination of service by one month's notice — If punishment.**

Under Rule 148 (3) (d), Indian Railway Establishment Code the Railway Administration are entitled to terminate the tenure of service of any permanent Non-gazetted employee, if they choose to do so, by merely giving a month's notice or a month's pay in lieu of notice and so may an employee belonging to that class relinquish his employment upon giving a similar notice. In such a case, no question of any penalty or punishment is involved. **(1957) 1 Lab LJ 272: 61 Cal WN 1: AIR 1957 Cal 4 (7) (Pt A) (Pr 12) (DB).**

——**Rr. 148 (3) and 1702 — Validity — (Constitution of India, Article 311).**

If a man merely binds himself to be governed by the general rules and regulations of Government service, he must be taken to be bound by those terms that are legal. It is not permissible to contract out of the provisions of the Constitution. Termination of service under a contract and in terms thereof does not attract the provisions of Aricle 311 of the Constitution. But if any penalty is imposed like dismissal or removal from service, the provisions are attracted. Even if a contract says that a service can be terminated without any notice that does not militate against the provisions of Article 311. But a provision in a contract that the employee can be dismissed or removed from service without giving him any opportunity to be heard, clearly militates against Article 311 and is to that extent bad.

Rule 148 (3) and Rule 1702 of the Railway Establishment Code, in so far as they purport to lay down a rule that in case of termination of service for failure to conform to the requisite standard of physical fitness, no notice is necessary or that such termination does not amount to a removal or dismissal from service, are 'ultra vires' the provisions of Article 311 of the Constitution. **58 Cal WN 336: AIR 1954 Cal 566 (568) (Prs 11 to 13).**

——**Rr. 148 and 2044** — Respondent, driver in service of railway administration — Respondent put under suspension of 8 years — Thereafter respondent informed that he could join duty — Immediately thereafter respondent served with order of termination of service — Emoluments during period of suspension not restored — Order held was of penal character and attracted Article 311 (2). See Constitution of India, Article 311 (2). **AIR 1964 Mad 243 (DB).**

——**R. 148** — Railway servant — Suspension pending disciplinary proceedings — No definite action taken and proceedings withdrawn after several years — Order of reinstatement — Subsequent order of termination of services under Rule 148, Railway Establishment Code — **Held,** by way of punishment — Procedure prescribed by Article 311 (2) not followed — Order is illegal. See Constitution of India, Article 311 (2). **AIR 1963 Mad 35.**

——**R. 148** — Railway servant — Termination of service in accordance with Service Rules — Order preceded by enquiry into misconduct under Security Rules, 1954 which was dropped — Article 311 (2) not attracted. See Constitution of India, Article 311 (2). **AIR 1962 Mad 379.**

[**Overruled** in AIR 1964 SC 600.]

——**R. 148 — Constitutional validity — Not violative of Article 14 of the Constitution — Constitution of India, Art. 14.**

Rule 148 of the Railway Establishment Code does not offend Article 14 of the Constitution. The classification of non-pensionable railway servants as a separate class is a reasonable classification based on intelligible differentia and is related to the object sought to be achieved by it. **(1962) 2 Lab LJ 124: (1962) 4 Fac LR 271: 1962 Mad WN 186: AIR 1962 Mad 379 (382) (Pt B) (Pr 8).**

[**Overruled** in AIR 1964 SC 600.]

——**R. 148 (3) — Termination of services without a confronted enquiry — If punishment and offends against Constitution of India (1950), Article 311.**

The Supreme Court in (1958) 1 An WR (SC) 162: (1958) SCJ 451: (1958) 1 MLJ (SC) 162 has held that, in a case where the terms of employment provided for services being terminated on a proper notice, no question of premature termination of services could arise, and that where there has been a termination of services in accordance with the terms of employment, it would not be a punishment unless there be a forfeiture of benefits already acquired or earned. The Railway Administration (in the instant case) placed the respondent under suspension, with the result that he was able to get only half his salary and the rest was withheld under the Rules of the Indian Railway Establishment Code. His services were terminated without any enquiry into the charges. The termination was stated to be under powers vested under R. 148 (3). The order terminating the services held, was by way of punishment and as the punishment was inflicted in contravention of Article 311 of the Constitution of India (1950), in that the respondent was not given an opportunity to prove his innocence, it is invalid. **(1962) 1 MLJ 373: 1961 Mad WN 751: (1962) 4 Fac LR 110: (1962) 2 Lab LJ 96: ILR (1962) Mad 375: 74 Mad LW 817: AIR 1962 Mad 376 (377) (Pr 4) (DB).**

——**R. 148 (3) — Scope — Jurisdiction of General Manager to terminate service.**

Rule 148 (3) conferred the jurisdiction on the General Manager to terminate the services of a person who held a non gazetted and non-pensionable post by giving him a month's notice, though earlier to the notice, charges had been framed and investigation was started but was not proceeded with. **69 Mad LW 576: (1956) 2 MLJ 217: AIR 1956 Mad 686 (686) (Pr 3).**

——**R. 148** — Railway authorities have a right to terminate services of employee under Rule 148 — There is nothing in Constitution of India, which restricts such a right — (Constitution of India, Articles 310, 311). See Railway Services

(Safeguarding of National Security) Rules (1949), Rule 3. **AIR 1953 Mad 54 (DB).**

——**Rr. 148, 1708 and 1709** — Provision does not apply where termination of service is according to terms of conditions of service — Employer having right to terminate service either under terms of contract or by holding departmental enquiry can proceed in either of the two modes — **Held,** that termination of service of the railway servant was according to terms of service and not by way of punishment. See Constitution of India, Article 311 (2). **AIR 1963 Mys 193 (DB).**

——**R. 148 — State Railway Rules, Rule 148 (3) and (4) — Permanent (non-pensionable) non-gazetted servants — Service is terminable with one month's notice or pay in lieu of it.**

It is permissible to terminate the services of a permanent (non-pensionable) non-gazetted servant of State Railway by giving one month's notice or one month's pay in lieu of notice. **1952 Nag LJ (Notes) 60 (DB).**

——**R. 148 (1) — Validity of termination of service of temporary servant — Temporary servant having no lien on permanent post — Agreement for 14 days notice — Opportunity to show cause given — Termination after 14 days notice is valid — Constitution of India, Article 311.**

A temporary railway servant having no lien on permanent post cannot claim the benefit of the provisions of Article 311, Constitution of India

A temporary railway servant was given a proper hearing before his services were terminated by the General Manager by giving 14 days notice. His contract provided for 14 days notice.

Held, that the termination was valid. **('52) 1952 Nag LJ (Notes) 60 (DB).**

——**R. 148** — Termination of service of railway employee under Rule 148 — Rule dispensing with compliance with provisions of Art. 311 (2), Constitution of India, is itself invalid and, therefore, termination of service in accordance with provisions of Rule 148 cannot be sustained. See Constitution of India, Article 311 (2). **AIR 1965 Pat 374 (DB).**

——**R. 148** — Railway Establishment Code (Discipline and Appeal Rules), Rules 1706 (ii), (iii) and 1707 — Termination of service of railway guard on giving one month's pay in lieu of notice, after holding him guilty in disciplinary proceeding — Trial Court holding that charges against employee were not proved, but holding termination as proper on basis of contract— **Held,** trial Court was wrong in approaching case from point of view of contractual rights and liabilities of parties and termination should have been judged on basis of Rule 148 and Discipline and Appeal Rules.: AIR 1958 SC 36, Foll. — **Held,** further that the Court was not competent to examine evidence afresh to find out whether conclusion of enquiring authority was right or wrong.: Case law discussed. **(1961) ILR 40 Pat 421 (DB).**

——**R. 148 (3)** — Removal from service and termination of service are not same — Railway employee — Termination of service in accordance with Rule 148 (3) — Article 311 of Constitution is not attracted: AIR 1954 Cal 399 and AIR 1954 Cal 566, Dissent. from — (Words and Phrases). See Constitution of Inlia, Article 311. **AIR 1956 Pat 221 (DB).**

[**Overruled** in AIR 1964 SC 600.]

——**R. 148** — Removal or dismissal — Used in same sense in both clauses — Temporary railway servant — Termination of service under R. 143, Railway Establishment Code — Not being by way of punishment does not amount to removal — Order of termination passed by authority subordinate to appointing authority — Validity. See Constitution of India, Article 311 (1). **AIR 1962 Raj 244.**

——**Rr. 148 (3) and (4) and 1708, Proviso — Applicability — Chapter XVII.**

Rule 1708 deals with removal from service, and there is no doubt that if a person is to be removed from service under that rule, the procedure of Chap. XVII has to be followed, namely a charge-sheet has to be given to the public servant concerned, his explanation taken, and the formalities of Article 311 complied with. **1957 Raj LW 567: ILR (1957) 7 Raj 836: AIR 1958 Raj 250 (252, 253) (Pt A) (Prs 9, 10, 12, 13) (DB).**

[**Overruled** in AIR 1964 SC 600.]

——**R. 148 and Ch. 17 — Notice under Rule 148 when required.**

If a railway servant is removed or dismissed under Chap. XVII, no notice under Rule 148 is required; nor is it necessary to pay him salary in lieu of notice. Notice is only to be given, and salary in lieu of notice is only payable if the railway authority proceeds under Rule 148 (3). **1957 Raj LW 567: ILR (1957) 7 Raj 836: AIR 1958 Raj 250 (253) (Pt C) (Pr 12) (DB).**

[**Overruled** in AIR 1964 SC 600.]

——**R. 148** — Validity of — Termination of service under Rule 148 (3) does not amount to removal or dismissal within meaning of Article 311 (2) of Constitution — Rule 148 is not repugnant to Article 311. See Constitution of India, Article 311. **AIR 1958 Raj 250 (DB).**

[**Overruled** in AIR 1964 SC 600.]

——**Rr. 148 and 2046 — Relative scope — If conflicting — Termination of service under Rule 2046 — If removal or dismissal — (Constitution of India, Article 311).**

Rule 2046 gives the general rule of termination of service on superannuation. Such termination of service would not amount to removal or dismissal within the meaning of Article 311. Rule 148 is a sort of proviso to Rule 2046, and applies in exceptional cases where it may be thought desirable in the interest of public service to terminate the service of a public servant before he reaches the age of superannuation by notice. Therefore, Rule 148 cannot be said to be invalid on the ground that it is in conflict with Rule 2046. **1957 Raj LW 567: ILR (1957) 7 Raj 836: AIR 1958 Raj 250 (255) (Pt E) (Pr 18) (DB).**

[**Overruled** in AIR 1964 SC 600.]

RULE 149

●——**R. 149 (3)** — Railway Establishment Code (1951), Rule 148 (3) — Validity — Termination of service of Railway servants by notice — No rational basis for distinction between them and other public servants — No guiding principle for exercising discretion — Rules held invalid. See Constitution of India, Article 14. **AIR 1964 SC 600.**

■——**R. 149 (3)** — Permanent Railway servant — Rights of — Termination of his service on notice — Amounts to removal within Article 311 (2) — No provision of enquiry and notice — Rules contravene Article 311 (2) and are invalid. (Majority view). See Constitution of India, Article 311 (2). **AIR 1964 SC 600.**

——**R. 149 (3) — Notice by whom may be issued.**

Rule 149 (3) does not specify the authority which has to issue notice. Under the general law the notice can be given by the appointing authority or one superior to him. Hence, the notice by the General Manager, a superior officer,

cannot be said to be illegal. Shyam Behari Tewari v. Union of India, **AIR 1963 Assam 94 (103) (Pt G) (Pr 25) (FB).**

[Reversed on another point in AIR 1964 SC 600.]

RULE 156

——Rr. 156 and 157 and R. 10 in Appendix 11-A — Contravention.

It was in exercise of the powers under Rules 156 and 157 and Rule 10 in Appendix 11-A that the General Manager South Indian Railway issued Circular No. 343, D/- 11-8-1949. The General Manager was specified by the statutory rules as the authority competent to frame rules to determine seniority. It was the same authority that authorised the issue of the order dated 25th April, 1952, addressed on behalf of the Commercial Operating Superintendents in charge of districts. One of the results of order dated 25-4-1952 was that the petitioner among others dropped from Rs. 64-4-170 scale of pay to Rs. 60-4-150.

Held, that the order, dated 25th April, 1952, obviously conflicted with the requirements of Rule 2 of Circular 343. The conflict between the Rule and the Order dated 25th April, 1952, could not obviously be resolved on any assumption that the order could proprio vigore operate as a rule framed by a competent authority: AIR 1955 Mad 305 (FB), Ref. **AIR 1958 Mad 243 (244) (Pt C) (Prs 2, 4).**

RULE 157

——R. 157 — Scope — General Manager of Railways can make rules in exercise of powers under Rule 157 — Order dated 14-5-1953, passed by General Manager of Central Railway — **Held,** order had the effect of rule made under Rule 157 — Order was binding on both parties — General Manager failing to discharge his duty — Writ of Mandamus should issue. See Constitution of India, Article 226. **AIR 1965 Bom 267.**

——Rr. 157 and 2003 (14) — Order by General Manager effecting separation of one department from another and consequent transfer of non-gazetted employees amounts to framing of a rule and acquires force of law — Person opting in pursuance of such order acquires legal right to hold post in separated department — Rule 157 does not prescribe any particular form. **1965 Mah LJ (Notes) 44.**

——Rr. 157 and 156 and R. 10 in Appendix 11-A — Contravention.

It was in exercise of the powers under Rules 156 and 157 and Rule 10 in Appendix 11-A that the General Manager South Indian Railway issued Circular No. 343, D/- 11-8-1949. The General Manager was specified by the Statutory rules as the authority competent to frame rules to determine seniority. It was the same authority that authorised the issue of the order dated 25th April, 1952, addressed on behalf of the Commercial Operating Superintendents in charge of districts. One of the results of order dated 25-4-1952 was that the petitioner among others dropped from Rs. 64-4-170 scale of pay to Rs. 60-4-150.

Held, that the order, dated 25th April, 1952, obviously conflicted with the requirements of Rule 2 of Circular 343. The conflict between the Rule and the Order dated 25th April, 1952, could not obviously be resolved on any assumption that the order could proprio vigore operate as a rule framed by a competent authority: AIR 1955 Mad 305 (FB), Ref. **AIR 1958 Mad 243 (244) (Pt C) (Prs 2, 4).**

RULE 418

——R. 418 — General and Subsidiary Rules for Indian Railways, Rule 418 — Suspension of Railway servant pending departmental enquiry — Validity — Charges investigated providing for a maximum penalty of fine — Suspension pending enquiry is illegal.

Where an express provision is made to suspend an employee in stated circumstances, then it must be held by clear implication that the Rule-making authority did not intend that the employee should be suspended in other cases, also. R. 418 of the General and Subsidiary Rules for Indian Railways, which is nothing but the reproduction of Section 47 (2), latter part of Railways Act, provides for a maximum penalty of a fine of one month's pay for breach of the rules in that part. Where, therefore, the charges investigated, relate to breach of rules, for which maximum penalty of fine of month's pay has been provided, and not either dismissal or removal, a Railway servant cannot be suspended under Rule 1711 (b) of the Rules, embodied in the Railway Establishment Code.

Where, a Railway servant, against whom a departmental enquiry was started on charges for breach of Rules S. R. 37 (27), G. R. 37 (iii) and S. R. 39 of the General and Subsidiary Rules for Indian Railways, was suspended with immediate effect pending enquiry.

Held, that the maximum penalty for the charges against the employee under the rules, having been provided as fine of one month's pay, no suspension could be ordered under Rule 1711 (b). There being no other rules for suspension. the order of suspension was void. **1961 MPLJ (Notes) 222.**

RULE 509

——Rr. 509, 510, 511 — Allowances claimable — If ex gratia payment.

The railway rules make it abundantly clear that allowances, even running allowances, were part of the emoluments payable and claimable by a certain class of railway employees. They are not an ex gratia payment. **1957 All LJ 840: 1957 All WR (HC) 831: (1958) 1 Lab LJ 198: AIR 1958 All 342 (344) (Pt B) (Pr 4).**

——Rr. 509, 510, 511, 2044 — Railway servant entitled to special running allowance suspended and later reinstated — Right to claim running allowances.

Where a railway servant, who was entitled to special running allowance under the rules, was suspended on his prosecution for certain offence and later reinstated on his acquittal by the Court, he is entitled to running allowances calculated according to the rules. Rule 510 has to be liberally interpreted and real meaning of the rule is to permit a person to earn allowance in case he is prevented from earning it for no fault of his. Under Rule 2044 a person has been held to be entitled, on honourable acquittal, not only to full pay but also to full allowances to which he was entitled and would have earned had he not been suspended. **1957 All LJ 840: 1957 All WR (HC) 831: (1958) 1 Lab LJ 198: AIR 1958 All 342 (344) (Pt C) (Pr 4).**

RULE 510

——Rr. 510, 509, 511 — Allowances claimable by certain class of railway employees are not ex gratia payment. See Railway Establishment Code, Rule 509. **AIR 1958 All 342.**

——**Rr. 510, 509, 511, 2044** — Railway servant entitled to special running allowance suspended and later reinstated after suspension was found unjustifiable — He is entitled to claim running allowances. See Railway Establishment Code, Rule 509. **AIR 1958 All 342.**

RULE 511

——**Rr. 511, 509, 510** — Allowances claimable by certain class of railway employees are not ex gratia payment. See Railway Establishment Code, Rule 509. **AIR 1958 All 342.**

——**Rr. 511, 509, 510, 2044** — Railway servant entitled to special running allowance suspended and later reinstated after suspension was found unjustifiable — He is entitled to claim running allowances. See Railway Establishment Code, Rule 509. **AIR 1958 All 342.**

RULE 742

——**R. 742 (v)** — 'Prohibited by Government' — Phrase governs only publications and not obscene books or pictures — News weekly, Indian Observer cannot be regarded as book or picture — Its publication not prohibited by Government — Ban under Rule 742 (v) not attracted. **1965 Pun LR (Supp) 267: AIR 1966 Punj 417 (419) (Pt A) (Pr 6) (DB).**

——**R. 742** — No power in Railway Board to ban a publication on ground that in its opinion it is obscene. **1965 Pun LR (Supp) 267: AIR 1966 Punj 417 (420) (Pt B) (Pr 6-A) (DB).**

——**R. 742** — Ban imposed by Railway Board on sale of publication on railway platform — Railway platforms are as much private property as any other highway in town — Person aggrieved can challenge decision of Railway Board. **1965 Pun LR (Supp) 267: AIR 1966 Punj 417 (420) (Pt C) (Pr 7) (DB).**

RULE 1314

——**Rr. 1314, 1336, 1503 — Construction — Special contribution to Provident Fund — Nature of.**

Where a railway servant who has become eligible for the special contribution to his Provident Fund under Rule 1314 of the D. S. Railway Provident Fund Rules, sues for recovery of such special contribution, Rule 1314 in the abstract cannot be relied on as a defence unless it is alleged and proved that the Controlling Officer, in the exercise of powers which vest in him, has decided under sub-rule (2) not to permit the addition of special contribution to plaintiff's account or has decided to withhold it under sub-rule (5). Plaintiff cannot be non-suited on the abstract proposition that the Controlling Officer has an unrestricted power to withhold payment. His claim cannot be resisted under Rule 1314 without the Controller coming to a decision adverse to the plaintiff on the facts of the case.

Obiter: The proposition that special contribution to Provident Fund is in the nature of a bounty or reward and is not at all grounded in right cannot be accepted. Rule 1336 (1) provides a mode of devolution of the special contribution. The contribution added under Rule 1314 becomes payable to the widow or widows or/and dependent children of the deceased subscriber in such cases as the Controlling Officer may determine. This rule has been held to be a condition of service, vide 58 CWN 483. If Rule 1336 (1) is a condition of service, it would be anomalous to hold that Rule 1314 embodies no enforceable condition of service even when the Controller does not, in the exercise of his authority, decide to withhold special contribution wholly or partially. Hence, if the conditions of sub-rule (2) are satisfied and the Controlling Officer does not decide to disallow or withhold it acting under Rule 1314, a subscriber could enforce his right to special contribution. The scheme of the rules points to that conclusion. **ILR (1954) 6 Assam 383: AIR 1955 Assam 17 (21 to 23) (Pt D) (Prs 14, 18, 19, 20) (DB).**

RULE 1336

——**R. 1336** — Construction of — Special contribution to Provident Fund — Nature, stated. See Railway Establishment Code, Rule 1314. **AIR 1955 Assam 17 (DB).**

RULE 1503

——**R. 1503** — Construction of — Special contribution to Provident Fund — Nature, stated. Railway Establishment Code, Rule 1314. **AIR 1955 Assam 17 (DB).**

RULE 1701

——**R. 1701, Para. 2 (1)** — Railway employee — Misconduct — Subordinate railway employee demanding and accepting paltry amount of 8 annas from passenger for service rendered — Dismissal from service — It is not within jurisdiction of High Court under Article 226 of the Constitution to enquire, whether punishment of dismissal was too severe. See Constitution of India, Article 226. **AIR 1964 Orissa 253 (DB).**

——**R. 1701, Para. 2 (1) — Railway servant accepting baksbis for service rendered amounts to misconduct — Distinction between 'misconduct' and 'serious misconduct'.**

According to Paragraph 2 (1) of Rule 1701 of Railway Servants Conduct Rules, acceptance of bakshis even if it is given by a person out of goodwill for service rendered to him by the Railway servant would amount to a contravention of that Rule and as such would amount to misconduct. Where, however, the bakshis was not demanded by the Railway servant but was given voluntarily by a passenger it may not amount to serious misconduct. **(1965) 1 Lab LJ 181: (1965) 7 OJD 69: ILR (1964) Cut 369: AIR 1964 Orissa 253 (254) (Pt A) (Prs 3, 4) (DB).**

——**R. 1701, Para. 2 (1) — Railway servant demanding and accepting bakshis of 8 annas for service rendered — Provisions of Penal Code (1860), do not apply.**

Where the Railway servant has demanded and accepted bakshis from a passenger the provisions of Section 161 read with Section 95 of Penal Code cannot be invoked since the Railway Establishment Code, itself prohibits the acceptance of any 'gift', gratuity or reward and it is immaterial whether it was given voluntarily or not by a passenger for services rendered by a Railway Servant even though such service may not be part of the official duties of the railway servant. Any contravention of the disciplinary rules prescribing the code of conduct of railway servants must necessarily amount to misconduct, and the question whether it is ordinary misconduct or serious misconduct will depend on whether the gift or reward was actually demanded by the Railway servant, so as to involve an element of extortion which necessarily implies dishonest intention. **(1965) 1 Lab LJ 181: (1965) 7 OJD 69: ILR (1964) Cut 369: AIR 1964 Orissa 253 (254) (Pt C) (Pr 6) (DB).**

RULE 1702

●——**Rr. 1702, 1712, 148** — Permanent railway servant — Charge of misconduct — Termination of service by way of punishment — Opportunity

against proposed punishment not given — Order held not valid — (Government of India Act (1935), Section 240 (3)). See Constitution of India, Article 311 (2). **AIR 1958 SC 905.**

——**R. 1702** — Scope — Termination of service — Whether by way of penalty or in terms of contract — How determined — Payment of one month's salary — Effect — Removal from service — Nature of, indicated. See Constitution of of India, Article 311 (2). **AIR 1957 All 439 (DB).**

——**Rr. 1702 and 1712** — Payment of Wages Act (1936), Section 7 (2) (h) — Authority competent to pass order for deductions from pay of railway employee — Officer having power under the rules can be styled as an 'authority' having the power to pass such order. See Payment of Wages Act (1936), Section 7 (2) (h). **AIR 1957 All 363 (DB).**

——**Rr. 1702 and 1704** — Punishment of reduction to lower post can be inflicted even if employee is governed by Payment of Wages Act. **AIR 1955 NUC (All) 3539.**

——**R. 1702** — Removal from service — 'Service' means whether permanent or temporary — Removal is different from reduction to lower grade — Change of service status of Travelling Ticket Inspector to lower grade — There is no removal. **AIR 1955 NUC (All) 3539.**

——**Rr. 1702, 1706, 1726 — Discipline and Appeal Rules (Non-Gazetted) — Misconduct, what amounts to — Misconduct outside working hours and duty — Disciplinary action can be taken.**

Rule 1706 of Railway Establishment Code enumerates the circumstances under which a railway servant is liable to be dismissed from service.

It is within the competence of the Railway Authorities to institue a disciplinary proceeding against a railway servant if according to it any of the circumstances as serious misconduct existed. One of these circumstances is serious misconduct during working hours and during the course of employment. But this does not necessarily mean that there can be no misconduct or serious misconduct outside the working hours or outside the course of employment.

The test is that the misconduct must be inconsistent with the fulfilment of the express or implied conditions of service in order to justify dismissal. (1886) 17 QBD 536, Relied on; AIR 1955 Nag 206, Dist.

Subsidiary Rule 4 to Rule 1706 does not and cannot either abridge or enlarge the scope of Rule 1706, under which disciplinary action can be taken for serious misconduct on the part of a railway servant. **61 Bom LR 1596: 1960 Nag LJ 26: (1960) 1 Lab LJ 167: ILR (1960) Bom 545: AIR 1961 Bom 150 (151, 152, 153) (Prs 3, 5, 8, 13) (DB).**

——**Rr. 1702 (5) and 1714** — Reduction to lower state in time scale — Amounts to reduction in rank. See Constitution of India, Article 311 (2). **1961 Nag LJ (Notes) 36.**

——**R. 1702** — Validity — In so far as it purports to lay down a rule that in case of termination of service for failure to conform to requisite standard of physical fitness, no notice is necessary or that such termination does not amount to removal or dismissal from service, is ultra vires the provisions of Article 311 of Constitution. See Railway Establishment Code, Rule 148 (3). **AIR 1954 Cal 566.**

——**Rr. 1702 and 1711** — Railway servant, disciplinary proceedings against — Order of suspension passed as penalty — Substantial non-compliance with procedure laid down in Rule 1711, Railway Establishment Code and Article 311, Constitution of India — Civil Court has jurisdiction to set aside suspension order — Order of suspension passed long before date of charge-sheet — Order continuing beyond 4 months without approval of competent authority — Validity — Order, held not sustainable. See Constitution of India, Article 311. **AIR 1964 Pat 168.**

——**R. 1702 — Termination of service by notice under contract — Charges framed but not mentioned in notice — Termination not by way of penalty — Constitution of India, Article 311 — (Master and Servant).**

When a Government employee holds his service on condition that his service may be terminated at any time with one month's notice on either side, the mere fact that certain charges have been made against the employee does not by itself show that the termination of the services of the employee is by way of penalty. The most important document to see as to whether the administration has proceeded by way of punishment or otherwise, is the order terminating the service.

Thus where the order terminating the services of the petitioner does not show that he has been found guilty of any charge, on the contrary the order clearly and simply states that the services of the petitioner, are no longer required by the administration and therefore he is being given one month's notice, the termination cannot be said to be by way of punishment. **1956 BLJR 49: (1958) 1 Lab LJ 324: AIR 1956 Pat 23 (26) (Pt B) (Pr 10) (DB).**

——**Rr. 1702 and 1712** — Order withholding increment of railway servant passed in contravention of Rules 1702 and 1712 of Railway Code — Authority under Payment of Wages Act holding loss of wages resulting from order as unauthorised deduction under Section 7 (1), Explanation 11 of the Act — Order of Authority does not contravene Article 310 of Constitution. See Payment of Wages Act (1936), Section 7 (1). **AIR 1964 Punj 242 (DB).**

——**Rr. 1702 and 1705** — Merger of B. B. and C. I. Railway with Western Railway and subsequent introduction of Divisional system — Divisional Operating Superintendent, who replaced District Traffic Superintendent of B. B. and C. I. Railway, was not lower in rank and had authority to punish employee by reducing him in rank. See Constitution of India, Article 311. **1965 Raj LW 115: ILR (1965) 15 Raj 205: AIR 1966 Raj 37 (DB).**

——**R. 1702** — Disciplinary authority, though not competent to impose major penalty, can issue charge-sheet for the same. See Railway Establishment Code, Volume 1, Rule 1707. **1965 Raj LW 115: ILR (1965) 15 Raj 205: AIR 1966 Raj 37 (DB).**

——**Rr. 1702, 1725, 1717 and 1727** — Removal from service under Rule 1702 (8) — Application under Article 226 of Constitution without pursuing remedies available under Rules 1717, 1725 and 1727 — High Court refused to grant relief under Article 226 in absence of any special or extraordinary reasons to do so. See Constitution of India, Article 226. **AIR 1953 Raj 199 (DB)**

RULE 1704

——**Rr. 1704, 1712** — Punishment of reduction to lower post — Notice not specifying proposed salary — Notice indicating that he was to be in

post carrying salary scale of Rs. 55-130 — Notice held not invalid — No prejudice to person concerned, since he had notice that he could be awarded starting salary of Rs. 55. **AIR 1955 NUC (All) 3539.**

——**R. 1704** — Travelling Ticket Inspector can be reduced to a lower post by District Traffic Superintendent. **AIR 1955 NUC (All) 3539.**

——**R. 1704** — Punishment of reduction to lower post can be inflicted even if employee is governed by Payment of Wages Act. See Railway Establishment Code, Rule 1702. **AIR 1955 NUC (All) 3539.**

——**Rr. 1704, 1705** — Prevention of Corruption Act (1947), Section 6 — Sanction — Validity — Sanction by Traffic Superintendent must be taken to be granted by an officer who was not competent to dismiss the servant and is not valid — The only authority that could remove or dismiss a railway servant is the General Manager and not the Traffic Superintendent. See Prevention of Corruption Act (1947), Section 6. **1956 Cri L 879: AIR 1956 Bom 504 (DB).**

——**Rr. 1704, 1708, 1709, Chap. 17 — Applicability — (Constitution of India, Art. 311).**

The petitioner was at the time of his removal serving as an assistant trains clerk in the Transport Department and at that time the District Officer of that department was one Mr. A. who was then holding the post of Superintendent Transportation. Mr. A Superintendent, Transportation, who passed the order of dismissal was not an officer lower than the Divisional Personnel Officer by whom the petitioner was appointed to the post of assistant trains clerk. Therefore the order of removal could not be held void or illegal in law. ILR (1955) Pat 625. **AIR 1965 Pat 305 (307 to 312) (Pt A) (Prs 5, 6, 8, 11, 13) (DB).**

RULE 1705

●——**R. 1705 (c)** — Authority competent to remove — Article 311 (1) of Constitution and Rule 1705 (c) of the Code cannot be read as implying that removal must be by the very same authority who made his appointment or by his direct superior — It is enough that removing authority is of same rank or grade. See Prevention of Corruption Act (1947), Section 6 (c). **1955 Cri LJ 249: AIR 1955 SC 70.**

——**Rr. 1705, 1704** — Prevention of Corruption Act (1947), Section 6 — Sanction — Validity — Sanction by Traffic Superintendent must be taken to be granted by an officer who was not competent to dismiss the servant and is not valid — The only authority that could remove or dismiss a railway servant is the General Manager and not the Traffic Superintendent. See Prevention of Corruption Act (1947), Section 6. **1956 Cri LJ 879: AIR 1956 Bom 504 (DB).**

——**R. 1705 (c)** — Removal of railway servant by authority subordinate to that by which he was appointed — Removal held not invalid. See Constituion of India, Article 311 (1). **AIR 1957 Ker 1 (DB).**

——**R. 1705 (c)** — Termination of service in pursuance of contract — No question of the application of rules in Section 2 of Chapter 17 of the Code arises. See Government of India, Act (1935), Section 240 (2). **AIR 1956 Pat 23 (DB).**

——**Rr. 1705, 1702 and 1707** — Western Railway — Schedule of Powers (1958), Schedule II — Railway employee appointed by District Traffic Superintendent of B. B. and C. I. Railway — Merger of B. B. and C. I. Railway with Western Railway and subsequent introduction of Divisional system — Divisional Operating Superintendent, who replaced District Traffic Superintendent of B. B. and C. I. Railway, was not lower in rank and had authority to punish employee by reducing him in rank. See Constitution of India, Article 311. **1965 Raj LW 115: ILR (1965) 15 Raj 205: AIR 1966 Raj 37 (DB).**

RULE 1706

——**R. 1706 (II) — Dismissal for serious misconduct — Permissibility.**

A railway servant is liable to dismissal from service if he is guilty of, among other things, serious misconduct; this is clear from Rule 1706 (II). **AIR 1957 All 671 (675) (Pt B) (Pr 26) (DB).**

——**Rr. 1706 (v) and 1708 — Concealment of antecedents by railway servant at time of appointment — If ground for removal from service.**

Rule 1708, read with Rule 1706, Clause (v) does not make the mere concealment by a candidate for appointment, of his antecedents a ground for his subsequent removal from service; in order to justify the removal, the concealment must have been such that had the true facts been known, the applicant would not have been appointed. **(1957) All WR (HC) 138: (1957) All LJ 143.**

——**Rr. 1706, 1702, 1726** — Misconduct, what amounts to — Misconduct outside working hours and duty — Disciplinary action can be taken. See Railway Establishment Code, Rule 1702. **AIR 1961 Bom 150 (DB).**

——**R. 1706** — Railway employee — Grounds for dismissal — Concealment of fact of active membership of subversive organisation — Sufficiency. See Constitution of India, Article 310. **AIR 1958 Cal 654.**

——**Rr. 1706, 1726** — Rules under Rule 1706 — Scope of — Rule 1706 does not confer power on General Manager to frame rule which will detract from Rule 1706 — Such a rule will be ultra vires. **AIR 1955 NUC (Cal) 1795 (DB).**

——**R. 1706** — Dismissal based on conviction — Conviction set aside on appeal — Re-employment cannot be claimed — (Master and Servant). **AIR 1955 NUC (Cal) 1793.**

——**R. 1706 (II), (III)** — Termination of service of railyaw guard on giving one month's pay in lieu of notice, after holding him guilty in disciplinary proceeding — Trial court holding that charges against employee were not proved but holding termination as proper on basis of contract — **Held,** trial Court was wrong in approaching case from point of view of contractual rights and liabilities of parties and termination should have been judged on basis of R.148 and discipline and Appeal rules — **Held** further that the Court was not competent to examine evidence afresh to find out whether conclusion of enquiring authority was right or wrong. See Railway Establishment Code (1951), R. 148. **(1961) ILR 40 Pat 421.**

——**R. 1706** — Notice to show cause against penalty — Absence of copy of enquiry report — There is no rule making it obligatory upon punishing authority to furnish the Government servant with copy of such report along with the show cause notice. See Constitution of India, Article 311 (2). **AIR 1957 Pat 676 (DB).**

——**Rr. 1706 and 1708 — Distinction between — Removal from service for offence under R. 1706 — Legality.**

The railway administration has made a distinction between dismissal from the service and removal from the service. The circumstances in which a railway servant shall be liable to be dismissed from the service are set forth in Rule 1706, and those justifying removal are enumerated in Rule 1708. 'Serious misconduct' comes under Rule 1706 and entails dismissal from the service. The penalty of removal from the service as envisaged in Rule 1708 is imposed in respect of offences which are less serious than those laid down in Rule 1706 for dismissal. But if a person for being guilty of a serious misconduct for which the prescribed punishment is dismissal from the service is simply removed from the service it cannot be reasonably argued that there was violation of the Statutory Rule 1708. The imposition of a lesser punishment in respect of an offence for which a higher punishment is prescribed is not at all illegal. **AIR 1957 Pat 676 (678) (Pt B) (Pr 4) (DB).**

——**R. 1706** — Railway servant removed from service for misconduct — Consultation with the Public Service Commission is not necessary — Notification in 1937 under Section 266 (3), Government of India Act. See Constitution of India, Article 320. **AIR 1957 Pat 676 (DB).**

——**R. 1706** — Discipline and Appeal Rules for non-gazetted staff, Rule 1706 — Word 'conviction' in Rule 1706 does not mean 'conviction' by inferior Court when superior Court sets it aside. See Constitution of India, Article 311 (2), Proviso (a). **AIR 1965 Punj 153.**

RULE 1707

——**Rr. 1707, 1708 and 148 (3)** — Reasonable opportunity — Permanent railway servant holding non-pensionable post—Absence from duty without leave — Order of removal from service on payment of one month's pay in lieu of notice not based on terms of agreement — Rule 148 (3) not applicable — Procedure prescribed by Rule 1707 not followed — Order of removal is by way of punishment and is illegal. See Government of India Act (1936), Section 240 (3). **AIR 1963 All 441.**

——**R. 1707 (c) — Departmental inquiry — Member of committee gathering knowledge of facts prior to inquiry — Effect.**

A departmental committee of inquiry is not deprived of jurisdiction to inquire into a matter because some of the members constituting the committee may have some knowledge of the facts that may have to be inquired into. It cannot be presumed that any member of the inquiry committee who knows some facts relevant to the inquiry is going to use that fact or suppress that fact to the prejudice of the person against whom the inquiry is held. **AIR 1957 All 671 (675, 676) (Pt E) (Prs 32, 33) (DB).**

——**R. 1707 (c)** — Inquiry committee functioning under control of authority not amenable to High Court's jurisdiction — Perpetration of injustice by committee — Powers of High Court to interfere. See Constitution of India, Article 226. **AIR 1957 All 671 (DB).**

——**R. 1707 (c)** — Evidence Act (1872), Sections 114 and 101 to 104 — Malice in law — Presumption — Mere non-adherence by a departmental inquiry committee to the strict procedure followed by a judicial tribunal does not amount to either acting mala fide or acting contrary to natural justice — (Constitution of India, Article 226) — (Words and Phrases). See Evidence Act (1872), Section 114. **AIR 1957 All 671 (DB).**

——**R. 1707 (c)** — Committee having jurisdiction to inquire — High Court's power to take away jurisdiction. See Constitution of India, Article 226. **AIR 1957 All 671 (DB).**

——**R. 1707 (c) — Committee — Conduct of inquiry.**

A committee, whether it is a departmental fact-finding committee or any other committee, which has the task of making inquiries and recording findings, should conform, as closely as possible, to those fundamental principles which govern the conduct of judicial inquiries. **AIR 1957 All 671 (678) (Pt I) (Pr 38) (DB).**

——**R. 1707** — Constitution of India, Article 311 (2) — 'Reasonable opportunity to show cause' — Meaning of — Opportunity to give explanation — Effect of — Enquiry under Rule 1707 — Sufficiency — (Government of India Act (1935), Section 240 (3)) — (Words and Phrases). See Constitution of India, Article 311 (2). **AIR 1956 All 393 (DB).**

——**R. 1707 (c)** — Non-supply of copies of statements of witnesses recorded by Fact Finding Committee — No provision in Code as to supply of copies to person charge-sheeted — Non-supply does not deprive him of reasonable facility for defence if he had reasonable opportunity to see the statements, read them and prepare his cross-examination on their basis. **AIR 1955 NUC (All) 3539.**

——**Rr. 1707, 1708 and 1709** — Service agreement — Power of termination of service can be exercised by Divisional Superintendent, if he follows proper procedure. **AIR 1955 NUC (All) 2656.**

——**Rr. 1707 to 1709 and 1712 — Scope — Reduction in rank — Procedure.**

The mere fact that in the charge-sheet, R. 1708, Railway Establishment Code is mentioned, does not make it necessary that the procedure should be one where the penalty imposed is one of removal from service. If the actual penalty imposed was one other than that of removal or dismissal in order to uphold the validity of the enquiry it will be sufficient if the procedure provided under Rule 1712 is followed. The provisions of Rule 1707 and sub-rules (c) and (e) do not contemplate a repetition of the enquiry before the officer before whom the applicant is called upon to show cause against the proposed punishment and who is authorised ultimately to pass the order of reduction in rank. The failure to supply the petitioner with a copy of the documents cannot constitute a failure to give a reasonable opportunity to the petitioner to defend himself before the enquiry committee, and also when it is done by the officer who ultimately passed the final order. **AIR 1959 Assam 112 (116) (Pt C) (Pr 4) (DB).**

——**R. 1707 (e)** — Railway servant — Disciplinary proceedings — Natural justice — Chairman of inquiry committee replaced in the middle of inquiry by another who had not heard witnesses so far examined — Enquiry is vitiated. **(1963-64) 68 Cal WN 1112.**

——**Rr. 1707, 148 (3) and 1709** — Contract of service — Termination of service — Right of railway authorities to take disciplinary action instead of terminating service in terms of contract — Employee entitled to protection of Section 240, Government of India Act — (Government of India Act (1935), Section 240 (3)) — (Constitution of India, Article 311 (2). See Railway Establishment Code, Rule 148 (3). **AIR 1960 Cal 264 (DB).**

[**Overruled** in AIR 1964 SC 600.]

——**R. 1707 — Show-cause notice — Who should issue — (Constitution of India, Art. 311).**

A show-cause notice under R. 1707 should be in the name of the punishing authority, or with its authority, consent or approval. This would make it an act of the punishing authority, and not an act of a third party. View expressed in 60 CWN 933, modified. **(1959) 1 Lab LJ 374: 62 Cal WN 169: AIR 1958 Cal 633 (634) (Pt C) (Pr 4).**

——**R. 1707** — Enquiry — Necessity of, pointed out. **AIR 1955 NUC (Cal) 1795 (DB).**

——**R. 1707-A** — Constitution of India, Article 311 (2) (a) — Applicability — Formal departmental enquiry against railway servant is not necessary — Conviction of criminal offence entitles Railway to dismiss servant, without taking note of further facts: **AIR 1955 NUC (Cal) 1793.**

——**R. 1707 (d), Proviso** — Nature of — Dismissal of Railway Employee based on findings in departmental enquiry — Non-compliance with Proviso to Rule 1707 (d) by enquiry committee — Order is illegal and can be set aside in exercise of powers under Article 227 of Constitution. See Constitution of India, Article 227. **AIR 1962 Pat 209 (DB).**

——**R. 1707** — Termination of service of railway guard on giving one month's pay in lieu of notice, after holding him guilty in disciplinary proceeding—Trial Court holding that charges against employee were not proved, but holding termination as proper on basis of contract — **Held,** trial Court was wrong in approaching case from point of view of contractual rights and liabilities of parties and termination should have been judged on basis of Rule 148 and Discipline and Appeal Rules — **Held,** further that the Court was not competent to examine evidence afresh to find out whether conclusion of enquiring authority was right or wrong. See Railway Establishment Code (1951), Rule 148. **(1961) ILR 40 Pat 421 (DB).**

——**R. 1707** — Order of termination — Date from which order operates is the date of decision of punishing authority and not date of communication of order. **(1961) ILR 40 Pat 421 (DB).**

——**R. 1707 — Clauses (c), (d), (e)** — Scope — Non-examination of defence witnesses — Mere non-examination cannot have effect of invalidating proceedings of the enquiry. See Railway Establishment Code, Rule 1709. **AIR 1955 Pat 305 (DB).**

——**R. 1707 — Clauses (c), (d), (e)** — Reasonable opportunity of showing cause — Petitioner wanted to prove, through defence witnesses, his allegations against one K and not to disprove charges — Members of departmental enquiry committee held, were justified in not giving opportunity to examine those witnesses. See Railway Establishment Code, Rule 1709. **AIR 1955 Pat 305 (DB).**

——**R. 1707 (e) — Findings of Inquiry Committee — Competent authority — If bound to accept.**

The competent authority is not bound to accept the findings of the Inquiry Committee and he is entitled under the rules to pass such orders as he thinks fit in the circumstances of the case. **AIR 1959 Punj 643 (645) (Pt A) (Pr 3).**

——**R. 1707** — Merger of B. B. and C. I. Railway with Western Railway and subsequent introduction of Divisional system — Divisional Operating Superintendent, who replaced District Traffic Superintendent of B. B. and C. I. Railway was not lower in rank and had authority to punish employee by reducing him in rank. See Constitution of India, Article 311. **1965 Raj LW 115: ILR (1965) 15 Raj 205: AIR 1966 Raj 37 (DB).**

——**Rr. 1707 and 1702** — Disciplinary authority, not competent to impose major but only minor penalty specified in Rule 1707 can issue charge-sheet for the same. **1965 Raj LW 115: ILR (1965) 15 Raj 205: AIR 1966 Raj 37 (39) (Pt B) (Pr 14) (DB).**

——**R. 1707 — Enquiry against railway servant belonging to category of senior Class III staff — Enquiry Committee to be constituted of three members — Rule 42 of Rules for Non-gazetted Railway servants of Northern Railway does not supersede Rule 1707.**

The rules providing procedure for conducting enquiries under the Disciplinary Action Rules are statutory rules, and a failure to comply with them has to be held to be illegal. Enquiry against a railway servant belonging to the category of senior Class III staff must be held by an enquiry committee constituted of three members. Rule 42 of the rules for non-gazetted railway servants of the Northern Railway published by its General Manager cannot supersede the above procedure. Even under Rule 42 which permits a single officer enquiry, circumstances warranting such course must clearly appear from the order appointing the departmental enquiry. **ILR (1962) 12 Raj 302: 1962 Raj LW 246: AIR 1962 Raj 265 (267) (Pt A) (Pr 8) (DB).**

——**R. 1707 — Applicability — Applies to case of reduction in rank after amendment on 18th July, 1956.**

Where in the charge-sheet served to the railway servant, on the 25th July, 1957, it was mentioned that he was sought to be proceeded against under Rule 1708 of the Railway Establishment Code, that did not make any difference to the procedure which was and should be held to be correctly applicable to the inquiry in a case where reduction in rank was contemplated. The reason was that Rule 1707 came to be amended from the 18th July, 1956, and the procedure laid down thereunder which was earlier applicable only to a case of dismissal was also prescribed for cases of dismissal, removal and reduction. **ILR (1962) 12 Raj 302: 1962 Raj LW 246: AIR 1962 Raj 265 (268) (Pt B) (Pr 10) (DB).**

RULE 1708

——**R. 1708, Proviso** — Applicability — Termination of service — Whether by way of penalty or in terms of contract — How determined — Payment of one month's salary — Effect — Removal from service under Rule 1702 — Nature of indicated. See Constitution of India, Article 311 (2). **AIR 1957 All 439 (DB).**

——**R. 1708** — Scope — Concealment of antecedents by railway servant at time of appointment — When ground for removal from service, stated. See Railway Establishment Code, Rule 1706 (v). **(1957) All LJ 143.**

——**R. 1708** — Service agreement — Power of termination of service — Can be exercised by a Divisional Superintendent if he follows proper procedure and if the conditions for removal exist. See Railway Establishment Code, Rule 1707. **AIR 1955 NUC (All) 2656.**

——**R. 1708, Proviso** — Removal of servant in terms of agreement by authority appointing him — Authority not Head of Department within Rule 1708 — Validity — Such termination of service cannot be disputed by the servant — (Constitution of India, Article 311). **AIR 1955 NUC (All) 1765 (DB).**

——**R. 1708, Proviso — Removal of — Servant in terms of contract of service — Authority of Divisional Superintendent — (Master and Servant).**

The power of removal referred to in the Schedule of powers contained in the pamphlet issued by the Railway Administration entitled 'Regulations regarding disciplinary action against non-gazetted staff including removal from service, dismissal and rights of appeal', is a punishment for an offence and has nothing whatever to do with that form of removal from service which consists in termination of an employee's contract of service.

It does not follow that because a particular officer has authority to impose the penalty he can terminate the contract.

Under the proviso to Rule 1708 the power to remove a railway servant from service in terms of his agreement can be exercised only by a General Manager or by an authority not lower than the head of the department to whom he has delegated his power. A divisional superintendent not being the head of a Department cannot exercise that power and hence such removal by him is invalid and has not the effect of terminating the service of the employee. **1955 All LJ 788: 1955 All WR (HC) 693: (1956) 1 Lab LJ 7: ILR (1956) 2 All 161: AIR 1955 All 568 (569) (Prs 9, 11) (DB).**

——**Rr. 1708, 1707 and 1709 and 1712** — Scope and applicability — Proceedings under para 1708 — Penalty of reduction in rank — Procedure indicated. See Railway Establishment Code, Rule 1707. **AIR 1959 Assam 112 (DB).**

——**Rr. 1708, 148** — Charges framed — Termination of services not under disciplinary rule but under contract without holding inquiry, is not illegal. See Railway Establishment Code Vol. I, Rule 148. **(1960) 2 Lab LJ 384 (AP).**

——**R. 1708** — Constitution of India, Article 311 (2) — Provision does not apply where termination of service is according to terms of conditions of service — Employer having right to terminate service either under terms of contract or by holding departmental enquiry can proceed in either of the two modes — **Held,** that termination of service of the railway servant was according to terms of service and not by way of punishment. See Constitution of India, Article 311 (2). **AIR 1963 Mys 193 (DB).**

——**Rr. 1708 and 1706** — Distinction between, pointed out — Removal from service for offence under Rule 1706 — Legality. See Railway Establishment Code, Rule 1706. **AIR 1957 Pat 676 (DB).**

——**Chap. 17, R. 1708** — Applicability — Assistant trains Clerk in Transport Department removed from service by order of Superintendent of Transport — Order held not void or illegal. See Railway Establishment Code, Chap. 17, Rule 1704. **AIR 1955 Pat 305 (DB).**

——**Rr. 1708, 148 (3) and (4)** — Order terminating service of railway servant — Order whether falls under Rule 148 (3) and Rule 148 (4) — Mention of Rule 1708 is mistake. See Railway Establishment Code, Rule 148 (3). **AIR 1958 Raj 250 (DB).**

——**R. 1708, Proviso — 'Remove' — Meaning of.**

The word 'remove' in the proviso is obviously used merely in the sense of termination of service and not in the sense of 'removal' which is contemplated under Article 311, and which results in certain losses to the person removed. **1957 Raj LW 567: ILR (1957) 7 Raj 836: AIR 1958 Raj 250 (252) (Pt B) (Pr 10) (DB).**

[**Overruled** on another point in AIR 1964 SC 600.]

RULE 1709

——**R. 1709** — Service agreement — Power of termination of service — Can be exercised by a Divisional Superintendent if he follows proper procedure and if the conditions for removal exist. See Railway Establishment Code, Vol. I, Rule 1707. **AIR 1955 NUC (All) 2656.**

——**Rr. 1709, 1707, 1708 and 1712** — Scope and applicability — Proceedings under para 1708 — Penalty of reduction in rank — Procedure indicated. See Railway Establishment Code, Para. 1707. **AIR 1959 Assam 112 (DB).**

——**Rr. 1709, 148 (3)** — Contractual right intended to be enforced against employee — Chance of explaining conduct should be given — (Constitution of India, Article 311 (2). See Government of India Act (1935), Section 240 (3). **AIR 1960 Cal 264 (DB).**

[**Overruled** in AIR 1964 SC 600.]

——**Rr. 1709, 148 (3), 1707** — Contract of service — Termination of service — Right of railway authorities to take disciplinary action instead of terminating service in terms of contract — Employee entitled to protection of Section 240, Government of India Act — (Government of India Act (1935), Section 240 (3)) — (Constitution of India, Article 311 (2)). See Railway Establishment Code, Rule 148 (3). **AIR 1960 Cal 264 (DB).**

[**Overruled** in AIR 1964 SC 600.]

——**Rr. 1709, 148 (3)** — Charge-sheet served on employee — No other step contemplated in Rule 1709 taken — Order of removal giving one month's notice — Proceedings held to be under Rule 148 (3) — Section 240, Government of India Act, held did not come into operation. See Railway Establishment Code, Rule 148 (3). **AIR 1960 Cal 264 (DB).**

[**Overruled** in AIR 1964 SC 600.]

——**R. 1709** — Rule prior to its amendment in 1952, is valid. See Constitution of India, Article 311 (2). **AIR 1956 Cal 662.**

——**R. 1709 (b)** — Validity of Rule — Rule held ultra vires the provision of Government of India Act and the Constitution. See Government of India Act (1935), Section 240 (3). **AIR 1954 Cal 399 (DB).**

——**R. 1709** — Constitution of India, Article 311 (2) — Provision does not apply where termination of service is according to terms and conditions of service — Employer having right to terminate service either under terms of contract or by holding departmental enquiry can proceed in either of the two modes — **Held,** that termination of service of the railway servant was according to terms of service and not by way of punishment. See Constitution of India, Article 311 (2). **AIR 1963 Mys 193 (DB).**

——**Chap. XVII, R. 1709** — Applicability — Assistant trains clerk in Transport Department removed from service by order of Superintendent of Transport — Order held not void or illegal. See Railway Establishment Code, Chap. XVII, Rule 1704. **AIR 1955 Pat 305 (DB).**

——**Rr. 1709, 1707, Cls. (c), (d), (e) — Reasonable opportunity of showing cause.**

Where the petitioner wanted to prove, through the defence witnesses, his allegations against one K and not to disprove the charges framed against the petitioner. **Held,** that the members of the departmental enquiry committee were perfectly justified in not giving an opportunity to the petitioner to examine those witnesses. **ILR (1955) Pat 625: AIR 1955 Pat 305 (313) (Pt C) (Pr 18) (DB).**

——**Rr. 1709, 1707, Cls. (c), (d), (e) — Scope — Non-examination of defence witnesses.**

The mere non-examination of the witnesses cited by the petitioner in the course of departmental enquiry cannot have the effect of invalidating the proceeding of the enquiry or the order passed by the ultimate authority on the basis of its report. So also the mere denial by the enquiry committee to allow the petitioner to cross-examine a witness does not cause any prejudice to him nor does it amount to any denial of reasonable facilities for the conduct of his defence as contemplated by Rule 1707. **ILR (1955) Pat 625: AIR 1955 Pat 305 (313, 316) (Pt D) (Prs 20, 24) (DB).**

——**R. 1709, Proviso** — Applicability — Nothing on record to show that officer competent to pass order of removal had consciously dispensed with departmental enquiry or that he had recorded any considered opinion why such inquiry should be dispensed with — Case held did not fall within proviso to Rule 1709. **1963 Raj LW 128: ILR (1963) 13 Raj 28: AIR 1963 Raj 57 (60) (Pt A) (Pr 8).**

——**R. 1709** — Proviso to Rule 1709, Railway Establishment Code — Validity — Provision, in so far as it overrides Article 311 (2) of the Constitution, is ultra vires. See Constitution of India, Article 311 (2). **AIR 1963 Raj 57.**

RULE 1710

——**R. 1710** — Disciplinary Authority can itself hold enquiry or at its discretion appoint either Board of Enquiry or Inquiring Officer. **1965 Raj LW 115: ILR (1965) 15 Raj 205: AIR 1966 Raj 37 (40) (Pt C) (Pr 16) (DB).**

——**R. 1710** — Inquiring Officer should be of rank higher than accused employee but need not belong to higher class. **1965 Raj LW 115: ILR (1965) 15 Raj 205: AIR 1966 Raj 37 (40) (Pt D) (Pr 17) (DB).**

RULE 1711

——**R. 1711 — Suspension — Servant guilty of serious misconduct — Discretion of authority.**

For the purposes of suspension it is not necessary that the authority suspending a railway servant should definitely come to the conclusion before he orders suspension that the railway servant who is to be suspended was guilty of serious misconduct. It is sufficient if the suspending authority has reason to think that the railway servant has been guilty of serious misconduct which could entail his dismissal from service. The matter must, per necessity, be within the complete discretion of the officer in whom is vested the power to suspend; his discretion cannot be circumscribed lightly. **AIR 1957 All 671 (675) (Pt C) (Pr 32) (DB).**

——**R. 1711 — Order of suspension by Financial Adviser and Chief Accounts Officer — Question whether order was justified — Power of High Court to go into question — (Constitution of India, Article 226).**

Where a suspension order is made by the Financial Adviser and Chief Accounts Officer, Northern Railways, the question whether he was justified in making that order cannot be gone into by the High Court in a proceeding under Article 226 if the F. A. and C. A. O. was no party to the proceeding and because, the F. A. and C. A. O. is not amenable to the jurisdiction of the High Court in so far as he resides and functions beyond the territorial limits of the High Court's jurisdiction. **AIR 1957 All 671 (675) (Pt D) (Pr 32) (DB).**

——**R. 1711 (a), (b) — Applicability — Conditions.**

Sub-rule (a) is attracted only when there are proceedings in a Court of law and sub-rule (b) is attracted in the case of departmental proceedings. No valid order for suspension can be made under Rule 1711 (a), where a railway servant has neither been arrested nor committed to prison pending trial by a Court of law. **ILR (1955) 1 Cal 456.**

——**R. 1711 (b)** — 'Investigation' — Meaning of — This has reference to departmental investigation. **62 Punj LR 714: AIR 1960 Punj 605 (605) (Pt A) (Pr 1a).**

——**R. 1711 (a)** — 'When he is arrested' — When a person appears in response to a summons to answer a charge of offence and execute a bail bond for future appearance in Court he cannot be regarded to have been arrested at any stage prior or subsequent to the grant of the bail: AIR 1953 Cal 45, Rel. on; AIR 1950 EP 53 (FB), Dist. **62 Punj LR 714: AIR 1960 Punj 605 (606) (Pt B) (Pr 3).**

●——**Rr. 1711, 2043** — Contract of service with railway administration — Terms contained in Railway Establishment Code forming basis of contract — Suspension of railway servant is valid — (Constitution of India, Article 311). **AIR 1957 Punj 130 (FB).**

●——**Rr. 1711, 2043** — Service in railway administration — Railway administration has an undisputable power to suspend its employee — Employee is not entitled to any salary for the period of suspension excepting the subsistence grant — (Constitution of India, Article 311). Divisional Superintendent, Northern Railway v. Mukand Lal, **59 Pun LR 173: (1957-58) 12 FJR 182: (1957) 2 Lab LJ 452: AIR 1957 Punj 130 (132, 133) (Pt D) (Prs 9, 12) (FB).**

●——**Rr. 1711 and 2043 — Conflict between Railway Establishment Code and Payment of Wages Act — Code prevails — (Constitution of India, Articles 254 and 311 (2)) — (Payment of Wages Act (1936), Sections 7 and 10).**

If there is any conflict between the provisions of the Payment of Wages Act, 1936 and the rules contained in the Indian Railway Establishment Code framed under Section 241 (2), Government of India Act, 1935, it is the Code which must prevail. A railway employee cannot, during his period of suspension, claim his full wages and he cannot go to the authority under the Payment of Wages Act alleging that his wages have been deducted, because in fact there has been no deduction. 58 Bom LR 821, Foll. Divisional Superintendent, Northern Railway, Delhi Division v. Mukand Lal, **ILR (1957) Punj 1059: 59 Punj LR 173: (1957-58) 12 FJR 182: (1957) 2 Lab LJ 452: AIR 1957 Punj 130 (133, 134) (Pt E) (Prs 13, 14) (FB).**

RULE 1712

●——**Rr. 1712, 1702, 148** — Permanent railway servant — Charge of misconduct — Termination of service by way of punishment — Opportunity against proposed punishment not given — Order held not valid — (Government of India Act (1935), Section 240 (3)). See Constitution of India, Article 311 (2). **AIR 1958 SC 905.**

——**R. 1712** — Government of India Act (1935), Sec. 240 (3) — Inconsistency — First and second opportunity — (Constitution of India, Article 311 (2)). See Government of India Act (1935), Section 240 (3). **AIR 1956 Ajmer 17.**

——R. 1712 — Show cause notice against proposed punishment — Servant is entitled to know materials on which he was found guilty. See Constitution of India, Article 311. **AIR 1961 All 276.**

——Rr. 1712, 1702 — Payment of Wages Act (1936), S. 7 (2) (h) — Authority competent to pass order for deductions from pay of railway employee — Officer having power under the rules can be styled as an 'authority' having the power to pass such order — (Government of India Act (1935), Section 241 (2)). See Payment of Wages Act (1936), Section 7 (2) (h). **AIR 1957 All 363 (DB).**

——R. 1712 — Reasonable facilities for defence— What amounts to.

The 1st respondent had asked for copies of all the statements of the officers who had deposed against him, but his request was refused. He was, however permitted to see the file containing the statements of the witnesses, which were recorded by the committee of enquiry. The 1st respondent wanted three days' leave to prepare his reply and that was also granted to him.

Held, that the 1st respondent had every opportunity to inspect that record and to prepare his defence. Hence, sufficient opportunity was given to him to prepare his defence, and the order passed by the Railway authorities for the deduction of the amount from his salary was fully justified. **1958 All WR (HC) 367: AIR 1957 All 363 (365, 366) (Pt E) (Prs 11, 12, 14).**

——Rr. 1712, 1704 — Punishment of reduction to lower post — Notice not specifying proposed salary — Notice indicating that he was to be in post carrying salary scale of Rs. 55-130 — Notice held not invalid — No prejudice to person concerned, since he had notice that he could be awarded starting salary of Rs. 55. See Railway Establishment Code, Rule 1704. **AIR 1955 NUC (All) 3539.**

——Rr. 1712, 1707, 1708, 1709 — Scope and applicability — Proceedings under Para. 1708 — Penalty of reduction in rank — Procedure indicated. See Railway Establishment Code, Rule 1707. **AIR 1959 Assam 112 (DB).**

——Rr. 1712, 1702 — Order withholding increment of railway servant passed in contravention of paras. 1702 and 1712 of Railway Code — Authority under Payment of Wages Act holding loss of wages resulting from order as unauthorised deduction under Section 7 (1), Expl. II — Order of Authority does not contravene Article 310 (1) of Constitution. See Payment of Wages Act (1936), Section 7 (1). **AIR 1964 Punj 242 (DB).**

——R. 1712 — Order punishing railway servant passed by Divisional Superintendent of Railways in purported exercise of revisional powers — Order not being made by authority competent to make it — Loss of wages resulting from it amounts to unauthorised deduction under Section 7 (2) (h), Payment of Wages Act — Contravention of Para 1712 of Railway Code. See Payment of Wages Act (1936), Section 7 (2) (h). **AIR 1964 Punj 242 (DB).**

——R. 1712 (3) — Departmental enquiry against railway servant — Ex parte proceedings — Employee not taking part in enquiry proceedings — Opportunity given but not availed of — Order of dismissal based on finding in such ex parte enquiry recorded without examining evidence — Article 311 (2) can be invoked. See Constitution of India, Article 311 (2). **AIR 1965 Raj 87 (DB).**

RULE 1713

——R. 1713 — Certiorari — Bias — Waiver of objection — Enquiry against railway servant — Enquiry by officer who conducted investigation regarding alleged charge — Servant, though aware of his right to object to enquiry being conducted by the officer, not objecting — **Held,** he could not be allowed to contend in writ, that enquiry was biased — Disciplinary authority could consider whether prejudice had been caused or not. See Constitution of India, Article 226. **1965 Ker LT 554: ILR (1965) 1 Ker 536.**

——R. 1713 — Enquiry against railway servant — Servant expressing satisfaction with manner of enquiry, on being questioned by enquiry authority — **Held,** enquiry could not be characterised as being violative of principles of natural justice, in writ petition — Disciplinary authority could consider whether it was fair or not. See Constitution of India, Article 226. **1965 Ker LT 554: ILR (1965) 1 Ker 536.**

——R. 1713 — Disciplinary authority, who is not enquiry authority — Duties of.

The rule insists on finding being entered on each of the charges by the disciplinary authority. This necessarily implies an advertence to the evidence which has been adduced at the time of the enquiry in relation to each of the charges and an analysis of this evidence and an assessment of the same, if not, the sifting of it, in order to come to the conclusion as to whether the charge has been established or not, Statement by such authority that he agrees with the findings of the Enquiry Officer that all charges mentioned in the charge-sheet have been established, cannot amount to compliance with the rule. **1965 Ker LT 554: ILR (1965) 1 Ker 536.**

RULE 1717

——Rr. 1717, 1725, 1727 and 1702 — Removal from service under Rule 1702 (8) — Application by railway servant under Article 226 of Constitution without pursuing remedies available under Rules 1717, 1725 and 1727 — High Court refused to grant any relief under Article 226 in the absence of any special or extraordinary reasons to do so. See Constitution of India, Article 226. **AIR 1953 Raj 199 (DB).**

RULE 1721

——R. 1721 — Duty of appellate authority.

It is a matter of great importance not only to the railway servant involved but to the prestige and sense of fair-play of the Railway Administration itself, that the appellate authority should give particular attention to the matters mentioned in Rule 1721. Even if there had been no rules, the demand of natural justice was that the points raised in the memorandum of appeal should be properly considered and due weight given by the appellate authority. Where the appellate authority in disposing of the long memorandum of appeal filed against the order of removal from service passed against the petitioner, merely said that after going through it and the relevant papers, it considered that penalty imposed should stand the way in which the appellate authority has disposed of the appeal amounts to no consideration of the appeal at all. **AIR 1960 Assam 51 (55) (Pt B) (Pr 9) (DB).**

——R. 1721 — Scope — Personal hearing — If essential.

Under Rule 1721, Railway Establishment Code, the giving of personal hearing to the delinquent

has been left to the discretion of the authority. There are only executive instructions issued by the Railway Board and unless it can be found that the refusal to give a personal hearing amounts to failure to give reasonable opportunity to show cause within the meaning of Article 311 (2) of the Constitution, no relief can be granted to the petitioner under Article 226 of the Constitution merely for the enforcement of the violation of such instructions. **AIR 1959 Assam 112 (118) (Pt E) (Pr 9) (DB).**

——R. 1721 — Scope of — Appellate authority not giving reasons for decision — If vitiates order.

Rule 1721 of the Railway Establishment Code only says that the appellate authority shall consider certain matters as stated therein. It does not, however, say that in considering those matters it should give reasons for its decision. The order of appellate authority cannot, therefore, be assailed as bad in law merely because it does not give reasons for its decision. **1961 Nag LJ (Notes) 36 (Bom).**

——R. 1721 — Departmental enquiry — Fair opportunity — Sudden closure of personal hearing — **Held,** prejudicial to delinquent officer. See Constitution of India, Article 311. **AIR 1965 Cal 557.**

——R. 1721 — Departmental enquiry — Order by appellate authority cryptic in the extreme not showing that it considered facts on which order was based — No consideration of whether in the background of defence, facts established any justification of action taken — Order held did not fit in requirements of Rule 1721. See Constitution of India, Article 311. **AIR 1965 Cal 557.**

——R. 1721 — Departmental enquiry — Right of delinquent officer to be assisted by another railway employee or official of trade union — Refusal to allow assistance of railway employee who was also official of trade union on ground that the trade union was unrecognised — Delinquent officer held prejudiced. See Constitution of India, Article 309. **(1964) 9 Fac LR 174: AIR 1965 Cal 557 (560) (Pt C) (Pr 5).**

RULE 1721-A

——R. 1721-A — Appellate authority has discretion to give personal hearing to appellant — Exercise of discretion will not be controlled by High Court under Art. 226 of Constitution. See Constitution of India, Article 226. **AIR 1959 Punj 643.**

RULE 1725

——R. 1725 — Scope — Petition to General Manager to exercise revisional powers — Competency.

Rule 1725 empowers the General Manager to exercise his revisional powers on his own motion or otherwise. The word 'otherwise' covers cases of petitions being moved to the General Manager to exercise his revisional powers. **1960 All LJ 727: (1961) 1 Lab LJ 424: AIR 1961 All 338 (340) (Pt A) (Pr 8) (DB).**

——R. 1725 (a) — Scope — Powers of revision and review.

Rule 1725 gives a two-fold power to the Railway Board, General Manager or the Divisional Superintendent. They can revise any order passed by a subordinate authority. They can also review their own orders or those of predecessor. The power of review, however, can be exercised only if some fresh facts come to light or if the employee by his subsequent conduct has proved that he deserves a mitigation of the penalty imposed on him. **AIR 1960 All 164 (176) (Pt D) (Prs 43, 441.**

——R. 1725 — Enquiry in misconduct of railway servant — Powers of revising authority — Rule 1725 is to be construed as being subject to Article 311 (2) — It is not ultra vires. See Constitution of India, Article 311 (2). **(1963) 67 Cal WN 199.**

——R. 1725 — Penalty — Imposition of — Enquiry in misconduct of railway servant — Revising authority — His power to impose punishment other than one imposed by subordinate authority. See Constitution of India, Article 311 (2). **(1963) 67 Cal WN 199.**

——Rr. 1725, 1702, 1717 and 1727 — Removal from service under Rule 1702 (8) — Application under Article 226 of Constitution without pursuing remedies available under Rules 1717, 1725 and 1727 — High Court refused to grant relief under Article 226 in absence of any special or extraordinary reasons to do so. See Constitution of India, Article 226. **AIR 1953 Raj 199 (DB).**

RULE 1726

——Rr. 1726, 1702, 1706 — Misconduct, what amounts to — Misconduct outside working hours and duty — Disciplinary action can be taken. See Railway Establishment Code (Discipline and Appeal) Rules (Non-Gazetted), Rule 1702. **AIR 1961 Bom 150 (DB).**

——R. 1726 — Rules under — Nature of — Subsidiary rules contemplated by Rule 1726 are rules proper and not Minutes recorded by Manager — Minute sheet No. AE 1795/2 of 3rd March, 1937, does not purport to be subsidiary rule and is mere expression of opinion — There are not rules having force of law — Rule 1706 may provide that upon conviction servant is liable to be dismissed, but railway may not dismiss him. **AIR 1955 NUC (Cal) 1795 (DB).**

——Rr. 1726, 1706 — Rules under Rule 1726 — Scope of — Rule 1726 does not confer power on General Manager to frame rule which will detract from Rule 1706 — Such a rule will be ultra vires. **AIR 1955 NUC (Cal) 1795 (DB).**

RULE 1727

——R. 1727 — Compulsory retirement of Railway servant — Only remedy is to petition the President under Rule 1727. See Constitution of India, Article 226. **AIR 1954 Punj 245.**

——Rr. 1727, 1725, 1717 and 1702 — Removal from service under Rule 1702 (8) — Application by railway servant under Article 226 of Constitution without pursuing remedies available under Rules 1717, 1725 and 1727 — High Court refused to grant any relief under Article 226 in the absence of any special or extraordinary reasons to do so. See Constitution of India, Article 226. **AIR 1953 Raj 199 (DB).**

RULE 1728

——Rr. 1728 and 1729 and Sch. II, Items (2) and (3) and Vol. II, R. 2021 — Effect of — Power to sanction increment next above the efficiency bar in respect of Railway Services, Class II, vests in the General Manager.

The combined effect of Rules 2021 and 1728 read with Schedule II is that the increment next

above the efficiency bar shall not be given without the specific sanction of the General Manager or the Railway Board. Thus the power of sanctioning increment next above the efficiency bar vests in the General Manager. **59 Cal WN 812: ILR (1957) 1 Cal 447: AIR 1955 Cal 385 (387) (Pt B) (Pr 5) (DB).**

RULE 1729

——**Rr. 1729, 1728 and Sch. II, Items (2) and (3) and Vol. II, R. 2021** — Effect of — Power to sanction increment next above the efficiency bar in respect of Railway Services, Class II, vests in the General Manager. See Railway Establishment Code, Vol. 1, Rule 1728. **AIR 1955 Cal 385 (DB).**

RULE 2003

——**R. 2003** — Suit by railway servant against Union of India for arrears of salary — Plaintiff claiming that he was entitled to draw salary on basis of old scales — Amount claimed representing difference between old scale and new scale — Maintainability — **Held,** as plaintiff must be deemed to have been placed in old scales, he was entitled to draw pay in that scale—On authority of AIR 1954 SC 245, the suit so far as relief of arrears of salary was concerned was maintainable. See Constitution of India, Article 300. **AIR 1961 Punj 329.**

RULE 2021

——**R. 2021** — Effect of — Power to sanction increment next above the efficiency bar in respect of Railway Services, Class II, vests in the General Manager. See Railway Establishment Code, Rule 1728. **AIR 1955 Cal 383 (DB).**

RULE 2043

● ——**Rr. 2043, 1711** — Contract of service with railway administration — Terms contained in Railway Establishment Code forming basis of contract — Suspension of railway servant is valid — (Constitution of India, Article 311). **AIR 1957 Punj 130 (FB).**

● ——**Rr. 2043, 1711** — Service in railway administration — Railway administration has an undisputable power to suspend its employee — Employee is not entitled to any salary for the period of suspension excepting the subsistence. See Railway Establishment Code, Rule 1711. **AIR 1957 Punj 130 (FB).**

● ——**Rr. 2043, 1711** — Conflict between Railway Establishment Code and Payment of Wages Act — Code prevails — (Constitution of India, Articles 254 and 311 (2)) — (Payment of Wages Act (1936), Sections 7 and 10). See Railway Establishment Code, Rule 1711. **AIR 1957 Punj 130 (FB).**

——**R. 2043** — Railway servant — Suspension — Administration having duly suspended him in exercise of the power to suspend, he was not entitled to any salary for period of suspension excepting subsistence grant. See Payment of Wages Act (1936), Section 15. **AIR 1955 NUC (Punj) 2163.**

——**R. 2043 — Applicability — Employees tried in Court.**

Where an employee is suspended and the suspension is followed, either by departmental proceedings or by prosecution in Court, Rule 2043, applies so far as pay and allowances for the period of suspension are concerned. In the case of departmental proceedings, it will apply by its own force and in those cases where the case is sent to Court it will apply by virtue of Section III of the Appendix XXXI. **1959 Raj LW 670: ILR (1958) 8 Raj 1129: AIR 1959 Raj 55 (56) (Pt A) (Pr 9) (DB).**

RULE 2044

——**R. 2044 — Scope — Dismissal of railway servant by Railway authority — Dismissal set aside as being illegal by High Court in writ petition — No question of reinstatement arises — Rule 2044 does not apply.**

Rule 2044, Railway Establishment Code is applicable to the cases where the employee who has been dismissed, removed or suspended is reinstated by an order of the Railway Authority acting as a revising or appellate authority. It does not seem to have any application where a railway employee has been removed from service by the order of a railway officer and then his dismissal has been held to be illegal and he has been ordered to be restored to service by an order of the Civil Court or by an order passed by the High Court in its writ jurisdiction. In such a case the question of reinstatement does not at all arise because the employee shall be deemed to have continued in service without any break. AIR 1958 Punj 155; (1961) 2 Lab LJ 454 (Cal) and AIR 1954 SC 245, Foll.; AIR 1959 Raj 55, Dist. **1962 All LJ 872: AIR 1963 All 123 (125) (Pt A) (Prs 6, 8, 10).**

——**R. 2044 — Salary and allowance to honourably acquitted railway servant — Discretionary power of revising or appellate authority.**

The revising or appellate authority has no power to exercise any discretion in the case of payment of salary and allowance of a railway servant who has been found to have been honourably acquitted. In regard to the situation contemplated by Clause (a) there was no discretion; the revising or appellate authority had to grant such a railway servant the full salary and full allowances and the authority had to determine by a separate order only the nature of the allowances. The word 'may' in the rule had been used only to indicate the 'empowering' of the authority and not to indicate that the authority had vested in him a discretion in the matter. AIR 1935 PC 12, Rel. on. **1957 All LJ 840: 1957 All WR (HC) 831: (1958) 1 Lab LJ 198: AIR 1958 All 342 (343) (Pt A) (Pr 3).**

——**Rr. 2044, 509, 510, 511** — Railway servant entitled to special running allowance suspended and later reinstated after suspension was found unjustifiable — He was entitled to claim running allowances. See Railway Establishment Code, Rule 509. **AIR 1958 All 342.**

——**R. 2044** — Interpretation of — Rule not unjustifiable — He was entitled to claim running inconsistent with Payment of Wages Act. See Payment of Wages Act (1936), Section 7 (2) (b). **AIR 1955 NUC (Bom) 4261 (DB).**

——**R. 2044** — Dismissal from service — Order of reinstatement by appellate or revisional authority — It can direct that no salary be paid for period during which employee remained under dismissal. **AIR 1955 NUC (Bom) 4261 (DB).**

——**R. 2044** — Railway servant dismissed on basis of conviction for offence unconnected with his duty — Conviction set aside in appeal — Order of dismissal also set aside — Servant is entitled to his pay for period between dismissal

and reinstatement. See Constitution of India, Article 311 (2). **AIR 1965 Cal 75.**

——**R. 2044** — Order of dismissal or removal of railway employee set aside by decree of Court — Rule 2044 of Railway Establishment Code not applicable to it — Order of dismissal quashed — Employee deemed to be always in service — No order under the above rule could be passed. See Payment of Wages Act, Section 7 (2). **1968 MPWR 745: 1964 MPLJ (Notes) 210.**

——**R. 2044 — Dismissal of railway servant set aside as being illegal by High Court in writ jurisdiction — No question of reinstatement arises — Deduction from wages made under Rule by authority under Payment of Wages Act (1936) is illegal — Payment of Wages Act (1936), Sections 7 (2) (h) and 15.**

Rule 2044 which governs cases of reinstatement of railway servants who have been dismissed, removed or suspended, applies only to consequential orders of reinstatement which are passed by the competent administrative authority. It has no application to cases where orders of dismissal or removal from service are declared by a decree of the Civil Court to be illegal and inoperative or quashed in proceedings under Article 226. AIR 1958 Punjab 155; AIR 1963 All 123, Rel. on.

Thus where the order of dismissal from service is quashed by High Court in writ jurisdiction on the ground that employee has not been afforded reasonable opportunity of defending himself, there can be no question of reinstating the employee as the position is that as if he has never been removed from service and he is all along on duty. In such circumstances an order purporting to be under Rule 2044 by the authority under Payment of Wages Act (1936) requiring deduction to be made from the servant's wages in contrary to the provisions of Payment of Wages Act (1936). **1968 MPWR 745: (1964) MPLJ (Notes) 210.**

——**R. 2044** — Respondent, driver in service of railway administration — Respondent put under suspension for 8 years — Thereafter respondent informed that he could join duty — Immediately thereafter respondent served with order of termination of service — Emoluments during period of suspension not restored — Order held was of penal character and attracted Article 311 (2). See Constitution of India, Article 311 (2). **AIR 1964 Mad 243 (DB).**

——**R. 2044 (F. R. 54) and S. III, Appendix XXXI — Criminal proceedings against employee — Suspension — Employee acquitted on benefit of doubt — He is not entitled to full wages during period of suspension.**

Section III, Appendix XXXI, Indian Railway Establishment Code, Vol. II, merely lays down that an adjustment of the allowances of a railway servant against whom proceedings have been taken on a criminal charge for the period of suspension should thereafter be made according to the cricumstances of the case, the full amount being given only in the event of the officer having been acquitted of blame. This provision when it talks of the contingency being only when he is acquitted of blame, contemplates virtually the same situation as sub-rule (2) of Rule 2044 (FR 54), Indian Railway Establishment Code, Vol. 2, does the difference in phraseology notwithstanding; and unless he is fully exonerated it is not permissible to hold that he has been acquitted of blame. The purpose, motive and object of the two provisions can on no principle or precedent be held to be different for the standards of blame-worthiness for Government employees must from the very nature of things be higher than that of securing conviction on a criminal charge in criminal Courts as adopted by our jurisprudence. Acquittal by giving benefit of doubt thus does not by itself or ipso facto amount to acquittal of blame. **(1963-64) 25 FJR 219: ILR (1963) 2 Punj 121: (1964) 1 Lab LJ 665.**

——**R. 2044** — Claim for wages for period of suspension, after reinstatement — Servant entitled to full wages and not merely subsistence allowance. See Payment of Wages Act (1936), Section 15. **(1961-62) 21 FJR 426 (Punj).**

——**R. 2044 — Applicability — Reinstatement of employee by decree of Civil Court.**

Rule 2044 is clearly intended to be applicable in cases where the employee who has been dismissed, removed or suspended is reinstated by some Railway Officer acting as a revising or appellate authority. It would not be applicable in a case where an employee removed from service by the order of the Railway Officer is restored to service by a decree of a Civil Court declaring his removal to be illegal and inoperative. AIR 1954 SC 245; 1954 SCJ 300, Rel. on **60 Punj LR 227: AIR 1958 Punj 155 (159) (Pt B) (Pr 15).**

——**R. 2044 — Applicability — Prosecution for offence connected with office duty.**

Though the rule itself says nothing as to whether it applies to reinstatement after the departmental proceedings only or also to reinstatement after a criminal prosecution resulting in an acquittal, certain instructions issued by the Government of India say that the Rule applies to departmental punishment and not to cases of punishment by a Court of law for an alleged offence which has nothing to do with his official duties. Therefore, where the prosecution is for an offence which is connected with official duties, there seems to be nothing in these instructions which debar the application of Rule 2044. **1959 Raj LW 670: ILR (1958) 8 Raj 1129: AIR 1959 Raj 55 (57) (Pt B) (Pr 10) (DB).**

——**R. 2044** — Order under, directing deduction of wages falls within Section 7 (2) (h) of Payment of Wages Act — (Constitution of India, Articles 309 and 372). See Payment of Wages Act (1936), Section 7 (2) (h). **AIR 1956 Raj 145 (DB).**

——**R. 2044 — Order under, when to be passed.**

Where a person is reinstated on account of procedural defect, and is again proceeded against departmentally on the same charges after removing the defect, the order under Rule 2044 has to be passed after the second proceeding is over. **1956 Raj LW 288: ILR (1956) 6 Raj 889: AIR 1956 Raj 145 (152) (Pt G) (Pr 39) (DB).**

——**R. 2044** — Payment of Wages Act (1936), Section 15 (2), Second proviso — Applicability — Sufficient cause. See Payment of Wages Act (1936), Section 15 (2), Proviso. **AIR 1956 Raj 145 (DB).**

RULE 2046

●——**R. 2046 (2) (a)** — Constitution of India, Article 311 (2) — Compulsory retirement — Interpretation — "Should ordinarily be retained" — Meaning of "ordinarily" — Right of servant to be retained in service after age of 55 years — Authority is not bound to retain servant in service up to 60 years even if he continues to be efficient. See Constitution of India, Article 311 (2). **AIR 1961 SC 1346.**

——**R. 2046** — Ministerial servant of Railway — Has no right to remain in service upto age of 60

— He can be retired from service between 55 and 60 years — (Fundamental Rules, Rule 56 (b) (1)). **1959 All LJ 154: (1959) 2 Lab LJ 161: AIR 1959 All 434 (436) (Pt A) (Prs 9, 11) (DB).**

——**R. 2046 (2) (a)** — Compulsory retirement — Railway authorities have an unfettered option to retire a person at the age of 55 — Word "ordinarily" in Rule 2046 (2) (a) does not take away their right to retire him. See Constitution of India, Article 310. **AIR 1953 All 352 (DB).**

——**R. 2046 (2) (a) — Scope — (Constitution of India, Article 226 — Discretion of High Court).**

What the Rule means is that continuance of efficiency is in all cases an essential condition for retention in service after the attainment of the age of fifty-five years. But the Rule does not require the authorities imperatively to retain him, but only says that 'ordinarily' ministerial servants in such position should be retained in service upto the age of sixty years. The rule thus does not give to all ministerial servants, who have attained the age of fifty-five years and retained efficiency, an unqualified right to be retained in service upto their sixtieth year, but only makes them eligible for retention and only gives a direction to the authorities that they should ordinarily be retained. Whether in a particular case a ministerial servant will or will not be retained is a matter entirely for the authorities concerned and into the reasons for their decision the High Court will not enquire particularly on an application under Article 226. **(1958) 62 Cal WN 765: AIR 1958 Cal 657 (659) (Pt B) (Pr 10) (DB).**

——**R. 2046 — President's interpretation of rule — Finality of.**

The Code itself provides by Rule 2002 that the power of interpreting the rules contained in it shall be in the President. If it falls to a Court to give its independent opinion as to the proper construction of the rule, it will not be bound by the President's interpretation, but there is another point of view. The rules contained in Railway Establishment Code are the conditions of service which the Railway servants accept when they take up employment under the Railways and which thus govern and control their rights. If those rules contain an interpretation clause and such clause provides that the rules shall be taken to mean what the President may interpret their meaning to be, it would seem to follow that it is one of the conditions of service of Railway servants that they shall accept the President's interpretation of the rules and that what they are really governed by are not the rules as such, but the rules as interpreted by the President. If so, the Courts may, in a question between a Railway servant and the employer Railway, properly give effect to the President's interpretation of the rules as a matter of agreement between the parties. **(1958) 62 Cal WN 765: AIR 1958 Cal 657 (660) (Pt E) (Pr 17) (DB).**

——**R. 2046 (2) (a)** — Railway employee in ministerial service — Right to continue in service after age of 55. See Constitution of India, Article 311. **AIR 1956 Cal 93.**

——**R. 2046** — Order of reduction passed prior to enforcement of Constitution — Power of High Court to issue writ cannot be invoked — Petitioner made to retire on attaining age of superannuation — Petitioner has no vested right to continue service further even though he be efficient — C. T. M. living in Bombay — No writ could be issued to him. See Constitution of India, Article 226. **1963 MPLJ (Notes) 192.**

——**R. 2046 (4) — Applicability — Employee officiating in Class I service — Suspension on charge of misconduct made by General Manager — Validity — Rule 2046 (4) — Charge of misconduct by competent authority after retirement of employee — Effect.**

In the case of an employee officiating in the senior scale class I service, the General Manager has nothing to do with the departmental inquiry in respect of such employee, and, therefore, he cannot issue a charge-sheet against the employee. The inquiry is the responsibility of the Railway Board and it is the Board who can, therefore, issue a charge-sheet. If on the date of superannuation or retirement, such employee is under suspension on a charge of misconduct made by the General Manager, Departmental proceedings cannot continue against him, the charge being incompetent and void. **(1961) 1 Lab LJ 51: 65 Cal WN 90.**

——**R. 2046 (2) (a) — 'Ordinarily be retained in service' — Meaning — (Words and Phrases — 'Ordinary').**

In common parlance 'ordinarily' means in a large majority of cases. The expression is never used in reference to a case to which there are no exceptions. The import of 'ordinarily' in Rule 2046 is that the Railway authorities are given the right to retire a ministerial servant at the age of 55, and if he is so compulsorily retired he can have no grievance, for he has no right to continue in service after the age of 55. He will be retained in most cases provided he is efficient but he cannot claim to be retained as a matter of right. **56 Punj LR 392: (1955) 1 Lab LJ 408: ILR (1955) Punj 382: AIR 1954 Punj 245 (246) (Pt A) (Pr 5).**

——**R. 2046** — Removal — Compulsory retirement under Rule 2046 does not amount to removal or dismissal. See Constitution of India, Article 311. **AIR 1954 Punj 245.**

——**R. 2046 — Scope — If conflicts with Rule 148.**

Rule 2046 gives the general rule of termination of service on superannuation. Such termination of service would not amount to removal or dismissal within meaning of Article 311 of Constitution. Rule 148 is a sort of proviso to Rule 2046, and applies in exceptional cases where it may be thought desirable in the interest of public service to terminate the service of a public servant before he reaches the age of superannuation by notice. Therefore, Rule 148, cannot be said to be invalid on ground that it is in conflict with Rule 2046. See Railway Establishment Code, Rule 148. **AIR 1958 Raj 250 (DB).**

[**Overruled** in AIR 1964 SC 600.]

RULE 2202

——**R. 2202 and Appendices 37 and 38** — Letter No. E 49 CPC/286, dated 11th May, 1949 issued by Ministry of Railway (Railway Board) — Interpretation of — Deputy General Manager has not been authorised to hold tests for crossing efficient bar. See Railway Establishment Code, Rule 101-A. **AIR 1955 Cal 385 (DB).**

APPENDIX II

——**App. II** — Different rules for promotion of Station Masters and Guards — Article 16 (1) of Constitution not contravened. See Constitution of India, Article 16 (1). **AIR 1960 SC 384.**

APPENDIX II-A

——**Appendix II-A — Non-selection posts — Promotion — Position as to — (Master and Servant) — (Public servant — Promotion).**

The position regarding the promotion of incumbents in non-selection posts of the Eastern Railway is that promotion is to be by order of seniority and not in order of merit. But this does not mean that a candidate who is the seniormost must be promoted if he is quite unsuitable for filling the higher post. For ascertaining suitability it is not open to the authorities to prescribe a general qualifying examination. In the first instance, the authorities must have recourse to the service records for ascertaining suitability. But mere recourse to service records may be insufficient, and some kind of test has to be made to find out as to who is the more suitable one. To hold that the authorities are precluded even from making such tests will be going to extremes and will certainly impair the efficiency of railway administration. The view that in non-selection posts, all candidates may be asked to sit at a general examination and qualify. themselves is not correct. **60 Cal WN 295: AIR 1956 Cal 465 (467) (Prs 7, 8).**

APPENDIX X

——Appendix X, Preamble, para. 2 — General Manager's power of delegation is to restrict to financial matters only — This power includes power to lift efficiency bar.

Under the second paragraph of the preamble to Appendix X the General Manager is authorised to delegate his special power relating to sanctioning of expenditure only and not his general powers. As the power of lifting the efficiency bar throws a financial burden on the Railway it is a matter relating to sanctioning of expenditure and as such it can be delegated by the General Manager under Appendix X of Vol. II of the Indian Railway General Code. **ILR (1951) 1 Cal 447: 59 Cal WN 812: AIR 1955 Cal 385 (387, 390) (Pt C) (Prs 6, 12) (DB).**

APPENDIX XI-A

——Appendix XI-A, Rules 10, 156 and 157 — Contravention.

It was in exercise of the powers under Rules 156 and 157 and Rule 10 in Appendix II-A that the General Manager South Indian Railway issued Circular No. 343, D/. 11-8-1949. The General Manager was specified by the statutory rules as the authority competent to frame rules to determine seniority. It was the same authority that authorised the issue of the order dated 25th April, 1952, addressed on behalf of the Commercial Operating Superintendents in charge of districts. One of the results of order dated 25-4-1952 was that the petitioner among others dropped from Rs. 64-4-170 scale of pay to Rs. 60-4-150.

Held, that the order, dated 25th April, 1952, obviously conflicted with the requirements of Rule 2 of Circular 343. The conflict between the Rule and the Order dated 25th April, 1952, could not obviously be resolved on any assumption that the order could proprio vigore operate as a rule framed by a competent authority: AIR 1955 Mad 305 (FB), Ref. **AIR 1958 Mad 243 (244) (Pt C) (Prs 2, 4).**

APPENDIX XIII

——App. XIII — Rules under — Rules have statutory force — Non-compliance therewith renders order ultra vires Government of India Act (1935), Section 241 (2). AIR 1965 Cal 389 (391) (Pt B) (Pr 7).

APPENDIX XIII, PART B, RULE 1

——App. XIII, Part B, R. 1 — Right of State servants to form Unions — Constitutes fundamental right subject to Art. 19 (4) — Recognition or withdrawal of recognition to Unions — Nature of the right stated. See Constitution of India, Article 19 (1) (c). **AIR 1965 Cal 389.**

——App. XIII, Part B, R. 1 — 'Due cause' — Administrative determination of, by Government — Court cannot revise it under Article 226 of the Constitution. **AIR 1965 Cal 389 (393) (Pt D) (Pr 20).**

——App. XIII, Part B, Rr. 1, 3 — Due cause — List in Rule 3 is illustrative and not exhaustive.

The contention that an exhaustive enumeration of 'due causes' is given in Rule 3 of Part B and that in order to be a 'due cause' for withdrawal of recognition under Rule 1, the cause must be one of those enumerated in Rule 3, or, at least analogous to them is not correct. Rule 3 enumerates the conditions on the fulfilment of which only recognition will be 'ordinarily' granted or continued. The word 'ordinarily' makes it clear that the provision is enabling and illustrative, not exhaustive or obligatory. **AIR 1965 Cal 389 (393) (Pt E) (Pr 20).**

——App. XIII, Part B, R. 1 — Exercise of statutory powers — When can be declared ultra vires — Cause which is non-existent — Cannot reasonably be 'due cause' within Rule 1. See Constitution of India, Article 226. **AIR 1965 Cal 389.**

——App. XIII, Part B, R. 1 — Withdrawal of recognition of Union — Opportunity to show cause means reasonable opportunity — Colourable compliance with Rule 1 — Vitiates order of withdrawal. See Constitution of India, Article 226. **AIR 1965 Cal 389.**

APPENDIX XIII, PART B, RULE 3

——Appendix XIII, Part B, R. 3 — Due cause — List in Rule 3 is illustrative and not exhaustive. See Railway Establishment Code, App. XIII, Part B, Rule 1. **AIR 1965 Cal 389.**

APPENDIX XX

——Appendix XX — Circular No. AE 721, dated 31st October, 1951, issued by General Manager — Clause 8, Schedule A, item 12 — Applicability — If case comes under item 12, Clause 8 of Schedule has no application. See Railway Establishment Code, Rule 105. **AIR 1955 Cal 385 (DB).**

APPENDIX XXIV

——Appendix XXIV, Form No. 1 — Implied compliance — Appointment by letter — Form not signed — Agreement held effected — Article 311 of the Constitution or Disciplinary and Appeal Rules held not applicable. See Railway Establishment Code, Rule 143. **(1957) 59 Bom LR 1210.**

——Appendix XXIV Form No. 1, Vol. 2, R. 2003, Item 24 — Suit by railway servant against Union of India for arrears of salary — Plaintiff claiming that he was entitled to draw salary on basis of old scales — Amount claimed representing difference between old scale and new scale — **Held,** as the plaintiff must be deemed to have been placed in old scales, he was entitled to draw pay in that scale — On authority of AIR 1954 SC 245; the suit so far as relief of arrears of salary was concerned was maintainable. See Constitution of India, Article 300. **AIR 1961 Punj 329.**

APPENDIX XXXI

——Appendix XXXI, Section III (amended by Circular No. AE 3063/1, dated 13-6-1951) — If retrospective.

Section III as amended is not retrospective in operation and, therefore, it cannot affect an order for suspension made previously. **ILR (1955) 1 Cal 456.**

——Appendix XXXI, S. IV (2) — If retrospective.

Sub-rule (2) of Sec. IV (2) not retrospective in operation, and an order of suspension, already made, which was invalid and beyond the jurisdiction when it was made, cannot be taken to be an order passed under sub-rule (2) of S. 4, App. XXXI and thus validate the suspension order. **ILR (1955) 1 Cal 456.**

——Appendix XXXI, S. III (2) — Scope — Reinstatement after acquittal — Order of adjustment of allowance by Railway Officer — Authority under Section 15, Payment of Wages Act — Jurisdiction to reconsider — (Payment of Wages Act (1936), Sections 15 and 7 (2) (h)).

In the cases of the railway employees reinstated after their acquittal in criminal proceedings against them, Sec. III (2) gives an option to the competent railway officer to deal with each case on the merits according to the circumstances except that it lays down that the full salary or allowance should be given in a case where the railway servant is acquitted of blame. In using the words 'acquitted of blame' in Sec. III (1) of Appendix XXXI, the intention was not anything different from 'full exoneration' which is mentioned in Rule 2044 of the Code.

Where, therefore, the Court does not record honourable acquittal in the case of the employee it is open to the officer who had to make adjustment of wages to come to his own conclusion. When he comes to a certain conclusion and passes an order to the effect that no further amount would be paid to the person besides what had been allowed already under Rule 2043, that order having been made under Section III (1) of Appendix XXXI by a competent Officer, is an order of the competent authority directing deductions to be made from the wages and would be in accordance with Section 7 (2) (h) of the Payment of Wages Act. Once such order exists, it is not open to the authority under the Act to go against that order under Section 15 of the Act. AIR 1957 All 363 and AIR 1956 Raj 145, Rel. on; AIR 1957 Punj 130, Not foll. **ILR (1958) 8 Raj 1129: 1959 Raj LW 670: AIR 1959 Raj 55 (57, 58) (Pt C) (Prs 12, 14) (DB).**

——Appendix XXXI, Section III — 'Acquitted of blame' — Meaning of — Duty of officer making adjustment.

The words 'acquitted of blame' cannot mean the same thing as the word 'acquitted'. (1) The Court may say that it is acquitting the man honourably having found that the case against him is false. In such a case the man is acquitted of blame by the Court itself and it is the duty of the officer making adjustment to allow him the full amount of his salary and allowances. (2) There may be a case where the Court says that it is only giving the benefit of the doubt to the accused. In such a case when the officer, who has to make adjustment comes to the conclusion that the man has not been acquitted of blame, his view can admit no doubt. (3) The Court may neither say that the case against him is false, nor does it say that the man has been acquitted on the ground of benefit of the doubt. In such a case again it is for the officer making the adjustment to read the judgment and come to his own conclusion whether it is a case of honourable acquittal or acquittal of blame or not. **1959 Raj LW 670: ILR (1958) 8 Raj 1129: AIR 1959 Raj 55 (57) (Pt D) (Prs 12, 13) (DB).**

——Appendix XXXI, Sec. III — Order of adjustment — When can be passed.

There is nothing in Sec. III, paragraph 1 of Appendix XXXI, which says that the order as to salary and allowances must be passed at the time of reinstatement and that if it is not passed simultaneously with the order of reinstatement it cannot be passed afterwards. Nor is there any just reason why, if for example the order was not passed by oversight at the time the reinstatement was made it should not be passed later even on the application of the employee for payment of full wages. **ILR (1958) 8 Raj 1129: 1959 Raj LW 670: AIR 1959 Raj 55 (58) (Pt E) (Pr 16) (DB).**

APPENDIX XXXVII

——Appendix XXXVII — Letter No. E 48 CPC/288, dated 11-5-1949 issued by Ministry of Railway (Railway Board) — Interpretation of — Deputy General Manager has not been authorised to hold tests for crossing efficiency bar. See Railway Establishment Code, Vol. 1, Rule 101-A. **AIR 1955 Cal 385 (DB).**

APPENDIX XXXVIII

——App. XXXVIII — Letter No. E 48 CPC/288, dated 11-5-1949 issued by Ministry of Railway (Railway Board) — Interpretation of — Deputy General Manager has not been authorised to hold tests for crossing efficiency bar. See Railway Establishment Code, Vol. 1, Rule 101-A. **AIR 1955 Cal 385 (DB).**

SCHEDULE 2, ITEM 2

——Sch. II, Item 2 — Effect of — Power to sanction increment next above the efficiency bar in respect of Railway Services Class II, vests in the General Manager. See Railway Establishment Code, Vol. 1, Rule 1728. **AIR 1955 Cal 385 (DB).**

SCHEDULE 2, ITEM 3

——Sch. II, Item 3 — Effect of — Power to sanction increment next above the efficiency bar in respect of Railway Services Class II, vests in the General Manager. See Railway Establishment Code, Rule 1728. **AIR 1955 Cal 385 (DB).**

RAILWAY FUNDAMENTAL RULES

RULE 2044

——R. 2044 — Constitution of India, Arts. 310, 311 (2) — Scope — Article 311 (2) is mandatory — Article 311 (2), Proviso (a) — Scope — Dismissal of Railway servant on ground of his conviction on criminal charge — Conviction set aside by higher Court — Effect — Government servant reinstated — Suit for recovery of arrears of salary for period of purported dismissal lies — Rule 2044 if can be relied upon to withhold salary. See Constitution of India, Article 310. **AIR 1961 Mad 488 (DB).**

RAILWAY GENERAL RULES NO. 29 (1954)

RULE 10

——R. 10 — Validity — Rule conflicts with Section 55, Railways Act and is inoperative. See Railways Act (1890), S. 55. **AIR 1965 Pat 49 (DB).**

RAILWAY GOODS TARIFF GENERAL RULES

RULE 15

——Rr. 15, 22 — Consignment of coconut bags — Bags loaded by consignor and not by railway servants — Number of bags stated by consignor accepted to be correct for freight charge — No proof that particular number of bags were loaded — Administration is not responsible for loss. See Railway Goods Tariff General Rules, R. 22. **AIR 1950 Nag 85 (DB).**

RULE 22

——Rr. 22 and 15 — Consignment of cocount bags — Bags loaded by consignor and not by railway servants — Number of bags stated by consignor accepted to be correct for freight charge — No proof that particular number of bags were loaded — Administration is not responsible for loss.

According to R. 22, Railway Goods Tariff General Rules then in force coconuts were required to be loaded and unloaded by senders and consignees when in wagon loads. Where it was nowhere stated or proved by the plaintiff consignee that the bags were loaded by railway servants or that they had opportunity to verify the number of coconut bags and the wagon was placed at the service of the consignor and the number stated was accepted as correct for the purpose of charging freight and the receipt issued qualified the number by stating that the wagon was 'said to contain' 255 bags, it was no admission on the part of the railway that the wagon contained 255 bags. To such a case R. 15 applied, and the administration was not liable, if at the destination the wagon was found to contain less number of bags.

Same results would follow even if the rules were left out of account, the consignment being a wagon load and the receipt being a 'said to contain' receipt. **1950 Nag LJ 128: ILR (1950) Nag 212: AIR 1950 Nag 85 (87) (Pt B) (Prs 10, 11, 12) (DB).**

RULE 29

——R. 29 (2) — Liabiilty of railway as that of bailee continues after transit even during 'free time" — Burden of proving that goods remained intact till expiry of free-time is on railway. See Railways Act (1890), S. 72. **AIR 1965 All 480.**

RAILWAY PROTECTION FORCE

See Railway Protection Force Act (1957).

RAILWAY PROTECTION FORCE ACT (23 of 1957)

SECTION 4

——Ss. 4, 5, 11, 12 — Evidence Act (1872), S. 25 — Police Officer, who is — Amongst other powers, he must have power to investigate crime — Member of Railway Protection Force is not a police officer. See Evidence Act (1872), S. 25. **(1962) 3 Guj LR 739.**

SECTION 5

——Ss. 5, 11, 12 — Evidence Act (1872), S. 25 — Police Officer who is — Amongst other powers, he must have power to investigate crime — Member of Railway Protection Force is not a police officer. See Evidence Act (1872), S. 25. **(1962) 3 Guj LR 739.**

SECTION 11

——Ss. 11, 5, 12 — Evidence Act (1872), S. 25 — Police Officer, who is — Amongst other powers he must have power to investigate crime — Member of Railway Protection Force is not a police officer. See Evidence Act (1872), S. 25. **(1962) 2 Guj LR 739.**

SECTION 12

——Ss. 12, 5, 11 — Evidence Act (1872), S. 25 — Police Officer who is — Amongst other powers, he must have power to investigate crime — Member of Railway Protection Force is not a police officer. See Evidence Act (1872), S. 25. **(1962) 3 Guj LR 739.**

RAILWAY RECEIPT

See (1) Contract Act (1872), S. 178.
(2) Railways Act (1890), S. 72-A (Old).

RAILWAY RULES REGULATING DISMISSAL OF SERVANTS

——Master and Servant — Dismissal of servant — Railway servant — Conviction for Criminal Offence — Dismissal — Conviction set aside on appeal — Re-employment cannot be claimed. **AIR 1955 NUC (Cal) 1793.**

RAILWAYS ACT (9 of 1890)

SECTION 3

SYNOPSIS

(Railways Act (1890), S. 3.)

1. Cl. (4) — Railway.
2. Cl. (6) — Railway Administration.
3. Cl. (7) — Railway servant.
4. Cl. (14) — Terminals.

1. Cl. (4) — Railway.

——S. 3 (4) — Railway employed in clearing city's refuse does not come within the definition as contemplated by Cl. 2 of Sch. II of Workmen's Compensation Act — Further 'railway' does not include railway wagons. See Workmen's Compensation Act (1923), S. 2 (1) (3). **AIR 1955 Cal 307 (DB).**

——S. 3 (4) (a) and (b) — 'Railway' — Definition of — Office of overseer engaged in construction work on railway — Included in definition.

The definition of the expression 'Railway' is very wide and any land within the limits of the boundary marks of a Railway and any office or other work constructed for the purpose of or in connection with the railway is also included in the wide definition of the word 'Railway'. The offices of the overseer and other persons engaged in construction work on the railway come within the definition of 'Railway'. AIR 1927 All 646 and AIR 1941 Mad 196, Distinguished. **1963 (1) Cri LJ 211: 28 Cut LT 508: AIR 1963 Orissa 20 (21) (Pr 5).**

——S. 3 (4) — Applicability of Orissa House Rent Control Order, 1943, to godowns built by licencees on railway lands.

Godowns built by licencees from Railway on railway lands for storing goods intended to be transported by railway cannot be brought in the municipal area and subjected to municipal laws. A municipality cannot claim to levy tax on Railway Administration in view

of Section 135 of the Railways (Local Authorities Taxation) Act. It necessarily follows that the Orissa House Rent Control Order can have no application to such structures built on railway lands. See Houses and Rents — Orissa House Rent Control Order (1943). **AIR 1955 NUC (Orissa) 5693 (DB).**

——**S. 3 (2) and (4)** — 'Railway' includes 'Steamer' — 'Jetty' is a ferry but jetty uncoupled with steamer is not part of steamer— Deceased standing on jetty to enboard steamer is a passenger but is not a passenger of steamer carrying passengers within the meaning of Section 82-A of the Act — Steamer of defendants dashing against jetty and drowned — Defendants are not entitled to compensation under S. 82-A — Case, however, recommended on humanitarian grounds. See Railways Act (1890), S. 82-A. **AIR 1962 Pat 109.**

2. Cl. (6) — Railway Administration.

——**S. 3 (6)** — Suit for compensation for loss of consignment carried by two railway administrations owned by Union of India — Suit against Union of India — Notices of claim under S. 77, Railways Act and S. 80, C. P. C. given to both railways — Suit is against both railways represented by Union of India — Burden of proving place where loss occurred is not on plaintiff. See Railways Act (1890), S. 80. **AIR 1965 All 122.**

——**S. 3 (6)** — Railway administration — Manager of railway — Position of, in view of definition of railway administration in Railways Act is equated to the Government. He satisfies the definition of Managing Agent given in Workmen's Compensation Act. See Workmen's Compensation Act (1923), S. 2 (f). **AIR 1960 All 362 (DB).**

——**S. 3 (6) — Administration— Claim based on contractual obligations — Liability for.**

Though the contract in suit was entered into within the territories which were subsequently included in the Dominion of Pakistan it fell under Cl. (b) of Para 8 (1) of the Indian Independence (Rights, Property and Liabilities) Order 1947, and the rights and liabilities arising out of it should be the rights and liabilities of the Union of India. AIR 1952 Assam 88 and AIR 1952 Cal 140, Rel. on. See Indian Independence (Rights, Property and Liabilities) Order (1947), Para 8 (1). **AIR 1955 NUC (All) 2668 (DB).**

——**S. 3 (6)** — Suit against Railway and Union of India for short delivery of goods — Service of summons on General Manager of Railway is due service as he is the authority to receive summons on behalf of both the defendants. See Limitation Act (1908), Art. 164. **AIR 1955 NUC (Assam) 4180.**

● ——**Ss. 3 (6) and 80 — Suit against Government owning railway administration — (Civil P. C. (1908), S. 79).**

In a case where the railway is administered by a Government or State, a suit under S. 80 can be brought against the Government or the State concerned. Thus, where, the railway administration to which the goods were consigned and the railway administration on which the loss occurred were both owned by the same Government or State, a suit can be brought against the State Government which owns both the railways. But the plaint must, on the face of it, state the cause of action as to how and in what capacity the State is sought to be made liable — whether as owner of the railway to which the goods were consigned. It is not necessary that the Railway Administration, as such through the Manager or anybody else, should be impleaded as a party defendant to the suit. **ILR (1953) Assam 326 : AIR 1953 Assam 193 (194, 195, 197, 198) (Pt D) (Prs 9, 12, 15, 17) (FB).**

——**Ss. 3 (6) and 77 — 'Manager' — Who is.**

The Officer designated as the General Manager is the Manager within the meaning of Sections 3 (6) and 77. 55 CWN 662 and AIR 1952 Cal 341, Foll. **(1957) 61 Cal WN 433.**

——**Ss. 3 (6) and 77 — 'Manager' — Chief Commercial Manager authorised by Manager to receive claims — Service on Chief Commercial Manager — Sufficiency.**

The requirements of S. 77 read with S. 3 (6) are satisfied if the claim is preferred in writing within the time prescribed either to the Manager of the East Indian Railway Administration or to the Union of India, who owns and administers the railways or to any person authorised by the manager to receive the claim on his behalf. It need not be thrust into the hands of the Manager personally. Having regard to the Notification published in the Amrit Bazar Patrika, dated 25th November, 1943, which had been issued by the General Manager, East India Railway, it must be held that the Manager duly authorised the Chief Commercial Manager to receive the claims preferred under Section 77, and that a claim preferred to the Chief Commercial Manager, is a claim duly preferred under Section 77. **(1957) 61 Cal WN 433: ILR (1957) 3 Cal 426.**

——**Ss. 3 (6), 77 and 140 — 'Railway administration' — Service of notice of claim on Government administering railways.**

To effect a claim on the railway administration under S. 77, the claim need not be served on the Manager, it may be served on the Government administering the railways, for by Section 3 (6) the Railway Administration includes the Government. ILR 44 Cal 16, Rel. on. **(1957) 61 Cal WN 433: ILR (1957) 3 Cal 426.**

● ——**Ss. 3 (6), 80** — Civil P. C. (1908), S. 79 — Suit against Railway Administration must be instituted against Union of India — The words Railway Administration comprehend not only such things as they signify according to their natural import but also those things which the definition clause Section 3 (6) declares that they shall include — Words include the Government also — AIR 1950 Nag 85, Dissented from; AIR 1924 Bom 306; AIR 1928 Bom 421; AIR 1931 Pat 326; AIR 1960 Ker 257 and AIR 1953 Assam 193, Rel. on. **1965 Ker LT 627: (1965) 1 Ker LR 449: ILR (1965) 2 Ker 112: 1965 Ker LJ 671: AIR 1965 Ker 277 (278) (Pt A) (Pr 5) (FB).**

——**S. 3 (6)** — 'Railway Administration' — It includes competent officer. See Railways Act (1890), S. 77. **1958 MPLJ (Notes) 167.**

——**Ss. 3 (6), 80** — Suit against Dominion of India for damages in respect of goods carried by two railway administrations — Frame of — Railway Administrations whether should be impleaded — Inference from the provisions of Section 79 of the Civil Pro. Code is that a suit against Union of India without impleading the Railway Administration is permissible under the law — Section 80 of the Railways Act only provides for liability of the Railway and not for frame of suit. See Civil P. C. (1908), S. 79. **AIR 1957 Madh Pra 157 (DB).**

——**S. 3 (6)** — Suit against Railway administered by Government — Summons or notice of suit may be served either on the Manager or the Government concerned — East Indian Rail-

way — Govrnment concerned is the Central Government — Notice to be served on General Manager who is the person ex officio authorised to act for and on behalf of Central Government. See C. P. Code (1908). S. 79. **AIR 1956 Pat 511 (DB).**

3. Cl. (7) — Railway servant.

——Ss. 3 (7) and 137 — Railway servant — When a public servant generally — Penal Code (45 of 1860), S. 353 — Railway servant — How far public servant.

Before the amendment of Section 137 of the Railways Act in 1955, a Railway servant was deemed to be a public servant only for certain limited purposes. After the amendment in case of State-owned railways, all its servants would be Government servants generally by virtue of the State taking over the Railways. In case of employees under private agencies however they would be public servants only for the limited purposes specified in that behalf. **(1964) 2 MLJ 477: 1964 MLJ (Cr) 645.**

4. Cl. (14) — Terminals.

● **——Ss. 3 (14) and 46-C (d) and (h) — 'Terminals' include 'wharfage' and 'demurrage' charges.**

"Wharfage" and "demurrage" being charges in respect of goods unloaded from wagons and kept at the station, and also in respect of goods kept on platforms of the station, the said charges could be described as charges in respect of the station and are terminals" within the meaning of the definition of the said expression in the Act. (Clause 14 of Section 3 omitted by Amendment Act (39 of 1961) w.e.f. 1st Jan. 1962). **66 Bom LR 315: (1964) 5 SCR 148: 1964 Mah LJ 426: 1964 MPLJ 777: (1964) 1 SCWR 248: AIR 1964 SC 1268 (1271) (Pt B) (Pr 8).**

● **——Ss. 3 (14), 41 (1) (c) — Terminal charges — Levy of — Conditions — (Cl. 14 omitted by the Amendment Act 39 of 1961).**

It is well settled that a limited interpretation has to be placed on words used by the legislature in spite of the generality of the language used where the literal interpretation in the general sense would be so unreasonable or absurd that the legislature should be presumed not to have intended same.

The words 'in respect of' in Section 3 (14) are wide enough to permit charges being made at terminals so long as any of these things, viz., stations, sidings, wharves, depots, warehouses cranes and other similar matters have been provided and are being maintained, and there is no reason to cut down the generality of the language used in the section. Therefore, the words 'in respect of' used in Section 3 (14) may be taken to mean 'for the provision of' and not 'for the user of'. Hence, irrespective of the fact of the actual user by any particular consignor of the stations, sidings and other things mentioned in Section 3 (14) 'terminal charges' are leviable by reason of the mere fact that these things have been provided by the Railway Administration.

Held, on facts that the charge of Rs. 4.11 at either end sought to be levied by the Railway Administration in addition to the charges for carriage was 'terminal charges' within the meaning of the Railways Act and the proposed levy being in accordance with Government Notification under Section 32 of the Act was nothing more than the application of standardized terminal charges. The Tribunal had, therefore, no jurisdiction to investigate the reasonableness or otherwise of the same and to reduce the same. **Held,** also on facts that even on the assumption made that on the definition of the terminals in Section 3 (14) no charges are payable unless certain services in addition to carriage are performed by the Railway Company, terminals were leviable in the present case for the haulage of trucks from the station platform to point A at the Shamli end and so there was no foundation for the argument that Rs. 4.11 being charged at the Shamli end was not really a terminal charge but some other charge in the garb of terminal. Shahdara (Delhi) Saharanpur Light Railway Company, Ltd. v. Upper Doab Sugar Mills, Ltd., **(1961) 1 SCJ 377: (1960) 2 SCR 926: AIR 1960 SC 695 (700, 701, 702) (Pt B) (Prs 14, 19, 21).**

——Ss. 3 (14) and 46-C (h) — Wharfage — Nature and purpose of — Legality — 'Terminals'.

The distinction between what are known as 'service terminals' and 'station terminals' is not observed in India but they are instead bracketed together in the definition of terminals in S. 3 (14) of the Act. Such charges are levied for services incidental to the business of the railway as a carrier. Over and above these, the Railway renders other services; for example where the Railway's wagons are detained or any accommodation is occupied, before or after carriage, for longer period than the time reasonably necessary for dealing with the traffic The charge levied after the expiry of the free time allowed for loading or unloading a wagon is known as demurrage: vide Section 46-C (d) of the Act. For the warehousing of goods for the convenience of the trader beyond the permissible free time the charge levied is wharfage; Cl. (h) in Section 46-C of the Act, defines wharfage.

'Terminals' is the charge levied for services incidental to the business of the Railway, while wharfage is the charge made for services rendered by it as the involuntary warehouseman of the trader or as a bailee and therefore falls outside the scope of terminals. That our legislature acknowledges this distinction is made manifest from the separate definitions of terminals and wharfage given respectively in Sections 3 (14) and 46-C (h) of the Act. The operation of the terminals ends with the expiry of the authorised free time, while wharfage comes into operation from the point the free time terminates. Any charge for wharfage over and above terminals does not fall beyond the ambit of the Act and is not illegal. **AIR 1960 All 438 (441, 442) (Pt C) (Prs 8, 9, 10, 11, 12).**

SECTION 7

——S. 7 — Railway company — Level crossing — Railway line crossing a thoroughfare — Railway is bound to give warning of approaching train — This duty need not be necessarily a statutory one — It is implied and inherent in the functions to be discharged by the Railway Administration in the matter of running their railways — Failure to do so amounts to negligence on its part. See Tort — Negligence. **AIR 1963 Assam 117 (DB).**

——S. 7 — Level crossing in shunting area — Railway line crossing busy road — In-coming train not visible — Railway is bound to give warning of approaching train — Accident to a

truck — Question of contributory negligence on part of lorry driver. See Tort. **AIR 1965 Pat 167 (DB).**

——**S. 7** — Railway — Level-Crossing is a public crossing and not merely one by private accommodation — It is the legal duty of the Railway to assure its reasonable safety — Railway's liability — Negligence of driver of engine — (Guiding principles for maintaining level-crossing indicated). See Tort — Negligence. **AIR 1954 Vind Pra 17.**

SECTION 13

——S. 13 — Public level-crossing — Duty to take care.

Although Section 13 (c) provides that the Central Government may require a railway administration to erect suitable gates, chains, bars, stiles or handrails at places where a railway crosses a public road on the level, the statutory duty of the railway administration does not arise, till the Central Government requires it to do so. The degree of care required where there is no statutory duty cast upon the railway administration to erect a gate or to post a gateman at the level crossing would certainly be more at a public level crossing than that required at accommodation crossings. It may be necessary in some cases to erect a gate even at an accommodation crossing, if the rush of traffic be heavy. On the other hand, if the traffic be insignficant or negligible, it may not be necessary to erect a gate and post a gateman even at a public level crossing. The question of erecting a gate would depend on the situation of the crossing, visibility of the rail track from the road, any sharp turns or curves and the extent of the road traffic, etc. In the absence of evidence on these points, the Court cannot hold that the failure of the railway administration to erect a gate and post a gateman amounted to an actionable negligence by itself. **1959 MPC 3: 1959 Jab LJ 112: 1959 MPLJ 289: AIR 1959 Madh Pra 128 (131) (Prs 19, 20, 22) (DB).**

——S. 13 — Duty of Railway to put up gates at railway crossings.

Section 13 does not make it obligatory upon the railway administration to put up gates upon a railway crossing, unless such demand is made by the Central Government. There would be a breach of the duty imposed by this section only if a demand has been made by the Central Government. In the absence of an order from them the railway administration is not under any duty to put up a gate at least so far as the provisions in the Indian Railways Act are concerned. **1957 MPC 492: 1957 MPLJ 617: 1957 Jab LJ 939: ILR (1957) Madh Pra 348: AIR 1958 MP 93 (95, 96) (Pt B) (Prs 10, 13) (DB).**

——**S. 13 (a), (c)** — Railway line running through residential locality — Duty of Railway to fence — Child trespassing upon railway line and getting injured by running train — Liability of railway — Railway Act does not impose any imperative obligation on Railway to fence a line but Section 13 (a) of the Act gives power to the Central Government to require the Railway to provide fences — Railway could not be held guilty of negligence for failure to provide fences — Duty of owner or occupier of land adjoining the railway line owes no obligation or duty to a trespasser — No difference between an adult and a child trespasser. See Tort — Negligence. **AIR 1958 Punj 246 (DB).**

SECTION 26

——Ss. 26, 34 and 41 (as in 1955) — Scope — Civil suit for refund of wharfage and demurrage charges collected by railway challenging the vires of rules empowering the railway to collect such amounts and alleging excess realization than legally leviable under rules Section 26 is no bar — Tribunal can decide only reasonableness of charges — It cannot decide vires of the rules empowering railways to collect such amount.

Section 26 of the Railways Act which ousts the jurisdiction of the civil Courts has to be strictly construed. So construed it does not bar a civil suit for refund of the amount collected by the railway administration by way of wharfage or demurrage filed on the ground that the rules empowering the railway administration to do so are ultra vires or that the amounts so collected are in excess of wharfage or demurrage leviable under the rules. The opening words "Except as provided in this Act" in Section 26 limit the operation of the bar. It can reasonably be interpreted to mean that the bar of a suit is limited to matters in respect whereof the Act has provided a remedy. The Act does not provide any remedy for an aggrieved party to approach the Tribunal constituted under S. 34 for refund of such amount on the ground that the rules empowering the said administration to do so are ultra vires or that the amounts so collected are in excess of wharfage or demurrage leviable under the rules. If the impugned charges are standardised terminal charges, the dispute in regard thereto falls outside Section 41 of the Act. If they are charges other than the standardised terminal charges, the jurisdiction of the Tribunal is confined only to the question of its reasonableness. It has no jurisdiction to decide whether the rules empowering the railway administration to levy a particular charge are ultra vires or whether the railway administration collected amounts in excess of the charges which it can legally levy under a rule. Civil Revn. Applns. Nos. 46, 49, 55, 57, 58 and 59 of 1958, D/- 25-2-1958 (Bom), **Reversed. 66 Bom LR 315: (1964) 5 SCR 148: 1964 Mah LJ 426: 1964 MPLJ 777: (1964) 1 SCWR 248: AIR 1964 SC 1268 (1270, 1271) (Pt A) (Prs 6, 9).**

——S. 26 — Scope — Suit for refund of charges made in excess of reasonable charges — Suit not barred under S. 26.

There is no provision in Chapter V saying that unreasonable charges shall not be made by a Railway Administration. If therefore any Railway Administration has received payment of unreasonable charges or rates that is not 'anything done in violation or contravention of any provisions of Chapter V'. If under the law, apart from the Railways Act, a consignor is entitled to obtain relief against unreasonable charges which he has paid in the past, Section 26 will not stand in his way. **(1963) SCD 303: (1963) 2 SCR 333: AIR 1963 SC 217 (218) (Pt D) (Pr 4).**

——**S. 26** — Charging for longer route on a shorter route — Is in contravention of S. 29 (1) — Section 26 is an absolute bar to the maintainability of the suit to recover the excess fare charged by the Railway. See Railways Act (1890), S. 29 (1). **AIR 1955 NUC (Cal) 2877.**

——**S. 26** — Repeal of, Cls. 3, 4, 5 and 6 of the Cotton Textiles (Control of Movement) Order, 1948, do not operate as an implied repeal of Sections 27, 28 and 41 of the Railways Act These clauses are all Constitutional. See Cotton Textiles (Control of Movement) Order, 1948, Cl. 3. **1953 Cri LJ 481: AIR 1953 Nag 58 (DB).**

SECTION 27

●——S. 27 — Validity of Cls. 3 and 4, Cotton Textile (Control of Movement) Order 1948 — — Do not override Sections 27, 28 and 41 of the Railways Act — Said clauses merely supplement the relevant provisions of the Railways Act and do not supersede them — Therefore the contention that these clauses operate as an implied repeal of Sections 27, 28 and 41 of the Railways Act is not well founded. See Cotton Textiles (Control of Movements), Order (1948), Cl. 3. **1954 Crl LJ 1322: AIR 1954 SC 465.**

——S. 27 — Rights of citizen against Railway administration are not taken away by the Cotton Textile (Control of Movement) Order 1948 — If the Railway Administration does something in derogation of a citizen's rights under Sections 27 and 28, the citizen will be entitled to seek redress under Section 41 of the Act. See Cotton Textiles (Control of Movement) Order (1948), Cl. 3. **1953 Cr LJ 481: AIR 1953 Nag 58 (DB).**

SECTION 27-A

——Ss. 27-A and 82-J — Rules for packing of goods — Delegation by Union Government — Validity (Ss. 72, 72-A and 74-A of the Railways Act (1890)).

The Union Government as the owner of the Railways, is empowered to make rules prescribing the manner of packing of goods entrusted to any Railway for carriage. But it cannot delegate its rule-making power to the Railway Conference Association and any rules made by the latter though with the authority of the Union Government cannot be said to be made by the Union Government. **ILR (1965) 2 All 768.**

SECTION 28

●——**Ss. 28 and 41 — Undue preference — Burden of proof — (Evidence Act (1872), Ss. 101-104).**

Whoever complains against the railway administration that the provisions of Section 28 have been contravened must establish that there has been preference between himself and his goods on the one hand and the competitor and his goods on the other; and where it appears to the Tribunal that such preference is 'undue' preference, the complainant would be entitled to adequate relief under Section 41 (1) (a) of the Act. Section 28 is obviously based on the principle that the power derived from the monopoly of railway carriage must be used in a fair and just manner in respect of all persons and all descriptions of traffic passing over the railway area. All cases of unequal rates cannot necessarily be treated as cases of preference attracting the provisions of Section 28. It is only when goods or persons can be said to be pari passu that a question of preference arises and so it is where the competition between two persons or classes of goods is either admitted or proved that the question of application of Section 28 would arise. It is only when the tribunal is satisfied that the railway has shown undue preference in favour of a particular class of goods that a complaint can be successfully entertained under Section 41 (1) (a). The initial burden to prove preference is on the complainant; but when the said burden is discharged by the proof of unequal rates as between the complainant and his competitor, it is for the railway administration to prove that the preference is not undue. In considering the question as to whether the alleged preference amounts to 'undue' preference or not, the tribunal may also be entitled to consider whether the lower charge levied by the administration in respect of the competing class of goods was necessary in the interest of the public. That is the result of the provisions of Section 41, sub-section (2) (i) and (ii). **1959 SCA 262: 1958 SCJ 720: (1958) 2 MLJ (SC) 86: (1958) Andh WR (SC) 86: 1959 SCR 236: AIR 1958 SC 525 (528, 529) (Pt B) (Prs 8, 9).**

●——**S. 28 — Validity of Cls. 3 and 4, Cotton Textiles (Control of Movement) Order, 1948 — Do not override Ss. 27, 28 and 41 of the Railways Act.**

The Railways Act does not exclude the placing of a disability on a railway administration by the Government or any other authority. See Cotton Textiles (Control of Movements) Order, (1948), Cl. 3. **1954 Crl LJ 1322: AIR 1954 SC 465.**

——**S. 28 — Tribunal is not competent to grant relief in respect of period anterior to its final order.**

Clearest indication on this point is to be found in the tense used in Section 41 (1) of the Act — Though railway administration might have contravened provisions of Section 28 or charged or levied unreasonable rates or charges during some period before complaint, yet if on the date of complaint they have ceased to do so, no complaint can be made under Section 41 (1). See Railways Act (1890), S. 41 (1) (a). **AIR 1955 Mad 476 (DB).**

——**S. 28 — Repeal of.**

Clauses 3, 4, 5 and 6 of Cotton Textiles (Control of Movement) Order 1948 do not operate as implied repeal of Sections 27, 28 and 41 of the Railways Act. See Cotton Textiles (Control and Movement) Order, 1948, Cl. 3. **1953 Crl LJ 481: AIR 1953 Nag 58 (DB).**

——S. 28 — Rights of citizen against Railway Administration are not taken away by Cls. 3 to 6 of the Cotton Textiles (Control of Movement) Order, 1948 — There is nothing in the said order which takes away the citizen's right to obtain relief under Section 41 of the Railways Act where complaint is that the Railway Administration deprived him of his rights under Sections 27 and 28. See Cotton Textiles (Control of Movement) Order, 1948. Cl. 3. **1953 Crl LJ 481: AIR 1953 Nag 58 (DB).**

——S. 28 — Disputed question of fact — Discretion of High Court to decide question — Question whether concession granted by railway in freight rates is discriminatory against petitioner is one of technical and complicated nature, necessitating an elaborate inquiry to decide it — High Court acting under Art. 226 not appropriate venue for deciding the question. See Constitution of India, Art. 226. **AIR 1961 Punj 268 (DB).**

——S. 28 — Differential treatment not necessarily discriminatory — Fixation of differential freight rates by railway — Does not violate Article 14 — The Article does not prohibit differential treatment but guarantees equal treatment to all similarly circumstanced. See Constitution of India, Art. 14. **AIR 1961 Punj 268 (DB).**

——S. 28 — Principle of equal treatment in Section 28 is same as is embodied in Art. 14 — Only difference between the two is that Article 14 of the Constitution is general in terms while Section 28 is specific in its application. See Constitution of India, Art. 14. **AIR 1961 Punj 268 (DB).**

SECTION 29

——Ss. 29 (1), 26 — Charging for longer route on a shorter route — Contravention of S. 29 (1) — Bar of suit — (C. P. Code (1908), S. 9).

When the railway administration charges a person Rs. 2-12-0 as though he is travelling by the longer route and covers a distance of 131 miles though in fact he has not covered more than 108 miles, what the railway administration is in effect doing is to charge the person for 108 miles at a higher rate although according to the Railway they have charged him on basis of 131 miles. This is obviously equivalent to charging the person at a higher rate for the actual mileage covered by him. There is thus a contravention of the provisions of Section 29 (1) and Section 26 is an absolute bar to the maintainability of the suit to recover the excess fare so charged by the Railway. **AIR 1955 NUC (Cal) 2877.**

SECTION 34

● **——S. 34 (as in 1955)** — Scope — Civil suit for refund of wharfage and demurrage charges collected by railway challenging the vires of rules empowering the railway to collect such amounts and alleging excess realization than legally leviable under rules — Section 26 is no bar — Tribunal can decide only reasonableness of charges — It cannot decide vires of the rules empowering railways to collect such amount — Civil Revn. Applns. Nos. 46, 49, 55, 57, 58 and 59 of 1958, D/- 25-2-1958 (Bom.). **Reversed.** See Railways Act (9 of 1890), S. 26. **AIR 1964 SC 1268.**

——S. 34 — Disputed question of fact — Question whether concession granted by railway in freight rates is discriminatory against petitioner — High Court acting under Article 226 not appropriate venue for deciding question — Section 34 constitutes a Special Tribunal with power to follow a procedure which is appropriate and adequate for deciding such dispute. See Constitution of India, Art. 226. **AIR 1961 Punj 268 (DB).**

SECTION 39

● **——Ss. 39 and 41 (1) (b) (c)**— Scope —Words 'charging' and 'levying' were not used in the sense of "collecting" — Tribunal has no jurisdiction over complaints in connection with charges already made — It has no jurisdiction to order refund also — An order for refund can by no stretch of imagination be considered to be 'necessary for the purpose of exercising the jurisdiction' within the meaning of S. 39. See Railways Act (9 of 1890), S. 41 (1) (b). **AIR 1963 SC 217.**

● **——S. 39 — Scope — Does not confer jurisdiction — But provides means for exercise of jurisdiction.**

Section 39 does not confer any jurisdiction; but only provides for means for exercise, by the Tribunal of the jurisdiction which it has otherwise got under other sections. Upper Doab Sugar Mills, Ltd., Shamli (U. P.) v. Shahdara (Delhi) Saharanpur Light Railway Co., Ltd., Calcutta, **(1963) SCD 303: (1963) 2 SCR 333: AIR 1963 SC 217 (221) (Pt C) (Pr 22).**

——Ss. 39 and 41 — Scope of — Railway Rates Tribunal Rules — Discretion and Powers of Railway Rates Tribunal — Tribunal opining that it would be fair to grant concessional rates but granting relief only from date of order and not from date of complaint — Interference by writ of certiorari not justified as the discretion exercised cannot be said to be improperly exercised — Omission of Tribunal to decide issue as it was unnecessary does not amount to error rendering decision liable to be quashed — Constitution of India (1950), Art. 226. **(1961) 2 Mad LJ 292: AIR 1962 Mad 218 (218) (Pr 1) (DB).**

——Ss. 39 and 46-B (as amended by Act 56 of 1949) — Railway Rates Tribunal — Refund of excess freight — Jurisdiction to order.

The Railway Rates Tribunal has no jurisdiction to pass a decree in favour of the complainants for the refund of the excess charges or freight collected from them. AIR 1955 Mad 476, Rel. on. **(1957) 2 Mad LJ 363: AIR 1958 Mad 471 (472) (Pt A) (Pr 3) (DB).**

——S. 39 — Date from which order of Tribunal operates — It can well become effective from the date of complaint — Fact that the Tribunal takes time to decide the question should not affect the complainant adversely — Final order of judgment relates back to date of filing of plaint or complaint. See Railways Act (1890), S. 41. **AIR 1955 Mad 476 (DB).**

——S. 39 — Powers of Tribunal.

Section 39 does not confer a power on the Tribunal to make an order for payment of compensation or damages or make an order of refund of overcharges. **68 Mad LW 341: (1956) 1 Mad LJ 395: AIR 1955 Mad 476 (480) (Pt C) (Pr 13) (DB).**

SECTION 41

SYNOPSIS

(Railways Act (1890), S. 41).

1. Implied repeal.
2. Jurisdiction of Tribunal.
3. Reasonableness of charges.
4. Wagonload rate — Meaning of.
5. Bar of suit.

1. Implied repeal.

● **——S. 41** — Clauses 3 and 4, Cotton Textiles (Control of Movement) Order, 1948, do not override Sections 27, 28 and 41 of the Railways Act. See Cotton Textiles (Control of Movement) Order (1948), Cl. 3. **1954 Cri LJ 1322: AIR 1954 SC 465.**

——S. 41 — Repeal of — Not repealed by Cls. 3, 4, 5 and 6 of Cotton Textiles (Control and Movement) Order 1948. See Cotton Textiles (Control of Movement) Order, 1948, Cl. 3. **1953 Cri LJ 481: AIR 1953 Nag 58 (DB).**

——Ss. 41, 27 and 28—Rights of citizen against Railway Administration are not taken away by Cls. 3 to 6 of Cotton Textiles (Control of Movement) Order, 1948. See Cotton Textiles (Control of Movement) Order (1948), Cl. 3. **AIR 1953 Nag 58 (DB).**

2. Jurisdiction of Tribunal.

● **——Ss. 41 (1) (b) (c) and 39 — Scope — Words 'charging' and levying were not used in the sense of 'collecting' — Tribunal has no jurisdiction over complaints in connection with charges already made — It has no jurisdiction to order refund also.**

The words 'charging a rate' in Cl. (b) were used by the legislature in its ordinary meaning of 'demanding a price'. The words 'charging' in Cl. (b) and 'levying' in Cl. (c) were used in the one and the same sense. However they were not used to include 'collecting'. The words 'is charging' in Cl. (b) and 'is levying' in Cl. (c)

must be construed to mean 'is demanding a price at the present time for services to be rendered'. The Railway Rates Tribunal had no jurisdiction to entertain or try the complaints as regards the reasonableness or otherwise of rates and charges made prior to the institution of the complaint. It follows necessarily that it could have no occasion to order any refund. Even in respect of those charges and rates for which the Tribunal had jurisdiction to entertain a complaint the Tribunal had no power to order any refund. In making the complaint the complainant can ask only for a declaration that the rate or charge is unreasonable and it is only this declaratory relief which the Tribunal has been authorised to give. There is no provision that the Tribunal can also give a consequential relief. The only other thing which the Tribunal is authorised to do in connection with the complaint is to fix 'such rate or charge as it considers reasonable'. The Tribunal in making this order fixing the reasonable rate or charge will mention a future date for this to come into operation. Even if it was assumed for the sake of argument that the Tribunal can fix these rates from the date of the complaint that would not give the Tribunal any power to order refund. An order for refund can by no stretch of imagination be considered to be 'necessary for the purpose of exercising the jurisdiction' within the meaning of Section 39. Upper Doab Sugar Mills, Ltd., Shamli v. Shahdara (Delhi) Saharanpur Light Railway Co., Ltd., Calcutta. **1963 SCD 303: (1963) 2 SCR 333: AIR 1963 SC 217 (220, 221) (Pt A) (Prs 15, 16, 17, 18, 19, 20, 21).**

● **——S. 41 (1) (c) — Terminal charges —Levy of — Can be levied for provision of stations etc. — 'In respect of' — Meaning of — Words 'in respect of' in Section 3 (14) may be taken to mean 'for the provision of' and not 'for the user of' — Irrespective of the fact of actual user by any particular consignor of stations, wharves etc. terminal charges are payable by him simply by reason of the fact that these things have been provided by the Railway Administration** See Railways Act (1890), S. 3 (14). **AIR 1960 SC 695.**

● **——Ss. 41, 28 — Undue preference — Burden of proof — (Evidence Act (1872), Ss. 101-104).**

Whoever complains against the railway administration that the provisions of Section 28 have been contravened must establish that there has been preference between himself and his goods on the one hand and the competitor and his goods on the other; and where it appears to the Tribunal that such preference is undue, the complainant would be entitled to adequate relief under Section 41 (1) (a) of the Act. See Railways Act (9 of 1890), S. 28. **AIR 1958 SC 525.**

——S. 41 — Railway Rates Tribunal — Grant of relief by — Relief may be granted from date subsequent to date of complaint. See Railways Act (1890), S. 39. **AIR 1962 Mad 218 (DB).**

——S. 41 (as amended by Act (56 of 1949) — Railway Rates Tribunal if can make order with retrospective effect.

Jurisdiction of the Tribunal under Section 41 is not limited to making an order to be operative from the date on which the order is made It has power to make an order capable of having effect or operation from before that date The order can become effective from a date anterior to the date of order, at any rate from the date of the complaint. AIR 1955 Mad 476 Rel. on. **(1957) 2 Mad LJ 363: AIR 1958 Mad 471 (475) (Pt B) (Pr 12) (DB).**

——S. 41 (as amended by Act 56 of 1949) — Order of Railway Rates Tribunal — Right to benefit under — Intervener — Railway Rates Tribunal Rules, R. 17 (1).

No distinction can be made between the original complainant and the intervener under Rule 17 (1). The order of the Tribunal would apply and have effect both as regards the actual complainant and any intervener. **(1957) 2 Mad LJ 363: AIR 1958 Mad 471 (475) (Pt C) (Pr 12) (DB).**

——S. 41 (1) (b) — Goods Tariff Rules, R. 82 (2) (ii) — Jurisdiction of Tribunal.

The Tribunal has, under Section 41 (1) (b), jurisdiction to determine the unreasonableness of the minimum charge condition levied under R. 82 (2) (ii) of the Goods Tariff Rules.

Though a wagon load rate is also a standardised charge, the reasonableness of this rate is within the jurisdiction of the Tribunal under Section 41 (1) (b). It is therefore, clear that the intention of the framers of the Act was not to exclude altogether from the jurisdiction of the Tribunal all disputes relating to the reasonableness of every component of a standardised rate or charge. **ILR (1956) Mad 67: (1956) 1 MLJ 417: AIR 1955 Mad 513 (515) (Pt A) (Prs 9, 11) (DB).**

——Ss. 41 (1) (a) and 28 — Competency of Tribunal to grant relief in respect of period anterior to its final order.

The competency of the Tribunal to make any declaration or grant any relief in respect of a period anterior to its final order has to be decided entirely on the implications of the language of the material provisions of the Railways Act. The clearest indication on this point is to be found in the tense used in Section 41 (1) of the Act. The injury contemplated is an injury subsisting on the date of the complaint. Hence, though the Railway Administration might have contravened the provisions of Section 28 or charged or levied unreasonable rates or charges during some period before the complaint, yet if on the date of the complaint they have ceased to do so, no complaint can be made under Section 41 (1). In this respect, the Tribunal's jurisdiction is much more narrow and restricted than the jurisdiction of an ordinary Court. **68 Mad LW 341: (1956) 1 Mad LJ 395: AIR 1955 Mad 476 (478) (Pt A) (Pr 7) (DB).**

——Ss. 41 and 30 — Date from which order of Tribunal operates.

The order of the Tribunal cannot only operate in future, that is, from and after the date of the order. The order of the Tribunal can well become effective from the date of the complaint. The finding of the Tribunal, if it is in favour of the complainant, would mean that the complainant was entitled to relief on the day on which he made the complaint. The fact that for reasons beyond the complainant's control, the Tribunal takes time to hear and decide the complaint and pass final orders thereon, should not adversely affect him. Thus, the general rule, that the final order of judgment, in a case should relate back to the date of the filing of the plaint or complaint, will apply. **(1956) 1 Mad LJ 395: 68 Mad LW 341: AIR 1955 Mad 476 (478) (Pt B) (Pr 7) (DB).**

3. Reasonableness of charges.

● **——S. 41 — Burden of proof — Unreasonableness of freight charges — Considerations.**

When a complaint is made under sub-section (1), Cl. (b), or (c), the onus to prove the alleged unreasonableness of the freight rests on the

complainant. The costs incurred by the complainant which are partly due to the geographical position can have no relevance whatever in determining the reasonableness or otherwise of the railway freight charged by the railway administration. Nor can the railway freight move up and down with the rise and fall of the commodity prices. In dealing with the question about the reasonableness of the railway freight it would naturally be relevant to consider mainly the working costs of the railway administration and other material circumstances. Raigarh Jute Mills Ltd. v. Eastern Rly., **1958 SCJ 720: 1959 SCA 262: (1958) 2 MLJ (SC) 86: (1958) 2 Andh WR (SC) 86: 1959 SCR 236: AIR 1958 SC 525 (531) (Pt C) (Pr 13).**

●——**S. 41 — Unreasonable freight charges — Test.**

The special or concessional rates charged by the railway administration in another zone cannot be treated as the sole basis for determining what rates should be charged in other zones. Raigarh Jute Mills Ltd. v. Eastern Railway, **1958 SCJ 720: 1959 SCA 262: (1958) 2 MLJ (SC) 86: (1958) 2 Andh WR (SC) 86: 1959 SCR 236: AIR 1958 SC 525 (531) (Pt D) (Pr 14).**

——**S. 41 (1) (c) — Complaint in relation to minimum wagon load charge.**

A complaint in relation to the minimum wagon load charge also falls within S. 41 (1) (c) as 'levying charges (other than standardised terminal charges) which are unreasonable'. **ILR (1956) Mad 67: (1956) 1 MLJ 417: AIR 1955 Mad 513 (515) (Pt B) (Pr 10) (DB).**

——**Ss. 41, 42** — Reasonableness of charges — jurisdiction of Railway Rates Tribunal — Power to reduce rate and power to declare them unreasonable are distinct — There is no conflict between S. 42 and S. 41 — Tribunal has jurisdiction to determine reasonableness of rates. See Railways Act (1890), S. 42. **AIR 1955 Mad 513 (DB).**

——**S. 41 (1) (b) — Charge found unreasonable by Tribunal — Proper order to pass.**

On its finding that the charge is unreasonable, the proper order to pass is to grant a declaration to that effect which the Tribunal is competent to do under S. 39 of the Act. The Tribunal has no power to order any exemption. As the Central Government are the owners of the railways in India, there is no necessity for any order by way of an injunction directing them to give effect to the declaration for S. 39 itself provides for the Government or the railway administrations giving effect to the orders of the Tribunal. **ILR (1956) Mad 67: (1956) 1 MLJ 417: AIR 1955 Mad 513 (516) (Pt E) (Pr 14) (DB).**

——**Ss. 41 and 42** — Enquiry into reasonableness of non-assignment of wagon scale to transport of strawboard— Jurisdiction of Tribunal —Railway Rates Tribunal has no jurisdiction to enquire — Expression "charges" in S. 41 (1) (c) does not include jurisdiction to determine reasonableness of rate apart altogether from conditions pertaining to the rate. **AIR 1955 Mad 513 (518) (Pt H) (Prs 20, 22) (DB).**

4. Wagon load rate — Meaning of.

——**S. 41 (1) (b) — General Rules, R. 63 — 'Waganload rate' — Meaning of.**

The expression 'wagon load rate' in S. 41 (1) (b) has to be understood in the context where it occurs in conjunction with 'station to station rate' which is the third type of rate as specified in R. 63 of the General Rules. In the threefold classification of rates both 'station to station rates' as well as 'wagon load rates' are concessional rates, that is, they would be less than the schedule class rates. Just as the expression 'station to station rates' in sub-cl. (b) of S. 41 (1) cannot be understood as meaning merely a rate which prevails between two stations, so also the expression 'wagon load rate' cannot be understood to mean merely the rate applicable to a wagon load. In the context in which the words occur in S. 41 (1) (b) the expression 'wagon load rates' has been used in the sense of a rate applied to a commodity to which one of 13 wagon load scales is made applicable in Chap. VIII of the Rules. **ILR (1956) Mad 69: (1956) 1 MLJ 417 : AIR 1955 Mad 513 (517) (Pt F) (Pr 18) (DB).**

5. Bar of suit.

●——**S. 41 (as in 1955)** — Scope — Civil suit for refund of wharfage and demurrage charges collected by railway challenging the vires of rules empowering the railway to collect such amounts and alleging excess realization than legally leviable under rules — Section 26 is no bar — Tribunal can decide only reasonableness of charges — It cannot decide vires of the rules empowering railways to collect such amount — Civil Revn. Applns. Nos. 46, 49, 55, 57, 58 and 59 of 1958, D/- 25-2-1958 (Bom), **Reversed.** See Railways Act (1890), S. 26. **AIR 1964 SC 1268.**

SECTION 42

——**Ss. 42 and 41 — Reasonableness of charges — Jurisdiction of Tribunal — No conflict between S. 42 and S. 41.**

The power to reduce a level of a schedule rate is quite different from a power to declare a rate to be unreasonable and there is no necessary conflict between S. 42 (2) (a) and S. 41. The Tribunal is not, when it is declaring a levy of a particular charge to be unreasonable in relation to a particular trader or to a particular commodity, reducing the level of the rate applicable to the commodity. Thus, the Tibunal has jurisdiction to determine whether the minimum wagon load is or is not unreasonable. **ILR (1956) Mad 67: (1956) 1 MLJ 417: AIR 1955 Mad 513 (516) (Pt D) (Prs 12, 13) (DB).**

——**S. 42 (2) (b) — 'Classification', meaning of.**

The meaning of the expression 'classification' in S. 42 (2) (b) has to be read in the light of the definition in S. 46 (c) (a) which is made applicable to the sections in Chap. V which includes S. 42. **ILR (1956) Mad 67: (1956) 1 MLJ 417: AIR 1955 Mad 513 (518) (Pt G) (Pr 20) (DB).**

——**S. 42** — Reasonableness of non-assignment of wagon scale to transport of strawboard — Railway Rates Tribunal has no jurisdiction to enquire — Words "charges" in S. 41 (1) (c) do not include jurisdiction to determine reasonableness of rate apart altogether from conditions pertaining to the rate. See Railways Act (9 of 1890), S. 41. **AIR 1955 Mad 513 (DB).**

SECTION 46

●——**S. 46 — Scope.**

The provision in S. 46, Railways Act, about the finality of the Railway Rates Tribunal's decision cannot affect the Supreme Court's jurisdiction under Art. 136 of the Constitution. See Constitution of India, Art. 136. **AIR 1958 SC 525.**

SECTION 46-B

●——**S. 46-B — Scope — Nature of orders which require execution by Civil Courts.**

An order for payment of costs which may be made by the Tribunal could under S. 46-B be transmitted to a Civil Court and executed by a Civil Court as if it were a decree. Even if the Tribunal can pass no other order which may require execution, S. 46-B will serve its purpose in connection with the orders for costs. Nor is it necessary to speculate as to what other orders made by the Tribunal could require execution by the Civil Courts. Upper Doab Sugar Mills, Ltd., Shamli v. Shahdara (Delhi) Saharanpur Light Railway Co., Ltd., Calcutta, **1963 SCD 303: (1963) 2 SCR 333: AIR 1963 SC 217 (221) (Pt B) (Pr 22).**

——**S. 46-B (as amended by Act 56 of 1949))**— Railway Rates Tribunal — Refund of excess freight — Tribunal has no jurisdiction to pass a decree in favour of the complainants for refund of such excess freight or charges collected from them. See Railways Act (1890) as amended by Act (56 of 1949), S. 39. **AIR 1958 Mad 471 (DB).**

SECTION 46-C

●——**S. 46-C (d) and (h) — "Terminals" include "wharfage" and "demurrage" charges —** Said charges could be described as charges in respect of the Station and are 'terminals' within the meaning of the expression as defined in the Act. See Railways Act (1890), S. 3 (14). **AIR 1964 SC 1268.**

——**S. 46-C (h) — Wharfage —** Nature and purpose of explained — Wharfage is over and above "terminals" defined in S. 3 (14) — Wharfage falls within ambit of Act and is legal — Purpose and significance of levying wharfare indicated. See Railways Act (1890), S. 3 (14). **AIR 1960 All 438.**

SECTION 47

SYNOPSIS

(Railways Act (1890), S. 47)

1. Scope.
2. Re-classification and revaluation of rates.
3. Sub-section (1) (b).
4. Sub-section (1) (e).
5. Sub-section (1) (f).
6. Sub-section (1) (g).
7. Sub-section (2).
8. Sub-section (3).

1. Scope.

——**S. 47 (1) —** Rules under — Scope of rules and standing orders indicated — Breach of — Railway is prima facie liable in tort — Negligence of Railway employee — Plaintiff sustaining injury while stepping out of compartment of a standing train due to jerk of engine — Railway administration is liable — Contributory negligence — Burden is on defendant to prove it — Law of torts, applicability in India — Damages — Assessment — Measure of indicated. **AIR 1955 NUC Cal 751 (DB).**

——**S. 47 —** General liability of Railways — Neither S. 47 nor S. 54 empower the Railway Administration to make rules for exemption from liability for any loss, deterioration or destruction of or damages to goods — Question of exemption from liability has therefore, to be determined upon general law — Responsibility of Railway in India is limited under S. 72 of Railways Act to that of a bailee under Ss. 151, 152, 160 and 161 of Contract Act and is not governed by the common law of England or the Carriers Act 1865. See Railways Act (1890), S. 72. **AIR 1957 Madh Pra 192.**

——**S. 47 —** Contracts on behalf of railway administration not exempted from S. 175 (3), Government of India Act. See Government of India Act (1935), S. 175. **AIR 1957 Pat 586 (DB).**

[Reversed in AIR 1962 SC 113.]

——**S. 47 — Rules under Appendix 'A', Part II, R. 21 — Applicability.**

Rule 21 only refers to a breach of the rules and can have nothing to do with any conviction under the substantive provisions of the statute, namely, Ss. 120 and 121 of the Railways Act. **ILR (1959) Punj 218: AIR 1959 Punj 169 (170) (Pt B) (Pr 3).**

2. Re-classification and revaluation of rates.

——**S. 47 — Carriage of goods — Forwarding Note — If part of contract — Assignee of consignor — If bound — Forwarding Note entitling railway to re-classification and re-calculation of rates at place of destination — Lower rate charged by mistake at place of acceptance — Higher and correct rate — If can be claimed at destination.**

The contract between the Railway Administration and the consignor of goods must be considered with reference to the terms contained in the Forwarding Note subject to which the goods are carried. An assignee of the consignor is bound by the conditions contained in the Forwarding Note. He can have no higher rights than the consignor or the consignee had under the terms of the Forwarding Note. It cannot be suggested that the freight which is mentioned in the Forwarding Note and the rate which has been charged therein form the sole term of the contract. All the terms contained in the Forwarding Note must be regarded as forming the basis of the contract. Where one of the clauses of the Forwarding Note was in these terms: 'That the Railway Administration has the right of re-measurement, reweighment, re-classification and re-calculation of rates, terminals and other charges at the place of destination and of collecting before delivery of goods any amount that may have been remitted or under-charged'.

Held, that the expression 're-classification, and re-calculation of the rates' covered cases where a wrong rate was charged through mistake and it was later discovered that the rates actually charged for the goods carried, were lower than those which were properly chargeable for those goods. In other words, if certain goods were to be charged at a rate which was payable for Cl. 1 goods and the rate levied at the place of acceptance of the goods was lower than that, the railway administration could very well claim to charge at the station of destination at the higher and the correct rate under that rule. **55 CWN 758: ILR (1953) 1 Cal 45: 88 CLJ 59: AIR 1952 Cal 70 (70, 71) (Pt A) (Prs 6, 7, 11) (DB).**

——**S. 47 (1) — Consignor paying at higher rate.**

A railway company contracts with the consignor the rate mentioned in the railway receipt and this has to be followed. If the goods are consigned to a station where the rate is higher than at the despatching station, the consignor cannot be charged at the higher rate and if he is so charged the payment is illegal. **ILR (1953) Hyd 451: AIR 1953 Hyd 274 (274) (Pt B) (Pr 2).**

——**S. 47 — Under-charge owing to mistake of railway clerk — Recovery of at destination.**

The contract of carriage entered into on behalf of the railway by the clerk of the Railway is subject to Goods Tariff Rules and he has no authority to contract outside the terms of the tariff. Term No. 6 moreover printed at the back of railway receipt clearly is a notice to the consignor that the railway authority has reserved the right of remeasuring, reclassifying and recalculating rates and therefore, where there is undercharge owing to mistake on the part of the clerk at the despatching Station it can always be got made good at the destination. The charges demanded in a case such as this can be included within the phrase 'other charges' as used in Rule No. 15 of the Rules aforesaid. AIR 1952 Cal 70, Foll.; 29 All 228 (FB) and AIR 1926 Lah 631, Dissented from. **Madh BLR 1955 Civ 396: Madh BLJ 1955 HCR 1541: AIR 1955 Madh Bha 181 (183) (Pt C) (Prs 14, 19).**

3. Sub-section (1) (b).

——Ss. 47, 72 and 74-A — General Rules for Acceptance, Carriage and Delivery of Goods, Rr. 31 and 47 and Rules relating to reporting of Damages, Deficiencies or Loss of Goods Rr. 161-I and II — Damaged consignment — Consignee's insistence on open delivery—Delay in making open delivery and destruction of goods by fire — Liability of Railways for loss — Consignee's right to open delivery for damaged consignment.

A consignment of 201 bags of gram-dhall booked from Punjab arrived at Eluru with 19 of the bags in a damaged condition. The consignee took delivery of 182 bags and insisted on open delivery for the remaining 19 damaged bags. As the Claims Inspector was not available, intimation was sent to him by the Railway to go to Eluru to give open delivery. Meanwhile the 19 bags, kept in the custody of the Railways, before open delivery could be given, were destroyed by fire. On the question whether, in such circumstances the Railways are liable for the loss:

Held, under R. 31 (2) of the General Rules for Acceptance Carriage and Delivery of Goods, a consignee is bound to take delivery within the time indicated therein under normal circumstances, i.e., within reasonable time. The reasonable time may vary in individual and special cases. Normally, as per the rule the reasonable time within which delivery should be taken would be the free time allowed for demurrage and wharfage on Railways. Rule 161-II of the Rules relating to reporting of damages, deficiencies or loss of goods, proceeds on the basis that, when goods appear to be damaged and the consignee asks for open delivery, the Claims Inspector has to come and give open delivery after following the instructions given in the rule. Under R. 47 of the General Rules, the consignee is not bound to take delivery of that part of the goods which are found damaged. It provides that the consignee must take such of the goods forming part of the consignment whenever they are available for delivery notwithstanding that the remaining goods are short or damaged or have not arrived at their destination or are otherwise not available for delivery. It further provides that, if the consignee does not take delivery, of such goods as are available for delivery i.e., which are not damaged and which can immediately be, delivered without further enquiry, those goods will be subject to wharfage charges if not removed within the time allowed. Where, therefore, a part of the consignment was found damaged, the consignee is entitled to ask for open delivery and is not bound to take delivery of the goods unless open delivery is given. And, if, before open delivery could be given, the goods were destroyed by fire while in the custody of the Railways, the railways are liable for the loss.

Obiter— If the Railway refuses to give delivery unless an amount which was not lawfully and legally due to it is paid, it may amount to an illegal or unlawful detention of the goods and the Railway may become liable for unlawful or illegal detention of the goods. It could retain the goods only till anything that is lawfully due and payable is paid. **(1963) 1 An WR 354: AIR 1963 Andh Pra 415 (417, 418) (Prs 6, 7, 8).**

——S. 47 — Change in practice making goods available for delivery till 8 p.m. — Chief Commercial Superintendent has jurisdiction to issue notice introducing the change — Rules relating to free delivery of goods made by Government under section are not altered by the change — Hence petition for writ to quash notice must fail — Constitution of India, Art. 226. **(1962) 3 Guj LR 75: AIR 1962 Gul 15 (16, 17) (Prs 4, 5, 6) (DB).**

——Ss. 47 (1) (b), (g), 67 (3) — Rules under S. 47 — Validity.

The power given to the railway administration under S. 47 is wide enough to cover not merely for providing for the accommodation and convenience of passengers and regulating the carriage of their luggage but also generally for regulating the travelling upon, and the use, working and management of the railway. When the railway administration issues season tickets at concession rates, for the convenience of passengers it is open to the railway administration to frame the rule in exercise of its powers vested under S. 47 to regulate the travelling of ticket holders also. So a rule framed in exercise of that power cannot be said to be ultra vires of S. 67 (3). **1955 Mad WN 266: (1955) 2 MLJ 159: AIR 1955 Mad 619 (620) (Pt B) (Pr 7).**

——S. 47 — Rules under Rr. 45, 181 — Loss of receipt — Execution of indemnity bond —Detention of goods — Duty of consignee ends as soon as the bond is executed and made over to Station Master concerned—Once the indemnity bond is delivered to S. M. it is his duty to forward it to Divisional Superintendent if necessary as per rules — Demurrage must cease to run from the date of delivery of the indemnity bond by person who wants to take delivery on the strength of that bond. See Railways Act (1890), S. 57. **AIR 1958 Pat 558.**

4. Sub-section (1) (e).

——S. 47 (1) (e)— Rules under— Railway Servants — Departmental inquiry — Procedure — Mention of proposed punishment in charge-sheet — Legality — Subsequent fresh charge-sheet mentioning different punishment — Not illegal — Competent authority has jurisdiction to withraw earlier charge-sheet which mentioned 'reduction' as punishment and substitute in its stead a charge-sheet indicating removal from service as punishment. See Constitution of India, Art. 311. **AIR 1959 Andh Pra 618 (DB).**

——S. 47 (1) (e) — Rules under— Discipline and Appeal Rules, R. 1725 (a) — Whether power of revision under is unqualified and not subject to two conditions which qualify power of reconsideration of previous orders — (Quaere). **AIR 1961 Cal 93 (94) (Pt A) (Pr 3).**

——S. 47 (1) (e) — Discipline and Appeal Rules, R. 1725 (b) — Validity — Constitution of India, Art. 311 (2).

Clause (b) of R. 1725 only lays down a summary method, and all that is to be done by the authority is to communicate his intention of enhancing penalty, with the reasons, and call upon the delinquent to show cause why it should not be imposed. Thereafter the only thing that is to be done is to consider the reply. There need be no hearing, no evidence and no semblance of a judicial approach. Therefore Cl. (b) of R. 1725, in so far as it provides that there can be an order of dismissal, removal from service or demotion, without giving a hearing to the delinquent, contravenes the provision of Art. 311 (2) and must be declared to be invalid. **(1961) 1 Lab LJ 55: 65 Cal WN 94: AIR 1961 Cal 93 (94) (Pt B) (Pr 3).**

——**S. 47 (1) (c)** — Rules under Mewar State Railway Establishment Rules, Appendix XI — List of what constitutes misconduct is not exhaustive but illustrative. **1950 Raj LW 351: AIR 1951 Raj 51 (53) (Pt B) (Pr 3) (DB).**

5. Sub-section (1) (f).

——**S. 47 (1) (f) — Power to enhance rates — Delegation to Chief Traffic Manager — Validity.**

The Railway Board is the officer appointed by the Central Government under S. 47 (1) of the Indian Railways Act, 1890, in exercise of powers vested in it by Section 47 of the Act. Accordingly it has jurisdiction to frame the required rules, including rule to enhance the rates. But there is no provision in the Act authorising the Board to delegate the power of enhancement to a subordinate authority, e.g., the Chief Traffic Manager, who has not been appointed the prescribed officer under S. 47 (1). The Railway Administration, which under S. 3 (6) means the Manager of the Railway, is entitled to fix rates provided the rules framed by the Board lay down necessary conditions for his guidance in this regard. Rule 17 of the Notification of 1926 prescribing rules regarding wharfage no doubt gives the Administration some guidance, but it is defective inasmuch as it does not prescribe the maximum limit of the rates. Hence in the absence of a maximum limit in the Board's notification, the Chief Traffic Manager had no jurisdiction to enhance the rates of wharfage through his order of 16-2-1950. But the notification of 6-9-1958 has radically altered the legal position and has authorised individual Railway Administrations to fix rates of wharfage so long as the rate does not exceed four annas. Whatever legal defects the Order of 1950 might have suffered from were cured from the date of the issue of the said Notification, since the rates fixed by the order were below the maximum limit fixed by the Notification of 1958.

Since the issue of the Notification of 1958 there can be no valid objection to the Railway Administration fixing any rate at any station under its control so long as the rate does not exceed the limit fixed. **AIR 1960 All 438 (442) (Pt D) (Prs 13, 17).**

——**S. 47 (1) (f) — Rules with regard to wharfage — Rules 1 and 17 — If inconsistent.**

There is no inconsistency between Rr. 1 and 17 of the Notification of 18-2-1926 issued by the Railway Board framing rules with regard to wharfage under S. 47 (1) (f). Rule 1 related to normal times, while R. 17 made provision for the State of the traffic on any sudden emergency. Both the rules fell within the ambit of the powers of the Railway Board. **AIR 1960 All 438 (442) (Pt E) (Pr 14).**

——**S. 47 (1) (f) — Different wharfage rates at different stations — Classification is reasonable.**

The rate of wharfage depends on factors which must necessarily differ from station to station e.g., the density of traffic, the amount of warehousing space available, habits of local traders etc. A classification made on taking these factors into account would be a reasonable one. What the law does not permit is for different rates to be charged from different persons at the same station. See Constitution of India, Art. 14. **AIR 1960 All 438.**

——**Ss. 47 and 54 (as in force in 1946) — Applicability and scope — Warehousing rates — Power to fix.**

Having regard to the fact that S. 47 (1) (f) specifically deals with warehousing S. 54 (1) does not give the same power which is given specifically by S. 47 (1) (f). Section 47 (1) (f) is the provision which must be resorted to for the purpose of either fixing the rate for warehousing or altering the rate to a fresh rate. Section 47 (1) (f) must be utilised for the purpose of fixing the warehousing rate, particularly so as the rules made under S. 47 (1) (f) have to be made by a specified authority, who may or may not be the same authority which has power to prescribe conditions under S. 54 (1) of the Act. Fixation of rates cannot be deemed to be a condition of receiving, forwarding or delivering. Section 54 (1) cannot possibly empower the fixation of rates for warehousing and that can only be done under S. 47 (1) (f) of the Act and in strict accordance therewith as it involves pecuniary liabilities. **1960 All WR (HC) 17: 1960 All LJ 16: AIR 1960 All 371 (371) (Prs 8, 9) (DB).**

——**S. 47 (1) (f), rules under R. 237** — Loss of goods in transmission—Liability of Railway Administration — Measure and extent of — Test — Onus to disprove negligence — Railway authorities taking all reasonable care — Consignments looted by unruly mob under circumstances beyond control — **Held,** in the circumstances that Railway Administration had exonerated itself from liability — Rule 237 of the rules framed under S. 47 (1) (f) Railways Act held had no application. See Railways Act (1890), S. 72, as it stood before the Amendment Act (39 of 1961). **AIR 1964 Andh Pra 477 (DB).**

——**Ss. 47 and 72 — Rule 30 (2) of I. R. C. A. Goods Tariff No. 28 and R. 3 of the Rules of Wharfage — Scope of — Liability of Railways for carriage of goods — Realisation of freight and wharfage by Railway Administration — If constitutes a contract of fresh bailment by force of R. 3 of the Rules of Wharfage — Contract Act (9 of 1872), S. 161 — Expression 'proper time' — Whether the same as 'reasonable time'.**

Indian Railways are free from the high degree of liability imposed on a common carrier in England. There liability in a case not affected by contract and any other provision in the Railways Act, starts only at the level of the liability of a bailee, that is to say to take as much care of the goods entrusted to them for carriage as a man of ordinary prudence would be expected to take care of his goods. This is the effect of the express statutory legislation contained in Section 72 (1) and (3), Railways Act, read with Sections 151, 152 and 161 of the Contract Act.

It is difficult to hold that the expression 'proper time' in S. 161 of the Contract Act is the same thing as 'reasonable time'.

Rule 30 (2) of I. R. C. A. Goods Tariff No. 28 is not a rule. It purports to be a public notice.

A public notice cannot have a binding force unless it is issued in pursuance of a rule. **(1959) 1 Andh WR 55: AIR 1959 Andh Pra 84 (86) (Prs 6, 7).**

——S. 47 (1) (f) — Scope — Rule 31 (2), Goods Tariff No. 28 of Indian Railway Conference Association — Validity — (See Amendment by Act (39 of 1961) substituting certain words).

Rule 31 would fall within the ambit of the power conferred on the Government to frame rules under S. 47, sub-section (1) Cl. (f) and is not, therefore, ultra vires. **(1958) 2 An WR 377: AIR 1959 Andh Pra 17 (18) (Pt C) (Pr 2).**

——S. 47 (1) (f) — Rules under, R. 2 — Rule 2 is inconsistent with S. 72 and is ultra vires.

Rule 2 under which goods consigned will in all cases be at owner's risk until a receipt in prescribed form is granted and is duly signed by an authorised railway servant is inconsistent with S. 72 which defines liability of the Railway and hence it is ultra vires of the Railways Act. ILR 31 Cal 951 and AIR 1932 Cal 257, Foll. See Railways Act (1890), S. 72. **AIR 1959 Cal 400 (DB).**

——S. 47 (1) (f) — Rules for wharfage, R. 3 — Termination of carrier's liability — Warehousing of goods by railway — Wharfage charges recovered — Contract of bailment is created and therefore, Railway is liable for the loss caused by the goods having been damaged while so warehoused. AIR 1920 All 280; AIR 1926 Lah 575 (2), Dissented from. See Contract Act (1872), S. 151. **AIR 1955 Cal 264 (DB).**

——Ss. 47 (1) (f), 55, 56 — Disposal of offensive goods by sale under R. 7 (e) framed under S. 47 (1) (f) — Validity of R. 7 (e) — Provisions of Ss. 55 and 56 not applicable to such sale —Rule not ultra vires — Sale held valid.

Quite apart from Ss. 55 and 56, rules can be framed under S. 47 (1) (f), providing for the terms and conditions on which goods may be warehoused or retained. Such rules may also provide inter alia for the warehousing and disposal of goods which have become or are likely to become offensive. Rule 7 (e) is such a rule under which perishable article, unclaimed or not taken delivery of, are to be disposed of, if they are, or are likely to become offensive, at any time after the expiry of twenty-four hours after they are left at the railway station, or even earlier as the situation demands. The Rule is in no way touched by the provisions for sale in Ss. 55 and 56, which do not relate to goods which have become or are likely to become offensive, R. 7 (e) is thus intra vires and consistent with the Act.

Held, on facts that the sale by the Station Master under R. 7 (e) of a consignment of dry fish which had become offensive was valid and that the claim by the consignor for damages for conversion was unsustainable. **1965 Ker LJ 1085: 1966 Ker LT 80: AIR 1966 Ker 97 (98) (Pr 5) (DB).**

——S. 47 (1) (f) — Rules under, R. 31 (2) — Goods reaching destination — Unreasonable delay in taking delivery — Damage caused by rain — Railway absolved from liability by virtue of R. 31 (2) — Rule 31 (2) not ultra vires. AIR 1959 AP 84, Doubted. See Railways Act (1890), S. 72. **AIR 1960 Orissa 103.**

——S. 47 — Applicability of Orissa House Rent Control Order, 1943, to godowns built by licensees on railway lands — Such Godowns cannot be brought wthin the municipal area and subjected to Municipal laws — Municipality cannot levy tax on the Railway Administration in view of S. 135 Railways Act and the Railways (Local Authorities Taxation) Act, 1941 — Orissa Rent Control Order can have no application to such structures built on railway lands. See Houses and Rents — Orissa House Rent Control Order, 1943. **AIR 1955 NUC (Orissa) 5693 (DB).**

——S. 47 (1) (f) — Rules framed under, R. 3 — Wharfage or demurrage charges, when become leviable.

A free time of six hours is available to the consignee for unloading and clearance of goods after the wagon is placed at the railway siding or at any place where the unloading can be possible. Until the free time expires, there will be no charge leviable for demurrage or wharfage against the consignee. Whether actually wharfage had become due or not would depend upon the time when the unloading took place and also on the time when the railway wagon was placed at the siding or at any place where unloading could be possible. **1965 BLJR 497: AIR 1965 Pat 49 (51) (Pt B) (Pr 3) (DB).**

——S. 47 (1) (f) — Rules under, R. 2 — Bags of sugar damaged due to negligence of railway employees — Consignee refusing to take delivery — Consignee — If liable to pay wharfage.

Where forty bags of sugar which formed part of a consignment were damaged due to the negligence of the railway employees and the plaintiff (consignee) refused to take delivery of the damaged bags though the railway authorities were prepared to give delivery of all the bags with a certificate of damage both as assessed by the railway claim inspector and as claimed by the plaintiff.

Held, that the plaintiff was liable to pay wharfage because of his refusal to take delivery. **1959 BLJR 404: AIR 1960 Pat 323 (324) (Prs 4, 5).**

——Ss. 47 (1) (f) and 56 — Goods consigned to railway — Liability of railway — It does not terminate with arrival of goods at station of destination — It continues till delivery or till disposal thereof under S. 56 — Condition in Rule 28 (2) — It is not valid as it exceeds the rule-making power of the Railway and it is inconsistent with liability imposed on the Railway under S. 72. See Railways Act (1890), S. 72. **AIR 1962 Raj 181 (DB).**

——S. 47 (1) (f) — Rules under, R. 5 — Goods of perishable nature — Consignor's address not known — Consignment booked to self — No representative of consignor coming to take delivery — In circumstances held it was not praticable to send notice of arrival. **AIR 1952 Sau 95 (97) (Pt A) (Pr 4).**

6. Sub-section (1) (g).

——S. 47 (1) (g) — Right to move freely on Railway Platform — Regulation of entry into Railway platform — Restriction on sale of platfrom tickets for particular period in the interest of pilgrims visiting the place — Restrictions do not violate Art. 19 (1) (d) — Railway authorities empowered to impose such restrictions — Railway platform, though a public place, is not a public property—In view of S. 47 (1) (g) and Rr. 127 and 128 of the Coaching Tariff. Railway authorities have got a right to restrict the issue of platform tickets and regulate the entry on Railway Platform. See Constitution of India, Art. 19 (1) (d). **AIR 1964 Pat 98 (DB).**

7. Sub-section (2).

——Ss. 47 and 113 — Railway Administrative rules R. 39 (b) — Failure to mention age and to

sign season-ticket by holder as required by R. 39 (b) — Conviction under S. 113 — Validity.

A railway Company can frame rules otherwise than under S. 47 to regulate its own traffic, and these rules can be framed in the exercise of the general powers of administration of a railway company. In order that these rules should be valid, two conditions have to be satisfied: one is that the rules must not be inconsistent with any provision of the statute or any rules framed under S. 47 and the other condition is that the rules must not be unreasonable. But if an administrative rule is framed by the Rly. authority, the Rly. authority cannot by that rule provide that if the rule is contravened, the contravener shall be liable to a particular penalty. The power to impose penalties is a power which only the legislature can exercise and the railway authority has no such power delegated to it. It is only when a rule is framed under S. 47 that, by its very terms, the rule can provide a penalty for its breach. If however, the rule itself does not provide for its breach and the contravention of that rule may result in the contravention of some provision of the statute, then there is no reason why a breach of that rule should not be punished, not because the rule itself provided for the penalty, but because by contravening that rule the offender contravened some provision of the statute.

The accused while travelling was found to possess a season ticket which was not signed by him and which did not mention his age as required by R. 39 (b) of the Administrative Rules framed by the Railway. The accused was asked to pay the fare but he refused. He was thereupon prosecuted and convicted under S. 113, Railways Act.

Held, that R. 39 (b) was a very reasonable rule intended to carry out the provisions of Section 70 of the Act and as such, was not ultra vires. All that Rule 39 (b) does is to define a proper season ticket is and inasmuch as the season ticket which the accused held was not a proper season ticket in accordance with R. 39 (b), he subjected himself to the penalty imposed by S. 113. The conviction of the accused under S. 113 was, therefore, fully justified. Case Law Ref.

It is true that the railway authority could have framed this rule under S 47. But that does not take away the authority and the power of the railway company to frame any rule for administrative reasons because it is not always easy to frame a rule under S. 47. **('52) 54 Bom LR 428: 1952 Cri LJ 1462: 21 Bom Cri Cas 339: ILR (1953) Bom 36: AIR 1952 Bom 421 (422, 423) (Pra 5, 7, 8).**

8. Sub-section (3).

——S. 47 (3) — Scope and effect of.

Under S. 47 (3), rule made under this section requires sanction of the Central Government. S. 2 of the Indian Railway Board Act (Act 4 of 1905) authorises the Central Government to invest the Railway Board with all or any of its powers and functions under the Railways Act. In exercise of the powers conferred by this provision the Central Government issued Notification No. 801, dated 24-3-1905 investing the Railway Board with its powers and functions inter alia, under S. 47 (3). In consequence the Notifications of 1926 and 1958 issued by the Railway Board prescribing rules under S. 47 are in the eye of law Notification of the Central Government itself and accordingly fulfil the conditions laid down by sub-section (3) of S. 47. So in such a case omission to receive sanction of the Central Government does not render the notifications invalid. **AIR 1960 All 438 (442) (Pt F) (Pr 15).**

SECTION 54

——S. 54 (as in force in 1946) — Scope of — Fixation of warehousing rates — Section 54 does not authorise such a fixation — That can only be done under S. 47 (1) (f) and in strict accordance with it as it involves pecuniary liabilities. See Railways Act (1890), (as in force in 1946), S. 47. AIR 1960 All 371 (DB).

——Ss. 54, 72, 74-A — Civil Procedure Code, S. 80 — Notice giving wrong number of R/R but mentioning all other particulars — Sufficiency.

Held, on facts that as damage occurred between Bezwada and Nagpur and the goods were transhipped at Bezwada by the Railway servants, protection under Tariff Coaching Rules could not be claimed; that there was sufficient compliance with S. 80, Civil Procedure Code and that there was no change in plaintiff's capacity and that the Railway was liable for damages. AIR 1946 Mad 73; 1950 All LJ 595 and AIR 1940 Mad 416; (1947) 2 Mad LJ 577, Dist. **1960 Nag LJ (Notes) 34 (Bom).**

——S. 54 — Goods Tariff Rules — Recovery of under-charge at destination — Goods described as 'kalanji' seeds in Railway Receipt at place of consignment — Goods classified at destination as 'kalajira' subject to higher tariff and under-charge on that basis collected — No evidence on record to show that the two terms described identical article— **Held,** the Railway was entitled under R. 15 of the Goods Tariff Rules No. 28 to correct the charges at the destination and recover the under-charge. **(1961) 3 Orissa JD 160; AIR 1962 Orissa 49 (49) (Pr 4).**

SECTION 55

——Ss. 55 and 56 — Auction — Sale of perishable and non-perishable goods not delivered or not taken delivery of — Even in case of non-perishable goods notice should be issued before selling the goods by auction. 1964 All LJ 632.

——S. 55 — Illegal detention of goods — Liability.

Where a consignment of goods had reached its destination but the railway reclassified the goods and refused to deliver it unless an additional charge which was not found to have been justifiably demanded, was paid.

Held, that the railway company was liable for the illegal or wrongful detention of goods and it could not claim exemption from liability when sued for damages. 11 All LJ 335, Rel. on. **1955 All WR (HC) 627: 1955 All LJ 890: AIR 1956 All 149 (149) (Pr 4).**

——S. 55 — Forwarding note — Condition 6 — Scope — "Reclassification and re-calculation of rates" — "Other charges".

The expression "re-classification and re-calculation of the rate" covers cases where a wrong rate was charged through mistake and it was later discovered that the rates actually charged for the goods carried, were more than those which were properly chargeable for those goods. The expression does not refer to cases where the goods carried by the railway administration were wrongly classified, because the words are "re-classification and re-calculation of rates" and not of goods. Further the last part of the condition "other charges" is sufficiently wide to cover a case like this. ILR 52 All 81 and ILR 1945 Mad 174, Rel. on; ILR 29 All 228 (FB), Dist.;

AIR 1926 Lah 631, Not foll. **55 Cal WN 758: 88 Cal LJ 59: ILR (1953) 1 Cal 45: AIR 1952 Cal 70 (70, 71) (Pt A) (Prs 6, 7, 11) (DB).**

——S. 55 — Forwarding note — Condition 6 — Binding effect.

The terms of the conditions on the back of the forwarding note bind the consignor and the assignee of consignee can have no higher rights than the consignor or the consignee has under the terms of the forwarding note. **55 Cal WN 758: 88 Cal LJ 59: ILR (1953) 1 Cal 45: AIR 1952 Cal 70 (71) (Pt B) (Pr 8) (DB).**

——S. 55 — Forwarding note — Condition 6 whether forms part of contract — Deed — Construction.

It cannot be said that condition 6 appearing on the back of the forwarding note is not part of the contract. The contract between the railway administration and the consignor must be considered with reference to the terms contained in the forwarding note. It cannot be said that the freight which is mentioned in the forwarding note and the rate which has been charged therein form the sole term of the contract. We must regard all the terms contained in the forwarding note as forming the basis of the contract, and one of the terms is that contained in condition 6. **55 Cal WN 758: 88 Cal LJ 59: ILR (1953) 1 Cal 45: AIR 1952 Cal 70 (71) (Pt C) (Pr 9) (DB).**

——S. 55 (5) — Recovery of undercharge after delivery of goods.

The combined effect of Cls. 6 and 7 of the Rules printed on the Railway receipt and S. 55 (5), Railways Act, is that the Railway is given the power to withhold delivery of the goods until the amount due to it on account of an undercharge is paid, and if the goods have been delivered, to exercise such a lien over the goods of the consignee which may come into its possession and if no lien is exercised or no goods come into its possession the law gives the Railway the right to file a suit for the recovery of the amounts due. The fact that the Railway is given such a power would conclusively prove that the right to recover is not restricted till the time of the delivery of the goods. The Railways right to recover the undercharge by filing a regular suit as would appear from the povisions of S. 55 is not taken away by Cl. 6 and, therefore, the language employed in Cl. 6 can only be be regarded as an enabling provision giving the Railway the right to recover the amount even before the delivery of the goods. **ILR (1955) Hyd 256: AIR 1955 Hyd 61 (62, 63) (Pt A) (Prs 6, 8) (DB).**

——S. 55 — Disposal of offensive goods by sale under Rule 7 (e) framed under Section 47 (1) (f) — Validity of Rule 7 (e) — Provisions of Sections 55 and 56 not applicable to such sale — Rule not ultra vires — Sale held valid. See Railways Act (9 of 1890), S. 47 (1) (f). **1965 Ker LJ 1085: AIR 1966 Ker 97 (DB).**

——S. 55 — Tariff rates — Applicability.

A contract of carriage emerges only after the goods are loaded and a receipt for the same has been issued. Till that time there is but an offer to take the goods subject to wagons being available. While they are on the railway premises the railway acts merely as bailee but not as carrier. Hence tariff rates existing on the date when the goods are loaded and the railway receipt is prepared and not those existing on the date when the goods are accepted for consignment are applicable in such a case. **1958 MPC 31: 1958 MPLJ 130: 1958 Jab LJ 129: ILR (1957) Madh Pra 366: AIR 1958 Madh Pra 294 (295) (Pr 3) (DB).**

——Ss. 55 (2) and 56 (1) and (2) — Scope of — Right of Railway Management to sell the goods consigned — When can be exercised — Duty to give notice — If can be contracted out of — Suit for damages for conversion — Limitation for — Limitation Act (9 of 1908), Articles 31, 36 and 48 — Condition in forwarding notes — Effect of.

A Railway Administration has a right to sell the goods consigned to them for carriage only in accordance with the provisions of the law authorising them in that behalf. Any sale of the goods delivered to them contrary to the provisions of the statute will be without legal authority and wrongful and the Railway will be guilty of conversion. It is not open to the Railway to contract itself out of the statutory obligations.

Where the goods consigned remain unclaimed and the owner of the goods is known the Railway is under a statutory duty to give the notice required by Section 56 (1) of the Railways Act before exercising their right of sale. The right to sell will accrue to them only when such a notice is given. Any sale in contravention of the provisions of the section will be invalid. The procedure to be followed in regard to the sale is laid down under Section 55 (2) of the Act The fact that the Railway is authorised, under Section 55 or condition 10 of the forwarding note, in certain cases to sell the goods in their custody for non-payment of charges does not mean that the railway is at liberty to sell the goods of a consignor without any notice to him merely because the goods are likely to get deteriorated. In cases of perishables a sale without notice might be justified only if the right to sell has accrued under Section 56 of the Act. A suit for damages for wrongful conversion will be governed by Article 31 of the Limitation Act and not Article 48. **71 MLW 70: 1958 Mad WN 36: (1958) 1 MLJ 175: ILR (1958) Mad 342: AIR 1958 Mad 321 (323) (Pt A) (Prs 7, 9) (DB).**

——S. 55 — General Rules No. 29 (1954), R. 10 — R. 10 is inoperative as it violates provisions of Section 55.

In the absence of a proved case of demand by the railway administration and failure by the consignee to pay it, the right of lien under Section 55 either over the same goods in respect of which the demand was made or on subsequent goods that may come later into the possession of the railway will not arise in favour of the railway. Rule 10 as contained in the General Rules No. 29, which were enforced from 1-6-1954, is in conflict with Section 55, Railways Act and in that view, cannot be supported. Section 55 makes the lien subject to two things — accrual of liability in respect of charges payable to the railway and demand for such payment by the railway from the consignor or the consignee. Unless these two things are there, particularly, the demand, there will be no room for exercise of lien. Besides, the extent of lien has been provided there. Rule 10 has omitted the condition of demand and has extended the lien beyond the limit prescribed by Section 55; it is clearly in violation of the statutory provision. AIR 1952 Bom 421 and AIR 1960 Orissa 103, Disting. **1965 BLJR 497: AIR 1965 Pat 49 (50, 51) (Pt A) (Prs 2, 4) (DB).**

——S. 55 — Unclaimed goods (Coal) — Railway administration must send notice to owner or to such person appearing to it to be entitled thereto. requiring him to remove the goods — No such

person known to Railway Administration — Administration can sell goods as early as may be under Section 55 — Consignee instructing its intention not to take delivery— Railway administration is not bound to take immediate step for disposal of goods — Railway is not bound to hold consignee as owner and is not expected to go into the question of law in determining ownership — It is justified in making enquiries from other sources on question of ownership— Permission of Coal Commissioner essential under Colliery Control Order and Bihar Coal Order for disposal of coal by public auction — **Held**, that there was no unavoidable delay in disposal of coal by Railway administration for recovery of freight and demurrage. See Railways Act (1890), S. 56. **AIR 1963 Pat 46 (DB).**

——**S. 55** — Notice under, giving time for removal of goods — Railway cannot claim wharfage charge for period subsequent to expiry of period of notice for removal of goods — (1860) 8 HLC 338, Rel. no. **1960 Pat LR 130: AIR 1961 Pat 119 (119) (Pr 2).**

——**S. 55** — Action for damages for non-delivery of goods — Who can maintain — Generally it is only the consignor or consignee or the endorsee of consignment who can maintain such an action — A blank endorsee for value can also maintain such an action — Principles as to — Endorsement in blank — Meaning of — If means writing one's name merely on the back of a railway receipt without specifying any restrictions as to payee, the manner of payment etc. which details may be filled in by holder thereof in whatever manner he likes — (Words and Phrases — 'Endorsement in blank') — (Sale of Goods Act (1930), S. 2 (4) and Section 23) — (Contract Act (1872), S. 178). See Railways Act (1890), S. 72. **AIR 1959 Pat 438.**

——**Ss. 55 and 56 — Distinction.**

Section 56 is independent of Section 55 and makes provision for sale of unclaimed goods, while Section 55 provides for realisation of the dues to the railway administration by exercise of their lien over the goods in their possession. **AIR 1952 Sau 95 (97) (Pt B) (Pr 5).**

——**S. 55 (2) — Perishability of goods — On what depends.**

The question whether the goods are perishable or not, does not depend upon whether freight in respect of them has been prepaid or not. The question depends upon the nature of the goods themselves. **AIR 1952 Sau 95 (98) (Pt C) (Pr 6).**

SECTION 56

——**S. 56** —Auction of— Sale of perishable and non-perishable goods not delivered or not taken delivery of — Even in cases of non-perishable goods notice should be issued before selling the goods by auction. See Railways Act (1890), Section 55. **1964 All LJ 632.**

——**S. 56 — Notice — When essential — Unclaimed goods in possession of Railway — Suit for damages — Maintainability.**

An owner is not entitled to sue the railway administration for damages on the bare ground that the railway failed to give the notice contemplated by Section 56 of the Railways Act, when the goods are still in the possession of the railway for delivery to the owner. A railway incurs no liability by its failure to give the notice when it does not sell the goods but keeps them in its possession to be delivered to the owner on his demand. The railway is not bound to give notice of the arrival to the owner if it does not want to sell the goods. It is for the railway to decide what time is reasonable, and so long as it does not want to sell the goods it is at liberty to wait for the owner to come. The owner is not given the right to say that after a certain time the railway must give the notice to him and sell the goods. The provision about notice is enacted for the benefit of the railway the object is to safeguard its position when it sells the goods. The principle of reasonable time is also to be invoked by it in justification of its act of selling; it cannot be invoked against it by the owner. **1952 RD (HC) 160: 1952 All WR (HC) 270: AIR 1952 All 880 (880) (Pr 2).**

——**S. 56** — Disposal of offensive goods by sale under R. 7 (e) framed under Section 47 (1) (f) — Validity of Rule 7 (e) — Provisions of Sections 55 and 56 not applicable to such sale — Rule not ultra vires — Sale held valid. See Railways Act (9 of 1890), S. 47 (1) (f). **1965 Ker LJ 1085: AIR 1966 Ker 97 (DB).**

——**Ss. 56 (1), 77 (1) and Indian Railway Conference Association, Goods Tariff (No. 31), Part I, R. 192** — Goods arriving at destination — Railway not bound to give notice of arrival to consignee — Goods not claimed within a month— Railway bound to give notice to owner before sending goods to unclaimed or lost property office. **1966 MPLJ (Notes) 21.**

——**S. 56 (1) — Scope — Notice under — Whether mandatory.**

So far as the intimation required by S. 56 (1) is concerned that is an intimation which the Railway Administration is under an obligation to give. The intimation required by Section 56 (1) relates accrual to the Railway Administration of the right to sell.

In order that they might be entitled to sell the property of which they are in possession on behalf of the owner or consignee, they have to cause a notice to be served on him requiring him to remove the goods. That obligation arises where the owner or other person entitled to remove the goods is known. See Railways Act (1890), S. 55 (2). **AIR 1958 Mad 321 (DB).**

——**Ss. 56 (2) and 80 — Consignment of goods — Delay in delivery — Damage to goods — Prices fallen — Refusal of consignee to take delivery — Claim of compensation.**

A wholesale dealer in Cuddalore (South India) had a branch in Northern India and certain bags of Bengal gram purchased by the Northern Indian branch were consigned on 1st November, 1944, to the Railway Authorities to be delivered at Cuddalore. When invoice was obtained by the plaintiffs he sent his representative to the Railway Authorities and asked for delivery of goods on 17th November, 1944. On the strength of the invoice they refused delivery owing admittedly to some confusion prevailing regarding the invoice numbers and the identifying marks on the bags. After 24th January, 1945, the South Indian Railway in Cuddalore sent word to the plaintiffs branch to take delivery of goods which they refused on the ground that the goods had deteriorated owing to exposure and that prices had fallen by about Rs. 8 a bag. Therefore under the Railways Act, Section 56 (2), the Authorities sold in auction the goods and after deducting freightage and demurrage charges paid to the consignee of the goods the balance available. On a suit filed by the plaintiffs against the South Indian Railway under Section 80 of the Railways Act.

Held, (1) That under Section 80 of the Railways Act the suit was one properly maintain-

able and it was not necessary to sue the contracting railways, viz., the G. I. P. Railway.

(2) That in all cases of refusal by the consignor to take delivery of goods there can be no hard and fast rule of his preclusion from filing a suit for compensation. When, as in this case, Railway Authorities themselves were guilty of negligence in having allowed the goods to deteriorate and subsequently to be sold for a lesser price the responsibility for the loss was certainly the Railway's.

(3) That the decree could not be given for the full amount claimed. The demurrage charges and freightage charges should be deducted. **1952 Mad WN 824: 65 Mad LW 1020: (1952) 2 MLJ 713: ILR (1953) Mad 915: AIR 1953 Mad 217 (218, 219) (Pts A, B) (Prs 4, 7, 8) (DB).**

——S. 56 (2) —Auction sale of unclaimed goods — Obligation of consignor — Claim for compensation — Freight and demurrage should be allowed to Railway Company.

Normally, as property in the goods entrusted to a carrier remains with the owner, he is bound to take delivery even if they are damaged, his remedy being to claim compensation, nor can he cast upon the bailee responsibility for further custody as bailee without payment of storage or demurrage dues.

Held, on facts, that despite the refusal of the Railway Company to give delivery when the plaintiff's representative demanded it, there was nevertheless a duty cast on the plaintiff to have taken delivery of the goods, though damaged when delivery was offered in accordance with the very fair and reasonable terms offered by the Railway Company.

There was therefore no justification for disallowing the freight and demurrage charges to the Railway Company from the claim for compensation against it. **1952 Mad WN 824: (1952) 2 MLJ 713: 65 Mad LW 1020: ILR (1953) Mad 916: AIR 1953 Mad 217 (218, 219) (Pt B) (Prs 7, 8) (DB).**

——Ss. 56, 72, 73 — Perishable goods — Power of Railways to sell — Notice to consignor or consignee before sale is essential.

The law relating to perishable goods is that where perishable goods are sent by Railway the Railway Co. are agents to carry, not to sell. To give them the right to sell, circumstances must exist, which put them in the position of agents of necessity for the owner to take that action which is necesasry in the interests of the owner. These conditions do not arise if the carrier can communicate with the owner, and get his instructions. They must give the owner the opportunity of deciding how he will deal with the goods. Therefore to justify a sale by a railway company they must first show that it was commercially impossible to communicate with the owner and receive instructions from him. If they show that, they must then show that a sale was in the circumstances the only reasonable business course to be taken.

In a suit for damages against Railways on the ground that the Railways ought to have obtained plaintiff's instructions as to disposal of goods prior to sale, the defence was that the Railway lines were submerged under floods and the train service was suspended for about 10 days: therefore, the goods being perishable had to be sold along with other articles in a lot in emergency.

Held, that the notice to the owner of goods was essential before selling the consignment and in absence of the proof that it was commercially impossible for the Railways to communicate with the consignee or the consignor, the plaintiff's was bound to succeed. (1913) 1 KB 103 and (1921) 1 KB 257. Rel. on; AIR 1940 Lah 412 and AIR 1932 Cal 492, Disting. **(1962) 4 Orissa JD 284: AIR 1963 Orissa 17 (19, 20) (Prs 4, 5).**

——S. 56 (1) —Delivery of consignment refused by consignee — Liability to pay freight and demurrage whether that of consignor or consignee — Tests — Consignor acting as agent of consignee — Consignee held liable.

Where the consignee of goods refuses to take the delivery of the goods from the railways on its arrival at the destination in order to determine as to whether the consignor or the consignee is liable to pay the amount of railway freight and demurrage it is necessary to find out who were the contracting parties and what was the nature of the contract between them. The person who is primarily liable for the payment of freight is the consignor and this liability of the consignor is to be implied from the fact that he had made over the goods to the carrier for the purpose of being carried to destination and this liability of the consignor, may, in some cases, be even independent of the question of actual ownership of the goods. The consignee as such is not liable to pay the freight, because ordinarily he is not to be treated as a party to the contract of carriage. But if the facts of the case show that the consignor acted to the knowledge of the carrier as agent only, the person on whose behalf he acted as agent is in reality the principal and liable for the freight.

Thus, the consignee is liable for the freight when he has made himself liable by express contract or when he is treated as the undisclosed principal of the consignor or when it is understood between the consignor and the carrier that freight is to be paid by the consignee. The mere fact that the entry "to pay" is made in the relevant column of the railway receipt or the forwarding note is not sufficient to show that the consignee was liable to pay the freight. AIR 1929 Pat 265 and AIR 1931 Cal 33, Rel. on.

Held, on facts that the contents of the sanction order and the forwarding notes were sufficient to prove that contract for supply of wagons was between the railway and the allottee-consignee and inasmuch as the consignor Company had booked the consignments in pursuance of the sanction order, it had acted as an agent of the consignee. Hence the consignee was liable to pay the freight as well as the demurrage, if any. **1962 BLJR 968: ILR 42 Pat 436: AIR 1963 Pat 46 (48) (Pt A) (Prs 2, 3) (DB).**

——S. 56 — Consignee cannot refuse to take delivery of goods on ground that the quality of goods was not to specification — Consignee can file suit for damages.

A consignor or a consignee of goods is not justified in refusing to take delivery from the railway on the ground that the quality of the consignment was bad or that there was a shortage in the consignment at the time of delivery. A consignor or a consignee is entitled to sue the railway for damages in such cases and if he refuses to take delivery, he does so at his own risk. **1962 BLJR 968: ILR 42 Pat 436: AIR 1963 Pat 46 (49) (Pt B) (Pr 5) (DB).**

——Ss. 56, 55 — Unclaimed goods (Coal) — Railway administration must send notice to owner or to such person appearing to it to be entitled thereto, requiring him to remove the goods — No such person known to Railway Administration — Administration can sell goods as nearly as may be under Section 55 — Consignee intimating its intention not to take delivery — Railway Administration is not bound to take immediate step for disposal of goods — Railway is not bound to hold consignee as owner and is not expected to go into nice question of law in determining ownership — It is justified in making enquiries from other source on question of ownership — Permission of Coal Commissioner essential under Colliery Control Order and Bihar Coal Order for disposal of coal by public auction — **Held,** that there was no unavoidable delay in disposal of coal by Railway Administration for recovery of freight and demurrage. AIR 1920 Pat 493 and AIR 1960 Pat 323, Rel. on; AIR 1961 Pat 119. Dist. **1962 BLJR 968: ILR 42 Pat 436: AIR 1963 Pat 40 (50) (Pt D) (Pr 6) (DB).**

——S. 56 — Action for damages for non-delivery of goods — Who can maintain — Principles as to — Endorsement in blank — Meaning of — (Words and Phrases — 'Endorsement in blank') — (Sale of Goods Act (1930), S. 2 (4) and S. 23) — (Contract Act (1872), S. 178). See Railways Act (1890), S. 72. **AIR 1959 Pat 438.**

——S. 56 — Suit for compensation for non-delivery of goods — Defences of laches in delaying to take delivery after arrival of goods — Defendant Railway must establish when the goods arrived — After arrival of goods the liability of Railway is that of bailee under Ss. 151, 152 and 161, Contract Act, to take care of goods as man of ordinary prudence would, under similar circumstances take of his own goods — Bailee is liable for loss, destruction or deterioration of goods, if they are not returned, delivered or tendered at proper time — On failure to claim goods, Railway has to act under S. 156 of Railways Act and they are not relieved from liability — (Contract Act (1872), Ss. 151, 152 and 161). AIR 1920 All 280, Not followed; Case law Ref. See Railways Act (9 of 1890), S. 72 (1). **AIR 1955 NUC (Punj) 994 (DB).**

——S. 56 — Goods Tariff General Rules, R. 31 (old Rule 28) — Goods consigned to railway — Liability of railway — It does not terminate with arrival of goods at station of destination — It continues till delivery or till disposal thereof under Section 56 — Condition in Rule 28 (2) (New Rule 31) — It is not valid as it exceeds the rule-making power of railway and it is also inconsistent with the liability imposed by Section 72. See Railways Act (9 of 1890), S. 72. **AIR 1962 Raj 181 (DB).**

——Ss. 56 and 55 — Distinction — Independent of Section 55, Section 56 provides for sale of unclaimed goods. See Railways Act (1890), Section 55. **AIR 1952 Sau 95.**

SECTION 57

——Ss. 57 and 72 — Scope of — Liability of the Railway Administration — Railway receipt — A document of title — Duty of the Railway Administration to insist upon its production — Contract Act — Provisions as to bailment — Applicability of.

A railway receipt is a document of title. As a rule, therefore, the Administration, should insist upon the production of the receipt before it parts with the goods to which it relates. The railway receipt may be endorsed by the consignor or his endorsee to any other person; when so endorsed it is a direction from the bailor to the bailee to deliver the goods to such other person and it is the duty of the bailee to obey the instructions of the bailor.

Section 57, Railways Act, covers goods coming into the possession of the Railway Administration either for carriage or otherwise and the first clause obviously refers to rival claims made by two or more persons in the case of goods coming into possession of the Railway Administration otherwise than for carriage. If goods are found for instance, in a train and thus come into possession of the Railway Administration and two or more persons lay claims to them, this clause applies. When the receipt given is not forthcoming, this section enables the Railway Administration to withhold delivery, until the person entitled in its opinion to receive them has given an indemnity to its satisfaction against the claims of any other persons with respect to the goods.

The mere fact that the consignment was made to self does not make the consignor the rightful owner. If the Railway Authorities deliver the goods on production of the receipt, they are protected, but when they do so without its production, they do so at their risk. Section 57 gives the Railway Company the right to withhold delivery until a particular point of time. The Section does not protect the Railway Administration from the consequences of deilvery to a wrong person. In fact, it provides for the possibility of a wrong delivery by enacting that the authorities should take an indemnity before delivering the goods to a person claiming them.

The relevant provisions of the Indian Contract Act as to contracts of bailment would apply to the carriage of goods by the Railway authority except in so far as they are altered or modified by the Railways Act. Under Section 166 of the Contract Act, where the bailor has no title to the goods, the bailee is protected from the consequences of wrong delivery if he acts in good faith in delivering them back or in accordance with the instructions of the bailor. When, to the knowledge of both the parties, the instructions are contained in a document, which is besides a document of title, that is to say, a document capable on endorsement of passing the title to the goods to which it relates, then the instructions of the bailor can only be sought in the document and the bailee is bound to ask for that document, although where it is not forthcoming, he may act in his discretion but still at his risk. Otherwise the Railway Authorities can hardly be stated to be acting in good faith. They will be absolutely protected if they refuse to deliver except on being reasonably satisfied that the document is lost or destroyed; when, however they deliver the goods in the absence of the receipt to a person, who in their opinion, is entitled thereto, they cannot have immunity from the claim of the lawful owner. That is indeed the reason why they take an indemnity against such claim. **(1959) 1 Andh WR 105: AIR 1959 Andh Pra 331 (332) (Prs 3, 4, 5) (DB).**

——S. 57 — Rules under S. 47, Rr. 45, 181 — Loss of receipt — Execution of indemnity bond — Detention of goods, if justified — Liability for demurrage.

Reading Rules 45, 181 (2) (a) together with Section 57, it is quite clear, that, in case the railway receipt is not produced, the person asking for delivery of goods can get the delivery of it on execution of an indemnity bond. Under

Rule 181 (2) (c), the duty of a consignee ends as soon as he had executed the indemnity bond and made it over to the Station Master concerned; it is none of his business to go about searching for the Divisional Superintendent of the area. The said sub-rule clearly says that if the indemnity bond is in respect of a consignment valued at more than Rs. 500, the indemnity bond has to be forwarded to Divisional Superintendent. Once the indemnity bond is delivered to the Station Master it is for him to forward the bond to the Divisional Superintendent, and from the date the indemnity bond is delivered by the person who wants to take delivery on the strength of that indemnity bond, the demurrage must cease to run. AIR 1922 Pat 890, Rel. on. **AIR 1958 Pat 558 (559, 560) (Prs 5, 6).**

——Ss. 57 and 76-B (as amended by Act of 1961) — Suit by consignor for recovery of price of goods against Railway — Railway delivering goods to consignee on executing indemnity bond contrary to consigor's instructions, is liable.

Held, that in the circumstances the railway was liable for the price of the goods to the consignor. The appropriation of the goods was conditional and the property in the goods was intended to pass only when the railway receipt was retrieved by the consignee from the bank after payment. Therefore, property in the goods never passed to the consignee and the consig nor had the right to stop delivery of the goods in transit. The railway authorities remained the agent of the consignor and they failed to give effect to the consignor's letter. AIR 1955 Mad 722 and (1865) 19 CB (NS) 290 and (1921) 1 AC 486, Rel. on. The Railway staff was highly negligent in making the delivery to the consignee contrary to the directions of the consignor and hence delivery of the goods by the railway was not bona fide. Section 57 of the Act was of no avail to the railway to escape liability in view of the specific directions given by the consignor in regard to the delivery of the goods. **65 Punj LR 1107: AIR 1964 Punj 20 (22) (Prs 7, 9, 10) (DB).**

SECTION 58

——S. 58 — Declaration need not be separately made — Requisite information should be given to railway administration — **Held,** there was no declaration made in the case. See Railways Act (1890), S. 75 (1). **(1957) 59 Bom LR 117: ILR (1957) Bom 321.**

SECTION 63

——S. 63 — Overcrowding — Actionable negligence — Damages — (Tort — Negligence — Damage) — (Contract Act (1872), S. 73).

The question whether overcrowding in a railway compartment by itself amounts to actionable negligence by the railway or its employees will depend on the duty arising out of the contract and must depend upon the ordinary facts known to the contracting parties at the time of the contract. Assuming that overcrowding in certain circumstances may amount to actionable negligence, the plaintiff has still to prove that the negligence resulted in some damages or injury to him. Mere inconvenience is not enough. **ILR 33 Pat 249: AIR 1955 Pat 282 (283) (Pr 4) (DB).**

SECTION 66

——Ss. 66, 74 and 113 — Scope — Passenger purchasing ticket — Half-ticket purchased by adult — Misrepresentation — Effect of — Contract of carriage — If void or voidable — Luggage booked on such ticket — Loss of — Liability of Railway administration — Contract Act (1872), S. 19.

If a half-ticket is obtained from the railway administration for carriage of an adult person the contract becomes voidable, at the option of the railway administration, under Section 19 of the Contract Act and not void. Moreover, Section 113 of the Railways Act provides for realisation of excess charge from a passenger travelling with an improper ticket and thereby validating the improper ticket.

That being so, the booking of luggage, on the strength of the half-ticket purchased by the passenger does not become a void contract. The railway administration having received the luggage charges and the luggages and having booked them against a proper receipt, becomes a bailee in respect thereof and is responsible for the loss thereof under Section 74 of the Railways Act. **65 Cal WN 727: ILR (1962) 1 Cal 230: AIR 1962 Cal 48 (52) (Pt B) (Pr 18) (DB).**

——Ss. 66 and 68 — Person travelling without ticket or permission is not passenger within Section 82-A.

Reading Sections 66 and 68 together it is clear that a person desirous of travelling on a railway has to obtain a ticket under Section 66 or can travel, if he has with him no proper pass or ticket, with the permission of the railway servant under Section 68. So long as he has not been supplied with a ticket under the previous section or given permission under the latter section he is not a passenger. See Railways Act (1890), S. 82-A. **AIR 1959 Pat 316 (DB).**

——Ss. 66, 68, 82-A — "Passenger" — Person travelling by goods train without ticket or permission injured in collision — Liability of railway — Trespasser — (Tort — Damages — Carrier — Collision — Liability of railway to trespasser).

(1) Generally speaking a passenger is one who travels in a public conveyance by virtue of a contract with the carrier, express or implied; (2) that a person who travels contrary to a bye-law and against the wishes of a railway servant is a trespasser and he cannot recover if as a result of negligence of the carrier he suffers injury; (3) if a person steals a ride on a goods train knowing that such a train is not meant for the carriage of passengers or, even on the case made out by the plaintiffs, is meant only for refugees, then the plaintiffs at least cannot recover damages as according to their own case the deceased does not fall in that category; (4) a railway servant, who under the law has not the power to permit a person to travel in a railway carriage, cannot give permission to a traveller to travel by a railway train and if he does so, his act is not binding on the railway company. The act of such a railway servant in allowing a lift to a person, if it is outside the scope of his employment, does not make the employer liable to damages because it is the performance of an act which the servant is not employed to perform; and (5) if it is not proved that the servants of the railway had allowed any passenger to travel by the goods train, and if the deceased travelled by such a train, the railway, administration is not liable. **ILR (1957) Punj 749: 59 Punj LR 189: AIR 1957 Punj 164 (169) (Pr 30) (DB).**

SECTION 67

——S. 67 (3) — Applicability to season ticket-holders — Section 67 (3) cannot be made applicable to the case of season ticket-holders.

Where a season ticket-holder was obliged to travel by the lower class only on account of the exercise of the railway administration of right under the rule to vary or alter the train the season ticket-holder having regard to the terms when the season ticket was issued to him, could not now question the right of the railway administration to alter and vary the trains and he could not make the railway administration liable for any loss or damage that might arise to him by reason of such alteration or variation of the train. **1955 Mad WN 266: (1955) 2 MLJ 159: AIR 1955 Mad 619 (620) (Pt A) (Pr 6).**

——S. 67 (3) — Rules under S. 47, are not ultra vires.

When the railway administration issues season tickets at concession rates, for the convenience of passengers it is open to the railway administration to frame the rules in exercise of its powers vested in Section 47 to regulate the travelling of ticket-holders also. So a rule framed in exercise of that power cannot be said to be ultra vires of Section 67 (3). See Railways Act (1890), S. 47 (1) (b) (g). **AIR 1955 Mad 619.**

——S. 67 (3) — Applicability to season ticket-holders.

Sub-clause (3) of S. 67 contemplates that when a ticket-holder is obliged to travel in a class lower than the one for which he has purchased a ticket, he has to deliver his ticket and then only he is entitled to a refund. There is no question of a season ticket-holder delivering up a season ticket at the counter where the collector stands for collecting the tickets from the persons who have travelled in the train. On the other hand, what the season ticket-holder is expected to do is to show the ticket to the collector and pass out of the gate or the counter as the case may be. It will be incorrect to say that Section 67 (3) is also capable of application to season ticket-holders. **1955 Mad WN 266: (1955) 2 MLJ 159: AIR 1955 Mad 619 (620) (Pt C) (Pr 8).**

SECTION 68

——Ss. 68 and 113 — Passenger's ticket lost during travel — Excess recovery — A certificate under Section 68 could be issued only on condition that ticketless traveller subsequently pays the fare for the distance to be travelled — Suit to recover single fare or excess charge — Not maintainable. AIR 1949 Nag 330; 1949 NLJ 251, Foll. **1961 MPLJ (Notes) 56.**

——S. 68 — Person travelling without ticket or permission is not passenger within the meaning of Section 82-A. See Railways Act (1890), Section 82-A. **AIR 1959 Pat 316 (DB).**

——S. 68 — Person travelling by goods train without ticket or permission, injured in collision — Liability of railway — Trespasser — A person who travels contrary to a bye law and against the wishes of a railway servant is a tresspasser and he cannot recover damages if he suffers injury as a result of negligence of the carrier — (Tort — Damages — Carrier — Collision — Liability of railway to trespasser). See Railways Act (1890), S. 66. **AIR 1957 Punj 164 (DB).**

SECTION 70

——S. 70 — Accused using Railway season ticket of another person pretending to be that another person — He can be charged under Section 419, I. P. C. — Even if the Railways Act does not specifically provide for the abuse of a season ticket, accused cannot escape his answerability under the general criminal law if his act brings him thereunder. See Penal Code (1860), S. 419. **1956 Cri LJ 44: AIR 1957 Andh Pra 4.**

——S. 70 — Rules — Rule 39 (b) — Validity — If ultra vires as unreasonable or inconsistent with Act — Rule 39 (b) was a very reasonable rule intended to carry out the provisions of S. 70 and as such was not ultra vires. See Railways Act, Section 47. **1952 Cri LJ 1462: AIR 1952 Bom 421.**

SECTION 72 (OLD)

SYNOPSIS

(Railways Act (1890), S. 72.)

1. "Delivered to be carried".
2. General liability of railways.
   See also Contract Act (1872), Ss. 151, 152 and 161.
3. General liability can be limited by contract.
   See also Note 2.
4. Risk Notes.
   —Risk Note A.
   —Risk Note B.
   —Risk Note C.
   —Risk Note G.
   —Risk Note X.
   —Risk Note Z.
   —Constitution.
   —Validity of Form.
   —Signature on Risk Note.
5. Delay in delivery.
   See Note 6.

5-A. Refusal to deliver.

6. Misdelivery, short delivery and non-delivery.
   See also Note 4.
7. Deviation from route.
8. Theft.
9. Theft from running train.
10. Looting.
    See Note 9.
11. Accident.
12. Fire
    See Note 11.
13. Misconduct.
14. Proof of misconduct.
15. Negligence.
16. Proof of negligence.
17. Wilful neglect.
    See also Note 15.
18. What ought to be proved by railway.
    See also Note 4.
19. Proof of loss.
20. Estoppel.
21. Rules.
22. Notice.
    See Railways Act (1890), S. 77 (old).
23. Who can sue.
24. Who can be sued.
25. Damages.
26. Pleadings and procedure.
27. Limitation for suit.
    See Limitation Act (1908), Art. 31

1. "Delivered to be carried".

——S. 72 — Liability of Railway — Goods delivered to railway for carriage — Railway receipt not issued by railway — Loss of goods — Right to sue for damages. See Contract Act (1872), S. 151. **AIR 1958 Assam 5 (DB).**

——S. 72 — Liability of Railway — Delivery of goods — If and when bailment indicated. See Contract Act (1872), S. 149. **AIR 1958 Assam 5 (DB).**

——S. 72 — Common carrier — Burden of proof See Contract Act (1872), S. 151. **AIR 1955 NUC (Assam) 2805.**

——S. 72 — **Delivered to be carried.**

There is no obligation upon a Railway Administration to refuse to carry goods if the consignor elects to have them carried under Risk Note A. **ILR (1952) 4 Assam 146: AIR 1951 Assam 173 (175) (Pt B) (Pr 12) (DB).**

——S. 72 — **Consignment to be sent by passenger train — Wagon attached to parcel train — Breach of contract — (Contract Act (1872), Ss. 151 and 152).**

Despatching a wagon attached to a parcel train, when the Parcel Way Bill was issued in response to a Forwarding Note requesting the Station Master to send the consignment by passenger train, amounts to a breach of contract. If in such a case, the goods consigned are of perishable nature and they are damaged on account of great delay in transit, the railway administration is liable for loss suffered by the consignor. **59 Bom LR 704: ILR (1957) Bom 647: AIR 1957 Bom 276 (278) (Pt A) (Pr 8) (DB).**

——S. 72 — **Applicability — "Delivery to railway for carriage" — What amounts to — Goods brought to railway station and deposited in premises with consent of station master for despatch to another station as no wagon was then available — Destruction by fire — Liability of railway.**

A consignment of 84 bales of cotton was taken by the agent of the consignor to K Railway station for despatch to another station and tendered to the station master. No wagon was immediately available for the purpose and, therefore, the consignment with the consent and permission of the station master at K, who was the authorised agent of the railway administration, deposited it in the station premises and stocked on the down platform and allowed to be left there pending the arrival of a suitable wagon. No forwarding note was tendered by the consignor's agent, nor any receipt given to him by the railway administration. Within three days of the deposit of the goods in the station yard the goods were destroyed by fire by a spark from an engine.

Held, that having regard to all the circumstances of the case, it was clear, that the goods had been "delivered to be carried" within the meaning of S. 72, Railways Act and that therefore the Railway Administration was liable to the consignor for the loss incurred by the destruction of the bales by fire. **54 Bom LR 652: ILR (1953) Bom 242: AIR 1953 Bom 46 (48 to 50) (Prs 3 to 6) (DB).**

——S. 72 — **Goods delivered for carriage to duly authorised agent of Manager — Liability of Railway.**

(Obiter) — Under Sec. 72, it is clear beyond doubt that if the goods are delivered for carriage to a duly authorised agent of the Manager, the Railway Administration is responsible as a bailee for the goods so delivered. It cannot be contended that the goods must be delivered to the Manager personally before the railway administration can be held responsible for the safe carriage of the goods. **(1957) 61 Cal WN 433: ILR (1957) 3 Cal 420.**

——S. 72 — **Gate clerk of Railway signing forwarding note and allowing goods to pass into railway premises — Goods lost — Railway not liable for loss.**

The forwarding agent of the plaintiff filled up the forwarding note and handed it over to the clerk who gave him a slip mentioning the consignor's name, the number of packages and the destination. On the following day he went with the goods to the gate of the E. I. R. goods-shed. He handed over the slip to the thelewala and asked him to give it to the clerk in charge of the gate. Goods were allowed to pass and the forwarding note was handed over to him after it had been signed and the man in charge at the gate told him that he should put the goods in the G. M. R. goods-shed. The same day at about 1 O' clock he left the goods near one of the weighing machines and went to the next one. At about 5, the same afternoon he asked the booking clerk for the railway receipt and then at about 6 P. M. it was found that there was only one bale and not two:

Held, that the passing of the goods through the gate and issuing by the gate-keeper of a forwarding note duly signed by him to the consignor did not amount to delivery to the railway. Beyond the fact that the gate clerk of the railway signed the forwarding note and allowed the goods to pass into the railway premises, nothing had been proved to establish the "passing from the physical custody" of the plaintiff's agent to "the physical custody" of the railway or its agent nor was there any implied acceptance of goods. And stage was never reached where the liablity (in case of loss) of the railway could commence. Case law discussed. **51 Pun LR 397: AIR 1950 EP 87 (90) (Pr 9).**

——S. 72 — **Delivered to be carried — Meaning — Goods lying in goods-shed with knowledge of goods shed officials — Goods technically not booked — Liability of railway as bailees.**

Whether there has or there has not been delivery to the railway administration is an inference of fact from the circumstances of each case. If the consignor was specifically refused permission to keep his goods in the goods shed overnight and directed to remove them by the officials responsible, it may be possible to hold that the goods would lie there entirely at the consignor's risk without any contract of bailment. But in cases where to the knowledge of the goods shed officials or with their permission specific goods lie in a goods shed, deposited there before the shed is locked up for the night, the Railway Company cannot avoid the responsibilities of bailees under Section 72. It must be remembered that the consignor in such a case is afforded no facilities for watching his goods at night. They are taken into the exclusive custody of the Railway Company and where they lie side by side in the goods shed along with

booked articles and also articles awaiting delivery to consignees, delivery in such a case cannot be made contingent on the completion of a particular stage in the process of booking. But the railway administration is not liable as bailees where a consignor sends goods to the goods shed and some of the goods get lost during the day before the goods shed staff accept delivery. **(1950) 2 Mad LJ 27: AIR 1950 Mad 700 (703) (Pt A) (Pr 9).**

2. General liability of railways.

See also Contract Act (1872), Ss. 151, 152 and 161.

——S. 72 — General liability of railways — Responsibility as bailee under Contract Act, will arise only when there is no provision in Railways Act to govern parties relationship. **AIR 1955 NUC (Ajmer) 1263.**

——**S. 72 — Liability of railway as that of bailee — Liability continues after transit even during "free time" allowed under Rule 29 (2) of Goods Tariff Rules — Burden of proving that goods remained intact till expiry of free time is on railway.**

The railway does not cease to be a bailee of a consignment as soon as the consignment reaches the station of destination and the liability of the railway as a bailee continues even after the termination of the transit. The purpose of bailment is carriage of the consignment but the duties of the railway as a bailee do not come to an end merely on the accomplishment of the purpose of the bailment and they continue until the consignment has been disposed of according to the direction of the person who delivered it to the railway. The person entitled to take delivery of consignment must be allowed reasonable time for doing so and it is not until the expiry of reasonable time that the liability of the railway can cease. In order to escape liability the railway has, therefore, to prove that for a reasonable period of time after the arrival of the goods at the station of destination the railway took such care as it was bound under the law to take and the loss to the goods did not occur during that period. In the absence of such proof the liability of the railway under the bailment is not discharged and it cannot be urged that if delivery of the goods is not taken within reasonable time the railway is relieved of the obligation to prove that loss did not occur during that period of time. AIR 1920 All 280 and AIR 1924 All 605, Rel. on.

Exemption from liability for loss, destruction, deterioration or damage to goods can, therefore, be claimed by the Railway under Rule 29 (2) of Goods Tariff Rules only when those things occur after the lapse of what is called the 'free time' and the rule cannot be construed as exempting the railway from liability irrespective of when the loss etc., occurs if the goods are not removed within the 'free time'. For availing of the protection of Rule 29 (2) it has to be established by the railway that the goods remained intact till the expiry of the 'free time' and if this fact is not established a case for exemption from liability under the rule cannot be regarded as having been made out. The rule purports to discharge the railway in absolue terms from its statutory obligation as a bailee and the burden, therefore, of proving that the requisite conditions for the application of Rule 29 (2) are satisfied obviously falls on the railway. **1965 All LJ 177: AIR 1965 All 480 (481, 482) (Prs 9, 11, 15).**

——**S. 72 — Railway administration delivering consignment to person other than endorsed on 'self' consigned railway receipt cannot escape its liability.**

Where the railway receipt which was consigned to 'self' bore an endorsement made by consignor in favour of a firm A, but the railway administration delivered the consignment to J without any proper endorsement by A in favour of J or any one.

Held, that the railway administration could not escape its liability because there should have been clear endorsement by a person who should have signed on behalf of the firm authorising J to take delivery of the consignment. **AIR 1965 All 184 (187) (Pt B) (Pr 12).**

——**S. 72 — Railway undertaking to carry goods by passenger train — Failure to keep contract — Liability for loss.**

If a carrier of goods, such as the railway, undertakes to carry goods by passenger trains or by special trains and fails to keep the contract and carries perishable goods by a goods train, and loss is occasioned to the consignee, the railway would evidently be guilty of a breach of the contract and the risk-note Form B would not come to its rescue. It is only when the railways perform their part of the contract in the manner in which it ought to have been done that they are absolved from any liability with regard to any loss or destruction arising out of any cause whatsoever, but this indemnity would not be available if the railways do not carry the goods in the manner contracted. **ILR (1957) 1 All 450: 1957 All LJ 150: 1957 All WR (HC) 142: AIR 1957 All 259 (260) (Pt A) (Pr 7) (DB).**

——**S. 72 (3) — Responsibility of Railway Administration — Nature of.**

Sub-section (3) of S. 72 excludes the railways from responsibility as common carriers. Therefore, the Railway Administration will not share any responsibility as insurers but only as bailees. **(1958) 2 Andh WR 377: AIR 1959 Andh Pra 17 (18) (Pt A) (Pr 2).**

——**S. 72 (2)—Agreement to take delivery within time allowed for demurrage and wharfage—Delay in taking delivery — Collection of demurrage — Responsibility of Railway Administration.**

Section 72 (2) lays down that limiting of the responsibility of the Railway Administration could be by means of an agreement with the bailor. If, therefore, a specific agreement is entered into by the bailor with the Railway Administration to the effect that the goods consigned to the railway should be taken delivery of within the free time allowed for demurrage and wharfage on railways, the responsibility of the Railway Administration would cease after the time so limited by that agreement. It may not also be wrong to say that the collection of demurrage by the Railway Administration on account of the delay caused by the consignee in taking delivery of the goods would not by itself cast further responsibility on the Railway Administration under S. 72. AIR 1943 Lah 244; AIR 1955 Cal 264 and AIR 1956

Nag 255, Dissented from. (1958) 2 Andh WR 377: AIR 1959 Andh Pra 17 (18) (Pt B) (Pr 2).

——S. 72 — Risk Note B — Proviso — Misconduct — Evidence — Failure of Railway Administration to discharge its obligation as bailee and also under proviso to Risk Note — Presumption— Evidence Act (1872), Ss. 106 and 114 (g) — Contract Act (1872), Ss. 151 and 152.

The plaintiffs brought a suit for compensation against a State Railway for the loss sustained by them by reason of the non-delivery of certain goods carried by the defendant under Risk Notes A and B. Some five months before the litigation commenced, the plaintiffs called upon the Railway Administration to make an enquiry into the matter of the loss of the consignment, and sent a reminder to the Railway Administration 3 weeks later. In the two letters, there was no specific request made by the plaintiffs for a disclosure by the Railway Administration as to the manner in which it had dealt with the consignment in transit, but it was plain from the endorsement of the Chief Commercial Manager forwarding a copy of the letter to the station master concerned that he understood the implication of the request made by the plaintiffs in the matter of the enquiry into the non-delivery of the consignment. However, the Railway Administration failed, before the litigation commenced, to furnish to the plaintiffs particulars of the manner in which the consignment was dealt with in transit. Even after a pleader's notice was served upon the Railway Administration, the Deputy Director, Railway Board, merely replied that the pleader's notice had been forwarded for disposal to the General Manager. No communication, however, was received by the plaintiffs from the General Manager. When the dispute came to the stage of litigation, the Railway Administration again did not lead any evidence in discharge of its obligation under the proviso contained in Risk Note B:

Held (1) that there was no obligation on the plaintiffs to call upon the Railway Administration to give evidence at the trial in discharge of its obligation under the proviso contained in Risk Note B, the obligation of the Railway Administration being unconditional;

(2) that the terms of Cl. (g) of S. 114, Evidence Act, were clearly attracted, the presumption being that if the Railway Administration had produced the reports and led evidence as to the manner in which the consignment was dealt with in transit, the reports and the evidence would have gone against the Railway Administration and given rise to an inference of misconduct on the part of the Administration or its servants;

(3) that even as a bailee, the Railway Administration had to give evidence to satisfy the Court that it had discharged its obligation under the Contract Act, and that the only way in which it could have discharged its obligation as a bailee was by giving evidence as to the manner in which the consignment was dealt with in transit, quite apart from its obligation under the proviso contained in Risk Note B having regard to the provisions of S. 106 of the Evidence Act;

(4) that, therefore, the Railway Administration was responsible for the loss of the consignment. **ILR (1950) 2 Assam 489: AIR 1950 Assam 175 (178) (Pt A) (Prs 12, 13, 14) (DB).**

——Ss. 72 (1) and 80 — Loss of goods — Responsibility of contracting railway.

The proposition that the contracting railway is liable to pay compensation to the consignor and to the consignee in any event is not always correct. If there is no negligence or misconduct on the part of the contracting railway it having duly discharged its duties and responsibilities under S. 72 (1) that railway also will have to be absolved from all responsibilities for the loss of the goods. AIR 1946 Pat 336, Dissented from. **60 Cal WN 683: ILR (1957) 3 Cal 713: AIR 1956 Cal 390 (403) (Pt G) (Pr 33) (DB).**

[Reversed on another point in AIR 1962 SC 1879.]

——S. 72 — Liability of Railway Administration is that of bailee — Duty of bailee is to take such care as ordinary prudent man would take of his own goods — (Contract Act (1872), Ss. 151 and 152). **AIR 1955 NUC (Cal) 5915.**

——S. 72 — Contract Act (1872), Ss. 151, 152 and 161 — Goods entrusted to Railway Administration for transit — Loss of goods in transit — Extent of liability of Railway Administration indicated. **AIR 1955 NUC (Cal) 860 (DB).**

——Ss. 72, 74-A and 74-C — Consignment booked at railway risk — No forwarding note as to any defect in packing — Goods found broken at time of delivery — Railway Administration cannot repudiate its liaiblity on ground of any defect in packing — **Held**, Railway Administration is not exonerated of its liability and proof of negligence or misconduct is not required — Liability of Railway Administration under S. 72 is that of a bailee — Responsibilities in cases of railway risk rates and owner's risk rates pointed out — Case-law discussed — Contract Act (1872), Ss. 151, 152 and 161. **1965 MPLJ (Notes) 5.**

——S. 72 — Responsibility of Railway as bailee — Coal of colliery company lying on railway platform — Coal neither accepted by railway nor delivered to it for transport — Liability arises where acceptance or delivery of goods is incidental to the contract of carriage — Mere depositing the goods as a licensee without objection from railway is not enough — The railway cannot be even liable as a warehouseman — It has only physical custody of the goods because it was lying on its yard — Railway is not bailee and not responsible for loss of coal — Contract Act (1872), Ss. 151, 152. **1961 Jab LJ 1077: 1961 MPLJ 920.**

——S. 72 — Liability of Railway.

Prima facie, the alleged theft of the consignment in a running train cannot be said to be an occurrence beyond the control of the Railway Administration. Under S. 72 of the Railways Act, the administration's liability is that of a bailee unless there is something on record to indicate that the theft, if any, took place in spite of proper precautions on their part. **1959 MPLJ 749: 1959 MPC 368: 1959 Jab LJ 718: AIR 1959 Madh Pra 232 (234) (Pt G) (Pr 11) (DB).**

——Ss. 72, 47 and 54 — General liability of Railways — (Contract Act (1872), Ss. 151, 152, 160 and 161).

Neither S. 47 nor S. 54 empowers the Railway Administration to make rules for exemption from liability for any loss, deterioration or destruction

of or damage to goods. Rule 29 (2) of the Goods Tariff, therefore, is not covered by the rule-making power of the railway authority. AIR 1943 Lah 244 and ILR 44 All 218, Rel. on. Therefore, the question of exemption from liability of a railway has to be determined upon the general law. In England, the liability of a railway as a carrier ceases after the termination of transit and thereafter it retains the merchandise as a warehouseman at common law. The responsibility of a railway in India, however, is limited under S. 72 of the Indian Railways Act to that of a bailee under Ss. 151, 152 and 161 of the Indian Contract Act and is not governed by the common law of England or the Carriers Act, 1865.

As a bailee, however, the railway during the period contemplated by Ss. 160 and 161, Contract Act, is under the liability to take care of the goods, enjoined on a bailee by S. 151. It is only when it takes the amount of care described in that section that, in the absence of any special contract to the contrary, it is absolved under S. 152 from responsibility for the loss, destruction or deterioration of the goods.

Rule 36-AA of Goods Tariff, Part I-A, provides for rules for the warehousing and retention of goods and levy of wharfage. Demurrage and wharfage are charged by the railway as a term and condition of the contract of warehousing. So long as the period of the goods remaining in the railway premises free of these charges is concerned, the railway obviously retains the goods in pursuance of the original contract of carriage and is, therefore, bound to take such amount of care of the goods as is prescribed under S. 151 of the Indian Contract Act. Therefore, it is bound to do so as a warehouseman until the goods are disposed of as unclaimed goods under Para IX, Chap. I. of Goods Tariff, Part I-A. ILR (1947) Nag 335, AIR 1934 Cal 151, AIR 1955 Cal 264, Rel. on. **1957 MPC 430: 1957 MPLJ 636: 1957 Jab LJ 873: AIR 1957 Madh Pra 192 (193, 194) (Pt B) (Prs 6, 7, 8, 11, 12).**

——S. 72 (1) — Damages caused by misinformation given by Railway servants — Supervening causes — Liability of Railway Administration, if affected.

Where the misinformation given to the plaintiff by the servants of the Railway Administration is the proximate cause of the damage, it is not necessary to enquire whether there are also other contributory factors. Therefore, even if the goods could not be removed to the shed earlier due to supervening causes or the damage was caused in spite of reasonable precautions for their safety while they were lying on the platform, the liability of the Railway Administration would not be affected. **(1957) MPLJ 294: 1957 Jab LJ 550: 1958 MPC 459: ILR (1957) Madh Pra 253: AIR 1957 Madh Pra 114 (115) (Pt C) (Pr 5) (DB).**

——S. 72 — Scope — Conditions limiting liability of carrier — Permissibility. AIR 1959 Mad 285.

——S. 72 — Responsibility of Railway — Nature of — (Contract Act (1872), S. 151).

Where it is found that the roof of the wagon in which the consignment in question was loaded contained holes and a gap of 4 inches even before the goods were destroyed by fire, it cannot be said that the Railway had taken such prudent care of the goods entrusted to it as was required of a bailee under S. 151 of the Indian Contract Act as there was every likelihood of the fire from the sparks of the engine getting into the wagon through those holes and gaps and the result of the fire was possibly due to that source. **AIR 1955 NUC (Mad) 85.**

——Ss. 72, 76, 74-C and 74-D — Onus — Nature of liability of Railway.

Ordinarily the responsibility of a Railway Administration for the loss, destruction or deterioration of goods delivered to it for carriage, is as provided by S. 72 that of a bailee. Therefore, it is normally under a duty to take reasonable and proper care for the due security and proper delivery of that bailment. It should, in order to take such care of the bailment do what a reasonable and prudent man would do and omit to do what a reasonable and prudent man would not do. Further, as provided by S. 76 of the Act in a suit for compensation for any loss or damage, it is not necessary for the plaintiff to prove how the loss or damage was caused. But where a consignment is carried at the special reduced rate, known under the Act as the owner's risk rate, the case will be governed by S. 74-C or S. 74-D and the ordinary rule that when it is proved that goods delivered to the Railway Administration for carriage are lost, the Railway Administration is not exonerated from liability in respect of such loss except upon proof of those facts which would, under the Contract Act, exempt a bailee from liability would not apply. In those cases the negligence or misconduct has to be proved by the plaintiff unless the fair inference, from the disclosure such as may be made by the Railway Administration under S. 74-D as to how it dealt with the consignment when it was in its possession or control, is that the loss is attributable to negligence on its part or on the part of its servants. **36 Mys LJ 216: ILR (1957) Mys 407: AIR 1959 Mys 90 (90, 91) (Pt A) (Prs 5, 6, 8).**

——S. 72 — It is not open to the Railway Administration to repudiate its liability if the claim is not made immediately to the clerk-in-charge and is not forwarded to the Traffic Manager forthwith in spite of the rule printed at the back of the Railway Receipt to that effect. The observance of this rule would be contrary to S. 28 of the Contract Act. AIR 1953 Nag 169 (171) (Pt D) (Pr 14) (DB).

——S. 72 — Wagon loaded by sender — Short delivery — Liability of Railway — Admission — (Evidence Act (1872), S. 17).

Where goods were loaded in the wagons by the sender and not by the Railway servants, and the information given by the sender was accepted as correct for the purpose of charging freight and a receipt was made out as follows: "said to contain 200 bags".

Held, that there was no admission on the part of the Railway authorities that the wagons did contain 200 bags, and if at the destination the wagon was found to contain less number of bags, the Railway Administration was not liable. **AIR 1950 Nag 85, Applied. 1955 Mad WN 983: AIR 1956 Mad 176 (176) (Pr 3).**

——Ss. 72, 56, 73 — Perishable goods — Power of Railways to sell — Notice to consignor or con-

signee before sale is essential. See Railways Act (1890), S. 56. **AIR 1963 Orissa 17.**

——S. 72 (as amended in 1949) — Scope and effect of.

Before the amendment of S. 72 by Act (56 of 1949) under the old sub-sec. (2), the responsibility of the Railway Administration was subject to the execution of risk notes which were in the form of a separate contract. But by the introduction by the said amending Act of the new Ss. 74-A to 74-E in place of sub-sec. (2) this contractual obligation under the risk notes has now been replaced on a statutory basis. **(1960) 2 OJD 504: ILR (1961) Cut 32: AIR 1961 Orissa 113 (115) (Pt B) (Pr 7) (DB).**

——S. 72 — Contract Act (1872), Ss. 151, 152, 160 and 161 — Consignment at railway risk — Duty of railway as bailee to deliver goods at destination — Failure to deliver goods at destination not explained — Liability of railway for loss, destruction or deterioration.

Where a consignment is booked at railway risk for carriage to the destination, the railway as a bailee is bound under S. 160, Contract Act, to return the goods at the destination. If by the default of the bailee, the goods are not returned, tendered or delivered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time under S. 161, Contract Act. The railway cannot take advantage of the provisions of S. 152, Contract Act, by showing that it had taken all possible care of the consignment during its transit. Since the risk of the railway is a special condition of booking, Section 152, Contract Act, which applies only in the absence of special contract, would not be attracted. The failure to return the thing bailed, if it is not explained, will be presumed to be by the bailee's default. In the present case, if the non-delivery would have been explained by the railway to have been due to an accident or vis major over which they had no control, they might have escaped their responsibility to the bailor for any loss suffered by him. The attempt in the present case has been, on the other hand, to show that not only there was no such accident but also the railway took all precaution about the transit of the goods till its destination. In such a case once non-delivery is established the plaintiffs will be entitled to damages from the carrier. **1962 BLJR 77: ILR 41 Pat 621: AIR 1962 Pat 384 (390) (Pt D) (Pr 15) (DB).**

——S. 72 (1) — Railway Administration — Responsibility as bailee. See Contract Act (1872), S. 161. **AIR 1955 NUC (Punj) 4954 (DB).**

——Ss. 72 (1), 56 — Suit for compensation for non-delivery of goods — Defences of laches in delaying to take delivery after arrival of goods— Defendant Railway must establish when the goods arrived — After arrival of goods the liability of Railway is that of bailee under Ss. 151, 152 and 161, Contract Act, to take care of goods as man of ordinary prudence would, under similar circumstances take of his own goods — Bailee is liable for loss, destruction or deterioration of goods, if they are not returned, delivered or tendered at proper time — On failure to claim goods, Railway has to act under S. 156 of Railways Act and they are not relieved from liability — (Contract Act (1872), Ss. 151, 152 and 161). AIR 1920 All 280, Not followed; Case-law, Ref. **AIR 1955 NUC (Punj) 994 (DB).**

——S. 72 — General liability of Railways — Seal that consignment is at owner's risk not put on railway receipt — It is of no value unless putting of it is part of agreement. AIR 1955 NUC (Raj) 289 (DB).

3. General liability can be limited by contract.

See also Note 2.

——S. 72 — Liability of Railway Company as bailees is restricted by risk note executed. AIR 1950 Mad 700 (703) (Pt C) (Pr 10).

——S. 72 — General liability of Railways — Limitations on, by contract — Proof of contract — Presumption.

If it is shown that the railway receipt itself refers to risk notes, the goods must be taken to have been despatched under those risk notes unless it is shown by the consignor or the consignee that the risk notes were not executed by him. **ILR (1953) Punj 362: AIR 1953 Punj 83 (85) (Pt A) (Pr 11) (DB).**

4. Risk Notes.

—Risk Note A.
—Risk Note B.
—Risk Note C.
—Risk Note G.
—Risk Note X.
—Risk Note Z.
—Construction.
—Validity of Form.
—Signature in Risk Note.

4. Risk Notes.

——Ss. 72 and 77 — Right to protection — Test.

Per Desai, J.—Whether the Railway is entitled to the protection afforded by S. 72 or the risk note and to the benefit of the provisions of S. 77 depends upon the actual facts and not upon what the plaintiff pleads in the plaint. **AIR 1958 All 234 (238) (Pt B) (Pr 5) (DB).**

——S. 72 — Risk Note though available not produced at trial — Proof thereof by indirect evidence cannot be allowed — (Evidence Act (1872), S. 91).

An endorsement on the railway receipt to the effect that a certain risk-note has been executed and the fact that the consignment is booked at a lower rate, are not sufficient to prove that the goods were consigned under a particular risk-note. When a direct evidence is available of any matter, it cannot be held as proved by indirect evidence. The railway receipt is merely an evidence that certain goods were consigned to the charge of the Railway for transit. Any endorsement thereon cannot be taken as a conclusive proof of the execution of any risk-note reducing the liability of the Railway and increasing the risks of the consignee. AIR 1950 Pat 215 and AIR 1944 Cal 50; AIR 1951 Nag 357, Rel. on; AIR 1929 Lah 698 and AIR 1929 Lah 887 and AIR 1925 Cal 915, Dissented from. **ILR (1956) Hyd 34: AIR 1956 Hyd 193 (193) (Pt B) (Pr 2).**

——S. 72 — Risk Notes.

When the risk notes are executed by the consignor, the consignee cannot be deemed to be

bound by it. ILR (1954) Hyd 74: AIR 1954 Hyd 172 (173) (Pt B) (Pr 3) (DB).

——S. 72 — Risk Notes.

When the execution of the risk notes is not proved, liability for delay resulting in loss to the plaintiff cannot be said to have been covered by the notes. ILR (1954) Hyd 74: AIR 1954 Hyd 172 (173) (Pt C) (Pr 3) (DB).

——Ss. 72 and 74-C — Goods consigned at railway risk note — Damage caused to goods—Railway cannot refute claim alleging that packing was not in accordance with rules — Goods accepted at railway risk — Railway Administration bound to see that they were packed properly when consigned or that declaration absolving Railway Administration was taken from consignor. 1965 MPLJ (Notes) 5.

——S. 72 — Both risk-notes 'Z' and 'A' executed by consignor — Claim for damages — Onus.

Where a consignor by a railway had executed both risk-note Z and risk-note A, risk-note Z being in the general form and risk-note A is the one used in special cases where the package is defectively and insufficiently packed so as to be liable for damage, it must be held that the special contract in note A supersedes the general contract in note Z. The Railway can take advantage of either of the notes. AIR 1948 Pat 45, Approved.

The burden in such a case is on the consignor claiming damages to prove misconduct on the part of the Railway and not on the Railway to show how the consignment was dealt with during the course of transit. 1953 Mad WN 36: (1953) 1 Mad LJ 258: AIR 1953 Mad 514 (515, 516) (Prs 4, 5, 6).

——S. 72 — Goods under Risk Note — Proof.

To establish that the goods have been consigned under a risk note, a mere entry in the railway receipt would not be sufficient if the risk note was still available, because the risk note would be the best evidence of the contract. 1951 Nag LJ 470: ILR (1952) Nag 10: AIR 1951 Nag 357 (2) (359) (Pt D) (Pr 14).

——S. 72 (2) — Risk Notes — Execution of — What amounts to — (Ss. 72 to 78-B substituted for Ss. 72, 72-A, 73, 74, 74-A to 74-E and 75 to 78 by the Amendment Act (39 of 1961).

Execution of a private document which contains all the terms stands on a different footing from the execution of the Risk Notes. An ordinary document containing terms binding upon the executant must, in the very nature of it, contain all the terms whereas in the case of a Risk Note the terms binding upon the executant are already contained in a printed form. If the executant, therefore, signs the printed form, it is obvious that he undertakes the liability involved in execution of the Risk Note which contains the essential conditions. As a matter of fact, the filling up of the other details is a part of the same transaction and if a Railway employee (in the instant case, Goods Clerk) asks the executant to sign the form and, for the convenience of entry of the details (in the instant case, description of the bales of jute consigned) fills up later on in the presence of the executant the validity of the document is not affected thereby. It may, however, be made clear that, where the details filled in later on are challenged as unauthorised by the executant as for instance, if there is a dispute between the parties as to the number of bales despatched, it could plausibly be argued that the entry with regard to the number of bales under consignment would not be binding upon the executant. But otherwise, there would be no question of material alteration of the document. AIR 1956 Cal 99 and AIR 1916 Pat 206 and AIR 1924 All 692 (2), Disting.

Where the plaintiff executant had held out an assurance to the Assistant Traffic Superintendent that Risk Note C would be executed and that he would supply tarpaulins and corrugated iron sheets and that his men would accompany the consignment, and on that assurance the Assistant Traffic Superintendent agreed to supply open trucks to him for the carriage of the jute, it would not be open to the plaintiff to turn around and say that Risk Note C was not executed in his behalf. 1960 BLJR 669: AIR 1960 Pat 489 (493) (Pt B) (Pr 11) (DB).

——S. 72 (2) — Risk Note Form issued in name of Governor-General-in-Council — Use of, after Adaptation of Laws Order, 1948, came into force —Propriety — General Clauses Act (1897), S. 24.

Section 24, General Clauses Act, lays down inter alia, that when any Act or Regulation is repealed and re-enacted with or without modification, then any form, etc., shall continue in force and be deemed to have been made or issued under the provisions so re-enacted. Accordingly, although the phrase 'Central Government' in S. 72 (2), Railways Act, has taken the place of the phrase 'Governor-General-in-Council' after the Adaptation of Laws Order of 1948, any Risk Note Form issued before in the name of the Governor-General-in-Council which occurred in S. 72 (2) before its adaptation in 1937, must be deemed to have been approved by the Central Government. 1960 BLJR 669: AIR 1960 Pat 489 (495) (Pt C) (Pr 13).

——S. 72 (2) — Risk Note B — Proof of execution — Mention of Risk Note in receipt — Effect — Onus of proof — Admissibility of secondary evidence — (Evidence Act (1872), Ss. 65, 67, 101).

There is a distinction between existence of the Risk Notes and their execution. The mention of letters 'A' and 'B' under the heading 'Risk Note Form' in a railway receipt merely prove that there were such documents but it does not relieve the Railway Administration from proving the due execution of the Risk Notes with particular reference to the conditions which have to be fulfilled under sub-sec. (2) of S. 72, Railways Act. AIR 1950 Pat 215, Rel. on.

If the original Risk Notes are lost, it is open to the Railway Administration to give secondary evidence of their execution. The Railway Administration is bound to prove due execution of the alleged Risk Notes and in the absence of such proof, no inference can be drawn merely on the basis of the note on the railway receipt. AIR 1956 Pat 434 (436) (Pt A) (Pr 6).

——S. 72 — Open delivery.

A consignee is not entitled to claim open delivery from the Railway Administration. ILR 34 Pat LT 10: 1953 BLJR 81: AIR 1953 Pat 206 (207) (Pt A) (Pr 6).

——S. 72 (2) — Risk note — Execution of—Proof — Secondary evidence — Execution is different from existence — Railway receipts referring to risk notes produced — Existence of risk notes held proved but not their execution.

To prove the execution of risk notes by secondary evidence the Railway Administration produced certain railway receipts, which referred to the risk notes.

Held that, that merely proved that there were such documents; that did not prove the due execution of the risk notes with particular reference to the conditions to be fulfilled under sub-sec. (2) of S. 72, Railways Act. There is difference between the existence of a document and the execution of a document. **ILR 29 Pat 170: AIR 1950 Pat 215 (216) (Pt A) (Pr 4) (DB).**

——S. 72 (2) — Risk note — Proof of — Railway receipt does not prove special agreement contemplated by sub-sec. (2).

The railway receipts are merely evidence to show that certain goods were placed in the custody of the railway and that a certain sum was paid as freight. The entry of the letter B against the column "Risk Note Form" does not prove the execution of a special agreement as contemplated by sub-sec. (2) of S. 72. AIR 1944 Cal 50, Foll.; Case-law, Ref. **ILR 29 Pat 170: AIR 1950 Pat 215 (220) (Pt B) (Pr 5) (DB).**

——S. 72 (2) — Risk note — Execution of — Onus of proof — Risk note must be proved by Railway Company.

The risk note is an exception to the ordinary responsibility of the railway company, and as an exception to the general responsibility, the risk note must be proved by the Railway Company to have been duly executed.

Mere charging of the lower rate would not take away the liability of the Railway Company unless the Railway Company brings itself within the provisions of sub-sec. (2) of S. 72: AIR 1927 Mad 639, Rel. on. **ILR 29 Pat 170: AIR 1950 Pat 215 (217) (Pt C) (Pr 5) (DB).**

Risk Note 'A'.

——S. 72 — Execution of Risk Note 'A' — Suit by consignor for damages on allegation of short weight — No evidence of tampering with packing — No proof that loss was due to misconduct on part of administration — No decree can be awarded in view of execution of Risk Note 'A'. **AIR 1955 NUC (Ajmer) 2646.**

●——S. 72 — Risk Note 'A' — Applicability — Applies only when goods reach destination. **AIR 1952 All 891 (893) (Pt C) (Pr 10) (FB).**

——S. 72 (1) — Risk Note 'A' — Scope of — Extent of indemnity under — Shortage in goods delivered — Onus of proof.

The Risk Note Form 'A' does not apply to a case of pilferage at all. It covers only two contingencies: (i) "Bad condition" of the goods at the time of delivery, and (ii) damage, leakage or wastage in transit owing to the fact that the goods were defectively packed.

Where it was definitely found that there was shortage in the goods delivered and that one of the nine bags was found cut, and there was no evidence led on behalf of the Railway to show how the goods had been handled in transit, it is clear that the shortage was not due to any defective packing nor was due to damage, leakage or wastage incidental to transit and the Risk Note does not afford any protection to the Railway Administration: AIR 1923 All 234, Disting.; AIR 1929 All 124, Not foll. **1951 All LJ 484: AIR 1951 All 489 (491, 493) (Prs 9, 22).**

——S. 72—Risk Note Form 'A'—Shortage in goods.

The Risk Note 'A' would obviously apply only to cases where the plaintiff has suffered some monetary loss due to some deterioration in the condition of the goods. Where there is a shortage in the quantity of the goods arrived or there is a loss of a complete package, it would not be a case covered by the Risk Note: AIR 1931 All 135, Dissent. from. **1951 All LJ 350: AIR 1951 All 438 (439) (Pt A) (Pr 5).**

——S. 72 — Risk Note 'A' — Applicability — Shortage in quantity — If covered by.

Where there is a shortage in the quantity of the goods arrived or there is a loss of a complete package or complete packages, it would not be a case covered by the Risk Note Form 'A' at all, for the simple reason that it cannot be said that the 'goods' have arrived or the 'goods' have been delivered at the destination point. The Risk Note would obviously apply to cases and only to such cases where the plaintiff has suffered some monetary loss due to some deterioration in the condition of the goods and not to a cutting away of a portion of the goods owing to theft or pilferage. In the latter case there would be no question of any loss due to deteriorated condition. **1951 All LJ 350: AIR 1951 All 438 (440) (Pt B) (Pr 9).**

——S. 72 — Risk Note 'A' — Short delivery — Leakage in transit — Railway, when can be absolved from liability.

For the purpose of Risk Note 'A', shortage in weight of goods is a condition in which the goods are delivered. It does not follow, however, that once Risk Note 'A' has been executed, every case of short delivery will be covered by the saving clause. Before the saving clause can have operation, it must appear prima facie that the loss which actually occurred was in some way connected with the defective condition of the packing.

A consignment of rape seed bags under 'Risk Note A' was found on delivery to be short in weight as a result of cuts caused in certain bags through flap-door gaps. The consignee sued for compensation for loss. The defendant Railway failed to prove that the loss was in some way connected with the defective condition of the goods or the shortage was due to circumstances beyond their control:

Held, that the Railway could not claim the special protection afforded under the clause in Risk Note 'A' and, therefore, it was liable to pay compensation. **ILR (1951) 1 Cal 119: AIR 1950 Cal 394 (395, 396) (Pt A) (Prs 7, 10, 11, 13).**

——S. 72 — Burden of proof — Risk Note Form 'A' — 'Misconduct' — Railway company having all cases consigned ready for delivery — Some cases damaged and contents missing — Open delivery demanded by consignee and permitted by Company without prejudice to legal position —

Refusal by consignee — Loss occurring — Liability for.

Under Risk Note Form 'A', there is no liability cast on the Railway Administration to account for the loss, if any, but, on the other hand, the onus is entirely cast on a plaintiff to prove misconduct on the part of the Railway Administration. Where the goods consigned, 6 cases, are all offered to be delivered, but the plaintiff, owing to the absence of part of the contents of some of the cases insists on open delivery being given to him, and when that is allowed by the Railway Administration, requiring the plaintiff to take delivery without prejudice to the legal position of the Railway Company, but the plaintiff refuses to take such delivery, the conduct of the plaintiff in so refusing cannot, by any means, be said to be reasonable or justifiable, since it is in any event open to him to prefer his claim in a Court of law after taking delivery. If owing to such refusal loss occurs when the goods are left with the Railway Administration, it cannot be held that there is any 'misconduct' on the part of the Railway Company, so as to render the Railway responsible for the loss. **30 Mys LJ 59: AIR 1951 Mys 68 (69) (Pt A) (Prs 3, 4).**

——S. 72 — Risk Note 'A' — Short weight.

16 bundles of fresh dates, whose weight as shown in the railway receipts, was 23 maunds and 18 seers, were booked from Wadibundar to Parasia in the Chhindwara district under Risk Note 'A'. On arrival at the destination it was found that three bundles were in broken condition and some contents were missing. These three bundles were separately weighed and were found to weigh 56, 51 and 54 seers. One unbroken bundle was found to weigh 52 seers. Delivery was taken six days later. The total weight of 16 bundles at the time of delivery was 21 maunds and 15 seers. Plaintiffs, therefore, claimed damages for the short weight of 2 maunds and 3 seers. It was stated in the Risk Note 'A' that a consignment of 16 bundles tendered for carriage was in bad condition and/or liable to damage, leakage, wastage in transit as the bundles were insecurely sewn and the contents were dropping:

Held, that the bailment in the instant case was of 16 bundles. Unexplained failure to return the thing bailed is presumed to be by the bailee's default. An unexplained failure to deliver a complete package would, therefore, fall within S. 161 of the Contract Act. This was not the case here and the Railway Administration could not be held liable for the short weight, if any, of the 13 bundles which were delivered in a sound condition. There was no material on record to show that the short weight of 2 maunds and 3 seers was the weight of the contents missing from the three bundles which were found in broken state. It is a matter of common knowledge that fresh dates are liable to dry and lose some weight thereby. The extent of this loss depends upon the degree of freshness of the fruit. Plaintiffs could not, therefore, succeed because they had failed to prove the weight and value of the missing contents of the three bundles in question. The suit was, therefore, liable to be dismissed on this short ground.

The recitals in the Risk Note 'A' undoubtedly protected the defendant from liability in the instant case because the articles tendered for carriage were in a bad condition and were liable to leakage in transit as the bundles were insecurely sewn and the contents were dropping. The goods were delivered to the consignee apparently after some leakage in transit due to insecure packing of the 3 bundles. The Railway Administration was, therefore, absolved from liability for any loss arising from this condition in which the goods were delivered to the consignee. Risk Note 'A' is to be used when the articles tendered for carriage are already in bad condition or so defectively packed as to be liable to damage, leakage, or wastage in transit. If a consignor fails in his duty to see that his goods are so securely packed as to be protected from the ordinary and inevitable incidents of a journey and the goods are consequently injured, the Administration is not liable. **ILR (1954) Nag 618: AIR 1954 Nag 346 (347, 348) (Prs 4, 5, 7, 8) (DB).**

——S. 72 — Risk Notes 'A' and 'Z' — Leakage in transit — No proof of misconduct of Railway servants — Liability of Railway.

When both the Risk Notes 'A' and 'Z' are executed, the terms of exoneration of the Railway Administration for the liability during transit except on proof of misconduct must prevail and the provisions for disclosure will not be operative.

There is no obligation upon the Railway Administration when a consignment is booked under Risk Note 'A' to prevent leakage of the contents during transit. **21 Cut LT 44: AIR 1955 Orissa 44 (45, 46) (Prs 6, 7, 8) (DB).**

——S. 72 — Risk Notes — Misconduct — Evidence of Railway Administration showing that loss arose from misconduct on part of its servants— Railway Administration cannot rely upon protection given by Risk Notes 'A' and 'B'. **AIR 1955 NUC (Orissa) 966 (DB).**

——S. 72 — Risk Note 'A' — Presumption arising from its execution — Onus of proof on consignor.

Execution of Risk Note 'A' by the consignor gives rise to a presumption that the consignment tendered for carriage is either already in a bad condition or is so defectively packed as to be liable to damage, leakage, or wastage, in transit and that it is in consideration of the bad condition of the consignment that the consignor has executed Risk Note 'A', agreeing not to hold the Railway Administration liable for any loss or damage during transit, except upon proof that such loss arose from misconduct on the part of the Railway Administration's servants.

It is no answer to the express undertaking given by the consignor in terms of risk note 'A', to say that it is difficult for him to prove misconduct on the part of the Railway staff. **ILR (1951) Cut 567: AIR 1952 Orissa 126 (127) (Pt A) (Pr 3).**

——S. 72 — Risk Notes in Forms 'A' and 'B' — Obligation of Railway Administration to make disclosures — Presumption — (Evidence Act (1872), S. 114).

Where the consignor executes Risk Note Form 'A', no obligation is cast upon the Railway Administration to make any disclosure. Nor even in case of Risk Note Form 'B', can the Court draw an adverse inference against the Railway Administration for any non-disclosure without following

the procedure as laid down in AIR 1956 Pat 68. It was incumbent upon the consignor to make a prayer to the Court to direct the Railway Administration to make any disclosure, and it is only when the Railway Administration fails to obey the direction given by the Court that an inference adverse to it can be drawn under S. 114, Evidence Act. **AIR 1956 Pat 71 (71, 72) (Pt A) (Pr 5).**

——S. 72 — Risk Notes — Position under Risk Notes 'A' and 'B'.

Reading Risk Notes Forms 'A' and 'B' together, the position is that whereas in case of consignment booked under Risk Note Form 'B', the Railway Administration is liable to make disclosures in certain cases, there is no such obligation on it when the consignment is booked under Risk Note Form 'A'. It is also well settled that where a consignor has executed two Risk Notes limiting the Railway's liability, it is open to the Railway Administration to take advantage of either, and if under either it can be shown that the Railway Administration has escaped liability, then the suit must be dismissed, even if some other Form of Risk Note might also have been executed under which it might be held that liability had not been fully taken away. AIR 1948 Pat 45, Foll. **AIR 1956 Pat 68 (69) (Pt B) (Pr 7).**

——S. 72 — Risk Note 'A' — Entry in Risk Note 'A', that stitches of packages were weak—It does not mean that packages were not packed in accordance with instructions in Tariff, in the absence of evidence to show what those instructions were — Entry in risk note itself showing that instructions were not complied with—Suit for damages for loss of packages — Administration must show how the consignment was dealt with. **1953 BLJR 240: AIR 1953 Pat 279 (281) (Pt A) (Pr 6).**

—S. 72 — Risk Note 'A' — Loss of consignment — Disclosure by Railway Administration as to how consignment was dealt with — No inference of misconduct possible — No such inference, either in law or fact could be made from non-examination of Railway guard — (Evidence Act (1872), S. 114). **1953 BLJR 240: AIR 1953 Pat 279 (282) (Pt B) (Pr 8).**

——S. 72 — 'Risk Note 'A' — Non-delivery — Liability of Railway.

Risk Note 'A' confers exemption from liability only in respect of the condition of goods at the time of delivery at destination. It does not confer immunity in a case of total non-delivery of the goods. **ILR 28 Pat 621: AIR 1951 Pat 382 (383) (Pt A) (Pr 5) (DB).**

——S. 72 — Risk Note 'A' — Short delivery.

The words "any loss arising from the same" occurring in Risk Note 'A' mean any loss arising from the condition in which the goods booked are delivered to the consignee at destination. Risk Note 'A' has no application to the case of failure to deliver the goods booked to the consignee because a thing never delivered cannot be said to have been delivered in any condition. Where the goods were booked under Risk Note 'A', the plaintiff is not required to show that short delivery was due to the negligence or misconduct of the Railway authorities. **AIR 1951 Punj 383 (384) (Pt A) (Pr 9).**

Risk Note 'B'.

●——S. 72 (old) — **Risk Note Form 'B' (as it stood before amendments of 1949 and 1961)** — North-Western Railway Commercial Manual, Rule 900 — Word 'misconduct' in Form 'B', Cl. (a) — Meaning — Different views mentioned and left unresolved — Goods consigned under Risk Note Form 'B' — Disregard of Rule 900 by Railway Administration — Non-delivery — Liability for, of Railway Administration to consignees — Negligence must necessarily be judged in light of circumstances — Circumstances of communal disturbances of 1947 — Wagons looted by lawless mobs and consequent loss of consignment—Railway Administration taking care of goods as it would have of its own goods — **Held,** Administration was not liable. See Railways Act (1890) (as it stood before amendments of 1949 and 1961), S. 72. **AIR 1965 SC 1666.**

——S. 72 — Misconduct — Inference — Risk Note 'B' or 'Z' — What Railway Administration has to prove.

Where the Railway Administration has not led any evidence to show how the consignment which was under Risk Notes 'B' and 'Z', was dealt with throughout the time it was in possession or control of the Railway Administration it is not incumbent on the consignor to establish misconduct on the part of the Railway Administration. **56 Bom LR 150: AIR 1954 Bom 297 (301) (Pt F) (Pr 16).**

——S. 72 — Risk Note 'B' — Refusal to make disclosure — Presumption.

Under the new Risk Note 'B', the Railway Company can no longer say "We decline to render you the least assistance.". They are bound under the terms of the Risk Note 'B' to disclose to the consignor how they dealt with the consignment while it was under their possession or control. If they refuse to make disclosure, presumption can be drawn against them. **1953 Nag LJ 451: ILR (1953) Nag 88: AIR 1953 Nag 281 (282) (Pt B) (Pr 9) (DB).**

——S. 72 — Risk Notes 'A' and 'B' — Rights of consignor before and after filing of suit — Right to serve interrogatories on Railway or to ask for discovery of documents not affected — (Civil P. C. (1908), S. 115, O. 11, Rr. 1 and 12).

Under the Provisos in Risk Note 'B', the consignor, besides his rights to serve interrogatories with the leave of the Court under Order 11, R. 1 of the Code of Civil Procedure, is given an additional right to call upon the Railway Administration to disclose to him even before the filing of the suit, how the consignment was dealt with. The object in introducing this term in the provisos seems to be that if the consignor is satisfied with disclosure, he may not sue the Railway Administration for compensation but may accept whatever value the Railway Company offers to pay under the circumstances, of the case, and thus avoid unnecessary litigation. This right has not been provided in the general law, i.e., under O. 11, R. 1, Code of Civil Procedure, where the plaintiff or the defendant has to obtain the leave of the Court to serve interrogatories after the filing of the suit.

No inference can be drawn to the effect that the consignor is also deprived of his right avail-

able to him under Order 11, Rule 1 or Rule 12 of the Code of Civil Procedure in cases falling under first part of Risk Note 'B', because this special concession is not allowed to him under the terms therein. There is nothing in the wording of Risk Note 'A' or the first part of Risk Note 'B', which is more or less the same as the Risk Note 'A', to destroy the right of one party, when proving his own case, to serve interrogatories to the other party under Order 11, Rule 1 of the Code of Civil Procedure. ILR (1937) Bom 375, Rel. on; Case-law, Ref.

Where in a suit for damages against a Railway Administration for deterioration of goods covered by Risk Notes 'A' and 'B', the Court, after the filing of written statement, granted leave to the plaintiff to serve interrogatories on the Railway Company under O. 11, R. 1, Civil P. C. and also ordered discovery of documents under Order 11, Rule 12:

Held, that the Court had not acted illegally or with material irregularity in granting such leave and therefore the order could not be interfered with in revision. **1953 Nag LJ 451: ILR (1953) Nag 88: AIR 1953 Nag 281 (283, 284) (Pt E) (Prs 20, 21) (DB).**

——S. 72 — Risk Note 'B', Proviso — Effect of— Execution of Risk Notes 'A' and 'B' — Defective packing of consignment noted on receipts — Responsibility of Railway for loss during transit.

It is clear from the proviso to the Risk Note 'B' that only in cases of non-delivery or pilferage, and that, too, of consignments that have been satisfactorily packed, is the Railway Administration bound to disclose and give evidence as to how the consignment was dealt with during the time when it was in its possession, before the consignor is called upon to prove misconduct.

Where, therefore, the consignor executes Risk Notes 'A' and 'B', in respect of his consignment of oil packed in drums and the existence of dents in the drums is noticed and noted on the railway receipt at the time the consignment was handed over for carriage over the railway, the Railway cannot be held liable for the loss, if any, caused during transit, when the plaintiff consignor himself does not allege that there was any pilferage or non-delivery or does not attempt to establish that the loss caused was due to any misconduct on the part of the servants of the Railway Administration. **ILR (1951) Cut 567: AIR 1952 Orissa 126 (127) (Pt B) (Pr 4).**

——S. 72 — Risk Note 'B' — Duty of Railway Administration — Extent of, indicated. AIR 1952 Pat 435 (435) (Pt A) (Pr 7) (DB).

——S. 72 — Suit for damages for short delivery of goods consigned — Delivery in two lots at intervals — Liability of the Railway — Risk Note 'B' — Duty of Railway Administration — Non-disclosure of theft as cause of loss prior to suit— Effect of — Misconduct — Finding of fact — Interference in second appeal.

Out of 40 bales of cotton yarn consigned, 24 bales were delivered on 14th June, 1946 and 6 bales on 17th June, 1946, and on the consignee's demand for the balance the authorities were sending replies that special enquiries were being made to trace the goods. The consignee sued the Railway. The consignment was under Risk Note Form 'B'. The defence was non-liability except on proof of misconduct on the part of the Railway:

Held, on the terms of the Risk Note 'B' the Railway was not bound to disclose how the consignment was dealt with throughout the transit No evidence was required to be given on that part of the Railway not considered to be eventful unless required by the plaintiff to adduce evidence on a particular part of the transit.

Merely because no mention of loss by theft was made in the replies made to the consignee by the Railway authorities, the suit is not to be decreed. The omission is a relevant and important factor in deciding the story of theft given at the trial; but it is not sufficient to establish misconduct on the part of the Railway or its servants.

Where the lower appellate Court did not take into consideration the facts that there was no proper explanation of the discrepancy between the forwarding note stating that all the 40 bales were loaded in a particular wagon and the entries in another document to the effect that they were loaded in separate lots in that wagon and another, that the writer of the entries had not been called as a witness and the significance of the replies wherein the loss by theft was not mentioned but he travelled in the realm of imagination in arriving at the important finding on the question of misconduct.

Held, that the finding on the question of misconduct, though a finding of fact cannot be accepted as it was not arrived at on a judicial consideration of relevant materials on record and the appeal had to be remanded for fresh hearing. **AIR 1952 Pat 435 (435) (Pt B) (Pr 8) (DB).**

——S. 72 — Risk Notes — Risk Note 'B', Proviso — Consignor also signing Risk Note 'A' — Loss of goods proved — Liability of Railway Company under Proviso.

The proviso to Risk Note 'B' will not apply to a case in which the loss of the goods consigned has been proved.

Even when there is no finding of loss, proviso (a) to risk note will not operate when the consignor has executed both Risk Notes 'A' and 'B'. Proviso (a) of Risk Note 'B' will apply only when the non-delivery is of the whole consignment or of the of the whole of one of the packages packed in accordance with the instructions in the Tariff. In cases where both the notes are executed, the assumption is that the packages are not in accordance with the Tariff instructions.

Therefore, in such a case where the plaintiff alleges that there was non-delivery of only some items in one of the packages consigned the proviso to Note 'B' does not apply and the Railway is not bound to disclose as to how the consignment was dealt with by them throughout the time it was in their hands before the plaintiff could be called upon to prove misconduct on the part of the Railway. Case-law discussed. **ILR (1953) Punj 362: AIR 1953 Punj 83 (86, 87) (Pt C) (Prs 20, 32) (DB).**

Risk Note 'C'.

——S. 72 — Risk Note 'C' — Exemption from liability for destruction and damage to goods — Misconduct of Railway employees — Relevancy.

It is true no doubt that in case of Risk Note 'B' there is a stipulation that the Railway Administration would be liable to make good the loss to the customer in spite of the execution of Risk Note 'B' if the loss has been caused to the latter on account of the misconduct of the Railway Administration or its employees, but the exemption granted to the Railway Administration from any liability for the destruction, deterioration and damage to goods when Risk Note 'C' is executed is absolute and no question relating to the misconduct of the Railway employees can at all be relevant in such a case. AIR 1946 Cal 249, Rel. on. **1960 BLJR 669: AIR 1960 Pat 489 (497) (Pt G) (Pr 15) (DB).**

——S. 72 — Risk Note Form 'C' — Duty of Railway to carry consignment in open wagons.

It cannot be said that after execution of Risk Note Form 'C' the Railway Administration is bound to carry the consignment in open wagons throughout the route. If a covered wagon is not available in which the consignment should have been carried and if the consignor does not want to wait until the arrival of a covered wagon, then goods may be carried in an open wagon at his risk. Unless the Railway has contracted to carry the consignment in open wagons throughout the route, the mere signing of the Risk Note Form 'C' will not make it incumbent on the Railway Administration to carry the consignments throughout the route in open wagons. **AIR 1957 Pat 219 (221) (Pt A) (Pr 7) (DB).**

Risk Note G.

——S. 72—Liability of Railway — Extent of — Risk Note 'G' — Misconduct, meaning of.

A bailee is liable for the loss arising out of his neglect under S 151, Contract Act. Therefore when the Railway Administration secures an agreement under Risk Note 'G', as provided in S. 72 (2), Railways Act, this cannot but be intended to lessen its liability to which it would otherwise be exposed under S. 72 (1), Railways Act.

The word 'misconduct' which is used to govern this liability cannot be read as synonymous with negligence but involves a greater degree of culpability than negligence. Whether on given set of facts and circumstances the act or conduct of Railway servants amounts to misconduct is a question of law. Case-law discussed.

Standing regulations prescribed by Railway authorities are intended to serve as a timely warning that the servants ought to follow the instructions given in these regulations in order to avoid possible risk. The Railway servants are expected to know them and follow them meticulously. If the servants of the Railway Company act not caring what these regulations are or in total disregard or violation of them and the loss occurs it is difficult to call it mere negligence. Conduct such as this would amount to misconduct as there is a higher degree of culpability involved in such conduct than mere negligence.

When acids are being transported in glass carboys, the supplementary regulations which control special regulations should be followed. For, if this is not done, the supplementary regulations will be rendered nugatory. **Madh B LJ 1955 HCR 174: Madh BLR 1954 (Civ) 450: AIR 1955 MB 70 (73, 74) (Pt C) (Prs 40, 41, 46, 50, 51, 55) (DB).**

Risk Note X.

——S. 72 — Liability under Risk Note X.

The risk Note X deals with all cases of excepted articles being consigned and not only where the excepted articles are consigned after being contained in any parcel or package. The risk note provides that the same percentage on value should be charged in respect of articles which do not fall within Sec. 75 as is to be charged with respect to the articles which fall within the ambit of Sec. 75. The reference to Sec. 75 is merely to obviate the necessity of setting out in the risk note the very percentage which is authorised under Sec. 75. Therefore the risk note in form 'X' constitutes a further limitation upon the liability of the railway administration under Sec. 72 (1), and this limitation is by reason of an agreement which falls under Sec. 72 (2) and the limitation clearly is that the railway administration is free from any responsibility under Sec. 72 in respect of expected articles whose value exceeds Rs. 100 unless the consignor pays the additional freight if so required to do by the railway administration. **55 Bom LR 595: ILR (1953) Bom 1301: AIR 1954 Bom 50 (53) (Pt B) (Prs 9, 10) (DB).**

Risk Note Z.

——S. 72 (2) — Risk Note Form 'Z' — Burden of proof.

The railway receipts are merely evidence of the facts that certain goods were placed with the railway and a certain amount was paid as freight or was to be charged at destination. Even if the reference to Risk Note 'Z' is to be taken as a reference to the execution of a Risk Note by the consignor, the railway company will not be absolved of the burden of proving that the Risk Note was duly and properly executed. The mere fact that a lower rate was charged would also not take away the liability of the Railway Company unless the execution of a Risk Note in Form 'Z' bringing the case of the Railway Company within the provisions of sub-section (2) of Section 72 of the Railways Act was duly proved. As such, if the Railway Company wants to take advantage of Sec. 72 (2) it must prove the due execution of Risk Note 'Z'. AIR 1950 Pat 215, Foll. **1953 AMLJ 82: AIR 1954 Ajmer 67 (67) (Pr 4).**

——S. 72 — Risk Note Z, Proviso, Cl. (b) — Applicability — Consignment under Risk Note A — Burden of proof.

Clause (b) of Proviso to the Risk Note Z applies only when two conditions are fulfilled, namely (1) it must appear that there was pilferage, and (2) it must appear that the consignment was properly packed. AIR 1937 PC 152, Rel. on.

Where the consignment is sent under the Risk Notes in Forms A and Z the signing of the Risk Note A amounts to an admission by the consignor that the goods were not properly packed. He cannot go behind that admission, Proviso to Risk Note Z cannot therefore apply to the case. **ILR (1957) 1 All 220: 1956 All LJ 258: 1956 All WR (HC) 842: AIR 1957 All 21 (25) (Pt D) (Pr 18) (DB).**

——S. 72 (2) — Risk Note Z — Imperfect disclosure by Railway — Effect.

The Railway in case of non-delivery cannot take advantage of Risk Note Z unless they fully discharge the contractual obligation to disclose to the consignee how the package was dealt with throughout the time it was in their possession or control. If the facts disclosed by the Railway are not sufficient to hold that the initial onus which lay upon them has been discharged as contemplated in law then on that ground alone they will be assessed to liability on the footing of a simple bailee. The obligation of disclosure laid upon the railway cannot be said to have been discharged simply because no demand for further disclosure has been made even though what has already been disclosed is on the very face of it, nothing but an apology for disclosure. AIR 1957 Pat 475, Rel. on. **ILR '37 Pat 1034: AIR 1959 Pat 202 (202, 203) (Pt A) (Prs 1, 2, 3) (DB).**

[Reversed in AIR 1965 SC 1755.]

——S. 72 (2) — Risk Note Z — Liability of railway.

The question whether the railway has discharged the contractual obligation undertaken by it under the proviso in the Risk Note Z is in ultimate analysis a mixed question of fact and law and therefore on the facts stated, it is for the Court to say whether the same has been discharged. **ILR 37 Pat 1034: AIR 1959 Pat 202 (203) (Pt B) (Pr 3) (DB).**

[Reversed on another point in AIR 1965 SC 1755.]

——S. 72 (2) — Risk Note Z — Duty of disclosure.

It is incumbent on the railway under the proviso to Risk Note Z to communicate all facts relating to how the consignment or package which has not been delivered was dealt with throughout the time it was in the possession of the railway. If it is their case that it was stolen from the running train they should communicate to the plaintiff all the facts relating to it at the earliest opportunity when they send their reply to his letter complaining of non-delivery or at least when they file their written statement in the suit for compensation. If they have not done so it is open to the plaintiff to say that the Railway in not disclosing the full facts at the earliest opportunity, have failed to discharge the onus that lay upon them under the proviso to Risk Note Z. **ILR 37 Pat 1034: AIR 1959 Pat 202 (204) (Pt C) (Pr 5) (DB).**

[Reversed on another point in AIR 1965 SC 1755.]

Construction.

——S. 72 — Risk Note A — "Bad condition" — Meaning of — Loss due to bad condition of packing.

Bad condition mentioned at the top of the risk Note A may refer to the condition of the contents of the consignment or may refer to the condition of the packing thereof. The word "condition" is wide enough to cover both senses.

Risk Note A is not confined to loss arising due to a deterioration in the condition of the goods. If the goods are delivered in a bad packing, loss arising on account of that condition is also included in the agreement. **ILR (1957) 1 All 220: 1956 All LJ 258: 1956 All WR (HC) 842: AIR 1957 All 21 (23, 24) (Pt B) (Prs 11, 16) (DB).**

——S. 72 — "Loss" — Risk Notes A and B — Misconduct — Burden of proof — Evidence Act (1872), Ss. 101 to 103, 106.

The burden of proving misconduct within the meaning of Risk Note "A" is always upon the plaintiff alleging misconduct. If a plaintiff, upon whom the burden of proving misconduct lies, relies upon circumstantial evidence, he must satisfy the Court that it amounts to misconduct within the meaning of Risk Note A. The obligation of the Railway Administration to lead evidence as to the manner in which the consignment was dealt with in transit arises from the terms of the proviso to Risk Note B, and not from the terms of Risk Note A. It is only when Clauses (a) and (b) of Risk Note B apply to facts of a particular case, that the Railway Administration is bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control.

In respect of a consignment carried under Risk Note A, none of the Clauses (a) or (b) of Risk Note B or Z have any application, if the consignment is delivered at its destination, and the loss or damage is due to the condition in which the consignment was packed. Clause (a) of Risk Note B does not apply to a case where there is short delivery of the contents of a particular consignment booked under Risk Note A, and the short delivery is due to defective packing. Similarly, Clause (b) of Risk Note B refers to a package or packages of the consignment properly packed. There is no obligation upon a Railway Administration, when a consignment is booked under Risk Note A, to prevent leakage of the contents in transit. In the absence of any such obligation on the part of the Railway Administration or its servant it is impossible to regard a leakage in transit from a consignment booked under Risk Note A, as due to misconduct or negligence or carelessness on the part of the Railway Administration or its servants.

Risk Note A expressly refers to leakage. The liability of the Railway in such a case would be governed by the terms of Risk Note A, and not by the terms of Sec. 106 of the Evidence Act. Before the plaintiffs could prove pilferage, they have to show that the suspected pilferage was brought to the notice of the Railway Administration on or before taking delivery. Where the entire consignment was duly delivered to the plaintiffs and only the contents of some of the tins were missing, and some tins were found to be half-empty the loss must prima facie be attributed to the condition of the tins—a circumstance which exonerates the Railway Administration from liability unless misconduct is proved.

Delay in forwarding consignment can never be properly regarded as misconduct unless the delay is deliberately caused by the Railway Administration or its servants. Case law discussed. **ILR (1952) 4 Assam 146: AIR 1951 Assam 173 (174 to 177) (Pt A) (Prs 9, 13, 14, 16, 19, 22, 23, 28) (DB).**

——S. 72 — Risk notes — Construction — Principles applicable for interpretation of statutes cannot apply to interpretation of these documents. 1953 Nag LJ 451: ILR (1953) Nag 88: AIR 1953 Nag 281 (283) (Pt D) (Pr 16) (DB).

——S. 72 (2) — Risk Note C — 'Open wagons' and 'open trucks' are synonymous — Use of Risk Note C for goods carried in open trucks — Not illegal: AIR 1946 Cal 249 and AIR 1952 Cal 285, Rel. on. **1960 BLJR 669: AIR 1960 Pat 489 (496) (Pt D) (Pr 14) (DB).**

Validity of Form.

——S. 72 — Risk Note forms — Proof of execution — Admission.

In cases where forms are prescribed and there is evidence tending to show that some such form must have been executed, the finding in favour of its execution must be held to be proper. Thus where there is an admission of the execution of Risk Note 'B' by the consignor, its execution must be held to be proved even if the signature on the form is not proved to be that of the consignor. **1957 Jab LJ 331: 1957 MPLJ 153: AIR 1957 Madh Pra 157 (158) (Pt B) (Pr 7) (DB).**

Signature in Risk Note.

——S. 72 (2) — Risk Notes A and B — Proof of execution and contents.

When the Railway Administration relies on the existence of Risk Notes, it is for them to produce them. Risk Notes are, according to law, filed with them and must be in their custody. Oral evidence to the effect that risk-notes were signed on behalf of the consignor or the presence of letters "A. B. or 'Owner's Risk' noted on the Railway invoice which also have not been produced would not justify the conclusion that Risk Notes A and B had been regularly and properly executed by or on behalf of the plaintiff. Even if a Risk Note is produced the question arises in many a case as to who had actually signed the document, what was contained in the completed document and what was the effect thereof. Even if it be held that the presence of letters 'A. B.' on other records would show that some Risk Note had purported to have been filed but that would not be sufficient to exculpate the defendant Railway from liability. On the execution of Risk Notes A and B legal rights are created in favour of one or disabilities are introduced so far as either party is concerned. It is therefore, only proper and desirable that the execution of and the contents of Risk Notes should be strictly proved. AIR 1950 Pat 215, Rel. on; AIR 1925 Cal 915 and AIR 1944 Cal 50, Discussed. **60 Cal WN 157: ILR (1957) 2 Cal 456: AIR 1956 Cal 99 (100) (Pt A) (Pr 6) (DB).**

——S. 72 — Execution and signature on risk-note.

Where the printed form of the risk-note was signed on behalf of the consignor when the blanks in the printed form had not been filled up but they were subsequently filled up by the Goods-clerk it cannot be held that the risk-note is properly executed. The Risk-Notes are contracts between the parties and the documents having been signed by the executant, the blanks cannot be filled in subsequently. **60 Cal WN 157: ILR (1957) 2 Cal 456: AIR 1956 Cal 99 (101) (Pt B) (Pr 9) (DB).**

5. Delay in delivery.

——S. 72 (prior to its amendment in 1961)— Damages — Perishable goods — Delay in transit due to negligence of railway authorities, damaging goods and resulting in loss to consignor — No satisfactory evidence to establish quality of goods despatched — Measure of damages — Not price of goods prevailing in market in place of destination on date of receipt but cost of goods to consignor plus freight. **AIR 1963 All 137 (143) (Pt B) (Pr 24).**

——S. 72 — Delay in delivery — Consignee whether can claim open delivery in case of loss or damage to goods — Railway agreeing to give open delivery on certain conditions involving delay — Railway if liable for damages on ground of such delay.

A clause in a railway receipt that the claimant in case of loss or damage to goods should at the earliest give a written statement showing the nature of the articles missing or the nature of the damage sustained by the consigned goods does not entitle the claimant to claim open the consignment and examine it before delivery and it is not wrongful on its part to refuse to give open delivery. Where the railway administration had gratuitously agreed to give open delivery on certain conditions which involved delay, the railway administration cannot be held responsible for damages on the mere ground that there was delay in making this gratuitous open delivery. When it is not the plaintiff's case that the goods had suffered any physical damage during the time when they were in the hands of the railway administration between the period of their arrival at destination and the time when actually open delivery was taken, the plaintiff could not even claim damages on the ground that even though the railway administration acted as a volunteer they were under the law bound to act like a reasonable person and take reasonable care of the goods which were in their possession. 21 Ind Cas 448 (All), Rel. on; AIR 1933 All 477, Dist. **1962 All LJ 593: 1962 All WR (HC) 473: AIR 1962 All 483 (484) (Pr 10) (DB).**

——S. 72 — Carriers's contract — Perishable goods — Delay in transit — Risk Note — Effect. See Contract Act (1872), S. 55. **AIR 1957 All 193 (DB).**

——S. 72 — Open delivery — Right to — Loss due to delay in giving open delivery at request of consignee — Liability of Railway.

The railway administration is not bound in law to give open delivery on the demand of a consignor. Hence, any delay in effecting open delivery in pursuance of the wishes of the consignee cannot make the railway administration liable for any loss on account of fall in the market price of the goods. 11 ALJ 772, Rel. on. **1951 All WR (HC) 658: AIR 1952 All 702 (702) (Pt B) (Pr 3).**

——S. 72 — Delivery of goods — Delay — Negligence of railway — Damages.

When the consignment reaches the destination, the railway station, then the goods should be delivered to the consignee within a reasonable time. If due to the reason that the goods having been sent under a free service delivery memo. the station master did not find it possible to connect the goods with the Railway Receipt produced by the consignee, there is a delay in delivery of goods, it is the fault and negligence of the railway company to have sent the goods in that form. That being so, if any loss is occasioned to the consignee on account of this deliberate failure to deliver the goods

in due course the Railway is liable for this loss. It is not a case of any remote expectation or remote damages whatsoever. ILR (1957) 9 Assam 199: AIR 1959 Assam 189 (190) (Pt A) (Pr 6) (DB).

——S. 72 — Liability of Railway — Duty to deliver goods within reasonable time.

Under Sec. 72 the position of the Railway Company carrying goods for another is that of a bailee. It is bound to carry the goods under ordinary circumstances within a reasonable time. When therefore goods are delivered to the Railway Administration for carriage, in the absence of any agreement, they should be delivered to the consignee within a reasonable time. It has, therefore, to be ascertained what was the reasonable time for delivery of the goods on the facts and in the circumstances of a case. AIR 1922 All 324 and AIR 1933 Oudh 339, Rel. on. AIR 1960 Cal 270 (274) (Pt A) (Prs 11, 12).

——S. 72 — Liability of Railway — Goods reaching destination owing to unreasonable delay after institution of suit — Goods badly damaged — Refusal to take delivery — If justified — Right to damages.

The goods reached the destination after the institution of the suit and therefore there was no question of delivery of the goods when the suit was instituted. There was unreasonable delay in the carriage of the goods to their destination. The plaintiff's agent found upon inspection that the goods were badly damaged. He tried to ascertain whether there was any possibility of selling them in the local market. He discovered that there was no purchaser for the goods in that condition.

Held, that in these circumstances the plaintiff was justified in refusing delivery and could claim compensation from the Railway Administration. AIR 1960 Cal 270 (276) (Pt D) (Pr 23).

——S. 72 — When execution of risk notes is not proved, liability for delay resulting in loss to the plaintiff cannot be said to have been covered by the notes. AIR 1954 Hyd 172 (173) (Pt C) (Pr 3) (DB).

——S. 72 — Scope — Contract of carriage — Time, whether essence of contract. See Contract Act (1872), S. 55. AIR 1959 Madh Pra 276 (DB).

——S. 72 — (Contract Act (1872), Ss. 151, 152 and 161) — Liability of Railway to carry goods within reasonable time — What is — Unreasonable delay — Onus.

The liability of the Railway is that of an ordinary bailee under Ss. 151, 152 and 161 of the Contract Act and in the absence of any special contract it is bound to carry the goods within reasonable time. What is reasoanble time for delivery cannot be answered in abstract and depends upon the circumstances actually existing in a particular case. Reasonable time means the time considered reasonable looking to all the circumstances of the case. Where there is apparently unreasonable delay, the burden of establishing circumstances in a particular case which would show that the delay was unavoidable or had been caused with no default or neglect on the part of the Railway Administration itself is on the Railway. (1866) LR 1 CP 385, Rel. on.

Five bags of almond seeds were booked from Bombay to Indore between 27th and 28th October, 1950. The bags reached Ratlam marshalling yard on 1-11-1950 but due to heavy congestion at the transhipment point the goods could not be moved. When the situation at the Ratlam Yard eased by 15-11-1950 the bags were moved to Indore on 16-11-1950. They reached there on 17th and were delivered to the consignee on 18th.

Held, that in face of the situation existing in this case it could not be said that the Railway Administration failed to carry out the obligations of an ordinary bailee and caused unreasonable delay. 1959 MPLJ (Notes) 170.

——S. 72 — Delay in delivery — Consignment under Risk Note B-1 — Delay not only unexplained but efforts to get at materials to establish actual misconduct frustrated by non-production of relevant documents by deliberate act of Railway concerned — Misconduct held must be taken to be established and Railway could not escape liability under terms of risk note apart from the proviso in risk note. ('51) 64 MLW 451: 1951 Mad WN 466: AIR 1952 Mad 679 (680) (Pt B) (Pr 6).

——S. 72 (as it stood prior to amendment of 1961) — Delay in delivery of goods due to misconduct of Railway servants — Consignee entitled to damages due to fall in market price on account of delay — Word, 'deterioration' — Meaning of — Contract Act (1872), S. 161.

In the absence of an express contract the obligation of a carrier is to carry by the usual routes and to deliver the goods within a reasonable time. Reasonable time means what is reasonable looking at all the circumstances of the case. AIR 1960 Cal 270, Rel. on. The word 'deterioration' used in Section 72 of the Railways Act and in Sec. 161 of the Contract Act, is wide enough to include depreciation in value on account of a fall in the price of the goods.

Where, therefore, the Railway Administration did not deliver the goods within a reasonable time and the delay was on account of the misconduct of the servants of the Railway Administration and there was depreciation in the value of the goods as a result of the fall in the market price, the consignee is entitled to damages on account of fall in price. ILR (1962) Cut 690: AIR 1963 Orissa 68 (69, 70) (Pt A) (Prs 6, 7).

——S. 72 — Delay in carrying consignment — If misconduct.

Delay on the part of the railway to carry consignment which is not unreasonable is no indication of misconduct. AIR 1935 Cal 811, Relied on. AIR 1960 Orissa 146 (148) (Pt B) (Pr 6).

——S. 72 —Risk Note Forms B and Z — 'Misconduct' — Delay.

Whether the railway administration is guilty of 'misconduct' or not really depends on the facts and circumstances of each case and it is not possible to lay down any hard and fast rule by which every case is to be judged. Misconduct is something more than mere negligence. It is the intentional doing of something which the doer knows to be wrong or which he does recklessly not caring what the the result may be. S. A. No. 2153 of 1948, dated 20-7-1954 (Pat), Foll.; AIR 1953 Nag 169, Distinguished.

Held, in the circumstances of the case, that it could not be said that the detachment at a certain station of wagons containing consignment of potatoes for about two days amounted to misconduct

on the part of the Railway Administration, nor could it be held that the trains by which the wagons were despatched from that station were ordinary slow going trains. AIR 1957 Pat 219 (223) (Pt B) (Pr 13) (DB).

5-A. Refusal to deliver.
See Note 6.

6. Misdelivery, short-delivery and non-delivery.
See also Note 4.

●——**S. 72 and Risk Note, Form B (as it stood before amendments of 1949 and 1961) — North Western Railway Commercial Manual, R. 900 — Word 'misconduct' in Form B, Cl. (a) — Meaning — Different views mentioned and left unresolved — Goods consigned under Risk Note Form B — Disregard of R. 900 by Railway Administration— Non-delivery—Liability for, or Railway Administration to consignees — Negligence must necessarily be judged in light of circumstances — Circumstances of communal disturbances of 1947 — Wagons looted by lawless mobs and consequent loss of consignments — Railway Administration taking care of goods as it would have of its own goods — Held, Administration was not liable. (1965) 2 SCWR 599: 1965 Pun LR (Supp) 231: 1965 SCD 831: AIR 1965 SC 1666 (1669, 1670, 1671) (Pt A) (Prs 6, 10, 11).**

——**Ss. 72, 74-C — Contract Act (9 of 1872), Ss. 151, 152 and 161 — Circumstances in which a consignor can sue for non-delivery — Goods despatched at owner's risk — Damage to goods— Negligence — Burden of proof.**

Plaintiff filed the suit for compensation for non-delivery of 154 baskets of Betel leaves which he had consigned from Nellore to be delivered at Manmad and Nagpur, on the allegations that some of the baskets were not delivered at all and some others were sought to be delivered to the consignee in a damaged condition and he refused to receive them. The trial Court found that though some of the baskets were not delivered, the plaintiff failed to prove negligence in respect of the damaged baskets. The appellate Court found that the railway was liable to pay compensation for the damaged consignment also. Both the Courts, however, dismissed the suit on the ground that the consignor could not institute the suit as he had sent the R/R in the name of the consignee. Plaintiff preferred a Second Appeal to the High Court.

Held, in cases where the consignor has not parted with the title in goods he being the bailor can certainly sue for damages the railway company which is the bailee. In this case it is not in dispute that although the R/R stands in the name of consignee it has not been endorsed in his favour conveying the title in the goods. When it is not in doubt that the title in the baskets of betel leaves consigned was with the consignor it is the consignor who alone can institute the suit. The consignee who has not had any title in goods could not have sued in the present case. Merely because the R/R stands in the name of the consignee, without the title in goods passing to him, he would not be entitled to institute the suit. Further, in this case the plaintiff has produced a letter of authority from the consignee which shows that the consignee has no objection for the plaintiff instituting the suit. Also held that, assuming that under Section 74-C (2) of the Railways Act in cases where there are two rates fixed for consignment it has to be presumed that the consignment was booked at owner's risk rate, the only effect of it is that the onus would be upon the plaintiff to prove that the non-delivery or damaged delivery was effected because of the negligence of the railway. The initial burden may thus lie upon the plaintiff. Nevertheless, the railway cannot be absolved from the responsibility of explaining to the Court how it handled the consignment during the transit. (1965) 1 An WR 342: ILR (1965) Andh Pra 1250: AIR 1965 Andh Pra 263.

——**Ss. 72 and 57 — Delivery to wrong person — Liability of railway company — (Contract Act (1872), S. 166). See Railways Act (9 of 1890), S. 57. AIR 1959 Andh Pra 331 (DB).**

——**S. 72 — Duty of Railway — Delivery of goods on forged railway receipt — Railway's liability.**

A railway receipt is a document issued by the railway administration and it is for the administration to take proper steps to prevent misdelivery on forged railway receipts. But even if it were to be held that the administration will not be liable in the case of a clever counterfeit—a forgery which cannot be detected by the use of reasonable diligence and ordinary prudence, the facts must be such as to lead to the conclusion that it was impossible for the railway employees at the destination to detect and prevent the practice of such fraud. **AIR 1957 Cal 573 (575) (Pt A) (Pr 10).**

——**S. 72 — Loss of consignment — Onus of proof — Goods not delivered to consignee — Consignor need not prove how loss occurred—Burden lies on bailee to prove non-liability for loss. AIR 1955 NUC (Cal) 5915.**

——**S. 72 — Non-delivery — Refusal to give delivery after reweighment — Damages.**

A railway company is under no obligation to reweigh the goods before delivery where the identity of the goods is not in question and if the consignee refuses to accept delivery on that ground, he does so at his own risk and is not entitled to claim damages for non-delivery. 58 IC 200 (Pat), Foll. Case law ref. ('52) **56 Cal WN 217: AIR 1952 Cal 726 (726, 727) (Prs 2, 4).**

——**S. 72 — Goods handed over to City Booking Agency to be carried by train — Goods not reaching destination — Railway administration liable to make good the loss irrespective of terms of contract between Bombay Agent and Railway Administration. 1965 MPLJ (Notes) 56.**

——**S. 72 — Short delivery — Right of consignee to insist on weighing of goods before taking delivery.**

A consignee has no right to insist that railway officer giving delivery should weigh the goods consigned and make an endorsement as regards the shortage and to refuse to take delivery if the railway officer refuses so to do. The consignee should take delivery of the consignment in the condition in which it is found after giving notice to the delivering officer as to its condition and then sue the railway administration for damages. AIR 1948 Nag 65, Foll. **1959 MPC 341: 1959 MPLJ 701: 1960 Jab LJ 985: AIR 1959 Madh Pra 276 (281) (Pt H) (Pr 30) (DB).**

——S. 72 — Consignee's right to demand open delivery.

It is not a right of a consignee to demand open delivery. His remedy is to take delivery of consignment in the condition in which it is found and then sue the Railway Administration for damages. ILR (1947) Nag 335, Foll. 1958 MPLJ (Notes) 122.

——S. 72 — Non-delivery of consignment booked on another railway — Consignee writing to Chief Commercial Superintendent (Claims) about non-delivery and asking for enquiry — Place of delivery, parcel-way-bill numbers with dates, articles booked and names of consignors given—When all these particluars were furnished there is no warrant for the railway authorities asking for certified copies of railway receipts. AIR 1961 Manipur 45 (47) (Pt A) (Pr 7).

——S. 72 — Risk Note B — Non-delivery, meaning of.

Non-delivery means failure of the Railway Administration to give delivery to the consignee or his assignee as required by the contract. It may be due to misdelivery, detention, conversion or loss, Loss is both to the consignee and the Railway Administration and may be due to one or more of the several causes such as accident to trains, fire, destruction including destruction when the goods have perished, short delivery in cases of bulk consignments, and from causes which cannot be located. Risk Note B contemplates non-delivery due to loss of the consignment by accident or fire. It may as well be due to destruction, the consignment having decayed. In the case of perishable goods, if the contents of the whole consignment deteriorate to such an extent that they become of no value, there is a loss of complete consignment. 1955 Nag LJ 172: ILR (1955) Nag 45: AIR 1954 Nag 337 (339) (Pt B) (Pr 7) (DB).

——Ss. 72 and 77 — "Non-delivery" — "Loss" is included — Notice under S. 77 is necessary.

In the case of a claim for damages for non-delivery of goods a notice under Section 77, Railways Act is necessary. "Non-delivery" constitutes "loss" within the meaning of Section 77. 5 Pat 106, 49 All 236, 51 All 480, AIR 1931 All 135 and C. R. No. 733/50, Foll.; AIR 1948 Pat 48, Diss. ('52) 1952 Nag LJ (Notes) 145.

——Ss. 72, 80 (as they stood prior to amendment in 1961) — Non-delivery of goods booked on Northern Railway to be delivered on station of Eastern Railway — Cause of action in suit against Eastern Railway based on loss of goods — Plaintiff must allege or prove loss on Eastern Railway — Decree on ground of non-delivery alone, held not proper.

Where the failure to deliver is the consequence of loss or destruction of goods, it does not furnish a cause of action on which a suit may lie, distinct from a cause of action for loss or destruction. Where the cause of action in a suit filed against the Eastern Railway, in respect of non-delivery of goods booked on Northern Railway and to be delivered at a station on the Eastern Railway is based on loss of the goods, it is necessary for the plaintiff under the old Sections 72 and 80 to allege and prove, in order to succeed against the Eastern Railway, that the loss had taken place on the Eastern Railway and a decree against the Eastern Railway on the ground of non-delivery alone, cannot be sustained. AIR 1961 SC 725, Rel. on. AIR 1964 Pat 486 (486) (Pr 5) (DB).

——S. 72 — Misconduct or negligence — Short delivery — Railway not disclosing how it dealt with consignment between two stations where it was found in pilfered condition — Adverse inference must be drawn against railway. AIR 1937 PC 152, Rel. on. AIR 1960 Pat 111 (112) (Pt C) (Pr 8).

——Ss. 72, 75 — Misdelivery — Negligence of railway servants — Effect — (Contract Act (1872), Ss. 151, 152, 161).

In the absence of any special contract between the parties limiting the liabilities of the carriers under S. 72 of the Railways Act, the railways are bailees for the goods consigned to them by the consignor for being carried from one railway station to another and are as such responsible for the loss, destruction or deterioration thereof under Ss. 151, 152 and 161 of the Contract Act, 1872. Misdelivery is also a loss under certain circumstances, for instance, when the railway authorities deliver the goods to some persons not entitled to receive them, and are unable to trace them out, when required to do so in order to deliver them to the real owners.

When a railway receipt is produced, for taking the delivery of the goods, it is the duty of the parcel clerk to compare the entries on the railway receipt with those in the Delivery Books. Where the parcel clerk without comparing these carefully gives delivery of the goods to the person producing the railway receipt on behalf of the consignee and the entries in the receipt do not tally with those in the book he ought not to deliver the goods to the bearer of the railway receipt on the strength of such a railway receipt.

That whole gamut of facts concerning the conduct of the railway authorities from the station to where the goods were booked to the station to which they were rebooked and misdelivery given, must be taken into consideration in arriving at the correct conclusion on the point as to whether or not there was negligence on the part of the bailees, namely, the railway concerned, or their servants.

Held, that the misdelivery of the goods has been the direct result of this negligence causing loss to the consignor (who was also the consignee) who was, therefore, under the law entitled to hold the Railway authority responsible for the price of the goods which he had lost. ILR 37 Pat 1355: AIR 1959 Pat 337 (339, 340, 342) (Pt A) (Prs 8, 13, 14, 19) (DB).

——S. 72 — Risk Note A confers exemption from liability only in respect of the conditions of goods at the time of delivery at destination — It does not confer immunity in a case of total non-delivery of goods. AIR 1951 Pat 382 (383) (Pt A) (Pr 5) (DB).

——S. 72 — Consignment under Risk Note A — Loss of goods due to looting at destination — Non-delivery — Liability of Railway — Burden of proof.

Under Sec. 72, Railways Act, the responsibility of Railway Administration is that of a bailee under Ss. 151 and 152, Contract Act. The railway must

take such care of the goods as a man of ordinary prudence would take of his own goods of the same quality and value under similar circumstances. The loss or damage of goods entrusted to a bailee is prima facie evidence of negligence and the burden of proof, therefore, to disprove negligence lies on the bailee and this burden lies also on the Railway Administration in the absence of special circumstances to the contrary.

Where a consignment of goods under Risk Note A was looted at the destination by an unruly mob under circumstances over which the Railway Administration had no control and there was no proof of negligence on the part of the railway, it was held that the railway could not be held liable in damages for non-delivery of the goods. **ILR 28 Pat 621: AIR 1951 Pat 382 (384) (Pt B) (Prs 6, 8) (DB).**

●——**S. 72** — Responsibility of Railway for non-delivery, extent of, indicated — (Contract Act (1872), S. 160). **AIR 1953 Punj 184 (185) (Pt A) (Prs 9, 10) (FB).**

——**S. 72 — Loss due to misdelivery on forged railway receipt — Liability of railway.**

There is no express provision in the Railways Act exempting the railway administration from liability on account of misdelivery. Misdelivery can only be pleaded under the general head 'loss' under Sec. 72 of the Railways Act and in order to prove loss, the railway must prove not only that the misdelivery was effected in spite of reasonable and due care but it must also prove that it could not trace out and recover the goods in spite of due care. Where the misdelivery was the result of the absence of the exercise of reasonable and due care by the railway administration, and the railway administration did not exercise due and reasonable care in taking proper steps to trace out and recover the goods when within a very short period of misdelivery it came to know that the railway receipts on the basis of which the deliveries were effected were forged documents, and when the part of goods was traced in the possession of the person who took delivery on the forged receipt, nothing had been brought on record to show as to whether the railway pursued the alleged cheats either in the criminal proceedings or in civil proceedings to recover the goods or the sale-proceeds thereof, it cannot reasonably be held that the railway had acted with due care and attention in the discharge of its duty as a bailee. (1922) 2 KB 155 and (1870) LR 5 Ex 51 and (1896) 1 QB 7, Distinguished. **1963 Raj LW 135: ILR (1963) 13 Raj 140: AIR 1963 Raj 162 (170) (Pt E) (Pr 16) (DB).**

——**S. 72 — Non-delivery of goods.**

Non-delivery of goods — Risk Notes A and C do not absolve Railway Administration from liability. **AIR 1955 NUC (Raj) 312 (DB).**

7. Deviation from route.

——**Ss. 72, 75 — Goods despatched under risk note — Deviation from route — Effect on liability of railway administration for loss.**

Every person who undertakes to carry as a common carrier impliedly undertakes to proceed without deviation from the usual and ordinary course to the place of delivery.

If a carrier deviates from the usual route and the goods are lost, even by inevitable accident, he is liable; for under such circumstances the loss is traced back through all the intermediate causes to the first departure from duty.

The risk notes which consignors execute are available only for the booked or usual route and if there is any deviation from the route, the railway administrations cannot rely upon them for the purpose of reducing their liability.

When owing to deviation a risk note becomes unavailing, the statutory liability under Sec. 72 is restored. But the exemption from liability under Sec. 75 is a statutory exemption and not an exemption granted under any special contract such as that contained in a risk note. The provisions of Sec. 72 are subject to Sec. 75. It follows that even if there be a deviation from the usual or booked route the railway administration would be entitled to claim the protection of Sec. 75. **1950 All LJ 625: ILR (1951) 2 All 249: AIR 1950 All 543 (548) (Pt B) (Pr 10) (DB).**

——**S. 72** — Route changed — Suit for damages — Existence of Risk Notes in Forms A and B makes no difference. **AIR 1955 NUC (Bom) 5856 (DB).**

——**S. 72 — Deviation from route — Effect on immunity from liability of Railway.**

Where the railway deviates from the route by which it professes to carry the goods and the deviation was not imperative, the railway administration forfeits the protection afforded to them by Risk Notes A and B. AIR 1950 All 543, Foll. **1959 MPC 341: 1959 MPLJ 701: 1960 Jab LJ 985: AIR 1959 Madh Pra 276 (280) (Pt G) (Pr 28) (DB).**

——**S. 72 — Contract exempting railway from liability during transit — Deviation from ordinary route — Railway if and when forfeits exemption — Overcarriage on same route of wagon containing consignment — If amounts to deviation.**

When the contract is to relieve the railway from liability for loss, damage, delay or detention of or to such goods during transit, the exemption is only from liability during the transit. Where the railway deviates from the ordinary route by which it proposes to carry the goods and the deviation is not imperative, the railway administration forfeits the protection afforded to them. Every customer dealing with the railway is bound not only by the ordinary route but also by the ordinary train arrangements according to which it professes to carry.

At the destination station, F, the wagon containing consignment was detached. At that station there were 3 lines only. On arrival the goods train in which suit consignment was carried could not be allowed to stay there for a long time since at that time two passenger trains were to cross at F and another goods train was also to come. Therefore the goods train carrying suit consignment was ordered by Controller of trains to proceed towards station B on the same line. The wagon containing the consignment was sent to T afterwards. In a suit for damages for short delivery:

Held, that the over-carriage by direct line of the wagon containing the suit consignment from F to B could not amount to 'deviation' for fixing the responsibility of the railway. It was due to operational reasons. Such carrying was imperative as it became necessary in due course of ordinary train

arrangements. ILR (1963) Cut 459: 29 Cut LT 527: AIR 1964 Orissa 82 (83) (Pt A) (Prs 4, 5).

——S. 72 (prior to amendment in 1961) — Deviation — Negligence — Goods damaged during transit due to deviation of route and transfer of wagon — Railway Administration, held liable for loss.

If the goods are taken across a different route, and loss is incurred by the consignor, the carrier that is, the railway, is responsible. When the contract is to relieve the railway from liability for loss, damage, misconveyance, misdelivery, delay or detention of or to such goods during transit, the exemption is only from liability during the transit and when once the goods are diverted from that route the protection ends; change from ordinary route therefore puts an end to the protection.

Certain goods made of cement (Asbestos Cement Sheets) were consigned on 16-3-1958 from station A on Central Railway to station B on S. E. Railway. The goods were carried over to another station on Central Railway, where the goods were unloaded and reloaded in another wagon. On 17-7-1958 at station B the goods were unloaded in a damaged condition. Even after the goods reached the station of destination the goods could not be traced for about a month and a half, and no delivery was given to the plaintiff although his godown clerk was presenting the Railway receipt at short intervals for taking delivery. Open delivery was refused. Plaintiff refused to take delivery. It was admitted that the goods were damaged during transit due to deviation of the route and transfer of the wagon. In the suit for damages:

Held, that it was a clear case of negligence. The Railway Administration was responsible for consequential damages due to deviation from usual route. Held, further, that the goods being completely damaged it was a case of total loss to the plaintiff. (Ss. 72 to 78-B substituted for Ss. 72, 72-A, 73, 74, 74-A, 74-B, 74-C, 74-D, 74-E, 75, 76, 77 and 78 by the Amendment Act (39 of 1961) with effect from 1st January, 1962). 29 Cut LT 647: AIR 1964 Orissa 34 (35) (Prs 6, 7).

8. Theft.

——S. 72 — Risk note — Goods train carrying wagon containing goods in question, stabled at station where there was no arrangement for safety — Thefts in wagons — In spite of reports of station-master, Watch and Ward not supplied — Subsequent looting — Misconduct and negligence of railway authorities, held established.

Held, on facts that no inference could be drawn that the goods in question were not removed by thefts before the looting started. The circumstances established in this case led clearly to the conclusion that the Railway Administration and its employees were guilty not only of negligence but of gross improper conduct within the meaning of the Risk Note. The word "misconduct" as used in the Risk Notes executed under the provisions of the Railways Act included culpable negligence and conduct which was improper and undesirable. AIR 1932 All 321, Foll. 1961 All LJ 796: 1961 All WR (HC) 634: AIR 1963 All 134 (136, 137) (Prs 10, 17, 18) (DB).

——S. 72 — Loss due to shortage by theft — Execution of risk notes 'A', 'B' and 'C' — Effect.

A consignment of 153 bags of biri tobacco was booked under Risk Notes A, B and C. At the time of taking delivery the consignee found that two complete bags were missing and nine bags were cut thus involving certain shortage of goods. He sued the Railway for loss due to the shortage. The Railway denied the liability on the ground that the loss was due to theft by outsiders and also because of the execution of the Risk Notes A, B and C. It was found that the story of theft by outsiders was not substantiated and that the goods were securely and not defectively packed.

Held, that (1) In Risk Note C no indemnity is given in case of loss as distinct from cases of destruction, deterioration or damage. Again, the destruction, deterioration or damage against which indemnity is given thereby must arise by reason of the consignment being conveyed in open wagons in transit. The Risk Note C did not protect the railways here as it was a case of loss which did not arise from the goods being carried in an open truck.

(2) The Risk Note 'A' also was of no assistance to the Railway as the loss did not arise from the initial condition of the goods at the time of booking or to "defective packing". AIR 1950 Cal 394, Referred.

(3) Further existence of Risk Note 'A' did not disentitle the consignee to plead that the goods were not defectively packed. 32 Cal WN 53 and Civ. Case No. 624 of 1946, D/-15-4-1947 (Cal.), Disting.

(4) The relevant note of defect being "old, weak contents dropping", such defect, even if it existed, could not explain loss of complete bags or cutting of bags and was, therefore, insufficient to protect the Railways. AIR 1931 Cal 489, Disting.

(5) As the goods were not defectively packed, the Railway was not protected under any of the proviso in Risk Note B.

(6) As "defectively packed" does not necessarily mean "not packed according to the instructions laid down in the Tariff" and as the Tariff Rules and their existence or non-existence are matters within the special knowledge of the Railway authorities, the mere execution of the Risk Note 'A' does not necessarily change the onus under the proviso to Risk Note 'B'. AIR 1952 Cal 285 (286, 287) (Prs 6 to 12).

9. Theft from running train.

●——Ss. 72 and 77 (before its amendment by Acts 56 of 1949 and 39 of 1961) — Consignment sent under Risk Note 'Z' — Non-delivery — Suit for damages — Duty of Railway to disclose how consignment was dealt with in transit — Extent of — Failure to make full disclosure — Effect — plaintiff when required to prove misconduct—Evidence Act (1872), S. 114 (g).

Where the consignor or the consignee brings a suit for compensation for non-delivery of goods, evidence has to be led by the Railway in the first instance to substantiate the disclosure which might have been made before the litigation or which might have been made in the written statement in reply to the suit. When the Railway Adminis-

tration has given evidence in proof of the disclosure and the plaintiff is not satisfied with the disclosure made in the evidence, the plaintiff can ask the Court to require the Railway to make further disclosure telling the Court what further disclosure he wants. It is then for the Court to decide whether the further disclosure desired by the plaintiff should be made by the Railway, and if the Court decides that such further disclosure should be made, the Railway has to make such further disclosure as the Court orders it to make. If the Railway fails to take the opportunity so given to satisfy the demands of the plaintiff, endorsed by the Court, the Railway would be in breach of its contractual obligation of disclosure. It is at this stage, therefore, that the Railway can be truly said to be in breach of its contractual obligation of disclosure.

Even though there may be a breach of the obligation to give full disclosure that does not, however, mean that the Risk Note Form 'Z' or Form 'B' can be ignored and the responsibility of the Railway fixed on the basis of S. 72 (1) as a simple bailee. If the Railway does not produce the evidence desired by the plaintiff in the suit even though the request of the plaintiff is endorsed by the Court, the effect of such breach is not that the risk note is completely out of the way, the reason for this being that the consignor has already taken advantage of the reduced rates and, therefore, cannot be allowed to ignore the risk note altogether. But where there is a breach by the Railway of the obligation to make full disclosure, the Court may more readily infer misconduct on the part of the Railway or its servants or more readily presume S. 114 (g) of the Evidence Act against the Railway. AIR 1937 PC 152, Explained and Rel. on. Thus, where in a suit by the consignee, he never tells the Court after the evidence of the Railway is over that he is not satisfied with the disclosure and that the Railway be asked to make further disclosure by producing further evidence, it cannot be said there was any breach by the Railway of its responsibility to make full disclosure. In the circumstances the risk note would still apply and the Court would have to decide whether misconduct on the part of the Railway can be fairly inferred from the evidence produced by it. If the Court cannot fairly infer misconduct from that evidence, the burden will be on the plaintiff consignee to prove misconduct.

Held, on the facts that there was no evidence on behalf of the consignee to prove misconduct on the part of the Railway servant and as misconduct could not fairly be inferred from the evidence produced on behalf of the Railway, the suit must fail. AIR 1959 Pat 202, **Reversed. (1965) 3 SCR 145: ILR 45 Pat 599: AIR 1965 SC 1755 (1760, 1761, 1763) (Pt B) (Prs 13, 15, 16, 20).**

●——**S. 72 (as it stood before amendments of 1949 and 1961) — Loss of many consignments on account looting of wagons — Wagon containing appellant's consignment not proved as looted — Held, Railway Administration was liable for non-delivery of appellant's consignment.** See Evidence Act (1872), S. 3, 'Proved'. **AIR 1965 SC 1666.**

——S. 72 — Theft in a running train — Liability of Railway.

The liability of the Railway as a carrier of goods is the same as that of a bailee under Ss. 152 and 161, Contract Act and if in spite of the necessary precautions, namely, sealing and reverting of a wagon, a theft takes place in a running train, the Railway Administration cannot be liable for the loss. **AIR 1955 Ajmer 5 (5) (Pr 10).**

——S. 72 — Theft in running train — Liability of Railway — It is no higher than this that he is bound to take the same care of property entrusted to him as a reasonably prudent and careful man would be expected to take of his own property of like description under similar circumstances — Obligations include taking reasonable precautions to obviate natural and incidental risks involved and also taking measures for protection of property — Responsibility of Railway Administration is that of bailee — Railway making full disclosure of attendant circumstances — Then plaintiff must show want of due care — When no full disclosure is made, plaintiff can ask to draw presumption against Railway — Plaintiff's goods securely locked in wagon — Adequate arrangement for care and protection — Theft taking place under cover of night in running train — No delay in detection of theft — Matter reported to higher authorities — Railway held took reasonable care — (Contract Act (1872), Ss. 151 and 152)— (Evidence Act (1872), S. 100). AIR 1955 NUC (Assam) 3640 (DB).

——S. 72 — Conversion — Test.

In order to determine whether there was conversion of goods the test to be applied is not merely to see whether there was failure to return the goods. It must also appear that there was intention to keep the goods in defiance of the plaintiff. Detention is not conversion unless there is an adverse claim. A carrier who on demand being made states that he would not return the goods because they were looted while in his possession cannot ipso facto be said to have been guilty of conversion. **56 Bom LR 150: AIR 1954 Bom 297 (300) (Pt D) (Pr 14).**

——Ss. 72 and 74-D — Theft of goods from running train — Railway Company is not bound to give evidence as to how consignment was dealt with even when train was in motion. Guard of the train deposing that train did not stop at any place till the station where loss was discovered — His testimony amounts to sufficient evidence by Railway as to how consignment was dealt with till it was found missing. See Railways Act (1890), S. 74-D. **1961 Jab LJ 1339.**

——S. 72 (prior to amendment in 1961) — Theft in running train — Liability of Railway — Extent — Degree of care necessary on part of Railway — Proof.

The liability of the Railway under S. 72 of the Railways Act for the loss of goods entrusted to it for carriage is governed by S. 151 of the Contract Act and is like that of a bailee who is bound to take as much care of the goods entrusted to it for carriage as a man of ordinary prudence would, under the circumstances, take care of his own goods of similar nature and value. The liability of the Railway is not confined to close wagons alone. It equally extends to open wagons so that the Railway cannot disown the liability by con-

tending that the goods were loaded in open wagons.

In a suit for damages for loss of steel plates booked for carriage and loaded in open wagons, the Railway denied the liability on the ground that the loss was due to an organised theft in the running train and was beyond the control of the Railway Administration. The evidence showed that as soon as the theft had been committed, the guard of the train had brought it to the notice of the superior authorities requesting for action to prevent any further incident, but no action was taken even to inspect the wagons which were tampered with, in order to ascertain the loss. Further, the goods recovered by the police as a result of investigation did not tally with the goods consigned to the plaintiff.

Held, that there was no evidence that the Railway Administration was diligent in taking that amount of care which they should have taken under the statute, and under the circumstances the loss could not be attributed to the theft. The Railway was liable for the loss. **76 Mad LW 331: (1964) 2 Mad LJ 329: ILR (1963) Mad 1175: AIR 1963 Mad 394 (394, 396, 397) (Pt A) (Prs 4, 7, 9) (DB).**

——S. 72 — Measure of liability — Goods lost by organised raid by thieves and by looting — Liability of Railway Administration.

Where not merely a large-scale and organised raid by thieves occurred, but the open wagon containing the goods was looted by the thieves, no general proposition can be laid down that a fact of this kind should be proved by direct evidence by the Railway Administration. The Administration is entitled to plead that the fact could be established by circumstantial evidence also. The Railway Administration would not be guilty of any neglect if this is established.

The criterion in S. 151 of the Contract Act of the care that should be taken by a man of ordinary prudence, under similar circumstances, in respect of his own goods, does not imply any heroic measure of responsibility, or conduct. **(1961) 1 Mad LJ 348: 1961 Mad WN 128: 74 Mad LW 320: AIR 1961 Mad 398 (399, 400, 401) (Prs 4, 8, 9, 11).**

——S. 72 (prior to amendment in 1961) — Goods on railway wagon looted during disturbances after death of Potti Shriramulu in connection with formation of Andhra Province — Court can take judicial notice of disturbances — But Railway not absolved in absence of proof that wagon in which consignment was kept was looted.

In a suit filed by a consignor for recovery of the price of goods lost in transit while in the custody of the Railway Administration, the Court can take judicial notice of the riots and disturbances, that took place in several parts of the Andhra territory consequent on the fast and death of Potti Shriramulu in connection with the formation of Andhra Province. The Railway Administration can, however, escape liability only if they can show that the missing goods were lost in the course of the said riots and not due to misconduct on the part of the Railway staff. Where there is no evidence to show that the wagon, in which the suit consignment was kept, was looted by the mob, the Railway Administration cannot be absolved from its liability. **ILR (1962) Cut 395: AIR 1963 Orissa 66 (67) (Pt A) (Prs 4, 5) (DB).**

10. Looting.

See Note 9.

11. Accident.

——S. 72 — Negligence — Wagon catching fire — Origin of fire not attributable to any fault on part of Railway — Railway servants immediately isolating wagon and fighting fire with extinguishers and buckets of water — Salvage of goods not possible — Railway authorities held were not negligent. ILR (1960) 2 Cal 597: AIR 1960 Cal 458 (462) (Pt E) (Pr 22).

——S. 72 — Risk Notes 'B' and 'H' — Loss by fire — Liability of Railway Administration — Burden of proof — (Evidence Act (1872), Ss. 101-103).

Under the Risk Note Forms 'B' and 'H' now in force, the Railway Administration will be made liable in case of loss, by fire provided that it was due to the misconduct of their officials. To bring the case within the exception clause, it is for the Railway Administration in the first instance to show that there was loss by fire. As soon as that is established, the onus shifts to the plaintiff to prove misconduct. But when the Railway Administration witnesses are proving that there was a fire which was the cause of the destruction or loss leading to non-delivery either of the whole or part of the consignment, the plaintiff-claimant gets the opportunity to cross-examine such witnesses and place before the Court materials which may or may not ultimately discharge the onus which lies on the plaintiff. The Railway Administration as a bailee is primarily liable for the loss but it may exonerate itself under certain circumstances. It may place materials before the Court to make it believe that the wagons in which goods entrusted to it had been so loaded with ordinary care caught fire. As soon as the Court is so satisfied, the onus is placed on the plaintiff. Where the Administration has not placed any such material before the Court, the plea of destruction by fire cannot be held to be proved. **(1956) 60 Cal WN 679.**

——S. 72 — Loss due to fire — Burden of proof — (Contract Act (1872), S. 151).

Where it is found that the roof of the wagon in which the consignment was loaded contained holes and a gap of 4 inches even before the goods were destroyed by fire, it is for Railway Administration to explain through their servants as to the existence or otherwise of the holes and gaps on the roof of the wagon, whether such holes were the result of the fire, or they could have been there prior to the fire. There was no duty cast on the consignor to elicit this information from those witnesses, when the report of the Commercial Inspector of the Railway was entirely in their favour. **AIR 1955 NUC (Mad) 85.**

——S. 72 — Gross negligence or misconduct — Fire breaking out in open railway trucks loaded with jute at wayside station due to sparks from the engine in April — No water available anywhere nearby — Engine driver loosening engine and taking it to safe distance — No gross negligence or misconduct on part of Railway servants

so as to make Railway Administration liable for loss. 1960 BLJR 669: AIR 1960 Pat 489 (497) (Pt F) (Pr 15) (DB).

——Ss. 72, 76 — Loss of goods by accidental fire — Negligence of Railway — Burden of proof.

The responsibility of the Raiway Administration is that of a bailee. Loss or damage to goods entrusted to a bailee is, prima facie evidence of negligence on his part and the burden of proof to disprove negligence lies on him.

Where the evidence showed that the goods were lost by an accidental fire over which the Railway had no control and, in that regard, the finding of the Court was that the Railway Administration took all possible steps to extinguish the fire and that they were not negligent:

Held, that the Railway Administration had discharged the burden of proof. AIR 1918 Cal 892 (2), Rel. on; AIR 1953 Nag 169, Distinguished. 1957 BLJR 199: AIR 1957 Pat 325 (326) (Pr 8) (DB).

12. Fire.

See Note 11.

13. Misconduct.

——S. 72 (prior to its amendment in 1961) — Risk Note in Form B — "Misconduct" in — Meaning of — Care which railway authorities must take when goods are carried at owners' risk — Perishable goods — Delay in transit resulting in damage to goods — Wagon carrying perishable goods reported sick on the way — Negligence in not carrying out minor repairs with greatest possible despatch — Railway authorities held guilty of misconduct.

Held, on facts that the omission of the railway authorities to take reasonable and prompt steps to put the wagon in question on the rail road after the necessary repairs amounted to misconduct on the part of the railway and it was not right to say that no blame could come on the railway authorities. because there was no evidence on record that they had intended to harm the consignor.

There are two criteria in considering the question as to when misconduct is established: (1) the intentional doing of something which the doer knows to be wrong and (2) which he does recklessly not caring what the result would be. Thus an act which a person does recklessly not caring what the result would be is also misconduct. Doing of a positive act or omission to do an act which a person is duty bound to do stand on the same footing.

The word "misconduct" as used in the risk notes executed under the provisions of the Railways Act included culpable negligence and conduct which was improper and undesirable.

The carelessness and the negligence shown by the railway authorities in the instant case in not undertaking the small repairs to the wagon in question with the greatest possible despatch as soon as it was reported sick and particularly when the railway authorities knew that it contained perishable goods for onwards despatch to Bombay shows that they were not only acting negligently but improperly in the circumstances. Even though the goods may be carried by the railway at the owner's risk, it does not mean that the railway administration can do anything with the goods and not take proper care so that during the transit they do not get damaged.

To establish misconduct, it is not necessary to prove that the act complained of or the omission complained of was done intentionally or with deliberation to cause harm. That element would be necessary to be established when a party is to be held guilty of "wilful" misconduct. In the risk note Form B, the railway authorities are liable if misconduct is established. It is not necessary for the consignor or consignee to establish "wilful" misconduct. AIR 1963 All 134, Foll. **AIR 1963 All 137 (140, 141, 142) (Pt A) (Prs 14, 15, 16, 18, 20, 21).**

——S. 72 — Misconduct or negligence — Inability to provide locomotives for hauling goods.

If the railway is unable to provide locomotives for hauling the goods accepted for transit this cannot be said to be a cause which was not within the control of the railway and the railway is guilty of misconduct or negligence. **ILR (1957) 1 All 450: 1957 All LJ 150: 1957 All WR (HC) 142: AIR 1957 All 259 (260) (Pt B) (Pr 8) (DB).**

——S. 72 — Suit for damages — Misconduct — Failure to make marks on consignments—Failure amounts to dereliction of duty on part of Railway servants. **AIR 1955 NUC (Bom) 5856 (DB).**

——S. 72 — Risk Note A — Misconduct — Whether there has been misconduct depends upon facts of each case — Use of wooden topped wagon to carry tobacco leaves during monsoon is negligence amounting to misconduct — Note A cannot be used as shield. **AIR 1955 NUC (Cal) 5904 (DB).**

——S. 72 (1) — "Misconduct" — Wrong information by railway servants.

Where the plaintiff's brokers were daily in touch with the Railway servants, but they were not informed about the arrival of the consignments and consequently there was delay on the part of the plaintiff in taking delivery:

Held, that this amounted to misconduct on the part of the railway servants. **(1957) MPLJ 294: 1958 MPC 459: ILR (1957) Madh Pra 253: 1957 Jab LJ 550: AIR 1957 Madh Pra 114 (115) (Pt B) (Pr 4) (DB).**

——S. 72 — "Misconduct" — Wagons containing kegs of hydrosulphate of soda catching fire — Fire extinquished by water and not by sand or gas — If misconduct — Railway, if responsible for damages.

Misconduct is not necessarily established by proving even culpable negligence and it is something opposed to accident or negligence, and is the intentional doing of something which the doer knows to be wrong or which he does recklessly, not caring what the result may be, ILR 60 Cal 996, Rel. on.

Held, that the use of water to extinguish the fire of wagons containing kegs of hydrosulphate of soda, the less desirable method as compared to the use of gas and sand, was only an error of judgment, in an emergency, in an honest attempt to put out the fire quickly when no sand or gas was immediately available and will not amount to misconduct or recklessness and entitle the consignor of the kegs to claim damages for spoiling the kegs due to the use of water, from the Railway. It is a case of one honest party, the consignor, being saddled with loss by an accidental fire, claiming the loss from another honest party, the railway administration, who put out the fire in one of the known ways, though it was not the best way, owing to some error of judgment and negligence Here, the railway administration did not do anything which it knew to be wrong, or do anything recklessly not caring what the result would

be. AIR 1955 Mad 274; (1955) 1 MLJ 157. Rel. on. 70 Mad LW 1035: 1957 Mad WN 692: (1957) 2 Mad LJ 620: ILR (1958) Mad 337: AIR 1958 Mad 179 (180) (Pr 4) (DB).

——S. 72 — Risk Notes A and Z — Liability of Railway arises on proof of misconduct — Consignment of turpentine drums — Danger labels not put on wagons — Whether misconduct — Wagon catching fire — Fire tried to be put out by pouring water — Whether misconduct — Negligence and misconduct — Negligence proved — Railway is not entitled to freight charges and cost — (Contract Act (1872), Ss. 151 and 152).

Where drums of turpentine are consigned by railway at owner's risk after executing Risk Notes A and Z, and drums are destroyed by the wagon catching fire while standing at mid-station on the way, the railway is liable, if it is shown that the destruction of goods was due to the misconduct of the railway administration or rather their servants. The bailee's liability under Sections 151 and 152 of the Contract Act, arising from mere negligence not amounting to misconduct, cannot be fastened on the railway authorities, because the goods are not carried at railway risk, but at owner's risk, and are also defectively packed.

A distinction has to be made between damages claimed for the loss of the goods destroyed by fire, and the frieght claimed to be refunded in respect of the goods which could never be delivered because of that fire and the Railway's negligent acts. Of course, the question of costs is a third thing not connected with the other two and depending on various considerations.

Misconduct is something different from mere negligence. There must be firstly proof of some wrong conduct and, secondly, proof that the destruction of the goods arose as a result of such wrong conduct. Some cases of reckless conduct and even gross negligence may very well fall within the frontiers of misconduct as, for instance, putting goods on the top of the train (like fastening tins on the top), instead of inside the wagon or putting inflammable and dangerous goods, like petrol or kerosene or turpentine, in wooden wagons against R. 3 of Ch. II, Appendix A of the Indian Railways Act. But in the absence of proof of misconduct leading to destruction or loss of goods, the plaintiffs, cannot recover damages for goods thus destroyed or lost, though because of the various acts of negligence not amounting to misconduct, as defined, the defendants may lose their right to claim the freight charges, and also the costs of the action.

The failure of goods clerk at the starting station to describe the goods as turpentine and dangerous and to affix danger labels to the wagon carrying turpentine drums as required by Rule 22 of Ch. II, Appendix A, of the rules framed under the Indian Railways Act, will not amount to misconduct and especially to misconduct leading to the fire, and destruction when there is no evidence that that caused loose shunting leading to the breaking out of the fire.

Where the persons who tried to put out the fire were not persons knowing all about the properties of fire and turpentine, and secondly, they did not know that the wagon contained drums of turpentine, it will be an exaggeration to say that by their act of throwing water on the burning wagon containing turpentine oil though not commendable, they fanned the fire and ensured the destruction of the goods by fire. These circumstances will only disentitle the defendants to the freight or to costs.

To expect porters and others to open the wagon which was on fire, select the burning drums of oil and roll them out, in order to save the other drums from destruction, is to ask for the impossible.

Fire extinguishers are provided in mail and passenger trains, and not in goods trains. Their absence in goods trains at a time when they are not easily available cannot be held to amount to misconduct. **(1955) 1 Mad LJ 157: AIR 1955 Mad 274 (277 to 281) (Prs 14, 16 to 19, 21, 23 to 25, 27).**

——S. 72 — Misconduct — Meaning.

A mere omission to do what is expected of a person to do constitutes misconduct whereas if such failure is directed to intentionally cause mischief or loss to any person then it is called wilful misconduct. There is really no difference in substance in the liability of the Railway Company as a bailee under S. 151, Contract Act, who is expected to take as much care of the goods bailed to them as a man of ordinary prudence would under similar circumstances take and in their liability as restricted in the risk note to cases of misconduct by their servants.

The obligation of a bailee includes not only the duty of taking all reasonable precautions to obviate risks but the duty of taking all proper measures for the protection of the goods when such risks are imminent or have actually occurred.

Where unbooked bales of cloth lying in goods shed along side booked articles are lost in quick succession to the exclusion of the booked articles, the inference that it is not achieved without the active connivance of some of the railway servants is legitimate. **(1950) 2 Mad LJ 27: AIR 1950 Mad 700 (703, 704) (Pt B) (Prs 10, 11).**

——S. 72 — Risk Note B — Misconduct, meaning of.

Misconduct literally means wrong or improper conduct i.e., conduct in violation of a definite rule of action. It ordinarily means failure to do what is required of a person to be done. An omission to do what is required of a person to do may, therefore, constitute misconduct even though the person has not acted wilfully or maliciously. Case law discussed.

(Distinction between the words 'wilful neglect' in the old Risk Note B and wilful misconduct in the English risk Note B pointed out). **1955 Nag LJ 172: ILR (1955) Nag 45: AIR 1954 Nag 337 (339, 342) (Pt D) (Prs 9, 18) (DB).**

——S. 72 — Misconduct — Unnecessary delay and failure to provide proper type of wagons.

The employees of a Railway Administration are guilty of misconduct if they do not provide proper type of wagons for the carriage of goods and cause unnecessary delay in transit. **ILR (1953) Nag 314: 1954 NLJ 353: AIR 1953 Nag 169 (172) (Pt E) (Pr 17) (DB).**

——S. 72 — "Misconduct" — Meaning of — Clerical error in entering mark of consignment in railway receipt.

Misconduct implies some degree of mens rea on the part of the person concerned or at any rate a very grave degree of negligence or serious failure to carry out instructions or comply with regulations. A clerical error such as wrongly entering the railway mark of a consignment in railway receipt due to a mere slip of the pen committed under pressure of work and which anybody might have made does not amount to misconduct. AIR 1933 All 477, Dissented from;

AIR 1930 Lah 120, Foll. **ILR (1957) Punj 497: 59 Pun LR 230: AIR 1957 Punjab 196 (197) (Prs 4, 7) (DB).**

——S. 72 — Risk Note — Misconduct — Meaning of, explained — A clerical mistake which could be made by anybody and committed under pressure of work is not misconduct. **AIR 1955 NUC (Raj) 4600 (DB).**

14. Proof of misconduct.

——S. 72 — Risk Note in Form H — Duty of Railway Administration — Inference of misconduct.

Per Mukerji, J. (agreeing with Beg, J.)— Where Risk Note H is executed by the plaintiff while forwarding the goods by railway and the goods are not delivered to the plaintiff, then the Railway Administration, before it can seek protection under the terms of Risk Notes Form H, has to disclose to the consignor as to how the consignment had been dealt with throughout the time it was in its possession or control and, if necessary under the terms of the Risk Note Form H it is the obligation of the Railway to give evidence thereof before the consignor will be called upon to prove misconduct. It is open to the Court to infer misconduct on the part of the Railway Administration or its servants from the failure of the railway to give evidence as to how the consignment had been dealt with throughout the time it was in its possession and control. **AIR 1958 All 234 (245, 255) (Pt K) (Prs 23, 73) (DB).**

——S. 72 — Risk Note A — Loss due to bad packing — Proof of misconduct — Burden on consignor.

In a case covered by Risk Note A the railway administration cannot be held liable unless the plaintiff proves that the loss is due to misconduct on the part of the railway servants. The burden of proving misconduct is on the plaintiff and not upon the railway administration.

Where in a consignment of 300 tins of ghee sent under Risk Note A, 16 tins were found empty and 19 tins were of short weight and the evidence showed that the loss was due to bursting and denting of tins in transit, the loss must be held to be due to bad condition of packing and as such covered by the Risk Note A. The burden of proving misconduct is on the consignor and if he fails to discharge it, he is not entitled to claim any damages from the Railway. **ILR (1957) 1 All 220: 1956 All LJ 258: 1956 All WR (HC) 842: AIR 1957 All 21 (24) (Pt C) (Pr 16) (DB).**

——S. 72 — Execution of Risk Notes A and B — Liability of Railway Administration — Proof of misconduct — Whatever the cause of deterioration or loss there was held no liability on Railway to explain how it had dealt with goods — Plaintiff had to prove misconduct. **AIR 1955 NUC (All) 1266.**

——S. 72 — Risk Note A — Misconduct of Railway servants — Proof of — Burden of proof — Circumstantial evidence can be given.

In a suit by consignor for recovery of damages for loss of goods consigned under Risk note A, the burden of proving that there was misconduct on the part of the Railway servant lies on the plaintiff consignor. Where the misconduct is by a person unknown, the consignor is not expected or required by law to produce direct evidence. He is at liberty to discharge the onus by circumstantial evidence. Thus where certain bales of cloth pieces were intact at the place of consignment when the wagon was sealed and it was found at the place of destination that though the seals were not broken, one bale was in loose condition and some pieces weighing 1 maund 20 seers were missing, it was held that the wagon being all the while in the custody of the Railway servants, who were the only persons who could have access to it and nobody but they could tamper with it while leaving the seals intact, it was clearly established that some Railway servants pilfered the contents of the bales and thus the loss was due to the misconduct of the Railway servant. **('50) ILR (1950) All 472.**

——S. 72 — Misconduct — Burden of proving misconduct within meaning of Risk Note A is always upon plaintiff alleging misconduct — Plaintiff relying on circumstantial evidence — He must satisfy Court that it amounts to misconduct within meaning of Risk note. **AIR 1951 Assam 173 (174) (Pt A) (Prs 9, 13) (DB).**

——S. 72 — Civil P. C. (1908), O. 41, R. 1 — Suit against Railway Administration — Plea that plaintiff without alleging and proving misconduct could not claim compensation not raised in written statement — Plea, if can be allowed to be raised in appeal. **AIR 1950 Assam 175 (DB).**

——S. 72 — Risk Notes A and B — Goods dispatched to Pakistan — Journey on Indian and Pakistan Railway — Misconduct on part of Indian Railway — Burden of proof.

A consignor sent under Risk Notes A and B goods from India to a destination in Pakistan. The goods had to travel by railways one of which was owned by Pakistan. The Indian Railway Administration had laid evidence to show how the goods were dealt with during its journey on Indian Railway. When the wagon was made over to the Pakistan Railway Administration, the wagon seals were intact.

Held, that in circumstances, the onus was upon the consignor to show that the loss and short delivery were occasioned on account of the misconduct and negligence of the Railway Administration. **AIR 1960 Cal 455 (457) (Pt A) (Prs 10, 11) (DB).**

——S. 72 — Misconduct — Proof of perishable goods — Transit delayed by misconduct — Deterioration of goods — Presumption — (Evidence Act (1872), Section 114).

Where a consignment of potatoes were despatched and at the despatching station all precautions were taken to indicate the nature of the goods and to give the advice that the wagon should be pushed on without delay but the wagon was detached at a wayside station and delayed there for a week although the goods train to which the wagon was attached proceeded further onwards and no explanation was given by the administration for the necessity of the detachment of the wagon.

Held, that the wagon was detached and detained on account of gross negligence of a railway officer amounting to misconduct. **Held,** further, that as the potatoes were all along in the custody of the railway administration and as there was an unusual and unreasonable delay due to to the misconduct of the railway servant the Court might well presume that the delay was the

cause of the deterioration of the goods and that the deterioration would not have taken place had the goods arrived at the destination in proper time. **63 Cal WN 343: AIR 1959 Cal 337 (337, 338) (Prs 5, 8) (DB).**

——S. 72 (1) (2) — Risk Notes A and B — Damage and deterioration to consignment on transit — Liability of Railway — Nature of, stated — Misconduct of Railway administration — Burden of proof indicated — Presumption under Section 114, Illus. (g), Evidence Act cannot be invoked aliunde Risk Notes, on issue of misconduct — (Evidence Act (1872), Section 114, Illus. (g)) — (Contract Act (1872), Ss. 151 and 152). **AIR 1955 NUC (Cal) 793.**

——S. 72 — Risk Notes A and B — Execution of both — Effect of — Loss of consignment — Misconduct of Railway servants — Burden of proof.

The combined effect of the execution of Risk Notes A and B is that the onus is entirely on the consignor to prove that the loss of the consignment is due to the misconduct of the railway servants. By executing Risk Note A it was recognised that the package was defective. This, therefore, brings the case outside the execution in proviso (a) of Risk Note B which only operates provided the consignment is packed in accordance with the instructions laid down in the tariff. At any rate, there is a clear onus on the consignor to show that despite the admitted defects in the packing the packet was packed in accordance with the instructions laid down in the Tariff or that no instructions were laid down. If the proviso in Risk Note B does not operate, the Railway administration is not bound to make any disclosure to the consignor as to how the consignment was dealt with througout the time it was in its possession. **55 CWN 251: AIR 1952 Cal 712 (712, 713) (Prs 4, 5).**

——S. 72 — Risk Note B — Misconduct of Railway servants — Presumption from facts — Question of fact or law.

The question whether a presumption of misconduct on the part of the Railway servants can be drawn from certain circumstances, is a question of law and not a mere question of fact. **AIR 1952 Cal 384 (384) (Pt B) (Pr 2).**

——S. 72 — Misconduct — Wagon not padlocked but sealed and rivetted — Sealing and rivetting found to be in accordance with current practice of railways — No evidence that either the wagon in question or the other wagons on the train had padlocking arrangement — **Held,** misconduct on the part of railway administration could not be inferred. AIR 1931 Cal 734, Not foll; AIR 1935 Lah 206, Rel. on. **1961 Jab LJ 1339.**

——S. 72 — Risk Note B — Misconduct — Burden of proof.

Risk Note B limits the liability of the company to cases where there is proof that the loss, destruction, deterioration or damage complained of arises from the misconduct of Railway Administration's servants. The burden of proving misconduct is upon the plaintiff. AIR 1917 PC 173 and AIR 1951 Nag 352 (2), Rel. on. **1957 Jab LJ 331: 1957 MPLJ 153: AIR 1957 Madh Pra 157 (158) (Pt C) (Pr 8) (DB).**

——S. 72 (1) — Consignment booked on Risk Notes A and B — Proof of misconduct — Consignment not so booked — Distinction.

Where a consignment is booked on Risk Notes A and B the plaintiff has to prove misconduct on the part of the Railway Administration's servants and where there is no evidence that the consignment was booked on Risk Note A, he has to prove that the Railway Administration failed to take the amount of care enjoined on a bailee under Section 151, Contract Act. **(1957) MPLJ 294: 1957 Jab LJ 550: 1958 MPC 459: ILR (1957) Madh Pra 253: AIR 1957 Madh Pra 114 (115) (Pt A) (Pr 3) (DB).**

——S. 72 — Liability of Railway Company as bailees is restricted by risk note executed — It is necessary for consignor to strictly prove misconduct of railway servants which led to his loss. **(1950) 2 Mad LJ 27: AIR 1950 Mad 700 (703) (Pt C) (Pr 10).**

——S. 72 — Risk Note B — Misconduct — Burden of proof.

In cases of consignment booked under Risk Note B, no doubt the initial burden to prove misconduct is on the plaintiff, but in cases falling under the first or the second proviso to Risk Note B the Railway Administration is bound to disclose to the plaintiff how the consignment was dealt with throughout the time it was in its possession or control, and if necessary to give evidence thereof before the consignor is called upon to prove misconduct. If misconduct on the part of the Railway Administration or its servant cannot be fairly inferred from such evidence, the burden of proving such misconduct shall lie upon the plaintiff; but if the Railway Administration fails to make the requisite disclosure to the consignor, or, in the event of the disclosure being made but being not found to be satisfactory, fails to give evidence in regard to the manner in which it dealt with the consignment throughout the time it was in its possession or control, the inevitable result of such a failure on the part of the Railway Administration to make the disclosure and to give evidence would be to fasten on it the liability for the loss as the Court will have in such a contingency no other alternative than to presume misconduct from the aforesaid failure and to hold the company liable for the loss caused by the misconduct of its servant. **1955 Nag LJ 172: ILR (1955) Nag 45: AIR 1954 Nag 337 (339) (Pt C) (Pr 8) (DB).**

——S. 72 — Risk Notes A and B — Misconduct — Suit for damages for non-delivery due to deterioration and destruction — Liability of Railway Administration.

A consignment of potato bags booked from Sagar to Raipur under Risk Notes A and B, reached the destination merely a week after the normal period of transit required. Though the goods were despatched in a through road-van the consignment was detained at Katni for 4 days, transhipped into another wagon and then despatched to Bilaspur where it was again detained for 3 more days due to the omission of the Railway servants to label the wagon containing potatoes as 'perishable' as required by the Tariff Rules. Though the potatoes were in a sound condition at the time of despatch, the entire consignment was found to be rotten at the destination and therefore was destroyed by

the railway authorities. The plaintiff brought a suit for damages for non-delivery. The defendant had not made the full disclosure and had not given evidence as to how the consignment was delayed for about 7 days after the despatch, why there was transhipment at Katni and how the wagon remained at Katni unattended to.

Held, that the plaintiff was entitled to succeed firstly because the defendant had not made full disclosure as to how the consignment was dealt with and secondly because the servants of the defendant committed a breach of a specific duty imposed upon them by the rules of the Railway Administration to label wagons of potatoes as 'perishable'. Consequently the failure to label the wagon as perishable transhipping a through wagon at Katni and delaying it at that junction and at Bilaspur without any reasonable explanation for the delay amounted to an improper behaviour on the part of the Railway Administration or its servants and misconduct within the meaning of the Risk Note B. **1955 Nag LJ 172: ILR (1955) Nag 45: AIR 1954 Nag 337 (342) (Pt E) (Prs 19, 20) (DB).**

——S. 72 — Risk Note 'A' — Misconduct — Burden of proof.

The risk-note A is to be used when articles are tendered for carriage which are either already in bad condition or so defective as to be liable to damage, leakage or wastage in transit. Under the present risk-note A, the Railway Administration will be held liable for misconduct on the part of its servants, and there is no liability on the part of the Railway without a finding of misconduct on the part of its servants. Of course, the burden of proving misconduct in the case of the risk-note A is on the plaintiff. The risk-note A would absolve the Company from any responsibility for loss owing to the bad condition of the articles throughout the period of transit. The question of onus will not be the same in regard to the risk note in form A as it is in regard to the risk note in form B. **1953 Nag LJ 451: ILR (1953) Nag 88: AIR 1953 Nag 281 (283) (Pt C) (Pr 14) (DB).**

——S. 72 — Misconduct — Burden of proof — Burden is on plaintiff to prove that loss arose from misconduct of servants of Railway Administration — Evidence Act (1872), Ss. 101 to 103. **1954 NLJ 353: ILR (1953) Nag 314: AIR 1953 Nag 169 (170) (Pt B) (Pr 7) (DB).**

——S. 72 — Risk Note B, Proviso — Proof of wilful misconduct on part of Railway — Right of consignor to ask for discovery, as distinct from "disclosure" of relevant documents, and serve interrogatories — Civil P. C. (1908), S. 11, Rr. 1 and 12.

Where a contract departs from the ordinary law of the land it must be construed strictly. There are no words in Risk Note B which destroy the right of one party when proving his own case to serve interrogatories to the other party. What the party does is merely to get certain answers from the opposite party relative to his case of wilful misconduct. If the Railway does not answer the questions such as can be properly asked under the law, it runs the risk of having an inference drawn against it.

Similarly the consignor in his attempt to prove wilful negligence on the part of the Railway can call upon the latter, to discover all relevant documents. In such a case the consignor is asking not for any "disclosures" within the terms of the proviso to the Risk Note B but for discovery of evidence relating to the consignment in the possession of the railway. No question of "disclosure" as such arises because all that the consignor demands is the discovery of documents from which the consignor would proceed to prove wilful misconduct, if any. Civil Revision 613 of 1950 decided on 31-10-1950 (Nag), Foll. Case law Ref. **1951 Nag LJ 599: AIR 1952 Nag 36 (39, 40) (Prs 19, 21).**

——Ss. 72 and 76 — Consignment at owner's risk — Fact of defective packing recorded in forwarding note — Railway is not liable for leakage, damage, etc. — Burden held was not on Railway to prove that there was no misconduct on part of their servant. **AIR 1955 NUC (Orissa) 2143.**

——S. 72 — Consignment of goods under Risk Note 'A' and 'Z' — Loss of part of goods in running train theft — Train though running during night no provision for watch and ward at scheduled stoppages — Guard also not checking wagon at stoppage nor checking seal — Held, loss was due to misconduct of Railway administration and particularly Guard.

Certain goods were consigned by the plaintiff under risk notes 'A' and 'Z'. Part of the consignment was lost in running train theft. It was found that though the train was running in night no proper watch and ward were provided. It was also found that the guard did not check the wagon at the scheduled stoppages nor checked the seal at the seal checking station.

Held, that the loss of the part of the consignment must be attributed to the misconduct of the Railway Administration's servants, particularly the Guard.

Misconduct may involve an element of negligence, but it is something more than mere negligence. But misconduct is not confined to immoral conduct and it may also arise from wilful neglect. AIR 1949 Pat 119 and AIR 1946 Cal 249 and AIR 1930 Pat 283 and AIR 1941 All 164 and AIR 1933 Cal 742 and AIR 1930 Pat 559 (2) and 1957 BLJR 451, Rel. on; AIR 1930 Bom 129 and AIR 1949 Pat 119 and AIR 1957 Pat 219, Distinguished. **1965 BLJR 24: AIR 1965 Pat 196 (200, 201) (Pt B) (Prs 11, 13) (DB).**

[Overruled on another point in AIR 1965 Pat 472.]

——S. 72 (1) — Loss in transit — Liability on Railways — Proof of misconduct — Onus — (Contract Act (1872), Ss. 151, 152, 161) — (Evidence Act (1872), Ss. 101-104).

Under S. 72 (1) the responsibility of a railway administration for loss of goods is, subject to the other provision of the Act, that of a bailee. They are responsible to the consignor for any loss, destruction or deterioration only if such loss, etc., arises from their fault. Where therefore, the consignor does not adduce any evidence indicating any misconduct or carelessness on the part of the employees of the Railway, the loss cannot be attributed to the Railway and hence the consignor cannot take any advantage of the omission on the part of the railway to prove the due execution of the Risk Notes in the alleged Forms A and B. **AIR 1956 Pat 434 (436) (Pt B) (Prs 8, 9).**

——S. 72 — Misconduct — Onus of proof.

The onus of proving misconduct on the part of a railway administration is on the plaintiff. **AIR 1956 Pat 71 (71, 72) (Pt B) (Pr 5).**

——S. 72 — Civil P. C. (1908), Ss. 100 and 101 — Inference of legal misconduct from proved facts. See Civil P. C. (1908), S. 100. **AIR 1956 Pat 68.**

——S. 72 — Risk Notes — Misconduct — Burden of proof — Inference from non-disclosure — (Evidence Act (1872), Ss. 106 and 114 (g)).

In view of the terms in Risk Note A it is clearly for the plaintiff to prove misconduct on the part of the servants of the Railway Administration and no inference could be drawn from any non-disclosure of how the consigment has been dealt with by the Railway Administration. Even on the terms of Risk Note Form Z, if the finding is that the goods in question were not packed as required by the rules of the traffic rules, the Railway Administration could not be held to have an obligation to make any disclosure under the terms of Risk Note Form B. Moreover, even under this agreement the consignor is not absolved from the burden of proving misconduct unless from the disclosure made by Railway Administration misconduct on its part can be fairly inferred. If the plaintiff is not satisfied with the disclosures already made by the Railway Administration, he should ask the Court to direct it to make further disclosure, and it is only on its failure to make such further disclosure as directed by the Court that an adverse inference against it could be drawn. AIR 1948 Pat 45 Foll. **AIR 1956 Pat 68 (69, 70) (Pt C) (Prs 7, 11, 12).**

15. Negligence.

●——S. 72 — Non-delivery of goods — Railway pleading looting by mob — Burden of proof on Railway. **AIR 1952 All 891 (892) (Pt B) (Pr 9) (FB).**

[Overruled on another point in AIR 1961 SC 725.]

——S. 72 (1) — Loss of consignment due to sudden and unexpected mob violence — Liability of railway.

It is well known that railways are peacetime organisations. They cannot be expected to cope with situation which could be handled only by the military. Section 72 (1), does not demand of the railways greater care or skill than that which is expected of an ordinary prudent man. In sudden emergencies a man takes the best precaution he can, and he cannot be held guilty of negligence if upon a subsequent appraisement of the situation a way out is discovered and it is found that the course taken was not the best and the adoption of some other strategy might have saved the situation or prevented the loss:

Held, on facts that due care and precaution were taken by the railway authorities in handling and protecting the consignment against mob-violence and there was no negligence on their part. The railway, under the circumstances was not liable for the loss. **(1950) ALJ 881: 1951 AWR (HC) 27: AIR 1952 All 648 (650) (Pr 8).**

——S. 72 — No knowledge of deteriorating condition of goods — Failure to convey knowledge to consignee or consignor whether want of such care as would make administration liable.

Where the Railway administration had no knowledge of the deteriorating condition of the potatoes consigned the question of the failure of the Railway Administration to convey information of the deteriorating condition of the potatoes to the consignor or the consignee is not want of such care, as would make the Railway Administration liable, assuming that conveying of such information was an obligation upon the Railway Administration. (as to which no opinion was expressed). **56 Cal WN 264: ILR (1952) 4 Assam 233: AIR 1952 Assam 140 (141) (Pr 10) (DB).**

——S. 72 — Loss caused by negligence or fraud of servants.

The four silver bars actually reached Ballia. Having reached Ballia, instead of being delivered to the person who had the railway receipts or, as the rules of the railway administration require, to a person who was prepared to execute an indemnity bond, they were delivered to a person who admittedly was not authorised to receive them, and this became possible by reason of the complicity of a servant of the railway administration who was the parcel clerk at the material time. Therefore, the loss caused to the plaintiff was entirely due to the negligence or, indeed it is much more than that the fraud practised by a servant of the railway administration. **55 Bom LR 595: ILR (1953) Bom 1301: AIR 1954 Bom 50 (54) (Pt C) (Pr 11) (DB).**

——S. 72 — Responsibility of Railway as bailee — Negligence — Absence of due and proper care — Onus of proof — (Contract Act (1872), Section 151).

Where the practice followed is that out of the three copies of all railway receipts prepared simultaneously at the forwarding station, the first copy is kept at the forwarding station, the second copy is sent to the destination station and the third copy is made over to the person booking the goods, then the whole purpose of sending a copy to the destination station is to ensure against delivery on forged receipts and if this copy is parted with before delivery of the consignment the railway can hardly urge that it had taken due and proper care of the goods as a bailee. The onus of establishing that the railway administration has lost the goods even after taking all reasonable care of them as a man of ordinary prudence lies on it. **AIR 1957 Cal 573 (575) (Pt B) (Pr 10).**

——S. 72 — Loss of consignment — Negligence of Railway followed by extraordinary cause — Question to be determined is whether Railway could have anticipated loss by extraordinary cause. **AIR 1955 NUC (Cal) 5915.**

——S. 72 — Negligence — What amounts to — (Contract Act (1872), S. 151).

Keeping a parcel of sarees near the verandah of the Railway Station without entrusting it to any person is not the manner in which any person would have dealt with his own goods in similar circumstances. The amount of care enjoined on the Railway Administration under Section 72 of the Indian Railways Act, 1890, read with S. 151 of the Indian Contract Act, 1872, cannot, therefore, be said to have been taken by the administration in respect of the parcel. The mere presence of a Railway servant on duty, on the night of theft cannot affect this inference when he had not been entrusted with the parcel. **1957 MPC 430: 1957 MPLJ 636: 1957 Jab LJ 873: AIR 1957 Madh Pra 192 (192) (Pt A) (Pr 4).**

——S. 72 — Railway receipt to 'self' endorsed in favour of another for delivery — Railway receipt falling into hands of third party who erased the endorsement and pasted a white paper over it and took delivery by making another endorsement — Negligence of Railway in delivering coonsignment without taking indemnity or even address of the person in the suspicious circumstances — Liability of Railway to the real owner.

Where a railway receipt for goods consigned to self and endorsed for delivery to a named person bore marks of scraping the endorsement over which a white paper was pasted and on it a fresh endorsement in favour of a stranger had been made on the strength of which the Railway Authorities delivered the goods to such stranger, without taking an indemnity or even ascertaining his address.

Held, the conduct of the officer of the Railway Department in so delivering the goods was grossly negligent and the Railway Department would therefore, be liable to reimburse the owners of the consignment for the loss sustained by them. **(1964) 1 Mad LJ 255: 77 Mad LW 114.**

——Ss. 72, 76 — Negligence — Proof.

Where the question of inflammable material is left unattended by the Railway Administration particularly when the value of the goods is in the neighbourhood of 2 to 3 lakhs of rupees, that in itself constitute negligence. **1951 Nag LJ 470: ILR (1952) Nag 10: AIR 1951 Nag 357 (2) (359) (Pt C) (Pr 13).**

——S. 72 (Old) — Liability of railway as bailee — Negligence — (Ss. 72 to 78-B substituted for Ss. 72, 72-A, 73, 74, 74-A; 74-B, 74-C; 74-D, 74-E, 75, 76, 77 and 78 by the Amendment Act (39 of 1961) w.e.f. 1st January, 1962).

Where a consignment of dye-stuff is carried at Railway risk rate the railways are liable as bailee. The Railways will be held to have been negligent if they, when the goods reach the station of destination, leave the consignment on open platform during rainy season in the month of August. **(1963) 29 Cut LT 193.**

——S. 72 — Negligence.

Where the consignments are overcarried due to the negligence of the staff of the railway administration, it is for the administration to take proper steps either by procuring a permit or in any other way that could be possible to rebook the consignments to the proper station to be delivered to the consignee and if the administration fails to do that it cannot escape its liability on the ground that the consignee failed to procure the permit. **AIR 1955 Pat 138 (140) (Pt B) (Prs 9, 12) (DB).**

——S. 72 — Events resulting in frustration, such as could be foreseen — Contract does not become void — Consignment of goods during riots of August, 1947 — Consignment not reaching destination — Railway held could not claim frustration. See Contract Act (1872), S. 56. **AIR 1955 Pepsu 51 (DB).**

——S. 72 — Negligence of servants — Responsibility of Railway.

It is not open to the defendant (Railway) to say that it is not responsible for the neglect and default of its servants. **ILR (1954) Patiala 563: AIR 1955 Pepsu 51 (57) (Pt D) (Pr 10) (DB).**

——S. 72 — Negligence — Consignment of cloth bales — Wagons having only rivets on either side without locks — Bales heavy — Rivets liable to give way due to pressure of bales from inside — Rivets actually giving way and bales falling out of the way — Failure to put locks is failure on the part of Railway to take care of goods as a bailee as required by S. 151, Contract Act and amounts to wilful neglect. AIR 1926 Oudh 218; AIR 1930 Lah 37, Rel. on. **ILR (1960) 10 Raj 1359: 1961 Raj LW 148: AIR 1961 Raj 211 (212) (Pt A) (Pr 6) (DB).**

16. Proof of negligence.

■ **——S. 72 (as it was prior to amendment in 1961) — Contract Act (1872), S. 151 — Responsibility of railway as carrier of goods — Railway protection police specially deputed to protect goods in transit — No evidence given as to extent of precaution taken by protection police — Held loss of goods in transit was due to negligence of railway administration.**

The responsibility of the railways under S. 72 of the Railways Act is subject to the provisions of S. 151 of the Contract Act. Section 151 states that in all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods, bailed. It must be taken to be the duty of the railway protection police to get out of the guard's van whenever the train stops, be it at the railway platform or at any other place. In fact, the necessity to get down and watch the train when it stops at a place other than a station is greater than when the train stops at a Station where at least on the station side there would be some persons in whose presence the miscreants would not dare to tamper with any wagon and any tampering to be done at a station is likely to be on the off side.

Held, that the loss of goods in transit took place due to the negligence of the railway servants and, consequently, of the railway administration. Union of India v. Udho Ram and Sons, **1963 SCD 39: 1963 All WR (HC) 105: (1963) 2 SCJ 183: (1963) 2 SCR 702: (1963) 2 Mad LJ (SC) 67: (1963) 2 An WR (SC) 67: 1963 All LJ 101: AIR 1963 SC 422 (423, 424) (Prs 8, 9, 10).**

——S. 72 (as it stood prior to amendment in 1961) — Damage not attributable to defective condition of goods or defective packing — Liability of Railway — Onus of proof — Railways Act (1890) (as amended in 1960), Ss. 73, 77-C.

Where the damage cannot be attributed either to the defective condition of the goods or the defective packing of the goods, the primary onus of a bailee to show that he had taken such care of the goods as a man with ordinary prudence would take in the case of his own goods must be discharged by the railway administration for denying relief to the plaintiff.

The proved facts were that there was no evidence to show the condition of the wagon at the time of loading and the only evidence in the case was that the wagon was leaking when delivery was given. There was also no evidence to show that the damage which was caused to the two bales of cloth was due to defective packing:

Held, that, under the circumstances mentioned above, a presumption of negligence and misconduct on the part of the railway administration could be made and the railway administration was liable for damages. **1962 All LJ 733: 1962 All WR (HC) 683: AIR 1963 All 1 (2) (Prs 6, 7).**

——S. 72 (as it stood before the Amendment Act (39 of 1961))—Contract Act (1872), Ss. 151, 152 and 161 — Loss of goods in transmission—Liability of Railway Administration — Measure and extent of — Test — Onus to disprove negligence — Railway authorities taking all reasonable care — Consignments looted by unruly mob under circumstances beyond control — Held in the circumstances that Railway Administration had exonerated itself from liability — Rule 237 of the Rules framed under S. 47 (1) (f), Railways Act held had no application — Evidence Act (1872), Ss. 101-104 — Carriers.

Section 72 contains the measure of general responsibility of the Railway Administration for the

loss of or damage to goods made over to them for transimission. It is not an unqualified liability. The responsibility is measured by the test formulated by S. 151 of the Contract Act. The Railway administration can claim immunity if it can prove that it had taken such care of the goods entrusted to it which a reasonable man or a man of ordinary prudence would have taken. Indisputably, the onus is on the Administration to prove that it was not negligent, i.e., it had not omitted to do anything which a reasonable man would do, or did not do something which a prudent and reasonable man would not have done. But when once it is able to establish that everything that is possible had been done in regard to the consignments that were made over to it for carriage, it absolves itself from all reasonability. AIR 1918 Cal 892; AIR 1952 All 648; AIR 1951 Pat 382, Rel. on.

Certain consignments booked at various stations for different destinations had arrived on different dates at Bezwada which is one of the biggest junctions and the most important station for purposes of railway operations. Some of the consignments were kept, in wagons and some were on the transhipment platform for loading. On 15-12-1952 Sri Potti Sriramulu passed away. When the news of his death was broadcast next morning, the whole population of Bezwada and neighbouring villages began looting goods kept at the Bezwada Railway Station. In the circumstances there was non-delivery of the entire consignments in some cases and short delivery in other cases. In the actions brought by the plaintiffs for recovery of the loss of their goods:

Held, that the railway had satisfied the test laid down by S. 151 of the Contract Act and come within the protection of S. 152. In the situation as could be seen the Railway Administration could not have anticipated the trouble and guarded against it. They had taken not only reasonable steps but all possible measures they could.

There was no dereliction of duty on the part of the authorities in keeping the goods on the transhipment platform instead of in goods shed as required under R. 237. In the instant case there was no evidence to show that there was accommodation in the goods-shed.

The alleged negligent act was not followed by injurious results as a natural and probable consequence, but by the occurrence of something abnormal which could not have been foreseen and guarded against. The proximate cause for the loss was the looting by the violent mob and not the alleged negligent act which constituted only a remote cause. In the circumstances, the railway administration had exonerated itself from the liability in regard to the goods that were kept on the transhipment platform. 1920 AC 956; 19 Law Ed 909; AIR 1918 Cal 892: AIR 1948 Pat 345, Appld. **(1964) 2 Andh WR 171: (1964) 2 Andh LT 208: AIR 1964 Andh Pra 477 (480 to 484) (Prs 17, 20, 21, 33, 40, 41, 52) (DB).**

——S. 72 — Onus to prove bailment — (Evidence Act (1872), Ss. 101 to 104, 106).

A railway administration, under S. 72, has the responsibility of a bailee if that responsibility is not reduced by any valid contract. If the liability of a bailee is sought to be enforced under the Railways Act, the plaintiffs have to show first that the administration was the bailee. The onus to prove the fact would be on them. It will be for the bailee to prove that he took as much care of the goods as any prudent man would do in case of similar goods. But the onus of proving bailment would necessarily be on the plaintiff under S. 72. Therefore, reliance cannot be placed on the provisions of S. 106, Evidence Act, which is of general application. **ILR (1957) 9 Assam 1: AIR 1959 Assam 98 (101) (Pt F) (Pr 9) (DB).**

——Ss. 72, 74-C (3) (as inserted in 1949) — Scope — Goods consigned at owner's risk rates — Loss or damage in transit — Consignor must prove negligence or misconduct on part of railway.

Where the goods are consigned at owner's risk rates, under sub-section (3) of S. 74-C, the railway is not responsible for the loss, destruction or deterioration of or damage to the goods unless the plaintiff proves negligence or misconduct on the part of the railway or any of its servants.

Under S. 74-C there must be some distinction in the case of damage sustained to goods in transit by some external agency and damage sustained because of any inherent defect or weakness in the goods themselves. AIR 1959 Pat 473, Rel. on; AIR 1951 Pat 382 and AIR 1960 Bom 344 and AIR 1960 Raj 121 and AIR 1960 Mad 149, Dist. **1960 Nag LJ 468: 63 Bom LR 44: ILR (1960) Bom 841: AIR 1961 Bom 130 (131, 132) (Prs 5, 6, 9).**

——S. 72 — Goods carried during monsoon season at owner's risk — Goods damaged due to rain water — Railway failing to show that it had provided rain-proof wagons — Negligence and misconduct on the part of Railway proved. See Railways Act (1890), S. 74-C. **AIR 1960 Bom 344 (DB).**

——S. 72 — Want of care or negligence on defendant's part — Burden of proof — (Evidence Act (1872), Ss. 101 to 104).

Where the defendant has placed all material evidence and there is no failure on the defendant's part then upon such materials as have been produced by the defendant it is incumbent upon the plaintiff in order to establish liability on the defendant that there was want of care or that there was negligence on the part of the railway authorities or their servants and agents. **ILR (1960) 2 Cal 597: AIR 1960 Cal 458 (462) (Pt F) (Pr 23).**

——Ss. 72, 76 — Liability of railway — Loss of goods — Goods booked at Railway Risk — Onus of proof.

The responsibility of the railway administration in respect of goods booked at railway risk is that of a bailee under Section 151 of the Contract Act. The railway administration is liable for the loss, destruction, etc., if it happens by its default or negligence. It is not for the plaintiff to prove, in the first instance, as to how it happened.

The burden of proof of the issue as to negligence ultimately rests with the plaintiff. The plaintiff has to satisfy the Court that the defendant was negligent but the duty of showing how the consignment was dealt with during transit lies on the railway administration, as a matter within its special knowledge. If the defendant does not adduce all the evidence at its command plaintiff may, in proper cases, ask the Court to make a presumption under S. 114 (g), Evidence Act and to come to the conclusion that the evidence which has been withheld, would have gone against the defendant. **98 Cal LJ 106: ILR (1957) 2 Cal 649: AIR 1957 Cal 190 (194, 196) (Pt A) (Prs 19, 20, 29).**

——S. 72 — Contract Act, S. 151 — Consignment booked at owner's risk — Consignment

reaching destination safely — Goods damaged later on — Railway administration to act as bailee — Negligence of railway administration proved — Railway administration liable to pay damages. AIR 1963 SC 422, Rel. on. and AIR 1948 Nag 65, Foll. **1965 MPLJ (Notes) 138.**

——Ss. 72, 74-A — Suit against Railways for damages caused by breaking of brittle goods — Defective packing — Fact not recorded in forwarding note — Section 74-A not applicable — Consignment is at Railway risk — Railway is responsible as bailee — Onus to prove discharge of responsibility is on Railways — Onus discharged — Fact whether plaintiff had apprised Railways that goods were brittle not known — Onus to prove if shifted to plaintiff — Evidence Act (1872), Ss. 101 to 104.

Railway Administration is not entitled to the protection from liability granted to it under Section 74-A in a case where the damage to the goods tendered for carriage to it arises as a result of a defective packing, if the fact of such defective packing has not been recorded in the forwarding note.

Where the goods are booked not at the owner's risk; but at the Railway risk and Section 74-A is inapplicable the burden will lie on the Railway administration to establish that it discharged its responsibility as a bailee properly as required by Section 72; and if the Railway administration fails to establish that fact, it will be liable for the damage to the goods.

Where, however, from the evidence on record it is established that the Railway administration took proper care of the goods as a bailee, but it is not known whether the consignor had apprised the railway authorities of the fact that the goods were brittle and that special care had to be taken during transit, the burden will again shift on the plaintiff to establish that although he apprised the Railway administration of the fact that special care was to be taken of the brittle goods, the servants of the railway administration did not take proper care. **1963 Jab LJ 603.**

——S. 72 — Risk Note A — Loss not due to condition of packing but by fire — Liability of Railway.

Risk Note A applies to goods which are either in bad condition or liable to damage, leakage or wastage, due to bad condition of packing. The Clause (a) in Risk Note 'A' provides that the Railway Administration is free from all responsibility for he condition in which the goods are delivered to the consignee at the destination, and also for any loss arising from the same. Where the loss or damage is due to fire and there is no evidence and no suggestion that the destruction of goods by fire was due to the condition of packing and the loss has been caused by the introduction of some external factor to the goods contained in the closed wagon, to such a situation as this, the benefit of Risk Note 'A' does not attach and it does not confer immunity from liability for the loss caused by fire. AIR 1924 All 760 and AIR 1924 All 8 and AIR 1928 Lah 166 and AIR 1951 All 438 and AIR 1950 Cal 394 and AIR 1952 Cal 285, Rel. on. **1961 MPLJ 484: 1961 MPC 302: 1961 Jab LJ 608: ILR (1961) Madh Pra 277: AIR 1961 Madh Pra 251 (253) (Pt A) (Prs 7, 9) (DB).**

——S. 72 — Responsibility of railway — Goods destroyed by fire — Negligence — Proof — Presumption from not producing records.

Under Section 72 the liability of the railway is only that of a bailee under Sections 151, 152 and 161 of the Contract Act. In its position of a bailee, the railway is bound to take as much care of the goods delivered to it for carriage as a man of ordinary prudence would take of his own goods of the same bulk, quality and value as the goods bailed. The Railway Administation cannot be expected to take extra-ordinary care of the goods. Loss or damage to goods entrusted to a bailee is prima facie evidence of negligence on his part and the burden of proof, therefore, to disprove negligence lies on him.

Where it is really a case of one honest party, the consignor, being saddled with loss by an accidental fire claiming loss from another honest party the loss must fall where it is suffered and cannot be allowed to be recovered from the other side. AIR 1958 Mad 179, Rel. on.

No presumption of misconduct on the part of the Railway servants can be drawn from the mere fact that the goods which are not of a nature which are spontaneously combustible, had caught fire in a closed wagon. AIR 1952 Cal 384, Rel. on. **1961 MPLJ 484: 1961 MPC 302: 1961 Jab LJ 608: ILR (1961) Madh Pra 277: AIR 1961 Madh Pra 251 (253, 255) (Pt B) (Prs 10, 13, 14, 15) (DB).**

——S. 72 — General liability of railway — Proof of negligence— (Contract Act (1872), Sections 151, 152).

In the absence on any risk note, the liability of the Railway is that of a bailee. The burden of proving negligence on the part of the servants of the carrier is on the plaintiff. In the absence of evidence of want of due diligence, the mere fact that great damage was done to the goods cannot raise an inference of negligence, when it could be caused in the long course of the journey on account of natural forces. **1957 Jab LJ 331: 1957 MPLJ 153: AIR 1957 Madh Pra 157 (159) (Pt D) (Pr 10) (DB).**

——Ss. 72 and 74-A — Goods consigned at owner's risk — Duty to take care — Onus of proof of negligence.

The measure of responsibility of bailees to take reasonable care of the goods entrusted to them applies to the Railway Administration in this country. It is, of course, open to the Railway Administration under Section 72 of the Railways Act to delimit their responsibility by a special contract, where goods are sent at owner's risk. Section 74-A of the Act casts the onus of proof of negligence or misconduct on the part of the railway on the plaintiff only in two cases, viz., when the goods are in a defective condition as a result of which they are liable to deteriorate and where the packings of the goods are defective. In all other cases the primary onus of a bailee to show that he has taken reasonable care of the goods, is on the railway. **(1959) 2 MLJ 365: 1959 Mad WN 489: 72 Mad LW 464: AIR 1960 Mad 149 (153) (Pt A) (Pr 14) (DB).**

——S. 72 — Negligence — Burden of proof — Loss due to fire in goods-shed — (Evidence Act 1872), Ss. 101-103).

Where the consignees of railway receipts sued the Railway Administration for damages for the loss sustained by them in respect of their consignments as a result of the fire which gutted the railway goods-shed.

Held, that in so far as the liability of the Railway Administration is concerned they are liable not as common carriers but as bailees and they are required to take through their servants and employees such care of the bailed goods as

they were expected to take of their own goods of the same bulk, quality and quantity. The law does not cast any burden upon the Administration to establish positively how the fire occurred and prove an absence of negligence on their part but a duty is cast on the Administration to lay all the materials concerning the occurrence before the Court. But even so it remains for the consignees to satisfy the Court that the true inference from the materials is that the carrier's servants have not shown due care, skill and nerve. AIR 1917 PC 173, Rel. on. **1956 Nag LJ 595: 1956 MPLJ 75: ILR (1956) Nag 506: AIR 1956 Nag 255 (255) (Pt A) (Pr 3) (DB).**

——Ss. 72, 74-A (2) (prior to the Amendment in 1961) — Tins of oil consigned for transport damaged in transit — Tins not packed according to instructions issued by Railway — But special caution label 'not to be loose shunted' pasted to wagon — Possibility of damage caused by rough and loose shunting not ruled out — Both parties are negligent — Damages should be equally apportioned. **ILR (1962) Cut 481: 28 Cut LT 380: AIR 1963 Orissa 41 (42) (Pr 2) (DB).**

——Ss. 72, 74-C — Responsibility of Railway as bailee — Duration of liability — Loss or damage — If prima facie proof of negligence.

The liability of the Railway Company as bailee is limited to the period of transit or carriage of the goods with the addition of a reasonable period of time for loading the goods and a reasonable period of time (namely, twenty four hours) which is to be given to the consignee to take delivery, and does not extend to any period beyond this time. 54 Cal WN 902, Relon; AIR 1934 Cal 151 and AIR 1955 Cal 264 Distinguished.

Further, in a case governed by Section 74-C, it is erroneous to hold that the loss or damage of goods is prima facie proof of negligence on the part of Railway administration.

Thus where no evidence has been adduced by the consignee firm to show that the deterioration of the goods was due to any negligence on the part of the Railway Administrations, nor is there any proof that the consignment was booked at railway risk, there is no liability on the Railway Administrations as carrier. AIR 1959 Pat 473, Rel. on.

Held, further, that there could be no fresh bailment as no wharfage was in fact paid on the goods in question. **AIR 1960 Pat 571 (573) (Prs 11, 12).**

——Ss. 72, 74-A and 74-C — Loss or damage — Burden of proof of negligence.

When the statute requires proof of negligence, misconduct, etc., for the liability for the loss, destruction deterioration, leakage, etc., to hold that the loss or damage is prima facie proof of negligence is to make the entire effect of Sections 74-A and 74-C nugatory. Hence lies the importance of the qualifying, words, "subject to the other provisions of this Act" occurring in Section 72 of the Railways Act.

Where the consignment was not tendered to the Railway for carriage packed according to the tariff rules contemplated by Section 74-A of the Railways Act and the consignment was on transit for nine days, it is necessary for the plaintiff to put materials before the Court to prove negligence or misconduct on the part of the Railway administration or of any of its servants. **1959 BLJR 134: AIR 1959 Pat 473 (474) (Pr 6).**

——Ss. 72 and 76 — Proof of misconduct — Risk note casting duty of disclosure in case of non-delivery — Discharge of duty. See Railways Act (9 of 1890), S. 76. **AIR 1957 Pat 475 (DB).**

——S. 72 — Risk Notes Forms A and B— "Misconduct" — Meaning of — Whether misconduct is established depends on facts and circumstances — Breach of standing order No. 163 (a) — Effect of — Inference of legal misconduct from proved facts — Question of law and mixed question of law and fact — (Civil P. C. (1908), S. 100) — (Words and Phrases).

Any and every omission of duty, or want of care, on the part of the servants of the railway administration does not amount to misconduct Non-observation of, or non-compliance with, any duty or order, no doubt amounts to "negligence", but "negligence" is not the same thing as "misconduct". Misconduct is something more than mere negligence. It is the intentional doing of something which the doer knows to be wrong, or which he does recklessly not caring what the result may be. Misconduct, as such, means "wilful neglect", and, amounts to malfeasance, as opposed to non-feasance. Therefore, a breach of Standing Order No. 163 (a) a priori will not necessarily amount to "misconduct" on the part of the Railway Administration's servants within the meaning of Risk Note Form A or Risk Note Form B. Whether in a particular case, such breach will amount to "misconduct" within the meaning of Risk Note Forms A and B, or not will very largely depend on the facts and circumstances of each particular case. Case law reviewed.

It is true that an inference of legal misconduct from proved facts and circumstances is a question of law which can be agitated in second appeal but the question whether misconduct has been established or not depends on the facts and circumstances of each case, and, it is not possible to lay down any handy formula which can apply to all cases.

The plaintiff-appellant consigned 71 bags of potates at Bhagalpur Railway Station on 2nd November, 1942, for being despatched to Patna City. These consignments reached Jamalpur from Bhagalpur on 7-11-1942 and were despatched from Jamalpur on 8-11-1942, arriving at Patna City on 11-11-42. The District Judge found that there was no delay, much less unreasonable delay, in transit from Jamalpur to Patna City. He, however, found that there was some delay in the transit of the potatoes from Bhagalpur to Jamalpur, but the delay was not unreasonable, because the delay in despatching the consignments from Bhagalpur to Jamalpur was due to great congestion in the railway yard due to War. He, therefore, found that the unexplained delay of a few days in transit by railway from Bhagalpur to Jamalpur was not due to mismanagement, or unbusinesslike conduct, tantamount to misconduct, on the part of the Railway administration's servants. He therefore, held that the loss to the plaintiff had not been proved to have been caused due to misconduct on the part of the Railway Administration's servants. In the second appeal an argument was put forward that Standing Order No. 163 (a) had not been complied with and therefore, its non-compliance and non-observance amounted, in law, to "misconduct" on the part of the Railway Administration's servant.

Held, that (i) it could not be said that a legal inference of misconduct could be drawn from the mere finding of the Court of appeal below

that there was some delay in the transit of potatoes from Bhagalpur to Jamalpur, particularly when he definitely found that the delay of six days in transit was not due to mismanagement, or unbusinesslike conduct tantamount to misconduct on the part of the Railway Administration's servant.

(ii) It could not be said on the finding of the District Judge that the legal inference of "misconduct" could be drawn in law from the mere violation of Standing Order No. 163 (a)

(iii) further, the question whether non-observance of Standing Order No. 163 (a) amounted to misconduct or not, was not raised either in the plaint, or before any of the two Courts below at all. As the question whether on the facts of a particular case, it would amount to misconduct or not was a mixed question of fact and law, the appellant could not be allowed to agitate this point in a second appeal, or ask for a remand for giving a finding on that question. **1957 BLJR 451 (Pat).**

——S. 72 — Proof of negligence — Loss or damage of goods consigned is prima facie evidence of negligence — Contract Act (1872), Sections 152, 161.

Loss or damage of goods entrusted to a bailee is prima facie evidence of negligence; the burden of disproving negligence lies on the bailee, and this burden lies also on a railway administration in the absence of a special contract to the contrary. **ILR 29 Pat 170: AIR 1950 Pat 215 (220) (Pt D) (Pr 6) (DB).**

——S. 72 — Negligence.

It is a well-known rule of law that when damage is caused by an article which is under the control or management of the defendant and the occurrence is one which does not happen if due care has been taken, the damage speaks for itself (res ipsa loquitur) and is prima facie evidence of negligence. Although this doctrine does not shift the burden of proof from the plaintiff to the defendant, it certainly establishes a prima facie case against the defendant and places an obligation on him to show that the damage was not due to his want of care.

Hence where a consignee brings a suit against the railway administration for damages on account of the negligence of the Railway administration and the goods were consigned at Railway's risk, the explanation by the Railway administration that the damage was caused by the rain water carried into the wagon through flap doors by strong winds cannot exonerate it from blame or exculpate it from the charge of negligence. **(1956) 58 Pun LR 447: ILR (1956) Punj 1245.**

——S. 72 — Suit aginst railway for loss of goods — Pleadings of both parties not placing reliance on section 74-C — Both, plaintiff and defendant contesting on basis of ordinary liability of bailee — Court held rightly placed burden to disprove negligence on defendant railway. See Railways Act (1890), S. 74-C. **AIR 1963 Raj 162.**

——S. 72 — Proof of negligence — Marble statute worth Rs. 9,000, wrapped in grass and gunny bags loaded in open wagon — Damaged by fire — Railway as bailee did not act with prudence in packing the thing in combustible articles in open wagon. **AIR 1955 NUC (Raj) 289 (DB).**

17. Wilful neglect.

See also Note 15.

——S. 72 — Wilful negligence — Wagon sealed and riveted but not locked — There is no negligence.

Failure to lock a wagon does not constitute wilful negligence when the wagon is properly sealed and riveted. AIR 1929 Nag 315 and AIR 1928 Lah 837, Rel. on. **('52) 1952 Nag LJ (Notes) 129.**

18. What ought to be proved by railway.

See also Note 4.

——S. 72 — Risk Note B — Non-disclosure of information prior to filing of suit — Presumption under S. 114, Illus. (g), Evidence Act, if can be raised — (Evidence Act (1872), S. 114, Illus. (g)).

The omission of the Railway administration to disclose to the plaintiff as to how the consignment was dealt with throughout the time it was in its possession or control before the filing of the suit would not necessarily lead to the raising of presumption under S. 114, Illus. (g), Evidence Act. The object of furnishing this information is to obviate, if possible, the necessity for litigation. If the Railway Administration fail to comply with the earlier part of its obligation, it has to lead evidence to indicate to the parties affected as to how the consignment was dealt with while it was in its control. Before the consignor or consignee could be required to show that the Administration or its servants have been guilty of misconduct or gross negligence, this initial burden has to be discharged by the Administration. It is only after this that the consignor will have to prove that the administration would not be entitled to the protection afforded by the Risk Note as it was guilty of misconduct. AIR 1937 PC 152, Discussed and Dist.; AIR 1927 Mad 908 and AIR 1938 Mad 206, Dist. **1956 Andhra WR 994: AIR 1957 Andh Pra 958 (959, 960) (Pt B) (Prs 10, 13).**

19. Proof of loss.

——Ss. 72, 73 and 76 — Liability for loss — Burden of proof.

A consigned 201 bags from a station on the S. S. Light Railway to Gauhati on the Assam Rly. and endorsed the railway receipt to B. B. alleging non-delivery of the goods brought a suit for the value of the goods against the Union of India.

Held, in view of the fact that evidence had been adduced by both the parties the question of burden of proof was not very important. The plaintiff had accepted the position as deposed to by his witness that the article passed to E. Bengal Railway and therefore, the burden no longer lay on the defendant to prove the transfer of the goods. It would no doubt have been better if the Railway authorities had come with the books in their possession to show the actual transfer of the article to the E. Bengal Railway and the subsequent non-receipt of the same by the Assam Railway. However, it must be accepted that the article was delivered to the Pakistan Railway as a matter of fact and that they were not subsequently received by the Assam Railway. Since it was not established that the article was lost when it was on the Union Railways, it could not be held that the Union of India was liable as a bailee. **ILR (1956) 8 Assam 337.**

——Ss. 72 and 77 — 'Loss' — Non-delivery of portion of consignment — If loss.

The interpretation of the word 'loss' as used in S. 72 must be applied to the word as used in S. 77, as both these sections form part of the scheme of the legislature as regards the liability of the railway administration as carriers.

The position in law is that if the non-delivery of a portion of the consignment in a case is due to the fact that the railway involuntarily or through inadvertence lost possession of the goods and was unable to trace them, it would be a case of loss within the meaning of S. 77. The mere fact that something was not delivered e.g., a part of the consignment, is not sufficient to show that there was loss within the meaning of S. 77. **AIR 1958 Cal 434 (436) (Pt B) (Pr 9) (DB).**

——**S. 72** — Goods sent by railway — No Risk Note signed — Loss in transit — Burden of proof. See Evidence Act (1872), S. 106. **AIR 1956 Hyd 193.**

——**S. 72 (before its amendment in 1961) — Applicability.**

In order to succeed on the basis of S. 72 of the Railways Act, the consignee should not merely show that there was a loss of the goods entrusted to the carrier, but that the loss was due to the fact that the carrier had failed to take as much care of the goods bailed as a man of ordinary prudence would. **78 Mad LW 566: (1965) 2 Mad LJ 460: ILR (1965) 2 Mad 599.**

——**Ss. 72 and 75 — Respective scope — Liability of Railway for loss of part of the goods — Consigned — When arises.**

Section 72 of the Railways Act no doubt imposes an absolute liability on the Railway administration for loss, destruction or deterioration of goods delivered to them as carriers and subject to the provisions of the Act, the responsibility of the Railway is that of a bailee under the provisions of the Contract Act. In order to sustain a claim under this provision the plaintiff should not only prove the loss or deterioration of the goods entrusted to the carrier but should also prove that the carrier failed to take as much care of the goods bailed as a man of ordinary prudence would. But S. 75 of the Railways Act is of special application. The whole purpose of the section is that the Railway should be informed of the special value of the goods entrusted for carriage and therefore, of the additional risk of the Rly. in consideration of which a higher charge is required to be paid. The section will cover also partial loss of goods contained in any parcel or package of the specified type. It will be defeating the very purpose of the section if it is held to apply only in cases of total loss of the entire goods consigned and not to cases where only a part of the goods is lost. But the section could be invoked only if the declaration is made according to its provisions. **78 Mad LW 566: (1965) 2 MLJ 460: ILR (1965) 2 Mad 599.**

——**Ss. 72 and 75 (prior to amendment in 1961)** — Applicability — Non-delivery of article — Liability of railway — "Loss" of article — Proof — Mere statement of Railway that article remained untraced — Not sufficient — See Railways Act (1890), S. 75. **1963 Mys LJ (Supp) 105.**

——**S. 72 (prior to its amendment by Act 39 of 1961)** — Goods carried at owner's risk — Damage to goods in transit — Suit for damages — Evidence to show how goods are dealt with in course of transit — Burden of proof. See Railways Act (1890) (prior to its Amendment by Act 39 of 1961), S. 74-C (3). **AIR 1964 Punj 147 (DB).**

20. Estoppel.

——**S. 72** — Estoppel — Consignor signing Risk Note A — He cannot deny defective packing in a suit brought by him on the basis of that contract. 32 Cal WN 53; AIR 1931 Cal 489; AIR 1949 Cal 679 and 55 Cal WN 251, Followed. **ILR (1953) Punj 362 : AIR 1953 Punj 83 (86, 87) (Pt B) (Prs 19, 32) (DB).**

21. Rules.

——**Ss. 72 and 74-A — Applicability — Goods Tariff Rules, R. 47 — Goods dispatched to one station — Consignor asking railway to rebook to another destination — Railway, sending goods to Lost Property Officer — Suit for compensation for loss — Maintainability.**

Under R. 47 where a consignor has booked the goods for one station, it is open to him to re book the goods to any other station provided that he forwards with his application the original railway receipt with sufficient money and stamps to enable the station master to post a reply and the re-booking railway receipt under a registered cover to him. Under Rule 47, the fact that packages were in damaged condition, is no ground for refusal by the Railway for re-booking the goods.

Section 74-A applies only to the stage when the goods are initially tendered for being consigned. Where the goods had already been tendered and the consignor had subsequently directed that the goods be re-booked and forwarded to another station from the station to which they were consigned, S. 74-A has no application. If in such a case, the railway fails to re-direct the goods but sends them to the Lost Property Office on the failure of the consignor to take delivery, the railway is liable for the loss sustained by the consignor. **1957 All LJ 967.**

——**Ss. 72, 47 and 74-A** — General Rules for Acceptance, Carriage and Delivery of Goods, Rr. 31 (2), 47 — Rules relating to Report of Damages, Deficiencies or Loss of Goods, Paras 161-I and 161-II — Part of consignment damaged — Railway is bound to give open delivery — Damaged consignment in custody of railway, to be given open delivery of — Destruction by fire — Liability as bailee — Railway is liable. See Railways Act (9 of 1890), S. 47. **AIR 1963 Andh Pra 415.**

——**Ss. 72, 47 (1) (f)** — Rules for Wharfage, R. 3 — I. R. C. A. Goods Tariff No. 28, R. 30 (2) — Validity — Consignment lost from railway warehouse after expiry of time allowed for delivery free of wharfage — Wharfage charges recovered — Liability of Railway for damages for loss — (Rules for wharfage R. 3) — (I. R. C. A. Goods Tariff No. 28, R. 30 (2)) — (Contract Act (1872), Ss. 151, 152 and 161). See Railways Act (1890), S. 47 (1) (f). **AIR 1959 Andh Pra 84.**

——**S. 72 — Scope — Rules under S. 47 (1) (f), R. 2 — If inconsistent.**

The Railway administration really accepts the goods for despatch on the dates on which the weights of the different consignments are noted on the notes. The liability of the Railway in respect of the consignments, therefore, really commences on the dates which appear on the forwarding notes and not on the dates on which railway receipts are granted.

The word 'delivered', occurring in S. 72, Railways Act, refers merely to a physical event and is devoid of any legal significance and restriction of liability created by S. 72 and by any rule

framed under S. 47 cannot be accepted as valid. In this view, R. 2 of the Rules framed under S. 47 (1) (f) of the Railways Act, under which goods will in all cases be at owner's risk until a receipt in the prescribed form has been granted and duly signed by an authorised railway servant, is inconsistent with S. 72 which defines the liability of the railway and is therefore, ultra vires of the Railways Act. ILR 31 Cal 951 and AIR 1932 Cal 257, Foll. **AIR 1959 Cal 400 (401) (Pt A) (Prs 3, 4) (DB).**

——**S. 72** — Rules for wharfage, R. 3 — Termination of carrier's liability — Warehousing of goods by railway — Wharfage charges recovered — Contract of bailment is created. 42 All 655: 7 Lah 370, Dissented from. See Contract Act (1872), S. 151. **AIR 1955 Cal 264 (DB).**

——**S. 72** — Non-observance of condition relating to protection of goods consigned — **Held,** even if such a condition in the Goods Tariff cannot be availed of by the Railway for repudiating its liability, it would be possible for it to urge that non-compliance with that condition by consignor would at least amount to such negligence on his part as would preclude him from holding the railway administration liable for any loss caused by it. **36 Mys LJ 216: ILR (1957) Mys 407: AIR 1959 Mys 90 (93) (Pt B) (Pr 22).**

——S. 72 — Liability of Railway — Delay by consignees in taking delivery — Railway if free from all responsibility — Goods Tariff, Part 1-A, Item 8, R. 29 (2) — Scope of.

Even if under R. 29 (2) the Railway Administration ceased to be a bailee because of the delay by the consignees in taking delivery of the consignments, they could not by virtue of that rule, be free from all responsibility in the matter. After the lapse of reasonable time the Administration though no longer bailees, become under the rule warehousemen and as such liable for the damage caused by the negligence of their employees. **ILR (1956) Nag 506: 1956 MPLJ 75: 1956 Nag LJ 595: AIR 1956 Nag 255 (256) (Pt B) (Pr 6) (DB).**

——S. 72 — General libaility of railway — Repudiation of liability — Failure to make claim to clerk in charge — (Contract Act (1872), Section 28).

It is not open to the Railway Administration to repudiate its liability if the claim is not made immediately to the clerk, incharge and is not forwarded to the Traffic Manager forthwith in spite of the rule printed at the back of the railway receipt to that effect. The observance of this rule would be contrary to S. 28 of the Contract Act. **ILR (1953) Nag 314: 1954 Nag LJ 353: AIR 1953 Nag 169 (171) (Pt D) (Pr 14) (DB).**

——S. 72 — Burden of proof — Goods Tariff General Rules, R. 15 — Railway receipt — If conclusive — Liability of railway.

Rule 15 specifies that the railway receipt conveys no admission by the railway administration that the weight of the consignment as shown in the receipt has been received or, the description of goods as furnished by the consignor is correct. AIR 1930 Bom 262 and AIR 1953 Mad 514, Rel. on.

Unless there is evidence of the actual booking of the goods as shown in the railway receipt, the railway is not liable for short delivery where the goods are received in sound and intact condition.

A statement in the plaint is a matter of pleading and not proof nor are the statements in the notices of demand any proof of the claim on which demand is made.

It is for the consignor or consignee to adduce evidence as to the actual booking of the goods as the contents of the consignment were within his special knowledge. **AIR 1961 Orissa 141 (142, 143) (Prs 4, 6, 7).**

——S. 72 — Scope — Rules framed under Section 47 (1) (f), R. 31 (2) — Goods reaching destination — Unreasonable delay in taking delivery — Damage caused by rain — Railway, if absolved from liability—Rule 31 (2) is not ultra vires.

Under R. 31 (2) of the General Rules for Acceptance, Carriage and Delivery of Goods (vide Goods Tariff R. No. 29 in force from 1st June, 1954), in respect of goods not removed from railway premises at station of destination within a reasonable time, the railway is not liable in any respect for any loss, destruction of or damage to such goods arising from whatever cause notwithstanding that the railway may have warehouse or otherwise kept the goods and notwithstanding that the railway shall be entitled to be paid the authorised charges for goods so left on their premises. The said rule also provides that normally the free time allowed for demurrage and wharfage on railway should be considered as reasonable time for this purpose. A carrier need not warehouse the goods for the consignee or owner beyond the actual time required for serving the specific purpose and any attempt by the consignee or owner to palm off the responsibility for loss, damage or destruction to the railway administration even though the delay is attributable to the owner has to be effectively checked. Rule 31 falls within the ambit of the power conferred on the Government to frame rules under S. 47, sub-section (1), Cl. (f). Hence R. 31 is not ultra vires the Railways Act. AIR 1959 Andhra Pra 17, Rel. on; AIR 1955 Cal 264 and AIR 1956 Nag 255 and AIR 1957 Madh Pra 192, Disting; AIR 1959 Andh Pra 84, Doubted.

In this case there was unreasonable delay, namely, two months on the part of the plaintiff to take delivery of goods after they reached the destination. The goods were damaged by reason of the alleged cyclonic rain.

Held, that the railway was absolved from the liability for the damage by virtue of R. 31 (2). **ILR (1959) Cut 716: AIR 1960 Orissa 103 (105) (Pt A) (Pr 5).**

——S. 72 — Damage certificate—If amounts to acknowledgment to damage.

A damage certificate states only the facts that damage had in fact been caused to the goods in transit but it does not amount to an acknowledgment of the fact that the damage was caused by negligence or misconduct on the part of the railway officers. AIR 1957 Cal 666, Foll. **ILR (1959) Cut 716: AIR 1960 Orissa 103 (107) (Pt C) (Pr 7).**

——S. 72 — General Tariff Rules, R. 15—Consignment at Railway risk — Consignment found cut or pilfered at destination — Suit for compensation for short delivery — Burden of proof.

The Railway administration, while accepting a consignment booked at railway risk and accepting the bailee's responsibility, is not entitled to take shelter under R. 15, General Tariff Rules, to say that it or its employees did not examine the condition of the bags and packages despatched at railway risk rate and, therefore, are not liable for the cut condition and the consequent short delivery of the portion of the goods despatched in the bags or packages. In a consignment which has been booked at railway risk it has got to be assumed, unless the contrary is

proved by the railway, that the bags when despatched were in a sound condition. The railway by noting in the railway receipt that the consignment was booked under 'L. U. conditions' meaning thereby that the loading and unloading were to be done by the consignor and the consignor and the consignee was not admitting either the correctness of the number of the bag and/or the weight and if the bags would not have been found cut, perhaps in such a case the railway will escape its responsibility unless it is proved by the plaintiff that at the time of despatch correct number of bags with the weight stated in the railway receipt were despatched.

It is well-established proposition of law that in a consignment booked under railway risk the condition of the consignment or the packages forming it and the consequent shortage in weight is a prima facie proof of the negligence of the bailee, that is, the Railway Administration, and it was for the Administration to discharge its responsibility by showing as to how the bags were cut in spite of taking all reasonable precaution by it as a man of ordinary prudence would have taken. **AIR 1961 Pat 473 (474) (Pr 3).**

——S. 72 — Misconduct — Coaching Traffic Rules, R. 161 — Agent having authority to take delivery only — Railway cannot re-book goods, on application of such person — (Contract Act (1872), Ss. 188, 227).

Where the consignor who was also the consignee had given authority to another to take delivery, the railway administration has no power to re-book the goods upon their reaching the destination, on an application by the person who was only authorised to take delivery. This amounts to irregularity on the part of the railway servants. Under R. 161 of the Coaching Traffic Rules whenever re-booking is done, an application is taken from the consignor or the consignee, as the case may be for that purpose, and after the re-booking of the goods, the railway receipts are sent to him under a registered cover. The proper course in such a case would be to show the agent himself as consignor and not the original person as the consignor. **ILR 37 Pat 1355: AIR 1959 Pat 337 (341) (Pt C) (Prs 15, 15a, 16) (DB).**

——Ss. 72, 47 (1) (f) and 56 — Goods Tariff General Rules, R. 31 (old R. 28) — Goods consigned to railway — Liability of railway — It does not terminate with arrival of goods at station of destination — If continues till delivery or till disposal thereof under S. 56 — Rule 28 (2) — Condition in — It is not valid.

Under the Indian law, the English notion of the carrier's liability terminating on the arrival of goods at the destination cannot be imported into India as in India railways are exempt from special liability of the insurer of goods and their liability is that of an ordinary bailee. The combined effect of Ss. 72, 47 (1) (f) and S. 56 and of the various rules framed under S. 47, indicate that the Railway's liability as bailee continues until delivery of goods at destination or until their sale under Sec. 56 or until otherwise duly discharged by an appropriate action after the arrival of the goods.

The condition laid down in R. 28 (2) (present R. 31) of the Goods Tariff General Rules that the railway is not liable in respect of any loss, destruction, deterioration and damage to such goods if the goods are not removed from railway premises at station of destination within the time allowed essentially seeks to exempt the railway from the liability as a bailee and cannot be treated as term or condition on which the Railway might warehouse or retain the goods. This condition cannot be valid as it exceeds the rule-making power of the railway and it is also inconsistent with the liability imposed on the railway under S. 72 of the Railways Act. Delay in taking delivery by itself cannot be pleaded in defence to the negligence and misconduct of the Railway employee. AIR 1943 Lah 244, Rel. on; (1958) 2 An WR 377; AIR 1959 Andh Pra 17, Dissent. from. **ILR (1962) 12 Raj 105: AIR 1962 Raj 181 (185, 187) (Prs 11, 16) (DB).**

22. Notice.

See Railways Act (1890), S. 77 (old).

23. Who can sue.

●——S. 72 — Contract Act (1872), Ss. 160 and 188 — Damage to goods in transit — Suit for damages by consignee who is commission agent — Maintainability.

A consignee, who is not the owner of the goods but to whom the goods are consigned for the purpose of sale on commission basis, is entitled to maintain the suit for loss in respect of damage caused to the goods in transit. AIR 1914 Bom 178 and AIR 1924 All 574 and AIR 1949 EP 190, Rel. on; 1954 All LJ 288; AIR 1954 All 747, **Overruled.** Dominion of India as owner of G. I. P. Railway v. Gava Pershad. **ILR (1956) 1 All 526: 1956 All WR (HC) 360: 1956 All LJ 173: AIR 1956 All 338 (341) (Pr 27) (FB).**

——S. 72 — Endorsee of railway receipt — No right to bring suit for value for shortage in delivery of goods sent by railway. See Contract Act (1872), S. 161. **AIR 1954 All 747 (DB).**

[Overruled in AIR 1956 All 338.]

——S. 72 — Who can sue.

A consignee under a railway receipt is entitled to sue the railway administration for non-delivery of the consignment so long as he has not specifically endorsed the railway receipt in favour of any other person. The mere fact that the delivery of part of the consignment has been taken by his agent on his behalf would not destroy the right of the plaintiff if there is no endorsement in favour of the agent. **1953 All LJ 55: 1953 All WR (HC) 107: AIR 1953 All 460 (461) (Pt B) (Pr 9).**

——S. 72 — Goods delivered to railway for consignment — Suit by consignor for loss by non-delivery—Consignor alleging consignee to be his commission agent — Suit not to be dismissed in limine without affording plaintiff opportunity to prove allegation.

When the goods have been delivered to Railway Company for consignment and the consignor sues for loss caused by the non-delivery of goods, definitely alleging that the consignee was his commission agent meaning thereby that the property in the goods had not passed to the consignee, his suit cannot be dismissed in limine without affording him an opportunity to substantiate his allegation that the property in the goods had not passed to the consignee; AIR 1924 Mad 517, Disting. **1949 All LJ 412: 1949 All WR (HC) 465: AIR 1950 All 89 (89, 90) (Pr 4).**

——S. 72 — Contract Act (1872), Ss. 148, 161 — Consignment of goods — Non-delivery due to negligence of Railway — R. R. in name of consignee but not endorsed in his favour — Consignor alone can sue for loss.

Looked at only from the provisions made applicable under S. 72 of the Railways Act, there

can be little doubt that the Railway accepts the consignment as a bailee only from the consignor, who, according to the definition in Section 148, Contract Act is a bailor. The Railway, therefore, under S. 161 of the Contract Act is liable for any loss occurred if the loss is due to the negligence of the Railway. The consignor therefore, is the person who can institute a suit for realising the losses which he has suffered on account of the negligence on the part of the Railway. This statutory obligation on the part of the Railway vis-a-vis the bailor would be discharged only when the losses are paid to the bailor either through the Court or outside the Court, and either to the bailor or to his representative. On principle as well as on authority, it can, therefore, be stated that the bailor can certainly sue for any loss, destruction, or deterioration of goods.

In a contract of bailment of this type, consignee is not the party to the contract. He cannot, therefore, institute any suit on the ground of breach of the contract or negligence committed by the Railway in carrying out the terms of the contract. If at all he can sue on the ground that he holds title in the goods consigned to him. That is very different than saying that the consignor who is the real bailor cannot sue at all. As far as the bailee is concerned, his responsibility under S. 161, Contract Act to meet losses is to the bailor.

In cases, however, where either the consignor or the consignee can claim and the person claiming receives the damages from the Railway Company either outside the Court, or through the Court, any payment thus made in the discharge of the claim by the Railway Company would certainly be a valid discharge as against the person who had not put his claim, and the rights of the consignor and the consignee will be settled between them. The Railway Company in any case is liable to pay the compensation because of its negligence. When it is not in doubt that the title in the goods consigned was with the consignor, the R. R. not having been endorsed in favour of the consigee, it is the consignor who alone can institute the suit. The consignee who has not had any title in the goods cannot sue in such a case. Merely because that R. R. stands in the name of the consignee without the title in goods passing to him he would not be entitled to institute the suit. AIR 1924 Mad 517, Dist.; AIR 1925 All 656 and AIR 1957 Bom 276, Rel. on. **(1965) 1 Andh WR 342: ILR (1963) Andh Pra 1250: AIR 1965 Andh Pra 263 (264, 265, 266) (Pt A) (Prs 6, 7, 9).**

——S. 72 — Consignor can sue for compensation.

The right of action to recover compensation for loss or damage to the goods ordinarily vests in the consignor. Where the plaintiff sued for compensation on the ground that the goods which he had sent to the consignee at Nasik were not received by him and the Railway pleaded that the plaintiff had no cause of action as the title to the goods had already passed to the consignee.

Held, that the consignor who was the contracting party had the right of suit. AIR 1957 Bom 276, Foll. **1962 NLJ (Notes) 18 (Bom).**

——S. 72 — Right of parties — Part of goods not delivered — Consignee suing — Railway finding goods and offering them in damaged condition — Plaintiff not bound to accept delivery. **1957 Nag LJ 573: 60 Bom LR 103: ILR (1958) Bom 453: AIR 1958 Bom 238 (239) (Pt A) (Pr 4).**

——S. 72 — Right to sue — Consignee's right — (Contract Act (1872), Ss. 2 (d) and 230).

The right of action to recover compensation for loss or damage to the goods ordinarily vests in the consignor. Where the goods lost or damaged in transit are the subject-matter of a contract of sale, the owner of the goods may, in the absence of a contract to the contrary, sue the railway administration. A consignee who is in possession of a railway receipt duly endorsed by the consignor may maintain an action for compensation for loss of the goods covered thereby, but he can do so not because he is the consignee but because he is the owner of the goods. A consignor may sue for compensation for loss relying upon the breach of contract of consignment. An owner of goods covered by a railway receipt may sue for compensation relying upon his title, and the loss of goods by misconduct of the railway administration. A bare consignee, who is not a party to the contract of consignment and who is not the owner of the goods, cannot maintain a suit for compensation for loss or damage to the goods. He has no cause of action ex contractu nor ex delicto. Normally a person who is not a party to a contract is not entitled to maintain an action for breach of that contract. That rule, is subject to certain well-recognised exceptions, e.g., a person who is not a party to a contract can sue on it if he is claiming through a party to the contract, or if he is in the position of a cestui que trust or of a principal suing through an agent or if he claims under a family settlement. A consignee does not fall within any of the excepted classes. **59 Bom LR 704: ILR (1957) Bom 647: AIR 1957 Bom 276 (279, 280) (Pt B) (Prs 12, 19, 20) (DB).**

——S. 72 — Who can sue — Liability of railway is same as bailee — Property passing to consignee on date of delivery of goods to railway — Consignor is agent of consignee who alone can sue — Consignor still owner of goods on date of delivery. He can sue, even though on subsequent date property passes to consignee — As far as Railway is concerned, contract is between it and consignor — Consignor can therefore sue. **AIR 1955 NUC (Bom) 2049.**

——S. 72 — Mere fact that consignee is a pucca Adatia does not entitle him to institute a suit for damages. See Contract Act (1872), S. 211. **ILR (1964) Guj 928: (1964) 5 Guj LR 379: AIR 1966 Guj 6 (DB).**

——S. 72 — Benefits of contract assignable — But assignee does not get right to sue — Only privy to a contract has right to sue. See Contract Act (1872), S. 37. **ILR (1964) Guj 928: (1964) 5 Guj LR 879: AIR 1966 Guj 6 (DB).**

——S. 72 — Right of consignor under railway receipt is not actionable claim and therefore not transferable. See Transfer of Property Act (1882), S. 3. **ILR (1964) Guj 928: (1964) 5 Guj LR 879: AIR 1966 Guj 6 (DB).**

——S. 72 — T. P. Act (1882), S. 130 — Goods consigned to self under Railway Receipt — Railway Receipt endorsed in favour of another — Endorsee not entitled to sue Railway merely by reason of endorsement.

Where goods are consigned to self by the consignor and the Railway Receipt is endorsed in favour of another, the endorsee cannot sue the Railway for short delivery of goods. The endorsee cannot be said to have acquired an interest in the goods by the mere fact of his being the endorsee. That interest is sufficient in law to sue the Railway, unless the endorsee has ac-

quired ownership in the goods of which he takes delivery. AIR 1947 Bom 169 and 58 Bom LR 650, Disting. AIR 1957 Bom 276 and AIR 1948 Pat 36, Foll; AIR 1944 Nag 362, Dissent from. **ILR (1964) Guj 628: (1964) 5 Guj LR 879: AIR 1966 Guj 6 (8, 14) (Pt A) (Prs 2, 3, 9) (DB).**

——S. 72 — Sale of Goods Act (1930), S. 19 — Consignor endorsing Railway Receipt to another — Property in the goods not transferred by mere edorsement.

Merely an endorsement on the Railway Receipt does not transfer the property in the goods covered by a Railway Receipt. To ascertain whether the property or any interest in the goods has or has not passed, the material question to be considered in each case is whether at the time when the endorsement was made and the railway receipt was delivered, the parties did or did not intend that the property or interest in the goods should pass. This has to be ascertained with reference to the terms of the contract by which the sale of goods took place, the conduct of the parties, and the circumstances of the case.

Held, having regard to the definite case set up by the petitioner and the events which preceded the endorsement of the railway receipt, that the petitioner had not acquired ownership in the goods represented by the railway receipt. 58 Bom LR 650, Foll.; AIR 1914 Bom 178, Disting. **ILR (1964) Guj 928: (1964) 5 Guj LR 879: AIR 1966 Guj 6 (9) (Pt B) (Pr 4) (DB).**

——S. 72 — T. P. Act (1882), S. 137 — Negotiable Instruments Act (1881), S. 13 — Sale of Goods Act (1930), S. 2 (4)—Document of title — Title to railway receipt does not pass by endorsement — Railway receipt is not a negotiable instrument.

It is true that by virtue of the definition contained in Section 2 (4) of the Sale of Goods Act, 1930, a railway receipt is a document of title to goods; yet the legislature has not used the term 'title' in the expression 'document of title to goods' in the wider sense of ownership of goods. The word 'title' is used in the limited sense of a right to receive or take delivery of the goods. A railway receipt is a document of title in this limited sense and in the absence of any provision in the Sale of Goods Act either expressly or impliedly stating that an endorsement on or a delivery of the railway receipt passes title to the goods represented thereby the proposition cannot be subscribed to that such an endorsement and delivery would pass title to the goods. A railway receipt is not negotiable instrument or a quasi-negotiable instrument. Even if the instrument were to be regarded as a quasi-negotiable instrument, it cannot be said that by mere endorsement and delivery of that instrument, not merely the right to take delivery of the goods represented thereby passes; but also the title in the goods themselves. AIR 1917 Nag 31, Dissent from. 58 Bom LR 650 and AIR 1916 PC 7, Rel. on. **ILR (1964) Guj 928: (1964) 5 Guj LR 879: AIR 1966 Guj 6 (10) (Pt C) (Pr 5) (DB).**

——S. 72 — Contract Act (1872), Ss. 160, 188 — Railway administration cannot enter into contract for benefit of third person.

It is incorrect to say that there is nothing to prevent the consignor and the railway administration from entering freely and voluntarily into a contract for the benefit of a third person. When the railway administration undertakes to give delivery to the order of the consignor or to the consignee, the railway administration undertakes the obligation, not in favour of the prospective consignee or endorsee but, the obligation is undertaken by it only for the consignor. Consequently a consignee who is not the owner of the goods but to whom the goods are consigned for sale cannot maintain a suit for loss in respect of damages caused to the goods in transit. AIR 1956 All 338 (FB); Not foll. **ILR (1964) Guj 928: (1964) 5 Guj LR 879: AIR 1966 Guj 6 (14) (Pt F) (Pr 9) (DB).**

——S. 72 (prior to amendment in 1961) —Suit against Railway — Right to maintain — Consignor alone competent — Bare consignee having railway receipt — Not competent — Contract Act (1872), Ss. 151, 152, 161 and 226. AIR 1956 All 338 (FB) and AIR 1957 Bom 276, Dist. **AIR 1962 Guj 266 (268) (Prs 6, 7).**

——S. 72 — Suit by consignee.

Where the railway receipt shows that the plaintiff is the consignee, and there is no endorsement on it in favour of another, the plaintiff is entitled to sue on it, for the non-delivery of the consignment. What agreement was between the plaintiff and other persons is not a matter with which the railway authorities are concerned. It is their duty to deliver the consignment of the plaintiff as the sole consignee. **ILR (1955) Hyd 604: AIR 1956 Hyd 30 (31) (Pt B) (Pr 3).**

——S. 72 — Sale of Goods Act (1930), Ss. 2 (4) and 27, Proviso — Consignor himself consignee — Delivery of Railway receipt to bank — Bank is agent of consignee — Unendorsed railway receipt — Purchase of, by plaintiff from agent (Bank) of consignee — Suit by plaintiff against railway for damages for non-delivery, is maintainable. See Sale of Goods Act (1930), Section 2 (4). **AIR 1955 Hyd 193 (DB).**

——S. 72 — Who can sue.

An endorsee of a railway receipt has a sufficient interest to enable him to sue on its basis. AIR 1955 Madh B 70, Foll. **Madh BLR 1955 (Clv) 396: Madh BLJ 1955 HCR 1541: AIR 1955 MB 181 (182) (Pt A) (Pr 9).**

——S. 72 — Who can sue — Right of consignee — Railway receipt is document of title — (Sale of Goods Act (1930), S. 2 (4)).

A railway receipt is a 'document of title' within the definition of the term in Section 2 (4), Sale of Goods Act, and enables the person mentioned as consignee to give a valid discharge in respect of the goods to which it relates. Hence, a consignee of goods or an endorsee of a railway receipt though he be an agent of the consignor has sufficient interest in the goods to file a suit against the railway. AIR 1947 Bom 169. Not foll. **Madh BLJ 1955 HCR 174: Madh BLR 1954 (Clv) 450: AIR 1955 MB 70 (73) (Pt B) (Pr 34) (DB).**

——S. 72 — Right of suit.

In the case of non-delivery or damage to a consignment it is either a consignor or a consignee or an endorsee of the railway receipt who alone can file a suit against the Railway administration. AIR 1957 Nag 31; AIR 1959 MP 222; 1959 MPLJ (Notes) 29, Foll. **1961 MPLJ (Notes) 93.**

——S. 72 — Last endorsee of a railway receipt — Right to sue in his own name.

A railway receipt though not a negotiable instrument, is clothed with the characteristic of negotiability and where there are a series of endorsements, the last endorsee is entitled to

sue in his own name. AIR 1957 Nag 31, Foll. **1961 MPLJ (Notes) 69.**

——**S. 72** — Who can sue— Unsigned endorsee of railway receipt— Suit by— Maintainability— (Evidence Act (1872), S. 115). **AIR 1959 Madh Pra 305 (308, 309) (Pt D) (Prs 21, 23, 25) (DB).**

——**S. 72 — Damages — Right to sue for — Assignee of railway receipt — Right of.**

The assignee of a railway receipt issued for a consignment is entitled to bring and maintain a suit on the strength of the endorsement made in his favour without any more. AIR 1957 Nag 31, Foll. **1959 MPC 341: 1959 MPLJ 701: 1960 Jab LJ 985: AIR 1959 Madh Pra 276 (278) (Pt A) (Pr 9) (DB).**

——**S. 72 — Suit for damages — Railway receipt endorsed in favour of another — Consignor if can maintain suit — (Specific Relief Act (1877), S. 23).**

The endorsee of a railway receipt can maintain a suit against the Railway for damages for the loss of the goods. The consignor of goods can also maintain a suit against the Railway Administration for damages, for the loss of the goods even though he has endorsed the railway receipt in favour of another, more so, when the railway receipt was returned by the endorsee to the consignor and the notice of this was given to the railway. **1959 MPC 239: 1959 Jab LJ 291: 1959 MPLJ 327: AIR 1959 Madh Pra 222 (223) (Pt A) (Pr 4) (DB).**

——**S. 72 — Right to sue — Person holding R. R. without endorsement — Right of.**

Held, on facts that a suit for damages for failure to deliver goods in time is not one in tort but one based on the contract of carriage with the Railway. The contract was with consignor so he could sue. Also any one in whose favour it was endorsed was entitled to sue. An unendorsed Railway receipt cannot be recognised to be conveying title of the consignor to the holder of the Railway receipt so as to enable him to file a suit against the Railway Administration for damages. The possession of the Railway receipt may justify the Railway in regarding the possessor as an agent of the consignor. But that will not clothe the holder with the rights of the consignor to institute a suit. **1959 MPLJ (Notes) 29.**

——**S. 72** — Who can sue — Endorsee of railway receipt. **AIR 1958 Madh Pra 314 (315) (Pt A) (Pr 6) (DB).**

——**S. 72 — Who can sue — Consignor delivering goods to railway for delivery to consignee — Loss caused by non-delivery — Consignee to whom property in goods has passed alone can sue for loss.**

Where a consignment is delivered to the railway, the consignor, except where he is acting as the agent of another, can be regarded as the party to the contract of carriage; prima facie, he can also be treated as the bailor; where he is acting as an agent, his principal can be regarded as the bailor so far as the railway is concerned. But where under a contract of sale, goods are delivered by the seller to the railway for carriage, in order to effect delivery, the railway is ordinarily treated as the agent of the buyer to receive the goods from the seller. Benjamin on Sales, 8th Edn. P. 737, cited with approval. Therefore, where property in the goods had passed to the buyer, on delivery to the railway the latter should have to be regarded as bailee to the owner of the goods, namely, the consignee. And only the consignee can sue for loss caused by the non-delivery of the goods after the goods have been delivered to the railway for delivery to him. AIR 1924 Mad 517, Rel. on; AIR 1947 Bom 169 and AIR 1957 Bom 276 and AIR 1959 Madh Pra 222, Dissent. from. **77 Mad LW 530: 1964 Mad WN 374: ILR (1965) 1 Mad 248: AIR 1965 Mad 152 (163) (Prs 5, 7, 8, 9) (DB).**

——**S. 72** — 'Documents of title' — Railway receipt — Assignability. See T. P. Act (1882), S. 137. **AIR 1957 Nag 31 (DB).**

——**S. 72** — Railway receipt having series of endorsements — Right of last endorsee to bring suit against railway. See T. P. Act (1882), S. 137. **AIR 1957 Nag 31 (DB).**

——**S. 72** — Endorsee of railway receipt — Right to sue for damages for short delivery. See T. P. Act (1882), S. 130. **AIR 1957 Nag 31 (DB).**

——**S. 72 — Suit for loss or leakage — Who can sue — Consignor consigning goods to self — Buyer taking delivery without endorsement on receipt — Mere delivery does not confer right to sue.**

The only person entitled to take delivery is either the consignee or anyone else to whom the receipt is endorsed. It is not correct to say that whenever a railway delivers up a consignment to the person who produces the railway receipt, there is a presumption that the person who takes delivery does so as the owner of the goods, or that it amounts to a recognition by the railway that he is the owner and that the property in the goods vests in him so as to entitle him to sue the railway administration for loss during transit. The only person entitled to sue for damages is the consignee or the person to whom the receipt is endorsed. AIR 1938 PC 52; AIR 1934 PC 246, Rel. on.

A consignor consigned some drums of oil to self and sent the railway receipt without endorsing it to the buyer, who took the delivery from railway. On finding that there was shortage in the quantity of oil, the buyer sued railway for the loss.

Held, that the plaintiff not having established that he was entitled to the consignment in question, either as a consignee or an endorsee of the railway receipt, was not entitled to maintain an action against the defendant railway administration for loss, if any, caused by leakage, or wastage during transit. **ILR (1951) Cut 567: AIR 1952 Orissa 126 (128) (Pt C) (Pr 5).**

——**S. 72 — Consignee — Right of suit — Consignee endorsing railway receipt in favour of third party — Effect.**

The only person who is entitled to maintain a suit for damages against railway is the person who is the owner of the goods at the relevant time. It does not matter whether he is the consignee or the endorsee of the railway receipt or not.

Where the plaintiff-company which was shown in the railway receipt as the consignee endorsed the railway receipt to a third person but failed to prove that even after endorsement it retained the property in the goods to itself.

Held, that it had no right to sue for compensation for damage to the goods. AIR 1947 Bom 169, Rel. on; AIR 1945 Pat 387, Distinguished. **1950 BLJR 182: AIR 1960 Pat 457 (458) (Prs 2, 4).**

——**S. 72 — Consignor — Suit by for non-delivery to consignee, his commission agent— Maintainability.**

A consignor is entitled to sue the Railway administration for non-delivery of the consign-

ment to the consignee who is merely his commission agent since the ownership of the goods is with the plaintiff. **1960 BLJR 348: AIR 1960 Pat 419 (419) (Pt A) (Pr 3) (DB).**

——S. 72 — Non-delivery — Compensation — Right to — Consignor or Consignee.

Held, on facts that the Railway had rightly paid the compensation to the consignee. The notice sent by the plaintiff's lawyer on 30-7-1955 asking the Railway not to pay the compensation to the consignee was of no avail as the payment had already been made to the consignee on 16-7-1955. The Railway was not concerned as to whether the title in the goods had really passed to the consignee or was still in the consignor. If the plainitff had any claim against the consignee, he might be at liberty to enforce that claim in a properly constituted suit if the law permitted him to do so. **AIR 1960 Pat 167 (167) (Pr 6).**

——Ss. 72, 55 and 56 — Suit for damages for non-delivery of goods — Right to institute — Principles as to — Endorsement in blank — Meaning of — Scope.

A railway receipt issued to the consignor of goods is a document of title to goods within the meaning of Section 2 (4) of the Indian Sale of Goods Act, 1930, and, Section 178 of the Contract Act, there being no distinction between the two terms. Generally, it is only the consignor, or the consignee, or the endorsee of the consignment, who can maintain an action for damages for non-delivery of the consignment.

But, even when there is an endorsement in blank in favour of a person, then also such a blank endorsee for value can maintain an action for damages for non-delivery of the goods. Endorsement in blank means writing one's name merely, on the back of a railway receipt without specifying and restrictions as to payee, manner of payment, etc., which details may be filled in by the holder thereof, in whatever manner he likes. Therefore, where the railway receipt is handed over on payment of the price of the goods, there is an absolute transfer both of the goods and of the right to take delivery under the contract. No doubt, generally an endorsement of a railway receipt creates rights, if any, between the endorser and the endorsee inter se, and, it creates no rights between the endorsee and the railway which had issued the railway receipt to the consignor, and the only remedy of the endorsee is against the endorser; but, when the property in the goods consigned has passed to the consignee, as the consignee under Section 23, Sale of Goods Act, at the time of the consignment, the consignee who is the principal in the transaction, would be deemed to be the person who had entered into the contract of carriage with the railway company through his agent, the consignor, and, would be the proper party to sue the railway for loss of the goods.

Held, on facts on the basis of the correspondence on record, that the consignment was booked to the Additional District Magistrate, Dhanbad, and, that he was the consignee thereof, and, as such, the State of Bihar was entitled to sue for damages for non-delivery of the goods to him; (ii) that the protection of Sections 55 and 56, Railways Act, could be given only if the provisions of those sections had been complied with. As no notice of auction was given to the consignee and no publication of auction sale was made in the local newspapers, the protection was not available to the Railway; (iii) that for the same reasons the Railway could not claim any wharfage from the plaintiff; (iv) that the plaintiff could not however be allowed interest in the absence of any contract or usage. **AIR 1959 Pat 438 (439, 440, 441) (Prs 2, 3, 9, 11, 14, 15, 19, 21, 22).**

——S. 72 (1) — Document of title — Railway receipt — Endorsee can sue railway administration for compensation for non-delivery of goods. See Sale of Goods Act (1930), S. 2 (4). **AIR 1955 NUC (Punj) 994 (DB).**

——S. 72 — Who can sue on contract of carriage — No proof that plaintiff was endorsee of railway receipt — Plaintiff has no right to bring suit for non-delivery. **AIR 1955 NUC (Raj) 4064 (DB).**

24. Who can be sued.

● **——Ss. 72, 80** —Goods consigned from Quetta in Pakistan to New Delhi in India — Goods carried by Pakistan Railway and Indian Railway — No treaty between two countries regarding liability for loss of goods in case of through traffic — Suit by consignee for compensation for non-delivery at New Delhi against Dominion of India — Liabiilty of Forwarding Railway, under implied contract of bailment indicated — Article of Limitation Act applicable — (Contract Act (1872), Sections 151, 152, 161, 71, 194) — (Limitation Act (1908), Article 30). See Railways Act (1890), S. 80. **AIR 1960 SC 233.**

——Ss. 72 and 80 — Short delivery — Goods carried by separate railways — Proof by the claimant.

Where a suit is brought for damages on account of short delivery of 5 tons of soft coke consigned with the Eastern Railway, then the Western Railway is not responsible for the short delivery unless it is proved that Eastern Railway had handed over the entire consignment to the Western Railway. The mere fact of payment of freight charges to the Western Railway will not be enough to raise any presumption against it. Further in the absence of any evidence to suggest that the loss occurred on the Western Railway it cannot be held that any tort was committed by the Western Railway. AIR 1953 Punj 43, Disting. **AIR 1956 Ajmer 1 (1) (Prs 1, 3, 4).**

——S. 72 — Indian Independence (Rights, Property and Liabilities) Order (1947), S. 8 (1) (b) — Liability of Union of India for loss of goods on Railways. See Indian Independence (Rights, Property and Liabilities) Order (1947), S. 8 (1) (b). **AIR 1952 Assam 88 (DB).**

——S. 72 — Consignment passing through number of Railways — Remedy for loss.

In a case where the plaintiff cannot prove the loss at a particular railway when his goods had to pass through a number of railways, his remedy for the loss lies against the particular railway administration at whose station the goods are booked. **1961 BLJR 223: 1961 Pat LR 26: ILR 40 Pat 921: AIR 1961 Pat 334 (338) (Pt C) (Pr 8) (DB).**

——S. 72 — Loss of consignment on Baroda Railway — Liabilities of former Baroda State — Effect of merger — Merged States (Laws) Act (59 of 1949), Ss. 5, 6.

Sections 5 and 6 of Merged States (Laws) Act cover all the liabilities of the merged State incurred under the operation of any law. The State of Baroda being liable to compensate the plaintiffs in case of the loss of the consignment occurring on the Gaekwad Baroda Railway, the

extent of the responsibility of the Indian Dominion in which the State has merged would be the same.

There is no reason why both in law and equity the Indian Union cannot be held liable for any obligation which was enforceable in law in respect of an act arising out of the running of the Gaekwad Baroda Railway as such. **1961 BLJR 223: 1961 Pat LR 26: ILR 40 Pat 921: AIR 1961 Pat 334 (338) (Pt D) (Prs 8, 9) (DB).**

——**Ss. 72, 80** — Liability of different railways — Plaintiff bringing suit against all railway administrations concerned — He is not entitled to decree against all — Plaintiff unable to prove default against contracting railway — Latter proving proper discharge of its duty as bailee — It is discharged of all responsibility for loss or damage. **AIR 1955 NUC (Raj) 4064 (DB).**

25. Damages.

——**S. 72 — Interest by way of damages.**

Suit against Railway for recovery of admitted damages in respect of goods consigned for carriage — Interest on amount claimed by way of further damages cannot be allowed. **ILR (1955) 7 Assam 261: AIR 1955 Assam 221 (226) (Pt F) (Pr 10) (DB).**

——**S. 72 — Compensation — Determination of.**

Per Ram Labhaya J.:— In case of non-delivery of consignment, the Railway Administration is responsible only to the consignee. The subsequent or the ultimate transferee stands in the shoes of the consignee so far as the loss is concerned. The price that he pays cannot afford any criterion for assessing compensation, for it is the loss to the consignee which the Administration has to make good. **ILR (1950) 2 Assam 489: AIR 1950 Assam 175 (186) (Pt D) (Pr 49) (DB).**

——**S. 72 (prior to amendment of 1961) — Damages — Assessment of — Suit for Compensation for short delivery and deterioration of goods — Assessment and damage certificate by Railway Inspector marked without prejudice — How far admissible as admission of liability or proof of damages— Absence of evidence allunde — Effect.**

In a suit for compensation against a Railway administration for short delivery and deterioration of goods consigned owing to misconduct and negligence of defendant, an assessment and damage certificate given by the Inspector of Railways who prefaced his declaration on the certificate by the averment, 'Without prejudice', does not furnish good cause for a decree straightway, without proof of actual loss and quantum of damages by the plaintiff, the certificate cannot be treated as an admission of liability. Even if it is conceded that such certificate shows prima facie admission of damage, the plaintiff has still to prove actual loss and damage as to the quantum and extent. The loss sustained might be incapable of proof with the certainty of mathematical demonstration but where absolute certainty is impossible, though damages are not uncertain, the amount of damages might be still ascertained by the usual rules of evidence to a reasonable degree of certainty. AIR 1957 Cal 666 and AIR 1957 Cal 190 and AIR 1923 Cal 49. Ref. to; AIR 1961 Madh Pra 190, Dist. **AIR 1965 Cal 636 (638) (Prs 9, 10).**

——**S. 72 — Damage — Measure of — Plaintiff refusing to take delivery because of deterioration due to misconduct — Railway assessing deterioration in quantity by 20 p. c. — Goods sold and price paid to plaintiff — Suit for damage — Right of plaintiff.**

Held, on facts that there was on record the evidence that on 28-1-50 damages were assessed at 20 per cent.; that though there was no clear evidence as to quantum on 21-1-50 the difference would be negligible, that the appellate Court was not justified in making an academic approach to the question of damages and that the trial Court's decree was correct. **1958 Nag LJ (Notes) 24.**

——**S. 72 — Damages.**

Consignment of onions despatched from Magatahsil to Howrah — No proof as to execution of Risk Notes A and B as alleged by Railway Administration — Consignment found to be in a deteriorated condition due to defective condition of wagon — Time taken for journey by Railway Administration was longer than it should ordinarily be — Wagon containing consignment not marked as 'Perishables' as required by rules — Railway Administration held was liable for compensation. **60 Cal WN 157: ILR (1957) 2 Cal 456: AIR 1956 Cal 99 (102) (Pt C) (Pr 17) (DB).**

——**S. 72** — Loss of goods in transit— Measure of damages will be value of goods — Interest by way of damages cannot be allowed as Interest Act does not apply — (Interest Act (1939), Section 1). **AIR 1955 NUC (Cal) 5915.**

——**S. 72 — Compensation for damage to goods — Assessment — No proof of extent of loss — Percentage basis — If justified.**

So far as the damage to the goods is concerned, the assessment of the Railway authorities would be binding on the Railway administration, although it may not be final. But, a plaintiff-consignee or a plaintiff-consignor would, all the same, be required to prove the extent of loss, so as to entitle him to damages. Whether a plaintiff has, in fact, proved the extent of the loss, so as to entitle him to any particular quantum of damages would be a question of fact to be decided with reference to the evidence on record.

Where the plaintiff had appropriated the goods to his own use, but had failed to prove the extent of loss, the plaintiff could claim damages on the basis of percentage of damage to the goods and if the judge has adopted that basis it cannot be said to be erroneous or illegal. **1961 MPLJ 179: 1961 Jab LJ 566: ILR (1960) Madh Pra 904: AIR 1961 Madh Pra 190 (191) (Pt A) (Pr 6).**

——**S. 72 — Damages caused to consignment — Assessment need not be to satisfaction of consignee — Delivery of consignment cannot be refused by party dissatisfied with assessment of damages — Assessment of damages cannot be insisted.**

Held, on facts that the plaintiff had no right in law to insist upon open delivery or to claim assessment of the damages, if any, caused to the consignment much less to his satisfaction. The plaintiff was bound to take delivery of the consignment in the condition in which it was found and then claim damages according to his own assessment and estimate. **(1961) MPLJ (Notes) 279.**

——**S. 72** — Contract Act (1872), Ss. 73 and 161 — Scope — Remote loss — Railway carrier — Misconduct — Delay in delivery of consignment — Fall in market price as a result of price control — Consignee not entitled to compensation

— Loss is too remote and indirect. See Contract Act (1872), S. 73. **AIR 1960 Madh Pra 289 (DB).**

——S. 72 — Damage caused to consignment — Assessment need not be to satisfaction of consignee —Delivery of consignment cannot be refused by party dissatisfied with assessment of damages — Assessment of damages cannot be insisted.

Plaintiff consigned bags of bidi leaves. At the destination he found that the seal of wagon was broken and leaves had changed colour. Plaintiff declined to accept delivery unless the damage to the consignment was assessed to his satisfaction.

Held, that the plaintiff had no right in law to insist that the Railway authorities should assess the damage caused, much less to his satisfaction. The plaintiff had to take delivery in the condition in which the consignment was found and then to sue for damages. 1947 NLJ 212; AIR 1948 Nag 65; ILR (1947) Nag 335, Rel. on. **1960 MPLJ (Notes) 23.**

——S. 72 — Loss of goods — Measure of damages.

In a suit for damages against a Railway for the loss of goods in the transit, the correct basis to assess damages is the price prevalent at the place of delivery and not the wholesale price. **1959 MPLJ 749: 1959 MPC 368: 1959 Lab LJ 718: AIR 1959 Madh Pra 232 (234) (Pt F) (Pr 10) (DB).**

——S. 72 — Damages — Suit for damages for non-delivery — Subsequent arrival of goods effect of, indicated. **AIR 1958 Madh Pra 314 (315) (Pt B) (Prs 7, 8) (DB).**

——S. 72 — Measure of damages.

Plaintiffs led no evidence to prove the value of the goods at the destination on or about the time consignment reached there.

Held, that damages claimed by them on the basis of rate prevailing at the issuing station, could not be claimed. AIR 1953 Nag 169, Foll. **1958 MPLJ (Notes) 122.**

——S. 72 — Damages — Measure of.

Where the plaintiff claims not only the price of the goods but also the profits which he would have earned by their sale, the profits have to be determined with reference to the price prevailing at the destination on the date of the receipt of the goods. Where, however, the plaintiff does not claim any profits on the goods, his claim for the cost price of the goods is well based. **1957 Jab LJ 550: (1957) MPLJ 294: 1958 MPC 459: ILR (1957) Madh Pra 253: AIR 1957 Madh Pra 114 (118) (Pt I) (Pr 14) (DB).**

——S. 72 (before amendment in 1961) — Loss of goods — Damages — Quantum.

In case of loss of goods booked for carriage by railway, the plaintiff would not be entitled either to any hypothetical loss of profits or to any interest on damages. (Plaintiff awarded decree for value of goods short delivered with interest at 6 per cent, from the date of the trial Court's decree). **76 Mad LW 331: (1964) 2 Mad LJ 329: ILR (1963) Mad 1175: AIR 1963 Mad 394 (397) (Pt B) (Pr 10) (DB).**

——S. 72 — Damage to goods — Award of damages—Basis — Portion of consignment found damaged at destination —Plaintiff selling damaged portion at lower rate than current market rate of goods — Basis for awarding damages held would be the difference between the value of the goods at the current market rate and the actual amount realised by sale of the damaged goods. **AIR 1960 Mad 149 (154) (Pt B) (Pr 15) (DB).**

——S. 72 — Consignment of oil despatched in entire unit wagons under Risk Notes A and B — At time of delivery some tins found missing and some empty and others badly damaged — Defective packing — Half damage attributed to defective packing — Other half attributed to misconduct of railway servants. **AIR 1955 NUC (Mad) 3944.**

——S. 72 — Suit for compensation for non-delivery — Burden is on plaintiff to prove value of consignment. **AIR 1961 Manipur 45 (50) (Pt H) (Pr 28).**

——S. 72 — Damages — Burden of proof.

It is no doubt true that it is always for the plaintiff to prove that the loss was caused by the neglect or negligence of the Railway Administration. But when the Court has the evidence that the goods had deteriorated while in the custody of the Railway Administration, there is a prima facie case of negligence for the Railway Administration to answer. The Railway Administration should place material before the Court from which it could be inferred how the consignment was dealt with, in order to ascertain whether the Railway administration took as much care as is required of them, being bailees of the goods under Ss. 151, 152 and 161 of the Contract Act. **1956 Nag LJ 679: 1956 MPLJ 119: AIR 1957 Nag 59 (60) (Pr 5).**

——S. 72 — Short delivery of goods — Measure of damages indicated. **AIR 1957 Nag 31 (DB).**

——S. 72 — Damages — Measure of.

The price of the goods at the place of destination on the date on which they reach the place should be the measure of damages for the loss suffered by the plaintiff due to the wrongful acts of the employees of the Railway Administration: 1951 NLJ 470, Foll. **ILR (1953) Nag 314: 1954 NLJ 353: AIR 1953 Nag 169 (170) (Pt A) (Pr 6) (DB).**

——S. 72 — Basis of compensation — Market rate and not amount paid for acquiring is basis.

The plaintiff in a suit against the Railway is entitled to claim compensation on the market rate prevalent at the material time. He cannot ask for the amount which he may have paid in acquiring the goods. **('52) 1952 Nag LJ (Notes) 14.**

——S. 72 — Damages.

When a Railway Administration undertakes to convey goods to a particular place and give delivery there and the goods are lost due to some fault of the railway, then the damages which the plaintiff is entitled to claim is the price of the goods at the place of their destination. **1951 Nag LJ 470: ILR (1952) Nag 10: AIR 1951 Nag 357 (2) (359) (Pt E) (Pr 17).**

——S. 72 (prior to amendment of 1961) — Suit by consignor for recovery of price of goods lost while in custody of Railway — Plaintiff cannot claim special damages or interest for loss of profit unless Railway had previous notice.

In a suit by a consignor for recovery of the price of goods lost in transit while in the custody of the Railway Administration, the plaintiff cannot claim special damages for loss of profits unless it is established that the parties know at the time of making the contract that such loss of profits would arise to the plaintiff due to non-delivery of goods. When the goods are lost and in consequence, the plaintiff loses the profits which he could have earned, the value of the lost goods can be recovered but not any profits in the absence of proper notice nor can the plaintiff claim interest by way of damages unless there was previous notice. AIR 1949 Cal

380 and AIR 1938 PC 67 and ILR (1960) Cut 600, Rel. on. **ILR (1962) Cut 395: AIR 1963 Orissa 66 (68) (Pt B) (Prs 6, 7) (DB).**

——S. 72 (Old) — Suit for damages against railway — Burden of proving damage is on plaintiff — Evidence Act (1872), Ss. 101-194.

Where a consignment of goods despatched by rail is damaged and a suit is brought against the railway for damages, the onus of proving the value of goods booked and the extent of damages caused to the goods is on the plaintiff. A damage certificate, on which the plaintiff relies, states only the facts that the damages had, in fact, been caused to the goods but it does not amount to an acknowledgment of fact that the damage was caused by negligence or misconduct on the part of the railway officers.

Held, that the plaintiff's suit for damages must fail for two reasons, namely, (1) he failed to show that when the goods were booked they were in an undamaged condition: and (2) he had also failed to establish that he actually suffered damage to the extent claimed in the plaint. **(1963) 29 Cut LT 193.**

——S. 72 (old) — Measure of damages—Freight charges cannot be added in computing damages payable by railway. **ILR 44 Pat 816: AIR 1965 Pat 408 (409) (Prs 3, 4) (DB).**

——S. 72 — Measure of damages — Short delivery — Plaintiff is entitled to cost price of goods short delivered in absence of evidence of prevailing market rate at time when goods ought to have been delivered — Plaintiff not entitled to profits or costs of sending notices but is entitled to interest pendente lite and future. **AIR 1960 Pat 111 (112) (Pt D) (Pr 9).**

——Ss. 72 and 80 — Damages caused to goods sent by through booked traffic — Goods transported by two railway administrations — Liability of the second when arises.

A suit for compensation for loss can be brought either against the Railway Administration under whose railway the consignment was booked or against the Railway Administration on whose railway the loss occurred. The former railway is bound to compensate by reason of the contract of consignment whether the loss may have occurred at a place within that railway or not. But, the latter railway is only bound for such loss if the loss has occurred at any place within its railway. AIR 1933 Pat 45; AIR 1949 Pat 329. Rel. on: AIR 1946 Pat 336, Disting. **AIR 1956 Pat 71 (72) (Pt C) (Pr 6).**

——S. 72 — Claim for damages for non-delivery of consignment — Such claim is debt. See Debt Laws — Displaced Persons (Debts Adjustment) Act (1951), S. 2 (6). **AIR 1960 Punj 291 (DB).**

——S. 72 — Compensation for non-delivery — Interest cannot be allowed. **AIR 1955 NUC (Punj) 994 (DB).**

——S. 72 — Scope — Loss of goods due to wilful neglect of railway — Value of goods on date of despatch established — No evidence to show that the price of goods had gone down by the date of the loss — For measure of compensation for loss, price of goods at the time of loss, need not be proved— Contract Act (1872), S. 73. **ILR (1960) 10 Raj 1359: 1961 Raj LW 148: AIR 1961 Raj 211 (212) (Pt B) (Pr 6) (DB).**

26. Pleadings and procedure.

——S. 72 — Shortage in consignment in custody of railway — Amendment of plaint by adding party — Amendment not disclosing cause of action against him — Effect discussed — Case on facts — (Civil P. C. (1908), O. 6, R. 17) — (Contract Act (1872), Ss. 43, 73). **AIR 1955 NUC (Assam) 2305 (DB).**

——S. 72 — Risk Note B — Proviso — Misconduct — Pleading.

Before any question relating to the discharge of the obligation imposed on the Railway Administration by the proviso contained in the Risk Note B arises, the plaintiff is not bound to state that the loss of the consignment was due to the misconduct of the Railway Adminitsration or its servants. **ILR (1950) 2 Assam 489: AIR 1950 Assam 175 (177) (Pt B) (Pr 10) (DB).**

——S. 72 — Civil P. C. (1908), S. 20 — Wheat entrusted to Railway station staff at K for despatch to P — Loss sustained at K — Suit for damages filed at P — **Held,** Court at P had no jurisdiction — Section 72 of Railways Act not attracted. See Civil P. C. (1908), Section 20. **AIR 1965 Pat 53 (DB).**

——S. 72 — Civil P. C. (1908), O. 2, R. 2 — One consignment of 54 bales — 3 bales lost and some articles missing from 2 bales — Two separate suits not maintainable — Bar under O. 2, R. 2 applied. See Civil P. C. (1908), O. 2, R. 2. **AIR 1958 Pat 565.**

27. Limitation for suit.

See Limitation Act (1908), Art. 31.

SECTION 72-A (Old)

——S. 72-A — Damage during transit — Duty of Railway to produce forwarding note.

Where from the evidence adduced in the case it is clear that the transit was at owner's risk rate and the conditions necessary to bring the case under S. 74-C are present it is immaterial whether the forwarding note under S. 72-A is forthcoming or not. In such a case the plaintiff is bound to prove negligence on the part of the Railway administration. **ILR (1959) Cut 398: AIR 1960 Orissa 141 (142).**

SECTION 73 (New)

——S. 73 (New) — Endorsee of railway receipt for consideration — Whether he can maintain action on contract embodied in receipt.

Per Mudholkar and Ramaswami, JJ.—The negotiation of the railway receipt may pass the property in the goods; it does not, however, transfer the contract contained in the receipt or the statutory contract under S. 74-E of the Railways Act (now, Sec. 76-D). Negotiability is a creature of statute or mercantile usage, not of judicial decisions apart from either. Therefore, in the absence of any usage of trade or any statutory provision to that effect, a railway receipt cannot be accorded the benefits which flow from negotiability under the Negitiable Instruments Act, so as to entitle the endorsee as the holder for the time being of the document of title to sue the carrier, the Railway authorities, in his own name. Where the claim of the plaintiff is as an ordinary assignee of the contract of carriage, the plaintiff has to prove the assignment in his favour. AIR 1947 Bom 169, Approved; (1845) 153 ER 532 and AIR 1938 PC 52, Rel. on. Morvi Mercantile Bank Ltd. v. Union of India, (1965) 4 Law Rep 261: (1965) 35 Com Cas 629: (1965) 2 SCA 187: AIR 1965 SC 1954 (1960, 1965) (Pt C) (Prs 10, 25).

——Ss. 73, 74-A (as it stood prior to amendment of 1960) — Loss not direct result of defective

packing — Railway not protected by S. 74-A. See Railways Act (1890) (as it stood prior to amendment of 1960), S. 74-A. AIR 1963 All 2.

——Ss. 73 (New) and 77 (as amended in 1960) — **Damage not attributable to defective condition of goods or defective packing — Liability of Railway — Onus of proof.**

Where the damage cannot be attributed either to the defective condition of goods or the defective packing of the goods, the primary onus of a bailee to show that he had taken such care of the goods as a man with ordinary prudence would take in the case of his own goods must be discharged by the Railway for denying relief to the plaintiffs. See Railways Act (1890) (as it stood prior to amendment of 1960), S. 72. **AIR 1963 All 1.**

——S. 73 (New) — Evidence Act, S. 166 — Goods booked at railway risk — Shortage found at the time of delivery — Damage not attributed to defective packing — Loss or damage of goods was prima facie evidence of negligence — Burden of disproving negligence lay on the Railway Administration. AIR 1963 All 1; 1956 Nag LJ 679; 1956 MPLJ 119; AIR 1957 Nag 59; 1965 MPLJ Note No. 5; AIR 1950 Pat 215, Foll.; AIR 1962 SC 1879, Rel. on. **1965 MPLJ (Notes) 109.**

——Ss. 73 (New), 56, 72 — Perishable goods — Power of Railways to sell — Notice to consignor or consignee before sale is essential. See Railways Act (9 of 1890), S. 56. **AIR 1963 Orissa 17.**

SECTION 74 (Old)

——S. 74 — "Passengers' luggage".

Under the Indian Railways Act there appears to be no bar or hindrance to the carriage of toilet articles as passengers' luggage. **65 Cal WN 727: ILR (1962) 1 Cal 230: AIR 1962 Cal 48 (52) (Pt A) (Pr 13) (DB).**

——Ss. 74 (Old), 66 and 113 — Contract between Railway Administration and passenger purchasing ticket — Half ticket purchased by adult — Misrepresentation — Contract becomes voidable and not void — Luggage booked on such ticket — Loss of luggage in transit — Railway Administration is responsible for loss. See Railways Act (1890), S. 66. **AIR 1962 Cal 48 (DB).**

——S. 74 — Party not entitled to claim open delivery from Railway Administration — Right of party is to take delivery and claim damages. See Contract Act (1872), S. 73. **1965 MPLJ 572: 1965 Jab LJ 1001: AIR 1966 Madh Pra 52 (DB).**

——Ss. 74 and 74-D — **Duty of Railway Administration.**

In the case of goods consigned at owner's risk, when the fact of the non-delivery is brought to the notice of the Railway Administration, it is the duty of the said Railway Administration to give information required under S. 74-D, namely, to disclose how the consignment was dealt with throughout, to the consignee. **AIR 1961 Manipur 45 (47) (Pt B) (Pr 9).**

SECTION 74-A (Old)

——Ss. 74-A and 74-C (2) — **Short delivery — Liability of Railway — Proof of misconduct.**

A consignment of a number of bags of jaggery was found to be short in weight owing to leakage. The remark in the railway receipt was that the bags were torn and resewn. There was no certificate under S. 74-C (2). Suit for damages for short delivery was decreed against the Railway.

Held, that the case was governed by S. 74-A, Railways Act and the Railway Administration could not be responsible for any deterioration, leakage, wastage or damage except upon proof of negligence or misconduct on the part of the Railway Administration or of any of its servants. In the absence of certificate under S. 74-C (2), the consignment must be deemed to have been carried at the owner's risk. The burden of proving the negligence and misconduct on the part of the Railway Administration and its servants lay primarily on the plaintiff. **AIR 1955 Ajmer 9 (9) (Pr 10).**

——S. 74-A (before amendment of 1961) — Consignment of groundnut oil by railway — Deviation from agreed route — Loss — Negligence and misconduct by Railway Administration — Mere proof of loss not sufficient — Burden to prove negligence and misconduct lies on plaintiff — Plaintiff throughout alleging negligence and misconduct — But notice under S. 80, Civil P. C., not containing instance of negligence alleged in amended plaint — Notice if valid — **Held**, what was in issue was not state of mind but breach of contract and hence mere allegation of negligence or misconduct was not sufficient in notice under S. 80. See Civil P. C. (1908), S. 80. **ILR (1965) 2 All 127: AIR 1966 All 333.**

——S. 74-A — **Damage to goods in transit — Defective packing — Negligence of Railway Administration — Onus.**

Section 74-A of the Railways Act shifts the onus of proving negligence or misconduct on the part of the Railway or its employees to the consignor claiming compensation for loss or damage to the goods delivered to the Railway packed defectively, if the Railway established the following facts:—

(i) the goods were delivered defectively packed or packed not in accordance with the prescribed conditions;

(ii) and as a result of such defective or improper packing the goods were liable to leakage, wastage, or damage in transit;

(iii) and the fact of such defective or improper packing was recorded by the sender in a forwarding note. **ILR (1965) 2 All 768.**

——S. 74-A (as it stood prior to amendment of 1960) — **Loss not direct result of defective packing — Railway not protected by S. 74-A — Railways Act (1890) (as amended in 1960), Ss. 73, 77-C.**

Unless the loss is the direct result of defective packing, defective packing cannot give protection to the Railway Administration.

Where, in respect of a consignment, it was noted in the forwarding note and railway receipt that "the planks of the cases were weak and loose" and it was found at the time of delivery that the cases were broken and had been renailed and the Railway Administration did not show how the boxes were broken and renailed.

Held, that the loss could not be connected to defective packing and the railway administration was not protected by S. 74-A. AIR 1951 All 489 and AIR 1960 Mad 149, Rel. on. **1963 All WR (HC) 47: AIR 1963 All 2 (3) (Pr 3).**

——**S. 74-A (as it stood prior to amendment of 1960)** — Damage not attributable to defective condition of goods or defective packing — Liability of Railway — Onus of proof — Where the damage cannot be attributed either to the defective condition of the goods or the defective packing, the primary onus of a bailee to show that he had taken such care of the goods as a man with ordinary prudence would take in the case of his own goods must be discharged by the Railway for denying relief to the plaintiff—Railways Act (1890) (as amended in 1960), Ss. 73, 77-C. See Railways Act (1890) (as it stood prior to amendment of 1960), S. 72. **AIR 1963 All 1.**

——**Ss. 74-A, 47, 72** — General Rules for Acceptance, Carriage and Delivery of Goods, Rules 31 (2), 47 — Rules relating to Report of Damages, Deficiencies or Loss of Goods, Paras 161-I and 161-II — Part of consignment damaged — Railway is bound to give open delivery—Damage consignment in custody of railway, to be given open delivery of — Destruction by fire — Liability as bailee — Railway is liable. See Railways Act (9 of 1890), S. 47. **AIR 1963 Andh Pra 415.**

——**S. 74-A** — Consignment booked at railway risk — No forwarding note as to any defect in packing — Goods found broken at time of delivery — Responsibilities in cases of railway risk rates and owner's risk rates pointed out. See Railways Act (1890), S. 72. **1965 MPLJ (Notes) 5.**

——**Ss. 74-A, 72** — Suit against Railways for damages caused by breaking of brittle goods — Defective packing — Fact not recorded in forwarding note — S. 74-A not applicable — Consignment at railway risk — Railway is responsible as bailee — Onus discharged — Fact whether plaintiff had apprised Railways that goods were brittle not known — Onus to prove is shifted to plaintiff. See Railways Act (1890), S. 72. **1963 Jab LJ 603.**

——**Ss. 74-A, 72** — Responsibility of Railway as bailee — Goods sent at owner's risk — Damage—Onus of proof of negligence or misconduct — It is only under two contingencies that the onus is cast upon the plaintiff to prove negligence or misconduct on the part of the Railway Administration or its servants. The first relates to defective condition of goods as a result of which they are liable to deterioration. The second condition relates to defective packing of goods which leads to damage in question. Where the damage is not attributable either to defective condition of the goods or the defective packing of goods, the primary onus is on the Railway to prove that it took such a care of the goods as an ordinary man of prudence would take in the case of his goods. (Contract Act (1872), Ss. 151 and 152) — (Evidence Act (1872), Ss. 101, 104). See Railways Act (1890), S. 72. **AIR 1960 Mad 149 (DB).**

——**S. 74-A (Old)** — Lower Court's finding that the Railways were guilty of negligence and misconduct, based on evidence on record — It could not be held that the lower Court had not followed the law laid down in S. 74-A. See Civil P. C (1908), S. 115. **(1965) 7 OJD 53: 31 Cut LT 320. ILR (1965) Cut 132.**

——**S. 74-A (2) (prior to the amendment of 1961)** —Tins of oil consigned for transport damaged in transit — Tins not packed according to instructions issued by Railway — But special caution label "not to be loose shunted" pasted to wagon — Possibility of damage caused by rough and loose shunting not ruled out — Both parties are negligent — Damages should be equally apportioned. See Railways Act (1890) (prior to the amendment of 1961, S. 72. **AIR 1963 Orissa 41 (DB).**

——**S. 74-A** — Civil P. C. (1908), O. 41, R. 4 — Suit for damages against two Railway Administrations — Common defence based on S. 74-A, Railways Act — Decree against both — Reversal in appeal even though one Railway Administration was not party on record — O. 41, R. 4, applies—Decree not vitiated. See Civil P. C. (1908), O. 41, R. 4. **AIR 1961 Pat 301 (DB).**

——**Ss. 74-A, 74-C and 74-D** — Scope — Onus of proof — Failure to record condition of package in forwarding note — Effect — In order to bring the case under the section, the onus is on the Railway to prove by legal and reliable evidence the recording of the condition of the package on the forwarding note either by the sender or his agent. **AIR 1960 Pat 111 (112) (Pt B) (Pr 6).**

——**Ss. 74-A, 72 and 74-C** — "Subject to the other provisions of this Act" — Case governed by Ss. 74-A and 74-C — Loss or damage not prima facie proof of negligence — Burden of proof — (Evidence Act (1872), Ss. 101 to 104). See Railways Act (1890), S. 72. **AIR 1959 Pat 473.**

——**S. 74-A — Word 'damage' does not cover partial loss of goods consigned.**

The word 'damage' as used in S. 74-A denotes partial destruction or partial impairment and implies that the goods still exist although in damaged form. The word is not comprehensive enough to cover the case of loss of part of the goods consigned. The Railway Administration consequently cannot escape its liability by relying on the provi sions of S. 74-A of the Act. **66 Punj LR 703: ILR (1964) 1 Punj 314.**

SECTION 74-B (Old)

——**S. 74-B — Applicability — Loss of goods.**

The words 'destruction, deterioration or damage do not include loss. AIR 1952 Cal 285, Rel. on; AIR 1926 Pat 384, Dissented. **1959 Nag LJ 5: 61 Bom LR 682: ILR (1959) Bom 819.**

SECTION 74-C (Old)

SYNOPSIS

(Railways Act (1890), S. 74-C (Old).)

1. **Liability of Railway Administration.**
2. **Negligence and misconduct.**
3. **Evidence and proof.**
4. **Burden of proof.**

5. Forwarding Note.
6. Miscellaneous.

1. Liability of Railway Administration.

——74-C (as it stood before amendment by Act 39 of 1961) — Contract of carriage at railway risk rate — No record in forwarding note about defective packing — Container found leaking at destination — Railway cannot take advantage of doctrine of "inherent vice" — Railway not showing that they treated consignment as prudent bailee would — Railway liable for loss. 67 Cal WN 279: AIR 1963 Cal 399 (404) (Pt D) (Pr 30).

——S. 74-C — Consignment of mustard oil at owner's risk rate — Wagon containing consignment over-carried — Goods not properly packed —Tins also old and used and liable to leakage in transit because of weak soldering — Defects noted in R.R. at the time of booking — Loss and damages to goods held due to defective packing and to over-carriage. ILR (1963) Cut 459: 29 Cut LT 527: AIR 1964 Orissa 82 (83) (Pt B) (Pr 8).

——S. 74-C — Liability of Railway Administration — Suit for damages for deterioration of goods due to unusual delay in transhipment — Goods carried at owner's risk — Negligence and misconduct on part of Railway Administration — Burden is on plaintiff — Station Master's certificate obtained when taking delivery is not conclusive on point of period of transit — (Evidence Act (1872), Ss. 101 to 104).

Under S. 74-C, the goods having been despatched at the owner's risk, and the consignor not having elected to pay the railway risk rate, there is no question of the Railway's liability unless it is proved that there was any negligence or misconduct on the part of the Railway Administration or any of its servants:

Held: that the burden to prove negligence and misconduct of Railway Administration was on plaintiff in a suit for damages caused to the goods on account of unusual delay in delivery. It was not a case of non-delivery so as to cast onus on Railways to prove that there was no negligence or misconduct on their part. Held, further, that Station Master's Certificate obtained by a consignee at the time of taking delivery of goods, did not amount to an acknowledgment of the facts stated therein; it only showed that damage had, in fact, been caused to the goods: accordingly his statement to the effect that it normally takes a particular period for a wagon to reach the particular place was not conclusive. AIR 1961 Orissa 113, Foll.; AIR 1957 Pat 475, Rel. on. (1961) 3 OJD 264.

——S. 74-C — Owner indenting wagon — Liability of Railway ceases. AIR 1960 Orissa 146 (147) (Pt A) (Pr 4).

——S. 74-C (3) (as it stood prior to its amendment by Act 39 of 1961)—Assessment of damages — Railway staff partly responsible for damage to goods caused by accidental fire — In assessing damages, certain amount of conjecture has to be used, because it was difficult to assess exact damages caused by negligence of Railway staff—Damages awarded by trial Judge not unreasonable—No serious flaw in reasoning — No interference in appeal. AIR 1964 Punj 147 (151) (Pt C) (Pr 20) (DB).

2. Negligence and misconduct.

——Ss. 74-C, 74-D (before its amendment by Act 39 of 1961) — Negligence and misconduct on part of Railway Administration — Proof of — Negligence — What amounts to — Loss or damage to goods — Not a prima facie evidence of negligence — (Present S. 74, substituted for old S. 74-C by the Amendment Act 39 of 1961; Present S. 76-F substituted for old S. 74-D by the Amendment Act 39 of 1961 with effect from 1st January, 1962).

As Sections 74-C and 74-D use the word 'negligence' along the word 'misconduct', the quantum of evidence necessary to attract liability of the Railway for loss of part of the consignment is only that much as may be sufficient to lead to the inference of negligence, and not of misconduct on the part of the Railway Administration or its servants. Negligence is something less than misconduct, and it consists in the doing of some act which a person of ordinary care and skill would not do under the circumstances and in omitting to do some act which such a person would do under the circumstances. In other words, the test to be applied is the care taken by a prudent man. AIR 1957 Pat 147, Rel. on. Further, in a case governed by S. 74-C, it is erroneous to hold that the loss or damage to goods is prima facie proof of negligence on the part of the Railway Administration. AIR 1964 Andh Pra 172 (177) (Pt B) (Prs 20, 21) (DB).

——S. 74-C — Goods carried during monsoon season at owner's risk — Goods damaged due to rain water — Misconduct and negligence — Burden of proof — Railway failing to show that it had provided rain-proof wagons — Effect — "Misconduct" and "negligence", meaning of — Res ipsa loquitur —S. 72.

"Misconduct" and "negligence" are different notions. Some kinds of negligence may amount to "misconduct" while some kinds of negligence may not amount to "misconduct". The principle of res ipsa loquitur may be applied to infer negligence but it cannot be applied to infer misconduct. Misconduct, that is conduct inconsistent with the rules of the Railway has to be proved and cannot be inferred from the mere fact of deterioration or damage. AIR 1930 Bom 129, Foll.

Although in cases to which Sec. 74-C of the Railways Act is applicable the burden of proving misconduct or negligence is on the plaintiff, under Section 106 of the Evidence Act the Railway Administration should call all the material witnesses to prove the facts which were within its special knowledge. Where the Railway Administration failed to adduce evidence to show that it had provided rain-proof wagons in monsoon and it had also admitted that the rain-water had entered the crevices of the door of the wagon, there was a prima facie case of negligence. The failure to provide water-tight wagons would also amount to misconduct because under the rules relating to conveyance of goods in monsoon it was the duty of the Railway servants to provide water-tight wagons. AIR 1917 PC 173 and AIR 1957 Nag 59, Foll. 1960 Nag LJ 177: 62 Bom LR 445: ILR

(1960) Bom 507: AIR 1960 Bom 344 (346, 347) (Pt B) (Prs 6, S, 9) (DB).

——S. 74-C (3) — Perishable articles sent at owner's risk rate by railway — Deterioration in transit — Two days' delay in transit — Inference of misconduct.

In a suit for recovery of a sum as damages from the Railway Administration on the ground that certain damages to his goods was caused by delay due to negligence and misconduct on the part of the said Railway Administration, in case the goods sent are the category of perishable goods such as potatoes and are tendered to be carried at owner's risk rate, then the consignor of such perishable articles must prove that the deterioration in the goods was due not only to the delay in transhipment of the articles but also to want of care on the part of the Railway servants or Administration. A common carrier of goods is not, in the absence of a special contract bound to carry within any given time, but only within a time which is reasonable, looking at all the circumstances of the case.

In a suit for damages, against Railway Administration, brought by the plaintiff, for the loss caused due to damaged condition of the goods.

Held, (1) that S. 74-C, and not S. 74-D, applied to the case; (2) that it was for the plaintiff to prove under S. 74-C (3) the misconduct in transit on the part of the Railway Administration; (3) that there was no misconduct on the part of the Railway Administration; (4) that there was no rule in the Goods Tariff General Rule No. 28 regarding attaching of perishable labels to the type of wagon in which the bags were sent; (5) that the reasonable time for carriage of goods was nine days under R. 14 of the said rules, that a delay of two days was not unreasonable and that this delay was no indication of misconduct. **(1960) 2 OJD 504: ILR (1961) Cut 32: AIR 1961 Orissa 113 (116, 117, 118) (Pt A) (Prs 7, 11, 12) (DB).**

——S. 74-C (3) — Misconduct.

Misconduct is something more than mere negligence. It is the intentional doing of something which the doer knows to be wrong or which he does recklessly not caring what the result may be. **(1960) 2 OJD 504: ILR (1961) Cut 32: AIR 1961 Orissa 113 (117) (Pt D) (Pr 11) (DB).**

——S. 74-C (3) (prior to its amendment by Act 39 of 1961) — Proof of negligence — Accidental fire in wagon carrying goods at owner's risk — All doors of wagon not opened by Railway staff — Throwing of water from engine discontinued although staff knew that it would take some time for fire brigade to arrive.

Held, Railway employees were partly responsible for damage caused to goods, due to their negligence.

Where the Railway staff failed to open all the doors of the wagon carrying the goods booked at owner's risk, while trying to extinguish the accidental fire caused to the wagon in transit, and failed to continue to throw the water from the engine although that arrangement had already proved useful in reducing the fire and the Railway staff knew that it would take some time before the fire brigade would arrive at the spot:

Held, that the Railway staff had failed to take two of the essential steps for controlling the fire and saving the goods which were then unaffected by it, when the same was discovered and it was a case of part-negligence on the part of the Railway employees in not taking steps to mitigate the damage. **AIR 1964 Punj 147 (151) (Pt B) (Prs 13, 17) (DB).**

3. Evidence and proof.

——S. 74-C (3) — Applicability — Delay in delivery — Misconduct — Mango consignment at owner's risk note — Complete deterioration — Delivery refused — Railway not responsible unless plaintiff proves negligence or misconduct on part of Railway Administration — Three day's delay in transit is not sufficient to prove misconduct. **AIR 1955 NUC (Ajmer) 1263.**

——S. 74-C—Consignor claiming damages alleging misconduct or negligence on the part of Railway — Railway not adducing evidence negotiating misconduct or negligence — Held, negligence was established by inference — Evidence Act (1872), Ss. 106 and 114. (New S. 74 substituted for the old S. 74-C by the Amendment Act (39 of 1961) with effect from 1st January, 1962.)

In a case covered by S. 74-C, the consignor who claims damages on the ground of misconduct or negligence on the part of the Railway to disclose certain facts if they are within its exclusive knowledge, and if the Railway does not disclose them, he can ask the Court to draw such inferences from its omission as are permitted under the law.

The plaintiff consigned certain goods for carriage by railway at owner's risk rates. The goods were in good condition when they were entrusted to the Railway, but found drenched with water when they were delivered at the destination. The plaintiff filed suit, for compensation for loss due to the negligence and misconduct of the Railway. The Railway did not lead any evidence which could have negatived misconduct or negligence on the part of itself or its servants.

Held, that the negligence of the Railway had been established by inference, it was impossible for the plaintiff to prove where, how and when the goods were drenched, as this fact was within the exclusive knowledge of the Railway. Under S. 106, Evidence Act, the Railway was bound to disclose what happened to the goods and how they were dealt with while under its custody. Its failure entitled the plaintiff to ask the Court to infer that the facts if disclosed would have been unfavourable to the Railway and the Court was entitled to draw this inference at its discretion. **1964 All LJ 802: AIR 1965 All 246 (248) (Pt B) (Prs 7, 8).**

——S. 74-C (before its amendment in 1961) — Nature of rules — Do not override rules in Goods Tariff — Not applicable to consignments of safety matches — Negligence cannot be presumed from their non-observance. (Present S. 74 (1) to (3) substituted for old Sec. 74-C by Amendment Act 39 of 1961 with effect from 1-1-1962). See Goods Tariff (1954), R. 76. **AIR 1964 Andh Pra 172 (DB).**

——S. 74-C (3) (as insterted in 1949) — Goods consigned at owner's risk notes — Loss or damage in transit — Consignor must prove negligence or misconduct on part of railway. See Railways Act (1890), S. 72 (as inserted in 1949). **AIR 1961 Bom 130.**

——Ss. 74-C, 72, 76 and 74-D — Nature of liability of railway — Suit for loss arising out of shortage — Proof of negligence or misconduct — Burden.

The responsibility of a railway administration, is as provided by S. 72 is that of a bailee. As provided by S. 76 in a suit for compensation for any loss or damage it is not necessary for the plaintiff to prove how the loss or damage was caused. But where a consignment is carried at the special reduced rate, the case will be governed by S. 74-C or 74-D and the ordinary rule that when it is proved that goods delivered to the railway are lost, the railway is not exonerated from liability except upon proof of these facts which would under the Indian Contract Act exempt a bailee from liability would not apply. In those cases negligence or misconduct has to be proved by the plaintiff unless the fair inference from the disclosure such as may be made by the railway under Sec. 74-D as to how it dealt with the consignment when it was in his possession or control, is that the loss is attributable to negligence on its part or on the part of its servants. ILR (1957) Mys 407: AIR 1959 Mys 90 (90, 91) (Pt A) (Prs 5, 6, 8).

——S. 74-C (3) (Inserted by Railways (Amendment) Act 1949) — Misconduct—Delay in delivering goods — Inference of misconduct—Where the plaintiff consignor successfully shows that there had been delay in delivering the goods without any reasonable cause and the Railway Administration fail to show as to how the consignment was dealt with during the time it was in their possession or how the delay had occurred, the only legal inference that can be drawn is that there was misconduct on the part of the Railway and the plaintiff is thus entitled to a decree. 22 Cut LT 512: ILR (1957) Cut 48: AIR 1956 Orissa 222 (224) (Pt B) (Pr 5).

——Ss. 74-C, 72 — Goods sent by railway — Resposibility of Railway as bailee — Duration of liability — Loss or damage not prima facie proof of negligence. See Railways Act (9 of 1890), S. 72. AIR 1960 Pat 571.

——Ss. 74-C (3), 72 (Prior to its amendment by Act 39 of 1961)—Goods carried at owner's risk — Damage to goods in transit — Suit for damages — Evidence to show how goods are dealt with in course of transit — Burden of proof — Evidence Act (1872), Ss. 106, 114, Illus. (g).

When the goods are booked at owner's risk, the Railway Administration, according to the provisions of S. 74-C (3) of the Railways Act, would not be responsible for any damage to those goods from any cause whatsoever except upon proof that such damage was due to the negligence or misconduct on the part of Railway Administration or any of its servants. In a suit brought against the Railway Administration for damages to goods booked at owner's risk the burden of proving misconduct or negligence is obviously on the plaintiff, but, according to the provisions of Sec. 72 of the Railways Act, the responsibility of the Railway Administration is that of a bailee under Ss. 151, 152 and 161 of the Contract Act. In other words, the Railway Administration is supposed to take much care of the goods as a man of ordinary prudence would take in respect of his own goods. Since the facts as to how the damage or loss had occurred to the goods are within the special knowledge of the Railway Administration, under the provisions of Sec. 106 of the Evidence Act, the Railway Administration is supposed to adduce evidence to show how the goods were dealt with in the course of the transit and that they had taken as much care as a man of ordinary prudence would do regarding his own goods. In case the Railway Administration does not produce such evidence, an adverse presumption would be drawn against them under Sec. 114 (g) of the Evidence Act. It may also be mentioned that in a case where the plaintiff calls upon the Railway Administration to adduce certain evidence, which was in their exclusive possession, and they fail to do so, the presumption under Section 114 (g) of the Act would be still stronger. AIR 1964 Punj 147 (149) (Pt A) (Pr 8) (DB).

——S. 74-C (3) —Scope — Burden of proof — Mention of owner's risk in receipt — Effect of S. 74-C (1).

The presumption under sub-sec. (1) of Sec. 74-C arises in cases where the Railway Administration provides for carriage of two rates one as railway risk rate and the other as the owner's risk rate. But where no document has been produced to show that in the case of particular goods in dispute there were two rates as referred to in S. 74-C (1) the presumption does not apply and the circumstances mentioned in sub-sec. (3) are not required to be proved by the consignor. 1957 Raj LW 145: AIR 1960 Raj 121 (122) (Prs 4, 5).

4. Burden of proof.

——S. 74-C (2) — Absence of certificate under — Effect.

In the absence of a certificate under sub-sec. (2) a consignment would be deemed to have been carried at owner's risk, and the burden of proving the negligence and misconduct on the part of the Railway Administration and its servants lie primarily on the plaintiff. AIR 1955 Ajmer 9 (9) (Pr 10).

——S. 74-C — Presumption — Negligence on part of Railway — Onus of proof is on plaintiff-consignor — Railway not producing any evidence to show how it dealt with consignment — Plaintiff producing some evidence of negligence — Court can hold railway negligent.

Assuming that under S. 74-C (2), in case there are two rates fixed for consignment, it has to be presumed that the consignment was booked at the owner's risk rate, the only effect of it is that the onus would lie upon the consignor-plaintiff to prove that the non-delivery or the damaged delivery was effected because of the negligence of the Railway. The initial burden may thus lie upon the plaintiff. Nevertheless, the Railway cannot be absolved from the responsibility of explaining to the Court how it handled the consignment during the transit. When the Railway has not explained this through proper evidence and the plaintiff has produced some evidence in this behalf, the Court can find the Railway negligent in handling the goods in transit. (1965) 1 Andh WR 342: ILR (1965) Andh Pra 1250: AIR 1965 Andh Pra 263 (266) (Pt B) (Pr 10).

——Ss. 74-C, 74-D (before its amendment by Act 39 of 1961) — Goods sent at owner's risk — Destruction by fire — Burden is on consignor to prove negligence or misconduct on part of railway

administration — Evidence adduced by both parties — Onus of proof not material.

It is clear from the provisions of Ss. 74-C and 74-D that where the goods are carried at the owner's risk rate, and the loss of goods is due to fire, the burden of proving negligence or misconduct lies upon the consignor. It is well settled that when both the parties have adduced all available evidence, burden of proof assumes little or no importance.

Held, on facts, that there was no evidence of negligence or misconduct on part of the railway administration or its servants and therefore, it was not liable for the loss. (Present S. 74 (1) to (3) substituted for old Sec. 74-C by the Amendment Act 39 of 1961 with effect from 1st January, 1962. Present S. 76-F substituted for old S. 74-D by the Amendment Act 39 of 1961 with effect from 1st January, 1962). **AIR 1964 Andh Pra 172 (177, 179) (Pt A) (Prs 22, 46, 47) (DB).**

——**S. 74-C** — Misconduct or negligence of Railway — Burden of proof is on plaintiff. [New S. 74 substituted for old S. 74-C by Amendment Act (39 of 1961)]. **1960 Nag LJ 177: 62 Bom LR 445: ILR (1960) Bom 507: AIR 1960 Bom 344 (346) (Pt A) (Pr 5) (DB).**

——**Ss. 74-C and 72** — Burden of proof — When it is found on facts that loss has been caused due to negligence or misconduct on the part of Railway Administration the Railway Administration will be liable and it is not necessary for the plaintiff to allege and prove that the rate other than the owner's rate was agreed. (Evidence Act (1872), Ss. 101-104). **AIR 1958 Bom 238 (239) (Pt B) (Pr 5).**

——**Ss. 74-C, 72, 74-A** — "Subject to the other provisions of this Act" — Case governed by Sections 74-A and 74-C — Loss or damage not prima facie proof of negligence — Burden of proof — (Evidence Act (1872), Ss. 101 to 104). See Railways Act (1890), S. 72. **AIR 1959 Pat 473.**

——**Ss. 74-C, 74-D — Suit for damages for loss of part of consignment — Burden of proof.**

As Ss. 74-C and 74-D use the word "negligence" along with the word "misconduct" the onus on the plaintiff in a suit for damages for loss of part of his consignment can be said to be discharged even if he succeeds to establish that the loss was due to the negligence on the part of the railway administration or its servants. **AIR 1957 Pat 147 (150) (Pt B) (Pr 10).**

——**S. 74-C (3)** — Suit for damages for short delivery of goods — Railway not pleading loss or destruction of goods — Still plaintiff cannot recover damages unless he proves negligence or misconduct on the part of the railway or its servants — Failure to deliver goods being the consequence of loss or destruction of goods does not furnish a cause of action distinct from cause of action for loss or destruction — Hence burden lies on plaintiff to prove negligence on the part of the railway administration or its servants. AIR 1961 SC 725, Rel. on; 1955 RLW 159, **Held** no longer good law, [S. 74 (1) to (3) substituted for the old S. 74-C by the Amending Act (39 of 1961) w.e.f. 1-1-1962.] **1964 Raj LW 212: ILR (1964) 14 Raj 811.**

——**Ss. 74-C, 72 — Contract Act (1872), Ss. 152, 161 — Suit against railway for loss of goods — Pleadings of both parties not placing reliance on Sec. 74-C — Both plaintiff and defendant contesting on basis of ordinary liability of bailee — Court held rightly placed burden to disprove negligence on defendant railway.**

Where in a suit against a railway for the loss of the goods, the pleadings of both the parties show that they did not rely on Sec. 74-C but contested the suit on the basis of the ordinary liability of a bailee and no facts were brought to the notice of the Court by way of evidence, to show that any reliance was placed on Sec. 74-C and the Court placed the burden to disprove negligence on the defendant railway.

Held, that the burden of proof was rightly placed. **Held**, further that the defendant having accepted the burden and having led evidence, could not turn round at the stage of argument in appeal and contend that the burden was wrongly placed on the defendant. **1963 Raj LW 135: ILR (1963) 13 Raj 140: AIR 1963 Raj 162 (170) (Pt B) (Pr 16) (DB).**

5. Forwarding Note.

——**S. 74-C** — Consignment booked at railway risk — No forwarding note as to any defect in packing — Goods found broken at time of delivery — Responsibilities in cases of railway risk rates and owner's risk notes pointed out. See Railways Act (1890), S. 72 (Old). **(1965) MPLJ (Notes) 5.**

——**Ss. 74-C, 74-D and 72-A — Damages during transit — Duty of Railway to produce forwarding note.**

Where from the evidence adduced it is clear that the transit was at owner's risk rate and the conditions necessary to bring the case under S. 74-C are present it is immaterial whether the forwarding note under Sec. 72-A is forthcoming or not. In such a case the plaintiff is bound to prove negligence on the part of railway administration. **25 Cut LT 260: ILR (1959) Cut 396: AIR 1960 Orissa 141 (141, 142) (Prs 2, 4, 5).**

——**Ss. 74-C, 74-A and 74-D** — Scope — Onus of proof — Failure to record conditions of package in forwarding note by railway — Ss. 74-C and 74-D held attracted. See Railways Act (9 of 1890), S. 74-A. **AIR 1960 Pat 111.**

6. Miscellaneous.

——**Ss. 74-C, 77, 80 and 74-D** — Administration not disclosing how consignment was dealt with — Consignee not in position to know whether goods were lost or destroyed in transit — Suit for non-delivery — Notice under Sec. 77 is not necessary. See Railways Act (9 of 1890), S. 77. **AIR 1961 Manipur 45.**

——**S. 74-C (3) — Degree of damage or deterioration in case of perishable goods.**

The degree of damage done to or deterioration in quality of articles in transit more often than not depends upon the nature of goods. For instance any soft fruit or fish or meat will deteriorate much sooner than other kinds of perishable goods such as potatoes, onion and cabbages. **(1960) 2 OJD 504: ILR (1961) Cut 32: AIR 1961 Orissa 113 (117) (Pt C) (Pr 10) (DB).**

SECTION 74-D (Old)

SYNOPSIS

(Railways Act (1890), S. 74-D (Old)).

1. Scope, object and applicability.
2. Negligence and misconduct.
3. Evidence and proof.
4. Duty and liability of Railway Administration.

1. Scope, object and applicability.

——S. 74-D — Aplicability — Delivery offered but refused — Sec. 74-D will not apply. **AIR 1955 NUC (Ajmer) 1263.**

——S. 74-D (as it stood before amendment of 1951) — Whole of consignment of goods or whole of package not lost — Nor pilferage alleged — S. 74-D does not apply. **ILR (1965) 2 All 127: AIR 1966 All 333 (335) (Pt B) (Pr 14).**

——S. 74-D — Object of. [Present S. 76-F substituted for old S. 74-D by the Amendment Act (39 of 1961) with effect from 1-1-1962].

Section 74-D of the Railways Act is not the only provision of law which impose an obligation on the Railway to disclose certain facts under certain circumstances. That section imposes a statutory provision on the Railway administration to disclose to a consignor of goods how the consignment was dealt with throughout the time it was in its possession or control. The object of this provision is to enable the consignor to point out the Railway administration that the facts disclosed by it raise a fair inference of negligence or misconduct on the part of the Railway or its servants. But Section 74-D does not have the effect of repealing the provisions of the Evidence Act providing for proof by inference or presumption, or of the Code of Civil Procedure providing for interrogatories requiring a party to disclose facts within its exclusive knowledge. Even in cases not covered by Section 74-D of the Railways Act, a consingor of goods claiming damages from the Railway for loss or destruction of the goods allegedly due to the negligence or misconduct of the Railway of its servants can rely on the provision of the Evidence Act and the Code of Civil Procedure in discharging the onus of proof of such negligence or misconduct. **1964 All LJ 802: AIR 1965 All 246 (247) (Pt A) (Pr 5).**

——S. 74-D — Section applies to the case of short delivery.

Where out of the total number of bags consigned some were not delivered, to that extent at least the case falls within Sec. 74-D (a). ILR 26 Bom 562 and AIR 1960 Andh Pra 495 and AIR 1962 Cal 175, Rel. on. AIR 1960 Orissa 141, Distinguished.

When Sec. 74-D is applicable to such cases, the Courts have only to see whether defendant railway has disclosed in entirety how the consignment or package was dealt with throughout the time it was in its possession or control and whether from the material which is disclosed negligence or misconduct on the part of the railway administration or of any of its servants can be fairly inferred. When the consignee successfully shows to the Court that the true inference from the materials is that the carriers' servants have not shown due care and skill the Railways must be held responsible for damages.

Where it was alleged by the railway that the goods were destroyed by fire, and the railway had appointed an enquiry committee to enquire into the reasons of fire and the committee had submitted its report, but the report was not put in evidence, the Court would not err in drawing adverse inference against the railway under Sec. 114 (g) of the Evidence Act. AIR 1961 Madh Pra 251 and (1957) 2 MLJ 620, AIR 1958 Mad 179, Distinghuished. **(1963) 1 Andh LT 158: AIR 1963 Andh Pra 344 (346, 347) (Pt A) (Prs 7, 8, 9, 10).**

——S. 74-D — Case of non-delivery — Art. 31 applis. See Limitation Act (1908), Art. 30. **AIR 1963 Andh Pra 344.**

——Ss. 74-D, 77, 80, 74-C — Administration not disclosing how consignment was dealt with — Consignee not in position to know whether goods were lost or destroyed in transit — Suit for non-delivery—Notice under S. 77 is not necessary. See Railways Act (9 of 1890), S. 77. **AIR 1961 Manipur 45.**

——Ss. 74-D, 80 — Civil P. C. (1908), S. 80 — Suit for non-delivery—Notice under S. 80, Civil P. C., has to be sent to destination Railway only. See Railways Act (9 of 1890), S. 80. **AIR 1961 Manipur 45.**

——S. 74-D (Inserted by Railways (Amendment) Act, 1949) — Applicability — Refusal to take delivery.

The case of refusal to take the delivery of the goods because they were in a rotten condition, not being a case of non-delivery or short delivery, S. 74-D would not apply to the case. **22 Cut LT 512: ILR (1957) Cut 48: AIR 1956 Orissa 222 (223) (Pt A) (Pr 3).**

——Ss. 74-D, 74-A, 74-C — Scope — Onus of proof — Failure to record condition of package in forwarding note by railway — Ss. 74-C and 74-D held attracted. See Railways Act (9 of 1890), S. 74-A. **AIR 1960 Pat 111.**

——S. 74-D — Evidence — Non-production of hand-book — Adverse inference.

Suit for damages for non-delivery of consignment — Consignor alleging negligence on part of the Railway and calling for hand-books of Watch and Ward Department of certain stations—Hand-books not produced in spite of Court's notice — **Held,** that though the non-production of the hand-books was susceptible in law to an adverse inference against the Railway, on the facts of the case there was no scope for drawing such an inference. **AIR 1957 Pat 147 (149) (Pt A) (Pr 8).**

2. Negligence and misconduct.

——S. 74-D — Non-delivery of part of consignment — Claim for compensation on ground of negligence of railway servants — Onus of proof.

The plaintiffs filed a suit for compensation for short delivery of a consignment of chilly bags against the Union of India as representing the Railway Administration on the ground that the shortage was due to wilful negligence or misconduct of the Railway Administration. The Railway Administratiaon contended that the loss of 86 bales

was due to a running train-theft over which the Railway Administration had no control and that therefore there was no negligence or misconduct on their part. On the evidence adduced the trial Court held that the loss was occasioned by the neglience of the Railway Administration or its servants and therefore the claim was decreed.

Held, that (i) under S. 74-D, Railways Act, the primary question to be determined in such cases is whether negligence or misconduct on the part of the Railway Administration or of any of its servants is inferable from the evidence adduced by the Railway Administration. It is only if such negligence or misconduct is not inferable that the burden of proving such negligence or misconduct shifts to the consignor. (ii) The question as to whether negligence or misconduct on the part of the Railway Administration has been proved or not is essentially a question of fact depending upon the inference to be drawn from the evidence and the circumstances appearing in each case. But the Court is entitled to the benefit of the principles laid down by Courts in similar cases and to decisions passed in circumstances more or less the same; (iii) on the facts and circumstances of the case that the finding of the trial Court that the loss was occasioned by the negligence or misconduct of the Railway Administration was correct. **AIR 1960 Andh Pra 495 (496, 497) (Prs 3, 6, 7).**

——S. 74-D — Negligence and misconduct — Distinction — Breach of express duty — Effect of — (Contract Act (1872), S. 151) — (Tort — Negligence).

Negligence is something less than misconduct. Negligence consists in the doing of some act which a person of ordinary care and skill would not do under the circumstances and in omitting to do some act which a person of ordinary care and skill would do under the circumstances. In other words, the test to be applied in determining whether there has been any negligence or not is the care taken by a prudent man. (1874) 7 HL 213 and (1937) 6 LJC 92, Rel. on.

Held, that the breach of duty cast upon the railway servants in not locking the wagon by E. P. lock in spite of the strong direction issued by the railway administration amounted at least to negligence. **AIR 1957 Pat 147 (150) (Pt C) (Pr 10).**

3. Evidence and proof.

——Ss. 74-D, 74-C (Before its amendment by Act (39 of 1961)) — Goods sent at owner's risk—Destruction by fire — Burden is on consignor to prove negligence or misconduct on part of railway administration — Evidence adduced by both parties — Onus of proof not material. See Railways Act (1890), (before its amendment by Act (1961)), S. 74-C. AIR 1964 Andh Pra 172 (DB).

——Ss. 74-D, 74-C, (Before its amendment by Act 39 of 1961) — Negligence and misconduct on part of railway administration — Proof of — Negligence — What amounts to — Loss or damage to goods — Not a prima facie evidence of negligence. See Railways Act (1890), (Before its amendment by Act (1961)), S. 74-C. AIR 1964 Andh Pra 172 (DB).

——Ss. 74-D and 72 — Theft of goods from running train — Railway company is not bound to give evidence as to how consignment was dealt with even when train was in motion — Guard of the train deposing that train did not stop at any place till the station where loss was discovered — His testimony amounts to sufficient evidence by railway as to how consignment was dealt with till it was found missing. AIR 1937 PC 152, Explained and distinguished. **1961 Jab LJ 1339.**

——Ss. 74-D, 72, 76 and 74-C — Nature of liability of railway—Suit for loss arising out of shortage — Proof of negligence or misconduct — Burden. See Railways Act (1890), S. 72. **AIR 1959 Mys 90.**

——S. 74-D — Disclosures made by Railway and not challenged by opponent, burden of proving negligence or misconduct is on the consignor — Consignor can rely on the Railway's evidence to establish negligence or misconduct.

On 8th November, 1955, plaintiff sent a consignment of 638 tins of oil by railway from Akola to Allahabad. On 16th November, 1955, the consignment arrived at Allahabad but with 14 tins short. The consignor made a claim for the loss against the Railway. It was contended that under Sec. 74-D of the Railways Act, the defendant-Railway had made all the disclosures which were not challenged by the plaintiff who led no evidence to prove this.

Held, that the plaintiff could rely on the evidence of the defence and if they proved negligence or misconduct that was enough. Plaintiff was not required to prove negligence of the defendant by his own witnesses. The burden of proving negligence or misconduct was no doubt on the plaintiff-consignor but it was discharged by relying on defence witnesses. **1962 Nag LJ (Notes) 31.**

——S. 74-D — Suit for damages for loss of part of consignment — Burden of proof. See Railways Act (1890), S. 74-C. **AIR 1957 Pat 147.**

4. Duty and liability of Railway Administration.

——S. 74-D — Liability of disclosure — Nature of — Defects and lacunae brought out in course of trial — Railway should be given opportunity to meet plaintiff's case.

In a case of short delivery of goods carried by Railway the liability of disclosure is not merely contractual but statutory. In a suit for non-delivery of certain consignment against Railways when the plaintiff brings out certain lacunae and defects in disclosure as contemplated in Sec. 74-D of the Railways Act a Court should give opportunity to Railway to meet the plaintiff's case. (1937) 2 Mad LJ 689: AIR 1937 PC 152, Dist. **AIR 1962 Cal 175 (176) (Pt A) (Pr 6) (DB).**

——Ss. 74-D and 74 — Duty of Railway Administration.

In the case of goods consigned at owner's risk when the fact of non-delivery is brought to the notice of the Railway administration, it is the duty of said administration to give the information required under S. 74-D, namely to disclose how the consignment was dealt with throughout to the consignee. See Railways Act (9 of 1890), S. 74. **AIR 1961 Manipur 45.**

——S. 74-D (b) (as it stood prior to amendment in 1961) — Consignment of seven cases, in cover-

ing not readily removable by hand — Shortage claimed regarding six cases received intact — Each case is to be considered as independent unit — Railway not liable for intact cases.

The plaintiff sued the Railway Administration for alleged short delivery. Out of seven cases which were so covered that the covering was not readily removable by hand, one was found broken but there was practically no shortage. The remaining six cases received at the destination were intact with no defect. The alleged shortage was in respect of the six cases found intact with no defect:

Held, that each case was an independent unit of consignment and so long as the cases received at the destination were intact the Railway was not in any way responsible for any shortage. Where goods are booked by the consignor and the information given by the consignor is accepted as correct for purposes of charging freight, and receipt is made out in the same way, there is no admission on the part of the Railway authorities that the cases contained the contents as described in the receipt and if at the destination the cases are found to contain less number or quantity than what was mentioned in the receipt, the Railway Administration is not liable: AIR 1950 Nag 85 and AIR 1956 Mad 176, Rel. on. ILR (1964) Cut 243: AIR 1965 Orissa 4 (5) (Pr 3).

——Ss. 74-D, 74-C and 72-A — Case of damages during transit — Duty of Railway to produce forwarding note.

The section will not apply where from the pleadings and evidence adduced the case appears to be not one for non-delivery but of damage during transit. See Railways Act (1890), S. 74-C. AIR 1960 Orissa 141.

SECTION 74-E (Old)

——Ss. 74-E, 80, (Before its amendment by Act 39 of 1961) — Scope — Sec. 74-E does not whittle down effect of S. 80 (Present Sec. 76-D substituted for old S. 74-E by Amendment Act 39 of 1961 with effect from 1-1-1962).

S. 74-E has reproduced some of the principles of the risk note form A to the effect that the agreement embodied in the risk note should be deemed to be made separately with all railway administrations who should be carriers for any portion of the transit so as to make the risk note equally operative over all the railways by which the consignment was carried. But the section cannot be construed as whittling down the effect of S. 80 of the Act. AIR 1964 Andh Pra 172 (182) (Pt E) (Pr 62) (DB).

——Ss. 74-E and 80 (old) — Goods destroyed by fire in transit — Destruction of goods at station on railway system belonging to Port Commissioners — Damage to goods through negligence of carrier — Calcutta Port Act (3 of 1890), S. 142 — Limitation under — Applicability of S. 15 (2) of Limitation Act to — Suit for damages brought by consignee or endorsee of goods — Maintainability of such suit — [New Sec. 76-D substituted for old S. 74-E by the Amendment Act (39 of 1961) w. e. f. 1-1-1962. New S. 80 substituted by the Amendment Act (39 of 1961) for old S. 80 w. e. f. 1-1-1962.]

Two consignments of goods comprising bales of woollen carpets were delivered to the railway administration at Mirzapur station on the East India Railway for carriage to Kiddarpore Docks, a station on the railway system belonging to the Port Commissioners. On or about 17-2-1951 the goods were destroyed in the fire that broke out in the Docks. The plaintiff filed a suit for damages against the Union of India and the Port Commissioners after serving a notice under Sec. 80, Civil P. C. (1908) on the Union of India. In respect of the first consignment of goods the plaintiff was named as consignee in the railway receipts so that he as shipping agent could clear the goods and arrange for their shipment to foreign buyers. The plaintiff was to receive commission for acting as such shipping agent. With regard to the other consignment the consignors were the owners of the goods represented by the railway receipt. They were also consignees of the goods but forwarded the railway receipt with an endorsement in favour of the plaintiff in order that the plaintiff as their agent could clear the goods from the railways and ship them to certain foreign buyers of the goods. The plaintiff did not pay any moneys in respect of any of the goods before the goods were actually destroyed by fire. He, however, paid the freight payable in respect of these goods to the defendant Port Commissioners. As against this payment, however, the plaintiff admittedly received equivalent amounts from the respective owners of the goods.

Held, (1) that the goods had been delivered by the railways of the Union of India to the Port Commissioners and at the relevant time the goods were or should have been in the custody of the Port Commissioners; (2) that the Port Commissioners failed to take all possible care with regard to the goods kept in their godown; (3) that the plaintiff had failed to prove the quantum of damages for which he was asking for compensation. In this respect mere tendering of the invoices as exhibits did not prove the value of the goods. The plaintiff should have given evidence to prove the contracts between the foreign buyers and the sellers in support of his claim that the values of the goods as shown on the invoices were correct; (4) that Sec. 142 of the Calcutta Port Act applied in the instant case and the period of limitation was therefore three months from the date of the accrual of the cause of action; (5) that the Union of India being at best a proper party to the suit, Sec. 15 (2) of the Limitation Act would apply to this case and the plaintiff would be entitled to compute the period of limitation by excluding the period of notice under Sec. 80 of the Civil P. C.; (6) that even apart from Sec. 15 (2) of the Limitation Act, the suit had been filed in time since limitation started running from the date of accrual of the cause of action and in the instant case it could not be said that such cause of action arose before 25th June, 1951 which was the first date when the Port Commissioners intimated their inability to give delivery of the goods to the plaintiff; (7) that so far as the Port Commissioners were concerned even though the High Court had jurisdiction to entertain this suit yet the jurisdiction of the said Court as against Union of India could not be invoked on the ground that Government carried on business within jurisdiction; (8) that the plaintiff had no beneficial interest in the goods and was merely acting as shipping and forwarding agent on behalf of the owners of the goods. No consideration passed between the plaintiff and the owners of

the goods for the delivery and endorsement of the railway receipt in favour of the plaintiff.

(9) Per A. K. Mukherjea, J. — That the plaintiff being only a consignee named on a railway receipt and a bare endorsee of a railway receipt was not entitled to bring an action against the railway in respect of either of the consignments. He, therefore, had no cause of action against the defendant Port Commissioners and was not competent to file this suit.

Per Bachawat, J. — That the plaintiff was not entitled to sue the Port Commissioners either for breach of contract or for an actionable wrong independently of contract. **68 Cal WN 410: AIR 1964 Cal 290 (295, 296, 297, 298, 299, 319, 324) (Pt A) (Prs 9, 15, 17, 22, 23, 24, 27, 104, 120) (DB).**

——**Ss. 74-E and 80** — Suit for damages for short delivery of consignment — Parties — Contracting Railway primarily liable for damage to consignment — Goods booked for transit over several Railways — Sec. 74-E, creating legal fiction that each of the Railways carrying goods is deemed to have contracted — Sec. 74-E, not to control operation of Sec. 80, but would be subject to the same — Unless the case is within the ambit of Sec. 80, the Railway Administration other than the contracting Railway is not liable for any damage — Other Railway liable only if damage was done within its jurisdiction. **1961 MPLJ (Notes) 200.**

——**S. 74-E — Applicability — Conditions — Loss must be proved as provided under S. 80.**

Section 74-E only provides that although goods were delivered to one railway, the other railways through which the goods travelled would also be deemed to have contracted with the persons delivering the goods for their carriage. The existence of a contract alone, however, is not sufficient to fasten the liability, although all the railways will be deemed to have entered into the contract. Section 80 only determines the liability of the different railways. Once that liability has been fixed, the railway cannot argue that it had not entered into contract with the persons who made the consignment because such a contention is now invalid in view of the provisions of Sec. 74-E of the Act. This is all that is provided by Sec. 74-E. But before Sec. 74-E comes into play, the loss must be proved as provided in Sec. 80. If the loss is not proved, then the only remedy of the person making the consignment is to sue the contracting railway. AIR 1958 Pat 575, Foll. **(1959) 1 OJD 299: ILR (1959) Cut 300: AIR 1960 Orissa 100 (102) (Pt A) (Pr 9).**

——**S. 74-E** — Goods booked with one railway— Other railway through which goods travel would also be deemed to have contracted with person with whom the original railway had entered into contract for carriage of goods — Rules of destination railway would apply to the case. **1962 BLJR 968: ILR 42 Pat 436: AIR 1963 Pat 46 (50) (Pt C) (Pr 6) (DB).**

——**Ss. 74-E, 80 — Liability of different railways.**

Section 74-E only provides that although the goods were delivered to one railway the other railways through which the goods travelled would also be deemed to have contracted with the persons delivering the goods for their carriage. The existence of a contract alone, however, is not sufficient to fasten the liability, although all the railways will be deemed to have entered into the contract. The question remains who will be responsible and in what cases. That question is determined by Sec. 80 of the Railways Act. Sec. 80 only determines the liability of the different Railways. Before Sec. 74-E comes into play, the loss must be proved as provided in Sec. 80. If the loss is not proved, then the only remedy to the person making the consignment is to sue the contracting Railway. AIR 1949 Pat 329, Foll. **1957 BLJR 800: 1957 Pat LR 409: AIR 1958 Pat 575 (576) (Pt A) (Pr 9).**

SECTION 75 (Old)

SYNOPSIS

(Railways Act (1890), S. 75 (old).)

1. **Scope, object and applicability.**
2. **Articles mentioned in the second Schedule.**
3. **Parcel or package.**
4. **Declaration of contents and value.**
5. **'Loss' — Meaning of.**
6. **Liability of railway for loss.**
7. **Evidence and proof.**
8. **Compensation for loss.**

1. Scope, object and applicability.

——**S. 75 (1) — Object of S. 75.**

The object of Sec. 75 is that if the goods consigned are of such a character, description, value, etc., as would fall under the second schedule to the Act, a special freight would have to be levied before the said goods could be accepted for carriage by railway. **59 Bom LR 117: ILR (1957) Bom 321.**

——**S. 75 — Applicability.**

Section 75 does not apply to an article which is mentioned in the second schedule which is not contained in any parcel or package. When you have a silver bar in its bare condition transported by the railway administration, it cannot be said that the silver bar was contained in a parcel or a packet, as the silver bars were not contained in any parcel or package, the railway administration cannot claim the protection of Section 75 (1) in order to escape its liability under Sec. 72 (1). **55 Bom LR 595: 1LR (1953) Bom 1301: AIR 1954 Bom 50 (51, 52) (Pt A) (Prs 3, 4, 6) (DB).**

——**S. 75 — Applicability — Conditions.**

In order to attract the operation of S. 75 the railway must prove that the consignment in question was lost or destroyed or deteriorated. **(1959) 63 Cal WN 253.**

——**S. 75 (1) and (2) — Applicability — Actual value of excepted goods consigned exceeding Rs. 100 but value declared to be less than Rs. 100 — Goods lost — Claimant not entitled to compensation.**

The words of Sec. 75 (1) are plain and admit of no qualification. If the package contains excepted goods, and the intrinsic value exceeds the statutory limit, the railway administration cannot be held responsible for the loss, destruction or deterioration of the package, unless the value and contents are declared. The value to be declared is the true value. Section 75 (2) in terms does not entitle the consignor or consignee to get the declared value.

It places a maximum limit, beyond which the claimant cannot recover whatever the true value may be. Section 75 (2) is intended to apply to cases where a declaration is called for. An unnecessary declaration is not contemplated by the section. In cases of over-valuation of excepted articles above the statutory limit, the claimant gets the true value, the declaration does not help him. In cases of under-valuation of excepted articles above the statutory limit, a limited disability is imposed by S. 75 (2), viz., that the claimant can only recover up to the declared amount.

Where, therefore, the actual value of the excepted goods consigned exceeds Rs. 100 but the declared value is less than Rs. 100 and the goods are lost, destroyed or deteriorated, the claimant will not be entitled to any compensation: AIR 1947 Cal 182, Not approved; Civil Rule No. 293 of 1948 Approved. **54 Cal WN 154: ILR (1950) 2 Cal 485: AIR 1950 Cal 100 (101, 102) (Prs 10, 11, 12) (DB).**

——S. 75 — R. 35, General rules of the Indian Railways Conference Association (Book No. 22) is not consistent with S. 75. **AIR 1955 NUC (Raj) 289 (DB).**

2. Articles mentioned in the second Schedule.

——S. 75 and Sch. II Cl. (c) and Cl. (1)—Goods assigned to railway — Held goods did not fall under Cl. (1) but fell under Cl. (c).

Certain goods consigned from Coimbatore to Sholapur were patkas and rumals, and gold and silver (jari) formed part of those patkas and rumals. It was the contention of the plaintiff that the goods fell under Cl. (1) of Sch. II and that as the value of the silk contained in those goods was less than half the value of the entire fabric, namely, the entire goods, it was not necessary for the consignor to make any declaration before the railway booking staff of Coimbatore under S. 75. sub-sec. (1).

Held, that the goods consigned could not fall under Cl. (1) since they would not amount to silk at all as the value of the silk therein was much less than half the value of the fabric and if they could not amount to silk Cl. (1) could not be attracted. The provisions of the clause which were attracted in this case were the provisions of Cl. (c) and Cl. (c) refers to "cloth and tissue and lace of which gold or silver forms part". 4 Bom HCR 129, Rel. on. **(1957) 59 Bom LR 117: ILR (1957) Bom 321.**

——S. 75 and Sch. 2, Cl. (a) — Articles mentioned in second schedule — Fountain pens.

A fountain pen is not merely made up of the basic materials of which it is constituted, nor is it merely made up of its constituent parts. A great deal of labour skill and designing must go to the making of the article and therefore to say, without making any attempt to assess the value of these factors, that because the value of gold used in the pen is more than the value of other materials, the object of gold is totally a wrong approach to the question. The words 'gold manufactured or unmanufactured' must be given a broad and commonsense meaning and in doing so it is impossible to say of a fountain pen, merly because it has a nib or a clip or even a cap of gold, that it is gold manufactured. Essentially it is a fountain pen made of bakelite. Some part of it contains gold, but even so it could not be said of this article that its predominant feature is gold and that the article is of gold. Case-law discussed. **ILR (1954) Bom 1202: 56 Bom LR 532: AIR 1955 Bom 98 (100) (Pt B) (Pr 7) (DB).**

——S. 75 (as it stood prior to its amendment in 1961) — Articles of "Special value" — Meaning — Parcel containing shawls, together exceeding Rs. 300 in value — Parcel is of special value for purposes of S. 75.

The words 'special value' in the marginal note to Section 75 are used because the section deals with articles in a parcel or package exceeding three hundred rupees in value. The expression "carrier of articles of special value" in the marginal note has reference to the totality of the articles in the parcel and not to the special value of each of the component articles in the parcel or package. A parcel containing shawls (which is one of the articles mentioned in the second Schedule) exceeding Rs. 300 in value is of special value as it exceeds Rs. 300 in value. That does not mean that everyone of the articles in the parcel must exceed Rs. 300 in value or be of a special value.

The object of Section 75 is to require that there should be a declaration and insurance when the parcel or package contains articles exceeding Rs. 300 in value. Even if a parcel contains articles of special value and the value of the parcel does not exceed Rs. 300 there is no need of declaration or for insurance. It cannot be held that not only should the value of the parcel exceed Rs. 300 but the articles themselves must be of a special type besides being the articles mentioned in the second Schedule. Observations of Shah, J., in AIR 1922 Bom 416, Foll. **AIR 1963 Guj 150 (151) (Prs 2, 3).**

——S. 75, Sch. II, Cl. (xi) — Articles made of glass — Glass bangles — If glass article —"Parcel" — Meaning of.

Glass bangles is one of the articles that comes within the description of articles specified in Cl. (xi) to the second schedule to the Railways Act. No distinction can be drawn between glass and glass bangles within the meaning of the category of specified articles.

In its primary signification a parcel is a number of quantity of things put up together. A package or a parcel is an entity by itself. The goods may be wrapped up in a single package or they may be kept loose. Then each article would be a different parcel. Under Sec. 75 of the Railways Act have not the value of the consignment as a whole, but the separate value of different packages or the items which form the consignment that would be declared, though they form part of a whole consignment. **AIR 1955 NUC (Mad) 85.**

——S. 75 and Sch. II, Cls. (a) and (b) — Fountain pens with gold caps and gold nibs not covered by clauses.

Where the parcel in question contained Parker Pens having gold caps and gold nibs, the parcel does not fall within Cl. (a) or Cl. (b) of the second Schedule. Cl. (a) refers to 'gold and silver, coined or uncoined, manufactured or unmanufactured. It is not every article where there is some little gold or silver that falls, within the scope of that clause.

It is the predominant characteristic of the article that has to be decided. It is impossible to say of fountain pen, merely because it has a nib or a clip or even a cap of gold, that it is gold manufactured. AIR 1955 Bom 98, Foll. Nor can such fountain pens be considered plated articles as mentioned in Cl. (b) of Sch. II. In numerous articles there may be some covering of a metal in one or other of its component parts. That will not make it a plated article; such articles do not come within the mischief of Cl. (b). Plating is not its predominant characteristic. Judging from that test it is not possible to conclude that a fountain pen is a plated article. The plated article referred to in Cl. (b) does not refer to 'gold plated articles'. It refers to all plated articles. It is a misconception to think that both Cls. (a) and (b) of the second Schedule refer to gold and silver articles. Cls. (a) and (b) of the second Schedule are independent clauses and it will be wrong to read the idea contained in Cl. (a) while interpreting Cl. (b). Each one of the clauses in that schedule covers separate articles. **36 Mys LJ 455: ILR (1958) Mys 245: AIR 1959 Mys 43 (44) (Pt A) (Prs 4, 6).**

——S. 75, Sch. II, Cl. (1) — Articles mentioned in second Schedule — "Silks" — Meaning.

The fact that the invoice sent by the person who sold the goods to the plaintiff, described "the package as a "Silk cloth parcel" cannot be conclusive against the plaintiff. Where the silk content of the articles in the bundle was very much less both in quantity and value than the cotton content and both in quantity and value, it was only 30 per cent of the articles that were made up of silk and the cost of the silk content in the articles would be a little less than 50 per cent of the total cost of the bundle, those articles are not silks within the meaning of Clause (1). Case law discussed. **30 Mys LJ 178: ILR (1951) Mys 520: AIR 1953 Mys 65 (65, 66) (Prs 4, 5) (DB).**

——S. 75 and Schedule II, Item (m) — Mysore Railways Act, S. 59 — Excepted goods — Articles of "Special nature" — 'Lohis' commonly called "shawls" priced low— Mysore Railways Act, Schedule, Item (m).

Lohis of very low value though described as 'woollen' in the consignment note are not 'shawls' in the sense as used in item (m) of second schedule. Therefore non-declaration and non-insurance of consignment of 'Lohis' cannot save the Railway Company of its liability in respect of the loss of the consignment. **AIR 1953 Mys 16 (17) (Pt A) (Pr 2).**

——S. 75 (old), Sch. II (k) — "Article of special value" — Switch made of porcelain, is not of any special value. AIR 1964 Pat 540 (541) (Prs 2, 4).

——S. 75, Sch. II, Item (m) — 'Shawls' — Woollen fardis.

The word 'shawls' as used in Item (m) of the Second Schedule of the Railways Act means Kashmere Shawls of special value and not things of inferior quality as Alwans, Tushi or ordinary chadars. Where there is no finding that the woollen fardis booked in the consignment were Kashmere shawls of special value the provisions of Section 75 do not apply. AIR 1957 Pat 328 and ILR 39 Cal 1029, Foll. **AIR 1960 Pat 340 (341) (Pt A) (Pr 2) (DB).**

——S. 75 and Sch. II, Cl. (m) — Applicability — Suit for damages for loss of goods in transit — Defence that goods were "shawls" which consignor had not declared — "Shawls" — Meaning of — (Carriers Act (1865), Sch.).

In a suit for damages for short delivery, the case of the railway was that the articles covered by the two bales not delivered to the plaintiff contained shawls as conlemplated by Cl. (m) of the Second Schedule to the Railways Act, 1890. That being so, the railway was not responsible for the loss of those bales as the consignor did not declare their contents as laid down in Section 75, Railways Act. To support the plea the Railway relied on the contents of the notice under Section 80, Civil P. Code, and the invoice wherein the plaintiff had described himself as shawl-merchant and the plaint wherein articles such as Kashmere Chadar, Tushi Chadar and Alwan were described:

Held, (i) that the mere description of the plaintiff that he was by profession a shawl-merchant could not decide the point as to what were the articles sent under the two bales alleged to have been not delivered by the Railway. He might be dealing with shawls also along with many other articles, (ii) that the word 'Shawl' as used in Cl. (m) of the Second Schedule meant the Kashmere shawl of special value and not things of inferior quality as that of Alwan, Tushi or ordinary chadar. (iii) that what was covered by the word 'shawls' in Cl. (m) was only 'shawls' and not only other thing same as or similar to shawls. (iv) that, in the circumstances, Sec. 75, Railways Act was no bar to the suit. **1957 BLJR 227: ILR 36 Pat 495: AIR 1957 Pat 328 (329, 330) (Pt A) (Prs 3, 5) (DB).**

3. Parcel or package.

——S. 75 (before amendment) — 'Parcel or package' — Meaning — Concealment if essential — Glass bangles made into strings, or package — All garlands together, if form one parcel or package.

It is not at all essential for a thing to come within the meaning of "parcel or package" that the articles contained in it are covered and concealed from view. Even the least amount of concealment is not essential. A wrapped up article would come within the meaning of "parcel or package", but so can a collection of articles which are not wrapped up in anything. Ordinarily, when a number of articles are made into a "parcel or package" there is some concealment of their nature, but it is also possible to pack articles into something without concealing their nature to any extent.

A bare article like a car or a silver bar or a bangle cannot possibly be described as a parcel or package; in order that an article can be said to be "contained" in a parcel or package, it is necessary that some other article is used with it in order to protect it, or cover it, or keep it in position or keep it together with another article or articles: AIR 1929 Lah 698, Dissent.

The words "parcel or package" do not include plural.

Where glass bangles are made into garlands, by passing a string through a number of bangles and tying its two ends together, the garlands come within the meaning of parcel or package.

Each garland is a parcel or package; it is not that all the garlands together form one parcel or

package. Therefore, each garland must be of the value of more than Rs. 100 in order to be governed by the provision of S. 75 as it stood before amendment. **1950 All LJ 625: ILR (1951) 2 All 249: AIR 1950 All 543 (545 to 547) (Pt A) (Prs 6, 7, 9) (DB).**

——S. 75 (1) and (2) (before its amendment in 1961) — Expression 'any parcel or package' — Meaning — Partial loss of goods contained in parcel or package — S. 75 applies.

The words 'any parcel or package' in Sec. 75 (2) as well as in Section 75 (1) have reference to the goods contained in the parcel or package. For the value to be declared is in relation to them, so that the goods in the parcel would include also part thereof. The whole purpose of Sec. 75 is that the railway should be informed of the special value and of the additional liability that the railway would have to undertake in carrying those goods and in consideration of that additional risk a higher charge is required to be paid. That being the purpose it would be defeating it if the risk of the railway were to arise only for the entire packet, in the sense when the entire goods had been lost and not when a part of the goods was lost. Sub-secs. (1) and (2) of Sec. 75 cover also partial loss of goods contained in any parcel or package of the specified type. **78 Mad LW 566: (1965) 2 Mad LJ 460: ILR (1965) 2 Mad 599.**

——S. 75 — Declaration under — Parcel or package — Meaning.

"Parcel" signifies a part of the whole taken separately and has for one of its meanings "a small bundle". In its primary signification a parcel is a number or quantity of things put together; a bundle or package; a quantity pressed or packed together; a small bundle.

The value of each particular package or parcel, though they form part of a whole consignment, is what is required to be declared under Sec. 75 of the Act and such a declaration becomes necessary only when the value of such package exceeds Rs. 100. Where therefore, each package does not exceed the value of Rs. 100 it is not open to the Railway to rely on Sec. 75 to disentitle the plaintiff to claim the cost of the consignment and the damages. **AIR 1955 NUC (Mad) 85.**

——S. 75 (1) (as it stood before amendments of 1947 and 1949) — 'Parcel or package' — Meaning of.

The true meaning and correct interpretation, of the words 'parcel or package' occurring in S. 75 (1) of the Railways Act is that the word 'parcel' or 'package' means the singular and not the plural, and, it contemplates each individual 'parcel' or 'package', and not the entire 'consignment' or 'luggage', consisting of several parcels or packages. In order that S. 75 (1) should apply, there should be declaration regarding the contents, and their value both of each parcel or package separately and not in respect of the entire 'consignment' or 'luggage', consisting of the different parcels or packages, booked under one luggage receipt under Sec. 74, collectively or in one lump. It is the parcel or package that is lost or destroyed which should have contained excepted goods of the value of more than Rs. 100 and in respect of which there should have been declaration of its contents and their value, as required by S. 75 (1) of the Act. AIR 1927 Nag 328 and AIR 1950 All 543 and (1954) 2 Mad LJ 677 and AIR 1936 Pat 393, Rel. on: ILR 33 Bom 703 and ILR 34 All 422, Dissented from. **1957 BLJR 183: 1957 Pat LR 63: ILR 36 Pat 408: AIR 1957 Pat 231 (233) (Pr 16) (DB).**

4. Declaration of contents and value.

——S. 75 (before amendments of 1947 and 1949) — Unless both conditions, namely, the person sending the parcel had declared the value of the goods at the time of the delivery of the parcel for carriage by railway and had paid or engaged to pay a percentage on the value so declared, if required to do so by the administration are complied with, administration is not responsible for loss of goods of the nature described in section — Manner of loss is immaterial — It might be due to misconduct or theft by railway servants. ILR (1954) 1 All 76: AIR 1953 All 318 (319) (Pt A) (Pr 10) (DB).

——S. 75 — Person sending parcel for carriage by railway not declaring value of goods — Loss of parcel to railway adminstration by theft or misappropriation by railway servant or otherwise — Administration is absolved from liability. ILR (1954) 1 All 76: AIR 1953 All 318 (320) (Pt C) (Pr 18) (DB).

——S. 75 (1) — "Declaration" — Meaning of — (Words and Phrases).

"Declaration" under Sec. 75, Sub-sec. (1), of the Act means of communication by a person delivering the parcel of goods to the railway administration for carriage by railway, telling the administration what the nature, description and value of the goods so delivered are, so that special freight, if leviable, may be levied. This communication has got to be in writing but it may be in any form, so long as it gives the above information to the railway administration. **(1957) 59 Bom LR 117: ILR (1957) Bom 321.**

——S. 75 (1) and Sec. 58 — Declaration need not be separately made — Requisite information should be given to railway administration — Held there was no declaration made in this case.

Section 75, sub-sec. (1), does not contemplate a separate declaration under that section, if the requisite information is otherwise supplied by the person delivering the goods to the railway administration by his presenting certain papers or documents before that administration.

A parcel containing 613½ yards of hand-woven cloth as detailed in the invoice attached to the plaint was despatched to the plaintiff from Coimbatore. The plaintiff was a resident of Sholapur and the parcel was consigned to him from Coimbatore, the destination of the parcel being Sholapur. Before the parcel could be accepted by the railway administration at Coimbatore the person delivering the parcel to the administration was required to produce before it a Government permit. Such a permit was obtained by the consignor in this case. The plaintiff's case was that the above-mentioned permit and the invoice of the goods consigned showed the nature, the quantity and the value of the goods consigned. After the permit and invoice were shown to the booking clerk at the railway station of Coimbatore, a railway receipt was pre-

pared and handed over to the consignor. According to the plaintiff, the Railway Administration never informed him as to what had ultimately become of the said consignment, the contention of the Railway Administration was that the consignor in this case had not made a declaration within the meaning of S. 75, Railways Act, before the Railway authorities at Coimbatore from where the consignment was booked and that the failure on the part of the consignor to make such a declaration would absolve the defendant from liability for the loss of the consignment.

Held, that in the invoice relating to the goods the value of the goods was stated. But the difficulty was about the permit. Looking to the permit it was impossible to hold that it gave a full and clear account and description within the meaning of S. 58 of the Act, of the goods consigned or that it contained a declaration, within the meaning of S. 75, sub-sec. (1) as to the nature and description of the goods. 15 Pat 394, Disting. **(1957) 59 Bom LR 117: ILR (1957) Bom 321.**

——S. 75 — Excepted articles of value of more than Rs. 100 — Declaration of contents not made — Railway Administration is not responsible — (Mysore Railways Act, S. 59). **AIR 1955 NUC (Mys) 904 (DB).**

——S. 75 — No declaration of contents and value —Railway is exempted from liability in respect of loss, destruction or deterioration. **AIR 1955 NUC (Raj) 289 (DB).**

5. 'Loss' — Meaning of.

——S. 75 — 'Loss' — Servant of Railway dishonestly removing parcel from railway premises for personal gain — It is a loss to Railway Administration. AIR 1949 All 223, Dissent. **ILR (1954) 1 All 76: AIR 1953 All 318 (320) (Pt D) (Pr 18) (DB).**

——S. 75 — "Loss" means loss to Railway.

The word 'loss' within the meaning of S. 75 of the Indian Railways Act or Risk Note 'Y' means loss to the Railway Administration. AIR 1953 All 318, Foll. **1957 MPLJ (Notes) 187.**

——S. 75 (1) — 'Loss, destruction or deterioration of the parcel or package' — Meaning of — Short delivery — If within the term 'loss'.

There is no reason why the words 'loss', 'destruction' or 'deterioration' in S. 75 of the Indian Railways Act should be given a different meaning from that given to them in the other sections of Chap. VII of the Act. The meaning of the word 'loss' is that the goods have been lost in the sense that the goods have not been forthcoming. It may be a loss to the Railway but it is equally a loss to the consignee. No distinction can be made of a loss being to the Railway or loss to the owner. It only means that the goods are lost by the Railway since they are not forthcoming and, therefore, they have no control over the goods, the resultant loss occurring to the owner. The word 'loss' should be interpreted liberally and is wide enough to include all cases where the goods are not forthcoming and includes a case of non-delivery. But if the Court, on the evidence, comes to the conclusion that there is any wilful withholding of the goods by the company, then it cannot be said to have been lost. But, where a loss has, in fact, occurred, the mere fact that the loss was occasioned by the misconduct of the servants of the Railway Administration will not make it any the less a 'loss' within the meaning of the section. (1950) 2 Mad LJ 506, AIR 1923 Cal 397: AIR 1945 Cal 412, Foll.; AIR 1952 All 891: AIR 1946 All 198, Differed. **ILR (1957) Mad 195: (1956) 2 Mad LJ 6: 69 Mad LW 375: AIR 1956 Mad 483 (486) (Prs 16, 17).**

6. Liability of railway for loss.

——S. 75 (old) — Wrong delivery of consignment consisting of ten harmoniums in separate packages — Value of harmoniums clearly mentioned in railway receipt as Rs. 120 for each — No attempt by Railway Administration to show that all the ten harmoniums were contained in one single parcel— Railway Administration cannot claim any protection under section. **AIR 1965 All 184 (187) (Pt C) (Pr 12).**

——Ss. 75, 72 — Goods despatched under risk note — Deviation from route — Effect on liability of Railway Administration for loss.

Even if there is a deviation from the usual or booked route, the Railway Administration can claim protection under the section. See Railways Act (1890), S. 72. **AIR 1950 All 543 (DB).**

——Ss. 75 (1) and 72 — Consignment not reaching destination — Liability of Railway as bailee— Necessity of proving loss — Railway has to prove loss before it is absolved from its liability — (Contract Act (1872), S. 161).

The Railway Administration cannot be absolved from the responsibility for the consigned goods not reaching the consignee unless the loss of the said goods is established in the first instance by the Railway Administration. So long as the conscience of the Court is not satisfied that the whereabouts of the consigned goods are untraceable, the Railway Administration, to whose care the goods were committed at the time of the consignment, cannot be absolved from responsibility for the goods not reaching the hands of the consignee.

Held, on the evidence in this case that the Railway Administration, which was a bailee in this case, had not taken such care of these goods as a man of ordinary prudence would in the matter of his own goods. That being so, the provisions of S. 161 of the Contract Act would be attracted by virtue of S. 72 of the Railways Act and the bailee, namely the Railway Administration, would be responsible for the consignment not arriving at its destination and not reaching the hands of the consignee. **(1957) 59 Bom LR 117: ILR (1957) Bom 321.**

——Ss. 75 and 72 (prior to amendment in 1961) — Applicability — Non-delivery of article — Liability of Railway — "Loss" of article — Proof — Mere statement of Railway that article remained untraced — Not sufficient.

In a suit to recover damages for non-delivery of a parcel consigned to a Railway when the latter claims protection under the provisions of Sec. 75 of the Railways Act, and the plaintiff proves non-delivery, it is incumbent upon the Railways to show that the parcel had been lost or destroyed. It must be shown that everything possible had

been done to trace the missing article; that the whereabouts of the article were not known or must adduce some other evidence from which it could be inferred that the parcel had been lost. Where all the evidence that was adduced by the Railway was to the effect that the article was not traced and that they were making efforts to trace it and the theory of loss in transit was not resorted to even at the stage of notice but was mentioned for the first time in their written statement without disclosing exactly in what way it had been established that there had been such a loss:

Held, that the Railways had failed to discharge the burden that was cast on them of proving that the article in question was lost. To state that it was missing and they were making efforts to trace it was not tantamount to loss of the article. The Railways were liable under S. 72 and could not claim protection under S. 75. AIR 1946 All 198 and ILR (1954) Mys 166, Rel. on; AIR 1961 SC 725, Dist. **1963 Mys LJ (Supp) 105.**

——Ss. 75, 72 — Misdelivery — Negligence of Railway servants — Care required of ordinary prudent man — Servants held negligent — (Contract Act (1872), Ss. 151, 152, 161). See Railways Act (1890), S. 72. **AIR 1959 Pat 337 (DB).**

——S. 75 — Insured consignment.

Where the consignment had been insured and their value is declared, the Railway Administration is liable for the loss of goods due to the negligence of the servants of the Administration. **ILR 37 Pat 1355: AIR 1959 Pat 337 (341) (Pt B) (Pr 15) (DB).**

7. Evidence and proof.

——S. 75 — Loss to Railway Administration — Burden is on Railway Administration to prove it — Nature of evidence required indicated — (Evidence Act (1872), S. 106). **ILR (1954) 1 All 76: AIR 1953 All 318 (321) (Pt E) (Pr 21) (DB).**

——S. 75 — Loss — Proof.

It must be decided upon the facts of each case whether loss has occurred within the meaning of S. 75. Mere proof of non-delivery is by no means conclusive evidence as to whether or not the loss has occurred.

Where it was proved that the consignment had reached a midway station but it was not put into the train again to be despatched to the station of destination:

Held, that it was not a case of a loss in transit within the meaning of S. 75 (1) and the consignor was not deprived of his right to claim compensation for non-delivery. AIR 1946 All 198 and AIR 1949 All 223, Foll. **33 Mys LJ 87: ILR (1954) Mys 166: AIR 1954 Mys 180 (181) (Pr 6) (DB).**

——S. 75 — Burden of proof — Suit for damages for loss of goods in transit — Onus — (Carriers Act (1865), S. 9).

In a suit for damages for loss of goods which had been consigned under Railway risk, the onus is entirely on the Railway to establish that the loss was not due to any negligence on its part. **1957 BLJR 227: ILR 36 Pat 495: AIR 1957 Pat 328 (331) (Pt C) (Pr 7) (DB).**

8. Compensation for loss.

——Ss. 75 and 76—Goods damaged due to negligence of Railways — Quantum of damages to be measured by amount by which value of goods diminished — Goods repairable — Prima facie damages are cost of repair. **1965 MPLJ (Notes) 54.**

——S. 75 — Suit for damages for loss of goods in transit — Measure of damages — (Carriers Act (1865), S. 9) — (Contract Act (1872), S. 73).

It is true that what is remote damage should not be allowed in a suit for damages for loss of goods caused in transit. But where what was claimed under the loss of profit was not the future profit which the consignor might have earned but it was only the difference between the price of the articles which he paid at one market and the price that was then prevalent at the place of destination, it could not be taken as remote damages. AIR 1921 Cal 315, Rel. on; (1854) 156 ER 145 and (1861) 142 ER 248 and (1876) 1 CPD 326, Disting. **1957 BLJR 227: ILR 36 Pat 495: AIR 1957 Pat 328 (330) (Pt B) (Pr 6) (DB).**

——S. 75 — Suit for damages for non-delivery—Interest on compensation — Interest is payable if there is an express agreement to pay interest or it is payable by the usage of the trade or under the provisions of any substantive law entitling the plaintiffs to recover interest. **AIR 1955 NUC (Punj) 5736 (DB).**

——S. 75 — Suit for damages for non-delivery—Plaintiff is not entitled to any profit which he would have made had the goods been delivered to him. AIR 1921 Cal 315, Foll. **AIR 1955 NUC (Punj) 5736 (DB).**

SECTION 75 (New)

——S. 75 (as amended in 1961) — Compensation for damage to or loss of goods — Railway freight when may be included in compensation claimed.

The principle is well established that where damages are calculated on the basis of the market rate prevailing at the place of destination, that should include the railway freight as well, because such rate is determined as a rule by the cost price of the commodity and the cost of transportation. It is also settled law that if it be a case of complete loss of the consignment in which even the railway freight is generally not paid because no delivery of the goods can be made; damages are allowed on the basis of the prevailing market rate of the commodity at the place of destination, but that railway freight has to be excluded because it is taken for granted that it has not been paid. When the market rate at the place of destination is not available, or no evidence has been adduced on that, then the cost price together with the railway freight must be taken into account for determining the amount of damages where it is in evidence that the railway freight, in fact, was paid. Where, however, there is no evidence to that effect either resulting from the circumstances or direct evidence on the point, then the railway freight cannot be taken into account for assessing the amount of damages awardable to the plaintiff. **AIR 1965 Pat 316 (316) (Pr 2) (DB).**

SECTION 76 (Old)

——S. 76 — Suit for compensation — Negligence on part of Railway Administration alleged — Burden of proof was on plaintiff — Loss due to deviation in agreed route — Mere allegation of misconduct was not sufficient in notice under S. 80, Civil P. C. — Notice under S. 80, Civil P. C., must contain the alleged instance of misconduct after amendment of plaint. See Civil P. C. (1908), S. 80. **ILR (1965) 2 All 127: AIR 1966 All 333.**

——S. 76 — Burden of proof is on Railway — (Evidence Act (1872), S. 106). **AIR 1955 NUC (Bom) 5549.**

——**S. 76 — Goods booked under railway risk— Loss of — Liability of Railway — Onus of proof.**

The responsibility of the Railway Administration in respect of goods booked under railway risk is that of a bailee. The Railway must take as much care of goods while under its control as a man of ordinary prudence would take of such goods if they were his own. The Railway is liable for the loss, destruction, etc., if it happens by the default or negligence. When loss, destruction, etc., occurs, it is not for the plaintiff to prove in the first instance as to how it happened. See Railways Act (1890), S. 72. **AIR 1957 Cal 190.**

——**Ss. 76 and 75 — Goods damaged due to negligence of Railways — Quantum of damages to be measured by amount by which value of goods diminished — Goods repairable — Prima facie damages are cost of repair. 1965 MPLJ (Notes) 54.**

——**Ss. 76, 72, 74-C and 74-D — Nature of liability of Railway — Suit for loss arising out of shortage — Proof of negligence or misconduct — Burden.**

Where a consignment is carried at special reduced rate, known under the Act as owner's risk rate, the case will be governed by S. 74-C or 74-D and the ordinary rule that when it is proved that goods delivered to the Railway Administration for carriage are lost, the Railway Administration is not exonerated from liability in respect of such loss except upon proof of those facts which would under the Indian Contract Act, exempt a bailee from liability would not apply. In these cases the misconduct or negligence has to be proved by the plaintiff unless the disclosure made by the Railway under S. 74-D itself gives rise to the inference that the loss is attributable to its negligence. **AIR 1959 Mys 90 (90, 91) (Pt A) (Prs 5, 6, 8).**

——**S. 76 — Suit for damages — Burden of proof.**

In a suit for damages against the Railway Administration for the destruction of a consignment, the plaintiff has to show, in order to establish a liability of the defendant that there was want of diligence or that there was negligence on the part of the latter or his servants or agents. **1951 Nag LJ 470: ILR (1952) Nag 10: AIR 1951 Nag 357 (2) (358) (Pt A) (Pr 5).**

——**Ss. 76, 72 — Negligence — Proof.**

Section 76 adds no new burden on the defendant. In a suit for damages for the destruction of a consignment of goods, the plaintiff must show, in order to establish a liability on the defendant-Railway, that there was want of diligence or that there was negligence on the part of the Railway or its servants or agents. See Railways Act (1890), S. 72. **AIR 1951 Nag 357 (2).**

——**Ss. 76, 80** — Object and scope of S. 80 — Goods booked through two railways — Loss — Aggrieved party has option of suit against Railway Administration where goods were delivered for consignment or against administration on whose railway loss occurred — Latter is agent of former — Suit against latter — Burden to prove that loss occurred there, is heavy on plaintiff — Case before Independence Act — Suit laid against Governor-General does not include suit against administration — Suit must be against administration which is sought to be made liable — Civil P. C. (1908), S. 79. See Railways Act (1890), S. 80. **AIR 1950 Nag 85 (DB).**

——S. 76 — Misconduct — Burden of proof — Goods consigned at owner's risk — Railway has not to prove absence of its servant's misconduct. **AIR 1955 NUC (Orissa) 2143.**

——**Ss. 76 and 72 — Proof of misconduct — Risk Note — Effect of.**

Held, that in the circumstances it was not a case of non-delivery within the meaning of the provision relating to non-delivery in the risk note and, therefore, there was no duty cast on the Rly. Administration to make a disclosure of the manner in which the goods were dealt during the transit. AIR 1929 Cal 700 and AIR 1931 Pat 201, Rel. on; AIR 1954 Nag 337, Distinguished. Even assuming that it was a case of non-delivery and not merely of deterioration, the Railway Administration had discharged the duty to make a disclosure. It was not open to the consignor who had not made a request for the production of the wagon movement register either to the trial Court or the lower appellate Court to make a grievance of the non-production at the stage of second appeal. AIR 1937 PC 152, Rel. on. **1957 BLJR 222: 1957 Pat LR 42: AIR 1957 Pat 475 (476, 477) (Prs 2, 3) (DB).**

——**S. 76 — Loss of goods by accidental fire — Negligence of Railway — Burden of proof.**

The responsibility of the Railway Administration is that of a bailee and as such the loss or damage to goods entrusted to it is prima facie evidence of negligence on its part. The burden of proof, therefore, to disprove negligence lies on it. **AIR 1957 Pat 325 (326) (Pr 8) (DB).**

SECTION 76-B (New)

——**Ss. 76-B, 57 (as amended by Act of 1961)** — Suit by consignor for recovery of price of goods against Railway — Railway delivering goods to consignee on executing indemnity bond contrary to consignor's instructions, is liable. See Railways Act (1890) (as amended by Act of 1961), S. 57. **AIR 1964 Punj 20 (DB).**

SECTION 77 (Old)

SYNOPSIS

(Railways Act (1890), Section 77.)

1. Scope and applicability.
2. Notice under, if part of cause of action.
3. Combined notice under this section and Section 80, Civil P. C. (1908).
See also Civil P. C. (1908), Section 80.

4. Notice, when not necessary.
See also Note 5.
5. "Loss, destruction or deterioration".
6. Form and contents of notice.
7. Claim for refund of overcharges.
8. Through booked traffic — Notice to one of several railways.
See also Railways Act (1890), Sections 80 and 140.
9. Notice to whom to be sent.
10. "Six months."
11. Proof of notice.
12. Waiver of notice.
13. Limitation for suit — Exclusion of period of notice.
See also Limitation Act (1908), Section 15 and Articles 30 and 31.

1. Scope and applicability.

——S. 77 — Notice — Object of notice.

Per Beg. J.:— The purpose of notice is to enable the railway to have an opportunity of settling the claim by making an enquiry into the matter in time with a view to prevent dishonest claims being put up all of a sudden by unscrupulous persons after a long time taking advantage of the fact that the railway records have been weeded out. AIR 1930 Cal 332 and AIR 1952 Mad 795 and AIR 1948 Nag 17 and AIR 1955 Assam 221, Rel. on. **AIR 1958 All 234 (247) (Pt C) (Pr 28) (DB).**

——S. 77 — Construction — Liberal interpretation.

Per Beg, J.:— A liberal interpretation of Section 77 alone will be conducive to the interest of justice and equity. The construction placed on the statute by a Court should be such as to suppress the mischief and advance the remedy. AIR 1955 SC 661, Foll. **AIR 1958 All 234 (248) (Pt G) (Pr 34) (DB).**

——S. 77 — Construction — Claims to compensation for losses — Notice issued under Section 77, Railways Act and Section 80, Civil Procedure Code (5 of 1908) by one person — Right shared by two persons, whether can be claimed in a Court by a person who had not complied with the statutory requirements of given notice.

Where a merchant doing business in lime fruits despatched some bundles of limes to the defendants (fifth defendant) to Shalimar by train from Palakol and a part of the consignment is alleged to have been spoiled in transit and the defendant (fifth defendant) filed a claim under Section 77 of the Railways Act claiming damages for the loss caused to the goods and subsequently the plaintiff (Revision-Petitioner) also sent a notice under Section 77 of the Railways Act and Section 80, Civil Procedure Code and however filed the suit claiming damages before the expiry of two months from the date of the notice under Section 80, Civil Procedure Code and where the Union of India represented by the different sections of the Railway raised a plea that the suit is premature, that there has been no negligence on the part of the different defendant railways and that only the consignee would be entitled to sue for the damages and thereupon the fifth defendant presented an application that in view of the defence raised he should be transposed as a co-plaintiff and argued that the plaintiff or the fifth defendant would be entitled to damages and that due to bona fide confusion of their respective rights the suit has been filed by the consignor impleading the consignee as the defendant and where the several arguments urged against the fifth defendant being transferred to the array of the plaintiff have not been accepted by the trial Court and the fifth defendant has been made a plaintiff subject to certain conditions, on the question whether the (Plaintiff-Revision Petitioner) will be entitled to the benefit of the notices issued under Section 77, Railways Act and Section 80, Civil Procedure Code, by the fifth defendant:

Held. A right shared by two persons cannot be claimed in a Court by the person who had not complied with the statutory requirements of giving notice. The position should not be different where a right is claimed by two persons in the alternative.

Notices issued by the fifth defendant cannot be taken advantage of by the original plaintiff in the case, for the claimants are not same persons though the claim may be one. (1937) 2 MLJ 466: (1944) 2 MLJ 65: ILR (1945) Mad 263 and AIR 1949 Mad 416, Ref. **(1958) 1 An WR 76.**

——S. 77 — Notice claiming damages for non-delivery of goods — Delivery of goods during pendency of suit — Plaint amended by claiming damages for depreciation in value and mishandling goods — Fresh notice — Necessity. See C. P. Code, Section 80. **1961 Nag LJ (Notes) 85.**

——S. 77 — Object of section.

Section 77 is intended to give protection against a mischief, viz., stale claims against the railway administration. Though not intended to deprive the customers of the railway of their just dues, it is at the same time intended as a weapon of defence against fraud and to protect railways against litigation. **56 Bom LR 150: AIR 1954 Bom 297 (299) (Pt B) (Pr 11).**

——S. 77 — Calcutta Port Act (1890), Sections 112, 142 — Applicability of Railways Act under Section 112 — Extent of — Suit for damages against Commrs. for loss of goods received for carriage by Railway — Limitation.

Though Section 112, Calcutta Port Act (1890) makes the provisions of Railways Act applicable for certain purposes, Section 77 of Railways Act is not attracted for purposes of determining period of limitation for service of notice to a suit for damages against Commissioner of Port for loss of goods received by them for carriage by rail. **AIR 1951 Cal 460.**

——S. 77 — Notice under — Necessity.

The provisions of Section 77 are mandatory. The fact that the Railway had other means of knowledge of the claim would not dispense with the notice enjoined by Section 77. Notice under Section 80, Civil P. C., would not dispense with the notice under Section 77, Railways Act. The one is a notice of suit as against the Government owning the Railway while the object of Section 77, Railways Act, is to enable the Railway to facilitate investigation. The absence of notice as required by Section 77, Railways Act, is fatal to the suit. **ILR (1956) Hyd 274: AIR 1956 Hyd 62 (63) (Pt B) (Pr 5).**

——S. 77 (as it stood prior to its amendment in 1961) — Notice under Section 77 is mandatory.

Notice under Section 77 is mandatory and such notice is necessary in all cases whether it be a case of deterioration, loss or non-delivery. AIR 1961 SC 725, Foll; AIR 1958 Madh Pra 314, held no longer good law. **1962 Jab LJ 1125: 1962 MPLJ 732: AIR 1962 Madh Pra 374 (375) (Pt A) (Pr 6).**

——S. 77 — Notice — Admission by defendant — Whether dispenses with enquiry as to — Validity of notice.

An admission of short delivery by the railway administration does not dispense with an enquiry into the validity or invalidity of the notice under Section 77. AIR 1948 Nag 17, Disting. A notice under Section 77 is a condition precedent to any claim covered by the section and it cannot be dispensed with because its object should be considered to have been otherwise served. **1959 MPC 341: 1959 MPLJ 701: 1960 Jab LJ 985: AIR 1959 Madh Pra 276 (279) (Pt C) (Pr 16) (DB).**

——Ss. 77 and 140 (c) — Giving of notice — General Clauses Act (1897), Section 10 — Applicability.

Giving of a notice to the Railway Administration is an act which is covered by Clause (c) of Section 140 as it permits forwarding of the notice by post in a pre-paid letter. There appears, therefore, no reason to hold that the plaintiff cannot take advantage of Section 10 of the General Clauses Act. **1957 Jab LJ 550: (1957) MPLJ 294: 1958 MPC 459: ILR (1957) Mad Pra 253: AIR 1957 Madh Pra 114 (116) (Pt E) (Pr 9) (DB).**

——S. 77 — Notice cannot be dispensed with because defendant has to say nothing on merits — Notice is mandatory — Observations to contrary in AIR 1948 Nag 17 held obiter and dissented from. See Civil P. C. (1908), Section 80. **AIR 1955 NUC (Mad) 4895.**

——Ss. 77 and 72 — Liability — Notice under Section 77 — Absence of — Effect.

Where the case has all along been fought on the footing that it was a case of non-delivery and not of loss and the defence of the railway because of their failure to discharge the onus cast on them by the proviso to Risk Note Z, the railway cannot claim that the suit should be dimissed because a notice under Section 77 had not been given. **ILR 37 Pat 1034: AIR 1959 Pat 202 (207) (Pt D) (Pr 9) (DB).**

[**Reversed** on another point in AIR 1965 SC 1755.]

——S. 77 — Act applied to Bhavnagar State even before it was applied to Acceding States on 3rd April 1948 by amending Act 21 of 1948 — Notice under Sction 77 held was therefore necessary before suit could be filed.

Before the Bhavnagar State had ceded its civil jurisdiction over railway lands by agreement to Kathiawar Political Agency Courts in 1881 A. D., the Railways Act was in force.

After the cession to Political Agency, the Railways Act, then in force was being applied by the Political Agency.

Bhavnagar State has retained both sovereignty and jurisdiction order the Bhavnagar Lock Estate section of the railway line. The State had adopted the provisions of Indian Railways Act as a state law together with general rules in force in British India, in respect of this jurisdiction.

On retrocession of jurisdiction on the 15th August 1947 notifications Hazur Tharavs No. 1 and No. 2, dated 9-11-1947 were published, according to which, the jurisdiction which was ceded to the Political Agency had reverted to the State, the paramountcy rights of the British Government having ceased from 15th August 1947 and the suits which were tried by the Agency were to be tried in accordance with Code of Civil Procedure of the State.

The Bhavnagar State had a 2 ft. 6 inches gauge tramway for which a set of rules which corresponded with Indian Railways Act, had been prescribed.

Several Indian Acts, such as Contract Act, T. P. Act, Specific Relief Act were being followed in the State even though they were not specifically adapted.

From all the above facts it can be inferred that Indian Railways Act applied to the State after the 15th August 1947, even though it was formally applied to the Acceding States including Bhavnagar State for the first time on 3rd April 1948 by the Amending Act No. 21 of 1948.

Consequently notice of claim against Railway under Section 77, Railways Act, within six months of the due date, was necessary, want of such a valid notice was a bar to the claim, even though the suit for the same was filed on 25th December, 1947, i.e., subsequent to the retrocession of jurisdiction and before the Act was formally applied to the State. **('51) 4 Sau LR 201 (207).**

2. Notice under, if part of cause of action.

——S. 77 — Civil P. C., Section 20 — Delivery of notice under Section 77, Railways Act — No part of cause of action. **AIR 1960 Cal 458 (460) (Pt C) (Pr 14).**

——S. 77 — Notice under — It is part of cause of action — Notice under Section 80, C. P. Code within jurisdiction — It gives jurisdiction — Consignment under Risk Note Z — Loss — Misconduct — Onus is on Railway to prove that non-delivery was due to "loss, destruction or deterioration or damage" — Inference of misconduct can be raised from defective system of giving delivery — (C. P. Code (1908), Section 80) — (Letters Patent (Cal.) Clause 12). **AIR 1955 NUC (Cal) 783.**

——S. 77 — Letters Patent (Cal.), Clause 12 — Cause of action — Civil P. C. (1908), Section 80.

The service of notice either under Section 77, Railways Act or under Section 80 of Civil P. C. can no longer be regarded as part of plaintiff's cause of action. AIR 1952 Cal 35 Rel. on. **AIR 1954 Cal 59 (60) (Pt A) (Pr 8).**

——S. 77 — Civil P. C., Sections 20 and 80 — Notice under Sec. 80 is part of cause of action — (Letters Patent (Cal.) Clause 12). See Civil P. C. (1908), Section 20. **AIR 1953 Cal 235.**

——S. 77 — Service of notice under — Is not part of cause of action. AIR 1949 Cal 622, **Overruled.** See Presidency Small Cause Courts Act, Section 18 (a). **AIR 1952 Cal 35 (FB).**

——S. 77 — Notice under — Not part of cause of action — Does not give jurisdiction. **AIR 1955 Mad 345 (DB).**

——S. 77 — Notice under — If part of cause of action — Goods despatched from B to D — Loss of — Notice issued from P — Court at P — Jurisdiction to entertain suit for compensation — (C. P. Code (1908), Section 20). **1958 BLJR 615.**

——S. 77 — Notice under — Scope of.

A statutory notice required by Railways Act as well as the Civil P. C. is an essential preliminary step for valid institution of suit. But this would not make such notice part of the cause of acion for the suit itself. The notice follows the cause of action and it merely paves the way for the institution of the suit itself. It is not therefore correct to say that, since notice was given in Bombay, the Court of Small Causes had jurisdiction to entertain the suit. **AIR 1954 Bom 129 (132) (Pt C) (Pr 11) (DB).**

[**Held Impliedly Overruled** on another point by AIR 1963 SC 1681 as interpreted in AIR 1967 Cal 205.]

3. Combined notice under this section and Section 80, Civil P. C. (1908).

See also under Civil P. C. (1908), S. 80.

——**S. 77** — Combined notice under Section 77 and Section 80, C. P. Code — Validity — In essence and substance subject-matter of the two notices is also the same — Under both sections notice is to be given to General Manager of the railway concerned — Hence combined notice under the two sections is not invalid. AIR 1952 Nag 22 and AIR 1954 Pat 424 and AIR 1952 Cal 439, Rel. on. **AIR 1961 All 433 (434) (Pr 3).**

——**S. 77** — Notice under Section 80, Civil P. C. is not sufficient. **AIR 1959 All 732 (733) (Pt B) (Pr 8).**

——**S. 77 — Civil P. C., Sec. 80 — Single notice against Union of India as representing all Railways — Sufficiency — (C. P. Code (1908), Section 80).**

Section 77, Railways Act, and Section 80, C. P. Code, definitely contemplate that for the purpose of a suit the different Railways of India must be treated as separate legal entities and there is no warrant for the proposition that it is sufficient to serve one notice under Section 77 against the Union of India as representing all the Railways. **59 Cal WN 1064: ILR (1957) 2 Cal 523: AIR 1957 Cal 202 (202) (Pt A) (Pr 1).**

——**S. 77** — One notice under both Section 77, Railways Act and Section 80, Civil P. C., complying with conditions of sections is enough. **AIR 1952 Cal 439 (440) (Prs 7, 8).**

——**S. 77 — C. P. Code, Section 80 — Notices under both sections written on same paper — Validity — Requirements of sections.**

It is not essential that notices under Section 77, Railways Act, and Section 80, C. P. Code, must be written on separate pieces of paper, and must be specifically labelled with their descriptions. The main difference between the two sections is that, under S. 77 of the Railways Act, the party is barred from ever being able to recover the claim unless notice is given to the railway within six months of the date when the goods in respect of which the claim is made could have been expected to be delivered; whereas the service of notice under Section 80 fixes a period of two months within which no suit on the claim mentioned in the notice can be brought. If the notice given is within the limits of time taken from either end it may well comply therefore in this respect with the purposes both of Sec. 77 of the Railways Act and Section 80 of the C. P. Code. The notice under Section 80 must of course be a notice indicating that a suit will be brought. The cause of action is to be stated. A statement in the notice implying that proceedings would not be brought if the claim was satisfied, can in no way detract from its value as a notice under S. 80.

As a result of the amendment to Section 80, C. P. Code, it so happens that notices under each of the sections are required to be served on or delivered to in the case of claims in respect of loss on a State Railway, the same person, namely, the General Manager of the Railway. Hence if the contents, of the paper giving notice fulfil the requirements of both sections and are correctly delivered, it must be considered that due notice has been given thereby under both the sections. **55 CWN 665: ILR (1952) 2 Cal 205: 87 CLJ 425: AIR 1952 Cal 439 (440) (Prs 7, 8).**

——**S. 77** — Civil P. C. (1908), Section 80 — Combined notice under Section 77, Railways Act and under S. 80, Civil Procedure Code is valid. 1959 MPLJ 327, Foll. **1962 MPLJ (Notes) 269.**

——**S. 77 — Notice under by consignee and notice under Section 80, C. P. Code, by consignor — Suit by consignor — Notice, validity of — (C. P. Code (1908), Section 80).**

A combined notice under Section 77 of the Railways Act and Section 80 of the C. P. Code can be given. Section 77 permits a notice to be given by the person concerned or by some other person concerned on his behalf. The notices under Section 77 of the Railways Act given by the consignee on behalf of the consignor are not in any way irregular. At any rate, the notice under Section 80 of the C. P. Code given by the consignor can be construed as a notice under both the sections, when it fulfilled the requirements of Section 77 of the Railways Act as also Section 80 of the Code. **1959 MPC 239: 1959 Jab LJ 291: 1959 MPLJ 327: AIR 1959 Madh Pra 222 (223) (Pt B) (Pr 6) (DB).**

——**S. 77 — Civil P. C., Section 80 — Notices under — Desirability of certain amendments to the section — Observations of Court.**

Observations by the Court :— It is desirable that the Central Government should undertake legislation dispensing with notice under Section 80, Civil P. C., in a case where the notice required under Section 77 has been given. It would also be better if Legislation is undertaken to clarify which is the railway administration to which notice should be sent under Section 77, Railways Act, in a case where through traffic passes through more than one railway system owned by the Government. **72 Mad LW 556: 1959 Mad WN 518: (1959) 2 Mad LJ 479: ILR (1959) Mad 939: AIR 1960 Mad 58 (64) (Pt C) (Pr 23) (DB).**

——**S. 77** — Civil P. C. (1908), Section 80 — Notice under Section 80, Civil P. C. and Section 77, Railways Act — Distinction pointed out. **AIR 1955 Mys 123 (125) (Pt C) (Pr 12) (DB).**

——**S. 77** — Civil P. C., Section 80 — Suit against Railway — Combined notice under Section 80, Civil P. C. and Section 77, Railways Act to General Manager if valid. See Civil P. C. (1908), Section 80. **AIR 1952 Nag 22.**

——**S. 77 — Applicability — Suit for non-delivery due to loss — Combined notice under Section 77 and Section 80, Civil P. C. — Validity.**

Where the plaintiff's case in the plaint is that the goods have been lost owing to the negligence of the servants of the defendant-railway, the case must be taken to be one of loss, even if the plaintiff may have framed the suit for non-delivery. In such a case, notice under Sec. 77 is necessary. AIR 1927 Pat 234 (FB) and AIR 1949 Pat 410 (FB), Rel. on.

Where a combined notice under Section 77 of the Railways Act and Section 80 of the Code of Civil Procedure is given that in itself does not vitiate the notice. AIR 1954 Pat 424, Rel. on. **1961 BLJR 223: 1961 Pat LR 26: ILR 40 Pat 921: AIR 1961 Pat 334 (338) (Pt E) (Pr 10) (DB).**

——**S. 77 — Combined notice under Section 77, Railways Act and Section 80, Civil P. C. — Validity.**

Where a notice specifically states that it is a notice both under Section 77, Railways Act and

Section 80, Civil P. C. and complies with all the requirements of Section 77, Railways Act and Section 80, Civil P. C., there is nothing illegal in such a combined notice. AIR 1952 Nag 22 and AIR 1952 Cal 439, Foll. **1954 BLJR 205: ILR 33 Pat 214: AIR 1954 Pat 424 (425) (Pr 5) (DB).**

——**S. 77** — Combined notice under Section 80 and Section 77 Railways Act (1890) — Validity — It is valid. See Civil P. C. (1908), Section 80. **AIR 1964 Raj 41 (DB).**

4. Notice, when not necessary.

See also Note 5.

——**S. 77 — Cases where notice is not necessary.** The principle is well settled that when certain duties or conditions are imposed by a statute, when those duties or conditions are not conditions precedent to the exercise of jurisdiction, they are subject to the maxim lex non comit ad impossibilis aut inutilia. They are understood as dispensing with the performance of what is prescribed when performance of it is idle or impossible.

Where in a case the Railway authorities take notice of a complaint and send an officer to investigate the claim and assess the damages and that officer after investigation and assessment fixes the amount of damages it would be futile for the consignee to send any further notice of the claim to the railway authorities. In the circumstances there is no further requirement of any notice under Section 77 of the Act and there is an estoppel against the Railway from pleading the absence of such a notice in bar of the suit. **ILR (1955) 7 Assam 261: AIR 1955 Assam 221 (225) (Pt E) (Pr 9) (DB).**

——**S. 77 — Applicability — Suit for damages based on negligence in torts — Notice not necessary.**

It is obvious that a contract and a tort belong to two different branches of the law. Though contractual or delictual duties differ in their juridical source, yet they may co-exist or concur in the same act, and when it is so, the wrong is both a breach of contract and a tort. Thus, where the Railway agrees to transport the goods of the plaintiffs, its liability arises out of contract. But if in carrying the goods, the Railway is negligent (and the suit filed against it is founded on negligence), it cannot escape liability under torts. And in the latter case no notice under Section 77 of the Railways Act is necessary, when the suit is based on negligence, and the relief sought is damages. AIR 1934 Pat 507 and AIR 1935 All 601, Foll. **1957 Jab LJ (MB) 129: AIR 1957 Madh Bha 111 (112, 113) (Prs 6, 9, 14).**

——**Ss. 77, 80, 74-C, 74-D — Administration not disclosing how consignment was dealt with — Consignee not in position to know whether goods were lost or destroyed in transit — Suit for non-delivery — Notice under Section 77 is not necessary.**

Section 80 refers to cases where the goods are lost or destroyed in the course of transit. In such case, notice under Section 77 will certainly be necessary.

In the case of a suit for compensation for non-delivery of the goods, against the Union of India as representing the Railway Administration at the destination who ought to have delivered the goods, it is not necessary for the plaintiff to show that he has sent the notice of the claim under Section 77. Section 77 will apply to cases of loss or destruction of the goods in the course of transit and not to a case of mere non-delivery. When such a suit is brought, Railway Administration can set up the defence that it was not a case of mere non-delivery, but that the goods were lost or destroyed in transit. It is for the Railway Administration to prove in Court in such a suit that the goods were actually lost or destroyed in the course of the transit.

Where in the case of consignment of goods at owner's risk rate, the Railway administration did not disclose how the consignment was dealt with as it was bound to do under Sections 74-C and 74-D and the consignee was not in a position to know the causes for the non-delivery and as a result he could not bring a suit under Section 80 on the ground of loss or destruction of the goods as he did not know whether the goods were lost or destroyed in transit, his suit could be only on the ground of non-delivery. If in such a case the railway did not take any plea that the goods were lost or destroyed in transit nor was there evidence let in for the defence to prove the loss or destruction, no notice under Section 77 was necessary and the plaintiff could not be non-suited because no notice was sent. **AIR 1961 Manipur 45 (47, 48, 49) (Pt D) (Prs 12, 14, 15, 19).**

5. "Loss, destruction or deterioration.

●——**S. 77 (before its amendment by Acts 56 of 1949 and 39 of 1961) — Non-delivery of consigned goods — Damages for — Cause of action is same as loss — Notice under Section 77 necessary — Held, on facts, that notice sent by party was sufficient.**

The failure to deliver goods is the consequence of loss or destruction and the cause of action for it is not distinct from the cause of action for loss or destruction, and, therefore, notice under Section 77 is necessary in the case of non-delivery which arises from the loss of goods. AIR 1961 SC 725, Foll.

Held, on facts, that the notice given by the consignee stating that 60 bales of cloth were booked for him but only 29 bales had been delivered, that the balance of 31 bales had not been delivered and that if the bales were not delivered to him within a fortnight, he would file a suit for the recovery of Rs. 36,461-12-0, giving the details as to how the amount was arrived at amounted to a notice under Section 77 though it did not specifically state that it was a notice under that section. AIR 1962 SC 1879, Rel. on. Union of India v. Mahadeolal Prabhu Dayal, **(1965) 3 SCR 145: ILR 45 Pat 599: AIR 1965 SC 1755 (1757) (Pt A) (Pr 5).**

——**S. 77 — Applicability — Goods detained by railway — No loss alleged or proved — Effect.**

Where a suit for damages is filed as against the Railway on the ground that goods which had been handed over to the Railway for carriage were not delivered to the plaintiff and had been detained by the Railway, Section 77 of the Railways Act is not attracted since the claim of the plaintiff is not based on the allegation that the goods had been lost and also because there is no proof whatsoever of loss. In such a case the want of notice under the aforesaid section does not bar the suit. **1959 All LJ 649: AIR 1960 All 131 (133) (Pt A) (Pr 6) (DB).**

——**S. 77** — Loss — Meaning of — Loss means both loss by Railway and loss to owner. **AIR 1959 All 732 (733) (Pt A) (Pr 7).**

——**S. 77 — Applicability — Suit for compensation for non-delivery.**

Per Mukerji J. (Agreeing with Beg, J.) — Section 77 does not apply to a case where a person seeks compensation for non-delivery or late delivery. A plaintiff suffers loss (1) (a) either when

the goods are lost to the carrier because of their being stolen or (b) having been destroyed while the goods are in the hands of the carrier or (c) because of the deterioration of the goods in the hands of the carrier. A plaintiff also suffers loss (2) when the carrier (a) fails to deliver the goods to him or (b) delivers them very late. AIR 1952 All 891 (FB) and AIR 1952 All 897 (FB), Foll.

Per Desai, J. — Loss of a consignment is not quite the same thing as non-delivery of it. These words have no technical meaning: 'loss' means that the goods have been lost, i.e., become untraceable and cannot be got hold of, while 'non-delivery' simply means that they have not been delivered. If they have not been delivered on account of their having become untraceable, it is a case of loss rather than of non-delivery. **AIR 1958 All 234 (238, 248, 252) (Pt A) (Prs 5, 35, 64) (DB).**

——S. 77 — Notice.

Where in a suit for damages against a railway administration for non-delivery of a part of the consignment, the plaintiff establishes that the non-delivery was due to misconduct on the part of the railway administration and there is no finding that it was due to loss, destruction or deterioration, the suit cannot fail for want of notice under Section 77, Railways Act. AIR 1952 All 891 (FB), Foll. **1953 All LJ 55: 1953 All WR (HC) 107: AIR 1953 All 460 (461) (Pt A) (Pr 7).**

●**——S. 77 — Notice, necessity of — Non-delivery — Cause, not due to 'loss, destruction or deterioration' of goods.**

Held, Non-delivery may be due to a variety of causes. When non-delivery is due to 'loss, destruction or deterioration' of goods then a notice under Section 77 of the Act is required, but if it is due to any other cause no such notice is necessary. "Loss" does not mean loss to the owner. AIR 1952 All 891 (FB), Foll. Mutsaddi Lal v. Governor-General. **1952 AWR (HC) 385: 1952 ALJ 451: ILR (1953) 2 All 654: AIR 1952 All 897 (898) (Pt A) (Pr 6) (FB).**

[Reversed in AIR 1961 SC 725.]

●**——S. 77 — Non-delivery of goods consigned to consignee — Inference from failure of Railway to show good cause — Suit for damages — Notice, when necessary — 'Loss', meaning of.**

M the consignee of 562 bags of rice in 2 consignments from a station in B and A Railway to a station in the O and T Railway filed a suit for the price, etc., as damages on the ground that the goods were not delivered to him because they were wrongfully diverted and converted to the tangible loss of the plaintiff. The three railways over which the goods, had to be transported were impleaded as parties. One of the contentions of the defendants was that no notice under Section 77 was given. The trial Court found that the loss to the plaintiff arising out of non-delivery was due to the misconduct of the defendants' employees and decreed the suit.

The defendants' appeal was referred to a Full Bench as the word 'loss' in Section 77 was interpreted differently by different Courts and by the same Court differently at different times and consequently the requirement of notice also to the Railways under Section 77 in case of non-delivery of goods.

Held,: The word 'loss' as used in the section means not loss to the owner but loss by the Railway Administration; for if it meant loss to the owner there was no need for the words "destruction or deterioration" following the word loss.

Where non-delivery of goods is due to the loss of goods by the railway administration or their destruction or deterioration then only notice under Section 77 of the Act is necessary; but where non-delivery is due to any other reason then no notice is required. The whole case law reviewed. The Governor-General v. Mahabir Ram. **1952 AWR (HC) 376: 1952 ALJ 443: ILR (1953) 1 All 64: AIR 1952 All 891 (896) (Pt A) (Prs 40, 41) (FB).**

[**Overruled** in AIR 1961 SC 725.]

——S. 77 — "Loss" — Claim based on non-delivery included.

The word "loss" in Section 77 of the Railways Act includes a claim made on the footing of non-delivery. It includes not only loss to the Railway but also loss to the consignee.

Where the consignee made a claim for short delivery but did not serve a notice under Section 77, Railways Act:

Held, that a notice under Section 77 was necessary without which the plaintiff could not succeed. 60 BLR 150. Foll. **1958 Nag LJ (Notes) 74.**

——S. 77 — 'Loss' — Meaning of.

The word "loss" in Section 77 must include loss arising from whatever cause. Thus it includes a claim on the footing of non-delivery, or negligence, or wrongful detention or conversion on the part of the railway administration. **56 Bom LR 150: AIR 1954 Bom 297 (299) (Pt C) (Prs 9, 13).**

——S. 77 — Notice under, is condition precedent in case of non-delivery of consignment. AIR 1961 SC 725, Foll. **(1965) 69 Cal WN 692.**

——S. 77 — Applicability — Non-delivery or short delivery of goods — Service of notice essential.

A plaintiff filing a suit against the Railway Administration for compensation is liable to serve notice under Section 77 of the Railways Act for loss caused to him both by non-delivery or short delivery of goods consigned by him and his failure to do so is fatal to the claim. AIR 1961 SC 725, Rel. on.

In the absence of evidence to show that the Railway Administration concerned had either expressly or by implication held out the Chief Commercial Manager as the officer authorised to receive notice under Section 77 of the Act; service of notice on him was held not good service. **(1961) 3 All LR 370: 65 Cal WN 876: AIR 1962 Cal 42 (45) (Prs 15, 16) (DB).**

——S. 77 — Applicability — Suit for compensation for non-delivery of part of consignment — Notice — Necessity.

The 'loss' in Section 77 means loss not for the consignor but the loss of the goods for the Railway. Non-delivery may be due to other causes than loss. The mere fact, therefore, that a part of the consignment was not delivered, is not sufficient to show that there was 'loss' within the meaning of Section 77. AIR 1926 Cal 612 and AIR 1958 Cal 434 and AIR 1924 Cal 725, Rel. on.

Where in a suit for compensation for non-delivery of part of the consignment, there was no admission of loss in the plaint, the written statement was also silent on the point of loss and the evidence also did not establish that there was loss of the goods by the railway:

Held, that Section 77 did not apply and the suit did not fail for want of notice under Section 77. **AIR 1960 Cal 571 (571, 572) (Prs 3, 4).**

——S. 77 — Loss — Burden of proof.

If it is merely a case of the railway seeking the protection of Section 77, it would be for the railway to establish that Section 77 applied and,

therefore, it would be for the railway to establish further that the non-delivery was due to circumstances which made it a case of 'loss' within the meaning of the law. Where however, the plaintiff himself comes to Court with the case that Section 77 applied and avers that a proper notice under Section 77 has been served on the railway and the defendant railway takes up the position that the notice is invalid, it is impossible to say that any burden lies on the railway to show that the non-delivery would amount to loss. The plaintiff having taken up the position in his plaint that Section 77 does not apply, the burden is certainly on him to show this. **AIR 1958 Cal 434 (436) (Pt C) (Pr 10) (DB).**

——S. 77 — Non-delivery — Reasons — Burden of proof.

Where the arrangement was that the consignment would be carried only a part of the way by the defendant railway and from there upto its destination by the Pakistan Railway, the Pakistan Railway cannot, in law be considered to be the agent of the defendant and, therefore, the contention that the circumstances due to which a part of the consignment could not be delivered at a station within Pakistan were within the knowledge of the defendant cannot be accepted. **AIR 1958 Cal 434 (436) (Pt D) (Pr 11) (DB).**

——S. 77 — "Loss" — Meaning of — (Words and Phrases).

The word "loss" in Section 77 includes loss by the carrier as also to the owner whether for mis-delivery or for non-delivery. **60 Cal WN 683: ILR (1957) 3 Cal 713: AIR 1956 Cal 390 (393) (Pt D) (Pr 30) (DB).**

[Reversed on another point in AIR 1962 SC 1879.]

——S. 77 — Applicability — Loss of goods by theft.

Section 77, Railways Act, applies to a case where the Railway Administration say that they could not deliver the goods because they were lost by theft. Non-delivery would also include loss. **AIR 1952 Cal 341 (343) (Pt C) (Pr 6).**

——S. 77 — No loss alleged — Notice is not required.

The word 'loss' occurring in Section 77 does not mean loss to the owner but loss suffered by the railway administration. Where a non-delivery of goods is due to loss of goods by the Railway Administration, or to their deterioration or destruction, then only a notice under Section 77, Railways Act, is necessary, but where non-delivery of goods is due to any other reason then no such notice is required. When the suit is based on non-delivery of the goods, notice of claim is not necessary under Section 77. If it is known to the plaintiff and if the plaint is so framed that the plaintiff admits and bases his claim on the fact that the Railway has lost the property, then possibly, the question of notice under Section 77 may arise, otherwise a notice is not necessary. If the word 'loss' refers to the loss of railway, this section cannot apply to the case in which such loss is not alleged or admitted by the plaintiff. AIR 1954 Bom 297; AIR 1926 All 686; AIR 1926 All 698; AIR 1925 All 273; AIR 1923 Pat 285 and AIR 1949 Pat 410, Not foll. **ILR (1955) Hyd 604: AIR 1956 Hyd 30 (30, 31) (Pt A) (Pr 2).**

——S. 77 — Hyderabad Railways Act, Section 46 — Word 'Loss' in Section 77 does not include non-delivery — Suit against Railway for compensation for non-delivery — Notice under Section 77 is not necessary — Notice expressly claiming compensation but not specifying any fixed and certain sum as compensation — Notice is insufficient compliance with Section 77. **ILR (1952) Hyd 983: AIR 1953 Hyd 139 (140) (Pt B) (Pr 3) (DB).**

——S. 77 — 'Loss' — Meaning of — Misdelivery is 'loss'. AIR 1919 Mad 140 and (1955) 1 Mad LJ 255 and AIR 1954 Bom 297 and AIR 1958 Andh Pra 475 and AIR 1921 Lah 1, Rel. on; 6 Punj Re 1897, Diss. from. **1930 Ker LJ 309: (1960) 1 Ker LR 513: ILR (1960) Ker 539: AIR 1960 Ker 306 (308) (Pt B) (Pr 11) (DB).**

——S. 77 — Notice under Section 77, Railways Act is necessary in cases of compensation for short delivery also — Suit would not be maintainable if notice under Section 77 is given beyond six months of the booking of the goods.

Held, that a notice under Section 77 was a condition precedent to any claim covered by the section and it could not be dispensed with because its object was considered to have been otherwise served. An admission of short delivery did not dispense with an enquiry into the validity or invalidity of the notice under Section 77. AIR 1959 MP 276, Foll. The word 'loss' in the section includes loss arising from whatever cause. Thus, it included a claim on the footing of non-delivery or negligence or wrongful detention or conversion on the part of the Railway Administration. AIR 1961 SC 725, Rel. on. 1954 NLJ Note 278; 1957 MPLJ Note 169; AIR 1954 Bom 297 and AIR 1962 Cal 42, Foll. Where a suit was filed against the Railways and the notice under Section 77 was issued beyond six months of the booking of the goods, the suit was not maintainable. AIR 1962 MP 301, Foll. **1964 MPLJ (Notes) 25.**

——S. 77 — Notice of claim for compensation for non-delivery — Subsequent late delivery of goods in deteriorated condition — Suit for compensation on basis of damage to goods — Validity of notice.

Section 77, Railways Act, prescribes no particular form of notice. All that it requires is that a claim for compensation shall be preferred to the railway administration in writing and that the said claim shall be preferred within six months from the date of delivery of the goods for carriage by the railway. Though the provisions of Section 77 of the Act are mandatory, and a suit for compensation for 'loss, destruction or deterioration of goods' is liable to fail if no notice is given, the object of the section is to prevent stale and possibly dishonest, claims for loss, destruction or deterioration being made against the railway administration. It is intended as a weapon of defence against fraud and not as a means to enable the railway authorities to deprive their customers of their just dues. Another important object of the section is the necessity of protecting the railways from groundless litigation. AIR 1930 Cal 332 and ILR 26 Bom 669, Rel. on.

Held, that in the instant case the goods had not arrived at their destination within the usual period in which they should have ordinarily arrived. The plaintiff firm could have no idea whether the goods had been lost or destroyed. Realizing that the period of six months was mandatory, the plaintiff firm rightly preferred a claim for compensation under Section 77 of the Railways Act on or about 28-6-1950. The notices served their purpose of preventing stale and possibly dishonest claims and of putting the railway administrations on enquiry, so that they could trace the consignment and check the allegations made by the plaintiff-firm. As, thereafter, the

railway administrations took time to trace the consignment and offer it for delivery, no further notices in respect of that consignment were necessary, as the purpose of Section 77 of the Railways Act had been served. The further facts, that ultimately a delivery was made possible, even though late, because the consignment could be traced and redirected to the station of delivery and that the traced consignment had suffered damage due to deterioration, are all matters of default going to the assessment of exact compensation payable to the owner, with which the notice under Section 77 of the Railways Act is not concerned. Hence, the notices, dated 28-6-1950, amply complied with the provisions of Section 77 of the Railways Act. **1959 MPLJ 605: 1959 MPC 447: 1960 Jab LJ 1008: AIR 1959 Madh Pra 305 (307) (Pt A) (Prs 14, 15) (DB).**

——**S. 77** — Loss or deterioration — Short delivery as result of loss — Section 77 applies. **AIR 1959 Madh Pra 276 (279) (Pt B) (Pr 15) (DB).**

——**S. 77 — Applicability — Suit for non-delivery.**

Section 77, Railways Act, only applies to suits for loss, destruction or deterioration of goods. A suit for non-delivery of the goods is not affected by it. AIR 1949 Pat 268; AIR 1952 All 891, Foll. **1958 Jab LJ 412: 1958 MPC 281: 1958 MPLJ 500: 1957 MPLJ (Notes) 193: ILR (1957) Madh Pra 504: AIR 1958 Madh Pra 314 (316) (Pt D) (Pr 10) (DB).**

——**S. 77 — Short delivery result of loss — Notice — Necessity.**

Notice under Section 77 of the Railways Act is necessary where the short delivery is the result of loss within the meaning of Section 77. AIR 1949 Cal 420; AIR 1954 Bom 297, Foll.; AIR 1924 Nag 288, Not foll. **1957 MPLJ (Notes) 169.**

——**Ss. 77 and 75 (1)** — "Loss, destruction" — Meaning and proof indicated — AIR 1952 All 891 (FB) and AIR 1949 All 223 and AIR 1949 Pat 410 (FB), Dissented from. See Railways Act (9 of 1890), Section 75 (1). **AIR 1956 Mad 483.**

——**S. 77 — 'Loss' — Meaning of.**

The loss may result in any manner but so long as the claimant does not receive the goods as per the Railway receipt it must be considered as loss and a notice is required. So long as the goods are not delivered to him, he should consider it as a loss. He will be entitled to commence a proceeding only after the issue of a notice under Section 77. Section 77 of the Railways Act does apply to non-delivery also, when it is not known what happened to the goods and it is not necessary for the railway company to establish that the goods have been lost in the sense of being not recoverable from any one. **AIR 1955 NUC (Mad) 2445.**

——**S. 77 — Applicability — Non-delivery.**

Section 77 does not apply to a mere non-delivery. Where in a suit for compensation for goods not delivered to the consignee or not redelivered to the plaintiff-consignor, the defendant wants to oppose the claim on the ground that the plaintiff had submitted his claim beyond six months, it is incumbent on the defendant to prove that the goods had been lost, destroyed or deteriorated. **AIR 1951 Mad 327 (328) (Pt B) (Pr 5).**

——**S. 77 — Cases of non-delivery are not included.**

The plain meaning of Section 77 is that the loss or destruction is of the goods and that too in the course of the transit after they were delivered to be carried. The loss or destruction is a thing which as a fact occurs in the course of transit. It can never mean the loss of the goods to the owner as a result of non-delivery thereby including cases of 'non-delivery' within the word 'loss'. **AIR 1961 Manipur 45 (48) (Pt E) (Pr 16).**

——**S. 77 — Wrongful refusal to give delivery of goods — Suit for compensation — Notice — Necessity.**

Where the consignment bore a wrong number due to fault of the railway authorities but there were no grounds for the railway administration at the destination station entertaining reasonable doubts as to the identity of the goods or to their having been consigned under the railway receipt produced by the consignee, refusal to deliver the goods to the consignee upon production of railway receipt after the arrival of the goods in spite of repeated attempts by the consignee to obtain delivery, cannot but be regarded as a wrongful refusal to deliver the goods to the person entitled to the delivery thereof. When a carrier wrongfully refuses to deliver goods to the person entitled to delivery thereof, he commits an act of conversion and in such a case, the rule of law that a consignee is bound to take delivery of the goods when the Railway administration offers to deliver them even if they are in a damaged condition when they arrived at the destination and that he should thereafter proceed to claim such compensation as he might be entitled to in respect of the injury caused to his goods has no application. In offering to deliver goods nearly four months after their arrival at destination, there is unjustifiable delay and the consignee is entitled to refuse to take delivery of goods of which there had been conversion. AIR 1928 Lah 804 and AIR 1927 Lah 471 & AIR 1925 All 656, Relied on. Where the consignment was named as 'self' and the consignor had made a blank endorsement on the railway receipt and had forwarded to another at destination station to take delivery, the endorsement in favour of another is only for limited purpose of enabling him to take delivery and it does not establish the fact that the endorsee has become the owner of the goods by purchase. In such a case a suit for compensation for conversion of goods is maintainable by the consignor.

The question as to when the title to the goods stands transferred from a seller to a buyer, even in cases where it could be said there was a sale of the goods, depends upon the intention of the parties to be deduced from the terms of the contract, the conduct of the parties and the circumstances of the case. If it was the intention of the railway administration to establish that the consignor had become divested of his title to the goods and that he had sold the goods to another and that the title had passed from the consignor to him it is incumbent on the railway administration to allege affirmatively these facts and to prove the transfer of title in the goods. Such a suit being not a suit for the recovery of compensation for loss, destruction or deterioration of the goods, but being one for compensation for conversion it need not be preceded by a notice under Section 77, Railways Act. AIR 1921 Lah 1 (FB) and AIR 1927 Lah 471, Relied on. **38 Mys LJ 301: ILR (1959) Mys 961: AIR 1960 Mys 283 (285, 286, 287) (Prs 17, 20, 23, 25, 27, 29, 30) (DB).**

——**S. 77 — 'Loss' — Meaning — Non-delivery or short delivery — Notice — Whether necessary.**

The word 'loss' in Section 77 can never mean loss to the owner. In its natural sense it would only mean that the goods have disappeared in the course of transit and neither the railway nor

the consignor nor the consignee are or is in a position to trace them either in specific or to some demonstrable cause such as misconduct on the part of any servants of the railway or theft, incendiarism, etc. A distinction ought to be drawn between a case where the railway being in possession of the goods deliberately withheld the goods which they may deliver if they chose to do so, and a case where the goods are lost and are no longer in their possession. Where the goods were unlawfully detained by the railway, no notice under Section 77 would be necessary but such notice would be necessary if the non-delivery was not a result of such detention. AIR 1952 All 891 (FB) and AIR 1923 Cal 397, Rel. on.

Principles of burden of proof are of relevance only for deciding whether or not liability exists. They could have no bearing on the question of the need or otherwise for a notice under Section 77. AIR 1951 Mad 327, Dissent. from. Notice is required to be given to the railway within a reasonable time in order to enable them to make enquiries and if possible to recover the goods. That also is the justification for holding that no notice is necessary in cases of unlawful detention of the goods by the railway because the purpose for which notice is required does not exist. The railways already have the goods in their possession and, therefore, do not stand in need of any notice to enable them to trace them. AIR 1919 Mad 140 and 1955 Mad WN 171, Rel. on.

Where in a suit for compensation for short delivery against the Railway, the report of the Claims Inspector disclosed that one of the bales consigned was found loose at the destination and the stitches on it appeared to have been removed and subsequently restitched.

Held, that it was only a case where goods were not forthcoming and nobody had tried to trace them. It was exactly in situations like this that notice under Section 77 was necessary with a view to enable the railway to trace the goods, if it could. **36 Mys LJ 655: ILR (1958) Mys 481: AIR 1959 Mys 13 (16, 17) (Pt C) (Prs 10 to 14).**

——S. 77 — Claim for non-delivery of goods received and not lost, destroyed or deteriorated — Notice is not necessary. **ILR (1953) Mys 489: 32 Mys LJ 74: AIR 1954 Mys 57 (57) (Pr 2).**

——S. 77 — Non-delivery — "Loss" is included — Notice under Section 77 is necessary. See Railways Act (1890), Section 72 (old). **('52) 1952 Nag LJ (Notes) 145.**

——S. 77 — Section (before 1961 amendment) was applicable even if there was complete non-delivery of goods. AIR 1961 SC 725, Foll. **28 Cut LT 331: ILR (1962) Cut 402: AIR 1963 Orissa 54 (55) (Pt A) (Prs 5, 8) (DB).**

——S. 77 — Non-delivery of part of goods — Notice — Necessity.

No notice under Section 77 is necessary in case of non-delivery. If a part of the consignment is not delivered, it is prima facie a case of non-delivery irrespective of the question whether the part not delivered is a full package or is a part of it which, in its turn, forms a part of the full consignment. **1959 BLJR 737: 1959 Pat LR 280: AIR 1960 Pat 150 (151, 152) (Prs 4, 5).**

——S. 77 — Claim based on non-delivery — Notice.

Held, on facts that, while there could be no doubt that the plaintiff must serve a notice under Section 77 if he admits that the goods have been lost in the circumstances of this case, it was clear that the plaintiff had not made an admission that the goods had been lost and the plaintiff having claimed on the basis of non-delivery no notice under Section 77 was necessary according to the well settled law, so far as the Patna High Court was concerned. AIR 1927 Pat 234 (FB) and AIR 1949 Pat 410 (FB), Distinguished. **AIR 1958 Pat 536 (537) (Prs 6, 7).**

——Ss. 77 and 80 — Applicability and scope — Claim for non-delivery and claim for loss of goods — Difference.

There is a difference between a claim on the basis of non-delivery and claim on the basis of loss of goods. The two claims stand on different footing. AIR 1929 Pat 109 and AIR 1949 Pat 268, Rel. on. Where the claim is purely one for non-delivery the principles of Section 80 cannot be made applicable so as to entitle the defendant to have the suit dismissed on that ground. **1958 Pat LR 58: ILR 37 Pat 442: AIR 1958 Pat 489 (490) (Pt A) (Pr 4).**

——S. 77 — Notice under — Notice relating to non-delivery combined with non-delivery due to loss or destruction — Held, sufficient compliance with Section 77.

If it is the law that it is not open to a person to give notice until he is certain on the point whether it is a pure case of non-delivery or of non-delivery due to loss or destruction, it might become too late for him to give such notice at all, for the knowledge might come to him much more than six months after the goods were delivered for transport. Where, therefore, a person combines both these notices in one notice given at a stage when it is not possible for him to decide whether it is a pure case of non-delivery or the other, the notice is sufficient under Section 77 to entitle him to sue for non-delivery due to loss or non-delivery: AIR 1949 Pat 410, Ref. **AIR 1951 Pat 219 (223) (Pt B) (Pr 11) (DB).**

——S. 77 — Applicability and scope — Suit for damages for non-delivery of goods — Subsequent knowledge of existence of goods and delivery — Effect.

On a strict perusal of the provisions of Section 77, Railways Act, no consignee can be entitled to compensation for deterioration of goods unless he has within six months of the date of the despatch of the goods, sent to the appropriate railway authorities a claim for compensation for deterioration, that is, he cannot be granted damages for deterioration if he has merely filed a claim within time for loss or destruction of goods. Where, however, in a suit for damages for non-delivery of goods, the first intimation which the plaintiff received that the railway administrations had any knowledge of the consignment or had any part of the consignment in its possession, was, when the written statement was filed on behalf of the Railway nine months after the suit was instituted, and it was only after that, when delivery was taken that the plaintiff became aware of the deterioration of the goods:

Held, that the railway authorities could not take the benefit of Section 77. **Held,** also, that up to the moment when the suit was instituted it was a suit based on non-delivery of goods in which case no notice under Section 77 was necessary. The subsequent revelation that part of the consignment was still available did not make any difference. **60 Pun LR 355: AIR 1958 Punj 270 (272) (Pt A) (Prs 10, 12) (DB).**

——S. 77 — Loss — Meaning.

The term loss in Section 77 does not include non-delivery of the goods and, therefore, in a

suit against a Railway administration for the value of goods delivered to the administration to be carried by railway, when the suit is based upon non-delivery of those goods, notice of claim is not necessary in the manner provided by Section 77. AIR 1953 Punj 184, Foll. **ILR (1958) Punj 467: AIR 1958 Punj 149 (150) (Pt A) (Pr 4) (DB).**

[**Overruled** on another point in AIR 1962 Punj 262.]

——**S. 77** — Notice — Non-delivery not result of loss, destruction or deterioration — Suit for compensation — Notice under Section 77 is not necessary. **AIR 1955 NUC (Punj) 4954 (DB).**

——**S. 77 — Applicability — Suit based upon non-delivery of goods — Notice of claim — If necessary.**

Per Full Bench.— In a suit against a railway administration for the value of goods consigned to the railway administration for carriage, when the suit is based upon non-delivery to the plaintiff of those goods, notice of the claim is not necessary in the manner provided by Section 77 of the Railways Act. The term "loss" occurring in that section does not include non-delivery.

Per Weston, C. J. — "It is of course possible for every consignee who has not obtained delivery to base his suit on non-delivery. It is then open to the railway administration to plead and prove that there has been loss or destruction of the goods and that their liability, therefore, is limited by Sections 151 and 152 of the Contract Act. In such event the railway administration can avoid all liability to pay if a claim to compensation within six months from the date of delivery for carriage has not been made. If, however, the railway administration is not able to establish that the non-delivery was due to loss or destruction of the goods then Section 77 would not apply". **54 PLR 398: AIR 1953 Punj 184 (184, 187) (Pt B) (Prs 1, 26, 28) (DB).**

——**S. 77 — Short delivery — Notice — Propriety of — (Compensation — Notice).**

In the case of a suit for compensation for short delivery of the goods no notice is necessary under Section 77, if short delivery is not the result of loss. **AIR 1951 Punj 383 (385, 386) (Pt B) (Prs 17, 25).**

——**S. 77** — Word "loss" includes case of non-delivery — Service by notice is obligatory. **AIR 1965 Raj 127 (128) (Prs 4, 5).**

——**S. 77** — Loss — Meaning of — Notice is necessary only where non-delivery is due to loss, deterioration or destruction. **AIR 1955 NUC (Raj) 4064 (DB).**

——**S. 77 — Non-delivery of goods.**

The word "loss" in Section 77 does not include "loss to owner". In its context, it clearly signifies loss by the Railway. If the cases are of non-delivery no notice under Section 77 was necessary. **AIR 1955 NUC (Raj) 312 (DB).**

6. Form and contents of notice.

●——**S. 77 (as it stood prior to amending Act of 1961) — Notice under — Object of —Construction of notice — Liberal construction favoured — Letter bringing to notice of railway administration non-delivery of part consignment and also requesting it to take appropriate action without delay — Sufficient notice for purpose of Section 77 — Claim for compensation must be deemed to be implied in notice.**

In enacting Section 77 the intention of the legislature must have been to afford only a protection to the railway administration against fraud and not to provide a means for depriving the consignors of their legitimate claims for compensation for the loss of or damage caused to their consignments during the course of transit on the railways. Bearing in mind the object of the section a notice under S. 77 should be liberally construed. AIR 1930 Cal 332, Ref.

Where within 6 months of booking the consignment, the consignor brought to the notice of the railway administration by a letter that part of the consignment had not reached the destination and requested the General Manager of the Railway to make a search for the goods without delay;

Held, (per Majority: Sarkar, J., contra) that the letter amounts to a sufficient notice for the purposes of Section 77. A claim for compensation must be deemed to be implied in the notice. The consignor must be regarded as making it clear that he would be holding the railway administration to its contractual engagement which necessarily involves the payment of damages for breach of that engagement. Therefore, not only the object underlying Section 77 is satisfied by the letter but also a claim for compensation is implied in that letter.

Per Sarkar, J., Contra:— The section (Section 77) requires a claim to compensation to be preferred. A letter asking that a search for the goods be made and they be delivered does not comply with Section 77. Such a letter is not in terms of the section nor does it serve the purpose of the section. The letter does not amount to any claim against the railway administration by necessary implication: AIR 1947 Mad 362 and AIR 1954 Bom 297, Rel. on. Jetmull Bhojraj v. Darjeeling Himalayan Railway Co., Ltd., **(1963) Mad LJ (SC) 89: (1963) 1 Andh WR (SC) 89: (1963) 1 SCJ 505: (1963) 2 Andh LT 80: (1963) 2 SCR 832: 1963 SCD 509: AIR 1962 SC 1879 (1881, 1884) (Pt A) (Prs 7, 20, 21).**

——**S. 77 — Notice under — Requirements of — Cause of action of claim need not be mentioned.**

Section 77 only requires that the plaintiff should prefer a claim to the railway administration. No form is prescribed nor does the section require that the cause of action of the claim be mentioned in the notice. Where the notice preferred a claim on the railway administration, and there was no evidence that the railway administration was in any manner misled by the notice or that if the notice had mentioned the correct number of the railway receipts, the railway administration would have averted the suit by setting the claim outside Court;

Held, that the notice under Sction 77 was valid in law. **1964 All WR (HC) 54.**

——**S. 77** — Preferring of claim — What constitutes — One railway company sending copy of notice of claim preferred to another company — There is no preferring of claim to latter company. **AIR 1959 All 732 (733) (Pt C) (Pr 6).**

——**S. 77 — Notice of claim — What is.**

Per Desai, J.:— Every correspondence or every letter of inquiry cannot be treated as a notice of claim; it may not be necessay to specify the exact amount claimed but there must be some sort of a claim. An inquiry is not the same thing as a claim and cannot be treated as a substitute for it. Making a claim is quite distinct from making an enquiry, so long as there is not communication of any intention to hold the railway administration liable for the loss, it cannot amount to lodging a claim before it. **AIR 1958 All 234 (241) (Pt E) (Pr 9) (DB).**

——S. 77 — Form of notice.

Section 77 merely requires that a demand for compensation should be made, but it nowhere prescribes that the money value of the claim should be stated or that the claimant should notify that he intends to bring an action. **ILR (1955) 7 Assam 261: AIR 1955 Assam 221 (224) (Pt D) (Pr 7) (DB).**

——Ss. 77 and 140 — Person to whom notice has to be sent.

The claim should be preferred in writing to the railway administration and "railway administration", as defined in Section 3 (6) of the Act, in the case of a railway administered by a Government or a State, means the Manager of the Railway and includes the Government or the State.

Under Section 140, a notice or other document required or authorised by the Act to be served on a railway administration may be served, in the case of a railway administered by the Government, on the Manager. The object of the notice on the Manager is simply to give an opportunity to the railway administration to enquire immediately into the complaint. The claim may be preferred to subordinate officers also who are authorised to entertain it. There is nothing to prevent the Manager from delegating such power to any subordinate officer. Section 140 is merely an enabling section which was enacted to help claimants, and not to assist the railway administration to put up a disingenuous defence. If the notice is served within its terms, the railway has no answer. It does not matter whether any individual officer knew about it or not. It is sufficient compliance with Section 77 if, in fact, notice has been given to the railway administration.

The plaintiff suspecting damage demanded open delivery well within the period of six months from the date of consignment by a letter addressed to the Deputy Traffic Superintendent (Claims). Open delivery was given by an officer who at the same time assessed the damages. The suit for recovery of the damages was resisted by the Railway on the ground that there was no notice under Section 77 and even if there was, it was illegal and ineffective because it was not given to the Deputy Commercial Manager who they claimed was the proper officer. The plaintiff on the contrary alleged the Deputy Traffic Superintendent also had the authority to entertain claims and led in evidence to that effect. The Railway though it was easy for them to have placed evidence before the Court to show who was the proper officer and whether the authority had been delegated to any other failed to do so.

Held, (i) that the demand for open enquiry was to be treated as a claim under Section 77 if the position that the period of limitation commenced from the date of consignment was accepted.

(ii) that in view of the fact that the evidence of plaintiff's witness stood unrebutted, and in the circumstances of the case, the reasonable inference was that the claim had been communicated within the period provided by the statute to an officer authorised to entertain it.

(iii) that the mere fact that a notice which was more in the nature of a notice under Section 80, Civil P. C. than a claim under Section 77 was sent by the plaintiff subsequently to some other officer did not necessarily indicate that no other officer was authorised to entertain a claim under Section 77 of the Act, and did not contradict the statement of the plaintiff's witness. **AIR 1955 NUC (Assam) 2044 (Pt C).**

——S. 77 — Form of notice — Money value of claim need not be stated — Claimant need not notify that he intends to bring action. **AIR 1955 NUC (Assam) 2044 (Pt D) (DB).**

——S. 77 — Notice — Demand for compensation — Mention of.

A notification of a claim under Section 77 must of necessity contain a demand for compensation, but the exact amount of compensation claimed need not be mentioned. The notice of claim should not be construed with extreme strictness; but at the same time there must be a substantial compliance with the provisions of the Act. **56 Bom LR 150: AIR 1954 Bom 297 (298) (Pt A) (Pr 7).**

——S. 77 — Letter addressed to Railway administration wherein, the consignor says that the consignment has not been delivered according to contract between him and Railway — Consignor must be regarded as making it clear that he would be holding the Railway to its contractual engagement which necessarily involved payment of damages for breach of that engagement — Not only object underlying Section 77 is satisfied but also a claim for compensation is implied in the letter. AIR 1962 SC 1879, Relied on. **(1965) 69 Cal WN 692.**

——S. 77 — Notice — Form of — Requests for enquiry and delivery.

Requests for enquiry and for early delivery of the goods which could not be traced cannot be taken as notice of a claim for compensation. **60 Cal WN 683: ILR (1957) 3 Cal 713: AIR 1956 Cal 390 (393) (Pt F) (Pr 31) (DB).**

[**Reversed** in AIR 1962 SC 1879.]

——S. 77 — All particulars except place of destination correctly given — Notice — If valid.

The requirements of Section 77, as to notice are that a person should make his claim to the refund or compensation in writing within six months from the date of delivery of the animals or goods. The section requires nothing else. Any defect which relates to minor particulars in a notice would not vitiate the notice. The notice is not invalidated merely because the plaintiff mentions a wrong place of destination, when the plaintiff had mentioned all other particulars correctly namely, the number of railway receipt, the place of dispatch etc. Under certain circumstances, the notice might be vitiated due to a wrong mention of the place of despatch, which might prevent the Railway administration from making enquiry or from taking any further action in regard to the notice of a claim made by a plaintiff. Such cases might be exceptional ones, but, then each case would have to be decided upon its own facts. AIR 1959 Madh Pra 232 and AIR 1959 Madh Pra 305 and AIR 1954 Nag 342, Foll. **1961 MPLJ (Notes) 310: 1965 Jab LJ 1097: ILR (1961) Madh Pra 173: AIR 1961 Madh Pra 220 (221, 222, 223) (Pt A) (Prs 7, 9, 14, 16).**

——S. 77 — Civil Procedure Code (1908), Section 80 — Validity of notice — Notice vitiated by defect which prevented Railway from locating consignment — Notice mentioning all particulars correctly but mentioning erroneous place of destination is not vitiated.

A notice under Section 77 of the Railways Act and Section 80, Civil Procedure Code would not be vitiated by a defence which relates to minor particulars therein. Further the indequacy or invalidity of a notice has got to be pleaded and where the defence alleges inadequacy or invalidity

of a notice under Section 77, Railways Act, and Section 80, Civil Procedure Code, a Court is not justified in considring the invalidity of the defect suo motu unless the facts are established. A notice would not be invalidated merely because the plaintiff mentions a wrong place of destination when all other particulars, namely, the number of Railway Receipt and the place of despatch have been mentioned correctly: 1961 MPLJ 756: AIR 1960 MP 305; 1961 MPLJ 263 & AIR 1954 Nag 342. Foll.; AIR 1949 Nag 394; AIR 1928 Cal 697 and AIR 1960 Cal 400. Rel. on. AIR 1946 Mad 77 and AIR 1959 All 168, Not foll.

Held, on facts that the defect did not invalidate the notice since there was nothing which prevented the Railway administration from enquiring about the location of the consignment. **1961 MPLJ (Notes) 310: 1962 MPLJ 512: ILR (1961) Madh Pra 173: AIR 1961 Madh Pra 220 (223) (Pt A) (Prs 7, 9, 14).**

——S. 77 — Suit by members of Hindu joint family carrying on business in name of their shop — Statutory notices given in name of shop and not in plaintiffs' name — Suit not maintainable — Civil P. C. (1908), Section 80.

Where individuals carry on business in some name and style other than their own, they must bring their suit against Railway Administration in their own name and the statutory notices under Section 77 of Railways Act and Section 80 of Civil P. C. given by them, to be valid, must also be in their own name.

Where the plaintiffs suing the Railway Administration for damages for non-delivery of goods are members of a Hindu joint family carrying on their business in the name of their shop, the statutory notices referred to above must be given either by the manager of the family in his own name or by the plaintiffs, if the contract was entered into in thier names and not in the name in which they carry on business. When therefore, the statutory notices are given in the name of the shop and not in their own names, the suit by them is not maintainable. AIR 1961 SC 449, Rel. on. **1962 MPLJ 682: 1962 Jab LJ 869: ILR (1963) Madh Pra 926.**

——S. 77 — Notice—Validity of — Wrong number of Railway receipt mentioned in notice to administration — Error if fatal — C. P. Code (1908), Section 80.

Held on facts that what Section 77 of the Railways Act and Section 80, C. P. Code required was that a notice giving the particulars of the claim, the cause of action and the names of the parties ought to be issued to the Railway Administration concerned, so that they may have a reasonable opportunity of settling the claim even before filing of the suit. Substantial compliance with the requirements of the sections would be enough. The mere fact that a wrong number of the railway receipt was mentioned while all other particulars were correctly stated would not affect the merits of the plaintiff's claim or the question relating to the tenability of the suit on the ground of invalidity of the notice. 1954 NLJ 512; 1959 MPLJ 749: AIR 1959 MP 232; 1959 MPLJ 605: AIR 1959 MP 305 and C. R. No. 88 of 1960, Foll (1950) 5 DLR All 365, Not foll. **1961 MPLJ (Notes) 76.**

——S. 77 — Wrong place of despatch mentioned in the notice — Notice, if invalidated.

Notice under Section 77 of the Railways Act and Section 80 of the Civil Procedure Code wrongly mentioned the place of despatch of certain goods as Calcutta instead of the correct name as A Ghat. The Railway authorities had delivered two packages out of the consignment and the claim suit was only in respect of the remaining one package. The trial Court dismissed the claim holding the notices to be invalid.

Held, if there was substantial compliance with the provisions of Section 77 of the Railways Act and Section 80 of the Civil Procedure Code, the notice was not invalidated. The error in the notice not being substantial, the same would not invalidate the notice. AIR 1954 Nag 342: 1954 NLJ 512; 1959 MPLJ 605: AIR 1959 MP 305: 1959 MPLJ 749: AIR 1959 MP 232 and AIR 1960 Cal 400, Foll. Merely because the applicant mentioned a wrong place of despatch in the notice, the same did not in fact and could not reasonably prevent the Railway administration from holding an enquiry and taking action in the matter of settlement of the claim, as two pacakges had been delivered at the place of destination while only one remained to be delivered. Making an enquiry from the place of destination was all that was required on the part of the Railway administration. AIR 1959 All 168, Dist. **1960 MPLJ (Notes) 210.**

——S. 77 — Notice in name of firm instead of in names of partners — Notice not defective. **AIR 1958 Madh Pra 314 (315) (Pt C) (Pr 9) (DB).**

——S. 77 — Letters written to Administration informing it of non-receipt of consignment and requesting it to arrange for early delivery — No claim for compensation made — No intimation that goods had been lost or destroyed — Letters cannot be treated as notices under Section 77. **AIR 1961 Manipur 45 (47) (Pt C) (Pr 11).**

——S. 77 — Suit against railway — That the consignment was booked to station B wrongly stated, instead of station A — Objection by defendant on ground that in notices under Section 80, Civil P. C. and S. 77, Railways Act also which Court could not correct, the place mentioned was B — Amendment held should be allowed and that carelessness was not sufficient to warrant refusal and that the question of the effect of the notice was still open for the decision by the Court. **1952 Nag LJ (Notes) 74.**

——S. 77 — Civil P. C. (1908), Section 80 — Suit against railway for non-delivery of consignment — Failure to state correctly name of railway station from which consignment is booked is fatal defect. AIR 1961 Pat 334, Rel. on. **AIR 1964 Pat 373 (374) (Pt B) (Pr 8).**

——S. 77 — Scope — Loss of consignment — Notice under Section 77 and under Section 80, C. P. Code — Place of consignment not correctly stated — If fatal.

Failure to state correctly the name of the railway station from which the consignment is booked, in the notices under Section 77 of the Railways Act and Section 80 of the Code of Civil Procedure is a fatal defect because it affects the cause of action. AIR 1949 Pat 93, Rel. on. **1961 BLJR 223: 1961 Pat LR 26: ILR 40 Pat 921: AIR 1961 Pat 334 (336) (Pt A) (Pr 6) (DB).**

——Ss. 77, 140 — Civil P. C. (1908), O. 5, Rule 12 and O. 41, Rr. 14 and 21 — Service of notice of appeal — Respondent East Indian Railway — Notice sent to Chief Administrative Officer, East Punjab Railway instead of to Manager, East Indian Railway — Information of notice given to Chief Commercial Manager, East Indian Railway, Banaras Cantonment — Validity.

A notice of appeal was issued to the Chief Administrative Officer, East Punjab Railway, Delhi, instead of to the Manager of the respondent, East Indian Railway. The Chief Administrative Officer, East Punjab Railway informed the Court by a letter that the notice had been re-

ceived in his office and that a copy of the memorandum of appeal should be sent for defending the appeal. It was noted at the bottom of this letter that a copy of the letter had also been sent to the Chief Commercial Manager, East Indian Railway, Banaras Cantonment.

Held, that the piece of information vague and private as it was conveyed by the Chief Administrative Officer, East Punjab Railway to the Chief Commercial Manager, East Indian Railway, Banaras Cantonment did not in law amount to the service of notice of appeal on him. There was no evidence to show that the original notice itself or a copy of it had been sent to the Chief Commercial Manager, East Indian Railway, Banaras Cantonment and even if a copy of the notice had been sent along with the letter it could not amount to a service of notice on him.

Further, there was no evidence whatsoever that the Chief Commercial Manager, East Indian Railway, Banaras Cantonment apart from dealing with the claim advanced under Section 77, Railways Act, had also then an authority to act and receive notice of suits or appeals on behalf of the Manger East Indian Railway Administration. Therefore, the rule of law applicable to the Chief Commercial Manager regarding the notice under Section 77 read with Section 140, Railways Act cannot be applicable in his favour in regard to the service of notice relating to a suit or appeal.

That being so, the information communicated to the Chief Commercial Manager, East Indian Railway, Banaras Cantonment in the form of a copy of letter sent by the Chief Administrative Officer, East Punjab Railway was not equivalent to the service of notice of appeal on the Manager, East Indian Railway Administration. **AIR 1956 Pat 511 (513, 514) (Pt B) (Prs 5, 6) (DB).**

——S. 77 — Scope — Section is mandatory — Notice not mentioning section — Notice not bad — Notice under Section 80 invalid — Notice under Section 77, Railways Act, fulfilling requirements of both sections — Suit cannot be thrown out. See Civil P. C. (1908), Section 80. **AIR 1964 Raj 41 (DB).**

7. Claim for refund of overcharges.

——S. 77 — 'Overcharge' — Meaning — Suit for refund of excess freight (overcharge) — Notice not given — Effect.

The word 'overcharge' was not defined in the Railways Act and is to be construed in a wide sense. An overcharge would mean a charge which is more than the charge permitted by law. A claim for refund of overcharge was not maintainable in the absence of a notice under Section 77 of the Railways Act. **(1959) Nag LJ (Notes) 92.**

8. Through booked traffic — Notice to one of several railways.

See also Railways Act (1890), Ss. 80 and 140.

●——**S. 77 (as it stood prior to amending Act of 1961)** — Through booked traffic — Notice under Section 77 must be given to every railway administration against whom suit is eventually filed. Jetmull Bhojraj v. Darjeeling Himalayan Railway Co., Ltd. **(1963) 1 Mad LJ (SC) 89:(1963) 1 An WR (SC) 89: (1963) 1 SCJ 505: (1963) 2 Andh LT 80: (1963) 2 SCR 832: 1963 SCD 509: AIR 1962 SC 1879 (1885) (Pt B) (Pr 22).**

——Ss. 77, 80 (before its amendment by Act 39 of 1961) — Scope of — Goods consigned to Railway A to be delivered at a place on Railway B — Liability for loss — Notice under Section 77 to be given to each railway.

It is clear from Section 80 of the Act that only two of the railway administrations are liable for damages or compensation i.e., the railway administration with which the consignor entered into a contract for carriage of the goods; or the railway over whose lines the loss occurred. The section treats each of the railway administration as a separate entity with separate existence and personality and unless the railway system, which is sought to be mulcted with damages has notice of it, it would not be in a position to enquire into the matter. The notice issued to another railway administration would be of no help whatsoever in regard to the matter indicated in that section, and there is no scope for creating a fiction that service of notice on one of the Railway Administrations is service on all the railway administrations. (1959) 2 Andh WR 403; AIR 1959 Andh Pra 594, Rel. on. Further, Sec. 80 is not prohibitory, but an enabling section and under it no suit will lie against a railway company to whom goods were not entrusted, unless it to be proved that the loss occurred while the goods were in their custody. Union of India v. Eastern Match Co., **AIR 1964 Andh Pra 172 (182) (Pt D) (Prs 61, 62) (DB).**

——Ss. 77, 80 (Before its amendment in 1961). — C. P. Code (1908), Ss. 79, 80 — Goods consigned on railway A for delivery on railway B — Goods destroyed by fire in godown of A — Notice by consignor under Section 77 to A — Consignor directed to contact Railway B — Further notice under Section 80, C. P. Code given by consignor to B and suit brought against B by both consignor and consignee — Held that there was no compliance with Section 80, C. P. Code — Suit also held bad for non-joinder, for no cause of action and dismissed — Railway A also held not estopped under Section 115, Evidence Act.

Held, on facts that when the notice under Section 80, C. P. Code was given only on behalf of the first plaintiff and the plaint was in the name of both the plaintiffs, the consignor and consignee it could not be held that Section 80, C. P. Code was complied with. (1962) 1 Andh WR (SC) 69: (1962) 1 SCJ 115: AIR 1961 SC 1449 Rel. on. (2) That as the goods were destroyed on railway A and not when on railway B, it was incumbent upon the plaintiffs to have sent the notice under Section 80 C. P. Code, and sued the Union of India represented by the General Manager of Railway A. In the instant case, the notice served under Section 80, C, P. Code even on behalf of the 1st plaintiff was served only upon the General Manager of Railway B. Under the circumstances, it must be held that the suit was not properly framed, that it was not maintainable against the defendant who was sued, and that as against him there was no cause of action. (1963) 1 SCJ 505; (1963) 1 Mad LJ (SC) 89; (1963) 1 Andh WR (SC) 89; AIR 1962 SC 1879, Distinguished. (3) that even though the objections as to the non-maintainability of the suit and the absence of a cause of action against the defendants were raised in the written statement the plaintiff had not taken any steps to rectify them. Further, the suit was barred by limitation on the date of application for amendment.

There was, therefore, no case for allowing the application for addition of party or for amendment of the cause title. (4) That even if the Railway A had directed the consignor to contact Railway B, none of the requirements of Section 115, Evidence Act, were satisfied in the case. There was no declaration, act or omission by

which A caused or permitted the plaintiffs to believe that they were not liable, or that the liability was only that of the Railway B. For the sake of administrative convenience it might be that the claim was investigated and examined by the Railway B, but that cannot have the effect of abrogating the statutory provisions cited above, nor creating an estoppel. It is well known that there can be no estoppel against a statute. (5) That even on merits the plaintiff's claim was not sustainable as the fire which destroyed the goods was accidental and there was no negligence on part of Railway A. **AIR 1964 Andh Pra 172 (183, 184, 185) (Pt L) (Prs 66 to 70) (DB).**

——Ss. 77, 80 and 140 — Service of notice on one Railway Administration — Sufficiency — Section 80 — Effect of.

Section 80 gives an option to the aggrieved party to sue either the Railway system with which he has entered into a contract of carriage or the Railway Administration over whose lines damages were caused to the goods. There is no scope for creating a fiction that service of notice on one of the Railway Administrations is service on all the Railway Administrations. Any Railway administration against whom relief is sought must be served with notice under Section 77 of the Indian Railways Act and failure to do so will disentitle the aggrieved party to maintain a suit for any of the relief mentioned in that section. **(1959) 2 Andh WR 403: 1959 Andh LT 817: ILR (1959) Andh Pra 879: AIR 1959 Andh Pra 594 (595, 596) (Prs 7, 11, 18) (DB).**

——S. 77 — Consignment to be carried on two railways — Non-delivery — Letter requesting enquiry, sent to one of railways and its copy to the other for information and action — Copy is not notice to other railway.

Where a letter containing a request for an enquiry into the non-delivery of a consignment to be carried over railway administrations of Eastern Railway and North Eastern Railway, is sent to Eastern Railway, a copy of the same sent to the North Eastern Railway for information and action is not a notice under Section 77 to the North Eastern Railway. for such a copy neither carries a request for an enquiry by North Eastern Railway nor a claim for compensation from that Railway. **(1965) 69 Cal WN 692.**

——S. 77 — Applicability — Consignment of goods to railway in Pakistan for delivery at station on Indian Railway — Notice of claim — Necessity.

Section 77, Railways Act, requires that before making a claim on account of the loss, destruction or deterioration of his goods, the consignor must prefer a claim in writing to the Railway Administration within six months from the date of the delivery of the goods for carriage by railway. The expressions 'Railway Administration' and 'Railway' can only refer to railway systems carrying on business within Indian Union and not to any foreign railway administration or foreign railway.

Where the goods were consigned and delivered for carriage to a railway situate in Pakistan and the goods were delivered on a station on the Indian Railway.

Held, that Section 77, Railways Act, was not applicable to carriage to a railway situate in Pakistan and the goods to the forwarding railway at the border station within the meaning of Section 77, Railways Act and, therefore, it was not necessary to serve any notice of the claim under Section 77 of the Railways Act. 1960 SCJ 543; AIR 1960 SC 233. Dist. **1961 Cal LJ 61: AIR 1961 Cal 542 (544) (Prs 11, 13) (DB).**

——Ss. 77 and 80 — Contract of carriage — Consignment of goods to East Bengal Railway belonging to Pakistan — Delivery to be made by East Indian Railway belonging to Union of India — Contract whether binding on latter — Claim for non-delivery against latter administration — Liability of — Onus of proof — Evidence Act (1872). Sections 106 and 114 — Contract Act (1872). Sections 152, 161 and 182.

The plaintiff, an endorsee of a railway receipt brought a suit for compensation for non-delivery of goods against the Union of India as the owner of the East Indian Railway. The consignor who had consigned certain goods to self did not pay the entire freight when he booked and delivered the goods at the Dohazari Station on the East Bengal Railway in Pakistan but some freight was to be paid at the destination station at the time of taking delivery from the E. I. Railway at the Ballygunge Station.

Held, (i) that the contract with the East Bengal Railway at Dohazari was one entire contract for carriage of the goods for the whole distance and either the Pakistan railway was acting as the agent of the East Indian Railway in making the contract or the Pakistan Railway administration acted as agent for the consignor in making the contract with East Indian Railway for carriage of the goods to the Ballygunge Station. It was reasonable to presume in the circumstances of this case that under an arrangement between the East Bengal Railway and the East Indian Railway one railway acted as agent in entering into the contract of carriage and so the act of the one was binding on the others.

(ii) That as two independent railways belonging to two different Governments were concerned, Section 80 of the Railways Act had no application. So the liability of the railway administration will be that of a bailee and the contract of carriage was a contract of bailment. The law is clear that when goods have not been delivered at the place of destination, the plaintiff need not prove how the loss occurred, but the onus is upon the bailee to prove the circumstances which exonerate him from liability for loss.

(iii) It was for the defendant to place all the materials before the Court and if the defendant failed to do so the plaintiff might ask the Court to presume that if produced, the materials would have gone against the defendant. The railway was under an obligation to satisfy the Court upon production of all relevant materials that the goods did not reach their hands at all and so they should not be made liable. The facts as to how the consignment was dealt with during transit were facts within the special knowledge of the railway administration and the railway was under a duty to disclose these facts. The fact that the goods were admittedly placed in charge of the railway and had not been returned, raised the presumption of negligence and it was for the railway to rebut the presumption. **ILR (1959) Cal 450.**

——S. 77 — Civil P. C. Section 80 — Single notice against Union of India as representing all Railways — Different Railways must be treated as separate legal entities — Single notice under Section 77 against Union of India as representing all railways is not sufficient. **59 Cal WN 1064: AIR 1957 Cal 202 (202) (Pt A) (Pr 1).**

——Ss. 77 and 80 — Notice of claim for loss or damages to goods — Goods consigned carried over several railways — Separate notice to each

of the Railway Administrations — Necessity — Section 80 — If should be read with Section 77 — Civil P. C. (5 of 1908), Section 80 — Notice under Railway carriers — Need for two notices, one under Railways Act and another under Civil P. C. — AIR 1955 Mad 151, Overruled.

In cases of through traffic where the goods consigned is carried over several railways, one notice to the General Manager of any one of the railways concerned in the route over which the through traffic passed would be sufficient compliance with Section 77 of the Railways Act. The section also does not lay down that such notice should be given to any particular railway administration such as the contracting railway or destination railway, etc. AIR 1955 Mad 151, **Overruled.** Section 77 of the Railways Act does not require that notice of claim for loss or damages should be given to every one of the General Managers of the different railways over which through traffic occurs. The section contemplates only one notice and such a notice could be given to the General Manager of any one railway.

The question of notice under Section 80, Civil P. C., has no bearing on liability of the Central Government in relation to the railways run by it and it could not govern the scope and application of Section 77 of the Railways Act. The amendment of Sec. 80, Civil P. C. in 1948, inserting a special provision as to notice in case of railways could not have any effect on the question of liability of the Government which now owns the several railway administrations after amalagamation. **72 Mad LW 556: (1959) 2 MLJ 479: 1959 Mad WN 578: ILR (1959) Mad 939: AIR 1960 Mad 58 (60, 62) (Prs 16, 18, 19, 20) (DB).**

——Ss. 77, 80, 140 — Goods carried over two Railway Administrations — Loss of goods — Notice to whom to be sent.

The 'Railway administration' under Section 77 does not mean 'any Railway Administration over which the goods are carried'. Section 77 read with Section 80 shows that each Railway Administration is treated as a separate entity with a separate existence and separate juristic personality. It is true that the Dominion of the Government of India now own all these Railways but they are none the less separate Railway Administrations with separate Agents and General Managers.

So long as Sections 77, 80 and 140 stand as they are, before a Railway Administration can be made liable in a suit for compensation, a necessary statutory requirement is the service of a notice on it by the claimant. These notices should be sent to the principal contracting Railway who accepts the goods for carriage and whose liability cannot be questioned even though the loss takes place on another Railway on through traffic. The view that a notice to the Railway Administration who the claimant thought was directly responsible, should be considered sufficient when that notice had been somehow brought to the notice of the other Administration from whom the claimant seeks to claim the relief is not sound. AIR 1952 Mad 795; (1952) 2 MLJ 24, Dissented from. **(1955) 1 MLJ 79: 67 Mad LW 1192: AIR 1955 Mad 151 (153) (Prs 6, 7).**

[**Overruled** in AIR 1960 Mad 58.]

——S. 77 — Goods carried by the Railways — Loss of goods in transit — Notice to one of the Railways — Correspondence between the two Railways regarding loss — Claim against the second Railway — Absence of notice as prescribed to such Railway — Effect.

The object and intention of Section 77 of the Railways Act is merely to put the railway on notice so that time may be made available to the railway to investigate such claims and meet them out of Court wherever possible. It is to prevent dishonest claims for loss when owing to delay it might be impossible to trace the transaction and is intended as a weapon of defence against fraud not as a means to enable the Railway authorities to deprive the customers of their just dues.

There is sufficient compliance with Section 77 if notice had been received by the Railway and the method by which it is received is a matter which is of comparative unimportance and a deviation from the methods prescribed in the section will be only an irregularity.

Where goods have been carried by the M. & S. M. Railway and B. B. and C. I. Railway and there was a loss in the transit and the loss was due to the misconduct of the employees of the B. B. and C. I. Railway and, therefore, of the administration, and notice was given of this loss to the M. & S. M. Railway who went into correspondence with the B. B. and C. I. Railway long before the expiry of the six months period prescribed under Section 77 of the Act.

Held, that Section 77 of the Act had been complied with and that the B. B. and C. I. Railway is liable for the loss. **65 Mad LW 133: 1952 Mad WN 138: (1952) 2 Mad LJ 24: AIR 1952 Mad 795 (797) (Pr 5).**

——S. 77 (as it stood prior to amending Act 39 of 1961) — Object of notice — Notice to be liberally construed — Through booked traffic — Notice to one administration and copy to another — Notice clearly bringing forth claim against both railways — Notice valid even to railway to which copy alone was sent.

In enacting Section 77, the intention of the legislature must have been to afford only a protection to the railway administration against fraud and not to provide a means for depriving the consignors of their legitimate claims for compensation for the loss of or damage caused to their consignments during the course of transit on the railway. Hence, a notice under Section 77 should be liberally construed.

Where the plaintiff, who had consigned goods to North Eastern Railway for delivery at a station in South Eastern Railway, served a notice of claim of damages for short delivery on the South Eastern Railway and sent a copy of it to North Eastern Railway, and the contents of the notice clearly brought forth a claim against both the railway administrations.

Held, that there was valid notice in law under Section 77 against North Eastern Railway also: AIR 1956 Orissa 29 and AIR 1931 Cal 585, **Held** no longer good law; AIR 1962 SC 1879, Applied. **29 Cut LT 106: AIR 1963 Orissa 56 (57) (Prs 8, 9).**

——S. 77 (before amendment by Act 39 of 1961) — To what railway, notice should be given — Copy of notice given to railway concerned "for necessary action" — If valid notice.

Where the consignment was booked at a station on the Southern Railway and the loss of the consignment took place also at a station on that Railway, the notice under Section 77 should be sent to that Railway and not to the Eastern Railway (now South Eastern Railway) where the station of destination is situated. If a notice under Section 77 was given to the Eastern Rail-

way while a copy of that notice was sent to the Southern Railway for favour of necessary action, there was a valid notice to the Southern Railway. The words "for favour of necessary action" would ordinarily mean that a claim was made against the Southern Railway also. AIR 1961 Cal 586, Distinguished. **28 Cut LT 331: ILR (1962) Cut 402: AIR 1963 Orissa 54 (55) (Pt A) (Prs 5, 8) (DB).**

——**Ss. 77, 80** — Through booked goods — Damage to — Notice of claim — Notice to one railway administration concerned is not sufficient to constitute notice to other railway administration. **AIR 1960 Orissa 154 (156, 157) (Prs 6, 7).**

——**Ss. 77 and 80** — Goods booked by Western Railway for delivery at a station on North Eastern Railway — Notice under Section 77 issued to latter Railway — No proof that loss or damage took place within jurisdiction of North Eastern Railway — Decree for damages cannot be granted against Union of India as owner of that Railway. AIR 1949 Pat 329 and S. A. No. 1670 of 1954, dated 22-1-1959 (Pat) and S. A. No. 551 of 1957, dated 16-7-1962 (Pat), Rel. on. **AIR 1964 Pat 383 (384) (Pr 3) (DB).**

——**Ss. 77 and 140 — Through traffic — Notice to General Manager of one of the Railway administration is sufficient.**

One notice under Section 77 to a General Manager of one Government railway concerned in the route over which through traffic passed will be sufficient because all the railways over which the traffic passed, are owned by the Central Government. In the absence of any specific enactment either in Section 77 or in Section 140, indicating the particular General Manager to whom notice ought to be given in a case of through traffic carried over more than one zonal unit of the Government railways notice to any one such General Manager is sufficient compliance with provisions of Section 77. AIR 1960 Mad 58, Foll; AIR 1956 Orissa 29, Dissented from. **64 Punj LR 425: ILR (1962) 2 Punj 451: 1962 Cur LJ 189: AIR 1963 Punj 224 (224) (Pt A) (Pr 5) (DB).**

9. Notice to whom to be sent.

——**S. 77 — Notice — Service of — Whom to be sent.**

Per Desai, J.— Though the East Indian Railway and the Oudh and Tirhut Railway are since 1st January, 1943, owned by Government, they are two distinct Railway administrations and giving notice of a claim to one will not dispense with giving a notice of it to the other if the other is ultimately found liable to pay compensation. Preferring a claim to the Government may satisfy the requirement of Section 77 but not preferring a claim to the manager of another railway. ILR 26 Bom 669 and AIR 1950 Nag 85 and AIR 1931 Cal 585, Rel. on.

Per Beg, J.— Notice under Section 77 is not a condition precedent to the filing of a suit. In fact, the word 'notice' is not used at all in the section. The use of the word 'notice' imports a certain amount of formality. Further the notice, if any, to be given is not a notice of the suit but merely a notice of the claim. It is not a condition of the maintainability of the suit. The railway administration can, therefore, waive it. Further notice can be preferred in writing by the claimant himself or it can be given by anyone 'on his behalf' to the railway administration, concerned. The whole purpose of Section 77, therefore, seems to be that knowledge of the claim is brought home to the railway company within a period of six months by the plaintiff or some one else on his behalf.

Held, on the facts that the knowledge of the claim was brought home to the Oudh and Tirhut Railway indirectly through the East Indian Railway, and the knowledge of non-delivery and loss was brought home to the Oudh and Tirhut Railway directly by the plaintiff himself. The Oudh and Tirhut Railway were informed of it within time. **AIR 1958 All 234 (241, 248) (Pt D) (Prs 8, 38) (DB).**

——**S. 77 — Notice under, when to be given — Construction of 'loss' and 'compensation for loss'.**

The language of Section 77 of the Railways Act (9 of 1890) is clear and admits of no doubt that the notice contemplated under this section should be given within six months from the date of the delivery of the goods for carriage by Railways and not within six months from the date of the delivery to the consignee, for there may not be any delivery at all; the goods might have been lost in transit. Entrustment of the goods is on a known date, while it could not be said so of the delivery of goods to the consignee. The object of a notice to the Railway is that the Railway authorities should be apprised of the loss or damage promptly in order to enable them to enquire and investigate into the matter quickly before it becomes too late to get any clue with regard to the loss or damage. It is wrong to compute the period of six months from the date when the goods were actually delivered to the plaintiff. The word "loss" in its general sense means deprivation, damage or detriment. The trend of decisions of all the Courts in India and the weight of authority is in favour of the view that there is no warrant for giving a restricted interpretation to the word 'loss' in Section 77 of the Act. Loss would include loss to the owner on account of non-delivery or misdelivery as well.

The words 'compensation for loss' have to be given their plain and natural meaning. The words imply that the claimant would be entitled to compensation for the loss sustained by him, whether such loss is occasioned by non-delivery on account of the tortious conduct of the Railway whether the cause of action is founded on contract or on tort. On a true construction of Section 77, loss means loss to the owner by whatever means. There is no warrant for making a distinction between a claim for compensation on account of loss of goods by a Railway Company and a claim for compensation on the ground of non-delivery or misdelivery.

On the facts of the instant case held: the plaintiff's suit has to be dismissed for want of notice under Section 77 of the Railways Act. **(1958) 1 Andh WR 510: 1958 Andh LT 375: ILR (1958) Andh Pra 323: AIR 1958 Andh Pra 475 (476 to 478) (Prs 6, 11, 14) (DB).**

——**Ss. 77 and 140 — Person to whom notice has to be sent.**

Under Section 140, a notice or other document required or authorised by the Act to be served on a railway administration may be served, in the case of a railway administered by the Government on the Manager. The object of the notice on the Manager is simply to give an opportunity to the railway administration to enquire immediately into the complaint. The claim may be preferred to subordinate officers also who are authorised to entertain it.

There is nothing to prevent the Manager from delegating such power to any subordinate officer. Section 140 is merely an enabling section which was enacted to help claimants, and not to assist the railway administration to put up a disingenuous defence. If the notice is served within its terms, the railway has no answer. It does not

matter whether any individual officer knew about it or not. It is sufficient compliance with Section 77 if in fact, notice has been given to the railway administration.

A demand for open delivery has to be treated as a claim under Section 77 if the position that the period of limitation commenced from the date of consignment is accepted.

The mere fact that a notice more in the nature of a notice under Sec. 80, Civil P. C., than a claim under Section 77 is sent by the plaintiff subsequently to some other officer would not necessarily indicate that no other officer was authorised to entertain a claim under Section 77 of the Act. **ILR (1955) 7 Assam 261: AIR 1955 Assam 221 (224, 225) (Pt C) (Prs 7, 8, 9) (DB).**

——S. 77 — Service of notice on Chief Commercial Superintendent is not preferment of claim.

Notice under Section 77 has to be served on the General Manager of the Railway concerned unless an officer subordinate to him is held out as the proper authority to whom such notices are to be addressed.

A notice on the Chief Commercial Superintendent, however, does not amount to the preferment of a claim to the Railway administration. 55 Cal WN 662; 60 Cal WN 985; 65 Cal WN 876, Rel. on. **(1965) 69 Cal WN 692.**

——Ss. 77 and 140 — Notice — Service of — Notification by Agent of Bengal Nagpur Railway authorising claims officer to receive notice — Force of, after taking over of railway by Government — Notice on claims officer — Validity.

The General Manager can authorise a subordinate officer to receive notices under Section 77 of the Indian Railways Act. 60 Cal WN 433, Rel. on.

A notification issued by the Agent of the Bengal Nagpur Railway investing the Claims Officer with authority to receive notices under Sections 77 and 140, Railways Act, is continuing as an effective and valid notification with the tacit approval of the General Manager after that Railway was taken over by the Government inasmuch as the notification was not withdrawn or cancelled. The mere fact that the Government has taken over the administration of the railway does not mean that every office procedure prevalent during the time of the administration of that railway by the Railway company was upset or that officers who were duly invested with some particular powers were automatically divested of those powers. Such investiture of power, once lawfully made, does not automatically cease to exist with the assumption of the administration of the railway by the Government, but continues until the power is expressly cancelled or withdrawn. Consequently a notice served on the claims officer in pursuance of this notification is good and valid. **(1958) 1 Cal LJ 136: 63 Cal WN 581: ILR (1959) 2 Cal 242: AIR 1959 Cal 215 (217, 219) (Pt A) (Prs 15, 32, 33) (DB).**

——S. 77 — Notice served on Chief Commercial Manager, if sufficient.

Notice under Section 77 is required to be served on the Manager of the Railway in the case of Railways which are administered by the Government. Notice of a claim under Section 77 of the Act served upon the Chief Commercial Manager is not a sufficient compliance with the section. AIR 1951 Cal 512, Foll.; AIR 1930 Cal 332 and AIR 1945 Cal 412, Not followed. **59 Cal WN 1064: ILR (1957) 2 Cal 523: AIR 1957 Cal 202 (203, 204) (Pt B) (Prs 2, 3).**

——Ss. 77 and 140 — Notice to Chief Commercial Manager — Validity — Waiver — Effect — (Civil P. C. (1908), Section 80) — (Evidence Act (1872), Section 115).

A notice of claim on the Chief Commercial Manager does not amount to the preferment of a claim to the railway administration. But where the Chief Commercial Superintendent in reply to the notice refused to entertain the claim on the ground that there was no negligence or misconduct on the part of the railway or its servants but he did not say that no claim could be entertained until and unless notice as required under Section 77 has been served.

Held, that it amounted to waiver by the Chief Commercial Superintendent of the protection of Section 77 and as he was dealing with the claim for compensation as an agent of the railway administration—which term included the defendant —the Union of India, the waiver by the Chief Commercial Superintendent amounted, in law, to waiver by the Union of India. **60 Cal WN 985: 98 Cal LJ 31: AIR 1957 Cal 17 (17) (Prs 8 to 10) (DB).**

——S. 77 — 'Manager' — Government administering railways — Officer designated as 'General Manager' is manager within meaning of Section 3 (6) and 77 of Act — Requirements of Section 77 are satisfied if claim is preferred to any person authorised by Manager to receive the claim on his behalf — Sending of claim to Chief Commercial Manager is sufficient, if it is established that he was duly authorised by the manager to receive claims on his behalf. See Railways Act (1890), Section 3 (6). **(1957) 61 Cal WN 433: ILR (1957) 3 Cal 426.**

——Ss. 77 and 140 — Chief Commercial Manager authorised by Manager to receive claims — Claim sent to Chief Commercial Manager by registered post — If duly served.

Where the Chief Commercial Manager was authorised by the Manager to receive claims under Section 77 and the claim was sent to the Chief Commercial Manager by duly prepaid registered post and the letter was duly delivered to and received by the Chief Commercial Manager, the claim is duly served upon the Chief Commercial Manager in one of the modes prescribed by Section 140. Service on the Chief Commercial Manager is service on the Manager as contemplat- by Section 140. **(1957) 61 Cal WN 433: ILR (1957) 3 Cal 426.**

——S. 77 — Allegation that particular official was authorised by manager to receive claim — Duty to prove.

Where it is contended that a particular official has authority from the Manager to receive a claim, such authority must be proved. In the absence of such proof it is not sufficient to send the claim to an official such as the Traffic Manager or the Goods Superintendent or the Traffic Superintendent, or the Claims Superintendent. Authority must be proved from the relevant facts and the notification, if any, in force at the relevant point of time. Further, authority must be proved as a matter of fact in each case. **(1957) 61 Cal WN 433: ILR (1957) 3 Cal 426.**

——S. 77 — Claim against Railway for injury to goods — Notice to whom to be sent — (Limitation Act (1908), Article 30).

The notice under Section 77, Railways Act served upon the Chief Commercial Manager instead of on the General Manager is good service, as claims against the Railway are dealt with by that officer. Hence service of the notice of claim upon him must be taken to be substantial compliance with the requirements of law. The notice under Section 77 is not—as distinguished from the other statutory notice under Section 80, Civil

P. C.—a condition precedent to the institution of the suit. **59 Cal WN 278: 95 Cal LJ 119: AIR 1955 Cal 448 (450) (Pt B) (Pr 8) (DB).**

——Ss. 77 and 140 — Notice of claim served on Chief Commercial Manager of East Indian Railway — Validity.

A notice of claim for short delivery served on the Chief Commercial Manager of the East Indian Railway is sufficient compliance with the provisions of Sections 77 and 140 of the Railways Act. **86 CLJ 308: AIR 1952 Cal 443 (445) (Pt A) (Pr 20).**

——Ss. 77 and 140 — Notice served on Chief Transportation Manager — Sufficiency.

The Manager of the railway means the person who is in management of the entire railway. It does not mean the Manager of any particular department. Service of notice on the Chief Transportation Manager instead of the General Manager is not, therefore, a compliance with the mandatory provisions of Sections 77 and 140. Railways Act. **AIR 1952 Cal 341 (342) (Pt B) (Pr 5).**

——Ss. 77, 140 — Railway administered by Government — Notice to Manager means notice to General Manager or Agent and not Chief Commercial Manager.

In the case of a Railway administered by the Government, as notice has to be given to the Manager of the Railway and that term means not any sectional or departmental Manager like the Chief Commercial Manager, but the Principal or General Manager who is in over-all charge of the Railway administration concerned. The General Manager can override the views of sectional officers and he can compromise or allow or resist any claim. A notice of claim under Section 77 sent to the Chief Commercial Manager of a Railway administered by Government is not, therefore, a proper notice under Section 140 and does not confer jurisdiction on the Court, only because a subordinate office of the Railway is within the Court's territorial jurisdiction: 28 CWN 438 and unreported decision in Civ. Revn. No. 1353 of 1947, Rel. on. **55 Cal WN 662: AIR 1951 Cal 512 (513) (Prs 6, 7) (DB).**

——Ss. 77 and 140 — Notice of claim received and acknowledged by Chief Commercial Manager of East Indian Railway — Claim dealt by him on basis that Section 77 had been satisfied — No evidence that General Manager was at the head of affairs of that Railway — Notice to Chief Commercial Manager is sufficient. **(1950) 86 Cal LJ 308 (313).**

——Ss. 77 and 140 — Claim for damages caused to consignment of goods — Notice of claim issued to Chief Commercial Superintendent — Chief Commercial Superintendent held out and acting as delegate of the Manager of the Railway for receipt and disposal of claims under Section 77 — Plaintiff is not liable to be non-suited on the ground of non-compliance with Sections 77 and 140: AIR 1960 Ker 257; AIR 1922 Mad 362; AIR 1926 Lah 253; AIR 1949 Pat 347, Rel. on.—Travancore Railways Act (22 of 1115), Sections 27 and 70. **ILR (1964) 1 Ker 355.**

——Ss. 77, 140 — Notice — Mode of service—Section 140 not exhaustive — Claim for compensation under Section 77 — Notice served on Chief Commercial Superintendent — Valid. See Railways Act (9 of 1890), Section 140. **AIR 1960 Ker 257.**

——S. 77 — Civil P. C., Sections 20, 79, 80 — Goods lost after reaching destination — Suit for loss of goods — Suit is to be filed against Central Government — Court at place where goods were booked has jurisdiction to entertain suit. See Civil P. C. (1908), Section 20. **AIR 1960 Ker 257.**

——S. 77 — Notice served on Chief Commercial Superintendent under Section 77, Railways Act cannot be treated as notice under Section 80, Civil P. C., on General Manager of Railways. **AIR 1960 Ker 135 (136) (Pt A) (Pr 5) (DB).**

——S. 77 — Notice — Validity — Notice under, must be in writing and should be addressed to manager or authorised agent — Provision is mandatory and its non-compliance is fatal.

Held, that under Section 77 of the Act it was necessary that the claim should be preferred by a notice in writing to the Railway Administration within six months from the date of the delivery of the goods. Under Section 140 the notice could be served on the Railway Administration by delivering the notice to the manager or agent or by leaving it at his office or by forwarding it by post to the manager or agent. It was implicit in that section that the notice must be in writing. The notice under Section 77 was mandatory. As the mandatory requirement was not complied with, the suit was liable to be dismissed. AIR 1939 Nag 141, Foll; AIR 1955 Assam 221 and C. R. No. 290/57, dated 22-9-58 (1958 MPLJ Notes 167), Dist. **1962 MPLJ (Notes) 192.**

——Ss. 77 and 80 — Notice to whom to be given.

A notice under Section 77 must be separately given to each railway administration impleaded as a defendant under Section 80 of the Act. This is because each railway administration is to be treated as a separate entity with separate existence and personality for the purpose of a suit under Section 80. AIR 1950 Nag 85, Foll. Where in answer to to the notice of claim given to the administration of the S. S. Light Railway on which the goods were booked, the railway administration wrote to say that since the destination station lay on the G. I. P. Railway, the matter may be referred to the G. I. P. Railway administration for disposal of the claim, the reply cannot be regarded as a communication authorising retrospectively the G. I. P. Railway administration to receive notices under Section 77 on behalf of the S. S Light Railway so that certain earlier communications made to that administration could be treated as notices of claim served on the S. S. Light Railway. AIR 1948 Nag 17, Disting. **1959 MPC 341: 1959 MPLJ 701: 1960 Jab LJ 985: AIR 1959 Madh Pra 276 (279) (Pt D) (Prs 16, 17) (DB).**

——S. 77 — Notice — Service of — Railway aware of plaintiff's claim — Effect.

The notice under Section 77 was addressed to "The Manager of both the railways" and a copy was sent to the Superintendent of Claims, of the G. I. P. Railway, Bombay. Though the plaintiff did not file the acknowledgments addressed to the managers of the two railways, there was a postal acknowledgment, dated 21st June, 1950, on record which was signed by the Chief Traffic Manager, G. I. P. Railway, Bombay. The correspondence on record showed that the railway authorities were fully aware of the plaintiff's claim. Moreover, the Suprintendent of Claims, G. I. P Railway, Bombay, who was the officer deputed by the General Manager to deal with such claims, actually received a copy of the notice.

Held, that a notice which substantially complied with Section 77 was a valid notice. In this case, the Railway administration was fully aware of the plaintiff's case and had also assessed the damages. From the correspondence on record, as also from the conduct of the railway authorities, the notice under Section 77 must have reached the proper authority. It must therefore be held that the notice was valid under the law. **1959**

MPLJ 749: 1959 MPC 368: 1959 Jab LJ 718: AIR 1959 Madh Pra 232 (233) (Pt B) (Pr 6) (DB).

——S. 77 — Service of notice — Suit against Railway — Notice addressed to Union of India — Validity and sufficiency. See C. P. Code (1908), Sec. 79. **AIR 1959 Madh Pra 232 (232) (DB).**

——S. 77 — Notice to Superintendent of Claims — Validity.

A notice under Section 77, must go either to the Agent or to the General Manager. A notice to the Superintendent of Claims will not be valid within the meaning of Section 77 of the Act. **1959 MPLJ (Notes) 26.**

——S. 77 — Service of notice — Assessment of damages by officer of Railway Administration — Notice can be inferred — 'Railway Administration' includes competent officer. **1958 MPLJ (Notes) 167.**

——Ss. 77 and 140 — Notice to General Traffic Manager — Validity.

The fact that notice was given by the railway administration to the consignors that details of claims must be sent forthwith to the General Traffic Manager, Bombay, coupled with the fact that he received and dealt with time in his office through the Superintendent of Claims, to whom they are passed on, even if received by the Manager, is sufficient to lead to an inference that he was authorised, either by the Manager or the Railway Administration, to receive notices under Section 77. **1957 Jab LJ 550: (1957) MPLJ 294: 1958 MPC 459: ILR (1957) Madh Pra 253: AIR 1957 Madh Pra 114 (117, 118) (Pt H) (Pr 13) (DB).**

——S. 77 — Notice — Due compliance — Notice has to be sent, according to amended law, to "General Manager of the Railway" — Notice by post on 17-6-1948 and served on Secretary, Central Government, is not due compliance with requirement of the section. **AIR 1953 Nag 360 (361) (Pt A) (Pr 3).**

——S. 77 — Notice to whom to be sent — Notice to one administration not sufficient against another — Object of notice.

Each Railway Administration is a separate entity and a different legal person capable of suing and being sued independently. Notice against the one Railway administration of the claim of the plaintiff is not therefore sufficient compliance of the provisions of Section 77 to constitute a notice against the other Railway administration.

There is no form for a notice under Section 77 and the writing in any form need not be styled as such a notice. The intention behind the provisions of the section is that the particular railway administration must be aware of the claim of the plaintiff so that they may avail of the opportunity of settling up the claim. What is essential for compliance with the section is that it must be preferred in writing by the plaintiff or on his behalf, and further, he must lay his claim as against the particular railway administration whom he is suing for obtaining a decree on the basis of the liability.

Thus where, the plaintiff, who had consigned goods from the station P. on E. I. Rly. to be delivered at the Station S. on B. N. Rly. sent a notice of claim for damages to the Claims Officer, B. N. Rly. and a copy to the General Manager, E. I. Rly.

Held, that the claim as against E.I. Rly was never brought to the notice of the said administration in any form as contemplated under Section 77 and the section was not complied with as against E. I. Rly. AIR 1931 Cal 585; 26 Bom 369, Rel. on.; AIR 1928 Lah 438, Disting. **AIR 1956 Orissa 29 (30, 31) (Prs 4, 7) (DB).**

——S. 77 — Notice sent to Chief Administrative Officer of East Punjab Railway instead of Secretary, Government of India, in charge of Railways — Subsequent amendment of Section 80, Civil P. C. requiring notice to be sent to General Manager of Railway — Chief Administrative Officer designated General Manager — Chief Administrative Officer, as General Manager taking cognizance of notice — He cannot afterwards contend that notice was not proper. **AIR 1955 Pepsu 51 (54 to 57) (Pt A) (Prs 7, 9) (DB).**

——Ss. 77 and 140 — Notice of claim addressed to Chief Commercial Superintendent Western Railway — In reply letter to notice, Superintendent asking claimant to send original beejak without prejudice to enable him to settle claim — Beejak sent but no reply was received in spite of several reminders — Suit for compensation — Plaintiff alleging that Chief Commercial Superintendent was the proper officer to deal with such notice — Allegation not denied by Railway in its written statement — Allegation must be taken to be admitted — There is sufficient compliance with Sections 77 and 140 and notice is not invalid — AIR 1947 Bom 169, 26 Bom 669 and AIR 1945 Cal 412, Rel. on., AIR 1948 Nag 17, Not foll. — Civil P. C. (1908), Order 6. **(1956) 9 Sau LR 86.**

10. "Six months."

——S. 77 — Object of — Claim preferred to Railway Administration — Meaning — Claim must reach within six months and not merely be posted within that period — (Words and Phrases — 'Prefer').

Clearly the Legislature intended that unless the Railway becomes aware of the claim within six months it should not be made liable to pay the compensation. The utility of a claim lies in its being received by the railway administration and not in its being merely posted by the claimant. The expression 'preferred in writing to the railway administration' therefore means that the written claim has reached the railway administration and not merely that the claim was posted, sent or dispatched within six months. AIR 1926 All 214, Rel. on; AIR 1957 MP 114, Dissented from. **1961 All WR (HC) 763: 1961 All LJ 983.**

——S. 77 — 'Date of the delivery' — Meaning of.

Per Desai, J.:— The words 'from the date of the delivery of the animals or goods for carriage by railway' in Section 77 means from the date of delivery to the railway and not from the date of the delivery by the railway of the goods. The words 'for carriage by railway' govern the word 'delivery' and cannot govern the words 'animals or goods'. AIR 1955 Assam 221, Dissented from. **AIR 1958 All 234 (242) (Pt F) (Pr 10) (DB).**

——S. 77 — "Six months" — Computation.

It is doubtful whether the period of six months should be calculated from the date on which the goods were delivered to the consignee or his representative or from the date on which the goods were originally consigned to the Railway. The words "for carriage by railway' may be read as qualifying the term "goods" only, and not the date of delivery of the goods. It would be more reasonable to hold that the period of limitation should be counted from the day when the goods were to be delivered or delivered to the consignee or his representative, and not from the date when the goods were originally consigned.

If the latter view is adopted, it is obvious that the claim under S. 77, Railways Act, will have to be in many cases a vague and speculative claim and must a fortiori include a claim for open delivery in case the goods are suspected to have

been lost or damaged in transit. (The Court, however, adopted the latter view for the purpose of this case). **ILR (1955) 7 Assam 261: AIR 1955 Assam 221 (224) (Pt A) (Pr 7) (DB).**

——S. 77 — "Six months".

It is doubtful whether the period of six months should be calculated from the date on which the goods were delivered to the consignee or his representative or from the date on which the goods were originally consigned to the Railway. The words "for carriage by railway" may be read as qualifying the term "goods" only, and not the date of delivery of the goods. It would be more reasonable to hold that the period of limitation should be counted from the day when the goods were to be delivered or delivered to the consignee or his representative, and not from the date when the goods were originally consigned. If it is held on the contrary that the limitation period should run from the date when the goods were first consigned or delivered for carriage to the Railway an anomalous position would arise in that in certain cases the claim under Section 77 will have to be preferred even before the goods are delivered or even before the consignee is aware whether any loss or damage has been caused because cases are not unknown where goods are actually delivered long after six months from the date of consignment and it is only when delivery is taken that the consignee is made aware of any shortage in or damage to the goods. If the latter view in adopted, it is obvious that the claim under Section 77 of the Railways Act will have to be in many cases a vague and speculative claim and must a fortiori include a claim for open delivery in case the goods are suspected to have been lost or damaged in transit. **AIR 1955 NUC (Assam) 2044 (Pt B).**

——S. 77 — Calculation of time.

Notice under Section 77 must be served within six months from the date of the goods for carriage by railway. Time is to be calculated as from the date of the delivery of the goods for carriage and not from the date of delivery. AIR 1924 Cal 725 and AIR 1949 Cal 420, Not followed. **60 Cal WN 683: ILR (1957) 3 Cal 713: AIR 1956 Cal 390 (393) (Pt E) (Pr 30) (DB).**

[Reversed on another point in AIR 1962 SC 1879.]

——S. 77 (as it stood prior to its amendment to 1961) — Phrase 'for carriage by railway' qualifies word 'delivery'.

The wording of Section 77 is very clear and the phrase 'for carriage by railway' cannot refer to animals or goods but has necessarily to be co-related to the word 'delivery' and the limitation of six months is to be computed from the date of delivery of goods to the Railway Administration. AIR 1957 Madh Pra 114, Rel. on. AIR 1955 Assam 221, Dissented from. **1962 Jab LJ 1125: 1962 MPLJ 732: AIR 1962 Madh Pra 374 (376) (Pt B) (Pr 12).**

——S. 77 — The word 'damage' — Meaning of — Claim for compensation for breakage of boiler — Controlled by Section 77 — Notice not issued within six months — Suit not maintainable.

The word 'damage' connotes a genus while "deterioration" and "destruction" connotes two species. A claim for compensation for breakage of certain parts of the boiler, and loss of certain other parts, is one for deterioration, which is a form of damage, and is controlled by Section 77 as the condition precedent. A suit filed against Railways for such a claim where the notice was issued beyond the prescribed period of six months is not, therefore, maintainable. AIR 1957 Madh Bha 111 and AIR 1954 Pat 507, Diss. from, AIR 1961 SC 725. Rel. on. **1962 Jab LJ 811: 1962 MPC 469: 1962 MPLJ 575: AIR 1962 Madh Pra 301 (303) (Pt A) (Pr 9) (DB).**

——S. 77 — Limitation.

Where the consignment was delivered for carriage on 7th September, 1947 and the notice of claim under Section 77 for loss was sent more than 6 months later, the claim for compensation in so far as it related to the goods destroyed by floods and the deterioration of goods was untenable. **1959 MPC 341: 1960 Jab LJ 985: 1959 MPLJ 701: AIR 1959 Madh Pra 276 (279) (Pt E) (Pr 18) (DB).**

——S. 77 — Computation of period of six months — Starting point.

The date from which the period of six months has to be computed under Section 77 is the date on which the goods were delivered to the railway company for carriage. **1957 MPLJ 294: 1957 Jab LJ 550: 1958 MPC 459: ILR (1957) Madh Pra 253: AIR 1957 Madh Pra 114 (116) (Pt D) (Pr 9) (DB).**

——S. 77 — Construction and scope — Service of notice within six months, if necessary.

If it is held that Sec. 77 should be interpreted to mean that the notice must be served on the Railway Administration within the stautory period of six months, it would not be giving to the consignee full use of the statutory period of six months. Section 77 only means that the claim should be preferred within that period and not that it should also reach the Railway Administration before its expiry. AIR 1926 All 214, 8 NLR 34 & 24 NLR 1, Not followed; AIR 1927 Pat 241, Rel. on. **1957 Jab LJ 550: (1957) MPLJ 294: 1958 MPC 459: ILR (1957) Madh Pra 253: AIR 1957 Madh Pra 114 (117) (Pt F) (Pr 10) (DB).**

——S. 77 — 'Six months' — Starting Point.

Under Section 77 the period of six months is to be counted 'from the date of delivery of animals or goods for carriage by the railway'. The natural meaning of these words can only be that the relevant date is the date on which goods are handed over to the railway for carriage. AIR 1955 Assam 221, Dissented from. **36 Mys LJ 655: ILR (1958) Mys 481: AIR 1959 Mys 13 (15) (Pt A) (Pr 6).**

——Ss. 77 and 145 — Mysore Railways Act, Sections 61 and 122 — Authority to whom notice should be sent — Notice within "six months".

Certain goods were consigned for transmission on 29th June, 1944. The plaintiff commenced correspondence with the Traffic Manager about non-delivery within six months from that date. On 9th November, 1945 a notification was issued authorising the Traffic Manager to receive notice and settle claims and the notification stated that "any notification served will be treated as equivalent to one served on the Railway administration in compliance with the provisions of Sections 61 and 122 of the Mysore Railways Act". The plaintiff served a notice for compensation on the Traffic Manager on 20th May, 1946.

Held, (1) that the notice was not defective as having been addressed to the Traffic Manager instead of the General Manager.

(2) That having regard to the terms of the notification and the fact that the Railway Administration treated the claim which was pending before it on the date of notification as sufficient to be acted upon, the objection that since the letter previous to the notification had been addressed to Traffic Manager instead of the General Manager there was no valid notice within time was unten-

able. AIR 1948 Nag 17. Rel. on. **ILR (1953) Mys 128: AIR 1953 Mys 16 (17, 18) (Pt B) (Pr 3).**

——S. 77 (old) — Non-delivery of part of consignment — Suit for compensation — Notice under Section 77 given after six months from date of delivery of part of consignment — Suit not maintainable.

Non-delivery of a part of a consignment amounts to loss of a part not delivered. Therefore, suit for the recovery of compensation for non-delivery of a part of a consignment is maintainable only if the plaintiff has given a notice under Section 77 of the Railways Act within the time mentioned in that section. Where the notice is served more than six months after the date of the delivery of goods, the suit clearly is not maintainable. **AIR 1964 Pat 392 (393) (Pr 5) (DB).**

——S. 77 — Computation of period required for notice — Time of six months commences from date of delivery of goods to Railway for carriage and not from delivery of goods to consignee.

The notice contemplated under Section 77 should be given within six months from the date of delivery of the goods for carriage by railway and not within six months from the date of the delivery to the consignee. The concept of delivery to railway consistently connotes 'handing over' to railway for carriage and not by railway to consignee. AIR 1949 Cal 420; AIR 1958 Cal 434; AIR 1959 Mys 13; AIR 1958 AP 475; AIR 1959 MP 276. Rel. on; AIR 1955 Assam 221 (FB). Dissented from. **1963 Raj LW 598: ILR (1964) 14 Raj 254: AIR 1965 Raj 127 (128) (Prs 4, 5).**

11. Proof of notice.

——S. 77 — Notice — Absence of — Effect.

Once loss or destruction of the goods is admitted or proved, the consignor cannot maintain an action for compensation for breach of contract to deliver the goods. He can then only maintain a suit for compensation for loss or destruction of the goods upon grounds for which the railway administration can be made liable. Notice under Section 77 of the Indian Railways Act is a condition precedent, to the maintainability of such suit:

Held, that the plaintiff had failed to prove service of notice under Section 77, Railways Act and, therefore, the plaintiff's suit for compensation for loss or destruction of goods was not maintainable. **(1958) 62 Cal WN 900: AIR 1959 Cal 281 (285) (Pt C) (Prs 22, 25, 26) (DB).**

——S. 77 — Proof of notice — Civil P. C. (1908), Order 8, Rules 3, 4.

Where the plaint states that the plaintiff had given notices to the Governor-General and the railway administration under Section 80, Civil P. C. and there is no specific denial by the defendant of the fact that there was a notice to the railway administration, the mere fact that there is no mention of Section 77 of the Railways Act does not make the notice to the railway administration incompetent. **1951 Nag LJ 254: AIR 1952 Nag 77 (78) (Pt B) (Pr 6).**

[Overruled on another point in AIR 1962 SC 1716.]

——S. 77 (before amendment in 1961) — Presumption and inference as to service of notice — Averment in plaint as to service of notice — Absence of specific denial in written statement — Effect of. See Railways Act (1890), Section 142. **AIR 1963 Orissa 54 (DB).**

——S. 77 — Suit against Railway — Governor-General-in-Council made defendant — Notice under Section 80, Civil P. C. addressed to Governor-General-in-Council — No denial in written statement that notice has been served, as defendant — **Held,** that if notice was sent in fact then it must have been delivered in the office of the Secretary to that department, namely the Railways and that upon the pleadings it was clear that notice had been served. **AIR 1955 NUC (Pat) 728.**

12. Waiver of notice.

——S. 77 — Waiver of protection of Section 77 — Waiver has to be made in suit for refund or compensation and cannot be prior to it. AIR 1952 Cal 35 (FB). Foll; AIR 1957 Cal 17, Not foll. **(1965) 69 Cal WN 692.**

——S. 77 — Waiver of notice.

Where the claims officer did entertain the claim made by the plaintiffs and did not turn it down on the ground that proper notice under Section 77 of the Indian Railways Act had not been served:

Held, that service of notice under Section 77 of the Indian Railways Act, according to the procedure prescribed in Section 140, was waived by the railway administration in this case, inasmuch as it allowed the claims officer to investigate the claim, made by the plaintiffs even without service of notice according to the statute. **(1958) 1 Cal LJ 136: 63 Cal WN 581: ILR (1959) 2 Cal 242: AIR 1959 Cal 215 (219) (Pt B) (Prs 28, 30) (DB).**

——S. 77 — Requirement of notice — Waiver of.

It is well settled that the requirement of the notice under Section 77 may be waived. AIR 1952 Cal 35 (FB), Rel. on. **61 Cal WN 433: ILR (1957) 3 Cal 426.**

——S. 77 — Waiver — Notice under Section 77, Railways Act — No objection to claim taken — It does not amount to waiver of notice under Section 80. Civil P. C. **AIR 1960 Ker 135 (137) (Pt B) (Pr 9) (DB).**

13. Limitation for suit — Exclusion of period of notice.

See also Limitation Act (1908), S. 15 and Articles 30 and 31.

——Ss. 77, 72 — Object of notice under Section 77 — Liability under Section 72 — Nature and extent of — Failure to deliver in consequence of loss or destruction — Non-delivery of goods not a separate cause of action — Provisions of Articles 30 and 31, Limitation Act cannot be projected on Sections 72 and 77.

Section 77 is enacted with a view to enable the railway administration to make enquiries and if possible to recover the goods and to deliver them to the consignee. It imposes a restriction on the enforcement of liability declared by Section 72. The liability declared by Section 72 is for loss, destruction or deterioration. Failure to deliver does not furnish a cause of action on which a suit may lie against the railway administration. If because of negligence or inadvertence or even wrongful act on the part of the employees of the railway administration, goods entrusted for carriage are lost, destroyed or deteriorated, the railway administration is guilty of failing to take the degree of care which is prescribed by Section 72 of the Railways Act. AIR 1952 All 897 (FB), **Reversed;** ILR (1953) 1 All 64; AIR 1952 All 891 (FB) and AIR 1929 Pat 109, **Overruled.** Governor-General in Council v. Musaddi Lal, **1961 All LJ 345: (1961) 3 SCR 647: 1961 SCD**

566: 1961 MPC 472: 1961 BLJR 380: (1961) 1 SCJ 597: (1961) 1 Mad LJ (SC) 169: (1961) 1 Andh WR (SC) 169: 1961 All WR (HC) 258: (1961) 1 Ker LR 384: AIR 1961 SC 725 (727) (Prs 5, 6, 7).**

——**S. 77** — Limitation — Period of correspondence with railway cannot be excluded — Hyderabad Railways Act, Section 46. See Hyderabad Limitation Act (2 of 1322-F), Section 15 (2). **AIR 1960 Andh Pra 406 (DB).**

——**S. 77** — Time spent in pursuing claim under Section 75 — Exclusion for purpose of limitation. See Hyderabad Limitation Act, Section 15 (2). **AIR 1957 Hyd 21.**

——**S. 77 (prior to amendment of 1960)** — Railway repeatedly asked about missing goods — Suit for damages for non-delivery of goods—Time runs from date when final reply is given — Obiter. **1962 MPLJ 682: 1962 Jab LJ 869: ILR (1963) Madh Pra 926.**

——**S. 77 — Wrongful refusal to give delivery of goods — Suit for compensation — Limitation for suit — Limitation Act, Articles 31 and 49.**

Article 31 has no application to the case. The Article applicable is Article 49, the starting point being the date of demand and refusal to deliver the goods. **38 Mys LJ 301: ILR (1959) Mys 901: AIR 1960 Mys 283 (285, 286, 287) (Prs 17, 20, 23, 25, 27, 29, 30) (DB).**

——**S. 77** — Suit for compensation against Railway for deterioration of goods — Limitation — Time taken for pursuing claim under Section 77, not to be excluded. See Limitation Act, Section 15. **AIR 1953 Nag 10 (DB).**

——**S. 77** — Short delivery of goods carried by rail — Short delivery on 19-2-57 — Suit filed on 18-4-1959 — Limitation. See Limitation Act (1908), Article 31 and Section 19. **AIR 1964 Orissa 198.**

——**S. 77** — Limitation Act (1908), Section 19 and Article 31 — Acknowledgment — Short delivery of goods carried by rail — Letter by Railways intimating the consignee that his complaint regarding short delivery was receiving notice does not amount to acknowledgment — Limitation commences from the date of short delivery — Short delivery made on 19-2-57 — Suit filed on 18-4-59 is barred. See Limitation Act (1908), Section 19. **AIR 1964 Orissa 198.**

——**S. 77 (as it stood before amendment in 1961)** — 'When the goods ought to be delivered' — Meaning — 'Reasonable time' — What is — Suit against Railway for damages for short delivery filed on 14th December, 1951 — Delivery made on 18th August, 1950 — Suit held barred. See Limitation Act (1908), Article 31. **ILR (1963) Cut 387.**

——**S. 77** — Claim for compensation for non-delivery of goods — Claim filed after two years after reasonable date of delivery — No notice served under section — **Held,** claim was barred. See Limitation Act (1908), Article 30. **AIR 1966 Pat 19 (DB).**

——**S. 77** — Starting point — Date not fixed for delivery of goods — Reasonable time should be taken — Date of refusal by Railway Administration when to be taken as date on which goods ought to be delivered — Major portion of goods delivered on certain date — Limitation for claim for remaining portion under both articles starts from such date. See Limitation Act (1908), Article 31. **AIR 1962 Pat 428 (DB).**

——**S. 77** — Limitation — Loss or injury to goods — Suit for damages — Limitation — Exclusion of time allowed to railway. See Limitation Act (1908), Section 15 (2). **AIR 1959 Pat 252 (DB).**

——**S. 77** — Non-delivery of consignment — Cause of action arises on date on which the goods ought to have been delivered even where they had been sent at owner's risk under risk note B — Subsequent correspondence cannot be considered where it is not material for determining time required for carrying goods. See Limitation Act (1908), Article 31. **AIR 1964 Raj 235.**

——**S. 77 — Claim for compensation for non-delivery of goods — Limitation — Exclusion of time — (Limitation Act (1908), Section 15 (2)).**

Obiter.— Section 77 of the Railways Act does not apply to claims for compensation for non-delivery of goods. Even if that section applies to a claim for compensation for non-delivery of goods still it does not enable the plaintiff to exclude the period between the date of the delivery of the goods and the date on which the claim is preferred in computing the period of limitation for the suit for compensation against the railway company. AIR 1922 Pat 549, **Held,** obiter. **1956 Ker LT 40: ILR (1954) Trav-Co 298: AIR 1954 Trav-Co 362 (368) (Pt F) (Prs 17, 18) (DB).**

SECTION 77-C (NEW)

See Railways Act (1890), Section 74-A (old).

SECTION 78 (OLD)

——**S. 78 — 'Misdescription' — Question of law and fact.**

Whether the description given of a parcel sent by railway is 'materially false' is a mixed question of law and fact.

Where a parcel containing fountain pens was described as haberdashery and in a suit against the Railway for non-delivery, the objection based on the ground of misdescription was raised for the first time in second appeal the contention was disallowed. **36 Mys LJ 411: ILR (1958) Mys 245: AIR 1959 Mys 43 (44) (Pt B) (Pr 8).**

SECTION 80

SYNOPSIS

(Railways Act (1890), S. 80.)

1. Scope.
2. Suits.
3. Liability of railways.
4. Non-delivery.
5. Proof of loss or damage.
6. Notice.

1. Scope.

——**Ss. 80, 74-E, (Before its amendment by Act 39 of 1961)** — Scope — Section 74-E does not whittle down effect of S. 80 — See Railways Act (1890), (Before its amendment by Act 39 of 1961), S. 74-E. **AIR 1964 Andh Pra 172 (DB).**

——**S. 80** — Scope — Compliance — Consideration based on agency of partnership — Relevancy of.

S. 80 lays down a specific rule of law governing the liabilities of different railways over which goods may be carried and those specific rules must be given effect to irrespective of any other consideration based on agencies or partnership. **60 Cal WN 683: ILR (1957) 3 Cal 713: AIR 1956 Cal 390 (392) (Pt B) (Pr 19) (DB).**

[Reversed on another point in AIR 1962 SC 1879].

——S. 80 — Civil P. C., S. 20 — (Contract Act (1872), S. 2 (d)) — Principles stated — S. 80 as now in force in India cannot apply beyond its own territories, to a foreign State namely Pakistan. AIR 1953 Cal 366 (367) (Pt A) (Pr 4).

——S. 80 — Applicability — [New section substituted for the old section by the Amendment Act (39 of 1961)].

In a suit to recover the value of a consignment lost in transit. S. 80, Railways Act, has no application unless the consignment was taken over by one of the Indian Railways. They are not liable on the basis of a contract which was made with a foreign railway. 1958 MPLJ 192: 1958 Jab LJ 235: (1958) 28 Com Cas (Ins) 19: 1958 MPC 156: ILR (1957) Madh Pra 434: AIR 1958 Madh Pra 297 (298) (Pt B) (Pr 7) (DB).

——S. 80 — Mysore Railways Act (4 of 1894), S. 64 — Consignment of goods passing through several railways — Short delivery — Suit against delivering company — Burden of proof.

When the goods are booked to pass through several railway systems and the plaintiff sues only the delivering company, he should under Section 64 of the Mysore Railways Act, which is similar to Section 80 of the Indian Railways Act, necessarily substantiate that the loss was occasioned by the defendant-company. The plaintiff should prove that the goods were transferred to the delivering company in good condition in which case the burden of proving shifts on to the carrying company, 34 All 422 and AIR 1922 All 514, Rel. on. ILR (1951) Mys 94.

——Ss. 80 and 74-E — Before S. 74-E comes into play, loss must be proved as provided under S. 80 — See Railways Act (9 of 1890), S. 74-E. AIR 1960 Orissa 100.

2. Suits.

——Ss. 80, 77 (before its amendment in 1961) — Civil P. C. (1908), Ss. 79, 80 — Goods consigned on railway A for delivery on railway B — Goods destroyed by fire in godown of A — Notice by consignor under S. 77 to A — Consignor directed to contact Railway B — Further notice under S. 80, C. P. C. given by consignor to B and suit brought against B by both consignor and consignee — Held that there was no compliance with S. 80, C. P. C. — Suit also held bad for non-joinder, for no cause of action and dismissed — Railway A also held not estopped under S. 115, Evidence Act — See Railways Act (1890) (before its amendment by Act 39 of 1961), S. 77. AIR 1964 Andh Pra 172 (DB).

——S. 80 — Suit by endorsee of railway receipt — Rights of third party — If independent of rights if endorser — Endorsement — If gives cause of an action.

Under S. 80, Railways Act it would be open to a plaintiff suing for compensation for loss or damage, to sue at the place where he consigned the goods or at the place where the damage occurred or where short delivery was made. The two places viz., the place of entrustment of the goods and the place where the damages occurred or the short delivery was made, could be regarded as the places where the Courts would have jurisdiction to try the suit.

The endorsement of a railway receipt by the consignor in favour of a third party would not constitute a part of the cause of action so as to enable the endorsee to bring a suit for damages against the Railway at the place where the endorsement took place. The right to sue the Railway administration would be only governed by the contract as between the original consignor and the Railway, and if under the contract between the consignor and the Railway the places where the cause of action could be said to have arisen could only be a place where the goods were consigned or where the short delivery was made or damage occurred, that alone could furnish a cause of action. AIR 1954 Trav-Co. 362 and AIR 1960 Cal 458, Rel. on; AIR 1959 Cal 563, Not Foll. AIR 1961 Andh Pra 282 (282) (Pr 2).

——S. 80 — Suit against Government owning railway administration — Parties to Railway administration through the manager or anybody else need not be impleaded. See Railways Act (1890). S. 3 (6). AIR 1953 Assam 193 (DB).

——S. 80—Indian Independence (Rights, Property and Liabilities) Order (1947), S. 8 (1) (b).

By virtue of the terms of Cl. (b) of S. 8 (1) notwithstanding the fact that the North Western Railway on which the goods were booked was not sued and notwithstanding the fact that it was not proved that the goods were lost on the Assam Railway, the Union of India took upon itself the rights and liabilities under the contract. The liability of the Union of India was the same as the liability of a bailee under the Contract Act in the absence of any risk note, and until the Union of India had led evidence that it had discharged its duties as a bailee the question of misconduct or negligence did not arise. AIR 1952 Assam 88 (89, 90) (Pt B) (DB).

——Ss. 80 (old), 74-E — Goods destroyed by fire in transit — Destruction of goods at station on railway system belonging to Port Commissioners — Damage to goods through negligence of carrier — Calcutta Port Act (3 of 1890), S. 142 — Limitation under — Applicability of S. 15 (2) of Limitation Act to — Suit for damages brought by consignee or endorsee of goods — Suit held not maintainable in the circumstances of the case. See Railways Act (9 of 1890), S. 74-E. AIR 1964 Cal 290 (DB).

——S. 80 — Railways receipt endorsed to endorsee — Rights of endorsee under such railway receipt.

An endorsee of a railway receipt cannot sue the railway on the contract contained in the railway receipt merely because the property or an interest in the goods has been transferred to him. He can sue in his own name only for commission or negligence. His position can be likened to the position of a consignee who has no right of property in the goods. See Sale of Goods Act (1930), S. 2 (4). AIR 1964 Cal 290 (DB).

——S. 80 — Suit against railway for compensation — Person who is entitled to bring such a suit, consignor or consignee — Principles governing such question.

The following principles have now been well established on the question as to who between the consignor and the consignee is entitled to sue the carrier, i. e., the Railway for loss or non-delivery of goods: (i) (a) Where the action is founded on contract, the right to maintain an action on the contract belongs to the person who entered into the contract. Ordinarily that person is the consignor; (b) where, however, the consignor acts as an agent of the consignee and the contract is actually entered into on behalf of the consignee, the consignee may sue in his own name; (c) thus, if the property in the goods passes to the consignee at the time of the delivery of the goods to the railway (as indeed it often can happen under S. 23 of the Sale of Goods Act), the consignee

will be deemed to be the person who has entered into the contract of carriage with the railway company through his agent, the consignor. In such a case, the consignee is the proper party to sue; (d) it will be open, nonetheless to the consignor to make a special contract with the railway company whereby the railway company will, even though the property in the goods has passed to the consignee at the time of the consignment, remain liable to the consignor. (ii) Subsequent dealings with the railway receipt after the goods have been consigned will have no effect on the incidents of contract as between the consignor and the railway company. They will have a bearing on the rights and liabilities of the consignor and the consignee inter se. (iii) (a) The owner of the goods, however, is entitled as such to sue for the loss or non-delivery or injury to the goods; (b) ordinarily the consignee is presumed to be the owner of the goods. Such presumption is, however, rebuttable; (c) where the consignor has parted with his title to and ownership of the goods, the consignor cannot maintain an action against the carrier on the basis of such ownership; (d) where, however, the property has not passed out of the ownership of the consignor, the consignor must sue in his own name as, for instance, in the case of goods sent for sale on approval. **68 Cal WN 410: AIR 1964 Cal 290 (303) (Pt C) (Pr 40) (DB).**

——S. 80 — Through-booking-over-several railways — Suit for compensation — Option to sue.

Section 80 lays down how compensation is to be levied when goods are booked over the line of more than one railway administration by through booking over several independent railways. The aggrieved party may sue either the railway administration with which the contract of carriage was entered into and/or the administration on whose line the injury had occurred. **60 Cal WN 683: ILR (1957) 3 Cal 713: AIR 1956 Cal 390 (392) (Pt A) (Pr 15) (DB).**

[Reversed on another point in AIR 1962 SC 1879].

——S. 80 — Suit for compensation for loss of consignment carried by more than one railway — Parties.

Although S. 80 gives the plaintiff the option to sue any one of the two companies through whose lines the goods have been carried, it by no means prohibits him from impleading both the companies in a suit. For, if the plaintiff sues one of the two Railways it may very well turn out that the loss occurred on the other railway and it was a necessary party to the suit. **ILR (1952) Hyd 983: AIR 1953 Hyd 139 (140) (Pt C) (Pr 5) (DB).**

——Ss. 80, 3 (6) — Civil P. C. (1908), S. 79 — Suit against Railway Administration must be instituted against Union of India — See Railways Act (1890), S. 3 (6). AIR 1965 Ker 277 (FB).

——S. 80 — Suit for damages for loss of goods against delivering railway — Burden is on plaintiff to prove loss on its lines — Request for production of documents relating to the goods in possession of defendant railway — Non-production — Presumption under S. 114 (g), Evidence Act arises — For ends of justice case remanded for such production — Evidence Act (1872), S. 114 (g) — Civil P. C. (1908), S. 151.

Under S. 80, a consignor can file a suit for damages for loss of goods in transfer either against a railway administration to which the goods have been consigned or against the railway administration which was carrying the goods when the loss occurred. When he sues the latter railway it is for the plaintiff to establish that the loss had occurred when the goods were on the lines of the defendant railway and the only way to prove the plaintiffs case is by the production of documents in possession of the defendant railway. When even in spite of the request by the plaintiff the documents relating to the goods concerned are not produced by the defendant railway, it is open to the Court under S. 114 (g) of the Evidence Act to draw a presumption that the documents if produced would go against the case of the defendant. AIR 1937 PC 152, Rel. on.

Held, on facts, that in view of the admission of the defendant railway that there was further loss after the goods came into their custody it was their duty to produce relevant documents and for end of justice, the case was remanded to give them the opportunity. **1963 Ker LT 444.**

——S. 80 — Civil P. C. (1908), Ss. 20, 79, 80 — Through-booked goods — Goods lost after reaching destination — Suit for loss of goods — Suit is to be filed against Central Government — Court at place where goods were booked has jurisdiction to entertain suit. — See Civil P. C. (1908), S. 20. AIR 1960 Ker 257.

——S. 80 — One railway administration receiving goods and sending it over its railway and over that of other administration — Damage caused to goods in transit — Suit filed against Union of India — Either of the Railways not joined as party — Suit not maintainable. AIR 1950 Nag 85, Rel. on. **1962 MPLJ 575: 1962 Jab LJ 811: 1962 MPC 469: AIR 1962 Madh Pra 301 (303, 304) (Pt B) (Prs 10, 11) (DB).**

——Ss. 80 and 74-E — Suit for damages for short delivery of consignment — Parties — Contracting Railway primarily liable for damages to consignment — Goods booked for transit over several railways — S. 74-E creating legal fiction that each of the Railways carrying goods is deemed to have contracted — S. 74-E not to control operation of S. 80 but would be subject to the same — Unless the case is within the ambit of S. 80, the Railway Administration other than the contracting Railway is not liable for any damage — Other Railway liable only if damage was done within its jurisdiction — See Railways Act (1890), S. 74-E. 1961 MPLJ (Notes) 200.

——S. 80 — Frame of suit — Suit against Dominion of India for damages — Goods carried by two railway administrations — Railway administrations need not to be impleaded. See C. P. Code (1908), S. 79. AIR 1957 Madh Pra 157 (DB).

——S. 80 — Forum of suit — Goods consigned at Cawnpore station on G. I. P. Railway for Cuddalore station on South Indian Railway — Deterioration and damage of goods at Cuddalore station as a result of negligence amounting to misconduct committed on South Indian Railway — Suit for compensation under Section 80 against South Indian Railway — South Indian Railway and not G. I. P. Railway held was prima facie liable for compensation and suit was therefore properly instituted. (1952) 2 MLJ 713: 1952 Mad WN 824: 65 Mad LW 1020: ILR (1953) Mad 916: AIR 1953 Mad 217 (218) (Pt A) (Pr 4) (DB).

——Ss. 80, 76 — Object and scope of S. 80 — Goods booked through two railways — Loss — Aggrieved party has option of suit against railway administration where goods were delivered for consignment or against administration

on whose railway loss occurred — Latter is agent of former — Suit against latter — Burden to prove that loss occurred there is heavy on plaintiff — Case before Independence Act — Suit laid against Governor-General does not include suit against administration — Suit must be against administration which is sought to be made liable — Civil P. C. (1908), S. 79.

Under S. 80, Railways Act, each railway administration is to be treated as a separate entity with separate existence and personality. The injured party has the option to sue either the railway administration with whom the contract was made or the railway administration on whose railway the loss occurred. It is true that under S. 76 in any suit against a railway administration it is not necessary for the plaintiff to prove how the loss was caused. But since different railway administrations are to be treated as separate entities and the contract is only with the administration that received the goods, that administration is the principal, and the other railway merely acts as agent of the principal. Section 80 saves the agent unless the agent is responsible for loss.

But where a plaintiff, who having his rights against the principal, (that is to say, the railway administration with whom he enters into a contract) chooses to omit that administration and sues the agent administration, undertakes a burden to prove that the loss occurred on the agent administration, which he is required to discharge strictly: 34 All 422; AIR 1917 Nag 119 and AIR 1927 Pat 844, Rel. on.

Merely suing the Governor-General as representing the entire State owned railways (at least before the Indian Independence Act was passed), is not a proper form of suit because that would render S. 80 otiose and meaningless. Whatever may be the position after the Indian Independence Act, the suit must be against one or the other railway administration or both. Suing the Governor-General would not make the railway administration a party as it is not only contrary to the scheme of the Act but would also make S. 80 of the Act inoperative. **1950 Nag LJ 128: ILR (1950) Nag 212: AIR 1950 Nag 85 (87) (Pt A) (Prs 7, 8, 9) (DB).**

3. Liability of railways.

●——Ss. 80, 72 — Applicability — Goods consigned from Quetta in Pakistan to New Delhi in India — Goods carried by Pakistan Railway and Indian Railway — No treaty between two countries — Suit by consignee for compensation for non-delivery at New Delhi against Dominion of India — Liability of Forwarding Railway under implied contract of bailment — Limitation — (Contract Act (1872), Ss. 151, 152, 161, 71, 194) — (Limitation Act (1908), Art. 30).

The plaintiff booked to himself as consignee goods per passenger train from Quetta in Pakistan to New Delhi in India. Receiving Railway (Pakistan Railway) ended at the Pakistan frontier. The goods were taken over by the Forwarding Railway (Indian Railway) and came safely upto New Delhi. There was no treaty or understanding between the two Railways or their States in the matter of liabilities of the respective railways in the case of through booked traffic. The plaintiff made a claim against the Forwarding Railway for compensation for non-delivery of goods entrusted to the said Railway and as the demand was not complied with, he instituted a suit against the Dominion of India.

Held, (1) the statutory liability under S. 80 of the Railways Act could not be invoked, as that section applied only to a case of through booked traffic involving two or more Railway Administrations in India; and not where the Receiving Railway was situated in foreign country and the Forwarding Railway in the Indian territory. In such a case by the doctrine of lex loci contractus, S. 80 could not apply beyond the territories of India. (2) In the absence of proof of any treaty arrangement between these two States governing the rights inter se in matter of through booked traffic, the plaintiff could not rely on the principle that (i) the Receiving Railway was the agent of the Forwarding Railway; or that (ii) both the Railways constituted a partnership and each acted as the agent of the other. (3) In the absence of any contract between the two Governments or the Railways, the legal basis on which the conduct of the plaintiff and the Railways could be sustained was that the plaintiff delivered the goods to the Receiving Railway with an authority to create the Forwarding Railway as his immediate bailee from the point the wagon was put on its rails. The facts clearly indicated that the plaintiff appointed the Receiving Railway as his agent to carry his goods on the railway to a place in India with whom Pakistan had no treaty arrangement in the matter of through booked traffic. In that situation the authority in the agent must necessarily be implied to appoint the Forwarding Railway to act for the consignor during that part of the journey of the goods by the Indian Railway; and, if so, by force of S. 194, Contract Act, the Forwarding Railway would be an agent of the consignor. If no such agency could be implied, a tacit agreement between the Receiving Railway and the Forwarding Railway to carry the plaintiff's goods to their destination might be implied from the facts found and the conduct of all the parties concerned. S. 71 of the Contract Act permitted the recognition of a contract of bailment implied by law under certain circumstances. If it be held that the Railway Administration in Pakistan for reasons of policy or otherwise left the wagon containing the goods within the borders of India and the Forwarding Railway Administration took them into their custody, it could not be denied that their responsibility in regard to the said goods would be that of a bailee. (4) Excluding the applicability of S. 80, Railways Act, the liability of the Forwarding Railway was governed by S. 72 of the said Act under which section the liability was, subject to the other provisions of the Act, that of a bailee under Ss. 151, 152 and 161 of the Contract Act. Therefore in the absence of any risk note the question reduced itself to an enquiry whether, on the facts, the Forwarding Railway observed the standard of diligence, required of an average prudent man. (5) On the question of limitation assuming that Art. 30 applied, the burden was upon the defendant (Forwarding Railway) who sought to non-suit the plaintiff on the ground of limitation to establish that the loss occurred beyond one year from the date of the suit. **Union of India v. Amar Singh, 1960 Mad WN 122: (1961) 2 SCA 73: ILR (1960) Punj 536: (1960) 2 SCR 75: (1960) SCJ 543: AIR 1960 SC 233 (236, 237, 238, 239) (Prs 8, 11, 13, 14, 15, 16, 19).**

——Ss. 80, 72 — Short delivery — Goods carried by separate railways — Proof by the claimant — One railway will not be liable unless it was proved that the other railway had delivered the entire consignment to it — Mere fact of payment of freight charges will not be enough to raise any

presumption — See Railways Act (1890), S. 72. AIR 1956 Ajmer 1.

——S. 80 — Through booked traffic — Loss of — Both parties giving evidence — Question of onus loses importance — Articles lost in foreign railway — Union of India cannot be made liable as a bailee. See Evidence Act (1872), Ss. 101-104. AIR 1956 Assam 188 (DB).

——S. 80 — Scope — Several railways on which goods were in transit — Liability for loss.

Plaintiff leaving out the company through whom the goods were consigned — Plaintiff also not succeeding in proving that the loss or destruction occurred in any of the railways run by Union of India. Held he would not be entitled to a decree against Union of India. ILR (1956) 8 Assam 337.

——S. 80 — Suit for compensation for non-delivery of through-booked goods against Union of India without impleading various railways through which consignment had to pass — No allegation or proof that loss occurred on any particular Railway owned by defendants — Defendants cannot be made liable for loss unless plaintiff proved that loss had occurred on one of the Railways owned by defendant — (Evidence Act (1872), Ss. 101 to 103). AIR 1955 NUC (Assam) 2855 (DB).

——S. 80 — Suit for compensation for loss of goods — Which Railways are liable.

When certain goods are booked from a station on G. I. P. Railway and they are lost on E. I. Railway the suit for compensation for their loss must be brought under S. 80 against the G. I. P. Railway which was the Railway administration to which the goods were delivered or against the E. I. Railway on which the loss occurred. Where the suit is brought not against these Railways but against the Indian Union as owner of the B. B. and C. I. Railway and the Assam Railways, no decree can be passed against the Indian Union only because it owned these railways also. AIR 1950 Nag 85, Foll. ILR (1951) 3 Assam 144: AIR 1952 Assam 51 (51) (Pr 5) (DB).

——Ss. 80, 72 (1) — Responsibility of contracting railway for loss of goods — AIR 1946 Pat 336, Dissented from.

The proposition that the contracting railway is liable to pay compensation to the consignor and to the consignee in any event is not always correct. If there is no negligence or mis-conduct on the part of the contracting railway it having duly discharged its duties and responsibilities under S. 72 (1) that railway also will have to be absolved from all responsibilities for the loss of the goods. AIR 1946 Pat 336, Dist. See Railways Act (9 of 1890), S. 72 (1). AIR 1956 Cal 390 (DB).

[Reversed on another point in AIR 1962 SC 1879].

——S. 80 — Goods booked by Western Railway for delivery at a station on North Eastern Railway — Notice under S. 77 issued to latter Railway — No proof that loss or damage took place within jurisdiction of North Eastern Railway — Decree for damages cannot be granted against Union of India as owner of that Railway. See Railways Act (1890), S. 77. AIR 1964 Pat 383 (DB).

——S. 80 — Liability of different railways.

Before S. 74-E comes into play the loss must be proved as provided by in S. 80. If the loss is not proved then the only remedy to the person making the consignment is to sue the contracting Railway. See Railways Act (1890), S. 74-E. AIR 1958 Pat 575.

——S. 80 — Scope — Remedies under — If alternative — Goods consigned to A Railway for delivery on B railway — Loss occurring on A railway — B Railway's liability.

Section 80 gives the consignor the choice of claiming his remedy either against the railway administration to which the goods are consigned or against the railway administration on which the loss occurs. The remedy is alternative, and not cumulative. Where therefore the goods are consigned to A railway for delivery at a railway station on B railway and the suit for damages for short delivery is brought against the Union of India representing B railway, on which railway the loss has not taken place, B railway cannot be made liable for the loss either on the theory of agency or partnership and hence the suit is not maintainable. AIR 1956 Pat 434 (436, 437) (Pt C) (Pr 11).

——S. 80 — Liability of different railways.

While S. 80 gives option to the plaintiff to sue one or another of a number of railway administrations where the goods are booked though it does not imply much less require, that where the plaintiff has brought his suit against all the railway administrations concerned he is entitled to a decree against all or even such of them as have satisfied the Court that the loss occurring to the plaintiff was not due to their negligence. Under the law a railway company has not the liability of an insurer but only that of a bailee. If the plaintiff is unable to prove any default against the so-called contracting railway and if the latter is able to prove that it has properly discharged its statutory duty as a bailee, it must be absolved from all responsibility to the consignor for the loss of or damage to the goods. See Railways Act (1890), S. 72. AIR 1955 NUC (Raj) 4064 (DB).

——S. 80 — Loss to goods during transit on other railway — Railway to which goods are delivered is liable. AIR 1955 NUC (Sau) 5412 (DB).

4. Non-delivery.

——S. 80 (as it stood prior to its amendment in 1961) — Non-delivery of goods is covered by expression "loss, destruction or deterioration". 1962 Ker LJ 530: 1962 Ker LT 341.

——S. 80 — Applicability — Claim for non-delivery and claim for loss of goods — Difference between — Claim for non-delivery — Principles of S. 80 cannot be made applicable so as to entitle the defendant to have the suit dismissed on that ground. See Railways Act (1890), S. 77. AIR 1958 Pat 489 (DB).

——S. 80 — "Loss" — Allegation of loss due to negligence of servant of railway administration — It is a case of loss and not of non-delivery. AIR 1955 NUC (Pat) 2492.

——S. 80 — Scope and applicability — Non-delivery of part of consignment — Suit for damages.

Though S. 80 in terms does not refer to non-delivery at all however when there was provision in the agreement that the agreement shall be deemed to be made specially with all railway administrations who shall be carrier for any portion of the transit each will be liable. See Limitation Act (1908), Art. 31. AIR 1954 Pat 548 (DB).

——S. 80 — Applicability — Case of non-delivery of goods.

S. 80 of the Railways Act is inapplicable to a case of non-delivery of goods. 54 PLR 440: AIR 1953 Punj 43 (45) (Pt B) (Pr 7) (DB).

5. Proof of loss or damage.

●——S. 80 (as it stood prior to its amendment in 1961) — Through booked traffic — Consignment received in damaged condition — Suit for compensation against railway other than one which booked consignment — Burden of proof.

Under S. 80 it is for the consignor to establish, if he wants to sue a railway administration other than the one which booked the consignment, that the damage had occurred on its system. But where a consignor receives his consignment in a damaged condition from the delivering railway the burden would shift to the delivering railway to show that the damage had not occurred on its railway. The burden could be discharged by showing that the consignment was already damaged before it was received by that railway. Jetmull Bhojraj v. Darjeeling Himalayan Railway Co., Ltd., (1963) 1 SCJ 505: (1963) 1 An WR (SC) 89: (1963) 1 Mad LJ (SC) 89: 1963 SCD 509: (1963) 2 An LT 80: (1963) 2 SCR 832: AIR 1962 SC 1879 (1885) (Pt D) (Pr 24).

——Ss. 80 and 3 (6) — Suit for compensation for loss of consignment carried by two railway administrations owned by Union of India — Suit against Union of India — Notices of claim under S. 77, Railways Act and S. 80, C. P. Code, given to both railways — Suit is against both railways represented by Union of India — Burden of proving place where loss occurred is not on plaintiff.

Held, if the consignment was booked at a place within the jurisdiction of one railway administration to a place within the jurisdiction of another railway administration and the plaintiff sued the latter railway administration, then in that case the burden was on the plaintiff to show that the loss occurred within the jurisdiction of the railway administration within whose jurisdiction the place of the delivery was situate. But if the plaintiff sued the railway administration of the place where the consignment had been booked, then it was not necessary for the plaintiff to show that the loss occurred at any particular point of its transit from the place of consignment to the place of its delivery. Since the definition of railway administration in S. 3 (6), Railways Act includes the Government, in the case of railways which are owned by Government they could sufficiently be represented by the Union of India. In the present case both the railway administrations being under the Central Government, the Union of India could represent both of them and it could be said that the suit was not only against N. E. Railway but also against Western Railway. The plaintiff never attempted to fix any particular place falling within the course of the transit of the consignment as the place where the loss occurred. The mere mention of North Eastern Railway in the array of parties could not imply that the claim had not been directed as against the Western Railway as well which was properly represented by the Union of India. Hence the burden was not on the plaintiff to prove the place where the loss occurred. AIR 1960 Ker 257 and AIR 1957 Madh Pra 157, Rel. on; AIR 1962 Madh Pra 301, Not foll. 1964 All LJ 298: 1964 All WR (HC) 654: AIR 1965 All 122 (123, 124) (Prs 6, 10).

——S. 80 — Suit against other railway administration.

The only other administration that may be made liable under S. 80 of the Railways Act in case of through booking, is the administration on which loss, destruction, or deterioration occurs. Compensation from any other administration is recoverable only on proof of loss, injury, destruction or deterioration of goods on the railway of that administration. It is for the plaintiffs to allege and prove, if the consignee railway has not been made a party to the suits whether the goods were actually delivered to any particular railway administration, and whether the goods were lost while in course of transit on any particular railway administration. ILR (1957) 9 Assam 1: AIR 1959 Assam 98 (101, 102, 103) (Pt A) (Prs 7, 14, 15) (DB).

——S. 80 — Loss of goods — Presumption.

The cause of action against the Union would arise only if the loss occurred on one of its Railways. The plaintiffs have to prove this and may not shift onus by a presumption. See Evidence Act (1872), S. 114. AIR 1959 Assam 98 (DB).

——S. 80 — Burden of proof — (Evidence Act (1872), Ss. 101 to 104).

The onus is on the plaintiff to prove that the loss had occurred while on the railway over which the goods have passed which is attempted to be made liable. 60 Cal WN 683: ILR (1957) 3 Cal 713: AIR 1956 Cal 390 (392) (Pt C) (Pr 21) (DB).

[Reversed on another point in AIR 1962 SC 1879].

——S. 80 — Mysore Railways Act, S. 64 — Burden of proving delivery by connecting Railway to defendant Railway.

When goods are carried by more than one railway, and the plaintiff wants to make a particular railway liable for the alleged loss of goods, the burden of proving that the goods were delivered by the connecting railway to the railway which is sought to be made liable is heavily on the plaintiff. ILR (1955) Mys 444: AIR 1955 Mys 123 (124) (Pt A) (Pr 8) (DB).

——S. 80 — Allegation of damage to goods against particular Railway administration — Onus of proof.

Where the case set up against a railway administration for damage caused to goods consigned to another railway administration is that a particular administration or administrations of the Union are responsible, it has got to be shown by the plaintiff that the loss occurred on the Railway or Railways of the Union administration. The only administration that may be made liable under S. 80 in case of through-booking is the administration on which loss, destruction or deterioration occurs. Compensation from such administration is recoverable only on proof of loss, injury, destruction or deterioration of goods on the railway of that administration. This liability being statutory, the onus of proof does not shift. And S. 106 and S. 114 of the Evidence Act have no application in a case where the onus is placed by a particular statute, namely, S. 80 of the Railways Act. AIR 1960 Orissa 100 and AIR 1956 Cal 390 and AIR 1959 Pat 335 and AIR 1959 Assam 98, Rel. on. ILR (1959) Cut 716: AIR 1960 Orissa 103 (106) (Pt B) (Pr 6).

——S. 80 — Plaintiff exercising his option to sue defendant Railway administration — Failure to discharge onus under section — Plaintiff cannot take advantage of S. 106, Evidence Act — (Evidence Act (1872), S. 106), (1959) 1 OJD 299: ILR (1959) Cut 300: AIR 1960 Orissa 100 (103) (Pt B) (Pr 10).

——S. 80 (as they stood prior to admendment of 1961) — Non-delivery of goods booked on Northern Railway to be delivered on station of Eastern Railway — Cause of action in suit against Eastern Railway based on loss of goods — Plaintiff must allege or prove loss on Eastern Railway

— Decree on ground of non-delivery alone, held not proper. See Railways Act (1890), S. 72. **AIR 1964 Pat 486 (DB).**

——**S. 80 — Short delivery — Suit against non-contracting railway — Proof of loss on such railway — Onus.**

Where goods are consigned to a railway for delivery at a railway station on another railway and the suit for damages for short delivery is brought against the Governor-General or the Union of India representing the latter railway where the loss does not take place the latter cannot be made liable for the loss on the theory of agency or partnership. Therefore it is necessary to allege and prove that the loss occurred while the goods were in the custody of that railway. The onus of proof is on the plaintiff before he could succeed in the claim against that railway and he could discharge that onus by asking for discovery of the documents from the defendant railway under the provisions of O. 11, R. 12 or O. 11, R. 14 of C. P. Code, with regard to the custody of the goods in the course of transit within their limits. **1959 BLJR 241: AIR 1959 Pat 335 (335) (Pr 2) (DB).**

——**S. 80 — Suit for loss against particular railway — Plaintiff claiming remedy against railway on which loss occurred and not against railway to which goods were consigned — Plaintiff must prove that loss occurred due to negligence of particular railway — He could have sued both railways, but having made his choice, he must stand by it. AIR 1955 NUC (Pat) 2492.**

——**S. 80 — Transport over several railways — Burden of proof.**

Where goods are consigned for transport from one place to another over two or more railways and there is evidence to show that they reached a particular midway station from where the jurisdiction of the delivering company commences, and the goods have not reached the destination, the only conclusion is that the loss occurred on the railway of the delivering company. In such a case the consignor has the option to sue either the forwarding company with whom he had contracted for transport of the goods, or the delivering company which after having received the goods, failed to deliver them to the consignor or his assignee. The other Railway systems over which the goods are to be carried, including the delivering Railway, act as substituted agents for (and not as sub-agents of) the forwarding company and are liable to the principal for all kinds of torts committed by them. **ILR (1958) Punj 467: AIR 1958 Punj 149 (151, 152) (Pt C) (Prs 6, 11) (DB).**

[**Overruled** on another point in AIR 1962 Punj 262].

6. Notice.

——**Ss. 80, 77 (before its amendment by Act 39 of 1961) — Scope of — Goods consigned to Railway A to be delivered at a place on Railway B — Liability for loss — Notice under S. 77 to be given to each railway — See Railways Act (1890) (Before its amendment by Act 39 of 1961), S. 77. AIR 1964 Andh Pra 172 (DB).**

——**Ss. 80, 77 and 140 — Section 77 read with Ss. 80 and 140 treats each railway administration as separate entity — Notice of claim should be served on each — AIR 1952 Mad 795, Diss. from — (Civil P. C. (1908), S. 80). — See Railways Act (9 of 1890), S. 77. AIR 1959 Andh Pra 594 (DB).**

——**S. 80 — Scope and applicability — Contract of carriage — Consignment of goods to East Bengal Railway belonging to Pakistan — Delivery to be made by East Indian Railway belonging to Union of India — Non-delivery — Notice to Governor-General through General Manager — Notice held valid — Union of India held liable. See Railways Act (1890), S. 77. ILR (1959) 1 Cal 450.**

——**S. 80 — Single notice against Union of India as representing all Railways — Not sufficient. See Railways Act (1890), S. 77. AIR 1957 Cal 202.**

——**S. 80 — Service of notice —To whom to be given.**

A notice under S. 77 must be separately given to each railway administration impleaded as a dependent under S. 80. This is because each railway administration is to be treated as a separate entity with separate existence and personality for the purpose of a suit under S. 80 of the Act. See Railways Act (1890), S. 77. **AIR 1959 Madhya Pradesh 276 (DB).**

——**Ss. 80, 77 and 140 — Through traffic — Notice under S. 77 to General Manager of one of railway administrations is sufficient — AIR 1949 Pat 329, Diss. from: (1955) 1 Mad LJ 79; AIR 1955 Mad 151, Overruled. See Railways Act (9 of 1890), S. 77. AIR 1960 Mad 58 (DB).**

——**S. 80 — Goods carried over two Railway Administrations — Loss of goods — Notice under S. 77 to General Manager of one railway administration is not sufficient. See Railways Act (1890), S. 77. AIR 1955 Mad 151.**

[Overruled in AIR 1960 Mad 58].

——**Ss. 80, 77, 77-C, 74-D—Administration not disclosing how consignment was dealt with — Consignee not in position to know whether goods were lost or destroyed in transit — Suit for non-delivery — Notice under S. 77 is not necessary — See Railways Act (9 of 1890), S. 77. AIR 1961 Manipur 45.**

——**Ss. 80, 77-D — C. P. Code (1908), S. 80 — Suit for non-delivery — Notice under S. 80, C. P. Code, has to be sent to destination Railway only.**

In a suit for non-delivery, the proper Railway against whom notice under S. 80, C. P. Code has to be sent and the claim to be made is the destination Railway who are bound to deliver the goods, as distinguished from a suit under S. 80 of the Railways Act which is for loss or destruction of the goods. In the latter case, the fact of loss or destruction is not in dispute and the fact must have been made known to the party, as required under S. 74-D (b) of the Act. In such a case the suit has to be brought either under S. 80 of the Railways Act, against the Railway to whom the goods were delivered for transit or the Railway where the loss or destruction occurred. But in the case of suit for compensation for non-delivery, which is not a suit under S. 80 of the Railways Act, it can be brought only against the destination Railway for their failure to deliver the goods and the notice under S. 80, C. P. Code sent to the destination Railway is a proper notice. AIR 1960 Mad 58, Relied on. **AIR 1961 Manipur 45 (49) (Pt F) (Pr 21).**

——**Ss. 80, 77 — Through booked goods — Damage — Notice to one railway administration concerned — If notice to other railway administration.**

In case of through booking of goods where the goods consigned are carried over several railway administrations notice of claim for the loss or damage to the goods has to be given to each of the railways concerned, and notice to one railway administration is not sufficient notice to

the other railways in order that they may be made liable for the alleged loss or damage. AIR 1960 Mad 58, Dissent, from; AIR 1956 Orissa 29 and AIR 1949 Pat 329 and AIR 1959 Pat 335 and AIR 1959 Andh Pra 594 and AIR 1960 Orissa 103, Foll. **(1960) 2 OJD 49: ILR (1960) Cut 110: AIR 1960 Orissa 154 (156, 157) (Prs 6, 7).**

SECTION 82-A

——Ss. 82-A and 82-H — 'Compensation more than once in respect of the same accident' — Injury or death in railway accident — Compensation received under S. 82-A — Compensation cannot be claimed once again under any other Act — (Workmen's Compensation Act (1923), S. 3).

Where a person has recovered compensation under section 82-A of the Railways Act for loss occasioned by a railway accident, he or, in case of his death, his heirs are not entitled to claim compensation in respect of the same accident once again under the Workmen's Compensation Act or under any other law creating a right to such compensation. Section 82-H clearly means, and it is plain from the concluding part of the section that in respect of loss occasioned by a railway accident there should be only one claim and under only one of the laws which create a right to such compensation. **(1965) 1 Mys LJ 215: (1965) 1 Law Rep 817: AIR 1965 Mys 306 (308, 309) (Pt A) (Prs 13, 16) (DB).**

——Ss. 82-A, 3 (4), 3 (2) — 'Railway' includes 'steamer' — 1960 SCJ 679: AIR 1960 SC 610, Rel. on — 'Jetty' is a part of a 'steamer' which is included in the new 'Railway' — It is a ferry but jetty uncoupled with steamer is not part of steamer — Deceased standing on jetty to enboard steamer is passenger but is not a passenger in steamer — (1896) AC 57, (1882) 9 QBD 106, Disting. — Steamer of defendants dashing jetty and drowned — Defendants are not entitled to compensation — Case, however, recommended on humanitarian grounds. 1962 BLJR 354: AIR 1962 Pat 109 (112, 113, 114, 115) (Pt A) (Prs 16, 17, 21, 29, 30, 31, 32, 34, 42).

——Ss. 82-A, 66 and 68 — 'Passenger' — Person travelling without ticket or permission.

The term 'passenger' has not been defined in the Railways Act. Reading Ss. 66 and 68 together it is clear that a person desirous of travelling on a railway has to obtain a ticket under S. 66 of the Act or can travel, if he has with him no proper pass or ticket, with the permission of the railway servant under S. 68 of the Act. A person who is travelling on a train without a proper pass, ticket or permission as required by Ss. 66 and 68 of the Act is a trespasser and cannot be called a passenger within the meaning of S. 82-A of the Act.

Semble — The heirs of such a trespasser, in case where he meets with death in an accident to the train through which he happens to be travelling, are not entitled to claim compensation from the railway. **1959 BLJR 150: 1959 Pat LR 65: ILR 38 Pat 577: AIR 1959 Pat 316 (317, 318) (Pt A) (Prs 4, 5, 8) (DB).**

——S. 82-A — Assessment of compensation — Principles.

The liability to pay compensation under S. 82-A has no necessary relation to the liability to pay damages in an action in tort. There are no reasons why the principles relating to damages in an action in tort should be imported into S. 82-A of the Act. AIR 1952 Pat 466, Rel. on. **1959 BLJR 150: 1959 Pat LR 65: ILR 38 Pat 577: AIR 1959 Pat 316 (318) (Pt B) (Pr 9) (DB).**

——S. 82-A — Compensation — Basis.

Person who suffers from temporary disablement is entitled to some compensation under the provisions of S. 82-A. The basis on which the compensation is to be fixed is not the same on which damages are allowed under the common law of torts, because the compensation payable under S. 82-A is irrespective of any wrongful act neglect or default on the part of the railway administration. See Railway Accidents (Compensation) Rules (1950), R. 6. **AIR 1954 Pat 507 (DB).**

——S. 82-A — Scope — Railway Accidents (Compensation) Rules, 1950 — If ultra vires or invalid.

The Railway Accidents (Compensation) Rules, 1950, made under S. 82-J of the Railways Act, clearly work out the object of S. 82, and are in no way inconsistent with the meaning of S. 82; nor do they go beyond the object of that section. They cannot therefore be held to be invalid and inoperative. **AIR 1952 Pat 466 (467) (Pt A) (Pr 4) (DB).**

——Ss. 82-A, 66, 68 — Person travelling by goods train without ticket or permission injured in collision — Trespasser — Railway administration is not liable to pay any damages — Scope of S. 82-A indicated — (Tort — Damages — Carrier — Collision — Liability of railway to trespasser). See Railways Act (9 of 1890), S. 66. AIR 1957 Punj 164 (DB).

——S. 82-A — Scope and applicability.

S. 82-A applies only when the death is of a passenger travelling by train and meeting with an accident. But when somebody other than a passenger is killed in the accident that section has no application. Damages payable exceeding Rs. 10,000. S. 82-A is no bar in awarding them. **AIR 1954 Vind Pra 17 (23) (Pt F) (Pr 36).**

SECTION 82-F

——S. 82-F — Appeal under, against order of Claims Commissioner — Covered by Sch. 2, Item 4 of Hyderabad Court-fees Act corresponding to Sch. 2, Art. 11 of Central Act — Sum of Rs. 2/- is sufficient — See Court-fees Act (1870), Sch. 2 Art. 11. ILR (1959) An Pra 194.

SECTION 82-G

——S. 82-G — Apportionment of compensation in respect of death of passenger — Claims commissioner can apportion compensation only among applicants — He has no power to apportion compensation to dependants of deceased who are not applicants before him.

It is only when there are more applicants than one for compensation in respect of the death of a single passenger that the Claims Commissioner can apportion the compensation determined to be payable by the railway administration but even in such a case the apportionment can be made only amongst the applicants and no part of the compensation can be given to those dependents of the deceased who are not the applicants before him. The Claims Commissioner has no power to inquire into the question as to who are the dependents of the deceased and whether the compensation determined to be payable by the railway administration should be apportioned amongst them. There is no provision in Ss. 82-A to 82-J or in any other part of the Railways Act which

enables a dependent of the deceased to make an application for the benefit of himself and the other dependents of the deceased nor is there any provision which makes the benefit of any order which may be made by the Claims Commissioner on the application of a dependent of the deceased available to the other dependents. (1964) 5 Guj LR 1021: ILR (1964) Guj 1178: AIR 1965 Guj 156 (157) (Pr 4) (DB).

SECTION 82-H

——Ss. 82-H, 82-A — "Compensation more than once in respect of the same accident" — Injury or death in railway accident — Compensation received under S. 82-A — Compensation cannot be claimed once again under any other Act — (Workmen's Compensation Act (1923), S. 3) — See Railways Act (9 of 1890), S. 82-A. AIR 1965 Mys 306 (DB).

SECTION 82-J

——S. 82-J — Rules under — Railway Accidents (Compensation) Rules (1950), R. 11 (1) (i) — Rule is not ultra vires.

Rule 11 (1) (i) of the Railway Accidents (Compensation) Rules, 1950 framed under S. 82-J of the Railways Act does not go beyond the rule making power and is not inconsistent with S. 82-A (1) and is not ultra vires. 1962 BLJR 354: AIR 1962 Pat 109 (115) (Pt B) (Pr 37).

——Ss. 82-J, 82-A — Rules under S. 82-J — Railway Accidents (Compensation) Rules (1950) — Rules are not inconsistent with S. 82-A, Railways Act — See Railways Act (9 of 1890), S. 82-A. AIR 1952 Pat 466 (DB).

SECTION 84

——S. 84 — Criminal P. C. (1898), Ss. 476-A, 476, 195 (3) — Claims Commissioner appointed under Railways Act, if subordinate to High Court — Claims Commissioner upholding claim — Subsequent application by State to file complaint for prosecution of claimant for offences under Ss. 420 and 193, Penal Code for making false claim — Not maintainable — See Criminal P. C. (1898), S. 476-A. 1959 Cri LJ 558: AIR 1959 Andh Pra 235.

SECTION 101

●——S. 101 — Criminal P. C. (1898), S. 367 — Appreciation of evidence — Collision between two trains at station — Prosecution of Station Master for negligence — Correct approach to impute negligence on the part of the Station Master is to see whether the signals were lowered at that crucial moment — Value of oral evidence — See Criminal P. C. (1898), S. 367. 1956 Cri LJ 1372: AIR 1956 SC 738.

——S. 101 (a) — Applicability — 'Endanger' — Facts to be proved for conviction.

Before a conviction can be had under S. 101 (a) of the Railways Act, the prosecution must prove that a general rule had been disobeyed; and that by reason of such disobedience, the safety of any person was endangered. Actual harm need not be caused but a possibility of harm being caused would suffice. A breach of the rules per se would not be punishable under S. 101 of the Act. While a contravention of the rules might justify departmental action, to sustain a charge under S. 101; the prosecution must prove that by the disobedience of the general rule, the safety of any person had been imperilled.

Held on facts, — There was not even a remote possibility of human life being endangered by the action of the petitioner in starting the train without taking the line clear token. 1961 Mad LJ (Cr) 494: (1961) 2 An WR 80.

——Ss. 101 (a) and 101 (c) — General and Subsidiary Rules, Rr. 52 and 52-I — Negligence is not only doing repairs negligently but also breach of rule endangering public safety — AIR 1924 Oudh 250, Disting.— Duty under General Rule 52 and Subsidiary Rule 52-I is that of person actually carrying out repairs. ILR (1961) Bom 923: 1961 Nag LJ 298: 63 Bom LR 711: 1962 (1) Cr LJ 273: AIR 1962 Bom 41 (43, 44, 45) (Prs 8, 9, 10, 11, 12).

——S. 101 — Contributory negligence is no defence. AIR 1955 NUC (Cal) 5910 (DB).

——S. 101 — Subsidiary Rules, Rr. 152-1 and 147-1 (a) — Supervision required of shunting master at time of loose shunting while setting points — Nature of.

Where the shunting master in charge of shunting operations, directed the pointsman to set the points for siding No. 2, for purposes of taking the wagons on that siding for loose shunting and on the pointsman shouting that the point has been accordingly set up, the shunting master signalled the engine driver to shunt the wagons, but it was found that the pointsman instead of setting the point for siding No. 2 had set it for siding No. 1 with the result that the wagons were moved on siding number 1 fatally injuring one of the labourers who were working on siding No. 1 the shunting master is not guilty of disobedience of subsidiary rules, 152-I and 147-1 (a).

The S. R. 147-1 (a) does not require that the shunting master should personally go to the spot where the levers for working the points are situated, and to verify by going there whether the points are set as per his orders.

Supervision as required by S. R. 147-1 (a) does not mean that the person supervising the work to be done under his orders, has, every time he issues orders, which have to be carried out by another, to go to that person and see that they are correctly carried out. If he issues a correct order, he cannot be said to have failed in his duty of supervision from the point of view of criminal liability, if a person who is carrying out the order commits a mistake, of which the person supervising could not have known, except by going to the spot where the order is being executed, and watching how that person is carrying out that order.

Since there was no evidence that the point-man set the point for siding No. 1 though he was directed to set it for siding No. 2, he also could not be said to be guilty of disobedience of the subsidiary rules. 1961 Jab LJ 1003: 1961 MPLJ 1157: ILR (1961) Madh Pra 403.

——S. 101 — Subsidiary rule 147-1 (b) — Applicability of.

Subsidiary rule 147-1 (b) refers to shunting connected with train at roadside stations and does not cover a case of loose shunting at main stations like Bhopal. 1961 Jab LJ 1003: 1961 MPLJ 1157: ILR (1961) Madh Pra 403.

——S. 101 — Scope — Culpable negligence of Assistant Station Master — Effect — Subsidiary Rules of Western Railway, S. R. 37 (2) — Non-compliance with — Effect.

In determining the culpability of negligence regard must always be had (i) to the nature of the employment of the accused, and (ii) to the special degree of care and caution in the discharge of his duty. The duties of an Assistant Station Master are of a highly responsible character and the most important of all his duties is to see that no colli-

sion takes place. Rules (in particular S. R. 37 (2)) require that the Assistant Station Master must keep the key in his personal custody. The clear intention of the rule is that in no circumstance should it be accessible to any one unless it is delivered by the Assistant Station Master himself. Therefore, in whatever manner the pointsman gets the key the Station Master must be held negligent and must be held to have disobeyed the rules, unless it is found that there is any force or fraud used against him. **1960 Jab LJ 308: 1959 Cr LJ 983: 1960 MPLJ 185: ILR (1959) Madh Pra 411: AIR 1959 Madh Pra 284 (288) (Pt C) (Pr 41) (DB).**

——S. 101 — Crossing of trains at railway station — Omission to discharge personal responsibility cast on Assistant Station Master by rules — Act directly contributing to train collision — Conviction under S. 101 and S. 304-A, I. P. Code held proper — Single sentence passed for both offences — Particular offence for which sentence passed not indicated — Lower Court's order modified — Penal Code (1860), Ss. 304-A, 71. Conviction under S. 101 of the Railways Act and S. 304-A, I. P. Code was held proper.

When a person is convicted of two offences the Court must indicate the particular offence for which the sentence is passed. It is always open to the Court not to pass any sentence for the other allied offence. Thus, where a single sentence was passed by the trial Court for the offence under S. 101 of the Railways Act and for that under S. 304-A, I. P. Code, as their ingredients were almost the same, the order of the lower Court was modified and it was directed that the sentence on the accused by the lower Court should be for the offence under S. 101 of the Railways Act, and that no separate sentence was necessary for the offence under S. 304-A, Penal Code. AIR 1916 Nag 26; AIR 1925 Lah. 423 and AIR 1924 All 438, Rel. on. AIR 1936 All 745; ILR 32 Cal 73 and 176 ER 1319, Disting. **(1961) 3 Orissa JD 313: 28 Cut LT 107: ILR (1962) Cut 60.**

——S. 101 — Sentence.

In assessing the proper punishment to be imposed on the accused, the likelihood of their losing their jobs as a result of departmental action following their conviction under S. 101, Railways Act can be taken into consideration. **1959 Raj LW 577: ILR (1959) 9 Raj 589.**

——S. 101 — Plea of obeying orders — If valid defence.

It is the duty of a subordinate officer to disobey an order of his superior officer if on the very face it is clearly wrong and will lead to wanton loss of life if carried out. Hence it is no defence that the accused who is a subordinate carried out the orders of his superior. **(1959) Raj LW 577: ILR (1959) 9 Raj 589.**

——S. 101 — Applicability — Diversion of train on wrong line — Offence.

In every case where a travelling train is actually diverted to a wrong line on which there is another train the safety of persons in the two trains is endangered within the meaning of S. 101 of the Railways Act. If the error is due to disobedience of any rule or order or due to any rash or negligent act or omission, the offence under S. 101 is committed. The fact that due to the alertness of the driver the collision was averted is no ground for holding that no life was actually endangered. **(1959) Raj LW 577: ILR (1959) 9 Raj 589.**

SECTION 109

——S. 109 (1) — Offence under — Ingredients not satisfied.

In a case where neither was it established that the compartment was reserved nor was it proved that the accused refused to leave the compartment when required to do so.

Held, that the conviction under Section 109 was not valid. **ILR (1964) 16 Assam 196: 1965 (1) Cri LJ 545: AIR 1965 Assam 38 (39) (Pt A) (Pr 4).**

SECTION 110

——S. 110 — Non-cognizable offence — Magistrate can take cognizance on police report — Omission to examine officer — Conviction cannot be set aside on the ground of that irregularity. See Criminal P. C. (1898), Section 190 (1). **1962 (1) Cr LJ 467: AIR 1962 Raj 94.**

——S. 110 — Section is applicable to Railway servants also.

Section 110 of the Railways Act is in general terms and it applies to all persons and there is no reason why any distinction should be made in the application of this section to an offence committed by a railway servant. He comes equally within the definition of the word 'person' and the use of the words 'fellow passengers' does not make any difference because a railway servant is a passenger in the compartment if he happens to be travelling therein. AIR 1962 Raj 92, Rel. on. **1961 Raj LW 518: 1962 (1) Cr LJ 467: AIR 1962 Raj 94 (96) (Pt B) (Pr 5).**

SECTION 112

——S. 112 — Evidence Act (1872), Sec. 106 Illustration (b) and Section 101 Illustration (a) — Scope and object — Facts especially within knowledge' — Interpretation — 'Especially', meaning of — (Interpretation of Statutes — Illustrations) — Civil P. C. (1908), Pre.) — (Words and Phrases — 'Especially') — Illustration (b) to Section 106, Evidence Act has obvious reference to a very special type of case, namely, to offences under Sections 112, 113 of Railways Act — See Evidence Act (1872), Section 106, Illus. (b). **1956 Cri LJ 794: AIR 1956 SC 404.**

——S. 112 — Criminal P. C. (1898), S. 4 (1) (h) — Complainant, who is — Case under Railways Act — Complaint by Asst. Commercial Officer — Whole railway administration cannot be treated as complainant — See Criminal P. C. (1898), Section 4 (1) (h). **1961 (2) Cri LJ 185: AIR 1961 All 447.**

——S. 112 — Criminal P. C. (1898), Section 439 — Who can aply in revision — Third parties — Locus standi of — There is no legal bar to revision applications being entertained at instance of third parties — See Criminal P. C. (1898), S. 439. **1961 (2) Cri LJ 185: AIR 1961 All 447.**

——S. 112 — Conviction under, when can be sustained — Ticketless travel — No allegation of fraudulent intention in complaint — Charge not framed thereon and accused not questioned on the point — Conviction under section cannot stand. **AIR 1955 NUC (All) 4430.**

——Ss. 112, 113 — Applicability and scope.

No doubt a person is bound to produce a railway ticket or pass when demanded and would be liable to pay the fare and penalty if he is unable to produce the ticket when demanded. It would, however, be difficult to say that in all cases the omission to produce the ticket or pass could be referable to an intention to defraud the railway. It is possible that a person may lose his ticket or may even be unable to purchase one on account of rush at the booking office or want of

sufficient time. In all such cases section 112 of the Railways Act would be inapplicable and the person in default could be held liable under section 113 of the Act. **1953 All WR (HC) 474: 1953 All LJ 474: 1953 Cri LJ 1855: AIR 1954 All 12 (13) (Pt A) (Pr 3).**

——**S. 112 — Fraudulent intent to defraud essential. AIR 1951 All 410 (411) (Pt B) (Pr 4).**

——**S. 112 — Criminal P. C. (1898), Ss. 221, 242 and 255 — Complaint under Section 113 (4), Railways Act — Conviction under Section 112 of the same Act — Conviction is illegal. See Criminal P. C. (1898), Section 221. 51 Cri LJ 1174: AIR 1950 All 441.**

——**S. 112 — Applicability — Burden of proof — Evidence Act (1872), Sections 101, 103.**

Before a person can be convicted of an offence under Section 112 of the Act, he has to be charged and tried for that offence. In order to make out an offence under Section 112 the main ingredient of that offence namely, the intention to defraud a railway administration has to be established. In some cases, it may be possible to prove that the person concerned intended to defraud a railway administration; but there may be other cases, where no such presumption would arise. In such cases, (illustrations given) it will be necessary for the prosecution to allege and prove as a fact that the person concerned intended to defraud the railway administration. **51 Cri LJ 1174: AIR 1950 All 441 (442) (Pt A) (Pr 6).**

——**S. 112 — Intention to defraud railway administration on part of accused — Burden of proof — S. 106, Evidence Act not applicable.**

Mere travelling without pass or ticket does not attract S. 112, unless it can be inferred from the circumstances that any person travelled in contravention of S. 68 with intent to defraud the Railway administration. The intention of the accused is a matter which is to be inferred from the circumstances of each case. Undoubtedly it will be especially within the knowledge of the accused to explain as to how he was not travelling in contravention of S. 68, Railways Act without a ticket or a pass and to that extent the burden is on the accused, but the prosecution is not relieved of its responsibility to establish that the accused travelled with intent to defraud the railway administration. The question of intention is one which depends upon the circumstances of each case, and to which S. 106, Evidence Act, does not apply. **1965 (1) Cri LJ 545: ILR (1964) 16 Assam 196: AIR 1965 Assam 38 (39) (Pt B) (Pr 5).**

——**Ss. 112 and 113 (2) — Intention to defraud essential — Person having authority to travel in second class travelling in first class compartment — No offence.**

The accused, a Railway guard, who had authority to travel by second class was found to be travelling in a first class compartment. The accused was tried and convicted on his own plea of guilty under S. 112, Railways Act.

Held, that the conviction of the accused under S. 112 could not be sustained. To constitute an offence under S. 112, Railways Act, the accused should enter the compartment with intent to defraud the Railway administration. When the allegations simply were that the accused was detected travelling in a first class compartment without any ticket or any authority, the allegations did not per se constitute an offence under S. 112, Railways Act, at best his liability was to make good the charges and the compensation, if any, as provided by S. 113 (5), Railways Act. **1956 Cr LJ 1393: AIR 1956 Assam 186 (186) (Pr 2).**

SECTION 113

●——**S. 113 — Evidence Act (1872), S. 106, Illustration (b) and S. 101, Illustration (a) — Scope and object — 'Facts especially within knowledge' — Interpretation — 'Especially', meaning of — (Interpretation of Statutes — Illustrations) — (Civil P. C. (1908), Pre.) — (Words and Phrases — 'Especially' — Illustration (b) to S. 106, Evidence Act has obvious reference to a very special type of cases namely to offences under Ss. 112, 113 of the Railways Act — See Evidence Act (1872), S. 106. Illus. (b). 1956 Cri LJ 794: AIR 1956 SC 404.**

——**S. 113 — Applicability and scope.**

No doubt a person is bound to produce a railway ticket when demanded. It is possible that a person may lose his ticket or may even be unable to purchase one on account of rush at the booking office or want of sufficient time. In all such cases S. 112 would be inapplicable and the person in default could be held liable under S. 113. See Railways Act (1890), S. 112. **1953 Cri LJ 1855: AIR 1954 All 12.**

●——**S. 113 — Scope.**

Section 113 only provides a procedure for the recovery of railway dues and does not define any offence. The procedure provided by S. 113 of the Act is set in motion by an application and not by a complaint.

Hence a complaint under S. 113 against an accused is alleged to have travelled without a ticket is entirely misconceived. **AIR 1951 All 410 (411) (Pt A) (Pr 3).**

——**S. 113 — Criminal P. C. (1898), Ss. 221, 242 and 255 — Complaint under S. 113 (4), Railways Act — Conviction under S. 112 of the same Act — Conviction is illegal.— See Criminal P. C. (1898), S. 221. 51 Cri LJ 1174: AIR 1950 All 441.**

——**S. 113 — Section does not create offence but a statutory liability for payment of penalty for breach of statutory obligations imposed upon every passenger travelling by railway. 51 Cri LJ 1174: AIR 1950 All 441 (443) (Pt C) (Pr 8).**

——**Ss. 113 (2), 112 — Intention to defraud essential — Person having authority to travel in second class travelling in first class compartment — No offence — See Railways Act (1890), S. 112. 1956 Cri LJ 1393: AIR 1956 Assam 186.**

——**Ss. 113, 47—Applicability—Travelling with pass not in accordance with R. 39 (b) — Offence — R. 39 (b)—Not in consistent with Act or unreasonable and therefore not ultra vires — Conviction under S. 113 held was fully justified. See Railways Act (1890), S. 47. 1952 Cri LJ 1462: AIR 1952 Bom 421.**

——**Ss. 113, 66, 74 — Contract between railway administration and passenger purchasing ticket — Half ticket purchased by adult — Misrepresentation — Contract becomes voidable and not void — Luggage booked on such ticket — Loss of luggage in transit — Railway administration is responsible for loss — See Railways Act (9 of 1890), S. 66. AIR 1962 Cal 48 (DB).**

——**Ss. 113 and 68 — Passenger ticket lost during travel — Excess recovery — A certificate under S. 68 could be issued only on condition that ticketless traveller subsequently pays the fare for the distance to be travelled — Suit to recover single fare or excess charge not maintainable —**

See Railways Act (9 of 1890), S. 68. **1961 MPLJ (Notes) 56.**

——S. 113 — **Applicability.**

Section 113 does not apply to offenders against justice, but ordinarily to innocent persons, who may find themselves in the wrong by mere accident. It imputes no criminal intention or offence to person to be dealt with thereunder. **ILR (1955) Nag 872: 1955 Nag LJ 617: AIR 1955 Nag 265 (267) (Pt B) (Pr 15) (DB).**

——S. 113 — Travelling without a ticket — Proceedings under S. 113 (4) — Relevant matters to be considered stated — Duty of Railway pointed out. **AIR 1955 NUC (Pat) 4585.**

——S. 113 (4) — Travelling without ticket — Doubt existing as to the actual distance the man travelled or the station at which he boarded the train — Proper form of charge-sheet to be used pointed out. **AIR 1955 NUC (Pat) 4585.**

——S. 113 (4) — Order under — Jurisdiction of High Court to interfere — Magistrate acting under S. 113 (4) is an inferior criminal Court within S. 435, Cri. P. C. read with S. 6 of that Code — High Court can interfer in revision under S. 439. See Criminal P. C. (1898), S. 435. **AIR 1955 NUC (Pat) 4585.**

SECTION 118

——S. 118 — 'Passenger' — Licensed caterer in railway department is not passenger — Bearer of licensed caterer cannot be convicted under S. 118 for travelling on foot-board of train. **AIR 1955 NUC (Pat) 248.**

——S. 118 — Criminal P. C. (1898), S. 239 — Same transaction — Petitioners tried under S. 118, Railways Act — No community of purpose being passengers travelling to various destinations, having nothing to do in common — It could not be said that there was any common transaction — See Criminal P. C. (1898), S. 239. **AIR 1955 NUC (Pat) 248.**

SECTION 120

——S. 120 — 'Person' — Meaning — Railway servant not included — AIR 1937 Bom 357, Foll; AIR 1919 Mad 971 (2) and AIR 1934 Pat 52 (1) and AIR 1946 Nag 200, Not Foll. **1960 All LJ 445: 1960 All WR (HC) 325: 1960 All Cr R 215: 1960 Cr LJ 1532: AIR 1960 All 721 (722) (Pr 8).**

——S. 120 — **Applicability — Railway servant — Prosecution.**

A railway servant can be prosecuted under S. 120. AIR 1919 Mad 971 (2): 19 Cr LJ 313; AIR 1934 Pat 52 (1) and AIR 1946 Nag 150, Foll.; AIR 1929 Sind 249 (1) and AIR 1937 Bom 357, Not Foll. **1957 Cr LJ 1041: AIR 1957 All 636 (636) (Pt A) (Pr 3).**

——S. 120 — **Mens rea — Presumption of Railway servant found in state of intoxication on railway platform — Conviction — Sustainability — (Penal Code (1860), S. 40).**

Absence of the word 'knowingly' from the relevant penal provision does not necessarily exclude that ingredient of mens rea. It follws therefore that neither expressly nor by necessary implication has the presumption of mens rea been excluded from the provisions of S. 120. That being so, the conviction of a railway servant could not be sunstained merely because the actus revs of the section stands established namely, that he was found in a state of intoxication on the railway platform at the alleged time. On the contrary, it will have to be established further that whatever he did was one by him with a guilty mind. Where neither the railway seravant's presence at the railway platform nor his intoxication could be said to be his acts and there is absence of guilty mind behind those acts, the railway servant cannot be held to have committed any offence under S. 120. **1957 Cr LJ 1041: AIR 1957 All 636 (637, 638) (Pt B) (Prs 5, 8).**

——S. 120 — **'Person' — Meaning of — Includes railway servant.**

The word 'person' in S. 120 includes a railway employee who was not on duty when the offence was committed by him. Where all the ingredients of an offence under S. 120 are satisfied a railway servant can be convicted under S. 120. Though certain provisions in Ss. 100 and 120 appear to be similar, that can be no ground for thinking that S. 120 was enacted to apply to persons not covered by S. 100. AIR 1919 Mad 971 (2) and AIR 1934 Pat 52 (1) and AIR 1950 Mad 406 and AIR 1962 Raj 92, Rel. on; AIR 1937 Bom 357, Not Foll. **1965 (2) Cri LJ 741: AIR 1965 Cal 635 (635) (Pr 5) (DB).**

——S. 120 — **'Any person' includes railway servant.**

Held, that the words 'any person' occurring in S. 120, Railways Act had to be construed in their ordinary plain dictionary meaning without importing reservations not appearing in the section itself. Section 120, Railways Act covers acts contemplated therein and committed even by railway servants. (1946) NLJ 78: AIR 1946 Nag 150: ILR (1946) Nag 282 and 200, Foll.; AIR 1960 All 721, Not Foll. **1962 MPLJ (Notes) 228.**

——S. 120 (b) — **'Nuisance' — Meaning.**

'Nuisance' within the meaning of S. 120 (b), Railways Act means that which is offensive or annoying and would apply to an incident in which there were abuse, grappling and exchange of blows between two persons on railway premises. **1959 MPLJ (Notes) 134.**

——S. 120 — Railway official hurling down bundle of bangles of fellow passenger and breaking them commits offence under S. 120. **63 Mad LW 66 (2): (1950) 1 Mad LJ 82: 1950 Mad WN 302 (1): 1950 Mad WN (Cri) 82 (1): 51 Cri LJ 1003: AIR 1950 Mad 406 (406) (Pr 1).**

——S. 120 — **Applicability — Drunkenness by railway servant on duty — S. 120 not applicable.**

S. 120 is not applicable to the acts of a railway servant while he is on duty and is acting as such. The Act treats drunkenness in the case of a railway servant to be a more serious offence than in case of any other person in any railway carriage or upon any part of a railway. AIR 1919 Mad 971 (2) and AIR 1950 Mad 406 and AIR 1934 Pat 52 (1) and AIR 1946 Nag 200, Diss. from. AIR 1937 Bom 357 and AIR 1929 Sind 249 (1) and AIR 1960 All, 721, Rel. on. **65 Pun LR 312: ILR (1963) 1 Punj 569: 1963 (2) Cri LJ 318: AIR 1963 Punj 362 (362) (Pr 2) (DB).**

——Ss. 120 and 121 — **Constitution of India, Art. 311 (2) — Conviction on charge under Ss. 120, 121 — If conviction on criminal charge within Art. 311 (2) proviso (a), Constitution of India.**

The word charge in Art. 311 (2), Proviso (a) contemplates some accusation and not merely a charge in the technical sense of the Code of Criminal Procedure. A charge under Ss. 120 & 121, Railways Act, on which a person is convicted falls under the proviso as the offences covered by the aforesaid sections can be regarded to be criminal in the sense in which that expression is used in the proviso. AIR 1946 Mad 375, Rel. on. **AIR 1959 Punj 169 (169) (Pt A) (Pr 2).**

——S. 120 (b) — Use of abusive language — Evidence.

A categorical statement of a witness that he was abused in the name of his mother and sister is evidence enough to warrant a finding that the accused persons used abusive language. AIR 1925 Lah 151, Not Foll. **ILR (1961) 11 Raj 959: 1961 Raj LW 392: 1962 (1) Cr LJ 465: AIR 1962 Raj 92 (92) (Pt A) (Pr 3).**

——S. 120 (b) — Nuisance — Meaning of — Beating a person on railway platform — Offence.

Nuisance ordinarily means that which annoys or hurts or that which is offensive. If persons indulge in the act of beating on a railway platform it is bound to cause annoyance to other persons who happen to be there at that time. The case would come under clause (b) because it would amount to the committing of nuisance on the Railway platform. **ILR (1961) 11 Raj 959: 1961 Raj LW 392: 1962 (1) Cr LJ 465: AIR 1962 Raj 92 (92) (Pt B) (Pr 3).**

——S. 120 — Person — Meaning of — Includes railway servant — Scope of S. 120 compared with that of Ss. 99 to 105.

Section 120 applies to railway servants. It may be that the provisions of S. 120 to some extent overlap the provisions of S. 100 but all the acts described in S. 120 are not covered under S. 100 and there is no other provision in the Act which makes the acts described in S. 120 (b) and (c) committed by railway servants punishable. Because Ss. 99 to 105 deal with the offences by railway servants and S. 120 appears under the offences falling under the head 'other offences' it cannot be said that the offences mentioned after S. 106 do not apply to railway servants. Offences under Ss. 99 to 105 are of special kind relating to railway servants but the offences mentioned in Ss. 106, 120 are such which can be committed both by railway servants as well as other persons. AIR 1919 Mad 971 (2) and AIR 1934 Pat 52 (1) and AIR 1946 Nag 150 and AIR 1946 Nag 200 and AIR 1957 All 636, Rel. on; AIR 1937 Bom 357 and AIR 1929 Sind 248 (1) and AIR 1960 All 721, Diss. from. **ILR (1961) 11 Raj 959: 1961 Raj LW 392: 1962 (1) Cr LJ 465: AIR 1962 Raj 92 (93) (Pt C) (Pr 4).**

SECTION 121

●——S. 121 — Wilful obstruction to railway servant — Train standing on platform — Pointsman having grudge against guard threatening guard with scythe in hand — Obstruction to guard held was in discharge of his duty (Per Majority Raghubar Dayal, J. — Dissenting).

Held, (by the Majority; Raghubar Dayal, J., dissenting) (1) that the act of waving a scythe in a menacing way alleged to have been done by S the pointsman was done by him, actuated by malice by reason of the fact that C the guard had not spared him in the past; (2) that C was on duty as a guard on train, which was then standing at the platform. Thus during the time that the incident took place, viz., for about 15 minutes, he was obstructed from discharging his duty by this deliberate and wilful act on the part of S (3) that S had wilfully created obstruction in the discharge of the public duty by C as a guard within the meaning of S. 121, Railways Act, 1890.

Raghubar Dayal, J. — (dissenting) (1) that the expression "in the discharge of his duty" was not equivalent to the expression "when on duty". The obstruction or impediment, caused to the railway servant in the discharge of his duty, should result in an obstruction or impediment in the execution of the duty he was performing at the time. There was nothing on the record to show that what C was doing at the time amounted to his discharging some duty as a guard. The fact that he was on the platform about 40 minutes before the departure of the train did not necessarily lead to the inference that he must have been discharging some duty which he had to perform as a guard of that train, (2) that the intention to do a certain act, in no way directed towards the obstruction of a railway servant, would not be an act of wilful obstruction of the railway servant. The guard was not threatened in order to prevent him from carrying out his duties and therefore S could not be said to have wilfully obstructed C in the discharge of his duty: 1883 All WN 197 and AIR 1925 All 409 and (1907) 1 KB 59 and (1910) 1 KB 1, Rel. on; (3) that an offence under S. 121 of the Act is committed only when an accused commits an act with the intention of preventing the public servant from discharging his duty and the act does prevent him from doing so: (4) that conduct of S in giving threats to C, the guard, at the station did not amount to an offence under S. 121, Railways Act, 1890, but made out an offence under S. 506, Penal Code. Shyamlal v. State of U. P., **1963 All LJ 596: 1963 Cur LJ (SC) 61: 1963 (2) Cri LJ 408: (1963) 1 SCWR 617: (1964) 1 SCJ 377: 1964 Mad LJ (Cri) 249: (1964) 2 SCR 61: ILR (1963) 2 All 717: AIR 1963 SC 1511 (1513, 1514, 1515, 1516) (Pt A) (Prs 6, 11, 13, 19, 22).**

●——S. 121 — Obstructing a railway servant.

Per Raghubar Dayal, J. — Threats of violence can amount to obstructing a public servant in the discharge of his duty, if the attitude of the person, holding out the threats indicated that violence would be used if the public servant persisted in performing his duty. AIR 1932 Cal 871 and AIR 1933 All 759, Rel. on. Shyamlal v. State of U. P., **1963 All LJ 596: 1963 Cur LJ (SC) 61: 1963 (2) Cri LJ 408: (1963) 1 SC WR 617: (1964) 1 SCJ 377: 1964 Mad LJ (Cri) 249: (1964) 2 SCR 61: ILR (1963) 2 All 717: AIR 1963 SC 1511 (1515) (Pt B) (Pr 20).**

——S. 121 — Applicability — Refusal of passenger to show ticket when demanded — Offence — Railway Mobile Court — Procedure — Examination of accused under S. 342, Cr. P. Code.

The refusal by a passenger alighting from a train to show his ticket when demanded by the railway servant will certainly impede the railway servant in the discharge of his duty and will amount to an offence under S. 121 of the Railways Act. In cases tried by Mobile Railway Courts, the Honorary Magistrate should follow the elementary principle of Criminal P. C. of questioning the accused also, after the evidence against him is recorded, with regard to the circumstances that appear against him. Otherwise the whole proceedings will be vitiated. **1958 Mad WN 175: (1958) 1 MLJ 242: 1958 MLJ (Cr) 258: 1958 Cr LJ 903: (1958) All WR (Supp) 71: AIR 1958 Mad 333 (334) (Pt A) (Pr 4).**

——S. 121 (before Amendment in 1959) — Criminal P. C. (1898), Ss. 423 (1) (b) and 439 — Appeal against conviction — Powers of appellate Court to order retrial — Appellate Court upholding conviction — Remand for writing fresh judgment and for passing proper sentence, is illegal — See Criminal P. C. (1898), S. 423 (1) (b). **1961 (1) Cri LJ 834: AIR 1961 Pat 252 (DB).**

SECTION 122

——S. 122 — Criminal P. C. (1898), S. 4 (1) (f) and Chapter XX — Offence under S. 122 is con-

gnizable offence — Punishable by maximum fine of Rs. 50/- — But it can be tried only as a Summons Case — See Criminal P. C. (1898), S. 4 (1) (f). **1964 All WR (HC) 108.**

——**S. 122** — Finding that accused were authorised to be in premises — No question of warning arises. **AIR 1955 NUC (All) 5820.**

——**S. 122 — Applicability.**

A was a railway employee and the route taken by him was the route he was accustomed to daily as a matter of routine. It was a route used by similarly situated employees of the railway and the railway workshop with the implied permission of the railway authorities. On the admitted facts of the case the railway authorities had by implication permitted workmen employed in the workshop to use this route.

Held that A could not be regarded as a trespasser and therefore S. 122 did not apply to him. See Workmen's Compensation Act (1923), S. 3 (1). **AIR 1954 All 132.**

SECTION 134

——**S. 134 — Opportunity to produce evidence.**

No doubt cases have to be tried by the Special Magistrate while he is on the line, but this would be no justification for refusing a proper trial if the accused wants to produce evidence to show that it was not his intention to defraud the railway. **1953 All WR (HC) 474: 1953 All LJ 474: 1953 Cri LJ 1855: AIR 1954 All 12 (13) (Pt B) (Pr 4).**

SECTION 135

——**S. 135** — Taxation of Railway Administration — Procedure indicated. See Municipalities — U. P. Municipalities Act (2 of 1916). **AIR 1954 All 56 (DB).**

——**S. 135 (2) — Applicability — Conditions.**

In order to attract the provisions of sub-s. (2) of S. 135, Railways Act, not only must there be a notification of the Central Government under sub-s. (1) of S. 135, but there must be a liability upon the Railway Administration to pay a tax by virtue of the Notification. It is only where the Railway Administration is made prima facie liable to pay a tax to a local authority that it can approach the appropriate authority for determining the quantum of such liability. **61 Bom LR 1097: ILR (1959) Bom 1497: AIR 1960 Bom 141 (143) (Pt B) (Pr 8) (DB).**

——**S. 135 (2) — Jurisdiction of tribunal.**

Where a person seeks from a tribunal an adjudication of a dispute, he must allege and, where disputed, prove that the tribunal has jurisdiction to entertain the proceding in which the dispute is raised. In the absence of such an averment, the Court must reject it, unless the Court is satisfied from the other averments in the plaint that it has, prima facie, jurisdiction to entertain the plaint and that the plaintiff's omission to make the averment as to jurisdiction is a mere clercial or accidental error. But where a plaintiff lodges his claim and denies the jurisdiction of the Court to entertain it, the Court must throw it out forthwith. The position is not different where an initial averment to the Court's jurisdiction is withdrawn by the plaintiff either expressly or by necessary implication, later on.

From the language of sub-s. (2) of S. 135, Railways Act, it is clear that the existence of liability on the Railway Administration to pay a tax to the local authority is a condition precedent to the exercise of the jurisdiction to determine the quantum of liability under S. 135 (2) of the Act. In other words only a Railway Administration which accepts the position that it is liable to pay a tax that is entitled to approach the appropriate authority under sub-s. (2) of S. 135. It is, therefore, not competent to such authority to consider, in a proceeding before him under this provision, the very factum of the liability of the Railway Administration to pay the tax of which the amount if any is required to be determined by it. **61 Bom LR 1097: ILR (1959) Bom 1497: AIR 1960 Bom 141 (143, 144) (Pt C) (Prs 10, 12) (DB).**

——**S. 135 (2) — Scope of enquiry.**

The opening words of sub-s. (2) of S. 135 are "while a notification of the Central Government under Cl. (1) of this Section is in force". Once a notification is issued under the aforesaid provision it would follow that the exemption of a Railway Administration from liability to pay a tax conferred by the opening words of sub-s. (2) of S. 135 is taken away or modified by that notification. That is a settled and indisputable fact and cannot be questioned before or by the authority approached under S. 135 (2). The authority can construe the notification or enquire into the existence of the notification. If it holds that there is no notification, it must straightway proceed to dismiss the application. It has no power to go into the question of the liability of the Railway Administration to pay a tax at all. Hence if the Railway Administration disputes the very fact of the liability then the proper course for it is to go to the ordinary Civil Court for redress and not to the authority appointed under the Railways Act. In such a case the District Judge has no jurisdiction to entertain the application, it follows that his findings on the various questions raised by the Railway Administration are inefficacious. **61 Bom LR 1097: ILR (1959) Bom 1497: AIR 1960 Bom 141 (144) (Pt D) (Prs 13, 14) (DB).**

——**S. 135** — Liability of Railway property to pay municipal taxes — Notification when old Municipal Act was in force — Act repealed and new Act coming into force — Notification sufficient to levy tax under new Act — Municipalities — C. P. and Berar Municipalities Act (2 of 1922), Ss. 66 (6), 2 (2). **AIR 1953 Nag 297 (301) (Pt E) (Prs 23, 27).**

——**S. 135** — Applicability of Orissa House Rent Control Order, 1943, to godowns built by licencees on railway lands — Municipality cannot claim to levy tax on the Railway administration in view of S. 135, Railways Act and the Railways (Local Authorities' Taxation) Act. See Houses and Rents — Orissa House Rent Control Order, 1943. **AIR 1955 NUC (Orissa) 5693 (DB).**

——**S. 135** — Railways (Local Authorities' Taxation Act) 1941, Ss. 4, 3 — Distinction between — Railway property liable to taxation before 1937 — Section 4 applies — Fresh notification not necessary—Government of India Act (1935), S. 154) — (Constitution of India, Art. 285) — See Railways (Local Authorities' Taxation) Act (1941), S. 4. **AIR 1959 Pat 216 (DB).**

——**S. 135 — Holdings belonging to O. T. Railway — Liability to taxation by municipality — (Railways (Local Authorities' Taxation) Act (1941), S. 4) — (Government of India Act (1935), S. 154, Proviso) — (Government of India (Adaptation of Indian Laws) Order (1937), S. 9).**

Section 135 of the Railways Act, S. 4 of the Railways (Local Authorities' Taxation) Act and S. 154 of the Government of India Act with its proviso and S. 9 of the Government of India (Adaptation of Indian Laws) Order are all in consonance with each other.

Where, therefore, a municipality brought a suit for arrears of municipal taxes in respect of holdings belonging to the O. T. Railway:

Held, that the notifications issued under S. 135, Railways Act, not having been varied or revoked by the Government the municipality was within its rights in claiming the tax. **AIR 1954 Pat 568 (572) (Pt E) (Pr 7).**

——S. 135 — Notification under — Right of local authority to vary amount of tax.

What the notifications issued under S. 135 authorise is a liability to certain kinds of taxes which are bound to be revised under the proper provisions of the Act governing the local authorities. All that is excluded is a new kind of tax but it does not in any way affect the right of the local authorities to vary the amount of tax in accordance with law. And no question of the amount of tax can affect the nature or class to which a particular tax belongs. **AIR 1954 Pat 568 (573) (Pt F) (Pr 9).**

——S. 135 — Notifications under — Property constructed after 1937 — Liability to taxation — (Railways Local Authorities' Taxation) Act (1941), S. 4 — (Government of India Act (1935), S. 154).

As the notifications issued under S. 135 do not provide any restriction upon the power of the local authorities to impose the tax specified thereunder there is no reason to restrict their operation to the properties which existed prior to 1937 as would be the case where the matter is governed only by the provisions of S. 154 of the Government of India Act. **AIR 1954 Pat 568 (574) (Pt H) (Pr 12).**

SECTION 137

——S. 137 (before Amendment in 1955) — Railway servant is public servant. See Prevention of Corruption Act (1947), S. 2. 1959 Cr LJ 1497: AIR 1959 SC 1310.

——S. 137 (1) (as amended by Act 17 of 1955)— Prevention of Corruption Act (1947), S. 5 (1) (d) — Offence under S. 5 (1) (d) — Railway servant — If public servant — (Penal Code (1860), S. 21).

Before the amendment of S. 137 by Act (17 of 1955) railway servants were treated as public servants only for the purposes of Chapter IX of the Indian Penal Code. But now, as the result of the amendment, all railway servants have become public servants not only for the limited purposes but also generally. In any event, they are public servants under the Prevention of Corruption Act. Ram Krishan v. State of Delhi, **1956 Pat LR (SC) 159: 1956 Mad WN 480: 1956 SCJ 432: (1957) 1 Lab LJ 4: 1956 SCA 577: 69 Mad LW 1002: (1956) All WR (Sup) 95: 1956 SCR 182: 1956 Cr LJ 837: 1956 Andh LT 512: (1956) 2 MLJ (SC) 4: ILR (1956) Punj 1163: AIR 1956 SC 476 (478) (Pt C) (Pr 9).**

——S. 137 (4) — Scope — Question whether S. 137 (4) excludes all railway servants from definition of public servant except for purpose of Ch. IX, I. P. Code is a substantial question of law. See Constitution of India, Art. 134 (1) (c). AIR 1955 Ajmer 18 (1).

——S. 137 — Prevention of Corruption Act (1947), S. 2—Penal Code (1860), S. 21 — Public servant— Railway servant is a public servant within the meaning of Act of 1947 — Proceedings under taken against him under the Act — (Penal Code (1860), S. 21) — See Prevention of Corruption Act (2 of 1947), S. 2. 1956 Cri LJ 687: AIR 1956 All 358.

——S. 137 — Criminal P. C. (1898), Ss. 200, Proviso (aa) and 537 — Public servant — Railway ticket examiner is public servant — (Penal Code (1860), S. 21) — See Criminal P. C. (1898), S. 200, Proviso (aa). 1956 Cri LJ 44: AIR 1957 Andh Pra 4.

——S. 137 (1) — Penal Code (1860), S. 161 — Public servant — Railway servant is a public servant and can be convicted under S. 161 — (Prevention of Corruption Act (1947), S. 2) — See Penal Code (1860), S. 161. 1957 Cri LJ 1127: AIR 1957 Ker 134 (DB).

——S. 137 — Before amendment of S. 137 in 1955 a railway servant was deemed to be a public servant only for certain limited purposes. After the amendment in case of State-owned railway, all its servants would be Government servant generally by virtue of the State taking over the railways. In case of employees under the private agencies however they would be public servants only for the limited purposes specified in that behalf — See Railways Act (1890), S. 3 (7). (1964) Mad LJ (Cri) 645: (1964) 2 MLJ 477.

——S. 137 (as amended in 1955) — Servant of State-owned railways is a public servant for all purposes and not merely for the purpose of Chapter IX of Penal Code.

After the amendment of S. 137 in 1955 by the deletion of sub-s. (4) therefrom, an employee of the State-owned railway is a public servant not merely for the purpose of Chapter IX of the Penal Code but even for the purpose of S. 353, Penal Code. AIR 1956 SC 476; AIR 1959 SC 1310, Rel. on. Before the amendment in 1955, as a result of the provisions of sub-s. (4) of S. 137, a railway servant was to be deemed to a public servant only for the limited purpose of Ch. IX of the Code and not for any other purpose although the railway was State-owned and the servants of that railway had automatically become Government officers and such of the provisions in S. 21, Penal Code, which refer to officers of the Government with reference to the duties they have got to discharge, were automatically attracted in their cases. But by the amendment of 1955, S. 187 (4) was deleted and S. 137 (1) had been recast using the phrase 'not being a public servant as defined in S. 21, Penal Code' in opposition to 'railway servant' which phrase has to be given an adjectival effect on the words 'railway servant'. In other words it means that only those railway servants who are not public servants as defined in S. 21 of the Penal Code shall be deemed to be public servants only for the purpose of Ch. IX of the Penal Code. The amendment of S. 137 (1) was not intended to affect the position of railway servants in the State-owned railways who had become already Government Servants. It was intended to apply to the servants of such railways as were not affected by the State taking over the railways but remained under the control of private agencies. In their case they would be public servants only for the purpose of S. 409, Penal Code or any of the sections in Ch. IX of the Penal Code. This appears to be the real effect of S. 137 (1) of the Railways Act after its amendment in 1955. **1964 Mad LJ (Cr) 645: (1964) 2 Mad LJ 477.**

——S. 137 — Criminal P. C. (1898), S. 197 — Prosecution of public servant — Railway servant — Offence under S. 408, I. P. C. — Accused not public servant—Sanction, not necessary—(Penal Code (1860), Ss. 405, 408, 21) — See Criminal P. C. (1898), S. 197. 1958 Cri LJ 1083: AIR 1958 Pat 441.

——S. 137 — "Public Servant" — Railway servant committing offence under S. 408, Penal Code — Applicability of Act 2 of 1947.

Under S. 137, Railways Act, 1890, a railway servant is deemed to be a public servant for purposes of Ch. IX of the Penal Code. Ch. IX consists of Ss. 161 to 171 only, and it is for the purposes of these sections alone therefore that a Railway servant can be called a public servant within the meaning of S. 21, Penal Code, and he cannot otherwise be called a public servant for the purposes of the Penal Code. If, therefore, the prosecution case is that the railway servant committed offence under S. 408, Penal Code, only they cannot call the railway servants public servants and no question of the application of Prevention of Corruption Act 2 of 1947, arises as they are not public servants within meaning of S. 2 of that Act, they being not public servants within S. 21, Penal Code. If, therefore, the servants are being proceeded against in the Court of a Magistrate, there is no occasion for withdrawing these cases from that Court and transferring them to Special Judge. **ILR (1955) Punj 9: 1954 Cr LJ 1290: 56 Punj LR 159: AIR 1954 Punj 189 (190) (Pr 3) (DB).**

[**Overruled** in AIR 1959 SC 1310.]

SECTION 138

——S. 138 — Remedy under — Whether dependent upon validity of discharge.

The remedy under Section 138 of the Railways Act is not dependent upon the validity or otherwise of the discharge or suspension of the Railway servant concerned. **63 Cal WN 78: 1959 Cr LJ 37: AIR 1959 Cal 64 (64) (Pt A) (Pr 2) (DB).**

——Ss. 138 and 148 (2) — Tea-stall contractor — Whether railway servant.

A Tea-stall contractor at a railway station, and not his servant, can be regarded as a railway servant within the meaning of Section 138 and Section 148 (2) of the Railways Act. **63 Cal WN 78: 1959 Cr LJ 37: AIR 1959 Cal 64 (64) (Pt B) (Pr 2) (DB).**

——S. 138 — "Discharge" — Meaning of.

The word "discharge" is generally enough to include in it discharge on retirement so that even if a railway servant has been relieved of his office on retirement, he will come within the mischief of the section; and it will be legally open to a Magistrate, provided the second condition also has been fulfilled, namely, that he, his wife, etc., refuses or neglects, after notice in writing for that purpose, to deliver up the quarters to the railway administration.

Where the only ground taken by the railway servant was that he was neither discharged nor suspended from his office but retired and that the railway not having paid his provident fund money on his retirement, he was not in a position to leave his quarters:

Held, refusal by the Magistrate to take action under Section 138 was wrong. **60 Cal WN 588: 1957 Cr LJ 175: AIR 1957 Cal 97 (97, 98) (Pr 2).**

SECTION 140

——S. 140 — Service of notice — Suit by railway servant to declare his removal invalid — Notice addressed to Secretary, Central Government for Railways sent by the latter to General Manager, East Indian Railway — It must be taken to have reached the General Manager in the ordinary course of official business — Suit could not be held to be defective for want of notice under Section 80. See Civil P. C. (1908), Section 80. 1956 All LJ 730.

——Ss. 140, 77, 80 — Section 77 read with Sections 80 and 140 treats each railway administration as separate entity — Notice of claim should be served on each — AIR 1952 Mad 795, Diss. from — (Civil P. C. (1908), Section 80) — See Railways Act (9 of 1890), Section 77. AIR 1959 Andh Pra 594 (DB).

——Ss. 140, 77 — Person to whom notice has to be sent — Claim to be preferred to Railway Administration as defined in Section 3 (6) — Railway administered by Government — Notice under Section 140 should be served on manager or subordinate officer who is authorised — Demand for open delivery held should be treated as claim under Section 77 — See Railways Act (1890), Section 77. AIR 1955 Assam 221 (DB).

——S. 140 — Notice under — Scope of.

Notice is no doubt an essential preliminary step for the valid institution of a suit but that would not make such a notice part of the cause of action for the suit itself. See Civil P. C. (1908), Sec. 80. **AIR 1954 Bom 129 (DB).**

[**Held impliedly overruled** by AIR 1963 SC 1681 as interpreted in AIR 1967 Cal 205.]

——S. 140 — Service of notice — Notification by Agent of Bengal-Nagpur Railway authorising claims officer to receive notice — Notice on claims officer — Notice valid after taking over Railway by Government. See Railways Act (1890), Section 77. AIR 1959 Cal 215 (DB).

——S. 140 — Notice to Chief Commercial Manager — Does not amount to the preferment of a claim to the railway administration — Waiver — Effect stated — See Railways Act (1890), S. 77. AIR 1957 Cal 17 (DB).

——S. 140 — Service of notice — Claim may be served on Government administering railways. See Railways Act (1890), Section 3 (6). (1957) 61 Cal WN 433.

——S. 140 — Service of notice — Chief Commercial Manager authorised by Manager to receive claims under Section 77 — Claim sent to Chief Commercial Manager by registered post — Claim is duly served in one of the modes prescribed by Section 140 — See Railways Act (1890), Section 77. (1957) 61 Cal WN 433.

——Ss. 140 and 77 — Notice to Chief Commercial Manager of E. I. Railway is sufficient — See Railways Act (1890), Section 77. AIR 1952 Cal 443.

——Ss. 140 and 75 — Service of notice — If compulsory.

The word "may" in Section 140 of the Railways Act, must be construed as "must". When it is said that a person wishing to make a claim may serve a notice it means that he has the option to serve the notice or not. If he does not serve it his claim will fail. If he wants to succeed he must serve the notice. 35 C. 194, Foll.; 57 C. 1286, Diss. from. **AIR 1952 Cal 341 (342) (Pt A) (Pr 4).**

——Ss. 140 and 77 — Railway administered by Government — Notice to manager means to General Manager or Agent and not to Chief Commercial Manager — See Railways Act (1890), Sec. 77. AIR 1951 Cal 512 (DB).

——Ss. 140 and 77 — Claim for damages caused to consignment of goods — Notice of claim issued to Chief Commercial Superintendent — Chief Commercial Superintendent held out and acting as delegate of the Manager of the Railway for receipt and disposal of claims under Section 77

— Plaintiff is not liable to be non-suited on the ground of non-compliance with Ss. 77 and 140. See Railways Act (1890), Section 77. **ILR (1964) 1 Ker 355.**

——**Ss. 140, 77 — Scope — Notice — Mode of service — Section 140 not exhaustive — Claim for compensation under Section 77 — Notice served on Chief Commercial Superintendent — Validity.**

It is true that Section 140 says that a notice for other document to be served on a railway administration may be served on the manager thereof; but that section does not say that it may be served only in that manner and it is not exhaustive of the modes in which service can be effected. When a responsible officer (in this case the Chief Commercial Superintendent) of a railway administration receives a claim for compensation under Section 77 on behalf of the administration and acts upon it, it may well be presumed that he had the necessary authority to receive it on behalf of the administration. **1960 Ker LT 352: (1960) 1 Ker LR 183: 1960 Ker LJ 408: ILR (1960) Ker 435: AIR 1960 Ker 257 (257) (Pt A) (Pr 3).**

——**S. 140 (c)** — Giving of notice — Plaintiff can take advantage of — General Clauses Act, Section 10 — See Railways Act (1890), Sec. 77. **AIR 1957 Madh Pra 114 (DB).**

——**Ss. 140 and 77** — Notice to General Traffic Manager — Notice is valid — See Railways Act (9 of 1890), Section 77. **AIR 1957 Madh Pra 114 (DB).**

——**Ss. 140, 77, 80** — Through traffic — Notice under Section 77 to General Manager of one of railway administrations is sufficient — AIR 1949 Pat 329, Diss. from; AIR 1955 Mad 151, Overruled — See Railways Act (9 of 1890), Sec. 77. **AIR 1960 Mad 58 (DB).**

——**S. 140** — Goods carried over two Railway Administrations — Loss of goods — Notice must be sent to both the Railway administrations — See Railways Act (1890), Section 77. **AIR 1955 Mad 151.**

[Overruled in AIR 1960 Mad 58.]

——**S. 140 — Civil P. C. (1908), Section 80 — Suits against Railway administration.**

Under the amended law, in the case of a suit against the Central Government which relates to a railway the notice has to be served on "the General Manager of that Railway" The notice sent by post on 17-6-1948 and served on a Secretary, Central Government therefore was not in due compliance with the requirements of that section— See Civil P. C. (1908), Section 80. **AIR 1953 Nag 360.**

——**S. 140** — Service of notice of appeal — Respondent East Indian Railway — Notice sent to Chief Administrative Officer, East Punjab Railway, instead of to Manager, East Indian Railway — Information of Notice given to Chief Commercial Manager, East Indian Railway, Banares Cantt. — Information is not equivalent to the service of a notice of appeal on the manager, East Indian Railway — See Civil P. C. (1908), Order 5, Rule 12. **AIR 1956 Pat 511 (DB).**

——**S. 140** — Notice sent to Chief Administrative Officer of East Punjab Railway instead of Secretary, Government of India, in charge of Railways — Subsequent amendment of Section 80 requiring notice to be sent to General Manager of Railway — Chief Administrative Officer designated General Manager — Chief Administrative Officer as General Manager taking cognizance of notices — He cannot afterwards contend that notice was not proper — See Civil P. C. (1908), S. 80. **AIR 1955 Pepsu 51 (DB).**

——**Ss. 140, 77** — Through traffic Notice to General Manager of one of the Railway administrations is sufficient — See Railways Act (9 of 1890), Section 77. **AIR 1963 Punj 224 (DB).**

——**S. 140** — Notice of claim addressed to Chief Commercial Superintendent, Western Railway — In reply letter to notice Superintendent asking claimant to send original beejak without prejudice to enable him to settle claim — Beejak sent but no reply was received in spite of several reminders — Suit for compensation — Plaintiff alleging that Chief Commercial Superintendent was the proper officer to deal with such notice — Allegation not denied by Railway in its written statement — Allegation must be taken to be admitted — There is sufficient compliance with Sections 77 and 140 and notice is not invalid — See Railways Act (1890), S. 77. **(1956) 9 Sau LR 86.**

SECTION 142

——**Ss. 142 and 77 (before amendment by Act 39 of 1961) — Presumption and inference as to service of notice — Averment in plaint as to service of notice — Absence of specific denial in Written statement — Effect of.**

Apart from presumption under Section 142, the absence of any specific denial by the Railway concerned of the averment in the plaint that registered notice under Section 77, was sent to it must lead to the inference that the notice under Section 77 was duly served by registered post and duly received. **28 Cut LT 331: ILR (1962) Cut 402: AIR 1963 Orissa 54 (55) (Pt B) (Pr 7) (DB).**

SECTION 145

——**S. 145** — Three persons authorised to plead and act for Governor-General — Only one of them signing memorandum of appeal — Other two allowed to sign memorandum after appeal was filed — Appeal could not be held to be filed without authority — Civil P. C. (1908), Order 41, Rule 1.

Under Section 145, authority was given to three persons to plead and act for the Governor-General in certain cases. The memorandum of appeal was, however, signed by one of them only. Subsequently, after the appeal was filed, the other two persons were allowed to sign the memorandum of appeal:

Held, that it could not be said that the appeal was filed without authority or that it was not properly presented. Even if it was held that the authority to file the appeal was given jointly the signing of the memorandum of appeal by one of the three persons was quite enough. The other two signed the memorandum after the appeal had been filed and this was a mere technical irregularity and could not be taken as fatal to the filing of the appeal: Case law referred. **AIR 1950 East Punj 160 (161) (Pt A) (Pr 3).**

——**S. 145** — Mysore Railways Act (1894), Sections 61 and 122 — Authority to whom notice should be sent — Notice within "six months" — Notice to Traffic Manager instead of General Manager held not defective. See Mysore Railways Act (4 of 1894), Section 61. **AIR 1953 Mys 16.**

——**S. 145** — Service of notice of appeal on recognised agent — Respondent, East Indian Railway Administration — Person holding special power of attorney from General Manager under Section 145, Railways Act, is authorised agent.

See Civil P. C. (1908), Order 3, Rule 3. AIR 1956 Pat 511 (DB).

——S. 145 — Suit against East Indian Railway in the name of Dominion of India — In appeal arising out of suit name of Union of India substituted due to constitutional changes — Special power of attorney executed in favour of B by General Manager, East Indian Railway, continues to have legal effect after transfer of power from Dominion of India to Union of India — See Constitution of India, Article 294. AIR 1956 Pat 511 (DB).

SECTION 148

——Ss. 148 (2), 138 — Tea-stall contractor — Whether railway servant.

A tea stall contractor at a railway station, and not his servant can be regarded as a railway servant within the meaning of Sections 138 and 148 (2) — See Railways Act (1890), Section 138. 1959 Cri LJ 37: AIR 1959 Cal 64 (DB).

SCHEDULE 2

——Sch. 2 — Sale of Goods Act (1930), S. 39 (2) — Loss of goods in transit — Ordinary precautions namely to declare to the Railway about the goods which came under the excepted articles enumerated in the IInd Schedule not taken by seller — Buyer held not liable — See Sales of Goods Act (1930), Section 39 (2). AIR 1957 Mad 183.

SCHEDULE 2, Cl. (a)

——Sch. II, Cl. (a) — Articles mentioned in second schedule — Fountain pens merely because they have a nib or a clip or even a cap of gold cannot come within the meaning of 'gold manufactured'. See Railways Act (1890), Section 75. AIR 1955 Bom 98 (DB).

——Sch. 2, Cls. (a) and (b) and S. 75 — Fountain pens with gold caps and gold nibs not covered by clauses — See Railways Act (9 of 1890), Section 75. AIR 1959 Mys 43.

SCHEDULE 2, Cl. (c)

——Sch. II, Cls. (c) and (l) — Goods assigned to railway — Held goods did not fall under Cl. (l) but fall under Cl. (c) — See Railways Act (1890), Section 75. 59 Bom LR 117: ILR (1957) Bom 321.

SCHEDULE 2, Cl. (k)

——Sch. II, Cl. (k) — Glass bangles.

Glass bangles are one of the articles that comes within the description of the articles specified in Cl. (k) to the second schedule. AIR 1955 NUC (Mad) 85.

SCHEDULE 2, Cl. (l)

——Sch. II, Cl. (l) and Section 75 — "Silks", meaning.

Mere description of the package as a 'silk cloth parcel' in the invoice sent by the seller cannot be conclusive against the plaintiff. Where the bundle contains articles made of a mixture of cotton and silk and the cost of the silk content in the articles is a little less than 50% of the total loss of the bundle it cannot be held that the articles are silks within the meaning of Cl. (1) of Sch. 2 — See Railways Act (1890), Section 75. AIR 1953 Mys 65 (DB).

SCHEDULE 2, Cl. (m)

——Sch. 2, Cl. (m) — Mysore Railways Act (1894), Section 59 — Excepted goods — Articles of "Special nature" — 'Lohis commonly called 'shawls" priced low are not shawls within the meaning of the Clause — See Mysore Railways Act (4 of 1894), Section 59. AIR 1953 Mys 16.

——Sch. II, Cl. (m) — 'Shawls' — 'Woollen 'fardis are not shawls within the meaning of the clause — See Railways Act (1890), Section 75. AIR 1960 Pat 340 (DB).

——Sch. 2, Cl. (m) and Section 75 — Suit for damages for loss of goods in transit — Defence that goods were shawls which consignor had not declared — Question whether goods were in fact shawls — Determination of — Meaning of 'shawls' — "Shawl" covers only shawls and not any other thing same or similar to shawls — (Words and Phrases — 'Shawls') — (Carriers Act (1865), Sch.) — See Railways Act (9 of 1890), Section 75. AIR 1957 Pat 328 (DB).

RAILWAYS AND WORKS MANUAL

RULE 638

——R. 638 (f) — Reasonable opportunity — Enquiry against Railway servant — Derailment of train due to creep in railway track — Charge against Assistant Permanent Way Inspector of not repairing creep in time — Inspector denying that accident was due to creep in track — At enquiry no attempt to prove cause of accident made but fact that creep was responsible for accident taken for granted — Art. 311 (2) held not satisfied. See Constitution of India, Art. 311 (2). AIR 1960 Assam 51 (DB).

RAILWAY SERVANTS

See Constitution of India, Arts. 310 and 311.

RAILWAY SERVANTS (DISCIPLINE AND APPEAL) RULES FOR NON-GAZETTED STAFF

RULE 1707

——R. 1707 — Departmental inquiry — Procedure — Railway servant — Mention of proposed punishment in charge-sheet — Legality — Subsequent fresh charge-sheet mentioning different punishment — Not illegal. See Constitution of India, Art. 311. AIR 1959 Andh Pra 618 (DB).

RAILWAY SERVANTS ENDANGERING SAFETY OF PERSONS

See Railways Act (1890), S. 101.

RAILWAY SERVANTS (HOURS OF EMPLOYMENT) RULES (1951)

RULE 5

——R. 5 — R. 5 read along with R. 25 entitles Railway employee to overtime wages. See Minimum Wages Act (1948), S. 14. AIR 1963 Bom 54 (DB).

RAILWAY SERVICES (SAFEGUARDING OF NATIONAL SECURITY) RULES (1949)

RULE 3

●——R. 3 — Action under — Writ petition on ground that Rules were ultra vires — Judgment proceeding on ground not raised by Railway authorities—Effect stated. See Constitution of India, Art. 226. AIR 1958 SC 232.

●——R. 3 — Applicability.

The Security Rules apply to a special class of employees, those who are engaged or are likely to engage in subversive activities, and in conjunction with the instructions which were issued when they were promulgated, they form a self-contained Code prescribing a special and elaborate procedure to be followed, when action is to be taken thereunder. The mention of the service agreement in R. 3 has reference only to the nature of the notice to be given. P. Balakotia v. Union of India, 1958 SCJ 451: (1958) 1 Mad LJ (SC) 162: (1958) 1 Andh WR (SC) 162: 1958 SCA 209: 1958 SCR 1052: AIR 1958 SC 232 (236) (Pt B) (Pr 12).

●——R. 3—Scope and operation of — R. 148 of Railway Establishment Code — Whether Security Rules have independent operation of their own, quite apart from Rule 148 of Railway Establishment Code (Quaere). P. Balakotiah v. Union of India, 1958 SCJ 451: (1958) 1 Mad LJ (SC) 162: (1958) 1 Andh WR (SC) 162: 1958 SCA 209: 1958 SCR 1052: AIR 1958 SC 232 (236) (Pt C) (Pr 12).

●——Rr. 3, 4, 5 and 7 — Scope — Rules are not ultra vires. See Constitution of India, Art. 14. AIR 1958 SC 232.

●——R. 3 — Constitution of India, Arts. 19 (1) (c) and 311 — Notice to appellant under R. 3, Railway Services (Safeguarding of National Security) Rules — Reference to appellant being member of Communist Party and to his activities in trade union — No violation of Art. 311 — Order terminating service does not contravene Art. 19 (1) (c) — See Constitution of India, Art. 19 (1) (c). AIR 1958 SC 232.

●——R. 3 — Constitution of India, Art. 311 — Applicability — Order terminating services under R. 3, Railway Services (Safeguarding of National Security) Rules — Order is an order of discharge and it is neither one of dismissal nor of removal within the meaning of Art. 311 — (Railway Establishment Code, R. 148). See Constitution of India, Art. 311. AIR 1958 SC 232.

●——Rr. 3, 4, 5 and 7 — Retrospective operation.

The rules are clearly prospective in that the action thereunder is to be taken in respect of subversive activities which either now exist or are likely to be indulged in in future, that is to say, which are in esse or in posse. That the materials for taking action in the latter case are drawn from the conduct of the employees prior to the enactment of the rules does not render their operation retrospective. P. Balakotiah v. Union of India, 1958 SCJ 451: (1958) 1 Mad LJ (SC) 162: (1958) 1 Andh WR (SC) 162: 1958 SCA 209: 1958 SCR 1052: AIR 1958 SC 232 (238) (Pt G) (Pr 19).

——R. 3 — Tenure of office of Government servant — Pleasure of President — No justifiable cause on dismissal under rules — Suit for declaration does not lie. See Constitution of India, Art. 310. AIR 1960 Bom 431.

——Rr. 3 and 4 — Non-compliance — Constitution of India, Arts. 310, 311 — (Railway Establishment Code, R. 148).

The rule that civil posts under the Government are held at pleasure is part of the law of this country and it involves the consequence that there can be termination of service at will. The Railway authorities have a right to terminate the services of the employee under Rule 148 of the Railway Establishment Code and there is nothing in the Constitution which restricts such a right. R. 4 does not differ from S. 240 (3) of the Government of India Act (1935) or Art. 311 (2) of the Constitution of India.

The petitioner was employed as a wireman in the Marine Department of the South Indian Railway. He was served with a notice, the contents of which were as follows: "Whereas in the opinion of the 'competent authority' as defined in R. 2 of the Railway Services (Safeguarding of National Security) Rules, 1949, there are reasonable grounds (which are given below) for believing that you are engaged in subversive activities and that consequently you are liable to have your services terminated under Rule 3 of the said rules; you are hereby required to state within 14 days of the receipt of this notice whether you accept or deny the accuracy of the above allegation. If you do not reply within that period, it would be assumed that you admit the allegation. In either case, you may, within the same period, submit any representation you wish to make as to why your services should not be terminated under the said rules. (Copy attached.) If after considering your representation the competent authority decides that no further action should be taken against you, you will be informed accordingly. If after considering your representation the competent authority considers that there are sufficient grounds for taking further action, the materials on record together with your representation will be referred to the Committee of Advisers set up by the Government of India for this purpose. You are further asked to state whether you wish to be heard in person by me or by the Committee of Advisers before orders are passed on your case."

Held, that when the services of an employee are terminated, he cannot be held to have been dismissed. But whether in fact it is a case of termination of services or dismissal is a question of fact. This was a case not of termination of service but of compulsory retirement falling within R. 3. The notice did not satisfy the requirements of R. 4. The statement that the petitioner was liable to have services terminated under R. 3 was not any intimation of a decision by the authorities that his services would be terminated. The notice calling upon the petitioner to give his explanation for the charges could in no manner be regarded as falling under R. 4 (b). As the proper procedure prescribed in R. 4 had not been followed, the subsequent order of compulsory retirement under R. 3 was illegal and inoperative. 1948 FCR 44; AIR 1948 PC 121, Foll.; Case-law discussed. 1952 Mad WN 253: 65 Mad LW 377: 1952-1 Mad LJ 540: ILR (1953) Mad 229: AIR 1953 Mad 54 (56, 58, 59) (Pt A) (Prs 7, 11, 12, 14, 15) (DB).

RULE 4

●——Rr. 4 and 5 — Scope — Not ultra vires. See Constitution of India, Art. 14. AIR 1958 SC 232.

●——R. 4 — Retrospective operation — The rules are only prospective in operation and not retrospective. See Railways Services (Safeguarding of National Security) Rules (1949), R. 3. AIR 1958 SC 232.

——Rr. 4 and 3 — Non-compliance — Subsequent order of compulsory retirement under R. 3 held was illegal and inoperative — (Constitution of India, Arts. 310, 311) — (Railway Establishment Code, R. 148). See Railway Services (Safeguarding of National Security) Rules (1949), R. 3 **AIR 1953 Mad 54 (DB).**

——R. 4 (b) — Termination of service — Per Ramaswami, J.: One notice for making enquiry—Second notice indicating the punishment proposed and for showing cause against it is not required, though the rule is in terms similar to Art. 311 (2) of the Constitution—R. 4 (b) has to be read in its context — Procedure under and context of R. 4 and Art. 311 (2) indicated — Per Sarjoo Prasad, J.: There is no distinction between wording and context of Art. 311 (2) and R. 4 (b) of National Security Rules — But question of want of second notice held could not be agitated in proceedings under Art. 226, but could be taken up by way of a suit—AIR 1948 PC 121, Considered — (Constitution of India, Arts. 311 (2) and 226). **1953 BLJR 171: AIR 1953 Pat 92 (94, 95) (Pt C) (Prs 9, 10) (DB).**

——R. 4 (b) — Termination of service under R. 4 (b) does not constitute disciplinary action. See also Constitution of India, Art. 320, Proviso 2. **AIR 1953 Pat 92 (DB).**

RULE 5

●——R. 5 — Constitution of India, Art. 14 — Rules not ultra vires — AIR 1956 Mad 220, **Overruled.** See Constitution of India, Art. 14. **AIR 1958 SC 232.**

●——Rr. 5, 3, 4 and 7—Retrospective operation—Rules are prospective in operation. See Railway Services (Safeguarding of National Security) Rules (1949), R. 3. **AIR 1958 SC 232.**

RULE 7

●——R. 7 — Scope — Rule not ultra vires. See Constitution of India, Art. 14. **AIR 1958 SC 232.**

●——R. 7 — Constitution of India, Art. 311 — Applicability — Order terminating services under R. 3, Railway Services (Safeguarding of National Security) Rules — Order is an order of discharge and not one of dismissal or removal — (Railway Establishment Code, R. 148). See Constitution of India, Art. 311. **AIR 1958 SC 232.**

●——Rr. 7, 3, 4, 5 — Retrospective operation — The rules are prospective in operation. See Railway Services (Safeguarding of National Security) Rules (1949), R. 3. **AIR 1958 SC 232.**

RAILWAY SERVICES (SAFEGUARDING OF NATIONAL SECURITY) RULES (1954)

RULE 3

——R. 3 — Constitution of India, Art. 14 — R. 3 is intended to cover infringement of law — Reasonable classification — Rule cannot be upheld. See Constitution of India, Art. 14. **AIR 1956 Mad 220.**

[Overruled in AIR 1958 SC 232.]

——**R. 3 — Essential requisites of R. 3.**

Before a person can be punished by virtue of R. 3, one of the 3 things must be established: (1) he must be engaged in subversive activities which are prejudicial to national security; or (2) he must be reasonably suspected of being so engaged; or (3) he must be associated with others in such activities. This last point requires clarification. What is made punishable is not association with persons who engage in subversive activities; what is made punishable is association in their subversive activities, which must occur in some particular place and at some particular time or in particular places and at particular times. **(1956) 1 Lab LJ 29: 1956 Mad WN 262: AIR 1956 Mad 220 (223) (Pt C) (Pr 12).**

[Overruled on another point in AIR 1958 SC 232.]

——**R. 3 — Action proposed to be taken against Railway servant under R. 3 — Charge should be clear.**

Where action is proposed to be taken against a Government servant under R. 3 for having been engaged in subversive activities, then the charge which he is called upon to meet must be clear, precise and accurate and should not be so vague that it is not reasonably possible to answer it. AIR 1948 Bom 334 and AIR 1950 Mad 162, Rel. on. **(1956) 1 Lab LJ 29: 1956 Mad WN 262: AIR 1956 Mad 220 (224) (Pt D) (Pr 18).**

[Overruled on another point in AIR 1958 SC 232.]

——R. 3 — Constitution of India, Art. 311 — Railway servant charged for being engaged in subversive activity — Decision of President — Court has power to examine material on which the decision is founded. See Constitution of India, Art. 311. **AIR 1956 Mad 220.**

[Overruled on another point in AIR 1958 SC 232.]

RAILWAYS GENERAL AND SUBSIDIARY RULES

RULE 52

——R. 52 — Railways Act (1890), Ss. 101 (a) and 101 (c) — Negligence is not only doing repairs negligently but also breach of rule endangering public safety — Duty under General R. 52 and Subsidiary R. 52-1 is that of person actually carrying out repairs. See Railways Act (9 of 1890), S. 101 (a). **1962 (1) Cri LJ 273: AIR 1962 Bom 41.**

RULE 52-I

——R. 52-I — Negligence is not only doing repairs negligently but also breach of rule endangering public safety — Duty under General Rule 52 and Subsidiary Rule 52-I is that of person actually carrying out repairs. See Railways Act (1890), S. 101 (a). **1962 (1) Cri LJ 273: AIR 1962 Bom 41.**

RAILWAYS GOODS TARIFF (1950)

CHAPTER 8, RULE 6

——Chap. VIII, R. 6 (12) — Recalculation of rates — Mistake in calculating freight on consignment on actual weight of goods instead of on capacity of wagon — Consignee compelled to pay difference as per condition 6 on Railway Receipt—Railways held had right to correct mistake.

Held, on facts that assuming that the consignor could not be assumed to have constructive notice of the rules contained in the Goods Tariff, he had notice of Condition No. 6 printed on the back of the railway receipt, and if the agent of the railway receipt committed a mistake in calculating the freight, the Railway Administration was entitled to correct that mistake. AIR 1932 All 540 and AIR 1926 All 146, Dissented from; ILR 29 All 228, Disting. AIR 1917 All 424 and AIR 1944 Mad 444 and AIR 1929 All 848, Rel. on. **ILR (1962) 12 Raj 591: 1962 Raj LW 220: AIR 1963 Raj 1 (2) (Pt A) (Pr 8).**

RAILWAYS (LOCAL AUTHORITIES' TAXATION) ACT (25 OF 1941)

PREAMBLE

——**Pre** — Applicability of Orissa House Rent Control Order, 1943, to godowns built by licensees on Railway lands — Municipality cannot claim to levy tax on the Railway Administration in view of S. 135, Railways Act and the Railways (Local Authorities' Taxation) Act. See Houses and Rents — Orissa House Rent Control Order, 1943. **AIR 1955 NUC (Orissa) 5693 (DB).**

——**Pre.** — Government of India Act (1935), S. 154 — "Save in so far as any Federal law may otherwise provide" — The Railways Act, 1941, does make distinct provision for a class of cases referred in S. 154 of Act of 1935 as that section itself speaks of a saving in so far as any Federal law otherwise provides. See Government of India Act (1935), S. 154. **AIR 1954 Pat 568.**

——**Pre. — Object of Act.**

The Act is a remedial Act passed to restore the situation in respect of the liabilities of the railway properties to a local taxation as it was prior to 1-4-1937, so as to put this class of properties apart from other State properties which were governed in general by the provisions of S. 154 of the Government of India Act, 1935. **AIR 1954 Pat 568 (571) (Pt D) (Pr 6).**

SECTION 3

——**S. 3 — Taxation of Railway Administration—** Procedure indicated. See Municipalities — U. P. Municipalities Act (2 of 1916). **AIR 1954 All 56 (DB).**

——**S. 3 — Right to apply — Conditions of.**

An application under sub-sec. (2) of S. 3 of the Railways (Local Authorities Taxation) Act, 1941, can only be made by a Railway Administration with respect to which a notification has been made by the Government under sub-sec. (1) of S. 3 of the Act. In absence of such a notification an application is incompetent. **61 Bom LR 1097: ILR (1959) Bom 1497: AIR 1960 Bom 141 (143) (Pt A) (Pr 6) (DB).**

——**Ss. 3 and 4 — Distinction between — Railway property liable to taxation before 1937 — Section 4 applies — Fresh notification not necessary** — (Government of India Act (1935), S. 154) — (Constitution of India, Art. 285) — (Railways Act (1890), S. 135). See Railways (Local Authorities' Taxation) Act (25 of 1941), S. 4. **AIR 1959 Pat 216 (DB).**

——**Ss. 3, 4 — Scope.**

Where a case is in terms governed by S. 4, applicability of S. 3 does not arise. **AIR 1954 Pat 568 (571) (Pt C) (Pr 6).**

SECTION 4

——**Ss. 4, 3 — Applicability and distinction — Railway property liable to taxation before 1937—** (Government of India Act (1935), S. 154) — Constitution of India, Art. 285) — (Railways Act (1890), S. 135).

There is a contrast between the language of S. 4 and S. 3 of Act (25 of 1941). Section 4 refers to the existing liability of the Railway property to be taxed, and constitutes the Federal law contemplated by the proviso to S. 154 of the Government of India Act. On the other hand, S. 3 refers to Railway properties which are brought into existence after the crucial date, namely, after the 1st April, 1937, and in regard to such properties the main provision of S. 154 of the Government of India Act applies; these properties are exempt from all taxes imposed by any authority within the Province or Federated State "save in so far as any Federal law otherwise provides".

Where the Railway properties were in existence before 1st April, 1937, and municipal taxes were being paid by the Railway authorities from before that date for these properties under a notification issued under S. 135 of the Railways Act, 1890, the case was governed by S. 4 of Act (25 of 1941) and not by S. 3 thereof, and it followed that the liability of these properties to tax continued even after the 1st April, 1937, under the proviso to S. 154 of the Government of India Act, 1935 and also under Art. 285 of the Constitution. The liability to pay the municipal tax continued so long as the notifications issued by the Central Government under S. 135 of the Railways Act continued to exist and had not been varied or revoked by the Central Government by S. 4 of Act (25 of 1941). **1959 BLJR 141: AIR 1959 Pat 216 (218) (Pr 9) (DB).**

——**Ss. 4, 3 — Scope.**

Where a case is in terms governed by S. 4, applicability of S. 3 does not arise. See Railways (Local Authorities Taxation) Act (25 of 1941), S. 3. **AIR 1954 Pat 568.**

——**S. 4** — Holdings belonging to O. T. Railway — Liability to taxation by Municipality — **Held,** that notifications issued under S. 135 not having been varied or revoked by the Government, the municipality was within its rights of claiming the tax. See Railways Act (1890), S. 135. **AIR 1954 Pat 568.**

——**S. 4** — Property constructed after 1937 — Property is liable to taxation. See Railways Act (1890), S. 135. **AIR 1954 Pat 568.**

RAILWAYS RATES TRIBUNAL RULES

RULE 17

——**R. 17 (1) — Order of Railways Rates Tribunal — Right to benefit under — Intervener.**

No distinction can be made between the original complainant and the intervener under R. 17 (1). See Railways Act (1890), S. 41. **AIR 1958 Mad 471 (DB).**

RAILWAYS REGULATIONS REGARDING DISCIPLINARY ACTION AGAINST SERVANTS

REGULATION 11

——Regn. 11 (a) — Criminal proceedings — Suspension comes to end after termination of proceedings — Acquittal by Criminal Court — Servant held entitled to full wages, for period of suspension — Fresh charge for inefficiency — Fresh proceedings held separate proceedings. **AIR 1955 NUC (All) 2751.**

RAILWAY STORES

See Railway Stores (Unlawful Possession) Act (1955).

RAILWAY STORES (UNLAWFUL POSSESSION) ACT (51 OF 1955)

SECTION 2

——Ss. 2, 3 — Charge under S. 3 — Ingredients to be proved — Onus — Shifting of — Stolen articles conforming to specifications of Railway standards — That they belonged to particular Railway need not be proved. See Railway Stores (Unlawful Possession) Act (1955), S. 3. **1964 All Cri R 417: 1964 All WR (Supp) 26: 30 Cut LT 275.**

——S. 2 (b) — 'Railway Stores' — Definition of — Whether includes used articles.

The intention to be gathered from the words used in S. 2 (b) of the Act should be that 'railway stores' include articles which are in use, or which have been in actual use in the operation of a railway. If the articles have actually been used in the operation of a railway, and they are still the property of the Railway, the articles will fall within S. 2 (a) and will be covered by the words 'which is used in the operation of a railway' in S. 2 (b). **ILR 41 Pat 672: 1964 (1) Cri LJ 694: AIR 1964 Pat 269 (270) (Pr 6) (DB).**

SECTION 3

——S. 3 — Offence under — It is not only essential to prove that the property found in possession of the accused was not only property belonging to Railway Administration but also that the property was in serviceable condition — Property must be reasonably suspected of being stolen property or unlawfully obtained and also there must be failure of accused to give reasonable explanation of his possession — It is for the prosecution to prove these elements. **(1962) 66 Cal WN 269.**

——S. 3 — Accused must offer satisfactory explanation as to how he came to be in possession of articles, the subject-matter of the charge — The standard of proof required from accused is not the same as that required from the prosecution — Burden on accused might be discharged by evidence which makes his version probable — Proof required of accused is less rigorous than that required of prosecution. 1 KB 607, 49 Cal WN 229, 6 DLR (Cal) 97, Rel. on. **(1962) 66 Cal WN 269.**

——Ss. 3, 2 — Charge under S. 3 — Ingredients to be proved — Onus — Shifting of — Stolen articles conforming to specifications of Railway standards — That they belonged to particular Railway need not be proved — (Evidence Act (1872), Ss. 101-104.

Before a person can be convicted under S. 3, the prosecution must affirmatively establish that (i) the incriminating articles were the property of any Railway Administration and (ii) they were used or intended to be used in the construction operation or maintenance of a railway. If these ingredients are established and the prosecution further prove that the accused persons were in possession of such articles, then by virtue of S. 3, the burden would shift on the accused persons to account satisfactorily as to how they came into possession of the same. Section 2 does not require the prosecution to prove that the incriminating articles belonged to a particular Railway. If the seized articles are found to conform to the specifications of the Railway standards, they may be reasonably held to be belonged to any of the Railways in India. Where the evidence of the Permanent Way Inspector of the Railway, who was examined as a prosecution witness, was that the stolen articles (iron sleepers and tie bars) were 'brand new' and were according to specifications of the Railway standard and that the tie bars were necessary to keep the iron sleepers firm on the ground.

Held, that the fact that the articles were 'brand new' showed that they were intended to be used in the construction, operation or maintenance of the Railway and as the accused did not give any explanation to account for their possession of these articles, their conviction was justified. **1964 All Cri R 417: 1964 All WR (Sup) 26: 30 Cut LT 275.**

RAILWAY STORES (UNLAWFUL POSSESSION) ORDINANCE (19 OF 1944)

SECTION 1

——S. 1 — Period of enforcement.

The Ordinance remained in force and did not lapse till after the date of the offence on 6-5-1952 by reason of the India and Burma Emergency Provisions Act, 1940. **1956 AMLJ 85.**

——S. 1 — Ordinance is still in force as a valid piece of legislation — (Government of India Act (1935), Sch IX, S. 72, as amended by India and Burma (Emergency Provisions) Act, 1940 (3 and 4 Geo 6), Ss. 1 (3) and 3) — Indian Independence Act (1947), S. 18 (3) — Constitution of India, Art. 372 — Adaptation of Laws Order, 1950.

The Railway Stores (Unlawful Possession) Ordinance was promulgated in 1944 in exercise of the powers conferred by S. 72 of Sch. IX, Government of India Act, 1935, as amended by India and Burma (Emergency Provisions) Act, 1940. Accordingly, the life of the Ordinance was without limit of time. The Ordinance did not cease to exist by reason of the expiration on 1st April, 1946, of the period specified in S. 3 of the British Act of Parliament concerned.

Then by reason of the combined effect of S. 18 (3), Indian Independence Act, Art. 372 of the Constitution and the Adaptation of Laws Order, 1950, Ordinance 19 of 1944 with but a verbal modification has continued to be and is still in force. It would follow that Ordinance 19 of 1944

has at all material times been as it still is, a valid piece of legislation. ILR (1957) 2 Cal 885: 1955 Cri LJ 1582: AIR 1955 Cal 614 (615) (Prs 4, 5, 6) (DB).

——S. 1 — Ordinance is still in force — (Government of India Act (1935), Sch IX, Cl. 72) — India and Burma Emergency Provisions Act (1940), S. 1 (3).

Railway Stores (Unlawful Possession) Ordinance (19 of 1944) was passed by the Governor-General during the period from 27-6-42 to 1-4-46 and that being so, having regard to the language of Cl. 72 of Sch. IX of the Government of India Act, 1935, and Clause (3) of S. 1 of the India and Burma Emergency Provisions Act of 1940, which took away the limitation of six months, this ordinance passed by the Governor-General will have the force and validity, as if it was an Act passed by the Legislature, and that too of a permanent character. There is nothing in the language of those sections, restricting the operation and validity of such ordinance during the period of emergency. 1956 Mad WN 185: 1956 Cri LJ 751: AIR 1956 Mad 333 (333, 334) (Pt A) (Prs 4, 7).

RAILWAY WHARFAGE RULES

See Railways Act (1890), S. 47 (1) (f).

RAIN WATER

See Easements Act (1882), Ss. 7, 8, 13, 17.

RAIPUR MUNICIPALITY OCTROI RULES

See under Municipalities.

RAIYAT

See Enactments under "Tenancy Laws".

RAJASTHAN ABOLITION OF LAGATS ORDINANCE (13 OF 1948)

PREAMBLE

——Pre., Ss. 1, 2 — Lagat, meaning of — (Kanun Maal Mewar (5 of 1947), Ss. 4 and 5)—(Rajasthan Administration Ordinance (I of 1948), S. 3) — (Words and Phrases — "Lagat").

The ordinance which is obviously intended to abolish 'lagats' in the whole of the former State of Rajasthan fails to give any definition of the term. Therefore, where in any case arising from a covenanting State, the question is whether a particular charge falls within the definition of Lagat as used in the Lagats Abolition Ordinance, then it should, unless it directly falls within the classes of Lagats named in the Ordinance itself, be determined with reference to the definition of the term 'lagat' in the laws of the State because such laws have been kept alive by the United State of Rajasthan Administration Ordinance, 1948.

So far as the former State of Mewar is concerned, the Kanun Maal Mewar which was saved by the Rajasthan Administration Ordinance contains a definition of the term 'lagat'. Therefore, where a suit arose from that State at the time when that statute was not abolished and the question was whether a particular payment claimed was a 'lagat' or not the Court would be justified in looking to the definition contained in that statute. Thus, reading Ss. 8 and 4 (1) of that statute, it is clear that the term 'lagat' means something apart from land revenue or rent payable by an agriculturist, in respect of the land held by him to the jagirdar or the State. But this definition of lagat, though it may be more or less satisfactory in the case of an agriculturist, does not give much assistance so far as the lagats on non-agriculturists are concerned. 1956 Raj LW 271: ILR (1956) 6 Raj 778.

SECTION 1

——S. 1 — Lagat, meaning of — It means something apart from land revenue or rent payable by an agriculturist, in respect of the land held by him to the jagirdar or the State. See Rajasthan Abolition of Lagats Ordinance (13 of 1948), Pre. 1956 Raj LW 271: ILR (1956) 6 Raj 778.

SECTION 2

——S. 2 — Lagat, Meaning of — It means something apart from land revenue or rent payable by an agriculturist, in respect of the land held by him to the jagirdar or the state. See Rajasthan Abolition of Lagats Ordinance (13 of 1948), Pre. 1956 Raj LW 271: ILR (1956) 6 Raj 778.

——Ss. 2 and 3 — Scope.

Literally interpreted these sections are apt to mean that once an agriculturist pays land-revenue for some land, no lagat can at all be levied against him for any other land of which he may be in possession but for which he may not be paying any land revenue to the State or to the jagirdar. This does not however appear to be the true or the probable intention of the legislature in enacting these sections. The real intention of the framers of the Ordinance in enacting these sections seems to be that no agriculturist was to be called upon to pay lagats for the land for which he in fact pays land revenue and that he was not to be exempt from payment of any lagats as to other lands held by him say in the abadi which do not carry with them the obligation to pay any land revenue. In other words, the sections as they are worded, do not clearly bring out the connection or nexus between the land and the payment of land revenue with respect to it. It is only where such a connection exists that the levy of any lagat has been prohibited under these sections. 1956 Raj LW 271: ILR (1956) 6 Raj 778.

SECTION 3

——Ss. 3 and 2 — Scope — The sections as they are worded do not clearly bring out the connection or nexus between the land and the payment of land revenue with respect to it. See Rajasthan Abolition of Lagats Ordinance (13 of 1948), S. 2. 1956 Raj LW 271: ILR (1956) 6 Raj 778.

SECTION 4

——S. 4 —Applicability — Jumpi Bhara in the nature of rent for occupation of residential land.

Giving every word in Section 4 its intended meaning, it seems that what the framers of this piece of legislation wanted to abolish was certain harrassing exactions which were made by the jagirdars from their people in connection with the enjoyment of water, grazing, fuel or other similar facil-

lities out of common village resources for which in common justice or fairness, he was not entitled to levy any charge whatever. The charging of Jhumpi Bhara which is in the nature of rent for occupation of residential land, apart from lease money, does not and cannot be considered to fall within the ambit of other amenities envisaged in the section. Even if it were a tax it would not be hit by the terms of Sec. 4 of the Ordinance because such a charge is obviously not made by the jagirdar from the tenant for enjoyment of water, grazing, lakd or other similar amenities. If Jhumpi bhara is a tax and it is sought to be realised by the jagirdar after the Constitution came into force on the 26th January 1950, different considerations would obviously arise and such a tax could not be recovered unless it is supported by the authority of law. **1956 Raj LW 271: ILR (1956) 6 Raj 778.**

——S. 4 — Jhumpi Bhara whether tax or lagat indicated. See Kanun Maal Mewar (5 of 1947) S. 100. **1956 Raj LW 271: ILR (1956) 6 Raj 778.**

RAJASTHAN ADAPTATION OF CENTRAL LAWS ORDINANCE (4 OF 1950)

SECTION 4

——S. 4 — Enforcement of Police Act in Rajasthan — Enforcement held valid. See Constitution of India Art. 372 (1). **AIR 1957 Raj 28 (DB).**

——S. 4 — Permanent sanad acquired under Ss. 4 and 7, Legal Practitioners Act as adapted in Rajasthan by Rajasthan Adaptation of Central Laws Ordinance (4 of 1950), has to be renewed every year under extended Act. See Legal Practitioners Act (1879), S. 7. **AIR 1955 NUC (Raj) 363 (DB).**

SECTION 5

●——S. 5 — Qualification of industrial tribunal. Sec. 5 of Ordinance is not applicable. See Industrial Disputes Act (1947), S. 7. **AIR 1954 SC 390.**

——S. 5 (7) — Industrial Disputes Act (1947), S. 7 (3) (a) — A 'Judge of a High Court' does not include Judge of High Court of former State of Jodhpur. See Industrial Disputes Act (1947), S. 7 (3) (a). **AIR 1951 Raj 161 (DB).**

SECTION 7

——S. 7 — Permanent sanad acqiured under Ss. 4 and 7, Legal Practitioners Act as adapted in Rajasthan by Rajasthan Adaptation of Central Laws Ordinance (IV of 1950), has to be renewed every year under extended Act. See Legal Practitioners Act (1879), S. 7. **AIR 1955 NUC (Raj) 363 (DB).**

SECTION 10

——S. 10 — Usurious Loans Act (1918), S. 3 — Marwar Relief of Indebtedness Act (1951), Ss. 5, 6 — Repeal of by Ordinance — Extent of — Test — Transaction prior to 1950 — Indian Act does not apply. **ILR (1956) 6 Raj 1070: 1957 Raj LW 61: AIR 1957 Raj 120 (121, 122) (Pt B) (Prs 8, 12 to 14) (DB).**

RAJASTHAN ADMINISTRATION ORDINANCE (1 OF 1948)

See also Rajasthan Administration Ordinance (1 of 1949).

——Integration of Mewar — End of the Constitution of Mewar — Not kept alive by Ordinance. See Constitution of Mewar (1947). **AIR 1953 Raj 22 (DB).**

SECTION 3

——S. 3 — 'Person' — Meaning — Includes Government — Suit against Rajasthan State Government for tortious act of Commissioner — Government has right to claim protection under Sec. 44. See Public Safety — Rajasthan Public Safety Ordinance, Sec. 44. **AIR 1961 Raj 64 (DB).**

——S. 3 — Kanun Maal Mewar — Reference to for ascertaining meaning of 'Lagat' not defined in Rajasthan Abolition of Lagat Ordinance — Lagat, meaning of — It means something apart from land revenue or rent payable by an agriculturist, in respect of the land held by him to the jagirdar or the State. See United State of Rajasthan Abolition of Lagats Ordinance (13 of 1948), Pre. **1956 Raj LW 271: ILR (1956) 6 Raj 778.**

SECTION 17

——S. 17 — Suits against Government — Suit maintainable — Part B States — Position in United State of Rajasthan including Kotah State indicated. See Constitution of India, Art. 300. **AIR 1961 Raj 64 (DB).**

RAJASTHAN ADMINISTRATION ORDINANCE (1 OF 1949)

See also Rajasthan Administration Ordinance (1 of 1948).

SECTION 3

●——S. 3 (1) — Merger of several sovereign States by stages to form a new State — At each stage covenants keeping old laws in force and new State taking over assets and liabilities of component States — New State not repealing old laws by its legislation — Liabilities of component States continue to be enforceable — A subject thereof can enforce his rights by a suit against the new State. See Constitution of India, Art. 295 (2). **AIR 1964 SC 1495.**

●——S. 3 — Scope and effect of — Contractual liabilities of covenanting Dholpur State — Liabilities enforceable in present State of Rajasthan. See Constitution of India, Art. 295. **AIR 1960 Raj 256 (FB).**

——S. 3 — Power to recognise succession to jagirs in former State of Alwar — Petition for recognition pending at the time of merger of Matsya Union into Rajasthan — Order by Rajpramukh in his executive capacity recognising succession under Art. 7 (3) of Covenant — Decision held was without jurisdiction. See Rajsthan Jagir Decisions and Proceedings (Validation) Act (18 of 1955), S. 3. **AIR 1957 Raj 372 (DB).**

——S. 3 — Scope.

Section 6 of the Jaipur General Clauses Act which remained in force by virtue of Sec. 3 of the Ordinance saved the rights of the defendant to pay the reduced rent during the continuance of the Jaipur Rent Control Order. See Houses and Rents — Jaipur Rent Control Order (1947), Cl. 2 (d). **AIR 1957 Raj 220.**

●——S. 3 (1) — "Laws" — If include judge-made law.

The term "law" in Sec. 3 (1) of the Rajasthan Administration Ordinance does not include the Judge-made law or the law deducible from the decisions of the High Courts of the covenanting States. **ILR (1951) 1 Raj 297: 1951 Raj LW 295: AIR 1952 Raj 7 (8) (Pt B) (Pr 6) (FB).**

RAJASTHAN ADMINISTRATION (AMEND-MENT) ORDINANCE (5 OF 1949)

SECTION 8

●——S. 8 (2) — Excise Rules framed—Ordinance — Publication and authorisation held valid. See Rajasthan Excise Duties Ordinance (25 of 1949), S. 5. **AIR 1961 SC 683.**

——Ss. 8, 9 and 30 — Agreement between Government of former Jodhpur State and plaintiff for setting up mill by latter — State agreeing to exempt plaintiff from payment of excise duty — Agreement not enforceable against State of Rajasthan or Union of India — Contract not void under Art. 14 — Constitution of India, Art. 14. See Constitution of India, Art. 294. **AIR 1960 Raj 92 (DB).**

●——S. 8 (2) — **Evidence Act (1872), S. 78 — Presumption as to authentication of rules published in Gazette.**

Authentication of publication of Act or Ordinance is not an authentication of the publication of Rules made thereunder — Presumption under S. 8 (2) does not apply. See Evidence Act (1872), S. 78. **AIR 1953 Raj 145 (FB).**

[**Reversed** on another point in AIR 1961 SC 683.]

——S. 8 — **Order authenticated by secretary — Absence of words "By order of his Highness the Raj Pramukh" — Effect.**

Where an order published in the Government Gazette itself shows that it has been passed by the Government of Rajasthan and is authenticated by a secretary to Government, it cannot be challenged because of a technical defect, viz., the absence of the words "By order of his Highness the Raj Pramukh". **1951 Raj LW 370: ILR (1951) 1 Raj 405: AIR 1952 Raj 17 (18) (Pt A) (Pr 7) (DB).**

RAJASTHAN (ADMINISTRATION OF EVACUEE PROPERTY) ORDINANCE (14 OF 1949)

SECTION 6

——S. 6 and 7.

Writ of certiorari or prohibition cannot be directed against person to purports to act under Ss. 6 and 7 of the Ordinance. See Constitution of India (1950), Art. 226. **AIR 1950 Raj 58.**

RAJASTHAN AGRICULTURAL INCOME-TAX ACT (23 OF 1953)

SECTION 2

——S. 2 (1) — **Scope — Assessee, a jagirdar — Recovering 'Patwar' income along with rent from tenants — Nature of 'Patwar' income — Such income is not an agricultural income within the section — Rightly excluded from assessment.**

The distinction between the words 'rent' and 'Land revenue' has always been well defined. The former is paid by a tenant to a landlord, whereas the land revenue is paid to the State. The charges made by the assessee Jagirdar for 'Patwar' may be called revenue in the wider sense of the term, but every revenue does not come within the ambit of the "Agricultural income" as defined in Sec. 2 (1) of the Rajasthan Agricultural Income-tax Act (1953) It is only revenue derived from land which is used for agricultural purposes and is either assessed to land revenue in the taxable territories or subject to a local rate assessed and collected by officers of the Government as such, which can be termed as "agri cultural income".

'Patwar' received by the assessee is clearly not rent because it is not payable in respect of the grant of a right to use the land as such. It may be called revenue in its wider sense, but it is not revenue derived from land. It is a charge made by the landlord for purposes of administration, that is, for emoluments to be paid to the patwari for maintenance of the records and management of the Jagir land. It was charged apart from rent and land revenue and the mere fact that the revenue of seven pies per rupees was fixed on the amount of the rent did not make it a part of rent or land revenue.

Therefore the 'Patwar' income recovered by the assessee is not "agricultural income" within the meaning of Sec. 2 (1) (i) of the Act and it was rightly excluded from his assessment. I. T. Ref. No. 20 of 1963, D/-30-7-65 (Raj), (DB); AIR 1949 PC 1, AIR 1950 Pat 86, AIR 1936 Lah 595, Foll. ILR 48 Cal 766, ILR 53 Cal 34, ILR 7 Pat 550, ILR 9 Pat 1, Dist. **1966 Raj LW 15: (1966) 1 ITJ 243: ILR (1965) 15 Raj 1148.**

——Ss. 2 (20), 5, 6 — **Assessment of jagirdars — Amount withheld by State out of collections — Not to be included in total agricultural income — Assessee to be assessed on that amount which was actually paid to them by the State in the relevant year under S. 6 (a) a sum equal to 15 per cent. of the total amount of rent or other dues which accrued to the assessee in the previous year was allowed by law in those cases in which the assessee were to make collections themselves — Further fifteen per cent. deduction under Sec. 6 held not available to assessee since the collections were made by the State. 1963 Raj LW 348: ILR (1963) 13 Raj 520.**

——Ss. 2 (17), 3 and 4 — **'Previous year' — Meaning of — Choice of year given to assessee — Method of computation of tax.**

Held, on facts, that Sec. 2 (17) of the Act gave an option to the assessee to choose his previous year. Where, therefore, the year of choice of the assessee was different from the financial year, the income of the assessee was to be taxed according to his year as provided by S. 4. The first proviso to that section was enacted for the purpose of making assessments, where no rate or rates were laid down for any year by the Finance Act. The proviso thus was in the nature of a supplementary provision for recovering tax for the assessment year 1954-55, on income accruing to the assessee from 1-4-1953 and did not therefore, override the main section.

The word 'during' in the expression 'total agricultural income accruing to a person during the year commencing from 1st April 1953' in the proviso did not convey the whole year from 1-4-1953 to 31-3-1954 necessarily but included part of the year as well where the previous year of the as-

sessee ended on a date prior to 31-3-1954 and in such a contingency the assessee could only be charged with tax for or the period of his year of choice beginning from 1-4-1953 when the Act came into operation. **1961 Raj LW 371: ILR (1961) 11 Raj 555.**

——**S. 2 (1) — 'Agricultural income' — Meaning of.**

Agriculture in its strict sense is restricted to the basic operations on the land itself that is, the cultivation and tilling of the soil, sowing, planting, hoeing and similar operations which require expenditure of human skill and labour on the land itself. Where the products on the land have not been raised by the performance of those basic operations, the other subsequent operations cannot by themselves be regarded as agricultural operations, so as to make the income derived from such produce agricultural income under the law.

Where the trees in the forest of Jagirs were all of natural growth but the Jagirs were under the management of the Forest Department of the State.

Held, that the income derived from the forest was not an agricultural income. AIR 1957 SC 768, Relied on. **1960 Raj LW 628: ILR (1960) 10 Raj 1636.**

SECTION 3

——**Ss. 3, 4 and 2 (17) — "Previous year" — Meaning of — Choice of year given to assessee — Method of computation of tax.** See Rajasthan Agricultural Income-Tax Act (23 of 1953), S. 2 (17). **ILR (1961) 11 Raj 555.**

SECTION 4

——**S. 4 — Act not retrospective — Previous year** commencing 8-7-52 and ending 26-7-53 — Rate of tax in first schedule applies to income for period 1-4-53 to 26-7-53 and not to total income of twelve months ending 26-7-53. **1965 Raj LW 472: ILR (1966) 16 Raj 24.**

——**Ss. 4, 3 and 2 (17) — "Previous year" — Meaning of — Choice of year given to assessee — Method of computation of tax.** See Rajasthan Agricultural Income-Tax Act (23 of 1953), S. 2 (17). **ILR (1961) 11 Raj 555.**

SECTION 5

——**Ss. 5, 6 and 2 (20) — Assessment of Jagirdars —Amount withheld by State out of the collections — Note to be included in total agricultural income.** See Rajasthan Agricultural Income-Tax Act (23 of 1953), S. 2 (20). **1963 Raj LW 348: ILR (1963) 13 Raj 520.**

SECTION 6

——**Ss. 6, 5 and 2 (20) — Assessment of Jagirdars —Amount withheld by State out of the collections— Not to be included in total agricultural income.** See Rajasthan Agricultural Income-Tax Act (23 of 1953), S. 2 (20). **1963 Raj LW 348: ILR (1963) 13 Raj 520.**

SECTION 13

——**Ss. 13 (a) (iii), 22, third proviso — Assignment by a jagirdar in favour of wife and other relatives entitled to cash grants from jagir land — Income from such assigned land — Not includible in the income of the jagirdar assessee.**

Where the assessee jagirdar had assigned lands from his jagir to his wife, grand-mother and other near relatives who were entitled to cash grants from the jagir by way of maintenance and other rights, on the question whether the income derived from these assigned lands could be deemed to be the "agricultural income" of the assessee:

Held, that though it was true that according to the provisions of the Sec. 13 (a) (iii) all the agricultural income of a wife or a minor child of an individual arising directly or indirectly from assets transferred directly or indirectly to them by the husband or the father as the case may be, could be included in the total agricultural income of the husband or the father, it can only be done if the assets transferred to the wife or the minor child are alienated otherwise than for adequate consideration. Where such assets were transferred to the assessee's wife and other relatives for adequate consideration, the income received by the wife of the assessee from the sub-grant could not be included in the income of the assessee, because it could not be said that the assessee derived any benefit out of the sub-grants. **ILR (1965) 15 Raj 1148.**

SECTION 22

——**S. 22, third proviso — Assignment by a jagirdar in favour of wife and other relatives entitled to cash grants from jagir land — Income from such assigned land — Not includible in the income of the jagirdar assessee.** See Rajasthan Agricultural Income-tax Act (1953), S. 13 (a) (iii). **ILR (1965) 15 Raj 1148.**

——**S. 22 — Assessee, jagirdar of Scheduled Jagir of erstwhile Jodhpur State — Income of assessee's brother and assessee's younger son derived from land assigned to them under Sec. 195 of Marwar Agricultural Land Act (40 of 1949) — Income not includible in assessee's income — Assignment of land in favour of wife and younger son — Assignments held were dispositions covered by third proviso to Sec. 22 of Act.**

The assessee was a jagirdar of a Scheduled Jagir of the erstwhile Jodhpur State. The revenue authorities sought to club with the assessee's income (1) the income of assessee's brother derived from the land assigned to him by their grandfather under S. 195 of the Marwar Land Revenue Act (40 of 1949), (2) the income derived by assessee's younger son from the land assigned to him by the assessee under Sec. 195 of the Marwar Act (40 of 1949) and (3) the income derived by the assessee's wife from the land assigned to her by the assessee. The question was whether the income derived from the land assigned to the assessee's brother was irrevocable for purpose of Sec. 22 of the Agricultural Income-tax Act, 1953 and could not be included in the income of the assessee and whether the assignments in favour of the assessee's wife and his son were dispositions covered by the third proviso to S. 22 of the Act.

Held, that, (1) as the assessee's brother became a sub-proprietor under Sec. 196 of the Marwar Act (40 of 1949) and was under Sec. 197 of that Act liable to pay to the landlord only land revenue and

other public demands and expenses relating to the part of jagir held by him, the grant was irrevocable so far as the assessee was concerned and the income derived from the land was irrevocable for the purpose of Sec. 22 of the Act of 1953 and could not be included in the income of the assessee, (2) The position of the assessee's younger son became similar to that of the assessee's brother, (3) As the grant in favour of the assessee's wife was treated as a sub-jagir by the Jagir Commissioner and the assignment of land was made to her in lieu of cash maintenance, the income derived therefrom could not be clubbed with the income of the assessee in view of Sec. 13 of the Act of 1953 and (4) The assignments made by the assessee in favour of his wife and his son were dispositions covered by third proviso to S. 22 of the Act. **1965 Raj LW 472: ILR (1966) 16 Raj 24.**

SECTION 61

——S. 61 (2), Proviso I — Proviso applies only if assessee wishes to take advantage of permission to pay by instalments.

An assessee who makes an application for being allowed to pay the tax by instalments can change his mind when he comes to know that the result of being permitted to pay by instalments would be that he will have no right to file an appeal. The proviso would come into play if the assessee wishes to take advantage of the permission to pay by instalments. If he wishes to change his mind and informs of it to A. I. T. O. within the original period allowed in the demand notice there is nothing in the section which may force him to pay by instalments only. **ILR (1958) 8 Raj 599: 1959 Raj LW 313.**

——S. 61 (2), Proviso — Department bringing to notice of assessee provisions of Sec. 61 (2) must also bring to his notice consequences of proviso.

It is up to the department that if it is thought necessary to bring to the notice of the assessee the provisions of sub-sec. (2), it is also incumbent upon it to bring to his notice the consequences which would follow, as laid down in the proviso. The omission to draw the attention to the proviso gave a fasle impression to the assessee and as soon as the assessee came to know what the consequences of allowing his application to pay by instalments would be, he immediately asked that he should be permitted to withdraw his application. As the application which was made to the Agricultural Income-tax Officer by the assessees was based on a misrepresentation the assessee, was at liberty to withdraw his application when he came to know what would be the consequences. **ILR (1958) 8 Raj 599: 1959 Raj LW 313.**

RAJASTHAN AGRICULTURAL PRODUCE MARKETS ACT (38 OF 1961)

SECTION 1

——S. 1 — Constitutional validity — Act does not contravene Art. 19 (1) (g) of Constitution. See Constitution of India, Art. 19 (1) (g). **1965 Raj LW 358: ILR (1965) 15 Raj 897: AIR 1966 Raj 142 (DB).**

SECTION 3

——S. 3 (2) — Expression 'within a period of not less than one month' — Meaning — Notification under Sec. 3, permitting filing of objections within one month — Expressions 'not less than one month' and 'within one month' mean same thing — Requirement under Sec. 3 is amply met if period for filing objection is exactly one month — Expression 'within a period of not less than one month' — Meaning. AIR 1957 SC 271 and AIR 1957 Pepsu 14 and AIR 1964 All 416, Rel. on. Civil Writ Petn. No. 893 of 1964, D/-18-8-1964 (Raj) and AIR 1957 Raj 388, Disting. **1965 Raj LW 358: ILR (1965) 15 Raj 897: AIR 1966 Raj 142 (150) (Pt D) (Pr 45) (DB).**

SECTION 4

——S. 4 (2) — Licences for operating in market — Market committee's bye-laws not valid — Market committee cannot be asked to issue licences — Machinery envisaged by Act for issue of licences not completed—It is mandatory for State Government to make suitable arrangement for issue of licence for interim period. See Rajasthan Agricultural Produce Markets Act (38 of 1961), S. 14. **1965 Raj LW 358: ILR (1965) 15 Raj 897: AIR 1966 Raj 142 (DB).**

SECTION 7

——S. 7 (2) (b) and 7 (1) (i) — Constitution of market committee for first time — Nomination of members by Government — No particular limitation as to qualification of members is laid down —S. 7 (2) is exception to S. 7 (1) (i). 1965 Raj LW 358: ILR (1965) 15 Raj 897: AIR 1966 Raj 142 (152) (Pt H) (Pr 56) (DB).

——S. 7 (2) (b) — Constitution of market committee for first time — Nomination of certain members by Government — Grievance of writ petitioners that members were not properly qualified — Members not impleaded as parties to writ petition — Decree about validity of their nomination would not be justified — Constitution of India, Art. 226 — Natural Justice. 1965 Raj LW 358: ILR (1965) 15 Raj 897: AIR 1966 Raj 142 (152) (Pt I) (Pr 56) (DB).

SECTION 14

——Ss. 14, 4 (2) and 37 — Licences for operating in market — Market committee's bye-laws not valid — Market committee cannot be asked to issue licences — Machinery envisaged by Act for issue of licences not completed — It is mandatory for State Government to make suitable arrangements for issue of licences for interim period. 1965 Raj LW 358: ILR (1965) 15 Raj 897: AIR 1966 Raj 142 (152) (Pt G) (Pr 54) (DB).

SECTION 36

——S. 36 (2) (f) — Levy of licence fee by market committee by its bye-law — Bye-law is not ultra vires market committee — Rule-making authority fixing maximum fee and leaving each market committee with discretion to fix fees below that maximum— No case of excessive delegation: Obiter. See Rajasthan Agricultural Produce Markets Act (38 of 1961), S. 37. **1965 Raj LW 358: ILR (1965) 15 Raj 897: AIR 1966 Raj 142 (DB).**

SECTION 37

——S. 37 — Bye-laws under, made by market committees — Requirement of previous sanction of

Director — Director sending approved Model Bye-laws to market committees — Requirement of previous sanction is not fulfilled — Each committee must consider model bye-laws in the light of its requirements, seek sanction of Director before passing them, and again when they are passed — AIR 1959 Raj 75 and 1955 Raj LW 454, Rel. on. **1965 Raj LW 358: ILR (1965) 15 Raj 897: AIR 1966 Raj 142 (151) (Pt E) (Pr 52) (DB).**

——Ss. 37 and 36 (2) (f) — Rajasthan Agricultural Produce Markets Rules (1963), R. 69 — Levy of licence fee by market committee by its bye-law — Bye-law is not ultra vires market committee — Rule-making authority fixing maximum fee and leaving each market committee with discretion to fix fees below that maximum — No case of excessive delegation (Obiter). **1965 Raj LW 358: ILR (1965) 15 Raj 897: AIR 1966 Raj 142 (152) (Pt F) (Pr 53) (DB).**

——S. 37 — Licences for operating in market — Market committee's bye-laws not valid — Market committee cannot be asked to issue licences — Machinery envisaged by Act for issue of licences not completed — It is mandatory for State Government to make suitable arrangement for issue of licence for interim period. See Rajasthan Agricultural Produce Markets Act (38 of 1961), S. 14. **1965 Raj LW 358: ILR (1965) 15 Raj 897: AIR 1966 Raj 142 (DB).**

RAJASTHAN AGRICULTURAL PRODUCE MARKET RULES (1963)

RULE 69

——R. 69 — Levy of licence fee by Market committee by its bye-law—Bye-law is not ultra vires market committee — Rule-making authority fixing maximum fee and leaving each market committee with discretion to fix fees below that maximum — No case of excessive delegation (Obiter). See Rajas-Agricultural Produce Markets Act (38 of 1961), S. 37. **1965 Raj LW 358: ILR (1965) 15 Raj 897: AIR 1966 Raj 142 (DB).**

RAJASTHAN AGRICULTURAL RENTS CONTROL ACT (19 OF 1952)

SECTION 1

——S. 1 (3) — Act violates Article 14 of the Constitution and is wholly void — (Constitution of India, Art. 14).

Section 1 (3) of the Rajasthan Agricultural Rents Control Act, 1952, violates Art. 14 of the Constitution and as such is ultra vires. There is no guiding principle anywhere in the Act controlling the discretion of the State Government as to the application of the Act to particular areas in Rajasthan, and the discretion, which is vested by S. 1 (3), in the State Government is absolute and unfettered. AIR 1952 SC 75, Applied.

As S. 1 (3) falls, and as that is the only section which provides for the enforcement of the Act, the whole Act falls. **ILR (1954) Raj 518: 1954 Raj LW 601: AIR 1954 Raj 197 (199, 200) (Pt A) (Prs 10, 12, 14) (DB).**

RAJASTHAN APPEALS AND PETITIONS (DISCONTINUANCE) ORDINANCE (40 OF 1949)

●——Constitution of India, Art. 374 (4) — Appeals authorised to be heard by High Court by the Rajasthan Appeals and Petitions (Discontinuance) Ordinance — If should be transferred to Supreme Court after the new Constitution came into force.

Appeals which could have been heard and disposed of by the Ijlas-i-Khas, Jodhpur, but which have been authorised to be heard by the High Court of Rajasthan by the Rajasthan Appeals and Petitions (Discontinuance) Ordinance, 1949, can be heard and disposed of by the High Court even after the Constitution has come into force because the High Court is not functioning as the Privy Council in respect of such appeals and so need not be transferred to the Supreme Court under Art. 374 (4) of the Constitution. Kishan Lal v. Bhanwar Lal, **1950 Raj LW 299: AIR 1951 Raj 1 (1, 11) (Pt A) (Prs 2, 38) (FB).**

——Rajasthan High Court Ordinance (dated 12-8-1949), Ss. 49 and 40 — Existing petitions for leave to appeal or appeals against decisions of former High Court — How far affected by Ss. 49 and 40 — The Rajasthan High Court Ordinance in the first place, does not touch the existing petitions for leave to appeal or appeals already presented against the decisions of any of the former High Courts of the covenanting States. Secondly, S. 49 of the High Court Ordinance seems to refer to cases pending in the former High Courts, which are directed to be transferred to the Rajasthan High Court for disposal. The judgments already passed by the former High Courts are not included in S. 40. See Rajasthan High Court Ordinance (dated 12-8-1949), Ss. 49 and 40. **AIR 1950 Raj 37 (DB).**

SECTION 3

——Ss. 3 and 4 (1) — Law in force in covenanting State — Statement of Power (Bikaner), Appendix A, Head 1, Item 1; Head 2, Item 17 — Reopening of jagir succession in Bikaner — Case pending till merger of Bikaner State in Rajasthan — Power of State of Rajasthan to pass orders — The State of Rajasthan had power under S. 4 (1), Clause (c) of Ordinance No. 40 of 1949 to deal with the case as it was neither a judicial nor a revenue matter, but a case of executive nature. See Rajasthan Appeals and Petitions (Discontinuance) Ordinance (40 of 1949), S. 4 (1). **AIR 1958 Raj 12 (DB).**

——Ss. 3 and 4 — Ijlas-I-Khas Rules, 1945, Rr. 3 and 36 — Scope and applicability indicated. **AIR 1955 NUC (Raj) 1642 (DB).**

——Ss. 3 and 4 — Civil P. C. (1908), O. 47, R. 2 — "Disposed of" — Meaning of — Abrogation of rule by Ordinance 40 of 1949 — Review of order of Ijlas-i-Khas — No notice issued — Disposal by High Court — The High Court, as successor to Ijlas-i-Khas, could not dispose of the application as no notice was issued. See Civil P. C. (1908), O. 47, R. 2. **AIR 1952 Raj 178 (DB).**

——S. 3 — Constitution of India, Art. 133 — Leave to appeal from decision of Rajasthan High Court — Conditions for — Ijlas-i-Khas Rules, 1939, if applicable — The Ijlas-i-Khas Rules of 1939 are no longer in force and no leave to appeal can be granted in pursuance thereof. See Constitution of India, Art. 133. **AIR 1951 Raj 55 (DB).**

SECTION 4

——S. 4 (1) (b) — Constitution of Special Board of Revenue — Board duly notified in Gazette —

Failure to notify the appointment of one member or an ad hoc member to the Board is mere irregularity.

Where the Special Board of Revenue is duly constituted and the Board is duly notified in the Gazette, failure to notify a change of personnel or appointment of an ad hoc member in the Gazette is merely an irregularity. Omission to notify such a change of personnel does not affect the validity of the appointment so as to make the officer appointed functus officio to hear and decide the appeal. **ILR (1960) 10 Raj 1520.**

——Ss. 4 (1) and 3 — Law in force in covenanting State — Statement of Powers (Bikaner), Appendix A, Head 1, Item 1; Head 2, Item 17—Reopening of jagir succession in Bikaner — Case pending till merger of Bikaner State in Rajasthan — Power of State of Rajasthan to decide — State of Rajasthan had power under S. 4 (1), Clause (c) of the Ordinance No. 40 of 1949 to deal with the case as it was neither a judicial nor a revenue matter, but a case of executive nature. **1957 Raj LW 338: ILR (1957) 7 Raj 349: AIR 1958 Raj 12 (14) (Pt A) (Prs 12, 14, 15, 16) (DB).**

——S. 4 — Scope and applicability — The representation made on 29-1-1949 was not one which was required to be heard, determined and disposed of according to S. 4 of the Ordinance. See Rajasthan Appeals and Petitions (Discontinuance) Ordinance (40 of 1949), S. 3. **AIR 1955 NUC (Raj) 1642 (DB).**

——S. 4 (1) (b) — 'Judicial revenue matter'—Expression should be given ordinary meaning according to purpose of Ordinance. **AIR 1955 NUC (Raj) 1049 (DB).**

——S. 4 — Civil P. C. (1908), O. 47, R. 2 — "Disposed of" — Meaning of — Abrogation of rule by Ordinance 40 of 1949 — Review of order of Ijlas-i-Khas — No notice issued — Disposal by High Court — The High Court, as the successor to Ijlas-i-Khas, could not dispose of the application as no notice was issued. See Civil P. C. (1908), O. 47, R. 2. **AIR 1952 Raj 178 (DB).**

●——S. 4 — Appeals transferred to High Court—High Court does not function as Privy Council — Constitution of India, Art. 374 (4).

Per Full Bench:—The High Court of Rajasthan is not functioning as Privy Council in respect of appeals and petitions which it has been authorised to entertain and dispose of under S. 4 of the Rajasthan Appeals and Petitions (Discontinuance) Ordinance, 1949, as amended by Ordinance 12 of 1950 and they need not be transferred to the Supreme Court under Art. 374 (4) of the Constitution. Kishen Lal v. Bhanwarlal, **1950 Raj LW 299: AIR 1951 Raj 1 (1, 11) (Pt A) (Prs 2, 38) (FB).**

SECTION 19

——S. 19 — Interpretation of, indicated — Section 19 of the Ordinance abolishes all Boards or other tribunals discharging functions similar to those of a Board prescribed by this Ordinance or any other law for the time being in force in the whole or any part of Rajasthan. The language is wide enough to cover any Board of Revenue or any other Revenue Tribunal discharging functions similar to those of a Board of Revenue.

Both the old Board of Revenue and the new Board constituted by the Maharaja of Bikaner came to be abolished by this Ordinance and under the second part of S. 19 cases pending before those Boards could be transferred to, heard and disposed of by the Rajasthan Board of Revenue. **AIR 1955 NUC (Raj) 5035 (DB).**

——S. 19 — Judgment delivered by Additional Commissioner — Power to review — An Additional Commissioner who delivers a judgment under S. 10 (2) of the Protection of Tenants Ordinance cannot subsequently review his own decision. See Tenancy Laws — Rajasthan (Protection of Tenants) Ordinance (9 of 1949), S. 10 (2). **AIR 1955 NUC (Raj) 764 (DB).**

RAJASTHAN APPEALS AND PETITIONS DISCONTINUANCE (AMENDMENT) ORDINANCE (12 OF 1950)

——Judgment of Ijlas-i-Khas cannot become judgment of High Court.

It is by virtue of the special provisions of Ordinance No. 12 of 1950 that the High Court hears appeals, petitions, etc., which were pending before the Ijlas-i-Khas, and by no amount of legal fiction can the judgment of the Ijlas-i-Khas become the judgment of the High Court. **1952 Raj LW 172: ILR (1952) 2 Raj 314: AIR 1952 Raj 178 (179) (Pt B) (Pr 6) (DB).**

RAJASTHAN ARMED CONSTABULARY ACT (12 OF 1950)

SECTION 6

——S. 6 (e) — 'Desertion' — Meaning.

The word 'desertion' does not simply mean leaving the post or mere departure from the post without permission. It means something more, and that something more is the intention never to return to the post, or to go away with the idea of avoiding hazardous duty, or shirking any important service. Where a person serving in the armed Constabulary simply leaves his post without leave, he is not guilty under S. 6 (e). **ILR (1956) 6 Raj 996: 1957 Cri LJ 103: 1957 Raj LW 139: AIR 1957 Raj 26 (26) (Pt A) (Pr 3) (DB).**

SECTION 7

——S. 7 (g) — Minor offence — Offence under S. 7 (g), Rajasthan Armed Constabulary Act — The offence under S. 7 (g), Rajasthan Armed Constabulary Act, is a minor offence as compared to the offence under S. 6 (e) of that Act and, therefore, it is open to a Court under S. 238, Criminal P. C., to convict the accused of the offence under S. 7 (g) even though he was not charged with it. See Criminal P. C. (1898), S. 238. **1957 Cri LJ 103: AIR 1957 Raj 26 (DB).**

——S. 7 (g) — Leaving post without leave — Offence.

Where a person serving in the Armed Constabulary leaves his post without leave, he is guilty under S. 7 (g) and the fact that some immediate superior officer of his knew of his intention to go away without leave would not be of any help to him. **ILR (1956) 6 Raj 996: 1957 Cri LJ 103: 1957 Raj LW 139: AIR 1957 Raj 26 (27) (Pt C) (Pr 5) (DB).**

RAJASTHAN BOARD OF REVENUE ORDINANCE (22 OF 1949)

SECTION 12

——S. 12 — Power of Revenue Board to revise orders under S. 4-A — The Board has the power of general superintendence and control over all other revenue courts and offences under S. 12 of the Rajasthan Board of Revenue Ordinance 22 of 1949. Whether the Tehsildar acting under S. 4-A of Act 22 of 1953 is a Court or an officer, the Board has power of superintendence over him under S. 12 and can interfere with his orders in appropriate cases, though there may be no power of revision as such under the Rajasthan Revenue Courts (Procedure and Jurisdiction) Act. See Tenancy Laws — Rajasthan Produce Rents Regulating (Second Amendment) Act (22 of 1953), S. 4-A. **AIR 1957 Raj 343 (DB).**

——S. 12 — Rajasthan (Protection of Tenants) Ordinance, S. 4 — Order of ejectment made in contravention of Sec. 4 — No power of revision under Rajasthan Revenue Courts (Procedure and Jurisdiction) Act, S. 26 — But power of superintendence is given by Rajasthan Board of Revenue Ordinance (22 of 1949), S. 12, under which ejectment order can be set aside. **AIR 1955 NUC (Raj) 1447 (DB).**

SECTION 13

●——S. 13 (2) — Rules framed under R. 4 — Revisions before Bench of Board — Parties heard only by one Member — Another Member concurring in decisions — Legality of decision.

According to R. 4 of the Rules framed under S. 13 (2) of the Board of Revenue Ordinance, no decree or order coming under the consideration of the Board on appeal, revision or reference, can be modified or reversed without the concurrent judgment of two members. Section 13 only provides two modes of hearing either by a member singly or by a Bench of two or more members. The compliance with R. 4, therefore, requires that the two members should sit as a Bench and not separately. Hence, a decision given by one member of the Board of Revenue after hearing parties and concurred by another member of the Board of Revenue without hearing the parties is not valid even in the case of revision, when the decision is one allowing the revision and reversing the decision of the lower Court. Shri Bishveshwar v. Board of Revenue, Rajasthan, **ILR (1955) 5 Raj 979: 1955 Raj LW 422: AIR 1956 Raj 101 (102) (Pt A) (Prs 5, 7) (FB).**

●——S. 13 — Rules under — Inconsistency between Rules and Act — Act prevails.

The rules to be framed under any provision of the Act cannot be inconsistent with the provisions of the Act and, therefore, any mode of hearing provided by the Rules which may be inconsistent with Cls. (a) and (b) of S. 13 cannot be a valid one. Shri Bishveshwar v. Board of Revenue, Rajasthan, **ILR (1955) 5 Raj 979: 1955 Raj LW 422: AIR 1956 Raj 101 (102) (Pt B) (Pr 6) (FB).**

——S. 13 (2) — Rules framed under, R. 6 — Validity — Procedure to be followed by single member.

Rule 6 of the Rules framed under S. 13 (2) of the Board of Revenue Ordinance says that a single member shall record his judgment or order, as the case may be, and send it to the other member for expression of his opinion. If the other member concurs, the judgment or order shall be deemed to be judgment or order of the Board. Rule 6, thus, purports to authorise two members to hear a case without forming a Bench. This rule is contrary to the provisions of S. 13 (1) of the Ordinance which provides only two modes of hearing: (i) either by a member of the Board sitting singly, or (ii) by a Bench of the Board consisting of two or more members, and is, therefore, invalid.

Rule 6 does not say that the second member can express his opinion without giving a notice of hearing to the parties or hearing them. If he does so, the procedure adopted is not authorised even according to the rules as they are. **ILR (1951) 1 Raj 512: 1951 Raj LW 478: AIR 1952 Raj 46 (47, 48, 49, 50) (Prs 6, 8, 10, 11, 19, 23) (DB).**

SECTION 19

——S. 19 — Notification No. 907 VIII/49, dated 26-10-1949 — Additional Commissioner deciding cases under S. 19 — No revision lies to the Board of Revenue — (Rajasthan Revenue Courts (Procedure and Jurisdiction) Act (1 of 1951), Ss. 26 and 36). **1953 Raj LW 21: ILR (1952) 2 Raj 647: AIR 1953 Raj 37 (39, 40) (Pt A) (Prs 7, 9) (DB).**

RAJASTHAN BUILDINGS (LEASE AND RENT CONTROL) ORDINANCE (22 OF 1948)

See under Houses and Rents.

RAJASTHAN CASH JAGIRS ABOLITION ACT (29 OF 1958)

SECTION 2

——Ss. 2, 3 — Cash jagir — What is — Cash allowance granted by ex-Ruler under rules framed by him is included in the definition — Compensation has to be paid for discontinuance and abolition of such allowance — Words and Phrases — 'Jagir'. **1961 Raj LW 386: ILR (1961) 11 Raj 596.**

SECTION 3

——S. 3 — Existing law — Meaning of — Rules framed by erstwhile Nawab of Tonk — Not mere executive orders or domestic instructions—Amount to existing law within Art. 366 (10) — Right to receive cash allowance under such rules cannot be determined by an executive order. See Constitution of India, Art. 372. **1961 Raj LW 386: ILR (1961) 11 Raj 596.**

——Ss. 3 and 2 — Cash jagir — What is — Cash allowance granted by ex-Ruler under rules framed by him is included in the definition — Compensation has to be paid for discontinuance and abolition of such allowance — Words and Phrases—"Jagir". See Rajasthan Cash Jagirs Abolition Act (1958), S. 2. **1961 Raj LW 386: ILR (1961) 11 Raj 596.**

RAJASTHAN CINEMAS REGULATION ACT (3 OF 1952)

SECTION 5

——S. 5 (3) — Grant of temporary licence by State Government — Power is administrative and

not judicial or quasi-judicial — Government not bound to give hearing or reasons while granting licence. 1962 Raj LW 222: ILR (1962) 12 Raj 44.

——S. 5 (2) and (3) — Grant of licence under Act — Subject to control of State Government — State Government can direct licensing authority to grant a licence in a particular case — Cinematograph Act (1918), S. 5 (3).

Sub-sections (2) and (3) of S. 5 of the Act show that the State Government has been given the power to control the grant of licences under the Act and this power extends to the issue of a direction to the licensing authority for the grant of licence in a specific case and once that control has been exercised, it is obligatory on the part of the licensing authority to carry it out. AIR 1956 All 99; AIR 1957 Andh Pra 513, Ref. 1962 Raj LW 222: ILR (1962) 12 Raj 44.

[Overruled in AIR 1966 SC 1081.]

RAJASTHAN CINEMAS (REGULATION) RULES (1959)

RULE 3

——Rr. 3 (3), 63 and 74 (xii) — Power to issue temporary licence under R. 3 (3) — Extent of.

The power to issue a temporary licence is not restricted to a touring cinematograph or special cinematograph exhibition. Rule 2 contains definitions of 'temporary building', 'temporary enclosure', 'temporary cinematograph' and 'open air cinema', and according to sub-rule (3) of Rule 3, a temporary licence can be granted in respect of (i) a temporary building or (ii) any place. Temporary building is a building which is not a permanent building and may consist of a booth or tent or other similar structure; so a temporary licence can be granted for a temporary building. A temporary licence can, therefore, be granted for exhibition at these places also. This interpretation of the provisions of R. 3 (3) is further borne out by reference to Rr. 63 and 74 (xii). The provisos to these rules authorise the State Government to permit the exhibition of films for trade purposes by temporary touring or open air cinemas within five miles' radius of a permanent cinema and thus it becomes all the more clear that the intention is to permit the grant of licences not only in respect of touring and open air cinemas but also for temporary buildings. 1962 Raj LW 222: ILR (1962) 12 Raj 44.

RULE 63

——Rr. 63 and 74 (xii) — Validity — Provisos are not invalid.

The validity of the provisos to Rules 63 and 74 (xii) of the rules cannot be challenged on the ground that the effect of the provisos is to give unfettered and arbitrary power to the State Government in the matter of granting licences. 1962 Raj LW 222: ILR (1962) 12 Raj 44.

——Rr. 63, 74 (xii) and 3 (3) — Power to issue temporary licence under R. 3 (3) — Extent of. See Rajasthan Cinemas (Regulation) Rules (1959), R. 3 (3). 1962 Raj LW 222: ILR (1962) 12 Raj 44.

RULE 74

——Rr. 74 (xii), 3 (3) — Power to issue temporary licence under R. 3 (3) — Extent of. See Rajasthan Cinemas (Regulation) Rules (1959), R. 3 (3). 1962 Raj LW 222: ILR (1962) 12 Raj 44

——Rr. 74 (xii) and 63 — Validity — Provisos are not invalid. See Rajasthan Cinemas (Regulation) Rules (1959), R. 63. 1962 Raj LW 222: ILR (1962) 12 Raj 44.

RAJASTHAN CITY MUNICIPAL APPEALS (REGULATION) ACT (3 OF 1950).

See under Municipalities.

RAJASTHAN CIVIL COURTS (AMENDMENT) ACT (6 OF 1956)

SECTION 21

●——S. 21 — Applicability — Applicability to suits decided before amendment but from which appeals were filed after amendment — Law governing. See Rajasthan Civil Courts Ordinance (7 of 1950), S. 21. AIR 1958 Raj 62 (FB).

RAJASTHAN CIVIL COURTS LAWS EXTENSION ACT (2 OF 1957).

PREAMBLE

——Pre. — Conflict between existing law made by State Legislature — Rajasthan Civil Courts Laws (Extension) Act (2 of 1957) falls under List II, Item 3 of Sch. VII and not under List III, Item 13 — Does not conflict with Ajmer Courts Regulation (9 of 1926) — Is intra vires. See Constitution of India, Art. 254 (1). ILR (1960) 10 Raj 1678.

——Pre. — Decree of Jaipur Court passed in 1944 — Execution in Ajmer in 1953.

A decree was obtained from the Civil Court at Jaipur in 1944. Before the 1st of November, 1956, the decree was not executable at Ajmer, but since that date it has become executable on account of the Civil Courts Extension Act (No. 2 of 1957). However, execution cannot be proceeded with on the execution petition that was filed in the year 1953, in the Ajmer Court. At the time that petition was presented, the decree was not executable at Ajmer and the petition, therefore, cannot be regarded to be a proper one. The Court would, therefore, not be justified in ordering execution of the decree on the execution petition already filed by the decree-holder in the Court of the Civil Judge at Ajmer. ILR (1958) 8 Raj 591: 1959 Raj LW 291.

[Overruled in AIR 1962 Raj 41 (FB).]

SECTION 3

——Ss. 3, 5 — Effect of — Was to repeal Ss. 12 to 15 of Ajmer Courts Regulation (9 of 1926) — Period of limitation for appeal from decision of Munsiff to District Judge under Rajasthan Civil Courts Ordinance (7 of 1950) would be period prescribed by Art. 152, Limitation Act — Limitation Act (1908), Art. 152 — Ajmer Courts Regulation (9 of 1926), Ss. 12 to 15 — Rajasthan Civil Courts Ordinance (7 of 1950).

The combined effect of Ss. 3 and 5 of the Rajasthan Act (2 of 1957), is that the provisions contained in the Ajmer Courts Regulation, as regards the constitution of the various Courts as also the provisions governing the matter of appeal from the Courts of one grade to that of anther from the Courts of one grade to that of another stood entirely repealed. Until some other provision was made, the Courts already constituted and the jurisdiction and powers conferred upon them was to be deemed to have been respectively constituted and conferred under the Ordinance 7 of 1950. Sections 12 to 15 of the Ajmer Courts Regulation could be of no avail. The Courts as constituted by and under the Act of 1957 read with the Ordinance of 1950 alone held the field, and the period of limitation which would govern an appeal from the decision of a Munsiff to a District Judge under the Ordinance of 1950 read with the Act of 1957 would be the period prescribed by Art. 152 of the Limitation Act. **ILR (1960) 10 Raj 1678.**

SECTION 5

——**Ss. 5 and 3 — Effect of** — Was to repeal Ss. 12 to 15 of Ajmer Courts Regulation (9 of 1926) — Period of limitation for appeal from decision of Munsiff to District Judge under Rajasthan Civil Courts Ordinance (7 of 1950) would be period prescribed by Art. 152, Limitation Act — Limitation Act (1908), Art. 152 — Ajmer Courts Regulation (9 of 1926), Ss. 12 to 15 — Rajasthan Civil Courts Ordinance (7 of 1950). See Rajasthan Civil Courts Laws (Extension) Act (2 of 1957), S. 3. **ILR (1960) 10 Raj 1678.**

RAJASTHAN CIVIL COURTS ORDINANCE (31 OF 1949)

SECTION 17

——**S. 17** — Suit against State by person claiming to be umrao is not maintainable either in High Court or any Civil Court in view of Mewar Revenue Act (5 of 1947), S. 123 (2), which is not repealed but saved by Ordinance 31 of 1949 — (Civil P. C. (1908), S. 9) — (Mewar Revenue Act (5 of 1947), S. 123 (2)). **1952 Raj LW 37: ILR (1951) 1 Raj 741.**

RAJASTHAN CIVIL COURTS ORDINANCE (7 OF 1950)

——Rajasthan Civil Courts Laws (Extension) Act (2 of 1957), Ss. 3, 5 — Effect of — Was to repeal Ss. 12 to 15 of Ajmer Courts Regulation (9 of 1926) — Period of limitation for appeal from decision of Munsiff to District Judge under Rajasthan Civil Courts Ordinance (7 of 1950) would be period prescribed by Art. 152, Limitation Act. See Rajasthan Civil Courts Laws (Extension) Act (2 of 1957), S. 3. **ILR (1960) 10 Raj 1678.**

SECTION 5

●——**S. 5** — Civil P. C. (1908), S. 13 — Decree passed by Ajmer Court and transferred for execution to Court in Rajasthan before integration — Pending execution Ajmer integrated with Rajasthan — Decree can be executed in Courts in Rajasthan — ILR (1958) 8 Raj 591: 1959 Raj Lw 291, **Overruled.** See Civil P. C. (1908), S. 13. **AIR 1962 Raj 41 (FB).**

SECTION 7

——**S. 7 — Jurisdiction of Civil Courts — Change of — Procedure — Notification under Rajasthan Territorial Divisions Ordinance — Effect of — (Rajasthan Territorial Divisions Ordinance (1949)) — (Civil P. C. (1908), Ss. 15 and 16).**

The jurisdiction of Civil Courts in Rajasthan is fixed by the Government by notification of 2nd June, 1950, under S. 7 of the Rajasthan Civil Courts Ordinance (7 of 1950). The jurisdiction having once been fixed by the Government under S. 7 can only be altered by another notification under that section, and it cannot be altered by any notification issued under the Rajasthan Territorial Divisions Ordinance, 1949, as the latter Ordinance has nothing to do with the jurisdiction of the Civil Courts. **ILR (1957) 7 Raj 702: 1957 Raj LW 190: AIR 1957 Raj 241 (243) (Pt A) (Pr 3).**

SECTION 21

——**S. 21** — Scope — High Court — Power to entertain appeal which lies to District Court — Under S. 24 of the Civil P. C., the High Court has power to transfer the appeal to itself even though no such application is presented, and there is no lack of jurisdiction in the High Court to hear the appear which is filed before it, even though the appeal lies to the District Court under S. 21 of the Rajasthan Civil Courts Ordinance. 1905 AC 369 and AIR 1957 SC 540, Ref. See Civil P. C. (1908), S. 24. **AIR 1961 Raj 186 (DB).**

——**S. 21 — Scope and effect of — Right of appeal — If taken away — (Civil P. C. (1908), S. 96).**

There is a distinction between the right of appeal as such and the forum of appeal. It cannot be an invariable rule that a party should have a right of appeal to the identical forum in every case, to which at the date of institution of the suit he had a right of appeal, if in the meantime that forum has been abolished and some other forum has been substituted so long as the right of appeal itself has not been taken away or otherwise prejudicially affected. The Rajasthan Civil Courts Ordinance, 1941, has not taken away the right of appeal. It has merely provided that in the given case instead of the appeal being filed before the District Judge, as it was under the earlier Ordinance (5 of 1948), it should now be presented before the High Court. That is not deprivation of the right of appeal. AIR 1959 Raj 45: ILR (1959) 9 Raj 71: 1959 Raj LW 172, **Overruled. 1959 Raj LW 391: ILR (1959) 9 Raj 734: AIR 1959 Raj 246 (247) (Pr 4) (DB).**

——**S. 21** — Forum of appeal — An appeal against an order in execution proceedings lies to the Court to which an appeal would lie against the decree in the original suit. See Suits Valuation Act (1887), S. 8. **AIR 1959 Raj 101 (DB).**

——**S. 21** — Venue of appeal — Law applicable — Amendment in — Effect — **Held,** (i) that the right of appeal under S. 21 of the Rajasthan Ordinance before its amendment had accrued on the commencement of the suit and had become vested in the plaintiff and the subsequent amendment in that section did not affect that right;

(ii) that there is nothing in the Amendment Act of 1951 which can give it such retrospective effect;

(iii) that the appeal was properly filed in the Court of the District Judge and his order of returning it for presentation to the High Court was unsustainable in law, and must be set aside. See Civil P. C. (1908), S. 96. **AIR 1959 Raj 45.**

[Overruled in AIR 1959 Raj 246.]

●——**S. 21 — Retrospective operation — (Interpretation of Statutes) — (Rajasthan Civil Courts (Amendment) Act (6 of 1956), S. 21) — Rajasthan Civil Courts (Amendment) Ordinance (7 of 1957), S. 21-A).**

Statutes, other than those relating to matters of procedure, do not and cannot have retrospective operation so as to destroy or impair existing vested rights. As a general rule, when law is altered during the pendency of an action, the law which is properly applicable to it is the law which existed at the commencement of the action. It is further well established that the right of appeal is a vested right and cannot be taken away retrospectively, unless such a right is so taken away by an express provision to that effect or by a distinct and necessary intendment. It is also equally well established and unquestionable that where a statute governing a right of appeal or for that matter any vested right is in its dominant intention and effect plainly retrospective, then it has to be accorded a retrospective effect, and the objection that such operation takes away a vested right is of little consequence. Judged by these principles, Ordinance No. (7 of 1957) is unquestionably retrospective inasmuch as the provisions of S. 21 of the Civil Courts Ordinance as amended in 1956 have been made expressly applicable to suits which were instituted before the Amendment Act of 1956 came into force but which were pending at the time of the commencement of that Act. Samdukhan v. Mandanlal, **ILR (1958) 8 Raj 5: 1957 Raj LW 464: AIR 1958 Raj 62 (64, 65) (Prs 12, 13) (FB).**

——**S. 21 — Appeal from execution proceedings — Forum.**

The word 'proceeding' in S. 21 relates to the original proceeding and not to the execution proceedings. In respect of appeals in execution proceedings the order in execution proceedings is either an order or a decree. If it is a decree, a provision is clearly made in S. 21 that it shall lie to the Court of the District Judge in case the value of the original suit was less than Rs. 5,000 and in any other case to the High Court. It is the value of the original suit which determines the forum of appeal against the decree. **1958 Raj LW 338: ILR (1958) 8 Raj 429.**

——**S. 21 (as amended by Rajasthan Act (6 of 1956)) — Applicability to suits decided before amendment but from which appeals were filed after amendment — Law governing.**

Section 21 of the Rajasthan Civil Courts Ordinance, 1950, as amended by Rajasthan Act (6 of 1956), which came into force on 11-4-1956, can have no application to suits decided before the amendment was brought into force though appeals therefrom were actually filed after the amendment. No doubt a right of appeal is not a mere procedural matter and it pertains to the domain of substantive rights. Such a right cannot be allowed to be taken away retrospectively unless an express provision to that effect has been made by the Legislature or the same result is deducible on the principle of necessary intendment.

Where a judgment from which an appeal lies is pronounced, a right of appeal at once arises to aggrieved party to appeal from decision given, to a Court which would be authorised to receive it at that time. The aggrieved party would be within his right on that very day to prefer an appeal from the decision by which he was feeling aggrieved, and in consonance with the law which was in force then, he would be well within his right to institute his first appeal in the High Court. This right cannot in any way be affected simply because he filed his appeal not immediately after the judgment sought to be appealed against was delivered, but he presented the appeal later within the period of limitation permitted to him under the law. It follows that this right cannot be allowed to be affected by any amendment of the law which may have been brought into force in between the pronouncement of the judgment and the presentation of the appeal. AIR 1927 PC 242, Applied.

It cannot be held that the intention of the Legislature in enacting S. 21 (5) was that appeals in suits decided before the amended section had come into force were necessarily to be filed in the District Court and not in the High Court after the amended section had come into operation. Indeed this provision is of too nebulous a character to admit of the necessary inference and was merely a provision intended to govern appeals pending in the High Court at the commencement of the amending Act of 1956. **1957 Raj LW 468: ILR (1957) 7 Raj 858: AIR 1957 Raj 336 (337, 338, 339) (Prs 5, 8, 9, 12, 13) (DB).**

——**S. 21 (as amended by Act 14 of 1951) — "Proceedings arising out of" — Proceedings to set aside ex parte decree arise out of original suit— Appeal lies from order dismissing application to set aside ex parte decree in suit of value of Rs. 8,000. AIR 1955 NUC (Raj) 1125 (DB).**

——**S. 21 (1) (as amended by Rajasthan Civil Courts Ordinance (Amendment) Act (14 of 1951)) — Jurisdiction to entertain appeal — Value of original suit.**

The jurisdiction of a District Judge to entertain an appeal depends upon the value of the original suit and it does not matter what the valuation of the appeal is. **ILR (1954) 4 Raj 613: 1955 Raj LW 138: AIR 1954 Raj 191 (192) (Pt A) (Pr 6) (DB).**

SECTION 22

——**S. 22 — District Judge — Persona designata — Power to transfer appeal — The District Judge under the Rajasthan Premises Act acts as an ordinary Civil Court of the State and is not a persona designata, and has the authority to transfer to any Civil Judge under his administrative control any appeal pending before him from the decrees or orders of Munsiffs. Principle laid down in 1913 AC 546, Applied. See Houses and Rents — Rajasthan Premises (Control of Rent and Eviction) Act (17 of 1950), S. 22. AIR 1955 NUC (Raj) 2197.**

SECTION 26

——S. 26 — General Rules (Civil), Ch. 1, R. 11— Work on holidays — Jurisdiction of Civil Court is not taken away. AIR 1955 NUC (Raj) 2553.

SECTION 27

——S. 27 (1) — Suit validly commenced in particular Court — Subsequent change in jurisdiction — Effect.

Once a suit is validly commenced in any Court, a subsequent change in the matter of jurisdiction does not affect the jurisdiction of the Court trying it, unless of course there is a clear provision of law, which robs the Court of its jurisdiction to decide such a case expressly or by necessary implication. See Civil P. C. (1908), S. 150. AIR 1957 Raj 241.

RAJASTHAN CIVIL COURTS ORDINANCE (AMENDMENT) ACT (14 OF 1951)

SECTION 2

——S. 2 — Civil P. C. (1908), S. 96 — Venue of appeal — Law applicable — Amendment in — Effect — (Rajasthan Civil Courts Ordinance (7 of 1950), S. 21).

The right of appeal is not a matter of procedure but a vested right and it is to be governed by the law which was in force at the time the suit in question was commenced, and not by the law which came into force at the date of decision or at the date of filing of the appeal. AIR 1957 SC 540, Rel. on. AIR 1959 Raj 45.

[Overruled in AIR 1959 Raj 246.]

RAJASTHAN CIVIL COURTS (SECOND AMENDMENT) ORDINANCE (7 OF 1957)

SECTION 21-A

●——S. 21-A — Retrospective operation — Ordinance No. (7 of 1957) is retrospective inasmuch as the provisions of S. 21 of the Civil Courts Ordinance as amended in 1956 have been made expressly applicable to suits which were instituted before the Amendment Act of 1956 came into force but which were pending at the time of the commencement of that Act. See Rajasthan Civil Courts Ordinance (7 of 1950), S. 21. AIR 1958 Raj 62 (FB).

RAJASTHAN CIVIL PROCEDURE CODE ADAPTATION ORDINANCE (5 OF 1950)

SECTION 14

——S. 14 — Civil P. C. (1908), S. 133 — Notification issued under S. 133, Marwar Civil P. C. — Notification is still in force. See Civil P. C. (1908), S. 133. AIR 1953 Raj 57.

RAJASTHAN CIVIL PROCEDURE CODE ADAPTATION ORDINANCE (AMENDMENT) ACT (14 OF 1950)

SECTION 43

——S. 43 — Scope — Ex parte foreign decree against non-resident foreigner who has not submitted to jurisdiction — Executability — Effect of merger of State — An ex parte decree of a foreign Court against a non-resident foreigner who had not submitted to its jurisdiction is an absolute nullity by International Law and it must be regarded as a mere nullity by the Courts of every State except those authorised by special legislation in the country of the forum by which it was pronounced. If a decree was a nullity when it was passed except in the State which passed it, it cannot become a living and executable decree in the areas of other States which happened to be merged with the State which passed the decree on account of political changes. Thus, a foreign decree of the type, remains a nullity in the Rajasthan State in spite of the changes which had come about in 1947 or on the 26th January 1950, by the Constitution. See Civil P. C. (1908), S. 13. AIR 1958 Raj 189 (DB).

——S. 43 — Foreign decree transferred for execution — Defence open to judgment-debtor. See Civil P. C. (1908), S. 13. AIR 1954 Raj 4 (DB).

RAJASTHAN CIVIL PROCEDURE CODE (AMENDMENT) ACT (2 OF 1951)

SECTION 20

——S. 20 — Decision in 1948 of Jaipur High Court under Bachat Rules was final — Civil Judge cannot refuse to accept deposit — (Civil P. C. (1908), Ss. 51 and 115). AIR 1955 NUC (Raj) 358 (DB).

RAJASTHAN CIVIL PROCEDURE CODE ORDINANCE (61 OF 1948)

SECTION 4

——S. 4 — Civil P. C. (1908), Ss. 48 and 48-A (as inserted by Rajasthan Act 20 of 1952) — Mewar Civil P. C. (1940), S. 48 (1) (c) — S. 4 of Ordinance wiped out all laws in force in covenanting States, with respect to which similar provision existed in new Code — Decree passed in 1922 — Execution application in 1951 is barred under S. 48 — S. 48-A inserted by Rajasthan Amendment Act 20 of 1952 did not save from bar of limitation. See Civil P. C. (1908), S. 48 AIR 1955 Raj 33 (DB).

RAJASTHAN CIVIL SERVICE RULES (1951)

RULE 244

——R. 244 (2) — Compulsory retirement — Rules vesting absolute authority in Government — Only Governor and Chief Minister competent to exercise power—Order not in conformity with rules— Invalid — Rajasthan Business Rules (1955), R. 31 (vii). See Constitution of India, Art. 166. ILR (1961) 11 Raj 536.

[Reversed in AIR 1963 SC 1323.]

RAJASTHAN CIVIL SERVICES (CLASSIFICATION, CONTROL AND APPEAL) RULES (1950)

——Force of — Rajasthan Police Regulations have no statutory force and cannot prevail over rules of 1950. See Rajasthan Police Regulations (1948), Regn. 100. AIR 1960 Raj 56 (DB).

——Police head constable reduced to rank of constable by order of Deputy Inspector-General of Police — Inspector-General of Police enhancing punishment one of removal in appeal — Order is without jurisdiction. See Constitution of India, Art. 309. AIR 1960 Raj 56 (DB).

——Applicability — Ministerial officers — These rules have no provision for enhancement of punishment awarded to ministerial officer. See Rajasthan Police Regulations (1948), Regn. 100. AIR 1958 Raj 284 (DB).

RULE 14

——R. 14 (2) — Integration of former State of Rajasthan — Servant of integrating State continuing in service of integrated State of Rajasthan— Appointing authority in such case — Before dis-

missal, servant already suspended before integration — Authority which can dismiss him after integration. See Constitution of India, Art. 311 (1). **AIR 1954 Raj 207 (DB).**

RULE 15

——R. 15 — Constitution of India, Art. 311 — Dismissal of Government servant — Scrutiny of reasons for — Generally speaking, the High Court will not scrutinise the reasons for dismissal, if they appear prima facie good and sufficient. It is only in an extreme case where, on the face of it, the reasons are not good and sufficient that the High Court may interfere on the ground that dismissal is not in accordance with R. 15. See Constitution of India, Art. 311. **AIR 1956 Raj 28 (DB).**

——R. 15 — Constitution of India, Art. 311 (2)— Government Servants' Conduct Rules, R. 22-A — Government servant going on strike prior to insertion of R. 22-A, Government Servants' Conduct Rules — Power of Government to dismiss such servant. See Constitution of India, Art. 311 (2). **AIR 1956 Raj 28 (DB).**

——R. 15 — Constitution of India, Art. 311 (2) and Art. 14 — Apology for misconduct tendered by Government servant — Discretion of Government to accept — No discrimination. See Constitution of India, Art. 311 (2). **AIR 1956 Raj 28 (DB).**

RULE 16

——R. 16 — Departmental enquiry — Procedure — Enquiring authority delegating its power to record evidence — Validity — Although in a case of departmental enquiry if the enquiring authority has the duty to come to a conclusion as to the guilt of the delinquent upon an evaluation or assessment of the evidence, it is entirely necessary that he should be the person who should hear the evidence of the witness but the correct test to be adopted is whether the procedure adopted by the Inquiring Officer has led to any prejudice or not. AIR 1958 Cal 470, Ref. See Constitution of India, Art. 311. **AIR 1963 Raj 203.**

——R. 16 — Departmental enquiry — Scope of— Rules of Evidence Act or Civil Procedure Code not applicable — Case resting wholly on documentary evidence — Oral evidence held not necessary — Constitution of India, Art. 311.

A departmental enquiry is not governed by the provisions either of the Evidence Act or of the Code of Civil Procedure. The enquiry should be in accordance with the rules of natural justice, and if such rules are substantially followed in the conduct of an enquiry and no prejudice is caused to the officer concerned, a mere failure to observe a particular rule should not be enough to quash the enquiry. AIR 1957 SC 882, Rel. on.

The provisions contained in R. 16 are, after all, matters of procedure and any and every breach of these provisions would not be enough to destroy the value of an enquiry where no real prejudice had been caused to the officer concerned on account of the alleged breach.

Held, that in the circumstances of the present case it was hardly necessary to produce any oral evidence, because the charges against the petitioner were all founded on documentary material which had been produced before the Enquiry Officer. **1961 Raj LW 104: ILR (1960) 10 Raj 1419.**

——R. 16 — State Government and its servants — Relation governed by Civil Service Rules — Departmental enquiry against servant — Rules not giving right to be defended by legal practitioner — No breach of rule in refusing such right. See Constitution of India, Art. 309. **ILR (1960) 10 Raj 1419.**

——R. 16 — Departmental enquiry resulting in exoneration — Second departmental enquiry on same facts — Maintainability — (Constitution of India, Arts. 226, 309, 310, 311) — (Justice, Equity and Good Conscience).

Once a departmental enquiry is over and a public servant has been exonerated, no second departmental enquiry on the same facts can be ordered unless there is a specific provision for reviewing an order of exoneration in the Service Rules or any law. On principles of justice, equity and good conscience it is wrong in the absence of provision in the Service Rules to permit such a second departmental enquiry.

It is true that a public servant holds office during the pleasure of the Governor, vide Art. 310 of the Constitution. But the "pleasure" mentioned in Art. 310 has to be exercised according to law or rules framed under Art. 309 or analogous law. It is not open to the State to assume such a power on the ground that Art. 310 provides that tenure of public service is at the pleasure of the President or the Governor or on the ground that the State is the master and the public servant is the employee and the master can do anything to his employee.

If a superior officer holds a departmental enquiry in that way, the State can take action against that superior officer. It is open to the State to prosecute a person once exonerated in a Court of law in spite of what a departmental officer might have decided in the departmental enquiry; for a Court of law is not bound by the results of a departmental enquiry one way or the other. On the other hand, if a second departmental enquiry could be ordered the danger of harassment to the public servant would be immense. **1957 Raj LW 587: ILR (1957) 7 Raj 1029: AIR 1958 Raj 38 (39, 40, 41) (Prs 5, 6, 7, 9, 10) (DB).**

——R. 16 — Scope if binding on Government.

The Rajasthan Civil Services (Classification, Contorl and Appeal) Rules, 1950, have been made in exercise of the powers conferred by Art. 309 of the Constitution of India, and therefore, it cannot be said that they are only made for the guidance of the Officers. They are as much binding on the Government as on the Civil Servants. A civil servant is entitled under R. 16 to be informed in writing of the grounds on which it is proposed to take action, and to be afforded an adequate opportunity to defend himself. It is not left to the whim and caprice of the officer conducting the enquiry to hold it in the manner it pleases him. It is in order to set up a uniform standard that this rule has been provided and therefore, the officer conducting the enquiry must adhere to it. AIR 1954 Raj 207, Foll. **ILR (1957) 7 Raj 823: 1958 Raj LW 1: AIR 1958 Raj I (3, 4) (Pt B) (Prs 10, 11) (DB).**

——R. 16 — Scope — Non-compliance — Failure to give statement of allegations — Effect.

The provisions for giving a statement of the allegations is not redundant and it should not be lightly ignored. The failure on the part of the

enquiring officer to provide the person charged with a statement of allegations and of the circumstances may, in particular cases be considered as a good ground for quashing the decision :

Held, in the instant case, that the charge was quite elaborate and contained all the allegations on which it was based. The enquiring officer did not take into consideration against the petitioner any other circumstances in finding him guilty and therefore, the failure in providing the petitioner with the statement of allegations was a mere irregularity which did not affect the merits of the case. **ILR (1957) 7 Raj 823: 1958 Raj LW 1: AIR 1958 Raj 1 (4) (Pt C) (Pr 15) (DB).**

——**R. 16** — Non-compliance — Effect — Natural justice — (Justice, Equity and Good Conscience) — (Constitution of India, Art. 226) — Witnesses examined in absence of person charged — Opportunity only to cross-examine afforded — Violation held was not only of the rule but also of principles of natural justice. **ILR (1957) 7 Raj 823: 1958 Raj LW 1: AIR 1958 Raj 1 (5) (Pt D) (Pr 16) (DB).**

——**R. 16 — Scope — Non-compliance with — Effect — (Constitution of India, Art. 311).**

When the person charged denies the charge and says that he wants to be heard in person, then it means that he wants that an oral enquiry should be held. Where the person charged was not even asked to state if he wanted to be heard in person and further he was asked to give his reply on the same day, i. e., he was not given reasonable time to put in a written statement of his defence, and further, although the Commissioner had given notice to the petitioner at the second stage for showing cause against the action proposed to be taken he did not seem to have applied his mind to the evidence against the petitioner and imposed punishment on the petitioner by simply saying that he had not led any evidence in defence :

Held, that the petitioner was not given reasonable opportunity of meeting the charge and the order of his removal was liable to be set aside. **1958 Raj LW 1: ILR (1957) 7 Raj 823: AIR 1958 Raj 1 (5) (Pt E) (Pr 18) (DB).**

——**R. 16** — Constitution of India, Art. 311 — Unconditional apology tendered by Government servant — Effect on enquiry. See Constitution of India, Art. 311. **AIR 1956 Raj 28 (DB).**

——**R. 16** — Applicant is entitled to two opportunities, when charges are framed and the other when particular punishment is proposed on proof of charges. See Constitution of India, Art. 311 (2). **AIR 1954 Raj 207 (DB).**

SCHEDULE 2

——**Sch. 2** — Applicant is entitled to two opportunities, when charges are framed and the other when particular punishment is proposed on proof of charges. See Constitution of India, Art. 311 (2). **AIR 1954 Raj 207 (DB).**

——**Sch. 2** — Integration of former State of Rajasthan — Servant of integrating State continuing in service of integrated State of Rajasthan — Appointing authority in such case — Before dismissal, servant already suspended before integration — Authority which can dismiss him after integration. See Constitution of India, Art. 311 (1). **AIR 1954 Raj 207 (DB).**

RAJASTHAN CIVIL SERVICES (CLASSIFICATION, CONTROL AND APPEAL) RULES (1958)

RULE 14

——**Rr. 14, Expl. VI, 16 (2)** — Rajasthan Service Rules (1950), R. 244 (2) — Government Servant completing 25 years of service — Order of compulsory retirement without enquiry — Does not amount to penalty — Order not invalid. See Rajasthan Services Rules (1950), R. 244 (2). **1961 Raj LW 298.**

RULE 16

——**Rr. 16 and 17** — Disciplinary action against Government servant — Charges initially levelled under R. 16 — Proceedings suddenly changed to R. 17 without notice — Chance to rebut charges not given — **Held,** punishment was in violation of principles of natural justice. **(1965) 2 Lab LJ 335: ILR (1965) 15 Raj 569: 1965 Raj LW 153: AIR 1966 Raj 55 (56) (Prs 8, 9) (DB).**

——**R. 16 (2) and R. 14, Expl. VI** — Rajasthan Service Rules (1950), R. 244 (2) — Government Servant completing 25 years of service — Order of compulsory retirement without enquiry — Does not amount to penalty — Order not invalid. See Rajasthan Services Rules (1950), 244 (2). **1961 Raj LW 298.**

RULE 17

——**Rr. 17 and 16** — Disciplinary action against Government servant — Charges initially levelled under R. 16 — Proceedings suddenly changed to R. 17 without notice — Chance to rebut charges not given — **Held,** punishment was in violation of principles of natural justice. See Rajasthan Civil Services (Classification, Control and Appeal) Rules (1958), R. 16. **(1965) 2 Lab LJ 335: ILR (1965) 15 Raj 569: 1965 Raj LW 98: AIR 1966 Raj 55 (DB).**

RULE 30

——**Rr. 30, 35 (3)** — Constitution of India, Art. 309 — Retrospective effect — Applicability to pending appeal against order reducing Government servant in rank — Appellate authority cannot enhance punishment awarded under Rules of 1950. See Constitution of India, Art. 309. **1962 Raj LW 613.**

RULE 35

——**Rr. 35 (3), 30** — Constitution of India, Art. 309 —Retrospective effect — Applicability to pending appeal against order reducing Government servant in rank — Appellate authority cannot enhance punishment awarded under Rules of 1950. See Constitution of India, Art. 309. **1962 Raj LW 613.**

RAJASTHAN CIVIL SERVICES (CLASSIFICATION, CONTROL AND APPEAL) RULES (1959)

RULE 14

——**R. 14 (v)** — Compulsory retirement — Rules vesting absolute authority in Government — Only Governor and Chief Minister competent to exercise power — Order not in conformity with Rules — Invalid — Rajasthan Services Rules (1951) — R. 244 (2) — Rajasthan Business Rules 1955, R. 31 (vii). See Constitution of India, Art. 166. **ILR (1961) 11 Raj 536.**

[Reversed in AIR 1963 SC 1323.]

RAJASTHAN COLONISATION ACT (27 OF 1954)

——Applicability — Notification applying the provisions of the Act containing names of towns and areas in schedule — Act does not apply to towns and areas not specifically mentioned in it. **1962 Raj LW 29: ILR (1962) 12 Raj 39.**

SECTION 2

——Ss. 2 (v) (ix), 7 (1) and (2) — Rajasthan Project Areas Brick-kilns (Leases) Conditions (1959) (issued under Notification No. F. 6 (123)/Rev/B/56 dated 21st March, 1959) — Scope — Section 7 does not give power to the Government to control mining leases in land in project areas — Notification No. F. 6 (123)/Rev./B/56 issued under — The section in that respect is ultra vires — No restriction on the right to carry on business for which valid leases have already been granted under relevant provisions, can be imposed under the section. Constitution of India, Art. 19 (5) (g) — Rajasthan Minor Mineral Concession Rules (1959), R. 1 (2). **1963 Raj LW 423.**

——Ss. 2 (1) and 22 — Power of re-entry — Power could be exercised only be Collector as defined in Sec. 2 (1) — Deputy Commissioner, Colonisation, not a 'collector' as defined — Notices to vacate given by him are without authority. **1962 Raj LW 29: ILR (1962) 12 Raj 39.**

SECTION 7

——Ss. 7 (1) and (2), 2 (v) (ix) — Rajasthan Project Areas Brick-kilns (Leases) Conditions (1959) (issued under Notification No. F. 6 (123)/Rev/B/56 dated 21st March, 1959) — Scope — Section 7 does not give power to the Government to control mining leases in land in project areas — Notification No. F. 6 (123)/Rev./B/56 issued under — The section in that respect is ultra vires — No restriction on the right to carry on business for which valid leases have already been granted under relevant provisions, can be imposed under the section. Constitution of India, Art. 19 (5) (g) — Rajasthan Minor Mineral Concession Rules (1959), R. 1 (2). **1963 Raj LW 423: ILR (1963) 13 Raj 895.**

SECTION 22

——S. 22 and S. 2 (1) — Power of re-entry — Power could be exercised only by Collector as defined in Sec. 2 (1) — Deputy Commissioner, Colonisation, not a 'collector' as defined — Notices to vacate given by him are without authority. **1962 Raj LW 29: ILR (1962) 12 Raj 39.**

RAJASTHAN CO-OPERATIVE SOCIETIES ACT (4 OF 1953)

See under Co-operative Societies.

RAJASTHAN COTTON CLOTH AND YARN DEALERS LICENSING ORDER (1943)

RULE 3

——R. 3 — Validity — No such order in force on 4-4-1950 — Accused held cannot be convicted for its breach on that date. See Rajasthan Essential Supplies (Temporary Powers) Ordinance (13 of 1949), S. 6. **AIR 1955 NUC (Raj) 294.**

RULE 6

——R. 6 — Ordinance of 13 of 1949, repealed by Act 24 of 1946 which came into force on 17-8-1950 — Case decided on 3-3-1951 on which date Sec. 12 (2) of Ordinance was not in force — Offence punishable with 3 years imprisonment — No provision in Act corresponding to S. 12 (2) of the Ordinance — Offence held should have been tried as a warrant case under Criminal P. C. See Criminal P. C. (1898), S. 4 (1) (w). **ILR (1953) 3 Raj 353.**

RAJASTHAN COURT-FEE AND STAMP DUTY LAWS (EXTENSION) ACT (11 OF 1958)

SECTION 8

——S. 8 (b) — Promissory note for Rs. 5,000 executed on 26-1-1961 stamped with four one anna stamps instead of 0.25 nP. stamps — Receipt below the pronote stamped with two anna stamps instead of one ten naya paisa stamp — **Held**, (i) promissory note was insufficiently stamped and was inadmissible in evidence. (ii) Receipt was insufficiently stamped but however admissible in evidence on payment of penalty — The receipt is to be treated as a separate document altogether despite the fact that it is contained on the same sheet of paper as the pronote — Stamp Act (1899), Ss. 35, 14. **1964 Raj LW 470: ILR (1964) 14 Raj 923.**

RAJASTHAN COURT-FEES ACT (ADAPTATION) ORDINANCE (9 OF 1950)

PREAMBLE

——Pre. — Retrospective effect. See Court-Fees Act (1870), S. 1. **ILR (1960) 10 Raj 85.**

RAJASTHAN COURT-FEES AND SUITS VALUATION ACT (23 OF 1961)

SECTION 40

——Ss. 40 (a) and 48 (1) — Suit by vendor for recovery of unpaid purchase money under executory contract for sale — Suit is for specific performance of contract for sale — Court-fee payable will be under Sec. 40 (a), i. e. on full consideration of the sale and not merely on the amount of unpaid purchase money. **1963 Raj LW 653: ILR (1963) 13 Raj 1183.**

RAJASTHAN COURT OF WARDS ACT (28 OF 1951)

SECTION 2

——Ss. 2 (2), 17 and 53 — Notice under earlier Act — Benefit of S. 53 can be availed of.

By virtue of Sec. 2 (2) notice issued under the corresponding provisions of the earlier Acts shall be deemed to be notices under S. 17 of the present Rajasthan Act 28 of 1951 and the claimants cannot be debarred from availing of the benefit of S. 53 of the Act on this ground. **1961 Raj LW 280: ILR (1961) 11 Raj 508.**

SECTION 4

——S. 4 (iii) — Idol is not a minor. See Rajasthan Court of Wards Act (28 of 1951), S. 8 (1). **AIR 1955 NUC (Raj) 2193 (DB).**

SECTION 8

——Ss. 8 (1), 4 (iii) and 12 — Applicability and scope — Landholder not suffering from disqualification mentioned in Sec. 8 — Action under S. 12 is unjustified — Idol is not minor within S. 4 (iii) — S. 8 (a) does not apply to temple — S. 8 (b) and (c) do not contemplate juristic persons. **AIR 1955 NUC (Raj) 2193 (DB).**

——Ss. 8 (1) (c) (ii), (iii) and (iv), 8 (2) and 9 (1) — Validity — Constitution of India, Art. 19 (1) (f) and (5).

It is well settled that the Court has to look at both the substantive and the procedural aspects of

the impugned restrictions in order to Judge the reasonableness of the provisions.

Looking at the substantive part of the law, Clauses (ii), (iii) and (iv) of Sec. 8 (1) (c) of the Rajasthan Court of Wards Act provide the criteria on which the Government makes a declaration as to the unfitness of a landholder to manage his estate and deprive him of the possession of the property. This declaration is a subjective determination by the executive in spite of the provisions made by S. 9 (1) and S. 8 (2). Further, the criteria provided by these clauses for making a declaration are so vague and elusive and liable to such different interpretations that it is merely left at the pleasure of the executive Government to decide in a particular case whether the criteria are satisfied. A law which makes such vague provisions, the application of which depends entirely on the subjective determination of the executive, cannot be called a reasonable restriction on the fundamental right of the applicant to hold property under Art. 19 (1) (f).

Nor is it correct to say that the object of the Court of Wards Act is to prevent the dissipation of property and to enable land-revenue to be more easily collected; for in Rajasthan State grants are inalienable, and the revenue would, in any case, be collected and there can be no dissipation or splitting up of the property. So also in the context of things as they are today when the Jagirdari Resumption Act is already on the statute book, it is not possible to say that the provisions contained in the impugned clauses are in the interests of the general public.

Turning to the procedural part of the provisions the declaration under Sec. 8 (1) (c) also is a mere subjective determination. The fact that the jagirdar is furnished with a detailed statement of the grounds, and given an opportunity of showing cause, does not take away the mere subjective nature of the determination by the executive Government resulting in depriving him of the possession of his property. Thus the procedural part of the law with respect to these three clauses is also not reasonable, and therefore these three clauses are ultra vires of Art. 19 (1) (f), and are not saved by Art. 19 (5). AIR 1952 SC 196, AIR 1953 SC 373, AIR 1952 Sau 59. Foll. Rao Bhagwat Singh v. State of Rajasthan, **ILR (1954) 4 Raj 542: 1954 RLW 411: AIR 1954 Raj 131 (132, 133, 134) (Pt A) (Prs 4, 9, 13, 15, 17, 18) (FB).**

SECTION 9

●——S. 9 (1) — Effect of on S. 8 (1) (c) (ii), (iii) and (iv). See Rajasthan Court of Wards Act (28 of 1951), S. 8 (1) (c) (ii), (iii) and (iv). **AIR 1954 Raj 131 (FB).**

●——S. 9 (1) — **Validity — [Constitution of India, Art. 19 (1) (f) and (5)].**

Simply because a time limit has not been provided within which an enquiry under S. 9 (1), shall be completed it cannot be said that S. 9 (3) is also hit by Art. 19 (1) (f), and is not saved by Art. 19 (5). S. 9 (3), as it stands, is a reasonable provision, and is saved by Art. 19 (5). Rao Bhagwat Singh v. State of Rajasthan, **ILR (1954) 4 Raj 542: 1954 RLW 411: AIR 1954 Raj 131 (134) (Pt B) (Pr 19) (FB).**

SECTION 12

——S. 12 — Superintendence over estate of temple — Position of manager — Application by manager under Art. 226 — He cannot be asked to file suit to establish his title as owner — He is entitled to remain in possession unless he is removed in due course of law — (Constitution of India (1950), Art. 226). **AIR 1955 NUC (Raj) 2193 (DB).**

——S. 12 — Applicability and scope — Landholder not suffering from disqualifications mentioned in S. 8 — Action under S. 12 is unjustified — Idol is not minor within S. 4 (iii) — S. 8 (a) does not apply to temple — S. 8 (b) and (c) do not contemplate juristic persons. **AIR 1955 NUC (Raj) 2193 (DB).**

SECTION 17

——Ss. 17, 53, 2 (2) — Notice under earlier Act — Benefit of S. 53 can be availed of.

By virtue of Sec. 2 (2) notices issued under the corresponding provisions of the earlier Acts shall be deemed to be notices under Sec. 17 of the present Rajasthan Act 28 of 1951 and the claimants cannot be debarred from availing of the benefit of S. 53 of the Act on this ground. **1961 Raj LW 280: ILR (1961) 11 Raj 508.**

SECTION 21

——Ss. 21 and 53 — S. 21 does not control Section 53.

Per Modi, J. — The two sections, namely S. 21 and S. 53 are designed to cover distinctly different situations, and Section 21 should not be so interpreted as to control Sec. 53 as such a course would perhaps defeat the entire object underlying the Act. That object, speaking broadly, is to ascertain all the liabilities of the ward and to liquidate them by an efficient and prudent management under the Court of Wards and to that end compel creditors to notify their claims on pain of extinguishment and encourage them to abide by their remedies under the Act, but at the same time to leave them free to file suits or execution application even during the continuance of the management if they should desire to do so, and, in any case, to remit them to their original or ordinary rights of actions or remedies if the liabilities of the ward as ascertained by the Court of Wards or the civil Court, as the case may be, have not been fully discharged and the estate is released from the Court of Wards without such discharge. Looked at from this perspective, Ss. 18, 21 and 53 of the Act need present no disharmony and can be properly given effect to in their proper sphere. **1961 Raj LW 280: ILR (1961) 11 Raj 508.**

SECTION 53

——S. 53 — The phrase 'applications for the recovery of all claims outstanding against the ward at the date of such notice' occurring at the end of Sec. 53, would seem to cover an execution application also. **1961 Raj LW 280: ILR (1961) 11 Raj 508.**

——S. 53 — Notice under earlier Act — Benefit of Sec. 53 can be availed of. See Rajasthan Court of Wards Act (28 of 1951), S. 17. **ILR (1961) 11 Raj 508.**

——Ss. 53 and 21 — Sec. 21 does not control S. 53. See Rajasthan Court of Wards Act (28 of 1951), S. 21. **1961 Raj LW 280: ILR (1961) 11 Raj 508.**

——S. 53 — The words 'without discharging the liabilities thereof in the manner provided in

Chapter IV' used in Sec. 53 should be given their plain and ordinary meaning. They do not mean 'without ascertaining the liabilities thereof in the manner provided in Chapter IV'. AIR 1947 Oudh 195 (FB), Overruling; AIR 1940 Oudh 107, Foll. **1961 Raj LW 280: ILR (1961) 11 Raj 508.**

SECTION 55

——S. 55 — Notice to Court of Wards — Necessity.

A suit was brought for recovery of money due on bonds against the representatives of the deceased debtor. Two minors, who were claiming as rival claimants to the estate of the deceased debtor on the basis of adoption were joined as defendants in the suit. No notice of the suit was given to the Court of Wards, although the properties of the minor were under the management of the Court of Wards.

Held, that it was true that at the time when the suit was filed by the plaintiff, there was dispute as to which of the minors was entitled to the estate of the deceased debtor. But that would make one or the other minor the holder of the estate of the deceased debtor even on the date of the suit, for as soon as the proper authority recognised the adoption of one of the minors, he immediately became the holder of the estate of the deceased debtor from the date of latter's death. No suit relating to the estate could therefore be commenced without notice under S. 55 as both the minors' estates were then under the superintendence of the Court of Wards. **ILR (1957) 7 Raj 229: 1956 Raj LW 483: AIR 1957 Raj 73 (74) (Pt A) (Pr 6) (DB).**

——S. 55 — Scope — 'In charge of estate'.

There is no warrant for holding that Section 53 requires that all the estate should be actually under the charge of the Court of Wards, and that if any part of the estate is not under the charge of Court of Wards the suit with respect to that part of the estate can be brought without notice under S. 55. A notice has been made obligatory as soon as the Court of Wards assumes superintendence of the estate, and it is immaterial if some part of the estate is not under the actual superintendence of the Court of Wards. The words 'in charge of estate' have been used in order to denote the particular officer to whom the notice should be given. It has nothing to do with the actual possession of the entire estate by Collector. AIR 1930 All 602 and AIR 1924 Oudh 438, Relied on. **ILR (1957) 7 Raj 229: 1956 Raj LW 483: AIR 1957 Raj 73 (74) (Pt B) (Pr 7) (DB).**

——S. 55 — Scope — If ultra vires — S. 55 of Rajasthan Court of Wards Act not ultra vires. See Constitution of India, Art. 14. **AIR 1957 Raj 73 (DB).**

RAJASTHAN COVENANT

See Rajasthan State Covenant.

RAJASTHAN DISPLACED PERSONS (INSTITUTION OF SUITS) ORDINANCE (28 OF 1949)

SECTION 3

——S. 3 — Onus — The burden of proving that the defendant was not a displaced person is on the plaintiff who wants to invoke the special jurisdiction under Section 4. See Displaced Persons (Institution of Suits) Act (1948), Section 4. **AIR 1960 Raj 13.**

RAJASTHAN DISTRICT BOARDS ACT (2 of 1954)

SECTION 5

——S. 5 — Member elected for constituency which on date of election was not municipal area — Subsequent constitution of municipality for area does not disqualify member for continuing as member during period for which he was elected. **1958 Raj LW 328: ILR (1958) 8 Raj 555.**

——Ss. 5 (2) and 7 — Co-opted member — Right to take part in meetings and to vote — Election of Vice-chairman at the same meeting in which co-option takes place — Co-opted members not taking part in meeting — Validity of election.

The fact that the Board consists of elected members and co-opted members under Section 5 (2) does not mean that a co-opted member becomes a member in the sense that he can take part in the meetings of the Board from the very minute that he is co-opted. So far as taking part in the meetings of the Board is concerned, a member, whether elected or co-opted, can only do so after he has taken the oath prescribed under the rules framed under Section 176. Where at the meeting in which the co-option was made that item being the first on the agenda was gone through first and then the election of the Vice-chairman took place by means of a special resolution and there was also the requisite quorum, the election cannot be held to be invalid on the ground that the new members having already been co-opted the further proceedings without their presence as they had not taken the oath was invalid. **1958 Raj LW 328: ILR (1958) 8 Raj 555.**

SECTION 94

——S. 94 — 'Officer' — Meaning of — The word 'Officer' as used in Section 94 cannot rightly be interpreted so as to include a member of the Board. **1962 (2) Cr LJ 786: ILR (1962) 12 Raj 327: 1962 Raj LW 307: AIR 1962 Raj 250 (256) (Pt D) (Pr 13) (DB).**

SECTION 203

——S. 203 — Public servant — Member of District Board under Rajasthan District Boards Act (1954) is public servant. See Prevention of Corruption Act (1947), Section 6. **1962 (2) Cri LJ 786: AIR 1962 Raj 250 (DB).**

RAJASTHAN DRAMATIC PERFORMANCES AND ENTERTAINMENTS ORDINANCE (29 of 1949)

SECTION 3

——Ss. 3, 4, 6 and 8 — Not enforceable — (Constitution of India, Article 19 (6)).

So long as no procedure is prescribed by rules under Section 11 of the Ordinance regarding issue of notice, an opportunity of making a representation and an authority or a tribunal to consider it, the provisions of Sections 3, 4, 6 and 8 of the Ordinance cannot be regarded as enforceable, because they do not come within the limits of reasonableness, of Clause (6) of Article 19 of the Constitution. Section 3 of the Ordinance, as it now stands, imposes an unreasonable restriction on the right of a citizen guaranteed by Article 19 (1) (g) of the Constitution, not because it differs with any unreasonableness relating to its substantive provisions, but because no reasonable procedure has yet been made by the Government under its rule-making powers. **ILR (1952) 2 Raj 993: 1953 Raj LW 311: 1953 Cri LJ 1283: AIR 1953 Raj 162 (167) (Pt B) (Pr 20) (DB).**

——S. 3 (c) — "Deprave" and 'Corrupt' — (Words and Phrases).

The words "deprave" and "corrupt" in Section 3 (c) should be understood having regard

to the ordinary moral standards of the society. Taking this view as the basis for understanding these terms, it cannot be said that these terms are incapable of correctly laying down the idea which is behind the objects of the impugned Act. These terms are, therefore, clear and they cannot be said to be vague. **ILR (1952) 2 Raj 993: 1953 Raj LW 311: 1953 Cri LJ 1283: AIR 1953 Raj 162 (164) (Pt C) (Pr 10) (DB).**

——S. 3 (c) — District Magistrate prohibiting performance or entertainment under Section 3 (c) — Necessity to record opinion — (Constitution of India, Article 19 (1) (g) and (6)).

It is necessary for the District Magistrate before issuing prohibitory order, to record an opinion that the performance or entertainment was likely to deprave and corrupt persons present at the performance or entertainment. **1952 Raj LW 369: ILR (1952) 2 Raj 364: AIR 1953 Raj 101 (102) (Pt A) (Pr 7) (DB).**

——S. 3 (c) — Constitution of India, Article 226 — Another remedy open — District Magistrate by order prohibiting pistol shooting game at applicants' variety show — Application for writ under Article 226 — To continue pistol shooting game, invite prosecution and then to plead in criminal case that order was illegal and, therefore, unenforceable held was not effective remedy and application could not be thrown out on that ground. See Constitution of India, Article 226. **AIR 1953 Raj 101 (DB).**

SECTION 4

——Ss. 4, 3, 6 and 8 — Not enforceable — So long as no procedure is prescribed by rules under Section 11 of the Ordinance regarding issue of notice, an opportunity of making a representation and an authority or tribunal to consider it, the provisions of Sections 3, 4, 6 and 8 of the Ordinance cannot be regarded as enforceable, because they do not come within the limit of reasonableness, of Clause (6) of Article 19 of the Constitution. See Rajasthan Dramatic Performances and Entertainments Ordinance (29 of 1949), Section 3. **1953 Cri LJ 1283: AIR 1953 Raj 162 (DB).**

SECTION 6

——Ss. 6, 8, 3 and 4 — Not enforceable. See Rajasthan Dramatic Performances Entertainments Ordinance (29 of 1949), Section 3. **1953 Cri LJ 1283: AIR 1953 Raj 162 (DB).**

SECTION 8

——Ss. 8, 3, 4 and 6 — Not enforceable. See Rajasthan Dramatic Performances and Entertainments Ordinance (29 of 1949), Section 3. **1953 Cri LJ 1283: AIR 1953 Raj 162 (DB).**

RAJASTHAN EDUCATION CODE (1957)

CHAPTER 8, RULE 3

——Chap. 8, R. 3 — Applicability to High School examinations.

Rule 3 in Chapater 8 is not applicable to high school examinations. Its application is confined to home examinations conducted by the school authorities upto Class IX. **1960 Raj LW 390: ILR (1960) 10 Raj 1078.**

RAJASTHAN ENTERTAINMENT TAX ACT (24 of 1957)

SECTION 6-A

——S. 6-A (as amended by Act 8 of 1960) — Power for levy of entertainment tax — Section not invalid for excessive delegation. **ILR (1964) 14 Raj 6: 1964 Raj LW 203: AIR 1964 Raj 106 (DB).**

——S. 6-A — Classification for levy of tax — Classification held reasonable — Does not offend Article 14 of Constitution. **ILR (1964) 14 Raj 6: 1964 Raj LW 203: AIR 1964 Raj 106 (109, 110) (Pt B) (Prs 12, 15) (DB).**

——S. 6-A — Entertainment tax under — Not a tax on calling or trade of proprietor — Article 276 (2) of Constitution not attracted.

The use of the word 'entertainments' in Entry 62 in List II of the seventh schedule in plural clearly denotes that the word is employed as a common noun and not as an abstract noun. Accordingly in the case of a cinema it means a tax on a show. Merely because the proprietor or exhibitor of a cinema house is called upon to pay the tax it does not acquire the character of a tax on the calling or the trade. The additional entertainment tax levied by Section 6-A is in the nature of an entertainment tax and not a tax on the calling or trade of the proprietor and the provisions of Article 276 (2) of the Constitution are, therefore, not attracted. AIR 1954 Bom 261, Rel. on; AIR 1953 Madh Bha 145, Dissented from. **ILR (1964) 14 Raj 6: 1964 Raj LW 203: AIR 1964 Raj 106 (111) (Pt C) (Pr 17) (DB).**

RAJASTHAN ESSENTIAL SUPPLIES (TEMPORARY POWERS) ORDINANCE (13 of 1949)

PREAMBLE

——Pre. — Register of sales — Retail licensee — It is his duty to enter in register retail sale made by him as arhatiya (agent) on behalf of another. **1952 Raj LW 67: ILR (1951) 1 Raj 734 (DB).**

SECTION 3

——Ss. 3, 6 — Rajasthan Foodgrains (Movement) Control Order (1949), Section 5 — Offence under is complete as soon as accused obtains "Rawana" — Entering into other division is not necessary. **AIR 1955 NUC (Raj) 4656.**

SECTION 6

——Ss. 6 and 3 — Rajasthan Foodgrains (Movement) Control Order (1949), Section 5 — Offence under is complete as soon as accused obtains "Rawana" —Entering into other division is not necessary. **AIR 1955 NUC (Raj) 4656.**

——S. 6 — Rajasthan Cotton Cloth and Yarn Dealers Licensing Order, 1943, Rule 3 — No such order in force on 4-4-1950 — Accused held cannot be convicted for its breach on that date. **AIR 1955 NUC (Raj) 294.**

——S. 6 — Warrant case — Ordinance 13 of 1949, repealed by Act 24 of 1946 which came into force on 17-8-1950 — Case decided on 3-3-1951 on which date Section 12 (2) of Ordinance was not in force — Offence punishable with 3 years' imprisonment — No provision in Act corresponding to Section 12 (2) of the Ordinance — Offence held should have been tried as a warrant case under Criminal P. C. See Criminal P. C. (1898), Section 4 (1) (w). **AIR 1955 NUC (Raj) 294.**

——Ss. 6 (1), 10 (ii) — Entries of receipt of quantities of Bajra, made in private accounts — No sale made till the time of raid — Entries found not made in required registers — Plea that they would have been so made at the end of day — Acquittal on charge of not making entry of receipt in register, held not incorrect. **1952 Raj LW 67: ILR (1951) 1 Raj 734 (DB).**

SECTION 11

——S. 11 — Compliance with — Non-mention of rule contravened does not render conviction invalid when report states all facts of offence under charge and accused had notice of the case against him. AIR 1946 All 416, Dissented. **AIR 1955 NUC (Raj) 4656.**

——S. 11 — First report accompanying the police charge — Held sufficient compliance.

Where the first report or an order of the appropriate Civil Supplies authority accompanies the charge sheet of the police, and is referred to therein, there is sufficient compliance with the provisions of Sction 11 of the Ordinance. In such case the facts are there for the Magistrate to see, and the mere fact that they are not repeated in a particular column will make no difference. AIR 1947 Sind 68 and AIR 1949 Oudh 66 Disting. **1952 Raj LW 67: ILR (1951) 1 Raj 734 (DB).**

SECTION 12

——S. 12 (2) — Warrant case. See Criminal P. C. 1898, Section 4 (1) (W). **AIR 1955 NUC (Raj) 294.**

SECTION 20

——S. 20 — Effect on pending prosecutions under repealed laws — (Essential Supplies (Temporary Powers) Act (1946), S. 17 (2)).

By the Rajasthan Ordinance a unified Act was given to the whole of Rajasthan and it was not intended that subjects of different parts of Rajasthan should be treated differently in the matter of prosecutions arising under the repealed laws. If it were the intention of the law-making authority that prosecutions launched under the different Acts repealed by the Rajasthan Ordinance should survive after its enactment they would have, while enacting the saving Clause (2) of Section 20, said that things done or action taken under any of the repealed laws and in force immediately before the commencement of the Ordinance would also continue in force. In the face of the facts that there was no unified General Clauses Act for the whole of Rajasthan at the time when the Rajasthan Ordinance came into being and that the Central General Clauses Act was not adopted in Rajasthan and that the legislature clearly made a saving in favour of the things it wanted to save, the only inference that can follow is that the legislature did not intend that prosecutions under the different repealed law should continue in spite of the repeal of the laws themselves.

Therefore a prosecution, launched under Sections 6 and 8, Jaipur Essential Supplies (Temporary Powers) Act, 1947, will not survive after the coming into force of the Rajasthan Ordinance and even if it be held that Sec. 6, Jaipur General Clauses Act applied the prosecution will not be saved in view of the different intention which appears from Section 20, of the Ordinance. **1952 Raj LW 480: ILR(1952) 2 Raj 374: 1953 Cri LJ 1890: AIR 1954 Raj 10 (12) (Pr 9) (DB).**

RAJASTHAN EXCISE ACT (2 of 1950)

SECTION 1

●——S. 1 (3) — Notification bringing into force Act at future date when notification is published in Gazette.

It cannot be said that the Rajasthan Excise Act (2 of 1950) failed to have effect or was prevented from coming into force merely because the State instead of itself fixing a definite date for its enforcement specified such date with reference to a future point of time, viz., the date of the publication of the notification (No. F. 49 (1), S. R. 150 dated 20-6-1950), in the Gazette which was in fact made on 1-7-1950.

The mention of Section 1 (13) as the provision under which the Notification was said to have been issued held was a printing mistake for Section 1 (3). Manohar Singh v. State of Rajasthan, **ILR (1954) 4 Raj 113: 1955 Raj LW 98: AIR 1954 Raj 85 (89) (Pt A) (Pr 11) (FB).**

SECTION 3

——Ss. 3 (4) (iii), 16 (g) and 54 (d) — Excisable article — Word "and" in Section 3(4)(iii) — Meaning — 'Fermented wash", Possession of by itself — Whether an offence.

Having regard to the object of the Rajasthan Excise Act and the provisions of Section 16 (g) and Section 54 (d) of the Act the word "and" appearing in Section 3 (4) (iii) of the Act has to be read as "or" so that the possession of a still or any other appliance for distillation as well as the possession of fermented wash or similar other material for distillation would fall within the mischief of Clause (d) of Section 54 of the Act and would be an offence. 1937-1 KB 305, Rel. on.

Provisions of Sections 54 (d) and 16 (g) indicate that it is not the combined possession of the appliances for distillation 'and' of the materials therefore which is sought to be punished, but an embargo has been put on the use or possession of each one of them taken individually, such as materials, still, utensil, implement, instrument or apparatus whatsoever, the pre-requisite condition being that such materials or appliances are intended to be used for the purposes of manufacturing any excisable article in the sense of an intoxicant for human consumption. 1937-1 KB 305, Rel. on.

The expression "excisable article" as used in the last part of Section 54 (d) as also in Cl. (a) carries the narrower meaning as provided for in sub-clauses (i) and (ii) of Clause (4) of Section 3. **1962 Raj LW 283: ILR (1962) 12 Raj 351.**

——Ss. 3 (4), 54 and 54 (a) — Seizure of several tins of illicit liquor from house of accused — No contention that article seized was medical preparation — Article seized found fit for human consumption as an intoxicating liquor — **Held,** that it was excisable article within Section 3 (4) — Premises from which liquor was recovered rented by accused who was head of joint family — Accused held in possession and was rightly convicted. See Rajasthan Excise Act, 1950, Section 54 (a). **1960 Raj LW 600.**

——Ss. 3 (4) (i), 57 — For offence under Section 57 — Spirit need not be fit for human consumption.

Whether spirit is for human consumption or otherwise it is included in Section 3 (4) (i). Even if the stuff is 'spirit' unfit for human consumption, a case under Section 57 can be made out against the accused persons. **1960 Raj LW 215: ILR (1960) 10 Raj 738.**

——Ss. 3 (14) and 54 (a) — Scope — Possession of Sulfa — Offence.

The definition of an intoxicating drug in sub-section (4) of Section 3 does not show that it means Sulfa also. Where there is nothing in the evidence to show that Sulfa is charas that is the resin obtained from the Indian hemp plant which has not been submitted to any manipulations other than those necessary for packing and transport, it cannot be held that Sulfa is an excisable article within the meaning of sub-section (4) of Section 3 of the Act. Hence a person possessing Sulfa cannot be convicted under Section 54 (a) of the Act. **1957 Raj LW 625: ILR (1957) 7 Raj 1082.**

SECTION 16

——S. 16 (g) — Excisable article — Word "and" in Section 3 (4) (iii) — Meaning — "Fermented wash", Possession of by itself — Whether an offence. See Rajasthan Excise Act (2 of 1950), Section 3 (4) (iii). **1962 Raj LW 283.**

●——S. 16 (2) — Notification by Rajasthan State withdrawing privileges granted by Ruler of Udai-

pur to Jamindars, to manufacture liquor for private consumption — Privilege held not right to property — No infringement of fundamental right. See Constitution of India, Article 31. **AIR 1954 Raj 85 (FB).**

SECTION 44

——**Ss. 44 (2), 54 and 67** — Report of Excise Officer under Section 67 — If police report — Cr. P. Code, Sections 251-A and 252 — Applicability. Report of Excise Officer under Section 67 is not a police report — Procedure under Section 252 and not under Section 251-A is applicable. See Criminal P. C. (1898), Section 251-A. **1959 Cr LJ 1214: AIR 1959 Raj 248.**

——**S. 44 (2) — Report of Excise Officer is not report of Police Officer within meaning of Section 251-A, Cr. P. C. — (Criminal P. C. (1898), Section 251-A).**

Section 44 (2) of the Rajasthan Excise Act, 1950, enables an Officer referred in sub-section (1) to exercise the same powers in respect of any investigation mentioned therein as an Officer-in-charge of the police station may exercise in a cognizable case under the provisions of Chapter 14 of the Code of Criminal Procedure. But this does not mean that the report of an excise officer would be turned into the report of a police officer. **ILR (1958) 8 Raj 1206: 1959 Raj LW 1.**

SECTION 47

——**Ss. 47 and 54 — Conviction under Section 54 — Irregularity in search — Effect on conviction — Criminal P. C. (1898), Section 103.**

A conviction of a person under Sec. 54 of the Rajasthan Excise Act for being in possession illicit liquor would not be affected by the fact that an irregularity had been committed in a search conducted under Section 47 of the Act unless he has been prejudiced by such irregularity. Nor would such irregularity render the recovery of article illegal. AIR 1929 All 937, Rel. on; AIR 1960 SC 210, Dist. **1962 Raj LW 628: ILR (1962) 12 Raj 815.**

SECTION 54

——**S. 54** — Conviction under Section 54 — Irreguarity in search — Effect on conviction. See Rajasthan Excise Act (2 of 1950), Section 47. **1962 Raj LW 628.**

——**S. 54 (d)** — Excisable article — Word "and" in Section 3 (4) (iii) — Meaning — "Fermented wash", Possession of by itself — Whether an offence — The word "and" appearing in Section 3 (4) (iii) has to be read as "or" so that the possession of a still or any other appliance for distillation as well as the possession of fermented wash or similar other material for distillation would fall within the mischief of Clause (d) of Section 54 and would be an offence. See Rajasthan Excise Act (2 of 1950), Section 3 (4) (iii). **1962 Raj LW 283.**

——**S. 54** — Seizure of several tins of illicit liquor from house of accused — No contention that article seized was medical preparation — Article seized found fit for human consumption as an intoxicating liquor — **Held,** that it was excisable article within Section 3 (4) — Premises from which liquor was recovered rented by accused who was head of joint family — Accused held in possession and was rightly convicted. **1960 Raj LW 600.**

——**S. 54 (Proviso) — Applicability of — Does not apply in case of conviction under Section 54 (c).**

Possession of a workable still is not an ingredient of an offence under Section 54 (c) and this circumstance is an ingredient of an offence under Section 54 (d). The proviso to Section 54 has reference to an offence under Section 54 (d) and it cannot be said as laying down minimum penalty for an offence under Section 54 (c). The proviso only comes into play when a person is convicted under Section 54 (d) and, therefore, a person convicted under Section 54 (c) cannot be sentenced under the proviso. **1960 Raj LW 446: ILR (1960) 10 Raj 936.**

——**Ss. 54, 44 (2) and 67** — Criminal P. C. (1898), Sections 251-A and 252 — Scope — 'Instituted on police report' — Report of excise officer under Section 67, Rajasthan Excise Act not a police report — Procedure under Section 252 and not under Section 251-A is applicable. See Criminal P. C. (1898), Section 251-A. **1959 Cri LJ 1214: AIR 1959 Raj 248.**

——**S. 54 — Offence under Section 54 is triable as warrant case — Procedure in Section 252, Cr. P. C. is to be followed — (Criminal P. C. (1898), Section 4 (1) (w) and Section 5 (2)).**

The offence under Section 54 of the Rajasthan Excise Act is punishable with imprisonment for a term which may extend to two years and therefore it is triable as a warrant case. And the procedure which is to be followed by a Magistrate in trying a warrant case which is instituted otherwise than on a police report is the one that is laid down in S. 252, Criminal P. C. **ILR (1958) 8 Raj 1206: 1959 Raj LW 1.**

——**S. 54 (a) — Sulfa, if charas — Possession of Sulfa — Offence — Conviction — Sustainability.**

The definition of an intoxicating drug in sub-section (4) of Section 3 does not show that it means Sulfa also. Where there is nothing in the evidence to show that Sulfa is Charas that is the resin obtained from the Indian hemp plant which has not submitted to any manipulations other than those necessary for packing and transport, it cannot be held that Sulfa is an excisable article within the meaning of sub-section (4) of Section 3 of the Rajasthan Excise Act. Hence a person possessing sulfa cannot be convicted under Section 54 (a) of that Act. **1957 Raj LW 625: ILR (1957) 7 Raj 1082.**

SECTION 54-A

——**S. 54-A — Possession of liquor of different strength from what is sold.**

What is an offence under the Act is the possession of any liquor in contravention of any rule which may have been made by the Excise Commissioner fixing the strength of quantity in excess of or below which the liquor shall not be possessed by any person. Unless, therefore, the Excise Commissioner has fixed the strength or the quantity of liquor by any notification with the previous sanction of the Government, the possession of liquor of a strength different from what is sold does not amount to an offence. Notification No. 4163 obviously only purports to fix the price of liquor of particular variety which can be charged by a licensee. It does not lay down the strength or quantity in excess of or below which any liquor shall not be possessed by any person. Therefore it cannot be said that the possession of the liquor is a transgression of the rule promulgated by the notification. **1957 Raj LW 438.**

SECTION 57

——**Ss. 57, 3 (4) (i) — For offence under Section 57 — Spirit need not be fit for human consumption.**

Whether spirit is for human consumption or otherwise it is included in Section 3 (4) (i). Even if the stuff is "spirit" unfit for human consumption, a case under Section 57 can be made

out against the accused person. **1960 Raj LW 215: ILR (1960) 10 Raj 738.**

SECTION 67

——**S. 67 (as amended in 1958)** — Scope and effect of. Having regard to the amendment of Section 67 no useful purpose would be served by setting aside the conviction of the accused, on account of the fact that the procedure under Section 251-A was followed instead of procedure laid down in Section 252, Cr. P. C., for a retrial would have to be made in accordance with the same procedure as was adopted at the trial already held. It was discretionary on the High Court to exercise its revisional jurisdiction and under the circumstances of the case, when substantial justice had been done, it would not interfere with the judgment of the lower Court on a highly technical point not resulting in prejudice or injustice to the accused. See Criminal P. C. (1898), Section 251-A. **1962 (2) Cr LJ 414 (Raj).**

——**S. 67** — Offence under — Trial — Procedure — The procedure followed under Sec. 251-A instead of Section 252 of Criminal P. C. (1898) is illegal. See Criminal P. C. (1898), Sec. 251-A. **1959 Cr LJ 1359: AIR 1959 Raj 266 (DB).**

SECTION 71

● ——**S. 71 (2) — Validity — (Constitution of India, Art. 14).**

Section 71 (2) of the Act is discriminatory and is therefore void. As sub-section (2) is worded, it does not contain any basis of classification itself although that it not an indispensable requirement for upholding a classification. There is nothing in the entire Act either in the preamble or elsewhere therein to show whether and if so on what basis an exemption from the operation of the provisions of the Act could be granted to any class of persons, and in respect of any excisable articles or with reference to any specified area or any specified period or occasion. It is further remarkable that the section pemits exemptions in the case of a single person as well. Section 71 (2) therefore, is clearly of character which would place unregulated and unbridled power in the hands of the Government by which it would be open to it to exempt any person whatsoever from the operation of the Act as contradistinguished from any other person without any rhyme or reason.

It follows as a necessary corollary from this that the Notification issued by the State of Rajasthan under Section 71 (2) of the Rajasthan Act must be held to be void and of no effect. Manohar Singh v. State of Rajasthan, **ILR (1954) 4 Raj 113: 1955 Raj LW 98: AIR 1954 Raj 85 (93, 94) (Pt C) (Pra 24, 28) (FB).**

SECTION 73

● ——**S. 73 (2)** — Notification by Rajasthan State withdrawing cash grants granted by Ruler of Udaipur to Jamindars, for taking away Jamindars' right to manufacture liquor for general consumption — Question, whether cessation of grant amounts to deprivation of — Suit challenging notifications would not be barred by Section 73 (2). See Constitution of India, Article 31. **AIR 1954 Raj 85 (FB).**

RAJASTHAN EXCISE DUTIES ORDINANCE (25 of 1949)

SECTION 5

● ——**Ss. 5, 26, 28 — Rajasthan Administration (Amendment) Ordinance (5 of 1949), Section 8 (2) — Excise Rules framed under Ordinance (25 of 1949) — Publication and authentication held valid.**

Held, on facts that the authentication by the Law Secretary appearing on the first page of the Gazette was intended to govern the entire notification including both the Ordinance proper and the Rules framed thereunder which became parts of the statute. Section 28 of the Ordinance authorised such a mode of promulgation and authentication. The authority that promulgated the rules having intended the signature of the Law Secretary appearing at the beginning of the publication as an authentication of the rules, the formal requirements of Section 8 (2) of the Rajasthan Administration (Amendment) Ordinance, 5 of 1949, were satisfied. Whether the authentication appeared in the beginning of the notification or at the end of it was not material. AIR 1953 Raj 145 (FB), **Reversed.** Union of India v. Maharaja Kishangarh Mills, Ltd., **(1961) 3 SCR 524: (1961) 2 SCJ 202: AIR 1961 SC 683 (686) (Pt A) (Pr 5).**

● ——**Ss. 5 and 26 — Invalidity of Jaipur Excise Duties Rules 1945— (Jaipur Excise Duties Rules, 1945).**

The Jaipur Excise Duties Rules of 1945, which appear at page 170 of the Hindi Gazette of Rajasthan, dated 12-11-1949 not having been proved to have been framed by the authority entitled to frame them, are invalid and of no effect. Maharaja Kishangarh Mills, Ltd. v. Union of India, **ILR (1953) 3 Raj 128: 1953 Raj LW 381: AIR 1953 Raj 145 (146) (Pt E) (Pr 5) (FB).**

[Reversed in AIR 1961 SC 683.]

SECTION 26

● ——**Ss. 26 and 28** — Rajasthan Administration (Amendment) Ordinance (5 of 1949), Section 8 (2) — Excise Rules framed under Ordinance (25 of 1949) — Publication and authentication held valid. AIR 1953 Raj 145 (FB), **Reversed.** See Rajasthan Excise Duties Ordinance (25 of 1949), Section 5. **AIR 1961 SC 683.**

● ——**Ss. 26 and 5 — Invalidity of Jaipur Excise Duties Rules (1945) — Jaipur Excise Duties Rules (1945).**

The Jaipur Excise Duties Rules of 1945, which appear at page 170 of the Hindi Gazette of Rajasthan, dated 12-11-1949 not having been proved to have been framed by the authority entitled to frame them, are invalid and of no effect. Maharaja Kishangarh Mills Ltd. v. Union of India, **ILR (1953) 3 Raj 128: 1953 Raj LW 381: AIR 1953 Raj 145 (146) (Pt E) (Pr 5) (FB).**

[Reversed in AIR 1961 SC 683.]

SECTION 28

● ——**Ss. 28, 26, 5** — Rajasthan Administration (Amendment) Ordinance (5 of 1949), Section 8 (2) — Excise Rules framed under Ordinance (25 of 1949) — Publication and authentication held valid. AIR 1953 Raj 145 (FB), **Reversed.** See Rajasthan Excise Duties Ordinance (25 of 1949), Section 5. **AIR 1961 SC 683.**

SECTION 30

——**S. 30** — Constitution of India, Articles 294, 295 and 14 — Agreement between Government of former Jodhpur State and plaintiff for setting up mill by latter — State agreeing to exempt plaintiff from payment of excise duty — Agreement not enforceable against State of Rajasthan or Union of India — Contract not void under Article 14. See Constitution of India, Article 294. **AIR 1960 Raj 92 (DB).**

RAJASTHAN FACTORIES RULES (1951)

RULE 4

——**R. 4** — Conducting business without licence — It is a continuing offence. See Factories Act

(1948), Section 6. **1955 (1) Cr LJ 333: AIR 1965 Raj 65.**

RAJASTHAN FINANCE ACT (14 of 1961)

SECTION 8

——**S. 8** — Rajasthan Passengers and Goods Taxation Act (18 of 1959), Section 3 — Rajasthan Finance Acts amending Section 3 of the Act of 1959 without obtaining assent of the President — Taxes imposed by the amending Act during 1961 and 1962 not valid — Effect of validating Act of 1964 — **Held,** that Section 4 not only validated the impugned provisions of the Finance Acts but also re-enacted them with retrospective effect — Taxes collected during the period held legal. See Constitution of India, Article 304 (b), Proviso. **1965 Raj LW 118.**

RAJASTHAN FINANCE ACT (11 of 1962)

SECTION 9

——**S. 9** — Rajasthan Passengers and Goods Taxation Act (18 of 1959), Section 3 — Rajasthan Finance Acts amending Section 3 of the Act of 1959 without obtaining assent of the President — Taxes imposed by the amending Act during 1961 and 1962 not valid — Effect of validating Act of 1964 — **Held,** that Section 4 not only validated the impugned provisions of the Finance Acts but also re-enacted them with retrospective effect — Taxes collected during the period held legal. See Constitution of India, Article 304 (b), Proviso. **1965 Raj LW 118.**

RAJASTHAN FOOD GRAINS CONTROL ORDER (1949)

CLAUSE 1

——**Cl. 1** — Essential Supplies (Temporary Powers) Amendment Act (1950), Section 10 — Rajasthan Food Grains Control Order (1949) kept in force — Notification of Rajasthan Government dated 9-6-1951, No. F. 3 (a) (iv) C. S. (F) prohibiting export of grain outside Rajasthan is valid in spite of Government of India, S. R. O. 393. See Essential Supplies (Temporary Powers) Act (1946) (As Extended to Rajasthan). **AIR 1955 NUC (Raj) 1890 (DB).**

CLAUSE 4

——**Cl. 4** — Scope of — Possession of grain by non-licensed person for a week is not unlawful See Rajasthan Food Grains Control Order (1949), Clause 17. **AIR 1955 NUC (Raj) 1054.**

CLAUSE 17

——**Cl. 17 (1) and (2) — Relative scope — Clause 17 (1), if exception to Clause 17 (2).**

Sub-clause 17 (1) cannot be treated as an exception to sub-clause 17 (2). Sub-clause 17 (1) by itself does not create any offence, it merely defines the scale of the quantity of food grains for the purposes of sub-clause (2). 1952 Raj LW 280, Dissented from. **ILR (1956) 6 Raj 316: 1956 Raj LW 378: 1957 Cr LJ 665: AIR 1957 Raj 178 (179) (Pt B) (Pr 8) (DB).**

——**Cl. 17 (1)** — Burden to prove that food grains in excess of that prescribed under Cl. 17 (1) had been in possession on accused for more than a week — Duty of prosecution stated. See Evidence Act (1872), Section 105. **1957 Cri LJ 665: AIR 1957 Raj 178 (DB).**

——**Cls. 17 and 4** — Scope of — Possession of grain by non-licensed person for a week is not unlawful. **AIR 1955 NUC (Raj) 1054.**

——**Cl. 17 (1) and (2) — Scope.**

Sub-rule (2) is an exception to sub-rule (1) of Rule 17. Sub-rule (1) clearly prohibits any person who is not a licensed grain dealer from retaining in his possession at any time more than 50 maunds of foodgrains. Sub-rule (2) establishes an exception for the benefit obviously of those who grow foodgrains. If, therefore, any person who is charged for contravention of Rule 17 (1) wants to take advantage of the exception provided under Rule 17 (2), it is for him to plead and prove that his case is covered by Rule 17 (2). If that were not so, it would generally be impossible to prosecute anyone for the breach of Rule 17 (1). **1952 Raj LW 280: ILR (1952) 2 Raj 286.**

——**Cl. 17 (1) — Mens rea.**

The manner in which Rule 17 (1) is worded rules out by necessary implication the requirement of mens rea and the mere fact of possession is sufficient to establish guilt. AIR 1947 PC 135, AIR 1949 Cal 348, Disting. **1952 Raj LW 280: ILR (1952) 2 Raj 286.**

——**Cl. 17 — Ignorance.**

Everyone is presumed to know the law. There is not even a provision corresponding to R. 119 of the Defence of India Rules in the Essential Supplies Ordinance or in the Foodgrains Control Order and, therefore, every one must be presumed to know the law as soon as it has been made. **1952 Raj LW 280: ILR (1952) 2 Raj 286.**

CLAUSE 25

● ——**Cl. 25 — Validity — (Constitution of India, Articles 19 (1) (g), 31 (2)).**

The freezing of the stocks of foodgrains under Clause 25 of the Rajasthan Foodgrains Control Order, 1949, is reasonably related to the object, which the Essential Supplies (Temporary Powers) Act, 1946, was intended to achieve, namely, to secure the equitable distribution and availability at fair prices and to regulate transport, distribution, disposal and acquisition of an essential commodity such as foodgrains. The first portion of the clause cannot, therefore, be held as void under Article 19 (1) (g).

The last portion of the clause, however, places an unreasonable restriction upon the carrying on of trade or business and is thus an infringement of the dealers' right under Article 19 (1) (g) of the Constitution and is therefore to that extent void.

The same result follows if the impugned clause is examined in the light of Article 31 (2) The clause by vesting the power in the authority to acquire the stocks at any price fails to fix the amount of the compensation or specify the principles on which the compensation is to be determined. The clause leaves it entirely to the discretion of the executive authority to fix any compensation it likes and thus offends against Article 31 (2). State of Rajasthan v. Nath Mal. **1954 SCJ 404: 1954 SCA 347: 1954 RLW 253: 1954 SCR 982: AIR 1954 SC 307 (308) (Prs 5, 6).**

——**Cl. 25 — Validity — Order directing sale of freezed stock made under — Freezing order passed under Marwar Food Grains Release Order, 1946 — If can be challenged under Constitution of India.**

Clause 25 of the Rajasthan Food Grains Control Order, which provides that freezed stocks shall be liable to be requisitioned or disposed of under order of the appropriate authority at the rate fixed for purposes of Government procurement, is void both under Article 19 (1) (g) and under Article 31 (2) of the Constitution. AIR 1952 Raj 74, Foll.

Where a freezing order was made under the Marwar Food Grains Release Order, 1946, and an order directing the sale of the freezed stock was made under Clause 25 of the Rajasthan Food Grains Control Order, the former order could not

be challegned under the Constitution having been made before it came into force, while the latter order is liable to be set aside. **ILR (1951) 1 Raj 692: 1952 RLW 478: AIR 1952 Raj 79 (60) (Pt C) (Pr 10) (DB).**

——Cl. 25 — Not void as contravening Article 14 of the Constitution — Constitution of India, Article 14.

Clause 25 of the Rajasthan Food Grains Control Order is equally applicable to all persons who come within the purview of the Order and therefore there is no discrimination in the law itself. It may be that an individual officer may exercise his discretion dishonestly, arbitrarily or capriciously and in contravention of Article 14 of the Constitution but then the officer would be going contrary to law.

The Court may not in such a case be powerless to give the subject protection against a dishonest officer, but that protection cannot be sought under Article 14 or under Article 226 of the Constitution. Clause 25, therefore, of the Rajasthan Foodgrains Control Order is not hit by Article 14 of the Constitution, and cannot be declared void on that ground. AIR 1951 Bom 132, Rel. on. (1886) 118 US 356, Dist. **1952 Cri LJ 732: 1951 Raj LW 467: ILR (1951) 1 Raj 674: AIR 1952 Raj 74 (75) (Pt A) (Pr 6).**

——Cl. 25 — Validity — Constitution of India, Articles 13, 19 (1) (g) and (6).

Clause 25 of the Rajasthan Food Grains Control Order gives powers to various officers mentioned therein to freeze any stocks of foodgrains held by any person. The clause does not say that no reasons need be assigned; but it gives this power without the necessity of assigning any reasons for such action. It is thus possible for any of the officers named in the clause to freeze the stock of any dealer without assigning any reason, and thus completely paralyse his trade or business. Such power is an arbitrary power, and cannot be said to be a reasonable restriction on the fundamental right conferred by Article 19 (1) (g) of the Constitution.

The provision of requisitioning foodgrains or directing their disposal under the last portion of Clause 25 at Government procurement rate, which is bound to be much lower than the ceiling price, would prevent people from carrying on trade or business which could be lawfully done at ceiling price. The last portion of Clause 25 is thus a restriction on carrying on trade or business which is a fundamental right under Article 19 (1) (g) of the Constitution of India, and the said restriction is not at all reasonable. Hence clause 25 is not saved by Article 19 (6), and, therefore, it being not in conformity with Part III of the Constitution is void. AIR 1951 Cal 90 and AIR 1951 SC 118. Applied. **1952 Cri LJ 732: 1951 Raj LW 467: ILR (1951) 1 Raj 674: AIR 1952 Raj 74 (76, 77) (Pt C) (Prs 10, 11) (DB).**

——Cl. 25 — Order was not in existence prior to 26-7-1948 — Clause 25 is not saved by Article 31 (5) of the Constitution — Constitution of India, Art. 31 (5).

Even though the Essential Supplies (Temporary Powers) Act might have been passed in 1946 orders passed thereunder must be held to have been passed on the day on which they were passed. Even, therefore, when the Essential Supplies (Temporary Powers) Act, 1946, became applicable to Rajasthan from the 17th of August, 1950, and the Rajasthan Foodgrains Control Order, 1949, became an order under the Act of 1946, after its application to Rajasthan, the date of the Rajasthan Foodgrains Control Order could not be changed from what is actually is, namely the 12th of August, 1949. Therefore, any provision in the Rajasthan Foodgrains Control Order, 1949, as to compensation would not be saved by Article 31 (5), as that Order came into force long after the 26th of July, 1948. **1952 Cri LJ 732: 1951 Raj LJ 467: ILR (1951) 1 Raj 674: AIR 1952 Raj 74 (78) (Pt E) (Pr 15) (DB).**

——Cl. 25 — Offends Article 31 (2) of the Constitution and is void — Constitution of India, Article 31 (2).

Clause 25, of the Rajasthan Food Grains Control Order which provides for requisitioning of stocks at the rate fixed for purposes of Government procurement, is void, as it offends Article 31 (2) of the Constitution, as fair compensation has not been fixed in the law for acquiring the food grains. **1952 Cri LJ 732: 1951 Raj LW 467: ILR (1951) 1 Raj 674: AIR 1952 Raj 74 (78) (Pt F) (Pr 17) (DB).**

RAJASTHAN FOOD GRAINS (MOVEMENT) CONTROL ORDER (1949)

CLAUSE 5

——Cl. 5 — Offence under is complete as soon as accused obtains "Rawana" — Entering into other division is not necessary. See Rajasthan Essential Supplies (Temporary Powers) Ordinance (13 of 1949), S. 3. **AIR 1955 NUC (Raj) 4656.**

RAJASTHAN FOOD GRAINS (RABI) MONOPOLY PROCUREMENT ORDER (1952)

CLAUSE 6

——Cl. 6 — Validity — (Essential Supplies (Temporary Powers) Act (1946), S. 3).

The words used in Section 3 (1) of the Essential Supplies (Temporary Powers) Act are wide enough to include acquisition by Government of an essential commodity for the purposes of its equitable distribution and availability at fair price. Clause 6 of the Order, in so far as it provides for acquisition of property, is not ultra vires of the provisions of the Essential Supplies (Temporary Powers) Act of 1946. Ramjidas v. State of Rajasthan, **ILR (1953) 3 Raj 921: 1954 Raj LW 357: AIR 1954 Raj 97 (99) (Pt C) (Prs 12, 13) (FB).**

RAJASTHAN FOOD GRAINS (RESTRICTION ON BORDER MOVEMENT) ORDER (1959)

CLAUSE 3

——Cls. 3, 4 and 5 (iv) — Charge that wheat was moved from internal border area within Rajasthan to a place outside territory of that State without necessary permit — Contention that wheat was being moved to nearest grain market within the State of Rajasthan itself — Moving of wheat without permit — Offence held technical offence — Moreover some of accused persons found only as carriers employed by another — Sentence of one year's R. I. and fine of Rs. 1,000 held excessive — Sentence of fine held alone would meet ends of justice. See Criminal P. C. (1898), Section 32. **1962 Raj LW 608: ILR (1962) 12 Raj 579.**

CLAUSE 4

——Cl. 4 — Sentence — Case under Essential Commodities Act (1955), Sections 7, 8 — Moving of wheat without permit — Offence held technical offence — Some accused employed as carriers by another — Sentence of one year's R. I. and fine of Rs. 1,000 held excessive — Sentence of fine held alone would meet ends of justice. See Criminal P. C. (1898), Section 32. **ILR (1962) 12 Raj 579: 1962 Raj LW 608.**

CLAUSE 5

——**Cl. 5 (iv)** — Sentence — Case under Sections 7 and 8 of Essential Commodities Act (1955) — Moving of wheat without permit — Some accused employed as carriers by another — Sentence of one year's R. I. and fine of Rs. 1,000 held excessive — Sentence of fine held alone would meet ends of justice. See Criminal P. C. (1898), Section 32. **ILR (1962) 12 Raj 579: 1962 Raj LW 608.**

RAJASTHAN FOREST ACT (13 of 1953)

SECTION 35

——**S. 35 — Power of Government under Section 35 to exercise control over private forests and lands — Absence of prior notice — Effect.**

Section 35 no doubt gives to the Government, control even over those forests which are not its property and it can pass regulatory and prohibitory orders for certain purposes detailed therein. But it is clear at the same time before exercising such power, the Government has got to issue a notification. Then sub-section (3) clearly provides that no notification shall be made under sub-section (1) nor shall any work be commenced under sub-section (2) so long as a notice is not issued to the owner of the forest concerned requiring him to show cause within a reasonable period not exceeding one month, which has to be specified in the said notice, as to why such notification should not be made or work constructed as the case may be. It further enjoins that before making a notification, the objection of the person against whom notice has been issued must be considered by an officer duly appointed in that behalf by the Government. That officer must give to the said person an opportunity to produce evidence in support of his objection and then he should be given a hearing before it is decided. Where this procedure is not followed, the action of the Government authorities in interfering with the control of private forests cannot be justified on the basis of S. 35. **1959 Raj LW 476.**

RAJASTHAN FOREST SERVICE RULES (1962)

RULE 7

——**R. 7 (b)** — Proviso and schedule — Officiating Sub-Divisional Forest Officer promoted as Assistant Conservator of Forests and subsequently reverted as Ranger Grade II — His juniors allowed to hold post of Sub-Divisional Forest Officers — Rule is infringed. See Constitution of India, Article 16. **1965 Raj LW 272: ILR (1965) 15 Raj 578: AIR 1966 Raj 8 (DB).**

——**R. 7 (ii)** — Scope of — Does not deal with permanent appointment. See Constitution of India, Article 309. **ILR (1965) 15 Raj 664.**

SCHEDULE

——**Sch.** — Officiating Sub-Divisional Forest Officer promoted on ad hoc basis as Assistant Conservator of Forests and subsequently reverted as Ranger Grade II — His juniors allowed to hold post of Sub-Divisional Forest Officers — Article 16 held was violated. See Constitution of India, Article 16. **1965 Raj LW 272: ILR (1965) 15 Raj 578: AIR 1966 Raj 8 (DB).**

RAJASTHAN (FORMER STATE) ORDINANCE (10 of 1949)

PREAMBLE

——**Pre. — Provisions for State taking management of collection of revenue are not void — (Constitution of India, Articles 31 (1) and (2), 19 (1) (f)) (Rajasthan (Former State) Ordinance 15 of 1949).**

A mere right to collect revenue is not property. Taking possession of the management of Jagir in so far as it relates to the collection of revenue and also the management of forests for which provisionally 35 per cent. of the forest income is being deducted on an ad hoc basis for supervision and administrative charges, does not amount to taking possession within the meaning of Article 31 (2), when the various right that go with the possession of the Jagir like the granting of pattas, control over unoccupied lands fall vacant to Chhutbhais, etc., all remain in the Jagirdar. The position of the State is somewhat analogous to that of an agent. If, for example, the Jagirdar appointed an agent to collect rents, there would be no transfer of possession from the Jagirdar to the agent. Under the Ordinance therefore, the Government has in a sense become statutory agent of the Jagirdar for the purposes of collection. Civil Misc. Petn. No. 894 of 1951 (Mad). AIR 1951 SC 41, Rel. on.

Therefore the two provisions taking over the management of jagir in Ordinance Nos. 10 and 15 of 1949 are not void under Article 13 (1) of the Constitution read with Article 31 (2) or under Article 19 (1) (f). **1952 Raj LW 81: ILR (1951) 1 Raj 888: AIR 1953 Raj 22 (26) (Pt D) (Pr 17) (DB).**

SECTION 3

——**S. 3** — Amendment to Section 8-A of Rajasthan Jagirdars (Abolition of Powers) Ordinance (27 of 1948) by Sec. 3 held had become void in view of Article 13 (1) read with Article 14 of the Constitution. **1952 Raj LW 81: ILR (1951) 1 Raj 888: AIR 1953 Raj 22 (DB).**

SECTION 4

——**S. 4** — Rajasthan (Former State) Ordinance (15 of 1949), Section 3 and Rajasthan Jagirdars (Abolition of Powers) Ordinance (27 of 1948), Section 8-A — Discrimination — No discrimination in Ordinances themselves but arising afterwards due to extraneous circumstances, such as subsequent integration of Rajasthan in April and May 1949, in present Rajasthan, other States having no such Law — Inequality arising between jagirdars of one part of Rajasthan with those of other parts after integration — On 26-1-1950, when Constitution of India came into force, any law which was in force in Rajasthan and which denied to any person equality before law or equal portection of Law became void to that extent — The discrimination could not be justified on the ground of classification Section 8-A, which was introduced in Rajasthan Jagirdars (Abolition of Powers) Ordinance No. 27 of 1948 by Section 4 of Rajasthan (Former State) Ordinance No. 10 of 1949, and the amendment to Section 8-A by Section 3 of Rajasthan (Former State) Ordinance No. 15 of 1949 have now become void under Article 13 (1) of the Constitution of India, read with Article 14 — (Constitution of India, Articles 13 (1) and 14). AIR 1951 SC 41, Rel. on. American case Law reviewed, **1952 Raj LW 81: ILR (1951) 1 Raj 888: AIR 1953 Raj 22 (27, 31) (Pt E) (Prs 20, 40) (DB).**

RAJASTHAN GENERAL CLAUSES ACT (8 of 1955)

SECTION 14

——**S. 14** — Postponement of elections by Chief Panchayat Officer — Reasons not stated — Action held illegal — Publication of result of election in Gazette — Amounts to implied cancellation of postponement order. See Panchayats — Rajasthan Panchayat Election Rules, 1954, Rule 3. **ILR (1960) 10 Raj 322.**

SECTION 23

——S. 23 — **Power to make rules — Amendment of — Rules cannot be so amended as to have retrospective operation.**

A rule, as such, cannot be so amended as to make it applicable with retrospective force by an agency which is a delegate of the sovereign statutory authority, which is the Legislature. AIR 1954 Raj 274 and AIR 1953 SC 95, Relied on. **1961 Raj LW 599: ILR (1962) 12 Raj 195.**

SECTION 27

——S. 27 — Office of profit under Government — Patel appointed under Jaipur Land Revenue Act — Patel is holder of an office of profit under Government — Jaipur Land Revenue Act held to be continuing by virtue of Section 27 Rajasthan General Classes Act. See Constitution of India, Article 191. **ILR (1959) 9 Raj 389.**

SECTION 32

——S. 32 (48) — **Government order when becomes notification.**

The term 'notification' has to be considered in the light of the statutory dictionary of words provided by the Rajasthan General Clauses Act and a Government order will, in law, become a notification when it fulfills the two requisite conditions, namely: (i) its publication in the gazette, and (ii) its publication under proper authority. These conditions can be fulfilled only when the notification is published and not when it is drafted and approved in the Secretariat, hidden from public gazette and when the date is put by some officer of Government. **1965 Raj LW 358: ILR (1965) 15 Raj 897: AIR 1966 Raj 142 (149) (Pt C) (Pr 39) (DB).**

——S. 32 (48) — Word "notification" in Rule 14 of Rajasthan Panchayat and Nyaya Panchayat Election Rules — Word is used in popular sense and not technical sense as in Section 32 (48) of Rajasthan General Clauses Act (1955). See Panchayats — Rajasthan Panchayat and Nyaya Panchayat Election Rules (1960), Rule 14. **1962 Raj LW 32.**

RAJASTHAN GOVERNMENT BUSINESS RULES (1955)

See also Government of Rajasthan Rules of Business.

RULE 31

——R. 31 (vii) — Compulsory retirement — Rules vesting absolute authority in Government — Only Governor and Chief Minister competent to exercise power — Order not in conformity with Rules — Invalid — Rajasthan Services Rules 1951), Rule 244 (2). See Constitution of India, Article 166. **ILR (1961) 11 Raj 536.**

[Reversed in AIR 1963 SC 1323.]

RAJASTHAN GOVERNMENT SERVANTS AND PENSIONERS CONDUCT RULES

RULE 6

——R. 6 — Police Act (1861), Section 29 — Proceedings under, for contravention of Rule 6 of Rajasthan Government Servants and Pensioners Conduct Rules, can be taken. See Police Act (1861), Section 29. **ILR (1960) 10 Raj 1407.**

RULE 23

——Rr. 23 and 23-A — Constitutional validity — Rules prohibiting Government Servants from becoming members of association not recognised by Government — Question of recognition left to arbitrary discretion of Executive — Rules are ultra vires the Constitution as denying fundamental rights of Government servants (including members of the police force) as a class. See Constitution of India, Article 309. **1963 (2) Cr LJ 50: AIR 1963 Raj 136 (DB).**

RULE 23-A

——Rr. 23-A, 23 — Rules prohibiting Government servants from becoming members of association not recognized by Government — Question of recognition left to arbitrary discretion of Executive — Rules are ultra vires the Constitution as denying fundamental rights of Government servants (including members of the police force) as a class. See Constitution of India, Article 309. **1963 (2) Cri LJ 50: AIR 1963 Raj 136 (DB).**

RAJASTHAN GRAM AND BARLEY (REGULATION OF DISTRIBUTION) ORDER (1964)

CLAUSE 1

——Cl. 1 — Rajasthan Gram and Barley (Regulation of Distribtion) Order, 1964 is issued by State Government as delegate of Central Government — Order falls under Section 3 (2) (d) of Essential Commodities Act — Order is within ambit of authority delegated to State Government. See Constitution of India, Article 245. **ILR (1965) 15 Raj 684: AIR 1966 Raj 105 (DB).**

——Cl. 1 — Validity — Order does not contravene Articles 303 and 304 of the Constitution See Constitution of India, Article 302. **ILR (1965) 15 Raj 684: AIR 1966 Raj 105 (DB).**

——Cl. 1 — Order does not contravene Articles 14 and 19 of Constitution. See Constitution of India, Article 14. **ILR (1965) 15 Raj 684: AIR 1966 Raj 105 (DB).**

RAJASTHAN GRAM PANCHAYAT ORDINANCE (79 of 1948)

See under Panchayats.

RAJASTHAN HIGH COURT CONDITIONS OF SERVICE OF STAFF RULES

RULE 10

——R. 10 — Appointment of Staff — Powers of Chief Justice — Extent and nature of — Appointment made on recommendations of Registrar — Article 16 of Constitution of India, not violated. See Constitution of India, Article 16. **AIR 1964 Raj 13 (DB).**

RAJASTHAN HIGH COURT GENERAL RULES (Civil) (1952)

See under High Court Rules and Orders.

RAJASTHAN HIGH COURT GENERAL RULES (Criminal) (1952)

See under High Court Rules and Orders.

RAJASTHAN HIGH COURT JUDGES SALARIES ORDER (1951)

CLAUSE 2

——Cl. 2 — Appointment of High Court Judge as Chairman of Election Tribunal — Performance of duties not covered by the order — Yet it would not invalidate appointment. See Representation of the People Act (1951), Section 86. **AIR 1954 Raj 158 (DB).**

CLAUSE 3

——Cl. 3 — Appointment of High Court Judge as Chairman of Election Tribunal — Performance of duties not covered by order — Yet it would not invalidate appointment. See Representation of the People Act (1951), Section 86. **AIR 1954 Raj 158 (DB).**

RAJASTHAN HIGH COURT ORDINANCE (3 of 1948)

SECTION 1

——S. 1 — **High Court (of former Rajasthan) had not inherited powers of High Court of Mewar**

upon merger of Merwar with former State of Rajasthan.

On the merging of former State of Mewar into United States of former Rajasthan, the High Court of the former State of Rajasthan did not inherit the powers of the former High Court of Mewar. Upon the merger, the constitution of the former State of Mewar must be held to have come to an end. **1952 Raj LW 37: ILR (1951) 1 Raj 741 (DB).**

RAJASTHAN HIGH COURT ORDINANCE (15 of 1949)

SECTION 15

——**S. 15** — Person holding general power of attorney from party — He has no right to plead in High Court. See Civil P. C. (1908), Order 3, Rule 1. **AIR 1959 Raj 35.**

SECTION 17

——**S. 17** — Companies Act (1913), Section 3, Proviso 3 (3) — Notification dated 9-8-1950 by Rajasthan Government empowering District Courts — Notification is intra vires, after application of Act to Rajasthan — High Court has power to entertain proceedings. See Companies Act (1913), Section 3, Proviso. **AIR 1956 Raj 61 (DB).**

SECTION 18

——**S. 18** — Appeal against Election Tribunal's judgment under Sec. 46 Rajasthan Municipalities Act (38 of 1959) heard and decided by Single Judge of High Court — Further appeal to Division Bench though permissible under general provision of Section 18, Rajasthan High Court Ordinance (15 of 1949) — Words 'shall be final and conclusive' in special provision of Section 48 of Act 38 of 1959 imply that it is barred. See Municipalities — Rajasthan Municipalities Act (38 of 1959), Section 48. **1965 Raj LW 458: ILR (1966) 16 Raj 1159.**

——**S. 18 (1) — Appeal from Single Judge of High Court — Findings of fact can be interfered with.**

In an appeal under Section 18 (1) from the appellate decree and judgment of a Single Judge of the High Court the findings of fact arrived by the Single Judge can be interfered with. AIR 1949 Nag 31, Distinguished; AIR 1916 Cal 843 (FB) and AIR 1949 EP 342, Rel. on. **ILR (1960) 10 Raj 1304: AIR 1961 Raj 52 (54) (Pt A) (Pr 7) (DB).**

——**S. 18** — Application under Section 235 against promoter, etc., of banking company — Value of claim less than Rs. 5,000 — Sections 45-H and 45-N apply — Appeal to High Court not maintainable — Section 202 does not apply — Material time for determining right of appeal is when application under Section 235 is filed. See Companies Act (1913), Section 235. **ILR (1961) 11 Raj 16.**

——**S. 18** — Winding-up proceedings against insurance Company — Order by single Judge dismissing application under Section 106, Insurance Act — Appeal lies to Division Bench in view of Section 110 of Insurance Act read with Section 18 (1) of Ordinance. **1960 Raj LW 158: ILR (1960) 10 Raj 775: AIR 1960 Raj 294 (295) (Pt A) (Pr 5) (DB).**

——**S. 18** — Appeal from Single Judge to Division Bench — Limitation is governed by Rule 134 and not by Article 156 of the Limitation Act. See Rajasthan High Court Ordinance (15 of 1949), Section 46. **ILR (1960) 10 Raj 629.**

——**S. 18 — Appeal — Scope of — Question of fact — Civil P. C. (1908), S. 100.**

A special appeal under Section 18 cannot fall within the four walls of Section 100, Civil P. C. Therefore, the limitations to which an appeal under Section 100 is subject cannot be imported for the purposes of dealing with special appeals under Section 18. The word 'judgment' as used in Section 18 does not bear the meaning which has been assigned to it under Section 2 (9) of the Code of Civil Procedure; but it has been used in the sense of a sentence of the law pronounced by Court and not in the sense of the reasons which have led to that pronouncement. In such appeal it would be open to the Court of Appeal to consider all the points necessary to be investigated for the determination of the question of the correctness of the decree under appeal, and the consideration is not limited to any particular, question of fact or law. AIR 1916 Cal 843; AIR 1949 East Punjab 342, Rel. on. **1960 Raj LW 328: ILR (1960) 10 Raj 1259.**

——**S. 18 (1)** — Appeal from Appellate decree dismissed for default — Application for restoration of appeal rejected by single Judge — No appeal lies from order of single Judge rejecting application — **Held,** on facts, that the order against which the appeal was presented was clearly hit by the provision in Section 18 (1) against such order. AIR 1942 Lah 95, Disting. **1960 Raj LW 256: ILR (1960) 10 Raj 379.**

——**S. 18 (1) — Appeal to division bench — Limitation — (Municipalities — Rajasthan Town Municipalities Act (16 of 1949), Section 19 (2)) — Elections.**

Section 18 (1) of the Rajasthan High Court Ordinance is a special provision which allows an appeal from the decision of a single Judge to the High Court. There is nothing in Section 19 of the Municipalities Act (23 of 1951) which can control that provision. Therefore, where an election appeal under Section 19 (2) of the Municipalities Act is heard by a single Judge of the High Court, an appeal will lie to the High Court under Section 18 (1) of the Rajasthan High Court Ordinance (15 of 1949).

Rule 134 of the High Court Rules clearly applies to an appeal whether it be under Section 18 (1) or Section 18 (2) of the High Court Ordinance and the period of limitation in either case is 60 days. Section 19 (2) of the Municipalities Act has nothing to do with the limitation for an appeal of this kind. **1959 Raj LW 515: ILR (1958) 8 Raj 764.**

——**S. 18** — Order in revisional jurisdiction by single Judge of High Court is not appealable. **1956 Raj LW 158.**

——**S. 18** — "Judgment" — Petition for liquidation of company by creditor — Decision stayed till decision of suit instituted by creditor on his claim — Stay order is not a "judgment" and no appeal lay under Ordinance — (Letters Patent (Cal) Clause 15) — (Companies Act (1913), Section 202). **AIR 1955 NUC (Raj) 1628 (DB).**

——**S. 18 (2)** — Appeal under — Case certified as fit one by single Judge for Letters Patent Appeal — Respondent cannot question fitness — (Letters Patent (Cal) Clause 15). **AIR 1955 NUC (Raj) 1628 (DB).**

——**S. 18 (2)** — Letters Patent Appeal — Leave should be granted only when single Judge is of opinion that his view of law requires confirmation by large tribunal or is under misapprehension that his view might be wrong — Similarly when point in dispute is of great public or private importance or when case may form precedent — Principle is similar to that under Section 109 (c) Civil P. C. (Letters Patent (Cal), Clause 15). **AIR 1955 NUC (Raj) 1628 (DB).**

——S. 18 — Letters Patent Appeal — New Case — Question of abatement depending on facts cannot be decided. **AIR 1955 NUC (Raj) 1628 (DB).**

——S. 18 (2) — Every mistake of law is not sufficient for certificate of fitness for appeal to Division Bench — Civil P. C. (1908), Section 109 (c). AIR 1949 Mad 741; AIR 1934 Pat 466; AIR 1932 Bom 218, Ref. **1952 Raj LW 133: ILR (1951) 1 Raj 705.**

SECTION 28

——S. 28 — Dismissal of appeal under Section 12 (2), Jaipur Rent Control Order (1947) for default without perusing record — Order is without jurisdiction and can be quashed by writ of certiorari — Constitution of India, Article 226. See Houses and Rents — Jaipur Rent Control Order, 1947, Section 12 (2). **AIR 1952 Raj 130 (DB).**

——S. 28 — Assessment Officer of Jaipur Municipality depriving owners or occupiers of opportunity of filing objections relating to assessment list — He acts without jurisdiction and contrary to Jaipur Municipal Act (1943) — Writ of prohibition can be issued against him. See Constitution of India, Article 226. **AIR 1951 Raj 139 (DB).**

SECTION 30

——S. 30 — **"Subject to the provisions of any law for the time being in force" — (Guardians and Wards Act (1890), Sections 9 and 25).**

The words "subject to . . . . . in force" in Section 30 only imply one restriction namely that if it is possible under any law for the time being in force to apply to any other Court in India for guardianship or custody of the minor, the jurisdiction of the High Court under Section 30 is ousted. All applications for guardianship or custody of the minor which can be made to a District Court under Section 9 or Section 25 of the Guardians and Wards Act must be made to the District Court and the High Court would have no jurisdiction to entertain such an application. But where no District Court in India can entertain an application under Section 9 or Section 25, the power resides in the High Court to entertain such an application under Section 30 if the minor is within the State. **ILR (1958) 8 Raj 299: 1958 Raj LW 228: AIR 1958 Raj 221 (222) (Pt B) (Pr 7) (DB).**

SECTION 34

●——S. 34 — **'Law', meaning of — Rajasthan Administration Ordinance (1 of 1949), Section 3.**

The term 'law' in Section 34 Rajasthan High Court Ordinance would obviously mean the law as described in Sec. 3 (2) of Rajasthan Administration Ordinance which does not include within its purview judge—made law or law deducible from decisions. Hasti Mal v. Shanker Dan, **ILR (1951) 1 Raj 448: AIR 1952 Raj 7 (8) (Pt B) (Pr 6) (FB).**

SECTION 40

——S. 40 — Constitution of India, Article 133 — Leave to appeal from decision of Rajasthan High Court — Conditions for — Ijlas-i-Khas Rules, 1939, held no longer in force — Leave to appeal in pursuance thereof not granted. See Constitution of India, Article 133. **AIR 1951 Raj 55 (DB).**

——S. 40 — Existing petition for leave to appeal or appeals against decisions of former High Court — Judgments already passed by former High Courts are not included in Section 40. See Rajasthan High Court Ordinance (15 of 1949), Section 49. **AIR 1950 Raj 37 (DB).**

SECTION 46

——S. 46 — Rajasthan High Court Rules are not in violation of Article 329, Constitution — Rules are mandatory — Election appeal filed without complying with rules — Appeal should be dismissed. See Representation of the People Act (1951), Section 116 (2). **AIR 1965 Raj 58 (DB).**

——Ss. 46, 18 — **High Court Rules under, R. 134 — Rule is not ultra vires — Appeal from Single Judge to Division Bench — Limitation is governed by Rule 134 and not by Article 156 of the Limitation Act — (Limitation Act (1908), Article 156) — (High Court Rules — Rajasthan High Court Rules, Rule 134).**

It is the Rule 134 of the High Court Rules, which will govern the limitation for an appeal from the decision of a single judge of the High Court to the Bench and the memorandum of appeal should be presented within 60 days.

It was fully competent for the Court under Section 46 of the Rajasthan High Court Ordinance to enact Rule 134 providing a period of limitation for presentation of such special appeals. Article 156 of the Limitation Act applies to those cases where appeals are preferred to the High Court from the decisions of the subordinate Courts.

Observation to contrary in Civil Special Appeal No. 21 of 1959, dated 15th October, 1959 (Raj) Explained and Not foll. **1960 Raj LW 250: ILR (1960) 10 Raj 629.**

SECTION 49

——S. 49 — **Transfer of suit by High Court to District Judge for dispossal according to law — This does not give jurisdiction to trial Court to whom the suit was transferred by District Judge — It is the duty of trial Court to consider whether suit is maintainable in any Civil Court — Civil P. C. (1908), Section 15.**

When a suit was transferred under Section 49 of the Rajasthan High Court Ordinance (No. 15 of 1949) to the District Judge of Udaipur for dispossal and from that Court, it was transferred to the Additional District Judge's Court, it does not mean that the trial Court gets jurisdiction. It is the duty of the trial Court to consider whether under the law in force at the time when the suit was filed, the suit was maintainable in any Civil Court. **1952 Raj LW 37: ILR (1951) 1 Raj 741.**

——Ss. 49, 40 — **Existing petitions for leave to appeal or appeals against decisions of former High Court — How far affected by Sections 49 and 40 — Rajasthan Appeals and Petitions (Discontinuance) Ordinance (40 of 1949).**

The Rajasthan High Court Ordinance in the first place, does not touch the existing petitions for leave to appeal or appeals already presented against the decisions of any of the former High Courts of the covenanting State. Secondly, Section 49 of the High Court Ordinance seems to refer to cases pending in the former High Courts, which are directed to be transferred to the Rajasthan High Court for disposal.

The language of the section seems to indicate that it is with respect to the pending cases that the records and documents of the former High Courts of the Covenanting States are to become the documents of the Rajasthan High Court.

Assuming, however, that it refers to all documents including those of the cases already decided, the judgments already passed by the former High Courts are not included in Section 40.

This is also made clear by the Rajasthan Appeals and Petitions (Discontinuance) Ordinance

(40 of 1949) as amended by amending Ordinance (12 of 1950). **1950 Raj LW 66: AIR 1950 Raj 37 (39) (Pt B) (Prs 7, 8) (DB).**

RAJASTHAN HIGH COURT RULES (1952)

See under High Court Rules and Orders.

RAJASTHAN HIGHER JUDICIAL SERVICE RULES (1955)

RULE 1

——R. 1 — Validity — Rules framed under Article 309, but in consultation with High Court under Article 233 — Rules do not contravene Article 233 — Constitution of India, Articles 233 and 309 **1965 Raj LW 14: ILR (1965) 15 Raj 390: AIR 1966 Raj 26 (31, 32) (Pt A) (Prs 10, 11) (DB).**

[**Reversed** in AIR 1967 SC 1599.]

RULE 4

——R. 4 (c) — 'Member of the service' — Officiating appointments against substantive vacancies cannot be considered as substantive appointments so as to make appointees members of the service. AIR 1958 SC 36 and AIR 1962 SC 794, Foll. **1965 Raj LW 14: ILR (1965) 15 Raj 390: AIR 1966 Raj 26 (34) (Pt F) (Pr 22) (DB).**

[**Reversed** on another point in AIR 1967 SC 1599.]

RULE 10

——R. 10 — Provision fixing proportion of vacancies to be filled by direct recruitment and by promotion — There is no curtailment of power under Article 233 (2) of the Constitution but only its regulation. See Constituion of India, Article 233 (2). **1965 Raj LW 14: ILR (1965) 15 Raj 390: AIR 1966 Raj 26 (DB).**

[**Reversed** on another point in AIR 1967 SC 1599.]

——R. 10 — Number of appointments to be made — Fixation of number and period of such appointment — Scope.

In fixing the number of vacancies all unfilled vacancies after the last recruitment can be taken into account by the Governor. Though the period mentioned in the rule may be future period only though not exceeding three years. The Governor is not however bound to determine the period as provided in Rule 10. He may decide to make appointments to the existing vacancies only and may not have any list prepared in advance for filling the vacancies occurring in future. Thus recruitment can be validly made for filling up the existing vacancies only. **1965 Raj LW 14: ILR (1965) 15 Raj 390: AIR 1966 Raj 26 (34) (Pt H) (Pr 22) (DB).**

[**Reversed** on another point in AIR 1967 SC 1599.]

RULE 13

——Rr. 13, 22 and 23 — Constitution of India, Article 233 — Consultation under rules amounts to consultation with High Court — No contravention of Article 233.

Consultation with the High Court under Article 233 means consultation with the full Court and not with a Committee consisting of the Chief Justice and a few Judges. Under Rules 13 and 22 of the Rajasthan Higher Judicial Service Rules, the selection for the post of District Judges is made by a Selection Committee consisting of the Chief Justice and two other Judges of the High Court. But it is not the Committee but the High Court which finally submits the list of suitable candidates to the Governor under Rule 23 The 'Court' can modify the list prepared by the Selection Committee. To say that consultation under the rules is consultation with the Selection Committee and not with the Court would not therefore be correct. There is thus no contravention of Article 233. **1965 Raj LW 14: ILR (1965) 15 Raj 390: AIR 1966 Raj 26 (32, 33) (Pt C) (Pr 15) (DB).**

[**Reversed** in AIR 1967 SC 1599.]

RULE 22

——Rr. 22, 13, 23 — Constitution of India, Article 233 — Consultation under rules amounts to consultation with High Court — No contravention of Article 233. See Rajasthan Higher Judicial Service Rules (1955), Rule 13. **AIR 1966 Raj 26 (DB).**

[**Reversed** in AIR 1967 SC 1599.]

RULE 23

——Rr. 23, 13, 22 — Constitution of India, Article 233 — Consultation under rules amounts to consultation with High Court — No contravention of Article 233. See Rajasthan Higher Judicial Service Rules (1955), Rule 13. **AIR 1966 Raj 26 (DB).**

[**Reversed** in AIR 1967 SC 1599.]

RULE 24

——R. 24 — Appointments to posts in service — Decision for appointments rests with Governor — But he has to act according to the list sent by the High Court under Rule 23 —Article 233 of the Constitution not violated — Constitution of India, Aricle 233. **1965 Raj LW 14: ILR (1965) 15 Raj 390: AIR 1966 Raj 26 (33) (Pt G) (Pr 17) (DB).**

[**Reversed** in AIR 1967 SC 1599.]

RAJASTHAN INDIAN MEDICINE ACT (5 of 1953)

SECTION 36

——S. 36 (1) — Prosecution under Section 337, Penal Code, of medical practitioner registered under Section 36 (2), Rajasthan Indian Medicine Act, 1953, for performing surgery with gross negligence — Controversy whether certificate entitled accused to practice surgery or medicine only — Court should summon Registrar, Board of Indian Medicine, Rajasthan, as a witness under Section 252 (2) Cr. P. C. See Criminal P. C. (1898), Section 252 (2). **1964 (2) Cri LJ 583: AIR 1964 Raj 242.**

RAJASTHAN INDUSTRIAL TRIBUNAL (CONSTITUTION AND PROCEEDINGS) VALIDATING ACT (31 of 1959)

SECTION 2

——S. 2 — Tribunal originally constituted under Section 7 of Industrial Disputes Act, before its amendment in 1956 — Reference made between 10-3-1957 and 15-4-1959 — Effect of passing of validating Act — Constitution of Tribunal and reference validated by Section 2 — Act if validly prevails in Rajasthan — Constitution of India, Article 254, Schedule 7, List 3, Item 22 — Industrial Disputes Act (1947) (as amended in 1956), Section 7-A.

It is clear from the validating provisions contained in Section 2 of the Validating Act of 1959 that the Tribunal originally constituted under Section 7 of the Industrial Disputes Act, 1947, be-

fore it was amended by Act 36 of 1956. is to be deemed to have been duly constituted under Section 7-A. and any reference made between the period of 10-3-1957 and 15-4-1959 (reference in this case was made on 18-12-1957) is to be deemed to have been made as if the Tribunal were constituted under Section 7-A of the amended Act. The Validating Act is. because of Item 22 of List III of the Seventh Schedule to the Constitution, within the competence of the State Legislature, and it was reserved for the consideration of the President and has received his assent. It must by virtue of Art. 254 (2) prevail in the State of Rajasthan. AIR 1963 Raj 22, Affirmed. H. H. The Maharana Sahib Shri Bhagwal Singh Bahadur of Udaipur v. State of Rajasthan. **(1964) 5 SCR 1: (1963-64) 25 FJR 171: (1964) 1 Lab LJ 33: (1964) 1 SCWR 238: AIR 1964 SC 444 (448) (Pt B) (Pr 14).**

RAJASTHAN JAGIRDARS (ABOLITION OF POWERS) ORDINANCE (27 of 1948)

See under Tenancy Laws.

RAJASTHAN JAGIRDARS' DEBT REDUCTION ACT (9 of 1957)

See under Debt Laws.

RAJASTHAN JAGIR DECISIONS AND PROCEEDINGS (VALIDATION) ACT (18 of 1955)

SECTION 1

●——**S. 1** — Jaipur Matmi Rules having no statutory force cannot be treated as existing jagir law. See Tenancy Laws — Rajasthan Land Reforms and Resumption of Jagirs Act (6 of 1952). Section 2 (d). **AIR 1961 Raj 146 (FB).**

SECTION 3

■——**S. 3** — After coming into force of Constitution Rajpramukh had no power to decide question of succession to jagirs — Rule 14 (2) of Jaipur Matmi Rules (1945) became void after Constitution. See Constitution of India, Article 154. **AIR 1961 Raj 146 (FB).**

——**S. 3 — Power to recognise succession to jagirs in former State of Alwar — Petition for recognition pending at the time of merger of Matsya Union into Rajasthan — Order by Rajpramukh in his executive capacity recognising succession under Article 7 (3) of Covenant — If within jurisdiction — (Alwar State Jagir Rules, Rules 4, 5 and 29 (d)) — (Rajasthan Administration Ordinance (1 of 1949), Sec. 3) — (Covenant of State of Rajasthan, Article 7 (3)) — (Constitution of India, Article 226).**

Held, (i) that the previous decision of the Council of Ministers of the Matsya State was a decision of the Government of that State, and by virtue of Section 3 of the Rajasthan Administration Ordinance by which all the laws in force in the former State of Alwar were continued to remain in force, the review petition could only be dealt with by the Government of Rajasthan State, vide Rule 29 (d), Alwar State Jagir Rules. The decision could no doubt be announced in the name of the Rajpramukh, but would not be one taken by the Rajpramukh in his discretion. (ii) The decision which was conveyed by the Revenue Secretary, Government of Rajasthan was not by the Government but by the Rajpramukh under Article 7 (3) of Covenant. This was without jurisdiction. (iii) As the decision was taken by the Rajpramukh in his executive capacity, it would still not be validated by Act (18 of 1955). The decision not being by the Government of Rajasthan, which takes the place of the Government of H. H. the Maharaja of Alwar referred to in R. 5 of the Alwar State Jagir Rules, it must be held to be without jurisdiction; AIR 1955 Raj 203. Foll. (iv) Even if the Rajpramukh might have the authority according to the Alwar State Jagir Rules read with the Rajasthan Administration Ordinance, who could finally decide the question of succession of a Jagir in areas to which those Rules were applicable, the decision was clearly against Rule 4 of the Alwar State Jagir Rules. There must be a finding that a certain person was the legally adopted son before he could be held to be the rightful successor under Rule 4 of the Alwar State Jagir Rules and anything short of that finding did not vest any right in the person claiming to succeed as the adopted son. **1957 Raj LW 620: ILR (1957) 7 Raj 670: AIR 1957 Raj 372 (374, 375) (Prs 13, 14) (DB).**

——**S. 3** — Talwarbandi dues — Recovery — Demand by State for recovery of such dues is legal — Levy held could not be struck down under Article 265 of Constitution. See Constitution of India, Article 265. **AIR 1957 Raj 151 (DB).**

SECTION 4

——**Ss. 4, 5 and 6** — Jurisdiction of Jagir Commissioner — Cases after resumption of Jagir must be taken to Jagir Commissioner if they relate to title, right, interest in any jagir other than cases of succession or resumption of jagirs under laws of covenanting States. See Tenancy Laws — Rajasthan Land Reforms and Resumption of Jagirs Act (6 of 1952), Section 37 (as amended by Act 17 of 1955). **AIR 1958 Raj 12 (DB).**

SECTION 37

●——**S. 37** — After coming into force of Constitution, Rajpramukh had no power to decide question of succession to Jagirs — Rules 14 (2) of Jaipur Matmi Rules (1945) became void after Constitution. See Constitution of India, Article 154. **AIR 1961 Raj 146 (FB).**

RAJASTHAN JAGIR DECISIONS AND PROCEEDINGS (VALIDATION) ORDINANCE (6 of 1955)

SECTION 3

——**S. 3 — Effect of.**

By virtue of Section 3 of the Ordinance, the various grades of revenue Courts or officers of the Rajpramukh must be deemed to have been created the forum for decision of cases relating to recognition of succession to jagirs in cases arising out of the laws of the covenanting States, and these decisions have further been validated by the same section, and prevented from being questioned in Civil Courts, as they could have been questioned in view of the decision in AIR 1955 Raj 135 (FB). **ILR (1955) 5 Raj 995: AIR 1955 Raj 203 (207) (Pt G) (Pr 13) (DB).**

——**S. 3 — Applicability.**

Succession is certainly one of the most important matters relating to jagirdars, and under item (35) of Appendix B of the notification issued by the Government of Mewar on 6-12-1940 previous sanction of His Highness would be required in this connection. Therefore, proceedings for sanction to recognise one of the disputants as jagirdar of Jilola arose under the law which required that such matters required the previous sanction of His Highness. Section 3 of the Ordinance therefore applied to these proceedings also

as they arose under a law of the covenanting State. **ILR (1955) 5 Raj 995: AIR 1955 Raj 203 (206) (Pt F) (Pr 12) (DB).**

——**S. 3 — Nature of forum.**

Nature of the forum (i.e., the Rajpramukh) which has been created, and whose decisions given from 26-1-1950, have been validated by Section 3, cannot be an executive authority, for the Rajpramukh's executive authority is to be exercised in accordance with Article 154. As such the Rajpramukh can only be treated as a quasi-judicial tribunal which has been specifically created by Section 3 and whose decisions as such tribunal have been validated. **ILR (1955) 5 Raj 995: AIR 1955 Raj 203 (207) (Pt H) (Pr 14) (DB).**

——**Ss. 3, 4 (d)** — Rajpramukh exercising quasi-judicial function under Section 3 of Ordinance 3 of 1955 — Minimum requirement is that he must give hearing to parties before it — If any evidence has to be taken it should be taken by authority designated by Rajpramukh — Hearing by Minister is not same thing as hearing by Rajpramukh — AIR 1948 Bom 48, Diss. from. See Constitution of India, Article 226. **AIR 1955 Raj 203 (DB).**

SECTION 4

——**Ss. 4 (d), 3** — Rajpramukh exercising quasi-judicial function under Section 3 of Ordinance 3 of 1955 — Minimum requirement is that he must give hearing to parties before it — If any evidence has to be taken it should be taken by authority designated by Rajpramukh — Hearing by Minister is not same thing as hearing by Rajpramukh. See Constitution of India, Article 226. **AIR 1955 Raj 203 (DB).**

RAJASTHAN JAIL MANUAL (1952)

CHAPTER 3

——**Chap. 3** — Imprisonment for life — Sentence is to be calculated as equivalent to 25 years. See Penal Code (1860), Section 57. **1959 Cri LJ 1365: AIR 1959 Raj 273 (DB).**

CHAPTER 3, PARAGRAPH 1

——**Chap. 3, Para. 1** — Classification of prisoners — Government alone can do — Trial Courts are not authorised to do it — Right of prisoner to move High Court for direction. See Criminal P. C. (1898), Section 401. **ILR (1959) 9 Raj 1212.**

RAJASTHAN LAND ACQUISITION ACT (24 of 1953)

SECTION 3

——**S. 3 (e)** — Company — Essence of — Mutual agreement or contract is essence of composition of company — Khadi Gram Udyog Board in Rajasthan is not 'company' within Section 3 (e). See Land Acquisition Act (1894), Section 3 (e). **ILR (1961) 11 Raj 486.**

SECTION 4

——**S. 4 (1) — Public notice of notification — Absence of — Effect.**

The language of Section 4 (1) shows that it casts a duty on the Collector to cause public notice of substance of the Government Notification to be given at convenient places in the locality where the land, which is sought to be acquired, is situated. Issue of the public notice is very necessary, so that those persons, who are interested in the land which is sought to be acquired, may be able to file their objections under Section 5-A. It is also necessary to enable the employees of the Government to enter upon the land, make necessary survey and find out if it is suitable for the purpose for which it is sought to be acquired. It is only after such a public notice is issued that it becomes lawful for the officers to proceed under Section 4 (2). In the absence of such a notice, they are likely to find themselves in difficult situation if their entry on the land is resisted by persons who are owners or occupiers of the land. In a case where persons interested in the land come to know of the notification and they file their objections within time and the objections are decided by the Government under Section 5-A, absence of a public notice may not be considered a fatal defect for vitiating further proceedings, but the same view cannot be taken in a case where persons interested in the land are unable to file their objections under Section 5-A on account of the absence of a public notice. **1964 Raj LW 346: ILR (1964) 14 Raj 748: AIR 1964 Raj 270 (273) (Pt A) (Pr 14) (DB).**

——**Ss. 4, 5-A, 6** — Non-compliance with provisions of Sections 4 (1) and 5-A — Declaration under Section 6 is invalid — AIR 1952 All 752. Rel. on. **1964 Raj LW 346: ILR (1964) 14 Raj 748: AIR 1964 Raj 270 (273) (Pt B) (Pr 16) (DB).**

SECTION 5-A

——**Ss. 5-A, 4, 6** — Non-compliance with provisions of Sections 4 (1) and 5-A — Declaration under Section 6 is invalid. See Rajasthan Land Acquisition Act (24 of 1953), Section 4. **AIR 1964 Raj 270 (DB).**

SECTION 6

——**Ss. 6, 5-A, 4** — Non-compliance with provisions of Sections 4 (1) and 5-A — Declaration under Section 6 is invalid. See Rajasthan Land Acquisition Act (24 of 1953), Section 4. **AIR 1964 Raj 270 (DB).**

——**Ss. 6, 17, 9** — Notification under Section 17 not followed by notification under Section 6 — Further proceedings under Section 9 are invalid See Rajasthan Land Acquisition Act (24 of 1953), Section 17. **AIR 1964 Raj 270 (DB).**

——**S. 6** — Arable Land — Direction under Section 17 (4) — Effect is to dispense with proceedings under Sections 5 and 5-A before making declaration under Section 6-A. See Rajasthan Land Acquisition Act (24 of 1953), Section 17 (4). **AIR 1955 NUC (Raj) 4673 (DB).**

SECTION 9

——**Ss. 9, 17, 6** — Notification under Section 17 not followed by notification under Section 6 — Further proceedings under Section 9 are invalid See Rajasthan Land Acquisition Act (24 of 1953), Sec. 17. **AIR 1964 Raj 270 (DB).**

——**S. 9** — Arable Land — Direction under Section 17 (4) — Effect is to dispense with proceedings under Sections 5 and 5-A before making declaration under Section 6. See Rajasthan Land Acquisition Act (24 of 1953), Section 17 (4). **AIR 1955 NUC (Raj) 4673 (DB).**

SECTION 12

——**S. 12** — Collector making award under — He is not agent of State but judicial authority. See Rajasthan Land Acquisition Act (24 of 1953), Sec-

tion 18. **1965 Raj LW 495: ILR (1965) 15 Raj 1192: AIR 1966 Raj 118 (DB).**

——**S. 12 (2)** — Application for reference made beyond six weeks from date of award — Plea that applicant was not present when award was made — Plea not raised before Land Acquisition Officer or before District Judge — **Held,** circumstances indicated that applicant was present and affidavit filed by him that he was not present was not of much value. See Rajasthan Land Acquisition Act (24 of 1953), Section 18 (2), Proviso (a). **1965 Raj LW 495: ILR (1965) 15 Raj 1192: AIR 1966 Raj 118 (DB).**

SECTION 17

——**S. 17** — Urgency — It cannot be said that the words अत्यंत आव यक in Hindi could never have been used in the sense of urgency. **1964 Raj LW 346: ILR (1964) 14 Raj 748: AIR 1964 Raj 270 (274) (Pt C) (Pr 20) (DB).**

——**Ss. 17, 6, 9** — Notification under Section 17 not followed by notification under Section 6 — Further proceedings under Section 9 are invalid. **1964 Raj LW 346: ILR (1964) 14 Raj 748: AIR 1964 Raj 270 (274) (Pt D) (Pr 20) (DB).**

——**S. 17 — Question regarding urgency — Not open for judicial review — Power of High Court under Constitution of India, Article 226.**

A question whether an urgency exists or not is a matter for the determination of the Government and it is not a matter for judicial review AIR 1954 Mad 481 and AIR 1955 Andhra 184 and AIR 1961 Madh Pra 140, Rel. on. The Land Acquisition Act enable the Government to acquire their property if it is needed for purposes mentioned therein, but it is extremely necessary that the provisions of this Act should be strictly followed. The question of urgency may not be justiciable, but the powers must be used only when there is urgency and they should not be used just to cover up the deficiencies, if any, left out by officers concerned under Section 4 (1) or Section 5-A. **1964 Raj LW 346: ILR (1964) 14 Raj 748: AIR 1964 Raj 270 (274) (Pt E) (Prs 20, 21) (DB).**

——**S. 17 (1)** — "Waste or arable land" — Land in town area intended for building site, can come under either waste or arable land. See Land Acquisition Act (1894), Section 17 (1). **ILR (1961) 11 Raj 486.**

——**S. 17 (1)** — Waste or arable land — Meaning of, stated — Grass farm is waste land — (Words and Phrases). **AIR 1955 NUC (Raj) 4673 (DB).**

——**Ss. 17 (4), 6, 9** — Arable land — Direction under Section 17 (4) — Effect is to dispense with proceedings under Sections 5 and 5-A before making declaration under Section 6. **AIR 1955 NUC (Raj) 4673 (DB).**

——**S. 17 (1)** — Intention of Legislature —Emergency powers only are to be used in connection with open land. **AIR 1955 NUC (Raj) 4673 (DB).**

SECTION 18

——**S. 18** — Reference under Section 18 rejected as time-barred — No appeal lies — Revision is entertainable. See Rajasthan Land Acquisition Act (24 of 1953), Section 54. **1965 Raj LW 495: ILR (1965) 15 Raj 1192: AIR 1966 Raj 118.**

——**Ss. 18 and 12 — Reference to District Judge by Collector under Section 18 (1) — Collector making award under Section 12 is not agent of State but judicial authority — Collector authorized to make reference only if application is within limitation — District Judge can go into question whether reference is valid or not.**

There is a conflict of judicial opinion on the question as to whether it is open to the District Judge to go into the question as to whether the reference made under Section 18 (1) of Land Acquisition Act, 1894, by the Collector is valid or not. The Allahabad view is that the District Judge cannot go into the question of the invalidity of the reference while the Bombay view is just to the contrary. The question as to which view is preferable came up for consideration before a Division Bench of the Rajasthan High Court in AIR 1957 Raj 44 and it followed the Bombay view. In any case so far as the Rajasthan Land Acquisition Act is concerned, there is slight difference between its provisions and those of the Indian Land Acquisition Act. Under the Rajasthan Act a Government Department on whose behalf acquisition is being made can also apply for reference under Section 18 (1) and under Section 18 (3) a revision lies to the High Court under Section 115, C. P. C. against any order made by the Collector on an application for reference. That shows that the Collector making an award under Section 12 is not regarded as an agent of the State as has been held to be the case under the Indian Land Acquisition Act, but is regarded as a judicial authority. Further, even if the Collector is regarded as an agent of the State, he is a public agent and the scope of his authority is defined by the provisions of the Land Acquisition Act and an act of the Collector cannot be regarded to be on behalf of the State if he exceeds the authority given to him. The Collector can only make a reference if the application for making it is filed within the limitation prescribed under Section 18 (2). It is true that there is no express provision prohibiting him from making a reference on an application made beyond the period of limitation, but the Act confers on him authority to make a reference only if the application is made within the time so prescribed. Therefore, so far as the Rajasthan Land Acquisition Act is concerned, the Bombay view is preferable and it must be held that the District Judge has jurisdiction to go into the question as to whether the reference made by the Collector is valid or not. **1965 Raj LW 495: ILR (1965) 15 Raj 1192: AIR 1966 Raj 118 (120) (Pt B) (Prs 6, 7, 8).**

——**S. 18 (1)** — No estoppel on a question of law — **Held,** State was not estopped from urging before District Judge that reference under Section 18 (1), Rajasthan Land Acquisition Act, 24 of 1953, was made on time-barred application See Evidence Act (1872), Section 115. **1965 Raj LW 495: ILR (1965) 15 Raj 1192: AIR 1966 Raj 118.**

——**S. 18 (2), Proviso (a) and Section 12 (2)** — Application for reference made beyond six weeks from date of award — Plea that applicant was not present when award was made — Plea not raised before Land Acquisition Officer or before District Judge — **Held,** cicumstances indicated that applicant was present and affidavit filed by him that he was not present was not of much value — Evidence Act (1872), Section 114. **1965 Raj LW 495: ILR (1965) 15 Raj 1192: AIR 1966 Raj 118 (121) (Pt D) (Prs 10, 11).**

——**S. 18 (1)** — Proceedings under the Act — Applicability of Sections 4, 9 to 18 and 22 of Limitation Act — Application for reference under Section 18 (1) of Act 24 of 1953 — Section 12 (2) of Limitation Act does not apply — Time taken in obtaining copy of award cannot be excluded. See Limitation Act (1963), Section 12

(2). **1965 Raj LW 495: ILR (1965) 15 Raj 1192: AIR 1966 Raj 118.**

——**Ss. 18 (1) and 18 (3)** — Reference to Court made by Collector on time-barred application — Court competent to go into question whether reference is valid or not — Objection that application was time-barred can be raised at that time — Failure to file revision-application under Section 18 (3), against Collector's order making reference does not make the order final. **1965 Raj LW 495: ILR (1965) 15 Raj 1192: AIR 1966 Raj 118 (121, 122) (Pt F) (Pr 15).**

——**S. 18 (1)** — Scope — Person claiming interest in land but whose claim not recognised by Collector — Section covers case of such person. **1962 Raj LW 128.**

SECTION 30

——**Ss. 30 and 54** — Appeal relating to apportionment of compensation under — Court-fee — Sch. II, Article 17 (iii) of Court-fees Act held applicable and not Section 8 thereof. See Court-fees Act (1870), Section 8. **AIR 1957 Raj 275 (DB).**

SECTION 54

——**Ss. 54 and 18** — Only award by Court is appealable — Reference under Section 18, rejected as time-barred — No appeal lies — Revision is entertainable. AIR 1918 Cal 445 (2) and AIR 1914 Lah 394 and AIR 1927 Lah 858 (2), Rel. on. **1965 Raj LW 495: ILR (1965) 15 Raj 1192: AIR 1966 Raj 118 (120) (Pt A) (Pr 6).**

——**S. 54** — Court-fees Act (1870), Section 8 and Schedule 2, Article 17, Clause (iii) — Court-fee in appeal relating to apportionment of compensation under Land Acquisition Act — Schedule II, Article 17, Clause (iii) of Court-fees Act held applicable and not Section 8 thereof. See Court-fees Act (1870), Section 8. **AIR 1957 Raj 275 (DB).**

RAJASTHAN LAND REFORMS AND RESUMPTION OF JAGIRS ACT (6 of 1952)

See under Tenancy Laws.

RAJASTHAN LAND REFORMS AND RESUMPTION OF JAGIRS RULES (1954)

See under Tenancy Laws.

RAJASTHAN LAND REFORMS AND RESUMPTION OF JAGIRS RULES (1957)

See under Tenancy Laws.

RAJASTHAN LAND REVENUE ACT (15 of 1956)

PREAMBLE

——**Pre.** — Suit for declaration that decree of revenue Court was void against plaintiff — No provision in Rajasthan Tenancy Act or Rajasthan Land Revenue Act for bringing such suit — **Held,** suit could be tried by Civil Court. See Civil P. C. (1908), Section 9. **1963 Raj LW 516.**

SECTION 9

——**S. 9** — Powers of Superintendence of Revenue Board under — Cannot be exercised where appeal lies to the Board. See Tenancy Laws — Rajasthan Tenancy Act (1955), Section 224. **ILR (1961) 11 Raj 708.**

SECTION 21

——**Ss. 21 (a) and 125 (3)** — Mutation proceedings — Nature of proceedings not contemplated — No question of proprietary rights is involved. See Tenancy Laws — Rajasthan Tenancy Act (3 of 1955), Section 293. **1963 Raj LW 186.**

SECTION 35

——**S. 35** — Office of profit under Government — Patel in state of Rajasthan holds office of profit. See Constitution of India, Article 191. **ILR (1959) 9 Raj 389.**

SECTION 83

——**S. 83 — Deputy Secretary putting words "By Order" before signing order — Order is of Government and not of Deputy Secretary as such.**

Where at the end of the order the Deputy Secretary has put the words "By Order" before signing the order, the order is ex facie an order of the Government passed by the Government in exercise of their revisional jurisdiction under Section 83 and not that of the Deputy Secretary as such. **ILR (1965) 15 Raj 880 (DB).**

SECTION 84

——**S. 84 — Revisional powers of Board of Revenue — Extent of.**

Section 84 confers very wide powers on the Board of Revenue to call for the record of any case of a judicial nature or connected with Settlement proceedings and pass any order that it considered appropriate. The only limitation is that this power can be exercised only where no appeal lies to the Board. An order by the Additional Collector entertaining the appeal and condoning the delay fall under Section 77 (a) of the Act and no appeal lies against any such order. That being so, it is open to the Board to exercise its jurisdiction under Section 84 of the Act and in revising the order make any order that it thinks fit. The Board is not in any manner hampered by the fact that an appeal may in due course lie either to the Settlement Commissioner or to some other authority subordinate to the Board. **1961 Raj LW 250: ILR (1961) 11 Raj 131.**

SECTION 91

——**S. 91** — Person granted tenancy rights by order of Bharatpur Government for term — Term expiring after Rajasthan Tenancy Act came into force — Ejectment as trespasser — Permissibility. See Tenancy Laws — Rajasthan Tenancy Act (3 of 1955), Section 15. **ILR (1958) 8 Raj 825.**

SECTION 114

——**Ss. 114, 132 and 140** — Scope — Record of rights — Entries in Khasra Girdawari — They are to be presumed to be true until there is proof to contrary. See Evidence Act (1872), Section 35. **1959 Raj LW 381.**

SECTION 125

——**S. 125 (3)** — Mutation proceedings — Nature of proceedings — No question of proprietary right is involved. See Tenancy Laws — Rajasthan Tenancy Act (3 of 1955), S. 293. **1963 Raj LW 186.**

SECTION 184

——**Ss. 184 and 193 — Partition of estate — Procedure — Application to Revenue Authorities or by Civil suit.**

Under Section 184 and the subsequent section of the Rajasthan Land Revenue Act, the proceed-

ings for partition of the estates have to be initiated by means of an application to the Collector. Of course under Section 193, the Collector can direct any party to institute a suit if the case involves a question of proprietary title, which has not been already determined by a Court of competent jurisdiction. The right to file such a suit accrues only when the Collector issues a direction requiring a party to file a civil suit. **1960 Raj LW 158: ILR (1960) 10 Raj 833.**

SECTION 193

——**S. 193 — Partition of estate — Proceedings thereof has to be initiated by means of application to Collector — Right to file suit accrues on Collector issuing direction to that effect.** See Rajasthan Land Revenue Act (1956), Section 184. **1960 Raj LW 158: ILR (1960) 10 Raj 833.**

SECTION 230

——**S. 230 — Prosecution under — Warrant under — Endorsement — Extension — Procedure — Attachment of cows of B by Revenue Inspector, void — Assault on Revenue Inspector by sons of B — Latter, has not committed any offence.** See Penal Code (1860), Section 392. **1964 Raj LW 617: ILR (1965) 15 Raj 166.**

RAJASTHAN LAND REVENUE (ALLOTMENT OF LAND FOR AGRICULTURAL PURPOSES) RULES (1957)

RULE 15

——**R. 15 — Matter relating to allotment of land for agricultural purposes — No appeal filed within prescribed period — Government is competent to call for record and pass orders thereon.**

Even if no appeal is filed under Rule 15 by any party within the prescribed period against the order of allotment, this will not affect the jurisdiction of the Government to deal with the matter. The matter relating to allotment of land for agricultural purposes is nothing but a non-judicial proceeding and as the same is not connected with settlement, the State Government will be competent to call for the record of such proceedings and pass in relation thereto such orders as it thought fit. **ILR (1965) 15 Raj 880 (DB).**

RAJASTHAN LAWS (EXTENSION) ACT (27 of 1957)

SECTION 7

——**S. 7 — Rajasthan Public Gambling Ordinance (48 of 1949), Sec. 3/4 — Ajmer Public Gambling Act (1953), Sections 3, 4 — Offence under Section 3/4 of Rajasthan Gambling Ordinance — Ordinance not extended to Ajmer Area — No offence committed.**

The accused, who were residents of Ajmer City which became a part of Rajasthen State only in November, 1956, were charged under Sections 3, 4 of the Rajasthan Public Gambling Ordinance, 1949. The Magistrate acquitted them on the view that when the offences were alleged to have been committed by the accused, provisions in Sections 3, 4 of the Gambling Ordinance were not extended to Ajmer City by necessary notification under Section 1 (2) of the Ordinance and hence it could not be said that the accused committed the offences charged against them. In acquittal appeal by the State it was argued that since provisions of Sections 3, 4 of Ajmer Public Gambling Act were similar to Sections 3, 4 of the Gambling Ordinance (1949), these sections should be deemed to have remained in force in Ajmer City, till Sections 3 and 4 of the Gambling Ordinance 1949 were made applicable thereto in spite of the provisions of Section 7 of the Extension Act (1957).

Held, that Section 7 of the Extension Act repealed in toto all laws in force in Ajmer area, as were corresponding to Rajasthan Laws and, therefore, as Rajasthan Public Gambling Ordinance (1949) embodied the laws on the subject of public gambling, Ajmer Public Gambling Act (1953) must be deemed to have been repealed in toto by the Ordinance, in spite of the fact that some of the sections of the Ordinance were not brought in force in some parts of the former Ajmer State area;

As the Ajmer Gambling Act applied to whole of that former state, no separate notification for applying it to Ajmer city was necessary thereunder; but if one such were there it would have been saved under Section 7 (2) of the Extension Act. In the absence of such notification Ajmer Gambling Act must be deemed to have been repealed on all matters covered by the Rajasthan Public Gambling Ordinance (1949) and there is no room for holding that part of that law alone was repealed and part remained in force. **1962 Raj LW 208: ILR (1961) 11 Raj 779.**

RAJASTHAN LIMITATION ACT (ADAPTATION) ORDINANCE (6 of 1950)

SECTION 1

——**S. 1 — Retrospective operation.**

The Rajasthan Ordinance No. VI of 1950 which is a law of procedure came into operation immediately on its promulgation and there was no interregnum within which litigants could avail themselves of their remedies under the old law. (In this case Dholpur Limitation Act, 1942). The new law could not have defeated pre-existing rights, if applied retrospectively, and those rights would have continued to be governed by the old law. But the Ordinance contains saving provisions and has therefore, retrospective effect. AIR 1955 Raj 97, Rel. on. **ILR (1960) 10 Raj 913.**

SECTION 3

——**Ss. 3, 9, 11 — Bikaner State Limitation Act (2 of 1920), Article 165 — Decree by former Bikaner High Court — Execution — Repeal of Bikaner Act — Limitation applicable — Coming into force of Part B States (Laws) Act, 1951 — Effect — Limitation Act (1908), Articles 182, 183.**

Bikaner State Limitation Act was repealed by the Rajasthtan Limitation Act (Adaptation) Ordinance and the Indian Limitation Act was brought into force in the whole of Rajasthan with effect from the date on which the Ordinance came into force. But in its applicability Article 182 of the Indian Act was omitted. Therefore, in spite of the repeal of the Bikaner Act, Article 165 of the Bikaner Act continued to govern an application for the enforcement of a decree passed by the former Bikaner High Court and was not governed by Article 182 of the Indian Act which was brought into force with modification by the Ordinance. After the enactment of Part B States (Laws) Act, 1951, Article 183, would apply to an application for enforcement of decree passed by the former Bikaner High Court. Government of Rajasthan v. Sangram Singh, **ILR (1961) 11 Raj 984: 1961 Raj LW 664: AIR 1962 Raj 43 (49, 51) (Pt B)** (Pa. 15, 16, 23, 25, 26) **(FB).**

SECTION 9

●——Ss. 9, 3, 11 — Bikaner State Limitation Act (2 of 1920), Article 165 — Decree by former Bikaner High Court — Execution — Repeal of Bikaner Act — Limitation applicable — Coming into force of Part B States (Laws) Act, 1951 — Article 183 of Limitation Act (1908), held applicable. See Rajasthan Limitation Act (Adaptation) Ordinance (6 of 1950), Section 3. **AIR 1962 Raj 43 (FB).**

——S. 9 (a) — "Suit" — Meaning of — The word suit does not include an application for execution. **ILR (1960) 10 Raj 913.**

——S. 9 — Construction and scope — Changes in period of limitation — Retrospective effect — Saving clauses in subsequent repealing Acts — Interpretation — Acknowledgment under prior law — Expression "period prescribed" means period prescribed not only by Articles but also by section in Act. See Limitation Act (1908) (as applied to Rajasthan by Part B States Laws Act, 1951), Section 19. **AIR 1958 Raj 318 (DB).**

——S. 9 — Scope of — Suit for money lent — Provision in Article 57 of Bharatpur Limitation Act prevails over Article 57 of Indian Limitation Act. See Limitation Act (1908), Section 29. **AIR 1958 Raj 260.**

——S. 9 — **Applicability.**

In order to apply Section 9, it becomes necessary to determine two points. The first question to be considered is wether the period of limitation prescribed by the Ordinance is shorter than the period of limitation prescribed by the previous law of limitation. And the next question for determination is which of the two periods expires first. **ILR (1955) 5 Raj 939: 1955 Raj LW 413: AIR 1956 Raj 6 (7) (Pt A) (Pr 8) (DB).**

——S. 9 — Suit to recover debt — Period of limitation is to be calculated according to Vikrami year and not Gregorian Calendar. See Limitation Act (1908), Section 25. **AIR 1956 Raj 6 (DB).**

●——S. 9 — Cause of action arising on 15-12-1947 — Suit instituted on 23-1-1952 — Not barred. See Marwar Limitation Act (1945), Article 64. **AIR 1955 Raj 97 (FB).**

SECTION 11

●——Ss. 11, 3, 9 — Bikaner State Limitation Act (2 of 1920), Article 165 — Decree by former Bikaner High Court — Execution — Repeal of Bikaner Act — Limitation applicable — Coming into force of Part B States (Laws) Act, 1951 — Article 183 of Limitation Act (1908) held applicable. See Rajasthan Limitation Act (Adaptation) Ordinance (6 of 1950), Section 3. **AIR 1962 Raj 43 (FB).**

——S. 11 — **Scope.**

Section 11 should be construed generally so as to provide for all types of applications for executing decrees passed before the promulgation of the Ordinance. While determining the period of limitation for such applications, it is desirable and necessary to invoke and adapt the principle of Section 9 (a) and to extend it to such cases. The applications for execution of which the Ordinance read with the Indian Limitation Act prescribed a shorter period can be filed within the period of 2 years next after the promulgation of the Ordinances or within the period prescribed for such applications by the old law whichever period expires first. **ILR (1960) 10 Raj 913.**

——S. 11 — Section 11 cannot be held to be invalid on grounds of any excessive delegation of power or on account of abrogation of any essential legislative function by the legislature. **ILR (1960) 10 Raj 913.**

RAJASTHAN LIMITATION ORDINANCE (33 of 1948)

SECTION 5

——S. 5 — Applicability — Suit filed within period of limitation as reduced by Ordinance — Proviso to Section 5 held not applicable and regarded as within time. See Limitation Act (1908), Pre. and Article 49. **AIR 1955 NUC (Raj) 1634 (DB).**

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A. I. R. Commentaries Judicially Appreciated

A.I.R. 1948 Patna 460 (462) (Pr. 9) [V 35 C 161] (D.B.)—Per *Meredith J.*—"I will make two quotations from Chitaley and Annaji Rao's annotated edition of the Civil Procedure Code, 4th Edn. Vol. III, because those learned commentators have, in my opinion, correctly summed up the position in language which cannot be bettered."

CONSTITUTION OF INDIA.

1961 Manipur 1 (4) (Pr. 11) [A.I.R. V 48 C 1]—*Tirumalpad J. C.*—"What is prohibited (in Art. 23 (1)) is begar and other similar forms of forced labour. The A. I. R. Commentaries on the Constitution of India at page 635 define 'begar' as a system under which persons are pressed to carry burdens for individuals or public or to perform other forms of menial service under compulsion".

1961 All. 341 (345) (Pr. 33) [(S) A.I.R. V 43 C 126] (DB).—*Desai J.*—"Shri Jagdish Sahal could not cite any authority in support of his contention that the right given to the Court to draw an adverse inference is equal to compelling the accused to be a witness against himself. We notice that Chitaley in his Commentary on Constitution, Vol. I, pp. 497.498, does not see any conflict between the provisions of Art. 20 (3) and those of S. 342, Cr. P. C."

1956 J. & K. 1 (10) (Pr. 34) [(S) A.I.R. V 43 C 1] (F.B.)—*Kilam J.*—"The learned author Chitaley in his luminous commentary on the Constitution has, after discussing almost the whole case law on the subject, enunciated some principles which I might give more or less in his own language. According to the learned author . . . ." (Points from Note 8 (g) under Art. 21, p. 588 quoted.)

CIVIL PROCEDURE CODE, 1908.

1953 S.C. 23 (27) [A.I.R. V 40 C 7]—[Touching the revisional jurisdiction of the High Court set out in S. 115, Civil P. C.] "A large number of cases have been collected in Edn. 4 of Chitaley & Rao's Code of Civil Procedure (Vol. I) which only serve to show that the High Courts have not always appreciated the limits of the jurisdiction conferred by this section."

P. L. D. 1965 (W. P.) Lahore 590 (594, 595) (DB). — *Sajjad Ahmad J.*—"There has been a conflict of judicial opinion on the question of the applicability of this section to decrees in appeals under the Letters Patent. The High Courts of Bombay, Punjab, Madhya Pradesh and Madras have held that the section applies. The High Court of Patna took a contrary view (*See* Chitaley's Commentary on S. 114 of the Civil P. C.—headnote 1, at page 1507, Vol. II, 1963, Edition.) In a recent Full Bench decision reported in *Jwala Prasad* v. *Jwala Bank Ltd.*, A. I. R. 1961 All. 881, the Allahabad High Court has held that . . . . and has overruled an earlier decision to the contrary given by another Full Bench of the same Court reported in *Mst. Abhilakhi* v. *Sada Nand*, A. I. R. 1931 All. 244."

1968 J. & K. 13 (14) (Pr. 7) [A. I. R. V 55 C 4] — *J. N. Bhat J.* — "The principle as laid down in certain authorities as summarized in the Commentary on Chitaley's Civil P. C. (7th Edn., Vol. 2, Page 1927) is that the Court has to see whether the suit cannot be determined in the absence of the person who applies to be made party or whether his interests will not be prejudiced by not being joined as a party".

1968 Mad. 1 (21) (Pr. 59) [A. I. R. V 55 C 1] (FB) — *Venkataraman J.*—"Pointing out that S. 105, C. P. C. must be read harmoniously with S. 99, C. P. C., the decisions have held that the phrase 'affecting the decision of the case' in S. 105 must be interpreted to mean 'affecting the decision of the case on merits'. The decisions will be found collected in any text book, for example, in the Commentary of A. I. R. Section 105, Note 6. . . . . "

1965 All. 527 (531) (Pr. 28) [A. I. R. V 52 C 148] — *Oak J.* — "Mr. Brij Lal Gupta pointed out that the Court dealing with the matter in April 1947 was a Munsif. The present suit was tried by a Civil Judge. The valuation of the suit was Rs. 85,000. The Munsif had no jurisdiction to try the present suit. Under S. 11, C. P. C., the Court trying the former suit should have been competent to try the subsequent suit itself. (See Chitaley's Commentary on the Code of Civil Procedure Volume I, Page 415). (Now see 1968 (7th Edn.) pp. 878.880)."

1965 Punj. 494 (496) [A.I.R. V 52 C 157 Pr. 7]—*Shamsher Bahadur J.*—"The words 'for any other substantial cause' (in O. 41, R. 27 (b)) must be read with the word 'requires' in the beginning of the sentence and need not be construed in the narrow sense suggested by the doctrine of ejusdem generis . . . . . Reference may be made to Chitaley's Commentary on the Code of Civil Procedure, Vol. IV, at page 4319".

1965 Punj. 166 (168) (Pr. 7) [A. I. R. V 52 C 55] – *Shamsher Bahadur J.*—"Mr. S. L. Puri has further contended that O. 21, R. 15 is not concerned with disputes inter se the decree-holders and has relied on a passage in Chitaley's Code of Civil Procedure Vol. III, 7th edition, at page 2820. It is thus stated that . . . . . ." (Contention accepted.)

1965 Kerala 104 (105) (Pr. 3) — *S. Velu Pillai J.* — "The rights inter se of rival purchasers in sales in execution of decrees on mortgages, have been the subject of consideration in several decided cases. The result of these has been summarised as follows in A. I. R Commentaries on Civil Procedure Code, Vol. 3, 1957 (6th) Edn., pp. 3791 and 3792. (Now see 1968 (7th Edn.), pp. 3807, 3808, O. 34, R. 1, N. 39, Pts. 26 to 34) . . . . . ."

('64) I. L. R. (1964) 1 Ker. 320 (322) — *Madhavan Nair J.* — "The A. I. R. Commentaries on the Code of Civil Procedure in Note No. 4 to O. 34, R. 7 put the position succinctly thus . . . . . ."

COURT-FEES ACT, 1870 & SUITS VALUATION ACT, 1887.

1968 Manipur 52 (53, 54) (Prs. 5, 12) [A. I. R. V 55 C 18]—*C. Jagannadha. charyulu J. C.* — "There is consensus of opinion in most of the High Courts that S. 7 (iv) (b) of the Court-fees Act does not apply to a suit for partition by a person in joint possession for partition of his share but that Art. 17 (vi) of Sch. II of the Court-fees Act applies. Vide pages 111, 112, 113, 114 and 115 of the Court-fees and Suits Valuation Act (A. I. R. Commentaries) Second Edition. . . . ."

1965 Punj. 1 (11) (Pr. 25) [A. I. R. V 52 C 1] (FB) — *P. C. Pandit J.* — "With regard to this definition (of 'consequential relief'), Chitaley in his Commentaries on the 'Court-fees Act and the Suits Valuation Act (Second Edition)', on page 135 has observed thus—".

CRIMINAL PROCEDURE CODE, 1898.

1967 Current L. J. 717 (719) — *Shamsher Bahadur J.*—"Prior to the enactment of this amendment (S. 139-A), the Court had by judicial decisions engrafted a law which, according to Chitaley's Commentary on the Code of Criminal Procedure, Vol. I, Page 590, was this . . . . . ."

('62) 1962 (1) Cr. L. J. 96 (98) (Pr. 13)—*T. N. R. Tirumalpad J. C.*—"This is the view which I find has been accepted as correct in the A. I. R. Commentaries to the Code of Criminal Procedure at Pages 830 and 831. It is seen from the said Commentaries that there is a conflict of decisions on the question . . . . . The Commentators are of the opinion that the view expressed in the Calcutta Case is not the correct view. I certainly agree with the A. I. R. Commentaries on this point."

LIMITATION ACT, 1908.

1968 Mad. 226 (229) (Pr. 5) [A. I. R. V 55 C 50] — *Natesan J.*—"Quoting from Chitaley and K. N. Annaji Rao on Limitation Act, it is observed therein. . . . ."

1963 Punj. 457 (459) (Pr. 7) [A. I. R. V 50 C 127] – *Grover J.* — "As stated in Chitaley's Limitation Act, (3rd Edition), Volume 1, Page 524, the words 'Stayed by an injunction or order' have reference to an order of a Court and not to a disability to sue or to apply arising from other causes."

1961 Pat. 134 (137) (Pr. 18) [A.I.R. V 48 C 36] – *Raj Kishore Prasad J.*—"The question under consideration has been thoroughly and clearly dealt with in A.I.R. Commentaries on the Indian Limitation Act, 3rd Edition, Vol. I, Note 11, page 595, Note 18, pages 601-604 and Note 32, page 688."

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A. I. R. COMMENTARIES JUDICIALLY APPRECIATED

1960 Kerala 306 (308) (Pr. 17) [A.I.R. V 47 C 144]—*M. S. Menon and T. Joseph JJ.* — "As pointed out by Chitaley : 'Where no time is fixed for delivery, if the correspondence between the parties shows that the matter was being enquired into and that there was no refusal to deliver up to well within a year of the suit, this article (Art. 31) cannot be pleaded as a bar . . . . . .' (Limitation Act, Vol. 2, Page 1137)."

REGISTRATION ACT, 1908.

1960 Madh. Pra. 3 (Pr. 8) [A. I. R. V 47 C 2] — *Dixit J.*—"The principle laid down in I. L. R. 4 Bom. 126 has been followed in many cases which have been noted in Chitaley's Registration Act (Second Edition) at page 867. . . . ."

1960 Mad. 244 (Pr. 9) [A.I.R. V 47 C 77] — *Ramaswami J.*—"It is interesting in this connection to note that the A. I. R. Commentaries on the Registration Act (Second Edition) at pages 526 to 530, after an elaborate discussion of the entire case-law and the principles of S. 77 of the Registration Act, mention at p. 530 that the view expressed by Abdur Rahman J. is correct."

STAMP ACT, 1899.

1967 Him. Pra. 29 (31) (Pr. 11) [A. I. R. V 54 C 9]—*Om Prakash J. C.*— "From the language, used in the document, it is capable of falling within the definition of a bond, as defined in sub.s. (5) (b) of S. 2, Stamp Act, and also within the definition of a promissory note, under sub.s. (22) of that section. The maxim being, specialia generalibus derogant, an instrument which satisfies the definition under sub.s. (5) (b) must be held to be taken out of the more general definition in sub-s. (22), vide A. I. R. Commentaries on the Stamp Act, p. 70."

TRANSFER OF PROPERTY ACT, 1882.

1964 Punj. 210 (211) (Pr. 4) [A.I.R. V 51 C 52]—*S. S. Dulat Actg. C. J. and D. K. Mahajan J.* — "It is significant that the provisions of this section (S. 111, T. P. Act) have never been applied as a rule of equity, justice or good conscience by any of the High Courts in the territories to which this provision is not made applicable under S. 1 of the T. P. Act, whereas a number of cases will be found at page 173, Note 4, of Chitaley's Transfer of Property Act, Vol. I, where principles underlying the provisions of the Transfer of Property Act have been so applied . . . . . ."

1961 Mad. 28 (30) (Pr 7) [A. I. R. V 48 C 7] — *Ramaswami J.* — "In this connection the learned District Munsif has pertinently pointed out the implications of the decision in *Gopal Chandra Das* v. *Harendra Nath Datta*, 63 Ind. Cas. 483 (Cal.) . . . . This decision has been cited with approval in the well-known commentaries on the Transfer of Property Act by Chitaley and Annaji Rao, Third Edition (1950) page 1861".

A. I. R. MANUAL (2ND EDN.) JUDICIALLY APPRECIATED

JAGANNADHACHARYULU J. C.—"Article 14 (of the Constitution) protects all persons from discrimination by the legislative as well as executive organs of the State. Vide Note 8, Page 2673 of A. I. R. Manual Vol. 3, 2nd Edn. . . . . ."—*1968 Manipur 58 (63) (Pr. 16) [A. I. R. V 55 C 21].*

P. N. RAMASWAMI J. :—"For an exhaustive citation of the relevant cases (on S. 10, Cattle Trespass Act, 1871), see the most welcome 2nd (1960) Edn. of the A. I. R. Manual Vol. I referring to A. I. R. 1947 Pat. 172 = 47 Cri. L. J. 986 ; A. I. R. 1943 Sind 152 = 44 Cri. L. J. 761 ; A. I. R. 1916 Lah. 281=17 Cri. L. J. 63 ; A. I. R. 1919 Cal. 93=20 Cri. L. J. 398."—*A. I. R. 1960 Mad. 331 (332)=1960 Cri. L. J. 932 (933)*

—See also A. I. R. 1960 Mad. 443 (446) = 1960 Cri. L. J. 1340 (1344) (Vol. 4 of the A. I. R. Manual (2nd Edn.) referred to.]